THE
QUINQUENNIAL DIGEST
1936—1940

VOLUME I

BY

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ABBREVIATIONS EXPLAINED

Reports.

All or A. I.L.R. 1940 All.	Indian Law Reports, Allahabad Series.
A.L.J	Allahabad Law Journal.
A. L. R.	Allahabad Law Reports.
A.W.R.	Allahabad Weekly Reporter.
A. Cr.C.	Allahabad Criminal Cases.
A.I.R. 1940 All. or 1940 A.	All India Reporter, 1940 Allahabad.
A.M.L.J.	Ajmer-Merwara Law Journal.
Bom. or B. I.L.R. (1940) Bom.	Indian Law Reports, Bombay Series.
Bom. L. R.	Bombay Law Reporter.
A.I.R. 1940 Bom. or 1940 Bom.	All India Reporter, 1940 Bombay.
Bur. L. T.	Burma Law Times.
Bur. L. J.	Burma Law Journal.
B.R.	Bihar Reports.
Cal, or C. I.L.R. (1940) 1 & 2 Cal.	Indian Law Reports, Calcutta Series.
C. L. T.	Cuttack Law Times.
C. L. J.	Calcutta Law Journal.
Cr. C.	Criminal Cases.
Cr. L. J.	Criminal Law Journal.
C. W. N.	Calcutta Weekly Notes.
Comp. C	Company Cases.
A. I. R. 1940 Cal. or 1940 Cal.	All India Reporter, 1940 Calcutta.
A. I. R. 1940 F. C.	All India Reporter, 1940 Federal Court.
Fed. L. J.	Federal Law Journal.
F. L. R.	Federal Law Reports.
I. A.	Law Reports, Indian Appeals.
A. I. R. 1940 P. C.	All India Reporter, 1940 Privy Council.
I. C.	Indian Cases.
I. T. R.	Income-tax Reports
R. P. C. ; R.F.C. ; R. A.; R. B.; R. C. ; R. L. ; R. M.; R. N.; R. O.; R. P.; R. R.; R. S.	Indian Rulings, Privy Council, Federal Court, All. Bom., Cal., Lah., Mad., Nag., Oudh, Pat., etc.
I.L.R. (1940) Kar.	Indian Law Reports, Karachi Series.
Lah. or L. I. L. R. (1940) Lah.	Indian Law Reports, Lahore Series.
A. I. R. 1940 Lah. or 1940 Lah.	All India Reporter, 1940 Lahore.
Lah. L. T. or L. L. T.	Lahore Law Times.
L. B. R.	Lower Burma Rulings.
L. W.	Law Weekly.
Luck.	Indian Law Reports, Lucknow Series.
Mad. or M. I. L. R (1940) Mad.	Indian Law Reports, Madras Series.
M.L.J. (1940) M. L. J.	Madras Law Journal.
M. L. T.	Madras Law Times.
M. W. N.	Madras Weekly Notes.
A. I. R. 1940 Mad. or 1940 Mad.	All India Reporter, 1940 Madras.
M. L. R.	Marwar Law Reports.
Mys. H. C. R.	Mysore High Court Reports.
Mys. L. J.	Mysore Law Journal.
I. L. R. (1940) Nag.	Indian Law Reports, Nagpur Series.
N. L. J.	Nagpur Law Journal.
N. L. R.	Nagpur Law Reports.
A. I. R. 1940 Nag. or 1940 Nag.	All India Reporter, 1940 Nagpur.
A. I. R. 1940 Oudh or 1940 Oudh	All India Reporter, 1940 Oudh.
O. A.	Oudh Appeals
O.L.R.	Oudh Law Reports.
O. W. N.	Oudh Weekly Notes.
P. R.	Punjab Record.
P. L. R.	Punjab Law Reporter.
Pat. or P.	Indian Law Reports, Patna Series.
P. W. R.	Punjab Weekly Reporter.
A. I. R. 1940 Pat. or 1940 Pat.	All India Reporter, 1940 Patna.
Pat. L. J.	Patna Law Journal.
Pat. L. T.	Patna Law Times.

P. W. N.	..	Patna Weekly Notes.
A. I. R. 1940 Pesh.	..	All India Reporter, 1940 Peshawar.
R. or Rang.	..	Indian Law Reports, Rangoon Series.
1940 Rang. L.R.	..	Rangoon Law Reports.
A. I. R. 1940 Rang. or 1940 Rang...	..	All India Reporter, 1940 Rangoon.
R. D.	..	Revenue Decisions.
S. L. R.	..	Sind Law Reporter.
A. I. R. 1940 Sind or 1940 Sind ..	..	All India Reporter, 1940 Sind.
U. B. R.	..	Upper Burma Rulings.

Other Abbreviations.

Appl.	.. Applied.	Disc.	.. Discussed.	P. C.	.. Privy Council
Appr.	.. Approved.	Diss.	.. Dissented from.	Ref. or R.	.. Referred.
Comm.	.. Commented.	Doubt	.. Doubted	Rel.	.. Relied.
Cons.	.. Considered.	Expl.	.. Explained.	Rev.	.. Revenue.
Cr.	.. Criminal.	Foll.	.. Followed.	S. B.	.. Special Bench.
Dist. or D.	.. Distinguished.	F. B.	.. Full Bench.		

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CIVIL, CRIMINAL & REVENUE

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ABADI.

See also (1) C. P. Land Revenue Act.
(2) Co-sharers—Abadi.
(3) Custom (Punjab).
(4) Landlord and Tenant—Abadi.

——*Abandonment—Proof of intention—House left in disrepair and not rebuilt—If necessarily proves abandonment.*

A tenant who abandons a site leaves the site to revert to the zamindar. In such a case proof of intention to abandon is necessary. The mere fact that a house is left in a dilapidated condition and is not rebuilt does not necessarily prove that the tenant means to abandon the site or lead to the result that the zamindar is entitled to enter upon the land. (*Allsop, J.*) Misri Lal *v.* Durga Narain Singh. 1940 A W.R. (H.C.) 171.

——*House allowed to fall down—Abandonment of site—Whether can be inferred.*

The mere fact that a *raiyas* house completely falls down does not justify the proprietor to take possession of the site, unless the circumstances afford a reasonable ground for believing that the *raiya* had abandoned all intention to rebuild it. In cases of doubt the proprietor might well give notice to him requiring him to rebuild the house and intimating that in case the house was not rebuilt within a reasonable time, he would treat the site as abandoned and would resume possession thereof. (*Niamatullah, J.*) Sheo Sahai *v.* Tilok Singh. 164 I.C. 205=9 R.A. 128=1936 R.D 248=1936 A W.R. 541=1936 A.L.J. 569=A.I R 1936 All. 553.

——*House occupied by cultivator—Whether appurtenant to his holding—Presumption.*

There is no presumption that a house occupied by a cultivator on the abadi site is appurtenant to his holding, and a tenant who loses his holding does not thereby lose his right of residence in his house (*Sulaiman, C J. and Bennet, J.*) Rajdhari Lal *v.* Bishunath Singh. 162 I.C. 503=8 R A. 870=1936 A W R 471=1936 R.D. 184=1936 A. L.J 505=A I R 1936 All. 867.

——*Land to be used* Sehan-darwaza—*Right to make constructions on it*

A Rayat entitled to use a bit of and as *Sehan-darwaza* cannot make construction on it. (*Bajpai,*

ABADI.

J.) Ram Narain Singh *v.* Shirpal Singh. 173 I.C. 140=10 R.A. 459=1937 A.W.R. 1093=1938 R.D. 52=1938 A.L.R. 94=A.I.R. 1938 All. 20.

——*Licence to build—Building put up leaving a portion as* sehan-darwaza—*Rights of the licensee.*

Where a person was given a licence to build a house on a piece of land in the abadi and he proceeds to build a house keeping a portion of the land vacant to be used as *sehan-darwaza*, all within the area of the land given, the licensee who has thus built the house in pursuance of the licence, has a possessory interest in the land to which the licence relates such as will enable him to maintain a suit, whether against his licensor or against any third party. As against the licensor the licence is unrevocable under S. 60 (*b*) of the Easements Act. (*Collister, J.*) Azhar Hussain *v.* Mansab. 1940 A.W.R. (H.C.) 290 =1940 A.L.J. 354=1940 R.D. 187=A.I.R. 1940 All. 324.

——*Nature of—Rights of persons entitled to plots in.*

The village abadi is not communal land. Persons entitled to plots of land in the abadi are entitled, when they receive possession of it, to exclusive possession and are entitled to exclude every other member of the community from occupation. (*Bose, J.*) Evangelical German Mission *v.* Mahant Ramsahaigir. 182 I. C. 613=12 R.N. 18=1939 N.L.J. 153=A.I.R. 1939 Nag. 145.

——Sale of house in, by tenant to co-sharer—Other co-sharers, if can sue for joint possession. *See* Co-Sharers—Abadi. 1939 A.W.R. (H.C.) 840

——*Tenant's rights to transfer—Difference between rural and urban areas.*

In the United Provinces, generally, the tenants in rural areas or agricultural villages are not entitled to transfer houses and the sites of houses but are only entitled to transfer the materials of which the houses are built. But the tenants in urban areas are entitled to transfer the houses as they stand upon their sites and the rights of occupation therein. Thus tenants in urban areas have

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to all intents and purposes a proprietary right over the sites of their houses and the zamindar or the owner of the land is left only with a right of escheat in the case of abandonment or in the case of the decease of a tenant who leaves no heirs to succeed him. (*Allsop, J.*) MISRI LAL *v.* DURGA NARAIN SINGH. **1940 A.W.R. (H.C.) 171=1940 R.D. 213=A.I.R. 1940 All. 317.**

———Transfer of house—Right of fixed rate tenant. *See* LANDLORD AND TENANT—ABADI. **1936 R.D. 18.**

———Transfer of sites in village—Right of—Custom—Proof. *See* LANDLORD AND TENANT—ABADI. **1936 R.D. 19.**

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———Of appeal. *See* C. P. CODE, O. 23, R. 1.

———Of claim. *See* C. P. CODE, O. 23, R. 1.

———Of Holding.

See (1) AGRA TENANCY ACT, S. 107.
(2) BENGAL TENANCY ACT, S. 87.
(3) BURMA LAND REVENUE ACT, S. 11.
(4) LANDLORD AND TENANT.

———Of issue.

See (1) C. P, CODE, ORDERS 6, 7 AND 8.
(2) PRACTICE.

———Of partnership. *See* PARTNERSHIP.

———Of plea. *See* (1) PRACTICE.
(2) LEGAL PRACTITIONER.

———Of Tenure. *See* LANDLORD AND TENANT.

———Of Wife.

See (1) HINDU LAW—MAINTENANCE.
(2) HUSBAND AND WIFE.
(3) RESTITUTION OF CONJUGAL RIGHTS.

———Of Worldly affairs. *See* HINDU LAW—ASCETIC.

———Surrender of rights in property—Proof—Evidence requisite — Registered document—Necessity—Express declaration—Proof of. *See* REGISTRATION ACT, S. 17 (1) (B). **A.I.R. 1936 Cal. 774.**

ABATEMENT.

———Of appeal. *See* C. P. CODE, O. 22, Rr. 4, 9 AND 11 AND PRIVY COUNCIL—PRACTICE.

———Of cause of action. *See* C. P. CODE, O. 22, R. 1.

———Of Execution. *See* EXECUTION — JOINT DECREE-HOLDERS.

———Of Nuisance. *See* TORT.

———Of Partial. *See* C. P. CODE, O. 22, R. 4.

———Of Rent. *See* BENGAL TENANCY ACT, S. 38—LANDLORD AND TENANT.

———Of Suit. *See* AGRA TENANCY ACT, S. 44; C. P. CODE, O. 22, AND S. 92

———Of Trial. *See* CRIMINAL TRIAL.

———Of Wrong. *See* TORTS.

———*Appeal—Death of appellant—Substitution of widow and minor son—Death of widow—Absence of application for appointment of next friend—Right of respondent to apply.*

The appellant in an appeal died pending the appeal. His widow and his minor son under the guardianship of the former were then brought on the record in the place of the deceased appellant. Then the widow also died, but no one applied to carry on the litigation on behalf of the minor within a reasonable time.

Held, that under O. 32, R. 9, C. P. Code, further proceedings should be stayed and that it was obviously for the respondents, as persons clearly interested in the matters in issue, to take steps in the matter to get a new next friend appointed;

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and if they did not do so, the minor on attaining majority would have to elect whether or not to proceed with the appeal. (*Das and Adami, JJ.*) RAMJI DAS *v.* MAHAMAYA PRASAD SINGH. **17 Pat.L.T. 86.**

———Appeal to Privy Council—Death of respondent—Hearing of appeal in ignorance and reservation of judgment—Subsequent discovery of death—Jurisdiction to pronounce judgment. *See* PRIVY COUNCIL—PRACTICE. **38 Bom.L.R. 680 (P.C.).**

———Execution proceedings—Joint decree-holders—Application by—Death of one—Effect—Right to continue. *See* EXECUTION—JOINT DECREE-HOLDERS. **A.I.R. 1936 Cal. 571.**

———*Partition suit—Suit by alienee from Mahomedan co-sharer—Death of defendant claiming interest only in part of the propertics—Plaintiff not concerned with such share—Failure to implead legal representatives of deceased defendant—Whole suit—If abates.*

A suit for partition must ordinarily abate as a whole. But in a suit for partition by an alienee from a Mahomedan co-sharer, if a defendant who is interested in a portion of the property, dies and his legal representatives are not brought on the record within the time limited, the suit cannot abate as a whole when the deceased defendant had no interest in the portion of the property to which the plaintiff and his assignor are entitled. The suit as regards the part claimed by the plaintiff can proceed. (*Rupchand Bilaram and Haveliwala, A J.Cs.*) JAMAL BHAWANDAS *v.* MURAD. **30 S.L.R. 242=165 I.C. 91=9 R.S. 75=A.I.R. 1936 Sind 169.**

———*Succession certificate — Application for—Death of applicant—Right—If survives to legal representative.*

The right to present an application for a succession certificate is a personal one and does not survive to the legal representative of the applicant on the latter's death (*Norman, I.C.S.*) HAMIDA *v.* RABIA. **1937 A.M.L.J. 40.**

———*Suit against devastanam—Defendant represented by trustee—Trustee ceasing to be such subsequently — Omission to bring on record another trustee—Effect—If causes abatement.*

Where a devasthanam is a party defendant to a suit, represented by a trustee, the fact that that trustee ceases to be such subsequently, does not cause the suit to abate by reason of the omission to bring on record another trustee to represent the devasthanam; especially when it is the devasthanam that is the party on record and the counsel originally retained for it continues to act on its behalf right down to the end of the action. (*Varadachariar and Mockett, JJ.*) ALAGAPPA CHETTIAR *v.* SOMASUNDARAM CHETTIAR. **1937 M.W.N. 465 (2).**

ABDUCTION. *See* PENAL CODE, SS. 363, 366 AND 367.

ABETMENT. *See* PENAL CODE, SS. 34, 109 AND 114.

ABSCONDING. *See* CRIMINAL TRIAL.

ABKARI.

See (1) BOMBAY ABKARI ACT.
(2) MADRAS ABKARI ACT.

ABSENCE. *See* C. P. CODE, O. 17, RR. 2 AND 3.

———From British India. *See* LIMITATION ACT, S. 13.

ABSOLUTE ESTATE.

——Of reasonable and probable cause. *See* TORT—MALICIOUS PROSECUTION.

ABSOLUTE ESTATE.

See (1) HINDU LAW.
(*a*) STRIDHANA.
(*b*) WIDOW.
(*c*) WILLS.
(2) WILL—CONSTRUCTION.

ABSOLUTE OCCUPANCY TENANT AND HOLDING.

(1) *See* LANDLORD AND TENANT.
(2) „ C. P. TENANCY ACT.
(3) „ MADRAS ESTATES LAND ACT.
(4) „ „ OCCUPANCY HOLDING.

ABSOLUTE PRIVILEGE. *See* PENAL CODE, S. 49—TORT—DEFAMATION.

ABUSE. *See* PENAL CODE, S. 504.

——of process of Court. *See* C. P. CODE, S. 151 AND O. 21, RR. 89-91.

ABWAB—*Kathiari* and *Mutarfa*—If illegal exactions. *See* BIHAR TENANCY ACT (AS AMENDED IN 1934). **20 Pat L.T. 88=A.I.R. 1939 Pat. 252.**

ACCELERATION OF ESTATE. *See* HINDU LAW—WIDOW—SURRENDER.

ACCEPTANCE. *See* CONTRACTS.

——Negotiable instruments. *See* NEGOTIABLE INSTRUMENTS ACT, S. 7 AND STAMP ACT, S. 62.

ACCESSION. *See* ALLUVION AND DILUVION.

ACCOMPLICE.

See (1) EVIDENCE ACT, SS. 111, 114 (*b*) AND 133.
(2) CR. P. CODE, S. 337.

ACCORD AND SATISFACTION. *See* CONTRACT ACT, S. 62.

ACCOUNTS.

See also (1) DEBTOR AND CREDITOR.
(2) HINDU LAW—JOINT FAMILY.
(3) LIMITATION ACT, S. 19.
(4) MORTGAGE.
(5) PARTNERSHIP—DISSOLUTION.
(6) PRINCIPAL AND AGENT.
(7) STAMP ACT, ART 1.
(8) TRUSTS AND TRUSTEES.
(9) WILL—EXECUTOR.

——*Decree for—Specific directions in decree—Duty of Court.*

In a decree directing accounts to be taken, it should be the practice of the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree. (*Lord Thankerton.*) MANOHAR MUKERJI *v.* BHUPENDRA NATH MUKERJI. **161 I.C. 927=8 R.P.C. 224=1936 O.L.R. 230=1936 A.L.R. 415=38 P.L.R. 359=1936 O.W.N. 367=A.I.R. 1936 P.C. 325 (P.C.).**

——*Settled accounts—Reopening of—Principles—Settlement between person who has just come of age and person in fiduciary position—Duty of latter—Former dispensing with production of accounts and taking gross sum as balance after taking competent advice—Right to reopen.*

If persons meet and agree not to ascertain the exact balance due on accounts, but agree to take a gross sum as the balance, which one is willing to pay and the other is content to receive, it is obvious that the production of vouchers is entirely out of the question, for the very object of the parties is to avoid the necessity for producing these vouchers. But when one of the parties to the transaction has just attained the bare age of majority, and the other party stands in a fiduciary relationship, the Court will jealously watch such a transaction, and it is the duty of the party standing in fiduciary relationship to make a full disclosure of the state of the account. The latter must affirmatively prove that the weaker party was a free agent and had independent and disinterested advice. Where it is established that the weaker party had competent and independent advice, and that there was neither importunity nor persuasion on the part of the other party, who was prepared to produce all the accounts, but that the party who had just come of age was, though young, very shrewd and dispensed with the production of the books agreeing to take a gross sum, it must be held that he has waived his right to disclosure. He cannot be permitted to repudiate the settlement afterwards and to claim that the settled accounts should be reopened. Further if he does not come to Court with clean hands, he cannot expect any sympathy from the Court. (*Venkatasubba Rao and Abdur Rahman, JJ.*) PETHAPERUMAL CHETTIAR *v.* RAMASWAMI CHETTIAR. **181 I.C. 409=11 R.M. 805=1938 M.W.N. 895=A.I.R. 1938 Mad. 919=(1938) 2 M.L.J. 505.**

——*Settled accounts—Reopening of—Permissibility.*

Where accounts have been settled and agreed upon between two parties and one party promises to pay, a suit can be filed on that promise. A settled account gives rise to a cause of action and the creditor need not prove that the balance found is correct provided it is accepted as correct by the debtor. The debtor will not be allowed to reopen the settled account and to defeat the claim of the creditor, based on a pronote by contending that certain account books relating to a particular period have not been produced in Court. For a settled account cannot be reopened except on specific allegations of fraud or mistake. (*Tek Chand and Abdul Rashid, JJ.*) PREM DAS RADHA KISHEN *v* MAHOMED HUSSAIN KHAN. **162 I.C. 882 (2)=8 R.L. 965=A.I.R. 1936 Lah. 51.**

——*Settled accounts—When re-opened—Specific averment of errors—Necessity for in pleadings.*

Where accounts settled are impeached, if it is shown that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the Court will order such accounts, though extending over a long period of years, to be reopened; and supposing a fiduciary relation to exist between the parties the Court will make a similar order if such accounts are shown to contain a less number of errors, or if they contain any fraudulent entries. When a party seeks to reopen a settled account, there must be in the pleadings some direct, distinct and specific averment of errors to entitle the party to open the account. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) ANANTHA PADMANABHA BHATTA *v* SUBBA RAO. **17 Mys.L.J. 200=44 Mys.H.C.R. 19.**

——Suit for—Accounts forged—Relief. **A.I.R. 1938 Pat. 42**

——*Suit for—Assignment of definite sum due from principal—Right of assignee to sue for account.*

Where, what is assigned to the plaintiff by the Official Receiver of an ex-broker's assets in insol-

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vency, is a definite sum of money due from the latter's principal and not a right to sue for account, if any, a suit for rendition of account for the recovery of the amount thus assigned is incompetent. (*Addison and Din Mahomed JJ.*) JAINI BROTHERS & Co. *v.* SHANKAR LAL. **178 I.C. 176=A.I.R. 1938 Lah. 270**

——Suit for—Duty of Court to pass preliminary before final decree—Suppression of accounts by defendant—If justifies passing of final decree straightaway. *See* PRACTICE. **1939 M.W.N. 360=A.I.R. 1939 Mad. 671.**

——*Suit for—Interest—Yearly balances—Whether can be allowed*

The plaintiff in a suit for rendition of accounts relating to a number of properties with which they alleged that the defendant had dealt as manager and co-sharer on behalf of themselves, while setting forth in their plaint the relief asked expressly for future interest only. The defendant had also filed cross-suit against plaintiffs for accounts. Both sides were found liable to account and the defendant was allowed interest to be calculated apparently on balances as they stood from year to year.

Held, that the suit was not one in which interest before date of final settlement ought to have been allowed, assuming that the Court had discretion to allow it, which it was perhaps doubtful. Interest would fairly be payable only on the amount found due on a balance of both accounts. (*Coldstream and Monroe, JJ.*) VIDYA WANTI KAUR *v.* SHAHDEV SINGH. **182 I.C. 426=12 R.L. 24=A.I.R. 1938 Lah. 139.**

——*Suit for — Maintainability — Plaintiff knowing state of account.*

The plaintiff claimed a certain sum of money from the defendant as heir of one *L* who had deposited money with the defendant and instituted a suit for an account. The plaintiff knew or could have known what was the state of accounts between *L* and defendant.

Held, that the suit should have been filed on an account and not for an account and even if the plaintiff did not know how much was due to *L* it was open to him to have sued on account valuing his relief according to his estimate.

Held further, after the inspection of all the accounts after filing of the suit he could have applied for amendment of the pleadings. A.I.R. 1933 Lah. 483, Dist. (*Rupchand Bilaram and Mehta, A. J. Cs.*) MULOMAL KHEMCHAND *v.* TARACHAND DASSUMAL. **161 I.C. 505=8 R.S. 147=A.I.R. 1936 Sind 9.**

——*Suit for—Relief when can be granted.*

A right to claim a statement of accounts is an unusual form of relief only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his rights. According to the terms of a lease the lessees were liable to pay rent at the rate of Rs. 10 per month; but if the lessees were to sub-let and recover more than Rs. 60 per month, they were also liable to pay ¼th of the excess to the lessors. The lessor alleged that the lessees had failed to pay rent according to the terms of this lease and sued to recover certain sum as rent and also claimed rendition of accounts, alleging that the lessees were realizing

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more than Rs. 60 per month, from their sub-tenants.

Held, that claim for rendition of accounts could be granted. (*Bhide, J.*) PANNA LAL *v.* RAM RICHHPAL. **A.I.R. 1940 Lah. 120.**

ACCRETION.

See ALLUVION AND DILUVION.
BENGAL ALLUVION AND DILUVION REGULATION.
HINDU LAW.
LANDLORD AND TENANT.
LAND TENURES.
T. P. ACT, SS. 63, 72 AND 108.

ACCUMULATION. *See* T. P. ACT, S. 18.

ACKNOWLEDGMENT.

See (1) CONTRACT ACT, S. 25 (3).
(2) LIMITATION ACT, SS. 19 AND 20.

ACQUIESCENCE.

See also (1) EVIDENCE ACT, S. 115.
(2) ESTOPPEL.
(3) LANDLORD AND TENANT—EJECTMENT.

——*Building on the land of another—Acquiescence of owner—Right of builder to remove building—Conditions.*

A party building on the land of another is allowed to remove the building when there has been a *bona fide* belief on the part of the person building that he has title and then it appeared that he had no title but was misled by the acquiescence of the owner. (*Stone, C. J. and Bose, J.*) ABDUL RAZAK *v.* SETH NANDLAL. **I.L.R. 1940 Nag. 269=182 I.C. 581=12 R.N. 12=1938 N.L.J. 317=A.I.R. 1938 Nag. 506.**

——Doctrine of—Elements to be proved—Building on land by trespasser—Silence of owner—If raises estoppel—Principles. *See* EVIDENCE ACT, S. 115. **40 C.W.N. 1370.**

——*Essentials of.*

Acquiescence imports full knowledge and it is no more than an instance of the law of estoppel. Apart from the full knowledge required, there must be some lying by to the detriment of the other side (*Stone, C J. and Bose, J.*) KUWARJI *v.* BHURELAL. **182 I.C. 527=12 R.N. 9=1939 N.L.J. 136=A.I.R. 1939 Nag. 163.**

——*Standing by—Decree-holder raising no objections by way of attachment nor asking money to be deposited in Court but allowing judgment-debtor to take it away—Subsequent claim to such money—Maintainability.*

Where a decree-holder knowingly acquiesces in the disbursement of money due to the judgment-debtor, he cannot subsequently claim that such money ought to have been kept for his benefit. Where the decree-holder never asked that certain money to which the judgment-debtor was entitled should be paid into Court nor tried to attach it but stood by and allowed the judgment-debtor to take it;

Held, that it was not open to him subsequently to plead that the money ought to have been kept for his benefit. (*Pollock, J.*) GHUSARAM *v.* PARASHRAM. **166 I.C. 950 (2)=9 R.N. 152=A.I.R. 1936 Nag. 163.**

ACQUISITION.

See HINDU LAW—JOINT FAMILY.

——By Government. *See* LAND ACQUISITION ACT.

ACQUISITION.

——Of easement. *See* EASEMENTS ACT, Ss. 47 AND 15.

——Of Title. *See* ADVERSE POSSESSION.

——*Compensation—Franchise for public utility granted to private undertakers—Latter under obligation to transfer undertaking to public authorities after expiry of limited period—Assessment of compensation on transfer—Basis of.*

It is a familiar feature common to all cases in which a franchise for a public utility is granted to private undertakers for a limited period coupled with an obligation to transfer the undertaking to a public authority at the conclusion of the period, that the undertakers must look to reap the reward of their enterprise in the profit which they may make during the currency of their franchise and on its expiry shall receive only the value of the structure which they have created without any compensation either for the profits or the losses which they may have made or sustained while in the enjoyment of their franchise. This is plainly just, for which the termination of the franchise the power to make profits or the liability to incur losses simultaneously terminates. The promoters have had their chance to make what they can out of their undertaking in the knowledge that it was of limited duration and that they must part with it at a fixed date. To compensate them on the basis of the profits which they have made and are surrendering, would be to assume that they had a right to go on making profits although *ex hypothesi* the franchise which gave them that right had come to an end. (*Lord Macmillan.*) INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION. **10 R.P.C. 17=169 I.C. 562=A.I.R. 1937 P C. 214 (P.C.).**

——*Compensation—Transfer of public utility undertaking as a going concern—Fixing of compensation—Basis of.*

In the absence of clearest directions to the contrary in the terms of transfer, the compensation payable by the transferee of a public utility undertaking as a going concern to the transferor should not be fixed at the break up value to the transferee. The compensation should be fixed on the basis of reconstruction cost less depreciation. (*Lord Macmillan.*) INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION. **10 R.P.C. 17=169 I.C. 562=A.I.R. 1937 P.C. 214 (P.C.).**

ACQUITTAL.

See (1) CR. P. CODE, SS. 403, 417 AND 439.
(2) CRIMINAL TRIAL.

ACTIONABLE CLAIM.

See (1) ASSIGNMENT.
(2) NEGOTIABLE INSTRUMENTS.
(3) PROMISSORY NOTES.
(4) T. P. ACT, SS. 3, 6 (E), 130 TO 137.

ACTIONABLE WRONG. *See* TORT.

ACTS. *See* INTERPRETATION OF STATUTES.

ACT OF STATE—*Dismissal of civil servant.*

The dismissal of a civil servant cannot be described as an Act of State of Sovereignty, and an action could be brought against the Secretary of State in respect thereof. (*Bhide and Currie, JJ.*) GIRDHARI LAL *v.* SECRETARY OF STATE. **8 R.L. 473=159 I.C. 1107=39 P.L.R. 514=A.I.R. 1937 Lah. 226.**

——*Test—Stolen property recovered from accused's person lost while in custody of police—Suit by owner for recovery thereof—Liability of Secretary of State—Jurisdiction of Court.*

The Act of State is an act which the King executes in the exercise of his absolute and extraordinary power. If the Secretary of State takes the property in suit by an act of Sovereignty, then no suit will lie: but if, on the other hand, he takes it under the colour of legal title, then his act will be within the jurisdiction of the Courts. Certain stolen property recovered from the accused was lost while it was in the custody of the police. The owner of the property, therefore, filed a suit against the Secretary of State for India for recovery of the property. It was contended on behalf of the Secretary of State that as the property came into his possession in the exercise of a Sovereign right and thus an Act of State, no suit lay against him.

Held, that as the stolen property was recovered from the offenders under the provisions of the Cr. P. Code, and disposed of also under the provisions of the same Code, there was no occasion for the exercise of any absolute power of the Sovereign in this matter and whatever was done, was done under the Municipal law of the land. The liability of the Secretary of State having thus arisen under the Municipal law of the land, the defence that the act was an Act of State, could not be invoked. (*Addison and Din Mohammad, J.*) UMA PRASHAD *v.* SECRETARY OF STATE. **18 Lah. 380=172 I.C. 567=10 R.L. 345=39 P.L.R. 845=A.I.R. 1937 Lah. 572.**

ADATHI SYSTEM. *See* PRINCIPAL AND AGENT—ADATHI.

ADEN CIVIL AND CRIMINAL JUSTICE REGULATION (VI OF 1933), S. 7—*Scope—Order by District Judge in revision—Bombay High Court's powers of interference in revision.*

S. 7 of the Aden Civil and Criminal Justice Regulation confers upon the High Court of Bombay a power of revision where any case has been decided by the District Judge of Aden whether in his original jurisdiction, or in appeal, or in revision. But the High Court should generally be slow to interfere with the exercise by the District Judge of his revisional powers. (*Beaumont, C.J.*) AHMED ABDULLA RUBATTI *v.* AHMED ABDULLA DUBAEE. **168 I.C. 576=9 R.B. 374=39 Bom.L.R. 110=A.I.R. 1937 Bom. 180.**

——S. 15—*Powers of District Judge—Revision—Admission of new evidence—Jurisdiction.*

The language of S. 15 of the Aden Civil and Criminal Justice Regulation is extremely wide, and the District Judge of Aden has jurisdiction under S. 15 to admit new evidence in revision, although it is obviously rather a dangerous course to admit further evidence in revision. (*Beaumont, C.J.*) AHMED ABDULLA RUBATTI *v.* AHMED ABDULLA DUBAEE. **168 I.C 576=9 R.B. 374=39 Bom.L.R. 110=A.I.R. 1937 Bom. 180.**

ADJUSTMENT. *See* C. P. CODE, O. 21, R. 2, and O. 23, R. 3.

——Executory agreement—If can be adjustment. *See* C. P CODE, S. 47 AND O. 21, R. 2. **I.L.R. (1939) Kar. 725.**

ADMINISTRATION—Application for letters with will annexed—Limitation—Long delay—Effect of. *See* SUCCESSION ACT, S. 217. **41 C.W. N. 1204.**

———*Application for letters by widow—Consent decree providing payments to widow—No payments made even after nine months—Widow with minor children starving—Directions giving relief.*

A widow with five minor children applied for letters of administration of her husband's estate. Her major step-son filed a caveat. A consent decree providing payments to widow was subsequently passed. But though her husband died 16 months ago and the consent decree was passed nine months ago, and though sums amounting to Rs. 3,000 or Rs. 4,000 had been paid out of the estate on account of costs, she and her five minor children were starving. She even sold her ornaments. She was informed by the Administrator-General that there were still adjustments to be made against anything that has in future to be paid to her.

Held, 'there is something wrong with the system of administration of such estates. With regard to possible change of this system it is not a matter for the Court. There are no doubt difficulties. There are vested interests from the revenues of the country down to the smallest law tout against change. But unless changed, the system will be destroyed and it will deserve to be destroyed.' Directions giving relief to the widow were given on consent of parties. (*Ameer Ali, J.*) PROBHAPATI RAY *v.* GOURISHANKAR RAY. **171 I.C. 510=A.I.R. 1937 Cal. 219.**

———Application for letters with will annexed—Scope of enquiry—Considerations. *See* SUCCESSION ACT, S. 217. **41 C.W.N. 1204.**

———*Constructive trustee—Liability of—Extent.*

Even a constructive trustee will not be liable except for moneys which he is proved to have received. (*Mr. Jayakar.*) ATISUKHLAL *v.* NATVARLAL. **183 I.C. 885=12 R.P.C. 78=6 B.R. 26=1939 O.L.R. 586=I.L.R. (1939) Kar. (P.C.) 391=A.I.R. 1939 P.C. 238 (P.C.).**

———Hindu joint family—Death of father—Absence of separate property—Creditor's suit for administration—If lies. *See* C. P. CODE, Ss. 50, 52 AND 53. **1939 M.W.N. 493=A.I.R. 1939 Mad. 552.**

———*Pleader's fee—Property involved worth Rs.* 1,24,000—*Suit notionally valued at Rs.* 800—*Calculation of fees—Basis of.*

The subject-matter of a suit is the actual value of the property to which the plaintiff would be entitled if the suit succeeds, and not the notional figure at which the plaintiff chooses to value it. For purposes of calculating pleader's fee in taxing the defendants' costs of an administration suit dismissed as bad for multifariousness the basis to be adopted was the value of the property, namely, Rs. 1,24,000, and not the notional value of Rs. 800, which the plaintiff had chosen. (*Broomfield and Macklin, JJ.*) NARHARI *v.* BABURAO. **41 Bom.L.R. 413=183 I.C. 655=12 R.B. 117=A.I.R. 1939 Bom. 299.**

———*Preliminary decree drawn up—Further steps to be taken.*

Where a preliminary decree for administration has been drawn up, nothing more is required from the Court beyond giving directions to the administrator or the receiver or whoever it is who is in charge of the estate, as to the lines the administration ought to take; and the only other decree which can be passed in the administration is the final decree, which will declare that the estate had been administered and which will allot out of the assets remaining in the hands of the Court or the administrator the various shares to the parties entitled to receive them. Hence after the preliminary decree, a supplementary decree cannot be passed by the Court on the application of a creditor. (*Baguley and Mosely, JJ.*) A. T. N. A. T. CHOCKALINGAM CHETTIAR *v.* KO MAUNG GYI. **178 I.C. 544=A.I.R. 1938 Rang. 372.**

———*Receiver in administration suit—Status and powers of.*

The receiver appointed in an administration suit has no better status than that of a receiver appointed under O. 40, C. P. Code. He is not on the same footing as a receiver appointed in an insolvency proceeding in whom the estate of the insolvent vests and the insolvent is divested of it. When a Court appoints a receiver, the property comes in the custody of the Court. The possession of the receiver is the possession of the Court. The property passes into legal custody (*custodia legis*) and such custody is for the benefit of the true owner. The receiver thus holds the property for the benefit of the true owners. By the appointment of a receiver the Court takes upon itself the management of the property during the continuance of the litigation, but the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed. So where a receiver is appointed to the estate of a certificate debtor, the sale cannot be inoperative against the estate simply because the receiver is not substituted as certificate debtor. (*Mahomed Noor and Rowland, JJ.*) MANGTULAL BAGARIA *v.* DAYA SHANKER. **165 I.C. 749=9 R.P. 205=18 Pat.L.T. 301=3 B.R. 73=A.I.R. 1936 Pat 572.**

———*Suit by creditor on behalf of himself and other creditors—Creditor not coming in and taking dividend—Distribution of assets among creditors coming in—Subsequent suit by former against latter for refund* pro rata—*Maintainability—C. P. Code, O. 20, R. 13.*

Where in an administration suit, by a creditor for himself and other creditors, for the administration of the estate of a deceased debtor, the assets which are not sufficient to pay the debts in full are distributed proportionately and rateably among the creditors proving their claims under the suit, a creditor who has neglected to come in at the proper time and to prove his debt in the suit cannot be permitted to disturb the dividend of the other creditors. A suit by him against the creditors who have proved and received dividends for a redistribution of the assets and for a *pro rata* refund by those creditors is not maintainable. (*Rangnekar, J.*) KISSONDAS PREMCHAND *v.* JIVATLAL PRATAPSHI & Co. **167 I.C. 529=9 R.B. 313=38 Bom.L.R. 864=A.I.R. 1936 Bom. 423.**

———*Suit for, of estate of deceased person—Duty of Court—If bound to make administration order—Power to refuse order—Practice.*

The Court is clearly not bound to make an order for the administration of the estate of a deceased person, if the questions between the parties can be properly determined without such order. The order may be refused, even if the deceased testator has directed his executors to take proceedings to have his estate administered by the Court. (*Rangnekar, J.*) KISSONDAS PREMCHAND *v.* JIVATLAL PRATAPSHI & Co. **167**

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I.C. 529=9 R.B. 313=38 Bom.L.R. 864=A.I.R 1936 Bom. 423.

———*Suit for—Disputed debt—Power of Court to direct its payment to administrator.*

No doubt a Court in pursuance of a decree in the administration suit is competent to direct one of the parties to the suit to restore or hand over to the administrator or the receiver assets belonging to the estate in possession of such party, but a debt, specially a debt which is disputed, is not governed by this rule, because the expression "asset" as used above means property which has come in the hands of the representatives of the deceased as such either actually or by implication and a disputed debt cannot be deemed to be an asset which has come in the hands of any person representing the estate. (*Jai Lal, J.*) AHMAD DIN *v.* MAHOMED TAQI. **163 I.C. 363=9 R.L. 6 (2)= 38 P.L.R. 284=A.I.R. 1936 Lah. 365.**

———*Suit for—Joint Hindu family—Debts by father—Suit after death against undivided son by creditor for administration—Maintainability—C. P. Code, S. 53.*

S. 53, C. P. Code, extends the meaning of the term "legal representative" as defined by S. 2 (11), by expressly making the son or descendant of a Hindu his legal representative in respect of joint family property in his hands which is liable under the Hindu Law for satisfaction of the debts of the deceased ancestor. The obligations of the Hindu son or other descendant, in respect of ancestor's debts which are not illegal or immoral, are, after the enactment of S. 53, precisely those of an heir, though the undivided son or other descendant gets the property by right of survivorship and takes it in his own right under the Hindu Law. Consequently a suit by a creditor for the administration of the estate of a deceased Hindu against his undivided son is maintainable. (*Lakshmana Rao, J.*) MEENAKSHI ACHI *v.* RAMASWAMI CHETTIAR. **173 I.C. 671=10 R.M. 618= 1937 M W.N. 757=46 L.W. 321=A.I.R. 1937 Mad. 785.**

———*Suit for—Maintainability — Debt due by Hindu father—Suit by creditor against undivided son after father's death for administration—Competency—Opposition by some creditors—If a bar.*

A creditor of a deceased Hindu sued his undivided son for an administration of such part of the son's estate as was liable for his father's debts. A number of creditors of the deceased who were also joined as defendants were against the suit for the obvious reason that they had already obtained decrees and were actually executing them.

Held, that though the son was not the legal representative of his deceased undivided father, the debtor, his obligations were nevertheless precisely those of an heir, unless the debts were incurred for illegal or immoral purposes, and the son would be liable for his father's debts, not being illegal or immoral, to the extent of the assets of the joint family property that had come into his hands; and it was equitable and desirable that the creditor should be allowed to bring an administration suit against the undivided son of the debtor. The interested objections of certain defendants-creditors would not be a sufficient ground for not permitting the plaintiff to pursue his remedies in an administration suit. (*Horwill, J.*) ANJAYYA *v.* ANKAMMA. **166 I.C. 866=9 R. M. 405=1936 M.W.N. 1398=44 L.W. 836=A.I. R. 1937 Mad. 99.**

———*Suit for — Maintainability—Suit between rival claimants.*

O. 20, R. 13, Cr. P. Code, makes it clear that administration suits are intended to be filed for the purposes of taking an account of any property and for its due administration under the decree of the Court. A suit between rival claimants to the estate of a deceased person, each one claiming to be his sole heir, is not a suit for an account of any property and for its due administration under the decree of the Court. When, therefore, the main purpose of a suit is to determine who is the rightful heir of a deceased person an administration suit cannot be filed by one of the heirs to obtain possession of the property wrongfully withheld by another person claiming to be the heir. (*Abdul Rashid, J.*) CHAND NARAIN *v.* GHASI RAM. **42 P.L.R. 145=A.I.R. 1940 Lah. 179.**

———*Suit for—Party claiming less share in plaint—Right to proper share.*

In a suit for the administration of the estate, the parties are entitled to obtain the shares of the estate to which they are entitled under the law, and the fact that the plaintiff may in his plaint have claimed a less share than is actually due to him does not prevent his proper share being awarded to him in the judgment. (*Mosely and Dunkley, JJ.*) OON CHAN THWIN *v.* KHOO ZUN. **177 I.C. 501=11 R.R. 134=A.I.R. 1938 Rang. 254.**

———*Suit for—Parties—All creditors, if necessary parties.*

In an administration suit, the object of which always is to obtain an order for the administration of the estate of a deceased person under the supervision of the Court which must necessitate the payments of all the debts from the estate and therefore essentially a representative suit, it is not necessary that all the creditors should be arrayed as parties. All that is necessary in such cases is to call upon all the creditors after the decree has been passed to prove their debts and to pay such debts as have been proved before distribution of the estate to the heirs. (*Jai Lal and Abdul Rashid, JJ.*) MT. SHAHZADI BI *v.* MT. RAHMAT BI. **174 I.C. 893=10 R.L. 616=A.I.R. 1937 Lah. 761.**

ADMIRALTY.

ADMIRALTY—*Collision action — Suit for damages—Burden of proof.*

In collision action the burden in the first instance lies on the plaintiff and before he can succeed he must prove loss or damage due to the wrongful acts of the defendants, namely, loss or damage due solely or in part to their negligence or default. When he makes out a *prima facie* case of negligence on the part of the defendant, the burden of proof is shifted, and the defendant will be liable unless he proves that his negligence in no way contributed to the loss. (*Davis, J.C.*) YOOSAF SAGAR ABDULLA *v.* S. S. "ELLORA". **(1940) I.L.R. Kar. 53=A.I.R. 1939 Sind 349.**

———*Collision — Actionability — Carrying of wrong lights by one ship misleading another—Suit by owner of former against latter for damages—Maintainability*

If a ship by carrying wrong lights, or by navigating in an improper or unusual manner, mis-

leads or embarrasses another, she cannot attribute as fault to the latter any act which was the probable result of her own negligence. (*Davis, J. C.*) YOOSAF SAGAR ABDULLA *v.* S. S. "ELLORA". (1940) I.L.R. Kar. 53=A.I.R. 1939 Sind. 349.

———*Collision—Liability — Contributory negligence—Negligence—Test of.*

In collision actions it may well be that both parties are guilty of a neglect of duty, and that, if either had used reasonable care and skill, the collision would have been avoided. In such a case the maritime law, which is followed in the Admiralty, apportions the joint damage. So far as what constitutes negligence, it may perhaps best be expressed as doing something which ought either to be done in a different way or not at all, or omitting to do something which ought to be done. In collision cases the negligence relied on is generally a failure to exercise the skill, care and nerve which are ordinarily to be found in a competent seaman, or a breach of regulation, either international or local, governing navigation or equipment, or more rarely the inefficient or defective condition of the vessel or her equipment. Extraordinary skill or extraordinary diligence is not expected but that degree of skill, and that degree of diligence, which is generally to be found in persons who discharge their duty. (*Davis, J.C.*) YOOSAF SAGAR ABDULLA *v.* S. S. "ELLORA". (1940) I.L.R. Kar. 53=A.I.R. 1939 Sind 349.

———*Jurisdiction—Owner of ship not resident abroad, or dead or bankrupt—Suit against—Maintainability.*

It is true that the Admiralty has jurisdiction *in rem* and that the ship is often spoken of as the wrongdoer and that a ship may be liable in admiralty where no damages could be recovered at law against the general owners. But where the owners of the ship are not resident abroad, dead or bankrupt a suit does not lie against the ship but against the owner. (*Davis, J.C.*) YOOSAF SAGAR ABDULLA *v.* S.S. "ELLORA". (1940) I.L.R. Kar. 53=A.I.R. 1939 Sind 349.

———*Regulations for preventing collisions at sea, Art. 28—Failure to give sound signals to country craft in open sea—Effect of.*

There is nothing in Art. 28 of the Regulations for preventing collisions at sea which exempts a steamer from giving sound signals to a country craft. Failure to give sound signals to country craft in the open sea is breach of the Regulation and a general practice to ignore it in certain cases is no answer to the charge that a breach of the Regulations is *prima facie* negligence. The burden lies upon the party failing to give signals to show that failure to give sound signals did not contribute to the collision. (*Davis, J.C.*) YOOSAF SAGAR ABDULLA *v.* S. S. "ELLORA." (1940) I.L.R. Kar. 53=A.I.R. 1939 Sind 349.

ADMIRALTY ACTIONS—*If party can succeed on failure of opposite party to prove his case.*

In admiralty actions if a party fails to prove his case it cannot be said that the other party must succeed or *vice versa*. The case set up by one party may be false. This will disentitle that party to recover, but it does not follow from this that the opposite party must be held to have succeeded. A party in order to be entitled to recover must prove his own case. This principle which is of general application has always been applied in admiralty actions. Again, a party must recover only "*secundum allegata et probata*". The rule that proof must not be at variance materially with pleadings and that a party must state in his pleadings the material facts on which his case rests and in order to succeed must prove those material facts must always remain one of the essentials of legal procedure. (*Sen, J.*) RIVER STEAM NAVIGATION CO. *v.* S.S. "JANARDAN". 184 I.C. 724=A.I.R. 1939 Cal. 513.

ADMISSIBILITY.

See (1) EVIDENCE.
(2) EVIDENCE ACT.
(3) REGISTRATION ACT, SS. 49 AND 17.

ADMISSION.

See also (1) C.P. CODE, O. 12.
(2) EVIDENCE ACT, SS.17 TO 30 AND 115.
(3) LEGAL PRACTITIONERS.

———*Gratuitous admission—When can be withdrawn.*

If a person makes a gratuitous admission that the maker has no right in the property in certain estate and that all his rights had been extinguished, there is nothing to prevent him from withdrawing the said admission unless there is some obligation not to withdraw the gratuitous admission made by him. (*Collister and Bajpai, JJ.*) ISHAR FATIMA BIBI *v.* ANWAR FATIMA BIBI. 182 I.C. 801 (2)=12 R.A. 38=1939 A.L.J. 642=A.I.R. 1939 All. 348.

———*Waiver—Difference between.*

There is a distinction in law between waiver and admission; in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on, the party making it cannot plead ignorance unless it is induced by the other party, for, if he does not choose to enquire beforehand, he takes the risk of error. (*Lord Thankerton.*) SHYAM SUNDER SINGH *v.* KALURAM AGARWALA. 32 S.L.R. 879=5 C.L.T. 1=176 I.C. 2=42 C.W.N. 1041=19 Pat. L.T. 561=48 L.W. 199=1938 M.W.N. 814=1938 O.L.R. 344=1938 A.W.R. (P.C) 186=68 C.L.J. 145=1938 O.W.N. 883=11 R.P.C. 58=1938 A. L.R. 672=4 B.R. 815=1938 O.A. 780=1938 P. W.N. 612=A.I.R. 1938 P.C. 230=(1939) 1 M.L. J. 147 (P.C.).

ADVANCEMENT.

See (1) BENAMI.
(2) HUSBAND AND WIFE.

———Doctrine of—Applicability in India—Purchase by father in son's name—Inference. *See* BENAMI—PRESUMPTION. A.I.R. 1939 Pat. 462.

ADVERSE POSSESSION.

See also (1) LANDLORD AND TENANT.
(2) LIMITATION ACT, S. 28, AND ART. 144.

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Burden of proof.
Co-owners.
Co-sharers.
Co-tenants.
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Evidence.
Guardian and ward.
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License.
Limited interest.
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Permissive possession.
Possession referable to lawful title.
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Acquisition of title.

——Acquisition of title—Khoti land—Wrong transfer by occupancy tenant— Possession by transferee for over 12 years—Effect of. *See* BOMBAY KHOTI SETTLEMENT ACT, SS. 6 AND 8. **40 Bom.L.R. 390.**

——*Acquisition of title—Possession in pursuance of settlement of disputes between brothers—No dispute for nearly* 50 *years—Possession ripening into ownership.*

Where in the settlement of dispute between two brothers as to the succession to an estate, the younger brother was given certain properties by way of maintenance and the elder was recognised as the owner of the remaining estate in his possession and which settlement remained unquestioned and in force for nearly 50 years, it was held that the possession of the elder brother and his representatives had been adverse to the younger brother and his representatives for more than the period of 12 years prescribed by the law of limitation, and had ripened into ownership. (*Sir Shadi Lal.*) KARUNAKAR TIKAIT SAMANTA *v.* PURNA CHANDRA BIDYADHAR. **174 I. C. 128=1938 O W.N. 412=1938 R.D 438=19 Pat.L.T. 294=1938 A.W.R. (P C.) 97=47 L.W. 611=1938 O.L.R. 180=1938 P W.N 384=1938 O.A. 431=1938 A.L R 293=10 R P C 256=4 B.R. 505=(1938) M W.N. 620 (P.C.).**

——*Acquisition of title—Possession by tenant.*

If a tenant does not claim in himself proprietary rights but claims only a subordinate right that of tenant, the effect of his possession for more than the statutory period is to make the land so possessed a part of his tenancy. (*Mitter and Sen, JJ.*) ABDUL LATIF *v* NAWAB KHAJEH HABIBULLA. **69 C L J. 28=185 I.C. 714=12 R.C. 404=A.I R. 1939 Cal 354.**

——*Acquisition of title—Agent or co-owner—Possession by.*

Ouster apart, a man's possession by his agent is not dispossession by his agent. The like is true between co-owners. (*Sir George Rankin.*) CADIJA UMMA *v.* DON MANIS APPU. **1939 A C 136=180 I C. 971=11 R P.C. 204=A.I.R. 1939 P.C. 63 (P C.)**

——*Acquisition of title—Assertion of hostile title by transfers of property.*

The transfers of property by a person in possession constitute a clear assertion of hostile title

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which is sufficient to make out title by adverse possession. (*Srivastava, C.J. and Zia-ul-Hasan, J.*) SALTANAT BAHADUR KHAN *v.* GAYA BAKHSH SINGH. **13 Luck. 386=168 I.C. 932=1937 O.W. N. 625=1937 O.L.R. 332=9 R. O. 514=1937 R.D. 351=A I.R. 1937 Oudh 397.**

——*Acquisition of title by females—Nature of estate acquired.*

A female who gets into adverse possession of land to which she has no legal right, takes it as full owner at the end of the statutory period. (*Ram Lall, J.*) ZAHARYA MAL *v.* SHIB CHARAN. **41 P.L R.672.**

——*Acquisition of title—Inclusion of disputed land in prior pre-emption suit—Effect—Starting point.*

The criterion of adverse possession is whether a person possesses land claiming it as his own; if he does he must be held to be in adverse possession. 46 I.C. 964, Rel. on. The defendant built a house in 1919 on the land claimed by the plaintiff as his own and was in possession for over 12 years till date of suit in 1932. In 1920, less than 12 years before date of suit, the defendant sued the plaintiff for possession of certain land by pre-emption. It was discovered subsequently that this land included the land in dispute. In the suit by the plaintiff for possession, it was contended that the defendant had admitted the title of the plaintiff by his suit for pre-emption and this cancelled the effect of overt act of adverse possession.

Held, that the fact that the area in dispute was included in the pre-emption suit did not show that there was any conscious admission by the defendant of plaintiff's title to the area in dispute, and by putting the building on the land in dispute the defendant claimed the site as his own and his adverse possession therefore started from that date and not from the date of the institution of the pre-emption suit. (*Abdul Rashid, J.*) AMAR NATH *v.* RAM RAKHA. **177 I.C. 158=11 R.L. 275=40 P.L.R. 479=A.I.R. 1937 Lah. 811.**

——*Acquisition of title—Mortgagee in possession under invalid sale.*

Where property is sold under an invalid sale deed to a mortgagee already in possession, there can be no adverse possession by the vendee against the real owners, no possession having followed under the sale-deed. (*Addison and Abdul Rashid, JJ.*) LACHHMAN SINGH *v.* NAWAB. **163 I.C. 48=8 R.L. 1025 (1)=38 P.L.R. 716.**

——Acquisition of title—Possession under agreement of sale—Suit for specific performance barred—Effect—Title—If can be acquired by adverse possession. *See* PART PERFORMANCE—SUIT FOR POSSESSION. **64 C.L.J. 115=A.I.R. 1937 Cal. 88**

——*Acquisition of title—Submergence of land during rainy season—Constructive possession of true owner.*

While the land remains submerged whether it is for the whole year or only for some months during the rainy season, no possession could be deemed to continue with a person who is not the rightful owner so as to be made available towards the acquisition of title by adverse possession. During this period, the possession of the true owner must be deemed to have revived constructively. (*Srivastava and Nanavutty, JJ.*) PARTAB BAHADUR SINGH *v.* JAGATJIT SINGH. **12 Luck.**

ADVERSE POSSESSION—Acquisition of title.

371=164 I C. 118=9 R O. 40=1936 O.W.N. 784 =1936 R D. 416=A.I.R. 1936 Oudh 387.

———*Acquisition of title—User of land by granting lease for grazing cattle during rainy season.*

Where, in a claim for title by adverse possession against Municipal Committee, the claimant produced a document purporting to be a rent deed executed in his favour, whereby he had given the property on rent to the lessee to graze his cattle in rainy season,

Held, this was not such a declaration of ownership as would become apparent to the Committee or put them on their guard. User of this sort was common in India and excited no particular attention and it was neither intended to denote nor understood as denoting a claim to the ownership of the land. This obviously was not an act which was sufficient to give title by prescription. (*Addison and Din Mohammad, JJ.*) DWARKA DAS *v.* MUNICIPAL COMMITTEE, AMRITSAR. **173 I.C. 971=10 R.L. 510=A.I.R. 1937 Lah. 492.**

Burden of proof.

———*Burden of proof—Acts of possession—Nature of.*

Acts indicative of possession must vary with the nature of the land over which possession is to be exercised and asserted. (*Davis, J. C. and Mehta, J.*) TAHILRAM TACKCHAND *v.* MT. MIRAL. **176 I.C. 549=11 R.S. 22=A.I.R. 1938 Sind 132.**

———*Burden of proof*—Animus—*Permissive possession—Presumption—Property belonging to mother held and enjoyed by son—Inference of enjoyment on behalf of mother.*

The question of adverse possession depends upon *animus*. In the case of property belonging to a mother which is held by her son, having regard to the relationship between the parties, the *prima facie* presumption would be that the possession and enjoyment by the son is on behalf of the mother. (*Venkataramana Rao, J.*) VEERABHADRAYYA *v.* SEETHAMMA. **1939 M.W.N. 1073 =A.I.R. 1940 Mad. 236.**

——— *Burden of proof.*

The burden of establishing adverse possession is on the person setting it up. (*Mitter and Patterson, JJ.*) BIRAJ MOHINI DASSI *v* SARALA DEVI CHOWDHURANI. **169 I.C. 913=10 R.C 59= 41 C.W.N. 396=64 C.L.J. 115=A.I.R. 1937 Cal. 88.**

———*Burden of proof.*

Where in a suit for possession of property, the title of the plaintiff, as well as the possession of the defendant for more than 12 years before suit are established and the plaintiff pleads that he has let the defendant in possession as a tenant but that has not been proved and the defendant pleads adverse possession, the burden of proof, in such a case, is on the defendant, and if he does not establish adverse possession, the plaintiff is entitled to a decree for possession (*Bose, J.*) MEHERBAN LALLI *v* YUSUF KHAN KALLU **1938 N.L.J. 418=181 I.C. 203=A.I.R. 1939 Nag. 7.**

———*Burden of proof—Female — Possession without right—Presumption.*

The possession of a female, when it is without right is *prima facie*, adverse leaving it to the person alleging that it is not adverse, to prove it. (*Thomas, J.*) MATA BAKSH SINGH *v.* AJODHIA BAKHSH SINGH. **163 I.C. 770=9 R. O. 1=1936 O.L.R. 378=A.I.R. 1936 Oudh 340.**

ADVERSE POSSESSION—Co-owners.

Co-owners.

———*Co-owners.*

One co-owner cannot hold property adversely to the other co-owner unless he, by means of some overt Act, asserts adverse possession or deals with the property in such a manner that his acts amount to an ouster of the other co-owner. (*Tek Chand and Abdul Rashid, JJ.*) MURLI DHAR *v.* AMAR NATH. **42 P.L.R. 348.**

———*Co-owners—Ouster—Onus.*

A co-owner is presumed to hold on behalf of all, and if any co-owner asserts ouster, burden of proof lies on the person asserting ouster. (*Vivian Bose, J.*) KHWAJA AFZAL *v.* MAHOMED SAHEB. **I.L.R (1936) Nag. 177=165 I.C. 177=9 R.N. 66=A.I.R. 1936 Nag. 214.**

———*Co-owners — Essentials —Co-heirs under Mahomedan Law—Alienee from some—Possession of—If adverse to rest.*

To constitute title by adverse possession in one co-owner as against another, there must be ouster or exclusion; there must be a disclaimer by the one of the other's title by open assertion of a hostile title. It is not sufficient to show acts of possession; the possession required must be adequate in continuity or publicity and in extent to show that it is possession adverse to the competitor. Among co-heirs under Mahomedan Law, each of whom inherits a specific share in the estate of the deceased, mere possession by strangers who become co-owners by a sale from some of the co-owners cannot necessarily be held to be adverse against the rest. (*Davis, J. C. and Lobo, J.*) MANGALMAL AGANMAL *v.* HAJI MAHOMED USIF BHORO. **I.L.R. (1939) Kar. 597=185 I.C. 11=12 R.S. 151=A.I.R. 1939 Sind 315.**

———*Co-owners — Hostile possession by one—What amounts to.*

Where one co-owner asserts a title hostile to his co-owners. he must do so by an open and unequivocal assertion of a hostile title. The possession must be actual, visible, exclusive, hostile and continued for the statutory period. Mere intention to possess is not a substitute for actual possession, or actual possession of one survey number would not be possession of say, sixty. (*Davis, J. C. and Mehta, J.*) TAHILRAM TACKCHAND *v.* MT. MIRAL. **176 I.C. 549=11 R. S. 22=A.I.R. 1938 Sind 132.**

———*Co-owners—Onus—Person becoming co-owner by taking joint possession under decree.*

Where under a decree for joint possession a person has taken joint possession the presumption is that all formalities of law prescribed for giving joint possession were observed and he thus became a co-owner in the property thereafter. It therefore lies heavily on the other co-owners to show that after the passing of possession they were so notoriously exclusive in their occupation of the property as to give them a right to say that they had started adverse possession. (*Almond, J. C. and Mir Ahmad, J.*) MUZAFFAR SARFRAZ *v.* RAHIM JANA. **A.I.R. 1940 Pesh. 21.**

———*Co-owners—Possession of co-owner—Presumption.*

The possession of one co-owner is in law the possession of all the co-owners and nothing short of ouster or something equivalent to it will put an end to that possession and where a co-owner in

ADVERSE POSSESSION—Co-sharers.

possession did not deny the title of the other co-owners and never laid claim to more than his share, it must be presumed that the co-owner in possession was in possession on his own behalf as well as on behalf of his co-owner. 11 Lah. 29, Foll. (*Skemp, J.*) JAGAN NATH *v.* BEGUM BIBI. 170 I.C. 89=10 R.L. 80=39 P.L.R. 773.

Co-sharers.

——*Co-sharers.*

Possession can never be considered adverse if it can be referred to a lawful title. There can be no adverse possession by one co-sharer as against others until there is an ouster or exclusion; and the possession of a co-sharer becomes adverse to the other co-sharer from the moment there is ouster, *i.e.*, after there is an assertion of hostile title by one co-sharer against the others and to the knowledge of the latter. In order to succeed on the ground of ouster the person setting up ouster is bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of 12 years. (*D. N. Mitter and Patterson, JJ.*) NIRMAL CHANDRA DAS *v.* MOHITOSH DAS. 161 I.C. 450=8 R.C. 523 =40 C.W.N. 777=A.I.R. 1936 Cal. 106.

——*Co-sharers.*

The possession of one co-sharer is the possession of all the co-sharers and in the absence of an ouster or an overt act amounting to ouster, limitation does not run against the co-sharer who is not in actual possession of his share. In order to establish his adverse possession the co-sharer in possession must distinctly deny and repudiate the title of the other co-sharers to their knowledge. It is after a lapse of 12 years from the date of the knowledge of the denial and repudiation that the possession of the co-sharer matures into ownership. Mere fact that the co-sharer in possession effected improvements on the land and the other co-sharers did not object to these improvements, is not sufficient assertion of hostile title to the knowledge of other co-sharers. If the occupant co-sharer does not give any notice of the denial of right of the other co-sharers he must make his possession so visibly hostile and notorious, and so apparently exclusive and adverse, as to justify inference of the knowledge on the part of the persons whom he intends to exclude. (*Janki Nath Wazir, J.*) MUNSHI SINGH *v.* NARAIN SINGH 39 P.L.R. J. & K 114.

——*Co-sharers—Co-sharer incurring expenditure on portion of joint property—Decree directing that it could not be partitioned until contribution by others—No time-limit— Possession of co-sharer after decree—If adverse.*

A co-sharer, having incurred some expenditure on certain portion of the joint property, sued for a declaration that that portion was exclusively his and not liable to partition. The decree in the suit rejected his claim but directed that the property could not be partitioned until contribution by other co-sharers to the expenditure incurred by him. No time-limit was mentioned and he remained in exclusive possession of the portion for twelve years after the decree.

Held, that as no time-limit was mentioned for contribution in the decree and as admittedly there was no hostile overt act openly denying the title of other co-sharers before the decree, his exclusive possession for twelve years after the decree could not be adverse. (*Tek Chand, J.*) NARINDAR NATH

ADVERSE POSSESSION—Co-sharers.

v. JAI NATH. 171 I.C. 757=39 P.L.R. 331= A.I.R. 1937 Lah. 65.

——*Co-sharers—Exclusive possession by one—Effect of.*

Where a co-sharer commits any act showing that he claims a right to exercise proprietary rights over the whole of a joint holding, the general rule is that his possession becomes adverse from the date of that act. (*Middleton, J. C.*) JANG BAHADUR *v.* ABDUL NUR. 160 I.C. 952= 8 R. Pesh. 139=A.I.R. 1936 Pesh. 24.

——*Co-sharers—Exclusive possession of some —Effect of—Ouster—Partition—If amounts to.*

The exclusive possession of co-sharers cannot be adverse to a person who is also co-sharer with them unless they repudiate his title. Mere partition between them would not imply denial of his title or his ouster. (*Niyogi, J.*) RAMJI *v.* MADKI. 173 I.C. 103=10 R.N. 278=A.I.R. 1938 Nag. 89.

——*Co-sharers—Exclusive possession by one—Effect.*

Possession should always be referred to a lawful source rather than to an unlawful source where the two alternatives are open to the Court. Where a co-sharer enters into exclusive possession of the land in dispute belonging to a widow co-sharer, paying land revenue for the same but the title of the widow to her shares has all along been recognized, and her name has been shown in the revenue records as a co-sharer, and, where on the death of the widow her share is mutated among all the co-sharers along with the co-sharer in possession, the possession of the latter (co-sharer in possession) cannot be held to have been adverse in the absence of any overt act showing adverse possession and all the reversioners of the widow are entitled to succeed to her share on her death. The mere fact that the co-sharer in possession was in exclusive possession of the widow's share and was paying land revenue for the same, or the fact that the land was partitioned among the sons of the co-sharer does not prove any overt act or adverse possession against the widow. (*Tek Chand and Dalip Singh, JJ.*) CHHITTAR *v.* UDE SINGH. 173 I.C. 327=10 R.L. 434=39 P.L. R. 651=A.I.R. 1937 Lah. 430.

——*Co-sharers—Exclusive possession by one—Effect of—Ouster—Onus of proof.*

Exclusive possession by one co-sharer is not adverse to the others in the absence of proof of ouster. He who claims a title by adverse possession must prove a definite act of ouster. (*Norman, I. C. S.*) FAZAL HUSSAIN *v.* TA SADIQ HUSSAIN, 1936 A.M.L.J. 127

——*Co-sharers—Ouster— Alienation by one— Possession of transferee—If adverse.*

Where a co-sharer takes an action with respect to a joint holding which transfers right in the whole holding, he thereby by his very act proclaims that he is in adverse possession, and that where that transfer is also a transfer with possession, the possession of the transferee becomes adverse at once. A.I.R. 1925 Lah. 518; A.I.R 1932 P.C. 235; A.I.R. 1931 All. 447 and A.I.R. 1924 Mad. 741, Dist.; A.I.R. 1922 Lah. 205, Foll. (*Middleton, J. C.*) JANG BAHADUR *v.* ABDUL NUR. 160 I.C. 952 =8 R. Pesh. 139=A.I.R. 1936 Pesh. 24.

——*Co-sharers—Ouster—Essentials—Burden of proof.*

Exclusion or ouster involves not merely the act

of the person ousting but the state of mind of the person ousted Knowledge on the part of the latter is therefore essential. The mere fact of non-receipt of rents is not conclusive proof of ouster by the co-sharer who is in possession. The onus of proving ouster is upon persons who set up adverse title. (*Wort and Rowland, JJ.*) MT. BIBI ZAINAB *v.* MUHAMMAD AYUB. **161 I.C 331 (2)= 8 R.P. 443=17 Pat. L.T. 366=1936 P.W.N. 140 =A.I.R 1936 Pat. 136**

———*Co-sharers—Ouster—Inference from non-participation of rents and profits.*

Mere non-participation of rents and profits of joint property by a co-sharer for a very long period would not be sufficient to give rise to the inference of ouster. When along with non-participation of rents and profits for a considerable length of time other circumstances concur, an inference of exclusion or adverse possession under hostile title might be drawn. The Court must be satisfied that the taking of the profits is an indication of the denial of rights in the other co-sharers to receive them. Mere long and uninterrupted possession without more, by a co-sharer is not sufficient to constitute adverse possession. (*D. N. Mitter and Patterson, JJ.*) NIRMAL CHANDRA DAS *v.* MOHITOSH DAS. **161 I.C. 450=8 R.C. 523=40 C.W.N. 777=A.I.R. 1936 Cal. 106.**

———*Co-sharers—Ouster—Non-sharing of profits and non-enjoyment of property— Sale by one without objection by other—Effect.*

To establish adverse possession in the case of a co-owner there must be express ouster, and mere non-participation in the profits and non-enjoyment of the property is not enough to destroy title. But where one co-sharer deals with the property as his own for a long time and sells it without any protest from the other co-sharers, coupled with the non-participation in profits and non-enjoyment of the property by the other co-sharers, this is enough to establish ouster of the alleged co-sharers. The length of ouster can make no difference to the principle, provided it is longer than the statutory period of twelve years It is for a Judge of fact to determine whether the length of exclusive possession in the case before him is enough to establish ouster or not. (*Vivian Bose, J.*) KRISHNABAI *v.* PARWATIBAI. **I.L.R. (1937) Nag. 242=9 R.N. 106=165 I.C. 934=A.I R. 1936 Nag. 282.**

———*Co-sharers —Ouster— Removal of co-sharer's name from revenue records—Non-participation by him in rents and profits for over 80 years —Effect of.*

The removal of a co-sharer's name from the revenue records at the instance of the other co-sharers, can be considered to be an overt act on their part amounting to ouster If the co-sharer whose name has been removed, and his descendants, do not take any interest in the land for a period of over 80 years and do not receive any share of its rents and profits, the circumstances would not only justify an inference of ouster but are also good evidence of "abandonment" (*i. e.*) an intentional quitting of possession by a proprietor coupled with an intention not to resume it. (*Bhide, J.*) AMAR SINGH *v.* SHIV DATT KAUR. **I. L. R. (1938) Lah. 367=175 I.C 605=11 R.L. 19=39 P.L.R. 695=A I R. 1937 Lah. 890.**

———*Co-sharers—Plaintiff's co-sharer who is in possession executing sale-deed—Adverse possession against plaintiff—When starts.*

The mere fact that the co-sharer of the plaintiff, who was in permissive possession, executed a sale deed of the plaintiff's share as well will not make adverse possession run against the plaintiff so long as the co-sharer continued in possession. Of course, if the knowledge of the execution of the sale-deed is brought home to the plaintiff, then it must be considered that the possession of the previous co sharer ceased to be on behalf of the plaintiff and time would begin to run against the plaintiff from the date of such knowledge. In the absence of any such proof, time would begin to run against the plaintiff only from the time when the vendee obtained possession exclusively, overtly and publicly so that if the plaintiff had exercised due diligence he ought to have discovered that a stranger other than the person whom he had allowed to remain in possession was in sole occupation of the property. (*Sulaiman, C.J. and Bajpai, J.*) RAM MANOHAR *v.* BABOO SINGH **167 I.C. 371=9 R.A. 525=1937 A.L.R. 176=1936 A.W.R. 1014=A.I.R. 1937 All. 124.**

———*Co-sharers—Possession of entire property by co-sharers—Presumption of ouster.*

Mere possession of the entire property by a co-sharer unaccompanied by any other circumstance is not sufficient to create a presumption of ouster. (*B.N. Rau, J.*) BHUTNATH BANDOPADHYA *v.* JAGAT TARINI DASI. **71 C.L.J. 200.**

———*Co-sharers—Possession by one—No assertion of exclusive title—Claim made only to share—Effect of—Properties registered in name of one —If conclusive—Respective shares of co-owners—Presumption as to.*

Where a co tenant in possession of joint property does not assert any exclusive title in himself to the knowledge of the others, but claims title only to a share therein, there can be no ouster so as to make his possession adverse to the other co-tenants. No importance can be attached to the fact that the property is registered in the revenue records in a co-tenant's sole name or that the patta has been issued in his name. The presumption in the case of co-owners, in the absence of evidence to the contrary, is that they hold the property in equal shares. (*Varadachariar, J.*) TIRUMALAPPA *v.* RAMAPPA **1937 M.W.N. 1285=46 L.W. 910 =176 I.C. 639=11 R.M. 140=A.I.R. 1938 Mad. 133=(1937) 2 M.L.J. 511.**

———Co sharers—Possession by one—When adverse—Mortgage of share by one co-sharer with possession—Effect of. *See* CO-SHARERS—ADVERSE POSSESSION. **1937 A.W.R. 718=A.I.R. 1937 All. 696.**

———*Co-sharers—Proof.*

The party who sets up the plea of adverse possession must prove that the possession was open, notorious, exclusive and hostile Simply because a party has not been in enjoyment of rents and profits of a property does not *per se* establish a title to it by adverse possession in the co-sharer who has enjoyed such profits. (*Abdul Qayoom, C J. and Kichlu, J.*) HARI CHAND *v.* KAKA. **42 P.L.R.J. & K. 68.**

———*Co-sharers—Proof of overt act—If necessary,*

ADVERSE POSSESSION—Co-sharers.

The possession of one co-sharer must be deemed to be the possession of all the other co sharers, and in order to defeat the title of absentee co-sharers, it is for the co-sharer in possession to prove that by some overt act he converted his possession into adverse possession to the knowledge of the other co-sharers. (*Addison and Din Mohammad, JJ.*) MUNSHI *v.* BELI RAM. 18 Lah. 618=174 I.C. 942=10 R.L. 637=40 P.L.R. 427=A.I.R. 1937 Lah. 578.

——*Co-sharers* — Shamilat *land—Village proprietor in possession of a portion.*

Where a village proprietor is in possession of a portion of the shamilat land, such possession must be deemed to be that of a co-sharer, and he cannot claim title by adverse possession unless he can establish that more than 12 years before the suit he had given notice to the other proprietors by some unequivocal declaration or overt act that he denied the title of the other co-sharers and converted his joint possession into exclusive possession. In such cases a claim to hold exclusive possession is distinct from a claim to exclusive title and it is a claim of exclusive title by a co-sharer that converts his joint possession into exclusive possession. (*Jai Lal, J.*) LAKHA SINGH *v.* TEJA SINGH. **38 P.L.R. 453.**

——*Co-sharers—Shebaits —Property held in common by persons in capacity of shebaits—Rule regarding co-sharers—If applicable.*

The rule with regard to exclusive possession of a co-sharer in joint properties, to the exclusion of other co-sharers also applies to property which is held in common by persons in their capacity as shebaits. (*D. N. Mitter and Patterson, JJ.*) NIRMAL CHANDRA DAS *v.* MOHITOSH DAS. **161 I.C. 450=8 R.C. 523=40 C.W.N. 777=A.I.R. 1936 Cal. 106.**

——*Co-sharers—Some of co-sharers in joint mahal giving plot to third person in lieu of plot in his own mahal—Nature of possession of such person.*

If some of the co-sharers in a joint mahal give a plot to a third person in exchange for a plot in his own mahal, the possession of such third person is permissive, and so far as the co-sharers who are not parties to the exchange are concerned he must be held to be in possession on behalf of the co-sharers who are parties to the exchange and there can, therefore, be no adversity of possession in such a case. (*Madeley, J.*) WAJID ALI *v.* MAHOMED NAZIRUDDIN HUSSAIN. **171 I.C 89 =10 R.O 87=1937 R.D. 528=1937 O.L.R. 520 =1937 O.W.N. 1036=A.I.R. 1937 Oudh 503.**

——*Co-sharers—Things to be proved—Exclusive and hostile possession and ouster.*

There could be no adverse possession where a person is in possession of the property of another with the consent of that person, and this is specially so where the parties happen to be co-sharers. To prove title by adverse possession, one should show that the possession was exclusive and hostile; where co-sharers are concerned ouster must be shown (*Thomas, C.J.*) MAIK *v.* TULSHA. **1939 O.W.N. 1039=1940 R.D. 36=1939 A.W.R. (C.C.) 300.**

——*Co-sharers—Three branches becoming entitled each to certain share in property—Possession of entire property continued by one branch—Nature of.*

ADVERSE POSSESSION—Essentials.

Each of three branches became entitled to certain share in property. Before accrual of this right, one of the branches was in possession of entire property and subsequent to the accrual also it continued to be so in possession.

Held, that its possession subsequently was not in a representative capacity on behalf of the other branches but adverse to them and that the principle that possession of one co-sharer in possession on behalf of the others had no application.

Held also, that a mutation entry in revenue records that each branch is entitled to certain share after the rights of the two branches have been extinguished by adverse possession did not affect the question. (*Jai Lal, J.*) UDE SINGH *v.* CHITTAR. **167 I.C. 473=9 R.L. 491=A.I.R. 1936 Lah. 994.**

Co-tenants.

——*Co-tenants—Ouster—Proof.*

The mere fact that a person is tenant in common with others who are in possession of the property is sufficient to show that the person is in possession even if he lived a great distance from where the property is situated and even if he had nothing whatever to do with the property unless it can be shown that other co-tenants had ousted the person from the property. Demand of rent by co-tenant from a lessee of the property is not evidence of ouster by the co-tenant of the other co-tenants whether such demand is made on his behalf or on behalf of the others. (*Wort, J.*) MOTI SINGH *v.* DEOKI SINGH. **160 I.C. 1054=8 R.P. 408=17 Pat.L.T. 170=A.I R. 1936 Pat. 66.**

——*Co-tenants—Proof required.*

If there is no definite proof of ouster, adverse possession could not be established against a co-tenant In the absence of a plea of a definite act of ouster, the co-tenant must be regarded as having been in possession of his share of the property. A.I.R. 1936 Pat. 136, Rel. on. (*James and Rowland, JJ.*) BAIJNATH SAHU *v.* JAIMANGAL PRASAD SINGH. **164 I.C 851=9 R.P. 139=1936 P.W.N. 610=A.I.R. 1937 Pat. 56.**

Essentials.

——*Essentials—Assertion of hostile title—Order in mutation proceedings—Effect of.*

An order made in a mutation proceedings is not a judicial determination of title or proprietary interest, and may not *per se* create any title. But, if accompanied by overt acts of possession, such an order may give rise to an adverse inference of an assertion of a hostile title. (*Singaravelu Mudaliar and Venkata Ranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. **17 Mys.L.J. 510.**

——*Essentials.*

When possession can be traced or referred to a lawful origin, it is not adverse. (*D.R. Norman.*) UMRAO *v.* MAHADEVI. **1937 A.M L.J. 64.**

——*Essentials—Admission of title of rightful owner—Effect.*

In order that adverse possession should mature into ownership, possession must be held under some claim of right. An adverse holding means an actual and exclusive appropriation of land commenced and continued *under a claim of right.* When the squatter impliedly admits the rightful owner's title to the land in question, his possession cannot be regarded as adverse to the rightful owner. (*Niyogi, A.J.C.*) RAMAJI GUJAR *v.*

ADVERSE POSSESSION—Essentials.

KUARJI GUJAR. **167 I.C. 801=9 R.N. 217=19 N L.J. 78.**

——*Essentials—Claim to proprietary rights against Government—Burden of proof.*

For establishing adverse possession against Government, it has to be proved by the plaintiff that adverse possession was within the knowledge of the Government. Where a person claims against Government proprietary rights in certain land by adverse possession, mere payment by Government of some amount as compensation to the members of the claimant's family at the time when some departments of Government occupied part of such land, does not amount to an admission on the part of Government of the claimant's title to such land, when it is not shown that the payment was merely for the value of the site occupied by Government and not for the value of some building which was standing on the place. (*Sulaiman, C.J. and Bennet, J.*) SECRETARY OF STATE *v* FARID UDDIN **171 I.C. 381=1937 A W. R. 814=1937 A.L.R. 831=A.I R. 1937 All. 622.**

——*Essentials—Continuous possession — What is.*

In order to give title as against the rightful owner, adverse possession must, among other things, be continuous. Overt acts of possession are only evidence from which adverse possession has to be inferred. Merely because the acts are separate, it does not follow the possession was not continuous. There is a difference between cessation of user and cessation of possession and the one does not necessarily lead to the other. Where for more than the statutory period, the adverse possessor not only treated the disputed land as his own but intended to exclude the others including the rightful owner from possession, and whenever an occasion arose it was the adverse possessor who exercised possession and not the rightful owner, the facts give rise to an inference of title by adverse possession in spite of the gaps in the evidence as to acts of possession during the aforesaid period. (*S.K. Ghose and Patterson, JJ.*) BHABANI PRASANNA LAHIRI *v.* MANINDRA CHANDRA ROY. **42 C.W.N. 1209.**

——*Essentials—Land used by neighbour for over 12 years—Land not of present use to owner but convenient to neighbour—User—If amounts to prescription.*

Where a small piece of land which is of no present use to the owner who is not a resident of the locality, and which is convenient in many ways to his neighbours whose house adjoins the land, is used by the latter in various ways, without objection for over 12 years, such user does not amount to adverse possession against the owner, and is insufficient to give a title to the land by adverse possession. Such acts of possession cannot be effectively taken notice of at once by the owner against whose interest they are exercised. (*Varma, J.*) KALADHARI SINGH *v.* JABACHH MISHRA **181 I C. 275=5 B R. 546=20 Pat L.T. 415=11 R.P. 580=A.I R 1939 Pat. 399.**

——*Essentials—Notice of hostile title to owner —Necessity—*Jeroyati *land in zamindari wrongly believed to be inam but later discovered to be* jeroyati *—Non-payment of rent by occupants for 12 years—If creates rent-free title—Belief of occupants of proprietary rights—Effect of.*

Adverse possession in order to become a basis of title must be brought to the notice of the owner.

ADVERSE POSSESSION—Essentials.

Where certain *jeroyati* land of a zemindar once formed part of a large tope within the limits of a village and was mistakenly believed to be an inam tope, held on rent-free tenure, but at a special survey and settlement before suit, it was discovered that the tope was not inam, but *jeroyati* land, the fact that the occupants of the land were in possession for more than 12 years without paying rent would not prevent the zemindar from levying rent when he comes to know of the occupation of the land, when there is no evidence of an assertion of a proprietary title adverse to the zemindar for twelve years. The fact that the occupants believed that they had the full ownership of the land and enjoyed it as such for over the statutory period would not be sufficient to give them a title by prescription against the zemindar, as such occupation would not affect the landholder with notice of their claim to be proprietors. (*Burn and Stodart, JJ.*) RAMACHANDRA DEO *v.* BALAJI. **I.L.R. (1940) Mad. 245=1940 M.W.N. 433=50 L.W. 721=A.I. R. 1940 Mad 91=(1940) 1 M.L.J. 673.**

——*Essentials—Openness—If to be brought to the knowledge of true owner.*

The fact of adverse possession in order to be effective need not be brought to the knowledge of the person against whom it operates. It is sufficient that such possession is overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. (*Singaravelu Mudaliar and Venkataranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. **17 Mys.L.J. 510.**

——*Essentials — Possession to knowledge of owner—If necessary.*

In order to establish adverse possession, it is sufficient to show that the possession of the trespasser was overt and without any attempt at concealment, so that the person against whom time was running ought, if he exercised due vigilance, to be aware of what was happening. It is not necessary to prove that the possession was to the knowledge of the owner. (*Tek Chand, J.*) SHANTI DEVI *v.* MANI SINGH. **170 I. C. 994=10 R.L. 163=A.I.R. 1938 Lah. 6.**

——*Essentials—Possession of one portion of plot—Presumption as to other portion—*Parti *land.*

In order to constitute adverse possession, the possession must be adequate in continuity, in publicity, and in extent of area to show that it was adverse to the real owner. It must be actual, exclusive and uninterrupted. The kind of possession must no doubt depend largely upon the character of the land but no presumption of possession can be made in favour of a trespasser. His possession must be confined to the land actually occupied by him. Though as a general rule possession of part is in law possession of the whole, if the whole is otherwise vacant, but constructive possession of this kind can only be presumed when there is a claim based upon title. It follows from the above that in the case of *parti* land the establishment of adverse possession regarding one portion of the plot cannot lead to any presumption in respect of the other portion. (*Srivastava and Nanavutty, JJ.*) PARTAB BAHADUR SINGH *v* JAGATJIT SINGH. **12 Luck. 371=164 I. C. 118=9 R O. 40=1936 O.W.N. 784=1936 R.D. 416=A.I.R. 1936 Oudh 387.**

ADVERSE POSSESSION—Essentials.

———*Essentials—Right of fishing exercised in beel—Beel drying up in hot seasons—Continuity, if broken.*

In order to acquire title by prescription or adverse possession, the trespasser must show that his possession is adequate in continuity, publicity and extent. The element of continuity is wanting in the case of possession of a beel which dries up in hot seasons every year. During the period when the trespasser is exercising actively the right of fishing to the exclusion of the rightful owner there is continuity but when the lands become dried constructive possession remains with the rightful owner. This is sufficient to break the continuity of the trespass and in the absence of continued possession no title can be acquired by the trespasser on the basis of adverse possession. (*D. N. Mitter, J.*) SHYAMADAS MUKHERJEE *v.* RADHA PROSANNA GON. **69 C.L.J. 170.**

———*Essentials of—Vacant land—Exclusion of owner—Inference as to adverse possession, when justified—Application of rule as to possession following title.*

Possession cannot be adverse unless it is held in such circumstances as are capable in their nature of notifying mankind that the party is on the land claiming it as his own openly and exclusively. There ought to be nothing equivocal in a possession which is relied on as bar; and possession cannot be adverse unless the owner is in denial of his title excluded from enjoyment. Possession to be adverse must be notorious, exclusive and hostile In the case of a vacant land the same kind of possession cannot be expected as in the case of an occupied land or building and where there is no effective intrusion the Court will be justified in giving effect to the principle of law that possession follows title. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ATCHAYYA PATRUDU *v.* JALALUDDIN SAHIB **178 I.C. 301=1938 M.W.N. 185=47 L.W. 202=A.I.R. 1938 Mad. 454=(1938) 1 M.L.J. 190.**

Evidence.

———*Evidence—Claimant proving exclusive possession.*

A person claiming property by adverse pessession must prove by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of real owner's title to property claimed. He must also prove that the real owner would have, on exercise of due diligence, been aware of possession by him of real owner's property. Even if intention on the part of the claimant to hold adversely to real owner is not proved, it is sufficient if claimant proves that he occupied the property exclusively for himself excluding the real owner definitely and completely. Defendant erected a hut on the portion of the land belonging to plaintiff's predecessors in-title, adjoining a main road and occupied it openly and without any attempt at concealment fenced it in and lived in it for more than 12 years before suit. It was proved that the real owner would have, on exercise of due diligence, discovered that the defendant was occupying a portion of his land.

Held, under the circumstances the defendant's possession was adverse to plaintiff's predecessors-in-title and therefore to the plaintiff. (*Mya Bu and Baguley, JJ.*) BASHIR AHMAD *v.* NEDERLAND

ADVERSE POSSESSION—Hindu widow,

SCHE HANDEL. **171 I.C. 643=A.I.R. 1937 Rang. 180.**

———*Evidence—Land passing by revenue sale—Adverse possession set up by old proprietors—Proof by them of receipt of rent—If necessary.*

If it be once shown that the lands in dispute passed by the revenue sale, there can in law be no presumption that, contrary to the purchaser's rights, the old proprietors remained in receipt of rent from the agricultural tenants. Any possession which the old proprietors may have exercised after the sale would no doubt be adverse to the purchaser, but they must prove that they continued in possession and it does not appear that it is possible for them to prove possession save by proving that they received rents from the tenants notwithstanding the sale. No doubt, if at some date rent was received by them in respect of a previous period subsequent to the sale, a question may arise whether this receipt does not evidence possession by the tenants on behalf of the old proprietors since the date of the sale but proof of receipt of rent would seem to be necessary if the old proprietors are to make out a case that the purchaser's title has come to an end by reason of their adverse possession. Proof of receipt of rent may be indirect, for example, public records showing that *A.B.* was in possession of the *maleki* interest may or may not be sufficient in any particular case. (*Sir George Rankin.*) KESHO PRASAD SINGH *v.* BAHURIA. **16 Pat. 258=31 S.L.R 242=1937 A L.J. 638=65 C.L J. 241=1937 M W.N. 593=1937 A.L.R. 252=39 Bom L R. 731=18 Pat L.T. 257=1937 O.W.N. 396=1937 R.D. 178=9 R.P.C. 199=1937 A.W.R. 459=41 C W.N. 577=45 L.W. 580=1937 P.W.N. 290=1937 O. L.R. 151=3 B.R. 368=167 I C. 329=A.I.R. 1937 P.C. 69=(1937) 2 M.L J. 631 (P.C.).**

Guardian and Ward

———*Guardian and Ward—Possession of guardian—If adverse to ward.*

Where a guardian is in possession of ward's property the guardian cannot set up any adverse title. His possession would be deemed to have been that of bailiff or agent on behalf of his ward but not hostile to him. (*Niyogi, J.*) RAMJI *v.* MADKI. **173 I.C. 103=10 R.N. 278=A.I.R. 1938 Nag. 89.**

Hindu widow.

———Hindu widow—Possession adverse to—If adverse to reversioners. *See* HINDU LAW—WIDOW. **39 Bom.L.R. 895.**

———*Hindu widow—Possession of mother-in law—When on behalf of widow—If adverse.*

Where a Hindu dies leaving his widow, and her mother-in-law takes possession of the property, it is only when it is proved that the widow was a minor at the time of her husband's death, that the mother-in-law as a lawful guardian under the Hindu law of her widowed daughter-in-law must be presumed to have got into possession only on behalf of her daughter-in-law. (*Varadachariar and King, JJ.*) RAMAYYA *v.* LAKSHMAYYA. **177 I C. 225=11 R.M 276=(1938) M.W N. 1032=A.I.R 1938 Mad. 513.**

———*Hindu widow— Possession of—If can be adverse to reversioners.*

Where a widow takes possession of the property after the death of the last male holder as a Hindu widow with a limited estate and there is nothing to show that the character of her title or posses-

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sion was altered at any time, such possession could not be adverse to her husband's reversioners and any rights which she acquires by reason of her possession would be accretions to the estate of her husband to which her husband's reversioners are entitled to succeed. The period of her possession therefore cannot be tacked on to that of her alienee. (*Coldstream and Din Mahommad, JJ.*) GANGA RAM *v.* NAORATA RAM. **178 I C. 946=11 R.L. 509=40 P.L.R. 616=A.I.R. 1938 Lah. 187.**

Interruption.

See BENGAL REVENUE FREE LANDS (NON-BADSHAHI GRANTS) REGULATION (XIX OF 1793). **41 C.W.N. 688.**

——Interruption—Attachment—Twelve years' possession not complete on date of attachment of property—Effects—Suit by claimant after expiry of twelve years—Plea by adverse possession—Sustainability. *See* C. P. CODE, O. 21, R. 63. **(1938) 2 M.L.J. 430.**

——*Interruption—Attachment in execution of decree—If interrupts adverse possession of stranger.*

An attachment in execution of a decree does not dispossess the party in possession, and it does not interrupt the adverse possession of a stranger holding adversely to the judgment-debtor, as possession of a stranger is not affected or disturbed by an attachment. (*Varadachariar, Lakshmana Rao and Gentle, JJ.*) DHARAPURAM JANOPAKARA NIDHI LTD. *v.* LAKSHMINARYANA CHETTIAR. **I.L.R. (1939) Mad. 803=182 I C. 999=12 R.M. 239=49 L.W. 671=1939 M.W.N 488=A.I.R. 1939 Mad. 456=(1939) 1 M.L.J. 802 (F.B.).**

——*Interruption—Attachment of property—Claim by adverse possessor—Dismissal on ground of delay—Omission to file suit within one year—Effect—Sale afterwards set aside on objection by judgment-debtor—Decree otherwise satisfied—Plea of adverse possession by claimant—If barred—Estoppel.*

Where a person in possession of land adversely to the judgment-debtor prefers a claim to the property which is attached in execution of a decree against the judgment-debtor, and the same is dismissed on the ground of delay in preferring the claim, the omission on the part of the claimant to file a purposeless suit within one year cannot deprive him of the benefit of his prior possession. The finality of the claim order cannot be invoked even by the particular decree-holder who is a party to the claim order and in respect of the very decree which is then under execution unless he is proceeding to bring the properties to sale in pursuance of that very attachment. The conclusiveness of the order dismissing the claim cannot also be availed of by any one other than the person or persons purchasing in a sale held in pursuance of the attachment in connection with which the claim was preferred. Where the sale held after the dismissal of the claim is set aside on the application of the judgment-debtor, and the decree is subsequently otherwise satisfied, so that it becomes unnecessary to take any further steps in execution of that decree, it cannot be held that the prior possession of the claimant is broken or that he is estopped from pleading his prior possession by reason of the order dismissing his claim and his omission to file a suit under O. 21, R.63, C.P Code. (*Varadachariar, Lakshmana Rao and Gentle, JJ.*) DHARAPURAM JANOPAKARA NIDHI, LTD. *v.* LAKSHMINARAYANA CHETTIAR. **I.L.R. (1939) Mad. 803**

=182 I.C. 999=12 R.M. 239=49 L.W. 671=1939 M.W.N. 488=A.I.R. 1939 Mad. 456=(1939) 1 M.L.J. 802 (F.B.).

——Interruption—Boundary dispute—Decision of Survey Officer—If interrupts adverse possession of unsuccessful claimant—Right of latter to plead adverse possession in subsequent suit. *See* MADRAS SURVEY AND BOUNDARIES ACT, S. 13. **48 L.W. 595.**

——Interruption—Claim to attached property by person in adverse possession—Dismissal—Effect—Attachment subsequently raised after one year from dismissal—Adverse possession—If interrupted. *See* C. P. CODE, O. 21, R. 63. **44 L.W. 617.**

——*Interruption—Declaratory decree—Effect.*

When a person is in adverse possession he is in the wrong and from the date of his possession starts maturing a title, and if a decree is passed against him declaring that his possession is adverse it simply "emphasises the fact that the possession is adverse", and if in spite of the decree the person remains in possession, his possession, if anything, becomes still more adverse. Accordingly a judgment of a Court declaring that a party in possession of immovable property has no title to it has not the effect of interrupting the continuity of his adverse possession as against the real owner. If he continues in possession for 12 years before suit, his title is perfected. (*Bajpai, J.*) MAHOMED TAHIR *v.* BECHEY LAL. **163 I.C 545 =9 R.A. 37=1936 A.W.R. 458=1936 A.L.J. 583 =A.I.R. 1936 All. 466.**

——*Interruption—Declaratory decree—Effect of.*

A declaratory decree cannot have the effect of causing a break in the continuity of the possession of a person in actual possession of the property, and will not prevent the acquisition of title by adverse possession for the statutory period. (*Nageswara Iyer and Venkataranga Iyengar, JJ.*) SANJEEVA GOWDA *v.* VENKAPPA. **17 Mys.L.J. 403 =44 Mys.H.C.R. 422.**

——*Interruption—Decree declaring right of true owner—Effect of.*

Where a Hindu widow trespasses upon property of the joint family and claims it in her own right as the widow of her husband to the exclusion of his surviving brother, that possession at its inception is adverse to the survivor in the coparcenary unless it is the result of an arrangement between the widow and the surviving coparcener. A mere declaration in a subsequent suit of the surviving coparcener's title does not deprive her of possession and does not alter its character; and does not interrupt the adverse possession. (*Macklin and Wassoodew, JJ.*) BHOGILAL *v.* RATILAL. **183 I.C. 482=12 R.B. 103=41 Bom.L.R. 497=A.I.R. 1939 Bom. 261.**

——*Interruption of—Declaratory suit under O. 21, R. 63, C. P. Code—During its pendency plaintiff wrongly dispossessed of property—Decision in declaratory suit in his favour—If would affect adverse possession.*

Where a person has instituted a suit under O. 21, R. 63, C. P. Code, for a declaration of his title to certain property, and if during the pendency of such suit he is wrongly dispossessed of the property, then it is his duty to protect himself from adverse possession either by amendment of his original suit for declaration or by instituting a fresh suit even though the fresh suit would be

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decided after the decision of the first suit. If he takes no such steps within twelve years from the date of dispossession, the possession would be adverse and a decision in the declaratory suit in his favour would not affect the adverse possession. (*Addison and Din Mahomed, JJ.*) HAR INDAR SINGH *v.* SHIV RAM. **172 I.C. 259=10 R.L. 292=A.I.R. 1937 Lah. 602.**

———*Interruption—Effect of.*

An interruption in the occupation or possession of the person claiming title by adverse possession is sufficient to break the period of adverse possession. (*Wort and Agarwala, JJ.*) RAM RAMBIJAYA *v.* KRISHNA MADHO. **182 I.C. 982=5 B.R. 864=12 R.P. 89=20 Pat.L.T. 677=A.I.R. 1939 Pat. 364.**

———*Interruption—Occasional visits by true owner—If interrupts adverse possession.*

Where another is in adverse possession of a property, such as a house, the true owner cannot keep his rights in the house alive against the accrual of prescription by the fact that, occasionally, he goes and stays in the house as a guest for a few days. That cannot prevent the running of adverse possession. (*Singaravelu Mudaliar and Venkata Ranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. **17 Mys.L.J. 510.**

———*Interruption—Party in adverse possession held to be rightful owner in suit—Effect of—Appellate Court holding possession wrongful—Party continuing in possession—Adverse possession—If interrupted by decree of trial Court.*

Where a person is in wrongful possession of another's land to the latter's exclusion and to his knowledge, the former is in adverse possession of the land. The fact that a subsequent decree of Court declares that the person in possession is the owner of the property is no ground for holding that he is in possession under the decree of Court. Possession which was adverse before that decree still remains adverse. Merely because a wrong order is made by the trial Court recognising his possession—even though that possession is held to be wrongful by the final decision on appeal—the possession which was adverse before does not cease to be adverse by reason of the decree in the trial Court. (*Rangnekar and Wadia, JJ.*) NARAYAN JIVAJI *v.* GURUNATHGOUDA. **I.L.R. (1939) Bom. 173=179 I.C. 178=11 R.B. 222=40 Bom.L.R. 1134=A.I.R. 1939 Bom. 1.**

———*Interruption—Person in possession and enjoyment of whole property without title—Acquisition of right to undivided share subsequently by right of succession—If alters character of possession or arrests course of limitation.*

The adverse character of the possession held by a person is not changed by reason of that person subsequently becoming entitled to a share in the property. Where the person in possession who has been in enjoyment of the whole property, later on becomes entitled to an undivided share in that property under a right of succession, that would not alter the character of his possession or arrest the course of limitation. (*Patanjali Sastri, J.*) ALAGIRI CHETTY *v.* MUTHUSWAMI CHETTY. **50 L.W. 571=1939 M.W.N. 1225=A. I. R. 1940 Mad. 102.**

———Interruption—Suit purporting to be under S. 10, Bengal Regulation XIX of 1793—Suit for resumption of lands on ground that they formed part of mal lands of plaintiff and that defendants

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were possessing them without any right—Plea by defendants that they were holding them as lakheraj grant from before 1790—Decree in favour of plaintiff—Effect of—Whether interrupts adverse possession of defendants. *See* BENGAL REGULATION (XIX OF 1793), S. 10. **41 C.W.N. 688.**

———*Interruption of—Symbolical possession given where actual possession ought to have been given.*

Symbolical possession given in circumstances in which actual possession ought to have been given is a nullity as symbolical possession is not actual possession nor is it equivalent to actual possession except where the Civil Procedure Code expressly or by implication provides that it should have that effect. The delivery of such possession does not interrupt adverse possession. 36 Bom. 373, Foll. (*Abdul Rashid, J.*) MT. KHAIRAN *v.* RAGHBIR SINGH. **174 I.C. 821=10 R. L. 603=A.I.R. 1937 Lah. 350.**

———*Interruption—What amounts to entries in record of rights or receipt for assessment—Effect of.*

Whether continuity of the possession be broken by flood or by draught, or because the nature of the land itself is such that it is not susceptible of continued acts of user or possession, once there is a breach in the continuity of adverse possession, the chain of years is broken and the land reverts to its rightful owner.

In a suit for adverse possession of certain Mahomedan family lands, which though they were described as waste, were susceptible of agricultural uses, it was found the plaintiff not only appropriated all the proceeds of cultivation, but used the lands, so far as they could be for grazing purposes and appropriated the grazing fees. Such possession by the plaintiff was for more than the statutory period. No ejectment suit was ever brought. But the defendant, who was entitled to such lands by sale, got entries made, got receipts for the payment of assessment, for payment of boundary marks, got compensation money when some land was acquired by Government, and got the entries made in the record of rights.

Held, that the defendant's possession was paper possession only, and the plaintiff had acquired a title by adverse possession. (*Davis, J. C. and Mehta, J.*) TAHILRAM TACKCHAND *v.* MT. MIRAL. **I.L.R. (1939) Kar 18=176 I. C. 549=11 R. S. 22=A.I.R. 1938 Sind 132.**

Landlord and Tenant.

———Landlord and tenant—Payment of rent to zamindar by persons declared to be sub-tenants—If renders their possession adverse. *See* LANDLORD AND TENANT—ADVERSE POSSESSION. **1939 R.D. 540=1939 A.W.R. (B.R.) 240.**

———*Landlord and tenant—Grove-land—Non-payment of rent—Erection of buildings—Inference from.*

In the case of groves, rent occasionally lapses when the grove ceases to be a grove producing fruit. Frequently rent is taken from the grove-holder as long as any produce is forthcoming, and when the grove becomes old and produce ceases, the Zamindar refrains from collecting rent. That is a common case, and does not amount to any exercise of adverse possession on the part of the person holding the grove. Nor does the mere erection of certain buildings on the land which

was originally grove amount necessarily to any evidence of adverse title, in the absence of a finding that they were not erected by the Zamindar's permission. (*Sulaiman, C. J. and Bennet, J.*) RAM SEWAK *v.* SUBHADDRA KUAR. **162 I.C. 907=8 R.A. 912=1936 R. D. 141=1936 A.W.R. 390=1936 A.L.J. 472=A.I.R. 1936 All. 381.**

——*Landlord and tenant—Assertion by tenant—Possession for over 12 years under invalid demise—Effect of.*

A mere assertion by a tenant cannot convert the nature of his tenure, but where either the origin of the tenancy is not known or a document purporting to confer a permanent tenure is invalid for want of registration or otherwise and the persons have been holding for a period of 12 years in assertion of a permanent right, they can certainly acquire a right by adverse possession and much more so in the case of an adjudication in their favour. (*Venkataramana Rao, J.*) ATHIRAMANKUTTI *v.* UPPARI. **168 I. C. 101=9 R. M. 525=1936 M.W.N. 1003=A.I.R. 1937 Mad. 126.**

——*Landlord and tenant—Death of a tenant at will—Suit against son for possession—Plea of adverse possession—Starting point.*

In the case of a tenancy-at will, the possession of the tenant becomes that of a wrongdoer as soon as the tenancy terminates. Where such a tenant died and the landlord sued his son it was held that the tenancy was not heritable and that the son's possession was nothing better than that of a wrongdoer's and he had the right to prescribe for any title open to him. (*Stone, C.J. and Bose, J.*) ABDUL RAZAK *v.* SETH NANDLAL. **I.L. R. (1940) Nag. 269=182 I.C. 581=12 R.N. 12=1938 N.L.J. 317=A.I.R. 1938 Nag. 506.**

——*Landlord and tenant—Entry in revenue papers as tenant* bila tasfiya.

Where a person is in possession of a certain plot as tenant, his possession cannot become adverse to the original proprietor merely because he is entered as tenant *bila tasfiya* in the village papers and has held the land for over the statutory period. (*Zia-ul-Hasan, J.*) MATHURA PRASAD *v.* UMA DATT. **179 I. C. 958=11 R. O. 217=1939 R. D. 99=1939 O.L.R. 99=1939 O. A. 212=1939 O. W. N. 171=A I.R. 1939 Oudh 106.**

——*Landlord and tenant—Essentials—Adverse possession against tenant—Effect as against landlord.*

To establish adverse possession against a landlord it is not sufficient to show that the person claiming adverse possession has established by adverse possession a title against a tenant of the landlord, because that might be treated as an incumbrance which can be annulled after a rent sale under S. 167, Bengal Tenancy Act. (*Courtney-Terrell, C.J. and James, J.*) GOPI RAM RAMCHANDRA *v.* NITAI LAL DUTT. **175 I. C. 202=4 B.R. 545=10 R P. 595=A I.R. 1938 Pat. 220.**

——Landlord and tenant—Khorposhdar adversely enjoying usufruct of adjoining jungle belonging to grantor—Title acquired by. *See* LIMITATION ACT, S. 28. **5 B.R. 676=181 I.C. 777.**

——*Landlord and tenant—Lease for term——Possession of leasehold property by stranger during term—If adverse to lessor.*

Per *Division Bench.*—Possession of leasehold roperty by a stranger cannot be adverse to the lessor as long as there is term outstanding, because the lessor would not be entitled *prima facie* to sue for possession before expiry of the term. Adverse possession can arise only if there has been a trespass against or unlawful interference with the tenant's possession and not where the tenant's rights are acquired by a third person. (*Varadachariar, Burn and Pandrang Row, JJ.*) ARUMUGHAM CHETTI *v.* SUBRAMANIAM CHETTI. **I.L.R. (1937) Mad. 638=171 I.C. 444=46 L.W. 818=A.I.R. 1937 Mad. 882=(1937) 1 M.L.J. 679 (F.B.).**

——*Landlord and tenant—Non-payment of rent.*

Mere non-payment of rent by a tenant to his landlord does not by itself create adverse possession, when there is no assertion by the tenant openly and to the knowledge of the landlord, of a title to hold the land without payment of rent. (*Mohammad Noor and Rowland, JJ.*) JYOTI PRASAD SINGH *v.* RAJENDRA NARAYAN SINGH DEO. **1936 P.W.N. 458=162 I.C. 838=8 R.P. 586=A.I.R. 1936 Pat. 287.**

——*Landlord and tenant—Non-payment of rent.*

The defendants were entered as proprietors of a particular land. The plaintiffs were entered as tenants who did not pay any rent to the landlord. On the basis of this entry, and non-payment of rent for over twelve years, plaintiff claimed title by adverse possession.

Held, that the possession of a tenant was permissive and unless the tenant could prove that he had disclaimed the title of his landlord openly and to his knowledge more than twelve years before the institution of the suit, he could not claim adverse possession against his landlord and that mere non-payment of rent by the tenant could not be treated as adverse possession. (*Agha Haidar, J.*) MT. BHANI *v.* UJAGAR SINGH. **166 I.C. 607=9 R.L. 395=A.I.R. 1936 Lah. 741.**

——*Landlord and tenant—Non-payment of rent.*

The mere non-payment of rent does not cause cessation of the relationship of landlord and tenant, or convert the possession of the tenant into adverse possession. (*Jai Lal, J.*) GIRDHARI RAM *v.* QASIM. **163 I.C. 592=9 R.L. 25=38 P. L.R. 804=A.I.R. 1936 Lah. 461.**

——Landlord and tenant—Non-payment of rent by tenant in possession—Effect. *See* LIMITATION ACT, ART. 131. **17 Pat.L.T. 819=A.I.R. 1937 Pat. 96.**

——*Landlord and tenant—Non-payment of rent for over 12 years—If creates rent free title to land.*

The fact that a person in possession of land has not paid any rent for more than 12 years does not create a prescriptive right in him to hold the disputed land rent-free. (*Manohar Lall, J.*) RUP NARAIN PANDEY *v.* SHEO SAGAR TEWARI. **180 I.C. 105=5 B.R. 342=11 R.P. 454=A.I.R. 1939 Pat. 258.**

——*Landlord and tenant—Occupancy tenant—Decree against—Sale of well of tenant in execution—Purchaser using well as owner openly—If acquires title by prescription.*

A person purchasing a well belonging to an occupancy tenant at a sale in execution of a decree against the tenant and using it as owner notori-

ADVERSE POSSESSION—Landlord and tenant.

ously and holding it as against the whole world for 12 years acquires absolute title to it by adverse possession as against the Zemindar of the holding. (*Harries, J.*) MAHOMED ASKARI HASAN *v.* SHEO NARAIN LAL. **1936 R.D. 15.**

——*Landlord and tenant—Permanent tenancy—Acquisition of—Essentials—Assertion by tenant—Adjudication in judicial proceeding—Effect of.*

A permanent tenant right can be acquired by adverse possession. In such a case it is enough for the tenant pleading adverse possession to show that he continued in open and hostile possession for over the statutory period after asserting his right in an earlier judicial proceeding, and that the landlord had throughout notice of the claim put forward during the entire period. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ATHIRAMANKUTTI *v.* UPPARI. **180 I.C. 720=11 R.M. 750=47 L.W. 386=(1938) M.W.N. 324=A.I.R. 1938 Mad. 570=(1938) 1 M.L.J. 400.**

——*Landlord and tenant—Person in adverse possession for over 12 years—Subsequent suit for rent against him—If can create relationship of landlord and tenant.*

Where a person has been in adverse possession for more than twelve years his adverse possession is matured into title, and that title cannot be defeated by a subsequent suit for rent against him as a suit for rent by itself cannot create the relationship of landlord and tenant. (*Sen, J.*) MEAH KHA *v.* SERAJUDDIN SARDAR. **A.I.R. 1940 Cal. 65.**

——*Landlord and tenant—Possession by tenant of adjacent accreted land as occupancy raiyat—Annual inundation—Effect of.*

Possession of a limited interest in immovable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Where, therefore, a raiyat takes possession of the land which forms adjacent to his holding by the silting up of the backwater of a river, and enjoys such possession for over a period of twelve years against the landlord, the raiyat is not liable to ejectment although he claims no more than the interest of an occupancy raiyat. Annual inundation of the accreted land does not interrupt the raiyat's possession when it does not interfere with the ordinary agricultural operations. (*James and Chatterji, JJ.*) RAMASRAY PRASAD CHAUDHURY *v.* RAMSURAT SINGH. **12 R.P. 282=21 Pat.L.T. 181=6 B.R. 84=184 I.C. 838=A.I.R. 1940 Pat. 131.**

——*Landlord and tenant—Sub-lessee from tenant under unauthorised transfer—Possession of—When adverse to landlord.*

A tenant of surface land transferred his holding without the consent of the landlord to a sub-lessee of underground mining rights. The sub-lessee in the place of growing crops substituted the headworks of a colliery and was in possession of this land for more than twelve years before a rent suit was brought by the landlord against the tenant. In the rent suit, the holding was put to sale and the purchaser instituted a suit for ejectment of the sub-lessee of the mining rights from the land forming part of the tenant's holding.

ADVERSE POSSESSION—Limited interest.

Held, that the possession of the sub-lessee of the land being open and public was adverse to the landlord and the purchaser had therefore acquired nothing by his purchase. (*Courtney-Terrel, C.J. and James, J.*) GOPI RAM RAMCHANDRA *v.* NITAI LAL DUTT. **175 I.C. 202=4 B.R. 545=10 R.P. 595=A.I.R. 1938 Pat. 220.**

——*Landlord and tenant—Tenant let into possession for limited term—If can prescribe for higher title.*

Whether a tenant who is let into occupation for a limited term can, during the continuance of that term, by mere assertion, acquire a higher title than what was given to him on the date of his entering into possession. (*Mohamad Noor and Manohar Lall, JJ.*) SURJA MOHAN *v.* RAMA PRASAD. **A.I.R. 1940 Pat. 37.**

Licensee.

——*Licensee—Cantonment tenure—Possession, if can be adverse.*

The possession of a licensee can never be adverse. Whether or not transfers by a licensee holding under cantonment tenure were reported to the cantonment authorities and sanctioned by them is immaterial. A transfer not known to those authorities can have no effect on title; a transfer reported or otherwise made known to those authorities and to which no objection was taken merely implies sanction. On the other hand, a definite claim to title made known to the cantonment authorities might result in possession becoming adverse. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SUJAN SINGH *v.* SECRETARY OF STATE. **168 I.C. 230=9 R. Pesh. 106=A.I.R. 1936 Pesh. 217.**

Limited interest.

——Limited interest—Landlord and tenant—Suit for rent—Plea of rent-free holding—Decree holding land rent-free—Effect of—Possession by tenant for over 12 years without paying rent—Acquisition of rent-free tenure. *See* C. P. CODE, S. 11. **48 L.W. 701=(1938) 2 M.L.J. 934.**

——*Limited interest—Land within permanently settled estate recorded as* milik *in record-of-rights—Purchase of—Sale deed describing land as* milik *—Possession of vendee claiming as* milikdar*—If assertion of title hostile to landlord—Suit to eject after 12 years—If barred.*

Where a person purchases land within a permanently settled zemindari, which is described in the sale deed as *milik* land, and the land is also entered as *milik* in the record-of rights, the person holding it for twelve years claiming to be *milikdar* would acquire title as *milikdar* by adverse possession as against the landlord. The statement in the sale deed that the land was *milik*, though not admissible to prove that it is *milik*, is certainly admissible to prove that the vendee, when he comes into possession, does so with an assertion that he is holding it as *milikdar*, and he begins to prescribe against the landlord as *milikdar*. A suit by the landlord after 12 years of the commencement of that possession to eject him as being in wrongful possession would be barred by limitation. (*Khaja Mohammad Noor and Madan, JJ.*) SURPAT SINGH *v.* BHUPENDRA NARAYAN SINGH. **16 Pat. 105=166 I.C. 123=9 R.P. 256=3 B.R. 127=17 Pat L.T. 824=A.I.R. 1937 Pat. 165.**

——*Limited interest—Possession under will conferring daughter's estate.*

ADVERSE POSSESSION—Mortgage.

A Hindu daughter who enters into possession of a property under her father's will which confers upon her a daughter's estate, cannot prescribe for an absolute estate but can prescribe only for such estate as the will gave her. The adverse possession of the daughter, therefore, is good only to the extent of her limited interest, and when this interest vanishes with her death, her son cannot derive any benefit. The adverse possession of a limited interest can only bar a suit for the recovery of that interest. (*Bajpai and Ganga Nath, JJ.*) SURAJ PRASAD *v.* GULAB DEI. **168 I.C. 541=9 R.A. 652=1937 A.L.R 377=1936 A.W.R. 1172=A.I.R. 1937 All. 197 (2).**

Mortgage.

——*Mortgage—Possession under invalid mortgage.*

In a mortgage transaction whether the mortgage is valid or not, the position of the mortgagee is that of a mortgagee and nothing more unless some adverse title is set up by him. (*Wort, J.*) BAIJNATH PRASAD SINGH *v* MUNESHWAR SINGH **160 I.C. 1066=8 R P. 410=A.I.R. 1936 Pat. 63.**

——*Mortgage—Usufructuary mortgage—Purchaser in execution sale of equity of redemption—Issue of sale certificate to—Effect of—Change of possession—Claim by mortgagor to title by adverse possession—Sustainability.*

Possession of equity of redemption in property subject to a usufructuary mortgage, in so far as there can be possession, must follow title. When a sale certificate is issued by the Court to the auction purchaser of the equity of redemption, it cannot be said that the original mortgagor remains still in possession, so as to entitle him to acquire title by adverse possession. (*Norman, I.C.S.*) DEEP CHAND *v.* CHEWAR CHAND. **1936 A.M.L.J. 136.**

——*Mortgage right—Acquisition by mere oral assertion.*

A contract cannot be brought into existence by prescription, and no one can, by a mere oral assertion, acquire rights as against a true owner as a mortgagee. (*Wort, A.C.J. and Manohar Lall, J.*) BHUKHAN MIAN *v.* RADHIKA KUMARI DEBI. **19 Pat.L.T. 489=176 I.C. 35=11 R.P 38=4 B.R. 667=1938 P.W.N. 789=A.I.R. 1938 Pat. 479.**

Mortgagor and mortgagee.

——*Mortgagor and mortgagee—Gift by mortgagor—Possession of donee—If adverse to mortgagee.*

Where in the case of a mortgage by conditional sale, the mortgagor who remains in actual possession makes a gift of a portion of the mortgaged property, the possession of the donee is adverse to the mortgagee, if he pays no rent to him and does not enter into possession permissively under him. (*Tek Chand, J.*) KISHORE CHAND *v.* BASANT DAS. **170 I.C. 283=10 R.L. 97=39 P.L.R. 282.**

——*Mortgagor and mortgagee—Mortgagee, if can assert adverse possession.*

A mortgagee who enters into possession of the mortgaged property in his capacity as a mortgagee can never during the continuance of the mortgage assert any adverse possession against the mortgagor. The mortgagor's right to redeem remains alive for sixty years and no question of adverse possession arises until after the expiration of that period. (*Rowland and Chatterji, JJ.*) WAJID ALI *v.* ALIDAD KHAN. **184 I.C. 124=12 R.P. 222=6 B.R. 19=A.I.R. 1940 Pat. 45.**

ADVERSE POSSESSION—Pardanashin lady.

——*Mortgagor and mortgagee—Mortgagee in possession—If can prescribe against mortgagor.*

In certain circumstances a mortgagee in possession can prescribe against the mortgagor, though generally he cannot. (*Fazl Ali and Varma, JJ.*) BALDEO SINGH *v.* MUHAMMAD AKHTAR. **184 I.C. 504=1939 P.W.N. 331=20 Pat.L.T. 399=A.I.R. 1939 Pat. 488.**

——*Mortgagor and mortgagee—Mortgagee in possession of mortgaged property—When can set up adverse possession.*

A mortgagee in possession of mortgaged property cannot set up adverse possession against the mortgagor unless he can prove a subsequent valid sale, in the absence of which his possession must be taken to retain its original character. (*Abdul Qayoom, C.J.*) NATHU RAM *v.* RAM CHAND. **39 P.L.R.J. & K. 7.**

——*Mortgagor and mortgagee—Possession of mortgagee—When adverse.*

In order to deprive the mortgagor of the property the mortgagee should clearly evince his intention of holding the land adversely to the mortgagor and must do some act as a manifestation of that intention to the knowledge of the mortgagor. (*Abdul Qayoom, C.J. and Wazir, J.*) MEHAR SINGH *v.* AMAR NATH MAHAJAN. **42 P. L R.J. & K. 63.**

——*Mortgagor and mortgagee—Proof required.*

In order to deprive the mortgagor of the property, the mortgagee must clearly evince his intention of holding it adversely to the mortgagor and must do some act as a manifestation of that intention to the knowledge of the mortgagor. Where, therefore, a mortgagee by conditional sale subsequently enters into possession of the property under an alleged oral sale, but his conduct does not manifest any intention of holding the property adversely to the mortgagor but on the other hand induces a belief in the mind of the mortgagor that he is merely holding it as a mortgagee, his possession is not adverse to the mortgagor. (*Tek Chand and Abdul Rashid, JJ.*) MT. DHAPAN *v.* SRI RAM. **172 I.C. 449=10 R L. 326 =39 P.L.R. 619=A.I.R. 1937 Lah. 837.**

Pardanashin lady.

——*Pardanashin lady—Possession adverse to—If should be brought home to her knowledge.*

To constitute adverse possession it is generally sufficient that the possession is overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises diligence, to be aware of what is happening. A person whose rights have been openly usurped cannot be heard to plead that the fact was not brought to his notice. But this cannot apply to the case of a pardanashin woman behind the purdah, who may not be aware of or might not know what was happening notwithstanding the exercise by her of due diligence so far as she could. The Court should be alert to protect the interests of a pardanashin woman and should, in her case, rely more upon facts than presumptions. (*Davis, J.C. and Lobo, J.*) MANGALMAL AGANMAL *v.* HAJI MAHOMED USIF BHORO. **I.L.R. (1939) Kar. 597=185 I.C. 11=12 R.S. 151=A.I.R. 1939 Sind 315.**

ADVERSE POSSESSION—Permissive possession.

Permissive possession.

———*Permissive possession—Entry in revenue papers*—Shamilat deh—Mutwalli *in cultivating possession—No rent paid to proprietary body—Effect on title of latter.*

Where a portion of the *Shamilat deh* was shown in the revenue papers to be in the possession of a *mutwalli* of a *khankah*, who cultivated the land through his tenants paying no rent to the proprietary body because he served the *khankah*.

Held, that the title in the land still vested in the proprietary body who had given the usufruct to the *mutwalli*, for the time being, for the purposes of the *khankah*. (*Tek Chand, J.*) GHULAM MOHY-UD-DIN *v.* MOHAMMAD DIN. **41 P.L.R. 283=A.I.R. 1939 Lah. 313.**

———*Permissive possession — Inference from facts.*

In a suit for possession of a two-storeyed building in the occupation of defendants, the plaintiffs alleged that they were the owners of the house and the defendants were occupying it as their tenants. The defendants, on the other hand, claimed that they were occupying it as co-sharers in the house. There was in evidence a statement filed by the father of the defendants in guardianship proceedings showing that the defendants must have been occupying the house with the consent of the plaintiffs. The Courts below found that plaintiffs were owners of the house and that the defendants were not co-sharers therein. They, however, held that plaintiffs had failed to prove that the defendants were occupying the portion of the house in dispute as tenants and that the defendants' possession thereof being adverse and over twelve years' duration, the plaintiffs could not recover possession. On second appeal,

Held, that when possession can be lawful, it should be presumed to be so, rather than wrongful and that in view of the relationship of the parties, the statement in the guardianship proceedings, and the fact that only a small room in a two-storeyed building is in the occupation of the defendants, the proper inference is that the defendants' possession is permissive and not adverse to the plaintiffs and on this inference plaintiffs must be held to have been in constructive possession all along and that the fact that the plaintiffs overstated their case in alleging that they were realising rent from defendants should not be considered to be sufficient to defeat the plaintiffs' claim. (*Bhide, J.*) MAHOMED YAKUB *v.* ABDUL KARIM. **160 I.C. 1033=8 R.L. 650=A.I.R. 1936 Lah. 673.**

Possession referable to lawful title.

———*Possession referable to lawful title—If adverse.*

Where a person is setting up a hostile title and is in possession, his possession will not be deemed to be adverse to the true owner if it can be referred to a lawful title. But when such possession is asserted in a capacity hostile to the title claimed by another it is adverse to the latter. (*Wadsworth, J.*) VEETTIL KELU *v.* CHAKKARA CHAPPAN. **161 I.C. 999=8 R.M. 935=1936 M.W.N. 399=A.I.R. 1936 Mad. 308.**

———*Possession referable to lawful title—When deemed adverse.*

ADVERSE POSSESSION—Possession by wrongdoer.

Where possession can be referred to a lawful title, it will not in the absence of very cogent reasons be deemed to be derived from usurpation. (*Wort and Rowland, JJ.*) MT. BIBI ZAINAB *v.* MUHAMMAD AYUB. **161 I.C. 331 (2)=8 R.P. 443 =17 Pat.L.T. 366=A.I.R. 1936 Pat. 136.**

———*Possession under agreement to lease land—Nature of—If adverse to proposed lessor—Plea of adverse possession in bar of suit for ejectment —Sustainability.*

A person in possession under an agreement to lease is in a very different position from a person in possession under a lease which has been registered. He has no defence to a claim for ejectment other than a right to insist upon specific performance of the contract to lease. If he is sued for ejectment, he can apply for a stay of proceedings to enable him to institute a suit for specific performance if such is not barred by limitation. He is not a mere trespasser so long as he has a right to sue for specific performance of the agreement to lease, and his possession is therefore not adverse to the owner of the land which is the subject of the agreement. A person who holds under the agreement to lease has no right whatever to apply for specific performance if he has repudiated the agreement to lease and asserted a title adverse to the proposed lessor. But if he has a subsisting right to maintain a suit for specific performance, he is not holding adversely to the proposed lessor, but. on the contrary, he is holding the land under the agreement to lease, and that would not give him any title by prescription or adverse possession. Having entered into possession with the consent of the landlord, he does not purport to hold the land under any instrument which gave him no title whatsoever to the property, so as to make time run against the landlord from the date of his taking possession. He is a mere tenant at will or something of that nature pending the execution of a registered lease. (*Harries, C. J. and Manohar Lall, J.*) SHIVA PRASAD SINGH *v.* MANDIRA KUMARI DEBI. **21 Pat.L.T. 277=A.I.R. 1940 Pat. 438.**

Possession under invalid title.

———*Possession under invalid title—Exchange neither stamped nor registered—Possession for over 12 years—Effect.*

Where a deed of exchange did not convey any title inasmuch as it was neither stamped nor registered, but a party was in possession undisturbed and for over 12 years, he must be held to be the proprietor of plots concerned. (*Ismail, J.*) KASHI NATH *v.* MAKCHHED. **184 I.C. 233=13 R.A. 202=1939 A.W.R. (H.C.) 373=1939 A.L.J. 384=A.I.R. 1939 All. 504.**

———*Possession under invalid title—When adverse*

Where though a transfer from one of the joint owners may not have transferred a good title to the transferee, yet if he is in possession of the property under the transfer for over 12 years, he could claim ownership by adverse possession. (*Ismail, J.*) KIRPA RAM *v.* DWARKA PERSHAD. **1939 A. W. R. (H.C.) 408=1939 R. D. 365=A.I. R. 1939 All. 518.**

Possession by wrongdoer.

———*Possession for less than statutory period—Heritability of right.*

ADVERSE POSSESSION—Presumption as to.

The possession of a wrongdoer held for a term less than the period of limitation is a good title against the whole world with the exception of the true owner. This possessory right even though it has not ripened into ownership by lapse of the statutory period, is a right in immovable property which is heritable and transmissible according to law. On the death of such wrongdoer, therefore, whatever right he has in the property devolves upon all his heirs. If possession is continued only by some of his heirs, it would be regarded as possession on behalf of the whole unless and until it is shown that there is an exclusion or ouster of the other co-sharers. (*Mukherjea and Latifur Rahman, JJ.*) KITAL ALI *v.* ANIL BEHARI DUTTA. **185 I.C. 408=12 R.C. 361=43 C.W.N. 877=70 C.L.J. 93=A.I.R. 1939 Cal. 723.**

Presumption as to.

———*Presumption as to.*

Possession is *prima facie* adverse and exclusive and is presumed to be as of right until such presumption is rebutted by evidence. It is a settled rule of law that possession should be deemed to be adverse, unless it is shown that at the time of its entry there was an agreement or arrangement, express or implied, to the effect that it was to be permissive. (*Singaravelu Mudaliar and Venkataranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. **17 Mys.L.J. 510.**

Principal and Agent.

———*Principal and agent—Trespass by agent—If can benefit principal.*

An act of trespass is an individual act of the trespasser and unless there is clear and cogent evidence to show that the trespass was committed by an agent in the interest of his principal, the principal cannot in any way be benefited by it. (*Addison and Din Mahomed, JJ.*) ZAFFAR HUSSAIN *v.* MAHOMED GHIAS-UD-DIN. **18 Lah. 276=172 I.C. 37=10 R.L. 259=39 P.L.R. 749 =A.I.R. 1937 Lah. 552.**

Religious endowment.

———*Religious endowment—Possession purporting to be as mutwalli of waqf found to be invalid —If adverse as against waqif's heirs.*

Where a mutwalli purports to be in possession as a mutwalli under a waqf deed which later on is found to be invalid, he does not prescribe a title adverse to that of the heirs of the waqif. In a suit for possession by the heirs of the waqif in such a case, the decision that it is not barred by limitation is based not upon the fact that no demand for possession had been made but on the fact that the nature of the mutwalli's possession had never changed. (*Thom, C.J. and Ganga Nath, J.*) SHER ALI *v.* HAMID ALI. **1940 A.L.J. 373=1940 A.W.R. (H.C.) 343=A.I.R. 1940 All. 365.**

Reversioner.

———*Reversioner—Possession, if can be adverse against him during female's lifetime.*

A reversioner is never barred by adverse possession during a female's lifetime, but in all cases he has 12 years from her death; and it is immaterial under what circumstances adverse possession was acquired or continued. Possession can be adverse against a person only if he has the immediate right to possession, and during widow's lifetime a reversioner has no immediate right to recover possession. 23 Bom. 725, Rel. on. (*Fraser, J.C. and Saad-ud-Din, A.J.C.*) AHMAD KHAN *v.* MT. HAYAT BIBI. **A.I.R. 1936 Pesh. 119.**

Rival landlords.

———*Rival landlords—Land in possession of tenants—Proof required.*

Where the land was in the possession of the tenants in order that there may be adverse possession against the rival landlords, the plaintiffs must show that they have intercepted rents payable by the tenants to the rival landlords for a period of 12 years prior to the institution of the suit. (*Mukherjea, J.*) KALIMUDDIN MIA *v.* EAKUTENNESSA BIBI. **71 C.L.J. 232.**

Service tenure.

———Service tenure—Non-performance of service for over 12 years—Effect of. *See* GRANT—SERVICE GRANT. **1939 P.W.N. 99=A.I.R. 1939 Pat. 362.**

Trustee.

———Trustee—Hereditary archaka right in temple—Exclusive right to be in possession and management—Acquisition against trustees—Inference from open enjoyment for long time. *See* RELIGIOUS ENDOWMENT—PUBLIC TEMPLE. **1939 M.W.N. 1143.**

———*Trustee—Religious endowment—Exclusion of shebait by person having no title—Physical presence of idol or performance of puja by wrongdoer—If material.*

An idol acts through its shebait, prosecutes and defends suits through its shebait. Its shebait is its protector and defender of its rights. An exclusion of the shebait accordingly from the endowed properties can have the effect of excluding the idol from it. In all cases of adverse possession, the extent of the interest acquired by adverse possession depends upon the assertion of intention expressed or necessarily implied of the wrongdoer when dispossessing and keeping out of possession the rightful owner. When therefore a shebait is turned out and kept out of the endowed properties by a person who has no title on the assertion that the property is his and not of the idols, the adverse possession is against the idol also and if its duration is sufficiently long, the idol loses the right to the property. The physical presence of the idol on the property or the fact that pujas were performed by the wrongdoer are not material. Nor would the mere fact that in law the wrongdoer would become the idol's shebait on the existing shebait's death, prevent the wrongdoer from prescribing against the idol. (*M. C. Ghose and R. C. Mitter, JJ.*) PANNA SUNDARI *v.* BENARES BANK, LTD. **176 I.C. 695=11 R. C 151=42 C.W.N. 469=66 C.L.J. 388=A.I.R. 1938 Cal. 81.**

———Trustee — Void alienation — Possession under—Nature of. *See* LIMITATION ACT, ART. 144. **A.I.R. 1938 Mad. 60.**

Wakf property.

———*Wakf property.*

Per *Bhide, J.*—When it is said that "wakf property" is "extra commercium" according to Mahomedan Law, all that is meant is that such property cannot be dealt with or alienated like ordinary property according to that law—the reason apparently being that according to that law human ownership in such property ceases and it vests in the Almighty. This feature of 'wakf' or dedicated property is not peculiar to Mahomedan Law and the position as regards dedicated property is practically the same under

Hindu Law. But this does not mean that no one can acquire a valid title to dedicated property by adverse possession over twelve years. The title of a person claiming such adverse possession over dedicated property rests not on Mahomedan or Hindu Law but on the Law of Limitation and Prescription as it prevails in British India. (*Young, C.J., Bhide and Din Muhammad, JJ.*) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE, AMRITSAR. 175 I.C. 945=11 R.L. 91=40 P.L.R. 319=A.I.R. 1938 Lah. 369 (F.B.).

Waste land.

——*Waste land—Assertion of hostile title—What amounts to—Sale of waste land by stranger—Trespass by vendee—Suit by owner within 12 years of trespass—Maintainability—Burden of proof.*

In the case of waste land, the owner is only bound to prove that it belongs to him; it is not necessary to support his case by evidence of overt acts of possession. He need only prove such possession as the property is capable of and that done, in the absence of any proof as to entry by some other person on this land beyond the twelve years' period, the owner is entitled to succeed. The owner starts with the presumption that the waste land is in his possession, and where it is clear that he is dispossessed within 12 years before suit by the defendant trespassing on it, he is entitled to succeed unless it is shown that he discontinued possession at some time more than 12 years before suit. The fact that some other person has sold the land as his to the defendant is not an assertion of title in the absence of evidence that the owner was ever aware of the sale. (*Beasley, C.J. and Stodart, J.*) PERIA KARUPPAN *v.* MADURA KAJIMARTHERU PALLI VASAL. 1937 M.W.N. 533.

——*Waste land — Construction of temporary chhappars.*

The construction of some temporary chhappars on a land which is lying waste is not sufficient in law to establish adverse possession, although such chhappars have been surrounded by an enclosure consisting of bushes. (*Bhide, J.*) SHAH NIWAZ *v.* GHULAM SHAH. 40 P.L.R. 91=176 I.C. 930 =11 R.L. 251 (1)=A.I.R. 1938 Lah. 324.

——*Waste land—Tying of cattle and storing of wood on land for over 12 years—If sufficient for acquisition of title by adverse possession.*

A person who for more than 12 years has been tying his cattle on a plot of waste land and has also stored logs of wood thereon, the logs merely lying on the open ground, does not acquire a title to such land as against the owner by adverse possession. (*Bennet, J.*) RAM CHANDER *v.* ASA RAM. 169 I.C. 962=10 R.A. 87=1937 A.L.R. 607=1937 A.L.J. 384=1937 A.W.R. 391=1937 R.D. 220=A.I.R. 1937 All. 429.

What constitutes.

——*What constitutes—Hindu in possession of mosque for over 12 years—User inconsistent with the character of the building—Abandonment—Plea of ignorance—If available.*

Where a Hindu has been in possession of the building of a mosque for over 12 years and has been exercising acts of adverse possession by using the building of the mosque for his own purposes, in a manner inconsistent with the purposes for which a mosque is constructed and the Mahomedans owing to their abandonment of this mosque had been unaware of these acts of user by the Hindu, the fact of ignorance based upon practical abandonment could not be a defence to the plea of adverse possession. 'It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, be aware of what is happening'. *Ex hypothesi* any mosque is a building in respect of which the local Mahomedan worshippers are expected to be continuously aware of its condition and use or misuse. If by many years of practical abandonment they remain unaware of acts of misuse by the owner of the premises in which the mosque is situated, it is not possible for them to say that by the exercise of due vigilance they could not be aware of what is happening. (*Thomas, C.J. and Yorke, J.*) MUSAHEB KHAN *v.* RAJ KUMAR BAKHSHI. 1938 O.A. 722=177 I.C. 718=11 R.O. 62=1938 O.L.R. 435 =1938 O.W.N. 937=A.I.R. 1938 Oudh 238.

Miscellaneous.

——*Encroachment pending suit*—Lis pendens.

Where the plaintiff was in possession of land in dispute and the defendant, subsequently to the institution of the suit, made encroachment upon it, the principle of *lis pendens* applies and the defendant cannot be allowed to set up adverse possession against the plaintiff. (*Ranjitmal, J.*) ALLABUX *v.* ISSAKH MAHOMED. 1939 Mar.L.R. 176 (Civ.).

——*Nature of possession—Decree for possession—Defendant continuing in possession after a subsequent compromise—Such possession if can be presumed to be adverse.*

Where after a decree for possession, an appeal by the defendant therefrom is compromised and the defendant thereafter continues in possession of the property concerned, in the absence of any proof as to the terms of the compromise, it could not be presumed that the defendant's possession following the compromise was adverse to the plaintiff. (*Pollock, J.*) TRIMBAK NARAYAN *v.* YADORAO. 186 I.C. 851=12 R.N. 260=1940 N. L.J. 85=A.I.R. 1940 Nag. 116.

——Office of mutawalli of mosque—Acquisition of by prescription—Society registered under Societies Registration Act—Management of mosque as mutawalli adversely to person claiming to be mutawalli—Effect. *See* SOCIETIES REGISTRATION ACT, S. 20. 50 L.W. 734.

——*Open and continuous enjoyment—Property of tarwad set apart for maintenance—Property in possession of tenant of tawazhi—Sale by karnavan of tarwad—Purchaser not taking possession—Possession of tawazhi—If adverse.*

Certain property belonging to the tarwad which was set apart for maintenance of a tawazhi, was in possession of the tenants of the tawazhi. The karnavan of the tarwad sold the property. The purchaser did not care to reduce the property to his possession or call upon the tenants to attorn to him. The tenants continued to pay the rent to the representative of the tawazhi. Thus the possession of the property was with the tawazhi for over twenty years without interruption. The purchaser brought a suit to recover possession of the property.

Held, there was an open and adverse enjoyment of the property by the tawazhi for over a period of twelve years by receipt of rent and the pur-

chaser's rights were barred. (*Venkataramana Rao, J.*) KRISHNA KURUP *v.* RAZHUKKATH. 167 I.C. 594=9 R.M. 471=A.I.R. 1936 Mad. 598.

———Under inam grant of soil—Trees on land occupied by khots, dharekaris and permanent tenants prior to grant—Latter cutting, selling and removing trees for over thirty years openly, constantly and without inamdar's consent and without protest from him—Effect of. *See* GRANT—CONSTRUCTION. 41 Bom.L.R. 805.

ADVOCATES.

See (1) BAR COUNCILS ACT.
(2) LEGAL PRACTITIONER.

AGENCY.

See also (1) ELECTION—CANDIDATE AND AGENT.
(2) PRINCIPAL AND AGENT—RELATIONSHIP.
(3) CONTRACT ACT, S. 182, ETC.

———Election agent—Creation of agency—Proof—Actual employment and express entrustment—If necessary—Liability for misdeeds of election agent. *See* ELECTION—CANDIDATE AND AGENT AND PRINCIPAL AND AGENT—RELATIONSHIP. 40 C.W.N. 741.

AGENCY RULES (MADRAS) — Scope — Decree of Agency—District Munsif's Court—Revision—Powers of High Court—Government of India Act, S. 107—Letters Patent, Cl. 14. *See* GOVERNMENT OF INDIA ACT (1915), S. 107. 43 L.W. 237=1936 M.W.N. 81=A.I.R. 1936 Mad. 187=70 M.L.J. 204 (F.B.).

AGENT.

See (1) CONTRACT ACT, SS. 187 AND 237.
(2) PRINCIPAL AND AGENT.

AGRA PRE-EMPTION ACT (XI OF 1922) —*Scope—Recourse to former rules of pre-emption—If permissible.*

The Agra Pre-emption Act was intended to consolidate and amend the law relating to pre-emption and therefore it purports to contain the whole of the law of pre-emption in Agra and the Act does not intend that the Courts should have recourse to former rules of pre-emption which find no mention in the Act. (*Bennet and Verma, JJ.*) BHOLA NATH *v.* SHIVA SINGH. I.L.R. (1939) All. 286=181 I C. 625=11 R.A. 593=1939 A.W.R. (H.C.) 110=1939 A.L.J. 253=A.I.R. 1939 All. 253.

———S. 1 (3)—*Applicability—Property lying within municipal limits—Right of pre-emption—Custom as to.*

It is not correct to hold that because a property lies within municipal limits there is no question of pre-emption at all. If the area within which the property sold is situate lies within the municipal limits, then the Agra Pre-emption Act does not apply in the sense that no right can be claimed under it independently of any custom or contract of the Muhammadan law. But it does not follow that no right of pre-emption can at all be exercised. A custom of pre-emption can be established by evidence. (*Sulaiman, C.J.*) FASAHAT ALI KHAN *v.* ASHFAQ ALI KHAN. 1937 A L.J. 790=171 I.C. 354=1937 A.L R. 828=1937 A.W.R. 639=A.I.R. 1937 All. 620.

———Ss. 3 and 5—*Mahomedan Law of pre-emption—How far abrogated.*

The proviso to S. 3 of the Act must be read as part and parcel of that section, and the effect of the whole section is that where there is no right

of pre-emption under S. 5 of the Act, the provisions of Mahomedan Law of pre-emption are not affected in case the vendor and pre-emptor are both Mahomedans. A right to pre-empt a house under the Mahomedan Law cannot be said to be a right to which a pre-emptor is entitled under the Act. (*Sulaiman, C.J. and Bennet, J.*) ZAINAB BIBI *v.* UMAR HAYAT KHAN. 58 All. 873=161 I.C. 753=8 R.A. 780=1936 A.W.R. 492=1936 A.L.J. 456=A.I.R. 1936 All. 732.

———S. 4(1)—"*Co-sharer*"—*Meaning of—Person holding possession as mutwali of waqf—If co-sharer.*

To sustain a claim as co-sharer it must be shown that the claimant is entitled as proprietor to a share or part of a mahal. The fact that he is in possession in a different capacity, *e.g.*, as mutwali of a waqf, cannot suffice. (*Sulaiman, C.J. and Bennet, J.*) MAHOMED BAKHSH *v.* RAM PRASAD. 171 I.C. 367=1937 A.L.J. 726=1937 A.L.R. 827=1937 A.W.R. 626=A.I R. 1937 All. 581.

———S. 4 (1)—"*Co-sharer*"—*Proof—Entries in* khewat—*Admissibility.*

A plaintiff in a suit for pre-emption has to prove that he is a co-sharer: entries in the *khewat* are, however, admissible in evidence for the purpose of proving that the plaintiff is a co-sharer. (*Sulaiman, C.J. and Bennet, J.*) PRAHLAD PRASAD *v.* CHAMELI KUAR. 170 I.C. 769=10 R.A. 203=1937 A.L.J. 751=1937 A.L.R. 774=1937 A.W.R. 500=A.I.R. 1937 All. 529.

———S. 4 (1)—*Co-sharer—Who is—Entry in Revenue papers—Effect on right of pre-emption.*

In order to be a co-sharer within the meaning of the definition in S. 4 (1) of the Agra Pre-emption Act, a person must be 'entitled' as proprietor to some share in the mahal. Where a person has not the shadow of a title to any portion of the mahal, his position is that of a complete stranger. The mere entry of the name of a person in the Revenue papers, does not entitle him to exercise the right of pre-emption unless he is as a matter of fact the rightful owner of some share in the mahal. (*Iqbal Ahmad, J.*) PHUL CHAND *v.* DHARAM CHAND. 175 I.C. 603=10 R.A. 698=1938 A.L.R. 463=1938 A.W.R. (H.C.) 164=1938 R.D. 491=1938 A.L.J. 325=A.I.R. 1938 All. 314.

———S. 4 (1)—*Proof as to—Onus—Plaintiff and defendant claiming equal right of pre-emption.*

The burden must be laid on the party that asserts that in spite of the fact that he is the proprietor merely of a specific plot or plots of land, he is a co-sharer. Where one claims to have right of pre-emption equal to that of the other, it is on him to prove that. (*Bennet and Verma, JJ.*) MUNNALAL *v.* BAHADUR LAL. 1939 A.L.J. 337=1939 A.W.R. (H.C.) 303.

———S. 4 (1) and (7)—'*Co-sharer*'—'*Petty proprietor*'—*Owners of specific plots of resumed* muafi—*When 'co-sharers'.*

Owners of certain specific plots of resumed *muafi* in a village are 'co-sharers' within the meaning of the definition of that word in S. 4 (1) of the Agra Pre-emption Act, they not being 'petty proprietors' within the meaning of that term as defined in S. 4 (7) of the Act. In cases where they have a voice in the appointment of the lambardar and of the patwari of the mahal, they must be deemed to be entitled to take part in the administration of the affairs of the mahal

in question. (*Iqbal Ahmad and Bajpai, JJ.*) BAJRANGI LAL *v.* SHAHARYAR KHAN. I.L.R. (1940) All. 35=186 I.C. 838=12 R.A. 455=1939 A.W.R. (H.C.) 863=A.I.R. 1940 All. 83.

——S. 4 (1) and (7)—*Owners of specific plots of resumed* muafi—*If 'co-sharers'—Taking part in administration of the affairs of the mahal—Meaning of.*

Where the owners of specific plots of resumed *muafi* are found to have an interest in the joint lands of the mahal and also to have a voice in the administration of the affairs of the mahal, they cannot be regarded as 'petty proprietors' as defined in the Agra Pre-emption Act, S. 4 (7), but must be held to be 'co-sharers' as defined in S. 4 (1) of the Act. Such proprietors of a mahal who have a voice in the appointment of a lambardar or of a patwari do take part in the 'administration of the affairs of the mahal'. (*Iqbal Ahmad and Bajpai, JJ.*) CHIRANJI LAL *v.* CHHEDA LAL. 185 I.C. 861=12 R.A. 362=1939 A.W.R. (H.C.) 722=A.I.R. 1940 All. 8.

——S. 4 (1) and (7)—*'Petty proprietor'—Who is—If a co-sharer.*

Where by a deed of exchange a person acquires only a particular number, that is a particular field in a mahal, he comes under the definition of 'petty proprietor' in S. 4, sub-S. (7) of the Agra Pre-emption Act. He cannot claim to be a 'co-sharer' in the mahal. (*Bennet and Verma, JJ.*) DIN DAYAL *v.* SHEO PRASAD. I.L.R. (1938) All. 623=11 R.A. 93=176 I.C. 386=1938 A.L.R. 610=1938 A.W.R. (H.C.) 348=1938 A.L.J. 534=A.I.R. 1938 All. 382.

——S. 4 (1)—*Mahomedan* waqf—*Right of pre-emption, if can be claimed by.*

Where a *waqf* represented by the mutwalli sued for pre-emption, on a contention that the suit is not maintainable as the plaintiff is not a person contemplated by S. 4 (1) of the Pre-emption Act.

Held, that for purposes of procedure, in the case of *waqf* the mutwalli represents the *waqf* property and estate under O. 31, C. P. Code; there is no defect or difficulty in the conception of God Almighty as a juristic person in the case of a Mahomedan *waqf*.

Held, further, that the plaintiff had a perfect right of pre-emption and that no disability whatever, attaches to the juristic rights in the case of a *waqf*. (*Bennet and Ismail, JJ.*) WAKF BANAM KHUDAWAND KARIM *v* RAJ KALI. I.L.R. (1938) All. 206=10 R.A. 553=1938 A.L.R. 255=174 I.C. 241=1937 A.L.J. 1337=1938 A.W.R. (H.C.) 15=A.I.R. 1938 All. 157.

——S. 4 (3)—*'Land'—Whether includes house.*

Houses are not land within the meaning of the Agra Pre-emption Act. (*Sulaiman, C.J. and Bennet, J.*) ZAINAB BIBI *v.* UMAR HAYAT KHAN. 58 All. 873=161 I.C. 753=8 R.A. 780=1936 A.W.R. 492=1936 A.L.J. 456=A.I.R. 1936 All. 732.

——Ss. 4 and 12—*Resumed* muafidar—*Status of*—Wajib-ul-arz—*Construction—Right to pre-emption.*

Where the whole scheme of the *wajib-ul-arz* of a village unmistakably indicates that a resumed *muafidar* is not treated on the same footing as a co-sharer and that his status was in no case better than that of a petty proprietor without the right of having any interest in the joint lands of the

mahal or in the administration of its affairs, such a person has no right of pre-emption. It was considered not necessary in view of the entries in the *wajib-ul-arz*, to decide as to whether the joint responsibility of revenue is a relevant factor in deciding the status of such a person. (*Iqbal Ahmad and Bajpai, JJ.*) MANGAN LAL *v.* BRAHM DUTT. I.L.R. (1939) All. 969=187 I.C 147=12 R.A. 476=1940 A.W.R. (H.C.) 1=A.I.R. 1940 All. 88.

——S. 5—Wajib-ul-arz *contemplated by.*

Where in a suit for pre-emption the plaintiff produced a *wajib-ul-arz* which purported to be a *wajib-ul-arz* of all the villages in the pargana, which recited a custom of pre-emption, while the defendants relied upon a *wajib-ul-arz* of the village in which the plot in question was situated, which did not mention any right of pre-emption, it was held that the *wajib-ul-arz* relied upon by the plaintiff was not such a *wajib-ul-arz* as was contemplated by S. 5 of the Agra Pre-emption Act and as such the record of the custom of pre-emption in that *wajib-ul-arz* could not be made the basis of a finding that a custom of pre-emption prevailed in the village. (*Iqbal Ahmad, J.*) MOHAN SINGH *v.* SHIV CHARAN SINGH. 1940 A.L.J. 370=1940 A.W.R. (H.C.) 347.

——Ss. 5 and 3—*Agreement conferring right of pre-emption not embodied in* wajib ul arz—*Such right, if enforceable.*

A right of pre-emption given by an agreement amongst the co-sharers of a village, but which is not incorporated in the *wajib-ul-arz*, is excluded from the purview of S. 5 of the Agra Pre-emption Act, as S. 3 of the Act prohibits the enforcement of a right of pre-emption, otherwise than in accordance with the provisions of the Act. Such a right cannot be enforced after the passing of Pre-emption Act. (*Iqbal Ahmad, J.*) AMBIKA PRASAD *v.* MST. NAZIRAN BIBI. 180 I.C. 361=11 R.A. 451=1938 A.W.R. (H.C.) 736=1938 A.L.J. 1066=A.I.R. 1939 All. 64.

——S. 6—*Sale under S. 5 of U. P. Regulation of Sales Act—Nature of—If gives rise to right of pre-emption.*

A sale by the collector of zamindari property under the provisions of S. 5 of the U. P. Regulation of Sales Act, is not a voluntary sale by the judgment-debtor, but is a sale in the course of execution proceedings and as such no right of pre-emption can arise therefrom. (*Iqbal Ahmad, J.*) SHEO BANDHAN PANDE *v.* KISHAN PRASAD PANDE. 179 I.C. 238=11 R.A. 364=1938 A.W.R. (H.C.) 767=A.I.R. 1939 All. 45.

——Ss. 6 and 11—*Transfer under S. 5 of the Regulation of Sales Act—Nature of—Right of pre-emption, if arises.*

The transfer of land by the Collector under S. 5 of the Regulation of Sales Act, is a transfer in execution of a decree and hence a co-sharer has no right of pre-emption in respect of such a transfer. (*Thom, C.J. and Ganga Nath, J.*) SHEO BANDHAN PANDE *v.* KISHAN PRASAD PANDE. 1940 A.W.R. (H.C.) 284=1940 A.L.J. 325=1940 R.D. 182=A.I.R. 1940 All. 323.

——S. 9—*Construction—'Which', if refers to 'land' or 'mahal'.*

The word 'which' occurring in S. 9 of the Agra Pre-emption Act can refer only to 'mahal' and not to 'land' in the section. Apparently the intention of the legislature in making the provision in S. 9

of the Act is that a person who had at one time been a proprietor in a mahal and who still held an ex-proprietary tenancy in any part of the mahal should not be prevented by a suit for pre-emption from again acquiring the status of a proprietor in the mahal. (*Bennet and Collister, JJ.*) KUBER SINGH *v.* JAI NATH. I.L.R. (1939) All. 750=184 I.C. 502=1939 A.L.J. 818=1939 A.W.R. (H.C.) 496=A.I.R. 1939 All. 618.

——S. 11—*Foreclosure decree—Money payable by pre-emptor.*

The pre-emptor claiming pre-emption on the passing of a foreclosure decree, cannot be made to pay anything more than the amount entered in the decree for foreclosure for a period prior to the passing of this decree. (*Sulaiman, C.J. and Bennet, J.*) MUSTAFAI BEGAM *v.* RAGHURAJ SINGH. 169 I.C. 577=10 R.A. 28=1937 A.L.R. 544=1936 A.W.R. 1191=A.I.R. 1937 All. 108.

——S. 11—Sale by rent-free grantee—If can give rise to a right of pre-emption. *See* AGRA TENANCY ACT, Ss 186 AND 192.

1939 A.W.R. (H.C.) 99=A.I.R. 1939 All. 226.

——S. 11—*Scope and applicability—Right of pre-emption, if accrues on the exercise of the right of repurchase by the original owner.*

The right of pre-emption recognized by the Agra Pre-emption Act does not accrue on the exercise of the right of repurchase by the original owner. S.11 of the Act is exhaustive of the cases in which the right of pre-emption accrues and is confined in its operation to cases where a co-sharer *sells* any proprietary interest in land, etc. The right of re-purchase when exercised is not tantamount to the sale of the property within the meaning of S. 11. The section applies only to cases of voluntary sales and not to transfers in pursuance of agreement to re transfer. (*Iqbal Ahmad, J.*) CHUNNI LAL *v.* RAM PRASAD. 185 I.C. 665=12 R.A. 435=1939 A.L.J. 1147=1939 A.W.R. (H.C.) 815=A.I.R. 1940 All. 90.

——S. 11—*Scope—Party paying cash and giving property as well in lieu of property acquired—Right of pre-emption.*

There can be no right of pre-emption contrary to the provisions of S. 11 of the Agra Pre-emption Act which confines the right to a case where the proprietary interest has been sold and not to a case where the property has been merely exchanged. Where a party not only pays cash, but also gives some property in addition in lieu of the property acquired by him the transaction is not sale but is an exchange. Such a transaction does not give rise to a right of pre-emption. (*Sulaiman, C.J. and Bennet, J.*) RANDHIR SINGH *v.* RANDHIR SINGH. 171 I C. 577=1937 A.L.R. 863=1937 A.W.R. 762=1937 A L.J. 743=A.I. R. 1937 All. 665.

——Ss. 11 and 4 (2)—*Foreclosure decree based on preliminary decree passed as result of compromise—Right of pre-emption—If accrues.*

The words "foreclose" and "foreclosure" in S. 4 (2) of the Agra Pre-emption Act refer to the passing of a final decree for foreclosure under O. 34, R. 3, C. P. Code. There is no mention there that such a decree should be passed only in a suit which has been brought on the basis of such a mortgage, and that if a preliminary decree which for all practical purposes is a decree under O. 34, R. 2 is passed on the basis of a compromise in a pending mortgage suit for foreclosure, the definition would exclude such a case. The mere fact, therefore, that the foreclosure decree is based on a preliminary decree which had been passed as a result of a compromise in a pending suit for foreclosure, does not prevent the accrual of the right of pre-emption under S. 11 of the Act. (*Sulaiman, C.J. and Bennet, J.*) MUSTAFAI BEGAM *v.* RAGHURAJ SINGH. 1936 A.W.R. 1191=169 I.C. 577=10 R.A. 28=1937 A.L.R. 544=A.I.R. 1937 All. 108.

——Ss. 11 and 20—*Scope—Exchange—If can defeat right of pre-emption.*

There is nothing illegal in a purchaser acquiring property by way of exchange which cannot be pre-empted, so as to be able successfully to defeat a claim for pre-emption brought against him with respect to subsequent sale-deed to be taken by him. If the transaction of exchange is a real one and is part and parcel of the same transaction there can be no right of pre-emption. If, on the other hand, the transaction of exchange is not real, but fictitious or unreal, there would be a right of pre-emption in respect of the sale, but the claim to pre-empt the property covered by the exchange transaction would fall to the ground. (*Sulaiman, C.J. and Bennet, J.*) RANDHIR SINGH *v.* RANDHIR SINGH. 171 I.C. 577=1937 A.L.R. 863=1937 A.W.R. 762=1937 A.L.J. 743=A.I.R. 1937 All. 665.

——S. 12—*Arazidari—Co-sharer in the same* khewat—*If has the right of pre-emption.*

By S. 12 of the Agra Pre-emption Act a co-parcener in a petty proprietary interest has the right of pre-emption. Where a plaintiff is a co-sharer in the same *khewat* in which the arazidari in dispute is situated he has a right of pre-emption. (*Iqbal Ahmad, J.*) JAGDISH RAI *v.* SURAJ KUMAR SINGH. 180 I.C. 525=11 R.A. 472=1938 A.W.R. (H.C.) 847=A.I.R. 1939 All. 113.

——S. 12—*'Sub-division of mahal', meaning of.*

The expression 'sub-division of mahal' occurring in S. 12 of the Agra Pre-emption Act connotes the idea of division of some sort between the co-sharers of the village or mahal. It is impossible to have a sub-division without a division of a mahal or a village. Where all the co-sharers of a mahal jointly own all the plots in the village, there is no division or sub-division of that village. (*Iqbal Ahmad and Bajpai, JJ.*) MAHABIR RAI *v.* RAJENDAR RAI. 1940 A. L.J. 391=1940 A.W.R. (H.C.) 349=A.I.R. 1940 All. 368.

——S. 12 (1) (v)—*'Co-sharers in the village'—If includes owner of a share in the mahal.*

The intention of the legislature in enacting the words 'co-sharers in the village', in S. 12 (1) (*v*) of the Agra Pre-emption Act was that the owner of a share in a mahal or the sole proprietor of a mahal should have a right of pre-emption in a different mahal in the same village. Hence an owner of a half share in a mahal can claim to pre-empt property which is in another mahal in the same village. (*Bennet and Verma, JJ.*) DIN DAYAL *v.* SHEO PRASAD. I.L.R. (1938) All. 623=176 I.C. 386=11 R.A 93=1938 A.L.R. 610=1938 A.W.R. (H C.) 348=1938 A.L.J. 534=A.I.R. 1938 All. 382.

——S. 12, Classes 3 and 4—*Determination of class of pre-emptors—Rules governing.*

AGRA PRE-EMPTION ACT (1922), S. 14.

The provisions of S. 12, class 3 of the Agra Pre-emption Act come into play only when on the date of the sale there are divisions and sub-divisions in a mahal and has no application to a case when the property sold is a mahal whose component parts have not been divided and sub-divided. The class of pre-emptors provided for by S. 12 must be determined with reference to the constitution of the mahal on the date of the sale and not with reference to the constitution of the mahal on some earlier date. (*Iqbal Ahmad, J.*) PRAN SINGH *v.* MANGAL SINGH. 174 I.C. 914=10 R.A. 638=1938 A.L.R. 347=1938 A.L.J. 156=1938 A.W.R. (H.C.) 133=A.I.R. 1938 All. 208.

——Ss. 14 and 15—*Scope—If exhaustive of modes of destroying right of pre-emption—Notice, if obligatory—Oral communication and refusal to purchase—If enough.*

Ss. 14 and 15 of the Agra Pre-emption Act only prescribe the procedure by which a vendor may put an end to a co-sharer's right of pre-emption. But it is not exhaustive of all the modes open for destroying such a right. It is not obligatory on a vendor to give the notice prescribed by S. 14. It is open to a vendor to orally inform a co-sharer having a right of pre-emption of his intention to sell and if such co-sharer refuses to purchase the property, then he will not be entitled to exercise the right of pre-emption. (*Iqbal Ahmad, J.*) BHORA SINGH *v.* FORA. 182 I.C. 319=11 R.A. 649=1939 A.W.R. (H.C.) 254=A.I.R. 1939 All. 347.

——S. 15—*Hindu manager's refusal to purchase property—If affects right of pre-emption of other members.*

Where the manager of a joint Hindu family refuses to purchase the property, his refusal disentitles the other members to enforce the right of pre-emption. His refusal to take the property in the exercise of the right of pre-emption is binding upon all the members of the family. (*Iqbal Ahmad, J.*) BHORA SINGH *v.* FORA. 182 I. C. 319=11 R.A. 649=1939 A.W.R. (H.C.) 254 =A.I.R. 1939 All. 347.

——S. 15—*Refusal to purchase by manager of joint Hindu family—Suit by any other member for pre-emption—Maintainability.*

The exercise of the right of pre-emption by the manager of a joint Hindu family must necessarily be on behalf of the members of the family. Hence the refusal by the manager of a joint Hindu family to purchase certain property is binding on all the members of the joint family and after such a refusal no member of the joint family is entitled to institute a suit for pre-emption. (*Iqbal Ahmad, J.*) KRISHNA KUMAR *v.* MAN SINGH. 186 I.C. 845=12 R.A. 453=1939 A.W.R. (H.C.) 834=A.I.R. 1940 All. 86.

——S. 16—*Partial pre-emption—Extent of prohibition.*

S. 16 of the Pre-emption Act embodies the principle of the prevention of partial pre-emption. Under this section, it is only incumbent upon the pre-emptor to include in his claim all such property as he is entitled to pre-empt under the Act. He is not compelled to include in his claim properties to which he may be entitled under some law or custom outside the Act. Where, therefore, the pre-emptor is not entitled under the Act to pre-empt a house which has been included in the sale-deed, then neither the omission to pre-empt it nor the disqualification in pre-empting the same is fatal to his claim as regards the properties which he is entitled to pre-empt under the Act. (*Sulaiman, C J. and Bennet, J.*) ZAINAB BIBI *v.* UMAR HAYAT KHAN. 58 All. 873=161 I C. 753=8 R.A. 780=1936 A.W.R. 492=1936 A L.J. 456 =A.I.R. 1936 All 732

AGRA PRE-EMPTION ACT (1922), S. 19.

——S. 17—*Actual price—Items of consideration paid in fact—Pre-emptor, if can question.*

The right of pre-emption is a right of substitution for the buyer and it is not open to a plaintiff in a pre emption suit, while enforcing this right of substitution, to take exception to the validity of the items of sale consideration when as a matter of fact those items of consideration have changed hands. Where one of the items of consideration for the sale is the payment and discharge of a mortgage debt incurred by the vendor during his minority, it is not open to a plaintiff in a pre-emption suit to attack that item of consideration on the ground that ratification by a minor after attaining majority is void and that hence the debt is unenforceable. (*Iqbal Ahmad and Bajpai, JJ.*) ANANT RAI *v.* BHAGWAN RAI. 187 I.C. 4=12 R.A. 461=1939 A.W.R. (H. C.) 741=1939 A.L.J. 935=A.I.R. 1940 All. 12.

——S. 17—*Actual price—Onus.*

Where the circumstances attending a sale are such as to cast a doubt on the genuineness of the price as entered in the sale deed, the burden of proving that the ostensible consideration was the real consideration is on the vendee. (*Iqbal Ahmad and Bajpai, JJ.*) ANANT RAI *v.* BHAGWAN RAI. 187 I.C. 4=12 R.A. 461=1939 A.W.R. (H.C.) 741=1939 A.L.J. 935=A.I.R. 1940 All 12.

——S. 19—*Defendant becoming co-sharer before suit—Decree, if could be passed.*

Where before the date of a suit for pre-emption the defendant vendee had become a co-sharer in the mahal by reason of a deed of gift executed before the date of the suit no decree for pre-emption can be passed in favour of the plaintiff because he has not a subsisting right of pre-emption at the time of the decree. (*Iqbal Ahmad and Bajpai, JJ.*) SHIAM SUNDER *v* SARMADI BEGAM. 188 I.C. 386=1940 A.W.R. (H.C.) 262=A.I.R. 1940 All. 171.

——Ss. 19 and 20 (as amended)—*Gift by vendee to preferential pre-emptor during pendency of suit for pre-emption—Plaintiff's right, if affected.*

Where during the pendency of a suit for pre-emption, the vendee makes a gift of the property to an idol of whom he is the manager and who happens to have a superior right of pre-emption to that of the plaintiff, but the deed of gift does not mention any question of pre-emption having been raised or the transfer being in recognition of any such preferential right, the plaintiff's right of pre-emption could not be affected by the gift. (*Bennet and Verma, JJ.*) BHOLA NATH *v.* SHIVA SINGH. I.L.R. (1939) All. 286=181 I.C. 625=11 R.A. 593=1939 A.W R (H.C.) 110=1939 A.L.J. 253=A.I.R. 1939 All. 253.

——S. 19 and U. P. Land Revenue Act, S. 131 —*Suit for partition—Effect of partition proceedings—Loss of right subsequent to decree by trial Court—Effect—Partition proceedings when complete.*

According to S. 19 of the Agra Pre-emption Act a pre-emptor is entitled to a decree if his

right of pre-emption subsists till the date of the decree by the trial Court. If follows that the loss of the right of pre-emption after the date of the decree of the trial is immaterial. Where it appeared that the vendor had filed an application in the Revenue Court for partition and either before the institution of a suit for pre-emption or during its pendency in the trial Court the partition proceedings was drawn up and confirmed by the Collector according to S. 114 of the Land Revenue Act as a result of which the share of the plaintiff in the pre-emption suit and the pre-empted share were allotted to different pattis and as a result of which the plaintiff lost his preferential right of pre-emption, it was held that the plaintiff's right was not affected at all, because prior to the decree in his suit, the partition proceedings had not become complete as the Collector had not passed an order under S. 131 of the Land Revenue Act and that a decree for pre-emption was not affected by any loss of right subsequent to its date. (*Iqbal Ahmad, J.*) JAIRAJ SINGH *v.* HAR NARAIN SINGH. **1940 A.L.J. 360=1940 A.W.R. (H.C.) 341.**

——**Ss. 20 and 22**—*Defence based on S. 20—If open in a suit under S. 22.*

The defence of S. 20 of the Agra Pre-emption Act is not technically barred in the case of a suit brought under S. 22 of the Act. (*Bennet and Verma, JJ.*) MOHIB ALI KHAN *v.* BALDEO PRASHAD **I.L.R. (1939) All. 305=183 I.C. 572=12 R.A. 148=1939 A.W.R. (H.C.) 157=1939 A.L.J. 344=A.I.R. 1939 All. 380.**

——**S. 20**—*Gift by manager of joint Hindu family to co-vendee to avoid decree for pre-emption—If a benefit to the estate—Co-vendee, if acquires indefeasible interest—Suit for pre-emption, if can lie.*

Where the manager of a joint Hindu family who was a joint vendee with another, with a view to prevent a threatened suit under S. 22 of the Agra Pre-emption Act being decreed, and to save the family from the costs of such a suit and the reduction of the face value of the sale, transfers a minute portion of the joint family property to his co-vendee, the sale is for the benefit of the family and as such the co-vendee acquires an indefeasible right in the mahal and a suit for pre-emption cannot lie as provided by S. 20 of the Agra Pre-emption Act. (*Bennet and Verma, JJ.*) MOHIB ALI KHAN *v.* BALDEO PRASHAD. **I.L.R. (1939) All. 305=183 I.C. 572=12 R.A. 148=1939 A.W.R. (H.C.) 157=1939 A.L.J. 344=A.I.R. 1939 All. 380.**

——**S. 20**—*Indefeasible, meaning of.*

The word 'indefeasible' in S. 20 cannot be taken to have the restricted meaning of 'not being liable to pre-emption' but has its ordinary though wider meaning of 'incapable of being defeated, or not liable to be defeated'. A.I.R. 1934 All. 343 (F.B.), Rel. on. (*Iqbal Ahmad and Bajpai, JJ.*) SHIAM SUNDER *v.* SARMADI BEGAM. **188 I.C. 386=1940 A.W.R. (H.C.) 262=A.I.R. 1940 All. 171.**

AGRA TENANCY ACT (II OF 1901)—*Super-imposition of a different tenure on a tenant—Effect—If amounts to merger.*

When a tenure different in character from the one which was enjoyed is super-imposed on a tenant then under the old Act there was no question of merger but of suspension or keeping the right in abeyance. Hence where a person entered

as a non-occupancy tenant just before the Act of 1926 came into force, takes on a *zar-e-peshgi* lease, there is no question of merger and on the determination of the *zar-e-peshgi* lease the right which had remained dormant, namely, that of a non-occupancy tenant, revived under the new Act. (*Marsh, S. M. and Mehta, J.M.*) JAI KISHUN DASS *v.* TULSI RAM. **1939 R.D. 536=1939 A.W.R. (B.R.) 236.**

——**S. 11**—*Landholder agreeing to acknowledge status of person as occupancy tenant—Binding nature of arrangement.*

Where a landholder or some one authorised on his behalf has definitely and with full knowledge and consent agreed to acknowledge the status of a person under Act II of 1901 as possessing all the rights of an occupancy tenant, the arrangement is binding on him. (*Drake Brockman, S.M. and Knox, J.M.*) MOOLA *v.* RAFIQ FATIMA. **1936 R.D. 90=1936 A.W.R. 246.**

——**S. 20 (3)**—*Construction—Interpretation—'Subject to the terms of his lease'—Meaning and effect of.*

The Agra Tenancy Act of 1901 and that of 1926 show clearly that it may be provided in the theka that the interest of a thekadar is transferable and there is no doubt that in S. 20 (3) of the Act of 1901, the same provision was intended. The natural construction according to the rules of grammar implies that the clause 'subject to the terms of his lease' shall also apply to the words 'not transferable' and is not limited to the word 'heritable'. (*Sulaiman, C. J. and Bennet, J.*) LACHMI NARAIN *v.* BATUK SINGH. **I.L.R. (1937) All. 588=171 I.C. 203=10 R.A. 239=1937 A.L.R. 813=1937 R.D. 425=1937 A.L.J. 656=1937 A.W.R. 699=A.I.R. 1937 All. 561.**

——**S. 201 (3)**—*Presumption under—Applicability—New Act coming into force while case is in appeal.*

Where a suit is filed before the new Act but the new Act comes into force when the case is before the appellate Court, the appellate Court cannot apply the presumption under S. 201 (3) of the old Act which has been deleted by the new Act as the rule of presumption is only one of procedure. (*Sulaiman, C.J. and Bajpai, J.*) BHAWANI PRASAD *v.* BAHAL SINGH. **163 I.C. 767=9 R.A. 76=1936 A.L.J. 801=1936 A.W.R. 611=1936 R.D. 246=A.I.R. 1936 All. 492.**

——**(III OF 1926)**—*Fixed rate tenancy—Orchards of lemons and guavas—Orchards treated as grove under Act of 1901—Change in the law—Liability of sub-tenant of ejectment—Compensation.*

Where the plots in question comprised an orchard of lemons and guavas and was treated as a grove prior to new Tenancy Act, and the fixed rate tenant sued the sub-tenant for ejectment, it was held that the plots do not constitute groves under the present Act and whatever protection he till then enjoyed has been removed by Act of 1926 and as such the tenant is liable to be ejected. Compensation cannot be given under S. 78 but defendant may apply under S. 98 of Act of 1926. (*Darling, S. M. and Bomford, J. M.*) MAHESH SINGH *v.* MT. MOOLA. **1938 R.D. 656=1938 A.W.R. (B.R.) 239=1938 A.L.J. (Supp.) 86.**

——*Co-tenants—Position of—Summary of conclusions based on the provisions of the Act.*

AGRA TENANCY ACT (1926).

Summary of conclusions on co-tenants based upon a consideration of the several relevant provisions of the Agra Tenancy Act: (1) A number of persons holding a tenancy are co-tenants. (2) These co-tenants are joint tenants and not tenants in common, except for succession. (3) Each co-tenant is jointly and severally responsible for the whole rent of the holding and entitled to share in the joint cultivation of the holding. (4) If one co-tenant loses his interest in the holding by surrender, abandonment or in any other way except by death, the rights of the remaining co-tenants are not affected but they remain as joint tenants of the whole holding. (5) If one co-tenant dies, his interest does not pass by survivorship to the other co-tenants, whether they are joint in estate with him or not, but it passes to his successors according to the order of succession in S. 24. (6) If there is no such heir, the interest passes by survivorship to the remaining co-tenants. (*Bennet and Verma, JJ.*) DWARKA DAS *v.* RAFIUDDIN. **I.L.R. (1940) All. 159=188 I.C. 389=1940 A.W.R. (H.C.) 188=1940 R.D. 123=1940 A.L.J. 310=A.I.R. 1940 All. 218.**

———*Licensee, if recognized under the Act—Entry as sub-tenant* bil ewaz sood—*Status of tenant—Entry of word* 'Marfat'—*Meaning.*

Licensee is nowhere defined in the Agra Tenancy Act. That word so far as the cultivator is concerned, is not a term with which the Revenue law has anything to do. A person whose name is entered as sub-tenant *bil ewaz sood* is as a matter of fact a sub-tenant (*i.e.*) a non-occupancy tenant. Such a person, is treated as a sub-tenant, which he is, and not as a licensee, unless there is a document to show that the holding has been hypothecated as a security. If the recorded tenant has put any person in cultivating possession on his behalf except as usufructuary mortgagee or sub-tenant then the name of the cultivator will be shown in the remarks column of the *khasra* with the word *Marfat. Marfat* means that the licence can be withdrawn and the licensee removed at the sweet will of the recorded tenant. (*Mehta, J.M.*) HARI NATH SINGH *v.* SATYADEO SINGH. **1939 R.D. 533=1939 A.W.R. (B.R.) 233.**

———*Applicability—Widow succeeding to husband under Act of* 1881 *and dying after* 1926—*Succession to—Law applicable.*

The law of succession to be followed in the case of a tenancy is the law as it stands on the date when the succession opens. In the case of widow tenant who succeeds under Act XII of 1881, but who dies after the enactment of Act III of 1926, it is the latter Act that governs succession to the widow. (*Darling, S.M. and Bomford, J.M.*) RAMDAYAL *v.* BINDESHWARI PRASAD. **1938 R.D. 121=1938 A.W.R. 72 (B.R.).**

———*Interpretation—Reference to former Act—Permissibility.*

Per *Iqbal Ahmad, J.*—Agra Tenancy Act of 1926 is a consolidating and amending Act as is apparent from its preamble. In order to appreciate the full significance and import of an amendment introduced by the Act reference must of necessity be made to the provisions of the former Act. (*Bennet, Ag. C.J., Iqbal Ahmad, Collister, Bajpai and Ganga Nath, JJ.*) DULAR PANDEY *v.* NANDA BUDHAI. **I.L.R. (1938) All. 563=11 R.A. 61=1938 A.L.R. 578=1938 A.L.J. 585=1938 A.**

AGRA TENANCY ACT (1926), S. 3.

W.R. (H.C.) 385=176 I.C. 226=1938 R.D. 628=A.I.R. 1938 All. 396 (F.B.).

———*Suits under—Technicalities—Reliance upon—Principle as to.*

It is a sound principle that technicalities should not be pressed too far in suits under Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) TIKORI *v.* HARAKH CHAND. **1938 R.D. 1=1938 A.W.R. (B.R.) 13.**

———**S. 3 (1)**—'Improvement'—Building of a temple by fixed rate tenant on agricultural holding—If amounts to. *See* AGRA TENANCY ACT, SS. 12 AND 109. **1940 A.L.J. 261.**

———**S. 3 (2) and (15)**—*'Agricultural land'—Government Notification—Garden and grove—Distinction.*

Grove-land has been defined in S. 3 (15) of the Tenancy Act. If a piece of ground comes within this definition, then under S. 3 (2) the land is agricultural land and cannot be sold through the Civil Court Amin according to Government Notification, dated March 26, 1932. If on the other hand the land is not agricultural land but is a garden, then it may be sold through Civil Court Amin. The Act draws a distinction in regard to the kind of fruit trees. Certain fruit trees such as guavas, peaches, plaintains, papitas, etc., are trees which do not constitute a grove, but on the other hand mangoes, jack fruit, etc., which occupy the land for a long period do constitute a grove. (*Sulaiman, C.J. and Bennet, J.*) NANDU MAL *v.* PANNA LAL. **163 I.C. 823=9 R.A. 78=1936 A.L.J. 576=1936 A.W.R. 524=1936 R.D. 189=A.I.R. 1936 All. 436.**

———**Ss. 3 (3) and (4) and 132**—'Sayar'—*Weighment dues—Suit for—Jurisdiction—Civil or Revenue Court.*

Arrears of weighment dues can properly be regarded as *'sayar'* within the meaning of the definition of the term in S. 3 (4) and S. 132 of the Act also applies to the recovery of *'sayar'* or arrears of *sayar.* A suit to recover weighment dues is therefore cognizable by the Revenue Court. Such a suit need not be instituted in the Small Cause Court. (*Harries, J.*) GULZARI LAL *v.* PHOOL CHAND. **1936 R.D. 14.**

———**S. 3 (4)**—'Sayar'—*Claim for a share in weighing charges—Jurisdiction of Revenue Court.*

Where the case of the plaintiffs amount to a claim for a share of the weighing charges realised by the defendants as licensees of the plaintiffs, the claim will come within the definition of 'sayar' in S. 3 (4) of the Act and so a suit for it will lie in a Revenue Court. (*Bennet and Verma JJ.*) NOOR MOHAMMAD *v.* LALLOO. **I.L.R. (1939) All. 760=184 I.C. 572=1939 R.D. 389=1939 A.L.J. 890=1939 A.W.R. (H.C.) 475=A.I.R. 1939 All. 614**

———**S. 3 (4)**—Sayar—*Weighment dues and* parjot—*If* sayar.

Weighment dues being mostly connected with agricultural produces weighed by the weighment should be classed as *sayar* as defined by S. 3 (4) of the Act. But *parjot* which is a kind of ground-rent paid by persons who are not agriculturists must be excluded from the definition of *sayar.* (*Drake Brockman, S.M. and Knox, J.M.*) ASFIA BEGUM *v.* DUKHIA. **1936 R.D. 520.**

———**S. 3 (6)**—*Tenant—Grove-holder, if a tenant.*

AGRA TENANCY ACT (1926), S. 3.

It is clear from the definition in the Tenancy Act that a grove-holder is included in the definition of tenant. (*Marsh, S.M.*) BOBDEE *v.* RAGHUBIR SINGH. **1939 R.D. 602=1939 A.W.R. (B.R.) 272.**

——**Ss. 3 (7) and 21**—*Applicability—Lessee in sir land—Status of—Liability to ejectment on expiry of lease.*

A lessee in *sir* land is not a sub-tenant within the meaning of S. 3 (7) of the Agra Tenancy Act. Statutory rights cannot accrue in *sir* land: the rights which accrue to the lease holder under the lease are non-occupancy. On the termination of the lease, if he has not been re-admitted to the holding as a statutory tenant, he is still a tenant not coming within any of the clauses of S. 21 of the Act, and as a non-occupancy tenant he is liable to ejectment. (*Darling, S.M.*) KUREY *v.* ZAHARIYA MAL. **1937 R.D. 45.**

——**S. 3 (7)**—*"Sub-tenant"—Grantee of* muafi khidmati—*Person holding under—Status of—Ss. 187 and 188.*

It cannot be held that there can be no sub-tenant of a rent-free grantee holding a *muafi khidmati*. A service grant is liable to have rent fixed under S. 187 of the Agra Tenancy Act, though it may also be resumed under S. 188. A person holding from such a grantee is a sub-tenant as defined by S. 3 (7) of the Act. (*Darling, S.M. and Bomford, J.M.*) BADRI TEWARI *v.* BECHAI CHANAR. **1938 R.D. 160=1938 A.W.R. (B.R.) 91.**

——**S. 3 (14)**—*"Decree"—Order of remand.*

An order of remand passed by a District Judge on appeal is not a 'decree' as defined in the Act. (*Sulaiman, C.J. and Bennet, J.*) PANCHAM *v.* RAMESHWAR. **162 I.C. 954=8 R.A 919=1936 R. D. 144=1936 A W.R. 393=1936 A L.J. 337=1936 All.L R. 522=A I.R. 1936 All. 376.**

——**S. 3 (14)**—Decree—Meaning of—If includes determination of any question under S. 47, C. P. Code. *See* AGRA TENANCY ACT, SS. 249 AND 3, CL. (14). **1938 A.L.J. 63.**

——**S. 3 (15)**—*Grove—Area of 7 biswas containing 10 full grown mango trees—If grove.*

Where in a small area of 7 biswas there are 10 full grown mango trees, the plot is certainly a grove, however those trees are arranged. The fact that some casual cultivation is possible does not matter, when the trees preclude any considerable portion of the land being used primarily for any other purpose. (*Darling, S.M. and Bomford, J.M.*) SARDHA DIN *v.* MASURIADIN. **1938 R D 147=1938 A.W R. (B.R.) 80.**

——**S. 3 (15)**—*Grove—Meaning of definition.*

Grove means a specific piece of land having trees planted thereon so as to preclude the area when the trees are full grown from being used for any other purpose. The trees on such an area, which is grove land, constitute grove. It is only those trees which are grown on a grove land, which is land specifically let out for the purposes of planting trees, that constitute grove-scattered trees are not grove. (*Mehta, S.M. and Harper, J.M.*) NARBADESHWAR MAHADEOJI *v.* BISHAMBHAR RAM. **1940 R.D. 24=1940 A.W.R. (B.R.) 47.**

——**S. 3 (15)**—*Grove—Nature of—Character, if destroyed by portion becoming bereft of trees—Test to be applied—Finding of trial Court—Interference in appeal.*

AGRA TENANCY ACT (1926), S. 3.

A grove is one unit and if a portion is bereft of trees the unit character of the holding cannot be destroyed by treating that denuded portion as one to which the definition of grove under S. 3 (15) of the Tenancy Act could not apply. Mere number of trees would not constitute an area as grove. No hard and fast rule could be laid down. It is the peculiar case-figuration of land and the trees on this land that would form the data from which the Court is in a position to draw the inference whether the major portion of the area could be put to any other use except the use of growing trees. In each case there must be a local inspection and after hearing the evidence, the Court must give a clear finding, and when the trial Court has so done, it would be unsafe for an appellate Court to interfere with that finding of fact. (*Mehta, S. M. and Harper, J. M.*) BECHAN SINGH *v.* RAM SAGAR SINGH. **1940 R.D. 14=1940 A.W.R. (B.R.) 21.**

——**S. 3 (15)**—*Grove land—Plots occupied by guavas and plum trees.*

Plum trees though not specifically mentioned in the explanation to the definition, are similar to guavas and peaches. Hence plots occupied by guavas and plum trees are not grove land within the definition of the Act. (*Darling, S. M.*) MASIT ULLAH *v.* SARDAR SINGH. **1938 A.W.R. (B.R.) 237 (1)=1938 R.D. 659=1938 A.L.J. (Supp.) 81.**

——**S. 3 (15)**—*Grove—Retention of character, as such—Test to be applied.*

Whether a grove area has lost its character or not has to be decided in each case with the guidance of the definition of grove given in S. 3 (15) of the Agra Tenancy Act. In such cases the Court has to determine whether the major portion of the land constituting the grove can be put to any other use, and if it comes to the conclusion that it cannot be put to any other use considering the *tout ensemble*, then the grove has maintained its grove character. It is not the number of trees that would matter but it is their location that would go to indicate whether the land can be put to any other use. (*Marsh, S. M. and Mehta, J. M.*) MANOHAR DAS *v.* SYED KAZIM HUSAIN. **1939 R.D. 326.**

——**Ss. 3 and 23**—*Applicability—Permanent lease with right of transfer, planting grove and building houses—Lessee not planting grove—Land—If grove—Liability to be sold in execution—T. P. Act, S. 117.*

Some plots were leased out to the lessee by a permanent lease. It was stated therein that the lessee was a tenant of the said plots and the lease was heritable. The lessee was also given the right of transfer whether by way of gift or sale or otherwise. The lessee was also permitted under the lease to plant groves or to construct buildings on the leased land. The lessee did not however plant any grove on such land.

Held, that the land being agricultural land and not grove land under S. 3, Agra Tenancy Act, S. 117, T. P. Act, applied to the lease of such plots. The interest of the tenant of such land was therefore not transferable in execution of a decree of a Civil Court by virtue of S. 23 of the Tenancy Act. (*Sulaiman, C. J. and Bennet, J.*) LACHMI NARAIN *v.* BATUK SINGH. **I.L.R. (1937) All. 588=171 I.C. 203=10 R.A. 239=1937 A.L.R.**

AGRA TENANCY ACT (1926), S. 3.

813=1937 R.D. 425=1937 A.L.J. 656=1937 A. W.R. 699=A.I.R. 1937 All. 561.

——Ss. 3 and 242—*Order under S. 144, C. P. Code—If a decree under Tenancy Act—Appeal, if lies.*

An order under S. 144, C. P. Code, is not an order in a suit and does not dispose of a suit and hence is clearly excluded from the definition of 'decree' as given in S. 3 (4) of the Tenancy Act. S. 242 speaks only of suits and decrees in suits. So an appeal does not lie to the District Judge under S. 242 from an order under S. 144, C. P. Code. (*Misra, J.*) SHEO NANDAN SINGH *v.* SURAJ PRASAD SINGH. **179 I.C. 39=11 R.A. 348=1938 A.L.J. 988=1938 A.W.R. (H.C.) 682=1938 R. D. 829=A.I.R. 1939 All. 22.**

——S. 4 (b) and (d)—*Land taken up for grove or cultivation but planted with fruit trees—Absence of proof of cultivation by landlord—Entry as* khudkasht *and* bagh*—Ex-proprietary rights—If can be claimed.*

The ancestor of the respondents took up a plot of land in 1297 F, either with the intention of planting a grove in it or with the intention of cultivating it with ordinary crops, but he changed his mind and planted fruit-trees in it. Up to the revision of records in 1336 F., the land had been continuously recorded as *khudkasht* for a period of 30 years. There was however no evidence to show that the land was continuously cultivated by the landlord for 12 years preceding the 1st January, 1902, as required by S. 4 (*b*) of the Agra Tenancy Act. In 1334 it was not being cultivated by the proprietor and was shown as uncultivated *bagh.*

Held, the claim of the respondents for ex-proprietary rights could be maintained in respect of the land in question. (*Drake Brockman, S.M. and Knox, J.M.*) MURARI LAL *v.* JOTI PRASAD. **1936 R.D. 87.**

——S. 4 (d)—*Land entered as* khudkasht *from 1924-25—Management by trustees of joint family—Father one of trustees—Land, if becomes* sir *of joint family or of father alone.*

Where land had been entered as *khudkasht* from before 1924-25 and it was managed by certain trustees who were appointed to manage the whole of a joint family estate, the land becomes the *sir* of the joint family. The fact that the father was one of the trustees and his name was entered in the Revenue papers in addition to the trustees would not make the land the *sir* of the father alone, and not of the joint family. (*Bennet and Smith, JJ.*) INDERJIT SINGH *v.* GIR RAJ SINGH. **164 I.C. 913=9 R.A. 209=1936 A. L.J. 993=1936 A.W.R. 651=1936 R.D. 285=A. I.R. 1936 All. 671.**

——S. 4 (d)—*Land if* 'sir'*—Test.*

Unless a plot of land is recorded as *khudkasht* in 1333 F. it cannot become *'sir'* under S. 4 (*d*) of the Agra Tenancy Act. (*Darling, S. M. and Marsh, J.M.*) SARBESHWARI DEBI *v.* HARNAM SINGH. **1938 R.D. 661=1938 A.W.R. (B.R.) 329 (1)=1938 A.L.J. (Supp.) 113.**

——S. 4 (d)—*Mortgage by co-sharer—Mortgagee taking land into* khudkasht *and acquiring* sir *rights—Second mortgage by mortgagor—Prior mortgagee paid off—Subsequent mortgagee if can claim to be recorded as co-sharer in* sir *acquired by the prior mortgagee—His remedy.*

AGRA TENANCY ACT (1926), S. 4.

Where one of the two co-sharers executes a mortgage in favour of the other with full rights to admit and eject tenants and such mortgagee by taking land into *khudkasht* acquires *sir* rights in such land under S. 4 (*d*) of the Agra Tenancy Act, a subsequent mortgagee from the same mortgagor who pays off the prior mortgagee, cannot claim to be recorded as co-sharer in the *sir* acquired by the earlier mortgagee, for, when the co-sharer of the joint *sir* parted with his share without claiming ex-proprietary rights in the *sir*, the *sir* became the *sir* of the remaining co-sharer. If the earlier mortgagee has acquired more than his proportionate share of *sir*, then the remedy of the subsequent mortgagee is to sue for partition. (*Darling. S.M. and Bomford, J.M.*) PUNJAB SUGAR MILLS *v.* LACHMAN PRASAD TEWARI. **1938 R D. 416=1938 A.W.R. (B.R.) 286=1938 A.L. J. (Supp.) 98.**

——S. 4 (d)—Sir *land—Land not recorded as* sir *in* 1333 *F—Person recorded as non-occupancy tenant* bila tasfia lagan*—Claim to land as* sir*—Sustainability.*

A person who is not the sole proprietor but who is recorded as non-occupancy tenant *bila tasfia lagan* of certain land cannot claim that land as his *sir*, when the land is not recorded in 1333 F, as his *khudkasht*. Such land is not *sir*. (*Knox, J.M.*) RAM DAS *v.* SARUP SINGH. **1936 R.D. 117.**

——Ss. 4 (d) and 14 (2)—*Construction—'Cultivated'—Meaning.*

Whether it is with reference to S. 4 (*d*) or S. 14 (2) of the Agra Tenancy Act the word 'cultivated' does not mean the same thing as 'ploughed' and provided that no other party is put in possession of the land, it is difficult to see why cultivation should not cover a normal period of fallow, more especially where the fields are included in a farm, the whole of which will not normally be under the plough every year without a rest. (*Darling, S. M. and Bomford, J. M.*) JUGUL KISHORE TANDON *v.* RAO NARSINGH RAO. **1938 A.W.R. (B R) 35=1938 R.D. 306.**

——Ss. 4 (d) and 14—Sir *land or land equivalent of* sir *being also grove land—Ex-proprietary rights in—When arise—Principles.*

It is beyond question that ex-proprietary rights will arise under S. 14 of the Agra Tenancy Act in *sir* land, which is also grove land, when the *sir* holder retains the property in the trees and is in possession of the grove standing on his *sir* after sale of his proprietary right. All area of such land will form his ex-proprietary holding and will be liable to be assessed to rent as it formed portion of his *sir* holding before transfer of his proprietary rights. But where the *sir* holder has transferred the property in the trees before parting with his proprietary rights, or when the property in the trees is transferred at an auction sale at the express wish or with consent of the proprietor along with the proprietary rights or because of a general condition in the sale certificate that the property in the trees also "is passed" to the auction-purchaser, no ex-proprietary rights can arise in favour of the ex-proprietor. If, however, the property in the trees purports but vaguely to be transferred at the auction sale along with the proprietary rights, such a transfer being inconsistent with the right of occupancy reserved to the ex-proprietor by law, his ex-proprietary rights are not lost in any way and extend

to the trees. This principle applies also to land which is the equivalent of *sir* under S. 4 (*d*) of the Act. (*Drake Brockman, S.M. and Knox, J. M.*) NAIM CHAND *v.* MALKHAN. **1936 R.D. 493.**

——**S. 5**—*Last male owner having only Zamindari rights*—Sir *and* khudkasht *rights not possessed by him—Reversioner's right to possession of* sir *and* khudkasht.

Where the last male owner had only zamindari rights and had no rights of *sir* and *khudkasht*, and no such rights came into existence when the last limited owner died, the reversioner is not entitled to the possession of the *sir* and *khudkasht*. A distinction has been drawn between the rights in *sir* and *khudkasht* and the proprietary rights in S. 5 of the Agra Tenancy Act. (*Bennet, J.*) KALI CHARAN RAM SAITHWAR *v.* BANKA CHAND. **168 I.C. 694=9 R.A. 675=1937 A.L.R. 399=1937 A.L.J. 147=1937 R.D. 50=1937 A. W.R. 49=A.I.R. 1937 All. 348.**

——**S. 6**—*Joint* sir—*Mortgage of part with possession by one only—Absence of proof of formal division—If binds other co-sharers—Status of mortgagee — Application by for mutation—Competency.*

It is not open to one co-sharer to mortgage with possession certain plots which are recorded as joint *sir*, on the allegation that he and his co-sharers have divided up the *sir* among themselves. Such a transfer in the absence of proof of a formal division is no transfer. The mortgagee in possession under such a mortgage can only be regarded as being in possession by the licence of the co-sharers, which is liable to be revoked at any time. He must be regarded as a tenant of the *sir* as a whole and no mutation can be effected in his favour. (*Drake Brockman, S.M. and Knox, J.M.*) RAGHUPAT *v.* SANMAN. **1936 R.D. 369.**

——**Ss. 6 and 14**—*Joint* sir *in* khata *owned jointly by five brothers—Mortgage of* sir *by three only—No ex-proprietary tenancy—Effect*—Sir *character—If lost*—Sir *entry—If to be corrected.*

Five brothers were recorded jointly as owners of a certain *khata* and of joint *sir*. Three of them mortgaged certain *sir* plots in the *khata* but no ex-proprietary tenancy was created.

Held, a proportionate area of the *sir* land did not lose its character of *sir*, but the *sir* reverted to the other two co-sharers. Consequently the *sir* entry should continue unchanged. (*Drake Brockman, S.M. and Knox, J.M.*) NAGESHWAR SHAH *v.* BHULAI. **1936 R.D. 110 (2).**

——**Ss. 7 and 17**—Sir *land—Granting of occupancy rights and transferring of possession—Subsequent sale of proprietary rights—Claim to ex-proprietary rights on the ground of the invalidity of the grant of occupancy rights.*

Where a person confers occupancy rights on another in respect of his own *sir* land and transfers possession to him and requests by an application that his *sir* rights be expunged from the *khatauni* and his request is granted, he cannot after the sale of the proprietary rights turn round and claim ex-proprietary rights when it is found for some reason that the conferment of the occupancy rights is invalid. (*Darling, S. M.*) HANS RAM *v.* GAINDA LAL. **1939 R.D. 43=1939 A.W.R. (B.R.) 131.**

——**Ss. 7 (b) and 17 (1) (j)**—Sir *land in possession of Hindu widow—Alienation of—Alienee's right to admit persons to tenancy—Limits of—Status of persons admitted by alienee.*

Admission to tenancy as a tenant with a right of occupancy is equivalent to the conferment of such rights; and as a Hindu widow having only a life estate can only confer occupancy rights with the written consent of the nearest reversioner or the sanction of the District Judge, under S. 17 (1) (*j*) of the Agra Tenancy Act, an alienee from the widow would, as regards admission of tenants with rights of occupancy, would be subject to the same restrictions. A person admitted by the alienee to other than *sir* land cannot be more than a statutory tenant. As for *sir* land, the conferment of occupancy rights brings *sir* to an end, under S. 7 (*b*), provided that the right is conferred in accordance with S. 17. When such rights are not conferred in accordance with S. 17, the *sir* character does not come to an end, and the holder of that land can only remain a tenant of *sir*. (*Drake Brockman, S.M. and Knox. J.M.*) RABAL SINGH *v.* RISAL SINGH. **1936 R.D. 355.**

——**Ss. 8 and 14**—*Private agreement as to ex-proprietary rent—Enforceability.*

Under S. 8 (1) of the Agra Tenancy Act parties could not contract themselves out of the provisions of law and it follows that parties cannot by private agreement seek to override the express provisions of law contained in S. 14 (1) as to the rent of ex-proprietary tenants. (*Mehta, S.M. and Harper, J.M.*) PARMARTHI RAI *v.* NAGESAR RAM. **1940 A.W.R. (B.R.) 61=1940 R.D. 165.**

——**S. 8 (2) (c)**—*Applicability—Enhanced rent as a result of a new contract—Right to impugn.*

S. 8(2) (*c*) of the Agra Tenancy Act would only apply to an agreement where the rent is allowed to be enhanced on any holding beyond the limit to be put down by S. 50 (2) of the Act. But where as a result of a compromise of a suit under S. 82 of the Act, two of the three tenants enter into a new contract as regards the rent, the third one cannot be allowed to come forward and impugn the transaction and seek a declaration under S. 123 of Act. (*Mehta, J.M.*) MUNESHAR *v.* OUDH NARAIN DHAR DUBE. **1939 R.D. 247=1939 A.W. R. (B.R.) 215.**

——**S. 8 (3)**—*Lease of* nautor *land—Construction—If constitutes reclamation contract—Accrual of statutory rights—If barred.*

Where it is stated in the body of a lease of *nautor* land that it is given to the tenant for cultivation, and there are no special conditions of any kind in the kabuliyat executed by the tenant, the lease cannot be said to be a reclamation contract, by virtue of which the accrual of statutory rights is barred. (*Darling, S.M.*) TUFAIL HASAN *v.* BHAGWANT SINGH. **1937 R.D. 485.**

——**Ss. 8 and 73**—*Lease by Zamindar to thekadar—Covenant contrary to S. 73—Validity.*

The word "tenant" in S. 8 of the Agra Tenancy Act does not include a thekadar and a zamindar can grant a "theka" which contains provisions contrary to the provisions of Act III of 1926 in regard to tenants. It follows, therefore, that a covenant in a lease by a zamindar to a thekadar, which provides that the thekadar would not be entitled to make any deductions even if remissions of rent be allowed by Government on account of terrestrial or celestial calamities, is not affected by the privisions of S. 73 of the Act. (*Bennet and*

AGRA TENANCY ACT (1926), S. 12.

Smith, JJ.) MAKHAN LAL *v.* MAHOMAD TAWASSUL HUSSAIN. **58 All 998=164 I.C. 600=9 R.A. 172=1936 A.W.R. 728=1936 A.L.J. 828=1936 R.D. 315=A.I.R. 1936 All. 628.**

——Ss. 12 and 109 and C. P. Code, S. 9—*Fixed rate holding—Rights of landholder—Invasion of proprietary right—Remedy—Building of temple by tenant—If an 'improvement'—S. 109, if helps tenant.*

The proprietary right in a fixed rate holding continues to vest in the landholder and any act of the tenant which constitutes an invasion of such right must, therefore, constitute a wrong. A fixed rate tenant, who puts his holding to a use which is inconsistent with the purpose for which the holding was let, may thereby jeopardize the rights of the landholder to realise the rent of the holding as and when it falls due and such an act would, therefore, constitute an invasion of the proprietary right of the landholder. There must be a remedy either in the Civil or Revenue Court for the landholder. Though the remedy by way of ejectment is not available against a fixed rate tenant there is no provision in the Tenancy Act barring suits for injunction or compensation against a fixed rate tenant. Where a fixed rate tenant to whom land was originally let for agricultural purposes proposes to build a temple thereon, it amounts to an act inconsistent with the purpose for which the holding was let and hence the landholder can sue the tenant for compensation or for an injunction and such a suit is neither barred by the Tenancy Act, nor is it by the Act made cognizable by the Revenue Court. Such a suit in view of S. 9, C. P. Code, lies in the Civil Court. The building of the temple is not an 'improvement' within the meaning of S. 3 (11) of the Tenancy Act and hence S. 109 of the Act cannot be pleaded in defence of such suit. (*Iqbal Ahmad and Bajpai, JJ.*) ASHRAFI SINGH *v.* RAJMATA CHANDRIKA PRASAD KUARI. **1940 A.L.J. 261=1940 A.W.R. (H.C.) 248=1940 R.D. 175=A.I.R. 1940 A. 389.**

——S. 13—*Break of one year in possession—If bars claim to benefit of the section.*

Where there is a definite break in cultivation for one year as the tenant was out of possession for the full year, the advantage of S. 13 of the Agra Tenancy Act (1901) could not be claimed. (*Marsh, S.M. and Mehta, J.M.*) INDRAJIT PRATAB BAHADUR SAHI *v.* RAMA LAGAN. **1939 R.D. 313=1939 A.W.R. (B.R.) 263.**

——S. 13—*Fixed rate holding—Finding by settlement officer—Misdescription of a plot—Correction.*

Where a settlement officer has found the holding to be a fixed rate holding and it is in the possession of the zamindar as fixed rate holding, but one number alone is misdescribed, *i.e.*, as in the possession of the defendant as mortgagee, but who in fact claims it as heir to her mother, a fixed rate tenant and the zamindar is aware of the fact that it was part of the fixed rate holding, there would be doing no violence to the language of S. 13 of the Agra Tenancy Act, if the misdescription is allowed to be corrected and in sustaining the plea of the defendant that she is holding it as heir of her mother. (*Marsh, S.M. and Mehta, J.M.*) SUKHDEI *v.* MAHADEO PRASAD. **1939 R.D. 206=1939 A.W.R. (B.R.) 204.**

——S. 13—*Scope of—Entry as to cultivation—If conclusive as to period put in as tenant—Holding on after ejectment—Period of trespass, if can be counted in his favour.*

S. 13 of Agra Tenancy Act of 1901 clearly refers to being put in possession in a rightful manner so as to bridge over the previous period before dispossession and the subsequent period put in after dispossession. The section confers no benefit on a trespasser. Mere entry of a period of cultivation is not conclusive evidence as regards the period actually put in as a tenant. The presumption arising out of the entry can be rebutted by other cogent evidence. Where there is evidence to show that the defendant was only trying to hold on after ejectment and had kept the patwari on his side, he is in reality only a trespasser and counting the period of trespass in his favour is not justified. (*Bomford, S.M. and Mehta, J.M.*) PASUPAT PRATAP SINGH *v.* SHEO SHANKER. **1939 R.D. 132=1939 A.W.R. (B.R.) 159.**

AGRA TENANCY ACT (1926), S. 14.

——Ss. 13 and 14—*Occupancy rights—Acquisition of—Proof of continuous possession—Shifting of onus.*

In a suit to eject the defendant as heir of a statutory tenant, proof of continuous possession from 1319 F. onward throws on the plaintiff the burden of proving in his turn that the tenure before 1323 F. could not be reckoned towards the acquisition of occupancy rights under Ss. 13 and 14 of the Agra Tenancy Act of 1901. (*Darling, S.M. and Bomford, J.M.*) SHEO SARAN KOERI *v.* RAM RAO KRISHNA JATAR. **1938 R.D. 667=1938 A.W.R. (B.R.) 350=1939 A.L.J. (Supp.) 65.**

——S. 14—Applicability—Ex-proprietary tenant—Determination of rent of—Holding in village not subject to settlement operations—Basis of valuation. *See* U. P. LAND REVENUE ACT, S. 36. **1936 R.D. 82.**

——S. 14—*Ex-proprietary rights accruing in sir while in possession of trespasser—Sir holder recovering possession of his sir from trespasser within 12 years—Right to claim ex proprietary rights.*

A *sir* holder who recovers possession of his *sir* from a trespasser within 12 years from the date of his adverse possession can as against the transferee claim ex-proprietary rights which had accrued in the *sir* while it was in the possession of the trespasser. (*Darling, S.M. and Bomford, J.M.*) BHAIRO PRASAD SINGH *v.* BHIRGUNATH SINGH. **1937 R.D. 451.**

——S. 14—*Ex-proprietary rights—Accrual—How lost.*

Ex-proprietary rights accrue in the area which is in the possession of the vendor of the anna pie share to which the *sir* is appurtenant. But if he has lost possession when the sale takes place, then unless he gets back possession within six months, he loses his ex-proprietary rights. (*Mehta, J.M.*) CHANDI PRASAD TEWARI *v.* GAYA PRASAD **1939 A.W.R. (B.R.) 75=1939 R.D. 272=1939 A.L.J. (Supp.) 76.**

——S. 14—*Father and son of joint family constituting themselves co-sharers by agreement—Agreement to an exchange of* sir *and* khudkasht*—Ex-proprietary rights, if arise.*

Where the father and the son agree that the property of the joint family should be divided equally between them and that the lands which were *sir* and *khudkasht* of the joint family should become the *sir* and *khudkasht* of the party who

owned a particular lot in which that *sir* and *khudkasht* was situate, it is a clear case of exchange between the co-sharers in the *mahal* within the meaning of S. 14 of the Tenancy Act, and no ex-proprietary rights will, therefore, arise, (*Bennet and Smith, JJ.*) INDARJIT SINGH *v.* GIR RAJ SINGH. **164 I.C. 913=9 R.A. 209=1936 A. L.J. 993=1936 A.W.R. 651=1936 R.D. 285= A.I.R. 1936 All. 671.**

——**S. 14**—*Land with trees which make it grove land—Proprietor parting with property in land as well as trees—Ex-proprietary rights— If can arise.*

A man who has parted with his proprietary rights in his land as well as his property in his trees thereon which brings it within the definition of a "grove land," has nothing further left in which ex-proprietary rights can arise in his favour. (*Drake Brockman, S.M. and Knox, J.M.*) BISHAMBHAR SAHAI *v.* RATI RAM. **1936 R.D. 480 =1936 A.W.R. 1098.**

——**S. 14**—*Mandatory, character of—Effect—Rent agreed to privately.*

In the face of the mandatory provisions of S. 14 of the Tenancy Act, any rent arrived at by private agreement regardless of the provisions of law is against the rent fixed under S. 36 of the Land Revenue Act. Relief cannot be granted on the basis of such rent. (*Mehta, J.M.*) NABIULLAH *v.* LACHHMI PRASAD. **1939 A.W.R. (B.R.) 69 (1)= 1939 R.D. 298=1939 A.L.J. (Supp.) 64.**

——**S. 14 (1)**—*Ex-proprietary rent—If can include extra charge for sugar-cane cultivation.*

Under the Agra Tenancy Act, S. 14 (1), the ex-proprietary tenant holds at a rent which is calculated on certain fixed rates. Unless they included provision for extra rent on the ground of sugar-cane cultivation, the ex-proprietor cannot legally include such extra charge. (*Bennet and Verma, JJ.*) PAUHARI BISHUNATH JATI *v.* RAMLAGAN JATI. **183 I.C. 471=12 R.A. 143=1939 A.L.J. 617 =1939 R.D. 234=1939 A.W.R. (H.C.) 313=A.I. R. 1939 All. 500.**

——**S. 14**—Sir *land constituting grove—Sale of land as well as trees—Claim to ex-proprietary rights—Maintainability.*

Where *sir* land is occupied by trees, which constitute a grove, and both the proprietary right in the land and the right in the trees is sold, there is no basis left for the vendor to claim ex-proprietary rights, and such rights do not arise. (*Drake Brockman, S.M. and Knox, J.M.*) MURARI LAL *v.* JOTI PRASAD. **1936 R.D 87.**

——**S. 14**—Scope—Ex-proprietary rights—*Sir* land also grove—Transfer of proprietary rights—Accrual of ex-proprietary rights in favour of *sir* holder—Conditions of. *See* AGRA TENANCY ACT, Ss. 4 (*d*) AND 14. **1936 R.D. 493.**

——**S. 14 (2)**—Construction — 'Cultivated'—Meaning. *See* AGRA TENANCY ACT, Ss. 4 (*d*) AND 14 (2). **1938 A.W.R. (B R.) 35.**

——**Ss. 14 and 15(2)**—*Promissory note—Defendant agreeing to pay money to plaintiff, if X does not relinquish her ex-proprietary rights—Sale deed by X in favour of plaintiff—X not applying for surrender of ex-proprietary rights under S. 15 (2)—Liability of defendant to pay agreed amount.*

The defendant executed a promissory note in favour of the plaintiff agreeing to pay him a certain amount if *X*, the wife of his brother, did not execute a relinquishment of her ex-proprietary rights. *X* executed a sale deed in favour of the plaintiff and ex-proprietary rights arose in her favour in accordance with the provisions of S. 14 of the Agra Tenancy Act. *X* did not apply under S. 15 (2) of that Act for surrender of those ex-proprietary rights. The plaintiff sued the defendant on the promissory note.

Held, that there would have been nothing illegal in *X* in doing all that she could do in accordance with S. 15 of the Agra Tenancy Act to give effect to the contract, that is, she could have made an application asking that her ex-proprietary rights should be relinquished, and that as she made no such application, the defendant became liable to pay the plaintiff the agreed amount. (*Bennet, J.*) BARAMDIN *v.* JAMUNA. **167 I.C. 320=9 R.A. 540 =1937 R.D. 40=1937 A.L.J. 15=1937 A.L.R. 173=1936 A.W.R. 1282=A.I.R. 1937 All. 123.**

——**Ss. 14 and 15**—*Scope*—Sir *land—Grant of occupancy rights in—Sale of proprietary rights subsequently—Death of transferor—Claim by widow to ex-proprietary rights—Suit under S. 99 —Maintainability.*

One *D.S.* conferred occupancy rights in 12 plots of *sir* land on *K.M.* The next day he sold his proprietary rights to *C.* Two days later *K.M.* applied to be recorded as occupancy tenant, and was so entered with the consent of *D.S. D.S.* died shortly after and his widow *W.K.* brought a suit three months later under S. 99, and another under S. 121 of the Agra Tenancy Act, claiming ex-proprietary rights in the lands in which *K.M.* was conferred occupancy rights.

Held, that the conferment of occupancy rights offended against S. 15 of the Act and was void; that *W.K.* as the widow and heir of *D.S.* inherited whatever interest he had in the potential ex-proprietary rights, and that as she exercised her rights to claim them within the period limited, she was entitled to be restored to possession, and the suit under S. 99 was maintainable and should be decreed. (*Drake Brockman, S.M. and Knox, J.M.*) KRISHNA MURARI LAL *v.* UTTAM KUER. **1936 R.D. 488.**

——**S. 14 and U P. Land Revenue Act, S. 39**—*Two co-sharers dividing their* sir *land—Transfer of share by one of them—Both relinquishing their* sir *rights—Application by transferee for expunction of entry of* sir *from the* khatauni*—Right of other co-sharer.*

Two co-sharers *D* and *N* came to an amicable arrangement for the division of their *sir* land and one of them, *N*, sold his share to *K*. Subsequently both the co-sharers relinquished all claim to ex-proprietary rights in their *sir* and *khudkasht* in the plots specified in the sale deed. The transferee asked for the expunction from the *khatauni* of the *sir* and *khudkasht* in the cultivation of *N*; *D* contended that his *sir* rights still subsisted.

Held, it is no longer open to *D* to claim that his *sir* rights still subsisted. The entry of *sir* should be expunged from the *khatauni* and the plots should be recorded as the *khudkasht* of the transferee. (*Darling, S.M. and Bomford, J.M.*) KANHAIYA SINGH *v.* NATHU SINGH. **1937 R.D. 522 (2).**

——**S. 14 (8)**—*Applicability to* sir *land.*

S. 14 (8) of the Agra Tenancy Act only refers to land continuously cultivated for 10 years mentioned in S. 14 (1) and not also to *sir*. (*Drake Brock-*

man, S.M. and Knox, J.M.) NAIM CHAND *v.* MAIN KHAN. **1936 R.D. 493.**

——**S. 15 (2)**—*Surrender of ex-proprietary rights not completed—Effect—Rights of vendor of* sir *plots.*

Where an application under S. 15 (2) of the Tenancy Act for surrender of ex-proprietary rights by a vendor of *sir* plots is dismissed, there is in law no valid surrender of such rights. As such the vendor, if he is so minded, can insist on his ex-proprietary holding being demarcated and rent fixed thereon. If he happens to be not in possession, he has his remedy under S. 99 of the Tenancy Act. The vendee in such a case has only himself to blame for not having insisted on the completion of the surrender prior to the completion of the sale. (*Darling, S.M. and Mehta, J M.*) SURTI *v.* KUNJI MAL. **1938 R.D. 885=1938 A. W.R. (B R.) 416.**

——**S. 15 (3)**—*Surrender by mortgagor of ex-proprietary rights—Awarding of ex-proprietary rights by S.D.O. in spite of surrender—Remedy, if can be had under the correction section of Land Revenue Act or by regular suit.*

Where though a mortgagor had surrendered his ex-proprietary rights, nevertheless the S. D. O. rightly or wrongly awards ex-proprietary rights, it cannot be abrogated by summary proceedings under the correction sections of Land Revenue Act. Any party who wishes to question those rights must have recourse to a regular suit. (*Darling, S.M. and Mehta, J.M.*) LAKHPAT SINGH *v.* UMRAO SINGH. **1938 A.W.R. (B.R.) 294=1938 R.D. 775.**

——**S. 15 (5)**—*Applicability—Recital in mortgage as to delivery of possession to mortgagees—Effect—Waiver.*

Where a proprietor executes a mortgage of certain *sir* plots and makes a statement therein that he has delivered possession to the mortgagees he must be taken to have deliberately waived his ex-proprietary rights in accordance with S. 15 (5) of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) GHURANANDEY *v.* HIRA LAL. **1938 R.D. 391=1938 A.L.J. (Supp.) 52=1938 A.W.R. (B.R.) 223.**

——**S. 16**—*Company, if could acquire occupancy right—Mere shareholders in business rather than actual cultivators.*

The question whether a recorded tenant, a company can acquire occupancy rights, depends upon whether the partners regarded themselves as a number of partners cultivating as partners and co-tenants under the Act or an association engaged in the business of cultivating not in any personal capacity but as shareholders in a business. When their whole conduct suggests that they were shareholders in a business rather than actual cultivators in any personal capacity, such a company cannot acquire occupancy rights (*Darling, S.M. and Bomford, J.M.*) MACKINNON *v.* SAMPAT KUMAR SINHA. **1938 R.D. 4=1938 A.W R. 16 (B.R).**

——**S. 16**—*Occupancy rights—Determination as to—Implications behind Ss. 14 to 17 of Tenancy Act of* 1901—*Ejectment or surrender and fresh admission—Tacking of former period of cultivation.*

Ss. 14 to 17 of the Tenancy Act of 1901 implied that if there is a surrender of land with implied agreement and within a year, the tenant is admitted to some other land, he shall be deemed to have been given the land in exchange and it would be treated for all purposes identically as the land surrendered (*i.e.*) it would take the same character. So in a case where there has been a surrender and fresh admission within one year then the period of cultivation put in in the area from which surrender has taken place will be added to the period put in, in the plot to which the tenant has been admitted. (*Mehta, S. M. and Harper, J. M.*) NAMDAR *v.* MAHADEO SINGH. **1939 A.W. R. (B.R.) 5=1939 R.D. 83.**

——**S. 16**—*Parties—Occupancy holding—Suit by recorded tenant to eject sub-tenant— Plea of acquisition of part of holding at partition as tenant and payment of rent to zamindar—Joinder of zamindar—If necessary.*

In a suit by a recorded occupancy tenant to eject his cousins as sub-tenants, the latter pleaded that the plot in suit was half one field which fell to their share at a partition of the family holding and that they had paid rent direct to the zamindar.

Held, that the zamindar should be made a party to the suit, as it was impossible to come to a final decision as to the status of the defendants until the zamindar had been made a party. (*Darling, S. M. and Bomford, J. M.*) SARJU KURMI *v.* BINDHYA CHAL. **1937 R.D. 23 (1).**

——**Ss. 16 and 86**—*Occupancy rights—Determination as to its acquisition—Seven years' leases—Period if to be deducted—Status of such tenants.*

Where seven years' leases are executed in favour of persons already in possession and the leases are given effect to by the Patwari and otherwise acted upon by the parties, the period under such leases cannot count towards occupancy. It has to be deducted from the period claimed towards the acquisition of the occupancy rights. Such tenants can be ejected under S. 86 as heirs of a statutory tenant. (*Mehta, S. M.*) JHINKAI *v.* BHUNESHAR RAI. **1939 A.W.R. (B. R.) 7=1939 R D. 18.**

——**Ss. 16 and 197**— *Person declared grove-holder by High Court— Subsequent ceasing of land to be grove—Effect—Status of occupant—Land in Government estate—Correction of papers—Proper entry.*

When a person has been declared by the High Court in a suit to be a grove-holder, if the land subsequently ceases to be a grove, the holder becomes a non-occupancy tenant under S. 197 of the Agra Tenancy Act; if the land be Government land, he becomes under S. 16 of the Act, an occupancy tenant. He must, therefore, be recorded as such if he applies for correction of papers under the Land Revenue Act. (*Knox, J.M.*) MATTOO BIBI *v.* RAJA RAM. **1936 R.D. 359.**

——**S. 17**—*Occupancy rights—Claim to on ground of conferment on payment of* nazrana—*Burden of proof.*

The Court would require strict proof in support of the claim of a new comer to have been admitted to share in occupancy rights. When there is no written agreement of recognition by the landlord of the new comer as an occupancy tenant, the interested oral evidence of the new comer in support of an alleged payment of *nazrana* to the zamindar is not sufficient proof of such recognition. (*Darling, S. M.*) BHARTU *v.* MOHAMMAD YUNUS. **1937 R.D. 47.**

AGRA TENANCY ACT (1926), S. 17.

———S. 17—*Occupancy rights—Grant of—Lambardar admitting persons as joint in tenancy with female occupancy tenant—If confers rights on persons so admitted.*

The fact the lambardar admits some persons as joint in tenancy with a female occupancy tenant, cannot have the effect of extending the occupancy rights of the female which are only good for her life to the persons admitted by the lambardar. (*Darling, S. M.*) KOMIL *v.* SANWAL SINGH. 1938 R.D. 114=1938 A.W.R. (B.R.) 53.

———S. 17—*Right of occupancy—Power of lambardar to confer on person who had not co-shared—Consent of co-sharers—Necessity.*

A lambardar has no right to accept as an occupancy tenant, a daughter's son when legally he could not possibly succeed to his maternal grandfather as he was too young to have co-shared in cultivation with him during his lifetime, without the consent of the co-sharers. (*Marsh, S.M. and Mehta, J.M.*) MUMTAZ HUSAIN *v.* CHIDDA. 1939 R.D. 526 (2).

———Ss. 17 (1) (a) and 18 (5)—*Applicability—Occupancy rights—Surrender of in one plot in consideration of conferment of such rights in other plots—Conferment of rights by plot proprietor only—Plots forming part of undivided* khewat—*Right to occupancy rights in exchanged plots—Remedy of tenant surrendering rights.*

A deed of surrender of occupancy rights in respect of a certain plot recited that the surrender was made in consideration of the conferment of occupancy rights in certain other plots. The plots were part of an undivided *khewat* in which the person who conferred the occupancy rights was only a plot-proprietor.

Held, that the tenants could not claim occupancy rights in the other plots by way of exchange, as under S. 17 of the Agra Tenancy Act. Occupancy rights could not be conferred by a single co-sharer and the whole body of co-sharers had an interest in the undivided *khewat* of which the plots in question were a part. The tenants had their remedy against the plot proprietor under S. 18 (5) for damages for loss of occupancy rights in the plot surrendered, but so far as the other plots were concerned, they were only trespassers so long as they were not formally admitted as tenants of the same. (*Darling, S. M and Bomford, J.M.*) SHIB CHUNDER *v.* RAMA CHANDER, 1937 R.D. 46.

———Ss. 17 (1)(b) and 265 (2)—*Perpetual lease by lambardar conferring occupancy rights—All co-sharers not concurring—Effect—Position of lessee.*

A lambardar without the written concurrence of all co-sharers has no authority to confer occupancy rights on any one as laid down in Cl. (1) (*b*) of S. 17, but under Cl. (2) of S. 265 of the Tenancy Act a lambardar is 'entitled to settle and eject tenants'. So where a lambardar executes a perpetual lease conferring occupancy rights and where the co-sharers have not concurred, that portion of the lease conferring occupancy rights is inoperative: but the admission of lessees as tenants of the holding is not thereby rendered null and void. The lessees having been duly admitted by the lambardar to the tenancy are not liable to ejectment as trespassers. (*Darling, S. M. and Bomford, J. M.*) KHARAG SINGH *v.* ISHRI SINGH. 1938 A.W.R. (B.R.) 189=1938 R.D. 325.

AGRA TENANCY ACT (1926), S. 17.

———S. 17 (1) (d)—*Co-sharer mortgaging his share—Right to confer occupancy rights during subsistence of mortgage.*

A co-sharer who has transferred his share in simple mortgage has no authority to confer occupancy rights over the plots covered by the mortgage during the subsistence of the mortgage. (*Darling, S. M.*) KISHORI LAL *v.* KASHI RAM. 1937 R. D. 255.

———S. 17 (1) (d)—*Occupancy rights—Competency to confer—When should be present.*

The competency to confer occupancy rights contemplated by S. 17 (1) (*d*) of the Agra Tenancy Act must be present when the occupancy rights are conferred. (*Mehta, J. M.*) ABDUL RAUF *v.* ABDUL GHANI. 1939 R D 323.

———Ss. 17 and 19—*Each co-sharer collecting rent from tenants according to his share—Lambardar's right to admit a person to a tenancy.*

Where the system in a village is for each and every co-sharer to collect rent according to his share from tenants, the lambardar has no authority as sole collector of rent to admit a person to any tenancy. (*Darling, S. M. and Bomford, J. M.*) SITLA BUX SINGH *v.* WAZIR JOLAHA. 1937 R.D. 71.

———Ss. 17 and 21—*Person recorded along with widow of occupancy tenant—Zamindar also suing him for rent—Status of such person on death of widow.*

Where the name of a person was recorded in the *khatauni* along with that of the widow of the occupancy tenant with the knowledge of the Zamindar, and the Zamindar also treated him as tenant not merely in suing him for rent but in arresting him in the course of execution of the decree, such a person is not, on the death of the widow, liable to be ejected as a trespasser but as a non-occupancy tenant. The fact that the Zamindar treated him as a joint tenant constitutes no recognition of him as entitled to any occupancy rights in the holding. Under S. 45 of the Agra Tenancy Act, he has three years from the death of the widow in which to apply for fixation of rent and consolidation of his status as a statutory tenant. If he fails to do that, he will be liable to ejectment as a non-occupancy tenant. (*Darling, S. M. and Bomford, J M.*) JAFAR ALI KHAN *v.* MAIKU. 1937 R.D. 560.

———Ss. 17 and 122—*Scope—General attorney of zamindar consenting to entry of persons as co-tenants in occupancy holding in* 1920—*Entry in* khatauni *not challenged by zamindar at subsequent settlement—Zamindar getting rent enhanced as against new persons also as tenants—Subsequent suit by zamindar to declare added persons not occupancy tenants—Maintainability—Estoppel.*

In 1920, when the Agra Tenancy Act of 1901 was in force, the names of three persons were added and entered in the *khatauni* as co-tenants in the occupancy holding along with that of the recorded occupancy tenant with the consent and on the authority of the zamindar's general attorney. The terms of the power-of-attorney did not of course include any provision for the conferment of occupancy rights, as under the Act of 1901, no occupancy rights could be conferred. Subsequently a settlement intervened; the zamindar did not question the correctness of the entry. The land

revenue was enhanced and the zamindar brought a case and had the rent enhanced and all the four men recorded in the *khatauni* were treated as tenants of the occupancy holding. After the lapse of 16 years the zamindar brought a suit under S. 122 of the Agra Tenancy Act for a declaration that the three persons whose names were entered as co-tenants in 1920 were not occupancy tenants in the holding with the original recorded tenant and for expunging their names from the *khatauni*.

Held, that the zamindar should not be allowed to turn round after the lapse of 16 years and deny the claim of the three men to be recognised as co-tenants in the occupancy holding and disown the action of the general attorney who derived his authority from the zamindar. and that the facts relating to the holding from 1920 constituted such a cumulative chain of evidence that they operated as estoppel, especially in view of the fact that occupancy right could now be conferred under S. 17 of the new Act of 1926. (*Darling, S. M.*) PERBAL PERTAP SINGH *v.* HIRA LAL. 1937 R.D. 1.

——**Ss. 17 (5) and 127**—*Registration under S. 17 (5)—Requirements—If satisfied by attestation before Qanungo.*

Where an occupancy tenant admits other persons as co-tenants in the occupancy holding by means of an agreement which is attested before the Qanungo the attestation is not sufficient under S. 127 of the Agra Tenancy Act because it relates to an occupancy tenancy, which necessarily exceeds a term of 10 years. Hence such an agreement does not satisfy the requirements regarding registration laid down in S. 17 (5) of the Act. (*Harper, S.M. and Sathe, J.M.*) SHEO NARAIN *v.* PHUL SRI. 1940 R.D. 224=1940 A.W.R. (B.R.) 85.

——**Ss. 18 and 121-123**—*Applicability—Occupancy holding—Plot becoming grove—Status of grove-holder—Disappearance of grove—Effect—Occupancy rights retained by tenant after disappearance of grove—Transfer of—Validity—Right and status of transferee—Application to establish occupancy rights by means of application for correction of* khatauni *—Maintainability—Proper remedy—Liability to ejectment.*

Occupancy rights lapse in any plot of an occupancy holding which becomes a grove, the occupancy rights therein are superseded by grove rights, and when the grove disappears the grove-holder becomes a non-occupancy tenant in the plot, the former occupancy rights not reviving on the plot ceasing to be grove. Where, however, the former occupancy tenants manage to retain their occupancy rights in spite of the disappearance of the grove plot, a transferee from them is not entitled to claim the same rights. Occupancy rights are not transferable and the transferee does not acquire any such rights from the recorded occupancy tenants. All that the transferee can acquire are grove rights which are extinguished on the disappearance of the grove Thereafter the transferee is either a sub-tenant or a trespasser who has never been admitted, or at best a non-occupancy tenant. He is not entitled to apply for correction of the *khatauni* to establish his claim to occupancy rights. His proper remedy is to bring a regular suit under Ss. 121-123 of the Agra Tenancy Act, if he is not content with the

entry as a sub-tenant. But if he fails to establish his claim to be an occupancy tenant and is declared a mere non-occupancy tenant under S. 21 of the Act, he is liable to be ejected forthwith by the zamindar. (*Darling, S. M.*) BANWARI *v.* ABID HUSAN. 1938 R.D. 124.

Admission to tenancy.

——**S. 19**—*Admission to tenancy—Acceptance of rent.*

It is now established law that the acceptance of rent is not necessarily a recognition of tenancy. (*Darling, S. M. and Bomford, J. M.*) SHAHID HUSAIN *v.* HARBANSA. 1937 R.D. 161.

——**S. 19**—*Admission to tenancy—Question of fact.*

S and *H* were recorded as tenants in 1342 F, with 16 years which means that their tenancy began in 1326 F. In 1333 F., the name of *L* appeared in the papers as *qabiz* and *S* as *ghair qabiz*. *S* had all along been asserting his rights against *L*.

Held, that it is a question of fact whether *L* was or was not admitted by the Zamindar. (*Bomford, J. M.*) LALWA *v.* SURAJ DIN. 1937 R.D. 83.

——**S. 19**—*Re-admission of ejected tenant—Burden of proof.*

When a tenant has been ejected, it is for him to prove that he has been re-admitted. If he retains possession, the mere acceptance of rent from him does not constitute admission of tenancy, nor can a mistake committed by the zamindar in misdescribing him as an occupancy tenant in a suit for arrears of rent be construed as an act of re-admission. (*Darling, S. M. and Bomford, J. M.*) MOHAMMAD ASGHAR *v.* MANNA. 1937 R.D. 378.

——**S. 19 (b)**—*Admission to tenancy—What constitutes—Acceptance of rent from person in possession—Describing defendant in suit for arrears of rent as tenant—Effect of.*

Mere acceptance of rent from a person in possession or even describing him as a tenant in a suit for arrears of rent cannot, of itself, be sufficient to prove that he was admitted to tenancy. (*Drake Brockman, S. M. and Knox, J. M.*) RAM LALJEE BALJI *v.* GAJRAJ SINGH. 1936 R.D. 542.

Construction and scope.

——**S. 19**—*Construction and scope—Retrospective effect—Non-occupancy tenants holding leases whose term has not expired—If become statutory tenants.*

S. 19 of the Agra Tenancy Act of 1926 provides that "every person" who is a tenant of land (not being of the excepted class of sub-tenant) at the commencement of the Act, shall be called a statutory tenant. The section cannot be construed as if containing restrictions against those persons who were holding under leases for a term at the time when the Act came into force. In the case of land held by persons as non-occupancy tenants under the prior Tenancy Act of 1901, liable to be ejected on the expiry of their leases, when the leases have not expired at the time when that Act ceased to operate and the new Act of 1926 came into operation, the tenants would become statutory tenants The lessor at the time would have no right to present possession of the lands. That right, being one which would in due course have accrued, was not one which he had at the time when the new Act came into force. The new

Act has not taken away any right which he had prior to the date when it came into operation, but only those which would have accrued to him in due time, but which had not in fact then accrued. In such a case the question whether the Act has retrospective effect is irrelevant.

Rowland, J.—The words of the statute are wide, and they apply not only to tenancies in existence at the commencement of the Act but to affect contracts entered into before the Act and intended to be fulfilled after its commencement. (*Agarwala and Rowland, JJ.*) RAM RANBIJAYA PRASAD SINGH *v.* DEOKI AHIR. **15 Pat. 619=18 Pat.L.T. 84=167 I.C. 865=9 R.P. 438=3 B.R. 357=A.I. R. 1937 Pat. 180.**

Fallow land.

——S. 19—*Fallow land—Accrual of statutory rights.*

A person who has taken a lease of old fallow land but has never cultivated it cannot become a statutory tenant, and a mere misdescription of such a person as '*haqdar*' tenant in a receipt for rent does not constitute a grant of statutory rights. (*Bomford, J.M.*) RAM ADHIN *v.* NARAIN RAO PATNIS. **1937 R.D. 456.**

Statutory tenant.

——S. 19—*Statutory tenant—Person in possession as tenant at time of coming into force of Act and becoming statutory tenant—Status of his sons—Liability to ejectment under S. 44.*

In a suit for ejectment by a lambardar under S. 44 of the Agra Tenancy Act, it was found that the defendants' father was in possession as tenant when the Tenancy Act of 1926 came into force, he having begun to hold as tenant in chief in his own right from 1325 F.

Held, that the father of the defendants became a statutory tenant in course of law, and the defendants, his heirs, were the heirs of a statutory tenant; and therefore the suit for ejectment should be dismissed. (*Drake Brockman, S.M. and Knox, J.M.*) AVDESH RAI *v.* SHEO BHAWAN. **1936 R.D. 538 (2).**

——Ss. 19 and 86—*Statutory tenancy—When can arise—Tenant of* sir, *subject of transfer—Status of—Absence of claim of ex-proprietary rights.*

According to S. 19 of the Agra Tenancy Act, without actual admission to tenancy nobody can become a statutory tenant by merely coming face to face with the landholding body and paying rent as from before. A tenant of *sir*, which is subject of transfer and in which ex-proprietary rights are not claimed, cannot, for that very reason, become the statutory tenant of the holding. He continues to be a non-occupancy tenant and as such his ejectment will have to be sought under S. 86 of the Tenancy Act. (*Mehta, J.M.*) JAGROTTAM *v.* KAILAS SAHI. **1939 R.D. 395.**

——S. 20 (2)—*Ejectment of heir of statutory tenant—Suit brought in fifth year of his tenancy—If premature.*

A suit for the ejectment of the heirs of a statutory tenant is not necessarily premature because it is brought in the fifth year of their period of tenancy. Under S. 20 (2) of the Tenancy Act, an heir is entitled to retain possession of the holding of the deceased statutory tenant for a period of five years from the latter's death and there is no reason why a suit should not be

brought before the end of the period, so long as five years will have elapsed before ejectment actually takes place. (*Darling, S.M.*) RAMESHWAR DAS *v.* DEBI SINGH. **1937 R D. 254.**

——S. 20 (2)—*New contract of tenancy conferring statutory rights—What amounts to—Essentials of.*

On the death of a statutory tenant, his widow who was recorded as his heir was sued by the zamindar for arrears of rent. The parties came to a compromise under which a new rent, at a much lower rate was fixed and the suit was decreed in terms of that compromise.

Held, that the compromise did not constitute a new contract of tenancy conferring statutory rights on the widow so as to protect her from ejectment. In the absence of a definite admission of the tenant to statutory rights by the landlord in writing the heir of a statutory tenant would be liable to ejectment. (*Darling, S.M. and Bomford, J.M.*) AZIZ FATIMA *v.* MUKAND LAL. **1936 R. D. 586.**

——S. 20 (2), Proviso (1) (b)—*'Proceedings', meaning of.*

'Proceedings' in S. 20 (2), proviso 1 (*b*) must be taken to mean effective proceedings. (*Darling, S. M. and Bomford, J.M.*) KALKA PRASAD *v.* RAHUA. **1938 A.W.R. (B.R.) 167=1938 R.D. 551.**

——S 20 (2), Proviso (1) (b)—*'Proceedings' if refers only to effective proceedings—Holding mortgaged with possession—Landholder, if in a position to assert his authority before redemption.*

The words 'no proceedings have been taken' occurring in S. 20 (2), Proviso (1) (*b*) of the Tenancy Act refers only to effective proceedings being taken. Where the holding has been mortgaged with possession the landlord is not in a position to take effective proceedings in assertion of his right till after redemption. (*Mehta, S. M.*) RAJESHWARI PRASAD SINGH *v.* SARJOO SINGH. **1939 A.W.R. (B.R.) 26=1940 R.D. 76.**

——S. 20 (2), Proviso (b)—*Heir to statutory tenant—Failure to eject within time allowed—Effect.*

According to the provisions of S. 20 (2), Proviso (*b*) of the Agra Tenancy Act if an heir of a statutory tenant is not ejected, within the time fixed by S. 20 (2) by the landlord, by appropriate proceedings, he shall be considered to have been admitted to the holding and shall be deemed to be a statutory tenant. The admission need not be an open one and the heir by sheer lapse of time owing to the negligence of the landlord, glide into tenancy. (*Mehta S.M. and Harper, J. M.*) RAM DULAR TELI *v* RAJ BAHADUR SINGH. **1939 A.W.R. (B.R.) 4=1939 R.D. 80.**

——Ss. 20 (2) and 86 (2)—*Scope—Ejectment of heirs of statutory tenant—Suit for before expiry of five years of death of statutory tenant—Maintainability.*

Although under the law it is intended that the heir of a statutory tenant should have five years' possession, there is no reason why a suit to eject him should not be brought before the end of that period, so long as the five years' period would elapse before the ejectment is really made effective. To hold otherwise would involve allowing the heir of statutory tenant to hold for more than five years. (*Knox, J.M.*) GANGA PASI *v.* GAYA PRASAD SAHI. **1936 R.D. 329.**

AGRA TENANCY ACT (1926), S. 21.

——**S. 21**—*Applicability—Sir land—Old proprietor holding at privileged rent and receiving percentage as* malikhana*—Status of—Sub-proprietor or non-occupancy tenant—U. P. Land Revenue Amendment Act, S. 3.*

Before the British occupation the revenue of a certain village was assigned by the Maharaja of Gwalior to a temple at Muttra. Subsequently the British made a settlement with the representatives of the temple, and the old proprietors of the village were declared entitled to hold the land in their own cultivation at a privileged rent and to receive 10 per cent. of the rental of the rented lands as *malikana*. The rent was payable by them to the temple.

Held, the old proprietors were necessarily non-occupancy tenants of the temple, in accordance with S. 21 of the Agra Tenancy Act, the temple obviously being their landholder, and that they were not sub-proprietors as defined by S. 3 of the U. P. Land Revenue Amendment Act of 1932. (*Drake Brockman, S. M. and Knox, J. M.*) GATSARAM NARAYANJI *v.* JAGAT SINGH. **1936 R. D. 180.**

——**S. 22** — *Scope—If retrospective — Sudra widow inheriting occupancy holding under Act XII of* 1881*—Remarriage—Forfeiture of rights—If caused—Act II of* 1901*—If retrospective.*

A Sudra widow inheriting the occupancy holding of her husband on his death while the N. W. P. Rent Act of 1881 was in force would not lose her occupancy rights so inherited, because she would inherit under her personal law which does not entail forfeiture rights on remarriage. Nor would such rights be forfeited on remarriage after the coming into force of the Agra Tenancy Act of 1901, as that Act is not retrospective in operation. (*Drake Brockman, S.M and Knox, J. M.*) GAYA SINGH *v.* BANDHU **1936 R D. 446.**

——**S. 23**—Land held by lessee under permanent lease with right to transfer, build and to plant grove—Lessee not planting grove—Land—If grove land—Liability to be sold in execution. *See* AGRA TENANCY ACT, SS. 3 AND 23 **1937 A.L. J. 656=1937 A.W.R. 699=A I.R. 1937 All. 561.**

——**S. 23**—*Mortgagee of occupancy holding—Suit for rent against tenant—Facts to be proved—Plea as to mortgagee's defective title—If sustainable.*

When a mortgagee of an occupancy holding sues his sub-tenant for rent, he has to prove the contract of tenancy. If such a contract existed or by a course of conduct the sub-tenant was paying rent to the mortgagee in possession, in that case, the fact that the mortgagee had derived his title under a voidable or even void transfer would not be a plea that could be sustainable against the plaintiff. (*Mehta J M.*) MATHURA RAM *v.* JAN KHAN. **1938 A.W.R. (B.R.) 353=1938 R.D. 851.**

——**S.23**—*Scope—Mortgage by occupancy tenant—Validity—Suit by mortgagee for rent due by sub-tenant—Maintainability—Sub-tenant admitted by mortgagee but paying rent to occupancy tenant—Effect of—Inference.*

Under the Agra Tenancy Act of 1926, it is quite clear that mortgages of occupancy tenancies are *ab initio* void; and the mortgagee, being a party to an illegal contract cannot invoke the aid of the Courts to realise any rent due to him. Such a man has no *locus standi* in the Courts. When a

AGRA TENANCY ACT (1926), S. 23.

sub-tenant who has taken the land from the mortgagee of the occupancy tenant has paid rent to the occupancy tenant, it has to be inferred that the occupancy tenant has resumed possession of the holding, in effect dispossessing the mortgagee, and the mortgagee cannot sue the sub-tenant for rent, he being the holder of an illegal mortgage. (*Drake Brockman, S.M. and Knox, J.M.*) PUTTI LAL *v.* LODI. **1936 R.D. 384.**

——**Ss. 23, 24 and 25**—*Applicability—Occupancy tenant—Succession to—Original tenant dying when Act XII of 1881 was in force—Widow succeeding and dying in 1900—Daughter succeeding and dying after 1926—Law governing succession.*

According to the Tenancy Act, 1926, S. 23 (1), the interest of an occupancy tenant is heritable. In general the personal law will apply for purposes of inheritance, and it is not to have application only where it has been modified by statute. The burden of proving that it has been so modified is on the person who so pleads. When an occupancy tenant died in 1882 while Act XII of 1881 was in force, under which succession was to be according to the personal law, and was succeeded by his widow who died in 1900 and who in turn was succeeded by the daughter who died after the Tenancy Act of 1926 came into force (*i.e.*) in 1933, succession was held to be governed by personal law, as it was not shown that the Tenancy Act of 1926 had modified the personal law in a case like that of the one before the Court and that it was not necessary for the claimants to show that they had shared in the cultivation with the last male owner. (*Bennet and Verma, JJ.*) HAR NARAIN SINGH *v.* NAND RAM. **181 I.C. 33=11 R.A. 544= 1939 R D. 61=1939 A.W.R. (H.C.) 27=1939 A. L.J. 199=A.I R. 1939 All. 197.**

—— **S. 23** (1)—*Execution sale of occupancy holding—Tenant not bound by decree or sale if can sue to declare sale void.*

Where in execution of a decree against some of the occupancy tenants the holding is sold and purchased by the decree-holder, one of the tenants not bound either by the decree or the execution sale, can sue to declare the sale void as being contrary to S. 23 (1) of the Tenancy Act and can eject the purchaser as a mere trespasser and obtain his relief with reference to the entire property and not only with reference to his share of the property. (*Bennet and Verma, JJ.*) DWARKA DAS *v.* RAFIUDDIN. **I.L.R. (1940) A. 159=188 I.C. 389=1940 A.W.R. (H.C.) 188= 1940 R D. 123=1940 A.L J. 310=A.I.R. 1940 All 218.**

——**S. 23** (2) (b)—*Division of holding under S. 37—Death of one of the holders—Zamindar, if can introduce new tenant under S. 23 (2) (b).*

When a holding which stood jointly in the name of two brothers is divided under S. 37 of the Tenancy Act, on the death of one of them his widow has a life interest and the other brother being a co-tenant is entitled as reversioner to his deceased brother's share in the tenancy. As long as the holding is not completely divided into two holdings the zamindar cannot introduce a new tenant under S. 23 (2) (*b*) of the Act so as to defeat the rights of the survivor in the holding and against his wishes. (*Mehta, J.M.*) NAUJADI *v.* MUNESAR AHIR. **1939 R.D. 248=1939 A.W.R. (B.R.) 256.**

AGRA TENANCY ACT (1926), S. 23.

——S. 23 (2) (b)—*Mortgage of occupancy rights by one co-tenant to another—Absence of entry—Inference.*

Under S. 23 (2) (*b*) one co-tenant is competent to transfer to another co-tenant his occupancy rights by mortgage. If a mortgagee is in possession of an occupancy holding, the standing orders are that his possession is entered. Where there was no such entry it was held it gave rise to a suspicion that for some reason or other the mortgage had not been acted upon. (*Mehta, S.M.*) GAYA DIN *v.* BABUA. **1940 R.D. 56=1940 A.W.R (B.R) 46.**

Applicability and scope.

——S. 24—Applicability and scope—Tenant under Act XII of 1881—Widow succeeding and completing 12 years—Right of occupancy—Death of widow after 1926—Daughter's son not co-sharing in cultivation with grandfather—Right to succeed to tenancy. *See* N.W.P. RENT ACT (XII OF 1881), S. 8 **1938 R.D. 121=1938 A.W.R. (B. R.) 72.**

Co-sharing.

——S. 24—*Co-sharing.*

It is necessary for co-sharing in cultivation, that there should be pooling of one's own cattle and the implements of cultivation. (*Darling, S. M. and Bomford, J.M.*) REOTI PRASAD *v.* MANGALI, **1937 R.D. 443=1937 A.W.R. 1028.**

——S. 24—*"Co-sharing"—Meaning of—Proof.*

Co-sharing involves a pooling of cattle and the implements of husbandry; and in the absence of evidence that the claimant had pooled his cattle and implements of husbandry along with those of the person with whom he claims to have co-shared the mere fact that he may have helped the latter over the holding would not amount to co-sharing. (*Darling, S.M. and Bomford, J.M.*) PEAREY LAL *v.* KUNJAL. **1937 A.W.R 869=1937 R.D. 397.**

——S. 24—*Co-sharing—What constitutes.*

Mere management does not imply co-sharing; there must be some measure of pooling of resources to justify a finding to that effect. From the facts that a daughter's son born and bred up in his grandfather's house, looked after the management, collected rent and performed his funeral obsequies, it cannot be said that there was co-sharing. (*Darling, S.M. and Bomford, J.M.*) SRI THAKURJI *v.* LALTA PRASAD. **1938 R.D. 378=1938 A.W.R. (B.R.) 165.**

——S. 24— *Co-sharing— What constitutes — Minority of one of the parties, if affects the question.*

To constitute co-sharing, there should be pooling of resources, and this requirement applies whatever may be the age of one of the parties. In the absence of evidence that daughters' sons living with and helping the grandfather had any holdings of their own or agricultural stock which they pooled with that of their grandfathers', it cannot be held that they co-shared with their grandfather, however much they helped in the agricultural duties which boys of their age could perform. (*Darling, S.M. and Bomford, J.M.*) TIKORI *v.* HARAKH CHAND. **1938 R.D. 1 =1938 A.W.R. (B.R.) 13**

——S. 24—*Co-sharing in cultivation—Burden of proof—Suit by landlord to eject daughter's sons of deceased tenant—Plea of inheritance by co-sharing in cultivation—Proof of definite acts of co-sharing—Necessity.*

AGRA TENANCY ACT (1926), S. 24.

The burden of proving co-sharing in cultivation with the last male tenant lies on those who claim the tenancy by inheritance on that ground; it is not enough to prove that the claimants lived with the late male tenant, that they helped him in cultivation, and that he was too old to manage the holding lately at the time of his death. What constituted the alleged co-sharing must be definitely made clear. In a suit for ejectment of the maternal grandsons of the last male tenant, the defendants cannot be entitled to succeed on their plea of co-sharing with the last male tenant, by merely producing evidence which amounts to no more than a vague statement that they gave assistance to the last tenant; that is not sufficient to establish co-sharing. (*Drake Brockman, S.M. and Knox, J.M.*) GOPISHWAR PRASAD MAN TEWARI *v.* BALDEO BARAI. **1936 R.D. 190.**

——S. 24—*Co-sharing in cultivation—What constitutes—Proof—Sub-tenancy—If co-sharing—Co-sharing in part of holding—Sufficiency.*

It is a mistake to assume that because a collateral is entered as a sub-tenant in a part of the holding, he must be taken to have been co-sharing. On the other hand that distinctly contradicts the claim of co-sharing. Co-sharing in cultivation means and implies that the co-tenants pool their agricultural stock and the implements and become a complete partnership. Further co-sharing in a part of the holding does not lead to the conclusion that there is co-sharing as regards the whole holding. Where the collaterals of the deceased tenant are shown to have been separate from him and carrying on their respective cultivations separately for a long time, and to have kept separate agricultural stock, the claim of co-sharing in cultivation must be negatived. (*Drake Brockman, S. M. and Knox, J.M.*) SARJOO KOERI *v.* JOGI RAM. **1936 R.D. 118.**

——S. 24—*Sharing in cultivation — Proof—Holding sub-let at the time of death of tenant and for a long time before—Effect.*

A person cannot claim to have shared in the cultivation when the plots comprising the holding were so sub-let when the tenant died, and had been sub-let for a long time before that. (*Darling, S.M. and Bomford, J.M.*) BRIJ BHUSHAN SARAN *v.* GAINDA MAL. **1937 A.W.R. 872=1937 R.D. 414.**

Succession.

——S 24—*Succession—Death of one of several brothers—Right of joint brothers in preference to separated brothers—Proof of separation.*

On the death of one of several brothers who are entitled to a tenancy, the brothers who are joint with him are entitled to the share of the deceased brother to the exclusion of the divided brothers. But in the absence of definite and strong evidence of such separation, all the brothers would be entitled. The fact that some of the brothers are sons of a different mother by the same father is not conclusive of the fact of separation. (*Bomford, J.M.*) MANNU TEWARI *v* INDERJEET TEWARI. **1938 A.W.R. (B.R.) 103 =1938 R.D. 166.**

——S. 24—*Succession — Daughter's son not sharing in cultivation—Right of.*

A daughter's son has no right to succeed to the occupancy holding of his grandfather unless he

has co shared in the cultivation. The fact that his grandfather made him his heir will not by itself give him the right to succeed. (*Darling, S. M. and Bomford, J.M.*) REOTI PRASAD *v.* MANGALI. 1937 R.D. 443=1937 A.W.R. 1028.

——S. 24—*Construction—"Lineal male descendants"—Meaning of—Sons—If exclude grandsons—Rule.*

Per *Drake Brockman, S M.*—S. 24 of the Agra Tenancy Act does not say that in succession to tenancy the son is to exclude the grandson. Both father and son have an equal interest in the holding to the extent of the father's share 'Lineal male descendants' mean sons, grandsons and great grandsons alive at the time.

Per *Knox, J M.*—According to the natural interpretation of S. 24, the succession is *per stirpes*, and while the father is alive, the grandsons have only a presumptive or contingent, but not a vested interest. If the father predeceased his father, the grandsons will inherit equally the share of their branch. (*Drake Brockman, S.M. and Knox, J.M.*) LAYAQ *v.* MEGHA. 1936 R.D. 575.

——S. 24—*Succession to occupancy holding—Chela's right to succeed a mahant.*

A chela has no right whatever to succeed to the occupancy rights of a mahant, whatever his rights may be in connection with the math. (*Bomford, J.M.*) HAR NANDAN GIR *v.* BAWAN SINGH. 1938 R.D. 456=1938 A.W.R. (B.R.) 336.

——S. 24—*Succession to occupancy holding—Rights of daughter.*

It is clear that a daughter cannot succeed to the occupancy rights of her father. (*Darling, S.M. and Bomford, J.M.*) MOHAMMAD SIDDIQ *v.* AISHA BIBI. 1938 A.W.R (B.R.) 290=1938 R.D. 480.

——S. 24—*Occupancy rights—Collateral succession—Uncle and nephew—Priority.*

In the matter of collateral succession to an occupancy tenant, an uncle of the late tenant is nearer collateral than his nephew, and the latter therefore has no rights as against the former. (*Drake Brockman, S.M. and Knox, J.M.*) SARJOO KOERI *v.* JOGI RAM. 1936 R.D. 118.

——S. 24—*Occupancy tenant—Succession to—Nearest collaterals in possession and sharing in cultivation—Rights of.*

The interest of an occupancy tenant devolves on his death on his nearest collaterals who have been in possession and have shared in the cultivation of the holding during the lifetime of the deceased tenant. (*Drake Brockman, S. M. and Knox, J.M.*) DHANNI *v.* SARJU PRASAD SINGH. 1936 R.D. 202.

——S. 24—*Right of collateral to succeed under—Conditions to be proved or fulfilled.*

It is not necessary that the collateral who is claiming to succeed under S. 24 of the Tenancy Act should not have a separate holding from the deceased from whom he is claiming inheritance. It is not necessary that he should be staying with him all the time. There might be jointness in the beginning followed by cesser of commensality and later on, one of the members of the family becoming effete there may be a reunion, so that assistance would be available to the members of the joint family in a newly set up commensality. All that is necessary is that the collateral should have co-shared in the cultivation. (*Mehta, J.M.*) RADHA KRISHNA *v.* GAYA DIN. 1939 A.W.R. (B.R.) 23=1939 R.D. 408.

——S. 24—*Succession under—Rule as to sons and grandsons*—Stirpital *or* per capita.

Revenue Courts, including the Board of Revenue, have, in deciding cases of succession to tenancies by sons and grandsons, generally decided on the basis of succession *per stirpes* and not *per capita*. Male lineal descendants in the male line succeed *per stirpes* and not *per capita*. That is the normal law for direct descendants, whether in the Hindu, Mahomedan or English systems. It is inconceivable that the Legislature should have intended to lay down a novel or different rule in regard to succession to a tenancy. (*Drake Brockman, S.M. and Knox, J.M.*) KESHO SARAN *v.* RAGHUNATH DAS. 1936 R.D. 568.

——S. 24—*Separated sons of occupancy tenant—Right of succession.*

Quaere.—Whether the separated sons of an occupancy tenant have a right to share in their father's inheritance. (*Darling, S.M. and Bomford, J.M.*) SUKHDEO *v.* KRISHNA LAL. 1938 R.D. 177 =1938 A.W.R. (B.R.) 110.

——S. 24—*Succession to tenant— Undivided holding—Uncle and uncle's son—Rights of.*

On the death of a tenant of an undivided holding, his uncle takes the whole of his share as against his another uncle's son. (*Darling, S.M. and Bomford, J.M.*) CHANDRIKA DUBE *v.* BANSDEO MISRA. 1937 R.D. 454.

——S. 24—*Succession—Tenant separated from his brothers—Co sharing in cultivation with descendants of one of brothers—Heir of such tenant.*

Where a tenant who is separate from his brothers is at death co-sharing in cultivation with the descendants of one of his brothers, the nearest of these collaterals is his heir. (*Darling, S.M. and Bomford, J.M.*) ASHARFI *v.* RAMJI. 1937 R.D. 596.

——S. 24—*Succession to tenant—Holding undivided.*

Where the holding of a deceased tenant is undivided, all the co-tenants alive on his death must be presumed to have co-shared in cultivation with him. Succession in such a case is governed by S. 24 of the Agra Tenancy Act and not by survivorship. (*Bomford, J.M.*) KUBER *v.* MUNESHWAR. 1937 R.D. 94.

——S. 24—*Succession in twice-born caste—Illegitimacy, if a bar.*

It is not correct to say that illegitimacy as a bar to inheritance is a matter of personal law and that it is not provided for in the strict wording of S. 24 of the Tenancy Act, for the simple reason that the section does not at all contemplate the succession of a person and related by legitimate descent in a twice-born caste. (*Harper, J.M.*) DELA *v.* DAYA NAND. 1940 R.D. 156= 1940 A.W.R. (B.R.) 73 (1).

——S. 24—*Succession—Widow leading immoral life—If entails loss of rights.*

Where after the death of an ex-proprietary tenant, his widow was leading a loose life and had a child, on an application by the mother of the deceased tenant to have her name recorded in the *khatauni* in the place of her son's widow, it was held that in the absence of re-marriage it could not be done and that the law only penalised re marriage and not living in sin by a widow. (*Darling, S.M. and Mehta, J.M.*) MST. MURTI *v.* MST JEO. 1938 A.W.R. (B.R.) 293=1938 R.D. 773.

AGRA TENANCY ACT (1926), S. 24.

——S. 24—*Widow succeeding to husband under Act of 1881—Death of—Claim by grandson to succeed—Sharing in cultivation with last male tenant—If necessary.*

The last male tenant of an occupancy holding died while Act XII of 1881 was in force, and his widow inherited the holding under the Mahomedan Law and became an occupancy tenant in her own right. On the death of the widow, her grandson claimed to succeed to the holding,

Held, that he could inherit provided he could show that he shared in cultivation with his grandmother, and that he need not prove that he shared in cultivation with the last male tenant. (*Drake Brockman, S.M. and Knox, J.M.*) DOST MOHAMMAD *v.* JAI LAL SINGH. **1936 R.D. 50.**

——S. 24—*Widow tenant — Remarriage—Re-admission to tenancy—Proof of—Mere acceptance of rent—Effect of.*

Mere acceptance of rent from a widow tenant who has remarried cannot amount to an admission to tenancy or re-admission so as to afford protection from ejectment, when there is no fresh contract of re-admission. (*Darling, S.M. and Bomford, J.M.*) MUST. TETRA *v.* ZAHID ALI. **1938 A.W.R. (B.R.) 2=1938 R.D. 130.**

——S. 24—*Widow—Re-marriage of—Effect—Life estate, if* ipso facto *determined.*

There is no doubt a liability on the part of a widow after re-marriage to lose the life-estate in the occupancy holding of her husband but the life-estate does not determine *ipso facto* on her re-marriage. (*Darling, S.M. and Mehta, J.M.*) KOMIL *v.* JOGESHWAR PRASAD. **1938 R D. 940=1939 A.W.R. (B.R.) 50 (2).**

——S. 24, Proviso—"*Sharing in cultivation*"—*Meaning of.*

In a case where the deceased tenant and the persons claiming as having shared in the cultivation of the holding have not done the actual work of cultivation themselves, it has to be shown, in order to prove the fact of sharing in cultivation, that they have made some positive contribution towards the expenses of cultivation, such as the supply of seed, upkeep of cattle or hiring the same, hiring of ploughman, irrigation, watching and so forth. (*Drake Brockman, S.M.*) MAHOMED MUSTAFA ALI KHAN *v.* MAHOMED MOAZZAM ALI KHAN. **1936 R.D. 349.**

—— Ss. 24 and 25—*Re-marriage of widow of occupancy tenant—Proof—Necessity for evidence of ceremonies—Widow living in concubinage—Liability to ejectment.*

To prove the remarriage of a widow there must be evidence of some ceremony of some sort so as to signify some sort of religious or legal contract, even among communities in which re-marriage is not a very formal ceremony. Granting that the widow of an occupancy tenant has been living in concubinage with another man, that does not entitle the landlord to eject her from the holding because what the law penalises is the re-marriage of the widow and not her "living in sin". (*Drake Brockman, S.M. and Knox, J.M.*) RAM DEI *v.* RAGHUVANSH NARAIN SINGH. **1936 A.W.R. 364 =1936 R.D. 123.**

——Ss. 24 and 26—*Succession to tenancy—Survivorship under Hindu Law—Applicability—Divided brother and undivided nephews—Preferential right.*

AGRA TENANCY ACT (1926), S. 24.

To hold that a joint Hindu family is a single "tenant" and that so long as a portion of this 'tenant' survives no outsider can have a claim to succession is foreign and contrary to the specific provisions of S. 26 of the Agra Tenancy Act. S. 26 no doubt leaves it open to the landholder to lease a holding to a joint family. But if he does so, succession to members of that joint family, will be as provided in S. 24 and the principle of inheritance by survivorship will only apply in the case of (*a*) widows, and (*b*) when a co-tenant dies leaving no heir entitled to succeed him under S. 24. A separated brother of the deceased tenant is entitled to succeed to the tenancy under S. 24 in preference to his nephews though the latter may have been joint with him. (*Drake Brockman, S.M. and Knox, J.M.*) DUDH NATH KOERI *v.* CHAUTHI. **1936 R.D. 573 (2).**

——Ss. 24 and 26—*Succession to tenant—Holding undivided—Collaterals of equal degree—Rights of.*

Where the holding of a deceased tenant is undivided, it must remain a single holding until a new contract is made with the zamindar; and when the claimants to the tenancy are collaterals of equal degree sharing in cultivation, they take equal shares in it under S. 24 of the Agra Tenancy Act. Succession in such a case does not go by survivorship under S. 26, as it is not a case of there being no heir to succeed. (*Drake Brockman, S.M. and Knox, J.M.*) AMJAD *v.* MOHAMMAD MUSTAFA. **1936 R.D. 177.**

——Ss. 24 and 44—*Joint family—Entry of holding in the name of one of the members—Not treated as separate—Effect—Death of that member—Proof of co-sharing, if necessary, to resist ejectment.*

Where the members of a joint Hindu family live together and manage the commensal affairs of the family, though a particular holding might be entered in the name of one of the members, so long as there is evidence that it was not treated as a severalty and there is evidence that it was treated as joint and that the family was also joint, the holding is practically a joint family holding. As such on the death of that member it is not necessary for the other members to prove co-sharing in cultivation with the deceased, in order to resist a suit for ejectment under S. 44 of the Act. (*Bomford, S M. and Mehta, Offg. S. M.*) KAMLA PRASAD *v.* PASHPAT PRATAP SINGH. **1939 R.D. 41 =1939 A.W.R. (B.R.) 143.**

——Ss. 24 and 44—*Widow occupancy tenant—Re-marriage—Zamindar not terminating occupancy rights—Status of widow—Death of widow—Sons by re-marriage—Liability to ejectment—Claim to statutory rights—Sustainability.*

If a widow's occupancy rights are allowed to continue for her lifetime by the zamindar in spite of her re-marriage, such rights are extinguished on her death, and her sons by her second husband in occupation are liable to ejectment under S. 44 of the Agra Tenancy Act. Occupancy rights cannot be extended by re-marriage though they may be extinguished by it; and a widow continues to be an occupancy tenant with a life-interest only if such rights are not terminated by the zamindar on her re-marriage. If the widow fails to claim statutory rights herself during her life, her sons by the second husband cannot claim such rights

AGRA TENANCY ACT (1926), S. 25.

and plead that in bar of ejectment. (*Darling, S. M.*) RAM PERSHAD *v.* MOHAMMAD SHAFI. **1937 R.D. 44.**

——**S. 25**—*Applicability—Widow of deceased occupancy tenant recorded in more numbers of plots than her husband—Presumption as to extra plots—Succession to—If governed by S. 25.*

Where it is found that a widow succeeding to the interest of her husband is recorded as occupancy tenant in a larger number of plots than her husband, it does not lead to the conclusion that she took up the additional plots for cultivation on her own account and in her own right. In the absence of evidence to show that she took them upon her own account, the balance of probability is in favour of the view that her husband took them up rather than his widow. Consequently the additional numbers cannot descend according to S. 25 of the Agra Tenancy Act. (*Drake Brockman, S.M.*) HAR KESH *v.* MUMTAZ ALI KHAN. **1936 R.D. 381.**

——**S 25**—*Widow of occupancy tenant re-marrying—Ejectment—Limitation.*

Where a widow of an occupancy tenant remained in possession and subsequently re-married, if the landlord wants to eject her, he must sue her within 12 years of the date of the knowledge of the landholder of the fact of re-marriage. (*Darling, S.M. and Bomford, J.M.*) MUSST. TETRA *v.* SYED ZAHID ALI. **1938 A.W.R. (B.R.) 2=1938 R.D. 130.**

——**S. 25**—*Grove land devolving on widow—Re-marriage—Effect—If incurs liability to ejectment—Grove and tenant land—Distinction.*

A grove descends on the holder's widow as personal property, while the succession of a widow comes to an end with her re-marriage under the Tenancy Law. The widow succeeding to the grove does not render herself liable to ejectment by re-marriage. (*Drake Brockman, S. M. and Knox, J.M.*) SHEO BARTI *v.* HANSRAJ. **1936 R D. 481.**

——**S. 25**—Sir *land in possession of Hindu widow—Alienation of—Subsequent setting aside—Effect*—Sir *land—If reverts to reversioners—Ex-proprietary tenancy—If extinguished—Status of tenants admitted by alienee.*

When a Hindu widow in possession of *sir* land as a life-estate holder alienates her proprietary rights, and the alienation is subsequently set aside on a suit by the reversioners, all *sir* land in the possession of the widow at the time of the alienation must revert as *sir* to the reversioners at her death or on the alienation being set aside. If the alienee has admitted any person to tenancy of *sir* land otherwise than as occupancy tenant, such persons will become tenants of *sir*. The ex-proprietary tenancy of the widow must be deemed to come to an end with her death or with the setting aside of the alienation. Otherwise her tenancy would be one falling under S. 25 (2) of the Agra Tenancy Act, and there is no valid reason why her heirs to the exclusion of her husband's reversioners should come into possession of land which she would be entitled to hold and enjoy only for her life. (*Drake Brockman, S.M. and Knox, J.M.*) RABAL SINGH *v.* RISAL SINGH. **1936 R.D. 355.**

——**Ss. 25 (1) and (2)**—*Applicability—Occupancy tenant dying while Act of 1901 was in force*

AGRA TENANCY ACT (1926), S. 25.

and succeeded by widow—Death of widow after Act of 1926 came into force—Devolution of tenancy.

Per *Bennet, Ag.C.J.*—Where an occupancy tenant died while the Agra Tenancy Act of 1901 was in force, and was succeeded by his widow under S. 22 of that Act, and the widow died after the Agra Tenancy Act of 1926 had come into force the tenancy devolves upon the nearest surviving heir of the last male tenant in accordance with the table of succession for occupancy tenancies and does not devolve upon the heirs of the widow under S. 25 (2), Agra Tenancy Act of 1926. The widow cannot come under S. 25 (2) because she has "acquired the right" under S. 22, Tenancy Act of 1901, to hold the tenancy of her husband "till her death or re-marriage"; and the "right" she acquired had the "liability" to forfeiture on her re-marriage. To put this widow under S. 25 (2), Tenancy Act of 1926, would "affect her right and liability" which thing is prohibited by S. 6, U. P. General Clauses Act. Moreover, the words in S. 24, Tenancy Act, 1926: "When a male .... tenant dies" mean "in the case of a male tenant's death" and the words do not imply that the male tenant should die when the new Act is in force, but the section will apply in the case of a widow dying after the new Act who has succeeded under the former Act. The case therefore comes under S. 24 of Act III of 1926 and the collaterals who shared in the cultivation are entitled to succeed, and the widow comes in under S. 25 (1) as a "widow of class 2 in S. 24."

Per *Iqbal Ahmad, J, concurring on different grounds.*—S. 6, U. P. General Clauses Act, cannot be invoked in support of the conclusion that the succession to the holding in the case is governed by S. 25 (1) of the present Tenancy Act. S. 6 is confined in its operation to right, privilege, obligation or liability acquired, accrued or incurred under any enactment that is repealed. S. 6, General Clauses Act, has no application to contingent rights. Further, though according to S. 22, the interest inherited by the widow was terminable on her death or re-marriage, it cannot be said that by succeeding to the holding she "incurred" any "liability" under the former Act. Neither death nor re-marriage is a liability though both, because of the provisions of S 22, had the effect of terminating the interest of the widow in the holding. Further, S. 24 is not applicable to a case in which a male tenant died before the present Act came into force and was succeeded by his widow who died after the passing of the present Act. However the case is governed by S. 25 (1) as the words "an interest in a holding under S. 24" mean an interest in a holding analogous to or similar to the interest prescribed by S. 24.

Collister, J., concurring—S. 25 (1) applies to the present case, as words in S. 25 (1) "who has inherited an interest under S. 24" must be deemed to mean "who has inherited an interest which can be held under S. 24."

Per *Ganga Nath, J, concurring*—The case is governed by S. 25 (1) as the words "under S. 24" in S. 25, Cl. (1) mean "from a male tenant." In order to attract the application of S. 24, the only condition that is necessary, is that the tenancy should have belonged to a male tenant.

Per *Bajpai, J., dissenting.*—The succession to the tenancy under the circumstances of the case

would be governed by S. 25 (2) of the Act. (*Bennet, Ag.C.J., Iqbal Ahmad, Collister, Bajpai and Ganga Nath, JJ.*) DULAR PANDAY *v.* NANDA BUDHAI. I.L.R.(1938) All. 563=11 R.A. 61=1938 A.L.R. 578=1938 A.L.J. 585=1938 A.W.R. (H.C.) 385=176 I.C. 226=1938 R.D. 628= A.I.R. 1938 All. 396 (F.B.).

——Ss. 25 (1) and (2) —*Applicability—Widow succeeding to husband as co-tenant under Act of 1901—Death of after 1926—Succession—Daughter's son not co-sharing with grandfather—Rights of.*

The son of the daughter of a widow who succeeded her husband as co-tenant in an occupancy holding is not entitled to be recorded as co tenant in succession to the widow when he has never co-shared with his grandfather, S. 25 (1) of the Agra Tenancy Act govern the case, and not S. 25 (2). The fact that the widow succeeded under the Act of 1901, would not make S 25 (2) applicable. (*Bomford, J.M.*) MAHADEO MALLAH *v.* RUM DAS MALLAH. 1938 R.D. 123=1938 A.W.R. (B.R.) 84.

——S. 26—*Co-tenancy—Proof—Claim to share holding with paternal cousin—Proof required of claimant.*

Mere jointness in business or indeed in living generally does not connote co-tenancy. A person claiming a right to share a holding with his paternal cousin must prove that the holding descended from his grandfather. (*Bomford, J.M.*) BARHARI SONAR *v.* BUNNI LAL. 1937 R.D. 100.

——S. 26—*Inheritance — Competition between separated brother and nephew.*

Under the tenancy law as amended by S. 26 of the Agra Tenancy Act, when one of the separated brothers die, the other must be regarded as the heir of the deceased brother and he would take the occupancy holding of the dead brother, in preference to the nephew. But in the case of fixed rate holding it would devolve according to Hindu Law. (*Darling, S.M. and Bomford, J.M.*) UDIT NARAIN AHIR *v.* RAM HARAKH AHIR. 1938 R.D. 429=1938 A.L.J. (Supp.) 46 = 1938 A.W.R. (B.R.) 231.

——S. 26—*Object and scope of.*

The whole object of the legislature in enacting S. 26 of the Tenancy Act is to make it clear that even in the case of persons who are joint in estate, they shall be deemed to be tenants in common for the purposes of succession so far as the tenancy rights dealt with by the Agra Tenancy Act are concerned. It cannot be read in any way to mean that even in the case of persons among whom there is no jointness in estate, for (*e.g.*), members of a Mahomedan family, any of the occupancy tenants will have rights in the occupancy holding which can in any way be analogous to the rights of co-parceners in a joint Hindu family. (*Bennet and Verma, JJ.*) DWARKA DAS *v.* RAFIUDDIN. I.L.R. (1940) All. 159=188 I.C. 389=1940 A.W.R. (H.C.) 188=1940 R.D. 12 =1940 A.L.J. 310 =A.I.R. 1940 All. 218.

——S. 26—*Scope and effect—Tenant of holding being head of joint Hindu family—Presumption that whole family is the tenant or that Zamindar contracted with whole family—If arises.*

As between a Zamindar and his tenant, who happens to be the head of a joint Hindu family there can be no general presumption that the Zamindar has made his contract with the whole

family; and there is no burden cast on the Zamindar to prove that he made his contract only with the head of the family acting as an individual and not as representative of a joint family. To hold otherwise would render meaningless the provisions of S. 26 of the Agra Tenancy Act. There is no tenancy existing between the Zamindars and the other members of the family. (*Drake Brockman, S.M. and Knox, J.M.*) RAM OUDH DAS *v.* KAULESHAR. 1936 R.D. 444.

——S. 26—*Uncle's grandson—Right to succeed as a co-sharer.*

A grandson of the paternal uncle of the deceased cannot claim to succeed as co-sharer. (*Darling, S.M. and Bomford, J.M.*) SARJU KUMAR MUKERJI *v.* INDERJIT SINGH. 1937 R.D. 166 (2).

——S. 27—*Scope—Sub-lease of holding— Consideration received in advance—Validity.*

A sub-lease of a holding executed by the tenant in consideration of money paid in advance is one in contravention of S. 27, Agra Tenancy Act, and is void. (*Drake Brockman, S.M. and Knox, J.M.*) PARBHU SHANKER *v.* SUKHA. 1936 R.D. 108.

——S. 27—*Sub-lease in contravention of—If void or voidable.*

A sub-lease in contravention to S. 27 of the Agra Tenancy Act is voidable and *locus penitentiae* is always given to the tenant to enable him to eject the sub-lessee within the time to be fixed by Court. (*Marsh, S.M. and Mehta, J.M.*) JAMUNA MISRA *v.* JAI GOVIND RAM TEWARI. 1939 R.D. 538=1939 A.W.R. (B.R.) 238.

——S. 27—*Void sub-lease by one of the co-tenants—Others, if affected.*

The action of one of the co-tenants would bind the other co-tenants and hence it is up to the latter to see that he does not enter into void leases. When there is an illegal sub-lease by one, it would entail an ejectment of all. (*Marsh, S.M. and Mehta, J.M.*) KISHEN *v.* KAMTA PRASAD. 1939 R.D. 309.

——Ss. 27, 34 (1), 82 (1) and 83—*Scope—Occupancy tenant—Transfer of plots to creditor in consideration of loan by way of mortgage—Validity—Ejectment—Right of landlord—Suit by tenant to eject mortgagee as sub-tenant—Competency—Maxim,* in pari delicto, *etc.—Applicability—Status of mortgagee.*

An occupancy tenant borrowed a sum of Rs. 300 from a person and admitted the lender to the occupation of three plots of land by an agreement in writing under which the lender was to pay a certain sum to the Zamindar by way of rent and to appropriate the balance of the yield towards his interest. The lease was for five years. But even after the lapse of years the lender continued in possession and the borrower-tenant sued to eject him as a sub-tenant.

Held, that the transfer was really a mortgage, and having been made in consideration of a loan was prohibited by S. 27 of the Agra Tenancy Act; and that the illegal transfer enabled the landholder under S. 34 (i) and S. 82 (1) to eject both the transferor and the transferee without mercy and without giving them an opportunity for repentance under the proviso to S. 83.

Held, further, that the mortgagee was in effect a non-occupancy tenant, but not one whose period expired at the end of the agricultural year; it would expire only when he had been paid back his

money; and that as between him and the transferor the maxim "*in pari delicto*, etc." applied, and the Revenue Court would not help the transferor to eject his transferee as a sub tenant. (*Drake Brockman, S.M. and Knox, J.M.*) TOFA *v.* KACHERU. **1936 R.D. 474.**

——**Ss. 27, 34 (1) and 882**—*Scope—Sub-lease by tenant to another to pay creditor of tenant of annual sum and rent to zamindar—Validity of sub-lease—Tenant—Liability to ejectment.*

A tenant, in order to pay up a debt due by him to his creditor, gave a registered sub-lease to a third person, an agent of his creditor, the arrangement being that the sub-lessee should pay annually a certain sum to the creditor of the tenant, as well as the rent to the zamindar. The tenant-lessor was not to get anything at all.

Held, that the sub-lease being a transaction prohibited by Ss. 27 and 34 (1) of the Agra Tenancy Act, was illegal and the fact that it was not in favour of the creditor did not make it legal. The tenant was consequently liable to ejectment under S. 82 of the Act on the ground of illegal sub-letting. (*Knox, J.M.*) LACHHMAN SINGH *v.* KUNJI KUER. **1936 R.D. 318 (2).**

——**S. 28**—*Former or lessee of proprietary rights—Holding over—Fictitious admission of son as sub-tenant—Status of latter—If* co thekadar *or sub-tenant or non-occupancy tenant.*

Where a person takes a farm or lease of proprietary rights and acts as a *thekadar* for several years, and towards the expiry of his *theka* pushes in his own son or other near relation as a tenant or sub-tenant under him, at an inadequate rent in the hope of retaining a hold on a substantial area of the land covered by his *theka*, and holds over after the expiry of the term, the sub-letting must obviously be held to be fictitious. He cannot be regarded either as a sub-tenant or as a *co-thekadar* with his father. Both of them should be recorded as non-occupancy tenants under head 10 of the *khautani bila tasfia lagan.* (*Drake Brockman, S. M. and Knox, J.M.*) RADHEY MOHAN LAL *v.* MOHAMMAD USMAN KHAN. **1936 R.D. 133.**

——**S. 29 (1) and (4)**—*Occupancy tenant mortgaging and sub-letting his plots—Liability to ejectment.*

Where the occupancy tenant of a holding of 4 numbers has mortgaged with possession two plots and illegally sub-let the other two, he deserved to be ejected. (*Darling, S M. and Mehta, J M.*) VINDHYACHAL RAI *v.* MAHOMED HUSAIN. **1939 A.W.R. (B.R.) 13=1939 R.D 305.**

——**Ss. 29 and 32 (3)**—*Widow holding as heir of occupancy tenant—Sub-lease by—Duration of.*

A sub-lease granted by a widow holding as heir to an occupancy tenant under S. 29 of the Agra Tenancy Act, subsists after her death for five years as laid down in S. 32 (3) of the Act. (*Darling, S M. and Bomford, J.M.*) KULDIP SINGH *v.* RAFIQ HUSAIN. **1937 A.W.R. 620=1937 R.D. 286.**

——**S. 29 (4)**—*Sub-lease of five years—Need for registration.*

Under S 29 (4) of the Agra Tenancy Act, a sub-lease of five years must be registered. The fact that the Government in 1885 exempted five years agricultural leases from the necessity of being registered cannot be invoked in face of the clear requirements of a subsequent law. (*Darling,*

S.M. and Bomford, J.M.) MANGRU RAM *v.* CHHEDI. **1937 R.D. 334.**

——**S. 29 (4)**—*Unregistered lease—Possession in pursuance of—Admissibility of document.*

Where a lease required to be registered by S. 29 (4) of the Agra Tenancy Act, is not so registered, though it might not protect parties, if the zamindar had come down on them for illegal sub-letting, is certainly evidence as to the nature of the transaction between the parties. (*Darling, S. M. and Bomford, J.M.*) NANDAN *v.* ZAHUR. **1938 R D. 381=1938 A.W.R. (B.R.) 166.**

——**S. 29 (6)**—*Benefit under—Person nearly blind—If entitled to.*

A tenant who was not a blind man, but was only a weak-sighted man is not entitled to the benefits of Cl. (6) of S 29 of the Tenancy Act which applies only to blind persons. (*Darling, S.M. and Bomford, J.M*) MUKARRAM ALI KHAN *v* PURAN. **1938 R.D. 421=1938 A.W.R. (B.R.) 179=1938 A.L J. (Supp) 29.**

——**S. 32 (1) and (3)**—*Widow of occupancy tenant—Sub-lease by—Validity—Duration of—Ejectment of sub-tenant—Landlord's right.*

A sub-lease granted by a widow of occupancy tenant is valid only for her life and will not continue to be effective after her death. After the death of the widow the sub-tenant cannot be regarded as holding under a valid sub-lease under S. 32 (3) of the Agra Tenancy Act. S. 32 (1) would apply to the case and the landlord has the option to allow the sub-tenant's interest to continue or to eject him under S. 44, as holding without valid admission. No suit will lie under S. 86. (*Drake Brockman, S.M. and Knox, J.M.*) MAHOMED SAJJAD ALI *v.* BISHAMBHAR DAS. **1936 R.D. 496.**

——**S. 32 (2)**—*Applicability—Benefit under—Right to claim—Extent of and limits to.*

The benefit of S. 32 (2) of the Agra Tenancy Act is limited to the lifetime of the tenant or for 10 years whichever is shorter. The section cannot be read as covering the lifetime of the successors of the original mortgaging tenant. The fact that a person holds under a valid mortgage is not by itself a ground on which he can claim the benefit of S. 32 (2). (*Darling, S.M. and Bomford, J. M.*) BALGOVIND *v.* SATNARAIN LAL. **1938 R.D. 174=1938 A.L.J. (Supp.) 2=1938 A W.R. (B.R.) 93**

——**S. 32 (2)**—*Conduct of tenant tantamount to abandonment—Mortgagee or lessee—If entitled to benefit of S. 32 (2).*

If the conduct of the tenant-in-chief is such as to suggest that he is abandoning his holding to the detriment of a mortgagee or lessee, then the mortgagee or lessee is entitled to the benefit given to him by S. 32 (2) of the Agra Tenancy Act. (*Darling, S M and Bomford, J. M.*) NAZEER HAIDER *v.* BADRI SINGH. **1937 R D. 85.**

——**S 32 (2)**—*Benefit of—When available—Usufructuary mortgage by occupancy tenant—No term fixed in mortgage—Surrender to landlord by representative of mortgagee.*

Where an occupancy tenant executes a usufructuary mortgage in which no term is fixed and later on the representatives of the occupancy tenant surrenders the holding to the zamindar and the mortgagee is sued under S. 44 for ejectment by the zamindar, he is entitled to the benefit of the provisions contained in S. 32 (2) of the Agra

AGRA TENANCY ACT (1926), S. 32.

Tenancy Act for the mortgage is a subsisting one and is in force and no question of the term or 'the remainder of the term of the mortgage' having expired can arise. (*Bennet and Verma, JJ.*) MAHARAJA OF BENARES *v.* BAULESHWAR SINGH. **181 I.C. 852=11 R.A. 619=1939 R.D. 101=1939 A.L.J. 120=1939 A.W.R. (H.C.) 150=A.I.R. 1939 All. 210.**

——**Ss. 32 and 99**—*Tenant filing surrender but not paying process-fee and resiling from same—Effect—Landlord ejecting sub-tenant - Right of tenant to sue under S. 99, for illegal ejectment.*

Under S. 32 of the Agra Tenancy Act to constitute a surrender which would extinguish the interest of the tenant, there must be cessation of cultivation. A mere notice of surrender does not constitute surrender. A tenant who files a surrender but who never pays the necessary process-fees and resiles from his wish to surrender,—the file of the case being ordered to be deposited—remains liable for the rent of the holding and there is no change in his status. He must be regarded as remaining in possession at least constructively of the holding. If the landholder ejects the sub-tenant acting on the alleged surrender, that amounts to illegal ejectment of the tenant giving the latter a right to sue under S. 99 of the Agra Tenancy Act. (*Darling, S. M. and Bomford, J. M.*) SARUP KOHAR *v.* PARBHU SHANKAR. **1938 R.D. 13=1937 A.W.R. 1205.**

——**S. 34**—*Mortgage of tenancy—If void.*

Mortgage of a tenancy may be illegal and result in justifying ejectment by the landlord, but as between the mortgagor tenant and his mortgage, the Board will not treat the contract void. 17 R. D. 370, Ref. to. (*Darling, S. M. and Bomford, J. M.*) HARSARAN PATHAK *v.* ABDULLAH KHAN. **1937 R D. 58.**

——**Ss. 34 and 82**—*Mortgage of occupancy holding—Possession through Civil Court on the basis of—Title of person in possession—Liability for ejectment.*

Where a mortgagee of an occupancy holding obtains possession though it be through Civil Court, but only on the basis of his mortgage, he cannot be said to derive any title on the basis of a decree passed on a void deed of transfer, so far as the rent Court is concerned. The transfer being void, the transferee is liable to be ejected and the Agra Tenancy Act does not provide any period for the ejectment of a transferee under a void transfer. (*Mehta, S. M.*) KUBER UPADHYA *v.* GANGA PRASAD GIR. **1939 R.D. 34 (2)=1939 A.W.R. (B.R.) 144.**

——**Ss. 34 and 86**—*Mortgage executed by occupancy tenant—Last legitimate occupancy tenant dying without heirs—His mother recorded as occupancy tenant—Suit by her to eject mortgagee as sub-tenant—Status of mortgagee—Mother if bound by the liability on the holding.*

An occupancy tenant executed a mortgage of his holding in favour of the defendant who was allowed to remain in possesion. He was succeeded by his son and grandson. After the death of the latter without heirs, his mother was recorded as an occupancy tenant in his place. There was no formul re-admission of the woman to the tenancy, as a statutory tenant, but the Zamindar accepted her as tenant. She sued to eject the defendant as a sub-tenant.

AGRA TENANCY ACT (1926), S. 35.

Held, the plaintiff though she was not heir to her son in the technical sense, took the holding as if she was heir. The defendant is not a sub-tenant. He held on as a mortgagee of the occupancy holding, with her consent. He is therefore only a licensee and not a trespasser. So he cannot be ejected as a sub-tenant. The plaintiff must be held to have accepted the liability on the holding. (*Darling, S. M. and Bomford, J. M.*) GOBINDI KUNWAR *v.* SURJAN SINGH. **1937 R.D. 525.**

——**S. 34 (1)**—Applicability—Occupancy tenant—Transfer to creditor in consideration of loan—Landlord's right to eject tenant and transferee. *See* AGRA TENANCY ACT, Ss. 27, 34 (1), 82 AND 83. **1936 R.D. 474.**

——**Ss. 34 (1), 82 (1) and 85 (3)**—*If applies to fixed rate tenant.*

Ss. 34 (1), 82 (1) and 85 (3) of the Tenancy Act can have no application to a fixed rate tenant, as such a tenant is given the right of transfer by the Act. (*Iqbal Ahmad and Bajpai, JJ.*) ASHRAFI SINGH *v.* RAJMATA CHANDRIKA PRASAD KUARI. **1940 A.L.J. 261=1940 A.W.R. (H.C.) 248=1940 R.D. 175=A.I.R. 1940 A. 389.**

——**S. 35**—*Scope—If exhaustive—Purchaser of proprietary right in land from widow with life-estate—Land being* sir *of purchaser—Transfer of proprietary right by purchaser—Declaration of exproprietary tenancy—Death of widow and setting aside of sale by reversioners in Civil Court—Effect—Proprietary and ex-proprietary rights—If terminate.*

A purchaser of certain lands from a widow with a life-estate subsequently sold his proprietary rights in the lands to the appellant. At the time of the latter sale the transferor held certain lands as *sir*, and proceedings were taken to demarcate this *sir* and to declare his ex-proprietary rights. After the death of the widow, the reversioners sued in the Civil Court and got the sale by the widow set aside.

Held, that the proprietary right transferred to the appellant by his transferor having been only a limited right, the ex-proprietary tenancy terminated when that interest came to an end, the proprietary interest of the appellant having itself terminated. S. 35 of the Agra Tenancy Act is not necessarily exhaustive and it is not the law that a tenancy can only be extinguished in the manner laid down in S. 35. (*Drake Brockman, S. M.*) SHIB CHARAN *v.* SURAJ PRASAD. **1936 R.D. 345.**

——**Ss. 35 and 107**—*Succession—Widow tenant acquiring rights of occupancy—Sub-letiing of entire holding and retirement to another village—Right of daughter's son to succeed as heir.*

Where a widow tenant who has acquired occupancy rights in a holding in her own right leaves the village and retires to another village after sub-letting her whole holding, her daughter's son who does not even allege co-sharing with his grandfather cannot succeed to the widow on her death and is not entitled to be recorded as occupancy tenant in succession to the widow. (*Darling, S. M. and Bomford, J. M.*) RAM DAYAL *v.* BINDESHWARI PRASAD. **1938 R.D. 121=1938 A. W.R. 72 (B.R.).**

——**Ss. 35 (1) (f) and 99**—*Scope—Lands submerged in river—Reformation—Claim to as forming part of occupancy tenancy—Dispossession by*

landlord—Remedy of claimant—Failure to take action within six months—Effect.

A person who claims that certain plots of land which were submerged in a river for some years formed part of his occupancy tenancy and that on their reformation his right has revived, must on dispossession by the landholder, must seek his remedy under S. 99 of the Agra Tenancy Act within 6 months of such dispossession. His remedy lies under S. 99, and if he fails to enforce the claim within that period, his rights, if any, would be extinguished by S 35 (1) (*f*) of the Act. (*Drake Brockman, S M. and Knox, J.M.*) RAM SANEHI MISRA *v.* LAKHRAJ SINGH. **1936 R.D. 336.**

——**Ss. 36 and 44**—*Merger of occupancy rights in the proprietary rights—No new contract of tenancy brought into existence—Status of sub-tenants —Suit for their ejectment.*

The plaintiffs were the occupancy tenants, and the defendants were sub-tenants. Subsequently the occupancy rights of the plaintiffs merged in their proprietary rights by virtue of a partition of the mahal. The plaintiffs brought a suit to eject the defendants as trespassers under S. 44.

Held, the defendants now occupy the position of the tenants in chief of the holding. But in the absence of a new contract of tenancy, they can only be treated as non-occupancy tenants who are liable to ejectment as such. (*Darling, S. M.*) UMRAO SINGH *v.* DINA SINGH. **1937 R.D. 522 (1).**

——**S. 37**—*Applicability and scope—Partition of rent-free tenure—Jurisdiction of Civil Court—If excluded.*

There is no warrant for holding that S. 37 of the Agra Tenancy Act extends to all lands held under one tenure, lease, engagement or grant. The section is confined to land held by tenants. It is only in the cases of suits in which rent paying tenancy lands are sought to be partitioned that the jurisdiction of Courts other than Revenue Courts acting under S. 37 is excluded. The object of the section is to confer exclusive jurisdiction on Revenue Courts where rent payable by a tenant is to be split. In the case of rent-free tenures the jurisdiction of the Civil Court is not excluded and the Civil Court is competent to divide specific plots constituting a proprietary tenure. A rent-free tenure can therefore be partitioned by a Civil Court, otherwise than under S. 37. (*Niamatullah J.*) GAYA MISRA *v.* RAMMANOG MISSER. **172 I C. 646=10 R A. 405=1938 A. L.R. 13=1938 R.D. 20=1937 A.W.R. 949=1937 A.L.J 943=A I R. 1937 All. 794**

——**S. 37**—*Applicability—Transfer of a portion of the holding by a fixed rate tenant.*

S. 37 of the Agra Tenancy Act does not apply to the case of a transfer of a portion of his holding by a fixed rate tenant. (*Iqbal Ahmad and Bajpai, JJ.*) ASHRAFI SINGH *v.* RAJMATA CHANDRIKA PRASAD KUARI. **1940 A.L.J. 261= 1940 A.W.R. (H.C.) 248=1940 R.D. 175=A.I.R. 1940 A. 389.**

——**S. 37**—*Co-tenants — Private partition—Finality—Suit for partition—If barred.*

Under the Agra Tenancy Act, 1926, co-tenants can divide up their holding by agreement; and provided that the agreement is definite and clear, and intended to provide for a permanent division, none of them can afterwards challenge it and sue for partition. But in the absence of sufficient

evidence to prove that there had been a permanent partition of the holdings, a suit will lie for partition. The mere fact that some of the fields have been separately mortgaged by the respective tenants does not prove that there has been a final or definite partition. Such mortgage transactions are by no means unknown in joint holdings. (*Knox, J.M.*) ANANT MUNI DUBE *v.* RAM SARUP DUBE. **1936 R.D. 30 (1).**

——**S. 37**—*Co-tenant—Suit for division of tenancy—Plaintiff absent from village for over 40 years—Plaintiff's name entered in papers throughout—Presumption—Abandonment — Burden of proof.*

Possession by one co-tenant is, as a general rule, possession on behalf of all the co-tenants. The mere fact that a co-tenant has been absent from the village for 40 or 50 years cannot lead to the presumption that he has abandoned or surrendered his interest in the tenancy, when his name has been throughout consistently entered in the papers. In a suit by him under S. 37 of the Agra Tenancy Act the defendant, if he wants to non-suit the plaintiff must prove that the papers are wrong and that the plaintiff had abandoned or surrendered, and that his own possession was adverse to the plaintiff for 12 years. (*Drake Brockman, S.M. and Knox, J.M.*) DEBI DIN AHIR *v.* BECHU AHIR. **1936 R.D. 342.**

——**S. 37**—*Division of ancestral holding—Proof—Holdings recorded in names of members —If they are still joint.*

Members of a family partitioned their ancestral holding and separate holdings were recorded in the names of separate members, at the settlement of 1320 F. There was no suggestion that the partition was not acquiesced in by the Zamindars. The question arose about the rights of survivors in regard to the holdings of a member who died.

Held, the members are not co-tenants in the holdings and cannot claim that the interests of all of them survive in the whole holding. (*Darling, S.M. and Bomford, J.M.*) SARJU KUMAR MUKERJI *v.* INDERJIT SINGH. **1937 R.D. 166 (2).**

——**S. 37**—*Division of holding—Duty of Court —Remedy of co-tenant claiming to be in possession as mortgagee.*

In dividing up a holding the Court must act within the four corners of S. 37 of the Agra Tenancy Act leaving a co-tenant who claims to be in possession as a mortgagee to get his rights asserted and an entry made in the papers. (*Mehta, S.M.*) GAYA DIN *v.* BABUA. **1940 R.D. 56=1940 A.W.R. (B.R.) 46.**

——**S. 37**—*Division of holding—Right to—Donee from widow of joint Hindu family in possession after mutation.*

Where a widow of a member of a joint Hindu family, applies for mutation soon after her husband's death, and the remaining members do not intervene and object, and the widow thereafter continues in possession and executes a deed of gift in favour of her daughter's sons, they are entitled to ask for a division under S. 37 of the Agra Tenancy Act. (*Mehta, J.M.*) JAGANNATH *v.* JEOT TELI. **1940 R.D. 81=1940 A.W.R. (B.R.) 37.**

——**S. 37**—*Division from part of a holding—If open.*

A suit under S. 37 of the Agra Tenancy Act cannot be maintained for a division from part of

a holding. (*Mehta, J.M.*) DULESARA *v.* RUPAN RAI. 1939 R.D. 23=1939 A.W.R. (B.R.) 120.

——S. 37—*Division of holding—Effect—If can affect succession.*

A division of holding under S. 37 of the Tenany Act cannot affect a person's right of succession. (*Bennet and Verma, JJ.*) MAHRAJI KUER *v* MANGAI PANDE. 188 I.C. 310=1940 A.W.R. (H.C.) 11=1940 R.D. 9=1940 A.L.J. 21=A.I.R. 1940 All. 199.

——S. 37—*Division of holding—Absence of landlord's consent—Binding character.*

A division of a holding among the tenants without the landlord's consent in writing is not binding either on the landlord or on the tenants in their relation with the landlord; it would be binding only on the tenants *inter se.* (*Drake Brockman, S.M. and Knox, J.M.*) DHANNI *v.* SARJU PRASAD SINGH. 1936 R.D. 202.

——S. 37—*Division of holding—Successive suits for—Maintainability.*

It is impossible to hold that a fresh suit for division of a holding cannot lie, merely because a previous suit has been dismissed for default or withdrawn; so long as it is admitted that the parties are co-tenants in the holding, there is a continuous cause of action and it would be open at any time for a co-tenant to claim a division. (*Drake Brockman, S.M. and Knox, J.M.*) AMJAD *v.* MOHAMMAD MUSTAFA. 1936 R.D. 177.

——S. 37—*Division of tenancy—Proof of—Grouping of fields as separate holdings in settlement record and separate enhancement of rent—If evidence of final division.*

The mere fact that groups of fields are recorded as separate holdings at settlement or that rent is enhanced on them separately would not be sufficient evidence to prove a definite final division made with the consent of the landlord. (*Drake Brockman, S.M. and Knox, J.M.*) DHANNI *v.* SARJU PRASAD SINGH. 1936 R.D. 202.

——S. 37—*Division of holding—Who can ask for—Joint grove-holders—Acquisition of muqarrardari rights by one—If can affect the right of others to ask for division of holding.*

S. 37 of the Agra Tenancy Act does not lay down what type of tenants could ask for division of the holding. If one of several joint grove-holders *qua* tenants subsequently acquires muqarrardari rights, that could not enable him to stand in the way of the other co-sharers getting their shares defined on the ground that the grove had lost its character *qua* one of the co-tenants his interests should be in the maintenance of the holding. But if he proves that the grove had lost its character, then under S. 197 read with S. 86, the muqarrardar can get rid of his co-tenants. (*Mehta, S. M. and Harper, J.M.*) BECHAN SINGH *v* RAM SAGAR SINGH. 1940 R.D. 14=1940 A.W.R. (B.R.) 21.

——S. 37—*Division of holding—Entry in village papers from 1272 onwards—Effect—Plea of withdrawal—Onus—Facts to be proved.*

Where as early as from 1272 a person's name is entered in the village papers as tenant and the entry has continued in the last settlement in 1319 and also continues up to the present day in 1343 and the entry is in favour of several tenants, then the onus lies very heavily on that co-tenant, who alleges that the other co-tenant had withdrawn from that holding. He will have to show that some overt act was committed by which the co-tenant's right was denied and that 12 years have passed since that period Else he cannot resist a suit under S. 37 of the Agra Tenancy Act for the division of the holding. (*Mehta, J.M.*) BHARAT SINGH *v.* PATHAK HAR SAHAI. 1939 R.D. 105=1939 A.W.R (B.R.) 167.

——S. 37—*Division of a holding—Right to—Entry in last settlement as occupancy holding in name of a woman—Reversion to family on her death—Inference.*

Where there is no explanation as to how a holding became the sole possession of a woman and reliance is placed solely on the settlement entry in 1308 in the name of the woman as an occupancy holding and where the previous entry shows that the holding belonged to the family of which the woman was a member and the subsequent entries bear out the view that it reverted to the family on her death, a son of that woman could not resist a division of the holding on the ground that it descended to him from his mother. (*Mehta, S.M. and Harper, J.M.*) BHAGWAN PRASAD *v.* BINDESHWARI PRASAD. 1939 A.W.R. (B.R.) 34=1939 R.D. 177.

——S. 37—*Private division—If and when can affect law of succession.*

A private division of a holding cannot supersede the law of succession unless the division is definite, clear and intended to provide for a permanent division. (*Harper, J.M.*) ABDUL GAFOOR *v.* ALI ABBAS. 1940 R.D. 157=1940 A.W.R. (B.R.) 74.

——S. 37—*Right to apply for division of holding—Dismissal of a prior suit* bila tajwis—*If bars right.*

Under S. 37 of the Agra Tenancy Act one or more co-tenants of a holding can apply for division thereof. The fact that a prior suit for division of the holding was in fact compromised, but the suit was dismissed *bila tajwis* cannot deprive a plaintiff of his right under the Act. (*Darling, S.M.*) NAIN SUKH *v* SUKHI. 1938 A.W.R. (B.R.) 351=1938 R.D. 849.

——S. 37—*Suit under—Widow inheriting joint share of her husband in occupancy holding and remarrying—Absence of any recognition of her as tenant—Right to ask for division of holding.*

Where a widow inheriting from her husband the joint share in an occupancy holding, remarries another co-tenant, she is not entitled to ask for a division of the holding under S. 37 of the Agra Tenancy Act, when she is unable to establish that she was at any time after her remarriage recognized as a tenant. (*Harper, J.M.*) KALAWATI *v.* HORI LAL. 1940 R.D. 196 (1)=1940 A.W.R. (B.R.) 72.

——S. 37—*Transfer contrary to—Suit for ejectment—Forum.*

Where area of the fixed rate tenancy is held by a single individual without any co-tenant, a transfer by him of portions of his holding is clearly contrary to S. 37 of the Tenancy Act which only allows a division in two particular cases. Hence the suit for ejectment under S. 82 or for injunction under S. 85 (3) would lie in the Revenue Court. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH I.L.R. (1938) All. 754=1938 A.L.J. 720=177 I.C. 458=11 R.A. 199=1938 A.L.R. 747=1938 A.W.R (H.C.) 522=1938 R.D. 714=A.I.R. 1938 All. 511.

AGRA TENANCY ACT (1926), S. 37.

——**S. 37, Proviso**—*Suit for division of ex-proprietary holding—Landholder not appearing in Court though served—Division, if effective.*

A suit under S. 37 of the Tenancy Act is a matter between tenants and it is not obligatory on the tenants to join the landholder as a party. But under the proviso to the section, a division of the holding is not binding on the landholder unless he agrees thereto in writing. This is a mandatory provision which cannot be ignored. Where therefore in a suit for a division of an ex-proprietary holding, the landholder, though served personally with a notice, took no part in the proceedings, the division of the holding is ineffective for want of the landholder's formal consent in writing. (*Darling, S.M. and Bomford, J.M.*) TOLARAM *v.* MULCHAND. **1937 R.D. 206.**

——**S. 37**—Division of holding—Effect—Mortgage by co-tenant of his share after division—Liability to ejectment. *See* AGRA TENANCY ACT (1926), SS. 82 AND 37—LIABILITY TO EJECTMENT. **1939 R.D. 267.**

——**S. 37 and Land Records Manual, para. 80**—*Division of holding—Requirements of law as to—Private division—Effect—Consent of landlord when can be presumed.*

The law requires that for a division of holding to be binding on the landlord, he must give his assent in writing. The mere division of holding for convenience would not necessarily raise a presumption that the holding has been formally divided up and the joint responsibility of co-tenants to pay the rent has been put an end to. The provisions in para. 80 of the Land Records Manual require that if there has been no writing, then an entry to this effect must be made in the khatauni. This entry should be made even if there has been an oral agreement. The implication of the rule thus is that if all the circumstantial evidence indicates a division with consent and if there is no entry in the khatauni, the fact of consent being in writing may be presumed. (*Mehta, S.M. and Harper, J.M.*) GAZI *v.* RAM GOPAL SINGH. **1940 A.W.R. (B.R.) 57=1940 R.D. 166.**

——**Ss. 37 and 3(14)**—*Suit under S. 37—Appeal—Limitation—Starting point—Analogy of preliminary and final decree, if applies.*

In a suit under S. 37 of the Tenancy Act the final adjudication takes place only when the division is complete and limitation for appeal starts only from that date. The Agra Tenancy Act does not contemplate the existence of a preliminary and a final decree as understood by O. 20, R. 18, C. P. Code. (*Mehta, J.M.*) DULESARA *v.* RUPAN RAI. **1939 R.D. 23=1939 A.W.R. (B.R.) 120.**

——**Ss. 37 and 44**—*Joint living and cultivation by brothers—One of them recorded as occupancy tenant—Disputes—Proper remedy of recorded occupancy tenant.*

Where the plaintiffs and defendants were the sons of the same father and mother and all lived jointly and cultivated jointly and one of them is recorded as occupancy tenant, his remedy, in case of disputes, is under S. 37 of the Agra Tenancy Act and not by a suit under S. 44 against his brothers. (*Marsh, S.M. and Mehta, J.M.*) RAJA RAM *v.* PANCHAM SINGH. **1939 R.D. 492=1939 A.W.R. (B.R.) 217.**

AGRA TENANCY ACT (1926), S. 38.

——**Ss. 37 and 99**—*Recorded co-tenant—Right to apply for partition under S. 37—Zamindars supporting defendants—If affects plaintiff's right.*

A suit by a recorded co-tenant under S. 37 of the Tenancy Act, cannot be met by the plea that the suit ought to be under S. 99 as the zamindars are supporting the defendants, for the possession of one co-tenant is the possession of all co-tenants and as the defendants have not been ousted, it cannot also be said that the plaintiff has been ousted. (*Bomford, J.M.*) RAM AUTAR *v.* GANESH. **1938 R.D. 282=1938 A.W.R. (B.R.) 45.**

——**Ss. 37 and 121**—*Application by recorded tenant for partition under S. 37—Possibility of opposition from landlord—Suit under S. 121, if necessary.*

A tenant who has been recorded as a co-tenant in proceedings under S. 42 of the Tenancy Act, is entitled to sue under S. 37 for partition of his share. The necessity of filing a suit under S. 121, in case of opposition from the landlord, does not apply to the suit of such a recorded co-tenant. (*Bomford, J.M.*) RAN AUTAR *v.* GANESH. **1938 R.D. 282=1938 A.W.R. (B.R.) 45.**

——**Ss. 37 and 121**—*Co-tenant seeking possession against tenants in possession—Proper remedy.*

A co-tenant who is out of possession and desires possession should bring a case under S. 37 of the Tenancy Act. If, however, the zamindar has challenged his status as tenant, he is entitled to bring a declaratory suit under S. 121 of the Act in the first instance. (*Darling, S.M. and Bomford, J.M.*) CHHATARDHARI AHIR *v.* GANESH. **1937 R.D. 584.**

——**Ss. 37 and 121**—*Procedure—Simultaneous under, involving identical questions—Decreeing of one and dismissal of other—Appeal in both—Proper procedure—Decree allowing appeal in one and order of remand in other—Propriety.*

Where a suit is filed by a tenant against his landlord under S. 37 of the Agra Tenancy Act, and the landlord files a suit against the tenant under S. 121, and the former suit is decreed and the latter dismissed, if appeals are filed in both suits, the appellate Court should refrain from passing any final order in one of them, when he remands the other suit to the lower Court for further inquiry, when the same questions are exactly in issue in each case. To allow the appeal in one and to remand the other is not the correct or proper procedure. (*Darling, S.M. and Bomford, J.M.*) RENUKA RAI *v.* SHYAM DUTT RAI. **1938 R.D. 133=1938 A.W.R. (B.R.) 81.**

——**Ss. 37 and 123**—*Applicability — Dispute between plaintiff and defendant claiming share in tenancy—Suit under S. 123—Maintainability — Proper remedy.*

When it is clear that the dispute between the parties is as to a share in the tenancies in dispute, both the plaintiff and the defendant claiming a share in the tenancies, the proper remedy is a suit for partition under S. 37 of the Agra Tenancy Act, as the plaintiff's title can perfectly well be decided in such a suit. A suit for declaration of joint tenancy-in-chief with the defendant is not the proper remedy. (*Knox, J.M.*) ANMOL PANDE *v.* RAM LAL. **1936 R.D. 371.**

——**Ss. 38 and 265**—*Scope—Co-sharer landlords—Exchange of* khudkasht *land by some with occupancy tenant without consent of new co-sharer*

AGRA TENANCY ACT (1926), S. 40.

—Validity—If can be given effect in correction of papers.

The conferment of a right of occupancy is a thing which even a lambardar cannot do except as provided by S. 265 of the Agra Tenancy Act. An exchange by some of the co-sharers with an occupancy tenant of *khudkasht* lands without the consent or knowledge of another new co-sharer operates as a sort of conferment of occupancy rights under S. 38 of the Act, and is therefore not valid so far as the tenants are concerned and cannot therefore be given effect to in proceedings for correction of papers under the Land Revenue Act. (*Drake Brockman, S.M. and Knox, J.M.*) GURDIAL SINGH *v.* MADHO SINGH. **1936 R.D. 136.**

——S. 40—*Application under—Duty of Collector—Local inspection—Necessity.*

When an application under S. 40 of the Tenancy Act is made for the acquisition of certain lands, it must be treated by the Collector as judicial proceedings. A local inspection by the Collector is absolutely necessary. (*Darling, S.M. and Marsh, J.M.*) RAJ KUMAR PRASAD *v.* MANSAB. **1938 A.W.R. (B.R.) 327=1938 R.D. 620.**

——S. 40—*Application under—Local inspection—Necessity.*

Where an applicant asks for acquisition of certain land in order to enable him to run compact and consolidated farms, the Collector should make a local inspection of the land. If the applicant has already the existing *khudkasht* which he genuinely cultivates himself, he is justified in asking for his *khudkasht* to be consolidated, if he can give reasonable grounds for his request. That can only be settled by a local inspection. (*Marsh, S.M. and Mehta, J.M.*) GHULAM MUJTABA BEG *v.* JHANJHAN. **1939 R.D. 528=1939 A.W.R. (B.R.) 228.**

——S. 40—*Acquisition—Justification—Negativing circumstances—Object of S.* 40.

Where the applicant lives in a different tahsil twenty miles away from the village in question and has himself allowed a compact block of his to be sliced away and has never systematically carried *khudkasht* cultivation in the real sense of the term, there is no justification for acquiring a compact block of tenants in order to make a compact block for such an applicant. One of the reasons for enacting S. 40 of the Agra Tenancy Act was that a genuine *khudkasht* holder wanting to secure a compact block should be assisted in his desire of acquiring as enclaves, all other owned plots, remove the chess board pattern of the area and secure compactness. (*Bomford, S. M. and Mehta, J.M.*) MANGAL *v.* SURAT NARAIN PANDEY. **1939 R.D. 125=1939 A.W.R. (B.R.) 168.**

——Ss. 40 and 41—*Application under—Summary dismissal on applicant's failure to appear in person—Propriety.*

Where an application under Ss. 40 and 41 of the Agra Tenancy Act for the acquisition of certain occupancy and statutory holding is summarily dismissed by the Collector on the ground that the applicant has failed to appear in person, though he is represented by his own general attorney and by a Court Mukhtar, the summary dismissal is for no adequate reasons and the order of the Collector is, therefore, liable to be set aside. (*Darling, S.M. and Bomford, J.M.*) HARGUR DASS RAO *v.* MULAIM SINGH. **1937 R.D. 457.**

AGRA TENANCY ACT (1926), S. 44.

——S. 40 (2)—*Compensation for improvements—Planting of trees on field boundary—Whether an improvement.*

Under S. 40 (2), it is not possible to decide whether any compensation is due for improvements, except with reference to the definition of improvement and the sections dealing with a tenant's right to make improvements. The planting of a few trees on a field boundary which does not add to the letting value of a holding, is not an "improvement" as defined in the Tenancy Act. (*Knox, J.M.*) TULAIN *v.* MATA DIN. **1936 A.W.R. 177=1936 R.D. 59.**

——S. 41—*Land held by statutory tenant—Application by landlord for acquisition alleging desire to cultivate himself—When to be allowed—Considerations for the Court.*

When a landlord who is a petty plot proprietor, naturally wanting to cultivate his own land, asserts that he wants the land for his own cultivation, and finding it difficult to get hold of other land applies for acquisition of his land from his statutory tenant, the acquisition has to be allowed. Whether the landlord is fit for doing the work of cultivation or whether it will be worth his while to take it or not is not a relevant consideration. But if the landlord, after the acquisition, fails to take the land into his own cultivation, the tenant will have a remedy in law. (*Drake Brockman, S. M.*) BHIMMA *v.* INAIT ULLAH KHAN. **1936 R. D. 536.**

——S. 41 (b)—*Scope and object of—Waste land re-claimed by tenant by own industry and enterprise—Application by landlord to acquire hoping to get same at less than cost of re-claiming—If to be granted.*

S. 41 (*b*) of the Agra Tenancy Act should be worked with some regard for equity. The section was not intended to allow zamindars to appropriate the fruit of a tenant's labours. Where a landlord applies under the section for acquiring a certain area, which till recently was waste, but which the tenant has, by his industry and enterprise, re-claimed, hoping to getting it at less than the cost of re-claiming the waste, the application cannot be allowed. It would be extremely hard in a case of this kind to calculate the compensation to be paid to the tenant. (*Darling, S.M. and Bomford, J.M.*) KRIPA SHANKAR *v.* BHAWANI. **1937 R.D. 19.**

——S. 43—*Rent, if can be attached before it falls due.*

Under S. 43 of the Agra Tenancy Act, the liability for the rent opens from the day of admission to tenancy and hence it is certainly open to a landholder to attach the rents before the date on which they fall due. (*Darling, S.M. and Bomford, J.M.*) RAM CHANDRA *v.* RAGHUNATH SINGH. **1938 R.D. 175=1938 A.W.R. (B.R) 42.**

——S. 44—Abatement—Suit for ejectment and damages against several persons—Dismissal by trial and appellate Courts—Second appeal—Death of two defendants-respondents—Omission to add legal representatives—Whole appeal—If abates. *See* C. P. CODE, O. 22, R. 4. **1936 R.D. 473.**

——S. 44—*Admission to tenancy—Acceptance of rent on mistaken view as to heirship—If would amount to—Liability to ejectment.*

Where certain persons have been recorded as occupancy tenants in the place of a deceased person, though as a matter of fact they were not his

heirs, the fact that the rent was accepted from such persons under the mistaken impression as to heirship, that cannot amount to an admission to tenancy. It is the person who claims to have been admitted as tenant that must prove that there was the intention to create a new contract of tenancy on the part of the landholder. (*Bomford, S.M. and Mehta, J.M.*) RAM CHARAN LAL *v.* LALOO LAL. 1939 R.D. 59=1939 A.W.R. (B.R.) 155.

——S. 44—*Applicability — Attachment of property in execution—Lease by proprietor pending attachment—Validity—Lease at low and inadequate rent with fraudulent intent—Purchaser of property in execution—Suit to eject lessee—Liability of lessee to ejectment.*

The existence of an attachment or injunction restraining the judgment-debtor from disposing of his property in any manner would not prevent him *qua* proprietor from making leases of the property in a prudent manner for the due management of the property. But he is not justified in grantlng a lease which is fraudulent and for a low and inadequate rent. If he does so, it is liable to be set aside by the Civil Court, and the lessee is liable to ejectment under S. 44 at the instance of the purchaser of the property in execution. (*Drake Brockman, S.M. and Knox, J.M.*) BRIJ BEHARIJI MAHARAJ *v.* BOHRA FATEH CHAND. 1936 R.D. 373.

——S. 44 — *Applicability — Co-sharer—Joint* khewat khata—*Tenant admitted by some—Ejectment suit by others—Competency.*

A suit for ejectment as trespasser and for damage under S. 44 of the Agra Tenancy Act is not maintainable at the instance of one co-sharer in a joint *khewat khata* as against a tenant admitted to occupation by another co-sharer. Such a suit is barred under S. 266 (1) of the Act. The landholder in such a case is the whole proprietary body and the tenant admitted by one co-sharer is not the tenant of the whole proprietary body. Since the right to eject is also vested in the whole proprietary body as a body, the dissatisfied co-sharer or co-sharers cannot by themselves sue to eject him. There is no remedy in the Revenue Courts at all. The remedy of the dissatisfied co-sharers is to bring a suit in the Civil Court to have the lease set aside. (*Drake Brockman, S.M. and Knox, J.M.*) SEELO *v.* KURYA SINGH. 1936 R.D. 114.

——S. 44—*Applicability—Co-sharer in possession and cultivating land without objection by other co-sharers—Suit to eject as trespasser—Maintainability*

Where a co-sharer takes possession of land and remains in peaceful possession for a number of years, cultivating the same without any objection by the lambardar or the general body of co-sharers, it has to be inferred that he occupies and cultivates it with the consent of the coparcenary body or of the lambardar. He is not a trespasser or a person occupying the land in contravention of the Act within the meaning of S. 44 of Agra Tenancy Act, and cannot be ejected as such under S. 44. He can of course be made to account to the other co-sharers for the rental of the land. (*Harries, J.*) BAL SINGH *v.* NAWAB SINGH. 171 I.C. 795=1937 A.L.J. 707=1937 R.D. 407=1937 A.W.R. 816=A.I.R. 1937 All. 688.

——S. 44—*Applicability—Co-widows—Remarriage of on death of other co-widow—Suit by zamindar against remarried widow for ejectment —Maintainability.*

Where one of two co-widows left by a deceased tenant remarries, the occupancy tenancy continues to subsist so long as the other co-widow who has not remarried is alive, notwithstanding the remarriage of one of them. On the death of the co-widow who has not remarried, the zamindar is entitled to assert his rights by treating the re-married widow as a trespasser on the ground of her remarriage which comes to his notice. (*Darling, S. M.*) BUNDI BEGAM *v.* MUSTAFA HUSAIN KHAN. 1937 A.W.R. 871= 1937 R.D. 413.

——S. 44 — *Applicability — Disappearance of tenant-in-chief—Payment of tenant-in-chief rent by sub-tenant—No new contract of tenancy—Sub-tenants if can be ejected as trespassers.*

Where the occupancy tenant disappeared from the village and his sub-tenants continued to pay the zamindar the tenant-in-chief rent, but with whom the zamindar did not enter into any new tenancy.

Held, that the sub-tenants are trespassers and could be ejected. (*Darling, S.M. and Bomford, J.M.*) KANHAI LAL *v.* NOKHEY. 1937 A.W.R. 1096=1937 R.D. 558.

——S. 44—*Applicability—Ejectment of one co-sharer by another, as a trespasser—If possible—Proper remedy—Suit under S. 44—Duty of plaintiff to prove title.*

One co-sharer cannot get rid of another co-sharer by suing for his ejectment as a trespasser. In a case where a co-sharer has taken possession of land and has been permitted to cultivate it for a number of years, the obvious inference is that he has been in occupation with the consent of the coparcenary body. As such the remedy of the other co-sharers is to sue him for profits. As a suit under S. 44 of the Agra Tenancy Act can only be brought by the landholder, where the plaintiffs in a suit under that section claim to be the sole *sirdars* of the plot in question, it is incumbent on them to establish their claim to the hilt. (*Darling, S.M.*) NIRMAL *v.* SAGWA. 1939 A.W.R. (B.R.) 16=1940 R.D. 44.

——S. 44—*Applicability—Grove land ceasing to be such and being assessed to revenue —Lease of —Suit by landlord to eject lessee on ground that latter is only lessee of produce of trees and is cultivating—If lies.*

When land with trees on it is let out for cultivation after the land has ceased to be a grove and after it has been assessed to revenue, the lessor is not competent to sue the tenant under S. 44 of the Agra Tenancy Act, alleging that he leased the produce of the trees and that the lessee has started cultivation. (*Knox, J.M.*) KARAMAT ALI *v.* MANGOO LAL. 1936 R.D. 486 (2).

——S. 44—*Applicability — Joint holding—One tenant getting share divided by suit under S. 37—Others keeping him out of possession and not giving him physical possession—Liability to be sued in ejectment as trespassers.*

If a tenant in a joint holding gets his share divided off by means of a suit under S. 37 of the Agra Tenancy Act, the other tenants are no longer the co-tenants of that tenant. If these other tenants do not allow the tenant getting his share divided to take physical possession of his share, but flout the orders of the Revenue Court

by keeping him out of possession, they are trespassers pure and simple and can be ejected as such. (*Bomford, J. M.*) CHITTAR *v.* JHUNVA. 1938 R D. 110=1938 A W.R. (B.R.) 50.

——S. 44—*Applicability—Joint mahal—Waste land—Co-sharer taking into separate possession and cultivating without consent of other co-sharers—If liable to ejectment as trespasser.*

Where land in a joint mahal is waste, and there is no competition among the co-sharers for the same, a co-sharer is entitled to bring it under cultivation without reference to the lambardar or other co-sharers. A co-sharer so taking the waste land into his separate possession and cultivating is not liable to ejectment under S. 44 of the Agra Tenancy Act at the instance of the lambardar. (*Drake Brockman, S.M. and Knox, J.M.*) RAM SARUP *v.* MUNNA LAL. 1936 R.D. 561.

——S. 44—*Applicability—Mortgage of* sir *land—Mortgagor retaining possession and becoming ex proprietary tenant—Sale of equity of redemption—Vendee failing to pay mortgage-debt—Ejectment.*

The proprietor of a plot of *sir* land mortgaged it to another, but remained in cultivating occupation of the land and paid rent therefor to the mortgagee. He was declared an ex-proprietary tenant of the lands, but subsequently sold his equity of redemption to two persons who entered into possession. The mortgagee sued on his mortgage impleading the vendees, got a decree, brought the land to sale in execution and purchased it himself at the auction-sale. The vendees did not pay the mortgage-debt and the mortgagee purchaser sued to eject them under S. 44, Agra Tenancy Act.

Held, the vendees, by substituting themselves for their vendor in occupation of the land became *khudkasht* holders of the land vice the ex-proprietary tenant, were liable to ejectment under S. 44, as persons taking possession without the consent of the landholder. (*Drake Brockman, S. M. and Knox, J.M.*) ASHARFI *v.* SRI RAM. 1936 R.D. 126.

——S. 44—*Applicability—Mortgagee from tenant retaining possession after tenant's death—Liability to ejectment—Mortgagee recorded as sub-tenant, but not properly admitted to tenancy.*

A mortgagee from an occupancy tenant who holds and retains possession after the tenant mortgagor's death, but who fails to prove any definite or proper admission to tenancy by the landlord, is not a person holding the land "in accordance with the provisions of the Agra Tenancy Act", and is therefore liable to ejectment as a trespasser, notwithstanding that he is recorded as a sub-tenent. (*Drake Brockman, S M. and Knox, J.M*) SOORAJPAL SINGH *v.* MUNSHI LAL. 1936 R.D. 225.

——S. 44—*Applicability—Mortgagor leasing mortgaged property to wife at low rent on eve of mortgage suit—Intention to decrease value of property to purchaser—Purchase by mortgagee in sale in execution of mortgage decree—Right to eject lessee.*

Where a mortgagor who is unable to pay the mortgage money due by him and who is confronted with a suit, executes within a few days of a suit being actually instituted on the basis of the mortgage, a lease of his land in favour of his wife, a *pardanashin* lady, for a definitely and consciously inadequate rent, with the intention of decreasing the value of the property for his successor-in-interest and the lessee does not cultivate the land, there are grounds for suspecting that the mortgagor wishes to retain possession of the land control over which will pass to the mortgagee or another as a result of the impending suit. When further there is evidence to show that the land is subsequently sub-let for nearly double the rent fixed in the lease to the wife, the lease has to be regarded as fraudulent. The mortgagee who subsequently purchases the land in execution of the decree in his suit is entitled to sue to eject the lessee, wife of the mortgagor, under the provisions of S. 44 of the Agra Tenancy Act, (*Drake Brockman, S.M. and Knox, J.M*) RAM NARAIN *v.* GOKUL CHAND. 1936 R.D. 182.

——S. 44—*Applicability—Ouster of recorded tenant by persons claiming to exclude former under family partition—Remedy of recorded tenant—Suit under S. 44—If lies.*

Where a recorded tenant has been ousted from a plot by persons claiming to be tenants and claiming to hold possession of the plot in virtue of a family partition to the exclusion of the recorded tenant, such claim being supported by the landlord, the remedy of the ousted recorded tenant is to bring a suit under S 99 of the Agra Tenancy Act against the landlord and the rival claimants in possession of the plot. A suit under S. 44 is not maintainable. (*Drake Brockman, S. M. and Knox, J.M.*) RAM LAL *v.* DHARMI. 1936 R.D. 33.

——S. 44—*Applicability—Person paying* nazarana *and allowed to plant grove—If trespasser—Ejectment.*

Where a zamindar accepts a *nazarana* from a person and grants him a field to plant a grove, the zamindar is not competent to eject that person as a trespasser under S. 44 of the Agra Tenancy Act such a person cannot be held to be a trespasser. (*Knox, J.M.*) JAI DEVI KUER *v.* TOTA RAM. 1936 R.D. 234 (1).

——S. 44—*Applicability—Purchaser of land from widow proprietor having life-estate—Planting of grove by purchaser—Sale set aside by Civil Court after death of widow at instance of reversioners—Purchaser—If trespasser liable to ejectment—Groves—If pass.*

When a purchaser of proprietary rights in land from a widow having a life-estate develops groves on the land, and after the death of the widow the reversioners get the sale set aside by a Civil Court, the reversioners are entitled to eject the purchaser as a trespasser. The trees planted by the purchaser are an improvement and pass to the reversioners along with the land. The purchaser is not a groveholder in the sense of the law; nor is he a proprietor. (*Drake Brockman, S. M.*) SHIB CHARAN *v.* SURAJ PRASAD. 1936 R.D. 345.

——S. 44—*Applicability—Rent decree against privileged tenant—Execution under S. 79—Tenant continuing in possession and allowing proceedings to go by default—Position of—Liability to ejectment.*

A landholder obtained decrees for arrears of rent against certain tenants who were holding *sir* land at a privileged rent and attacked them in execution under S 79 of the Agra Tenancy Act by way of ejectment and obtained formal posses-

sion. The tenants allowed the proceedings in ejectment to go against them by default, but retained possession as if nothing had happened. They were since recorded as non-occupancy tenants *bila tasfia lagan.*

Held, that the tenants could not remain *sir*-holders still, but that they were nothing but trespassers and liable to ejectment under S. 44 of the Act. (*Drake Brockman, S. M. and Knox, J. M.*) GATSARAM NARAYANJI *v.* JAGAT SINGH. **1936 R.D. 180.**

——**S. 44**—*Applicability—Tenant admitted by agent of collecting co-sharer of* pattidari mahal—*Liability to ejectment.*

Where a co-sharer in a *pattidari mahal* is, by arrangement amongst the co-sharers, recognised as collecting co-sharer of the *patti* and as such entitled to do all acts which the landholder or the landlord can do, and that co-sharer executes a *mukhtarnama* in favour of an agent giving him wide powers to act on behalf of his principal, and the agent misuses and utilises those powers to admit to tenancy his own relations at inadequate rents, the landholder has the option either to accept those persons as tenants and get the contracts set aside in the Civil Court and then sue for fixation of proper rent, or to eject them as persons holding without the consent of the landholder under S. 44 of the Agra Tenancy Act. (*Drake Brockman, S. M.*) BHUP SINGH *v.* DEBI SINGH. **1936 R.D. 295.**

——**S. 44**—*Applicability—Usufructuary mortgage—Subsequent* theka *by mortgagee to mortgagor—Admission of tenants by latter—Cancellation of* theka *and mortgagee standing out as landholder—Right to eject tenants admitted by mortgagor—Such tenants, if grove-holders—Liability to ejectment—Mortgagee accepting some tenants admitted by mortgagor—If estopped from ejecting others.*

Plaintiff who took a usufructuary mortgage of the suit property executed the next day a *theka* of the property in favour of the mortgagor. The latter as *thekadar* admitted tenants, collected rents and so forth as a *thekadar* could do. The *thekadar* having failed to abide by the terms of the *theka*, plaintiff cancelled the *theka* and ejected the mortgagor *thekadar* and stood forth as the landholder of the property. He accepted certain tenants admitted by the mortgagor and sued to eject the others under S. 44 of the Agra Tenancy Act. There was no evidence that he authorised the mortgagor, in the manner enjoined by law to act as his agent or give up his rights to object to any arrangement purporting to be made on his behalf by the mortgagor.

Held, (1) that the tenants admitted by the mortgagor were holding without the consent of the landholder who was the plaintiff, and therefore liable to ejectment under S. 44 of the Act; (2) that they were not grove-holders, as the land was not let or granted to them by the landlord; and merely because they had planted a few trees they were not exempt from ejectment when they had no right to be in occupation; and (3) that the fact that the plaintiff accepted admission of some tenants made by the mortgagor did not estop him from ejecting the others whose admission he was not prepared to accept. (*Drake Brockman, S. M. and Knox, J. M.*) KRISHNA SAHAI *v.* KUNWAR SEN. **1936 R.D. 339.**

——**S. 44**—Applicability—Sub-lease by widow of occupancy tenant—Suit by landlord to eject sub-tenant—Competency. *See* AGRA TENANCY ACT, S. 32 (1) AND (3). **1936 R.D. 496.**

——**S. 44**—*Auction purchase of mortgagee's right*—Dakhal dehani *beyond time—Mortgagee in possession—If can be used as trespasser.*

Where a person purchases another's mortgagee rights at a public auction but takes *dakhal dehani* beyond the time allowed, it has not the effect of bringing about the actual dispossession of the original mortgagee. Hence the auction purchaser cannot sue the mortgagee as trespasser as there has been no dispossession. (*Mehta, S.M.*) JAIDIRI SINGH *v.* BAJRANG SINGH. **1940 A.W.R. (B.R.) 60=1940 R.D. 164.**

——**S. 44**—*Ejectment—Allegation that defendant's mother was not legally married to late occupancy tenant—Onus.*

In a suit for ejectment of the defendant on the ground that his mother was not properly married to his father, *i.e.*, the late occupancy tenant, when it is not disputed that his father and mother had lived together as husband and wife for about 18 or 20 years, the burden of proving that there was no valid or proper marriage is on the plaintiff-landlord. (*Knox, J. M.*) PARMESHWARI NARAIN CHADDA *v.* MAGAN. **1936 R.D. 110 (1).**

——**S. 44**—*Ejectment—Cause of action—Sale of occupancy holding—Starting point—Damages—Measure of.*

The mere execution of a deed of sale of an occupancy holding does not give rise to a cause of action to eject the vendee; it only arises on the actual transfer to the vendee. A claim to be in possession from a date prior to that mentioned in the papers, has to be proved by the vendee. As regards damages it must be remembered that a trespasser is not entitled to any remission. (*Darling, S. M. and Bomford, J.M.*) NARAINI PRASAD SINGH *v.* MAKUND. **1938 R.D. 455=1938 A.W.R. (B.R.) 323.**

——**S. 44**—*Ejectment—Coparceners—One of them when can eject trespasser.*

Where one of the coparceners by virtue of a mutual agreement among themselves, collects the rent of a particular land, he is the landholder thereof and as such he can eject anybody taking possession as trespasser under S. 44 of the Agra Tenancy Act. (*Mehta, J. M.*) QUDRAT ALI *v.* MUNESHWAR TEWARI. **1939 A.W.R. (B.R.) 118 (1)=1939 R.D. 439=1939 A.L.J. (Supp.) 90.**

——**S. 44**—*Ejectment—Co-sharer taking possession on the death of tenant of occupancy holding heirless—Suit against, by lambardar for ejectment.*

A tenant of an occupancy holding died heirless. A co-sharer in the khewat to which the holding belonged, took possession of the holding, without the consent of the lambardar. The lambardar brought a suit to eject him as a trespasser.

Held, the lambardar is a landholder and is at liberty to eject the co-sharer defendant. The accident that the defendant is a co-sharer cannot protect him. (*Darling, S. M.*) MAREY *v.* NIADAR SINGH. **1937 R.D. 524.**

——**S. 44**—*Ejectment—Grant of pattas by mortgagor in possession—Subsequent purchase by*

creditor—Plea of fraudulent transfer —Test—Status of tenants.

Where a mortgagor in possession grants pattas which purport to create occupancy rights but which do not conform to the requirements as laid down in S. 17 (1) (*b*) and (5) and the creditor purchases the property subsequently and seeks to eject the tenants on the ground of the lease being fraudulent, it is the conduct of the parties that would primarily go to decide the issue whether the document confers a statutory right or not. Whether it is an act in the ordinary course of zamindari management or one of a fraudulent nature and void under S. 53, T. P. Act, depends on the circumstances attending on the transaction. Where the *nazarana* was not excessive and the interval between the patta and sale was fairly long, the patta mnst be taken to have been granted in the ordinary course of management of zamindari property and the tenants could not be treated as trespassers. (*Mehta, S. M.*) SUNDER LAL *v.* SUKDEO. **1939 A.W.R. (B.R.) 31=1940 R.D. 45.**

——S. 44—*Lease by co-sharer, pending partition proceedings—Leased plots falling to share of another co-sharer—Lessee, if can be ejected as trespasser.*

Where partition proceedings were pending, a co-sharer leases certain plots at a time when the proceedings were practically coming to an end and the co-sharer should have been in a position to know that the particular plots would fall to share of another co-sharer, the lessee of such plots is only in the position of a trespasser and cannot resist ejectment at the hands of the co-sharer to whose share the plots ultimately fall on partition. (*Darling, S.M. and Bomford, J.M.*) MOOL CHAND *v.* JITENDRA PRASAD. **1938 R.D. 346=1938 A.W.R. (B R.) 192.**

——S. 44—*Lease by mortgagee—Lessee, when protected from ejectment.*

When a lease by a mortgagee is found to be neither fraudulent, collusive or unreasonable, the Court must hold that the admission of the lessee is not fraudulent and as such he cannot be ejected as a trespasser and must be accepted as a tenant by the mortgagor or his transferee after redemption. (*Marsh, S.M.*) GHASITA *v.* AMAN SINGH. **1939 R.D. 278=1939 A.W.R. (B.R.) 255.**

——S. 44—*Liability to ejectment—Absence of any contract of tenancy—Plaintiff sole proprietor of* khewat *to which the plots in dispute belong.*

Where the plaintiff is the sole proprietor of the *khewat* to which the plots in suit belong and of which the defendant a neighbouring zamindar is in possession and there is no contract of tenancy, the defendant is liable to ejectment as a trespasser. (*Darling, S.M. and Mehta, J.M.*) GANGA PRASAD SINGH *v.* GIRWAR SINGH. **1938 R.D. 937 =1939 A.W.R. (B R.) 58.**

——S. 44—*Liability to ejectment—Acceptance of enhanced rent—Occupation for over 12 years—Estoppel.*

Where enhanced rent is being taken from some persons treating them as tenants and where those persons have been in occupation for over 12 years, though it be under a void compromise, they cannot be treated as trespassers and ejected, for the zamindar is estopped by his own conduct. (*Darling, S.M. and Mehta, J.M.*) KOMIL *v.* JAGESHWAR PRASAD. **1938 R.D. 940=1939 A.W.R. (B.R.) 50 (2).**

——S. 44—*Liability to ejectment—Person not a grove-holder planting trees without permission.*

Land may be a grove, without the owner of the trees being a grove-holder. If such person plants without permission, he remains a trespasser on the land and he can be ejected therefrom under S. 44 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) RAM NARAIN RAI *v.* RAM RAN BIJAI PRASAD SINGH. **1938 R.D. 545=1938 A.W.R. (B.R.) 247.**

——S. 44—*Limitation—Suit to get rid of person staying on against consent of recorded tenant.*

Where the ejectment is not by the zamindar, then the tenant has 12 years to get rid of a person who is staying on against the consent of the recorded tenant. (*Mehta, S.M.*) PUTTOO LAL *v.* SARDAS SINGH. **1940 A.W.R. (B.R.) 63=1940 R.D. 211.**

——S. 44—*No contract of tenancy proved between zamindar and sub-tenant—Liability of sub-tenant to be ejected as trespasser.*

Where the zamindar has been recognising the recorded tenant as the occupancy tenant of the holding although the rent was paid by the sub-tenant, and there is no adequate evidence to establish a new contract of tenancy between the zamindar and the sub-tenant, the latter is liable to be ejected as a trespasser, even though the patwari had struck out the name of the recorded occupancy tenant on the ground that he was no longer the cultivator of the plot, and had entered the name of the sub-tenant as the tenant-in-chief. (*Darling, S.M. and Bomford, J.M.*) SHIB SARAN SAHAI *v.* AZMAT ULLAH KHAN. **1937 R.D. 149.**

——S. 44—*Person holding land in khudkasht at the time of partition, and not admitted as a tenant —Suit for his ejectment as trespasser—Limitation, when begins to run.*

The limitation for a suit for ejectment as trespasser, of a person who was holding land in khudkasht at the time of partition and who was not admitted as a tenant, begins to run not from the date of confirmation of partition but from the date from which the partition was to take effect. (*Darling, S.M. and Bomford, J.M.*) BADRI NATH TEWARI *v.* KASHI PRASAD SINGH **1937 R.D. 140.**

——S. 44—*Person settled on land by* thekadar *after expiry of* theka—*Status of—Right of landlord to eject.*

A person settled on the land by a *thekadar* after the expiry of the period of his *theka* has no right to be treated as a tenant and can be ejected by the landlord under S. 44 of the Agra Tenancy Act. (*Drake Brockman, S.M. and Knox, J.M.*) RAM PIYARI *v.* RAM BHAROSE. **1936 R.D. 229.**

——S. 44—*Re-admission—Written consent to—Receipt for rent, for period of time subsequent to the alleged re-admission—If enough to prove written consent for re-admission.*

Where in a suit for ejectment filed under S. 44 of the Agra Tenancy Act, brought on a plea that there had been no written consent to re-admission as required by S. 95 of the Act, the defendant filed a receipt for arrears of rent and also a document according to which the tenant was paid a particular sum on account of the sale of a tree to the servant of the plaintiff, both having reference to a period of time three years subsequent to the alleged re-admission, it was held that they were no proof of a written consent to

AGRA TENANCY ACT (1926), S. 44.

re-admission. (*Harper, J.M.*) JUKHU RAM *v.* LAL MAHADEO PRASAD SINGH. **1940 R.D. 195=1940 A.W.R. (B.R.) 70.**

——**S. 44**—Sir *holder—Order of ejectment—Persistence in trespass—Damages—Measure of.*

If *sir* holders persist in trespass after an order of ejectment against them, damages may be awarded as against themat full rental permissible. (*Drake Brockman, S.M. and Knox, J.M.*) GATSARAM NARAYANJI *v.* JAGAT SINGH. **1936 R.D. 180.**

——**S. 44**—*Ejectment suit by one co-sharer—Maintainability.*

Ordinarily a suit for the ejectment of a trespasser can only be brought by the whole coparcenary body. Where, however, in a suit by the plaintiff for the ejectment of the defendant as a trespasser, the defendant claimed full occupancy rights from the plaintiff's immediate predecessor-in-interest and thus recognised the plaintiff as the landholder even to the extent of the conferment of occupancy rights, and when he found it impossible to maintain this claim applied for an amendment of his pleadings to the effect that the plaintiff was not entitled to sue alone as there were other co-sharers in the joint *khewat.*

Held, that the defendant could not amend his pleas and that the plaintiff was entitled to a decree. (*Darling, S.M.*) KISHORI LAL *v.* KASHI RAM. **1937 R.D. 255.**

——**S. 44**—*Ejectment—Suit by a co-sharer lambardar—Applicability by the other co-sharer to be made a party—Dismissal of suit, in spite of—Propriety.*

Where a suit for ejectment under S. 44 of the Tenancy Act is filed by one of the co-sharers lambardar and where the other co-sharer applies to be made a party, it is not proper to dismiss the suit on the ground that the plaintiff could not sue alone. The proper course is to add the other co-sharer and proceed with the suit. (*Darling, S.M. and Bomford, J.M.*) RAM DAYAB *v.* BUDH SINGH. **1938 A W.R. (B.R.) 175=1938 R.D. 323.**

——**S. 44**—*Ejectment of trespasser—Joint holding—Suit by single co-sharer—Competency.*

The test to determine whether one of several proprietors in a joint mahal can by himself sue to eject a trespasser under S.44 of the Agra Tenancy Act is whether the rent in respect of the land in suit is payable to the plaintiff alone. Where the rent is not payable to the plaintiff alone, the latter cannot be allowed to get rid of the trespasser against the wishes and without the assistance of the other co-sharers. The fact that the defendant was let in by the plaintiff alone cannot give him the right alone of ejecting the defendant. (*Drake Brockman, S.M. and Knox, J.M.*) MAHADEO SINGH *v.* KULWANTA. **1936 R.D. 187.**

——**S. 44**—*Ejectment of trespasser—Suit by one of co-sharers—Maintainability.*

One of several co-sharers in a joint *khewat* is not entitled to bring a suit for the ejectment of a trespasser. The right to eject is vested in the whole coparcenary body, and if the other co-sharers would not agree to the ejectment, an individual co-sharer must seek his remedy in the Civil Courts. (*Darling, S.M. and Bomford, J.M.*) BAKHTAWAR *v.* SHANKAR SINGH. **1937 R.D. 265 (2).**

——**S. 44**—*Ejectment under S. 79 and obtaining of possession—Restoration to possession in respect of another decree—Status of tenant.*

AGRA TENANCY ACT (1926), S. 44.

Where a tenant has been once legally ejected under S. 79 of the Tenancy Act and the landlord has obtained possession, though thereafter he might have been formally restored to possession when he paid up the arrears when execution was taken in respect of another rent decree, yet the ejectment as the result of the rent decree is binding on the tenant and he is only a trespasser in the holding. (*Marsh, S.M.*) NANHEV *v.* MAHOMED UNUS AHMAD. **1939 A.W.R. (B.R.) 182 (2)=1939 R.D. 417=1939 A.L.J. (Supp.) 92.**

——**S. 44**—Ejectment of licensee—Suit under S. 44, when proper remedy—Such suit, if can be converted into one under S. 86. *See* AGRA TENANCY ACT, SS. 86 AND 44—EJECTMENT OF LICENSEE. **1939 R.D. 533.**

——**S. 44**—*Lambardar—Power to eject co-sharer taking possession of abandoned holding without his consent.*

A lambardar can eject a co-sharer who without his consent takes possession of land vacated by a tenant, or a holding abandoned. (*Darling, S.M. and Bomford, J.M.*) BIJAI BAHADUR *v.* CHIRANJI. **1938 R.D. 379=1938 A.L.J. (Supp.) 37=1938 A. W.R. (B.R.) 218.**

——**S. 44**—*Limitation—Burden of proof of suit being in time.*

In a suit under S. 44 of the Agra Tenancy Act, it is for the plaintiff to prove that his suit is brought within limitation when it appears that the defendant has held for over 12 years by the time the suit is brought. (*Darling, S.M. and Bomford, J.M.*) AMINUDDIN *v.* ZAHIR HASAN KHAN. **1938 R.D. 190 (1)=1938 A.W.R. (B.R.) 119.**

——**S. 44**—*Limitation—Starting point—Knowledge, possession of defendant—If means personal knowledge of zamindar.*

In the case of large estates the knowledge of possession of the defendant required for the period of limitation for a suit under S. 44 of the Agra Tenancy Act cannot be taken as the knowledge of the landlord personally. The period of limitation must be reckoned from the date of knowledge by the estate. (*Darling, S.M. and Bomford, J.M.*) RENUKA RAI *v.* SHYAM DUTT RAI. **1938 R.D. 133=1938 A.W.R. (B.R.) 81.**

——**S. 44**—*Limitation—Partition of* sir *land—Holder of divided plot—Suit for ejectment of trespasser—Defendant in possession as mortgagee—Limitation—Starting point—Plaintiff's knowledge of mortgage right prior to confirmation of partition—Effect.*

A suit to eject the defendants from a field which the plaintiff has received in partition as his share of the joint *sir* on the ground that the defendants were holding as trespassers without the plaintiff's consent has to be brought within 12 years from the date when the partition was confirmed. It is only from that date that the plaintiff becomes entitled to sue, and the fact that the defendant is a mortgagee in possession and that the plaintiff knew that the defendant was a mortgagee before that date cannot affect the period of limitation for the suit under S. 44 of the Agra Tenancy Act. (*Bomford, J.M.*) SACHITANAND PANDEY *v.* SHIVA SARAN RAI. **1938 R.D. 125=1938 A.W.R. (B.R.) 70.**

——**S 44**—*Limitation—Starting point—Lease by Hindu widow with life-interest—Ejectment suit by reversioner—Starting point of limitation.*

AGRA TENANCY ACT (1926), S. 44.

In the case of a lease given by a Hindu widow holding a life-interest, it is not open to a reversioner of her husband to attack the lease so long as the lessor-widow is alive; and the limitation of twelve years for a suit by the reversioner to eject the lessee under S. 44 of the Agra Tenancy Act commences to run only from the date of death of the widow and not before that date. (*Darling, S.M.*) PITAM SINGH *v.* LILADHAR SINGH. **1938 R.D. 181=1938 A.L.J. (Supp.) 8=1938 A.W.R. (B.R.) 98.**

——**S. 44**—*Limitation—Suit to eject widow on ground of remarriage—Starting point of limitation—Date of remarriage or date of knowledge of landholder.*

In a suit to eject as trespasser a widow tenant who has remarried the period of limitation runs from the date on which the plaintiff-landholder obtains knowledge of the remarriage. (*Darling, S.M. and Bomford, J.M.*) MT. TETRA *v.* ZAHID ALI. **1938 R.D. 130=1938 A.W.R. (B.R.) 2.**

——**S. 44**—*Limitation—Allotment at a partition—If opens a fresh period.*

The allotment of a plot to the patti of a plaintiff at a recent partition, cannot have the effect of opening out a fresh period of limitation, for the purpose of ejecting as a trespasser, a person in possession of the plot long prior to the partition. (*Darling, S.M. and Mehta, J.M.*) MAN SINGH *v.* MALKHAN. **1938 R.D. 872=1938 A.W.R. (B.R.) 418=1939 A.L.J. (Supp.) 29.**

——**S. 44**—*Purchaser's right— Purchaser of proprietary share—Demarcation of vendor's* sir *land and fixing of separate rent—Rights of vendee, on ejectment of ex-proprietary tenant.*

Where a vendee of proprietary share has the *sir* land of the vendor demarcated and rent fixed on the same, and subsequently ejects the ex-proprietary tenant for failure to pay the rent, the vendee becomes the landholder of that ex-proprietary holding: thereafter as the landholder, he is entitled to sue for the ejectment of the trespassers. (*Darling, S.M.*) RAMPHOOL *v.* KUNDAN LAL. **1938 R.D. 601=1938 A.W.R. (B.R.) 299=1938 A.L.J. (Supp.) 117.**

——**S. 44**—*Father transferring his* sir *land to his sons—Latter cultivating it as their* khudkhast *—Transfer declared by Civil Court as fraudulent and land sold at auction sale—Purchaser's right to eject the sons as trespassers.*

The plaintiff sued under S. 44 of the Agra Tenancy Act for the ejectment of the sons of one *X*, whose share he had bought at an auction-sale. This share had been previously transferred by *X* to his sonsbut that former transfer had been declared by the Civil Court to have been fraudulent, the object of which was to defraud creditors. Since the execution of the earlier deed by *X* in favour of his sons, the latter had been entered in the *khatauni* as being in possession of their father's *sir* as their *khudkasht*.

Held, that the sons of *X* who were holding the land without the consent of the plaintiff who was the new proprietor, were undoubtedly liable to ejectment as trespassers. (*Darling, S.M. and Bomford, J.M.*) BAKHTAWAR *v.* SHANKAR SINGH. **1937 R.D. 265 (2).**

——**S. 44**—*Transferee from Hindu widow of fixed rate tenant—Status and rights of—Landlord, if can challenge transfer.*

AGRA TENANCY ACT (1926), S. 44.

Where a Hindu widow of a fixed rate tenancy transfers it without legal necessity, the proprietor of the parent holding out of which the tenancy was carved out as a subordinate tenure, would be in a position to challenge the transfer. Where the transferor dies without leaving heirs, the tenancy reverts to the landholder and the transferee without legal necessity cannot enjoy the position higher than that of a trespasser. (*Mehta, S.M.*) GANGA *v.* RAJDEO. **1940 R.D. 18=1940 A.W.R. (B.R.) 18.**

——**S. 44**—*Mortgage—Defendant in possession as mortgagee—Mortgage executed by plaintiff's mother during his minority—Defendant, if can be ejected.*

Where the defendant is in possession in virtue of a mortgage executed by the plaintiff's mother during his minority as his guardian and there is no doubt that the defendant did not enter into possession without the consent or knowledge of the landholder at the time, the defendant cannot be ejected in a suit under S. 44 of the Agra Tenancy Act until the money transactions between the parties have been settled, and that is a matter for the Civil Courts. (*Darling, S.M. and Bomford, J.M.*) BHAGAUTI SINGH *v.* RAM NATH SINGH. **1937 R.D. 135.**

——**S. 44**—*Mortgagor leasing mortgaged property pending mortgage suit—Mortgagee purchasing the property in execution of his decree—Suit by him for possession and mesne profits—Proper forum—Civil Court, if competent to grant declaration that lease is void—T. P. Act, S. 52.*

A mortgagee brought a suit on the footing of his mortgage, obtained a decree, and purchased the property mortgaged in execution. Prior to the auction sale, the mortgagor executed a *theka* whereby he leased the property in suit, and the lessee also obtained mutation in his favour. The mortgagee filed a suit against the mortgagor and the lessee for possession of the property and for mesne profits. The Subordinate Judge held that the plaintiff must have recourse to the Revenue Court for possession of property purchased by her and for the mesne profits due to her. He, however, granted a declaration in favour of the plaintiff that the lease was not binding upon her by virtue of S. 52 of the T. P. Act, having been executed during the pendency of the mortgage suit. On appeal, it was contended that the proper form to decide the validity of the lease in question was the Revenue Court which alone could grant possession and award mesne profits.

Held, that the plaintiff must have recourse to the Revenue Court for possession of the property in suit and for mesne profits, but that the Civil Court could grant a declaration that the lease was void, as the general power which the Civil Courts have to give effect to the provisions of S. 52 of the T.P. Act could not be inferentially cut down because the Revenue Court in a suit for a declaration and mesne profits might have to record a decision as to whether the lease was invalid under S. 52 of the T. P. Act. (*Thom and Rachhpal Singh, JJ.*) ABDUL MUGHNI KHAN *v.* MST. FARKHUNDA BIBI. **164 I.C. 762=9 R.A. 204=1936 A.L.J. 1256=1936 R.D. 303=1936 A.W.R. 717 (2)=A.I.R. 1936 All. 661.**

——**S. 44**—*Mortgage—Purchaser of equity of redemption taking possession of mortgaged land*

from mortgagor's sub-tenants—If liable to be ejected as trespasser.

While a mortgagor may retain proprietary rights as against his co-sharers in an undivided *mahal*, he cannot retain any proprietary right in the share which he has transferred by mortgage. Until the mortgage is redeemed, the mortgagor is not a proprietor, though he may be recorded in the *khewat*, and he has no right to take into his cultivation any portion of the mortgaged land. A purchaser of the equity of redemption cannot have more right than his vendor, and if therefore, the sub-tenant in *sir* of the mortgagor surrender and hand over the fields to the purchaser, the mortgagee can sue to eject him as a trespasser on the ground that he has no right to take land in the *patti* mortgaged to the plaintiff without his consent. (*Darling, S.M. and Bomford, J.M.*) CHINTAMANI SINGH *v.* BASAWAN SINGH. **1937 R.D. 339.**

——**S. 44**—*Usufructuary mortgage of* khudkasht *plot under old Act—Mortgagor simultaneously exeeuting deed of relinquishment of ex-proprietary right—Effect—Mortgagor losing cultivating possession of plot—Right of his sons to revive ex-proprietary rights—Liability to ejectment.*

Where while the old Tenancy Act of 1901 was in force a person executed a usufructuary mortgage of his *khudkasht* plot and simultaneously on the same day executed a deed of relinquishment of all ex-proprietary rights,the surrender of ex-proprietary rights was null and void having been made before their accrual. If the mortgagor, in whose favour ex-proprietary rights might have accrued, lost cultivating possession of the plot, his sons who subsequently come to be recorded as holding *bila tasfia* cannot revive these ex-proprietary rights and are liable to be ejected as trespassers. (*Darling, S.M. and Bomford, J. M.*) BILASI SINGH *v.* RAM CHANDER SINGH. **1937 R.D. 462.**

——**S. 44**—*Scope— Co-tenants — Division of holding—One co-tenant taking possession of portion of another—Suit by latter for ejectment of former—Maintainability.*

There is no legal bar to a suit under S. 44 of the Agra Tenancy Act by one co-tenant of a holding against the other co-tenants who have taken possession of the former's portion of the holding after a formal partition of the holding under S. 37 of the Act, whether the landholder has or has not agreed to the division. His rights are still unaffected (*Drake Brockman, S.M. and Knox, J.M.*) KARTARI *v.* UMRAO SINGH **1936 R.D. 525.**

——**S. 44**—*Scope of—Trespasser in possession—Remedy of owner—Option as to.*

It is open to the proprietor of agricultural land either to sue a trespasser for ejectment in the Civil Court or to avail himself of the speedier remedy provided by S. 44 of the new Tenancy Act and to file a suit for ejectment and for damages in the Revenue Court. (*Iqbal Ahmad and Varma, JJ.*) LACHHMINA KUNWARI *v.* MAKFULA KUNWARI. **I.L.R. (1938) All. 441=175 I.C. 902=11 R.A. 17=1938 R.D. 463=1938 A.L.R. 497=1938 A.W.R. (H.C.) 199=1938 A.L.J. 333=A.I.R. 1938 All. 316.**

——**S. 44**—*Suit under—Abatement—Fresh suit by successor in interest—If lies.*

Where a suit under S. 44 of the Agra Tenancy Act abates owing to the death of the plaintiff,

O. 22, R. 9, C. P. Code, bars a subsequent suit by the successor in interest of the deceased plaintiff for the same relief and against the same defendant in respect of the same land. (*Marsh, S.M.*) MURLI DHAR *v.* RAGHUBIR. **1939 R.D. 476=1939 A.W.R. (B.R.) 219.**

——**S. 44**—*Suit under—Claim as mortgagee made with reference to a wrong plot—Liability to ejectment,*

Where owing to a clerical mistake, the tenant in a suit for ejectment, pleads that he held one of the plots from the zamindar and the other as a mortgagee but gave the wrong numbers with reference to the plots, his ejectment from the field which he really held as a mortgagee cannot be upheld. (*Bomford, S.M. and Mehta, J.M.*) GUR DIAL *v.* MOTI. **1939 R.D. 131=1939 A.W.R. (B.R.) 194.**

——**S. 44**—*Suit under—Defendants retaining land without consent of proprietor for over 12 years—Liability to ejectment—Limitation.*

Persons who retain possession of land without the consent of the proprietor for 12 years, cannot be ejected by a suit under S. 44. When the defendants are shown in 1340 F., as non-occupancy tenants *bila lagan* with a period of 13 years, having been recorded as *khudkasht* holders of one year at settlement in 1326 F., and when soon after settlement, a partition takes place as a result of which the land of the said *khudkasht* holders fall into another *mahal* or *patti*, they become non-occupancy tenants of it without fixation of rent pending arrangements with the landholder. A suit to eject such persons under S. 44 more than 12 years after such partition is barred by limitation. (*Drake Brockman, S.M. and Knox, J.M.*) FATIMA *v.* SIRAJUDDIN. **1936 R.D. 85.**

——**S. 44**—*Suit under—Damages—Measure of —Discretion of Court—Limits.*

In a suit for trespass under S. 44 of the Agra Tenancy Act damages do not necessarily depend on the number of years during which the trespass has taken place. Damages are in the discretion of the Court. But they should not exceed four years annual rental calculated in the manner laid down in S. 44. (*Drake Brockman, S.M. and Knox, J.M.*) KARTARI *v.* UMRAO SINGH. **1936 R.D. 525.**

——**S. 44**—Suit under—If barred by admissions in suit under S. 106 by the landholder. *See* EVIDENCE ACT, S. 31 AND AGRA TENANCY ACT, S. 31. **1939 R.D. 299.**

——**S. 44**—*Who can sue—Suit by some only of the co-parcenary body—Maintainability.*

An ejectment suit under S. 44 of the Tenancy Act can only be brought by the landholder and the landholder has been held to mean the whole co-parcenary body. So a suit by some only of the members is not maintainable. (*Darling, S.M. and Bomford, J.M.*) MEWA RAM *v.* SUKHEY SINGH. **1938 A.W.R. (B.R.) 137=1938 R.D. 267.**

——**S. 44**—*Suit under, by a zamindar, one of several co-sharers—Maintainability— Refusal of others to join—Remedy.*

A suit under S. 44 of the Tenancy Act can only be brought by the landholder and the landholder is the entire co-parcenary body. So one or more of the co-sharers only cannot bring a suit under S. 44. If a plaintiff cannot induce his co-sharers to join in the suit, then his remedy lies by way of

partition under the Land Revenue Act. (*Darling, S.M. and Mehta, J.M.*) PARBHOO *v* CHARTAR SEN. 1938 A.W.R. (B.R.) 321=1938 R.D. 789=1938 A.L.J. (Supp.) 110.

——S. 44—*Suit under—Maintainability—Plaintiff collecting rent and obtaining possession under S. 79—Ejectment, if can be resisted.*

In a suit under S. 44 of the Agra Tenancy Act by a person who has been collecting rent of the plots in question for over 25 years and who had also obtained possession under S. 79 of the Act, ejectment cannot be resisted by the defendants on the ground that the plaintiff was only the mortgagee of half the *khewat* and that until the half shares have been definitely demarcated by a regular partition through Revenue Courts the whole *khewat* must be presumed to be joint and that as such the suit is not maintainable under S. 44. (*Marsh, S. M.*) BARE LALL *v.* UMRAO SINGH. 1939 A.W.R. (B.R.) 93=1939 R.D. 397.

——S. 44—*Suit under—Plea in defence—Failure to prove title set up—Plea of limitation, if available thereafter.*

In a suit under S. 44 of the Agra Tenancy Act, it is always open to a defendant to plead a title and on his failure to prove that, to plead limitation. (*Harper, J. M.*) BIJAI BAHADUR *v.* CHOORAMAN. 1940 R. D. 192=1940 A. W. R. (B.R.) 69 (2).

——S. 44—*Suit under—Pleadings—Contents.*

When a landlord brings a suit under S. 44 of the Agra Tenancy Act he must be certain of the position that he has to take. His pleading must contain a clear statement that the area has been settled with no one and that the person proceeded against has come in as a trespasser. He cannot plead that some one else is in possession and a third person has trespassed on the plot. In that case the trespass would be against the person who is in possession and as such the suit would have to be dismissed. (*Darling, S.M. and Mehta, J.M.*) AMARJIT SINGH *v.* THAGRAM. 1938 R.D. 836=1938 A.W.R. (B.R.) 432.

——S. 44—*Suit under—What are proper issues.*

In a suit under S. 44 of the Tenancy Act, the proper issues to be framed are firstly as to the existence of the contract of tenancy, secondly, if the former issue is decided against the defendant, whether they are liable to ejectment as trespassers and lastly, if the prior issue is decided in favour of the plaintiff, to what damages is he entitled? (*Darling, S.M. and Bomford, J M.*) HARDAN SINGH *v.* SHIB KARAN. 1938 R.D. 347 =1938 A.W.R (B.R.) 224.

——S. 44—*Suit by recorded* sir *holders for ejectment of defendants as trespassers—Joint mahal—Existence of other co-sharers—Existence of* sir *rights—Materiality.*

The existence or otherwise of *sir* rights is a very material question in a case where the plaintiffs sue as recorded *sir* holders for the ejectment of the defendants under S. 44 of the Tenancy Act as trespassers. For it the land is *khalsa* the suit would be bad, if it is only by some of the co-sharers. (*Darling, S.M. and Bomford, J.M.*) RAM KARAN SINGH *v.* RAM BARAN DUBE. 1938 R.D. 376 =1938 A.W.R. (B.R.) 217=1938 A.L.J. (Supp.) 56.

——S. 44—*Suit under—Defences open—Onus.*

In contesting a suit under S. 44, Tenancy Act, the written statement may take one of two shapes

—either the defendant will urge that he is in possession as a trespasser and it is then for the plaintiff to show that the suit is within time; or the defendant will urge that he has been admitted to the tenancy, in which case the onus is on him to show that he has been so admitted. When a tenancy in chief determines and a sub-tenant claims that he has been accepted by the zamindar as tenant, then the novation of the contract has to be specifically proved by the defendant urging the novation of the contract. (*Marsh, S.M. and Mehta, J M*) RAJENDRA PRASAD SINGH *v.* SHANTA UPADHYA. 1940 R.D. 16=1940 A.W.R. (B.R.) 12=1940 A.L.J. (Supp.) 5.

——S. 44—*Suit under—Plea of admission to tenancy—Onus.*

Where a defendant in a suit for ejectment under S.44 of the Agra Tenancy Act sets up a plea of an admission to tenancy by the plaintiff, the onus is on him to prove the contract of tenancy. Where he has discharged it and the plaintiff did not care to go into the box and the only other evidence that of the patwari was negative in character, the Board will not interfere with the finding of the Commissioner as to admission to tenancy. (*Darling, S.M. and Mehta, J.M.*) KHEM CHAND *v.* BUDHA. 1938 R.D. 938=1939 A.W.R. (B.R.) 57.

——S. 44—*Suit under—Proof of possession for over 12 years without payment of rent—Starting point for adverse possession—Onus.*

When once the trespassers, in a suit under S. 44 of the Tenancy Act have shown that they are in possession without payment of rent for over 12 years, the onus lies very heavily on the landholder as regards fixing of the terminus from which according to him adverse possession began and that it has not been long enough to constitute 12 years. (*Mehta, S M.*) ADITYA NARAIN SINGH *v.* JANGI. 1939 R.D. 3=1939 A.W.R. (B.R.) 103.

——S. 44—*Suit under, against ejected tenant—Defence of re-admission—Burden of proof.*

If in a suit to eject the defendant under S. 44, the plaintiff proves that he had ejected the defendant about 10 years ago, the defendant claims that he was re-admitted and has been cultivating for about 4 years, the burden of proving re-admission to the holding lies on the defendant. The law allows a limitation of 12 years in cases coming under S. 44, and it is not reasonable to draw an inference adverse to the landlord merely because he takes no action for three or four or more years. (*Drake Brockman, S.M. and Knox, J.M.*) LALU CHAUDHRI *v.* SAKALRAJ CHAUDHRI. 1936 A.W.R. 60=1936 R.D. 22.

——S. 44—*Suit under—Burden of proof—Defendant admitting possession—Effect.*

In a suit under S. 44 of the Agra Tenancy Act, once the defendant admits that he is in possession, the burden of proving that he was admitted to tenancy lies on him. The only case, in which the onus might lie on the plaintiff is when the defendant denies that he is in possession of the land in suit at all. (*Drake Brockman, S.M. and Knox, J.M.*) JAGDISH MANI *v.* KANDHAI BHAR. 1936 R.D. 330.

——S. 44—*Procedure—Suit by holder of* sir *plot allotted on partition—Defendant proved to be mortgagee of plot — Procedure — Remedy of defendant—Right of plaintiff to possession.*

AGRA TENANCY ACT (1926), S. 44.

Where in a suit for ejectment under S. 44, by a person who gets *sir* land on partition, the defendant pleads and proves that he is a mortgagee of the plot that has been allotted to the plaintiff, the claim of the plaintiff for possession of his plot should not be dismissed. The mortgagee has his remedy against the other party of the original mortgagor and must pursue his remedy in that direction. (*Bomford, J. M.*) SACHITANAND PANDEY *v.* SHIVA SARAN RAI. 1938 R. D. 125= 1938 A.W.R. (B.R.) 70.

———S. 44—*Suit under—Prior ejectment in suit under S.* 58—*Absence of actual demarcation—Suit, if to be dismissed.*

In a suit under S. 44 of the Agra Tenancy Act after ejectment of the defendant in a prior suit under S. 58 of the Act, as long as the land is identifiable there is no necessity of actual demarcation; and the suit cannot be dismissed on the ground that there is no specification as to the position of the area from which ejectment was ordered in the prior suit. (*Knox, S.M. and Grant, J.M.*) BENOY RATNA BANERJI *v.* MANNU. 1936 R.D. 32.

———S. 44—*Suit under—Plea of ownership as donee under gift deed—Claim referred to Civil Court and found against—Subsequent plea of rent-paying tenant—If open.*

In a suit for ejectment under S. 44, Agra Tenancy Act, the defendant claimed to be an out-and-out proprietor, as a donee under a deed of gift. The claim was referred to the Civil Court and decided against the defendant. Later he claimed to be a tenant paying rent.

Held, the defendant should not be allowed to turn round and put an entirely inconsistent defence and claim that he was a rent-paying tenant. (*Drake Brockman, S.M. and Knox, J.M.*) MAHADEO PRASAD *v.* BANDHAN. 1936 R.D. 365 (2).

———S. 44—*Tenant admitted by some only of the co-parcenary body—If only a trespasser.*

Where a person has not been admitted to tenancy by the whole co-parcenary body, the lease is invalid and such a person is only a trespasser and not a tenant. (*Darling, S.M. and Bomford, J. M.*) MANGLI *v.* BHAWANI. 1938 A.W.R. (B.R.) 139=1938 R.D. 269.

———S. 44—*Tenant persisting in holding after formal ejectment—Zamindar's right to eject when estate is under attachment by Collector—U. P. Land Revenue Act, S.* 151.

If a tenant persists in holding on to the tenancy even after a formal ejectment in a proceeding under S. 79 of the Tenancy Act, the Zamindar is entitled to bring another suit for his ejectment as trespasser under S. 44 of the Act, although the Collector has attached his estate for default in paying the land revenue. (*Darling, S.M.*) PAHLAD SINGH *v.* SETH BANSIDHAR. 1937 R.D. 581.

———S. 44—*Tenant ousted by some of landholders—Right to sue them as trespassers.*

Where some of a body of landholders have ousted the tenant, in pursuance of some supposed right, the tenant has the right to sue them for ejectment under S. 44 as trespassers. (*Darling, S. M.*) DULAR SINGH *v.* GAJRAJ SINGH. 1937 R. D. 449.

———S. 44—*Suit to eject defendant from part of field belonging to more than one* mahal—*Previous demarcation of plot—If essential—Plaintiff share shown to be specific part and area known—Ejectment—If can be ordered.*

Where a field cultivated by the defendant belongs to more than one *mahal*, and there is nothing to show which part of the field is in which *mahal*, ejectment cannot be ordered without previous demarcation of the part from which ejectment is sought. But when there is evidence to show that the plaintiff's share of the field is a specific part of it, and the area is known, there is no difficulty about ejecting the defendant from the plaintiff's share of the field. (*Bomford, J. M.*) MUNIR KHAN *v.* GUR DAYAL. 1937 R.D. 11.

———S. 44—*Suit for ejectment—Defendant in possession for* 34 *years*, bila lagan—*Suit, if barred.*

Where in a suit by an occupancy tenant for the ejectment of the defendants as trespassers under S. 44 of the Tenancy Act, the Court finds that the defendant had been in possession for 34 years, *bila lagan* and that it is quite impossible to believe that the plaintiff was not aware of this possession for the greater part of this period, though he was in the army for 19 years, the suit is liable to be dismissed as barred by limitation of 12 years. (*Darling, S. M.*) PEM SINGH *v.* INDER SINGH. 1937 R.D. 270.

———S. 44—*Suit and decree for ejectment under —Subsequent suit for declaration of tenant right by nephew of ejected tenant — Bar of —* Res judicata.

A zemindar sued one M. T. for his ejectment under S. 44, Agra Tenancy Act, and got an order for his ejectment from the Board of Revenue in second appeal. Subsequently S. T., nephew of M., sued for the zamindar and M. T. for a declaration that he was the tenant of the land in suit, alleging that though he and his uncle were living separate, they were cordial and cultivated jointly.

Held, though S. T. was not a party to the prior suit for ejectment, yet he could not be held to be ignorant of the decree for ejectment of his uncle from the land in suit. and must therefore be held bound by that decree, and the suit must therefore be dismissed as not maintainable in view of the prior decree. (*Drake Brockman, S. M. and Knox, J. M.*) HARAKH CHAND *v.* SUMER TEWARI. 1936 R.D. 119.

———S. 44—Suit to eject maternal grandsons of last male tenant—Plea of co-sharing in cultivation —Burden of proof. *See* AGRA TENANCY ACT, S. 24. 1936 R.D 190.

———S. 44—*Transferee from co-sharer in exclusive possession—If can be ejected.*

Where a co-sharer in undivided property is in enjoyment of a definite share by arrangement with the other co-sharers, it is not permissible for him to alienate to a third person as his exclusive property the portion which he has been thus occupying by agreement with his co-sharers. Any transferee from him acquires no right by the transfer and is not entitled to any relief in a suit against him under S. 44 of the Tenancy Act. (*Bennet and Verma, JJ.*) RAM KRIPAL *v.* ABDUL WAHID. 1940 A.W.R (H.C.) 199=1940 R.D. 132.

———S. 44—*"Trespasser"—Mortgagee from tenant holding after termination of tenancy—Status of—Mortgage over* 60 *years old—Effect of.*

A mortgagee from a tenant whose tenancy has expired by surrender or by death is a trespasser and can be ejected by the zamindar as such. The

AGRA TENANCY ACT (1926), S. 44.

fact that the mortgage is over 60 years old makes no difference. (*Darling, S. M. and Bomford, J. M.*) BALGOVIND *v.* SATNARAIN LAL. 1938 R.D. 174=1938 A.L.J. (Supp) 2=1938 A.W.R. (B. R.) 93.

———S. 44 (1)—*Object and effect of—Suit by some co-sharers to eject trespasser—Plea by defendant that he holds under lease granted by other co-sharers with consent of plaintiffs—Plaintiffs not accepting lease but challenging its validity—Jurisdiction of Civil Court—If barred.*

A suit by some of the Zamindars of a village to eject a trespasser is perfectly maintainable in a Civil Court; the fact that the defendant pleads that he holds under a lease by the plaintiffs' co-sharers, which has been concurred in by the plaintiffs does not deprive the Civil Court of its jurisdiction. Jurisdiction is determined primarily by the allegations in the plaint; and when the plaintiffs allege that the defendant is a trespasser and that the lease under which he holds invalid, the suit is cognizable by a Civil Court, although, S. 44 of the Agra Tenancy Act would also give the plaintiffs a remedy in the Revenue Court to a limited extent. S. 44 was enacted in order to allow facility to an owner of an agricultural land in seeking a speedy remedy through the Revenue Court, if the defendant has taken possession without the consent of the landlord and if the landlord is prepared to accept damages up to the maximum prescribed in the section. But the section does not and cannot deprive the landlord of his right to eject the defendant through the Civil Court on the ground that he is a trespasser. (*Niamatullah, J.*) JAGADAMBA SINGH *v.* RAM SARUP. I.L.R. (1937) All. 570=170 I.C. 477=10 R.A. 111=1937 A.L.R 668=1937 A.L.J. 329 =1937 R.D. 176=1937 A.W.R. 320=A.I.R. 1937 All. 415.

——— Ss. 44 and 36—Suit for ejectment of sub-tenants—Merger of occupancy rights in proprietary rights—No new contract of tenancy brought into existence. *See* AGRA TENANCY ACT, Ss. 36 AND 44. 1937 R D. 522 (1).

———Ss. 44 and 45—*Acceptance of rent on behalf of deceased recorded tenant—Person paying rent, if can be ejected under S.* 44.

Where the defendant has been making payments on behalf of long deceased recorded tenants and they had been accepted by the plaintiff's agents and the usual receipts had been given, such a defendant cannot be ejected under S. 44 of the Tenancy Act as a trespasser. But fresh rent can be assessed under S. 45. (*Marsh, S.M. and Mehta, J. M.*) CHITESAR RAI *v.* RAM RAN BIJAI PRASAD. 1939 A.W.R. (B R.) 139=1939 R D. 472=1939 A.L.J. (Supp.) 84.

———Ss. 44 and 45—*Applicability—Tenants holding on in possession in spite of ejectment for over 12 years—Effect—Suit by landlord under S.* 44 *if lies—Proper remedy.*

The defendants who were formally ejected in 1923 managed to hold on to the plots and to retain possession for more than 12 years; there was no evidence of any regular re-admission to the tenancy. The names of the defendants continued in the *khatauni* even after the ejectment, and there was a settlement the very next year. In a suit by the zamindar for ejectment under S. 44 of the Agra Tenancy Act,

AGRA TENANCY ACT (1926), S. 44.

Held, that it was impossible to believe that the plaintiff-zamindar had no knowledge of the entry in the settlement, that the defendants had acquired statutory rights and that they were therefore protected from ejectment.

Held, further, that it was open to the zamindar to bring a suit under S. 45 of the Act for the assessment of rent on the holding. (*Darling, S.M. and Bomford, J.M.*) PULANDER SINGH *v.* DAULI SINGH. 1937 R.D. 442=1937 A.W.R. 1027.

———Ss. 44 and 45—*Suit for ejectment—No prayer for fixation of rent—Subsequent prayer for fixing rent—Absence of sufficient material on record—Relief—If can be granted.*

Though under S. 192 of the Agra Tenancy Act, a Court can, in a suit under S. 44 of the Act, grant any relief to which the plaintiff may be found entitled, though he may not have asked for it in the plaint, yet when there is no sufficient material to fix the rent under S. 45, a plaintiff who asks for fixation of rent in a suit for ejectment under S. 44, at a late stage, cannot be granted that relief. (*Drake Brockman, S.M. and Knox, J.M.*) FATIMA *v.* SIRAJUDDIN. 1936 R.D. 85.

———Ss. 44 and 45—*Trespasser—Ejectment—Delay in suing for—Effect—Inference of admission of defendant to tenancy—When justified.*

The zamindar generally has 12 years in which to make up his mind whether or not he will eject a trespasser, *i.e.*, a man who has taken possession of his land without his consent. Mere delay in suing without more is no bar to ejectment of the defendant. If the zamindar, however, delays for a considerable time and if in regard to acceptance of rent and other matters he acts in such a way that it may be inferred that he has in fact admitted the defendant to tenancy, it would be reasonable to draw the conclusion that the defendant has been admitted to tenancy. Where there has been no payment of rent at all, there can be no such inference. (*Drake Brockman, S.M. and Knox, J.M.*) JAGDISH MANI *v.* KANDHAI BHAR. 1936 R D. 330.

———Ss. 44, 45 and 192—*S.* 192, *when could be invoked—Rent, if can be fixed in a suit under S.* 44 *—Separate suit, when necessary.*

The whole object of S. 192 of the Agra Tenancy Act is to avoid multiplicity of suits, and it could be invoked only where a defendant claims to hold the land as rent-free grantee. Even though a suit is under S. 44, if there is a prayer for fixation or rent it could be fixed in the same suit. But if a defendent pleads that he is holding the land adversely and that adverse possession has ripened by prescription, in that case a separate suit under S 45 would have to be filed. (*Mehta, J.M.*) ADITYA NARAYAN SINGH *v.* RAM CHARITTRA TEWARI. 1938 R.D. 918=1938 A.W.R. (B.R.) 406.

———Ss. 44 and 82—*Applicability—Land validly let to tenant and transferred by him to another—Remedy of landlord—Suit by landlord to eject transferee as trespasser—Maintainability.*

S. 44 of the Agra Tenancy Act only applies to a case where a person has taken possession of the landholder's land without his consent and in contravention of the provisions of the Act. It is only then that the landholder can treat the occupier as a mere trespasser and sue him in a Revenue Court for ejectment. Where, however, the land had been validly let to a tenant who was in lawful

possession thereof, and the latter has transferred it to another person, S. 44 cannot apply. To such a case S. 82 is the special section applicable. The proper course for the landlord in such a case is to bring his suit under S. 82, because the cause of action for his suit is the illegal act of his tenant and not the occupation of the land by the transferee. (*Sulaiman, C.J. and Harries, J.*) RAM CHANDRA SINGH *v.* MISRILAL. I L.R. (1937) All. 958=172 I.C. 629=10 R.A. 418=1938 A.L.R. 18=1937 A.W.R. 888=1937 R.D. 532=1937 A.L.J. 1204=A I.R. 1937 All. 790.

——Ss. 44 and 86—*Trees disappearing from portion of grove land—Suit to eject grove-holder from that portion—If lies.*

Even though the trees may have disappeared from a portion of a grove land, the whole plot should still be treated as grove land, and a suit for ejectment of the grove-holder or his transferee from that portion is bad whether it be laid under S. 44 or S. 86 of the Agra Tenancy Act. (*Darling, S.M.*) RAGHUBIR SINGH *v.* GHULAM QADIR KHAN. 1937 R.D. 166 (1).

——Ss. 44 and 86—*Applicability—No ex-proprietary rights claimed on mortgage of* sir—*Suit to eject non-occupancy tenant in* sir—*Section applicable.*

Where no ex-proprietary rights are claimed on the mortgage of *sir* land, the non-occupancy tenant in *sir* continues to be non-occupancy tenant and a suit to eject him should be brought under S. 86 and not S. 44 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) BALDEO PRASAD PANDE *v.* LALTA. 1938 R.D. 549=1938 A.W.R. (B.R.) 244.

——Ss. 44, 86 and 92—*Prior suit under Ss.* 86 *and* 92 *against defendant as sub-tenant——Dismissal for default—Subsequent suit against same person under S.* 44 *as trespasser—If maintainable.*

Where an earlier suit under Ss. 86 and 92 of the Agra Tenancy Act in which the defendant was sued as a sub-tenant, was dismissed for default, a subsequent suit under S. 44 of the Act against the same defendant treating him as a trespasser after the tenant in chief had abandoned his interest in the holding, is not barred, for there has been a change in the position giving rise to a fresh cause of action. (*Darling, S.M. and Bomford, J.M.*) BADU *v.* HULASI. 1938 R.D. 57 =1938 A.W.R. (B.R.) 29.

——Ss. 44, 86 and 92—*Suit under—Defendants being non-occupancy tenants—Treatment of suit as one under Ss.* 86 *and* 92.

A suit lodged under S. 44 can be decreed, as if it had been brought under Ss 86 and 92, if the defendants be found to be non-occupancy tenants. 18 R.D. 618, Foll. (*Darling, S.M.*) UMRAO SINGH *v.* DINA SINGH. 1937 R.D. 522 (1).

——Ss. 44, 86, 205 (1) (d) and (e) and 218—*Co-sharers—Form or* theka *share by one*—Thekadar *holding over and admitting relation as tenant—Suit to eject such tenant by co-sharer singly—Maintainability.*

Where one of several proprietors in a joint mahal gives a form or *theka* of his share gives up possession in favour of the *thekadar*, and the latter holds over and admits a relation of his as tenant, the co-sharer who grants the *theka* cannot go behind these arrangements and sue to eject the tenant without the concurrence of the other co-

sharers as plaintiffs, in the absence of evidence to show that the admission of the tenant by the *thekadar* was fraudulent, which might support a suit under S. 44 of the Agra Tenancy Act. (*Drake Brockman, S.M. and Knox, J.M.*) MAHADEO SINGH *v.* KULWANTA. 1936 R.D. 187.

——Ss. 44 and 95—*Ejectment—Plea of admission—Onus—Re-admission—Oral evidence—Admissibility—Ejected person re-entering into occupation—Position of.*

In a suit for ejectment if the defendant pleads that he is not a trespasser as he has been admitted to tenancy, the onus is on him to prove the admission. As regards re-admission, it is the intention of the Act that there should be written consent in such cases and oral evidence is inadmissible. A person who re-enters into occupation after ejectment, without the written consent of the landlord remains liable to ejectment for 12 years as a trespasser. He takes possession at his own risk. (*Darling, S.M. and Bomford, J.M.*) BADRI NARAIN LAL *v.* SURJA RAM. 1938 A.W.R. (B.R.) 206= 1938 R.D. 652.

——Ss. 44 and 99—*Applicability and scope—Co-sharer admitting tenant—Ouster of tenant by stranger claiming admission under another co-sharer—Ejectment of stranger by first co-sharer—Latter admitting another to tenancy over the head of tenant without terminating tenancy—Suit by tenant against co-sharer and new tenant under S.* 99—*Maintainability—Limitation.*

The plaintiff-appellant was admitted to tenancy by a co-sharer *H*, he having authority to do so under the village custom. He was admitted in 1339 F.; but was ousted in 1340 by one *R*, who claimed to have been admitted by another co-sharer. *H* then ejected *R* as a trespasser at the end of 1341 but admitted *B* into possession over the head of the plaintiff, *H* himself having become landholder in 1340. In 1342 plaintiff-appellant brought a suit against *H* and *B* under S. 99 of the Agra Tenancy Act, within six months of the date on which *B* entered into possession.

Held, that though plaintiff could have brought a suit against *R* under S. 44 of the Act to eject him, the fact that he did not do so, and that *H* ejected *R* under S. 44, did not put an end to the contract of tenancy between *H* and the plaintiff; that plaintiff could not have sued *R* under S. 99; but having been admitted to tenancy by *H* plaintiff could eject *R* as a trespasser within 12 years from 1339 F.; and that the act of *H*, in letting the land to *B* over the head of the plaintiff without legally extinguishing the plaintiff's tenancy, amounted to an ejectment of the plaintiff, who thereupon became entitled to sue *H* and *B* under S. 99 of the Act within six months from the date on which *B* was put into possession. (*Drake Brockman, S.M. and Knox, J.M.*) GANGA RAM *v.* HIRA LAL. 1936 R.D. 477.

——Ss. 44 and 99—*Applicability—Suit under S.* 44—*Plea of surrender and new admission by zamindar—Zamindar's support, if converts suit into one under S.* 99—*Effect on limitation—Procedure to be followed.*

Where a suit is filed under S. 44 of the Tenancy Act and the defendant pleads that there was a surrender by plaintiff and that he got the lands from the zamindar, then if such plea is supported by the zamindars, the suit becomes one under S. 99 and ought to be changed accordingly and

AGRA TENANCY ACT (1926), S. 44.

fresh issue framed as to limitation. In such a case where the plaintiff became aware of the hostile attitude of the zamindars only after filing of his suit under S. 44, the suit as filed was held to be within time. (*Darling, S. M. and Bomford, J.M.*) BADRI PRASAD *v.* BINDRABAN. 1938 A.W R. (B.R.) 159=1938 R.D. 339.

——Ss. 44 and 99—*Applicability—Forcible possession by co-sharer—Ejectment—Section applicable—Facts to be proved by tenant.*

Where one of several co-sharers takes forcible possession over a holding of a tenant, then the section under which his ejectment has to be sought is not under S. 99 but S. 44 of the Agra Tenancy Act. It is for the plaintiff tenant to prove in such a case that the suit lay and that he has come within 12 years of dispossession. (*Marsh, S. M. and Mehta, J.M.*) RAJJAB HUSSAIN *v.* ALOPI. 1939 R. D. 202=1939 A.W.R. (B.R.) 187.

——Ss. 44 and 99—*Scope—Co-sharers—Ejectment by some only illegally and dispossession of tenant—Suit by latter under S. 99—Subsequent suit by same co-sharers for ejectment of heir of tenant—Plea by latter that plaintiffs are not landlords entitled to sue—Estoppel—If arises.*

A tenant who is illegally dispossessed by some only of the co-sharers of the joint patti has a right to sue such co-sharers under S. 44 of the Agra Tenancy Act. But the fact that he sues them under S. 99 of the Act instead of under S. 44, cannot estop him or his heir in a subsequent suit by those co-sharers for his ejectment from pleading that the plaintiffs co-sharers are not his landlords and that they are not competent to eject him as not being the whole body of co-sharers. (*Darling, S. M. and Bomford, J. M.*) BHAROSA *v.* BIJAI BAHADUR SINGH. 1938 R.D. 163=1938 A. W.R. (B.R.) 99.

——Ss. 44 and 99—*Suit by tenant to eject trespasser—Limitation—Starting point.*

Where a tenant sues to eject a person as a trespasser, time for such a suit begins to run only from the time the tenant is ousted from possession either by the zamindar or the trespasser claiming under the zamindar. The mere giving of a receipt for rent to the trespasser by the zamindar after the filing of the suit could not amount to an overt act to oust the tenant from possession. (*Bomford, J. M.*) BHAGIRATH TEWARI *v.* ATIRAJI. 1938 A. L.J. (Supp.) 77=1938 R.D. 778.

——Ss. 44 and 99—*Suit to eject trespasser—No plea as to non-joinder of recorded tenants-in-chief—Later objection—Procedure to be followed.*

Where in a suit to eject as a trespasser a person recorded as *quabiz*, no plea was specifically taken as to the non-joinder of all the recorded tenants-in-chief but later on the objection is raised, it is unnecessary to make them parties. If the recorded tenants-in-chief have any rights there is nothing to prevent them from asserting their rights under S. 99, if after ejecting the trespasser, the plaintiff either takes the fields into his own cultivation or puts in another tenant. (*Darling, S.M. and Bomford. J M.*) SHEO NARAIN *v.* SHEO RATAN. 1938 A.W.R. (B.R.) 156=1938 A.L.J. (Supp.) 18= 1938 R D. 248.

——Ss. 44 and 107—*Occupancy tenancy—Mortgage—Tenant not recorded as 'Mafrur' but mortgagee recorded as mortgagee—Surrender by tenant—Mortgagee, if can be ejected.*

AGRA TENANCY ACT (1926), S. 44.

Where an occupancy tenant who leaves the village is not shown as 'Mafrur' while a mortgagee of the tenancy is shown as a mortgagee, on the formal surrender by such a tenant in favour of the zamindar, the mortgagee is liable to be ejected. (*Darling, S. M. and Marsh, J.M.*) RAM SANKAR SINGH *v.* RAGHUBIR KHAGI. 1938 R.D. 619=1938 A.W.R. (B.R.) 331=1938 A.L.J. (Supp) 112.

——Ss. 44 and 107 (2)—*Applicability—Occupancy holding—Tenant permitting his sons to divide it amongst themselves—Father receiving rent and remaining liable to landlord—Notice to quit on one of the sons—Refusal—Suit under S. 44, if maintainable.*

Where an occupancy tenant permitted his sons to divide the holding between themselves and received the rent from them and continued to be responsible to the landlord, and where after several years he served a notice to quit on one of the sons and on his refusal to leave filed a suit under S. 44 of the Agra Tenancy Act.

Held, that the case was covered by S. 44, for the son was obviously retaining possession without the consent of the immediate landholder and against the provisions of the statute.

Held further, that S.107 (2) might only apply if the whole holding had been left in the charge of the son concerned, but as in fact only a portion was left in his charge, the section had no application. (*Darling, S.M. and Bomford, J.M.*) GOVIND DAS *v.* AJODHIA PRASAD. 1938 R.D. 58=1938 A. W.R. 20 (B.R.).

——Ss. 44 and 132—*Distinction—Proof that no third party interests affected—Necessity for, in suits under S. 44.*

It is necessary to distinguish cases under S. 44 from those under S. 132. In cases under S. 44 it is necessary for Courts to call on plaintiff to prove that the interests of no third party are affected. (*Marsh, S.M. and Mehta, J.M.*) MUKAT SINGH *v.* JAGANNATH PRASAD. 1939 A. W. R. (B.R.) 50 (1)=1940 R.D. 48 (1).

——Ss. 44 and 205—Theka—*Collaterals of* thekadar *in possession—Expiry of* theka—*Liability of the collaterals to ejectment.*

Where collaterals of a *thekadar* have been put in possession of lands, on the expiry of the *theka* they can all be ejected as trespassers. (*Darling, S. M. and Marsh, J.M.*) MASUDA BIBI *v.* AZIMULLAH. 1938 R.D. 621=1938 A.W.R. (B.R.) 268= 1938 A.L.J. (Supp.) 102.

——Ss. 44 and 205—*Applicability—Person admitted to possession under lease conferring rights of landlord—Holding over after expiry of term—Status of—If statutory tenant or* thekadar *or trespasser—Ejectment—Remedy of lessor.*

A person coming into possession of lands leased to him under an instrument which gives him all the usual rights of a landholder, and holding over after the expiry of the term of the instrument under which he comes into possession is not a *thekadar* in the legal sense, in view of S. 200 of the Agra Tenancy Act, but is either a tenant or a trespasser in the loose sense of that term. He cannot, however, claim the rights of a statutory tenant. He has to be classed as belonging to the category of "other non-occupancy tenants," his actual status as tenant or trespasser being left to be determined on the merits of each case. The landlord can only bring a suit against him for

ejectment under S. 44 of the Agra Tenancy Act and not under S. 205 of the Act. (*Drake Brockman, S.M. and Knox, J.M.*) RADHEY MOHAN LAL *v.* MOHAMMAD USMAN KHAN. 1936 R.D. 133.

——S. 45—*Applicability—Person occupying land without permission of landlord—Landlord accepting as tenant—Suit for arrears of rent without fixation of rent—Maintainability—Proper procedure.*

A landlord wishing to treat as tenant a person who has occupied his land without his permission must ordinarily sue for fixation of rent under S. 45, Agra Tenancy Act, if they cannot agree upon the rent. He cannot miss out this step and sue straightaway for arrears of rent. But if both the parties accept the rent claimed in the plaint as correct, it is not necessary to insist upon the landlord plaintiff taking proceedings under S. 45 before he can obtain a decree for arrears.

Per *Drake Brockman, S. M.*—This rule holds good only if the plaintiff accepts the person admitted to tenancy of the lands to which he alone has the right to admit, as tenant. If he does not, his course would be to eject the person admitted under S. 44 of the Act. (*Drake Brockman, S. M. and Knox. J. M.*) PITAM RAM *v.* RAHIM. 1937 R.D. 20.

——S. 45 -Fixation of rent—Procedure—If can be done in a suit under S. 132. *See* AGRA TENANCY ACT, SS. 132 AND 45. 1938 A.W.R. (H.C.) 634 (2).

——S. 45—Separate suit under—When necessary. *See* AGRA TENANCY ACT, SS. 44, 45 AND 192. 1938 R.D. 914.

——S. 45—Suit under—Court-fee payable. *See* COURT-FEES ACT, S. 7 (*xi*). 1936 R.D. 390.

——Ss. 45 and 123—*Fixing rent in suit under S. 123—Power of Court.*

It is not open to a Court to fix rent under S. 45 when the suit is brought under S. 123 of the Agra Tenancy Act. (*Bomford, S. M. and Mehta, Offg. S.M.*) MANGAL CHAND *v.* RAHAM ALI KHAN. 1939 R.D. 162=1939 A.W.R. (B R.) 161.

——S. 47—*Agreement to pay enhanced rent under compromise in ejectment suit—Absence of registration—Acted upon—Binding nature—Onus.*

Where an ejectment suit is dismissed in terms of a compromise under which the tenant agreed to pay enhanced rent in return for the granting of occupancy rights, such a compromise though unregistered, will become binding on the parties, if it has been acted upon. Hence it is the duty of the zamindar who bases his cause of action on such a compromise to prove that the agreement was in fact acted upon. (*Darling, S. M. and Bomford, J.M.*) RANGAI CHAMAR *v* JOGI SINGH. 1938 A. W.R. (B.R.) 153=1938 R.D. 303.

——S. 47—*Applicability—Tenant of sir land—Rent—Enhancement—Oral agreement—If sufficient.*

"Tenant" in S. 47 of the Agra Tenancy Act includes also a tenant of *sir* land; and the rent of a tenant of *sir* land cannot be enhanced otherwise than by registered agreement or order of Court as laid down by S. 47. It cannot be enhanced by oral agreement. (*Drake Brockman, S. M. and Knox, J. M.*) MANNA SINGH *v.* SRI RAM. 1936 R.D. 362.

——S. 47—Scope—Rent suit—Compromise varying cash rent into *batai rent*—Rate of commutation not stated and no change made in the

papers—No bargain in compromise and tenant getting no benefit—Decree by tahsildar on basis of—Legality of—If *res judicata*. *See* C. P. CODE, S. 11. 1938 A.W.R. (B.R.) 105=1938 R.D. 169.

——S. 47—*Scope—Variation of rent agreed on—Conditions of.*

The rent originally agreed on cannot be varied without an order of Court or a registered agreement. (*Drake Brockman, S.M. and Knox, J.M.*) MAZHAR KHAN *v.* SHEIKH INAYAT. 1936 R.D. 121.

——S. 47—*Scope and effect—Rent—Fixation of—Procedure—Variation of rent—Proper procedure—Proceedings under Tenancy Act—Necessity for—Agreement as to rent—If to be registered.*

The rent of a tenant cannot be decided in proceedings under the Land Revenue Act. It can only be decided under the Agra Tenancy Act; and under S. 47 of the latter Act, the rent payable by a tenant is presumed to be a rent or rate of rent previously payable by him until a registered agreement or a decree or order of a Court is proved varying the same. The rent of a tenant can be varied by way of enhancement or abatement, but that has to be made in proceedings under the Agra Tenancy Act. The order of a Collector or any other Court or a Revenue Officer directing that a certain rent, even if it has been agreed to before him whether in proceedings under the Land Revenue Act or out of Court, be recorded as the rent payable, is in no sense an order varying the rent. The law must be interpreted strictly; if the parties agree to a certain rent, there must be a registered agreement or an order of a Court in proceedings under the Tenancy Act varying the same. (*Drake Brockman, S.M.*) HAR PERSHAD *v.* SAVANT. 1936 R.D. 565.

——S. 58—*Suit under—Compromise admitting contesting defendant to occupancy holding—Effect on subsequent suit for division of holding by member of another branch.*

Where on the death of the holder of an occupancy holding, the zamindar filed a suit under S. 58 of the Old Tenancy Act against all his presumptive heirs, but it was contested only by a member of one branch and was eventually compromised by him by which he was admitted to the occupancy holding and where later on the members of another branch of the original holder sued for partition of the holding it was held that in view of the decision in the prior suit, it was for the plaintiffs in the later suit to prove possession, if they wished to prove their co-tenancy. (*Darling, S.M. and Bomford, J M.*) RAM SUMAR MISRA *v.* RAM NIRANJAN MISRA. 1938 A.W.R. (B.R.) 209=1938 R.D. 670.

——S. 59—*Roster rates—How fixed.*

Roster rates are fixed not on the basis of the rents of one village which may be unduly high or even imaginary, but on the rents paid by the villages of the circle, *i.e.*, similar villages with similar advantages. (*Bomford, J.M.*) NANHOO SINGH *v.* MANMOHAN DAS. 1937 R.D. 331.

——S. 59 (4)—Applicability—Ex-proprietary holding—Fixation of rent—Absence of settlement operations and absence of sanctioned rates—Procedure for determining rent. *See* U. P. LAND REVENUE ACT, S. 36. 1936 R.D. 82.

——S. 67—*Applicability—U. P. Land Revenue Act, S. 87—"Determine and fix"—Meaning—*

AGRA TENANCY ACT (1926), S. 72.

Settlement Officer—Rejection of application for abatement or enhancement—Effect of.

An order of the Settlement Officer rejecting abatement of rent is as equally effective as a definite order of enhancement or abatement under S. 87 of the Land Revenue Act. Where the rent payable is brought to the notice of the Settlement Officer by definite application of the tenant or landholder, the rejection by the Settlement Officer of an application for enhancement or abatement has the effect of "determining and fixing" the rent and such rent is equally not liable to enhancement or abatement for a period of 20 years or longer with rents which had been enhanced or abated. (*Drake Brockman. S.M.*) HAR PRASHAD *v.* SAVANI. **1936 R.D. 565.**

———**S. 72**—*Covenant overriding provisions of—Validity.*

It is not the intention of the Legislature to allow any covenant in a lease to override the provisions of S. 72 of the Tenancy Act. Hence any covenant against remission of rent in the kabuliyat is void. (*Ganga Nath, J.*) MAHARAJAH OF BENARES *v.* RAM NARAIN. **1938 A.W.R. (H.C.) 293=1938 R.D. 550=1938 A.L.J. 464.**

———**S. 73**—*Remission in contravention of—Zamindar's remedy.*

Where the remissions of rent are in violation of the provisions of S. 73 of the Agra Tenancy Act, the zamindar is entitled to treat them as *ultra vires* and proceed straightaway to realise the rents by suits. If he fails to do so the loss he thereby incurs is directly attributable to his own inaction in not taking the proper proceedings. A suit against the Secretary of State for damages is not maintainable in respect of such a loss. (*Thom and Iqbal Ahmad, JJ.*) ABDUL QAIYUM *v.* SECRETARY OF STATE. **I.L.R. (1938) All. 114=174 I.C. 505=10 R.A. 588=1938 R.D. 274=1938 A.W.R 126 (H.C.)=1938 A.L.R. 288=A.I.R. 1938 All. 158.**

———**S. 73**—*Remission slip—Entry in—If can be altered in judicial proceeding.*

The entry of a particular figure in the remission slip, if it remained unobjected to on the executive side by either party concerned, is not susceptible of being altered on any *a priori* grounds in a judicial proceeding before the Assistant Collector, the Collector, the Commissioner or the Board. The entry of the figure in the remission slip represented what should be allowed by way of abatement on account of slump in prices. (*Marsh, S.M. and Mehta, J.M.*) RAMCHARAN *v.* DAMODAR PRASAD. **1939 R.D. 520=1939 A.W.R. (B.R.) 220.**

———**Ss 73 and 74**—*Remission of rent under S. 73—Conditions to be observed—Non-compliance with—Validity of remissions—Suit regarding—If barred by S. 74.*

According to S. 73 of the Agra Tenancy Act, the remission or suspension of revenue is to precede the suspension or remission of rent and further the proportion of the rent remitted or suspended must not be in excess of the proportion of the revenue remitted or suspended. Where these two requisites are not complied with the remission is not one under S. 73, though it might purport to be one under S. 73 of the Act. S. 74 of the Act cannot be invoked to bar a suit in respect of such a remission. (*Thom and Iqbal Ahmad, JJ.*) ABDUL QAIYUM *v.* SECRETARY OF STATE. **I.L.R. (1938) All. 114=174 I.C. 505=10 R.A. 588=1938 R.D. 274=1938 A.W.R. 126 (H.C.)=1938 A.L.R. 288=A.I.R. 1938 All. 158.**

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———**S. 74**—Bar of suit under—Remission contravening provisions of S. 73. *See* AGRA TENANCY ACT, SS. 73 AND 74. **1938 A.W.R. 126 (H.C.).**

———**S. 78 (1)**—*Claim for compensation made after close of evidence—Entertainability.*

A claim for compensation for trees which is not put forward in the reply to the plaint but is advanced at a very late stage when the evidence has been closed will be entertained, as such a claim is not "duly" made within the meaning of S. 78 (1) of the Agra Tenancy Act. (*Darling, S.M.*) GAJRAJ SINGH *v.* PHUL KUNWAR. **1937 R.D. 380 (2).**

———**S. 79**—*Applicability—Agreement conferring status of fixed rate tenant and agreeing not to eject—Legality—Subsequent application for ejectment for arrears of rent—Maintainability.*

There is nothing illegal in a zamindar entering into a contract with a person conferring upon the latter the status of a fixed rate tenant and in agreeing for valuable consideration that he would not be ejected. Where a zamindar has agreed to such terms, he cannot later on seek or apply to execute a decree for arrears of rent by ejectment of the tenant under S. 79 of the Tenancy Act. (*Bennet and Verma, JJ.*) SITAL DIN DUBE *v.* SRIPAL SINGH. **186 I.C. 611=12 R. A. 427=1939 A.W.R. (H.C.) 716=1939 R.D. 564 =1939 A.L.J. 932=A.I.R. 1940 All. 44.**

———**S. 79**—*Application under — Limitation—Decree for arrears of rent—Application for arrest, unsuccessful—Subsequent application for action under S. 79 after time allowed—Limitation, if extended by prior application.*

Where after obtaining a decree for arrears of rent, the decree-holder applies to have the judgment-debtor arrested in execution of his decree, but fails to get him arrested, such an application cannot be considered as one which would keep alive the right to have the decree executed within the period of limitation, if it is followed by an application beyond time for action being taken under S. 79 of the Agra Tenancy Act. The two types of applications are not the same and cannot prop up each other and extend the period of limitation. (*Marsh, S.M. and Mehta, J.M.*) DWARKA PRASAD *v.* KHARGA. **1939 A.W.R. (B.R.) 91= 1939 R.D. 399=1939 A.L.J. (Supp.) 69.**

———**S. 79**—*Decree against ex-proprietary tenant for arrears of rent—Ejectment in execution—Extinguishment of all ex-proprietary rights.*

Where in pursuance of a decree for rent against an ex-proprietary tenant, an order in ejectment is passed in execution, all the ex-proprietary rights of the tenant are lost, for no such rights can exist after such formal ejectment, (*Darling, S.M. and Bomford, J.M.*) RAJADEI *v.* THAKUR DAS. **1938 R.D. 360=1938 A.W.R. (B.R.) 161 (2).**

———**S. 79**—*Ejectment—Review proceedings in connection with—Use of, as lever to obtain satisfaction of* takair *claim—Propriety—Revision.*

In proceedings for review of order of ejectment, it is most improper for a Court to bring pressure on the ejected tenants to satisfy the *takair* claims against one of them, before proceeding with the application on its own merits. Where it had been used as a lever for collecting the *takair* due, it is such a grave irregularity, that

the Board should exercise its revisional powers to set it right. (*Darling, S.M. and Mehta, J.M.*) KHACHEROO *v.* MOHAMMAD HASHIM. **1938 R.D. 918.**

——**S. 79**—Proceedings for ejectment of tenant—Applicability of S. 7 of the U. P. Encumbered Estates Act. *See* U. P. ENCUMBERED ESTATES ACT, Ss. 6, 7 AND 2 (*g*). **1937 R.D. 510.**

——**S. 79**—Rent decree—Execution by ejectment—Tenant allowing ejectment to go by default but retaining possession—Delivery of formal possession to land-holder—Effect—Status and rights of tenants continuing after ejectment. *See* AGRA TENANCY ACT (1926), S. 44. **1936 R.D. 180.**

——**S. 79**—*Zamindars refusing settlement but retaining possession — Liability to ejectment under.*

Where zamindars of certain village, who refused settlement first offered to them are allowed to retain possession of plots which they are in cultivatory possession, on a rental to be fixed by their settlement officer, they are excluded proprietors within the meaning of S. 74, Land Revenue Act, and must be regarded as rent paying ex-proprietors on the land held by them. Their position thus being clearly analogous to that of ex-proprietary tenants, they are tenants within the meaning of the Agra Tenancy Act and as such liable to ejectment under S. 79. (*Bennet and Collister, JJ.*) GATASRAN NARAYANJI MAHARAJ *v.* GHANSHIAM. **184 I.C. 577=1939 R.D. 428=1939 A.L.J. 910=1939 A.W.R. (H.C.) 523=A.I.R. 1939 All. 533.**

——**S 79**—*Service of notice—Personal effort of decree-holder—Necessity.*

Even when the defaulter judgment-debtors are evading service, the decree-holder must really make some personal effort to get personal service on them. (*Marsh, S.M.*) KRISHNA KUMAR *v.* TEJI. **1939 R.D. 526 (1)=1939 A.W.R. (B.R.) 226.**

——**Ss. 79 and 80**—*Decree for arrears—Execution proceedings—Court unable to take up case on date of expiry of third extension granted to judgment-debtor for payment of decree amount and adjourning case—Payment of balance due on adjourned date—If sufficient compliance—Effect on ejectment proceedings.*

A decree for arrears of rent passed on 10-12-1934 was put into execution under S. 79 of the Agra Tenancy Act on 17-1-1935. Three extensions were given to the judgment-debtors, the last of which would expire on 25-5-1935. In the course of this period two payments of Rs. 20 were paid by the judgment-debtors. On 25-5-1935, one of the judgment-debtors asked for one more month's grace. The Court having no time to deal with the case ordered that the case should be put up for orders on 6-6-1935. On 6-6-1935 another of the judgment-debtors deposited the balance of the decretal amount and on 26-6-1935, the Court dismissed the proceedings and refused to take any further action in ejectment.

Held, that though under S. 80, not more than three extensions could be granted to the judgment-debtors to pay up the decree amount, there having been no order of ejectment actually passed the effect of the adjournment order passed on 25-5-1935, postponing the case to 6-6-1935, was

to advance the date of the third extension for payment till 6-6-1935; and the judgment-debtor having made full use of this *locus penitentiae* and paid up the balance of the decretal sum on that date, which was the adjourned date fixed for the hearing, the ejectment proceedings were rightly dismissed. (*Darling, S.M.*) GHASI RAM *v.* PIRANA. **1937 R.D. 3.**

——**Ss. 79 and 80**—*Decree for arrears of rent—Order for ejectment in execution—Application by tenant for review on ground of want of knowledge of proceedings— Landlord making four attempts to serve summons and failing and then publishing in newspaper—Inference—Review—If to be allowed.*

Where it appears from the records that the zamindar made four efforts to serve a summons on his tenant, and failed, and after that he resorted to publication of the summons in a local newspaper, it cannot be supposed that the tenant had no knowledge of the proceedings so as to entitle him to apply for review of an order of ejectment in execution of a decree for arrears of rent. (*Bomford, J.M.*) KRISHNA DUTT *v.* RAM KUMAR. **1936 R.D. 573 (1).**

——**Ss. 79 and 80**—*Ejectment in execution of decree for arrears of rent—Tenants given every consideration and grace but proving regular defaulters and failing to appear on date of hearing without adequate reason—Plea of illness disbelieved—Court ordering ejectment and rejecting application for review—Appeal to Collector—Order on appeal allowing appeal and allowing tenant to deposit amount—If justified.*

A zamindar applied on 29-10-1934 for execution of his decrees for arrears of rent by ejectment of the tenants under S. 79 of the Agra Tenancy Act on 7-12-1934, the tenants applied for grace for settlement of the decrees and were allowed grace till 10-1-1935. On that date small payments were made and further time was granted till 26-1-1935, when further payments were made. The Court again allowed grace till 26-2-1935, but on that date the tenants were absent. The Tahsildar waited again till 28-2-1935, but again the tenants failed to appear. Since the decrees were not fully satisfied, the Tahsildar ordered the ejectment of the tenants. On 2-3-1935, one of the tenants applied for a review alleging that he was prevented from appearing in Court on 26-2-1935, by illness. The Tahsildar after due enquiry foundthat the plea of illness was not made out and on 26-5-1935 rejected the application for review. The tenants appealed to the Collector, who, while holding that there was no satisfactory proof of the alleged illness, allowed the appeal and proceeded to pass orders on the ground that the days were hard days for agriculturists; and he allowed them to deposit the balance of the decretal amounts.

Held, that the interests of the zamindars had to be protected as much as those of the tenantry; that the tenants who appeared to be regular defaulters had been shown every possible consideration in the Court of the Tahsildar, but yet they failed to appear on 26-2-1935, for no adequate reason; that their only possible plea of illness was disbelieved both by the Tahsildar and the Collector; and therefore the Tahsildar was fully justified in refusing to review his ejectment orders

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passed on 28-2-1935. The order of the Collector was therefore wrong and must be set aside.

Held, further, that the Collector had no business to pass orders in the case allowing deposits, but he was only entitled, if at all, to allow the review application and then to send the case back to the original Court for disposal according to law. (*Darling, S. M. and Bomford, J. M.*) RANCHHOR SINGH *v.* BIR SAHAI. **1937 R.D. 24.**

——**Ss. 79 and 80**—*Ejectment under S. 80—Tenant undischarged insolvent during period for which decree was obtained—Legality of ejectment—Tenancy, if vests in receiver—Provincial Insolvency Act* (1920), *S.* 28 (2) *and* (5).

An order for ejectment in respect of an unsatisfied decree for rent is not illegal merely because one of the tenants was an undischarged insolvent during the period in respect of which the decree for arrears of rent was passed. There is no landed property in question but only a tenancy. This is not 'real' property which can vest in an Official Receiver. (*Darling, S.M.*) BHOOREY *v.* QAMAR-UL-HASSAN KHAN. **1938 R.D. 787.**

——**S. 80**—*Alleged payment and extension of time—Finding of fact—If revisable.*

Where a tenant alleged a payment and applied for extension of time, when the payment is denied by the decree-holder, a decision thereon though a question of fact, can be considered in revision. It is wrong to suppose that a question of fact could not be considered in revision. (*Marsh, S.M. and Mehta, J.M.*) AJUDHIA PERSHAD *v.* KEWAL. **1939 R.D. 523=1939 A.W.R. (B.R.) 223.**

——**S. 80**—*Costs not deposited owing to a misunderstanding—Ejectment, if justified—Concurrent findings—Interference in second appeal.*

Per *Mehta, J.M.* and *Marsh, S.M.*, contra.—Where owing to a misunderstanding, the deposit of the decree amount in respect of a decree for arrears of rent, did not include the costs, it cannot entail the ejectment of the tenant. Where there were concurrent findings of two Courts on the above point, the Board refused to interfere with the finding. (*Marsh, S.M. and Mehta, J.M.*) BISHNATH SARAN SINGH *v.* PARSIDH NARAIN SINGH. **1939 R.D. 569=1939 A.W.R. (B.R.) 245.**

——**S. 80**—*Decree for arrears of rent—Judgment-debtor paying small portion of amount within the period of grace and asking for further grace—Discretion of Court—Interference.*

Where a judgment-debtor pays only a small portion of the amount due under a decree for arrears of rent within the period of grace given to him and asks for further grace, it is within the discretion of the Court to refuse to grant a further extension, and if it rejects the application of the judgment-debtor for a further extension and orders his ejectment, the Board will not interfere in revision. (*Darling, S.M.*) SURJA *v.* PANNA LAL. **1937 R.D. 374.**

——**S. 80**—*Ejectment—Payment of decree amount alone—Costs of ejectment, not paid—Liability to ejectment.*

A tenant is not liable to ejectment if he pays the decree amount alone without the costs of the ejectment proceedings. (*Bomford, J.M.*) NEWAL DUBE *v.* BHOLANATH. **1938 R.D. 395 (2)=1938 A.W.R. (B.R.) 335.**

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——**S. 80**—*Ejectment proceedings under—Defence by one of several co-tenants—Application for review of order by another on ground of non-service of notice—Competency.*

Where ejectment proceedings are taken against several co-tenants, it is a common practice for one of them to be sent and act on behalf of all; and when one of them has had an opportunity of defending and showing cause against ejectment, it is not open to another to apply for review of the order of ejectment on the ground that he was absent from the village and that notice was not served on him. In such cases, even if there is some doubt about the due service of notice on one of them, the review is usually refused the case having been actually defended by one of a number of defendants having a common interest. (*Drake Brockman, S.M.*) BHOLA SINGH *v.* RAM DEVI. **1936 R.D. 331.**

——**S. 80**—*Extension of time—Scope of—Tenant, if entitled to whole of last day—Order for ejectment on such last day—Legality—Review of order—Grounds.*

A tenant is entitled to have the whole of his last day of extension at his disposal for the satisfaction of the decree. Though an order for ejectment on such last day is not necessarily illegal, yet if the debtor appears on the following day and satisfies the Court that he did appear with money within the time allowed by law, the Court should review its order for ejectment. (*Darling, S.M. and Bomford, J.M.*) DURGA *v.* CHARAN SINGH. **1938 A.L.J. (Supp.) 31=1938 A.W.R. (B.R.) 152=1938 R.D. 301.**

——**S. 80**—*Judgment-debtor failing to appear on last day allowed for payment—Order of ejectment—Duty of Court to pass.*

If judgment-debtors fail to appear on the last day allowed by the law for payment of the decretal amount, the order of ejectment should necessarily follow and Courts should be chary of accepting the many and varied excuses made for failure to meet their obligations by defaulting tenants. (*Darling, S.M. and Bomford, J.M.*) RAM DHARI SINGH *v.* TAHSILDAR AHIR. **1937 R.D. 472.**

——**S. 80**—*Order of ejectment passed on date fixed for payment by tenant—Legality.*

An order of ejectment passed on the date fixed for payment of the decree amount by the tenant is not *per se* illegal. If a tenant is given time for payment till a certain day, he has no doubt time till midnight to pay the money. But a Court works in Court hours and is fully justified in passing orders on the day fixed, though it is bound to review its order if the tenant satisfies it that he has appeared with the money within the time allowed by law. (*Darling, S.M. and Bomford, J.M.*) DURGA PRASAD *v.* CHHANGAN LAL. **1937 R.D. 336.**

——**S. 80**—*Order of ejectment passed on judgment-debtor failing to appear on day fixed for payment—Judgment-debtor applying to set aside order on next day alleging illness—Order setting aside ejectment order—Revision.*

Where a judgment-debtor against whom a decree for arrears of rent was passed failed to appear on the last day fixed for payment and an order of ejectment was passed, and on the very next day he applied for that order to be set aside on the ground that he had been taken ill the day

before and so had arrived later and the ejectment order was thereupon set aside, there is no illegality or material irregularity such as would justify interference in revision. (*Darling, S.M. and Bomford, J.M.*) BENI MADHO PRASAD *v.* JASAI. 1937 R.D 453.

——S. 80—*Order of ejectment passed on judgment-debtor failing to appear on last day—Order subsequently set aside on judgment-debtor's application—Court, if can order damages to decree-holder.*

Where an order of ejectment passed on the failure of the judgment-debtor to appear on the last day fixed for payment of the decretal amount is subsequently set aside on the application of the judgment-debtor giving a satisfactory reason for his failure to appear, the Court cannot order compensation in the form of damages to the decree-holder. (*Darling, S.M. and Bomford, J.M.*) RAM DHARI SINGH *v.* TAHSILDAR AHIR. 1937 R.D. 472.

——S. 80—*Notice under—Some of the co-tenants contesting—Presumption of knowledge as regards others.*

When some of the co-tenants have appeared and contested a suit for ejectment for arrears of rent, it must be presumed that the co-tenants who remained silent were well aware of the ejectment proceedings. (*Darling, S.M. and Marsh, J.M.*) BHOLA NATH SRIVASTAVA *v.* ALI SHAH KHAN. 1938 R.D. 617=1938 A.W.R. (B.R.) 279.

——S. 80—*Order under, when to be made—Order of ejectment before expiry of full period allowed for payment.*

It is illegal to pass an order of ejectment under S. 80 of the Agra Tenancy Act before the expiry of the time given for payment. The proceedings should be allowed to remain pending for the whole of the last day of the period allowed for payment, and if at any time on that day payment be made, no order of ejectment ought to be made. (*Niamatullah, J.*) AISHA BIBI *v.* DIVANDAR PRASAD. 1937 A.L J. 259=1937 R.D. 131=168 I C. 680=9 R A 665=1937 A.L.R. 392=1937 A.W. R. 195=A.I.R. 1937 All. 350.

——S. 80 (2)—*Order under—Time for carrying out, if any.*

There is no provision in the Agra Tenancy Act for limiting the period within which, an order of ejectment having been passed the decree-holder must apply for possession. But there is no doubt that it is undesirable that a decree-holder should delay his application for taking formal possession. (*Darling, S.M. and Bomford, J.M.*) SHEO PRASAD GUPTA *v.* MANDIL SINGH. 1938 R.D. 541=1938 A.W R. (B.R.) 235.

——S. 80 (2) (a)—*Ejectment suit—Order on tenant to pay fixed sum of money by certain date—Plea of payment out of Court—Payment not certified or recorded—Effect.*

In an ejectment suit the defendant is ordered to pay a certain sum by a certain date to escape ejectment, and if the tenant pleads payment out of Court, the payment must be either certified or recorded in the manner prescribed by law; otherwise no such payment can be taken account of. (*Drake Brockman, S.M. and Knox, J.M.*) MOHAN LAL *v.* NANDIA. 1936 R.D 557.

——S. 80 (3)—*Review—Ejectment order after allowing three periods of grace—Total period*

reasonable though less than six months—Review on ground of plea ad misericordian—*Jurisdiction.*

Where the trial Court has allowed three periods of grace for payment, and the total period allowed is not unreasonable though falling short of 6 months, it is not justifiable to allow a review of an order of ejectment on a plea *ad misericordian.* To allow such review is to reopen an ejectment already ordered without any good reason and has the effect of allowing a further and fourth exclusion. Such an order is without jurisdiction. (*Drake Brockman, S.M. and Knox, J.M.*) SHYAMA NAND NATH *v.* RAM BARAN SINGH. 1936 R.D. 270.

——S. 81—Notice under—Service of—Omission to contest notice or to pay arrears—Order of ejectment—Application for review—Competency—"Sufficient reason" for review—Failure to explain non-compliance with section—Effect. *See* C. P. CODE, O. 47, R. 1. 1936 R.D. 466.

——S. 81—*Procedure under—Powers of review—Notice by Tahsildar followed by order of ejectment—Application by tenant for review—Duty of Collector on granting review—Collector confirming order granting review on appeal—Duty of.*

If a Court grants a review application, it has either at once to re-hear the case or make such order in regard to re-hearing as it thinks fit. When, therefore, a Tahsildar who has passed an order of ejectment in pursuance of a notice under S. 81, Agra Tenancy Act, accepts an application of the tenant for review, he should restore the case to the register and proceed according to law. When the contentions of the tenant are such that he intends to contest the claim against him, the application of the landlord for issuing notice under S. 81, therefore, becomes a suit for arrears of rent, and if such arrears exceed Rs. 200, the Tahsildar is bound to forward the suit to the Sub-Divisional Officer. He has no jurisdiction to proceed further in the matter. If on appeal by the landlord the Collector confirms the order of the Tahsildar granting the application for review, he should direct the Tahsildar to proceed as laid down in S. 81 (5). (*Drake Brockman, S.M. and Knox, J.M.*) AJODHIA PRASAD *v.* SURJI. 1936 R.D. 466.

——S. 81—*Services of notice under—Extensions of time—Default in payment—Order of ejectment—Review.*

Where on service of a notice under S. 81 of the Tenancy Act, a tenant appears and obtains extensions of time more than once for the payment of the arrears, but does not care to appear on the expiry of the extended time, an order for ejectment is passed, his application thereafter to review the order of ejectment should not be allowed. (*Darling, S.M. and Bomford, J.M.*) SWAMI HAR SARAN DAS *v.* NATHU. 1938 R.D. 341=1938 A.W R. (B.R.) 182.

——S. 82—Applicability—Lands let to tenant validly and transferred by him to another—Remedy of landlord—Suit to eject under S. 44—Maintainability. *See* AGRA TENANCY ACT, SS. 44 AND 82. 1937 A.W.R. 888.

——S. 82—*Applicability—Mortgage by one of several co-tenants—Acquiescence by others—Effect of.*

S. 82 of the Agra Tenancy Act is not inapplicable to the case of a mortgage executed by one of

several co-tenants of a holding. To hold that the section does not apply in such a case would result in a number of co-tenants whittling away the tenancy by small mortgages with which the zamindar would be helpless to interfere. The co-tenants must assert themselves actively as soon as they see that one co-tenant executes a mortgage infringing on their rights. If they deliberately acquiesce in it, they must pay the penalty. (*Darling, S.M. and Bomford, J.M.*) ABDUL MAJID *v.* ABDUL HAMID. **1938 R.D. 190 (2)=1938 A.W.R. (B.R.) 120.**

——**S. 82**—Applicability—Sub-lease by tenant for five years in favour of third party—Sub-lessee to pay annually fixed sum to tenant's creditor and zamindar's rent—Legality of sub-lease—Tenant—If liable to ejectment. *See* AGRA TENANCY ACT, SS. 27 AND 34 (1). **1936 R.D. 318 (2).**

——**S. 82**—Decision in suit for arrears of *inter partes* under the Agra Tenancy Act of 1901 holding that defendant was a proprietor and not tenant does not operate as *res judicata* in a subsequent suit for ejectment under S. 82 of Act III of 1926. **1937 A.W.R. 1215=1937 A.L.J. 1339.**

——**S. 82**—*Illegal sub-letting—Co-tenants not objecting to each other's sub-letting—Effect—Liability to ejectment.*

As a division of the holding is not binding on the landlord without his consent in writing, it is equally not binding on his tenants in their relation with the landlord. Nevertheless, if each co-tenant sub-lets his holding without objection from the others, then the whole holding becomes illegally sub-let, and each of such co-tenants is liable to ejectment under S. 82 of the Tenancy Act. It is not open to the tenants-in-chief to plead that the whole tenant body did not sub-let the whole holding in one transaction, and thereby try to escape the consequences of their acts. (*Bomford, J.M.*) LACHHUA *v.* DAMRU LAL. **1938 A.W.R. (B.R.) 149=1938 R.D. 290.**

——**S. 82**—*Illegal sub-letting—Ejectment suit—Limitation—Starting point—Renewal of lease from year to year—If furnishes fresh cause of action—Absence of registered lease—Effect.*

In the case of illegal sub-lease, not effected by a registered deed, a fresh cause of action accrues to the Zamindar at every fresh renewal of the lease from year to year, though the sub-letting may have commenced several years before the suit. (*Darling, S.M. and Bomford, J.M.*) BADLU *v.* DWARKA PRASAD. **1937 R.D. 49.**

——**S. 82**—*Mere entry of 'mortgage' in recent patwari papers—If enough to justify ejectment.*

The mere entry of mortgage in a recent patwari paper, in the absence of convincing secondary evidence of the execution of mortgage of an occupancy holding subsequent to Act III of 1926 would not be enough to justify ejectment of the transferee as well as of the transferor under S. 82 of the Tenancy Act. (*Mehta, J.M.*) IBNI HUSAN *v.* GOODAR. **1939 A.W.R. (B.R.) 41=1939 A.L.J. (Supp.) 49=1939 R.D. 303.**

——**S. 82**—Mortgagee of occupancy holding obtaining possession through Civil Court—Liability for ejectment. *See* AGRA TENANCY ACT, SS. 34 AND 82. **1939 R.D. 34 (2).**

——**S. 82**—*Proof of a case under—Necessary ingredients.*

If the landholder produces copies of village papers to show that there has been transfer under a void lease, then all the ingredients necessary to prove the case under S. 82 of the Agra Tenancy Act are present. (*Marsh, S.M. and Mehta, J.M.*) KISHEN *v.* KAMTA PRASAD. **1939 R.D. 309.**

——**S. 82**—*Suit for ejectment on ground of illegal mortgage by one of co-tenants—Mortgagee found not to have been put in possession—Suit, If liable to be dismissed.*

A suit for the ejectment of the recorded co-tenants from a holding on the ground that one of them had illegally mortgaged a portion of the holding, is liable to be dismissed if it is found that the mortgagee had never been put in possession. (*Bomford, J.M.*) PARTAB BAHADUR *v.* MAZHAR KHAN. **1937 R.D. 268 (1).**

——**S. 82**—*Suit under—Maintainability—Sub-tenant ejected prior to institution of suit under S. 82—Cause of action, if exists.*

Where a tenant had filed a suit under S. 86 of the Tenancy Act against a sub-tenant, got him ejected and actually took possession all prior to the date of the institution of a suit against him under S. 82 of the Act, the latter suit is not maintainable, for no cause subsisted, on the date when the suit was filed. (*Marsh, S.M. and Mehta, J.M.*) JAMUNA MISRA *v.* JAI GOVIND RAM TEWARI. **1939 R.D. 538=1939 A.W.R. (B.R.) 238.**

—— **S. 82**—*Suit under—Decree in favour of plaintiff with proviso that if tenants 'filed suits' to eject sub-tenants decree would not be executed—Sub-tenants surrendering possession without suits—Tenants, if can be ejected.*

Where in a suit under S. 82 of the Agra Tenancy Act, the Court gave the plaintiff a decree with the proviso that if the tenants "filed suits" to eject the sub-tenants the decree would not be executed, and when the plaintiff applied for execution, the tenants filed an objection explaining that the sub-tenants had left possession and that was why they had not thought it necessary to comply with the order of the Court, the Court should, in such circumstances, enquire whether there had been substantial compliance with its order and if it is satisfied that the sub-tenants had really surrendered, should not order the ejectment of the tenants. (*Darling, S.M. and Bomford, J.M.*) PHARENDRA GIR *v.* JHAGROO. **1937 R.D. 261.**

——**S. 82**—*Void mortgage—Redemption subsequent to suit under S. 82—If can save ejectment.*

Where it is clear that when the suit under S. 82 of the Tenancy Act was brought the alleged void mortgage was in existence, but was paid off some months after the filing of the suit, that circumstance cannot save the tenant from ejectment. (*Darling, S.M. and Mehta, J.M.*) BALRAM GOVIND RAI *v.* NABI RASUL. **1938 A.W.R. (B.R.) 370=1938 R.D. 605.**

——**Ss. 82 and 83**—*Defendant belonging to family paying Rs. 1,800 land revenue—Right to benefit of proviso to S. 83.*

The mere fact that in a suit under S. 82 of the Agra Tenancy Act, the main defendant is not an agriculturist inasmuch as he belongs to a family that pays Rs. 1,800 land revenue, cannot be a reason for not giving him the benefit of the proviso to S. 83 of the Act. (*Darling, S.M. and Bomford, J.M.*) ABDUL AZIZ KHAN *v.* MOHAMMAD AHSAN. **1937 R.D. 263.**

——Ss. 82 and 83—*Illegal sub-letting—Ejectment—Discretion.*

Where there has been illegal sub-letting in favour of the members of the family, which is a typical agriculturist family, in a suit for ejectment, a proper exercise of discretion would be to allow the tenant to eject the sub-lessees under S. 83 of the Tenancy Act. (*Darling, S. M. and Mehta, J.M.*) BAHORAN TEWARI *v.* RAM CHANDER TEWARI. 1938 A.W.R. (B.R.) 325=1938 R.D. 674.

——Ss. 82 and 83—*Illegal sub-letting—Penalty—Discretion of trial Court—Exercise of—Principles.*

Full discretion is lodged in the trial Court as regards the area from which a tenant, who transfers land by sub-leases beyond the period allowed by law, is to be penalised. Usually where the tenant belongs to an agriculturist class and there is no persistency in sub-letting, in that case grace is given or if ejectment at all is ordered, it is from the offending area and not from the whole area. (*Marsh, S.M. and Mehta, J.M.*) TIRBENI *v.* KEDAR GOVIND RAI. 1939 R.D. 277 (2)=1939 A.W.R. (B.R.) 115.

——Ss. 82 and 83—*Mortgage of occupancy holding before Act—Zamindar not taking action to eject mortgagee—Subsequent sub-letting of holding by mortgagee to mortgagor and others—Zamindar's right to sue for ejectment.*

Where an occupancy holding was mortgaged before the Act of 1926 came into force and the Zamindar did not take action in time to eject the mortgagee but the mortgagee subsequently sublet the holding to the mortgagor and others, the Zamindar is entitled to sue for ejectment of all concerned for illegal sub-letting and no leniency should be shown in such a case under S. 83 of the Act. (*Darling, S.M. and Bomford, J.M.*) PHEKU CHAMAR *v.* ABDUL WAHAB. 1937 R.D. 445.

——Ss. 82 and 83—*Suit for ejectment on ground of illegal sub-letting—Defendant, if entitled to benefit of S.* 83.

Where a suit for ejectment is brought on the ground of illegal sub-letting, the defendant is entitled to the benefit of S. 83 of the Agra Tenancy Act. (*Darling, S. M. and Bomford, J. M.*) GAJADHAR *v.* AMARNATH. 1937 R.D 137.

——Ss. 82 and 83—*Sub-tenancy in respect of bulk of holding going back* 40 *years—Tenants' right to benefit of S.* 83.

Where the sub-tenancy in respect of the bulk of the holding goes back 40 years and two of the fields alone had been sublet for 8 years only to a person who is also a sub-tenant in another field in the holding, the tenant is entitled to the benefit of the proviso to S. 83 of the Agra Tenancy Act, in respect of the entire holding. (*Darling, S.M. and Bomford, J.M.*) ABDUL AZIZ KHAN *v.* MOHAMMAD AHSAN. 1937 R.D. 263.

——Ss. 82 and 37—*Liability to ejectment—Mortgage by a co-tenant of his share after a division under S.* 37—*Effect on the share of the other co-tenant.*

Division of a holding between two co-tenants under S. 37 of the Agra Tenancy Act without getting the zamindar to agree does not result in the creation of two holdings and novation of the contract of tenancy. Where, after such a division, one of the co-tenants mortgages his share alone, yet as in the eye of the law the holding is

one, the liability to ejectment is from the whole of the holding. (*Mehta, J. M.*) SUBHAN *v.* NABIULLAH. 1939 R.D. 267=1939 A.W.R. (B.R.) 251.

——S. 82 (1)—Applicability—Occupancy tenant—Transfer by in contravention of S. 27—Validity—Liability of tenant and transferee to ejectment by landlord. *See* AGRA TENANCY ACT, SS. 27, 34 (1), 82 (1) AND 83. 1936 R.D. 474.

——S. 82 (1)—If applies to fixed rate tenant. *See* AGRA TENANCY ACT, SS. 34 (1), 82 (1) AND 85 (3). 1940 A.L.J. 261.

——S. 83—Benefit of section—When to be allowed *See* AGRA TENANCY ACT, SS. 82 AND 83. 1938 R.D. 674.

——S. 83—*Exemption under — Discretion—Grounds—Sub-letting of whole holding—Relief if available.*

Under S. 83 of the Agra Tenancy Act, the Court in its discretion can exempt from the decree for ejectment, that portion of the holding which had not been 'actually transferred or sublet' at the date of the suit. But where the whole holding has been sublet, and it had been so sublet persistently for a number of years, S. 83 cannot be applied to such a case. (*Darling, S.M. and Bomford, J.M.*) MUKARRAM ALI KHAN *v.* PURAN. 1938 R.D. 421=1938 A.W.R. (B.R.) 179=1938 A.L.J. (Supp.) 29.

——S. 83—*Sub-letting for* 20 *years—Sub-tenant—If becomes tenant in chief.*

Merely because certain plots of land have been sublet for 20 years, the sub-tenant does not become a tenant-in-chief. (*Drake Brockman, S.M. and Knox, J.M.*) KULA *v.* DASAI KOERI. 1936 R.D. 337 (1).

——S. 83—*Void mortgage—Applicability of S.* 83.

Though the benefit of the grace can be allowed under S. 83 of the Agra Tenancy Act in a case where the sub-letting is of the voidable variety, it cannot be applied to a case of a mortgage which is *ab initio* void. (*Marsh, S.M. and Mehta, J.M.*) AHMAD-ULLAH *v.* SHEO NATH BADHAI. 1939 A.W.R. (B.R.) 112=1939 R.D. 436.

——S. 83, proviso—*Applicability—Illegal sub-letting by occupancy tenant—Tenant essentially agriculturist—Right to benefit of proviso—Conditions.*

An occupancy tenant who is essentially an agriculturist, but who makes an illegal sub-lease should not be lightly deprived of his occupancy rights, if he is prepared to resume possession of the holding and to eject the sub-tenant admitted by him. He should in such a case be given the benefit of the proviso to S. 83 of the Agra Tenancy Act. (*Darling, S.M. and Bomford, J. M.*) BADLU *v.* DWARKA PRASAD. 1937 R.D. 49.

——S. 83, Proviso—*Applicability—Void lease.*

The benefits of the proviso to S. 83, Agra Tenancy Act, can be availed of only in the case of voidable leases and not in the case of transactions which are void *ab initio*. (*Drake Brockman, S.M. and Knox, J.M.*) PARBHU SHANKAR *v.* SUKHA. 1936 R.D. 108.

——S. 83, proviso—Right of the tenant to the benefit of. *See* AGRA TENANCY ACT, SS. 82 AND 83. 1937 R.D. 263.

——S. 83, proviso—Scope—Transfer by occupancy tenant in contravention of S. 27—Ejectment by landlord—Benefit of proviso—If availa-

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ble. *See* AGRA TENANCY ACT, Ss. 27, 34 (1), 82 (1) AND 83. **1936 R.D. 474.**

——Ss. 84 (1) (a) a1 197 (e)—*Grove divided between two* mahals *at partition—Smaller area falling within one ceasing to be grove—Holder—Liability to ejectment from that portion—Holder continuing as grove-holder in respect of larger part in other* mahal—*If affords protection from ejectment from smaller area.*

Where as the result of a partition a grove is divided between two *mahals*, and a small area falling within one *mahal*, and constituting an entirely separate grove, quite independent of the larger portion which has fallen in another *mahal*, has, since the partition, ceased to be a grove, the holder becomes a non-occupancy tenant liable to ejectment from that plot which has ceased to be a grove. The fact that he continues to be a grove-holder in the larger portion of the other *mahal* cannot protect him from ejectment. (*Darling, S.M. and Bomford, J.M.*) ALLAH JALLE SHANHU *v.* RAJ BAHADUR. **1937 R.D. 43.**

——S. 85 (3)—If applies to fixed rate tenant. *See* AGRA TENANCY ACT, Ss. 34 (1), 82 (1) AND 85 (3). **1940 A.L.J. 261.**

——S. 86—*Applicability—Mortgagee from one of the co-tenants—Status of—Liability to ejectment.*

Where a person claims to be a mortgagee from one of the co-tenants in an occupancy holding, his position will be nothing higher than that of a sub-tenant liable to be ejected and when the alleged mortgage is not proved, the appropriate section to deal with such a tenant would be S. 86 of the Agra Tenancy Act. (*Mehta, J.M.*) JAGARNATH SINGH *v.* SHEOMANGAL LAL. **1939 R.D. 124=1939 A.W.R. (B.R.) 191.**

——S. 86—*Applicability—Tenant of Zamindar's grove—Ejectment—Forum.*

In the case of a tenant paying *sayar*, and not rent in respect of a grove, he can be ejected only by a Civil Court, though the *sayar* payable could be collected by the Revenue Courts. (*Bomford, J.M. and Darling, S.M.*) RAM CHANDRA SINGH *v.* THAKUR GOPAL LALJI. **1938 R.D. 371=1938 A.W.R. (B.R.) 203=1938 A.L.J. (Supp.) 58.**

——S. 86—Applicability—Widow of occupancy tenant—Sub-lease by—Death of widow—Ejectment of sub-tenant by landlord—Right of—Procedure. *See* AGRA TENANCY ACT, S. 32 (1) AND (3). **1936 R.D. 496.**

——S. 86—*Ejectment—Application under—Ejectment of non-occupancy tenant—Respondent discovered to be* thekadar—*Procedure—Application—If can be converted into and dealt with as a plaint under S. 207—Proper course for landlord.*

An application under S. 86 of the Agra Tenancy Act, though it is to be deemed to be a plaint when challenged, cannot be converted into a plaint under S. 207 of the Act and be dealt with as such, if it is discovered that the alleged non-occupancy tenant is a *thekadar*. The landlord in such a case must bring a suit under the proper section and stamp it with the proper court-fees. (*Drake Brockman, S.M. and Knox, J.M.*) BENI RAM *v.* BHAGWANT SINGH. **1936 R.D. 539.**

——S. 86—*Defendant's possession found to be as mortgagee—Ejectment as sub-tenant—Validity.*

AGRA TENANCY ACT (1926), S. 86.

In a suit under S. 86 of the Agra Tenancy Act against an alleged sub-tenant, in order to succeed, one must prove the contract of sub-tenancy. Where the defendant's possession has been found by a Civil Court to be that of a mortgagee he cannot be ejected as a sub-tenant. (*Mehta, J.M.*) RAMESHWAR PRASAD *v.* KHEDAN KOERI. **1939 A.W.R. (B.R.) 70=1939 A.L.J. (Supp.) 65 =1940 R.D. 71.**

——S. 86—*Ejectment—Notice of—Form—Inclusion of two khatas in one notice—Legality of notice.*

Where two separate khatas are included in one notice of ejectment, the notice is at the very outset bad in form. (*Darling, S.M. and Bomford, J.M.*) SALIG RAM *v.* GHANA RAM. **1938 A.W.R. (B.R.) 150=1938 R.D. 292.**

——S. 86—*Ejectment of recorded tenant—Effect on other members of the family.*

Where, on the death of a common ancestor, a surviving son is recorded as heir of a statutory tenant and he is ejected under S. 86 of the Agra Tenancy Act, it is not the duty of the zamindar to look for other tenants who were members of a joint family and whose names had not been recorded in the papers. The members of the family have only to thank themselves for not having got themselves recorded. They cannot deny the knowledge of the ejectment of the recorded tenant who was recorded as the head of the family. (*Marsh, S.M.*) SHIAM SUNDAR LAL *v.* MUKET BEHARI LAL. **1939 R.D. 522=1939 A.W.R. (B.R.) 222.**

——S. 86—*Ejectment—Person in possession paying sayar—If can be ejected—Appeal—New point of law.*

It is clear that a zamindar cannot under S. 86 of the Agra Tenancy Act sue to eject a person who is only in possession on payment of sayar. Such a point can be taken for the first time in appeal as it is a perfectly good point of law which can be taken at any time. (*Darling, S.M. and Bomford, J.M.*) MAHADEO SINGH *v.* GANGA RAM DAS. **1938 A.W.R. (B.R.) 86=1938 R.D. 252.**

——S. 86—*Ejectment of sub-tenant—Failure to establish sub-tenancy—Effect.*

Where a plaintiff sues to eject another from possession as a sub-tenant, his suit is liable to be dismissed, if he fails to establish any contract of sub-tenancy between himself and the defendant. (*Darling, S.M. and Mehta, J.M.*) MOHIB ALI *v.* BUCHUNU. **1938 R.D. 753.**

——S. 86—*Mortgage and theka in favour of mother and son respectively on same day—Nature of the transaction—Ejectment, if can be had.*

Where a simple mortgage in favour of the mother of a thekadar is executed on the same date as that on which the theka is given to the son and where both the transactions are in respect of the same share of property, the transaction is really a mortgage of zamindari share with possession. As such, Courts would not help to eject the mortgagee without paying the consideration money. (*Darling, S.M. and Mehta, J.M.*) MUNESHWAR PATHAK *v.* MST. UREHA. **1938 A.W.R. (B.R.) 354 =1938 R.D. 852=1939 A.L.J. (Supp.) 1.**

——S. 86—*One of co-sharers in* sir *executing mortgage in favour of sub-tenant—Suit to eject latter—Joinder of all co-sharers in suit—If necessary.*

AGRA TENANCY ACT (1926), S. 86.

All the co-sharers in *sir* should join in a suit under S. 86 of the Agra Tenancy Act to eject a sub-tenant in *sir* in whose favour one of the co-sharers has executed a mortgage. (*Darling, S.M. and Bomford, J.M.*) RAGHUNANDAN *v.* RAM BACHAN SINGH. **1937 R.D. 345.**

——**S. 86**—*Recorded as sub-tenant claiming to be mortgagee—Holding of land in lieu of interest—If can be ejected as sub-tenant.*

Where a person who is recorded as a sub-tenant in the papers, claims that he is a mortgagee to whom the land was given in lieu of interest for a period of three years and that he was entitled to retain possession if the principal was not paid, he is not a sub-tenant and cannot be ejected under S. 86 of the Tenancy Act. (*Mehta, S.M. and Harper, J.M.*) MISRI LAL *v.* KALAP NATH. **1940 R.D. 122 (1)=1940 A.W.R. (B.R.) 49.**

——**S. 86**—*Suit for ejectment of sub-tenant—Denial of sub-tenancy by person holding land for over 32 years—Burden of proof.*

Where a sub-tenancy is pleaded, but is denied by the other side, the plaintiff has to prove that the sub-tenant was under a direct contract of sub-tenancy, his sub-tenant. When such a sub-tenant is one of 32 years standing, the doubt arises that the sub-tenant is holding direct by some arrangement with the zamindar. (*Mehta, J.M.*) RAM GHULAM *v.* DIWARI LAL. **1938 A.W.R. (B.R.) 352=1938 R.D. 850=1939 A.L.J. (Supp.) 2.**

——**S. 86**—*Suit to eject sub-tenant—Plaintiff declared occupancy tenant at concessional rate—Sub-tenants of long standing at concessional rate—If can resist ejectment.*

Where a person was declared to be an occupancy tenant at the time of the revision of records and rent was fixed though it was at a concessional rate and later, in an enhancement suit it was again so decided his suit for ejectment of sub-tenants who though of long standing, could not be resisted. (*Mehta, J.M.*) SHEO NANDAN SINGH *v.* RAJA BRIJENDRA. **1938 A.W.R. (B.R.) 361=1938 R.D. 854 (2)=1939 A.L.J. (Supp.) 4.**

——**S. 86**—*Suit to eject tenant from grove land—Question if grove was planted by zamindar or tenant—Burden of proof.*

Where in a suit under Ss. 86 and 92, Agra Tenancy Act, for the ejectment of the defendants as non-occupancy tenants from certain plots which are claimed by the plaintiff zamindar to be his grove land, it is established that the grove in one of the plots had already been planted by the zamindar when the defendants were admitted to the holding, it must be assumed that the whole area is zamindari grove, and if the defendants claim the other plots as their grove-land, it is incumbent on them to show that the trees thereon were planted by them. (*Darling, S.M.*) MOHAN *v.* MALIK MOHAMMAD IHSAN ULLAH KHAN. **1937 R.D. 369.**

——**S. 86**—*Tenant admitted by all the co-sharers—If can be ejected by some of them.*

All the co-sharers must join in ejecting a tenant who is admitted by all of them, even though the majority of them might have come to some arrangement about collecting rents behind the back of the others and the tenant. (*Darling, S.M. and Bomford, J.M.*) NOOR MUSSALMAN *v.* RAMESHWAR PRASAD. **1937 R.D. 55.**

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——**S. 86**—*Sir* land—Sale of—Relinquishment of ex-proprietary rights—Ejectment of sub-tenant—Suit by vendee alone—Competency. *See* LANDLORD AND TENANT—EX-PROPRIETARY TENANT. **1936 R.D. 46.**

——**S. 86**—Sir *land—Sub-tenant—Liability to ejectment—Hereditary rights—When conferred.*

When there is nothing to show that a sub-tenant in *sir* land is to be protected from ejectment *naslan bad naslan*, it must be presumed that he is an ordinary sub-tenant liable to ejectment. Hereditary rights are not conferred unless they are expressly stated to be such. (*Darling, S.M.*) GANGA RAM *v.* LALTA PERSHAD. **1936 R.D. 572.**

——**S. 86 (2)**—*Lease with re-entry clause—Absence of provision for ejectment on failure to give up land when demanded—If confers occupancy rights on heir of statutory tenant.*

In a suit to eject the heir of a statutory tenant, the latter pleaded that as he had been holding continuously under the lease for more than 12 years before the Tenancy Act of 1926 came into force, he had become an occupancy tenant. It was found that the lease contained a re-entry clause, but there was no enforcible clause that the tenant should be liable to ejectment if he failed to give up the land when the zamindar required it.

Held, that the lease did break the period counting for occupancy, and that the defendant was not an occupancy tenant. (*Knox, J.M.*) NAKCHHED *v.* RAM SUNDAR PRASAD. **1936 R.D. 166.**

——**S. 86 (2)**—*Suit to eject heirs of statutory tenants—Plea of occupancy tenancy—Defendant's predecessor proved to have been in continuous occupation from* 1309-F. *to* 1337-F.*—Plaintiff alleging seven years' lease but failing to prove same—Status of defendants—Liability to ejectment.*

In a suit for ejectment of heirs of statutory tenants, the latter claimed to be occupancy tenants. Their predecessor in interest was found to have been in continuous possession of the land from 1309-F. till his death in 1337-F. The plaintiff who contended that the predecessor of the defendants held the land on a seven years' lease from 1319-F. which would preclude the accrual of occupancy rights, but could not prove it.

Held, the defendants must be held to be occupancy tenants not liable to ejectment and not merely heirs of statutory tenants. (*Drake Brockman, S.M. and Knox, J.M.*) SUKHDEO TELI *v.* ABHIRAJI. **1936 R.D. 337 (2).**

——**Ss. 86 and 34**—Mortgage by occupancy tenant—Last legitimate occupancy tenant dying without heirs—Mother recorded as occupancy tenant—Suit by her against the mortgagee in ejectment, treating him as sub-tenant—Status of mortgagee. *See* AGRA TENANCY ACT, SS. 34 AND 86. **1937 R.D. 525.**

——**Ss. 86 and 44**—*Ejectment of licensee—Proper remedy—Suit under S.* 86, *if can be converted into one under S.* 44.

Where a suit is brought under S. 86 of the Agra Tenancy Act, the person sued is treated as a non-occupancy tenant. It cannot be said in the same breath that such a person is a licensee, whose licence it is desired to be revoked under S. 60 of the Easements Act. In such a case the proper thing would be to file a suit under S. 44 after giving the licensee the necessary notice and.

if he had stayed on, then under the strict wording of S. 44, he would be a trespasser. But it is not possible to convert a suit under S. 86 to one under S. 44, though the contrary is possible. (*Mehta, J.M.*) HARI NATH SINGH *v.* SATYADEO SINGH. **1939 R.D. 533=1939 A.W.R. (B.R.) 233.**

——**Ss. 86 and 44**—Trees disappearing from portion of grove land—Suit to eject grove-holder from that portion—If lies. *See* AGRA TENANCY ACT, SS. 44 AND 86. **1937 R.D. 166 (1).**

——**Ss. 86 and 92**—*Deed described as* zar-e-peshgi *for five years—Provision for re-payment of amount at end of period and for payment by lessee to landholder of fixed amount—Lessee entering and remaining in possession—Non-payment of amount by lessor—Right to eject lessee as sub-tenant at end of term—Transaction—If lease or mortgage.*

A deed purporting to be a *zar-e-peshgi* lease for a period limited to five years, acknowledging receipt of a sum of money *bataur zar-e-peshgi*, and providing, *inter alia*, for payment of a certain amount by the lessee to the landholder and for re-payment of the *zar-e-peshgi* money after the end of the period of five years and also providing for the giving up of possession by the lessee after the period stated, is really a mortgage and not a lease. The lessee entering possession under such a deed and remaining in possession until re-payment of the principal amount is not a sub-tenant, but a mortgagee, and is not liable to ejectment as a sub-tenant at the end of the term when he has not been paid the amount due to him. (*Drake Brockman, S.M. and Knox, J.M.*) BALAK RAM *v.* NATHOO. **1936 R.D. 461.**

—— **Ss. 86 and 92**—*Name of occupancy tenant removed from* khatauni *merely on order of* qanungo—*Procedure under S.* 107 *not followed—Right of such tenant to sue for ejectment of his sub-tenants.*

From 1336-F. onwards the plaintiff who was an occupancy tenant was shown as *ghair qabiz* in the *khatauni* with the Zamindar cultivating the plots as his *khudkasht*. The names of the defendants appeared in the *khatauni* for the first time in 1341-F. as cultivating *vice* the Zamindar. In 1342-F. there was a marginal note in *khatauni* to the effect that under the order of the supervisor *qanungo* the name of the occupancy tenant had been expunged. The procedure under S. 107 of the Tenancy Act was not followed in the present case. The occupancy tenant brought a suit for ejectment of the defendants as sub-tenants under Ss. 86 and 92 of the Act and established their contract of sub-tenancy with them.

Held, that the plaintiff must still be recognized as the occupancy tenant of the holding and the defendants were, therefore, liable to ejectment. (*Darling, S.M.*) CHHEDI *v.* DUJA SINGH. **1937 R.D. 463.**

——**Ss. 86 and 92**—*Occupancy holding—Suit for ejectment—Mortgage in favour of defendant—Lease also executed simultaneously in his favour by co-tenants—Rent fixed as payable by lessee.*

One of the co-tenants of an occupancy holding executed a bond in favour of *M* and simultaneously gave him a lease. In the lease there was no reference to the bond which was executed on the same day. A specific rent was fixed as payable by the lessee. The survivor of the co-tenants surrendered his rights in the occupancy holding to the plaintiff who brought a suit under Ss. 86 and 92 of the Agra Tenancy Act for the ejectment of *M* as a sub-tenant.

Held, the transaction cannot be considered to be a mortgage and *M*, the defendant is a sub-tenant who is liable to ejectment on the maturity of the sub-lessee. (*Darling, S. M. and Bomford, J.M.*) MOHRAM SINGH *v.* DEEP SINGH. **1937 R. D. 512.**

——**Ss. 86 and 92**—*Scope—Widow of occupancy tenant—Re-marriage—Suit for ejectment by landlord—Dismissal—If involves admission to tenancy—Entry of name of widow as tenant in papers—Effect of.*

A landlord sued the widow of an occupancy tenant under Ss. 86 and 92 of the Agra Tenancy Act for ejectment, on the allegation that on her re-marriage the occupancy rights inherited from her former husband ceased to exist and that by process of law she became a non-occupancy tenant liable to ejectment from year to year by the zamindar. The Courts found that she had not become an occupancy tenant, and that the suit under S. 86 was not maintainable. The widow's name, it appeared, was entered in the papers as tenant for several years.

Held, that the suit under Ss. 86 and 92 and its dismissal did not involve an admission on the part of the landlord, that the widow, in spite of her re-marriage, was his tenant, and that the entry of her name in the papers as a tenant did not prove that the landlord, either expressly or by implication, admitted her to tenancy after her re-marriage. (*Drake Brockman, S.M. and Knox, J.M.*) BALARAM CHAUBE *v.* BIRANJA. **1936 R.D. 440.**

——**Ss. 86 and 92**—*Suit for ejectment brought while Act II of* 1901 *was in force—Suit compromised—Defendant admitted to fresh tenancy and given land under* Singhara—*Subsequent suit to eject him from* Singhara *plot—Defendant, if can revive his claim to occupancy rights.*

Where a suit for ejectment brought by the zamindar while Act II of 1901 was in force was compromised, and the defendant was admitted to a fresh tenancy of the holding and was given land under *Singhara*, in a subsequent suit for his ejectment the defendant cannot revive his claim to occupancy rights which was not recognised in the agreement which led to the decision of the earlier ejectment suit, and as under the new Tenancy Act of 1926 he is not entitled to statutory rights in the *Singhara* plot, he is liable to ejectment as a non-occupancy tenant from this plot. (*Darling, S.M.*) CHATURI *v.* RAM CHANDER. **1937 R.D. 377.**

——**Ss. 86 and 92**—*Suit to eject as heirs of statutory tenant—Father treated as non-occupancy tenant—Suit, if maintainable—Fresh suit to eject, if lies.*

Where the defendants are sued under Ss. 86/92 of the Agra Tenancy Act as heirs of a statutory tenant, if it is found that the father was rightly or wrongly treated as a non-occupancy tenant, then the suit has to be dismissed. The zamindar cannot ascribe superior rights to the father after his death merely to enable him to eject the sons. The zamindar can bring a fresh suit to eject them as non-occupancy tenants. It would be equally open to the tenants defendants to plead

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acquisition of statutory right and fresh admission. (*Darling, S.M. and Marsh, J.M.*) BHAGWAT SARAN *v.* MOHAMMAD YAR KHAN. **1938 A.W.R. (B.R.) 249=1938 R.D. 547.**

——**Ss. 86 and 92**—*Suit under—Burden of proof—Long standing entry in Revenue Records—Effect.*

There is no doubt that when a tenant-in-chief seeks to eject the defendant as his sub-tenant and the defendant alleges that he is holding direct from the landlord and denies the existence of any sub-tenancy, the onus is on the plaintiff to prove the relationship alleged by him. But when there is a long standing entry in the Revenue Records in the case of an occupancy tenant, it will be a considerable piece of evidence and the onus will at once be shifted to the defendant to show that though he was recorded as a sub-tenant the course of payment of rent showed that he paid rent in his capacity as tenant-in-chief to the zamindar and that as a matter of fact the plaintiff had abandoned that plot. (*Mehta, J.M.*) BALDEO LONIA *v.* KAMLESHWAR LONIA. **1939 R.D. 530=1939 A.W.R. (B.R.) 230.**

——**Ss. 86/92**—Suit under—Dismissal for default—Fresh suit under S. 44—If barred. *See* AGRA TENANCY ACT, SS. 44, 86 AND 92. **1938 R.D. 57=1938 A.W.R. 29 (B.R.).**

——**Ss. 86 and 92**—*Zamindar seeking to eject occupancy tenants under S. 79—Decretal sum paid by one of them raising money on mortgage—Death of mortgagor tenant—Surviving tenants—If can eject mortgagees as sub-tenants.*

The Revenue Courts will not help an occupancy tenant to get rid of his mortgagee without discharging his liability under the mortgage. Where, therefore, while the zamindar was bringing about the ejectment of the occupancy tenants of the entire holding in proceedings under S. 79 of the Tenancy Act, the decretal sum was paid by one of them raising the requisite money on an usufructuary mortgage, on the death of the mortgagor tenant the surviving occupancy tenants cannot eject the mortgagees as sub-tenants under Ss. 86 and 92 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) NAROTTAM *v.* SHIAM LAL. **1937 R.D. 342.**

——**Ss. 86 and 92**—*Suit for ejectment of heir of statutory tenant*—Ex parte *decree passed—Decree not put in execution within a month—Subsequent suit filed by zamindar—Limitation.*

After the death of a statutory tenant, the zamindar brought a suit for ejectment against his heir and got an *ex parte* decree, on the ground that his period as heir had expired. But he failed to put it into execution within the period of a month allowed by law. He again brought a suit. The defendant contended that the previous suit barred the present suit.

Held, a fresh cause of action arises in each year after the five years during which the heir is entitled to hold up to a limit of three years. The plaintiff has therefore a fresh cause of action in the two succeeding years after the first attempt: provided that the suit was not barred by limitation and the heir was not admitted as a tenant by a written agreement. (*Darling, S.M. and Bomford, J.M.*) RAM KUMAR *v.* NAIKU. **1937 R.D. 513.**

AGRA TENANCY ACT (1926), S. 86.

——**Ss. 86 and 92**—*Suit for ejectment of sub-tenant—Sub-tenant pleading that he is mortgagee—Suit dismissed in default—Second suit—If maintainable—C. P. Code, O. 9, R. 9.*

Where in a suit for ejectment of a sub-tenant brought under Ss. 86 and 92 of the Agra Tenancy Act, the sub-tenant claimed a status of a permanent character like that of a mortgagee and the suit was dismissed in default, the decision would operate as a bar to a subsequent suit under O. 9, R. 9, C. P. Code. (*Darling, S.M. and Bomford, J.M.*) MANGRU RAM *v.* CHHEDI. **1937 R.D. 334.**

——**Ss. 86 and 92**—*Suit to eject sub-tenant—Burden of proof—Duty of plaintiff—Entry of defendant as sub-tenant in patwaris papers—Presumption as to—Evidentiary value of.*

In a suit to eject a sub-tenant, the ordinary rule of law as to burden of proof is that when the defendant denies the sub-tenancy, the plaintiff has to prove the contract of sub-tenancy. It is not enough for him to prove merely a long statement in the patwari's papers describing the defendant as a sub-tenant; he must prove something more. There is no presumption in favour of the entry in the Government records; so far as an entry of tenancy or sub-tenancy is concerned, it is only a piece of evidence just like any other evidence. If no contract of sub-tenancy is proved, the suit must fail and must be dismissed. (*Drake Brockman, S.M. and Knox, J.M.*) NAIM NARAIN SINGH *v.* RAM ACHARAJ SINGH. **1936 R.D. 479.**

——**Ss. 86, 92 and 44**—Suit under S. 44—Treatment as one Ss. 86 and 92—Defendants being non-occupancy tenants. *See* AGRA TENANCY ACT, SS. 44, 86 AND 92. **1937 R.D. 522 (1).**

——**Ss. 86, 92 and 205**—Suit under—Stay of Proceedings Act, if apply to. *See* U. P. STAY OF PROCEEDINGS ACT. **1938 R.D. 801.**

——**Ss. 86 and 99**—*Suit to eject defendants as sub-tenants—Defendants claiming to be in direct relationship with zamindar—Plaintiff not proving contract of tenancy—Liability of suit to dismissal—Plaintiff's remedy.*

The plaintiff sued as a tenant-in-chief for the ejectment of the defendants as sub-tenants. The defendants claimed to be in direct relationship with the zamindar and they never paid rent to the plaintiff. The plaintiff was not able to establish any contract of tenancy.

Held, that *vis a vis* the plaintiff the defendants might be trespassers but they were not his sub-tenants and that the remedy of the plaintiff did not lie by way of an ejectment suit under S. 86 of the Tenancy Act.

Held, further, that the plaintiff could have sued the zamindar for recovery of possession of the holding under S. 99 of the Tenancy Act if he had been kept out of possession through the defendants. (*Darling, S.M. and Bomford. J M.*) MIHIN LAL *v.* SURANDRAJIT SINGH. **1937 R. D. 173.**

——**Ss. 86, 121 and 123**—Sir—*Loss of* Sir *character—Absence of any claim for ex-proprietary rights—Position of tenant—If can claim to be statutory tenant.*

A tenant of *Sir* which is the subject of transfer and in which ex-proprietary rights are not claimed, cannot become for that very reason the statutory tenant of that holding. He continues

to be a non-occupancy tenant and his ejectment will have to be sought under S. 86 of the Agra Tenancy Act. The tenant cannot sue to get a declaration that he is a statutory tenant. At best he is entitled to have a declaration that he is a non-occupancy tenant and not a trespasser. (*Mehta, J. M.*) JAGSOTTAM *v.* KAILAS SAHI. **1939 A.W.R. (B.R.) 98=1939 R. D. 473.**

——**Ss. 92, 86 and 44**—Suit under S. 44—Treatment as one under Ss. 86 and 92—Defendants being non-occupancy tenants. *See* AGRA TEN. ACT, Ss. 44, 86 & 92. **1937 R. D. 522 (1).**

——**S. 95**—Consent of landlord—Proof—Oral evidence—Admissibility. *See* AGRA TENANCY ACT, SS. 44 AND 95. **1938 A.W.R. (B.R.) 206.**

——**S. 95**—*Object of—Ejected tenant holding over—Liabilities of.*

Where a tenant after an order for his ejectment, holds on and retains possession of the holding, he thereby renders himself liable not only to criminal prosecution but also to a suit under S. 44 of the Tenancy Act. It is not open to such a person to take any technical point to prove re-admission for S. 95 was introduced in the new Act, to prevent trespassers from raising such points. (*Darling, S. M. and Bomford, J.M.*) SHEO GULAM LAL *v.* MAHARAJA OF BUMRAON. **1938 A.W.R. (B. R.) 211=1938 R. D. 655.**

——**S. 95**—*Proof of re-admission to tenancy—Mere acceptance of rent—If sufficient.*

The mere acceptance of rent by the zamindar is not necessarily evidence of a contract of tenancy. According to S. 95 of the Tenancy Act the re-admission of an ejected tenant should be in writing. (*Darling, S. M. and Mehta, J. M.*) RADHEY MOHAN LAL *v.* RICHHPAL SINGH. **1938 A.W.R. (B. R.) 320=1938 R.D. 788.**

See also JUKKU RAM LAL *v.* MAHADEO PRASAD. **1940 R.D. 195=1940 A.W.R. (B.R.) 70 (Col. 108).**

——**Ss. 97 and 98**—*Ejectment—Sowing done prior to—Ejected tenant, if entitled to value of crop at harvest.*

An ejected tenant is not *prima facie* entitled to be paid the value at harvest of a crop which he has sown just before ejectment, leaving it to the landlord to take all the risks of damage between sowing and harvest. In such a case he would at best be entitled only to the value of the seed, and labour charges for ploughing and sowing. (*Darling, S.M. and Bomford, J.M.*) CHIRANJIVA NARAIN *v.* MUSTA. **1938 R. D. 395 (1)=1938 A. W.R. (B.R.) 230=1938 A.L.J. (Supp.) 44.**

——**S. 97 (2)**—*Construction—"After the date of the order for execution"—Meaning of—Material date.*

The words "after the date of the order for execution" in S. 97 (2) of the Agra Tenancy Act govern both the word "decree" and the words "order for ejectment." The material date is the date of the order for execution of the order for ejectment. The sub-section only governs the rights of the parties to crops sown after the date of an order for execution of an order for ejectment. The fact that the crops are sown without permission after the order for ejectment is made would not in itself disentitle the tenant to such crops. (*Harries, J.*) IBRAHIM KHAN *v.* NAZIR AHMAD. **169 I.C. 269=10 R.A. 8=1937 A.L.R. 509=1937 A.L.J. 231=1937 R. D. 122=1937 A. W.R. 147=A.I.R. 1937 All. 334.**

——**S. 97 (2)**—*Construction—"Date of the order for execution of the decree or order for ejectment"—Decree for arrears of rent followed by order for ejectment—Order for delivery of possession in execution—Review application by tenant and recall of process—Effect—Dismissal of review application and subsequent delivery of possession—Crops sown without permission after order for ejectment—Right to.*

The appellants sued their tenants (respondents) for arrears of rent, obtained a decree and later on took proceedings in execution and obtained an order for ejectment on 18-11-1929. On 29-11-1929, the execution Court ordered the issue of a delivery order directing delivery of possession to the appellants in pursuance of the order of 18-11-1929. In the meantime the respondents tenants applied for a review of the order of ejectment and on 14-12-1929, the executing Court ordered the Amin to return the process to the Court without executing it, directing that the execution proceedings would be carried out after the disposal of the review application. The review application was heard and dismissed on 28-8-1930. On 29-8-1930, the Amin was again ordered to execute the order of ejectment and on 30-8-1930, the appellants obtained possession. The tenants respondents had sown crops on the land after the order of ejectment was passed consequent upon the decree for arrears of rent, but had not cut the crops by 30-8-1930 on which date delivery was effected. The respondents entered upon the land and cut and removed them and the appellants brought a suit for value of the crops so cut and removed. The crops were sown without the written permission of the landlords appellants.

Held, (1) that the order of 14-12-1929, recalling the Amin to return the process unexecuted was one which merely stayed the earlier order passed on 29-11-1929 and did not set aside that earlier order; and its effect was merely to suspend the execution of the order of ejectment because of the respondent's application; and that the appellants were in no way responsible for the delay which was entirely due to the acts of the respondents; (2) that the order for the execution of the order for ejectment which was carried into effect on 30-8-1930 was not a new order passed on 29-8-1930; but was the original order passed on 29-11-1929, which remained in existence from that date and which was not set aside or recalled though its operation was stayed; and (3) that the crops in question having been sown after the date of the order for execution of the order of ejectment (namely, 29-11-1929) without the written permission of the appellants, the latter were entitled to the crops when possession was delivered to them, and the respondents had no right to the crops under S. 97 (2).

Held, further, that if the original order for the execution of the order for ejectment had been set aside, and possession actually given in pursuance of a new order, the respondents would be entitled to the crops sown by them without permission before such new order for execution had been passed. (*Harries, J.*) IBRAHIM KHAN *v.* NAZIR AHMAD. **1937 A.L.J. 231=169 I.C. 269=10 R. A. 8=1937 A.L.R. 509=1937 R.D. 122=1937 A. W.R. 147=A.I.R. 1937 All. 334.**

AGRA TENANCY ACT (1926), S. 99.

S. 99—Applicability.

——S. 99—*Applicability — Conditions—Act of 1901, S. 79—Relative scope—Rulings under—If proper guides in applying S. 99.*

Under S. 99 of the Agra Tenancy Act of 1926, if a tenant is wrongfully ejected or prevented from obtaining possession of his holding or any part thereof otherwise than in accordance with the Act by any co-sharer of the landholders, a suit would lie in the Revenue Court. It is not necessary for the application of the section that the ejectment should be by the whole body of the landholders. S. 99 of the Act of 1926 is much wider in scope than S. 79 of the Act of 1901, and the rulings under the latter section of the old Act cannot be relied upon as guides in applying S. 99 of the new Act. (*Ganga Nath, J.*) RAM CHANDER SINGH *v.* MIJLI. **173 I.C. 651=10 R.A. 486=1938 R.D. 106=1938 A.L.R. 154=1937 A.L.J. 1249=1937 A.W.R. 1174=A.I.R. 1938 All. 65.**

——S. 99—*Applicability*—Grant of occupancy rights in Sir—Subsequent sale of proprietary rights—Death of vendor—Grantee of occupancy rights getting recorded as occupancy tenant before death of grantor—Suit by widow claiming ex-proprietary rights—Competency. *See* AGRA TEN. ACT, SS. 14 AND 15. **1936 R.D. 486.**

——S. 99—*Applicability—Land carried away by river and reformed — Tenant prevented by landlord from taking possession—Suit for declaration of occupancy rights—Maintainability—Proper remedy.*

Where a tenant sues his landlord on the allegation that the land in suit formed part of a larger holding in occupancy right and that it was carried away some years ago by a river but had re-appeared and that when he took, or attempted to take, possession of the land reformed he was prevented or ousted by the zamindar, the suit must be, if the land is identifiable with the land which was previously in his occupation as occupancy tenant, one under S. 99 of the Agra Tenancy Act and not for a declaration of his occupancy rights under S. 126 of the Act. (*Drake Brockman, S.M. and Knox, J.M.*) BANS BAHADUR SINGH, BABU *v.* BHIKHARI LAL. **1936 R.D. 111.**

——S. 99—*Applicability—"Otherwise than in accordance with the Act'—Meaning of—Co-tenants holding jointly—Ejectment proceedings against some only—Ouster of all—Legality—Suit by whole body for recovery of possession and compensation—Maintainability.*

It is no doubt true that if a body of co-tenants is ejected in circumstances which warrant the inference that the proceedings have been taken only against some of them without the knowledge of the others who also are ousted from possession along with those who were actual parties to the proceedings, the ejectment of "the tenant" that is the whole body of individuals in joint possession of the holding would be "otherwise than in accordance with the Act," and would therefore give rise to a suit under S. 99 of the Act by the whole body of co-tenants, both those who were parties to the ejectment proceedings and those who were not. But it cannot be held that when proceedings for ejectment have been taken against the majority of a number of tenants constituting "the tenant" whose names alone are recorded, and those whose names are not recorded have certainly had knowledge of the proceedings throughout and have made no attempt to challenge the legality of the proceedings as against themselves, the mere fact that they were not made parties to the proceedings justifies a suit by the whole body of tenants, including those who were parties to the proceedings, for recovery of possession by the whole lot, still less a decree for possession with compensation for ouster of the whole lot. No such suit under S. 99 will lie in the latter case. (*Drake Brockman, S. M.*) KRISHNA *v.* SAHEB SINGH. **1936 R.D. 393.**

——S. 99—Applicability—Recorded tenant ousted by persons claiming to be exclusive tenants under family partition—Remedy of former. *See* AGRA TEN. ACT, S. 44. **1936 R.D. 33.**

——S. 99—Applicability—Suit to eject co-sharer taking forcible possession of tenants holding. *See* AGRA TENANCY ACT, SS. 44 AND 99—APPLICABILITY. **1939 R.D. 202.**

——S. 99—*Applicability—Suit for restoration of possession on the ground of illegal ejectment—No proof of fraud.*

Where a suit is brought under S. 99 of the Agra Tenancy Act for restoration of possession on the ground of illegal ejectment brought about by fraud, when the alleged fraud is not established, the case does not fall within the purview S. 99 of the Act. (*Harper, S.M. and Sathe, J.M.*) THAKRA *v.* TIKA RAM. **1940 R.D. 222=1940 A.W.R. (B.R.) 87.**

——S. 99—*Applicability—Several sir holders—Sub-lessee from one—Suit by for possession—Maintainability.*

A sub-lessee from one of several *sir* holders of a holding cannot maintain a suit under S. 99 of the Agra Tenancy Act for possession of the holding. A tenancy can only be created by all the co-sharers acting conjointly; a tenancy sought to be created by a single co-sharer is ineffective. (*Darling, S.M.*) GANESHI LAL *v.* BHABUTI SINGH. **1937 R.D. 12.**

——S. 99—Applicability — Submerged land—Re-appearance—Person claiming same as part of his occupancy tenancy—Remedy of—Omission to seek remedy within 6 months—Effect. *See* AGRA TENANCY ACT, SS. 35 (1) (*f*) AND 99. **1936 R.D. 336.**

——S. 99—Applicability—Suit under S. 44—Zamindar supporting defendant's plea of surrender and new admission—If converts suit into one under S. 99. *See* AGRA TENANCY ACT, SS. 44 AND 99. **1938 R.D. 339.**

——S. 99—Applicability—Tenant filing surrender but resiling and not paying process-fee for notice—Landlord ejecting sub-tenant on basis of surrender—Suit by tenant under S. 99—Competency. *See* AGRA TENANCY ACT, SS. 32 & 99. **1937 A.W.R. 1205.**

S. 99—Dispossession wrongful.

——S. 99—*Dispossession, wrongful—Compensation—Right to—Considerations.*

Where a tenant is found to be illegally dispossessed, he cannot be denied compensation on the mere ground that no crop was upturned. The land has to be prepared by ploughings and weed-

ing for the sowing, next season. Hence if a tenant is prevented from 'cultivating' the area, compensation for loss is called for. (*Darling, S. M. and Mehta, J.M.*) KASHI SAHU *v.* SEKHRAJ SINGH. **1938 R.D. 882.**

S. 99—Right of suit.

——S. 99—*Right of suit—Conditions to be complied with.*

If a tenant pleads that he has been dispossessed by a fraudulent abuse of legal process, he has a right to come under S. 99 of the Act, provided he has not availed himself of the other remedies open to him, by way of review and appeal. In default of a definite finding that the decree-holders were guilty of fraud the suit was not maintainable. (*Darling, S.M. and Bomford, J.M.*) SHEO PRASAD GUPTA *v.* MANDIL SINGH. **1938 A.W.R. (B.R.) 235=1938 R.D. 541.**

——S. 99—*Right of suit under—Ejectment for arrears of rent—Proof of fraud—Effect.*

Where in a suit for ejectment for arrears of rent, there has been fraud and a tenant has thereby been ejected, the ejectment is not in accordance with the provisions of the Act and such a tenant has a right to bring a suit under S. 99 of the Act. (*Darling, S.M. and Bomford, J.M.*) RAM PRASAD PANDE *v.* JAI BAHADUR SINGH. **1938 A.W.R. (B.R.) 228=1938 R.D. 469.**

——S. 99—*Patta given to another during existence of tenant in possession—If valid and enforceable.*

As no patta can be given validly about a holding in which a tenant is already in existence, a second patta to a different party is not susceptible of being enforced and hence there is no cause of action under S. 99 of the Agra Tenancy Act in respect of it. (*Mehta, J.M.*) RAMJAG *v.* BAILDEHI. **1939 R.D. 122=1939 A.W.R. (B.R.) 174.**

——S. 99—*Right of suit under—Parties.*

A suit under S. 99 of the Agra Tenancy Act can be brought against the landholder or any person claiming through the landholder or both. But a tenant who is ousted by a stranger, *i.e.*, a person who does not claim through the landholder cannot sue the stranger under S 99, but only under S. 44. (*Drake Brockman, S.M. and Knox, J.M.*) GANGA RAM *v.* HIRA LAL. **1936 R.D. 477.**

S. 99—Scope.

——S 99—Scope—Ouster of tenant by stranger—Landlord ejecting stranger and letting land to another—Effect—Suit by tenant against latter and landlord—Maintainability—Limitation. *See* AGRA TEN. ACT, SS. 44 AND 99. **1936 R.D .477.**

——S. 99—*Scope—Retrospective operation—Cause of action arising before Act.*

S. 99 of the Agra Tenancy Act has no retrospective effect and does not oust the jurisdiction of the Civil Court in respect of a suit the cause of action for which arose prior to the coming into force of the Act. (*Ganga Nath, J.*) JAGDEI *v.* SAMPAT DUBE. **172 I.C. 635=1938 A.L.R. 8=10 R.A. 414=1937 A.W.R. 916=1937 R.D. 548=1937 A.L.J. 1111=A.I.R. 1937 All. 796.**

——S. 99—*Scope of suit under—Decision as to status of defendant claiming under landholder—*

Unnecessary—If res judicata *between co-defendant.*

In a suit for illegal dispossession under S. 99 of the Agra Tenancy Act against the landholder and a person claiming under him, it is not necessary for its disposal to decide the exact status of the person claiming under the landholder. A decision, even if given, cannot operate as *res judicata* as between the co-defendants in any later suit. (*Mehta, J.M.*) KAYASTHA PATHSHALA, ALLAHABAD *v.* MEWA LAL. **1939 R.D. 302=1939 A.W.R. (B.R.) 258.**

S. 99—Suit under.

——S. 99—*Suit for wrongful dispossession alleging that plaintiff was member of joint family with deceased statutory tenant—Assistant Collector finding in plaintiff's favour on ground that he was heir to deceased as his nearest collateral—Decision, if* res judicata *on question of plaintiff's status.*

Where the plaintiff sued the zamindar for wrongful dispossession under S. 99 of the Agra Tenancy Act claiming in his plaint that he was a member of a joint family with the deceased statutory tenant, but the Assistant Collector found in his favour on the ground that he was heir to the deceased tenant as being his nearest collateral who had co-shared in cultivation with him at his death, the decision operates as *res judicata* on the question of the plaintiff's status, and he cannot in a subsequent suit for ejectment shift his ground and claim that he was really admitted to the co-tenancy with the deceased tenant. (*Darling, S.M. and Bomford, J.M.*) TULSI *v.* JAMUNA. **1937 R.D. 373 (2).**

——S. 99—*Suit under—Limitation—Plaintiff appearing to be out of possession during two years following settlement year—No proof that he had since recovered possession—Suit, if barred.*

Where in a suit for recovery of possession of a holding under S. 99 of the Agra Tenancy Act, it was shown from the entries in the *khatauni* that the plaintiff appeared to have been out of possession during the two years succeeding the settlement year when another person was recorded *dewedar qabiz*, and there was nothing to show that the plaintiff had since recovered possession of the holding, his suit is barred by limitation. (*Darling, S.M.*) GAYASI RAM *v.* KALIA. **1937 R.D. 299.**

——S. 99—*Suit under—Limitation—Zamindar getting possession of holding of minor tenant—Suit by latter for possession.*

The law is perfectly clear that if a Zamindar gets possession of a tenant's holding, be he adult or minor, by fair means or foul, the tenant has only six months in which to sue for recovery of possession. (*Darling, S.M. and Bomford, J.M.*) SHYAM SARAN PANDEY *v.* RAM KHELAWAN. **1937 R.D. 208.**

——S. 99—*Suit under—Limitation—Zamindar giving lease of holding to one* R *on death of recorded tenant—*J, *an unrecorded co-tenant of deceased filing criminal complaint against* R*—Criminal Court deciding that* J *must regard himself as out of possession—Suit by J. for restoration of possession—Limitation—Starting point.*

Where on the death of the recorded statutory tenant, the Zamindar gave a lease of his holding

to one *R*, and one *J*, an unrecorded co-tenant of the deceased tenant, filed a criminal complaint against *R* which was dismissed, the Court deciding that *J* must regard himself as out of possession, the limitation for a suit by *J* for restoration of possession runs from the date of the decision of the Criminal Court and not from the date of the lease in the absence of proof that *J* knew anything of the lease. (*Bomford, J.M.*) RAJA TIWARI *v.* JHOPARI. **1937 R.D. 294.**

——**S. 99**—Suit under—Time spent in futile application for review—Benefit of S. 14 of Limitation Act if available. *See* LIMITATION ACT, S. 14 —BENEFIT OF. **1938 R.D. 469.**

——**S. 99**—Appropriateness of proceedings under. *See* AGRA TENANCY ACT, SS. 37 AND 99. **1938 A.W.R. (B.R.) 45**

——**S. 99**—Remedy under—When can be availed of. *See* AGRA TEN. ACT, Ss 44 & 99. **1938 R.D. 248.**

——**S. 99, Proviso**—*Applicability—Order for ejectment in execution of rent decree—No actual ejectment—Subsequent lease to another—Suit by original tenant under S. 99—Reliefs to which parties are entitled.*

In execution of a decree for arrears of rent, an order for ejectment was obtained. But the Zamindar did not apply for actual ejectment. He nevertheless leased the property to a different person. The original tenant thereupon filed a suit under S. 99 of the Agra Tenancy Act. It was held that he was entitled only to damages and at the same time was liable to ejectment under the Act in the year "in which the suit was brought" and that the proviso to S. 99 applied. (*Darling, S.M. and Bomford, J.M.*) BABU LAL *v.* PAL. **1938 A. L.J. (Supp.) 1=1938 A W.R. (B.R.) 33=1938 R.D. 310.**

——**Ss. 99 and 44**—*Ejected grove-holder—Failure to avail remedy under S. 99—Retention of possession—Liability to ejectment under S. 44.*

Where a grove-holder alleges that his ejectment under S. 79 of the Tenancy Act and dispossession is illegal, has his remedy under S. 99 of the Act and if he fails to avail himself of it within the period of limitation, he has no remedy left. Any attempt by him to retain possession over the plot subsequent to his ejectment gives the other party a right to eject him as trespasser under S. 44 of the Act. (*Marsh, S.M.*) BOBDEE *v.* RAGHUBIR SINGH. **1939 R.D. 603 (1)=1939 A.W.R. (B.R.) 273 (1).**

——**Ss. 99 and 44**—*Occupancy tenant seeking to recover possession of his plot from defendant who is in cultivating possession—Remedy.*

Where an occupancy tenant seeks to recover possession of a plot which belongs to his holding from the defendant who is in cultivating possession, his remedy lies by way of a suit under S. 99 of the Tenancy Act for which limitation is only six months. A suit by him under S. 44 for the ejectment of the defendant as a trespasser does not lie (*Darling, S.M.*) DHARAM SINGH *v.* NARAIN SINGH. **1937 R.D. 207 (2).**

——**Ss. 99 and 44**—*Regaining possession after ejectment—Failure to avail remedy under S. 99—Liability to ejectment under S. 44.*

Where after an ejectment under S. 79 of the Agra tenancy Act the tenant whose remedy even if he was illegally dispossessed was only under S. 99 of the Act, fails to invoke S. 99 within the period of limitation, cannot regain forceable possession of the land; and if he does so he is liable to be ejected under S. 44 of the Act. (*Marsh, S. M.*) BOBDEE *v.* RAGHUBIR SINGH. **1939 R.D 602 =1939 A.W.R. (B.R.) 272.**

——**Ss. 99 and 44**—*Widow of co-tenant obtaining division of holding—Subsequently re-marrying the other co-tenant—Latter in possession of whole holding—Rights and remedies of the mother of the deceased co-tenant.*

Where the widow of a co-tenant obtains by suit a division of the holding, but which is not consented to by the zamindar and later on re-marries the other co-tenant, and he remains in undisputed possession of the whole holding, he must be held to be claiming the whole holding through the landholder within the meaning of Cl. (1) (*b*) of S. 99. As such the mother of the deceased co-tenant should put forward her claim through a suit under S. 99 of the Act for recovery of possession. A suit under S. 121 is infructuous, as she was never in possession. (*Darling, S.M.*) SURJA *v.* GIRAND SINGH. **1938 R.D. 935 (2)= 1939 A.W R. (B.R.) 59.**

——**Ss. 99 and 82**—*Ejectment—Remedy—Suit by ejected tenant under S. 99, after rejection of review of order of ejectment—If maintainable.*

Whether or not a tenant who has been ejected under S. 82 of the Agra Tenancy Act has a right in certain special circumstances to bring a suit under S. 99 he cannot certainly be allowed to do so where he has tried one remedy after another. An order rejecting an application for review of the order of ejectment when not appealed against should be treated as final. (*Darling, S.M. and Bomford, J.M.*) VIVEK SINGH MAJITHIA *v.* RAM LALL. **1938 A.W. R. (B. R.) 303=1938 A. L. J. (Supp.) 119=1938 R D. 436.**

——**Ss. 99 and 121**—*Applicability—Hindu joint family having fixed rate tenancy—Suit by one member to set aside alienation of fixed rate tenancy by another member and for declaration that it is not binding on family—Jurisdiction of Civil Court—If excluded.*

A suit by a member of a joint Hindu family seeking to set aside an alienation of family property made by another member thereof and to have it declared that the same does not affect the family property, which, in spite of it, continues to belong to the family, and praying that in case the property has passed out of the family, it be restored to it, is a suit which is usually and generally instituted in the Civil Court Such a suit is of a very rare occurrence in a Revenue Court. The fact that the property alienated which is the subject-matter of the suit is a fixed rate tenancy, which is both heritable and transferable does not exclude the jurisdiction of the Civil Court which is otherwise the proper Court to decide the question arising in such a case. The fixed rate tenancy belongs to the entire joint family of which the plaintiff is a member, and it is the family and not the plaintiff that is the tenant thereof. Ss. 99 and 121 of the Agra Tenancy Act are wholly inapplicable to such a suit, as the plaintiff and the alienating members are not co-tenants in the strict sense of the term but they are members of a co-parcenary body to whom the fixed rate tenancy belongs. There is consequently nothing in those sections read with S. 230 and Sch. IV of the Act to exclude the jurisdiction of the Civil Court

(*Niamatullah and Harries, JJ.*) DEOKINANDAN PANDEY *v.* RAM CHANDRA TEWARI. **I.L.R. (1938) A. 40=173 I.C. 180=10 R.A. 470=1938 A.L.R. 107=1937 A.L.J. 905=1937 A.W.R. 919=1937 R.D. 551=A.I.R. 1938 All. 17.**

——**Ss. 99 and 121**—*Applicab ility —Plaintiff claiming to be tenant but not in possession—Suit against landlord and another in possession under S. 121—Maintainability—Proper remedy.*

A person who claims to be a tenant of a plot of land on the basis of a written lease, and who sues the landlord and another who claims to be in possession, must, when he is not in possession, bring his suit under S. 99 of the Agra Tenancy Act and not under S. 121. (*Drake Brockman, S. M.*) MAHOMED ALI *v.* SUMER **1936 R.D. 450 (1).**

——**Ss. 99 and 121**—*Applicability—Death of one co-tenant—Collaterals recorded as heirs—Other co-tenants seeking possession—Remedy—Suit for declaration of tenancy rights—Maintainability.*

Where on the death of a co-tenant,his collaterals are recorded as his heirs, claiming to have shared in the cultivation of the holding with the deceased at the time of his death, the proper remedy of the other co-tenants who wish to obtain possession of the holding is to bring a suit under S. 99 of the Agra Tenancy Act. A declaratory suit under S. 121 is useless and is not the proper remedy. (*Drake Brockman, S.M. and Knox, J. M.*) DUNGAR *v.* KAUNSALYA. **1936 R.D. 559.**

——**Ss. 99 and 121**—*Applicability and scope—Dispute between landlords and sons of late occupancy tenant—Attachment of holding by Criminal Court pending decision by Revenue Court—Suit by sons of late tenant for declaration—Maintainability.*

As the result of a dispute between the landholder and the sons of his late occupancy tenant, in which both parties were prepared to use violence to prevent each other from taking possession of the holding, the Criminal Court attached the holding pending decision of the dispute by a competent Court. The Magistrate took possession and made it clear that he would give back possession to the person whom the Revenue Court might hold to be entitled to hold possession. The sons of the deceased tenant sued under S. 121 of the Act for a declaration of their rights against the landholder, but not for recovery of possession under S. 99 of the Act.

Held, though ordinarily it was useless for a tenant who had been ejected or kept out of possession by his landholder to obtain a declaration under S. 121, in the peculiar circumstances of the case in practice the distinction between Ss. 99 and 121 was not an important one and the suit having been brought within the period of 6 months for a suit under S. 99 the use of the wrong section ought to be condoned. (*Knox, J.M.*) SHEO BUX SINGH *v.* CHATTAR SINGH. **1936 R.D. 323.**

——**Ss. 99 and 121**—*Suit between two tenants of same village—Declaration that land included in defendant's plot by Revenue Court really belongs to plaintiff and that possession be given to him—Suit for—Jurisdiction—Civil or Revenue Courts.*

Where a tenant brings a suit against another tenant of the same village, seeking a declaration that a certain portion of land which was included in the defendant's plot by the Revenue Court really appertains to the plaintiff's grove and that possession of the same should be given to the plaintiff after dispossession of the defendant, the Civil Court will have jurisdiction in the matter if the landholders of the parties are different. But if the landholders are the same the Revenue Court has jurisdiction. (*Sulaiman, C.J. and Bennet, J.*) MATA PRASAD *v.* TIKA RAM. **167 I.C. 927=9 R.A. 597=1937 A.W.R. 110=1937 A.L.J. 137=1937 A.L.R. 275=1937 R.D. 72=A.I.R. 1937 All. 261.**

——**Ss. 99,121 and 230**—*Suit for declaration by one tenant against a rival tenant—Addition of a prayer for possession—Jurisdiction of Revenue Court to try.*

Where a suit is really one for a declaration by one tenant against a rival tenant. that he is the tenant of the holding in dispute and possession of the holding is also sought, the fact remains that the opposite party claims only a derivative title from the landlord and hence the suit lies exclusively within the jurisdiction of the Revenue Courts in view of the provisions of Ss. 99 and 121 read with S.230 of the Agra Tenency Act. (*Mulla, J.*) BHOLA OJHA *v.* DHANESHWAR OJHA. **1939 A.W.R. (H.C.) 459=1939 R.D. 386=A.I.R. 1939 All. 677.**

——**Ss. 99 and 123**—*Suit under Ss. 99 and 123—Plaintiff executing qabuliat after death of occupancy tenant without heir—Trespasser occupying the land—Ejectment by Zamindar—Another person executing qabuliat in favour of Zamindar and placed in possession—Suit by plaintiff three weeks thereafter—Limitation — Wrongful possession—Commencement of.*

The occupancy tenant of a holding died without heirs on 26th March, 1934. On the following day, the plaintiff executed a quabuliat for the holding. Meanwhile, a stranger *H* set up a claim to the occupancy rights of the holding and took possession. The Zamindar proceeded against *H* as a trespasser under S. 44 of the Agra Tenancy Act and obtained a decree and secured the formal ejectment of *H* on 25th June, 1935. On 29th June, 1935, the Zamindar took a fresh quabuliat from an entirely new party, *S*. Three weeks later, the plaintiff brought a suit against the Zamindar under S. 123 of the Tenancy Act for a declaration that he was the statutory tenant of the holding and the plaint was amended by the addition of S. 99. On a question of limitation being raised,

Held, the case is governed by Sch. IV, Group *B*, Serial No. 12; limitation for the suit under S. 99 begins from the time when the wrongful possession took place, and the wrongful possession by the zamindar took place when he accepted another quabuliat from *S* and thereupon placed him in possession of the holding and not from the date when the plaintiff executed the quabuliat. The suit being within time the plaintiff was declared to be the statutory tenant. (*Darling, S. M. and Bomford, J.M.*) JAHANGIRA *v.* MOHAMMAD HASNAIN. **1937 R.D. 507.**

——**S. 99 (1)**—*"Claiming through the landholder"—Meaning.*

A person making a false claim without a s hadow of a title cannot be regarded as "claiming through the landholder" within the meaning of S. 99 of the Agra Tenancy Act and plead that he can only be ejected by a suit under that section. (*Bomford, J.M.*) CHITTAR *v.* JHUNNA. **1938 R.D. 110=1938 A.W.R. (B.R.) 50.**

AGRA TENANCY ACT (1926), S. 99.

——**S. 99 (1) (iii)**—*Suit for compensation for improvement—If lies, where there has been neither an ejectment nor keeping out of possession.*

A suit for compensation for improvement which is only a consequential relief cannot lie when the tenant has neither been ejected nor kept out of possession. (*Harper, J.M.*) BALLI BHAR *v.* VAKCHHED MAL. **1940 R.D. 122 (2)=1940 A.W.R. (B.R.) 51 (1).**

——**S. 103**—*Relinquishment with all formalities—Plea of fraud and absence of intention to relinquish—Onus.*

When an applicant for relinquishment has gone through the elaborate procedure prescribed by the Revenue Court Manual and complied with all the requirements of procedure, the onus lies very heavily on him to prove that a fraud had been played on him and that he did not want to relinquish the holding. (*Mehta, J.M.*) MAHADEO KALWAR *v.* SYED MOHAMMAD RIZWAN-ULLAH. **1939 A.W.R. (B.R.) 97=1939 R.D. 375.**

——**S. 103**—*Scope—Surrender—Execution of deed by tenant without ceasing to cultivate land—Suit to declare occupancy rights in land surrendered—Maintainability.*

A tenant who has merely executed a deed of surrender but has not actually ceased to cultivate the land in question is entitled to sue for a declaration of his occupancy rights in the plots alleged to have been surrendered. The mere execution of the deed does not break the continuity of the holding, and if he brings the suit within six months of the date of execution of the deed, he will be entitled to the declaration. (*Drake Brockman. S.M. and Knox, J.M.*) SUKH NANDAN *v.* BINDESHRI BUX SINGH. **1936 R.D. 350.**

——**S. 103**—*Surrender—Conditions of validity—Absence of one co-tenant—If renders surrender invalid.*

When a surrender by co-tenants is otherwise valid, and the other co-tenants really accept the lands in exchange for the plots surrendered, the fact that one co-tenant was absent at the time and did not join in the surrender deed would not by itself vitiate the surrender. (*Drake Brockman, S. M. and Knox, J.M.*) SUKH NANDAN *v.* BINDESHRI BUX SINGH. **1936 R.D. 350.**

——**S. 103**—*Surrender by ex-proprietary tenant—Subsequent sale of holding—Ex-proprietary rights, if revived.*

Where an ex-proprietary tenant relinquishes his holding before its sale by him takes place the ex-proprietary rights which he had lost by actual surrender cannot revive. (*Drake Brockman, S.M. and Knox, J.M.*) GIRWAR SINGH *v.* POP SINGH. **1936 R.D. 98=1936 A.W.R. 222.**

——**S. 103**—*Surrender—What constitutes.*

In order to constitute surrender of a holding there must be an actual "ceasing to cultivate." A notice of surrender, if accepted by the landlord, is not itself a complete surrender. (*Drake Brockman, S.M. and Knox, J.M.*) GIRWAR SINGH *v.* POP SINGH. **1936 R.D. 98=1936 A.W.R. 222.**

——**S. 103**—*Tenant of holding belonging to several proprietors—Surrender by—Conditions of validity.*

A surrender by a tenant, who is a tenant of the whole proprietary body, must be made in favour of the whole proprietary body; and a surrender cannot be made of a portion of the holding without the consent of the whole proprietary body (the landholder). (*Drake Brockman, S. M. and Knox, J.M.*) DOONGAR SINGH *v.* BALJIT SINGH. **1936 R.D. 57.**

AGRA TENANCY ACT (1926). S. 107.

——**Ss. 103 and 106**—*Surrender—Resiling—Proper remedy.*

When a tenant feels that he has given a wrong surrender, then his remedy is not under S. 106 of the Agra Tenancy Act, which is the section under which the zamindar can come in to contest the surrender. While it is doubtful whether the order passed under S. 103 is open to review, the tenant, if he had given up, possession under a misapprehension, has a remedy under S. 99 of the Act within six months of his actual dispossession. In case of fraud, he has only to sit tight and the patwari will return him as in possession in the next year's papers. (*Marsh, S. M. and Mehta, J.M.*) SAHDEO RAM *v.* DUKHANTI NONIA. **1939 R.D. 330.**

——**S. 105**—*Surrender—Application—Forum—Presentation to S. D. O.—Effect.*

The proper person before whom the application is to be put under S. 105 of the Agra Tenancy Act is the Tahsildar. Nowhere has it been provided that the S. D. O. is the proper Court for the consideration of such an application. But if it is put in before him, he merely passes it on to the Tahsildar for necessary action. Unless the formalities contemplated by S. 105 and the rules laid in the Revenue Manual are complied with, the proceedings are not complete. (*Mehta, J.M.*) JANHAWI PRASAD *v* JWALA PRASAD. **1939 R.D. 225=1939 A.W.R. (B.R.) 207.**

——**Ss. 105 and 247**—*Order of Tahsildar under S. 105—Appealability.*

An appeal does lie from an order passed by Tahsildar under S. 105 of the Agra Tenancy Act for the Tahsildar in the eyes of the Revenue Courts is an Assistant Collector of the second class and under S. 247 of the Act appeals are provided from all orders of the Assistant Collector second class. (*Mehta, J.M.*) JANHAWI PRASAD *v.* JWALA PRASAD. **1939 R.D. 225=1939 A.W.R. (B.R.) 207.**

——**S. 107**—*Abandonment—Mere letting in of sub-tenant—If can constitute.*

Where a holding is an ancestral one with occupancy status, the mere letting in of a sub-tenant could not possibly be interpreted as an abandonment. (*Mehta, S. M.*) PUTTO LAL *v.* SARDAR SINGH. **1940 A.W.R. (B.R.) 63=1940 R.D. 211.**

——**S. 107**—*Abandonment—Presumption of—Recorded tenant-in-chief ceasing to have connection with holding for long time—Absence of proof of contract between him and person in cultivation—Inference.*

Where it is found that the recorded tenant-in-chief of a holding has long ceased to have any connection with the holding, and there is no evidence to prove any contract between him and the person in cultivation, an abandonment by the recorded tenant must be presumed. (*Drake Brockman, S. M. and Knox, J. M.*) SHANKER KALWAR *v.* FIDA HUSAIN. **1936 R.D. 435.**

——**S. 107**—*Abandonment—Presumption of—Tenant out of possession and neither paying rent to landlord nor collecting rent from sub-tenants—Inference.*

A tenant-in-chief who does not pay rent to the landlord or collect any rent from the recorded sub-tenants, who lives in another village and who,

so far as the records go, has exercised no possession for very many years, must be taken to have abandoned his holding, particularly when the sub-tenants have been paying rent direct to the landlord. The burden is on the tenant-in-chief to prove that he still has title and that he has sub-let the land to the recorded sub-tenants. (*Drake Brockman, S. M. and Knox, J. M.*) KUNNU KOERI *v.* ABDUL HAYI. **1936 R.D. 30 (2).**

——S. 107—*Abandonment— Sub-letting when may amount to.*

The general rule is that when a portion of a holding is sub-let, the usual presumption about abandonment from part of the holding cannot arise, but where the area has been let out to more than one tenant and one of these tenants who finds his position insecure takes shelter behind the recorded occupancy tenant, it is a case of abandonment of a wholesale character to which the general rule would not apply. (*Mehta, S.M.*) HARI SHANKER LAL *v.* BADRI SINGH. **1940 R.D. 79=1940 A.W.R. (B.R.) 24.**

——S. 107—*Abandonment—What may constitute.*

Per *Marsh, S. M.*—Where a tenant has taken no interest in a holding for a period of five years for which he is entitled to sub-let, he must be held to have abandoned the holding.

Per *Mehta, J. M.*—In each case facts would have to be scrutinised to find out if an inference in favour of abandonment can be warranted. (*Marsh, S. M. and Mehta, J. M.*) MAIKU *v.* DURJAN. **1939 R.D. 605=1939 A.W.R (B.R.) 292.**

——S. 107—*Belated application—Inference.*

A zamindar who makes an application under S. 107 of the Tenancy Act, a year after he has taken possession, is invoking the aid of the Court under false pretences. Such an application is not intended to legalize *ex post facto* a trespass already committted. (*Bomford, J. M.*) BHAGWATI PRASAD *v.* SUNDAR KOERI. **1938 A.W.R. (B.R.) 225=1938 R.D. 359.**

——S. 107—*Scope—Abandonment by tenant-in-chief—Claim by sub-tenant to be tenant-in-chief—Burden of proof—Zamindar's right of ejectment—Delay in suing—Effect of.*

In the case of a holding which is abandoned by the occupancy tenant the person put in possession by the former tenant-in-chief cannot claim himself to be the tenant-in-chief. S. 107 of the Agra Tenancy Act does not give the sub-tenant any rights as against the zamindars. It only protects him against his tenant-in-chief if the zamindar chooses to treat the holding as abandoned, but he can in no case be a tenant-in-chief unless he proves that the zamindar has recognised him as such. The burden is of course on the sub-tenant claiming to be tenant-in-chief, but when the zamindar delays taking actions for many years, the standard of proof required of the tenant must be lowered. (*Bomford, J. M.*) NARSINGH TEWARI *v.* KESHO RAI. **1938 A.W.R. (B.R.) 101=1938 R.D. 165.**

——S. 107—*Sub-tenancy continued by occupancy tenant after expiry of statutory period—Suit for ejectment of sub-tenant—Latter, if can plead abandonment of occupancy rights by plaintiff.*

The fact that the statutory period for which an occupancy tenant could sub-let legally expired at least two years before he brought a suit for ejectment of the sub-tenant, does not enable the

latter to plead that the occupancy rights of the plaintiff came to an end because his tenure as sub-tenant was unduly prolonged, so long as the Zamindar was content to recognize the plaintiff as his tenant and had not accepted the sub-tenant as his tenant. (*Bomford, J.M.*) GHARIB *v.* JHALLAR. **1937 R.D. 138.**

——S. 107—*Tahsilder's duty before passing an order under.*

Before passing an order under S. 107 of the Agra Tenancy Act, a Tahsildar should be really satisfied that the tenant has abandoned. (*Bomford, J. M.*) BHAGWATI PRASAD *v.* SUNDAR KOERI. **1938 A.W.R. (B.R.) 225=1938 R.D. 359.**

——S. 107 (1)—*Abandonment—Tenant disappearing—No arrangement made for payment of rent—Zamindar's right.*

Where a tenant has abandoned and left the village without making any arrangements at all for the payment of rent to the zamindar, the case comes under Sub-Cl. (1) of S. 107 of the Tenancy Act and the zamindar can straightaway give a lease of the holding to anybody. (*Bomford, J. M.*) RAGHURAJ SINGH *v.* BADRI SINGH. **1938 A.W.R. (B.R.) 145=1938 R.D. 286.**

——S. 107 (1)—*Abandonment—Tenant quitting holding without leaving anybody in charge—Effect—Zamindar, if entitled to take possession.*

Where a tenant leaves his field, without either leaving any one in charge of it, or a sub-tenant to whom the zamindar could turn to for his rent, he must be taken to have clearly abandoned his holding as explained in S. 107 (1) of the Tenancy Act and as such the zamindar is entitled to take possession of it and put any other person in his place. (*Darling, S. M. and Bomford, J. M.*) SUKHNA *v.* SHIAM KRISHNA. **1938 A.W.R. (B.R.) 142=1938 R.D. 272.**

——S. 107 (2)—Applicability—Only a portion of holding left in charge of another *See* AGRA TENANCY ACT, SS. 44 AND 107 (2). **1938 R.D. 58 =1938 A.W.R. 20 (B.R.).**

——S. 107 (3)—*Abandonment — Sub-tenant cultivating land for about 20 years and paying rent direct to zamindar—Inference of abandonment by recorded tenant-in-chief.*

Where in a suit for ejectment of an alleged sub-tenant, it is found that the defendant has been in cultivation of the land for about 20 years paying rent direct to the zamindar, the recorded tenant-in-chief must be held to have abandoned the land. (*Drake Brockman, S. M. and Knox, J. M.*) KUALESHAR AHIR *v.* SARJU KOHAR. **1936 R.D. 178.**

——S. 121—Applicability—Claim to be tenant on basis of lease—Claimant not in possession—Suit under S. 121 against landlord and another in possession—Maintainability. *See* AGRA TENANCY ACT, SS. 99 AND 121. **1936 R.D. 450 (1).**

——S. 121—Applicability—Collaterals of deceased co-tenants recorded as heirs—Remedy of surviving co-tenants—Suit for declaration of tenancy rights—Competency. *See* AGRA TENANCY ACT, SS. 99 AND 121. **1936 R.D. 559.**

——S. 121—*Applicability—Ejectment in proceedings under S. 79—Delivery of possession—Option under S. 97 not exercised—Failure of negotiations for re-admission—Remedy of ejected tenant.*

With the formal ejectment of a tenant in proceedings under S. 79 of the Tenancy Act, his

tenancy is completely concluded. Though as a result of the failure of the decree-holder to exercise his option under S. 97, the tenant remains in possession to collect the crops and carries on negotiations for re-admission to holding, he cannot on the failure of such negotiations sue under S. 121 of the Act for a declaration, for, being no longer a tenant he has no *locus standi* to sue under S. 121. It may be open to him perhaps to sue under S. 99 of the Act, if he thinks that he has been in fact re admitted. (*Darling, S.M. and Marsh, J.M.*) RAM SINGH *v.* BHOP SINGH. **1938 A.W.R. (B.R.) 309=1938 A.L.J. (Supp.) 114=1938 R.D. 593.**

——**S. 121—Applicability**—Suit by Hindu coparcener challenging alienation by another coparcener—Property alienated consisting of fixed rate tenancy—Jurisdiction of Civil Court. *See* AGRA TENANCY ACT, SS. 99 AND 121. **1937 A.W.R. 919=A.I.R. 1938 All. 17.**

——**S. 121**—*Application for correction of papers—Application opposed by other tenants who claimed adverse possession—Dismissal of application—Suit under S.* 121 *by applicant after* 12 *years—If barred.*

Where a person put in an application for correction of papers asking that his mother's name should be expunged, and this application was opposed by the other recorded tenants who declared that they did not admit the claims of the applicant and were in adverse possession to him, and the application was dismissed, a suit under S. 121 of the Agra Tenancy Act brought by the applicant who was out of possession for more than 12 years after the dismissal, is time barred. (*Darling, S.M. and Bomford, J.M.*) SHEO NANDAN *v.* BUDHU KOERI. **1937 R.D. 98.**

——**S. 121**—Application for correction of papers dismissed—Subsequent suit under S. 121—*Res judicata. See* U.P. LAND REVENUE ACT, S. 39. **1937 R.D. 82.**

——**S. 121**—*Declaratory suit—Absentee tenant claiming share in tenancy—Disentitling circumstances.*

Where a tenant, who has been absent for a long time, claims a share in the tenancy, he would be entitled to a declaration of co-tenancy excepting in a case where it is proved that the plaintiff gave up his share in the joint family property or where it is proved that the defendants have perfected their rights by adverse possession for the required period. (*Darling, S.M. and Bomford, J.M.*) GANGA PANDE *v.* SHEONET PANDE. **1938 A.W.R. (B.R.) 257=1938 A.L.J. (Supp.) 50=1938 R.D. 539.**

——**S. 121**—*Declaratory suit that plaintiffs were joint occupancy tenants in a holding recorded in names of their cousins alone—Settlement entries not challenged for* 30 *years—Proprietors collecting rent from defendants alone—Suit, if should be dismissed.*

The plaintiffs sued for a declaration that they were joint occupancy tenants in a holding recorded in the names of their cousins alone. The proprietors deposed that they collected rent from defendants alone and did not recognise the plaintiffs as tenants. For over 30 years the settlement entries had stood unchallenged. The defendants alone were found to be in possession of the fields in dispute.

Held, that the suit should be dismissed. (*Bomford, J.M.*) RAJABALI *v.* KHALIL. **1937 R.D. 120.**

——**S. 121**—Necessity of suit under—Possibility of opposition from landlord. *See* AGRA TENANCY ACT, Ss. 37 & 121. **1938 A.W.R. 45 (B.R.).**

——**S. 121**—Suit under—If barred by prior decision under S. 42 of U. P. Land Revenue Act against the landlord. *See* U. P. LAND REVENUE ACT, S. 42. **1938 R.D. 837.**

——**S. 121**—*Suit under—Order for delivery of possession—Validity.*

In a declaratory suit under S. 121 an order for delivery of possession could not be passed by any Court. Any such order and any such delivery of possession is wholly *ultra vires*. (*Darling, S.M.*) SURJA *v.* GIRAND SINGH. **1938 R.D. 935 (2)=1939 A.W.R. (B.R.) 59.**

——**S. 121**—*Widow succeeding occupancy tenant—Commutation of batai rent without reference to occupancy tenant—Widow's name removed from* khatauni—*Suit under S.* 121—*Onus as to loss of occupancy rights.*

Where a widow of an occupancy tenant, whose name was cut off the *khatauni*, sues under S. 121 of the Agra Tenancy Act and establishes the occupancy rights of her deceased husband, the burden of proving that those occupancy rights have been lost by abandonment or otherwise lies entirely on the party now claiming to be the tenant in chief. Neither the fact of the commutation of *batai* rent, nor the removal of the name of the occupancy tenant from the *khatauni*, nor the acceptance of cash rent by the lambardar, would deprive the widow of her occupancy rights. (*Darling, S.M. and Bomford, J.M.*) MT. AJUBAN *v.* MT. MULU. **1938 A.L.J. (Supp.) 15=1938 R.D. 280=1938 A.W.R. 40 (B.R.).**

——**Ss. 121-123**—Applicability—Tenant of grove land retaining occupancy rights after disappearance of grove—Transferee from—Status of—Claim to occupancy rights—Remedy—Application for correction—Maintainability. *See* AGRA TEN. ACT, Ss. 18 & 121-123. **1938 R. D. 124.**

——**Ss. 121 and 123**—*Death of co-tenant—Other co-tenant minor—Settlement by Court of Wards with certain others to ensure recovery of rent—Effect of—Suit by co-tenant for declaring him sole tenant.*

Two co-tenants were descendants of the same ancestor from whom the holding descended. One of them died. The other who was living jointly and cultivating with the deceased was a minor. The Court of Wards, acting on his behalf, made a sort of *kachcha* settlement with certain persons which would ensure the recovery of rent. In a suit by the surviving co-tenant after becoming a major for a declaration that he was sole tenant of the land in dispute.

Held, that no sort of relinquishment or surrender on behalf of the plaintiff was made or intended by the Court of Wards; that it would be impossible to hold that the plaintiff was occupancy tenant in part and that those with whom a settlement was made were statutory tenants in the rest of the holding; and since there could not be two kinds of tenants in one and the same holding the plaintiff was entitled to the declaration sued for. (*Drake Brockman, S.M. and Knox, J.M.*) SAMHARU *v.* GAYA DIN. **1936 R.D. 179.**

AGRA TENANCY ACT (1926), S. 121.

——Ss. 121 and 123—*Grove holder, if can get a declaration under.*

A grove holder is one of those persons who could get a declaration in his favour under Ss. 121 and 123 of the Agra Tenancy Act. (*Darling, S.M. and Mehta, J.M.*) BINDHACHAL RAI *v.* MOTI RANI. **1938 A.W.R. (B.R.) 282 (2)=1938 A.L.J. (Supp.) 91=1938 R.D. 627.**

——Ss. 121 and 123—*Mortgagee from tenant holding over after death of tenant—Payment of arrears of rent and admission to tenancy by landlord's agent not expressly authorized to do so—Status of—Suit for declaration of statutory tenancy rights—Maintainability.*

A mortgagee from a tenant who is holding and retaining possession after his mortgagor's death and paying up the arrears of rent due in respect of the holding cannot maintain a suit for declaration of statutory tenancy rights at fixed rent, even though he has been recorded as sub-tenant and has been admitted to tenancy by the landlord's agent on payment of arrears of rent, when such agent has no authority to admit tenants without the landlord's express concurrence. The admission by the landlord's agent under such circumstances is not a proper or legal admission, and the mortgagee has to be recorded as a non-occupancy tenant *bila tasfia lagan* in the holding. (*Drake Brockman, S.M. and Knox, J.M.*) SOORAJPAL SINGH *v.* MUNSHI LAL. **1936 R.D. 225.**

——S. 121—*Suit for declaration—Maintainability—Loss of possession more than 12 years prior to suit.*

Where a tenant had lost possession over 12 years prior to his suit under S. 121 of the Tenancy Act to be declared an occupancy tenant of the land in dispute, he cannot obtain the declaration without first obtaining possession. (*Mehta, S.M.*) PUTTOO LAL *v.* SARDAR SINGH. **1940 A.W.R. (B.R.) 63=1940 R.D. 211.**

——S. 121—*Suit under—Main question for consideration—Unexecuted decree for ejectment against occupancy tenant—Effect on occupancy right.*

Where a suit is under S. 121 of the Agra Tenancy Act, the main question to see is who is in possession. According to S. 35 (1) (*b*) a decree for ejectment standing against an occupancy tenant cannot take effect until it is executed. Hence, where a decree for ejectment against an occupancy tenant remains unexecuted, the occupancy rights of the tenant in the holding continue to subsist. (*Harper, S.M and Sathe, J.M.*) TAHSILDAR AHIR *v.* RAMDHARI SINGH. **1940 A.W.R. (B.R.) 80 (2)=1940 R.D. 218.**

——Ss. 121 and 123—*Suit under—Fixed rate tenancy, purchased by member of joint Hindu family, but treated as separate—Merger—Onus.*

Where a fixed rate tenancy is purchased by a member of a joint Hindu family but it is treated as separate from the other properties and the entries are in favour of the son of the original purchaser, sanctity must be attached to existing entries and the onus lies heavily on the recorded sub-tenant who claims a declaration that he is a tenant in chief, to show that the existing entries were wrong and that as a matter of fact the fixed rate tenancy had no legal existence and that it had determined on account of merger.

AGRA TENANCY ACT (1926), S. 122.

(*Mehta, S.M.*) SITA AHIR *v.* KESHOPRASAD RAI. **1940 R.D. 5=1940 A.W.R. (B.R.) 11=1940 A. L.J. (Supp.) 3.**

——Ss. 121 and 123—*Suit under by one branch of a family—Remaining three branches alone recorded as tenants of occupancy holding—Plaintiff branch found to be in possession along with other branches—Zamindar having no objection to inclusion of fourth branch—Right of latter to be recorded as co-tenant.*

Where, in a suit under Ss. 121 and 123 of the Agra Tenancy Act for a declaration of rights in an occupancy holding by one of four branches of a family, it is found that though only the other three branches are recorded as tenants of the holding, the fourth branch is in possession along with the other branches, and that the Zemindar has no objection to the inclusion of the name of the fourth branch in the holding the plaintiff branch is entitled on the score of possession to be recorded as co-tenant in the occupancy holding. (*Darling, S.M.*) SULTAN *v.* DWARKA. **1937 R.D. 15 (2).**

——Ss. 121 and 123—Tenant of *sir* subject to transfer—No claim for ex-proprietary rights—If can obtain a declaration that he is a statutory tenant. *See* AGRA TENANCY ACT, Ss. 86, 121 AND 123. **1939 A.W.R. (B.R.) 98.**

——Ss. 121 to 123—*Scope and object of—Rent fixed in proceedings under S. 36 of Land Revenue Act—Disregard of S. 14 of Agra Tenancy Act—Remedy.*

It is not the object of Ss. 121 to 123 to declare what rent ought to be payable. The object of the sections is to declare what rent is payable. When once this rent has been fixed once for all in proceedings under S. 36 of the Land Revenue Act, though it be that it was fixed in utter disregard of the mandatory provisions of S. 14 of the Agra Tenancy Act, unless those proceedings are set aside one cannot come under Ss. 121 to 123 of the Tenancy Act for a declaration that the rent fixed in those proceedings was wrong. He can file a suit for abatement, if he likes. (*Marsh, S.M. and Mehta, J.M.*) ANRUDH SINGH *v.* MEGH NARAIN SINGH. **1939 R.D. 221=1939 A.W.R. (B.R.) 203.**

——S. 122—*Applicability—Dispute between landlord and person claiming as tenant.*

S. 122, Agra Tenancy Act, does not apply to a case in which the dispute is between the landlord and another person claiming to be a tenant but whose right as such is denied by the landlord, there being no rival claimant to the tenancy in the field. In such a case, if a suit is instituted in the Civil Court, the provisions of S. 273 of the Act will apply. (*Niamatullah, J.*) RANJIT RAI *v.* JUTHAN RAI. **171 I.C. 404=1937 A.W.R. 821=1937 A.L.R. 840=1937 R.D. 546=1937 A.L.J. 1092=A.I.R. 1937 All. 638.**

——S. 122—*Scope — Occupancy holding—Widow succeeding to husband and getting daughter also recorded as co-occupancy tenant with consent of lambardar—Partition proceedings—Holding falling into several mahals—New landholder by partition—Suit for declaration that widow alone is tenant of the holding—Maintainability.*

One *S. R.* an occupancy tenant of a holding having died, the holding devolved on his widow

R., at a time when Act II of 1901 was in force and she was accordingly recorded tenant. Pending partition proceedings in the village, *R.* applied to have the name of her daughter *K.* also to be entered as co-occupancy tenant with her. The request was supported by the lambardar for the time being and was granted and the daughters name too was added along with that of the widow. In the allotment of lands under the partition, the holding of *S.R.* was split up among various *mahals* and the portions in suit fell into the *mahal* of the plaintiff. The latter brought a suit for a declaration that the tenant of the holding was *R.* and not *R.* and *K.* jointly.

Held, that though there was an express consent to both being co-tenants by the then landholder, *i.e.*, the lambardar, there was nothing to prevent the plaintiff who became a lambardar by virtue of a partition from suing for a declaration of the sort, and that S. 122 under which the suit fell, allowed a suit to be brought at any time during the continuance of the tenancy. (*Drake Brockman, S.M. and Knox, J.M.*) TALEWAR *v.* KETKAI. **1936 R.D. 391.**

——**S. 123**—Applicability—Dispute between persons claiming share in tenancy—Suit for declaration of joint tenancy-in-chief—Competency. *See* AGRA TENANCY ACT, SS. 37 AND 123. **1936 R.D. 371.**

——**S. 123**—*Compromise as to rent between landlord and tenant before Collector in proceedings not under Tenancy Act—Binding nature of—Suit by tenant for declaration of rent payable—If barred.*

If in proceedings between the landlord and the tenant before the Collector, which are of such a nature that the Collector could embody the terms of a compromise entered into between the parties in a decree and thereby decree the rent agreed on between them, he passes an order that the rent so decreed should be recorded as the rent, that order is final and no exception can be taken to it afterwards by the tenant either by suit or otherwise. But when that is not the case, the tenants are not debarred from filing a suit under S. 123 of the Agra Tenancy Act for a declaration of rent payable by him. (*Drake Brockman, S.M.*) HAR PERSHAD *v.* SAVANT. **1936 R.D. 565.**

——**S. 123**—*Declaration under—Absence of any entry as joint tenant for over 60 years—Effect.*

Where the plaintiffs have not for over 60 years been entered as tenants jointly with another branch and further where they live in another village, they have no right after such a long interval of time to get a declaration under S. 123 of the Tenancy Act. In such a case the last settlement entry must be taken as correct. (*Mehta, S.M.*) JAGMOHAN SAITHWAR *v.* HANSAI. **1939 A.W.R. (B.R.) 25=1939 R.D. 519.**

——**S. 123**—*Rent as originally shown in* khatauni *modified—Modified entry repeated in successive years—No objection taken by zamindar—Suit by thekadar for declaration that correct rent payable is that originally shown—If liable to be dismissed.*

Where the rent of a holding as originally shown in the *khatauni* was modified and the modified entry was repeated in every successive year and neither the zamindar nor his servants questioned the correctness of the rent entered in the *khatauni*, not even when the district was under record operations, a suit by the thekadar for a declaration that the correct rent payable is that originally entered in the *khatauni* is liable to be dismissed. (*Darling, S.M. and Bomford, J.M.*) BHARAT SINGH *v.* HAFIZ ULLAH. **1937 R.D. 148.**

——**S. 123**—*Scope—Power of Court under—Rent once fixed—Remedy.*

S. 123 of the Agra Tenancy Act does not allow either the landholder or the tenant to get the rent fixed anew. It only gives power to the Court to declare the rent payable, when a rent has been alleged to be fixed and the dispute relates only to the amount which has been settled. Where the rent has been fixed on the basis of a compromise before a Civil Court, any tenant feeling aggrieved by it cannot come by suit under this section, but only to seek abatement of rent. (*Mehta, J.M.*) DEO SARAN RAI *v.* DWARIKA RAI. **1939 R.D. 27=1939 A.W.R. (B.R.) 170.**

——**S. 123**—*Scope and applicability.*

The plaintiff-zamindar sued for a declaration under S. 123 of the Tenancy Act that the defendants were liable to pay a certain sum annually for their holding as fixed-rate tenants. This amount included the cess payable under the Benares Family Domains Act, III of 1904. The case for the plaintiff was that the payment of this cess was a condition of the tenure of the defendants.

Held, that this was a matter which could form the subject of a suit under S. 123 of the Tenancy Act. (*Bennet, J.*) NARSING PRASAD SINGH *v.* PURANMASHI. **161 I.C. 762=8 R.A. 779=1936 R.D. 201=1936 A.W.R. 475 (1)=1936 A.L.J. 282=A.I.R. 1936 All. 459.**

——**S. 123**—*Suit for declaration of plaintiff as grove-holder—Plaintiff out of possession—Maintainability of suit.*

A suit for a declaration that the plaintiff is grove-holder of the land in suit is not maintainable under S. 123 of the Agra Tenancy Act, when the plaintiff is not in possession of the suit land. (*Drake Brockman, S.M. and Knox, J.M.*) SHEO BARTI *v.* HANSRAJ. **1936 R.D. 481.**

——**S. 123**—*Suit under for declaration of rent—Original rent reduced at revision of records—Inference.*

In a suit for declaring the amount of rent payable in respect of a holding, it was found that the rent of the holding originally payable was Rs. 24-6-0, but that at the revision of records it was entered as Rs. 17—1—0 only.

Held, that there was no reason to believe that the entry at the revision of records was erroneous or mistaken, and that it was quite possible that the Record Officer deliberately recorded only so much of the rent as was legally payable, as it was notorious that landlords in many districts used to collect both cesses and *zaid lagan*. (*Drake Brockman, S.M. and Knox, J.M.*) MARZHAR KHAN *v.* SHEIKH INAYAT. **1936 R.D. 121.**

——**S. 123**—Suit under—Limitation. *See* AGRA TENANCY ACT, SS. 99 AND 123. **1937 R.D. 507.**

——**S. 123**—Suit under—Power of Court to fix rent under S. 45. *See* AGRA TENANCY ACT, SS. 45 AND 123. **1939 R.D. 162.**

——**S. 123**—*Suit under—Power of Court to fix rent under S. 45.*

AGRA TENANCY ACT (1926), S. 123.

It is not open to the Court to fix a rent under S. 45 of the Agra Tenancy Act, when the suit is brought under S. 123 of that Act. 14 R.D. 711, Ref. to. (*Bomford, J.M.*) RANNA RAI *v.* JAIDAYAL OJHA. **1937 R.D. 97.**

——S 123—*Suit under—When to be brought—Necessity of possession.*

A suit under S. 123 can be brought at any time during the continuance of the tenancy. The tenancy commences from the date of the quabuliat in the case of a valid lease. A suit under this section being declaratory, the plaintiff need not have possession on the date of the suit. (*Darling, S. M. and Bomford, J. M.*) JAHANGIRA *v.* MOHAMMAD HASNAIN. **1937 R.D. 507.**

——S. 123—*Suit for declaration under—Fixed rate tenancy—Rent payable—Entry of* 'adam wasul'—*Meaning.*

Where at the settlement the rent of a fixed rate tenancy was recorded at a particular figure including an amount *adam wasul* the proper rent payable must be the rent recorded as such by the Settlement Officer and the mere fact that for some reason part was not being realized at the time of settlement will not make the whole amount any the less payable. *Adam wasul* means 'not realized' and 'not realizable.' (*Darling, S.M. and Bomford, J.M.*) SRI NARAIN SINGH *v.* MAHARAJA OF BENARES. **1938 R.D. 420=1938 A.W.R. (B.R.) 169 (2)=1938 A.L.J. (Supp.) 28.**

——S. 123 and 44—*Plaintiff not in possession—Remedy.*

A plaintiff not being in possession cannot sue under S. 123 of the Agra Tenancy Act. It is his duty to sue under S. 44 to get the ejectment of the defendants. (*Darling, S.M. and Bomford J. M.*) MAHANGOO GOND *v.* SHEO NATH GOND. **1938 A.W.R. (B.R.) 340=1938 R.D. 474.**

——S. 123 (c)—*Declaration as to rent payable different from that entered—When justified.*

In the absence of a definite compromise, or course of conduct indicating the existence of a subsequent compromise reducing the rent which was entered in the papers, no Court could be called upon to declare under S. 123 (*c*) of the Tenancy Act any rent to be payable which is other than the rent which is entered in the papers. (*Darling, S.M. and Mehta, J.M.*) SHARAFAT ULLAH *v.* NOOR MOHAMMAD. **1938 A.W.R. (B.R.) 358=1938 R.D. 746.**

——S. 123 (c)—*Enquiry — Scope — Duty of Court—Parties both agreeing that rent was fixed —Difference as to amount—Power of Court to hold no rent fixed—Procedure.*

Where both parties to an application under S. 123 (*c*) of the Agra Tenancy Act agree in saying that the rent has been definitely fixed, but they differ as regards the amount at which it was fixed, it is not open to the Court to hold that no rent has been fixed at all. The Court is bound to decide only as to what was the rent fixed. (*Darling, S.M. and Bomford, J.M.*) RAM SAJAWAN *v.* GANESH PRASAD. **1938 R D. 96=1938 A.W.R. 51 (B.R.).**

——S. 123 (c)—*New plea — Application for declaration of rent—Denial of relationship of landlord and tenant—When to be raised—Plea in appeal—If open.*

In an application for declaration of the amount of rent, the tenant-defendant denying the relationship of landlord and tenant must specifically plead it in his written statement, and must see that an issue is fixed on the point. He cannot be allowed to take the point for the first time at the hearing of appeal from the decision. (*Darling, S.M. and Bomford, J.M.*) RAM SAJAWAN *v.* GANESH PRASAD. **1938 R.D. 96=1938 A.W.R. 51 (B.R.).**

AGRA TENANCY ACT (1926), S. 132.

——S. 123 (c)—*Suit for declaration of rent payable by statutory tenant—Zamindar claiming higher figure than that entered in* khatauni*—Burden of proof.*

In a suit by a zamindar under S. 123 (*c*) the Tenancy Act for a declaration of the rent payable by his statutory tenant, the burden of proving, in the absence of a lease, a higher figure than that entered in the *khatauni* lies heavily on the plaintiff zamindar. (*Darling, S.M. and Bomford, J. M.*) CHOTEY *v.* MOHOBBE ALI KHAN. **1937 R.D. 376.**

——S. 126—Applicability—Land washed away by river and re-formed—Occupancy tenant taking possession as belonging to his holding—Obstruction or ouster by landlord—Suit by tenant for declaration of occupancy rights—Maintainability. *See* AGRA TENANCY ACT, S. 99. **1936 R.D. 111.**

——S. 127—Agreement to confer occupancy rights—Attestation before Qanungo—Sufficiency. *See* AGRA TENANCY ACT, Ss. 17 (5) AND 127. **1940 R.D. 224.**

——Ss. 131, 132 and 137—*Scope—Suit for arrears of grain rent—Suit brought after delay of three years—Claim to interest at 25 per cent.—Maintainability.*

"Siwai", though it is the usual rate on grain loans, is collected at once. A landlord who chooses to wait for about three years and then sues for arrears of his grain rent under a provision of law which is primarily intended for the recovery of cash rent should not be allowed to charge interest at 25 per cent. The Court in such a case should not allow him more than the interest usually allowed on cash rent arrears. (*Darling, S. M. and Bomford, J.M.*) RAJ KUMAR KAI *v.* RAM LAKHAN. **1938 A.W.R. (B.R.) 105=1938 R.D. 169.**

——S. 132—*Applicability—Rent payable in kind on* batai *basis—Failure to proceed under Ss. 137 and 138—If bars suit for arrears of rent.*

A landholder of a plot in respect of which the rent is payable in kind on a *batai* basis has a remedy under Ss. 137 and 138 of the Agra Tenancy Act. But the remedy therein prescribed is only permissive and not mandatory. A landholder who fails to avail himself of this remedy is not debarred from seeking his redress against his tenant by way of a suit for arrears of rent under S. 132. But such a landlord cannot expect the Court to accept, without the strictest proof, high estimates of the produce. The Courts must always exact definite evidence of the value of the produce. (*Darling, S.M. and Bomford, J.M.*) MANGAN *v.* JODHI. **1937 R.D 287=1937 A.W.R. 621.**

——S. 132—Applicability—Suit for weighment dues—Jurisdiction of Revenue Court. *See* AGRA TENANCY ACT, Ss. 3 (3) AND (4) AND 132. **1936 R.D. 14.**

——S. 132—Applicability—Suit against sub-proprietor for rent—Suit under S. 132 if can be

converted into one under S. 224. *See* AGRA TENANCY ACT, Ss. 224 AND 132. **1938 R.D. 565.**

——**S. 132**—*Appraisement—Landlord resorting to remedy under S.* 132—*Duty as to proof.*

Where a landholder resorts to S. 132 for relief, rather than to the procedure prescribed by Ss. 137 to 139 of the Tenancy Act, he cannot expect the Courts to accept, without the strictest proof, high estimates of the produce. Definite evidence of the value of the produce should be made available to the Court. (*Darling, S.M. and Bomford, J.M.*) GANGA BALLABH *v.* RATAN SINGH. **1938 A.W.R. (B.R.) 174=1938 R.D. 331.**

——**S. 132**—*Liability for rent—Original letting for agricultural purposes—Acquisition of occupancy rights—Land recorded as abadi only in later settlement.*

Where the land in suit was let for agricultural purposes and the defendants had acquired occupancy rights therein and where in the settlement of 1272-F. it was recorded as cultivated land, and it was only in the settlement of 1301-F. that it was recorded as abadi, a suit for arrears of rent cannot be dismissed on the ground that the land was not cultivated but abadi land. (*Bomford, S.M. and Mehta, J.M.*) CHUNNA *v.* RAM PRATAP SINGH. **1939 R.D. 129=1939 A.W.R. (B.R.) 146 (2).**

——**S. 132**—*Mortgage of fixed rate tenancy—Suit for rent against mortgagor and mortgagee jointly—Maintainability.*

If a fixed-rate tenant mortgages his holding, the mortgagor and the mortgagee form one tenant between them. The landholder would be able to sue both mortgagor and mortgagee in the same way as he would sue a number of co-tenants and be able in the same way to execute his decree against the person of his choice, leaving it to the persons who together form "the tenant" to settle in the Civil Courts their respective liabilities under the agreement to which the landlord was not a party. (*Darling, S.M. and Bomford, J.M.*) KUNJ BEHARI SINGH *v.* LAKHPATI. **1937 R.D. 329.**

——**S. 132**—*'Nadhwana' if a 'cess' leviable under S.* 56 *or S.* 86 *of the Land Revenue Act—If a 'Sayar' under the Tenancy Act—If can be sued for.*

Nadhwana is leviable not on the occupation of the land but on the use of water for irrigation. Therefore it is not a 'cess' as defined by S. 56 of the Land Revenue Act; nor does it come under S. 86. But that *Nadhwana* must be included in 'Sayar' is clear from the definition of 'Sayar' which includes irrigation charges. Dues which come under the definition of 'Sayar' can be sued for under S. 132 of the Agra Tenancy Act provided they are 'payable', and they are entirely different from the cesses referred to in the Land Revenue Act. (*Darling, S.M. and Bomford, J.M.*) RADHA KRISHNA *v.* RAM NARAIN. **1938 A.W.R. 38 (B.R.)=1938 R.D. 308.**

——**S. 132**—*Scope—Suit under S.* 123 (*c*) *for arrears of rent—Rent shown in papers as Rs.* 12 *plus Rs.* 10 *Zaid mutalba—Decree for Rs.* 12 *only—Appeal dismissed—Failure to apply in revision—Effect—Finality of decision.*

As the result of a compromise decree in a suit for arrears of rent the rent of a holding was shown in the papers as Rs. 12, plus Rs. 10 zaid mutalba. In a subsequent suit a decree was given only at the rate of Rs. 12 by the Assistant Collector, and an appeal against that was dismissed by the Additional Collector. But the plaintiff did not take the order in revision.

Held, that the order should stand as final for the purposes of a rent suit until and unless the zamindar secured a declaration that a higher rate of rent was payable and that it was for him to file suit for a declaration. (*Darling, S.M. and Bomford, J.M.*) RAM PRASAD *v.* KALI PRASAD. **1938 R.D. 99=1938 A.W.R. 49 (B.R.).**

——**S. 132**—Suit under. *See* C. P. CODE, O. 2, R. 2 **1937 A.W.R. 867=1937 R.D. 394.**

——**S. 132**—*Suit under—Maintainability—Rent left unfixed in prior suit under Ss.* 121-123—*Proper remedy.*

Where in a prior suit for declaration of rent under Ss. 121/123 of the Tenancy Act the rent was not fixed but only the tenant was declared to be a statutory tenant, a suit for arrears of rent cannot be filed before getting the rent first fixed by a suit under S. 45. (*Marsh, S.M. and Mehta, J.M.*) SRIPATA *v.* RAM GARIB. **1939 R.D. 222=1939 A.W.R. (B.R.) 66=1939 A.L.J. (Supp.) 57.**

——**S. 132**—*Suit under—Right of one of the landlords to sue alone—Admission to tenancy by one only.*

Where one of the landholders has succeeded in ejecting the ex-proprietary tenant without any interference from any one and the probabilities are that he alone admitted the tenant, then such a landholder can maintain the suit alone, under S. 132 of the Agra Tenancy Act. The fact that he joined with his brother in levying distraint on some fields which included fields other than those in suit, is of little importance in connection with such a suit. (*Bomford, S.M. and Mehta, J.M.*) GENDAN LAL *v.* MANPHUL. **1939 R.D. 118 (1)=1939 A.W.R. (B.R.) 156 (1).**

——**S. 132**—*Suit under—Admission of claim in part by defendant—Plaintiff not appearing—Duty of Court.*

Where in a suit for arrears of rent under S. 132 of the Tenancy Act, the defendant admits the claim in part, then the Court should decree the suit to that extent, even though the plaintiff is absent. (*Darling, S.M. and Bomford, J.M.*) AJUDHIA PRASAD *v.* FATTU. **1938 A.W.R. (B.R.) 91=1938 R.D. 344.**

—— **S. 132**—*Suit to declare statutory tenancy—Failure to prove right in respect of certain plots—Declaration of plaintiff as statutory tenants of some plots and of defendants in respect of other plots—Appeal—Dakhaldihani showing ejectment of certain tenants by zemindar from latter plots—Defendants not proved to be ejected tenants—Power of appellate Court to reverse or disturb declaration in favour of defendants.*

One *P.D.* and others sued for a declaration that they were statutory tenants of a certain number of plots. The Court granted a declaration in respect of 11 plots, but held that he had failed to prove that he was a tenant in possession of the remaining 8 plots; it then ordered that one *L* should be entered as statutory tenant in respect of 4 of them, and one *S*, as statutory tenant in respect of the other 4. In appeal the Commissioner while agreeing with the lower Court that the plaintiffs had failed to prove their claim

in respect of the 8 plots, ordered them to be entered as the *Khudkasht* of the zamindar, *N.*, relying on a *dakhaldihari* which showed that *N.*, the zamindar, had ejected tenants from those plots. *N* himself did not claim to be in possession but accepted plaintiff's claim to be tenants.

Held, that in the absence of proof on the specific point, it cannot be assumed that the ejected tenants were *L* and *S*. The order declaring them as statutory tenants of the plots in question could not be reversed or disturbed. (*Drake Brockman, S.M. and Knox, J.M.*) LUTAWAN *v.* BISHWA NATH. **1936 R.D. 484.**

——**S. 132**—*Suit for arrears of rent—Plea of non-fixation of rent and of absence of possession —Decree for arrears—If* res judicata *as to status of defendant.*

In a suit for arrears of rent in the Court of the Tahsildar, the defendant pleaded that no rent had been fixed and that he was not in possession, but the Tahsildar decreed the suit.

Held, the decision could not operate as *res judicata* in a subsequent proceeding as regards the status of the defendant in the prior suit. (*Drake Brockman, S.M. and Knox, J.M.*) BANSRAJ *v.* MUTSADDI LAL. **1936 R.D. 538 (1).**

——**S. 132**—*Suit for rent—Lambardar having no proprietary interest in holding—Plea of payment to him in good faith—Sustainability.*

Payment of rent to a lambardar cannot be pleaded in defence to a suit for arrears of rent by the co-sharers, as having been made in good faith, when such lambardar has no proprietary interest in the holding but is actually a co-tenant and the other tenants are his near relatives. (*Darling, S. M. and Bomford, J. M.*) BOHRA KISHUN CHAND *v.* JUMNA BUX. **1937 R.D. 56.**

——**S. 132**—*Undivided mahal—Right of individual co-sharer to sue for rent—Individual co-sharer getting* sir *demarcated and rent fixed—If solely entitled to sue ex-proprietary tenant for rent—U.P. Land Revenue Act, S.* 36.

Co-sharers in an undivided mahal must, as a rule, exercise their rights jointly unless they have appointed an agent; the only exception to this rule is where the law allows one co-sharer to sue for his share of the rent when it is the custom in the *mahal.* The law does not countenance the division of the tenants amongst the proprietary body and the collection of the whole of the rents from such tenants. The mere fact that an individual co-sharer has got the area which was once that joint *sir*, demarcated and the rent fixed thereon under S. 36 of the U. P. Land Revenue Act, does not entitle him to sue alone for the rent due from the ex-proprietary tenants. (*Drake Brockman, S.M.*) GOPI NATH *v.* CHUNNI. **1936 R.D. 443.**

——**Ss. 132 and 45**—*Suit for arrears of rent—If competent, when rent not settled—Proper procedure.*

A suit for arrears of rent could only be decreed, if the rent was fixed from before. So it is not competent for a Court to fix rent in a suit for arrears. If the rent is unsettled, the proper course is for a plaintiff to have it fixed by a suit under S. 45 of the Tenancy Act and then sue for arrears under S. 132. (*Misra, J.*) KUNDAN *v.* JAWAHAR SINGH. **1938 A.W.R. (H.C.) 634 (2)= 1938 R.D. 804=1938 A.L.J. 985=1938 R.D. 831 =1938 A.L.R. 850=A.I.R. 1938 All. 617.**

——**Ss. 132 and 45**—*Suit for rent—Court if can make out new case that no rent had been fixed.*

Unless a suit under S. 45 of the Agra Tenancy Act is before the Court, it is not at liberty in a suit for arrears of rent to make out a new case against the pleadings that no rent had been fixed. (*Marsh, S.M. and Mehta, J.M.*) MAHESH SAHOO *v.* BADLU. **1939 A.W.R. (B.R.) 105=1939 R.D. 378.**

——**Ss. 132 and 200**—*Suit for theka money—Absence of written lease—Mortgage and a qabuliyat in favour of mortgagee—Relief on the basis of compensation for use and occupation.*

Where a mortgagor executes a qabuliyat in favour of the mortgagee purporting to take the mortgaged property on lease from the mortgagee as thekadar and agreeing to pay a certain amount, though no written instrument of lease as required by S. 200 of the Agra Tenancy Act is executed by the mortgagee, in a suit by the latter under S. 132 of the Agra Tenancy Act, relief can be given to him by treating the suit as one for compensation for use and occupation. (*Verma, J.*) MIR SINGH *v.* RAGHUBIR SINGH. **184 I.C. 873= 1939 A.W.R. (H.C.) 454=A.I.R. 1939 All. 615.**

——**Ss. 132 and 265 (1)**—*Shamilat patti—Right to collect rent—Co-sharers, if can sue separately for arrears of rent—'Usage', what may not amount to.*

Per *Darling, S.M.*—In the case of a shamilat patti, a lambardar is entitled to collect the rents, in the absence of any usage or contract to the contrary. As such, a co-sharer of a solitary statutory holding in the shamilat patti cannot sue alone for arrears of rent in respect of it. The fact that a particular co-sharer used to collect rent of this holding cannot be said to establish a usage within the meaning of S. 265 (1) of the Tenancy Act.

Per *Mehta, J M.*—The exact significance of the term 'usage' used in S. 265 (1) is that it is a usage to the contrary to what takes place normally, that is, a lambardar collects rent but a usage may be set up by which, it is not the lambardar who collects rent but somebody else, or by usage, it is not all co-sharers who collect rent, but some body appointed by them as agent. Where a course of practice has ripened into usage and which has been embodied as a result of a joint declaration of the co-sharers into an entry in the *wajib-ul-arz*, it ought to be respected and individual co-sharers allowed to sue separately for arrears of rent. (*Darling, S.M. and Mehta, J.M.*) BACHAN SINGH *v.* DALEL SINGH, **1938 R.D. 816.**

——**Ss. 132 and 266**—*Sale of proprietary share by a co-sharer—Demarcation of ex-proprietary tenancy and fixation of rent—Right of vendee to sue for arrears of ex-proprietary rent, independently of other co-sharers—Agency if can be implied.*

Per *Darling, J.M* —Where in Khata khewat forming a part of a divided mahal the co-sharers are in possession of their respective shares in the shape of Sir and Khudkasht, and on a sale by one of the co-sharers of his proprietary rights though the vendee gets the ex-proprietary tenancy demarcated and rent fixed, yet he cannot sue alone for the arrears of this rent, as the tenant is the tenant of the whole coparcenary body.

AGRA TENANCY ACT (1926), S. 132.

Per *Mehta, J.M.*—The language of S. 266 of the Tenancy Act allows a course of conduct to set up, being the result of internal mutual arrangement by which an implied agency may be created in favour of some co-sharers or other acting on behalf of the whole coparcenary body under S. 266 (1) or 265 (1). (*Darling, S.M. and Mehta, J.M.*) NATHOO RAM *v.* MIHI LAL. **1938 R.D 806=1938 A.W.R.(B.R.) 428=1939 A.L.J. (Supp.) 19.**

——**Ss. 132 (2) and 216**—*Land occupied by tenants—Lessee of tenants' rights—Position of—S. 132 (2) if can be used against such a person.*

Though a proprietor can give as many leases as he like, he cannot superimpose a tenant over existing tenants. Where land is already occupied to a great extent by tenants, what purports to be a lease of tenant's rights must be either regarded as void or as a lease of thekadari rights. S. 216 of the Tenancy Act is clear that S. 132 (2) cannot be used as against a thekadar for recovery of arrears of rent in respect of such a lease. (*Darling, S.M. and Bomford, J.M.*) RAM NATH SINGH *v.* SECRETARY OF STATE. **1938 R.D. 796.**

——**Ss 132 (2) and 252**—*Order by Collector on application under S. 132 (2), for realisation of arrears of rent—If revisable by Board.*

Where a case comes before a Collector because it was filed under S. 132 (2) of the Tenancy Act for realisation of arrears of rent, revision will lie to the Board in respect of any order that may be passed therein. (*Darling, S.M. and Bomford, J.M.*) RAM NATH SINGH *v.* SECRETARY OF STATE. **1938 R.D. 796.**

——**Ss. 133 and 134**—*Combining number of suits for arrears of rent—Condition—Amount due on each holding not separately specified in either decree or notice—Power of Court to grant relief.*

The facility of combining in one suit, a number of suits for arrears of rent against the same tenant, is afforded to a plaintiff provided he sees to it that in being allowed this privilege, he does not prejudice the interests of the defendant. Where five such suits were combined, but neither in the decree nor in the notice was there any specification of the arrears of rent due in respect of each separate holding, there is a serious failure of compliance with law, resulting in prejudice to the defendant. Every Court has inherent power to correct a mistake of this character. The legislature in framing Ss. 133 and 134 of the Tenancy Act wanted to see that the ignorant tenantry was not allowed to be exploited by the carelessness of the Court or the plaintiff. Hence where it is merely a matter of arithmetical calculation to arrive at the exact amounts due, the executing Court, can work out the figures and give relief accordingly. (*Marsh, S.M. and Mehta J.M.*) SANTOO KEWAT *v.* RAI RASH BEHARI LAL. **1939 A.W.R. (B.R.) 95=1939 R.D. 393.**

——**S. 136**—*Scope of—Decree for arrears of canal dues—Tenant, if can escape ejectment—Remedies open to decree-holder.*

According to S. 136 of the Agra Tenancy Act, a tenant against whom a plaintiff has obtained a decree for arrears of canal dues, cannot escape ejectment, for the decree-holder has all the remedies open to a decree-holder for arrears of rent. The remedy against the defaulter is complete as

AGRA TENANCY ACT (1926), S. 183.

under ordinary arrears of rent. (*Marsh, S.M. and Mehta, J.M.*) SHANKER *v.* DESRAJ. **1939 R.D. 238 (2)=1939 A.W.R. (B.R.) 211.**

——**Ss. 137 and 138**—Scope—Remedy under—If mandatory—Failure to resort to—If bar to suit under S. 132. *See* AGRA TENANCY ACT, S. 132. **1937 A.W.R. 621=1937 R.D. 287.**

——**Ss. 140 and 141**—*Suit for ejectment—Plea of holding with consent of plaintiff—Rent receipts—Ambiguity—Benefit of doubt.*

Where in a suit for ejectment as a trespasser, the defendant who has been in occupation for 11 years pleads that he held with the consent of the plaintiff and produces certain rent receipts which are ambiguous in its terms, the landlord who prepared his receipts in such a form that they are ambiguous, has only himself to thank if the Courts give the tenant who has held for 11 years the benefit of the doubt. (*Bomford, S.M.*) KAMLA DATT *v.* DALLU. **1939 R.D. 123=1939 A.W.R. (B.R.) 166.**

——**S. 152 (2) and U. P. Land Revenue Act S. 36**—*Landholder distraining crops of tenant and selling them while proceedings to fix rent are pending—Legality—No arrear of rent.*

In a proceeding under S. 36, Land Revenue Act, no doubt as soon as the rent is fixed it becomes payable from the date the ex-proprietary tenancy arises and not from the date when it is fixed by the Collector but until the land has been specified and the rent has been fixed by the Collector, it can hardly be treated as an arrear of rent. Where, therefore, a landholder distrains the crops of his tenant for arrears of rent and sells them, while proceedings under S. 36, Land Revenue Act, are pending and the rent is not fixed, the distraint is illegal as there is no arrear of rent within the meaning of S. 152 (2) of the Act. The subsequent fixing of rent by the Collector will not make the distraint valid on the date when the property is sold and so legalise the sale. (*Sulaiman, C.J. and Niamatullah, J.*) MURLIDAR *v.* HAR SARUP. **169 I.C. 843=10 R.A. 72=1937 A.L.J. 702=1937 A.W.R. 629=1937 R.D. 343=1937 A.L.R. 593=A.I.R. 1937 All. 451.**

——**Ss 175 and 179**—*Suits under—Claims for compensation — Distinction — Separate suits—Necessity.*

While compensation can be claimed either under S. 175 or S. 179 of the Agra Tenancy Act, the difference between the two is that compensation will be given under S. 175 if there were no arrears at all, while it will be given under S. 179 if there has been irregularity in procedure. Suits under S. 175 and S. 179 are really distinct with distinct causes of action and separate periods of limitation. An aggrieved party desirous of coming under S. 176 or Ss. 178 and 179, has to file separate suits. (*Darling, S.M. and Bomford, J.M.*) BABAR SINGH *v.* RUP SINGH. **1938 A.W.R. 34 (B.R.)=1938 R.D. 311.**

——**Ss. 183 and 184**—*Rent-free grant—Agreement by superior proprietor to pay land revenue on behalf of inferior proprietor—Effect of—Suit by superior proprietor for arrears of revenue against inferior proprietor—Maintainability—Procedure for making latter liable for revenue—Fixing of revenue by Settlement Office—If amounts to order of resumption or rescission of agreement.*

When there is an agreement in force between the superior proprietors and the inferior pro-

prietors that the former will pay the land revenue on behalf of the inferior proprietors of the *khewat*, such a contract amounts really to a rent-free grant within the meaning of Ss. 183 and 184 of the Agra Tenancy Act, and if it is desired to rescind or revise the contract, proceedings must be taken under the Resumption Chapter. If the Settlement Officer fixes revenue on the land, his action cannot amount to a rescission of the contract or to an order resuming the grant. It is for the superior proprietor to apply for resumption, and until an order for resumption, is obtained, the holder, *i.e.*, inferior proprietor will not be liable to pay the revenue. (*Knox, S.M. and Grant, J.M.*) PYAREY LAI *v.* AMNA KHATOON. **1936 R.D. 404.**

——**Ss. 183 and 184**—*"Rent free grant"—Superior and inferior proprietors of land—Agreement by former land revenue—Inferior proprietors to hold land without payment of revenue—Effect of—Suit for arrears of revenue—Maintainability—Procedure for making holder liable for revenue—Agra Tenancy Act, Ss. 221 and 224—U. P. Land Revenue Act, Ss. 75, 76 and 77.*

Where by an agreement the inferior proprietors are permitted to remain in possession of lands free of payment of land revenue payable thereon, the payment of which the superior proprietor, who engaged for the payment of revenue, undertakes to make, such arrangement is one which can be revised by the Settlement Officer under S. 75, 76 or 78 of the U. P. Land Revenue Act at the time of revision of settlement. It is an agreement which holds good until it is definitely abrogated. Where, however, the Settlement Officer omits to make the arrangement which the law provides that he shall make, the remedy of the superior proprietor is to proceed under the Resumption Chapter. He cannot sue the holders for arrears of revenue under S. 221 or 224. These sections are not applicable to the case. The term "rent free grant" covers grants where under an agreement even the land revenue payable on the area is to be paid by the landlord. (*Drake Brockman, S.M.*) JUGAL KISHORE *v.* MUTHRA PERSHAD. **1936 R.D. 406.**

——**S. 184**—*Presumption under—Retrospective application—Refutation by continuous entry.*

The presumption allowed by S. 184 of the Agra Tenancy Act does not apply to rent-free grants prior to the Act of 1926. Though a grant is not made as required by S. 123 by a registered instrument, there may still be a presumption in favour of the grantee but that can be refuted by a continuous entry of the holder as an occupancy tenant. (*Mehta, S.M. and Harper, J.M.*) RAMA DEVI *v.* CHURA SINGH. **1940 R.D. 82=1940 A. W.R. (B R.) 29=1940 A.L.J. (Supp.) 9.**

——**S. 184**—*Rent-free grant—What amounts to—Mere non-collection of rent—Effect.*

S. 184 of the Agra Tenancy Act lays down that land held rent-free in respect of which no liability to rent is recorded in the annual registers shall in the absence of evidence to the contrary be presumed to be held under a rent-free grant. Where the liability to pay rent is recorded but land is held rent-free with the consent of the landlord, it does not mean that it is held in virtue of a rent-free grant. (*Darling, S.M. and Bomford, J.M.*) BALDEO PRASAD PANDE *v.* LALTA. **1938 A.W.R. (B.R.) 244=1938 R.D. 549.**

——**S. 186 (1) (c)**—Applicability— Grantee holding grant for over 50 years—No two successors to original grantee—Status of such grantee. *See* AGRA TENANCY ACT, Ss. 187 AND 186 (1) (*c*). **1938 A.W.R. (B.R.) 88=1938 R.D. 304.**

——**Ss. 186 (c) and 188 (1) (b)**—*Applicability—Rent-free grant for religious service of looking after dargah—Liability of tenant for rent and to ejectment—Claim to proprietary right—Maintainability.*

Under S. 186 (*c*) of the Agra Tenancy Act, no length of tenure can entitle a tenant to claim proprietary rights in the land. Land which is found to be rent-free grant for the purpose of a specific religious service, namely that of looking after a *dargah* cannot fall within the purview of S. 186. Such land is liable to have rent fixed upon it at the instance of the landlord and the latter is entitled to eject the holder of the land under S. 188 (1) (*b*) of the Act, when he no longer requires the service. (*Drake Brockman, S.M.*) MANZOOR ALI SHAH *v.* BABU RAM. **1936 R.D. 234 (2).**

——**Ss. 186 and 192 and Agra Pre-emption Act (XI of 1922), S. 11**—*Rent-free grantee—When becomes a proprietor—Sale by—If gives rise to a right of pre-emption.*

Though a rent-free grantee might fulfil the conditions laid down by S 186 of the Tenancy Act he becomes a proprietor only from the date of his declaration as such in a suit brought under S. 192 and not at any time before. Where such a rent-free grantee whose status had not been converted into that of a petty proprietor by reason of appropriate proceedings under the Tenancy Act, effects a sale, it is neither a sale of proprietary interest in land nor is the vendor a petty proprietor within the meaning of S. 11 of the Agra Pre-emption Act and hence no suit for pre-emption lies in respect of such a sale. (*Iqbal Ahmad and Bajpai, JJ.*) RAM GHULAM *v.* RAM BHAJAN. **I. L. R. (1939) All. 282=181 I. C. 805=11 R. A. 612=1939 A. W. R. (H. C.) 99=1939 R. D. 107 (2)=1939 A.L.J. 157=A.I.R. 1939 All. 226.**

——**Ss. 187 and 186 (1) (c)**—*Grant held for over 50 years, but not by two successors to the original grantee—Position of grantee—Sub-tenants from—Liability to ejectment.*

Even though the grantees may have held the grant for more than 50 years, yet until the grant has been held by two successors in interest to the original grantee, they come under S. 187 of the Agra Tenancy Act and it is wrong to hold that their status is that as defined in Cl. (1) (*c*) of S. 186 of the Act. Any one admitted to a subtenancy by such grantees are liable to ejectment as sub-tenant within the definition of Cl. (7) of S. 3 of the Act (*Darling, S.M.*) UMRAO *v.* SOHAN LAL. **1938 A.W.R. (B.R.) 88=1938 R.D. 304.**

——**Ss. 187 and 188**—Muafi khidmati grant—Nature and incidents of—Grantee of—Person holding under—Status of—If sub-tenant. *See* AGRA TENANCY ACT, S. 3 (7). **1938 R.D. 160=1938 A.W.R. (B.R.) 91.**

——**S. 188**—*Suit to eject under—Grant subject to a condition against alienation—Ejectment, when can be ordered.*

Where a suit is brought under S. 188 of the Agra Tenancy Act for the ejectment of a grantee from land alleged to be held under a service tenure on the ground that the services were no longer required, but the evidence showed that

the grant was not an ordinary service tenure and that no definite services were required of the grantee, it was held that grant was one subject to a condition that the grantee should not mortgage or sell the land included in the grant, and that if it was found that the condition had been broken, the grantee was liable to ejectment. (*Marsh, S. M. and Mehta, J M.*) JIVA RAM *v.* MOONGA RAM. **1939 R.D. 242=1939 A.W.R. (B.R.) 216.**

——**S. 189 (b)** – Khidmati *tenant—Ejectment—Limitation—Starting point.*

According to the provisions of S. 189 (*b*) of the Agra Tenancy Act, in the case of a *Khidmati* tenant, whenever a landlord finds that he does not require the tenant's services, he can, within 12 years of notice to the other party that his services are no longer required,bring the suit for ejectment. (*Mehta, S.M.*) ALOPI DATTA *v.* RADHEY SHYAM. **1940 R.D. 134=1940 A.W.R. (B.R.) 52.**

——**S. 192**—Scope—Suit under S. 44—Absence of prayer in plaint for fixation of rent—Subsequent prayer for – If can be granted—Absence of material for fixing rent—Effect. *See* AGRA TENANCY ACT, SS. 44 AND 45. **1936 R.D. 85.**

——**S. 192**—When could be invoked. *See* AGRA TENANCY ACT, SS. 44, 45 AND 192. **1938 R. D. 914.**

——**S. 196**—*Construction-Grove-holder—Meaning—Planting of grove—Written permission of landlord—When necessary.*

Under S. 196 of the Agra Tenancy Act a grove-holder is a person to whom land has been let by a landlord for the purpose of planting a grove and the opening words of the section say nothing about a written permission. It is only when a tenant has a holding already and wants to plant a grove on it that he should get the written permission of the landlord in order that he may have the rights of a grove-holder. (*Knox, J.M.*) JAI DEVI KUER *v.* TOTA RAM. **1936 R.D. 234 (1).**

——**S 196**—*Permission to re-plant—When necessary.*

It is only when the grove as a unit loses its character as a grove and re-plantation is necessary that written permission of the zamindar is necessary under S. 196 of the Agra Tenancy Act. But if it is maintaining its grove character, no written permission is necessary for plantation of individual trees. (*Marsh. S. M. and Mehta, J. M.*) MANOHAR DAS *v.* SYED KAZIM HUSAIN. **1939 R.D. 326.**

——**S. 196**—*Tenant, holding over—Status of—Planting of trees by him—If becomes a grove.*

When once the area was definitely held not to be a grove and when the tenant was ejected but was holding over, he is only a trespasser, and any plantation of trees by that person would not be recognised under the law, and what was held not to be a grove cannot be converted into a grove by the action of a trespasser. (*Mehta, J. M.*) SALIG RAM *v.* THAKUR SRI RAM SINGH. **1938 A.W R. (B.R.) 267 (1)=1938 R.D. 771=1938 A.L.J. (Supp.) 89 (2).**

——**Ss. 196 and 197**—*Mahanth allowing persons to plant groves—Right to eject—Limits.*

Where a Mahanth allows persons to plant groves, they become grove-holders and are not trespassers. Grove-holders as long as they look after their trees and pay their rent regularly

cannot be ejected as trespassers. (*Marsh, J.M.*) GORAKH NATHJI *v.* SWAMI NATH LAL. 1938 **A.W.R. (B.R) 315=1938 R. D. 623.**

——**Ss. 196 and 197**—*Applicability—Occupancy holding—Plot planted with trees—Sale in execution—Purchaser—Right of—Surrender of holding by tenant to landlord—Purchaser's right to be recorded as grove-holder.*

Where in execution of a decree of a Civil Court a plot of land comprised in the holding of an occupancy tenant with trees thereon—the number of trees being such as making the plot a grove—if sold, the purchaser who gets possession of the plot through the Civil Court is entitled to be recorded as groveholder of that plot under Ss. 196 and 197 of the Agra Tenancy Act, when the occupancy tenant surrenders the holding to his landlord. Where a tenant plants a grove with the implied consent of the landlord, such planting changes the character of the holding, and the grove can be mortgaged and sold. The purchaser gets the right to use the plot so long as it retains the character of grove. (*Darling, S.M. and Bomford, J.M.*) SARDHA DIN *v.* MASURIA DIN. **1938 R.D. 147=1938 A.W.R. 80 (B.R.).**

——**Ss. 196 and 197 (a)**—*Grove lands ceasing to be such—Status of holder—Right to re-plant grove*

Under S. 197 (*a*) of the Agra Tenancy Act it has to be presumed that a grove-holder holds the grove land under a lease for a term expiring with the land ceasing to be grove land; and the moment it ceases to be grove land, he becomes a non-occupancy tenant holding over. If he subsequently wishes to re-plant trees on the land, he becomes a person planting a grove on land held by him as a tenant under the second clause of S. 196. Before he can be entitled to re-plant the grove, he must prove that he is acting in accordance with local custom giving him such a right or that he has the landlord's written permission. (*Drake Brockman, S. M. and Knox, J. M.*) BACHAN SINGH *v.* BHOLA. **1936 R.D. 321 (2).**

——**Ss. 196 and 197 (h)**—*Scope of—Planting of grove by occupancy tenant with permission of landholder—Removal of trees—Effect—Liability of grove-holder to ejectment.*

An occupancy tenant who plants a grove in a plot of his occupancy holding with the permission of his landholder, holds that plot as a grove-holder in supersession of all subsisting rights and liabilities under S. 197 (*h*). The effect of this is that when the plot ceases to retain the character of a grove, the grove-holder cannot rely on his former occupancy rights to protect him from ejectment as a non-occupancy tenant. (*Darling, S. M. and Bomford, J.M.*) RAM SAHAI *v.* HET SINGH. **1938 A.W.R. 1 (B.R.)= 1938 R.D. 108.**

——**S. 197**—*Grove ceasing to be such—Status of grove-holder—Right to plant new trees.*

If a plot ceases to be a grove, the grove-holder becomes a non-occupancy tenant and without written permission is not entitled to plant new trees. (*Drake Brockman, S.M. and Knox, J.M.*) KAILASH BIHARI LAL *v.* MUKTA PRASAD. **1937 R.D. 599.**

——**S. 197**—*Grove land—Trees dying out or cut down from part—Part left vacant—Assessment of vacant part to land revenue—Remedy of*

grove-holder—Suit to declare that he is grove-holder of whole plot—If lies.

It is not legitimate to split up a grove into two portions merely because the trees have disappeared from one portion of it, having been cut or having died away, and the land has been left vacant. It has to be presumed that the whole plot has been held under a single agreement, and until there is some sort of formal division, the holding cannot be split up. If the vacant half is assessed to revenue, the tenant-grove-holder is not bound by the assessment proceedings, because assessment takes place without reference to the tenant; it must be shown that he had some notice of the proceedings or that there was a formal or actual division of the holding and that the tenant had lost possession of a portion of it. The tenant is entitled to sue for and get a declaration that he is grove-holder in case the vacant portion is assessed to revenue. (*Drake Brockman, S. M. and Knox, J. M.*) PREM SHANKAR *v.* SHRI NARAIN. **1936 R.D. 348.**

——**S. 197**—*Grove-holder—Right to transfer his interest—Law as to—Custom to the contrary—Onus.*

S. 197 of the Agra Tenancy Act has introduced a change in the law from what had been ruled in various rulings, and the general law is that a grove-holder has a right of transfer and the burden of proof of a custom to the contrary lies on any one who denies the rights of transfer to a grove-holder. (*Bennet, Iqbal Ahmad, Yorke and Varma, JJ.*) MUBARAK HASAIN *v.* SAGAR MAL. **I.L.R. (1933) All. 396=175 I.C. 665=10 R.A. 717=1938 A.L.R. 473=1938 R.D. 505=1938 A.L.J 400=1938 A.W.R. (H.C.) 251=A.I.R. 1938 All. 321 (S.B.).**

——**S. 197 (a)**—*Grove-holder—Status of—Grove ceasing to exist—Position of grove-holder—Liability to ejectment*

It is clear from the provisions of S. 197 of the Agra Tenancy Act that the status of a grove-holder is that of a non-occupancy tenant. Though, no doubt, the lease under which a grove-holder is presumed to hold as a non-occupancy tenant comes to an end when the grove ceases to exist, even thereafter his position continues to be that of a non-occupancy tenant and he is therefore liable to ejectment at the instance of the land-holder. The mere non-payment of rent by him cannot affect his status as a non-occupancy tenant A non-occupancy tenant whether holding or not holding under a lease is liable to ejectment at the instance of the land-holder, even though he may have continued in possession of the holding for a period of more than 12 years after the expiry of the term of a lease. (*Iqbal Ahmad, J.*) FAKHRUDDIN HUSAIN *v.* ABDUL WAHID. **175 I.C. 20=10 R.A. 644=1938 A.L.R.374=1938 A.W.R (H.C.) 145=1938 R.D. 367=1933 A.L.J. 208=A.I.R. 1938 All. 213.**

——**S. 197**—*Right to eject grove-holder—Sale splitting holding and destroying unitary character of grove—Retained area denuded of trees—Zamindar's remedy.*

Where a grove-holder by transfer of a portion of his holding splits the holding and thereby destroys the unitary character of the holding, and retains in himself a portion of the holding completely denuded of trees, the zamindar is entitled to eject the holder on the ground that the grove character has been lost. (*Mehta, S.M.*) BADRI NARAIN SINGH *v.* SUGRIV SINGH. **1939 A.W.R. (B.R.) 8=1939 R.D. 36.**

——**S. 197**—*Suit for arrears of rent—Plots in suit found to be grove land as entered in settlement—Suit, if can be decreed on basis of subsequent entries in* khatauni.

Where in a suit for arrears of rent by the zamindar, the Court finds that the plots in suit are still grove land as recorded at the settlement and that no rent has been duly assessed thereon, the suit cannot be decreed even though rent has been entered against the plots in suit in the subsequent *khatauni*. (*Darling, S.M.*) MOHAMMAD SAID KHAN *v.* MAHADEO. **1937 R.D. 267.**

——**S. 197 (a) and (h)**—*Occupancy tenant planting grove—Liability to ejectment on land ceasing to be grove.*

S. 197 (*h*) of the Agra Tenancy Act merely states that a tenant planting a grove becomes a grove-holder and under Cl. (*a*) of the section the grove-holder becomes a non-occupancy tenant when the land ceases to be grove land and that liability is subject to custom and contract. Where in the *wajib-ul-arz* of a village it is laid down that in the case of a rented grove when the field is clear of trees, the land will remain with the man who planted the grove on payment of rent, while if the grove is not rented he will cease to have any right in the land once the grove loses its character, it cannot be said that it means that the rent-free grove-holder became a trespasser and the rent paying grove-holder a tenant liable to ejectment at will. In such a case the grove-holder becomes a non-occupancy tenant whose lease has not expired. He is not a non-occupancy tenant holding from year to year whose lease has expired or will expire. As such he is not liable to ejectment under S. 86. (*Bomford, S.M. and Mehta, J.M.*) BHAGWANT *v.* GAURI GANESH. **1939 R.D. 57=1939 A.W.R. (B.R.) 133.**

——**Ss. 197 (b) and 198**—*Ex-proprietary holding—Grove in—Usufructuary mortgage of before Act of* 1926—*Suit by mortgagee to enforce after Act—Maintainability—Plea that mortgage void under Act of* 1901—*Sustainability—T. P. Act, S.* 43—*Applicability of.*

Defendant executed in 1915 a registered deed of usufructuary mortgage in favour of the plaintiff in respect of certain property which was described as a grove in an ex-proprietary holding. Trees in the grove numbering about 325 were also mortgaged by the deed. The plaintiff having sued for enforcement of the mortgage by sale of the trees, or, in the alternative, possession over the trees, etc., the defendant raised the plea that the grove being an ex-proprietary holding, could not be mortgaged under the law then in force and that the mortgage was therefore void and unenforceable.

Held, that though the grove was not legally transferable in 1915, under the law as it stood then, the holding which was originally ex-proprietary became a grove-tenure as a result of the planting of the trees and became capable of being transferred by way of mortgage, etc., under the Act of 1926, and there was no legal bar to the suit filed in 1927 being decreed.

Held, further, that the defendant could under S 198 of the Agra Tenancy Act be presumed to be a grove-holder, and the transfer made by

AGRA TENANCY ACT (1926), S. 197.

him in 1915 should, under S. 43 of the T. P. Act, be held to operate on the interest held by him at the time of the suit, which was now a transferable interest capable of being sold in execution of a decree on the mortgage. (*Sulaiman, C.J. and Bennet, J.*) KUNWAR BAHADUR *v.* GULSHER KHAN. **169 I C. 115=9 R A. 702=1937 A.L.R. 441=1937 A.L.J. 275=1937 R.D. 59=1937 A.W.R. 174=A.I.R. 1937 All. 287.**

——**S. 197 (b)**—*Grove—Transferability—No prohibition in* wajib-ul-arz—*Countenancing of transfer by landlord on prior occasion—Effect of.*

The Courts would not allow words to be introduced in the *wajib-ul-arz* which are not actually present. Where in the *wajib-ul-arz* of a village, the right to transfer grove rights is not specially forbidden, and where further such a transfer has been countenanced by the landlord, in the past, such rights could not be denied particularly after the passing of the Tenancy Act of 1926. Any custom which might have existed has been broken by the landlord countenancing such transfer. (*Darling, S M. and Mehta, J. M.*) MOHAMMAD UMAR *v.* RAM PIARI. **1938 R.D. 916.**

——**S. 199**—*Ejectment suit against alleged sub-tenant—Plea of proprietary title—Order referring defendant to civil suit—Non-compliance with —Subsequent suit in Civil Court for ejectment as trespasser—Competency—Remedy of plaintiff.*

In a suit for ejectment of an alleged sub-tenant by the co-sharers of a mahal the defendant claimed proprietary rights, and he was referred to the Civil Court to establish his right. The defendant did not, however, institute such a suit against the present plaintiff who was also a co-sharer. The plaintiff then sued the defendant in the Civil Court for ejectment treating him as a trespasser.

Held, that the result of the failure of the defendant to sue the plaintiff in the Civil Court as directed was that under S. 199 (2) of the Agra Tenancy Act, the Revenue Court was bound to decide the question of title against the defendant and that it did not entitle the plaintiff to sue the defendant in the Civil Court for ejectment as a trespasser. The proper remedy of the plaintiff was to apply to the Revenue Court to revive the former ejectment suit which had been lying dormant, and move that Court to decide it. (*Rachhpal Singh, J.*) MURTAZA HUSAIN *v.* MUZAFFARUDDIN. **1936 R.D. 7.**

——**S. 199**—*Second lease executed during currency of first lease—Validity.*

It is open to a proprietor to execute a second lease towards the end of the period of the first lease provided that he does not attempt to superimpose the second lease on the first during the currency of the first lease. (*Bomford, J. M.*) SUNDER SINGH *v.* MAIKU LAL. **1937 R.D. 207 (1).**

——**S. 199**—*'Thekadar'—Lessee under permanent lease getting mere possession of plots without right of collecting rents and profits—Status of.*

Where the lessee is given the mere possession of certain plots of land by a permanent lease and the collection of the rents and profits is not the subject of the lease, the lessee not being a lessee of proprietary rights in the land, is not a thekadar within the meaning of S 199 of the Act. (*Sulaiman C.J. and Bennet, J.*) LACHMI NARAIN *v.* BATUK SINGH. **I.L.R. (1937) All. 588=1937 R.D. 425=171 I.C. 203=1937 A.L.R. 813=10 R. A 239=1937 A.L.J. 656=1937 A.W.R. 699=A. I.R. 1937 All. 561.**

AGRA TENANCY ACT (1926), S. 202.

——**S. 199**—'Thekadar'—*Permanent lease by owner over the heads of sitting tenants—Conferment of heritability and transferability—Status of lessee—Right to recover rent from sitting tenants—Latter induced to execute leases at increased rates and as sub-tenants—If bound by such lease—Liability to pay increased rates.*

When a person competent to give a permanent lease, gives a lease over the heads of sitting tenants conferring both heritability and transferability, and reciting *inter alia*, that the lessor has no concern with the property as to what he does with it so long as he receives the annual rent, the lessee is, under Act III of 1926, a *thekadar* or assignee of rents. He has full authority to collect the rents from the sitting tenants. But when the permanent lessee induces the sitting tenants to execute leases at increased rates admitting themselves as sub-tenants, the leases cannot be held to be binding either as to the status or as to the new rates. The tenants continue as tenants-in-chief and are liable to pay rent to the *thekadar* only at the rate at which the rent stood before the new leases were executed. (*Drake Brockman, S.M. and Knox, J.M.*) RAM ADHAR KOERI *v.* SHRI HANUMANJI. **1936 R.D 451.**

——**S. 200**—Scope—*Thekadar*—Person coming into possession under lease conferring landholder's powers and holding over—Status of. *See* AGRA TEN. ACT, SS. 44 & 205. **1936 R.D 133.**

——**Ss. 201 (1) and 218**—*Construction*—Thekadar—*Holding over after expiry of* theka—*Status and rights of—Absence of proof of payment of rent or consent of landlord to holding on—Effect.*

It cannot be held that a *thekadar* holding over and retaining possession after the expiry of the period of the *theka* can exercise the rights of a *thekadar* when there is no evidence to show that the landlord has accepted from the *thekadar* any rent falling due after the expiry of the *theka* or that he assented to the continuance of the *theka* after that date. (*Darke Brockman, S.M. and Knox, J.M.*) RAM PIYARI *v.* RAM BHAROSE. **1936 R.D. 229.**

——**S. 202**—*Construction—'Other dues' if includes profits—Arrears of rent and other dues, meaning of.*

The expression 'other dues' occurring in the first part of S. 202 of the Tenancy Act includes profits; and the expression 'arrears of rent and other dues' means arrears of rent and other arrears and includes arrears of profits. (*Collister, J.*) HAR DAYAL *v.* RAM MANOHAR LAL. **181 I. C. 484=11 R.A. 569=1939 R.D. 86=1939 A.W. R. (H.C.) 72 (2)=A.I.R. 1939 All. 206.**

——**S. 202**—Effect on limitation for a suit under S. 226. *See* AGRA TENANCY ACT, SS. 226 AND 202. **1939 A.W.R. (H.C.) 72 (2).**

——**S. 202**—Theka—*Suit for arrears of profits—Period of limitation.*

S. 202 of the Agra Tenancy Act provides for a period of limitation for suits for arrears of profits in respect of the *theka* area which accrue prior to the commencement of the *theka* and for arrears which remain due at the expiry of the theka. A *thekadar* has a right to recover any

arrears remaining due at the expiry of his *theka*, provided he brings his suit, within one year of the expiry of his *theka*. (*Thom, C.J. and Ganga Nath, J.*) HAR DAYAL *v.* RAM MANOHAR LAL. **1940 A.L.J. 255=1940 A.W.R. (H.C.) 265=1940 R.D. 190=A.I.R. 1940 All. 316.**

——S. 203 — *Applicability — Perpetual lease giving heritable rights and powers of transfer—Provision against ejectment under any circumstances—Effect of—Status and rights of lessee—Rights—If saleable in execution*—Thekadar.

A deed of perpetual lease, the terms of which give the lessee the right to receive rents and profits and also full power to transfer his rights and which provides that the lessee's rights should be heritable and that in no circumstances should the lessee be ejected, confers on the lessee the status and rights of a *thekadar* and not merely of an agricultural tenant. His rights are transferable and saleable in execution of a decree. (*Thom, Ag. C. J. and Niamatullah, J.*) NAZIM HUSAIN *v.* RAM NATH DUBEY. **172 I.C. 923=10 R.A. 435=1938 A.L.R. 45=1938 R.D. 81=1937 A.W.R. 1043=1937 A. L. J. 1166=A. I. R. 1938 All. 35.**

——S. 205 – Applicability—Lease conferring powers of landholder—Person entering possession under and holding over—If *thekadar*—Ejectment—Remedy. *See* AGRA TENANCY ACT, SS. 44 AND 205. **1936 R.D. 133.**

——S. 213—*Effect of*—Theka—*Surrender by* thekadar *before expiry of period—Zamindar, if can sue for rent.*

S. 213 of the Agra Tenancy Act authorizes a *thekadar* to surrender his interest in the *theka* at any time with the consent of the lessor zamindar. It is erroneous to think that once the *theka* has been executed for a certain period the lessor zamindar can on no account be ever entitled to exercise his rights as zamindar during that period, even if the *thekadar* surrendered his rights. So where there has been a surrender before the expiry of the period fixed a zamindar is entitled to maintain a suit for arrears of rent, even if it be with reference to the period for which the *theka* was executed. (*Verma, J.*) SURYA PAL SINGH *v.* BUNDE ALI KHAN. **1938 A.L.J. 93=1938 R.D. 204=1938 A.W.R. 74 (H.C.).**

——S. 216—*Scope—Usufructuary mortgage by zamindar and lease back—Separate deed charging rent on zamindari—Suit to enforce charge for arrears of rent—Jurisdiction of Civil Court—Deeds—If one and same transaction—Evidence—Admissibility to prove that transactions amount only to simple mortgage.*

A proprietor of a zamindari estate executed a usufructuary mortgage of his zamindari, and also a *qabuliat* in favour of the mortgagee, whereby he retained possession of the zamindari on payment of a certain sum by way of rent of *theka* money. On the same day he also executed a third document by which the equity of redemption in the mortgaged property was charged as security for the due payment of the rent or *theka* money. The rent having fallen in arrears the mortgagee brought a suit in the Civil Court to enforce the security bond executed by the mortgagor.

Held, that though by reason of S. 216 of the Agra Tenancy Act, the mortgagee would be

bound under the Act to sue for arrears of rent in the Revenue Court, the claim in the present case being one for enforcement of the charge, the suit had to be brought only in the Civil Court; although the latter could not pass a decree for arrears of rent, it could ascertain the amount of the arrears of rent and enforce the charge created by the agreement.

Held, further, that the three documents did not form one transaction, and that it was not open to the parties to adduce evidence tending to vary or contradict the terms of the written documents or to prove that the documents taken together created only a simple mortgage. (*Harries and Rachhpal Singh, JJ.*) MAHOMED ASHRAF ALI KHAN *v.* BEHARI LAL. **169 I.C. 1004=10 R.A. 89=1936 R.D. 2=1937 A.L.J. 511 =A.I.R. 1937 All. 478.**

——S. 219—*Scope and applicability*—Theka *of* 1901—*Right of* thekadars *to remission—U. P. General Clauses Act, S.* 6 (c).

S. 219 of the Agra Tenancy Act applies to 'all' *thekadars* and as the word 'all' does not admit of any exception, it applies to all *thekadars* past, present and future. S. 6 of U. P. General Clauses Act would apply to only those cases 'where a different intention does not appear in the new enactment.' As such it cannot apply to the case of *thekas* though they may have been executed prior to the new Act and the *thekadars* have right to remission in rent though there may have been a remission of revenue by Government. (*Thom, C.J. and Ganga Nath, J.*) AMNA KHATOON BEGUM *v.* BENI RAM. **I.L.R. (1939) All 334=181 I.C. 30=11 R.A. 551=1939 A.W. R. (H.C.) 107=1939 A.L.J. 70=1939 R.D. 73= A.I.R. 1939 All. 209.**

——S. 221—*Applicability—Plot proprietor under sale-deed by co-sharer stipulating non-liability for* lagta *to vendor and his heirs, successors, etc.—Suit against for arrears of land revenue—Maintainability by successor of vendor —Proper remedy—Suit under Resumption Chapter.*

Where a person becomes a plot proprietor by virtue of a sale deed executed by a co-sharer, which contains a stipulation that the vendor, his heirs, successors, and representatives-in-interest would not be entitled to demand *lagta* from the vendees, a suit by the successor in interest of the vendor under S. 221 of the Agra Tenancy Act for arrears of land revenue against the plot proprietor is misconceived and not maintainable. Such an agreement is not binding after the death of the grantor beyond the expiration of the term of the settlement, and is subject to the law of Resumption. The correct remedy of the vendor's representative-in-interest is to bring a suit under the Resumption Chapter of the Tenancy Act. (*Darling, S.M.*) RAJENDRA PRASAD *v.* KALLUA. **1937 R.D. 10.**

——S. 221—"*Co-sharer*"—*Meaning of—Co-sharer not in possession—Liability of.*

There is nothing in S 221 of the Agra Tenancy Act which indicates that the person who may be sued is a co-sharer out of possession. A co-sharer, for the purpose of S. 221, must be taken to be the person who is recorded as a co-sharer for the period in suit. (*Sulaiman, C. J. and Bennet, J.*) BRIJ CHANDRA SHARMA *v.* RAM NARAIN. **I.L.R. (1937) All. 706=1937 A.L.J.**

AGRA TENANCY ACT (1926), S. 221.

707=1937 R.D. 385=1937 A.L.R. 847=171 I.C. 394=1937 A.W.R. 627=A.I.R. 1937 All. 618.

——S. 221—*Profits collected by lambardar exceeding revenue paid—His right to sue for arrears of revenue.*

If the profits collected by a lambardar exceed the land revenue and cesses actually paid, he is not entitled to maintain a suit for arrears of revenue under S. 221, Agra Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) BABU SINGH *v.* MUNSHI SINGH. **1937 R.D. 370.**

——S. 221—*Suit for arrears of land revenue by lambardar with rights by purchase—Plea of* malik farotar—*Duty of Court—Decree without enquiring into plea—Propriety of.*

A superior proprietor must seek his remedy through the resumption chapter in the Agra Tenancy Act. Where in a suit for arrears of land revenue under S. 221 of the Act by the lambardar who has recently acquired rights in the mahal by purchase, the defendant pleads the status of *malik farotar* and declares that the land revenue has always been payable by the *malik mahal*, the Court must decide whether the defendant is a *malik farotar* against whom the plaintiff should proceed under the resumption chapter, and if the plea is found against, whether the plaintiff is entitled to any and what relief. It is not proper to decree the suit straightaway. (*Darling, S.M. and Bomford, J.M.*) BHAWANI *v.* REOTI RAM. **1938 R.D. 117=1938 A.W.R. 76 (B.R.).**

——S. 221—*Suit by lambardar for arrears of revenue—Liability of defendant—Test.*

Where there is no doubt that the defendant is entered in the *khewat* and the revenue has been assessed against his *khata* in the *khewat*, he is liable to pay the land revenue assessed on his *khata*. (*Darling, S.M. and Bomford, J.M.*) LAL RATNAKAR SINGH *v.* BHIM LAL SINGH. **1938 R.D. 194=1938 A.W.R. 58 (B.R.).**

——S. 221—*Suit for lambardari fees—Payment of revenue direct by co-sharer—If negatives right to fees.*

Though a co-sharer pays his revenue direct into the Thasil nevertheless, the lambardar is entitled to his fees, as he is legally responsible for paying the revenue. (*Darling, S.M. and Bomford, J.M.*) HARDEI *v.* RAM SARUP. **1938 R.D. 127=1938 A.W.R. 4 (B.R.).**

——S. 221—*Suit under—Onus—Facts to be proved by lambardar.*

In a suit under S. 221 of the Agra Tenancy Act, unless the lambardar shows that his realisations are not sufficient to pay the land revenue, he is not entitled to a decree. The burden of proving this is entirely on the plaintiff lambardar. (*Darling, S.M. and Bomford, J.M.*) BABU RAM *v.* CHATURBHUJ. **1937 R.D. 562=1937 A.W.R. 1122 (1).**

——S. 221—*Village expenses—Right to recover—Proof of incurring of expenses—Necessity.*

A claim for village expenses cannot be allowed in the absence of any evidence to show that the lambardar had incurred any such village expenses. (*Darling, S.M. and Bomford, J.M.*) HARDEI *v.* RAM SARUP. **1938 R.D. 127=1938 A.W.R. 4 (B.R.).**

——Ss. 221 and 224—Applicability—Superior and inferior proprietors—Latter permitted to hold possession free of revenue—Former undertaking to pay revenue—Effect of—Suit for arrears of revenue—Maintainability. *See* AGRA TENANCY ACT, SS. 183 AND 184. **1936 R.D. 406.**

AGRA TENANCY ACT (1926), S. 223.

——S. 222—*Applicability*—Thekadar *from co-sharer—Payment of arrears of revenue—Right to sue co-sharer for recovery of such arrears.*

A *thekadar* is a farmer or lessee of proprietary rights in land, and in particular of the right to receive rents or profits, and unless otherwise provided for in the *theka*, he may exercise all the rights of his lessor under the Act, subject to certain exceptions. A *thekadar* from a co-sharer can under S. 222, therefore, sue a co-sharer for arrears of revenue which he has himself paid on behalf of that co-sharer. (*Drake Brockman, S.M.*) NARAIN SINGH *v.* GIRDHAR SINGH. **1936 R.D. 372 (2).**

——S. 222—*Each co-sharer collecting rent from his own tenants by private arrangement—Sum in excess of land revenue due from a co-sharer realised from his tenants—Suit by him against other co-sharers to recover the excess—If lies.*

Where by a private arrangement every co-sharer of a *mahal* has his own tenants from whom he collects rents, and a sum in excess of the land revenue due from a co-sharer has been realised from his own tenants, he cannot seek to recover that excess from the other co-sharers of the *mahal* by means of a suit under S. 222 of the Agra Tenancy Act. A suit under this section can only lie against co-sharers who have defaulted and in no sense of the word can the co-sharers be said to have defaulted in the present case. (*Darling, S.M.*) RADHA GOVIND *v.* KANHAIYA. **1937 R.D. 67.**

——S. 223—*Assignee of land revenue—Suit by, for arrears—Parties—Joinder of several co-sharers collectively—If bad.*

An assignee of land revenue is not precluded from suing a number of co-sharing proprietors collectively for arrears of revenue due to him, which the defendants have defaulted to pay. All the co-sharers being jointly and severally responsible for the revenue, the assignee can in fact only sue all of them as a body and cannot distinguish between them. Nor can the Court giving a decree specify the separate liability of any other co-sharers. (*Drake Brockman, S.M. and Knox, J.M.*) IMAM BAKSH *v.* LAIQ-UN-NISSA. **1936 R.D. 45.**

——S. 223—*Suit by assignee of revenue—If can be brought against lambardar alone.*

A suit under S. 223 of the Tenancy Act by the assignee of revenue should be brought against all the co-sharers collectively, not merely against the lambardar. (*Darling, S.M. and Bomford, J.M.*) BOHREY LEKHRAJ *v.* SPECIAL MANAGER, COURT OF WARDS, MUTTRA. **1937 R.D. 563.**

——S. 223—*Suit by assignee of revenue—Proper parties—Decree against lambardar, if proper.*

A suit under S. 223 of the Agra Tenancy Act by the assignees of revenue, should be brought against all co-sharers collectively. But if it is brought against the lambardar alone and he has no objection, a decree can be passed against him in his individual capacity, to the extent of his share. (*Darling, S.M. and Bomford, J.M.*) LEKHRAJ *v.* SPECIAL MANAGER, COURT OF WARDS, MUTTRA. **1937 A.W.R. 1122 (2).**

——S. 223—Suit under—Denial of liability to pay revenue—Decision—Appeal, if lies to Dist-

rict Judge. *See* AGRA TENANCY ACT, S. 242 (1) (*d*)—APPEAL TO DISTRICT JUDGE. **1939 A.W.R. (H.C.) 433 (F.B.).**

——**S. 224**—*Applicability—Under-proprietary holding—Jama included in revenue payable by superior proprietor at settlement of* 1287—*Same provision repeated at settlement of* 1330 *F. but revenue calculated and assessed in* 1330 *F.—Revenue still paid by superior proprietor—Suit by latter under S.* 224 *for arrears of land revenue—Maintainability—Proper remedy.*

At the settlement of 1284 F., it was laid down that the *jama* for an under-proprietary holding was included in the revenue payable by the superior proprietor. This was repeated at the current settlement of 1330 F.. but the under-proprietary revenue was calculated and assessed. In spite of the actual assessment of this under-proprietary revenue in 1330 F., it continued to be paid by the superior proprietor who tried to resume the grant by way of a suit for arrears of land revenue under S. 224 of the Agra Tenancy Act.

Held, that the suit under S. 224 was incompetent and that the superior proprietor's remedy was through the Resumption Chapter of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) JUGAL KISHORE *v.* SONPAL. **1937 R.D. 23 (2).**

——**Ss. 224 and 132** — *Applicability — Suit against sub-proprietor for rent—Suit filed under S.* 132, *if can be converted into one under S.* 224.

The remedy of a plaintiff muafidar for recovery of the rent due from the *sirdars* who are sub-proprietors under S. 4 (16) of the Tenancy Act lies by way of suit under S. 224 and not S. 132 of the Act. Such suits are triable only by an Assistant Collector of 1st class. Consequently, where the suits are lodged under S. 132 in the Court of an Assistant Collector of the 2nd class, it cannot be converted into one under S. 224. (*Darling, S.M. and Bomford, J.M.*) GATSARAN NARAINJI *v.* RAM SINGH. **1938 A.W.R. (B.R.) 307=1938 R.D. 565.**

——**Ss. 224 and 230**—*Suit to recover malikana dues—Forum—Civil or Revenue Court.*

Where by an order of the Settlement Officer a certain percentage of the assets was fixed as malikana payable to a superior proprietor by an inferior proprietor, it represents the former's share of the rent payable by the tenants to the landholder and so they come within the words 'rent due to him as such in S. 224. S. 230 of the Act becomes applicable to such a suit and hence any suit in respect of a malikana would not be cognizable by a Civil Court and can be brought in the Revenue Court. (*Bennet, A.C.J. and Verma, J.*) BHAGWAN SINGH *v.* IMRAT SINGH. **I.L.R. (1938) All. 856=1938 A.W.R. (H.C.) 594 =1938 A.L.R. 862=1938 A.L.J. 936=1938 R.D. 790=178 I.C. 455=A.I.R. 1938 All. 615.**

——**S. 226**—*Decree against collecting co-sharer —When can be passed.*

When a suit is filed against a lambardar under S. 226 of the Agra Tenancy Act, a decree cannot be passed against the collecting co-sharer who is not a lambardar unless the plaintiff has applied to amend his plaint to add all co-sharers and the suit to proceed under S. 227 of the Act. (*Marsh, S.M. and Mehta, J.M.*) BABU RAM *v.* KUNDAN SINGH. **1939 R.D. 240=1939 A.W.R. (B.R.) 67**

(2)=1939 A.L.J. (Supp.) 63.

——**S. 226**—*Profits—Collection charges—Suit by co-sharer against lambardar for share of profits—Rate of collection expenses to be allowed.*

The customary and reasonable rate of collection charges or expenses is 10 per cent. and that rate should be allowed in a suit for profits by a co-sharer against a lambardar. (*Harries, J.*) SHYAM LAL *v.* SUNDER LAL. **171 I.C. 686=1937 A.L.R. 872=1937 A.W.R. 650=1937 A.L.J. 769 =1937 R.D. 387=A.I.R. 1937 All. 661.**

——**S. 226**—*Rate of profits—Decision as to, if can operate as* res judicata.

It cannot be held that a decision as to the rate profits operates as a *res judicata*, for circumstances governing the rate of profits differ from year to year. (*Darling, S.M. and Bomford, J.M.*) SHIVA BANS PANDEY *v.* RAJMAN PANDEY. **1938 A.L.J. (Supp.) 84=1938 A.W.R. (B.R.) 300= 1938 R.D. 441.**

——**S. 226**—*Re-union of plots—Effect on proprietary interest of parties.*

The mere re-union of plots so as to constitute a new joint khewat will not confer any fresh right or disturb the proprietary interests of the parties. (*Sulaiman, C.J. and Bajpai, J.*) BHAWANI PRASAD *v.* BAHAL SINGH. **163 I.C. 767=9 R.A. 76=1936 A.L.J. 801=1936 A.W.R. 611=1936 R.D. 246=A.I.R. 1936 All. 492.**

——**S. 226**—Sir *and* khudkasht *cultivated by co-sharer in excess of his share—Collection of excess —Duty of lambardar.*

As a part of the profits of the mahal arise from the cultivation of *sir* and *khudkasht* by co-sharers, where such cultivation is in excess of the share then a collection of the excess at a certain fixed rate has to be made from those co-sharers. It is the duty of the lambardar to make this collection, and if a certain co-sharer will not pay the excess due from him, to inform the co-sharers who may be entitled to bring a suit. (*Bennet, J.*) SOHANPAL SINGH *v.* THE SPECIAL MANAGER, COURT OF WARDS. **166 I.C. 889=9 R.A. 460=1936 R.D. 578=1936 A.W.R. 1189=1937 A.L.R. 101=1936 A.L.J. 1318=A.I.R. 1937 All. 113.**

——**S. 226 (1)**—*Co-sharer in village—Auction purchaser of share of—Right to sue for profits from date of sale—Mutation in village papers—If condition precedent to right to profits—C.P. Code, S.* 65.

A person who has purchased in auction the share of an admitted co-sharer in a village gets vested in him all the rights of the co-sharer whose share he has purchased from the date of the actual sale and purchase and is therefore entitled to sue for his profits from the date of sale, though his name is not recorded as a co-sharer in the revenue papers until some later date. To entitle him to sue for profits, it is not necessary that mutation should be effected in his name in the village papers. (*Harries, J.*) SHYAM LAL *v.* SUNDER LAL. **1937 A.L.J. 769=1937 R. D. 387=171 I C. 686=1937 A.L.R. 872=1937 A.W.R. 650=A.I.R. 1937 All. 661.**

——**S. 226 (1)** — *Lambardar — Negligence— Collection less than 75 per cent.—If evidence of negligence—Liability to account—Basis of—Gross rental.*

Where the collections made by a lambardar are considerably less than 75 per cent. there is a *prima*

facie case of negligence on his part, and the onus is on him to show that he had not been negligent in the matter of collections. In such cases where the lambardar is found negligent, the Court is entitled to make him liable to account on the basis of gross rental. (*Harries, J.*) SHYAM LAL *v.* SUNDER LAL. 171 I.C. 686=1937 A.L.R. 872=1937 A.W.R. 650=1937 A.L.J. 769=1937 R.D. 387=A.I.R. 1937 All. 661.

——Ss. 226 and 202—*Limitation for suit for profits—Effect of S. 202.*

For a suit under S. 226 of the Tenancy Act the period of limitation is three years. The effect of S. 202 of the Agra Tenancy Act is only to reduce the period as against the lessor only in respect to arrears which had accrued before the *theka* and to reduce it as against the *thekadar* only in respect to arrears accruing during the period of the *theka* that period is not reduced in favour of the *lambardar* by S. 202. (*Collister, J.*) HAR DAYAL *v.* RAM MANOHAR LAL. 181 I.C. 484=11 R.A. 569=1939 R.D. 86=1939 A.W.R. (H.C.) 72 (2)=A.I.R. 1939 All. 206.

——Ss. 226 and 227—*Co-sharers—Suit by one for accounts—Parties—Joinder of all—If necessary—Suit against one only—Competency.*

Under the law a co-sharer can sue another single co-sharer or any number of them for settlement of accounts. It is not absolutely necessary that all the co-sharers should be impleaded. The ultimate decree will be of course against the one sued only in proportion to his share. The co-sharer selected as defendant is usually the one who has been making collections and who holds a large share of *sir* and *khudkasht*. (*Drake Brockman, S.M. and Knox, J.M.*) BALLEY *v.* JAGDEO SINGH. 1936 R.D. 259 (1).

——Ss. 226 and 227—*Suit under—Maintainability—Settlement providing for distribution of profits contrary to the Tenancy Act—Rights—Agitation—Forum.*

No action under S. 236 or 227 of the Agra Tenancy Act will lie in a case where there is a settlement which provides for a distribution of profits in a manner different from that to which the co-sharers are entitled under the Agra Tenancy Act, and the rights of parties under such a settlement must be vindicated only in the Civil Court. (*Thom, C.J. and Ganga Nath, J.*) ASHARFI KUER *v.* RAM PEAREY. I.L.R. (1939) All. 594=183 I.C. 584=12 R.A. 152=1939 A.W.R. (H.C.) 456=1939 A.L.J. 428=1939 R.D. 382=A.I.R. 1939 All. 442.

——Ss. 226 and 229—*Assignee from co-sharer of profits—'Profits on account of a year,' meaning of.*

Where the 'profits on account of a year' is assigned, the expression means that the profits which arises out of the rental demand for that particular year, irrespective of the year in which the collection is made, is assigned. It cannot include arrears previous to the year with reference to which the profits are stated to arise. (*Bennet and Ismail, JJ.*) MAHOMED ISMAIL *v.* HIRA LAL. 183 I.C. 432=12 R.A. 135=1939 R.D. 236=1939 A.L.J. 353=1939 A.W.R. (H.C.) 321=A.I.R. 1939 All. 449.

——S. 227—*Collecting co-sharer—If entitled to retain his total share of profits.*

A collecting co-sharer is entitled to retain out of what he has collected from a tenant only a

share of proportionate to his share in the *khewat*. He cannot claim to deduct his entire share of profits in the whole jamabandi. (*Thom, C.J. and Ganga Nath, J.*) MAN SINGH *v.* BAIJ NATH SAHAI. I.L.R. (1939) All. 888=185 I.C. 668=12 R.A. 341=1939 A.W.R. (H.C.) 692=1939 A.L.J. 830=1939 R.D. 513=A.I.R. 1939 All. 694.

——S. 227—*Co-sharers—Realisation of rent—Method—Excess realisation by one—Remedy of others—Suit for profits.*

Every co-sharer in a joint mahal is entitled to realize from each tenant his share of the rent and no more. If a co-sharer realizes from a particular tenant rent in excess of his share he is liable, in a suit under S. 227 of the Tenancy Act, to pay to the other co-sharers the amount realized by him in excess of his share in the rent payable by the tenant. Further the excess rent realized cannot be credited by one co-sharer towards his full share of profits according to the jamabandi. In a suit for settlement of accounts under S. 227 of the Tenancy Act, all that the collecting co-sharer would be entitled to is to deduct from the realizations made by him from particular tenants his share of the rent payable by those tenants, and the excess realizations, if any, must go towards the satisfaction of the claim of such co-sharers who may not have realized their legitimate share of the rent from those tenants. (*Iqbal Ahmad, J.*) BAIJ NATH SAHAI *v.* MAN SINGH. 177 I.C. 454=11 R.A. 203=1938 R.D. 683=1938 A.L.R. 757=1938 A.W.R. (H.C.) 461=1938 A.L.J. 698=A.I.R. 1938 All. 515.

——S. 227—*Co-sharers — Suit by one against another for profits—Right of defendant to deduct own share.*

In a suit under S. 227 of the Agra Tenancy Act by a co-sharer for arrears of profits against another co-sharer who has collected them, the latter collecting co-sharer would only be responsible for distributing any profits remaining after deducting his own share. (*Drake Brockman, S.M. and Knox, J.M.*) BHOOP RAM *v.* KEDAR SINGH. 1936 R.D. 49.

——S. 227—*Co-sharers—Suit by one for profits—Mortgagee of specific plots from one co-sharer—Decree against—If can be passed.*

Where a co-sharer mortgages specific plots of which he is in exclusive possession, the Court in a suit for profits instituted by another co-sharer should regard the mortgagor-co-sharer and his mortgagee as a single unit, and a decree can be passed under S. 227 of the Agra Tenancy Act against the mortgagee from the co-sharer as well. (*Bennet, J.*) SHEOMURAT SINGH *v.* BIP NARAIN SINGH. 174 I.C. 60=10 R.A. 585=1938 R.D. 139=1938 A.L.R. 228=1937 A.L.J. 1354=1938 A.W.R. 19 (H.C.)=A.I.R. 1938 All. 108.

——Ss. 227 and 266—*Co-sharer, if can collect whole rent due—Liability to be sued by others for their share.*

Each co-sharer is entitled to collect only his own share of the rent of a tenant and not the entire rent payable by a tenant. Where there has been a collection of the full rent from the tenant, it is in excess of his legal right and the other co-shares are entitled to make a claim against him for such excess collection from each and every tenant from whom he had collected in full or for

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more than his share. (*Bennet and Verma, JJ.*) GAJRAJ SINGH *v.* KALLU. **1940 A.W.R. (H.C.) 267=1940 R.D. 207=A.I.R. 1940 All. 309.**

——**S. 227**—*Decree under—Execution by Collector—Order by Collector—Appeal— Forum—District Judge or Commissioner—S. 242 -C. P. Code, S. 47.*

When a decree for profits under S. 227 of the Agra Tenancy Act is sought to be executed against immovable property forming part of a mahal, the decree must be sent to the Collector who must deal with it as a decree of his own Court; and in executing the decree, the Collector acts under S. 47, C. P. Code. Any order passed by the Collector in execution is appealable to the District Judge under S. 242. But no appeal lies to the Commissioner. (*Drake Brockman, S.M. and Knox, J.M.*) MUQADDAM ALI *v.* MAHERUDDHUGH SINGH. **1936 R.D. 197.**

——**S. 227**—Gonwandhar—*Right to sue for share of profits of* mahal.

A *gonwandhar* has no share in a *mahal* as defined in S. 4 (4) of the Land Revenue Act. Therefore, he cannot sue for a share of the profits of a *mahal* under S. 227 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) RAM LAKHAN SINGH *v.* RAM NARESH SINGH. **1937 R.D. 337.**

——**S. 227**—*Lambardar—Suit for settlement of accounts—Competency.*

Every lambardar is a co-sharer first, and the fact that he is a lambardar does not make him any the less a co-sharer, and a lambardar is competent to maintain a suit for settlement of accounts under S. 227 of the Agra Tenancy Act. He may have to implead all the co-sharers or such of them as may be interested in the result of the suit as parties to the suit. But the suit cannot be dismissed on the ground that the lambardar has no right of suit under S. 227. (*Niamatullah and Ismail, JJ.*) GAJRAJ SINGH *v.* TEJ SINGH. **I.L.R. (1938) All. 143=1938 R.D. 101=1938 A.L.R. 191=173 I.C. 884=10 R.A. 528=1937 A.W.R. 1169=1937 A.L.J. 1277=A.I.R. 1938 All. 55.**

——**S. 227**—*Suit against collecting co-sharer—Right to share in profits actually realised.*

When a co-sharer sues a collecting co-sharer for profits under S. 227 of the Tenancy Act, there is no reason why the sole collecting co-sharers should not share with the other co-sharers the profits actually realised. (*Darling, S.M. and Bomford, J.M.*) MADAN *v.* RAM GOPAL. **1938 A.W.R. (B.R.) 163=1938 R.D. 373.**

——**S. 227**—*Suit for profits—Maintainability—Purchaser from co-sharer obtaining decree for proportionate share of ex-proprietary rent only—If can sue for profits.*

Where a purchaser from a co-sharer obtains a decree, only for the proportionate share of the ex-proprietary rent, in his suit, he is entitled to sue for profits. (*Darling, S.M. and Bomford, J.M.*) GANGA RATHI *v.* RAM AUTAR. **1938 A.W.R. (B.R.) 349=1938 R D. 398.**

——**S. 227**—Suit for profits by co-sharer—Sale of plaintiff's proprietary rights in auction—Right to profits after date of sale. *See* C. P. CODE, S. 65. **1936 R.D. 49.**

——**S 277**—*Suit for profits—Scope—Question as to nature of holding as to being* sir, khudkasht *or ex-proprietary—Relevancy of.*

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A suit for profits should ordinarily be decided on the records as they stand. Such a suit is not a suit in which it can be conveniently decided whether a particular plot is partly ex-proprietary tenancy, or *sir* or *khudkasht*. (*Drake Brockman, S.M. and Knox, J.M.*) BATAN LAL *v.* BALA PRASAD. **1936 R.D. 530 (1).**

——**S. 227**—*Suit under—Appeal to District Judge—When lies.*

No appeal lies to the District Judge in a suit under S. 227 of the Agra Tenancy Act, when the amount claimed is below Rs. 200. (*Drake Brockman, S.M. and Knox, J.M.*) BHOOP RAM *v.* KEDAR SINGH. **1936 R.D. 49.**

——**S. 227**—*Suit under—Necessity to implead proper properties—Failure to add—Duty and powers of Court.*

In a suit under S. 227 of the Agra Tenancy Act, for the settlement of accounts, it is necessary to implead all the parties who have collected the money. Where there has been an omission to do so, the Court should in the exercise of its wide powers under O. 1, R. 10, C. P. Code, implead all the necessary parties and not dismiss a suit on that ground, if necessary damages may be awarded to the other party. (*Darling, S. M. and Mehta, J. M.*) RAM BHAROSE *v.* SUNDAR LAL. **1938 A.W.R. (B.R.) 419=1938 R.D. 826.**

——**S. 230**—*Applicability—Suit for return of sum advanced for* zaripeshgi *on repudiation by heir of grantor—Jurisdiction of Civil Court.*

A suit by a person for return of the money advanced by him in consideration of a *zaripeshgi* lease, the validity of which is denied by the persons succeeding the grantor of the lease, on the ground that the consideration for the contract of lease has failed is a suit which the Civil Court is competent to try, and is not one for the Revenue Court. S. 230 of the Agra Tenancy Act does not apply to such a case. (*Niamatullah and Allsop, JJ.*) MAHOMED ANIS *v.* IQBAL HUSAIN. **173 I.C. 642=10 R. A. 485=1938 R.D. 88=1938 A.L.R. 158=1937 A.W.R. 990=1937 A.L.J. 1202=A.I.R. 1938 All. 29.**

——**Ss. 230 and 123**—*Attachment, under decree for arrears, of crops in different zamindari—Distraint by that zamindar—Civil suit to declare distraint fictitious and that rent paid was on basis of* batai—*If barred by S. 230*

Where a person who had obtained a decree for arrears of rent, attached certain share of standing crop, in a different zamindari, but the other zamindar distrained the whole crop for his own arrears, a civil suit to declare the distraint fictitious and to declare that the rent paid to that zamindar was on the basis of *batai* is maintainable and is not barred by S. 230 of the Tenancy Act, for the plaintiff not being a landholder with reference to the land in question could not file a suit under S. 123 of the Agra Tenancy Act. (*Bennet and Verma, JJ.*) ALI AHMAD *v.* MEHARBAN ALI. **179 I.C. 814=11 R.A. 389=1938 A.L.J. 1076=1938 R D. 880=1938 A.W.R. (H.C.) 786=A.I.R. 1939 All. 59.**

——**S. 230**—*Joint lease for agricultural land and for shops--One sum of rent reserved for both—Suit for arrears of rent—Jurisdiction of Revenue Court.*

A suit for arrears of rent due under a joint ease for both the agricultural land and for shops, reserving one sum of rent for both the proper-

ties, can be entertained only by a Civil Court. Such a suit does not fall under the Fourth Schedule of the Agra Tenancy Act, and consequently it is not cognizable by the Revenue Court. (*Ganga Nath and Smith, JJ.*) DAU DAYAL *v.* RAM PRASAD. **58 All. 1050=165 I.C. 649=9 R. A. 293=1936 A.L.J. 1009=1936 R.D. 293=1936 A.W.R 696=A.I.R. 1936 All. 741.**

——**S. 230**—*Bar under—Suit by a tenant against his co-tenant for profits—Jurisdiction of Court of Small Causes to try.*

Where the plaintiffs claim profits in proportion to their share in the holding on the allegation that they were co-tenants with the defendants, of certain land which was exclusively in the cultivation of the defendants, the suit is exclusively cognizable by Civil Court. The bar provided by S. 230 of the Agra Tenancy Act will be effective only if the suit is of the nature specified in Sch. 4 to the Act. The mere fact that the defendants alleged that the plaintiffs were not the tenants of the holding would not oust the jurisdiction of the Civil Court. (*Niamatullah and Ismail JJ.*) DATA RAM *v.* DHARA. **I.L.R. (1938) All. 462=176 I.C. 514=11 R A. 117=1938 R.D. 725=1938 A.L.R. 639=1938 A.W R. (H.C.) 326 =1938 A.L J. 519=A.I.R. 1938 All. 375.**

——**S. 230**—*Jurisdiction of Revenue Courts—Test—Perpetual lease by co-sharers, including minors—Landlord and tenant relationship established—Minors, if can agitate validity of lease in Civil Court.*

In the case of agricultural lands, when once the relationship of landlord and tenant is established between the parties, their rights and liabilities can be adjudicated upon by the Revenue Courts only. Where agricultural land is granted on a perpetual lease by all the co-sharers who were majors and by the mother on behalf of the minors and the lessee is in possession as a tenant, though the perpetual lease may be invalid, the relationship of landlord and tenant is established, and as such any agitation as to the invalidity of the lease cannot be carried on in a Civil Court. (*Bennet, A.C. J. and Verma, J.*) TAHAD ALI *v.* ISRAR. **I.L.R. (1939) All. 89=180 I C. 504=11 R.A. 466=1938 A.L.J. 1110=1938 A.W.R. (H.C.) 788=1938 R. D. 910=A.I R.1939 All. 121.**

——**S. 230**—*Relief falling within competence of Revenue Court—Jurisdiction of Civil Court.*

Where a landholder brings a suit that the transferee of a fixed rate tenant has no right to build a house on the ground that it does not constitute improvement, adequate relief can be granted by Revenue Court under Ss. 82 and 120 and hence only Revenue Court has jurisdiction to try the suit. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH. **I.L.R (1938) All. 754=177 I.C. 450=11 R.A. 199=1938 A.L.R. 747=1938 A.L. J. 720=1938 A.W.R. (H.C.) 522=1938 R.D. 714 =A I.R. 1938 All. 511.**

——S 230—Usufructuary mortgage of zamindari—*Quabuliyat* by mortgagor retaining possession on payment of rent—Separate deed charging rent on equity of redemption—Suit in Civil Court to enforce charge for arrears of rent—Maintainability. *See* AGRA TEN. ACT, S. 216. **1936 R.D. 2.**

——**S. 234**—*Jurisdiction—Decree for arrears of rent—Agreement to enhance rent—Power of Assistant Collector of 2nd class to include in decree.*

The Court of an Assistant Collector of the second class has no power to include in a decree for arrears of rent an agreement to enhance rent. (*Darling, S. M. and Bomford, J. M.*) RAM PRASAD *v.* KALI PRASAD. **1938 R. D. 99=1938 A.W. R. (B.R.) 49.**

——**S. 237**—Theka *granted by mortgagor pending foreclosure proceedings—Mortgagee agreeing to* thekadar *being recorded as such on his undertaking to surrender possession after Civil Court's decree—Mortgagee applying for mutation after decree by Civil Court— Application opposed by* thekadar—*Mortgagee's remedy.*

In the course of foreclosure proceedings the mortgagor gave a *theka* of the mortgaged village to one *X* who applied for mutation. The mortgagee opposed the application but eventually agreed that *X* should be recorded as *thekadar* on the understanding that if and when the mortgagee should get "*dakhal*" he would surrender possession. The proceedings in the Civil Court ended in favour of the mortgagee and he was granted possession as against the mortgagor. When the mortgagee applied for mutation and removal of *X's* name, *X* opposed the application.

Held, that the possession of a proprietor was distinct from that of a *thekadar* and all that the mortgagee had been given by the Civil Court was proprietary possession and that if he thought that *X's theka* was really void *ab initio* or had come to an end in accordance with his promise, it was open to him to file a suit to get rid of him, and that a mutation case between proprietors was not the proper forum to decide whether *X's theka* had come to an end or not. (*Darling, S. M. and Bomford, J M.*) BHAWANI SHANKAR *v.* DULAREY LAL. **1937 R.D. 391.**

——**S. 238**—*Assistant Collector not empowered under to carry on sales—Proceedings before such officer, if null and void.*

Where an Assistant Collector is not duly empowered under S. 238 of the Agra Tenancy Act with the powers of a Collector for the purpose of carrying out sale of landed property, all the proceedings in his Court, in execution of a decree for arrears of land revenue, are *ab initio* null and void. (*Darling, S. M. and Marsh, J. M.*) RAM RAKSHPAL *v.* RAM SARUP. **1938 A.W.R. (B.R.) 254=1938 R.D. 557.**

——**Ss. 238 and 258**—*Decree of Revenue Court sent for execution to Collector—Transfer by latter to Sales Officer—Legality.*

Where an application for execution of a Revenue Court decree for execution against the share of the judgment-debtor in a revenue paying *mahal*, under serial No. 13 of List II of Sch. II to the Agra Tenancy Act, the Collector must execute the decree as if it were a decree of his own Court He cannot transfer the execution—assuming that execution proceedings constitute a 'case' under S. 258—to an Assistant Collector or Sales Officer subordinate to him, unless the officer to whom it is transferred is invested with the powers of a Collector under S. 238 of the Act. (*Drake Brockman, S. M. and Knox, J. M.*) MUQADDAM ALI *v.* MAHERUDDHUJH SINGH. **1936 R. D. 197.**

——**S. 239**—*Order by Collector empowering Honorary Assistant Collector to entertain plaints —If confers power to entertain applications.*

AGRA TENANCY ACT (1926), S. 240.

An Honorary Assistant Collector who has been empowered by order of the Collector to entertain plaints in suits, has jurisdiction to entertain applications as well although the word "application" is not specifically mentioned in the order. It must be deemed to cover applications also and both plaints and applications can be filed in the Court of the Honorary Assistant Collector under S. 239 of the Agra Tenancy Act. (*Drake Brockman, S. M. and Knox, J. M.*) RAMJI LAL *v.* BHARAT SINGH. **1936 R.D. 195.**

——**S. 240** —*"Court" — If includes District Judge.*

It is impossible to hold that the word "Court" used in S. 240 must necessarily mean the "Revenue Court" of the first instance (*i.e.*) the Assistant Collector, or the Collector and not a District Judge. (*Sulaiman, C. J. and Bennet, J.*) PANCHAM *v.* RAMESHWAR. **162 I.C. 954=8 R.A. 919=1936 R.D. 144=1936 A.W.R. 393=1936 A. L.J. 337=A.I.R. 1936 All. 376.**

——**S. 241**—*Suits for arrears of rent under S. 132 against same tenant by same landlord in respect of different plots—Appeal in one only—Jurisdiction of Collector in appeal to modify decree in another suit not appealed from.*

Under S. 241 of the Agra Tenancy Act, the Collector has no jurisdiction to modify the decree passed in a suit for arrears of rent under S. 132, when there is no appeal duly presented with regard to that suit, though an appeal is validly before him in respect of another suit against the same tenant by the same landlord with regard to another plot. (*Darling, S. M. and Bomford, J. M.*) GANGA SINGH *v.* DWARKA PRASAD. **1937 R. D. 14.**

——**S. 242**—*Applicability—Court of a Small Cause Court Judge.*

A forum such as a Small Cause Court Judge has no jurisdiction at all under the Agra Tenancy Act as an appellate Court. S. 242 of that Act only refers to the Court of the District Judge and not to a Court such as the Court of the Small Cause Court Judge. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH. **I.L.R. (1938) All. 754=177 I.C. 450=11 R.A. 199=1938 A.L. R. 747=1938 A.L.J. 720=1938 A.W.R. (H.C.) 522=1938 R.D. 714=A.I.R. 1938 All. 511.**

——**S. 242**—Appeal against order under S. 144, C. P. Code—If lies. *See* AGRA TENANCY ACT, Ss. 3 AND 242. **1938 A.L.J. 988.**

——**S. 242**—Decree under S 227—Execution by Collector—Order in execution—Appeal—Forum —District Judge or Commissioner. *See* AGRA TENANCY ACT, S. 227. **1936 R.D. 197.**

——**S. 242 (1) (d)**—*Appeal to District Judge—Competency—Decision of Revenue Court in suit under S. 223 in which the liability to pay revenue is denied.*

An appeal does lie to the District Judge under S. 242 (1) (*d*) of the Agra Tenancy Act against the decision of the Revenue Court in a suit for the recovery of arrears of revenue brought under S. 223 of the same Act, if the defendant pleads that he is not liable to pay any revenue at all. (*Bennet, Allsop and Verma, JJ.*) MAHENDER MAN SINGH *v.* BADRI. **I.L.R. (1939) All. 704=182 I.C. 602=12 R.A. 35=1939 A.L.J. 489=1939 A.W.R. (H.C) 433=1939 O.L.R. 427=1939 R.D. 367= A.I.R. 1939 All. 433 (F.B.).**

AGRA TENANCY ACT (1926), S. 242.

——**S. 242 (1) (a) and (d)**—*Appeal to District Judge—Essentials.*

Though a suit may be one under S. 221 of the Agra Tenancy Act, it is only when the amount of revenue annually payable is in issue that an appeal lies to the District Judge. When a person denies his liability to pay the amount claimed, there is no issue about the amount as there is no contention about it. (*Ganga Nath, J.*) MOHAMMAD YUSUF ALI KHAN *v* SHIAM KUNWAR. **174 I.C. 448=1938 R.D. 144=1938 A.L.R. 275=10 R.A. 576=1938 A.W.R. (H.C.) 24=1938 A.L.J. 3=A.I.R. 1938 All. 135.**

——**S. 242 (d)**—*Applicability—Suit by lambardar for revenue against co-sharers—Plea of denial of liability to revenue—Appeal to District Judge —If lies.*

S. 242 (*d*) contemplates only suits in which liability for revenue is not denied, but the amount of the revenue annually payable is in dispute between the parties in the Court of first instance and also in appeal. It has no reference to the question of the liability for revenue. When the defendants therefore plead that they are revenue free proprietors and are not liable to pay any revenue, S. 242 (*d*) does not apply, and no appeal therefore lies to the District Judge in such a case. (*Ganga Nath, J.*) RAMESHWARI PRASAD *v.* DINA NATH. **1936 R.D. 17.**

——**S. 242 (3) (a)**—*Scope—Question of proprietary right—Whether lands are* sir *lands or tenancies—Appeal to District Judge—If lies.*

A question whether certain lands are the *sir* plots of a person or whether they are their tenancies would not be a question of proprietary right within the meaning of S. 242 (3), Agra Tenancy Act, and no appeal therefore lies to the District Judge in such a case. An appeal would lie only to the Court of the Commissioner. (*Sulaiman, C.J. and Harries, J.*) RAM CHANDRA SINGH *v.* MISRILAL. **I.L.R. (1937) All. 958=172 I.C. 629=10 R.A. 418=1938 A.L.R. 18=1937 A.W.R. 888=1937 R.D. 532=1937 A.L.J. 1204 =A.I.R. 1937 All. 790.**

——**S. 242 (3) (a)**—*Suit under S. 44 of Tenancy Act—Defendant pleading lease—Question of proprietary right if in issue—Appeal from decision in suit—Forum.*

Where in a suit under S. 44 of the Tenancy Act, it was admitted that the plaintiff was a zamindar, but it was contended by the defendant that he was a lessee of proprietary rights, and the suit is dismissed, the appeal lies to the Commissioner and not to the District Judge, for as the lease is not a transfer of proprietary interest in land under the Tenancy Act, there is no question of proprietary right in issue between the plaintiff and the defendant. (*Iqbal Ahmad and Bajpai, JJ.*) BHAIRO KUMAR *v.* MARKANDE GIR. **I.L.R (1939) All. 822=185 I.C. 767=12 R.A. 347=1939 A.L. J. 620=1939 A.W.R. (H. C.) 585=1939 R.D. 444=A.I.R. 1939 All. 679.**

——**S. 242 (3) (b)**—*Decision on a question of jurisdiction—Decision on a concession by an Advocate—Right of appeal.*

Where a question of jurisdiction was raised and an issue was also framed, but as it was conceded in arguments, the finding on the issue was recorded as based on such concession, and where regarding which grounds of appeal are taken, there is a suit in which a 'question of jurisdiction

has been decided and is in issue in the appeal' and hence an appeal lies under S. 242 (3) (*b*) of the Tenancy Act. (*Bennet and Verma, JJ.*) MAHARAJA OF BENARES *v.* BAULESHWAR SINGH. **181 I.C. 852=11 R.A. 619=1939 R.D. 101=1939 A.W.R. (H.C.) 150=1939 A.L.J. 120=A.I.R. 1939 All. 210.**

——**Ss 242 and 248 (3)**—*Suit for profits under S. 227—Decree by Assistant Collector—Execution sale—Order of Collector confirming—Appeal—Forum—District Judge or Commissioner.*

An order passed by the Collector confirming a sale carried out by the sale officer in execution of a decree for profits passed by an Assistant Collector under S. 227 of the Agra Tenancy Act is appealable to the District Judge under Ss. 242 and 248 (3), when the value of the subject-matter exceeds Rs. 200 and no appeal lies to the Commissioner. (*Darling, S M. and Bomford, J. M.*) KALYAN SINGH *v.* BHAGWAN SINGH. **1937 R.D. 37.**

——**Ss. 242 (3) (a) and 252**—*Applicability—Suit against lambardar for arrears of profits—Question of proprietary right involved—Appeal—Revision.*

Where a question of proprietary right is raised in a suit by a co-sharer against the lambardar for arrears of profits, the case is one in which an appeal lies to the District Judge under S. 242 (3) (*a*), and, therefore, no revision lies to the Board of Revenue under S. 252 of the Agra Tenancy Act. (*Drake Brockman, S. M. and Knox, J. M.*) SHIB KARAN SINGH *v.* JIWA KUNWAR. **1936 R.D. 29.**

——**S. 243**—*Interpretation—Right of second appeal—Condition.*

S. 243 of the Tenancy Act requires that a question of proprietary title should have been in issue between the parties claiming such right in the first appellate Court and shall be in issue in the appeal. The section clearly indicates that the dispute between the parties should be as regards their respective proprietary rights and that each party should be claiming such right. The mere fact that the defendant is denying the plaintiff's proprietary right without setting up any proprietary right in himself would not bring the case within the scope of the section. The intention of the Legislature by using the words "parties claiming such right" obviously was that the parties between whom the dispute arises should each claim such a right. 1930 A.L.J. 1065 and A.I.R. 1935 All. 568, Overr. (*Sulaiman, C.J. and Bajpai, J.*) KAN KUAR *v.* ATAL BEHARI LAL. **I.L.R. (1937) All. 138=165 I.C. 736=1936 R.D. 432=1936 A.W.R. 954=1936 A.L.J. 1007=A.I.R. 1936 All. 800.**

——**S. 244**—*Mixed question of law and fact—Second appeal—Question of admission to tenancy.*

The question of admission to tenancy might be interpreted as a mixed question of law and fact and as such on that ground a second appeal might be admitted. (*Darling, S.M. and Mehta, J.M.*) NAND LAL *v.* WAJID ALI. **1938 A.W.R. (B.R.) 547=1938 R.D. 672.**

——**S. 244**—*Second appeal—Interference—No doubt as to identity of plot—Difference in area owing to mistake in measurement—Court being misled.*

Where there is no doubt about the identity of the plot in question, but the Commissioner was misled by the difference in the area of the plot which was due to a mistake in the measurement, his order can be set aside in second appeal (*Darling, S.M. and Mehta, J.M.*) MADHAI SAITHWAR *v.* TULSI KEWAT. **1938 A.W.R. (B.R.) 373=1938 R.D. 735.**

——**S. 247**—*Construction and effect—Order by Assistant Collector, second class, on review application—Appeal—C. P. Code, O. 47, R. 7.*

Under the special rule of law enacted by S. 247 of the Agra Tenancy Act, all orders of an Assistant Collector of the second class passed on review, when granting or rejecting the application for review, are appealable without the limitations and restrictions given in R. 7 of O. 47, C. P. Code. (*Drake Brockman, S M. and Knox, J.M.*) ALGU KEWAT *v.* GHIRAU TEWARI. **1936 R.D. 257.**

——**S. 248 (3)**—*Execution proceedings governed by O. 21, C.P. Code—Order confirming sale—Appeal—Forum — Either revision or appeal under para. 1011-A or 1011 of the Revenue Manual—Competency.*

Where the execution of a decree in a suit under S. 132 of the Tenancy Act is governed by O. 21, C. P. Code, an appeal against the order confirming the sale of the judgment-debtor's property lies under S. 248 (3) of the Tenancy Act to District Judge if the value of the subject-matter exceeds Rs. 200. No appeal nor revision lies to the Commissioner under paras. 1011 and 1011-A of the Revenue Manual in such a case. (*Darling, S.M. and Bomford, J.M.*) ASA RAM *v.* PARMA. **1938 A.W.R. (B.R.) 158=1938 R.D. 254.**

——**Ss. 248 (3) and 226**—*Order of Collector confirming sale in execution of decree for profits—Appeal—Forum.*

An appeal against an order of Collector confirming a sale in execution of a decree for Rs. 225 passed in a suit for profits under S. 226 of the Agra Tenancy Act, lies not to the Commissioner, but to the District Judge under Cl. (3) of S. 248 of the Act. (*Darling, S.M and Bomford, J.M.*) AMIR HASAN *v.* BADRI PRASAD. **1937 R.D. 373 (1).**

——**Ss. 248 (3) and 252**—*Stay of execution of decree for ejectment—Appeal, if lies to District Judge—Revision to Board—Competency.*

Where an Assistant Collector stays the execution of a decree of ejectment, the order though one under S. 47, C. P. Code, will not be open to appeal to District Judge by reason of Ss. 248 (3) and 242. Hence it is open to revision by the Board under S. 252. (*Darling, S.M. and Mehta, J.M.*) HOLDSWORTH *v.* ZAMINDAR CHAUDHURI. **1938 R.D. 801.**

——**Ss. 248 (3) and 253**—*Ejectment order under S. 80—Appeal—Revision—Jurisdiction of High Court.*

An order of ejectment passed under S. 80 of the Agra Tenancy Act is appealable to the District Judge under S. 248 (3) of the Act; and a revision lies to the High Court under S. 253 of the Act and not to the Board of Revenue. (*Niamatullah, J.*) AISHA BIBI *v.* DIVANDAR PRASAD. **1937 A.L.J. 259=168 I.C. 680=9 R.A. 665=1937 A.L.R. 392=1937 R.D. 131=1937 A.W.R. 195=A.I.R. 1937 All. 350.**

——**S. 249**—*Appeal—Order of remand by District Judge—Appealability—Remedy.*

AGRA TENANCY ACT (1926), S. 249.

The Agra Tenancy Act does not provide for an appeal from an order of remand; but the order can be questioned by a superior Court when the final decree is appealed from, under S. 105 (1), C. P. Code, which applies to suits and appeals under the Tenancy Act, though S. 105 (2) does not apply, as the Tenancy Act does not allow an appeal from an order of remand. (*Niamatullah and Allsop, JJ.*) SRI RAM *v.* JAI KISHAN LAL. I.L R. (1938) All. 79=1938 R.D. 66=1938 A. L. R. 57=172 I.C. 964=10 R.A. 448=1937 A.W.R. 1075=1937 A.L.J. 1237=A.I.R. 1938 All. 37.

——S. 249—*Order dismissing objection by judgment-debtor in execution—Second appeal.*

No second appeal lies from an order passed in appeal dismissing an objection by judgment-debtor in execution. (*Bennet, J.*) GULAB DEVI *v.* ABDUL GHAFUR KHAN. 166 I.C. 229=9 R A. 382=1937 A. L.R. 2=1936 A.W.R. 984=1936 A. L.J. 1235=A.I.R. 1936 All. 868.

——S. 249—*Order under S. 79—Second appeal.*

No second appeal lies to the High Court from an order under S. 79 of the Agra Tenancy Act passed by the District Judge in appeal. (*Allsop, J.*) MUBARIK HASAN *v.* ISHRI PRASAD. 163 I.C. 971 (1)=9 R.A. 104=1936 A.W.R 472=1936 R. D. 186=1936 A.L.J. 678=A.I.R. 1936 All. 451.

——S. 249—*Second appeal—Appellate order of Revenue Court in execution proceedings—If appealable.*

No further appeal lies against an order passed in appeal by a Revenue Court in execution proceedings. (*Allsop, J.*) JANNAT-UN-NISSA BEGAM *v.* PARSHADI. 185 I.C. 808=12 R.A. 355=1939 A.W.R. (H.C.) 793=1939 A.L.J. 1014=A.I.R. 1940 All. 28.

——S. 249—*Suit for profits—Order of remand by District Judge on appeal—Appeal, if lies.*

No appeal lies to the High Court from an order of remand passed by a District Judge on appeal in a suit for profits. (*Sulaiman, C.J. and Bennet, J.*) PANCHAM *v.* RAMESHWAR. 162 I C. 954=8 R.A. 919=1936 R.D. 144=1936 A W.R. 393=1936 A.L.J. 337=A I.R 1936 All. 376.

——Ss. 249 and 3, Cl. (14)—*Second appeal from order passed under S. 47, C. P. Code, under Tenancy Act—If lies—'Decree' under Tenancy Act—Meaning of.*

The definition of a 'decree' given in S. 2, Cl. (2) of the C. P. Code does not apply to the Agra Tenancy Act. Under the Agra Tenancy Act, a 'decree' as defined in S. 3, Cl. (14) means any order which so far as the Revenue Court is concerned, finally disposes of a suit. So it does not include the determination of any question within S. 47, C P. Code. Any order passed under S. 47 is not a decree but remains an order under the Agra Tenancy Act. Hence no second appeal would lie from an order passed under S 47, C. P. Code, under the Tenancy Act. Where a lower appellate Court assumes jurisdiction in a matter, treating it as one in which a second appeal is allowed by a statute, a second appeal would lie to the High Court and the High Court could then correct the mistake of the lower Court. But it is not so in a case which, as treated by the lower Court, is one in which, a second appeal is expressly prohibited by the statute. (*Ganga Nath, J.*) DHARAM SINGH *v.* TIKAM SINGH. 174 I. C. 481=10 R.A. 586=1938 A.L.R. 280=1938 A.L. J. 63=1938 R.D. 149=1938 A.W.R. (H.C.) 53=A.I.R. 1938 All. 124.

AGRA TENANCY ACT (1926), S. 251.

——S 250—*Review—Observance of provisions of O. 47, C. P. Code, if obligatory.*

The absence of reference to O. 47, C. P. Code, in S. 250 of the Agra Tenancy Act in the terms in which that order is referred to in S. 251 of the Tenancy Act, makes it quite clear that in the case of reviews before the Board the observance of the provisions of O. 47 are not legally obligatory. (*Mehta, S.M. and Harper, J.M.*) KUBER SINGH *v.* BAIJNATH SINGH. 1940 R.D. 193=1940 A.W. R. (B.R.) 71.

——S. 251—*Ejectment order under S. 79 against several co-tenants—Application for review by one—Plea of non-service of summons—Applicant's brothers and uncle taking prominent part in ejectment proceedings—Inference—Review—If to be allowed.*

An application for review of an order of ejectment should be refused where the case has been actually defended by one of a number of defendants having a common interest, even if there be some doubt about the due service of summons on one of several such persons. Where an applicant for review pleads non-service of notice as the reason for review, but it is found that his uncle, a co-tenant has actually taken a prominent part in the ejectment proceedings, as also his own full brothers, it has to be held that the applicant has had full knowledge of the proceedings, and his application for review has to be rejected. (*Darling, S.M.*) GANGA SARAN *v.* HOTI LAL. 1937 R.D. 42.

——S. 251—*Order for ejectment followed by order for possession—Review—Non-service of notice personally on tenant—Poverty and illiteracy of tenant—If grounds for review.*

The law does not lay down that orders for ejectment under S. 86 of the Agra Tenancy Act and orders for delivery of possession may be reviewed or cancelled because notices have not been personally served on the tenants; nor does it allow review or cancellation because the tenants defendants are poor and illiterate. (*Drake Brockman, S. M. and Knox, J M.*) RAMJI LAL *v.* BHARAT SINGH. 1936 R.D. 195.

——S. 251—*Review—Limitation — Ejectment order—Starting point.*

The date of delivery of possession is the date from which the period of limitation is to be counted for purposes of an application to review an order of ejectment. (*Marsh, S.M. and Mehta, J.M.*) JAMMI KUER *v.* MATHURI. 1939 A.W.R. (B.R.) 87=1939 R D. 275=1939 A.L.J. (Supp.) 77.

——S. 251—*Review of ejectment order—Holding sub-let when possession delivered—Limitation—Starting point.*

Where after an order of ejectment possession had been given to the landlord of a holding which was sub-let at the time of the delivery of possession, the order of ejectment may be reviewed even though the application for review is filed long after possession had been given, but is within time from the date of the knowledge of ejectment. (*Marsh, S.M. and Mehta, J M*) SHAMBHOO NATH *v.* SHER SINGH. 1939 A.W.R. (B.R.) 90=1939 R.D. 433.

——S. 251—*Review of ejectment order—Limitation—Starting point.*

AGRA TENANCY ACT (1926), S. 252.

The only safe date from which limitation can run in order of ejectment cases is the date on which possession is actually delivered. (*Marsh, S.M. and Mehta, J.M.*) TOTA *v.* ASA RAM. **1939 A.W.R. (B.R.) 100=1939 A.L.J. (Supp.) 80.**

——**S. 252**—*Failure to award costs—Revision.*

Failure to award costs has, no doubt, been held to be a ground for revision. But it is undesirable that applications in revision should be encouraged in trivial cases where the amount at stake in the case is small. (*Darling, S.M. and Bomford, J.M.*) MAHBOOB ULLAH *v.* RAHMAT ULLAH. **1937 R.D. 379.**

——**S. 252**—*Finding of fact—Production of additional evidence before the Board—Desirability.*

Per *Mehta, J.M.* (*Marsh, S.M.*, contra)—Where there is a finding by the Collector as to the non-existence of a practice of payment of rent by the sub-tenant to the mortgagee, it is a finding of fact and in such a case it would be dangerous to allow the sub-tenant to go before the Commissioner and fail to convince him as to the existence of the practice and thereafter to allow the same person to produce additional evidence before the Board to show that the Collector had come to a wrong decision. (*Marsh, S M. and Mehta, J. M.*) BALDEO PRASAD *v.* BUDHOO. **1939 R.D. 567=1939 A.W.R. (B.R.) 243.**

——**S. 252**—Order on application under S. 132 (2) of the Tenancy Act—If revisable. *See* AGRA TENANCY ACT, SS. 132 (2) AND 252. **1938 R.D. 796.**

——**S. 252**—*Revision—Competency—Order under R. 13 of O. 9, C. P. Code.*

No revision lies under S. 252 of the Agra Tenancy Act against a Commissioner's order under R. 13 of O. 9, C. P. Code, refusing to set aside an *ex parte* decree, as O. 43, R. 1 (*d*) clearly provides that an appeal would lie therefrom. (*Mehta, J. M.*) JAI DEVI *v.* CHAUDHRI RAGHUBIR NARAIN. **1938 A.W.R. (B.R.) 388.**

——**S. 252**—*Revision—Stay of suit for inadequate reasons—If a ground.*

Where a trial Court for grossly inadequate reasons postpones a suit, the Board has wide powers under S. 252 of the Tenancy Act to interfere in revision with such an order. (*Darling, S.M. and Mehta, J.M.*) RAM LAL *v.* NAWAL KISHORE. **1938 R.D 935 (1)=1939 A.W.R. (B. R.) 60.**

——**S. 252 (c)**—*Material irregularity contemplated by—Absence of adequate service of notice to appear—Revision.*

Where there is no adequate service of a notice to appear, it constitutes a material irregularity as contemplated by S. 252, Cl. (*c*) of the Agra Tenancy Act and the Board can therefore exercise its revisional powers and pass such orders as it thinks fit. (*Darling, S.M. and Mehta, J.M.*) MAM RAJ *v.* MANGAL SEN. **1938 R.D. 929=1939 A.W.R. (B R.) 54.**

——**S. 252**—*Powers of revision—Improper admission of application under S. 132 (2)—Interference.*

The Board has full powers of revision under S. 252, if the Collector has improperly admitted an application under S. 132 (2) of the Act against a Thekadar, notwithstanding the provisions of S. 216 of the same Act. (*Darling, S.M. and Marsh, J.M.*) SECRETARY OF STATE *v.* RAM NATH SINGH. **1938 R.D. 798=1938 A.W.R. (B.R.) 410.**

AGRA TENANCY ACT (1926), S. 253.

——**S. 252** — Revision — Competency — Order staying execution of decree for ejectment. *See* AGRA TENANCY ACT, SS. 248 (3) AND 252. **1938 R.D. 801.**

——**S. 252**—*Revision—Grounds — Absence of hard and fast standard as to what is an illegality or irregularity—Finding not based on evidence.*

It is impossible to lay down a hard and fast standard of what constitutes such illegality or irregularity as would justify interference. Where a Collector's finding was not based on the evidence on the record and he had entirely failed to appreciate what constituted a separate property in which a lambardar has no share, and where it is clear that to deprive the lambardar of the right to collect rents of what may be a number of small tenants on behalf of a large number of petty co-sharers would result in great confusion and difficulty to all concerned, the circumstances were held to be sufficient to warrant the Board's interference in revision. (*Darling, S.M. and Bomford, J.M.*) SAHDEO *v.* RAM SARAN. **1938 R.D. 742=1938 A.W.R. (B.R.) 359 (2).**

——**S. 252**—*Revision—Sale of landed property in execution of rent decree—Stay order consequent on the order under S.6 of the Encumbered Estates Act—No appeal—C. P. Code, S. 47.*

Where a judgment-debtor's landed property is brought to sale in execution of a decree for arrears of rent passed against him and before the sale is confirmed he obtains an order under S. 6 of the Encumbered Estates Act and the Collector passed an order staying all further execution proceedings.

Held, no appeal lies against the stay order as it does not determine the rights and liabilities of the parties. S. 47, C. P. Code, is not applicable to the stay order. The Board can deal with the order of stay in revision under S. 252 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) CHHATER SAIN *v.* NAGINA. **1937 R.D. 510.**

——**S. 252**—Suit for profits against lambardar—Question of proprietary right raised—Revision to Board of Revenue—If lies. *See* AGRA TENANCY ACT, SS. 242 (3) (*a*) AND 252. **1936 R.D. 29.**

——**S. 252 (c)**—*Material irregularity—Assistant Collector giving plaintiff only 3½ weeks to deposit fees for fresh summons—Dismissal of suit on default by plaintiff—Interference in revision—C. P. Code, O. 9, R. 5.*

Under R. 5 of O. 9, C. P. Code, a period of three months is allowed to a plaintiff when a summons is returned unserved. Where, therefore, in a suit for profits under S. 226 of the Agra Tenancy Act the Assistant Collector only allows the plaintiff some 3½ weeks within which to furnish a new application and to deposit fresh fees for the issue of another summons, and when through some oversight the plaintiff's lawyer fails to do the needful, the Assistant Collector in a very summary fashion dismisses the suit, he acts with material irregularity within the meaning of S. 252 (*c*) of the Act, and his order is liable to be set aside in revision. (*Darling, S.M. and Bomford, J.M.*) SRI NIWAS PERSHAD *v.* DUDERSHAN PERSHAD. **1937 R.D. 381.**

——**S. 253**—*Revision—Conditions for—Order in execution of decree passed by Special Officer*

AGRA TENANCY ACT (1926), S. 258.

under S. 35 (c), U. P. District Boards Act—Revision to High Court if lies.

According to S. 253 of the Tenancy Act one of the conditions for a revision to lie to the High Court is that an appeal must lie to the District Judge from the suit or application decided by the Subordinate Revenue Court. Where an order is passed in execution in respect of a decree passed by a Special Officer designated by the Local Government under S. 35 (*c*) of the U. P. District Boards Act, no appeal lies to the District Judge and hence no revision would lie to the High Court. (*Bennet and Verma, JJ.*) SARDAR SINGH *v.* CHHOTEY LAL **I.L.R. (1940) All. 178=1940 A.W.R. (H.C.) 33=188 I.C. 314=1940 A.L.J. 44 =1940 R.D. 32=A.I.R. 1940 All. 194.**

——**S. 258**—*Order by Collector transferring execution to Assistant Collector—Appeal.*

An order by the Collector to whom a decree under S. 227, Agra Tenancy Act, is sent for execution, transferring the execution case to an Assistant Collector under S. 258 of the Act is appealable as an order under S. 47, C. P. Code, and the appeal lies to the District Judge. (*Drake Brockman, S.M. and Knox, J.M.*) MUQADDAM ALI *v.* MAHERUDDHUJH SINGH. **1936 R.D. 197.**

——**S. 264 and Sch. II, List 2, Serial 14**—*C. P. Code, O. 42, R. 1 (All.).*

According to the provisions of S. 264 and serial No.14 of list 2 of the 2nd Sch.of the Agra Tenancy Act, the memorandum of second appeal must be accompanied by a copy of the judgment of the original Court. This is unaffected by the proviso introduced into R. 1 of O. 42 by the Court, for the Court has no jurisdiction, to effect, by way of a rule, an amendment to the provisions of the Agra Tenancy Act. (*Thom, C.J. and Ganga Nath, J.*) RAM BIJAI PRASAD SINGH *v.* RAM BHANJAN SINGH. **I.L.R. (1939) All. 766=1939 A.L.J. 592= 1939 A.W.R. (H.C.) 564=12 R.A. 291=184 I.C. 895=A.I.R. 1939 All. 638.**

——**S. 265**—Lambardar—If entitled to receive capital money in land acquisition cases. *See* LAMBARDAR. **66 I.A. 145=I.L.R. (1939) All. 460 =1939 A.W.R. (P.C.) 58=(1939) 2 M.L.J. 98 (P.C.).**

——**S. 265**—*Admission to tenancy by lambardar after he ceased to have any share in the patti—Validity.*

Where a lambardar had ceased to have any share in the patti, an admission to tenancy in that patti by such lambardar would be invalid. (*Darling, S.M. and Bomford, J.M.*) DAULAT SINGH *v.* SUNDAR. **1938 A.W.R. (B.R.) 155=1938 R.D. 247.**

——**S. 265**—*Joint patti—Collection of rent—Right of lambardar—Custom entitling co-sharer——Proof—Evidence of.*

Under S. 265 of the Agra Tenancy Act, the lambardar in a joint patti is entitled to collect rent, unless by some contract or usage some other co-sharer is entitled to do so. It is possible to infer a custom or contract from a large number of instances in which the right of a co-sharer was repeatedly recognised in proceedings under S. 270 of the Act but such evidence can berebutted. Oral evidence of co-sharers in proof or disproof of the custom or contract will be valuable. (*Niamatullah, J.*) HADIYAR KHAN *v.* UMARDARAZ ALI KHAN. **172 I.C. 621=10 R.A. 411=1938**

AGRA TENANCY ACT (1926), S. 265.

A.L.R. 11=1937 A.L.J. 788=1937 R.D. 347= 1937 A.W.R. 595.

——**S. 265** — *Lambardar—Right of, to collect rent or settle land in patti in which he has no interest—Lessee settled by such lambardar—Right of co-sharers to eject.*

A lambardar has no legal right to collect rents or to settle land in pattis in which he has no share or interest. If the lambardar grants a lease of land in a patti in which he has no interest and admits a tenant, the lease is waste paper, and the tenant under the lease is a trespasser liable to be ejected by the co-sharers of the patti or their representatives in interest. (*Knox, S.M. and Grant, J.M.*) BAKHT BAHADUR *v.* BALDEO. **1936 R.D. 455.**

——**S. 265**—*Right of lambardar to settle and eject tenants.*

S. 265 of the Agra Tenancy Act is perfectly clear and if any person denies the right of the lambardar to settle and eject tenants it must be proved that there is a contract or usage which debars him from collecting rents. The fact that one of the co-sharers is allowed to accept rents, which are brought to her, is not sufficient to deprive the lambardar of his ordinary rights. (*Bomford, J.M.*) BALLABHDASS *v.* MAHPAL SINGH. **1937 R.D. 171.**

——**S. 265**—*Lambardar—Right to sue for rent —Absence of share in patti—Onus.*

The lambardar cannot sue for rents in a patti in which he has no share, but it is for the defendant concerned to prove that his field represents a property in which the lambardar has no share. (*Darling, S.M and Bomford, J.M.*) SAHDEO *v.* RAM SARAN. **1938 A.W.R. (B.R.) 359 (2)=1938 R.D. 742.**

——**S. 265** —'Usage'—What may not amount to—Significance of the term. *See* AGRA TENANCY Act, SS. 132 AND 265. **1938 R.D. 816.**

——**Ss. 265 and 266**—*Lambardar having no share in the* khewat—*Suit by him in ejectment—Defendant sued on the ground that the lease got by her is fictitious—Maintainability of suit.*

A lambardar who had no share in the *khewat* to which the area in suit belonged, brought a suit under S. 44 of the Agra Tenancy Act for the ejectment of a lady as a trespasser on the ground that the lease got by her from her husband, the former lambardar, was fictitious. He had not been appointed as an agent on behalf of all the co-sharers nor have any of them joined him in the plaint.

Held, that the suit is not maintainable. If the lambardar cannot collect rent, he cannot eject.

Obiter.—If all the co-sharers bring a suit for the ejectment of the lady, it will be open to them to establish that the lease granted to her by her husband, cannot be recognised. (*Darling, S.M. and Bomford, J.M.*) HOORJAHAN BEGAM *v.* ATARSEN. **1937 R.D. 517.**

——**Ss. 265 and 266**—*Co-trustees—Suit by one who is also lambardar but not described as such—Joinder of other trustee as co-plaintiff—If justified—Proper procedure.*

The fact that one of two co-trustees who is also the lambardar, does not sue for arrears of rent as lambardar does not entitle the other co-trustee to be added as a co-plaintiff in the suit. Since the plaintiff is a lambardar and is as such entitled to make collections, it is against his

interests that another person should be given the right to make collections. His failure to sue as lambardar would only deprive him of his costs, but cannot justify the grant of a decree in favour of the other co-trustee as well. (*Darling, S.M. and Bomford, J.M.*) HIRA LAL ROY CHOWDHURY *v.* ANNAPURNA. **1938 A.L.J. (Supp.) 9=1938 A.W.R. (B.R.) 97=1938 R.D. 188.**

——**S. 266**—*Co-sharers—Suit by one only for arrears of rent—Competency—Plea that suit not maintainable—When to be raised.*

One of several co-sharers cannot maintain a suit for arrears of rent. The tenant can plead that the suit by one co-sharer only is not maintainable and he can raise this plea at any stage. The mere fact that one of the other zamindars and the son of another say in the witness box that they have no objection to the plaintiff suing alone cannot satisfy the requirements of the law. The plaintiff co-sharer must implead all the co-sharers as parties to the suit unless he can show that he is their appointed agent or is allowed by usage or contract to sue alone. (*Darling, S.M. and Bomford, J.M.*) RAJ KUMAR RAI *v.* RAM LAKHAN. **1938 A.W.R. (B.R.) 105=1938 R.D. 169.**

——**S. 266**—*Joint patti—Ejectment of heir of statutory tenant—Suit by some only of the co-sharers—Maintainability—Burden of proof.*

The landholder is the person entitled to sue for ejectment of an heir of a statutory tenant; and the landholder in the case of a joint undivided patti is either the lambardar or the whole coparcenary body of co-sharers, or that co-sharer who is entitled to receive the whole rent of the tenant. In a suit for ejectment of the heir of a statutory tenant by two of the sharers, who do not form the whole coparcenary body and neither of whom is the lambardar, the burden is on the plaintiff to prove that they used to collect, and had a right to collect, the whole rent of the defendant. In the absence of such proof no decree for ejectment can be made. (*Darling, S.M. and Bomford, J.M.*) BHAROSA *v.* BIJAI BAHADUR SINGH. **1938 R.D. 163=1938 A.W.R. (B.R.) 99.**

——**S. 266**—*Non-compliance with provisions of—Plea, if open to tenant who has exhausted all remedies to set aside ejectment order.*

A tenant who has exhausted all his remedies for getting the ejectment order against him, set aside, and who even after a further *locus penitentiae* did not pay the decretal amount, cannot be permitted to plead that as the provisions of S. 266 of the Agra Tenancy Act were contravened, the ejectment order passed against him was illegal and that hence his possession was legal entitling him to a declaration under Ss. 121 and 123 of the Act. (*Marsh, S.M. and Mehta, J.M.*) SHIV SAGAR PANDE *v.* LUCHMAN KOERI. **1939 R.D. 598=1939 A.W.R. (B.R.) 268.**

——**S. 266**—*Scope of—Creation of tenancy—Power of one of several co-sharers.*

The granting of a lease of agricultural plots is permitted by the Tenancy Act and every owner of an agricultural plot of land is, therefore, competent to grant a lease of the same. But if the plot is owned by two or more co-sharers the right to grant a lease can be exercised jointly by them all or not at all. Each co-sharer has the right to enjoy possession of joint agricultural plots in conjunction with his other co-sharers, but has not the right, without the concurrence of the other co-sharers, to introduce a tenant on the joint plots. It is this principle that has been given legislative sanction by S. 194 of the former and by S. 266 of the present Tenancy Act. (*Iqbal Ahmad and Verma, JJ.*) LACHHMINA KUNWARI *v.* MAKFULA KUNWARI. **I.L.R. (1938) All. 441=175 I.C. 902=11 R.A. 17=1938 R.D. 463=1938 A.L.R. 497=1938 A.W.R. (H.C.) 199=1938 A.L.J. 333=A.I.R. 1938 All. 316.**

——**S. 266**—Scope of—Language, if allows agency to be implied. *See* AGRA TENANCY ACT, SS. 132 AND 266. **1938 R.D. 806.**

——**S. 266**—*Suit by one of the co-sharers—When permissible.*

S. 266 of the Agra Tenancy Act does not bar a suit by one of the coparceners suing as a landholder, if as a result of a private arrangement between the coparceners, he was allowed to act as the landholder. In the case of a private partition between co-sharers, the co-sharer in whose share a tenant's holding lies, has the authority to eject without joining other co-sharers. (*Mehta, J.M.*) HABIBULNISAN BIBI *v.* ABDUL LATIF. **1939 A.W.R. (B.R.) 108=1939 R.D. 377=1939 A.L.J. (Supp.) 68.**

——**S. 266**—"*Special contract*"—*Form and requisites of—Necessity for written instrument—Actionable claim—T. P. Act, S.* 130.

A "special contract" under S. 266 must denote something special and the section suggests that there must be an instrument in writing to evidence such a special contract. A claim for rent to fall due in future being an actionable claim, the special contract must be in the form of an instrument in writing as contemplated by S. 130 of the T. P. Act. (*Drake Brockman, S.M. and Knox, J.M.*) MAN SINGH *v.* ROSHAN. **1936 R.D. 230.**

——**S. 266**—Vendee of *sir* land—Right to sue alone to eject sub-tenants on relinquishment of exproprietary rights by vendor. *See* LANDLORD AND TENANT—EXPROPRIETARY TENANT. **1936 R.D. 46.**

——**S. 266 (1)**—Construction and scope—Joint *khewat khatas*—Admission of tenant to occupation by one co-sharer—Ejectment suit under S. 44 by another—Maintainability. *See* AGRA TENANCY ACT, S. 44. **1936 R.D. 114.**

——**S. 266 (1)**—*Co-sharers—Suit by one for whole rent from one tenant—Maintainability—Absence of custom or special contract—Effect.*

In the absence of proof of a custom or special contract to that effect an individual co-sharer in undivided *mahal* cannot maintain a suit for the whole rent against an individual tenant. It is, however, doubtful, whether an individual co-sharer can even sue an individual tenant for the whole of the rent even if there is a custom or special contract to that effect. (*Drake Brockman, S.M. and Knox, J.M.*) SUNDAR LAL *v.* CHUNNI LAL. **1936 R.D. 357 (1).**

——**S. 266 (1)**—*Undivided patti—Co-sharers—Right of one to sue for whole rent.*

One of several co-sharers in an undivided patti is not entitled to collect, or to sue for, the whole rent, unless he happens to be the lambardar or unless he proves a special contract or a local usage entitling him to collect the entire rent. S. 266 (1) is fatal to such a claim. He can only sue for his share of the rent. (*Knox, S.M. and*

AGRA TENANCY ACT (1926), S. 266.

Grant, J.M.) CHITRA *v.* SHER ALI KHAN. 1936 R.D. 321 (1).

——S. 266 (2)—*Applicability and scope—Sale of proprietary rights along with* mahal—*Undertaking to pay rent of ex-proprietary holding to vendor—Latter given right to collect whole rent—Undertaking acted upon for* 50 *years—Usage in* mahal *for ex-proprietary tenant to pay whole rent to vendee who accounted to co-sharers—Effect of—Right of vendee to realize entire rent.*

C.S., the proprietor of a fractional share in a *mahal*, who also held some *sir* land, sold his entire proprietary rights in the *mahal* along with his *sir* land to the plaintiff in 1880, *C.S.* thus became entitled to ex-proprietary rights in that *sir*. There was a covenant in the sale deed that *C.S.* should pay the plaintiff purchaser a sum of Rs. 80 a year as the rent of his ex-proprietary holding, and the plaintiff-purchaser would be entitled to collect the whole rent of the holding. In pursuance of this covenant the plaintiff had been realising from *C.S* and after his death from his sons, the whole rent of the ex-proprietary holding from the date of the sale-deed up to the year 1930. It was also found by the Court, in suits instituted by the plaintiff for rent, that there was a custom in the *mahal* for the ex-proprietary tenant to pay the rent to the purchaser who accounted for it to this co-sharers.

Held, that the case fell within S. 266 (2), Agra Tenancy Act, and that though the ex-proprietary tenant in the joint *mahal* was a tenant not only of the purchaser of his share but of the entire co-parcenary body in view of the custom or usage obtaining in the *mahal* and of the special contract contained in the sale-deed which was acted upon for about 50 years, the plaintiff-purchaser was entitled to realize not only his share of the rent but the whole of rent due from the ex-proprietary tenant. (*Iqbal Ahmad, J.*) DURBIGAI SINGH *v.* ZOHRA SULTAN BEGAM. **172 I.C. 216=10 R.A. 387=1937 A.L.J. 1130=1937 A.W.R. 838=1937 R.D. 480=A.I.R. 1937 All. 760.**

——S. 266 (2) and (3)—*Scope and effect of—Joint* khewat—*Rights and powers of co-sharers—Collection of rents and admission and ejectment of tenants—Right of individual co-sharers.*

S. 266 (2) of the Agra Tenancy Act means that the law will not interfere in any way with the right of single co-sharers, who under local usage or special contract are entitled to receive separately their share of the rent payable by a tenant realising such share of the rent in any manner allowed by law. But the effect of S. 266 (3) is that the power of the co-sharers is severally limited to recoveries of money due to them from the tenants. The Act is silent as to who is entitled to admit tenants or eject them or eject trespassers. The reason is that any recognition of the right of an individual co-sharer to so admit or eject tenants or trespassers would destroy the jointness of the property. There is also no provision made for the case where a co-sharer may by usage or special contract receive separately the whole rent of a particular tenant or particular tenants, presumably because if the tenants are, so to speak, divided up amongst the co-sharers, each individual co-sharer becomes the landlord of that tenant and for all practical purposes the so-called joint undivided property becomes a congeries of specific properties held in severalty. (*Drake Brockman,*

AGRA TENANCY ACT (1926), S. 270.

S.M. and Knox, J.M.) SEELO *v.* KURYA SINGH. **1936 R.D. 114.**

——Ss. 267 (2) and 242 (3)—*Revenue Court returning appeal for presentation to Civil Court—Civil Court disagreeing with view of Revenue Court—Procedure.*

Where the Revenue Court returns the memorandum of appeal for presentation to the Civil Court on the ground that as the finding of the Court below that the respondents have proprietary rights in the land in suit is being challenged in appeal, the proper forum is the Civil Court according to S. 242 (3), and if the appeal is presented to the Civil Court, it is the duty of the Civil Court, if it disagrees with the view expressed by the Revenue Court, to submit the record to the High Court with a statement of the reasons for his disagreement under S. 267 (2) of the Agra Tenancy Act. (*Darling, S.M.*) AHSAN ALI KHAN *v.* GORI LAL. **1937 R.D. 244 (1).**

——S. 268—*Applicability.*

S. 268 applies only to cases in which, if rightly instituted in a Civil or Revenue Court, an appeal lies to the District Judge according to law and cannot consistently with other provisions of the Act (S. 230 and S. 242), be applied to suits wrongly instituted in a Civil Court, in which, if rightly instituted in the Revenue Court, an appeal would have lain on the revenue side. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH. **I.L.R.(1938) All. 754=177 I.C. 450=11 R.A. 199 =1938 A.L.R. 747=1938 A.L.J. 720=1938 A.W. R. (H.C.) 522=1938 R.D. 714=A.I.R. 1938 All. 511.**

——S. 269 (1)—*Suit for enforcement of charge for arrears of rent in Civil Court—Dismissal on ground of suit being cognisable in Revenue Court —Appeal to District Judge—Transfer to Subordinate Judge—Jurisdiction of latter to determine appeal.*

A suit to enforce a charge for arrears of rent was dismissed as being cognisable by a Revenue Court. An appeal was taken to the District Judge who transferred it to a Subordinate Judge for trial.

Held, even if the suit were not cognisable in the Civil Court—which was not the case—the Subordinate Judge had jurisdiction to hear the appeal, and having all the materials before him, should hear and determine it under S. 269 (1) of the Agra Tenancy Act. (*Harries and Rachhpal Singh, JJ.*) MAHOMED ASHRAF ALI KHAN *v.* BEHARI LAL. **169 I.C. 1004=10 R.A. 89=1937 A.L.J. 511=1936 R.D. 2=A.I.R. 1937 All. 478.**

——S. 270—*Applicability—Suit for arrears of rent by co-sharer—Plea of payment to another co-sharer—Latter becoming co-sharer only in year previous to year of suit—If valid defence to suit.*

Under S. 270 of the Agra Tenancy Act a person to whom the tenant pleads payment of rent in good faith must be a person to whom he has been paying up to the date of the institution of the suit for rent. A person who has come in as co-sharer only in the year just preceding the year of suit is not such a person and a payment to such a person is not a valid defence to a suit for rent by the other co-sharer. S. 270 is not applicable to such a case. (*Drake Brockman, S.M. and Knox, J.M.*) MAN SINGH *v.* ROSHAN. **1936 R.D. 230.**

AGRA TENANCY ACT (1926), S. 270.

——S. 270 (2)—*Scope of—Decree against third person impleaded under S. 270 (1)—If can be passed.*

Cl. (2) of S. 270 of the Agra Tenancy Act contemplates a separate suit which may be brought by the landholder to recover his arrears of rent from the third person to whom the tenant might have paid the rent in question in good faith, or to get his proprietary right in the holding determined against the third person. S. 270 does not provide for the passing of any decree against the third person who may be impleaded under its provisions, and the reason is obvious. (*Ganga Nath, J.*) LAKSHMI NARAIN *v.* HARISH CHANDER **1940 A.L.J. 365=1940 A.W.R. (H.C.) 337=A.I.R. 1940 All. 339.**

——S. 271—*Dispute as to shares in suit for profits—Prior decision of Civil Court—Reference to Civil Court—Necessity.*

In a suit for profits though there is a dispute as to the exact shares of the parties, it is unnecessary to refer the case to a Civil Court, where the parties have already resorted to it and the decision of that Court was before the Revenue Court on a prior occasion in connection with a previous profits case. The decision in the earlier profits case will operate as *res judicata*, at least as regards the shares of parties. (*Darling, S.M. and Bomford, J.M.*) SHIVA BANS PANDEY *v.* RAJMAN PANDEY. **1938 A.L.J. (Supp.) 84=1938 A.W.R. (B.R.) 300=1938 R.D. 441.**

——S. 271—*Jurisdiction—Civil and Revenue Courts—Dispute as to whether defendant is a mortgagee of* sir *or not.*

Where there is a dispute as to whether a defendant is a mortgagee of *sir* or not, it is for the Civil Courts to decide that question. (*Darling, S.M. and Bomford, J.M.*) RAMAKANT SINGH *v.* BENI MADHO SINGH. **1938 A.W.R. (B.R.) 334=1938 R.D. 397.**

——S. 271—*Scope—Dispute as to proprietary right—Jurisdiction of Revenue Court—Decision by Revenue Court—Finality of.*

Under S. 271, Agra Tenancy Act, read with the Explanation (1) if there is a real and *bona fide* dispute between the parties upon the question of proprietary right, that question must be submitted to a competent Civil Court for decision and the Revenue Court should not decide the same. The Revenue Court has only power to decide the whole suit where it is clear that the question of proprietary right has already been decided by a competent Court. But where there is a real doubt about the matter, it is the duty of the Revenue Court to send an issue on the point to the Civil Court for a decision; and if it decides a question of proprietary right when it ought not to do so, its decision is without jurisdiction and the decree is a nullity and is not a final decision between the parties, which would prevent either of them from raising the question again. (*Harries and Rachhpal Singh, JJ.*) UBAID-ULLAH KHAN *v.* ABDUL JALIL KHAN. **I.L.R (1937) All. 628=170 I.C. 657=10 R.A. 142=1937 R.D. 302=1937 A.L.R. 699=1937 A.L.J. 979=1937 A.W.R. 539=A.I.R. 1937 All 481.**

——S. 271—*Suit for ejectment—Defendant claiming proprietary title and possession—Procedure.*

Where in a suit for ejectment of the defendant as a trespasser under S. 44 of the Tenancy Act,

AGRA TENANCY ACT (1926), S. 271.

the defendant sets up a definite claim for proprietary title and possession, the Court should frame an issue on the question of proprietary title and then submit the record to the competent Civil Court for the decision of this issue. (*Darling, S.M. and Bomford, J.M.*) ABDUL LATIF KHAN *v.* SHANTI SARAN. **1937 R.D. 506.**

——S. 271 (1)—*Applicability.*

Sub-S. (1) of S. 271, Agra Tenancy Act, applies only to a case where the original tenant pleads that he is not a tenant but that he had a proprietary right in the land. But it cannot apply to a case where such a plea is raised not by the original tenant but by a defendant added under S. 270 (1) of the Act. (*Iqbal Ahmad and Bajpai, JJ.*) RISAL SINGH *v.* HIRA. **I.L.R. (1940) All. 117=188 I.C. 74=1940 A.W.R. (H.C.) 12=1940 R.D. 11=1940 A.L.J. 24=A.I.R. 1940 All. 197.**

——S. 271 (1) (a)—*Scope—Suit under S. 44—Defendant setting up mortgage right—Mortgage not denied—Question of proprietary right, if raised—Jurisdiction of Revenue Court.*

Where in suit under S. 44, the defendant pleads that he is a mortgagee and the mortgage is not denied, it is not open to the defendant to contend that the defence raises a question of proprietary right, so as to necessitate the sending of an issue to the Civil Court for decision. And when the point is raised for the first time in second appeal before the Board of Revenue it is without force. The question whether the defendant is a mortgagee of the plaintiff is one of fact, as also his status, and is a point for the Revenue Courts to decide. (*Bomford, J.M.*) SACHITANAND PANDEY *v.* SHIVA SARAN RAI. **1938 R.D. 125=1938 A.W.R. (B.R.) 70.**

——S 271 (4)—*Decree after Civil Court's finding—Appeal—Forum.*

Where on a question of proprietary right being raised by the defendant the matter is referred to a Civil Court and on receipt of its finding an Assistant Collector passes a decree, it becomes appealable to the Civil Court (*i.e.*) District Judge, if a question of proprietary right is in issue in appeal also. (*Iqbal Ahmad and Bajpai, JJ.*) RISAL SINGH *v.* HIRA. **I.L.R. (1940) All. 117=188 I.C. 74=1940 A.W.R. (H.C.) 12=1940 R.D. 11=1940 A.L.J. 24=A.I.R. 1940 All. 197.**

——S. 271 (4)—*Scope—Suit under S. 44—Dispute as to proprietary right—Reference to Civil Court—Compromise and decision accordingly—Subsequent finding by Revenue Court that compromise invalid owing to incompetency of parties—Appeal—Forum—District Judge or Commissioner.*

In a suit for ejectment under S. 44 of the Agra Tenancy Act, an issue relating to proprietary rights in the land in suit was referred to the Civil Court and in the Civil Court there was a compromise between the parties as to that issue. When the case came back to the Revenue Court it was found that the parties who effected the compromise were not competent to do so and therefore the compromise was invalid.

Held, that the dispute regarding proprietary right was still in issue, and an appeal from the decree in the suit therefore lay to the District Judge under S. 271 (4) of the Act and not to the Commissioner. (*Drake Brockman, S.M. and Knox, J.M.*) PARMANAND LAL *v.* ACHHAIBAR PANDE. **1936 R.D. 231.**

AGRA TENANCY ACT (1926), S. 271.

——Ss. 271 and 242 (3)—*Claim of proprietary right—Procedure to be followed—Decision of issue by Assistant Collector—Appeal—Forum.*

Where the written statement raises a clear claim of proprietary right, under S. 271 of the Agra Tenancy Act, the Assistant Collector ought to frame an issue and send it for decision to the Civil Court. If instead of that he decides the issue himself, an appeal against his decision lies to the District Judge only under S. 242 (3), as the question of proprietary right is still in issue in the appeal. Where the appeal is preferred to the Commissioner, he has no jurisdiction to hear it, and he has only to return it for presentation to the proper Court. (*Bomford, S.M. and Mehta, J.M.*) RAM GOPAL *v.* BABU RAM. **1939 R.D. 128.**

——S. 273—*Appeal—Decision by Revenue Court on issue referred by Civil Court—Order reviewing decision—Appeals from first decision and from that passed on review—Competency.*

Where an issue is framed by the Civil Court and referred to the Revenue Court under S. 273 of the Agra Tenancy Act as to whether the relationship of landlord and tenant exists between the parties and decided by the Revenue Court, no appeal lies from the decision of the Revenue Court or against an order passed on an application for review of such decision altering or setting aside the previous finding on the issue referred. The only remedy open to the aggrieved party is to prefer an appeal from the final decree passed by the Civil Court. and therein challenge the finding of the Revenue Court. (*Sulaiman, C.J. and Bennet, J.*) IOKHAI *v.* JAWAHIR LAL. **I.L.R. (1937) All. 699=1937 A.W.R. 471=1937 R.D. 271=1937 A.L.J. 521=170 I.C. 17=10 R.A. 103 =1937 A.L.R. 649=A.I.R. 1937 All. 500.**

——Ss. 273 and 268—*Suit instituted in Court of Munsiff having jurisdiction—Reference by him to Revenue Court—Objection in appeal to such reference—Maintainability.*

Where a suit is instituted in the Court of a Munsiff having jurisdiction and the Munsif makes a reference under S. 273 of the Agra Tenancy Act to the Revenue Court, and the District Judge, on appeal, has the case fully before him, no objection on the ground that the Munsif has committed an error of procedure in making the reference can, on the analogy of S. 268, be maintained by the appellate Court. (*Sulaiman, C.J. and Bennet, J.*) NANDAN SINGH *v.* PHUNESH SINGH. **167 I.C. 397=9 R.A. 528=1936 R.D. 543=1937 A.L.R. 188=1936 A.W.R. 1085=1937 A.L.J. 46=A.I.R. 1937 All. 105.**

——S. 273 (1)—"*Agricultural holding*"—*Land taken for growing vegetables.*

Agriculture in the broad sense includes the growing of vegetables. Land taken for the cultivation of vegetables is, therefore, agricultural holding within the meaning of S. 273 (1) of the Agra Tenancy Act. (*Sulaiman, C.J. and Bennet, J.*) NANDAN *v.* PUNESH SINGH. **167 I.C. 397=9 R.A. 528=1936 R.D. 543=1937 A.L.R. 188=1936 A.W.R. 1085=1937 A.L.J. 46=A.I.R. 1937 All. 105.**

——Sch. II, List I—Revenue Court decree—Execution -- Procedure — Revenue Manual — Applicability—C. P. Code, Ss. 68 to 72 and O. 21. *See* C.P. CODE, SS. 68, 69, 70, 71 AND 72. **1936 R. D. 197.**

AGRA TENANCY ACT (1926), Sch. II.

——Sch. II, No. 10—*Scope—Set-off effected by parties on agreement—Recognition by Court—If barred.*

What Sch. II, No. 10 of the Agra Tenancy Act forbids, is a set-off by the Court. The Court is not prohibited from giving effect to a set-off already agreed on by the parties. There is a clear distinction between a case in which a Court is called upon to allow a set-off and one in which it is merely asked to recognise a set-off already made by the parties themselves. The latter is not prohibited by No. 10 of Sch. II of the Act. (*Niamatullah, J.*) NITANAND *v.* ROOP NARAIN. **169 I.C 15=9 R.A. 723=1937 A.L.R. 487=1937 A.L.J. 183=1937 A.W.R. 168=1937 R.D. 129= A.I.R. 1937 All. 320.**

——Sch. II, Serial No. 10—*Scope—Suit under S. 222 for recovery of defendant's share of revenue paid by plaintiff—Plea that plaintiff paid same out of funds due to defendant in his hands out of collections—Plaintiff's father as lambardar and not accounted for—If open—Duty of plaintiff to account and prove that payment was out of his own pocket.*

In a suit under S. 222, Agra Tenancy Act, for recovery of the defendant's share of the revenue paid by the plaintiff, the defendant pleaded that the plaintiff's father who was the lambardar at the time of the alleged payment did not make the collections diligently on behalf of all the co-sharers as he ought to, and in consequence of his negligence arrears were not collected, and the plaintiff as representing his father was liable to pay the defendant the latter's share of the profits at the time his father was lambardar. The plaintiff was never the lambardar, and after the death of his father, which occurred in the year in which he paid the revenue, and before a new lambardar was appointed every co-sharer collected for himself.

Held, that the defendant's plea was in substance a plea of set-off which could not be entertained in view of serial No. 10 of schedule to the Agra Tenancy Act, and that the defendant should, if he wanted to raise the question, should do so by a separate suit; (2) that the plaintiff, having paid revenue to Government, was entitled to call upon the defendant to contribute his share of the revenue; and (3) that the plaintiff was not to establish that the payment had been made out of his pocket and not out of the funds of the defendants in his hands before he could get a decree. (*Niamatullah and Allsop, JJ.*) SRI RAM *v.* JAI KISHAN LAL. **I.L.R. (1938) All. 79=1938 R.D. 66=1938 A.L.R. 57=172 I.C. 964=10 R.A. 448 1937 A.W.R. 1075=1937 A.L.J. 1237=A.I.R. 1938 All. 37.**

——Sch. II, Serial No. 10—*Suit for arrears of rent—Plea of discharge of liability by agreement —If open.*

In a suit for arrears of revenue, there is nothing to prevent a defendant in the Revenue Court from pleading that the liability incurred by him has been legally discharged by a prior agreement with the plaintiff under which the amount due as revenue had been set-off against a prior debt. It is not a 'set-off' as is contemplated by O. 8, R. 6, C. P. Code. (*Allsop, J.*) RAMANUJ DAS *v.* RAM SAMUKH DAS. **1940 A.W.R. (H.C.) 285=1940 R.D. 185=1940 A.L.J. 372.**

AGRA TENANCY ACT (1926), Sch. IV.

——Sch. IV, Group A—*Suits under—Appeal to District Judge—When lies.*

It is not in every suit in Group A of Sch. IV of the Agra Tenancy Act that an appeal lies to the District Judge. No appeal lies when the value of the subject-matter of the suit is below Rs. 200. (*Drake Brockman, S. M. and Knox, J.M.*) IMAM BAKSH *v.* LAIQ-UN-NISSA. **1936 R.D. 45.**

——Sch. IV, Group A—Suit under S. 271—Appeal to District Judge—When lies. *See* AGRA TENANCY ACT, S. 227. **1936 R.D. 49.**

——Sch. IV, Group B, Serial No. 2—*Starting point—Suit under S. 44—Date of unauthorised occupation within 12 years—Onus of proof as to.*

A suit under S. 44 of the Agra Tenancy Act is governed for purposes of limitation by Serial No. 2 of Group B of Sch. IV of the Act and the period of 12 years must be computed from the date when the landlord first knew of the unauthorised occupation of the land by the defendant; the plaintiff must prove that he obtained such knowledge within 12 years of the suit. (*Niamatullah, J.*) HAMIDUDDIN *v.* AKBAR HUSAIN. **169 I.C. 628=10 R.A. 43=1937 A.L.R. 568 (1)=1937 A.L.J. 413=1937 A.W.R. 337=A.I.R. 1937 All. 372.**

——Sch. IV, Group B, Serial No. 12—Applicability—Wrongful dispossession—When commences. *See* AGRA TENANCY ACT, SS. 99 AND 123. **1937 R.D. 507.**

——Sch. IV, Group F, Serial No. 3 or 5—*Applicability—Decree—Nature—Test.*

In order to determine whether a decree falls under Serial No. 3 or 5 of group F of the Sch. IV of the Tenancy Act, the only question for consideration is the nature of the decree. If not only costs are included in the decree but an order for abatement, ejectment or some other matter, then the costs are only subsidiary and the decree is not a money decree. If however the decree gives no relief whatever apart from costs then it is a money decree. (*Harper, J.M.*) UMA SHANKER *v.* SIDDHESHWAR PRASAD. **1940 R.D. 133=1940 A.W.R. (B.R.) 51 (2).**

——Sch. IV, Group F, Serial Nos. 3 and 5—*Suit for abatement of rent remanded by Board to Assistant Collector—Suit compromised before him and rent abated—Application for realisation of costs awarded to Zamindar in Court of Commissioner and Board—Limitation.*

Where a suit for abatement of rent was remanded by the Board back to the Court of the Assistant Collector before whom the suit was compromised and rent was abated, an application by the defendant zamindar for the realisation of costs awarded to him in the Court of the Commissioner and the Board falls under Serial No. 5 and not Serial No. 3 of Group F of Sch. IV of the Tenancy Act. The limitation is only one year. (*Darling, S.M.*) KHALIL AHMAD *v.* DALTUA. **1937 R.D. 448.**

——Sch. IV, Group F, Serial No. 5—*Wrongful ejectment of tenants in proceedings under S. 79—Subsequent cancellation of on review—Order cancelling ejectment—If decree.*

In a case tenants were ejected in proceedings under S. 79 of the Tenancy Act for failing to meet a decree for arrears of rent. On review the order of ejectment was cancelled in execution proceedings, as it was found that the decretal sum had been paid in full, and the order of ejectment had been wrongly passed. The tenants applied for delivery of possession more than a year after this order.

Held, the order cancelling the order of ejectment is not a decree and does not fall under Sch. IV, Group F, Serial No. 5 of the Agra Tenancy Act. The only section under which the ejected tenants could be put back in possession of their holding is S. 144 of the C. P. Code. The limitation for recovery of possession is three years under Art. 181, Limitation Act. (*Darling, S.M. and Bomford, J.M.*) HOTI *v.* GANGADHAR. **1937** R.D. 509.

AGRA ZAMINDARS' ASSOCIATION RULES AND REGULATIONS, R. 5 (1)—Right to membership of Association—Qualification—Representative of family paying land revenue amounting to Rs. 1,500—If qualified—If elector for landholder's constituency—Electoral Rules, R. 11. *See* U. P. ELECTORAL RULES, SCH. II, R. 11. **1937 A.L.J. 135 (F.B.)**

AGRICULTURISTS' LOANS ACT (XII OF 1884), S. 4—Applicability—Loan for weeding land and making pavement—If one under Act. *See* LAND IMPROVEMENT LOANS ACT, S. 4. **41 Bom. L.R. 257.**

——S. 4 and Land Improvements Loans Act, S. 4—Relative scope and operation of. *See* LAND IMPROVEMENTS LOANS ACT, S. 4. **(1939) 2 M.L.J. 23.**

AJMER COURTS REGULATION (I OF 1877), Ss. 14, 15 and 17—*Appeal against order of abatement by first appellate Court—If competent.*

An appeal against an order of the first appellate Court that an appeal had abated, is not competent under any of the Ss. 14, 15 or 17 of the Ajmer Courts Regulation. (*Weston.*) MANGI LAL *v.* GOPI NATH. **1937 A.M.L.J. 107.**

——S. 15—*Decree modified by lower appellate Court in favour of appellant—Actual point decided against—Right of second appeal.*

Where the lower appellate Court modifies the decree of the trial Court in favour of a party, but the point raised in second appeal is actually decided against him, a second appeal by him is not barred under the Ajmer Courts Regulation. (*Norman, I.C.S.*) DURGAH KHWAJA SAHIB *v.* GIRDHARI. **1936 A.M.L.J. 108.**

——S. 15—*Second appeal—Maintainability—Grounds—Order by appellate Court that appeal abated—Second appeal—Revision.*

Under Regulation I of 1877 a second appeal lies only when the decision of the original Court has been modified or reversed in first appeal, and not otherwise. When the appellate Court has passed an order that the appeal has abated on the ground that the legal representatives of a deceased appellant have not been brought on the record within the time limited, no second appeal lies. The case is also not one in which a reference can lie under S. 17, for a reference under the Regulation is restricted to points of law upon which the first appellate Court has upheld the trial Court's decision. Further a right of reference under certain circumstances would not oust the revisional jurisdiction of the Judicial Commissioner when those circumstances do not exist. The case can therefore be considered as a revision application and dealt with on that footing. (*Weston, I.C.S.*) ABDUL AZIZ *v.* AMIR ALI. **1935 A.M.L.J. 102.**

AJMER COURTS REGN. (1877), S. 17.

——S. 17—Reference—Competency — Order declaring appeal has abated—Reference—If can be made—Revision—Competency. *See* AJMER COURTS REGULATION, S. 15. **1935 A.M.L.J. 102.**

——(IX OF 1926)—*Applicability—Execution proceeding continuing from before the coming into force of Regulation of* 1926—*Reference to High Court under old Regulation—Objections causing the reference filed after new Regulation—Reference, if competent.*

An execution proceeding had been continuing from before the coming into of the Ajmer Courts Regulation of 1926. A reference was made to the High Court under Ss. 17 and 18 of the old Regulation I of 1877 in connection with certain objections which were filed after the new Regulation of 1926 came into force. A point was raised that the reference was incompetent as the case was governed not by the old Regulation but by the new Regulation under which no reference could be made to the High Court.

Held, that the reference should be heard because of an order of the High Court passed on a previous reference arising out of some execution proceedings between the same parties that a reference was competent. (*Sulaiman, C.J., Rachhpal Singh and Allsop, JJ.*) ALE RASUL *v.* BALKISHEN. **167 I.C. 21=9 R.A. 506=1937 A.L.J. 204=1937 A.W.R. 70=1937 A.L.R. 162=A.I.R. 1937 All. 144 (F.B.).**

——(as amended in 1932). S. 21—*Scope—Agent empowered by jagirdar—If a recognized agent under O. 3, Rr. 1 and 2 to C. P. Code.*

According to S.21 of the Ajmer Courts Regulation as amended in 1932 in additions to the persons mentioned in O. 3, R. 2, C. P. Code, a person specially empowered to act as his agent by a jagirdar to whom a sanad has been granted, shall be deemed to be a recognized agent for the purposes of O. 3, Rr. 1 and 2, C. P. Code. (*Davies.*) DURGAH KHAWAJA SAHIB *v.* JATAN LAL. **1940 A.M.L.J. 5.**

——S. 24—*Exemption under—If extends to benefits arising from land.*

The exemption from attachment and sale given by S. 24 of the Ajmer Courts Regulation is confined to land and does not include benefits arising from land. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L.J. 89.**

——S. 24—Lands exempted under—Receiver in respect of—If can be appointed. *See* CIVIL PROCEDURE CODE, S. 51. **1937 A.M.L.J. 89.**

AJMER FOREST REGULATION (VI OF 1874), S. 2—*Forest officer—Forest guard, if a forest officer.*

A forest guard since he is not appointed by the Chief Commissioner is not a forest officer. (*D. R. Norman.*) JAS RAJ *v.* EMPEROR. **1939 A.M.L.J. 90.**

——S. 9—*Bye-laws under—Bye law V—Zamindar—Meaning of.*

The persons termed 'zamindars' in the bye-laws framed under S. 9 of the Ajmer Forest Regulation, are a clearly defined group and their common feature is not that they own land outside the forest, but that they once owned the land which has been declared to be forest and who are entitled to get a share of forest profits. (*D. R. Norman.*) JAS RAJ *v.* EMPEROR. **1939 A.M.L.J. 90.**

AJMER LAND & REV. REGN. (1877), S. 67.

AJMER GOVERNMENT WARDS REGULATION (I OF 1888), S. 17—*Sanction for sale—If refers only to private sale.*

S. 17 of the Ajmer Government Wards Regulation which requires the sanction of the Chief Commissioner to the sale of property by the Court of Wards obviously refers to a private sale. (*D. R. Norman.*) BENI PRASAD *v.* SARFRAZ ALI. **1939 A.M.L.J. 85.**

——S. 21—*Suit for* Hasil *Nature of—Permission from Court of Wards—Necessity.*

Suit for *Hasil* is a suit for rent and as such sanction of the Court of the Wards is not necessary. Rent is not confined to an obligation arising out of express contract. *Hasil* is not a share of the land revenue assigned to the Istimarardar. The term 'Land revenue' applies only to Government dues. (*D. R. Norman.*) BAHADUR *v.* ABDUL RAHMAN KHAN. **1937 A.M.L.J. 62.**

——S. 22—*Scope and applicability—Mortgage prior to estate coming under Court of Wards.*

S. 22 of Ajmer Government Wards Regulation lays down that a Government Ward is incompetent to charge his property, but where the mortgage was in point of time, executed prior to the estate of the Ward coming under the Court of Wards, the section has no application. (*D. R. Norman.*) BENI PRASAD *v.* SARFRAZ ALI. **1939 A.M.L.J. 85.**

AJMER LAND AND REVENUE REGULATION (II OF 1877), S. 9—*Scope—Sub-division of ownership—If prohibited.*

The prohibition contained in S. 9 of the Regulation is only as regards the division of liability to pay land revenue beyond a defined minimum share; it does not prohibit the sub-division of ownership beyond that minimum. (*Norman.*) BIRDHI *v.* SURAJMAL. **1936 A.M.L.J. 23.**

——Ss. 65 (3) and 68—*Settlement record—Entry as to party holding share in each unit—If evidence of non-division of shares.*

A statement in the settlement records that each of the parties holds a share in each unit is no evidence that the shares are not divided and separately owned, as opposed to a tenancy in common. (*Norman.*) BIRDI *v.* SURAJMAL. **1936 A.M.L.J. 23.**

——Ss. 67 and 69—*Entry in settlement record—Value of—Suit for declaration of title—Cause of action.*

There is nothing in any of the laws applicable to Ajmer-Merwara, to warrant the statement that an entry in the settlement record either creates or takes away any right or title. An entry is only a piece of evidence to which a presumption of correctness attaches, and this presumption is rebuttable. A right to sue for declaration of title will arise onlywhen there is any invasion of title. The mere fact that a settlement entry is adverse to title, will not debar a person for all time from seeking for a declaration of his title. (*Weston.*) ABDUL HAKIM KHAN *v.* MATHURA. **1938 A.M.L.J. 33.**

——Ss. 67 and 69—*Revenue records—Entry in—Presumption of correctness—Earlier and later entry.*

Although the presumption of correctness would attach to the later entry rather than to the earlier one. yet when the earlier entries are supported by substantial evidence while the later entry is supported by none, that presumption of

correctness is thereby sufficiently rebutted. (*Weston.*) ABDUL HAKIM KHAN *v.* MATHURA. **1938 A.M.L.J. 33.**

——**Ss. 68, 69 and 70**—*Effect on Patwari Cess Regulation—Extent of repeal—Repeal of Patwari's Cess Regulation—Effect.*

Ss. 68, 69, paras 2 and 70 of the Ajmer Land and Revenue Regulation were repealed by S. 6 of the Ajmer Patwaris Cess Regulation as regards those estates which are mentioned in the schedule to the latter Regulation. But they are still in force as regards other estates; and though the Patwari's Cess Regulation itself has since been repealed, that cannot revive any law repealed by it. (*D. R. Norman.*) SHAMLAT COMMITTEE *v.* BHAGWAN SINGH. **1937 A.M.L.J. 1**

——**S. 69**—*Mutation—Grounds for—Punjab Land Revenue Act, Ss. 34 to 37—Effect of.*

S. 69 of the Ajmer Land and Revenue Regulation only authorises mutations on account of something which happens after the settlement. The application of Ss. 34 to 37 of the Punjab Land Revenue Act to Ajmer has not changed the law in this respect. These sections give no power to amend a settlement record except on acccunt of something occurring subsequently. (*D. R. Norman.*) SHAMLAT COMMITEE *v.* BHAGWAN SINGH. **1937 A.M.L.J. 1.**

——**S. 69 (2)**—Applicability—Muafi estate—Punjab Land Revenue Act, S. 37—Scope and effect of. *See* AJMER PATWARI'S CESS REGULATION, S. 3. **1937 A.M.L.J. 1.**

——**S. 119**—*Bar of civil suit—Scope and extent of—Recovery of hasil—Suit on title, if barred.*

Though there may be a prayer for declaration of the plaintiff's right as *muafidar*, if the suit is really one for recovery of hasil, it is not barred by S. 119 of the Land and Revenue Regulation. No provisions exist in the Regulation for recovery of hasil through revenue officers. The Regulation does not bar suits on title unless a copy of the settlement record in the name of the plaintiff is produced with the plaint. (*Weston.*) UMRAO MAL *v.* GOPI NATH. **1938 A.M.L.J. 63.**

——**S. 119 (b)**—*Bar of civil suit—Scope and limit of the rule as to.*

The restriction on the jurisdiction of Civil Courts created by S. 119 of the Land and Revenue Regulation should be construed strictly. It was intended merely to prevent interference through the medium of Civil Courts with final decisions taken by revenue officers. A suit to obtain a declaration which may be used as evidence before a revenue officer and a suit to obtain an order directly within the province of the revenue officer are quite different. Clearly a civil suit to eject a tenant at will or a suit to restrain ejectment by injunction is barred by S. 119. But a decree of declaration is not an executable decree and it may not be binding on the revenue officials. S. 119 cannot be held to be a bar to such a decree being given. (*Weston.*) ABDUL HAKIM KHAN *v.* MATHURA. **1938 A.M.L.J. 33.**

AJMER LAND AND REVENUE RULES (1895), R. 18 (e)—*Applicability*—Chahi *land—Well-water not used in particular year—If makes land non*-chahi.

Chahi land, that is land irrigated by a well, does not cease to be *chahi* because it is not necessary in any particular year to use the well-water. R. 18 (*e*) of the Ajmer Land and Revenue

Rules would only apply when the character of the land has been permanently changed. (*Norman, I.C.S.*) GIRDHARI *v.* DURGAH KHAWAJA SAHIB. **1936 A.M.L.J. 128.**

AJMER LAWS REGULATION (III OF 1877), S. 8—*Right to pre-empt all the properties sold—Pre-emptor if can pick and choose only one.*

Where a pre-emptor had a right of pre-emption in more than one of several properties sold, he cannot pick and choose and claim to pre-empt only one of them. (*D. R. Norman.*) GHULAM CHISTY *v.* FATEH MOHAMMED. **1939 A.M.L.J. 77.**

——**S. 33**—*Construction—"Which may be decreed in the suit"—Effect of—Interest—Award of—Limits.*

The words "which may be decreed in any suit", in S. 33 of the Ajmer Laws Regulation, which contains the rule of *damdupat* in the province, limit the meaning of the words "principal sum" to the principal claimed in the suit and not the amount originally advanced when part of it has been repaid before suit. (*D. R. Norman.*) RIDHA KARAN *v.* JIWAN. **1937 A.M.L.J. 26.**

——**S. 33**—*Interest—Decree for—Limits.*

S. 33 of the Ajmer Laws Regulation lays down that interest which may be decreed by a Civil Court may not exceed the amount of the principal sum of money received by the defendants. In this particular case an account was directed to be taken of sums of money and the value of the goods and so forth actually advanced, and it was ordered that in the matter of interest an equivalent sum to this sum and no more should be added and decreed. (*Davies.*) MEHTA SURAT SINGH *v.* AMAR SINGH. **1939 A.M.L.J. 161.**

AJMER MUNICIPAL REGULATION (VI OF 1925)—*Rules—Lease of Nazul land within municipality—Sanction of Chief Commissioner—Necessity.*

Under the rules framed under the Ajmer Municipal Regulation for the sale and lease of Nazul land within municipal limits, sanction of the Chief Commissioner is required only to leases for more than a year. The rules have no restrospective application and cannot invalidate leases granted before the rules. (*D. R. Norman.*) GHULAM HUSAIN *v.* MUNICIPAL COMMITTEE, AJMER. **1937 A.M.L.J. 12.**

——**S. 234**—*"Other moneys payable"—Rent—If recoverable summarily.*

Rent for lands owned by the Municipality is not money payable under a Regulation or Bye-law, and is not covered by the expression "other moneys payable", in S. 234 of the Ajmer Regulation. Such rent cannot therefore be recovered by summary process under S. 234 (*Norman.*) MUNICIPAL COMMITTEE, AJMER *v.* VAKIL & Co. **1936 A.M.L.J. 7.**

——**S. 245 (e) (i)**—*Fixing of rent—Power of Municipal Committee.*

S. 245 (*e*) (*i*) of the Ajmer Municipal Regulation does not authorize the fixing of rent. (*Norman.*) MUNICIPAL COMMITTEE, AJMER *v.* VAKIL & Co. **1936 A.M.L.J. 7.**

AJMER PATWARI CESS REGULATION (1877), S. 3—*Applicability to muafi estate—Punjab Land Revenue Act, S. 37—Applicability—Land and Revenue Regulation, S. 69 (2)—Effect of.*

AJMER PATWARI CESS REGN. (1877), S.6.

A muafi estate is one to which the Patwari Cess Regulation applies. S. 69 (2) of the Land and Revenue Regulation does not apply to such an estate. Whether S. 69 (2) of the latter Regulation is or is not law in Ajmer, S. 37 of the Punjab Land Revenne Act, which was applied to Ajmer in 1895 is law in Ajmer, and as that is later than the Land Revenue Regulation, S. 69 (2) of the latter cannot limit any powers contained in S. 37 of the Punjab Land Revenue Act as applied to Ajmer. (*D. R. Norman.*) SHAMLAT COMMITTEE *v.* BHAGWAN SINGH. **1937 A.M. L.J. 1.**

——**S. 6**—Effect on Land Revenue Regulation. *See* AJMER LAND AND REVENUE REGULATION, SS. 68, 69 AND 70. **1937 A.M.L.J. 1.**

AJMER RURAL BOARDS REGULATION (VI OF 1886), S. 2—*Right of landholder or jagirdar to levy local right from tenants.*

Regulation VI of 1886 only provides for the levy of local rate by Government from all landholders, but it does not provide for the levy of local rates by a landholder or jagirdar from his tenants. (*Norman, I.C.S.*) DURGAH KHWAJA SAHIB *v.* GIRDHARI. **1936 A.M.L.J 108.**

ALLAHABAD GENERAL RULES (CIVIL), Chap. 21, R. 1—*Fees to legal practitioner—Inclusion in decree—Duty of Judge to be satisfied as to its payment.*

The Judge has to satisfy himself that the fee of the legal practitioner has been paid before the amount is included in the decree. He may of course accept a certificate given by the legal practitioner if it is unrebutted, or in any case if he believes it in preference to any other evidence which may be before him. (*Allsop, J.*) SARJURAM SAHU *v.* MT DULARNA BIBI. **162 I.C. 53 (1)=8 R.A. 824=1936 A.W.R. 384=1936 A.L. J. 507=A.I.R. 1936 All. 652.**

ALLAHABAD HIGH COURT RULES, Chap. 1, R. 1 (4)—*Application under S. 5, Limitation Act—Power of Single Judge to hear—Appeal not cognizable by him.*

Even though the appeal under which an application under S. 5,Limitation Act, is made, cannot be heard by a single Judge, being valued at more than Rs. 1,000 but less than Rs. 2,000 he can hear an application under S. 5, Limitation Act, made in that appeal if the applicant has not valued it at a sum exceeding Rs. 2,000. (*Niamatullah and Bajpai, JJ.*) DURGA *v.* LAKHPAT RAI. **160 I.C. 876=8 R A. 657 (2)=1936 A.W.R. 63= 1936 A.L.J. 1=A.I.R. 1936 All. 139.**

——**Chap. 1, R. 1 (4)**—*Application under S. 5 of Limitation Act—Valuation—Duty of office.*

Chapter 1, R. 1 (4) requires at least by implication that an application thereby contemplated should be specifically valued and such valuation should appear on the face of it. Where any application is found to be not valued the counsel should be called upon to state the valuation which will determine the jurisdiction of the Bench under that rule. The office are not justified in assuming that the value of an application under S. 5, Limitation Act, which is not specifically valued, cannot exceed the value of appeal. (*Niamatullah and Bajpai, JJ.*) DURGA *v.* LAKHPAT RAI. **160 I.C. 876=8 R.A. 657 (2)=1936 A. W.R. 63=1936 A.L.J. 1=A.I.R. 1936 All. 139.**

ALLUVION AND DILUVION.

ALLUVION AND DILUVION—*Accretion—Lanka—Whether accretion—Gradual formation—Meaning of.*

It cannot be laid down invariably that a lanka is not an accretion at all because its formation has not to be proved to be gradual. The recognition of title by alluvial accretion is largely governed by the fact that this accretion is due to the normal action of physical forces; the word "gradual", in reference to the formation, with its qualifications, only defines a test relative to the conditions to which it is applied. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR. **182 I.C. 682=12 R M. 121=1938 M.W.N. 301=47 L.W. 163=A.I. R. 1938 Mad. 470.**

——Accretion—Ownership of identifiable land—Determination—General rule as to—Custom—Onus. *See* BENGAL ALLUVION AND DILUVION REGULATION, SS. 2 AND 4—ACCRETION. **1939 A.L.J. 708.**

——*Accretion in river-bed formed in one season—Accretion remaining unchanged—Accretion, if belongs to riparian owner.*

An accretion formed in a river-bed in a single flood season and remaining unchanged thereafter for 30 years cannot be held to belong to the riparian owner and is not a "gradual" accretion. (*King, J.*) NARAYANI *v.* KRISHNAN NAMBIAR. **161 I.C. 111=8 R.M. 779=1936 M.W.N. 473= A.I.R. 1936 Mad. 128.**

——Apportionment of alluvial accretion—Several estates concerned—Principles and methods of apportionment. *See* BENGAL ALLUVION AND DILUVION REGULATION (1825), S. 4 (5). **I.L.R. (1938) 1 Cal. 361=66 C.L.J. 304.**

—— *Claim based on reformation and claim based on lateral accretion—Priority.*

Where there are two competing claims to land, one based on re-formation and the other upon lateral accretion, the former must prevail. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR. **182 I.C. 682 =12 R.M. 121=47 L.W. 163=1938 M.W.N. 301 =A.I.R. 1938 Mad 470.**

——*Dhardura—What is meant by.*

The custom of Dhardura means that the main stream of the river would always remain the boundary between any two villages, irrespective of the fact that the change in the course of the river is gradual or sudden. The land which is thrown out by the change in the course of the river would by custom appertain to the village in proximity with which it comes out of the river. (*Zia-ul-Hasan and Hamilton, JJ.*) PASHPAT PRATAP SINGH *v.* UDAI BHAN PRATAP SINGH. **14 Luck. 763=183 I.C. 808=1939 O.A. 674=1939 O.L.R. 558=12 R.O. 62=1939 A.W.R. (C.C.) 153 =1939 O.W.N. 809=A.I.R. 1939 Oudh 269.**

——*Lanka in river—Lateral accretion or vertical accretion—Onus of proof—Circumstances to be considered.*

In the case of a lanka in a river, which at that point is both tidal and navigable, if the lanka presents every appearance of being a lateral accretion and not an island, the onus is on the Government to show that it once was an island. When there is no positive evidence to establish the continued existence of any stream along the bank of the river which has shrunk, and when it is obvious that the course of the deep channels in

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the river must be subject to frequent changes, the lanka must be held to be a lateral and not a vertical accretion. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR. **182 I.C. 682=12 R.M. 121=47 L.W. 163=1938 M.W.N. 301=A.I.R. 1938 Mad. 470.**

——*River changing course—Lands gained by accretion — Division of—Rights of riparian proprietors—Principles.*

The fundamental principle governing the apportionment of accreted lands among riparian proprietors whose lands abut on the sea or river is that the division must be made fairly amongst them giving them each a share in the new frontage in proportion to the extent of their old frontages. The method that is to be adopted must lead to a fair and proportionate division of new river frontage, amongst the riparian owners. Perpendicular lines therefore dropped from the common boundary point of *asli* lands on the old river bank to the new river bank would secure this equitable distribution of the new river frontage amongst the riparian owners. If such method is adopted there may be little overlappings or gaps triangular in shape according to the configuration of the new river bank, but these small triangular plots can be divided amongst the adjoining proprietors by the process of bisection. (*R.C. Mitter, J.*) SAHABADDIN SARKAR *v.* KAFILADDIN TAPADAR. **167 I.C. 130=9 R.C. 639=A.I.R. 1937 Cal. 18.**

——*Submerged land — Re-formation after seventy years—Title of owner—Abandonment of right by owner—If can be presumed—Rule as to.*

No presumption of abandonment of title to submerged land can be drawn against an owner from lapse of time, although the interval may amount to about seventy years. The presumption must normally be the other way, because, in the nature of things, the owner of submerged land can exercise no acts of ownership over it during the period of its sub-mergence. Further in the case of a river whose fluctuations in course and tendency to throw up and wash away lankas is notorious, the mere extension of the period of submersion to nearly seventy years is not enough to support a finding that the owner must be deemed to have abandoned his right to the land. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR. **182 I.C. 682=12 R.M. 121=47 L.W. 163=1938 M.W.N. 301=A.I.R. 1938 Mad. 470.**

——*Submerged land—Re-formation—Title to—Proof— Identification — Proof required from claimant.*

All that is required to establish title by re formation to a lanka in a tidal and navigable river is identification of the site or part of the site of the lanka with the site of land which formerly belonged to the claimant and which was washed away by the river. The fact that between the submergence and the re-formation the land was wholly lost and absorbed and no part of its surface remained capable of identification in no way militates against the title based upon the reformation. But a title founded on original ownership and identification of site must be confined *prima facie* to the re-formation on that site. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR. **182 I.C. 682=12 R.M. 121=47 L.W. 163=1938 M.W.N. 301=A.I.R. 1938 Mad. 470.**

APPEAL—Appellate Court.

AMENDMENT. *See* PRACTICE—PLEADINGS.
——Of decree. *See* C. P. CODE, S. 152.
——Of plaint. *See* C. P. CODE, O. 6.
——Of pleadings. *See* C. P. CODE, O. 6, R. 17.

ANIMALS FERAE NATURAE—Damage to crops by cattle—Liability of owner—Plea that he had lost control over them—Sustainability. *See* TORT—VICARIOUS LIABILITY. **A.I.R. 1936 Nag. 272.**

ANNUITY—Annuity and maintenance—Distinction. *See* MAINTENANCE. **A.I.R. 1936 Pat. 527.**

APPEAL.

See also (1) C. P. CODE, O. 41 AND O. 43, R. 1 (APPEALS FROM ORDERS).
(2) PRACTICE—APPEALS.
(3) PRIVY COUNCIL APPEALS.
(4) SECOND APPEALS.

Alternative plea in.
Appellate Court.
Competency.
Costs.
Court-fee.
Interference.
Letters Patent Appeal.
New point.
Parties.
Question of fact.
Right of.
Miscellaneous.

Alternative plea in.

——*Alternative plea in—If open.*

Where in a case for damages for breach of contract a party claims damages on the basis of a re-sale and fails to prove it, he cannot in appeal set up an alternative claim for damages on the basis of a market price. (*Monroe, J.*) TIKAM CHAND BHAG CHAND *v.* KAKHAN LAL DIN DAYAL. **40 P.L.R. 55=175 I.C. 90=10 R.L. 676=A.I.R. 1937 Lah. 842.**

Appellate Court.

——*Duty of appellate Court—Objection going to root of case.*

An appellate Court is bound to take notice of an objection which goes to the root of the case although not pressed by the appellant. (*Mir Ahmad, A.J.C.*) BHUNDHELKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD., LAHORE. **162 I.C. 416=8 R. Pesh. 197=A.I.R. 1936 Pesh. 97.**

——*Appellate Court—Finding of fact—Reversal by final Court of fact—Duty of such Court.*

A final Court of fact, especially when it reverses the decision of the Court of first instance should consider the entire evidence on the record and its judgment should indicate that its conclusion has been arrived at after a consideration of all the materials on record. (*Tek Chand, J.*) LALA RAM *v.* CHHANGA. **42 P.L.R. 275.**

——*Appellate Court—Functions and duties of Court of first appeal—Necessity for determination of all questions of fact.*

It is the function and duty of a Court of first appeal to determine all the questions of fact necessary for decision of the issues in the case. It might think that on a particular issue the burden of proof is on the plaintiff or on the defendant and its view on that may effect its finding. In that case it would do well to say what view it would take of the disputed question of fact had

it placed the burden on the other party. It would then be possible for the Court of first appeal to avoid all the unnecessary harassment to the parties which is involved when in second appeal it is found that there is no ascertained set of facts to which the law can be applied. (*Rowland, J.*) RAJPATI NARAYAN SINGH *v.* KIRIT NARAYAN SINGH. **173 I.C. 599=4 B.R. 299=10 R.P. 424=18 Pat. L.T. 806=1937 P.W.N. 578=A.I.R. 1938 Pat. 71.**

———*Duty of appellate Court in first appeal regarding matters of fact.*

The Legislature has thought fit to entrust to the first appellate Court the final decision of all matters of fact on which the disposal of the suit turns. Every officer in this position should realize that the confidence thus reposed in him implies a corresponding duty and trust, that he will to the best of his power weigh and balance the evidence, facts and considerations appearing on both sides. He should endeavour so to decide his cases that his judgment may carry a conviction, if not of its correctness, at least of a fair endeavour to place a correct valuation on the merits of the cases of both sides. He should never let it appear either to the public or to a superior Court that he has chosen to accept the evidence of one side or the other without due consideration of the salient facts established and contrary to the conclusion to which the outstanding facts point, aribitrarily or on patently inadequate grounds. (*Rowland, J.*) BHAGWAN SINGH *v.* UJAGIR SINGH. **A.I.R. 1940 Pat. 33.**

———*Appellate Courts — Power — Remand on issues not raised in pleadings—Competency.*

An appellate Court is competent to remand a suit for re-hearing on issues not raised in the pleadings, when such remand is on questions of jurisdiction which can be raised at any time. (*Courtney-Terrell, C.J. and Madan, J.*) BARAIK RAM GOBIND SINGH *v.* CHOWRA URAON. **16 Pat. 632=1938 P.W.N. 78=173 I.C. 644=4 B.R. 315 =19 Pat.L.T. 259=10 R.P. 430=A.I.R. 1938 Pat. 97.**

———*Appellate Court—Powers of—Addition of parties—Successful defendant—Right to impeach decree as wrong.*

A person who is impleaded as a defendant to a suit and is a party to a decree dismissing the suit that has been passed in the suit, has the right to show even as a respondent in the appeal from the decree, that the decree was wrongly passed even though the effect of setting aside the decree would be to re-open the suit as against him. The Court has wide powers to add a party to a suit or an appeal. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C 615=9 R.C. 726=A.I.R. 1936 Cal. 593.**

———Appellate Court—Powers of — Appeal against interlocutory order—Subsequent abatement of suit—Effect on appeal—Power of Court to deal with appeal *See* PRACTICE—APPEAL. **14 Mys.L.J. 108=41 Mys.H.C.R. 208.**

———*Appellate Court—Powers of—Finding of fact—Presumption of correctness — Reversal—Burden of proof.*

The reversal of the findings of fact of a trial Judge is well within the competence of an appellate Court, but the presumption is that the decision of the trial Judge on the facts is right, and that presumption must be displaced by the appellant. (*Sir Lancelot Sanderson.*) JAMES AUGUSTUS WILLIAMS *v.* P. P. JOHNSON. **1937 A.W.R. 1155=1937 A.L.J. 1027 (P.C.).**

———*Appellate Court—Powers of—Findings of trial Court based on oral testimony—Reversal of —Duty to discuss and consider relevant evidence.*

When the appellate Court reverses the findings of the trial Court it must consider and discuss the relevant evidence in the trial Court where the conclusions of the trial Court mostly depend upon the oral testimony of witnesses. (*Nasim Ali, J.*) RAGHUMANI ROY *v.* BIBHUTI BHUSAN ROY. **162 I.C. 790=8 R.C. 655=64 C.L.J. 65= A.I.R. 1936 Cal. 256.**

———*Appellate Court—Powers of interference—Discretion of trial Court.*

The discretion exercised by the trial Court, which is indubitably vested in it by law, may only be interfered with by appellate Court where such discretion is not exercised judicially or is exercised in an arbitrary manner. The mere fact that the appellate Court is inclined to exercise its discretion in favour of a party is no ground for interference. (*Rupchand Bilaram and Haveliwala, A J.Cs.*) TEJUMAL BHAWANDAS *v.* MURAD. **30 S.L.R 242=165 I.C. 91=9 R.S. 75=A.I.R. 1936 Sind 169.**

Competency.

———*Competency--Appeal from decree and application for review filed at same time—Application successful before appeal is heard—Appeal —If barred.*

Where an appeal from a decree and an application for review of the decree are filed at once and at the same time if the application for review is successful before the appeal is heard and a second decree is passed in substitution of the first then the appeal must be directed against the second decree and not against the first. 34 All. 2?2; A.I.R. 1931 Cal. 323 and A.I.R. 1929 Bom. 183, Rel. on. (*Davis, C.J. and Mehta, A.C.J.*) LACHMIBAI *v.* DOULATRAM DEVIDAS. **29 S.L.R. 445=163 I.C. 30=8 R.S. 182=A.I.R. 1936 Sind 53.**

———*Competency—Court deciding suit under special procedure agreed on between the parties—Decree—If one passed with consent—Appeal—If lies—Right of parties to resile from—Estoppel.*

When a party invites the Court to adopt a special procedure which is not contemplated by the Code of Civil Procedure, he cannot afterwards turn round and say that the Court is to blame for adopting that procedure. In other words, the doctrine of estoppel would apply and prevent him from blowing hot and cold. The decree passed by the Court as a result of adopting the special procedure with the acquiescence of the parties is in the nature of an arbiter's award and must be deemed to be a decree passed with the consent of the parties, and no appeal lies from such a decree. (*Pandrang Row, J.*) MAKUDAM MAHOMED *v.* MAHOMED SHEIK ABDUL KADIR. **164 I.C. 611=9 R.M. 148=44 L.W. 351 =1936 M.W.N. 740=A.I.R. 1936 Mad. 856=71 M.L.J. 281.**

———*Competency — Decree — Application for review — Rejection—Effect—If supersedes old decree—Correction of accidental slip on review application—If one passed under S. 152 or under O. 47—Appeal from original decree—Maintainability—Original decree, if superseded.*

APPEAL—Competency.

There are three stages in a review application. The first is the *ex parte* stage when the Court may either reject the application at once or may grant a rule calling on the other side to show cause why review should not be allowed. In the second stage, the rule may either be admitted or rejected. If the rule is discharged, the case ends then and there: if on the other hand the rule is made absolute then the third stage is reached. The case is then heard on the merits and may result in a repetition of the former decree or in some variation of it. In either case the whole matter having been reopened, there is a fresh decree. When the Court rejects a review application holding that there is no ground the order is passed in the second stage and not in the third stage. There is no fresh decree. The hearing of the rule in the second stage may involve to some extent an investigation into the merits, but that does not alter the character of the order made. When the rule is discharged in the second stage, there is no fresh decree superseding the original decree, the parties being relegated to and still resting on the old decree. In such a case an appeal from the original decree is not barred, but is maintainable; and the appeal cannot be dismissed on the ground that the order dismissing the review application has the legal effect of vacating the decree from which the appeal is filed. Nor can the correcting of an error arising from an accidental slip bring into existence a fresh decree barring the right of appeal from the original decree. Such correction must in truth be deemed to be an order passed in exercise of the powers of amendment under S. 152, C. P. Code, though the Court may have passed the order on a review application, purporting to act under the review provisions of the Code. An amended decree must, in the contemplation of law, be taken as in force from the date of the original decree, as there is a well-founded distinction between a case of amendment and a case of novation or substitution. In the case of the amended decree, an appeal therefrom is perfectly competent. (*Venkatasubba Rao and Abdur Rahman, JJ.*) PAKKIRI MAHOMED ROWTHER *v.* SWAMINATHA MUDALIAR. **182 I.C. 251=12 R.M. 27=1938 M. W.N. 250=47 L.W. 474=A.I.R. 1938 Mad. 573 =(1938) 1 M.L.J. 796.**

——Competency—Finding — When open to appeal—Decree against personal property of late mahant of mutt—Finding that rents accrued due during his lifetime and collected since by his successor are personal property of late mahant—Appeal against—If competent *See* RELIGIOUS ENDOWMENT—MUTT. **71 M.L.J. 797.**

——*Competency—Interlocutory order passed by consent.*

A decree by consent is not appealable. But an interlocutory order passed by consent may be appealable under certain circumstances. (*Mosely and Sharpe, JJ.*) T. R. M. RAMASWAMY CHETTIAR *v.* M. M.K. KUTTAIN CHETTYAR. **A.I.R. 1940 Rang. 153.**

——Competency—Issue as to court-fee—Decision of trial Court on—Appealability. *See* COURT-FEES ACT, S. 12. **63 C.L.J. 16.**

——Competency—Order rejecting appeal for failure to furnish security for costs. *See* C. P. CODE, O. 41, R. 10 (2). **A.I.R. 1936 Rang. 109.**

APPEAL—Competency.

——*Competency—Order of remand under inherent powers—If decree—Appealability.*

An order of remand under the inherent powers of the Court cannot be treated as a decree unless the order can be brought within the definition of 'decree' as given in the C. P. Code and no appeal lies from such order. (*Middleton, J.C. and Almond, A.J.C.*) MOTI KHAN *v.* ATAM CHAND. **161 I.C. 716=8 R. Pesh. 182=A.I.R. 1936 Pesh. 79.**

——Competency—Order under O. 34, R. 12, C. P. Code, on application by person not party to suit—"Decree." *See* C. P. CODE, S. 2 (2). **45 L. W. 646=A.I.R. 1937 Mad. 554.**

——Competency—Partition suit—Order after preliminary decree and before final decree—If decree—Appealability. *See* C. P. CODE, S. 96. **1937 A.W.R. 692.**

——*Competency—Party taking benefit of decree —Right to appeal—Decree declaring election of defendant invalid—Nomination of defendant on footing of invalidity of defendant—Right of defendant to appeal against decree.*

The right of appeal is the creature of statute and is a very valuable right. It should not be ordinarily taken away unless a party has definitely by his conduct or act lost the right. The acceptance by a party of the benefit of a decree or order does not debar the party from appealing against such decree or order, unless the decree or order imposes a term or condition on the opposite party which is for the benefit of the appellant and unless the appellant accepts the benefit of the term or condition so imposed on his opponent. In any event there can be no scope for a preliminary objection to the competency of the appeal unless there is a benefit conferred on the appellant by the decree or order itself. In a suit for a declaration that the defendant has not been validly elected as a Municipal Commissioner, the lower Courts held the election invalid and granted the declaration. The Local Government under its statutory powers of nomination appointed the defendant as a Commissioner to fill up the vacancy caused by the decree declaring the election invalid. The defendant accepted the appointed, but nevertheless appealed against the decree.

Held, by the High Court, that the defendant by accepting the nomination did not lose his right of appeal, no benefit having been conferred on him by the decrees of the lower Courts, and that the appeal was therefore perfectly competent. (*Guha and Bartley, JJ.*) GOPESH CHANDRA ADITYA *v.* BENODE LAL DAS. **165 I.C. 606 (2)=9 R.C. 425 =40 C.W.N. 553=A.I.R. 1936 Cal. 424.**

——*Competency—Pendency of review application against decree—If bar to appeal from decree —Review granted pending appeal—Effect.*

An appeal from a decree presented after the filing of an application for review of the judgment and decree appealed from, and during the pendency of the review application is incompetent; and if the application for review is granted and a new decree is passed, the appeal cannot be heard, and it must be dismissed, for the decree appealed from is superseded by the new decree. (*Pandrang Rao, J.*) PACKIRI MUHAMMAD ROWTHAR *v.* SWAMINADHA MUDALIAR. **162 I C. 261= 8 R M. 970=1936 M W.N. 277=43 L.W. 542= A.I.R. 1936 Mad. 464.**

APPEAL—Competency.

———*Competency* — Pro forma *defendant impleaded as assignor of plaintiff—Appeal by assignor claiming relief in favour of plaintiff—Maintainability.*

A person who is impleaded as a *pro forma* defendant in a suit as the person from whom plaintiff derived title but who has no interest in the property in suit, has no *locus standi* to appeal against the dismissal of the suit against which the plaintiff himself does not appeal. (*Sulaiman, C. J. and Bennet, J.*) NIRMAL SINGH *v.* ZAMIR UDDIN KHAN. **169 I.C. 395=10 R.A. 17 (1)=1937 A.L.R. 526=1937 A.L.J. 296=1937 R.D. 151=1937 A.W.R. 260=A.I.R. 1937 All. 368.**

———*Competency—Preliminary decree in mortgage suit—Appeal—Omission to apply for stay of proceedings—Subsequent final decree—Failure to appeal from—If bar to maintainability of appeal from preliminary decree.*

Pending an appeal from a preliminary decree in a mortgage suit the trial Court made a final decree. The appellant did not ask for a stay of proceedings after he instituted his appeal nor did he file an appeal against the final decree. At the hearing of the appeal a preliminary objection was raised that the appeal was not competent.

Held, that the appeal from the preliminary decree was not incompetent, and that the passing of the final decree was no bar to the hearing of the appeal from the preliminary decree, and that the Court in appeal had also the power to vary or reverse or affect the final decree. (*Rangnekar and Norman, JJ.*) BASAWANT *v.* KALLAPPA. **175 I.C. 43=10 R B. 515=40 Bom L.R. 164=A.I R. 1938 Bom. 222.**

———Competency—Rent sale—Application to set aside—Order refusing—Observation that sale was only a sale in execution of money decree—Appealability. *See* B. T. ACT, S. 174 (5). **40 C. W.N. 182 (2).**

———Competency—Rent suit—*Ex parte* decree—Order refusing to set aside—Appealability. *See* C. P. CODE, O. 43, R. 1 (*d*). **63 C.L.J. 277=40 C. W.N. 992.**

———*Competency—Suit against two persons—Claim to relief against both or either—Decree against one only—Appeal claiming relief against other—If incompetent.*

Where a plaintiff sues two defendants praying the Court to make both or either of them liable, the fact that he gets a decree against one of them will not operate as a bar to an appeal by him as regards the other defendant. He has still got a grievance in that he does not get a decree against the other defendant, his appeal for relief against him is perfectly competent. (*Wort, J.*) BANK OF BEHAR, LTD. *v.* MADHUSUDAN LAL. **170 I.C. 451=10 R.P. 125=3 B.R. 729=18 Pat L.T. 337 =1937 P.W.N. 344=A.I.R. 1937 Pat. 428.**

———Competency—Suit of small cause nature tried as money suit by judge having small cause power—Decree—If appealable—Remedy. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 25. **62 C.L.J. 530.**

———*Competency—Suit of small cause nature—Trial as original suit by Court having small cause powers—Decree—If appealable—Revision.*

If a suit of a small cause nature is tried by a Judge as an ordinary suit but not as a Small Cause Court Judge, and if the Judge has the powers of a Small Cause Court Judge to try suits of that value his decision must be taken to be a decision of a Small Cause Court, and is not open to appeal. The decree can only be revised by the High Court under S. 25 of the Provincial Small Cause Courts Act. (*R. C. Mitter, J.*) BANKIN CHANDRA DEB SARKAR *v.* MADAN MOHAN DEB. **40 C.W.N. 698.**

APPEAL - New point.

———Competency—Sureties—Appeal by some only—Failure of one to appeal—If a bar. *See* SURETY—CO-SURETIES. **A.I.R. 1936 Pesh. 20.**

———*Competency—Wrong decision on jurisdiction.*

A wrong decision, even though it relates to jurisdiction, would not give a right of appeal where otherwise no appeal lay. A.I.R. 1930 Pat. 280, Foll. (*Wort, J.*) NASIRUDDIN HAIDER *v.* HAKIM MUHAMMAD TAHIR. **161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.**

Costs.

———Costs—Direction of trial Court—Interference by appellate Court. *See* COSTS—DISCRETION. **17 Pat.L.T. 279.**

Court-fee.

———*Court-fees—Appeal filed in District Court, transferred to High Court on application by appellant—Court-fee payable.*

A memorandum of appeal presented to the Court of the District Judge under the law applicable to appeals, which has been transferred to the High Court on an application by the appellant, should bear court-fee stamp as prescribed for a memorandum of appeal presented to the High Court. (*Guha, J.*) DHARNIDHAR SARDAR *v.* SURJYA KANTA ROY. **172 I.C. 518=10 R.C. 385 (1)=41 C.W.N. 1083=65 C.L.J. 499=A.I.R. 1937 Cal. 514.**

Interference.

———Interference — Discretion — Order as to costs—Grounds for reversal. *See* COSTS—DISCRETION. **(1940) 1 M.L.J. 388.**

Letters Patent appeal.

———*Letters Patent appeal—Memorandum of appeal not mentioning names of all parties—If complete.*

No memorandum of appeal, whether in a Letters Patent appeal or in any other appeal can be considered to be complete unless it mentions the names of all the parties against whom relief is sought. There is no reason for distinction in this respect between a Letters Patent appeal or any other appeal. (*Young, C. J. and Monroe, J.*) RAMESHWAR DAS *v.* OFFICIAL RECEIVER, DELHI. **I. L. R. (1938) Lah. 398=40 P. L. R. 1060=180 I.C. 698=11 R.L. 707=A.I.R. 1938 Lah. 325.**

New point.

———New point—Point of law—If can be raised in appeal for the first time. *See* AGRA TENANCY ACT, S. 86. **1938 R.D. 252=1938 A.W.R. (B.R.) 86.**

———*New point—Question of fact—Plea based on—If can be raised for the first time in appeal.*

A suit by a mortgagee of a recorded occupancy tenant against another treating him as his subtenant, for arrears of rent, was decreed. But the defendant in appeal pleaded for the first time that the plaintiff had not proved his right to sue, as a mortgagee after the Act of 1926 will not be recognized by the Courts. It was held that it was clearly a point that required a definite issue to be framed on which the plaintiff could have

APPEAL—New point.

produced the requisite evidence. The defendant never having challenged the right of the plaintiff on this question should not be allowed to raise for the first time in the appellate Court, a definite question of fact which should have been specifically raised in the Court below. (*Bomford, J.M. and Darling, S. M.*) DURPAT *v.* SHEO NARAIN. **1938 A.L.J. (Supp.) 6=1938 A.W.R. (B.R.) 96 =1938 R.D. 353.**

——*New point—Question of fact not raised in trial Court or in grounds of appeal—If can be raised at hearing of appeal.*

A question of fact which has not been raised before the first Court or in the grounds of appeal cannot be permitted to be raised at the hearing of the appeal for the first time. (*Varadachariar and Mockett, JJ.*) KUPPUSWAMI *v.* RASAPPA CHETTIAR. **170 I C. 7=10 R.M. 178=44 L.W. 438=1936 M.W.N. 738=A.I.R. 1936 Mad. 865.**

——*New point—Sale for arrears of rent—Objection to validity as having been conducted by person without authority—If can be raised for first time in appeal.*

A new point, for instance, that a certain sale for arrears of rent was invalid because it was conducted by a person having no authority to hold the sale, may be raised for the first time in appeal and given effect to when it is not necessary to take any evidence on the point. Nor can it be said that the decree of the appellate Court based on such new point is wrong or without jurisdiction, when no real prejudice is caused thereby to the respondent, so as to justify interference in second appeal. (*Pandrang Row, J.*) SUBBIAH THEVAR, *In re.* **1936 M.W.N. 611=44 L.W. 306 =164 I.C. 973=9 R.M. 186=A.I.R. 1936 Mad. 700=71 M.L.J. 284.**

Parties.

——*Parties*—Pro forma *defendant.*

Where persons were joined in a suit as *pro forma* defendants as they did not join as plaintiffs and where no issues were framed with respect to their interest and where none of these persons are interested in the result of the litigation, such persons are not necessary parties to the appeal in that suit. (*S. K. Ghose and Patterson, JJ.*) SABITRIBAI *v.* JUGAL KISHORE. **179 I C. 95=11 R. C. 468=43 C.W N. 41=A I.R. 1938 Cal. 639.**

Question of fact.

——*Question of fact—Inference of intention from circumstances.*

Whether a particular intention can be inferred from a particular set of circumstances is rather a question of fact than of law. (*Sir George Lowndes.*) BALASUBRAMANYA PANDYA THALAIVAR *v* SUBBIA TEVAR. **65 I A. 93=I L.R. (1938) Mad. 551=1938 A.W R. (P C.) 62=66 C.L.J. 581=40 Bom.L R. 704=32 S.L.R. 328=1938 A. L.J. 215=4 B R. 251=42 C.W.N. 449=10 R.P. C. 162=19 Pat.L.T. 169=172 I C. 724=47 L.W. 110=1938 O.W.N. 117=1938 O L R. 61=1938 O.A. 54=1938 A L.R. 77=A.I.R. 1938 P.C. 34= (1938) 1 M.L.J. 426 (P.C).**

Right of.

——*Right of—Adverse finding against a party but the decree wholly in his favour.*

When a decree is wholly in favour of a party and gives him all the relief sought for by him but the judgment contains an adverse finding against him, he has no right of appeal against the decree, which can enable him to contest such

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adverse finding. The right of an appeal is a creation of the statute and one has to look to the provisions of the Code of Civil Procedure to find out whether in a particular case an appeal is competent or not. Ss. 96, 100 and 104, C. P. Code, make provisions for appeals There is no provision for any appeal against a mere finding irrespective of the decree or order. (*Srivastava, C.J.*) PATESHWARI DIN *v.* SARJU DASS. **171 I.C. 596= 1937 O L R. 567=1937 O.W.N. 1127=A.I.R. 1938 Oudh 18.**

——Right of—Decision by Land Acquisition Court—Appealability. *See* LAND ACQUISITION ACT, S. 54. **43 L.W. 338.**

——Right of—Decree in favour of plaintiff imposing conditions—Appeal against imposition of conditions—Adverse finding — Appealability— Test. *See* C. P. CODE, S. 96. **42 C.W.N. 492.**

——Right of—If lost—Election—Defeated candidate accepting appointment in Municipality —Right of appeal not lost. *See* ASSAM MUNICIPAL ACT (I OF 1923), S. 21-A, 10 AND 19. **A.I.R. 1936 Cal 424=40 C.W.N. 553.**

——Right of—High Court rules relating to constitution of Benches—Amendment pending appeal—Retrospective operation. *See* GOVERNMENT OF INDIA ACT, S. 108 (1). **1936 A.L.J. 1046**

——*Right of—Necessary party impleaded in suit but not in appeal—Such party, if has right of second appeal.*

Where a necessary party is impleaded in a suit but not impleaded in first appeal, such a party has a right of second appeal as he is interested in its right decision. (*Bhide, J.*) PALA SINGH *v.* MT. HARNAMI. **177 I.C. 632 =11 R.L. 348 (2)=A.I.R. 1938 Lah. 70.**

——*Right of—Non-party to suit.*

Only persons whose names appear as parties to the decree or order of the Court below are entitled to appeal if they are aggrieved. A person whose name does not appear in the array of parties can ask the Court to implead him by including his name among the parties. If he does not choose to do so, he cannot maintain an appeal. (*Agha Haidar, J.*) SADHU MAL KHAZANA MAL *v.* DEVI CHAND. **173 I.C. 505=10 R.L. 450=A. I.R. 1937 Lah. 347.**

——Right to—Deprivation of—Acquiescence in the procedure adopted by the Judge. *See* PRACTICE—PROCEDURE. **30 S.L.R. 17=A.I.R. 1936 Sind 72.**

Miscellaneous.

——*Failure by party to appeal—Party, if debarred from having recourse to other modes of relief.*

Where there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth. So far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed. 24 Cal. 546, Rel. on. (*Addison and Din Mohammad, JJ.*) INTIZAMIA COMMITTEE *v.* CENTRAL BANK OF INDIA, LTD. **182 I.C. 785=12 R.L. 68=A.I.R. 1938 Lah. 129.**

——Order of remand—Direction for *de novo* trial—Appeal. *See* C. P. CODE, S. 151. **A.I.R. 1936 Pat. 491.**

——Rejection of—Non-payment of court-fee on plaint—Appellate Court calling on plaintiff to pay court-fee on plaint. *See* C. P. CODE, S. 2 (2). **1937 A.L.J. 171=A.I.R. 1937 All. 280.**

APPELLATE COURT—Power of—Power to direct determination of mesne profits subsequent to suit in execution proceedings—Lower Court not dealing with subsequent mesne profits. *See* PARTITION—MESNE PROFITS. **30 S.L.R. 17=A.I.R. 1936 Sind 72.**

APPROBATE AND REPROBATE.

See (1) ESTOPPEL.
(2) EVIDENCE ACT, S. 115.

APPROPRIATION. *See* CONTRACT ACT, SS. 59 TO 61.

ARBITRATION AND AWARD.

See also (1) ARBITRATION ACT (IX OF 1899).
(2) C. P. CODE, SCH. II, O. 32, R. 7 AND O. 23, R. 3.

Arbitrator.
Award.
Clause in contract.
Misconduct.
Reference.
Umpire.
Miscellaneous.

Arbitrator.

———*Arbitrator—Misconduct — Meaning of—Proof—Onus—Rejection of material evidence tendered by party—If ground for setting aside award.*

"Legal misconduct" on the part of an arbitrator does not necessarily involve moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of the justice. It has also been described as such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice. Misconduct is a question of fact in each case and has to be ascertained from the facts of the entire proceedings before the arbitrator. It really lies in the conduct of the arbitration proceedings and the onus of proof lies on the party who alleges it. If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling a party to have the award set aside. (*Wadia, J.*) ABOOBAKER LATIFF *v.* RECEPTION COMMITTEE, INDIAN NATIONAL CONGRESS. **171 I.C. 470=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410.**

———*Arbitrator—Nomination of, by party--Time for.*

The period of days after which one party in accordance with the terms of the agreement may nominate an arbitrator on behalf of the other must be so many clear days commencing from the midnight after the receipt of the letter or notice requiring the other party to nominate his arbitrator. Where a party anticipating the necessity of such an appointment wrote letters on a day just before the expiry of the period to be sent when the necessity actually arose, it cannot be said that the appointment was complete before the expiry of the period provided the formal appointment by communication to the arbitrator or to the party concerned is not made before the expiry of the period. (*Weston, J.*) LOUIS DREYFUS & CO. *v.* HEMANDAS HOTCHAND. **187 I.C. 262=A.I.R. 1940 Sind 37.**

———Arbitrator—Position of—Commissioner and arbitrator—Distinction. *See* C. P. CODE, SCH. II, PARA. 16. **18 Pat. 193.**

ARBITRATION AND AWARD.

———*Arbitrator—Powers of — Amendment—Entire suit referred—Amendment of plaint to correct mistake in date—Power to allow—Previous refusal of amendment by Court—Effect of.*

Where an entire suit has been referred to arbitration, the arbitrator has power to allow an amendment of the plaint in order to correct a mistake in a date given therein, when the amendment is one which the Court had power to allow if it had tried it, even though the Court had refused such amendment on a previous occasion. (*Harries, C.J. and Fazl Ali, J.*) TEJPAL MARWARI *v.* KEDARNATH HIMAT SINGHA. **6 B.R. 144=185 I.C. 273=12 R.P. 336=20 Pat.L.T. 700=1939 P.W.N. 703=A.I.R. 1939 Pat. 597.**

———*Arbitrator—Power of—Power to award interest.*

An arbitrator has wide powers in deciding the disputes referred to him. He has power to award interest, where he considers it fair and fit. (*Pollock, J.*) TULSIRAM *v.* JHANAKLAL. **I.L.R. (1936) Nag. 44=155 I.C. 556=9 R.N. 88=19 N. L.J. 151=A.I.R. 1936 Nag. 197.**

———*Arbitrator—Powers of—Power to decide question of costs—Award as to costs—Power of Court.*

Where all questions in dispute between parties are referred to arbitration, the arbitrator is thereby empowered to decide the question of cost which is one of the matters involved in the suit. Where the arbitrator files the award and directs that the parties should bear their own costs the award can be said to contain sufficient provisions concerning costs and the directions in the award do not need any amplification to be put into effect and the Court's discretion in the matter of costs is removed by the arbitrator's award. A.I.R. 1918 Nag. 108, Foll.; A.I.R. 1914 Sind 62, Dist. (*Middleton, J.C.*) HARNAM SINGH *v.* KISHAN CHAND. **161 I C. 7=8 R.Pesh. 151=A.I.R 1936 Pesh.37.**

———*Arbitrator or referee—Statement of Counsel appointing referee—Latter empowered to examine parties—Character of referee, if altered thereby.*

Where the Counsel's statement makes it clear that a person is being appointed as a referee and that he is to make a statement in Court, the fact that he was allowed to make the statement after taking the statements of the parties, could not have the legal effect of altering the character of the referee, for it cannot be said that a referee can never be authorized by the parties to examine the parties before making his statement in Court. Such a person is not an arbitrator. (*Mulla, J.*) RAMESHWAR NATH *v.* GHULAM RASOOL KHAN. **I.L.R. (1939) All. 50=180 I.C. 316=11 R.A. 437 =1938 A L.J. 1132=1938 A.W.R. (H.C.) 807= A I.R. 1939 All. 92.**

———*Arbitrator—Who is—Technical expert authorised to settle disputes merely by use of his skill and judgment—If arbitrator.*

A mere agreement between two persons to be concluded by the decision of a third does not by itself constitute such third person an arbitrator. To give him that character it should be intended that such person should determine the disputes in a quasi-judicial manner. What is the intention of the parties in any particular case must necessarily depend upon the true construction of the agreement between them. Where an architect or other technical expert in the service of one of the par-

ties to a contract is clothed with authority to settle disputes between the parties, which he is required to decide merely by the exercise of his own skill and judgment, such architect or expert is not an arbitrator. (*Rupchand and Bilaram, A. J.C.*) DES RAM *v.* SECRETARY OF STATE. **165 I. C. 598=9 R.S. 104=A.I.R. 1936 Sind 201.**

Award.

——*Award accepted and acted on by a party to it—If liable to be challenged by him—Evidence to impugn it—Court—If can go into.*

Where a party to an award has not merely signed it as an award but understood it,agreed with it, accepted it and acted on it, and took possession of the property dealt with in it, he is estopped from challenging it. It is not open to the Court to go into evidence which has for its object the impugning of that award. 24 A. 164, Foll. (*Stone, C.J. and Niyogi. J.*) DULAN BAI *v.* SUNDERSAO. **I.L.R. (1937) Nag. 449=A.I.R. 1938 Nag. 132.**

——Award against firm—Application to file in Court—Objection by person served with notice that he is not partner of firm—Competency—When to be raised. *See* C. P. CODE, O. 21, R. 50 (2). **29 S.L.R. 292.**

——*Award—Assessment of compensation—Inclusion of interest—Power of arbitrator.*

The arbitrators whose only duty is to ascertain the actual value of certain property at a certain time have no power to include interest in their assessment of value. (*Lord Macmillan.*) INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION. **169 I.C. 562=10 R.P.C. 17=A.I R. 1937 P.C. 214 (P.C.).**

——*Award—Assessment of compensation—Methods of valuation—Discretion of arbitrators.*

The arbitrators must in general have a wide discretion in selecting their method of valuation for purpose of compensation but where they have considered two methods and two methods only and have chosen one of these methods and have rejected the other, it becomes a question of law whether, having regard to their terms of reference their decision can be justified. (*Lord Macmillan.*) INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION. **169 I.C 562=10 R.P.C. 17=A.I. R. 1937 P.C. 214 (P.C.).**

——*Award—Binding nature—Clause in excess of terms of reference—Award fixing rate of maintenance to Hindu widow at fixed rate—Provision that rate fixed could not be increased or decreased—Award acted upon and maintenance paid at that rate for long time—Effect—Right of widow to claim enhancement on ground of altered circumstances.*

An award on an arbitration, which has been acted upon by the parties for a considerable length of time, may be treated as an agreement between the parties, that they would abide by it, even though the award contains a clause which is in excess of the terms of reference. Where a clause in such an award allotting maintenance to a Hindu widow at a certain rate, provides that the widow cannot ask for any increase at all, and that the party bound to pay it cannot get it reduced though it may be in excess of the terms of reference, if the parties have acted upon it for a long time, and maintenance has been paid and received at such rate, the widow is bound by it and cannot claim a higher rate afterwards on the ground of altered circumstances. (*Venkataramana Rao, J.*) KAMESWARAMMA *v.* THAMMANA. **1937 M.W.N. 1039.**

——Award—Construction—Provision for payment of money by one party to the other as the equivalent of latter's share in immovable property—Clause that until such payment ownership of latter shall not cease—If operates as a document of title and as present creation, declaration or assignment of title—Registration *See* REGISTRATION ACT, S. 17 (1). **17 Pat L T. 835.**

——*Award—Criminal complaint of misappropriation—Disputes between parties referred to arbitration—Criminal Court not compounding case—Award acquitting accused holding that there was no misappropriation—Validity.*

After filing a complaint for criminal misappropriation the parties submitted their disputes, the chief one concerning misappropriation to arbitration. One of the parties moved the Criminal Court to have the case compounded, but the application was rejected. The result was that while the arbitrators were engaged in settling the disputes, one of the main disputes concerning misappropriation was being agitated in the Criminal Court. The award delivered held that no amount had been misappropriated and acquitted the accused. The whole award mainly depended on the finding on the issue.

Held, that under the circumstances although the reference did not succeed in stifling the criminal prosecution, still the arbitrators did arrogate to themselves the powers of a Magisterial Court. Hence the award was invalid.

Held also, that the rest of the award also could not be upheld. That would have been possible only if the arbitrators had acquitted the accused of the charge pending against him by merely stating that fact. (*Mehta, J.*) FAZAL ELLAHIE *v.* NAZIR AHMED. **176 I.C. 490=11 R.S. 18=A.I. R. 1938 Sind 130.**

——*Award—Duty of arbitrator to keep record of enquiry.*

There is no law, which requires an arbitrator to keep a record of his proceedings. All that is necessary is that there should be an award in writing by the arbitrator. He is, of course, bound to make enquiry, but he is not bound to keep a record of such an enquiry. (*Jai Lal, J.*) RAM DHAN DAS RAMJI DAS *v.* SHANKAR DAS DEVI DAYAL. **164 I.C. 296=9 R.L. 100=A.I.R. 1936 Lah. 492.**

——*Award—Effect of—Absence of finding on particular point of dispute between parties—Right of parties to re-agitate that point*—Res judicata.

The decision given by arbitrators, when it becomes final, puts an end to all the controversies between the parties. It is no longer open to any of the parties to say that he is entitled to re-agitate a point which had been taken either in attack or in defence on the ground that the arbitrators have not given any finding on it. When the arbitrators make an award, all disputed points between the parties on which they were at variance are set at rest as a result thereof, and when the arbitrators, after taking into consideration the pleas raised on both sides, give a finding on the respective rights of the parties, then all the controversies between the parties come to an end. It is not open to any of the parties to re-agitate any of the pleas which had been taken by them

before the matter was referred to arbitration. (*Harries and Rachhpal Singh, JJ.*) GANPAT RAI *v.* BHAGWAT DAYAL. 1937 A.W.R. 805=1937 A.L.J. 1141.

——*Award—Enforceability of—Suit to enforce—Private reference to arbitration in pending suit—Award of arbitrator—Validity.*

In a suit for delivery of possession of certain land, the parties agreed to refer their dispute to arbitration outside Court and had the suit dismissed. The arbitration proceeded and the arbitrator awarded the land to the plaintiff, but the defendants refused to give it up. The plaintiff brought a suit for possession of the land based on the agreement to refer to arbitration and the award of the arbitrator.

Held, (*i*) that the suit could be filed on the award irrespective of the procedure laid down in Sch. II despite S. 89, C. P. Code, which only deals with the filing of awards under that special procedure; (*ii*) that the award was valid though made on a reference made during the pendency of the suit without the intervention of the Court and that it operated to merge and extinguish all claims embraced in the submission and furnished a good cause of action. (*Baguley, J.*) MAUNG PO IT *v.* MA BU LI. 1937 Rang.L.R. 225=173 I.C. 690=10 R.R. 365=A.I.R. 1937 Rang. 459.

——*Award—Finality of—Presumption of—Plea that award is beyond scope of reference—Burden of proof.*

The Courts will make every reasonable intendment in favour of an award being a final, certain and sufficient termination of the matters in dispute, and unless and until the contrary is shown, the Court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him, and that the burden of proving that the arbitrator has awarded on matters not within the submission or has failed or omitted to award on matters which were within the submission lies upon the party who seeks to impeach the award. (*Rupchand Bilaram, Ag.J.C. and Lobo, A.J.C.*) VISHINDAS KHUSHALDAS *v.* TEJUMAL KHUSHALDAS. 174 I.C. 334=10 R.S. 250=A.I.R. 1938 Sind 59.

——*Award—If contract or consent decree*

An award is not a contract inasmuch as the parties to it do not contract with the arbitrator; and it is also different from a consent decree where the order of the Court is imposed upon the agreement of the parties. (*Davis, J.C. and Tyabji, J.*) TARA CHAND KHIMANDAS *v.* SYED ABDUL RAZAK SHAH. I.L.R. (1939) Kar. 422=182 I.C. 226=12 R.S. 4=A.I.R. 1939 Sind 125.

——*Award—Misconduct of arbitrator—Error of judgment—If amounts to.*

Where arbitrators have allotted through error of judgment an asset of uncertain and fluctuating value upon the basis of a gross over-valuation, to one branch of the family instead of to all the branches according to their respective shares, this does not amount to misconduct within the meaning of the law of arbitration. (*Lort Williams, J.*) RAJ KUMAR *v.* SHIVA PRASAD. 184 I.C. 553=A.I.R. 1939 Cal. 500.

——Award going beyond terms of reference—Acceptance by parties—Party consenting and receiving benefits under—Right to challenge afterwards. *See* HINDU LAW—MAINTENANCE—WIDOW. 50 L.W. 195.

——*Award—Minor represented by father—If bound by award.*

The fact that one of the parties to the reference to arbitration is a minor is no ground for holding that he is not bound by the award. When he is represented in the arbitration proceedings by his father he cannot repudiate them or the award following thereon. (*Pollock, J.*) TULSIRAM *v.* JHANAKLAL. I.L.R.(1936)Nag. 44=165 I.C. 556=9 R.N. 88=19 N.L.J. 151=A.I.R. 1936 Nag. 197.

——*Award—Nature of—Partition proceedings—Award declaring rights of parties in property without giving them possession—If merely declaratory.*

In partition proceedings, the award declared the rights of the parties in the property and did not state that possession was to be given to the parties.

Held, that the award was merely declaratory and hence possession of the properties could not be given to the parties in the execution proceedings. (*Tek Chand and Abdul Rashid, JJ.*) SANT LAL *v.* RAMAYA RAM. 178 I.C. 547=11 R.L. 474=40 P.L.R. 619=A.I.R. 1938 Lah. 177.

——*Award—Objection to—Suit on mortgage—Reference to arbitration—Award allowing mortgagors to occupy house for certain period free of rent though house to be conveyed to mortgagees on date of award—On default mortgagees to pay mesne profits at rate of Rs. 100 per month—House capable of realizing only Rs. 10 per mensem—Default in handing over possession—Decree based on award, giving mortgagees mesne profits at rate of Rs. 100 per mensem—Validity.*

In a suit on a mortgage the dispute was referred to arbitration. The award allowed three years to the mortgagors to occupy the mortgaged house free of rent, though it was to be conveyed to the mortgagees from the date of award. In case the mortgagors failed to hand over possession at the expiry of three years they would pay mesne profits at the rate of Rs 100 per month from date of default up to possession. The house could realize only Rs. 10 per mensem as rent. The mortgagors occupied the house rent free for three years but defaulted in handing over possession. The mortgagees obtained decree for mesne profits at the rate of Rs. 100 per mensem.

Held, that a Court executing the decree was *prima facie* bound by the decree. As the mortgagors did not raise any objection to the award at the proper time, it was too late for them to challenge the decree. The mere fact that the house if given on rent might not fetch Rs. 100 was not sufficient ground for affording relief to the mortgagors; there might be several considerations weighing with the arbitrators in fixing the amount. (*Rupchand Bilaram and Havelivala, A.J.Cs.*) CHHUGOMAL *v.* BRIJLAL. 171 I.C. 515=10 R.S. 110=A.I.R. 1937 Sind 219.

——*Award—Operation of—Basis of rights of parties.*

A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made the submission and the award furnish the only basis by which the rights of the parties can be determined. (*Abdul Rashid and Addison, JJ.*) DAMODAR DAS AND SONS, LTD. *v.* BASHESHWAR NATH. 167 I.C. 730=9 R.L. 541 (2)=A.I.R. 1936 Lah. 865.

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——*Award—Setting aside—Grounds.*

An award cannot be set aside on the ground of uncertainty upon a point upon which there is no controversy between the parties. (*Rupchand Bilaram, Ag J.C. and Lobo, A.J.C.*) VISHINDAS KHUSHALDAS *v.* TEJUMAL KHUSHALDAS. **174 I.C. 334=10 R.S. 250=A.I.R. 1938 Sind 59.**

——*Award—Setting aside—Grounds—Irregularity in proceedings—Effect of—Powers of Court in proceedings to set aside award—Scope of enquiry.*

The Court never sits in appeal from the award of an arbitrator. Its function is to see whether the grounds of misconduct alleged have been strictly proved. In order that the Court may set aside the award on the ground of irregularities in the proceedings, the irregularities must be of such a nature as to amount to no hearing at all. Parties cannot get out of an award upon objections which do not affect the substantial justice of the case. (*Wadia, J.*) ABOOBAKER LATIFF *v.* RECEPTION COMMITTEE, INDIAN NATIONAL CONGRESS. **171 I.C. 470=10 R.B. 200=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410.**

——*Award—Setting aside of—Submission of specific question of law.*

Where it is alleged that there was a submission of a specific question of law, it must be such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Court, and in lieu thereof to submit that question to the final decision of a tribunal of their own. Where circumstances are not such, then the Court is entitled to interfere with the decision of the arbitrator. (*Costello and Lort Williams, JJ.*) GOPINATH *v.* SALIL KUMAR MITTER. **I.L.R. (1938) 2 Cal. 349=179 I.C. 106=11 R.C. 470=A.I.R. 1938 Cal. 705.**

——*Award—Setting aside—Terms of reference directing physical partition—Award ordering sale of premises and dividing sale proceeds—Award—If should be set aside.*

Where the terms of the order of reference direct the arbitrators to decide on the mode of partition of the premises, and to partition the premises with the assistance of an engineer if necessary on the basis that each party is entitled to one-third share therein, the jurisdiction of the arbitrators is limited to effecting a physical partition. If they direct the sale of the premises and divide the sale proceeds among the parties according to their shares, the award goes beyond the terms of reference and must be set aside. (*Panckridge, J.*) DIBOPRAKASH GANGULY *v.* SUPROKOSH GANGULY. **177 I.C. 289=11 R.C. 224=A.I.R. 1938 Cal. 341.**

——*Award—Uncertainty—What is.*

Where an award directs certain produce to be sold at market price, the amount to be realized is sufficiently certain and cannot make the award uncertain. (*Rupchand Bilaram, Ag. J. C. and Lobo, A J.C.*) VISHINDAS KHUSHALDAS *v.* TEJUMAL KHUSHALDAS **174 I.C. 334=10 R.S. 250=A.I.R. 1938 Sind 59.**

——*Award—Validity—Absence of an arbitrator at all sittings.*

If any one of the arbitrators was not present at all the sittings, that would affect the validity of the award. (*Niyogi, J.*) RAMDHAR RAM *v.* SANTADAR. **178 I.C. 29=A.I.R. 1938 Nag. 492.**

——*Award — Validity — Agreement to refer future disputes to arbitration.*

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An award made on an agreement to refer future disputes to arbitration can be legally filed in Court. There is nothing illegal in such agreements and an award made on such reference to arbitration is perfectly valid. (*Jai Lal, J.*) RAM DHAN DAS RAMJI DAS *v.* SHANKAR DAS DEVI DAYAL. **164 I.C. 296=9 R.L. 100=A.I.R. 1936 Lah. 492.**

——*Award—Validity—Award of costs—Order of reference giving arbitrator discretion in the matter—Arbitrator omitting to follow directions of appellate Court—Effect of.*

Where the arbitrator is directed by the Court to keep the directions of the appellate Court as to costs in view while awarding costs, but at the same time the order of reference gives him a discretion in the matter, he is not bound to follow the directions of the appellate Court and his failure to d so does not vitiate the award and no substantial injustice is involved. (*Baguley and Mosley, JJ.*) MA NGWE *v.* U MIN SIN. **163 I.C. 590=9 R.R. 29=A.I.R. 1936 Rang. 240.**

——*Award—Validity—Dispute between A and B regarding boundary referred to arbitration—A not knowing English — Document n English containing agreement to refer and not explained to A—Award, if a bar to subsequent suit by A against B regarding same cause of action.*

The dispute between *A* and *B* regarding boundary line between two territories was referred to arbitration. The agreement referring the dispute to arbitration was contained in a document written in English. *A* who was ignorant of English affixed his mark to the document which was not explained to him so as to make him understand its true import.

Held, that the award was not binding on *A* and was no bar to the subsequent suit by *A* against *B* regarding the same cause of action. (*Lord Russel of Killowen.*) KWAMIN BASSAYIN *v.* BENDENTU II. **170 I.C. 423=10 R.P.C. 66=A.I.R. 1937 P.C. 274 (P.C.).**

——*Award—Validity—Minor's share in property referred to arbitration—Decision about its partition—If outside reference.*

Where what is referred to arbitration is only the share of a minor in a certain property, the decision of the arbitrators about its disposal or partition is outside the scope of the reference and is, therefore, void. (*Dalip Singh, J.*) SARASWATI DEVI *v.* JAGANNATH. **41 P.L.R. 201=A.I.R. 1939 Lah. 308.**

——*Award based on a compromise between parties—Validity of.*

An award which purports to be the considered award of the arbitrators cannot be said to be no award simply because the arbitrators accepted the compromise arrived at by the parties and cast the terms of the compromise in the form of an award. Such an award cannot be invalidated. (*Stone, C. J. and Niyogi, J.*) DULAN BAI *v.* SUNDERSAO. **I.L.R. (1937) Nag. 449=A.I.R. 1938 Nag. 132.**

——*Award—Validity of—Arbitrator not holding public enquiry—Award, if vitiated.*

No procedure is laid down for the arbitrator in Sch. II, C. P. Code, and unless it is proved that the arbitrator refused to examine any evidence tendered by the parties, the mere fact that he did not record any proceedings or did not hold a public enquiry will not be enough to vitiate the

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award. (*Din Mahomed, J.*) KANSHI RAM *v.* HARNAM DAS. **A.I.R. 1940 Lah. 73.**

———*Award—Validity—Failure of one of the arbitrators to sign award—Defect of procedure—Award when not to be set aside.*

Where an award is arrived at under the 'joint consultation' of all the arbitrators and represents their decision, the mere failure of one of the arbitrators to sign the award does not render it invalid. An award made on proper reference ought not to be set aside on the ground of an alleged defect in procedure not affecting the merits, where substantial justice has been done. (*Thomas, C.J. and Zia-ul-Hasan, J.*) BENI DATT *v.* BAIJ NATH. **14 Luck. 65=174 I C. 369=10 R. O. 255=1938 O.W.N. 480=1938 O.L.R. 186=1938 O.A. 341=A.I.R. 1938 Oudh 125.**

———*Award—Validity—Award not signed by disagreeing arbitrator.*

Where the parties to a reference to an arbitration agree that the decision of the majority of the arbitrators would prevail, the fact that the award was not signed by the arbitrator who differed from the opinion of the majority does not affect its validity. (*Henderson, J.*) ABINASH CHANDRA *v.* PARASHURAM. **44 C.W.N. 866.**

———*Award—Validity of—Partition of joint properties—No specific directions given by arbitrators with respect to particular easements.*

Where joint property belonging to certain persons has been partitioned by an award made without the intervention of the Court, the mere fact that no specific directions having been given by the arbitrators about the ventilators and drains existing in the properties partitioned does not render the award invalid on the ground of difficulty in execution of the award or indefiniteness in the award. It is open to the parties to find out for themselves what would be the legal inference to be derived from the award with respect to these particular easements in the properties. The ordinary rules of law relating to easements in a joint property divided between two owners will apply unless there is something in the award which takes any particular easement out of the general law and assigns a particular right in any party to that easement. (*Dalip Singh, J.*) MOHAMMAD MUSTAFA KHAN *v.* MOHAMMAD YAR KHAN. **188 I.C. 477=A.I.R. 1940 Lah. 24.**

———*Award—Valid ty — Partnership — Disputes referred to arbitration—One partner subsequently dying—Proceedings conducted without his legal representatives.*

The terms of an agreement of partnership expressly provided that upon the death of a partner his rights survived to his legal representatives. Upon disputes as to accounts having arisen between the groups of partners the matter was referred to arbitration. Shortly afterwards a partner in one group died but the arbitration proceedings were conducted in the absence of and without notice to the legal representatives of the deceased partner.

Held, that the proceedings were not binding on the legal representatives of the deceased partner as they were not parties to it, nor could it be said that their interests were substantially represented by other members of the group because although the interests of all might be identical, the group was not a legal entity and the real parties to the agreement were individual members of the group.

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(*Bhide, J.*) ABDUL GHANI *v* SIRAJ-UD-DIN. **41 P. L.R. 580=A.I.R. 1939 Lah. 154.**

———*Award—Validity—Partnership accounts—No valid reference on behalf of one partner.*

The principle that in a pending suit all parties must join in the reference also applies to arbitrations out of Court. Disputes relating to accounts of partnership cannot be settled unless all the interested persons are joined, because the dispute involves the interests of all the partners which cannot be settled piecemeal by some of the partners without the consent of the others. Where therefore such a dispute between the partners is referred to arbitration out of Court on the assumption that all the partners have joined in the reference but it subsequently transpires that there was no valid reference on behalf of one of the partners, then the award that is afterwards passed on such reference is not binding on the other partners also. (*Bhide, J.*) ABDUL GHANI *v.* SIRAJ-UD-DIN. **41 P.L.R. 580=A.I.R. 1939 Lah. 154.**

———*Award—Validity—Piecemeal awards.*

It is not competent to an arbitrator to decide a matter piecemeal and deliver several awards, unless he is so authorised by the agreement between the parties. (*Rachhpal Singh and Bajpai, JJ.*) GANGA DHAR *v.* INDAR SINGH. **I.L.R. (1938) All. 236=174 I.C. 671=10 R.A. 607=1938 A.L.R. 316=1938 A.W.R. (H.C.) 63=1938 A.L.J. 113=A.I.R. 1938 All. 195.**

———*Award treated as a compromise acted under—Doctrine of estoppel—Applicability of.*

The doctrine of estoppel applies, even if an award were not an award but merely a compromise acted under. (*Stone, C.J. and Niyogi, J.*) DULAN BAI *v.* SUNDERSAO. **I.L.R. (1937) Nag. 449=A.I.R. 1938 Nag. 132.**

Clause in contract.

———Clause in contract—Construction. *See* CONTRACT—CONSTRUCTION. **I.L.R. (1937) 1 Cal. 606.**

———*Arbitration clause—Construction—Agreement authorizing one party to nominate arbitrator or other party on failure of latter to nominate—Appointment of such arbitrator by first party—If inoperative until other party receives notice of it.*

Where an agreement has provided that if any party shall refuse or neglect to appoint an arbitrator within certain days after one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then upon such failure the party making the request may appoint another arbitrator to act on behalf of the party so failing to appoint and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment, the appointment of such arbitrator cannot be deemed to be inoperative or incomplete until other party received notice of it. (*Weston, J.*) LOUIS DREYFUS & Co. *v.* HEMANDAS HOTCHAND. **187 I.C. 262=12 R.S. 224=A.I.R. 1940 Sind 37.**

———*Clause in contract—Officer referring to arbitration—Competency of—Officer to whom it is referred—Validity of reference—Government—On being one of the parties—Rules framed by Government regarding Government litigation if relevant.*

Where an agreement between the Military and

a contractor for the supply of fodder provided that, any dispute or difference arising out of this contract shall be referred to the arbitration of the officer sanctioning the contract, a reference made by the Assistant Director of Grass Farms is competent, an officer of the Department is competent, in the absence of any indication in the contract that the reference should be made by a particular officer. Further the rules framed by the Government regarding the conduct of Government litigation have no bearing on the question of reference to arbitration. The reference has to be made not to the person who sanctioned the contract but to the officer who may be holding the appointment of the sanctioning authority at the time of the dispute. So reference to the Officer who became the successor of a different officer as the sanctioning authority on a re-organization of the department is valid. (*Jai Lal, J.*) KIDAR NATH RAM CHANDRA *v.* SECRETARY OF STATE. **171 I.C. 361=40 P.L.R. 643=A.I.R. 1938 Lah. 223.**

——*Clause in contract—Submission to—Proof—Writing, if necessary.*

A submission of a party to an arbitration clause need not be in writing. It may be proved by other evidence. (*Addison, J.*) JUBILEE CHAMBER OF COMMERCE, LTD., RAWALPINDI *v.* LALA AMRIT SHAH. **42 P.L.R. 48=A.I.R. 1940 Lah. 180.**

——*Clause in contract—Validity—One of parties a firm—Dispute to be referred to its directors.*

Where one of the parties to a contract is a firm, a clause for the submission of disputes to the arbitration of its directors is perfectly legal. (*Addison, J.*) JUBILEE CHAMBER OF COMMERCE, LTD., RAWALPINDI *v.* LALA AMRIT SHAH. **42 P.L.R. 48=A.I.R. 1940 Lah. 180.**

——Clause in contract—Validity. *See* CONTRACT ACT, S. 28. **A.I.R. 1937 All. 650.**

Power of.

——*Powers of arbitrator—Death of one of parties before decision—Power of arbitrator to continue proceedings.*

The arbitrators have jurisdiction to continue the arbitration proceedings although one of the parties dies before they give their decision, where one of the terms of the agreement between the parties is that their heirs and legal representatives would be bound by the decision of the arbitrators. In the absence of such a term in the agreement between the parties, the arbitrators have no authority to go on, although a son of the deceased files an application on behalf of himself and on behalf of his minor brothers to the effect that the arbitration proceedings should continue. (*Henderson, J.*) ABINASH CHANDRA *v.* PARASHURAM. **44 C.W.N. 866.**

——*Powers of arbitrator—Procedure.*

An arbitrator is not bound by the technical rules of procedure which the Court must follow, nor need he record separate findings on the various points on which the parties are at issue, or write a reasoned judicial decision. All that he is required to do is to give an intelligible decision which determines the rights of parties in relation to the subject-matter of the reference. Where an arbitrator has been selected by reason of his special knowledge of the affairs of the parties to decide dispute, he is entitled to take a broad view of the case and give an award, which he conceives to be just and equitable in the circumstances. (*Young, C.J. and Tek Chand, J.*) RAMINDER SINGH *v.* MOHINDER SINGH. **A.I.R. 1940 Lah. 186.**

——Powers of Court—Difference of opinion between arbitrators—Power of Court to appoint umpire—Deed of reference filed by parties not providing for such contingency. *See* C. P. CODE, SCH. II, PARA. 4. **42 P.L.R. 124.**

Misconduct.

——*See* under sub-headings. ARBITRATOR—AWARD—MISCELLANEOUS.

Reference.

——Reference—Agreement not signed by *ex parte* defendant—Award—Decree on—Mortgagee with possession from *ex parte* defendant—Suit to declare decree illegal and void—Maintainability. *See* C. P. CODE, SCH. II, PARA. 15. **1935 A.M.L.J. 89.**

——*Reference—Parties to suit agreeing to abide by decision of presiding officer after local inspection—Effect of—Presiding officer, if appointed as arbitrator—C. P. Code, Sch. II.*

Where the parties to a suit presented an application saying that they were desirous of leaving the matter entirely in the hands of the presiding officer, and that they would be bound by whatever decision he should arrive at after making a local inspection.

Held, (1) that although the word 'arbitrator' was used by the parties in their application, the agreement was no more than to abide by the decision of the Court, arrived at as the result of a local inspection, without recording any evidence, and there was nothing against the validity of such an agreement and that the parties did not mean to appoint the presiding officer as an arbitrator in the case, (2) that the provisions of Sch. II, C. P. Code, did not apply to cases in which the parties to a suit wanted to appoint the presiding officer of the Court, in which the suit was pending, as an arbitrator, (3) that it was not incumbent upon the presiding officer under the law to record notes of his local inspection. (*Zia-ul-Hasan and Smith, JJ.*) NAUSHAD ALI *v.* MOHAMMAD ISHAQ. **13 Luck. 152=166 I.C. 853=9 R.O. 343 (2)=1937 O.W.N. 223=1937 O.L.R. 63=A.I.R. 1937 Oudh 224.**

——*Reference—Revocation—Ground for—One of the parties working at the shop of a kuram of arbitrator.*

Where after the subject-matter of a suit was referred to arbitration and before any proceedings are taken by the arbitrator, one of the parties applies to revoke the reference on the ground that the other party is working at the shop of one *X*, a kuram of the arbitrator, a fact which has subsequently come to his notice, the Court should cancel the reference even though it was originally made on the joint application of both the parties. (*Skemp, J.*) KARAM DIN *v.* MOHAMMAD DIN. **166 I.C. 1008=9 R.L. 454 (1)=38 P.L.R. 480 (1)=A.I.R. 1937 Lah. 71.**

——*Reference by party to contract on basis of arbitration clause—Stay by Court—Party charged with fraud—Right to apply to Court for stay of arbitration proceedings.*

The Court has a discretion to stay arbitration proceedings which have been initiated by a party on the strength of an arbitration clause in the contract between the parties. When the questions at issue between the parties involve serious allegations of fraud—one of the parties going to the length of filing a criminal complaint against the other—the party who is charged with fraud has

the r ght to ask the Court that matters which affect his honesty and integrity should be decided in open Court. (*Leach, C.J. and Madhavan Nair, J.*) LALDAS LAKSHMIDAS *v.* J. D. ITALIA. **48 L. W. 399=178 I.C. 761=11 R.M. 494=1938 M.W. N. 924=A.I.R. 1938 Mad. 918=(1938) 2 M.L.J. 531 (2).**

———Reference made in pending suit without Court's intervention—Award if compromise. *See* C. P. CODE, O. 23, R. 3. **1939 Rang. L.R. 280(F.B.)**

———*Reference to—Validity—Mutwalli—Declaratory suit by.*

In a suit for a declaration that the plaintiff is the mutwalli of a mosque, reference to arbitration is not illegal and the decree passed in accordance with the award is not invalid. (*Bhide, J.*) FAZAL RAHMAN *v.* ZAINAB BIBI. **A.I.R. 1940 Lah. 123.**

———Reference to arbitration—Leave of Court. *See* C. P. CODE, O. 32, R. 7.

Umpire.

———*"Umpire"—Meaning of.*

The ordinary meaning of the word 'umpire' is a person who is to decide upon disagreement. (*Weston, J.*) LOUIS DREYFUS & Co. *v.* HEMANDAS HOTCHAND. **187 I.C. 262=12 R.S. 224=A.I.R. 1940 Sind 37.**

———*Umpire—Failure to appoint—If fatal.*

In a case where the arbitrators disagreed on the matters referred to them, and the necessity for umpire became established, it may well be that the omission of the arbitrators to appoint an umpire before they entered upon the submission would be fatal to the whole proceedings. But when, no disagreement between the arbitrators occurred, the omission to make the appointment of umpire is not a defect amounting to legal misconduct on the part of the arbitrators and sufficient to vitiate the award made. (*Weston, J.*) LOUIS DREYFUS & Co. *v.* HEMANDAS HOTCHAND. **187 I.C. 262=12 R.S. 224=A.I.R. 1940 Sind 37.**

Miscellaneous.

———*Contemporaneous civil suit—Absence of stay—Validity of arbitration proceedings—Continuation—Procedure.*

Where the same matter comes before two tribunals, a public tribunal appointed by the Sovereign and a domestic forum chosen by the parties, and no order is made staying the proceedings either under S. 19, Arbitration Act, or under Para. 2 of Sch. II, C. P. Code, before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication thereupon made by the private tribunal. Neither can that adjudication be pleaded as a bar to the action nor can it be allowed to affect the merits of the decision given by the public tribunal. Thus the effect of the institution of the suit is that all proceedings before the arbitrators subsequent to the institution of the suit are invalid. But if after the institution of the suit a party still wishes to proceed with the arbitration, his remedy is to apply for stay, which the Court will grant, unless there are weighty reasons to the contrary, leaving the parties to proceed with the arbitration from the stage at which the proceedings were on the date of the institution of the suit. (*Tek Chand, Offg. C.J. and Abdul Rashid, J.*) JOWAHIR SINGH SUNDAR SINGH *v.* FLEMING SHAW & Co., LTD., AMRITSAR AND KARACHI. **176 I.C. 352=11 R.L. 201=A.I.R. 1937 Lah. 851.**

———*Misconduct—Party aware of the claim against him—Arbitrator supplying him with the details of the claim and passing award on the same day—Propriety.*

Where an arbitrator supplied the litigant appearing as a party before him with details of the claim against him and proceeded to give his award on the same day,

Held, he should have given the party further opportunity to meet the case set up against him. But his failure to do so does not amount to judicial conduct, where the party has not been ignorant of the nature of the claim when he appeared before the arbitrator. Ordinarily a litigant appearing as a party before an arbitrator is entitled to know the details of the claim which has been prepared against him. (*Jai Lal, J.*) KIDAR NATH RAM CHANDRA *v.* SECRETARY OF STATE. **171 I.C. 361=40 P.L.R. 643=A.I.R. 1938 Lah. 223.**

ARBITRATION ACT (IX OF 1899)—Applicability—Contract of insurance accepted in Presidency Town—Contract containing arbitration clause. *See* C. P. CODE, SCH. II, PARA. 17. **1937 A.L.J. 98=A.I.R. 1937 All. 208.**

———*Applicability of provisions—Architect settling cost of work redone.*

When a member of a firm of architects is holding an inquiry as to the cost of certain work redone, on the refusal of the contractor to do so, he acts in his capacity as an arbitrator and is subject to the provisions of the Arbitration Act. (*Rupchand Bilaram, Ag. J.C. and Lobo, A.J.C.*) HARNAMSING *v.* PARSRAM LALCHAND. **173 I.C. 401=10 R.S. 210=A.I.R. 1938 Sind 45.**

———**S. 2 (as amended by U. P. Local Act)**—*Applicability.*

Under the Arbitration Act as amended by the U. P. Local Act, in order to make the Act applicable, the parties themselves should agree that the arbitration proceedings should take place under the Arbitration Act. It is, therefore, necessary that there should be a specific reference in the agreement to the Indian Arbitration Act, and a mere reference to arbitration in general would not bring in the operation of the Act. (*Sulaiman, C.J. and Bajpai, J.*) GUARDIAN ASSURANCE COMPANY, LTD. *v.* SHIVA MANGAL SINGH. **I.L.R. (1937) All. 234=1937 A.L.R. 265=167 I.C. 897 =9 R.A. 585=1937 A.L.J. 98=1937 A.W.R. 52 =A.I.R. 1937 All. 208.**

———**S. 2**—*Award relating to mortgaged property situated at Sialkot—Jurisdiction of Amritsar Court to make order filing award.*

Though S. 2, Arbitration Act, does not expressly refer to the provision of the law contained in S. 16, C. P. Code, the implication is obvious when it states where the suit could be instituted. Where mortgaged property which was involved in the award is situated at Sialkot, the Court of the District Judge at Amritsar has no jurisdiction to make an order filing the award, inasmuch as if the subject-matter submitted to arbitration were the subject of a suit, the suit could not be instituted at Amritsar. (*Addison and Din Mohammad, JJ.*) GOPI CHAND *v.* KHAZAN CHAND. **178 I.C. 240=40 P.L.R. 598=A.I.R. 1938 Lah. 226.**

———**S. 2**—*Scope—Suit maintainable in Presidency town on account of residence of defendant.*

A case falls within the purview of S. 2 of the Arbitration Act only where the subject-matter in dispute is of such a nature as to be the subject of

ARBITRATION ACT (1899), S. 3.

dispute in a Presidency-town, and not where the subject-matter is not of such a nature and the suit could be filed because the defendant resides there. (*Sulaiman, C.J. and Bajpai, J.*) GUARDIAN ASSURANCE COMPANY, LTD. *v.* SHIVA MANGAL SINGH. I.L.R. (1937) All. 234=1937 A.L.R. 265 =167 I.C. 897=9 R.A. 585=1937 A.L.J. 98=. 1937 A.W.R. 52=A.I R. 1937 All. 208.

——Ss. 3, 4 (a) and 11 (2)—Reference to arbitration by company—Award, where to be filed. *See* COMPANIES ACT, S. 152 (3). 44 C.W.N. 285.

——S. 4—"*Submission*"—*Rules of Merchants' Association requiring members to submit differences* inter se *to arbitration—Written undertaking to abide by rules signed by members—If written agreement to submit.*

The words of the definition of 'submission' in S.4 of the Arbitration Act are sufficiently wide to include cases where the agreement is made without, at the time it is made, there being any differences between the parties, either in existence or in direct contemplation. Also it is not necessary, to constitute a 'submission' that the terms of the agreement should all be contained in one document. Such an agreement may be found in correspondence consisting of a number of letters. The printed rules of Merchants' Association requiring all members in all cases of dispute or differences *inter se* arising from certain transactions to submit the said disputes or differences to arbitration together with the written undertakings to abide by the rules, signed by members at the time of their admission as members are sufficient to constitute the written agreement to submit required by S. 4. (*Weston, J.*) KOTUMAL POKARDAS *v.* ADAM HAJI. I.L.R.(1939)Kar. 769= 186 I.C. 272=12 R.S.189=A.I.R. 1939 Sind 357.

——Ss.4 (b) and 19—'*Submission*'—*Arbitration clause in contract.*

An arbitration clause in a contract for sale of goods ran thus:—"If any dispute arises with regard to this indent or to relative goods, it shall be optional to you (seller) to release me from the contract and take the goods back or to refer the dispute in respect of Japanese goods to the arbitration of Japanese Commercial Museum and in respect of other goods to the arbitration of the Bengal Chamber of Commerce or to two merchants, one to be nominated by each party,and I agree to accept the decision of the arbitration as final." Though the defendant offered to refer the dispute to the arbitration, the plaintiff filed a suit claiming damages for breach of contract. The defendant made an application for stay of the suit.

Held, that the arbitration clause fulfilled the definition of "submission" as given in the Indian Arbitration Act and that the test was whether both parties were bound by that clause and not whether a right had also been expressly given to the opposite party to initiate arbitration proceedings.

Held, further, when the plaintiff elected not to release the defendant from the contract, he was bound to refer the matter in dispute to arbitration. Further the suit and all proceedings thereunder were stayed. (*R. C. Mitter, J.*) BRINDABAN CHANDRA DATTA & Co. *v.* BISHESHWAR LAL. I.L.R (1937) 1 Cal. 606=174 I.C. 58 =10 R.C. 610=A.I.R. 1938 Cal. 10.

——S. 4 (b)—*Submission to arbitration—Essentials.*

ARBITRATION ACT (1899), S. 9.

In order that there may be a valid submission to arbitration as defined by S. 4, Cl. (*b*) of the Arbitration Act, it is only necessary that there should be a written agreement embodying either directly or by implication all the terms. It is not necessary that each party should sign the submission to arbitration. All that is required is that both parties accept a written document as containing the agreed terms; it might be in the form of a signed document by both parties containing the terms, or a signed document by one party containing the terms and a plain acceptance either signed or orally accepted by the other party, or in the third case, an unsigned document containing the term of the submission to arbitration, agreed to orally by both parties. 56 Cal. 118 and 53 All. 384, Foll. (*Panckridge, J.*) KESHORAM COTTON MILLS *v.* KANHYALAL. 44 C.W.N. 607.

——S. 5—*Applicability—Matter in dispute not within jurisdiction of arbitrators—Remedy of aggrieved party—Application for leave to revoke submission.*

If a matter in dispute submitted to arbitration is not within the jurisdiction of arbitrators, the proper remedy of a party to the submission is to apply to the Court for leave to revoke the submission. If the Court is satisfied that the submission was *ultra vires* it has undoubtedly the power to give leave to revoke the submission to arbitration, and that is the appropriate remedy. (*Cornish, J.*) MADURA MILLS CO., LTD. *v.* KRISHNA AYYAR. 171 I.C. 690=10 R.M. 390=1937 M.W.N. 518= 45 L.W. 405=A.I R. 1937 Mad. 405.

——S. 8—*Refusal by arbitrator to act further till payment of his fees—If amounts to refusal to act.*

Where the arbitrator says that he would act no further till his fees are paid in advance such action amounts to a refusal to act on his part within the meaning of S. 8, Arbitration Act, and a new arbitrator can be appointed in his place. (*Ameer Ali, J.*) PRIYABRATA BOSE *v.* PHANI BHUSAN GHOSE. 174 I.C. 483=10 R.C. 677=A. I.R. 1937 Cal. 523.

——S 8 (1) (b)—*Construction—Parties jointly appointing two arbitrators—One of them dying—Court's power to supply vacancy.*

It is an ordinary canon of construction that a section of a statute should be so construed as to render every part thereof consistent with every other part. S.8 must be read as a whole and Cl. (*b*) of sub-S. (1) must be read as qualified by sub-S. (2). It is consistent with the language of entire section to construe Cl. (*b*) as covering the case of a vacancy where the submission provides for reference to a single arbitrator and any other construction would render Cl. (*b*) of sub-S. (1) inconsistent with the words of sub-S (2). Hence where the parties have jointly appointed two arbitrators and one of the arbitrators dies or a vacancy otherwise occurs, the Court has no power under S. 8 (1) (*b*) to supply the vacancy and appoint an arbitrator. (*Lobo, J.*) RAMJI PURUSHOTAM *v.* HARI SHAMLA. 181 I.C. 337=11 R.S. 215=A.I.R. 1939 Sind 81.

——S. 9—*Appointment of arbitrator before expiry of seven days from notice—Legality.*

The appointment of an arbitrator within seven days from the service of notice on the other party is illegal and the mere embodying of the appointment in a reference on a later date does not affect the invalidity of the appointment. (*Lobo, J.*)

ARBITRATION ACT (1899), S. 9.

KISHINCHAND SANTRAM *v.* ROCHALDAS. **180 I.C. 143=11 R.S. 170=A.I.R. 1939 Sind 24.**

——S. 9—*Scope—Contract of sale—Arbitration clause—Appointment of arbitrators in contravention of S. 9—Legality.*

K and *M* entered into a contract of sale of certain goods on terms and conditions of the importing office. The contract between the parties contained an arbitration clause which provided that all disputes of whatsoever nature, unless amicably settled, should be referred to two arbitrators, one to be nominated by each under the provisions of the Arbitration Act. Upon a dispute having arisen *K* nominated one arbitrator on its behalf and called upon *M* to nominate one for him within three days. On failure of *M* to do so *K* himself appointed an arbitrator on behalf of *M*. This was in accordance with the arbitration clause contained in the contract between *K* and the importing office. The two arbitrators thus nominated by *K* drew up an award.

Held, that the arbitrators acted without jurisdiction because whatever terms and conditions of the importing office were to be incorporated in the contract between *K* and *M*, the arbitration clause in the contract of the office could not be incorporated by implication because the contract between *K* and *M* actually contained a separate arbitration clause and hence the appointment of another arbitrator by *K* on behalf of *M* was in contravention of the provisions of S. 9, Arbitration Act, and hence illegal. (*Lobo, J.*) KISHINCHAND SANTRAM *v.* ROCHALDAS. **180 I.C. 143=11 R.S. 170=A.I.R. 1939 Sind 24.**

——S. 10—*Duty of arbitrator to follow rules of evidence.*

An arbitrator is not of course bound by the technical and strict rules of evidence. But he must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy. (*Wadia, J.*) ABOOBAKAR LATIFF *v.* RECEPTION COMMITTEE, INDIAN NATIONAL CONGRESS. **171 I.C. 470=10 R.B. 200=39 Bom. L.R. 476=A.I.R. 1937 Bom. 410.**

——S. 11—*Award against minor—Filing of—Appointment of proper guardian—Necessity for—C. P. Code, S. 141 and O. 32, R. 3.*

Under S. 141, C. P. Code, the procedure provided in regard to suits is to be followed, so far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The presentation of an application by an arbitrator for filing an award under S. 11 of the Arbitration Act comes within the category of "civil proceedings." Where, therefore, the award is against a minor, it is incumbent to make a prayer in the application for the appointment of a proper guardian for such minor under O. 32, R. 3, C. P. Code. If a proper guardian is not appointed, a decree passed against the minor on the basis of the award is a nullity. (*Abdul Rashid, J.*) ARURA *v* PUNJAB ZAMINDARA BANK, LTD **42 P.L.R. 114=A.I.R. 1940 Lah. 164.**

——S. 11—*Filing of award—Jurisdiction of.*

The contention that under the Arbitration Act jurisdiction to entertain proceedings is given to the District Judge alone and the Additional District Judge is not competent to entertain such proceedings is not maintainable as it is opposed to S. 21, Punjab Courts Act, which provides that the Additional District Judge can exercise all the powers of the District Judge, but the District Judge has to assign such powers to him. Previously a case was on the record of the District Judge, who actually heard it and subsequently it went to the Additional District Judge who disposed of it. No objection was taken by the party to the jurisdiction of the Additional District Judge on that date.

Held, that under the circumstances it must be assumed that the District Judge did assign this case to the Additional District Judge. In any case, the party having taken no objection to the jurisdiction of the Additional District Judge was not entitled to raise it subsequently. (*Jai Lal, J.*) SHIV NATH RAI *v.* MESSRS. LALLO MAL. **182 I.C. 159=12 R.L. 3=A.I.R. 1938 Lah. 838.**

ARBITRATION ACT (1899), S. 11.

——S. 11—*Order declining to file award—Appeal.*

There is no provision in the Arbitration Act for appeal against an order refusing to file an award. But an appeal filed through mistake can be heard as a revision. (*Mir Ahmad, A.J.C.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* LEKHU RAM. **173 I.C 11=10 R. Pesh. 49=40 P.L.R. 79 =A.I.R. 1938 Pesh. 3.**

——S. 11 (2)—*Award filed in wrong Court—Proper order.*

If an application to file an award is made in a Court which has no jurisdiction to entertain it, the proper order on it would be, not an order of dismissal, but an order for return of the application for presentation to the proper Court. (*Mitter and Lodge, JJ.*) JHIRIGHAT NATIVE TEA CO., LTD. *v.* B. GUPTA. **I.L.R. (1940) 1 Cal. 358=188 I.C. 143=44 C.W.N. 285=71 C.L.J. 62=1940 Comp.C. 56=A.I.R. 1940 Cal. 220.**

——S. 11 (2)—Reference to arbitration by company—Award, where to be filed. *See* COMPANIES ACT, S. 152 (3). **44 C.W.N. 285.**

——Ss. 11, 13 and 14—*Application by arbitrator to District Judge for filing award—District Judge transferring file to another Judge—Legality of procedure.*

A dispute between a Bank and *S* was referred to arbitration under the provisions of the Arbitration Act. The arbitrator made an award in favour of the Bank and filed it in the Court of the District Judge. The District Judge transferred the application and award to the Court of the Honorary Sub-Judge who on the acceptance of the award by the parties passed a decree in terms of the award. Subsequently the designations of the various Courts in the province were altered and the Divisional Judge (old style) became the District Judge. The arbitrator and the Bank presented a fresh application in the Court of the District Judge that the award be filed in his Court. The Court directed it to be filed.

Held, that the procedure adopted by the District Judge in sending the file to the Court of the Honorary Sub-Judge was a nullity. All the proceedings were complete when the award was filed by the arbitrator subject to any action which might be taken by the Court under Ss. 13 and 14; the mere presentation of the award amounted to filing of it within the meaning of S. 11 and as it was already filed, a second application for filing it did not lie and the order of the District Judge on that application was a nullity. (*Middleton, J.C. and Almond, A.J.C.*) SAINDITTA MAL *v.* LYALLPUR BANK. **160 I.C. 693=8 R. Pesh. 127 =A.I.R. 1936 Pesh. 2.**

ARBITRATION ACT (1899), S. 12.

——**S. 12**—*Extension of time—Discretion of Court—Power to extend time without application by a party.*

Extension of time for making the award under S. 12 of the Arbitration Act is a matter entirely within the discretion of the Court. There is nothing in the section to suggest that the Court should not exercise this power to extend the time unless it had been expressly asked by a party to do so. (*Cornish, J.*) MADURA MILLS CO., LTD. *v.* KRISHNA AYYAR. **171 I.C. 690=10 R.M. 390=1937 M.W.N. 518=45 L.W. 405=A.I.R. 1937 Mad. 405.**

——**S. 13**—*Award remitted re-consideration—Powers of arbitrator—Scope of.*

A Judge remitted an award to the arbitrator and indicated particular matters which had to be dealt with by the arbitrator. In the final award the arbitrator submitted that he dealt specifically with those points and also gave certain directions for carrying out his decision on these matters into effect.

Held, the other changes introduced in the final award were merely incidental or consequential, and that they fell within the scope of the questions remitted to him for re-consideration and that the award was not vitiated. (*Abdul Rashid and Addison, JJ.*) DAMODAR DAS AND SONS, LTD. *v.* BASHESHAR NATH. **167 I.C. 730=9 R.L. 541 (2)=A I.R. 1936 Lah. 865.**

——**S. 13**—*Award—Remission in part—Jurisdiction of Court.*

A Court in remitting an award under S. 13 of the Arbitration Act must remit it as a whole and has no jurisdiction to remit only a part of the award for re-consideration. (*Wadia, J.*) ABOOBAKER LATIFF *v.* RECEPTION COMMITTEE, INDIAN NATIONAL CONGRESS. **171 I.C. 470=39 Bom.L.R. 476=10 R.B. 200=A.I.R. 1937 Bom. 410.**

——**Ss. 13 and 14**—*Award—Remission of—Grounds for—If same as for setting aside.*

Under S. 13 of the Arbitration Act, the Court is not bound to remit the award only on the grounds mentioned in para. 14, Sch. II, C. P. Code. An award may generally be remitted on the following grounds: (1) defect patent on the face of the record; (2) mistake on the part of the arbitrator, such that he himself desires a remission of the award to him; (3) discovery of some material evidence subsequent to the making of the award which might have affected the arbitrator's decision; and (4) misconduct. These are not, however, exhaustive. The grounds for remitting an award are much wider than those for setting an award aside under para. 14; but the jurisdiction is statutory and cannot be increased or decreased. (*Wadia, J.*) ABOOBAKER LATIFF *v.* RECEPTION COMMITTEE, INDIAN NATIONAL CONGRESS. **171 I.C. 470=39 Bom.L.R. 476=10 R.B. 200=A I.R. 1937 Bom. 410.**

——**S. 14**—Petition under—Nature and scope of—Applicability of O. 1, R. 8, C. P. Code. *See* C. P. CODE, O. 1, R. 8. **38 Bom.L.R. 380.**

——**S. 14**—*Scope—Question of validity of submission—If can be enquired into.*

The words of S. 14 are sufficiently wide to cover an enquiry into and a decision on the question of the validity of the submission. As the basis of an arbitration is the submission, the improper procuring of an arbitration, which is covered by S. 14 must include the question of the validity of the submission. (*Davis, J.C. and Mehta, A.J.C.*) ROCHANBAI *v.* MOTUMAL. **31 S.L.R. 55=169 I.C. 623=10 R.S. 10=A.I.R. 1937 Sind 110.**

ARBITRATION ACT (1899), S. 15.

——**S. 14**—*Scope—Suit to set aside award on the ground of arbitrator's misconduct—Maintainability.*

Quaere.—Whether a suit lies to set aside an award on the grounds covered by S. 14 of the Arbitration Act, by reason of R. 373 of the Bombay High Court (Original Side) Rules. (*Wadia, J.*) ABDUL GANI SUMAR *v.* THE RECEPTION COMMITTEE OF THE 48TH INDIAN NATIONAL CONGRESS. **60 Bom. 645=163 I.C. 532=9 R.B. 29=38 Bom.L.R. 380=A.I.R. 1936 Bom. 259.**

——**S. 15**—*Award filed in Court—Conclusive nature of—Remedy of aggrieved party.*

An award, once it is made and filed under the Arbitration Act, is conclusive of the matters which it decides until it has been set aside by legal process. A party dissatisfied with an award may either file a suit to set aside the award or he can apply under S. 14 of the Act. (*McNair, J.*) BAL KRISHNA MOHTA *v.* BRIJMOHAN BIANI. **42 C.W.N. 367.**

——**S. 15**—*Award filed in Court—Effect of—Enforceability as a decree—Objection as to jurisdiction of arbitrator or validity of award—If can be raised in execution.*

Award when filed in Court is enforceable as if it were a decree of Court and an executing Court has to treat it as such and execute it. It is open to an aggrieved party to raise the question of the jurisdiction of the arbitrator by instituting a regular suit. But he cannot be permitted to raise the question in execution as the executing Court cannot go into the question as to the validity of the award or the jurisdiction of the arbitrator. (*Rachhpal Singh and Ismail, JJ.*) KRISHNA GOPAL *v* MST. LAKSHMI BAI. **I.L.R. (1938) All. 389=175 I.C. 297=10 R.A. 676=1938 A.L.R. 412=1938 A.L.J. 210=1938 A.W.R. (H.C.) 135=A.I.R. 1938 All. 232.**

——**S. 15**—*Decree passed on award—If a bar to enforce award.*

No decree need be passed on an award to which the Arbitration Act applies. The passing of a decree therefore is a superfluous act for doing which a Judge has no legal sanction. It is consequently a nullity and a surplusage which must be ignored and is no bar to the application to enforce the award. (*Mir Ahmad, A.J.C.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v* LEKHU RAM. **173 I.C. 11=10 R. Pesh. 49=40 P.L.R. 79=A.I.R. 1938 Pesh. 3.**

——**S. 15**—*Execution of award—Right of holder after transfer of his rights thereunder—C. P. Code, O. 21, R. 16.*

Though an award filed in Court is not a decree it is given the same status as a decree for the purpose of enforcement, with the result that all the provisions of the C. P. Code applicable to execution apply to such award. Therefore the holder of an award is entitled to execute the award, although he may have transferred his rights under it to a transferee unless and until such transferee comes to the Court and applies under O. 21, R. 16, C P. Code. (*McNair, J.*) ANATH NATH *v* MONMOTHA NATH **184 I.C. 652=12 R.C. 263=A.I.R. 1939 Cal. 482.**

ARBITRATION ACT (1899), S. 15.

——S. 15—*Reference to arbitration by company —Decree passed on award and executed by Court without objection—If* ultra vires—*Points decided in such proceedings—If* res judicata.

Where in a reference to arbitration by a limited liability company a decree is passed by a Sub-Judge and is executed without objection by the judgment-debtor, the question whether the decree could be executed in that Court or not does not become *res judicata*. The decree is a nullity in such arbitrations because it is the award which has to be executed. It follows that the Court should ignore the decree and the execution of such decree is *ultra vires*. *A fortiori* a point decided in such *ultra vires* proceedings cannot become *res judicata*. It is the award which has to be enforced and it can only be enforced by the District Judge and no one else A.I.R. 1933 Pesh. 66, Rel. on. (*Almond, J.C. and Mir Ahmad, J.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* PADAM LAL. **177 I.C 659=11 R. Pesh. 30=A.I.R. 1938 Pesh. 54.**

——Ss. 15 and 11—*Award made, but not filed, before institution of suit—Power of arbitrator to file award.*

Where a valid award has been made, but not filed, before the institution of a suit by one of the parties to the arbitration proceeding, the arbitrator, although he is *functus officio* in his judicial capacity when the suit is instituted, is not prevented from acting in a ministerial capacity in filing the award. (*McNair, J.*) BALKISSEN MEHTA *v.* BRIJMOHAN. **41 C.W.N. 1198.**

——S. 19—*Application under—Nature of—Order on—Revision.*

An application made under S 1⁰, Arbitration Act, is not an interlocutory proceeding or a mere branch of a suit within the meaning of S. 115 of the Code. It is a case in itself and decides finally between the parties whether the matter shall or shall not be decided by arbitration; therefore an application in revision will lie and is not excluded by S. 115. (*Davis, J. C. and Lobo, A.J.C.*) INDO PERSIAN TRADING CO. *v* PARMANAND HARNAMSINGH **166 I.C. 541=9 R.S. 146=A.I.R. 1936 Sind 205.**

——S. 19—*Application for stay—Onus.*

Where an application is filed by a defendant for stay of the suit under S. 19 of the Arbitration Act, the onus is always on the plaintiff to show why he should not be bound by an agreement to refer disputes to arbitration. (*Addison, J.*) JUBILEE CHAMBER OF COMMERCE, LTD., RAWALPINDI *v.* LALA AMRIT SHAH. **42 P.L.R. 48=A.I.R. 1940 Lah. 180.**

——S. 19—*Arbitration and civil suit—Award prior to stay of suit—Legality—Stay of suit—If can be ordered.*

The defendant submitted a dispute to the arbitration under an agreement to do so. The plaintiff instituted a suit in the Civil Court relating to the same dispute in breach of the agreement. The plaintiff subsequently filed an application under O. 39, R. 1, C. P. Code, for injunction, restraining the arbitration from continuing its proceedings, pending the suit. The arbitration proceedings continued in spite of this application, on which no order had been passed and an award was delivered. Subsequently during O. 39, proceedings, the defendant filed an application under S. 19, praying for the stay of the suit as the award had already been delivered. The defendant had taken no other proceeding or filed any written statement in the suit concerning the dispute.

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Held, that the award was null and void as an order staying the suit under S. 19 of the Act was not obtained before the award.

Held, further, that the declaration that the award was null and void did not mean that the defendant's application under S. 19 should be dismissed. On the other hand the Court was bound to consider and decide it according to law. (*Tek Chand, Offg. C.J. and Abdul Rashid, J.*) JOWAHER SINGH SUNDER SINGH *v.* FLEMING SHAW & CO., LTD. **176 I.C. 352=11 R.L. 201=A.I.R. 1937 Lah. 851.**

——S. 19—*Clause in agreement to refer to arbitration, dispute arising out of agreement—Plaint alleging rescission of contract on ground of breach of its terms by defendants—Plaint raising issue as to factum of contract—Suit, if may be stayed in either case.*

Where an agreement in writing was entered into between the plaintiffs and the defendants, which contained a clause, whereby it was provided that in case of disputes between the parties arising out of the agreement, the matter should be submitted to arbitration, and the plaintiff's case is that the contract was rescinded by him as the defendants were gulity of a breach of some of the written as well as the oral terms of the contract relating to payment, the dispute between the parties arises out of the agreement, the question being whether the defendants committed a breach of the terms, and the defendants are, therefore, entitled to an order staying the suit of the plaintiffs for a declaration that the contract has been validly rescinded. But where the case of the plaintiffs is that the person who signed the contract as representing them had no authority to do so, that there was, therefore, no contract between the parties and, accordingly, no agreement to refer to arbitration, a suit by them for a declaration that they did not enter into the alleged contract is not, so far as it deals with that contract, in respect of a matter referred within the meaning of S. 19 of the Arbitration Act, and the defendants are not, therefore, entitled to a stay of the suit. (*Panckridge, J.*) HARI NAGAR SUGAR MILLS, LTD. *v.* SKODA (INDIA), LTD. **41 C.W.N. 563.**

——S. 19—*Order refusing stay—Appeal or revision.*

Obiter.—From an order refusing stay under S. 19, no appeal lies; only revision is competent. (*Coldstream, J.*) REGAL THEATRES, LTD. *v.* GURCHARAN SINGH. **39 P.L.R. 423=172 I.C. 432=10 R.L. 323=A.I.R. 1937 Lah. 206.**

——S. 19—*Right to invoke Act—Onus.*

It is for the party who is invoking the Arbitration Act to prove his right so to do. (*Panckridge, J.*) KESHORAM COTTON MILLS *v.* KANHYALAL. **44 C.W.N. 607.**

——S. 19—*Stay of suit—Award declared nullity—Arbitration proceedings—If can continue.*

Any proceedings taken after the institution of a suit on a reference made prior to the institution of the suit are no doubt null and void; but a suit can still be stayed and the parties cannot be compelled to waive their right to move the private tribunal upon which they had agreed at the time

the contract was entered into between them. The arbitration proceedings can legally continue on the stay of the suit in spite of the decision that the award already made is a nullity. (*Din Mohammad, J.*) HUKAM CHAND *v.* TOYA MENKA KAISHA, LTD. **A.I.R. 1940 Lah. 265.**

——**S. 19**—*Stay of suit—Grounds—Allegations of fraud, misrepresentation and coercion.*

If allegations of fraud and coercion go to the very root of the agreement to refer to arbitration, or if they relate to matters outside the scope of the submission, the only forum to decide that matter is the Civil Court. In either of these cases S. 19 will *ex necessitate rei* be inapplicable. If, on the other hand, misrepresentation, fraud or coercion is alleged to have been committed in reference to matters which are sought to be proved in proof or disproof of the contentions of the parties relating to a dispute which has been, or can be, validly referred to arbitration in accordance with the original agreement, this will not necessarily be a ground for declining to stay the suit. (*Tek Chand, Offg. C.J. and Abdul Rashid, J.*) JOWAHIR SINGH SUNDER SINGH *v.* FLEMING SHAW & CO., LTD., AMRITSAR AND KARACHI. **176 I.C. 352=11 R.L. 201=A.I.R. 1937 Lah 851.**

——**S. 19**—*Stay of suit ordered on misrepresentation—Revival of suit—Inherent power of Court.*

An order staying the suit if made on a fraudulent misrepresentation can be reversed by the Court making the order, if it is satisfied of the fraud and misrepresentation of the other side and the suit can in the circumstances be revived. Similarly, the Court is empowered under S. 151, C. P. Code, to make any order as may be necessary for ends of justice or to prevent abuse of the process of the Court. Nothing in the Arbitration Act bars this action. (*Din Mohammad, J.*) HUKAM CHAND *v.* TOYA MENKA KAISHA, LTD. **A.I.R. 1940 Lah. 265.**

——**S. 19**—*Stay of suit—If can be ordered after award.*

There is nothing in S. 19 of the Arbitration Act to justify the conclusion that an order of stay can be passed under the section even after the award had been given. The object of passing an order staying the suit under S. 19, is to allow the parties to proceed with the arbitration. But if before the application for stay is made or has been disposed of the arbitrators have already made the award, there will be no point in making the stay order. In that event, the proper course for the opposite party would be to plead the award in bar of the suit and not to obtain an order staying the suit pending arbitration which had already terminated. (*Tek Chand, Offg. C.J. and Abdul Rashid, J.*) JOWAHIR SINGH SUNDAR SINGH *v.* FLEMING SHAW & CO., LTD., AMRITSAR AND KARACHI. **176 I.C. 352=11 R.L. 201=A.I.R. 1937 Lah. 851.**

——**S. 19**—*Stay—Grant of—Conditions—Proof of existence of contract or submission in writing—Necessity—Duty of applicant for stay—Denial of contract or submission—If justifies refusal of stay.*

S. 19 of the Arbitration Act is in the nature of a summary procedure and does not normally include any lengthy or protracted inquiry or investigation. The Arbitration Act requires a submission in writing, and the fact that a contract or submission in writing exists has to be established by the person who comes to Court and applies for a stay. On the assumption that a contract which contains a submission in writing exists, an application may be made, because on that assumption the arbitrators have jurisdiction. If the fact of the contract itself is disputed, the arbitrators cannot decide the point, and the Court in the normal course would refuse a stay. Merely sending contract notes by a party to another without any confirmation notes signed by the other party does not amount to a submission in writing as required by the Arbitration Act. (*Kania, J.*) SHRIRAM HANUTRAM *v.* MOHANLAL & Co. **I.L.R. (1940) Bom. 249=187 I C. 494=12 R.B. 460=41 Bom.L R. 1293=A.I.R. 1940 Bom. 93.**

——**S. 19**—*'Step in the proceedings'—Defendant asking for adjournment of hearing of plaintiff's summons to compel him to file written statement—Adjournment obtained by consent and without prejudice to defendant's application for stay of suit—Effect of.*

Where the defendant asked for an adjournment of the hearing of the summons taken out by the plaintiff to compel him to file the written statement, and the adjournment was obtained by consent and without prejudice to the defendant's pending application for stay of the suit.

Held, that the defendant did not take any step in the proceedings within the meaning of S. 19. (*Lort Williams, J.*) DWARKA DAS & CO. *v.* CHAIN ROOP SINGHEE. **I.L.R. (1937) 2 Cal. 63=41 C.W.N. 1261.**

ARCHAKA—Grant—If to deity or Archaka burdened with service. *See* GRANT—RELIGIOUS ENDOWMENT. **(1937) 2 M.L.J. 413.**

——Right of—Right to claim adversely to temple. *See* GRANT—RELIGIOUS ENDOWMENT. **(1937) 2 M.L.J. 368.**

ARMS ACT (XI OF 1878). S. 4—*'Ammunition'—Empty cartridge cases.*

An empty cartridge case is undoubtedly a part of ammunition within the meaning of S 4 of the Arms Act and its possession is an offence under that Act. (*Allsop and Ganga Nath, JJ.*) EMPEROR *v.* BHOPAL SINGH. **162 I.C. 912=8 R.A. 915=37 Cr.L.J. 727=1936 A L J. 657=1936 A. W R 216=1936 A.Cr.C. 91=1936 Cr. C. 504=A I.R. 1936 All. 392.**

——**S. 4**—*"Ammunition"—Lead bullets.*

Bullets made of lead are not excluded from the terms of the Arms Act. A piece of lead in the shape of a bullet or in the shape of shot is certainly ammunition or a part of ammunition. Lead as such which is not in such a shape is excluded from the meaning of the term, although lead can be made up into cartridges. (*Allsop and Ganga Nath, JJ.*) EMPEROR *v.* BHOPAL SINGH. **162 I.C. 912=8 R.A. 915=37 Cr.L.J. 727=1936 A.L J. 657=1936 A.W.R. 216=1936 A.Cr.C. 91=1936 Cr.C. 504=A.I.R. 1936 All. 392.**

——**S. 4**—Carrying gun without percussion cap—If 'armed'. *See* ARMS ACT, SS. 19 (*e*), 13 AND 4, **A.I.R. 1937 Nag. 213.**

——**S. 4**—*'Spear'—If includes spear-head.*

As the word 'spear' is used in S. 4 of the Arms Act in contradistinction to spear-head, a spear cannot be held to include spear-head. (*Iqbal*

ARMS ACT (1878), S. 13.

Ahmad, J.) RAM BRICH *v.* EMPEROR. **167 I.C. 935=9 R.A. 600=38 Cr.L J. 511=1937 A.L.R. 285=1937 A Cr.C. 25=1936 A.W.R 1289=1937 A.L.J. 41=A I.R. 1937 All. 228.**

——**S 13**—*Intention—Person found going about with 'arms'—Presumption.*

Obiter.—A man who is found going about with a pistol, gun, sword or other weapon which comes within the definition of 'arms' must, in the absence of proof to the contrary, be presumed to be carrying it with the intention of using it, should an opportunity for using it arise This presumption is further strengthened where the accused is coming back from a jungle. (*Grille and Gruer, JJ.*) LOCAL GOVERNMENT *v.* GAJRAJSINGH. **I.L.R. (1937) Nag. 488=168 I.C 879=9 R.N. 278=38 Cr.L.J. 639=A.I.R. 1937 Nag. 213.**

——**Ss. 19 and 20**—*Relative applicability—Scope of S. 20.*

It is difficult to lay down any general rule as to what cases fall under S. 20 and what cases under S. 19, Arms Act. Every case must be decided on its own facts. S. 20 is not confined to cases where import or export of arms is attempted and applies to cases where a person is concealing a weapon. Where certain arms and ammunition were found tied and concealed under the cot of the accused in a room in a hostel, it must be presumed that the intention of the accused was not only to conceal them from the boys of the hostel but also from any public servant who may happen to come to the hostel and hence they are guilty under S. 20 of the Act. (*Thomas, C. J.*) JAGDISH DUTT SHUKLA *v.* EMPEROR. **188 I.C. 110=1940 A. Cr. C. 69=12 R.O. 424=1940 O.L.R 306=41 Cr.L. J. 545=1940 O.A 421=1940 O.W.N. 481.**

——**Ss. 19 (e), 13 and 4**—*Offence under—Carrying gun without percussion cap.*

The word 'arms' is defined in S 4, and it includes part of arms. It would, therefore, include a gun *minus* a percussion cap, and a person carrying that gun would be going armed with arms within the meaning of S. 13, though it could not immediately be fired. The absence, therefore, of the percussion cap would not be fatal to a prosecution under S. 19 (*e*) of the Arms Act. (*Grille and Gruer, JJ.*) LOCAL GOVERNMENT *v.* GAJRAJSINGH. **I.L.R. (1937) Nag. 488=168 I.C. 879=9 R.N. 278=38 Cr.L.J. 639=A.I.R 1937 Nag. 213.**

——**S. 19 (f)**—*Applicability—Servant carrying unlicenced gun of master—Absence of knowledge that gun was not licensed—Offence—Sentence—If severe punishment called for.*

A person who merely assists the owner of a licensed weapon by carrying it for him or taking it somewhere for him may be said to assist the owner in doing a perfectly legal act, for the owner, being the licensee, is entitled to have the gun in his possession. But if the weapon be an unlicensed weapon neither the actual owner nor his servant or any one to whom he entrusts it can be said to be engaged in a legal act, because the possession in that case is illegal, whether it be in the possession of the owner or of his servant Technically therefore a person who carries an unlicensed gun of his master is guilty of an offence under S. 19 (*f*) of the Arms Act. But in the absence of proof that the servant had any knowledge that the gun which he was carrying for his master was unlicensed the offence of which he is guilty does not call for a severe

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punishment. (*Agarwala and Varma, JJ.*) EMPEROR *v.* LALMAN THARU. **167 I.C. 352=9 R.P. 409=38 Cr.L.J. 409=18 Pat.L.T. 88=3 B.R. 298=1937 P.W.N. 78=A I R. 1937 Pat. 347.**

——**S. 19 (f)**—*Applicability—Two persons in joint possession of revolver—Offence.*

S. 19 (*f*) of the Arms Act was never intended to cover a case of two persons making temporary use of a revolver in order to foist a false case on another. That two people should jointly own a single revolver is itself an unusual circumstance. (*King, J.*) SUBBIA GOUNDAN *v.* EMPEROR. **1937 M.W.N. 572 (2).**

——**S. 19 (f)**—*Conviction—Grounds for—Discovery of arms in house of accused—Sufficiency.*

Where the only evidence for the prosecution is that a miscellaneous collection of arms and ammunition was found in a house belonging to the accused, it is not safe to convict him of an offence under S. 19 (*f*) of the Arms Act, when there is no clear evidence that the accused was living in the house until within a short period before the discovery. (*King, J.*) RAMALINGA GOUNDAR *v.* EMPEROR. **172 I.C. 498=10 R M. 459=39 Cr.L. J. 147=1937 M.W.N. 878=46 L W. 522=A.I R. 1937 Mad. 975=(1937) 2 M.L.J. 620.**

——**S. 19 (f)**—*Exclusive possession not proved—Conviction.*

An accused was charged under S. 19 (*f*) of the Arms Act and the only evidence against him was that at his instance a place was dug up in the house of another person wherefrom a pistol and some cartridges were recovered, but during the commission of robbery he was not alleged to be armed with a pistol; moreover the person from whose house the pistol and cartridges were recovered was suspiciously withheld by the police.

Held, that such exclusive possession was not established against the accused as would justify his conviction for the offence of possessing a pistol without a licence. (*Din Mohammad, J.*) MARU *v.* EMPEROR. **172 I.C 351=10 R.L. 301=39 Cr.L.J. 119=A.I.R. 1937 Lah. 561.**

——**S. 19 (f)**—*"Possession"—Arms concealed in railway premises and discovered on accused's information—If in possession and control of accused.*

Where an unlicensed gun, on the information of the accused, was recovered from the railway premises within the railway fencing, which place was accessible to the public, and a path was running close by.

Held, that no member of the public could have ordinarily got at the gun inasmuch as it was concealed from view, whereas the accused could have access to it at opportune moments and hence in the eye of the law he must be deemed to be in possession and control of the gun. (*Collister and Bajpai, JJ.*) EMPEROR *v.* CHOKHEY. **I L.R. (1937) All. 710=170 I.C. 453=1937 A.L J. 715 =1937 A.Cr.C. 105=1937 A.L R. 661=38 Cr.L. J 910 (2)=10 R.A. 108=1937 A.W.R. 616=A.I. R 1937 All 497.**

——**S. 19 (f)**—*Possession of arms—Several people occupying house—Head of family—If presumed to be in possession.*

What the prosecution has to prove under S. 19 (*f*), Arms Act, is that the accused has the arms in his possession or control. Where several people occupy a house, it should be presumed that the head of the family is in possession and

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control of everything in the house including unlicensed arms. It is of course open to him to rebut that presumption by any evidence which he can adduce. (*Middleton, J. C and Almond, A. J. C.*) EMPEROR *v.* MIR AHMAD. **169 I C 681=10 R. Pesh. 9=38 Cr.L J 838=A.I.R 1937 Pesh 73**

——**S 19 (f)**—*Possession or control—Firearms concealed in master's garden—Servant aware of same—If in possession or control—Conviction—Legality.*

Because a man happens to know that there are illegally concealed in his master's garden a revolver and cartridges, it cannot be held that they are necessarily in his possession or control; and he cannot be convicted of an offence under S.19(*f*) of the Arms Act. (*Cunliffe and Henderson, JJ.*) CHERU SHEIKH *v.* EMPEROR. **40 C.W.N. 1374.**

——**S. 19 (f)**—*Possession of spear-head in Ghazipur District—Conviction for—If justified.*

The notification dated 9th May, 1934, issued by the U. P. Local Government does not prohibit the possession of a spear-head in the District of Ghazipur. The word 'spear' used in that notification cannot be extended to spear-head, in view of the language of S. 4 of the Arms Act. Accordingly, the possession of a spear-head in Ghazipur District cannot justify a conviction under S. 19 (*f*) of the Arms Act. (*Iqbal Ahmad, J.*) RAM BRICH *v.* EMPEROR. **167 I.C. 935=9 R. A. 600=38 Cr.L J 511=1937 A L R 285=1937 A.Cr C. 25=1936 A W R. 1289=1937 A.L.J. 41 =A I.R 1937 All. 228.**

——**S. 19 (f)**—*'Possession"—Weapon and other articles in room of house of joint family—Absence of evidence as to who is in possession to the exclusion of others—Conviction of head of family and all other male members—Legality.*

During the search of a house belonging to a joint family by the police, a weapon, some gunpowder and other articles were found; the head and manager of the joint family and the other male members of the family were prosecuted and convicted under S. 19 (*f*) of the Arms Act. The articles were found in a loft in one of the rooms in the house but there was no evidence that the room in question or the weapon was in the particular or exclusive possession of any particular member of the family.

Held, that it could not be inferred that the weapon was in the possession of any other person than the head and manager of the family and therefore he alone was liable to conviction and that the convictions and sentences in respect of the other members must be set aside. (*Agarwala and Madan, JJ.*) MANGAR KOIRI *v.* EMPEROR. **15 Pat. 696=165 I.C. 803 (1)=17 Pat L T. 573= 1936 Cr.C. 820=1936 P.W.N. 908=38 Cr.L.J. 100=9 R.P. 216=A I.R 1936 Pat. 512.**

——**S. 19 (f)**—*Servant of licensee carrying latter's gun to his house under his orders—Conviction of—Sustainability.*

A servant of a gun licensee who is merely carrying the gun of his master to the latter's house under his orders cannot be held liable to conviction under S. 19 (*f*), Arms Act. (*Lakshmana Rao, J.*) VEERASWAMI *v.* EMPEROR. **187 I C. 120=12 R M 699=41 Cr.L J 400=1939 M. W.N. 1260=A.I R 1940 Mad 257.**

——**Ss. 19 and 20**—*Concealment of arms in loin cloth—Attempt to escape when challenged by Police—Offence committed.*

ASSAM BIJNI SUCCESN. ACT (1931).

Where the accused who was travelling on horseback at 4-30 in the morning attempted to escape when challenged by two *sowars* of the mounted police, and he was found carrying a spear-head concealed in his loin cloth.

Held, that the offence fell not under S. 19 but under S. 20 of the Arms Act. (*Skemp, J.*) JODH SINGH *v.* EMPEROR. **179 I.C. 897=11 R.L. 650= 40 Cr.L.J. 279=40 P.L.R. 921=A.I.R. 1939 Lah. 17.**

——**Ss. 19 (f) and 23**—*Person holding arm after expiry of licence—Offence.*

A man who possesses an arm for which he holds an expired licence does not do so "under that licence and in the manner and to the extent permitted thereby." Accordingly he commits an offence under S. 19 (*f*) and is not punishable under S. 23. (*Middleton, J.C.*) ZAINUL ABDIN *v.* EMPEROR. **167 I.C. 191=9 R. Pesh. 84=38 Cr. L J. 396=A.I.R. 1937 Pesh. 30.**

——**S. 20**—Scope and applicability. *See* ARMS ACT, SS. 19 AND 20. **1940 O.A. 421=1940 O.W. N. 481=188 I.C. 110.**

——**S. 29**—*Scope of—Trial under S. 19-F by City Magistrate who was also Additional District Magistrate empowered with powers of District Magistrate—Sanction—Necessity.*

Where a City Magistrate who is also the Additional District Magistrate empowered with the powers of District Magistrate tries a case under S. 19-F, it cannot be said that sanction under S. 29 is unnecessary because he exercised the powers of a District Magistrate as well. Even in such a case trial without sanction under S. 29 is illegal. Sanction under S. 29 can only be granted on a consideration of the facts connected with the prosecution and it cannot be said that the Magistrate tried the case after granting sanction to himself in his capacity as Additional District Magistrate; for having granted the sanction in that capacity the case cannot be tried by the Magistrate granting the sanction whether he acts as Additional District Magistrate or City Magistrate. The trial therefore is illegal. (*Lobo, J. C.*) YUSAF UMAR *v.* EMPEROR. **I.L.R. (1940) Kar. 296=189 I C. 29=A.I.R. 1940 Sind 107.**

ASSAM BIJNI SUCCESSION ACT (II OF 1931)—*Applicability outside—Assam.*

The Bijni Succession Act applies to the status of the holder of the Raj wherever the properties appertaining to the Raj may be situate. It was intended by the Assam Legislature that the Act should operate even outside the limits of the province of Assam and was within its authority in legislating on that footing. The scheme of an Act may be such as to affect the properties outside the territorial limits of jurisdiction of a particular Legislature. This generally happens when the legislation is intended to act through a person who is within its jurisdiction. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726 =64 C.L J. 212=A.I R 1936 Cal. 593.**

——*Scope—If confiscatory.*

The legislature in passing the Bijni Succession Act has passed no provision forfeiting or confiscating the property of any person. It has merely declared a rule of succession which according to it is the customary law and has only supplemented that law where in its view, it needed supplementing. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA

ASSAM BIJNI SUCCESN. ACT (1931).

NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.**

———*Scope—If* intra vires.

The Assam Bijni Succession Act is *intra vires* the Assam Legislature. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.**

———S. 1—*Act, if public Act or local Act.*

The Bijni Succession Act, even though it may be regarded as local and personal in some of its aspects, is none the less a public Act. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.**

———S. 4 (1)—*"With title dating back", etc.—Force and effect of.*

The words "with title dating back", etc., cannot be taken apart from the rest of the passage and treated as a mere recital and not as a part of the enactment. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.**

———S. 4 (1) and (2)—*Declarations in—If law.*

The declarations contained in sub-Ss. (1) and (2) of S. 4 are 'law'. They are such declarations as a local legislature of a province, otherwise competent, is empowered to enact. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB **167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.**

———S. 4 (1) and (2)—*Scope—Claim based on title by adverse possession—If barred.*

The Bijni Succession Act, 1931, is confined to the succession to the Raj and any title otherwise than on the basis of succession, which any body may have to the properties of the Raj or any portion thereof, is clearly outside the scope and purview of the enactment. The only title that sub-Ss. (1) and (2) of S. 4 purport to declare, and the only title which S. 8 speaks of, is title as holder of the Raj on the basis of succession either by nomination or by appointment and no title based on any other ground. A claim solely based on an alleged right of succession to the Raj is therefore hit by sub-Ss. (1) and (2) of S. 4 and is barred, but a claim based upon an alleged title acquired by adverse possession, even though that claim is in respect of the properties which constitute the Bijni Raj, as defined in the Act, but does not concern any question of status as the holder of the Raj or any question of succession, is not barred by the Act. The title declared by the Act is the title to succession based upon the nomination as made on 28th September, 1895, and has nothing to do with any title based on adverse possession and the declaration contained in S. 4 does not affect such title. (*Mukerji and S. K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.**

———S. 9—*Scope.*

The enactment contained in S. 9 is expressly prospective in its language. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.**

ASSAM DEBT CONCILIATION ACT (X OF 1936) Ss. 7, 8 and 16—*Decision by Board that debt is time barred—Effect of—Power of Civil Court to deal with such debt.*

A decision by a Debt Conciliation Board that a particular debt covered by a decree is not subsisting as it is barred by limitation, amounts to a decision that the Board has no jurisdiction to deal with such debt. The Civil Court would be competent to deal with any application for the execution of the decree, which might thereafter be filed in such Court, and to decide for itself in those proceedings whether the debt was in effect time-barred. (*Edgley, J.*) PULIN BEHARI *v.* REASAT ALI. **44 C.W.N. 774.**

———S. 8 (3)—*Decision of Board—Finality—Extent.*

Under S. 8 (3) of the Act, the Board's decision on the question of jurisdiction would be final. Finality only attaches to the order in so far as it purports to decide that the Board has no jurisdiction to deal with the matter, but, in so far as the order purports to decide whether the alleged debt is in existence or its amount, no finality will attach thereto so as to oust the jurisdiction of the Civil Court. (*Edgley, J.*) PULIN BEHARI *v.* REASAT ALI. **44 C.W.N. 774.**

———S. 21 (1)—*Order of Board that particular debt included in application is time barred—Application continuing to be pending before Board—Civil Court, if obliged to suspend proceedings relating to such debt.*

An order of the Board that a particular debt covered by a decree included in the application to it is barred by limitation, disposes of the application in respect of that particular debt inasmuch as it amounts to a decision that the Board has no jurisdiction to deal with it. It, therefore, follows that the Civil Court is under no obligation to suspend thereafter the execution proceedings in connection with that decree, although the application may continue to be pending before the Board. (*Edgley, J.*) PULIN BEHARI *v.* REASAT ALI. **44 C.W.N. 774.**

ASSAM LAND AND REVENUE REGULATION (I OF 1886)—*Beels—Separate Settlement—Power of Government.*

Government has power to settle the Beels separately or to assess them on their own profits. (*D. N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v.* BROJENDRA KISHORE ROY CHOUDHURY. **168 I.C. 249=9 R.C. 780=64 C.L.J. 458=A.I.R. 1936 Cal. 629.**

———*Fisheries—If can be assessed separately from land.*

Fisheries included in a lease can be assessed and offered for settlement separately from the other lands of the patta. There is nothing in the Assam Land and Revenue Regulation to prevent such splitting up. (*D. N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v.* BRAJENDRA KISHORE ROY CHOUDHURY. **168 I.C. 249=9 R.C. 780=64 C.L.J. 458=A.I.R. 1936 Cal. 629.**

———S. 6—*Scope and effect.*

S. 6 of the Assam Land and Revenue Regulation means that for purposes of settlement of land revenue, and for exercising the powers conferred by the Regulation, Government would not recognise any other species of right over land save and except those which are specified in that section. But that does not mean that as between party and party, these rights could not be acquired under the provision of laws which are also in

ASSAM LAND & REV. REGN. (1886), S. 6.

ASSAM LAND & REV. REGN. (1886), S. 6.

force in Assam, or that the rights already acquired would stand confiscated. (*M. C. Ghose and Mukherjea, JJ.*) ASRABULLA *v.* KIAMATULLA HAJI CHOUDHURY. **I.L.R. (1937) 2 Cal. 86=171 I C. 785=10 R C. 305=66 C.L.J. 284=41 C.W.N. 503=A.I.R 1937 Cal. 245.**

——**S. 6 (b)**—*Right founded on adverse possession is legally derived.*

A right founded on adverse possession for more than the statutory period is a legally derived right within the meaning of S. 6 (*b*) of the Regulation. (*D. N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v* BRAJENDRA KISHORE ROY CHOUDHURY. **168 I.C 249=9 R.C. 780=64 C.L.J. 458 =A.I.R. 1936 Cal. 629.**

——**S. 6 (b)**—*Right under—Right by adverse possession—If legally derived right—Long possession—Effect of.*

The law does recognise a right founded on adverse possession for more than the statutory period to be a legally derived right, and there can be no question that a right acquired by prescription is a legally derived right within the meaning of S. 6 (*b*) of the Assam Land and Revenue Regulation. The Indian law like the English law practically transmutes long possession of real property into ownership by bringing to an end that right of the owner. (*D. N. Mitter and Rau, JJ.*) HANIFULLA *v.* BRAJENDRA KISHORE ROY CHOUDHURY. **168 I.C. 249=9 R.C. 780=64 C.L. J. 458=A.I.R. 1936 Cal. 629.**

——**Ss. 8 and 9**—*Scope and effect—Lease—Acquisition of rights of landholder under—Re-settlement—Clause in* potta *providing for forfeiture—Validity—Abandonment of rights—Proof.*

Where the lessees under a lease have acquired the status of a landholder and acquired heritable rights and the right of use and occupation, the same cannot be taken away by the insertion of a forfeiture clause in a *potta* executed at a re-settlement which would really mean surrender at the end of the term of the lease valuable rights which have been acquired by reason of the lessees being the landholders within the meaning of S. 8. Such a clause would be *ultra vires* under the *statute* and cannot be legally enforced by the Government. Nor can it be said that the lessees have, by reason of the clause in the *potta*, contracted themselves, out of their rights. In order to establish that there has been an abandonment of their rights by the *potta*, there must be something to show in the most explicit terms that the parties understood when accepting the *potta* that they were giving up a very valuable right by reason of their being landholders within the meaning of Ss. 8 and 9 of the Regulation. (*D. N. Mitter and Patterson, JJ.*) KRISHNA PROSAD ROY CHAUDURI *v.* SECRETARY OF STATE FOR INDIA. **167 I.C. 124=9 R.C. 633=63 C.L.J. 52=A.I R. 1936 Cal. 774.**

——**S. 8 (b)**—*Construction—Status of landholder—Acquisition of—Condition—Occupation of land for ten years—If obligatory.*

The language of Cl. (*b*) of S. 8 of the Assam Land and Revenue Regulation does not make it obligatory on the lessees to occupy the land for ten years before he can acquire the status of a landholder. All that is required is that he must hold, irrespective of the period of occupation under a lease, for a term of not less than ten years. The question of the rights of a landholder

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is not dependent on the length of possession under the lease but is dependent on the lessee's holding under a lease which is given for a term of 10 years. The exception provided for in S. 8 (*b*) would refer to a case where a lessee is holding under a lease to which S. 12 applies (*D. N. Mitter and Patterson, JJ.*) KRISHNA PROSAD ROY CHAUDHURI *v.* SECRETARY OF STATE FOR INDIA. **167 I.C. 124=9 R.C. 633=63 C.L.J. 52=A.I.R. 1936 Cal. 774.**

——**S. 34**—*Re-settlement* ultra vires—*Effect—Dispossession under by person claiming in virtue of re-settlement—Right of holder under prior settlement—Mesne profits—Government's liability*

Where a re-settlement of an estate is *ultra vires* and is not accepted by the party, the latter is entitled to hold on even after the expiry of the term of the previous settlement, and he cannot be dispossessed by the person claiming under the re-settlement. The possession of a person claiming under the Government under the re-settlement which is *ultra vires* is wrongful possession, and the Government is consequently liable for mesne profits to the party entitled to hold under the prior settlement. (*D. N. Mitter and Rau, JJ.*) HANIFULLA *v.* BROJENDRA KISHORE ROY CHOUDHURY. **168 I C. 249=9 R.C. 780=64 C.L.J. 458 =A.I.R. 1936 Cal. 629.**

——**S. 70**—*Scope of.*

S. 70 was intended to cover only cases of waste land or lands which have been held on behalf of the proprietor Government. (*D.N. Mitter and Patterson, JJ.*) KRISHNA PROSAD ROY CHAUDHURI *v.* SECRETARY OF STATE. **167 I C. 124=9 R. C. 633=63 C L.J. 52=A.I.R. 1936 Cal 774.**

——**Ss. 70 (2) and 76**—*Separate account in arrear—Sale of entire estate—Power of Deputy Commissioner—Separate accounts—If must be advertised and put up to sale separately again for next kist.*

On the opening of a separate account under S. 65 of the Assam Land and Revenue Regulation, the liability of all the proprietors still continues to be joint and several. But the separate account in default must first be put up to sale and not the entire estate for such default. If no bids are offered or the bids offered are insufficient to wipe off those arrears, the entire estate is to be put to sale, but after giving an opportunity to the other proprietors to pay up the same within 10 days. As soon as the above-mentioned circumstances combine with the non-payment of the arrears in terms of S. 76, the Deputy Commissioner is empowered to put up the entire estate to sale and he cannot again be required to advertise for sale the separate accounts separately and to put them up separately for the default of the next kist. The entire estate can, however, be put up to sale, if and only if, on merging the accounts of the separate accounts into one account, an arrear appears. The net balance has to be struck up to the kist date for which he intends to put it up for sale. He has jurisdiction to include the arrears of the next kist if the advertisement is for the sale of that kist also. (*Mitter and Akram, JJ.*) ABDUL JABBAR *v.* JITENDRA KUMAR PAUL. **I L.R. (1940 1 Cal. 138=186 I.C. 636=12 R.C. 503=70 C.L.J. 451= 44 C.W.N. 122=A.I.R. 1940 Cal. 77.**

——**S. 71**—*'Encumbrance'—Interest acquired by adverse possession.*

ASSAM LAND & REV. REGN. (1886), S. 71.

Obiter.—The interest acquired by a person by adverse possession by remaining in occupation of an estate for 12 years or more before the revenue sale adversely to the old proprietors is not an encumbrance within the meaning of S. 71 of the Assam Land and Revenue Regulation. (*Mitter and Biswas, JJ.*) JITENDRA KUMAR PAL *v* DEBENDRA CHANDRA SAHA **180 I C 721=11 R C. 727=42 C W.N. 913=67 C.L J. 380=A.I R. 1939 Cal 50.**

——**S 71**—*Recorded or unrecorded proprietor repurchasing estate from stranger revenue-sale purchaser—Right to annul encumbrances.*

If a purchaser at a revenue sale who was not a recorded or unrecorded proprietor and who was not responsible for the encumbrance on the estate, later on sells his rights to one who was a recorded or unrecorded proprietor at the time of the revenue sale, the latter would step into the shoes of the former, and would be entitled to exercise all the rights, including the right to avoid or annul encumbrances, which the former had acquired by his purchase. (*Mitter and Biswas, JJ.*) JITENDRA KUMAR PAL *v* DEBENDRA CHANDRA SAHA. **180 I C 721=11 R.C 727=42 C.W. N. 913=67 C.L J 380=A I.R. 1939 Cal. 50.**

——**S 72**—*Sale statement—Lumping arrears for earlier kist with arrears for later kist—If an irregularity.*

The lumping of the arrears for an earlier kist with the arrears for the later kist in the sale statement does not constitute an irregularity. (*Mitter and Akram, JJ.*) ABDUL JABBAR *v.* JITENDRA KUMAR PAL. **I L R (1940) 1 Cal 138=186 I.C 636=12 R.C 503=70 C.L.J. 451=44 C.W.N. 122=A I R 1940 Cal. 77.**

——**Ss 77 and 82**—*Deposit of earnest money five hours after sale—Irregularity—Sale, if liable to be set aside.*

The deposit of the earnest money five hours after the sale takes place is no doubt not in strict accordance with S. 77 of the Assam Land and Revenue Regulation. But if there is no evidence that the neglect of this provision has resulted in substantial injury, the sale is not liable to be set aside. (*Mitter and Akram, JJ.*) ABDUL JABBAR *v.* JITENDRA KUMAR PAL. **I L.R. (1940) 1 Cal. 138 =186 I C 636=12 R.C 503=70 C.L J. 451=44 C W.N 122=A I R. 1940 Cal. 77.**

——**Ss 80 and 82 (2)**—*Scope—Suit to set aside sale—Limitation—Order confirming sale—If furnishes starting point—Limitation Act, Art. 12 (c)—Applicability*

The Assam Land and Revenue Regulation does not speak of any confirmation of the sale held thereunder. After the sale becomes final, it is not necessary to have a further order from the authority holding the sale for the purpose of getting the sale confirmed. Nor does an order of confirmation, if passed, furnish a fresh starting point of limitation for a suit to cancel or set aside the sale. Under S 82 (2) read with S. 80 of the Regulation, the sale becomes final when an application to set aside the sale is finally dismissed by the Commissioner, and a suit instituted beyond a year from that year is barred under the Regulation. Art. 12 (*c*) of the Limitation Act does not apply to a suit to set aside a sale under the Regulation, as the Regulation itself contains a special provision as to limitation. If is not therefore right to travel beyond the Regulation and to go to

ASSAM LAND & REV. REGN. (1886), S. 146.

the Limitation Act. (*Mukerji and Jack, JJ.*) SADHIRAM ATOI *v.* KUNJA BEHARI BANERJI. **I.L. R. (1937) 1 Cal 437=168 I.C. 568=9 R.C 838 =40 C.W N. 1359=A I.R. 1936 Cal 715.**

——**S. 82 (2)**—*Construction—"Or"—Meaning of—Suit under—Maintainability—Conditions.*

The word "or" in S. 82 (2) of the Assam Land and Revenue Regulation must be regarded as having been used in the sense of "and" and under the sub-section, unless both the conditions specified are satisfied a suit to annul a sale cannot be maintained. (*Mukerji and Jack, JJ.*) SADHIRAM ATOI *v.* KUNJA BEHARI BANERJEE. **I L.R (1937) 1 Cal. 437=168 I C 568=9 R C. 838=40 C.W. N.1359=A.I.R. 1936 Cal. 715.**

——**S. 82 (2)**—*Construction—Specification of irregularity in application to Commissioner—Necessity for.*

S. 82 (2) of the Assam Land and Revenue Regulation cannot be construed to the effect that the irregularity complained of must be specified in the application made to the Commissioner under S. 79, only in the case where the suit is instituted beyon l a year of the finality of the sale but need not be specified where it is instituted within a year. Both under this provision and under Art. 12 (*c*) of the Limitation Act, the period of limitation to set aside a revenue sale is only one year from the date of the confirmation of the sale. (*Mitter and Akram, JJ.*) ABDUL JABBAR *v.* JITENDRA KUMAR PAL. **I.L R. (1940) 1 Cal. 138=186 I.C. 636=12 R.C. 503=70 C.L.J. 451=44 C.W. N. 122=A.I R. 1940 Cal. 77.**

——**S. 82 (2)**—*Scope—Sale of properties of surety for defaulter—Suit to avoid on ground of non-liability of surety under bond—Ground not taken in application to Commissioner—Sustainability*

A suit by a surety for a defaulter for a declaration that the sale of his properties was improper and not in accordance with law on the ground that the plaintiff was under no liability under his surety bond is not a suit to set aside a sale falling under S. 82 (2) of the Assam Land and Revenue Regulation. It is a suit for a declaration that the sale was void *ab initio* as being outside the powers of the revenue authorities. The question can, therefore, very well be agitated in the Civil Court though it may not have been raised on the application made to the Commissioner to set aside the sale. (*Mukerji and Jack, JJ.*) SADHIRAM ATOI *v* KUNJA BEHARI BANERJEE. **I.L R. (1937) 1 Cal, 437=168 I C 568=9 R C. 838=40 C.W.N. 1359 =A.I.R. 1936 Cal. 715**

——**Ss 82 (2) and 146**—*Scope—Sale of surety's properties—Suit to set aside on ground of non-compliance with S. 146—Maintainability—Conditions.*

A suit to set aside a sale under the Assam Land and Revenue Regulation on the ground that the provisions of S. 146 of the Regulation have not been duly complied with is a suit coming within the proviso of S. 82 (2) of the Regulation, and must, in order to be maintainable, comply with the provisions of that sub-section. (*Mukerji and Jack, JJ.*) SADHIRAM ATOI *v.* KUNJA BEHARI BANERJEE. **I.L R. (1937) 1 Cal. 437=168 I C. 568=9 R.C. 838=40 C.W N. 1359=A.I.R. 1936 Cal. 715.**

——**S. 146**—*Construction and scope—Sale of properties hypothecated by surety for defaulter*

ASSAM LAND & REV. REGN. (1886), S. 154.

—Sale of movables of defaulter under S. 69—If condition precedent.

S. 146 of the Regulation merely lays down the procedure under which the sale should take place. The section, by making S. 91 (1) applicable to a sale of a surety's immovable properties does not require that before the sale can take place the movable properties of the defaulter should first be proceeded against as laid down in S. 69 of the Regulation (*Mukerji and Jack, JJ.*) SADHIRAM ATOI *v.* KUNJA BEHARI BANERJEE. **I L R. (1937) 1 Cal. 437=168 I.C. 568=9 R.C. 838=40 C.W. N. 1359=A.I.R. 1936 Cal. 715.**

——S. 154 (1) (a)—*Applicability and scope—Jurisdiction of Civil Court—Settlement officer really partitioning estate and offering re-settlement of part only—If* **ultra vires—***Jurisdiction of Civil Court to declare* **ultra vires.**

The Assam Land and Revenue Regulation does not contemplate a partition of an estate except in the manner provided for in Ch. VI. If the settlement officer, in making a temporary settlement of a part of an estate, contravenes the provisions of the Regulation, his acts are *ultra vires*. One of the essentials of an offer of re-settlement is that it should be of the whole estate; if such offer is made and the revenue is increased considerably, the re-settlement cannot be questioned in the Civil Court, because S. 154 (1) (*a*) would apply to such a case; the act of the settlement officer being in conformity with the essential provisions of the Regulation which gives him jurisdiction to act, a mere irregularity in the mode of carrying out the act would not make it *ultra vires*. Where the re-settlement has been offered of the whole estate, the fact that the assessment of revenue has been based on a new basis which increases the assessment considerably will not render it *ultra vires* or liable to be questioned in the Civil Court. But the offer of an estate for re-settlement after partitioning the same is an excess of the authority of the settlement officer, and can be questioned in the Civil Court.

Rau, J.—Where the settlement officer, in effect, partitions an estate and then re-settles one of the partitioned estates, and the partition is effected without any application from the landholders concerned, it is not authorised by the Regulation. Such a composite proceeding which is partly a settlement and partly a partition is entirely foreign to the Regulation. S. 154 is no bar to the Civil Court pronouncing such a proceeding to be *ultra vires*. The question in such a case is not the validity of a mere settlement such as is referred to in S. 154 (1) (*a*). (*D N. Mitter and Rau, JJ.*) HANIFULLA *v.* BROJENDRA KISHORE ROY CHOUDHURY. **168 I.C. 249=9 R.C. 780=64 C.L. J. 458=A I R 1936 Cal 629.**

——S. 154 (1) (b)—*Scope—Questions as to legality of enhancement of revenue and the assessment of revenue—Jurisdiction of Civil Court to decide.*

Under S. 154 (1) (*b*) of the Assam Land and Revenue Regulation, a Civil Court has no jurisdiction to decide whether the Government has power to enhance the revenue or whether the assessment of revenue is illegal or beyond the power of Government, as these are questions as to the amount of revenue to be assessed or as to the mode of principle of assessment. (*D. N. Mitter and Rau, JJ.*) HANIFULLA *v.* BROJENDRA KISHORE ROY CHOUDHURY. **168 I.C. 249=9 R.C. 780=64 C.L.J. 458=A I.R. 1936 Cal. 629.**

ASSAM LOCAL SELF-GOVERNMENT ACT (VIII OF 1926), S. 93-A—*Realisation of dues by Local Board—Remedy by suit—Availability.*

A Local Board is not precluded from realizing its dues by instituting a civil suit, if it prefers to adopt that method, although such dues might be recovered as an arrear of land revenue under the provisions of S. 93-A of the Assam Local Self-Government Act. (*Edgley, J.*) RAGHUBIR SINGH *v.* TAZPUR LOCAL BOARD. **I.L.R. (1939) 1 Cal. 329 =43 C.W.N. 408=187 I.C. 593=12 R.C. 595=A. I.R. 1939 Cal. 587.**

ASSAM MUNICIPAL ACT (I OF 1923)— Assessment of building made arbitrarily and maliciously—*Ultra vires*—Suit in Civil Court to challenge—Maintainability. *See* JURISDICTION—CIVIL COURT. **40 C.W.N. 337.**

——S. 13, Proviso & S. 296 (2)—*Construction and scope—Election to Municipal Board—Suit to declare that plaintiff was validly nominated and that the election of defendants was invalid—Jurisdiction of Civil Court—Existence of separate election tribunal—If a bar to civil suit.*

The meaning the proviso to S. 13 of the Assam Municipal Act is that the Civil Court's jurisdiction to adjudicate at least upon questions of qualifications of candidates for election to the Municipal Board shall not be taken to be affected either by anything contained in the Act or the rules framed by the Government under S. 296 of the Act. Consequently a suit for a declaration that the plaintiff was duly nominated as a candidate for election and that the election of his rivals, the defendants, is not valid, is maintainable in the Civil Court, under the proviso to S. 13. The fact that by R. 32 of the rules framed under S. 296, election tribunals have been set up does not oust the jurisdiction of the Civil Court, although a party who has approached the election tribunal, specially constituted under the rules, and has been unsuccessful there, may, on the principle of election of remedies, be prevented from re-agitating the matter in the Civil Court. (*Guha and Bartley, JJ.*) GOPESH CHANDRA ADITYA *v.* BENODE LAL DAS. **165 I C. 606 (2)=9 R.C. 425 =40 C.W.N. 553=A I.R. 1936 Cal. 424.**

——Ss. 21-A, 10 and 14—Elections set aside by Civil Court—Unseated candidate accepting appointment under S. 21-A—Right of appeal by unseated candidate not lost. **165 I.C. 606 (2)= 9 R.C. 425=40 C.W.N. 553=A.I.R. 1936 Cal. 424.**

——Ss. 91 and 76—*Irregular assessment—Interference by Civil Court.*

A Civil Court cannot interfere with an action of the Municipal Board except on the ground of lack of jurisdiction. It cannot, therefore, interfere with an assessment made by the Board when it is within their jurisdiction under S. 76, though they had acted irregularly in the exercise of their jurisdiction. (*M C Ghose, J.*) SYLHET MUNICIPAL BOARD *v.* HARISH CHANDRA RAM KANAI. **172 I C. 739=10 R.C. 416=65 C.L.J. 553=A.I.R. 1937 Cal. 750.**

——S 286—Rules under—R. 32—Special election tribunals constituted under—Jurisdiction of —If exclusive—Suit in Civil Court to declare validity of plaintiff's nomination and invalidity of

ASSAM MUNICIPAL ACT (1923), S. 296.

defendant's election to Board—If lies. *See* ASSAM MUNICIPAL ACT, S. 13, PROVISO. **40 C.W. N. 553.**

———S. 296 (2)—*Election rules—R.* 13—*Construction and scope—*15 *days' time—Necessity for strict compliance with—Election fixed for* 18*th April—Nomination reaching on* 5*th April—Office closed from* 30*th March to* 4*th April—Validity of nomination—Eastern Bengal and Assam General Clauses Act, S.* 14.

The time of 15 days mentioned in R. 13 of the rules framed under the Assam Municipal Act is the essence of the thing; and if there be not clear fifteen days' interval between the date of submission of the nomination paper and the date of election, the nomination is not valid. A nomination paper reaching the chairman on the 5th of April in respect of an election fixed for the 18th of April is not a valid nomination, even though the office of the Municipal Chairman is closed from 30th March to 4th April, inclusive. S. 14 of the Eastern Bengal and Assam General Clauses Act cannot be invoked for shortening the interval of 15 days mentioned in the rule, for that section has no application when an act is required to be done in such a way as to leave a clear margin of a definite and stated period of time between the date of the act and a fixed date. The rejection of the nomination paper in such a case is not illegal, but perfectly justified. (*Guha and Bartley, JJ.*) GOPESH CHANDRA ADITYA *v* BENODE LAL DAS. **165 I.C. 606 (2)=9 R.C. 425=40 C.W.N. 553=A I.R. 1936 Cal. 424.**

———S. 296 (2)—*Election Rules—R.* 13—*Scope—Nomination paper sent to Magistrate and not to Chairman—If proper compliance.*

R. 13 of the Election Rules framed under S. 296 of the Assam Municipal Act is mandatory; and the candidate must send his nomination paper to the Chairman himself. If he sends it to anybody else, such as the Election Magistrate, he does not comply with the rule. The fact that the Magistrate sends back the nomination paper to the Chairman would not satisfy the requirements of the rule so as to make the nomination valid. (*Guha and Bartley, JJ.*) GOPESH CHANDRA ADITYA *v.* BENODE LAL DAS. **165 I.C. 606 (2)=9 R.C. 425 =40 C.W.N 553=A.I.R 1936 Cal. 424.**

ASSIGNMENT. *See also* LEASE.

———Oral assignment of debt—Validity. *See* C. P. CODE, S. 73—APPLICABILITY. **1937 A.L.J. 348=A.I.R 1937 All 424.**

ATTACHMENT. *See also* C. P. CODE, S. 60 AND O. 21, RR 46 AND 63 AND O 38, R. 7.

———Abandonment or waiver of—Attachment before judgment—Re-attachment after decree—Effect of. *See* MYS. C. P. CODE REGULATION, O. 38, R. 11. **40 Mys H.C.R. 477.**

———*Effect of—Administration suit—Decree—Attachment of money due to debtor by Co-operative Society under R.* 22 (6) (*a*), *Madras Co-operative Societies Act—If confers exclusive rights on Society as against other creditors.*

An attachment creates no interest in, or charge on, the property attached in favour of the attaching creditors as against the other creditors. When an administration decree is made in respect of the properties of a debtor, all the creditors standing on the same footing, and a creditor who has attached the property of the debtor is not entitled to priority over the others. There is no distinction in this respect between an attachment by a Civil Court under the C. P. Code and an attachment by a Registrar of Co-operative Societies under R. 22 (6) (*a*) of the Rules made under the Madras Co-operative Societies Act. The attachment of a money debt by the Registrar does not stand on any higher or superior footing than an attachment by the Civil Court of a debt under the C. P. Code. (*Madhavan Nair, J.*) NICHOLSON TOWN BANK, LTD., TANJORE *v.* VARADARAJALU NAIDU. **182 I.C. 254=12 R M. 29=48 L W. 849 =1938 M.W.N. 1127=A.I.R. 1939 Mad. 204.**

ATTACHMENT.

———*Effect—If creates an equitable or judicial lien.*

An attachment does not create a charge; it only prevents an alienation and does not confer any title. Hence it does not create that particular type of charge known as an equitable lien. Nor does it create a judicial lien for the latter arises where in a judgment *in rem* a lien is established by judgment. (*Stone, C.J. and Rose, J.*) SETH LAXMINARAYAN *v.* SETH GHASIRAM. **1939 N.L. J. 257=A.I.R. 1939 Nag. 267.**

———Effect—Writ of attachment—Property not mentioned in—If attached. *See* C. P. CODE, O. 38, R. 7. **A.I.R. 1939 Pat. 81.**

———*Execution of a warrant of—If a judicial act.*

It is a matter of considerable doubt whether the execution of a warrant of attachment by a process-server can be considered a judicial act which may be considered as taking place at the earliest period of the day on which it takes place.. (*Grille, J.*) POONAMCHAND SHEORATAN *v.* MT. FULABAI. **I.L.R. (1938) Nag. 573=11 R.N. 194= 177 I.C. 971=A.I.R. 1938 Nag. 309.**

———Share of royalty—Legality. *See* C. P. CODE, O. 21, R. 44. **I.L.R. (1937) 2 Cal. 440.**

———*Termination of—Property attached and handed over to bailiff—Persons furnishing security bond for decretal amount and getting charge of property from bailiff—Effect on attachment.*

The property of a judgment-debtor was attached and kept in charge of the bailiff. Two persons executed a security bond and undertook to sell the property. The bailiff handed over the property to them. One of them who claimed the property as his, sold it away but applied for removal of the attachment and the Court granted it on the plea, that the surety bond was not valid in the eye of the law because the bailiff allowed the parties to execute it on his own initiative without receiving any order from the Court. The creditor contended that there was no subsisting attachment of the property since the execution of the bond had released it from attachment.

Held, that the action of the bailiff in handing over the property to the sureties could not be considered to amount to a release of the property from attachment. The sureties were to hand back the property so long as the value thereof remained unpaid and so the property could be regarded under the bailiff's charge and his action did not amount to a release of the property.

Held, further, that it was within the jurisdiction of the Court to consider the application for removal of the attachment and to pass orders for its removal. (*Mackney, J.*) BANK OF CHETTINAD, LTD. *v.* MAUNG PO LU. **161 I.C. 258=8 R. R. 463=A.I.R. 1936 Rang. 12.**

AUDIT CODE, Art. 183—*Applicability—Person who has served under two Municipalities.*

Article 183 does not in terms apply to the case of a person who has served under two Municipalities. The rule does not apply even by analogy in matters of this kind. In the absence of definite rules framed by Government or by Municipalities themselves relating to such cases, the matter must be considered on general principles, according to which each Municipality would be liable to pay for the leave earned during the period of service under it. (*Tek Chand, J.*) MUNICIPAL COMMITTEE, HODAL *v.* PIRYA LAL. 183 I.C. 111=12 R.L. 101=A.I.R. 1939 Lah. 103.

BAILMENT. *See* CONTRACT.

BANKER AND CUSTOMER—A *having deposit in Bank—Power-of-attorney executed to* B *to get investments at higher rate of interest—* B *withdrawing amount to discharge his own debt to Bank and executing promissory note instead—Bank acting without consulting* A—*Remedy of* A *against* B *and the Bank.*

A who had money in a Bank to her credit executed a power-of-attorney to *B* to attend to make investments of her money at higher rate of interest than ordinary Bank rate. *B* who owed a large amount to the Bank was being pressed by the Bank for payment. *B* withdrew *A's* money, paid off his debts to the Bank and executed instead a promissory note to *A* which was kept with the Bank. The Bank so acted for their own benefit without making any inquiries or consulting *A*.

Held, that *B*, apart from any liability at common law, became a constructive trustee in respect of the sum and the Bank who for their own benefit concurred in the transaction without any inquiry became subject to a fiduciary obligation similar to that by which *B* was bound.

Held also, that *A* could sue both *B* and the Bank or either of them subject to this, that she could not recover more than sum due.

Held, further, that a subsequent contract between *A* and *B* which changed *B's* liability for damages for breach of duty into one of debt did not release the Bank as it was not a party to the contract. *A* could have released *B* and yet have pursued her remedies against the Bank, for there was no question here either of joint liability or of the liability of principal and surety. (*Lord Maugham.*) IMPERIAL BANK OF CANADA *v.* MARY VICTORIA BEGLEY. 163 I.C. 295=1936 A.L.J. 944=1936 A.W.R. 937=44 L.W. 128=1936 M.W.N. 844=A.I.R. 1936 P.C. 193 (P.C.).

———*Cheques delivered by customer to Bank for collection—Bank realising amounts after suspending payment—Liquidation of bank—Right of customer to preferential payment—Draft purchased by customer drawn on branch for cash—Right to preferential payment.*

When a customer delivers cheques to a Bank for collection, and the Bank realises the amounts thereunder after it suspends payment, the customer would be entitled on the Bank going into liquidation, to claim preferential payment in respect of the proceeds of cheques over other creditors of the Bank. But in the case of draft which a customer gets from the Bank, drawn

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on a branch of the Bank, on payment of cash therefor, it is only a purchase of the draft, and there is no entrustment to the Bank of the amount for any specific purpose. The purchaser cannot therefore claim preferential payment in respect of the amount covered by the draft, on the Bank going into liquidation. *Venkataramana Rao, J.*) ALL-INDIA SPINNERS ASSOCIATION, TAMIL NAD BRANCH *v.* OFFICIAL LIQUIDATORS, T. N. & Q. BANK, LTD. 186 I.C. 773=12 R.M. 668=51 L.W. 111=1939 Compy. C. 279=1939 M.W.N. 1071=A.I.R. 1940 Mad. 101.

———*Collecting banker—Duties and liabilities of—Goods sent by parcel post—Duty to intimate date of arrival of goods to buyer—Omission to do so—Negligence—Collection of money after goods sent back—Liability to refund money to buyer—Misrepresentation.*

A collecting banker is under no special duty, as such, to protect the interests of the person to whom he presents a draft for acceptance or payment. So long as he does not give any personal undertaking or make any misrepresentation, he incurs no liability to him. But he is under a duty to see that by any act or omission of his the buyer is not prevented from taking delivery of the goods in respect of which he presents the draft. In the case of goods sent by a parcel post, which would be kept in the post office only for a specified period, the collecting banker must inform the buyer or consignee of the date of arrival of the goods so that the latter may take steps to take delivery of the goods before the goods are sent back by the post office. If he does not do that, he is guilty of negligence. If the collecting banker does anything with reference to the customary documents by which the buyer is prevented from taking delivery of the goods the banker cannot escape liability. An omission on his part to intimate the date of arrival, and his conduct in taking the money when he is aware or must be deemed to be aware that the goods have already been sent back by the post office to the consignor would certainly amount to a misrepresentation sufficient to render the banker liable in a suit by the buyer for return of the amount collected by him. (*Venkatramana Rao, J.*) CHAMPION AUTOMOBILES, LTD. *v.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA. 173 I.C. 989=10 R.M. 651=46 L.W. 370=1937 M.W.N. 1010=A.I.R. 1937 Mad. 858=(1937) 2 M.L.J. 546.

———*Deposit of amount in Bank by way of fixed deposit as security for overdraft and for opening overdraft accounts—Nature of transaction—Deposits—If trust money—Right to preferential payment in winding-up proceedings.*

Where under an agreement between a customer and a Bank, the former makes fixed deposits of amounts in the Bank for the purpose of enabling him to open overdraft accounts on the security of such fixed deposits, and to obtain accommodation by opening overdraft accounts, such deposits are *prima facie* governed by the ordinary law which regulates a banker and a customer. It does not constitute anything more than a relation of a debtor and creditor. No question of trust arises in

such a case; it cannot be pretended that the amounts paid into the Bank by way of fixed deposits are moneys placed with the Bank for any specific purpose so as to clothe the Bank with the relationship of a trustee. The depositor cannot therefore claim payments of the amounts in full in preference to the ordinary creditors of the Bank in winding-up proceedings. (*Venkataramana Rao, J.*) NAYAR MODERN BANK, LTD., PALGHAT *v.* OFFICIAL LIQUIDATOR, T. N. & Q. BANK, LTD. **1939 M.W.N. 1174=A.I.R. 1940 Mad. 149.**

———*Failure to honour customer's cheque—Measure of damages.*

Where the Banker, being bound to honour his customer's cheque, has failed to do so, he will be liable in damages. If special damage naturally ensuing from the dishonour is proved, it will be properly taken into account in assessing the amount of damages. If the customer be a trader, the Court may properly award substantial damages, in the absence of proof of special damage. In other cases the customer will be entitled to such damages as will reasonably compensate him for the injury which, from the nature of the case, he has sustained. All loss flowing naturally from the dishonour of a cheque may be taken into account in estimating the damages. (*McNair, J.*) JOGENDRA NATH CHAKRAVARTI *v.* NEW BENGAL BANK, LTD. **180 I.C. 660=11 R.C. 713=A.I.R. 1939 Cal. 63.**

———Forged cheque—Payment—Liability of Bank—Negligence, *See* NEGOTIABLE INSTRUMENT ACT, S. 85. **1938 A.L.J. 504.**

———*Liability of banker—Customer having private account and trust account—Transfer of trust funds to private account—Liability of banker for misapplication—Suit by co-trustee against banker and trustee—Limitation—Starting point—Knowledge of breach of trust—Sanction of Advocate-General—Necessity—C. P. Code, S. 92.*

A banker is not entitled to apply what he knows to be trust funds in discharge of or in reduction of a debt of a customer who has two separate accounts, one in respect of his private funds and another in respect of funds of which he is a trustee. If the banker does so, he can be compelled to make restitution of the moneys so applied. If the banker has the slightest knowledge or reasonable suspicion that the money is being applied or transferred by the trustee from the trust account into his private account in breach of a trust, and if he is going to derive a benefit from the transfer and intends and designs that he should derive a benefit from it, then the banker is not entitled to transfer the amounts from the trust account without further inquiry into the matter. If he does so, he renders himself liable to make good the trust moneys to the trust. A suit against the banker by a co-trustee to recover such trust moneys wrongly applied by the banker in reduction of the private debts owed by the other co-trustee is governed by Art. 120 of the Limitation Act, and the right to sue accrues when the trust funds are wrongly transferred or misapplied. But if the plaintiff co-trustee is kept in ignorance of a breach of trust the right to sue does not accrue until the trustee becomes aware of the fact. Such a suit does not fall within the purview of S. 92, C.P. Code, a suit by a co-trustee against the banker to recover trust moneys misapplied by him and against another co-trustee for accounts does not come under S. 92 and may be instituted without the sanction of the Advocate-General. (*Leach, C. J. and Krishnaswami Ayyangar, J,* NAGAPPA CHETTIAR *v.* O.R.M.O.M.S.P. FIRM. **I.L.R. (1939) Mad. 121=182 I.C. 673=12 R. M. 125 =1938 M.W.N. 1017=48 L.W. 577=A.I.R. 1938 Mad. 999=(1939) 1 M.L.J. 625.**

———*Money paid by customer for transmission to another—Bank suspending payment and going into liquidation—Right to preferential payment.*

A customer of a Bank who had a current account with the Bank handed to the Bank a sum of money for remitting it by telegraphic transfer to a company in Bombay. The Bank did not credit this amount in his account but debited the charges for the intended transfer. The money was, however, never transferred, because on that very day the Bank suspended payment, and liquidation proceedings were started later on. The customer applied for payment of the amount in preference to the ordinary creditors of the Bank.

Held, that the money was received by the Bank in the capacity of a mere agent and was held apart by the Bank as property of the customer, and the customer was therefore entitled to preferential payment in respect of the amount. (*Venkataramana Rao, J.*) NEW FIELD CO. *v.* OFFICIAL LIQUIDATOR, T. N. & Q. BANK, LTD. **1939 Compy. C. 284=1939 M.W.N. 1072=51 L. W. 107=A.I.R. 1940 Mad. 139.**

———*Negligence of customer—Liability—Facts to be shown.*

Even if there is a duty as between the banker and the customer in drawing a cheque in a proper mode, it must be shown in order to hold the customer liable for negligence in drawing cheques, that there was a breach of the duty by the neglect of some usual and proper precaution. (*Lord Wright.*) MERCANTILE BANK OF INDIA, LTD. *v.* CENTRAL BANK OF INDIA. **65 I.A. 75=I.L.R. (1938) Mad. 360=172 I.C. 745=42 C.W.N. 321=1938 O.L.R. 68 (2)=1938 O.W.N. 206 =1938 A.L.R. 100=1938 P.W.N. 152=19 Pat.L.T. 147=1938 M.W.N. 552=4 B.R. 260=40 Bom.L.R. 713=47 L.W. 329=32 S. L.R. 313=1938 A.L.J. 273=10 R.P.C. 169 =1938 A.W.R. (P.C.) 90=66 C.L.J. 510= 1938 O.A. 312=A.I.R. 1938 P.C. 52=(1938) 1 M.L.J. 268 (P.C.).**

———Person having individual account and joint account—Amount in joint account solely belonging to him—Right to set-off against debt due on individual account in winding-up proceedings. *See* COMPANIES ACT, S. 229. **(1940) 1 M.L.J. 115.**

———*Relationship—Customer directing Bank to apply deposit in particular manner when occasion arises—Effect of—Trust—If created—Bank going into liquidation—Claim by customer to preferential payment—Sustainability.*

According to the rule regulating the relationship between a banker and a customer who has deposited moneys in the Bank, the banker is a debtor, the customer is a creditor and the deposit is a loan to the Bank. The mere fact that the customer gives the Bank a mandate or a direction to

apply the money to his credit in a particular manner would not clothe the Bank with a trust. Where a sum of money is paid to the general account of a customer with a direction that the amount must be applied in a particular manner when occasion arises, until the said sum of money is appropriated in the manner directed, no question of trust would arise. The matter would rest in a mere mandate. The Bank is not a trustee for the customer, and he cannot claim preferential payment over other creditors or customers if the Bank goes into liquidation, but can only rank as an ordinary creditor. (*Venkataramana Rao, J.*) DHARMAMBAL AMMAL *v.* OFFICIAL LIQUIDATOR, T. N. & Q. BANK, LTD. **1939 M.W.N. 1063=1939 Compy. C. 266 =50 L.W. 939=A.I.R. 1940 Mad. 98.**

———*Relationship—Fiduciary capacity—When arises—Moneys paid by party for the purpose of effecting specific transaction and credited in anamath account—If held in trust—Insolvency of Bank—Right to preferential payment.*

Defendants 1 to 7 were members of a joint Hindu family carrying on business at Trichinopoly under the name of a banking firm which suspended payment on 30th April, 1935. The plaintiff had arranged to purchase certain lands in Tuticorin and the third defendant suggested to the plaintiff that the transaction could be arranged through their branch office at that place. The plaintiff paid various sums of money into the defendants' banking firm between 25th March, 1935 and 17th April, 1935, on the above account. After the defendants were adjudicated insolvents, the plaintiff sued to recover the moneys paid by him to the Bank alleging that he paid the amounts under an arrangement that the defendants should keep the amounts in trust for him until he decided how they should be disposed of. The plaintiff had no prior banking transaction with the defendants' firm. The account books of the firm showed that the plaintiff's moneys were credited in an *anamath* or suspense account to await the instructions of the plaintiff as regards their disposal. According to the defendants' oral evidence, when amounts were paid to their firm in current account or fixed deposit, generally pass books and cheque books used to be given, and usually agreements used to be entered into regarding the interest payable on the deposits, but this procedure was not followed in respect of the moneys paid by the plaintiff.

Held, that the moneys paid by the plaintiff were received by the defendants' firm in a fiduciary capacity, and not as between a Bank and its customer and that the plaintiff was therefore entitled to preferential payment in full of the moneys paid by him. (*Venkataramana Rao and Kunhi Raman, JJ.*) OFFICIAL ASSIGNEE OF MADRAS *v.* NATESAM PILLAI. **51 L.W. 144=1940 M.W.N. 598=1940 Comp. C. 66=A.I.R. 1940 Mad. 441=(1940) 1 M.L.J. 254.**

———*Relationship—Nature of.*

The relationship of banker and customer is generally that of agent and principal, of debtor and creditor or of pledgor and pledgee; there are however cases where the banker stands in the relation of trustee as well as agent for his customer. The banker is not a trustee for the customer in respect of money paid in or responsible for him for the use he makes of it, but the position is not

the same where the banker uses the securities deposited with him for his own use, and there is conversion of the securities for the purposes of the Bank and not for the purpose of customer. Where securities are deposited as cover or advances and for the purpose of securing overdrafts or advances, the transaction is strictly of the nature of pledge. (*Guha and Bartley, JJ.*) BANK OF DACCA, LTD. *v.* GOUR GOPAL SAHA. **I.L.R. (1937) 1 Cal. 57=166 I.C. 855=9 R.C. 602= 65 C.L.J. 74=A.I.R. 1936 Cal. 409.**

———*Relationship—Nature of—Deposits on current account—If repayable only on demand.*

Where native bankers accept deposits on current account on a very extensive scale from their customers and conduct nearly every branch of ordinary banking business as it is understood in England, the relationship is not that of mere lender and borrower but there is an implied agreement that the money is payable on demand. (*Mosely and Dunkley, JJ.*) DAW HNIT *v.* ANAMALAI CHETTYAR. **1938 Rang. L. R. 468=179 I.C. 428=11 R.R. 315=A.I.R. 1938 Rang. 335.**

———*Relationship—Trustee depositing trust moneys in Bank—Bank aware of moneys being trust moneys—Effect—If makes Bank a trustee—Company depositing employee's cash security fund in Bank earmarked as such—Bank—If trustee for company's employees.*

The fact that a depositor in a Bank is a trustee, and the money deposited is trust money does not affect the relation which the law creates between a bank and a customer, namely, the relation of debtor and creditor. The legal effect of a notice to the Bank that the money deposited is trust money is only to cast a duty on the Bank not to participate in a breach of trust by the trustee. Where a company, acting under S. 282-B of the Companies Act, deposits in a Scheduled Bank moneys deposited with it by its employees in pursuance of their contracts of service, asking the Bank to earmark the same as employees' cash security, the fact that the Bank receives and accepts the deposit with notice of the fact that the moneys represent cash security of the employees of the depositor company, would not make the Bank a trustee in respect of the moneys. The Bank must be deemed to be aware of the limitation of the powers of the company in regard to the moneys deposited and should not permit any dealing by the depositor-company with those moneys in violation of the duty which the statute imposes. But it cannot be held that the Bank holds the moneys in trust for the employees of the depositor-company, so as to entitle that company to claim preferential payment over the ordinary creditors of the Bank, on the Bank going into liquidation. (*Venkataramana Rao, J.*) NAYAR MODERN BANK, LTD. *v.* OFFICIAL LIQUIDATOR, T. N. AND Q. BANK, LTD. **1939 M.W.N. 1066=1939 Compy. C. 272=50 L.W. 944=A.I.R. 1940 Mad. 178.**

———*Rule reserving right to close account without notice to depositor—Legality—Power to close accounts without notice.*

Where a rule regarding the keeping of accounts in a Bank reserves to the Bank the right to close any account without reference to the depositor, if in the opinion of the Bank it is not desirable to keep such account for any reason whatsoever, the

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Bank is entitled to close the account without any notice. Such a rule is not illegal or invalid. It is in the nature of a contract between the parties and it cannot be said that the rule is either immoral or opposed to public policy. (*Leach, C.J. and Varadachariar, J.*) CHAMPION AUTOMOBILES, LTD., MADRAS *v.* TRAVANCORE NATIONAL BANK, LTD. **174 I.C. 928=10 R.M. 745 (2)=1937 M.W.N. 1052=46 L.W. 733=A.I.R. 1938 Mad. 77=(1937) 2 M.L.J. 817.**

———*Sale of securities by Bank—Customer's right to balance of money over and above his liabilities to Bank.*

The customer is entitled to enforce his ownership to the amount in the hands of the banker, after the sale of the Government Promissory Notes deposited in the Bank as security to cover overdrafts or advances after payment of loans from the Bank for which they were security. (*Guha and Bartley, JJ.*) BANK OF DACCA, LTD. *v.* GOUR GOPAL SAHA. **I.L.R. (1937) 1 Cal. 57=166 I.C. 855=9 R.C. 602=65 C.L.J. 74=A.I.R. 1936 Cal. 409.**

———*Set-off in liquidation proceedings—Joint and separate debt—Principle—Individual overdraft account and joint fixed deposit account—Claims in respect of, when can be set off.*

Where there is an amount payable by *A* in his individual account and an account payable to *A* and *B* in their joint account, the two accounts cannot be set off, but if it could be shown that, though the account is in the names of *A* and *B*, *A* is solely entitled to the amount, a set-off will be allowed. Where a person owed to a bank (in liquidation) a sum in respect of an overdraft account and there was an amount due and payable by the bank to the same person and another jointly in respect of a fixed deposit transaction, it was held, that the latter sum could be set off against the former, when it was shown that the sum due in respect of the fixed deposit transaction belonged solely to him who owed money on the overdraft account, though the fixed deposit receipt stood nominally in the name of him and another. (*Venkataramana Rao, J.*) VEERAPPA CHETTIAR *v.* OFFICIAL LIQUIDATORS, T. N. & Q. BANK, LTD. **1940 Compy. Cas. 52=51 L.W. 680=1940 M.W.N. 608=A.I.R. 1940 Mad. 436=(1940) 1 M.L.J. 115.**

———*Suit by fixed depositor for repayment—Forum.*

A fixed depositor cannot bring a suit for repayment from a Bank in any place where he may happen to reside. It has to be filed only in the place where the Bank is situated. (*Bennet and Verma, JJ.*) ALLAHABAD BANK, LTD. *v.* GULLI LAL. **I.L.R. (1940) A. 207=1940 A.W.R. (H.C.) 72=1940 A.L.J. 94=A.I.R. 1940 All. 243.**

BANKER AND EMPLOYEES—Security for good conduct—Deposit earning interest—If trust monies. *See* COMPANIES—WINDING UP—EMPLOYEES' SECURITY. **(1939) 1 M.L.J. 209.**

———Liquidation—Employees' provident fund—If part of assets of company or trust money. *See* COMPANIES ACT, Ss. 229 AND 230 (1). **1938 M.W.N. 1332=A.I.R. 1939 Mad. 352.**

BANKER'S BOOKS EVIDENCE ACT (XVIII OF 1891), S. 5—*"Order of Court for special cause"—Order for production of books under S. 94, Cr. P. Code—S. 94, Cr. P. Code, if conflicts with S. 5 of former Act—Prosecution of auditors of Bank for false statements in balance sheet certified as correct—Order for production of Bank's books—Legality—Right of prosecution to inspection—Duty of Court.*

There is really no conflict between S. 94 of the Cr. P. Code, and the Banker's Books Evidence Act. S. 5 of the latter Act is the only section which can be relied upon as containing anything inconsistent with S. 94, Cr. P. Code. But all that S. 5 of that Act enacts is that no officer of the Bank shall in any legal proceeding to which the Bank is not a party be compellable to produce any banker's book the contents of which can be proved under the Act or to appear as a witness to prove the matters, transactions and accounts, etc., unless by order of the Court or Judge made for special cause. "Court" includes a Magistrate trying a criminal case, so that a Bank cannot be compelled to produce its books without an order of the Court "for special cause." But there is no reason at all why an order made under S. 94, Cr. P. Code, should not be regarded as a sufficient order for the purpose of S. 5 of the Banker's Books Evidence Act. There is nothing in that Act which prevents an order being made under S. 94, C. P. Code, in the proper case. In a prosecution against the auditors of a Bank for offences in respect of false statements in the balance-sheet of the Bank certified by them as correct, an order for production can lawfully be made under S. 94, Cr. P. Code, but it should be made, in the case of banker's books, very cautiously and carefully drafted. A routine order *ex parte* is generally undesirable. The prosecutor who applies for an order and for inspection of the books produced should be required to state before the issue of the order not only what books he requires to be produced but also why their production is necessary with specific reference to the allegations in his complaint. Anything in the nature of a roving or fishing inspection of the books of a Bank should be prevented. But the prosecution cannot be denied the right of inspection of documents the production of which has been held to be necessary or desirable for the purpose of the trial and which have been held to be relevant after considering the objections of the party producing. (*Broomfield and Wadia, JJ.*) P. D. SHAMDASANI *v.* SIR HUGH GOLDING COOKE. **I.L.R. (1938) Bom. 31.**

———**S. 5**—Police officer conducting investigation—Right to inspect Bankers' books. *See* CR. P. CODE, S. 94. **17 Lah. 593.**

———**S. 6**—*Bankers' books—Production and inspection—Principles governing—Right to object.*

A Bank has under S. 6, sub-S. (3) of the Bankers' Books Evidence Act a statutory right to object to any order directing inspection to be given of its books. It is not the practice of the Court to allow inspection of bankers' books under the Act, unless a *prima facie* case is made out for thinking that there is some matter on which the books of the Bank are bound to be relevant. Courts have no doubt very wide powers of ordering production and directing inspection of documents but such an order against a person, not a party to the proceedings involves a serious inroad upon his normal rights as a citizen. Courts are always averse to giving anything in the nature of a roving or fishing commission to inspect documents.

BAR COUNCILS ACT (1926), S. 4.

(*Beaumont, C.J., Rangnekar and Norman, JJ.*) CENTRAL BANK OF INDIA, LTD. *v.* SHAMDASANI. **I.L.R. (1938) Bom. 119=172 I.C. 684=10 R.B. 291=39 Cr.L.J. 207=39 Bom.L.R. 1187=A.I.R. 1938 Bom. 33 (S.B.).**

BAR COUNCILS ACT (XXXVIII OF 1926).

See also LEGAL PRACTITIONER.

———Ss. 4, 5, 6, 7 and 8—*If cumulative.*

Ss. 4, 5, 6, 7 and 8 must be read together. (*Davis, J.C., Rupchand Bilaram and Lobo, A. J. Cs.*) UDHARAM PAHLAJARI, *In re.* **163 I.C. 510=9 R. S. 9=A.I.R. 1936 Sind 75 (S.B.).**

———S. 5 (2) and R. 21—*Rule permitting of continuance of member beyond three years—If ultra vires.*

There is nothing in S. 5 (2) which prevents rules being framed whereby certain members elected to the first Bar Council may continue in office thereafter so that a certain continuity may be maintained between the first Bar Council and its successor. R. 21 is not *ultra vires* of the Act. (*Davis, J.C., Rupchand Bilaram and Lobo, A.J. Cs.*) UDHARAM PAHLAJARI, *In re.* **163 I.C. 510 =9 R.S. 9=A.I.R. 1936 Sind 75 (S.B.).**

———S. 6 (1) (b) and (4)—*Powers and rules under—Operation of—If extend to second Bar Council.*

Under S. 6 (1) (*b*) and (4) of the Act, rules may be made to provide for the retirement of members from office by rotation, and for the manner in which the order of such retirement shall be determined, and there is no reason to suppose that the powers conferred by this section and rules made thereunder should not relate to the first Bar Council but only to its successors. (*Davis, J.C., Rupchand Bilaram and Lobo, A.J.Cs.*) UDHARAM PAHLAJARI, *In re.* **163 I.C. 510=9 R.S. 9= A.I.R. 1936 Sind 75 (S.B.).**

———Ss. 8 and 9—Agent authorised to appear and conduct judicial proceedings—Right to act as solicitor and to appear in Court. *See* C. P. CODE, O. 3, RR. 1 AND 2. **(1937) 2 M.L.J. 552 (F.B.).**

———S. 10—*Complaint*—Locus standi *to make.*

It is open to any person to complain to the Court as to the undesirability of certain remarks made by a Counsel during the course of a trial. Where a Mahomedan Counsel is alleged to have made certain communal remarks during the course of a trial it is open to a Hindu Association to make a complaint to the High Court for taking action in the matter. (*Davis, J.C. and Mehta, A.J.C.*) MAHOMED ASLAM, *In re.* **162 I.C. 919=8 R.S. 177=37 Cr.L.J. 783=1936 Cr.C. 487=A.I.R. 1936 Sind 49.**

———S. 10—*Disciplinary powers of Court under —If can be used to aid the criminal law and award supplementary punishment.*

The principle has to be recognised that the disciplinary jurisdiction vested in the High Court to reprimand, suspend or remove from practice an advocate for misconduct, should not be employed merely to supplement, as it were, by way of a further punishment, a punishment which the advocate has received under the law for the misconduct of which he is guilty. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R. C. 575=37 Cr.L.J. 534=40 C.W.N. 366=1936 Cr. C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

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———S. 10—*Duty of Advocates accepting Vakalats for withdrawal of money from Court—Necessity to verify Vakalat before acceptance.*

It is extremely and clearly necessary that Advocates having to withdraw money or to accept serious responsibility of the kind from and on behalf of a client should even if there be no apparent circumstances to justify a suspicion, do everything in their power to verify the form of the *Vakalatnama,* and furthermore should not accept a *Vakalatnama* unless they have satisfied themselves of the *bona fides* of the person who offers it to them. (*Courtney-Terrell, C.J., Khaja Mahomed and Varma, JJ.*) G., AN ADVOCATE, *In the matter of.* **16 Pat. 488=170 I.C. 339=3 B.R. 745= 10 R.P. 135=17 Pat.L.T. 407=1937 P.W.N. 416 =38 Cr.L.J. 926=A.I.R. 1937 Pat. 433 (S.B.).**

———S. 10—*Misconduct—Advocate convicted for sedition and bound over for speeches in connection with labour movement—Tribunal finding him honest and straight in dealings and of good character—Disciplinary action if called for.*

An advocate took a prominent part in Labour and Trade Union Movements and delivered a number of speeches advocating certain reforms. For some of these speeches he was bound over for one year under S. 107, Cr. P. Code. For others, he was prosecuted under S. 124-A, I. P. Code, and convicted thrice. There was no indication that he made any organised or persistent attempt to create a breach of the peace or to incite acts tending to subvert law and order. The general tenor of the speeches was inoffensive and except on some particular occasions his views were not in any way hostile to the Government; and indeed several passages in them advocated obedience to law and order. The Tribunal of the Bar Council which held an enquiry reported that apart from his activities in connection with the labour movement, he was a young man of good character, inexperienced in his profession, honest and straight in his dealings, while acquitting him of professional misconduct, found him guilty of other misconduct and also observed that the case seemed to be very near the border line.

Held, no further action was called for in the case. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) N., AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R.C. 575=37 Cr.L. J. 534=40 C.W.N. 366=1936 Cr.C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

———S. 10—*"Misconduct"—Conviction under S. 124-A, I. P. Code—If ground for removal from practice.*

A conviction for the offence of sedition under S. 124-A, I. P. Code, cannot be regarded as such misconduct as would, in all circumstances, require action to be taken under the Court's disciplinary jurisdiction and as would demand the removal of the advocate from practice. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) N., AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R.C. 575=37 Cr.L.J. 534=40 C.W. N. 366=1936 Cr.C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

———S. 10—*Misconduct in other than professional capacity—Disciplinary jurisdiction of High Court—Discretion.*

There is no reason why the words "professional or other misconduct" in S. 10 (1) of the Bar

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Councils Act should not be read in their plain and natural meaning. The legislature intended by the aforesaid words to confer on the High Court jurisdiction to take action in all cases of misconduct, misconduct in a professional or other capacity. The Court has discretion to take action in suitable cases. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) N., AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R.C. 575=37 Cr.L.J. 534=40 C.W.N. 366=1936 Cr. C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

———**S. 10**—*Professional misconduct—Agreement with client to receive payment in event of success only—Propriety.*

For an advocate to enter into an agreement with his client to receive nothing unless the suit was successful amounts to professional misconduct, and the Court is bound to take serious notice of it. (*Leach, C.J., Gentle and Somayya, JJ.*) RAMANUJACHARIAR, *In re.* **I.L.R. (1940) M. 17=41 Cr.L.J. 83=184 I.C. 606=(1939) M.W.N. 766 =50 L.W. 234=A.I.R. 1939 Mad. 772=(1939) 2 M.L.J. 320 (F.B.).**

———**S. 10**—*Professional misconduct—Employment of unregistered clerk—Negligence in not finding out. if plaint was filed—Failure to account for money.*

An advocate was engaged to file a suit, employed an unregistered clerk and left the plaint with him for presentation. The clerk failed to file the plaint. The advocate however did not take care to see whether the suit had been filed and thus allowed his clerk to cheat his client. Besides this the advocate did not return or account for the money he had taken from his client for stamps and other incidental purposes.

Held, that this amounted to gross misconduct on the part of the advocate. (*Mya Bu, Offg. C. J., Ba U and Dunkley, JJ.*) O., A BARRISTER-AT-LAW, *In the matter of.* **178 I.C. 398=40 Cr.L.J. 53=A.I.R. 1938 Rang. 423 (S.B.).**

———**S. 10**—*Professional misconduct—Findings of facts by Bar Council—If to be interfered with by High Court.*

The question whether a particular advocate has violated the recognized canons of professional etiquette is primarily a matter that concerns the Bar Council and consequently the High Court ordinarily will accept findings on questions of fact recorded by the Bar Tribunal provided they are not perverse. (*Iqbal Ahmad, Rachhpal Singh and Hunter, JJ.*) AN ADVOCATE OF RANIKHET, *In the matter of.* **I.L.R. (1940) All. 60=41 Cr.L.J. 211=1939 A.W.R. (H.C.) 828=1939 A.L. J. 957=1940 A. Cr. C. 10=12 R.A. 367=185 I.C. 611=A.I.R. 1940 All. 1 (F.B.).**

———**S. 10**—*Professional misconduct—Misappropriating client's moneys temporarily—Offence—Proper punishment.*

Per *C.J.*, and *Gentle, J.*—An advocate who misappropriates his client's moneys is not fit to remain a member of an honourable profession of advocates of the High Court, and the High Court should be failing in its duty if it does not direct the advocate's name to be removed from the rolls. The advocate is guilty of a criminal offence and such conduct cannot be condoned as to do so would encourage crimes of that nature and might have a harmful effect on the profession as a whole. The fact that the misappropriation is only temporary does not lessen the offence or the gravity of the misconduct.

Varadachariar, J.—Though the conduct of an advocate who misappropriates the moneys belonging to his client must be strongly disapproved and though the members of the profession should observe the highest standard of professional conduct, the Court when dealing with the question of punishment, cannot shut its eyes to the fact that those standards have not unfortunately yet come to be generally observed and the way that advocates and clients carry on their pecuniary dealings sometimes leads advocates to imagine that they can persuade their clients to condone the faults on their part in dealing with their client's money. The possibility or even the fact of condonation by the client is, however, no justification for such conduct. (*Leach, C.J., Varadachariar and Gentle, JJ.*) S., ADVOCATE, *In the matter of.* **1937 M. W.N. 1322 (F.B.).**

BAR COUNCILS ACT (1926), S. 12.

———**S. 10 AND BAR COUNCIL RULES (Allahabad); R. 3**—*Consultation of counsel—When debars appearance for the opposite party.*

An advocate who has once been consulted by a party is not thereby debarred from appearing for the opposite party for all times. He is free to accept a brief against him, if he has not received any information of a confidential nature from the party who consulted him. The onus of proving that such information was conveyed lies and lies heavily on the party seeking to restrain the advocate's appearance. (*Thom, C.J.*) SAHARANPUR GRAIN CHAMBER, LTD. *v.* MAHARAJ SINGH. **I.L.R. 1040 A. 262=188 I. C.) 376=1940 A.L.J. 170=1940 A.W.R. (H. C.) 165=1940 A. Cr. C. 49=A.I.R. 1940 All. 233.**

———**S. 10 (1)**—*"May"—Scope and effect of—Discretion of High Court—Exercise of—Advocate—Misconduct—Disciplinary jurisdiction—Exercise—Test to be applied.*

The word "may" in S. 10 (1) of the Bar Councils Act makes it plain that while the High Court has unrestricted jurisdiction in all cases of misconduct, a discretion is left to the Court to take action in suitable cases only. It is not possible to lay down any hard and fast rule or any general principles with regard to exercise of such discretion. It must be exercised judicially. The test which the Court has to apply is whether the proved misconduct of the advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted, or unfit to be entrusted with the responsible duties that an Advocate is called upon to perform. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) N., AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R. C. 575=37 Cr.L.J. 534=40 C.W.N. 366=1936 Cr.C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

———**S. 12**—*Findings of tribunal—Interference—Practice.*

It would need very good reason to induce the High Court to throw over the findings of fact which have been arrived at by a tribunal. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) ABINASH CHANDRA *v.* HEMANTHA KUMAR. **42 C.W.N. 1111.**

BAR COUNCILS ACT (1926), S. 12.

———S. 12 (1)—*Sind Rules, R. 12—Enquiry referred to District Judge by High Court—Power of District Judge to delegate.*

Where a case against an advocate for his alleged misconduct is referred for inquiry by the High Court to the District Judge, the District Judge has no power to delegate this inquiry to one of his assistants; the jurisdiction conferred on the District Judge being of a special nature, it is the District Judge alone who can exercise the jurisdiction by following the procedure laid down for enquiry and none else. (*Davis, J. C. and Mehta, A.J.C.*), R., BAR.-AT-LAW, *In re*. **168 I. C. 992 =38 Cr. L. J. 664 (1)=9 R. S. 254 (1)=A. I. R. 1937 Sind 98.**

———S. 12 (3)—*Complainant—Right to be heard.*

Sub-S, (2) of S, 12 of the Bar Councils Act cannot be intended to exclude the right of the Court to hear any person other than the persons mentioned in that sub-section. It is in the power of the Court, and in any ordinary case it would be its duty to hear the complainant, if he so desires. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) ABINASH CHANDRA *v.* HEMANTHA KUMAR. **42 C. W. N. 1111.**

———S. 12 (5)—*Assessment of costs.*

In a case where the complainant was unsuccessful before the tribunal whose findings were confirmed by the Court, the complainant was ordered to pay the costs of the Advocate both in the enquiry before the tribunal and in the hearing before the Court. He was also ordered to pay the fees of the short-hand writer and the interpreter in the enquiry before the Bar Council. The costs were directed to be taxed by the Registrar of the original side as of a hearing. (*Derbyshire, C.J. Costello and Mukherjea, JJ.*) REV. FATHER P. MESARIC *v.* RAMANI MOHAN. **178 I. C. 253=42 C. W. N. 1113=A. I. R. 1938 Cal. 766.**

———S. 14 (1) (b)—Scope—Counsel's right of audience—Departmental inquiry under Civil Services Rules—Right of Government servants to be represented by counsel. *See* CIVIL SERVICES (CLASSIFICATION CONTROL AND APPEAL) RULES, R. 55. **(1937) 2 M. L. J. 189.**

———Ss. 14 (2) and 15 (b)—*Advocate of one High Court—Application for permission to appear in case in another High Court—If to be granted as of right—Discretion and duty of the Chief Justice.*

Where an application is made on behalf of an advocate of one High Court for permission to appear in case in another High Court under the rules framed under the Bar Councils Act, good reasons must be shown for the grant of such permission. The permission cannot be granted on mere application or as a matter of course. The Chief Justice of the High Court must use a judicial discretion in the matter and then grant or refuse permission. The right of an advocate of a particular bar to appear in other High Courts does not exist as a matter of right. Nor is there any question of reciprocity involved in the matter. The Chief Justice will apply his mind to the circumstances of the application and see whether good reasons have been made out for the grant of permission in any particular case.

BENAMI—Advancement.

(*Courtney Terrell, C.J.*) EMPEROR *v.* GIRINDRA MOHAN MISHRA. **167 I. C. 486=9 R. P. 406 =38 Cr. L. J 392=1936 Pat. W. N. 822=3 B. R. 303=17 Pat. L. T. 861=A. I. R. 1937 Pat. 122.**

———S. 15—*Rules framed under—Rule prohibiting trade or business—Investments by way of money-lending—If amounts to engagement in money-lending business.*

Investment of his savings by an advocate do not necessarily amount to an engagement in money-lending business, the more so when such investments are few and far between and are mostly made to relations and friends. Nevertheless if investments by way of loan are made as a matter of regular business and for gain there can be no escape from the conclusion that such investments constitute engagement in money-lending business. It depends on the facts of each case and is a mixed question of fact and law, as to whether certain transactions amount to a money-lending business. (*Iqbal Ahmad, Rachhpal Singh and Hunter, JJ.*) AN ADVOCATE OF RANIKHET, *In the matter of*. **I. L. R. (1940) All. 60=41 Cr. L. J. 211=12 R. A. 367 =1940 A. Cr. C. 10=185 I. C. 611=1939 A. W. R. (H. C.) 828=1939 A. L. J. 957=A. I. R. 1940 All. 1 (F. B.).**

———R. 16—*Rule applies to election of all candidates.*

Rule 16 cannot be restricted to the election of any one candidate; the singular covers the plural and validity of the election of all the elected members can be challenged thereunder. (*Davis, J.C., Rupchand Bilaram and Labo, A.J.Cs.*) UDHARAM PAHLAJARI, *In re*. **163 I. C. 510=9 R. S. 9=A. I. R. 1936 Sind 75 (S. B.).**

BENAMI.

Advancement.
Burden of proof.
Essentials to be proved.
Evidence.
Fraudulent transfer.
Husand and wife.
Nature of transaction.
Presumption.
Proof.
Res judicata.
Resulting trust.
Right to sue.
Ryot holding ryotwari land.
Revenue sale.
Suit by benamidar.

———*Advancement—Burden of proof—Law in Burma.*

In Burma, the doctrine of intended advancement, in connection with transactions in which property is purchased by a father or a father and mother, and in the conveyance the name or names of the children are inserted as transferees, does not form part of the law of the land, as the doctrine is not in consonance either with the sentiment or the practice of the Burmans. Where, therefore, certain persons claim that their parents, although purchasing certain property with their money, have taken the conveyance in their name by way of intended advancement, the burden is on them to prove that the conveyance, which must *prima facie* be presumed to have been made for the benefit of

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the real purchaser, was in fact intended to operate solely for benefit of children. 4 Rang. 522, 6 Rang. 203, **7 Rang. 751, Overr.** (*Page, C.J., Baguley, Mosely, Ba U and Dunkley, JJ.*) MAUNG TUN PE *v.* B. K. HALDER. **14 Rang. 242=163 I.C. 211=8 R.R. 616=A.I.R. 1936 Rang. 256 (F.B.).**

———*Advancement — Presumption — Property purchased in name of wife.*

The rule of English law relating to advancement in favour of a wife is not applicable to transactions by Indians in respect of property situated in India. Where property is purchased at an auction sale in the name of a wife and the money or the purchase is supplied entirely by the husband, the presumption is in favour of the transaction being benami. (*Tek Chand, J.*) JAI KISHAN SINGH *v.* PARMESHRI DAS. **171 I.C. 856=10 R.L. 240=39 P.L.R. 152=A.I.R. 1937 Lah. 471.**

———*Advancement—Hindu father purchasing property out of his own money in son's name—Presumption of benami.*

Where a Hindu father purchases property out of his own money in the name of his son, the presumption is that he intended to make the purchase for his own benefit and not for the benefit of his son. Hence the property so purchased is *prima facie* father's self-acquired separate property. (*Pollock, J.*) GOPAL TRIMBAK *v.* KESHEOSA VISHNOOSA. **I.L.R. (1936) Nag. 65 =165 I.C. 350=9 R.N. 80=A.I.R. 1936 Nag. 185.**

———Advancement—Purchase by Hindu father in son's name with own funds—Inference—If joint family property or property of son—Presumption of benami. *See* HINDU LAW—JOINT FAMILY. **I.L.R. (1936) Nag. 65.**

———*Advancement—Purchase in son's name—Doctrine of advancement—If applicable.*

In England if the conveyance or transfer is made not to a stranger but to the wife or child of the person who provided the consideration, if the transaction is wholly unexplained, the law presumes an intention to benefit the wife or child. In India no such rule exists. Hence where property is purchased by a father in the name of the son and the latter claims the property as his own by alleging that the father intended to make a gift of the property to him, the onus rests upon him to establish such a gift, (*Harries, C.J. and Chatterji, J.*) SAHDEO KARAN SINGH *v.* USMAN ALI KHAN. **184 I.C. 113=6 B.R. 14=12 R.P. 225=20 Pat. L.T. 787=A.I.R. 1939 Pat. 462.**

———*Advancement—Purchase in son's name—Mutation and grant of receipts in son's name—Presumption of gift—If arises.*

Where a father has purchased property in the name of his son, the fact that he has obtained mutation of names and granted receipts in the name of the son does not establish a gift by him in favour of the son, as such acts are entirely consistent with the transaction being a purely benami one. Indeed such acts inevitably follow a benami transaction. Experience has shown that frequently benami transactions are entered into in this country for no apparent reason. (*Harries, C.J. and Chatterji, J.*)

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SAHDEO KARAN SINGH *v.* USMAN ALI KHAN. **184 I.C. 113=6 B.R. 14=12 R.P. 225=20 Pat.L.T. 787=A.I.R. 1939 Pat. 462.**

———*Burden of proof.*

The person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt. (*Dunkley, J.*) S.P. L.A. CHETTIAR FIRM *v.* MA PU. **163 I.C. 604=9 R.R. 33=A.I.R. 1936 Rang. 262.**

———*Burden of proof.*

The burden of proof is on the person seeking to establish that any particular transaction is a benami one. It is notorious that in benami transactions all the subordinate parts are well fitted in to correspond with the benami arrangement in its integrity, and if it is once established that a transaction is benami, the fact that the deeds bear the benamidar's name is necessarily consistent with the benami case and is of no essential weight on one side or the other. Since therefore it is unlikely that there will often be any other relevant circumstances from which the conclusion can be drawn that a transaction is a benami one, the usual mode of proving that a purchase is a benami transaction is by showing that the funds from which the purchase was made were exclusively the funds of the person alleged to be real owner of the property. The main test is to find out the real intention of the parties. All the peculiar circumstances and probabilities of each particular case must be carefully considered. Although no one of those circumstances taken by itself may be of any particular value or afford any conclusive proof of the intention to transfer the ownership from one person to the other, yet a combination of some or all of them, and a proper weighing and appreciation of their value, may well raise such a presumption of real ownership as to shift the burden of proof on to the opposite party, and if the latter is unable to discharge the burden so transferred, he will fail. (*Baguley and Sharp, JJ.*) MOHAMMAD HAJEE *v.* VEDNATH SINGH. **1938 Rang.L.R. 52=174 I.C. 725=10 R.R. 419=A.I.R. 1938 Rang. 26.**

———*Burden of proof—Test to determine character of transaction—Circumstances to be considered—Doctrine of advancement—Applicability in India.*

There is in India no presumption in favour of the advancement of wife or child when property is purchased by the husband or father in their name. In a suit for a declaration that a transaction is benami, the burden lies on the plaintiff. A person cannot be deprived of property upon mere conjecture or surmise. The decision must rest not upon suspicion but upon legal grounds established by legal testimony. In the absence of other relevant circumstances, the criterion of ownership is the source from which the purchase-money comes, but in determining whether a transaction is benami or not, all relevant factors must be taken into consideration, the surrounding circumstances, the position of the parties and their relation to one another, the motives governing their actions and their subsequent conduct. Less evidence is required in India than in England to prove that a transaction is benami. The transaction must be shown to be a bogus or sham transaction, though a slight quantity will suffice

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to show it. (*Davis, J.C. and Weston, J.*) SABHAGIBAI v. PIRKASH CHAND. **I.L.R. (1940) Kar. 334.**

———*Essential to be proved.*

Before any transaction can be held to be benami, it must be clearly shown that it was not carried out for the benefit of the alleged *benamidar* but for the benefit or for the protection of the interests of the alleged true owner. (*Davis, J. C. and Tyabji, J.*) SARDAR KHATUN *v.* SECRETARY OF STATE. **I.L.R. (1939) Kar. 348=179 I.C. 252=11 R.S. 124=A I.R. 1939 Sind 9.**

———*Evidence—Non-production of draft of document—If material fact.*

In benami cases, the non-production of the draft of the document would ordinarily be a material fact for consideration. (*R. C. Mitter and Edgley, JJ.*) SARAT SUNDARI DEBI *v.* RAM KINKAR RAI. **180 I.C. 445=11 R.C. 685=68 C. L.J. 416=A.I.R. 1939 Cal. 244.**

———*Fraudulent transfer—Alienation by father benami to daughter to cheat son—Fraud not carried out—Suit by benamidar for possession—Defence of benami—Sustainability.*

A Hindu father executed a sale-deed benami in favour of his daughter of certain properties belonging to the joint family in order to cheat his son of his share in that property. The father subsequently sued his son for partition excluding the property conveyed to the daughter. The son objected to such exclusion and the father then consented to the inclusion of that property also and asked that it might be allotted to his share. The suit was compromised and the property in question was allotted to the father and possession also was delivered to him by the son. Subsequently, after the death of the daughter, her sons sued the father for possession of the property comprised in the sale-deed executed to their mother, and the father pleaded that it was a benami transaction entered into by him to cheat his son.

Held, though the father no doubt intended to defraud his son and entered into the transaction with that object in view, since he did not do anything more to carry out his original fraudulent intention but on the contrary compromised the matter and agreed to the inclusion of the property in the partition suit, and no damage had resulted to any body, the plea of benami could be successfully set up and was a valid defence to the suit. (*Beasley, C.J., King and Gentle, JJ.*) VENKATARAMAYYA *v.* PULLAYYA. **59 Mad. 998=164 I.C. 588=9 R.M. 129= 1936 M.W.N. 676=44 L.W. 294=A. I. R. 1936 Mad. 717=71 M.L.J. 458 (F.B.).**

———*Husband and wife—Properties purchased and standing in name of Hindu wife—Husband not shown to have debts—Wife having some means of her own—Presumption—Allegation of benami—Onus.*

In the case of properties purchased and standing in the name of a Hindu woman, where there is no suggestion that the husband of the woman had any creditors from whom he desired to screen the properties, but on the other hand there is positive evidence that the woman herself had some means of her own, the onus of proving that they

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have been purchased with funds of her husband benami in her name is in the first instance on the person pleading the same. Mere suspicion that the purchase might not have been made wholly with the lady's money will not suffice to establish that the purchase was benami nor even suspicion that moneys of the husband must also have been utilised for the purchase. Even in cases where there is positive evidence that money was contributed by the husband and not the wife, that will not conclude the matter as to its being benami, though that is an important criterion. Where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine transfer and not by a benami transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of the beneficial interest and not as a mere benami transaction. (*Varadachariar and King, JJ.*) SITAMMA *v.* SITAPATIRAO. **I.L.R. (1938) Mad. 220=170 I.C. 535=11 R.M. 103=46 L.W. 651=A.I.R. 1938 Mad. 8= (1937) 2 M.L.J. 606.**

———*Husband and wife—Property purchased in wife's name—Benami or gift—Test.*

Where a husband purchases property out of his own money in the name of his wife, it is the intention of the husband that mainly counts in the determination of the question whether he intended to make an absolute gift in favour of his wife or whether the transaction was merely intended to be a benami transaction, and if a party avers that an absolute gift was intended, clear and cogent and preferably documentary evidence should be produced in support of that allegation. (*Addison and Din Mohammad, JJ.*) MST. NAWAB BEGUM *v.* HUSAIN ALI KHAN. **18 Lah. 149=171 I.C. 831=10 R.L. 232=39 P.L.R. 907=A.I.R. 1937 Lah. 589.**

———*Husband and wife—Purchase by wife—Presumption.*

There is no presumption that when a wife possessed of considerable wealth and considerable income purchases a property in her own name the property must be regarded as one purchased benami for her husband. (*D. N. Mitter and Patterson, JJ.*) SYED MAHOMED MALEEH *v.* SHASI MOULI NAG. **67 C.L.J. 188.**

———*Husband and wife—Purchase of property in name of wife or child—Inference—Resulting trust.*

Where property is purchased or provided by one person in the name of or for another, there is a presumption of a resulting trust in favour of the person who provides or purchases the property and the situation is not altered by the fact that the person in whose name the property is purchased is the child or wife of the purchaser. In the absence of circumstances rebutting such presumption, such property is attachable in execution of a decree against the purchaser. A.I.R. 1914 Lah. 17 and A.I.R. 1916 Lah. 320, Expl.; A.I.R. 1931 P. C. 55 and A.I.R. 1928 P.C. 172, Appr.; A.I.R. 1934 Mad. 671, Dist. (*Middleton, J.C. and Almond, A.J.C.*) UMAR KHAN *v.* MOHAMMAD SHARIF KHAN. **161 I.C. 456=8 R. Pesh. 173= A.I.R. 1936 Pesh. 88.**

———*Nature of transaction.*

A benami transaction is a perfectly genuine transaction which is legally enforceable and the

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term benami should not be regarded as being equivalent to not genuine. So also to speak of a benami gift is a contradiction in terms, for either there was a gift, in which case the donee obtained title to the property or there was not a genuine or valid gift. A benami transaction has the same effect as a resulting trust. (*Page, C.J., Baguley, Mosely, Ba U and Dunkley, JJ.*) MAUNG TUN PE *v.* B. K. HALDER. **14 Rang. 242=163 I.C. 211=8 R.R. 616=A.I.R. 1936 Rang. 256 (F.B.).**

———*Nature of transaction—Title of benamidar.*

Where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested, and the title to the property is with the latter. (*Rowland and Varma, JJ.*) SHEO GOBIND KOERI *v.* RAM ASRAY SINGH. **180 I.C. 615 =11 R.P. 521=5 B.R. 458=1938 P.W.N. 738 =19 Pat.L.T. 697=A.I.R. 1939 Pat. 5.**

———Presumption of—Life Assurance Policy—Assignment to wife or child—Effect—Assignee, if mere benamidar or nominee of assured. *See* LIFE ASSURANCE—POLICY OF. **31 S.L.R. 98= A.I.R. 1937 Sind 181.**

———Presumption—Property in wife's name. *See* INCOME-TAX ACT, S. 10 (2). **160 I.C. 611= 8 R.P. 373.**

———*Proof—Custody of documents of title—If conclusive.*

The fact that the documents of title are produced from the custody of certain person, is of importance in considering a question of benami; but the Judge in considering such question, is not bound to come to the conclusion that, in the event of a document being produced from the custody of the person asserting that title, his case is made out. (*Wort and Rowland, JJ.*) MT. BIBI ZAINAB *v.* MUHAMMAD AYUB. **161 I.C. 331 (2)=8 R.P. 443=1936 P.W.N. 140=17 Pat.L.T. 366=A.I.R. 1936 Pat. 136.**

———*Proof—Evidence—Sale-deed in name of husband—Latter deed by wife that previous sale was benami—If conclusive.*

A person taking a sale deed in respect of certain properties in his name *prima facie* gets title to the properties; and a mere recital in subsequent deed executed by another person (even though the latter is the wife of the former) that the prior sale-deed represented a benami transaction is insufficient to hold that it is benami. (*A. S. R. Chari and Sreenivasa Rao, JJ.*) VARADACHAR *v.* DASAPPA. **14 Mys.L.J. 256=41 Mys.H.C.R. 30.**

———*Proof—Evidence requisite.*

In order that a property may be shown to be benami, it is not only necessary to show that it was purchased by another's money, but it is necessary to show that it was purchased by that other, benami. But circumstances in India are such and the habits of society are such, that evidence which might not be sufficient in England to show that the property was benami would be sufficient in India. (*Davis, J.C. and Mehta, J.*) VIRANBAI *v.* PARMANAND THANGALDAS. **I.L.R. (1939) Kar. 140=178 I.C. 801=11 R.S. 108=A.I.R. 1938 Sind 206.**

———*Res judicata—Decree against benamidar—Real owner—If bound.*

A decree obtained against the benamidar will bind the beneficial owner. (*Dhavle, J.*) INDER-

BENAMI—Ryot holding ryotwari land.

JIT PRATAB BAHADUR SAHI *v.* SURAJ NARAIN. **A.I.R. 1940 Pat. 21.**

———*Res judicata—Proceeding against benamidar—True owner, if bound.*

A benamidar is ordinarily deemed to be a trustee or representative of the true owner, and consequently in a proceeding by or against the benamidar the person beneficially entitled is fully affected by the rules of *res judicata*. Exceptions to this rule might exist only when the circumstances disclose a conflict of interest between the benamidar and the real owner. 46 I.A. 1, Rel. on. (*Mukherjea, J.*) THAKUR DAS NATH *v.* KESHAB CHANDRA GHOSH. **42 C.W.N. 497.**

———*Resulting trust—A purchasing property in B's name—Consideration flowing from A—Resulting trust in A's favour.*

Where property is purchased by *A* in the name of *B* and the consideration has come through *A* the transaction is benami and a resulting trust is created in favour of *A*. (*Dunkley, J.*) U MAUNG GALE *v.* MAUNG PO YIN. **169 I.C. 389= 9 R.R. 398=A.I.R. 1937 Rang. 198.**

———Revenue sale during pendency of suit by mortgagee of the property—Purchase benami for mortgagor—Suit by mortgagee after decree to declare sale fraudulent—If barred by S. 36, Bengal Land Revenue Sales Act. *See* BENGAL LAND REVENUE SALES ACT, S. 36. **A.I.R. 1939 Pat. 168.**

———Right to sue—Benami purchaser at revenue sale—Right of creditor of real owner. *See* BENGAL LAND REVENUE SALES ACT, S. 36. **178 I.C. 357=5 B.R. 91.**

———*Right to sue—Benami purchaser at revenue sale—Right to sue for possession—Bengal Land Revenue Sales Act, S. 37.*

A benamidar is a trustee for the beneficial owner. As the legal title is in him, he can maintain in his own name a suit for possession. The fact that he had before suit admitted that a certain company was the real owner and that he as its director had asserted the claim of the company does not make inapplicable the aforesaid principle. If he is a declared purchaser at a revenue sale, he has also the right to avoid and annul all unprotected under-tenures under the provisions of S. 37 of the Bengal Land Revenue Sales Act. (*Mitter and Rau, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARY CO., LTD. **44 C.W. N. 38=70 C.L.J. 218=A.I.R. 1940 Cal. 115.**

———*Right to sue—Right of benamidar—Benami transaction contravening law.*

A benamidar cannot maintain a suit if the benami transaction contravenes the provisions of any law. A benamidar cannot, therefore, sue for possession, where the transaction offends against the provisions of the Punjab Land Alienation Act in so far as it effects a sale as well as a mortgage for an indefinite period, neither of which is permissible under the Act if once it is found that the real transferee is a non-agriculturist. (*Din Mahomed, J.*) LALA *v.* JAGE RAM. **40 P.L.R. 784= 181 I.C. 465=11 R.L. 841=A.I.R. 1938 Lah. 789.**

———Ryot holding ryotwari land—If can be benamidar. *See* LAND TENURE—RYOTWARI TENURE. **A.I.R. 1937 Nag. 63.**

BENAMIDAR—SUIT BY BENAMIDAR.

———Suit by benamidar—Dismissal—Appeal by real owner—Permissibility. *See* C. P. CODE, S. 146. **50 L.W. 429.**

———*Suit by benamidar—Real owner's right to be joined as party.*

As the benamidar represents the real owner, it is open to the latter to apply to be joined in the action, but whether he is joined or not he is bound by the result of the proceeding unless it is revoked. (*S. K. Ghose and Patterson, JJ.*) BANWARI MUKUND DAS NANDI DALAL *v.* AJIT KUMAR NANDI. **67 C.L.J. 320=A.I.R. 1938 Cal. 874.**

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1877), Ss. 3 and 13—*Jurisdiction of Munsif to attach property lying out of his jurisdiction though within the district.*

Although there may be one or more munsifs for every district for mere administrative purpose, each and every munsif is a munsif for the district, although by an administrative order he exercises jurisdiction over a limited part of the district. It is no doubt quite right and proper for a munsif executing a decree to say that, with regard to attachment and sale of property outside his jurisdiction so limited it is a matter of convenience to transfer it to the munsif or another sub-division where the property is situated; but his jurisdiction as munsif of the district is unimpaired, and he has jurisdiction to attach property in any part of the district. (*Courtney Terrell, C.J. and Manohar Lall, J.*) RAM BILAS MAL *v.* RAGHUNATH SAHAY. **172 I.C. 30=10 R.P. 330=1937 P.W.N. 757=18 Pat.L.T. 822.**

———**S. 8**—Additional District Judge—Jurisdiction to hear appeal under S. 476-B, Cr. P. Code—Power of District Judge to transfer appeal. *See* CR. P. CODE, S. 476-B. **17 Pat.L.T. 276.**

———**Ss. 11 (1) and 9**—*Transfer of proceeding in Subordinate Judge's Court—Power of District Judge.*

A preliminary decree in a mortgage suit was passed in the Court of the 4th Subordinate Judge of a certain place. That Court was then abolished and the Court of the second Subordinate Judge of that place was placed in charge of the business of the fourth Court and the final decree in the mortgage suit was passed by the second Court. The decree-holder applied for execution of the decree in the second Court but his application was returned to him with a statement that the Court of the third Subordinate Judge of the place had already been placed in charge of the business of the fourth Court. The decree-holder thereupon presented his application for execution to the third Court. There was a sale but that sale was set aside. After that fresh sale processes were served but before the sale date, the execution case was transferred under the District Judge's order to the fourth Court which had been reinstated in the meantime. The sale was held and confirmed by the fourth Court.

Held, that the whole of the proceedings was in order as a result of orders properly made by the District Judge in pursuance of his powers under Ss. 9 and 11 (1) of the Civil Courts Act. (*Derbyshire, C.J. and Mukherjea, J.*) SISIRCHANDRA DUTT GUPTA *v.* GOPAL DAS. **42 C.W.N. 977.**

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (1877), S. 22.

———**S. 13 (2)**—*Order by District Judge re-distributing work in Courts of Subordinate Judges—If affects jurisdiction of latter.*

Under S. 13 (1) of the Civil Courts Act, the Local Government fixes as well as alters the local limits of the jurisdiction of the Civil Courts. The local jurisdiction of a Subordinate Judge which extends over the whole District, is not altered by an order of the District Judge under Cl. (2) of that section re-distributing the civil business of the District. Such an order under S. 13 (2) therefore cannot operate to take away the jurisdiction of a Subordinate Judge who passed a mortgage decree from executing that decree, although the civil business relating to the local area within which the mortgaged properties are situated is assigned by the District Judge to another Subordinate Judge of the District. (*Bartley and Nasim Ali, JJ.*) JITENDRA NATH *v.* BIRENDRA KRISHNA ROY. **42 C.W.N. 167=175 I.C. 204=10 R.C. 769=A.I.R. 1938 Cal. 193.**

———**S. 13 (2)**—*Several Sub-Judges in one District—Distribution of business among them by District Judge—Effect on their territorial jurisdiction—Plaint filed before one of them returned for presentation to proper Court according to such distribution—Date of institution of suit.*

Where there are more than one Subordinate Judge in a district having territorial jurisdiction over the entire district, and the District Judge has under S. 13 (2) of the Civil Courts Act distributed civil business among them by reference to local limits, and a plaint filed before one of them is returned for presentation to proper Court in accordance with the distribution made by the District Judge, the suit must be taken to have been instituted on the date on which the plaint is filed in the first Court, as that Court, having territorial jurisdiction over the whole District, has territorial jurisdiction to entertain the suit. In such a case, there is no necessity for the plaintiff to invoke the aid of S. 14 of the Limitation Act. (*Mitter and Akram, JJ.*) BILLADA SUNDARI DASSI *v.* NILAMBARA SAHA. **44 C.W.N. 225.**

———**S. 21**—*Forum of appeal—Determining factor—Plaint valuation or adjudged valuation.*

To determine the proper appellate forum, it is the value of the original suit as assigned by the plaintig in his plaint that should be looked into and not the value as found by the trial Court if accepted by the plaintiff, unless of course there has been misrepresentation, etc. In fact it is that valuation which controls not only the jurisdiction of the trial Court but of the appellate Court as well. Where a suit for accounts was valued at Rs. 130 but the trial Court decreed the suit for Rs. 7,000 and odd, an appeal lies to the District Judge and not to the High Court under S. 21 of Bengal, Agra and Assam Civil Courts Act. (*Rachpal Singh and Ismail, JJ.*) ISHTIAQ AHMAD *v.* ABDUL SAMAD. **I.L.R. (1939) All. 172=181 I.C. 939=11 R.A. 628=1939 A.W.R. (H.C.) 59=1939 A.L.J. 133=A.I.R. 1939 All. 273.**

———**S. 22**—*Order of Munsif refusing to file complaint under S. 476, Cr. P. Code—Appeal to District Judge—Power of latter to transfer it for hearing to Sub-Judge.*

An order of a Munsif refusing to file a complaint under S. 476, Cr. P. Code, does amount to

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (1877), S. 37.

an order within the meaning of S. 22 of the Civil Courts Act. A District Judge has, therefore, jurisdiction to transfer an appeal against that order made to him to a Subordinate Judge under his administrative control for hearing. (*Jack and Henderson, JJ.*) CHANDRA KUMAR *v.* GOPI NATH KAR. **I.L.R. (1938) 2 Cal. 287=68 C.L.J. 86=176 I.C. 823=11 R.C. 172=42 C.W.N. 586=A.I.R. 1938 Cal. 463.**

——S. 37—*Family custom modifying personal law—Whether can be allowed to be proved.*

In the case of parties who are Muhammadans, a family custom under which succession is governed by the Hindu Law can be allowed to be proved. Courts are not bound under S. 37 of the Bengal, Agra and Assam Civil Courts Act, to enforce the rule of Mahomedan Law notwithstanding such custom. (*Sulaiman, C.J. and Bennet, J.*) JAFFO *v.* CHITTA. **58 All. 889=163 I.C. 650=9 R.A. 49=1936 A.L.J. 493=1936 A.W.R. 449=A.I.R. 1936 All. 443.**

——S. 37—*Question regarding dower—Applicability of Mahomedan Law.*

Though the topics of divorce, dower, betrothal, family relations, are not particularized in S. 37 as in the enactments of other provinces, yet this does not import an intention that the social and family life of Muslims should be differently regarded from province to province. The right of the wife to her dower is a fundamental feature of the marriage contract; it has a pivotal place in the scheme of the domestic relations affecting the mutual rights of the spouses at more than one point. While by the Mahomedan Law, marriage itself is viewed as a civil contract and the agreement to pay a certain amount of dower is a part of the contract of marriage, the mere principles of the law of contract as embodied in the Indian Contract Act are insufficient of themselves to account for the main features of the law of dower. The Mahomedan texts and the principles of Mahomedan law have therefore to be applied to determine every facet of the law of dower among Mahomedans in Bengal, Bihar, Agra and Madras, as in the other provinces. (*Sir George Rankin.*) SABIR HUSSAIN *v.* FARZAND HASAN. **42 C.W.N. 353=1938 A.W.R. (P.C.) 32=1938 A.L.J. 141=173 I.C. 1=47 L.W. 227=65 I.A. 119=I.L.R. (1938) All. 314=1938 O.W.N. 233=19 Pat.L.T. 215=1938 O.L.R. 112=4 B.R. 358=1938 P.W.N. 170=66 C.L.J. 548=1938 A.L.R. 148=10 R.P.C. 211=1938 O.A. 214=1938 M.W.N. 626=40 Bom.L.R. 735=32 S.L.R. 362=A.I.R. 1938 P.C. 80=(1938) 1 M.L.J. 458 (P.C.).**

——S. 37 (2)—*Scope and meaning of.*

What is meant by S. 37 (2) of the Bengal, Agra and Assam Civil Courts Act is that where the statute law deals with a subject and allows certain rights, equity cannot be invoked to extend the rights which are provided by the statute. (*Bennet, A.C.J. and Verma, J.*) BEHARIJI MAHARAJ *v.* MANMOHAN DAS. **I.L.R. (1939) All. 24=180 I.C. 699=11 R.A. 502=1938 A.L.J. 1199=1939 A.W.R. (H.C.) 43=A.I.R. 1939 All. 141.**

BENGAL ACTS AND REGULATIONS.

Agricultural Debtors' Act (VII of 1936).
Alluvion and Diluvion Regulation (XI of 1825).

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Cess Act (IX of 1880).
Children Act (II of 1922).
Court of Wards Act (IX of 1879).
Criminal Law Amendment Act (VI of 1930).
Embankment Act (II of 1882).
Estates Partition Act (V of 1897).
Excise Act (V of 1919).
Ferries Act (I of 1865).
Food Adulteration Act (VI of 1919).
General Clauses Act (I of 1899).
Irrigation Act (III of 1876).
Landlord and Tenant Procedure Act (VIII of 1869).
Land Redemption and Foreclosure Regulation (XVII of 1806).
Land Registration Act (VII of 1876).
Land Revenue Sales Act (XI of 1859).
Land Revenue Sales (Amendment) Act (III of 1862).
Land Revenue Settlement Regulation (VII of 1822) and (IX of 1825).
Limitation Regulation (II of 1805).
Local Self-Government Act (III of 1885).
Money-Lenders Act (VII of 1933).
Municipal Act (III of 1884).
Municipal Act (XV of 1932).
Patni Taluk Regulation (VIII of 1819).
Public Demands Recovery Act (III of 1913).
Public Gambling Act (II of 1867).
Regulation XXVII of 1793 (Sair).
Rent Act (X of 1859).
Revenue Free Lands (Non-Badshahi Grants) Regulation (XIX of 1793).
Revenue Free Lands Regulation (VIII of 1800).
Revenue Recovery Act (I of 1890).
Sanitary Drainage Act (VIII of 1895).
Supplementary Act (XXIV of 1932).
Suppression of Immoral Traffic Act (VI of 1933).
Suppression of Terrorist Outrages Act (XII of 1932).
Survey Act (V of 1875).
Survey and Settlement Manual (1917).
Tenancy Act (VIII of 1885).
Village Chaukidari Act (VI of 1870).
Village Self-Government Act (V of 1919).
Wakf Act (XIII of 1934).

BENGAL AGRICULTURAL DEBTORS' ACT (VII OF 1936), S. 1 (3)—*Effect of.*

Per *Derbyshire, C.J., Lort Williams and Mitter, JJ.*—The Act extends to the whole of Bengal. The provision in S. 1 (3) that it shall come into force in such areas as the Local Government may by notification direct means that it shall come into force so far as concerns the establishment of Debt Settlement Boards in the local areas as provided in S. 3 and all matters arising under the provisions of the Act consequent upon such establishment. Once these Boards are set up, the Act has come into force in those areas by reason of sub-S. (2), and its provisions apply to the whole of Bengal. 41 C.W.N. 1363, Disappr. (*Derbyshire, C.J., Lort Williams, Bartley, Nasim Ali and Mitter, JJ.*) NARSINGHDAS TANSUKDAS *v.* CHOGEMULL. **I.L.R. (1939) 2 Cal. 93=183 I.C. 118=12 R.C. 129=**

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2 Fed.L.J. 71=43 C.W.N. 613=69 C.L.J. 458=A.I.R. 1939 Cal. 435 (S.B.).

———S. 1 (3)—*Notified areas—If should be administrative or judicial districts.*

The areas mentioned in S. 1 (3) of the Bengal Agricultural Debtors' Act need not be administrative or judicial "districts". Under the Act, the Local Government can notify an area the entirety of which lies within the limits of the administrative district, but which does not include the whole of such district, or they may notify an area lying partly in one district and partly in another. (*Panckridge, J.*) NURSINGDAS TUNSOOKDAS *v.* CHOGEMULL. **178 I.C. 529=11 R.C. 364=42 C.W.N. 293=A.I.R. 1938 Cal. 402.**

———S. 2 (8) (i)—*"Contingent liability"—Liability of defendant in accounts suit.*

The liability of a defendant in an accounts suit is not a "contingent liability" within the meaning of S. 2 (8) (*i*) of the Bengal Agricultural Debtors' Act. The underlying idea in connection with the use of the expression "contingent" seems to be that the liability in question must depend upon some prior occurrence or condition. The liability of the defendant may possibly be unascertained, but, if it exists at all, it is a present liability which does not in any way depend upon the happening of any other event or the fulfilment of any other condition. (*Edgley, J.*) RAVATI MOHAN ROY *v.* BHIKCHAND BHUIAN. **43 C.W.N. 497=A.I.R. 1939 Cal. 343.**

———S. 2 (8)—"Debt"—If includes one payable under decree of High Court on Original Side. *See* BENGAL AGRICULTURAL DEBTORS' ACT, S. 34. **43 C.W.N. 886.**

———Ss. 2 (8) and 34—*"Debt"—Plaintiff's liability to repay decretal amount withdrawn from Court, on reversal of decree in appeal—If debt—Execution by defendant against him for that amount stayed on notice from Board—Execution against surety—Permissibility.*

Where the amount due under a decree passed against defendant was deposited by him in Court, and the plaintiff was allowed to withdraw it on furnishing surety, but the decree was reversed on appeal with the result that the plaintiff became liable to refund that money, the liability of the plaintiff to repay the money is a 'debt' within the meaning of the Bengal Agricultural Debtors' Act. If the plaintiff applies to a Debt Settlement Board and on notice from it the execution proceedings taken out by the defendant against him for the money are stayed, the defendant can start execution against the surety. (*Henderson, J.*) GOPENDRA NARAIN DHAR *v.* RADHA KRISHNA DHAR. **188 I.C. 388=44 C.W.N. 393=A.I.R. 1940 Cal. 224.**

———S. 9 (2)—*Applicants before Board jointly liable for debt along with others—Right of latter to contribution from applicants—Extent of.*

Per *Mukherjee, J.*—If some of the persons liable in respect of a joint debt apply to the Board for settlement of their debts, the liability of the other persons jointly liable with the applicants and who are not before the Board remains intact and is not in any way affected by the settlement of the debt of the applicants, and the creditor can realise his dues from the other debtors. But the right of contribution of the other debtors from the applicants is limited to such amount as is determined by the Board. (*S. K. Ghose and Mukherjea, JJ.*) ABU TAHER BAZULAL RASHID *v.* CHANDRA MONI SAHA. **43 C.W.N. 318.**

BENGAL AGRICULTURAL DEBTORS' ACT (1936), S. 34.

———Ss. 18 and 20—Validity of notice—Power of Civil Court to consider. *See* BENGAL AGRICULTURAL DEBTORS' ACT, SS. 34, 18 AND 20, *infra.* **41 C.W.N. 1307.**

———Ss. 18 and 20—*Distinction between—Scope of enquiry before Board.*

Per *Mukherjea, J.*—The enquiry by the Board contemplated by S. 18 (1) is not one as to whether the liability amounts to a debt at all within the meaning of the Act but whether a debt as defined by the Act and which is alleged by the party to exist, exists as a fact; and if so, what is its amount. There is a marked difference between Ss. 18 and 20. Under S. 20 if any question arises before the Board as to whether a person is a debtor or not, the Board should decide the matter. (*S. K. Ghose and Mukherjea, JJ.*) NUR MIA *v.* NOAKHALI NATH BANK, LTD. **I.L.R. (1939) 1 Cal. 437=184 I.C. 118=12 R.C. 204=43 C.W.N. 322=69 C.L.J. 126=A.I.R. 1939 Cal. 298.**

———S. 20—*Purchaser of equity of redemption against whom decree was passed—If a "debtor."*

A purchaser of the equity of redemption who was made a party to the mortgage suit and against whom the usual mortgage decree was passed is not a "debtor" within the meaning of the Act. The fact that he cannot be made personally liable does not really affect the question. (*Mukherjea, J.*) KAILASH CHANDRA BHAUMIK *v.* RAM KANAI CHAKRAVARTI. **182 I.C. 408=12 R.C. 60=68 C.L.J. 513=43 C.W.N. 187=A.I.R. 1939 Cal. 177.**

———S. 34—*Appeal from order setting aside execution sale—Notice received by Appellate Court—Jurisdiction to hear appeal.*

As soon as an order setting aside a sale in execution of a decree is passed under O. 21, R. 90, C. P. Code, the debt which was extinguished by the sale is revived. Consequently the Court to which an appeal is filed from the order setting aside the sale, has no jurisdiction to hear the appeal after it receives a notice from the Debt Settlement Board under S. 34 of the Bengal Agricultural Debtors' Act. There can be no doubt that by using the expression "other proceeding" in that section, the legislature intended to include appeals, execution proceedings and matters of any kind connected with litigation relating to debts. (*Edgley, J.*) BRAJA BASHI RAY *v.* NAGAR BASHI CHOUDHURY. **179 I.C. 748=11 R.C. 614=42 C.W.N. 479=A.I.R. 1938 Cal. 362.**

———S. 34—*Applicability—Decree of High Court transferred to Munsif for execution—Notice to Munsif for stay—Legality.*

The definition of 'debt' in S. 2 (8) of the Bengal Agricultural Debtors' Act does not include one payable under a decree of the High Court exercising its original jurisdiction. S. 34 of the Act does not, therefore, apply to such a decree transferred to a Munsif for execution, and the Munsif cannot be called upon by a notice under that section to stay the proceedings. (*Mukherjea and Roxburgh, JJ.*) TARAK NATH KUNDU *v.* PANCHANAN DUTT. **I.L.R. (1939) 2 Cal. 381**

BENGAL AGRICULTURAL DEBTORS' ACT (1936), S. 34.

=185 I.C. 131=12 R.C. 338=43 C.W.N. 886=69 C.L.J. 590=A.I.R. 1939 Cal. 564.

———S. 34—*Applicability—High Court decree—High Court transferring its decree to another Court for execution—Procedure on receipt of notice.*

There is nothing in the Bengal Agricultural Debtors' Act which would legitimately exclude decrees of the High Court or other Courts not within the scheduled districts, from the effect of the Act. Where the High Court, after it transfers its decree for execution to another Court in the same or a different province receives the notice under S. 34 of the Act, it is not necessary for it to re-call the decree. It would be sufficient if it makes a note that proceedings in execution are stayed and sends a copy of that note to the executing Court. (*Ameer Ali, J.*) BAIJNATH TAMAKUWALLA *v.* TORMULL. **171 I.C. 151=11 R.C. 484=42 C.W.N. 481=A.I.R. 1938 Cal. 455.**

———S. 34—*'Civil Court'—If includes High Court.*

The High Court is a Civil Court within the meaning of S. 34 of the Bengal Agricultural Debtors' Act when it acts as a Court of appeal under S. 16 of the Letters Patent. (*S. K. Ghose and Patterson, JJ.*) SATISH CHANDRA *v.* NAOGAON UNION BANK, LTD. **182 I.C. 480=12 R.C. 70=69 C.L.J. 113=42 C.W.N. 1216=A.I.R. 1938 Cal. 753.**

———S. 34—*"Civil Court"—If includes High Court.*

The words "Civil Court" in the Act do not include the High Court in its appellate jurisdiction. (*Derbyshire, C.J., Nasim Ali and R. C. Mitter, JJ.*) KHIRODE CHANDRA GHOSE *v.* NARENDRA NATH. **185 I.C. 256 (1)=12 R.C. 347 (1)=44 C.W.N. 485=A.I.R. 1939 Cal. 599 (S.B.).**

———Ss. 34 and 40—*Civil Court receiving notice—Jurisdiction to decide if debtor resides or property is situate within Board's jurisdiction.*

On receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, the Civil Court cannot refuse to take any action on the ground that the debtors do not ordinarily reside or that the mortgaged property is not within the jurisdiction of the Board. This is a matter which is not within the jurisdiction of the Civil Court at all, but is to be decided by the appellate officer appointed under S. 40 of the Act. (*Henderson, J.*) HATEMUDDIN SIRCAR *v.* MUSAJJAMMA SIRCAR. **174 I.C. 880=10 R.C. 737=42 C.W.N. 280=A.I.R. 1938 Cal. 176.**

———S. 34—*Civil Court receiving notice for stay—Jurisdiction to decide if applicant before Board is debtor.*

S. 20 of the Bengal Agricultural Debtors' Act provides that if any question arises in connection with proceedings before a Board under this Act, whether a person is a debtor or not, the Board shall decide the matter. This section was, of course, enacted in relation to the definition of 'debtor' under S. 2 of the Act. A Civil Court receiving notice for stay under S. 34 has, therefore, no jurisdiction to decide such a question. (*Henderson, J.*) BASIRUDDIN AHMED CHOWDHURY *v.* NOAKHALI SWADESHI STORE. **66 C.L.J. 539.**

BENGAL AGRICULTURAL DEBTORS' ACT (1936), S. 34.

———S. 34—*Civil Court receiving notice under—Question if applicant before Board is a debtor—Power to investigate.*

It is not open to a Court to which notice under S. 34 of the Bengal Agricultural Debtors' Act is sent to decide or even consider whether the debtor comes within the Act or whether he does not; that question rests solely with the Board. Thus a Debt Settlement Board can hold up a suit started in the Court of the Subordinate Judge, in which a sum of over Rs. 26,000 is in dispute, and if that Debt Settlement Board comes to the conclusion that the debtors are in fact 'debtors' within the meaning of the Act, the Board can completely oust the Court and adjudicate in effect upon a claim for Rs. 26,000 and the only appeal against their decision will be to a Munsif whose ordinary powers are limited to cases involving not more than one thousand rupees. Thus it seems to be that the Act in its present form is likely to entail consequences of a fantastic description which obviously could not have been realised or foreseen when the Act was drafted or passed. (*Costello, Ag. C. J. and Edgley, J.*) BHAGAWAN DAYAL *v.* CHANDULAL. **I.L.R. (1938) 1 Cal. 256=174 I. C. 51=10 R.C. 612=41 C.W.N. 1363=A.I.R. 1938 Cal. 23.**

———S. 34—*Civil Court receiving notice—Question, if applicant before Board is a 'debtor'—Power to investigate.*

The question whether the applicant before the Board is a 'debtor' within the meaning of S. 2 (9) of the Bengal Agricultural Debtors' Act, cannot be investigated by the Civil Court receiving a notice under S. 34 of the Act from the Board. It is, at any rate, in the first instance, for the Board, subject to such right of appeal as the Act gives, to determine whether it can exercise jurisdiction over any particular applicant. (*Panckridge, J.*) NURSINGDAS TUNSOOKDAS *v.* CHOGEMULL. **178 I.C. 529=11 R.C. 364=42 C.W.N. 293=A.I.R. 1938 Cal. 402.**

See also (*Mukherjea, J.*) KAILASH CHANDRA BHAUMIK *v.* RAM KANAI CHAKRAVARTI. **182 I. C. 408=12 R.C. 60=68 C.L.J. 513=43 C.W.N. 187=A.I.R. 1939 Cal. 177.**

———S. 34—*Notice received by Civil Court—Jurisdiction to decide whether "debtor" within meaning of the Act.*

Where a notice under S. 34 of the Bengal Agricultural Debtors' Act is received by the Court and no sale has taken place and the debt still exists, so that there is, in fact, a proceeding with regard to the debt which has been included in the application under S. 8 or in the statement under sub-S. (1) of S. 13 as the case may be, the Civil Court has got no jurisdiction to decide the question whether the debtor is a debtor within the meaning of the Act. The Act has set up a special tribunal for the determination of the question whether the person is a debtor or not. It would be inconsistent with the provisions of the Act to hold that the Civil Court is to go into and decide the same question. (*S. K. Ghose and Nasim Ali, JJ.*) SAILABALA DAS *v.* NITYANANDA SARKAR. **I.L.R. (1938) 2 Cal. 168=182 I.C. 462=12 R.C. 69=42 C.W.N. 415=A.I.R. 1938 Cal. 375.**

BENGAL AGRICULTURAL DEBTORS' ACT (1936), S. 34.

——S. 34—*Court not situated in District in which Act is in force—If can be compelled to issue stay order.*

No Court situated in a district in which the Bengal Agricultural Debtors' Act has not been brought into force can be compelled to issue the stay order contemplated in the latter portion of S. 34 of that Act. In order to obtain such a stay order, the Act must be in operation both in the district in which the Board is situated to which an application is made for the settlement of a debt and also in the district in which the Court is situated to which the notice under S. 34 of the Act is actually sent. (*Costello, Ag. C.J. and Edgley, J.*) BHAGAWAN DAYAL SAHU *v.* CHANDULAL AGARWALA. **I.L.R. (1938) 1 Cal. 256=174 I.C. 51=10 R.C. 612=41 C.W.N. 1363=A.I.R. 1938 Cal. 23.**

——S. 34—*Court not situated in District in which Act is in force—Notice received by such Court—Duty to issue stay order.*

Sub-S. (3) of S. 1 of the Bengal Agricultural Debtors' Act must be read in conjunction with sub-S. (2) of the same section. Read together, the sub-sections mean that until an area is notified no Debt Settlement Board can be established therein, but when this has been done all Civil Courts in Bengal are to treat the proceedings of such a Board in accordance with the provisions of the Act. Accordingly, a Civil Court in Bengal receiving a notice under S. 34 of the Act from a Board duly established is bound to issue the stay order contemplated in that section, although its territorial jurisdiction does not lie within an area that has been notified under S. 1 (3). 41 C.W.N. 1363, Not foll. (*Panckridge, J.*) NURSINGDAS TUNSOOKDAS *v.* CHOGEMULL. **178 I.C. 529=11 R.C. 364=42 C.W.N. 293=A.I.R. 1938 Cal. 402.**

——S. 34—Execution against principal debtor stayed on notice from Board—Execution against surety—Permissibility. *See* BENGAL AGRICULTURAL DEBTOR'S ACT, *Ss.* 2 (8) AND 34. **44 C.W.N. 393.**

——S. 34—*Mortgaged property sold to mortgagee decree-holder—Latter allowed to set off price as against his debt, but sale not confirmed—Further execution proceedings—If can be stayed on receipt of notice from Board.*

Where the mortgaged properties had been sold to the mortgagee decree-holder for the exact amount of the debt then due and owing to him and he was allowed to set off the amount of the price as against the amount of the debt due to him from the judgment-debtors, the debt is no longer in existence although the sale has not yet been confirmed. There being no debt, the Court cannot stay further execution proceedings on receipt of a notice from the Debt Settlement Board under S. 34 of the Bengal Agricultural Debtors' Act. (*Costello, Ag. C.J. and Edgley, JJ.*) MANINDRA MOHAN ROY TALUKDAR *v.* BEPIN BEHARI. **I.L.R. (1938) 1 Cal. 597=41 C.W.N. 1366.**

——S. 34—*Notice given by Board to Court—Duty of Court to stay proceedings.*

Where an application has been made to the Board under S. 8 of the Bengal Agricultural Debtors' Act and the Board has given notice thereof to the Court, the proceedings before that Court should be stayed. It is not for the Court to decide whether the Board is specially empowered under S. 7 or not to deal with the application. (*S. K. Ghose and Patterson, JJ.*) SATYENDRA MOHAN GHOSH *v.* NIBARAN CHANDRA BOSE. **I.L.R. (1937) 2 Cal. 478=172 I.C. 236=10 R.C. 353=41 C.W.N. 928=A.I.R. 1937 Cal. 392.**

——S. 34—*Notice issued after decree-holder purchases property and is allowed set-off—Sale not confirmed and application under O. 21, R. 90, C.P. Code, pending—Civil Court, if can stay further proceedings.*

Where in execution of a decree, the decree-holder purchases the property of the judgment-debtor and he is allowed a set-off, the debt is entirely wiped out and there is no proceeding pending in respect of any debt, although the sale has not been confirmed and an application under O. 21, R. 90, C.P. Code, is pending. Consequently, if at this stage a notice is issued to the Civil Court under S. 34, it has no jurisdiction to stay further proceedings in execution. (*Costello, Ag. C.J. and Edgley, J.*). NRISHINGHA CHANDRA NANDI CHOUDUURY *v.* KEDAR NATH CHAUDHURY. **I.L.R. (1938) 1 Cal. 345=176 I.C. 330=11 R.C. 77=66 C.L.J. 433=41 C.W.N. 1307=A.I.R. 1937 Cal. 713.**

——S. 34—*Notice is issued but not received by Court—Proceedings, if void.*

The expression "give notice" implies not only the issue of notice but also the receipt of notice by the Court. Before the notice for stay is actually received by the Court in which the suit or proceeding is pending, such suit or proceeding cannot be held to be void simply because a notice has been issued by the Board but not actually received by the Court. (*S.K. Ghose and Patterson, JJ.*) AHMAD ALI *v.* FAJARALI RASULI. **179 I.C. 750=11 R.C. 613=A.I.R. 1938 Cal. 869.**

——S. 34—*Notice issued by Board before consideration of application under S. 12—If premature.*

It is not necessary before the issue of the notice by the Board under S. 34 that a date and place for the consideration of the application by the debtor must be fixed under S. 12, or that notice of such date must be given to the parties and the parties heard. (*M.C. Ghose and Biswas, JJ.*) JOGESH CHANDRA *v.* MAHESCHANDRA. **178 I.C. 1001=11 R.C. 454=42 C.W.N. 1179=A.I.R. 1938 Cal. 750.**

——Ss. 34 and 20—*Notice received by Insolvency Court—Power of latter to decide if insolvent is 'debtor'.*

Under S. 20 of the Bengal Agricultural Debtors' Act if any question arises in connection with proceedings before a Board under this Act, whether a person is a debtor or not, the Board shall decide the matter and it would seem that such a decision must precede any notice issued under S. 34 of the Act. It is not for the Insolvency Court which receives the notice to decide, more especially without taking any evidence whatsoever, whether a person is or is not a debtor within the meaning of the Act. (*Bart-*

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ley and Nasim Ali, JJ.) SHIB DULAL *v.* KISHOREGANJ LOAN OFFICE, LTD. **176 I.C. 927 =11 R.C 191=42 C.W.N. 173=A.I.R. 1938 Cal. 194.**

——**S. 34**—*Notice for stay—Application for setting aside sale—Compromise between judgment-debtor and purchaser that sale should be set aside on payment by judgment-debtor—Judgment-debtor thereafter obtaining stay order—Court if bound to stay proceedings.*

On application filed in Court for setting aside an execution sale under O. 21, R. 90, C. P. Code, a compromise was effected between the judgment-debtor and the purchaser. It was agreed that if the judgment-debtor paid to the purchaser a certain sum, the sale would be set aside. Instead of paying, the judgment-debtor obtained a stay order from a Debt Settlement Board.

Held, that the Court was not bound to stay the proceedings. (*Henderson, J.*) KRISHNA GOBINDA *v.* SALAMATULLA. **44 C.W.N. 789.**

——**S. 34**—*Notice for stay—Powers of Civil Court.*

Per *S.K. Ghose, J.*—The Civil Court receiving notice under S. 34 of the Bengal Agricultural Debtors' Act must see that there is a debt in respect of which proceedings before it are pending, and where the debt does not exist, for instance by reason of the execution sale having taken place, there is nothing to stay and the notice cannot be given effect to. The Court has also jurisdiction to decide whether the notice is in the prescribed manner as provided for by the Act. But where the Board has given an express decision on a question of fact or on a question of mixed law and fact within its jurisdiction as provided for by the Act, as (*e.g.*) that the debtor was a debtor within the meaning of the Act and that he ordinarily resided within its jurisdiction, the Court cannot sit in judgment over such decision and override it and then refuse to stay the proceedings in accordance with the notice. (*S.K. Ghose and Nasim Ali, JJ.*) HARISH CHANDRA PAL *v.* CHANDRA NATH SAHA. **I.L.R. (1938) 2 Cal. 155=181 I.C. 739= 11 R.C. 846=42 C.W.N. 411=A.I.R. 1938 Cal. 369.**

——**S. 34**—*Notice for stay in respect of joint debt—Power of Court to enquire if application to Board was valid.*

A Civil Court, on receipt of notice under S. 34 of the Bengal Agricultural Debtors' Act in respect of a debt for which several persons are jointly liable, has no power to enquire whether the application made to the Board was a valid application having regard to the provision of S. 8 (1) (*b*) of the Act. If the Civil Court is satisfied that an application for the settlement of debts has in fact been made to the Board and that such application actually includes a debt in respect of which a suit or other proceeding is pending before it, it has no option but to stay the suit or proceeding. (*Edgley, J.*) JAGAT KISHORE ACHARYYA CHOWDHURY *v.* HAZARAT ALI BEPARI. **176 I.C. 651=11 R.C. 144=42 C.W. N. 529=A.I.R. 1938 Cal. 447.**

BENGAL AGRICULTURAL DEBTORS' ACT (1936), S. 34.

——**S. 34**—*Notice to High Court—Decree passed on Original Side—High Court, if bound to stay execution—'Civil Court'—Meaning of.*

Per *Curiam.*—On receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, the High Court is not bound to stay execution of a decree passed by itself in its ordinary original civil jurisdiction.

Per *Derbyshire, C.J., Bartley and Nasim Ali, JJ.*—The words 'Civil Court' in the Bengal Agricutural Debtors' Act do not include the High Court.

Per *Lort Williams, J.*—The Bengal Agricultural Debtors' Act and especially Ss. 32 to 36 thereof should not be construed as not to apply to the High Court in its original jurisdiction. But the Act, so far as it purports to limit its jurisdiction, is beyond the powers of the Local Legislature.

Per *Mitter, J.*—The words "Civil Court" in S. 34 of the Bengal Agricultural Debtors' Act include the High Court exercising original civil jurisdiction, but the section, so far as it relates to proceedings of the High Court is *ultra vires* of the Bengal Legislatures by reason of S. 80-A (4) and S. 131 (3) of the Government of India Act. (*Derbyshire, C.J., Lort Williams, Bartley, Nasim Ali and Mitter, JJ.*) NARSINGHDAS TANSUKDAS *v.* CHOGEMULL. **I.L.R. (1939) 2 Cal. 93=183 I.C. 113=12 R.C. 129=2 Fed. L.J. 71=69 C.L.J. 458=43 C.W.N. 613= A.I.R. 1939 Cal. 435 (S.B.).**

——**S. 34**—*Notice received by Civil Court after sale but before confirmation—Third party auction-purchaser—Proceedings, if must be stayed.*

The Civil Court receiving a notice under S. 34 after the sale in execution of the decree but before its confirmation, is not bound to stay further proceedings, although the auction-purchaser is not the decree-holder himself. The real principle is that on a sale the debt due under the decree under execution ceases to exist. It makes no difference in principle whether the decree-holder or a stranger is the purchaser. (*Latifur Rahman, J.*) GIRIJA KANTA ROY *v.* TUNI BIBI. **43 C.W.N. 978.**

——**S. 34**—*Notice received after sale and before deposit of balance of sale price—Third party auction-purchaser—Proceedings, if must be stayed.*

A Civil Court receiving notice under S. 34 after the execution sale and before the deposit of the balance of the sale price, is bound to stay further proceedings, where the auction-purchaser is not the decree-holder himself but a third party. If the sale price has not been deposited on the date of notice, the sale is not complete on that date and there can be no question of the decretal debt being satisfied either in whole or in part until the sale price is deposited in Court. (*Sen, J.*) BHABANI CHARAN LAW *v.* BAIKUNTHA SHAH. **184 I.C. 646=43 C.W. N. 358=69 C.L.J. 117=12 R.C. 264=A.I.R. 1939 Cal. 341.**

——**S. 34**—*Notice in respect of debt and not admitted by applicant—Court, if bound to stay suit.*

BENGAL AGRICULTURAL DEBTORS' ACT (1936), S. 34.

The debt need not be an "admitted" liability before a notice under S. 34 can issue in respect thereof. On receipt of a notice from the Board in respect of a debt included by the applicant in his application but in respect of which liability is not admitted by him, the Court is bound to stay the suit in respect of such debt. (*Biswas, J.*) AMIRUDDIN AHMAD *v.* ABDUL RAHMAN. **43 C.W.N. 332.**

——**S. 34**—*Notice—Some of parties not applicants before Board—Entire proceedings, if must be stayed.*

The notice under S. 34 can only refer to proceedings as against those persons who are debtors applicants before the Debt Settlement Board and not others who might be jointly liable. On receipt of such notice, therefore, the Civil Court is bound to stay proceedings only so far as they relate to the applicants before the Board, and it can continue the proceedings as against the other persons jointly liable with them. (*S.K. Ghose and Mukherjea, JJ.*) ABU TAHER BAZLUL RASHID *v.* CHANDRA MONI SAHA. **43 C.W.N. 318.**

——**S. 34**—*Notice for stay—Question if subject-matter of proceeding is debt—Duty of Court to decide.*

It is the duty of the Civil Court receiving notice under S. 34 of the Bengal Agricultural Debtors' Act to decide the question, if raised, whether the subject-matter of the proceeding pending before it is a debt as defined in the Act. 43 C.W.N. 322, Folld. (*Edgley, J.*) RAVATI MOHAN ROY *v.* BHIKCHAND BHUIAN. **43 C.W.N. 497=A.I.R. 1939 Cal. 343.**

——**S. 34**—*Notice under—Suit for foreclosure of mortgage by conditional sale—If must be stayed.*

A debt secured by mortgage by conditional sale is a debt within the meaning of S. 34 of the Bengal Agricultural Debtors' Act, and a suit for foreclosure of such a mortgage must, therefore, be stayed by the Court receiving notice under that section. (*Nasim Ali and Rau, JJ.*) ABDUL LATIF *v.* ABDUL GANI. **I.L.R. (1940) 1 Cal. 133=185 I.C. 393=12 R.C. 358=43 C.W.N. 1221=A.I.R. 1939 Cal. 730.**

——**S. 34**—Order staying or refusing to stay execution—Appeal. *See* C. P. CODE, S. 47—APPEAL. **44 C.W.N. 364.**

——**Ss. 34 and 35**—*Petition filed under S. 8—Power of High Court to decide if it is properly presented—Exclusive jurisdiction of Board.*

After a petition has been filed purporting to be filed under S. 8 of the Bengal Agricultural Debtors' Act and before the events specified in S. 35 (*a*) and (*b*) take place, the High Court cannot, on interlocutory proceedings, decide that the petition should not have been presented. S. 20 of the Act vests the Board with final and exclusive jurisdiction to decide its own jurisdiction. (*Ameer Ali, J.*) BAIJNATH TAMAKUWALLA *v.* TORMULLL. **179 I.C. 151=11 R.C. 484=42 C.W.N. 481=A.I.R. 1938 Cal. 455.**

——**S. 34**—*Plaint registered and time granted for putting in deficit court-fee—Notice received by Court from Board—Filing of deficit court-fee—If should be stayed.*

BENGAL AGRICULTURAL DEBTORS' ACT (1936), S. 34.

Where a plaint which was not sufficiently stamped was ordered by the Court to be registered with a direction to the plaintiff to put in the deficit court-fee within a certain time, which was extended on his application, and before the deficit court-fee was put in a notice under S. 34 of the Bengal Agricultural Debtors' Act from the Debt Settlement Board was received by the Court.

Held, that the filing of the deficit court-fee should be stayed till the final disposal of the application before the Board. (*Nazim Ali and Rau, JJ.*) NATH MULL *v.* GOLAM JABBAR. **I.L.R. (1940) 1 Cal. 10=188 I.C. 523=43 C.W.N. 1146=A.I.R. 1940 Cal. 273.**

——**S. 34**—*Proceeding for delivery of possession started by auction-purchaser—If can be stayed.*

A proceeding for delivery of possession started by an auction-purchaser is not a proceeding in respect of a debt which was already wiped out by the auction-sale and cannot, therefore, be stayed on a notice under S. 34 of the Act. (*Derbyshire, C.J. and Mukherjea, J.*) JAGABANDHU SAHA *v.* RASHMANI DASYA. **I.L.R. (1937) 2 Cal. 625=41 C.W.N. 924.**

——**S. 34**—*"Proceeding in relation to debt"—Appeal pending from order setting aside execution sale—Notice received by appellate Court—Appeal if should be stayed.*

A proceeding under O. 21, R. 90, C.P.C., whether pending before the trial Court or in appeal, is a proceeding in relation to debt. Where, therefore, a notice under S. 34 of the Bengal Agricultural Debtors' Act is issued after the executing Court had set aside the sale and an appeal against that order is pending before the appellate Court, the appellate Court is bound to stay further proceedings in connection with the appeal on receipt of the notice. It cannot be said that the debt is non-existent at the time of the receipt of the notice. (*Mukherjea and Akram, JJ.*) DULICHAND *v.* RAJANI KANTA. **44 C.W.N. 922.**

——**S. 34**—*Question of rateable distribution pending after sale—Proceedings, if must be stayed.*

Once a sale has taken place, the debt has ceased to exist to the extent of the purchase price and therefore there is no proceeding pending with regard to that amount of the debt in the Civil Court and so at that stage the notice under S. 34 can have no effect. As between the sale and the confirmation thereof various kinds of proceedings may take place, but those will not be treated as keeping the proceedings pending with regard to the debt which is mentioned in the notice. The operation of the Act cannot be extended by reason of other matters coming in after the sale, such as applications for rateable distribution, for setting aside a sale and so on. (*S.K. Ghose and Edgley, JJ.*) JATINDRA MOHAN BANIK *v.* SURENDRA MOHAN ROY. **182 I.C. 656=12 R.C. 91=43 C.W.N. 221=A.I.R. 1938 Cal. 549.**

——**S. 34**—*Sale in execution of decree—Purchase by decree-holder for less than decretal amount—Notice received by Court before confirmation of sale—If bound to stay proceedings.*

BENGAL AGRICULTURAL DEBTORS' ACT (1936), S. 34.

Where in execution of a decree certain property is put up to sale and purchased by the decree-holder for less than the decretal amount, the debt ceases to exist to the extent of the price paid for the property and the executing Court is not bound to stay further proceedings on receipt of a notice under S. 34 although the sale has not been confirmed. No doubt, if the decree-holder makes an attempt to realise the balance of the debt, S. 34 would come into play. (*Henderson, J.*) RAMENDRA NATH *v.* DHANANJOY MONDAL. **178 I.C. 186=11 R.C. 329=42 C.W.N. 218=A.I.R. 1938 Cal. 261.**

———**S. 34**—*Sale—Executing Court—Property sold, and money credited to decree—Sale not confirmed—Jurisdiction to stay further proceedings.*

Where the judgment-debtor's properties were sold in pursuance of a money decree and purchased by the decree-holder for a sum which was less than the amount of the decree which sum was credited towards the satisfaction of the decree, the executing Court has no jurisdiction to stay further proceedings on receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, although the sale has not been confirmed. (*Bartley and Nasim Ali, JJ.*) JAGABANDHU ROY *v.* BHUSAI BEPARI. **178 I.C. 344 (1)=42 C.W.N. 217=11 R.C. 343=A.I.R. 1938 Cal. 256.**

———**S. 34**—*Sale in execution—Notice received by Court before confirmation of sale—Proceedings, if should be stayed.*

In execution of a mortgage decree the entire mortgaged property was sold for less than the decretal amount and was purchased by the decree-holder. His prayer for set-off was allowed and the decretal debt to the extent of the amount realised by the sale was wiped out. After the sale had taken place and before it was confirmed the Court received notice under S. 34 of the Bengal Agricultural Debtors' Act for stay of further proceedings. This the Court refused to do.

Held, that the debt to the extent to which it was satisfied by the aforesaid sale had ceased to exist, and that as the entire mortgaged property had been sold and there was no application for a penal decree under O. 34, R. 6, C.P. Code there was nothing else for the Court to do, and that, therefore, the Court acted rightly in refusing the stay. (*S.K. Ghose and Nasim Ali, JJ.*) JATINDRA MOHAN MANDAL *v.* ELAHI BUX, **42 C.W.N. 530.**

———**S. 34**—*Stay of insolvency proceedings—Notice received after adjudication order.*

An insolvency proceeding, no doubt, relates to a debt. But after an adjudication order has been passed, there is no proceeding pending before the Court with regard to a debt which may form the subject of an application under S. 8 of the Bengal Agricultural Debtors' Act. Consequently, the Court is not bound to stay insolvency proceedings on receipt of a notice from the Board under S. 34 of that Act after the order of adjudication. (*S. K. Ghose and Patterson, JJ.*) SATISH CHANDRA *v.* NAOGAON UNION BANK, LTD. **182 I.C. 480=12 R.C. 70=42 C.W.N. 1216=69 C.L.J. 113=A.I.R. 1938 Cal. 753.**

BENGAL AGRICULTURAL DEBTORS' ACT (1936), S. 34.

———**S 34**—*Stay of suit for rent, damages and ejectment—Petition by plaintiff for leave to withdraw claim for rent and damages—Duty of Court.*

A suit to recover arrears of rent, damages and ejectment was stayed under S. 34 of the Bengal Agricultural Debtors' Act. The plaintiff then filed a petition for permission to withdraw his claim for rent and damages with leave to bring a fresh suit on the same cause of action. The Court directed the petition to be put up for orders after the stay order was vacated.

Held, that in the absence of permission from Court, the claim for rent and damages should be treated as withdrawn, and the Court should proceed with the trial of the ejectment suit. (*Henderson, J.*) BIJOLI BHUSAN GHOSH *v.* MAI HUSUI HAN GOPE. **44 C.W.N. 733.**

———**Ss. 34, 18 and 20**—*Validity of notice—Power of Civil Court to consider.*

Per *Edgley, J.*—Ss. 18 and 20 of the Bengal Agricultural Debtors' Act do not debar the Civil Court from satisfying itself that the valid requirements of any notice which may be issued under S. 34 of the Act actually exist. It is, in fact, the duty of a Civil Court not to stay proceedings on receipt of a notice which purports to be a notice under S. 34 of the Act, unless the Court is satisfied that the notice in question is really a valid notice. (*Costello, Ag. C.J. and Edgley, J.*) NRISHINGHA CHANDRA NANDI CHOUDHURY *v.* KEDAR NATH CHAUDHURY. **I.L.R. (1938) 1 Cal. 345=176 I.C. 330=11 R.C. 77=66 C.L.J. 433=41 C.W.N. 1307=A.I.R. 1937 Cal. 713.**

———**Ss. 34 and 33**—*Notice for stay—Question if subject-matter proceeding amounts to debt—Jurisdiction of Court to consider—Material point of time—Time of application or of notice.*

The Civil Court after receipt of notice under S. 34 of the Bengal Agricultural Debtors' Act has jurisdiction to enter into the question whether the debt, in respect of which the proceeding is pending before it, is a debt within the meaning of S. 2 (8) and if it finds that it does not come within that definition, it should not stay proceedings in pursuance of the notice. In deciding the question whether the subject-matter of the proceeding pending before the Court is a debt, the material point of time is not the time of the application to the Board but the time of the stay order. If what was a debt at the time of the application ceases to be so at the time of the notice, the notice has no force as against the Court and the Court may disregard the notice to stay the proceeding under S. 34.

Per *Mukherjea, J.*—In order that the Civil Court might be called upon to exercise its powers under S. 33 or S. 34 of the Act, it is necessary under both these sections that there must be a suit or proceeding pending in respect of a debt. If the liability had ceased to be a debt at the time when the suit or proceeding was commenced in the Civil Court, it cannot be said that any suit or proceeding in respect of any debt was pending before such a Court and neither of the section obliges the Civil Court to stay its hands under such circumstances. (*S. K. Ghose and Mukherjea, JJ.*) NUR MIA

BENGAL AGRICULTURAL DEBORS' ACT (1936), S. 40.

v. NOAKHALI NATH BANK, LTD. **I.L.R. (1939) 1 Cal. 437=184 I.C. 118=12 R.C. 204=43 C.W.N. 322=69 C.L.J. 126=A.I.R. 1939 Cal. 298.**

——S. 40—*Order of Munsif as Special Appellate Officer—High Court's power of revision—C. P. Code, S.* 115.

The High Court has no power to revise under S. 115, C.P. Code, an order of a special Appellate officer appointed under S. 40 of the Bengal Agricultural Debtors' Act, although such officer is a Munsif. (*S. K. Ghose and Edgley, JJ.*) RAM KRISHNA SUKUL *v.* ALI NEWAJ. **178 I.C. 172=42 C.W.N. 892=11 R.C. 328=A.I.R. 1938 Cal. 688.**

——S. 52—*Application by debtor dismissed by Board—Subsequent suit by creditor—Extension of limitation.*

A creditor who brings a suit against the debtor under the ordinary procedure after the dismissal of an application filed by the latter before the Debt Settlement Board, is entitled to exclude in calculating the period of limitation for the suit the period during which the application by the debtor was pending before the Board. (*Edgley, J.*) DARAJUDDIN AKANDA *v.* JAHIR MONDAL. **44 C.W.N. 396 (1).**

——S. 54—*Prosecution under Ss.* 465, 467 *and* 471, *I.P. Code—Sanction of Collector—If necessary.*

S. 54 of the Agricultural Debtors' Act has no application except in respect of the offences expressly mentioned therein. Sanction of the Collector is, therefore, not necessary for a prosecution in respect of offences under Ss. 465, 467 and 471, I.P. Code. (*Khundkar and Edgley, JJ.*) HARI CHARAN *v.* KAUSHIKI CHARAN. **I.L.R. (1940) 2 Cal. 14=44 C.W.N. 530=A.I.R. 1940 Cal. 286.**

——S. 54 (a)—*Offence under—Production of document falsely endorsed as to repayments—Collector's permission for prosecution—If necessary.*

The production before the appellate tribunal of mortgage documents falsely endorsed as to the repayments is something more than the offence set out in S. 54 (*a*) of the Bengal Agricultural Debtors' Act. It is an offence of a more serious and general nature coming under the Penal Code. Consequently the permission of the Collector to commence prosecution for such an offence is not necessary. (*Derbyshire, C.J. and Bartley, J.*) SASHI BHUSAN *v.* FULKHAN. **44 C.W.N. 763.**

——S. 55 and Rule 145—*Determination of amount of debt—Jurisdiction of Civil Court.*

The question as to what is the amount of a debt of a particular debtor is to be decided by the Board under Rule 145 of the Bengal Agricultural Debtors' Rules. Before the Board determines the amount of the debt, the Civil Court has no jurisdiction to go into that question and refuse to stay proceedings on the ground that as the debt is above Rs. 25,000 the Board has no jurisdiction to deal with the same. (*Nasim Ali and Rau, JJ.*) BHABAGOBINDA *v.* BHOLANATH. **187 I.C. 95=12 R.C. 544=44 C.W.N. 172=A.I.R. 1940 Cal. 112.**

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), Ss. 2 and 4—

BENGAL ALLUVION AND DILUVION REGULATION (1825), S. 4.

Accretion—Ownership of identifiable land—Determination—General rule as to—Custom—Onus.

If the land in dispute is identifiable with reference to its physical features, land marks or by measurement, it should be deemed to continue to belong to the former owner, whether its transfer from one side of the river to the other side was by a sudden change in the course of the river or was the result of the river gradually receding on one side and throwing up land on the other, unless a custom to the contrary is established. In this view the burden of proving custom lies on the party who claims the land by accretion. (*Niamatullah and Bajpai, JJ.*) MAHADEO *v.* BALESHWAR PRASAD. **186 I.C. 564=12 R.A. 415=1939 A.L.J. 708=1939 A.W.R. (H.C.) 671=1939 R.D. 493=A.I.R. 1939 All. 626.**

——Ss. 3 and 4—*Applicability in Oudh—Villages in valley of river—Change of course—Alteration of boundaries—Procedure—Person adjudicated proprietor without adjudication under Regulation—Proper remedy—U. P. Land Revenue Act, S.* 34.

The boundaries of villages generally are, or should always remain, the boundaries fixed at the first revenue survey. In the case of villages lying between the high bank of a river on one side and the high bank on the other, when there is a change of course of the river, the boundaries would only be altered in conformity with an adjudication under Regulation XI of 1825, which applies in Oudh. If there is no adjudication under that Regulation, but if a person is adjudicated proprietor of lands in any village, his name will be recorded as proprietor of such lands in the records of that village. Such a person has to file his application for correction of records under the Land Revenue Act, S. 34. (*Drake Brockman, S. M.*) PARBATI KUER *v.* RAJENDRA BAHADUR SINGH. **1936 R.D. 528.**

——S. 4—*Applicability—Proof of local custom.*

As provided by S. 3 of Reg. XI of 1825, S. 4 has no application where the custom of the deep stream rule and the accretion of alluvion to the zemindars has been proved to exist. In such a case, the accretion belongs to the zemindars and not to the person who owns the particular plot of land to which it is added by the river. (*Bennet and Smith, JJ.*) KESHAVA PRASAD SINGH *v.* BENI KUNWAR. **164 I.C. 877=9 R.A. 199=1936 A.L.J. 1058=1936 R.D. 309=1936 A.L.R. 815=1936 A.W.R. 723=A.I.R. 1936 All. 631.**

——S. 4—*Scope—Accreted land held under different proprietor.*

The provisions of Cl. (4) of Regulation XI of 1825, appear to contemplate that the parent holding and the accretion shall together form one single holding and that the estate of the occupier in the accreted land shall be exactly the same as the estate which he enjoys in the parent holding. This is not possible where the accreted land is held, under proprietors other than the proprietors of the parent holding. (*James and Chatterji, JJ.*) RAMASRAY PRASAD CHAUDHURY *v.* RAMSURAT SINGH. **6 B.R. 84=184 I.C. 838=12 R.P. 282=21 Pat.L.T. 181=A.I.R. 1940 Pat. 131.**

——S. 4 (2)—*River between two villages suddenly changing course—Land clearly recognizable—Right to—Custom—Reasonableness.*

BENGAL ALLUVION AND DILUVION REGULATION (1825), S. 4.

A river running between two villages suddenly changed its course. The land which was gained by such change was annexed to the land of *L* who claimed it on the ground of an alleged custom, that the river was the boundary between the villages. The custom was not proved and the land was clearly recognizable.

Held, that it should remain the property of its original owner and *L* could not claim it.

Held, further, that the custom alleged was so unreasonable as not to be provable in law. (*Wort and James, JJ.*) BAJRANGI RAUT *v.* JANKI PRASAD. **3 B.R. 135=166 I.C. 198 (2)=9 R.P. 266 =A.I.R. 1936 Pat. 637.**

———S. 4 (5)—*Applicability—Apportionment of alluvial accretion—Several estates concerned—Principles and methods of apportionment.*

Regulation XI of 1825 does not lay down any rule for division or apportionment of the alluvial accretion when several estates or interests are concerned and the increment has been to more than one riparian estate or tenure. In all such cases the general provision contained in S. 4, Cl. (5) of the Regulation applies and the Courts are to be guided by the best obtainable evidence of local usage and failing that, by general principles of equity and justice. It would not be proper to lay down any hard and fast rule on the point. The general principle underlying an apportionment should be to secure to each riparian owner a portion of the new waterline which is proportionate to his frontage on the old water line. The division of the accreted lands by lines drawn from the extremities of the estates of the competing frontagers perpendicular to the newly formed coasts may be an equitable and satisfactory method, if circumstances permit. (*Nasim Ali and Mukherjea, JJ.*) SAHABADDIN SARKAR *v.* MOULVI KAFILADDIN TAPADAR. **I.L.R. (1938) 1 Cal. 361=174 I.C. 301=10 R.C. 666=66 C.L.J. 304=41 C.W. N. 1353.**

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847)—*Alluvial lands—Assessment—Powers of Government—Claim to such lands by zamindar on ground of being included in permanently settled estate—Burden of proof.*

The Bengal Alluvion and Diluvion Act empowers the Government to direct the local revenue authorities to make a survey of alluvial lands and to determine the revenue which they are liable to pay to Government; and if any land is thrown up by a large and navigable river and appears to be the property of the Government, the revenue officers are required to take immediate possession of the same on behalf of the Government and to assess and settle it according to the rules in force in that behalf. It is, however, open to the person who claims to be the proprietor thereof on the ground that it was included in and formed part of his estate at the time of the Permanent Settlement, to establish his right in a suit in a competent Court of law. The burden is on him to prove that the land in question belongs to his permanently settled estate and is therefore not liable to be resumed or assessed. The fact that the river in question has been constantly changing its course makes no difference as regards the onus of proof. (*Mukerji and S. K. Ghose, JJ.*) SECRETARY OF STATE *v.* RANJIT PAL. **40 C.W.N. 395.**

———S. 6—*"Added" land—Land comprised in permanently settled estate being washed away by water and afterwards reforming on original site—Acceptance by Zemindar of abatement of revenue in respect of such land—If proves abandonment by him.*

Lands comprised in a permanently settled estate which had been washed away by water and afterwards reformed on the original site, cannot be regarded as lands "added to the estate" within the meaning of S. 6 of Act IX of 1847 and are, therefore, not liable to a fresh assessment whether or not an abatement of sadar jama had been granted while they were under water, unless it can be shown that when the assessment was reduced the lands which had been washed away or lost had in some way ceased upon the reduction being made to form a part of the original estate. The fact that the Zamindar accepted an abatement of revenue for the portion of his estate under water cannot be regarded as an abandonment of that portion of the estate for the benefit of the public domain. (*Lord Maugham.*) SECRETARY OF STATE *v.* MIDNAPORE ZAMINDARY CO. **I.L.R. (1937) 2 Cal. 769=64 I.A. 281=169 I.C. 881=1937 O.L. R. 418=1937 P.W.N. 638=10 R.P.C. 46=3 B. R. 722=66 C.L.J. 145=1937 A.L.R. 651=18 Pat. L.T. 689=46 L.W. 943=1937 M.W.N. 1299= 41 C.W.N. 1061=A.I.R. 1937 P.C. 244=(1937) 2 M.L.J. 834 (P.C.).**

BENGAL CESS ACT (IX OF 1880)—*Scope—Liability for cess.*

According to the general scheme of the Cess Act, subject to certain statutory exceptions, cess must be paid on all immovable property situate within any district whether rent is paid in respect of such immovable property or such property is rent free. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144=9 R.C. 475 =A.I.R. 1936 Cal. 695.**

———*Strict construction.*

The Bengal Cess Act, being a taxing statute, should be strictly construed. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144=9 R.C. 475=A.I.R. 1936 Cal. 695.**

———S. 4—*"Cultivating* raiyat"*—Meaning of.*

In order to claim the privileges of a cultivating *raiyat* under the Bengal Cess Act, a person must be an actual cultivator of the soil, although a *raiyat* may be a tenure-holder under the Act. (*Guha and Bartley, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* JITENDRA NATH RAY. **161 I.C. 210 (2)=8 R.C. 490=62 C.L.J. 541=40 C.W.N. 630=A.I.R. 1936 Cal. 70.**

———Ss. 4 and 6—*"Annual value of land"—Fees levied for privilege of selling goods in* hats *—Assessment to cess.*

Where the vendors attending the *hats* do not sit in any particular place and tolls or fees are realised by the plaintiff on the quantity and quality of articles actually sold and no fee is payable if there is no sale, and fees are also realised on sales from hawkers who do not sit in the *hat* but stroll about the *hat* compound, the money realised by the plaintiff from the vendors of articles is not rent, but fees levied for the right or privilege of selling their goods in the *hats* and does not therefore represent the "annual value of land" as defined in S. 4 of the Cess Act. Consequently an assessment to cess under Chapter II of the Act on the basis of such income is illegal and *ultra vires*. (*Mitter*

BENGAL CESS ACT (1880), S. 5.

and Biswas, JJ.) SECRETARY OF STATE *v.* HINGUL KUMARI DASSI. **42 C.W.N. 169=67 C.L.J. 50.**

———Ss. 5 and 6—Scope and effect of. *See* LEASE—CONSTRUCTION—MINING LEASE. **42 C.W.N. 1098=176 I.C. 433 (P.C.).**

———S. 6—*Royalty on mines from lessee—"If net annual profit".*

In S. 6 of the Cess Act the expression "net annual profit" has reference to the property and not to the individual, and the royalty that is received by the lessor from the occupier of the mines, is as much a part of the annual profits, as the earnings of the occupier himself. 38 Cal. 372 (P.C.), Rel. on. (*Mukherjea and Latifur Rahman, JJ.*) NEW BEERBHOOM COAL CO. *v.* RAI SAHEB CHANDAN MALL KARNANI. **43 C.W.N. 874=69 C.L.J. 501=186 I.C. 253=12 R.C. 460 =A.I.R. 1939 Cal. 690.**

———Ss. 14 and 16—*Annual value of land—Necessity for inclusion in returns.*

The annual value of the land is one of the most important details required to be furnished in the returns under S. 16 read with S. 14 in the prescribed form as it is upon the basis of these returns that the valuation roll is prepared by the Collector under S. 34. The Act is a taxing statute and should therefore be strictly construed. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144=9 R.C. 475=A.I.R. 1936 Cal. 695.**

———Ss. 14 and 16—*Rent free lands—Inclusion in return—If condition precedent to liability to cess.*

The inclusion of the rent free land in the landlord's return under Ss. 14 and 16 of the Act is a condition precedent to any liability which is imposed upon the holder of rent free land to pay cess in respect thereof. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144= 9 R.C. 475=A.I.R. 1936 Cal. 695.**

———S. 16—Collector calling for returns from niskardars and making valuation—Order directing inclusion of niskar lands in estate—Claim for cess from niskar lands—Notice under S. 54—Publication—If condition precedent. *See* BENGAL CESS ACT, Ss. 54 & 56. **A.I.R. 1937 Cal. 26=169 I.C. 690.**

———S. 16—*Non-service of notice—Legality of assessment.*

The service of notice under S. 16, Bengal Cess Act, is not merely a matter of procedure but is part of the law with reference to which valuation or re-valuation as contemplated by law can be made by the revenue authorities and liability imposed in the matter of payment of cesses; and non-compliance with the law by failure to serve notice under S. 16 makes the assessment of cesses invalid under law. The service of notice is made imperative by law and where it is not served, the person assessed is entitled to a declaration that the cess re-valuation is *ultra vires*, illegal and not binding on him. (*Guha and Bartley, JJ.*) SECRETARY OF STATE *v.* JITENDRA NATH ROY. **161 I.C. 210 (2)=8 R.C. 490=62 C.L.J. 541=40 C.W.N. 630 =A.I.R. 1936 Cal. 70.**

———Ss. 21 and 66—*Scope—Rent free lands omitted from landlord's return—Valuation under S. 21—Notice under S. 66—Necessity.*

The general scheme of the Cess Act demands that as regards rent free lands, the special conditions prescribed by Ch. 4 should be observed before the procedure laid down in Ch. 2 can be brought into operation, and, in this view, the issue of a notice under S. 66 is a condition precedent to the valuation under S. 21 of rent free lands which had been omitted from the landlord's cess returns. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144=9 R.C. 475=A.I.R. 1936 Cal. 695.**

BENGAL CESS ACT (1880), S. 45.

———S. 24 Note and Cess Manual, R. 66—*Whether* ultra vires.

The note to S. 24, Cess Act, and R. 66 in the Cess Manual cannot be held to be *ultra vires* and inoperative, as having been made by the Board of Revenue without jurisdiction. They are not in any way inconsistent with the definition of "cultivating raiyat" as contained in S. 4 of the Act, and re-valuation under the Cess Act made on the basis of the Note to S. 24 and R. 66 of the Cess Manual is not illegal. A raiyat may be a tenure-holder within the meaning of the Cess Act and the distinction between holder of a tenure and a cultivating raiyat and not between holder of tenure and a raiyat must be recognized. 15 C.L.J. 428 and A.I.R. 1928 Cal. 508, Rel. on. (*Guha and Bartley, JJ.*) SECRETARY OF STATE *v.* JITENDRA NATH ROY. **161 I.C. 210 (2)=8 R.C. 490=62 C.L.J. 541=40 C.W.N. 630=A.I.R. 1936 Cal. 70.**

———S. 37—*Non-compliance—Tenure escaping assessment—Liability to cess.*

Where the procedure prescribed by S. 37 of the Cess Act is not followed with the result that certain tenures have escaped assessment, no cess would be payable either at the old rate or at any rate at all. (*Harries, C.J. and Manohar Lall, J.*) RANI HARSAMUKHI DASI *v.* AGADHU MOHAPATRA. **18 Pat. 723=6 B.R. 746=21 P.L.T. 637= A.I.R. 1940 Pat. 180.**

———S. 41 (2)—*Decree for cess under—If conclusive on question of defendant's status as tenure-holder—Subsequent suit in ejectment as tenant at will or trespasser*—Res judicata.

A mere finding that a person is a tenure-holder for the purposes of the Cess Act does not amount to anything more than that he holds some interest in the land which makes him liable for cess. The holder of a tenure, for purposes of the Cess Act, includes all persons holding any interest in land, whether rent paying or not. The fact that a landlord has obtained a decree for cess against a person in possession of his land does not operate as *res judicata* on the question of the defendant's status as a tenure-holder so as to bar a suit in ejectment as a trespasser or tenant at will. (*Harries, C.J. and Manohar Lall, J.*) SHIVA PRASAD SINGH *v.* MANDIRA KUMARI DEBI. **21 Pat.L.T. 277= A.I.R. 1940 Pat. 438.**

———S. 45—*Construction—"Recovered"—Meaning of.*

The word "recovered" in S. 45 of the Bengal Cess Act means "sued for" or "recovered by means of an action." (*Harries, C.J. and Fazl Ali, J.*) MANGTU LAL BAGARIA *v.* SECRETARY OF STATE. **18 Pat. 854=187 I.C. 727=6 B.R. 549= 12 R.P. 647=1940 P.W.N. 45=A.I.R. 1940 Pat. 161.**

———S. 45—*Decision of Revenue Court permitting recovery of cess—Suit to set aside—Jurisdiction of Civil Court.*

BENGAL CESS ACT (1880), S. 52.

The question whether cess was recoverable in a particular case under S. 45 of the Cess Act is one to be decided by the Revenue Court which issued the certificate, and if that Court has decided, rightly or wrongly, that the cess was recoverable and the claim was not barred by limitation, a suit cannot be entertained by a Civil Court to set aside that decision. A Civil Court can entertain a suit only if the order of the Revenue Court is without jurisdiction, and not because the decision of that Court is not correct. (*Harries, C.J. and Fazl Ali, J.*) MANGTU LAL BAGARIA *v.* SECRETARY OF STATE. **18 Pat. 854=187 I.C. 727=12 R.P. 647=6 B.R. 549=1940 P.W.N. 45=A.I.R. 1940 Pat. 161.**

———**Ss. 52, 54 and 55**—*Notices under Ss. 52 and 54—If obligatory to deposit them to be available for general inspection at any malkutchery of an estate—Placing of notice in tenures and service on defendants—Sufficiency.*

In a suit by a proprietor of the estate to recover cesses in respect of a certain rent-free holding, copies of a notice under Ss. 52 and 54 of the Bengal Cess Act were placed in the tenures concerned and notice was served also in the houses of defendants.

Held, that this in law was a sufficient publication. It is not obligatory, under S. 55, that a copy of the notice must be put up for general inspection at a malkutchery of an estate. (*M.C. Ghose, J.*) GOSTA BEHARI DUTT *v.* SARAT CHANDRA HALDAR. **66 C.L.J. 84.**

———**Ss. 54 and 56**—*Applicability—Proceedings under S. 66—Order by Collector for returns from niskardars under S. 16—Subsequent valuation—Direction that niskar lands shall be included in estate—If condition precedent to claim for cess.*

Section 54 requires the holder of every estate or tenure-holder, to whom any cess is payable by holders of rent-free lands, to cause a notice to be published in a certain form and in a certain manner requiring the niskardars to pay to him. Such a notice is necessary whenever a new valuation or re-valuation takes effect, and whenever the rate of cesses, and the date fixed by the Board of Revenue under S. 57 for payment of instalment of cesses by holders of rent-free land, are changed. Where, the Collector proceeds under S. 66 and calls for a return from the niskardars under S. 16 and thereafter makes a valuation so far as the niskardars are concerned, and makes an order under the last paragraph of S. 71 directing that for future the niskar lands shall be included in the estate, the provisions of Ss. 54 and 56 are attracted and the proprietors of the estate are not entitled to claim cess in respect of the niskar lands, without first publishing the notice under S. 54, in the manner described therein. (*R. C. Mitter, J.*) KIRAN CHANDRA ROY BAHADUR *v.* BROJENDRA NATH CHATTERJEE. **169 I.C. 690=10 R.C. 31=A.I.R. 1937 Cal. 26.**

———**S. 54**—*Non-compliance with—Effect.*

The Bengal Cess Act which is a taxation statute must be strictly interpreted, and in view of the mandatory nature of the language of S. 54 of the Act, unless the notices required by S. 54 are properly published with all the details specified in the section, the holder of an estate cannot legally be entitled to sue for cesses under S. 58 of the Act. A mistake as to the dates fixed by the Board of Revenue in the notice and the omission to specify the exact amounts payable constitute not merely an irregularity, but an illegality which vitiates the proceedings. (*N. G. A. Edgley, J.*) MADAN MOHAN DAS *v.* JITENDRA NATH ROY. **167 I.C. 248=9 R.C. 664=62 C.L.J. 564=A.I.R. 1936 Cal. 781.**

BENGAL CESS ACT (1880), S. 56.

———**Ss. 54, 56 and 58**—*Non-compliance—Omissions and mistakes in notice—If illegality vitiating notice.*

In view of the mandatory nature of the provisions contained in Ss. 54 and 56, Cess Act, unless notices required by S. 54 of the Act have been properly published with all details specified in S. 54, the zamindar is not entitled under the law to sue for recovery of cesses under S. 58. Omissions and mistakes in the notices issued under S. 54 are not mere irregularities but illegalities which vitiate the notices. (*Guha and Bartley, JJ.*) JITENDRA NATH ROY *v.* MADAN MOHAN DAS. **167 I.C. 232=9 R.C. 659=41 C.W.N. 220=A.I.R. 1936 Cal. 813.**

———**S. 54**—*Notice under—Object of.*

The purposes for which S. 54 of the Bengal Cess Act requires a notice to be published are (1) to inform all concerned of the rate which has been fixed for the levy of the cesses, and (2) to require the persons concerned to pay the amount of the specified cesses as it falls due. (*N. G. A. Edgley, J.*) MADAN MOHAN DAS *v.* JITENDRA NATH ROY. **167 I.C. 248=9 R.C. 664=62 C.L.J. 564=A.I.R. 1936 Cal. 781.**

———**S. 54**—*Notice under—Presumption that notice was in proper form—Non-production of copy—Effect.*

Where there is the finding of service of notice under S. 54, the Court is entitled to presume unless the contrary is shown that this referred to service of a notice framed in accordance with law. The mere non-production of a copy of the notice cannot be regarded as in any way militating against the presumption of correctness of form. (*Biswas, J.*) KAMAL KRISHNA *v.* SARAT KUMAR ROY. **179 I.C. 50=11 R.C. 461=A.I.R. 1938 Cal. 145.**

———**S. 54**—*Re-valuation of estate within which rent-free lands were included by Collector's order—Liability of such lands for cess—Service of notice—If necessary.*

The expression "part of a district" in S. 54 (1) of the Cess Act covers a case where there is a re-valuation of certain specified estates or tenures which contained the rent-free lands or to which the rent-free lands were attached by an order of Collector under S. 71 of the Act. Before, therefore, any liability to pay cess could attach to the holders of such rent-free lands under S. 56, it is necessary to serve notices upon them under S. 54 of the Act. (*Mukherjea, J.*) BHOWANIPORE ZAMINDARI CO., LTD. *v.* BIBHUTI BHUSAN ROY. **44 C.W.N. 389.**

———**S. 56**—*Liability to cess—Issue of notices under Ss. 52 and 54—If a condition precedent.*

It is clear on the wording of S. 56 that the liability of any owner or holder of rent-free lands to pay any cess to the owner of any estate or tenure under Ch. 4 cannot arise unless there has been a due publication of both the notices under Ss. 52 and 54. The issue of such notices is indeed a condition precedent to the accrual of such liability. (*Biswas, J.*) KAMAL KRISHNA *v.* SA-

BENGAL CESS ACT (1880), S. 56.

RAT KUMAR ROY. 179 I.C. 50=11 R.C. 461= A.I.R. 1938 Cal. 145.

——Ss. 56 and 18—*Owner of larger estate not submitting return in Sch. A, Part IV—Right to recover cess from owner of rent-free lands comprised in his estate.*

The mere fact that the owner of a larger estate did not render to the Collector a return in the form in Sch. A, Part IV does not disentitle him to recover from the owner of the rent-free lands comprised in his estate the cess payable by the latter under S. 56 of the Cess Act, as it is open to the Collector under S. 18 of that Act to dispense with the return in that form if sufficient cause for so doing is shown to his satisfaction, (*Derbyshire, C. J. and D. N. Mitter, J.*) KIRAN CHANDRA *v.* SUDHANSU SEKHAR. 169 I.C. 850=10 R.C. 39=41 C.W.N. 654= A.I.R. 1937 Cal. 352.

——S. 58—Suit for cesses under—Non-publication of notices as required by S. 54—Notice omitting details of exact amounts and giving wrong dates—Legality—Maintainability of suit. *See* BENGAL CESS ACT, S. 54. 62 C.L.J 564.

——S. 64-A—*Scope of—Niskar lands in separate possession of each co-sharer—Liability for cess—Limits.*

S. 64-A of the Bengal Cess Act creates joint and several liability in all persons who may be jointly interested in any rent-free land in respect of the cesses payable for it. Where the niskar lands constituting one single holding are not held jointly by a number of co-sharers but the co-sharers are each in separate possession of specified quantity of land within the niskar, either in khas or through tenants, each such co-sharer will be liable in respect of the land held or owned by him, and the principle of joint and several liability embodied in S. 64-A cannot be extended to make a co-sharer in possession of a separate piece of land liable for the lands separately held by another co-sharer. (*Biswas, J.*) KAMAL KRISHNA *v.* SARAT KUMAR ROY. 179 I.C. 50=11 R.C. 461=A.I.R. 1938 Cal. 145.

——S. 66—Proceedings under—Collector making valuation of niskar lands and directing inclusion in estate—Claim by proprietor for cess from niskar lands—Publication of notice under S. 54—If obligatory. *See* BENGAL CESS ACT, Ss. 54 AND 56. A.I.R. 1937 Cal. 26.

——S. 71—Order including niskar lands in estate after calling for returns from niskardars and after valuation—Claim by proprietor of estate for cess—Notice under S. 54—If condition precedent. *See* BENGAL CESS ACT, Ss. 54 AND 56. A.I.R. 1937 Cal. 26.

——S. 81—*Owner and occupier—Either paying more than his dues—Rights of contribution.*

Under S. 81 of the Cess Act the burden of cess is equally distributed between the owner and the occupier, and if either has been compelled to pay more than his dues he can certainly recover it from the other by a contribution suit. (*Mukherjea and Latifur Rahman, JJ.*) NEW BEERBHOOM COAL CO. *v.* RAI SAHEB CHANDAN MALL KARNANI. 186 I.C. 253=12 R.C. 460=43 C.W.N. 874=69 C.L.J. 501 =A.I.R. 1939 Cal. 690.

BENGAL CHILDREN ACT (1922), S. 40.

——S. 93—*Scope—Jurisdiction of Civil Court—Suit questioning valuation by cess department on ground that it is wrong—Bar of.*

The Civil Court has jurisdiction to grant relief in a case where the cess department has acted *ultra vires* and imposed liability for cess on income which is not subject to cess. S. 93 of the Cess Act is no bar to such a suit. The section does not bar a suit to establish that the amounts on which a person has been assessed is not subject to the Cess Act; but it does bar a suit in which the contention is not that the cess department has acted *ultra vires*, but merely that its decision is wrong. (*Agarwala and Varma, JJ.*) BRAJA BEHARI DASS *v.* RAM NARAYAN RAI. 17 Pat. 436=4 B.R. 475=10 R.P. 547=1938 P.W.N. 459=174 I.C. 752=19 Pat.L.T. 352 =A.I.R. 1938 Pat. 362.

——S. 95—*Cess returns—Admissibility—Extent and purpose of.*

A cess return is admissible in evidence not only against the persons filing it but also against the heirs and representatives of the persons filing and for all purposes, including the identity of the lands, and also for showing that certain statements made later contrary to the admission in the cess returns are false. (*R. C. Mitter, J.*) KIRAN CHANDRA ROY BAHADUR *v.* TARAK NATH GANGOPADHYAY. 166 I.C. 460=9 I.C. 528= 40 C.W.N. 566=A.I.R. 1936 Cal. 456.

——S. 99—*Notification under—Rent payable to tenure holders—Collector's power to Collect.*

After a notification is issued under S. 99 of the Cess Act in respect of an estate which has fallen into arrears of cess, the Collector is not only authorised to collect the rent payable directly to the owners of the estate but also the rent payable by the tenants to the intermediate tenure-holders. The latter have no right to receive any sum due as rent from the tenants which have already been paid to the Collector or which have not yet been paid to him. (*Edgley, J.*) DILIP KUAR DUTTA *v.* SRIDHAR DALNI. I.L.R. (1940) 1 Cal. 339=44 C.W.N. 259=A.I.R. 1940 Cal. 110.

——S. 99—*Withdrawal of attachment—Power of Collector.*

The Collector has jurisdiction to withdraw an attachment made by him under S. 99 of the Cess Act. (*Mitter and Rau, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARY CO., LTD. 70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.

——Sch. D—*Words 'his' and 'his lands'—Meaning of.*

The word 'his' in Sch. D means 'heir' and words 'his lands' refer to the lands held by the 'owners and holders' of lands mentioned before. (*Biswas, J.*) KAMAL KRISHNA *v.* SARAT KUMAR ROY. 179 R.C. 50=R.C. 461=A.I.R. 1938 Cal. 145.

BENGAL CHILDREN ACT (II OF 1922), S. 40—*Custody—Meaning of.*

The question whether a person has the custody of another within the meaning of S. 40 of the Bengal Children Act is purely a question of fact, and no question of lawful custody or legal custody arises. (*Bartley and Khundkar, JJ.*) BHAGAWATI

BENGAL COURTS OF WARDS ACT (1879), S. 61.

DASI v, EMPEROR. 177 I.C. 943=11 R.C. 302=39 Cr.L.J. 974=42 C.W.N. 983=A.I.R. 1938 Cal. 638.

BENGAL COURT OF WARDS ACT (IX OF 1879), S. 6—*'Proprietor of an estate'—Executrix and tenant for life under a will—If a proprietor.*

Where a Hindu testator had bequeathed a life-estate in all his properties to his wife and also appointed her as an executrix, the widow after the death of the testator is the 'proprietor of the estate' within the meaning of S. 6 of the Bengal Court of Wards Act. (*Panckridge, J.*) INDUMATI DEBI *v.* BENGAL COURT OF WARDS. I.L.R. (1938) 1 Cal. 476=181 I.C 973=11 R.C. 879=42 C.W.N. 230=A.I.R. 1938 Cal. 385.

——S. 6 (a)—*Declaration under—If a judicial act—Notice to persons affected—Necessity.*

In making a declaration that a person is a disqualified proprietor under S. 6 (*a*) of the Act the Court of Wards acts judicially. It would be wrong to say that it is a purely administrative act. Hence the person affected by such a declaration is entitled to notice. (*Panckridge, J.*) INDUMATI DEBI *v.* BENGAL COURT OF WARDS. I.L.R. (1938) 1 Cal. 476=181 I.C 973=11 R.C. 879=42 C.W.N. 230=A.I.R. 1938 Cal. 385.

——S. 6 (a)—Declaration under—If a matter concerning revenue under S. 226 (1) of Government of India Act. *See* GOVERNMENT OF INDIA ACT, S. 226 (1). I.L.R. (1938) 1 Cal. 476=42 C.W.N. 230—A. I.R. 1938 Cal. 385.

——S. 7—*Taking charge of property—Facts to be considered—Opportunity to person affected to show competency to manage.*

Before the Court of Wards can take charge of the property of a person under S. 7 of the Act, after a declaration of the incompetency of the proprietor to manage it, the Court of Wards must consider whether there exist materials to warrant such a declaration. Principles of natural justice require that the proprietor should have an opportunity of testing those materials and of establishing competency to manage. (*Panckridge, J.*) INDUMATI DEBI *v.* BENGAL COURT OF WARDS. I.L.R. (1938) 1 Cal. 476=181 I.C. 973=11 R.C. 879=42 C.W.N. 230=A.I.R. 1938 Cal. 385.

——(as amended by Act VI of 1936), S. 10-C—*Applicability—Pending execution proceedings.*

S. 10-C of the Court of Wards Act as amended by Act VI of 1936 applies not only to decrees already obtained before Act VI of 1936 came into force, but also operates upon execution pending at the date of the commencement of the said Act. (*R. C. Mitter and Mukherjea, JJ.*) HABIBA BIBI *v.* RAMRANJAN MALLICK. I.L.R. (1937) 2 Cal. 54=171 I.C. 226=10 R.C. 252=41 C.W.N. 401=A.I.R. 1937 Cal. 207.

——S 10 (c) (as amended by the Amending Act of 1936)—*Applicability—Co-judgment-debtors with Wards of Court—Section, if can be construed to affect them adversely—Retrospective operation.*

The new S. 10 (*c*) of the Court of Wards Act is retrospective in its operation and its provisions apply only to the person or property of a Ward, and other persons cannot avail themselves of the protection afforded by the section merely because they happen to be co-judgment-debtors with

BENGAL COURT OF WARDS ACT (1879), S. 51.

Wards of Court. Nor is there any reason for reading into the section any limitation to the effect that the section is not to operate in cases, where as a result of protecting the property of a ward, the interests of others are adversely affected. (*Costello, Ag.C.J. and Edgley, J.*) PROMODE CHANDRA SINHA SARMA *v.* NARENDRA NARAIN MAJUMDAR CHOUDHRY. 175 I.C. 172=10 R.C. 797=66 C.L.J. 321=A.I.R. 1938 Cal. 297.

——S. 10 (c)—*Appointment of receiver—Power of Court.*

Under S. 10 (*c*) of the Court of Wards Act, the Court can appoint a receiver in respect of the property under the management of the Court of Wards. But that receiver will not be able to take possession until he can do so in accordance with the terms of the Act. (*Remfry, J.*) NATIONAL INSURANCE CO., LTD. *v.* GAGANENDRA NATH TAGORE. 42 C.W.N. 374.

——S 10 (c)—*If confers absolute immunity.*

S. 10 (*c*) of the Court of Wards Act does not confer absolute immunity upon a ward of the Court of Wards. (*Henderson and Sen, JJ.*) K. G. M. FAROQUI *v.* HABIBUR RAHAMAN CHOWDHURY. 44 C.W.N. 749.

——S. 10 C [inserted by Assam Court of Wards (Amendment) Act, 1937]—*If void—Government of India Act*, 1935, *S.* 107.

S. 10-C inserted in the Bengal Court of Wards Act in force in Assam by the Assam Court of Wards (Amendment) Act, 1937, is not repugnant to any existing Indian Law and is, therefore, not void by virtue of S. 107 (1) of the Government of India Act. (*Mitter and Rau, JJ.*) G. P. STEWART *v.* BROJENDRA KISHORE ROY. 184 I.C. 689=2 Fed.L.J. 112=69 C.L.J. 573=12 R.C. 271=43 C.W.N. 913=A.I.R. 1939 Cal. 628.

——Ss. 51 and 52—*Construction and scope—Power of Court of Wards under—Suit against minor represented by manager of Court of Wards as guardian—Power of Court of Wards to remove and make fresh appointment successively—Duty of Court—Procedure.*

When a suit is instituted against a minor who is a ward under the Court of Wards, through the guardianship of the manager of the Court of Wards as required by S. 51 of the Court of Wards Act, the Court of Wards has authority under S. 52 of the Act to appoint another person to represent the minor in place of the manager. They can likewise exercise the power of appointing a guardian successively from time to time as occasion arises. The proper procedure in such a case is to communicate the appointment to the Civil Court which has to recognise the appointment and is bound to substitute the new appointee in place of the person on record as guardian. The Court of Wards is not *functus officio* as soon as it has appointed a guardian. It has the power to remove him and appoint another in his place, and on the communication of such removal and appointment the Civil Court is bound to recognise the same and to make necessary substitution. (*Khaja Mohammad Noor and Saunders, JJ.*) CHHOTI RANI SAHEBA *v.* KUMAR BRIJDEO NARAYAN SINGH. 15 Pat. 667=167 I.C. 233=9 R.P. 399=3 B.R. 288=A.I.R. 1937 Pat. 108.

—— S. 51—*Suit against disqualified proprietor—Court of Wards taking charge pending suit—Representation of ward—Necessity—Nature of*

BENGAL COURT OF WARDS ACT (1879), S. 51.

amendment required—Formal order—Absence—Effect on acts of parties and decrees of Court.

Whether a suit is brought before or after the Court of Wards has assumed charge of the property of a disqualified proprietor, the Court of Wards' manager or the Collector should be made guardian and must represent the ward in the suit. If an amendment is required owing to the Court of Wards taking charge pending the suit, the amendment must produce the result set forth in S. 51. The suit against the proprietor becomes defective upon his becoming a ward of the Court of Wards and the suit is to be reconstituted to satisfy S. 51. A proper formal order to that effect should always be made, but if the proper parties are on the record and are dealt with on the correct footing, the mere want of formality will not make void the bargain of the parties and the decree of the Court. Where therefore in a suit against the proprietor, the manager, Court of Wards, is added as an additional defendant, on the manager assuming charge of the property, and a compromise is arrived at between the parties, the validity of the compromise depends entirely upon whether the Court of Wards consented on behalf of the proprietor. If they did, the absence of a formal order making the manager guardian *ad litem* as distinct from an additional defendant does not invalidate the decree. (*Sir George Rankin.*) BRAJA SUNDER DEB *v.* RAJENDRA NARAYAN BHANJ DEO. **65 I.A 57=40 Bom L R. 700=32 S.L.R. 290=10 R.P.C. 160=66 C.L.J. 493=172 I.C. 643=42 C W.N. 289=19 Pat.L.T. 69=1938 O.L.R. 57=1938 A.L.R. 84=4 B R. 248=1938 P.W.N 129=17 Pat. 1=A.I.R. 1938 P.C. 49=(1938) 1 M.L.J. 590 (P.C.).**

——**Ss. 51 and 56**—*Suit filed in High Court—Manager of Court of Wards—If necessary party.*

The manager appointed by the Court of Wards is not a necessary party to a suit filed in the High Court. S. 51 of the Court of Wards Act is not applicable to the High Court under S. 56, and therefore the ordinary procedure must apply. Wards of Court are not persons under a disability within the meaning of C. P. Code. (*Remfry, J.*) NATIONAL INSURANCE CO., LTD. *v.* GAGANENDRA NATH TAGORE. **42 C.W.N. 374.**

——**S. 55**—*Scope—Suit instituted before estate taken over by Court of Wards—Permission—Necessity.*

S. 55, Court of Wards Act, simply prohibits initiation of litigation on behalf of a ward by the Manager except with the authorisation of a Court of Wards. The prohibition does not extend to a litigation which is already in progress when the Court of Wards assumes charge of the estate of the wards. The Act sufficiently provides for such a case in S. 51 under which the manager is to be, named as next friend or guardian for the suit and to represent the ward. Where therefore a suit is instituted by the plaintiffs before their estate is taken over by the Court of Wards, the mere fact that the estate is taken over by the Court of Wards during the pendency of suit does not take away the jurisdiction of the Court to try the suit by reason of the suit having been instituted without the permission of the Court of Wards. A.I.R. 1920 Cal. 197, Ref. (*Macpherson and Dhavle, JJ.*) MT. LAIKUNNISSA *v.* DURGA DASS. **15 Pat.S**

BENG. EMBANKMENT ACT (1882), S. 6.

382=161 I.C. 18=8 R.P. 435=1936 P.W.N. 127 =17 Pat.L.T. 118=A.I.R. 1936 Pat. 114.

——**S. 59-A**—*Manager of estate under Court of Wards—Public servant.*

The manager of an estate under the Court of Wards in Chota Nagpur is, by the operation of S. 59-A of the Court of Wards Act, a public servant within the meaning of the Penal Code. (*Harries, C.J. and Manohar Lall, JJ.*) ANGELO *v.* KANDAN MANJHI. **185 I C. 738=6 B.R. 241= 12 R.P. 440=41 Cr L.J. 221=1940 P.W.N. 233= A.I.R. 1940 Pat. 316.**

——**Ss. 69 and 70**—*Rule* 115—*If* ultra vires.

R. 115 of the rules made under the Court of Wards Act is not *ultra vires*. Ss. 69 and 70 empower the making of such a rule. (*Harries, C.J. and Manohar Lall, J.*) ANGELO *v.* KANDAN MANJHI. **185 I C. 738=6 B.R. 241=12 R.P. 440 =41 Cr.L.J. 221=1940 P.W.N. 233=A.I.R. 1940 Pat. 316.**

BENGAL COURT OF WARDS REGULATION (X OF 1793), Cl. 33—*Applicability to Oudh.*

The Bengal Regulation X of 1793 applied to Oudh and a disqualified proprietor could not without the previous consent of the Court of Wards give authority to his widow to adopt. (*Thomas, J.*) MATA BAKSH SINGH *v.* AJODHIA BAKSH SINGH. **163 I.C. 770=9 R.O. 1=1936 O L.R. 378=A.I.R. 1936 Oudh 340.**

BENGAL CRIMINAL LAW AMENDMENT ACT (VI OF 1930), S 2 (1)—*Order not reviewed within one year—Prosecution for its disobedience.*

An order was made on 7th January, 1933 and was amended on 31st May, 1933. There was a further order on 14th June, 1934. There was no review of the orders dated 7th January, 1933 and 31st May, 1933 within the time required by law but accused was charged with disobeying the order on 2nd July, 1934.

Held, that the order was no longer in force at the time when the accused was alleged to have disobeyed it on 2nd July, 1934. (*Lort Williams and Jack, JJ.*) HIRANMOY BHOWMIK *v.* EMPEROR. **160 I.C. 743=8 R C. 452=37 Cr.L.J. 377=1936 Cr.C 72=A.I.R. 1936 Cal 16.**

BENGAL CRUELTY TO ANIMALS ACT (I OF 1920), S. 6—*Charge of performing* phooka *on milch animal—Conviction for being owner of that animal—Legality—Re-trial.*

There are two branches to S. 6 of the Bengal Cruelty to Animals Act. The first makes punishable the offence of performing the operation of *phooka* on a milch animal and the second lays a penalty upon the owner of an animal upon which the operation is performed. If an accused person who was charged only under the first branch is convicted under the second branch, it is necessary in the interest of justice that he should be re-tried for the offence of which he has been convicted. (*Khundkar and Edgley, JJ.*) DARGAHI MIAH *v.* EMPEROR. **44 C.W.N. 398=71 C.L.J. 179=A.I.R. 1940 Cal. 328.**

BENGAL EMBANKMENT ACT (II OF 1882), S. 3—"Water-course"—If includes "a river." *See* S. 76 (*b*) *infra*. **43 C.W.N. 391.**

——**S. 6**—*Publication of notification under—Absence of direct proof—Effect—Evidence Act, S. 114—Presumption under, if available.*

BENG. EMBANKMENT ACT (1882), S. 56.

Apart from the difficulty of getting direct proof of local publication of notification under S. 6, Bengal Embankment Act, relating to the provisions of S. 76 (*b*) of the Act, after an interval of time exceeding 25 years, the Crown can be permitted to rely on the presumption under S. 114, Cls. (*e*) and (*f*), Evidence Act, namely, that judicial and official acts have been regularly performed and that the common course of business has been followed in particular cases. (*Rowland, J.*) RAMADHIKARI SINGH *v.* EMPEROR. **166 I.C. 699=9 R.P. 337=38 Cr.L.J. 266=3 B.R. 214=A.I.R. 1937 Pat. 14.**

——**Ss. 56 and 57**—*Notice under—If condition precedent to creation of liability.*

A notice under S. 56 or 57 of the Bengal Embankment Act is a condition precedent to creation of liability of the proprietor or the tenure-holder, as the case may be, and unless and until due publication or service of the notice is proved the very foundation of the liability is taken away. (*Mukherjea and Latifur Rahman, JJ.*) JADUNATH BANERJEE *v.* SECRETARY OF STATE. **I.L.R. (1939) 2 Cal. 268=187 I.C. 477=12 R.C. 581=43 C.W.N. 1021=A.I.R. 1939 Cal. 617.**

——**S. 76 (b)**—*Offence under—Obstruction of river.*

S. 76 (*b*) of the Bengal Embankment Act clearly applies in a case in which there has been a diversion or obstruction of a river, as the expression "water-course" in S. 3 of the Act includes a river. (*Edgley, J.*) PASUPATI KARMAKAR *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 334=183 I.C. 470=40 Cr.L.J. 808=12 R.C. 162=43 C.W.N. 391=A.I.R. 1939 Cal. 528.**

——**S. 76 (b)**—Prosecution under—Notification extending Act to area—Absence of direct proof—Effect—Presumption as to official acts under S. 114, Evidence Act—If sufficient. *See* BENGAL EMBANKMENT ACT, S. 6. **A.I.R. 1937 Pat. 14.**

——**Ss. 76 (b) and 79**—*Accidental breach in embankment—Repair without Collector's permission—Conviction by Sub-Deputy Magistrate—Order to remove obstruction within fortnight—Propriety—Order by District Magistrate after period of limitation modifying order for removal—Jurisdiction to pass.*

Certain tenants who repaired accidental breaches in an embankment without the permission of the Collector were convicted and fined under S. 76 (*b*) of the Bengal Embankment Act by a Sub-Deputy Magistrate. He made no investigation and without giving much consideration to the matter also added an order, apparently under S. 79, "to remove the obstruction within a fortnight." A third party then applied to the Magistrate to stop the removal of the obstruction, but the Magistrate, holding that he had no jurisdiction to revise his order, directed him to the District Magistrate. The latter, long after the period of appeal had expired, modified the order of the Magistrate, by setting forth that the order for removal of the obstruction need not be carried out.

Held, in revision, that the order of the District Magistrate modifying the order of the Magistrate and the order of the Magistrate to remove the obstruction were both improper and without jurisdiction and must therefore be set aside. (*Macpherson, J.*) KAMESHWAR SINGH BAHADUR *v.* EMPEROR. **163 I.C. 965=9 R.P. 74=37 Cr. L.J. 875=17 Pat.L.T. 412=1936 P.W.N. 383=1936 Cr.C. 660=A.I.R. 1936 Pat. 413.**

BENG. ESTATES PARTITION ACT(1897), S. 5.

——**S. 79**—*Procedure—Conviction under S. 76 (b)—Proper order—Restoration of* status quo.

The system of embankments in North Bihar is very complex and it is extremely hazardous to interefere with them in any way without the advice of a competent engineer and full inquiry. The Bengal Embankment Act is largely composed of provisions designed for the maintenance of the *status quo* and to prevent interference therewith except by competent persons or under competent advice or sanction. Where therefore certain persons erecting a new embankment are convicted under S. 75 (*b*), the proper order to be passed under S. 79 is one directing them to demolish so much of the embankment as is a new embankment and to remove so much of the new earth as is an addition to the existing embankment, thus restoring the locality as nearly as possible to its *status quo ante*. (*Rowland, J.*) RAMADHIKARI SINGH *v.* EMPEROR. **166 I.C. 699=9 R.P. 337=38 Cr.L.J. 266=3 B.R. 214=A.I.R. 1937 Pat. 14.**

——**S. 80**—*Publication under—Whether mandatory.*

The publication under S. 80 is directory and not mandatory. (*Rowland, J.*) RAMADHIKARI SINGH *v.* EMPEROR. **166 I.C. 699=9 R.P. 337=38 Cr L.J. 266=3 B.R. 214=A.I.R. 1937 Pat. 14.**

——**S. 86**—*Order of Collector under—Jurisdiction of Civil Court.*

An order of apportionment of costs passed by the Collector under S. 86 of the Bengal Embankments Act cannot be questioned in a Civil Court. Such an order would not be *ultra vires* simply because the Collector apportioned costs on certain lands which he should not have done under the provisions of the Act. It may be at the most an erroneous decision or an irregular exercise of the jurisdiction which the Collector undoubtedly possessed, and in no sense it can be said to be an usurpation of jurisdiction by the Collector which would make the order a nullity or without jurisdiction. (*Mukherjea and Latifur Rahman, JJ.*) JADUNATH BANERJEE *v.* SECRETARY OF STATE. **I.L.R. (1939) 2 Cal. 268=187 I.C. 477=12 R.C. 581=43 C.W.N. 1021=A.I.R. 1939 Cal. 617.**

BENGAL ESTATES PARTITION ACT (V OF 1897), Ss. 5 (2) and 28—*Decree declaring proprietor's interest over specific plots in estate—Jurisdiction of Civil Court to make—Executability when partition proceedings are pending and when they have terminated.*

It is competent to a Civil Court to make a decree declaring the plaintiff's proprietary right in an estate and the extent of his interest in respect of specified plots in the estate, whether partition proceedings by the revenue authorities are pending or have terminated. Such a decree cannot be regarded as one not warranted by law. The decree must be made in recognition of the partition proceedings and framed in such a manner that the partition proceedings may not be nullified. If the partition proceedings are still in progress, the successful litigant in the Civil Court may ask for a sub division in the new estate into which the lands claimed by him have fallen. whereas if the partition proceedings have concluded, he occupies merely the position of a co-owner with the proprietors of the new estate within which the disputed lands have been included.

BENGAL ESTATES PARTITION ACT (1897), S. 7.

The decree can be given effect to in either case. If the proceedings are pending, the new estate into which the disputed lands have fallen can be sub-divided. If, on the other hand, they have been completed, the plaintiff is entitled to have assigned to him as his separate estate the specific lands under S. 5 (2) of the Act. The decision of the Civil Court must be taken in effect to be a direction to divide off the lands from the new estate and to assign to the plaintiff as a separate estate in accordance with S 28 of the Act. (*Nazim Ali and Hendersan, JJ.*) SASI KANTA ACHARJEE CHOUDHURY *v.* RAJENDRA KUMAR CHAKRAVARTY. **40 C.W.N. 112.**

——**S. 7**—*Suit for partition of zemindari—Admission of prior partition of* bakasht *lands—Pattidars collecting rents separately from tenants—Effect—Power of Court to pass decree.*

Where it is admitted in a partition suit, that the *bakasht* lands of the estate or zemindari were divided sometime previously, but the land in the occupation of the tenants was not divided although each of the pattidars collected his share of the rents separately from the tenants, that amounts to a complete partition of the proprietary interest, and the Court cannot pass a decree for partition. If the Civil Court passes a decree for partition in such a case, it must be vacated. (*Agarwala and Varma JJ.*) MUKUND JHA *v.* DHORUP NARAIN JHA. **160 I.C. 921 (1)=8 R.P. 397 (1)=1936 P W.N. 23=17 Pat.L.T. 104=A. I.R. 1936 Pat. 77.**

——**Ss. 22 and 25**—*Partition by Collector—Lands claimed as raiyati treated as* bakasht*—Suit in Civil Court for declaration that such land is occupancy jote or falls under S. 22 (2), B. T. Act, and for decree directing to be entered as jama in batwara papers—Maintainability—Specific Relief Act, S. 42—Jurisdiction of Civil Court.*

The High Court (or a Civil Court) cannot set aside or alter a partition which has been effected by a Revenue Court of competent jurisdiction; it cannot be said that the Revenue Court was acting without jurisdiction merely because, regarding a matter for which there is no special provision in the Bengal Estates Partition Act, it adopted a view which, though contrary to the view taken by the High Court, cannot yet be said to have been unreasonable. A co-sharer landlord of a village which has been partitioned by the Collector, who was a party to the collectorate partition proceedings and was allotted his due share of the assets of the *mahal* which was fixed in his presence, cannot maintain a suit for a declaration that certain lands treated as *bakasht* lands in such partition are his occupancy jote and in the alternative that he has the peculiar right in them which is defined in S. 22 (2) of the Bengal Tenancy Act and for a decree directing that the amount of rental payable by him before the partition may be entered in the batwara papers as the jama of the said lands. To give a decree to the plaintiff co-sharer in such terms would involve the re-adjustment of the assets not only so far as he is concerned, but also so far as the other co-sharer-landlords are concerned. Such an order is clearly beyond the jurisdiction of the High Court or Civil Court. Nor can a mere declaration of the plaintiff's right under S. 22 (2) of the B. T. Act be granted, though he would be entitled to it, because no consequential relief can be granted to him. In view of S. 42, Specific Relief Act, and the settled practice of the Court not to grant any declaratory decree when that would be of no avail to the party seeking it, the suit cannot be maintained. It is a matter for the revenue authorities to decide whether the partition should be re-opened in order to relieve the plaintiff of the hardship involved. (*Fazl Ali and Madan, JJ.*) BHAIRO SINGH *v* SHAMSUNDAR PRASAD. **173 I C. 849=10 R P, 453=4 B R. 347=18 Pat L.T. 843= 1937 P.W.N 816=A.I.R. 1938 Pat 76**

BENGAL ESTATES PARTITION ACT (1897), S. 48.

——**Ss 23 to 27**—*Question of extent of proprietor's interest in estate—Jurisdiction to decide—Partition proceedings—Claim to separate possession of specific plots on basis of private arrangement—Finding of no partition and no separate possession—Subsequent suit for declaration of proprietary interest over such plots—Jurisdiction of Civil Court—If barred under S* 119.

Ss. 23 to 27 of the Bengal Estates Partition Act show that a Civil Court has jurisdiction to decide questions of title or extent of interest not only between a proprietor and a stranger, but also between proprietors themselves. The revenue authorities have no power under the Act to determine finally the question of extent of interest or of right or title Where a Partition Deputy Collector partitions an estate on the footing that the estate was not divided by private arrangement formally agreed to by all the proprietors and that the proprietors were not in possession of separate lands representing their interest in the estate, as alleged by the plaintiff co-sharer-proprietor, a suit by the co-sharer proprietor for a declaration that the interest in the parent estate is the proprietary right over certain specific lands claimed by him on the basis of the private arrangement set up, can be entertained by the Civil Court. Such a suit is not barred under S. 119 of the Estates Partition Act, the question raised in the suit being a question about the extent of plaintiff's interest in the estate. (*Nasim Ali and Henderson, JJ.*) SASI KANTA ACHARJEE CHOUDHURY *v.* RAJENDRA KUMAR CHAKRAVARTY. **40 C.W N. 112.**

——**S 25**—*Partition order by Revenue Court—Interference by Civil Court—Injunction to* batwara *Court to stay proceedings—Civil Court's jurisdiction to issue—Allotment of lands—Jurisdiction.*

The Civil Court has no power to issue injunction to the *batwara* Court. It should be very slow to interfere with the jurisdiction which is exercised by a Revenue Court upon powers conferred by the Revenue Court by the Estates Partition Act. When such interference is invoked, the facts must be scrutinised with particular care. It falls to the Revenue Officers during the *batwara* to consider and decide for themselves whether or not S. 77 of the Act should be applied to the case in the matter of allotment of lands. In such matters the jurisdiction of the Civil Court is limited. (*Dhavle and Agarwala, JJ.*) GOPALJI JHA *v* GAJENDRA NARAYAN SINGH. **15 Pat. 404=162 I C 210=8 R P 513=1936 Pat. W.N. 109=17 Pat.L T 109=A.I.R. 1936 Pat. 226.**

——**S. 48**—Record of existing rents and assets published under—If admissible as public or

official record. *See* EVIDENCE ACT, Ss. 13 AND 35. **40 C W.N. 821.**

——**S. 77**—Allotment of lands—Application of S. 77—Jurisdiction of Civil and Revenue Courts. *See* BENGAL ESTATES PARTITION ACT, S. 25. **17 Pat.L T. 109=A.I.R. 1936 Pat. 226.**

——**S. 81**—*Rent fixed by Batwara officer on basis of illegal enhancement made prior to partition—Party holding landlord's interest as well as tenant's interest not objecting—Subsequent plea of illegal enhancement in suit for rent—If open.*

A party who, having two capacities in a village, both of a landlord and of a tenant, allows the partition to proceed on a certain basis and gets advantage under it, cannot be allowed later on to claim that his right as a *raiyat* has been interfered with and thereby practically ask the whole partition to be reopened. The plaintiffs and the defendants and some other persons held a separate *patti* of eight annas in a village. In that *patti*, the defendants, in addition to their having some other land as well, had a holding, of which the rent was enhanced by some contract to a figure which was undoubtedly illegal under S 29 of the Bihar Tenancy Act. Subsequently there was a collectorate partition in which the plaintiffs were allotted a separate estate for their share in the parent estate, which included five plots out of the holding of the defendants. Under S. 81 of the Estates Partition Act, the Batwara officer fixed the rent payable by the defendants to the plaintiffs on the basis of the enhanced rent. The defendants allowed the partition to proceed on that basis and raised no objection, and got assets in respect of their own share on that basis. In a suit by the plaintiffs for rent fixed under S. 81, the defendants pleaded that the enhancement of rent prior to partition was void under S. 29 of the Bihar Tenancy Act and hence illegal.

Held, that the defendants, having got the advantage of an enhanced asset for the purposes of the partition and having allowed the plaintiffs to get their *takhta* on that basis, could not be allowed to turn round and say that the rent fixed by the Collector under S. 81 of the Partition Act was illegal and irrecoverable. (*Noor, J.*) KISHORE RAMAN PRASAD *v.* HANUMAN SINGH. **178 I.C. 567=11 R.P. 275=5 B R. 113=1938 P. W.N. 147=A.I.R. 1938 Pat. 509**

——**Ss. 81 and 99**—*Construction and scope—Holding under some landlords under pattidari arrangement between co-sharer landlords—Dispossession of tenant from one plot and consequent suspension of rent—Subsequent* batwara *by Collector—Allotment of dispossessed plot and another to one landlord—Right of tenant to claim suspension of rent—If "encumbrance."*

The plaintiff landlord became the owner of a holding consisting of two plots of land as the result of a collectorate *batwara*. Prior to the *batwara*, the tenant-defendant who was a settled raiyat had a cash holding consisting of 10 plots in the *takhta* of one set of landlords under a *pattidari* arrangement among all the landlords in the nature of an imperfect partition. Out of the 10 plots the landlords dispossessed the tenant from one plot, which led to the result that the tenant was held entitled to suspension of rent as regards all the other plots including one of the two plots

comprising the holding of the plaintiff. The latter having sued the defendant for rent of the holding, the tenant defendant pleaded suspension of rent in respect of that plot in bar of suit.

Held, (1) that the tenant's right to suspension of rent was not affected by the *batwara* proceedings and that the dispossession of the tenant from the one plot could not be regarded as an encumbrance created by the evicting landlords under S 99 of the Estates Partition Act; (2) that the provisions of S. 81 of the Act did not entitle the tenant-defendant effectively to insist in the *batwara* proceedings that his holding shall or shall not be divided in a particular way; (3) that the Estates Partition Act did not contain any provisions which could be regarded as depriving the tenant, by reason of the *batwara*, of his right to suspension of rent for the balance of his holding; (4) that the dispossession of the tenant from the plot having benefited all the landlords by reason of its conversion into *bakasht*, it was not unfair that the bar of suspension of rent should continue to apply to all the plots of the tenant's old holding, in whichever *pattis* they might fall as a result of the *batwara*; and (5) that consequently the defendant must be held entitled to suspension of rent in regard to the dispossessed plot and should be made liable for the rent of that part only of the present holding which did not form part of the old holding. (*Courtney-Terrell, C. J. and Dhavle, J.*) KHUBLAL SINGH *v.* ISHRI PRASAD. **15 Pat. 443=161 I C. 109=8 R.P. 433=17 Pat. L.T. 155=1936 P.W.N. 236=A.I.R. 1937 Pat. 200.**

——**S. 81**—*Order under—If can be challenged in rent suit.*

An order passed by a partition officer while acting under S. 81, exercising the powers of quasi-judicial officer, cannot be challenged by way of defence to a suit for rent in absence of other parties to the partition. It can only be challenged by a suit or proceeding in which all the parties to the partition are parties. 29 C.W. N. 221, Foll. (*Jack, J.*) NABENDRA KISHORE ROY *v.* KERAMAT ALI MUNSHI. **161 I.C. 214=8 R.C. 489=A.I.R. 1936 Cal. 63.**

——**S. 81 (3)**—*Partition of estate—Presumption as to service of notice.*

In case of partition of an estate the presumption is that the proceedings were regularly taken and that partition would not have been carried out unless the regular notices as required by S. 81 (3) have been served (*Jack, J.*) NABENDRA KISHORE ROY *v.* KERAMAT ALI MUNSHI. **161 I.C. 214=8 R.C 489=A.I.R 1936 Cal. 63.**

——**S. 99**—*Applicability—Co-sharers*—Bakasht *lands—Some co-sharers placed in possession for convenience of management—Settlement of raiyats by latter in course of management—Acquisition of occupancy rights—Subsequent partition—Lands allotted by partition to co-sharer subject to tenancy—Right to eject tenants.*

Where all the co-sharers put one of their number in sole possession of a particular portion of the estate, there is an implied authority giving him the right to represent them for all the ordinary details of management, including the settling of raiyats upon estate land for convenience of cultivation. Of course it would extend only to

acts done in good faith for the benefit of the estate. Such settlements made in good faith would not be encumbrances so as to attract the operation of S. 99 of the Estates Partition Act. Certain *bakasht* lands were in possession of some of the co-sharers under a private arrangement made for convenience; the co-sharers in possession gave the defendants a raiyati settlement in 1314 fasli, since when the defendants remained in cultivating possession. The defendants were settled raiyats of the village and the settlement was made in the ordinary course of management of the estate and was a prudent act. There was no protest at any time by the other co-sharers, one of whom was the plaintiff. In 1923, there were partition proceedings under the Estates Partition Act, and on their conclusion in 1927, the different proprietors were given delivery of possession over the *takhtas* or allotments assigned to them respectively. The *bakasht* lands which had been settled with the defendants were allotted to the plaintiff's *takhta* on partition subject to the tenancy. The plaintiff, who was one of the co-sharers, brought a suit for recovery of possession by ejecting the defendants and for mesne profits.

Held, (1) that S. 99 of the Estates Partition Act had no application to the case; (2) that the settlement of the defendants on the land having been made in the ordinary course of management, and having been a prudent act, the defendants had become the tenants of the plaintiff and had acquired occupancy rights under him, and could not be ejected under S. 99 of the Estates Partition Act, otherwise than under the principles governing the Bihar Tenancy Act; (3) that the plaintiff having been allotted the lands in the partition or *batwara* proceedings subject to the tenancy, could not get khas possession in the suit, without in the first instance getting the partition set aside, if at all. (*Agarwala and Meredith, JJ.*) RAJENDRA NARAYAN *v* HARGOBIND 19 Pat. 275=21 Pat. L.T. 185=1940 P.W.N. 212.

——S. 99—*Applicability—Lessee admitted by one co-sharer—Possession for over 12 years continuously—Effect of—Right of other co-sharers to eject.*

In applying the provisions of S. 99 of the Bengal Estates Partition Act, a distinction must be made between occupancy rights which are the creation of statute, and the rights of a lessee or a tenure-holder which are the result of a contract between a co sharer and the person in possession. It is doubtful if after occupancy rights have accrued by 12 years continuous possession, any other co-sharer would be entitled to eject the raiyat or lessee under the provisions of S. 99. (*Courtney-Terrell, C.J. and James, J.*) RAJA RAM RAI *v.* NIRANJAN RAI. 17 Pat. 143=1938 P.W.N. 371 =19 Pat.L.T. 387=175 I.C. 943=11 R.P. 35=4 B.R. 658=A.I.R. 1938 Pat. 297.

——S. 99—Co-sharers landlords—One in exclusive possession—Grant of thika—Settled raiyat of land inducted on to land by thikadar—Subsequent partition—Land allotted to another co-sharer—Suit by latter for ejectment of raiyat—Maintainability—Occupancy rights—Accrual of. *See* B. T. ACT, S. 22. 1940 P.W.N. 221=21 Pat.L.T. 201.

——S. 99—"Encumbrance"—Dispossession by landlords of tenant from one plot in holding—If

encumbrance. *See* BENGAL ESTATES PARTITION ACT, SS. 81 AND 99. 17 Pat.L.T. 155.

——S. 99—*Scope of—If affects accrual of occupancy rights under Bihar Tenancy Act—Settlement of raiyat by co-sharer in possession on behalf of all co-sharers—Effect of—Occupancy rights—Accrual of—If effective after partition.*

S. 99 of the Bengal Estates Partition Act cannot override the provisions of the Bihar Tenancy Act or prevent the accrual of occupancy rights. Where a raiyati settlement is made by a co-sharer in possession in the ordinary course of prudent management, the incidents of a raiyati tenancy will be applicable as against the co-sharers. In cases where it can be held that a co-sharer in possession has an implied authority to induct tenants on land, and does represent the entire body of landlords by virtue of that implied authority, a settlement made by him is binding on all. A tenancy interest is then created under the entire body of landlords and nothing in S. 99 of the Estates Partition Act can prevent the accrual of occupancy rights in appropriate cases which will be effective even after partition. (*Agarwala and Meredith, JJ.*) RAJENDRA NARAIN *v.* HARGOBIND. 19 Pat. 275= 21 Pat.L.T. 185=1940 P.W.N. 212.

——S. 113—*Appeal to Board of Revenue from Commissioner's order directing fresh partition by Collecter—Orders passed on—If* ultra vires—*Suit to declare null and void—Jurisdiction of Civil Court.*

The Board of Revenue is incompetent to entertain and hear an appeal against an order of the Commissioner directing the Collector to make a fresh partition, and it acts *ultra vires* in interfering with the Commissioner's order. The appeal being without jurisdiction all the proceedings from the point when the Board entertains the appeal are void and of no effect. The Civil Court in such a case has jurisdiction to entertain a suit by the aggrieved party and declare the proceedings before the Board of Revenue a nullity. The finality of the orders of the Revenue Courts has effect so long as the acts of such Courts are not *ultra vires* the statute. When they act in excess of their limited jurisdiction, their acts are liable to be scrutinised by the Civil Court and to be set aside. (*D. N. Mitter and Patterson, JJ.*) FATEMA BANOO *v.* KUMAR KAMALA RANJAN ROY. 161 I.C. 744=8 R.C, 547=40 C.W.N. 539=A.I.R. 1936 Cal. 138.

—— S. 113—*Collector confirming partition—Commissioner in appeal remanding case for fresh partition—Appeal to Board of Revenue—Competency—Orders on such appeal—If null and void—Suit in Civil Court to declare void—Maintainability.*

An order made by the Commissioner in an appeal from the Collector's order confirming a partition, sending the case back to the Collector and directing him to make a fresh partition cannot by any stretch of language be regarded as an order "amending" the partition within the meaning of S. 113 (*c*) of the Bengal Estates Partition Act, and is therefore not appealable to the Board of Revenue. The scheme of the Act is that there should be appeals only from final orders made by the Commissioner either confirming or amending the partition and not where he directs a fresh partition. Where the Board entertains and hears such

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an appeal, it acts without jurisdiction and all the proceedings and the order passed by the Board are null and void, and the order can consequently be challenged in a Civil Court. (*D. N. Mitter and Patterson, JJ.*) FATEMA BANOO *v.* KUMAR KAMALA RANJAN ROY. **161 I.C 744=8 R.C. 547=40 C W.N. 539=A.I.R 1936 Cal. 138**

——**S 11**—*Construction and scope—Jurisdiction of Civil Court—When excluded.*

S. 119 of the Bengal Estates Partition Act excludes the jurisdiction of the Civil Court when the question raised before it relates to apportionment of Government Revenue between the separate estates formed out of the parent estate or to the details of partition, but it does not oust the jurisdiction of the Civil Court in matters which involve questions of title or questions of the extent of the plaintiff's interest in the estates. (*Nasim Ali and Henderson, JJ.*) SASI KANTA ACHARJEE CHOUDHURY *v.* RAJENDRA KUMAR CHAKRAVARTY. **40 C.W.N. 112.**

——**S 119**—Objection in partition proceedings disposed of without deciding real point at issue—Declaratory suit. *See* LIMITATION ACT, ARTS. 14 AND 120. **A I R. 1939 Cal. 749.**

——**S 119** - Scope—Partition by Deputy Collector—Finding of no private partition and no separate possession—Suit in Civil Court for declaration of proprietary right over certain specific plots—If barred. *See* BENGAL ESTATES PARTITION ACT, SS. 23 TO 27. **40 C.W.N. 112.**

BENGAL EXCISE ACT (V OF 1919), Ss. 46 and 62—*Accused charged under S. 46 having previous conviction—Summons case procedure—Legality.*

Where the accused who is charged with an offence under S. 46 of the Bengal Excise Act is liable to enhanced punishment under S. 62 of that Act by reason of a previous conviction, and the Magistrate is cognisant of this fact at the commencement of the trial, the proper procedure for him to adopt is that laid down for a warrant case. The irregularity of following the summons case procedure instead of the procedure for a warrant case is not a mere matter of form and would not be cured by S. 537, Cr. P. Code. (*Biswas, J.*) SUFAL GOLUI *v.* EMPEROR. **42 C.W.N. 222=174 I.C 454=10 R.C. 674=39 Cr.L.J. 438=A I.R. 1938 Cal. 205.**

——**S. 63**—*Liquor in Excise and Customs bond.*

The liquor in Excise and Customs bond is not liable to confiscation under any of the provisions of the Bengal Excise Act. (*Bartley and Narsing Rau, JJ.*) GUBBAY *v.* EMPEROR. **188 I.C. 267= 41 Cr L.J. 556=A.I.R. 1940 Cal. 205.**

——**S. 63**—*Order for confiscation—Identity of premises—If material.*

Under S 63 what is material is not identity of premises but identity of the possessor. A.I.R. 1939 Cal 346, Foll (*Bartley and Narsing Rau, JJ.*) GUBBAY *v.* EMPEROR. **188 I.C 267=41 Cr. L J 556=A I R. 1940 Cal 205.**

——**S. 63 (2)**—*Bonded liquor—If liable to confiscation.*

Under S. 63 (2) of the Bengal Excise Act, one quantity of liquor cannot be said to be "had in possession along with or in addition to" another, unless the possessor of both is the same. As liquor in the excise bond and the customs bond is in the dual possession of the Revenue authorities

BENGAL EXCISE ACT (1919), S. 74.

and the party and not in the sole possession of the latter, it is not liable to confiscation under S. 63 (2). (*Bartley and Rau, JJ.*) EZEKIEL EPHRAIM *v.* EMPEROR. **I.L.R (1939) 1 Cal. 549=181 I.C. 955=11 R.C. 875=40 Cr.L J. 608=43 C.W.N. 522=A I R. 1939 Cal. 346.**

——**S. 63 (2)**—*Liquor lawfully had in possession—Liability to confiscation.*

Under S. 63 (2) of the Bengal Excise Act, any liquor lawfully "had in possession along with or in addition to" any liquor liable to confiscation under sub-s. (1), is likewise liable to confiscation. It is immaterial who is the person in possession; all that the sub-section requires is that some person should be in possession at some point of time subsequent to the commission of an excise offence, both of the illicit liquor and also of some licit liquor. The fact that the latter liquor is on different premises is immaterial. The sub-section does not say that the person in possession need be guilty of any offence. (*Bartley and Rau, JJ.*) EZEKIEL EPHRAIM *v* EMPEROR. **I L R (1939) 1 Cal. 549=181 I.C. 955 =11 R.C 875=40 Cr L.J. 608=43 C.W.N 522 =A.I R. 1939 Cal. 346.**

——**S. 64**—*Confiscation of things lying outside territorial limits—Jurisdiction of Magistrate.*

According to S. 64 the Magistrate who tries a case under the Act has power to confiscate anything in Bengal which is liable to confiscation under S. 63, whether it is within or without the district where the case is tried. A.I.R. 1939 Cal. 346, Foll. (*Bartley and Narsing Rau, JJ.*) GUBBAY *v.* EMPEROR. **188 I.C. 267=41 Cr.L.J. 556= A.I.R. 1940 Cal. 205.**

——**S. 64 (1)**—*Confiscation of things lying outside territorial limits—Jurisdiction of Magistrate.*

S. 64 (1) of the Bengal Excise Act contains no territorial limitation. The Magistrate who tries the case has power to order confiscation of anything in Bengal which is liable to confiscation under S. 63, whether it is within or without the district where the case is tried. (*Bartley and Rau, JJ.*) EZEKIEL EPHRAIM *v.* EMPEROR. **I L.R. (1939) 1 Cal. 549=181 I.C. 955=11 R.C. 875= 40 Cr L J. 608=43 C.W.N. 522=A.I.R. 1939 Cal. 346.**

——**S. 64 (1)**—*Confiscation—Omission to give notice to interested parties—Effect.*

The omission to give notice to interested parties before an order of confiscation is made under S. 64 (1) of the Bengal Excise Act, might in ordinary circumstances be fatal to the order. But where facts sufficient for a decision of the question of liability to confiscation are stated by the petitioner himself in his application for revision, and the omission to give the notice has not caused any real prejudice, the Court of revision will not interfere. (*Bartley and Rau, JJ.*) EZEKIEL EPHRAIM *v.* EMPEROR. **I L.R. (1939) 1 Cal. 549=181 I.C 955=11 R.C 875=40 Cr.L.J. 608=43 C.W N 522=A I R 1939 Cal. 346.**

——**Ss 74 and 81**—*Investigation by Excise Authorities—Procedure applicable.*

The provisions contained in Ss. 74 and 81 make the provisions of the Criminal Procedure Code applicable to investigations by Excise Officers. The Bengal Excise Act does not lay down a complete procedure for investigation of offences under the Act and the provisions of Ch. 9 of the

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Act, relating to the procedure in the matter of detection, investigation and other matters including trial of offences. in which Ss 74 and 81 find place, make it clear that it is mainly the procedure laid down in the Criminal Procedure Code that has to be followed in investigations into offences under the Bengal Excise Act. A Magistrate is, therefore, empowered under S. 5, Identification of Prisoners Act, to order a person to be measured and photographed for the purpose of any investigation or proceeding under the Code of Criminal Procedure. (*Guha and Bartley, JJ.*) GUBBAY *v.* EMPEROR. **63 Cal 780=161 I C. 238=8 R C. 499=37 Cr.L J. 438=40 C W.N. 415=1936 Cr.C. 196=A I R. 1936 Cal. 65.**

BENGAL FERRIES ACT (I OF 1885), S. 6 *—Notification under—If confers right to embark or disembark passengers on private property.*

When the Crown grants a ferry and purports to declare the limits within which it is to run, the termini must be on places over which the public may have the right to embark or disembark. The Legislature has not expressed in the Act any intention to convert all lands within such limits into highways. Such conversion would, in effect, amount to confiscation of private property without a corresponding award or compensation and would be tantamount to a declaration in favour of the public of an incorporeal hereditament over private property over which no such right accrued under the ordinary laws of the land. Such words as are contained either in the definition of ferry (S. 5) or the defining of the limits (S. 6) do not express any intention of taking away rights of private individuals or vesting any rights in the public. And unless such intention is very clearly expressed no inference of such intention would be permissible. The land, if it is to be converted into a highway, has to be converted, under the law as it stands either by obtaining a dedication absolute or restricted or by acquisition voluntary or compulsory. By merely calling a piece of land a ferry or a landing stage the Legislature cannot be taken to have affected private rights of individuals. The notification under S. 6, therefore, the whole scope of which is to define the limits of the ferry, taken along with the definition of ferry as including a landing stage, does not confer any right on the owner of a ferry to embark or disembark the passengers and cargo of the ferry so long as the lands to be used as landing stages have not been made into highways by such means as the law allows. (*Derbyshire, C. J. and D N. Mitter, J.*) CHAIRMAN, MIDNAPORE DISTRICT BOARD *v.* MONMOTHANATH MONDAL. **171 I C 815=10 R C. 312=A.I.R. 1937 Cal 289.**

——**Ss 16 and 28**—*Liability under—Carrying of passengers on ferry in contravention of Act—Person liable to punishment—Lessor or lessee.*

Under S. 28 read with S. 16 of the Bengal Ferries Act, the person responsible and liable to conviction is not the person who has leased out the ferry right, but the person who conveys passengers for hire, *i.e*, the former, lessee, thikadar or ghatwala, by whichever name he may be called, who actually convey passengers for hire and collect tolls from passengers so conveyed. (*James and Verma, JJ.*) KHAJA ABDUL GHANI *v.* KING-EMPEROR. **15 Pat. 655=167 I.C. 757=9 R. P. 425=38 Cr L J. 454=3 B R. 328=1936 P.W. N. 880=17 Pat.L T 845=A.I.R. 1937 Pat. 144.**

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—— **S. 28**—Liability under—Conveyance of passengers in contravention of S. 16—Liability to punishment—Lessor of ferry or lessee. *See* BENGAL FERRIES ACT, SS. 16 AND 28. **15 Pat. 655.**

BENGAL FOOD ADULTERATION ACT (VI OF 1919), Ss. 4 and 6—*Mustard oil—Saponification value found excessive—Presumption under S. 4—Rebuttal—Proof required.*

In the case of mustard oil, if the analyst finds that the saponification value is excessive, the presumption under S. 4 of the Bengal Food Adulteration Act that it is not genuine is raised. But if it is proved that none of the common adulterants are present and that different mustard seeds give different saponification value owing to the peculiar properties of the seeds, the presumption is rebutted. An accused person cannot be tied down to any particular method in rebutting the presumption raised against him under S. 4 of the Bengal Food Adulteration Act. In the case of mustard oil, he need not rebut the presumption by following the oil from the mustard seeds throughout the process of manufacture right up to its arrival in his shop and demonstrate that no deleterious substance had been introduced. The presumption is rebutted if the accused calls evidence which satisfies the Court that the article in question is derived exclusively from mustard seeds. Mere proof that none of the common adulterants is present will not rebut the presumption (*Henderson and Khundkar, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* KSHITISH CHANDRA BANERJEE. **I L. R. (1939) 2 Cal 465=184 I C 423=12 R C. 229=43 C.W N. 1030=A I R. 1939 Cal. 667.**

——**Ss 4 and 6**—*Scope of—Powers of Local Government—Presumption arising under S. 4—Applicability*

Per *Henderson, J.* Under S. 4 of the Bengal Food Adulteration Act the local Government has power to declare the normal constituents of the articles of food specified in S. 6. The two sections are really dealing with different matters. The former is concerned merely with the constituents of different articles of food and the latter with the conditions under which they may be sold. It follows, therefore, that the presumption arising under S. 4 and the rules made thereunder would apply in respect of those articles of which the normal constituents have actually been declared. But in the case of ghee the notification is more severe than the conditions laid down in S. 6 and the presumption therefore would be of very little help to the prosecution. (*Henderson and Khundkar, JJ.*) NOWRANGA LAL *v.* CHAIRMAN. MIDNAPORE MUNICIPALITY. **I.L.R. (1940) 2 Cal. 82=44 C W.N 615=A.I.R. 1940 Cal 324.**

—— **Ss 6 (1) and 21**—*Offence under—Ghee sold not fulfilling conditions but unadulterated—Presumption arising under S. 4—Whether applies.*

If a person sells an article of food specified in S. 6 of the Bengal Food Adulteration Act which does not fulfil the conditions laid down in that section or such conditions as are prescribed by the Local Government, he is guilty of an offence under S. 6 (1) read with S. 21 of the Act. In the case of ghee the Local Government has by a notification under S. 6 fixed a standard of quality, and in so doing has prescribed conditions within the

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meaning of S. 6. If the ghee sold does not comply with the requirements of the notification, an offence is committed whether or not the ghee is adulterated. S. 6 enacts an absolute prohibition and renders any presumption arising under S 4 and the rules made thereunder that the ghee is not genuine or is injurious to health entirely superfluous. This anomaly does not arise from any necessary conflict or overlapping as between Ss. 4 and 6, but arises from the manner in which the rules framed under these two sections are expressed. In the presence of the essential and irrebuttable condition prescribed in respect of ghee by the notification under S. 6, it was unnecessary for the Local Government to make the declaration under S. 4. (*Henderson and Khundkar, JJ.*) NOWRANGA LAL *v* CHAIRMAN, MIDNAPORE MUNICIPALITY. **I.L.R. (1940) 2 Cal. 82=44 C.W.N 615=A.I.R. 1940 Cal. 324.**

——**S. 6 (1) (e)**—*Offence under—Magistrate acquitting accused and directing return of tins of oil to him—Order of acquittal not appealed from—Power of Sessions Judge on appeal to direct forfeiture of tins if report of public analyst is against accused.*

Where in a case under S. 6 (1) (*e*) of the Bengal Food Adulteration Act the Magistrate acquitted the accused and directed the return of the tins of mustard oil to him, and the order of acquittal was not appealed from, the Sessions Judge cannot, on appeal, proceed on the basis that the order of acquittal is wrong and direct the forfeiture of the tins in case the report of the public analyst is against the accused. (*Guha and Lethbridge, JJ.*) KISHAN LAL *v.* SASHI BHUSAN. **42 C.W.N. 220.**

——**S. 6 (4)**—*Ghee in transit—Presumption of storing for sale—If can be drawn.*

The fact that the ghee was in a cart for the purpose of being carried and was not deposited in any place for the purpose of sale, in other words, that it was in transit, need not militate against the presumption of storing for sale. (*Biswas, J.*) RAM CHARITA RAM BHAKAT *v.* DISTRICT BOARD OF RAJSHAHI. **I.L.R (1938) 1 Cal. 420=172 I C 869=10 R C 469=39 Cr.L.J 252=41 C.W.N. 1213=A.I.R. 1937 Cal. 710.**

——**S. 6 (4)**—*'Habit of storing ghee for sale—Proof.*

Where the evidence showed that the accused had a very big shop dealing in ghee and was getting consignments of ghee from other places but there was not a word in the evidence as to what the consignments were intended for, nor as to what used to be done at the accused's shop, it cannot be said that the only inference that can be drawn from the evidence is that the accused is in the habit of storing ghee for sale. (*Biswas, J.*) RAM CHARITA RAM BHAKAT *v.* DISTRICT BOARD OF RAJSHAHI. **I.L.R. (1938) 1 Cal. 420=172 I C. 869=10 R C 469=39 Cr L.J. 252=41 C.W.N 1213=A I R. 1937 Cal. 710.**

——**S. 6(4)**—*'Possession'—If includes constructive possession.*

'Possession' in S. 6 (4) of the Bengal Food Adulteration Act means actual physical possession and does not include constructive possession. Where, therefore, at the time when a consignment of adulterated mustard oil was seized by the Sanitary Inspector it was merely in transit from the railway station to the shop of the accused and

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was, then in the possession of the accused's carter, the presumption raised by S 6 (4) of the Act can have no application. (*Edgley, J.*) SACHI NANDAN PIRI *v.* THE CHAIRMAN, MIDNAPORE DISTRICT BOARD. **I.L.R. (1940) 1 Cal. 333=188 I.C 398=41 Cr.L.J. 582=44 C.W.N. 173=A I.R. 1940 Cal. 213.**

——**S. 6 (4)**—*Presumption.*

The word 'possession' in S. 6 (4) of the Bengal Food Adulteration Act must be given a strict interpretation, and cannot be extended to include "constructive possession." It means only actual possession. Accordingly the presumption under that sub-section cannot be invoked against the master where the articles mentioned therein are seized from the possession of his servant while they are in transit to him (*Biswas, J.*) RAM CHARITARAM BHAKAT *v* DISTRICT BOARD OF RAJSHAHI. **I.L.R. (1938) 1 Cal. 420=172 I.C. 869=10 R.C. 469=39 Cr.L.J. 252=41 C.W.N. 1213=A.I.R. 1937 Cal. 710.**

——**Ss. 9 and 10**—*Sanitary Inspector not specially authorized under S. 10—Powers of.*

A Sanitary Inspector of a Municipality took some samples from a ghee shop and sent them to public analyst. It was proved that Sanitary Inspector was not specially authorized under S. 10, Bengal Food Adulteration Act, to act under Ss. 10 and 12 of the same Act.

Held, that Sanitary Inspector could take the samples and send them to public analyst for examination by the provision of the Act, as a private individual under S. 9. (*Henderson and Mitter, JJ.*) MANINDRA NATH BANERJEE *v.* JYOTISH CHANDRA DATTA **I.L.R. (1937) 1 Cal. 765=169 I.C 251=9 R.C. 910=38 Cr. L.J. 745=A.I.R 1937 Cal. 60.**

——**S. 11**—*Compliance with—Notification of intention—Form of.*

The person buying the articles is bound by the statute to notify to the seller his intention to have the article analysed. But no particular form of words is required, nor even any words at all. What is necessary is that the seller must know that the samples are to be taken for the purpose of analysis so that he may see that the samples are to be fairly taken. (*Henderson and Mitter, JJ.*) MANINDRA NATH BANERJEE *v.* JYOTISH CHANDRA DATTA. **I.L.R. (1937) 1 Cal. 765=169 I.C. 251=9 R,C. 910=38 Cr.L.J. 745=A.I.R. 1937 Cal 60.**

——**S. 13 (2)**—*Sample taken from one of several tins of a consignment—Order forfeiting entire consignment—Legality.*

Where the several tins of a consignment were of the same brand and formed part of one consignment, a forfeiture order under S. 13 (2) of the Act with regard to the whole of the consignment is quite proper, although a sample was taken from one tin only. (*Edgley, J.*) SACHI NANDAN PIRI *v* THE CHAIRMAN, MIDNAPORE DISTRICT BOARD. **I.L.R. (1940) 1 Cal. 333=188 I.C. 398=41 Cr.L J. 582=44 C.W.N. 173=A.I R. 1940 Cal 213.**

——**S. 13 (2)**—*Some out of several tins seized from accused found to contain adulterated ghee—Order of forfeiture in respect of all tins—Appellate Court setting aside that order and directing samples from rest of tins to be sent to Public Analyst—Legality.*

BENG. FOOD ADULTRN. ACT (1919), S. 14.

Fifteen tins of ghee were seized from the accused and the ghee in two of them was found to be adulterated. The Magistrate convicted the accused under S. 216 (1) of the Bengal Food Adulteration Act and passed an order under S. 13 (2) of that Act, directing that all the 15 tins of ghee should be forfeited. On appeal, the Sessions Judge upheld that conviction but set aside the order of forfeiture in respect of 13 tins. He then ordered that samples should be taken from them and sent to the Public Analyst after which those found to be adulterated ghee would be destroyed.

Held, that when the Sessions Judge set aside the order passed with regard to 13 tins of ghee, he should have made a direction to return the tins to the accused, (*Henderson, J.*) BENARSI LAL *v.* CHAIRMAN, ASANSOL MUNICIPALITY. **42 C.W.N 731.**

——**S. 14 (2)**—*Article of food sent for analysis before case—Costs of analysis—Power of Court to order their payment.*

S. 14 (2) of the Bengal Food Adulteration Act applies only to cases in which an article of food is sent for analysis under an order of the Court before which a case under the Act is pending. It does not apply to a case in which such article was sent to the Chemical Examiner by the Health Officer of the Municipality before the institution of the case and without the intervention of any Court. In such a case, therefore, the Court cannot order for payment of the costs of analysis under S. 14 (2) of the Act. (*Patterson, J.*) ATUL CHANDRA MODAK *v.* EMPEROR. **42 C.W N. 760.**

——**S. 20**—*Rule-making power of Local Government—Scope of.*

Henderson, J.—Under S. 20 of the Bengal Food Adulteration Act, the Local Government may make rules determining what deficiencies in or additions to any article of food, the normal constituents of which have been declared under S. 4, shall raise the presumption that such article is not genuine or is injurious to health. The essential thing, therefore, is that the rules should refer to deficiencies in or additions to any article of food, that is to say, they must lay down the absence of something or the presence of something. They cannot lay down a new rule of evidence to the effect that if certain chemical results are not obtained there is to be a presumption that the article is not genuine. The presumption in the Act is a rule of evidence made by S. 4 itself. It is not open to the Local Government to make a further rule of evidence under S. 20. (*Henderson and Khundkar, JJ.*) NOWRANGA LAL *v.* CHAIRMAN, MIDNAPORE MUNICIPALITY. **I.L.R. (1940) 2 Cal. 82=44 C.W.N. 615=A.I.R. 1940 Cal 324**

BENGAL GENERAL CLAUSES ACT (I OF 1899), S. 8—*Scope and applicability.*

S. 8 of the Bengal General Clauses Act does not contemplate a case where the procedure only is changed, leaving the rights of the parties intact. It contemplates a case where the repealing enactment repeals a substantive right as well as the procedure by which it was enforced, and in such cases if the rights are saved in respect of transactions completed prior to the repealing of the statute, the remedies in respect of such rights, as laid down in the repealed statute are also saved and the litigant can institute or continue proceedings in the same way for the enforcement

BENG. LANDLORD AND TENANT PROCEDURE ACT (1869).

of his rights as if the repealing Act had not come into force. (*Mukherjea and Akram, JJ.*) DHIRENDRA NATH ROY *v.* IJJETALI MIAH. **44 C.W.N. 729=A.I.R 1940 Cal. 423.**

——**S 8 (e)**—*"Instituted, continued or enforced"—Interpretation.*

The words "instituted, continued or enforced" in S 8 (*e*) of the Bengal General Clauses Act are to be taken with each of the words "investigation legal proceeding or remedy" so far as they seem to be appropriate. (*Mukherjea and Akram, JJ.*) DHIRENDRA NATH ROY *v.* IJJETALI MIAH. **44 C.W.N. 729=A.I.R. 1940 Cal. 423.**

——**S. 25**—Applicability—Extension of Act to area by Notification—Act repealed by later Act—Later Act not extended to area—Effect. *See* CALCUTTA HACKNEY CARRIAGE ACT (II OF 1891), S. 45. **40 C.W.N. 1353.**

——**S 25**—Applicability. *See* CALCUTTA HACKNEY CARRIAGE ACT (I OF 1919), S. 60. **40 C.W.N. 1353=A.I.R. 1936 Cal. 707.**

BENGAL IRRIGATION ACT (III OF 1876), Ss 47, 59 and 63—*Right to sue for rent for use of channel—Registered owner—Suit by—Plea of ownership in some one else—Maintainability.*

Under the Bengal Irrigation Act, no one other than a registered owner who has been awarded by the canal department the right to realise rent can sue for rent for use of the channels; and when such an owner brings a suit, the defendant cannot plead that the rent was due to some one else also. (*Khaja Mahammad Noor, J.*) DEONANDAN PANDEY *v.* RAM PIRITA RAI. **181 I.C. 844=5 B R. 683=11 R.P. 644=19 Pat. L.T. 897=A.I.R. 1939 Pat. 188.**

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII OF 1869)—*Agricultural lease—Forfeiture clause—Validity—Termination of lease on forfeiture—Form of notice.*

Act VIII of 1869 leaves landlords and agricultural tenants free to regulate their rights by contract. There is nothing in that Act which would render invalid a forfeiture clause in an agricultural lease. It cannot be contended that a forfeiture could be availed of by the landlord, in spite of a contract to the contrary contained in a written lease, only at the end of the agricultural year. This being the position, no particular form of notice is required under the law to terminate a tenancy forfeited according to a covenant contained in the lease. If the landlord intimates to the tenant before suit his election to determine the lease, there is a valid termination of the lease. (*Mitter and Biswas, JJ.*) PRAVAT CHANDRA SYAM *v.* BENGAL CENTRAL BANK, LTD. **I.L.R. (1938) 2 Cal. 434=42 C.W.N. 761=68 C.L.J. 519=A.I.R. 1938 Cal. 589.**

——*Occupancy rights—Grant by landlord to tenant—Competency—Bengal Tenancy Act.*

Occupancy rights are creatures of statutes, or of custom adopted by statute, only in the sense that the acquisition of such rights by *ryots* does not depend upon the bounty or gift of the landlord, but they can be acquired against his will. But this does not imply that the landlord cannot by grant confer on his tenant rights exactly similar to rights of occupancy. Where in a locality governed by the Bengal Landlord and Tenant Procedure Act, a landlord inducts a tenant on this

land and grants him a *potta*, giving him *tota* rights therein and rights of occupancy, the tenant gets a permanent right to occupy the land, and the landlord cannot eject him by giving him a notice to quit.

Obiter.—It is competent to a landlord by a grant to confer on a person inducted by him on the land, rights exactly similar to rights of occupancy even in a village in Bengal where the Bengal Tenancy Act is in force. (*Guha and Bartley, JJ.*) JOGENDRA NARAYAN DHAR *v.* ASKARULLA. **I.L.R. (1937) 1 Cal. 455=169 I C 700=10 R.C. 26=40 C.W.N. 1301=A.I R. 1937 Cal. 27.**

——Ss. 38 and 39—*Decision of Collector—Second appeal.*

No second appeal lies from a decision by the Collector under S. 38 of the Landlord and Tenant Procedure Act. (*Henderson and Sen, JJ.*) NAJMUL ISLAM *v.* SASHI BHUSAN. **44 C.W N. 753**

BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION (XVII OF 1806), Ss. 7 and 8—*Applicability—Some portion of property with mortgagor and another with mortgagee—Foreclosure—Remedy.*

Where a portion of the property is in possession of the mortgagors, whereas another portion of the property is in possession of the mortgagee, it is impossible to apply the terms of the Regulation or to take action for foreclosure under it; the only remedy provided is the general remedy given by O 34, R. 2, C P. Code. (*Tek Chand and Dalip Singh, JJ.*) AHMAD SAYYEED KHAN *v.* NARAIN SINGH. **167 I.C 681=9 R.L. 517=A.I. R. 1936 Lah. 982.**

——Ss. 7 and 8—*Proceedings under, carried out—Foreclosure, if automatic.*

Once proceedings have been taken under the Bengal Regulation and they have been duly carried out, foreclosure takes place automatically and title passes by virtue of the clause in the mortgage deed to the mortgagee. Any suit brought thereafter is not a suit for foreclosure under the Civil Procedure Code, but is a suit for possession as owner. (*Tek Chand and Dalip Singh, JJ.*) AHMAD SAYYEED KHAN *v.* NARAIN SINGH. **167 I.C. 681=9 R.L. 517=A.I R. 1936 Lah. 982.**

——S. 8—*Regularity of proceedings—Burden of proof.*

The Courts have been very stringent in the matter of the application of Regulation XVII of 1806, and a mortgagee who relies upon it is bound to show that the proceedings were quite in accordance with S. 8 of that Regulation. (*Din Mohammad, J.*) AHSAN ELAHI *v.* ALLA-UD-DIN. **179 I.C. 752=11 R L. 622=40 P.L.R. 798=A.I. R. 1938 Lah. 809.**

BENGAL LAND REGISTRATION ACT (VII OF 1876)—*Scope and object of*—Debutter *estate*—Shebaits *opening separate accounts in their names in respect of shares held as* shebaits—*If* ultra vires.

The whole object of the system of land registration under the Land Registration Act as well as the Regulations preceding it, has been to keep a proper record of possessory titles in landed properties so as to have a knowledge of the persons who are in actual possession and are responsible for the discharge of their duties. The object has never been to make an inquisition into titles either in revenue paying or revenue-free properties, but to identify the individuals on whom the legislature has imposed duties and obligation in virtue of their being in possession of land as proprietors. In the case of *debutter* property, where the deity is the property of the estate, it is competent to the *shebaits* of the deity to open separate accounts in their own names in respect of shares in the Touzi or estate to which they are entitled as *shebaits*. Such opening of separate accounts is not *ultra vires*, although the entire estate is the property of deity. (*Mukherji and S.K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal. 629=40 C.W N. 271.**

——S. 55—*Reference to Civil Court—Irregular exercise of jurisdiction by Deputy Collector—Jurisdiction of Civil Court—If affected.*

S. 55 of Bengal Land Registration Act expressly gives the Land Registration Deputy Collector jurisdiction to make a reference to the Civil Court, and however illegal or irregular the exercise of that jurisdiction may have been, that does not affect the jurisdiction of the Civil Court to entertain the matter referred to it. (*Wort, J.*) SHREE SHREE NARAYAN THAKUR *v.* KAMALRANI DEBI **159 I C. 821=8 R.P. 310=17 Pat.L.T. 414=A.I.R. 1936 Pat. 167.**

——Ss. 57 and 84—*Decision in mutation proceeding—If conclusive as to possession.*

The plaintiff brought a suit against the defendant for possession of certain lands on the ground that they were purchased by him out of his own funds. The plaintiff and the defendant were members of a Mahomedan family. The lands were mutated in the plaintiff's name alone. The defendant contended that he got them on partition but it was found that he never tried to get them mutated in his own name. The lands were sold in 1921 by the defendant to another who applied in 1932 for mutation of his own name in the record of rights. But his application was rejected by the Sub-Divisional Officer in 1932. He however got his name entered in 1933 in the settlement records.

Held, that the decision of the Sub-Divisional Officer in the mutation proceedings of 1932 was conclusive as to the plaintiff's possession of the lands in suit under S. 57. (*McNair, J.*) BEROJULLAH SARKAR *v.* AYATULLAH AKAND. **176 I C. 706=11 R.C. 159=66 C.L.J 455=A.I.R. 1938 Cal 117.**

——S. 74—*Suit under — Apportionment of revenue—Duty of Civil Court—Basis of apportionment.*

It is incumbent upon the Civil Court deciding a suit contemplated by S. 74 of the Land Registration Act to determine the plaintiff's share of revenue on the materials placed before it, when no agreement among the proprietors on the point is admitted or found. In determining the revenue payable by him, the Civil Court is not bound to have a survey of the assets. It should determine the revenue payable by a sharer by following a method which appears to it to be reasonable and proper under the circumstances. If there is no evidence that the quality of lands varies from place to place within the *Tauzi*, the allotment of revenue on the basis of area is not improper or illegal (*M C. Ghose and Mukherjea, JJ.*) BENGAL YOUNG MEN'S CO OPERATIVE SOCIETY CO., LTD *v.* NRITYA GOPAL GUHA. **I.L.R. (1937) 1 Cal. 665=**

BENG. LAND REGN. ACT (1876), S. 74.

171 I.C. 237=10 R.C 255=66 C L J. 180=41 C. W.N. 281=A.I R. 1937 Cal. 159.

——S. 74—*Suit under—Claim for refund of excess payments of revenue—Whether can be included.*

It is true that a suit instituted in pursuance of an order made under S 74, Land Registration Act, does not ordinarily contemplate a refund of money on account of excess payments of revenue made by the plaintiff. But there is nothing wrong in instituting a suit of a more comprehensive character, in which relief of an incidental nature which flows from the main relief, is claimed by parties, on payment of proper court-fees. (*M. C. Ghose and Mukherjea, JJ.*) BENGAL YOUNG MEN'S CO-OPERATIVE SOCIETY CO., LTD. *v.* NRITYA GOPAL GUHA. **I L R. (1937) 1 Cal. 665=171 I. C 237=10 R C. 255=66 C.L.J. 180=41 C.W.N. 281=A.I R. 1937 Cal. 159.**

——S. 78—*Co-sharer in possession of larger share in some mauzas of estate and less share in others—Suit for rent by—If barred.*

A co-sharer who by an amicable arrangement among the co sharers has been put in possession of a larger share than his registered share in some mauzas of an estate and a less share or no share in others, is not debarred from obtaining a decree for the rent due to him, so long as the total interest which he holds in all the mauzas represents his registered interest in the entire estate. (*Rowland, J.*) LAL BEHARI SINGH *v.* MAHABIR MAHTON. **163 I C 522=9 R.P. 33=1936 P.W.N 314=A.I.R. 1936 Pat. 414.**

——S. 78—*Scope and effect of—Entry in Collector's Register—Evidentiary value as regards possession of property.*

The registers maintained by the Collector under the Land Registration Act purport to be a record of possession of the persons whose names are there entered. S. 78 of the Act bars a suit for rent by a person whose name is not entered in the register. When this statutory provision recognizes the person whose name is entered in the register as the person exclusively entitled to recover rent the entries in the register must be held to afford evidence that that person whose name appears in the register is the person in possession of the property. (*James and Agarwala, JJ.*) EKRAM HUSSAIN *v.* ALI HUSSAIN. **17 Pat. L.T. 423.**

——S. 78—*Scope and effect of—If bars right to rent—Suit within time—Subsequent registration after limitation—If bars claim.*

S. 78 of the Bengal Land Registration Act merely puts an impediment in the way of the proprietor realising the rent until he has complied with the law by obtaining registration of his name as a proprietor. It does not take away his right to recover the rent. The right to the rent of an estate being the proprietor, though not registered, the section does not take it away. When a suit has been instituted within the period of limitation, the fact that the registration is effected only subsequently and beyond the period of limitation will not make the claim in the suit time barred. The section does not bar the right to sue if the rent is due; its only effect is that the liability for rent cannot be enforced in the absence of registration. (*Fazl Ali and Chatterji, JJ.*) DOMAN SAHU *v.* GANGU NAYEK. **185 I.C. 638=**

BENG. LAND REV. ASSESS. REGL. (1819).

1940 P.W.N 566=12 R P. 404=21 Pat L T. 165 =6 B.R. 229=A.I R. 1940 Pat. 300.

——S 78—*Unregistered mortgagee—If can sue for rent.*

S. 78 precludes unregistered mortgagees from suing for rent. (*Wort and Rowland, JJ.*) DILDAR HUSSAIN *v.* SADDIQ. **172 I C. 935=10 R.P. 366= 1938 P.W N. 15=4 B R. 206=18 Pat.L.T. 925= A I.R 1938 Pat. 35.**

——Ss. 78 and 81 — *Applicability—Contract between plaintiffs and defendants' assignors—Defendants notifying plaintiffs of assignment and offering to be bound by contract and tendering rent—Right to recover rent—Non-registration of plaintiffs' name—If a bar.*

When there is a contract between the plaintiffs and the assignors of the defendants, and the defendants after taking assignment of the contract give notice to the plaintiffs stating that they were henceforth bound by the contract, actually making a tender of rent, it cannot be said that the relationship is not created by a written contract to which each have become a party. S. 81 of the Bengal Land Registration Act applies to such a case, and S 78 of the Act is no bar to the plaintiff suing to recover rent on the ground of non registration of the plaintiffs' name. (*James and Rowland, JJ.*) DEONANDAN PRASAD *v.* GIRDHAR. **182 I C. 863=5 B.R 839=12 R.P. 82=20 Pat.L.T. 697=1939 P W.N. 120=A.I.R. 1939 Pat. 272.**

——S. 79—*Burden of proof—Bihar Tenancy Act, Ss. 60 and 72.*

A defendant in a suit for rent, who claims indemnity under S. 79 of the Bengal Land Registration Act and under Ss. 60 and 72 of the Bihar Tenancy Act, must prove that he had in fact paid rent to the proprietor subsequent to the expiry of the term of *thica* or lease (*Agarwala, J.*) BACHU NARAIN SINGH *v.* MAHOMED UMROO. **21 Pat.L.T. 336.**

——S. 81—*"Contract"—If must be between parties themselves—Contract by predecessor-in title of plaintiff—Right to realise rent on basis of.*

The contract referred to in S. 81 of the Bengal Land Registration Act need not be a contract between the parties themselves. It includes a contract entered into between the predecessors of the parties. There is no reason why the contract of the predecessors of the parties by which their successors are bound should not have exactly the same effect as the contract between the parties. Therefore, a plaintiff, whose name is not recorded in the Land Registration Register can realise rent from a tenant by virtue of a contract between his predecessor-in-title and the predecessor-in-title of the tenant. (*Jack, J.*) SATYENDRA NATH MONDOL *v.* NANDALAL CHOUDHURY. **40 C. W.N 588.**

BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION (II OF 1819)—Debuttar *land resumed by Government—Land, if continues to be* debuttar *after resumption.*

Where land which was *debuttar* was resumed by Government under Regulation II of 1819, it does not necessarily follow that the tenancy is the same after the resumption and that the land continues to remain *debuttar*. (*Jack, J.*) GOPI MOHAN JEO THAKUR *v.* BEPIN BEHARI BHAKAT.

BENG. LAND REV. ASSESS. REGL. (1819), S. 3.

173 I.C. 358=10 R.C. 507=65 C.L.J. 325=A.I.R. 1937 Cal. 371.

——**S. 3**—Scope—Resumption proceedings—Intention and object of—Invalid Lakhiraj—Position of holders on resumption. *See* BENGAL REVENUE FREE LANDS (NON-BADSHAHI GRANTS) REGULATION, SS. 4, 5 AND 6. **63 C L J 593**

BENGAL LAND REVENUE ASSESSMENT (RESUMED) REGULATION (III OF 1828), S. 13—*Government granting lands in Sunderbans area—Government if a 'landlord'—Demand described as 'revenue', if only 'rent'—Grantee, if can claim abatement of rent in case of diluvion—B. T. Act, S. 52.*

By the force of S. 13 of the Regulation III of 1828 alone, the state does not become a 'landlord' as defined in the Bengal Tenancy Act, when it grants to a person a tract of the Sunderbans forest. A grant by Government of lands in the Sunderbans area in favour of a person under S. 13 of the Regulation, does not create as between the Government and the grantee, the jural relationship of 'landlord' and 'tenant' and the Government demand described as 'revenue' in the grant cannot be construed to mean 'rent'. Hence in respect of such a land a grantee cannot claim abatement of rent under S. 52 of the Bengal Tenancy Act on account of some portion of his lands being diluviated. (*Mitter and Biswas, JJ.*) AMBUJ BASHINI CHOWDHURANI *v.* SECRETARY OF STATE. **I.L.R. (1938) 2 Cal 1=182 I.C. 121=12 R.C. 5=42 C.W.N. 239=A.I.R. 1938 Cal 229.**

——**S. 13**—*Grant of waste land in Sunderbans to lotdar under Waste Land Rules—Effect of—Part of grant diluviated—Claim for abatement under S. 52, B. T. Act—If sustainable.*

The right of property in the Sunderbans claimed and declared to be vested in the State by S. 13, Bengal Land Revenue Assessment Regulation (III of 1828), is not of the same category as the right of property vested in a private person which may in a sense be regarded as a derivative right. The right of property so asserted in the State in the said section is the right of property in Sovereign by reason of conquest. Such proprietary right in the Government was not of the same class as its property right in what are technically known as khas mehals, where its position is that of a private proprietor. By the force of S. 13 of the Regulation III of 1828 alone, the State does not therefore become a 'landlord' as defined in the Bengal Tenancy Act, when it grants to a person a tract of the Sunderban forest. If the terms of the actual grant or assignment make it a landlord, that is, another matter, for the State can also grant leases of its property in such a capacity. A lotdar of the Sunderbans was granted a large block of waste land under the Waste Lands Rules of 1853. The potta conferred in terms a "proprietary right in the grant" on the grantee, his heirs, executors and assigns. It gave the grantee a right to engage with Government on conditions applicable to owners of temporarily settled estates. The grant was for a term of 99 years, giving the grantee the right to have the lands measured once and only once between the 20th and 30th year of the grant. The adjustment of the Government demand, which was termed 'revenue' on the results of the said measurements was to be the only adjustment during the currency of the term of 99 years. The grant was included

BENG. LAND REV. SALES ACT (1859), S. 2.

in the Register A maintained under the Land Registration Act as Touzi. The lotdar claimed abatement of the amount payable by him to the Government under his engagement, on account of some portion of his grant being diluviated under the provisions of S. 52, B. T. Act.

Held, that the grant was an 'estate' as defined in S. 3 (4), B. T. Act, and the plaintiff was its proprietor as defined in S. 3 (11), B. T. Act. The relationship between the Government and the grantee not being that of a landlord and tenant, the claim for abatement was not sustainable in Civil Court as what was payable by him was revenue and not rent.

Held also (*obiter*) that the Crown Grants Act applied to grants by Government of Sundarban lands. The Crown had unfettered discretion to impose any condition, limitation or restriction in its grants and the rights, privileges and obligations of the grantee were regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law. The grant in suit assuming to be a lease was against the right conferred by S. 52 (2), B. T. Act, which must consequently give way in view of the provisions of the Crown Grants Act. (*R. C. Mitter and Biswas, JJ.*) SURJA KANTA ROY CHOUDHURY *v.* SECRETARY OF STATE. **I.L.R. (1938) 2 Cal. 1=182 I.C. 121=12 R.C. 5=42 C.W.N. 239=A.I.R. 1938 Cal 229.**

BENGAL LAND REVENUE SALES ACT (XI OF 1859)—*Procedure under—Applicability*—Raiyati *holding in Government khas mahal—Sales of, for arrears of revenue.*

A *raiyati* holding in a Government khas mahal can properly be sold for arrears of revenue under the same procedure as under Act XI of 1859 (*S. K. Ghose and Patterson, JJ.*) MOHAMMAD ESLAM *v.* ANIMESH CHANDRA SEN. **43 C.W.N. 46.**

——*Sale for arrears of revenue—Rights of purchaser—Avoidance of intermediate tenures and encumbrances.*

So far as the legal position of a purchaser at a revenue sale is concerned what passes to such a purchaser in law is the interest of the Crown subject to the payment of the Government assessment and he is remitted to all the rights possessed by the original settlor at the date of the settlement and may take advantage of that position to sweep away or get rid of all the intermediate tenures and encumbrances created by the preceding zamindar since that date. (*Wort and Fazl Ali, JJ.*) KAMESHAR SINGH BAHADUR *v.* RAMDHARI MANDAL. **168 I.C. 281=9 R.P. 472=3 B.R. 399=A.I.R. 1937 Pat 88.**

——**Ss. 2 and 3**—*Notice to proprietor under S. 94, Estates Partition Act—No separate engagement by him*—Kists *mentioned in notice—If* kist *days or latest days of payment.*

Where the notice served on the proprietor of a separated estate under S. 94 of the Estates Partition Act mentions that the revenue of such estate is payable in two *kists*, January and March, and the proprietor does not enter into a separate engagement thereafter, the only possible interpretation of the notice is that the January and March *kists* are the *kist* days referred to under S. 2 of Act XI of 1859, and not the latest days of payment under S. 3 of that Act. (*Henderson and Latif ur Rahman, JJ.*) MANINDRA CHANDRA SEN

BENG. LAND REV. SALES ACT (1859), S. 2.

v. SHAMSUL HUQ MUKHTEAR. **I.L.R. (1939) 2 Cal. 157=186 I.C. 134=12 R.C. 446=A.I.R. 1940 Cal. 17.**

——Ss. 2 and 3—*12th January and 28th March fixed in tauzi ledger as latest dates in each year for payment of arrears of land revenue—Sum demanded as payable in respect of January kist not paid before 12th January—Sale held after 12th January—Validity.*

The expression 'kist', as explained in the Tauzi Manual issued by the Board of Revenue, Bengal, means the period between one latest day for payment of arrears of revenue and the next, and is not used in the restricted meaning assigned to it in S. 2 of the Act. Thus, where in pursuance of S. 3, the Board of Revenue has, in tauzi ledger, fixed for an estate paying an annual revenue, 12th January and 28th March in each year as the latest dates, on or before which, an arrear of land revenue must be paid, the expression "January kist" means the period beginning on 29th September and ending on 12th January, and the "kist day" means the latest day of payment on which that period expires, that is 12th January. Hence where a sum is demanded as payable in respect of January kist and is not paid on or before 12th January, the date fixed for the payment of arrears the estate becomes liable to sale, and the sale held on 22nd March after the latest date for payment of arrears, is within the jurisdiction of the Collector. (*Sir Shadi Lal*) DINABANDHU *v.* ASHUTOSH. **65 I.A 380=I.L.R. (1938) 2 Cal 665=32 S.L.R 931=19 Pat.L.T. 705=176 I.C. 881=42 C. W N. 1245=1938 P.W N. 715=11 R P.C. 74=1938 A L.R. 736=4 B.R. 832=68 C.L J. 275=1938 O.L.R. 384=A.I R. 1938 P.C. 248=(1938) 2 M.L J. 734 (P.C.).**

——Ss 2, 3 and 33—*'Arrear of Revenue'—Determination—Factors to be taken note of.*

It is necessary to find out three factors in cases where a question arises as to whether there was any arrear of land revenue, first the date of payment of instalment in accordance with the lease, secondly the date on which an instalment remaining unpaid would be an arrear of revenue in accordance with S. 2, Bengal Land Revenue Sales Act, and thirdly the latest date of payment as fixed by the Board of Revenue in accordance with S. 3 of the Act. The kist dates on the Touji Ledger are really the latest dates of payment as fixed by the Board of Revenue, but it does not follow that they are also the latest dates of payment in accordance with the Settlement. (*S.K. Ghose and Patterson, JJ.*) MAKBUL ALI CHOWDHURY *v.* AMRITA LAL GHOSE. **174 I.C. 698=10 R.C. 709=A I R 1937 Cal 703.**

——Ss. 2 and 3—*Construction*—Kistbandi *dates—Meaning of*—Kist *dates under S.2—If* kistbandi *—Dates fixed in June, September, January and March—If* kistbandis *or latest dates of payment.*

It is well-known that in Bihar the original *kistbandis* fixed under the engagements entered into with the proprietors for payment of the Government revenue were almost invariably according to *Fasli* era and the four dates in June, September, January and March fixed, for the payment of the Government revenue are the latest dates of payment determined by the Board of Revenue under S. 3 of the Revenue Sales Act and not *kistbandi* dates of the *Fasli* era. Where the original

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kistbandi under S. 2 of the Act is unknown and forgotten, the latest dates fixed under S. 3 are properly known as *kist* dates. They are not *kistbandi* dates as provided by S. 2 but only the latest dates of payment as fixed by the Board of Revenue under S 3. *Kistbandi* dates of the *Fasli* era under S. 2 are usually eleven or twelve while latest days of payment under S. 3 are usually the four dates in the months of June, September, January and March. These latter are shown as instalment dates in the *Tauzi* ledger. In the case of estates where the annual revenue is a small amount, there would be only two, instead of the four, latest days of payment. (*Macpherson and Khaja Mohammad Noor, JJ.*) NANAK PRASAD SAHU *v.* MT. KASEDA KUMARI. **15 Pat. 272=162 I.C. 1004=8 R.P. 604=16 Pat.L.T. 915=A.I.R. 1936 Pat. 260.**

——Ss. 2, 3 and 5—*Revenue when becomes arrear—Jurisdiction of Collector to sell*—Kistbandi *and* kist*—Non-payment of revenue on last day of payment—Liability to sale—When arises.*

Though normally, as a rule, the *kistbandis* are fixed according to the *Fasli* era under the engagements with the proprietors of the estate, there are abnormal or exceptional cases where the latest dates of payment under S. 3, or popular "*kist*" dates, as they have come to be known, are found to coincide with the original *kistbandi* dates (or some of them) under S. 2. It is also possible that after a regular partition the Collector, whether inadvertently or not, may have made a new *kistbandi* in this manner. In determining the jurisdiction of the Collector to sell an estate for arrears of revenue, in the case of an estate where the revenue is payable in one instalment, it has to be considered whether the date of payment is the latest date of payment under S. 3 or merely the date under S. 2 on which the revenue is due. If it is the latest date of payment within the meaning of S. 3, and the *Tauzi mahal*, the Collector has jurisdiction to sell the estate before the expiry of the last date of payment for the *Fasli* year. If it is merely the *kist* or instalment of any month of the era according to which the settlement or *kistbandi* of the *mahal* has been regulated it does not become an arrear of revenue under S. 2, and the Collector has no jurisdiction to sell until the latest date of payment prescribed under S. 3. (*Macpherson and Khaja Mohammad Noor, JJ.*) NANAK PRASAD SAHU *v.* MT. KASEDA KUMARI. **15 Pat. 272=162 I.C. 1004=8 R.P. 604=16 Pat. L.T. 915=A.I.R. 1936 Pat. 260.**

——S. 3—*Revenue payable in four* kists*—Latest date for payment of arrears in respect of one* kist.

According to the Collectorate registers there were four dates for payment of arrears of revenue, namely 28th June, 28th September, 12th January and 28th March, the revenue being payable in four *kists*. Certain amount was in arrears on 28th March, 1932. The revenue sale in respect of this amount took place on 9th January, 1933.

Held, that the *kists* were also the same as the latest dates for payment mentioned in the Land Revenue Roll. Consequently an arrear in respect of one *kist* that is 28th September, 1932, would have its latest date of payment on the date of the

next *kist* that is on 12th January, 1933, following. The sale before this date therefore was void. (*S. K. Ghose and Patterson, JJ.*) JAGADISH CHANDRA MITRA *v.* KUNJA MOHAN SHAH. **171 I.C. 822=10 R.C. 310=A.I.R. 1937 Cal. 273.**

——S 5—*Applicability—Part only of estate under attachment.*

S. 5 of Act XI of 1859 requires the publication of a special notification before an estate which is under attachment by an order of a Civil Court can be sold by the Collector for arrears of revenue. If only a part or share of the estate is under attachment S. 5 also applies. (*Mitter and Rau, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARI CO., LTD. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal 115.**

——S. 5—*Non-compliance with—Objections not taken in appeal to Commissioner—Sale, if can be challenged in Civil Court.*

A sale held without complying with S. 5 where that section is attracted, is a sale contrary to the Act and such sale cannot be challenged on that ground in a Civil Court, unless such a ground had been specified in an appeal made to the Commissioner. (*R.C. Mitter, J.*) SUBODHBALA GHOSE *v.* HARENDRA NATH DAY **181 I.C. 47=11 R.C. 769=A.I.R. 1938 Cal 584.**

——S 5—*Notice including arrears of current and preceding years—Validity.*

It is true that S. 5 of Act XI of 1859 only contemplates arrears other than those of the current year or of the year immediately preceding it. But if the arrears of the current year or of the preceding year are included along with the arrears which come within the purview of S 5 that cannot invalidate the notice. (*Nasim Ali and Henderson, JJ.*) KUSUM KAMINI ROY *v.* APURBA KUMAR HAZRA. **159 I.C. 1074=8 R.C 384=A.I.R. 1935 Cal. 743.**

——S. 5—*Scope—Estate under attachment by Civil Court—Notification—Necessity—Want of knowledge of attachment on the part of the Collector If dispenses with notification—Legality of attachment—If material.*

Under S 5 of the Land Revenue Sales Act, when there is an attachment by a Civil Court in respect of any share in the estate sought to be sold under the Act, the issue of a special notification under S 5 is positively imperative. Whether such attachment is proper or wrongful is not material. If there is in fact an attachment, there must be a notification; and it must be issued irrespective of any question of knowledge or want of knowledge on the part of the Collector of the attachment. When the sale is held without the issuing of a notice under S. 5, it is not mere defect or irregularity which can be cured by S 8 of Bengal Act VII of 1868. The omission renders the sale one held in contravention of an express provision of the law, although the sale in itself is not null and void. (*Mukerji and S. K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal 629=40 C.W.N. 271.**

——S 5—*Scope—Notice showing amounts which have become arrears and amounts which have not—Sale—If void.*

When there is an arrear in respect of certain kists of revenue but the notice under S. 5 of the Revenue Sale Law shows not only the amount of those arrears but also other sums which have not

yet become an arrear, the sale held in pursuance of such a notice cannot be said to be a sale otherwise than under the Act and is not void. Although S. 5 is contravened, there being an arrear of duty, there is a sale under the Act and such a sale is hit by the provisions of S. 33 of the Act, and cannot be set aside; and if a proprietor appropriates a portion of the purchase-money towards the payment of a different debt of his, he cannot subsequently contest the legality of the sale, notwithstanding that such appropriation is made after the institution by him of a suit to set aside the sale. (*Patterson, J.*) RAM PRASAD CHOUDHURY *v.* RAM JADU LAHIRI. **40 C.W.N. 1054.**

——S 6—*Notice of sale—Mention of arrears of revenue as well as of arrears of cess—If renders sale illegal.*

It is well established that in a case even of amalgamation of cesses with revenue payable in respect of an estate, the sale for arrears of revenue cannot be set aside on the ground that it is illegal or *ultra vires*. In a case when the amount due on account of cesses is mentioned separately from the amount of revenue in arrear, and not amalgamated with, or included in, the revenue, in the sale notification, that cannot, therefore, make the sale illegal under the law. (*Guha and Bartley, JJ.*) RAM RANJAN MULLIK *v.* JAMINI SUNDARI DASSYA **40 C.W.N 1114=64 C.L.J. 486=166 I.C 485=9 R.C. 535=A.I.R 1936 Cal. 415.**

——Ss 6 and 14—*Payment in respect of separate account after latest day of payment—Effect on sale ordered under S. 14.*

The provisions of the last paragraph of S. 6 of the Act are attracted to sales not only of the entire estate, but also of shares of estate. The payment by the defaulting proprietor of the arrears due in respect of a separate account after the latest day of payment cannot, therefore, in any way interfere with the sale ordered under S. 14 of the Act. (*Nasim Ali and Henderson, JJ.*) NIRMAL NALINI DASI *v* RANI HARSAMUKHI DASI **I.L.R. (1938) 2 Cal 549=180 I.C. 665=11 R.C. 709=42 C.W.N. 1203=A.I.R. 1939 Cal. 233.**

——Ss. 6 and 33—*Sale notice issued by Collector describing owners of the property to be sold as 'X and another"—Sale notice published in newspaper not mentioning share to be sold as residuary share—Irregularity—Annulment of sale.*

Under S 6 of Act XI of 1859, the specification of the property to be sold in the sale notification must be sufficiently definite and clear to induce likely purchasers to appear and bid at the sale. Where the sale notice issued by the Collector described the owners of the property to be sold as "X and another," and the sale notice published in the local newspaper did not mention the share to be sold as a residuary share.

Held, that the specification of the property to be sold in the sale notices did not meet the requirements of S. 6 of the Act and that if the low price fetched at the sale was due to paucity of genuine and substantial bidders in consequence of the absence of proper specification in the sale notices, it was incumbent on the Court, regard being had to the provisions of S 33 of the Act, to annul the sale. (*Guha and Bartley, JJ.*) SIBADAS

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CHAKRAVARTY *v.* HEM CHANDRA KAR. **170 I.C. 611=10 R C. 162=64 C.L.J. 571=A I.R. 1937 Cal 473.**

——**S. 6**—*Scope—Proclamation of sale in Gazette within 30 days of sale—If rendered sale void.*

S. 6 of the Bengal Revenue Sale Law does not prescribe a period of 30 days in the matter of publication in the Gazette of the notification of sale, and the fact that the publication in the Gazette of the sale is made at a time within 30 days before the sale does not render the sale void. Assuming that such a publication in the Gazette is not in accordance with the provisions of S. 6, it only amounts to an irregularity ;if the party aggrieved wants to get the sale set aside on that ground, he must make out that he has suffered substantial injury by reason of that irregularity. (*Guha and Bartley, JJ.*) RAM RANJAN MULLIK *v* JAMINI SUNDARI DASSYA. **9 R C 535=166 I.C 485=64 C.L J. 486=40 C W.N. 1114=A.I R 1936 Cal. 415.**

——**S 8**—*Revenue received by Collector by money order on last date—Money not credited to intended taluk owing to mistake in description of taluk—Sale of taluk—If void.*

A Collector received the revenue by money order on the last date for payment of revenue. This money could not be credited to the account of the intended taluk on account of mistake in the description of the taluk. The Collector kept the money in deposit and the acknowledgment receipt with certain remarks in red ink was sent to the remitter. The remitter did not rectify the mistake within time with the resuit that the taluk was sold on the footing that there was an arrear of revenue due.

Held, that as the description of the taluk was not correctly given, it could not be reasonably said that the money was undoubtedly placed in the hands of the Collector for crediting the same in respect of the defaulting taluk. The sale therefore could not be said to have been without jurisdiction. (*Bartley and Nasim Ali, JJ.*) SAYED AHAMED *v.* SAMSUDDIN AHAMED **175 I C. 745=11 R.C 5=A I R 1938 Cal 275.**

——**Ss. 13 and 14**—*Sale of separate account—Proceeds insufficient to liquidate arrears—Other separate accounts also in arrears—Powers of Collector to order sale of entire estate before putting them to sale.*

If a separate account in arrears is put up to sale and the sale proceeds do not satisfy the arrears due thereon S. 14 of the Bengal Land Revenue Sales Act comes into operation at once and the Collector can order the sale of the entire estate under that section without putting to sale the other separate accounts which are also in arrears It would be useless for the Collector to put them to sale as the sale proceeds, if any, of those accounts could not be utilised to wipe off the arrears or the balance of arrears due on the separate account first exposed to sale. (*Nasim Ali and Henderson, JJ.*) NIRMAL NALINI DASI *v* HARSAMUKHI DASI **I.L.R. (1938) 2 Cal. 549=180 I. C. 665=11 R.C. 709=42 C.W N 1203=A I.R. 1939 Cal 233**

——**S. 14**—*Construction—"Other recorded co-sharer"—Meaning of—Defaulting co-sharer—Right of to purchase.*

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The expression "other recorded co-sharer" in S. 14 of the Bengal Land Revenue Sales Act means a recorded sharer of a share other than the share exposed for sale. The defaulting co-sharer, who, having had ample opportunity of paying in the arrears, fails to do so, has no right to purchase the estate as "other recorded co-sharer." (*Mukerji and S K. Ghose, JJ*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal 629=40 C.W N 271.**

——**S. 14**—*Declaration under—Neglect of other proprietors to purchase share in default—Effect of.*

The effect of a declaration under S. 14 followed by the neglect of the other recorded proprietors to purchase the share in default by paying up the arrears due in respect thereof is that the separate accounts are closed. On the closing of the separate accounts, a general account of the receipts of revenue in respect of the entire estate must be made and if on such account being made, there appears an arrear of the revenue, the entire estate is to be notified for sale. (*R.C. Mitter, J.*) SUBODHBALA GHOSE *v.* HARENDRA NATH DAY. **181 I.C. 47=11 R C 769=A.I R. 1938 Cal 584.**

——**S. 14**—*Entire estate, when can be sold—Duty of Collector before sale—Separate accounts, if to be closed*

Before the declaration made by the Collector under S. 14 of Act XI of 1859 can be followed up by him, it is necessary that there must be an arrear of revenue due from the entire estate. The accounts of the separate shares in respect of which separate accounts had been opened under S. 10 must accordingly be merged into one account, the credits and the revenue demands must be totalled up and the balance struck. If the balance so struck is a deficit one then and then only can the Collector sell the entire estate. If the Collector without striking such a balance brings the entire estate to sale, the sale will be held to be a good one—a sale with jurisdiction—if it is shown to the Civil Court when the sale is challenged that on the balance being struck there was in fact an arrear due from the entire estate. For the purpose of satisfying himself that the entire estate is in arrear the Collector in practice merges all the accounts into one, and he ought to do so. It is not necessary that the Collector must by an order close the separate accounts before he holds a sale of the entire estate under S 14 of Act XI of 1859. (*Mitter and Rau. JJ*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZAMINDARI CO., LTD. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.**

——**S. 14**—*One co-sharer paying entire arrears—Purchase, if becomes complete—Subsequent payment of same amount by other co-sharers—Effect of.*

When one co-sharer has paid the entire arrears due, any other co-sharer or co-sharers by subsequently paying the money, even within ten days cannot rank as co-purchasers with him. As soon as the full amount of arrears is paid by one co-sharer. the offer made by the Collector must be deemed to be accepted, and the purchase becomes complete. That the subsequent payments were also made by recorded co-sharers within ten days cannot affect the position. (*Mukherjea and Roxburgh, JJ.*) KAMAL KRISHNA *v.* HEMENDRA

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KRISHNA. 187 I.C. 286=12 R.C. 556=71 C.L.J. 413=44 C.W.N. 129=A.I.R. 1940 Cal. 39.

——S. 14—*Sale under—When effected.*

A sale under S. 14 is not really made by the Collector after the period of ten days has expired, and after all the moneys are put in. The sale is effected by the first payment of the entire arrears. If there are no materials, upon which the Collector can find as to whether one payment is earlier than the other, the obvious course would be to regard these payments as simultaneous, and declare both of them as the joint purchasers. (*Mukherjea and Roxburgh, JJ.*) KAMAL KRISHNA *v.* HEMENDRA KRISHNA. 187 I.C. 286=12 R.C. 556=71 C.L.J. 413=44 C.W.N. 129=A.I.R. 1940 Cal. 39

——S. 14—*Ten days period expiring on holiday—Period, it extended till reopening day.*

Per *Roxburgh, J.*: *Obiter.*—The ten days period in S. 14 is not absolute. If the period of ten days has expired on a holiday, the period is extended till the reopening day. (*Mukherjea and Roxburgh, JJ.*) KAMAL KRISHNA *v.* HAMENDRA KRISHNA. 187 I.C. 286=12 R.C. 556=71 C.L.J. 413=44 C.W.N. 129=A.I.R. 1940 Cal 39.

——Ss. 14, para. 2 and 53—*Purchase by sharer of another separate account or residuary share in default—Effect of—Suit to enforce charge on share in default pending at time of purchase—Decree, if can be executed against purchaser.*

If a recorded sharer or sharers purchase under paragraph 2 of S. 14 of Act XI of 1859 another separate account or residuary share in default, he would only acquire the right, title and interest of the defaulting sharer and would not acquire the said share free from all incumbrances. The opening words of S. 53 of the Act are an exception only to the provisions of S. 37 and not to those of S. 14 of the Act. Consequently, if at the time of the purchase a suit to enforce a charge on the share in default was pending against the defaulting sharer, the purchaser becomes a representative in interest of the judgment-debtor and can, therefore, be rightly made a party to the execution proceedings so that execution may proceed against the share purchased by him. (*Mitter and Khundkar, JJ.*) BHRAMAR SINGH NAHAR *v.* UMESH CHANDRA DAS BARMAN. 43 C.W.N. 803.

——S. 17—*Applicability — Attachment under S. 99 of Cess Act—Sale of estate under attachment—Jurisdiction of Collector.*

An attachment by the Collector under the provisions of S. 99 of the Cess Act would come within S. 17 of Act XI of 1859. S. 17 of Act XI of 1859 does not say that the Collector shall have no jurisdiction to sell during the subsistence of the attachment, but that he will have no jurisdiction to sell for *arrears of revenue which had accrued* whilst the estate was under attachment. (*Mitter and Rau, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZAMINDARY CO., LTD. 44 C.W.N. 38=70 C L J. 218=A.I.R. 1940 Cal. 115.

——S 31—*Revenue sale—Surplus sale proceeds paid to recorded proprietor—Prior sale by him to plaintiff—Suit by plaintiff to recover amount—Cause of action—Interest.*

Plaintiff sued to recover the surplus sale proceeds of certain property of which the defendant was the recorded proprietor. The property, however, had been sold to the plaintiff prior to the date upon which the revenue sale was held. The defendant having been paid the surplus sale proceeds by the Collector under S. 31 of Act XI of 1859, this action was brought by the plaintiff.

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Held, (*i*) S. 31 merely directs payment by the Revenue Officer to a certain person, that person being the person whose name is entered as proprietor and there is nothing in that section which in any way governs the right of a person who is in fact entitled to the surplus sale proceeds recovering them from the person paid by the Collector under the section; (*ii*) that the real test in the case is not the knowledge of the Collector as to whom the money really belonged, not the question as to whether the defendant had rightfully received the money from the Collector but to whom the money rightfully belonged; (*iii*) that the cause of action is for money had and received to the plaintiff's use, and that in considering that cause of action the Court is applying no specific provision of the law of India as there is none, but the rule of justice, equity and good conscience (*i.e.*) the law of England; (*iv*) that the plaintiff is entitled to interest only from the date upon which the demand was made by him. (*Wort and Rowland, JJ.*) BHAGWATI SARAN SINGH *v.* RAI KISHUNJI. 15 Pat. 433=161 I C. 171=8 R.P. 426=17 Pat L.T. 663=A.I.R. 1936 Pat. 370

——Ss. 31 and 13—*Sale proceeds of one separate account—If can be appropriated towards arrears due from other separate account.*

The proceeds of sale of one separate account held under S 13 of the Act can be appropriated only towards the arrears due from that account and not towards the arrears due from other separate account or accounts. (*Nazim Ali and Henderson, JJ.*) NIRMAL NALINI DASI *v.* HARSAMUKHI DASI. I L.R (1938) 2 Cal. 549=42 C W. N. 1203=180 I.C. 665=11 R.C. 709=A.I.R. 1939 Cal. 233.

——S. 33—*Annulment of sale by Civil Court—Conditions.*

In order that a sale for arrears of revenue can be annulled by a Civil Court, two conditions are necessary: the sale must have been held contrary to the provisions of Act XI of 1859, and it must be proved by the plaintiff that he has sustained substantial injury by reason of the irregularity which evidently includes illegalities as well. (*Nazim Ali and Henderson, JJ.*) KUSUM KAMINI ROY *v* APURBA KUMAR HAZRA. 159 I.C. 1074=8 R.C. 384=A.I.R. 1935 Cal. 743.

——S. 33—*Appeal to Commissioner not presented in time—Suit in Civil Court on ground that sale was contrary to Act—Maintainability.*

The appeal contemplated in S. 33, Bengal Land Revenue Sales Act, is an appeal made to the Commissioner under S. 2 of Act VII of 1868, that is, an appeal which it would be "lawful for Commissioner of Revenue to receive", that is an appeal presented to him within 60 days of the sale or one presented to the Collector within 45 days of the sale for transmission to the Commissioner. An appeal not so presented is to be treated as no appeal and no attack can be launched on the sale in a suit on the ground that the sale was contrary to the provisions of the Act, the estate being admittedly in arrears. (*R. C. Mitter, J.*) SUBODH-

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BALA GHOSE *v.* HARENDRA NATH DAY. **181 I.C. 47=11 R.C 769=A.I.R 1938 Cal. 584.**

——**S. 33**—*Applicability—Sale illegal for non-compliance with S. 5—Setting aside—Grounds—"Irregularity."*

S. 33 of the Land Revenue Sales Act applies not merely to cases where the sale has been irregularly conducted, but also where the sale has been illegal in consequence of contravention of some express provision, *e.g.*, the omission to issue a notice as required by S. 5 of the Act. What is meant by irregularity under S. 33 is the fact of the sale having been contrary to the provisions of the Act; and there is no distinction between illegality and irregularity. Non-compliance with S. 5 of the Act does not therefore make the sale null and void; it only renders the sale liable to be set aside on the ground that a party has sustained substantial injury by reason of the illegality or irregularity complained of, and only on that ground. (*Mukerji and S. K. Ghose, JJ*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal. 629=40 C.W.N. 271.**

——**S 33**—Applicability—Sale in contravention of S. 5—Suit to challenge—Appropriation by proprietor of part of sale proceeds for payment of different debt—Effect—Suit, if barred. *See* BENGAL LAND REVENUE SALES ACT, S. 5. **40 C.W.N. 1054.**

——**S. 33**—*Applicability—Suit by co-sharer for declaration that he has preferential title and that sale should stand entirely in his favour.*

It may be assumed that S. 33 is not confined to sales by public auction under the Act, but also applies to a sale under S. 14 of the Act. But in order to attract the operation of S. 33 the suit must be one to annul the sale and this presupposes that the party suing is the defaulting co-sharer or any other person who derives his title from him. Where a co-sharer impeaches the rights of the other co-sharers to become purchasers by reason of the subsequent deposits they made, and wants at the same time that the sale should stand and stand entirely in his favour, it is really a suit by one purchaser against another for a declaration that he has a preferential title. Such a suit does not come within the purview of S. 33. Under these circumstances a suit would certainly lie in a Civil Court, quite apart from S 33 of Act XI of 1859, for having a declaration that the plaintiff is the sole purchaser, and no title was vested in any of the other co-sharers by reason of the payments they made under S. 14 of the Revenue Sale Law. (*Mukerjea and Roxburgh, JJ.*) KAMAL KRISHNA *v* HEMENDRA KRISHNA **187 I C. 286=12 R C. 556=71 C.L.J. 413=44 C W.N. 129=A. I.R. 1940 Cal. 39.**

——**S. 33**—Arrear of revenue—Absence of—Determination—Factors to be taken note of. *See* BENGAL LAND REVENUE SALES ACT, SS 2, 3 AND 33. **A.I.R. 1937 Cal. 703**

——**S. 33**—*Entire amount of revenue not being arrear—Sale, if liable to be set aside.*

Where the entire amount of revenue for which the sale was held was not an arrear and thus there was a material irregularity in the sale and the price fetched at the sale was inadequate causing substantial loss.

Held, the sale was liable to be set aside under S. 33 of the Act. (*S. K. Ghose and Patterson, JJ.*)

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JAGADISH CHANDRA MITRA *v.* KUNJA MOHAN SHAH **171 I.C. 822=10 R C. 310=A.I.R, 1937 Cal. 273.**

——**S. 33**—*Ground not specifically set forth before Commissioner—If can be raised in suit.*

The wording of S. 33 of the Revenue Sale Law is very particular; and as worded, that section requires that the ground should be declared and specified. There can be no question that apart from anything else, omission to take the ground in a definite form and with sufficient particularity before the Commissioner is a bar to the ground being put forward as a ground in a suit to set aside the sale. (*Mukerjee, Ag.C.J. and S. K. Ghose, J.*) MANINDRA NATH SEN *v.* KUDIRAM DAS **161 I.C. 735=8 R.C. 541=A.I.R. 1936 Cal. 142.**

——**S. 33**—*Payment—Taking out money order in office of origin—If amounts to payment*

In no part of the rules in the Tauzi Manual is it suggested that the Government have agreed that the post office should be the agent for the purpose of receiving payment and hence it cannot be held that the taking out of a money order in the office of origin can be considered a payment to the Collector of the revenue. (*Wort and Agarwala, JJ*) INDERJIT RAI *v.* BULAK CHAND. **179 I.C. 861=11 R.P. 420=5 B.R 305=1939 P.W.N. 265 =20 Pat.L.T 300=A I.R. 1939 Pat. 76.**

——**S. 33**—*Question of substantial injury not made specific ground of appeal before Commissioner—Maintainability of suit.*

It is certainly incumbent upon the plaintiff in a suit under S. 33 to establish that he has suffered substantial injury by reason of the irregularity complained of, but it is not necessary that the question of substantial injury must also be made a specific ground of appeal before the Commissioner. (*Mukerjea and Roxburgh, JJ.*) KAMAL KRISHNA *v* HEMENDRA KRISHNA **187 I.C. 286= 12 R.C 556=71 C.L.J. 413=44 C.W.N. 129= A.I.R. 1940 Cal. 39**

—— **S 33**—*Revenue sale—Setting aside—Money paid to credit of estate—Misdescription of touzi—Effect of.*

In a suit for a declaration that the sale was a nullity on the ground that there were no arrears, the existence of which alone could authorize the Collector to hold the sale, it is incumbent upon the plaintiff to establish that the Collector was in possession of money belonging to the plaintiff and indisputably placed to his credit. When the estate has been correctly described and money paid to the credit of the estate, no sale under law is permissible and it is immaterial that certain erroneous debit entries were made by the Collectorate officers to which the proprietor was not a party. When however there is a misdescription of the touzi and it is not undisputed that money has been placed to the credit of a particular estate, different considerations arise. The Collector may in such cases justly hesitate to credit the amount to one estate rather than to the other. The rules framed by the Revenue Department make detailed provisions, as to the duties of the Collectorate officers who are entrusted with the charge of receiving these payments in such cases. Where there is a violation of these rules by the officers concerned and the proprietor is not given an opportunity to rectify the mistakes, a sale with-

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out giving the proprietor such opportunity is without jurisdiction. (*B. K. Mukerjea, J.*) MANODA MOHINI DAS *v* SAKINA BIBI. **43 C.W.N. 43=A.I R. 1938 Cal. 738.**

——**S. 33**—*"Sale"—Meaning of.*

Per *Roxburgh, J.*—'Sale' necessarily includes the whole procedure from issue of notices under Ss. 5 and 6 up till the final completion of the 'sale' in its narrower sense as the corollary to 'purchase.' A 'sale' is conducted contrary to the provisions of the Act within the meaning of S. 33 if there is any defect in any of these proceedings, not merely for defect at the time of actual auction. (*Mukerjea and Roxburgh, JJ.*) KAMAL KRISHNA *v.* HEMENDRA KRISHNA. **187 I.C. 286=12 R C 556=71 C.L.J. 413=44 C.W N. 129=A.I R. 1940 Cal. 39.**

——**S 33**—*Scope—Appeal preferred to Commissioner beyond time—Effect—Dismissal—Suit in Civil Court on grounds urged in appeal—Maintainability.*

An appeal provided for by S 25 of the Land Revenue Sales Act must be preferred on or before the 60th day of the date of sale; an appeal presented beyond the 60th day is no valid appeal. When such an appeal has been dismissed as being barred, a civil suit to set aside the sale on the same grounds as alleged in the appeal is not maintainable under S. 33 of the Act. (*Macpherson and Khaja Mohammad Noor, JJ.*) NANAK PRASAD SAHU *v.* KASEDA KUMARI. **15 Pat. 272=162 I C 1004=8 R P. 604=16 Pat.L.T. 915=A I.R. 1936 Pat 260.**

——**S. 33**—*Scope—No arrears of land revenue—Sale—Suit to set aside—If barred.*

Where a sale is held for arrears of land revenue in cases where there were no such arrears, a suit to set aside the sale is not barred under S 33. (*Wort and Agarwala, JJ.*) INDERJIT RAI *v.* BULAK CHAND. **179 I.C. 861=11 R.P. 420=5 B.R. 305= 1939 P.W N. 265=20 Pat.L. T. 300=A.I.R. 1939 Pat. 76.**

——**S. 33**—*Scope—Revenue sale—Suit to declare illegal and* ultra vires*—Maintainability without consequential relief.*

Obiter.—A suit merely for a declaration that a revenue sale is illegal and *ultra vires* and without any force and effect is not maintainable under the law in the absence of a prayer for setting aside the sale by way of consequential relief. (*Guha and Bartley, JJ.*) RAM RANJAN MULLIK *v.* JAMINI SUNDARI DASSYA. **40 C W.N. 1114=9 R C. 535=166 I.C. 485=64 C.L.J. 486=A.I.R. 1936 Cal. 415.**

——**S. 33**—*Scope—Suit to declare that sale would not affect plaintiff's reversionary rights—Allegation of fraud—Suit, if barred.*

S 33 does not bar a suit by a reversioner for a declaration to the effect that the revenue sale held under the Act did not affect his rights as reversioner in respect of the property sold, when such a suit is based on the allegation that the sale was a fraudulent transaction, and the reversioner will be entitled to the relief if he proves that fraud had been committed and the reversionary right residing in him had been adversely affected. (*S K Ghose and Edgley, JJ.*) ASHUTOSH SANYAL *v* RAM SANKAR GHOSE. **162 I. C. 695=8 R.C. 645=A.I.R. 1936 Cal. 198.**

G. LAND REV. SALES ACT (1859), S. 36.

——**S 33**—*"Substantial injury"—Meaning of—Inadequacy of price.*

Pecuniary loss is not the only kind of injury contemplated by the words "substantial injury" in S. 33, although inadequacy of price fetched at the sale is the most common form of injury that is asserted. (*Mukerji and S. K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal. 629=40 C W.N 271.**

——**S 33**—*Substantial injury—Proof of—Onus—Omission to issue notice under S. 5—Inadequacy of price fetched at sale—Substantial injury—Inference of—Permissibility.*

When a revenue sale is sought to be set aside on the ground of omission to issue a notice as required by S. 5 of the Act, the fact that the irregularity complained of has resulted in substantial injury within the meaning of S. 33 is a fact which the party impeaching the sale must make out. The object of the notification under S 5 is to protect the interest of an attaching creditor, and the omission to issue the notice under the section would not by itself mean that an inadequacy in the price fetched by the sale is the result of that omission. (*Mukerji and S. K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal. 629=40 C W.N. 271.**

——**S 34**—*Effect of annulment of sale.*

Per *Roxburgh, J.*—The effect of an annulment of sale is dealt with in S. 34 of the Act which clearly contemplates restoration of the defaulter, assumed to be decree-holder, on certain terms and conditions (*Mukherjea and Roxburgh, JJ.*) KAMAL KRISHNA *v.* HEMENDRA KRISHNA. **187 I. C. 286=12 R.C 556=71 C L J. 413=44 C.W.N. 129=A.I R. 1940 Cal 39.**

——**S. 34**—*Sale of holding for arrears of revenue—Title suit by owner against purchaser—Sale set aside on compromise—Compromise decree not executed within six months—Effect on sale.*

A *raiyati* holding in a Government *khas* mahal was sold for arrears of revenue under Act XI of 1859. The owner, after an unsuccessful appeal to the Commissioner, brought a title suit against the purchaser to have the sale set aside alleging that processes required to be served under the Act were not served and that caused substantial injury to him. The suit ended in a compromise decree. According to the terms of compromise, the revenue sale was set aside on the ground that the Collector had no jurisdiction to sell a *raiyati* holding under the Act.

Held, that there was no judicial determination of the question whether the sale was valid or not, that the sale was not set aside on the ground that it was a nullity, that, therefore, S. 34 of the Act applied to the compromise decree, and that the failure to apply for its execution within six months from the date thereof would make the sale and the right acquired by the purchaser under it stand good. (*S. K. Ghose and Patterson, JJ.*) MOHAMMAD ESLAM *v.* ANIMESH CHANDRA SEN. **43 C.W N. 46.**

——**S 36**—*Object of—Revenue sale during pendency of suit by mortgagee of the property—Purchase,* benami *for mortgagor—Suit by mortgagee after decree to declare sale fraudulent, if barred by S. 36.*

BENG. LAND REV. SALES ACT (1859), S. 37.

The object of S. 36 of the Bengal Land Revenue Sales Act is to discourage *benami* purchases at sales and with that in view the Legislature has said that a suit to oust the *benamidar* shall not lie. What the Legislature intends to prohibit appears to be this; that a purchaser having elected to make his purchase in a *benami* name, he could not thereafter come into Court to have the *benami* character of the transaction established and the *benamidar* ousted by Court. The section is not to be construed so as to enable the sham title of a *benamidar* to be set up against a creditor of the real owner. Where during the pendency of a mortgage suit, the estate was sold for default in the payment of the land revenue by the mortgagor proprietor, under the Bengal Land Revenue Sales Act, and it is purchased in auction in the name of a third person *benami* for the mortgagor, and where after the passing of a preliminary decree in the mortgage suit, the purchaser obtains possession, it is open to the mortgagee decree-holder to institute a suit to declare that the revenue sale was fraudulent and void and inoperative as against his mortgage lien and S. 36 of the Act could not be pleaded in bar of such a suit, for that section has no application at all to such a case. (*Dhavle and Rowland, JJ.*) CHATRADHARI LAL *v.* BHAGWATI PRASHAD. **178 I.C. 357= 5 B.R. 91=1939 P.W.N. 46=A.I.R.1939 Pat.168.**

——**S. 37**—*Annulment of tenure—Tenure-holder claiming* nishkar *title—Proof required.*

Where in a case in which it is sought to annul a tenure under S. 37 of Act XI of 1859 the tenure-holder claims protection by reason of his *nishkar* title, the proof of long possession without payment of rent must be of a very definite and convincing nature such as would be sufficient to enable the Court to draw the inference that the *nishkar* grant in respect of the tenure had been made prior to the permanent settlement. (*Edgley, J.*) ASHA MOYI BASU *v.* BARANAGORE JUTE FACTORY CO., LTD. **I.L.R. (1939) 2 Cal. 330=187 I.C. 535=12 R.C. 584=A.I.R. 1940 Cal. 141.**

——**S. 37**—*Annulment of tenure—Tenure held partly under* touzi *purchased at sale and partly under other* touzis*—Purchaser's right to recover possession.*

Where a tenure is held partly under the *touzi* purchased at the revenue sale and partly under other *touzis*, it cannot be annulled in part by the purchaser under S. 37 of Act XI of 1859, and he is not, therefore, entitled to recover possession of any portion of the land appertaining to the tenure. (*Edgley, J.*) ASHA MOYI BASU *v.* BARANAGORE JUTE FACTORY CO., LTD. **I.L.R. (1939) 2 Cal. 330=12 R.C. 584=187 I.C. 535=A.I.R. 1940 Cal. 141.**

——**S. 37**—"Incumbrance"—Meaning — Same word in Bengal Tenancy Act—Distinction. *See* BENGAL TENANCY ACT, S. 167. **A.I.R. 1937 Cal. 36.**

——S. 37—*Occupancy holding at fixed rate of rent—Mokarari right created subsequent to permanent settlement—Right of purchaser to enhance rent.*

Raiyats having a right of occupancy at a fixed rate of rent are not liable to be ejected under S. 37 of the Revenue Sales Law (Act XI of 1859). But if their mokarari right was created subsequent to the permanent settlement, the purchasers at the revenue sale are entitled to treat them as occupancy raiyats whose rents are liable to enhancement according to law. (*M. C. Ghose, J.*) JANAKI NATH DE SARKAR *v.* RAJANI NATH KAR. **67 C.L.J. 470.**

——**S. 37**—*Part only of under-tenure within estate—Right of auction-purchaser to eject under-tenant.*

Under S. 37 of the Bengal Land Revenue Sales Act, the auction-purchaser is entitled to eject all under-tenants who hold their land entirely within his estate, but he is not entitled to eject an under-tenant who holds an under-tenure partly within his estate and partly within other estates. (*Ghose and Bartley, JJ.*) SM. ASHAMOYEE BASU *v.* BARANAGORE JUTE FACTORY CO., LTD. **70 C.L.J. 34.**

——**S. 37**—*Recovery of possession on basis of revenue sale—Suit for—Onus of proof.*

In a case in which the plaintiff is seeking to recover possession of property on the basis of a revenue sale, the initial onus lies on the plaintiff to show that the land lies within his regularly assessed estate or *mahal* and not merely that it lies within the ambit of his *zamindari*. If he discharges this initial onus, it would be for the defendant to prove that his case would fall within one of the exceptions to S. 37 of Act XI of 1859. (*Edgley, J.*) ASHA MOYI BASU *v.* BARANAGORE JUTE FACTORY CO., LTD. **I.L.R (1939) 2 Cal. 330 =187 I.C. 535=12 R.C. 584=A.I.R. 1940 Cal. 141.**

——**Ss. 37, 38 and 39**—*Registration of tenure in respect of undivided share of land—Protection of tenure-holder.*

A tenure can in law comprise undivided parcels of land. All that is required is that the tenure must be held immediately under the proprietor or proprietors of the estate. If this condition be fulfilled the tenure-holder, provided he applies in time, is entitled to have his tenure registered in the common register, and if it is registered he is entitled to enjoy the protection given by the third exception mentioned in S. 37 of Act XI of 1859. (*Mitter and Rau, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARI CO., LTD. **70 C.L. J. 218=44 C.W.N. 38=A I.R. 1940 Cal. 115.**

——**S. 37**—*Scope—Occupancy raiyat subsequently taking* mukarrari *lease—Sale of land for arrears of revenue—Notice by purchaser to annul* mukarrari *lease—Right to actual possession as against tenant.*

Where a raiyat with occupancy rights is granted by the landlord a permanent lease by way of *mukarrari*, a purchaser of the lands at a sale for arrears of revenue is not entitled to recover khas possession of the lands from the tenant, by serving a notice on the tenant of his intention to cancel the *mukarrari* as an encumbrance. If the *mukarrari* right is annihilated the person in whose interest it is annihilated can only get the proprietary interest free from the *mukarrari* right, but he cannot get the actual lands which the *mukarraridar* held as an occupancy raiyat prior to the creation of the *mukarrari* right and independently of the *mukarrari* lease. (*Wort and Fasl Ali, JJ.*) KALI SINGH *v.* MATRU SINGH. **15 Pat. 584=167 I.C. 781=1936 P.W.N. 791=9 R.P. 435=3 B.R. 346=A.I.R. 1937 Pat. 189.**

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——**S. 37, Proviso**—*'Raiyat'—Meaning of.*

There being no definition of raiyat in Act XI of 1859, it must be read in its ordinary sense of a cultivator. Where a wealthy inhabitant of a town who carries on business has not cultivated the land nor has taken the land for purposes of cultivation, he is not an agriculturist and is not therefore competent to invoke the Proviso to S.37 in his favour even if fruits and flowers were grown on a portion of the land which is used as a garden house. A.I.R. 1931 P.C. 314, Rel. on. (*Mukherjea and Latifur Rahman, JJ.*) ASHAMOYI *v.* SARBATOSH SEN. **I L.R. (1939) 2 Cal. 236=184 I.C. 892=A.I R. 1939 Cal. 526.**

——**S. 37, Excep. 1**—Scope—Jagir granted to invalided soldiers under Regulation XLIII of 1793—If protected. *See* BENGAL REGULATION (XLIII OF 1793), S. 33 (1). **A.I R. 1940 Pat. 275 (F.B.).**

——**S. 37, Excep. 2**—*'Settlement'—Meaning of—Settlement of estate for term and re-settlement after expiry of term—Tenure created by settlement-holder before re-settlement—If protected from annulment.*

The word "settlement" in the second exception to S. 37 of Act XI of 1859 means the settlement of the estate. Where an estate was settled by the Government for a term of 40 years with the option of re-settlement for a period of 30 years after the expiry of that term, and the settlement-holder created a tenure and after the expiry of 40 years a re-settlement was made of the estate which was subsequently sold for arrears of revenue.

Held, that the re-settlement was not completely a new settlement although the term in the re-settlement was altered but was only a continuation of the original settlement, and that as the tenure was not in existence at the time of the original settlement, it was not protected from annulment after the revenue sale under the second exception to S. 37 of the Act. (*S. K. Ghose and Edgley, JJ.*) NILIMA PROVA DUTTA *v.* P. S. MANTOSH. **42 C.W.N. 864.**

——**S. 37 (4)**—*'Lease'—Meaning of.*

The word "lease" has been used in the ordinary sense of a tenancy and though a tenancy must be based upon a contract either express or implied, mere non-payment of rent is not conclusive to show that there is no tenancy. It is well known that agricultural tenancies do frequently come into existence in Bengal without a definite stipulation as to the amount of rent payable, it being understood that the tenant would pay the amount of rent which is customary or which is fair and equitable. If a man holds land under another person with his consent either express or implied and is legally liable to pay rent to the latter for the land he holds, a tenancy will be constituted, even if the amount of rent is not determined, and no rent is actually paid. (*Mukherjea and Latifur Rahman, JJ.*) ASHAMOYI *v.* SARBATOSH SEN. **I.L.R. (1939) 2 Cal. 236=184 I.C. 892=A.I.R. 1939 Cal. 526.**

——**S. 40**—*Application not containing all particulars—Registration of tenure—Effect of.*

S 40 of Act XI of 1859 mentions the particulars which are to be given in an application for registration. The applicant is to state the said particulars "so far as they are ascertainable." If his application does not contain all the particulars mentioned therein it is for the Collector and Collector alone to ask him to fill up the gaps. But if the Collector does, in spite of defects in his application, register his tenure, the tenure itself is protected. The tenure-holder cannot be ejected by the purchaser at a revenue sale from any portion of the lands included in the tenure. (*Mitter and Rau, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARI CO., LTD. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.**

BENG. LAND REV. SALES ACT (1868), S. 8.

——**S. 48**—*Scope—Registration of tenures—Validity of—Right of revenue purchaser to question.*

S. 48 of Act XI of 1859 contemplates a suit between the grantor and persons claiming under him on the one part and the grantee and his representatives on the other. A purchaser of an entire estate at a revenue sale does not claim through the old proprietor who may have created the tenure. He has a paramount right. The revenue sale may take place years after the grant. His rights are declared by the main provisions of S. 37. He who claims protection must bring his case within one of the exceptions. If he relies upon exception 3 he will have to prove that the tenure had been duly registered (*i.e.*) registered in accordance with the provisions of the Act dealing with registration of tenures. If the tenure has been registered either in the common or the special Register, the presumption would be that it had been duly registered but the revenue purchaser cannot be precluded by any principle of law from showing that it was not duly registered. Such a purchaser can show that the Collector had no jurisdiction by reason of the breach of S. 45 to register the tenure and that the act of registration was *ultra vires*. (*Mitter and Rao, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARY CO., LTD. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.**

BENGAL LAND REVENUE SALES (AMENDMENT) ACT (III OF 1862), S. 2—*Registration of tenures— Limitation— Starting point.*

Tenures created after the 4th May, 1859, are divided into two classes, those created before the 21st April, 1862 and those created after. The period of limitation for application for registration of both these classes is the same, namely, three months but the starting point is different. In respect of those created between the 4th May, 1859 and the 21st April, 1862, the starting point is expressly stated to be from the 21st April, 1862 and in respect of other tenures created after 21st April, 1862, the starting point is to be the date of creation. (*Mitter and Rau, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARY CO., LTD. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.**

BENGAL LAND REVENUE SALES ACT (VII OF 1868), S. 8—*Applicability and scope—Sale of estate for arrears of revenue—Non-compliance with S. 5 of the Land Revenue Sales Act—Effect of—Omission—If cured by S. 8.*

S. 8 of Bengal Act VII of 1868 cures only the defects, if there be any, in the procedure to be observed regarding the service and posting of the notices required to be served or posted under Act XI of 1859; but the section has no application

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when no order has been passed for the issue of a notice under S. 5 of the latter Act, and when no such notice is in fact issued. (*Mukerji and S.K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal. 629=40 C.W.N 271.**

BENGAL LAND REVENUE SETTLEMENT REGULATION (VII OF 1822) AND REGULATION (IX OF 1825)—*Suit by Secretary of State for possession of* khas mahal *lands —Dismissal—Declaration of right to assess fair rent on the lands by properly framed suit--Assessment of rent by Collector—Issue of certificate for arrears of rent—Legality.*

The Secretary of State for India in Council instituted a suit against the appellant in 1921 for *khas* possession of lands in a *khas mahal*. The claim for *khas* possession was dismissed, but the Court passed a decree declaring his title to 5 cottas 15 chattaks of land as proprietor, holding that he was entitled to get possession of the land through the tenants and to get fair and equitable rent for the land, to be determined in a properly framed suit. The decree was affirmed in appeal on 4—2—1927. The rent was assessed in 1928, and the appellant was given notice of the assessment of rent by the *khas mahal* Deputy Collector. Appellant did not accept the rent assessed by the Revenue authorities and, therefore, recourse was had to the certificate procedure, and a certificate was issued to recover arrears of rent due. Appellant challenged the certificate.

Held, that Regulation VII of 1822 and Regulation IX of 1825 applied to the case, that the conjoint effect of S. 20 of Regulation IX of 1825 and of the provisions of Regulation VII of 1822 was that the assessment of rent made was legal and that the assessment of rent having been made validly under the law, the issue of a certificate for realisation of the arrears of rent was neither *ultra vires* nor without jurisdiction in any way.

Held, further, that the direction contained in the decree in the suit of 1921, that the rent was to be determined in a properly framed suit could not operate as *res judicata*, so as to bar the assessment of rent in accordance with law under the Regulations, as it was perfectly open to the Collector to assess rent without having recourse to a suit. There could be no estoppel against statute and against statutory rights exercisable by the Secretary of State in the matter of assessment of rent payable in respect of *khas mahal* lands. (*Guha and Bartley, JJ.*) SARBARANJAN BASAK *v.* SECRETARY OF STATR FOR INDIA. **40 C.W.N. 341.**

——**Ss. 9 and 10**—*Rules framed under—Raiyatwari settlements concluded by Collector—If bind Government.*

In view of S. 9, Second, of Regulation VII of 1822, and the statutory rules made under S. 10, First, of the said Regulation, which sections have been extended by Regulation IX of 1825 to the whole of Bengal, raiyatwari settlements concluded by the Collector which are not summary settlements of land revenue up to Rs. 500 or settlements for colonisation are not binding on the Government unless and until confirmed by the Board of Revenue. The acceptance of a kabuliyat by the Collector is of no effect against the Government, if the Board of Revenue subsequently overrules the Collector. (*Mitter and Edgley, JJ.*) BROJESH CHARAN SEN *v.* SECRETARY OF STATE. **I.L.R. (1938) 2 Cal 573=179 I.C. 724=11 R.C. 603=67 C.L.J. 56=42 C.W.N. 996=A.I.R. 1939 Cal. 81.**

BENGAL LOCAL SELF-GOVERNMENT ACT (1885), S. 5.

——**S. 10 (4) and (5)**—*Notices issued to all proprietors of mahal—Appearance by some only of them—Joint settlement made with them—Non-appearing proprietor— If entitled to malikana from them.*

When notices were issued under Cl. (4) of S. 10 of the Bengal Land Revenue Settlement Regulation upon all the co-sharer proprietors of a mahal but only some of them appeared and a joint settlement was made with them, a non-appearing proprietor is bound by the terms of the settlement and is not entitled to get malikana from those with whom the settlement was made. (*Rau and Mukherjea, JJ.*) ABDUL LATIF CHOWDHURY *v.* DHIRENDRA CHANDRA ROY. **44 C.W.N. 323.**

BENGAL LIMITATION REGULATION (II OF 1805), S. 11, Second—*Assessment of invalid* lakhiraj *with revenue—Cause of action—When arises.*

Under S. 11, Second, of the Bengal Regulation II of 1805, the cause of action in respect of the right of the Government to assess invalid *lakhirajes* with revenue arises on the date of the invalid grant, at least when possession is taken on the basis of such grant. (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v.* MRITUNJOY. **I.L.R. (1940) 1 Cal. 216=44 C.W.N. 101.**

——**S. 11, Second**—*Claim barred under—If revived by subsequent repeal of Regulation.*

If the Government's right to assess invalid *lakhirajes* becomes barred under S. 11, second, of the Regulation II of 1805, the subsequent repeal of that Regulation by Act VIII of 1868 would not revive that right. (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v.* MRITUNJOY. **I.L.R. (1940) 1 Cal. 216=44 C.W.N. 101.**

——**S. 11, Second**—*If impliedly repealed by Act XIV of* 1859.

S. 11, Second, of Bengal Regulation II of 1805 was not repealed by necessary implication by Act XIV of 1859. It was expressly repealed by Act VIII of 1868 as having become unnecessary by lapse of time (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v* MRITUNJOY. **I.L.R. (1940) 1 Cal. 216=44 C.W.N. 101.**

BENGAL LOCAL SELF-GOVERNMENT ACT (III OF 1885)—*District Board—Lease by —Validity—Lease contravening R. 95 of Rules published by Local Government.*

A lease for 15 years granted by the District Board without the previous sanction of the Divisional Commissioner contravenes the provisions of R. 94 of the Rules published under the statutory authority by the Local Government and is, therefore, *ultra vires*. (*R.C. Mitter, J.*) AMOLOK CHAND RAPARIA *v.* KESHAB PATI. **68 C.L.J. 116.**

——**S. 5**—*District Magistrate—Delegation of powers by– Effect.*

The word 'includes' in the definition of the "Magistrate of the District" in S. 5, Bengal Local Self-Government Act, indicates that the District Magistrate is not divested of his authority after he delegates his powers to a Subordinate Magistrate. Therefore the Magistrate of the District under S. 5 has a continuing authority to delegate

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his powers under R. 1-A of the Election Rules. His powers are the same as those under S. 21, General Clauses Act. (*Nasim Ali and Remfry, JJ.*) SUBODH CHANDRA CHAKRAVARTY *v.* JNANENDRA NATH. **I.L.R. (1938) 1 Cal. 62=42 C.W.N. 177=173 I.C. 846=10 R.C. 581=A.I.R. 1937 Cal. 718.**

——**Ss. 9 (2) and 138-A and R. 59**—*Scope and effect of—Person not qualified to vote at Union Board election—If qualified to be member of District Board.*

Under S. 9 (2) of the Bengal Local Self-Government Act, a person who is qualified to vote at an election to a Union Board within the area under the authority of a Local Board is entitled to be a member of a Local Board, if duly elected thereto; and under S. 59 of the rules framed under S. 138-A of the same Act, only persons qualified for election as members of the Local Board in the District are qualified for election as members of the District Board. The combined effect of S. 9 (2) and R. 59 is that only electors qualified to vote at a Union Board election can become members of the District Board. (*Jack, J.*) KASIRUDDIN *v.* MAFFIZUDDIN AHMAD. **63 Cal. 1163=165 I.C. 354=9 R.C. 383=40 C.W.N. 753 =A.I.R. 1936 Cal. 295.**

——**S. 53**—*Construction and scope—If exhaustive—Resolution of District Board sanctioning expenditure for propaganda work in favour of Union Board—Legality—If* ultra vires—*S.* 100 (4).

The power of a body corporate are not confined to what is expressly stated in the Act or statute constituting it but also extend to what is necessary and properly required for carrying into effect the undertakings and works which the Act has expressly sanctioned. S. 53 of the Bengal Local Self-Government Act must, however, be construed as being exhaustive of the purposes for which the District Board can spend the District Fund. It enumerates exhaustively the objects and purposes for which the Fund can be spent, and in the second place it indicates the order of priority of these payments. Though the section does not militate in any way against the implied powers of a corporation, Cl. (5), Sub-S. (*a*) (*iii*) expressly lays down that the District Fund shall be applicable to "the performance of duties imposed and the exercise of powers conferred by the Act," and Sub-S. (*d*) of the same clause authorises payments of any sum to a Local Board or to a Union Board constituted under the Act. The spending of money for starting a propaganda in favour of Union Boards for the purpose of educating public opinion is not one of the purposes coming expressly or impliedly within the scope of the powers and duties of the District Board. A resolution passed by the District Board sanctioning expenditure for purposes of such propaganda work to be carried is therefore illegal and *ultra vires*. Such propaganda work does not also come within the residuary provision in S. 100 (4). The words in S. 100 (4), "works likely to promote the health, comfort or convenience of the public, etc." must be construed *ejusdem generis* to mean and include those things which are of the same nature as those specifically provided for in the Act. (*M.C. Ghose and Mukherjea, JJ.*) JESSORE DISTRICT BOARD *v.* SURENDRA NATH HALDAR.

BENGAL LOCAL SELF-GOVERNMENT ACT (1885), S. 138.

I.L.R. (1937) 1 Cal. 646=169 I.C. 726=10 R.C. 24=41 C.W.N 151=A.I.R. 1937 Cal. 127.

——**S 53-A**—*Scope—Resolution of District Board sanctioning expenditure of Fund on unauthorised purpose—If cured or legalised.*

S. 53-A of the Act, though it must cure a defect regarding money already spent by the District Board on an unauthorised object cannot be invoked to legalise a resolution passed by the Board, which is illegal and *ultra vires*, sanctioning the expenditure of the District Fund on an unauthorised object. (*M. C. Ghose and Mukherjea, JJ.*) JESSORE DISTRICT BOARD *v.* SURENDRA NATH HALDAR. **I.L.R. (1937) 1 Cal. 646=169 I.C. 726=10 R.C. 24=41 C.W.N. 151=A.I.R. 1937 Cal. 127.**

——**Ss. 73 and 75**—*Roads under control of District Board—Title of District Board.*

S. 73 of the Local Self-Government Act merely transfers the control of roads hitherto under the control of certain authorities to the District Board. It does not say that the title of the District Board in the land held by it under Ss. 73 and 75 respectively would be different. (*Sen, J.*) SECRETARY OF STATE *v* DISTRICT BOARD OF RANGPUR. **185 I.C. 454=12 R.C. 373=70 C.L.J. 126= A.I.R. 1939 Cal. 758.**

——**S. 100 (4)**—Construction—"Works likely to promote the health, comfort or convenience of the public, etc."—Propaganda work in favour of Union Board—If comes under. *See* BENGAL LOCAL SELF-GOVERNMENT ACT, S. 53. **I.L.R. (1937) 1 Cal. 646=41 C.W.N. 151=A.I.R. 1937 Cal. 127.**

——**S. 120**—Removal of Chairman of Union Board by District Board—Jurisdiction of Civil Court. *See* BENGAL VILLAGE SELF-GOVERNMENT ACT, S. 16. **44 C W.N, 362.**

——**S. 138 (a)**—*Authority appointed under, to settle election disputes*—Persona designata *or 'Court'.*

The authority appointed under S. 138 (*a*), Bengal Local Self-Government Act, to determine election disputes does not function as *persona designata* but as a Court. (*Costello, Ag. C.J. and Edgley, J.*) SACHINDRA NATH DAS *v.* SURYA KANTA MISRA. **I L.R. (1938) 1 Cal. 146=176 I. C. 515=11 R.C. 114=42 C.W.N. 54=A.I.R. 1937 Cal. 720.**

——**S. 138 (a)**—*R.* 1-*A of Rules framed under —Decision of District Magistrate—Revision—Government of India Act, S.* 107.

A District Magistrate in deciding a dispute under R. 1-A of the Rules under the Local Self-Government Act is acting judicially and is not merely a *persona designata*. His decision may, therefore, in proper cases, be revised by the High Court under the provisions of S. 107 of the Government of India Act. (*Jack and Patterson, JJ.*) CHANDRA KISHORE MANDAL *v* SHASINDRA KUMAR ROY. **41 C.W N. 441=10 R.C 266=171 I.C. 365=65 C.L.J. 172=A.I.R. 1937 Cal. 174.**

[But under S. 224 of the new Government of India Act of 1935, the High Court is deprived of its revisional powers under S. 107 of the old Act.]

——**S. 138 (a)**—*R.* 1-*A of Rules framed under —Decision of scrutinizing officer—Power of District Magistrate to interfere,*

Per *Patterson, J.*—The District Magistrate is not empowered by R. 1-A of the Rules under the Local Self-Government Act to interfere with

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the decision of the scrutinizing officer, as R. 30 provides that such decision is final. (*Jack and Patterson, JJ.*) CHANDRA KISHORE MANDAL *v.* SHASINDRA KUMAR ROY. **171 I.C. 365=41 C.W.N. 441=10 R.C. 266=65 C.L.J. 172=A.I.R. 1937 Cal. 174.**

——**Ss. 138 (a) and 148**—*R. 1-A of Rules framed under—Order of Sub-Divisional Officer rejecting nomination paper of candidate—If can be questioned in Civi Court.*

An order of a Sub Divisional Officer rejecting the nomination paper of a candidate for election to the Local Board, is final, and cannot be questioned in a Civil Court. Under R. 1-A of the Local Government Rules framed under S. 138 (*a*) of the Local Self-Government Act the proper authority to decide a dispute relating to the validity of a nomination paper is the Magistrate of the District, and his decision is final. S. 5 of the Act makes it clear that the Sub-Divisional Officer could be a Magistrate of the District for purposes of the rules, but even if he is not, the remedy of the candidate whose nomination paper is rejected by the Sub-Divisional Officer is to approach the Magistrate of the District whoever he may be, for redress of his grievances. He cannot come to the Civil Court. (*Mukherjea, J.*) ABALA KANTA GHOSE *v.* SYED JALALUDDIN. **174 I.C. 501=10 R.C. 681=41 C.W.N. 986=A.I.R. 1937 Cal. 487.**

——**S. 138-A, Rr. 1-A and 56**—*Construction and scope—Dispute as to qualification of members of District Board—Election to District Board of persons not qualified to be elected—Suit to declare constitution of Board illegal and* ultra vires—*Jurisdiction of Civil Court.*

Any dispute as to the qualification for membership of a District Board is a dispute under the rules for election framed under S. 138-A of the Local Self-Government Act and under Rr. 1-A and 56 of the Election Rules, such a dispute shall be decided by the District Magistrate and his decision is to be final. The Civil Court has no jurisdiction in such a matter, and a suit for declaration that the constitution of a District Board is illegal, and *ultra vires* on the ground that certain members elected thereto are not qualified for election is, therefore, not maintainable in the Civil Court. (*Jack, J.*) KASIBUDDIN *v.* MAFFIZUDDIN AHMAD. **63 Cal. 1163=165 I.C. 354=9 R.C. 383=40 C.W.N. 753=A.I.R. 1936 Cal. 295.**

——**S. 138-A, R. 57**—*Scope—Invalid election of member to District Board—If ground for declaring invalid election of Chairman or Vice-Chairman—Right of member from one Local Board to question election of member from another Local Board.*

The mere fact that one of the members of a District Board is found not to be duly qualified to be elected would not invalidate the whole election, and when it is not shown that the invalid election of a member to the Board has in any way affected the election of the Chairman or Vice-Chairman, the election of these latter cannot be declared invalid.

Quaere.—Whether a member elected to the District Board from one Local Board can question the validity of the election to the District Board of a member from another Local Board. (*Jack, J.*) KASIRUDDIN *v.* MAFFIZUDDIN AHMAD. **63 Cal. 1163=165 I.C. 354=9 R.C. 383=40 C.W.N. 753=A.I.R. 1936 Cal. 295.**

BENG. MONEY-LENDERS' ACT (1933).

——**S. 146**—*Period of one month's notice—If can be excluded.*

Under S. 146 of the Bengal Local Self-Government Act, the period of one month's notice can be excluded from the period of three months provided for limitation. (*Henderson, J.*) DISTRICT BOARD, CHITTAGONG *v.* EMDADAL HOQUE. **44 C.W.N. 362=A.I.R. 1940 Cal. 305.**

——**Ss. 148 and 138** (a)—Bengal Government Rules, R. 1-A—Order of Sub-Divisional Officer rejecting nomination paper of candidate—If can be questioned in Civil Court. *See* BENGAL LOCAL SELF-GOVERNMENT ACT, SS. 138 (*a*) AND 148. **41 C.W.N. 986.**

——**(as amended by Act XXIV of 1932), S. 148**—*Jurisdiction of High Court to interfere in revision.*

The provisions of S. 148, Bengal Local Self-Government Act, as amended by Act XXIV of 1932, are so wide and definite in their terms that the jurisdiction of the High Court is excluded altogether whether in appeal or in revision. The terms of S. 148 are so comprehensive that the jurisdiction of the High Court is ousted whether it can be rightly said that what the High Court is concerned with is not a decision but a right to decide and whether or not the High Court is concerned with the decision of an authority which has never been properly constituted. The High Court cannot therefore interfere in revision with the decision of the authority appointed under S. 138 (*a*) of the Act to determine election disputes, however flagrantly illegal his decision may be or even if such authority has exercised jurisdiction not vested in him by law or acted in the exercise of his jurisdiction illegally and with material irregularity as such decision is final under S. 148 of the Act. (*Costello, Ag.C.J. and Edgley, J.*) SACHINDRA NATH DAS *v.* SURYA KANTA MISRA. **I.L.R. (1938) 1 Cal. 146=176 I.C. 515=11 R.C. 114=42 C.W.N. 54=A.I.R. 1937 Cal. 720.**

——**S. 148.**

S. 148 of the Local Self-Government Act precludes interference by High Court by way of revision with any order made by the authority lawfully appointed to decide disputes relating to elections under S. 138 (*a*) of the Act. (*Bartley and Nasim Ali, JJ.*) PHANINDRA NATH SARKAR *v.* MAULVI DEDAR HUSSAIN KHAN CHOWDHURY. **174 I.C. 879=10 R.C. 738=42 C.W.N. 283=A.I.R. 1938 Cal. 240.**

——**S. 148.**

An application in revision under S. 115, C.P. Code, does not lie to the High Court from an order passed by the District Magistrate on a petition filed under R. 1-A of the Election Rules. (*S.K. Ghose and Nasim Ali, JJ.*) TARA PROSAD SUKUL *v.* ABUL KASAM KHUNDKAR. **179 I.C. 746=11 R.C. 611=69 C.L.J. 148=42 C.W.N. 441=A.I.R. 1938 Cal. 359.**

BENGAL MONEY-LENDERS' ACT (VII OF 1933)—*Scope--Rate of interest--Whether proper or excessive—Onus of proof—Usurious Loans Act—Relative scope.*

Cunliffe, J.—The scheme of the Bengal Money-Lenders' Act is to benefit the borrowers; and the provisions of the Act in favour of the borrowers

are more advantageous than the Usurious Loans Act. Whereas under the Usurious Loans Act the borrower has the onus on him to prove that the interest was harsh and unconscionable, the reverse is the case under the Bengal Act VII of 1933, and the creditor has to show that the interest charged by him is not excessive. (*Cunliffe and Henderson, JJ.*) MRINALINI DEBI *v.* HARI LAL ROY. **168 I.C. 902=9 R.C. 881=63 C.L.J. 117=A.I.R. 1936 Cal 339.**

——S. 3—*Applicability—Provision for compound interest at rate not exceeding* 15 *per cent.*

If a mortgage bond provides for compound interest at a rate not exceeding 15 per cent. and provides for rests at intervals of six months or more, the case does not come within the purview of S. 3 of the Bengal Money-Lenders' Act. The rate of 15 per cent. mentioned in the section does not mean 15 per cent. simple interest only. (*Mitter and Roxburg, JJ.*) SURESH CHANDRA *v.* SATYENDRA KUMAR DAS **44 C.W.N. 694.**

——Ss. 3 and 4—*Applicability—Decision before Act—Appeal pending—If governed by Act.*

S. 3 of the Bengal Money-Lenders' Act is not retrospective and applies only to such suits as are instituted after the commencement of the Act or as are pending at the time when the Act comes into operation. Neither S. 3 nor S. 4 can therefore apply to a suit which had already been decided by the trial Court prior to the coming into force of the Act and against the decision in which an appeal is pending at the time the Act comes into force. (*D. N. Mitter and Patterson, JJ.*) RADHARANEE DASSYA *v.* KSHETRA MOHAN CHAKRAVARTY. **40 C.W.N. 409.**

——S. 3.

It is doubtful whether the provision of S. 3, Bengal Money-Lenders' Act, can be applied to a case where the decision of the trial Court was given before the Act came into force (*R.C. Mitter, J.*) INDRA CHANDRA BAG *v.* HIRALAL RONG. **167 I C. 441=9 R.C. 689=40 C.W.N. 696=62 C.L.J. 545=A.I.R. 1936 Cal. 127.**

——Ss. 3 and 4—*Applicability—Loans in kind—Usurious Loans Act—Loan of paddy—Agreement to pay half of principal as profits or interest—Enforceability.*

Ss. 3 and 4 of the Bengal Money-Lenders' Act do not apply to the case of a loan in kind, as the Act contemplates loans of money only. But under the Usurious Loans Act, loan means a loan whether of money or in kind. An agreement to pay fifty per cent. of the principal as profit or interest for each year, in the case of a loan of paddy, is substantially unfair, and the Court has power to reduce the interest. (*Nasim Ali, J.*) AMIRUDDIN *v.* RADHA RANI. **41 C.W.N. 181.**

——S. 3—*Harsh and unfair transaction—Test—Construction—Charged.*

The word 'charged' in S. 3, Bengal Money-lenders' Act undoubtedly qualifies the words 'money lent' and it means 'charged' or payable under the contract of loan. It is the nature of the stipulation between the parties at the time of the contract that determines the question as to whether the transaction is one which can be called harsh or unfair within the meaning of the section and both the two clauses mentioned in the section have reference to the actual stipulations in the contract itself regarding the amount of interest

or the period of rests irrespective of the claim made by the plaintiff in the suit. (*Mukherjea, J.*) RAJ KUMAR BISWAS *v.* GOPAL GUNJ INDUSTRIAL BANK. **173 I.C. 138=10 R.C. 487=A.I.R. 1937 Cal. 415.**

——S. 3—*Interpretation.*

S. 3 only raises a presumption that a rate of interest exceeding 25 per cent. is excessive and that the transaction was harsh and unconscionable and is substantially unfair. It does not say that if any loan before the passing of the Act was given, the Court shall not in any circumstances allow interest at a rate more than 25 per cent. per month, if the loan is unsecured. The section raises a presumption of fact which the lender can by evidence rebut. (*R. C. Mitter, J.*) INDRA CHANDRA BAG *v.* HIRALAL RONG. **167 I.C. 441=9 R.C. 689=40 C.W.N. 696=62 C.L.J. 545=A.I.R. 1936 Cal. 127.**

——S. 4—*Applicability—Interest already paid.*

S. 4 of the Bengal Money-Lenders' Act only applies to arrears of interest. It has nothing to do with interest that has already been paid. (*Henderson, J.*) AUNAR ALI *v.* JEBAR MULLICK. **182 I.C. 230=12 R.C. 22=43 C.W.N. 495=A.I.R. 1939 Cal. 338.**

——S. 4—*Applicability—Interest on money lent by persons other than money-lender.*

S. 4 of the Bengal Money-Lenders' Act does not apply to arrears of interest due on money lent by persons other than the money-lender in suit. (*Henderson, J.*) AUNAR ALI *v.* JEBAR MULLICK. **182 I C. 230=12 R.C. 22=43 C.W.N. 495=A.I.R. 1939 Cal. 338.**

——S. 4—*Applicability—Pending suits.*

Obiter.—S. 4 of the Bengal Money-Lenders' Act does not apply to a suit which had already been instituted and was pending in the trial Court at the date when the said Act came into force. (*Mitter and Roxburgh, JJ.*) SURESH CHANDRA *v.* SATYENDRA KUMAR DAS. **44 C.W.N 694.**

——S. 4—*Applicability—Pending suits.*

S. 4 of the Bengal Money-Lenders' Act does not apply to suits instituted before the commencement of that Act. (*Nasim Ali and Henderson, JJ.*) HARI MOHAN GOVINDA CHANDRA DAS *v.* AMRITALAL CHOWDHURY **179 I.C. 365=11 R.C. 534=42 C W.N. 975=A.I.R. 1938 Cal. 665.**

——S. 4.

S. 4 of the Money-Lenders' Act is not applicable to a suit which was instituted before that Act came into force. (*S. K Ghose and Patterson, JJ.*) LALMOHAN RAUTH *v.* KUNJA BEHARI DAS. **41 C.W.N. 499.**

——S. 4.

(*Cunliffe, J.*) *Obiter.*—S. 4 of the Money-Lenders' Act is undoubtedly retrospective and applies to suits already instituted prior to the Act coming into operation.

Henderson, J.—S. 4 has no retrospective operation and does not apply to suits instituted before the Act came into force. It applies, however, to suits relating to money lent before the Act came into force. The words "before the commencement of this Act" in S. 4 are intended to qualify only the words "money lent by a money lender". (*Cunliffe and Henderson, JJ.*) MRINALINI DEBI *v.* HARI LAL ROY. **168 I.C. 902=9 R.C. 881=63 C. L.J. 117=A.I.R. 1936 Cal. 339.**

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——**S. 4**—*Applicability—Suits for redemption.*

The applicability of S. 4 of the Bengal Money-Lenders' Act to suits for redemption is open to argument. The words "unless it is satisfied that the money-lender had reasonable grounds for not enforcing his claim earlier" seem to suggest that in the suit in question the creditor must be the plaintiff. (*Henderson, J.*) AUNAR ALI *v.* JEBAR MULLICK. **182 I.C. 230=12 R.C. 22=43 C.W.N. 495=A.I.R. 1939 Cal. 338**

BENGAL MUNICIPAL ACT (III OF 1884), S. 15—*Frame of suit.*

The fact that a suit is filed against the Chairman of the Municipality and not against the Municipal Commissioners is a technical flaw, and no importance should be attached to it if the commissioners duly appeared in Court and contested the suit. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY. **181 I.C. 762=11 R.C. 852=68 C.L.J. 267=42 C.W.N. 768=A.I.R. 1939 Cal. 178.**

—— **(as amended by Act IV of 1894), S. 30**—*Construction—Roads—Public having right of way—If vest in municipality—Private ownership—Permissibility.*

Per *Mukherji, D.N. Mitter and Patterson, JJ.*—Roads over which the public have a right of way, if they are not private property, vest in the municipality under the Bengal Municipal Act of 1884, S. 30, as amended by Act IV of 1894. There may, however, be roads over which the public have a right of way and yet the road *qua* road may still be private property; but part of a road which is included in the rent free property of a private individual over which the public in general, and not the residents of the neighbourhood only, have a right of way cannot *qua* road still be private property, especially when there has been no instance of any member of the public having been ever disallowed the use of that part of land as road.

Quaere.—To what extent the proprietary rights of private persons as owners of the land are lost to them by the operation of the Act and the consequent vesting of the property in the municipality?

Per *Jack and S.K. Bose, JJ.*—Roads over which the public have a right of way in the municipality vest in the municipal commissioners. Such roads as roads cannot be regarded as private property. (*Mukherji, Jack, D N. Mitter, S.K. Ghose and Patterson, JJ.*) NIROD CHANDRA MUKERJEE *v.* CHAIRMAN, KAMARHATI MUNICIPALITY. **I.L.R. (1937) 1 Cal. 25=164 I.C. 500=9 R.C. 233=40 C.W.N. 1070=63 C.L.J. 426=A.I.R. 1936 Cal. 506 (F.B.).**

——**S. 34**—*Election offence—Right to make complaint—Person having no vote in ward in which election takes place.*

The words "electoral roll" in S. 34 of the Bengal Municipal Act refer to the whole municipality, and any person whose name is on it is entitled to make a complaint of an offence committed in connection with an election, although he is not in the list of voters of the particular ward in which the election has taken place. (*Henderson and Khundkar, JJ.*) KAZI ALI HAIDER *v.* UPENDRA NATH. **I.L.R. (1939) 2 Cal. 442=184 I.C. 451 (2)=12 R.C. 234=43 C.W.N. 1063=41 Cr.L.J. 17 (2)=A.I.R. 1939 Cal. 662.**

BENGAL MUNICIPAL ACT (1884), S. 119.

——**S. 34 (b)**—*Limitation for complaints.*

In S. 34 (*b*) of the Bengal Municipal Act, the period of 14 days relates to offences committed in connection with an election, and the shorter period to other offences, as (*e.g.*) offences enacted in S. 28 which have nothing to do with an election. (*Henderson and Khundkar, JJ.*) KASI ALI HAIDER *v.* UPENDRA NATH **I.L.R (1939) 2 Cal. 442=184 I.C. 451 (2)=12 R.C. 234=43 C.W.N. 1063=41 Cr.L.J. 17 (2)=A.I.R. 1939 Cal. 662.**

——**Ss. 119, 120 and 121**—*Construction—Notice of demand for tax—Application for review—Further notices of demand for other quarters at original rate—Rate reduced on review—Single demand notice for all instalments with copy bills at altered rate—Copy bills beyond six months—Distress warrant within three months of notice—Legality—Tender of tax for last quarter under protest—Refusal — Propriety — Computation of three months' time for distress.*

Plaintiff who was the owner and occupier of certain premises within a municipality was originally served with a bill and notice of demand at a certain rate in respect of tax on his property for the first quarter of 1927-28 on 6-9-1927. On 20-6-1927, he applied for a review pending which bills at the original rate continued to be served on him for five more quarters, the last of them being on 20-6-1928. On 17-10-1928, as a result of the review the tax was reduced; on 29-11-1928 a bill at the original rate was served for a subsequent quarter. On 7-2-1929 a bill for a subsequent quarter at the reduced rate was again served. No payment was, however, made on any of these bills. There was no notice of demand in connection with any of these bills. On 16-3-1929, a second notice of demand was served on the plaintiff for a sum representing a total amount due in respect of all the eight quarters of 1927-28 and 1928-29. This notice of demand was accompanied with eight 'copy bills' purporting to be bills for the eight quarters. On 28-3-1929, plaintiff tended the tax due for the last quarter of 1928-29 under protest. But it was refused by the municipality. On 20-4-1929, a distress warrant was issued against the plaintiff for the second, third and fourth quarters of 1927-28 and for all the four quarters of 1928-29. The distress was levied and plaintiff's goods were seized on 27-4-1929. Plaintiff gave a notice of suit on 13-6-1929, and instituted the suit on 16-7-1929. But on 15-7-1929, the goods were sold.

Held, though the notice of demand, the distress and the sale in respect of the tax for 1927-28 and for the first three quarters of 1928-29 were taken correctly and within the time prescribed and were in order, the refusal of the municipality to accept the tender made by the plaintiff on 28-3-1929 was wholly illegal. The demands in respect of the several quarters were distinct and the amount due for the last quarter of 1928-29 which had been tendered within 15 days of the notice of demand had not yet become 'an arrear due' within the meaning of the second paragraph of S. 121 of the Bengal Municipal Act. It necessarily followed that the warrant issued including the amount of tax due for the last quarter of 1928-29 was illegal and the distress and sale held thereunder must be held *ultra vires*

BENGAL MUNICIPAL ACT (1884), S. 120.

The fact that the warrant was a good warrant so far as the taxes for the other quarters were concerned did not alter the position, and plaintiff was entitled to the full value of the goods lost to him as damages without any deduction for the tax due. (*Mukerji and Jack, JJ.*) BHABANI PRASANNA LAHIRI *v.* CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE RANGPUR MUNICIPALITY. **166 I.C. 333=9 R.C. 500=40 C.W.N. 977=A.I.R. 1936 Cal. 542.**

——Ss. 120 and 121—*Construction—Limitation—Object of—Intention of legislature—Tax reduced on review under S.* 118—*Distress warrant—Legality.*

The provisions as to time in Ss. 120 and 121 of the Bengal Municipal Act cannot be construed as indicating that the protection of the tax-payer was the sole concern of the legislature. A more sensible interpretation is that the legislature intended that if the process for distress is to be allowed, the municipality will have to begin with presentation of the bill within six months, but may wait for such a reasonable time at their option, subject to the general law of limitation, as the circumstances of the case may demand, and then issue a notice of demand; and that once such notice is served it must give the party 15 days' time for payment; but if no payment is made it must levy distress within three months of the service or of the order on review as the case may be. It is not permissible to assume that a remedy by way of distress was not favoured by the legislature in a case where the tax is reduced on review. (*Mukerji and Jack, JJ.*) BHABANI PRASANNA LAHIRI *v.* CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE RANGPUR MUNICIPALITY. **166 I.C. 333=9 R.C. 500=40 C.W.N. 977=A.I.R. 1936 Cal. 542.**

——(XV OF 1932), S. 2—*Sanction lapsed before new Act—If can be saved.*

If the sanction had lapsed before the new Act came into force, there is nothing which could be preserved under S. 2. (*Henderson and Mohamed Akram, JJ.*) AMULYA CHARAN PAUL *v.* KANCHRAPARA MUNICIPALITY. **71 C.L.J. 588=A.I.R. 1940 Cal. 336.**

——S. 2, proviso—Valuation list prepared under old Act—If saved. *See* BENGAL MUNICIPAL ACT, Ss. 3, 123, 133 AND 2, PROVISO. **44 C.W.N. 277.**

——Ss. 3 (38) and 129 (b)—"*Owner*"—*Definition if exhaustive—Commissioners deciding "occupancy raiyats" as owners—Decision, if* ultra vires.

S. 129 of the Act leaves the decision of the matter of deciding "ownership" to the Commissioners themselves and not to the Court. It may be stated that the definition of "owner" in S. 3 (38) is not exhausive. It begins with "owner includes, etc." But there may be "owner" other than what is stated in the definition. An owner may be a person who actually occupies the land. It depends upon the circumstances of each case. In a case where the plaintiffs are the occupancy raiyats holding agricultural lands within the Municiaplity and they receive rent from nobody but on the contrary they pay rent to the landlords, the term "owner" may be applied both to the holder of the occupancy right in the land and to his landlord. In the Municipal Act it is left to the discretion of the Commissioners to determine which of the two shall be taken to be the owner. Where the Commissioners thought fit to decide that the owners of the occupancy right shall be considered to be the owner within the Municipality, it cannot be said that they have exceeded their right. The right is given to them absolutely under S. 129 (*b*). (*M. C. Ghose, J.*) DHARNIKAR PARAH *v.* CHAIRMAN OF COMMISSIONERS OF TAMLAK MUNICIPALITY. **168 I.C. 460=9 R.C. 825=A.I.R. 1936 Cal. 641.**

BENGAL MUNICIPAL ACT (1932), S. 39-B.

——S. 15—*Plaint by municipality—Cause-title.*

Where the plaintiffs are stated in the plaint to be "the Commissioners of the *P* Municipality represented by the chairman Mr. B" the designation of the plaintiffs in the plaint is in substantial compliance with the provisions of S. 15 of the Bengal Municipal Act. In any case, if the Court is inclined to be meticulous, an amendment ought to be allowed. (*Biswas, J.*) MUNICIPAL COMMISSIONERS OF PABNA TOWN *v.* ANUKUL CHANDRA MOITRA. **180 I.C. 673=11 R.C. 719=43 C.W.N. 194=A.I.R. 1939 Cal. 79.**

——S. 15—*Suit filed against Municipal Chairman instead of against Commissioners—Subsequent amendment of plaint—If relates back to date of suit.*

After the commencement of the Bengal Municipal Act of 1932, a suit was filed against the Chairman of the Municipal Commissioners of a Municipality challenging the validity of certain resolutions and proceedings of the Commissioners and praying for a declaration that an assessment purporting to have been made by them was *ultra vires* and illegal and for an injunction. The mistake was discovered subsequently and the plaint was then amended so as to implead the Municipal Commissioners themselves as required by the new Act.

Held, that it was clear from the nature of the allegations in the plaint and of the relief sought that the suit was from its very inception a suit against the Municipal Corporation, that the effect of the amendment of the plaint was, therefore, not to substitute or add a new party or to convert the suit into a new suit, and that in those circumstances the amendment related back to the date of the suit as originally filed. (*Rau and Mukherjea, JJ.*) MUNICIPAL COMMISSIONERS OF DACCA *v.* GANGAMANI. **187 I.C. 605=12 R.C. 596=70 C.L.J. 583=44 C.W.N. 277=A.I.R. 1940 Cal. 153.**

——S. 18 (1), Cls. (1) and (2)—*Action under one clause alone—If can be taken.*

In sub-S. (1) of S. 18, Cls. (1) and (2) are to be read not conjunctively but disjunctively; in other words when the Local Government takes action under Cl. (1) of sub-S. (1) it is not at the same time bound to take action under Cl. (2). (*Mukerji, Ag.C.J. and S. K. Ghose, J.*) APARNA PROSAD CHUNDER *v.* CHAIRMAN, GARULIA MUNICIPALITY. **161 I.C. 749 (2)=8 R.C. 546=40 C.W.N. 533=A.I.R. 1936 Cal. 123.**

——Ss. 39-B and 43—*Order of District Judge under S. 36—Power of High Court to interfere.*

The provisions of Ss. 39-B and 43 of the Bengal Municipal Act preclude the High Court from making any order by way of interference with the order of the District Judge setting aside an election on a petition filed under S. 36 of the Act on the ground that the nomination paper of the petitioner had been improperly rejected. The High

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Court cannot intervene under S. 224 of the Government of India Act. (*Bartley and Nasim Ali, JJ.*) BAN BIHARI MUKHERJI *v.* MAKHAN LAL MUKHERJI. I.L.R. (1938) 2 Cal. 69=178 I. C. 848 (2)=11 R.C. 419=42 C.W.N. 282=A.I. R. 1938 Cal. 768.

——Ss. 39-B and 43.

In view of the provisions laid down in Ss. 39-B and 43 of the Bengal Municipal Act, the High Court has no power under S. 115, C. P. Code, to revise an order of the District Judge deciding an application contesting an election under S. 36 of the Act. (*S. K. Ghose and Nasim Ali, JJ.*) RADHA NATH SAHA *v.* HARI MOHAN SAHA. 179 I.C. 759 =11 R.C. 616=42 C.W.N. 647=A.I.R. 1938 Cal. 465.

——S. 51—*Remission of rates by chairman not authorised by Act—If binds municipality.*

S. 51 of the Bengal Municipal Act merely authorises the chairman to exercise the powers vested in the Commissioners by the Act and will not obviously confer on him any delegated authority to act on behalf of the Commissioners in respect of matters not authorised by the Act. If, therefore, the chairman allows a reduction or remission of rates without acting in conformity with the provisions of the Act, the Municipality cannot be bound by such act. (*Biswas, J.*) MUNICIPAL COMMISSIONERS OF PABNA TOWN *v.* ANUKUL CHANDRA MOITRA. 180 I.C. 673=11 R. C. 719=43 C.W.N. 194=A.I.R. 1939 Cal. 79.

——S. 71—*Offence under—If continuing offence —Date of offence—Proof—Duty of prosecution.*

Offence under S. 71 is not a continuing offence. As soon as a sweeper withdraws from his service, the offence is complete and he does not go on committing it merely by working under some other municipal body. It is the business of the prosecution to establish on what date the offence under S. 71 (2) is alleged to have been committed. (*Henderson and Latifur Rahman, JJ.*) BHAGIA *v.* CHITTAGONG MUNICIPALITY. 184 I.C. 585 (1)=41 Cr.L.J. 47=44 C.W.N. 481=A.I.R. 1939 Cal. 608.

——S. 95 (a)—*Scope—If has altered the law.*

S. 95 (*a*) of the Bengal Municipal Act of 1932 has not made any substantial change in the law in respect of the rights of the Municipality in such pathways as the Act purports to deal with. The section is merely declaratory. (*Mukerji, Jack, D. N. Mitter, S. K. Ghose and Patterson, JJ.*) NIROD CHANDRA MUKERJEE *v.* CHAIRMAN, KAMARHATI MUNICIPALITY. I.L.R. (1937) 1 Cal. 25=164 I.C 500=9 R.C. 233=63 C.L.J. 426=40 C.W.N. 1070=A.I.R. 1936 Cal. 506 (F.B.).

——Ss. 123, 133 and 2, Proviso—*Assessment of conservancy rate—Valuation list not prepared—Validity of assessment.*

An assessment of property to a conservancy rate under S. 123 of the Bengal Municipal Act, 1932, without preparing a valuation list as provided in S. 133 of that Act, is *ultra vires*. A valuation list prepared under the old Act of 1884 is not saved by the proviso to S. 2 of the new Act so as to make the preparation of a fresh list unnecessary. (*Rau and Mukherjea, JJ.*) MUNICIPAL COMMISSIONERS OF DACCA *v.* GANGAMANI. 187 I.C. 605=12 R C. 596=70 C.L.J. 583=44 C.W.N. 277=A I.R. 1940 Cal. 153.

BENGAL MUNICIPAL ACT (1932), S. 278.

——S. 182 and Sch. IV, Class 1—"*Transacting business for profit*"—*Meaning.*

Per *Jack, J*—It is perfectly obvious, when class 1 of Sch. IV is read along with S. 182, that the Legislature intended to impose a tax on all trades carried on by companies. Class 1 of Sch. IV specifies in one class all trades carried on by companies just as class 2 of the Schedule specifies in one class all wholesale trades.

Per *Patterson, J.*—Under S 182, a company, like a private individual can only be required to take out a licence if it exercises in the Municipality one or more of the trades, professions or callings specified in Sch. IV. The expression "transacting business for profit" in class 1 of that schedule might be applied to almost any kind of trade, profession or calling and it is quite impossible to hold that it amounts to a *specification* of a trade, profession or calling. That being so, a company cannot be taxed as coming under class 1 alone, without any reference to the other three classes. (*Jack and Patterson, JJ.*) THE MUNICIPAL COMMISSIONERS OF BARANAGORE *v.* THE BARANAGORE JUTE FACTORY CO., LTD. I.L.R. (1937) 2 Cal. 211=173 I.C. 900=10 R.C. 586=41 C.W.N. 662=65 C.L.J. 156=A.I.R. 1937 Cal. 324.

——S. 182 and Sch. IV, Class 1.

A certain company bought raw jute in Calcutta and elsewhere, made it into hessians, etc., at its mill at Baranagore and sold the finished products in Calcutta. The work of manufacture carried on at Baranagore was controlled from Calcutta and the profit-earning contracts of the company were also entered into in Calcutta.

Held, that in carrying on the business of the manufacture of jute within the Baranagore Municipality, the company did not come under class 1 of Sch. IV of the Bengal Municipal Act, for it could not be said to "transact business for profit" within that Municipality and that, therefore, the company was not liable to be taxed under S. 182 read with class 1 of Sch. IV of the Act. (*Jack and Patterson, JJ.*) THE MUNICIPAL COMMISSIONERS OF BARANAGORE *v.* THE BARANAGORE JUTE FACTORY CO., LTD. I.L.R. (1937) 2 Cal. 211=173 I.C. 900=10 R.C. 586=41 C.W.N. 662=65 C.L. J. 156=A.I.R. 1937 Cal. 324.

——Ss 182, 123 (1) (f) and Sch. IV, Class 1—

The expression "transacting business for profit" used in class 1 of Sch. IV of the Bengal Municipal Act in the case of companies, is sufficient to constitute specification of a trade as required by S. 182 or S. 123 (1) (*f*) of that Act, although no particular trade is indicated thereby. A company answering to that designation is, therefore, liable to take out a licence and pay the tax under S. 182. (*Henderson and Biswas, JJ.*) LANDAL AND CLARK, LTD. *v.* CHAIRMAN, JALPAIGIRI MUNICIPALITY. I L.R. (1938) 1 Cal. 35=174 I.C. 673=10 R.C. 704=41 C.W.N. 1022=A.I.R. 1937 Cal. 551.

——Ss. 278 and 281—*Municipality not providing adequate drainage — Suit, if lies — Proper remedy.*

No suit lies against the Municipality for nonfeasance in respect of their duty under S. 278 of the Bengal Municipal Act to provide adequate drainage. The only remedy in such a case is under S. 281 of that Act, which gives a right of intervention to the Local Government. (*M.C.*

BENGAL MUNICIPAL ACT (1932), S. 295.

Ghose and Bartley, JJ.) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY **181 I C. 762=11 R.C. 852=68 C L.J. 267=42 C.W.N. 768=A.I.R. 1939 Cal. 178.**

——S. 295—*Maintenance of meter in good condition—Duty of Municipality.*

Under S. 295 of the Bengal Municipal Act, the duty of maintaining the meter in good order rests upon the Municipality and not on the owner or occupier of the house. It is true that under rules framed by Government which were adopted as bye-laws by the Municipality. the entire costs of house connection including the expenses of a meter had to be borne by the owner or occupier of the house, but there is no rule or bye-law that the costs of maintaining the meter in good order have to be met by the house-owner and not by the Municipality. *(B.K Mukherjea, J.)* SARAT CHANDRA GUHA *v.* KALIPADA RAY. **180 I.C 391=11 R.C. 682=68 C L.J. 463=A.I.R. 1939 Cal. 254.**

——S. 302 (2)—*Excess water consumed by sole occupier—Liability of owner.*

Sub-S. (2) of S. 302 of the Bengal Municipal Act means that when there is only one occupier of a house under an owner and there is excess water consumed by the occupier, he, the occupier, shall be liable for the excess water. In such a case, the occupier alone is liable and not the owner. *(M C. Ghose, J.)* NARENDRA NATH SEN *v.* COMMISSIONER OF THE DUM-DUM MUNICIPALITY. **41 C.W.N. 222.**

——S. 309 (d)—*Non-repair of meter—Power of Commissioner to cut off water.*

S. 309, Cl. (*d*) of the Bengal Municipal Act does not empower the Commissioner to cut off water supply on the ground of any defect in or non-repair of the meter. *(B.K. Mukerjea, J.)* SARAT CHANDRA GUHA *v.* KALIPADA RAY. **180 I C. 391=11 R.C. 682=68 C.L.J. 463=A.I.R. 1939 Cal. 254.**

——S. 317—*Scope.*

S. 317 applies to persons who intend to erect a building. It has nothing to do with persons who start to erect surreptitious buildings, are caught red-handed and then stopped. *(Henderson and Mohamed Akram, JJ.)* AMULYA CHARAN PAUL *v.* KANCHRAPARA MUNICIPALITY. **71 C.L.J. 588=A.I.R 1940 Cal. 336.**

——(as amended), Ss. 326 and 501—*Material alteration—Person removing partition wall within building.*

S. 326 (2), Bengal Municipal Act, only refers to increase in the cubical capacity of a building or any part thereof. Where a person removes a partition wall in the building and thereby increases the area of the rooms, it does not necessarily result in the increase of the cubical capacity of the building as distinguished from the rooms within the building and unless it is shown that the cubical capacity of the building is affected, it cannot be said that there has been a material alteration within the meaning of S. 326 of the Act. Hence permission of the Commissioners under S. 501 is not required. *(Jack, J.)* RAM RATAN LALL *v.* CHAIRMAN OF THE ASANSOL MUNICIPALITY. **173 I.C. 63=10 R.C. 484=39 Cr.L.J. 258=41 C.W.N. 1316=A.I.R. 1937 Cal. 556.**

——S. 370 (1) (ix)—*Offence of burning bricks without licence—Resolution of Commissioners—Interpretation.*

BENGAL MUNICIPAL ACT (1932), S. 535.

The resolution of the Municipal Commissioners passed at a meeting was in two paragraphs. In the first paragraph the relevant words were these:—"It was unanimously resolved that the following rates, taxes and fees be in force within the limits of the Municipality under S. 123 of the Bengal Municipal Act, 1932 and at the rate and scale specified against each". Then began the second paragraph:—"It was unanimously resolved that under S. 370 of the Bengal Municipal Act licences be leviable for the following purposes at the scale mentioned against each." The accused persons were convicted by the lower Court under S. 370 (1) (ix) of the Bengal Municipal Act for having without licence burnt bricks on different premises. It was contended for them that as the words "within the limits of the Municipality" were used only in the first paragraph of the resolution and not in the second, no limits were fixed by the Municipality for the operation of S. 370 and if that be so the levying of fees was *ultra vires*,

Held, that on a plain reading of the resolution, it was clear that it was the intention of the Municipal Commissioners that S. 370 should apply to the whole of the Municipality and that as the accused persons proceeded to make bricks and burn them and made profit thereby without taking licences which they were directed by the municipal officers to take, they had no defence on the merits. *(M. C. Ghose, J.)* EMPEROR *v.* KRISHNA CHANDRA BANERJI. **64 C.L.J. 524.**

——S. 535—*Applicability—Defective hackney stand—Nuisance resulting from—Suit for permanent injunction and damages.*

S. 535 of the Bengal Municipal Act has no application to a suit for a permanent injunction and damages in respect of a continuing nuisance resulting from the erection of a defective hackney carriage stand with no suitable contrivance for drainage. *(R. C. Mitter, J.)* NIRMAL CHANDRA SANYAL *v.* MUNICIPAL COMMISSIONER OF PABNA TOWN. **I.L.R. (1937) 1 Cal 407=167 I.C. 254=9 R.C. 665=40 C.W.N. 1353=A.I.R. 1936 Cal. 707.**

——S. 535—*Notice not mentioning all reliefs claimed in suit—If invalid.*

The fact that a notice under S. 535 of the Bengal Municipal Act does not mention all the reliefs claimed in the suit, does not make it invalid. *(S. K. Ghose, J.)* MUNICIPAL COMMISSIONERS OF NABADWIP MUNICIPALITY *v.* SATISH CHANDRA MODAK. **70 C.L.J. 41.**

——S. 535—*Scope and applicability.*

S. 535 of the Bengal Municipal Act cannot be taken to apply only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners. It is clear from the wording of the section that it applies to all suits for any act purported to be done under the Act. A suit for a mere declaration would, no doubt, be exempted, but not a suit for a declaration combined with a suit for confirmation of possession and injunction. *(Jack, J.)* BIDHU BHUSAN MAJUMDAR *v.* COMMISSIONERS OF THE BARANAGORE MUNICIPALITY. **42 C.W.N. 467.**

——S. 535—*Suit for illegal omission of Municipality—Notice, if necessary.*

The words "for any act purporting to be done under this Act" in S. 535 of the Bengal Municipal

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Act include an illegal omission. Consequently a suit for a non-feasance or illegal omission of the Municipality would be bad, if the notice required by the section is not given. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLY GUNJ MUNICIPALITY. **181 I.C. 762=11 R.C. 852 =68 C L.J. 267=42 C.W.N. 768=A.I.R. 1939 Cal. 178**

——**Sch. IV, Class I**—'Construction—Transacting business for profit'. *See* BENGAL MUNICIPAL ACT, S. 182 AND SCH. IV, CLASS I. **41 C.W. N. 636=A.I R. 1937 Cal. 324.**

——**Sch. IV, Class I**—*Profit, it must accrue within municipality.*

It is not necessary under class 1 of Sch. IV of the Bengal Municipal Act that the profit must be received or realised by the company within the Municipality, or that all the operations connected with the business constituting the trade of the company should be carried on within the Municipality. It would be enough of the transactions within the Municipality are carried on as part of the business. (*Henderson and Biswas, JJ*) LANDALE AND CLARK, LTD. *v.* CHAIRMAN, JALPAIGIRI MUNICIPALITY. **I.L R. (1938) 1 Cal. 35=174 I.C. 673=10 R.C. 704=41 C.W.N. 1022=A.I.R. 1937 Cal. 551.**

BENGAL N. W. PROVINCE AND ASSAM CIVIL COURTS ACT (XII OF 1877). *See* BENGAL AGRA AND ASSAM CIVIL COURTS ACT.

BENGAL OPIUM SMOKING ACT (X OF 1932), S. 8—*Presumption under—When arises.*

The fact that the accused and two other persons were sitting in a room together and that one of them was smoking a preparation of opium, establishes the presumption referred to in S 8 of the Bengal Opium Smoking Act, and if this presumption has not been rebutted in any way, the conviction of the accused under S. 7 of the Act cannot be questioned. (*Bartley and Henderson, JJ.*) PULIN BEHARI DUTTA *v.* EMPEROR. **42 C.W N. 384.**

BENGAL PATNI REGULATION (VIII OF 1819)—*Liability to sale under—Presumption—Putnis created subsequent to the passing of the Regulation—Principles governing applicability of the Regulation to such Putnis—Pottah describing tenure as Putni—Construction.*

After the Patni Regulation was passed, the expression 'Putni Taluk', acquired a distinct technical meaning. In a case therefore where a Putni Taluk specifically described as such, is created after the year 1819 the general principle is that the parties must be intended to have created a Taluk of the denomination given in the Regulation itself with all the incidents attached to it under the Regulation. On a contention that there were certain clauses in the Pottah in question which limited the incidents of this Putni Taluk.

Held, that the words in the document indicated that the parties did not intend to give up their rights under the Patni Regulation. (*Nasim Ali and Mukherjea, JJ.*) GADAHAR ROY CHOUDHURY *v* DHIRENDRA NATH GHOSE. **175 I.C. 128=10 R. C. 747=66 C L.J. 97=A.I.R. 1938 Cal. 180.**

——**S. 8**—*Cess*, lakheraj *cess and costs—Right of zemindar to include in advertised balance—Bengal Cess Act, S. 47.*

In view of the provisions of S. 47 of the Cess Act, the zemindar is entitled to include the arrears of cess in the demand which is made under S. 8 of the Patni Regulation. The arrears of *lakheraj* cess can also be included by the zemindar within whose estate the rent-free lands are situated. Costs which are incidental to the demand for rent can also be included in the advertised balance. (*S.K. Ghose and Patterson, JJ.*) PROVAT KUMAR SINHA *v.* BIJOY CHAND MAHATAB. **41 C.W.N. 946.**

BENGAL PATNI REGULATION (1819), S. 8.

——**S. 8**—*Patni taluk held under more than one zemindar—Application for its sale—If must be made by all.*

Where there are more than one zemindar under whom a *patni taluk* is held, the application to the Collector for its sale under S. 8 of the Patni Regulation must be a joint application made by all of them. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

——**S. 8**—*Publication of notice — Mode of—Onus of proof.*

Notice under S. 8 of the Patni Regulation must be published at the *katchery* on the land of the defaulter, and only if there is no such *katchery*, then at the principal town or village appertaining to the *taluk* sought to be sold. The onus is entirely upon the zemindar to prove that the notice has been served in terms of the Regulation. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

——**S. 8**—*Service of notice — Signatures of three substantial persons obtained—Name of one of them signed by one of the others—Formalities, if complied with.*

Where the sale notice is served by obtaining the signatures of three substantial persons, there is sufficient compliance with the requirements of the section although the name of one of them, who was an illiterate person, was with his consent signed by one of the others. (*S.K. Ghose and Patterson, JJ.*) PROVAT KUMAR SINGH *v.* BIJOY CHAND MAHATAB. **41 C.W.N 946.**

——**Ss. 8 and 9**—*Intermediate tenure created by zemindar over existing putni—Validity—Interest of such tenure holder—Whether can be sold under the Regulation.*

It is quite legal and proper on the part of a zemindar to create an intermediate tenure over an existing putni. The interest of such an intermediate tenure-holder can be sold under the provisions of the summary sale as laid down in the Putni Regulation, provided there is a distinct agreement to that effect between the zemindar and the intermediate tenure holder. Such an agreement would be perfectly valid, though it could not operate in any way to the injury of the existing putnidar. The provision for summary sale in the Putni Regulation is not confined to putni tenures in the strict sense of the word, but extends to every kind of saleable tenure, provided there is clear stipulation for such sale in the lease. (*M.C. Ghose and Mukherjea, JJ.*) DURGAKANTA MAJUMDAR *v.* SURENDRA PRASAD LAHIRI CHOWDHURY. **I.L.R. (1937) 1 Cal. 788=41 C. W.N. 364.**

BENGAL PATNI REGULATION (1819), S. 10.

——S. 10—*Receipt of notice—If to be read.*

The expression "until the receipt of the notice shall have been read" occurring in the second clause of S. 10 cannot be interpreted to mean that the notice may be read privately and that it has no more force than that some document is taken "as read" at a proceeding. The object of this provision is clearly to ensure correctness and publicity. (*S.K. Ghose and Patterson, JJ.*) JALADHI CHANDRA MUKHERJI *v.* PARPATI CHARAN MUKHERJI **172 I.C. 827=10 R.C. 433=41 C.W.N. 1262=65 C.L.J. 534=A.I.R. 1937 Cal. 673.**

——S. 11—"*Incumbrance*"— *Commutation of rent in kind into cash rent by patnidar—If amounts to.*

An arrangement made by a patnidar with a tenant for payment of cash rent for the holding, instead of rent in kind, cannot be said to amount to an incumbrance. It is merely a *bona fide* engagement made with the tenant and is, therefore, covered by Cl. (3) of S. 11 of the Bengal Patni Taluk Regulation. (*Edgley, J.*) BIJOY CHAND MAHATAB *v.* BEPIN BEHARI MANDAL. **44 C.W.N. 230.**

——S. 11 (1)—*Grant of mokarari right to cultivator—If an incumbrance.*

When no under-tenure is created between the putnidar and the actual cultivator, but the latter himself is given a right of fixity of rent, the grant of *mokarari* right by the putnidar is an incumbrance within the meaning of S. 11, Cl. (1) of the Putni Regulation, and the right cannot subsist after the *putni* sale, unless it comes within the exception, provided for in Cl. (3) of S. 11. (*Mukherjea, J.*) ANNADA PRASANNA *v.* RAM SARAN KOWER. **172 I.C. 602=11 R.C. 133=41 C.W.N. 1234=A.I.R. 1937 Cal. 686.**

——S. 11 (3)—*Engagement relating to fixity of rent between* putnidar *and* raiyat—*If binds purchaser at* putni *sale.*

An engagement relating to fixity of rent between the defaulting *putnidar* and a *raiyat*, is not binding on the purchaser at a *putni* sale under the provision of Cl. (*iii*), S. 11 of the Putni Regulation. After the *putni* sale, the *mokarari* character of the tenancy would be lost and the future right of the parties would be governed by the law for the time being in force. The purchaser would, therefore, be able to claim enhancement of rent for any reason for which a landlord is entitled in law to claim enhancement. (*Mukherjea, J.*) ANNADA PRASANNA *v.* RAM SARAN KOWER. **172 I.C. 602=11 R.C. 133=41 C.W.N. 1234=A.I.R. 1937 Cal. 686.**

——S. 11 (3)—*Settled* raiyat—*If a* khudkasht raiyat.

It cannot be said that a settled *raiyat* must necessarily be a *khudkasht raiyat* within the meaning of S. 11, Cl. (3) of the Patni Regulation. The essential thing in a *khudkasht raiyat* is that he is a resident cultivator, who holds land in the village in which he has his fixed residence. Even a non-resident cultivator can acquire the status of a settled *raiyat* by holding and cultivating lands in a village for a period of twelve years. (*Mukherjea, J.*) ANNADA PRASANNA *v.* RAM SARAN KOWER. **172 I.C. 602=11 R.C. 133=41 C.W.N. 1234=A.I.R. 1937 Cal. 686.**

——S. 13—Putnidar's *liability for* putni *rent—Transfer of interest by* putnidar—*Transfer not registered in landlord's* serista—*Effect*—Putnidar, *if bound by law to pay* putni *rent.*

A *putnidar* is liable to pay the zemindar's *putni* rent and cannot seek to avoid liability for the same on the ground that he has transferred his interest to another, when such transfer has not been registered in the zemindar's *serista*, under S. 13 of the Putni Regulation, the zemindar is not bound to recognize the *putnidar's* transferee until certain conditions are fulfilled, until the name of the purchaser of a *putni* tenure is registered in the zemindar's *serista*, the transfer does not affect the zemindar's right to hold the recorded *putnidar* liable for rent and may ignore the transferee. In spite of the transfer the *putnidar* continues liable for rent, and is the person "bound by law" to pay the rent within the meaning of S. 69 of the Contract Act. (*D.N. Mitter and Patterson, JJ.*) ADHAR CHANDRA MANDAL *v.* DOLGOBINDA DAS. **63 Cal. 1172=167 I.C. 604 (2)=9 R.C. 707 =63 C.L.J. 287=40 C.W.N. 1037=A.I.R. 1936 Cal. 663.**

BENGAL PATNI REGULATION (1819), S. 14.

——S 14—*Defaulting* putnidar—*Right to sue to set aside sale.*

A defaulting *putnidar* is entitled to sue to set aside a *putni* sale on the ground that it was vitiated by error in the procedure and the sale has caused serious prejudice to him. (*S.K. Ghose and Patterson, JJ.*) JALADHI CHANDRA MUKHERJI *v.* PARBATI CHARAN MUKHERJI. **172 I.C. 827=10 R.C. 433=41 C.W.N. 1262=65 C.L.J. 534=A.I.R. 1937 Cal. 673.**

——S. 14—Patnidar *paying direct to zemindar on date of sale—Right to stop sale.*

There is nothing in the provisions of the Patni Regulation which disentitles the *putnidar* from paying the demand up to date direct to the zemindar even on the date of the sale. But unless the payment is made within the period of the notice, it cannot be said that the *putnidar* has a statutory right to stop the sale by such payment to the zemindar. (*S. K. Ghose and Patterson, JJ.*) JALADHI CHANDRA MUKHERJI *v.* PARBATI CHARAN MUKHERJI. **172 I.C. 827=10 R.C. 433=41 C.W.N. 1262=65 C.L.J. 534=A.I.R. 1937 Cal. 673.**

——S. 14—Putni *sale—Liability to be set aside —Mistaken impression on part of auction-purchaser.*

A mere mistaken impression on the part of the auction-purchaser will not be sufficient to justify the setting aside of a *putni* sale. It will have to be shown further that there was an error in the statutory procedure which led to such a wrong impression, if any. (*S. K. Ghose and Patterson, JJ.*) JALADHI CHANDRA MUKHERJI *v.* PARBATI CHARAN MUKHERJI. **172 I.C. 827=10 R.C. 433 =44 C.W.N. 1262=65 C.L.J. 534=A.I.R. 1937 Cal. 673.**

——S. 14—*Scope—Deposit of amount—Sale, if must be stayed.*

S. 14 does not refer to payments made in satisfaction of the demand but provides for deposits being made to stay the sale. The lodging of the amount claimed is a condition precedent under both clauses of S. 14. But even if this condition is complied with, it does not follow that the sale must be stayed. The zemindar is made exclusively responsible for saying whether the demand is satisfied or not, and where the summary investigation is not finished in time, the lot will be put

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up to sale nevertheless at the risk of the zemindar. (*S. K. Ghose and Patterson, JJ.*) JALADHI CHANDRA MUKHERJI *v.* PARBATI CHARAN MUKHERJI. **172 I.C. 827=10 R.C. 433=41 C.W.N. 1262=65 C.L.J. 534=A.I.R. 1937 Cal. 673.**

——**S. 14**—*Scope—If exhaustive—Suit to declare that patni sale is collusive and fraudulent and not binding—Maintainability— Proper frame of suit—Amendment of plaint—Permissibility at late stage.*

The only remedy open to a person who wishes to challenge a *patni* sale is that provided by S. 14 of the Bengal Patni Regulation, and he is not entitled to any relief unless he proceeds in accordance with the provisions of that section. That is to say he must sue to set aside the sale. A suit for a declaration that a patni sale is void and not binding by reason of collusion and fraud on the part of the defendant is not maintainable. Where the suit as framed is objected to as not maintainable in the written statement of the defendant, but application to amend the plaint is made at a late stage, at the very close of the suit and after the expiry of the period of limitation for the suit, the Court acts properly in rejecting the amendment sought to be made. Such an amendment, if allowed, would interfere with the rights of the purchaser at the sale. The fact that the purchaser is a party to the suit does not affect the matter. The discretion exercised by the lower Courts in rejecting the application for amendment will not be interfered with in second appeal. (*Jack and Edgley, JJ*) MAHOMED BADSHA MIA *v.* KUMAR ARUN CHANDRA SINGH BAHADUR. **40 C.W.N. 1233.**

——**S. 14-A**—*Application—Shortage in deposit—If can be waived—Zemindar not objecting to deposit—Power of Court to set aside sale.*

As a general rule it is no doubt true that a person can waive a benefit intended solely for him, and it would make no difference whether such benefit is conferred on him by contract or by statute. It is equally well settled that if such a provision made in a statute, though for his benefit, is also intended for the benefit of or protection of the interest of others or is based on public policy, there can be no scope for the application of the principle of waiver. By a sale of a patni under the regulation the auction-purchaser acquires very valuable rights. Hence there is no scope for the application of the principle of waiver in applying S. 14-A of the Patni Regulation and the mere statement by the zemindar that he has no objection to set aside the sale will not cure the illegality of shortage of deposit. (*R. C. Mitter, J.*) NANDA KUMAR PANDE *v.* SOURENDRA NATH GHOSE. **166 I.C. 452=9 R.C. 532=40 C.W.N. 792=A.I.R. 1936 Cal. 129.**

——**S. 14, First**—*Ground for reversal of sale—Non-deposit of 15 per cent. of purchase-money on date of sale.*

The fact that 15 per cent. of the purchase-money was not deposited on the date of sale in terms of S. 9 of the Patni Regulation is not such an irregularity which would entitle a party to have a *patni* sale reversed, when the whole amount of the purchase-money was deposited within 8 days of the sale and was accepted by the Collector. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442**

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=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.

——**S. 14, First**—*Ground for reversal of sale—Notice under S. 8 making excess claim.*

If the notice issued under S. 8 of the Patni Regulation includes a claim to interest on the arrears of rent which the zemindar is not entitled to, and the excess claim made is for a substantial amount, there is sufficient ground for the reversal of the sale. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

——**S. 14, First**—*Ground for reversal of sale—"On any other ground"—Interpretation.*

The second paragraph of the first part of S. 14 of the Patni Regulation does not indicate exhaustively the grounds for which a patni sale can be reversed. One specific ground is indicated, namely, there being no balance, but the words following, namely, "on any other ground" cannot be construed on the principle of *ejusdem generis*, that is to say other grounds need not be of a nature similar to the ground of total absence of arrears. Any ground which may affect the right of the zemindar to make that questioned sale would be sufficient. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

——**S. 14, First**—*Reversal of patni sale—Remedy of patnidar.*

The second paragraph of the first part of S. 14 of the Patni Regulation confers on the defaulting patnidar the right to sue the zemindar in the Civil Court for reversal of the sale. That is the only form of remedy given to him for a patni sale cannot be attacked collaterally and holds good till it is reversed in a suit brought under that sub-section. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

——**S. 14, Second**—*Summary investigation by Collector—Patnidar, if bound to ask for.*

Under the second part of S. 14 of the Patni Regulation, the patnidar can, no doubt, ask for a summary investigation by the Collector not only when his case is that no balance was due but also when he contends that the balance claimed was more than what the zemindar was entitled to. But he is not bound to ask for it but may reserve it for a suit for reversal of the sale under the section. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R (1940) 1 Cal. 442=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

——**S. 15 (2)**—*Application by purchaser for issue of proclamation—Application resisted by* darputnidars—*Power of Court to decide questions raised between parties.*

If an application under S. 15 (2) of the Patni Regulation is made by a purchaser of a *putni* taluk for the issue of a proclamation, there is a duty cast upon the Judge before whom the application is made to consider and determine, at any rate in a summary fashion whether the circumstances are such that the purchaser can justly have a proclamation issued in his favour. If the *darputnidars* appear in the proceedings and resist the

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application, the Court is entitled to decide questions raised between the parties by a summary enquiry. (*Costello, A.C.J. and Edgley, J.*) DEBI SANKAR BANERJEE *v.* JNANENDRA NARAYAN. **41 C.W.N. 1280.**

——S. 15 (2)—*Issue of proclamation—Duty of Judge.*

There is a duty cast upon the Judge before whom an application is made under S. 15 (2) of the Patni Regulation to consider and determine, at any rate in a summary fashion, whether the circumstances are such that the purchaser can justly have a proclamation issued in his favour. (*Costello, A C.J. and Edgley, J.*) BYOM KESH MUKHERJI *v.* NIRENDRA NARAYAN BAGCHI. **I L R. (1938) 1 Cal. 427=41 C.W N. 1280=179 I.C. 675=11 R.C. 593=A I.R. 1939 Cal. 110.**

BENGAL PUBLIC DEMANDS RECOVERY ACT (III OF 1913), Ss. 3 (1) and 20—*Order directing addition as parties of certain persons—Names not specified in order nor added in certificate—If makes them certificate debtors.*

An order merely directing the addition as parties of certain persons, whose names were not specified in the order, nor added in the certificate, cannot make these persons certificate-debtors within the meaning of S. 3 (1) and consequently their rights do not pass by the sale. (*Mukherjea and Roxburgh, JJ.*) BHARAT BANDHU *v.* RANENDRA KUMAR. **187 I.C. 276=12 R.C. 555=70 C.L. J. 370=A.I.R. 1939 Cal. 752.**

——Ss 5 and 6—*Jurisdiction of certificate officer—Property situate outside his district.*

The jurisdiction of the certificate officer under S. 5 of the Public Demands Recovery Act does not depend upon the situation of the property in respect of which the demand arises but upon the place where the money is demandable or payable. If this place is within the district where the certificate officer holds office, the certificate officer has jurisdiction to receive the requisition and to make a certificate although the property is situate outside the district. (*Nasim Ali and Rau, JJ.*) SECRETARY OF STATE FOR INDIA. *v* SYED SADAK REZA. **44 C W N 901.**

——Ss. 7 and 21—*Certificate-debtor, a lunatic—Notice served on him and not on his guardian—Validity of sale—Decree and certificate—Difference—Determination of lunacy—Order of Court if necessary.*

The service of the notice under S 7 of the Public Demands Recovery Act on the certificate-debtor who is a lunatic, instead of on his guardian does not make the sale void There is an essential difference between a decree passed by a Court and a certificate. A decree cannot be made without proper service on the defendant and without some evidence. A certificate has the force of a decree when signed under S. 4 and filed under S. 7 of the Public Demands Recovery Act; no evidence has to be taken and no notice has to be served. Lunacy is determined not by an order of the Court but by recovery. (*Henderson, J.*) JOGESH CHANDRA BANERJEE *v.* DIGENDRA CHANDRA BANERJEE. **I L R. (1939) 1 Cal. 517=183 I C. 515=12 R.C. 163=43 C.W.N. 1177=69 C.L J. 374=A.I R. 1939 Cal. 542.**

——S. 8—*Order prohibiting tenants from paying rent and for sale of property outside District—Jurisdiction of certificate officer.*

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Per Nasim Ali, J.—Under S. 8 (*b*) of the Public Demands Recovery Act, the certificate debt becomes a charge upon the immovable property of the certificate debtor wherever situated after the service of notice of the certificate under S. 7 upon the certificate debtor. An order of the certificate officer prohibiting the tenants from paying their rents to the certificate debtor and an order by him for sale of the properties are not, therefore, without jurisdistion although the properties affected by the orders are outside his district. (*Nasim Ali and Rau, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SYED SADAK REZA. **44 C.W.N. 901.**

——S. 19 (3)—*Attaching certificate-holder—Position of—Right to adjust attached decree to his satisfaction—C. P. Code, S. 146 and O. 21, R. 53 (3).*

The provisions of S. 19 of the Public Demands Recovery Act and S. 146 and O. 21, R. 53, C. P. Code, make the attaching certificate-holder or the attaching decree-holder the representative of the original decree-holder only for a limited purpose, namely, for executing the attached decree and for satisfying his own decree out of the proceeds of the execution. He is, therefore, not competent to adjust the attached decree to his own satisfaction and release the judgment-debtor from his liability under the decree. (*Nazim Ali and R. C. Mitter, JJ.*) DURGA PRASAD CHAMARIA *v.* SECRETARY OF STATE FOR INDIA. **172 I C. 560=10 R.C. 397=41 C.W.N. 880=A.I R. 1937 Cal. 468.**

——Ss. 34 and 37—*Petition under S. 9—Right of certificate debtor to maintain suit.*

If the certificate debtor has filed a petition under S. 9 he cannot bring a suit until after the date of determination of that petition. Hence a suit under S 34 before such decision is premature; but the certificate debtor, where fraud is alleged, is not limited to a suit under S. 34 of the Act but can bring a suit independently of its provisions. (*Jack, J.*) HARSHAMUKHI DASI *v.* NABA KRISHNA ROY. **178 I.C. 941=11 R.C. 437=A.I.R. 1938 Cal. 609.**

——Ss. 34, 37 and 9—*Petition filed under S. 9, pending—Certificate debtor's rights to maintain suit.*

Per *Jack, J.*—If a certificate debtor files a petition of objection under S. 9 of the Public Demands Recovery Act, he is not entitled to bring a suit under S. 34 of the Act, until after the decision of the certificate officer under S 10. But if he alleges fraud, he is not bound by S. 34, and he can maintain a suit under S. 37 of the Act. (*Nazim Ali and Mukherjea, JJ.*) HARSHAMUKHI DASI *v.* NABA KRISHNA ROY. **44 C.W.N. 433=71 C.L J. 192=A.I.R. 1940 Cal. 314.**

—— S. 36, Proviso (a)—*Suit to set aside sale—Limitation.*

S. 36, Proviso (*a*) of the Public Demands Recovery Act lays down a rule of limitation, and a suit to set aside a sale instituted more than a year after the delivery of possession to the purchaser is, therefore, time barred. (*Henderson and Latifur Rahman, JJ.*) DHIRENDRA NATH BHATTACHARJEE *v.* CHARU CHANDRA MITTRA. **188 I C. 169=12 R C 657=43 C.W.N. 849=70 C.L.J. 329 =A I.R. 1940 Cal. 207.**

——S. 37—*Adjustment of certificate debt—Question relating to—Jurisdiction of Civil Court.*

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A question arising between the certificate-holder and the certificate debtor relating to an adjustment of the certificate debt is to be determined by the certificate officer and not by the Civil Court in a suit. (*Nasim Ali and Rau, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SYED SADAK REZA. **44 C W.N. 901.**

——**Ss. 37 and 35**—*Question, if certificate was "duly filed"—Jurisdiction of Civil Court.*

Per *Rau, J.*—The question, whether the certificate has been "duly filed under the Act" is not excluded from the purview of the Civil Court either by S. 35 or by S. 37 of the Public Demands Recovery Act. (*Nasim Ali and Rau, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SYED SADAK REZA. **44 C.W.N. 901.**

——**S. 37**—*Suit to set aside sale—Non-joinder of Secretary of State—Fraud found by Court—Proper order*

A suit was filed for setting aside a sale held under the Public Demands Recovery Act on the ground of fraud. The Court found that the sale was brought about by the fraud of defendant No. 2, but dismissed the suit on the ground that the Secretary of State for India in Council was not made a party to it.

Held, that the Court without setting aside the sale should have, in view of its finding as to fraud, passed a decree declaring that the Jote purchased at the certificate sale by defendant No. 2 in the benami of the defendant No. 1 was held by the defendants for the benefit of the plaintiffs according to their interests at the date of the sale, subject to the repayment by them of their proportionate share of the purchase price and of the costs properly incurred with interest at 6 per cen . from the date of sale up to the date of repayment. (*Akram, J.*) ANU MIAH *v.* OSI MIAH. **71 C.L.J. 251.**

——**S. 57**—*Security bond in favour of certificate officer—Nature of—District Board, if can sue upon.*

A judgment-debtor under arrest, under the Public Demands Recovery Act, in respect of certificate dues, was released from such arrest on a surety executing a security bond in favour of the certificate officer agreeing to stand surety for the payment of the decree amount due to the District Board, and to produce the judgment-debtor on a particular date. In a suit on the bond by the District Board,

Held, that the agreement was in the nature of a contract of guarantee under S. 126 of the Contract Act and that though a suit could not be maintained by the certificate officer on such a bond, he being deemed to be a Court by S. 57 of the Act, yet that is no reason why the District Board having been deprived of its proper remedy by the action of the certificate officer, should be held not entitled to maintain a suit to enforce the security which was admittedly for its benefit unless of course it is barred by any other principle.

Held, further, that case came within the well-recognised exception to the general as laid down in *Tweedle* v. *Atkinson*, founded on the creation of a trust, and that the certificate officer being a nominee or trustee of the District Board, the Board was entitled to sue upon the contract. (*Henderson and Biswas, JJ.*) MALDA DISTRICT BOARD *v.* CHANDRA KETU NARAYAN SINGH. **I.L.R. (1937) 2 Cal. 698=175 I.C. 929=10 R.C. 19=41 C.W.N. 1008=66 C.L.J. 373=A.I.R. 1937 Cal. 625.**

BENGAL REGULATION (1793), S. 33.

BENGAL PUBLIC GAMBLING ACT (II OF 1867), S. 6—*Presumption under—Applicability to prosecution under.*

All the persons present in such an enclosed place as a common gaming house, may naturally be supposed to be members of the gaming party. But in dealing with a public place where the gravamen of the offence may be said to be the danger of corrupting the morals of the innocent passer-by, the presumption regarding any one found present (unless something further is proved against him) is that he is an innocent passer-by. The mere fact that a person was found running away from public gambling place is not sufficient to support the presumption that he was actually gambling. (*Rowland, J.*) RAMJANAK PATWA *v.* EMPEROR. **168 I.C. 840=9 R.P. 518=38 Cr.L.J. 608=3 B.R. 499=18 Pat.L T. 352=1937 P.W.N. 388=A.I.R. 1937 Pat. 276.**

——**S. 11**—*Counterfoil receipts bearing names of horses—If instruments of gaming.*

It is doubtful whether the view that counterfoil receipts bearing names of certain horses on which bets had apparently been made which were found in the possession of the accused are instruments of gaming is sound. Accused in possession of such counterfoils was held not guilty when there was no clear evidence as to what the accused was doing at the time of arrest. (*Patterson, J.*) AMULYA DHONE GHOSE *v.* RAM SUNDAR SINGH. **175 I.C. 446=10 R.C. 803=A.I.R. 1938 Cal. 422.**

——**S. 11**—*Possession of racing guides and notes on horses—Inference from.*

Having racing guides and notes on horses does not necessarily justify the inference that accused were taking unauthorized bets. It is not unlawful for men to possess racing guides and notes on horses specially when they are on their way to the racecourse to attend the races. (*M. C. Ghose, J.*) PRAFULLA KUMAR MUKHERJEE *v.* EMPEROR. **178 I C. 412=11 R.C. 357=40 Cr.L.J. 60=A.I.R. 1938 Cal. 713.**

——**S. 11**—*"Public place"—Meaning and requisites of.*

It is not necessary that a public place for gambling should be public property; but if it is private property, the public must have access to it; nor is it sufficient that a place should be accessible to the public; it must be a place to which the public do in fact resort. Where the public has no access a place cannot be called a public place. (*Rowland, J.*) RAMJANAK PATWA *v.* EMPEROR. **18 Pat.L.T. 352=1937 P.W.N. 388=168 I.C. 840=9 R.P. 518=38 Cr.L.J. 608=3 B.R. 499=A.I R. 1937 Pat. 276.**

BENGAL REGULATION (XLIII OF 1793), S. 33 (1)—*Grant of Jagirs to invalided soldiers—Nature of—Jagirdar or heirs of tenants of zemindar—If protected from annulment under S. 37, Excep. 1, Bengal Revenue Sale Law.*

The provisions of the regulations relating to jagir lands granted to invalided soldiers clearly indicate that the lands which were granted to invalids or their heirs are regulated by the terms of the regulations themselves and are not tenures granted by the zemindar in any sense of the

term. The zemindar is not entitled to assess rents upon the jagirdars not to realize direct the malikanah payable to him nor to resume the lands upon the death of the invalid or his heirs. In truth the grant of this kind of jagir is a grant by the Government by virtue of its paramount power of a piece of land to its invalided soldiers which would remain in perpetuity in the possession of the heirs of the jagirdar provided the heirs complied with the terms in the regulations. Therefore the jagirdar is not a tenant of the zemindar in any sense of the term. S. 33 (1) merely defines the status of the heir of the grantee in the village hierarchy and does not in the least derogate from the rights which the Government was providing anxiously by means of the various regulations prior to and after Regulation XLIII of 1793 to enable the heirs of the grantee to remain upon the land in perpetuity. Therefore the rights of the heirs of the grantee to continue to hold the land in perpetuity agreeably to the holders and their heirs observing the terms of the various regulations are not at all affected by a revenue sale and are protected from annulment under S. 37, Excep. 1, Bengal Revenue Sale Law. The legislation of 1859 (Revenue Sale Law) was clearly not intended to get rid of the permanent mukarrari character given to these grants by the old regulations, nor did it have the effect of repealing the special protective provisions previously enacted. (*Harries, C.J., Dhavle and Manohar Lall, JJ.*) BISHUN PRASAD *v.* KAMTA PRASAD. **19 Pat. 553=1940 P.W.N. 528 =21 P.L.T. 552=6 B.R. 602=188 I C. 154=12 R.P 666=A.I.R. 1940 Pat. 275 (F.B.).**

BENGAL RENT ACT (X OF 1859)—*Applicability—Jote nan-agricultural.*

When a jote in suit is non-agricultural in character, provisions of the Bengal Rent Act have no application. (*S.K. Ghose and Patterson, JJ.*) PRASANNADEB RAIKAT *v.* TABIUR RAHAMAN. **I.L.R. (1939) 1 Cal. 101=179 I.C. 479=11 R.C. 546=68 C.L.J. 381=A.I.R. 1938 Cal. 866.**

——**S. 13**—*Enhancement—Grounds — Contents of notice.*

An under-tenure-holder is liable to pay at enhanced rate, on grounds which must be intimated to him by the landlord by a notice and which groun ls must be fair and equitable on consideration of prevailing customary rates of similar tenures in the neighbourhood. Scheduled Districts Act (XIV of 1874) does not in any way affect this privilege of tenure-holders of paying customary rates. (*S. K. Ghose and Patterson, JJ.*) PRASANNADEB RAIKAT *v.* TABIUR RAHAMAN. **I.L.R. (1939) 1 Cal. 101=179 I.C. 479=11 R.C. 546 =68 C.L J. 381=A.I.R. 1938 Cal 866.**

——**S. 18**—*Scope—Occupancy tenant—Right to abatement of rent—Effect of Bengal Tenancy Act, Ss. 38 and 52.*

S. 18 of the Bengal Rent Act of 1859 which provides for the abatement of rent in the case of an occupancy ryot in case of diluvion, or deterioration or otherwise, has since been split up and re-enacted in two separate sections, namely, S. 38 and S. 52 of the Bengal Tenancy Act of 1885. S. 38 provides for cases where the soil of the holding has, without the fault of the *raiyat*, become permanently deteriorated by deposit of sand or other specific causes, sudden or gradual. S. 52 deals with cases where the whole or part of the tenant's land is lost to him by reason of diluvion or other similar causes. But while S. 52 is general and applies to all classes of tenants, S. 38 applies only to an occupancy tenant. S. 52 is more general than S. 38 and applies even to a tenant holding under a *mukarrari lease*. (*Courtney-Terrell, C. J., Macpherson and Fazl Ali, JJ.*) DUKHA LAL CHAUDHURY *v.* MST. MANABATI. **15 Pat 594=163 I.C. 1003=9 R.P. 69=17 Pat.L.T. 339=1936 P.W. N. 373=A.I.R. 1936 Pat. 341 (S.B.).**

BENGAL REVENUE FREE LANDS (NON-BADSHAHI GRANTS) REGULATION (XIX OF 1793), Ss. 4, 5 and 6—*Scope—Resumption proceedings—Effect on holders of invalid lakhiraj grants—Right to hold lands—Land Revenue Assessment (Resumed Lands) Regulation, S. 3.*

The provisions of Ss. 4 to 6 of the Bengal Revenue Free Lands Regulation of 1793 and S. 3 of the Land Revenue Assessment Regulation of 1819 make it clear that there was no intention in the resumption proceedings to dispossess the holders of invalid lakhiraj, but rather to assess them to revenue where the land exceeded 100 bighas, or to rent under the proprietors of the estates within whose boundaries they were included where the area was less than 100 bighas. The successors of the original holders of the invalid lakhiraj resumed are entitled to continue to hold the lands as tenants of the proprietors of the estate to which they belong. (*Pearson and Jack, JJ.*) JUGAL CHARAN MONDAL *v.* RAI DWENDRA NATH BALLAV BAHADUR. **63 C.L.J. 593.**

——**S. 10**—*Suit purporting to be under—Suit for resumption of lands on ground that they formed part of* mal *lands of plaintiff and that defendants were possessing them without any right—Plea by defendants that they were holding them as* lakheraj *grant from before* 1790 *— Decree in favour of plaintiff—Effect of—Whether interrupts adverse possession of defendants.*

In 1862, a suit was instituted by the predecessor of the plaintiff for resumption of certain lands on the ground that they formed part of the *mal* lands of their *Touzi* and that the predecessors-in-interest of the defendants came into possession of these lands after 1790 and were possessing them without any right. The suit purported to be one under S 30 of Regulation II of 1819 for resumption of lands under S. 10 of Regulation XIX of 1793 which gives right to the zemindar to dispossess the grantee of the *lakheraj* grant made since 1790, and there was no prayer for ejectment. The predecessors of defendants in that suit contended that they were holding these lands as *lakheraj* from before 1st December, 1790. This suit was decreed in favour of the plaintiff. It was held in that case that there had been no *lakheraj* grant in respect of these lands either before or after 1790 and that the defendant s predecessors were in wrongful possession of the lands. Thereafter the proprietors of the *Touzi* did not take any steps to eject the defendant's predecessors from the lands or to assess rent on them. In 1932, the plaintiff instituted a suit for assessment of rent in respect of these lands.

Held, that as the case of both the parties in the suit of 1862 was that there had been no *lakheraj* grant in favour of the defendants since 1st December, 1790, the effect of the decree in that

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suit could not be the same as that of a decree passed in a suit for resumption of *lakheraj* grants since 1st December, 1790, under S. 10 of Regulation XIX of 1793 or S. 28 of Act X of 1859, that this decree did not and could not convert the adverse possession of the defendants into permissive possession and no relationship of landlord and tenant between the parties was, therefore, created by this decree, and that the rights of the plaintiff and his predecessor to recover possession of the property and their right to the property were, therefore, extinguished.

Held also, that as the plaintiff had lost his right to recover possession of the lands from the predecessors of the defendants who were denying the plaintiff's proprietary right to the lands all along and were asserting their *lakheraj* right to the lands on the basis of grants before 1790, no action could be brought now to assess or recover rent in respect of these lands. (*Nasim Ali and R. C. Mitter, JJ.*) BEJOY GOPAL DEY *v.* GOPIDAS ROY. **I.L.R. (1937) 2 Cal. 234=41 C.W.N. 688.**

BENGAL REVENUE FREE LANDS REGULATION (VIII OF 1800), S. 10—*No entry in Pergunah register relating to* lakhiraj—*Non-registration of grant—Presumption.*

From the mere fact that there is no entry in the *lakhiraj* part of the Pergunah register relating to a particular *lakhiraj*, it cannot be taken or presumed that the *lakhirajdar* had omitted to take steps to register his grant so as to entitle the Government to assess to revenue land included in the grant. (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v.* MRITUNJOY. **I.L.R. (1940) 1 Cal. 216=44 C.W.N. 101.**

BENGAL REVENUE RECOVERY ACT (I OF 1890), S 4 (2)—*Applicability—Certificate in respect of amount due to public body or local authority—Proceedings in execution—Payment under protest—Suit to recover sum paid under protest—Forum—Jurisdiction.*

Reading Ss. 3 and 5 of the Bengal Revenue Recovery Act, it is clear that whether the amount stated in a certificate is recoverable as payable to the Collector or as payable to any public body or any local authority other than the Collector, the proceedings taken against the defaulter must be proceedings referred to in S. 3 of the Act. That would bring the case directly within S. 4 of the Act, and S. 4 (*2*) becomes applicable and a suit for recovery of the amount paid under protest, on the ground that the plaintiff was not liable to the amount claimed from him or any part thereof must be filed in the Civil Court of the Province where the office of the Collector who made the collection is situate and not at the place where a sale in pursuance of the certificate is held. (*Fazl Ali and James, JJ.*) BHARATH BHUSHAN PRASAD SINGH *v.* SECRETARY OF STATE. **182 I.C 223=5 B.R 734=12 R.P. 7=A.I.R. 1939 Pat. 517.**

BENGAL SAIR REGULATION (XXVII OF 1793), Art. 2—*Scope—Consolidated amount payable by occupant of* gola *to landlord on grains, etc., stored by him on* gola—*If tax or duty prohibited by Regulation.*

A consolidated amount of dues payable by the occupant of a *gola* to the landlord on the sales of various articles there stored by him, *e.g.*, grains, tobacco, mustard oil and so on, must be held to be a tax or duty within the meaning of Art. (2) of the Bengal Regulation of 1793; and the levy of same is prohibited. (*Wort, J.*) BIKAN MAHURI *v.* MT BIBI WALIAN. **183 I.C. 763=5 B.R. 983=12 R.P. 189=20 Pat.L.T. 671=A.I.R. 1939 Pat. 633.**

[Note Reg. XXVII of 1793 repealed by Act XXIX of 1871.]

BENGAL SANITARY DRAINAGE ACT (VIII OF 1895), S. 23—*Claim for cess—Limitation.*

Where the amount due by the tenure-holders by way of drainage cess is not ascertained definitely by the Government at the time when the original assessment is made in 1920, as required by the provisions of the Cess Act, and the proprietor brings a suit against the tenure-holders in 1932, after the record-of-rights in 1930 is published which fixes the amount due from the tenure-holders, claiming the cess due from 1920, the suit can be decreed for the period of four years only up to date of the institution of the suit, for though the provisions of the Cess Act require this amount to be settled by the Government, this fact cannot affect the limitation as regards the amount due from the tenure-holder. (*Jack and S. K. Ghose, JJ.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* JNANADAYINI DEVI. **173 I.C. 334=10 R.C. 502=A.I.R. 1937 Cal. 483.**

——**S. 23.**

The landlord is entitled to a decree for cess only for a period of 4 years up to the date of the institution of the suit (*S.K. Ghose and Mukherjea, JJ.*) JOGENDRA KRISHNA BANERJEA *v.* ADMINISTRATOR-GENERAL OF BENGAL. **186 I.C. 522=12 R.C. 475=70 C.L.J. 194=A.I.R. 1940 Cal. 87.**

BENGAL SUPPRESSION OF IMMORAL TRAFFIC ACT (VI OF 1933), S. 6 (5)—*Applicability—Service of notice to quit by landlord on tenant—Order on landlord and sub tenant under S. 6 (2)—Landlord unable to take steps for eviction on account of Courts being closed—Conviction—Sustainability.*

After the landlord had served a notice to quit on his tenant, an order was served on him as well as on the sub-tenant of his tenant under S. 6 (2) of the Suppression of Immoral Traffic Act. The sub-tenant did not vacate and the Civil Courts closed for the Puja Vacation, making it impossible for the landlord to eject the sub-tenant. Before the suit could be filed for ejectment in accordance with the notice to quit, a prosecution was started against him under S. 6 (5) of the Act on the ground that he allowed the house to be used as a brothel after the order under S. 6 (2).

Held, the landlord could not, under the circumstances, be held guilty of any offence. (*Nasim Ali, J.*) MAHADEO PRASAD *v.* EMPEROR. **40 C.W.N. 350.**

——**S. 9**—*Intention — Nature of — Trial of offence—Duty of Judge.*

The intention specified in S. 9 is not necessarily an intention that the girl should become an inmate of an existing brothel. Where in a trial for an offence under S. 9, Bengal Suppression of Immoral Traffic Act, the Judge omits to point out to the jury that the prosecution must prove that the girl alleged to have been taken by the accused to a house, was taken there for prostitution but tells the jury that the offence would be committed

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even if the house was not a brothel within the definition of S. 3 of the Act, it amounts to a serious misdirection. (*Bartley and Henderson, JJ.*) EKKARI DAS *v.* EMPEROR. **182 I.C. 447=12 R.C. 65=40 Cr.L.J. 660=43 C.W.N. 668=A.I.R. 1939 Cal. 290.**

BENGAL SUPPRESSION OF TERRORIST OUTRAGES ACT (XII OF 1932)—Sentence under—Revision by High Court—Competency—Government of India Act, S. 107. *See* GOVERNMENT OF INDIA ACT, 1919, S. 107. **40 C.W.N 735.**

——Ss. 24 and 25—*Special Magistrate—Power to tender pardon under S. 337, Cr. P. Code.*

Per *Full Bench* (*Mukherji, J.*, contra).—A special Magistrate appointed under S. 24 of Bengal Suppression of Terrorist Outrages Act (XII of 1932), has power to tender a pardon under S. 337, Cr. P. Code, even though he has no power to commit the accused to the Court of Session or High Court. The Magistrate may, acting under S. 337 (1), tender a conditional pardon, and under S. 337 (2) examine the pardoned man as a witness in his Court, but must, acting under the Bengal Suppression of Terrorist Outrages Act, 1932, try the accused himself instead of committing him for trial to the Court of Session on the High Court, as S. 337 (2-A) of the Code provides. 1933 Cal. 557 and 1935 Cal 281, Appr.

Mukherji, J.—The special Magistrate has no power to tender pardon under S. 337, Cr. P. Code, for the following reasons:—(1) The words used in S. 25 are that "such person shall be tried." If a Magistrate proceeds to tender pardon to an accused person he stops his trial and does something which he has no jurisdiction to do He thereby ceases to proceed with the trial of that particular accused person, the object of which is to determine his guilt or innocence and does something which is not covered by the direction under which he has jurisdiction to act. No doubt, in a case in which a prosecutor withdraws from the prosecution of an accused, the trial of that accused is also stopped; but such act is the act of the prosecutor. Hence tendering pardon is not trial of such person. (2) S. 337, Cr.P.Code, cannot be taken in compartments, and it cannot be held that all the compartments, with the exception of that which ensures the right to have the case committed to the Court of Session, may be availed of by the Special Magistrate. 1933 Cal. 537, Dist.

Per *Panckridge, J.*—The various powers and directions given to Magistrates by S. 337 are so distinct and independent that each is a provision within the meaning of the Local Act. The argument that the Special Magistrate is only clothed with power to "try" the accused under S. 25 of Local Act and not with the power to "pardon," construes "try" and "trial" in an artificial and unnecessarily narrow fashion. S. 337, Cr. P. Code, is part of Ch. 24 which contains "General Provisions as to Inquiries and Trials," and the power to tender a pardon can be exercised "at any stage of the investigation or inquiry into, or the trial of the offence." The special Magistrate authorized under S. 25 (1) has all the powers which the Code confers on Magistrates trying such cases, save such powers as are clearly inconsistent with the Local Act. (*Derbyshire, C.J., Mukerji Panckridge, M.C. Ghose and Bartley, JJ.*) HARIHAR

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SINHA *v.* EMPEROR. **163 I.C. 9=8 R.C. 698=37 Cr.L.J. 758=63 C.L.J. 307=40 C.W.N. 876=1936 Cr.C. 583=A.I.R. 1936 Cal 356 (F.B.).**

——S. 25—*Construction—Evidence* prima facie *disclosing offence punishable with death—Jurisdiction of Local Government to direct trial by Special Magistrate.*

S. 25 of the Bengal Suppression of Terrorist Outrages Act empowers the Local Government to appoint a Special Magistrate to try only those offences of a terrorist nature which are not punishable with death. Where a case of an offence punishable with death is *prima facie* disclosed by the prosecution evidence, the Local Government has no power under the section to appoint a Special Magistrate to try that offences. (*Cunliffe and Henderson, JJ.*) SASADHAR CHATTERJI *v.* EMPEROR. **40 C.W.N. 959.**

——S. 25.

S. 25 does not empower the Local Government to order a trial before Special Magistrate where a case of murder is *prima facie* disclosed by prosecution evidence, and trial by the special Magistrate under such circumstances is without jurisdiction.

Per *Henderson, J.*—An opinion of the Local Government merely that an accused person has committed an offence not punishable with death would not give it jurisdiction to appoint a special Magistrate to try him. The Local Government have not in their power to decide finally that a particular accused person has not committed an offence punishable with death and to ignore the most serious part of the crime altogether simply to give jurisdiction to a Special Magistrate. (*Cunliffe and Henderson, JJ.*) NETAI CHANDRA JANA *v.* EMPEROR. **165 I.C. 162=37 Cr.L.J. 1092=9 R.C. 351=40 C.W.N. 959=64 C.L.J. 421=1936 Cr.C. 785=A.I.R. 1936 Cal. 529.**

——S. 25—*Opinion of Local Government—If final—Power of Court.*

The opinion of the Local Government is not decisive under S. 25. An accused person can show that the order for trial by a Special Magistrate was made without jurisdiction.

Per *Henderson, J.*—Although it is not open to a convicted person to suggest in appeal to the High Court that the crime was not committed in furtherance of or in connection with the terrorist movement, he can show that the order for trial by a Special Magistrate is without jurisdiction, and also that the conviction by the Magistrate is improper. (*Cunliffe and Henderson, JJ.*) SASADHAR CHATTERJEE *v.* EMPEROR. **40 C.W.N. 959.**

——S. 35—*'Knowingly'—Meaning of.*

Under S. 35 (*a*) of the Act, the word 'knowingly' qualifies the word 'possession' in the same section. So mere constructive possession is not enough. The possession must be known to the person. It is immaterial whether he had knowledge of the notification or not. (*Henderson, and R C. Mitter, JJ.*) HARIPADA SEN GUPTA *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 774=169 I.C. 60=9 R.C. 889=38 Cr.L.J. 691=A.I.R. 1937 Cal. 49.**

——S. 35—*Sentence—Considerations—Character of book—Relevancy.*

Under S 35 of the Act, it is the duty of the Court to take into account the character of the book when considering the sentence to be award-

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ed. If the book in question is a violent one advocating terrorism or terrorist crimes, the sentence ought to be substantial. If it is an innocent one, it may be unfortunate that authority to file complaint has been given by the District Magistrate, but the Court must take the character of the book into consideration in passing sentence. (*Henderson and R.C. Mitter, JJ.*) HARIPADA GUPTA *v.* EMPEROR **I.L.R. (1937) 1 Cal. 774=169 I.C. 60=9 R.C. 889=38 Cr.L.J. 691=A.I.R. 1937 Cal. 49.**

——**S. 35 (a)**—*Offence—Possession of book.*

An offence under S. 35 (*a*) of the Act, in respect of a book is committed, if it could have been rightfully seized by the Chief Customs Officer at the time of its importation under the Sea Customs Act, 1878. (*Henderson and R.C. Mitter, JJ.*) HARIPADA SEN GUPTA *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 774=169 I.C. 60=9 R.C. 889=38 Cr.L.J. 691=A.I.R. 1937 Cal. 49.**

——**S. 35 (a)**—*Sanction under—Power of Court to go behind*

Under S. 35 (*a*) of the Act, once the Local Government or the District Magistrate sanctions the prosecution, the Court cannot go behind the sanction or question the propriety of the judgment of the sanctioning authority. (*Henderson and R.C. Mitter, JJ.*) HARIPADA SEN GUPTA *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 774=169 I.C. 60=9 R.C. 889=38 Cr.L.J. 691=A.I.R. 1937 Cal. 49.**

——**Ss. 35 (b) and 38**—*Possession of prescribed book—Prosecution for—Magistrate's knowledge as to* prima facie *presumption of guilt—Sentence—Book not connected with or* per se *encouraging terrorist movement—Accused described in newspaper as prominent Congress worker—Severe sentence—If called for.*

In a prosecution for possession of a proscribed book under S. 35 (*b*) of the Bengal Suppression of Terrorist Outrages Act, which can be launched only after following the requisites laid down in S. 38 of the Act, it may safely be said that the trying magistrate, before he comes to the judicial determination of the case, is well aware that responsible persons have made up their minds that there is a *prima facie* presumption of guilt against the person who is prosecuted. Though the book may be a proscribed book, if it has nothing to do with the terrorist movement, and does not *per se* encourage the terrorist movement no severe sentence is called for. The mere fact that the accused is described by a journalist in a newspaper as a prominent congress worker is no evidence of his being such and is no proof of his status in the movement; nor does it have any real significance as to his connection with the terrorists. That does not justify a severe sentence. (*Cunliffe and Henderson, JJ.*) RABINDRA NATH CHANDRA *v.* EMPEROR. **172 I.C. 133=10 R.C. 341=39 Cr.L.J. 61=64 C.L.J. 417=A.I.R. 1937 Cal. 652.**

——**Ss. 36 and 38**—*Scope and effect.*

S. 38 of the Suppression of Terrorist Outrages Act lays down certain conditions to be fulfilled before a prosecution under S. 35 or S. 36 is instituted. These provisions relate to the filing of a complaint and have nothing whatever to do with the provisions of S. 36 which defines the substantive offence. When, therefore, it is established

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that a person has in his possession any document of the nature defined in S. 36, that person is liable to conviction unless he proves the circumstances indicated in sub-S. (*b*) (*i*) or (*b*) (*ii*) of S. 36 of the Act. (*M. C. Ghose and Bartley JJ.*) SASANKA GHOSAL *v.* EMPEROR. **42 C.W.N. 732.**

——**(SUPPLEMENTARY) ACT (XXIV OF 1932), S. 3 (1) and (2)**—*Appeals from convictions under Bengal Suppression of Terrorists Outrages Act—Powers of High Court in.*

The Judges of the High Court hearing appeals from convictions for offences alleged to have been committed under the Bengal Suppression of Terrorists Outrages Act retain their full rights of procedure and their full rights of alteration or acquittal as provided for in Chap. 31, Cr.P. Code, unless there is some specific language in any part of the Acts which qualifies these rights, and they are entitled to act as they would act in similar circumstances in an ordinary appeal. (*Cunliffe and Henderson, JJ.*) NETAI CHANDRA JANA *v.* EMPEROR. **165 I.C. 162=37 Cr.L.J. 1092=9 R.C. 351=40 C.W.N. 959=64 C.L.J. 421=1936 Cr.C. 785=A.I.R. 1936 Cal. 529.**

—— **S. 3 (2)**—*Powers of High Court under.*

The High Court, in hearing appeals from conviction under the Bengal Suppression of Terrorists Outrages Act, has all the powers which the Appellate Side of the High Court has been given under Ch. 3 of the Cr. P. Code. The High Court has full rights of procedure and full rights of alteration or acquittal. It has all the powers referred to in S. 423, Cr P. Code.

Per *Henderson, J.*—If the order of the Special Magistrate is improper, though not without jurisdiction, the High Court has power to set aside that order and pass consequential orders. (*Cunliffe and Henderson JJ.*) SASADHAR CHATTERJEE *v.* EMPEROR. **40 C.W.N. 959.**

BENGAL SURVEY ACT (V OF 1875), S. 40—*Decision under—Effect of—If operates to make possession adverse.*

Where a dispute about the bounbary between two mouzas was decided in favour of one party under S. 40, Survey Act, the decision operated as a Civil Court decree and created rights under it until the other party set it aside by a proper suit. But where the legal successors of the other party did not dispute the decision against them within twelve years from the date of decision and allowed limitation to run against them, their title to property would be extinguished. (*M. C. Ghose, J.*) HUMAYUN RAJA CHOUDHURY *v.* JOTIRMOYEE DEBI. **168 I.C. 270=9 R.C. 789=A.I.R. 1936 Cal. 452.**

——**S. 41**—*Adoption of boundary line given in record of rights of neighbouring mauza—Effect of.*

Adoption of a boundary line given in the record-of-rights of a neighbouring mauza, does amount to determination of boundary according to actual possession within the meaning of S. 41. (*Dhavle and Agarwala, JJ.*) BHUP NARAYAN SINGH *v.* HIRA LAL. **161 I.C. 709=8 R.P. 475 (2)=17 Pat.L.T. 405=A.I.R. 1936 Pat. 185.**

——**Ss. 41 and 62**—*Order determining boundary line dispute passed—Suit for confirmation of possession, on allegation that plaintiff in possession before order—If barred.*

BENGAL SURVEY ACT (1875), S. 62.

S 62 is a bar to a suit by a plaintiff against whom an order determining a boundary dispute has been made under the Survey Act, for confirmation of possession on the allegation that he has been in continuous possession from before the order, such an order having, under S. 41, the effect of a Civil Court decree which is binding on the parties as regards the question of possession. 14 C W N 3 6, Foll (*Dhavle and Agarwala, JJ.*) BHUP NARAYAN SINGH *v.* HIRA LAL. 161 I.C. 709 =3 R P 475 (2)=17 Pat L.T. 405=A.I.R. 1936 Pat. 185.

——S. 62—*Applicability—Entry in record-of-rights relating to boundary between mauzas.*

Entry in the record of-rights relating to the boundary between two mauzas unlike many other entries is governed by S. 62. 14 C.W.N. 366, Foll. (*Dhavle and Agarwala, JJ.*) BHUP NARAYAN SINGH *v.* HIRA LAL. 161 I.C. 709=8 R.P. 475 (2)=17 Pat L T. 405=A.I R 1936 Pat. 185.

BENGAL SURVEY AND SETTLEMENT MANUAL (1917), R. 414 —Annulment of *patnis* by purchaser zamindari in revenue sale—Liability for costs of settlement operations under certificates issued against patnidars prior to sale—Purchaser in possession—If liable. *See* B. T. ACT, S. 114. 64 C L J 126=A I R. 1937 Cal. 94.

BENGAL TAUZI MANUAL, R. 1—"*Kist*"—*Meaning of*—Tauzi *roll—Effect of.*

It is set out in R. 1 of the Bengal *Tauzi* Manual that the *Tauzi* roll of a district is the list of the estates from which the land and police revenue of the district is collected, showing the revenue assessed upon each estate divided into the amounts due on each latest day of payment. The word "*Kist*" as defined in the Manual indicates the period between one latest day for payment of arrears of revenue and the next and that the word is not used therein in the restricted sense assigned to it by S 2 of the Revenue Sales Act. (*Macpherson and Khaja Mohammad Noor, JJ.*) NANAK PRASAD SAHU *v.* MT. KASEDA KUMARI. 15 Pat. 272=162 I C 1004=8 R P 604=16 Pat. L.T 915=A.I R. 1936 Pat. 260.

BENGAL TENANCY ACT (VIII OF 1885).

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Protected interest, Ss. 159 and 167.
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Rent decree of a co-sharer landlord, Ss. 148-A (1) and 153.
Res judicata, S. 148.
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Setting aside sale, Ss. 146 and 174.
Suit for rent, Ss. 148 and 148-A.
Usage, S. 120. *See* CUSTOM.
Words.
LANDLORD, S. 3 (3).

——*Applicability — Rent decree — Execution against property other than that in respect of which rent is due—Rights of landlord—Decree for rent against Hindu joint family—Execution against family properties—Conditions of right.*

It is not obligatory upon the landlord to execute a rent decree against the rent paying property and not against other properties belonging to the judgment-debtor. He may, if he thinks fit, proceed to execute the decree against other properties owned by the judgment-debtor; but if he does so he will not have the advantage of the provisions of the Bengal Tenancy Act with regard to rent decrees and would be thrown back into the position of having a money decree in execution of which he can sell the property of the joint family in case the judgment-debtor happens to be a member of joint Hindu family one in those circumstances under which a joint family property would be liable. (*Wort, J.*) MUKHRAM MAHTO *v* KESHO PRASAD SINGH BAHADUR. 162 I.C. 879=8 R.P. 597=1936 P.W.N. 461=A.I.R. 1936 Pat. 258.

——*Applicability—Under-raiyati of homestead and agricultural land—Settlement of homestead alone by under-raiyat—Incidents of lease—T. P. Act.*

Where, after the passing of the Bengal Tenancy Act, an under-raiyat with a holding of homestead and agricultural lands carves out the homestead portion only and settles it with another, the incidents of the tenancy so created would be governed by the provisions of the B. T. Act, and the person with whom the homestead land is settled would be an under-raiyat of the second degree.

The provisions of the T. P. Act are not applicable to the case. (*R. C. Mitter, J.*) PANKAJINI DEBI *v.* SATISH BEHARA. **165 I.C. 208=9 R.C. 360=40 C.W.N. 86.**

——Occupancy rights—Acquisition—Grant by landlord—If can confer such rights. *See* BENGAL LAND AND TENANT PROCEDURE ACT. **40 C.W.N. 1301.**

——*Rent sale—Effect of—Sale under C. P. Code—Distinction.*

The effect of a sale under the Bengal Tenancy Act and that of a sale under the Civil Procedure Code are two very different things. (*Wort, J.*) RAMJANAM SINGH *v.* RAMPHAL LAL. **167 I.C. 692 (1)=9 R.P. 419=3 B.R. 312 (1)=A.I.R. 1937 Pat. 93.**

——*Suit for settlement of fair rent on ground of accretion—Plea that at the time of passing of Act predecessors of landlord had no right to additional rent—Burden of proof.*

Where a suit is instituted under the Bengal Tenancy Act by a landlord for settlement of fair rent for certain lands on the ground of accretion to the tenure of the tenants and the tenants contend that at the time the Bengal Tenancy Act was enacted, the predecessors of the landlord had no right to additional rent, the burden of proof of establishing the plea taken by them rests on them. They must show that at the time of the passing of the Bengal Tenancy Act the predecessors of the landlords had no right to enhancement of rent. (*Cunliffe and Henderson, JJ.*) KHAJE HABIBULLA *v.* BEPIN CHANDRA. **168 I.C. 375=9 R.C. 811=A.I.R. 1936 Cal. 454.**

——*Under-raiyat with rights of occupancy—Interest of—Heritability.*

The interest of an under-raiyat with occupancy rights is not heritable under the law. Heredit-ability is a right which has been attached by legis-lation to the tenure of an occupancy raiyat in Bengal, Bihar and Orissa, but it is not a necessary condition attaching to the enjoyment of an occu-pancy right for life. The question whether an under-raiyat who acquires occupancy right ac-quire also the rights of an occupancy raiyat as defined by the Tenancy Acts depends entirely on local custom. (*Dhavle, J.*) JUGESH CHANDRA BOSE *v.* MAQBUL HOSSAIN. **163 I.C. 415=9 R.P. 9=17 Pat.L.T. 202=1936 P.W.N. 333=A.I.R. 1936 Pat. 384**

——**S. 3 (3)**—'Complete usufructuary mort-gage'—Mortgage with possession for certain period—Period considered sufficient to extinguish loan—Personal covenant to indemnify mortgagee if loan is not so extinguished—Nature of mort-gage. *See* BENGAL TENANCY ACT, Ss. 26-G (5) AND 3 (3). **44 C W N. 726.**

——**S. 3 (3)**—'Lardlord'—Proprietor of resum-ed mahal with whom no settlement has been made. *See* B. T. ACT, Ss. 26-F AND 3 (3). **43 C. W.N. 274.**

——**Ss. 3 (3) and 26-G (5)**—*Mortgagee in pos-session in lieu of interest—Covenants giving to mortgagee right to sue for money and to mort-gagor right of proportionate redemption—Character of mortgage.*

Where from the terms of a mortgage bond it is clear that the mortgagees are in possession of the occupancy holding in lieu of the interest due on the money advanced by them on the mortgage, the existence of covenants giving to the mort-

gagees a right to bring a suit for recovery of the mortgage-money if they are dispossessed and to the mortgagor a right to redeem a part of the mortgaged property on payment of a proportion-ate amount of the total mortgage-money does not in any way effect the character of the mortgage as an usufructuary mortgage. In view of the definition of a complete usufructuary mortgage in S. 3, the mortgage is liable to be extinguished under S. 26 G (5) of the Bengal Tenancy Act. (*Nasim Ali and Rau, JJ.*) GADADHAR MANDAL *v.* CHINTA MONI DAS. **188 I.C. 382=12 R.C. 670=44 C.W.N. 171=A.I.R. 1940 Cal. 210 (2).**

—— (as amended in 1928), S. 3 (17)—*Appli-cability—Bargadar agreeing to cultivate land and pay half produce to landlord—Suit by landlord for produce for period subsequent to year 1929.*

The question whether a Bargadar in a particular case is a tenant or not is a question to be decided on facts of each case. Certain land formerly belonged to *A*. Subsequently *A* and his co-sharers transferred their raiyati interest to *B* and obtained from him a barga kabuliat by which *A* agreed to cultivate the land and pay half produce to *B*. *B* brought a suit for produce for the period subsequent to the year 1929.

Held, that on facts as well as according to the amendment of S. 3 (17) which applied to the case as the suit was in respect of years subsequent to 1929, the bargadar was not a tenant and this being so, the Court of Small Causes had jurisdiction to entertain the suit (*M. C. Ghose, J.*) SISHU MOHAN KOYAL *v.* RAJENDRA NATH SARKAR. **179 I C. 263=11 R.C. 511=A.I R. 1938 Cal 707.**

—— **S. 4**—*Under-*raiyat—*Status of—Power to sub-lease—Purchaser of under-*raiyati's *right—If can eject sub-lessee.*

Under S. 4 of the B. T. Act an under-*raiyat* is a tenant. He may either be directly a tenant under a *raiyat* or under an under-*raiyat*. In either case he is not a trespasser but a tenant having the status of an under-*raiyat*. S. 4 (3) gives an indication that under-*raiyats* have power to sub let their under-*raiyatis* and the sub-lessees are tenants. Where such a sub-lessee has ac-quired a right of occupancy to the land by a local custom, he could not be ejected by a purchaser of the under-*raiyati* at a sale in execution. (*Nasim Ali and Remfry, JJ.*) DWARKA MANDAL *v.* NALINI KANTA MITRA. **I.L R. (1937) 2 Cal. 689=175 I.C. 509=10 R.C. 794=A.I.R. 1938 Cal. 223.**

—— **Ss. 5 and 20**—*Tenant holding undivided shares in parcels of land—If raiyat.*

Under the Bengal Tenancy Act, even before the amendment of 1928, a tenant holding un-divided shares in parcels of land would be a raiyat, and could be a settled raiyat of a village by reason of occupation of such lands for a period of 12 years, for S. 20 of the Act requires that the tenant should be a raiyat and must hold the "land" as such continuously for 12 years. 8 C. W. N. 192 and 751, Rel. on. (*Mitter, J.*) SRIPATI CHARAN DE *v.* KAILASH CHANDRA JANA. **166 I. C. 448=9 R. C. 523=A. I. R. 1936 Cal. 331.**

—— **S. 5 (2)**—*Heir of* raiyat *not accepting in-heritance—Liability for rent.*

If a heir of a *raiyat* does not accept the inheri-tance, there is no privity of estate by succession and he is, therefore, not liable to pay rent

BENGAL TENANCY ACT (1885), S. 5.

Absence of possession or cultivation by him by itself cannot exonerate him from the liability to pay rent. But absence of possession is cogent evidence to be taken into consideration with other facts in determining whether the inheritance was accepted or not. (*Nasim Ali and Remfry, JJ.*) PRODYOT COOMAR TAGORE *v.* HAMIDAR RAHAMAN MIA. **41 C.W.N. 1154.**

——S. 5 (4)—*Status of lessee—Raiyat or tenure-holder—Test to decide.*

Where the object of the lease is that the lessee should himself cultivate the lands and should never settle them with any tenant, the lessee is a raiyat and not a tenure-holder. The use of words like 'mustajiri' in the lease is irrelevant as the dominant factor in determining whether a lessee is a raiyat or a tenure-holder is the purpose of the tenancy. (*Fazl Ali and Chatterjee, JJ.*) SURAJ MOHAN THAKUR *v.* GANESH PRASAD. **175 I.C. 501=4 B.R. 592=10 R P. 633=A.I.R. 1938 Pat. 235.**

——S. 5 (5)—100 *standard bighas—If must be under same title.*

There is nothing in S. 5 (5), which supports the suggestion that the tenant must hold 100 standard bighas under one and the same title. (*Remfry, J.*) KRISHNA CHANDRA MUKHERJEE *v.* MANIK LAL MUKHERJEE. **178 I.C. 892=11 R.C. 435=A.I.R 1938 Cal. 246.**

——Ss. 6 (a) and 7—*Tenure existing from time of Permanent Settlement—Landlord's right to enhancement of rent—Method of assessment.*

If a tenure has been in existence from the time of the Permanent Settlement and enhancibility is one of its incidents, the landlord is entitled to an enhancement of rent under Cl. (*a*) of S. 6 of the Bengal Tenancy Act. If there has not been any contract between the parties to regulate the principle on which or the amount by which, the enhancement is to be given, the case would come within either of the two methods of assessment of rent prescribed in S. 7 of the Act, notwithstanding the fact that the tenure was in existence from the time of the Permanent Settlement. But if there was a contract between the parties regulating the amount of enhancement or the principle of enhancement, that contract must be given effect to and the two methods of assessment indicated in S. 7, which section is expressly made subject to any contract between the landlord and the tenant, would not be the proper methods to apply. (*R. C. Mitter, J.*) SREEMANTA NARAYAN SARKAR *v.* MAHARAJA SRISH CHANDRA NANDI. **68 C.L.J. 120.**

——S. 7—*Enhancement of rent of tenures.*

Once it is found that the lands do constitute tenures, S. 7 must necessarily be attracted if the rent is proved to be enhancible but that must always be subject to a contract between the parties. (*Mukherjea, J.*) BASANTA KUMAR DUTTA *v.* SUKUMARI DAS GUPTA. **177 I.C. 175=11 R C. 215=A.I R. 1938 Cal. 442.**

——S. 7—*Scope—Permanent lease by shebait—Claim to enhancement of rent by succeeding shebait—Maintainability.*

The power of a shebait of an idol to make an alienation is a limited power. Ordinarily a shebait cannot grant a permanent lease at a fixed rent, but he may do so in cases of unavoidable necessity. Where therefore the predecessor of the shebaits has granted a permanent tenure, even

BENGAL TENANCY ACT (1885), S. 18.

though no justifying necessity like the preservation of the property was proved, the rent under the tenure is liable to enhance nent under S. 7. The Court can in such a case consider the question as to what should be the fair and equitable rent (40 per cent. of the gross collection allowed as fair rent to the landlord). (*M. C. Ghose, J.*) HRISHIKESH RAY *v.* UPENDRA NATH MANDAL. **166 I C. 757=9 R.C. 581=66 C.L.J. 28=A.I.R. 1936 Cal. 432.**

——S. 7—*Suit for enhancement of rent by plaintiffs as intermediate holders—Plaintiffs also holding the inferior tenure with defendants—Form of suit.*

Where the plaintiffs who were intermediate holders over a tenure sued as superior holders only the defendants for enhancement of rent, though the plaintiffs also held the inferior tenure together with the defendants,

Held, that the form of the suit was not bad though the plaintiffs should have been well advised to have first separated the share of the defendants and then sued the defendants for enhancement of rent. (*M. C. Ghose, J.*) UDAY CHANDRA CHAKRAVARTY *v.* AMBIKA CHARAN CHAKRAVARTY. **170 I C. 259=10 R.C. 125=64 C.L.J. 547=A.I.R 1937 Cal. 455.**

——S. 7 (2)—*Landlord adducing evidence to show absence of customary rent—Tenant not rebutting this evidence—Enhancement of rent—Power of Court.*

In a suit for enhancement of rent the landlord in his plaint expressly stated that there was no customary rent in the locality and adduced evidence for the purpose of showing the absence of any customary rate. The tenant in his written statement did not challenge this position nor was any evidence adduced on his behalf to rebut the evidence adduced on behalf of the landlord.

Held, that under the circumstances it could be taken to be established that there was no customary rate of rent in the locality and as such the Court was at liberty to enhance the rental up to such limit as it thought fair and equitable under S. 7 (2). (*Mukheriea, J.*) BASANTA KUMAR DUTTA *v.* SUKUMARI DAS GUPTA. **177 I.C. 175=11 R.C. 215=A.I.R. 1938 Cal. 442.**

——S. 12—*Transfer of putni—Transferor's liability for rent.*

A putnidar is not relieved of his liability to pay rent to the landlord by his transferring the putni to another, when there is no proof that the transfer fee had been paid or that the transfer had been recognised by the landlord. (*Henderson, J.*) RAM DAS AULIA *v.* BAZLEY KARIM FAZLEY MAULA. **70 C.L.J. 284=A.I.R. 1940 Cal. 83.**

——Ss. 18 (2) and 23 (as amended in 1928)—*Scope and effect of—Tenant at fixed rate—If governed by S. 23—Liability to ejectment.*

S. 18 (2) of the B. T. Act, as amended in 1928, has made no alteration in law as regards the applicability or non-applicability of S. 23 to tenants holding at a fixed rate of rent. Though the clause in question states that S. 23-A, etc., shall not apply to holdings at fixed rates, the provisions of that clause do not affect S. 23. S. 23 had no application to tenancies at fixed rate under the previous law; and it has clearly no application even under the amended Act in the absence of any evidence of a breach of contract

between the landlord and tenant under the terms of which the tenant is liable to be ejected. In the case of a raiyat at a fixed rate of rent, even if the amended Act of 1928 be held to be applicable, the old Act and not the amended Act will govern a case where the cause of action for the suit in ejectment arose before the amended Act came into force. (*Jack, J.*) SHIB CHANDRA SARKAR *v.* PANCHANAN KOLAY. **64 C.L.J. 71.**

——**S. 18-A**—*Sale certificate—If instrument of transfer.*

Under S. 18-A of the B. T. Act, a sale certificate cannot be treated as an instrument of transfer by the tenant. (*Akram, J.*) BASANTA KUMARI DASI *v.* JNANENDRA NATH GHOSH. **71 C.L.J. 504.**

——**S. 20 (7)**—*Applicability—Kabuliyat providing for rent at highest rate—Suit for rent of entire holding including portion not included in Kabuliyat, on basis of Kabuliyat—If one for enhancement—Tenant—If to be presumed occupancy raiyat.*

Per *Jack, J.*—A suit for recovery of rent on the basis of a *Kabuliyat* stipulating for payment of rent at the highest rate of rent payable in respect of lands in the locality, on the entire area in possession of the tenant, which is found to be larger than the area mentioned in the *Kabuliyat*, is not really a suit for enhancement of rent, but one for adjustment of rent in accordance with the terms of the contract between the landlord and the tenant. Such a suit not being a proceeding under the Act, the tenant cannot be presumed to be an occupancy *raiyat* under the terms of S. 20 of the Bengal Tenancy Act. In the absence of evidence to the contrary it must be assumed that the tenant was not an occupancy *raiyat*. (*Guha and Bartley, JJ.*) SANNYASI BASAR *v.* RATNESWAR GHATAK. **167 I.C 170=9 R.C. 650=41 C.W.N. 169=A.I.R. 1937 Cal. 8.**

[Letters Patent Appeal from the judgment of Jack, J.]

——**S. 21**—*Applicability — Government lands under management of Railway Company without power of leasing—Agreement by company for cultivation of special crop for limited period—Cultivator settled raiyat of village—Occupancy rights—If acquired.*

The Bengal Tenancy Act, in dealing with the acquisition of occupancy rights was intended to apply to the ordinary agricultural relationship of zamindars, tenure-holders and raiyats under them. If a zamindar brings a settled raiyat on waste land and gives him an interest in that land for the purpose of cultivation for however short a time, and even if the crop to be cultivated be of a limited kind, the provision of S. 21 of the Act might apply so as to enable the raiyat to acquire occupancy rights in that land. But when a Railway Company in possession of lands entrusted to them by Government enters into a special agreement with a person and brings him on the land normally held by them for railway purpose, for the cultivating it and for growing a special crop for a very short and specified term, the company themselves having no power to grant a lease or tenancy, the contract or agreement is one which was never contemplated by the Bengal Tenancy Act. The agreement or arrangement is taken out of the operation of the Act and no occupancy rights are acquired in that land, though the cultivator to whom the lands are let happens to

be a settled raiyat of the village in which the lands are situated. (*Courtney Terrell, C.J. and Agarwala, J.*) BENGAL NORTH-WESTERN RAILWAY CO., LTD. *v.* JANKI PRASAD. **163 I.C. 525=9 R.P. 26=1936 P.W.N. 298=17 Pat.L.T. 206=A.I.R. 1936 Pat. 362.**

——**Ss. 21 and 29**—*Applicability—Usufructuary mortgagee of village making raiyati settlement of part of land—Mortgagor subsequently redeeming four annas share of village*—Raiyats *agreeing to pay enhanced rent to mortgagor—Liability of—Agreement—If void.*

The usufructuary mortgagee of a village made a *raiyati* settlement of a portion of land with the defendants at an annual rent of Rs. 670. Two years after the defendants were in occupation of the land as *raiyats*, the mortgagor redeemed four annas share in the village. Thereupon, the defendants agreed with the mortgagor to pay him an annual rent of Rs. 433 for his one-fourth share. On a suit by the mortgagor for the arrears of rent against the defendants,

Held, that when the mortgagee in possession who was then the *de facto* landlord of the village gave tenancy to the defendants as settled *raiyats* of the village, the *raiyats* acquired occupancy rights by operation of law under S. 21, Bengal Tenancy Act. The subsequent agreement with the mortgagor which had the effect of enhancing the rent from Rs. 670 to Rs. 985 was void by virtue of S. 29 of the Act and could not therefore be enforced. (*James, J.*) DWARKA PRASAD *v.* PARMESHWARI RAI. **171 I.C. 425=10 R.P. 209=4 B.R. 23=A.I.R. 1937 Pat. 541.**

——**S. 21**—*Mortgagee in possession granting* mokarari *lease pending redemption suit—Settled* raiyat—*Liability to ejectment—Transfer of Property Act, Ss. 52 and 76 (1).*

S. 52 of the Transfer of Property Act does not take away the rights of mortgagees in possession under S. 76 (1) of that Act after the redemption suit is instituted. The mortgagee has the right to lease the property for the period of his possession after the suit for redemption is instituted. If, therefore, a mortgagee of a *mouza* grants, during the pendency of the redemption suit, a *mokarari raiyati* lease to a settled *raiyat* of that *mouza*, the lease, though not operative as a *mokarari* lease, confers on the settled *raiyat* such right as the mortgagee in possession is then capable of conferring. The settled *raiyat*, therefore, acquires a right to cultivate the leased lands as a *raiyat*, and if he is in possession as a *raiyat* till the mortgage is redeemed, he acquires occupancy right in the lands under S. 21 of the Bengal Tenancy Act and is not liable to be ejected. (*Nasim Ali and R.C. Mitter, JJ.*) PRAMATHA NATH BHATTACHARJYA *v.* SASHI BHOOSHAN BANERJI. **I.L.R. (1937) 2 Cal. 181=174 I.C. 88=10 R.C. 614=A.I.R. 1937 Cal. 763.**

——**S. 22** — Applicability — Non-transferable occupancy holding —Purchase of part by co-sharer landlord—Effect — Subsequent batwara proceedings—Effect—Position of co-sharer-purchaser. *See* BIHAR TENANCY ACT, S. 26-N. **18 Pat.L.T. 173.**

——**S. 22**—*Applicability—Transferable holding —Purchase by co-sharer landlord of holding with consent of other co-sharers.*

Section 22 applying obviously to the case of a transferable holding without the consent of the

landlords would also apply to those cases in which the landlords had given their consent; that is to say, the purchase by the co-sharer landlord of a holding of one of the tenants with the consent of his co-sharers would place the purchaser co-sharer landlord in the position provided for by S. 22 (2), B. T. Act. (*Wort, J.*) NAGA RAI *v.* BUCHI RAI. **162 I.C. 875=8 R.P. 594=A.I.R. 1936 Pat. 285.**

——S. 22—*Co-sharer landlord in exclusive possession*—Thikadar *under—Settlement of land on settled raiyat owning share in proprietary interest—Accrual of occupancy rights—Subsequent collectorate partition—Land allotted to another co-sharer—Right of latter to recover possession—Bengal Estates Partition Act, S. 99.*

Where a co-sharer landlord is placed in exclusive possession of joint land for convenience by mutual arrangement among all the co-sharers gives a *thika* of the land, and the *thikadar*, in the ordinary course of management, inducts on to the land a settled raiyat of the village, *bona fide*, the tenant so settled on the land *bona fide* acquires occupancy rights in the land The statutory rights which accrue to such a tenant by operation of the Tenancy Act cannot be affected by a subsequent partition between the owners of the estate in which the land is situate, and the tenant cannot be ejected under S. 99 of the Bengal Estates Partition Act by any other co-sharer to whom the land in question is allotted at a subsequent collectorate partition. The fact that the tenant settled on the land has a share in the proprietary right to the land in dispute will not entitle the co-sharer to whom the land is allotted at the partition to recover possession. The tenant is entitled under S. 22 of the Bengal Tenancy Act to hold the land as part proprietor on the conditions mentioned in S. 22. (*Agarwala and Rowland, JJ.*) INDER CHANDRA *v.* SHRI RADHA KRISHNAJI. **1940 P.W.N. 221=21 Pat.L.T. 201.**

——Ss. 22 and 159—*Landlord auction-purchaser—Right to annul incumbrance.*

S. 22 (1) of the B. T. Act undoubtedly effects a merger of the raiyati interest with the superior interest of the landlord, if the latter happens to be the purchaser at the rent sale, but the landlord purchaser is certainly competent in exercise of his powers under S. 159 of the Act to annul the under-raiyati as an incumbrance, and this right cannot in any way be affected by the provision of S. 22 (1). If he does not choose to exercise this right or becomes incapable of exercising it, and the under-raiyat is treated as a tenant, the consequence of the disppearance of the raiyati right might be to make the under-raiyat a raiyat in the eye of law. (*Mukherjea and Roxburgh, JJ.*) PROMOTHA NATH *v.* JITENDRA NATH. **43 C.W.N. 1102.**

——S. 22—Raiyat *acquiring* shikmi taluki *right—Merger of* raiyati *interest.*

On the acquisition of a *shikmi taluki* right by a *raiyat*, his *raiyat* interest does not merge in the superior rights of a *shikmi talukdar.* It is impossible to hold that when the immediate landlord simply creates an intermediate tenancy right between him and the actual *raiyat*, there would be a merger under S. 22 of the B. T. Act simply because the intermediate tenant happened to be the *raiyat.* (*M.C. Ghose and Mukherjea, JJ.*) SHASHEE KUMAR MAJUMDAR *v.* GOLAP BANU.

I.L.R. (1937) 1 Cal. 679=173 I.C. 590=10 R.C. 546=A.I.R. 1937 Cal. 669.

——S. 22 (1)—*Merger—Entire raiyati interest purchased by co-sharer proprietors—Purchase not in proportion to their shares.*

S. 22 (1) of the B. T. Act applies to a case where the acquisition of the whole raiyati interest is by all the co-sharer proprietors, even though they may not have acquired the raiyati interest in the same proportions as their shares in the proprietary interest, and there is a merger of the raiyati and proprietary interests when the purchase of the former by the proprietors is complete. (*Roxburgh, J.*) ASAD ALI *v.* WAHED ALI. **70 C L.J 594=A.I R. 1940 Cal. 145.**

——S. 22 (1)—"*Proprietor.*"

The word 'proprietor' in sub-S. (1) of S. 22 includes the proprietor of a temporarily settled estate. (*R.C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. **I.L.R. (1939) 1 Cal. 349=180 I.C. 278=11 R.C. 659=69 C L.J. 51=43 C.W.N. 57=A.I.R. 1938 Cal. 804.**

——S. 22 (2) (before amendment)—*Acquisition by co-sharer patnidar of occupancy right in holding by inheritance—Merger.*

The first two sub-sections of S. 22 of the B. T. Act as it stood before the amendment of 1928, should be read together. Where, therefore, a co-sharer putnidar of a holding acquires by inheritance the occupancy right therein, the occupancy interest merges in his proprietary interest under that section. This will be so even if the holding is non-transferable. (*Edgley, J.*) RADHAGOBINDA BISHAYE *v.* JNANENDRA CHANDRA. **42 C.W.N. 495.**

——S. 22 (2)—*Co-sharer landlord purchasing holding in execution of rent decree—Position of.*

Under S. 22 (2), a purchase by co-sharer landlord in execution even of a decree which has the effect of a money decree must be deemed to extinguish the tenancy and any lease subsequently granted by him would create a raiyati interest and not a mere under-raiyati interest. Hence where a co-sharer landlord in execution of rent decree against his tenant purchases the holding of the tenant which is transferable and sublets it to a third person, the third person acquires a raiyati interest and the purchaser in the subsequent sale in execution of a rent decree obtained by another co-sharer landlord against the same holding would acquire nothing by his purchase. But if the holding is not transferable, the position of the co-sharer landlord who purchased in the previous sale would be that of an unrecognized transferee of an occupancy holding and there would be no merger. Hence, in a subsequent sale in execution of a rent decree obtained by other co-sharer landlord, the entire holding would pass to the purchaser. (*Khundkar, J.*) KHIRABALA DEBI *v.* SURESH CHANDRA. **177 I.C. 184=11 R.C. 207=A.I.R. 1938 Cal. 452.**

——S. 22 (2)—*Co sharer landlord purchasing occupancy holding—Status of—If a raiyat—Transferee from such a co-sharer—Sub-lessee from—Position of.*

The status of a co-sharer landlord who has purchased an occupancy holding is not the status of a raiyat but a peculiar status. His right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors of their shares of the rent. The status is a

peculiar status which attaches to the co-sharer so long as he remains a co-sharer. If he ceases to be a co-sharer and his proprietary interest is lost, then he has no right to retain possession of the land and it would pass on to the person who acquires the interest of that co-sharer. The person who acquires such interest can sub-let the same to another who thereupon becomes a raiyat of the holding. (*Rowland and Chatterji, JJ.*) SUKHDEO PANDEY *v.* RAMESHWAR PRASAD. **6 B.R. 200 =180 I.C. 557=12 R.P. 381=A.I.R. 1939 Pat. 522.**

——**S. 22 (2)**—*Co-sharer landlord—Purchase of non-transferable holding at money sale—Right of other co-sharers to joint possession with purchaser.*

If a co-sharer landlord purchases the interest of the tenant of a non-transferable occupancy holding in a sale in execution of a money decree, the other co-sharer landlords are not entitled to joint possession with the purchaser if the tenant has not abandoned the holding. (*Sen, J.*) ABINASH CHANDRA ROY *v.* ROHINI LAL ROY. **43 C.W.N. 379=A.I.R 1939 Cal. 295.**

——**Ss. 22 (2) and 158-B**—*Co-proprietor purchasing* raiyati *lands in execution sale—Right to hold such lands after partition.*

S. 22 (2) of the Bengal Tenancy Act does not disentitle a co-proprietor to hold *raiyati* lands purchased by him in rent executions subject to the payment of rent under the clause, after he has ceased to be a co-proprietor by reason of a partition of the holding among the co-sharers, undue stress should not be laid on the word "co-proprietor" in S. 22 (2). The words "subject to the provisions of S. 22 (2)," occurring in S. 158-B of the Act, do not really introduce any new consideration, but only take one back to S. 22. It is not correct or justifiable to read into the affirmative proposition contained in S. 22 (2) a negative provision that the purchasing co-sharer, will have no right at all to the land as soon as he ceases to be a co-sharer by reason of the partition. It is only as long as there are others interested in the land as co-proprietors that it is necessary to deal with specifically with the purchasing co-sharer's right to hold the land. The partition does not put an end to that right or make a present of it to the co-proprietors who purchased nothing. What is really available for partition is not the land itself, but the rent that would have been paid for the land by the occupancy *raiyats* whose place has been taken by the purchasing co-proprietor. The result is that the latter becomes liable to the other co-sharers until partition for a proportionate share of the rent; and these rents, and not the land purchased by him, would be taken into account in the partition. (*Courtney Terrell, C.J. and Dhavle, J.*) DHANESHWAR KUER *v.* CHANDRADHARI SINGH. **162 I C 820=8 R.P. 579 =1936 P W N. 336=17 Pat.L.T. 97=A.I.R. 1936 Pat. 317**

——**Ss. 22 (3)**—*Construction of kabuliyat—Farming lease.*

A company obtained a settlement from Government of a *khas* mahal. The company recognized the Government as a proprietor. The settlement was expressed not to be a ryotwari settlement. The status of the grantee was described as farmer. However, in certain clause of the settlement, the payment which the company was liable to make to the Government was described as revenue and it was further provided that in case of default in payment the Government had right to cancel the lease and to realize its dues by the pro edure under Public Demands Recovery Act,

Held, that the use of the word 'revenue' and the provision for realization of dues by procedure under the Public Demands Recovery Act did not signify that the relationship of landlord and tenant was not being created by the settlement. Under the settlement the company became not the farmer of revenue but the farmer of rent or ijardar within the meaning of S. 22 (3). (*R. C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. **I L R. (1939) 1 Cal. 349=180 I. C. 278=11 R.C. 659=69 C.L.J. 51= 43 C.W.N. 57=A.I.R. 1938 Cal. 804.**

——(prior to amendment of 1907), **S. 22 (3)**—*Purchase by ijardar of occupancy holding—Effect of.*

Ordinarily by an amendment, the Legislature must be taken to have intended a change in the law, but it does not necessarily follow that such is the intendment in every case. An amendment may also be intended to clarify matters. The word "acquire" is a word wide enough to connote acquisition by purchase and by inheritance, and the Legislature had not indicated its intention in other parts of the statute as existing before 1907 to cut down the ordinary meaning of that word. Hence S. 22 (3) as it stood before 1907 debarred an ijardar from acquiring occupancy right by purchase or otherwise in the land of his ijara, but it did not debar him from acquiring a non-occupancy ryoti interest. The result is that if an ijardar purchases an occupancy holding, he acquires it as a non-occupancy holding. (*R. C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. **I.L.R. (1939) 1 Cal 349 =180 I.C. 278=11 R C 659=69 C.L.J. 51=43 C.W.N. 57=A.I.R. 1938 Cal. 804.**

——**S. 23**—Tenancy for horticultural purposes —Structures erected by tenant—Suit for mandatory injunction by landlord dismissed as time-barred—Structures subsequently destroyed by fire—Transferee from tenant erecting fresh structure on same site—Landlord, if can bring fresh suit. *See* LIMITATION ACT, S. 28. **42 C.W. N. 758.**

——**S. 23 (as amended in 1928)**—Applicability —Fixed rate tenant—Liability to ejectment—Conditions—Cause of action arising prior to 1928—If governed by amended Act. *See* B. T. ACT, SS. 18 (2) AND 23. **64 C.L.J. 71.**

——**Ss 23 and 23-A**—*Scope—Tenants' right to fell trees in spite of assessment of* falkar—*Right to remission of* falkar *in respect of trees felled.*

Subject to the provisions of S. 23, B. T. Act, even if the assessment of *falkar* formed part of the original rent at the time of the inception of the tenancies, the tenants are at liberty to fell trees and would thereafter be entitled to a remission of *falkar* in respect of the trees so felled. So also the landlords are not entitled to levy *falkar* in respect of any trees planted by the tenants after their induction. (*Edgley, J.*) K. C. DE *v.* HIRA BEWA. **I L.R. (1937) 1 Cal. 491=167 I.C. 461=9 R.C. 695=41 C.W.N. 88=A.I.R. 1937 Cal. 51.**

BENGAL TENANCY ACT (1885), S. 26

——S. 26—*Death of one of joint occupancy tenants without heir—Effect of—Landlord's right to take possession of his share.*

If one of the joint occupancy tenants dies without leaving any heir, the occupancy right must be deemed to be extinguished *pro tanto*, so far as the share of the deceased tenant extended. The landlord, in such circumstances, can take possession of the holding to the extent of the share of the deceased tenant. (*Mukherjea, J.*) TRAILOKYA NATH PAL *v.* AMBICA CHARAN DE. **I.L.R (1937) 2 Cal. 684=173 I.C. 551=10 R C 540=67 C.L.J. 55=41 C W.N. 1148=A.I.R 1937 Cal. 545.**

——S. 26-A—*Transfer of portion of occupancy holding—Transfer fee levied and notice of transfer sent to landlord—Landlord allowing mutation of purchaser—If can question validity of transfer.*

Where on a transfer of a portion of an occupancy holding, the transfer fee was duly levied from the purchaser and the notice of the transfer was sent to the landlord who far from denying the rights of the purchaser in due course allowed him mutation, the landlord must be deemed to have accepted the transfer as a valid transfer and he cannot, therefore, question its validity on the ground that the purchaser purchased it from a person who was not recognised by the landlord. (*M. C. Ghose and Bartley, JJ.*) AMULYA CHARAN MISRA *v.* PRAN KRISHNA ADHIKARY. **179 I. C. 334=11 R C. 532=42 C W.N. 755=A. I. R. 1938 Cal. 531.**

——S 26-B (as amended in 1928)—*If retrospective—Effect on landlord's right to re enter under S. 87.*

S. 26-B is not retrospective in its purpose and cannot, therefore, operate to compel the landlord to recognize as his tenant a person to whom a portion of a holding had been transferred before the amendment Act of 1928 came into operation. Further as the right conferred by S. 26-B is subject to the provisions of the Act, the new section does not affect the right of the landlord to re-enter under S. 87 of the Act is the tenant vacated his holding without arranging for the payment of his rent as it fell due. (*Edgley, J.*) ANNADA PROSAD *v.* RAMJAN SARKAR. **I L R. (1939) 2 Cal. 471=186 I.C 555=12 R.C 478=70 C.L.J. 501=44 C W N. 118=A I.R. 1940 Cal 6.**

——(as amended), S. 26(B), (C), (D) and (J)—*Construction and scope—Contract by landlord before amendment giving tenant right to transfer holding—Transfer fee—Liability for.*

On a fair interpretation of S. 26 (B), (C), (D) and (J), the transfer fee of 20 per cent. is not to be imposed on a holding where, by a special contract, made before the Amendment of the Bengal Tenancy Act, the landlord has given the right of transfer to the tenant. The amendment is not intended to make worse the position of a tenant who has by a contract obtained from the landlord a right to transfer his holding. (*M.C. Ghose, J.*) JOY CHANDRA BHOWMIK *v.* KALI KINKAR NATH. **64 C L.J. 545=41 C.W.N. 149**

——Ss. 26 C and 26-J—*Construction and scope—Transfer of holding pending attachment in execution of rent decree—Subsequent sale in execution—Landlord's right to transfer fee—Liability of transferee—If dependent on validity of transfer or consent of landlord.*

The landlord's right to the transfer fee under S. 26-C of the new Bengal Tenancy Act is a statutory right, and once there is a transfer of the

BENGAL TENANCY ACT (1885), S. 26-D.

holding the landlord is entitled to the transfer fee. A landlord who has caused the holding to be sold in execution of a rent decree is nevertheless entitled to recover transfer fee from a transferee who has taken a conveyance from the tenant prior to such execution sale. Nor does the fact that the transfer was effected pending an attachment in execution disentitle the landlord from recovering his fee. When there has been a transfer in fact, the transferee who has accepted such transfer is bound under S. 26-C read with S. 26 J to pay the transfer fee to the landlord in full. The question whether the transfer is legal and operates to pass title is entirely foreign to the enquiry held by the Court under S. 26-J. All that is necessary to attract the operation of S. 26-J is that there must be a transfer in fact, *i.e.*, the transfer must be accepted by the transferee. It is not necessary that the landlord should signify his acceptance of the transfer. (*Mitter, J.*) SHARFUDDIN AHMED *v.* JAGADISH NATH ROY BAHADUR. **63 Cal. 900=165 I.C 426=9 R C. 397=63 C.L.J. 255=40 C.W.N. 502=A.I.R. 1936 Cal. 304.**

——S. 26-C—*Occupancy holding—Transfer of—When complete—Receipt of notice by landlord—If condition precedent.*

As soon as the document by which an occupancy tenant transfers his holding is registered, the title to the holding passes from the transferor to the transferee with retrospective effect from the date of the execution of the deed of conveyance. The question whether the landlord is served with the notice of transfer or whether he receives the transfer fee or not is not material. The transfer is complete even as against the landlord even if he receives the notice of transfer and his fees only later on. (*R. C. Mitter, J.*) MAHARAJ BAHADUR SING *v.* NARI MOLLANI. **63 Cal. 1117=165 I.C. 17=9 R.C. 363=40 C.W.N. 683=A.I.R. 1936 Cal. 279.**

——S. 26-C (2)—*Instrument of transfer stating sale price as Rs. 200—Recital in body that certain mortgage debts were satisfied—Amount of such debts not stated—Validity of registration.*

Where an instrument of transfer stated the sale price as Rs. 200 and in the body of the instrument one mortgage in favour of the transferee and another mortgage decree in favour of his son were recited and stated to have been satisfied but the amount due on the mortgage or on the mortgage decree was not mentioned, and the registering officer accepted Rs. 200 as the sale price of the holding and on that footing registered the document,

Held, that the document was validly registered as contemplated by S. 26-C, Cl. (2) of the B. T. Act. (*Bartley and Nazim Ali, JJ.*) KUNJA KAMINI *v.* MANGAL CHANDRA. **I.L.R. (1938) 1 Cal. 695=42 C.W.N. 209.**

——Ss. 26 D and 26-F—*Applicability—Pre-emption proceedings by landlord—Plea of fixed rate tenancy—Question expressly left open—Suit by tenant for declaration that tenancy was one at fixed rate of rent—Kobala not reciting fixity of rent—Payment of landlord's fee at time of registration of kobala—If raises estoppel against purchaser.*

Where in a proceeding under S. 26-F, B. T. Act, when the landlord wanted to exercise his right to pre-emption, he is met with an objection that the

tenancy was at a fixed rate of rent, and the application is allowed, leaving the question of the status of the tenant whether he was tenant at fixed rate of rent is expressly left open, the fact that in the kobala by which the purchaser purchased the holding, there was no mention of the fixity of rent, and that the purchaser paid the landlord's fees at the time of the registration of the kobala, does not give rise to any estoppel against the purchaser in a suit by the latter for a declaration that he was a tenant at fixed rate of rent in respect of the holding, and Ss. 26-D and 26-F, Bengal Tenancy Act, have no application. (*Guha and Bartley, JJ.*) FERDINAND PERIER *v.* KUMAR KRISHNA NANDY CHOUDHURY. **167 I.C. 596=9 R.C. 705=A.I.R. 1936 Cal. 582.**

——**S. 26-D (b)**—*Transferred holding liable to be assessed to rent but not so assessed—Landlord's fee, if payable.*

Under S. 26-D (*b*) of the Bengal Tenancy Act landlord's fee is payable if the transferred holding is liable to be assessed with money rent at some future date, even though such an assessment has never taken place before the date of the transfer. (*Edgley, J.*) PROMODE KUMAR BANERJEE *v.* KUSUM KAMINI DASSYA. **43 C.W.N. 217.**

——**S. 26-E**—*Failure to deposit landlord's fee—Re-sale—Conditions of validity—Omission to fix time for deposit—Effect—Power to order re-sale without order of forfeiture.*

Though S. 26-E (1) does not state that the landlord's fees are to be deposited within a time to be fixed by the Court, the Court should fix a time within which the deposit required by S. 26-E (1) is to be made. If the auction-purchaser fails to make the deposit within the time so specified, the Court may then make an order for the forfeiture of the purchase money, and for re-sale of the property. The Court may not order re-sale without first making an order of forfeiture; and there can be no re-sale under S. 26-E (3) until the time specified has expired. The sale, however, cannot be treated as a nullity merely because the landlord's fee is not deposited, or because no time is specified for making the deposit of the landlord's fee or because the Court overlooks the fact that such time had been specified, and the Court, when it has made an order of full satisfaction cannot treat the sale as a nullity and set aside the order of full satisfaction on the ground that the decree-holder purchaser fails to deposit the fee. If the only defect is the failure to deposit the landlord's fee, and if the decree holder so requires a re-sale can be held under S. 26-E (3), and the provisions of S. 26-E (3) must be complied with. Where no order of forfeiture has been made and when no reason is given for not making such an order of forfeiture, no order for re-sale can be made. The fact that the decree holder is the auction-purchaser does not affect his liability to be penalised for failure to deposit the landlord's fee. (*Guha and Lodge, JJ.*) DURGA CHARAN DAS *v.* CHAIRMAN OF THE LABANGA SAMABAI SAMITY. **162 I C. 135=8 R.C 570=40 C.W.N. 143=62 C.L J 372=A I.R 1936 Cal. 171.**

——**S. 26 E**—*Landlord's fee—Landlord's right to retain—Sale set aside on appeal.*

If a sale of an occupancy holding held in execution of a money decree is subsequently set aside on appeal, the landlord is not entitled to retain the landlord's fee which has been in the meantime withdrawn by him. (*Edgley, J.*) SARASWATI DASI *v* BENODE BEHARI. **44 C.W.N. 484.**

——**S. 26-E**—*Transfer fee—Amount of—Right of landlord*

The landlord is entitled, under S. 26-E of the Bengal Tenancy Act, to either five times the annual rent of the holding or twenty per cent. of the purchase whichever sum is greater. (*R. C. Mitter, J.*) SASHI KANTA ACHARYA BAHADUR *v.* NASIRABAD LOAN OFFICE CO. **168 I.C. 849=9 R. C. 819=63 C.L.J. 105=A.I.R. 1936 Cal. 786.**

——**S. 26-E (1)**—*Applicability—Rent decree in respect of share of holding.*

The provision in sub-S. (1) of S. 26-E applies to the case of a decree for arrears of rent due in respect of the entire holding. The reason behind the exception in the case of such a decree appears to be that the decree-holder of such a decree is the landlord himself and there is no necessity to serve notice upon him or to pay the landlord's fee when he himself is the auction-purchaser. But the position is different when the decree is in respect of a share of a holding and the other co-sharer landlord has been made a party. (*S. K. Ghose and Patterson, JJ.*) ATUL CHANDRA *v.* MOHINI MOHAN. **182 I.C. 751=12 R.C. 102=A.I.R 1939 Cal 28.**

——**S. 26-E (1)**—*Sale of tenure and occupancy holding together—Landlord's fees so far as tenure deposited—Sale of tenure confirmed and that of occupancy field set aside—Validity.*

In execution of a mortgage decree, *A* purchased and obtained possession of a tenure and an occupancy field in one lot. He deposited landlord's fees so far as the tenure only was concerned. While confirming the sale, the executing Court confirmed the sale of the tenure and set it aside so far as the occupancy holding was concerned. Later on, landlord sold the tenure in execution of rent decree without making *A* as party and purchased it himself and took symbolical possession. Therefore *A* brought a suit against the landlord for declaration of his title to the tenure. Landlord contended that the order of confirmation of the tenure only was illegal as the tenure and occupancy field were sold in one lot and the entire sale should have been set aside. He further contended that the Court should ignore the order of confirmation of the tenure.

Held, that there was no violation of the provision of S. 26-E.

Held, further, that the non-compliance with S. 26-E (1) did not oust the jurisdiction of the Court and any order made by it cannot be treated as nullity and be ignored unless it has been properly set aside. (*B.K. Mukherjea, J.*) BASIRUDDIN MAHOMED *v.* PRASANNA DEB RAI KAT. **177 I. C. 758=11 R.C. 271=A.I R. 1938 Cal 282.**

——**S. 26-E (3)**—*Re-sale under—Procedure—Fresh execution application—Necessity for.*

S. 26-E (3) does not contemplate fresh execution proceedings for the purpose of a re-sale; it provides for fresh sale in the execution proceedings then pending. (*Guha and Lodge, JJ.*) DURGA CHARAN DAS *v.* CHAIRMAN OF THE LABANGA SAMABAI SAMITY. **162 I.C. 135=8 R C. 570=40 C.W.N. 143=62 C.L.J. 372=A.I. R. 1936 Cal. 171.**

——**S 26-F**—*Applicability—Co-sharer landlords—Partition of holdings under Estates*

BENGAL TENANCY ACT (1885), S. 26 F.

Partition Act—Suit for rent of holding for period anterior to partition by some co-sharers and decree—Execution sale—Application for pre-emption by remaining co-sharer.

A, *B* and *C* were co-sharer landlords in respect of three occupancy holdings. Later on, under a proceeding under the Bengal Estates Partition Act, two holdings were allotted exclusively to *A* and the third holding was allotted partly to *A* and partly to *B* and *C*. *B* and *C* instituted a suit for rent for the three holdings for a period anterior to the partition without impleading *A* and obtained decrees and in execution thereof purchased the three holdings. *A* applied for pre-emption.

Held, that his application was competent. (*R. C. Mitter, J.*) RAMSHASHI GHOSE *v.* MOHENDRA NATH SINHA **162 I C. 664 (1)=8 R.C. 632 (1)=A.I.R 1936 Cal 223.**

——**S. 26-F (as amended)**—*Applicability—Document of transfer executed before and registered after section coming into force.*

S. 26-F of the B. T. Act as amended by the Amending Act of 1938 is, no doubt not retrospective in its operation and it does not take away any vested right that accrued under the old section. But both under the old Act as well as under the new, no right of pre-emption could possibly secure until the document of transfer was registered. The material date is the date of registration and not the date of execution. The provisions of the new section would, therefore, be applicable to transfers registered after it became operative, although they were executed while the old section was in force. (*Mukherjea and Akram, JJ.*) GOBARDHAN BAR *v.* GUNADHAR BAR. **44 C.W.N. 802.**

——**S. 26-F**—*Applicat on by landlords mentioned in transfer deed—Rejection of, on ground that certain idol is landlord and applicants are merely shebaits—Propriety—Applicants who are members of Mitakshara family not impleading their sons and nephews—Effect.*

An application for pre-emption under S. 26-F of the Bengal Tenancy Act presented by the persons described as the landlords in the deed of transfer cannot be rejected on the ground that a certain idol is the landlord and that the applicants are merely the shebaits, when there is no mention of the idol in the transfer-deed. Nor can the application be rejected on the ground that the applicants are members of a Mitakshara family and have not joined in their application their sons and nephews as co-sharers, when they are the adult members, who actually manage the properties. (*M. C. Ghose, J.*) MAHENDRA NATH DAS *v.* RADHASHYAM MANDAL. **173 I.C. 686=10 R.C. 561=41 C.W.N. 1185=A.I.R. 1937 Cal. 577.**

——**S. 26-F**—*Application made before repeal of section—Order passed after its repeal—Validity—Act VI of 1938.*

An order passed under S. 26-F of the Bengal Tenancy Act after its repeal by Act VI of 1938 is valid, if the application for pre-emption was made at a time when the section was operative. Neither the language of the new enactment nor the primary object for which it was passed furnishes any indication that the Legislature intended to give a retrospective operation to the new Act so as to affect suits or proceedings already pending at that time. (*Mukherjea and Akram, JJ.*) BEPIN CHANDRA GHOSH *v.* SRIMATI BITYUTLATA ROY. **71 C.L.J. 400.**

BENGAL TENANCY ACT (1885), S. 26-F.

——**S. 26-F**—*Application for pre-emption filed before its repeal—Order passed thereon after repeal—Validity.*

Where the application for pre-emption was made at a time when S. 26-F of the Bengal Tenancy Act was operative, an order can be validly made on that application after its repeal by Act VI of 1938. Neither the language of the new enactment nor the primary object for which it was passed furnishes any indication that the legislature intended to give a retrospective operation to the new Act so as to affect suits or proceedings already pending at that time. (*Mukherjea and Akram, JJ.*) BEPIN CHANDRA *v.* MAHIM CHANDRA. **44 C.W.N 640.**

——**S. 26-F**—*Application for pre-emption—Benamidar of co-sharer landlords made party—Sufficiency.*

A benamidar fully represents in a suit or proceeding the beneficial owner. Where therefore in an application for pre-emption under S. 26-F of the Act, the benamidar of certain co-sharer landlords is made a party, the application is not defective by reason of failure to implead the co-sharer landlords. The benamidar represents the co-sharer landlords and the co-sharer landlords can at any time be added as parties in place of the benamidar, in case they want to come in and represent themselves instead of their benamidar representing them. (*R. C. Mitter, J.*) MUKTI DEVI *v* MONORAMA MITRA. **I L.R. (1937) 1 Cal. 194=169 I.C. 862=10 R.C. 45=40 C.W.N. 1211=53 C.L.J. 566=A.I.R. 1936 Cal. 490.**

——**S 26-F**—*Application for pre-emption—Co-sharer impleaded as party getting notice after one month—Right to apply as co-applicant.*

Whether a co-sharer landlord impleaded as an opposite party to an application for pre-emption by a co-sharer under S 26-F of the B. T. Act can apply for pre-emption as a co-applicant when he gets through Court notice of the application for pre-emption after a month of its filing, whether he is made a party originally or added as party afterwards within a month from the date of filing of the application. (*R. C. Mitter, J.*) GAJENDRA NATH MANDAL *v.* KUNJA BEHARI MISTRI. **166 I.C. 492=9 R.C. 538=40 C.W.N. 506=A.I.R. 1936 Cal. 388.**

——**Ss. 26-F and 188**—*Application for pre-emption—Joinder of minor as one of opposite parties—Application if defective—Subsequent proceedings without appointment of guardian—Validity.*

An application for pre-emption under S. 26-F is not defective merely because one of the opposite parties impleaded in it is a minor and no guardian is appointed to act for him. The minor must be taken to have been made a party for purposes of S. 18[8]. The subsequent proceedings are however irregular if the Court fails to appoint a guardian to act for the minor and the order for pre-emption passed therein is liable to be discharged and the case remitted to the lower Court in order that the proceedings may be continued after appointment of a guardian of the minor. If after the appointment of the guardian the minor wants to be made a co-applicant, his application is competent, although made after the period of limitation for making it is over,

provided it is made promptly. The minor should not be allowed to suffer by reason of the failure of the Court to discharge its duty. (*R. C. Mitter, J.*) MUKTI DEVI *v.* MONORAMA MITRA. **I.L.R (1937) 1 Cal. 194=169 I C. 862=10 R C 45=40 C.W.N. 1211=63 C.L.J. 566=A.I.R. 1936 Cal. 490.**

——**S. 26-F**—*Application for pre-emption by co-sharer landlord—Addition of other co-sharers as parties—Limitation.*

Where some of the co-sharer landlords file the application for pre-emption, an application by the applicants for addition of their co-sharer landlords as opposite parties must be made within the two periods mentioned in sub-S 4 (*a*) of S. 26-F of the B. T. Act, namely either within two months of the service of notice issued under S. 26-C or S. 26-E, or within one month of the application for pre-emption. But though all co-sharer landlords are necessary parties to an application, for pre-emption, it is not necessary that such of them as are left out in the original application for pre-emption should be added within two months of the date of service of notice under S. 26-C or S. 26-E, on the co sharer who has filed the application for pre-emption. (*Mitter, J.*) GAJENDRA NATH MANDAL *v* KUNJA BEHARI MISTRI. **166 I C 492=9 R. C. 538=40 C.W.N. 506=A.I.R. 1936 Cal. 388.**

——**S. 26-F**—*Application for pre-emption by some of co-sharer landlords—Others made parties after limitation—Application, if barred—Limitation Act, S. 22.*

An application for pre-emption under S. 26 F of the B T.Act must be made by all the co-sharer landlords. If some of the co-sharers only apply within time and the others are made parties after the expiry of the period of limitation, the application is barred by limitation. By operation of S. 29 (2) (*a*) of the Limitation Act, the provisions of S. 22 of that Act apply to an application under S. 26-F of the B. T Act. (*Bartley and Nasim Ali, JJ.*) DINESH CHANDRA CHOUDHURY *v.* RAJENDRA CHANDRA KAR. **177 I.C. 798=11 R. C. 276=42 C.W.N. 316=A.I.R. 1938 Cal. 324.**

——**S. 26-F**—*Application for pre-emption dismissed for technical defects—Second application—If maintainable.*

Where an application for pre-emption under S. 26-F of the B.T. Act is dismissed for technical defects and not on the merits, a second application could lawfully be made. (*M. C. Ghose, J.*) ANANTA LAL SAHA *v.* KAMAKHYA CHARAN DAS. **41 C.W.N. 1371.**

——**S. 26-F**—*Application for pre-emption with the required deposit—Dismissal for default—Fraudulent attachment of deposit and withdrawal in execution of decree against co-sharer landlord—Subsequent restoration of application—Order for refund of deposit withdrawn—Non-compliance—Order calling on applicant to make fresh deposit—Default—Proper procedure.*

An application by certain co-sharer landlords for pre-emption of an occupancy holding under S. 26-F of the Bengal Tenancy Act, accompanied by the necessary deposit required by law, having been dismissed for default, certain holders of a decree against such applicants acting in collusion with the transferee and by surreptitiously suppressing all processes attached the deposit in execution of their decree and withdrew the same from Court. The co-sharers subsequently applied and got their application restored on showing good cause and then applied to the executing Court to call upon the decree-holders to refund the amount withdrawn by them. The Court made such an order but it was not complied with. The pre-emption Court then called on the co-sharers to make a fresh deposit under S. 26-F, and on their failure to do so within the time fixed dismissed their application for pre-emption for want of the necessary deposit in Court. The Judge who passed the orders for deposit and the order of dismissal was the Judge who as the Judge of the executing Court, passed the order calling on the decree-holders to refund the money withdrawn by them in execution.

Held, (*i*) that the order dismissing the application for pre-emption was wrong and must be set aside; and that the Court below should be directed to hear the application on the merits and to pass an order of pre emption if the co-sharers made out their right for pre-emption, but the Court should postpone passing of the order for payment of the price and 10 per cent. to the purchaser or transferee, etc., till the money is brought into Court by the decree-holders who withdrew it; (*ii*) that where the deposit required by the statute is made with the application for pre-emption, and that within the time limited, the requirements of S. 26-F are complied with, and the application cannot be dismissed as defective, merely because the deposit has been withdrawn by holders of decree against the applicants fraudulently; (*iii*) that S. 26-F (5) contemplates two orders, one for pre-emption in favour of the applicant if he is entitled to it and a further and distinct order in favour of the purchaser or transferee, which is no doubt dependent on an order for pre-emption in favour of the applicant. (*R. C. Mitter, J.*) RAKHAL DAS SOM *v.* SARALA BALA HALDAR. **I.L R. (1937) 1 Cal. 223=66 C.L.J. 73 =40 C.W N. 1182.**

——**S. 26-F**—*Application under—Money deposited into treasury on following day—Application if barred.*

If at the time of making an application under S. 26-F of the B. T. Act the applicant brings the money with him in Court but it could not be deposited into the Treasury until the next day owing to the rules of procedure, the Court cannot reject the application as time-barred. (*Henderson, J.*) MANILAL PAL *v.* GOUR CHANDRA DAS. **178 I.C 1008=11 R.C. 453=67 C.L.J. 80=A.I. R. 1938 Cal.792.**

——**S. 26-F**—*Application under—Question if applicant is landlord—Jurisdiction of Court to entertain.*

On an application under S. 26-F of the B. T. Act, the Court has jurisdiction to entertain the question whether the applican is a landlord. The mere fact that the applicant has been served with notice as landlord does not give him the right to get the reliefs which may be granted by the Court under that section. (*Sen, J.*) BIRENDRA KUMAR ROY *v.* JAGAT KISHORE ACHARJYA. **43 C.W.N. 274.**

——**S. 26-F**—*Application under old section after amendment—Maintainability—Transfer before amendment.*

An application for pre-emption filed under the old S. 26-F of the B. T. Act after the Amendment

Act of 1938 by which it was amended has come into operation, is not entertainable although the transfer took place before the amendment. (*Nasim Ali and Rau. JJ.*) PRAFULLA CHANDRA *v.* RAJMOHAN DAS. **186 I C. 589=12 R. C. 502=43 C.W.N. 1172=A.I.R. 1940 Cal. 81**

——S. 26-F—*Holding purchased by decree-holder in execution for less than decretal amount —Application by landlord for pre-emption—Sale subsequently set aside and so pre-emption application also dismissed—Sale again restored on decree-holder agreeing to discharge judgment-debtor from entire liability—Landlord's right to pre-empt—Deposit necessary.*

In execution of a money decree, an occupancy holding belonging to the judgment-debtor was sold for less than the decretal amount and purchased by the decree-holder, and the sale was confirmed. The landlord thereupon applied for pre-emption under S. 26-F of the B. T. Act and made the necessary deposit, and his application was allowed. Subsequently an application previously made by the judgment-debtor under O.21, R. 90, C. P. Code, was allowed *ex parte* and the sale was set aside. The Court thereupon allowed the landlord to withdraw the money deposited by him and dismissed the application for pre-emption. Subsequently the decree-holder applied for setting aside the *ex parte* order by which the sale was set aside. The decree-holder and the judgment-debtor entered into a compromise by which the decree-holder agreed to discharge the judgment-debtor from the entire liability under the decree. The application of the decree-holder was thereupon allowed and the order confirming the sale was restored. On application by the landlord for re-depositing the amount which was paid by him in Court for pre-emption of the holding and also for possession of the holding under S. 26-F (6) (*iii*),

Held, that the effect of the revival of the order confirming the sale was to restore the order for pre-emption previously made and that, therefore, the application of the landlord must be allowed.

Held also, that the landlord was bound to deposit the amount for which the holding was originally sold and not the entire decretal amount. (*Nasim Ali, J.*) CHAND MIA *v.* MAHARAJA BIR VIKRAMKISHORE MANIKYA BAHADUR. **42 C.W.N. 644.**

——S. 26-F—*Instrument of transfer stating sale price as Rs. 200—Notice under S. 26-C also stating same amount—Recital in body of instrument that certain mortgage debts were satisfied—Amount of such debts not stated—Amount to be deposited by landlord for pre-emption.*

Where the instrument of transfer and the notice issued to the landlord under S. 26-C of the B. T. Act stated the sale price as Rs. 200 and in the body of the instrument one mortgage in favour of the transferee and another mortgage decree in favour of his son were recited and stated to have been satisfied but the amount due on them was not mentioned and it appeared that the mortgage was in respect of a different property and the mortgage decree directed a sale not only of the holding sold but also of other properties.

Held, that the transferee was not entitled to ask the Court to consider the amount payable on the mortgage or the mortgage decree as part of the consideration for the purposes of S. 26-F of the Act, and that the landlord was not bound to deposit for pre-emption anything more than what was stated in the instrument of transfer and in the notice issued under S. 26 (*c*). (*Bartley and Nasim Ali, JJ.*) KUNJA KAMINI *v* MANGAL CHANDRA. **I.L.R. (1938) 1 Cal. 695=42 C.W.N. 209.**

——S. 26-F—*Notice of application served on co-sharer landlord as purchaser—Latter not invited to join in application—Application, if maintainable.*

Where a co-sharer landlord who is himself the purchaser is served with notice of the application for pre-emption under S. 26-F of the B. T Act, the application is maintainable although no notice is served on him describing him as a co-sharer and inviting him to join in the application for pre-emption of his share. (*M. C. Ghose, J.*) ANANTA LAL SAHA *v.* KAMAKHYA CHARAN DAS. **41 C.W.N. 1371.**

——S. 26-F—*Order for pre-emption—Validity —Power of third persons to question—Holding sold to minor—Minor not represented in pre-emption proceeding.*

The proceeding by which the landlord exercises his right of pre-emption under S. 26-F of the B. T. Act cannot be challenged as void by third persons on the ground that the purchaser of the occupancy holding, who was a minor, was not properly represented in such proceeding. There is no real analogy between a decree of a Civil Court and an order for pre-emption passed under S. 26-F of the Act. The right of the landlord to pre-emption does not depend upon any decision by the Court. It flows automatically from the transfer itself and no duty is cast upon the landlord to give any notice to the purchaser. Where the purchaser describes himself in the *Kobala* as a major, the Court can only serve the notice in accordance with its terms. (*Henderson, J.*) DEBENDRA CHANDRA DE *v.* JAMINI KUMAR DEY. **I. L.R (1940) 1 Cal. 156=185 I.C. 704=12 R.C. 402=43 C.W.N. 1209=A I.R. 1939 Cal. 744.**

——S. 26 F—*Proceeding under—Judgment of competent Court declaring transfer by tenant void—Admissibility—Evidence Act, S. 43.*

In a summary proceeding for pre-emption under S. 26-F of the Bengal Tenancy Act, which is based upon the assumption that a transfer from a tenant to a third party has taken place, a judgment of a Court of competent jurisdiction declaring that transfer void must be regarded as a fact in issue under S. 43 of the Evidence Act and as such is admissible in evidence, and the Court has no jurisdiction to allow pre-emption to the pre-empting landlords. (*Edgley, J.*) BASANTA KUMAR *v.* DURGANATH PAL. **I L.R. (1939) 1 Cal. 558=183 I.C 489=12 R.C. 165=43 C.W.N. 549 =A.I R 1939 Cal. 432.**

——S. 26-F—*Proceeding under—Minor party—Compromise entered into by guardian—Sanction of Court—If necessary—Order of Court—If can be challenged by suit—C. P. Code, O. 32, R. 7.*

By virtue of S. 141, C. P. Code, O. 32, R. 7 of the Code applies to proceedings under S. 26-F of the Bengal Tenancy Act and express sanction must be given by the Court to a compromise where a minor is concerned. An order passed on an application made under S. 26-F of the Bengal Tenancy Act can be challenged by a suit on the

ground of fraud and can also be challenged by a suit by a minor on attaining majority if it was the result of a compromise entered into by his guardian without the leave of the Court expressly recorded. (*Guha and Mitter, JJ.*) SYED MAHOMMED ALI *v.* AJIT KUMAR DAS. **42 C.W.N. 154.**

——S. 26-F—*Proceedings under—Nature of—Vendee a minor—Appointment of guardian* ad litem—*If essential.*

Pre-emption proceedings under S. 26-F are in the nature of suits. Hence if the vendee be a minor the appointment of a guardian *ad litem* is mandatory and an order passed in a proceeding under S. 26-F against a minor where no guardian is appointed is a nullity. And where in a suit by the minor the order in the pre-emption proceedings is declared null and void and the pre-emptor files an appeal, the appellate Court has no jurisdiction to direct the lower Court to revive the pre-emption proceedings after giving an opportunity to the appellant of getting the minor properly represented by a guardian. (*Sen, J.*) BIMAL KUMAR HUI *v.* PURNIMA DASI. **179 I C. 199=11 R.C 490=A.I.R. 1938 Cal. 736.**

——S. 26-F—*Proceeding under—Objection regarding nature of holding raised at late stage, disallowed by lower Court—Interference in revision.*

Where in a proceeding under S. 26-F of the B. T. Act an objection regarding the nature of the holding which was raised at a late stage was disallowed by the lower Court, the High Court sitting in revision will not interfere with that order. (*Henderson, J.*) KALI MOHAN PAL *v.* SACHINDRA MOHAN RAY. **67 C.L.J. 5.**

——S. 26-F (as amended)—*Proceeding under—Parties—Co-sharer tenants—If necessary parties.*

There is no provision in the B. T. Act which makes it necessary that the co-sharer tenant who seeks to exercise his right of repurchase under S. 26-F of the new Act should make the other co-sharers parties to the proceeding. The non-joinder of the other co-sharer tenants would not therefore, in any way make the proceeding defective. (*Mukherjea and Akram, JJ.*) GOBARDHAN BAR *v.* GUNADHAR BAR. **44 C W.N. 802.**

——S. 26-F—*Proceeding under—Scope of enquiry—Rights of third party—If can be adjudicated.*

S. 26-F of the Bengal Tenancy Act requires certain matters to be proved and upon proof thereof the landlord is entitled to pre-emption. It is not open to the transferee to raise independent issues which are not contemplated by the section nor can he be allowed to say that the deed of transfer upon which the pre-emption is claimed is not what it purports to be. The party must be held bound by the statements in the deed itself. S. 26-F does not contemplate the adjudication of the rights of a third party. (*M. C. Ghose, J.*) JOGENDRA NATH CHOWDHURY *v.* GOLAM SAMDANI. **65 C.L.J. 472=41 C.W.N. 1155.**

——S. 26-F—*Proceeding under—Vendor, if necessary party.*

The question as to whether or not the vendor has *locus standi* to contest an application for pre-empt on under S. 26-F of the Bengal Tenancy Act depends entirely upon the circumstances of the case. Where the position adopted by the vendor is that there had not been an effective

transfer of his holding which the landlord is seeking to pre empt, that he intended to execute a mortgage-deed but owing to fraud on the part of the transferee, he had been made to execute a deed of transfer, the vendor is vitally interested in the result of the application for pre-emption and has every right to be made a party to the pre-emption proceedings in order to contest the same. (*Edgley, J.*) BASANTA KUMAR *v.* DURGANATH PAL **I L.R. (1939) 1 Cal 558=183 I.C 489=12 R.C. 165=43 C W.N. 549=A.I.R. 1939 Cal. 432.**

——S. 26-F—*Right of pre-emption—Applicant, if must be immediate landlord at time of order.*

The right of pre-emption under S 26-F of the Bengal Tenancy Act depends upon the applicant being an immediate landlord of the holding not only at the time he makes his application but also at the time when an order for pre-emption is made under sub-S. 5 (5). (*Henderson, J.*) RAMENDRANATH RAY CHOWDHURY *v.* JITENDRA NATH CHAKRAVARTY. **I.L R. (1938) 2 Cal 85=42 C.W.N. 382=176 I.C 810=11 R.C. 181=67 C.L J. 76=A.I.R 1938 Cal. 351.**

——S. 26-F—*Right to apply—Unrecognised purchaser of share of occupancy holding.*

A person who had purchased a share of an occupancy holding before the Bengal Tenancy Act of 1928 came into operation but had never been recognised as a tenant by the landlord, does not acquire the status of a tenant within the meaning of the Act. He has, therefore, no *locus standi* to apply for pre emption under S. 26-F of the Act. (*Edgley, J.*) ABDUL MAJID *v.* ALTAB ALI. **I.L.R. (1940) 1 Cal. 527=44 C W.N 500**

——Ss. 26-F and 3 (3)—*Right to apply for pre-emption—Proprietor of resumed mahal with whom no settlement has been made—If landlord entitled to pre-empt.*

Where a mahal had been resumed under Regulation II of 1819 (on the ground that it was held under an invalid lakeraj grant), the proprietor of the resumed mahal with whom no settlement has been made by the Government, is not a landlord within the meaning of S. 3 (3) of the Bengal Tenancy Act, and he has, therefore, no right to apply for pre-emption under S. 26-F of that Act. (*Sen, J.*) BIRENDRA KUMAR ROY *v.* JAGAT KISHORE ACHARJYA. **43 C W.N. 274.**

——S. 26-F—*Sale of property in two lots—Landlord's right to pre-empt one of them.*

Where property was sold in two lots in execution of a money decree, the landlord seeking to pre-empt under S. 26-F of the Bengal Tenancy Act cannot be allowed to pre-empt only one lot. He must pre-empt both the plots or his application must be refused. (*S K. Ghose, J.*) SURABALA BASU *v.* RUKMINI KANTA BARMAN ROY. **42 C.W.N. 288.**

——S. 26-F—*Two separate holdings sold by one deed—Pre-emption of one—Permissibility.*

Under S. 26-F, Bengal Tenancy Act, it is permissible for the landlord to pre-empt one of two separate holdings which have been sold by one transfer deed. (*Sen, J.*) MONORANJAN CHATTERJEE *v* PYARE MOHAN DE. **43 C.W.N. 220**

——S. 26-F (1)—*Application by co-sharer landlord—Applicant added as co-applicant in another application by other co-sharer landlords—Latter dismissed as defective—Applicant—If debarred from continuing his own application.*

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Where a co-sharer landlord making an application for pre-emption under S. 26-F is added as a co-applicant, on his request, in another application by his co-sharer landlords and the latter application is dismissed by reason of certain defects, he is not debarred from continuing his own application. Each of the co-sharer landlords has an independent right to make an independent application under S. 26-F (1) and he is not entitled to exercise his right of pre-emption only by becoming a co-applicant in other co-sharer's pending application for pre-emption. Two applications for pre-emption can go on simultaneously. (*R. C. Mitter, J.*) MUKTI DEVI *v.* MONORAMA MITRA. I.L.R. (1937) 1 Cal. 194 =169 I.C 852=10 R.C. 45=40 C.W.N. 1211= 63 C.L.J. 555=A.I.R. 1936 Cal. 490.

——S. 26-F (1)—Application by co-sharer landlord for pre-emption under S. 26 F (1)—Notice on other co-sharer landlords not served in time owing to laches of Court officers or mistake of Court—Their application under S. 26-F (4) dismissed as time-barred—Application under S. 26-F (1)—Maintainability. *See* BENGAL TENANCY ACT, S. 183 (1), PROVISO. 41 C.W.N. 444.

——S. 26-F (1) and 26-F (4) (a)—*Application for pre-emption by co-sharer landlord served with notice of transfer—Application for being made co-applicant by another co-sharer not served with notice—If one for pre-emption—Application by other co-sharers to be made co-applicants within one month of latter application but beyond one month of former and two months of service of notice—Maintainability.*

The application of a co-sharer landlord who has not been served with the notice of transfer to become a co-applicant in the application for pre-emption by another co-sharer landlord who has been served with notice, must be considered as an application for pre-emption under S. 26-F (1) of the Bengal Tenancy Act. As soon as such an application is made the remaining co-sharer landlords are entitled to become co-applicants, if they apply for being so made within one month of the application by the co-sharer not served with notice, even though they ask for pre-emption beyond one month of the application of the other co-sharer served with notice and beyond two months of the service of notice of transfer on them. It is not incumbent on a co-sharer landlord to exercise his right to pre-empt by becoming a co-applicant at the earliest opportunity, as soon as the first application for pre-emption is made by one of the co-sharers. (*R. C. Mitter, J.*) GADADHAR SARKHEL *v.* GOPAL CHANDRA DAS. 63 Cal 1079=40 C.W.N 680=166 I.C 641=9 R. C. 570=A.I.R. 1936 Cal 343

——S. 26-F (1), (5) and (6)—*Sale of share in occupancy holding—Pre-emption application by landlord—Pre-emption suit by another co-sharer by inheritance—Decree in—Effect on landlord's application.*

Certain co-sharers sold their share in an occupancy holding, and getting notice of it, the landlord filed an application for pre-emption under S. 26-F. Pending this application, another co-sharer of the transferors who had become a co-sharer by inheritance under Mahomedan Law, filed a suit for pre-emption to enforce the right under Mahomedan Law. Both the application and the suit were heard together. The suit was decreed.

Held, that the landlord's application should be dismissed as there was no right, title or interest left in the vendees and as there could be no order for pre-emption against the co-sharer who had obtained the decree by reason of S. 26-F (1). (*R. C. Mitter, J.*) NALINAKSHA DUTTA *v.* ABDUL JALIL 155 I.C. 742=9 R.C. 579=A.I.R. 1936 Cal. 398.

——S. 26-F (1) and 183—*Scope and construction—Application by some co-sharers for pre-emption—Applicants, if bound to invite other co-sharers to join—Failure to express consent to their joining as co-applicants—If fatal.*

Where some of the co-sharer landlords apply for pre-emption under S. 26-F (1) of B.T. Act, the remaining co-sharers must be made opposite parties either in the application originally filed or by an application for amendment made within one of the two periods of time mentioned in sub-S. 4 (*a*) of S. 26-F. That is the effect of the words "giving opportunity of joining in the proceedings" occurring in S. 183. It is not necessary that the co-sharer landlords applicants must invite the remaining co-sharer landlords to join in their application or should expressly consent to their so joining. All that is necessary is that the applicants must place their co-sharer landlords in a position to join in the pre-emption if they like. The absence of an express statement in the application to the effect that the applicants have no objection to their co-sharer landlords joining in the application or that they would be willing to treat them as co-applicants would not make their application for pre-emption a bad one on that account. (*R. C. Mitter, J.*) SACHINDRA NATH CHAKRAVARTY *v.* TRAILAKYA NATH CHAKRAVARTY. 157 I.C. 432=9 R.C. 693=40 C.W.N. 1023=A.I.R. 1935 Cal. 576.

——S. 26-F (1) and (4)—*Deposit by co-sharer landlord—Time limit.*

The whole scheme in the matter of deposits to be made by co-sharer landlords applying for pre-emption under the Bengal Tenancy Act, whether the application be under S. 26-F (1) or under S. 26-F (4) of the Act, seems to be that the deposit to be made by applicants or co-applicants must be made within the time limit imposed by the statute for making such application, though failure to deposit the amount along with the application would not be fatal. The deposit must however be made within the period of limitation prescribed by S. 26-F (4) (*a*). If the service of notice be delayed, *i.e.*, of the application under S. 26-F (1), beyond one month by reason of the act or defaults of the applicant for pre-emption, his application for pre-emption would be thrown out on the ground of non-compliance with S. 188. But if the notice be not served within that period by any act of omission or mistake of the Court or of its officers, the application of the co-sharer applicant under S. 26-F (1) would be a good one; and the Court would be under a duty to relieve the co-sharer landlords opposite parties from the injury done to them by its acts or defaults or those of its officers. (*R. C. Mitter, J.*) SACHINDRA NATH CHAKRAVARTY *v.* TRAILAKYA NATH CHAKRAVARTY. 157 I.C. 432=9 R.C 693=40 C. W.N. 1023=A.I.R. 1936 Cal. 576.

——S. 26-F (2)—*Application for pre-emption—Necessary deposit made only on following day—Application and deposit both within two months of service of notice—Application brought to notice of Court only on following day after deposit—Application, if in order.*

The expression "time of making" in sub-S. (2), S 26-F, Bengal Tenancy Act, is to be given a liberal construction and the expression 'making' does not mean filing but refers to some time when application is brought to the notice of the presiding officer, who has power to dismiss, and not the point of time when the application is presented to some officer of the Court. Hence where an application for pre-emption is made on a certain day, and the deposit of necessary amount is made only on the following day, and the application is brought to the notice of the Court after the deposit, both the application and the deposit being within two months of the service of notice, the application is quite in order. (*S. K. Ghose and Patterson, JJ.*) JOTIS CHANDRA BISWAS *v.* JADU NATH SIKDAR. **173 I.C. 398=10 R C. 509 =A.I R. 1937 Cal. 377.**

——S. 26-F (2)—*Compliance with—Sufficiency —Deposit made two days after application*

Where the application and the payment of the money were both within two months of the receipt of the notice, and on the day on which the application was made the landlord's officer came ready with the *challan* to deposit the money but it being a Saturday, the money could not be accepted after 1 P.M. and the officer had to wait till the next Monday when the money was taken by the office.

Held, that there was sufficient compliance with sub-S (2) of S. 26-F of the Bengal Tenancy Act. (*M. C. Ghose, J.*) ABU BAKKAR *v.* NRIPENDRA NATH SEN. **41 C.W.N. 1212.**

——S. 26-F (2) and (3)—Kobala *showing price of land and of trees separately—Price of trees not included in notice to landlord—Landlord, if bound to deposit price of trees also—Right of purchaser to remove trees.*

The value of a holding would include the value of the trees standing on it, and the landlord would ordinarily be bound to deposit under S. 26 (F) of the B T. Act not only the price of the land as stated in the *Kobala*, but the price of the trees also, if that is separately shown. But under S 26 (F) (2), the landlord has only to deposit the price of the property as specified in the notice issued under S. 26 (C), and if the purchaser omits to include the price of the trees in the notice, the landlord cannot be compelled to deposit the price of trees also. Nor can the landlord be directed to deposit the price of the trees under S. 26 (F) (3) as the trees cannot be regarded as incumbrances within the meaning of that clause The purchaser is, however, entitled in such circumstances to remove the trees. (*M C Ghose and Mukerjea, JJ.*) RAJ BALLAV MONDAL *v.* RAJENDRA NARAIN MONDAL **I.L.R. (1937) 2 Cal. 73= 170 I.C. 641=10 R C 167=41 C.W.N. 317=64 C.L J. 582.**

——S 26-F (3)—*Transferee of occupancy holding—If entitled to be paid mortgage debt due to himself.*

A transferee of an occupancy holding who is also a mortgagee of that holding is not entitled under S. 26-F (3) of the B. T. Act to be paid his unpaid mortgage debt. If he wishes to enforce his mortgage, he must do so by a proper suit in the ordinary Courts. (*Henderson, J.*) BENOY KUMAR *v.* SK. EAKUB. **42 C.W.N. 1110.**

——S. 26-F (4)—*Co-sharer landlord not availing opportunity to apply for pre-emption—Subsequent death—Substitution of his heirs—If necessary.*

The object of S. 26-F (4) is merely to afford co-sharer landlords an adequate opportunity themselves to apply for pre-emption in respect of transferred holding. If, therefore, a co-sharer landlord who was made a party to an application for pre-emption dies without availing himself of the opportunity given to him, it is not necessary to substitute his heirs as parties to the application. (*Edgley, J.*) KAKHAL CHANDRA DE *v.* LALIT MOHAN SAHA **43 C.W.N. 554.**

——S. 26-F (4) (a)—*Application by co-sharer to join as co-applicant in pre-emption application—Time for—Period of one month—Starting point.*

The period of one month within which the co-sharer landlord has to apply to be joined as co-applicant under the second alternative in S. 26-F (4) (*a*) of the B. T. Act must be counted from the date of the filing of the application under S. 26-F (1) and not from the date of service thereof on the co-applicant. (*R.C. Mitter, J.*) SACHINDRA NATH CHAKRAVARTY *v.* TRAILAKYA NATH CHAKRAVARTY. **167 I.C. 482=9 R.C. 698 =40 C W N 1023=A.I.R. 1936 Cal 576.**

——Ss. 26-F (4) (a) and 148-A (2)—*Application by some co-sharers for pre-emption impleading others as parties defendants—Notice on latter not served within one month due to act of Court—Latter coming in within reasonable time after notice—Their right to pre-emption—Knowledge of application apart from notice—If sufficient to deprive them of right.*

Where in an application for pre-emption by some of the co-sharer landlords impleading the others as parties defendants, the notice under S. 148-A (2) of the B. T. Act was not, due to the act of the Court, served upon the latter within one month from the date of the application, but the latter came in within reasonable time of the service of the notice, they should be allowed to exercise the right of pre-emption. The mere fact that they had, apart from the service of notice, vague information of the application made by the other co-sharer landlords for pre-emption, is not sufficient to deprive them of their right of pre-emption, when there is no evidence that they had definite knowledge of that application and, in particular, of the date when such application was made. (*D. N. Mitter, J.*) SATISH CHANDRA BANERJEE *v.* JOGENDRA KRISHNA BANERJEE. **41 C. W.N 674.**

——S. 26-F (4) (a)—*Co sharer landlord acquiring interestafter transfer and application by some co-sharers under S 26-F (1)—Right to join as co-applicant—Limitation.*

A co-sharer landlord (although he acquires his interest after the date of transfer of the occupancy holding or after the date of an application for purchase by some of the co-sharer landlords under S. 26-F (1) of the Bengal Tenancy Act) is competent to apply under sub-S. (4) (*a*) to join as a co-applicant in the application under S. 26-F (1). In such cases the applicant will not be bound by the special rule of limitation prescribed in

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S. 26-F (4) (*a*), but may make his application within a reasonable time of his knowledge of the sale of the occupancy holding. (*Biswas, J.*) BENI MADHAB *v.* TAHERANNESSA. **43 C.W.N 110.**

——S. 26-F (4) (a)—*Purchase of raiyati holding by co sharer landlord—Other co-sharer landlords applying to pre-empt entire holding—Transferee not joining in application—Effect.*

Where on the purchase of a raiyati holding by a co-sharer landlord, the other co-sharer landlords make an application for pre-emption under S.26-F of the B. T. Act, the transferee co-sharer landlord must within the time allowed by sub-S. (4) (*a*) of S. 26-F also apply for pre emption according to his share. Otherwise he will not save his proportionate share of the holding from pre-emption, and the other co-sharer landlords would be entitled to pre-empt the entire holding. (*M C. Ghose, J.*) SONAMADDI *v* PRAMADA SUNDARI SARKAR. **173 I.C. 481=10 R.C. 529=41 C.W.N. 1251=A I R. 1937 Cal 746.**

——S. 26-F (4) (a)—*Scope—Application for pre-emption under—Co sharers not joining in nor claiming share—Effect—Purchaser co-sharer landlord not claiming alternative right of pre-emption—If loses rights.*

Petitioner had two annas share, respondent No. 1 four annas share and respondents 2 to 22, the remaining ten annas share in a Patni Taluk. In June, 19 9, the said Patni was sold for arrears of rent and purchased by the petitioner. He also purchased the occupancy holding in that Patni on 12-1-1933. Respondent No. 1, a lady, brought a title suit in 1933 for a declaration of her title to four annas share in the Patni and for reconveyance of her share and got a decree declaring that she had four annas share in it and that the purchase by the petitioner of the Patni at the rent sale enured for the benefit of all the co-sharers in the Patni at the time of the sale. She was also ordered to deposit a certain amount in Court within two months and the petitioner was thereupon to reconvey to her four annas share by a registered *kobala* at the cost of respondent No. 1. The latter duly deposited the amounts in terms of the decree but the petitioner defaulted to execute the reconveyance. On 8-5-1934, respondent No. 1 applied for pre-emption. But neither the petitioner nor respondents 2 to 22 joined her in the application.

Held, that the decree in the title suit operated to vest the beneficial interest in four annas share in the respondent No. 1, though no reconveyance had been executed by the petitioner, and she having done what she was directed to do by the decree, the petitioner could not merit by or take advantage of his own default and resist her application for pre-emption.

Held, further, that since the petitioner neither joined in her application for pre-emption nor put forward any alternative claim to pre-empt as a co-sharer in case he was not adjudged sole landlord, and since respondents 2 to 22 never cared to exercise their right of pre-emption. The respondent No. 1, in view of the provisions of S 26-F (4) (*a*) of the B. T. Act, became entitled to get a decree for pre-emption of the entire sixteen annas share in the Patni. (*R. C. Mitter, J.*) SURENDRA NATH NANDI *v.* SUSHILABALA DASI. **167 I C. 259=9 R.C. 671=63 C.L.J. 49=A.I.R 1937 Cal. 47.**

BENGAL TENANCY ACT (1885), S. 26-G.

——S. 26-F (4) (a)—*Time fixed for deposit—Extension—Power of Court.*

A Court cannot extent the period for making a deposit by a co-applicant for pre-emption beyond the periods of time mentioned in Cl. (*a*) of sub-S. (4) of S. 26 F. (*R. C Mitter, J.*) SACHINDRA NATH CHAKRAVARTY *v* TRAILAKYA NATH CHAKRAVARTY. **167 I.C 482=9 R.C. 698=40 C.W.N. 1023=A.I.R. 1936 Cal. 576**

——S 26 F (4) (a)—*Time limit under—Power of Court to extend under inherent powers—Mistake of Court—Duty to set right.*

Where owing to the mistake of the Court, notice of a co-sharer landlord's application for pre-emption is not issued to the other co-sharer landlords within one month of the filing of the application, the Court has inherent power to set right the injuries caused to the rights of the co-sharer landlords and extend the time for joining as co-applicants as provided for in S. 26-F (4)(*a*). (*R. C. Mitter, J.*) GADADHAR SARKHEL *v.* GOPAL CHANDRA DAS. **63 Cal. 1079=166 I.C. 641=9 R.C. 570=40 C.W.N. 680=A.I.R. 1936 Cal. 343.**

——S. 26-G (as amended)—*"Any other law for the time being in force"—If includes Evidence Act*

In a proceeding under S. 26-G of the Bengal Tenancy Act, the principle of estoppel can be invoked to preclude the mortgagor from showing that he is an occupancy raiyat. The Evidence Act which contains the law of estoppel is not included within the words "any other law for the time being in force" occurring in that section. (*Nasim Ali and Rau JJ.*) PRAFULLA KUMAR MAITY *v* UDAY CHANDRA PRODHAN. **43 C.W N. 1192=185 I.C. 587=12 R C. 391=A.I.R. 1939 Cal. 736.**

—— S. 26-G—*Applicability—Mortgage giving mortgagee all rights of usufructuary mortgagee and also right of sale.*

Under S. 26-G of the Bengal Tenancy Act the Legislature has interfered to a great extent with the rights of a usufructuary mortgagee under the existing law. The section should be construed strictly and the privilege should not be extended to a case where the mortgage does not come within the plain language of the section. If a mortgage document gives the mortgagee not only the rights of the usufructuary mortgagee but also allows him to demand the mortgage money after the stipulated period and to have a decree for sale in respect of the mortgaged property in default of payment, the transaction is an anomalous mortgage to which S. 26-G has no application. (*Mukherjea and Akram, JJ.*) KHOAJ JAMADAR *v.* ABDUL SOBHAN. **44 C.W.N. 756=71 C.L.J. 484=A.I R. 1940 Cal 426.**

——S. 26-G—*Applicability — Mortgage with possession—Usufruct to be enjoyed in lieu of interest—Mortgagor undertaking to pay principal at stipulated period—Mortgagee given right to realise principal and interest if dispossessed.*

Under a mortgage-bond, the mortgagee was given possession of the mortgaged property and the stipulation was that he should remain in possession till the sum advanced was paid and enjoy the usufruct in lieu of interest. The bond mentioned a period after which the mortgagor undertook to redeem the property on payment of the principal money. There was a provision that in case of dispossession the mortgagee would be able to realise the principal and interest.

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Held, that the mortgage was a usufructuary mortgage, to which S. 26 G of the Bengal Tenancy Act applied, that the fixing of a period for redemption did not import any personal liability and that the provision giving the mortgagee right to realise principal and interest if dispossessed was in the nature of an indemnity clause and did not alter the nature of the mortgage. (*Mukherjea and Akram, JJ.*) BHUTNATH DANA *v.* GOPAL PROSAD. **44 C W.N. 761=A I.R 1940 Cal. 436.**

——**S 26-G** —*Applicability— Mortgagee with possession- Usufruct to be enjoyed in lieu of interest—Mortgagor undertaking to pay principal at stipulated time—Mortgagee given right of sale in case of disclosure of encumbrance.*

Under a mortgage deed, the mortgagor gave up possession of the properties to the mortgagee who was to enjoy the usufruct in lieu of interest. The mortgagor undertook to take back the properties on payment of the principal sum at a stipulated period, in default of which the mortgagee would go on enjoying the properties till the money was paid There was a further stipulation that if it was subsequently disclosed that the mortgagor had already mortgaged the properties to other persons or before payment of the mortgage money it was again mortgaged to some other person or the mortgagor surrendered the lands in favour of the landlords, the mortgagee would be entitled to recover the mortgage-money by sale of the mortgaged properties.

Held, that the deed created a usufructuary mortgage to which S. 26-G of the Bengal Tenancy Act applied, that the term fixed in the deed did not import any personal liability but laid down the minimum time within which the mortgagor could redeem, and that the stipulation which gave the mortgagee a right to sell the mortgaged property was in the nature of an indemnity clause. (*Mukherjea and Akram, JJ.*) ABHOY CHARAN *v.* HARENDRA. **44 C.W.N. 760=A.I.R. 1940 Cal 437.**

——**S. 26-G** —*Applicability—Niskar holding.*

The provisions of S 26-G of the Bengal Tenancy Act do not apply to a *niskar* holding although the raiyat has a right of occupancy in the holding. (*Edgley, J.*) DEBENDRA NATH MAJHI *v.* SARAT CHANDRA NAYAK. **I.L.R. (1940) 1 Cal. 342=44 C.W N. 232.**

——**S. 26 G**—*Mortgage—Usufructuary or anomalous—Construction.*

A mortgage deed provided that on receipt of certain amount the possession of the property was made over to the mortgagee. It was then stipulated that after a period of 28 years the debt would be extinguished both as regards the principal and interest. There was a stipulation by which the mortgagor agreed that in the event of the mortgagee being dispossessed of the property in any way, the mortgagor would on account of the period of dispossession, be liable to pay interest at certain rate per month. There was in addition to this, a personal covenant to pay:

Held that the mortgage in question was an anomalous mortgage (*Henderson, J.*) SURESH CHANDRA *v.* JADAV CHANDRA. **A.I.R. 1940 Cal. 372.**

——**S. 26-G**—*Applicability—Possession of part only of mortgaged property delivered to mortgagee.*

BENGAL TENANCY ACT (1885), S. 26-G.

A usufructuary mortgage can only come into existence if the whole of the mortgaged property is made over to the possession of the mortgagee. If the mortgagor delivers possession to the mortgagee part only of the mortgaged property, the mortgage must be regarded as an anomalous mortgage, and as such S. 26-G of the Bengal Tenancy Act can have no application to it. (*Edgley, J.*) SITAL PRASAD LALA *v.* UMESH CHANDRA CHAKRAVARTY. **44 C.W.N 728.**

——**S. 26-G** —*Order of Revenue Officer—Revision—C. P. Code, S. 115.*

The High Court cannot exercise its revisional jurisdiction in respect of an order made by a Revenue Officer in a proceeding under S. 26-G of the B. T Act. Even if a Revenue Officer in discharge of his judicial duties is a Court within the meaning of S 115, C. P. Code, it cannot be said that he is a Court subordinate to the High Court. (*Mukherjea, J.*) GOSTHA BEHARI GORAIN *v.* CHANDRA BHUSAN SARKAR. **44 C.W.N. 426= 71 C L.J. 255**

——**S. 26-G**—*Order in — Proceeding under— Appeal.*

No appeal is competent from an order in a proceeding under S 26-G of the Bengal Tenancy Act. (*Derbyshire, C. J and Nasim Ali, J.*) DIGAMBAR PONDA *v* SATISH CHANDRA DAS. **43 C W N. 1108 =185 I.C. 368=12 R.C. 357=A.I.R. 1939 Cal. 717.**

——**S. 26-G**— *Order in proceeding under— When* res judicata—*Revision.*

Although an order under S. 26-G of the Bengal Tenancy Act restoring possession to the mortgagor will operate as *res judicata*, no question of *res judicata* can arise if the application by the mortgagor to have possession restored to him is rejected. On this view there would be no justification for interference by the High Court in revision with an order rejecting an application, Different considerations, however, must arise when an order restoring possession is made. This has the effect of a decree of a Civil Court. An order can only be legally made in the case of a usufructuary mortgage. If in fact there is no such mortgage the order is without jurisdiction and the High Court can interfere under S. 115, C.P. Code. (*Henderson, J.*) KISHORI MOHAN *v.* MAIJANNESSA. **43 C.W.N. 1114=A.I. R. 1939 Cal 719**

——**S. 26-G (1-a)**—*'Usufructuary mortgage'— Meaning of—Additional covenants—If can change character of mortgage*

The term 'usufructuary mortgage' in S. 26-G (1-*a*) of the Bengal Tenancy Act is to be understood in the sense defined in S. 58 (*d*) of the Transfer of Property Act. If a mortgage satisfies that definition, its character is not changed by the following additional covenants, *viz.*, (1) that the mortgagor would pay the rent of the mortgaged land and that if the mortgagee pays it he might recover it from the mortgagor; (2) that if the mortgagor had already made any transfer or created a charge upon the mortgaged property, the mortgagee would be entitled to realise his dues by sale of other properties of mortgagor; (3) that if the mortgagee was dispossessed from the mortgaged land, the mortgagee would be entitled to recover the principal money with interest. (*Nasim Ali and Rau, JJ.*) PANCHANAN *v.* SHASHI BHUSAN. **44 C W.N. 465=71 C.L.J. 477=A.I. R. 1940 Cal. 281**

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——**S. 26-G (5)**—*Mortgage including both occupancy holdings and tenures—Mortgagor's right to recover possession of occupancy holdings.*

If a mortgage bond includes both occupancy holdings and permanent tenures the mortgagor, though not entitled to get back the tenures, is entitled to recover possession of the occupancy holdings under S. 26-G (5) of the Bengal Tenancy Act. (*Mukherjea and Akram, JJ.*) PRAFULLA CHANDRA GOPE *v.* SOARU MAHAMMAD. **44 C.W.N. 726=71 C L J. 489.**

——**S. 26-G (5)**—*Mortgage of occupancy holding describing it as* mokarari *tenancy—Mortgagee cognisant of actual facts—Estoppel against mortgagor.*

Where the mortgagor mortgaged an occupancy holding describing it as a *mokarari* tenancy but the mortgagee was fully cognisant of the actual facts no question of estoppel can possibly arise and the mortgagor would be entitled to apply for restoration of possession of the mortgaged property under S. 26-G (5) of the Bengal Tenancy Act. (*Mukherjea and Akram, JJ.*) BHUTNATH JANA *v.* GOPAL PROSAD. **44 C.W.N. 761=A I.R. 1940 Cal 436.**

——**S. 26-G (5)**—*Mortgagors in possession as* adihars *under mortgagee—If competent to apply for restoration of possession.*

Although the mortgagors are in possession of the mortgaged property as *Adihars* under the mortgagee, they are competent to apply for restoration of possession under S. 26-G (5) of the Bengal Tenancy Act. They are either labourers or tenants and in either case their possession is in law the possession of the mortgagee. They can certainly claim to be restored to possession of the property in their own right. (*Mukherjea and Akram, JJ.*) PRAFULLA CHANDRA GOPE *v.* SOARU MAHAMMAD. **44 C.W.N. 726=71 C.L.J. 489.**

——**Ss. 26-G (5) and 3 (3)**—*Complete usufructuary mortgage—Mortgage with possession for certain period—Period considered sufficient to extinguish loan—Personal covenant to indemnify mortgagee if loan is not so extinguished—Nature of mortgage.*

A mortgage-bond provided that the mortgagee was to remain in possession of the property and enjoy the rents and profits for a certain period The contemplation of the parties was that under normal conditions that period would be sufficient to extinguish the loan. There was a further clause in the bond which was a personal covenant on the part of the mortgagor to compensate the mortgagee in case, owing to loss of fertility of the land or similar other reasons, the profits fell short of the expected amounts. In the event of that contingency the mortgagor undertook personally to make good the deficiency from his own pocket.

Held, that the personal covenant was in the nature of a contract to indemnify the mortgagee in the event of his not being able to realise the entire profits and was quite outside the mortgage transaction, and that the transaction was a complete usufructuary mortgage in spite of that covenant and hence attracted the provisions of S. 26-G (5) of the Bengal Tenancy Act. (*Mukherjea and Akram, JJ.*) PRAFULLA CHANDRA GOPE *v.* SOARU MAHAMMAD. **44 C.W.N. 726=71 C.L.J. 489**

——**S. 26-G (5) and (6)**—*If* ultra vires *of Provincial Legislature.*

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The second part of S. 26-G (5) of the Bengal Tenancy Act merely gives the mortgagor certain rights in land at the end of a certain period. Rights in land fall wholly in entry 21 of the Provincial Legislative List; therefore this part of the sub-section, as distinct from the first part, can be subject to no limitations flowing from any "existing Indian law" in the concurrent field, the two fields being different. For the same reason, the proviso at the end of the sub-section must also continue to have full effect according to its tenor The result is that the mortgagor's right to apply for re-toration of possession under S. 26-G (5) and the power of the Court under S. 26-G (6) to make appropriate orders upon such an application are in no way affected. (*Nasim Ali and Rau, JJ.*) PANCHANAN *v.* SHASHI BHUSAN. **44 C.W.N. 465=71 C.L.J. 477=A.I.R. 1940 Cal. 281.**

——**S 26 G (6)**—*Order refusing application under sub-S. (5)—Appeal.*

The language used in the concluding portion of sub-S. (6) of S 26-G of the Bengal Tenancy Act is sufficiently wide to provide that any order passed by the Court or the Revenue Officer with reference to the matters mentioned in that sub-section shall have the effect of a Civil Court decree whether such order rejects or grants an application which has been filed under sub-S. (5). Hence the remedy against the order is by way of an appeal. (*Edgley, J.*) GADADHAR MANDAL *v.* GOVINDA PRASAD MANNA. **182 I.C. 745=12 R.C 100=A I.R 1939 Cal 458.**

——**S. 26-G (6)**—*Order restoring possession to mortgagor—Appeal.*

No appeal is competent from an order restoring possession of the mortgaged property to the mortgagor passed under S. 26-G of the B. T. Act, although the nature of the mortgage is in dispute. (*Henderson and Latifur Rahman, JJ.*) ACHINTA NATH SASMAL *v.* GOBINDA PRASAD. **I.L.R. (1939) 2 Cal 366=187 I.C. 530=12 R C. 588=70 C.L J 1=43 C.W.N. 1036=A.I.R. 1939 Cal. 705.**

——**S 26-G (6)**—*Order of Revenue Officer—Revision—C. P. Code, S. 115.*

An order made by a Revenue Officer under S. 26 G (6) of the Bengal Tenancy Act cannot be revised by the High Court under S. 115, C.P. Code. A Revenue Officer is not subject to the appellate jurisdiction of the High Court. The mere fact that his order might have the effect of a decree of Civil Court does not make him a Court, far less a Court subordinate to the High Court within the meaning of S. 115, C.P. Code. (*Nasim Ali and Rau, JJ.*) KASHINATH HALDAR *v.* KARNADHAR BAIDYA. **I.L R. (1940) 1 Cal. 329=187 I.C. 14=12 R.C 542=70 C.L.J. 570=44 C.W.N. 191=A.I.R. 1940 Cal. 111.**

——**S. 26-J**—*Applicability – Transfer fee—Evasion of payment by false statement as to relationship of transferee to transfer or—Remedy of landlord—Application or suit—Court entertaining application instead of suit—Revision.*

S. 26-J of the B. T. Act in terms only provides remedies to the landlord in the event of the raiyat making a false statement of his right to the land transferred. Whether or not the landlord can proceed by way of an application under S. 188 (1) of the Act in cases where the payment of transfer fee is avoided by a false statement to the effect that the transferee is a relation by a

consanguinity within three degrees of the transferor or whether he has to institute a regular suit for the purpose, is a matter of same doubt. But assuming that a regular suit is necessary and that a Court entertains an application instead of demanding *ad valorem* court-fee as in a suit, if commits only a technical error which does not justify interference in revision, as no injustice can be said to be caused by such procedure. (*M. C. Ghose and McNair, JJ.*) PADMA LOCHAN MAHATO *v.* BARADA KANTA MAHATO. **63 C.L.J. 103.**

——**Ss. 26-J and 111**—*Application for recovery of money and not for determination of status of tenant—Power to stay application under S. 111.*

A suit or proceeding can be stayed under S. 111, Bengal Tenancy Act, only if the suit or application is filed for the determination of the status of any tenant. Where therefore the prayer in an application under S 26-I is not for the determination of the status of a tenant but is for recovery of a sum of money and it is a money claim which the landlord wants to enforce the mere fact that the question of status may have to be gone into because the defendant has raised it, will not authorise the Court to stay the application under S. 111. (*R. C. Mitter, J.*) MAHARAJ BAHADUR SINGH *v.* BINODE BEHARY CHOUDHUAY. **162 I.C. 814=8 R.C. 662 (1)=63 C.L.J. 152=A.I.R. 1936 Cal. 263.**

——**Ss. 26-J and 158 (c)**—*Application for transfer fee—Prayer for determination of tenancy—Order for payment of fee—No declaration of status of tenant—Revision—Maintainability.*

In an application under S. 26-I of the Bengal Tenancy Act for recovery of transfer fee, the landlord also prayed for the determination of the nature of the tenancy under S. 158 (*c*). Though the Court went into the question of the status of the tenant, the order passed by it only awarded the landlord a sum of money as transfer fee, but did not give any declaration of the status of the tenant. The tenant filed a revision application to the High Court against the order, and it was objected that as an appeal lay, the revision was not maintainable.

Held, though in regard to the order under S. 158 (*c*), the finding of the Court below could not be challenged in revision, the order for payment of the transfer fee under S. 26-J could be challenged in revision and hence the application was maintainable. (*Mitter, J.*) SHARFUDDIN AHMED *v.* JAGADISH NATH ROY BAHADUR. **63 Cal 900=165 I.C. 426=9 R.C. 397=63 C.L.J. 255=40 C.W.N. 502=A.I.R. 1936 Cal. 304.**

——**S. 26-J**—*Application under after its repeal—Maintainability—Bengal General Clauses Act, S. 8 (c).*

A landlord can recover the balance of landlord's transfer fees by an application under S. 26-J of the Bengal Tenancy Act even after the repeal of that section by the Amending Act of 1938, where the occupancy holding was sold prior to such repeal. As the right to recover the fees was saved under S. 8 (*c*) of the Bengal General Clauses Act, it could be enforced in the same manner as it could be done under the old Act. 44 C.W.N. 729, Foll. (*Mukherjea and Akram, JJ.*) SUMMERMAL *v.* GOVINDA BANDHU. **44 C.W.N. 791.**

——**S. 26-J**—*Application under—Decision, if* res judicata.

Under S. 11, C. P. Code, no question of *res judicata* arises unless there has been a suit. There can be no question of *res judicata* in connexion with summary proceedings unless Legislature has made express provision on the point. The Legislature by directing that an application should be made under S. 26-J, Bengal Tenancy Act, for landlord's fee, intended that decision on that application would not operate as *res judicata* even in respect of fee payable. (*Remfry, J.*) KRISHNA CHANDRA MUKHERJEE *v.* MANIK LAL MUKHERJEE. **I.L.R. (1938) 2 Cal. 418=178 I.C. 892=11 R.C. 435=67 C.L.J. 363=42 C.W.N. 793=A.I.R. 1938 Cal 246.**

——**S. 26-J**—*Application under—Limitation—Starting point—Limitation Act, Art.* 181.

The provisions of Art. 181 of the Limitation Act apply to an application under S. 26-J of the B. T. Act and limitation will run from the date on which the right to apply accrues. It is only when the steps contemplated by S. 26-C (3) of the Act have been duly taken or at any rate when it is clear that the landlord has been informed that the transfer has taken place that it can be said that his right to file an application under S. 26-J has accrued. Where, therefore, no notices were ever served upon the landlord, an application filed by him within three years from the date of his knowledge of the transfer would be within time. (*Edgley, J.*) PROMODE KUMAR BANERJEE *v.* SM. KUMAR KAMINI DASSYA. **43 C.W.N. 217.**

——**S. 26-J**—*Deed of transfer of occupancy holding registered before Amendment Act of 1938—Application for transfer fee filed by landlord after Amendment Act—Maintainability.*

Reading Cls. (*c*) and (*e*) of S. 8 of the Bengal General Clauses Act, it will be seen that the Bengal Tenancy (Amendment) Act of 1938 cannot in the absence of a different intention appearing therein affect the liability which has already accrued and a legal proceeding in respect of such liability may be instituted and continued as if the Amendment Act has not been passed. Where, therefore, a deed of transfer of an occupancy holding was registered before the Amendment Act came into force, an application filed by the landlord after that Act came into force for balance of transfer fee under S. 26-J of the Bengal Tenancy Act is maintainable. (*Ghose, J.*) RAJENDRA NATH *v.* ASHALATA DEBI. **I.L.R. (1939) 2 Cal. 346=186 I.C. 349=12 R.C. 471=43 C.W.N. 948=A.I.R. 1940 Cal. 86.**

——**S 26-J**—*Landlord's compensation under—Fixing of—Considerations—Powers of Court.*

S. 26-J of the Bengal Tenancy Act no doubt permits the Court to grant compensation to the extent of the landlord's fee. The Court has got the power, but the amount of compensation in any special case must depend on the circumstances of that case and must be considered by the Court. Where there are conflicting decisions as to the nature of the land, *i.e*, as to whether the holding is an ordinary holding or a holding at a fixed rent, and the contention of the purchaser is supported by decisions of Courts, the ends of justice would well be met by granting only nominal compensation. (*R. C. Mitter, J.*) ARJEDALI *v.* SORBASONA DASSI. **I.L.R. (1937) 1 Cal. 278=40 C.W.N. 1279=64 C.L.J. 51.**

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——S. 26-J—*Order to pay balance of landlord's fees—Mode of execution.*

An order of the High Court for the payment of the balance due in respect of the landlord's transfer fees under S. 26-J of the Bengal Tenancy Act, can be carried into effect only by executing the order under the ordinary provisions of Civil Procedure Code. (*Edgley, J.*) JOGESH CHANDRA GANGULY *v.* PRODYOT K. TAGORE. **44 C.W.N. 790.**

——S. 26-J—*Order under—Extent of finality—Question of status of tenant—If* res judicata *in subsequent suit.*

An order for payment of transfer fees passed in a proceeding under S. 26-J of the B. T. Act is final and conclusive and cannot be challenged in a subsequent suit. But the order is not final on the question of the status of the tenant, and the tenant is not precluded from raising the question in a subsequent suit that the tenancy which he holds is a permanent tenure or raiyati at fixed rate of rent. Such suit is not barred either under S. 11, C. P. Code, or the general pri ciples of *res judicata*. (*Mukerjea and Roxburgh, JJ.*) MAHA LUXMI BANK *v.* A. KHALEQUE. **43 C.W. N. 1046.**

——S. 26-J—*Proceeding under—Decision as to nature of tenancy—Whether* res judicata.

If in a proceeding by the landlord under S 26-J of the B. T Act for the recovery of the landlord's fee from the transferee, the nature and character of the tenancy is in dispute, the determination of the status of the tenancy is part and parcel of the question whether are not the money is due from the transferee. The question of the status of the tenancy is not merely incidental, ancillary, or subsidiary. It is a matter which is directly in question between the parties. Consequently the decision of that question by the Court in a proceeding before it, operates as *res judicata*, in a subsequent suit between the same parties instituted in a Court of concurrent jurisdiction. The fact that in the prior proceeding the High Court in revision has expressed an opinion as to the right of the unsuccessful party to institute a suit cannot in law prevent the application of the doctrine of *res judicata*. (*Costello and Panckridge, JJ.*) KRISHNA CHANDRA *v.* MANIKLAL. **I.L.R. (1938) 2 Cal. 418=178 I.C. 892=11 R.C. 435=67 C.L. J. 363=42 C.W.N. 793=A.I.R. 1938 Cal. 246.**

——S. 26-J—*Proceeding under—Decision holding tenant liable to pay transfer fee to landlord in respect of particular transfer*—Res judicata—*Subsequent suit by tenant to declare holding to be mukrari and non-liability for transfer-fee—If barred.*

A decision in a proceeding under S. 26 (J) of the Bengal Tenancy Act, in favour of a landlord, to the effect that his tenant is liable to pay a premium of 20 per cent. as transfer fee on the footing that the holding is an occupancy holding is final and cannot be set aside in a subsequent suit by the tenant for a declaration that he holding is a *mukrari* one. The decision though made in a summary proceeding, is *res judicata*. But a finding that the holding in question is always liable on transfer to pay a premium cannot operate as *res judicata* in the subsequent suit; and the suit by the tenant is maintainable. (*M. C. Ghose, J.*) JOY CHANDRA BHOWMIK *v.* KALI KINKAR NATH. **64 C.L.J. 545=41 C.W N. 149.**

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——S. 26-J—*Recovery of transfer fees—Proper remedy—Application or suit.*

The proper remedy of the landlord for the recovery of the balance of transfer fees under S. 26-J of the Bengal Tenancy Act is by an application and not by suit. (*Mukherjea and Roxburgh, JJ.*) MAHA LUXMI BANK *v.* A. KHALEQUE. **43 C.W.N 1046.**

See also (*M. C. Ghose, J.*) SUNITY BALA DAS GUPTA *v.* PRODYOT KUMAR TAGORE. **I.L.R. (1938) 2 Cal. 569=183 I.C. 239=12 R.C. 151=43 C.W. N. 248=A.I.R. 1939 Cal. 305.**

——S 26-J.

There is no reason why the proceeding adopted by the landlord under S. 26-J of the Bengal Tenancy Act to recover the balance of the transfer fee should not be by means of a suit. The section itself does not indicate whether recovery is to be by means of an application or by means of a suit or by some other means (*Costello and Panckridge, JJ.*) KRISHNA CHANDRA *v.* MANIKLAL. **I.L.R. (1938) 2 Cal. 418=67 C.L.J. 363=178 I.C. 892=11 R.C. 435=42 C.W.N. 793=A.I.R. 1938 Cal. 246.**

——Ss. 26-J and 188, proviso (1).

S. 26-J of the Bengal Tenancy Act only deals with three classes of cases, namely, where an occupancy holding is sold on the footing (*a*) that it is a permanent tenure, (*b*) that it is a raiyati at a fixed rate, or (*c*) that it is a Lakheraj. It does not cover the case where the landlord is paid only a portion of the transfer fee due to him under S. 26-E and he claims to recover the balance of fee due to him. There is no indication in the Act anywhere whether the remedy is to be sought by means of a suit or by means of an application. In such a case the power of the Court to entertain a suit by the landlord for recovery of the balance of the transfer fee under the provisions of S. 9, C. P. Code; remains unaffected and has not been taken away by S. 26-J or by S. 188, proviso (1) of the Act. (*R. C. Mitter, J.*) SASHI KANTA ACHARYA BAHADUR *v.* NASIRABAD LOAN OFFICE CO. **168 I.C. 849=9 R. C. 819=63 C.L.J. 105=A I.R. 1936 Cal. 786.**

——Ss. 26-J and 188—*Sale of occupancy holding under erroneous description as* mokarari *before repeal of sections—Landlord's right to recover balance of landlord's fees by application—If subsists after their repeal—Bengal General Clauses Act, S.* 8 (c) *and* (e).

Under S. 26-J of the Bengal Tenancy Act, the landlord acquired a right to recover the balance of landlord's fee as soon as an occupancy holding was sold with an erroneous description that it was a *mokarari* tenancy. A right which had so accrued under that section subsists even after its repeal by the Amending Act VI of 1938, as there is nothing in the repealing Act which would show that the legislature intended to take away or impair any vested right that had already accrued under the repealed section The right which the landlord had of recovering the landlord's fees by an application under S. 188 (1) also subsists after the repeal of that section, and the landlord is not bound to enforce his right by means of a regular suit. The right is saved in respect of antecedent transactions under Cl. (*c*) of S. 8 of the Bengal General Clauses Act and

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the remedy is also saved under Cl (*e*). (*Mukherjea and Akram, JJ.*) DHIRENDRA NATH ROY *v.* IJJITMALI MIAH. **44 C.W.N. 729=A.I.R. 1940 Cal 423.**

——**S. 26-J.**

The provisions of S. 26-J do not bar a suit by a landlord for recovery of "landlord's fees." Where such a suit is filed, the proper procedure is for the Court to treat the matter as an application under S. 26-J. (*Jack, J.*) ANANDA PROSAD GHOSE *v.* RONENDRA LAL. **165 I.C 715=9 R.C. 453=40 C.W.N 856=A I.R. 1936 Cal. 342.**

——**S. 29**—*Applicability—Compromise beyond scope of suit—Term as to enhancement of rent—Decree in terms of compromise—Enforceability of term as to enhancement.*

A term in a compromise petition which goes beyond the scope of the suit has no force beyond that of an agreement, even though such term is made part of the consent decree which is passed on the compromise. Such a term ought not to be made part of the decree of Court. A contract for enhancement of rent in contravention of S. 29 of the Bengal Tenancy Act, contained in such a compromise does not become enforceable merely because it is made part of the decree passed on the compromise though ordinarily, the consent decree is not void, but has to be avoided, and is valid until set aside. (*R. C. Mitter, J.*) MAKHAN LAL SAMADDAR *v.* KHAGENDRA NATH CHAKRABARTY **63 Cal. 750=165 I.C. 650=9 R. C. 438=40 C.W.N. 689=A I.R. 1936 Cal. 446.**

——**S. 29**—*Claim of excess rent—Burden of proof.*

Proviso (1) to S. 29 only dispenses with the necessity of a contract being in writing and registered but does not affect Cls. (*b*) and (*c*) of S. 29. Although S 29 has no application where there are excess lands which are added to the original holding and a consolidated rent is assesssd upon the whole, still it is incumbent on the Court to find in all cases, that this addition of excess land is not resorted to as a mere device to get round the provisions of S. 29 and that the lands which are said to have been added were real and not a fictitious addition. Where there is no proof that there has been an increase in area, the mere fact that the tenant agreed to pay enhanced rent beyond the limits prescribed by S. 29 and actually paid rent at that enhanced rate for a considerable period of time, is by itself not sufficient to take the case out of S. 29. If the original rent is known and the excess that is claimed is, *prima facie*, in excess of that which is allowed by S. 29, the initial burden to justify the increase must always be upon the landlord. The landlord can discharge the burden by showing that, in fact there has been an increase for which additional rent was assessed and it would also be open to him to rely upon any admission made by the tenant-defendant admitting the existence of additional lands, in which case the burden will be upon the tenant to explain away the admission or to prove by positive evidence that, as a matter of fact, there was no increase. (*Mukerjea, J.*) GOBINDA KISHORE *v.* JITENDRA CHANDRA. **177 I.C. 106=11 R.C. 202=A.I.R 1938 Cal. 459.**

——**S. 29**—*Illegal enhancement of rent—Enhanced rate realised amicably for some years—Excess realisations—If can be deducted from claim for rent for subsequent years.*

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In a suit for rent at an enhanced rate, the defendant denied his liability to pay at that rate. The Court found that the enhancement was in contravention of S. 29 (*b*) of the Bengal Tenancy Act, but that the plaintiff was realising rent at the enhanced rate amicably from the defendant for some years. No issue regarding liability to render account was framed in the suit

Held, that the Court should not deduct the excess sum raised by the plaintiff from his claim for rent in the suit. (*Akram, J.*) MOHAN BASHI PODDER *v.* BILAT ALI. **44 C.W.N. 579.**

——**S. 29**—*Plea under—If can be raised for first time in second appeal.*

The question whether a stipulation as to payment of rent at a certain rate mentioned in a contract between the landlord and the tenant is enforceable or not enforceable as being in contravention of S 29, B. T Act, is dependent on various circumstances, and involves a decision on facts; it cannot therefore be raised for the first time in second appeal. (*Guha and Bartley, JJ.*) SANNAYASI BASAR *v* RATNESWAR GHATAK. **167 I.C. 170=9 R.C 650=41 C.W.N. 169=A.I.R. 1937 Cal. 8.**

——**Ss. 29, 33 and 80**—*Raiyat contracting to pay enhanced rent in consideration of improvement—Improvement not registered—Landlord's right to enhanced rent*

Where a raiyat binds himself by a contract to pay an enhanced rent in consideration of an improvement made by the landlord, the landlord is entitled to the enhanced rent although the improvement in respect of which the enhancement is claimed has not been registered under the provisions of the Bengal Tenancy Act. (*Macnair, J.*) MADAN MOHAN *v.* KALI CHARAN. **42 C.W.N. 126.**

——**S. 29**—*Scope—Contract for enhancement of rent—Settlement of* bona fide *dispute—Absence of dispute as to amount of rent—Contract—If falls under S. 29.*

Where there is no dispute as to what is the rent payable, an agreement between the parties for enhancement of rent is still controlled by S. 29 of the B. T. Act; and it cannot be taken out of the scope of S. 29, merely on the ground that the agreement has been arrived at as the result of a settlement of a *bona fide* dispute. (*R.C. Mitter, J.*) MAKHAN LAL SAMADDAR *v.* KHAGENDRA NATH CHAKRABARTY. **63 Cal. 750=165 I.C. 650=9 R.C. 438=40 C.W.N. 689=A.I.R. 1936 Cal. 446.**

——**Ss. 29 and 51 (1) (a)**—*Scope—Suit for rent at increased rate—Jamabandi showing increase of area and increase of rent signed by tenant—Tenant actually paying increased rate for some years—Plea that increase illegal under S. 29—Burden of proof—Increase of area in holding—Onus.*

Where in a suit for rent at an increased rate on the ground of increase in area which is recorded in a *jamabandi* prepared on the basis of a survey made after the creation of the jama, it is found from the *jamabandi* and the record-of-rights that the rent fixed as payable at the time of the original settlement of the land on the tenant was calculated with reference to the basis rates for the various classes of land mentioned in the *jamabandi* and that the area of the holding was carefully ascertained and measured in terms of

bighas, *cottas* and *chittaks*, and that the tenant' who has signed the *jamabandi* has actually paid the increased rate for some years; if the tenant pleads that the enhancement is illegal by relying on S. 29 of the Bengal Tenancy Act, the onus is on him to prove that his *jama* has been actually held at a consolidated rent with reference to certain defined boundaries. It is not for the landlord to prove the contrary. If the tenant, however, fails to prove by satisfactory evidence that the settlement of the holding was a consolidated *jama* within specified boundaries, the landlord cannot as a matter of course get a decree for the increased rate. He must still prove that the area of the holding has actually increased since the settlement before he can get an increase under S. 52 (1) (*a*) of the Bengal Tenancy Act. (*Edgley, J.*) RADHARAMAN CHOUDHURY *v.* PURNA CHANDRA MAITRA. **I.L.R. (1937) 1 Cal. 313=40 C.W.N. 1330.**

——(as amended in 1928), S. 30—*If retrospective—Tenancy created before amendment—Landlord's right to sue for enhancement of rent.*

In the case of tenancy consisting entirely of undivided shares in parcels of lands or partly of entire parcels of lands and partly of undivided share in parcels of lands, S. 30 cannot be combined with the definition of holding as amended so as to give the landlord the right to sue for enhancement of rent in respect of the tenancy created before Act IV of 1928 came into force. The Amending Act cannot be given retrospective effect. (*Guha and Bartley, JJ.*) SRIPATI CHANDRA *v.* KAILASH CHANDRA. **40 C.W.N. 984=166 I.C. 464=9 R.C. 534=66 C.L.J. 93=A.I.R. 1936 Cal. 386.**

On appeal from A.I.R. 1936 Cal. 331.

——S. 30 (a)—*Claim to enhancement under—Absence of prevailing rate in village—Effect of—"Prevailing rate"—Meaning of.*

The "prevailing rate" must be understood to mean the actual prevailing rate of rent at which all the villagers or the great majority of them hold their land, and the term does not mean the average rate or even the rate at which more than half the land of the village is held. If in a village for example, ninety per cent. of the raiyats hold their land at a certain definite rate that would properly be regarded and taken as the prevailing rate unless some special circumstances such as, a recent commutation of rent on a large scale, makes it impossible to so treat that rate. If there is no prevailing rate found in the village, the claim of the landlord for enhancement under S. 30 (*a*) of the B. T. Act, must fail. But S. 30 (*a*) cannot be applied to assess the land at the lowest rate paid for lands of similar description in the village, when there is no prevailing rate. (*Courtney-Terrell, C. J. and James, J.*) JAGDEO NARAIN SINGH *v.* TULA SINGH. **170 I.C. 593=3 B.R. 744=10 R.P. 137=18 Pat.L.T. 197=1937 P.W.N. 238=A.I.R. 1937 Pat. 430.**

——S. 30 (a)—*"Prevailing rate"—Meaning of.*

The "prevailing rate" referred to in S. 30 (*a*) of the B. T. Act is to be determined as a question of fact, and not to be deduced inferentially from the actual rates which may be found to be in force in the locality concerned. In many instances, the prevailing rate will no doubt be one single rate but not necessarily so. The expression "prevailing rate" means no more and no less than a rate actually prevailing, not a rate which ought to prevail. Such a rate, that is, a rate generally prevalent in the locality, may not, however, be ascertainable in every case as an exact mathematical figure: but only the limits within which it varies may be ascertained. As to what the limits of variation should be, will depend not merely on the extent of the actual variations, but also on the number of cases which show such variations or the extent of the areas which may be involved. In areas to which S. 31-A of the Act is not extended, it is a fair rule to adopt, in order to ascertain the prevailing rate to consider whether or not it is the rate, or substantially the rate, paid by the majority of the raiyats in the locality. (*Biswas, J.*) DHIRENDRA NATH *v.* GOLEJANNESSA. **43 C.W.N. 93.**

——S. 30 (a)—*'Prevailing rate'—Meaning.*

340 tenants occupying almost about the same number of bighas of land of the same quality and enjoying the same privileges paid rent at varying rates.

Held, that it could not be said that there was a prevailing rate of rent within the meaning of 30 (*a*). (*Wort, J.*) JAGDEO NARAIN SINGH *v.* TULA SINGH. **160 I.C. 1102=8 R.P. 423=A.I.R. 1936 Pat. 54.**

——Ss 30 (b) and 52—*Decree against recorded tenant—Unrecognised transferee of occupancy holding—If can sue to set aside decree.*

The unrecognized transferee of a portion of an occupancy holding has undoubtedly a right to get a decree obtained against the recorded tenant set aside on the ground that it was vitiated by fraud or collusion; but it is not open to him to attack the decree simply on the ground that the decree is wrong in law and should not have been passed having regard to the evidence that was adduced in the case of the provisions of law which were applicable to the facts. (*B.K. Mukherjea, J.*) BARKATULLA SHEIKH *v.* JNANENDRA CHANDRA GHOSH. **175 I.C. 731=11 R.C. 4=A.I.R. 1938 Cal. 281.**

——S. 30 (b)—*Enhancement of rent—Landlord's right to—Rent fixed in perpetuity in* patta *and* kabuliyat—*Effect—Permanent tenure and raiyati tenure—Distinction.*

It is a settled principle of law that the landlord has *prima facie* a right to claim enhancement of rent unless he has precluded himself by contract from claiming the same. If the Court can gather from the *patta* and *kabuliyat* an intention on the part of the landlord giving up his *prima facie* right to get enhancement, and finds that the rent is intended to be fixed in perpetuity, it will not grant an enhancement. In this respect no distinction can be drawn between cases where the tenancy is a permanent tenure and cases where it is only a raiyati one. (*R. C. Mitter, J.*) NAGENDRA MOHAN NATH *v.* JOGENDRA NATH SEN. **63 C.L.J. 579.**

——S. 30 (b)—*Enhancement—Rent already low—Principle of economic depression—If applies.*

In a suit for enhancement of rent the landlord was entitled to an enhancement of Rupees 0-3-9 per bigha but enhancement of only 1 anna was allowed by the Court on the principle of economic depression. The rent of the land was already low.

Held, that the principle relating to economic depression did not apply by reason of the rent

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being low—(*Obiter*). (*Wort, J.*) JAGDEO NARAIN SINGH *v.* TULA SINGH. **160 I.C. 1103=8 R.P. 423=2 B.R. 289=A.I.R. 1936 Pat. 54.**

——(as amended in 1928), Ss. 30 (b) and 3 (9) *—If retrospective—Immunity from enhancement of rent—If affected or taken away by amendment of* 1928.

Where a tenancy created before 1928 consisted of undivided shares in parcels of land, the tenant enjoyed immunity from action for enhancement of rent. This immunity has been taken away by the amendment of 1928 But the amendment cannot be given retrospective operation and the landlord has no right to sue for enhancement of rent in respect of such a tenancy created before Act IV of 1928. In re *Joseph Suche & Co., Ltd.*, 1 Ch. D. 48, Appl. (*R. C Mitter, J.*) SRIPATI CHARAN DE *v.* KAILASH CHANDRA JANA. **166 I. C. 448=9 R.C. 523=A.I.R. 1936 Cal. 331**

——S. 30 (b)—*Suit for enhancement—Plea of* maurashi mokarrari*—Pattas at fixed rent granted by* shebait *of idol—Entry in record-of-rights that tenancy is held at fixed rent*—Pattas *not challenged for long time—Legal necessity—Inference of—Defendants—If bound to prove necessity.*

Plaintiff as *shebait* of a deity sued, in 1932 for enhancement of rent under S. 30 (*b*) of B. T. Act. The defendants contended that their tenures were *maurashi mokarrari*. The record-of-rights which was finally published in 1912 recorded the tenancies as tenancies held at fixed rent and also contained a reference to the parties who created the tenancies in suit. The *pattas* which had been granted in 1847, 1878 and 1879, by the then shebait fixed the rent in perpetuity; and the succeeding shebaits accepted the *pattas* and recognised the tenancies as *maurashi mokarrari*. Plaintiff, though aware of the entries on the record-of-rights as well as the *pattas* alleged that the tenancies were occupancy tenancies and claimed enhancement on the ground that the prices of staple food crops had gone up, but did not challenge the *pattas* as not binding on him or on the deity

Held, that plaintiff not having challenged the *pattas* in the plaint, as he was bound to do, there was no obligation on the defendants to plead legal necessity or to adduce evidence to that effect, and that in any case legal necessity could be inferred from the fact that the *pattas* had not been challenged for a long number of years by the successors of the grantors of the *pattas*, even in the absence of a recital in the *pattas* themselves of legal necessity. No enhancement could therefore be granted to the plaintiff (*R. C. Mitter, J.*) RAM KISHORE DAS *v.* KEDAR PANDA. **63 C.L.J. 22.**

——S. 31-A—*Applicability—Conditions—Area outside Monghyr.*

S. 31-A must not be applied except in the small area in the Monghyr District to which the section has been extended. The principles laid down in that section are not to be applied if the lowest rates paid for land of similar description can be ascertained. (*Courtney-Terrell, C J. and James, J.*) JAGDEO NARAIN SINGH *v.* TULA SINGH. **170 I.C. 593=3 B.R. 744=10 R.P. 137=18 Pat.L.T. 197=1937 P.W.N. 238=A.I.R. 1937 Pat. 430.**

——Ss. 32 and 35—*Scope—Claim to enhancement—Rents paid found to be low—Full enhancement under S. 32, if to be allowed—Duty to apply S. 35 and find out what would be fair and equitable.*

BENGAL TENANCY ACT (1885), S. 38.

From the mere fact that the rents paid by the tenants are low, it does not necessarily follow that the full enhancement on a strict reading of S. 32 of the B. T. Act ought to be allowed. S. 35 of the Act should be read as saving an officer who is applying the provisions of S. 32 from the anomalous position in which he might find himself otherwise, of being obliged to take as a basis for further payments comparatively recent conditions which he might know have already ceased to exist. S. 35 has also to be applied to see what rate of enhancement would be fair and equitable. (*Courtney-Terrell, C.J. and James, J.*) JAGDEO NARAIN SINGH *v.* TULA SINGH. **170 I.C. 593=3 B R 714=10 R P. 137=18 Pat.L.T. 197=1937 P.W.N. 238=A.I.R. 1937 Pat 430.**

——S. 38—*Construction—"Permanent"—Meaning of.*

The word "permanent" must be read with reference to the circumstances of the case. The deterioration must be such deterioration as would continue to have effect from year to year unless and until something is done to remedy it. The fact that it can be remedied by expenditure of capital and labour will not prevent its being regarded for the purposes of S. 38 and similar provisions of law as a permanent deterioration. (*Rowland, J.*) LAL BEHARI SINGH *v.* MAHABIR MAHTON. **163 I.C. 522=9 R.P. 33=1936 P.W. N. 314=A.I.R. 1936 Pat. 414.**

——S. 38—Falkar *rent—Tenant claiming reduction—Onus of proof.*

Where a tenant claims reduction of the *falkar* rent by reason of the fact that any of the trees on which the assessment had originally been made had ceased to exist or that any of the trees in respect of which it was sought to recover *falkar* had been planted by the tenant himself, the onus of proving that lies on him. (*Edgley, J.*) K. C. DE *v.* HIRA BEWA. **I.L.R. (1937) 1 Cal. 491=167 I C. 461=9 R.C. 695=41 C.W.N. 88=A.I.R. 1937 Cal. 51.**

——S. 38—*Right to abatement—"Deterioration"—Nature of—Omission of landlord to keep irrigation system in order—Effect—Right of tenant to abatement in suit for rent—Pleadings.*

The deterioration contemplated by S. 38 of the Bengal Tenancy Act is a deterioration of the soil which must be more or less of a permanent character, namely, by a deposit of sand or other specific causes, sudden or gradual. Where the productive capacity of the land depends on irrigation, the mere fact that for want of irrigation the land does not yield as much produce as it did before cannot amount to a permanent deterioration of the soil so as to entitle the tenant to an abatement of rent. If, however, it is shown that as a result of some local custom or contract the landlord is not entitled to receive the full rent unless he maintained the irrigation system in good order, suitable relief can be given to the tenant even in a suit for rent by the landlord. But for this to be done, the case, whether based on custom or contract, must be clearly made out in the pleadings and supported by proper evidence. A tenant may also counterclaim for

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damages when he has sustained any loss owing to the omission on the part of the landlord to carry out his obligation to him or to the tenants in general. (*Courtney-Terrell, C J. and Fazl Ali, J.*) SOMESHWAR NATH SINGH *v* RAGHUBANSH LAL. **178 I.C 495=11 R.P. 264=5 B R. 106=1938 P. W.N 411=A.I R. 1938 Pat. 514.**

——S. 38—*Suit for rent—Plea of reduction of rent—Reduction allowable—Extent of.*

Where in a suit for rent by a landlord the tenant takes a plea of reduction of rent, the Court should not give effect to the plea to a greater extent than is warranted by the written statement submitted by the defendant. The Court is not entitled to make its own calculations. (*Rowland, J.*) LAL BEHARI SINGH *v.* MAHABIR MAHTON. **163 I.C. 522=9 R.P. 33=1936 P.W.N. 314=A.I. R 1936 Pat 414.**

——S. 38—*Suit for rent by landlord—Plea for abatement of rent by tenant—If open.*

The principle of S. 38 applies not only to suits instituted by a tenant for abatement of rent but also to a plea for abatement of rent taken by a tenant in a suit for rent by the landlord, in which he is a defendant The tenant is entitled to raise such a plea and what he has to show is permanent deterioration leading to failure of outturn. (*Rowland, J.*) LAL BEHARI SINGH *v.* MAHABIR MAHTON. **163 I C 522=9 R.P. 33=1936 P.W. N· 314=A.I R. 1936 Pat. 414.**

——S. 38—*Tenant holding under*—Istimrari mukarrari *lease—Right to abatement of rent—Natural justice—Applicability*

There is no warrant for holding that a tenant who holds under an *istimrari mukarrari* lease is entitled to claim reduction of rent on the ground that his land has permanently deteriorated or has become useless for cultivation. Nor can the principle of natural justice and equity be invoked for the purpose. Where the rent has been permanently fixed by contract, the rights and liabilities of the parties are regulated by contract, and when the terms of such a contract cannot be said to have been unfair at the date when the contract was entered into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract but which the parties have omitted to provide for. There is therefore no justification for extending the principles underlying S. 38 to a tenant holding under an *istimrari mukarari* lease. (*Courtney-Terrell, C. J., Macpherson and Fazl Ali, JJ.*) DUKHA LAL CHAUDHURY *v.* MST. MANABATI. **15 Pat. 594=163 I C. 1003=9 R P. 69=17 Pat.L.T 339=1936 P.W.N. 373=A.I.R. 1936 Pat. 341 (S.B.).**

——Ss. 38 and 52—Tenant holding under *mukarari* lease—Right to abatement of rent. *See* BENGAL RENT ACT, S. 18. **17 Pat.L.T. 339=A.I. R. 1936 Pat. 341 (S.B.).**

——S. 38—*Tenure holder—Right to benefit of section.*

S. 38 of the B. T. Act applies only to an occupancy raiyat, and a tenant cannot invoke it to his aid unless it is clearly established by him that he is an occupancy tenant. A tenant who is only a tenure-holder cannot get the benefit of the section. (*Courtney-Terrel, C. J. and Fazl Ali, J.*) SOMESHWAR NATH SINGH *v.* RAGHUBANSH LAL. **178 I C 495=11 R P. 264=5 B.R. 106=1938 P. W N. 411=A I.R. 1938 Pat. 514.**

BENGAL TENANCY ACT (1885), S. 48-C.

——Ss. 44 (c) and 116—*Applicability—Verbal lease for one year—If one for "term of years"—Status of tenant—Ejectment—Liability of tenant.*

The words 'term of years' in S. 116 in the context in which they occur cannot be read as applying to a verbal lease for one year or less. And unless a proprietor when letting out zirat takes the precaution of letting "under a lease for a term of years or under a lease from year to year", the tenant inducted on the land, if he is a raiyat within the definition of S 5 (2), will get the benefit of the provisions of Ch. 6 thereof. Therefore a tenant who has been inducted on the zirat land as a *raiyat* by a verbal lease for one year only, becomes a non-occupancy *raiyat* as S. 116 does not apply so as to bar the operation of Ch 6. Nor is he liable to be ejected under S. 44 (*c*) at the expiry of his lease as he has not been admitted to occupation of the land under a registered lease. (*Rowland, J.*) KUNJ BIHARI THAKUR *v* UMASHANKAR PRASAD. **173 I.C. 237 =10 R.P. 388=4 B.R. 228=A.I.R. 1938 Pat. 38.**

——S. 48 (as amended in 1928)—*Applicability—Rent claimed for period after new Act came into force.*

Where the period for which the rent is claimed in a suit is after the new Act came into force, the rights of the parties must be governed by S. 48 of the new Act, as the bar which was imposed by the old section has now been removed. (*Nasim Ali and Mukherjea, JJ.*) JODHAN PRASAD *v.* HAJI MAHAMMAD YUNUS. **42 C W.N. 992 =176 I.C 1006 (1)=11 R.C. 190 (1)=A.I R. 1938 Cal. 160.**

——(as amended in 1928), S. 48—*Scope—If retrospective—Under-raiyati created prior to Amending Act—Rent claimable by landlord.*

In the case of an under-raiyati created prior to the passing of the Bengal Tenancy Amending Act of 1928, the landlord is not entitled to recover rent from this under raiyati at a rate exceeding the rent allowed by the old S. 48, for the period before the coming into force of the new S. 48; although there is no such bar for the period subsequent to the coming into force of the new section The fact that the suit is instituted after 1928 makes no difference. (*Nasim Ali and Henderson, JJ.*) AHMAD AKANDA *v.* BAHAR UDDIN SHAH. **40 C.W.N. 569=64 C.L J. 1.**

——S. 48—Scope—Non-compliance with—Effect—Decree without preliminary order—Executing Court—Power to refuse execution. *See* EXECUTION—EXECUTING COURT. **40 C.W N. 1293.**

——S. 48 C, Cl. (d) and proviso (i) (2)—*Continuous possession by under-raiyat for 12 years—Computation of period—Period covered by ejectment notice—If should be excluded.*

If an under-raiyat has been in continuous possession of his holding for more than 12 years on the date on which the ejectment notice expires, he is protected by proviso (*i*) (2) to S. 48-C of the Bengal Tenancy Act and is not liable to ejectment. In computing the period of his continuous possession, the period covered by the ejectment notice should be included. Neither S. 15 (*2*) of the Limitation Act nor anything contained in S. 185 of the Bengal Tenancy Act would appear to operate so as to exclude from the benefit of

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the proviso to S. 48-C, any period covered by the ejectment notice. (*Edgley, J.*) KRISHNA KANTA GHOSH *v.* RAJESHWAR GHOSH. **I.L.R. (1937) 1 Cal 499=174 I C. 31=10 R C. 605=A.I R. 1937 Cal. 656.**

——**S. 48-C proviso (i) (2)**—*Continuous possession for 12 years as under-raiyat—Necessity for.*

The language of proviso (*i*) (2) of S. 48-C of the Bengal Tenancy Act clearly implies that, if an under-raiyat claims protection from eviction under this proviso, he must show that he has been in continuous possession of the demised land *as an under-raiyat* for a period of 12 years or more. This proviso cannot, therefore, be brought into operation, if a person was in possession of a holding as an under-raiyat for 9 years, thereafter as a *bargadar* for one year, and again as an under-raiyat for four years. (*Edgley, J.*) ALI AHAMMAD *v.* ABDUL GANIA MIA. **I L.R. (1940) 1 Cal. 367=44 C.W.N. 330=A.I.R. 1940 Cal. 441.**

——**S. 48-C (c) and (d)**—*Under-raiyat holding under lease specifying no term—Liability to ejectment*

The words "written lease" in Cls. (*c*) and (*d*) of S. 48-C of the Bengal Tenancy Act, mean a written lease which is for a term. It follows that an under-raiyat holding under a lease in which no term is stated would be liable to ejectment under the provisions of Cl. (*d*), and there can be no ground for suggesting that he would be virtually holding under a perpetual lease. (*Biswas, J.*) ABINASH CHANDRA GARGARY *v.* RAJ KUMAR SARDAR. **183 I.C. 141=12 R.C 144=69 C.L.J. 225=43 C.W.N. 356=A.I.R 1939 Cal. 281.**

——**S. 48-C (1), Proviso 2 (f) (as amended in 1928) and S. 178**—*Scope—Under-raiyat holding under lease executed prior to and expiring after 1928—Continuous holding for over 12 years—Liability to ejectment*

An under-raiyat who has been holding the land continuously for over 12 years, whether partly before or partly after the amendment of the Bengal Tenancy Act in 1928, is protected from ejectment on the expiry of his lease. It is not necessary for claiming immunity from ejectment that he should have been in possession as under-raiyat for the whole period of 12 years. Where he has held the land as a service tenure for several years and subsequently becomes an under-raiyat of the same land under a lease executed before, and expiring after the amended Act of 1928, Proviso 2, Cl. (1) of S. 48-C of the amended Act will apply, if he has been in possession of the land for over 12 years. The landlord cannot claim that he has got a vested right of ejectment on the execution of the lease prior to the enactment of S. 48-C by the amended Act of 1928. S. 178 (*f*) of the new Act makes S. 48-C (1), Proviso (2) applicable to the case so as to take away any such vested right of the landlord under the contract of lease. (*Jack, J.*) BISWAMBAR CHAKRAVARTY *v.* KALIDAS DHUPI. **40 C.W.N. 1275.**

——**S. 48-D**—*Decree not drawn up in proper form after preliminary order—Irregularity.*

The fact that the decree was not drawn up in proper form after a preliminary order, amounts at the most to this that the final decree for ejectment was made in an irregular manner. (*R. C. Mitter, J.*) SUBAL CHANDRA JANA *v.* SURENDRA NATH BERA. **66 C L.J. 33.**

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——**S. 48 F**—*Scope and effect of—Under raiyat—Permanent lease amounting to full transfer without landlord's consent—Under-raiyat vacating possession and leaving the place—Effect—Abandonment—Presumption—Absence of proof of relinquishment without arrangement for payment of rent—If material—S. 87.*

A transfer by an under-raiyat of his holding is not valid unless it is made with the previous consent of the landlord, as under S. 43 of the B. T. Act, the holding of an under-raiyat is heritable but not transferable except with the consent of the landlord. Where an under-raiyat grants a permanent lease of the land, which is in effect a full transfer, without notice and without the permission of the landlord, vacates the land in favour of the lessee and then leaves the place, the permanent lease operates as an actual abandonment or relinquishment of the land by the under-raiyat. The fact that there is no proof that the transferring tenant has relinquished the land without arranging for the payment of the rent as it falls due does not prevent the Court from presuming that the abandonment is complete; this circumstance cannot decide the question of abandonment. S. 87 of the B. T. Act is not exhaustive and the method described by it is not the only one by which a landlord can claim that the tenant has abandoned the land. (*Ghose, J.*) IAJUDDIN SHEIKH *v.* UMEDALI MEAH. **64 C. L.J. 58.**

——**S. 48-G (3)**—*Operation of—Occupancy right acquired by under-raiyat before enactment of section.*

The provisions of S. 48-G are sufficiently clear to deprive an under-raiyat of protection under S 160 (*d*) of the Act to which he may have been entitled by virtue of his status before that section became law. (*Edgley, J.*) NARENDRA NATH *v.* ALANGA SUNDARI. **I.L.R. (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659=A.I.R. 1939 Cal. 754.**

——**Ss. 48-H and 174 (3)**—Bemeadi *lease to under-raiyat registered without payment of landlord's fee—Effect of—Rent sale of holding—* Locus standi *of under-raiyat to set aside sale.*

A *bemeadi* lease to an under-raiyat, that is to say, a lease without any definite term specified in it and in which there is nothing to show that it is meant to be a lease in perpetuity, does not come within the mischief of S 48-H of the B. T. Act. Such a lease, therefore, creates a valid interest in the holding, although registered without payment of landlord's fee, and the under-raiyat has *locus standi* to make an application under S. 174 (3) to set aside a rent execution sale of the holding. (*Biswas, J.*) ABINASH CHANDRA GARGARY *v.* RAJ KUMAR SIRDAR. **183 I.C 141=12 R C 144=69 C L.J. 225=43 C.W. N. 356=A.I.R. 1939 Cal. 281.**

——**S. 48-H**—*Registration of under-raiyati lease without payment of landlord's fee—Validity—Subsequent payment—Effect of.*

The registration of an under-raiyati lease without payment of the landlord's fee has no effect, and the defect cannot be cured by a subsequent payment. (*Henderson, J.*) DEBENDRA CHANDRA DE *v.* JAMINI KUMAR DEY. **I.L.R.**

BENGAL TENANCY ACT (1885). S. 48-H.

(1940) 1 Cal. 156=185 I.C. 704=12 R.C. 402=43 C.W.N. 1209=A.I.R. 1939 Cal. 744.

——**S. 48-H**—*Under-raiyati lease infringing terms of section—Claim of landlord pre-emptor to* khas *possession—Under-raiyat, if can resist—Right to refund of premium.*

A person claiming under an under-raiyati lease created by the original occupancy tenant, which infringes the terms of S. 48-H of the B T. Act, is not entitled, to resist the claim for *khas* possession of the landlord who has obtained an order for pre-emption As, however, the landlord pre-emptor succeeds only to the interest of the original tenant, he cannot repudiate the lease without refunding the premium paid by the under-raiyat. (*Henderson, J.*) DEBENDRA CHANDRA DE *v.* JAMINI KUMAR DEY. **I.L.R (1940) 1 Cal. 156=185 I.C. 704=12 R.C. 402=43 C.W.N. 1209=A I.R. 1939 Cal 744.**

——**S. 48-H**—*Under-raiyati lease registered without payment of landlord's fee—Landlord's right to sue for such fee.*

If an under-raiyati lease by an occupancy raiyat is registered without payment of the landlord's fee in contravention of S. 48-H of the B. T. Act, the lease itself would be void as against the superior landlord. But the section does not entitle that superior landlord to sue for the unpaid landlord's fee. (*Bartley and Nasim Ali, JJ.*) HARENDRA NATH MITTER *v.* HOSSAINALI SANA. **174 I.C. 972=10 R.C 740=42 C.W.N. 215=A.I R 1938 Cal. 254.**

——**S. 49-K**—*Applicability—Member of aboriginal tribe changing religion and embracing Christianity—If loses benefit of section.*

S. 49 (*k*) of the B. T. Act does not become inapplicable to a member of an aboriginal tribe merely because he or she changes his or her religion and embraces Christianity. Notwithstanding change of a religion a member of an aboriginal tribe can invoke the provisions of S. 49 (*k*); and there is nothing in the B. T. Act justifying the importation of any fact with regard to the change of religion as affecting the status of a member of an aboriginal tribe. (*Mitter, J.*) KARMOO HANSADA *v.* FANINDRA NATH SAREN. **41 C.W.N. 32.**

——**S. 49-K, proviso (b) (ii)**—*Garos*—Bona fide *mortgage registered more than one year before* 1923—*If protected.*

A *bona fide* mortgage executed by a member of the primitive community called the Garos and registered more than one year before 1923, in which year the provisions of Chap VII-A of the B. T. Act were extended to the Garos, comes within the saving provisions of S. 49-K, proviso (*b*) (*ii*) of the Act, and the mortgagee is entitled to sell the property in execution of his final mortgage decree. (*Derbyshire, C.J. and Syed Nasim Ali, J.*) ARDHA CHANDRA SAHA *v.* NAMANI GARONI. **182 I.C. 666=12 R.C, 94=69 C.L.J. 120=A I.R. 1939 Cal. 323.**

——**S. 49-L**—*If mandatory.*

The provision of S. 49-L of the B. T. Act by which the Court executing the decree should allow the tenant a reasonable time within which to pay the amount due is mandatory. It is for the Court to give the reasonable time whether it is asked for by the tenant or not. (*Derbyshire, C.J. and Syed Nasim Ali, J.*) ARDHA CHANDRA

BENGAL TENANCY ACT (1885), S. 50.

SAHA *v.* NAMANI GARONI. **182 I.C. 666=12 R.C, 94=69 C.L.J. 120=A.I.R. 1939 Cal. 323.**

——**S. 50**—*Applicability—Variation in rent due to abatement consequent on compulsory acquisition—If deprives tenant of benefit of presumption.*

Where the tenant has not been paying uniform rent to the landlord but the difference in the rents paid is due only to abatement of rent on account of acquisition under Land Acquisition Act and not due to any variation in the rent, the tenant is entitled to the presumption under S. 50. (*Nasim Ali, J.*) RAJ NANDINI DEBI *v.* BHUSAN CHANDRA SEN. **162 I C. 694 (1)=8 R.C. 647 (1)=A.I.R. 1936 Cal. 234.**

——**S. 50**—*Fixed rate tenancy—Inclusion of small area of land on rent which is subject to enhancement—If affects status of tenant as fixed rate tenant.*

It is not a contradiction in terms that a fixed rate tenure or holding should comprise, besides an area held at a fixed rent or at a fixed rate of rent, an area carrying a rent which is liable to enhancement in accordance with the law. When a tenancy is predominantly of the character of fixed rate, the addition of a small area which the tenant is not entitled to hold at fixed rate cannot affect his status as a fixed rate tenant. There is no reason for holding that a tenant may not have a fixed rate tenancy combined with an area the rent of which may be enhanced from time to time in accordance with law. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R.P. 420=3 B.R. 313=17 Pat.L.T. 747=A.I.R. 1937 Pat. 127.**

——**S. 50**—*Fixed rate tenant—Interest in excess land—Nature of—If same as in original lands—Right to fixed rate or same rate in excess lands.*

The nature of the interest acquired by a tenant in land adjoining the land settled with him by his landlord is not necessarily of the same kind as his interest in the land originally settled, but depends on the circumstances. The holder of a rent-free holding, for example, though he is entitled to all land forming an accretion thereto, is not entitled to hold the same rent-free; similarly a fixed rate tenant cannot be held to be entitled to a fixed rate interest in the excess lands or an interest therein at the same rate as in the lands originally constituting the tenancy. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R.P. 420=3 B.R. 313=17 Pat.L.T. 747=A.I.R. 1937 Pat. 127.**

——**S. 50**—*Presumption under—Applicability—Amalgamation of holdings.*

The presumption arising under S. 50 of the B. T. Act is not affected by the fact of amalgamation of separate holdings into one. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. **179 I.C. 587=11 R.C. 572=42 C.W.N. 637=A.I.R. 1938 Cal. 481.**

——**S. 50**—*Presumption under—Applicability to proceedings under S. 104-H.*

In proceedings under S. 104-H, B. T. Act, a party can claim the benefit of the presumption under S. 50, although final publication has taken place, because it cannot be held that the particulars mentioned in S. 115 have been completely recorded so long as any dispute remains pending which would immediately affect the record which

is being prepared. (*Courtney-Terrell, C.J. and James, J.*) PRATAP MANDAL *v.* SURPAT SINHA. **16 Pat. 377=170 I.C. 760=1937 P.W.N. 588=3 B.R. 765=10 R.P. 146=18 Pat.L.T. 554=A.I.R. 1937 Pat. 417.**

——**S. 50**—*Presumption under—Rebuttal—Absence of entry of jamas in books of accounts.*

The absence of entry of the jamas in the books of account is evidence of their non-existence under Ss. 9 and 11, Evidence Act, but it is difficult to say that the Courts are bound to regard the absence of these entries as sufficient to rebut the presumption arising out of uniform payment of rent under S. 50, B. T. Act. (*Jack, J.*) LILABATI DASI *v.* CHITPORE GOLABAI CO., LTD. **174 I.C. 163=10 R.C. 650=A.I.R. 1937 Cal. 542.**

——**S. 50**—*Presumption under—Rebuttal—Small variation in rent—Effect of.*

When the variation in rent is a small one or slight one, although unexplained, there is no rebuttal of the presumption which arises under S. 50 of the B. T. Act or under the general law (*D. N, Mitter and B. N. Rau, JJ.*) PRODYOT KUMAR TAGORE *v.* HIRENDRA NATH DUTT. **62 C L.J. 551.**

——**S. 50**—*Presumption under—Right to—Plaintiff entering possession of holding by virtue of purchase—Landlord not recognising purchase and not taking rent from plaintiff—Right of latter to tack on his period of possession to that of his vendor.*

The plaintiff came into possession of the disputed holding by virtue of purchase which was not recognised by the landlord who instituted proceedings under S. 145. Cr. P. Code, against him. The plaintiff was however allowed to retain possession of the holding as a result of the decision of the Magistrate in that proceeding, and the landlord thereafter took no steps to evict the plaintiff. The plaintiff during the period of his possession did not pay rent to the landlord on account of the latter's unwillingness to receive rent from him. It was proved that during the period of possession of the plaintiff's vendor within the 20 years immediately before the institution of the suit by the plaintiff under S. 10 of the B T. Act, the rate of rent in respect of the holding remained unchanged.

Held, that the plaintiff must be recorded as having stepped into the shoes of his vendor who must be recorded as his predecessor in interest within the meaning of S. 50 (2) of the B. T. Act and that the plaintiff was entitled to tack on his period of possession to that of his vendor in order to obtain the benefit of the presumption under that section.

Held further, that the plaintiff had succeeded in establishing that the rate of rent had not been changed during the 20 years before suit and that the mere fact that the landlord did not accept rent from the plaintiff during the period of his possession could not be of any advantage to the landlord. (*Edgley. J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. **179 I C 587=11 R.C. 572 =42 C.W.N. 637=A.I.R 1938 Cal. 481.**

——**S. 50**—*Principle of—Applicability—Suits not under Act.*

Even in suits which are not under the B. T, Act, the principle of S. 50 of the Act is a useful guide to the Courts in determining the nature of

a tenancy, and a presumption similar to the one arising under the section may be accepted along with the other facts and circumstances of a case. (*Guha and Mitter, JJ.*) PRODYOT KUMAR *v.* RADHAKISHEN **42 C W.N. 304.**

——**Ss. 50 and 115**—*Relative scope—Record of rights—Entry as to status of tenants—Bulk of land recorded as* sharah muaiyan *and excess land as otherwise—Effect of—Presumption under S. 50—If excluded.*

S 115 of the B. T. Act, when it provides that the presumption under S. 50 shall not apply to a tenancy after the particulars mentioned in S. 102 (*b*) have been recorded, does not mean that if the entry in the record-of-rights regarding the tenant's *sharah muaiyan* status is challenged they will not be at liberty to support that entry by falling back on S. 50. Entries showing the bulk of the land as *sharah-muaiyan* and the excess land as otherwise will not defeat themselves. The record-of rights will carry a statutory presumption of correctness, and if assailed, the tenants can always fall back on S. 50 in support of the entries in the record. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA **167 I. C. 736=9 R P. 420=3 B R. 313=17 Pat.L.T. 747=A.I.R 1937 Pat. 127.**

——**Ss. 50 (1) and 52**—*Construction—Fixed rate tenancies—Excess area—Assessment of rent—Increase in rate of rent—If permissible—Fair and equitable rent—S.* 112.

Under S. 50 (1) of the B. T. Act, although it is true that a holding or tenure will remain at what the Act compendiously calls "fixed rates", the concluding words "except on the ground of an alteration in the area of the tenure or holding", only show when the rent or rate of rent may be increased and cannot be taken to mean that the increase in the rent must be proportionate to the area; they clearly include an increase in the rate of rent as well. S 52 is no doubt general in terms and does not deal specifically with tenancies coming under S. 50. But the general rule for assessment of excess area found in sub-S. (3) of that section is not inapplicable to "fixed rate" tenancies in assessing rent under S. 112; the sub-section prohibits rent which is unfair and inequitable, and S. 112, esp cially when read with S. 104, does much the same by providing positively for the settlement of fair and equitable rates (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v* HEM NATH JHA. **167 I C. 736=9 R.P. 420=3 B.R. 313=17 Pat. L.T. 747=A.I.R 1937 Pat. 127.**

——**S. 50 (2)**—*Presumption under—Applicability and scope—Fixed rate tenant—Part of land recorded as* sharah muaiyan *and excess land otherwise—Enhanceability of rent in respect of excess land—If detracts from status of fixed rate as regards* sharah muaiyan *land.*

The presumption in S. 50 (2) of the B. T. Act cannot prevail in a case where the area of the holding admittedly includes a portion which has been commuted to *nakdi* at some time previous to the last twenty years but since the Permanent Settlement, and the tenant cannot identify the plots for which the *sharah muaiyan* status is claimed on the basis of payment of a fixed rate of rent for the entire holding for 20 years. But that is no ground for holding that a tenant may not

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have a fixed rate tenancy combined with an area the rent of which may be enhanced from time to time according to the law. As regards the status of such a tenant, it wou d undoubtedly be unjust to him to leave out the fixed rate of the *sharah-muaiyan* element from the description (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R.P. 420=3 B R. 313=17 Pat.L.T. 747=A I.R. 1937 Pat. 127.**

——S. 50 (2)—*Presumption under—Rebuttal—Suit under S.* 106, *by occupancy raiyat claiming certain jamas to be Maurashi Mokarari for correction of record of rights—Collection papers—Admissibility to rebut presumption.*

Where in a suit under S. 106 by a person recorded as an occupancy raiyat, in respect of cer tain jamas, claiming them to be Maurashi Mokarari and praying correction of the record-of-rights accordingly, the plaintiff is entitled to the benefit of the presumption, under S. 50 (2) by reason of his having been paying a uniform rent for a period over twenty years before the institution of the suit, and the defendant landlords in rebutting the presumption rely upon their collection papers, the absence of entries relating to the jamas in the collection papers is evidence in the case, although its evidentiary value d·pends upon other facts disclosed in the case. The collection papers are admissible in evidence and are relevant to the question whether the jamas came into existence after the permanent settlement If the Court excludes from consideration the collection papers and finds that the landlords have failed to rebut the presumption under S. 50 (2) its finding is viti ated by an error of law. (*Nasim Ali and Edgley, JJ.*) ANANDA LAL CHAKRAVARTY *v.* NARAYAN CHANDRA **166 I.C. 764=9 R.C. 583=A.I.R. 1936 Cal. 481.**

——S. 50 (2)—*Presumption under—Rebuttal—Variation in rent if to be substantial—Small variation—If sufficient.*

In order that the statutory presumption of fixity of rent arising under S 50 (2) of the Ben gal Tenancy Act, may be rebutted, all that is necessary to be proved is that there has been a real change or variation in the rent or rate of rent. It is not necessary that it should be a sub stantial one. The amount of the variation is only one of the elements to be considered in determining whether there has been a real change If there is a variation even of a small amount, and if the excess amount had been actually realised and is being realised by the lan llord, that fact will put an end to the presumption arising under S 50 (2). (*R C. Mitter, J.*) ARJEDALI *v.* SORBASONA DASSI. **I.L.R. (1937) 1 Cal 278=40 C.W. N. 1279=64 C.L.J 51.**

——Ss 50 (2), 103-B (3), 104-H and 115—*Suit under S.* 104-*H—Entry in favour of tenant in record of-rights challenged—Tenant—If can rely on presumption under Ss.* 50 (2) *and* 103-*B* (3).

In a suit under S. 104 H, when the entry in the record of-rights in favour of the tenants is challenged, it is open to them to support its correctness by proof including the presump ion laid down in Ss. 50 (2) and 103-B (3), and there is nothing to preclude this being done in S 115. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* BACHA KOIRI. **164 I.C 98=9 R.P. 88=1936 P. W.N. 436=A.I.R. 1936 Pat. 446.**

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——S 52—Abatement of rent—Grantee of Sunderbans land under S. 13 of Regulation III of 1828—If can claim. *See* BENGAL LAND REVENUE ASSESSMENT (RESUMED) REGULATION (III OF 1828) S 13. **42 C.W.N. 239.**

——S. 52—*Abatement of rent—Right of tenant—Unlawful eviction.*

A landlord is bound to put his tenant in possession If he fails to put his tenant in possession of the whole of the demised premises, he can only get rent for so much of the demised premises of which he had put his tenant in possession. If he has discharged that duty and the tenant is actually put in possession, his duty is to maintain the possession of the tenant against all lawful ev ctions. The landlord's duty does not extend to protect the tenant from unlawful evictions, that is to say, the evictions by persons who have not got any title or who have not derived any title from the landlord. If the tenant is unlawfu ly evicted from any land of his tenancy, it is for him to recover the same from his disposse sor. If he does not choose to do so, he cannot on any principle of law whatsoever claim abatement of rent. (*R. C. Mitter, J.*) SURENDRA NATH MONDAL *v.* BHUDAR CHANDRA SAFUIX. **177 I.C. 996=11 R.C. 307=67 C L.J. 136=A.I.R. 19 8 Cal. 690.**

——S 52—*Applicability—Conditions of—Tenant holding under* mukarrari *lease—Right to abatement of rent on ground of diluvion of land.*

S. 52 of the Beng·l Tenancy Act is applicable even to a tenant holding under a *mukarrari* lease. But it is applicable only when there is found to be any deficiency in the area of the holding or tenure from whatever cause. A tenant would be thus entitled to claim abatement of rent under the section if it can be ascertained that he has lost the whole or portion of the la d by diluvion or some similar cause. (*Courtney Terrell, C.J. Macpherson and Fazl Ali, JJ.*) DUKHALAL CHAUDHURY *v.* MST. MANABATI. **15 Pat. 594=163 I.C 1003=9 R.P. 69=17 Pat.L.T 339=1936 P.W.N. 373=A.I.R. 1936 Pat 341 (S.B.).**

——S. 52—Applicability to fixed rate tenancies. *See* B.T. ACT, SS. 50 (1) AND 52. **17 Pat L.T. 747.**

——S. 52—*Claim for additional rent for additional area based both on kabuliyat and section—Landlord omitting to make measurement as provided for in kabuliyat—Claim, if barred.*

A claim for additional rent in respect of additional area based not only on the term of the kabuliyat but upon the express provision of S 52 of the B.T. Act, is not time barred simply because the landlord omitted to make the measurement which was provided for in the kabuliyat, as the claim under S. 52 of the Act is a recurring right. (*Mukherjea, J.*) KEDAR NATH BOSE *v.* EMANDI MONDAL. **42 C.W N. 994.**

——S. 52—*Claim for rent for additional area—Standard of measurement—Presumption*

In a suit for additional rent in respect of additional area, the presumption is that the staandard of measurement has not varied since the first letting out of the lands, if there is no evidence to the contrary adduced by the tenant. (*Mukherjea, J.*) KEDAR NATH BOSE *v.* EMANDI MONDAL. **42 C.W.N 994**

——S 52—*Construction—Liability of tenant to pay additional rent—When arises.*

The words "area for which rent has been previously paid" mean the area with reference to which rent was assessed or adjusted. In order therefore to prove the area for which rent was being previously paid it is not necessary for the plaintiff to prove the area of the tenancy at its inception, and in order to determine whether the landlord is entitled to additional rent the question which has to be solved is whether the tenant is in occupation of the land for which no rent has been assessed and for which he is bound to pay rent. If since the date of the last assessment he has encroached on adjoining waste of the landlord he is liable for rent for the land encroached. If he has not encroached upon the adjoining waste and is in occupation of the same area which he possessed when the rent was last assessed he may be liable to pay the additional rent if it is proved that rent was not assessed at a consolidated sum upon the entire area found in his possession but upon an assumed area or upon an area determined by measurement as the area in his possession. 55 C. 680 and 25 C.W.N. 704, Relied on. (*Nasim Ali and Edgley, JJ.*) GOPAL CHANDRA CHAUDA *v.* C.K. NAG & CO., LTD. **167 I C. 474=9 R.C. 690 =A.I.R. 1936 Cal. 375.**

——**S. 52**—*Enhancement of rent for excess area —Deduction of 10 per cent. on settlement area.*

When a suit is instituted for enhancement of rent on the ground of excess area under S. 52 of the B. T Act. the Court would be acting rightly in reducing the settlement area by ten per cent. before comparing it with the previous area as found on private measurement. (*M C. Ghose, J.*) JAYNUDDIN SHEIK *v.* RAMESH CHANDRA ROY. **40 C.W N. 1022.**

——**S. 52**—*Excess area within boundaries discribed in kabuliyat—Landlord's right to additional rent.*

A tenant executed a kabuliat nnd agreed therein to pay certain rent for certain area assumed to be comprised within boundaries described in the kabuliat He also agreed that if at the time of the survey there was an excess, the landlord would have a right to make a separate settlement for the excess land At the time of the kabuliat there had been no khas land of the landlord on any of the sides of any plots demised by the kabuliat so that there was no room for encroachment.

Held, that while entering into stipulation about payment of additional rent for excess area, the parties were not thinking of any land outside the boundaries mentioned in the kabuliat. The rent mentioned in kabuliat was not intended to be a consolidated rent for the entire land within the original boundaries for all time to come. It was taken to be the rent of the holding till after fresh measurement the actual area was ascertained The landlord was therefore entitled to get additional rent for excess area if there be any, within the original boundaries (*S.K Ghose and Nasim Ali, JJ.*) NANDA KISHORE LAL *v* KHETABUDDIN AHMED **177 I.C. 670=11 R.C 265=A.I.R. 1938 Cal. 449.**

——**S 52**—*Precedents under—Value.*

Each case under S. 52, B. T. Act, ought to be studied with reference to its facts and with reference to the particular point or points which arose therein, and an attempt to spell out of a decision of any other case or cases a proposition of law which it did not intend to lay down can only lead to confusion. (*Biswas, J.*) NANDA KISHORE LALA *v.* KHETABUDDIN AHMED. **176 I C. 336=11 R.C. 88=42 C.W.N. 276=A I.R. 1937 Cal. 632.**

——**S 52**—Principle underlying—Abatement of rent—Diluvion—Right of tenant. *See* LANDLORD AND TENTANT—ABATEMENT OF RENT. **17 Pat.L. T. 339=A.I R. 1936 Pat. 341. (S.B)**

——**Ss. 52 and 183**—*Scope—Occupancy holding —Usage depriving tenant of right to reduction of rent on diluvion—Legality*

A usage whereby a tenant of an occupancy holding loses his right to reduction of rent on diluvion under S. 52 of the Bengal Tenancy Act and to re-occupy the land on its reformation is a serious derogation of the rights of an occupancy raiyat. Although a usage relieving a tenant from payment of rent for the diluviated portion of his holding may be of benefit to him and not inconsistent with the Act, serious hardship would arise if, for instance, a tenant having paid eleven years' full rent for his holding were then to lose a substantial portion of his holding by temporary diluvion, and were debarred from retaining his right to that portion on payment of rent. A usage to that effect, even if proved, is not in accordance with law and is barred by the provisions of S. 183 of the Bengal Tenancy Act. (*Agarwala and Madan, JJ.*) RUDRA NARAIN SINGH *v.* KEDAR NATH SINGH **18 Pat.L.T. 477= 3 B R 762=170 I.C. 754=10 R.P. 148=1937 P. W N. 526=A.I.R. 1937 Pat. 458.**

——**S. 52**—*Scope and applicability of.*

S. 52 would apply even where the tenant is found to be holding land without any variation in the boundaries, the excess being merely due to the later measurement showing the area to be greater than the supposed previous area. The test is not what was the actual area before but what was the area, actual or assumed, for or with reference to which the rent previously paid had been assessed. What S 52 requires to be shown is land held in excess and such excess may be established even within the limits of the original boundaries, provided of course it is shown that the previous settlement was on the basis of the supposed area. On the other hand, in some cases, S. 52 would not apply even when there is a real increase in area of the holding. It may so happen that at the time of the assessment of the previous rent the area might have been actually ascertained and specified, but the settlement of rent might not have been on the basis of the area so ascertained, the rent being fixed as a consolidated sum. (*Biswas, J.*) NANDA KISHORE LALA *v.* KHETABUDDIN AHMED. **176 I.C. 336=11 R.C. 88=42 C.W.N. 276=A.I R 1937 Cal 632.**

——**S. 52**—*Suit for enhancement—Excess area —Facts to be proved—'Proved by measurement' 'area for which rent was previously paid'—Meaning of.*

In order to establish a tenant's liability for additional rent, the first thing to be proved is that the tenant is in possession of land in excess of the area for which rent has been previously paid by him. The excess area must be proved by measurement. The collocation of the words "proved by measurement" in the context in

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which they occur in S. 52, T. P. Act, does not require evidence to be given of two measurements, one to show what is the land for which the previous rent was fixed and another to show what land the tenant is in possession now. What the section requires to be proved by measurement is the quantity of land held in excess and not the old area as well as the new area. Similar y the words "the area for which rent was previously paid by tenant" mean not the actual area of the holding at the time previous rent was assessed, but the determinate area with reference to which such assessment was made. For this purpose it is first necessary to determine whether the previous rent was at all assessed with reference to area. The mere fact that the old area was arrived at by measurement will not be enough It will have to be further shown that the settlement of rent was made after measurement on the basis of the area so measured. (*Biswas, J.*) NANDA KISHORE LALA *v.* KHETABUDDIN AHMED. **176 I.C. 336=11 R.C. 88=42 C.W N. 276=A.I.R. 1937 Cal. 632.**

——**S. 52**—*Suit for enhancement — Second appeal—New case—Permissibility.*

The burden which the landlord takes on himself under S. 52, B. T. Act, is to show the area for or with reference to which the rent was assessed or adjusted at the inception of the tenancy or at any intermediate assessment which followed. Where the landlord's case both in second appeal and in the Courts below was that the area mentioned in the kabuliyat was such area and this he attempted to establish in the Courts below by showing that this was the actual area of the holding at the time, but the findings being against him, he sought to argue in second appeal that this must in any case be assumed to be the area for which the previous rent was being paid.

Held, that this was not such a new case as the appellant was not entitled to raise in second appeal, it arises on the record as it stands, and is urged substantially as a question of law. (*Biswas, J*) NANDA KISHORE LALA *v.* KHETABUDDIN AHMED. **176 I C 336=11 R.C. 88=42 C.W.N, 276=A I.R. 1937 Cal. 632.**

——**S. 52 (1) (a)**—Burden of proof—Jamabandi signed by tenant showing increase in area and enhancement of rent—Effect—Plea of illegality of enhancement under S. 29—Onus. *See* BENGAL TENANCY ACT, SS. 29 AND 52 (1) (*a*). **40 C.W.N. 1330.**

——**S. 52 (1) (a)**—*Retrospective effect—Suit pending in appeal.*

Sub-S (1-a) inserted in S. 52 of the Tenancy Act by the Amendment Act of 1939 was made applicable by S 3 of that Act to suits which were pending on the date of commencement of that Act. A suit must be deemed to be pending during the pendency of an appeal filed in that suit. (*Rau, J.*) NUR AHAMED *v.* RASIK CHANDRA. **44 C.W.N. 780=71 C L J. 493.**

——**S. 52 (2)**—Grant of waste lands in Sunderbans to lotdar under Waste Land Rules—Part of grant diluviated—Claim for abatement—If sustainable. *See* BENGAL LAND REVENUE ASSESSMENT REGULATION, S. 13. **A.I.R. 1938 Cal. 229.**

BENGAL TENANCY ACT (1885), S. 67.

——**S. 52 (2)**—*Right conferred by—Availability.*

Even assuming a grant of Sunderbans land to be a case, its terms which provide for a measurement and revised assessment only once during the whole term of 99 years, militate against the right conferred by S. 52 (2) of the Bengal Tenancy Act. (*Mitter and Biswas, JJ.*) AMBUJ BASHINI CHOWDHURAIN *v.* SECRETARY OF STATE. **I.L.R. (1938) 2 Cal. 1=42 C.W.N. 239=182 I.C. 121=12 R.C. 5=A.I.R. 1938 Cal. 229.**

——**S. 60**—Dakhilas *granted by landlord's agent—If conclusive against landlord.*

Dakhilas showing payments of rent, granted by an authorised agent of the landlord are not conclusive against the landlord. S. 60 of the Bengal Tenancy Act does not prevent the landlord from proving that in fact no payments had been made, and the the *dakhilas* were collusive documents. The only effect of a *dakhila* is this, that the onus is shifted on the landlord. (*Mitter, J.*) JOGENDRA MOHAN DAS *v.* RAMANATH KARMAKAR. **43 C.W. N. 581.**

——**S. 65**—*Landlord purchasing tenure in execution of money decree—Right to recover arrears of rent for anterior period.*

Per *S. K. Ghose, J.*—If a landlord purchases a tenure in execution of a money decree against the tenure-holder the liability of the tenure for arrears of rent in respect of a period anterior to the auction purchase passes with the sale and attaches to the landlord-purchaser and the latter is not entitled even to a money decree against the judgment-debtor tenant. The fact that the proclamation of sale which resulted in the landlord's purchase did not contain any notice that there were rents in arrears for the anterior period is immaterial.

Per *Patterson, J.*—The arrears of rent due to the landlord are extinguished by his purchase of the tenure. (*S. K. Ghose and Patterson, JJ.*) MIDNAPUR ZEMINDARY CO., LTD. *v.* MRINAL KANTI ROY. **182 I.C 110=11 R.C. 901=42 C.W N. 967=A.I.R. 1938 Cal. 681.**

——**S. 65**—*Sale of holding—Right of co-sharer landlord who has parted with his interest.*

The right to bring the tenure or holding to sale under S. 65 appertains exclusively to the landlord; and a person to whom certain rents are due and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. (*Edgley, J.*) NARENDRA NATH *v.* ALANGA SUNDARI. **I.L.R. (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659=A.I.R. 1939 Cal. 754.**

——**S. 67**—*Interest on arrears of patni rent—If can be claimed.*

Interest on arrears of rent due in respect of a patni taluk cannot be claimed under S. 67 of the Bengal Tenancy Act, if according to the terms of the engagement between the parties no interest on arrears is payable. In view of the provisions of S. 195 (*c*) of the Bengal Tenancy Act, as it stood in 1933, those terms cannot be affected by any provision contained in the Bengal Tenancy Act. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

BENGAL TENANCY ACT (1885), S. 68.

——**S. 68 (2)**—*False suit by landlord—Damages to tenant—Award of, at twenty-five per cent.—Propriety.*

Where a landlord is found to have instituted a suit for *bhaoli* rent against his tenant without resonable and probable cause the defendant is, under the provisions of S. 68 (2) of the Bengal Tenancy Act, entitled to be awarded damages of twenty-five per cent. of the whole amount claimed. (*Macpherson and James, JJ.*) BRINDABAN PRASAD *v.* BANKU BIHARI MITRA. **15 Pat. 295=166 I.C. 317=9 R.P. 282=17 Pat.L.T. 575=1936 P.W.N. 598=3 B.R. 153=A.I.R. 1936 Pat. 595.**

——**S. 70**—*Order under—If a decree.*

An order of a Collector passed under S. 70 of the Bengal Tenancy Act is not a decree. It is an order in a proceeding which does not start with a plaint but with an application on which court-fees are not payable as for a plaint. (*Agarwala and Varma, JJ.*) RAMESHWAR PRASAD NARAIN SINGH *v.* KUNJ BEHARI MAHTO. **160 I.C. 27 (1)=8 R.P. 329=1936 P.W.N. 23=17 Pat.L.T. 36=A.I.R. 1936 Pat. 125.**

——**(as amended in 1928), S. 73, Proviso**—*Applicability — Transfer by one co-tenant—Transferee undertaking to pay part of arrears only—Liability of transferor.*

The proviso to S. 73 of the Bengal Tenancy Act, as amended in 1928, deals with a case where the liability to pay the entire rent has been taken over by the transferee. Such arrears must obviously refer to the whole of the arrears due. Where there has been a transfer by one of the tenants only, and the transferee has not taken upon himself to pay the whole of the arrears due the proviso can have no application, and under the first part of S. 73, the transferor and the transferee, whether the transfer be of the whole of the holding or of a part, would be jointly and severally liable for the whole of the arrears due. (*R. C. Mitter, J.*) AMIRUL ISLAM *v.* SARADA KUMAR SEN. **165 I.C. 249=9 R.C. 366=40 C.W.N. 149.**

——**(as amended in 1928), S. 73, Proviso**—*If retrospective.*

S. 73, B. T. Act, as amended came into force in February, 1929, and has no retrospective operation. The transferors of a holding are therefore liable for the arrears of rent of the holding for the years prior to the date of the coming into operation of the amended section (*R. C. Mitter, J.*) AMIRUL ISLAM *v.* SARADA KUMAR SEN. **165 I.C. 249=9 R.C. 366=40 C.W.N. 149.**

——**S. 74**—Falkar—*If part of rent.*

Where *falkar* is claimed as a part of consideration for the use and occupation of land and arises from the inception of the tenancy it forms part of the rent for the demised premises. (*Edgley, J.*) K. C. DE *v.* HIRA BEWA. **I.L.R. (1937) 1 Cal. 491=167 I.C. 461=9 R.C. 695=41 C.W.N. 88=A.I.R. 1937 Cal. 51.**

——**S. 74**—*Old kistibandi patta—Small sum of* moltana *shown as payable—Recoverability—If* abwab.

Where in a kistibandi patta the instalments put down include a small expense of *moltana* to be paid along with every instalment, and the document is of old times and record-of-rights shows the amount of instalment inclusive of *moltana* as the rent, the small sum cannot be deemed to be an *abwab*. (*M. C. Ghose, J.*)

BENGAL TENANCY ACT (1885), S. 86.

SACHINDRA KUMAR ROY *v.* PURNA CHANDRA PAL. **166 I.C. 1008 (1)=9 R.C. 643=A.I.R. 1936 Cal. 541.**

——**S. 74**—*Scope—Rent payable—What is—Customary rent and actual rent—Claim to sum in excess of actual rent—Maintainability.*

The rent of a holding is that which is paid by a tenant for the use and occupation of the land. Actual rent is the rent actually agreed upon between the parties. A tenant may be inducted on land on an agreement to pay the customary rent; that is perfectly a good contract, and on proof of what has been customary, such rent is leviable. What must not be levied is something in excess of the actual rent agreed upon. It is not the concern of the tenant how the landlord actually devotes the money which the tenant pays him by way of agreement for the use of the land. If the amount has been definitely agreed upon that is the actual rent payable. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) SURJO MOHAN *v.* CHHOTE SINGH. **174 I.C. 447=10 R.P. 521=4 B.R. 448=19 Pat.L.T. 365=1938 P.W.N. 286=A.I.R. 1938 Pat. 319.**

——**S. 76 (2) (f) (as amended)**—*Effect—Right of tenant to erect building.*

The only effect of the amendment of S. 76 (2) (*f*) is that the description of dwelling-house is made more specific in the present Act. But it is certainly not correct to say that the tenant is entitled to build without reference to area even though the effect might be to render the land unfit for the purposes of the tenancy. (*S. K. Ghose, J.*) BHUPENDRA NATH *v.* ELOKESHI DASSI. **177 I.C. 294=11 R.C. 223=A.I.R. 1938 Cal. 318**

——**Ss. 76 (2) (f) and 77**—"*Tenant*"—*Unrecognized transferee of non-transferable holding—Right to erect permanent structure.*

Under S. 76 (2), sub-S. (*f*) and S. 77, a landlord is not entitled to prevent his tenant from erecting a permanent dwelling-house whether of masonry bricks, stone or any other material whatsoever, for the tenant and his family, together with all necessary out-offices. The right to erect a dwelling house is a right belonging to the tenant and to no other and even the tenant is entitled to do so only for the benefit of himself and his family. It belongs to the tenant by virtue of his relationship to the landlord and not by virtue of his rights of occupying the land. An unrecognised transferee of a portion of a non-transferable holding does not stand to the landlord in the relationship of tenant. (*Lodge, J.*) JOGESH CHANDRA DAS *v.* HEM CHANDRA GHOSH. **162 I.C. 617=8 R.C. 616=A.I.R. 1936 Cal. 243.**

——**S 85**—*Sub-lease created by raiyat void under—Superior landlord purchasing raiyati holding at rent sale after repeal of section—If can treat sub-lease as nullity.*

A superior landlord who purchases a raiyati holding at a rent sale after the repeal of S. 85 by the Bengal Tenancy (Amendment) Act (IV of 1928) cannot treat a sub-lease created by the raiyat before the repeal of that section as void and inoperative, even though such sub-lease was void under that section. (*Mukherjea and Roxburgh, JJ.*) PROMOTHA NATH *v.* JITENDRA NATH. **43 C.W.N. 1102.**

——**S. 86 (6)**—*Applicabillity to non-transferable holding.*

BENGAL TENANCY ACT (1885), S. 87.

S. 86, Cl. (6) does not apply to a non-transferable holding. Though the section speaks in general terms of a holding it has to be read with the other provisions of the Act. Occupancy holdings in the absence of proof of any custom to the contrary are presumed to be non-transferable. The mortgagee of a raiyat cannot claim that the surrender of the mortgaged property to the landlord could not be valid unless it was made with his consent. (*James and Chatterjee, JJ.*) RAM CHANDERJI *v.* HEM CHANDRA **18 Pat. 184=182 I.C. 557=5 B.R. 779=12 R.P. 21=20 Pat.L.T. 469=A.I.R. 1939 Pat. 200.**

——S. 87—*Abandonment of holding—Transfer by original tenant of portion of his holding to* R *before amendment of Act in 1928—He after amendment transferring remaining portion to* K *—No arrangement made regarding payment of rent in respect of former treated as having abandoned his holding and landlord could evict* R *from portion transferred to him.*

It cannot be said that the transferee of a portion of a holding steps into the position of the former tenant except as regards that portion of the holding which has been transferred to him. As long as the original tenant retains the holding or a portion thereof the landlord has some security for the payment of his rent. If, on the other hand, the original tenant severs his connexion with the holding the only method by which the landlord can safeguard his interest is by pre-empting the portion transferred or by attempting to recover rent from the transferee in respect of the entire holding. Such a course will afford the landlord no guarantee that he will be able to recover rent for any portion of the holding that may have been transferred previously by the original tenant unless that tenant has made proper arrangements for the payment of the rent as it falls due. An original tenant transferred, before the passing of the Bengal Tenancy Amendment Act of 1928, a portion of his holding to *R*. Subsequently, after the passing of the Act of 1928, he transferred the remainder of the holding to *K*. He had made no arrangement regarding payment of rent with regard to that portion of the tenancy which had been transferred to *R* before the passing of the Bengal Tenancy Amendment Act.

Held, that the original tenant must be treated as having abandoned his holding within the meaning of S. 87, B. T. Act. The landlord was therefore entitled to re-enter and might evict *R* from that portion of the holding which was transferred to him. (*Edgley, J.*) ANNADA PROSAD *v.* RAMJAN SARKAR. **I.L.R. (1939) 2 Cal. 471=70 C.L.J. 501=186 I.C. 555=12 R.C. 478=44 C.W.N. 118=A.I.R. 1940 Cal. 6.**

——S. 87—Scope—If exhaustive—Under-raiyat granting permanent lease without landlord's consent and vacating land and leaving place—Abandonment—Presumption. *See* B.T. ACT, S. 48-F. **64 C.L.J. 58.**

——S. 87 (4)—*Applicability—Permanent lease by under-raiyat.*

S. 87 (4) of the B. T. Act is not applicable to a permanent sub-lease by the under-raiyat, but only to a sub-lease for a term. (*Ghose, J.*) IAJUDDIN SHEIKH *v.* UMEDALI MEAH. **64 C.L.J. 58.**

——S. 87 (5) (c)—*Applicability.*

BENGAL TENANCY ACT (1885), S 102.

S. 87 (5) (*c*) of the B. T. Act can only apply to an under-raiyat of the first degree and not to an under-raiyat of the second degree. A permanent sub-lease by the under-raiyat without the consent of the landlord being invalid, the sub-lessee under such a lease cannot get the protection of S. 87 (5) (*c*). (*Ghose, J.*) IAJUDDIN SHEIKH *v.* UMEDALI MEAH. **64 C.L.J. 58.**

——S. 88, (ii)—*Applicability—Putni tenures.*

S. 88, Cl (ii) of the B. T. Act is not applicable to putni tenures, and the Civil Court has, therefore, no power under that provision to order distribution or apportionment of the rent of a putni tenure. (*Nasim Ali and Rau, JJ.*) JAGADISH CHANDRA *v.* ISHAN KUMARI. **I.L.R. (1940) 1 Cal. 318=188 I.C. 304=12 R.C. 667=44 C.W.N. 192=A.I.R. 1940 Cal. 212.**

——S. 88, Proviso 2—*Kabuliyat involving division of original holding without consent of all co-sharer tenants—Validity—Inclusion of new land in kabuliyat—Effect of.*

New kabuliyat which involves a division of the original holding without the consent of all the co-sharer tenants of that holding is invalid under Proviso 2 to S. 88. The fact that new land had been included in the kabuliyat does not make any difference to the validity of the kabuliyat itself. (*Edgley, J.*) MAHENDRA CHANDRA *v.* RAJANI KANTA. **A.I.R. 1939 Cal. 609.**

——Ss. 94 and 99—*Common manager appointed by proprietors—Removal—Jurisdiction of District Judge.*

Where in pursuance of a notice under S. 94 of the B. T. Act, all the co-owners appoint a common manager of their estate, the District Judge has no jurisdiction thereafter to remove him under S. 99 of the Act and to restore the management to the co-owners. (*Nasim Ali and Edgley, JJ.*) JOGENDRA NATH MUKHERJEE *v.* KSHITESH CHANDRA ROY CHOUDHURY, **40 C.W.N. 1312.**

——S. 95—*Common manager—Position of—If agent of proprietors.*

A common manager of an estate appointed by the District Judge under S. 95 of the B. T. Act is not an agent of the proprietors of the estate placed in his charge. (*R. C. Mitter, J.*) BRINDABAN CHANDRA MITRA *v.* ATUL KRISHNA BASU, **164 I.C. 728=9 R.C. 267=40 C.W.N. 92.**

——S. 102—*Record-of-rights—Statement of particulars.*

It is not wrong for the settlement authorities to state in the record of-rights the amount of rent payable for the land or whether it is assessable to rent. (*M. C. Ghose and Mukherjea, JJ.*) THE NUDDIA MILLS CO., LTD. *v.* RAJ LAKSHMI DEBI. **64 C.L.J. 530.**

——S. 102 (dd)—*Dispute between neighbouring proprietors—Settlement Officer's jurisdiction to decide.*

A Settlement Officer has authority to decide a dispute between two neighbouring proprietors under the provisions of S. 102 (*dd*), 19 Cal. 641, Diss. (*M. C. Ghose, J.*) HUMAYUN RAJA CHAUDHURY *v.* JYODIRMOYEE DEBI. **168 I.C. 270=9 R.C. 789=A.I.R. 1936 Cal. 452.**

——Ss. 102 (11) (gg) and 103-B—*Scope*—Fard-ab-pashi—*Entry in stating that raiyat will be liable to pay existing rent if landlord fully maintains existing irrigation arrangement—If authorised—Presumption of correctness.*

BENGAL TENANCY ACT (1885), S. 102.

An entry in the *fard-ab-pashi* to the effect that the raiyat will be under an obligation to pay the existing rent to the landlord if the arrangements for irrigation are fully maintained, is one which the Settlement Officer is authorised to make under S. 102 (11) (*gg*) of the Bengal Tenancy Act in the *fard-ab-pashi*, which is part of the record-of-rights. Such an entry must be presumed to be correct under S 103-B of the Bengal Tenancy Act. (*Harries C.J. and Fazl Ali, J.*) KAPILDEO BHAGWAN *v.* ALI RAZA. 19 Pat. 104=1940 P.W. N. 280=A.I.R. 1940 Pat. 322.

——Ss. 102 (j) and 103-B—*Scope and effect—Entry in record-of-rights that land is rent-free—Presumptive force of—Rebuttal—Mode of—Suit to declare entry erroneous and for assessment of fair rent—Burden of proof—Proof that land lies within zamindari—If sufficient*

In a suit for a declaration by a landlord that the entry in the record-of-rights to the effect that the land held by the defendant tenant is rent-free and for assessment of a fair rent, it is not enough for the landlord to merely show that the land in question fell within the ambit of his zemindari. The effect of Ss. 102 (*j*) and 103-B of the B. T. Act is that the entries in the record-of-rights are given presumptive force, and those entries must prevail unless the presumption is rebutted by positive evidence that the land in question was in fact assessed to rent, unless the landlord proves that his suit must fail. (*Courtney-Terrell, C.J. and James, J.*) RASHIK LAL SAHU *v.* SURPUT SINGH. 16 Pat 281=18 Pat.L.T. 187=1937 P. W.N. 210=169 I.C. 964=3 B.R. 646=10 R.P. 59 =A.I.R 1937 Pat. 408.

——Ss 103-B and 191—*Fresh settlement of revenue made in respect of taluk—Entry in record-of-rights showing increase in rent of holding situate therein—Presumption of correctness—Rebuttal by lease granted after Act.*

A fresh settlement of land revenue was made in respect of a taluk not subject to a permanent settlement, and an entry was made in the record-of-rights showing an increase in rent in respect of a holding situate in that taluk. In a suit for rent at the higher rate mentioned in the record-of-rights, the defendant relied on a lease granted after the passing of the Bengal Tenancy Act showing that the rent of the tenancy was permanently fixed at a certain rate. It was not shown that the right of the defendant to hold the tenancy at the rate mentioned in the lease beyond the term of the previous revenue-settlement of the taluk was expressly recognised by the revenue authorities.

Held, that by the provisions of S. 191 of the B. T. Act nothing in the lease entitled the defendant to hold at the rent mentioned therein and it could not, therefore be said that the lease proved the incorrectness of the entries in the record-of-rights. (*Rau J.*) BOKSA BUNJARI *v.* AMANA KHATUN. 44 C.W N. 778.

——S. 103-B—*Presumption under—Extent of.*

The record-of-rights raises a strong presumption in favour of the recorded holder, but it is only presumptive evidence of the state of things at the date the record-of-rights was prepared, and cannot ordinarily raise a presumption in favour of the recorded holder of his possession at some earlier date. A.I R. 1934 Cal. 707, Foll. (*McNair, J.*) BEROJULLAH SARKAR *v.* AYATUL-

BENGAL TENANCY ACT (1885), S. 104.

LAH AKAND. 176 I.C. 706=11 R.C. 159=66 C. L.J. 455=A.I R. 1938 Cal. 117.

——S. 103 B—*Suit for assessment of fair rent—Plea of rent-free grant—Burden of proof—Lands within plaintiff's regularly assessed estate—Entry in record-of-rights in defendant's favour—Effect.*

In a suit for a declaration by a landlord that certain lands, which were recorded in the record-of-rights as in possession of the defendants as *belagan*, were liable to assessment for rent and claiming that a fair and equitable rent should be assessed on the Court, if the defendants set up a rent-free title to the lands in dispute, if the landlord proves that the lands in suit lie within his regularly assessed estate or mahal, the onus is shifted on to the defendants. If the plaintiff establishes that the disputed lands are within his zamindari and within the area assessed to revenue, the defendants must establish their right to a rent-free grant, notwithstanding that the record-of-rights is in favour of the defendants. It is not for the plaintiff landlord to rebut the entry in the record. Even if there be no evidence adduced by the plaintiff to the effect that the lands are within his zamindari, if the allegations in the plaint and the admission of the defendants in their written statement lead to that conclusion, the defendants have the burden on them to establish by satisfactory evidence that they have been relieved of the obligation to pay rent either by contract or by some old grant. (*Wort and Agarwala, JJ.*) KAMESHWAR SINGH BAHADUR *v.* SAKHAWAT ALI. 167 I.C. 238=9 R. P. 396=3 B.R. 283=17 Pat.L.T. 819=A.I.R. 1937 Pat 96.

—— Ss. 103-B and 50—*Tenant not entitled to presumption under S. 50—Payment of same rent for long period—If rebuts presumption under S. 103-B.*

It cannot be held in a case brought under the Bengal Tenancy Act that any presumption arises as to the fixity of rent from mere payment of the same rate of rent for a number of years apart from the presumption arising under S. 50 of the Act. Where a tenant is not legally entitled to the presumption under S. 50, having regard to the provisions of S. 115 the presumption relied upon by the landlord arising under S. 103-B regarding the entries in the record-of-rights cannot be said to have been rebutted by the fact that the holding was held at the same rate of rent for a long period. (*Edgley, J.*) DWARIKA NATH SAHA *v.* RASIK LAL SAHA. 179 I.C. 992=11 R.C. 643= A.I.R. 1939 Cal. 19.

——S. 104—*Assessment of land added to an estate paying revenue—Complaint of wrong inclusion of land in Diara estate—Omission to file suit—Effect of—Bengal Act IX of 1847.*

Where on assessment of land which has been added to an estate paying revenue to Government, the complaint of the tenant is that his lands have been wrongly included in the Diara estate, he ought to institute a suit within six months of the final publication of the record-of-rights under the provisions of S. 104-H (iii) (*d*) of the B. T. Act, and if he does not do so, he must abide by the rent settled under the provision of the section, provided the Settlement Officer had jurisdiction to settle rent under S. 104. The Settlement Officer has jurisdiction to settle rent for any land which

shall appear to the local Revenue Officer to be added to any estate paying revenue to the Government Collector, on inspection of a map prepared under S. 3 of Act IX of 1847. (*Jack, J.*) BHUPATI CHARAN DEY *v.* LALIT MOHAN BANERJEE. **42 C.W.N. 403.**

——**S. 104**—*Permanent tenure at fixed rent created by grantee of permanent lease under Government—Grantee subsequently surrendering permanent lease and taking lease for term—Settlement of rent of tenure after expiry of term—Jurisdiction of Settlement Officer.*

In 1827, Government granted a permanent lease to certain persons. Thereafter in 1840 the grantees created certain permanent tenures at fixed rent under the above permanent lease. These tenures were held by themselves. Thereafter in 1853 the grantees surrendered the permanent lease and in its place took from Government a lease for 99 years of the same estate. In 1926, when the term of 99 years was over, the Settlement Officer settled the rent of the tenure under S. 104 of the B. T. Act at rates much more than the rates which had been fixed in 1840.

Held, that the assessment was in accordance with law and not *ultra vires*. (*M. C. Ghose and Bartley, JJ.*) SATINDRA NATH CHOUDHURY *v.* HARENDRA NATH CHOUDHURY. **178 I.C. 335=42 C.W.N. 866=11 R C. 341=A.I R. 1938 Cal. 529.**

——**Ss. 104 and 104-J**—*Record-of-rights—Entries in—Conclusive nature.*

Where proceedings under Part II of Chapter X of the B. T. Act have been taken, *only* the entry regarding rent and not other entries in the record-of-rights is conclusive. (*R.C. Mitter and Biswas, JJ.*) SRISH CHANDRA NANDI *v.* MIDNAPORE ZEMINDARY CO., LTD. **I.L.R. (1938) 2 Cal. 41=67 C. L.J. 202=181 I.C. 370=11 R.C. 802=A.I.R. 1938 Cal. 853.**

——**Ss. 104, 104-J and 112**—*Settlement of rent under—Principles—Rent prevailing at rates settled at Permanent Settlement—If fair and equitable for excess area.*

Rents which have not been changed from the time of the Permanent Settlement would generally be found to be very low for the present, and if the rents for excess areas are to be proportionate they would, again speaking generally, be very low, while the rent settlement under Ss. 112, 104 and 104-J, is to be a settlement of fair and equitable rents for tenants of every class. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R.P. 420=3 B.R. 313=17 Pat. L.T. 747=A.I.R. 1937 Pat. 127.**

——**Ss. 104-A to F and 104-J**—*Settlement of rent ignoring contractual rights—Validity.*

S. 104 (2) read with S. 192 of the B. T. Act, does not empower the Revenue Officer to disregard the terms of contract entered into before the Act in settling rents for tenures under Ss. 104-A to 104-F. He has, therefore, no power to touch contractual rights acquired before the Act. By S. 104-J, the amonnt of rent is to be deemed to have been correctly settled within the meaning of the Act. Any rent settled by a Revenue Officer ignoring such contractual rights cannot be deemed to have been correctly settled under the Act if in settling such rent he abrogates such contractual rights and thereby exceeds

his powers under the Act. It cannot be presumed that the Revenue Officer in settling rent of a tenancy touched or intended to touch the contractual right of the tenants. If the entry is taken to have such effect, it would be void and not binding on the tenants. (*Syed Nasim Ali and Henderson, JJ.*) MIDNAPORE ZEMINDARY COMPANY, LTD. *v* CHANDRA SINGH DUDHORIA. **181 I.C. 674 =11 R.C. 828=68 C.L.J. 305=A.I.R. 1939 Cal. 1.**

——**S. 104-H**—*Parties — Suit for declaration that status of defendant should be altered—Under-tenants recorded as occupancy raiyats—If necessary and proper parties.*

In a suit framed under S. 104-H the relief claimed must determine the question whether the under-tenants are or are not necessary parties. Where the plaintiff asks for a declaration that the statuts of the defendants should be altered, the under-tenants or the persons who have been recorded as occupancy raiyats of a portion of the same holding are necessary and proper parties, as the decision would not only affect the status of the defendant but would also affect the status of the under-tenants. (*Wort and Manohar Lall, JJ.*) KAMESHWAR SINGH BAHADUR *v.* BIBI FATMA **17 Pat. 150=173 I.C. 6=10 R.P. 383=4 B.R. 222= A.I.R 1938 Pat. 43.**

——**S. 104-H**—*Scope—Suit under sub-S. 3 (e)—Landlord plaintiff failing to prove claim to increase of rent in respect of excess area in holding recorded as* sharah muaiyan—*Power of Court to reduce rent settled—Proper course.*

S. 104-H of the B. T Act, which is a special provision of law eptitling the Civil Court to interfere with the fair rents that the Revenue Courts are to settle under Ss. 104 to 104-J, empowers any person aggrieved by an entry of a rent settled in the Settlement Roll, etc., to institute a suit in the Civil Court within six months from the final publication of the record-of-right, etc., on any of the grounds stated in sub-S. (3) of that section and on no others. Where in a suit instituted by the landlord against the tenant under S. 104-H (3) (*e*) on the ground that the tenant belonged to a class different from that to which he is shown in the record-of-rights as belonging, the landlord fails to prove his case, the suit has only to be dismissed. Merely because the plaintiff fails to make out his case for an increase, it is not open to the Court to reduce the rents settled by the settlement authorities in respect of excess areas, which the tenant is found to hold. When the tenant is primarily *istimrari-mukarrari* or *sharah-muaiyan* tenant, and does not claim to hold the excess area on the same terms as his old holding, the Court cannot reduce the existing rent of the excess area merely because it erroneously finds the entries to be incorrect. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R P. 420=3 B.R. 313=17 Pat.L.T. 747=A.I.R. 1937 Pat. 127.**

——**S. 104-H (4)**—*Applicability—Suit under S. 104-H (3) (e)—Plaintiff landlord failing to prove claim for increase—Power of Court to reduce rent settled.*

Cl. (4) of S. 104-H of the B. T. Act can only apply to suits brought properly under it. It does not empower the Court to settle fair rents or to reduce rents already settled, when the landlord suing under sub-S. 3 (*e*) fails to prove his case

for an increase. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. 167 I.C. 736=9 R. P. 420=3 B.R 313=17 Pat. L.T. 747=A.I.R. 1937 Pat. 127.

——Ss. 104-J and 111-A—*Applicability—Re-opening of area and rent settled by Revenue Officers—Procedure.*

Where the main reliefs prayed for, relate to the question of area of the tenancy and to the question whether the rent payable by the tenant is liable to enhancement or not, it is incumbent upon the plaintiff to proceed under S. 104-J if he wants to have the question of area decided and to have the question of rent settled by Revenue Officers re-opened; this cannot be allowed to be done by an indirect method of having a declaration under S. 111-A. The Civil Court would not be justified in granting a discretionary relief by way of declarations, if the remedy by way of consequential relief is unquestionably barred, which consequential relief is the ultimate object of the relief prayed by way of simple declarations. (*Guha and Khnndkar, JJ.*) MAHIM CHANDRA GUHA *v* SECRETARY OF STATE. 166 I.C. 734=9 R.C. 575=A I.R. 1936 Cal. 300.

——S. 104-J and H—*Effect of—Entries in record-of-rights—Conclusive nature of.*

The effect of S. 104-J of the B. T. Act is that neither the landlord nor the tenant can challenge the amount of rent settled under Ss. 104-A to 104-F except by a suit under S. 104-H. From this, it necessarily follows that other entries in the record-of-rights so far as they bear upon the amount of rent settled cannot be also challenged except by a suit under S. 104-H. The effect of S. 104-H is that the failure to get the entry cancelled by a suit under that section on the grounds specified therein precludes the civil Court from entertaining and giving effect to any plea which would have the effect of declaring that the amount of rent was not correctly settled under Ss. 104-A to 104-F. (*Syed Nasim Ali and Henderson, JJ.*) MIDNAPORE ZAMINDARY COMPANY. LTD. *v.* CHANDRA SINGH DUDHORIA. 181 I.C. 674 =11 R.C. 828=68 C.L J. 305=A.I.R. 1939 Cal. 1.

——S. 104-J—*Lease created before Act—Estate subsequently resettled with original temporary settlement holder—Enhanced rent entered in Settlement Record—Rent recoverable by landlord.*

In the case of a lease which was created before the Bengal Tenancy Act the stipulation as to rent remains unaffected as between the contracting parties, although the estate is subsequently resettled by Government with the original temporary settlement holder and the annual rent is increased under Chap. X, Part II of the Bengal Tenancy Act. The fact that the tenant did not move the Revenue Officer under S. 104-E or 104-G or the Civil Court under S. 104-H does not make the entry of rent in the Settlement Records conclusive against the tenant under S. 104-J so far as the original landlord is concerned, and the rent recoverable by the latter is the rent provided under the terms of his lease and not the enhanced rent recorded by reason of the settlement. (*S. K. Ghose and McNair, JJ.*) SARADA PRASAD GHOSE *v.* PRAFULLA CHANDRA GHOSH. 176 I.C. 671=11 R.C. 145=65 C.L.J. 583=A.I.R. 1938 Cal. 188.

——S. 104-J—*Presumption under—Record-of-rights—Entry recording rent—Conclusive nature of.*

Though the presumption of correctness attaching generally to entries in the record-of-rights can be rebutted by evidence, the entry with regard to rent is on a different footing. It is conclusive, even if the other entries have been rebutted and proved incorrect. (*Rowland, J.*) MAHABIR SINGH *v.* RAMSUMRAN ANANTNIDHI. 179 I C. 753=5 B. R. 283=11 R.P. 398=A.I.R. 1939 Pat. 44.

——S. 104-J—*Record of Rights mentioning progressive rent for number of years—Maximum rent to be in force for fixed period—No rent fixed after existing settlement—Right to enhance rent.*

There was progressive rent for a certain number of years, and a maximum rent was mentioned which was to be in force for the last five years of the period of the existing settlement, there was no mention about the rent to be paid after the period of that settlement.

Held, that when there was the occasion for a revision of settlement, there could be no bar to the rent being enhanced and the rent was not fixed in perpetuity. 54 I.A. 48; 54 C. 166 (P.C.), Rel. (*Guha and Khundkar, JJ.*) MAHIM CHANDRA GUHA *v.* SECRETARY OF STATE. 166 I.C. 734=9 R. C. 575=A I.R. 1936 Cal. 300.

——S. 105—*Application under — Court-fee—Appeal from decision of Revenue Officer to Special Judge—Court-fee—Court-Fees Act, S. 7 (ii) and Sch. I, Art. 1.*

The amount of Court-fee payable on application under S 105 of the Bengal Tenancy Act before a Revenue Officer raising issues under S. 105-A of the Act, as well as in appeals to the special Judge against the decision of the Revenue Officer thereon is governed by the notification issued by the Government under S. 105 (3) of the Act. The proper Court-fee payable is: (*i*) a stamp of 12 annas for each tenancy which is the subject matter of an application under S. 105, and (*ii*) an additional *ad valorem* fee chargeable under Sch. I, Art. 1 of the Court-Fees Act, on the value of the subject-matter of the dispute in appeal, subject to a maximum of Rs. 20. The value of the subject-matter in appeal must be determined under S. 7 (*ii*) of the Court-Fees Act, that is to say, in addition to the court-fee of 12 annas a fee on ten times the difference between the fair rent claimed and the rent recorded in the record-of-rights subject to a maximum of Rs. 20 for each of the *Khatians* must be paid. (*Nazim Ali and Henderson. JJ.*) CHARUSILA DASI *v.* ABHILAS BAURI. I.L.R. (1937) 1 Cal. 103=168 I. C. 203=9 R.C. 770=40 C.W.N. 1149=A.I.R. 1936 Cal. 804.

——S. 105—*Decree for enhancement of rent—Suit to set aside—Heirs of one of decree-holders not impleaded—Effect.*

Where in a suit to set aside a decree for enhancement of rent the heirs of one of the decree-holders who is dead are not impleaded, the decree cannot be set aside in their absence. (*Jack, J.*) HARSHAMUKHI DASI *v.* NABAKRISHNA ROY. 178 I C. 941=11 R.C 437=A.I R. 1938 Cal. 609.

——S. 105—*Enhancement of rent—Right of landlord.*

A zamindar holding under the perpetual settlement is entitled to enhance the rents of all rent paying lands, unless he is precluded from doing

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so by a contract binding on him. Where the taluk was not described as putni taluk but the potta mentioned Putni Regulation and also provided for assessment of khilla lands at the rate of the present settlement.

Held, that the mere mention of these was not conclusive to show that the rent was fixed for all time and hence the landlord was entitled to enhance rent. (*M. C. Ghose and B. K. Mukherji, JJ.*) AMAR KRISHNA CHOWDHURY *v.* SURENDRA BIJOY DEWANJI **171 I.C. 632=10 R.C. 291=A. I.R. 1937 Cal. 148.**

——**Ss. 105 and 109**—*Proceedings under S. 105—Claim for additional rent for unassessed lands of tenancies not pressed—Suit for enhancement of rent is not barred.*

Under S. 109, the failure to press the claim for additional rent for unassessed lands of the tenancies in proceedings under S. 105 bars the landlord from suing the tenant in Civil Court for increasing the rent of tenancies. (*Nasim Ali and Edgley, JJ.*) GOPAL CHANDRA CHAUDA *v.* C. K. NAG & CO., LTD. **167 I.C. 474=9 R.C. 690=A.I. R. 1936 Cal. 375.**

——**S. 105**—Proceedings under—Decision of Special Judge—Appeal to High Court—Maintainability—Conditions *See* BENCAL TENANCY ACT, S. 115-C (3). **40 C.W.N. 1149.**

——**S. 105**—*Rent—Liability to enhancement or reduction—Presumption.*

The proposition is too well established that "*prima facie* the rent is liable to enhancement on the application of the landlord or to reduction on the application of the tenant unless either of them has precluded himself by contract from claiming such enhancement or reduction respectively." 54 I.A. 48, relied on. (*M. C. Ghose and Mukherjea, JJ.*) PANCHU GOPAL MUKHERJEE *v.* KUMAR GOCOOL CHANDRA LAW. **66 C.L.J. 24.**

——**Ss. 105 and 107**—*Scope—Settlement proceedings—Rent fixed at definite lump sum—Effect of—Rent suit by landlord—Claim to sum in excess of and over and above the settlement rent—Maintainability.*

When the rent has definitely been fixed in settlement proceedings under S. 105 of the Bengal Tenancy Act, it cannot, by reason of S. 107 of the Act, be made the subject of further litigation. A suit by the landlord against the tenant claiming a certain amount as *patwari* rent over and above the jama entered in the record-of-rights in respect of the holding is not maintainable. When the Settlement Officer has decided upon a definite sum and fixed the rent at a lump sum in respect of the holding, it is not open to the landlord in a suit to attempt to establish that the rent even in a limited class of suits is other than the rent which the Settlement Officer has in fact found to be payable, (*Courtney-Terrell, C. J. and Fazl Ali, J.*) SURJO MOHAN *v.* CHHOTE SINGH. **174 I.C. 447=4 B.R. 448=10 R.P. 521=19 Pat. L.T. 365=1938 P.W. N. 286=A.I.R. 1938 Pat. 319.**

——**S. 105**—*Suit for assessment of rent—Land recorded as liable to rent—Assertion of claim of Niskar—When bars claim.*

Before the landlord's right to assess rent in respect of land which has been recorded as liable to rent, can be barred, it is necessary that the assertion of a claim of Niskar must be made to the knowledge of the landlord twelve years before the proceedings for assessment of rent. (*M. C.*

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Ghose and R. C. Mitter, JJ.) ANANDA LAL CHAKRAVARTY *v.* GIRINDRA NATH. **168 I.C. 806=9 R.C. 876=A I.R. 1936 Cal 483.**

——**S. 106**—*Suit under—Transfer of interest of plaintiff pending suit—Continuance of suit.*

The trial of a suit under S 106 of the B. T. Act cannot be arrested merely by reason of the transfer of the interest of the plaintiff pending suit. The transferee may, if he chooses, obtain leave of the Court under O. 22, R. 10, C. P. Code, to continue the suit, but if he does not do so, the original plaintiff may continue the suit, and the transferee will be bound by the result of the litigation. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. **179 I C. 587=11 R.C. 572=42 C.W.N. 637=A.I.R. 1938 Cal, 481.**

——**S. 106**—*Suit under—Parties—Transferee of interest of tenant who was made* pro forma *defendant, not made party—Suit, if maintainable.*

The fact that in a suit under S. 106 of the B. T. Act the transferee of the interest of a tenant who was impleaded as a *pro forma* defendant was not made a party, does not render the suit non-maintainable on account of the defect of parties. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD **179 I.C. 587=11 R.C. 572=42 C.W. N. 637=A.I.R. 1938 Cal. 481.**

——**S. 106**—*Suit under—Questions of title—Power of Court to consider.*

A suit for the determination of a bare question of title divorced from possession is not one which falls within the purview of S. 106 of the Bengal Tenancy Act. But this does not mean that the Court is not under any circumstances to consider questions involving the title of the rival parties. In order to determine the nature of the possession of a party with respect to a particular piece of land, the Court can in a suit under that section enter incidentally into questions of title. (*Sen, J.*) SECRETARY OF STATE *v.* DISTRICT BOARD OF RANGPUR. **185 I.C 454=12 R C. 373=70 C.L.J. 126 =A.I.R. 1939 Cal. 758.**

——**S. 106**—*Suit under—Transportation of cosherer defendant as plaintiff after limitation—Jurisdiction of Court—C. P. Code. O. 1, R. 10—Limitation Act, S. 22 (2).*

In a suit under S. 106 of the B. T. Act, a cosharer *pro forma* defendant can be transferred to the category of the plaintiff, although a period of four months has elapsed since the final publication of the record of rights, and a decree can be passed in his favour. The Court clearly has jurisdiction to order the transfer under O, 1, R. 10, C. P. Code, and having regard to the provisions of S. 22 (2) of the Limitation Act no question of limitation can arise. (*Edgley, J.,*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. **179 I. C. 587=11 R.C. 572=42 C.W.N. 637=A.I.R. 1938 Cal. 481.**

——**(as amended), S. 109**—*Applicability—Suit instituted after amendment—Proceeding under S. 105 withdrawn prior to amendment.*

S. 109 of the B. T. Act, as amended in 1928, applies to all cases instituted after February, 1929, even though the proceeding under S. 105 was withdrawn prior to the amendment. 61 C.L.J. 127, Rel. on. (*M. C. Ghose, J.*) UDAY CHANDRA CHAKRAVARTY *v.* AMBIKA CHAKRAVARTY. **170 I. C. 259=10 R.C. 125=64 C.L.J. 547=A.I.R. 1937 Cal. 455.**

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——**S. 109**—*Applicability—Suit under S.* 106—*Dismissal as barred by limitation—Fresh suit by plaintiff more than* 12 *years later on the ground of title by adverse possession—If barred.*

Plaintiff's father who had purchased the suit property in execution of a decree against the father of the defendants, brought a suit under S. 106 of the Bengal Tenancy Act to correct the entry in the *Khatian* where the defendants were recorded as being in possession: but it was dismissed on the ground of limitation on 25-6-1911. In the next settlement in 1927, the defendants were again shown as being in possession, though the plaintiff's father and afterwards plaintiff remained in possession of the property in spite of the dismissal of the suit under S. 106. Plaintiff's objection to the settlement under S. 116 of the Orissa Tenancy Act having been dismissed he brought a suit in 1928 for a declaration of his title and confirmation of possession, asserting that by being in possession for more than twelve years previous to the suit, he had acquired a right to the disputed property by adverse possession.

Held, that S. 109 of the Bengal Tenancy Act did not bar the suit by reason of the earlier suit under S. 106, as the two suits were not in respect of the same matter, and that plaintiff was entitled to succeed in the suit on the ground of title by adverse possession acquired after the date of the previous decision. S. 109 of the Bengal Tenancy Act would bar only a suit based on the same subject-matter as the previous suit which might have been dismissed or withdrawn and would not bar a suit on a different cause of action. (*Courtney-Terrel. C.J. and Dhavle, J.*) NIMAICHARAN DAS *v.* SURENDRA NATH GHOSH. **3 B R. 91=1936 P.W.N. 583=165 I.C. 854=9 R.P. 225 =17 Pat.L.T. 549=A.I.R. 1936 Pat. 606.**

——**(as amended in 1929), S. 109, Proviso**—*Applicability—Proceedings on application under Ss.* 105 *and* 106 *withdrawn before amendment—Suit instituted after amendment.*

The amendment is operative from the time when it comes into force. The amendment to S. 109 of the Act came into force in February, 1929. Proceedings on application under Ss. 105 and 106 of the Act were withdrawn before February, 1929, but the suit respecting the same matter was brought after February, 1929.

Held, that the suit being instituted after the amendment came into force, it was maintainable, no matter whether the proceedings on the application under Ss. 105 and 106 were withdrawn before it came into force. (*M. C. Ghose and Mukherji, JJ.*) ADMINISTRATOR-GENERAL, BENGAL *v.* SACHINDRA KUMAR ROY. **171 I.C 834=10 R. C 315=65 C.L.J. 90=A I.R. 1937 Cal. 237.**

——**(as amended in 1928), S. 109, proviso**—*Applicability—Suit instituted after amendment came into force—Proceeding under S.* 105 *withdrawn before amendment—Suit in Civil Court—If maintainable.*

The proviso to S. 109 of the Bengal Tenancy Act introduced by the Amending Act of 1928 applies to a suit for assessment of rent instituted after the amendment came into force in 1929. Such a suit is, therefore, maintainable in a Civil Court, in spite of withdrawal of an application under S. 105 made before the amendment came into force. (*Guha and Bartley, JJ.*) HINGAL KUMARI DASSI *v.* SATIS CHANDRA PAL. **175 I.C. 73=10 R.C. 745=41 C.W.N. 737=A.I R. 1937 Cal 361.**

BENGAL TENANCY ACT (1885), S. 111-A.

——**S 109, Proviso**—*Proceeding under S.* 105 *withdrawn before amendment—Suit instituted after amendment—If barred.*

S. 109 of the Bengal Tenancy Act as amended in 1928 does not bar a suit for the assessment of a fair and equitable rent instituted after the amendment, although the withdrawal of the proceeding under S. 105 took place before the amendment. (*Patterson, J.*) KAMESHWAR SINGH *v.* HRIDOY NATH SAHOO. **182 I C. 413=12 R.C. 62=67 C.L J. 111=A.I.R 1938 Cal 763.**

——**(as amended in 1928), S. 109, Proviso**—*Scope—If retrospective—Application under S.*105 *made before Amendment but withdrawn after—Suit in Civil Court—If barred.*

S. 109, Bengal Tenancy Act, as it stood before the amendment in 1928, was doing injustice both to the landlords and the tenants, by depriving them of their right to have the question of rent settled by the Civil Court, once an application under S. 105 was made before the Revenue Court, even though the matter was not decided by the Revenue Court. The proviso to S. 109 was enacted by the Amending Act of 1928 to remedy this evil. The Court must therefore give the proviso the widest operation which its language will permit. Where therefore an application for enhancement of rent is made by the landlord under S. 105 before the amendment, and is withdrawn after the coming into force of the Amending Act, and a suit for enhancement is subsequently instituted in the Civil Court, the proviso applies to the cases and the suit is maintainable and not barred by S. 109. The proviso added in 1928 merely affects the procedure and does not alter the rights of the parties by destroying or creating a new right of action. (*Nasim Ali and Edgley, JJ.*) SUPRABHAT CHANDRA *v.* BHUPATI BHUSAN MANDAL. **165 I.C. 294=9 R.C. 370 (2) =63 C.L.J. 585=40 C.W.N. 773=A.I.R. 1936 Cal. 307.**

——**Ss. 109 and 105**—Ex parte *decision under S.* 105—*Subsequent suit by tenant for declaration of his niskar right—Maintainability.*

An *ex parte* decision under S. 105 of the Bengal Tenancy Act does not operate as a bar under S. 109 of that Act to the institution of a suit by the tenant for a declaration of his niskar right in the land. But the tenant is not entitled to a declaration that the order passed under S. 105 is not binding upon him, as that is a matter which was the subject of the application before the Revenue Officer. (*Roxburgh, J.*) MAHOMED RAHUL AMIN *v.* DINANDHU BARNI. **188 I.C. 247=12 R.C. 663 =71 C L.J. 104=A.I R 1940 Cal. 235.**

——**S. 111**—Applicability—Application under S. 26-J for recovery of money incidentally involving question of title—Stay of—Power of Court. *See* BENGAL TENANCY ACT, SS. 26-J AND 111. **63 C.L.J. 152=A.I.R. 1936 Cal. 263.**

——**S. 111-A**—Applicability—Suit for declaration of extent or area and for declaring record-of-rights incorrect—Maintainability—Proper remedy. *See* BENGAL TENANCY ACT, S. 104-J. **A.I.R. 1936 Cal. 300.**

——**S. 111-A**—*Suit to declare title of plaintiff and to declare that entry in record is incorrect—*

BENGAL TENANCY ACT (1885), S. 111-A.

Limitation—Starting point—Cause of action—Limitation Act, Art. 120.

There are two courses open to person whose status and rights are entered wrongly in the record-of-rights. In the case of an entry adverse to the plaintiff, he is not bound to institute a suit for a declaration that the entry is wrong. He can wait, and when an invasion of his rights is made on the basis of the entry, he can come in and sue for a declaration of his title on the ground that the record is wrong; and the suit would be in time if brought within 6 years of the threatened invasion. He can also make the entry in the record-of-rights as the basis of his cause of action on the ground that the entry has cast a cloud upon his title; one of the purposes of the suit being the removal of the cloud. If he makes the said entry as his cause of action, he must institute the suit within 6 years from the date of the final publication of the record-of-rights, under Art. 120 of the Limitation Act. The very fact that the entry records the plaintiff as possessing rights lower than what he claims, gives him a cause of action for the suit. S. 111-A is no bar to such a suit for a declaration of the plaintiff's title, his claim being to a status higher than that recorded in the settlement record. (*R. C. Mitter J.*) KIRAN CHANDRA ROY BAHADUR *v.* TARAK NATH GANGOPADHYAY. **166 I.C. 460=9 R.C. 528=40 C.W.N. 566=A.I.R. 1936 Cal. 456.**

——**S 111-A, Proviso**—*Suit by ijardar for declaration of title—Sub-tenants, if necessary parties.*

An ijardar purchased occupancy holding. By operation of S. 22 the occupancy rights in those holdings ceased but these holdings were not recorded even as non-occupancy holdings in the record-of-rights. The ijardar brought a suit for declaration that the record-of-rights was incorrect and that he was entitled to possession of the holdings as non-occupancy holdings. The sub-tenants did not deny ijardar's title.

Held, that as the sub-tenants did not deny ijardar's title and as the suit was under Proviso to S. 111-A, the sub-tenants were not necessary parties to the declaratory suit brought by the ijardar. (*R. C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. **I.L.R. (1939) 1 Cal. 349=180 I C. 278=11 R.C. 659=69 C.L.J. 51=43 C.W.N. 57=A.I.R. 1938 Cal. 804.**

——**S. 111-B and Limitation Act, Art. 120**—*Suit for correction of record-of-rights—Limitation—Computation—Deduction of four months—If permisslble.*

A suit for a declaration and correction of the record-of-rights falls under Art. 120 of the Limitation Act and in computing the period of limitation, the period of four months mentioned in S. 111-B (4) of the Bengal Tenancy Act, shall be excluded from the time allowed. (*M.C. Ghose, J.*) BHABADAS MUKHERJEE *v.* KARPUR KAMINI DEBI. **173 I.C 945=10 R.C. 602=42 C.W.N. 96 =A.I.R. 1937 Cal. 745.**

——**S. 112**—Fair and equitable rent—Rates fixed at Permanent Settlement. *See* B. T. ACT, Ss. 104, 104-J AND 112. **17 Pat.L.T. 747.**

——**S. 112**—Scope and effect of—Assessment of rent—Fixed rate tenancy—Excess area—Principle of assessment—Increase in rate. *See* **B. T. ACT, Ss. 50 (1) AND 52. 17 Pat.L.T. 747.**

BENGAL TENANCY ACT (1885), S. 115-B.

——**S. 113**—*Tenure-holder—If entitled to reduction of rent under S, 52 (1) (b).*

The meaning of the word "holding" in latter part of S. 113 of the B. T. Act is the same as in the beginning of the section and it cannot include a tenure. Accordingly the last part of S. 113 deprives a tenure-holder of his right to get reduction of rent under S. 52 (1) (*b*) of Act on account of deficiency in the area of his tenancy by diluvion. (*Nasim Ali and R.C. Mitter, JJ.*) PRAFULLA NATHA TAGORE *v.* SYED MAHAMMAD MALIHA. **170 I.C. 910=10 R.C. 206=41 C.W.N. 637 =A.I.R. 1937 Cal. 276.**

——**S. 114**—*Zamindari estate sold under Bengal Land Revenue Sales Act—Purchaser annulling under-tenures—Liability for unpaid balance of costs of preparation of record-of-rights.*

A purchaser of a zamindari estate sold under the provisions of the Bengal Land Revenue Sales Act for the recovery of arrears of land revenue, is not liable, after he has annulled, as he is entitled to do under S. 27 of that Act, the under-tenures, for the unpaid balance of the costs of the preparation of a record-of-rights of the estate, which has been duly apportioned on the patnidars of the estate prior to his purchase of the estate and the annulment of the under-tenures. When the purchaser, under S. 37, of the entire estate elects to avoid and annul under-tenures they cease to exist and when they have ceased to exist the charge imposed on them in respect of the costs also ceases to exist. And R. 414 of the Bengal Survey and Settlement Manual does not apply as it does not purport to deal with a case of the annulment of under-tenures but deals only with death, transfer or abandonment. An abandonment cannot be construed as including an annulment. 64 C.L.J. 126 =9 R.C. 757=A.I.R. 1937 Cal. 94=167 I.C. 741, Reversed. (*Lord Wright.*) KAMALARANJAN ROY *v.* SECRETARY OF STATE. **66 I.A. 1=11 R.P.C. 108=178 I.C. 472=43 C.W.N. 113=5 B.R. 165 =1939 M.W.N. 148=1938 O.L.R. 505=1938 P.W.N. 908=1938 A.L.R. 905=68 C L.J. 505 =I.L.R. (1939) 1 Cal. 222=I.L R. (1939) Kar. 1=19 Pat L.T. 861=A.I.R. 1938 P.C. 281= (1939) 1 M.L.J. 1 (P.C.).**

——**S. 115**—Scope and effect of—Presumption under S. 50—If affected. *See* B. T. ACT, Ss. 50 AND 115. **17 Pat L.T. 747.**

——**S. 115**—*"Thereafter" meaning.*

Word "thereafter" in S. 115, clearly signifies "after the particulars have been finally recorded after recourse to all the provisions contained in Chap. 10 for the attainment of finality in this respect." (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* BACHA KOIRI. **164 I C. 98=9 R.P. 88= 1936 P.W.N. 436=A.I R. 1936 Pat. 446.**

——**S. 115-B**—*Correction of entries in record-of-rights—Power of Revenue Officer.*

Per *Mukherjea, J.*—S. 115-B of the B. T. Act authorises the correction of entries in a record-of-rights which has been made owing to a *bona fide* mistake. *Bona fide* mistake means a genuine mistake which is possible even after due care and caution. If the Settlement Officer, on a consideration of the evidence before him, deliberately comes to a particular conclusion regarding the rights of the parties and makes an entry to that effect in the records, however much his judgment might be wrong or the decision erroneous it can-

not be said that there was a *bona fide* mistake vitiating the records. On the other hand, if the conclusion drawn by the Settlement Officer does not follow from his own premises, or one part of the record contradicts the other, there may be in such and similar cases *bona fide* mistakes and there may be scope for reconsideration of the matter on the merits. (*Nasim Ali and Mukherjea, JJ.*) AYESHAKHANUN *v.* COMMISSIONERS FOR THE PORT OF CHITTAGONG. **I.L.R. (1938) 1 Cal. 413=174 I.C. 113=10 R.C. 645=41 C.W.N. 1332=A.I.R. 1938 Cal. 31.**

——S. 115-C—*Proceeding under S.* 105—*Second appeal.*

In a proceeding under S. 105 of the B. T. Act for settlement of fair and equitable rent of certain holding on the ground of rise in the price of staple food crops and of increase in area on the basis of certain stipulations in the lease by which the tenancy is created, a second appeal is not barred under S. 115-C of the B. T. Act. (*Guha and Nazim Ali, JJ.*) THE CHANDRA SEKHAR ZEMINDARY CO. *v.* RADHA GOBINDA KOER. **67 C. L.J. 2.**

——S. 115 (c) (3)—*Special Judge—Appeal from order on application under S.* 105—*Non-payment of additional Court-fee—Rejection—Power of Special Judge—Appeal from order rejecting—Competency—Decision on issues under S.* 105-*A—Appeal to High Court.*

A Special Judge to whom an appeal is preferred against decision of a Revenue Officer in proceedings under S. 105 of the Bengal Tenancy Act, has power to reject the memorandum of appeal for failure of the appellant to supply the requisite additional Court-fee which he demands. An order of the Special Judge so rejecting a memorandum of appeal is not appealable to the High Court, though the High Court, can, in special circumstances, treat the appeal as memorandum of revision under S. 115, C. P. Code. But an appeal arising out of a proceeding under S. 105 of the B. T. Act lies to the High Court against the decision of the Special Judge when there has been an investigation and determination by him of any of the questions under S. 105-A of the B. T. Act. (*Nasim Ali and Henderson, JJ.*) CHARUSILA DASI *v.* ABHILAS BAURI. **I.L.R. (1937) 1 Cal. 103=168 I C. 203=9 R.C. 770=40 C.W.N. 1149=A.I.R. 1936 Cal. 804.**

——S. 116—Applicability—"Term of years"—Verbal lease for one year. *See* B. T. ACT, Ss. 44 (*c*) AND 116. **A.I R. 1938 Pat. 38.**

——S. 120—*Claim to lands by proprietor as* khamar *lands—Proof—Standard of—Nature of evidence requisite.*

Under S. 120 of the B. T. Act, which lays down the standard of proof necessary when a proprietor claims certain lands as his *khamar* lands, if *khas* cultivation by the proprietor for twelve continuous years before the passing of the Act is proved, that is sufficient. If village usage recognises a parcel of land to the *malik's kamar*, that too would be enough. If it has been let out as *khamar* before 2nd March, 1883, that would be enough. Even admissions and assertions made after 2nd March, 1883, or after the passing of the Act and in fact any piece of evidence relevant under the Evidence Act would be admissible to prove that it is *khamar*, and will have to be weighed by the Court. (*R.C. Mitter, J.*) UMA CHARAN BISWAS *v.* DEBENDRA NATH PODDAR. **164 I.C 1001=9 R.C. 329=40 C.W.N. 119.**

——Ss. 144 and 26 J—*Application for landlord's fee under S. 26-J—Jurisdiction of Court.*

The whole of S. 144 of the B. T. Act seems to refer to the territorial jurisdiction of the Court; as to the pecuniary jurisdiction of the Court, this section must be read together with the relevant sections of the Code of Civil Procedure. Under that Code, a suit is to be instituted in the Court of the lowest grade competent to try it. Hence a Court having territorial jurisdiction under S 144 of the B. T. Act, can try an application under S. 26-J of that Act to recover the balance of the landlord's transferfee if the sum claimed is within its pecuniary jurisdiction, although the market-value of the holding would take the case out of its jurisdiction. (*M.C. Ghose, J.*) SUNITY BALA DAS GUPTA *v.* PRODYOT KUMAR TAGORE. **I.L.R. (1938) 2 Cal. 569=183 I C 239=12 R C. 151=43 C.W.N 248=A.I R. 1939 Cal. 305.**

——S. 144—Ex parte *rent decree—Separate suit to set aside—If lies.*

Where a rent suit is decided *ex parte* in the absence of the defendant, a separate suit always lies to have such a decree set aside or declared a nullity on the ground that the Court passing the decree had no territorial jurisdiction as regards the subject-matter of the suit. (*Mukherjea, J.*) SARAT KUMAR *v.* DHARAMDAS. **42 C.W.N. 375=174 I.C. 522=10 R.C. 685=A.I.R. 1937 Cal. 738.**

——S. 144—*One suit for rent in respect of two plots—One of them alone within jurisdiction of Court—Decree in respect of both plots—Validity.*

Where one suit for rent claiming two decrees in respect of two plots is instituted as contemplated by S. 144 of the B. T. Act and one of the plots alone is within the jurisdiction of the Court but a decree is passed in respect of both the plots, the decree in so far as it relates to the plot within the jurisdiction of the Court is valid but the decree relating to the other plots is liable to be set aside. (*Mukerjea, J.*) KUMAR SARAT KUMAR ROY *v.* DHARMADAS BHATTACHARJEE. **174 I.C. 522=10 R.C. 685=42 C.W.N. 375=A.I.R. 1937 Cal. 738.**

——Ss. 145 and 187—*Recognised agent of landlord—Right to conduct and plead in rent suits.*

There is nothing in the Bengal Tenancy Act empowering a recognised agent of a landlord to conduct and plead in rent suits filed by the landlord. (*Henderson, J.*) SARAT CHANDRA *v.* ARJUN MONDAL. **185 I.C. 416=12 R.C. 360=43 C.W.N. 1191=A.I.R. 1939 Cal. 742.**

——S. 146-A—*Applicability—Certificate sales—Bengal Public Demands Recovery Act, S. 20.*

S. 146-A of the Bengal Tenancy Act does not apply in terms to certificate sales. But apart from that section, if a co-sharer tenant who is not a party to the proceedings is represented therein by others, his interest is bound by the sale. (*Mukherjea and Roxburgh, JJ.*) BAJROGA KHATUN *v.* PROVINCE OF BENGAL. **I L.R. (1939) 2 Cal. 358=187 I.C. 301=12 R C. 564=43 C.W. N. 1096=A.I.R. 1940 Cal. 113.**

——S. 146-A—*Decree for rent obtained against tenants—Landlord omitting to implead purchasers of portion of holding, being unaware of the purchase—Decree, if ceases to be rent decree.*

BENGAL TENANCY ACT (1885), S. 146-A.

After the enactment of S. 146-A of the B. T, Act, a decree for arrears of rent obtained against the tenants does not cease to be a rent decree merely by reason of the landlord decree-holder omitting to implead in the suit certain persons who had purchased an interest in the holding, when he was not aware of the purchase at the time of the suit or of the decree and when there was no notice of the purchase served on him till after the decree was passed. (*M. C. Ghose, J.*) NAGENDRA NATH SINHA *v.* NIRANJAN PATSA. **I L R. (1938) 1 Cal 164=176 I C. 183=11 R.C. 46=41 C.W N. 1173=A I.R. 1937 Cal. 665.**

——(as amended in 1929), S. 146-A (3)—*Construction—Rent suit—Representative character of defendants—All conditions laid down by Cls.(1) to (4)—If must co-exist.*

In order to give the defendants in a rent suit a representative character, all the four conditions mentioned in Cls. (1) to (4) of sub-S. (3) of S. 146-A, B.T. Act, need not concur. The word "and" occurring in between Cls. (3) and (4) of S. 146-A (3) must be read in a disjunctive way; if the defendants fulfil any of the conditions enumerated in Cls. (1), (2), (3) and (4) of sub-S. (3), they need not fulfill all the conditions and they would be deemed to represent the entire tenure. (*R.C. Mitter, J.*) AYESHA KHATUN *v.* MAHOMED HOSSAIN MOLLA. **41 C.W.N. 85.**

——S. 146-A (3)—*Interpretation.*

The four sub-clauses of S. 146-A of the B. T. Act cannot be read disjunctively. (*Jack, J.*) CHANDRAKANTA BAL MUNSHI *v.* SAHARALI SHEIKH. **178 I.C. 923=11 R.C. 438=67 C.L.J. 467=A I.R. 1938 Cal. 758.**

——S. 146-A (3)—*"Homestead"—Meaning of—Bare piece of lands used as dwelling place long ago—If "homestead"*

The word 'homestead" in S. 146-A (3) means the actual habitation of the tenure-holders. It does not mean or include a bare piece of land with no structures thereon which had been used as a dwelling-house years before by the tenure-holder or some of the tenure-holders. (*R. C. Mitter, J.*) AYESHA KHATUN *v.* MAHOMED HOSSAIN MOLLA. **41 C.W.N. 85.**

——(as amended in 1929), S. 146-A (3)—*Scope—If exhaustive--Co-sharer tenants—Agreement that some of them should represent all in dealings with landlord—Latter made aware of agreement—Suit by landlord for rent against some only—Decree—Sale in execution—Whole tenure—If passes.*

The conditions enumerated in sub-S. (3) of S. 146-A of the B.T. Act are not exhaustive, and those conditions are not the only conditions which would give to the defendants in a rent suit a representative character. There may be other circumstances from which a Court would be entitled to come to decide as a question of fact that the defendants in a rent suit did in fact represent their co-sharers not made parties to such rent suit. If all the co-sharer tenure-holders agree that some of them should be their representatives in their dealings with their landlord and if that fact is communicated to the landlord, the latter would be entitled to institute a suit against those persons who have been held out to him as representing the tenure, and if he gets a decree in a rent suit against such persons, the consequences mentioned in sub-S. (2) of S. 146-A would attach

to that decree; and a sale of the defaulting tenure in execution of that decree would pass not only the right, title and interest of the persons actually sued by him in the tenure, but the entire tenure. (*R. C. Mitter, J.*) AYESHA KHATUN *v.* MAHOMED HOSSAIN MOLLA. **41 C.W. N. 85.**

——S. 146-A (3)—*Rent suit—Co-sharer tenant coming under any of four classes—If should be impleaded.*

Under S. 146-A (3), B. T. Act, the entire body of co-sharer tenants is to include the names of every one of the four classes enumerated therein and the landlord in order to get a proper rent decree must implead as defendants every co-sharer tenant who comes under the description of any of the four classes. In other words, if any co-sharer tenant comes under any of the four classes and he is not sued in the rent suit then the decree will not be a proper rent decree. (*M. C. Ghose and Bartley, JJ.*) AMULYA CHARAN MISRA *v.* PRAN KRISHNA ADHIKARY. **179 I.C. 334 =11 R.C. 532=42 C.W.N. 755=A.I.R. 1938 Cal. 531.**

——S. 146-A (3)—*Representation of co-sharer tenants.*

Under S. 146-A of the Bengal Tenancy Act, in order that the whole body of tenants may be deemed to be represented by the defendants, such defendants must include all the four classes therein set out. Otherwise the decree passed in the suit will be a mere money decree. (*Henderson, J.*) BHARANI KANTA RAY *v.* RAJAGOPAL LAL. **70 C.L.J. 199.**

——S. 146-A (3), Cls. (iii) and (iv)—*Portion of holding purchased by plaintiff - Recognition of purchase by all co-sharer landlords except one—Rent suit by latter against original tenants without impleading plaintiff—Decree and sale—What passes—Plaintiff's right to declaration that sale not binding on him.*

The plaintiff acquired the greater portion of an occupancy holding partly by private purchase before the amendment of the B. T. Act, and partly by auction-purchase after the amendment. All the co-sharer landlords except defendant No. 1 recognised the plaintiff, and defendant No. 2, one of the co-sharer landlords even accepted the transfer fees paid in respect of the auction-purchase. Defendant No. 1 brought a suit for rent against all the original tenants, impleading his co-sharer landlords as defendants. The plaintiff was not made a party to this suit. Defendant No. 2, however, subsequently joined as co-plaintiff. The rent suit was decreed and defendants Nos. 1 and 2 purchased the holding in execution. The plaintiff sued for a declaration that the decree in the rent suit and the resultant sale of the holding in execution were not binding upon him.

Held, (*i*) that the plaintiff was entitled to come in under Cls. (*iii*) and (*iv*) of sub-S. (3) of S. 146-A of the B.T. Act, that being so, the omission to implead him in the rent suit must operate against the landlords, and it must be held that the defendants in that suit did not represent the entire body of tenants and that, therefore, the decree obtained in the course of the rent suit must be held to be a money decree and the auction-sale in execution thereof only passed the right, title and interest of the original tenants;

(*ii*) that the plaintiff was entitled to the declaration prayed for, although he did not take the other course of getting the auction sale set aside by making the deposit. (*S. K. Ghose and Patterson, JJ.*) TAYAJA MOLLA *v.* BIRENDRA NATH. **43 C.W.N. 80.**

——S. 148—*Decree for rent obtained against widow after adoption—Effect of—Right acquired by purchaser in execution.*

If a widow of a deceased tenant makes an adoption, the landlord is bound to recognise the adopted son, who becomes the heir of the deceased tenant, as the tenant in respect of the holding. If he institutes a suit for rent against the widow without impleading the adopted son as a party and obtains a decree, the decree will not have the effect of a rent decree. The purchaser at a sale in execution of that decree cannot, therefore, acquire any interest in the holding. ((*Mukherjea, J.*) HAMED GAZI *v.* SADAT ALI SIKDAR. **188 I.C. 479=44 C.W.N. 443=71 C.L.J. 243=A.I.R. 1940 Cal. 241.**

——S. 148—*Succession to tenancy not notified —Landlord getting credible information as to who are all heirs—Decree for rent obtained against other persons—If rent decree.*

It is, no doubt, the duty of the persons succeeding by inheritance to a permanent tenure to notify the succession and it is not the duty of the superior landlord to find out who all the heirs of a deceased tenure-holder are. But where the landlord prior to the institution of the suit for rent or during its pendency gets credible information with regard to succession, it is not open to him to ignore that information and proceed with the suit for rent as against some other person and thereafter to say that the decree which he has obtained as against that person is a decree which should be treated as a decree for rent. (*Mukherji, J.*) ALI BAKSHA BEPARI *v.* CHITTA RANJAN GUHA. **42 C.W.N. 334.**

——S 148-A—*Rent suit—Co-sharer originally defendant made co-plaintiff on his application—Bar of limitation.*

Where, in a rent suit, a co-sharer landlord is originally made a defendant, but later on he is joined as a co-plaintiff on his application under S. 148-A, Bengal Tenancy Act, there could be no bar of limitation operating against the party so made a co-plaintiff. It is not necessary for him to call into his aid the provisions of S. 22 of the Limitation Act, and the special limitation for a suit for rent as provided by the B. T. Act cannot have also any application to the case. (*Guha and Bartley, JJ*) BHUJANGA BHUSAN MUKHERJEE *v.* KALIDAS DAS. **173 I.C. 896=10 R.C. 593=A.I.R. 1937 Cal 333.**

——S. 148-A—*Rent suit—Sole landlord's right to institute—Arrears of rent due to former co-sharers.*

If there is only one landlord of the holding at the date of the institution of the suit there is nothing in the provisions of the Bengal Tenancy Act to prevent such landlord from instituting a rent suit the decree of which will be executable against the holding, provided he sues for the entire amount of rent actually due to him, even although certain former co-sharers may have arrears of rent due to them in respect of some of the years for which the suit is brought. (*Edgley, J.*) NARENDRA NATH *v.* ALANGA SUNDARI. **I.L.**

R (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659 =A.I.R. 1939 Cal. 754.

——S. 148-A—*Scope—Non-compliance with—Objection based on—When to be raised—Maintainability in proceedings for setting aside sale in execution of decree—Decree in contravention of S. 148-A (9)—Suit to declare nullity—Maintainability*

Once a decree for rent under S. 148-A (1) of the Bengal Tenancy Act is passed and executed by sale of the tenancy, the tenant cannot, in proceedings on an application to set aside the sale, challenge the decree or sale in execution on the ground that the provisions of S. 148-A (9) have not been complied with. The question of compliance or non-compliance with S. 148-A (9) cannot be raised at that stage.

Obiter.—Even a suit to have the decree declared a nullity would not lie. (*R. C. Mitter, J.*) KALI PADA BHANEARI *v.* PANCH KARI MANDAL. **162 I.C. 623=8 R.C. 621=40 C.W.N. 531=A.I.R. 1936 Cal. 197.**

——S. 148 A—*Scope—Suit for rent—Tenant admitting liability for rent as to rate claimed but pleading that holding was larger in extent than alleged in plaint—Finding that rent sued for was of part of holding—Proper decree.*

In a suit under S. 148-A of the B. T. Act, the tenants defendants admitted that rent was due at the rate claimed, but pleaded that the holding included a further area than that comprised in the plaint. The Court found the contention of the tenants as regards the extent of the holding was true and found that the suit was for rent of a portion of a holding.

Held, that the suit should not be dismissed altogether but that the landlord should be given a money-decree and not a rent-decree, there being an obligation to pay rent apart from the Tenancy Act. (*Madan, J.*) JANKI SINGH *v.* JEVANANDAN SINGH. **171 I.C. 689=10 R.P. 235=1938 P.W.N. 47=4 B.R. 64=18 Pat.L.T. 715=A.I.R. 1937 Pat. 558.**

——S. 148-A—*Suit by co-sharer landlord for portion of rent due to him—Decree passed in such suit—If a rent decree.*

A decree passed in a suit by a co-sharer landlord framed in the manner contemplated by S. 148-A, Cl. (1) of the B. T. Act, is a rent decree and could be executed as such, even though the suit is only to recover not the entire rent due to the landlord but a portion of the rent due to him in respect of his share. (*D. N. Mitter and S. K. Ghose, JJ.*) BIRAJ KRISHNA MUKHERJEE *v.* PURNA CHANDRA TRIVEDY. **41 C.W.N. 361.**

——S. 148-A (1)—*Object of—Co-sharer landlord who has parted with his interest—If entitled to be joined as party.*

The object of S. 148-A (1) is apparently (1) to ensure that a suitable opportunity is afforded to all co-sharer landlords to recover against the holding any arrears of rent which may be due to them in respect of their shares and (2) to secure the tenant against multiplicity of rent suits by his landlords in respect of the same period. This section can have no application in the case of a former co-sharer of the landlord who institutes a rent suit and such a person has no right to be joined as a party to the suit if he has parted with his interest at the time when the suit is brought. If arrears of rent are due to him from the tenant

his only remedy would be to recover the same by instituting an ordinary money suit but he has no remedy against the holding. (*Edgley, J.*) NARENDRA NATH *v.* ALANGA SUNDARI. **I.L.R. (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659=A.I.R. 1939 Cal. 754.**

——**S. 148-A (1)**—*Rent suit by some of the usufructuary mortgagees—Others disclaiming interest in mortgage and stating that they are* benamidars *of plaintiffs—Suit, if bad for defect of parties.*

If in a suit for rent by some of the usufructuary mortgagees the plaintiffs state that they alone are the mortgagees and the other usufructuary mortgagees appear as witnesses and disclaim all interest in the mortgage and state that they are *benamidars* of the plaintiffs, the provisions of S. 148-A (1) of the B. T. Act are not violated and the suit is not bad for defect of parties. (*Sen, J.*) KIRTIBASH MODAK *v.* RAKHAL MAJHI. **182 I.C. 567=12 R.C. 86 (1)=69 C.L. J. 95=A.I.R. 1939 Cal. 368.**

——**S. 148-A (8)**—*Rent suit decreed in favour of two co-sharer landlords—Sale of holding at instance of one of them—Sale proceeds allowed to be withdrawn by him—Application by the other for rateable distribution—Limitation.*

A rent suit was decreed in favour of two co-sharer-landlords specifying separately the amount payable to each. Thereafter, one of them applied for execution of his share of the decree by sale of the holding, and notice of this application was served upon the other in accordance with S. 148-A (7) of the B. T. Act, but he did not appear. The sale was held and the applicant decree-holder was permitted to withdraw the sale proceeds. A year and a half after the sale, the other decree-holder made an application demanding that the applicant decree-holder should bring into Court the amount which he had withdrawn for rateable distribution between them.

Held, that though Cl. (8) of S. 148-A of the B. T. Act does not lay down a period of limitation, it is the duty of the Court to impose a reasonable period for the remedy sought, and that the application must be rejected having been made beyond a reasonable time. (*M. C. Ghose, J.*) JAGADAMBA LOAN CO., LTD. *v.* SATYENDRA CHANDRA GHOSE. **I.L.R. (1938) 1 Cal. 175=173 I.C. 516=10 R.C. 532=41 C.W.N. 1248=A.I.R. 1937 Cal. 730.**

——**S. 148-A (9)**—*Scope—Suit for rent by co-sharer landlord impleading others as defendants—If prevents latter from further prosecuting certificate proceedings previously started—Latter withdrawing from certificate proceedings and joining as co-plaintiffs in suit—Right to exclude time taken by such proceedings—Limitation Act, S. 14.*

Sub-S. (9) of S. 148-A of the Bengal Tenancy Act bars the recovery by *suit* only of the co-sharer landlord's dues, when he had not joined as co-plaintiff in his co-sharer's suit for rent. It does not bar recovery of such dues by certificate proceedings. A suit by a co-sharer landlord under S. 148-A of the Act for recovery of rent due to his share impleading the other co-sharer landlords as defendants does not prevent the latter from proceeding further with the certificate proceedings previously started by them for recovery of their share of rent for the same period. If, therefore, the latter withdraw from the certificate proceedings and join as co-plaintiffs in the suit, they cannot invoke S. 14 of the Limitation Act to extend the period of limitation for their claim by excluding the period during which they prosecuted those proceedings. (*M. C. Ghose and R.C. Mitter, JJ.*) HRISHI KESH MITRA *v.* BARADA PRASAD RAY CHAUDHURI. **I.L.R. (1938) 1 Cal. 262=177 I.C. 948=11 R.C. 303=A.I.R. 1938 Cal. 517.**

——**S. 148-B**—*Suit for rent—Identity of land—Need for proof.*

It is not sufficient for a plaintiff to establish merely that the defendant is liable to pay a certain amount of rent. He must establish also the identity of the lands of the tenancy. No decree for rent should be passed until the Court is satisfied regarding the identity of the land with respect to which the rent is payable. The Court cannot leave the question of identity open because there can be no tenancy except with reference to a definite piece of land. (*Sen, J.*) RADHASHYAM *v.* GOURINATH. **187 I.C. 154=12 R.C. 547=A.I.R. 1940 Cal. 9.**

——**S. 148 (g)**—*Separate suit to set aside rent-decree—When lies.*

Where there were defects in service required by S. 148 (*g*), B. T. Act, they may be grounds for setting aside the *ex parte* decree under O. 9, R. 13, C. P. Code; but unless there was fraud with regard to service which kept the defendant in ignorance of the suit or unless by putting in a false return the plaintiff kept the Court in ignorance of the real state of affairs and thus enabled it to pass a decree which otherwise it could not have passed, no suit for setting aside the decree would lie. (*Mukerjea, J.*) SARAT KUMAR *v.* DHARAMDAS. **174 I.C. 522=10 R.C. 685=42 C.W.N. 375=A.I.R. 1937 Cal. 738.**

——**S. 148 (h)**—*Natural guardian—Who is.*

The mere fact that an infant is in the care of a person does not make that person the natural guardian of the person of the infant. S. 148 (*h*) contemplates guardians who are entitled to the custody of the infant under the personal law by which the infant is governed, in the absence of a testamentary guardian or a guardian appointed. An elder brother was entitled to the custody of the minor under the Muslim law. He did not appear and object to be appointed guardian of the minor when served with a notice under S. 148 (*h*).

Held, that he must be deemed to be duly appointed guardian of the minor for the suit. (*Nasim Ali, J.*) JAGAT KESHORE ACHARYA *v.* BADAN MANDAL. **166 I.C. 82=9 R.C. 470=41 C.W.N. 895=A.I.R. 1936 Cal 702.**

——**S. 148 (h)**—*Person other than natural guardian appointed as guardian of minor without his consent—Decree, if binds minor—C. P. Code, O. 32, R. 4 (3).*

Under S 148 (*h*) of the B. T. Act, only a natural guardian may be appointed without his consent to act as a guardian of a minor. If a person who is not the natural guardian is so appointed without his consent being taken, the minor concerned cannot be regarded as being properly represented in that suit. A decree passed in that suit is, therefore, not binding upon the minor. (*Edgley, J.*) RAGHUNATH BARAL *v.* BHOLA NATH ROY. **44 C.W.N. 391.**

——S. 148 (o)—*Applicability—Assignee—If includes assignee by operation of law*—Patni *lease by life-estate holder—Decree obtained by for arrears of rent—Execution by legatee-executors—If barred.*

S. 148 (*o*) is a complete bar to an application for execution of a decree for rent by an assignee in whom the interest of the landlord has not vested. An assignee includes not only an assignee by deed but also an assignee by operation of law. Consequently, the executors to the estate of a female life-estate holder, who are also her legatees under the will executed by her appointing them executors, and bequeathing to them the outstanding profits of her properties and the amount of a decree for arrears of rent obtained by her in respect of a *patni* lease granted by her, are not competent to execute the decree for arrears of the *putni* rent. S. 148 (*o*) operates as a bar to such an application for execution. Nor is the bar removed by reason of the fact that the *patni* lease has altogether ceased to exist with the demise of the testator life-estate holder who granted the *patni* tenure. (*Guha and Bartley, JJ.*) AKHIL KANTA LAHIRI *v.* ASWINI KANTA BHATTACHARJI. **165 I.C. 631=9 R.C. 435=40 C.W.N. 589=A.I.R. 1936 Cal. 464.**

——S. 148 (o)—*Usufructuary mortgagee getting assignment of rent decrees obtained by landlord—Right to execute the decrees.*

A usufructuary mortgagee who has under the mortgage deed got from the landlord an assignment of certain rent decrees obtained by him, is entitled to execute those decrees. S. 148 (*o*) of the B. T. Act is no bar to their execution. (*S. K. Ghose, J.*) RADHARANI BASU *v.* DWARKANATH MANDAL. **41 C.W.N 608.**

——S. 153—*Appeal—Rent suit—Claim for less than Rs.* 50—*Lower Court deciding question of title or interest in land.*

Although the claim in a rent suit is less than Rs. 50 yet the decree of the lower Court (which has decided a question relating to title of the land or to some interest in the land as between parties having conflicting claims thereto, the question being with regard to the liability to pay rent between other co-sharer landlords and the principal tenants) is appealable notwithstanding the fact that the tenants have not appeared in the suit. (*S. K. Ghose and Patterson, JJ.*) ATUL CHANDRA *v.* MOHINI MOHAN. **182 I.C. 751=12 R.C. 102=A.I.R. 1939 Cal. 28.**

——S. 153—*Appeal not competent under—No objection taken by respondent—Jurisdiction of appellate Court.*

When no appeal lies under S. 153 of the Bengal Tenancy Act and there is no decision by the appellate Court on the question of the competency of the appeal, mere inaction or want of objection on the part of the respondent cannot invest the appellate Court with the jurisdiction it does not possess. (*Mukherjea, J.*) PIRU PRAMANIK *v.* PABNA DHANABHANDAR CO., LTD. **172 I.C. 663=10 R.C. 404=41 C.W.N. 958=A.I.R. 1937 Cal. 427.**

——S. 153—*Decree in rent suit—Defence that all persons entitled to receive rent not brought on record overruled—Appeal, if competent.*

If in a rent suit the trial Court passes a decree overruling the defence that all the persons who are entitled to receive rent have not been brought on record, and holding that the plaintiffs alone are entitled to the 16 annas of the rent, S. 153 of the Bengal Tenancy Act applies and an appeal is incompetent. There is no decision in the suit as to the amount of rent annually payable. (*S. K. Ghose and B. K. Mukherjea, JJ.*) RASIDUNNESSA KHATUN *v.* NABIN CHANDRA NATH. **69 C.L.J. 383.**

——S. 153—*District Judge deciding appeal when no appeal lies—Non-appealability—Revision.*

Where the trial Court had to consider and decide a question relating to the title to the land in suit, but that question did not fall for decision between parties having conflicting claims to the land in suit, no appeal lies to the District Judge from the decision of the trial Court. But if the District Judge decides an appeal, his decree will be without jurisdiction and yet under S. 153 no appeal will lie against such decree. But the Court can under such circumstances vary the decree in revision. (*Patterson, J.*) HRISHIKESH CHAKRAVARTY *v.* NILMADHAB CHATTOPADHYA. **177 I.C. 833=11 R.C. 279=67 C.L.J. 484=A.I.R. 1938 Cal. 543.**

——S. 153—*Order under S. 174 setting aside sale on application by private purchaser from tenant—Appeal by auction purchaser—Maintainability.*

After an auction sale of the tenant's lands in execution of a rent decree, a private purchaser from the tenant applied under S. 174, B. T. Act, to have the sale set aside on the ground of his purchase. The Court allowed the application, disallowing the objection raised by the auction-purchaser. The auction-purchaser preferred an appeal.

Held that, that as there was a conflict of title between the private purchaser and the auction-purchaser, an appeal lay. (*M. C. Ghose, J.*) BISWAMBAR NAMA *v.* ABDUL MAJID MEA. **164 I.C. 785 (1)=9 R.C. 278=40 C.W.N. 95.**

——S. 153—*Rent suit*—Muafi *claimed by tenant—Court, if can pass decree after deducting* muafi.

If *muafi* is claimed as an incident of the tenancy the decision which arises with regard to it in a rent suit is a matter which affects the amount of rent within the meaning of S. 153 of the Bengal Tenancy Act. The Court can, therefore, pass a decree for rent after deducting the *muafi* to which the tenant is found entitled. (*Agarwala, J.*) DIWAKARNATH PANDEY *v.* KAMLA PRASAD SING. **165 I.C 962=9 R.P. 242=1937 P.W.N. 375=3 B.R. 119=A.I.R. 1937 Pat. 199.**

——S. 153—*Scope—Composite suit—Claim for rent and alternatively for money—Second appeal barred if claims considered separately—Bar if can be avoided by joinder of both claims—C. P. Code, S.* 102.

Where in a suit for arrears of rent with an alternative prayer for decree for money, a second appeal would be barred under S. 153 of the Bengal Tenancy Act so far as the claim for rent is concerned, and the claim for money would be cognizable by a Court of Small Causes and the amount claimed is below Rs. 500, not allowing of a second appeal by reason of S. 102, C. P Code, the bar of second appeal cannot be evaded by the joinder of the two claims, and amalgamating the two claims in one suit. (*R. C. Mitter, J.*) BANKIM CHANDRA DEB SARKAR *v.* MADAN MOHAN DEB. **40 C.W.N. 698.**

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——S. 153—Scope—Rent suit valued below Rs. 50—*Ex parte* decree—Order refusing to set aside—Appeal. *See* C. P. CODE, O. 43, R. 1 (*d*). **63 C.L.J. 277=40 C.W.N. 992.**

——S. 153—*Scope—Question whether certain rent is payable or nothing at all—Second appeal.*

It is difficult to distinguish on principle a case of total suspension of the rent from a case of abatement of rent or a decree for rent at a rate lower than that claimed by the plaintiff. Where the Court will have to decide whether rent payable is a certain amount, or in the alternative nothing at all, the question is of the amount of rent payable annually by the tenant, and as such a second appeal is competent. 34 I.C. 851, Rel. on; S. A. No. 1520 of 1924, not foll. (*Nasim Ali and Henderson, JJ.*) SABARATULLA SHEIKH *v.* MANIKJAN BIBI. **166 I.C. 750 (2)=9 R.C. 580 =A.I.R. 1936 Cal. 323.**

——S. 153—*Second appeal—Rent suit—Claim to particular amount of rent—Denial by defendant of claim on ground of rent-free tenancy.*

Where in a suit for *bhaoli* rent the plaintiff asserts that a certain amount of rent is due, and the defendant pleads that no rent is due because the holding is rent free, the question between the parties is as to the amount of rent annually payable for the holding, and the case falls under S. 153, B. T. Act; a second appeal is not barred in such a case, though the amount falls below Rs. 100. Even if the question be regarded as one as to liability to pay rent, it makes no difference, because in such a case the question would be about title to hold the land free from liability to pay rent. (*Manohar Lall, J.*) RUP NARAIN MANDEY *v.* SHEO SAGAR TEWARI. **180 I.C. 105= 11 R.P. 454=5 B.R. 342=A.I.R. 1939 Pat. 258.**

——S. 153 (b)—*Applicability—Rent suit below Rs. 50 in value—*Ex parte *decree by Munsif having final jurisdiction—Application to set aside —Order rejecting by Munsif without final jurisdiction—Appealability.*

In a rent suit in respect of an agricultural holding valued at less than Rs. 50 an *ex parte* decree was passed as none of the defendants appeared. The Munsif who passed the decree was vested with final jurisdiction under S. 153(*b*) of the Bengal Tenancy Act. No question was decided which would come under the proviso to that section. Subsequently some of the defendants applied to have the *ex parte* decree set aside, and the application was heard by another Munsif who had no final jurisdiction under S. 153 (*b*) and was dismissed by him. An appeal was preferred from the order of dismissal and was allowed.

Held, in revision from the appellate order, that the appeal to the lower appellate Court was competent and was not barred by S. 153. (*R. C. Mitter, J.*) MAHENDRA CHANDRA DUTTA ROY *v.* BASIRUDDIN. **I L.R. (1937) 1 Cal. 135=166 I.C. 103=9 R.C. 471=63 C.L.J. 277=40 C.W.N. 992 =A.I.R. 1936 Cal. 485.**

——S. 153, Proviso—*Scope—Question as to liability for arrears of rent as between transferor and transferee—Decision on—Appeal and second appeal.*

Where the question decided relate to disputes between the transferor and transferee of a holding as to the liability for the arrears of rent of the holding prior to the transfer, the questions so

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raised and decided do not come within the proviso to S. 153 of the B. T. Act, because there is no question relating to title to land or to some interest in land as between parties having conflicting claims thereto. Where in such a case a Munsif having final powers under the section passes a decree for arrears of rent for a sum below Rs. 50, no appeal or second appeal lies. But where an appeal is preferred and decided by the lower appellate Court without deciding any question falling under S. 153, proviso, a second appeal to the High Court is competent. (*R. C. Mitter, J.*) AMIRUL ISLAM *v.* SARADA KUMAR SEN. **165 I.C. 249=9 R.C. 366=40 C.W.N. 149.**

——S. 155—*Applicability—Lessee bound by covenant not to alienate—Transferee of—Right to benefit of section.*

A transferee from a lessee, who is bound by a covenant in the lease not to alienate, is not a tenant, and is not therefore entitled to the benefit of S. 155, B. T. Act. S. 155 does not apply so as to enable the Court to relieve him against forfeiture. (*Dhavle and Agarwala, JJ.*) THAKUR DAYAL SINGH *v.* PROMETHA NATH MITRA. **15 Pat. 673=9 R.P. 136=164 I.C. 811 (2)=17 Pat. L.T. 502=1936 P.W.N. 534=A.I.R. 1936 Pat. 493.**

——S. 155—*Person sued under—Status of—Proceedings under section—If imply tenancy—Absence of proof as to how defendant acquired holding—Effect.*

The fact that the landlord has taken proceedings against the defendant under S. 155 of the Bengal Tenancy Act shows that the plaintiff has recorded the defendant as tenant, and it is immaterial in what way the defendant acquired the holding. (*Jack, J.*) SHIB CHANDRA SARKAR *v.* PANCHANAN KOLAY. **64 C.L.J. 71.**

——S. 157—*Claim for assessment of fair rent not claimed in trial Court—If can be allowed in appeal.*

A person is not entitled in an ejectment suit to get an assessment of rent under S. 157 there was no prayer whatsoever made in the plaint for an assessment of a fair and equitable rent, and it was only when the appeal was being heard that a petition was filed claiming this relief. This is too late a stage at which this relief could be claimed. The granting of this prayer would necessitate an amendment of the plaint, and the taking of fresh evidence. The amendment of the plaint would really amount to a changing of the nature of the suit and such an amendment should not be allowed at such a late stage. (*Sen, J.*) MEAH KHA *v.* SERAJ-UDDIN SARDAR. **A.I.R. 1940 Cal. 65.**

——S. 158—*Refusal to revise by District Judge —High Court's power.*

Where a District Judge has failed to revise an order under S. 153, the High Court has power in a proper case to act under its powers of revision. (*Macpherson, J.*) KAMESHWAR SINGH *v.* MAHABIR PASI. **15 Pat. 605=166 I.C. 488=9 R.P. 303 =1936 P.W.N. 385=17 Pat.L.T. 363=3 B.R. 173=A.I.R. 1936 Pat. 402.**

——S. 158—*Right of appeal—Defendant denying relationship of landlord and tenant, and setting up tenancy at lower rate under third person —Issue framed as to amount of rent payable and decided in plaintiff's favour—Effect.*

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Where in a suit for rent the defendant's case is that there is no relationship of landlord and tenant between him and the plaintiff and that he holds the *jama* at a lower rate of rent as tenant under a third party, the defendant is not entitled to appeal against the decree passed against him although the Court frames an issue with regard to the *jama* payable for the jote in suit and decides that issue in favour of the plaintiff, as that issue is unnecessary for the decision of the suit. (*Edgley, J.*) GOUR CHANDRA *v.* GHAWA SINGHA. **44 C.W.N. 539.**

——**S. 158 (b)**—Construction—"Subject to the provisions of S. 22 (2)"—Meaning and effect of—Co-sharer purchasing *raiyati* land—Right to hold same after partition. *See* BENGAL TENANCY ACT, Ss. 22 (2) AND 158-B. **17 Pat.L.T. 97.**

——**S. 158 (c)**—Scope—Prayer for determination of status of tenant in application for transfer fee—Order for payment of fees without declaring status — Appealability — Revision — Competency. *See* B. T. ACT, Ss. 26-J AND 158 (c). **40 C.W.N. 502.**

——**Ss. 159 and 22**—Landlord auction-purchaser—Right to annul incumbrance. *See* BENGAL TENANCY ACT, Ss. 22 AND 159. **43 C.W.N. 1102.**

—— **Ss 159 and 167**—*Suit for possession by purchaser at rent sale—Claim resisted by mortgagee-purchasers under mortgage decree—Mortgage subsisting at date of rent sale—Rights of mortgagee—Purchaser at rent sale—Liability to redeem mortgage.*

Where a claim, in a suit for possession of property by a purchaser at rent sale, is resisted by certain persons claiming to be mortgagee-purchasers of the property at a sale in execution of their mortgage decree and it is found that the mortgage was subsisting at the date of rent sale that the property was purchased by the mortgagees within a year of the rent sale in execution of their decree, and that the rights of the mortgagee under the mortgage were not annulled, the sale under the mortgage does not for all purposes extinguish the mortgage, and the mortgagee who purchases at the mortgage sale can fall back upon the mortgage and use it as a shield against the purchaser at the rent sale and the purchaser is not entitled to possession of the property unless he redeems the mortgage. (*Guha and Bartley, JJ.*) ANNADA PROSAD CHATTERJI *v.* PHANINDRA BHUSHAN GHATAK. **166 I.C. 740=9 R.C. 577=41 C.W.N. 277=A.I.R. 1936 Cal. 381.**

——**S. 160 (c)**—*Temporary straw huts—If entitled to protection.*

The dwelling-houses which the Legislature intended to protect under S. 160 (*c*) should be of a permanent character. A dwelling-house merely consisting of temporary straw huts is not entitled to protection under S. 160 (*c*). (*Edgley, J.*) NARENDRA NATH *v.* ALANGA SUNDARI. **I.L.R. (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659=A.I.R. 1939 Cal. 754.**

——**S. 160 (c)**—*Under-raiyat—Right to protection.*

An under-raiyat is entitled to protection under S. 160 (*c*) of the B. T. Act, if there is any garden or plantation on the land. (*Mukherjea and Roxburgh, JJ.*) PROMOTHA NATH *v.* JITENDRA NATH. **43 C.W.N. 1102.**

BENGAL TENANCY ACT (1885), S. 163.

——**S. 160 (d)**—*Occupancy right acquired by under-raiyat under custom—If protected interest.*

The occupancy right which the under-raiyat acquires under custom is not a protected interest under S 160 (*d*) of the B. T. Act. (*Mukherjea and Roxburgh, JJ.*) PROMOTHA NATH *v.* JITENDRA NATH **43 C.W.N. 1102.**

——**S. 161**—"*Incumbrance*" —*Meaning of—Lands included in* sepatni *but never put in possession of* sepatnidar—*Lands held throughout by landlord—If "incumbrance" on* sepatni—*Purchaser of* sepatni *in rent sale—Right to annul incumbrance and to sue for khas possession—Bengal Tenancy Act, S. 167.*

The term "incumbrance", as defined in S. 161 of the B. T. Act, has no doubt been held to include not merely such interests as have been directly created by the tenant but also interest of the nature described in the definition which have been allowed to grow up by his sufferance or negligence. But this meaning, assuming that it is correct, can by no stretch of imagination be taken to include the case of lands of which the tenant had never been put in possession and in respect of which the landlords themselves by means of adverse possession on the strength of their own title, either real or supposed, have acquired an indefeasible title against the whole world Where certain lands, though included in a *sepatni patta* and *kabuliyat*, were never put in possession of the *sepatnidar*, but remained in the possession of the landlord himself ever since the commencement of the *sepatni*, a purchaser of the *sepatni* at a rent execution sale with power to annul incumbrances is not entitled to treat those lands as forming an incumbrance upon the *sepatni* and proceed to annul the incumbrance by service of notice under S. 167 of the B. T. Act, or to sue for *khas* possession of the lands. The provisions relating to annulment of incumbrances in Chapter XIV of the B. T. Act, are intended primarily for the benefit of the landlord, and can never be utilised by a purchaser at a rent execution sale in order to defeat the title of the landlord himself. (*Mukherji and Jack, JJ.*) MIDNAPORE ZEMINDARY CO., LTD. *v* RADHIKANATH BISWAS. **64 C.L.J. 476=41 C.W N. 81.**

——**S. 161**—*'Incumbrance'—Under-raiyati created by raiyat invalid against landlord under S. 85.*

An under-raiyati created by a raiyat, although invalid against the landlord of the raiyat under S. 85 (now repealed) of the B. T. Act, is perfectly valid as against the raiyat and also against a third party who purchases the raiyati interest at a certificate sale. The interest of the under-raiyat, therefore, amounts to an incumbrance within the meaning of S. 161 of the B. T. Act which can only be annulled by a notice served in accordance with S. 167 of the Act. (*Sen, J.*) NIBARAN CHANDRA GHOSE *v.* PRATAP CHANDRA. **44 C.W.N. 141.**

——**S. 163 (2) (a)**—*Application for attachment under—Proceedings actually taken under S 163 (2) (b) owing to use of wrong form—Effect—Sale if ceases to be rent sale.*

A landlord who had obtained a rent decree asked for attachment and sale according to S 163 (2) (*a*) of the B. T. Act, but through some mistake, a wrong form was used and proceedings were taken obviously under S. 163 (2) (*b*) of the

Act, instead of under S. 163 (2) (*a*). It was stated that the sale would be by public auction and with power to annul all incumbrances of the occupancy holding. But the sale proclamation described the holding as a *mokurari mourashi* interest of the judgment-debtor.

Held, that this was only a misdescription and it did not render the sale as one not coming under Ch. XIV of the Act, and that notwithstanding the defect, the sale was a rent sale under Ch. XIV of the Act. (*D.N. Mitter and Patterson, JJ.*) MOHENDRA NATH BANERJI *v.* HARSHAMUKHI DASSI. **164 I C. 490=9 R.C. 229=40 C.W.N. 108.**

——**S. 167**—*Annulment of incumbrance—Service of notice—Limitation—When begins to run.*

Under S. 167 of the B. T. Act, the time for the application for service of the notice of annulment of an incumbrance will begin to run from the date of the confirmation of the sale held under the certificate or from the date of knowledge of the purchaser at the certificate sale of the existence of the incumbrance. The date of purchase from the certificate purchaser is not relevant. (*Sen, J.*) NIBARAN CHANDRA GHOSE *v.* PRATAP CHANDRA. **44 C.W.N. 141.**

——**S. 167**—*Fresh notice—Power of Court to issue—Question of service of previous notice pending in appeal.*

The Court cannot issue a fresh notice of annulment of encumbrance under S. 167 of the B. T. Act, when the question whether the notice previously issued was served or not is pending determination in appeal. (*Sen, J.*) KIRAN CHANDRA *v.* MATILAL. **44 C.W.N. 864=71 C.L.J. 544.**

——**S. 167** — *"Incumbrance"—Meaning of—"Under-tenure"—If incumbrance—Revenue Sale Law.*

The word "incumbrance" as used in the Bengal Tenancy Act is of wider import than the same word as used in S. 37, Revenue Sales Act. An under-tenure created by the defaulting tenure-holder would be an incumbrance within the meaning of S. 167, B. T. Act, according to the definition given in S. 161, but is not incumbrance within the meaning of S. 37, Revenue Sales Act. (*R. C. Mitter, J.*) SERAJGANJ LOAN OFFICE CO., LTD. *v.* SASIMUKHI DEBI. **I.L.R. (1937) 1 Cal. 595=168 I.C 538=9 R.C. 835=41 C.W.N. 110=A.I.R. 1937 Cal. 36.**

——**S. 167**—*Non-transferable holding sold under rent decree—Purchase by landlord—Effect—Rights of landlord purchaser.*

Where a holding is non-transferable and a purchaser under a rent decree happens to be the landlord, he in his capacity as landlord is entitled to disregard the encumbrance, if not made with his consent, and may take possession of the purchased holding and may successfully maintain it in opposition to the claims of encumbrancer. (*James and Chatterjee, JJ.*) RAM CHANDERJI *v.* HEM CHANDRA. **18 Pat. 184=182 I.C. 557=5 B.R. 779=12 R.P. 21=20 Pat.L.T. 469=A.I.R. 1939 Pat. 200.**

——**S. 167**—*Order refusing to issue notice—Revision—C.P.C., S. 115.*

An order of a Munsif refusing to issue a notice of annulment ot encumbrance under S. 167 of the B. T. Act, is open to revision by the High Court under S. 115, C. P. Code. The Munsif in passing the order acts as a Court and not merely in a ministerial capacity. (*Sen, J.*) KIRAN CHANDRA *v.* MATILAL. **44 C.W.N. 864=71 C.L.J. 544.**

BENGAL TENANCY ACT (1885), S. 167.

——**S. 167**—*Property subject to maintenance charge—Rent sale—Zamindar purchasing himself—Subsequent grant of putni or permanent tenure—Right to annul charge.*

Where a certain property subject to maintenance charge is sold in rent sale and is purchased by zamindar himself and subsequently the zamindar grants a putni or permanent tenure, the charge does not shift from the zamindar to the putni-holder. In spite of the putni, the zamindar still remains a person affected by the charge as being the owner of the charged property; the zamindar therefore is entitled to make an application to annul the charge under S. 167, B. T. Act. (*R. C. Mitter, J.*) SERAJGANJ LOAN OFFICE CO., LTD. *v.* SASIMUKHI DEBI. **I.L.R. (1937) 1 Cal. 595=168 I.C. 538=9 R.C. 835=41 C.W.N. 110=A I.R. 1937 Cal. 36.**

——**S. 167**—*Rent decree—Sale in execution—Annulment of under-tenure—Prior purchaser of tenant's interest not impleaded in suit—Right to set up purchase in defence.*

A landlord sued his recorded tenants for rent, and having obtained a decree, put up the holding for sale. Plaintiff purchased the holding, obtained possession and annulled the interest of an under-tenant by a notice under S. 167, B. T. Act, and sued for recovery of possession. The under-tenant had purchased the interest of one of the recorded tenants at a sale in execution of a money decree prior to the rent suit, but was not impleaded as a party to the latter suit, as the landlord did not know of the purchase. The sale in execution of the money decree was not confirmed until after the purchase by the plaintiff. The under-tenant pleaded that as he was not impleaded in the rent suit, the decree was not a rent decree and that the sale therefore did not pass the entire tenure.

Held, that the entire tenure itself passed to the plaintiff, and that the purchaser at the sale in execution of the money decree could not set up his purchase as a shield to defeat the plaintiff's claim. (*Cunliffe and Henderson, JJ.*) RAMESH CHANDRA GUHA *v.* DINANATH MESTARI. **63 Cal. 846=162 I.C. 348=8 R.C. 600=62 C.L.J. 483=A I.R. 1936 Cal. 178.**

——**S. 167**—*Rent sale—Purchase by incumbrancer—Omission to serve notice of annulment of incumbrance—Effect of—Sale if subject to encumbrance.*

Where at a rent sale the encumbrancer himself purchases the property hypothecated to him, it is not necessary that any notice should be given, under S. 167 of the Bengal Tenancy Act, to annul the incumbrance, and the omission to give a notice under S. 167, will not render the sale subject to the mortgage in question. (*D. N. Mitter and Patterson, JJ.*) MOHENDRA NATH BANERJI *v.* HARSHAMUKHI DASSI. **164 I.C. 490=9 R.C. 229=40 C.W.N. 108.**

——**S. 167**—Scope—*Sepatni patta* and *kabuliyat*—Lands included in *sepatni* but not put in possession of *sepatnidar*—Lands throughout held by landlord—Purchaser of *sepatni* in rent sale—Right to annul landlord's possession as incumbrance and to sue for *khas* possession. *See* B. T. ACT, S. 161. **41 C.W.N. 81.**

BENGAL TENANCY ACT (1885), S. 170.

——S. 170—*Decree for arrears of rent against recorded tenants of putni tenure—Tenure attached and advertised for sale in execution—Claim filed by tenure-holders under O. 21, R. 58, C. P. Code—Maintainability.*

A putni tenure had been sub-divided amongst a number of tenure-holders. The proprietors brought a suit for rent in respect of the entire tenure against the recorded tenants and obtained a decree *ex parte*. The decree was in due course put into execution and the putni tenure was attached and advertised for sale. Thereupon, some of the tenure-holders filed a claim under O. 21, R. 58, C. P. Code, stating that they had a four anna share in the attached putni mehal, that they had been paying rent to their landlord, and as they had not been made parties to the original suit, the decree passed in that suit was not a rent decree. These tenure-holders had not however applied in the suit for rent for being made parties.

Held, that the decree as it stood was valid against all the co-tenants including the tenure-holders, and as they had their remedy by way of suit, their claim under O. 21, R. 58 was barred under S. 170, B. T. Act. (*S. K. Ghose and B. K. Mukherjea, JJ.*) DEBENDRA NATH *v.* SASI BHUSAN. **182 I.C. 489=12 R.C. 72=A.I.R. 1939 Cal. 272.**

——S. 170—*Deposit of decretal amount by third party—Landlord challenging depositor's right to make deposit and failing—Withdrawal of deposit by landlord—If operates as recognition of depositor as tenant.*

Where a third party has deposited the decretal amount and the landlord has challenged the depositor's right to make deposit, but that objection has been overruled by the executing Court on the footing that the depositor had an interest voidable on the sale as he was the real purchaser of the land sought to be sold, the decision of the executing Court is a summary order and is not appealable. If, in such circumstances, the landlord chooses to withdraw the deposit, the withdrawal does not amount to recognition of the depositor as tenant. (*Dhavle, J.*) INDERJIT PRATAB BAHADUR SAHI *v.* SURAJ NARAIN. **A.I.R. 1940 Pat. 21.**

——S. 170—*Execution of rent decree against benamidar—Landlord withdrawing same—Right of landlord to proceed against benamidar—If lost.*

The benami character of the interest of a tenant in whose name the sale certificate stands cannot, merely because the executing Court allowed the beneficial owner to deposit the decretal amounts and the landlord proceeded to withdraw them, disentitle the landlord to proceed against the certified auction-purchaser or entitle the beneficial owner to claim that he should have been sued instead of his benamidar and that the decrees obtained against the latter do not bind him. (*Dhavle, J.*) INDERJIT PRATAB BAHADUR SAHI *v.* SURAJ NARAIN. **A.I.R. 1940 Pat. 21.**

——Ss. 170 and 171—*Mortgagee of portion of occupancy holding, also a co-tenant with judgment-debtor—Right to order for possession in his favour.*

A mortgagee of a portion of the occupancy holding is entitled to deposit the money under S. 170 of the Bengal Tenancy Act and to have an order for possession in his favour under S. 171 of that Act, although he is also an unrecognised transferee of another portion of the occupancy holding and is, therefore, a co-tenant with the judgment-debtor. (*Mukherjea, J.*) MANINDRA CHANDRA GHOSE *v.* RAM NATH SAMANTA. **41 C. W.N. 983.**

BENGAL TENANCY ACT (1885), S. 173.

——S. 170—*Scope—Decree for arrears of rent against all tenants recorded in the Sherishta of landlord—Execution—Claim by person claiming to be purchaser from tenant—Maintainability—O. 21, R. 58, C. P. Code.*

S. 170 of the B. T. Act bars a claim under O. 21, R. 58, C. P. Code, by a person not a party to the decree who claims to be in possession under purchase from a tenant of the holding, in all cases where it is shown that the decree is one for arrears of rent, and where all the tenants recorded in the landlord's *Sherishta* are the judgment-debtors. The landlord is not bound to go beyond his own record, and the mere fact that there may be other tenants than the judgment-debtors does not allow of a claim being preferred in the execution of a decree for arrears of rent.

Rowland, J.—If the decree is only a money decree, the sale in execution passes only the right, title and interest of the judgment-debtor, and S. 170 is no bar in such a case to a claim by a person interested under O. 21, R. 100, C. P. Code. The remedy of claim under O. 21, R. 58, C. P. Code, is barred in all cases where the holding is put to sale for its own arrears. The only way of preventing the sale is to pay the decretal amount. (*Agarwala and Rowland, JJ.*) SURPAT SINGH *v.* SHITAL SINGH. **15 Pat. 614=162 I C. 805=8 R. P. 575=17 Pat.L.T. 385=1936 P.W.N. 388=A.I R. 1936 Pat 480**

——S. 170 (1)—*Scope—Execution of rent decree—Third party claiming title to tenure—Right to sue for declaration of title to holding.*

It is true that in execution of a rent decree a third party claiming title to the tenure is not competent to apply under O. 21, R. 53, C. P Code. But S. 170 (1) does not bar a substantive suit by him for declaration of title to the holdings and for declaring that the landlord had no right to have them sold in execution of the decree. (*Dhavle, J.*) INDERJIT PRATAB BAHADUR SAHI *v* SURAJ NARAIN. **A.I.R. 1940 Pat. 21.**

——S. 171—Scope—Payment to save holding from sale—Mortgage in respect of—Incidents—Applicability of Transfer of Property Act. *See* T. P. ACT. S. 60. **15 Pat. 481.**

——S. 171—*Suit for arrears of rent—One of co-tenants paying entire decretal amount—Contribution suit against other co-tenants Right to charge.*

Where in a suit for arrears of rent by the proprietors one of the co-tenants pays the entire decretal amount and then sues other co-tenants for contribution it is doubtful whether such person is entitled to claim a charge under S. 171. (*Mahomed Noor, J.*) BHAGWAN DAS *v.* AKBAR HUSSAIN KHAN. **3 B.R. 50=165 I.C. 567=9 R. P. 182=A.I.R. 1936 Pat. 571.**

——Ss. 173 and 174—Locus standi *to apply—Purchaser of interest of under-raiyat—Purchase invalid*

A purchaser of a portion of the interest of an under-raiyat cannot make an application under Ss. 173 and 174 of the Bengal Tenancy Act to

have the sale of an occupancy holding set aside, when his purchase is not valid in law and he has not got possession of the land. (*S. K. Ghose and Edgley, JJ.*) SKISH CHANDRA MANDAL *v.* BISHNUPADA MANDAL. **178 I.C. 204=11 R.C. 330=42 C.W.N. 1011=A.I.R. 1938 Cal. 550.**

——Ss. 173 (3) and 174—*Order setting aside sale under both provisions—Appealability.*

Where an application by a judgment-debtor in a rent decree to set aside a sale held in execution of that decree under S. 174 of the Bengal Tenancy Act and also on the ground that the purchase was barred under S. 173 (3), is allowed under the provisions of both, the order allowing the application is open to an appeal by one who was a party to the rent suit and to the application. (*Edgley, J.*) ADAM ALY KHAN *v.* JAGADISH CHANDRA. **43 C.W.N. 108.**

——S. 174—*Appeal—Order of Munsif refusing to set aside sale—Appealability—Revision.*

No appeal lies against an order of a Munsif refusing to set aside a sale under S. 174, B. T. Act. The remedy is by way of revision. (*Courtney-Terrell, C.J., James and Manohar Lall, JJ.*) SUKHOO SAO *v.* SITA RAM HAJJAM. **17 Pat. 53=172 I.C. 785=4 B.R. 174=10 R.P. 345=18 Pat. L.T. 938=1937 P.W.N. 934=A.I.R. 1938 Pat. 21 (S.B.).**

——S. 174—*Application to set aside sale—Limitation—Sale processes fraudulently suppressed by decree-holder purchaser—Applicant's knowledge of fraud—Burden of proof.*

Where in an application to set aside a rent sale under S. 174 of the B.T. Act the Court finds that the decree-holder purchaser fraudulently suppressed the sale processes, the burden is upon him to show that the person injured by this fraud and suing to recover the property had clear and definite knowledge of the fact which constituted fraud at a time which is too remote to allow him to bring his application. (*Mukherjea, J.*) MAHAMMAD GHUNGURIA SARKAR *v.* RAMGOPAL DAS KUNDU. **43 C.W.N. 467.**

——S. 174—*Application to set aside sale by usufructuary mortgagee of holding—Limitation—Applicant's knowledge of sale—If material.*

In an application to set aside sale under S. 174 of the Bengal Tenancy Act by a usufructuary mortgagee with regard to a portion of the holding in arrears, his knowledge or ignorance of the sale is not at all material for purposes of limitation. (*Mukherjea, J.*) BISHOP OF MYLAPUR *v.* MEHER ALI. **41 C.W.N. 993.**

——S. 174—*Compliance with—Decree-holder and judgment-debtor certifying satisfaction of decree—Deposit by judgment-debtor of five per cent. for payment to auction-purchaser—Sufficiency—Sale—If to be set aside—Deposit of decretal amount in Court—Necessity.*

After a sale of a holding in execution of a rent decree and within thirty days of the sale the decree-holder and the judgment-debtor certified to the Court that the decree had been satisfied and fully paid, and the judgment-debtor deposited five per cent. of the purchase-money for payment to the auction-purchaser and prayed that the sale be set aside.

Held, that the provisions of S. 174, B. T. Act, had been substantially complied with and the sale should be set aside; it was not necessary for the judgment-debtor to deposit the amount of the

decretal debt in Court for the benefit of the decree-holder when the decree-holder himself had certified satisfaction of the decree. (*Courtney-Terrell, C.J., James and Manohar Lall, JJ.*) SUKHOO SAO *v.* SITA RAM HAJJAM. **17 Pat. 53=172 I.C. 785=4 B.R. 174=10 R.P. 345=18 Pat. L.T. 938=1937 P.W.N. 934=A.I.R. 1938 Pat. 21 (S.B.).**

——S. 174—*Compliance—Payment to decree-holder out of Court of amount due to him within 30 days—Application to set aside sale and deposit of compensation to auction-purchaser within time—If sufficient compliance—Duty of Court to set aside sale.*

Where it is established, either by an admission of the decree-holder or by an application made by him to the Court, that the amount due to the decree-holder has been received by him out of Court within thirty days, and the judgment-debtor applies to set aside the sale within the thirty days and deposits the compensation money due to the auction-purchaser also within the same time, the Court is bound to set aside the sale, because there is a substantial compliance with the provisions of S. 174 of the Bengal Tenancy Act. (*Manohar Lall, J.*) MAHOMED ZAKIRUDDIN *v.* MAHOMAD NAEEM. **18 Pat.L.T. 776=1937 P.W.N. 764=172 I.C. 13=10 R.P. 294=A.I.R. 1937 Pat. 635.**

——S. 174—Locus standi *to deposit—Person claiming under interest created before rent sale but devolving on him subsequently.*

A person who claims under an interest which had been created before the rent sale, has *locus standi* to make the deposit under S. 174 (1) of the B. T. Act, though such interest devolved on him subsequently to such sale. (*R. C. Mitter, J.*) DAYALUDDIN SIRKAR *v.* AZIMUDDIN MONDAL. **41 C.W.N. 255.**

——S. 174—Locus standi *to deposit—Purchaser of portion of non-transferable occupancy holding—Purchase effected before amendment.*

A purchaser of a portion of a non-transferable occupancy holding has *locus standi* to make the deposit under S. 174 (1) of the B. T. Act, though the purchase was effected before the amendment of the Act came into force. (*R. C. Mitter, J.*) DAYALUDDIN SIRKAR *v.* AZIMUDDIN MONDAL. **41 C.W.N. 255.**

——S. 174—Order under— Dispute between auction purchaser and private purchaser from tenant—Appeal—Competency. *See* B. T. ACT, S. 153. **40 C.W.N. 95.**

——S. 174—*Order under—Second appeal, if competent.*

No second appeal is competent against an order setting aside or refusing to set a sale under S. 174 of the Bengal Tenancy Act. (*Mukherjea, J.*) BISHOP OF MYLAPUR *v.* MEHER ALI. **41 C.W.N. 993.**

——S. 174 (1)—*Right to apply—Purchaser at private sale after auction sale—"Interest"—Meaning of.*

There is nothing in S. 174 (1) of the Bengal Tenancy Act to indicate that the interest of the person, who makes the application for setting aside the sale, must be in existence at the date of the sale. The sole criterion for determining whether a person's interest is affected by the sale is to find out whether his interest will be affected if the sale be ultimately confirmed. Under S. 159 of the Bengal Tenancy Act, a purchaser at a rent

sale gets his title from the date of the confirmation of the sale, and not from the date of the sale, as in a sale under C. P. Code. The judgment-debtor has, therefore, a subsisting interest between the date of the sale and the date of the confirmation of the sale. The purchaser from the judgment-debtor after the date of the sale and before the confirmation of the sale, therefore, acquires the subsisting interest of the judgment-debtor, and has *locus standi* to get the sale set aside under S. 174 (1) of the Act. (*Nasim Ali and Rau, JJ.*) SUSHIL KUMAR GHATAK *v.* SATYA GOPAL CHATTERJI. **I.L.R. (1940) 1 Cal. 153=189 I.C. 203=A.I.R. 1940 Cal. 329.**

——**S. 174**—*Sale set aside on condition of deposit of decretal amount within certain time—Further extension of time for deposit—Power of Court to grant—C P. Code, S.* 148.

An order allowing an application to set aside a sale under S. 174 of the Bengal Tenancy Act on condition that the applicant deposited in Court the decretal amount within a certain time, is a final order which cannot be modified except in the manner provided by O. 20, R. 3, C. P. Code. In a case such as this S. 148, C. P. Code, has no application and the Court has, therefore, no jurisdiction to allow a further extension of time for making the requisite deposit. (*Edgley, J.*) GIRISH CHANDRA DAS *v.* ANNADAMONI DASI. **182 I.C. 760=12 R C. 104 (1)=43 C.W.N. 553=A.I.R. 1939 Cal. 309.**

——**S. 174**—*Scope—Setting aside of sale—Conditions of—Application by transferee from judgment-debtor—Deposit of five per cent. alone for auction-purchaser—Decree amount and costs not deposited—Allegation of payment to decree-holder out of Court—Decree-holder consenting—Objection by auction purchaser—Proper course—Duty of Court—Order setting aside sale—Legality.*

Under S. 174, B. T. Act, before a sale in execution of a decree for rent can be set aside, the deposit must be made within 30 days as laid down by S. 174 (2), and on a plain reading of the words of the section, the sale has to be confirmed unless the money is paid into Court. The section does not provide for any settlement between the decree-holder and the judgment-debtor out of Court or for an application being made by the decree-holder-landlord. A sale cannot be set aside otherwise than under S. 174 or R. 89 of O. 21, C. P. Code, by consent of some but not of all of the parties concerned in the decree, the execution and the sale. Though the Court may give effect to a compromise and to allow adjustment outside the scope of S. 174 provided all the parties entitled to be heard in the matter concur, and if that is done one of those parties will not be heard at a later stage to resile from his agreement and impeach the act of the Court on the ground of its irregularity. The correct procedure is to abide by what the statute has laid down But in any case, when there is no such general agreement among all the parties, the proper course for the Court to follow is to adhere strictly to what is laid down by the statute itself for its guidance. Where a transferee from the judgment-debtor applies to the Court on the last but one day of limitation to have the sale set aside on depositing the five per cent. of the purchase-money alone for payment to the auction-purchaser, alleging, in lieu of depositing the amount of the decree with

costs, that he has paid the same to the decree-holder out of Court, and the application is assented to by the decree-holder but objected to by the auction-purchaser, the Court is bound to reject the application and confirm the sale. An order setting aside the sale under such circumstances is illegal and without jurisdiction. (*Rowland, J.*) HANUMAN SINGH *v.* BAIJNATH PRASAD SINGH. **172 I.C 8=10 R P 298=1937 P.W.N. 497=18 Pat.L.T. 409=A.I.R. 1937 Pat. 537.**

——**S. 174** (1)—*Application under—Applicant obtaining attachment before judgment*—Locus standi.

The words of S. 174 (1) are *pari materia* with the provisions of O. 21, R. 90. The words "whose interests are affected by the sale" are no doubt not limited to persons whose proprietary or possessory interests are affected. They also include persons whose pecuniary interests are affected by the sale. But a person who has obtained an attachment before judgment of property subsequently put to sale at a rent sale, but has not obtained a decree in his suit before his application under S. 174, Cl. (1), for setting aside the rent sale, is not a person whose pecuniary interests are affected by the sale and he has therefore no *locus standi* to make and maintain the application under S. 174 (1). 15 I.C. 668 and A.I R. 1925 Cal. 1103, applied. (*R. C. Mitter, J.*) BAIDYA NATH PANDEY *v.* HEMLATA DASI. **160 I. C. 1080=8 R.C. 468=40 C.W.N. 759=A.I.R. 1936 Cal. 26.**

——**S. 174** (1)—*Right to apply under—Holder of money decree obtaining order for attachment of holding in execution*—Locus standi *to apply.*

A person who has obtained a decree for money and has obtained an order for attachment of the holding in question is a person "whose interests are affected by sale" within the meaning of those words in S. 174 (1), and such person has a right to apply to have the sale set aside, although the attachment is actually effected after the sale only. (*R. C. Mitter, J.*) BULANDA BASHINI DASI *v.* PRAN GOVINDA DHAR. **I.L.R. (1937) 1 Cal. 230=166 I.C. 388=9 R.C. 509=40 C W.N. 1334 =63 C.L.J. 554=A.I.R. 1936 Cal. 547.**

——**S. 174** (1)—*Scope—Application by decree-holder to set aside sale—Competency—Purchase by decree holder—Payment of decree amount and compensation out of Court—Agreement that sale should be set aside—Power of Court to set aside sale on application of decree-holder.*

S. 174 (1), B. T. Act, no doubt lays down the normal procedure to get a sale set aside by making payment of the decree-amount and compensation. But it is an undoubted principle of law that where a Court has general jurisdiction, the parties to a proceeding can, by agreement, adopt a different procedure—procedure quite contrary to the ordinary *cursus curiae*, and the Court is bound to give effect to such an agreement. Where the decree-holder is himself the auction-purchaser, and if he and the judgment-debtor agree between themselves on a payment of the decretal amount and compensation out of Court after the sale that the decree-holder should apply and get the sale set aside the Court has to set aside the sale. There is no principle on which the Court can refuse to set aside the sale. (*R. C. Mitter, J.*) BANGA CHANDRA MOZUMDAR *v.* NANDA KUMAR MOZUM-

BENGAL TENANCY ACT (1885), S. 174.

DAR. I.L.R. (1937) 1 Cal. 142=40 C. W. N. 1402.

——S. 174 (3)—Locus standi *to apply—Transferee of holding from judgment-debtor before decree.*

A person who alleges that the holding had been transferred to him by the judgment-debtor before the date of the rent decree, and who was not a party to the rent suit or to the subsequent proceedings taken in execution of the decree, has no *locus standi* to apply to have the execution sale set aside under S. 174 (3) of the Bengal Tenancy Act. (*Edgley, J.*) CHARUBALA DEI *v.* BAIKUNTHA NATH JANA. 182 I.C. 980=12 R.C. 124=43 C.W N. 743=A.I.R. 1939 Cal. 419.

——S. 174 (3)—*Scope—Objection under—Right to raise*—Locus standi *of third party when landlords admit receipt.*

An objection under S. 174 (3) of the B. T. Act to a deposit made by a transferee of the judgment-debtor tenant on the ground that the transferee has not paid the transfer fee and therefore is not competent to make the deposit, is one for the landlord to raise. If the landlord, however, admits receipt of it, a third party cannot compel the Court to investigate such a question of fact. (*Rowland, J.*) HANUMAN SINGH *v.* BAIJNATH PRASAD SINGH 172 I.C. 8=10 R.P. 298=18 Pat.L.T. 409=1937 P.W.N. 497=A.I.R. 1937 Pat 537.

——S. 174 (3) (*b*)—*Time for deposit of decretal amount fixed in order—Extension of—Jurisdiction of Court—C. P. Code, S.* 148.

The Court which passes an order under S. 174 (3) (*b*) of the B. T. Act that the application of the judgment-debtor to have the sale set aside will be allowed on deposit of the decretal amount by him within a certain time and that on his failure to do so the application will stand dismissed, has no power to extend the time for making the deposit, even though the application for extending the time is made within the period mentioned in the order. Owing to the final character of that order, the Court has no jurisdiction to vary it unless proper steps are taken to review it under O. 47, R. 1, C. P. Code. S. 148, C. P. Code, has no application to the above case That section only authorises an enlargement of time in respect of acts prescribed or allowed by the Code. Further it does not apply in the case of a decree or order of a final character made by a Court, but it applies only to acts preliminary to or during the course of the trial of a case before the final order has actually been made. (*Edgley, J.*) HAJI EAKUR SHEIK *v.* SAMIAN BIBI. 188 I. C. 661=44 C.W.N. 449=A.I R. 1940 Cal. 275.

——S. 174 (3), proviso (b)—*Deposit under—If condition precedent to application—"Shall be allowed"—Construction.*

The preliminary deposit under S. 174 (3), proviso (*b*) of the Bengal Tenancy Act is not a condition precedent to the entertainability of the application to set aside. It is enough if the deposit is made after the filing of the application, but before the application is heard and allowed. The expression "shall be allowed' cannot be construed to mean "shall be admitted" or "shall be entertained." To admit the application is not the same thing as to allow it. (*Cunliffe and Henderson, JJ.*) AJIT KUMAR BASU *v.* SURENDRA NATH MANDAL. 165 I.C. 385=9 R.C. 387=40 C W N. 526=63 C.L.J. 19=A I.R. 1936 Cal. 430.

——S. 174 (3), proviso (b)—*Deposit under—When to be made.*

The deposit required under proviso (*b*) to sub-S. (3) of S. 174, B. T. Act, has to be made not along with the application under S. 174 (3), but has to be made before that application is allowed, that is to say, the proper time for the Court to call for the deposit under S. 174 (3), proviso (*b*), is after the Court comes to the conclusion that the sale ought to be set aside. (*R. C. Mitter, J.*) KALI PADE BHANDARI *v.* PANCH KARI MANDAL. 162 I.C. 623=8 R C. 621 =40 C W.N. 531=A.I.R. 1936 Cal. 197.

——S. 174 (3), proviso (b)—*Deposit under—When to be made—"Allowed"—Meaning of.*

The word "allowed" in proviso (*b*) to sub-S. 3 of S. 174 of the B. T. Act means "granted" and should not be read as "admitted" or "entertained". It is not therefore necessary for an applicant to make the deposit at the time he makes the application for setting aside the sale as a condition precedent to his application being entertained. (*S. K. Ghose and Edgley, JJ.*) BHOLANATH ROY CHOUDHURY *v.* HAJI SYED MAHAMAD MASHUD. 171 I.C. 479=10 R.C. 270 =40 C.W.N. 528.

——S 174 (5)—*Appeal filed within limitation but deposit made only after limitation—Appeal, if competent.*

Under S. 174 (5) of the B. T. Act, the deposit must be made before the appeal could be entertained at all. Consequently an appeal, though filed on the last date of limitation, is not competent, if the deposit is made only subsequently after the period of limitation. (*S. K. Ghose, J.*) DAKHAJA MOHAN ROY CHOUDHURY *v.* MATIAR RAHMAN. 42 C.W.N 646.

——S 174 (5)—*Appeal presented before but deposit made after limitation—Competency.*

Where an appeal is preferred against an order dismissing an application to set aside a sale, the deposit must be made as required by S. 174 (5) of the B. T. Act before the appeal can be entertained at all. If, therefore, the deposit is made after the prescribed period of limitation, the appeal is incompetent although it is presented within time. A subsequent order accepting the deposit cannot save limitation. (*Edgley, J.*) BHAGABAN CHANDRA BHAKAT *v.* SATIA BEWA. I.L.R. (1939) 2 Cal. 49.

——S. 174 (5)—*Deposit under—When to be made—Power of Court to extend time.*

S. 174 (5) of the Bengal Tenancy Act contemplates that the amount recoverable in execution of the decree must be deposited with the appellate Court immediately after the presentation of the appeal to the Court in question and before its registration. The deposit is a condition precedent or at any rate a contemporaneous act in connection with the admission of the appeal. The Court has no authority to extend the time within which the deposit might be made. (*Edgley, J.*) SUDHIR CHANDRA *v.* NAZIR MAMUD. 182 I.C. 118=12 R. C. 11=43 C.W.N. 106=68 C.L.J. 402=A.I.R. 1939 Cal. 30.

——S. 174 (5)—*Deposit, when to be made.*

Where an appeal is preferred against an order dismissing an application to set aside a sale, the deposit must be made as required by S. 174 (5) of

the B. T. Act before the appeal can be entertained at all. The deposit is a condition precedent to or, at any rate, a contemporaneous act in connection with the "admission of the appeal". After the appeal is presented and registered, the Court has no power to give the appellant an opportunity of making the required deposit. (*Costello, Ag. C.J. and Edgley, J.*) BIDHUBALA DASI *v.* KUMUDNATH DAS. **67 C.L.J. 211=41 C.W.N. 1299.**

——**S. 174 (5)**—*Order dismissing for default application for setting aside sale—Appeal.*

An order dismissing for default an application for setting aside a sale is appealable under S. 174 (5) of the Bengal Tenancy Act. (*S. K. Ghose, J.*) DEBENDRA NATH *v.* GOPAL CHANDRA. **42 C.W.N. 128.**

——**S. 174 (5)**—*Order dismissing for default application to set aside sale—Appeal.*

An appeal lies against an order of Court dismissing for default an application under S. 174 of the B. T. Act to set aside a sale. (*Edgley, J.*) MOHAMMAD KAZIBULLA *v.* HUMAYUN REZA CHOUDHURY. **I.L.R. (1938) 2 Cal. 345=42 C.W.N. 612=179 I.C. 816=11 R.C. 619=A.I.R. 1938 Cal. 454.**

——**S. 174 (5)**—*Order setting aside sale—Second appeal—If competent.*

No second appeal is competent against an order setting aside a sale under S. 174 of the B. T. Act. The word 'appeal' in S. 174 (5) cannot be interpreted to include, by implication, a second appeal also. (*Mukherjea, J.*) CHARLES DE SA FRAGOSA *v.* MEHER ALI. **I.L.R. (1937) 2 Cal. 496.**

——**S. 174 (5)**—*Order under S. 173 (3)—Right of appeal.*

S. 174 (5) of the B. T. Act applies to applications falling under S. 174 and does not apply to applications coming under S. 173 (3). Consequently, there is no right of appeal against an order under S. 173 (3). (*S.K. Ghose and Nasim Ali, JJ.*) ASHUTOSH MANDAL *v.* GATIKRISHNA. **176 I C 761=11 R.C. 171=42 C.W.N. 585=A.I.R. 1938 Cal. 446.**

——**S. 174 (5)**—*Scope—Order refusing to set aside sale but finding that sale is only one in execution of money decree on account of non-service of notice under S. 148-A (7)—Appeal by decree-holder landlord—Maintainability—Revision.*

Two co-sharer landlords obtained rent decrees against the tenant on an occupancy holding under them. The petitioner, one of the co-sharer landlords, purchased the holding at a sale in execution of his decree. The other then applied to have the sale set aside on the ground that the processes and the proclamation of sale had been suppressed. The Court found against the allegation, but found that the notice required by S. 148-A (7) of the B. T. Act had not been served. It therefore refused to set aside the sale but observed that the sale was to be considered only as one in execution of a money decree, as passing the right, title and interest only of the tenant in the holding but not the holding itself. Petitioner applied in revision against this observation contending that the same was outside the scope of the proceedings.

Held, on a preliminary objection, that under S. 174 (5) of the B. T. Act, an appeal would lie against the finding or observation that the sale was only a sale in execution of a money decree, and therefore the petitioner could not maintain an application in revision and agitate the question therein.

Held, further, that the observation complained of was not outside the scope of the proceedings. (*Khundkar, J.*) KHAGENDRA NATH PARUI *v.* SARAT KUMAR DAS. **40 C.W.N. 182 (2).**

——**Ss. 178, 179 proviso and 195 (e)**—*Interest on arrears of* patni *rent—How regulated—Patni Regulation, Ss. 2 and 3.*

In view of Ss. 2 and 3 of the Patni Regulation and S. 195 (*e*) of the B. T. Act, the matter of payment of interest on the arrears of *patni* rent is to be regulated by the terms of the engagement between the parties, and not by S. 178 or the proviso to S. 179 of the B. T Act. 39 C.W.N. 1003, Foll. (*Guha and Bartley, JJ.*) SHAMSER ALI CHOUDHURY *v* HAJI ARAF MUHAMMAD TALUKDAR. **167 I.C. 404=9 R.C. 685=41 C.W.N. 605.**

——**S. 178**—*Monthly tenancy* — Kabuliyat—*Clause that tenant not to claim compensation in case of acquisition—Effect of—Tenant making improvements—Right of.*

A clause that the tenant is not to receive any compensation in case the acquisition of land is made by Government or Municipality is not inconsistent with the nature of the tenancy, namely, the tenancy being one from month to month. The clause regarding the non-taking of compensation cannot be said to be a clause which is collateral to the ordinary incident of the holding. But the clause does not preclude the tenant from claiming such part of the compensation as has been the result of the improvements on the land made by the tenant; in other words such part of the compensation as had been the result of improvements which have enhanced the market value of the land: *Bradbury* v *Grimble & Co.*, (1920) 2 Ch. D. 548 and *Sherwood* v. *Tucker*, (1924) 2 Ch. D. 440, Ref. (*D. N. Mitter and Patterson, JJ.*) RADHA NATH MAITY *v.* KRISHNA CHANDRA MUKERJI. **165 I.C. 682=9 R.C. 445=40 C.W.N. 722=63 C.L.J. 72=A.I.R. 1936 Cal. 249.**

——**S. 178**—*Scope—Acquisition of land—Occupancy raiyat agreeing to abandon claim for—If bound by agreement.*

Even in the case of an occupancy raiyat a clause in a kabuliat with regard to the tenant abandoning any claim to compensation money is effective and does not hit in any way the provisions of S. 178, Bengal Tenancy Act. (*D. N. Mitter and Patterson, JJ.*) RADHA NATH MAITY *v.* KRISHNA CHANDRA MUKERJI. **165 I.C. 682=9 R.C. 445=40 C.W.N. 722=63 C.L.J. 72=A.I.R. 1936 Cal. 249.**

——**S. 178 (f)**—Scope and effect of—Under-raiyat in possession as service tenure—Subsequent lease before 1928 expiring after 1928—If protected from ejectment by holding for over 12 years—Right to claim benefit of S. 48-C (1), proviso (2). *See* BENGAL TENANCY ACT, S. 48-C (1), PROVISO (2). **40 C.W.N. 1275.**

——**S. 178, proviso (1)**—*Applicability*—Kabuliat *of forest land for purposes of reclamation—Stipulation for interest at one anna per rupee per month—Enforceability.*

Where the terms of a *kabuliat* of the year 1876 evidence a demise in favour of tenants by way of a *Howladari potta* of certain land covered by forest consisting of timber and nals, for the purpose of reclamation, and all the terms usually

present in a reclamation lease are also present in the *kabuliat*, the *kabuliat* must be held to be a *bona fide* lease for reclamation purposes, so as to attract the operation of proviso (1) to S. 173, B. T. Act. A stipulation in such a lease for payment of interest in respect of arrears of rent at the rate of one anna per rupee per mensem is legal and enforceable. (*Guha and Khundkar, JJ.*) UPENDRA NATH DAS *v.* SURENDRA NATH ROY SIRCAR. **63 C.L.J. 283.**

——**S. 179**—*Scope*—Kabuliyat—*Stipulation in providing for 6¼ per cent. per month interest in case of default in instalment even in respect insignificant or petty default—Power of Court to relieve against—Contract Act, S. 74, etc.*

Under S. 179 of the B. T. Act, the parties are competent to make their own contract. But if a provision in a *kabuliyat* is found to be a penalty, the Court has ample jurisdiction to grant proper relief to the tenant. Where a tenant in his *kabuliyat* undertook that he would not deposit any amount of rent, road cess, etc., that fell short of the amount of any kist, and that if any instalment of rent, road cess, etc., paid by him fell short by even a rupee the landlord in that case should be competent to realise interest for default at the rate of 6¼ per cent. per mensem on the entire amount of instalment or rent, etc, from the date of default to the date of realization without any objection on his part.

Held, that the stipulation was one by way of penalty coming within the mischief of S. 74, Contract Act, and could be relieved against, and that the landlord was entitled only to reasonable damages or compensation. Interest at 12 per cent. per annum was considered reasonable under the circumstances and damages and compensation were allowed at that rate. (*Harries, C.J. and Manohar Lall, J.*) JANGDHARI SINGH *v.* BADRI NARAYAN SINGH. **1939 P.W.N. 220.**

——**S. 179**—*Scope*—Mokrari mourashi pottas *—Payment of selami and fixing of annual rent —Simultaneous* ekrarnama *undertaking to surrender land on payment of Selami, etc., within fixed time—Enforceability—Plea of occupancy right—Maintainability.*

Plaintiffs let out certain lands to the defendants by *mokrari mourashi pottas*, taking *selamis* and fixing annual rents. On the same date and simultaneously with them, defendants executed *ekrarnamas* to the plaintiffs, stipulating that if within fifteen years from the date of the *ekrarnamas*, the amount of selami paid for the *mokrari mourashi pottas* together with the costs of the *ekrarnamas* were paid, they would execute deeds of surrender in respect of the *mokrari mourashi pottas* and return the lands.

Held, that the contract evidenced by the *ekrarnamas* was valid and enforceable and did not contravene the provisions of S. 178, B. T. Act, and that the defendants could not avoid the agreement lawfully entered into by them by asserting that they had acquired occupancy rights in the lands, in view of S. 179 of the B. T. Act. (*Guha and Bartley, JJ.*) SHIB NARAYAN GHOSE *v.* GOPALCHANDRA GHOSE. **40 C.W.N. 1366**

——**S. 182**—*Applicability—Holding acquired subsequent to homestead—Benefit of S. 182—If available.*

When a raiyat holds his homestead otherwise than as part of his holding, he is entitled to the

benefit of S. 182, although he may have become a raiyat subsequently to the taking of his residential tenancy. (*Edgley, J.*) KALIKUMAR DEB *v* SECRETARY OF STATE. **167 I.C. 310=9 R.C. 684 =41 C.W.N. 405=A.I.R. 1936 Cal. 528.**

——**S. 182**—*Applicability—Homestead*—Kabuliyat *creating tenancy at will—Subsequent acquisition of occupancy right by tenant—Effect—Tenant—If protected from ejectment from homestead.*

If a raiyat's homestead is not part of his agricultural holding, *i e.*, if he holds the homestead otherwise than as a part of his holding, the incidents of his tenancy of the homestead are regulated by the Bengal Tenancy Act, and he can claim the benefit of S. 182, B. T. Act, notwithstanding that the status of an occupancy raiyat is acquired by the tenant subsequent to his taking the homestead for residential purposes and notwithstanding that the *kabuliyat* in respect of the homestead creates only a tenancy at will terminable by notice to quit. The tenant acquires occupancy rights in the homestead as well and cannot be ejected from it on the basis of the *kabuliyat*. (*Nasim Ali and Henderson, JJ.*) PULIN CHANDRA DAW *v.* AB-U-BAKHAR NASKAR. **163 I.C. 406=9 R.C. 22=40 C.W.N. 599=A.I.R. 1936 Cal. 565.**

——**S. 182**—*Applicability—Homestead situated in municipal area.*

S. 182 of the B. T. Act applies to a homestead which is situated within a municipal area which has not been notified as provided for in S. 1 (3) (iii) of the said Act. The tenant is entitled to the benefit of that section in spite of the fact that the homestead does not constitute an agricultural tenancy. (*S. K. Ghose, J.*) PANCHANON CHAUDHURY *v.* SAMATUL CHANDRA. **173 I.C. 602=10 R.C. 542=41 C.W.N. 1327=A.I.R. 1937 Cal. 695.**

——**S. 182 (as amended in 1928)**—*If retrospective.*

S. 182 of the Amending Act of 1928 became applicable to tenancies which were in existence at the time of the passing of the Amending Act. Both raiyats and under-raiyats on that date would get the benefit of the new section and would therefore be entitled to hold their homestead subject to the provisions of the Act as amended and the incidents of their homestead will be governed by provisions of new Act applicable to raiyats and under-raiyats. (*Edgley, J.*) KALIKUMAR DEB *v.* SECRETARY OF STATE. **167 I.C. 310=9 R.C. 684=41 C.W.N. 405=A.I.R. 1936 Cal. 528.**

——**S. 182**—*Settled raiyat—Acquisition of occupancy in homestead—Subsequent sale of agricultural holding—Effect—Occupancy in homestead—If lost—T. P. Act—Applicability.*

Where the settled raiyats of a village in respect of agricultural lands acquire occupancy rights in homestead lands, under S. 182 of the B. T. Act, the mere fact that they subsequently sell away the agricultural lands, in respect of which they have occupancy rights, cannot divest them of their right of occupancy in their homestead. The incidents of the tenancy would still be governed by the B. T. Act and not by the T. P. Act. (*Nasim Ali, J.*) HARU CHARAN MANNA *v.* SOURENDRA NATH GHOSH. **40 C.W.N. 182 (1).**

BENGAL TENANCY ACT (1885), S. 183.

——**S. 183**—Scope—Diluvion of lands in holding—Tenants ceasing to pay rent—Abandonment of holding—Usage as to—Validity. *See* LANDLORD AND TENANT—ABANDONMENT. **18 Pat.L.T. 477=A.I.R. 1937 Pat. 458.**

——**S. 183**—Scope—Occupancy holding—Right to deduction of rent under S. 52—Usage depriving tenant of such right—Validity. *See* B. T. ACT, Ss. 52 AND 183. **18 Pat.L.T. 477=A.I.R. 1937 Pat. 458.**

——**S. 184 (1)**—*Question of limitation not raised by pleadings—When may not be raised in appeal.*

S. 184 (1) of the B. T. Act does not overrule the provisions of O. 8, R. 2, C. P. Code, and a question of limitation should not be allowed to be raised before the Appellate Court, if the necessary facts had not been pleaded and so attention had not been drawn to them at the time of the trial. S. 184 (1) requires a suit to be dismissed even in an *ex parte* case although limitation has not been pleaded, only if it is clear from undisputed facts that the suit was filed after the period of limitation. (*Mukherjea and Roxburgh, JJ.*) BAJROGA KHATUN *v.* PROVINCE OF BENGAL. **I.L.R. (1939) 2 Cal. 358=187 I.C. 301=12 R.C. 564=43 C.W.N. 1096=A.I.R. 1940 Cal. 113.**

——**S. 188**—Construction—'Giving opportunity of joining in the proceedings'—Meaning of—Duty of co-sharer landlord applying for pre-emption under S. 26-F (1). *See* B. T. ACT, Ss. 26-F (1) AND 188. **40 C.W.N. 1023=A.I.R. 1936 Cal. 576.**

——**S. 188**—*Scope—Non-compliance with—Effect—Application under S. 26-F (1) beyond time—Procedure.*

If an application for pre-emption under S. 26-F (1) does not comply with the provisions of S. 188 of the B. T. Act or is defective and not made good within time, the application will have to be dismissed on that ground; but the so-called defect cannot nullify the provisions of S. 26-F (4) (*b*) by authorizing the Court to receive as a good deposit an amount of money put into Court beyond the periods mentioned in S. 26-F (4) (*a*). In such a case mistakes and omissions of the Court itself or of its officers are out of the question. (*R. C. Mitter, J.*) SACHINDRA NATH CHAKRAVARTY *v.* TRAILAKYA NATH CHAKRAVARTY. **I.L.R. (1937) 1 Cal. 112=167 I.C. 482=9 R.C. 698=40 C.W.N. 1023=A.I.R. 1936 Cal. 576.**

——**S. 188 (1)**—Scope—Transfer of holding—Evasion of payment of transferee by false statement as to relationship of transferor to transferee—Remedy of landlord—Application or suit—Court entertaining application without Court-fee as required for suit—Revision—If open. *See* B. T. ACT, S. 26-J. **63 C L.J. 103.**

——**S 188 (1) proviso**—*Application by co-sharer landlord for pre-emption under S. 26-F (1)—Notice on other co-sharer landlords not served in time owing to laches of Court officers—Their application under S. 26-F (4) dismissed as time barred—Application under S. 26-F (1)—Maintainability.*

In order to entitle a co-sharer landlord who applies for pre-emption under S. 26-F (1) of B.T. Act to get the benefit of the proviso to S. 188 (1) of that Act, the other co-sharer landlords must not only be made parties defendants to the proceeding but they must be given an opportunity of joining in the proceeding as co-applicants. In order that the other co-sharer landlords may get an opportunity of joining in the proceeding, the notice to join must be given to them before the period of limitation expires (*i.e.*) within the time prescribed by S. 26-F (4). Where the applicant for pre-emption under S. 26-F (1) does all that is required of him but on account of mistake of the Court or the laches of Court officers, the notice is not served upon the co-sharer landlords in time and their application under S. 26-F (4) (*a*) to join in the proceeding as co-applicants is rejected as barred by limitation, the application under S. 26 F (1) is not hit by S. 188 and is maintainable. (*Nasim Ali, J.*) FAZLE RAHAMAN PRODHAN *v.* BAHARULLA PRODHAN. **41 C.W.N. 444.**

BENGAL TENANCY ACT (1885), S. 193.

——**S. 188, proviso (1)**—Scope—Transfer fee due to landlord—Payment only in part—Recovery of balance—Procedure—Suit—If barred. *See* B. T. ACT, Ss. 26-J AND 188, PROVISO (1). **63 C.L.J. 105.**

—— **S. 191**—*Scope—Zamindar granting mokarari lease of* asli *and* diara *lands at consolidated rental—Revenue officers settling rent payable by tenant of* diara *portion—Government settling* diara *lands as temporarily settled estate with Zamindar—Contract of lease—If affected.*

When a Zamindar grants a mokarrari lease in respect of lands comprising his *asli* lands and *diara* lands accreted to his estate at a consolidated rental, his contract is not affected when the revenue officers settle the rent payable by the said tenant of the *diara* portion under S. 104 of the B. T. Act and Government settles the *diara* lands as temporarily settled estate with the said Zamindar The contract is not hit by S. 191 of the Act. When the contract is for *one* tenancy bearing a consolidated rent covering *both* lands of the permanently settled estate and *diara* lands, the contract cannot be split up, whether at the instance of the Revenue officer or of the landlord alone or of the tenant alone, and made into two. That would be creating a new contract between the parties, *i.e*, substituting two tenancies in the place of one. This can only be done by the mutual consent of the landlord and tenant, S. 191 contemplates that a lease or contract (provided it is made after the passing of the B. T. Act) may be seperseded as therein stated, only where the area comprised in the tenure or holding to which the contract relates is situate wholly in an estate not subject to a subsisting permanent settlement. (*R.C. Mitter and Biswas, JJ.*) SRISH CHANDRA NANDI *v.* MIDNAPORE ZAMINDARY CO., LTD. **I.L.R. (1933) 2 Cal. 41=181 I.C. 370=11 R.C. 802=67 C.L.J. 202=A.I.R. 1938 Cal. 853.**

——**S. 193 and Sch. III, Art. 2 (b)**—*Applicability—Settlement of toddy trees for taking juice—Suit for settlement money—If one for rent under Tenancy Act—Limitation Act, Art.* 110—*Jurisdiction—Small Cause Court.*

A person taking a settlement of date and toddy palm trees, who gets the right to take the juice of the trees for the season is not a tenant, nor is the person settling the trees a landlord within the meaning of the B. T. Act. A suit by the settlor against the settlement holder for recovery of money due under the settlement is not a suit between a landlord and a tenant and does not fall under S. 193 of the B. T. Act. No part of the provisions of the Act applies to such a suit. The

BENGAL TENANCY ACT (1885), S. 195.

suit is governed for purposes of limitation not by Art. 2 (*b*) of Sch. III of the B. T. Act, but by Art. 110 of the Limitation Act. The suit not being a suit for immovable property is a suit cognizable by the Small Cause Court and must therefore be brought in that Court and not in the Court of the Munsif as an ordinary suit under the B. T. Act. (*Agarwala and Rowland, JJ.*) KAMESHWAR SINGH *v.* MAHABIR PASI. **15 Pat. 626=166 I.C. 484=9 R.P. 301 (1)=3 B.R. 171=17 Pat L.T. 363=A.I.R. 1936 Pat. 403.**

——S. 195 (e) (as amended in 1929)—*Retrospective operation.*

The amended Cl. (*e*) of S. 195 of the B. T. Act is not retrospective in its operation. Where, therefore, the putni sale took place before the amended section came into force in 1929, an occupancy *raiyat* cannot claim the benefit of S. 11, Cl. (3) of the Putni Regulation by reason of the extended definition of the expression "khudkhast raiyat" given in amended S. 195 (*e*), B. T. Act. (*Mukherjea, J.*) ANNADA PRASANNA *v.* RAM SARAN KOWER. **41 C.W.N 1234=176 I.C. 602=11 R C. 133=A.I.R. 1937 Cal. 686.**

——Sch. III, Art. 1—*Applicability — Suit in ejectment on breach of covenant against alienation —Lessee not appealing against decree in ejectment—Right of transferee to plead Sch. III, Art. 1, in bar.*

In a suit for ejectment for breach of a covenant against alienation, when the lessee-transferor does not appeal against the decree in ejectment, the transferee from the lessee cannot plead limitation by calling to his aid Art. 1 of Sch. III to the B. T. Act, and the landlord is entitled to eject the transferee. (*Dhavle and Agarwala, JJ.*) THAKUR DAYAL SINGH *v.* RAI PROMOTHA NATH MITRA. **15 Pat. 673=9 R.P. 136=164 I.C. 811 (2)=17 Pat.L.T. 502=1936 P.W.N. 534=A.I.R. 1936 Pat. 493.**

——Sch. III, Art 2—*Applicability—Lease for collection of rent—Limitation Act, Art. 116.*

The B. T. Act applies only to a lease for an agricultural purpose and not to a lease which is a lease of agricultural lands, but not for an agricultural purpose. The true test to determine whether a lease for collection of rents does or does not come within the Act is, therefore, not whether the lands comprised in it are or are not agricultural lands, but whether or not the letting was for agricultural purposes. Where the letting is merely for collection of rents, and there is no question of the lessee being required or expected to bring any land under cultivation either himself or by members of his family or by servants or labourers, or by establishing tenants on the land, the mere fact that the land is agricultural or that there are cultivating tenants on it, would not make the lease one for an agricultural purpose. Such a lease is, therefore, not subject to the operation of the B. T Act, and the special rule of limitation prescribed by that Act will accordingly not apply. If the lease is in writing and registered, a suit for rent based on such a lease will be governed by Art. 116 of the Limitation Act. (*Henderson and Biswas, JJ.*) ALAUDDIN AHAMMAD *v.* TOMIZUDDIN AHAMMAD. **I.L.R. (1937) 2 Cal. 631=173 I.C. 540=10 R.C. 535=41 C.W.N. 1001=A.I.R. 1937 Cal. 587.**

——Sch. III, Art. 3—*Applicability—Dispossession by landlord as auction-purchaser.*

BENGAL TENANCY ACT (1885), Sch. III, Art. 3.

Dispossession by the landlords as auction-purchasers does come under the provisions of the special law of limitation under Art. 3 of Sch. III. A.I.R. 1927 Cal. 488, Rel. on. (*Jack, J.*) AMIRUDDIN SARKAR *v.* NISARUDDIN SARKAR. **175 I.C. 697=10 R.C. 815=A.I.R. 1938 Cal. 276.**

——Sch. III, Art. 3—*Applicability—Landlord dispossessing tenant from possession obtained in execution of mortgage decree against co-sharer tenants.*

Where a tenant in execution of a mortgage decree against his co-sharer tenants obtains their rights in the land, he represents the tenancy and when he is dispossessed by the landlord the rule of special limitation would apply. A.I.R. 1936 Cal. 299, Rel. on. (*Jack, J.*) AMIRUDDIN SARKAR *v.* NISARUDDIN SARKAR. **175 I.C. 697=10 R.C. 815=A.I.R 1938 Cal. 276.**

——Sch. III, Art. 3—*Applicability—Landlord setting up servant as tenant and dispossessing raiyat through him—Suit by raiyat to recover possession—Limitation.*

Mere allegations or suggestions in the pleadings are insufficient material on which to base a conclusion that dispossession was dispossession by the landlord. Where the landlord does not directly dispossess the raiyat, but sets up his servant as a tenant who dispossesses the raiyat, the dispossession is by landlord and a suit by the raiyat to recover possession is governed by Art. 3. (*Agarwala, J.*) BINDESHWARI RAI *v* RAM PALAK SINGH. **175 I.C 91=4 B.R. 521=10 R.P. 580=1938 P.W.N. 741=A.I.R. 1938 Pat. 181.**

——Sch. III, Art. 3—*Applicability and construction—Strict construction— Transferable occupancy holding—Purchase by mortgagee in execution of decree on mortgage—Suit for possession against prior landlord purchaser in execution of money decree against mortgagor-tenant—Limitation—Starting point.*

The provision as to the special period of limitation contained in Sch. III, Art. 3, B. T. Act, must be construed as other statutes prescribing limitation of suits and actions are construed, strictly against the party seeking to apply the same. The well-settled general rule, that the statute of limitation will not run against a mortgagee purchaser, at a sale in execution of a decree on his mortgage against his mortgagor, until the ownership in, and beneficial title to, the land vested in him for the first time under the decree and sale on his mortgage, cannot be completely ignored in applying the provisions of Art. 3, Sch. III, B. T. Act. Nor can a landlord purchasing his tenant's holding at a sale in execution of a money decree against his tenant altogether ignore the rights accruing by a transfer by way of mortgage of a tenancy that is transferable, and defeat the rights of such a mortgagee in view of a special provision as to limitation of suits of a particular nature. such as is contained in Sch. III, Art. 3. (*Guha and Lodge, JJ.*) GOSTA BEHARI PRAMANIK *v.* AMIYA KUMAR DAS. **63 Cal. 503=165 I.C. 135=9 R.C. 346=40 C.W.N. 135.**

——Sch. III, Art. 3—*Applicability—Dispossession by landlord as auction-purchaser in execution sale under money decree—Suit within two years—If necessary.*

The fact that a landlord dispossesses his occupancy tenant as auction-purchaser of the holding,

at a sale in execution of a money decree against the tenant cannot take the case out of the operation of Art. 3, Sch. III of the B. T. Act. Again the mere fact that the dispossession is brought about by the process of the Court cannot take away the case from the operation of Art. 3, because the responsibility for the dispossession is on the landlord who resorts to the process of the Court as a mode of effecting ouster. The dispossessed raiyat must in such a case bring his suit within two years of the dispossession. (*Nasim Ali and Henderson. JJ.*) SHEIKH ALAM *v.* ATUL CHANDRA ROY. **163 I.C 84=8 R.C. 686=40 C W.N. 173=A I.R. 1936 Cal. 299**

——**Sch. III, Art. 3**—*Applicability—Mortgage of transferable occupancy holding—Purchase of holding by co-sharer of land in execution of money decree and actual possession for over two years—Subsequent purchase by mortgagee in execution of his mortgage decree—Suit for actual possession after delivery of symbolical possession—Limitation.*

Plaintiffs were mortgagees of a holding of a *raiyat* who had transferable occupancy right in the holding mortgaged. They obtained decrees on the mortgage and purchased the holding in execution of the decrees and took symbolical delivery of possession through Court on 20-8-1927. When they attempted to take actual possession, they were resisted by the defendant who set up title as a co-sharer landlord who had purchased the holding at a sale in execution of a money-decree against the *raiyat* which he had obtained. The defendant, as such purchaser had taken actual delivery of possession on 25-6-1924 and remained in possession thereafter keeping the *raiyat* out of possession. Plaintiffs thereupon instituted suits for possession on 17-8-1929.

Held, that the special provision as to limitation contained in Art. 3 of Sch. III of the B. T. Act was not applicable to the suits, and that the fact that the defendant (co-sharer landlord) had been in possession since 25-6-1924 did not and could not amount to dispossession of the plaintiffs within the meaning of Art. 3, Sch. III, B. T. Act, as plaintiffs had never been in, and had no right to possession before 20-8-1927. (*Guha and Lodge, JJ.*) GOSTA BEHARI PRAMANIK *v.* AMIYA KUMAR DAS. **63 Cal. 503=165 I.C. 135=9 R.C. 346=40 C.W.N 135.**

——**Sch. III, Art. 3**—*Applicability—Occupancy holding—Tenant losing land by diluvion—Subsequent reformation — Proceedings by landlord under S. 145, Cr. P. Code—Finding of taking of possession by landlord on re-appearance—Suit by tenant for declaration of occupancy right and possession—Limitation.*

Where a tenant loses his land by diluvion, and it is found in proceedings under S. 145, Cr. P. Code, that the landlord took possession of the land on its re-appearance, there is no dispossession of the tenant by the landlord; and a suit by the tenant for a declaration of his occupancy rights in the land and for possession does not fall under Art. 3, Sch. III of the Bengal Tenancy Act. (*Agarwala and Madan, JJ.*) RUDRA NARAIN SINGH *v.* KEDAR NATH SINGH. **170 I.C. 754=3 B.R. 762=10 R P. 148=18 Pat.L.T. 477=1937 P.W.N. 526=A.I.R. 1937 Pat. 458.**

——**Sch. III, Art. 3**—*Applicability—Suit for possession—No allegation that landlord instigated dispossession—No evidence to prove landlord responsible for his dispossession — Landlord denying any dispute with plaintiff—Limitation.*

Where in a suit for possession of a holding the plaintiff stated in the plaint that he was dispossessed by the defendants third persons claiming land, and he did not allege that the defendant landlord instigated or assisted such third persons in his dispossession, and no evidence was adduced by him to show that the landlord was responsible for his dispossession, but, on the contrary, the land ord denied that there was any dispute with the plaintiff.

Held, that the suit was governed by the general law of limitation and not by the special period of limitation prescribed by Art. 3, B. T. Act. (*Agarwala and Madan, JJ.*) SHIVE SARAN RAI *v.* SUKHDEO RAI. **4 B.R. 20=171 I.C. 317=10 R. P. 192=A.I.R. 1937 Pat. 418.**

——**Sch. III, Art. 3**—*Applicability—Usufructuary mortgage by raiyat—Mortgagee in possession—Dispossession by landlord—Suit by mortgagee for possession—Limitation.*

The provisions of Art. 3 of Sch. III of the Bengal Tenancy Act are attracted if a raiyat wants to recover possession by a suit from his landlord who has wrongfully dispossessed him from his holding, whether such dispossession be by the landlord as such or as auction-purchaser of the holding at a sale in execution of a money-decree against the tenant and taking possession through Court. A usufructuary mortgagee who is in possession of the holding at the time of such dispossession is also hit by Art. 3, Sch. III, and must bring a suit for ejectment against the landlord within the time prescribed by Art. 3, in as much as he has a right to put an end to the trespass by the landlord. (*Nasim Ali and Henderson, JJ.*) SHEIKH ALAM *v.* ATUL CHANDRA ROY **163 I.C. 84=8 R.C. 686=40 C.W.N. 173=A.I.R. 1936 Cal. 299.**

——**Sch. III, Art. 3**—*Construction—"Dispossession"—Meaning of—Money decree against tenant in favour of co-sharer landlord—Sale of holding in execution—Purchase by co-sharer landlord and delivery of possession—If "dispossession."*

A dispossession effected by the act of delivery of possession by the Court to a co sharer landlord as auction-purchaser of the lands appertaining to the tenancy of his tenant at a sale in execution of a money-decree is not dispossession by the landlord within the meaning of Art. 3, Sch. III of the Bengal Tenancy Act. (*Guha and Lodge, JJ.*) GOSTA BEHARI PRAMANIK *v* AMIYA KUMAR DAS. **63 Cal. 503=165 I.C. 135=9 R.C. 346=40 C.W. N. 135.**

——**Sch. III, Art. 6, Proviso**—*Interpretation.*

The two arms of the proviso to Art. 6, Sch. III of the B. T. Act, should be read together, and it comes to this that normally the period of limitation for pursuing execution is three years from the date of the decree. But if in the course of that period a sale has taken place, and subsequently that sale has been set aside, the intervening period is not to be counted, if he then desires to go on with the execution, provided there is no further break in the continuity of the execution proceedings due to his own inaction. Otherwise, the total period of time within which the decree-holder must set in motion proceedings

for enforcing his decree is a period of three years. (*Costello and Biswas, JJ.*) SIDDESWAR GHOSE *v.* PANCHANAN. **I.L.R. (1938) 2 Cal. 125 =177 I.C. 110=11 R.C. 204=42 C.W.N. 485= A.I.R. 1938 Cal. 390.**

[Reversing A.I.R. 1937 Cal. 490.]

——**Chap. XIV**—*Applicability—Suit for rent by landlord—Transfer of holding by tenant pending suit—Transferee not impleaded—Decree—If rent decree—Execution—Claim by transferee under O. 21, R. 58, C. P. Code—Maintainability.*

Where after the institution by the landlord of a suit for recovery of the rent of an occupancy holding from the tenant, the latter transfers the holding to another, and the landlord, though aware of the transfer, does not make the transferee a party to the suit, the decree passed against the defendant on record is not a rent decree which can be executed under the procedure of Ch. XIV of the Bengal Tenancy Act. When, therefore, the landlord attempts to execute the decree under the special procedure provided for in Ch. XIV, the transferee of the holding is entitled to object to the same and prefer a claim under O. 21, R. 58, C.P. Code.

Obiter.—The landlord can possibly preserve his security of the holding by adding the transferee in the execution proceedings. (*R. C. Mitter, J.*) MAHARAJ BAHADUR SINGH *v.* NARI MOLLANI. **63 Cal. 1117=165 I.C. 17=9 R.C. 363=40 C.W.N. 683=A.I.R. 1936 Cal. 279.**

——**Chap. XIV**—*Rent decree—Transferee of putni tenure not recognised by landlord—Suit for rent against putnidar—On objection by latter, transferee impleaded as party defendant—Decree obtained against putnidar alone—If rent decree.*

So long as a Transferee of a putni tenure is not recognised by the landlord and his name is not registered in the landlord's *sherista* in conformity with the provisions of Ss. 5 and 6 of the Putni Regulation, the latter may sue the original putnidar for rent and put the tenure up to sale in execution of the decree without any notice to the assignee. The mere fact that in the rent suit, on objection by the putnidar, the landlord impleads the transferee as a party defendant cannot be construed as an act of recognition on the part of the landlord. If, therefare, in such a suit the landlord obtains a decree against the original putnidar alone, the decree can be executed as a rent decree by sale of the tenure under the provisions of Chap. XIV of the B. T. Act. (*Mukherjea, J.*) RADHARANI DEBI *v.* BIJOY CHAND MAHATAP. **I.L.R. (1938) 2 Cal. 527=180 I.C 716=11 R.C. 725=42 C.W.N. 890=A I.R. 1939 Cal. 257.**

BENGAL VILLAGE CHOWKIDARI ACT (VI OF 1870)—*Mokarari grant of Chowkidari Chakran lands—Resumption by Government and Settlement with zamindar—Latter settling with new persons—Pesh Khash included in jama—Mokarari—If bars claim of zamindar to fair and equitable rent.*

The plaintiff was the proprietor of estate to which the Chowkidari Chakran lands appertain. The defendant was a Mokarariдar in respect of these lands by virtue of some grants made by the predecessor in interest of the plaintiff. The lands were resumed and were settled by the Collector under Chowkidari Act VI of 1870 with the plaintiff. The plaintiff after taking settlement from the Collector made new settlement of these lands with certain persons and instituted suits for settlement of fair and equitable rent in respect of these lands.

Held, that the mere fact that Pesh Khash which was being paid by the Chowkidars to the Zamindars, was included in the jama and the Mokarariдar was given the right to realise it from the Chowkidars, would not go to indicate that the Zamindar at the time of the grants gave up his right to get fair rent for these lands arising out of events which were not contemplated then. The grants do not take away the right of Zamindar to get fair and equitable rent for the disputed lands after they have been resumed. 45 I.A. 162 and 52 I.A. 355, Ref. (*Nasim Ali and Henderson, JJ.*) HRISHIKESH LAW *v.* SATISH CHANDRA PAUL. **170 I.C. 634=10 R.C. 160= A.I.R. 1936 Cal. 203.**

——Chowkidari jagir—Liability to resumption. *See* GRANT—CHOWKIDARI JAGIR. **17 Pat. 315.**

——**S. 50**—*Chowkidari chakran lands lying in plaintiff's estate wrongly transferred to defendant—No contribution paid to chowkidari fund of the union in which they were originally included—Lands subsequently transferred by Collector to plaintiff—Suit by latter for possession—Limitation—Starting point—Limitation Act, Art. 144.*

In 1907, certain Chowkidari Chakran lands lying within the plaintiff's estate were by a mistake transferred by the Collector to the defendant under S. 50 of the Village Chowkidari Act and without any order under S. 61. These lands contributed nothing to the Chowkidari fund of the union within which they were originally included. They were subsequently resumed by Government and were transferred to the plaintiff by an order of Collector, dated 23rd January, 1920. under S. 50 of the Village Chowkidari Act. The said order was communicated to him on March 8, 1920. On March 7, 1932, the plaintiff filed a suit for possession of these lands on the basis of that order. The defendant pleaded that the plaintiff's claim was barred by limitation as he was in adverse possession of the disputed lands from 1907.

Held, that as the disputed lands contributed nothing to the chowkidari fund of the union in which they were originally included, the right of the chowkidars of that union to possess them in lieu of their services to that union was not affected by the order of transfer in 1907, and that the plaintiff's right to possess could not, therefore, accrue so long as the chowkidar's right to possess continued, and that as the right of the chowkidars to possess the lands continued till 1920 when the order of transfer in favour of the plaintiff was passed, the plaintiff's right to take possession did not arise before 1920.

Held, further, that time began to run not from the date of the order of transfer in favour of the plaintiff but from the issue of that order and the plaintiff's suit, therefore, was not barred under Art. 144 of the Limitation Act. (*Nasim Ali and R. C. Mitter, JJ.*) NARATTAM DEY *v.* DEBENDRA LAL KHAN. **173 I.C. 439=10 R.C. 518=41 C.W. N. 763=A.I.R. 1937 Cal. 343.**

——**S. 55**—*Purchase at sale under—When takes effect.*

A purchase at a sale held under S. 55 of Act VI of 1870 for arrears of Chaukidari assessment

BENG. VILL. SELF. GOV. ACT (1919), S. 6.

takes effect on the day after that fixed by the Collector in the sale notification for payment of the arrears. (*Edgley, J.*) KANTI CHANDRA *v.* SUCHITRA SUNDARI. **I.L.R. (1939) 2 Cal. 285=185 I.C. 560=12 R. C. 385=43 C.W.N. 855=A.I.R. 1939 Cal. 606.**

BENGAL VILLAGE SELF-GOVERNMENT ACT (V OF 1919), Ss. 6, 7 and 101 and Rr. 6, 7 and 9—*Person appointed member of Union Board under S. 6 (3)—Such person's name appearing on list of candidates duly qualified under S. 7 (2) to be member of Board—Suit challenging his appointment—Jurisdiction of Civil Court.*

Under R. 6 the Circle Officer who is appointed to decide the claims and objections and to prepare the list of voters is the only person who is to determine as to who is entitled to vote at an election of members of the Union Board. Under R. 6 his decision is final. So also under R. 9 he is the only person who can decide the question of residence of any person within the Union and his decision as to residence of any person is also final. Where therefore the name of a person appointed to the Union Board as a member appears on the list of candidates duly qualified under S. 7 (2), on a decision arrived at by the Circle Officer or tribunal appointed for the purpose under the Act and after proper proceedings taken in accordance with the Act, such person is a duly qualified person to be appointed a member of the Board under the provisions of S. 6 (3) of the Act. The appointment to the Union Board of such person is proper and a suit in ordinary Civil Court to challenge his appointment cannot lie on account of the exclusive jurisdiction bestowed by the Act on the Circle Officer to decide as to who is entitled to vote at the election of the Union Board. 31 Bom. 604, Appl. (*Derbyshire, C. J. and D. N. Mitter, J.*) SAJANI KANTA GHOSAL *v.* BISTOOPADA MEYUR. **41 C.W.N. 706=169 I.C. 486=10 R.C 5=A.I.R. 1937 Cal. 277.**

——**S. 6 (3)**—*Appointment of member to Union Board by Dt. Magistrate—Suit challenging validity—Maintainability.*

It cannot be said that the District Magistrate is the final authority in the matter of the eligibility of a person appointed by him as a member of the Union Board under S. 6 (3) of the Bengal Village Self-Government Act and that the appointment by him of a particular person is a decision by him that the latter is qualified to be appointed, for that view would nullify the proviso to S. 6 (3) of the Act. Accordingly, a suit challenging the validity of such appointment is maintainable in a Civil Court. (*R. C. Mitter, J.*) SURENDRA NATH ROY *v.* PROSAD CHANDRA CHAKRABUTTY. **41 C.W.N. 356.**

——**S. 7**—*Construction—Joint undivided family—Father and son having joint interest in property—Cess paid by father—Right of son to vote.*

Where a father and son having joint interests in certain inherited property live together in one house, the son being supported by the father, it cannot be said that they are technically members of a joint family. Even if they are to be regarded as such, when the cess payable as the union rate is paid not by the family but by the father, the son is not qualified to be a voter, even if the father nominates the son to take his place and allows him to vote in his place on behalf of the joint family. (*Jack, J.*) KASIRUDDIN *v.* MAFFIZUDDIN AHMAD. **63 Cal. 1163=165 I.C. 354=9 R.C. 383=40 C.W.N. 753=A.I.R. 1936 Cal. 295.**

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——**S. 7 (3)**—*Union Board election—Right of resident to vote—Title to place of residence—If essential—Son living in father's house—Right to vote.*

Under S. 7 (3) of the Bengal Village Self-Government Act, a person claiming to be a voter on the ground of residence within a Union Board area must not only live within the union, but must also have title to the place of residence in which he lives. Otherwise he will not be eligible as having a place of residence within the union. Consequently a son who lives with his father in a house which belongs to the father cannot claim to be a voter by reason of such residence. (*Jack, J.*) KASIRUDDIN *v.* MAFFIZUDDIN AHMAD. **63 Cal. 1163=165 I C. 354=9 R.C. 383=40 C.W.N. 753=A.I.R. 1936 Cal. 295.**

——**S. 16**—*Removal of Chairman of Union Board—Jurisdiction of Civil Court—Bengal Local Self-Government Act, S. 120.*

Where the action taken by the District Board under S. 16 of the Bengal Village Self-Government Act in removing the plaintiff from the office of the Chairman of a Union Board to which he was elected was without jurisdiction, the Civil Court has jurisdiction to grant the plaintiff a declaration in his favour. There is nothing in S. 120 of the Bengal Local Self-Government Act to suggest that the ordinary jurisdiction of the Courts to give the plaintiff a declaration to which he is entitled has been taken away. (*Henderson, J.*) DISTRICT BOARD, CHITTAGONG *v.* EMDADAL HOQUE. **44 C.W.N. 362=A.I.R. 1940 Cal. 305.**

——**S. 27 (1) (b)**—*Construction of public drains—Issue of notice upon owner or occupier—If mandatory.*

It is not mandatory for the Union Board to issue any written notice upon the owner or occupier of the land under S. 27 (1) (*b*) of the Bengal Village Self-Government Act before undertaking any work in connection with the construction of public drains. (*Edgley, J.*) IMAMUDDIN *v.* MOQBUL AHAMMED. **43 C.W.N. 555.**

——**S. 31**—*Applicability*—Halot *used as public pathway during dry season and as public boatway during rainy season—If "waterway"—Power of Union Board to raise level of and obstruct boat passage.*

A *halot* which is private property and which is used as a public pathway in dry season and as a public boat passage during the rainy season does not come under the operation of S. 31 of the Bengal Village Self-Government Act as a waterway. A Union Board has therefore no authority to exercise control over the *halot* purporting to act under S. 31. Even assuming that S. 31 applies, and that the Union Board has the control and power to make improvements in regard to the *halot*, such control and power to make improvement can only be exercised in a manner consistent with the rights of user of the members of the public. When the public have acquired a right to use the *halot* as a boat passage during the rainy season, such right cannot be interfered with, and the Board cannot, under its powers under S. 31, raise the level of the passage so as to totally obstruct the passage of boats. (*Guha and Bartley, JJ.*) LALIT MOHAN SAHA *v.* DEBENDRA-

BENG. VILL. SELF-GOVT. ACT (1919), S. 38.

NATH THAKUR. 63 Cal. 1221=165 I.C.281=9 R. C. 367=40 C. W. N. 838=A. I. R. 1936 Cal. 444.

——S. 38—*"Assessment on circumstances within the union"—Meaning of.*

The words "assesssment on circumstances within the union" in S. 38 of the Village Self-Government Act must not be construed to mean that assessment should be made only on the income derived from properties within the union. (*Jack, J.*) TARINI CHARAN KUNDU *v.* SAGARKANDI UNION BOARD. **172 I.C. 548=10 R.C. 393=41 C. W.N. 802=65 C.L.J. 337=A.I.R. 1937 Cal. 405.**

——S. 63—*Member of Union Board acting in pursuance of resolution of that Board—Prosecution for such action—Maintainability.*

If an officer or member of a Union Board acts in pursuance of a resolution of that Board duly and properly passed, his prosecution in respect of such action is barred under the provisions of S. 63 of the Bengal Village Self-Government Act, unless the prosecution shows that he secured the passage of the resolution by improper means or that otherwise he was acting *mala fide* or merely in his own interest. (*Edgley, J.*) IMAMUDDIN *v.* MOQBUL AHAMMAD. **43 C.W.N. 555.**

——S. 63—*Protection under—Union Board, when can avail—Encroachment by Union Board on private property—Suit for its removal—If lies.*

Before the Union Board can avail themselves of the advantage of S. 63 of the Village Self-Government Act, it is necessary for them to show that the act complained of was done both lawfully as well as in good faith with due care and attention, under the provisions of the Act. If the land is not a public road but the private property of an owner, an act of encroachment upon it by the union Board, cannot be said to be a lawful act done under the provisions of the Act, even though they may have an honest belief that it was really vested in them. S. 63, therefore, does not protect the Union Board from a suit for removal of an encroachment by them upon private property. (*Mukherjea, J.*) KEDARUDDIN AHAMAD *v.* SAMSUR MATA. **41 C.W.N. 769=169 I.C. 771=10 R.C. 54=A.I.R. 1937 Cal. 355.**

——S. 64—*Applicability—Suit to establish easement right.*

A suit against the Union Board for the establishment of easement rights does not come within the purview of S. 64 of the Village Self-Government Act. The suits contemplated by that section are those where the plaintiff claims damages or compensation for some wrongful act committed by the Union Board or their officers in the exercise or honestly supposed exercise of their statutory powers. (*Mukherjea, J.*) KEDARUDDIN AHMED *v.* SAMSUR MATA. **169 I.C. 771=10 R.C. 54=41 C.W.N. 769=A.I.R. 1937 Cal. 355.**

——S. 64—*Benefit of protection under—If limited to acts done* bona fide.

The protection afforded by S. 64 of the Bengal Village Self-Government Act is not confined to acts done by the Board or a member thereof *bona fide* in the due discharge of duty. The Board or member is entitled to protection of S. 64 even when the acts complained are alleged to be done maliciously. (*M.C. Ghose, J.*) HEM CHANDRA

BENG. VILL. SELF-GOVT. ACT (1919), S. 101.

ROY CHOUDHURY *v.* TARAPADA SANYAL. **40 C. W N. 500.**

——S. 64—*Limitation of three months—Applicability—Union Board not properly constituted—Right to claim benefit of section.*

The three months' limitation provided by S. 64 of the Bengal Village Self-Government Act is applicable, if the Board concerned is actually functioning as such on the date of the Act complained of, even if the Board happens to be not duly constituted. Even if there be a legal flaw in the appointment of the Board or of its members, benefit of the section can be claimed by the Board and the members. (*M.C. Ghose, J.*) HEM CHANDRA ROY CHOUDHURY *v.* TARAPADA SANYAL. **40 C.W.N 500.**

——Ss. 71 and 93—*Conviction by Union Bench—Revision—Jurisdiction of High Court—Transfer of case pending before such Bench—Power of High Court.*

The High Court has no jurisdiction to interfere in revision under S. 439, Cr. P. Code, with an order of conviction by a Union Bench. Nor has it power to transfer a criminal case pending before such Bench. (*Bartley and Khundkar, JJ.*) SITALPADA SARKAR *v.* PULIN BEHARI GURE. **42 C. W.N. 1068.**

——S. 79—*Order of dismissal under—Bar of fresh suit.*

The order of dismissal in the presence of the defendant under S. 79 does not bar a fresh suit on the same cause of action, the fresh suit can be instituted either in the Union Court or in a Civil Court as the plaintiff chooses. (*Ghose, and Mukerjee, JJ.*) MUHAMMAD ABDUL KERAM *v.* DABIRUDDIN MUHAMMAD. **166 I.C. 1004=9 R.C. 648=64 C.L.J. 520=41 C W.N. 180=A.I.R. 1937 Cal. 59.**

——Ss. 93 and 71—Conviction by Union Bench—Revision—Jurisdiction of High Court—Transfer of case pending before such Bench—Power of High Court. *See* BENGAL VILLAGE SELF-GOVERNMENT ACT, SS. 71 AND 93. **42 C W.N. 1068.**

——S. 101, Rr. 6, 8, 9 and 38—*Eligibility of candidate for election—Jurisdiction of Civil Court.*

Rr. 6, 8, 9 and 38 framed under S. 101 of Bengal Village Self-Government Act, bar the jurisdiction of a Civil Court to try a question whether a particular person was a qualified voter or not and consequently whether his election was void on the ground of his not being a qualified voter. The Circle Officer is the authority or special tribunal constituted to decide the question of a person's eligibility to vote The authorities constituted by the Bengal Self-Government Act are the final uthorities in the matter of conducting elections after deciding the eligibility of voters, on objections raised before them or without objection, and the provisions contained in the Act bar the jurisdiction of a Civil Court to try the question of eligibility or otherwise of a candidate for election. A.I.R. 1935 Cal. 10, Rel. on. (*Guha and Bartley, JJ.*) PURNA CHANDRA CHOWDHURY *v.* ALFP BISWAS. **161 I.C. 183=8 R.C. 488=62 C.L.J. 538=40 C.W.N. 543=A.I.R. 1936 Cal. 64.**

——S. 101 (2)—*Rule 9 of Rules framed under—Qualification of candidates under S. 7 (2)—Deci-*

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sion of circle officer—Jurisdiction of Civil Court to interfere.

Under R. 9 of the Rules framed by the Local Government under S. 101 (2) of the Village Self-Government Act, the decision of the circle officer as to whether the candidates are duly qualified under S. 7 (2) of the Act is final and the Civil Court has, therefore, no jurisdiction to interfere with his decision. (*Jack, J.*) PRIYANATH GHOSAL *v.* TARAK NATH DUTTA. **173 I C. 275=10 R.C. 495=65 C L.J. 358=A I.R. 1937 Cal 727.**

——**S 101 (2) (a) and Rr. 6, 7, 8 and 9**—*If* ultra vires.

Rules 6, 7, 8 and 9 of the Rules framed by the Local Government are not *ultra vires*. (*R. C. Mitter, J.*) SURENDRA NATH ROY *v.* PRASAD CHANDRA CHAKRABUTTY. **41 C.W.N. 356.**

——**S. 101 (2) (a) and Rr. 6, 8 and 9**—*Election of member to Union Board—Suit challenging its validity—Jurisdiction of Civil Court.*

Rules 6, 8 and 9 of the Rules framed by the Local Government have made the circle officer the exclusive tribunal for deciding questions bearing upon qualifications of voters and of candidates who offer themselves for election to the Union Board and no suit would lie in a Civil Court for setting aside an election or declaring an election invalid on the ground that persons appearing on the voters' list and who had voted for the candidate returned had not the qualification of voters as defined in S. 7 (1) of the Bengal Village Self-Government Act or that the returned candidate whose nomination had been accepted by the circle officer, had not the qualification prescribed in S. 7 (2) of that Act. In a case not governed by Act VIII of 1935, a suit for declaring an election invalid on other grounds (*e.g.*) for corrupt practice, would lie in a Civil Court. (*R.C. Mitter, J.*) SURENDRA NATH ROY *v.* PROSAD CHANDRA CHAKRABUTTY. **41 C.W.N 356.**

BENGAL WAKF ACT (XIII OF 1934), S 40—*Power to appoint temporary* mutwalli—*Exercise of.*

The power of the Commissioner to appoint an *ad interim mutwalli* under S. 40 of the Wakf Act can be invoked only if there is no *mutwalli* already. The power of appointing a temporary *mutwalli* can be exercised subject to any order of a competent Court. (*M C. Ghose and Mukherjea, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* UMME SALIMA. **I.L.R. (1937) 1 Cal 673=171 I C. 59 =10 R.C. 224=65 C.L.J. 340=41 C.W.N. 382= A.I.R 1937 Cal. 150.**

——**S. 70**—*Applicability—Proceedings outside Bengal.*

S. 70 of the Bengal Wakf Act has no application to proceedings outside the province of Bengal. (*S. K. Ghose and Mukherjea, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* MESSRS. NARSING CHANDRA DAW & Co. **I L.R. (1939) 1 Cal 462 =43 C.W.N. 415=185 I.C. 438=12 R.C. 366= A.I.R. 1939 Cal. 648.**

——**Ss. 70 and 71**—*If retrospective.*

Ss. 70 and 71 have no retrospective operation and do not apply to suits pending at the time when the Act became law. (*M. C. Ghose and Mukherjea, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* UMME SALIMA. **I L.R (1937) 1 Cal. 673=41 C.W.N 382=171 I.C. 59=10 R.C. 224= 65 C.L.J. 340=A.I.R. 1937 Cal. 150.**

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——**Ss. 70 and 72**—*Petitions by* mutwallis *under O 21, R. 58, C. P. Code, dismissed for default—Right of Commissioner to present similar petition on notice from Court.*

Although petitions under O. 21, R. 58, C. P. Code, previously filed by successive *mutwalli* were dismissed for default, the Commissioner of wakf is entitled to file a similar petition of claim on receipt of notice under S. 70 of the Bengal Wakf Act, and he is entitled to have his petition heard on the merits. (*S.K. Ghose and Nazim Ali, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* GAGAN CHANDRA DAS. **I.L R (1938) 2 Cal. 187= 180 I. C. 782=11 R. C. 749=42 C. W. N. 616= A.I R. 1939 Cal. 20.**

——**S 70 (1)**—*"Suit or proceeding"—Meaning of—If includes appeal also.*

The words "suit or proceeding" in S. 70 (1) of the Bengal Wakf Act must be regarded in their ordinary sense and cannot be held to include an appeal. (*D N. Mitter and Patterson, JJ.*) THE COMMISSIONER OF WAKFS, BENGAL *v.* MAHMUDA BIBI. **166 I.C. 212=9 R.C. 488=40 C.W.N. 816 =A.I.R. 1936 Cal. 480.**

——**Ss. 70 (4) and 83 (a) and (b)**—*Scope and effect of—Appeal pending when Act came into force—Order appointing receiver by consent of parties—Right of Commissioner of wakfs to apply to vacate.*

Two appeals were pending in the High Court against the decree of a Subordinate Judge, the question in controversy being whether certain properties were wakf. In those appeals an application was made for appointment of a receiver on 2—3—1936, *i.e.*, a day after the Bengal Wakf Act came into force; and by consent a receiver was appointed during the pendency of the appeals. Subsequently the Commissioner of Wakfs appointed under the Act applied to the High Court under S. 70 (4) of the Act for vacating the order appointing the receiver.

Held, that the suit having been instituted long before the promulgation of the Act, any right or rights acquired by the parties before the promulgation of the Act could not be affected by the provisions of the Act, and that the application by the Commissioner for wakfs under S. 70 (4) was therefore incompetent in view of S. 83 (*a*) and (*b*). (*D. N. Mitter and Patterson, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* MAHMUDA BIBI. **166 I.C 212=9 R.C. 488=40 C.W.N. 816=A.I. R. 1936 Cal. 480.**

——**S. 71**—*Construction—'Any other person.'*

Quaere.—The words 'any other person' are wide enough to include a mutawalli. (*M. C. Ghose and Mukherjea, JJ.*) COMMISSIONER OF WAKES, BENGAL *v.* UMME SALIMA. **I.L.R. (1937) 1 Cal. 673=41 C.W.N. 382=171 I.C. 59=10 R. C. 224=65 C.L J. 340=A.I.R. 1937 Cal. 150.**

——**S. 71**—*Property not admitted to be wakf—Right of Commissioner to intervene.*

Per *Nasim Ali, J.*—S. 71 of the Bengal Wakfs Act enables the commissioner of Wakfs to intervene and to defend a suit or a proceeding although it is in respect of property which is not admitted by all the parties to the suit or proceeding to be wakf. If, therefore, a person attaches certain wakf property in execution of a decree for money obtained against the mutwalli personally on the allegation that it is not wakf, the commissioner can intervene and oppose the

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attachment and sale of the property on behalf of and in the interests of the wakf. (*S. K. Ghose and Nazim Ali, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* GAGAN CHANDRA DAS. **I.L.R. (1938) 2 Cal. 187=42 C.W.N.616=180 I.C. 782=11 R.C. 749=A.I.R. 1939 Cal. 20.**

——**Ss. 71 and 83**—*Suit under S. 92, C. P. Code pending when Act came into force—Right of Commissioner to intervene.*

S 83 of the Bengal Wakf Act exempts all suits in respect of rights which accrued before the Act, from the operation of the Act. The Commissioner has, therefore, no right to intervene under S. 71 of the Act in a suit relating to a wakf estate under S. 92, C. P. Code, whether such suit is commenced before or after the Act, if it is in respect of a right or for enforcement of an obligation which is antecedent to the passing of the Act. The right to have a scheme framed or accounts examined in a suit under S 92, C. P. Code does not flow from the preliminary decree but accrues before it and originates from facts which constitute the very foundation of the suit itself, and the preliminary decree simply records the finding of the Court. (*M. C. Ghose and Mukherjea, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* UMME SALIMA. **I.L.R. (1937) 1 Cal. 673=171 I.C. 59=10 R.C. 224=65 C.L.J. 340=41 C.W.N. 382=A I.R. 1937 Cal. 150.**

——**S. 73 (2)**—*Suit under—Receiver—Power of Court to appoint.*

It is well within the power of a Judge in dealing with a suit under S. 73 (2), Bengal Wakf Act, 1934, to appoint a receiver pending the hearing of the suit. (*Costello, Ag. C.J. and Edgley, J.*) SYED FATEH ALI MIRZA *v.* SAJJAD HUSSAIN. **173 I.C. 921=10 R.C. 590=A.I.R. 1937 Cal 740.**

BERAR ALIENATED VILLAGES TENANCY LAW, S. 22—*Right of hypothecation—Limits.*

The right of hypothecation contemplated by S. 22 of the Berar Alienated Villages Tenancy Law, could only be exercised against those crops which had been reaped or gathered and were deposited or stored, and only on account of an arrear which has not been due for more than one year. (*Pollock, J.*) RAMCHANDRA GOVIND *v.* MISHRIMAL CHANDANMAL. **173 I.C. 800=10 R. N. 325=A.I.R 1938 Nag 202.**

——**S. 76 (3)**—*Suit for arrears of rent due by ante alienation tenant—Limitation.*

According to S. 76 (3) of the Berar Alienated Villages Tenancy Law, the period of limitation for a suit by a landlord for an arrear of rent due by an ante-alienation tenant is three years and this is so notwithstanding anything contained in Arts. 120 and 132 of the Limitation Act. (*Pollock, J.*) RAMCHANDRA GOVIND *v.* MISHRIMAL CHANDANMAL. **173 I.C. 800=10 R.N. 325=A.I.R. 1938 Nag. 202.**

BERAR COTTON MARKET RULES, R. 56 (3)—*Who are all affected by.*

Sub-R. (3) to R. 56 of the Berar Cotton Market Rules, prohibits any person from buying or selling cotton within the market proper unless he is a registered cotton trader. The word 'person' must comprise both the ostensible and the real buyer or seller. The rule therefore affects both the cotton trader and the Adatya or broker. A

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firm or a registered company would also seem to be included in the word 'person'. (*Niyogi, J.*) CHIRANJI MOTILAL *v.* COTTON MARKET COMMITTEE. **188 I.C. 77=12 R.N. 315=1940 N.L.J. 174=A.I.R. 1940 Nag. 226.**

BERAR INAM RULES (1859)—*Assignment of share in inam certificate—Failure of heirs—Devolution.*

If the share assigned to a grantee in the inam certificate amounts to a distinct and independent grant it will on failure of heirs of the grantee, escheat to Government. But, if it is merely one carved out of a major grant it would revert back to the major grant and merge in it. (*Stone, C.J. and Niyogi, J.*) SHRIRAM DEORAO *v.* BANYA BAI. **I.L.R (1940) Nag. 244=1940 N.L.J. 78=A.I.R. 1940 Nag. 129**

——*Nature of Inam estates in Berar—Alienability—Onus,*

As Inams in Berar are *prima facie* held in restricted tenure, the onus is on those who allege that a particular inam was to be treated as freehold and alienable to prove that Cl. (1) in the classification given in R. II relates to personal Jagirs and cl. (3) to personal or subsistence grants. If the grant is one of Cl. (3) to which R. V applies and the inam has not been enfranchised, it is inalienable. (*Grille and Niyogi, JJ.*) MAHADEO BHAGWAN *v.* HARIHAR. **I.L.R. (1940) Nag. 89=186 I.C. 375=12 R.N. 199=1939 N.L.J. 548=A.I.R. 1940 Nag. 108.**

——*Scope of—Enfranchisement following from grant—Rules, if to be applied.*

The Inam rules lay down the general principles of succession and enfranchisement, and if the act of enfranchisement follows from the terms of the Inam grant itself, it is not necessary that it should be brought about by the exact operation of the rules. (*Roughton, F.C.*) MIR AHSANALLI *v.* MST. HUSSAINBI. **1938 N.L.J. 248.**

——**R. IV**—*Inam—Service grant—Succession to—Sister and Father's brother's son—Preferential right—Watan belonging to family—Succession to.*

A person who is disqualified by reason of sex from performing a particular service cannot be considered a successor to an Inam within the meaning of R. IV of the Berar Inam Rules. In the case of an Inam grant for the purpose of performance of Abhishek to a Maruthi Samsthan, it is an essential feature of the service grant that it should be held by the person who performs the service. A sister of the deceased certified holder, though she is a nearer heir than the father's brother's son for purposes of Hindu Law, cannot be held to be the successor for the purposes of R. IV since she cannot perform the service herself. As the sister goes out of the family on her marriage she cannot inherit a watan which belongs to the family. A watan is not the same thing as an Inam. (*Roughton, F.C.*) HARNABAI *v.* GANGADHAR. **1938 N.L.J. 22.**

——**R. IV**—*Service grant to temple—Mahant's powers of alienation.*

Land given as a service grant to a temple under R. IV of the Berar Inam Rules can be alienated by the Mahant of the temple as under the general law, for the period of the tenure of his office, as the Rules place no limitation on alienation. If the Mahant makes a permanent alienation of the property, it binds him although it does not bind

BERAR INAM RULES (1859), R. V.

his successor. It is open to his successor when he succeeds to the office, either to ratify his predecessors action, or to set it aside. But any rights of resumption which Government may choose to exercise are unaffected. (*Bose, J.*) BHAGWANDAS GURU BADA KAMDAS *v.* PRAYAGDATTA **171 I. C. 242=10 R N. 100=A I.R. 1938 Nag. 127.**

——**Rr. V, XI & XV**—*Applicability and scope —Inam grant—Representative of inamdar not applying to Inam Commissioner or getting certificate or paying quit rent—Right to claim protection from attachment.*

An inamdar who claims under a grant from the Crown governed by Rr. V, XI & XV of the Inam Rules in the Berar Code, is entitled to get a certificate giving protection against attachment. But a representative of the grantee—the grant being conferred on the grantee and not upon the person entitled as his representative—who does not apply to the Inam Commissioner or get the certificate given to the inamdar is not entitled to such protection from attachment. Such a representative who is not called upon to pay a quit rent does not receive a free-hold estate as provided by R. V. (*Stone, C J. and Puranik, J.*) LAXMAN *v.* RAMCHANDRA. **I.L R. 1938 Nag. 151= 1938 N L J. 48=182 I.C. 232=11 R N. 511=A. I.R. 1938 Nag. 145.**

[On appeal from 161 I. C. 784=8 R. N. 235= A.I.R. 1936 Nag. 29]

——**Rr. V and VI**—*Scope—Alienation for life by holder of service inam—Effect of.*

An alienation for life by a holder of a service inam does not amount to a realization of the total benefit for himself. The inams covered by R. VI are alienable by the holders thereof for their lives like those covered by R. V, subject to the right of resumption reserved by Government to itself. (*Vivian Bose, J.*) YADEO NILKANTH DESHPANDE *v.* JANKIDAS NARSINGDAS. **170 I. C. 78=10 R.N. 37=A.I.R. 1937 Nag. 202.**

——**R. V. (2)**—*Applicability—Hereditary inams granted in lieu of lands or money stipends.*

The inams granted in lieu of lands or money stipends popularly called hugs and russums of offices, the services of which has either been dispensed with or otherwise discontinued are to be disposed of according to cl. (2) of R. (v) of the Inam Rules, if they are hereditary. (*Stone, C.J. and Niyogi. J.*) SHRIRAM DEORAG *v.* BANYA BAI. **I.L.R. (1940) Nag. 244=1940 N.L.J. 78=A.I.R. 1940 Nag. 129.**

——**Rr. V (3) and (5)**—*Use of ward 'Jahgir' in grant—If precludes its enfranchisement.*

The use of the words "as the Jahgir' in the inam grant does not preclude the inam from being enfranchised. (*Roughton, F. C.*) MIR AHSANALLI *v.* MST. HUSSAINBI. **1938 N.L.J. 248.**

——**Rr. VI (2) and V (2)**—*Applicability—Inam for the service of Deshmukh and maintenance.*

The words in a grant 'service of Deshmukh and maintenance' suggest that the inam is something more than a mere maintenance grant. It falls under R. VI of the Berar Inam Rules and by reason of Cl. (2) of R. VI it is governed by Cl. (2) of R. V, except in so far as that clause is inconsistent with R. VI. (*Roughton, F. C.*) MT. RENUKABAI *In re.* **1938 N.L.J. 258.**

BERAR LAND REV. CODE (1896), S 49.

——**R. VI, Cl. (4)**—*Interpretation—Grant in return for services—Services ceasing to be rendered — Continuing of service grant by Inam Commissioner—Nature of estate granted to inamdar.*

Where the original grant of lands was in return for certain services which had now ceased to be rendered and the service grant was continued in perpetuity on the recommendation of the Inam Commissioner on payment of 'one half rates of assessment,' it was held, on an interpretation of Cl. 4 of R. 6 of the Berar Inam Rules which governed the case that the grantee obtained a free hold estate. (*Pollock, J.*) DIGAMBAR *v.* KISHANDAS GOVERDHANDAS. **174 I.C. 84=10 R. N. 340=A.I.R. 1938 Nag. 220.**

BERAR LAND REVENUE CODE (1896)—*Revenue auction sale—Notice of arrears due or of sale to mortgagee—Failure to give—If fatal.*

There is no legal provision requiring notice of arrears due upon or sale of a survey number to be given to a mortgagee of the property proclaimed for sale, though this is desirable and should be done when the mortgage is on record. The mere failure to give such notice in itself in no way affects the legality or propriety of the proceedings. (*Burton, R. M.*) VYANKATRAO *v.* SHANKAR. **20 N.L J. 177.**

——**S. 4 (12) and (13)**—*Inferior holder and tenant.*

The two terms tenant and inferior holder are not synonymous because the definition of a "tenant", expressly excludes an "inferior holder". (*Subhedar, A.J.C.*) RAMCHANDRA WASUDEO *v.* LAXMAN ANANDRAO. **161 I.C. 784=8 R.N. 235= A.I.R. 1936 Nag 29.**

[*See* on appeal I.L.R. 1938 Nag. 151=1938 N.L.J. 48=A.I.R. 1938 Nag. 145].

——**S. 39 (1), proviso (iv)**—*Scope—Collector's power to review* suo motu.

By reason of proviso (*iv*) to S. 39 (1) of the Berar Land Revenue Code, the Collector has no power to review an order affecting any question of right between private persons except on the application of a party to the proceedings. A Collector reviewing an order *suo motu* acts illegally in the exercise of his jurisdiction. (*Greenfield, F.C.*) SHRIRAM *v.* MAROTI. **20 N.L.J. 222.**

——**Ss. 49 and 83 (1)**—*Lands in Berar—Liability to assessment and enhancement of revenue—Right of Government to assess and enhance revenue—Non-enhancement for long time—Effect—Estoppel—If arises*

Under S. 49 of the Berar Land Revenue Code, all lands are made liable to pay land revenue, for whatever purpose they are used and wherever they may be situate in Berar, unless exempted by any special contract or any law or rule or order of the Government. All lands are also liable to pay any enhanced assessment imposed in accordance with a survey under S. 83 (1) of the Code. The mere fact that the rent or revenue has not been enhanced for a number of years does not deprive the Government of the right to enhance it, nor does it raise an estoppel against the Government in that respect, as it cannot be said that there is any act or representation emanating from the Government or its agents upon which the holder of land acts. (*Bose, J.*) MAHADEO-GANORKAR *v.* SECRETARY OF STATE. **20 N.L.J. 209.**

BERAR LAND REV. CODE (1896), S 96.

——S. 96—*Scope—Title entered in record-of-rights—Presumption of correctness—Extent of—Presumption as to entries having been made after due enquiry.*

There is a presumption under S. 96 of the Berar Land Revenue Code of 1898 that the entries in the record-of-rights and certified entries in the mutation register are true until the contrary is proved or a new entry is lawfully substituted for them. The presumption is of the correctness of the title so entered and not merely of the fact that it was asserted on the date of the application for mutation. In the absence of evidence to the contrary it must be presumed that these official acts were duly and properly performed and that, therefore, these entries were made and certified after due and proper enquiry. (*Bose, J.*) CHHOGLAL BULIDAN MAHESIR *v.* NAZIM SHABI. **I.L.R (1937) Nag. 395=172 I.C. 715=10 R.N. 242=A.I.R. 1938 Nag. 73.**

——Ss. 149 (1) and 150 (3)—*Scope—Sale—Validity—Want of due proclamation—Effect—If cured by improvised measures of sale officer.*

A sale should be held only after the prescribed requirements for giving publicity to it by proclamation have been satisfied. If the proclamation is wanting, its place cannot be taken by improvised and casual measures taken by the sale officer; and a sale held without due proclamation is invalid. (*Burton, R.M.*) DHANJI SHIOLAL *v.* MADANLAL. **20 N.L.J. 50.**

——S. 150 (3)—*Scope—Non-compliance—Effect—Sale fixed for particular date—Sale officer absent on tour—Adjournment of sale to another date on next day—Sale on adjourned date without fresh proclamation—Validity.*

Where a sale is fixed for a particular date, but no proceedings take place at all on that day owing to the absence of the Naib Tahsildar on tour, and on the following date he fixes another date for the sale, the proclamation of sale lapses, and it cannot be revived by informal measures to give notice of the fresh date to essential parties. A sale held on the adjourned date without a fresh proclamation is illegal as being not in conformity with S. 150 (3) of the Berar Land Revenue Code, and cannot be upheld. (*Burton, R. M.*) DHANJI SHIOLAL *v.* MADANLAL. **20 N.L.J. 50**

——S. 150 (3)—*Scope—Postponed sale—Change of place—Fresh proclamation—If necessary.*

An auction-sale postponed under S. 150 (3) of the Berar Land Revenue Code may not be held in a place other than that notified; the section only empowers the officer holding a sale to postpone it, but not to change the venue of the sale. If the place of auction is to be changed a fresh proclamation is necessary. (*Burton, R.M.*) VYANKATRAO *v.* SHANKAR. **20 N.L.J. 177.**

——S. 174—*Right of pre-emption in Berar—Basis of—Doctrine of substitution.*

In Berar, the right of pre-emption given by the Code is to a large extent based on Mahomedan law. The right is not one of re-purchase but of substitution. The only limitation is that when the amount specified in the notice exceeds the market value or, in the case of a foreclosure, the alternative given in S. 183 (1) (*b*), then a fair consideration is to be fixed. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R. (1937) Nag. 469=172 I.C. 701=10 R.N. 237=A.I.R. 1938 Nag. 59.**

BERAR LAND REV. CODE (1896), S. 177.

——S. 174 (1)—*Scope of the Code—Rights of pre-emption to be determined by the Code—Reference to the Mahomedan Law of pre-emption when relevant.*

The Berar Land Revenue Code is exhaustive with regard to the rights of pre-emption. In so far as the rights are founded on the Code, they must be determined by the Code and not by any other law. So references to the Mahomedan Law of pre-emption or the rights prevailing in other Provinces may be misleading. It is legitimate to look to the Mahomedan Law for assistance upon any matter in regard to pre-emption on which the Code is silent (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R. (1937) Nag. 469=172 I.C. 701=10 R.N. 237=A.I.R 1938 Nag. 59**

——S. 174 (4)—*"Any transfer"—"Has been enforced"—Meaning of.*

The expression "any transfer" used in sub-S (4), S. 174, Berar Land Revenue Code, may comprise three kinds of transfers: (1) re-sale to the vendor, (2) sale to a co-occupant, or (3) sale to a stranger. To meet the last mentioned case it was necessary to enact a law such as sub-S. (4) of S. 174, because a transfer to stranger by a stranger purchaser could not obviously affect the pre-emptor's right. It was to prevent the pre-emptor's right being defeated by the first two kinds of transfers that sub-S. (4), S. 174 has been expressly enacted. This sub section counteracts the device to defeat the pre-emptor's right after it has accrued. The meaning of the expression "has been enforced" in sub-S. (4), S. 174 is that the subsequent transfer becomes voidable only when the pre-emptor enforces his right of pre-emption, either by depositing the money as contemplated in S. 180 or when the pre-emptor files a suit claiming pre-emption. (*Niyogi, J.*) KISAN DEOLU MALI *v.* GANGABAI. **I.L.R. 1937) Nag. 108=167 I.C. 592=9 R.N. 194=A.I.R. 1936 Nag. 278.**

——S. 177—*Failure to give notice under—Position of pre-emptor*

Where a mortgagee omits to give the notice mentioned in S. 177, the pre-emptor should not be placed at a disadvantage. He can have pre-emption for the fair consideration. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R (1937) Nag. 469=172 I.C. 701=10 R.N. 237=A.I.R 1938 Nag. 59.**

——S 177 (1)—*Foreclosure decree—Amount distributed over a large number of fields—Pre-emption in regard to a less number of fields—Apportionment of the sum decreed.*

Where the forclosure decree is distributed over a certain number of fields and pre-emption is sought in respect of a smaller number of fields, the price of pre-emption is fixed by apportioning the amount in proportion to the respective values of the various fields. The only guide for ascertaining the values is the land revenue payable in respect of the fields. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R (1937) Nag 469=172 I.C. 701=10 R.N. 237=A.I.R. 1938 Nag 59**

——S. 177 (1)—*Foreclosure decree—Interest—Inclusion in the price of pre-emption—No notice given by mortgagee in possession.*

No question of interest arises where no notice was given by the mortgagee and he has been in possession of the property. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R. (1937) Nag. 469=172 I.C. 701=10 R.N. 237=A.I.R. 1938 Nag. 59.**

BERAR LAND REV. CODE (1896), S. 177.

——**S. 177 (1)**—*Foreclosure decree price of pre-emption—Costs awarded in the decree if included in.*

In the case of foreclosure decree the price of pre-emption includes everything that the mortgagee is entitled to receive at the date of the final decree before the property can be redeemed. So the pre-emptor must pay everything due to the mortgagee including the costs of the suit, unless he considers it exceeds the market value. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R. (1937) Nag. 469=172 I.C. 701=10 R N 237=A.I R. 1938 Nag 59.**

——**S 182 (4)**—*Market value of the land—How far relevant for consideration by the Court.*

The Court is directed to fix, not the market value of the land, but a 'fair consideration'. The market value is to be taken into consideration for determining whether the price was fixed in good faith or not. It is not the criterion, however relevant it may be, for consideration in determining the fair consideration, for the various interests, *viz.*, the interests of the transferee in the case of mortgages and leases and of the proposed vendee in the case of an intended sale. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L R. (1937) Nag. 469=172 I.C. 701=10 R.N. 237=A I.R. 1938 Nag. 59.**

——**S. 182 (4)**—*Price fixed by vendor being less than the market value—Position not dealt with in the Code.*

The Code does not make any provision for the position when the price fixed by the intending vendor is less than the market value because such a position does not arise when the notice contemplated by S. 176 (1) has been duly served on the co-occupants. They are then bound to pre-e ipt at that price or not at all. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L R. (1937) Nag 469=172 I.C. 701=10 R.N. 237=A I.R. 1938 Nag. 59**

——**Ss. 182 (4) and 183 (2)**—*'Fair consideration'—Contruction of.*

The 'fair consideration' contemplated by S. 182 (4) is not the same thing as the market value and it must be similary construed in S. 183 (2). (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R (1937) Nag. 469=172 I.C. 701=10 R N. 237=A.I.R. 1938 Nag. 59.**

——**S. 183 (2)**—*Construction—To examine the transaction and fix a fair consideration, for the interest to be pre-empted.*

The words 'examine the transaction' mean that the Court is to determine the nature of the interest sought to be pre-empted and apply the principles enumerated in S 182 (1) (*b*). The 'interest to be pre-empted' must be the interest of the transferee in the case of mortgages and leases, and of the proposed vendee in the case of an intended sale. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R. (1937) Nag. 469=172 I C. 701=10 R.N 237=A.I.R 1938 Nag. 59.**

——**Ss 192 and 194 (2) (g)**—*Appointment of village* mahar—*Dispute as to—Jurisdiction of Civil Court.*

The appointment of a *mahar* in a village is a matter which, under the rules framed under S. 194 (2) (*g*) of the Berar Land Revenue Code, is a matter which the Revenue authorities have been empowered to deal, and consequently the jurisdiction of the Civil Courts is ousted by S. 192, unless the Revenue Courts think fit to refer the matter to the Civil Court when there is a dispute between rival claimants. A reference by the Revenue Court is a condition precedent to the jurisdiction of the Civil Court. (*Bose, J.*) IRBHANYA *v.* SAKHOO. **I.L R. (1937 Nag. 355=172 I.C. 394=10 R N. 203=A.I.R. 1937 Nag, 308.**

BERAR LAND REV. CODE (1928), S. 72.

——**(1928), Ss. 24 and 145**—*Defaulter—If entitled to be served personally with prohibitory order.*

A copy of the prohibitory order is not required to be personally served on the defaulter either by S. 24 of the Berar Land Revenue Code read with R. 4-A under S. 194 (2) (*a*) or by S. 145 of the same Code read with O. 21, R. 54, C. P. Code. (*Greenfield, F C.*) BHAURAO VITHOBA *v.* KAIKAJI KANHUJI. **1939 N L J. 57.**

——**Ss. 38 and 178**—*Nature of rules contemplated by S. 38—If comes into operation by itself—Basis of their validity—Publication in gazette, if only directory.*

'General rules' contemplated in S. 38 of the Berar Land Revenue Code are not rules of procedure but rules to guide the Revenue Officers in the disposal of Government lands. Since the power to 'sanction' such rules is given by S. 38 itself, it is unnecessary to invoke the general power conferred by S. 178. As such the general rules contemplated by S. 38 take effect by virtue of their having been sanctioned by the Chief Commissioner and becomes operative *de hors* their publication in the gazette under S. 218. They are valid, not because they have the force of law, but because they were sanctioned by a competent authority in accordance with law. Publication is a condition subsequent to the making of the rules and hence directory. The non-observance of that condition would not prevent the rules from taking effect. (*Gruer and Niyogi, JJ.*) MADHAO GOPAL *v* SECRETARY OF STATE. **I.L.R. (1939) Nag. 143=180 I.C. 532=11 R.N. 370=1938 N.L.J 439=A I.R. 1939 Nag 44.**

——**S 41 (3)**—*Right of suit in Civil Court—Adverse decision by Revenue Officer on Government's right to enhance assessment.*

Where a person questions the right of Government to enhance the assessment on his land, but the Revenue Officer decides it adversely to him, he is clearly entitled to sue for establishing his right under sub-S (3) of S 41 of the Berar Land Revenue Code. (*Gruer and Niyogi, JJ.*) MADHO GOPAL *v.* SECRETARY OF STATE. **I.L.R. (1939) Nag 143=180 I.C 532=11 R.N. 370=1938 N. L J. 439=A.I.R. 1939 Nag 44.**

——**S. 72**—*Ante-alienation tenant--Arrears of rent—Jagirdar, if entitled to interest on the arrears.*

In the case of an ante-alienation tenant in a Jagir Village, the jagidar is the receiver of the rent reserved on the holding of such tenant and if the rent is not paid on the due date in spite of demands, it is a case in which it would be equitable to order interest to be paid to the jagirdar on the rent due. (*Stone, C.J.*) RAJE SHRIDHAR RAO *v.* SHRAWAN VITHOBA. **183 I.C. 176=12 R N. 52=1939 N L.J. 198=A.I.R. 1939 Nag. 149.**

——**S. 72**—*Scope of—Status of ante-alienation tenant—Proof of—Requisites.*

S. 72 of the Berar Land Revenue Code requires that the land must have been held on a rent equal

BERAR LAND REV. CODE (1928), S. 2. 102

in amount with the fair assessment. 'Equal' cannot be interpreted to mean approximately equal. In order to establish a status as an ante-alienation tenant, a tenant must show that what he has to pay does not depend on the choice of the landlord but what the Government considered to be the fair assessment at each successive settlement. An approximation to the fair assessment due to the leniency of a Jagirdar who may rack-rent his tenants cannot give the tenant a right to claim a status to which he is not otherwise entitled. (*Grille, J.*) SYED HIDAYAT *v.* RAMCHANDRA DUMNAJI. **I.L.R. (1940) Nag. 388=1940 N.L.J. 229= A.I.R. 1940 Nag. 209.**

——**S. 102**—*Powers of Deputy Commissioner—Reduction of* nazul *ground rent.*

S. 102 of the Berar Land Revenue Code only gives the Deputy Commissioner, powers to interfere to correct an error due to a mistake in survey or arithmet cal calculation. Reduction of *nazul* ground rent cannot come under the section. (*Roughton, F.C.*) UMAR HAJI, *In re.* **1938 N.L.J. 316.**

——**S. 112 (1)**—*Expression "first hearing"—Meaning of.*

The expression "first hearing" of a suit in S 112 (1) means the hearing at which the Court examines the pleadings of the parties with a view to understand their contention and to frame issues. (*Niyogi, J.*) BALIRAM *v.* UTTAM CHAND. **I.L.R. (1939) Nag. 452=182 I.C. 52=11 R. N. 495=1939 N.L.J. 157=A.I.R. 1939 Nag 110.**

——**S. 112 (2)**—*Dismissal of suit under—If a decree—Appeal, if lies.*

The dismissal of the suit under S. 112 (2), Berar Land Revenue Code, must be regarded as a decree within the meaning of that term as defined in S. 2 (2), C. P. Code, and under S. 96, C. P. Code, the plaintiff is entitled to file an appeal. (*Niyogi, J.*) BALIRAM *v.* UTTAM CHAND. **I.L.R. (1939) Nag. 452=182 I C 52=11 R.N. 495= 1939 N L.J. 157=A.I.R. 1939 Nag. 110.**

——**S. 112 (2)**—*Granting of time—Computation.*

The granting of time by the Court contemplated in sub-S. (2) of S. 112 must be interpreted in the sense of granting time after the lapse of first hearing and not before it. (*Niyogi, J.*) BALIRAM *v.* UTTAM CHAND. **I.L.R. (1939) Nag. 452=182 I.C. 52=11 R.N. 495=1939 N.L.J. 157 =A.I.R. 1939 Nag. 110.**

——**S. 129**—*Applicability—Right of way claimed running partly over boundaries and partly through fields of others.*

Where the right of way claimed by the plaintiff does not lie altogether over the boundaries but lies in part through the fields of others. S. 129 of the Berar Land Revenue Code would not apply to the entire right of way claimed, and the plaintiff can only rely on a right of easement acquired under the ordinary civil law. (*Pollock, J.*) BALIRAM SHIWAPPA *v.* NARAYAN. **173 I.C. 266=10 R.N. 291=A.I.R. 1938 Nag. 144.**

——**S. 129**—*Persons acquiring right of easement under ordinary law—If need apply to Deputy Commissioner.*

S. 129 of the Berar Land Revenue Code can never have been intended to take away a right of easement or any other right acquired under the ordinary civil law. It merely gives the Deputy

BERAR LAND REV. CODE (1928), S. 156.

Commissioner power to give a right of way over the boundaries of other survey numbers, but it is open to persons who havea right of way acquired by easement to rely on their rights and not to apply to the Deputy Commissioner under S. 129. (*Pollock, J.*) BALIRAM SHIWAPPA *v.* NARAYAN. **173 I.C. 266=10 R.N. 291=A.I.R. 1938 Nag. 144.**

——**S. 129 (3)**—*Limitation—Starting point—Decision in dispute about a right of way—Order by Tahsildar and appeal to Deputy Commissioner.*

The terms of sub-S. (3) of S. 129 of the Berar Land Revenue Code go to show that it is the decision of the Deputy Commissioner which is the starting point of limitation for filing a suit in a Civil Court. Where in the case of a dispute about a right of way the Tahsildar enquired and passed orders, but an appeal was preferred to the Deputy Commissioner, which was heard by the Sub-Divisional Officer and decided and the matter was then taken up in due course to the Commissioner and local Government, it was held that the starting point of limitation for filing civil suit was the date on which the Sub-Divisional Officer passed his orders and not the date on which the Tahsildar passed his orders. (*Niyogi, J.*) SAMBHOO UKARDA MALI *v* PARASHRAM. **187 I.C. 404=12 R.N. 287=1940 N.L.J. 76=A I.R. 1940 Nag 95.**

——**S. 154**—*Forfeiture—Legality—Intentional default—Clearance of arrears—If an excuse for avoiding forfeiture.*

Where a defaulter neglects to avail himself of the remedies open to him by Ss. 144 and 145 of the Berar Land Revenue Code, and resorts to a collusive arrangement with the purchaser and pays the deposit amount himself and later on intentionally defaults in the payment of the balance, but in the meanwhile pays off the arrears of land revenue is nevertheless liable to have his deposit forfeited. (*Burton, F. C.*) VITHOBA PANDURANG NEWA SALKAR, *In re.* **1939 N.L.J. 56.**

——**S. 155**—*Absence of jurisdiction to sell—Question, if can be raised after sale but before confirmation.*

An objection as to jurisdiction of a Court to sell can be raised between the sale and its confirmation for, if there is no jurisdiction, the sale would be void and there could be no confirmation. (*N. J. Roughton, F C.*) KILACHAND DEVCHAND & CO., LTD. *v.* DHUNDIRAJ GANESH SAHASRABUDHE. **1938 N.L.J. 128.**

——**S. 156**—*Attachment not effected as required by S. 145 (2) of the Revenue Code—Objection if open—Absence of prejudice—Sale if should be set aside.*

The objection that the attachment of the Survey numbers was not effected as required by S. 145 (2) of Revenue Code. does not lie under S. 15 of the Code inasmuch as it is an irregularity or mistake in publishing or conducting the sale. Hence it could not be raised by way of an application to set aside the sale. Further when there has been no prejudice, there is no substance in the plea. (*Burton, F.C.*) RAMGOPAL HARDE *v.* SYED KARIMUDDIN. **1940 N.L.J. 424.**

——**S. 156**—*Sale of all survey numbers in one lot—Legality.*

BERAR LAND REV. CODE (1928), S. 176.

Where there were arrears due in respect of several numbers for a series of years and all were liable to sale under S. 141 (*c*), of the Berar Land Revenue Code, a sale of all of them in one lot in order to obtain a better price is not illegal. (*Burton, F. C.*) RAMGOPAL HARDE *v.* SYED KARIMUDDIN. **1940 N.L.J. 424.**

——**S. 176**—*Sale—If confined to sales as defined in the T. P. Act.*

The word 'sale' in S. 176 of the Berar Land Revenue Code is not to be construed in the narrow sense in which it is used in the T P. Act. As such it includes an oral sale. (*Bose, J.*) JAINARAYAN *v* BALWANT. **180 I.C. 963=11 R. N. 414=1938 N.L.J. 379=A I.R. 1939 Nag. 35.**

——**S 194**—*Rules framed under—R.* 18—*Interpretation of.*

The last sentence in R. 18 of the rules framed under S. 194 of the Berar Land Revenue Code can only refer grammatically and logically and in the ordinary meaning of the words to the former part of that rule and cannot refer to the preceding rule The result is that R. 18 provides for an application to the Tahsildar for redress only in the particular case stated, namely, when the Civil Court has decided a dispute as to the right to office and the patel demands a substitute in place of the person who, the Civil Court has decided, has the right to office. (*Burton, F.C.*) NAGO MAHAR *v.* BHAWANIA MAHAR. **1939 N L.J. 166**

BERAR LAND REVENUE MANUAL (1906). Vol. I, App. VIII--*Nazul land held by Municipal Committee—Permanent lease by latter at fixed rent—Validity of.*

A Municipal Committee which holds Nazul land from Government cannot grant to others any right in such land which it does not itself possess It cannot consequently grant a permanent lease of such land at a fixed rent which is not liable to enhancement (*Bose, J.*) MAHADEO GANORKAR *v.* SECRETARY OF STATE. **20 N.L.J. 209.**

BERAR PATELS AND PATWARIS LAW (1900)—*Review—Grounds for—Procedure—C P. Code, O.* 47, *R.* 1.

There are no rules under the Berar Patels and Patwaris Law of 1900, regulating the procedure about applications for review; therefore the rule in the C. P. Code contained in O. 47, R. 1 should be followed so far as they may be applicable; and a review can be allowed only on the grounds specified in O. 47, R. 1, C. P. Code. (*Burton, R. M. and Roughton, H. M*) MADHORAO KALE *v.* VYANKATRAO. **19 N.L J 276.**

——*Rules framed under—Scope of—Revenue officer—Powers, if any regarding collection of rent in a Jagir village*

The duties of patels and patwaris prescribed in the rules under the Patels and Patwaris law relate to the collection of land revenue and cesses and not to the recovery of rent in alienated villages. There is no law or rule in force by which any revenue officer is competent to give directions regarding the recovery or disposal of rent in a Jagir village. (*Burton, F. C.*) RAMCHANDRA ATMARAM *v.* YELLUE VITHAL RANU KANANDAN. **1939 N.L.J. 224.**

——*Scope—Watan rights—Permanent forfeiture—Legality.*

BERAR PATELS AND PATWARIS LAW (1900), S. 6.

In the ab ence of specific orders *watan* rights cai not be legally forfeited for ever or permanently. (*Raghavendra Rao, H M.*) SONAJI *v.* LARWATRAO (KRISHNARAO DESHMUKH. **19 N.L.J. 239.**

——**Ss. 5, 6, 6-A and 6-B**—*Scope—Appointment under S. 6-A—If governed by S. 5.*

Though there is no specific exemption of appointment under S. 6-A of the Patels and Patwaris Law from the operation of S. 5 of the same Law, S. 5 cannot have been intended to apply to appointments made under S. 6-A, as the application of S. 5 would involve a breach of the conditions of the lease granted under the Waste Land Rules of 1865 Ss. 5 and 6 are mutually exclusive, and S. 6-A is part of the law dealing with a matter similar in nature to what is provided for in S 6. S. 5 provides for the appointment under the watandari system in khalsa villages, while Ss. 6, 6-A and 6-B provide for appointment under the proprietary systems prevailing in jagir, palampat and izara villages. (*Greenfield, F. C.*) BHAURAO *v.* BAPURAO **20 N.L.J. 224.**

——**S. 5 (3)**—*Construction—Adopted son—Right of—Son adopted by widow of prior incumbent—Claim of as against son of last incumbent—Rule—Disqualification of widow—If bar to claim of son adopted by her.*

The words "shall not appoint a woman if a male relative of the late incumbent of the office exists" in S. 5 (3) (*e*) of the Patels and Patwaris Law postpone the rights of a woman to those of a male relative; but they do not affect the rights of a son adopted by a widow, who claims not through the widow but through the widow's deceased husband into whose family he has been adopted. The rights of the adopted son have to be decided according to the law of inheritance applicable to the family into which he has been adopted. (*Burton, R M. and Roughton, H. M.*) LAXMAN *v* TUKARAM **19 N.L.J 279.**

——**S. 6 (3) (amendment of 1934)**—*Amendment, if retrospective.*

The amendment of S. 6 (3) of the Berar Patels and Patwaris Law was an alteration by way of limitation of the period within which application for assistance could be made to the Revenue Court. The right under S. 6 prior to amendment was a vested right and hence it could not be taken away by the amendment being given a retrospective operation. (*Roughton, F.C.*) MURADBEG *v.* RAJE GOPALRAO. **1938 N L.J 94.**

——**S. 6 (3)**—*Applicability—"Withholding of poyment"—Meaning of—Patwari agreeing to accept payment after next harvest—Effect of—"Emoluments of patwari"—Meaning of—Rate fixed by agreement—Power of Deputy Commissioner to fix emoluments.*

The words "emoluments of a patwari" in S. 6 (3) of the Patels and Patwaris Law cannot be interpreted as meaning the emoluments at the rate fixed by the Deputy Commissioner under the proviso (*b*) after the patwari has intimated that he no longer abides by the agreed rate. When the rate of emoluments has once been fixed by agreement between the Jagirdar and the Patwari, the Deputy Commissioner cannot fix emoluments under S. 6 (3). S. 6 (3) does not further come into operation unless there has been a withholding of payment by the proprietors; and when the withholding is condoned by the patwari by

BERAR PATELS AND PATWARIS LAW (1900), S. 6.

agreeing to accept payment later on after next harvest. there is no such withholding as would invoke the application of S. 6 (3). A contract should not be varied in one particular and maintained in another particular without the consent of the contracting parties; and although there is nothing illogical in this being done in the peculiar circumstances of a contract between a jagirdar and a patwari in a Jagir village, such a departure from the ordinary law should be clearly indicated in the section of the law. (*Roughton, F.C.*) SYED CHHABAN *v.* RAJARAM. **1938 N.L.J. 64.**

——**Ss. 6 (3) and 8**—*Applicability—Patwari nominated by jagirdar and appointed by Government—Status of—Loose description as substitute patwari—If makes him substitute.*

Where it is clear that a patwari is appointed under S. 6 (1) of the Berar Patels and Patwaris Law by the Government. on the nomination of the Jagirdar S. 6 (3) applies to the case. The fact that he is loosely described as a substitute partwari, cannot make him a substitute, under S. 8 of the Patels and Patwaris Law, of a malik who is unable to work himself. (*Roughton, F.C.*) SYED CHHABAN *v.* RAJARAM. **1938 N L.J. 64.**

——**S. 6-A**—*Scope—Izara village created under Waste Land Rules—Malik and patel—Non-performance of services personally—If entails dismissal.*

The malik and patel of an izara village, created under the Berar Waste Land Rules, 1865. whether he be the sole proprietor or one of the proprietors appointed as such under S. 6-A of the Patels and Patwaris Law, is not bound to perform the duties of the office of patel personally. A deputy may be appointed to perform the duties. Merely because the patel fails to render personal service, does not entail his dismissal, (*Greenfield, F.C.*) BHAIRAO *v.* BAPURAO **20 N. L.J. 224.**

——**S. 7**—*Reintroduction of practice of lapsed rotation—Principle.*

Where the practice of rotation has lapsed and an attempt to reintroduce it is made, its revival would be sanctioned only when the cessation is shown to have been wrongful or to have been due to the operation of the rules prohibiting or discouraging rotation. Where it is due entirely to the voluntary action or inaction or acquiescence on the part of the representatives of the different *munds*, the practice of rotation would not be permitted to be reintroduced. (*Burton, F. C.*) SHESHRAO *v.* NARAYAN. **1939 N.L.J. 105.**

——**S. 7 (3)**—*Amalgamation of two villages with separate patels—Joint patels—Dismissal of one in 1874 and sole holding by other—Success on—Rotation between families—Rules of 1886—Effect of.*

Where two separate villages, having a separate patel each, were combined and the two patels continued to be patels working jointly till 1874, when one of them was dismissed for embezzling government money, and the other patel remained as sole patel till his death in 1876 and was succeeded by his son, and on the death of the latter in 1935, disputes arose between the two families about the succession to the office.

BERAR PATELS AND PATWARIS LAW (1900), S. 14.

Held, that the old rules having been superseded in 1886, the case was a fit one for the introduction of rotation between the two families under S. 7 (3) of the Berar Patels and Patwaris Law.

Held, further, that in the absence of a specific order, no watan right could be legally forfeited; and merely because a patel is dismissed, the watan rights of the family of the dismissed patel could not be held to be forfeited. (*Raghavendra Rao, H.M.*) NARAYAN *v.* GANPAT. **19 N.L.J. 201.**

——**S. 7 (3) (b)**—*Appointment of patel—Two branches of family found jointly working as patels in the past—Proper order.*

Where it is found that two branches of a family have worked jointly as patels in the past, both have equal claims to share the Revenue Patelki Office under S. 7 (3) (*b*) of the Patels and Patwaris Law. The proper order in such a case is to direct the representatives of the two branches to work as revenue patel in rotation for 10 years each. (*Raghavendra Rao, H M.*) SONAJI *v.* PARWATRAO KRISHNARAO DESHMUKH. **19 N.L. J. 239.**

——**S. 8 (4) and R. XII (iii)**—*Appointment under S. 8 (4), if falls within scope of R. XII (iii)—Son of a lunatic Malik—Proper remedy to remove substitute.*

Any appointment made under sub-S. (4) of S. 8 of the Berar Patels and Patwaris Law, whether on the nomination of the Malik or on his failure to do so, by selection of the Deputy Commissioner is an appointment made on behalf of the Malik and falls within the scope of R. XII (*iii*). Where a substitute is appointed for a lunatic Malik patel, his son who at that time was not a major, cannot apply to remove the substitute. His only remedy is to get his father resign and then himself to become patel. making the substitute go out automatically. (*Greenfield.*) SHESHRAO *v.* RAMRAO. **1940 N.L.J. 198.**

——**S. 8 (4)**—*R. (x) of Rules framed under the Act—Nomination of substitute—Procedure—Deputy Commissioner, when can select and appoint—Malik Patwari's power, if affected by the absence of members of the family.*

It is only when the Malik Patwari refuses or fails to nominate a substitute, or the Deputy Commissioner does not approve of such a nomination, that the Deputy Commissioner gets the power of selection and nomination. R. (*x*) of the rules framed under S. 21 of the Act requires the principal to nominate a member of his family or of the sub-division of his family. But it does not follow that in the absence of any such persons, the principal's right to nominate a substitute is lost. (*Burton, F.C.*) GOVIND BALKRISHNA *v.* VITHAL VINAYAK. **1940 N.L.J. 120.**

——**S. 8 (4)**—*Scope—If permits alternative nominations till acceptance of one.*

There is no provision in S. 8 (4) of the Berar Patels and Patwaris Law, that the maiik patwari is to be given the option and opportunity of making alternative nominations until one of them is approved by the Deputy Commissioner. (*Burton, F.C.*) YADO PARASHRAM *v.* SHAIKH AZIZ. **1939 N.L.J. 104.**

——**S. 15**—*Enquiry—Procedure to be followed prior to dismissal.*

An enquiry under S. 15 of the Berar Patels and Patwaris Law should, apart from other things, at

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least have a Judicial form. Definite charges should be framed and the patel's explanation and evidence taken and a Judicial finding recorded. (*Greenfie d, F.C.*). NAMDEO EKOBA, *In re*. 1940 N.L.J. 255.

BERAR REVENUE BOOK CIRCULAR—*Sale—Objections—Bid not in fact accepted, but case adjourned—Appellate Court, if can direct sale on other terms.*

Where after a sale objections are filed and the case comes before Collector to consider the objections and whether the final bid is to be accepted, he simply adjourns it without accepting the bid, the Deputy Commissioner in appeal has no power at that stage to raise the bid and direct a sale. It is for the Collector to accept the bid first. (*Burton, F.C.*) JAGANNATH *v.* SETH MISHRILAL. 1940 N.L.J. 61.

——Vols. II-III—8—Adjournment of sale—Failure to specify hour of adjourned sale—Omission to inform all persons present of adjournment—Effect—Material irregularity. *See* C. P. CODE, O. 21, R. 90. 20 N.L.J. 283.

——III—8—*Execution sale by Naib Tahsildar—Acceptance of bid and confirmation of sale by Sub-Divisional Officer — Considerations—Inadequacy of price and irregularity in proceedings—Effect of.*

Eleven fields comprising an area of about 250 acres with a rental of Rs. 195, only one of which was encumbered to the extent of Rs. 500 were sold in execution of two B class decrees by a Naib Tahsildar. The total amount of the decrees was about Rs. 9,100, but the price fetched was only Rs. 1,365 or Rs. 5-8-0 per acre. The Naib Tahsildar fixed the reserve price only at Rs. 1,240, though on a prior auction, about one month previously, it was Rs. 1 07,000. The bidders were not informed of the cancellation of the prior sale. The Sub-Divisional Officer without any regard to the interests of the judgment-debtor and without considering the objections and protest of the judgment-debtor accepted the bids and confirmed the sale.

Held, that the bids should not have been accepted and the sale must be set aside. (*Raghavendra Rao, H.M.*) BHAN *v.* DIPCHAND. 19 N.L.J. 51.

——(1118), R. 11 (ii)—*Sale by officer deputed by Collector—Acceptance of bid—Further procedure—Powers of Collector.*

Where a sale is held by an officer deputed by the Collector, R. 11 (*ii*) of Berar Revenue Book Circular (1118) requires that the sale shall be adjourned to the Deputy Commissioner (*i.e.*, the Collector) before the final bid is accepted. The rule gives the Collector power to accept or reject the bid obtained in the original sale and does not give him the power to continue the sale without a fresh proclamation. (*Burton F C.*) VITHAL *v.* JAMNADAS. 1940 N.L.J. 323.

BERAR WASTE LAND RULES (1865)—Izara village—Malik and patel—Liability to render personal service. *See* BERAR PATEL AND PATWARIS LAW, S. 6-A. 20 N.L.J. 224.

BHOPAL CIVIL PROCEDURE CODE, Ss. 27, 58 and 2 (8)—*Suit on basis of foreign judgment to recover costs—Maintainability—Suit decided* ex parte *by foreign Court.*

BHOPAL C. P. CODE O. 6, R. 17.

In a suit instituted in a British Indian Court. the plaintiff's witness who was under examination absented himself whereupon the counsel for the plaintiff applied for adjournment. This being disallowed the counsel withdrew from the suit with the result that the plaintiff's claim was rejected and he was required to pay costs to the defendant. The defendant instituted a suit in the Bhopal State to recover costs from the plaintiff on the basis of the judgment of the British Indian Court.

Held, (1) that the suit was decided by the British Indian Court *ex parte* under O. 17, R. 2, C. P Code; (2) that the definition of judgment in S. 2 (8), Bhopal C. P. Code, covered both an order and a decree, and equally held good whether the decree was passed *ex parte* or on merits; (3) that the suit to recover costs on the basis of the *ex parte* judgment of the British Indian Court was not barred by S. 58, Bhopal C. P. Code. (*Mohammad Ahmad Khan, C.J. and Birdie, J.*) HARKUNWAR RAI *v.* KESRI SINGH. 187 I.C. 439.

——Ss. 58 and 27—Suit on basis of foreign judgment to recover costs—Maintainability. *See* BHOPAL C P. CODE, SS. 27 AND 58. 187 I.C. 439.

——O. 6, R. 17—*Amendment of plaint—When not allowed—Suit on instalment-bond containing default clause—Amendment to plead waiver of right to sue for whole amount—Amendment of date of payment of instalment—Permissibility.*

It is generally accepted that no amendment of a plaint can be allowed which has the effect of depriving the defendant of any right already acquired by him or of altering the cause of action in any suit Amendment of every other kind is permitted. An amendment by which the defendants' plea of limitation against the suit might entirely fall to the ground must always be permitted. A right which the defendant has already acquired is one thing, and a mere right to raise the plea is quite another. The plaintiff shall not be allowed to add any new relief by way of an amendment which on account of the efflux of time he could not claim at that time. But in a suit on an instalment bond containing a default clause giving the creditor a right to recover the whole amount in the event of failure of any one instalment, the plaintiff's request to plead waiver of his right to sue for the whole amount is neither a new relief nor it has the effect of depriving the defendant of any right already acquired by him. The nature of the suit is not in the least altered thereby. In fact the plaintiff is trying by this amendment to explain that his suit is within time, and such an amendment is permissible at any stage. If the plaintiff has made a mistake in stating the date of payment of money and now requests to correct the same, he by doing so is not in any way depriving the defendant of any right whatsoever which he had so far acquired. A mistake of fact of this nature can always be corrected in pleadings by any party without injuring any right of his adversary. It would clearly be against the principle of amendment laid down in O. 6, R. 17, C P. Code, to refuse an amendment in respect of a *bona fide* mistake regarding the mere date of any transaction. (*Mohamad Ahmad Khan, C.J. and Birdi, J.*) MADAN MOHANLAL *v.* ZAHIRUDDIN. 187 I.C. 809.

BHOPAL C. P. CODE, O. 23, R. 1.

——O. 23, R. 1—*Withdrawal of suit in appeal —Failure to implead necessary defendant—If sufficient ground.*

Failure to implead even a necessary party as defendant is neither such a formal defect as can be cured in appeal nor does it afford sufficient ground to withdraw from the suit with permission to institute the same afresh after it has once been heard and decided. (*Mohammad Ahmad Khan, C.J. and Fazle Azim, J.*) KISHORILAL *v.* SUNDARBAI. **187 I.C. 581.**

——O. 23, R 1 (2) (b)—"*Other sufficient reasons*"—*Interpretation.*

The sphere of "other sufficient reasons" in O. 23, R. 1 (2) (*b*) is wider than the sphere of "some formal defect". (*Mohammad Ahmad Khan, C. J. and Fazle Azim, J.*) KISHORILAL *v.* SUNDARBAI. **187 I.C. 581.**

BHOPAL LIMITATION ACT, Arts 40 and 137—Scope—Suit to recover property given for sale on commission basis—Article applicable. *See* BHOPAL LIMITATION ACT, ARTS. 137 AND 40. **188 I.C. 437.**

——**Arts. 137 and 40**—*Scope—Suit to recover property given for sale on commission basis—Article applicable.*

A suit for the recovery of a philatelic album given to he defendant for negotiating a sale on commission basis is governed not by Art. 40 but by Art. 137 of the Bhopal Limitation Act The defendant is a depositary within the meaning of the latter article. Art. 40 has no application to a case of property entrusted by one person to another. The fact that the defendant refused to give delivery of the property does not make his possession unlawful and simultaneously start limitation against a suit for recovery under that article. The depositary cannot be allowed to take advantage of his own wrongful act by claiming to be benefited by the shorter period under Art. 40, because by so doing, he would be clearly defeating the object of the Legislature. (*Mohammad Ahmad Khan, C. J. and P. C. Birdi, J.*) HASHMAT ALI *v.* M. GODREJ. **188 I.C. 437.**

BHOPAL SMALL CAUSE COURTS ACT —*Jurisdiction of Small Cause Court—Suit for accounts—What is—Suit for against agent for value of tickets given for sale and not accounted for by him—If cognisable by Small Cause Court.*

The Small Cause Courts Act excludes from its purview all suits relating to settlement of accounts between the parties. The essential nature of such a suit is that therein the plaintiff does pray for a decree for a fixed sum of money, but only wants rendition of account by the defendant followed by a decree for the amount found due. It is possible that even in claims for a fixed amount the defendant's plea might some time give rise to the necessity of settlement of account, but this alone would not convert a suit for a fixed sum into a suit for account. It is a settled principle that a suit which is essentially of small cause nature does not change its character merely because the defendant has chosen to raise a plea of account. Even if the Court has to go into the parties' account to a certain extent the jurisdiction of Small Cause Court is not ousted. A suit against an agent for a fixed sum representing the value of certain number of tickets given to him for sale and not accounted for by him, is not a suit for account and is, therefore, cognisable by the Court of Small Causes. (*Mohammad Ahmad Khan, C J.*) ISHAQUE ALI *v.* ABDUS SAMAD. **187 I.C. 480.**

B. AND O. CO-OP. SOC. ACT (1935), S. 48.

BIHAR AND ORISSA CO-OPERATIVE SOCIETIES ACT (VI OF 1935), S. 24-A—*Scheme of compromise pending suit by depositor —Plaintiff not party to compromise—If bar to passing of decree and execution.*

S. 24-A (2) of the Bihar and Orissa Co-operative Societies Act makes a scheme of compromise agreed to by the specified majority, if sanctioned by an order of registrar binding on all the creditors or the class of creditors, as the case may be and also on the Co-operative Society. It may be that a particular creditor was no party to the scheme of compromise, but S. 24-A (2) makes his individual participation absolutely immaterial. Where therefore pending a suit by a depositor against a Co-operative Bank for recovery of his deposit a scheme of compromise under S. 24-A of the Act is agreed to by the required majority of creditors and sanctioned by the Registrar of Co-operative Societies, and a decree is subsequently passed in favour of the depositor in his suit the decree cannot be executed, against the Bank. The depositor-plaintiff being a creditor, is bound by the compromise. though not a party to it. The compromise bars execution of the decree not by resson of any express provision in the Act but under the general law. The scheme of compromise has to be regarded as an arrangement under which creditors are to refrain from bringing execution in return for the restrictions, imposed upon the Bank as regards the disposal of its income and property. The decree passed is only a security for the debt and has the effect of establishing the debt as against the Bank. The compromise, while not operating as a bar to the passing of the decree, is a clear bar to execution. (*Harries, C. J. and Dhavle, J.*) BUXAR CENTRAL CO-OPERATIVE BANK, LTD. *v.* AKHOURI BINDHYACHAL PRASAD. **185 I.C. 606=6 B R 222=12 R. P 387=21 Pat L.T. 173=A.I.R. 1940 Pat. 261.**

—— **S 48**—*Jurisdiction of Registrar—"Dispute" —Prior award under Act of* 1912*—Second award under new Act in respect of same debt—If a nullity and without jurisdiction—C. P. Code, S.* 11.

The expression "dispute" in Expl. I to S. 48 of the Co-operative Societies Act is used in a very special sense. There may be a dispute under the section even when the claim is admitted. There is nothing to prevent the Registrar from dealing under S.48 with a dispute between the parties as to a decretal debt. Therefore even when a previous award has been given, if there is still a dispute as to the judgment-debtor's ability to pay or the method of enforcement of payment, the Registrar is competent to deal with the matter. There is no section in the Act which makes S. 11 of the C. P. Code applicable to the Co-operative Societies Act. Therefore the fact that an award was made by the Registrar in respect of a debt under the Act of 1912 does not deprive the Registrar of jurisdiction to make a second or subsequent award in respect of the same debt under the provisions of the new Act of 1935. The second award cannot on that ground be held to be a nullity as being without jurisdiction. (*Fazl Ali and*

B. AND O. CO-OP. SOC. ACT (1935). S. 48.

Meredith, JJ.) DWARKA PRASAD *v.* TRADERS' CO-OPERATIVE BANK, LTD. **21 Pat.L.T 343.**

——Ss. 48 and 57—*Suit by member against Society to recover interest on deposit—Dispute as to rate of interest—Jurisdiction of Civil Court.*

Where the plaintiff sued a co-operative union, of which he was a member to recover arrears of interest on deposit made by him, and the dispute was about the rate of interest,

Held, that the suit did not lie in the Civil Court, as it was barred by S. 57 of the Bihar and Orissa Co operative Societies Act, 1935, read with S 48 of the same Act. (*Rowland, J.*) HAJIPUR CENTRAL CO OPERATIVE UNION, LTD. *v.* KAMLA PRASAD. **166 I.C. 689=8 R.P. 335=3 B R. 208=18 Pat.L. T. 255=A.I.R. 1937 Pat. 531.**

——S. 57 (2)—*Applicability and scope—"Touching the affairs of the Society"—Decree for costs against Co-operative Society—Execution in Civil Court—Leave of Registrar—Necessity for—S.* 57 (1).

S 57 (2) of the Bihar and Orissa Co-operative Societies Act imposes a bar to certain proceedings in the case of a Co-operative Society in liquidation, *i.e.*, on any matter touching the affairs of the Society. The affairs of a Society in liquidation are confined to the winding of the Society and the payment of its debts, the collection of amounts due to it and of contributions from members, etc. The payment of the debts of a Society whether decretal or otherwise, is clearly a matter touching the affairs of the Society within the meaning of S. 57 (2), and proceedings to realize such debts are barred except by leave of the Registrar. An application to execute a decree for costs against a Society can therefore lie only with the leave of the Registrar under S. 57 (2).

Rowland, J.—(*Quaere*).—Whether such an execution application is also barred by S. 57 (1) of the Act. (*Agarwala and Rowland, JJ.*) GAYA PRASAD *v* SADAR CENTRAL CO OPERATIVE SOCIETY, GAYA. **1940 P.W.N. 155=21 Pat.L.T. 217=6 B. R. 776=A.I.R. 1940 Pat. 253.**

——S. 63—*Applicability—Debtor not ceasing to be member of Society—Limitation.*

There can be no question of limitation at all under S. 63 of the Co-operative Societies Act so long as the person from whom a debt is due to a Society is still a member of the Society. (*Fazl Ali and Meredith, JJ.*) DWARKA PRASAD *v.* TRADERS' CO-OPERATIVE BANK, LTD. **21 Pat.L.T. 343.**

BIHAR AND ORISSA EXCISE ACT (II OF 1915), S. 74—*Scope—Search—Omission to record reasons—Effect—Obstruction to search—If offence—Penal Code, S.* 353—*Penal Code, S.* 99—*Search at night—If illegal*

Under S. 74 of the Excise Act, if an officer, having reason to believe that an offence under the Act has been committed, wants to search, he has to record his reasons for doing so. The recording of reasons before search is provided for both under the Excise Act and the Code of Criminal Procedure, and is intended to protect the liberty of citizens and avoid useless and unjustified searches. If no reason is recorded before an attempt to search is made, the officer cannot be said to be acting in the exercise of his powers or in good faith; consequently a person pushing such officer or otherwise preventing the search cannot be convicted of an offence under S. 353 of the Penal Code. Nor can the officer be said to be acting with due care and attention, so as to render S. 99, I. P. Code, applicable. There is no restriction in S. 74 of the Bihar and Orissa Excise Act, to the effect that a search can be made only in day and not at night. A night search is not therefore illegal. (*Khaja Mahomed Noor, J.*) CHANDER PRASAD *v.* EMPEROR **170 I C. 784=3 B.R. 786= 10 R.P. 156 (1)=38 Cr L J. 982=1937 P.W.N. 377=18 Pat.L.T. 398=A I R 1937 Pat. 501.**

B. AND O. MICA ACT (1930), S. 17.

BIHAR AND ORISSA FOOD ADULTERATION ACT (II OF 1919), S 3—*Articles illegally seized under Municipal Act—Complaint in respect of—Legality.*

Articles which are not intended for sale within the Municipality cannot be legally seized by the Commissioners under S. 286 of the Bihar and Orissa Municipal Act. But when they are seized, and it is found that their condition warrants a complaint of an offence punishable under S. 3 of the Food Adulteration Act, committed within the Municipal area, there is nothing to prevent the Commissioners from making a complant in proper form before a Magistrate. There is nothing in the Food Adulteration Act which prohibits a Magistrate from taking cognisance on complaint of an offence punishable under the Act wherever that offence may have been discovered. (*James, J*) RAMJAS MARWARI *v* PURULIA MUNICIPALITY. **160 I.C 343=37 Cr.L.J. 289=8 R.P. 353=17 Pat.L.T. 258=1936 Cr.C. 231=1936 P.W.N. 45 =A I R. 1936 Pat. 145.**

BIHAR AND ORISSA LOCAL SELF-GOVERNMENT ACT (III OF 1885), S. 118-C (3) (d)—*Construction—Joint Hindu family owning several buildings—Assessment in respect of all exceeding limit prescribed by section—Legality—If* ultra vires.

An owner or occupier of buildings within a union is not taxable under S. 118 C of the Bihar and Orissa Local Self-Government Act in respect of each of the buildings which he owns or occupies; only one tax is assessable on each individual. Cl. (*d*) of sub-S. (3) of that section limits the amount to be assessed on any person to Rs. 5 per mensem. This clause does not refer to buildings, tanks, wells or water-courses, but to persons, and in unequivocal language it limits the assessment on any one person (including a joint Hindu family) to five rupees per mensem. An assessment on a joint Hindu family which owns several buildings within the union to any amount in excess of Rs. 5 per mensem is *ultra vires*, (*Agarwala, J.*) MEMBERS OF THE UNION COMMITTEE *v.* SAHAY SAH, **21 Pat L.T. 271=187 I. C. 300=6 B.R. 448=12 R.P. 581=A.I.R. 1940 Pat. 474.**

——S. 118 Cl. (3) (d)—*"Person"—If includes joint Hindu family.*

A joint Hindu family is a 'person' within the meaning of Cl. (*d*) of sub-S. (3) of S. 118-C of the Bihar and Orissa Local Self-Government Act. (*Agarwala, J.*) MEMBERS OF THE UNION COMMITTEE *v.* SAHAY SAH. **21 Pat.L.T. 271=187 I. C. 300=6 B.R. 448=12 R .P. 581=A.I.R. 1940 Pat. 474**

BIHAR AND ORISSA MICA ACT (I OF 1930), S. 17 (2) (a)—Offence under—Nature of --Mica found in excess of amount entered in

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account— Conviction for — Order confiscating excess mica—Propriety—Cr. P. Code, S 517. *See* CR. P. CODE, S. 517. **18 Pat.L.T. 146=A.I.R. 1937 Pat. 257.**

BIHAR AND ORISSA MOTOR VEHICLE RULES, R. 46, Permit H, Para. 7—"*Ply*"—*Meaning.*

The word 'ply' in para. 7 of Permit H, under rule 46, means plying for hire, that is to say, it means that the person driving a vehicle stops to take up or put down the passengers for reward. A person merely driving his vehicle cannot be said to be plying his vehicle. (*Courtney-Terrell, C.J.*) BERRY MAHAPATRA *v.* EMPEROR. **163 I.C. 399=9 R P 6 (2)=37 Cr.L.J 850=17 Pat.L.T. 378=1936 Cr.C 497 (1)=A.I R. 1936 Pat. 321 (1).**

——R 61—*Construction and scope—"Attendant"—Meaning of—Cleaner—If attendant.*

Rule 61 of the Bihar and Orissa Motor Vehicle Rules requires only that there shall be one man besides the driver appointed for the purpose of dealing with and competent to deal with all matters unconnected with the actual driving of the bus. A man employed on the bus as a cleaner whose duties are to put on the bus the luggage, to unload it, put water in the radiator and to start the bus, the driver being left with other duties such as issuing tickets and giving information to passengers, cannot be regarded as an "attendant" within the meaning of R. 61. (*Saunders, J.*) GANGULLY *v.* EMPEROR. **161 I.C. 703 (1)=8 R.P. 474=37 Cr.L J 469=17 Pat L T. 162=1936 Cr. C. 256=1936 P.W N. 147=A I R 1936 Pat 172.**

BIHAR AND ORISSA MUNICIPAL ACT (VII OF 1922)—*Limitation—Market dues—Contract granting right to collect market tolls—Suit by Municipality against grantee to recover—Limitation—Limitation Act, Arts.* 110, 115 *and* 120

The Bihar and Orissa Municipal Act does not prescribe any special period of limitation for the recovery of dues under the Act. A Municipality in exercise of its powers under the Act, maintained a market and settled the right to collect the tolls in the market with the defendant for a period of two years. The amount payable by the defendant was fixed at Rs. 560, out of which the defendant paid only a part. The Municipality brought a suit for recovery of the balance from the defendant.

Held, (1) that the dues payable by the defendant were not rent and so Art. 110 of the Limitation Act was not applicable; (2) that the amount sued for was due to the plaintiff-Municipality under a contract by which the defendant bound himself to pay a certain amount annually, and the suit having been due to the breach of that contract by the defendant, Art. 115 of the Limitation Act applied to the suit; (3) that since the suit fell under the specific Art. 115, it would not be governed by the residuary Art. 120. (*Fazl Ali and Madan, JJ.*) CHAIRMAN AND COMMISSIONER, CHAIBASA MUNICIPALITY *v.* GOBIND SAO. **16 Pat. 302=169 I C 364=3 B R. 561=10 R.P. 7=18 Pat.L T. 252=A I R. 1937 Pat. 360.**

——S. 3 (13)—Owner—Sharahmoaiyan holding—Tenant of—If "owner." *See* **BIHAR AND ORISSA MUNICIPAL ACT, S. 109 (2). 20 Pat.L.T. 86.**

——S. 3 (24)—*"Road"—What it includes.*

By reason of the definition in S. 3 (24) of the Bihar and Orissa Municipal Act, a road includes

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on both sides of it the land between the metalled portion of the roadway and the defined boundary of the abutting property. (*Harries, C.J. and Fazl Ali, J.*) PATNA CITY MUNICIPALITY *v.* DWARKA PRASAD SINHA, **18 Pat 735=184 I C. 52=6 B. R. 8=12 R. P. 214=20 Pat. L. T. 810=A. I. R. 1939 Pat. 683.**

——Ss. 6 and 16—*Sabarkars—Status of—If tenure-holders—Liability to pay transfer fee to landlord—Amount of fee.*

Under S. 6 of the Orissa Tenancy Act, sabarkars are, for purposes of S. 16, tenure-holders and are payers of rent and must pay the transfer fee accordingly. The fee payable by them is six times the rent. (*Mohamad Noor, J.*) CHARU CHANDRA ROY *v.* SRI RADHA GOBINDA JIN THAKUR. **6 Cut.L.T. 13.**

——S. 12—*Chairman—Representative—Capacity of.*

By S. 12, the Commissioners become a legal entity which legal entity is not represented by the Chairman; although reference is made to the Chairman from time to time in the Act, he is a person who apart from such reference is unknown to the law, is not a legal entity but is merely a person. If the Chairman is sued, the plaintiff is entitled to relief only against him. In no sense of the word can he be held to be the representative, for the purpose of the proceedings, of the Municipal Commissioners, and there is no justification on principle or on authority or under the Act itself to entitle a party to seek his relief against the Commissioners by bringing an action against the Chairman. It is not merely a mistake of form but it goes to the very root of the action. (*Wort, J.*) KALI PRASAD SINHA *v.* BADRI NARAIN SAHU. **182 I.C. 457=12 R.P. 16=5 B.R. 768=20 Pat.L.T. 613=A I.R. 1939 Pat. 236.**

——S. 12—*Suit by chairman—Maintainability.*

Although the position of a chairman of a Municipality is recognised by the Municipality Act, he is not a legal entity nor a corporation sole and therefore he is not entitled to sue on behalf of the Municipality. The suit must be brought by the body of Commissioners under S. 12 of the Act. The use of the word 'may' in that section must be construed in the sense that they shall by that name sue and be sued and by no other. (*Wort, J.*) KAMAKHYA NARAYAN SINGH *v.* CHAIRMAN, HASARIBAGH MUNICIPALITY. **5 B.R. 599=181 I.C. 486=11 R.P. 594=20 Pat.L.T. 563=A.I.R 1939 Pat. 499.**

——S. 62—*Disposal of road—Power of Municipality.*

There is no exhaustive definition of "land" in the Bihar and Orissa Municipal Act and the phrase "may sell, lease, exchange or otherwise dispose of any land" in S. 62 seems to be wide enough to cover "road" But even if it be held that the word "land" does include a road, yet the Municipality has not an unrestricted right to sell such road. At its very highest, the power given to the Municipality by S. 62 is to sell, lease, exchange or otherwise dispose of any land not required as a road or for other purposes of the Act. If such land is still required for any of the purposes of the Act, then it cannot be disposed of under the powers given by S. 62. (*Harries, C.J. and Fazl Ali, J.*) PATNA CITY MUNICIPALITY *v.* DWARKA PRASAD SINHA. **18**

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——**S. 62**—*Land vested in Municipality under S. 58—Disposal of—Power of Commissioners.*

The power of sale, lease or exchange given to the Commissioners under S. 62 of the Bihar and Orissa Municipal Act is not confined to land which has been acquired by the Municipality under that section, but extends to land which is vested in the Municipality by reason of S. 58 of the Act. (*Harries, C.J and Fazl Ali, J.*) PATNA CITY MUNICIPALITY *v.* DWARKA PRASAD SINHA. **18 Pat. 735=184 I.C. 52=6 B.R. 8=12 R.P. 214=20 Pat L.T 810=A.I R. 1939 Pat. 683.**

——**S. 64**—*Scope - Non-compliance—Contract not in writing or under seal—Suit on—Maintainability—Implied contract—Limitation Act, Art. 115.*

Defendant took a lease or a licence to collect the tolls of a municipal market and agreed to pay a sum of Rs. 4,001 to the Municipality in consideration of the licence giving him the right to collect the tolls. There was only a resolution of the Municipality, but no contract or document under seal as required by S. 64 of the Bihar and Orissa Municipal Act. Defendant, however, entered into possession of the market under the resolution. The Municipality through its representative sued to recover money due to it under the contract from the defendant.

Held, (1) that there was no contract binding under the Act, and the contract not being in accordance with S. 64 could not be sued upon; (2) that if the Municipality be held entitled to sue on the basis of an implied contract, Art. 115 of the Limitation Act applied to the case, and the suit brought more than three years after the breach was barred. (*Wort and Varma, JJ.*) GANESH PRASAD SAH *v.* SHEIKH JAWAD HUSSAIN **17 Pat. 277=19 Pat L.T. 653=4 B.R. 801=177 I.C. 272 =11 R.P. 140=A.I.R. 1938 Pat. 429.**

——**S. 82**—*Burden of proof on assessee that meeting was not held—Failure of municipal officers to produce papers called for with explanation for non-production—Finding that meeting was not held—Irregularity of imposition of the tax.*

It must be assumed that what ought to have been done, that is, the holding of the meeting, was in fact done and hence the onus is on the assessee to show that the meeting was not held. An assessee called upon the Municipal Officers to produce papers. The Municipal Officers gave an explanation why the records relating to the meeting were not forthcoming. The Judge thereupon came to the conclusion that the meeting was in fact not held.

Held, that in these circumstances the imposition of the tax was irregular. It did not however prevent the Municipality from holding a meeting and imposing the tax in a proper and regular manner. (*Wort, Ag C.J.*) COMMISSIONERS OF DARBANGA MUNICIPALITY *v.* SHIVA PRASAD. **179 I.C. 965=11 R.P. 432 (1)=5 B.R. 326=20 Pat.L.T. 119=A.I.R. 1939 Pat. 20.**

——**S. 82 (2)**—*Construction—Licence fees for platforms under S. 180—Imposition without sanction of Provincial Government—Legality—If* ultra vires.

Licence fees to be imposed under S. 180 of the Bihar and Orissa Municipal Act in respect of platforms over municipal drains fall within the mischief of S. 82 (2) of the Act; and imposition of a scale of fees in respect of such platforms by the Municipality without the sanction of the Provincial Government is illegal and *ultra vires*. (*Harries, C.J. and Wort, J.*) COMMISSIONERS OF THE ARRAH MUNICIPALITY *v.* INDER CHAND. **19 Pat. 485=187 I.C. 701=6 B.R. 532=12 R.P. 626=21 Pat L.T. 289.**

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——**S 82 (2)**—*Licences for platforms—Obligation to take out—Imposition of—Resolution by Municipal Commissioner—If sufficient authority.*

There is nothing in the Bihar and Orissa Municipal Act requiring any other authority than a resolution of the Commissioners at a meeting to impose the obligation on the owners of platforms to take out licences. The Commissioners have power by their own resolution to make it obligatory on the owner of platforms to take out licences. (*Rowland, J.*) GHADSIRAM *v.* VICE-CHAIRMAN, SAMBALPUR MUNICIPALITY. **160 I.C. 1076 =8 R.P. 415=37 Cr.L.J. 374=17 Pat.L.T. 148 =1936 P.W.N. 12=1936 Cr.C. 122=A I.R. 1936 Pat. 101.**

——**S '99 (b)**—*Scope and applicability—Procedure under, if condition precedent to an assessment—Prescribing of tests—When necessary*

S. 99 of the Act does not prescribe the procedure which as a matter of course and on all occasions must be followed by municipalities before assessment is made. It comes into operation only when the question arises of how the words in Cl. (9) of S. 3 "held under one title or agreement" are to be interpreted. Then the Commissioners are to decide at a meeting what tests shall be applied. (*James and Dhavle, JJ.*) CHAIRMAN, ARRAH MUNICIPALITY *v.* RAMKUMAR CHOUDHURY. **16 Pat. 662=1938 P W N. 33=19 Pat.L.T. 91= =174 I.C 855=4 B R. 488=10 R.P. 558=A.I.R. 1938 Pat 177.**

——**Ss. 100 and 111**—*Unoccupied holder—Owner's liability for latrine-tax—Claim by Municipality against owner—Sustainability.*

"Occupier" as defined in the Bihar and Orissa Municipal Act includes an owner in actual occupation of his own premises, but in the absence of an occupier for a holding which is actually unoccupied, the owner thereof cannot be deemed to be the occupier for purposes of payment of latrine-tax under S. 100 of the Act. The Municipality cannot therefore make the owner who has never been in actual occupation of his holding liable for latrine-tax under S. 111 of the Act.

Quaere.—Whether S. 111 of the Act applies at all to claims of the Municipality for latrine-tax. (*James and Agarwala, JJ.*) PATNA CITY MUNICIPALITY *v.* KRISHNAVATI BAHOO. **175 I.C. 475= 4 B.R. 585=10 R.P. 626=19 Pat.L.T. 405=1938 P.W.N. 444=A.I.R. 1938 Pat. 391.**

——**S. 107 (2)**—*One month's notice—If condition precedent to alteration of assessment—Suit—Bar of.*

The effect of sub-S. (2) of S. 107 is to make the issue of at least one month's notice of the proposal to make an alteration a condition precedent to the making of the alteration itself. Where no such notice has been given, the fact that the Municipality had already gone into the matter of the merits of the objection to the increased assessment is not a bar to the plaintiff's suit for consideration of validity of such assessment on merits.

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(*Courtney-Terrell, C.J.*) LACHMINARAYAN DAS *v* CHAIRMAN, CUTTACK MUNICIPALITY **163 I.C. 131=8 R.P. 616=17 Pat.L.T. 420=A.I.R. 1936 Pat. 322.**

——**S. 107 (2)**—*Scope—Non-service of notice—If fatal—Illegality if cured by assessee's appearance.*

The appearance of the assessee before the Committee appointed by the Municipality does not cure the non-service of notice under S. 107(2), Bihar and Orissa Municipal Act. (*Varma, J.*) COMMISSIONER OF PATNA MUNICIPALITY *v.* BISHAMBARDEO NARAIN. **172 I.C. 109=10 R.P. 275=A.I.R. 1937 Pat. 586.**

——**S. 109 (2)**—*Sharahmoaiyan holding in Municipality consisting of several plots including house—Municipal tax paid by tenant for land—Right to deduct from rent payable to landlord—S. 3 (13)—"Owner".*

A tenant of a sharahmoaiyan holding consisting of a number of plots within a Municipality, one of which is a house occupied by him, is entitled to deduct from the rent payable by him to his landlord the municipal tax which he pays for the land, under S. 109 (2) of the Bihar and Orissa Municipal Act The tenant cannot be treated as the owner of the house or the land though he has an unrestricted right of transfer under the tenure. Owner as defined in S. 3 (13) of the Act is the person who is entitled for the time being to receive any rent with respect to the land and the landlord is therefore the owner. The tenant is consequently entitled to claim a set off for the municipal tax paid by him. (*Manohar Lall, J.*) HARIHAR PRASAD *v.* ANANT PRASAD **183 I C. 48=12 R.P. 84=5 B.R. 854=20 Pat.L.T. 86=A.I.R. 1939 Pat. 352.**

——**S. 111**—Applicability—Latrine-tax—Claim against owner of unoccupied holding—Sustainability. *See* BIHAR AND ORISSA MUNICIPAL ACT, Ss. 100 AND 111. **1938 P.W.N. 444**

——**S 111**—*Holding unoccupied—Owner—If bound to apply for remission of latrine-tax.*

When a holding becomes unoccupied and unproductive of rent, the owner of the holding must apply under S. 111 of the Bihar and Orissa Municipal Act for remission of liability for a portion of municipal taxes other than latrine-tax; but he is not bound to apply for remission of latrine-tax. (*James and Agarwala, JJ.*) PATNA CITY MUNICIPALITY *v* KRISHNAVATI BAHOO. **175 I.C 475=4 B.R 585=10 R.P. 626=19 Pat.L.T. 405=1938 P.W.N. 444=A.I.R. 1938 Pat. 391.**

——**S. 115**—*Applicability—Latrine taxes.*

S 115 relates not only to taxes on persons but also to latrine taxes; in other words, it is a "general provision" as stated at the head of S. 113 "relating to assessment." (*Wort, J.*) KALI PRASAD SINHA *v.* BADRI NARAIN SAHU. **182 I.C. 457=12 R.P. 16=5 B.R. 768=20 Pat.L.T. 613=A.I R. 1939 Pat. 236.**

——**S. 115 (2)**—*Applicability—Illegal enhancement of assessment—If can be looked into in revision of assessment as legal—Notice—Necessity.*

Where an original assessment is illegal by reason of the assessee not having been given an opportunity of presenting his case, it must be wiped out of consideration altogether. Such an enhancement of the assessment in the revised list must be regarded as an enhancement made for the first time and therefore notice of the same must be given to the assessee under S. 115 (2) of the Bihar and Orissa Municipal Act. (*Harries, C.J.*) PANCHANAN MUKHERJI *v.* THE COMMISSIONERS OF THE CUTTACK MUNICIPALITY. **6 Cut.L.T. 9.**

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——**Ss. 116 and 117**—*Applicability—Amendment of valuation list*

Ss. 116 and 117 of the Bihar and Orissa Municipal Act apply to objections to a proposed amendment of the valuation list by reason of S. 107 (3) of the Act. (*Harries, C.J.*) PANCHANAN MUKHERJI *v.* THE COMMISSIONERS OF THE CUTTACK MUNICIPALITY. **6 Cut. L.T. 9.**

——**Ss 116 and 119**—*Objection as to liability to assessment—Non-observance of procedure under S. 116—Bar under S. 119—Scope of.*

Where an assessee disputed his occupation of any holding or his liability to be assessed, it is necessary under S. 116 of the Act that he should apply to the Commissioners for review of the assessment or exemption; and S. 119 of the Act provides that no objection shall be taken to any assessment in any other manner than that provided by the Act. (*James and Dhavle, JJ.*) CHAIRMAN, ARRAH MUNICIPALITY *v.* RAMKUMAR CHOUDHURY **16 Pat. 662=1938 P.W.N. 33=19 Pat. L.T 91=174 I.C 855=4 B.R. 488=10 R.P. 558=A.I.R. 1938 Pat. 177.**

——**S 117**—*Cases of one Ward heard by Committee directed to hear cases of different Ward—Decision—If without jurisdiction.*

All that the Act provides is that the objections should be heard by a Committee consisting of not less than three Commissioners. It may be a domestic or internal arrangement of the Municipality in assigning cases of one Ward to one Committee and another Ward to another Committee. But it is purely domestic and in no way affects the jurisdiction. There is nothing in the Act to prevent the Municipal Commissioners from arranging their business in whatever way they desire so long as they comply with the provisions of the Act, and the fact that the objections regarding cases of one Ward were heard by the Committee which was directed to hear cases regarding different Wards does not go to the root of the jurisdiction. (*Wort, J.*) KALI PRASAD SINHA *v.* BADRI NARAIN SAHU. **182 I.C. 457=12 R.P. 16=5 B.R. 768=20 Pat.L.T. 613=A.I.R. 1939 Pat. 236.**

——**S. 117**—*"Heard and determined"—Meaning—Objections disposed of without hearing assessee—Assessment—Legality of.*

Applications under S. 117 of the Bihar and Orissa Municipal Act urging objections to the proposed enhancement of assessment cannot be disposed of without the assessee being given an opportunity of presenting his case. If they are disposed of without giving such opportunity, then the assessment is clearly illegal and *ultra vires* and the increased amount collected by the Municipality cannot be retained. (*Harries, C.J.*) PANCHANAN MUKERJI *v.* THE COMMISSIONERS OF THE CUTTACK MUNICIPALITY. **6 Cut. L.T. 9.**

——**S. 117**—*Scope—Objection — Validity of assessment.*

S. 117 is quite clear that the objection should be heard and determined by a Committee

consisting of not less than three Commissioners. The mere fact that the decision was by majority and that the two members of the Committee who heard the objection were unanimous in their decision makes no difference. But again it does not go to the root of the validity of the assessment but merely entitles the plaintiff to a declaration that the particular objection to the assessment which is objected to is invalid. (*Wort, J.*) KALI PRASAD SINHA *v* BADRI NARAIN SAHU. **182 I.C. 457=12 R.P. 16=5 B.R. 768=20 Pat.L.T. 613=A.I.R 1939 Pat. 236.**

——**S. 119**—Bar under—Scope of *See* BIHAR AND ORISSA MUNICIPAL ACT, SS. 116 AND 119. **16 Pat. 662.**

——**S. 172 (c)**—*Power of Commissioners—Scope of.*

Under S. 172 (*c*) of the Bihar and Orissa Municipal Act, the power given to the Commissioners to turn, divert, discontinue or close any public road, is a power to do so when they are carrying out the road development or road improvement scheme. The section does not empower the Commissioners to close any public road if they so think fit. (*Harries, C. J. and Fazl Ali, J.*) PATNA CITY MUNICIPALITY *v.* DWARKA PRASAD SINHA. **18 Pat. 735=184 I.C 52=6 R.B 8=12 R.P. 214 =20 Pat.L.T. 810=A.I R 1939 Pat. 683.**

——**S. 172 (f)**—*Disposal of roadway—Power of Commissioners.*

Cl. (*f*) of S. 172 of the Bihar and Orissa Municipal Act must be read with the preceding clauses, and it does not give the Commissioners an unrestricted right to dispose of any roadway. (*Harries, C. J. and Fazl Ali, J.*) PATNA CITY MUNICIPALITY *v.* DWARKA PRASAD SINHA. **18 Pat 735=184 I C. 52=6 B R. 8=12 R P. 214=20 Pat.L.T. 810= A.I.R. 1939 Pat. 683.**

——**S. 180**—Licence fee for platforms over municipal drain—Imposition of—Sanction by Provincial Government under S. 82 (2)—Necessity. *See* BIHAR AND ORISSA MUNICIPAL ACT, S. 82 (2). **21 Pat.L T. 289.**

——**Ss 180 and 363**—Limitation—Municipal licence fee—Suit for—Limitation. *See* LIMITATION ACT, ARTS. 115 AND 20. **A.I.R. 1938 Pat. 192.**

——**S. 180 (2)**—*Scope—Old platforms—Retention license—Necessity.*

S. 180 (2) contains nothing to distinguish between the cases of new platforms and old platforms. The intention is that while old platforms will be allowed to be retained, their owners must take out licenses. (*Rowland, J.*) GHADSIRAM *v.* VICE-CHAIRMAN, SAMBALPUR MUNICIPALITY. **160 I.C. 1076=8 R.P. 415=37 Cr.L.J. 374=17 Pat. L.T. 148=1936 P.W.N. 12=1936 Cr. C. 122=A. I.R. 1936 Pat. 101.**

——**S. 182 (5)**—*Roadside lands—Powers of Municipality to lease—Lease for five years with option of renewal for erecting petrol pump—Competency.*

The powers conferred on Municipalities to deal with roadside lands are very limited. Roads (and roadside lands) are only vested in the Municipality as roads. A lease of such land by the Municipality for 5 years with an option of renewal and authorizing the erection of a petrol pump on roadside land is beyond the powers of the Municipality to grant in exercise of its powers under

the Act. It is not competent to the Municipality under the Act and the bye-laws under S. 185 (*b*) to make an income by putting up substantial buildings on roadside lands through lessees while largely destroying the value of the abutting properties of private owners. (*Dhavle, J.*) DWARKA PRASAD SINHA *v* PATNA CITY MUNICIPALITY **177 I.C. 315=4 B R 806=11 R.P. 142=19 Pat. L.T. 511=A.I.R. 1938 Pat 423.**

——**S. 185**—*By-laws—Lease of road by Municipality for erection of permanent structures—Validity—Access to road—Right of owners of abutting land.*

The by-laws made under S. 185 of the Bihar and Orissa Municipal Act restrict the rights of the Municipality to grant licences for the use or occupation of any public road. In no case can they grant a licence for the erection of any permanent booth or stall, and the maximum period for which they can grant a licence for a temporary booth or stall is one year. A Municipality cannot, therefore, validly grant a lease of a piece of road for a period of five years with powers to renew which gives the lessee a right to erect permanent structures for the sale of articles. Under such a lease, the lessee has no right to erect permanent structures to the prejudice of the owners of land abutting the road. Such structures are a serious infringement of one of their most valuable rights, namely, a right of access to the highway along the whole length of their boundary, and that being so, they are e titled to insist on their removal. (*Harries, C. J and Fazl Ali J.*) PATNA CITY MUNICIPALITY *v* DWARKA PRASAD SINHA. **18 Pat. 735=184 I.C. 52=6 B.R 8=12 R.P. 214= 20 Pat. L.T. 810=A I.R 1939 Pat. 683.**

——**Ss. 194 and 360**—*Notice requiring owner to demolish building or file objection—Failure to comply with—Objection filed after 5 days and enquired into by Municipality—Subsequent prosecution for failure to comply with original notice—Sustainability.*

Where in answer to a notice under S. 194 (1) (*ii*) of the Bihar and Orissa Municipal Act issued to the owner of building requiring him to demolish the building within a week or to file objection within five days, the owner files an objection after 5 days, that is not a sufficient compliance with the notice. But if the objection so preferred is in fact inquired into by the Municipal authorities, it is not competent to the Municipality thereafter to prosecute the owner of the building for non-compliance with the original requisition, taking advantage of the technical defect of delay in filing the objection. (*Dhavle and Rowland, JJ.*) DWARKA MAHTON *v.* PATNA CITY MUNICIPALITY. **15 Pat. 36=162 I.C 550=8 R.P. 541=37 Cr.L J. 634 (2)=17 Pat.L T. 123=1936 Cr.C. 398=1936 P.W.N 215=A.I.R. 1936 Pat. 282.**

——**S. 194**—*Scope—Notice requiring demolition of building without alternative of repairing—Legality.*

A notice requiring the owner of a building requiring him merely to demolish the building without giving him the choice of one of the alternatives of securing or repairing it also is not illegal as being contrary to S. 194 (1) (*ii*) of the Bihar and Orissa Municipal Act. (*Dhavle and Rowland, JJ.*) DWARKA MAHTON *v.* PATNA CITY MUNICIPALITY. **15 Pat. 36=162 I.C. 550=8 R.P.**

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541=37 Cr.L.J. 634 (2)=17 Pat. L T. 123=1936 Cr C. 398=1936 P.W.N. 215=A.I.R. 1936 Pat. 282.

——**S. 194 (1) (ii)**—*Notice to demolish building—Legality of—Dangerous and ruinous condition of the building—If to be proved before court of law—Decision of Municipality—If final.*

It is not necessary for the legality of a notice under S. 194 (1) (*ii*) of the Bihar and Orissa Municipal Act, requiring the demolition of a building, that the building should be found by the Courts to have been in a ruinous condition and dangerous to persons or property. The scheme of this Act is that it is for the Municipality to decide not only whether a building is in a ruinous condition or dangerous to persons or property, but also whether demolition is necessary or repairs would suffice. The decision of the Municipality cannot be questioned in the Courts. The rate-payer is not, however, absolutely helpless, for he has the alternative of preferring an objection under S 360 of the Act, If he disputes the necessity for doing the thing required by the notice, he is entitled to prefer an objection under S. 360 within five days. (*Dhavle and Rowland, JJ.*) DWARKA MAHTON *v* PATNA CITY MUNICIPALITY. **162 I C. 550=8 R P 541=37 Cr L.J. 634 (2)=15 Pat. 36=17 Pat.L T. 123=1936 P W.N. 215=1936 Cr.C 398=A.I.R. 1936 Pat. 282.**

——**S 194 (2)**—*Failure to comply with notice under S.* 194 (1) (*ii*)—*Prosecution—Plea that building not dangerous or ruinous—If open.*

In a prosecution of the owner or occupier of a building who has failed to comply with a notice under S. 194 (1) (*ii*) of the Bihar and Orissa Municipal Act, requiring him to demolish the building or to file objections, it is not open to the owner or occupier to contend in answer to the prosecution that the building was not in a ruinous or dangerous condition and that no demolition in fact was necessary. Neither the fact that repairs have been carried out by the owner nor the condition of the building as it appears to the trying Magistrate on inspection of the building has any bearing on the question of the liability of the owner to be convicted and fined under S. 192 (4) for failure to comply with the requisition. (*Dhavle and Rowland, JJ.*) DWARKA MAHTON *v.* PATNA CITY MUNICIPALITY. **15 Pat. 36=162 I.C. 550 =8 R.P. 541=37 Cr.L.J. 634 (2)=17 Pat.L.T. 123=1936 Cr.C. 398=1936 P.W.N. 215=A.I.R. 1936 Pat. 282.**

——**Ss. 203 and 197**—*Sentence imposing daily fine—Legality.*

Where a Magistrate convicted the petitioner under S. 197 read with S. 203 of the Bihar and Orissa Municipal Act and sentenced him to pay a certain fine and further directed him to pay a daily fine after the expiry of one month from his order till the encroachment was removed.

Held, that under S. 203 of the Act it was competent for the Magistrate to impose a daily fine in respect of an offence which had already taken place, that is to say, it was open to him to impose a daily fine from the date when the petitioner failed to comply with the Municipal order directing him to remove the encroachment, and that as the Magistrate had not seen fit to impose that fine but had imposed a fine in respect of an offence

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which had not been committed at the date of the order, the order directing the petitioner to pay a daily fine should be set aside. (*Agarwala, J.*) HALUMAN SAH *v* MOTIHARI MUNICIPALITY **167 I.C. 665=9 R.P 412 (1)=38 Cr.L.J. 416 (2)=3 B R. 297=18 Pat.L.T. 332=A.I.R. 1937 Pat. 352.**

——**Ss. 285 and 286**—*Power to seize articles while in transit.*

Articles of the kind described in S. 285 intended for sale within the Municipality, which are in course of transit in public roads, can be seized by the Commissioners in virtue of the general powers given to them by S. 285. Such articles could not, however, be legally seized if they were not intended for sale within the Municipality. (*James, J.*) RAMJAS MARWARI *v* PURULIA MUNICIPALITY **160 I.C 343=37 Cr.L.J. 289=8 R.P. 353=17 Pat.L. T. 258=1936 P.W.N. 45=1936 Cr. C. 231=A.I. R 1936 Pat. 145.**

——**S. 354**—*Applicability—Resolutions under S 259 (1) and (3) fixing local limits and requiring licences for mills—Order requiring licences and fixing fees—If rules or bye-laws—Confirmation by government—Necessity.*

The fixing of local limits under S. 259 (1) of the Bihar and Orissa Municipal Act is not the making of a rule. It is more of the nature of an order applying a section of the Act. Resolutions passed by the Municipal Commissioners under S. 259 (1) and (3) of the Act fixing local limits and requiring licences for working surkhi mills and fixing licence fees do not fall under S. 354. Therefore orders requiring licences for working such mills and fixing the licence fees are not rules requiring confirmation by Government as a condition precedent to their taking effect under S. 354 of the Act Nor are they bye-laws. (*Rowland, J.*) MUZAFFERPUR MUNICIPALITY *v* TARA PRASAD. **185 I C. 630=12 R.P. 433=41 Cr.L.J. 217=1940 P.W.N. 255=6 B R. 226=A.I.R. 1940 Pat. 313.**

——**S. 359 (2)**—*Scope—Non-compliance with—Effect on notice and on prosecution for not complying with notice.*

A notice under S. 238 was served upon the manager of the estate asking him to construct a proper type of drains within one month. The other alternative, that if he did not do what he was being asked to do, the Commissioners would get it done themselves, was not mentioned in the notice

Held, that the provisions of S. 359, Cl. (2) were imperative and non-compliance with those provisions made the notice illegal. Hence prosecution could not be based thereon.

Held, further, that the notice was very vague as nothing was expressed regarding the idea of Municipal authorities about a proper type of drains and the notice was defective even from the point of view of S. 217 as no specification had been supplied. (*Varma, J.*) MANAGER, DALBHUM ESTATE *v.* OVERSEER, JUGSALAI NOTIFIED AREA COMMITTEE. **169 I C. 38=3 B.R. 511=9 R.P. 538=18 Pat. L.T 559=38 Cr.L.J. 685=1937 P. W.N. 602=A.I.R. 1937 Pat. 224.**

——**S. 377**—*Applicability—Suit for declaration that alteration in assessment is illegal and injunction restraining levy of same.*

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S. 377 is for the purpose of protecting a public authority from suits in respect of acts *bona fide* purporting to have been performed under the ægis of a lawful act but in which in spite of the *bona fides* of the public authority the law has been overstepped and a tort has been committed. It is not intended to apply to suits for the recovery of sums of money other than damage for tort which are lawfully recoverable either under statute or at Common Law. It does not apply to a suit for a declaration that an alteration in assessment is illegal and for injunction preventing the Municipality for levying such assessment. (*Courtney Terrell, C.J.*) LACHMINARAYAN DAS *v.* CHAIRMAN, CUTTACK MUNICIPALITY. **163 I.C. 131=8 R P. 616=17 Pat.L T. 420=A.I.R. 1936 Pat. 322.**

——**S. 380**—*Scope—Notice served under S.* 115 (2) *instead of under S.* 107 (2)—*Defect—If curable.*

Where a notice instead of being served under S. 107 (2), Bihar and Orissa Municipal Act, is served under S. 115 (2) of the same Act, and there is no defect in form, the defect is not curable under S. 380 of the Act. (*Varma, J.*) COMMISSIONER OF PATNA MUNICIPALITY *v.* BISHAMBARDEO NARAIN. **172 I.C. 109=10 R.P. 275=A.I.R. 1937 Pat. 586.**

BIHAR AND ORISSA OPIUM SMOKING ACT (II OF 1928), S. 12—*Rules under R.* 11—*If* ultra vires—*Power of rule-making authority to create new offence and impose penalty for breach of rules.*

The Bihar and Orissa Opium Smoking Act does not provide for any penalty for the breach of the conditions and restrictions referred to S. 12, namely, the conditions and restrictions subject to which a registered smoker may manufacture, possess or smoke prepared opium. The Act neither imposes a penalty for breach of the terms of a licence granted to a licensed smoker, nor does it expressly empower the rule-making authority to provide for such penalty. The rule-making authority therefore has no authority to create an offence and impose a penalty for breach of the rules in the absence of statutory authority, as has been done by R. 11 of the rules framed under the Act. R. 11 of the Opium Smoking Rules is consequently *ultra vires* (*Agarwala and Varma, JJ.*) EMPEROR *v.* NEMU SINGH **16 Pat. 244=9 R.P. 479=3 B.R. 418=38 Cr L.J. 540=168 I C. 332=18 Pat.L T. 118=1937 P.W.N. 128=A.I.R. 1937 Pat. 226.**

BIHAR AND ORISSA PREVENTION OF ADULTERATION ACT (II OF 1919), S 4 (b)—*Applicability—Conditions—Proof of fraud—Necessity—Mere presence of foreign matter in small quantity—Offence.*

Before applying S 4 (*b*), in a prosecution under the Act, what the Court has to determine is that foreign matter or ingredient has been added fraudulently to the food. The mere presence of some foreign matter in small quantity is not necessarily an offence inasmuch as Excep. (*ii*) to S 4 specially excludes the case where without fraud any extraneous matter has in the process of collection, preparation or conveyance become mixed with the food. The Court has to decide whether the admixture of the foreign matter is so large that it cannot be explained otherwise than by fraud. (*Rowland, J.*) SARUP LAL *v.* EMPEROR. **166 I.C. 206=9 R.P. 264=38 Cr.L J. 192=3 B. R. 137=17 Pat.L.T. 958=1936 Cr.C. 1067=A.I. R. 1936 Pat 636.**

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——**S. 10**—*Prosecution under—Question as to absence of order or consent of local authority or that the Act has not been brought into force in the area—When to be raised.*

In proceedings started under the Bihar and Orissa Prevention of Adulteration Act, the questions that the prosecution was started without the order or consent in writing of the local authority or that it has not been shown that the Act has been brought in force in the local area by a notification of the Local Government are questions which ought to be raised and determined before the Courts of facts and cannot be raised in revision. (*Rowland, J.*) SARUP LAL *v.* EMPEROR. **166 I.C. 206=9 R.P. 264=38 Cr.L J. 192=3 B.R. 137=17 Pat.L.T. 958=1936 Cr.C. 1067=A I.R. 1936 Pat 636.**

——**S. 10**—*Scope—Absence of complaint by local authority—Effect—Irregularity, if cured by S.* 537, *Cr. P. Code.*

Where proceedings under the Bihar and Orissa Prevention of Adulteration Act are alleged to have been irregular, by reason of an absence of complaint by a local authority or an authorized person required by S. 10, S. 537, Cr. P. Code, provides sufficiently to cure that irregularity. (*Rowland, J.*) SARUP LAL *v.* EMPEROR **166 I.C. 206=9 R.P 264=38 Cr.L J. 192=3 B.R. 137=17 Pat L.T. 958=1936 Cr.C. 1067=A.I.R. 1936 Pat 636.**

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1914)—*Proceedings under—Doctrine of representation—Applicability—*Karta *of joint family—If represents entire family.*

The *karta* of a joint family effectively represents the family even although not expressly named as such. The principle of representation cannot be regarded as foreign to certificate proceedings, but applies to such proceedings. (*Wort and Dhavle, JJ.*) KAMESHWAR SINGH *v.* ISHWARI PRASAD SINGH. **189 I.C. 114=6 B.R. 761=21 Pat L.T. 503.**

——*Sale under—Rights of purchaser—Debt due to Government by Company—Mortgage by Company to director to discharge part of debt—Subsequent liquidation of Company—Sale at the instance of Government—Suit by director to enforce mortgage—Right to priority over purchaser in Government sale.*

A limited company borrowed a sum of Rs.75,000 from the Government under the Bihar and Orissa State Aid to Industries Act and executed a mortgage of all its assets in favour of the Government; undertaking to repay annually a sum of Rs. 5,000. The mortgage was not, however, registered, and after the payment of two instalments the company executed to the Government a promissory note for the balance. As the company could not find the money for payment of the next instalment, the plaintiff, one of the directors of the company, advanced Rs. 5,000 for the purpose, and took from the company a mortgage of the assets of the company. The deed recited, *inter alia* that there was a prior mortgage to

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Government, and that the mortgage to plaintiff was a second mortgage, the Government being recited as the first mortgagee. At the instance of another creditor, an order was made for a compulsory winding up of the company. The Government also proceeded under the Public Demands Recovery Act to realise the amount due to it and brought the assets of the company to sale under an order from the Court. At the sale the second defendant became the purchaser. The plaintiff afterwards sued the company and the second defendant to enforce his mortgage. The lower Court having decreed the suit, the 2nd defendant appealed to the High Court.

Held, (1) that the second defendant, as the auction-purchaser at the sale under the Public Demands Recovery Act, stood in the shoes of the company and was entitled to and affected by the same equities and estoppels as those which the debtor-company might have enjoyed or laboured under; (2) that the plaintiff could not insist that his mortgage should take precedence of the debt due to the Government; (3) that it was not right that the plaintiff, a director of insolvent company, about to go into liquidation should be allowed the privileged position of a secured creditor by merely discharging a small portion of the company's indebtedness: and (4) that as against an innocent purchaser (defendant No. 2), for value of property sold in execution of a debt due to an unsecured creditor, the plaintiff should not be allowed to enforce his security, and the plaintiff's suit should therefore be dismissed. (*Courtney-Terrell, C.J. and James, JJ.*) THAKUR DAS *v.* RAMGULAM SINGH. **15 Pat 762=168 I.C. 124=3 B.R. 391=9 R.P. 466=18 Pat.L.T. 217=1936 P.W.N. 768=A I R. 1937 Pat. 151.**

——**S 7**—*Notice under—Service of—Validity—Form of return by process-server—If material.*

The validity of the service of a notice under S. 7 of the Public Demands Recovery Act does not in any way depend upon the form of the process-server's return of service. Where it is found that the process-server had offered the notice to the party but that he refused it and that thereupon the process-server affixed it to the darwaza of his house, the service must be held valid according to the statutory rules under Sch. II of the Act. (*Courtney-Terrell, C.J. and James, J.*) RAMKESHWAR SINGH *v.* KESHO PRASAD SINHA. **180 I.C. 740=11 R.P 528=5 B.R. 483=1938 P.W.N. 202=19 Pat.L.T. 645=A I.R. 1938 Pat. 622.**

——**S. 8 (b)**—*Scope and effect of—Charge—When comes into force—Sale of property in execution of mortgage decree after service of notice in certificate proceedings—Subsequent certificate sale—If rent sale or merely money decree sale.*

The charge provided by S. 8 (*b*) of the Bihar and Orissa Public Demands Recovery Act comes into existenee from the date on which the notice under S. 7 is served on the certificate debtor and subsists throughout from that date, and a sale held would have the effect of a rent sale subject to the provisions of S. 22 of the Bihar Tenancy Act. A purchaser of the property at a sale in execution of a mortgage decree held after the service of the notice on the certificate debtor in the certificate proceedings cannot therefore impeach the certificate sale or be allowed to

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contend that the certificate proceedings have only the effect of a money decree. (*Wort and Dhavle, JJ.*) KAMESHWAR SINGH *v.* ISHWARI PRASAD SINGH. **189 I.C. 114=6 B.R. 761=21 Pat. L.T. 503.**

——**Ss 24 and 25**—Order rejecting objections to sale by certificate officer—Suit by objector for title and possession—Limitation applicable. *See* LIMITATION ACT, ART. 11. **17 Pat 446.**

——**S. 25**—*Scope — Certificate— Validity and finality of—Decision on claim preferred—If can be challenged or ignored in suit under S. 25—Plea raised in suit—If can be abandoned in appeal.*

The Certificate (Public Demands Recovery) Act has a procedure of its own according to which as soon as a certificate is signed by the certificate officer, it becomes a decree, and then may follow certain enquiries as a result of which the decree may either be cancelled, varied or may be proceeded with. The decree may be varied or cancelled under S. 10 of the Act on objection by the certificate-debtor, or under S 11 it may, subject to the law of limitation, be amended at any time by the addition, omission or substitution of the name of any certificate-holder or certificate-debtor or by the alteration of the amount claimed therein. But a party who prefers a claim to the certificate Court and gets a decision pronounced upon it cannot challenge it in a separate Civil Court and cannot ask the Civil Court to ignore the decision of the certificate Court on the ground that that Court had no jurisdiction to decide that question. Where a defeated claimant raises in a suit under S. 25 a plea which is outside the scope of such a suit, and the parties go to trial and adduce evidence upon that issue, he cannot be allowed at the appellate suit to ask the Court to dismiss that issue from consideration. (*Courtney-Terrell, C.J., Fazl Ali and James, JJ.*) BINDESHWARI PRASAD *v.* SHIVA DUTT SINGH. **176 I.C. 49=4 B.R. 661=11 R.P 43=1938 P.W.N. 329=19 Pat. L.T. 328=A.I.R. 1938 Pat. 315 (S.B).**

——**S. 26**—*Certificate sale—What passes.*

A certificate has no greater force than that of a simple money decree and nothing is sold in execution of it except the right, title and interest of the certificate-debtor mentioned therein. If a property which has devolved upon another person be sold as belonging to the certificate-debtor mentioned in the certificate, nothing passes to the auction purchaser. (*Mahomed Noor and Rowland, JJ.*) MANGTULAL BAGARIA *v.* DAYA SHANKER. **165 I C 749=9 R.P. 205=18 Pat.L.T. 301=3 B.R. 73=A I R 1936 Pat. 572.**

——**S. 26**—Certificate sale in execution as against one of two co-sharers—Effect on interest of other co-sharer and his transferee—Suit for declaration by latter—Competency without prayer for consequential relief *See* SPECIFIC RELIEF ACT, S. 42. **A.I R. 1937 Pat. 250.**

——**S. 26**—*Effect of sale under—What passes*

The provisions of the Public Demands Recovery Act clearly show that the effect of a sale under that Act is the same as the effect of a sale under the C. P. Code and consequently all that passes to the purchaser is the right, title and interest of the persons named as the judgment-

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debtors. (*Courtney-Terrell, C J and James, J.*) MAHADEO RAM *v.* GANESH PRASAD. **171 I C. 232= 10 R P 191=1937 P.W.N. 807=4 B.R. 9=A.I. R. 1937 Pat. 517.**

——S. 26 (1)—*Certificate sale—What passes—Certificate against Hindu father—Sale--Father's power of sale of son's share for own debts not illegal or immoral—If passes.*

It is beyond question that a Hindu Mitakshara son cannot, by reason of his pious obligation, successfully impugn a sale of the family property by the father to discharge his own debts provided they are not *avyavaharika*; the father may sell the joint family property including the son's interest therein to discharge such debts, or lay it open to be taken in execution proceedings for them. But this power of sale of the father cannot pass to a certificate purchaser of his own right, title and interest at a certificate sale. The certificate holder under S. 26 (1) of the Public Demands Recovery Act is a different position from that of a holder of a decree against a Hindu father. A sale held at his instance can only pass to the certificate purchaser the right, title and interest of the certificate debtor. This does not and cannot include the father's qualified power to dispose of the son's interest in the joint family property. (*Harries. C.J., Dhavle and Manohar Lall, JJ.*) HARI PRASAD SINGH *v.* LAL BEHARI SARAN SINGH. . **21 Pat. L.T. 377=6 B.R 713= 1940 P.W.N. 420=A I.R. 1940 Pat. 328 (F B.).**

——S. 45, Proviso—*Certificate sale—Suit in Civil Court to set aside—Limitation*

Under the proviso to S. 45 of the Public Demands Recovery Act, a suit in the Civil Court by a legal representative of a deceased certificate debtor for recovery of possession of the property sold or to declare the sale void on the ground that the certificate debtor died before the sale and the sale was held without notice to his legal representative, must be brought within one year from the date of delivery of the property to the purchaser. A suit brought after one year is clearly barred and cannot be entertained. (*Harries, C.J., Dhavle and Manohar Lall, JJ.*) HARI PRASAD SINGH *v.* LAL BEHARI SARAN SINGH. **6 B.R. 713=21 Pat L.T 377=1940 P.W.N. 420= A I R. 1940 Pat 328 (F B.).**

——S. 46—*Scope—"Making of a certificate"—Meaning of—Deputy Collector enhancing rent of holding in suit by landlord—Appeal to Collector—Latter varying rate of rent in appeal—Jurisdiction—Suit to declare decision of Collector null and void—If barred.*

An appeal is a creation of statute and no one can constitute himself an appellate tribunal in a case where the statute does not constitute him an appellate tribunal for the purpose of an appeal. In the case of a decision by a Deputy Collector enhancing the rent of a holding in a suit by the landlord, the tribunal indicated by the statute to hear an appeal is the District Judge. The Collector has no jurisdiction to hear such an appeal and if he entertains an appeal and makes an order, that would be *ultra vires* and null and void. The making of a decision as to the validity of the Collector's order purporting to be passed in the appeal cannot be a question relating to the making of a certificate within the meaning of S. 46 of the Bihar and Orissa Public Demands Recovery Act.

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The "making of a certificate" in that sectionmeans the doing of those things which are required to be done by the Certificate Officer under the statute. It is not necessary for that officer to come to a decision as to the validity of the Collector's order as that order is on the face of it null and void S. 46 of the Act is therefore no bar to a suit for a declaration that the decision of the Collector passed in appeal is *ultra vires* and that the tenants are therefore liable to pay rent at the rate to which it was enhanced by the Deputy Collector whose decision was varied by the Collector without jurisdiction. (*Agarwala, J.*) SARPANANDA SAMAL *v.* RAJA RAJENDRA NARAYAN BHUNJ DEO. **5 C L.T 6.**

——S. 46—*Scope of—Suit for declaration that sale does not affect plaintiff—If barred.*

There is wide difference between setting aside a sale and deciding that the plaintiff's right was not affected by it. S. 46 refers to a suit for setting aside a sale. It has got no reference to a case in which the plaintiff alleges that the sale though good has not in fact affected him as there was no decree against him. (*Mahomed Noor and Rowland, JJ.*) MANGTULAL BAGARIA *v* DAYA SHANKER **165 I.C. 749=9 R.P. 205=18 Pat L.T. 301=3 B R. 73=A I.R. 1936 Pat 572.**

——S. 52—*Scope—Death of debtor after notice and before sale—Absence of notice to legal representatives—Sale—If void.*

Dhavle, J—The certificate officer's jurisdiction to sell under the Public Demands Recovery Act is founded in a "duly filed" certificate and not on the actual existence of the certificate debtor himself. A notice to the legal representatives of a deceased certificate debtor cannot be placed on a higher footing than the notice to the certificate debtor. Where the certificate debtor who has been served with a notice under S. 7, dies before sale, but notice is given to his legal representatives, the sale held after the death of the certificate debtor without notice to the legal representatives, cannot be held to be void in respect of the interest of the deceased debtor.

Harries, C.J. and Manohar Lall, J.—Quaere: Whether the certificate officer while proceeding to enforce a certificate under the Public Demands Recovery Act has jurisdiction to sell the estate of the right, title and interest of a certificate-debtor who has died between the death of the service on him of the notice under S. 7 of the Act and the date of the actual sale without the issue of a notice to his legal representatives. (*Harries, C. J., Dhavle and Manohar Lall, JJ.*) HARI PRASAD SINGH *v.* LAL BEHARI SARAN SINGH. **6 B R. 713= 1940 P.W.N. 420=21 Pat.L.T. 377=A.I.R. 1940 Pat. 328 (F.B.).**

——Sch. II, R. 25—*Notice under—Service on debtor's elder brother—Validity—Suit to set aside sale on ground of non-service of notice—Burden of proof.*

Where the notice of sale proclamation under R. 25 of Sch. II of the Public Demands Recovery Act is served on the elder brother of the debtor, that is a valid service as required by the rules. In a suit by the debtor to set aside the sale on the ground that he was not informed of such service it is for him to prove his allegation; it is not for the defendant to prove that the plaintiff knew or was informed of such service. (*Courtney-*

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Terrell, C.J. and James, J.) RAM KESHWAR SINGH *v.* KESHO PRASAD SINHA. **180 I C. 740=11 R.P. 528=5 B.R. 483=1938 P.W.N. 202=19 Pat.L.T. 645=A I R. 1938 Pat. 622.**

BIHAR AND ORISSA ROAD CESS ACT —Scope—Road cess return—Admissibility in evidence. *See* EVIDENCE—ADMISSIBILITY. **A.I.R. 1937 Pat. 561.**

BIHAR AND ORISSA SUGAR CANE RULES (1934), R. 15 (d), (e) and (f)—*Object and scope of—Purchasing agent—Liability for infringement of rule by weighment clerk.*

Rule 15 of the Sugar-cane Rules distinctly makes the purchasing agent liable if it is found that the weighment clerk acting on his behalf is guilty, unless he shows that he has used all due diligence to enforce the observance of the rules and that the offence was committed without his knowledge or consent. The object of the rule is to protect the cultivators who are not always educated from the wiles of persons dealing with them on behalf of the purchasing agent and hence rule 15 makes the latter himself liable along with the person acting on his behalf unless he shows that he was not negligent in his duties. Such cases are not likely to be detected easily, and when detected should not be dealt with leniently. A purchasing agent who merely says that he was not present at the time of the offence and that he never used to go to the weigment clerk who used to remain at the weighbridge cannot be absolved from liability under R. 15. *(Varma. J.)* BALA BUX *v.* EMPEROR. **176 I.C. 558=39 Cr.L.J. 732= 11 R P. 85=4 B.R 734=1939 P.W.N. 181=19 Pat L.T. 395=A.I.R. 1938 Pat. 366.**

——**R. 18**—Applicability—"Whoever"—If restricted to actual purchaser of sugar-cane. *See* SUGAR-CANE ACT, Ss. 5 AND 7. **16 Pat. 251=18 Pat L T. 182.**

BIHAR AND ORISSA VILLAGE ADMINISTRATION ACT (III OF 1922). Ss. 53 (2) and 68—*Scope and effect of—Complaint before Magistrate—Transfer to Union Board—Application by accused for transfer to Magistrate—Power of Union Board to transfer case—Proper procedure.*

S. 8 of the Bihar and Orissa Village Administration Act does not empower a Union Board or Panchayat to re-transfer a case to the Court of a Magistrate; it only empowers it to direct the complainant to file a complaint before the proper Court. Where a complaint was originally filed before a Magistrate and was transferred to the Union Board under S. 53 (2) of the Act, the procedure to be followed by an accused claiming trial by a Magistrate is to move the District Magistrate or the Sub-Divisional Magistrate under S. 53 (2) (*b*). *(Fazl Ali, J.)* RAMACHANDRA SINGH *v.* BALDEO SINGH. **185 I C. 748=12 R P. 446=6 B.R 247=41 Cr L.J. 232=1939 P. W.N. 937=A I.R 1940 Pat 184.**

——**S 58**—*Plaintiff obtaining decree in Panchayat Court—Right to get it transferred to Civil Court for execution.*

There no is provision anywhere in the Village Administration Act save in the special Panchayat Courts of Chota Nagpur for the transfer of a decree to the Civil Court for execution, and the C. P. Code does not apply to the Panchayat Court. Accordingly, a plaintiff, who in a suit of the kind contemplated by S. 58 of the Village Administration Act obtains a decree in the Panchayat Court, cannot get that decree transferred to the Civil Court for execution. *(Courtney-Terrell, C.J. and Muhammad Noor, J.)* BANWARI LAL *v.* BADRI RAM. **160 I.C 345=8 R P 357 (1) =1936 P.W.N. 44=17 Pat.L.T. 12=A.I.R. 1936 Pat. 150.**

BIHAR MONEY-LENDERS' ACT (1938), S. 11.

BIHAR MONEY-LENDERS' ACT (III OF 1938), S. 7—*Applicability to period after date of suit.*

The rule of Damdupat introduced by S. 7 of the Bihar Money-Lenders'Act is restricted to the period proceeding the institution of the suit and does not apply to the period subsequent to the institution of the suit. *(Agarwala and Rowland, JJ.)* RAM SARUP SAH *v.* MUKHI SINGH. **187 I. C. 132=12 R P 564=6 B R 430.**

——**S 8**—*Discretion—Interference in second appeal.*

Where the Court of appeal below fails to exercise its statutory discretion in the matter of interest subsequent to the date of institution of the suit, it is open to the High Court in second appeal to pass necessary orders in respect of interest subsequent to suit. *(Agarwala and Rowland, JJ.)* RAM SARUP SAH *v.* MUKHI SINGH. **187 I.C. 132=12 R.P. 564=6 B.R. 430**

——**S 8**—*Reduction of interest—Discretion of Court.*

There is nothing in S 8 of the Bihar Money-Lenders' Act, 1938, to indicate that the Court is bound to exercise its discretion in favour of the debtor in every case. What appears to be contemplated is that the Court shall reduce the interest as indicated in the section in cases where the Court considers that the circumstances justify taking such a course. But where the original rate of interest is not exhorbitant, and there is nothing to indicate that the debtor has not been fairly treated by the creditor, there is no reason why the High Court in second appeal should exercise this discretion. *(Agarwala and Rowland, JJ.)* BAIJ NATH THAKUR *v.* SARWAN CHAUDHURY. **6 B R. 369=186 I.C. 438=12 R.P. 501=A.I R. 1940 Pat. 423.**

——**S. 11**—*Appeal—Order determining instalments—Appealability—C. P. Code, S. 47.*

An order determining instalments under S. 11 of the Bihar Money-Lenders' Act is not appealable as an order under S. 47, C. P. Code. The only orders under S. 47, C. P. Code, which are appealable are orders which finally determine the rights of the parties. Under S. 11 of the Bihar Money-Lenders' Act there is nothing for the Court to decide as to the rights of the parties in the suit. The question is one of procedure, whether the judgment-debtor should be given time to pay and the decree-holder restrained from exercising the right which he has under the law to execute his decree at once. An order regulating the procedure in this matter is an interlocutory order and is not appealable. *(Agarwala and Rowland, JJ.)* DHANUKDHARI SINGH *v.* RAMRATTAN. **1940 P.W.N. 492.**

——**(as amended by Act V of 1938), S. 11**—*Applicability—Mortgage suit—Preliminary decree long before* 1938—*Final decree in terms of preliminary decree—If can be passed after* 1938.

BIHAR MONEY-LENDERS ACT (1938), S. 11.

S. 11 of the Bihar Money-Lenders Act has to be construed as not intended to affect a decree already passed; a Court cannot therefore go behind a preliminary decree already passed by it in a mortgage suit long before the Act, The Court cannot therefore refuse to pass a final decree for sale in accordance with the preliminary decree on the ground that S. 11 of the Act came into force before the application for final decree was made. (*Rowland and Manohar Lall, JJ.*) MUHAMMAD YUNUS *v.* CHAMPAMANI BIBI. **18 Pat 141=179 I C. 549=5 B.R. 252=11 R.P. 382=1938 P.W.N. 885=19 Pat.L.T. 875=A.I.R. 1939 Pat. 49.**

——**S. 11**—*Application under—When to be made.*

An application under S. 11 for payment of decretal amount by instalments can be made at any time between the date of the first levying of execution and the date fixed for the sale. Therefore the fact that the application is made only when properties are going to be sold and not when decree was passed is no reason for the Court to decline to consider the merits of the case. (*Wort and Meredith, JJ.*) VISHANATH KUMARI *v.* SONU LAL. **6 B.R. 775=A.I.R. 1940 Pat. 352.**

——**S 11**—*Discretion of Court under—Circumstances to be considered in fixing and ordering instalments.*

The power conferred on the executing Court by S. 11 of the Bihar Money Lenders Act, is a discretion which the Court may exercise in derogation of the rights of the decree-holder to execute the whole of his decree immediately against the judgment-debtor. The Court is no doubt required to take into consideration the capacity of the judgment-debtor to pay the instalment; but the Court is also required to take into consideration the amount of the decree and the circumstances of the judgmedt debtor. If after taking into account the various circumstances mentioned, it appears to the Court that a judgment-debtor will be able to discharge his obligations to his creditor if he is given a reasonable time, the Court is empowered to give that time. The Court is, however, bound to consider whether the resources of the judgment-debtor are such as to justify an expectation that the decree-holder's claim will not be defeated by allowing instalments. Where it is clear that the resources of the judgment-debtor are so meagre in relation to his liability that he is not likely to be able to discharge the decretal debt within a reasonable time, the Court would not be exercising a wise discretion in prolonging the execution proceedings by fixing instalments. (*Agarwala and Rowland JJ.*) DHANUKDHARI SINGH *v.* RAMRATAN. **1940 P.W N. 492.**

——**S 11**—*Scope—Appellate Court—Power to reduce interest in the absence of appeal as to amount decreed for principal and interest.*

S. 11 of the Bihar Money-Lenders Act is clear and gives power to an appellate Court to reduce the interest, if the conditions mentioned in S. 11 are present, although there is no appeal by any of the parties concerned with respect to the amount decreed by the trial Court as principal and interest. (*Agarwala and Rowland, JJ.*) RAM SARUP SAH *v.* MUKHI SINGH. **187 I.C. 132=12 R.P. 564=6 B.R. 430.**

BIHAR MONEY-LENDERS ACT (1938), S. 12.

——**S 11**—*Scope—If* ultra vires—*If void as repugnant to any existing Indian Law—Government of India Act* (1935). *S.* 107 (1).

S. 11 of the Bihar Money-Lenders Act of 1938 is not *ultra vires* of the Provincial Legislature, as the latter has power to pass such an Act dealing with money-lending and money-lenders. But the section being repugnant to existing Indian law is void under S. 107 (1) of the Government of India Act, 1935.

Wort, J.—S. 11 of the Bihar Money-Lenders Act whether it be described as a mere rule of limitation or as a provision of substantive law, most certainly deprives the Court of the discretion given to the Court under S. 3 of the Usurious Loans Act of 1918 in cases in which the circumstances proved allow of the exercise of a discretion, and is most certainly opposed to the express provision of law laid down in the Usury Laws Repeal Act of 1855 in those cases to which the Usurious Loans Act does not apply S. 11 of the Bihar Money-Lenders Act is therefore repugnant to the earlier existing Indian law and to the extent of the repugnancy is void under S. 107 (1) of the Government of India Act of 1935.

Dhavle. J.—S 11 of the Bihar Money Lenders Act has not been competently enacted so as to supersede S 2 of the Usury Laws Repeal Act and must be treated as void

Manohar Lall, J.—S. 11 of the Bihar Money-Lenders Act is *intra vires* of the Bihar Legislature but it conflicts with existing Indian law, namely, the Usury Laws Repeal Act of 1855, the Usurious Loans Act of 1918 and the Contract Act of 1872 dealing with contracts, and is therefore void. (*Wort Dhavle and Manohar Lall, JJ.*) SADANAND JHA *v* AMAN KHAN. **18 Pat. 13 20 Pat L.T. 1=179 I C 379=11 R P 357=5 B R. 265=1938 P.W N. 913=A I.R. 1939 Pat. 55 (F. B.)**

——**S 12**—*Exercise of powers—Discretion of Court.*

The word 'may' in the opening portion of S 12 of the Bihar Money-Lenders Act of 1938 does not mean "shall"; on the other hand by the use of this word it was intended that the Court should consider the circumstances of each case and then decide whether it should or should not exercise all or any of the three powers mentioned in the section. (*Gwyer, C J., Sulaiman and Varadachariar, JJ.*) JAI GOBIND SINGH *v.* LACHMI NARAIN RAM. **I L R (1940) Kar. (F C.) 33=1940 O.L.R. 343=1940 P.W.N 614=187 I C. 796=6 B R 589=12 R F C 39=3 F L.J 46=A. I.R 1940 F C. 20=(1940) 1 M L.J, (Supp) 14.**

——**S. 12**—*Reopening past transactions—Discretion of Court.*

In the case of successive renewals of handnotes which have the effect of charging compound interest, S. 12 of the Bihar Money-Lenders Act, no doubt, empowers the Court to reopen the transactions. But the Court will not be disposed to do so, if the lender appears to have behaved reasonably and forbearingly towards his debtor. (*Dhavle and Rowland JJ.*) THAKUR PRASAD *v.* AJODHYA PRASAD **5 B R 394=11 R P. 503 (2)=1939 P.W N. 305=180 I.C 365=20 Pat L.T 321 =A.I.R 1939 Pat 490.**

——**S. 12**—*Scope of—Discretion of Court.*

BIHAR MONEY-LENDERS ACT (1938), S. 12.

S. 12 of the Bihar Money-Lenders Act gives a complete discretion to the Court as to whether accounts are to be reopened; the section does not compel the Court to reopen the accounts and give relief regardless of the facts of the case, and when there is nothing which would justify a reopening of the accounts. (*Harries, C J. and Chatterji, J.*) JAI GOBIND SINGH *v.* PACHKAURI RAM. **5 B R. 613=181 I.C. 572=11 R.P. 599=A.I.R. 1939 Pat. 555.**

——**S. 12**—*Scope—If effects pending litigations.*

S. 12 of the Bihar Money-Lenders Act no doubt refers to transactions or contracts before the passing of the Act, but it does not and cannot be taken to affect pending litigations. The Legislature did not intend to interfere with those litigations which were pending when the Act came into force and certainly not those which had already culminated in a decree, whether of the trial Court or of the appellate Court (*Wort, A C J. and Manohar Lall, J.*) BIBI SHAIMA *v.* BANK OF BIHAR, LTD. **5 B.R. 94=11 R.P 258=178 I C. 383=1938 P W.N. 603=19 Pat.L.T. 585=A.I R. 1938 Pat. 484.**

——**S. 15**—*Scope—If void.*

S. 15, Bihar Money-Lenders Act, being repugnant to O. 20, R, 11, Cl. (2), C. P. Code, is under S. 107, Government of India Act, void. (*Mahomed Noor and Dhavle, JJ.*) MATHURA PRASAD SINGH *v.* BHAN KUMAR CHAND. **20 Pat. L.T. 513=5 B.R. 856 (2)=182 I,C. 989=12 R. P. 93=A.I.R 1939 Pat 217.**

——**S. 15**—*Scope—If void as repugnant to O. 34 and O. 21, R. 11 (2), C. P. Code.*

S. 15 of the Bihar Money-Lenders Act is repugnant to the provisions of O. 34, C. P. Code, and is therefore void.

Quaere.—Whether S. 15 is also void on account of its repugnancy to O 21, R. 11 (2), C. P. Code. (*Khaja Mahomed Noor and Dhavle, JJ.*) BENIMADHO PRASAD SINGH *v.* HEM CHANDER MITTER. **183 I.C. 96=12 R.P. 101 (1)=5 B R. 856 (1)=20 Pat.L.T. 32=1939 P.W.N. 7=A.I.R. 1939 Pat. 277.**

——**S. 15**—*Scope—Power of Court—Application for instalments in payment of decree amount—Maintainability.*

Both under S 15 of the Bihar Money-Lenders Act of 1938 and under S. 11 of the new Act of 1939, a Court has jurisdiction to consider the question whether the judgment-debtor should be relieved to the extent of being allowed to pay the decree by instalment. A Court would be wrong if it summarily dismisses an application by a judgment-debtor on the ground that it has no power after the passing of a decree to allow the payment of the decretal amount by instalments. (*Wort and Varma, JJ.*) JUGESHWARI PRASAD *v.* KANIALA PRASAD. **21 Pat.L.T. 255=1940 P.W.N. 491.**

——**S 16**—*Applicability—If confined to executions started after* 15—7—1938—*Pending executions—Sale—Procedure—If governed by S.* 16—*Amending Act V of* 1938, *S.* 3 (2)—*Scope and effect of.*

The application of S. 16 of the Bihar Money-Lenders Act is not restricted only to execution proceedings started after the Act came into force. The section applies to all pending executions and prescribes the procedure for the sale of the property of the judgment-debtor. Therefore in

BIHAR MONEY-LENDERS ACT (1938), S. 16.

all execution cases which on 15—7—1938 (the date on which the section came into force) were at a stage when the properties were not sold, the sale must be according to the procedure laid down in S. 16 provided of course that the section is not void or *ultra vires.* S. 3 (2) of the Amending Act III of 1938 makes it clear that S 16 applies to all pending proceedings whether instituted before or after the section came into force. (*Mahomed Noor and Chatterji, JJ.*) VISHWANATH NARAYAN SINGH *v.* HARIHAR GIR. **17 Pat. 714=11 R.P. 231=178 I C. 279=5 B.R. 73=19 Pat.L.T. 760=1938 P.W.N. 765=A.I.R. 1939 Pat. 90.**

——**Ss. 16 and 11**—*Appeal from order under S.* 16—*Order relating to S.* 11—*If can be dealt with.*

An appeal lies to the Federal Court from an order of the High Court under S. 16 of the Act of 1938 (now S. 13 of the Act of 1939), and in this appeal the order of the High Court so far as it relates to S. 11 of the Act of 1938 (now S. 7 of the Act of 1939) can also be dealt with. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) RAMANANDAN PARSAD NARAIN SINGH *v.* GOSHWAMI MADHWANAND RAMJI. **185 I.C. 1=12 R F.C. 13=21 Pat.L.T. 24=1940 M W N. 7=6 B.R. 170=3 Fed L J. (Part 1) 1=71 C L.J. 49=A.I.R. 1940 F C. 1.**

——**Ss. 16 and 17**—Order dismissing application—High Court dismissing appeal—Appeal to Federal Court—If lies. *See* GOVERNMENT OF INDIA ACT (1935), S. 205. **20 Pat L T. 473=A I R. 1939 F.C. 74=(1939) 2 M.L J. (Supp) 45.**

——**S. 16**—*Scope if void on the ground of repugnancy to O.* 21, *R.* 66, *C. P. Code (Patna Amendment)—Government of India Act,* 1935, *S.* 107.

The effect of S. 107 (1) of the Government of India Act, 1935, is that when a Provincial Legislature enacts any law in respect of any matter enumerated in the concurrent Legislative List which is repugnant to the existing Indian law, it will be void to the extent of that repugnancy, unless the assent of the Governor General or of His Majesty is given as laid down in sub-S. (2) of S. 107. O. 21, R. 66, C. P. Code, as amended by the Patna High Court is an existing Indian law within the meaning of S. 107 of the Government of India Act. While O. 21, R, 66, as amended, provides that the Court shall not enter any estimate of the value of the property in the sale proclamation other than the value, if any, given by the decree-holder and the judgment debtor and requires it not to vouch for the correctness of either S. 16 of the Bihar Money-Lenders Act, read with S. 17, enjoins the Court to estimate the value and mention it in the sale proclamation and to vouch for the absolute correctness of the value as fixed by it. S. 16 which must be read with S. 17 in effect repeals O. 21, R. 66, C. P. Code, and is thus repugnant to O. 21, R. 66, C. P. Code, and therefore void, having been assented to only by the Governor and not having been reserved for the assent of the Governor-General or for the signification of the pleasure of His Majesty. (*Mahomed Noor and Chatterji, JJ.*) VISHWANATH NARAYAN SINGH *v.* HARIHAR GIR. **17 Pat. 714=11 R.P. 231=178 I.C. 279=5 B.R. 73=19 Pat.L.T. 760=1938 P.W.N. 765=A.I.R. 1939 Pat. 90.**

BIHAR MONEY-LENDERS (REGULATION OF TRANSACTIONS) ACT(VII OF 1939)—*Scope—If void as repugnant to existing Indian law.*

Although the Act purports to regulate the transactions of money-lenders, it does not in terms profess to exercise powers only belonging to the Provincial Legislature under the Provincial Legislative List. In these circumstances, the new Act can only be challenged on the ground that it is repugnant to an existing Indian law, but the reservation of the Act for the consideration of the Governor-General and His Excellency's subsequent assent to it make such a challenge impossible. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SHYAMAKANT LAL *v.* RAMBHAJAN SINGH. **I.L.R. (1939) Kar. 165=182 I.C. 161=12 R.F.C. 1=2 F.L.J. 183=43 C.W.N. (F.C.R.) 68=1939 O.L.R. 399=71 C L.J. 369=5 B.R. 756=1939 M.W.N. 674=(1939) F.C.R. 193=1939 P.W.N. 533=20 Pat. L.T. 473=A.I.R. 1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.**

——**S. 2 (f) (2)**—*'Bond'—Meaning of—Balance entries in accounts signed by debtor.*

Per *Sulaiman, J*—An instrument cannot be a "bond" as it is understood in India unless it contains an express obligation undertaken by the executants to pay or deliver goods. If the promise to pay is to be inferred by implication, then the document may amount to an acknowledgment of liability, or adjustment or even account stated, but would not be a bond.

Per *Varadachariar, J.*—Whether the word "bond" in S. 2 (*f*) of the Bihar Money-Lenders Act, 1939, is intended to be limited to a formal deed or to documents of the kind specified in the definition of "bond" in the Indian Stamp Act or not, mere debit entries or balance entries in accounts even though signed by the debtor are not comprised in the expression "transaction on a bond" used in that section. It is at least necessary that the document relied on should have been intended to embody the contract between the parties and should *ex facie* show a promise or undertaking to pay before it can be said to be a "bond". The mere mention of interest being payable at a particular rate and the possible implication therefrom of a promise to pay the principal would not suffice to bring an entry in an account within the category of "bond". (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SURENDRA PRASAD NARAIN SINGH *v.* GAJADHAR PRASAD. **3 F.L.J. 27=I.L.R. (1940) Kar. (F.C.) 14=187 I.C. 612=1940 O.L.R. 275=12 R.F.C. 25=6 B.R. 508=71 C.L J. 557=1940 M.W.N. 686=1940 P.W.N 542=A.I R. 1940 F.C. 10=(1940) 1 M.L.J. (Supp.) 1.**

——**S. 7**—*Applicability—Mortgage suit—Preliminary decree passed before Act.*

In mortgage suits, the appropriate time for passing a decree for an amount of interest for the period preceding the institution of the suit is the preliminary decree. The final decree is entirely controlled by the preliminary decree and merely works out the arithmetical results of the preliminary decree. S. 7 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, has, therefore, no application in a case where the preliminary decree was passed in 1936 and confirmed on appeal in 1937 and it is only the final decree that has yet to be passed. The opening words of the section "Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement," have little to do with the law of procedure. (*Dhavle, J.*) CHANDRAWATI DEBI *v* NANDKISHEN PRASAD **6 B.R. 367=186 I.C. 401=12 R.P. 500=A I.R. 1940 Pat 376.**

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——**S. 7**—*Co-debtors—Suit against one to enforce his share of liability only—Maximum amount of interest which could be decreed.*

Where one of the executants of a document is liable only in respect of a portion of the total amount of loan mentioned in the document, the maximum amount of interest which could be decreed against him under S. 7 of the Bihar Money-Lenders Act, 1939, in a suit against him to enforce his share of the liability is the portion of the amount for which he is liable. The expression "amount of loan mentioned in the document" in that section must in such a case be read as referring to the amount which is due from the particular defendant who is sued. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) BIRENDRA PRASAD SUKUL *v.* SURENDRA PRASAD SUKUL. **3 F L.J. 55=I.L.R. (1940) Kar. (F.C.) 42=187 I.C. 622=1940 O L.R. 286=6 B.R. 517=52 L.W. 124=1940 P.W.N. 622=A.I.R. 1940 F.C. 19=12 R.F C. 23=(1940) 1 M L.J. (Supp.) 21.**

——**S. 7**—*Construction—"Evidenced by such document"—Meaning of.*

The meaning of the words "evidenced by such document" is that the Court should, in every case, look to the document on which the loan is based in order to find out the loan advanced. If the loan is based upon a single document then the Court will ascertain from that document what is the amount of loan mentioned in it, always bearing in mind the definition of the word "loan" which covers an engagement to fulfil a previous obligation; where the loan is evidenced by a series of letters or other documents like bahi khattas or by a handnote which for some purposes may be inadmissible in evidence, nevertheless a Court must refer to them for the purpose of S. 7 to find out what the loan was in order to apply the rule of damdupat adopted by the Legislature with the limitations provided by the Act. (*Varma and Manohar Lall, JJ.*) SINGHESHWAR SINGH *v.* MEDNI PRASAD. **6 B.R. 453=187 I.C. 339=12 R.P. 582=A.I.R. 1940 Pat. 65.**

——S. 7—*"Document on which the loan was based"—Accounts settled every year and balance signed by debtor—Suit for amount shown in final entry and interest thereon—Entry, if "document on which loan is based"—Amount for which decree could be passed.*

The plaintiff had advanced a loan of Rs. 3,700 to the defendants. At the close of every year when the accounts were adjusted an acknowledgment of the amount found due, including interest was written out and signed by the debtors, and a chitha for the next year was opened with its head lines written and signed by the debtors. The last chitha was for the year 1929 and showed a balance of Rs. 11,249 as due to the plaintiff. The accounts showed that an amount of Rs. 4,953 had by this time been paid towards interest. The plaintiff filed a suit for the recovery of Rs 11, 249 and interest thereon till date of suit.

Held per curiam.—That the chitta of 1929 was not a "document on which the loan was based"

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within the meaning of S. 7 of the Bihar Money-Lenders Act, 1939, and consequently under the said section the Court had no power to pass a decree for more than the principal amount of Rs. 3,700.

Per Varadachariar, J.—Even if it were possible to regard the accounts in this case as the document on which the loan is based, the accounts must be taken as a whole and the loan cannot be said to be based on the last entry alone. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SURENDRA PRASAD NARAIN SINGH *v.* GAJADHAR PRASAD **187 I.C 612=12 R.F.C. 25=1940 O.L.R 275=I.L.R. (1940) Kar (F C) 14=3 F.L.J 27=6 B R. 508=71 C.L.J. 557=1940 M.W N. 686=1940 P. W.N. 542=A I.R. 1940 F.C. 10=(1940) 1 M.L. J. (Supp.) 1.**

——**Ss. 7 and 2 (f)**—*"Loan"—Meaning of—Interest, whether "loan".*

Sulaiman, J.—"Loan" as defined in S 2 (*f*) of the Bihar Money-Lenders Act, 1939, is a wider word than the principal amount actually lent, as it may be an advance in cash or kind or it may be a transaction on a bond bearing interest executed in respect of past liability, or may be any transaction which is substantially a loan. Interest that accrues is not an advance of money, but can become a loan if liability to pay it is undertaken in a "bond". Though the word "loan" is thus wider than the term "principal" it is used in some places in S. 7 of the said Act in contradistinction to "interest." The intention of the Provincial Legislature in enacting S. 7 of the said Act read with S. 2 (*f*), which draws a distinct on between loan and interest appears to be to accept the amount of the loan ment oned or evidenced by a document, if the loan is based on such a document and amounts to a transaction on a bond bearing interest and duly executed. But when a statement of account, not amounting to a bond, itself shows that the whole of the amount mentioned therein is not a loan, but part of it is professedly interest, that interest cannot be accepted conclusively as a part of the loan within the meaning of S. 7 (*Gwyer, C.J., Sulaiman and Varadachariar JJ.*) SURENDRA PRASAD NARAIN SINGH *v.* GAJADHAR PRASAD **187 I C 612=1940 O L.R 275=12 R F C 25=I L.R. (1940) Kar (F C) 14=3 F L J 27=6 B.R 508=71 C L.J. 557=1940 M.W.N. 686=1940 P.W.N. 542=A I. R. 1940 F.C. 10=(1940) 1 M.L.J. (Supp.) 1.**

——**S. 7**—*"Loan"—Settlement of accounts by borrowing afresh—Nature of.*

Varadachariar, J.—Whatever may be the case with regard to ordinary "renewals", where the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that pre-existing liability, the later transaction should in law be regarded as a loan by itself, though cash did not actually pass between the parties by way of lending and repayment (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) JAI GOBIND SINGH *v.* LACHMI NARAIN RAM. **I L R (1940) Kar (F C.) 33=187 I C 796=6 B R 589=12 R.F C 39 =1940 O.L.R. 343=1940 P.W.N. 614=3 F.L.J. 46=A I R. 1940 F.C. 20=(1940) 1 M.L J. (Supp.) 14.**

——**S. 7**—*Validity.*

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S. 11 of the Bihar Money-Lenders Act, 1938, has now been re-enacted as S. 7 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, and as this Act has been passed in conformity with the procedure prescribed in S. 107 (2) of the Constitution Act, its validity is not open to question. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) JAGDISH JHA *v* AMAN KHAN **12 R F C. 16=3 Fed L J. (Part 1) 7= 21 Pat L T 142=71 C L J 55=185 I.C 294= 1940 O L R. 1=1940 P.W.N. 71=6 B.R. 194= A.I.R. 1940 F C 3**

——**S 8**—*Burden of proof—Duty of debtor claiming relief.*

Under S. 8 of the Bihar Money-Lenders (Regulation of Transactions) Act of 1939 it is for the debtor to establish a state of facts which would require the Court to reopen a transaction; the debtor must show that the amount claimed by the creditor as due includes sums due by way of interest in excess of the rate permitted by the Act. (*Harries, C.J. and Manohar Lall, J.*) CHATARGOON SAO *v.* RAM LAL. **21 Pat L.T. 104 =A I R 1940 Pat. 430.**

——**S. 8** - *Scope—If mandatory—Duty of Court under.*

Under S 8 of the Bihar Money-Lenders (Regulation of Transactions) Act, the Court is not bound to reopen a transaction, though of course, it should do so in a proper case. (*Harries, C.J. and Manohar Lall, J.*) CHATARGOON SAO *v* RAM LAL **21 Pat L T 104=A I R 1940 Pat 430.**

——**S. 11**—Decree—Application for payment in instalments—Power of Court to grant. *See* BIHAR MONEY-LENDERS ACT (1938), S. 15 **21 Pat.L.T. 255.**

——**S 13**—*Proclamation of sale not issued before Act coming into force—Rights given by section—If can be availed of*

There is no substance in the contention that litigants can only avail themselves of the rights given by S. 13 of the new Act in cases where a proclamation of sale has not been issued before 3rd May, 1939, the day on which the Act came into force. On the natural construction of S. 13 of the Act, the judgment-debtor can, if he so desires file an application even after 3rd May 1939, for an order under that section. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SHYAMAKANT LAL *v* RAMBHAJAN SINGH **I L R (1939) Kar 165=71 C L J. 369=12 R F.C 1=2 F L J. 183=43 C W.N. (F C R.) 68=182 I C 161= 1939 M.W.N. 674=1939 O L.R 399=1939 P.W. N. 533=5 B.R. 756=20 Pat L.T. 473=(1939) F.C R 193=A.I.R. 1939 F.C 74=(1939) 2 M. L J (Supp) 45.**

——**S 13** *Retrospective operation—Pending proceedings—If affected—Rejection of application under S. 16—Appeal—Amending Act of 1939 coming into force pending appeal—Effect—Sale taking place before hearing of appeal—Effect of on rights of parties to appeal.*

S. 13 of the Bihar Money-Lenders (Regulation of Transactions) Amending Act of 1939 is retrospective and applies to proceedings pending at the time when that Act came into force. The section applies to applications made before or after the commencement of the Act. When an order rejecting an application under S. 16 of the

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Act of 1938, is appealed from, the appeal is a continuation of the application, and on the coming into force of the Amending Act of 1939 during the pendency of the appeal, the application must be held to be pending and must be dealt with under the provisions of S. 13 of the new Act of 1939. The fact that a sale has taken place following the rejection of the application and before the hearing of the appeal cannot affect the rights of the parties to the appeal, as the sale has taken place subject to the result of the appeal.) (*Harries, C.J. and Fazl Ali, J.*) BISHUN SINGH *v.* PALAKDHARI SINGH. 185 I C 129=12 R P. 304=1939 P.W.N. 667=A.I.R 1939 Pat. 592.

——**S. 13**—*Scope—If repugnant to O. 21, R. 66, C. P. Code, as amended by Patna High Court.*

Sulaiman, J.—Repugnancy should not be extended to a section by implication if it does not in fact exist. There is no repugnancy between the new S. 13 (old S. 16), Bihar Money-Lenders Act, and O. 21, R. 66, C P. Code, as amended by the Patna High Court (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SHYAMAKANT LAL *v.* RAMBHAJAN SINGH. I L.R. 1939 Kar. 165=71 C L.J. 369=12 R.F C 1=(1939) F.C.R 193=2 F.L J 183=43 C.W N. (F.C R.) 68=182 I C. 161=1939 O.L R 399=5 B R. 756=1939 M.W N 674=1939 P W.N 533=20 Pat.L T 473=A.I R 1939 F.C 74=(1939) 2 M.L J. (Supp.) 45.

——**S. 13**—*Validity.*

S. 13 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, which re-enacts S. 16 of the Act of the previous year, cannot now be questioned in any Court since the Act of 1939 has received the assent of the Governor-General. (*Gwyer. C J, Sulaiman and Varadachariar, JJ.*) RAM PRATAPJI *v.* HARI KISHAN DOSS. 185 I C 4 =12 R.F.C. 15=6 B.R. 172 (1)=71 C.L.J. 84.

——**Ss. 13 and 14**—*Applicability— Mortgage decrees.*

Ss. 13 and 14 of the Bihar Money-Lenders Act, 1939, do apply to mortgage decrees and sales thereunder. (*Harries, C.J. and Fazl Ali, J.*) RAZIA BEGUM *v.* KRISHNADEONARAYAN MAHTHA. 184 I.C. 134 (1)=12 R.P. 221=6 B.R. 22=A.I R. 1940 Pat. 17.

——**Ss. 13 and 14**—*Applicability—Sale confirmed before Act.*

There is nothing in either the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, or the Bihar Money-Lenders Act, 1938, to express the intention of the Legislature to invalidate a completed sale which was otherwise good. If, therefore, the order confirming an execution sale was passed before either of the Acts were enacted, the provisions of Ss. 13 and 14 of the Act of 1939 cannot operate to invalidate the sale. In order that these sect ons may be applicable it is necessary that the execution should be still pending, and the execution is complete on the sale being confirmed. (*Rowland and Chatterji, JJ.*) RAZIA BEGUM *v.* KISHUNDEO NARAIN MAHTHA. 185 I.C. 404=21 P.L T. 541=12 R.P. 367=6 B. R. 177=A.I.R. 1940 Pat. 286

——**Ss 13 and 14**—*If retrospective—Power of Federal Court—Relief under new Act—Formal application by Judgment-debtor—If necessary.*

The Bihar Money Lenders (Regulation of Transactions) Act, 1939, is retrospective and the Court has power to make such an order on an appeal as the Court below could have made if the case had been heard by them at the date of the appeal The Federal Court can, therefore, on appeal direct the Court below to dispose of the matter under the provisions of Ss 13 and 14 of the Act, the sections which have replaced Ss. 16 and 17 of the earlier Act. No formal application by the judgment-debtor to the Court is necessary before he can obtain relief under the provisions of the new Act. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) BRIJ RAJ KUMARI *v* SUBHKARAN DAS. 185 I C 804=12 R F.C. 21=1940 O L.R. 97=71 C.L.J. 86=6 B.R. 333=1940 P. W.N 275=A I R. 1940 F C. 5.

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——**Ss. 13 and 14**—*If retrospective.*

Gwyer, C J., and Varadachariar, J.—Ss. 13 and 14 of new Bihar Act are retrospective in the sense that they apply to proceedings pending at the time when the Act came into force, for they refer to applications made and decrees passed "before or after the commencement of this Act." (*Gwyer, C.J., Sulaiman and Varadachariar JJ.*) SHYAMKANT LAL *v.* RAMBHAJAN SINGH. I.L R. 1939 Kar. 165=71 C L.J 369=12 R F.C 1=(1939) F.C R 193=2 F L.J 183=43 C W N. (F C R.) 68=182 I.C 161=1939 M.W.N 674=1939 O.L.R. 399=1939 P W N. 533=5 B.R. 756 =20 Pat.L T. 473=A.I R 1939 F.C. 74=(1939) 2 M.L J. (Supp) 45

——**Ss. 13 and 14**—*Retrospective operation.*

Ss. 13 and 14 of the Bihar Money-Lenders Act, 1939, are retrospective in the sense that they apply to proceedings pending at the time when the Act came into force. (*Harries, C.J. and Fazl Ali, J.*) MAHABIR SARAN PRASAD SINGH *v.* LACHHMI SAO. 184 I.C. 64=12 R.P. 219=6 B. R. 12.

BIHAR RESTORATION OF BAKASHT LANDS AND REDUCTION OF ARREARS OF RENT ACT (IX OF 1938), S. 15—*Applicability to execution proceedings.*

S. 15 of the Bihar Act IX of 1938 does apply to execution proceedings. (*Khaja Mohamad Noor and Chatterji, JJ.*) RAZAUR RAHMAN *v.* UDIT SINGH. 18 Pat. 694=185 I.C. 135=12 R.P. 303 =20 Pat.L.T. 492=1939 P.W.N. 530=A.I.R. 1939 Pat. 570.

——**S. 15**—Scope—If void as repugnant to S. 38, C. P. Code. *See* GOVERNMENT OF INDIA ACT, S 107. 20 Pat.L.T. 492.

BIHAR TENANCY ACT (VIII OF 1885)—*Person in possession recognised as tenant by receiver of estate—Payment of rent to receiver—Effect of—Receiver — If landlord— Tenant if acquires occupancy rights.*

A receiver in judicial possession of an estate by the implicit consent of the parties under the orders of the Court must be treated as the landlord for the time being. When the receiver acting *bona fide* recognises a person in possession as tenant, doing so in the ordinary course of management and receives rent from him for over seven years, the latter acquires rights as an occupancy *raiyat* under the Bihar Tenancy Act, on his showing continuous and unbroken possession for the statutory period. It is not open to the lawful owner to eject such tenant by pleading that the tenant's rights enure only so long as the receiver continues to manage the estate. (*Fazl Ali and Manohar Lall, JJ.*) MAHABIR DAS *v.* UDIT

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NARAIN VARMA 17 Pat. 594=178 I.C. 849=11 R.P. 306=5 B.R. 149=19 Pat.L.T. 570=A.I.R. 1938 Pat. 613.

——(as amended in 1934)—*Scope and effect of* —"Abwab"—*Law as to—If altered*—Kathiari—*If* abwab—Mutarfa bithouri—*Meaning and nature of*

The recent amendment of the Bihar Tenancy Act has not changed the law as to *abwab*. What was *abwab* before is *abwab* now, and what was not *abwab* before has not been made such by the new Act. The only modification has been as to the nature and amount of punishment for exacting an illegal *abwab*. *Kathiari*. which is payable by the weavers to their landlords on the basis of the looms which they work on the land, is a rent payable on the basis of the work to be done on the land and not on the basis of the area of the land occupied. It is not an *abwab* but an amount legally payable to the landlord. *Mutarfa* is ground-rent and *Kathiari* is profession-tax according as the settlor takes up cultivation or merely trade. *Bithouri* may be either *mutarfa* or *kathiari*, and is practically rent for homestead land based on the profession carried on on the land. (*Khaja Mahomed Noor and Dhavle, JJ.*) HALUMAN PRASAD *v.* PURAN TATMA. 18 Pat.190 =179 I C. 840=11 R.P. 419=1939 P.W.N 271 =5 B.R. 303=20 Pat.L.T. 88=A.I.R. 1939 Pat. 252.

——S. 5—*Tenancy—Settlement by unregistered* hukumnama—*Possession and acceptance of rent —Effect of*

Where a landlord's son settled certain property with X by an unregistered *hukumnama* and the landlord accepted rent through his son and the person so settled got into possession of the property.

Held, that it was not necessary to register the *hukumnama* and that a contract of tenancy was constituted between the parties and that the landlord thereafter could not grant a patta of the same property to any one else by either a registered or unregistered deed. (*Wort, J.*) BIHARI MIAN *v.* SONA MARIK. 167 I.C. 563=9 R.P. 417 =3 B.R. 312 (2)=A.I.R. 1937 Pat. 81.

——S. 5 (1)—*Usufructuary mortgage by owner and lease back to him—Effect—Relation of landlord and tenant—If created—Incidents.*

Where the proprietor of a holding or estate executes a usufructuary mortgage and takes a lease of the same from the mortgagee, the transaction is essentially one transaction, and the relationship of landlord and tenant is created between the parties. A tenure as defined by S. 5 (1) of the Bihar Tenancy Act is created thereby and a suit by the lessor-mortgagee for rent against the mortgagor tenant is governed by that Act. (*James and Rowland, JJ.*) DEONANDAN *v.* GIRDHAR. 182 I.C. 863=12 R.P. 82=5 B.R. 839 =20 Pat. L.T. 697=1939 P.W.N. 120=A.I.R. 1939 Pat. 272.

——S. 15—*Scope—Non-compliance—Effect—If justifies landlord in treating one of several tenants as representative of all.*

Failure on the part of the heirs of a tenant to give the notice of succession required by S. 15 of the Bihar Tenancy Act does not necessarily entitle the landlord to treat one of the several heirs of the original tenure-holder as representative of the tenancy. (*Harries, C.J., Dhavle and Manohar Lall, JJ.*) HARI PRASAD SINGH *v* LAL BEHARI SARAN SINGH. 21 Pat.L.T. 377=1940 P.W.N. 420=6 B.R. 713=A.I.R. 1940 Pat. 328 (F.B.).

BIHAR TENANCY ACT (1885), S. 22.

——Ss. 20, 21 and 25—*Settlement of land by co-sharer in good faith—Acquiescence by other co-sharer—Raiyat. if can acquire occupancy right.*

If in the ordinary course of management one of two co sharers settles land in good faith and for the benefit of the estate. and the other co-sharer acquiesces in the settlement, the person who accepts settlement in good faith in this way becomes a raiyat, and after occupation for twelve years he acquires an occupancy right by the operation of Ss. 20 and 21 of the Bihar Tenancy Act, and under S. 25 of that Act, he cannot be ejected except on the conditions prescribed by that section. (*James and Chatterji, JJ.*) RAMASRAY PRASAD CHAUDHURY *v.* RAMSURAT SINGH. 6 B.R. 84=184 I C. 838=12 R.P. 282= 21 P.L.T. 181=A.I.R. 1940 Pat. 131.

——S. 21—*Cultivating lease—Lease to settled raiyat, of kharbaur and khudkasht land fixing annual jama payable to landlord—Tenant entitled to remain in possession and occupation till term of lease and to appropriate produce—Clause that tenant to have no right in land besides cutting wild khar—Effect of—If cultivating lease—Occupancy right—If accrues.*

Where a kabuliyat which purports to be a "lease of land" fixes an "annual *jama*" payable to the lessor, the lands being described as kharbaur and khudkasht, and provides that the lessee should, up till the term of the lease, remain in possession and occupation of the leasehold property and appropriate the produce thereof, it is fairly clear on the terms of kabuliyat that it creates an interest in the land and not merely in the *khar* growing on it, although there is a provision in the kabuliyat to the effect that "besides cutting the wild *khar* the lessee shall have no right to the land." The lease is cultivating lease and the absence of so many words in the lease that the land is let out for cultivation is no ground for holding that it is not a cultivating lease. The lessee under such a lease who is a settled raiyat of the village acquires an occupancy right in the lands in question under S. 21 of the Bihar Tenancy Act. There is a difference in law between a lease and license and though, generally speaking. it is true that the thatching grass grows spontaneously, it is treated as a form of crop, and in order to make the best use of this grass, the tenant must have recourse to certain process of cultivation. (*Fazl Ali and S. C. Chatterji. JJ.*) W. W. M. MURRAY *v.* SUMRIT RAI. 186 I C. 232 =12 R.P. 463=6 B R. 313=20 Pat L.T. 589= 1939 P.W.N. 635=A.I.R. 1939 Pat. 594.

——(as amended in 1934), S. 22—*Applicability —If retrospective—Suit after Act on cause of action arising before—Period of limitation.*

A suit for produce rent instituted after the Bihar Tenancy Amendment Act came into force, though on a cause of action which arose before the Act came into force, is governed by the shorter period of limitation introduced by the Amending Act. The law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding.

BIHAR TENANCY ACT (1885), S. 22.

(*Rowland, J.*) RAMESHWAR PRASAD SINGH *v.* MANGAR KAHAR. **18 Pat.L.T. 193=169 I.C. 78 =9 R P. 524=3 B.R. 534=1937 P.W.N. 95=A. I.R. 1937 Pat. 311.**

——**Ss. 22 (2) and 26-A**—*Applicability and relative scope.*

The fact that in cases covered by S. 22 (2), Bihar Tenancy Act, the occupancy right ceases to exist upon transfer by operation of law or by virtue of some specific provision in the Act will not prevent S. 26-A of the Act and the other sections connected with it from being applicable to such a case, because the tenant who sells the holding purports to transfer it together with the occupancy right in it. Besides, there is nothing in the Act to suggest that the Legislature could have intended that the position of the co-sharer landlord when he acquires a raiyati holding should be worse than that of a third person acquiring such a holding. (*Fazl Ali and Dhavle, JJ.*) MISS G. B. SOLANO *v.* UMESHWARI KOER. **16 Pat. 500=171 I.C. 306=10 R.P. 196=1937 P.W. N. 742=18 Pat.L.T. 700=A.I.R. 1937 Pat. 506.**

——**S. 22 (2)**—*Applicability—Non-transferable holdings.*

S. 22 (2), Bihar Tenancy Act, refers only to an occupancy holding which is transferable by custom and it does not apply to a non-transferable holding. It would however apply to a non-transferable holding also if the co-sharer landlord or permanent tenure-holder to whom the holding is transferred, can prove that the holding has been transferred to him with the consent of the other co-sharers or that the latter have waived their right to object to the transfer either expressly or by doing something which may amount to a recognition of the transfer. (*Fazl Ali and Dhavle, JJ.*) MISS. G. B. SOLANO *v.* UMESHWARI KOER. **16 Pat. 500=171 I.C. 306=10 R.P. 196=1937 P.W.N. 742=18 Pat.L.T. 700 =A.I.R. 1937 Pat. 506.**

——**(before amendment of 1907), S. 22 (2)**—*Co-owner purchasing occupancy right—Right to retain possession after allotment of land to other co-sharer by partition.*

There is nothing in sub-S. (2) to suggest that a co-owner who purchases an occupancy right is entitled to retain possession after the land which he has purchased has been allotted to the patti of any other co-sharer by partition. (*Harries, C.J., Agarwala and Manohar Lall, JJ.*) SUNDAR MALL *v.* LACHHMI TEWARI. **1940 P.W.N. 596=A.I.R. 1940 Pat. 467 (F.B.).**

——**(before amendment of 1907), S. 22 (2)**—*Co-proprietor purchasing occupancy right—Status of—If tenant of other co-proprietors.*

A co-proprietor purchasing an occupancy right in land is not a tenant under the other co-proprietors of the land. Nor can he be viewed as occupying the status of a tenant under himself and his co-proprietors, for that involves the purchaser being a tenant under himself and the other co-proprietors as landlords. (*Harries, C. J., Agarwala and Manohar Lall, JJ.*) SUNDAR MALL *v.* LACHHMI TEWARI. **1940 P.W.N. 596= A.I.R. 1940 Pat. 467 (F.B.).**

——**S. 22 (2)**—*"Rent"—Meaning.*

The word "rent" used in Sub-S. (2), S. 22, Bihar Tenancy Act, means the rent which was payable in respect of the holding when it was transferred. The words "in respect of the holding" do not occur in Sub-S. (2) but they do occur immediately after the words "payable to them" in the illustration and this indicates clearly that the rent referred to is the rent of the original occupancy holding and not the rent payable in respect of the tenancies that might be created afterwards by the purchasing co-sharer. If the purchasing co-sharer sub-lets the land to a third person and realizes from him a higher rent than that paid by the original tenant, the other co-sharers are not entitled under this section to realize from the purchasing co-sharer their share of such rent. (*Fazl Ali and Dhavle, JJ.*) MISS G. B. SOLANO *v.* UMESHWARI KOER. **16 Pat. 500= 171 I.C. 306=10 R P. 196=1937 P.W N. 742= 18 Pat.L T. 700=A.I.R 1937 Pat. 506.**

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——**(before amendment of 1907), S. 22 (2)**—*Scope and effect of—Purchase by one co-owner of occupancy right—Only occupancy right ceases to exist and not all tenancy rights.*

The effect of the purchase by one of the co-owners of land of an occupancy right is not that the tenancy rights cease to exist altogether but only the occupancy right which is an incident of the holding. (*Harries, C.J., Agarwala and Manohar Lall, JJ.*) SUNDAR MALL *v.* LACHHMI TEWARI. **1940 P.W N. 596=A.I.R. 1940 Pat. 467 (F B).**

——**(as amended in 1907), S. 22 (2)**—*Scope Retrospective effect.*

The amendments made in S. 22 (2) by the Amending Act of 1907 do not apply to a purchase made before that date. (*Harries, C.J., Agarwala and Monohar Lall, JJ.*) SUNDAR MALL *v.* LACHHMI TEWARI. **1940 P.W.N. 596=A.I.R. 1940 Pat. 467 (F B.).**

——**S. 22 (3)**—*Construction—Occupancy holding—Purchase by* thicadar—*Effect*—Thicadar *selling right to co-sharer landlord—Right and status of latter—If can resist claim of other co-sharers to share by partition.*

Where a *thicadar* purchases an occupancy holding during the period of his lease, he becomes a non-occupancy raiyat in respect of the holding so purchased, as it is well-settled that land held in non-occupancy right is not ordinarily transferable, a vendee from the *thicadar* purchaser cannot acquire either non-occupancy or occupancy rights in the lands, though the vendee from the *thicadar* is a co-sharer landlord of the holding. A co-sharer landlord purchasing from the *thicadar* the holding of the occupancy raiyat purchased by the *thicadar*, cannot resist the claim of the other co-sharers to a share in the lands in proportion to their interests in the village in question. (*Fazl Ali and Varma, JJ.*) HARIHAR PRASAD SINGH *v.* HITLAL SINGH. **21 Pat.L.T. 320.**

——**S. 23 A, Proviso**—*Scope and effect of—Trees on holding of tenant—Recording trees as in possession of landlord—Effect of—Right of landlords to produce of trees.*

Where it is recorded in the latest record of rights that there were trees on the tenant's holding and that they were in the possession of the landlord, the entry must be interpreted as meaning that the landlord is entitled not only to his common law right to the timber, but also to the produce of the trees. The trees being on the tenant's land, the landlord is in possession through his tenant and no question of limitation or adverse possession can arise in the absence of

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an assertion of a hostile title by the tenant. (*Agarwala, J.*) MAHOMED NAIM *v.* LACHCHU SAHU. **1939 P.W.N. 868=A.I.R. 1940 Pat. 175.**

——**Ss. 26-B and 26-N**—*Applicability to mortgages.*

S. 26-B and 26-N by their terms apply to transfers by sale, exchange, gift or will. They do not apply to mortgages and therefore do not protect sudhbharnadar. Assuming, however, that the view that when a mortgage is followed by a sale in execution of a decree on the mortgage the execution sale may be treated on the same footing as a voluntary sale and would therefore come within the purview of S. 26-B is correct, it does not hold good with regard to usufructuary mortgages. (*James and Chatterjee, JJ.*) RAM CHANDERJI *v.* HEM CHANDRA. **18 Pat. 184=182 I C 557=12 R.P. 21=20 Pat.L.T. 469=5 B.R. 779=A.I.R. 1939 Pat. 200.**

——**(as amended in 1934), Ss. 26-B, 26-F and 26-O**—*Applicability and scope—Holding transferable by custom—Transfer of before* 1934 *—Title of transferee—Payment of transfer fee—If condition precedent.*

The provisions of Ss. 26-B and 26-F of the Bengal Tenancy Act, as amended in 1934, apply to transfers made after the passing of the Amendment of 1934. They have obviously no application to cases where the holdings are transferable by custom and have been transferred before the commencement of the Act as amended. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer; and if the title is already perfect, recourse to S. 26-O of the Act is unnecessary. The latter section providing for the payment of transfer-fee is clearly intended to apply only to those cases where the title of the transferee has not been perfected, or in other words, to those transfers only which relate to non-transferable holdings. (*Fazl Ali and Madan, JJ.*) HARGOURI PRASAD *v.* RAGHUNATH SINGH. **169 I C. 350=10 R.P. 11=3 B.R. 548=16 Pat. 239=1937 P.W.N. 202=18 Pat.L.T. 239=A.I.R. 1937 Pat. 314.**

——**(as amended in 1938), S. 26-B Proviso**—*Scope and operation of—Non-transferable holding—Transfer in* 1912*—Transferee in possession continuously thereafter—Consent of landlord—Presumption—Sale of holding in execution of rent decree against original tenant alone in* 1931*—Suit for ejectment of transferee by purchaser in execution—Competency.*

In the case of a transfer of a holding made before 1923, if the transferee has been continuously in possession since the transfer, the Court, under the proviso to S. 26-B of Bihar Tenancy Act as amended in 1938, must assume that the landlord consented to the transfer, and therefore the transferee cannot be ejected. A non-transferable holding was transferred by the original tenant in October, 1912. After the transfer, the transferees entered into possession of the holding and effected golas or pakka buildings thereupon, and they were in continuous possession for over twenty years thereafter. In 1930, the landlords sued the original tenant for arrears of rent, obtained a decree on 18—5—1930, in execution of which the holding was sold on 22—9—1931. It was purchased by the plaintiff who was a minor son of one of the landlords. The sale was confirmed on 18—11—1931. When the Civil Court peon went to deliver possession on 17—4—1933, he found there were pakka buildings and therefore could not deliver possession. On 29—11—1933, the plaintiff sued for a declaration of title and for possession after removal of the structures,

Held, that by reason of the proviso to S. 26-B of the Bihar Tenancy Act which was substituted for S. 26-N, in 1938, which provision was retrospective, it must be assumed that the transfer was made with the consent of the landlord; and the transferees who had been continuously in possession since the date of transfer could not be ejected.

Held, further, that the rent decree and execution sale consequent on it could not affect the interest of the transferees in any way. They were not parties to the rent suit or the execution proceedings and they were entitled to rely on the old S. 26-N and the new S. 26 B proviso of the Bihar Tenancy Act. (*Harries, C.J. and Fazl Ali, J.*) CHANDRIKA PRASAD SINGH *v.* RAM LAL SAHU. **187 I.C 629=6 B R. 521=12 R.P. 623=1939 P. W.N. 661.**

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——**Ss. 26-E and 26-F**—*Scope—Duty of Collector under—Enquiry—Scope of—Power to refuse to accept tender of transfer fee*

There is no provision in the Bihar Tenancy Act which authorises the Collector to refuse to accept a deposit of the landlord's transfer fee properly tendered to him. The only question which he has to determine before the issue of a receipt for the fee tendered is whether the deposit is in accordance with S. 26-E (1) (*c*) and the only questions for him after the grant of a receipt are to see whether the value stated in the transferee's application is the correct market value and, if not, whether the transferee has wilfully understated the value with a view to reduce the amount of the landlord's fee—in which case the transferee is liable to penalty, and to decide disputes as to who is entitled to receive the fee deposited. (*Agarwala, J.*) MAHADEO JHA *v.* JOGESHWAR THAKUR. **1938 P.W.N. 135.**

——**Ss. 26-E, 26-N and 26-O**—*Scope—If retrospective—Transfer of non-transferable holding—Decree in ejectment giving landlord right to re-enter—Decree confirmed on appeal—Second appeal—Act coming into force pending second appeal—Transferee depositing transfer-fee with Collector and getting receipt—Effect—Ejectment decree—If sustainable.*

A tenant of an occupancy holding having transferred the holding which was not transferable without the consent of the landlord, the landlord obtained a decree in ejectment giving him right to re-enter. Pending a second appeal the Bihar Tenancy Act came into force and the appellant transferee deposited the transfer-fee due to the landlord with the Collector and got a receipt therefor.

Held, that the effect of the deposit was that the landlord must be deemed to have consented to the transfer.

Held further, that the title of the transferee had not become extinct by reason of the decree of the lower Courts, as they had not become final since a second appeal was pending. Ss. 26-N and 26-O were retrospective in effect. (*Khaja Maho-*

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med Noor and Rowland, JJ.) MT WALIHAN *v.* PARAMESHWAR NARAIN PATAKH. **16 Pat. 405=18 Pat L.T. 602=171 I.C. 657=10 R.P. 233=4 B.R. 48=1937 P.W.N. 585=A.I.R. 1937 Pat. 582.**

——(as amended in 1934), S. 26-E (1) (b) and (c)—*Scope—Transferee—Title of—Conditions of—Duty of transferee to pay landlord's fee to landlord and deposit same with Collector.*

Under the Bihar Tenancy Act as amended in 1934, a transferee of a non-transferable holding has no valid title as against the landlord until the landlord's transfer fee is paid to the landlord in accordance with S. 26-E (1) (*b*) of the Act, or deposited with the Collector in accordance with S. 26-E (1) (*c*), so that the consent of the landlord may be deemed to have been given to the transfer. (*Dhavle, J.*) GAYA PRASAD SAH *v.* RAM PRASAD PATHAK. **179 I.C. 923=5 B.R 320=11 R.P. 425=A I.R 1939 Pat. 358.**

——(as amended in 1934), S. 26 M—Scope and effect of—Sale held before coming into force of—Confirmation in ignorance of—Legality—Non-deposit of amount and non-filing of notice—If renders confirmation illegal. *See* C. P. CODE, S. 151. **1938 P.W.N. 192.**

——(as amended in 1934), S. 26-N—*Applicability—Non-transferable occupancy holding—Purchase of part by co-sharer landlord in* 1908—*Subsequent batwara proceedings—Effect of—Bengal Tenancy Act, S. 22.*

Plaintiff and defendants were co-sharers in a certain village of a plot of non-transferable occupancy land. The tenant of that holding sold a portion of it to the plaintiff in 1908, and about 1928 there was delivery of possession in a partition by which the portion of the holding sold to the plaintiff in 1908 fell to the path of the defendants.

Held, that the purchase by the plaintiff being prior to 1923, the same was governed by S. 26-N of the Bihar Tenancy Amendment Act of 1934, and the *batwara* proceedings of 1928 conferred no right on the defendants and did not affect the matter at all. S. 22 of the Bengal Tenancy Act would also apply to those cases of transfer in which the landlords had given their consent; under S. 26-N of the Bihar Tenancy Amendment Act the consent must be deemed to have been given. Plaintiff was consequently in the position of a third party purchaser of a holding or a part of a holding in which the landlords had given their consent to transfer. (*Courtney-Terrell, C.J and James, J.*) NAGA RAI *v* BUCHI RAI. **18 Pat.L.T. 173=1937 P.W.N. 739.**

——S. 26-N—*Applicability—Pending litigation.*

S. 26-N of the Bihar Tenancy Amendment Act of 1934 governs all cases which were pending on June 10, 1935, whether the landlord be an appellant or respondent (*James, J.*) BABU LAL MANDER *v.* KAMESHWAR SINGH. **165 I.C. 801=9 R.P. 212=3 B.R. 80.**

——(as amended in 1934), S. 26-N—Scope and effect of—Decree for rent against tenant before coming into force of amended Act—Execution after amended Act—Right of mortgagee under S. 171—If lost. *See* BIHAR TENANCY ACT. S. 171. **1938 P.W.N. 654.**

——(as amended in 1934), S. 26-N—*Scope—If retrospective—Pending actions—If affected—Sale*

BIHAR TENANCY ACT (1885), S. 26-N.

of holding—Dispossession of transferee by landlord in execution of money decree—Suit by transferee—Decree by first appellate Court—Second appeal—Amending Act coming into force—Effect—Landlord's right to resist claim.

S. 26-N of the Bihar Tenancy Act introduced by the Amending Act of 1934 is retrospective and applies to pending actions. The landlord of a holding purchased it in execution of a simple decree for money on 2-12-1931 and got delivery of possession on 21-2-1932. Plaintiffs who were purchasers of the holding from the tenant under a deed dated 26-6-1921 and who were dispossessed by the landlord's taking possession in execution instituted a suit for possession against the landlord on the ground that the landlord had purchased not the holding itself, but only the right, title and interest of the judgment-debtor tenant. The suit was dismissed; but the appellate Court decreed it and the landlord thereupon preferred a second appeal to the High Court. Pending the second appeal, the Bihar Tenancy Amendment Act, introducing S. 21-N, came into force.

Held, that though the plaintiffs had no title on the date of their suit, yet as soon as the Amending Act came into force, the landlord must be deemed to have given his consent to the transfer which was prior to 1923, and the title of the plaintiffs therefore became complete, and there was no defence to their claim for possession. (*Khaja Mahomed Noor and Rowland, JJ.*) MAHOMED SHAFAIT *v.* NITHALI RAM. **169 I.C. 1000=3 B R 644=10 R.P. 62=18 Pat.L T. 345=1937 P.W.N. 371=A.I R. 1937 Pat 387.**

——S. 26-N—*Scope and operation of—Retrospective effect—Transfer of part of holding—Suit by landlord more than 10 years after against recorded tenant alone—Decree and execution sale—Transferee's title—If affected.*

Section 26-N of the Bihar Tenancy Act is retrospective and the object of the section is to quiet titles which are more than ten years old, and to ensure that if during those ten years the transferee has not been ejected, he shall have the right to remain on the land. In 1913 there was a transfer of a part of a holding to plaintiff, which transfer, according to the plaintiff, was recognized by the landlord. In 1931, the landlord brought a rent suit against the recorded tenants, without impleading the plaintiff as a party, and purchased the holding in execution of the decree in that suit. Plaintiff sued for a declaration of his right to possession.

Held, that the plaintiff had title by reason of the operation of S. 26-N of the Bihar Tenancy Act, and that he was in no way affected or extinguished by the decree in the suit against other parties, as he was not a party to that action. (*Wort and Varma, JJ.*) THAKUR RAI *v.* ISSARDYAL PARSHAD. **17 Pat. 333=179 I.C 104=11 R.P 247=1939 P.W.N. 239=5 B.R. 176=A I.R. 1938 Pat. 559.**

——S. 26-N—*Scope—Retrospective effect—Pending suits.*

The language of S. 26-N, Bihar Tenancy Act, is plain and it was intended to be retrospective in operation, the object of the Legislature being to quiet titles which are more than ten years old. This provision applies even to holdings which at

BIHAR TENANCY ACT (1885), S. 26-N.

the date of the commencement of the Act are in question in a pending suit. (*Fazl Ali and Dhavle, JJ.*) MISS G.B. SOLANO *v.* UMESHWARI KOER. **16 Pat. 500=171 I.C. 306=10 R P. 196=1937 P. W. N. 742=18 Pat. L. T. 700=4 B. R. 12= A.I.R. 1937 Pat. 506.**

——(as amended by Act of 1935), S. 26-N—*Sale before* 1923—*Consent of landlord is presumed even if purchaser is one of co-sharers.*

Sale before 1923 is presumed to be with consent of the landlord even if the purchaser is one of the co-sharer landlords and he is in the position of a third party purchaser of a holding or part of holding. (*Wort, J.*) NAGA RAI *v.* BUCHI RAI **162 I. C. 875=8 R. P. 594=2 B. R. 523= A.I.R. 1936 Pat. 285.**

——(as amended in 1934), S. 26-O—*Applicability and scope—Pending suit by landlord and pending suits by tenant—Distinction if any—Deposit pending appeal—Sufficiency.*

In applying S. 26 O of the Bihar Tenancy Act, as amended in 1934, to pending suits, it is not possible or permissible to draw any distinction between cases in which the landlord is the plaintiff and cases in which the tenant is the plaintiff. The title of the transferee would not become extinct by the passing of a decree against him unless and until that decree becomes final, as it might, by the lapse of the period of limitation for an appeal and the omission to file an appeal against the decree. Deposit pending appeal is sufficient. (*Agarwala and Rowland, JJ.*) JAGA SINGH *v.* BASDEO SINGH. **6 B.R. 483=187 I.C. 518=12 R.P. 601.**

——S. 26-O—*Discretion of Court—Application to be added as intervener by person depositing landlord's fee—Rejection—Revision.*

A Judge in the exercise of his discretion rejected the application, to be added as an intervener, of a person who deposited the landlord's fee under S. 26-O, Bihar Tenancy Act, 1934.

Held, that the Act gave the Court a discretion and when once the Judge had exercised it, the High Court would not interfere in revision. (*Wort, J.*) JAGDISH NARAYAN SINGH *v.* ALAKHDEO NARAIN SINGH. **166 I C. 948=9 R.P. 360 (2)=3 B.R. 239=A.I.R. 1937 Pat. 38.**

——(as amended in 1934), S. 26 O—*Retrospective effect—Transfer without consent—Action for ejectment by landlord—Deposit of landlord's fee with Collector and grant of receipt by latter—Effect—Consent of landlord—If deemed to be given.*

S. 26-O of the Bihar Tenancy Act as amended in 1934 is retrospective in operation. Where pending an action by the landlord for ejectment of the transferee on the ground of want of consent to the transfer of the holding, the transferee under a transfer, made before the commencement of the amending Act, deposits the landlord's fee with the Collector within the time and in the manner required by the Act and is granted the necessary receipt by the Collector the consent of the landlord to the transfer must, under S. 26-O (3), be *prima facie* be deemed to have been given from the date on which the receipt is granted, with the result that the landlord's action for ejectment must fail. (*Agarwala, J.*) MAHADEO JHA *v.* JOGESHWAR THAKUR. **1938 P.W.N. 135.**

BIHAR TENANCY ACT (1885), S. 48-A.

——S. 26-O, cl. (3) (b)—*Scope—Consent of landlord—Date of—Objection by landlord as to sale price and distribution of rent—If sustainable.*

Landlord's consent shall be deemed to have been given on the date on which the receipt for deposit of sum as transfer fee, is granted by Collector. If the landlord objects to the alleged sale price and distribution of rent, he has a separate remedy under S. 26-J and his objection does not affect the effect of S. 26-O, Cl. (3) (*b*). (*Rowland, J.*) RAMESHWAR BHAGAT *v.* THAKUR JEBAN NARAYAN SINGH. **166 I C. 794=9 R.P. 353=3 B.R. 231=18 Pat.L T. 278=1936 P.W. N. 708=A.I.R. 1937 Pat 49.**

——S. 29—*Scope—Occupancy tenant—Kabuliat regarding land occupied by him together with new land at enhanced rent, to be doubled after certain period—Effect of.*

Where kabuliat was executed by a tenant with regard to bhaoli land, which he already occupied as occupancy tenant together with new lands at a certain rent per bigha for certain period after which it was to be doubled, the effect of the kabuliyat being that the rent for the portion previously held was enhanced and was subsequently again doubled.

Held, that the enhanced rent reserved for the period being for what was a substantially different holding did not contravene the provisions of S. 29. But its doubling after the period clearly contravened S. 29. (*Wort and Rowland, JJ.*) RAJNITI PRASAD SINGH *v* RAMUDGAR. **174 I.C. 367=4 B.R. 437=19 Pat.L.T. 380=10 R.P. 503=A.I.R. 1938 Pat. 116.**

——S. 29—Scope—Plea of illegal enhancement—Partition by Collector and fixation of rent on basis of enhanced rent—Party consenting and taking advantage of enhanced assets—Plea that enhancement was illegal—Sustainability. *See* BENGAL ESTATES PARTITION ACT, S. 81. **1938 P. W.N. 147.**

——Ss. 38 and 52—*Scope—Lands in Sonthal Parganas—Abatement of rent on diluvion—Right of tenants—Claim based on contract instead of on law—Failure to prove contract—If bar to relief.*

It has always been held to be the law that a tenant, whether he be an occupancy *raiyat* or otherwise, is entitled to an abatement of rent if the whole or part of the land held by him is diluviated. Ss. 38 and 52 of the Bihar Tenancy Act make this clear, so far as Bihar is concerned. S. 52 is wider than S. 38 in terms, the latter section being applicable to the case of a tenure-holder. Lands in Sonthal Parganas are no exception to this rule. The fact that the tenants fail to establish or prove a contract to that effect on which they rely would not in any way prevent their getting the relief to which they are entitled under the law, though they might base their claim on the contract and not on the general law. (*Wort and Agarwala, JJ.*) FOUZI LAL KURMI *v* DHANA KUMARI DEVI. **17 Pat. 530= 179 I.C. 92=11 R P. 322=5 B.R. 193=19 Pat.L. T. 658=A.I.R. 1938 Pat 597**

——(as amended in 1938), S. 48-A—*Retrospective operation.*

S 48-A of the Bihar Tenancy Act as amended in 1938 is intended to be retrospective and applies to all pending actions. A suit shall be deemed to be still pending in appeal, although a decree for

ejectment has already been passed by the Court below, and it has been duly executed and possession taken before the new S. 48-A came into force. (*Rowland and Chatterji, JJ.*) AGIN SINGH *v.* BHUDEO SINGH 187 I C. 580=12 R.P. 620=1940 P.W.N. 272=6 B.R 496.

——S. 49 — *Applicability — "Under-raiyat" — Homestead comprised in holding of agricultural and homestead land—Settlement on condition that lessee supplied milk, curd and ghee to settlor at certain prices on ceremonial occasions—Status of lessee—Notice of ejectment—Necessity.*

Where lands included in the holding of an agricultural *raiyat* consists partly of agricultural and partly of homestead land and the homestead is let out for use as homestead, the person to whom it is so let is an *under-raiyat*, and such person is not liable to ejectment unless a notice has been served upon him in accordance with the provisions of S. 49 of the Bihar Tenancy Act. Where homestead land is so let out and settled with a person on condition that he provided milk, curd and ghee to the settlor at certain prices on ceremonial occasions and assisted him in his cultivation, a produce tenancy is created, and the person taking such settlement is an under-raiyat, liable to ejectment only on notice served in accordance with S. 49. (*Agarwala, J.*) MIAN AHIR *v.* PARAMHANS PATHAK. 181 I C. 172=11 R.P. 571=5 B. R. 541=A.I.R. 1939 Pat. 409

——(as amended in 1934), S. 50 (2)—*Presumption under—When arises.*

S 50 (2) of the Bihar Tenancy Act only provides for the presumption that land is held at a uniform rent since the permanent settlement from proof that the rent has not been changed during the 20 years immediately before the institution of a suit 'until the contrary is shown.' Where the rent was changed in 1889 to double the previous amount, it is obvious that the contrary has been shown. (*Dhavle and Verma, JJ*) KAMESHWAR SINGH BAHADUR *v* KRISHNA CHANDRA JEW. 175 I.C. 316=4 B.R. 561=10 R.P. 611=A.I.R. 1938 Pat. 396.

——Ss. 52 and 180—*Relative scope—Right of tenure-holders to abatement*

S. 52 is a much wider section than S 180, inasmuch as it deals with every class of tenants. S 52 undoubtedly gives right of abatement to tenure-holders. (*Wort, J.*) NRIPENDRA NATH CHATTERJI *v.* JUGAL PRASAD MANDAL. 185 I.C. 144=12 R.P. 306=A.I.R. 1939 Pat. 386.

——S. 53—*Rent—When accrues—If accrues from day to day—Compromise providing for right in appellant to rents and profits as from that date —Kist falling beyond that date—Advance collection by respondent prior to compromise—Suit by appellant for recovery—Right to decree—Limitation—Limitation Act, Arts. 62, 109 and 120.*

A compromise entered into between the appellants and respondents on 20-7-1928 by which certain property was to be transferred to the appellants, *inter alia* provided that the appellant "should be entitled to all rents and profits accruing in respect of these properties as from the twentieth day of July, 1928." The kist in question was that of 29-9-1928 but the respondents had collected the rent in advance from the tenants prior to the date of the compromise, 20-7-1928. Appellant

having sued the respondents for recovery of such collections,

Held, (1) that the rents in question accrued only on the date of the kist, *i.e.*, 29-9-1928 which was after the date of the compromise, although in fact there had been advance payment to the respondents which might in certain circumstances have been a complete discharge as against them. Rent in India does not accrue from day to day, and therefore did not accrue until the date of the kist of September, 1928, and there could therefore be no question of diminution of the amount claimed by the appellant; (2) that the compromise must be construed plainly on the assumption that the parties were contracting with the full knowledge of the law that there was an agreement and an undertaking by the respondents to pay those sums (if they had already collected them) to the appellant in so far as they were rents which accrued due after 20-7-1928; and (3) that the proper article of Limitation Act applicable to the case was not Art. 109, as there was no wrongful receipt of profits by the respondents, but either Art. 62 or 120 of the Limitation Act, and the cause of action did not accrue until the end of September, 1928, which was the date of the kist (*Wort and Agarwala, JJ.*) RAM RANBIJAYA PRASAD SINGH *v.* HARIHAR PRASAD SINGH. 16 Pat. 184=168 I.C. 502=3 B.R. 434 =9 R.P. 487=18 Pat.L.T. 162=A.I.R. 1937 Pat. 237.

[*See also* under Transfer of Property Act, S. 38].

——S. 60—*Applicability—Conditions of.*

S. 60 of the Bihar Tenancy Act is intended to apply to cases where rent has accrued due to the proprietor of an estate and is still unpaid The fact that something happens to the proprietor cannot affect the character or the nature of the liability for rent, nor will the rent cease to be rent due to the proprietor. It is only where rent is due to a tenure-holder by an under-tenure holder or raiyat or due to a raiyat by an under-raiyat that S. 60 will not apply All that is required to make the section applicable is that the tenancy should be held under a proprietor, manager or mortgagee of an estate. If this condition is satisfied, the registered proprietor suing for rent shall be deemed to be the person to whom the rent is due and no plea to the contrary by the tenant will be permissible. (*Rowland and Chatterjee, JJ.*) RAMA PRASAD *v* RAM RAN VIJAYA PRASAD SINGH. 18 Pat. 746=186 I.C. 269=12 R.P. 466 =6 B.R. 321=20 Pat.L.T. 752=1939 P.W.N. 683 =A.I R. 1939 Pat. 630.

——S 60—*Construction—Registered proprietor really entitled to less interest than recorded or to no interest—Right to obtain full decree for rents of estate to extent of interest recorded.*

Under S. 60 of the Bihar Tenancy Act it is quite clear that the registered proprietor of an estate is not debarred from obtaining a full decree for the rents due to the estate to the extent of the interest for which he is recorded, notwithstanding that he may in reality have title only to a smaller interest or even to no interest at all. (*Rowland and Chatterjee, JJ.*) RAMA PRASAD *v.* RAM RAN VIJAYA PRASAD SINGH. 18 Pat. 746=186 I.C. 269=6 B.R. 321=12 R. P. 466=20 Pat. L.T. 752=1939 P.W.N. 683=A.I.R. 1939 Pat. 630.

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——**Ss. 60 and 72**—Plea of payment of rent to proprietor after expiry of *thica*—Onus. *See* BENGAL LAND REGISTRATION ACT, S. 79. **21 Pat. L.T. 336.**

——**S 60**—*Scope—Plea barred under.*

S. 60 of the Bihar Tenancy Act bars a plea that the rent is due to any third person. The section cannot be held to bar only a plea that the rent is due to some third person as proprietor. These words of limitation are not found in the section. (*Rowland and Chatterjee, JJ.*) RAMA PRASAD *v.* RAM RAN VIJAYA PRASAD SINGH **18 Pat. 746=186 I.C. 269=6 B.R 321=12 R.P. 466=20 Pat. L.T. 752=1939 P.W.N. 683=A.I.R. 1939 Pat. 630.**

——**S. 65**—*Rent decree—Execution—Sale of holding subject to arrears of rent subsequent to suit but anterior to sale—Liability for such arrears—Landlord's right to proceed against tenant—Landlord purchaser and stranger purchaser—Distinction.*

A landlord decree-holder who purchases the tenant's holding in execution of his decree for rent subject to the liability for arrears of rent for a period anterior to the date of the sale cannot be heard to say that the tenant is liable for those arrears of rent. It is undisputed that a third party purchaser is liable to pay off the arrears, which are an encumbrance, notified in the proclamation of sale. On principle it is impossible to distinguish between the position of a third party purchaser who purchases subject to the encumbrance and that of the decree-holder landlord who himself purchases under like circumstances. (*Wort, C.J., Varma and Manohar Lall, JJ.*) NRIPENDRA NATH CHATTERJEE *v.* KULDIP MISRA. **17 Pat 694=11 R.P. 222=178 I.C. 10=5 B R. 68=19 Pat.L.T. 723=1938 P.W.N. 720=A.I.R. 1938 Pat. 545 (F.B.).**

——**S. 65**—*Scope and effect—Rent decree—Sale of holding—Purchaser in execution—Rights of as against mortgagee of holding under mortgage executed prior to sale—Priority—Delay in applying under S.* 167—*Effect of.*

A purchaser (not being a landlord) of a holding in execution of a decree for rent has a charge for the amount of the decree for rent as against the holder of a mortgage of part of the holding executed before the purchase, and is entitled to the same rights as the purchaser of a holding in execution of a decree passed on a prior mortgage. This priority is acquired by the purchaser as a matter of law in consequence of the rent being a first charge on the holding under S. 65 of the Bihar Tenancy Act, and it should not be confused with the special privilege conferred on him by S. 167. The fact that proceedings are not taken under S 167 of the Act until after the expiry of more than a year after the purchaser becomes aware of the mortgage cannot deprive him of his priority. (*Fazli Ali, J.*) MAHADEV MAHARAJ *v.* JAGDEV SINGH. **18 Pat. 676=182 I.C. 678=12 R.P. 44=1939 P.W.N. 523=5 B.R. 799=20 Pat.L.T. 460=A.I.R. 1939 Pat. 339 (F.B.).**

——**S. 65**—*Scope and effect of—Two rent decrees—Property purchased in execution of one decree—If free from charge created by other decree.*

Where there are two rent decrees, if one decree is executed first and the holding is sold in execution, it will not pass subject to the charge created by the other decree. On general principle where there are two decrees of equal priority, and in execution of one of them the judgment-debtor's property is sold, the same property cannot be sold again in execution of the other decree. (*Rowland and Chatterji, JJ.*) SURYA MOHAN *v.* BIBI TASIRAN NISAN. **A.I.R 1940 Pat. 19.**

BIHAR TENANCY ACT (1885), S. 103 B.

——**S. 87**—*Scope and applicability.*

S 87 of the Bihar Tenancy Act applies even in those cases where there has been no actual abandonment. Whenever a landlord takes a proceeding under that section and a notice is published in conformity with it, the tenant must have the matter settled within the time prescribed in the section. Taking steps under that section is not obligatory upon the landlord, but if he takes possession of the holding otherwise than in conformity with that section, he does so at his own risk and in that case he will not get the advantage of a shorter period of limitation prescribed for suits by the raiyats. (*Mahomed Noor, J.*) JAGAT MOHAN PRASAD *v* L.W. RION. **167 I.C. 817=9 R.P. 431=3 B.R. 338=1937 P.W.N. 236 =A I.R. 1937 Pat. 479.**

——**S. 88**—*Scope—Thicca lease—Amalgamation and sub-division of holdings by* thiccadar—*If binding on landlord—Covenant in lease restricting creation of new rights—Effect of.*

A recognition by a *thiccadar* to the amalgamation of separate holdings into one and the subdivisions thereof would be binding upon the landlord when the *thiccadar* has acted in good faith and in the ordinary course of business Where the action of the *thiccadar* has been absolutely *bona fide*, that binds the landlord and it is not necessary that it should also have been for the benefit of the estate. The fact that the *thicca* lease contains a covenant restricting the creation of new rights and tenures cannot make any difference; any amalgamation and subdivision made in good faith and in the ordinary course of business cannot amount to the creation of new rights. (*Manohar Lall and S.C. Chatterji, JJ.*) G. B. SOLANO *v.* UMESHWARI KUER. **175 I C. 120=4 B.R. 529=10 R.P. 584=19 Pat.L.T. 157=1938 P.W.N. 239=A.I.R. 1938 Pat. 216.**

——**S. 103-B** — *Construction — Presumption under—Rebuttal — Question of fact—Entry of land as rent free—If rebutted by entry of another person as landlord of permanently settled village in which land is situate.*

Whether the presumption attaching to an entry in the record-of-rights has been proved to be incorrect is a question of fact and has to be decided on the facts of the particular case. The presumption of correctness of an entry in the record cannot be rebutted by another presumption under the general law in favour of the landlord. In many cases the very record which shows a tenancy as rent free also shows that a particular person is the landlord of the village and that the tenancy is held under him and is not revenue free, that is to say, it is assessed to revenue. "Landlord" under the Bihar Tenancy Act is one immediately under whom a tenant holds, and "tenant" is one who holds land from another person and who is, but for a special contract, liable to pay rent for that land to that person. A rent-free holder is in most cases a tenant. Proof

that a particular person is the landlord of a land, holding it under the Permanent Settlement, cannot by itself rebut the presumption from the entry of land as rent-free in the record-of-rights. To so hold would lead to a vicious circle and would conflict with S. 103-B of the Bihar Tenancy Act, which clearly lays down that every entry in the record-of-rights shall be evidence of the matter referred to therein and shall be presumed to be correct until it is proved by evidence to be incorrect. To hold that the entry of rent-free tenancy is rebutted by the proof that the land is within the permanently settled village of the landlord and is assessed to revenue would involve reading into the section an exception which is not there. that an entry about the land being rent-free shall not be presumed to be correct where the land is held under a landlord of a village which has been assessed to revenue. (*Khaja Mohammad Noor and Madan, JJ.*) SURPAT SINGH *v* BHUPENDRA NARAYAN SINGH. **16 Pat. 105=166 I C. 123=9 R P. 256=3 B R. 127=17 Pat.L.T. 824=1936 P.W.N. 817=A.I.R. 1937 Pat. 165.**

——**S 103-B**—*Entry in record-of-rights—Presumption of correctness — Rebuttal— Landlord proving land to be within regularly assessed estate—If rebuttal of entry of rent-free or* miliki *—Onus of proving rent-free or* miliki*—If shifted on to tenant*

The correctness of an entry in the record-of-rights can only be rebutted by proof of facts which are inconsistent with the entry Assessment of land revenue on any land is not inconsistent with its having been made rent-free after the assessment of land revenue It is not therefore correct to hold that the presumption of the correction of an entry in the record-of-right about a certain land being rent-free is rebutted by the landlord proving that the land was included within the ambit of his village which was permanently settled with him. When therefore the land is recorded as rent-free or *miliki*, it is not enough for the landlord to show that the land is within the ambit of his regularly assessed estate to shift the onus on to the defendant, of showing the land to be rent-free or *miliki*, by reason of a contract or grant. (*Khaja Mohammad Noor and Madan, JJ.*) SURPAT SINGH *v* BHUPENDRA NARAYAN SINGH. **16 Pat 105=166 I.C. 123=9 R.P. 256=3 B.R. 127=17 Pat.L.T. 824=1936 P.W.N. 817=A.I.R. 1937 Pat. 165.**

——**S. 103-B**—*Record finally published—Presumption attached to—Rebuttals — Proceedings before survey authorities before publication—Admissibility in evidence.*

The proceedings before the survey authorities prior to the publication of the record-of-rights are admissible in evidence for the purpose of rebutting the presumption which attaches to the finally published record. (*Agarwala, J.*) KHEDU MAHTO *v* KHONKA MAHTO. **185 I.C 254=12 R.P. 330=20 Pat L T 929=6 B R. 142=1939 P. W.N. 700=A.I.R. 1939 Pat. 591.**

——**Ss. 105 and 109**—*Scope—Application for settlement of fair rent withdrawn — Subsequent suit on same matter—Bar of*

The withdrawal of an application under S. 105 for settlement of fair rent of kabil-lagan land debars the Civil Court from entertaining a subsequent suit on the same matter. S. 109 is a bar to such a suit. Such a suit is also barred by limitation when the defendants having denied in the case under S. 105 the plaintiff's right to get any rent from them, the plaintiff brings the suit more than 12 years after the assertion of the hostile right to hold the land rent free. (*Mohamad Noor, J.*) RAM SANVIJAYA PRASAD SAITA *v.* MUNI PANDEY. **175 I.C. 342=4 B R. 576=10 R.P. 618=19 Pat.L.T. 566=A.I.R. 1938 Pat. 215.**

——**S. 115** — *Interpretation — 'Thereafter'—Meaning of.*

If the expression 'thereafter' in S. 115 is interpreted so as to mean 'after the particulars have been finally recorded after recourse to all the provisions contained in Ch. 10,' it is definitely adding something to S. 115 of the Act which does not appear in that section and hence such interpretation is wrong. (*Wort, J.*) SURPAT SINHA *v.* PRATAP MANDAL. **166 I.C. 955=9 R.P. 358=3 B.R. 236=A.I.R. 1937 Pat. 48.**

——**S. 116**—*Applicability—Conditions.*

In order to bar the acquisition of occupancy or of the right of a non-occupancy raiyat in respect of proprietor's private or *zirati* lands, it is necessary that such lands should be held under a lease for a term of years or under a lease from year to year. The proprietor is entitled to the benefit of S. 116 of the Bihar Tenancy Act if he has taken the precaution of letting out his zirat lands under a lease for a term of years or under a lease from year to year. If he has done this, S. 116 would apply to the land with the result that his lessee can neither acquire nor confer on any sub-lessee a tenancy carrying the benefits of Chapters V and VI of the Act. (*Agarwala and Rowland, JJ.*) LALA RAJBALI LAL *v.* PARTAPPUR & CO., LTD. **19 Pat. 398=1940 P.W.N. 498.**

——**S. 116**—*Construction—"Lease for term of years"—Meaning of.*

Quaere:—Whether the words "lease for a term of years", include a lease for one year or for a fraction of a year? (*Agarwala and Rowland, JJ.*) LALA RAJBALI LAL *v.* PARTAPPUR & CO., LTD. **19 Pat. 398=1940 P.W.N. 498.**

——**S 116**—*Construction—Lease for "a term of years"—Meaning of—If to be one for at least two years.*

The words "a term of years" in S. 116 of the Bihar Tenancy Act are merely a classificatory term and mean nothing more than any definite term, any definite term of time may be measured in years though not necessarily at an even number of years. The expression "a term of years" is a generic term and means merely a period of time which can be measured in years, *e.g.*, one year or half a year. A lease for a term of years truly means a lease for a definite period to come to an end at a definite date and nothing more. The words "a term of years" cannot be construed to mean that the term must be a term of at least two years. (*Courtney-Terrell, C. J. and James, J.*) UMASHANKAR PRASAD *v.* KUNJ BEHARI THAKUR. **17 Pat. 218=4 B.R. 356=1938 P.W.N. 254=173 I C. 904=10 R.P. 461=19 Pat.L.T. 180=A.I.R. 1938 Pat 299.**

——**S. 116**—"*Lease from year to year*"—*Meaning of—Zerait land—Lease for one year only end-*

ing on fixed date—If one from year to year—Tenant not delivering possession on date fixed—Status of—Liability to ejectment—Plea of occupancy rights—Maintainability.

A lease for a year certain is not the same as a lease from year to year; where the former expression is used, whether the landlord takes any steps or not, the tenant becomes a trespasser, when his lease comes to an end whereas when the latter expression is used, the tenant has the right to stay for a year certain, and if he shall not receive notice from the landlord to quit his tenancy at the end of the year certain, then his tenancy shall extend for another period of one year. The expression "from year to year" does not therefore cover the case of a lease for a year certain. A tenant to whom zerait land is let out orally for one year only ending on a fixed date, is bound to deliver up possession on that date, as his right to occupy the land ceases on that land, and if he does not so deliver up possession, he becomes a trespasser liable to eviction at any time. He cannot plead acquisition of occupancy rights. (*Courtney-Terrell, C. J. and James, J.*) UMASHANKAR PRASAD *v.* KUNJ BEHARI THAKUR. **17 Pat. 218=4 B R. 356=1938 P.W.N. 254=173 I.C. 904=10 R.P. 461=19 Pat. L.T. 180=A.I.R. 1938 Pat. 299.**

——S. 148—*Suit for rent—Defect in frame of plaint—Omission to mention all plots in holding—Effect—Right to decree—Admission by defendant—Effect of.*

A suit for arrears of rent is a suit of a double nature. It is ordinarily a suit to enforce the charge upon the holding which is created by S. 65 of the Bihar Tenancy Act, but a decree enforcing this charge can only be made when the plaint is framed so as to exactly comply with S. 148 of the Act. The suit, however, does not necessarily fail because a decree cannot be made enforcing the charge in such a manner as to entitle the purchaser at the execution sale to annul all incumbrances. The suit being also one to enforce the personal liability of the tenant to pay a sum of money to the landlord, a decree enforcing this personal liability may be made even though no decree can be made enforcing the charge under S. 65. Where owing to the existence of a dispute regarding the real area of the tenancy, the landlord has, in the description given in the plaint, omitted to mention certain plots forming part of the tenant's holding, a money decree may properly be given against the tenant, especially when the latter admits that an amount of rent is due from him to the landlord. When the tenant is in possession of the area which he claims and there has been no ejectment by the landlord, the latter ought not to be deprived of the whole of the rent which the tenant admits to be payable. The landlord must in such cases pay to the tenant the costs of the contest which he has forced upon the tenant, and if it appears that he has not been willing to give a quittance in the manner required by law, he should not be allowed any damages or interest on his claim. (*Courtney-Terrell, C. J., Fazl Ali, Khaja Mohammad Noor, James and Manohar Lall, JJ.*) JEONANDAN SINGH *v.* JANKI SINGH. **17 Pat. 451=177 I.C. 676=5 B.R. 6=11 R.P. 171=1938 P.W.N. 379=19 Pat.L.T. 325=A.I.R. 1938 Pat 306 (S.B.).**

——S. 148—*Scope—Suit for rent of part of holding—Maintainability—Money decree—If can be passed.*

A suit for rent in respect of a part of a holding is not maintainable at all; nor can the Court pass a money decree even. (*Agarwala, J.*) DWARKA PRASAD SINGH *v.* BABU LAL SINGH. **174 I.C 583=10 R.P. 530=1938 P.W.N. 62=4 B R. 458=18 Pat L.T. 1021=A.I.R. 1938 Pat. 124.**

——S. 148-A—*Applicability*—Diara *holding—Rent varying according to area under cultivation—Suit by landlord for part of rent—Maintainability.*

A suit by a landlord of a *diara* holding for the rent of a part of the holding, the rent of which varies according to the area under cultivation in a particular year, is maintainable. The fact that the tenant's entire holding is of a larger area is not always an obstacle against his landlord getting a decree based on the out-turn of a smaller area being the area from which crop is actually obtained. A decree should be given for the plaintiff's share of the rent calculated in that manner, leaving open the question of the total area of the defendant's holding. (*Rowland, J.*) KRISHNA BAHADUR *v.* HARICHARAN RAUT. **170 I.C. 783=10 R.P. 151=3 B R. 787=1937 P.W.N. 427=18 Pat.L.T. 613=A.I.R. 1937 Pat. 475.**

——S. 148-A—*Construction—Suit for arrears of rent—Parties—Duty of plaintiff.*

S. 148-A, Bihar Tenancy Act, requires the plaintiff to join as co-defendants only the other landlords of the holding, not the other proprietors of the estate, and for whatever share the other proprietors may be recorded in Register D, they are not in the sense in which the word is used, in the Tenancy Act, landlords of these holdings unless they are actually co-sharers in the patti within which the holdings lie. (*James, J.*) MATBER SINGH *v.* RAI KRISHNA BAHADUR. **168 I.C. 109=9 R.P. 457=1936 P.W.N. 530=3 B.R. 385=A.I.R. 1937 Pat. 86.**

——S. 148-A—*Rent suit for part of holding—Maintainability—Money decree—If may be passed.*

A suit for rent with regard to a part of holding is not maintainable. In such suit the landlord is not entitled even to a money-decree. (*Wort. J.*) RAM CHANDRA MAHTON *v.* RAM GULAM MAHTON. **177 I.C. 529=4 B.R. 826=11 R.P. 160=A.I.R. 1938 Pat. 305.**

——S. 148 A—*Two suits by different co-sharers against same tenants—Two decrees—Nature of—If to be regarded as one consolidated rent decree.*

There can be only one rent decree for the entire rent of the holding and the effect of two decrees obtained in two suits by different co-sharer landlords, and framed according to the provisions of S. 148-A, Bihar Tenancy Act, is that one is supplementary to the other and both are regarded as a consolidated decree for the entire rent, payable to the different co-sharer landlords in proportion to their shares It cannot be said that the first is a rent decree and the second decree has the effect of only a money decree. (*Rowland and Chatterji, JJ.*) SURYA MOHAN *v.* BIBI TASIRAN NISAN. **A.I.R. 1940 Pat 19.**

——S. 148 (h)—*Applicability—Decree for arrears of rent in favour of landlord—Latter assigning interest in zamindari to superior landlord—Subsequent assignment of decree to another—*

BIHAR TENANCY ACT (1885), S. 153.

Application for execution by assignee of decree—Competency.

An assignee of a decree for arrears of rent who has not obtained assignment of the landlord's interest cannot make an application to execute the decree even as a simple decree for money. Where a landlord who has obtained a decree for rent assigns his interest in the zamindari to the superior landlord and then assigns the decree for rent to another, S. 148 (*h*) of the Bihar Tenancy Act is a complete bar to an application by the assignee of the decree for rent The decree does not become exempt from the bar of S. 148 (*h*) by reason of the fact that the landlord has parted with his interest before the execution is applied for. (*Fazl Ali and Rowland, JJ.*) KEDAR NATH *v.* SAMRU KAZI. **17 Pat. 189=173 I.C 609=4 B R. 312 (1)=10 R.P. 426=18 Pat. L.T. 1017=A.I.R. 1938 Pat. 95.**

——**S. 153**—*Conflicting claims—Suit for rent below Rs. 50 against* A—A *alleging that* B *was in possession of lands*—B *joined and allowed to contest—Decree—Appeal and second appeal.*

A landlord brought a suit for rent against *A* as tenant and the rent claimed was below Rs. 50. *A* alleged that suit lands were in possession of *B*. *B* was joined as party and allowed to contest the suit.

Held, that the appeal lay to the District Judge and also second appeal to the High Court, as there was conflict of interest and a decision of conflicting claims of *A* and *B*. (*Manohar Lall, J.*) BIKRAM RAJ *v* PALAK NONIA. **173 I.C. 29=4 B. R. 219=10 R.P. 380=A.I.R. 1938 Pat. 37.**

——**S. 153**—*Jeth raiyat relieved of duties—Claim to hold at lower rent—Claim that holding is other than occupancy and one burdened with service—Second appeal—Competency.*

Though *muafi* allowed to a jeth raiyat in lieu of wages, may not be rent, if the jeth raiyat had been relieved of his duties or if the right to pay lower rent is claimed irrespective of whether the duties had been performed or not, the question whether the jeth raiyat is liable to pay at a higher rate or at a lower rate, must be treated as a dispute relating to the amount of rent annually payable by the tenant. When the tenant also claims that his holding is something other than an occupancy holding, and that he is holding under a grant burdened with service, the dispute regarding the status of the tenant raises a question relating to an interest in land, and a second appeal is therefore competent under S. 153 of the Bihar Tenancy Act. (*Harries, C.J., James and Agarwala, JJ.*) DWARKA DAS *v.* BHEKU MAHTON. **18 Pat. 502=184 I.C. 308=6 B R. 34=12 R P. 236 =20 Pat. L.T. 659=1939 P.W.N. 607=A.I.R. 1939 Pat. 520.**

——**S. 153**—*Question as to amount of annual rent payable—Second appeal, if barred.*

Where the appellate Court has decided the question as to what the annual Jama of a holding was, it is only a question of the amount of rent payable annually by the tenant and comes under one of the exceptions mentioned in S. 153 of the Bihar Tenancy Act and a second appeal is not barred. (*Chatterji, J.*) SHIVA PRASAD SINGH *v.* DEOKI KUER. **175 I C. 61=4 B.R. 516=10 R.P. 573=A.I.R. 1938 Pat. 379.**

BIHAR TENANCY ACT (1885), S. 158-A.

——**S. 153**—*Question of title—Suit for rent valued below Rs. 100—Decision by District Judge holding that right to collect rent alleged not made out—Second appeal.*

Certain co-sharer landlords instituted rent suits against the tenants for a certain percentage of the rent on the ground that by an arrangement their co-sharer landlords were entitled to realise the rent to the extent claimed by them. The suit was valued below Rs. 100 and the co-sharers of the plaintiffs were not impleaded as parties to the suit. The tenants-defendants did not claim any interest in the land adverse to the plaintiffs. The Munsif and, in appeal, the District Judge held that the arrangement set up by the plaintiffs was not established and that the plaintiffs did not prove separate collection of rent even to the extent of their shares and dismissed the suit. No question of title was decided between the parties.

Held, that no second appeal lay to the High Court, as S. 153 of the Bihar Tenancy Act barred a second appeal. (*Khaja Mohammad Noor, J.*) JAGDAM THAKUR *v.* HIRA THAKUR. **19 Pat.L.T. 212.**

——**S. 155**—*Applicability—Permanent mukarrari lease—Provision entitling lessor to re-enter on default of payment of rent on certain date of any year—Default by lessee—Lessor's right of ejectment.*

The application of the provisions of S. 155 of the Bihar Tenancy Act relating to ejectment is excluded by S. 179 where the conditions entailing forfeiture are provided by a contract between the parties to a permanent mukarrari lease. Where, therefore, such a lease contains a provision entitling the lessor to re-enter on default of payment of rent on a certain date of any year and the lease is forfeited by default in payment by lessee, the lessor can enforce his unqualified right of ejectment given him by the contract without conforming to the provisions of S. 155. (*Agarwala, J.*) MUKHAN SINGH *v.* CHANDRIKA PRASAD SINGH. **5 B R. 462=180 I.C. 624=11 R. P. 523=20 Pat.L.T. 440=A.I.R. 1939 Pat. 413.**

——**S. 155**—Mukarari lease—Landlord's right to contract out of section. *See* BIHAR TENANCY ACT, S. 179. **185 I.C. 278=19 Pat. 269.**

——**S. 158-A**—*Scope and effect of—Certificate sale in respect of rent of holding—What passes—Doctrine of representation—Applicability.*

S. 158-A of the Bihar Tenancy Act places certificates on the same footing as rent decrees in respect of the sale of a tenure or holding. In view of that section, the doctrine of representation is no longer foreign to certificate proceedings. In order to justify the sale of a tenure or holding under the Public Demands Recovery Act, all parties interested in the tenure or holding must be joined as debtors in the certificate proceedings or be sufficiently represented by the parties joined as such; unless this is done, the purchaser at the certificate sale would acquire neither the shares of other parties nor the power to annul incumbrances, but only the right, title and interest of the certificate debtors themselves. The certificate procedure, being a summary mode for the recovery of arrears, makes it all the more necessary for the certificate holder to make it clear that he is bringing the whole holding or

tenure to sale. He can do so by joining as certificate debtors all the persons interested in the tenure or holding, but where he has not done so it becomes necessary for the purchaser at the sale (or his transferee), in a contest with other members of the debtors' family who were not joined in the certificate proceedings to establish clearly that these latter were represented by those against whom the landlord (certificate-holder) had taken the proceedings. In order to entitle the purchaser to invoke the aid of the principle of representation, it would not be sufficient to show that the landlord chose to take a decree for rent against one out of several heirs. It must be established that the whole body of tenants had held on one of them as their representative in their transactions with the landlord. (*Harries, C.J., Dhavle and Manohar Lall, JJ.*) HARI PRASAD SINGH *v* LAL BEHARI SARAN SINGH **6 B R 713=1940 P. W. N. 420=21 Pat. L. T. 377=A.I.R. 1940 Pat. 328 (F.B.)**

——(as amended in 1938), Ss. 158-B (2), 163 (5) and 163-A—*Construction and scope—Pending application for execution—If governed by—Intention of Legislature.*

The object of the Bihar Tenancy Amendment Act of 1938 which introduced Ss. 158-B (2), 163 (5) and 163-A, was to remedy a defect in the procedure of the executing Court which experience showed frequently resulted in the sale of agricultural holdings and tenures below their market value. The Act being a remedial one should be construed as widely as possible to give effect to the intention of the Legislature in as many cases as possible in so far as this can be done without injustice to the parties. It cannot be held that because S. 158-B (2) contemplates that notice of the date on which the sale proclamation is to be drawn up should be given when the application for execution is made the remedial provisions of the amending Act should not be applied in cases where the application for execution is made before the amending Act came into operation. S. 158-B (2) is only one of a group of sections by which the legislature has sought to remedy an evil and must be construed in relation to the other sections in the group including S. 163-A. The latter expressly prohibits the sale of a holding for a price lower than that specified in the sale proclamation. S. 163-A too must be read with the group of sections of which it is a part and which includes Ss. 158-B (2) and 163 (5) which require the Court to hear the parties in the matter of the value of the property to be sold and to estimate the value of it or that part of it which the Court considers will be sufficient to satisfy the decree. A decree for rent was obtained by a landlord who applied on 9—2—1938 to execute that decree. On 7—3—1938 the executing Court directed the issue of a writ of attachment and a sale proclamation, fixed 5—5—1938 as the date of sale. The Bihar Tenancy Amendment Act meanwhile came into force on 10—3—1938 The writ and proclamation of sale were not however issued actually until 28—3—1938 On the date fixed for sale the judgment-debtor objected to the sale being held on the ground that the Court had not valued the property to be sold as required by S. 163 (5) of the Bihar Tenancy Act as amended in 1938.

Held, that Ss. 158-B (2), 163 (5) and 163-A applied to be execution though the application was made before the sections came into force and that inasmuch as the sale proclamation had not been issued when the amending Act came into force, there was no question of giving retrospective effect to the sections in question. The law had been amended before the proclamation was issued and the Court was required to hear the parties as to the value of the holding sought to be sold. (*Agarwala and Meredith, JJ.*) BIGAN SINGH *v* SYED SHAH ZAFFAR HUSSAIN. **19 Pat. 289=1940 P.W.N 412.**

——S. 163—*Scope—If mandatory.*

There is a certain method of procedure to be adopted as laid down by Bihar Tenancy Act for the purpose of executing a rent decree as such and parties cannot depart from the procedure so laid down Hence in executing a rent decree, simultaneous issue of the sale proclamation and the order of attachment is necessary. (*Wort, J.*) RAMJANAN SINGH *v* RAMPHAL LAL. **167 I C. 692 (1)=9 R.P. 419=3 B.R. 312 (1)=A.I.R. 1937 Pat. 93.**

——(as amended in 1938), S. 163 (5)—Scope—Retrospective operation—Pending proceedings—If affected—If to be read with S. 158-B (2) and 163-A. *See* BIHAR TENANCY ACT (AS AMENDED IN 1938), Ss. 158-B (2), 163 (5) AND 163-A. **19 Pat. 289.**

——(as amended in 1938), S. 163-A—Scope—Retrospective operation—If to be read with S. 158-B (2) and 163 (5). *See* BIHAR TENANCY ACT (AS AMENDED IN 1938), Ss. 158-B (2), 163 (5) AND 163-A. **19 Pat. 289.**

——S. 167—Scope—Purchaser at sale in execution for rent decree—Rights of—Failure to annul incumbrance created prior to sale—Effect of right to priority. *See* BIHAR TENANCY ACT, S. 65. **18 Pat. 676=1939 P.W.N. 523=A.I.R. 1939 Pat. 339 (F.B.).**

——S. 169 (a), (b) and (c)—*Moneys payable under—If moneys realised in execution—Money payable to decree-holder in respect of rent falling due after suit and before confirmation of sale—If same as money due under decree—Fresh vakalat to draw out—Necessity.*

There is no reason to distinguish the claim to money payable to the decree-holder under S. 169 (*c*) of the Bihar Tenancy Act from money payable to him under Cls. (*a*) and (*b*) of the section All such sums are moneys realised in execution of the decree. Where, therefore, a vakalat given by the decree-holder to his pleader gives him full authority to take out execution and to realise money in the suit or execution and to draw any decretal money deposited in Court on the decree-holder's behalf, the pleader has power to draw out on the party's behalf any balance due to his client on account of subsequently accrued rent, as well, *i.e.*, rent falling due between the institution of the suit and the confirmation of the sale of the holding in execution. No separate vakalat is necessary for that purpose. (*Rowland, J.*) KAMESHWAR SINGH *v* DHOLAI KHAWAS. **169 I. C. 725=3 B R 609=10 R.P. 32=1937 P W.N. 304=18 Pat.L T. 469.**

——S. 170—*Scope—Decree for rent—Execution—Claim under O. 21, R. 58, C. P. Code—*

BIHAR TENANCY ACT (1885), S. 170.

Maintainability—Grounds—Decree alleged to be against wrong person—Claim, if sustainable.

A claim under O. 21, R. 58, C. P. Code, is barred under S. 170 of the Bihar Tenancy Act, if it is not disputed that the decree-holder is the landlord of the tenure or holding and that the decree is for the rent due in respect of it. A claimant cannot be allowed to plead that the decree had been obtained against a wrong person. If it can be shown that the decree is not a rent decree a third party can maintain a claim under O. 21, R. 58, C. P. Code; but if the decree is a rent decree but against a wrong person, the claim is barred. (*Khaja Mahomed Noor and Madan, JJ.*) RANI CHHATER KUMARI DEBI *v.* BHAGWATI PRASAD. **15 Pat. 812=169 I.C. 72=3 B.R. 530=9 R.P. 546=1937 P.W N. 959=18 Pat.L.T. 604 and 928=A.I.R. 1937 Pat. 278.**

——**S. 170**—*Scope—Person purchasing holding in execution of rent decree—Same holding put up in execution of subsequent rent decree—Application under O. 21, R. 58, C. P. Code, by purchaser—Competency.*

A third party cannot avail himself of O. 21, R. 58, C. P. Code, against a rent decree merely on the ground that the tenure or holding in suit belonged to him. A person purchased a holding in execution of a rent decree. In execution of a subsequent rent decree, the same holding was put up for sale and an application was made by the purchaser under O. 21, R. 58, that the rent decree was a nullity.

Held, that the application was not competent in view of S. 170, Bihar Tenancy Act. (*Wort, J.*) ALAKHNANDAN PROSAD *v.* BIBI SALMA. **169 I.C. 729=10 R.P. 31=3 B.R. 610=A.I.R. 1937 Pat. 341.**

——**S. 171**—*Applicability—Rent decree against tenant—Subsequent coming into force of S. 26-N of amended Act—Effect—Decree—If ceases to be rent decree—Execution—Right of mortgagee to benefit of S. 171.*

Where a suit properly framed as a suit for arrears of rent under the Bihar Tenancy Act is instituted and a decree executable under the Act as a rent decree is passed, the fact that S. 26-N of the amended Act comes into force between the signing of the decree and its execution does not make the decree anything other than a rent decree. The fact that under S. 26-N of the amended Act, the landlord must be deemed to have given his consent to transfers made prior to 1923, and to the distribution of rent upon which the transferor and the transferee had agreed, and that thereby the decree in effect at the time of execution affects two holdings, is no ground for holding that the decree is not a rent decree. The new S. 26-N no doubt confers new rights on purchasers, but the decree remains a rent decree and for purposes of execution the parties are governed by the Bihar Tenancy Act. S. 171 of the Bihar Tenancy Act can therefore be applied to the decree in execution, and a usufructuary mortgagee of the holding can avail himself of the provisions of S. 171. (*James, J.*) SITAL SINGH *v.* RAMJI PRASAD. **177 I.C. 338=4 B.R. 823=11 R.P. 149=1938 P.W.N. 654=A.I.R. 1938 Pat. 591.**

——**S. 171**—*Construction—"Debt"—Amount paid by mortgagee of recorded tenant to prevent*

BIHAR TENANCY ACT (1885), S. 174.

sale—Amount payable by tenant to regain possession—Right to deduct from amount deposited by mortgagee sums due by mortgagee in respect of his share of rent payable and price of crops reaped by mortgagee.

Where a mortgagee of a recorded tenant deposits the amount decreed against his mortgagor in a suit for rent at the instance of the landlord and gets delivery of possession under S. 171 of the Bihar Tenancy Act, it is only on repayment of the amount so deposited by the mortgagee to prevent the sale that the judgment-debtor tenant (mortgagor) would be entitled to regain possession of his holding. A deposit by the tenant judgment-debtor of any lesser amount arrived at after deducting from the amount deposited by the mortgagee an amount which the judgment-debtor claims to be due to him from the mortgagee as the share of the rent payable by the mortgagee and the price of crops reaped by the mortgagee, is not a valid deposit and is not in compliance with S. 171. (*Agarwala, J.*) RAM LAL JHA *v.* THAKUR DAS. **173 I.C. 721=4 B.R. 321=10 R.P 439=18 Pat.L.T. 1019=1937 P.W. N. 967=A.I.R. 1938 Pat. 94.**

——**S. 171**—*Jurisdiction—Mortgagee of tenant depositing decree amount to prevent sale of holding and getting possession—Application by tenant to be put back in possession offering to pay mortgagee amount deposited by him—Power of Court to entertain.*

Quaere.—Whether the Court has jurisdiction under S. 171 of the Bihar Tenancy Act to entertain an application by the tenant-judgment-debtor, who has been dispossessed under the section by a deposit made by his mortgagee to prevent a sale, praying to be put back in possession by offering to pay the mortgagee the amount deposited by him. (*Agarwala, J.*) RAM LAL JHA *v.* THAKUR DAS. **173 I.C. 721=4 B.R. 321=10 R.P. 439=18 Pat.L.T. 1019=1937 P.W.N. 967=A.I.R. 1938 Pat. 94.**

——**S. 171 (e)**—*Rent decree—Execution—Usufructuary mortgagee paying off balance of decree amount and getting possession of holding—Right of judgment-debtor to recover possession of holding from mortgagee.*

Where a usufructuary mortgagee of a holding which was advertised for sale in execution of a rent decree has stepped in and obtained possession of the holding under S. 171 of the Bihar Tenancy Act on his paying off the balance of rent due under the rent decree, a judgment-debtor who desires to recover possession from the mortgagee must pay off the amount which the mortgagee has paid. On such payment, he would be entitled to recover possession of so much of the holding as has not been alienated by himself or his purchasers. (*James, J.*) SITAL SINGH *v.* RAMJI PRASAD. **177 I.C. 338=4 B.R. 823=11 R.P. 149=1938 P.W.N. 654=A.I.R. 1938 Pat. 591.**

——**S. 174**—Jurisdiction under—Omission to make deposit at time of application—Effect—Power of Court to set aside sale. *See* C. P. CODE, S. 151. **1938 P.W.N. 192.**

——**S. 174 (1)**—*Scope—Compliance—Deposit in full—Mistake in* challan *as to very small amount—Deposit of four annas deficit wrongly made in favour of decree-holder instead of in*

BIHAR TENANCY ACT (1885), S. 177-A.

favour of auction-purchaser—Refusal to set aside sale—If justified—De minimus non-curat lex.

When the judgment-debtor deposits the full amount due, the sale ought to be set aside. The mere fact that there is a mi-take in the *challan* to the extent of a very small amount is no ground for refusing to set aside the sale. A judgment-debtor made the deposit but there was a deficit of 4 as in favour of the auction purchaser. He then made good the deficit, but he made the mistake of depositing it in favour of the decree-holder.

Held, that the Court had the power to alter the *challan* for the purpose of putting matters in order, and to hold that the strict letter of the law had not been complied with would be to ignore the well-known principle of *de minimus non-curat lex*; the judgment-debtor was under the circumstances entitled to have the sale set aside. (*Wort, J.*) RUKMINI KUER *v* BALMIK PRASAD. **170 I.C. 64=10 R.P. 71=3 B R. 645=18 Pat. L. T. 314=1937 P.W.N. 279=A.I.R. 1937 Pat. 409.**

——(as amended in 1937), S. 177-A (b)—"*Occupied by him*"—*Meaning of.*

The words "occupied by him" in S. 177-A *(b)* of the Bihar Tenancy Act, as amended in 1937, mean occupied by the raiyat or under-raiyat as such raiyat or under-raiyat and do not exempt from attachment houses or buildings not occupied by a raiyat or under-raiyat as a dwelling house or for some purpose connected with his vocation as a raiyat or under-raiyat. (*Agarwala and Rowland, JJ.*) BAIJNATH RAM MARWARI *v.* RAI KUMAR SINHA. **19 Pat. 410=1940 P.W.N. 502.**

——S. 179—*Lease falling under—Clause for re-entry on non-payment of rent—Validity.*

S. 179 of the Bihar Tenaacy Act is by its terms an exception to the law as laid down in the earlier sections. It permits the parties to a lease falling within that section to contract out of the provisions of the Act. A clause in such a lease entitling the landlord to re-enter on non-payment of rent is, therefore, perfectly valid and can be enforced by a suit at law. (*Harries, C.J. and Fazl Ali, J.*) MUHAMMAD HASAN *v.* BAIDYA NATH SAHAY. **6 B R. 62=12 R.P. 253=184 I.C. 605=21 Pat.L.T. 117=A.I.R. 1940 Pat. 140.**

——S. 179—*Mukarari lease—Landlord's right to contract out of S. 155—Lessee's right to equitable relief—T. P. Act, S.* 114.

There is nothing in S. 179 of the Bihar Tenancy Act to prevent the landlord from entering into a contract with the lessee to the effect that the right of ejectment which he shall have under the agreement shall not be subject to any such qualifications as are imposed by S. 155. The lessee cannot claim any relief under S. 114 of the Transfer of Property Act. That section is not applicable as the case is not governed by the Transfer of Property Act but by the Bihar Tenancy Act. Further the principle underlying that section is also embodied in S. 155 of the Bihar Tenancy Act and if that Act itself which contains this provision enables the tenant to contract himself out of the concession available to him under it, there can be no further room for the application of any equitable principle. (*Harries, C.J. and Fazl Ali, J.*) MUKHAN SINGH *v.* CHANDRIKHA PRASAD SINGH. **19 Pat. 269=185**

BIHAR TENANCY ACT (1885), S. 184.

I C. 278=12 R.P. 333=6 B.R. 145=1940 P.W. N. 484=A.I.R. 1940 Pat. 371.

——S. 181—*Grant of land to gorait in lieu of services—Resumability.*

Chakrana Jagirs when they are granted in lieu of remuneration for zamindari service differ essentially from those jagirs which may be granted as rewards for past services or grants of land burdened with some formal service; and there does not appear to be any particular reason why an office of which remuneration is given by the grant of chakrana lands should be distinguished from an office of which remuneration is given in any other way, in cash or kind. Therefore a zemindar when he appointed the first gorait and assigned for his remuneration the goraiti jagir cannot be supposed to have deprived himself thereby of the right to dismiss this servant and appoint another in his place if he should please, or of the right to take jagir away and substitute for it remuneration in cash or kind. The zemindar is entitled to dismiss at his pleasure a servant of this kind, whose services are private and personal to the zemindar although the remuneration of his office consists of the enjoyment of certain land. (*James, J.*) SHILLINGFORD *v.* GENA TATMA. **174 I.C. 588=4 B.R. 463=10 R.P. 529=A.I.R. 1938 Pat. 141.**

——(as amended in 1934), S. 184, Sch. 3, Art. 2, (b) (ii)—*If retrospective—Suit for rent on cause of action arising before Amending Act came into force—If affected.*

The rule ordinarily applicable is the law which is in force at the time of the institution of suit. But where the Amending Act prescribes a period of limitation shorter than the one under the old law, the Amending Act does not apply to suits in which the cause of action arises before the Amending Act comes into force, when the Amending Act comes into force on the very day on which it is passed into law. The case is otherwise when there is a sufficient interval between the passing of the Amending Act and its coming into force; because the passing of the Amending Act gives full notice to the litigant of the law to come into force and the interval thus gives him a fair and reasonable opportunity of availing himself of the right of suit which is soon to be extinguished by the Amending Act. In such a case the limitation is governed by the Amending Act even in the cases of suits in which the cause of action has arisen before the Amending Act came into force. Where, therefore, limitation for filing suits for rent under the Bengal Tenancy Act was three years and later on the Act was amended by the Bihar Tenancy Amendment Act and the period was reduced to one year, and a suit for rent was brought in respect of a cause of action which arose before the Amending Act came into force,

Held, that inasmuch as the Amending Act was passed into law on 14th November, 1934, and was brought into force on 10th June, 1935, the suit even though within limitation under the old Act, was barred by limitation under the Amending Act as there was sufficient time intervening between the passing of the Amending Act and its coming into force. (*Rowland, J.*) RAMESHWAR PRASAD SINGH *v.* MANGAR KAHAR. **169 I.C. 78=**

BIHAR TENANCY ACT (1885), S. 184.

9 R.P. 524=3 B.R. 534=18 Pat.L.T. 193=1937 P.W.N. 95=A.I.R. 1937 Pat. 311.

——(as amended in 1934), S. 184 and Sch. III, Art. 2 (b) (ii)—*Scope—If retrospective—Interpretation of statutes—Act amending statute of limitation and shortening period of limitation—Retrospective operation—Limitation—Law applicable.*

The Bihar Tenancy Amending Act of 1934 applies to all suits instituted after the 10th June 1935, whether the cause of action had accrued or not before that date. There is a great difference between a case where a statute amending the law of limitation comes into force immediately and the case where a period of time is given between the passing of the Act and the date upon which it comes into force, during which suits can be brought which would otherwise be barred by the Amending Act. Where in an Act amending and shortening a period of limitation, a period of time is given between the passing of the Act and the date upon which it is intended that it should come into force, such an Act must be given retrospective effect.

Agarwala, J.—The law of limitation being a breach of the objective law, the statute of limitation applicable to a particular suit or legal remedy is that which is in force at the date when the suit is instituted or the remedy is sought and not the statute which was in force at the time of the transaction or the vesting of the cause of action on which the suit or remedy is based. (*Harries, C.J. and Agarwala, J.*) REYASAT *v.* GOPINATH MISSIR. **18 Pat. 1=180 I.C. 414=11 R.P. 510=5 B.R. 398=1938 P.W.N. 975=20 Pat. L.T. 38=A.I.R. 1939 Pat. 122.**

——S. 193 and Sch. III, Sub-Cl. 2 (b)—*Applicability—Money reserved under settlement in respect of right to cut grass—Suit for—Limitation.*

The rights to which S. 193 of the Bihar Tenancy Act relates are rights which do not create the relationship of landlord and tenant. A right in respect of pasturage, whether it be an actual grazing or cutting of grass, falls within S. 193, for whatever purpose it may be used. The period of limitation for a suit to recover payment of money reserved under a settlement of the right to cut grass is that prescribed by sub-Cl. 2 (*b*) of Sch. III of the Act. (*Wort, A. C. J. and Manohar Lal, J.*) KAMESHWAR SINGH BAHADUR *v.* RAMPAT THAKUR. **179 I.C. 164=11 R.P. 334=5 B.R. 200=19 Pat.L.T. 701=1938 P.W.N. 736=A.I.R. 1938 Pat. 607.**

——(as amended in 1934), Sch. II, Art. 2 (b) (ii)—*Scope—If retrospective—Suit for produce rent after Act on cause of action arising before—Limitation.*

Quaere.—Whether the Bihar Tenancy Amending Act is retrospective, and whether the shorter or the longer period of limitation applies to a suit for produce rent instituted after the Amending Act on a cause of action which arose before the Act came into force. (*Wort and Manohar Lall, JJ.*) BADRI NARAYAN SINGH *v.* HARI LAL SINGH. **10 R.P. 314=172 I.C. 202=1937 P.W.N. 843=18 Pat.L.T. 812=A.I.R. 1937 Pat. 639.**

——(as amended in 1934), Sch. III, Art. 2 (b) (ii)—*Scope—Retrospective operation—Suit after Act in respect of cause of action accrued before—Law applicable.*

BIHAR TENANCY ACT (1885), SCH. III, ART. 3.

Ordinarily an Act of Limitation is placed in the category of adjective law and under the established rules of interpretation it has retrospective effect. The new Bihar Tenancy Act of 1934 curtailing the period of limitation for a suit for produce rent is retrospective and affects causes of action already accrued. The Act would apply to suits instituted after it came into force though the cause of action may have arisen prior to it. (*Fazl Ali and Varma, JJ.*) BIRANCHI SINGH *v.* NAND KUMAR SINGH. **18 Pat. 355=183 I.C. 212=12 R.P. 116=5 B.R. 902=1939 P.W.N. 108=20 Pat.L.T. 139=A.I.R. 1939 Pat. 282.**

——(as amended in 1934), Sch. III, Part I, Art. 2 (iii) (b) (ii)—*Applicability—Holding consisting of lands partly on cash rent and partly on produce rent—Suit for rent instituted after November, 1934—Limitation.*

A suit for rent of a holding for part of which cash rent is paid and for part of which produce rent is paid, instituted after the Bihar Tenancy Amending Act of 1934 came into force is governed by the shorter period of limitation prescribed by Art. 2 (*iii*) (*b*) (*ii*) of Sch. III, Part I of the Act, though the cause of action might accrue before the passing or coming into force of the Amending Act of 1934. (*James and Rowland, JJ.*) SIDHESHWAR PRASAD *v.* RAM CHARITER CHOUDHURY. **182 I.C. 454=5 B.R. 746=12 R.P. 19=1939 P.W.N. 217=A.I.R. 1939 Pat. 269.**

——Sch. III, Art. 3—*Applicability—Dispossession—If must be by landlord as such.*

Art. 3, Sch. III of the Bihar Tenancy Act does not provide, even by implication, that dispossession must be by the landlord *as such*. Dispossession of the tenant by the landlord as auction-purchaser of the right, title and interest of the tenant also comes under the special law of Limitation under Art. 3, Sch. III of the Bihar Tenancy Act. In a case where the decree obtained by the landlord against the original tenant, is only a money decree, and the landlord purchases only the right, title and interest of the original tenant (whatever that may be) and not the holding or the tenancy right of the tenant, the dispossession of the tenant by the landlord purchaser effected long after the sale and out of Court, is not really as auction-purchaser but merely upon the excuse of being auction purchaser. The special limitation under Art. 3, Sch. III of the Bengal Tenancy Act is applicable to such a case. (*Fazl Ali and Meredith, JJ.*) DEORATI KUER *v.* DASARATH DUBEY. **187 I.C. 539=12 R.P. 612=21 Pat.L.T. 374=6 B.R. 495=1940 P.W.N. 358=A.I.R. 1940 Pat. 476.**

——Sch. III, Art. 3—*Applicability—Sale of holding for arrears of rent—Purchase by landlord and delivery of possession—If "dispossession of tenant by landlord."*

Where a landlord in execution of his decree for arrears of rent puts up his tenant's holding for sale, and, having purchased it, himself obtains delivery of possession as auction purchaser, that does not amount to dispossession of the tenant by the landlord within the meaning of Art. 3 of Sch. III of the B. T. Act, so as to make that article applicable. (*Agarwala and Rowland, JJ.*)

BIHAR TENANCY ACT (1885), SCH. III, ART, 6.

JAGA SINGH *v.*.BASDEO SINGH. **6 B.R. 483=187 I.C. 518=12 R.P. 601.**

——Sch. III, Art. 6—*Applicability—Single suit by same proprietor far rent of two different tenures held by different tenants—Two separate decrees for amounts less than Rs.* 500 *against respective tenants—Execution—Limitation—Article applicable—Rent decree or money decree.*

The plaintiff the sole proprietor of an estate instituted a suit and claimed the full rent of two tenures for 4 years, one tenure being recorded in one khewat and the other tenure in another khewat. The tenants interested in one khewat were not identical with the tenants interested in the other, *i.e.*, each khewat was held by a different set of tenants separate from the other. The plaintiff got a decree for Rs. 204-4-6, against one set of tenants and another decree for Rs. 309-11-9 against the other set of tenants.

Held, that the position resulting from this was precisely the same as if the plaintiffs had brought two distinct suits, for rent against the respective tenants in respect of each tenancy and that each of these decrees was executable each being for an amount less than Rs. 500, as a rent decree under the Bihar Tenancy Act, and execution of either of them was governed by Art. 6 of Sch. III of the Bihar Tenancy Act.

Held, further, that the fact the suit was a single suit for rent of more than one tenure did not make it a suit in which only a money decree could be passed, so as to exclude the operation of Art. 6 of Sch. III of the Act. (*Rowland, J.*) JANKI RAI *v.* RAM RAN BIJAYA PRASAD SINGH. **187 I.C. 49=12 R P. 560=6 B.R. 416=20 Pat. L.T. 889=A.I.R. 1940 Pat. 145.**

——(as amended in 1934), Sch. III, para. 2 (b) (ii)—*Applicability—Suit for* bhaoli *rent after Act in respect of rent accrued due prior to Act—Limitation.*

The period of limitation prescribed by para. 2 (*b*) (*ii*) of Sch. III of the Bihar Tenancy Act as amended in 1934 is not applicable to suits for arrears of *bhaoli* rent, which had accrued due and in respect of which the causes of action had arisen before the amended Act, though the suits are instituted after the Act. (*Courtney-Terrell, C.J.*) BADRI NARAYAN SINGH *v.* GANGA SINGH. **171 I.C. 953=10 R.P. 268=4 B.R. 88=18 Pat. L.T. 731=1937 P.W.N. 723=A.I.R. 1937 Pat. 605.**

——Ch. V—*Occupancy rights—If conferred by mere recognition.*

The institution of an occupancy right is a creature of statute. Recognition means existence of something from before. If the occupancy right had not been acquired from before, mere recognition by landlord would not confer occupancy right upon a raiyat. (*Varma, J.*) DEO NARAIN LAL *v.* RAM KHELAWAN SINGH. **167 I.C. 47=9 R.P. 373=3 B.R. 257=A.I.R. 1937 Pat. 98.**

——Ch. V and Ch. VI—Applicability—Land comprised in holding of raiyat acquired by Government for purposes of Railway—Effect—Subsequent transferee from raiyat paying rent to zamindar—If protected from ejectment. *See* LIMITATION ACT, ART. 149. **18 Pat.L.T. 486.**

BILL OF LADING—*See* SHIPPING—BILL OF LADING.

BIRBHUM GHATWALI REGULATION (XXIX OF 1814), S. 5—*Ghatwal—Power of Government to dismiss and to forfeit tenure—Grounds for dismissal.*

The Ghatwal is not liable to be proceeded against under the provisions of S. 5 of the Regulation, 1814, for non-payment of choukidari dues. The Government therefore have no right to dismiss the Ghatwal acting under the provisions of S. 5 (2) in cases where he is in arrears for the payment of the choukidari dues. The power to dismiss a Ghatwal then for non-payment of choukidari dues must be fonnd, if at all, elsewhere. The ruling power however always has a customary right, as a necessary incident of a Ghatwali tenure to dismiss a Ghatwal for misconduct or for non-payment of his dues which are as a matter of ancient and customary form enumerated in the muchalka.

Per *Chatterjea, J.*—S. 5 gives in clear terms to the Government full power to forfeit the tenure of the defaulting Ghatwal and to make it over to any person whom it may approve or otherwise to dispose of it in such manner as it may think proper. It is thus evident that notwithstanding the hereditary character of the Ghatwali tenure the Government in case of breach of the condition to pay rent is at liberty to forfeit the tenure and to take it away from the family of the defaulting Ghatwal. It must be as a matter of policy of the State based on grounds of expediency touching the administration of police duties by the Ghatwals that this right of the Government was recognised by legislative enactment. When for breach of the conditions on which he holds the tenure the Ghatwal is dismissed from his office by the Government his tenure is forfeited and the Government has a right to make a new grant to any person whom it may consider fit. Once a tenure is forfeited the right of the Government to resettle it with any new Ghatwal whom it may consider fit comes in. Ordinarily the Government should consider and respect the hereditary claim of the next heir of the dismissed Ghatwal but he cannot force such claim upon Government. (*Manohar Lal and Chatterjee, JJ.*) JOGENDRA NARAIN *v.* RADHA PRASAD. **17 Pat. 398=175 I.C. 854=19 Pat.L.T. 519=4 B.R. 633=11 R.P. 20=A.I.R. 1938 Pat. 245.**

——S. 5—*Scope—If incorporated in S. 8 (2), Sonthal Parganahs Rural Police Regulation.*

S. 5 of the Regulation of 1814 is not by necessary implication incorporated in S. 8 (2) of the Regulation of 1910 for the simple reason that if that was the intention of the Legislature they could easily have said so. (*Manohar Lal and Chatterjee, JJ.*) JOGENDRA NARAIN *v* RADHA PRASAD. **17 Pat. 398=175 I.C. 854=19 Pat.L.T. 519=4 B.R 633=11 R.P. 20=A.I.R. 1938 Pat. 245.**

BOILERS ACT (V OF 1923), Ss. 2 and 23—*'Owner'—Absentee owner—Liability of.*

The word 'owner' in S. 23, Boilers Act, has been used in its dictionary meaning and also includes an agent or other persons mentioned in S. 2. The question whether an owner who is absent should or should not be prosecuted, and, if prosecuted, how he should be dealt with, is one which depends upon the facts and circumstances of each particular case. As a mere proposition

BOILERS ACT (1923), S. 2.

of law an absentee owner of a boiler, which is being used for bis work comes within the purview of S. 23 of the Boilers Act. (*Mohamad Noor and Madan, JJ.*) EMPEROR *v.* JUGAL KISHORE. **16 Pat. 495=1937 P.W.N. 759=171 I C. 143=10 R.P. 189=38 Cr.L.J. 1054=4 B.R. 10=18 Pat. L.T. 734=A.I.R. 1937 Pat. 500.**

——**S. 2 (b)**—*Boiler—Meaning of definition.*

The meaning of the definition of 'boiler' in S. 2 (*b*) of the Boilers Act is, that the definite and clear object of the contrivance should be to generate steam under pressure. The fact that in a particular contrivance though steam is generated under pressure, the steam is used only for sterilizing some vessels, cannot take it away from the definition of a 'boiler', for the use to which the steam is ultimately put is quite irrelevant to the issue. (*Mulla, J.*) A. S. AGARWAL *v.* EMPEROR. **I.L.R. 1939 All. 883=41 Cr.L.J. 26=184 I. C. 488 (2)=1939 A L.J. 806=1939 A.Cr.C. 176=1939 A.W.R. (H.C.) 618=A.I.R. 1939 All. 697.**

BOMBAY ACTS.

Abkari Act (V of 1878).
Bhagdari and Narwadari Act (V of 1862).
Borstal Schools Act (XVIII of 1929).
Children's Act (XIII of 1924).
City Land Revenue Act (II of 1876).
City Municipal Act (III of 1888).
City Police Act (IV of 1902).
Civil Courts Act (XIV of 1869).
Civil Medical Code.
Co-operative Societies Act (VII of 1925).
Court of Wards Act (I of 1905).
District Municipal Act (III of 1901).
District Police Act (VI of 1890).
Finance Act (1932 as amended in 1939).
Hereditary Offices Act (III of 1874).
High Court Civil Circulars (1925).
High Court Rules (Appellate Side).
,, ,, Original Side.
Jail Manual.
Khoti Settlement Act (I of 1880).
Land Revenue Code (V of 1879).
Land Revenue Rules.
Local Boards Act (VI of 1923).
,, ,, Amendment Act (XIII of 1935).
Motor Vehicles Act (XIV of 1935).
,, ,, Rules (1905).
Municipal Boroughs Act(XVIII of 1925).
Native Shares and Stock Brokers' Association Rules.
Pleaders Act (XVII of 1920.)
Prevention of Adulteration Act(V of 1925)
Prevention of Gambling Act (IV of 1887.)
Primary Education Act (IV of 1923).
Public Conveyances Act (VII of 1920)
Regulation (XVII of 1827).
Regulation (XIX of 1827).
Rent Free Estates (Inam) Act XI of 1852.
Revenue Jurisdiction Act (X of 1876).
Survey and Settlement Act (I of 1865).
Title to Rent Free Estates Act (XI of 1852).
(District) Tobacco Act (II of 1933).
Town Tobacco Duty Act (IV of 1857).
Wages Act (III of 1865).

BOMBAY ABKARI ACT (V OF 1878),—*Scope and object of—Introduction of total prohibition of intoxicants—If contemplated.*

The primary object of the Bombay Abkari Act was to secure Abkari revenue, though some of the sections of the Act show that the Legislature intended also to confer power to control the trade in drink and drugs, and to obviate abuses which might arise from such trades. Nowhere in the Act is there anything to suggest that the Legislature contemplated the introduction of total prohibition of intoxicants as a measure of social reform, and it is obvious that such introduction would virtually make an end of the purposes of the Act. (*Beaumont, C.J., Wadia, Macklin, Wassoodew and Sen, JJ.*) EMPEROR *v.* CHINUBHAI. **42 Bom.L R. 669 (F.B.).**

BOMBAY ABKARI ACT (1878), S. 43.

——**S 14-B**—*Construction—Object of Act—Relevency.*

In construing S. 14-B of the Bombay Abkari Act, the Court is entitled to have regard to the objects of the Act. (*Beaumont, C.J., Wadia, Macklin, Wassoodew and Sen. JJ.*) EMPEROR *v.* CHINUBHAI. **42 Bom.L.R. 669 (F.B.).**

——**(as amended in 1912)—S. 14 B (1) proviso and (2)**—*Construction and scope—Proviso—If controls Sub-sec. (2)—"Any person or class of persons"—Meaning—If includes public generally—Notification by Government prohibiting any person within specified area from possessing any intoxicant—Legality—If* ultra vires.

The proviso to Sub-sec. (1) of S. 14-B of the Bombay Prohibition Act is clearly a part of Sub-sec. (1), and there is no doubt that it is competent to Government under Sub-sec. (2) of the section to prohibit the possession by any person or class of persons of foreign liquor as fully as they can prohibit the possession of country liquor. But this power to prohibit the possession by any person or class of persons either throughout the whole presidency or any local area of any intoxicant will not justify Government in prohibiting possession by the public generally. The natural meaning of the expression "any person or class of persons" in S. 14-B (2) is a person designated by name or description or a class of persons designated. It does not extend to the public generally Therefore notification by the Government of Bombay under S. 14-B (2) prohibiting the possession by any person within a specified area of any intoxicants (excepting certain specified preparations) is *ultra vires* and of no effect. (*Beaumont, C.J., Wadia, Macklin, Wassoodew and Sen, JJ.*) EMPEROR *v.* CHINUBHAI. **42 Bom.L.R. 669 (F.B.)**

——**S. 43**—"*Possession*"—*Son producing bottle containing illicit liquor—Presumption of joint possession by son and father—If arises.*

When a search was made, the son produced the key of the box from which a bottle containing illicit liquor was found. The father was not present at the time of the search.

Held, that before a presumption could be raised that the bottle was in the joint possession of both the son and the father, it was incumbent upon the Crown to prove that both of them had either physical or constructive possession of the contraband liquor or the son had such a possession that he had it on behalf of himself and his father to the knowledge of the latter. (*Rupchand Bilaram and C. Mehta, A.J.Cs.*) DODO RADHO *v.* EMPEROR. **169 I.C. 561=10 R.S. 16=38 Cr.L.J. 796 (1)=A.I.R. 1937 Sind 154.**

——**S. 43 (1) (a)**—"*Transportation*"—*Meaning of—Transportation from one place to another—If transportation to every place on the route.*

Transportation of an excisable article from one place to another does not involve transportation to every place between those two places. When

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the Bombay Abkari Act talks about transport from one place to another it means only transport from the starting point to the ultimate destination. It is a question of fact for the Court to determine what the destination may be. If a man comes to a place and stays there for an appreciable time--and what amounts to an appreciable time would have to be considered in relation to the purposes of the Act—the Court might hold that that place was the destination although it appeared that the journey was to be resumed subsequently. But merely passing through a place in the course of a journey does not amount to transporting to that place.

Norman, J.—The word "place" in the definition ot "Transport" in the Abkari Act means the place from which the journey starts and the place to which the liquor or excisable article is ultimately taken. It cannot mean every place on the route. Where the ultimate destination of the liquor is a place where the still-head duty is the same as at the place from which the journey starts, it cannot be said that there is a transport from a lower to a higher still-head duty area merely because the journey is through a place where the still-head duty is higher, so as to constitute an offence under S. 43 (1) (*a*). (*Beaumont, C. J. and Norman, J.*) EMPEROR *v.* DAGADU SHETIBA. **I.L.R. (1938) Bom. 49=172 I.C. 764=10 R.B. 295=39 Cr.L.J. 197=39 Bom.L.R. 1062=A.I.R. 1938 Bom. 43.**

——**S. 43-A**—*Charge jointly, against three persons—What must be proved.*

Where three persons are charged with joint illegal possession of liquor, it is incumbent upon the Crown to prove (*a*) that each of the accused had either physical or constructive possession of the property in question, or (*b*) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused and to their knowledge. (*Rupchand Bilaram and Mehta, A. J. Cs.*) NARUMAL DAYALDAS *v.* EMPEROR. **162 I.C. 263=37 Cr.L.J. 546=8 R.S. 165=1936 Cr.C. 316=A.I.R. 1936 Sind 44.**

——**Ss. 43-A and 53**—*Three brothers forming a joint Hindu family charged nnder S. 43-A—Bottles containing liquor found in godown owned by—If evidence of possession by any one of them.*

In order to convict a person of illegal possession of liquor, it is necessary for the Crown to prove that he had knowledge of his possession. A person who is unaware that the liquor has been placed in his custody cannot be so convicted. Where therefore three brothers, who are members of a joint Hindu family are accused under S. 43-A, Bombay Abkari Act, the mere fact that they are members of a joint Hindu family and as such own the godown in which the bottles containing the liquor are found concealed, does not at all prove that any one of them was in conscious possession of the bottles found there, so as to bring them within the purview of S. 53. (*Rupchand Bilaram and Mehta. A. J. Cs.*) NARUMAL DAYALDAS *v.* EMPEROR. **162 I.C. 263=37 Cr.L.J. 546=8 R S. 165=1936 Cr.C. 316=A.I.R. 1936 Sind. 44.**

——**S. 43 (h)**—*Burden of proof—Shifting of.*

The burden of proof on prosecution which shifts under proceedings under the Abkari Act, does not shift until the factum of possession is proved. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* HAJI GHULAB SHAH. **32 S.L.R. 689=174 I.C. 835=10 R.S. 269=39 Cr.L.J. 504=A.I.R. 1938 Sind 80.**

BOM. BORSTAL SCHOOLS ACT (1929), S. 6.

——**S. 47**—*Licensee's liability for acts of servant—"All due and reasonable precautions"—Construction of.*

The language used by the Legislature in S. 47 of the Bombay Abkari Act is very wide. But a statute should be construed not with reference to its language, but also its subject-matter and object; further in construing the provisions of S. 47 regard must also be had to the express terms of the limitation contained in the section. The section which expects the discharge of a duty by the licensee must always be regarded in the administration of the law subject to the maxim *lex non cogit ad impossibilia ant inutilia.* The phrase "all due and reasonable precautions" cannot be read as implying "all precautions" having no room for loophole whatever. That would be an impossible construction. The phrase only implies precautions that are reasonable or practical and due or necessary and which a prudent and sensible person, would take in endeavouring to prevent transgressions of the terms of the license in carrying out the object of the license. The licensee's liability must be decided according to the circumstances of each case. (*Wassoodew and Samjee, JJ.*) EMPEROR *v.* GANPAT LAXMAN. **177 I.C. 665=11 R.B. 112=39 Cr.L.J. 933=40 Bom. L.R. 820=A.I.R. 1938 Bom. 427.**

——**S. 53**—Scope—Liquor found in godown of joint Hindu family—Coparceners—If in possession of liquor. *See* BOMBAY ABKARI ACT, SS. 43-A AND 53. **1936 Cr.C 316=A.I.R. 1936 Sind 44.**

BOMBAY BHAGDARI AND NARWADARI ACT (V OF 1862), S. 1—*Scope—Lands forming unrecognised sub-divisions of bhag—Attachability in execution—Appointment of receiver in execution—Power of Court.*

Lands of a judgment-debtor which are unrecognised sub-divisions of a *bhag* cannot be attached and sold in execution of a decree against him in the face of the prohibition contained in S. 1 of the Baghdari and Narwadari Act. Nor can the Court appoint a receiver in execution in respect of such lands. To make such an appointment would be to contravene the provisions of the Act. (*Beaumont, C.J and Divatia J.*) HARILAL CHHOTALAL *v.* CHATURBHAI. **165 I.C. 604=9 R.B. 157=38 Bom.L.R. 938=A.I.R. 1936 Bom. 399.**

——**Ss. 3 and 5**—*"Recognised sub-division"—Meaning of.*

There can be no doubt that "recognised sub-division" in the Act means a sub-division recognised by Government and not any sub-division by partition or otherwise. (*Broomfield and Macklin JJ.*) GOVINDBHAI *v.* DAHYABHAI. **163 I.C. 632=9 R.B. 38=38 Bom.L.R. 175=A.I.R. 1936 Bom. 201.**

BOMBAY BORSTAL SCHOOLS ACT (XVIII OF 1929), S. 6 (as amended by Act XVII of 1935)—*Period of detention—Duration of—Sentence of two years—Legality.*

Under S. 6 of the Borstal Schools Act as amended in 1935 the minimum period of detention for which a youthful offender can be sentenced is three years. It is not therefore competent to a Magistrate to pass a sentence of detention for a

BOM BORSTAL SCHOOLS ACT (1929), S. 6.

period of two years only. (*Davis, J.C. and Lobo, A.J.C.*) EMPEROR *v.* KISHNO CHOPO. **30 S.L.R. 98=163 I.C. 373=9 R.S. 1 (1)=37 Cr.L.J. 855 (2)=1936 Cr.C. 661=A.I.R. 1936 Sind 78**

——**S. 6**—*Previous convictions as evidence of criminal habits—Proof—Necessity for—Degree of proof.*

Where the evidence of criminal habits or tendencies from which it is to appear to Court that it should take action under S. 6 is that of previous convictions, the Court should require these previous convictions to be properly proved before it can say that there is evidence from which it can appear to the Court that the accused is of criminal habits or tendencies within the meaning of Cl. (*b*) of S. 6. The standard of proof in such a case is the same as that required for purposes of S. 75, I.P. Code. Where the only evidence of previous convictions was merely the extracts from records of the Central Bureau of finger-prints and no certificate from jail officer or warrant of commitment was produced to prove it,

Held, that the Court could not on such evidence take account of the previous conviction and that it could not therefore take action under S. 6. (*Davis, J.C. and Tyabji, J.*) EMPEROR *v.* ABDULLAH KARIM. **I.L.R. 1940 Kar. 83=41 Cr L.J. 143=185 I.C. 268=12 R.S. 161=A.I.R. 1939 Sind 335.**

——**S. 6**—*Reference under—Conditions precedent to—Maintainability.*

Before a case is referred to the High Court under S. 6 a reference should be first made to the Inspector-General and only when he is of the opinion that he cannot by reason of the particular circumstances of the case or the provisions of S. 11 transfer a young offender to Borstal School by his own order or with the previous sanction of Government, should any reference in such matters be made to High Court. (*Davis, J. C. and Tyabji, J.*) EMPEROR *v.* ABDULLAH KARIM. **I.L.R. (1940) Kar. 83=41 Cr.L.J. 143=185 I.C. 268=12 R.S. 161=A.I.R. 1939 Sind 335.**

——**S. 6**—*Scope—Magistrate sentencing accused below 18 years to two years' rigorous imprisonment for one offence and for one year for another—Direction that in lieu of sentences accused be detained in Borstal School for three years—Legality.*

Where a Magistrate sentences the accused, who is found to be under 18 years of age to two years' rigorous imprisonment for one offence and for one year's rigorous imprisonment for another, the sentences to run consecutively, and directs that in lieu of the sentences the accused should be detained for three years in a Borstal School, his order offends against the provisions of S. 6, Bombay Borstal Schools Act. So also the order of detention passed should be one for three years and not divided up into two parts, *i.e.*, two years and one year. S. 6 contemplates not a sentence of imprisonment passed under any one particular section or sections of Penal Code either concurrent or consecutive, but, an order for detention for the period prescribed. (*Davis, J.C. and Mehta, A J C.*) EMPEROR *v.* KUNDAN. **166 I.C. 831=9 R.S. 155=38 Cr.L.J. 320=A.I.R. 1937 Sind 2.**

——**(as amended by Act XVII of 1935), S. 6**—*Scope—If mandatory.*

BOM. CHILDREN ACT (1924), S. 51.

The wording of the Bombay Borstal Schools Act is designed not only to reform the offender but to save him from the stigma of conviction, and therefore the Magistrate should follow the wording of S 6 of the Act and should find the youthful offender guilty of an offence but should not convict him of an offence and should pass in lieu of a sentence of imprisonment an order for detention within the provisions of S 6. (*Davis, J.C. and Lobo, A.J.C.*) EMPEROR *v.* KISHNO CHOPO. **30 S.L.R. 98=163 I.C 373=9 R.S. 1 (1) =37 Cr.L.J. 855 (2)=1936 Cr.C. 661=A.I.R. 1936 Sind 78.**

BOMBAY CHILDREN ACT (XIII OF 1924), Ss. 3 (a) and (c) and 22—*Conviction of youthful offender—Detention in prison—Certificate—Necessity.*

Where the accused, convicted of the offence of murder, is a child within the meaning of Cl. (*a*) of S 3, and is a youthful offender within the meaning of Cl. (*c*), the Court can lawfully commit him to prison only under the provisions of S. 22 after it certifies that the boy is so unruly or of so depraved a character that he is not a fit person to be sent to a certified school and that none of the methods by which a case may be legally dealt with is suitable (*Davis, J. C. and Lobo, J.*) EMPEROR *v* KAURO MIZARI. **I.L.R. (1939) Kar. 189=11 R.S. 79=39 Cr L J. 996= 178 I.C. 126 (1)=A.I.R. 1938 Sind 224.**

——**S. 7**—*Appeal—Order in proceedings under S. 7—Person alleging but not proving to be father of children concerned*—Locus standi *to appeal.*

Quaere:—Whether a person alleging, but failing to prove, that he is the father of certain children has any *locus standi* to appeal against an order passed in proceedings under S. 7 of the Bombay Children Act. (*Beaumont, C. J. and Wadia, J.*) ANANDI MAHAR, *In re.* **171 I.C 274 =10 R.B. 187=38 Cr.L.J. 1053=39 Bom.L.R. 468=A.I.R. 1937 Bom. 388.**

——**S. 51**—*Revision—Order by District Magistrate in appeal—Revision to High Court—Competency.*

An order passed by the District Magistrate in appeal under S 51 of the Bombay Children Act is revisable by the High Court. Sub-S. (3) of S. 51 cannot be construed as restricting or limiting by implication the High Court's powers of revision conferred by statute (*Beaumont, C.J. and Wadia, J.*) ANANDI MAHAR, *In re.* **171 I.C. 274=10 R. B. 187=38 Cr.L.J. 1053=39 Bom.L.R. 468=A. I.R. 1937 Bom. 388.**

——**S. 51 (3)**—*Powers of High Court—Power to extend period of detention of youthful offender—Limits.*

The High Court has, under S. 51 (3) of the Bombay Children's Act, jurisdiction to extend the period of detention of a youthful offender sentenced under S. 23 of the Act, provided the extended period does not exceed the limit specified in S. 32 of the Act. There is no limit of time within which the revisional powers may be invoked, and the powers can be exercised at any time before the expiration of the term of detention limited in the order under revision. (*Beaumont, C. J. and Lokur, J.*) EMPEROR *v.* MAHOMED ISLAM. **184 I.C. 205=12 R.B. 153=40 Cr L.J. 900 =41 Bom.L.R. 554=A.I.R. 1939 Bom. 371.**

BOMBAY CITY LAND REVENUE ACT (II OF 1876), S. 8—*Superior holder claiming total exemption from assessment—Burden of proof.*

Where a superior holder claims total exemption from assessment to land revenue, the burden is on him to show that as the superior holder of the property in question he has a right in limitation of the right of Government to make an assessment in consequence of a specific limit to assessment having been established or preserved and that that specific limit is nill. (*Lord Macmillan.*) KAMALA VAHOOJI *v.* COLLECTOR OF BOMRAY, 64 I.A. 334=31 S L.R. 665=1937 P.W.N. 985=169 I.C. 778=41 C.W.N. 1194=46 L.W. 227=1937 O.L.R. 413=1937 A.L.R. 647=I.L.R. (1937) Bom. 756=10 R.P.C. 54=1937 M.W.N. 939=3 B.R. 759=39 Bom.L.R. 1046=66 C.L.J. 43=A. I.R. 1937 P.C. 271=(1937) 2 M.L.J. 362 (P.C.).

BOMBAY CITY MUNICIPAL ACT (III OF 1888), S. 19 (3) and (4)—*Scope—Mandatory nature of—Ward lists—Voters grouped in order according to communities—Legality—Right of voter to impeach election held on basis of such list—If causes injury to franchise or personal right of voter—Specific Relief Act, S.* 45.

The provisions of S. 19 (3) and (4) of the City of Bombay Municipal Act are mandatory; but there is nothing in them which prevents the voters from being grouped in alphabetical order according to communities; the ward lists would still be in alphabetical order, though literally the names of voters appearing in alphabetical order are grouped according to the communtties to which they belong. Nor would an electorate be any the less a joint electorate, even though its component members are grouped according to the communities to which they respectively belong. It cannot be said that the ward lists so prepared are in material deviation from S. 19 (3) and (4). Even if the ward lists are not literally prepared in accordance with the provisions of those subsections, they are substantially so prepared, and in the absence of any allegation and proof that any injustice has resulted to any one on that account, it cannot be held that there is no proper electoral roll or that the elections held under that roll are in law a nullity. Such lists are not illegal and it cannot be said that any voter who is in fact enrolled as such in his ward is injured from exercising his right to vote. There is really no act or omission in such a case which can be said to really interfere with or cause injury to the franchise or personal right of a voter, so as to entitle him to an order under S. 45, Specific Relief Act, against the Election Officer. (*Wadia, J.*) SHANKARLAL *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **186 I.C. 203=12 R.B. 301=41 Bom.L.R. 911=A.I.R. 1939 Bom. 481.**

——**Ss. 28 (k) and 32**—*Scope—If mandatory.*

The provisions of Ss. 28 (*k*) and 32 of the City of Bombay Municipal Act are mandatory; and so long as an election has not been called in question, the Municipal Commissioner cannot forbear to act under Ss. 28 (*k*) and 32. (*Wadia, J.*) SHANKARLAL *v* MUNICIPAL COMMISSIONER OF BOMBAY. **186 I.C. 203=12 R.B. 301=41 Bom.L.R. 911=A. I.R. 1939 Bom. 481.**

——**S. 33**—*Scope—Remedy under—If excludes application under S. 45, Specfic Relief Act, before declaration of result of election.*

BOM. CITY MUN. ACT (1888), S. 217.

S. 33 of the City of Bombay Municipal Act only comes into operation after the declaration of the results of an election is complete under S. 32, and it does not take away a voter's right, if any, to go to the High Court in a proper case under S. 45 of the Specific Relief Act even before the declaration of the result is completed. The remedy under S. 33 would be the more complete remedy; and a voter cannot say that he has no other remedy whatsoever, though before the declaration of the results is complete, he has technically no remedy under S. 33. (*Wadia, J.*) SHANKARLAL *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **186 I.C. 203=12 R.B. 301=41 Bom.L.R. 911=A.I.R. 1939 Bom. 481.**

——**Ss. 106 and 110**—*Loan by corporation—Issue of debentures with option of renewal—If compulsory.*

S. 106 of the City of Bombay Municipal Act gives to the corporation power to borrow on the security of debentures and S. 110 provides for debentures in a certain form. But the corporation is not compelled under the Act to borrow, and in the second place, having decided to borrow, although they are compelled to issue debentures, they are not compelled to issue debentures containing a right or option of renewal. (*Beaumont, C. J. and Wadia, J.*) VISHWANATH SADASHIV *v.* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY. **I.L.R. (1938) Bom. 715=177 I.C. 636 =11 R.B. 108=40 Bom.L.R. 685=A.I.R. 1938 Bom. 410.**

——**S. 140**—"*Property tax*"—*Meaning of—Charge for water supplied to premises by meter—Nature of—If a charge on premises.*

Charges for water supplied by meter to property do not constitute a "property tax" under S. 140 of the City of Bombay Municipal Act and are not a charge on the premises under S. 212 of the Act. S. 212 in terms imposes a charge in respect of property taxes due, which taxes include water-tax, but do not include the charge by meter under S. 169. S. 169 distinguishes a charge by meter from a water-tax. (*Beaumont, C.J. and Blackwell, J.*) MUNICIPAL CORPORATION OF THE CITY OF BOMBAY *v.* HAJI EISA HAJI OOSMAN. **60 Bom. 232=161 I.C. 10=8 R.B. 300= 37 Bom. L R. 1017=A.I.R. 1936 Bom. 49.**

——**S. 169**—Construction—Charge for water by meter—If water-tax—If a charge on premises. *See* BOMBAY CITY MUNICIPAL ACT, S 140. **60 Bom. 232=37 Bom.L.R. 1017=A.I.R. 1936 Bom. 49.**

——**S. 212**—Applicability—Charge for water supplied by meter—If a charge on property. *See* BOMBAY CITY MUNICIPAL ACT, S. 140. **60 Bom. 232=37 Bom.L.R. 1017=A I.R. 1936 Bom. 49.**

——**Ss. 217 and 219**—*Scope—Chief Judge of Court of Small Causes hearing municipal appeal—If Court or* persona designata—*Writ of* certiorari *—High Court's jurisdiction to issue—Grounds for issue of writ—Erroneous decision.*

The High Court has power to issue a writ of *certiorari* in respect not only of the orders of Subordinate Courts, but also of the proceedings of any tribunal or officer, who, though not a Court, is yet acting judicially. It is true that the Chief Judge of the Small Causes Court, Bombay, is not a Court when hearing municipal appeals, but acts as a *persona designata*, as the wording of

BOM. CITY MUN. ACT (1888), S. 219.

S. 217 of the City of Bombay Municipal Act shows. But his decision is a judicial act, and if he acts without jurisdiction or in excess of his legal authority, his act can be controlled by the High Court by a writ of *certiorari* or prohibition, as the case may be, S. 219 does not affect the power of the High Court to issue a writ of *certiorari* in such cases. The High Court has therefore power to issue a writ of *certiorari* if a proper case is made out. Before a writ can be issued two conditions have to be fulfilled: (1) the tribunal or officer whose act is complained of must be acting judicially, and (2) the act complained of must be without jurisdiction or in excess of the legal authority of that tribunal or officer. But an officer or tribunal having jurisdiction to decide a question cannot be said to have acted in excess of the legal authority if the decision happens to be wrong. The fact that the Chief Judge of the Small Cause Court has wrongly interpreted the sections of the Municipalities Act and has thus arrived at an erroneous decision does not justify the issue of a writ of *certiorari*. (*Macklin and Lokur, JJ.*) MULJEE SICKA & Co. *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **187 I.C. 8=12 R.B. 395=3 Fed. L.J. 61 (H.C.) =41 Bom. L.R. 984=A.I.R. 1939 Bom. 471.**

——S. 219—If takes away High Court's power to issue writ of *certiorari* in respect of decision of Chief Judge of Small Cause Court under S. 217. *See* BOMBAY CITY MUNICIPAL ACT, SS. 217 AND 219. **41 Bom.L.R. 984.**

——S. 231—*Powers of Commissioner under—Notice—Requisites of validity—Notice requiring owner within 15 days to connect unconnected waste water to municipal storm water drain—Validity.*

The notice authorised by S. 231 of the Bombay City Municipal Act is one requiring the owner or occupier of a house to make a drain of the character therein specified, that is to say, of such material, size and description and so forth as may appear to the Commissioner necessary. A notice served by the Commissioner on the owner or occupier of a house requiring him within 15 days to connect the unconnected waste water of the naharies and wasting places to the municipal storm water drain at a particular place after obtaining necessary permit of the owners of the drain is not a sufficient notice to comply with S. 231. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* EUGENE MIRANDA. **175 I.C. 1001=11 R.B. 1 (1)=39 Cr.L.J. 684 (2)=40 Bom. L.R 320=A.I.R. 1938 Bom. 315.**

——S. 384-A—*Liability of owner of building for act of tenant.*

S. 384-A of the City of Bombay Municipal Act is a penal provision and must be construed strictly; the owner of a building cannot be held liable for an act of the tenant, when he is not himself using the premises for any prohibited purpose. The language of the section is not appropriate to the case of the owner unless he is also the occupier, and uses the premises. (*Broomfield and Macklin, JJ.*) EMPEROR *v.* DATTATRAYA RAMCHANDRA. **180 I.C. 97=11 R.B. 290=40 Cr.L.J. 343=41 Bom.L.R. 82=A.I.R. 1939 Bom. 95.**

——S. 394 (1) (b) and Sch. M, Part III—*"Timber"—Plywood—If timber.*

BOM. CITY MUN. ACT (1888), S. 527.

The object of requiring a licence for the keeping of articles mentioned in Part III of Sch. M of the City of Bombay Municipal Act, is to safeguard the public against nuisance or danger. Timber is not used in Part III of Sch. M, in any technical sense; it only means wood used for building or carpentry. "Timber" in Part III of Sch. M does not include plywood. Keeping plywood for sale without licence is not an offence under S. 394 (1) (*b*), for which the person keeping it can be convicted. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* AHMEDALLI ESUFFALLI. **175 I.C. 358=39 Cr.L.J. 575=10 R.B. 537=40 Bom. L.R. 322=A.I.R. 1938 Bom. 282.**

——S. 394 (4) (a) and (b)—*Discretion of Commissioner under—Licence for melting vegetable oil—Breach of condition in licence—Refusal to renew licence—Propriety.*

Under S. 394 (4) (*a*) of the City of Bombay Municipal Act, the Commissioner has a discretion to issue a licence for carrying on the business of melting vegetable oil subject to such conditions and restrictions as he shall think fit to prescribe, *e.g.*, he can impose a condition to the effect that "ghee or butter or other animal fat, whether unmixed or mixed with vegetable oil or with other subject shall be kept on the premises." And under Cl. (*b*) of S. 394 (4), he has likewise the discretion to refuse to renew the licence on the ground that the licensee has infringed the condition imposed. The imposition of such a condition is not *ultra vires*. (*Kania, J.*) PACHAN LADHA *v.* MUNICIPAL COMMISSIONER, BOMBAY. **60 Bom. 838=164 I.C 101=9 R.B. 54=38 Bom.L.R. 556 =A.I.R. 1936 Bom. 264.**

——S. 411—*Construction—Power of Municipal Commissioner to refuse licence or renewal of licence for butcher's shop—Discretion—Exercise of—Interference by Court—Specific Relief Act, S. 45.*

S. 411 of the City of Bombay Municipal Act, in terms, deprives every citizen living within the city or to whom the Act applies, of the power to carry on the business of a butcher, and the only exception is the grant of a licence by the Municipal Commissioner and carrying on the trade of a butcher in conformity with the terms of that licence. The Commissioner has power under that section either to grant a licence or refuse to grant or to refuse to renew a licence for carrying on the business of a butcher within the city. So long as the Commissioner exercises his power in a proper manner, *i.e.*, not arbitrarily or for an ulterior motive, and the discretion is exercised for the proper Municipal administration in accordance with the considered policy of the Municipality, the High Court will not be justified in interfering with the exercise of that discretion under S. 45 of the Specific Relief Act. (*Kania, J.*) FAKIR MAHOMED MALANG *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **I.L.R. (1937) Bom. 774=171 I.C. 331=10 R.B. 191=39 Bom.L.R. 536=A.I.R. 1937 Bom. 395.**

——S. 527—*Applicability—Act done in pursuance of contract authorised but not required by Act — Suit against corporation — Limitation—Period of six months—Starting point of.*

The protection of S. 527 of the City of Bombay Municipal Act extends only to acts done in

direct execution of the powers conferred by that Act of the local authority or corporation, and does not cover acts done in pursuance of contract which the local authority or corporation is empowered to enter into, but is not required to enter into, by the Act. Plaintiff and *N* were joint holders of eight debentures issued by the corporation of Bombay, under the terms of which either the plaintiffs or any of them or *N* could deal with them. *N* died on 13—7—1930, and shortly after, *A*, to whom the debentures had been handed over for collection wrongfully dealt with them by forging an endorsement by *N* in favour of himself and of a nominee for himself and subsequently endorsing them over to a Bank. The Bank lodged the debentures with the corporation who cancelled them and issued fresh debentures to the Bank. On 30—11—1932, plaintiffs wrote to the corporation pointing out that *A* had forged *N's* signatures and asking the corporation to return the original debentures to the plaintiffs. They sent a reminder on 15—?—1933. On 6—3—1933, the corporation wrote to the plaintiffs asking them to wait for their next letter and to take no action in the meanwhile. After further correspondence the corporation wrote on 27—7—1933 to the effect that it was not possible to reply definitely, but that they could not give a definite promise to admit or deny the plaintiffs' claim and that they require to keep in view their position as against all parties concerned. On 11—8—1933, the plaintiffs filed a suit against the corporation for a declaration that the endorsement of *N* on the debentures was a forgery, and that the plaintiffs were the owners of the debentures and they further asked that the defendants may be ordered to transfer and hand over to the plaintiffs the said debentures, or alternatively, to pay the plaintiffs the market value thereof together with accrued interest.

Held, (1) that the action was clearly in tort and not in contract; (2) that the issue of a debenture containing an option of renewal, and the giving effect to that option were not acts done in direct execution of any power contained in the Act, but were acts done under a contract authorised, but not required, by the Act; (3) that the wrongful action charged against the corporation not being an action directly required by the statute, S. 527 of the Act had no application to the case; (4) that assuming S. 527 applied to the case, the cause of action for suit did not arise until a demand was made for return of the debentures and that demand is refused, and as the cause of action did not arise until 27—7—1933, the suit filed on 11—8—1933 was well within time. (*Beaumont, C.J. and Wadia, J.*) VISHWANATH SADASHIV *v.* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY. **I.L.R. (1938) Bom. 715=177 I.C. 636=11 R.B. 108=40 Bom.L.R. 685=A.I.R. 1938 Bom. 410.**

BOMBAY CITY POLICE ACT (IV OF 1902), S 22 (b) and (c), Rr. 1 and 12—*Applicability—Parking of motor car in front of owner's place of business for driving owner home—Offence—Conviction—Sustainability.*

S. 22 (*c*) of the Bombay City Police Act speaks about regulating conditions under which vehicles may remain standing in streets and R. 1 framed under that sub-section speaks of a person allowing his vehicle to be halted or kept standing at any street, while S. 22 (*b*) and R. 12 framed thereunder are quite general and speak of any person occupying a portion of a street and thereby causing obstruction or inconvenience to the public. Petitioner, a chauffeur, kept his car near the kerb on a public road in front of a shop, which was his master's place of business, where he took it in order to drive his master home at the close of the day. He was prosecuted and convicted under R. 12 framed under S. 22 (*b*) of the Bombay City Police Act.

Held, in revision, that the R. 12 did not apply to the case, and that the case fell under the specific words of Cl. (*c*) of S. 22 and the rule framed thereunder, rather than under any rule under S. 22 (*b*) of the Act; but that there being no proof that the obstruction was wilful, the conviction was wrong in law and must be set aside. (*Barlee and Divatia, JJ.*) EMPEROR *v.* BHANA MAKAN. **163 I.C. 847=9 R.B. 50=37 Cr.L.J. 883=38 Bom L.R. 432=1936 Cr.C. 702=A.I.R. 1936 Bom. 256.**

——S. 22 (c), R. 1—*Conviction under—Essentials—Proof of wilful obstruction.*

An obstruction under R. 1 framed under S. 22 (*c*) of the Bombay City Police Act must be wilful; and there can be no conviction under that rule unless that element is proved. (*Barlee and Divatia, JJ.*) EMPEROR *v.* BHANA MAKAN. **163 I.C. 847=9 R.B. 50=37 Cr.L.J. 883=38 Bom. L.R. 432=1936 Cr.C. 702=A.I.R. 1936 Bom. 256.**

——S. 27—*Construction and scope—Order under—Conditions for making—Commissioner's power to deport dangerous or undesirable character.*

S. 27 of the City of Bombay Police Act is of very limited application, and it is one of a group of sections which confer upon the Commissioner of Police power to deal with various emergencies so as to secure the public safety, and the orders to be made by the Commissioner under those sections are mainly of a strictly temporary character. It is clear from the language of S. 27 that the foundation for any order under the section is the movements or encampment of any gang or body of persons. Before any action can be taken under the section it must appear to the commissioner that the movements or encampment of a gang or body of persons are or is causing or calculated to cause danger or alarm, or a reasonable suspicion that unlawful designs are entertained by such gang or by any member or members thereof; then only can the Commissioner give directions to the members of the gang or body. He has no power under the section to deport any one whom he regards as a dangerous or undesirable character apart from his actions as a member of a gang or a body of persons moving or encamping in the city. (*Beaumont, C.J., Rangnekar, Wadia and Wassoodew, JJ.*) EMPEROR *v.* YARMAHOMED AHMEDKHAN. **I.L.R. (1938) Bom. 403=176 I.C. 839=11 R.B. 53=39 Cr.L.J. 792=40 Bom.L.R. 483=A.I.R. 1938 Bom. 338 (F.B.).**

——S. 27—*Order under—Validity—If can be impeached in Court of law—Prosecution for disobedience of order—Duty of Court—Burden of proof.*

BOM. CITY POLICE ACT (1902), S. 70.

An order made under S. 27 of the City of Bombay Police Act is, it is true, an order made by an executive officer and is not subject to appeal or revision in any Court. But that is very different from saying that when an attempt is made to impose a penalty for breach of an order under S. 27, the validity of the order cannot be impeached. In all charges before a Magistrate under S. 128 of the Act for disobedience of an order under S. 27, it is incumbent upon the Magistrate to be satisfied, first, that the accused was informed by the Commissioner of the charge against him with sufficient particularity to enable him to answer the charge, and that he was given an opportunity of answering; and, secondly, that there was material before the Commissioner of Police on which he could properly hold that the conditions of S. 27 had co ne into operation. In a prosecution under S. 128, the burden is not on the accused to show that the order is invalid; the burden is on the prosecution to satisfy the Court that the order alleged to have been disobeyed was a valid one. There is no reason why the Commissioner should not give evidence before the Court as to the general character of the material which he had before him. (*Beaumont, C.J., Rangnekar, Wadia and Wassoodew, JJ.*) EMPEROR *v.* YARMAHOMED AHMEDKHAN. **I.L.R. (1938) Bom. 403=176 I.C. 839=11 R.B. 53=39 Cr.L.J. 792=40 Bom.L.R. 483=A.I.R. 1938 Bom. 338 (F.B.).**

——**S. 70**—Scope—If subject to S. 167 (2), Cr. P Code. *See* CR. P. CODE, S. 167 (2). **A.I.R. 1937 Sind 251.**

——**S. 128**—Charge under—Burden of proof—Validity of order disobeyed—If can be gone into. *See* BOMBAY CITY POLICE ACT, S. 27. **40 Bom.L.R. 483 (F.B.).**

BOMBAY CIVIL COURTS REGULATION (IV OF 1827), S. 26—Law to be applied in the trial of suits. *See* CONFLICT OF LAWS. **39 Bom. L.R. 1324.**

BOMBAY CIVIL COURTS ACT (XIV OF 1869), S. 8—*Applicability—Suit for account in Second Class Sub-Court in Bombay—Plaint valued at Rs. 200—Decree for over Rs. 5,000—Appeal—Forum.*

In a suit for account filed in the Court of a Second Class Subordinate Judge in Bombay, the plaint was valued at Rs. 200, but the decree passed was for over Rs. 5,000.

Held, that S. 8 of the Bombay Civil Courts Act was the law governing appeal, and under that section, the appeal lay to the District Court and not to the High Court. (*Macklin and Sen, JJ.*) GOPAL TRIMBAKRAO *v.* CHIMABAI PRABHAKAR. **I.L.R. (1938) Bom. 833=11 R.B. 146=178 I.C. 116=40 Bom.L.R. 1040=A.I.R. 1938 Bom. 464.**

——**S. 23 (5)**—*Construction and scope—Transfer of suit—Powers of Subordinate Judge—If controlled by S. 24, C. P. Code—Transfer of suit after another Judge has taken cognizance—Competency.*

The powers of transfer of suits conferred on a Subordinate Judge by S. 23 (5) of the Bombay Civil Courts Act are controlled by the provisions of S. 24 of the C. P. Code and are necessarily limited to administrative orders allocating business. Consequently an order by a Subordinate Judge transferring a suit pending before another Subordinate Judge and after the latter had taken cognizance of the suit to some other Judge is incompetent. (*Wassoodew, J.*) AJAM IBRAM *v.* HAVA BIBI. **I.L.R. (1939) Bom. 472=41 Bom.L.R. 892=185 I.C. 813=12 R.B. 266=A.I.R. 1939 Bom. 485.**

BOM. CIVIL COURTS ACT (1869), S. 26.

——**S. 24**—*If controlled by S. 8, Suits Valuation Act—Suit for declaration and injunction—Reliefs valued at Rs. 230—Properties worth over Rs. 15,000—Valuation for jurisdiction—Second class subordinate Judge—Jurisdiction to try.*

S. 24 of the Bombay Civil Courts Act has to be read with S. 8 of the Suits Valuation Act, which again must be read with the Court Fees Act. Under S. 7 (*IV*) (*c*) and (*d*) of the Court-Fees Act a suit to obtain a declaratory decree with consequential relief or for an injunction has to be valued according to the amount at which the relief sought is valued in the plaint. The same is the value for purposes of jurisdiction. Where the plaintiff values the suit at Rs. 230, though the properties which are the subject-matter of the suit are worth over Rs. 15,000, the valuation for jurisdiction is governed by S. 8 of the Suits Valuation Act which must affect the construction of S. 24, Bombay Civil Courts Act. A second class subordinate Judge has therefore jurisdiction to try the suit, though the properties are worth more than Rs. 5,000. (*Beaumont, C.J.*) JAMNADAS *v.* CHANDULAL. **I.L.R. (1937) Bom. 623=168 I.C. 449=9 R.B. 369=39 Bom.L.R. 138=A.I.R. 1937 Bom. 167.**

——**S. 26**—*Appeal — Forum—Administration suit—Subject-matter valued for court-fees at sum below Rs. 5,000—Plaint returned by First Class Subordinate Judge for presentation to proper Court—Appeal—If lies to District Court or to High Court—Sind Courts Act, S. 8.*

In suit for administration the court-fees payable determine the jurisdiction of the Court and the Court to which an appeal lies depends not upon the pecuniary jurisdiction of the Subordinate Court, but on the value of the subject-matter in dispute. Hence, where the subject-matter valued for purpose of court-fee is below Rs. 5,000 and First Class Sub-Judge has returned the plaint for presentation to the proper Court an appeal from his order lies to the District Court and not to the High Court. Since the Subordinate Judge does not decide the suit in such a case, an appeal does not lie to the High Court under S. 26, Bombay Civil Courts Act. S. 8 of the Sind Courts Act is the appropriate section. The Bombay Civil Courts Act, the Sind Courts Act, and the Suits Valuation Act must be read with the Court-Fees Act. (*Davis, J.C. and Tyabji, J.*) KALAWANTIBAI *v.* UDHAVDAS GIRDHARIDAS. **I.L.R. (1940) Kar. 1=185 I.C. 244=12 R.S. 154=A.I.R. 1939 Sind 305.**

——**Ss. 26, 28-A and 32**—*Appeal—Forum—Suit below Rs. 5,000—Decision of Sub-Judge, First Class—Appeal to High Court—Competency.*

Where a suit is filed against the manager of the Incumbered Estates in Sind in the Court of the Subordinate Judge, First Class, but the subject-matter of the suit is below Rs. 5,000, an appeal from the decision of Subordinate Judge lies to the District Court and not to the High Court. Jurisdiction is determined by pecuniary conside-

BOM. CIVIL COURTS ACT (1869), S. 26.

rations and not by the powers of the Subordinate Judge. (*Davis, J.C. and Mehta, A J.Cs*) NATHASINGH MULSINGH *v.* MANAGER, INCUMBERED ESTATES IN SIND. **30 S.L.R. 335=9 R.S. 107=165 I.C. 742=A.I.R. 1936 Sind 190.**

——**S. 26**—Suit for administration of estate in Court of First Class Subordinate Judge valued at Rs. 200—Decree—Appeal—Forum—High Court or District Court. *See* COURT-FEES ACT, S. 7 (*iv*) (*f*) AND (*v*). **38 Bom L.R. 754.**

——**S. 40**—*Clerk authorised to receive and register plaints—Power to accept plaint outside Court hours and outside Court buildings—C. P. C., O. 4, R. 1.*

There is nothing in O. 4, R. 1, C. P. Code, to suggest that the plaint must be presented during Court hours or within the precincts of the Court. The clerk of the Court who is a duly constituted officer of the Court with power to accept a plaint under S. 40 of the Bombay Civil Courts Act can accept plaints outside office hour, and outside the Court buildings, although he is not bound to so accept. (*Beaumont, C. J.*) RATAN JOYAKISAN SHUKLA *v.* BAPU HIRAJI KUNBI. **I.L.R. (1937) Bom. 136=166 I.C. 896=9 R.B. 261=38 Bom. L.R. 1196=A.I.R. 1937 Bom. 25.**

BOMBAY CIVIL MEDICAL CODE, R. 7—*Applicability—If confined to cases brought to hospitals by police—"Brought"—Meaning of.*

The word "brought" in R. 7 of the Bombay Civil Medical Code should not be unduly stressed; it really does not mean more than "is admitted." Rule 7 cannot be regarded as having reference only to cases brought to the hospitals by the police themselves. (*Broomfiled and Norman, JJ.*) S.D. MARATHE *v.* PANDRANG NARAYAN. **I.L.R. (1938) Bom 770=177 I.C. 589=11 R.B. 98=40 Bom. L.R. 825=39 Cr.L.J. 903=A.I.R. 1938 Bom. 419.**

BOMBAY CO-OPERATIVE SOCIETIES ACT (VII OF 1925), Ss. 54 and 59 (1) (a)—*Award under—If "decree"—Application for execution within three years of Registrar's certificate—If barred—Limitation Act, Art. 182.*

An award of an arbtrator made under S. 54 is not a decree of a Civil Court within the meaning of Art. 182 of the Limitation Act. An application for execution of such an award within three years of the grant of a certificate by the Registrar under S. 59 (1) (*a*) of Act is in time and not barred.

Quaere.—Whether the award, on the grant of a certificate under S. 59 becomes a "decree of a Civil Court" within the meaning of Art. 182 of the Limitation Act. (*Beaumont, C.J. and Wadia, J.*) RAGHAVENDRA *v* INDUSTRIAL BANK, GULEDGUD. **165 I.C. 512=9 R.B. 147=38 Bom.L.R. 927=A.I.R. 1936 Bom. 396.**

——**Ss. 54 and 57**—*Scope and effect—Award by arbitrator—Suit to set aside on ground of fraud and undue influence—Jurisdiction of Civil Court.*

The terms of S. 57 of the Bombay Co-operative Societies Act *prima facie* show that the award of the arbitrators or a decision by the Registrar or his nominee cannot be called in question in any Civil Court. When a question may arise as to whether there has been undue influence or fraud in any transaction involved in the reference to the Registrar under the Act, that would be a question

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for the arbitrator to decide and would not be a matter on which a Civil Court would be competent to inquire. It is not open to a Civil Court to go behind the award of the arbitrator and to call in question any matter which might have arisen in connection with the decision of the dispute which necessitated that award. (*Wadia and Sen, JJ.*) DHARWAR URBAN CO-OPERATIVE BANK, LTD. *v.* RAMCHANDRA. **169 I C. 439=10 R B. 27=39 Bom.L.R. 249=A.I.R. 1937 Bom. 231.**

——**Ss. 57 and 59**—*Award—Executability by Civil Court.*

Awards made under the Act which have become final are not liable to be questioned by Courts under S. 57 and are under S. 59 executable by Civil Court in the same manner as decrees of Civil Court, being effective from the date on which they are made and not only from the date when they are filed. (*Tyabji, J.*) KARACHI URBAN CO-OPERATIVE BANK *v.* SAHIBDIN ALANDIN. **A.I.R. 1940 Sind 147.**

——**S. 59 (1) (b)**—*Award—Execution—Sale proceeds in hands of Collector—Liability to attachment at the instance of other creditors—Rateable distribution—Right of.*

S. 59 (1) (*b*), Bombay Co-operative Societies Act, provides for the execution of an award according to law applicable for the recovery of arrears of land revenue. Where therefore an award under the Bombay Co-operative Societies Act is executed under S. 59 (1) (*b*) of that Act according to the procedure provided for recovery of arrears of land revenue by the sale of the judgment-debtor's land, the sale proceeds in the hands of the Collector are not liable to attachment at the instance of other creditors of the person whose land is sold as the sale proceeds are specifically to be applied in payment of the claim of the person obtaining award. The principle of S. 73, C. P. Code, cannot be applied to such case. (*Lobo, J.*) KHUDABADI AMIL CO-OPERATIVE CREDIT BANK, LTD. *v.* HYDERABAD AMIL CO-OPERATIVE URBAN BANK, LTD. **I.L.R. (1939) Kar. 104=176 I.C. 709=11 R.S. 32=A.I.R. 1938 Sind 157.**

——**S. 59 (1) (b)**—Collector acting under—If "Court"—Proceedings under—If step in aid of execution. *See* LIMITATION ACT, ART. 182 (5). **40 Bom.L.R. 889.**

——**S. 70**—*Scope—Mandatory nature of—Failure to give requisite notcie—Effect.*

The terms of S. 70 of the Bombay Co-operative Societies Act are mandatory, and the omission to give the notice as required by the section makes a suit unsustainable *in limine*. (*Wadia and Sen, JJ.*) DHARWAR URBAN CO-OPERATIVE BANK, LTD. *v.* RAMCHANDRA **169 I.C. 439=10 R.B. 27=39 Bom.L.R. 249=A.I.R. 1937 Bom. 231.**

BOMBAY COURT OF WARDS ACT (I OF 1905), Ss. 4 (1) and 10 (1) (a)—*Relative scope and distinction—Temporary custody of landholder's property under S. 10—Effect of—Subsequent execution of promissory note by landholder—Subsequent assumption of superintendence by Court of Words—If relates back to date of temporary custody—Suit on promissory note—Maintainability—S. 37.*

Taking temporary custody of the property of a disqualified landholder under S. 10 (1) (*a*) of the Bombay Court of Wards Act is not the same thing

BOM. COURT OF WARDS ACT (1905), S. 31.

as the assumption of superintendence of his property under S. 4 (1) of the Act. The two kinds of orders have to be distinguished in nature and importance. The conditions necessary for assuming superintendence under S. 4 (1) are: (1) disqualification under S. 5; (2) previous sanction of the Government; (3) the actual assumption by the Court of Wards or some declaration to that effect; and (4) notification in the Government Gazette setting out the fact of assumption and the date of the sanction. If these conditions are fulfilled, then only the property of the landholder is deemed to be under the superintendence of the Court of Wards. The Act never intended that the assumption of superintendence by the Court of Wards under S. 4 (1) should relate back to the temporary custody under S. 10 or the order for it. S. 37 of the Act has no application to a liability incurred by the disqualified landholder prior to the assumption of superintendence under S. 4 (1), though after the taking of temporary custody under S. 10. Where after the Court of Wards have taken temporary custody of the property of a disqualified landholder the latter executes a promissory note and the sanction for the assumption of superintendence under S. 4 (1) is given by the Governor-in-Council only subsequently, the property of the landholder must be deemed to be under the superintendence of the Court of Wards only from the date of such sanction, and he becomes a Government ward only as and from that date. The promissory note executed prior to such date does not fall within the prohibition of S 37 of the Act, and there is no legal bar to a suit being maintained on it in a Civil Court.

Tyabji, J.—The order for the temporary custody and protection of the property is not linked up with the scheme of the Act for the assumption of superintendence; whereas S. 37 is a necessary corollary of the assumption of superintendence. To give to an order under S. 10 (1) (*a*) the effect for which the Act requires compliance with Ss. 4,5, 13 and 14, would not be giving efficacy to the Act, but setting the Act at nought. (*Rangnekar, Ag. C. J. and Tyabji, J.*) BOMBAY NAMDEO CO-OPERATIVE AGENCY, LTD *v.* VIRDHAVAL. **170 I.C. 162=10 R.B. 55=39 Bom.L.R. 189=A.I.R. 1937 Bom. 266.**

——**S. 31**—*Applicability and construction—Suit on promissory note executed by ward's ancestor—Suit against ward as legal representative of maker of note—Notice of suit—Necessity.*

The words "suit relating to the person or property of any Government ward," in S. 31 of the Bombay Court of Wards Act are very wide and include a suit to enforce the liability of a ward as legal representative of his deceased ancestor under a promissory note executed by such ancestor, in other words, the section applies to a suit in which the liability sought to be enforced against the property was incurred before the property was acquired by the defendant. Notice of suit is therefore essential in the case of the suit, and the omission to deliver a notice renders the suit incompetent. (*Broomfield and Tyabji, JJ.*) PARSHRAM SHIVAJIRAM *v.* GULABSING FATTESING. **167 I.C. 816=9 R.B 342=38 Bom.L.R. 1306=A.I.R. 1937 Bom. 113.**

BOM. DT. MUN. ACT (1901), S. 23.

——**S. 37**—Applicability—Promissory note by disqualified landholder after taking of temporary custody but before assumption of superintendence by Court of Wards—Validity—Suit on—Competency. *See* BOMBAY COURT OF WARDS ACT, Ss. 4 (1) AND 10 (*a*). **39 Bom.L.R. 189.**

——**S. 44-A**—*Power to call for documents.*

S. 44-A gives the Court of Wards power to call for production of documents for the purposes of the Act referred to in S. 4 and other sections of the Act and not only for the purposes of Ss. 15 and 16; and an enquiry under Ss. 15 and 16 is not a condition precedent for the exercise of the power. So also the mere fact that a claimant to the estate has filed a civil suit against the Court of Wards would not deprive it of the power to call for documents under S. 44-A. (*Davis, J. C. and Mehta J.*) TAKHTRAM TULSIDAS *v.* EMPEROR. **I.L.R. (1939) Kar. 238=40 Cr.L.J. 75=11 R.S. 90=178 I.C. 381=A.I.R. 1938 Sind 217.**

BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901), Ss. 11 (1) (c) (iv) and 22—*Orders of District Judge and Assistant Judge in appeal relating to amendment of list of voters—Revision by High Court*—Persona designata *or Court.*

The whole scheme of Act III of 1901 is that in matters of dispute relating to Municipal election, while inquiry shall be held by a Judicial Officer as distinct from a Revenue Officer, that Judicial Officer shall hold an inquiry as a *persona designata* and not as a Court. It was not the intention of the Legislature that the words "judicial authority" in Cl. (*iv*) of sub-S. (1) (*c*) of S. 11 should be construed to mean a Court as such. There is no distinction between an inquiry relating to the validity of the election itself and objections regarding the lists of voters. Hence the orders of the District Judge and of the Assistant Judge in an appeal relating to the amendment of the list of voters are in the capacity of *persona designata* and therefore an application against such orders does not fall under S. 115, C. P. Code. (*Davis, J.C. and Dadiba C. Mehta, J.*) HARCHANDRAI *v.* TANDO ADAM MUNICIPALITY. **I.L.R. (1939) Kar. 121=176 I.C. 826 =11 R.S. 38=A.I.R. 1938 Sind 153.**

——**(as amended in 1930), S. 23 (7-A)**—*Construction—Right of retiring president to preside—If exclusive—Non-compliance—If fatal to validity of proceedings.*

Cl. (7-A) of S. 23 of the District Municipal Act, which was inserted by the Amending Act XXVI of 1930 confers on the retiring president the exclusive right and privilege of convening the meeting and presiding until a new Chairman is elected for the meeting. It is the intention of the Legislature that the retiring president only and no one else should have the right to preside. The natural meaning of the language of the clause is that the retiring president is an integral part, or that his presence in the chair is an integral part, of the machinery for the election of a Chairman at the meeting at which the new president has to be elected. It is not a reasonable construction of the clause to hold that it is a mere matter of procedure which can be disregarded without affecting the validity of the proceedings. (*Broomfield and Tyabji, JJ.*) TRIMBAK RAVJI *v.* VISHNU WAMAN. **I.L.R. (1937) Bom. 158=167**

BOM . DT. MUN. ACT (1901), S. 46.

I.C. 548=9 R.B. 332=38 Bom.L.R. 1314=A.I.R. 1937 Bom. 114.

——**Ss. 46 and 48**—*Bye-laws and rules—Powers of Municipality to make—Rule for levy of toll—Bye-law imposing penalty for breach of rule—If competent.*

Matters relating to payment of tolls ought to be dealt with by rules under S. 46 of the Bombay District Municipal Act, and not by bye-laws under S. 48. A bye-law framed by a Municipality imposing a penalty for the infringement of a rule under S. 46, prescribing payment of toll-tax on conveyances is not within the powers of a Municipality under S. 48. (*Barlee and Tyabji, JJ.*) EMPEROR *v.* VISHNUSHANKAR. **I.L.R. (1937) Bom. 304=9 R.B. 365=168 I C. 219=38 Cr.L.J. 538=39 Bom. L.R. 89=A.I.R. 1937 Bom. 150.**

——**S. 50 (2) (f)**—*"Public street"—Sub-soil—If vests in Municipality—Public street converted to private street—Effect on right of owner to land.*

It does not follow from S. 3 (13) of the Bombay District Municipal Act that the soil of every public street must necessarily be of the ownership of the Municipality. "Public streets" in S. 50 (2) (*f*) cannot include the sub-soil, unless it is definitely proved that the soil of any public street belongs to the Municipality, it cannot be presumed to be of the ownership of the Municipality merely on the ground that it is used as a public street. The section cannot have the effect of depriving a person of any right of private property that he might have in the land used as a public street, nor does it vest the sub-soil of such land in the Municipality. When such land is no longer required as a public road or when it is converted into a private street from a public street, the owner can contend that by reason of such conversion the land of the street reverts to him. (*Lokur, J.*) CHHOTALAL PANACHAND *v.* BOROUGH MUNICIPALITY OF NADIAD. **187 I.C. 166 =12 R B. 417=41 Bom.L.R. 1097=A.I.R. 1939 Bom. 501.**

——**S. 65 (3)**—*Scope—Non-compliance—Confirmation of increased assessment without hearing assessee—Legality—Suit to contest—If barred—S. 86.*

S. 65 (3) of the Act lays down an essential condition, namely, that the assessee who objects to an increase in his assessment must be afforded an opportunity of being heard; and when that is not complied with the order passed by the assessing committee confirming the increased assessment is without jurisdiction and *ultra vires*. A suit by the assessee to cancel such assessment as being illegal and *ultra vires* is maintainable in a Civil Court and is not barred by S. 86 of the Act. S. 86 is only an enabling section and does not oust the jurisdiction of the Civil Courts in a case where the attack goes to the very root of the assessment fixed. (*Rupchand and Mehta, A.J.Cs.*) KARSONDAS DHARAMSI *v.* THE KARACHI MUNICIPALITY. **30 S L.R. 59=164 I.C. 170=9 R.C. 43 =A.I.R. 1936 Sind 114.**

——**S. 86**—Construction and scope—Increased assessment to house-tax—Confirmation without hearing assessee—Suit to contest in Civil Court—If barred. *See* THE BOMBAY DISTRICT MUNICIPAL ACT, S. 65 (3). **30 S.L.R. 59=A.I.R. 1936 Sind 114.**

BOM. DT. POLICE ACT (1890), S. 48.

——**S. 96**—Scope—Powers of Municipality—Refusal of permission to build on land which is intended to be acquired later by Municipality—If justified. *See* LAND ACQUISITION ACT, S. 23. **39 Bom. L.R. 142=A.I.R. 1937 Bom. 177.**

——**S. 96 (5)**—*Offence under—Ingredients—Prosecution—Notice under S. 96 (3)—If condition precedent to maintainability.*

In order to establish an offence under S. 96 (5) of the Bombay District Municipal Act, all that is necessary is to show that the accused had begun a construction, or started altering an existing construction, or added to it or re-constructed it, without giving a notice thereof in writing to the Municipality as required by S. 96 (1). The question whether a wrong notice was given by the Muncipality or no notice at all was given is entirely immaterial. The Municipality is not bound to give the notice mentioned in S. 96 (3) before launching a prosecution although ordinarily it would. But whether it does or does not give, the offence is complete under sub-S. (5) as soon as a person begins any construction, alteration, addition or reconstruction without the notice under sub-S. (1). (*Rangnekar, Ag. C.J. and Tyabji, J.*) BHAGUJI *v.* THE ALANDI MUNICIPALITY. **166 I.C. 925=9 R.B. 267=38 Bom.L.R. 1098=A.I.R. 1937 Bom. 37.**

——**S. 139**—Scope—If overrides S. 1 of Bombay Markets and Fairs Act. *See* BOMBAY MARKETS AND FAIRS ACT, S. 1. **42 Bom.L.R. 584.**

BOMBAY DISTRICT POLICE ACT (IV OF 1890, as amended in 1920), S. 6—Assistant Superintendent of Police—Power to issue search warrant under Prevention of Gambling Act. *See* BOMBAY PREVENTION OF GAMBLING ACT, SS. 6 AND 7. **42 Bom L.R. 203.**

——**S. 39-A**—Order by District Magistrate under—Revision application to High Court—Competency. *See* CR. P. CODE, S. 435. **A.I.R. 1939 Sind 340.**

——**S. 48 (1) (a)**—*Rule-making powers under—Extent and limits—Rule prohibiting processions along streets in specified areas except with pass obtained previously from police authorities—If* ultra vires.

The rules which a District Superintendent or an Assistant Superintendent can make under S. 48 (1) (*a*) of the Bombay District Police Act must be rules with reference to possible future events, but the rules as made can only regulate the conduct of persons as members of assemblies and processions. A rule which provides that no procession shall pass on or along the streets within specified areas unless a pass has been obtained from the Sub-Divisional Police Officer, having jurisdiction, or the District Superintendent of Police, and upon the conditions mentioned in the pass except *bona fide* religious or funeral or marriage processions, is not *ultra vires*. Such a rule no doubt involves that a person requiring a pass shall apply for it before the procession actually starts, but the actual prohibition under such a rule is against some action by a person who is at the time a member of an assembly or procession. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* DINKAR KRISHNALAL. **184 I.C. 203=12 R.B. 154=40 Cr.L.J. 889=41 Bom.L.R. 557=A. I.R. 1939 Bom. 364.**

BOM. DT. POLICE ACT (1890), S. 71.

——S. 71—*Scope—Order under S. 42 prohibiting playing of music—Ringing of temple bell at time of worship—If breach—Presence of*—Mens rea—*Effect.*

A notification was issued by the District Magistrate of Poona under S. 42 of the Bombay District Police Act, prohibiting the playing of music in or at a Hindu temple, which was specified in the notification. The accused, a worshipper at the temple, rang but once a small temple bell when he worshipped there, as was usual for the worshippers to ring it when they visited the shrine to make *darshan*.

Held, that the bell was not a musical instrument, and the mere ringing of the temple bell by the accused did not amount to the making of a music, although a bell could be used for the production of music, and the accused was not therefore liable to conviction for breach of the notification in question.

Wasoodew, J.—In as much as the act of the accused in ringing the bell was in itself not contrary to the notification, the mere presence of *mens rea* in the accused would not render him liable to conviction, because both the intention and the act must concur before any one could be convicted. (*Barlee and Wasoodew, JJ.*) EMPEROR *v.* RAMAKRISHNA GOPAL BHIDE. **174 I.C. 478=39 Cr.L J. 408=10 R.B. 454=40 Bom.L.R. 59=A.I.R. 1938 Bom. 179.**

BOMBAY FINANCE ACT (1932 as amended in 1939), Part VI—*Scope—If* ultra vires—*Urban Immovable Property Tax—If tax on income or tax on capital value of lands and buildings—Government of India Act* (1935), *S.* 100 (1) *and* (3)—*Income-tax Act, S.* 9.

Part VI of the Bombay Finance Act of 1932, as amended in 1939, is not *ultra vires* the Provincial Government, and the Urban Immovable Property Tax imposed by that Act is a valid tax. It is a tax on lands and buildings, imposed on the owners *qua* owners, and assessed by a somewhat arbitrary but not inequitable standard, which is not dependent either on the income of the assessees or on the capital value of the properties. It is not a tax upon income. The charging S. 22 of the Act imposes the tax on lands and buildings, and not on income and the basis of the tax is annual value. This is an arbitrary basis which might be applied as well for ascertaining capital value as for ascertaining income. The fact that some concession is allowed to the small owner, and that an allowance may be made where the property is shown to produce no income cannot alter the nature of the tax. It is impossible to say that the tax is a tax on the capital value of the lands and buildings as it is imposed without any relation to the capital value except so far as such value can be ascertained by reference to rateable value. The tax in question falls within item 42 of the Provincial List, List 3 of S. 100 (3) of the Government of India Act, 1935, and does not fall under items 54 and 55 of the Federal List, List 1 of S. 100 (1) of the Government of India Act.

Kania, J.—If land and buildings are treated as investments and, the return, as income, is taxed, it is a tax on income. On the other hand, if the tax is on the lands and buildings themselves, and the assessment is on a standard named by the legislature which may fluctuate or vary on the produce or income from it, it would be tax on the property. The measure of the tax is not itself the test. From the fact that the owner is liable to pay the tax it does not follow that the tax is income-tax. The impugned tax is not a tax on income. (*Beaumont, C.J., Broomfield and Kania, JJ.*) SIR BYRAMJI JEEJEEBHOY *v.* PROVINCE OF BOMBAY. I.L.R. (1940) Bom. 58=186 I.C. 817=12 R.B. 379=3 Fed.L.J. (Part II) 25=42 Bom.L.R. 10=1939 I.T.R. 670=A.I.R. 1940 Bom. 65 (F.B.).

BOMBAY HEREDITARY OFFICES ACT (III OF 1874), S. 4—*"Watandar"—Meaning of—Person holding watan lands without acquiring office—Status of—Amendment Act* (*V of* 1886), *S.* 2—*"Watandar family"*

A "watandar" as defined by S. 4 of the Bombay Hereditary Offices Act means a person having an hereditary interest in a watan, *i e*, the hereditary office and the property attached thereto, and includes, so far as watan property is concerned, a person holding watan property acquired in the manner set out in the definition. But a person who merely acquires watan property without acquiring the office is not a watandar, and to such a person and his family the special law of inheritance enacted by the Watan Amending Act of 1886 has no application.

N. J. Wadia, J.—"Watandar family" in S. 2 of the Watan Amendment Act of 1886 must be taken to mean the family of a person who has a hereditary interest in the property of a watan and in the hereditary office and the rights and privileges attached to that office (*Beaumont, C.J. and Wadia, J.*) TARABAI *v.* MURTACHARYA. **I.L.R. 1939 Bom. 576=185 I.C. 874=12 R.B. 275=41 Bom L.R. 924=A.I.R. 1939 Bom. 414.**

——S. 5—*Permanent lease of watan land—Validity.*

A permanent lease of watan lands is expressly prohibited by S. 5 of the Bombay Watan Act. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB *v.* LAXMANAPPA RAMAPPA. **178 I C 854=11 R B. 198=40 Bom.L.R. 1015=A.I R. 1938 Bom. 492.**

——S. 5—Scope—If overridden by Bombay Land Revenue Act, S. 217. *See* BOMBAY LAND REVENUE ACT, S. 217. **40 Bom. L.R. 461.**

——S. 9—*Construction—Jurisdiction of Collector and Revenue Officer under—Alienation when to be declared null and void—Jurisdiction to decide whether there has been an alienation—Decision of Revenue Officer—Finality.*

Under S. 9 of the Bombay Hereditary Offices Act (Watan Act), an alienation of a Watan (that is the passing of the Watan into the ownership or beneficial possession of a person not a Watandar of the same Watan), before the Act came into force may be declared null and void by the Collector whenever it has taken place (*a*) otherwise than by virtue of a decree or order of a British Court and (*b*) without the consent of the Collector and transfer of ownership in the revenue records. The two conditions laid down by the section must both be satisfied before alienation can be set aside. The consent of the Collector must relate to the time when the lands pass to the ownership and beneficial possession of a non-watandar. Unless the alienation has taken

place before the Act without the consent of the Collector, and unless in addition to it the alienation has taken place otherwise than by virtue of a decree or order, the revenue authorities have no power or jurisdiction to declare it null and void. A Collector acting under S. 9 is not in the same position as a Court and has no jurisdiction to decide finally the facts on which his jurisdiction depends. A Revenue Officer can exercise the prescribed powers if the conditions mentioned in the statute are satisfied and has no jurisdiction to determine finally whether those conditions are in fact satisfied. If he holds after inquiry that a land is Government land and deals with it accordingly, or if he holds that there has been a breach of the conditions of an occupancy and forfeits the holding, but the Civil Court comes to the conclusion that the land was not Government land or that the conditions of the occupancy have not been broken, then the order of the Collector will be treated as a nullity which does not require to be set aside. It will be regarded as an order of an officer not "duly authorised in that behalf" within the meaning of S. 4 (*a*) (3) of the Revenue Jurisdiction Act. (*Broomfield and Tyabji, JJ.*) MALLAPPA *v.* TUKKO. **I.L.R. (1937) Bom. 464=170 I.C. 801=10 R.B. 121=39 Bom. L.R. 288=A.I.R. 1937 Bom. 307.**

——**S. 9**—*"Passed by virtue of a decree into the ownership or beneficial possession, etc."—Meaning of.*

The words "passed by virtue of a decree into the ownership or beneficial possession of a person not a Watandar" surely imply that there must have been a change of ownership or possession effected by the decree. If the transfer of ownership and possession has taken place previously, and the decree merely recognises or confirms it, it cannot with propriety be said that it has taken place by virtue of a decree. (*Broomfield and Tyabji, JJ.*) MALLAPPA *v.* TUKKO, **I.L.R. (1937) Bom. 464=170 I.C. 801=10 R.B. 121=39 Bom. L.R. 288=A.I.R. 1937 Bom. 307.**

——**Ss 9 and 11**—*Jurisdiction of Collector—Status of watandar—Power to adjudicate on—Decision by Collector as to whether or not there has been alienation—Finality—If binding on Civil Courts.*

The determination of the status of being a watandar is one of the matters from which the jurisdiction of the Collector is excluded, and there is no provision in the Watan Act (Hereditary Offices Act) for the determination by the Collector of what persons shall be held to be watandars, but only what persons shall be recognised as representatives of watandars. There is no warrant for holding that the Civil Courts are bound by the finding of the Collector on the question of fact whether there has or has not been an alienation, in view of the language of Ss. 9 and 11 of the Watan Act. (*Broomfield and Tyabji, JJ.*) MALLAPPA *v.* TUKKO. **I.L.R. (1937) Bom 464=170 I.C. 801=10 R.B. 121=39 Bom. L.R. 288=A.I.R. 1937 Bom. 307.**

——**S 11**—*"Alienation"—Meaning of—If covers title by immemorial possession—Bombay Land Revenue Code, S. 83.*

The alienation referred to in S. 11 of the Bombay Watan Act must be of the nature described in S. 10. The alienation described in S. 11, read with S. 10, covers any case where a watan or any part thereof has passed without the sanction of the Government into the ownership or beneficial possession of any person other than the officiator or, if the property has not been assigned, into the ownership or beneficial possession of any person not a watander of the same watan. But the alienation referred to in S. 11 does not cover a title sought to be made under S.83 of the Bombay Land Revenue Code by possession from time immemorial.

Quaere.—Whether the alienation under S. 11 would cover other cases of a title sought to be established by adverse possession. (*Beaumont, C.J.*) SHAMRAO *v.* HOLYA SUBHANNA. **172 I.C. 464=10 R.B. 283=39 Bom. L.R. 920=A.I.R. 1937 Bom. 494.**

——**S. 11**—*"Alienation"—Actual transfer or conveyance by watandar to stranger—If necessary.*

The word "alienation" in S. 11 does not necessarily imply a transfer or conveyance by a watandar to a stranger. What is meant by "alienation" is only the passing of watan property into the ownership or beneficial possession of any person other than the officiator or a person not a watandar of the same watan as the case may be. No transfer or conveyance by a watandar is necessary at all. (*Broomfield and Tyabji, JJ.*) KHANGOUDA *v.* SECRETARY OF STATE FOR INDIA. **I.L.R. (1937) Bom. 236=168 I.C. 73=9 R.B. 356=38 Bom.L.R. 1308=A.I.R. 1937 Bom. 121.**

——**Ss. 11 and 11-A**—*Watan lands—Entry of one adopted son as representative watandar—Adoption held invalid by competent Court—Orders annulling alienation and resuming lands and removing name from—If* ultra vires—*Suit by adopted son in Civil Court for register of declaration of title and for restoration of land—If barred—Revenue Jurisdiction Act, S.* 4 (a).

The holder of a watan died in about 1877 leaving three widows, *F., Sh.* and *Sa.* The last gave birth to a posthumous son who, however, died shortly after birth; subsequently *F* adopted one *C* in 1901 and the plaintiff in 1908. The plaintiff was put in possession of the property of the deceased watandar and the Revenue authorities recognised his adoption and entered his name in place of the deceased watandar as one of the representative watandars, in 1909. In 1920, *C* sued the plaintiff claiming the property as the adopted son of the deceased watandar. The Court held both adoptions invalid and the suit was dismissed finally. The plaintiff, however, continued in possession, but in 1926, the 4th defendant relying on the decision of the Civil Court applied for restoration of the watan land to him as the heir of the deceased posthumous son of the former watandar. In September, 1926, the District Deputy Collector, on the application of the 4th defendant decided that the plaintiff was a stranger to the watan, and held the alienation of the lands to him was null and void and ordered the removal of his name. In June, 1927, the Commissioner, on the recommendation of the Collector, cancelled the order of 1909 by which the plaintiff's name had been entered; and ordered the District Deputy Collector to hold a fresh enquiry. As a result of the enquiry, the latter held that the lands should be

restored to defendants 2 and 3, members of the watandar family and his order was confirmed on appeal by the Collector in June, 1929. Plaintiff then field a suit in 1930 against the Secretary of State and defendants 2 to 4 for a declaration of the title to hold the property and for restoration of the same. It was contended that the order setting aside the alienation and resuming the land and the order removing the plaintiff's name from the register were *ultra vires*. There was a previous suit in 1928 by the plaintiff against the 4th defendant seeking a declaration that he was the validly adopted son, but it was dismissed.

Held. (1) if *F* had power to adopt at all, her adoption of *C* in 1901 would *prima facie* be valid, and that would render the subsequent adoption of the plaintiff invalid, and the Revenue authorities were therefore justified in holding the plaintiff to be a stranger to the watan, and the orders annulling the alienation under S. 11, and resuming the lands under S. 11-A, were legal orders and not *Ultra vires*; (2) that the suit regarded as a claim against Government relating to property appertaining to the office of a village patil, was barred under S. 4 (*a*) (1) of the Bombay Revenue Jurisdiction Act; (3) that it also apparently fell under S. 4 (*a*) (4), regarded as a claim against Government relating to land declared by Government to be held for service; and (4) that the orders of the Revenue authorities not being *ultra vires* the suit, would be barred under Cl. (3) of S. 4 (*a*) as well as under Cls. (1) and (4) of S. 4 (*a*) of the Revenue Jurisdiction Act. (*Broomfield and Tyabji, JJ.*) KHANGOUDA *v.* SECRETARY OF STATE FOR INDIA I.L.R. (1937) Bom. 236=168 I.C. 73 =9 R.B. 356=38 Bom. L.R. 1308=A.I.R 1937 Bom. 121.

——S. 15—*"Holder"—Meaning of—Widow of deceased watandar—Competency to effect—Commutation of service.*

The widow of a deceased watandar whose name has been entered as representative watandar is not a holder of the watan within the meaning of S. 15 of the Bombay Hereditary Village Offices Act, and she is not consequently competent to enter into an agreement for commutation of services under that section. (*Broomfield and Macklin, JJ.*) GOVERNMENT OF BOMBAY *v.* GANPAT MANOHAR. I.L.R. (1939) Bom. 482=186 I.C. 324=12 R.B. 321=41 Bom.L.R. 772=A.I.R. 1939 Bom. 398.

——S. 34—*"Decree"—Meaning.*

The word "decree" in S. 34 must be deemed to include the judgment on which the decree is based. (*Broomfield and Tyabji, JJ.*) KHANGOUDA *v.* SECRETARY OF STATE FOR INDIA. I.L.R. (1937) Bom. 236=168 I.C. 73=9 R.B. 356=38 Bom. L.R. 1308=A.I.R. 1937 Bom. 121.

——Ss. 34 and 36 (3)—*Construction and scope—Decree declaring adoption invalid—Power of Collector to remove name of adopted son from register.*

S. 34 does not say that the name of an adopted son whose name is registered as such, can only be removed when there is a decree setting aside the adoption. Under S. 36 (3) of the Act as amended in 1930, the Collector has power to amend the entry on production before him of a decree of a competent Court which gives any person the right to have his name registered as

the nearest heir of the deceased watandar in preference to the person whose name has been ordered to be registered. It would be a strange position if the Collector could declare an alienation null and void and resume the land, and yet should have no power to remove from the Register of representative watandars the name of a person whose adoption has been held to be invalid and who is held to have no title by a competent Court. (*Broomfield and Tyabji, JJ.*) KHANGOUDA *v.* SECRETARY OF STATE. I.L.R. (1937) Bom. 236=168 I.C. 73=9 R.B. 356=38 Bom. L.R. 1308=A.I.R. 1937 Bom. 121.

——S. 36—*Scope—Principle underlying—Rule of legal primogeniture—Applicability before* 1910 *—Effect of Amending Act III of 1910.*

The real intention of S. 36 of the Bombay Hereditary Offices Act, as it stood before the amendment of 1910 was that the nearest heir of a deceased watandar was to be determined according to the rule of lineal primogeniture, and the Amending Act of 1910 merely made explicit the real intention of the section. The amendment of 1910 did not introduce the principle of lineal primogeniture for the first time. (*Wadia, J.*) BASANGOWDA *v.* FAKIRGOWDA. I.L.R. (1939) Bom. 123=179 I.C. 984=11 R.B. 269=40 Bom. L.R. 1288=A.I.R. 1939 Bom. 56.

——S. 36, proviso (3)—*Suit to declare plaintiff's right as nearest heir of deceased watandar as against defendant—Defendant recognised by Government as representative watandar and entered in the register—Absence of prayer to set aside order entering defendant—Limitation—Limitation Act, Arts.* 14 *and* 120.

Art. 14 of the Limitation Act has no application to a suit filed under S. 36, proviso (3) of the Bombay Hereditary Offices Act. for a declaration that the plaintiff is the nearest heir of the deceased last holder of a watan as against the defendant who has been recognised by the Government as the representative watandar without any express prayer for setting aside the order of the Collector entering the defendant's name as the successor to the watan. The suit is really one for a declaration and is governed by Art. 120 of the Limitation Act. (*Wadia, J.*) BASANGOWDA *v* FAKIRGOWDA I.L.R. (1939) Bom. 123=179 I.C. 984=11 R.B. 269=40 Bom. L.R. 1288=A.I.R. 1939 Bom. 56.

——S. 58—Officiating kulkarni—Status—If Public servant. *See* CR. P. CODE, S. 197. 40 Bom. L.R. 1286.

BOMBAY HIGH COURT CIVIL CIRCULARS (1925), Ch. VIII—Suit dismissed with costs—Several defendants incurring separate costs—Separate sets of costs—Award of—If justified. *See* COSTS—AWARD OF. 41 Bom.L.R. 575.

BOMBAY HIGH COURT RULES (Appellate Side), Rr. 1 (a) and 2 (c)—*Applicability—Finding that suit bad for multifariousness—Failure to amend plaint—Rejection—Pleader's fee—Calculation.*

Where a plaint is rejected on the ground that the suit is bad for multifariousness, the plaintiff having failed to amend the plaint as ordered by the Court on its finding on the issue as to multifariousness, there is no decision on the merits

between the parties within the meaning of R. 1 of the Appellate Side Rules of the Bombay High Court. The case falls under R. 2 (*c*) and the plaintiff in such a case can only be required to pay one-fourth of the full fees payable under the rules as pleader's fee. (*Broomfield and Macklin, JJ.*) NARHARI *v.* BABURAO. **183 I.C. 655=12 R.B. 117=41 Bom.L.R. 413=A.I.R. 1939 Bom. 299.**

——R. 1 (a)—"Subject-matter"—Meaning of. *See* ADMINISTRATION SUIT—PLEADER'S FEE. **41 Bom.L.R. 413.**

——App. E, R. 6—*Applicability—Land acquisition proceedings—Suit by owners of lands for declaration of invalidity and injunction—Dismissal—Appeal—Valuation—Advocate's fee—Calculation of.*

A representative suit by owneres of properties which are sought to be compulsorily acquired for a declaration that the notifications under the Land Acquisition Act issued by the Government are *ultra vires* and illegal and for an injunction restraining them from going on with the acquisition proceedings is one in which the value of the subject matter is not capable of ascertainment. An appeal from a decree dismissing such a suit is governed for purposes of advocate's fees by R. VI of Appendix E of the Appellate Side Rules of the High Court of Bombay. (*Broomfield and Wassoodew, JJ.*) PARSHOTTAM *v.* SECRETARY OF STATE. **174 I.C 67=10 R.B. 420=39 Bom.L.R. 1257=A.I.R 1938 Bom. 148.**

——App. E, R. 97—"First hearing"—Meaning of—Engagement of two pleaders before date on which appeal is first heard—Fees of two pleaders—If to be allowed. *See* BOMBAY PLEADERS ACT, S. 20. **38 Bom.L.R. 518.**

——(Original Side), R. 40 (Ch. II, Part I)—*Advocate enrolled on original side—Right to appear in Mofussil Court without vakalatnama—Memorandum signed by himself—Sufficiency—C. P. Code, O. 3, R. 4 (5).*

Rule 40, in Ch. II, Part I of the Bombay High Court Rules is not confined to the High Court, but is intended to apply to all Courts in the Presidency. An advocate enrolled on the original side of the High Court is not required to file any authority authorising him to appear in a Mofussil Court. Where such an advocate files a memorandum signed by himself in accordance with O. 3, R.4 (5), that is sufficient to entitle him to plead in a Mofussil Court, and the latter Court is not justified in rejecting the memorandum and insisting on a vakalatnama. (*Beaumont, C.J and Sen, J.*) AMBELAS KASHIBHAI *v.* VADILAL CHHAGANLAL. **42 Bom.L.R. 515=A.I.R. 1940 Bom 272.**

——(1936), R 150—Effect of. *See* C. P. CODE O. 23, R. 3. **39 Bom.L.R. 1179.**

——R. 314—*Receiver in execution—Appointment—Right to—Attachment of property—If condition precedent.*

An attachment of property is not always a condition precedent to the appointment of a receiver in execution. In order that a receiver may be appointed, it is not necessary that there should be an attachment, or that an attachment once effected should be subsisting. If the decree-holder makes out proper grounds for equitable or indirect execution, a receiver can be appointed; and there is nothing in the High Court Rules which

prohibits such an appointment. (*Wadia, J.*) VARJIWANDAS *v.* MAGANLAL. **39 Bom.L.R. 493=170 I.C. 850=10 R.B. 140=A.I.R. 1937 Bom. 382**

——R. 373—Scope—Award—Setting aside on ground of misconduct of arbitrator—Remedy—Suit—If lies. *See* ARBITRATION ACT, S. 14. **38 Bom.L.R. 380.**

——R. 444—*Remuneration of Court Receiver—Transfer of money from the Accountant General to the Receiver—Right to commissian.*

Where a Court Receiver gets a transfer to himself as the guardian of the property of a minor, of a sum of money standing to the credit of the minor with the Accountant-General, it really amounts, only to a transfer of the sum in question from one officer of the Court to another. In such a case the receiver is not entitled under R. 444 of the Bombay High Court Rules (Original Side) to any remuneration. (*Wadia, J.*) ZULEKHABAI, *In re.* **39 Bom. L.R. 1175=173 I. C. 783=10 R.B. 379=A.I.R. 1938 Bom. 75.**

——R. 767—*Construction and scope—Mofussal Court—Proceedings for compulsory winding up of company—Costs—Taxation—General instruction charges—If to be allowed—Rules—Practice to be followed.*

The words 'so far as the same are applicable" in R.767 of the Bombay High Court Rules (O.S) govern the rule that "the fees must be allowed as set forth and referred to in the second schedule" referred to in the rule. It is not reasonable to apply the schedule in such a manner and for such reasons as to deprive parties of costs which they have necessarily and properly to incur. In proceedings in mofussil Courts for compulsory winding up of a company, the costs of which have to be taxed under R. 767, on the same scale as on the original side of the High Court, there is no reason or principle why advocates should be deprived of fair remuneration for work necessarily undertaken by them which in the High Court would have to be done through counsel. The advocates in the mofussil are therefore entitled to "general instruction charges" including remuneration for getting together the evidence, preparing themselves with the facts of the case and the law on the subject, and looking up the authorities for being able to address the Court. This is a species of work going beyond mere attendance in Court. In the mofussil special directions would ordinarily have to be applied for at the proper time, so as to indicate that in the opinion of the Court the questions of law involved were of such a nature and complexity that the advocates ought to be allowed special remuneration for the same; that the services rendered were such that counsel might properly have been briefed to render them in the High Court. A failure to observe the strict practice ought not to be made a ground for disallowing the item in the taxation of the bill of costs. (*Barlee and Tyabji, JJ.*) CHHOTALAL *v.* SOMESHWAR. **39 Bom. L.R. 820=173 I.C. 489=10 R.B. 337=A.I.R. 1938 Bom. 10.**

——R. 767—Mofussil Court—Proceedings for compulsory winding up of company—Incidental or interlocutory proceedings in—Costs of—Order as to—Jurisdiction of Court and of taxing officer—Nature of jurisdiction in appeal from taxing

officer—Duty of parties and advocates to apply for orders and directions—Duty of Court. *See* C. P. CODE, S. 35. **39 Bom.L.R. 820.**

——R. 865—*"Given in charge to the jury"—Jury empanelled and challenged and sworn in—Substance of offence charged not stated to jury—Prisoner if given in charge—Alteration of charge necessitating special jury—Permissibility.*

The expression "given in charge to the jury" is used in R. 865 of the High Court rules in a technical sense. The question whether the prisoners have been given in charge to a jury must be determined by reference to the form of the oath administered and the procedure followed thereafter. When the jury has been merely sworn in and allowed to be challenged with a view to their trying the accused in due turn, but the substance of the offence charged in the indictment has not been stated to the jury, it cannot be said that the accused has been given in charge to jury. But even if the prisoner has been given in charge to a common jury, the rule will not operate as a bar to the trial of the prisoner by a special jury on an altered charge. (*Wassoodew, J.*) EMPEROR *v.* YESHVANT VITHU. **I.L.R. (1937) Bom. 369=170 I.C 153=38 Cr.L.J 850 (2)=10 R.B. 49=39 Bom.L.R. 355=A.I.R. 1937 Bom. 260.**

——**Tables of Fees, Items 54 and 55**—Ex parte *motion and hearing of motion—Costs to be awarded—Proper rule as to—Practice.*

It is desirable that Judges hearing *ex parte* motions on the original side of the High Court; instead of making the costs of the *ex parte* motion costs in the motion to be heard on notice, reserve the costs to be dealt with on the hearing of the motion. Then the Judge who hears the motion can allow such additional sum beyond the costs of the motion as he thinks will compensate the successful party for the costs of the *ex parte* motion. (*Beaumont, C.J. and Rangnekar, J.*) CALICO PRINTERS ASSOCIATION *v.* AHMED ABDUL KARIM BROS. **60 Bom. 861=164 I C. 695=9 R. B. 91=38 Bom.L.R. 531=A.I.R. 1936 Bom. 310.**

——**Table of fees, Item 56**—*Construction and scope—"Unless otherwise ordered"—Discretion of trial Judge in allowing costs of Solicitor.*

Under item 56 of the Table of fees given in the Bombay High Court Rules (Original Side), costs for *ex parte* short causes, "unless otherwise ordered" confer a complete discretion upon the trial Judge, and it is not desirable that the Appellate Court should seek to limit the grounds upon which that discretion should be exercised. It was contemplated that the fixing of lump sum would save expenses and discharge unnecessary work and would at the same time provides reasonable remuneration for the solicitor. In a suit to recover a sum of Rs. 15,000 odd, the defendants who were residents of Arabia remained *ex parte*. An effort to serve them in accordance with the provisions of O. 5, R. 26, C. P. Code, proved abortive and ultimately substituted service had to be effected, and as the defendants were Arabians, many documents had to be translated into Arabic. The plaintiff's solicitors had to do a good deal of work, substantially more than they would have to do normally on an *ex parte* short cause. The Solicitors filed an affidavit setting out in detail the out-of-pocket expenses which amounted

to Rs. 449—10—6. The Judge allowed a sum of Rs. 400 for costs in decreeing the suit. The plaintiff appealed against the order for costs.

Held, that the case was one in which either the costs should have been taxed or else a sum should be allowed which would provide reasonable remuneration for the solicitors and also cover the out-of-pocket expenses. A sum of Rs. 650 was allowed as the lump sum costs. (*Beaumont, C.J. and Kania, J.*) ABDUL LALIF *v.* KHALAF ABDULLA. **42 Bom.L.R. 578.**

BOMBAY JAIL MANUAL, R. 387 (c)—*Order of Court in conflict with—Procedure.*

The rules of the Jail Manual are administrative rules for the guidance of the Jail officials, and it is for the Jailor to keep in safe custody a prisoner consigned to his care under the lawful order of the Court. If any conflict occurs between an order of Court and an administrative rule, the order of Court should be sent to the High Court through proper channels for consideration and modification, if need be. (*Davis, J. C. and Mehta, A.J.C.*) EMPEROR *v.* KADU. **29 S. L.R. 353=164 I.C. 576=9 R.S. 49=37 Cr.L.J. 1003=1936 Cr.C. 802=A.I.R. 1936 Sind 125.**

BOMBAY JURISDICTION OF JAGIRDARS' REGULATION (XIII OF 1830), S. 4—*Construction—Execution of decree by Jagirdar—Sale of agriculturists' land—Procedure—Application to set aside sale—District Judge's power to transfer to Subordinate Judge's Court.*

S. 4 of the Bombay Regulation XIII of 1830 gives authority to the Jagirdar to execute his own decrees. That does not mean that the sale of land of an agriculturist must be done by him, and no other person has a right to do so. The regulation lays down no special procedure at all and therefore the normal rule found in the Code of Civil Procedure under which sales of property of agriculturists are required to be transferred to the Collector applies also to the Jagirdar's decrees. The District Judge has jurisdiction to transfer an application to set aside a sale from the Jagirdar's Court to a Subordinate Judge's Court. (*Kania, J.*) MALEGAON BUDRUK CO OPERATIVE CREDIT SOCIETY *v.* GANGADHAR NARAYAN. **42 Bom.L.R. 525.**

BOMBAY KHOTI SETTLEMENT ACT (I OF 1880), S. 5—Applicability—Tenant proved to be in occupation from 1848—Absence of proof of prior occupation—Permanent tenancy—Presumption of—*Presumitur retro*—Application of doctrine. *See* BOMBAY LAND REVENUE CODE, S. 83. **40 Bom.L.R. 534.**

——**S. 6**—*Permanent tenant of Khoti land—Mortgage with possession for term—Effect of—Vendee from tenant after expiry of term of mortgage—Right and status of vendee—Right to redeem mortgage.*

Where a permanent tenant of Khoti lands executed a mortgage with possession for a term, and the mortgagee is in actual possession, the mortgagee, as the actual holder of the land, is to be deemed to be the tenant of that land, by virtue of S. 6 of the Bombay Khoti Settlement Act. But under the proviso to S. 6, the actual holder being in possession as mortgagee, his occupation or cultivation must, for the purposes of S. 6, be deemed to be the occupation or cultivation of the mortgagor. So that if the mortgagor (permanent

BOM. KHOTI SETTLT. ACT (1880), S. 6.

tenant) transfers his right, title and interest by way of sale to another person, it must be held that the transferee steps into the shoes of the mortgagor, and must be deemed to be the actual holder, and the rights which can be claimed by the actual holder under S. 6 become vested in such transferee. The transferee thus becomes the actual holder and is entitled to redeem the mortgage, though the transfer in his favour has not been made with the consent of the Khots or the managing Khot. The transferee is at least an ordinary tenant entitled to be in possession until evicted by the Khots in exercise of the right conferred on them by S. 10 of the Act. (*Lokur, J.*) GAFUR USMAN *v.* SAKHARAM TANSHET. I L.R. (1939) Bom. 713=41 Bom.L R. 1199=186 I.C. 643=12 R.B. 357=A.I.R. 1940 Bom. 15.

——**Ss. 6 and 8**—*Scope of — Unauthorised transfer of Khoti land by occupancy tenant—Effect—Rights and status of transferee—Possession for over 12 years—If becomes occupancy tenant—Right of Khot to eject—Notice to quit.*

The respondents were the Khots of a village, *D.* who was an occupancy tenant of the lands sold the same on 13—5—1896 to the appellants. After *D'S.* death, his nephew sold the same lands to the respondents on 21—10—1927, and in December, 1928, passed a rajinama in their favour. The respondents, the admitted Khots of the occupancy holding of *D*, gave notice to the appellants to quit on 27—12—1929 under S. 84 of the Bombay Land Revenue Code, and on 7—12—1930, sued for ejectment of the appellants and for possession. The appellants pleaded that they had become occupancy tenants of the respondents by reason of their having held the occupancy holding adversely to the respondents for over 12 years.

Held, (1) that under S. 6 of the Khoti Settlement Act, the appellants became the tenants of the respondents by virtue of the sale in their favour by *D*, in 1896; (2) that in the absence of any special agreement set up by the appellants, the latter become yearly or annual tenants of the respondents under S. 8 of the Act; (3) that the appellants, as transferees under a wrong transfer could not claim to be occupancy tenants merely because they had been in possession for over 12 years and set up adverse possession; and (4) that the respondents, having determined the tenancy by a notice to quit under S. 84 of the Land Revenue Act, were entitled to evict the appellants. (*Rangnekar and Sen JJ*) RAMKRISHNA *v* BABURAO. 175 I C. 518=10 R.B. 564 =40 Bom.L.R. 390=A.I.R. 1938 Bom. 284.

——**Ss. 8 and 10**—*Permanent tenant of Khoti lands—Transfer by sale—Absence of consent of Khots—Effect —Status of transferee—If mere trespasser or ordinary tenant.*

Where a permanent tenant of *Kularag Khoti* lands sells his rights to another without the consent of the Khots or the managing Khot, the only result is that the Khots thereby get the right to dispose of the lands as they choose, and it is open to them to evict the transferee and take possession of the lands under S. 10 of the Bombay Khoti Settlement Act. But it does not follow that the transfer without the consent of the Khots or the managing Khot does not confer any interest in the khoti lands on the transferee. The transferee is not a trespasser. The permanent tenancy is terminated by such transfer, and the transferee becomes only an ordinary tenant within the meaning of S. 8 of the Act, and the Khots would be entitled to eject the transferee, who is only an ordinary annual tenant, after giving him a proper notice to quit under S. 84 of the Bombay Land Revenue Code. But until the tenancy is determined by such a notice, the transferee is entitled to remain in possession of the lands as a tenant. (*Lokur, J.*) GAFUR USMAN *v.* SAKHARAM TANSHET 41 Bom L.R. 1199=I L R (1939) Bom. 713=186 I.C. 643=12 R.B. 357=A.I.R. 1940 Bom. 15.

BOM. LAND REV.CODE (1879), S. 31.

——**Ss. 9 and 10**—*Sale or relinquishment of holding—Consent of managing* Khot—*Sufficiency and validity—Presumption of consent—If arises from fact of managing* Khot *being party to deed.*

The managing *Khot* is entitled under S. 9 of the Khoti Settlement Act to give consent to a transfer by way of sale of a holding. But the consent to be a valid consent on behalf of all the *Khots* under S. 9 must be given by him as managing *Khot* and not in his individual capacity. The consent must also be express and cannot be presumed from the mere fact that the managing *Khot* himself is the executant of the deed of transfer in his personal capacity. The same consideration as to the necessity of the consent of the managing *Khot* as such also apply to a relinquishment under S. 10 of the Act. (*Macklin, J.*) VINAYAK YESHWANT *v.* GHANASHYAM. 164 I.C. 177=9 R B. 59=38 Bom. L.R. 511=A.I.R. 1936 Bom. 287.

——**(as amended in 1912), S. 9**—*Scope—If retrospective.*

The amendment to S. 9 of the Khoti Settlement Act made in 1912 has no retrospective effect and does not apply to the case of a transfer made by the tenant prior to 1912. (*Rangnekar, and Sen, JJ.*) RAMKRISHNA *v.* BAPU RAO. 175 I.C. 518=10 R. B 564=40 Bom. L.R. 390=A.I.R. 1938 Bom. 284.

BOMBAY LAND REVENUE CODE (V OF 1879)—*Coustruction—Rule of strict construction.*

The Land Revenue Code not only imposes a pecuniary burden on the subjects but restricts the use and enjoyment of his property. Such a statute must always be strictly construed. The proprietor is therefore entitled to ask the Court to construe it in his favour. (*Wassoodew, J.*) RAI CHAND GULAB CHAND *v.* SECRETARY OF STATE. 185 I.C. 495=12 R B. 242=41 Bom. L.R. 1077= A.I.R. 1939 Bom. 505.

——**S. 31 (2)**— *Applicability— If confined to public sales by auction—Private sale—Purchase by revenue officer—If prohibited.*

S. 31 (2) of the Bombay Land Revenue Code which prohibits a Revenue Officer from being directly or indirectly concerned in any of the transactions or acts set out in it, is not confined to purchases at public sales; it prohibits purchases by Revenue Officers, without express permission of Government, not only at public sales by auction but also at private sales. The section itself does not in particular refer to a purchase at a public sale or a private sale and makes no distinction of

BOM. LAND REV. CODE (1879), S. 48.

that character. The prohibition cannot be restricted to a purchase at a public sale only. (*Rangnekar, J.*) DHARWAR URBAN BANK LTD. *v.* KRISHNARAO. **I.L.R. (1937) Bom 293=169 I.C. 381=10 R.B. 22=39 Bom.L.R. 203=A.I.R. 1937 Bom. 198.**

——**S. 48**—*Applicability—Altered assessment—When leviable—Intention to use or actual use.*

S. 48 of the Bombay Land Revenue Code comes into operation when land is put to any use unconnected with agriculture. The determining factor in the levy of altered assessment under S. 48 is the altered use to which the property is put. But the mere intention to use property for a particular purpose, without its actual use for that purpose, will not enable Government to alter the agricultural assessment which is the lowest standard of assessment on property under the Land Revenue Code. (*Wassoodew, J.*) RAI CHAND GULAB CHAND *v.* SECRETARY OF STATE. **185 I C. 495=12 R B. 242=41 Bom.L.R. 1077=A.I.R. 1939 Bom. 505.**

——**S. 48**—*"Fixed"—Meaning.*

The word "fixed" in S. 48 of the Bombay Land Revenue Code as it stood before the amendment of 1901 cannot mean "fixed in perpetuity". (*Davis, J.C. and Rupchand, A.J.C.*) RAMCHAND *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **29 S.L.R. 382=163 I.C. 887=9 R.S. 17=A.I.R. 1936 Sind 108.**

——**S. 48**—*Revised assessment—Power to levy retrospectively.*

The Collector has no power to levy revised assessment retrospectively. (*Broomfield and Tyabji, JJ.*) AHMADABAD GINNING AND MANUFACTURING CO., LTD. *v.* SECRETARY OF STATE. **39 Bom. L.R. 266=169 I.C. 542=10 R.B. 39=A.I.R. 1937 Bom. 226.**

——**S. 48**—*Scope—Conversion of agricultural land to non agricultural use by trespasser—Altered assesment—If leviable.*

S. 48 of the Bombay Land Revenue Code which provides for the levy of altered assessment when land held for agricultural purposes is converted to a non-agricultural purpose, makes no distinction between conversion of the land by the occupant or persons holding through or under him, and by trespassers without the knowledge or permission of the occupant. (*Beaumont, C.J. and Wadia, J.*) SECRETARY OF STATE FOR INDIA *v.* GANESH NARAYAN. **I.L.R. (1937) Bom. 801=172 I C 194=10 R B. 257=39 Bom.L.R. 885=A.I.R. 1937 Bom. 456.**

——**Ss. 48 and 52**—*Agricultural lands converted to non-agricultural use—Government permitting and levying fine—Non-levy of altered assessment—Effect—If bar to subsequent levy of revised assessment.*

Where agricultural lands are appropriated to non-agricultural purposes, *i.e.*, building purposes, with the permission of the Government on payment of fine, and the Government do not then levy an altered assessment on such lands that does not imply that there is any agreement on the part of the Government that the assessment would not be altered. It is still open to the Government to levy an altered assessment on a non-agricultural basis. It would be opposed to principle to imply, from the mere circumstance that non-agricultural assessment has not been

BOM. LAND REV CODE (1879), S. 65.

previously levied, any limitation on the prerogative of the Crown to assess the land to land revenue, and to revise the assessment periodically according to law. (*Broomfield and Tyabji, JJ.*) AHMADABAD GINNING AND MANUFACTURING CO., LTD. *v.* SECRETARY OF STATE. **169 I.C. 542=10 R. B 39=39 Bom. L.R. 266=A.I.R. 1937 Bom. 226.**

——**S. 48 (1) and (2)**—*Construction and relative scope of.*

Cl. (1) of S. 48 of the Bombay Land Revenue Code clearly means that assessments are to be made in future, and shall be deemed to have been made in the past with reference to the use of the land. It may also mean that whether assessments are actually fixed with reference to the use of the land or not, they shall be deemed to have been so fixed. But in any case Cl. (1) lays down the conditions for the operation of Cl. (2). It cannot be held that it deals with two categories of cases, only one of which is dealt with by Cl. (2) and the other not at all. (*Broomfield and Tyabji, JJ.*) AHMEDABAD GINNING AND MANUFACTURING CO., LTD *v* SECRETARY OF STATE. **169 I.C. 542=10 R. B. 39=39 Bom.L.R. 266=A.I.R. 1937 Bom. 226.**

——**S. 65**—*Construction—"Farm-building"—If includes godown.*

The term "farm-building" in S. 65 of the Land Revenue Code would absorb within its meaning many kinds and classes of buildings such as storehouses for implements, manure, seed and farm produce, and would include a godown. The character of the building or the amount of money spent upon its construction is immaterial in judging the purpose for which it is eventually put by the former. It cannot be said that a strong or substantial store-house or a godown is unnecessary for facilitating farm operations and the protection of agricultural produce; the substantial character of a godown cannot alter its character as farm-building. (*Wassoodew, J.*) RAI CHAND GULAB CHAND *v* SECRETARY OF STATE. **185 I C. 495=12 R.B. 242=41 Bom. L.R. 1077=A.I.R. 1939 Bom. 505.**

——**S. 65**—*"Make any other improvements thereon for the better cultivation of the land"—Meaning of—Erection of godown to store agricultural produce, such as grass for being sold in favourable market—If protected—Altered assessment—If justified on ground of non-agricultural use.*

The words "make any other improvements thereon for the better cultivation of the land" in S. 65 of the Bombay Land Revenue Code, ought not to receive a narrow construction limited to some object directly connected with agricultural operations or the act of production merely. Any improvement which conduces to profitable husbandry and facilitates the marketing of agricultural produce would fall within the class of improvements protected by S. 65. That would include provision for store-houses made by an agriculturist for the protection of his agricultural produces until it leaves his farm. Thus, if grass as agricultural produce is cut, pressed, baled and stored in a godown with the object of eventually selling it when the market improves and it is profitable to sell the produce, the construction of a godown which facilitates that object would be protected. The erection of a godown for such purpose would not be a ground for holding that

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the land has been "used for any purpose unconnected with agriculture" within the meaning of R. 80 of the Land Revenue Rules or be a basis upon which altered assessment can be levied. (*Wassoodew, J.*) RAI CHAND GULAB CHAND *v.* SECRETARY OF STATE. **185 I.C. 495=12 R.B. 242 =41 Bom.L.R. 1077=A.I.R. 1939 Bom. 505.**

——S. 65—*Scope—Kinds of improvement—Enumeration of—If exhaustive.*

The use of the words "farm-buildings, wells or tanks" in S. 65 of the Bombay Land Revenue Code does not exhaust but only illustrates the kind of improvements intended by the Legislature to entitle the owner to the benefit of lesser assessment. (*Wassoodew, J.*) RAI CHAND GULAB CHAND *v.* SECRETARY OF STATE. **185 I.C. 495=12 R.B. 242=41 Bom.L.R. 1077=A.I.R. 1939 Bom. 505.**

——S. 66—*Applicability—User of agricultural land for non-agricultural purposes by trespasser without consent or knowledge of occupant—Liability of occupant to fine.*

S. 66 of the Bombay Land Revenue Code is not confined to user of agricultural land for non-agricultural purposes by the occupant or any of the persons referred to in the first paragraph of S. 65 *i.e.*, servants, tenants, agents or other legal representatives. The words of the section are quite general and clearly include the case of user by even a trespasser; and an occupant is liable to fine under S. 66, if there is any user of his agricultural land for purposes other than agriculture, whether or not the occupant has consented to or has knowledge of such user. (*Beaumont, C.J. and Wadia, J.*) SECRETARY OF STATE FOR INDIA *v.* GANESH NARAYAN. **I.L.R. (1937) Bom. 801= 172 I.C. 194=10 R.B. 257=39 Bom.L.R. 885= A.I.R. 1937 Bom. 456.**

——S. 83—*Applicability—Khoti lands*—Presumitur retro—*Application of doctrine—Tenant shown to be in occupation from* 1848—*Absence of proof of prior occupation—Rent notes passed to landlord from* 1855 *to* 1901 *admitting annual tenancy—Presumption of permanent tenancy.*

The doctrine of *presumitur retro* might apply to a case falling under S. 83 of the Bombay Land Revenue Code where the only thing to be proved is that the the origin of the tenancy was lost in antiquity, that is, it cannot be proved to have commenced from a particular year or period. In such a case if the tenant proves that he was on the land, say in 1848, and if it is not shown that his occupation commenced in that year, a presumption could be made that his ancestors were on the land even before that date, though there is no presumption as to the actual date from which the occupation commenced. But the doctrine has no scope for application to a case falling under S. 5 of the Bombay Khoti Settlement Act; that section requires proof of occupation from or before a particular year and the burden lies on the tenant to prove that particular fact. The fact that the tenant was proved to be on the land in 1848, three years after the particular year fixed by S. 5, would not entitle him to the benefit of the presumption that his tenancy began from or before 1845—1846. Where the evidence establishes the tenant's possession since 1848, but there is no definite evidence that he was on the land before that year, and it is found that there were various

BOM LAND REV. CODE (1879), S. 83.

kabuliyats passed by the tenant's ancestors and himself from 1855 to 1901 admitting an annual tenancy, the tenant cannot be held to have established a permanent tenancy under S. 83 of the Bombay Land Revenue Act. Nor can the tenant claim the benefit of S. 5 of the Khoti Settlement Act, when his possession is not shown to have commenced on or before 1845—1846. (*Divatia, J.*) SONU KASHIRAMSHET *v.* SHANKAR SAKHARAM. **I.L.R. (1938) Bom. 524=177 I.C. 614=11 R.B. 106=40 Bom.L.R. 534=A.I.R. 1938 Bom. 381.**

——S. 83—*Applicability to khoti tenures—General and special enactments.*

Quaere.—Whether S. 83 of the Bombay Land Revenue Code would apply to a case falling under S. 5 of the Khoti Settlement Act, having regard to the fact that the latter is a special enactment while the former remains a general enactment. (*Divatia, J.*) SONU KASHIRAMSHET *v.* SHANKAR SAKHARAM. **I.L.R. (1938) Bom. 524 =177 I.C. 614=11 R.B. 106=40 Bom.L.R. 534 =A.I.R. 1938 Bom. 381.**

——S. 83—*Applicability — Watan lands—Permanent tenancy—Acquisition by adverse possession—Conditions of.*

S. 83 of the Land Revenue Code would apply in the case of watan lands if the tenancy is shown to have commenced before the watan lands were rendered inalienable by the operation of Regulation No. 16 of 1827. Tenants of watan lands whose tenancy has commenced subsequently cannot acquire title to a permanent tenancy of the lands by adverse possession as against the watan lands from whom they hold. When the tenancy has been ascertained with reasonable definiteness, S. 83 cannot in terms assist the tenant. The section has no application to a case where the commencement of the tenancy has been traced either to particular year or to a reasonably short and definite period of time on satisfactory evidence. (*Broomfield and Sen, JJ.*) KRISHNA BHIMA *v.* LAHMIBAI. **I.L.R. (1938) Bom 465= 176 I.C. 398=11 R.B. 30=40 Bom.L.R. 439= A.I.R. 1938 Bom. 316.**

——S. 83—*Landlord's right to claim enhanced rent—Burden of proof.*

The right of the landlord to claim enhanced rent from his tenants is regulated by S. 83 of the Land Revenue Code, and the words "if he have the same either by virtue of agreement, usage or otherwise" in the saving clause of the section, cast the burden primarily on the landlord to establish the right which he claims. It is not for the tenants to establish that fixity of rent attaches to their tenure. (*Wassoodew, J.*) SURYAJI RAO *v.* SHIVAKACHARU. **186 I.C. 445=12 R B. 335= 41 Bom.L.R. 951=A.I.R 1939 Bom. 421.**

——S. 83—*"Or otherwise"—Construction—If* ejusdem generis *with preceding words.*

The words "or otherwise" cannot be interpreted as *ejudem generis* with the words "agreement or usage" preceding them. The term "or otherwise" cannot be said to be controlled by its association with the preceding words "agreement or usage." (*Wassoodew, J.*) SURYAJI RAO *v.* SHIVAKACHARU. **186 I.C. 445=12 R.B. 335=41 Bom.L.R. 951=A.I R. 1939 Bom. 421.**

——S. 83—*Rent—Rate—Demand for enhanced rate—Propriety of—Just and reasonable rate—What is.*

BOM. LAND REV. CODE (1879), S. 83.

If the landlord is not hampered by agreement or ancient usage to enhance the rent, and if in accordance with the prevailing rates of the locality, the landlord in other instances has been raising the rent, S. 83 of the Bombay Land Revenue Code would not exempt the tenant from yielding to the demand if it is just and reasonable having regard to the prevailing rates. The proper standard to apply under S. 83 in fixing a just and reasonable rate, would be the prevailing rates in the locality, particularly the rates which the landlord has levied for similar class of land let out for similar purposes. (*Wassoodew, J.*) SURYAJI RAO *v.* SHIVAKACHARU. **186 I.C 445=12 R.B. 335=41 Bom.L.R. 951=A.I.R. 1939 Bom. 421.**

——**S. 83**—Title by possession from time immemorial—If alienation under S. 11, watan Act. *See* BOMBAY HEREDITARY OFFICES (WATAN) ACT, S. 11. **39 Bom.L.R. 920.**

——**S. 83**—*"Usage"—Meaning of—Evidence.*

The term "usage" in S. 83 might imply practice prevailing in a locality or business under uniform or common circumstances and conditions. It is generally qualified by antiquity, as a practice long continued or shown to have existed immemorially. It is therefore reasonable to expect that evidence of usage should be in relation to circumstances which are similar or common prevailing for a long time as opposed to current practice. (*Wassoydew, J.*) SURYAJI RAO *v.* SHIVAKACHARU. **186 I.C 445=12 R B. 335=41 Bom.L.R. 951=A.I.R. 1939 Bom. 421.**

——**S. 84**—*Notice under—Proper service of—What amounts to—Notice sent by registered post but refused by tenant—Sufficiency.*

All that S. 84 of the Bombay Land Revenue Code requires the landlord to do is to give to the tenant a notice in writing; if the landlord sends such a notice by registered post or through the village officers, but the tenant declines or refuses to accept the notice it must be held that the notice is properly served. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB *v.* LAXMANAPPA RAMAPPA. **178 I.C 854=11 R.B. 198=40 Bom. L.R. 1015=A.I.R. 1938 Bom.. 492.**

——**Ss. 85 and 86**—*Scope—Injunction against Government not to pay superior holder but to pay direct to purchaser of latter's rights—Competency.*

Under S. 85 of the Bombay Land Revenue Code, the superior holder is entitled to receive his dues through the village officers; and under S. 86 of the Act the superior holder only is entitled to assistance from Government. An injunction against Government not to pay to the superior holder but to pay direct to a person who claims to be entitled to payment by reason of his having become purchaser of the rights of the superior holder would be contrary to the spirit, if not to the express terms, of the Land Revenue Code. The relation between the Government and the superior holder is not affected by the sale of the superior holder's rights. The Government cannot therefore be ordered not to pay the superior holder and to pay it to the purchaser direct. But as long as Government is not prepared to pay it to the purchaser direct, the superior holder whose rights have been sold may be ordered to pay it to the purchaser who is entitled to the income as purchaser, as soon as the superior holder receives it from the treasury. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. **185 I.C. 839=12 R B. 271=41 Bom.L.R. 882=A.I.R. 1939 Bom. 513.**

BOM. LAND REV. CODE (1879), S. 133.

——**Ss. 86 and 87**—*Co-sharers of inam village not registered as sharers in Village Form 3—Right to sue* khatedar *for share of land revenue directly—Proper remedy.*

It is only the registered managing inamdar who has the sole right to manage the village, *i.e.*, to recover revenue, etc. If it were not so, every co-sharer who is not registered in the Village Form No. 3, as such, might file a suit to recover his own share individually from different *khatedars* in the village. Co-sharers who are not recognised as managing inamdars and whose names are not registered in the Village Form No. 3, though they are entered as sharers in the *khatawni* cannot file a suit or seek assistance against the *khatedars* directly. Their remedy is to sue the managing inamdars for an account and to recover their share in the land revenue which may have been recovered or which may have been negligently omitted to be recovered by the managing inamdars. (*Lokur, J.*) NARHAR SONAJEE *v.* TRIMBAK SHRIDAR. **12 R.B. 255=185 I.C. 608=41 Bom.L.R. 1174=A.I.R. 1940 Bom. 12.**

——**Ss. 102 and 106**—*Assessments fixed at survey settlement—Duration of—If cease to be operative on expiry of period of guarantee.*

The assessments fixed at a survey settlement do not cease to be operative at the expiry of the period of guarantee unless and until they are revised. (*Broomfield and Tyabji, JJ.*) AHMEDABAD GINNING AND MANUFACTURING CO. LTD. *v.* SECRETARY OF STATE. **169 I.C. 542=10 R.B. 39=39 Bom.L.R. 266=A.I.R. 1937 Bom. 226.**

——**Ss. 132 and 133**—*Construction and scope—Survey fee and penalty—Liability for—When arises—Public notice—If condition precedent—Burden of proof.*

Ss. 132 and 133 of the Bombay Land Revenue Code that survey fee is payable by the holder of a property in the city in which survey is introduced within six months from the date of the public notice given by the Collector, and if default is committed by such holder, that is to say the survey fees are not paid within six months from the date of the public notice, then the Collector is authorized to levy a penalty not exceeding one rupee for each sanad. The payment of the survey fees and the grant of a sanad seem *prima facie* to be concurrent conditions. Unless a public notice is given as provided by S. 132, the Collector would not be entitled to levy a penalty under S. 133. The burden to prove that the requirements of law have been complied with is clearly on the Government and it is for them to prove that every condition precedent to the levy of the survey-fee and penalty was fully complied with. (*Rangnekar and Wadia, JJ.*) HARIPRASAD CHOTUBAI *v.* SECRETARY OF STATE. **182 I.C. 987=12 R.B. 54=41 Bom. L.R. 348=A.I.R. 1939 Bom. 234.**

——**S. 133**—*Sanad under—If document of title—Order granting sanad—If conclusive—Suit for possession against grantee of sanad—Limitation—Order granting sanad—If to be set aside—Limitation Act, Art.* **14.**

BOM. LAND REV. CODE (1879), S.133.

A sanad granted under S. 133 of the Bombay Land Revenve Code is not strictly speaking in the nature of a document of title between litigating parties. It is a document affecting rights only between the crown and the person to whom it is granted. The object of an inquiry under the Land Revenue Code is to determine the right of Government to revenue, and for that purpose to survey the land and to determine who is the holder, and, therefore, liable to assessment. But an order made under the Land Revenue Code is not intended to operate, and does not operate, finally as a determination of title between subjects of Government. No doubt such an order is *prima facie* evidence of title, but it is not conclusive and may be overriden as other evidence may be overriden. It is not essential for a person claiming possession against another person to whom a sanad has been granted under S. 133 to obtain an order setting aside that sanad before he can obtain an order for recovery of possession from a Civil Court. Art. 14 of the Limitation Act does not govern such a suit and the order of the revenue authorities granting a sanad is not an act or order of a Government officer within the meaning of Art. 14, which has to be set aside before possession could be decreed. (*Beaumont, C. J. and Wadia, J.*) NARBHERAMJI *v.* VIVEKRAMJI **I.L.R. (1939) Bom. 564=186 I C. 164=12 R.B. 299=41 Bom.L.R. 939=A.I.R. 1939 Bom. 425.**

——S. 133 and Sch, H—*Sanad—Form and contents of—Duty of Government to describe property fully by boundaries and dimensions.*

The sanad issued under S. 133 of the Bombay Land Revenue Code are valuable documents and evidence of title and must be in proper form. Having regard to the form of Sch. H of the Land Revenue Code, it is the duty of the Government to issue sanads describing not merely the plot or building in question, but also describing the property fully by its boundaries and its full dimensions. (*Rangnekar and Wadia, JJ.*) HARIPRASAD CHOTUBHAI *v* SECRETARY OF STATE. **182 I.C. 987=12 R B. 54=41 Bom.L.R. 348=A.I.R. 1939 Bom. 234.**

——S. 137—*Government claims—Priority over other debts—Nature of—If extends to arrears of past years or is confined to demands of current year, S.* 151.

The right of priority given to the claim of Government by S. 137 of the Bombay Land Revenue Code is very much more extensive than that given by the common law, since it creates on behalf of the Government a right to priority over all debts of every kind, whether secured or unsecured. But such right of priority is curtailed by S. 151 of the Code. Ss. 137 and 151 should be read together, and the priority is therefore confined to the demands of the current year and not for arrears of past years. S. 151 in terms restricts the common law prerogative of the Crown. The prerogatives of the Crown can be affected with the consent of the Crown, that is, by statute. (*Barlee and Wadia, JJ*) THE SECRETARY OF STATE *v.* VEDAVYAS VFNKATESH BHATTA. **163 I.C. 357=9 R.B 18=38 Bom.L.R. 267=A.I.R. 1936 Bom. 213.**

——Ss. 137, 187, 150 (2)—*Liquor licence granted to firm forfeited and sold as result of its inability to pay instalments—Stocks of liquor in bonded warehouse belonging to firm—Government's right as against secured creditor.*

BOM. LAND REV. CODE (1879), S. 217.

Where the liquor licence granted to a firm for sale of liquor in its premises, is forfeited and sold as a result of its inability to pay the instalments due and subsequent instalments, the stocks of liquor in the bonded warehouse belonging to the firm come within the scope of S. 150 (*c*), Bombay Land Revenue Code, and they are movables in respect of which the Government has no prior charge, and the claims of the Government do not have preference over secured creditors in whose favour the stocks of liquor have been mortgaged. (*Davis, J.C. and Tyabji, J.*) SECRETARY OF STATE *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **I L.R. (1939) Kar. 393=179 I.C. 863=11 R.S. 155=A.I.R. 1939 Sind 46.**

——S. 151—Scope and effect of—Prerogative of Crown—If affected—Priority of Crown debts—If confined to demands of current year. *See* BOMBAY LAND REVENUE CODE, S. 137. **38 Bom.L.R. 267.**

——S. 189—*Applicability—Mutation proceedings.*

S. 189 would apply as much to an enquiry relating to the record of rights under Chap. 10-A as to a summary or formal enquiry within the provisions of S. 196. (*Davis, J.C. Weston, J.*) ASSUDOMAL RAMANDAS *v.* JHAMANDAS HOTCHAND. **A.I.R. 1940 Sind. 100.**

——Ss. 213 and 214, Rules of 1905, R. 56—*"Co-terminous"—Meaning.*

The word "co-terminous" in Part V of R, 56 of the Rules framed in 1905 under Ss. 213 and 214 of the Bombay Land Revenue Code applies only to the revision settlement in the course of which the appropriation takes place and not to subsequent periods of settlement (*Davis, J.C. and Rupchand A.J.C.*) RAMCHAND *v.* SECRETARY OF STATE FOR INDIA. **29 S.L.R. 382=163 I.C. 887=9 R.S. 17=A.I.R. 1936 Sind 108.**

——S. 217—*Applicability—Watan lands—Alienation contrary to S.* 5, *Watan Act—Permanent tenant under—If becomes occupant by introduction of survey settlement.*

S. 217 of the Land Revenue Code would not apply in the case of watan lands governed by S. 5 of the Bombay Watan Act. S. 217 cannot override the clear provisions of S. 5 of the Watan Act. An alienation by way of a permanent lease made by wantandar in contravention of S. 5 of the Bombay Watan Act is not binding on the successor of the alienating watandar. A tenant under such a lease granted by the watandar does not therefore become an "occupant" of the lands by reason of the introuction of survey settlement into the village under S. 217 of the Land Revenue Code. It would be contrary to the principle of S. 5 of the Watan Act (Bombay Hereditary Officers Act of 1874) to hold that the lessees acquires occupancy rights under S. 217 of the Land Revenue Code. (*Rangnekar and Wadia, JJ.*) SHRIPAD RAMACHANDRA *v.* TULJARAMRAO. **177 I.C. 593=11 R B. 101=40 Bom.L.R. 461=A.I.R. 1938 Bom. 372.**

——(as amended in 1913), S. 217—*Scope—Retrospective operation.*

BOM. LAND REV. RULES, R. 80.

S. 217 of the Bombay Land Revenue Code, as amended in 1913, has retrospective effect. (*Rangnekar and Wadia, JJ.*) SHRIPAD RAMACHANDRA *v.* TULJARAM RAO. **177 I.C. 593=11 R.C. 101=40 Bom.L.R. 461=A.I.R. 1938 Bom. 372.**

BOMBAY LAND REVENUE RULES, R. 80—"Used for any purpose unconnected with agriculture"—Erection of godown and use of same for storing agricultural produce—If justifies levy of altered assessment. *See* BOMBAY LAND REVENUE CODE, S. 65. **41 Bom.L.R. 1077.**

——**R. 91**—"*Assessed*"—*Meaning of.*

The expression "any holding which has been assessed" in R. 91 of the Land Revenue Rules implies "legally assessed". When the basis for altered assessment fails, the levy of altered assessment would be illegal. (*Wassoodew, J.*) RAI CHAND GULAB CHAND *v.* SECRETARY OF STATE. **185 I.C. 495=12 R.B. 242=41 Bom.L.R. 1077=A.I.R. 1939 Bom. 505.**

BOMBAY LOCAL BOARDS ACT (VI OF 1923), S. 4 (3)—*District Local Board—Power to levy octroi on goods imported in notified area.*

A District Local Board under the Bombay Local Boards Act has power to impose and levy octroi duty on goods imported in a notified area in its district. (*Broomfield and Macklin, JJ.*) EMPEROR *v.* MOHIDIN. **180 I.C. 940=11 R.B. 318=40 Cr L.J. 522=41 Bom.L.R. 93=A.I.R. 1939 Bom. 97.**

——**S. 8 (b)**—*Scope—If controlled by S. 14 (3)—Right of person whose name appears in voters' list as finally published to stand as candidate—If can be challenged.*

S. 8 (*b*) of the Bombay Local Boards Act cannot be construed as meaning that if the name of any person appears in the voters' list, he was entitled to stand as a candidate or that the names appearing in the list are to be treated as conclusive. S. 8 (*b*) is to be read along with S. 14 (3). The effect of this provision is that nobody whose name does not appear on the list of voters is qualified to stand as a candidate but that does not mean that if a person's name appears on the voters' list and he is therefore entitled to stand as a candidate at the election, his candidature cannot be challenged on the ground that although his name appears on the voters list, he is not duly qualified as a voter. The list as finally published is not conclusive and does not bar the right of any person to challenge the names appearing therein. (*Divatia, J.*) VINAYAK VASUDEO *v.* GOPAL CHIMNAJI. **I.L.R. 1938 Bom. 515=177 I.C. 302=11 R.B. 77=40 Bom.L.R. 525=A.I.R. 1938 Bom. 377.**

——**Ss. 13 and 14 (2)**—*Construction and scope—Voters' list—Finality as regards the right to vote or to be elected.*

There is nothing in Ss. 13 and 14 of the Bombay Local Boards Act which provides that the voters' list is conclusive in the sense that no one has a right to challenge the names appearing in that list after it has been duly published before the election. S. 14 (2) is clearly negative and it says nothing about the name of a person who is on the list but who is not qualified to be a voter. The marginal note to the section to the effect that the lists are conclusive evidence of the right to be

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elected or to vote is clearly incorrect, because the section does not say so. (*Divatia, J.*) VINAYAK VASUDEO *v.* GOPAL CHIMNAJI. **I.L.R. 1938 Bom. 515=177 I.C. 302=11 R.B. 77=40 Bom. L.R. 525=A.I R. 1938 Bom. 377.**

——**S. 14 (3)**—Scope and effect—If control, S. 8 (*b*). *See* BOM. LOCAL BOARDS ACT, S. 8 (*b*). **40 Bom. L.R. 525.**

——**S. 15 (2) (a) (ii) and (4) (c)**—*Construction and scope—If to be read together—"In his own right"—Meaning—Joint Hindu family—Right of member other than manager to vote at election—Family property entered in revenue records in member's name—If sufficient.*

The words "in his own right" in S. 15 (2) (*a*) (ii) of the Bombay Local Boards Act mean that he must own the land by himself, in other words he must be the exclusive owner of the land. Sub-S 2 (*a*) (ii) must be read with sub-S. 4(*c*) of S. 15, and both of them read together mean that in the case of a joint Hindu family no other person than the manager has the right to vote except in a case where one of the coparceners is holding some separate or self-acquired property in his own right, and in such a case he is entitled to be a voter if he fulfils the other requisites of the section. The fact that some family property is entered in the name of a coparcener in the revenue records would not entitle him to have his name on the voters' list. (*Divatia, J.*) VINAYAK VASUDEO *v.* GOPAL CHIMNAJI. **I.L.R. 1938 Bom. 515=177 I.C. 302=11 R.B. 77=40 Bom. L.R. 525=A.I.R. 1938 Bom. 377.**

—— **S. 35 (1) and (2) (k)**—*Scope—Power to make regulations—Regulation providing for voting by ballot in case of election of President and Vice Pres dent—If* ultra vires—*Ordinary meeting and meeting for election of President or Vice-President—Distinction.*

Sub-Cl. (*k*) of S. 35 (2) of the Bombay Local Boards Act clearly and explicitly confers upon the members of a Board the right to have the names of persons who voted for or against a resolution disclosed. The power of a Board to make regulations under S. 35 (1) must also be subject to the provisions of Sub-Cl. (*k*) among others. A regulation framed by a Board, which provides for votes being taken by ballot in the case of election of President and Vice-President, is clearly in consistent with sub-Cl. (*k*) of S. 35 (2) and therefore *ultra vires*, as under the Act there can be no voting by ballot. The Act further makes no distinction between a meeting held by the Board for electing a President or Vice-President and any other meeting held to transact any other business. S. 35 would equally apply to both. (*Rangnekar, Ag. C.J. and Tyabji, J.*) SAMALBHAI *v.* JESANGBHAI. **I.L.R. (1937) Bom. 225=9 R.B. 359=168 I.C. 20=38 Bom. L.R. 1331=A.I.R. 1937 Bom. 104.**

——**S. 100**—*Rules under—Rule 8—Scope—Goods on board ship brought to* Naka *but not landed as destined for another part—Demand of octroi duty—Refusal—Obstruction to seizure of goods—If offence—Convict on—Legality—Penal Code, S.* 183.

Accused was the Tandel or master of a country ship which arrived at the port of Jitapur, at the mouth of a creek in the Ratnagiri District, carrying goods consigned to various places in Jitapur

and in Rajapur, the latter being a port about 18 miles further up the creek. The goods consigned to persons in Jitapur were landed and octroi duty was duly paid thereon as per rules framed under S. 100 of the Bombay Local Boards Act. There being no separate *Naka* in Rajapur, the *Nakedar* of Jitapur went on board the ship and demanded octroi in respect of goods in the ship destined to Rajapur, but the accused refused to pay. The *Nakedar* thereupon seized part of the cargo and proceeded to weigh it, in virtue of the powers under rule 8 of the rules, but the accused obstructed him and removed the same and sailed away to Rajapur. On these facts the accused was prosecuted under S. 183, Indian Penal Code, for the offence of resisting to the taking of property by the lawful authority of a public servant and convicted, the conviction being confirmed in appeal.

Held, in revision, (1) that the rules framed under S. 100 of the Local Boards Act could not confer on the *Nakedar* power to board the ship and seize cargo, since that was beyond the powers given by the Act itself, and consequently, R. 8 being inconsistent with the Act, could not be held to be validly framed; (2) that the rules did not make it clear that goods on board the ship destined to Rajapur, where there was no *Naka*, could be said to be brought to *Jitapur Naka*, so as to make rule 8 applicable to the case; (3) that it was not made out that the District Local Board had any jurisdiction or authority to levy octroi on goods on board the ship in the port but not landed; and (4) that as the prosecution had not produced full, clear and satisfactory proof of the existence of the necessary authority as required by S. 183, Indian Penal Code the conviction of the accused was unsustainable and must be set aside. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* DEMA MAHADU AMBERKAR. **165 I.C. 637=9 R. B. 159=38 Bom.L.R. 790=38 Cr.L.J. 37=1936 Cr.C. 921=A.I.R. 1936 Bom. 376.**

——**S. 136**—*Applicability and scope—District Local Board—Administrative officer—Delivery of false travelling allowance bill to get higher rate of allowance—Prosecution under S. 420, Indian Penal Code—Absence of notice under S. 136—If bar to maintainability.*

An officer of a District Local Board who deliberately delivers afalse bill of travelling expenses cannot be said to be acting or purporting to act in pursuance of the Bombay Local Boards Act within the meaning of S. 136 of the Act. Such a protection clause was never intended to protect a dishonest rascal from the consequences of his rascality. It is intended to protect people who from excess of zeal or negligence, or other cause, exceed their powers. Where the Administrative Officer of a District Local Board submits a false bill for travelling allowance in order to obtain a higher rate of allowance than he would be entitled to in fact, a prosecution against him for cheating under S. 420, Indian Penal Code, can be commenced without the notice required to be given under S. 136 of the Bombay Local Boards Act. There is nothing in that Act or in the rules which compels him to claim travelling allowance or to put in a bill therefor if he does not desire to do so. The delivery of the travelling allowance bill is not a duty imposed upon him by the Act. And since the charge of cheating by the suppression of the true facts in order to make a false claim for a higher rate involves an act outside the accused's official duties, the absence of the notice required by S. 136 is no bar to a prosecution under S. 420, Indian Penal Code. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* R. K. NAIK. **I.L.R. (1940) Bom. 29=168 I.C. 133=41 Cr.L.J. 256=12 R.B. 316=41 Bom. L.R. 1227=A.I.R. 1940 Bom. 35.**

——**(as amended by Act XIII of 1935), S. 136 (2)**—*Applicability—Test of—President and servant of Taluk Board charged with offences under S. 120-B read with S. 406 or S. 409, Penal Code and S. 406 or S. 409 read with S. 477-A, Penal Code—Notice as required by sub-S. (2) not given to accused—Prosecution launched more than three months after acts complained of—Effect—"act" in S. 136 (2)—If means "offence".*

Per *Davis, J.C.* and *Mehta, A.J.C.* (*Rupchand Bilaram, A.J.C.*, dissenting).—The general test applicable in cases of the kind, as for instance a case falling under S. 136, Bombay Local Boards Act is, whether the act complained of is an act done by the protected person in his public capacity in relation to the public or whether it is done in relation to a private individual. The protection applies only to the performance of duties towards the public. The words of sub-S. (2) of S. 136 of the Act, as applicable to prosecutions can be compared with the corresponding words in S. 197 (1), Cr. P. Code. In S. 197 (1) of the Code occur the words "while acting or purporting to act in discharge of his official duty". It is true that in S. 197 (1) occurs the word "offence" while in S. 136 (2) of the Act occurs the word "act", but the word "prosecution" as introduced into that sub-section by the amendment by necessary implication, gives to the word "act" in reference to a prosecution the meaning of "offence" and as an official acting or purporting to act in the discharge of his official duty must of necessity act or purport to act in pursuance of statutory duties conferred on him by law, there is in this respect no difference of substance between the relevant words of S. 197 (1), Cr. P. Code and S. 136 (2) of the Act. If therefore for the words "acting or purporting to act in the discharge of his official duty" in S. 197 (1), the words "acting or purpurporting to act in pursuance of this Act" are substituted, the analogy between the two is clear. Official duty is something done in pursuance of some Act or Statutory authority. The words used in the Act are merely a variation of the words used in S. 197 of the Code considered necessary by the Legislature to apply the same principle of protection to the members or officers or servants of a Local Board acting or purporting to act under the particular statute which governs them. S. 136 (2) of the Act can apply only to acts done by the protected persons in discharge of their public duties towards the public. A President and a servant, who was sub-overseer of a certain Taluk Board, were charged with conspiring with a contractor to commit criminal breach of trust (S. 120-B read with S. 406 or S. 409, Penal Code) and with the commission of criminal breach of trust and falsification of accounts (S. 406 or S. 409 read with S. 477-A of the Code). No notice as required by sub-S. (2) of

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S. 136 of the Act was served on the accused and the proceedings were commenced more than three months of the acts complained of:

Held, that it could not be said that the President was not acting or purporting to act in exercise of his statutory duties towards the public when in pursuance of the Act he got measurement books and got bills prepared by the sub-overseer or that the sub-overseer was not acting or purporting to act in pursuance of the Act when he recorded measurements, prepared bills, signed a certificate, and wrote a cheque. It being alleged that they committed the acts complained of in order to defraud the public, the acts complained of could not fall outside the scope of S. 136 (2) of the Act. S. 136 (2) of the Act as amended by Act XIII of 1935 was therefore applicable to the offences with which the accused were charged. (*Davis, J C., Rupchand Bilaram and Mehta, A.J. Cs.*) NURALHAQSHAH *v.* EMPEROR. **32 S L R. 567=169 I.C 274=9 R.S 257=38 Cr.L.J. 723=A.I R. 1937 Sind 129 (F.B.).**

——**S. 136 (2)**—*Public and private prosecutions—Distinction.*

Obiter.—There is no distinction between public and private prosecutions in S. 136 (2), Bombay Local Boards Act. (*Davis, J.C. Rupchand Bilaram and Mehta, A. J. Cs.*) NURALHAQSHAH *v.* EMPEROR. **32 S.L.R. 567=169 I.C. 274=9 R S. 257=38 Cr.L.J. 723=A.I.R. 1937 Sind 129 (F.B.).**

——**(as amended by Act XIII of 1935), S. 139 (2)**—*Applicability—Sub-overseer of Local Board preparing false bills and overcharging Board in course of his duty of taking measurements of work and preparation of bill—Prosecution for—Limitation.*

A part of the duties of a sub-overseer under a Local Board was the taking of measurements of repair and other work done and the preparation of bills in respect thereof. The overseer prepared false bills and overcharged the Board.

Held, that the acts which were alleged to constitute a criminal offence on his part were acts done by him, or, in any case purported to have been done by him, in pursuance of the Local Boards Act, and whether they were *bona fide* or otherwise, he was immune from prosecution after a lapse of three months from the date of the act complained of. ((*Davis, J.C. and Lobo, J.*) TARACHAND PRIBHDAS *v.* EMPEROR. **32 S.L.R. 622 =175 I.C. 834=39 Cr.L.J. 668=11 R.S. 7=A.I. R. 1938 Sind 116.**

BOMBAY LOCAL BOARDS AMENDMENT ACT (XIII OF 1935)—*Scope—If retrospective.*

The general rule of construction is *nova constitutio futuris formam imponere debet, non praeteritis.* This rule does not apply to statutes relating to procedure and the law of Limitation being held to be a law of procedure, has retrospective effect unless the Legislature has made a distinct provision to the contrary. The amending Act lays down rules of limitation and they are *prima facie* rules of procedure. The amending Act has therefore a retrospective effect. (*Davis, J.C. Rupchand Bilaram and Mehta A.J. Cs.*) NURALHAQSHAH *v.* EMPEROR. **32 S.L.R. 567=169 I.C. 274=9 R.S. 257=38 Cr.L.J. 723=A.I.R. 1937 Sind 129 (F.B.).**

BOM. MUN. BOROUGHS ACT (1925), S. 33.

BOMBAY MARKETS AND FAIRS ACT (IV OF 1862), S. 1—*Scope—If conflicts with S. 139. Bombay District Municipal Act—Establishment of cattle market on private land within municipality without sanction of District Magistrate—Offence.*

It cannot be held that the provisions of S. 1 of the Bombay Markets and Fairs Act conflict with S. 139 of the Bombay District Municipal Act and therefore the provisions of the latter Act override those of the former so far as Municipal areas are concerned. If a person establishes a (cattle) market on his private land within Municipal limits without obtaining permission from the District Magistrate, he commits an offence under S. 1 of the Markets and Fairs Act and is liable to conviction under that section. (*Wadia and Sen, JJ.*) EMPEROR *v.* NAJMUDDIN IBRAHIMSAHEB. **42 Bom.L.R. 584.**

BOMBAY MOTOR VEHICLES ACT (XIV OF 1935), S. 3—Scope—Vehicle liable to tax under—If also liable under Bombay Municipal Boroughs Act. *See* BOMBAY MUNICIPAL BOROUGHS ACT, S. 73 (2). **41 Bom.L.R. 1249.**

BOMBAY MOTOR VEHICLES RULES (1905), R. 3 (1)—*Applicability—Letting for hire in public places—Private arrangement with selected customer not done in pnblic place—Permit of District Superintendent of Police not obtained—If breach of rule.*

Rule 3 (1) of the Bombay Motor Vehicles Rules applies to letting in public places, and this implies that actual transaction of letting must be done in a public place where it is open for any member of the public to take the vehicle on hire. It cannot apply to a case where the letting is to selected customer and is not done in a public place and where the vehicle is not available to any member of the public. In the latter case it is no offence or breach of the rule if the permit of the District Superintendent of Police is not obtained. The accused arranged with the Principal of a school to bring the pupils of the school from their homes in several places to the schools and to take them back for a certain fixed amount in reach of each pupil per month and was paid at that rate every month. He did not obtain a license under R. 3 (1) of the Motor Vehicles Rules from the District Magistrate,

Held, that the accused had not committed a breach of R. 3 (1). (*Broomfield and Wadia, JJ.*) EMPEROR *v.* NANDKISHORE SINGH. **I.L.R. (1937) Bom. 719=171 I.C. 277=10 R.B. 186=38 Cr.L. J. 1049=39 Bom.L.R. 616=A.I.R. 1937 Bom. 399.**

——**R. 21**—If *ultra vires. See* MOTOR VEHICLES ACT, SS. 11 AND 16. **40 Bom.L.R. 1099.**

BOMBAY MUNICIPAL BOROUGHS ACT (XVIII OF 1925), S. 33—*Applicabity—"Removal or reduction"—If confined to removal or reduction by way of punishment—Separation of two offices held jointly by one and the same individual and offer of one of them alone to him on lower salary—If covered by S. 33.*

The language of S. 33 of the Bombay Municipal Boroughs Act is wide enough to cover the case of removal or reduction of the Chief Officer, which is not by way of punishment but is the result of a separation of offices formerly held. Where the combined offices of Chief Officer and

Engineer are held by one and the same person, but the Municipality resolve to separate posts and offer one of them alone to the incumbent on a salary which is less than what he has been getting for the combined posts, the effect is that he is removed from the office held by him and relegated to an inferior position. That amounts to a removal or reduction within the meaning of S. 33 of the Act. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **I.L.R. (1937) Bom. 867 =174 I.C. 643=10 R.B. 477=39 Bom.L.R. 1269 =A.I.R. 1938 Bom. 137.**

——**S. 33**—*Construction—Resolution passed by majority of Councillors present at meeting — Majority not amounting to two-thirds of the whole number of Councillors of Municipality— Effect—Action taken upon such resolution—If* ulra vires.

Where a resolution of removal from office or reduction is passed by a mojority of fifteen to eleven Councillors out of those present, the total number of Councillors of the Municipaiity then being thirty-one, there is no majority of two-thirds of the whole member of Councillors as required by S. 33 of the Bombay Municipal Boroughs Act, and the resolution therefore contravenes the statutory provisions of S. 33 of the Act. The rule contained in that section is conducive to stability in the higher grades of service and is essentially for public good. Any action taken by the Municipality in the contravention of or in violation of that rule must be regarded as *ultra vires*. Although every resolution passed by a majority of votes is an expression of the will of the public body passing it, when the law as laid down in S. 33 requires that the resolution upon the particular matter must contain the expression of the pleasure or will of a stated number of members of the Municipality, the failure to comply with such provisions would render the expression nugatory and of no consequence. Consequently any action taken on a resolution passed by a majority with less than two-thirds of the whole number of Councillors is wrong and irregular. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **I L.R. (1937) Bom. 867=174 I.C. 643=10 R.B. 477=39 Bom.L.R. 1269=A.I.R. 1938 Bom. 137.**

——**S. 33**—*Dismissal of Chief-Officer in contravention of—Suit for damages — Measure of damages.*

The Chief Officer of a Municipality is only entitled to one month's notice before discharge like any other Municipal officer or servant, the only difference between his position and that of the other servants and officers being that he cannot be discharged except in the manner provided by S. 33. He cannot claim as of right to remain in service until he reaches a particular age fixed by the rules under the Act; nor can he claim a gratuity the grant of which is entirely at the discretion of the Municipality under the rules made under the Act. Since there is nothing to prevent him from being removed from office at any time by a valid resolution under S. 33, the only damages which he can claim and which can be awarded to him in a suit for damages for wrongful dismissal are wages for the period of notice, *i.e.*, one month's pay. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **I.L.R (1937) Bom. 867 =174 I.C. 643=10 R.B. 477=39 Bom.L.R. 1269 =A.I.R. 1938 Bom. 137.**

——**S. 33**—*Scope and effect—Removal of Chief Officer in contravention of procedure prescribed— Suit for damages in Civil Court—If barred—Servants of Municipalities and local bodies—Tenure of—Rule as to Crown servants—Applicability— Right of suit—If to be expressly given by statute —Jurisdiction of Civil Courts.*

The general rule applicable to the tenure of servants holding office under theCrown and their liability to dismissal without notice and without reason assigned cannot be applied in its entirety to other public servants not in the employment of the Crown, *e.g.*, servants holding offices under a Municipality under the Bombay Municipal Boroughs Act. Whatever justification there may be for bringing the servants of local bodies within the statutory definition of public servants, it cannot be concluded from that circumstance that local bodies enjoy all the prerogatives of the Crown governing its relations with its servants. Even the Crown's prerogative of dismissal can be curtailed by a statute, and if a statute regulates the procedure of dismissal of a public servant the Crown will be bound by it. The provision in S. 33 of the Bombay Municipal Boroughs Act is a limitation of the right to dismiss at pleasure; that section may reasonably be said to affect the tenure of the post of the Chief Officer and to give him a right to hold his office until removed from his Office in the manner prescribed by the section. Even if the general rule as to the tenure and dismissal of Crown servants be applicable to the case of the Chief Officer of a Municipality. S. 33 of the Act would take the case out of the general rule and would prevent the officer from being removed from office except in accordance with the provisions of that section. The removal of the Chief Officer in contravention of S. 33 is an infringement of his right to hold office unless or until he is lawfully removed; it gives him a cause of action for a suit for damages for wrongful dismissal in the Civil Court, as it cannnot be denied that the infringement of the right causes damage. Nor is it necessary that a right of suit should be expressly given by statute. The maxim *ubi jus ibi remedium* may fairly be applied.

Wassoodew. J.—Where the act complained of is professedly done under the sanction of the law and in the exercise of the power conferred by statute upon the Municipality, the fact that it is done by the Municipality under a supposed delegation of Sovereign authority but in actual disregard of the procedure in that respect laid down by law will not afford justification in a Civil Court. Even the Crown could not put forward such a plea in such a case. There is no warrant for holding that no action lies against Municipality even if it violates the rules of procedure laid down by the law of its incorporation. Where a right and an infringement thereof are alleged, and a cause of action is disclosed, the Civil Courts are bound to entertain the same in the absence of any legal bar. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF

DHULIA *v.* RAMACHANDRA BAPUJI KALE. **I.L.R. (1937) Bom. 867=174 I.C. 643=10 R.B. 477= 39 Bom.L.R. 1269=A.I.R. 1938 Bom. 137.**

——**Ss. 48 and 49**—Scope—If exceptions to S. 70, Contract Act—Act done in contravention of Ss. 48 and 49—Right to compensation—"Lawful Act"—Liability to make compensation—If excluded by Ss. 48 and 49. *See* CONTRACT ACT, S. 70. **39 Bom.L.R. 835.**

——**S. 68 (1) (d)**—*Scope—Duty of Municipality—Cutting off of water supply at night—Destruction of house by fire owing to delay in getting water to extinguish fire—Liability to damages—Tort—Nonfeasance—If actionable.*

Appellant had a shop within the Municipality of Ahmedabad. The Municipality had, under the advice of a Government expert and owing to shortage of water, passed an order to prevent waste of water, to the effect that the water supply should be cut off from 10 P M. in the night until 5 A.M. in the morning. One night the house adjoining the appellant's shop caught fire and the fire spread to the shop and destroyed it. It was found that the spreading of the fire was due to the fact that water could not be obtained from the mains for about half an hour after the arrival of the fire engines. The appellant sued the Municipality for damages on the ground that the latter were guilty of a breach of the duty imposed by S. 68 (1) (*d*) of the Municipal Boroughs Act to make reasonable and adequate provision for extinguishing fires and protecting life and property, and that the same amounted to misfeasance.

Held, that though the Municipality had negligently failed in its duty to make an adequate and reasonable provision for extinguishing fire, its action in cutting off the water supply could not be regarded as a misfeasance of a kind which gave the appellant a right of action for damages; that it was only a case of non-feasance and therefore no action lay. (*Broomfield and Sen, JJ.*) MOHANLAL BAPA LAL *v.* BOROUGH MUNICIPALITY OF AHMEDABAD. **I.L.R. (1938) Bom. 696=177 I.C. 160=11 R.B. 66=40 Bom.L.R. 552=A.I.R. 1938 Bom. 370.**

——**S. 73 (ii)**—*Construction—"Kept for use within the said borough"—Meaning of—Vehicle kept and used for main purpose in one municipality but making occasional visit to another municipality for minor object—Right of latter municipality to tax vehicle.*

S. 73 of the Bombay Municipal Boroughs Act is a taxing section and has to be construed strictly in favour of the tax payer. The words "kept for use" in S. 73 (ii) cannot be construed as involving a liability to tax in case of every vehicle which is kept with the intention of being used even occasionally within the borough imposing the tax, what has to be considered is the main real or pressing object in keeping the vehicle. The words "kept for use" really mean "maintained with the main object of being used." Where a vehicle makes a visit to a Municipality occasionally for a very minor object their main and major use being outside that municipality, the vehicle is not liable to be taxed by that Municipality. In such a case it cannot be said that the vehicle is kept for use so as to enable that Municipality to tax it. (*Barlee and Macklin, JJ.*) BANDARA MUNICIPALITY *v.* BURMA SHELL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD. **I.L.R.(1938) Bom. 111=174 I.C. 985=10 R.B. 514=40 Bom. L.R. 111=A.I.R. 1938 Bom. 214.**

——**S. 73 (x)**—*Construction—Water supplied by the municipality"—Meaning of—Water rate—Levy of—Conditions—Actual house cannection—If necessary.*

The true meaning of the words "water supplied by the municipality" in S 73 (x) of the Bombay Municipal Boroughs Act is water supplied for general public purposes by the Municipality. The words cannot be construed as meaning supplied to, that is connected up with, particular premises, under S. 73 (x), the Municipality can charge a water rate if they supply water to the borough. The mere fact that water supply system has not yet been extended to a particular district in which a particular person's premises are situate, so as to enable these premises to be connected, does not show that the Municipality has not supplied water within the meaning of the section. (*Beaumont, C.J, and Sen, J.*) BRAHMIN MITRA MANDAL CO-OPERATIVE HOUSING SOCIETY LTD. *v.* AHMEDABAD MUNICIPALITY. **42 Bom.L.R. 587= A.I.R. 1940 Bom. 269.**

——**S. 73 (2)**—*Construction—"Kept for use"—Meaning of—Same vehicle—If liable to taxation under two Acts—Bombay Motor Vehicles Act, S. 3.*

The words "kept for use within the borough," in S. 73 (2) of the Bombay Municipal Boroughs Act mean "kept for normal use within the borough" and there is no doubt that where a vehicle is kept for normal use outside the borough, an occasional user within the borough can be rejected on the principle of *de minimis non curat lex*. A vehicle which is both used in the Presidency of Bombay and is also used within the borough may be the subject of taxation by two taxing bodies, *i.e.*, both under the Municipal Boroughs Act and under the Motor Vehicles Act of 1935. There is no principle to prevent such double taxation. (*Beaumont, C. J.*) CHUNILAL JETHALAL *v.* AHMEDABAD BOROUGH MUNICIPALITY. **186 I.C. 518=12 R.B. 345=41 Bom.L.R. 1249= A.I.R. 1940 Bom. 41.**

——**Ss. 80 and 81**—*Individual notice under S. 81—Presumption that public notice under S. 80 was given and other formalities followed—If arises.*

If individual notice is proved to have been given under S. 81, the presumption as to official or legal acts which may be raised under S. 114, Evidence Act, should be raised, and it can be presumed that public notice under S. 80 was properly given of the assessment list, and that all formalities required for the proper assessment of the tax were followed by the municipality. (*Davis, J.C and Lobo, J.*) JAMNADAS *v.* EMPEROR. **187 I.C. 127=12 R.S. 223=41 Cr.L.J. 401 (2)= A.I.R. 1940 Sind 42.**

——**S. 90**—*License fee under—If rent—Suit for—Limitation—Limitation Act Arts. 110 and 120.*

The license to use Municipal land for temporary purposes under S. 30 of the Bombay Municipal Boroughs Act is not a demise or lease of the premises and the fee charged by the Municipality for issuing such a license is not "rent" within the meaning of Art. 110 of the Limitation Act. It is only a tax as defined by the Municipal Boroughs Act. Hence a suit for recovery of such license fee or tax is governed

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for purposes of limitation not by Art. 110 but by Art. 120 of the Limitation Act. (*Rupchand and Havelivala, A.J.Cs.*) MASAND MOTIRAM *v.* SHIKARPUR MUNICIPALITY. **30 S.L.R. 146=165 I.C. 369=9 R.S. 100=A I.R. 1936 Sind 184.**

——**S. 105**—*Limitation—Distraint under—Conditions for taking out—Claim barred by time—Recoverability by distraint.*

Once a bill is presented "with the least possible delay" as required by S. 104 (1) of the Bombay Municipal Boroughs Act, the right to issue a notice of demand and then to recover the amount of the bill by distress warrant under S. 105 accrues to the Municipality, and that right is not lost by lapse of time. S. 105 does not prescribe any period of limitation. The powers of the Municipality acting under Ss. 104 and 105 are not governed by the Limitation Act, and the fact that the remedy of the Municipality to recover the amount by filing a suit in a Civil Court is time-barred cannot prevent it from exercising the special powers conferred upon it by the Act. (*Lokur, J.*) SURAT BOROUGH MUNICIPALITY *v.* SARIFA KARUNNISSA. **I.L.R. (1939) Bom. 685=185 I.C. 366=12 R.B. 233=41 Bom.L.R. 1002=A.I.R. 1939 Bom. 494.**

——**S. 110 (2) (b) (i)**—*Applicability and construction—Water tax imposed in the form of rate on buildings or lands—If a rate on buildings or lands.*

The expression "a rate on buildings or lands" in S. 110 (2) (*b*) (*i*) of the Bombay Municipal Boroughs Act includes a tax in the form of a rate on buildings or lands; and the clause applies not merely to a rate on buildings or lands, but also to a water-tax imposed in the form of a rate assessed on buildings or lands. (*Beaumont, C.J.*) BOROUGH MUNICIPALITY OF AHMEDABAD *v.* AHMEDABAD MANUFACTURING AND CALICO PRINTING CO., LTD. **I.L.R. (1939) Bom. 701=186 I.C. 456=12 R B. 341=41 Bom.L.R. 1015=A.I.R. 1939 Bom. 478.**

——**Ss. 110 and 111**—*Scope—Jurisdiction of Civil Court—Decision of Magistrate in appeal—Suit in Civil Court—Maintainability in the absence of appeal or revision to superior Court.*

The words of S 111 of the Bombay Municlpal Boroughs Act that the decision passed on appeal by the Magistrate is, at the instance of either party, subject to revision etc., are not mandatory in the sense that it is incumbent on either party to adopt the remedy provided in the section, and there is nothing to prevent an assessee to municipal tax from filing a suit in the Civil Court even though he may not have followed in its entirety the procedure for appealing to the Magistrate laid down in S. 110 of the Act quite apart from the Municipal Boroughs Act, the Civil Court has jurisdiction to entertain a suit with regard to any liability to municipal taxation. Such a suit is an independent one and need not be filed after exhausting the other remedies provided in S. 110 and 111 of the Bombay Municipal Boroughs Act. (*Divatia, J.*) BHOPSHETTI *v.* B. V. BHAT. **188 I. C. 531=42 Bom.L.R. 223=A.I.R. 1940 Bom. 188.**

——**S. 111**—Order of Sessions Judge under—Revision to High Court—Competency. *See* C. P. CODE, S.115. **41 Bom.L.R. 937.**

——**S. 114 (2)**—*"Purchase'—Meaning—If includes compulsory acquisition.*

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T word "purchase" in S. 114 of the Bombay Municipal Boroughs Act includes compulsory acquisition, if necessary, and not merely acquisition by private negotiations. (*Broomfield and Wassoodew, JJ.*) PARSHOTTAM *v.* SECRETARY OF STATE. **174 I C. 67=10 R.B. 420=39 Bom.L.R. 1257=A.I.R. 1938 Bom. 148.**

——**Ss. 123 and 137**—*Construction and relative scope—Notice of proposed construction—No steps taken by Chief Officer within one month—Right of owner to proceed with construction—Drains constructed for house—Right to demand demolition on the ground of want of sanction or notice.*

Where a notice specifying the building sought to be constructed is given, and the Chief Officer of the Municipality has not taken steps within a month in relation thereto, the building owner can proceed with his proposed construction; that is on the basis that the consent of the Chief Officer must in such circumstances be implied. There is no warrant for holding that S. 123 of the Bombay Municipal Boroughs Act is not concerned with the question of drainage. The section in terms does deal with the drains and sewers of the proposed new building. Where a proper notice has been given under S. 123, and the proposed building including the drains has been proceeded with properly under S. 123 (5), the Municipality cannot require the drains to be removed under S. 137. S. 137 is primarily designed to give the Municipality a power exercisable at any time merely by notice in writing to require the demolition of a drain constructed without proper consent or contrary to regulations, whereas the penalty under S. 123 for breach of that section is primarily a fine, and demolition can only be ordered after conviction has been obtained under sub-S. (7) (*b*). (*Beaumont, C.J. and Divatia, J.*) EMPEROR *v.* DIRAJLAL DALSUKHRAM. **174 I.C. 466=39 Cr.L.J. 413=10 R.B. 451=40 Bom.L.R 67=A.I.R. 1938 Bom. 186.**

——**S. 123 (1)**—*Notice under—Form of—Endorsement on plan showing proposed drain—If sufficient notice—Separate letter asking for leave—If necessary.*

The sending of a plan to the Municipality showing a drain and a septic tank, with an endorsement upon it saying that it is a plan as to the proposed drainage and septic tank amounts to the giving of notice to the Chief officer of the Municipality within the meaning of S. 123 (1) of the Bombay Municipal Boroughs Act, as to the work proposed to be constructed, without any separate covering letter asking for leave. There is nothing in S. 123 which requires that the notice should be in a document separate from the plan itself. (*Beaumont, C. J. and Divatia, J.*) EMPEROR *v.* DIRAJLAL DALSUKHRAM. **174 I C. 466=39 Cr. L.J. 413=10 R.B. 451=40 Bom.L.R. 67=A.I.R. 1938 Bom. 186.**

——**S. 129**—*Construction and scope—Notice under—Requisites of validity—Powers of chief officer—Notice calling for plan for laying out drain, etc.—Legality.*

S. 129 of the Bombay Municipal Boroughs Act gives power to the chief officer to require something to be done, and it is for him to say what he requires to be done and not for the owner of the house or buildings to submit proposals. A notice

calling upon the owners of houses or buildings to submit a plan for laying out a six inches drain in their property and to get it passed by the engineering department and after laying out a six inches drainage line according to the passed plan and getting a connection only through the Municipality to join it therewith within thirty days of the receipt of the notice is not a proper or valid notice under S. 129, and a failure to comply with such a notice is not a breach of S. 129 which would render the owners liable to conviction. The chief officer is bound in his notice to specify the size, materials, level and fall which he requires in respect of the drain which he is ordering. A notice which does not comply with these requirements is not a good notice under S. 129. The house-holder is entitled to know in the first instance what he is required to do. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* TRIKAMLAL KESHAVLAL. **175 I C. 765=11 R B 5=39 Cr.L. J. 667=40 Bom.L.R. 314=A.I.R 1938 Bom.303**

——**Ss. 167 and 193**—*Low lying land comprising several acres—Order by chief officer of Municipality calling upon owner to fill up to level of surrounding ground within* 15 *days—Validity—Failure to obey—Liability to conviction under S.* 193—*"Fill up, cover over or drain off"—Construction.*

S. 167 of the Bombay Municipal Boroughs Act gives power to the Chief Officer of a Municipality to require the owner of the property referred to in the section "to fill up, cover over or drain off" the property. These words refer back without distinction to clauses (*a*), (*b*) and (*c*) of the section, though obviously all the words are not equally appropriate to all that precedes. It is by no means clear that the words "fill up" were intended to apply to land on which water accumulates and it is extremely doubtful whether they would apply or could have intended to apply to filling up in the sense of raising the level of a large area of land which is naturally low lying land. The power to order levelling of this kind is on the face of it so harsh and oppressive that one cannot suppose that the Legislature intended to confer this power. The words of the section cannot be held to confer on the chief officer the power to make an order requiring the owner of low lying land (comprising several acres) to fill it up with dry earth to the level of the surrounding ground which was two to three feet higher in level. Where the chief officer ordered the owner to raise the level of low lying land by about two to three feet within 15 days, and it was found that the work would cost about four to five thousand rupees which was beyond his resources and out of all proportion to the value of the land and that the work would take at least two or two and a half months,

Held, that the order was beyond the powers conferred by S. 167 of the Act, even if the officer had the power, the order must be regarded as an arbitrary and oppressive one and the time being unreasonably short, the accused could not be convicted under S 193 of the Act for failure to obey the order. (*Broomfield and Sen, JJ.*) EMPEROR *v.* DON FILLIUS D'SILVA. **168 I.C 199=39 Bom. L.R. 77=38 Cr.L.J. 535=9 R.B. 363=A.I.R. 1937 Bom. 165.**

——**S. 167**—*Powers of chief officer of Municipality to act under—Nuisance—If should be proved to exist in fact—Opinion of Chief Officer—Proof of—Necessity for—Mere production of notice—If sufficient proof.*

Under S. 167 of the Bombay Municipal Boroughs Act, what is required is that the chief officer of a Municipality be satisfied of the existence of a nuisance, because he is given power to issue the notice there provided for if in his opinion a nuisance exists. It is not necessary that it should be proved by evidence that a nuisance exists in fact. But it is necessary that the opinion of the chief officer should be properly proved. The mere production of a notice signed by him is not sufficient proof of his opinion. (*Broomfield and Sen, JJ.*) EMPEROR *v.* DON FILLIUS D'SILVA. **168 I.C. 199=38 Cr.L.J. 535=9 R.B. 363=39 Bom.L.R. 77= A.I R. 1937 Bom. 165.**

——**S. 167 (c)**—*Construction—"Or to take such order with the same. etc"—Meaning—If empowers Chief Officer of Municipality to require filling up of low lying land to a height of two to three feet.*

The words "or to take such order with the same for removing or abating the nuisance as the Chief Officer shall prescribe" must be considered with their context. It is a case of *noscitur a sociis*, The words in question cannot be construed as empowering the Chief Officer of a Municipality to make an order requiring the owner of low lying land comprising several acres to fill it up with dry earth to the level of the surrounding ground, to a height of two to three feet. (*Broomfield and Sen, JJ*) EMPEROR *v.* DON FILLIUS D'SILVA. **168 I.C. 199=38 Cr.L.J. 538=9 R.B. 363=39 Bom.L.R. 77=A.I.R. 1937 Bom. 165.**

——**S. 193**—Applicability—Order under S. 167 beyond powers conferred by section—Time given unreasonably short—Non-compliance—Offence—Liability to conviction. *See* BOMBAY MUNICIPAL BOROUGHS ACT. Ss. 167 AND 193. **39 Bom.L.R. 77.**

——**S. 198**—*Scope—Proceedings under—Compensation—Additional* 15 *per cent. for compulsory acquisition—If can be awarded—Land Acquisition Act, Ss.* 23 *to* 25—*Applicability.*

Ss. 23, 24 and 25 of the Land Acquisition Act constitute a Code laying down the principles on which the District Court is to act in arriving at the compensation to be paid for the compulsory acquisition and it is impossible to leave out of that Code. S. 23 (2) which provides for an additional 15 per cent. These sections have to be treated as applicable to proceedings in the District Court under S. 198 of the Bombay Municipal Boroughs Act. The District Court in fixing compensation under S. 198 of the latter Act is therefore competent to allow the 15 per cent. for compulsory purchase in addition to the compensation awarded under the section. (*Beaumont. C.J.*) THE BOROUGH MUNICIPALITY OF AHMEDABAD *v.* JAYENDRA VAJUBHAI DIVATIA. **I.L.R. (1937) Bom. 632=171 I.C. 692=10 R.B. 222=39 Bom L.R. 329=A.I.R. 1937 Bom. 432.**

——**S. 203**—*Scope—If affects rights given by Ss.* 104 *and* 105.

S. 203 of the Bombay Municipal Boroughs Act only provides an alternative procedure for the recovery of taxes, and does not deprive the Municipality of its right to proceed ander Ss. 104 and 105 when that is available. The fact that the

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remedy under S. 203 is barred by time does not lead to the conclusion that the remedy by way of distress under Ss. 104 and 105 is also lost. (*Lokur, J.*) SURAT BOROUGH MUNICIPALITY *v.* SARIFA KARUNNISSA. **I.L.R. (1939) Bom. 685=185 I.C. 366=12 R.B. 233=41 Bom.L.R. 1002=A.I.R. 1939 Bom. 494.**

——S. 206—*Applicability and scope—'Purporting to have been done in pursuance of the Act' meaning—Acts done* mala fide *if covered—Prosecution by municipality under Act—Acquittal—Suit for malicious prosecution—Limitation applicable—Limitation Act, Arts. 2 and 23—Application of.*

S. 206 of the Bombay Municipal Boroughs Act is not confined to acts of the Municipality or its officers which are done *bona fide*. The section applies also to acts done *mala fide*. Though the general tendency of the Court is to construe provisions protecting persons from the consequences of acts done under a particular statute so as to limit those provisions to acts of a *bona fide* character, and not to extend them to acts done *mala fide*, it cannot be held that if the legislature expresses itself in sufficiently clear language, it cannot afford protection to acts done *mala fide*. The effect of the section is to protect the Municipality or its officers in respect of any thing done or purporting to have been done in pursuance of the Act. The words "purporting to have been done" must bear their natural meaning. If a prosecution is launched for an alleged infringement of some provisions in the Act, then the prosecution purports to be in pursuance of the Act, whether the action is a *bona fide* one or not. An action against the municipality for malicious prosecution falls under S. 206 of the Act, and unless instituted within 6 months from the date when the plaintiff was acquitted in the prosecution. Neither Art. 2 nor Art. 23 of the Limitation Act applies to such a suit; because S. 206 of the Municipal Boroughs Act is a specific section which covers the case on the point of limitation. (*Beaumont. C.J. and Wadia, J.*) PARVETEPPA *v.* THE HUBLI MUNICIPALITY. **172 I.C. 430=10 R.B 276=39 Bom.L.R. 881=A.I.R. 1937 Bom. 491.**

——S. 206—*Applicability—Suit for injunction against Municipality—Notice—Necessity.*

A suit for an injuction against a Borough Municipality is a suit to which S. 206 of the Bombay Municipal Boroughs Act applies, and notice of suit should therefore be given to the Municipality before it is brought. (*Wadia, J.*) MUNICIPAL BOROUGH OF DHULIA *v.* MAHOMED ISAK ABDUL KARIM. **160 I.C 736=8 R.B. 278=37 Bom.L.R. 1027=A.I.R. 1936 Bom. 43.**

——S. 206—*Limitation—Starting point—Wrongful dismissal of Municipal servant—Suit for damages—Period of six months—When commences to run—Date of resolution of dismissal or date of actual handing over of charge.*

A suit by a dismissed servant of a Municipality for damages for wrongful dismissal is not barred by limitation because it is brought after six months of the municipal resolution finally removing the servant from office or after six months of the intimation given to him that he would have to hand over charge. Until the plaintiff is actually forced to vacate his office by the appointment of his successor, he is entitled to say that he is not actually damnified, and the cause of action for the suit does not arise until he actually hands over charge. A suit brought within six months of the date of handing over charge is in time under S. 226 of the Bombay Municipal Boroughs Act. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **I.L.R. (1937) Bom. 867=174 I.C. 643=10 R.B 477=39 Bom.L.R. 1269=A.I.R. 1938 Bom. 137.**

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BOMBAY NATIVE SHARE AND STOCK BROKERS' ASSOCIATION RULES, Rr. 16 and 17—*Applicability—Member of association dying leaving no son—Will naming beneficiary—Right of widow to sale proceeds of membership card—Liability to account to beneficiary—Deed of Association, Cl. 12—Card, if property of member.*

Under Cl. 12 of the Deed Constituting the Bombay Native Share and Stock Brokers' Association a membership card held by a member of the Association gives a merely personal right to the holder and does not constitute in the ordinary sense property. Under the rules of the Association the widow of a member who dies leaving no son is entitled in her own right to the proceeds of the sale of the card held by her deceased husband. Such sale proceeds do not form part of the corpus of the estate of the deceased member. The fact that the deceased member has left a will disposing of his property makes no difference; the widow cannot under the rules be made accountable for the proceeds to the beneficiaries under the will of her husband. Where a case falls under R. 15, R 17 can have no application; if the sale has already taken place under Rr. 15 & 17 will not apply. (*Beaumont, C.J. and Blackwell, J.*) TRIBHOVANDAS MOTILAL *v.* BHIKHUBHAI RAVCHAND. **172 I.C 233=10 R.B 258=39 Bom L.R 666=A.I.R. 1937 Bom. 477.**

——R. 297—*Brokers' havala transactions—Making up price—Directors' power to alter—When to be exercised—Power to alter making up price in respect of one broker's transactions only.*

R. 297 of the Bombay Native Share and Stock Brokers' Association enables the Board of Directors of the Association under exceptional circumstances to alter the making-up price which has been fixed in respect of havala transactions carried through by the members on the exchange. But the alteration must be made before the pay out day. But there is nothing in the rules to justify the directors in altering the making-up price in respect of one broker's transactions only. The making-up price is settled for the whole market and if it is to be altered, it must be altered for the whole market. (*Beaumont, C.J. and Sen, J.*) BHAGWANDAS PURSHOTTAMDAS *v.* CHUNNILAL DAHYABHAI. **42 Bom.L.R. 518.**

BOMBAY PLEADERS ACT (XVII OF 1920), S. 20—*"First hearing"—Meaning of—If date fixed in notice under O. 41, R. 12. C.P. Code—Bombay High Court Rules (Appellate Side), Appendix E, R. 97—Engagement of two pleaders before date on which there is hearing—Right to fees of two pleaders.*

The term "first hearing" in S. 20 of the Bombay Pleaders Act, as also in R. 97, Appendix E of the Bombay High Court Rules (Appellate Side) must be taken to mean the day on which there is

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for the first time a hearing in Court, and not the date fixed in the notice issued under O. 41, R. 12, C. P. Code, and a party who engages more than one pleader in an appeal before that date is consequently entitled to fees of two pleaders. (*Barlee and Macklin, JJ.*) RAMCHANDRA *v.* SERVANTS OF INDIA SOCIETY. **60 Bom. 696=164 I.C 566=9 R B. 80=38 Bom.L.R. 518=A.I.R. 1936 Bom. 272.**

——**S. 20 (c)**—*"On the merits" — Meaning—Appeal decided on preliminary point—If decided on merits.*

"In any appeal....decided on the merits in S. 20 of the Act, cannot be interpreted as meaning a decision on the merits in the High Court, but a decision in the High Court even on a preliminary point, from a decree on the merits in the lower Court. (*Barlee and Macklin, JJ.*) RAMCHANDRA *v.* SERVANTS OF INDIA SOCIETY. **60 Bom 696=164 I C. 566=9 R.B 80=38 Bom.L.R 518 =A.I.R. 1936 Bom. 272.**

BOMBAY PREVENTION OF ADULTERATION ACT (V OF 1925), Ss. 3 (a), 4 (4) (a), 13—*Plea of warranty—Duty of accused—Right to adjournment.*

In a trial for an offence under the Bombay Prevention of Adulteration Act, if the accused rely on the defence of warranty, they must prove it and must have the witnesses ready on the date of hearing. They are not entitled to an adjournment as of right for the purpose of proving warranty. Where however neither the summons served on the accused nor the evidence for the prosecution makes it clear what the case is that the accused have to meet, the accused may be pardoned if they do not state clearly the defence of warranty before the case for the prosecution is closed. (*Davis, J.C. and Lobo, J.*) CHOITHRAM *v.* EMPEROR. **32 S.L.R 684=174 I.C. 685=39 Cr.L.J 474=10 R.S. 259=A.I.R. 1938 Sind 70.**

——**S. 4**—*Applicability — Sale of articles of food containing ghee—Offence.*

It cannot be said that S. 4 applies only to sale of ghee simply as such and does not apply to the sale of articles of goods of which it is a necessary ingredient. The words of the section are wide enough to include articles of food which contain ghee mixed with other substance. (*Davis, J.C. and Tyabji, J.*) NEBHANDAS HOLLARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 91=185 I C 832=41 Cr.L.J. 246=12 R.S. 192=A.I.R. 1939 Sind 337.**

——**S. 4 (1)**—*Conviction—Validity.*

S. 4 (1) contemplates three distinct offences, under Cls. (*a*), (*b*) and (*c*) respectively and a conviction under S. 4 (1) generally is bad in law. (*Davis, J.C. and Lobo, J.*) CHOITHRAM *v.* EMPEROR. **32 S.L R. 684=174 I.C. 685=39 Cr.L.J. 474=10 R S 259=A I.R. 1938 Sind 70.**

——**S. 4 (1) (a)**—*Applicability—Sale to public officer—Offence.*

An offence under S. 4 (1) (*a*) is committed in respect of adulterated food even though it is purchased by a public officer as such public officer. (*Davis, J C. and Lobo, J.*) GOBINDRAM JAMIATRAI *v.* KARACHI MUNICIPAL CORPORATION. **I L.R. (1939) Kar. 191=178 I.C. 119=11 R.S. 80=40 Cr.L.J. 7=A.I.R. 1938 Sind 218.**

——**S. 4 (1) (a)**—*Liability of sleeping partner.*

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A proprietor of a shop is liable for the sale of adulterated stuff sold in his shop, although such proprietor is only a sleeping partner. (*Davis, J.C. and Lobo, J.*) GOBINDRAM JAMIATRAI *v.* KARACHI MUNICIPAL CORPORATION. **I.L.R. (1939) Kar. 191=178 I C. 119=11 R.S. 80=40 Cr.L.J. 7=A.I R. 1938 Sind 218.**

——**S. 4 (1) (a)**—*Selling as "vinegar" synthetic vinegar produced not by fermentation but by diluting acetic acid and with water—Offence.*

The question whether the particular article sold was not of the nature, substance or quality demanded so as to contravene the provisions of S. 4 (1) (*a*) of the Act, is a question of fact to be determined on the evidence. In a case the prosecution examined an analyser who said that "vinegar" was the product of fermentation or brewing and that the substance sold by the accused was "artificial" or synthetic vinegar produced not by fermentation or brewing but merely by diluting acetic acid with water. The defence produced no evidence whatever:

Held, that the accused was guilty under S. 4 (1) (*a*). (*Lobo, J.C. and O'Sullivan, J.*) PARSRAM TEKCHAND *v.* EMPEROR. **I.L.R. (1940) Kar. 282 =A.I.R. 1940 Sind 127.**

——**S. 4 (1) (b)**—*Burden of proof—Admission of accused—Effect of.*

It is true that the burden of proof that an article of food is adulterated lies upon the prosecution, but that burden may in effect be assisted or even completely discharged by the admission of the accused himself. (*Davis, J.C. and Tyabji, J.*) NEBHENDAS HOLLARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 91=185 I.C. 832=41 Cr.L.J. 246=12 R. S. 192=A.I.R. 1939 Sind 337.**

——**S. 4 (1) (b)**—*Scope—Adulterated ghee taken from sweetmeat shop out of frying-pan—Presumption.*

Where ghee alleged to be adulterated was taken from a shop where sweetmeats and pakoras were offered for sale and indeed from a frying-pan in which other sweetmeats and pakoras were being made a presumption can be raised that the sweetmeats and pakoras in accused's shop had been manufactured for sale within the meaning of S. 4 (1) (*b*) of the Act and that he was manufacturing and offering for sale sweetmeats and pakoras as containing pure ghee which contained impure ghee. (*Davis J.C. and Tyabji, J.*) NEBHENDAS HOLLARAM *v.* EMPEROR. **I.L.R (1940) Kar. 91= 185 I C. 832=41 Cr.L.J. 246=12 R.S. 192= A.I.R 1939 Sind 337.**

——**S 4 (4) (b)**—*Commission to warrantor—Powers of Court.*

The words in the 'exception' contained in S. 4 (4) (*b*) are wide enough to cover the power of a Magistrate to ask for the issue of a commission under S. 506, Cr. P. Code, in case where he thinks that it is only just and proper that that power should be exercised. The cases in which the Court would grant a request for the issue of a commission to a warrantor would be rare, but there is nothing in S. 4 (4) (*b*) to prevent the Court asking the District Magistrate to issue a commission for the examination of the warrantor. It is not, however, necessary for the Magistrate rejecting the application for the issue of commission to give his reasons for doing so in writing. (*Davis, C. J. and Lobo, J.*) GIRDHARILAL *v.*

BOM. PREVEN. OF ADULT. ACT (1925), S. 4.

EMPEROR. 32 S.L.R. 659=174 I.C. 542=39 Cr. L.J. 477=10 R.S. 257=A.I.R. 1938 Sind 72.

——Ss. 4 (4) (b) and 5—*Warranty—Proof of—Personal attendance of warrantor—Necessity for.*

Under S. 4 (4) (*b*), it is the rule that a warranty must be proved by the personal attendance in Court, of the person by whom or on whose behalf it was given and it may well be that this provision of S. 4 (4) (*b*) is to be read with S. 5 whereby provision is made for the punishment of the warrantor in case a false warranty is given. It is the rule that the warrantor must personally attend in Court, and it is only in exceptional circumstances that he should not do so. (*Davis, J.C. and Lobo. J.*) GIRDHARILAL *v.* EMPEROR. 32 S.L.R. 659=174 I.C. 542=39 Cr.L.J. 477=10 R.S. 257=A.I.R. 1938 Sind 72.

—— S 12 (1)—*Complaint addressed to Bench of Honorary Magistrates as such—Verification of complaint signed by one Magistrate only—If implies presence of one only.*

In Hyderabad the Magistrates who constitute the 'B' Bench, are Magistrates of the Second Class only when sitting together as a Bench, and when sitting singly they are Magistrates only of the Third Class. Where the complaint was addressed to a Bench of Honorary Magistrates as such, from the fact that upon the verification of the complaint itself there was only the signature of one Magistrate, it would not follow that two magistrates were not present sitting as a Bench. (*Davis, J.C and Mehta, J.*) LILARAM LADAKMAL *v.* WADHUMAL. I.L.R. (1939) Kar. 230=178 I.C. 648=11 R.S. 100=40 Cr.L.J. 122=A.I.R. 1938 Sind 209.

——S 13 (1)—*Scope—Summons not applied for within 30 days—If fatal.*

S. 13 should be considered separately as regards its two sub-sections, because sub-s. (1) relates to a condition of time, and if it can be shown that a summons was not applied for within 30 days of the date of the grant of the certificate by the public analyst, that would be fatal to the prosecution case, for time once gone is gone beyond recall. This cannot be regarded as a mere irregularity which can be cured. (*Davis, J.C. and Mehta, J.*) LILARAM LADAKMAL *v.* WADHUMAL. I.L.R. (1939) Kar. 230=178 I.C. 648=11 R.S. 100=40 Cr.L.J. 122=A.I.R. 1938 Sind 209.

——S. 13 (2)—*Scope—If mandatory—Absence of date in summons—If fatal.*

Though it is very desirable indeed that the provisions of S. 13 (2) should be closely followed, that the name of the complainant should be given the name and place fixed for hearing should be shown, it cannot be held that if for instance the date be omitted from the summons it would be a fatal flaw in the proceedings. All that can be said is that it is an irregularity which can be cured, if necessary by an issue of amended summons and by the Magistrate allowing such adjournment as the omission of any particular from the summons may seem to require so as to give the accused the notice in the summons to which he is entitled. (*Davis, J.C. and Mehta, J.*) ILARAM LADAKMAL *v.* WADHUMAL. I.L.R. (1939) Kar. 230=178 I.C. 648=11 R.S. 100=40 Cr.L.J. 122=A.I.R. 1938 Sind 209.

——Ss 14 and 16—*Construction and scope—Certificate of Public Analyst—Value of—Production of certificate—If casts burden on accused—Right of accused to require Analyst to be summoned—Evidence to prove certificate wrong—If to be led by accused in the first instance.*

BOM. PREVEN. OF GAMBLING ACT (1887), S. 3.

There is nothing in the language of Ss. 14 and 16 of the Bombay Prevention of Adulteration Act to suggest that the ordinary rule with regard to the burden of proof in a criminal case is to be departed from S. 14 does not deal with the procedure to be followed in a trial for an offence under the Act. and has nothing to do with the order of proceedings at the trial; it merely lays down a rule of evidence and allows a presumption to be drawn. The certificate of a Public Analyst is to be accepted as correct without further proof until the contrary is proved. Nor is there anything in either S 14 or S. 16 to justify the view that before the accused can ask the Court to summon the Public Analyst as a witness, he must prove by other evidence that the certificate of the Public Analyst is not correct. S. 16 nowhere says that the accused's right to insist on the Analyst being summoned and examined is to be exercised only after the accused has led evidence in his own evidence challenging the correctness of the certificate of the Public Analyst. It is open to the accused under the section at the commencement of the trial, as soon as he is accused of the offence, to require the Court to summon the Public Analyst as a witness, and if he deposits the requisite amount in Court, he is entitled as of right to have the Public Analyst called as a witness (*Broomfield and Wadia, JJ.*) BOMBAY MUNICIPALITY *v.* HARIDAS VALLABHADAS. I.L.R. (1937) Bom. 751=170 I.C. 867=10 R.B. 141=38 Cr.L.J. 975=39 Bom. L.R 629=A I.R. 1937 Bom 364.

—— S. 14 (1)—*Applicability—If confined to certificate of Analyst produced by prosecution.*

Broomfield, J.—S. 14 (1) of the Prevention of Adulteration Act applies to any certificate of a Public Analyst and not only to a certificate on which the prosecution is based. The rebuttable presumption under S. 14 (1) will equally apply to a certificate of a Public Analyst produced by the accused himself. (*Broomfield and Wadia, JJ.*) BOMBAY MUNICIPALITY *v.* HARIDAS VALLABHDAS. I.L.R. (1937) Bom. 751=170 I.C. 867=10 R.B. 141=38 Cr.L.J. 975=39 Bom L.R. 629=A.I.R. 1937 Bom. 364.

——S. 16—Pulbic Analyst—Right of accused to be summoned and examined—If conditional on his leading evidence to disprove correctness of certificate. *See* BOMBAY PREVENTION OT ADULTERAT ON ACT, Ss. 14 AND 16. 39 Bom.L.R. 629 =A.I R. 1937 Bom. 364.

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887), S. 3—*Applicability—"Using or keeping"—Meaning of.*

The expression "using or keeping" in S. 3 of the Bombay Prevention of Gambling Act means having a right to use or keep as in S. 4 (*a*), and if the accused was not a person having a right to use this passage, then it would be irrelevant to prove that he was making a profit out of the gaming carried on there. To bring a case within the definition, it would be necessary to show that profit was to be made for the person owning, keeping or using the passage, that is, presumably the landlord. (*Beaumont, C.J. and Sen, J.*)

BOM. PREVEN. OF GAMBLING ACT (1887), S. 3.

EMPEROR *v.* IBRAHIM HAJI ABDUL RAHIMAN. **I.L.R. (1940) Bom. 322=42 Bom.L.R. 161=188 I.C. 316=41 Cr.L J. 571=A.I.R. (1940) Bom. 129.**

——**S. 3**—*Common gaming house—"Using"—Meaning of—Passage—If common gaming house.*

The word 'using' in the definition of a common gaming house in S 3 of the Bombay Prevention of Gambling Act connotes some sort of right or some sort of possession. The use is not of the kind prohibited unless it imports some measure of possession or control, for the person using as one who, although the designations of owner, occupier or keeper do not apply to him, is nevertheless some other person who is analogous to, and is of the same terms as owner, occupier or keeper. In cases where a passage is a place to wh ch the public have access, or are permitted to have access there may be an offence under S. 12. (*Broomfield, Ag.C.J. and Sen J.*) EMPEROR *v.* KRISHNAJI MADHUSUDAN. **186 I.C. 242=12 R. B 338=41 Cr.L J. 273=41 Bom.L R. 1114=A. I.R. 1940 Bom. 18.**

——**(as amended in 1936), S. 3**—*Construction "Act intended to aid or facilitate, etc."—Meaning of—"Gaming"—Distribution of profits of gaming—When an offence punishable under Act.*

"Gaming," as defined by S. 3 of Act IV of 1887 as amended in 1936, includes various ancillary and accessory acts, among others the carrying or conveying of the winnings of gaming for the purpose of distribution. But it must be noted that gaming is not an offence except as made punishable by certain other sections of the Act, *viz.*, Ss. 4 and 5 and S. 12. Where the Court is concerned with a particular form of gaming made punishable under the Act and the charge is based on one of the ancillary acts in the definition, some connection ought to be shown between that act and the particular form of gaming which is the subject of the charge. The distribution of the profits of gaming in a public place is a part of that offence and so is any act facilitating the same. But if the charge is gaming in a public place and the only act alleged is one which facilitates the distribution of profits of some other kind of gaming, the ancillary act cannot be said to form part of the offence charged unless it is an overt act which itself amounts to gaming in public within the intendment of the section. Though the distribution of the winnings of gaming and any act facilitating the same is gaming, it is not gaming in a public place, unless (*a*) the winnings are the winnings of gaming in a public place, in which case the mischief aimed at has been committed somewhere or (*b*) the distribution or ancillary act is itself public

Beaumont, C.J.—The words "intended to aid or facilitate" the various acts described must be read as ancillary to the general words of the definition. Before the Court can convict a man of aiding or facilitating an act, it must be shown that the act has taken place and that it is an offence. (*Beaumont. C J., Broomfield and Norman, JJ.*) EMPEROR *v* SOMABHAI GOVINDBHAI. **I.L R. (1939) Bom. 53 =178 I C. 588=11 R B 176=40 Cr L.J. 97=40 Bom.L R. 1082=A.I R. 1938 Bom. 484 (F.B).**

——**S. 3**—*Instruments of gaming—Marked coin.*

BOM. PREVEN. OF GAMBLING ACT (1887), S. 4.

A marked coin may be an instrument of gaming. It becomes an instrument of gaming if it has in fact been used as a means of gaming. (*Broomfield, Ag.C.J. and Sen, J.*) EMPEROR *v.* KRISHNAJI MADHUSUDAN. **186 I.C. 242=12 R.B. 338 =41 Cr.L J 273=41 Bom.L.R. 1114=A.I.R. 1940 Bom. 18,**

——**Ss. 3 (a) and 13**—*"Gaming"—Operations necessary for gaming—Person performing—If guilty.*

Where in a certain game, certain operations are to be performed to enable the gamester to play the game, the persons taking part in such operations must be deemed to be "gaming" within the provisions of the Act as they actually assist in the gaming. (*Davis, J.C. and Mehta, A.J.C.*) MOHAMMAD HASAN *v.* EMPEROR **31 S L.R. 44=169 I.C. 35=38 Cr.L.J. 668=9 R S. 255=A.I.R 1937 Sind 99.**

—— **S. 4**—*"Place"—Meaning of.*

The word 'place' in S. 4 has a wide meaning, and its application is not excluded by S. 12 in proper cases even though the latter section might apply to the same 'place'. Hence a shop abutting on to a public street, though a 'place' under S. 12, is a place under S. 4, and a search warrant under the Act can be issued, and presumption under S. 7 can be drawn against the keeper of such a shop for the purposes of gaming for profit, and he can be convicted under S. 4. (*Davis, J.C.*) SAT NARAIN AMRATLAL *v.* EMPEROR. **I.L.R. (1939) Kar. 741=183 I.C. 562=12 R.S. 60=40 Cr.L.J. 817=A I.R. 1939 Sind 184.**

——**Ss. 4 and 5**—*Convictions under, on same facts—Separate sentences—Legality.*

Where the prosecution have relied upon the same facts and upon the same acts of the accused to prove that the offences under Ss. 4 and 5 were committed, the convictions under both sections may be confirmed, but there should be one punishment for both. He should not be punished twice over for the same acts. (*Davis, J.C.*) BHAGWANDAS *v.* EMPEROR. **I.L R. (1940) Kar. 150=187 I.C 78=12 R.S. 219=41 Cr.L.J. 399=A.I.R. 1940 Sind 28.**

——**Ss. 4 and 5**—*Prosecution under—Evidence—Failure to examine* panchas *and to produce independent evidence as to what was found at raid—Effect.*

In a prosecution under Ss. 4 and 5 of the Bombay Prevention of Gambling Act, the failure to examine the *panchas* in whose presence a *panchnama* was made at the raid or search, and to produce independent evidence as to what was found at the raid is a serious omission and a vital defect. (*Broomfield, Ag.C.J. and Sen, J.*) EMPEROR *v.* DESOUZA. **185 I.C. 203=12 R.B. 229= 41 Cr L.J. 127=41 Bom.L.R. 974=A.I.R. 1939 Bom. 465.**

—— **Ss. 4, 5 and 7**—*Scope—Presumption of common gaming house—Rebuttal—Conviction—Conditions for.*

Under S. 7 of the Prevention of Gambling Act a presumption arises when instruments of gaming are found in a place that it is a common gaming house. But if the circumstances show that the only person who can make a profit from the gaming is not the owner, occupier, or person using or having the use of the same within the meaning of Ss. 3 and 4 of the Act, the presump-

tion must be rebutted and no conviction would be possible under S. 4 or S. 5. (*Broomfield, Ag. C.J. and Sen, J.*) EMPEROR *v.* KRISHNAJI MADHUSUDAN. **186 I C. 242=12 R.B. 338=41 Cr.L.J. 273=41 Bom L. R. 1114=A.I.R. 1940 Bom. 8.**

——**S. 4 (a)**—*"Having the use of"—Interpretation.*

The words "having the use of" in S. 4 (*a*) of the Prevention of Gambling Act, in the context seem to imply something more than mere using even though the use may be habitual. (*Broomfield, Ag C J. and Sen, J.*) EMPEROR *v.* KRISHNAJI MADHUSUDAN. **186 I.C 242=12 R B 338=41 Cr L.J 273=41 Bom.L.R. 1114=A.I.R. 1940 Bom. 18.**

——**Ss. 4 (a) and 5**—*Applicability—Accused living in second floor of building found gambling in passage in ground floor—Passage used by accused for going to and from his room—Conviction under Ss. 4 (a) and 5—Sustainability.*

The accused occupied a room on the second floor of a certain building and was found by the police with another person in a passage on the ground floor of the building. He was writing something on a piece of paper and talking with the other person and on search of the passage instruments of gaming were found in that passage. He was convicted under Ss. 4 (*a*) and 5 of the Prevention of Gambling Act.

Held, (1) that in the absence of evidence to the contrary, the accused had only a right to pass and repass along the passage, and there being no evidence that the accused had a right to the use of the passage within the meaning of S. 4 (*a*) and his conviction under S. 4 (*a*) could not therefore stand; (2) that since the accused did not give any evidence to prove that the passage was not a common gaming house to rebut the presumption arising under S 7 of the Act on the facts proved by the prosecution, his conviction under S. 5 was justified and must be upheld. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* IBRAHIM HAJI ABDUL RAHIMAN. **I L R. (1940) Bom. 322=186 I.C. 316=41 Cr.L.J. 571=42 Bom.L R. 161=A.I.R. 1940 Bom 129.**

——**Ss 4 (a) and 5**—*Applicability and construction—"Place"—Passage leading from house to road—"Person having the use of"—Meaning of—Trespasser found gaming in passage—Offence—Liability for conviction under S. 4 (a) or 5.*

The words "person having the use of" in S. 4 (*a*) of the Bombay Prevention of Gambling Act, must be read *ejusdem generis* with the previous words "owner or occupier" and mean "a person having the right to the use of" under some title, *e.g.*, a licence which is less than ownership or right of occupation. It does not include a trespasser. The whole of S. 4 is directed against those who enable premises to be used as a common gaming house; while S. 5 deals with persons who resort to such premises for the purpose of gaming. The accused was receiving bets in a passage on the ground floor of a house in a road. A marked coin proved to have been used for the purpose of placing a bet, a note book and a sutta chit, were found in this passage, on a police raid. He was a mere trespasser in the passage in question, and there was no evidence that his user of the passage was with the knowledge or permission of any person who owned or controlled the passage. The accused was convicted under Ss. 4 (*a*) and 5 of the Prevention of Gambling Act.

Held, (1) that the passage in question was a place within the meaning of S 4 (*a*); (2) that since there was no evidence to show that the accused had got anything in the nature of a licence to use the passage from a person entitled to give such licence, he could not be convicted under S. 4 (*a*) of the Act; (3) that the Crown having proved the finding of instruments of gaming and the presence of the accused in the passage, the burden, in view of the presumption arising under S. 7, was thrown upon the accused to show that the place was not a common gaming house, the accused, who had not discharged that burden, was properly convicted under S 5 of the Act. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* GULAM HUSSEIN RAWJI. **I L R. (1940) Bom. 105=186 I C. 148=12 R B 310=41 Cr.L J. 253=41 Bom. L.R. 1326=A.I.R 1940 Bom. 62**

——**Ss. 4 (a) and 5**—*Conviction under—Grounds for—Finding of marked coins and slips of paper with figures—Sufficiency.*

The mere fact of finding of marked coins and slips of papers with figures on it in the room or house of the accused would not be sufficient to justify his conviction under Ss. 4 (*a*) and 5 of the Bombay Prevention of Gambling Act, unless the evidence made it perfectly clear that these articles were instruments of gaming. (*Broomfield, Ag. C.J and Sen, J.*) EMPEROR *v.* DE SOUZA. **185 I. C. 203=12 R B. 229=41 Cr.L J. 127=41 Bom. L R 974=A.I.R. 1939 Bom. 465.**

——**S. 5**—*Applicability—Taking bets over telephone—Offence.*

S 3 makes "gaming" within the meaning of the Act the collection or soliciting of bets, and it makes no difference if these bets are brought by a messenger or person or sent by telephone or sent and received by telephone. It is gaming within the definition of S. 3, and in S. 7 the word "persons" includes "person", the plural includes the singular. Hence, a person caught actually in the act of taking bets over telephone can be convicted of gaming under S 5. (*Davis, J. C.*) BHAGWANDAS *v.* EMPEROR. **I.L.R. (1940) Kar. 150=187 I.C 78=12 R.S. 219=41 Cr.L.J. 399=A.I.R. 1940 Sind 28.**

——**S. 5**—*Charge under—Proof — Evidence necessary—Evidence of police agent—Value of—Corroboration—Necessity*

A charge of gambling, like any other criminal charge, must be proved by the prosecution by proper evidence. Police agents are not only accomplices, but are also unreliable witnesses, because they are generally paid by the results. It is always in their interest to secure a conviction in the hope of getting a part of the fine which may be imposed. The evidence of a police agent in these cases must always be corroborated before it can be acted upon. Nor is the case improved by providing the police agent with a companion and calling him a panch (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* HARILAL GORDHAN. **I.L.R. (1937) Bom 670=171 I.C 282=10 R.B. 184=38 Cr.L.J. 1047=39 Bom.L.R. 613=A.I.R. 1937 Bom. 385.**

——**Ss. 6 and 7**—*Construction and scope—Search warrant issued by Assistant Superintendent*

of Police—Legality—Presumption under S. 7—If arises—Bombay District Police Act, S. 6—Scope.

The words "specially empowered by Government in this behalf" in S. 6 of the Bombay Prevention of Gambling Act cover the Assistant or Duputy Superintendent of Police. A Magistrate of the first clause or a District Superindent of Police can exercise the power without any special authority from Government. There is however nothing said in the section about an additional Superintendent of Police. An additional Superintendent of Police appointed under S. 6 of the Bombay District Police Act, as amended in 1920, has no power to authorise the issue of a search warrant under S 6 of the Prevention of Gambling Act. Where a search warrant is issued by an Assistant Superintendent of Police the presumption under S.7 of the Gambling Act does not arise, and a conviction based on such presumption connot be sustained. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* ASGARALLI MAHOMEDALLI. **187 I.C. 459=12 R B. 487=41 Cr.L.J. 485=42 Bom.L.R. 203=A.I.R. 1940 Bom. 127.**

——Ss. 6 and 7 as amended by Bombay Act I of 1936—*In gambling cases as well, corroboration of evidence of approver by other independent evidence is necessary—Amount of evidence required depends upon circumstances of each case.*

In a gambling case, as in any other case, the evidence of approvers or accomplices must be corroborated, in the usual manner, by evidence other than that provided by themselves, whereby the Court can be satisfied that they speak the truth not only when they speak to the factum of the crime but when they speak as to the identity of the accused. The purpose of requiring independent evidence corroborating the evidence of the approver is that the Court can be satisfied that he is speaking the truth. It has no other purpose The amount of that evidence depen 's upon the circum stances of each particular case; the question as to whether it provides sufficient corroboration for the evidence of the approver to be relied on with confidence also depends on the circumstances of each case. (*Davis, J.C. and Dadiba, C. Mehta, J.*) EMPEROR *v.* ALI MOLO. **I. L.R (1939) Kar. 217=179 I.C. 794=11 R.S. 150 =40 Cr.L J. 271=A.I.R. 1938 Sind 228.**

——Ss. 6 and 7, as amended by Bombay Act I of 1936—*Interpretation of.*

Ss. 6 and 7 must be interpreted in a reasonably broad spirit having some fair relation to the realities of the kinds of people to which the Act was intended by the Legislature to apply. (*Davis, J.C. and Dodiba C. Mehta, J.*) EMPEROR *v.* ALI MOLO **I L.R. (1939) Kar, 217=179 I C. 794= 11 R.S. 150=40 Cr.L.J. 271=A.I.R. 1938 Sind 228.**

——Ss. 6 and 7, as amended by Bombay Act I of 1936—*Reason for suspicion—If includes information given by police informant.*

The reason for suspicion which is referred to in Cl. (*a*) of S. 6 includes the information given by a police informant, for, in many cases it is only upon such information that the p lice can act at all. So also, so far as the seizure of all things, reasonably suspected to have been used or intended for the purpose of gaming under Cl. (*c*) is concerned, it cannot be expected that the police-officer must wait for a translation or interpretation of a writing, otherwise unintelligible to him, found upon slips of paper on the person of the suspected man. He must judge and be judged by all the surrounding circumstances and the information he then possesses. He may particularly, where his information is that the betting is betting in American Futures, have reason to suspect that when slips of paper with writing upon them are considered of sufficient importance by the suspected person to be kept upon his person, those slips of paper are betting slips used or intended to be used for the purpose of gaming, even though the writing is to him unintelligible at the time. (*Davis, J.C. and Dadiba, C. Mehta, J.*) EMPEROR *v.* ALI MOLO. **I. L.R. (1939) Kar. 217=179 I C. 794=11 R.S. 150=40 Cr L.J. 271=A.I.R. 1938 Sind 228.**

——Ss 6 and 7, as amended by Bombay Act I of 1936—*Scope and effect—Presumption of gambling—When to be raised—Duty of Court.*

Ss. 6 and 7, Bombay Prevention of Gambling Act, must be read together. The words "which he has reason to suspect" in S 6 must be read with the words "had reasonable ground for suspecting, which occur in S. 7: for, though it is true that under S. 7 it is the Court that has to be satisfied that where a thing seized is not obviously an instrument of gaming, but is to come if at all, within the category of "any other thing" referred to in S 7, that the police-officer had reasonable grounds for suspecting the thing did so come, yet even the Court must look at it from the police officer's point of view, from the point of view of the information the police-officer had before the seizure and not after. Indeed, the words in Ss. 6 and 7 must mean very much the same thing. Where, on the information of a police informant that gambling is going on in a particular house in American Futures, a Sub-Inspector finds a number of persons of different communities, who have no particular relationship or connexion among themselves, sitting at a table in a room in that particular house at midnight, who can give no satisfactory account of their presence and who, when searched, are found to have considerable sums of money upon them, while upon one of them are found slips of paper on which there is a writing not necessarily intelligible to the Sub-Inspector at the time the Sub-inspector has every reason to suspect that these slips of papers with the unintelligible writing, so taken from one of the persons, contain record of bets, and the Court, under the circumstances is justified in raising the presumption against the accused which puts upon them the burden of proof under S. 7. Where in such a case the accused fail to give an account of their presence in the room on the particular night which the Court can accept, the High Court will not interfere in revision and acquit the accused. (*Davis, J.C and Dadiba C Mehta, J.*) EMPEROR *v.* ALI MOLO. **I. L R. (1939) Kar. 217=179 I.C 794=11 R.S. 150=40 Cr.L.J. 271=A.I.R. 1938 Sind 228.**

——Ss. 6 (d) and 8—*Money found in coat pocket of accused convicted of gaming—Liability to forfeiture.*

It was not the intention of the Legislature that moneys should be forfeited when there was no reason to believe that these moneys were connected with the gaming. The power of forfeiture

exercisable by the Magistrate under S. 8 is discretionary. Where the money was found in the coat pocket of the accused convicted of gaming it cannot be said, in the absence of any satisfactory explanation by the accused that this money cannot be seized under S. 6 and was not connected with the gaming of which the accused had been convicted. (*Davis, J.C.*) BHAGWANDAS *v.* EMPEROR. **I.L.R. (1940) Kar. 150=187 I.C. 78=12 R.S. 219=41 Cr.L.J. 399=A I.R. 1940 Sind 28.**

———S. 7—*Applicability—Conditions—Presumptions—When raised.*

Under S. 7 of the Bombay Prevention of Gambling Act, certain presumptions arise when two things are proved. It must be proved first that there was a house, room or place, entered under S. 6; and secondly that an instrument of gaming was found in such a house, room or place on the occasion of the raid under S. 6 or upon the person of any one found therein. When these two facts are proved, then two presumptions arise: (1) that the house, room or place is used as a common gaming house, and (2) that the persons found therein were there for the purposes of gaming (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* IBRAHIM HAJI ABDUL RAHIMAN. **I L R. (1940) Bom 322=188 I C. 316=41 Cr.L J. 571=42 Bom.L.R. 161=A.I.R 1940 Bom. 129.**

———S. 7—*Finding of marked coin—Presumption.*

The mere finding of a marked coin only does not give rise to any presumption under S. 7 of the Bombay Prevention of Gambling Act. (*Broomfield, Ag. C.J. and Sen, J.*) EMPEROR *v.* KRISHNAJI MADHUSUDAN. **186 I.C 242=12 R B 338=41 Cr.L J 273=41 Bom.L R. 1114=A. I.R. 1940 Bom. 18.**

———S. 7—*Presumption under—When arises—Finding of things other than instruments of gaming—Evidentiary value of.*

There are two events on which the presumption under S. 7 of the Prevention of Bombay Gambling Act arises. As to the first event, namely, the seizing of any instrument of gaming, all that the Court has to do is to see whether the documents or things found in the house raided fall within the definition of "instruments of gaming." If they do, then the presumption arises. The other event is more difficult to determine. There are two things required to prove the occurrence of that event first, that something has been seized which is other than an instrument of gaming, and, secondly, that the police-officer had reasonable grounds for suspecting that the thing so seized was an instrument of gaming. When these two things are proved, then the Court must presume that the house which has been entered was used as a common gaming house until the contrary is proved. But if the only evidence of the house being used as a common gaming house lies in the seizure in the house of something which is in fact not an instrument of gaming, although the police-officer had reasonable grounds for suspecting that it was an instrument of gaming, then there is no evidence of such user, and the presumption is rebutted. The presumption arising in the second event specified in S. 7 must always be still-born, because it is rebutted by proof of the very event which gives it birth, namely, seizure of something other than an instrument of gaming. The section must be construed strictly, and the second event can only arise, on the language of the section. When it is proved that the thing which was found in the house raided was not an instrument of gaming and directly one proves it one destroys the evidential value of the thing found. (*Beaumont C.J. and Wadia, J.*) EMPFROR *v.* NATHALAL VANMALI. **I.L.R. (1939) Bom. 434=184 I C. 252=40 Cr L.J. 891=12 R. B 155=41 Bom.L.R. 548=A.I.R 1939 Bom. 339.**

———S. 8—*Money found on persons of those gaming or present in common gaming-house—Forfeiture—Conditions of—Burden of proof.*

In S. 8 there is no general provision that money as such found upon persons keeping or using a common gaming-house or gaming therein or being present therein for the purpose of gaming can be forfeited. Money found on the persons of those gaming or present in the common gaming-house and so on can be forfeited only as instruments of gaming within the definition of S. 3, Prevention of Gambling Act. That definition is wide because it covers any article used or intended to be used as the subject or means of gaming or proceeds of gaming so that any money or currency notes used or intended to be used as a means of gaming or the proceeds of gaming, found on the person of one present in the common gaming-house for the purpose of gaming and so on, can be forfeited, but the prosecution must, of course, show that any particular money to be forfeited as means of gaming falls within the definition of "instruments of gaming" in S 3. (*Davis, J.C*) DOONGERSI AWTHAR *v.* EMPEROR. **I L R. (1940) Kar. 125=186 I.C. 883=12 R.S. 221=41 Cr.L.J. 385=A.I.R. 1940 Sind 22.**

———S 12—*Applicability —"Found gaming"—Meaning af.*

S. 12 does not require that the police should apprehend persons in the actual act of gaming. The words "found gaming" have a wider meaning than "seen gaming". "Found" is more akin to "discovered" in its nature and purpose, and therefore, if people are found by the police in such circumstances that it is clear that when the police came upon the scene they were engaged in gaming, the section applies. (*Davis J C. and Mehta, A J.C.*) GHANSHAM DAS *v.* EMPEROR. **29 S L R. 349=164 I.C 642=9 R.S. 50=37 Cr.L.J, 1005=1936 Cr.C. 803=A.I R. 1936 Sind 126,**

———S 12—*Gaming—Game of dart—If game of skill or chance.*

A game of dart in which skill cannot enter into the game to any material extent is not a game of skill but one of chance. Law is enacted for the average man and not for a person of unusual skill, and, if, taking the average man, chance and not skill is the deciding factor in a particular game, the game is a game of chance and amounts to gaming under the Act. (*Davis, J,C. and Mehta, A.J.C.*) GHANSHAMDAS *v.* EMPEROR. **29 S L.R. 349=164 I.C 642=9 R.S 50=37 Cr L.J. 1005=1936 Cr.C. 803=A.I.R 1936 Sind 126.**

———S. 12—*Person selling tickets in respect of game—If guilty.*

Where the person seeking to gain by chance has to pay money and purchase a ticket before he

will be allowed to take part or participate in the game at all, the selling of tickets, is a part and parcel of the particular gaming: and therefore, the person who sells the tickets and receives the money, which is the wager takes just as great a part in the act of gaming as does the actual participant, and is therefore guilty under S. 12 of the Act. (*Davis, J.C. and Mehta, A J C*) GHANSHAMDAS *v* EMPEROR. **29 S.L.R 349=164 I C. 642=9 R.S. 50=37 Cr L J 1005=1936 Cr.C. 803=A.I.R 1936 Sind 126.**

——(as amended in 1910), S. 12—*Public place —Test of—Private garden—If may be "place to which public have or are permitted to have access" —Owner reserving right to exclude undesirable persons—If material.*

Whether a place is one to which the public have or are permitted to have access within the meaning of S. 12 of the Act is a question of fact. No distinction can be made between a right conferred on the public by a statutory provision or a resolution of a Municipality, and a right conferred on the public by a private owner. The deciding factor is not whether the place is or is not owned by a private individual, or a public or statutory body, but the use to which it is put. If a private owner expressly or by implication invites the public generally to enter his garden, then the garden is a "place to which the public have or are permitted to have access" within the meaning of S. 12. The fact that the owner reserves to himself the right to exclude undesirables, is not material. (*Davis, J.C. and Lobo, A J.C.*) TAHIRALI *v.* EMPEROR, **30 S.L.R 72=164 I C 58=9 R.S 29=37 Cr.L.J. 876=1936 Cr C. 674=A.I.R. 1936 Sind 90.**

——S. 12 (as amended)—*Scope—Conviction for merely gaming—Order of forfeiture—If justified.*

In S. 12 of the Act, before as well as after its amendment the forfeiture of money and the other severer penalties imposed by the section relate to a person convicted of wagering or betting but not to a person convicted merely of gaming; and so in a case of gaming the money and instruments of gaming found in a public place should be disposed of as directed in the section. Money should be returned to the owner thereof and instruments of gaming should be directed to be destroyed and not sold. (*Davis, J.C. and Mehta, A.J.C.*) MOHAMMAD HASAN *v.* EMPEROR. **31 S.L R. 44=169 I.C 35=38 Cr. L. J. 668=9 R S. 255=A.I.R 1937 Sind 99**

——S. 12 (a)—*Construction and scope—Offence—Essentials of—Conviction—Proof requisite—Mere reasonable suspicion of gaming— Sufficiency—Accused found to be in possession of money, proceeds of gaming and betting chits in public place—Liability to conviction—Proof of overt act—Necessity.*

It would be a remarkable departure from the accepted principles of criminal justice if the mere fact of being reasonably suspected by a police officer were to be held sufficient to justify a conviction of a criminal offence. Under S. 12 (*a*) of the Bombay Prevention of Gambling Act, a man may be arrested on a reasonable suspicion of gaming in a public place, but he can only be convicted of the offence at which the section is aimed, *viz.*, actual gaming in public. The conviction must be of gaming, and not merely of being reasonably suspected to be gaming. The accused, a cotton broker, working in Surat, and belonging to a village called Bhadran in Baroda territory, used to visit his village where he had a house several times a month. Where he was travelling by train from Surat to Anand which is the Railway Station for Bhadran he was arrested at Anand Railway Station by a police officer and on being searched there was found in his possession a substantial sum of money which, it was found, represented the proceeds of gaming and which he was taking to another place for the purpose of distribution, there were also found upon him certain chits of the description known as satta chits which were instruments of gaming. The accused was, on these facts, charged under S. 12 (*a*) of the Bombay Prevention of Gambling Act, with gaming in public place, *viz.*, Anand Station,

Held, that since there was no evidence in the case that what might be called the actual or substantive gaming took place in a common gaming house or in a public place—there being in fact no evidence in the least as to how or where the actual gaming took place—since it could not be said that the money with the accused was the winnings of gaming in a public place, and since the accused obviously did no overt act which in itself amounted to gaming in public, it could not be held that any offence under S. 12 (*a*) had been committed and the accused could not therefore be convicted under the section. (*Beaumont, C.J. Broomfield and Norman, JJ.*) EMPEROR *v.* SOMABHAI GOVINDBHAI. **I.L R (1939) Bom. 53=178 I.C. 588=11 R B. 176=40 Cr.L.J. 97=40 Bom. L.R. 1082=A.I R. 1938 Bom 484 (F.B.).**

——S. 13—*"Mere skill"—Meaning of—Game of cards* pettin-ata, *for money stakes—If exempt under S.* 13.

The phrase "mere skill" in S. 13 of the Bombay Prevention of Gambling Act means pure skill, skill and nothing else. A game in which there is a substantial element of chance cannot be described as a mere element of mere skill or pure skill. In view of the provisions of S. 13, it is clear that if a game is played for stakes, it amounts to gaming and comes within the mischief of the Act, quite irrespective of the question whether chance or skill predominates, provided of course that it is not a mere game of skill, that is to say, a game in which there is no element of chance. No doubt, if the element of chance in a game is so small as to be negligible, it may be reasonable to ignore it. Playing a game of cards called *pettin-ata*, for money stakes, is a gambling game and is not a game of mere skill so as to be exempted under S. 13. (*Broomfield, Ag. C.J. and Sen, J.*) EMPEROR *v.* KALLAPPA GURAPPA. **I.L.R. (1939) Bom. 679=185 I C 315=12 R. B. 231=41 Cr L J. 157 =41 Bom L R. 970=A.I R. 1939 Bom. 481.**

——S. 13—*Scope—"Game of skill"—Test to decide.*

No game can be a game of skill alone, and in any game in which even great skill is required, chance must play a certain part. Even a skilled player in a game of mere skill may be lucky or unlucky, so that even in a game of mere skill chance must play its part. But it is not necessary to decide in terms of mathematical precision

the relative proportion of chance to skill when deciding whether a game is a game of mere skill within the provisions of S. 13 of the Act. When in a game the elements of chance most strongly preponderate, it cannot be a game of mere skill. (*Davis, J.C. and Mehta, A.J.C.*) MOHAMMAD HASAN *v.* EMPEROR. **31 S.L.R. 44=169 I.C. 35=38 Cr. L.J. 668=9 R.S. 255=A.I.R. 1937 Sind 99.**

BOMBAY PRIMARY EDUCATION ACT (IV OF 1923)—District School Board constituted under—Chairman of—If public servant—Liability to prosecution without sanction of Government—Cr. P. Code, S. 197. *See* CR. P. CODE, S. 197. **38 Bom.L.R. 956.**

——**Ss. 4 2) and 8 (2)**—*Teacher in School under local authority—Services transferred under S. 8 (2)—Compulsory retirement and subsequent reinstatement—Grant of half pay for period of absence—Suit for full pay—Maintainability.*

Plaintiff, a teacher in a school under the control and management of a local authority, whose services were transferred under S. 8 was made to retire by the District Local Board before he was actually due, but was reinstated after some time and was treated as on leave on full pay for half the period and on half pay for the rest, and he sued the District Board for the remaining half pay.

Held, that under sub-S. (2) of S. 4, the rights and liabilities of the local authority with respect to the transfers of the teachers were not vested in or transferred to the School Board, and that the Legislature intended that so far as such teachers were concerned the rights as regards them and liabilities towards them should remain with the local authority and not with the School Board and hence the suit of the plaintiff lay against the local District Board. (*Davis, J.C. and Weston, J.*) DISTRICT LOCAL BOARD, SUKKUR *v.* NAVALRAI TOPANDAS. **I.L.R. (1939) Kar. 518=182 I.C. 669=12 R.S. 19=A.I.R. 1939 Sind 150.**

——**S. 8**—*Appeal—Power of appellate authority—Discretion—Interference.*

Where a teacher in the employ of a District Local Board is given a right of appeal with regard to his suspension, dismissal, etc., and a statutory rule governing such a case provides that in case the appellate authority orders the reinstatement of such teacher it may grant him full pay for the period during which such teacher was under suspension or dismissal, the word "may" does not mean "shall," but merely confers upon such appellate authority a discretion in the matter, and such statutory discretion, if exercised according to statutory rules, cannot be interfered with. (*Davis, J.C and Weston, J.*) DISTRICT LOCAL BOARD, SUKKUR *v.* NAVALRAI TOPANDAS. **I.L.R. (1939) Kar. 518=182 I.C. 669=12 R.S. 19=A.I.R. 1939 Sind 150.**

BOMBAY PUBLIC CONVEYANCES ACT (VII OF 1920), S. 24—*Applicability—Ingredients of offence under.*

To convict an accused under S. 24, it is not sufficient merely to show that the accused is a licensee of a public conveyance and that he permitted it to be driven by a driver who is not licensed; it must be shown that when this unlicensed driver was driving, he was driving a public conveyance for use as such. S. 24 does

not mean that if the licensee of a public conveyance himself takes his family out for a treat or permits an unlicensed driver to take his family out for a treat, an offence is committed; for, the public conveyance is not then used for the purpose of public conveyance at all. It is used for the purpose of private conveyance. (*Davis J.C. and Lobo, J.*) BHOJRAJ PHEROOMAL *v* ABDUL WAHEED. **I.L.R. (1939) Kar. 187=177 I.C. 783=11 R.S. 68 (1)=39 Cr.L.J. 976=A.I.R. 1938 Sind 190.**

BOMBAY REGULATIONS (XVII OF 1827) and (XIX OF 1827)—*Property in Bombay. city—Prescriptive right to exemption from land revenue—If can be claimed.*

Bombay Regulation XVII of 1827 does not apply to property in the city of Bombay. Regulation XIX of 1827 which does apply to such property, contains no provision for recognizing a prescriptive right to exemption from land revenue as is contained in Chap. 9, S. 36 of the Regulation XVII. Therefore no statutory prescriptive title to exemption from land revenue can be claimed in respect of property in the city of Bombay. (*Lord Macmillan.*) KAMALA VAHOOJI *v.* COLLECTOR OF BOMBAY. **I.L.R. (1937) Bom 756=10 R.P.C. 54=1937 M.W.N. 939=3 B.R. 759=39 Bom. L.R. 1046=66 C.L.J. 43=169 I.C. 778=41 C.W.N. 1194=31 S.L.R. 665=1937 P.W.N. 985=64 I.A. 334=46 L.W. 227=1937 O.L.R. 413=1937 A.L.R. 647=A.I.R. 1937 P.C. 271=(1937) 2 M.L.J. 362 (P.C.).**

BOMBAY RENT-FREE ESTATES (INAM) ACT (XI OF 1852)—*Powers of Inam commissioner—Inquiry—Scope of—Power to direct resumption of soil—Order directing that certain villages be resumed and assessed as khalsat—Meaning and Effect of.*

What have to be considered by the Inam commissioner in inquiries under the Bombay Rent-free Estates Act (Inam Act), are claims made to hold lands free from, or partially free from, assessment, and all that the commissioner can do under the Act is direct resumption by Government of the claim to exemption from assessment. Government is only entitled to resumption of possession of the privilege claimed by the inamdar and not of the possession of the soil. Government under the Act is not entitled to interfere with actual possession. All that they can deal with was the claim of certain person to hold lands free from the ordinary obligation to contribute to Government revenues. An order by the Inam Commissioner that certain villages should be resumed and assessed as khalsat, cannot be construed as amounting to a resumption of the soil of the villages; it must be taken as meaning only that the privilege claimed by the holder holding the villages free from liability to assessment is resumed. (*Beaumont, C.J. and Wadia, J.*) RAMSOMAPPA *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **172 I.C. 271=10 R.B. 263=39 Bom. L.R. 851=A.I.R. 1937 Bom. 465.**

BOMBAY REVENUE JURISDICTION ACT (X OF 1876), S. 4—*Scope—Order of revenue authorities setting aside mortgage by watandar—Observation that claim to permanent tenancy by reason of ancient possession not established—Suit to declare title as permanent tenant—Jurisdiction of Civil Court—If barred.*

BOM. REV. JURISDICTION ACT (1876), S. 4.

A, the owner of a certain watan property mortgaged it to the plaintiffs for a period of ten years in 1923. *A* died in 1930, and in 1931, his widow adopted the defendant. After the adoption the defendant claimed from the revenue authorities restoration of the watan property, and the Assistant Collector ordered such restoration. Before him the plaintiffs relied on their mortgage of 1923, and also claimed that they were permanent tenants under S. 83, Bombay Land Revenue Code as having been in possession from time immemorial. The Assistant Collector declared the mortgage null and void; he also expressed the view that the plaintiffs did not establish their claim of ancient possession. Their orders of restoration was confirmed on appeal by the Collector and subsequently by the Commissioner. The plaintiffs thereupon filed a suit for a declaration that they were permanent tenants of the land in suit, and for an injunction to restrain the defendant from interfering with their possession. It was pleaded that under S. 4 of the Bombay Revenue Jurisdiction Act the Civil Court had no jurisdiction to entertain the suit.

Held (1) that the order of the revenue authorities merely set aside the mortgage of 1923 and did not in fact go so far as to hold that the plaintiffs' claim to be permanent tenants was invalid; (2) that if the order did in fact purport to dispose of the plaintiffs' claim to be permanent tenants, the order to that extent was then *ultra vires*; (3) and that though the plaintiffs were not entitled to challenge in a Civil Court the order setting aside the mortgage, the suit based on the claim to permanent tenancy was not barred by S. 4 of the Revenue Jurisdiction Act. (*Beaumont, C.J.*) SHAMRAO *v.* HOLYA SUBHANNA. **172 I C. 464=10 R.B. 283=39 Bom.L.R. 920=A.I.R. 1937 Bom. 494.**

——S. 4—*Scope—Suit to declare plaintiff's right to be registered as watandar for patilki service—If barred.*

A suit for a declaration that plaintiff is entitled to have his name entered in the watan register for the sixteen annas right of patilki service is in effect a claim to perform the duties of patil, and cannot be granted by the Civil Court, as it is barred by S. 4 of the Revenue Jurisdiction Act. (*Broomfield and Wadia, JJ.*) BASANGOUDA *v.* BASALINGAPPA. **164 I.C 703 (2)=9 R.B. 92=38 Bom.L.R. 593=A.I.R. 1936 Bom. 301.**

——S. 4—*Tenures specified in—Nature of.*

The tenure of lands the title to which has been of a permanent nature and neither precarious nor limited in character is not a tenure of the kind specified in S. 4 of the Bombay Revenue Jurisdiction Act. To all of such tenures there is attached an element of grace and of precariousness. (*Lord Roche.*) VINAYAKRAO DHUNDIRAJ BIWALKAR *v.* SECRETARY OF STATE. **164 I.C 753=9 R P.C 112=64 C.L.J 178=1936 All L R. 855=1936 O.L.R. 569=3 B.R. 37=45 L W. 739=1937 M.W.N. 619=38 Bom.L.R. 1265=A.I.R. 1936 P.C. 312=(1937) 1 M L.J. 367 (P.C.).**

——S. 4 (a) (1) and (3)—*Construction and scope—"Claim against Government"—Meaning of—Suit for declaration of status as watandar and for possession of watan lands—Jurisdiction of Civil Court—Government made party to suit—Suit—If barred—Valid orders of revenue authorities and ultra vires orders—Distinction.*

In S. 4 (*a*) of the Bombay Revenue Jurisdiction Act a distinction is made between claims and suits. Cls. (1) and (4) speak of claims against Government; Cl. (2) speaks of claims to perform duties; and Cl. (3) speaks of suits to set aside or avoid orders. It may be necessary under Cls. (2) and (3) that Government should be a party. But Cls. (1) and (4), on the other hand will as a rule apply only where Government is a party, since otherwise it could hardly be said that there was any claim against Government. But the mere fact that the Government is a party will not be enough to bring the case under those clauses. The words "claim against Government relating to property or lands" may fairly be said to imply that relief of some kind is sought against Government. Government must be more than a purely formal party. If Government is to be bound by the decree to make any payment or to restore any property, or if an injunction is sought against Government, the position is clear—that is a "claim against Government". A suit for a declaration of title against Government cannot be held to be a claim against Government within the meaning of Cl. (1), though it would seem to fall under Cl. (3). If what the plaintiff seeks is an order for delivery of possession of property which is merely to bind a private party and is not to be enforced against Government, the suit may offend against Cl. (3) but can hardly be brought under Cl. (1). A suit, whether between private parties or against Government, which would have the effect of nullifying an order made by the Collector would be barred under S. 4 (*a*) (3), at any rate, if the order is validly made under the Watan Act. If the relief sought does not affect the position of Government at all, for instance, if a person seeks a declaration of his status as watandar simply with a view to approach the revenue authorities under S. 36 (3) of the Watan Act, it cannot be regarded as a suit to set aside or avoid an order. In such suits Government is neither a necessary nor a proper party. If, however, a declaration of status is sought and a claim for possession of lands is made in flat contravention of the orders of the revenue authorities, the suit certainly comes within the mischief of Cl. (3) of S. 4 (*a*) of the Revenue Jurisdiction Act, assuming that the orders are not *ultra vires*. But it is not necessary to set aside an order made without jurisdiction. Such an order is no bar to a suit for relief inconsistent with it. An order validly made within the powers conferred by the Watan Act will bar a suit. An order without jurisdiction will not. But the order must have been made by an officer "duly authorised in that behalf" as required by S. 4 (*a*) (3). In order to decide whether a suit is barred under S. 4 (*a*) (3), the Court has to ascertain whether the orders of the revenue authorities were within their jurisdiction. (*Broomfield and Tyabji, JJ.*) MALLAPA *v.* TUKKO. **I.L.R. (1937) Bom. 464=170 I.C 801=10 R B. 121=39 Bom.L.R. 288=A.I.R. 1937 Bom. 307.**

——S. 4 (a)—*Scope—Alienation of watan land made before Bombay Watan Act of 1874—Refusal by Assistant Collector to set aside—Suit in Civil Court to set aside and for possession—If barred.*

BOM. REV. JURISDICTION ACT (1876), S. 4.

Where an Assistant Collector refuses to set aside an alienation of watan land made before the passing of the Watan Act (Bombay Hereditary Village Offices Act) of 1874, in the exercise of his discretion under S. 9 of that Act, such refusal does not oust the jurisdiction of the Civil Court which has an inherent jurisdiction to declare void such an alienation of watan property to a stranger. A civil suit to have such alienation set aside and the land restored to the possession of the plaintiff is not barred by S. 4 (*a*) of the Revenue Jurisdiction Act. (*Beaumont, C. J. and Lokur, J.*) WASUDEV VISHNU *v.* PANDU VISHNU. **I L R (1939) Bom. 428=184 I.C. 633=12 R.B. 186=41 Bom L R. 578=A I.R. 1939 Bom. 369.**

——S. 4 (a) (1), (3) and (4)—Scope Watan lands—Name of adopted son entered as representative watandar—Subsequent removal after annulment of alienation and resumption of lands on decree of Court holding adoption invalid—Suit by adopted son for declaration of title and for restoration of lands—If barred. *See* BOMBAY HEREDITARY OFFICES ACT, SS. 11 AND 11-A. **38 Bom.L.R. 1308.**

——S. 4 (a) (3)—"Duly authorised in that behalf"—Meaning—Collector acting under S. 9 of Watan Act—Powers of. *See* BOMBAY HEREDITARY OFFICES ACT, S. 9. **39 Bom.L R. 288.**

——S. 4 (a) (3)—*Scope—Grant of watan land prior to* 1827—*If alienation under Watan Act—Order of Collector setting aside "alienation"—If* ultra vires—*Suit by grantee for declaration and for possession of watan lands—If barred.*

Certain lands form part of a Nadgoudki watan inam granted to the ancestor defendant No. 1 in 1694 Plaintiff alleged that they were granted in pot inam to his ancestor in 1811 before the introduction of British rule in 1827 or 1828 and claimed to have been in possession of the same since then until evicted by the revenue authorities. In 1862, defendant 1's grandfather *S.* brought an ejectment suit against *A*, a member of the plaintiff's family, got a decree in 1864 and sought to execute it. But *A's* nephew *N.* obstructed *S.* and under the rules of procedure then in force *S.* had to file a fresh suit, which he did in 1867. *N*, the defendant in that suit, claimed under a sanad given to his father by *S.* in renewal of an order of grant. In execution, *S.* admitted *N's* claim, as a result of a settlement between the parties. This admission was produced in the suit of 1867 and was acted upon with the result that the suit was dismissed. There was no further litigation and the plaintiff's family remained in undisturbed possession. In 1924 defendant No. 1 applied to the revenue authorities for restoration of the land to him under the Watan Act. The District Deputy Collector found that the plaintiff had been in possession from before the introduction of British rule, and that he was a watandar and therefore refused to interfere holding that there was no alienation. But the Collector on appeal reversed the order, and the Collector's order was confirmed by the Commissioner. Plaintiff was ultimately evicted in 1926 He then instituted a suit against defendant No. 1 and the Government for declaration of title as watandar and for possession of the lands.

Held, that there having been a grant to the plaintiff's predecessor before 1827, the revenue authorities had no power under S. 9 or 11 of the Watan Act to set aside the alienation, for in fact there was no alienation within the meaning of that Act, and consequently the orders of the Collector and of the Commissioner were *ultra vires* and not duly authorised, and the suit was therefore not barred by S. 4 (*a*) (3) of the Bombay Revenue Jurisdiction Act. (*Broomfield and Tyabji, JJ.*) MALLAPPA *v.* TUKKO. **I L R (1937) Bom 464=170 I.C. 801=10 R.B. 121=39 Bom. R. 288=A.I.R. 1937 Bom 307.**

——S. 4 (b) and (d)—*Applicability—Suit to declare order of Government revising and increasing revenue on plaintiff's lands* ultra vires *and void as being contrary to law—If barred*

The provisions of Cls. (*b*) and (*d*) of S. 4 of the Bombay Revenue Jurisdiction Act apply only to a suit which hits directly at the amount or incidence of land revenue or at its mode assessment or the principle on which it is assessed or aims directly at the alteration of entries in land records. They do not apply so as to exclude a suit for a declaration that the powers exercised by Government have no basis in law or that the power is exercised contrary to law. (*Davis, J.C. and Rupchand, A.J.C.*) RAMCHAND *v.* SECRETARY OF STATE FOR INDIA. **29 S.L.R 382=163 I.C. 887=9 R S. 17=A.I.R. 1936 Sind 108.**

——S. 4 (d)—*Construction and scope—Claim to have name entered in the village records either as owner in place of the existing one or alternatively as purchaser of shares along with the existing one—If cognizable in Civil Court.*

It is true that the Bombay Revenue Jurisdiction Act has to be construed strictly in favour of the right of suit; but that does not mean that it should be construed so technically as to make its provisions a dead letter. A person who claims to have his name entered in the village papers either in place of or associated with that of the superior holder is really in effect claiming to have his name entered as superior holder. Where a plaintiff in a suit prays that the name of the defendant entered in the records should be removed and that the name of the plaintiff should be entered instead as the owners of certain shares in the villages, or alternatively that the defendant's name may be retained nominally and the plaintiff's name entered as the purchaser of the shares, it is clear that the claim is obnoxious to S. 4 (*d*) of the Revenue Jurisdiction Act; that clause debars the Civil Courts from ordering that the entries should be changed. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. **185 I.C. 839=12 R.B. 271=41 Bom.L.R. 882=A.I.R. 1939 Bom. 513.**

——Ss. 4 (f) and 5 (a)—*Scope* Saranjam *grant—Suit by* Saranjamdar *to recover from Government arrears of* ain chillar *deducted out of revenue payable to him—If barred.*

S. 4 (*f*) of the Revenue Jurisdiction Act cannot have been intended to bar a suit by an alienee of the land revenue to recover sums wrongly deducted from the land revenue payable to him; when it refers to claims against Government to receive payments payable out of the land revenue, it must mean payable out of the land revenue which is itself payable to Government. The *chillar* fund, though it may no doubt be payable out of the land revenue, is a fund, which according to the

BOM. REV. JURISDICTION ACT (1876), S. 4.

practice of a *Saranjam grant*, is to be administered by the *Saranjamdar*; and the practice of the *Saranjan* is the best index, of the meaning of the grant. Consequently a suit by a *Saranjamdar* to recover from the Government arrears of *ain chillar* which the Government have deducted from the revenue of the plaintiff's *Saranjam* villages is not barred by S. 4 (*f*) of the Act. S. 5 (*a*) also has no application to the case. (*Broomfield and Tyabji, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* NARAYANRAO. 168 I.C 357=38 Bom. L.R. 1339=9 R.B. 367=A.I.R. 1937 Bom 109.

——S 4 (f)—*Applicability—Alienated village—Government having no interest in revenue—Effect.*

S. 4 (*f*) of the Bombay Revenue Jurisdiction Act can have no application to the case of an alienated village where Government has ceased to have any interest in the revenue at all. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. 185 I C. 839=12 R.B. 271=41 Bom. L.R. 882=A I.R. 1939 Bom 513.

——S. 4, Proviso—*Applicability—Dispute as to who is entitled to be holder of shares in village.*

The proviso to S. 4 of the Bombay Revenue Jurisdiction Act relates to cases where there is a dispute as to the nature of a holding, that is to say, as to whether it is exempt from the payment of land revenue or not. It does not relate to disputes as to who is entitled to be the holder. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. 185 I.C. 839=12 R.B. 271=41 Bom L.R 882=A.I.R. 1939 Bom 513.

——S. 5 (b)—*Application—Suit comprising main reliefs against Crown.*

S. 5 (*b*) of the Bombay Revenue Jurisdiction Act has no application whatever to a case of a suit which is not a suit between private parties and in which some at any rate of the main reliefs are sought against the Crown. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. 185 I. C. 839=12 R B. 271=41 Bom.L.R. 882=A.I.R. 1939 Bom. 513.

——S. 6—*Applicability—Illegal distraint by Mamlatdar—Suit for damages and compensat on—If barred.*

Where a Mamlatdar issues a warrant of distraint against the property of a person in respect of arrears of land revenue due by some other person, the former being neither the occupant of the land nor in any sense a defaulter, the action of the Mamlatdar is *ab initio* illegal and *ultra vires*. No *bona fide* can be claimed in respect of such an act. Since it cannot be said that the Mamlatdar's act is *bona fide* in pursuance of the provisions of any law for the time being in force, his action is not protected by S. 6 of the Bombay Revenue Jurisdiction Act, and that section cannot be pleaded in defence to a suit for compensation and damages for illegal distress. (*Wassoodew, J.*) SHRIDHAR MAHADEO *v.* GODULAL JETHMAL I.L R. (1939) Bom. 721=41 Bom L.R 1223=186 I.C. 509=12 R B. 343=A.I.R. 1940 Bom. 20

BOMBAY SURVEY AND SETTLEMENT ACT (I OF 1865), S 38—*Kabuliyat taken by Government from managing khot—Effect—Right of khot to take faida in kind.*

Onc Government have taken a kabuliyat in a particular form from the managing khot, he becomes entitled to recover the faida in accordance with the terms of the kabuliyat. If any occupant is dissatisfied with the terms of the kabuliyat, it is for him to take such steps as he may be advised against Government, or approach Government to get the kabuliyat charged but until that is done, the managing khot cannot go beyond the terms of the kabuliyat so long as it stands. If the kabulayat entitles the khot to recover faida in kind, he can take it in kind, and the tenant cannot resist the demand and insist on payment in cash. (*Rangnekar, J.*) PANDU NARAYAN *v* AMIRUDDIN SHEKH. 176 I.C. 245=11 R. B. 34=40 Bom.L R. 407=A.I.R. 1938 Bom. 329.

BOMBAY TITLES TO RENT-FREE ESTATES ACT (XI OF 1852)—Inam Commissioner— Adjudication in disputes— Binding force of. *See* LIMITATION ACT, S. 10. 39 Bom. L.R. 572.

BOMBAY (DISTRICT) TOBACCO ACT (II OF 1933), S. 17—*Scope—License in form A—Holder of—Right to sell outside place of business through agent—Agent of licensee selling wholesale to merchants outside place of business—Liability to conviction for offence under section.*

A wholesale dealer holding a license in Form A, for the wholesale sale of tobacco under the Bombay (District) Tobacco Act, is entitled to sell tobacco and its preparations personally or through agents and servants wholesale at any place in the Bombay Presidency and Sind with the exception of the City of Bombay; and he is entitled to conduct his business by means of travellers. A sale by the licensee's agent wholesale outside his own place of business is covered by the license, and the agent does not require a hawkers's license, since the license for wholesale sale is wide enough to cover wholesale hawking. Such an agent selling whole sale without a hawker's license cannot therefore be convicted under S. 17 of the Act. (*Barlee and Sen, JJ.*) EMPEROR *v.* BABURAO. I.L.R. (1937) Bom. 931=172 I.C. 160 =10 R.B. 251=39 Cr L.J. 88=39 Bom.L.R, 832 =A.I.R. 1937 Bom. 480.

BOMBAY TOWN TOBACCO DUTY ACT (IV OF 1857), S. 18—*Order of confiscation under—Discretion of Court—Notice to owner of vehicle—Necessity for—Omission to give notice—Effect on order.*

S. 18 of the Tobacco Duty (Town of Bombay) Act leaves it to the discretion of the Court to confiscate a vehicle used for the illegal transport of tobacco. The discretion has, however, to be judicially exercised. The Court before confiscating the vehicle, must be satisfied that the owner had consented or knew that the vehicle was used for the said illegal purpose. The discretion can only be properly exercised after hearing the owner. The omission to give notice to the owner and to hear him before making an order of confiscation is illegal and results in injustice and renders the order of confiscation liable to be set aside. (*Broomfield and Wassoodew, JJ.*) JAFFARBHAI MASAM, *In re*, 166 I.C. 562=9 R.B. 238=38 Cr.L.J. 224=38 Bom.L.R. 961=A.I.R. 1937 Bom. 10.

BOMBAY WAGERS ACT (III OF 1865), S. 1—*Scope and effect of—Contract made through broker—Claim to brokerage, commission or losses etc.—Enforceability—If wager,*

BOUNDARIES.

S. 1 of the Bombay Wagers Act only means that contracts collateral to or in respect of wagering transactions cannot be enforced. But in order to bring the case within the section the transaction in respect of which the brokerage, commission or losses etc., in the case of a contract made through a broker are claimed, must amount to a wagering contract. The result of the Act is to put a contract collateral to an agreement by way of wager on the same footing as the agreement itself. Such a collateral contract is void in the Bombay Presidency though not in other provinces. (*Rangnekar and Macklin, JJ.*) CHIMANLAL *v.* NYAMATRAI. **173 I.C. 205=10 R B. 319=39 Bom.L.R. 1083=A.I.R. 1938 Bom. 44.**

BOUNDARIES—*Encroachment—Suit by owner of land against adjoining owner—Proof of disturbance of boundary marks—If essential—Measurements and area—If conclusive.*

In the case of persons owning or occupying adjoining plots of land, in order to determine whether there has been an encroachment by one of them upon the land of his neighbour. what has to be shown is that there has been a disturbance of the actual boundary marks on the site. In the absence of such disturbance of the actual boundary marks, an argument based on measurements is of little value; an argument based on area is of even less value, because there may have been an encroachment in any direction or in any part of the plot. The measurements of area in a record cannot be expected to be meticulously accurate; as the area is given only by way of description. (*Allsop, J.*) RAM KISAN *v* PAHLAD **172 I.C. 962=10 R A. 450=1938 R D. 71=1938 A.L.R. 56=1937 A.L.J. 1216=1937 A.W.R. 1078=A.I.R. 1938 All. 36.**

BROKER. *See* PRINCIPAL AND AGENT—BROKER.

BUDDHIST LAW (Burmese).

Adoption.
Advancement.
Ancestral Property.
Applicability.
Divorce.
Ecclesiastical law.
Guardianship.
Husband and wife.
Inheritance.
Law applicable.
Maintenance.
Marriage.
Mortgage.
Partition.
Payin property.
Succession.

——(Chinese).

Divorce.
Illegitimate son's right of inheritance.
Letters of administrator.
Marriage.
Succession.

——(Burmese)—*Adoption—Apatitha adoption—Rights of adoptee.*

Where it appears that there was only some kind of informal adoption resembling that called apatitha, the adoptee can have no right of inheritance from adoptive parents' estate where there are natural children living. (*Mosely and Mackney, JJ.*) MAUNG MYA MAUNG *v.* MA MYA SEIN. **167 I.C. 362=9 R.R. 310=A.I.R. 1936 Rang. 518.**

——(Burmese)—*Adoption—Apatitha child—Position of.*

An apatitha child is one who has been adopted casually and without any intention expressed on the part of the adoptive parent that it shall inherit. The intention either express or implied on the part of the adoptive parent that the adopted child shall or shall not inherit, forms the dividing line between a keittima child and an apatitha child. In other respects the position of an apatitha child is the same as that of keittima. A.I.R. 1914 P.C. 97; 5 L.B.R. 216 and 1920 L B. 163, Diss. Where a widow had brought up a girl from her childhood who lived with her till her death, and it was proved that the widow gave her own jewels to the girl to wear, lent out moneys in the name of herself and the girl as mother and daughter, purchased some land in her name and in that of the girl, and described the girl as a joint donor with her of a tazaung.

Held, that the facts fell short of proving the girl as keittima, adopted daughter of the widow, but proved that the girl was apatitha child. (*Mosely and Ba U, JJ.*) MA THAN NYUN *v.* DAW SHWE THIT. **14 Rang. 557=164 I.C. 272=9 R. R. 73 (2)=A.I R 1936 Rang. 344.**

——(Burmese)—*Adoption—Consent of all wives—If necessary.*

An adoption by a Burmese is not invalid merely because his other wives do not consent to it. Once a Burmese wife consents to her husband taking another wife—which amounts to misconduct on the part of husband and entitles the wife to divorce him—she must be held to have consented to adoption of a child by him. (*Mosely and Mackney, JJ.*) MAUNG MYA MAUNG *v.* MA MYA SEIN. **167 I.C. 362=9 R.R. 310=A.I.R. 1936 Rang. 518.**

——(Burmese)—*Adoption—Consent of natural parents—Natural mother acquiescing in adoption—Effect.*

Although the consent of natural parents is a legal condition for adoption, yet where it is established that although the natural mother of the adoptee did not give her express consent to the adoption, yet she acquiesced in it, it must be taken that she consented to it (*Mosely and Mackney, JJ.*) MAUNG MYA MAUNG *v* MA MYA SEIN. **167 I.C. 362=9 R.R. 310=A.I.R. 1936 Rang. 518.**

——(Burmese)—*Adoption—Evidence of repute—What amounts to.*

Evidence of repute of status is distinguishable from what witnesses hear others say, which ordinarily amounts to mere hearsay, which is inadmissible in evidence. Evidence of the reputation which the person concerned gains among the people among whom he or she resides, reputation which is the result of the impressions of the people derived from their knowledge of the contract between the adopter or adopters and the alleged adoptee. (*Dunckley and Mya Bu, JJ.*) MA SEIN MAY *v.* MA SAING. **165 I.C. 358=9 R.R. 206=A.I.R 1936 Rang. 459.**

——(Burmese)—*Adoption—Keittima adopted child—Right of inheritance—Estate of father of his adoptive father where latter having acquired status of auratha has died before death of former.*

A keittima adopted child succeeds not only to the estate of his adoptive parents but also to

property left by the parents' relatives. An adoptive child is for all purposes in the footing of a natural born child except that the special rights of auratha child do not and cannot appertain to him because those rights arise not only from relationship but from the special claims of the natural born eldest child within the family of the parents by whom it has been begotten and conceived. Hence a child adopted in the keittima form according to Burmese Buddhist Law can claim a share of the estate of the father of his adoptive father where the latter having acquired the status of auratha has died before the death of the former; but the keittima adopted child cannot become auratha of his adoptive parent. His share is claimed by virtue not of personal representation of his adoptive father but of an independent right of inheritance given by Burmese Buddhist Customary Law. As an out of time grandchild, he shares equally with the younger brothers of his adoptive father, the latter being auratha according to the rules laid down in the law of Menoo, Vol. 10, page 277; but he has no claim, by virtue of his adoptive father having been an auratha child, to be considered as an auratha child himself. (*Roberts, C.J., Mya Bu and Mosely, JJ.*) MAUNG THEIN *v.* U THA BYAW. **1939 Rang L.R. 341=182 I.C. 268=12 R.R. 2=A.I.R. 1939 Rang 197 (F.B.).**

——(Burmese)—*Adoption—Keittima form—Onus.*

Though the initial burden of proving facts sufficient to establish keittima adoption undoubtedly lies on the keittima claimant, nevertheless, as in every other question of fact to be proved before the Court, that burden shifts from time to time during the trial as each point is reached at which if no more evidence were given, the one party or the other, as the case may be, would succeed and, in the long run when evidence is given on both sides, the Court is left with the evidence as a whole and the surrounding circumstances to judge from. (*Roberts, C.J. and Braund, J.*) MA PU TU *v.* MAUNG BA SIN. **178 I.C. 700 =11 R R. 262=A.I.R. 1938 Rang. 369.**

——(Burmese)—*Adoption — Keittima form—Burden of proof.*

Where a girl claims to be an adopted daughter of certain persons, under a keittima form of adoption, the burden is on her to prove that there was an intention on the part of the adoptive parents that she should inherit from them, more so when it appears from the evidence, that the girl might have been treated as a daughter without there having been any intention that she should inherit. (*Mosely and Mackney, JJ.*) MAUNG MYA MAUNG *v.* MA MYA SEIN. **167 I.C. 362=9 R.R. 310=A.I.R 1936 Rang 518.**

——(Burmese)—*Adoption — Keittima form—Proof of.*

When facts showing that the adoptee was adopted with a view to inherit are proved, then the adoption is in the keittima form and the mere fact that the catchword 'keittima' is not used in the evidence goes for nothing. After all, 'keittima' is merely a label, and if facts which would justify that label are proved, there is no need for the label to appear. (*Roberts, C.J. and Baguley, J.*) DAW IT *v* U PO DEVE. **167 I.C. 90 =9 R.R. 291=A.I.R. 1937 Rang. 19.**

——(Burmese)—*Adoption—Keittima adoption —Proof required.*

In order to establish an adoption on the basis of one who will inherit to the entire exclusion of relatives by blood. The son or daughter should have been adopted with the intention publicly signified, of taking the adoptee as a son or daughter who will inherit. This intention may have been expressed at the time of the taking or later; or may be inferred from a long course of conduct making such intention public. Where there is a sole natural daughter, parents are old and the natural daughter actually resides with her parents with her husband to whom she is long married, the mere fact that a certain child was brought up as natural daughter does not necessarily indicate an intention that the child should inherit. Some stronger evidence than in an ordinary case in which alleged adoptive parents are childless is required to prove such intention and such intention should be clearly shown either by direct evidence or circumstances from which it may safely be inferred. (*Dunkley and Mya Bu, JJ.*) MA SEIN MAY *v.* MA SAING. **165 I.C. 358=9 R.R. 206=A.I.R. 1936 Rang. 459.**

——(Burmese)—*Adoption — Keittima—Requisites.*

A keittima child is the child of others taken and brought up to the knowledge of the public with the intention that the child shall inherit. No formal ceremony is necessary to constitute this adoption. The intention that the child shall inherit and the publicity of the intention of the person who takes the child of another in adoption that the child shall inherit are the principle requisites for keittima adoption. (*Mosely and Ba U, JJ.*) MA THAN NYUN *v.* DAW SHWE THIT. **14 Rang 557=164 I.C. 272=9 R.R. 73 (2)=A. I.R 1936 Rang. 344.**

——(Burmese)—*Adoption—Keittima adoption —Proof of—Test of adoption—Change of family.*

Keittima adoption may be proved either by evidence of a ceremony on a particular date of giving and taking in adoption, or by evidence of a course of conduct which cannot be explained on any other basis than that the children had been adopted with a view to inherit. The acid test of adoption is that the children should leave the family of their natural parents and join the family of their adoptive parents, and, consequently, in a case of a keittima adoption it is essential that the adoptive parents should, from the date of the adoption, make themselves responsible for the upbringing of the children. (*Roberts, C.J. and Dunkley, J.*) U BA THAUNG *v.* DAW OO. **178 I.C. 830=11 R.R. 273=A.I.R. 1938 Rang. 381**

——(Burmese) — *Adoption — Keittima and apatitha forms—Distinction—Intention—Proof—Duty of a Judge.*

The dividing line between keittima adoption and apatitha adoption must be the question of intention to inherit: and it is clear that the intention must be given effect to in such a way as to secure a measure of public notoriety or attention. It cannot be said that no proof of keittima adoption should be considered satisfactory if established upon oral evidence alone. All that the Judge has to do is to see whether from oral, documentary or circumstantial evidence, from all the

different elements at his disposal, he can infer that intention and that notoriety which the law demands as being consistent with keittima adoption and keittima adoption alone. (*Roberts, C.J and Braund, J.*) MA PU TU *v.* MAUNG BA SIN. 178 I C. 700=11 R.R. 262=A I R 1938 Rang. 369.

——(Burmese)—*Adoption—Living with adoptive parents—Rule as to—Extent to which applicable.*

Although it is by no means essential that, in these days at least, children should live with their adoptive parents or that if they do not do so the proof of adoption should be deemed incomplete, yet in the case of young children it is a normal characteristic of adoption that the upbringing of the children adopted should be undertaken by the adoptive parents and where this is not done, one must look carefully at the surrounding circumstances to see whether, when the normal characteristics have been departed from, there is still sufficient proof of the factum of adoption remaining. (*Roberts, C.J. and Dunkley, J*) U BA THAUNG *v.* DAW OO. 178 I.C. 830= 11 R R.273=A I R 1938 Rang 381.

[Appeal from A I.R 1937 Rang. 170.]

——(Burmese)—*Adoption—Proof required—Residence of adoptee with adoptive parents—Evidentiary value.*

Acc.rding to the law of Burma, no formal ceremony is necessary to constitute valid adoption ; what is to be proved is not only the fact of adoption but also the facts of the intention to adopt in the keittima form and of the public notoriety which are necessary to constitute valid adoption in this manner. Residence of adoptee with the adoptive parents is not one of the legal ingredients of a valid adoption but where other evidence is lacking, residence with the adoptive parents, though not essential, is at any rate most valuable as evidence. (*Braund, J*) U BA THAUNG *v.* DAU U. 1938 Rang.L.R 323=169 I.C. 617= 10 R R 14=A.I.R. 1937 Rang. 170.

——(Burmese) — *Adoption — Motive—Relevancy.*

In cases of adoption, as in other cases, although motive is not a necessary ingredient, it always forms a good index to the way in which the truth lies. (*Dunkley and Mya Bu, JJ.*) MA SEIN MAY *v.* MA SAING. 165 I C. 358=9 R.R. 206=A.I.R. 1936 Rang 459.

——(Burmese)—*Adoption — Proof—Keittima Daughter.*

A applied for letters of administration to the estate of *D* on the ground that *A* was the keittima adopted daughter of *D* and her sole heir. *D* and her husband were a childless couple. *A* was living at *D's* house since she was four years old, and so she was not able to give evidence of actual adoption but there was a good deal of evidence to show that she had been so adopted and had a reputation of an adopted daughter. *A* was married to the nephew of *D* and even after her divorce she lived with her children at the house of *D* and there was also evidence that her reputation as an adopted daughter still persisted. The opposite party contended that *A* lived at *D's* house not as an adopted daughter but as a servant girl.

Held, that the evidence was sufficient to establish the adoption as keittima daughter. The fact that *A* was married to the nephew of *D* and that she lived with her children at the house of *D* even after her divorce with him made it impossible that she had the position of a servant girl. As *D* and her husband had no child and *A* lived with them for many years, there was nothing surprising in their adopting *A* as keittima daughter. (*Baguley and Spargo, JJ.*) U TUN PE *v.* MA AYE KI. 174 I C. 223=10 R R. 393=A.I.R. 1938 Rang. 40.

——(Burmese)—*Advancement — Presumption of—Applicability to Chinese Buddhist.*

The presumption of advancement for the benefit of the children arising in the case of a purchase of a Burman Buddhist of property in the name of his children is applicable to the case of Chinese Buddhists. 6 M I.A. 53 (P.C.). 13 M.I.A. 232 (P.C.) and A.I.R. 1921 P.C. 56, Appl. (*Mya Bu, J.*) MAUNG KYA YAN *v.* MAUNG THA E. 161 I. C. 665=8 R.R. 503=A.I R. 1936 Rang. 121.

——(Burmese)—*Ancestral property — Presumption as to jointness, if any.*

There is no presumption in Burmese Buddhist law that ancestral property remains undivided. (*Dunkley J,*) MAUNG HLA PE *v.* MANIKA. A.I. R. 1940 Rang. 141.

——(Burmese) — *Applicability — Marriage contracted between Chinese Buddhists in Burma.*

As regards validity of the marriage between Chinese Buddhists contracting marriage in Burma, the Burmese Buddhist law is applicable as the *lex loci contractus*, but as regards inheritance or succession to the estates of Chinese Buddhists dying intestate in Burma the Chinese customary law is applicable as the customary law of the Chinese Buddhists. (*Mya Bu and Mosely, JJ.*) MA TIN *v.* KO SEIN HONE 184 I.C. 665=12 R. R. 167=A.I.R. 1939 Rang. 291.

——(Burmese)—*Aramika sanghika property—Nature of—Suit to recover such property by monk on behalf of Kyaundaik—Maintainability.*

Aramika sanghika property is only one kind of sanghika property. The right of use in such property vests in the monks residing in a particular locality but for the sake of convenience the power of control res des in a particular monk such as the presiding monk of that locality. A suit under O. 1, R. 8, C. P. Code, by a Burmese monk who is not the presiding monk of the kyaungdaik in which he resides, for the recovery of certain land on the ground that it is aramika sanghika property, on behalf of all the sanghas of the kyaundaik (and not on behalf of the general body of sanghas) is not maintainable, inasmuch as none of the sanghas or monks residing in the kyaungdaik is entitled individually to the control, management or possession of the property in addition to mere use and enjoyment. The property is the property of the sanghas in general and not the property of the sanghas of a particular locality. It is the presiding monk alone who is entitled to management, control and possession. The plaintiff in such a suit is also not entitled to a declaration that the lands in suit constitute aramika sanghika property for the enjoyment and benefit of the sanghas of the kyaungdaik, as that would convert the suit into one of entirely a different character. (*Mya Bu, Offg. C.J. and Mackney, J.*) U ZAWTIPALA *v.* U THATDAMA. 180 I.C. 210=11 R.R. 382 =A I R. 1939 Rang. 21.

——(Burmese)—*"Auratha" child—Meaning.*

The "auratha" or "orasa" child literally means "child of the body" and is used in Burmese

Buddhist Law as meaning also "eldest born child." (*Roberts, C.J., Mya Bu and Mosely, JJ.*) MAUNG THEIN *v.* U THA BYAW. **1939 Rang L R. 341=182 I.C. 268=12 R.R. 2=A.I.R. 1939 Rang. 197 (F.B).**

——**(Burmese)**—*Dedication of property to nuns —Gifts—If exempted from operation of S. 123 of T. P. Act.*

Buddhist religious gifts are not excepted from the operation of S. 123, T. P. Act, since that Act has been enforced. Modern nuns are little more than lay devotees: they do not undergo any ordination and are not regarded as dying a civil death: they are under no disabilities with regard to money and property. Hence there could be no possible dedication to nuns as such and if it is to be a gift, then it must conform to the provisions of the Transfer of Property Act. (*Mackney, J.*) DAW SEIN *v.* MA MAI MA. **178 I.C. 232=11 R. R. 219=A.I.R. 1938 Rang. 303.**

——**(Burmese)** — *Divorce — Divorce between Eindaunggyi couple on account of wife's adultery —Forfeiture of wife's rights.*

In the case of a divorce between Eindaunggyi couple on account of adultery by the wife, the wife loses all her rights in the Hnapazon property. And there is no difference in principle between the case of a Nge-lin-nge-maya and that of an Eindaunggyi regarding imposition of forfeiture on the guilty spouse. (*Ba U, J.*) S. A. S. CHETTIAR FIRM *v.* U MAUNG GYI. **14 Rang 329 =163 I.C. 600=9 R.R. 36=A.I.R. 1936 Rang. 274.**

——**(Burmese)**—*Divorce—Dissolution—Desertion of husband by wife.*

In the case of Burman Buddhists, if the wife elopes with her paramour and deserts her husband the marriage is automatically dissolved at the end of one year from date of desertion and no further expressed act of volition on the part of the deserted party is necessary to effect such dissolution. (*Ba U. J*) S. A. S CHETTIAR FIRM *v.* U MAUNG GYI. **14 Rang. 329=163 I.C. 600=9 R R. 36=A.I R. 1936 Rang. 274.**

——**(Burmese)**—*Divorce—Dissolution by desertion—Allegation of adultery on part of wife—Wife, if forfeits her share in hnapazon property.*

Under Burmese Buddhist law divorce is essentially a personal action and the penalties for adultery can be only enforced by the husband. When a marriage is dissolved by the desertion of the wife she does not lose her interest in the joint property of the marriage, and even if there is an allegation of adultery against the wife, the joint property must be divided on the footing that the marriage has become dissolved by desertion, unless the husband has proved the adultery in a suit for divorce brought by him. Consequently in such circumstances the wife does not forfeit her share in the hnapazon property. (*Mosely and Dunkley, JJ.*) MA DUN MAI *v.* MAUNG SAN TUN. **1938 Rang L R. 229=177 I.C. 492=11 R.R. 132 =A I.R. 1938 Rang 168.**

——**(Burmese)**—*Divorce—Wife deserting husband and staying away for one year—Divorce by operation of law.*

After the wife has departed from the house of her husband, there is a divorce by operation of law, where there has been no maintenance of the

wife for the period of one year. But the contribution by the husband to the maintenance of the wife, who has left him will avoid the consequence that the marriage tie is dissolved by operation of law. (*Roberts, C.J. and Leach, J.*) DWA PWA MAY *v.* MA THIN MYA. **171 I.C. 656=10 R.R. 176=A I R 1937 Rang 255.**

——**(Burmese)**—*Ecclesiastical Law—Monkhood —Entry into order of* rahans—*Effect of—Divesting of property.*

A Burmese Buddhist who enters into the Buddhist order of *rahans* with the intention of remaining therein permanently automatically divests himself of all his interest in or title to property in his ownership or possession at the time of his ordination. (*Roberts, C.J., Mya Bu, Baguley, Mosely and Ba U, JJ.*) A.R.L P FIRM *v.* U PO KYAING **1939 Rang.L R. 311=183 I C. 673=12 R.R. 93=A I.R 1939 Rang. 305 (F B).**

——**(Burmese)**—*Ecclesiastical Law—Monkhood —Right of* rahan *to possess or acquire property—* Kappiya *system.*

The Buddhist monkhood is a mendicant order, and the only properties which a monk could originally possess were articles which fell within the category of the Four Requisites or Resources —food, clothing lodging and medicine, but the ancient texts recognise a vicarious possession on behalf of the *rahan* by a lay steward who is called *kappiya.* The *kappiya* may receive gifts offered to a monk after his ordination but he does not enter into possession of the property of a layman when the latter becomes a monk. When paddy land is given to a monk after ordination it is given for future requirements in order that the four requisites may be satisfied. A *rahan* becomes ineligible to receive an inheritance from his lay relatives. It is, however, inaccurate to describe him as civilly dead. (*Robert, C.J. Mya Bu, Baguley, Mosely and Ba U, JJ.*) A.R.L.A. FIRM *v.* U PO KYAING. **1939 Rang.L.R. 311=183 I C. 673=12 R R. 93=A I R 1939 Rang. 305 (F.B.).**

——**(Burmese)**—*Ecclesiastical law—Owner of poggalika conferring rights of appointing his successor upon other persons—Such persons not exercising right—Vesting of ownership in sangh.*

If the owner of a poggalika does not appoint his successor but confers the right of appointing successor upon certain persons then if those persons do not exercise that right, the ownership of the poggalika vests in the sangh at large. After the death of the owner the presiding monk is then to be elected by the sangh. The latter may elect such monk in any way they choose provided it is a real, valid and true election. The members of the sangh may nominate some of the senior members of them representing the whole body to elect the monk and the election of the monk by the members so nominated is a valid and proper election by the sangh as such. (*Roberts, C J. and Dunkley, J.*) U THISEITTA *v.* U. EINDAWUNTHA. **1940 Rang L.R. 97=185 I.C. 483=12 R.R. 196=A I.R. 1939 Rang. 385.**

——**(Burmese)**—*Ecclesiastical law—Poggalika —Election of presiding monk by sangh.*

Although there may be some ceremonial contemplated at the time of installing a presiding monk of a poggalika the election of such a presiding monk by the sangh is not analogous to a ceremonial but is a mere question of fact depending upon the consideration of the question

whether the members of the sangh are substantially in favour of the appointment of the proposed monk. (*Roberts, C J. and Dunkley, J.*) U THISEITTA *v.* U EINDAWUNTHA. 1940 Rang. L.R. 97=185 I.C. 483=12 R.R. 196=A.I.R. 1939 Rang. 385.

——(Burmese)—*Ecclesiastical law*—Poggalika *property—Devolution.*

On the death of a *poggalika* owner of a monastery or a monastic institution, the property becomes *Sanghika* property (that is property belonging to the *Sanga* in general). *Sanghika* property is either of the kind known as *Aramika Sanghika* or of the kind known as *Ganika Sanghika* (*Aramika Sanghika* meaning *Sanghika* property for the use of the *Sangha* dwelling in a particular locality and *Ganika Sanghika* meaning *Sanghika* property for the use of the *Sangha* of a particular sect). The right of use in such property vests in the monks residing in the particular locality or in the *Sangha* of the sect, but, for the sake of convenience, the power of control resides, in the case of *Aramika Sanghika* property, in a particular monk such as the presiding monk of the locality, or, in the case of *Ganika Sanghika* property, in the leading monks of the sect or one of them. (*Roberts, C.J. and Mya Bu, J.*) U ZAWTIKA *v.* U KALYANA. 14 Rang. 566=168 I.C. 967=9 R.R. 381=A.I.R. 1937 Rang. 76.

——(Burmese)—*Family living in patriarchal state—All working and living together—Members seeking service and remaining separate—Returning after father's death and continuing father's business—Separate banking account—If separate property.*

Where a family kept together in a kind of patriarchal state all working for the father and after him for the mother, and none having any separate property of their own, only getting their boarding, clothing and pocket-money, and where one member went out and found work and remained apart, but came back on his father's death and continued his father's business and had a separate banking account of his own as distinct from that of the family, *prima facie* his banking account would be his personal property until the contrary is shown. (*Baguley and Shaw, JJ.*) DAW KYIN *v.* MA HLA YI. 176 I.C. 909=11 R.R. 89=A.I.R. 1938 Rang. 71.

——(Burmese)—*Gift—Acceptance, if necessary.*

Dunkley, J.—It is nowhere stated in the Burmese Buddhist Law that a gift need not be accepted. (*Mya Bu, Offg C.J. and Dunkley, J.*) BISSESSAR DAS *v.* MA YI. 179 I.C. 730=11 R.R. 346=A.I.R. 1939 Rang. 49.

——(Burmese)—*Gift—Testamentary disposition in guise of gift—Validity.*

It is not only a death-bed gift which is void under the Burmese Buddhist Law but a gift in the nature of testamentary disposition, or in other words, a testamentary disposition in the guise of a gift is also void as contravening the fundamental principles of the Burmese Buddhist Law which recognizes no form of succession other than intestate succession. (*Mya Bu and Sharpe, JJ.*) MA LON *v.* MYA MAY. 179 I.C. 946=11 R.R. 363=A.I.R. 1939 Rang. 59.

——(Burmese)—*Gift—Validity—Gift affecting inheritance.*

No Burman Buddhist can, under the guise of making a gift, be allowed to make a will. He cannot set at naught the provisions of his personal law as to the inheritance of his property after his death. Where therefore his act in making a gift, owing to the circumstances under which it is made or the conditions attached thereto are such as to affect the succession to, or inheritance of, his property after his death, Buddhist law must be resorted to, to arrive at a decision as to whether his action can be maintained or is invalid. The deed of gift, affecting inheritance will be a nullity, in spite of the fact that it was otherwise made in accordance with Ss. 122 and 123, T. P. Act. A.I.R. 1924 Rang. 13 and 3 Bur.L.T. 107, Rel. on. (*Mackney, J.*) MA YAR THEIN *v.* U TA TE. 176 I.C. 799=11 R.R. 84=A.I.R. 1938 Rang. 216.

——(Burmese)—*Guardianship*—De facto *guardian—Right to alienate.*

Under Burmese law a *de facto* guardian cannot dispose of immovable property of the minor. Hence a mortgage executed by a person purporting to act as guardian of minors cannot affect the interests of the minors in the mortgaged property. (*Dunkley and Braund, JJ.*) R. M. A. R. M. CHETTYAR FIRM *v.* MG. SHWE HMUN. 180 I.C. 489=11 R.R. 404=A.I.R. 1938 Rang. 468.

——(Burmese)—*Husband and wife—Atetpa and Lettetpwa property.*

So long as the corpus of paying or atetpa property is unchanged it will always remain payin or atetpa. The question as to whether there has been a change in the corpus of the property is one of fact. Where atetpa property originally brought by wife to her marriage changes its original character by reason of its having been entirely rebuilt during the coverture, the property becomes lettetpwa property of the marriage and the husband has half interest equally with the wife in such property. (*Roberts, C.J. and Dunkley, J.*) MAUNG BA U *v* MA SHWE HMI. 186 I.C. 286=12 R.R. 256=A.I.R. 1939 Rang. 355.

——(Burmese)—*Husband and wife—Joint property—Wife consenting to husband's mortgaging of—Effect.*

Where a Burmese Buddhist wife consents to her husband mortgaging the joint property as if it were his sole property, then clearly she is holding him out to the mortgagee as her agent, not only in respect of the execution of the mortgage but also in respect of all subsequent transactions in connection with the mortgage. (*Dunkley and Wright, JJ.*) U RAI GYAW THOO, LTD. *v.* MA HLA U PRU. 1940 Rang.L.R. 180=A.I.R. 1940 Rang. 126.

——(Burmese)—*Husband and wife—Mortgage deed by husband and wife jointly—Second mortgage deed as novation of first by husband alone—Liability of wife.*

Where a mortgage deed is jointly executed by Burmese husband and wife, but subsequently a second mortgage deed is executed as a novation of the first, but wife expressly withholding her consent to the new deed, then according to the doctrine of novation the original deed need not be performed and under the second deed the wife cannot be liable. The principle that a liability incurred by a Burmese Buddhist husband for the joint purpose of himself and his wife binds the wife based upon the presumption that the wife

has consented to the incurring of such liability, cannot be availed of in face of wife's express dissent. (*Mya Bu and Dunkley, JJ.*) U SAN YA *v.* P. R. M. P. S. P. L FIRM. **165 I.C. 388=9 R. R. 213=A.I.R. 1936 Rang. 396.**

——(**Burmese**)—*Husband and wife—Mortgage by husband of joint property—When binds wife.*

If a Buddhist Burmese mortgages the property of himself and his wife, the mortgage binds the wife only if it is made with her full knowledge and consent. (*Baguley and Mosely, JJ.*) DAW MAY *v*, MAUNG AUNG KYAW. **163 I.C. 166=8 R.R. 512=A.I.R. 1936 Rang. 246.**

——(**Burmese**)--*Husband and wife—Property acquired during coverture—Burden of proof.*

Where a Burmese wife asserts that certain property was acquired by her husband during her coverture, the burden is on her of establishing satisfactorily that it was acquired after her marriage.(*Dunkley, J.*) S. P. L. A. CHETTYAR FIRM *v.* MA PU. **163 I.C. 604=9 R R. 33=A.I.R 1936 Rang. 262.**

——(**Burmese**)—*Husband and wife--Property acquired during coverture—Mutual rights—Insurance policy in the name of husband—Extent of wife's right therein.*

The general rule of Burmese Buddhist Law with reference to the rights of husband and wife to property acquired during coverture is, that each shall have an equal interest in it Where a husband took a life policy in his name during coverture and it was not known from what source the premia were paid, and became insolvent, it was held that the general rule as to the wife's equal right applied and that she was entitled to half of the amount recovered from the Insurance Company by the Official Receiver. It was further held that what was acquired during the coverture was, not the proceeds of the policy, but the right to obtain the proceeds of the policy—which was a right contingent on the death of one of the persons who jointly 'acquired' the right to the policy and that there could be no difference between the acquisition of the right to draw the proceeds at the death of the assured and the acquisition of other kinds of property during the life time of both husband and wife. (*Mya Bu, Off, J. C. J., Mosely and Ba U, JJ.*) OFFICIAL ASSIGNEE *v.* MA HNIN SAN. **1940 Rang.L.R. 208 (F.B).**

——(**Burmese**)—*Husband and wife—Rights in jointly acquired property.*

The Burmese Buddhist husband and wife have equal rights in their hnapazon or jointly acquired property. (*Ba U and Mackney, JJ.*) U SO MAUNG *v* THOM. **184 I C. 622=12 R R. 163= A.I.R. 1939 Rang. 287.**

——(**Burmese**) —*Husband and wife—Rights to atetpa property on separation.*

Where the husband and wife separate from each other by mutual consent, either is entitled to take his or her atetpa property. (*Ba U and Parker, JJ.*) U THIN *v.* DAW HMU. **171 I.C. 702=10 R.R. 179=A I R. 1937 Rang 142.**

——(**Burmese**)—*Inheritance—Share of children of first mortgage in* payin *property.*

Where a Burman Buddhist leaves surviving him his children by a former marriage and also his second wife and his children by her, the children of the first marriage are entitled to three-fourths of the *payin* property, brought by their parent to the second marriage, as against

their step-mother on their father's death. (*Mosely and Dunkley, JJ.*) MA E NYUN *v.* DAW MA GET. **178 I.C. 200=11 R.R. 218=A.I.R. 1938 Rang. 293.**

——(**Burmese**) — *Law applicable — Duty of Courts.*

The task of the Courts of British Burma has been, and still is, to deduce from the *ad hoc* decisions compiled in the Dhammathats general principles of the common law of Burma which are in accordance with the habits and customs of the Burman of today. (*Roberts, C.J., Dunkley and Braund, JJ.*) MAUNG THEIN *v.* MAUNG NYO SEIN. **1939 Rang L.R. 160=178 I.C. 883=11 R. R. 284=A I.R. 1938 Rang. 449 (S B).**

——(**Burmese**)—*Maintenance—Suit by wife—Maintainability—Right to arrears.*

Under Buddhist Law there is a positive duty cast on the husband to maintain his wife or wives. Where by law, a person is under a duty towards another person, there is vested in that other a corresponding right to have that duty performed. Hence a suit for maintenance by Burmese Buddhist wife against her husband who is living separately from her, is maintainable. But a claim for arrears of maintenance cannot be sustained. (1872-92) L.B.R. 258 Rel. on (*Dunkley, J.*) MA SAW NWE *v.* U AUNG SOE. **1939 Rang. L.R. 527=182 I.C. 799=12 R.R. 28=A.I.R. 1939 Rang. 223.**

——(**Burmese**) — *Marriage — Co-habitation accompanied by agreement to marry* in futuro*— If creates change of status.*

Co-habitation accompanied by an agreement to marry *in futuro* does not create a change of status, although in cases where parties to the agreement are competent to bind themselves by a contract to marry and the agreement is broken, the co-habitation in certain circumstances may affect the quantum of the damages that are awarded as compensation for the breach of the contract. (*Page, C.J., Mya Bu, Baguley, Mosely and Ba U, JJ.*) MAUNG TUN AUNG *v.* MA E KYI. **14 Rang 215=162 I.C. 60=8 R.R. 574=A.I R. 1936 Rang. 212 (F.B.)**

——(**Burmese**)—*Marriage—Co-habitation with intention of being husband and wife—Effect.*

If *P* and *N* were co-habiting with intention of being husband and wife, then they were husband and wife whatever other people may have thought of them. (*Baguley and Mosely, JJ.*) **MA** NYUN *v.* DAW HLA OHN. **163 I.C. 393=9 R.R. 11=A.I.R. 1936 Rang. 253.**

——(**Burmese**)—*Marriage—Denial of—Burden of proof.*

Where the plaintiff denies that he had ever married the defendant and proves that he had married another wife, and calls witnesses to say that that lady was the only person whom he had ever treated or who had ever been treated as such unless it could be shown in cross-examination that such evidence was unworthy of belief there would be a case to answer, and it would be for the defendant to adduce such evidence in rebuttal as would clearly point to the existence of a valid marriage, according to Burmese Buddhist law, between the parties. (*Roberts, C. J. and Dunkley, J.*) MAUNG MAUNG *v.* MA SEIN KYI. **A I.R. 1940 Rang. 181.**

——(**Burmese**)—*Marriage—Essentials.*

A marriage between Burmese Buddhists is created by co-habitation coupled with intent to become husband and wife. There must also be publicity of the relationship. (*Dunkley and Wright, JJ.*) MAUNG BA TO *v.* MAUNG NYUN. A.I.R. 1939 Rang. 442.

——(Burmese)—*Marriage—Essentials to be proved to raise* prima facie *presumption.*

What must be proved to raise a *prima facie* presumption of marriage is that the acts of intercourse were not clandestine, but that there was an open avowal of the married state as distinct from the relationship between a man and his mistress. And if the parties made no open avowal their method of living must have been such as to induce members of the public, not to gossip about the relationship, but to show by their conduct that they were treating the pair as man and wife. (*Roberts, C.J. and Dunkley, J.*) MAUNG MAUNG *v.* MA SEIN KYI. A.I.R. 1940 Rang. 181.

——(Burmese)—*Marriage--Evidence of--Reputation of marriage—How to be established—S.* 50, *Evidence Act, if affected by S.* 110, *Cr. P. Code.*

A reputation as regards marriage can only be established by means of admissible evidence under S. 50, Evidence Act. What people think may be expressed in words, or by conduct. If there is a rumour, or gossip, to the effect that two persons are married the existence of that rumour or gossip is inadmissible in evidence. On the other hand, the fact that they were usually received and treated by their friends as husband and wife is relevant. Hence, in such cases, the use of such phrases as "I learnt that they were living together as man and wife" or "they were man and wife" are not receivable as evidence. The witness must prove conduct on the part of the man and woman, or on the part of their friends and neighbours from which the Court can draw this conclusion. The general reputation of a man amongst the community may no doubt be evidence in inquiries under S. 110, Cr. P. Code. The nature of the section is such as to render admissible what persons who know him think of him. But this fact in no way nullifies the provisions of S. 50, Evidence Act, which lays down a clear rule as to the limits within which opinion may be evidence when a question of relationship has to be decided. (*Roberts, C.J. and Dunkley, J.*) MAUNG MAUNG *v.* MA SEIN KYI. A.I.R. 1940 Rang. 181.

——(Burmese)—*Marriage—Promise of marriage by young Burman below age of majority—Validity—Law applicable.*

The Burmese Buddhist Law does not form the rule of decision of the question as to the validity of a promise of marriage made by a Burmese Buddhist young man below the age of the majority fixed by the Majority Act and a Burman is not competent to enter into a valid or binding contract to marry *in futuro* until he has completed the age of 18 years. (*Page, C.J., Mya Bu, Baguley, Mosely and Ba U, JJ.*) MAUNG TUN AUNG *v.* MA E KYI. 14 Rang. 215=162 I.C. 560 =8 R.R. 574=A.I.R. 1936 Rang. 212 (F B.).

——(Burmese)—*Marriage—Proof required.*

In order to establish a marriage under Burmese Buddhist Law, what is required is mutual agreement between the parties to become man and wife coupled with consummation. Neither ceremony nor open living together is necessary, but they

are cogent evidence to prove the central fact that mutual agreement. Where the woman admits that the man already had a wife when she first associated with him and that they never went out in public together and never received any friends in the house as husband and wife, the mere fact that the man was visiting her daily for a space of 2 or 3 years and that she is living in a house built by the man cannot be taken as proof of a mutual agreement between them to become husband and wife. (*Spargo, J.*) MA KYIN MYA *v.* MAUNG SIT HAN. 1937 Rang. L.R. 103=170 I.C. 355= 38 Cr.L.J. 895=10 R.R. 77=A.I.R. 1937 Rang. 245.

——(Burmese)—*Marriage—Proof of.*

Among Burman Buddhist marriage is a contract entered into by mutual consent of the parties and no ceremony is necessary. In the absence of direct proof, consent may be inferred from the conduct of the parties or established by reputation. Generally in such circumstances, some open recognition of the wedded state is to be expected. Relatives and neighbours are usually asked to some form of entertainment in order to signify the occasion, and where this is dispensed with, evidence of the intention to enter into married life must be clear. Clandestine acts of sexual intercourse do not by themselves establish marital relationship and where there is no regular cohabitation under the same roof and the couple who resort to each other for purposes of intimacy are thought by some to be engaged and by others to be cousins or mere friends, proof of marriage has not been established by reputation. Moreover, as it takes two persons to make a contract, in order to prove marriage there must be evidence not merely of desire by one person to be considered as having married another, but of the consent of that other, express or implied, to the joint assumption of a status consistent only with the marriage bond. (*Roberts, C.J.*) U TUN SEIN *v.* MA SAN MYINT. 175 I.C. 418=39 Cr.L. J. 571=10 R.R. 490=A.I.R. 1938 Rang. 115.

——(Burmese) — *Marriage — Second wife—Share of—Jointly acquired property of first marriage.*

The share of a second wife in the jointly acquired property of the first marriage is one-sixth. (*Spargo, J.*) S.P.L.A.A. CHETTIAR FIRM *v.* MA PU. 169 I.C. 693=10 R.R. 27=A.I.R. 1937 Rang. 138.

——(Burmese)—*Marriage—Union of Chino-Burman Budahist and Burmese Buddhist woman —Mutual consent—Sufficiency.*

The law that is applicable to the union of Chino-Burman Buddhist and a Burmese Buddhist woman is the same as is applicable to the case of Burmese Buddhist man and Burmese Buddhist woman. All that is required, so long as they are *sui juris*, is their mutual consent to live together as husband and wife. If such consent is proved then the woman would be deemed to be the legally married wife of the man. (*Ba U, J.*) MA MYA TIN *v.* MAUNG AH LON. 183 I.C 477=40 Cr.L.J. 796=12 R R. 77=A.I.R. 1939 Rang. 252.

——(Burmese)—*Marriage—Validity — Hindu becoming Buddhist, marrying according to customs of Buddhists.*

Where a Hindu not only formally recites the five receipts after a pongyi, but builds and endows a kyaung and after selecting a koyin and getting

him raised to the position of upazin accepts him in the position of private chaplain, he is going a long way further than any Hindu can be expected to go if he retains Hinduism. When this is coupled with his completely cutting himself off from his relations in India and settling down permanently in Burma in the Burmese Buddhist way, the only possible inference is that he has become a Buddhist. If such a person marries conforming with the customs of Buddhist in Burma, the marriage must be regarded as a legal marriage on the principle of *lex loci contractus*. (*Baguley and Sharpe, JJ.*) CHINNASWAMI PILLAI *v.* MA TOKE. **174 I.C. 558=10 R.R. 414=A.I.R. 1938 Rang. 51.**

——— **(Burmese)**—*Mortgage — Equitable mortgage by Burman—Burman's wife dying leaving son—Decree passed on mortgage—Burman marrying again—Suit by son for declaration that mortgage decree did not affect his mother's share—Second marriage, if affects mortgagee's rights.*

An equitable mortgage was created by a Burman. His wife died afterwards leaving a son. A mortgage decree was passed. The Burman afterwards married again and the execution of the mortgage decree was stayed pending the decision of a suit which was brought by the son for a declaration that the mortgage decree did not affect his mother's share of the property.

Held, that the second marriage of the mortgagor did not affect the rights of the mortgagee, the decree having been passed before the marriage and even if the first wife was not consenting party, on her death, her husband became absolute owner of the property subject to the mortgage he had created and his interest in property having increased, the increase enured to the benefit of the mortgagee. A.I.R. 1919 P C. 14 and A.I.R. 1927 Cal. 665, Rel. on. (*Leach, J.*) MAUNG CHIT KHIN *v.* U BA. **176 I.C. 929=11 R.R. 94=A.I.R, 1938 Rang. 108.**

——— **(Burmese)**—*Orasa daughter—Rights in parental estate—Limits of.*

Under the Buddhist law of inheritance an eldest born daughter having all the qualities of an orasa child has no right whatever of claiming a quarter share from her father when her mother has predeceased her. She can have such a right, against the mother if the father dies before her mother. The only circumstances under which the daughter as the orasa child can acquire a vested interest in the parental estate is where the father remarries before the death of her mother. (*Mya Bu and Mosely. JJ*) U MAUNG MAUNG *v.* MA TIN. **A.I R. 1940 Rang. 139.**

——— **(Burmese)**—*Partition—Suit for on re-marriage of surviving parent—Property liable to partition.*

In a suit by a person for partition of the estate of his parents on re-marriage by his surviving parent, the estate subject to partition is the estate held by the surviving parent at the date of the re-marriage and not such estate to which the surviving parent might be legally entitled. (*Page, C.J. and Mya Bu, J.*) MAUNG SEIN BA *v* MAUNG KYWE. **161 I.C. 584=8 R.R. 489=A.I.R. 1936 Rang. 107.**

——— **(Burmese)**—*Partition—Heir seeking to obtain his share of inheritance—Proper remedy.*

Per *Dunkley, J.*—Strictly there is no such thing as a suit for partition among Burmese Buddhist

heirs because they are tenants-in-common and not joint tenants of the inheritance. The only way in which one heir can obtain his share of inheritance from another heir or heirs in possession thereof is by an administration suit and the whole of the property belonging to the estate must be brought to account. Consequently if an heir is to get a share of an inheritance, then a suit for a share of one property out of the inheritance will not lie. (*Dunkley, J., on difference between Leach and Spargo, JJ.*) MA PWA SHIN *v* U PO SIN. **170 I.C. 946=10 R.R. 117=A.I.R. 1937 Rang. 324.**

——— **(Burmese)**—Payin *property—House built on* payin *site with* lettetpwa *funds—House becomes* payin.

The more valuable part of a house and site is ordinarily the site, and so long as the corpus of site is unchanged, it will always remain the same. Hence where a house is built on *payin* land with *lettetpwa* funds, the house becomes *payin*. 10 Bur. L.R. 49, Ref. (*Dunkley, J.*) S P. L. S. CHETTYAR FIRM *v.* MA I U. **14 Rang. 697=9 R. R. 186=164 I.C. 1023=A.I.R. 1936 Rang. 417.**

——— **(Burmese)**—*Sayadaw—Right to evict monk—Grounds.*

A Sayadaw or presiding monk of a kyaungtaik which is sanghika and not poggalika property is not entitled to evict a monk merely on the ground that the latter challenges the position of the plaintiff to be the poggalika owner of the property, in absence of proof of any misconduct on his part or of such behaviour as would render his eviction from the kyaungtaik desirable. The sanghika property does not belong to any particular person or group or section. It partakes of the nature of public religious property. When a kyaung becomes vacant, there is nothing wrong in a monk who comes peaceably in to dwell in the kyaung. (*Roberts, C.J. and Dunkley, J*) U EINDAWBATHA *v.* U ZANEENDA. **178 I.C. 566=11 R.R. 247=A.I.R. 1938 Rang. 396.**

——— **(Burmese)**—*Succession—Apatitha child—Right to share when one parent is surviving.*

In the absence of keittima or natural children, the apatitha child is entitled to inherit in the estate of his adoptive parents when both parents are dead; but he has no right to share in the estate of the deceased parent when the other survivor parent is living. (*Mya Bu and Mackney, JJ.*) MA SINT *v.* MA MA GALE. **1939 Rang L. R. 378=179 I.C. 43=11 R.R. 295=A.I.R. 1938 Rang. 451.**

——— **(Burmese)**—*Succession — Apatitha child living apart from its parents—Right of—Keittima child—Distinction.*

An apatitha child who lives apart from his parents is not entitled to inherit from them. A keittima child gets his right of inheritance from the intention of the adoptive parents that he shall inherit. An apatitha child does not get any right to inherit from the intention of the person who adopts, because the person who adopts has no intention to give him any such right. (*Baguley and Mosely, JJ.*) KO PE KYAI *v.* MA THEIN KHA. **1937 Rang. L R. 426= 173 I.C. 238=10 R.R. 327=A.I.R. 1937 Rang. 455.**

——— **(Burmese)**—*Succession — Burmese male marrying twice—Both wives living simultaneously —Child from former marriage—Right to inherit to step-mother.*

BUDDHIST LAW—Burmese.

When a Burmese Buddhist male had contracted two marriages and both wives had been alive at the same time, the children of the first marriage in point of time whose parents both predeceased their step-mother, are heirs of their step-mother in respect of her separate property, when there are no children or direct descendants of the second wife. (*Roberts, C.J. Dunkley and Braund, JJ.*) MAUNG THEIN *v* MAUNG NYO SEIN. **1939 Rang. L.R. 160=178 I.C. 883=11 R.R. 284=A.I.R. 1938 Rang. 449 (S.B.).**

——(Burmese)—*Succession—Child whose property was in possession of parent and who lived with parent dying issueless—Who inherits.*

As between the parent and the surviving spouse of a child who dies leaving no issue but who lived with his or her parent and whose property is in the possession or keeping of the parent, the parent is entitled to inherit such property under the Burmese Buddhist law. But the rule will not affect the vested interest of the son-in-law or daughter-in-law in the payin property brought to the marriage by the daughter and son. (*Robert, C.J. Mosely and Mackney, JJ.*) MA AYE TIN *v.* DAW THANT. **A.I.R. 1940 Rang. 120 (F.B.).**

——(Burmese)—*Succession—Death of one parent and re-marriage of the other—Rights of children taking a share—If they retain further claim in respect of future property—Widow and widower having children remarrying—One of the sons of widow taking his share—Right of the other son to share in the lettetpwa or hnapazon property.*

Under the Burmese Buddhist Law a child who takes his share in the estate of his parents after the death of one parent and upon the remarriage of the surviving parent ceases to have any further claim in the remainder of such estate and in the property acquired subsequent to the remarriage of the surviving parent except probably in the event of the surviving parent dying without leaving a widow or widower or descendants. One *U*, a widower, married *D*, a widow. They had children of their respective previous marriages and also some *payin* property. *D's* children were her two sons, *S* and *M*. Shortly after the marriage of *D* and *U*, *S* died leaving a widow who demanded and received the share to which her husband was entitled in *D's* atetpa property (*i.e.* property which *D* brought from her previous marriage) on account of her marriage with *U*. *S's* share was one half of the half-share to which two sons, *S* and *M* were entitled to the estate of their parents on account of *D's* re-marriage after the death of their father. After *D's* death the representatives of *M* brought a suit for half of the lettetpwa or hnapazon property of *U* and *D*.

Held, that it was not logical that, because *S* or his representatives had taken away his share in the property of *D's* previous marriage and *S* thus dropped out of the new family, the share to which *M* or his representative were entitled in the property acquired subsequent to *D's* marriage with *U* should be reduced by the share which *S* would have had in it if he or his representatives had not taken away the share in the atetpa property upon the remarriage of *D*. Hence *M's* representatives were entitled to the entire half-share in the lettetpwa or hnapazon property of *U* and *D*. (*Mackney, Mya Bu and Spargo, JJ.*)

BUDDHIST LAW—Burmese.

MAUNG PO ZAW *v.* MAUNG AN. **1939 Rang. L.R. 83=179 I.C. 6=11 R.R. 303=A I.R. 1938 Rang. 376.**

——(Burmese)—*Succession— Dhammathats—Former marriage—Meaning.*

Two contemporaneous or overlapping marriages, may be described as 'former' and latter, the 'former' being that which was contracted earlier and the latter being that which was contracted later, where the two marriages subsist for some time side by side. (*Roberts, C. J, Dunkley and Braund, JJ.*) MAUNG THEIN *v* MAUNG NYO SEIN. **1939 Rang L.R 160=178 I C. 883=11 R.R 284=A.I R. 1938 Rang. 449 (S.B.).**

——(Burmese)— *Succession — Full and half blood—Preference—Limits of rule that inheritance should not ascend when it can descend*

Among relations of the same degree of relationship to the deceased, the full blood relations should be preferred to the half blood relation. It cannot be said that the rule that inheritance should not ascend when it can descend, still operates in competition between relations of full blood and those of the half blood of the same degree of relationship to the deceased. (*Mya Bu, Offg. C.J. and Mackney, J.*) MRS. KIRKWOOD *v.* MAUNG SIN. **174 I.C. 603=10 R R. 412=A.I. R. 1938 Rang. 74.**

——(Burmese)—*Succession* — Lettetpwa *property*

The share of two wives jointly in *lettetpwa* property of both marriages is the same as the share of one wife where there is a single wife. Hence the share of the wife by the second marriage is one-fourth in such property. A.I.R. 1925 Rang 329 and A.I R. 1928 Rang 125, Rel. on. (*Dunkley, J.*) S P L.S CHETTYAR FIRM *v.* MA PU. **14 Rang. 697=164 I.C. 1023=9 R.R. 186= A I.R. 1936 Rang. 417.**

——(Burmese) — *Succession—Lettetpwa property.*

Land obtained by mother from her father on his second marriage as being her share of the joint property of the first marriage, becomes the lettetpwa property of the mother's first marriage and as such her children by the first marriage obtain vested interest upon the second marriage of the mother. A.I.R. 1929 Rang. 155, Ref. (*Dunkley, J.*) KYI MAUNG *v.* S N.V.R. CHETTIYAR FIRM. **164 I.C. 392=9 R.R. 90=A.I.R. 1936 Rang. 336.**

——(Burmese)—*Succession — Share of orasa son by first wife on father's remarriage.*

Where after the death of his wife the widower marries a second wife, his orasa son by the first wife is entitled to his share in the estate as it existed at the time of re-marriage. (*Baguley and Mosely, JJ.*) A.L.A. CHETTYAR FIRM *v.* MAUNG PO TAW. **1938 Rang L R 583=177 I C, 435=11 R R. 128=A I.R. 1938 Rang 250**

—— **Burmese)** — *Succession — Orasa child—Death of one parent leaving only one child—Surviving parent re marrying—Claim of child of first marriage to one quarter share as orasa child—If receives fresh period of limitation beginning from remarriage—That child's right to one half of estate brought to re-marriage by its father.*

It is quite contrary to the ordinary notions current amongst the Burmese to hold that an orasa child, who does not claim his share on the death of his parent nevertheless must be regarded as having taken it, with the further consequence that

he falls out of the family. By Burmese law, when after the death of one parent leaving only child the surviving parent remarries, the only child of former marriage is entitled to claim partition. The child's claim to a one-quarter share as orasa child must be deemed to have received a fresh period of limitation beginning from the re-marriage of its father and it is entitled to one half of the estate brought to the re-marriage by its father. (*Mya Bu and Mackney, JJ.*) U TAUK TA *v* MA OHN YIN. 1939 Rang. L.R. 217=182 I.C. 403=12 R R. 14=A.I R. 1939 Rang. 167.

——(Burmese) — *Succession — Out-of-time grandchildren.*

Under the Burmese Buddhist Law, an out-of-time grandchild or out-of-time grandchildren who are entitled to an equal share with an uncle or aunt in the division of the estate of the grandparents are the child or children of the eldest child of the grandparents. It is not essential to the success of their claim to such a share that their parent who predeceased either one or both of the grandparents was the *orasa* child, and all that is necessary to show is that their parent was the eldest child of the grandparents. (*Mya Bu and Mosely. JJ.*) MA HNIN YI *v.* MAUNG THIN. (1940) Rang.L.R. 32.

——(Burmese) — *Succession — Out-of-time grandson.*

Under the Burmese Buddhist Law an out-of-time grandchild or out of time grandchildren who are entitled to an equal share with an uncle or aunt in the division of the estate of the grandparents are the child or children of the eldest child of the grandparents. It is not essential to the success of their claim to such a share that their parent who predeceased either one or both of the grandparents was the orasa child, and all that is necessary to show is that their parent was the eldest child of the grandparents. Where the eldest child was a son and died in infancy, being survived by two brothers the elder of the two is eldest for the purpose and his son is entitled to equal share with his uncle in the estate of his grandmother. The claim to inheritance of an out-of-time grandson does not arise through his acquisition of the interest of an orasa at all; it is an independent right of inheritance. (*Roberts, C J. and Braund, J.*) MAUNG PAIK *v.* MAUNG THA SHUN. (1940) Rang.L R. 28=12 R.R. 158 =184 I.C. 561=A.I R. 1939 Rang. 335.

——(Burmese)—*Succession—Second wife inheriting property of husband's first wife—Liability for her debts.*

A Burmese heir to an estate takes the property of his ancestor subject to the ancestor's debts. Where a second wife of a Burmese takes by inheritance the property belonging to his first wife, such property is subject to attachment and sale in satisfaction of the debts of the first wife. (*Dunkley. J.*) S.P L.A CHETTYAR FIRM *v.* MA PU. 163 I C. 604=9 R.R. 33=A.I.R. 1936 Rang. 262.

——(Burmese) — *Succession — Second wife's interest in lettetpwa property of husband's first marriage.*

The second wife must acquire by marriage a one-third interest in the property brought by her husband to the marriage. Where, therefore, the share of the husband before his second marriage. in lettetpwa property of his first marriage is one

half, his second wife acquires one sixth interest in the property. (*Dunkley, J.*) S.P.L.A. CHETTIAR FIRM *v.* MA PU 163 I.C. 604=9 R.R. 33= A.I R 1936 Rang. 262.

——(Burmese)—*Succession—Shares—Rules of division of joint property on divorce—Applicability to partition on inheritance—Share of second wife.*

The rule of division of property between a husband and his two wives on a divorce is that the second wife gets one sixth of the property jointly acquired in the first coverture and one-third of the property acquired in the second or double coverture. The husband gets two-sixths of the property jointly acquired in the first coverture and one third of that acquired in the second coverture. This rule as to division of joint property on divorce can be extended to partition of it on inheritance. In this latter case, on the applicability of the rule, the second wife being an equal heir with the first wife to the husband, she gets one-third of the property jointly acquired in the first coverture and half of that jointly acquired in the second coverture. (*Baguley and Mosely, JJ.*) DAW HLA OHN *v.* MA NYAN. 1937 Rang. L.R. 410=172 I.C. 734=10 R.R. 275=A. I.R. 1937 Rang. 453.

——(Burmese) —*Succession—Step-daughter.*

A step daughter suing her step-father for a share in the estate acquired by her mother and him jointly must show not only that her mother was a Burman Buddhist at the time of her death but that her step-father was also a Burman Buddhist. For if he is a Mahomedan then the presumption will be that her mother embraced the Mahomedan faith at the time of her marriage with the step-father in which case her estate would not got to her step-daughter but to her husband. (*Mosely and Ba U, JJ.*) MA PWA *v.* TASUDAT. 164 I.C. 556=9 R.R. 123=A.I.R. 1936 Rang. 388.

——(Burmese)—*Succession—Wife—Share of second wife in property inherited by husband from his first wife.*

A second wife becomes entitled to one-third share in property inherited by her husband from his first wife. (*Dunkley, J.*) S.P.L.S. CHETTYAR FIRM *v.* MA PU. 14 Rang. 697=164 I.C. 1023= 9 R.R. 186=A.I.R. 1936 Rang 417.

——(Burmese)—*Sucession—Wife— Wifehood —Proof.*

Amongst the Burmese the term "wife" may be very loosely used. Where a woman other than the undisputed wife of a person claims a share in his estate on his death on the ground that she was also his wife, there must be a clear and unequivocal recognition of her status as such to establish wifehood in the legal sense of the term. Where from the evidence it appears that the claimant was not a wife but only mistress, she cannot succeed. 4 L.B.R. 175 (P.C.), Rel. on. (*Ba U and Parker, J.*) MA HLA MIN *v.* MAUNG HLA U. 166 I.C. 413=9 R.R. 256=A.I.R. 1936 Rang 454.

——(Chinese)—*Divorce — Wife's right to jewellery and wearing apparel.*

Under the Chinese customary law the wife upon divorce is entitled to take away her jewellery and her wearing apparel with her. (*Mya Bu and Mosely, JJ.*) MA TIN *v.* KO SEIN HONE. 184 I. C. 665=12 R.R. 167=A.I.R. 1939 Rang. 291.

BUDDHIST LAW—Chinese.

——(Chinese)—*Illegitimate son—Rights of inheritance.*

An illegitimate son of a husband would be entitled to inherit only if the latter dies without leaving any other heir, but an illegitimate son is entitled to a half share or to an equal share with a legitimate son only if the deceased father had recognized his paternity and had also made himself responsible for his upbringing. Responsibilities for the upbringing must be something analogous to the responsibilities that a man would assume for his own legitimate children, and mere compliance with a statutory obligation for the maintenance of a child, for example a casual contribution towards the expenses of a religious ceremony, cannot be regarded as denoting the assumption of responsibilities by the father for his illegitimate son's upbringing. (*Mya Bu and Mackney, JJ.*) DAW E THIN *v.* MAUNG SAN THEIN. 1939 Rang.L.R. 258=180 I.C. 943=11 R.R 446=A.I.R. 1939 Rang. 154.

——(Chinese) —*Letters of administration—Estate of deceased Chinaman—Right of his widow to obtain.*

So far as contested applications for letters of administration to the estate of a deceased Chinaman are concerned, when the applicants are a widow and a son, it does not matter whether the deceased was a Buddhist or a non-Buddhist, that is, whether the succession to his estate is governed by the Chinese Customary Law or by the Succession Act, for in either case the proper person to obtain letters of administration to his estate is his widow, and other persons having claims to the estate must, if necessary, prosecute those claims in the form of a separate suit against the widow, either for their share or for the administration of the estate by the Court. (*Mosely and Dunkley, JJ.*) SHWE KHOON *v.* MA SEIN NU. 1938 Rang.L.R. 249=177 I.C. 628=11 R R. 153=A.I.R. 1938 Rang. 321.

——(Chinese)—*Letters of administration—Right of widow of intestate Chinese Buddhist.*

According to the Chinese Customary law, the widow's sole right in the estate in the presence of children is the right to maintenance and ultimately to funeral expenses. A right to maintenance out of the estate of the deceased is not a right to any share of the estate, it is not even a charge on the estate. She does not therefore fall within the provisions of S. 218 (1), Succession Act. Hence the widow of an intestate Chinese Buddhist deceased in Burma, succession to whose estate is governed by the Chinese Customary law, is not entitled to the grant of letters of administration to that estate as against the son of the deceased. A.I.R. 1938 Rang. 321, Overr. (*Mya Bu, Offg. C. J., Ba U and Dunkley, JJ.*) MA PWA TIN *v.* YEO SEIN MAUNG. 1939 Rang.L.R. 170=179 I.C. 599=11 R.R. 334=A.I.R 1939 Rang. 74 (F.B.).

——(Chinese)—*Marriage — Validity—Conditions.*

In a case of a marriage between a Chinese Buddhist man and a Chinese Buddhist woman, where the question of status of a chief or first wife is not involved, what constitutes a valid marriage is the consent of the parties concerned to live together as husband and wife. They must however give sufficient publicity to the relationship. This being the legal position the result is the same whether the Burmese Buddhist law or Chinese Customary law applies to a marriage between a Chinese Buddhist man and Chinese Buddhist woman. 8 L.B.R. 222. Foll. (*Ba U, J.*) MA KYIN HLAING *v.* MAUNG KYIN SWI. 1937 Rang.L.R. 90=166 I.C. 577=9 R.R. 270=38 Cr. L.J. 274=A.I.R. 1937 Rang. 29.

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——(Chinese)—*Succession—Chinese Buddhist domiciled in Burma—Chinese customary law applies.*

Succession to the estate of a Chinese Buddhist domiciled in Burma is governed by Chinese customary law. Therefore in a case of a marriage of a Burmese Buddhist wife to a Chinese Buddhist husband, the wife does not own half the husband's property during the continuance of the coverture. (*Mosely, J.*) AL PEIN *v.* M. C. DEVA. A.I.R. 1937 Rang. 543.

——(Chinese)—*Succession—Nephew.*

In Chinese law, failing sons, a legitimate heir is adopted because it is of paramount importance that the line should not be allowed to die out. If a sonless father fails to adopt, the senior agnates will adopt one for him. Where a person dies intestate and elders fail to adopt for him, the Chinese law contemplates succession of an agnate in the next generation. Among brothers, if the eldest has no son, the eldest son of the second brother succeeds. The widow of the deceased has practical control of the inheritance during the life-time of her sons and the same rule applies in the case of a nephew who ought to be adopted in default of direct issue. As the estate is not deliverable to the nephew during lifetime of the widow of the deceased, limitation for a suit by nephew under Art. 123, Limitation Act, would begin to run from the death of the widow. (*Roberts, C.J. and Leach, J.*) KHOO SOO CHENG *v.* TA MA SHWE ZIN. 172 I.C. 550=10 R.R. 257=A.I.R. 1937 Rang. 354.

——(Chinese)—*Succession—Right of son to exclusion of daughter.*

The succession to the estate of a Chinese Buddhist in Burma is governed by the Chinese Customary law. Under this law the son is entitled to the whole of the deceased's estate to the exclusion of daughter. (*Mosely and Dunkley, JJ.*) OON CHAN *v.* KHOO ZUN. 177 I.C. 501=11 R.R. 134=A.I.R. 1938 Rang. 254.

BUILDINGS—*Building on another's land—Right of parties.*

There are rulings to the effect that where a trespasser *bona fide* believing that he has title is allowed to construct buildings, etc., on a piece of land not belonging to him and the owner allows this to proceed without taking steps to stop him from building, then in equity the Courts should allow compensation for the land encroached upon rather than order demolition of buildings. But these rulings cannot possibly apply where there could have been no possibility of a *bona fide* belief as to title. (*Dalip Singh and Sale, JJ.*) AHSAN ALI SHAH *v.* BRIJ BHUSHAN LAL. 42 P. L.R. 324.

——Husband building on wife's land—Wife's right to. *See* HUSBAND AND WIFE. 44 C.W.N. 247.

BUNDELKHAND LAND ALIENATION ACT (II OF 1903), S. 3—*Scope—Agriculturist debtor—Insolvency of—Property—If vests in Receiver—Provincial Insolvency Act, S. 28.*

Under S. 3 of the Bundelkhand Land Alienation Act the property of an agriculturist debtor is not

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transferable, and hence such property will not vest in the Official Receiver in insolvency under S. 28 of the Provincial Insolvency Act. (*Sulaiman, C. J. and Bennet, J.*) BASORE SINGH *v.* SANT KUMAR. 171 I.C. 903=10 R.A 338=1937 A W. R. 686=1937 A.L.J. 801=1937 R.D. 422=1937 A.L.R. 905=A.I.R. 1937 A. 699.

——Ss. 3 and 16 A—*Position in regard to purchase of Bundelkhand land.*

Members of an agricultural tribe may purchase and pre-empt Bundelkhand land without the sanction of the Collector. Non-agriculturists may purchase and pre-empt Bundelkhand land provided they have obtained the sanction of the Collector to bring a suit or proceeding to enforce a right of pre-emption. (*Thom C. J., Allsop and Ganga Nath, JJ.*) ZAMAN KHAN *v.* BAHADUR SINGH. 1940 A.L.J. 434=1940 A.W.R. (H.C.) 359=A I.R. 1940 A. 371 (F.B.).

——Ss. 6 (b) and 9 (1)—*Scope—Mortgage by agriculturist not in proper form—Application to enforce—Procedure—Duty of Collector.*

When a mortgagee, holding a mortgage from a member of an agricultural tribe, which is not in a form permitted by the Act, applies to the Collector to enforce the terms of his mortgage, the Collector should, in exercise of his powers under S. 9 (1) of the Bundelkhand Land Alienation Act, revise the terms of the mortgage so as to bring it into conformity with the provisions of S. 6 (*b*) of the Act, and then tell the mortgagee-applicant to apply to him formally to be placed in possession for such period as he considered equitable. (*Drake Brockman, S.M. and Knox, J.M.*) BINDRABAN *v.* CHOKHEY LAL. 1936 R.D. 352.

——S. 16, Proviso—*Mortgage decree—Order by executing Court disallowing sale—Subsequent enactment of proviso—Effect of—Decree, if can be executed by sale of property.*

The proviso to S. 16 of the Bundelkhand Land Alienation Act added by the Amending Act, VII of 1929, permitting sale of property in execution of mortgage decree under certain special circumstances, does not have the effect of nullifying a previous order of the Executing Court passed *inter partes*. Where prior to the enactment of that proviso, the Executing Court passed an order disallowing the decree-holder's application for the sale of the property under his mortgage decree, on the ground that the property was not saleable under the law as it then stood, the proviso enacted subsequently cannot deprive the judgment-debtor of his right which he had acquired under that order which had become final, and make the property available afresh to the decree-holder in spite of that order. (*Sulaiman, C. J., and Ganga Nath, J.*) SUNDER *v.* SHEO DAT SINGH. 167 I.C. 120=9 R. A. 492=1936 A. L. J. 1363=1937 A. L. R. 141=1936 A. W. R. 1157=AI.R. 1937 A. 48.

BURDEN OF PROOF. *See also* EVIDENCE ACT, Ss. 101-105.

——Bar of civil suit. *See* C. P. CODE, S. 9. A.I.R. 1936 Mad. 522.

——Cess levied by Government under S. 78, Madras Local Boards Act—Suit to recover cess as illegally collected—Onus. *See* MADRAS LOCAL BOARDS ACT, S. 78. A.I.R. 1939 Mad. 651 =(1939) 1 M.L.J. 780.

——Claim based on adoption varying natural course of succession—Burden of proving adoption. *See* ADOPTION — BURDEN OF PROOF. 20 N.L.J. 191.

BURDEN OF PROOF.

——Deed—Recitals in—Onus of proving incorrectness. *See* DEED—RECITALS. 19 N.L.J. 179.

——Damages—Injury caused by motor car negligently driven—Suit for damages—Ownership of car and control of car at time of accident—Onus—Presumption. *See* TORT—NEGLIGENCE. 39 Bom.L.R 44=A.I.R. 1937 Bom. 155.

——*Ejectment of sub-tenant—Suit for—Denial of sub-tenancy—Onus—Failure of defendant to prove case pleaded—If entitles plaintiff to decree.*

In a suit to eject a sub-tenant, where the defendant denies that he is a sub-tenant, the burden is on the plaintiff to prove that there was a contract of sub-tenancy. The fact that the entries in the papers support the plaintiff or that the defendant fails to prove the plea set up by him is insufficient to entitle the plaintiff to a decree. (*Drake Brockman, S.M. and Knox, J.M.*) RAJ BIR *v.* RAGHUNANDAN. 1936 R.D. 163.

See also KAMLESHAR AHIR *v.* SARJU KOHAR. 1936 R.D. 178.

——*Ejectment suit—Plea of tenancy by defendant—Admission that lands situate within plaintiff's zamindari—Onus.*

In a suit for ejectment, if the defendant admits that the lands are within the ambit of the plaintiff's zemindari but pleads that he is a tenant not liable to ejectment, the onus is on him to prove his tenancy. (*Fazl Ali and Manohar Lall, JJ.*) MAHABIR DAS *v.* UDIT NARAIN VARMA. 17 Pat. 594=19 Pat.L.T. 570=178 I.C. 849=11 R.P. 306=5 B.R. 149=A.I.R. 1938 Pat. 613.

——*Ejectment suit—Proof of title—Rule—Defendant admitting plaintiff's prior possession and claiming under transfer from plaintiff—Onus.*

In an ejectment suit the ordinary rule is that plaintiff must prove a title to possession subsisting at the date of the suit. But where defendants admit that plaintiff and his joint brother were in possession of it less than 12 years before the institution of the suit and base their own title upon a transfer by plaintiff's brother, the onus is upon the defendants to establish the validity of their transfer. (*Gruer, J.*) KHULWA SUKHRA RAO *v.* LAHARSAI. 165 I.C. 957=9 R.N. 113=A.I.R. 1936 Nag. 254.

——Encroachment—Suit for—Proof of disturbance of boundary marks—If essential—Measurements and area—If conclusive. *See* BOUNDARIES. 1937 A.L.J. 1216=A.I.R. 1938 All. 36.

——Gift by old lady to medical attendant—Presumption of influence—Validity of gift—Onus. *See* DEED—SETTING ASIDE. 1937 A.L.J. 1027 (P.C.).

——Hindu Law—Partition—Separation—Onus of proof—Proof of cessor of commensality—If shifts onus. *See* HINDU LAW — PARTITION SEPARATION—ONUS OF PROOF. A.I.R. 1937 Nag. 230.

——Marriage—Denial of. *See* BUDDHIST LAW (BURMESE)—MARRIAGE. A.I.R. 1940 Rang. 181.

——Marriage—Parties living as husband and wife for 18 or 20 years—Allegation that parties not properly married—Onus. *See* AGRA TENANCY ACT (1926), S. 44. 1936 R.D. 110 (1).

——Mortgage — Consideration — Onus. *See* MORTGAGE—CONSIDERATION. 38 Bom.L.R. 526.

———*Mortgage suit—Plea by defendant that he was a minor on date of mortgage—Onus.*

A defendant pleading that he was a minor on the date of execution of a mortgage deed on which a suit is brought has the onus upon him to prove the same. (*Leach, C.J. and Varadachariar, J.*) DHANAPALA CHETTI *v.* GOVERCHAND SOWCAR. **182 I C. 312=12 R.M. 48=1938 M.W.N. 938=A.I.R. 1938 Mad. 959=(1938) 2 M.L.J. 775.**

———Onus wrongly cast—If ground of reversal of decree in appeal. *See* PROVINCIAL INSOLVENCY ACT, S. 53. **40 C.W.N. 731.**

———*Onus wrongly cast—Interference by High Court.*

In the first place it is for the plaintiff to substantiate his allegations. It is then for the defendant to rebut them, When the parties lead evidence on both sides the question of burden of proof loses much of its importance. But where in a case the plaintiff's evidence does not satisfy the Court and the Court proceeds to decide the issues on presumptions raised against the defendant because of non-production of certain documents, it is the duty of the High Court to interfere. (*Ismail, J.*) MUNICIPAL BOARD, JALESAR *v.* HOTI LAL. **1938 A L.J. 686=177 I.C. 663=1938 A L R. 768=11 R.A. 211=1938 A.W.R. (H.C.) 458=A.I.R. 1938 All. 520.**

———Promissory note—Denial of execution and consideration by defendant—Plaintiff proving execution—Effect — Further proof of consideration by plaintiff — Necessity *See* NEGOTIABLE INSTRUMENTS ACT, S. 118. **1938 P.W.N. 634.**

———*Question of — Materiality — Both sides adducing evidence and decision on balance of evidence.*

When both sides have adduced evidence and the case is decided on the balance of evidence, the question of onus of proof is not important and does not really arise. (*Khaja Mohammad Noor and Madan, JJ.*) SURPAT SINGH *v.* BHUPENDRA NARAYAN SINGH. **16 Pat. 105=166 I.C. 123=9 R.P. 256=3 B.R. 127=17 Pat. L.T. 824=1936 P.W.N. 817=A.I.R. 1937 Pat. 165**

———*Receipt executed by illerate woman—Plea of ignorance of contents—Onus.*

Where an illiterate woman who usually conducts her own business pleads that a receipt to which she had affixed her thumb impression, contained terms of which she was not aware, the onus is on her to show that it was executed under fraud or misrepresentation. (*Yorke, J.*) MAHDEI *v.* ISHWARI. **174 I.C. 843=10 R O. 278=1938 O.W.N 531=1938 O.L.R. 228=1938 O.A. 393=A.I R. 1938 Oudh 152**

———*Rule as to—Duty of plaintiff — Onus—When shifts.*

The onus is upon the plaintiff and nonetheless so even when he has adduced some kind of evidence. The onus will shift on to the defendant only if the evidence adduced by the plaintiff is held to be sufficient to establish a *prima facie* case. It is not merely a question of weighing feathers on one side or the other and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given. (*Courtney-Terrell, C.J. and Manohar Lal, J.*) NIRMAL KUMAR *v.* SANT LAL MAHTO. **16 Pat. 622=171 I.C. 715=10 R.P. 239=1938 P.W.N. 101=4 B. R. 58=A.I R. 1937 Pat. 563.**

———*Special plea—Pardanashin—Plea that she did not understand nature of transaction entered into by her—Onus.*

Where in a suit on a mortgage executed by a husband and wife, the wife, a pardanashin lady, alleges that she did not understand what she was doing and that she signed the document on being asked by her husband to do so, the pleas raised by the wife are in the nature of special pleas resting on facts within her knowledge and the burden is on the wife to establish her case founded on the special pleas. (*Guha and Bartley, JJ.*) SURESH CHANDRA SEN *v.* MARANI DASSI. **166 I.C. 842=9 R.C. 592=A.I.R. 1936 Cal. 378.**

———*Suit on handnote — Plea that defendant handed blank signed paper to another intending it as collateral security for a loan due to that other —Onus.*

Where in a suit on a handnote by the payee thereof, the defendant pleads that he made an endorsement or signature on a blank paper which was intended to operate as a collateral security for a loan advanced by a third person to whom he delivered the paper, and that the latter had unauthorisedly inserted the name of the plaintiff as payee, the burden is on him to explain how the handnote bearing his signature came into existence. (*Agarwala and Rowland, JJ.*) HRIDAY SINGH *v* KAILASH SINGH. **19 Pat. 404=186 I.C. 809=12 R.P. 532=6 B.R. 398=A.I.R. 1940 Pat. 377.**

———*Suit on mortgage—Plea of inalienability of rights in question.*

Where the plaintiff represents that he holds muafi rights in certain villages which he is entitled to mortgage and which in fact he mortgages, the onus in a suit challenging the mortgage is upon the plaintiff to prove that these rights are inalienable. (*Thom, C J., Collister, Allsop, Ganga Nath and Braund, JJ.*) SAADAT HUISSAIN *v.* RAM KISHAN DAS. **1940 A.L.J. 420=1940 A.W.R. (H.C.) 397=A.I.R. 1940 All. 373 (F.B.).**

———*Suit for possession—"Possession following title"—Applicability.*

The maxim that possession follows title like all other legal maxims is only a means of gathering a number of legal rules together under a convenient heading and must in every case be read subject to the limitations imposed by the actual rules themselves. It is applicable in cases where proof of actual physical possession cannot reasonably be expected, as for instance, in the case of waste lands. It can be invoked also when nothing is known about possession one way or the other. The ordinary presumption that the owner is in possession then applies. The rules for determining actual physical possession in difficult and doubtful circumstances are not meant to relieve a party of the burden of proving possession by ordinary means in cases where the property is capable of actual physical possession and there is either an admission or proof of dispossession. (*Bose, J*) SHANKARASA GANPATSA *v.* PUNAMCHAND. **I. L R. (1937) Nag. 254=171 I.C. 271=10 R.N. 105=A.I.R. 1937 Nag. 129.**

BURDEN OF PROOF.

——Suit for arrears of produce rent. *See* LANDLORD AND TENANT—RENT. **19 Pat.L.T. 4 (S.B.).**

——Workmen's Compensation Act providing for compensation for workman contracting disease other than disease caused by silica dust—Disease caused by silica dust—Onus of proof. *See* WORKMEN'S COMPENSATION ACT. **A.I.R. 1936 P. C. 158 (P.C.).**

BURMA ACTS.

Co-operative Societies Act (VI of 1927).
Courts Act (XI of 1922).
Courts Manual.
(Frontier Districts) Criminal Justice Regulation (I of 1925)
Expulsion of Offenders Act (I of 1926).
Ferries Act (II of 1898).
Fisheries Act (III of 1905).
Gambling Act (I of 1899).
General Clauses Act.
Hired Motor Vehicles Rules.
Income-Tax Act (XI of 1922).
(Lower) Land and Revenue Act (II of 1876).
Laws Act (XIII of 1898).
Municipal Act (III of 1898).
Prevention of Crime (Young Offenders) Act (III of 1930).
Rural Self-Government Act (IV of 1921).
Suppression of Brothels Act (II of 1921).
Village Act (IV of 1907).

BURMA ADAPTATION OF LAWS ORDER (1937), Cl. 10—*Effect on S. 8, proviso 2, Burma Income-tax Act.*

Cl. 10 declares in the plainest terms, that a right, which has already accrued prior to the Government of Burma Act coming into force, is not affected by any amendment made by the Adaptation of Laws Order. The right to have interest on securities income-tax free is a right which is attached to the securities themselves and is not merely the personal right of the particular person who happens to be the holder of the securities at any one time. Therefore the question as to when the purchaser became possessed of the securities does not arise. The interest on securities issued before the Government of Burma Act came into force cannot be made liable to income-tax in Burma throughout the currency of those securities. (*Robert, C.J., Dunkley and Mackney, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* CENTRAL BANK OF INDIA, LTD. **1940 I. T.R. 264=A.I.R. 1940 Rang. 123 (S.B.).**

BURMA CO-OPERATIVE SOCIETIES ACT (VI OF 1927), S. 49—*Liquidator selling property conveyed to him—Suit by purchaser for possession—Civil Court, if precluded from questioning validity of transfer.*

A liquidator of Co-operative Society purported to sell certain property, conveyed to it, to a person who had nothing to do with the Society. The purchaser brought a suit to obtain possession.

Held, that the question which the Court had to decide was whether the purchaser acquired good title to the property from the liquidator. This was not a matter connected with the dissolution or winding up of a co-operative society and so the Court was not precluded from questioning the validity of the transfer by S. 49. (*Leach, J.*)

BUR. CO-OP. SOCIETIES ACT (1927), S. 50.

MAUNG BA HNIT *v.* U SEIN. **168 I.C. 910=9 R. R. 377=A.I.R. 1937 Rang. 98.**

——**S. 50 Rules under (1931), R. 15**—*Award by arbitrator, contrary to law of limitation—Civil Court, if can set aside award.*

A statutory arbitration is not unlike a reference by consent out of Court. Even in the case of arbitrator appointed by statutory rule, the arbitrator should not be permitted to ignore the operation of the laws applicable in matters which come before him and should not be permitted to give his decision according to his mere caprice. Hence, where an award made by an arbitrator appointed under R. 15 of the Burma Co-operative Societies Rules has ignored the law of limitation, Civil Court has jurisdiction to set aside such award. (*Mackney, J.*) U KYAW THA *v.* CO-OPERATIVE TOWN BANK, HENZADA. **A.I.R. 1940 Rang. 157.**

——**S. 50**—*Rules under, R. 15—Jurisdiction of Civil Courts in relation to proceedings of Registrar or arbitrators—If barred*

There is no provision in R. 15 framed under S. 50, Burma Co-operative Societies Act, expressly barring the jurisdiction of Civil Courts in relation to proceedings of the Registrar or of arbitrators in the same way as the jurisdiction of Civil Court is barred with respect to matters connected with the liquidation of a society. (*Mosely, J.*) MAUNG KYAW THA *v.* CO-OPERATIVE TOWN BANK, HENZADA. **1937 Rang.L.R. 399=173 I.C. 377=10 R.R. 343=A.I.R. 1937 Rang. 363.**

——**S. 50**—*Rules under, R. 15 (4)—Execution of award—Legality of award—If can be attacked on ground of limitation.*

Though it is not the intention of the Legislature that the arbitrator should arrogate to himself the right to ignore the law of limitation, yet the award, under R. 15 (4) framed under S. 50, Burma Co-operative Societies Act, which is to be executed as a decree, cannot be attacked in execution proceedings merely on the ground that it has ignored the law of limitation. The arbitrator has jurisdiction to commit errors in law and hence the legality of the award cannot be questioned in execution proceedings. (*Mosely, J.*) MAUNG KYAW THA *v.* CO-OPERATIVE TOWN BANK, HENZADA. **1937 Rang.L.R. 399=173 I.C. 377=10 R.R. 343=A.I.R. 1937 Rang. 363**

——**S. 50**—*Rules under, R. 22 (g)—Nominee—Power to deal with property mortgaged by member.*

A Mahomedan, a member of Co-operative Credit Society, mortgaged his property to the Society to secure a loan obtained from the Society. According to the rules he nominated his eldest son as the person who could receive his interest in the Society after his death. The son, after his father's death, purported to transfer the property to the liquidator of the Society which was then being wound up. The Mahomedan was survived by the nominee-son and other brothers and sister.

Held, that the nominee-son had no authority to transfer to the liquidator the interest of his brothers and sister in the equity of redemption of the mortgaged property. The fact that his father had nominated his son as the person who should receive his interest in the property after his death did not and could not operate to transfer to him the right of his brothers and sister-

BUR. CO-OP. SOCIETIES ACT (1927), S.50.

The object of the rule in nomination was merely to facilitate the granting of a valid receipt to the Society. (*Leach, J.*) MAUNG BA HNIT *v.* U SEIN. **168 I.C. 910=9 R R. 377=A.I.R. 1937 Rang. 98**

——S. 50 (2) (f)—*Rules made under—R.* 15—*Jurisdiction of Civil Courts, if taken away.*

The rules made under the Burma Co-operative Societies Act take away by implication the jurisdiction of the Courts in respect of disputes contemplated under R. 15 (*Roberts, C J., Dunkley and Braund, JJ.*) H. C. DEY *v.* BANGALEE YOUNGMEN'S CO-OPERATIVE CREDIT SOCIETY, LTD **1939 Rang.L R. 50=178 I.C 674=11 R.R. 259=A.I. R. 1938 Rang. 392 (F.B.).**

——S. 51—Recovery of sum due by a member of Co-operative Society—Availability of Ss. 46 and 47 of the Land and Revenue Act. *See* BURMA LAND AND REVENUE ACT, SS. 46 AND 47 AND BURMA CO-OPERATIVE SOCIETIES ACT, S. 51. **1940 Rang.L.R. 230.**

BURMA CO-OPERATIVE SOCIETIES RULES (1931), R. 15—*Society registered after granting loan—Debtor making payments both before and after registration—Inference and effect—Jurisdiction of Civil Courts in respect of the transaction.*

Where an unregistered society lent money to a person and was subsequently registered under the Burma Co-operative Societies Act and the debtor made no objection when the society was registered and in fact acquiesced to its registration and thereafter also, made payments towards the principal and interest, it must be inferred that the debtor agreed that the transaction entered into by him with the society before its registration, should be binding upon him and the society after its registration. Hence the registered society could sue for the balance of a loan advanced by it when it was not registered. R. 15 of the Burma Co-operative Societies Rules does not bar the jurisdiction of the Civil Court to entertain such a suit. (*Ba U, J.*) BENGAL NATH CO-OPERATIVE SOCIETY. LTD. *v.* KALI KUMAR NATH. **1940 Rang. L.R. 77=A.I R. 1940 Rang. 145.**

BURMA COURTS ACT (XI OF 1922), S. 11—*Concurrent findings of fact—Interference in second appeal—Practice.*

High Court in second appeal is entitled to interfere on a finding of fact, concurrent or otherwise. A concurrent finding of fact however should not be upset unless it is very clearly wrong. (*Baguley. J.*) E. HOE CHAN CO. *v.* BABOO CHOTALAL. **1939 Rang L R 622=181 I.C. 846=11 R.R. 501=A.I. R. 1939 Rang. 139.**

——S. 11—*Order on appeal from dismissal of application under O. 21, R. 89, C. P. Code—Second appeal.*

S. 11, Burma Courts Act, may be regarded as modifying S. 100, C P. Code, but there is no section of the Burma Courts Act which modifies S. 104 (*2*), C. P. Code, and therefore no second appeal lies from an order of the Appellate Court on appeal from the dismissal of an application under O. 21, R. 89, C. P. Code, to set aside a sale. (*Spargo, J.*) MA BI BI *v.* SAYA HATTIE. **174 I.C. 691=10 R.R. 418=A I R. 1937 Rang. 537.**

——S. 11—*Powers of High Court acting under—Interference with concurrent findings of fact on remanded issue.*

BURMA EXCISE ACT (1917), S. 30.

It would be anomalous to hold that, whereas the Court could consider any finding of fact, whether concurrent or not, by the lower Courts, occurring in their original judgments, it is precluded from considering their finding on questions of fact which it has itself found necessary to raise because the lower Courts have failed to frame an issue which was necessary for the right decision of the case. More especially is this so because the findings of the lower Courts are not decisions. Hence, High Court acting under S. 11 of the Burma Courts Act can interfere with the concurrent findings of fact on a remanded issue. But it would not be proper, where the lower Courts have come to a concurrent finding, to dissent from this finding without very strong reasons. (*Mackney, J.*) E. HOE CHAN CO. *v.* CHOTALAL UJAMSI. **A. I.R. 1940 Rang. 177.**

——S. 11—*Suit for agricultural rent—Value less than Rs.* 500—*Second appeal—C. P. Code, S.* 100.

A suit for rent of agricultural land is not cognizable by a Court of Small Causes, and if it is not of a value more than Rs. 500, a second appeal lies under S. 100, C. P. Code, and not under S. 11 of the Burma Courts Act. (*Baguley, J.*) KO PO SET *v* MA SAW YIN. **1939 Rang.L.R. 472=184 I.C. 492=12 R.R. 146=A.I.R. 1939 Rang. 350.**

BURMA COURTS MANUAL, Para. 664-A—*Applicability—Cognizable warrant case.*

Paragraph 664-A, Burma Courts Manual, relating to the deposit of witness expenses relates to orders under Ss. 244 and 245, Cr. P. Code, which relate to the trial of summons case and does not apply to a cognizable warrant case. It is only from the defence, that the Magistrate can under certain circumstances require the deposit of witness expenses: *vide* S. 257 (2), Cr. P. Code. (*Parker, J.*) CHIN HONE ON *v.* AH FOO. **A.I.R. 1937 Rang. 35.**

——Para. 791—*Fixing of date of birth—Option of Court.*

Where there is evidence only of the year of birth it is at the option of the Court to fix the date other than 1st January under Para. 791 of Burma Courts Manual. (*Mosely, J.*) THE KING *v.* UNOOSE. **176 I C. 217=39 Cr.L.J. 697=11 R. R. 36=A.I.R. 1938 Rang. 228**

BURMA (FRONTIER DISTRICTS) CRIMINAL JUSTICE REGULATION (I OF 1925), Sch., Cl. (ii)—*Transfer of cases—Powers of High Court—Cr. P. Code, S.* 526.

The third proviso to Cl. (ii) of the Schedule in the Burma (Frontier Districts) Criminal Justice Regulation, confers upon the High Court a power to reverse or vary an order made by a Court of Session under S. 526, Cr. P. Code. But it does not take away the power from the High Court to transfer cases under S. 526, Cr. P. Code. (*Ba U and Spargo, JJ.*) MAUNG BA KU *v.* DEPUTY COMMISSIONER, BHAMO. **1939 Rang.L.R 614.**

BURMA EXCISE ACT (V OF 1917), Ss. 30, 37 and 44—*Charges under Ss* 30 (a) *and 37—Presumption under S.* 44, *if available.*

S. 44 of the Burma Excise Act which says that in prosecution under Ss. 30 and 37 and some other sections the Court may presume until the contrary is proved, that the accused person has committed an offence under the section under which he is

BURMA EXCISE ACT (1917), S. 44.

charged in respect of excisable articles and materials for the possession of which he is unable to account satisfactorily does not appear to have any application to the common case under S. 30 (*a*) where the charge is one of possession of a larger quantity of an excisable article than is allowed under the Act. In prosecutions under S. 30 (*a*) it is necessary to prove such possession, and there is no room, or need for any presumption. In prosecutions for possession of an excisable article under S. 37 it is necessary either to prove that the accused person knew or had reason to believe that the excisable article was unlawfully manufactured, or to set up circumstances from which a presumption of such knowledge or belief may be presumed. Such a presumption could ordinarily be drawn under S. 114 of the Evidence Act but S. 44 of the Excise Act may be of useful application and allow the prosecution to be drawn in rarer cases. (*Mosely, J.*) THE KING *v.* MI NGE SO. 1940 Rang. L.R. 219=188 I.C. 72 =12 R.R. 363=41 Cr.L J. 541=A.I.R. 1940 Rang. 109.

——S. 44—Presumption under—If available in cases charged under Ss. 30 (*a*) and 37. *See* BURMA EXCISE ACT, Ss. 30, 37 AND 44. 1940 Rang.L. R. 219.

BURMA EXPULSION OF OFFENDERS ACT (I OF 1926), Ss. 2 (A), (B) and 3—*Accused brought to Burma from India by his parents when only a child—No proof of how he acquired domicile in Burma—Liability to expulsion.*

Where it appears that the accused was brought to Burma from India by his parents when he was only a few years old, and there is nothing to show how he acquired his domicile in Burma or that he has no intention to return to India when he is in a position to do so, the accused is a non-Burman within the meaning of S. 2 (A) and an offender within the meaning of S. 2 (B) and is liable to expulsion under S. 3. (*Mya Bu, J.*) EMPEROR *v.* RANGASWAMY. 167 I.C. 589=9 R.R. 324=38 Cr. L J. 432 (2)=A.I R. 1937 Rang. 54.

BURMA FERRIES ACT (II OF 1898), S. 12—*Rules under R. 4-A—If* ultra vires.

R. 4-A of the rules as framed under S. 12 of the Burma Ferries Act is *ultra vires*. It cannot be said that the rule is one consistent with the Act, framed for carrying out its purposes and objects. (*Baguley and Mosely, JJ.*) SHWE PHONE *v.* CHAIRMAN, DISTRICT COUNCIL, MERGUI. 1938 Rang.L R. 573=178 I C. 445=11 R.R. 237=40 Cr.L.J. 77=A.I.R. 1938 Rang 384.

——S. 15—*Ply for hire—Meaning—Test.*

A person is said to ply for hire a ferry when he waits or attends on the bank or in the stream regularly (that is to say not uninterruptedly, for it might be done periodically, but regularly in the sense of repeatedly, making a business of it), for hire by the public or by any body who chooses to employ him to cross the river or convey goods across the river. (*Baguley and Mosely, JJ.*) SHWE PHONE *v* CHAIRMAN, DISTRICT COUNCIL, MERGUI 1938 Rang.L R 573=178 I.C 445=11 R.R 237=40 Cr L.J. 77=A.I.R. 1938 Rang. 384.

——Rules Framed Under, R. 4—*'Plying for hire'—Meaning of.*

It is necessary before a person can be said to be plying for hire as required by R. 4 of Rules framed under Burma Ferries Act that he waits or attends at a certain place for hire by any-

BURMA GAMBLING ACT (1899), S. 6.

body who chooses to employ him or requires his services. A person crossing the river with parcels once each way on the arrival and departure of the trains at and from a certain place cannot be deemed to be 'plying for hire.' (*Spargo, J.*) LIM TWA KEE *v.* M. ISMAIL 170 I C. 236=10 R. R. 68=38 Cr.L.J. 872=A.I R 1937 Rang. 275.

BURMA FISHERIES ACT (III OF 1905), Preamble—*Lease of fishery—Position and rights of lessee.*

Under the Preamble of the Burma Fisheries Act the Government merely claims to dispose of the right to fish when a person takes the lease of a fishery; he does not thereby buy the fish to be found therein from Government, nor does Government transfer the property in the fish to him. The fish come into the lessee's possession only when he catches them. It matters not that for his own convenience of catching them the lessee dams up the pond so that the fish cannot escape out of it. This operation is merely preliminary to catching the fish. Even after that has been done any member of the public may come to the fishery and, provided that he uses not more than four rods and lines, may catch fish therefrom without committing any offence of criminal trespass or theft. (*Mackney, J.*) MOHAMMAD CASSIM *v.* THE KING. 176 I C. 150=11 R R. 31 (2)= 39 Cr.L.J. 692=A.I.R 1938 Rang. 220.

——*Rules under—R.* 45—*Meaning of.*

The meaning of R. 45 of rules framed under Burma Fisheries Act is that baling is not allowed. The bar placed by the rule upon baling may be lifted at any moment by the Deputy Commissioner with the Commissioner's sanction and baling thereafter, so long as it has been continuously permitted, can be practiced without infringement of the law until the Deputy Commissioner again prohibits it. (*Roberts, C. J.*) MAUNG MON BIN *v.* THE KING. 174 I.C. 931=10 R R. 444=39 Cr. L.J. 499=A.I.R. 1938 Rang. 104.

BURMA GAMBLING ACT (I OF 1899), S. 6—*Money found in purse or longyi of gambler—If intended for purpose of gaming—Presumption.*

It is usual way for Burmans to carry their money wrapped up in their longyis. No presumption can safely be drawn that money found in the purse or in the longyi of a gambler was intended to be used for the purpose of gaming. (*Spargo, J.*) MAUNG THA ZAN *v.* EMPEROR. 170 I.C. 818=38 Cr.L.J. 976=10 R.R. 108=A.I.R. 1937 Rang. 317.

——Ss. 6 (1) and 7—*Warrant issued on mere information without stamp of credibility—Presumption under S. 7—If justified.*

The provisions of sub-S. (1), S. 6, are all important and unless those provisions are strictly carried out, a house or place cannot be said to have been entered under the provisions of that section and consequently the presumption specified in S. 7 cannot be made. The mere recording of the information that illegal gambling is going on at a certain place and bearing no stamp of credibility is not sufficient to meet the requirements of the law and consequently the result of the raid or the search made under such warrant does not constitute a legal basis of the presumption under S 7. (*Mya Bu. J.*) AH SEIN *v* THE KING. 1939 Rang.L.R. 447=181 I.C. 112=11 R.R. 452=40 Cr.L.J. 529=A.I.R. 1939 Rang. 120.

BURMA GENERAL CLAUSES ACT, S. 16—Scope and effect of. *See* C. P. CODE, O. 40, R. 1 and O. 43, R. 1 (*s*). **A.I.R. 1938 Rang. 387.**

BURMA HIRED MOTOR VEHICLES RULES, R. 7—*Child under 7 registered as owner of motor vehicle—Such vehicle plying for hire without licence—Liability of child to conviction—Penal Code, S. 82.*

In Burma, although no person under the age of 18 years is allowed to drive, there seems to be no provision against children, however young, being registered owners of motor vehicles, even of hired motor vehicles. But a child under the age of seven, who is a registered owner of a motor vehicle, cannot be convicted of the offence of plying it for hire without a licence, in view of S. 82 of the Penal Code which applies not only to offences under the Code but also to offences under any special or local law, in the absence of special provisions to the contrary in such law. (*Baguley, J.*) THE KING *v.* BA BA SEIN. **1938 Rang.L.R. 227=178 I.C. 508=11 R.R. 239=40 Cr.L J. 80=A.I.R. 1938 Rang. 400.**

BURMA INCOME-TAX ACT (XI OF 1922), S. 3—"*Association of individual*"—*Meaning of—Co-heirs under Mahomedan Law inheriting shares in properties of father and mother—Status of—Appointment of one as agent of all to realise rents—Effect of.*

The words "association of individuals" in S. 3 of the Income-tax Act should not be construed with reference to the word "firm" only preceding, but should be construed *ejusdem generis* with all other groups of persons mentioned, namely, Hindu undivided family company, as well as firm. When there is a combination of persons formed for the promotion of a joint enterprise, banded together as co-adventurers, those persons to constitute an association of individuals within the meaning of Ss. 3 and 55 of the Act. Where an individual, such as an heir under the Mahomedan Law, inherits a share in property he has an opportunity of deciding whether he will, by reason of having inherited it, form an association of individuals or renounce such relationship; if there be evidence that he has chosen the former alternative, that may be taken as the basis of the ultimate decision. By merely inheriting a share of property, however, no person can become a member of an association of individuals unless there is some forbearance or act on his part to show that his intention and will accompanied the new status which he has been asked to receive. The appointment of one of the co-heirs under Mahomedan law as the agent of all the co-heirs to realise the shares of the property left to them by their deceased father and mother is sufficient to constitute them an association of individuals. In each case the question is one of fact. (*Roberts, C.J., Baguley and Sharpe, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* M.A. BAPORIA. **1939 Rang.L.R. 631=163 I.C 261=12 R.R. 66=1939 I.T.R. 225=A.I.R. 1939 Rang. 258.**

——**S. 3**—*Estate of father derived by his only son—Income from it—If should be taxed as income of Hindu undivided family.*

According to the law of Mitakshara the property which a man obtains from his father cannot be said to belong to a Hindu undivided family. Hence, where an estate belonging to father is after his death derived by his only son, income from such estate should be treated and taxed as part of son's personal income and not as income of Hindu undivided family even if he has a mother and sister still alive. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* VEDNATH SINGH. **186 I.C. 807=1940 I.T.R. 222=12 R.R. 290=A.I.R. 1940 Rang. 65 (S.B.).**

BURMA INCOME-TAX ACT (1922), S. 33.

——**S. 10 (2) (ix)**—*Applicability—Partnership—Criminal charges against partners and manager—Expenses incurred in defending same successfully—Claim to deduct as business expenditure or business loss—Maintainability—Firm—If different entity from partners—Nature of liability.*

It cannot be said that when expenditure has been undertaken by persons to protect their good name and they have succeeded, they can be said to have suffered loss. A firm of a partners in Burma, which for a number of years had imported certain brands of whisky and brandy from a company in Calcutta, became involved in very serious charge under the Bengal Excise Act and the Indian Penal Code, and they incurred expenses in defending the individual partners and the manager of the liquor department against criminal charges of conspiracy to commit offences against the Excise Act, brought against them in Calcutta. All the charges were finally dismissed. The partners claimed that the expenses so incurred ought to be deducted against their Income-tax assessment either as expenditure under S. 10 (2) (ix) of the Income-tax Act or as a business loss.

Held, (1) that the object of the expenditure was to save the individual partners from the possible adverse consequences of a criminal conviction and the expenses did not fall within the ambit of S. 10 (2) (ix) of the Income-tax Act; (2) that the expenditure was voluntary expenditure which was not unsuccessful, and the sum could not also be deducted as business loss.

Held, further, that it was erroneous to regard the partnership as though it were an entity apart from the entities of its individual partners, the word 'firm" being merely a collective name for the different members of it. The liability which existed between the partner was a liability existing between themselves and the firm had no separate personality. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* GASPERR & CO. **1940 I.T.R. 100.**

——**Ss. 33 and 34**—*Assessment of income alleged to have partially escaped assessment—Power of Commissioner.*

Once a final assessment has been made under Ss. 23 and 29 of the Act it cannot be reopened except in the circumstances detailed in Ss. 34 and 35 and within the time mentioned in those sections. The Commissioner of Income-tax cannot in law, in exercise of his power of revision unner S. 33, Burma Income-tax Act, assess to income-tax income alleged to have partially escaped assessment without causing proceedings to be initiated by the proper authority under S. 34 of the Act. A.I.R. 1938 P.C. 175, Rel. on. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* VEDNATH SINGH. **186 I.C. 807=12 R.R. 290=1940 I.T.R. 222=A.I.R. 1940 Rang. 65 (S.B.)**

BURMA INCOME TAX ACT (1922), S. 33.

——**Ss. 33 and 66 (2)**—*Refusal to review under S. 33—Reference under S. 66 (2), if lies.*

S. 33 makes no mention of the right of an assessee to move the Commissioner to take action but as the Commissioner may take action of his own motion the assessee must have the right of calling his attention to a prejudicial order and of asking that action be taken. Where the Commissioner there being no material on which he could proceed satisfactorily had declined to exercise his powers of review under S. 33, Income-tax Act, and has in no way altered the position as it existed before he chose to review the case and the original order is not proved to be prejudicial to the assessee, there is no ground for a reference under S. 66 (2). (*Roberts, C.J. Dunkley and Blagden, JJ.*) AMULAKHARAI *v.* COMMISSIONER OF INCOME-TAX, BURMA. **1940 I.T R. 382=A.I. R. 1940 Rang 175 (S.B).**

——**S. 34**—"*Escaped assessment*"—*Meaning.*

Income has "escaped assessment" within the meaning of S. 34, when it has not been assessed in the assessment under consideration; it is immaterial that it has been assessed in some other assessment. (*Roberts, C. J., Mya Bu and Dunkley, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* VEDNATH SINGH. **186 I.C. 807=12 R. R. 290=1940 I.T.R. 222=A.I.R. 1940 Rang. 65 (S.B.)**

——**S. 66 (2)**—Reference, if lies, on refusal to review under S. 33. *See* BURMA INCOME-TAX ACT, SS. 33 AND 66 (2). **A.I.R. 1940 Rang. 175 (S.B).**

BURMA (LOWER) LAND AND REVENUE ACT (II OF 1876), S. 8—*Rules framed under R.52—Applicability—"Occupying available land" —Meaning of—Persons entering available land—Land subsequently made subject of grant—Application of rule.*

"Occupying available land" is not the same thing as "entering upon available land". It is not persons who enter upon available land who are subject to eviction but persons who are actually occupying available land. R. 92 applies to a person to whom a grant has been made but whose grant has been subsequently cancelled and who remains in occupation of such land even after such cancellation. The rule refers to present occupation and the present status of the land. Where certain persons enter upon land which is available at the time of their entry but subsequently such land is made the subject of a grant, such persons cannot be proceeded against under R. 52 (2) on their failure to comply with a notice under R. 52 (1) as they cannot be deemed to have occupied available land. (*Mackney, J.*) MA NGWE YON *v.* EMPEROR. **172 I.C. 413=10 R.R. 247= 39 Cr L.J. 140=A.I.R. 1937 Rang. 452**

——**Ss. 44 and 45**—*Notice of demand addressed to deceased owner, served on care-taker of property—Validity of sale.*

Where a notice of demand under S. 44 of the Burma Land and Revenue Act for Municipal taxes, which was addressed to an owner of property who had been dead was served on the care-taker of the property, there was no valid service of the notice upon any person liable to pay within the meaning of that section. The care-taker cannot be regarded as an agent of the deceased owner. A sale of the property is, therefore, invalid and a nullity. (*Roberts, C. J. and Dunkley, J.*) MAUNG THAUNG *v.* SHAIK ABDUL GANI. **1938 Rang. L.R. 603=180 I.C 234=11 R.R. 385=A.I.R 1939 Rang 30**

BURMA (LOWER) LAND AND REVENUE ACT (1876), S. 56.

——**S.45**—*Sale certificate—If document of title.*

It is not the owner that signs a sale certificate; a revenue officer signs it and he signs it to give effect to the sale that has taken place; and the power of selling property belonging to other people is strictly limited by law. Hence a sale certificate is not a document of title. (*Mya Bu, Offg. C.J. and Baguley, J.*) SAW YU HLAING *v.* CHETTYAR FIRM. **174 I.C. 260=10 R.R. 398= A.I.R. 1938 Rang. 55.**

——**S. 45**—*Sale under—What passes—Revenue officer signing sale certificate in wrong form—Effect of.*

Where the attachment for sale is under S. 45 and the sale proclamation is also under S. 45, the sale must be under that section, and it would transfer only the right, title and interest of the owner. The mere fact that after some months the revenue officer signs the sale certificate in the wrong form cannot alter what is actually sold. (*Mya Bu, Offg. C.J. and Baguley, J.*) SAW YU HLAING *v.* CHETTYAR FIRM. **174 I.C. 260=10 R. R. 398=A.I.R. 1938 Rang. 55.**

——**Ss. 46 and 47 and Burma Co-operative Societies Act (V of 1927), S. 51**—*Conditions under which Ss. 46 and 47 of the Land and Revenue Act are available—Sale to realise sum due from member of Co-operative Society—Availability of Ss. 46 and 47 of the Land and Revenue Act.*

The provisions of S. 46 following of the Burma Land and Revenue Act are available only when the Revenue Officer is seeking to recover arrears of land revenue accruing in respect of the land against which he is proceeding under those sections; that is to say, when he sells land under S. 47 of the Act he can do so only in the attempt to recover arrears of land revenue accruing from that very land In a case where sums due to a Co-operative Society which according to S. 51 of the Co-operative Societies Act shall be recovered in the same manner as arrears of land revenue, the Revenue Officer cannot apply S. 46 following of the Land and Revenue Act in selling any land belonging to the defaulter, for the amount due from him is not due on account of the land against which he is proceeding. (*Mackney, J.*) MAUNG MYA DIN *v.* K. P. A. P. CHETTYAR FIRM. **1940 Rang.L.R. 230.**

——**Ss. 55 and 56**—*Bar of jurisdiction of Civil Court—Question as to existence of legal authority for the Revenue Officer to act.*

Where the question to be decided is whether a Revenue Officer had any legal authority to act as he did, and no question arises as to the legality of any process issued under S. 45 of the Burma Land and Revenue Act, the jurisdiction of the Civil Court is not barred by Ss. 55 and 56 of the Act. (*Mackney, J.*) MAUNG MYA DIN *v.* K. P. A. P. CHETTYAR FIRM. **1940 Rang.L.R. 230.**

——**S. 56**—*Scope—Jurisdiction of Civil Courts.*

The prohibition under S. 56 of Act II of 1876 to the jurisdiction of the Civil Courts extends to disputes to which Government is a party and not to disputes regarding the right to occupy land between private individuals. (*Roberts, C.J. and*

BURMA LAWS ACT (1898), S. 12.

Dunkley, J.) MAUNG THAUNG *v.* SHAIK ABDUL GANI. **1938 Rang.L R. 603=180 I C. 234=11 R.R. 385=A I R. 1939 Rang. 30.**

BURMA LAWS ACT (XIII OF 1898), S. 12 —*Shan States—Power of Shan Court to carry out orders of other Courts in other places.*

The mere fact that a simplified procedure has been prescribed for a backward area like the Shan States does not affect the power of the Court there to carry out the orders of other Courts in other places. That is a matter of the comity of Courts. Similarly, there is nothing to prevent the Court at Mandalay from issuing orders to a Court in the Shan States, provided that the order will be carried out; for Courts will not issue orders that cannot be carried out any more than Courts will entertain actions to try matters where they have no power to enforce their decisions. *(Mosely, J.)* DESRAJ CHANAN LAL *v.* RAMJASHER MADANCHAND. **1937 Rang.L. R. 249=171 I.C. 806=10 R.R. 190=A.I.R. 1937 Rang. 367.**

——**S. 13**—*'Buddhist'—Chinese Buddhist.*

A Chinese Buddhist is a Buddhist within the meaning of that term both in S. 13, Burma Laws Act, and in the Succession Act. *(Mya Bu and Mosely, JJ.)* MA TIN *v.* KO SEIN HONE. **184 I. C. 665=12 R R. 167=A.I.R. 1939 Rang 291.**

—— **S. 13**—*Entry by Burman Buddhist into monkhood—Effect on his property--Law applicable.*

The effect of the entry by Burman Buddhist into the Buddhist monkhood upon properties in his ownership or possession at the time of such entry, is a question of religious usage which must be decided according to the Buddhist Law under S. 13 of the Burma Laws Act. The law pertaining to religious usages among Burman Buddhists is to be found in the *Vinaya*. *(Roberts, C.J., Mya Bu, Baguley, Mosely and Ba U, JJ.)* A. R. L. P. FIRM *v.* U PO KYAING. **1939 Rang.L.R. 311=183 I.C. 673=12 R.R. 93=A.I.R. 1939 Rang. 305 (F.B.).**

—— **S. 13**—*Gift—Mahomedan parties — Law applicable—Delivery of possession—If necessary.*

Sub-S. (1), S. 13, Burma Laws Act, specifically requires Mahomedan Law to be applied in cases where the parties are Mahomedans and the question at issue affects succession, inheritance, marriage or caste or any religious usage or institution. No reference is made to gifts, and Mahomedan Law on this subject is, therefore, not made applicable by this sub-section. Sub-S. (3) provides that in cases not within either sub-S. (1) or sub-S. (2) or governed by any other enactment, the decision shall be in accordance with justice, equity and good conscience. Therefore sub-S. (3) and S. 129, T. P. Act, leave it open to the Court to apply the Mahomedan Law of gifts on the grounds of justice, equity and good conscience and a gift without giving delivery of possession is invalid even though the donor has executed and registered a written instrument. *(Leach and Spargo, JJ.)* MAUNG GYI *v.* MAUNG SAUNG. **171 I.C. 752=10 R.R. 184=A I R 1937 Rang. 240.**

——**S. 13 (1) and (2)**—Gift between Mahomedans—Registered instrument—If necessary—Law in Burma. *See* T. P. ACT, Ss. 123 AND 129. **14 Rang. 485.**

——**S. 13 (1) (a) and (3)**—*Marriage between Confucian and Buddhist—Law applicable.*

BURMA LAWS ACT (1898), S. 13.

Where one of the parties to a marriage in Burma is a Confucian and the other a Buddhist, S. 13 (1) (*a*) of the Burma Laws Act does not apply, nor does S 2 of the Special Marriage Act. As no other enactment is applicable to such a marriage, under S. 13 (3) of the Burma Laws Act the decision must be according to equity, justice and good conscience ascertained not by reference to English Law but by reference to Burmese Buddhist Law which is applicable as the *lex loci contractus*. *(Spargo, J.)* MA KYIN MYA *v.* MAUNG SIT HAN. **1937 Rang.L.R. 103=170 I C. 355=38 Cr.L.J. 895=10 R.R. 77=A.I.R. 1937 Rang. 245.**

——**S. 13 (1)** — *Succession to property of Chinese Buddhist domiciled in Burma—Law applicable.*

Burmese Buddhist Law governs the succession to the property in Burma of a Chinaman who was a Buddhist and who was domiciled in Burma at the date of his death, unless it is proved that Chinese customary law is applicable. A Chinaman who is a Buddhist comes within the term "Buddhists" in S. 13 (1) (*a*) of the Burma Laws Act, and cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist or because the law which governs him in China is not a specifically Buddhist or even a religious law. The same is true of the word 'Buddhist' in the Succession Act. It follows from this view that S. 13 (1) must be applied to such a case as the present. The Court would not be justified in applying as Buddhist Law, a law which is not Buddhist at all, merely because it is applied generally in China to Chinamen without any special exception for Buddhists. The law which is described in the statute as "the Buddhist Law" is like the Hindu and Mahomedan Law intended to be applied by the Court as a law known to the Court, and administered by the Court of its own skill and competence. *(Sir George Rankin.)* TAN MA SHWE ZIN *v.* KOO SOO CHONG. **1939 A.C. 527=1939 Rang.L R. 548=1939 O.L R. 491=12 R.P. C. 52=70 C L.J. 341=5 B.R. 908=182 I.C. 993=A.I.R. 1939 P.C. 228=(1939) 2 M.L.J. 731 (P.C.).**

——**S. 13 (3)**—*Marriage between — Chinese Buddhist husband and Burmese Buddhist wife—Claim for partition of property on divorce—Law applicable.*

There is no *prima facie* ground for applying the personal law of the man and disregarding personal law of the woman in a case where Burmese Buddhist wife demands a partition of property on divorce from her Chinese Buddhist husband. It is the community or religious denomination to which the parties belong by which the personal law which forms the rule of decision in such a case has to be ascertained. But the personal law of the husband is not *ad idem* with the personal law of the wife. In absence of any sufficient authority either judicial or legislative to show that either the Chinese customary law or the Burmese Buddhist law should govern the question as to the respective interests of the Chinese Buddhist husband and the Burmese Buddhist wife in the property held by either or both, the question as to the division of property between the parties upon divorce should be decided according to justice, equity and good conscience under S. 13 (3), Burma Laws Act. *(Mya Bu and Mosely, JJ.)*

BURMA MUNICIPAL ACT (1898), S. 8.

MA TIN *v.* KO SEIN HONE. **184 I.C. 665=12 R.R. 167=A.I.R. 1939 Rang. 291.**

BURMA MUNICIPAL ACT (III OF 1898), S. 8—*Rules under R. 68—Election not properly held—Powers of Government.*

One of the candidates to a Municipal election brought a petition against four others who were thought successful, on several grounds of irregularities, with the result that it came to the notice of Government that the proceedings of the faulty election were a farce and a fiasco; and consequently they proceeded under R. 68 made under S. 8 for the preparation and publication of the electoral roll for holding a proper election. The Judge who decided the petition however held that the objections raised were valid and all criticisms were correct and that next four persons who were on the list of candidates ought to be elected. The candidates so declared elected sued for a declaration that the order of the Government and the electoral authority were *ultra vires* and that they were duly elected members of the Municipal Committee.

Held, that once an election took place the Government could not declare it void and hold a new one. But the authorities must make a decision upon the facts as represented to them and must make their decision in good faith; and no proper election having been held the candidates could not be declared elected, and that the orders of the Government and the electoral authority were within their powers. (*Roberts, C.J. and Dunkley, J.*) GOVERNMENT OF BURMA *v.* ARUNACHALLAM. **185 I.C. 526=12 R.R. 203=A.I.R. 1939 Rang. 408.**

——**S. 43**—*Municipal Councillor—Position of—Loss of municipal fund due to neglect of his duty—Liability for.*

The position of Councillors with regard to municipal fund is in law that of trustees. As trustees they would be bound to exercise over trust properties the same degree of caution and care as a man of ordinary prudence would exercise in case of his own property. They would be liable for any loss of the trust fund which was facilitated by the gross neglect of their own duties by their own acts or by any other agency. The President of a Municipal Committee appointed a tax-collector even though he had no authority to do so without taking any security from him; though many reports against such person were made by the secretary he did not take any steps and the Municipality was thereby put to a loss by the embezzlement of the tax-collector.

Held, that the President was guilty of acts of malfeasance and was liable to make good the loss under S. 43. (*Dunkley, J.*) U. WIN TSU *v* SECRETARY OF STATE. **1940 Rang.L.R. 172=187 I.C. 212=12 R.R. 317=A.I.R. 1940 Rang. 8.**

——**S. 59**—*Member of Committee guilty of non-feasance—Right of action—Limitation.*

There can be no right of action against a member of an elected Committee, arising out of the results of an act amounting to a mere non-feasance. If the Committee has a remedy against the member that remedy must be by the creation of statute. The ward headmen of a Municipality had executed a mutual security bond for collection and credit by them of the Municipal revenue.

BURMA MUNICIPAL ACT (1898), S. 62.

The effect of the bond was that all the others of them guaranteed the due collection of the revenue by each. Later on, an application was presented to *A*, the President by the other wardmen that they did not want to stand guarantee for one of their number *M*, as they had had to make good the deficiency in his collection. No enquiry was made into the allegation and no action was taken on the petition. It was subsequently discovered that *M* had embezzled a certain sum out of the year's revenue. On the Municipal Committee calling upon the wardmen to show cause why they should not make good the amount, the wardmen relied on their petition to *A*, and asked to be discharged from their bond. The Committee ordered them to make good the deficiency. The headmen appealed against the order to the Commissioner who held that the petition of the headmen to *A* had discharged them, from all liability on their bond and decided that the responsibility for the loss fell on *A* for not taking any action on the petition. The Municipal Committee thereupon had to institute a suit against *A* for recovery of the amount defaulted.

Held, that the act of *A* in taking no action on the petition of headmen was a non-feasance only. That the case was governed by S. 59, Burma Municipal Act, and the loss occurring to the Municipality was not the direct consequence of the failure by *A* to take action on the petition of the headmen as the mutual security bond of the headmen was not rendered automatically void and of no effect by the presentation of the petition.

Held, further, that the loss of the Municipal Committee was the direct result of the order of the Commissioner and not of the non-feasance of *A*.

Held also, that the case was governed by Art. 30, Limitation Act. The time began to run from the date of non-feasance by *A* and the suit not having been filed within two years of non-feasance by *A* was barred. (*Dunkley, J.*) TAVOY MUNICIPAL COMMITTEE *v.* U KHOO ZUN NEE. **164 I.C. 410=9 R.R. 87=A.I.R. 1936 Rang. 310.**

——**S. 62**—*Municipal assessment—Annual value of building—Computation—Methods—Safeguards to be observed.*

The only proper basis of assessment is that which enables the gross annual rent, for which the buildings and lands liable to taxation may reasonably be expected to let, to be discovered; in other words, neither the contractor's test, nor the revenue principle, is a principle of assessment. They may be useful as a method to find out what the hypothetical rent may be. A test based upon the actual figures of profits can only be applied where a hereditament itself has an exclusive profit-making characteristic, enabling one to single it out from other classes of hereditaments. In order to arrive at the rent which a hypothetical tenant would pay, the contractor's test may be taken as a rough test, but care must be taken to examine the actual return which the contractor would reasonably expect to receive on his outlay. (*Roberts, C J., Mya Bu and Dunkley, JJ.*) DYER MEAKIN (BURMA), LTD. *v.* CHIEF EXECUTIVE OFFICER, MANDALAY MUNICIPALITY. **1938 Rang. L.R 336=177 I C. 803=11 R.R. 172=A.I.R. 1938 Rang. 345 (S.B.).**

BURMA MUNICIPAL ACT (1898), S. 84.

——**Ss. 84 and 93**—*Premises and hereditaments belonging to Electric Supply Co.—Mode of assessment.*

Where the premises and hereditaments belonging to an Electric Supply Co. are sought to be assessed by the Municipal Committee, the assessment should be made without taking into account any value in respect of the overhead mains, cables or wires. The overhead mains are not assessable under the Act at all. (*Roberts, C.J., Leach and Dunkley, JJ.*) AKYAB ELECTRIC SUPPLY CO. *v.* AKYAB MUNICIPAL ASSESSMENT SUB-COMMITTEE. **14 Rang. 649=166 I.C. 512=9 R.R. 266 (1)=A.I.R. 1937 Rang. 1 (S.B.).**

——**S. 229 (g) and Burma Municipal Rules (1934), Ch. 6, R 24**—*Rule if directory or mandatory—Contract in violation of rule—Validity.*

Per *Roberts, C. J.*—Rule 24 of Ch. 6 of the Burma Municipal Rules framed under S. 229 (*g*), Burma Municipal Act, was made generally for guidance of committees and public officers in all matters connected with the carrying out of the Act, and so it has a directory and not a mandatory significance. Hence a breach of this rule does not make a contract void.

Per *Sharpe, J.*—The rule was either under S. 71 and beyond the powers of the Local Government to make or at least it was only directory if made under S. 229 (*g*) and it could not in any way interfere with the right acquired by third persons under any contract entered into with the Municipality, even though it had been entered into it otherwise than in accordance with the directions given in the rule. (*Roberts, C. J. and Sharpe, J.*) MUNICIPAL COMMITTEE, MYAUNG MYA *v.* PAW HAING. **1938 Rang.L.R. 704=178 I.C. 817=11 R.R. 269=A.I.R. 1938 Rang. 404.**

BURMA PREVENTION OF CRIME (YOUNG OFFENDERS) ACT (III OF 1930), Ss 13 and 25—*Order of detention in Borstal School—Appeal—Forum.*

It is plain from S. 13 of the Prevention of Crime (Young Offenders) Act that in respect of any order of detention in a Borstal School for any period, passed by a Magistrate, there is a right of appeal to the local Court of Session, and the only circumstance in which the appeal against such an order will lie to the High Court is when a co-accused, who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding four years. In such a case, the appeal will lie to the High Court under the provisions of S. 408 proviso (*b*), Cr. P. Code. (*Dunkley, J.*) NGA THA E *v.* EMPEROR. **14 Rang. 143=163 I.C. 144=8 R.R. 611=37 Cr.L.J. 793=1936 Cr.C. 513=A.I.R. 1936 Rang. 229.**

——**S. 14**—*Finding of trial Court as to age of accused—High Court, if can re-consider, in determining sentence.*

According to S. 14, it is not open to a Court of appeal to re-consider a finding arrived at by the trial Court as to the age of an accused so far as the question as to the applicability of S. 15 is concerned. Still the discretion of the High Court is not fettered in considering whether the accussed has really reached the age arrived at by the trial Court in determining the general question as to the appropriate sentence to be passed. (*Mya Bu and Mackney, JJ.*) NGA SAW HTUN *v.* EMPEROR. **171 I.C. 125=38 Cr.L.J. 1022=10 R.R. 131=A.I.R. 1937 Rang. 121.**

BUR. PREVENTION OF CRIME (YOUNG OFFENDERS) ACT (1930), S. 24.

——**S. 15**—*Age of accused—Time with reference to which it should be ascertained.*

While for the purpose of S. 15, Burma Prevention of Crime (Young Offenders) Act, the age must be ascertained with reference to the time when the sentence is to be passed, the age with reference to the general question as to the capacity to exercise reason and self-control must be with reference to the time of the commission of the offence. (*Mya Bu and Mackney, JJ.*) NGA SAW HTUN *v.* EMPEROR. **171 I.C. 125=38 Cr.L.J. 1022=10 R.R. 131=A.I.R. 1937 Rang. 121.**

——**S. 16 (e)**—*Isolated crime—Detention in Borstal School—Necessity for.*

The Borstal Schools in Burma are introduced for training and care of young persons who are by their circumstances likely to enter upon a life of crime. Where it appears that the crime which a juvenile has committed is an isolated one, due to his losing self-control in a set of special circumstances and where the juvenile is not shown to be subjected in his normal life to undesirable influences it is not necessary that he should be detained in a Borstal School. (*Mackney, J.*) MAUNG TIN HLAING *v.* THE KING. **184 I.C. 464=12 R.R. 147=41 Cr.L.J. 22=A.I.R. 1939 Rang. 383.**

——**Ss. 16 (e) and 24 (b) (ii)**—*Offender between 15 and 16 years—Order detaining him in Training School for 4 years—Legality.*

Where an offender of between 15 and 16 years is ordered to be detained in the Training School under S. 16 (*e*), Burma Prevention of Crime (Young Offenders) Act, for a period of 4 years, the order is illegal as the offender will have passed his 19th birthday by the time the period of 4 years expires. The proper order therefore in such a case is to detain him in the Training School, till he attains his 19th birthday. (*Mosely, J.*) THE KING *v.* UNOOSE. **39 Cr L.J. 697=176 I.C. 217=11 R.R. 36=A.I.R. 1938 Rang. 228.**

——**S. 24 (b)**—*"Beyond age of 18"—Meaning of.*

The expression "beyond the age of 18" in Cl. (*b*), S. 24 means and includes the period up to the nineteenth birthday of the person. Hence a person who is just under 16 years of age at the time of passing the order can be ordered to be detained for a period of three years under S. 24 (*b*). (*Dunkley, J.*) EMPEROR *v.* NGA BALA. **14 Rang. 327=163 I.C. 1008=37 Cr.L.J. 869=9 R.R. 55=A.I.R. 1936 Rang. 297.**

——**S. 24 (b)**—*"Beyond the age of 18"—Meaning of—Duty of Magistrate.*

The expression "beyond the age of 18" in S. 24 (*b*) of the Prevention of Crime (Young Offenders) Act means and includes the period up to the 19th birthday of the person concerned. The duty of the Magistrate is to fix the age of the accused person as nearly as he can from evidence, and his order for detention should be accompanied by a reference to the date upon which the 19th birthday occurs in order that the school authorities may with certitude carry out the duties entrusted to them. 14 Rang. 327, Foll. (*Roberts, C.J., Leach and Dunkley, JJ.*) EMPEROR *v.* ISMAIL. **14 Rang. 625=165 I.C. 575=9 R.R.**

BURMA PREVENTION OF CRIME (YOUNG OFFENDERS) ACT (1930), S. 25.

215=38 Cr.L.J. 33=1936 Cr C. 976=A.I.R. 1936 Rang. 485 (F.B.).

——S 25—*Offence under S.* 380, *I. P. Code—Order of detention in Borstal School passed by Magistrate—Substitution of sentence of whipping on appeal—Legality—Whipping Act S.* 3.

In the case of a juvenile offender committing an offence under S. 380, I. P. Code, the Magistrate has two alternatives before him. He may send the offender to prison or, in lieu thereof, he may either cause him to be whipped or send him to Borstal. If the Magistrate orders him to be detained in the Borstal School, the Sessions Judge on appeal cannot pass a sentence of whipping in lieu of the order of detention, as he would be enhancing the sentence. Under S. 3 of the Whipping Act, he can only pass a sentence of whipping in lieu of any punishment to which the offender might be liable under the Penal Code, that is to say, he can only pass a sentence of whipping in lieu of imprisonment. (*Roberts, C J. and Dunkley, J.*) THE KING *v* KYAW AYE. **1939 Rang L R. 744=12 R.R 332=187 I C. 405 =41 Cr.L.J. 455=A I.R. 1940 Rang. 81.**

——S. 25 (1)—*Order directing accused, guilty under Ss.* 302 *and* 307, *I. P. Code, to be sent to Borstal School—Legality*

S. 25 (1), Prevention of Crimes (Young Offenders) Act, only allows an order directing accused to be sent to a Borstal School in a trial against a person between 16 and 19 where a sentence of imprisonment would ordinarily be passed. An offence under S. 302, Penal Code, is not punishable with imprisonment but with death or transportation for life. An order under S. 25 (1) directing accused aged 16 found guilty under Ss. 302 and 307, Penal Code, to be sent to a Borstal School for seven years is illegal. (*Mosely, J.*) EMPEROR *v.* NGA U. **163 I.C. 118= 8 R.R. 610=37 Cr.L.J. 791=1936 Cr C. 518= A.I.R. 1936 Rang. 234.**

BURMA RURAL SELF-GOVERNMENT ACT (IV OF 1921), Rules under R. 55—*District Judge acting under*—Persona designata—*Right to appeal against his decisions.*

In performing the functions laid upon him by the rules the District Judge does not act as a Court and his proceedings are not subject to appeal or revision by the High Court because he acts as a *persona designata.* (*Mackney, J.*) U AUNG MYIN *v.* DISTRICT AND SESSIONS JUDGE, HENZADA. **A.I.R. 1940 Rang. 148.**

——S. 2 (h) (ii)—*"Public market"—Meaning of.*

"Public market" within the meaning of S. 2 (*h*) (ii) means any place belonging to a District Council or constructed, repaired or maintained out of a District Fund, where persons periodically assemble for the sale of goods, livestock or articles of food. To be a "public market" a market need not necessarily be a building constructed, repaired or maintained out of a District Fund It is sufficient if the place where persons periodically assemble for the sale of goods, livestock or articles of food belongs to the District Council. (*Mya Bu, J.*) AH SU *v* TARAWAY KAKA. **181 I.C. 986=11 R R. 508=A.I.R. 1939 Rang. 162.**

See also JAHOO GANI *v.* U PO THET. **164 I.C. 141=9 R.R. 62=A.I.R. 1936 Rang. 331.**

BURMA RURAL SELF-GOV. ACT (1921), Sch. II, O. 1.

——S. 28 (1) (a)—*Fee levied under—Nature of.*

The fee leviable under S. 28 (1) (*a*) is not rent charged for the use or occupation of a place or a building or a stall in a public market. The fee is levied for the right to expose goods or livestock for sale in the public market. (*Mya Bu, J.*) AH SU *v.* TARAWAY KAKA. **181 I.C. 986=11 R. R. 508=A.I.R 1939 Rang. 162.**

——S. 28 (1) (c)—*Applicability—Shop in private house.*

Only temporary stall established on a road or street itself comes within purview of S. 28 (*c*), and shops established in buildings built on private property, but abutting on to a road or street, do not come within the clause. (*Dunkley, J.*) JAHOO GANI *v.* U PO THET **14 Rang. 701=164 I.C. 141=9 R.R. 62=A.I.R. 1936 Rang. 331.**

——S. 58 (3)—*Contract not executed in manner prescribed—Right of suit for breach of contract.*

Where a contract which must be executed in a particular form prescribed by law has not been so executed, a party who acts upon it has no right to sue for the breach of such contract. 30 M. 290 and 27 A. 592, Foll. (*Mosely, J.*) M. M. SHERAZEE *v.* DISTRICT COUNCIL, KYAUKSE. **173 I.C. 345=10 R.R. 339=A.I.R. 1937 Rang. 378.**

——S. 77—*Scope.*

S. 77, Burma Rural Self-Government Act, does not limit contracts intended to be covered by its penal provision only to such contracts as may be related to the matters mentioned in Ss. 48, 50 and 56 of the Act. Where a clerk of the Circle Board rents his house to the Circle Board for use as its office without the permission in writing of the Commissioner as required by S. 77, Burma Rural Self-Government Act, he commits an offence under S. 168, I. P. Code, read with S. 77, Burma Rural Self-Government Act, as he is interested in the contract made with the Board. (*Shaw, J.*) THE KING *v.* MAUNG SAW HAN. **179 I.C. 716=40 Cr.L.J. 248=11 R.R. 343=A.I.R. 1939 Rang. 69.**

——Ss. 78 and 79—*Rules—Chap.* 1, *R.* 34—*Application disputing election of Chairman—Maintainability.*

The rules framed for the election of a Chairman of the District Council framed under S. 79 (1) (*e*) of the Act, do not provide for any questioning of the election of a Chairman by petition to Court. An application purporting to be made under R. 34, Chap. 1 of the rules framed under Burma Rural Self-Government Act of 1921 for declaring the election of a Chairman of the District Council void, does not lie. (*Mosely and Ba U. JJ.*) GOVERNMENT ADVOCATE, BURMA *v.* U PO SHWE. **161 I.C. 335=8 R R. 469=A.I.R. 1936 Rang. 110.**

——Sch. II, O. 1, Cl. 1 (1) (b)—*Words "have been assessed"—Meaning of.*

The words "have been assessed" in Sch. II, O 1, Cl. 1 (1) (*b*), Burma Rural Self-Government Act, do not merely mean "have paid" land revenue but that the person's name actually appears in the assessment rolls as assessee. To prove that an elector has a qualification under Sch. II, O. 1, Cl. 1 (1) (*b*), the only method is to produce extracts from relevant assessment rolls. (*Mackney. J.*) MAUNG TUN GAUNG *v.* EMPEROR. **171 I.C 86=38 Cr.L.J. 1015=10 R.R. 128=A.I. R. 1937 Rang. 318.**

BURMA SUPPRESSION OF BROTHELS ACT (II OF 1921), S. 11 (a)—*Proper sentence.*

Where a person is convicted of an offence of managing a brothel under S. 11 (*a*) of Burma Suppression of Brothels Act, a sentence of fine or in default imprisonment is entirely inadequate in such a case. To stamp out an offence of this kind it is proper that the offender should be sent to prison. (*Roberts, C.J.*) M ULLA *v.* THE KING. **174 I.C. 885=39 Cr.L.J. 494=10 R.R. 439=A.I.R. 1938 Rang. 107.**

BURMA TENANCY ACT (X OF 1939), Ss. 14 and 15—*Duty of Rent Settlement Officer.*

The Act does not say that the Rent Settlement Officer must strike an average, and then, tinker with the results lest they appear ridiculous; it enjoins an inquiry into each tenancy and the determination of a proper figure by certain specified means. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MAUNG PYU, *In the matter of.* **1940 Rang.L.R. 325=188 I.C. 422=12 R.R. 365 =A.I.R. 1940 Rang. 84 (S.B.).**

——**S. 15**—*"Such other factors as may seem relevant"—Matters falling within.*

The situation of the land, nearness to or remoteness from a village, a railway station, a waterway, a mill, or a road, accessibility of the land, are clearly necessary considerations in determining a fair rent as falling within the phrase "such other factors as may seem relevant." (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MAUNG PYU, *In the matter of.* **1940 Rang.L.R. 325=188 I.C 422=12 R.R. 365=A.I.R 1940 Rang. 84 (S.B.).**

——**S. 40**—*Powers of High Court.*

The provisions of S. 40 do not in any way affect the power of High Court to bring into High Court the proceedings of Revenue Officers in order to ascertain whether they have been conducted in due compliance with the statute. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MAUNG PYU, *In the matter of.* **1940 Rang.L.R. 325=188 I.C. 422=12 R.R. 365=A.I.R. 1940 Rang. 84 (S.B.).**

BURMA VILLAGE ACT (IV OF 1907), Ss. 8, 11 (d) and 12 (ii)—*Refusing to help headman to despatch injured person to hospital—Conviction—Sustainability.*

The public duties of a headman are enumerated in S. 8 of the Act, and it is not the public duty of a headman to despatch an injured person to hospital. Hence refusal of a villager to help the headman to carry an injured person to hospital is not an offence within the meaning of S. 12 (*ii*) read with S. 11 (*d*) even though such injured person is a Government officer and a conviction for such refusal is unsustainable. (*Mosely, J.*) EMPEROR *v.* MAUNG THA DIN. **161 I.C 604=8 R.R. 496=37 Cr.L.J. 468=1936 Cr.C. 195=A.I.R. 1936 Rang. 120.**

——**S. 10**—*'Abuse of power', meaning of.*

An abuse of power means that, when a person has power to do a certain thing, he exercises that power in a manner in which authority is not given to him to exercise it. (*Dunkley, J.*) MAUNG BA SHIN *v.* EMPEROR. **160 I.C. 477=8 R.R. 386 =37 Cr.L.J. 295=1936 Cr.C. 4=A.I.R. 1936 Rang. 11.**

——**Ss. 10 and 28**—*Complaint against headman—Act punishable departmentally—Previous sanction of Deputy Commissioner.*

CAL. HACKNEY CARRIAGE ACT (1919), S. 60.

S. 28 refers to a complaint of an act which constitutes an offence under the Penal Code or any other law if such act is also punishable departmentally under S. 10 of the Act. Where the Act of which the person is complaining is also punishable departmentally by the Deputy Commissioner under S. 10 of the Act, then the sanction of the Deputy Commissioner to the prosecution of the applicant is necessary. 1 L.B.R. 336, 1923 Rang. 27 and 1931 Rang. 87, Rel. on. (*Dunkley, J.*) MAUNG BA SHIN *v.* EMPEROR. **160 I.C. 477=8 R.R. 386=37 Cr.L.J. 295=1936 Cr C. 4=A.I.R. 1936 Rang. 11.**

——**S. 12**—*Offence under—Villager not paying* thathameda-tax—*Order to him by headman to appear at Township office—Disobedience of order—If offence.*

The payment of *thathameda-tax* is not a public duty imposed on a villager by the Village Act. Therefore, if a villager who has not paid his *thathameda-tax* is directed by his headman to appear at a Township office but fails to do so, he does not commit any offence punishable under S. 12 of that Act. (*Mackney, J.*) THE KING *v.* MAUNG KAN TUN. **1938 Rang.L.R. 119=175 I.C. 512=10 R.R. 505 (1)=39 Cr.L.J. 626=A.I.R. 1938 Rang. 180.**

CALCUTTA ACTS, Etc.

Hackney Carriage Act (I of 1919).
High Court Civil Rules and Orders.
High Court General Rules and Orders.
High Court Insolvency Rules (1910).
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Improvement Act (V of 1911).
Municipal Act (III of 1923).
Police Act (IV of 1866).
Port Act (III of 1890).
Survey Act (I of 1887).

CALCUTTA HACKNEY CARRIAGE ACT (I OF 1919), S. 60—*Scope and effect—Act of* 1891 *extended to Pabna in* 1913—*Act I of* 1919 *not extended—Hackney carriage stand established in* 1918—*Nuisance caused in* 1933—*Suit against Municipality for, injunction and damages—Maintainability—Municipality—If exempted from liability by S.* 60 *of Act I of* 1919, *Bengal General Clauses Act, S.* 25—*Applicability—Bad and offensive smell emitted by accumulated urine of horses—Injunction—Grant of—Continuing nuisance—Proper remedy.*

The authority to appoint stands for hackney carriages conferred on a municipality by S. 60 of the Act is absolute; and the Municipal Commissioner will therefore not be liable in respect of a stand established under that section, even if the stand so erected is a source of nuisance to the neighbours. But, where a stand for hackney carriages is erected in 1918 in Pabna, under the Act of 1891, which was extended to Pabna by a notification in 1913, but the Act of 1919, which repealed the Act of 1891, is not so extended to Pabna, the effect is that the Hackney Carriage Act of 1891 is not in existence in Pabna since 1919; and the Municipal Commissioners would have no authority under the law to appoint or maintain a carriage stand since 1919. If, therefore, in 1933, the Pabna Municipality have the stand erected in 1918 or do anything else which results in nuisance, it will be liable to be sued in

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respect of that Act. Neither S. 25 of the Bengal General Clauses Act nor S. 3 (2) of the Hackney Carriage Act of 1919 would be of any assistance so as to protect the Municipal Commissioners against the suit. When the smell emitted from the stand, though bad, is not more noxious or disagreeable than the smell emitted from the streets of the place generally, no action for nuisance would lie. But where it is found that there is no proper drain or channel to drain off the urine of the horses, with the result that offensive matter drains into and accumulates in a long strip of land between the stand and the plaintiff's land, the plaintiff has a cause of action and is entitled to relief by way of an injunction and not merely to nominal damages. In the case of continuing nuisances, an injunction is the usual and proper remedy, and ought to be granted unless the injury complained of is trivial. (*R.C. Mitter, J.*) NIRMAL CHANDRA SANYAL *v.* MUNICIPAL COMMISSIONER OF PABNA TOWN. **I.L.R (1937) 1 Cal. 407=167 I.C. 254=9 R.C. 665=40 C.W.N. 1353=A.I.R. 1936 Cal. 707.**

CALCUTTA HIGH COURT CIVIL RULES AND ORDERS, R. 760—*Duty of Sheristadar—Short deposit accepted by him—Party, if can be penalised.*

Under R. 760 of the High Court Civil Rules and Orders, it is the duty of the Sheristadar to ascertain that the amount tendered is correct. If a judgment-debtor seeking to set aside a sale of his property effected in execution of a rent decree, makes a short deposit of the decretal amount which is accepted by mistake by the Sheristadar as sufficient, he cannot be penalised if he pays the deficit when the mistake is found out, as the short deposit is due to an omission of duty on the part of a Court official The sale should, therefore, be set aside. (*M.C. Ghose, J.*) SURESH CHANDRA SINGH *v.* JNANENDRA NATH SINGH. **68 C L.J. 273.**

CALCUTTA HIGH COURT GENERAL RULES AND ORDERS (CIVIL) (1934), R. 951—*"Business"—Pleader taking up appointment as Assistant Secretary of Loan Office—If commits breach of rule—Liability to suspension from practice.*

"Business" in R. 951 of the High Court General Rules and Orders (Civil) is quite a comprehensive word. The rule does not speak of a business carried on for the benefit of the pleader himself. A pleader who accepts an appointment as Assistant Secretary of a Loan Office and accepts an office as Director thereof must be said to engage himself in "business" within the meaning of R. 951, and when he does so without previously intimating his intention to the High Court, he commits a breach of the rule. But the pleader's connection with the business as Director and Assistant Secretary is neither derogatory to the dignity of a practising lawyer nor likely to interfere with his duties as such to any appreciable extent so as to make him liable to suspension from practice. (*Mukerji, A.C.J., Lort Williams and S.K. Ghose, JJ.*) *In re* RAMESH CHANDRA SEN GUPTA. **63 Cal. 855=162 I.C. 517=8 R.C. 605=37 Cr.L.J. 590=40 C.W.N. 377=63 C.L.J. 127=1936 Cr.C. 350=A.I.R. 1936 Cal. 205.**

——**Rr. 951 and 953**—*Scope—If* **ultra vires.**

CAL. H. C R. AND O. (Ori. Side) (1933), Ch. IX, R. 11.

R. 951 of the General Rules and Circular Orders (Civil) framed by the High Court in 1934, which requires that a pleader or muktear intending to accept an engagement, etc., shall give prior notice thereof to the High Court is entirely within the competence of the High Court to make and is perfectly consistent with the Legal Practitioners Act and not *ultra vires* The provision as regards previous notice is evidence for the benefit of the pleader or muktear. But R. 953, in so far as it provides for and prescribes a fine for breach of Rr. 950 and 951, is clearly *ultra vires*, because it provides for a misconduct and penalty unknown to the Legal Practitioners Act besides being unjustifiable and unreasonable and also because the enforcement of the rule is impossible in view of the provisions of the Legal Practitioners Act. (*Mukerji, A.C.J., Lort Williams and S K. Ghose, JJ.*) *In re* RAMESH CHANDRA SEN GUPTA. **63 Cal. 855=162 I.C. 517=8 R.C. 605=37 Cr.L.J. 590=40 C.W.N. 377=63 C.L.J. 127=1936 Cr.C. 350=A.I.R. 1936 Cal. 205.**

CALCUTTA HIGH COURT INSOLVENCY RULES (1910), R. 79—*Affidavit of debtor purporting to be notice—Rejection of as out of time—Debtor, if can tender evidence at the hearing.*

The rejection of an affidavit of the debtor which purported to be a notice under R. 79 of the Calcutta Insolvency Rules on the ground that it was filed out of time, does not amount to the shutting out of evidence or the preventing of the debtor from giving any further evidence at the hearing in rebuttal of the case put forward by the petitioning creditor. (*Costello, A.C.J. and Edgley, J.*) AHMAD MAHOMED PARUK *v.* PRAPHULLA NATH TAGORE. **I.L.R. (1938) 1 Cal. 13=181 I.C. 251=11 R.C. 795=A.I R. 1939 Cal. 35.**

CALCUTTA HIGH COURT RULES (Appellate Side), Ch. VI, Rr. 7 and 9—*Revision petition—Affidavit—If necessary—Facts relied upon supported by certified copy of order attached to petition.*

Where a petition to the High Court states facts which are all matters of record and which are all supported by certified copies of the order passed by the Court below attached to the petition, such a petition need not be supported by an affidavit. (*R.C. Mitter, J.*) RAJBALLAV MANDAL *v.* RAJENDRA NARAIN MANDAL. **40 C.W N. 1408.**

CALCUTTA HIGH COURT RULES AND ORDERS (Original Side) (1933), Ch VIII, R. 20-A—Applicability—Suit against firm—Person not served with writ and denying to be partner but interested in firm—Joinder of—Power of Court—Procedure. *See* C. P. CODE, O. 1, R. 10 AND O. 30, RR. 3 AND 8. **40 C.W.N. 677.**

——**Ch. IX, R. 4**—*Applicability.*

R. 4 of Ch. IX is intended to apply not to a case of non-entry of appearance but simply to a case of failure to file written statement. (*Ameer Ali, J.*) RAMDEO KEDIA *v.* BALVADRA KEZRIVAL. **41 C.W.N. 561.**

——**Ch. IX, R. 11**—*Paper Book in First Appeal—Papers compulsorily inclusible—Permission to exclude when granted.*

Papers enumerated in R. 11 of Chap. IX of the High Court (Appellate Side Rules), as compul-

sorily inclusible in the Paper Book of a First Appeal can, on application by the appellant, be excluded therefrom, on condition that the appellant undertakes not to question the findings of the trial Court which are dependent on the papers sought to be excluded. The appellant in that case cannot be permitted to question those findings. (*D. N. Mitter and Patterson, JJ.*) PROKASH CHANDRA NAG *v.* SUBODH CHANDRA NAG. **40 C.W.N. 383.**

——**Ch. X, R. 25 and Ch. VIII, R. 16**—*One alone of several defendants entering appearance—Allegation by him in written statement that one among them is a minor—Transfer of suit to undefended list as against major defendants who have failed to appear—Practice.*

Where one alone of several defendants enters appearance and files a written statement alleging that one among the defendants is a minor, the practice is to transfer the suit to the undefended list as against those defendants who have not appeared and who are not alleged to be minors. (*Ameer Ali J.*) RAMDEO KEDIA *v.* BALVADRA KEZRIVAL. **41 C.W.N. 561.**

——**Ch. X, R 30 (c)**—*Omission to give notice—Effect of.*

Rule 30 (*c*) of Chapter X of the Original Side Rules is clear that when the report of the referee is set down for confirmation, notice in writing should be given by the party applying to the other party or parties. If no such notice is given and the report is confirmed, the principle embodied in O. 9, R. 13 should be applied. (*Derbyshire, C.J. and Lort Williams, J.*) ATINDRA NATH DAS *v.* DHIRENDRA NATH DAS. **43 C. W.N. 393.**

——**Ch. X, R. 36**—*Discretion of Court—Exercise of.*

R. 36 is mainly conceived in the public interest, as the defendants will usually be able to force progress under R 7. Every litigant has the right to have his case heard and disposed of, but that right must not be abused, even though the defendant, for reasons of his own, is not anxious to complain of the plaintiff's delay. But the Court is not entitled to deprive the litigant of his right, except on clearly ascertained grounds, and to the exclusion of grounds which rest on suspicion. (*Lord Thankerton*) SRINIVAS PRASAD SINGH *v.* KESHAVA PRASAD SINGH 63 I.A. 12=63 Cal. 662=1936 M.W.N. 327=1936 A.L.J. 101=43 L.W. 228=1936 A.W.R. 202=38 Bom L.R. 146=8 R P.C. 82=159 I.C. 549=40 C.W.N. 321=1935 O.L.R. 721=1936 A.L.R 6=A.I.R. 1936 P.C. 9=70 M.L.J. 94 (P.C.).

——**Ch. X, R. 36**—*Interpretation of.*

Under R. 36, the material time at which the failure to appear in the prospective list is to be looked for is when the suit is placed before the Judge in chambers. The six months provides a minimum period, on the lapse of which action may be taken under the rule. The failure to appear in prospective list must be still continuing at the date of such action and the default in respect of which the suit is liable to dismissal is such continuing failure The conduct of the suit as from its institution up to the date of the action under the rule, is proper matter for the consideration of the Judge. 58 Cal. 736, Appr. (*Lord Thankerton.*) SRINIVAS PRASAD SINGH *v.* KESHAVA PRASAD SINGH. **63 I.A. 12=63 Cal. 662=1936 M.W.N. 327=1936 A L.J 101=43 L.W. 228=1936 A.W.R. 202=38 Bom.L.R. 146=8 R. P.C. 82=40 C.W.N 321=159 I.C. 549=A.I.R. 1936 P C. 9=70 M.L.J. 94 (P.C.).**

——**Ch. XII, R. 6**—*Process-fees—Right of Sheriff to levy charge for conveyance of officer serving notice from Court to place of person to be served and back—Right to call on party to attend office to identify person to be served—Procedure.*

There is no rule in the Rules of the High Court either on the original or on the appellate side of the Court, which authorises the Sheriff to levy charges for conveyance for his officer from his office to the place of the person to be served and back from that place to the Court premises. A party at whose instance the notice of process was to be served cannot therefore be compelled to pay those charges to the Sheriff's officer serving the notice; nor is it necessary for that party to attend at the office of the Sheriff to accompany or take the Sheriff's officer to the place of the person to be served in cases where no identification of the person to be served is necessary. The Court will not endorse the proposition that a process-server is not expected by any Court to walk for the purpose of serving notices and processes. If the Sheriff insists on the payment of conveyance charges and refuses to serve the notice without them the Court will not compel the party to pay them, but will direct service of notice by registered post. (*Mukherji and Jack, JJ.*) BRAHMA NIRANJAN CHAKRAVARTI *v.* JAGADAMBA LOAN CO., LTD. **I.L.R. (1937) 1 Cal. 322=40 C.W.N. 1295.**

——**Ch XIII**—*Originating summons—Jurisdiction of High Court—Letters Patent, Cl.* 12.

It is now settled that Chap. XIII of the Rules and Orders of the Original Side, which governs the procedure with regard to originating summons, must be read subject to the provisions of Cl. 12 of the Letters Patent, and it follows that the Court has no jurisdiction to entertain an originating summons unless it would have jurisdiction to make an administration decree with regard to the estate in respect of which relief by originating summons is sought. An originating summons asking for the decision of the Court on certain questions arising out of a will cannot, therefore, be maintained if no leave of the Court has been obtained under Cl. 12 of the Letters Patent, where the will was executed outside its jurisdiction and the assumption by the executors was registered at Edinburgh. (*Panckridge, J.*) MACDONALD *v.* WILSON. **I L.R. (1940) 1 Cal. 102=A.I.R. 1940 Cal. 354.**

——**Ch. XIII**—*Originating summons—Maintainability—Relief claimed by beneficiary or trustee against agents of trustee.*

Any relief claimed by a beneficiary or trustee against the agents of trustees cannot be determined by means of an originating summons. (*Panckridge, J.*) MACDONALD *v.* WILSON. **I.L.R. (1940) 1 Cal. 102=A.I R. 1940 Cal. 354.**

——**Chap. XIII-A**—*Application in suit on promissory note—Oral agreement postponing obligation till adjustment of partnership accounts—Defendant, if can set up.*

In an application under Ch. XIII-A of the Calcutta High Court Rules for summary judg-

ment in a suit on a promissory note, it is not permissible for the defendant to set up an oral agreement between him and the plaintiff that the promissory note created no liability or obligation till their partnership accounts were adjusted. (*McNair, J.*) GOPIRAM BHOTICA *v.* BALMUKUND BANSHIDHAR. **44 C W N. 811**

——Chap. XIII-A, R. 5 (b)—*Form of affidavit.*

Under R. 5 (*b*) of Chap. XIII-A of the Calcutta High Court Rules, the affidavit of the defendant should be either on oath or solemn affirmation. (*McNair, J.*) MAHADEOLAL *v.* BISSESWARLAL. **44 C.W.N. 808.**

——Chap. XIII-A, Rr. 6 and 9—*Leave to defend—Grant of—Merits of defence—Duty of Judge to consider.*

A Judge who is hearing an application under Chap. XIII-A of the Rules of the Calcutta High Court, should consider all the facts which are brought before him in the affidavits and direct his attention as to whether the defence is or is not a good defence and after such consideration decide whether leave should be given to defend unconditionally or subject to terms which may include the furnishing of security. (*McNair, J.*) MAHADEOLAL *v.* BISSESWARLAL. **44 C.W.N. 808.**

——Ch. XVI R. 27—Effect of—Application by defendant for review of judgment—Limitation—Computation—Period between date of decree and date of filing of decree—Right to exclude. *See* LIMITATION ACT, S. 12 (2). **41 C.W.N. 129.**

——Ch. XVII, Rr. 37 and 38—Ex parte *application for payment out—When may be made—Registrar's certificate showing prior applications for attachment—Procedure — Decree transferred to another Court—If remains subsisting application for attachment.*

An application for payment out may be made under Ch. XVII, R. 37 and *ex parte* only where the Registrar's certificate properly so called shows no prior applications for attachment. If it shows such prior applications, the applicant must apply for rateable distribution under R. 38. In such case notice, unless dispensed with by the Court, must be given to all persons whose names appear in the Registrar's certificate. The fact that there has been a particular decree which has been transferred to another Court does not affect the matter for the purpose of the certificate, and for purpose of rateable distribution it remains a subsisting application for attachment. (*Ameer Ali, J.*) HONGKONG AND SHANGHAI BANKING CORPORATION *v.* PARESH LAL ROY. **I.L.R. (1939) 1 Cal. 40=183 I.C. 444=12 R.C. 158=43 C.W.N. 169=A.I.R 1939 Cal. 485.**

——Ch. XIX, Rr. 1 and 2—*Effect of—Suit filed by certificated guardian of lunatic without affidavit of competency—Jurisdiction of Court to entertain suit—Subsequent filing of such affidavit—Effect of.*

The effect of R. 2 read with R. 1 of Chapter XIX of the Original Side Rules is to require that the next friend of a person of unsound mind, in whose name the suit is instituted, shall make an affidavit to be presented with the plaint that he has no interest directly or indirectly adverse to that of the lunatic. But where a suit is instituted by a certificated guardian of the lunatic, who alone is competent to act as his next friend under O. 32, R. 4 read with O. 32, R. 15, C. P. Code, the

failure to present an affidavit of competency by him along with the plaint does not oust the jurisdiction of the Court to entertain the suit. It is no more than a defect of procedure which the Court itself has power and discretion to cure. When the defect is subsequently cured by the filing of an affidavit of competency, the filing of such affidavit relates back to the date when the plaint was presented to the Court and admitted by it. (*Khundkar, J.*) RABINDRA NATH MITTER *v.* PURNA CH. SINHA. **I.L.R. (1938) 1 Cal. 531 =42 C.W.N. 422.**

——Ch. XX, Rr. 3, 4 and 9—Notice of motion —Grounds of exception—If must be served with notice. *See* CALCUTTA HIGH COURT RULES (ORIGINAL SIDE), CH. XXVI, R. 89. **41 C.W.N. 425.**

——Ch. XX, R. 13—*Scope and implication—Order for commission to examine witness—Direction that costs of application to be costs in the cause—Dismissal of suit with costs as against one defendant—Right of latter to costs of commission.*

On an application by one of the defendants for a commission to examine a party, an order was made directing such examination and that "the costs of and incidental to the application including the fee to counsel will be costs in the cause." But there was no direction given as to how the costs of the commission were to be dealt with. Subsequently the plaintiff having failed to furnish security for costs ordered by the Court, the suit was dismissed with costs against a particular defendant. The latter applied to have his bill of costs taxed and claimed the commission costs as against the plaintiff.

Held, (1) having regard to the terms of the application for commission and the order thereon, it must be held in accordance with the practice of the Calcutta High Court that the costs of the commission must be borne by the several parties; (2) that the costs which the plaintiff was ordered to pay by the order dismissing the suit must be held to be costs of the suit exclusive of the costs of the commission.

Held, further, that the Court had to construe the orders as they stood and was precluded from investigating the circumstances in which the commission was granted and the conduct of the various parties with regard to it. (*Panckridge, J.*) EASTERN TAVOY MINERALS CORPORATION, LTD. *v.* CLARKE KAWLINS KER & CO. **40 C.W.N. 1068.**

——Ch. XXI, R. 17—*Application for passing of accounts by previous receiver—Objection by subsequent receiver on basis of wilful neglect—Latter, if should be relegated to suit.*

Although as a general rule, the Court would direct the person objecting to a receiver's account on the basis of wilful neglect to bring a suit, if he is so advised, rather than deal with the matter on an application for the passing of accounts, it does not follow that in every case that procedure should be adopted. Where a subsequent receiver is calling in question the accounts, of the former receiver and a *prima facie* case of neglect and default on the part of the latter has been made out on the affidavits. it would be undesirable if not impossible, to force the subsequent receiver to bring a suit for accounts on the basis of wilful default. (*McNair, J.*) RADHA PROSAD DHUR *v.* ASHUTOSH DHUR. **43 C.W.N. 488.**

CAL. H. C. R. AND O. (Ori. Side) (1933), Ch. XXVI.

——Ch. XXVI—*Registrar's report—Confirmation of—Part of it not on point referred to him.*

Where the Registrar has in making his report regarding the payment of alimony *pendente lite* made certain suggestions regarding the amount of maintenance which should be paid for the children, latter part of the report cannot be confirmed if there was no reference to the Registrar on that point. (*Sen, J.*) LOBO *v.* LOBO. **187 I.C. 252=12 R.C. 554=A.I.R. 1939 Cal. 753.**

——Ch. XXVI, Rr. 4 and 8—*Applicability.*

P obtained a decree in 1920 for a certain amount less one definite sum and less an unascertained amount. The suit was referred to the Assistant Referee to take the accounts and the further hearing of the suit was adjourned until after the reference. *P* appealed from the decree. The suit was remanded to the trial Court for a finding on certain facts and there was a finding by the Court. Nothing however was done for about nine years, when *P's* appeal appeared in the peremptory list. *P* did not appear and his appeal was dismissed as also an application by him for restoration of his appeal. The reference was never in fact proceeded with and nothing of any consequence was done by *P* for a space of five years. After five years, in 1934, a summons was taken out by the defendant *D* asking for an order that the suit be dismissed with costs for want of prosecution. *P* secured an adjournment and was directed to file an affidavit. Nothing was done by *P*. He again sought an adjournment on the next date, it was refused and *P's* suit was dismissed for want of prosecution.

Held, that the matter was governed by the provisions of Rr. 4 and 8, Ch. 26, Reference Rules. It was *P's* duty and not that of the defendant *D* to file the decree in the Account Department of the Registrar's Office and that was not done and therefore the lower Court was justified in coming to the conclusion that *D* could apply under R. 8 for dismissal of the suit for want of prosecution; even if *D* were held to be the party having the carriage of reference it was open to *P*, on *D* not having taken any steps within 30 days, to ask under 2nd part of R. 8 to have all proceedings under the reference stayed and to obtain a final decree in the suit which he could execute. After the lapse of 30 days *P* had a present right to enforce the decree as he could have applied to have the reference stayed and a final decree made *P's* position was analogous to that of a mortgagee who obtained a preliminary decree and then did nothing towards putting himself into the position of being able to obtain a final decree before the lapse of 12 years from the date of the preliminary decree. (*Derbyshire, C.J. and Costello, J.*) RAMPROSAD SURAJMALL *v.* MOTILAL. **63 Cal. 612=A.I.R. 1936 Cal. 53.**

——Ch. XXVI, R. 50—*Construction and scope—Powers of Registrar and of Court.*

All that R. 50 of Ch. 26 of the Original Side Rules of the Calcutta High Court does is to authorise the Registrar taking the reference to apply for the opinion of the Court on a question arising in the reference. On that application the Court or Judge may give his opinion in the form that is contemplated by the rule itself. Nowhere in the Rule is any authority given to the Judge to pronounce a "judgment". (*Derbyshire, C. J. and Costello, J.*) GANGADHAR BAGLA *v.* KANTI CHUNDER MUKHERJEE. **(1937) 1 Cal. 149=40 C.W.N. 1264.**

CAL. H. C. R. AND O. (Ori. Side) (1933), Ch. XXVII, R. 36.

——Ch. XXVI, R. 50—Reference under—Scope—Ruling of Judge on—Nature of—If "judgment"—Appeal *See* LETTERS PATENT (CAL.), CL. 13. **40 C.W.N. 1264.**

——Ch. XXVI, R. 89 and Ch. XX, Rr. 3, 4 and 9—*Notice of motion to vary Registrar's report—Grounds of exceptions——If must be served with notice.*

In the case of notice of motion, it is not necessary nor is it right for the applicant to serve his notice accompanied by copies of the grounds to be used in support. What the provisions of Chapter XX which deals with motions contemplate is that the notice of motion should apprise the opposite party of the materials which the applicant intends to use, and then if the opposite party so wishes, he can obtain a copy of those materials under R 9 by asking the applicant to supply it on payment of the usual charges. It follows, therefore, that a notice of motion to vary a report of the Registrar under Chap. XXVI, R. 89 need not be accompanied with the grounds of exceptions relied on by the party objecting to the report. Even if the proper practice were for the grounds of exceptions to accompany the notice, it does not necessarily follow that failure to serve the grounds with the notice would involve the dismissal of the application 62 Cal. 369, Over. (*Costello and Panckridge, JJ.*) RENUBAL *v.* MAHAMAYA DASSI. **I.L.R. (1937) 1 Cal. 293=41 C.W.N 425.**

——Ch. XXVII, R. 10—Execution—Attachment before judgment—Order for continuance by Court at time of decree—If one in execution—Application by plaintiff under O. 39, R. 6 for sale of goods attached before judgment—If one for execution of decree. *See* C. P. CODE, O. 21, R. 11. **40 C.W.N. 1317.**

——Ch. XXVII, R. 15—*Condition of sale requiring purchaser to assume certain facts owing to inability of vendor to obtain necessary title deeds or documents—Effect of.*

A condition of sale requiring the purchaser to assume certain facts, specifically added, owing to the inability of the vendor to obtain particular title deeds or documents, is not misleading if the vendor believes the facts, to be true, even though the condition is intended to cover a flaw which goes to the root of the title. The conditions of sale settled under R. 15 were in the form set out in rules and orders, as far as condition 14 is concerned, condition 15 was specifically added to the effect that the purchaser shall accept the recitals in the abstract of title, owing to the inability of the decree-holder to obtain the necessary title deeds and documents. Where the formalities of Rr. 15 and 20, Ch. 27 of the Calcutta High Court (Original Side) Rules, are complied with, and the purchaser signs the bidding paper and purchases the property, he cannot subsequently be allowed to impeach the sale on the ground of want or defect in title. (*McNair, J.*) SAGOREMULL *v.* GAJADHAR MANSINGHA. **168 I.C. 244=9 R.C. 797=A.I.R 1936 Cal. 703**

——Ch. XXVII, R. 36—*Scope and effect.*

R. 36 of Ch. 27 of the Calcutta High Court Rules and Circular Orders deals only with costs

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of inquiry and cannot, by implication, deprive the purchaser of any rights that he may have *aliunde*. (*McNair, J.*) JANAKI NATH ROY *v.* AKSHOY CH. BOSE. **173 I.C. 404=10 R C. 514=A.I.R. 1937 Cal. 417.**

——**Ch. XXVII, R. 38**—*Time to complete purchase extended -Result of inquiry showing that purchaser was justified in objecting to title—Purchaser also waiving right to rent—Purchaser, if can be called upon to pay interest*

The latter part of R. 38 of Ch. 27, Calcutta High Court Rules and Circular Orders, leaves the Judge an ample discretion as to the terms which may be imposed on the purchaser as to the payment of interest or waiving his right to the rent up to the time when the question of title is determined. In an auction-sale, there being dispute as to the title to the property and the consequent inquiry the time for the purchaser to complete the purchase was extended by one month from the date of the completion of the enquiry. The result of the enquiry showed that the purchaser was justified in objecting to the title. He also waived his right to the rents.

Held, that in these circumstances it would be inequitable that the purchaser should pay interest. (*McNair, J.*) JANAKI NATH ROY *v.* AKSHOY CH. BOSE. **173 I C. 404=10 R.C. 514=A.I R. 1937 Cal. 417.**

——**Ch. XXVII, R 57**—*"Encumbrancer"*.

The word "encumbrancer" in R. 57 of Ch. 27 of the High Court (Original Side) Rules should not be restricted to a prior encumbrancer. (*McNair, J.*) ANNAPURNA ROY *v.* RAM RANJAN MULLICK. **40 C.W.N. 1173.**

——**Ch. XXXII, Rr. 2, 3 and 34**—Application for review—When made—Date of presentation of memorandum of review or date of being dealt with by Court *See* C. P. CODE, O. 47, R 1 (1) (*a*). **41 C.W.N. 129.**

——**Ch XXXV, R. 29**—*Caveat—Notice by caveator that he merely insists on will being proved in solemn form—Plea of undue influence—Propriety.*

Obiter.—A notice by a person entering a caveat in probate proceedings stating that he merely insists on the will being proved in solemn form of law and that he intends only to cross-examine the witnesses produced in support of the will, does not fall within the terms of R. 29 of Ch. 35 of the High Court Rules (O.S.) when the plea raised is that the will is not a genuine will and has been obtained by undue influence. A plea of undue influence or fraud is inconsistent with such a notice. (*Derbyshire, C. J. and Costello, J.*) MAHI TOSH GHOSH *v.* MALIN BIHARI DATTA. **63 Cal. 914=170 I.C. 888=10 R.C. 220=A.I.R. 1937 Cal. 163.**

——**Ch. XXXVI, R. 77, Item 22**—*Attachment by sheriff under precept—Subsequent compromise of claim—Sheriff's right to poundage—C. P. Code, S.* 46.

A precept issued by a Court at Benares under S. 46, C. P. Code, to the Registrar of the High Court in Calcutta for attachment of a certain property in Calcutta, is a step in execution proceedings. If consequent upon that precept the sheriff attaches the property concerned and the claim is compromised thereafter, the sheriff is entitled to poundage under the second part of

CAL. H. C. R. AND O. (Ori. Side) (1933), Ch. XXXVI, R. 77.

Item No. 22, R. 77 of Chapter XXXVI of the Rules of the Original Side of the Calcutta High Court. (*Derbyshire, C. J. and Lort Williams, J.*) FAZAL ELLAHI *v.* SREE KRISHNA MAKKAR. **I.L.R. (1940) 1 Cal. 309=44 C.W.N. 273=A.I.R. 1940 Cal. 369.**

——**Ch. XXXVI,R 77 (22)**—*"Levy"—Meaning of—Attachment before judgment followed by decree—Application by plaintiff for sale—Insolvency of judgment-debtor and claim by Official Assignee for delivery of goods—Duty of Sheriff to draw over goods attached—Right to poundage—Presidency Towns Insolvency Act, S.* 54.

The word "levy" has been defined as being the turning of the goods into money, and when there has been no levy in that sense, no poundage can be said to have been earned by the Sheriff under sub-R. 22 of R. 77 of Ch. 36 of the High Court (Original Side) Rules. It is perfectly clear that when the bankruptcy of a judgment-debtor supervenes after seizure of the goods but before sale by the Sheriff, the latter must hand over the property to the Official Assignee under S. 54 of the Presidency Towns Insolvency Act, and he is not entitled to any poundage under R. 77 (22). The mere fact that the Court attaching goods before judgment passes an order at the time of the decree that the attachment should continue or that the plaintiff applies for sale of the attached goods prior to the order adjudicating the judgment-debtor an insolvent cannot make any difference and cannot confer on the Sheriff a right to claim poundage. (*McNair, J.*) GRAHAM TRADING CO. (INDIA), LTD. *v.* NAROTTAMDAS HARJEEBANDAS. **I.L.R. (1937) 2 Cal. 1=40 C.W.N. 1317.**

——**Ch. XXXVI, R. 77 (22)**—*Sheriff's poundage—Calculation—Basis—Decree amount or sale proceeds.*

The practice of charging sheriff's poundage on the amount realized by the sale is wrong. The sheriff is entitled to poundage, not on the amount realized by the sale, but upon the sum payable to or received by the execution creditor as the result of the levy, and it must be calculated on that basis. (*McNair, J.*) SHUSHAMABALA DASEE *v.* POORNACHANDRA DE **63 Cal. 621.**

——**Ch. XXXVI, R. 77 (22)**—*Sheriff's right to poundage—Compromise after attachment by him under precept—C. P. Code, S.* 46.

Under R. 77 of Ch. XXXVI of the Rules of the Original Side of the Calcutta High Court, there are two sets of circumstances under which the sheriff can get poundage: (*a*) where the sheriff levies a sum in execution and (*b*) where the claim in respect of which the sheriff has taken steps to levy a sum in execution is satisfied, compromised or settled. It is clear that the alternative portion of the rule is not independent of the first portion; the sheriff is not entitled to poundage under the second portion of the rule unless he has taken steps under the first portion of the rule with a view to levying a sum in execution. An attachment by the sheriff pursuant to a precept under S. 46, C. P. Code, is merely a step taken to facilitate execution, it is not a step taken in the proceedings in execution. If, therefore, subsequent to such attachment and before an application for execution is made, the decree is satisfied under a compromise between

CAL. H C. R. AND O. (Ori. Side) (1933), Ch. XXXVI, R. 82.

the parties, the sheriff is not entitled to any poundage. (*Sen, J.*) RAI KISSENJI *v.* SRI KISSEN MAKKAR. **I.L.R. (1939) 2 Cal. 370=185 I C. 811 =12 R.C. 415=A.I.R 1940 Cal. 26.**

——**Ch. XXXVI, R 82**—*Special Referee's fees —Taxation—Effectual meeting—Computation.*

For the purpose of taxation of fees of a Special Referee, every four hours' engagement should be taken to be an effectual meeting and the Referee's fees must be taxed on that basis. (*Derbyshire, C. J. and Costello, J.*) MANMATHA NATH CHATTERJEE *v.* SARAT CHANDRA MULLICK. **40 C.W.N. 1133.**

——**Ch. XXXVI, 1st Sch., Item 58**—*Money paid to sheriff—Right of Accountant-General to commission.*

Ch. XXXVI, 1st Sch.. Item 58 of the Rules and Orders of the Calcutta High Court entitles the Accountant-General to commission only upon monies actually paid into Court. Payment to sheriff is not payment into Court. (*McNair, J.*) CO-OPERATIVE HINDUSTAN BANK, LTD. *v.* TARINIBALA DASSEE. **43 C.W.N. 600.**

——**Ch. XXXVI, 4th Sch., R. 77, Item 22**—*Settlement of claim—Sheriff's right to poundage.*

Under Ch. XXXVI, 4th Sch., R. 77, Item 22 of the Original Side Rules, the sheriff is entitled to poundage only on the claim of the execution creditor as settled. The rule does not give him a commission upon the settlement of every man's claim or even upon the settlement of every claim made in the suit The word 'claim' in item 22 means claim of the execution creditor. (*McNair, J.*) CO-OPERATIVE HINDUSTAN BANK, LTD. *v.* TARINIBALA DASSEE. **43 C W.N. 600.**

——**Ch. XXXVI, Item 5**—*Suit for infringement of patent—Counter-claim for its revocation —Permissibility.*

In England it is quite usual and proper to add to the defence in an action for infringement a counter-claim for revocation of the Letters Patent alleged to have been infringed. But in this country although S. 128, C. P. Code, gives power to a High Court to make rules for procedure in suits by way of counter-claims, no appropriate rules of procedure by way of counter-claim have as yet been made by the Calcutta High Court and, therefore, it must be taken that it is not possible for the defendant in the infringement suit to set up a counter-claim for revocation. He must for the purpose of obtaining revocation take separate proceedings. It is, however, just and convenient that procedure by way of counter-claims—analogous to that which obtains in England—should be provided for and made permissible in all suits for infringement of patents. (*Costello and Panckridge, JJ.*) ERNEST BRUNO NIER *v.* GEORGE REINHART. **43 C.W N. 697.**

——**Ch. XXXVIII, R. 33**—*"Time appointed by the rules"—Time, fixed by Registrar under Ch. VIII, R. 4.*

The time fixed by the Registrar in any particular case, acting under Chap. VIII, R. 4, is "time appointed by the rules" within the meaning of Chap. XXXVIII, R. 33. (*Panckridge, J.*) MONI SETHANI *v* RADHA KISSEN. **42 C W.N. 601.**

——**Ch. XXXVIII, R. 33**—*Time for filing written statement—Power of Court to extend—Defendant not asking for extension within period fixed by summons.*

CAL. IMPROVEMENT ACT (1911), S. 31.

R. 33 of Chap. XXXVIII of the Original Side Rules gives the Court power to extend the time for filing a written statement in cases where the defendant has neglected to take out any summons asking for extension within the period fixed by the writ of summons for filing the written statement. R. 2 of Chap. IX as amended was not intended to exclude Chap. IX from the purview of Chap. XXXVIII, R. 33. (*Panckridge, J.*) MONI SETHANI *v.* RADHA KISSEN. **42 C.W N. 601.**

CALCUTTA IMPROVEMENT ACT (V OF 1911), Preamble—*Acquisition made by Improvement Trust—If acquisition for Government.*

Acquisition of land made by the Calcutta Improvement Trust under the Calcutta Improvement Act amounts to acquisition made by or on behalf of the Governmeut. (*D. N. Mitter and Patterson, JJ.*) RADHA NATH MAITY *v.* KRISHNA CHANDRA MUKERJEE. **165 I.C. 682=9 R.C. 445 =63 C.L.J. 72=40 C.W.N. 722=A.I.R. 1936 Cal. 249.**

——**Preamble**—*'Award'—Order of Tribunal rejecting reference under S. 49 (1) of Land Acquisition Act—Appealability.*

A decision on or a determination by the tribunal of any matter which has no reference to compensation in some form or other does not come under the definition of "award". No appeal, therefore, lies from an order of the tribunal rejecting a reference made to it under S. 49 (1) of the Land Acquisition Act. (*Mukherjea and Roxburgh, JJ.*) MAHESH MISSIR *v.* PROVINCE OF BENGAL. **I.L.R. (1939) 2 Cal. 349=187 I C. 872=12 R.C. 623= 70 C.L J. 81=A.I.R. 1939 Cal. 733.**

——**S. 3**—*Appeal under—Finding of tribunal—When can be attacked.*

A finding of fact arrived at by the tribunal which is not supported by any evidence can be attacked in an appeal filed under the provisions of S. 3 of the Act. (*D. N. Mitter and Patterson, JJ.*) SECRETARY OF STATE *v.* MAHIP SHA. **41 C. W.N. 437.**

——**Ss. 24 and 78**—*Abandonment of acquisition —Powers of Board.*

There is nothing in the Land Acquisition Act or the Calcutta Improvement Act which prevents the acquiring authority from abandoning a portion of the land in respect of which proceedings under the Act have been taken. S. 78 of the Calcutta Improvement Act lays down only one particular method of abandoning acquisition. Under S. 24 of that Act very comprehensive powers are given to the Board of Trustees and they can enter into and perform any contract which they might consider necessary for carrying out the purposes of the agreement. The Board is not, therefore, prevented from abandoning any portion of the land intended to be acquired in pursuance of a contract entered into under the provisions of S. 24 of the Act. (*Mukherjea and Roxburgh, JJ.*) MAHESH MISSIR *v* PROVINCE OF BENGAL. **I L R. (1939) 2 Cal. 349=187 I.C. 872 =12 R.C. 623=70 C.L.J. 81=A.I.R. 1939 Cal. 733.**

——**S. 31 (b)**—*Rules under.*

Rules contained in the Calcutta Improvements Trust Accounts Manual (1933) are only directions and would not be operative if they are in conflict with the fundamental rules made under S. 31 (*b*) of the Calcutta Improvement Act. (*McNair, J.*)

CALCUTTA IMPROVEMENT ACT (1911), S. 35.

NONI GOPAL GANGULY *v.* CALCUTTA IMPROVEMENT TRUST. **174 I.C. 756=10 R C. 712=A.I.R. 1938 Cal. 43.**

——**Ss. 35, 154 and 160 (e)**—*Chairman's power to institute legal proceedings—Delegation of—Legality.*

The delegation by the Chairman of his power under S. 154 of the Calcutta Improvement Act to institute legal proceedings is a direct contravention of the provisions of S. 35 of that Act, and it cannot be treated as a mere omission defect or irregularity within the meaning of S. 160 (*e*) of the Act. (*Bartley ard Khundkar, JJ.*) AMARENDRA NATH SHAW *v.* SATYA PRAKAS SARKAR. **I.L.R. (1938) 2 Cal. 546=177 I.C. 885=11 R.C. 288 =42 C W.N. 894=39 Cr.L.J. 962=A.I.R. 1938 Cal. 692.**

——**S. 68**—Improvement Trust entering into contract with owner as to price of land to be acquired—Power of Collector to make award on basis of such contract—Owner, if precluded from leading evidence relating to market value before Improvement Tribunal. *See* LAND ACQUISITION ACT, Ss. 11 AND 18. **41 C.W.N. 1291.**

——**Ss. 78 and 24**—Abandonment of acquisition —Powers of Board. *See* CALCUTTA IMPROVEMENT ACT, Ss. 24 AND 78. **70 C.L.J. 81.**

——**S. 78**—*Power of trustees to abandon portion of land from acquisition—Owner agreeing to such abandonment—Monthly tenant, if entitled to compensation for machinery lying on exempted portion—Land Acquisition Act, S.* 48.

It is permissible to the Board of trustees of the Calcutta Improvement Trust to abandon a portion of the land in respect of which notice under S. 9 of the Land Acquisition Act was given from acquisition. There is nothing in either S. 78 of the Calcutta Improvement Act or in S. 48 of the Land Acquisition Act preventing such piecemeal acquisition. Where such abandonment is by agreement with the owner of the land, a monthly tenant cannot claim compensation for the machineries which lie on the exempted portion of the land. (*D N. Mitter and Patterson. JJ.*) SECRETARY OF STATE *v.* MAHIP SHA. **41 C.W.N. 437.**

——**S. 171**—*Construction—Conviction of several persons to fine—Total fine exceeding Rs.* 500—*Legality.*

Under S 171 of the Calcutta Improvement Act where more persons than one join in erecting a building, each of them is clearly liable to a fine extending to Rs. 500. The fact that the total fine imposed on all the accused together amounts to more than Rs. 500 does not render the fine illegal. (*Jack, J.*) ADITENDRA NATH MITTER *v.* BHUPATHI BHUSHAN SEN. **166 I.C. 457=9 R.C. 531=38 Cr. L.J. 219=63 C L.J. 582=40 C.W.N. 799=1936 Cr.C. 646=A.I.R. 1936 Cal. 373.**

——**S. 171**—"*Re-erect*"—*Meaning of.*

The word "re-erect" in S. 171 of the Calcutta Improvement Act must be given its ordinary meaning only, and not the meaning of that word as defined in the Calcutta Municipal Act. (*Jack, J.*) ADITENDRA NATH MITTER *v* BHUPATHI BHUSHAN SEN. **166 I.C. 457=9 R.C. 531=38 Cr.L.J. 219=63 C.L.J. 582=40 C.W.N. 799= 1936 Cr.C. 646=A.I.R. 1936 Cal. 373.**

CALCUTTA MUNICIPAL ACT (III OF 1899), S. 461—*Right to swim in public tanks—Repeal of this section—Effect of—Bengal General Clauses Act (I of* 1899), *S.* 8.

The Calcutta Municipal Act, 1899, by virtue of the provisions contained in S. 461, operated to take away the "right to swim" in the public tanks at Calcutta which every citizen originally had before the passing of the Act. S. 8, Bengal General Clauses Act, 1899, has this effect that the repeal of the Calcutta Municipal Act of 1899 by Act of 1923 does not occasion a revival of a right which had been taken away by that Act. (*Costello and Panckridge, JJ.*) ANIL KUMAR BHATTA CHARYA *v.* CORPORATION OF CALCUTTA. **I.L.R. (1937) 2 Cal 397=A.I.R 1937 Cal. 603.**

——**S. 538**—*Suit against Corporation for damages for nuisance—Limitation — Limitation Act, S. 23 and Art.* 36.

Plaintiff filed a suit in 1938 against the Corporation for damages for nuisance alleging that his house remained untenanted since 1933 due entirely to the nuisance. The nuisance continued *de die in diem.*

Held, (*i*) that the cause of action arose from day to day, as the injuries arose from day to day; (*ii*) that if under Art. 36 or S. 23 of the Limitation Act, a claim to damages was barred before the period of limitation fixed in that Act, it was equally barred on the lapse of the period prescribed in the special Act (*i.e.*) S. 538 of the Calcutta Municipal Act, in other words, the position on the Limitation Act must be ascertained with the special section read into it; (*iii*) that, therefore, the *terminus a quo* for damages was four months prior to the date of the suit; (*iv*) that in India there was no provision under which the Court could grant damages for a period after the filing of the suit except in the special case provided for by O. 20, R. 12, C. P. Code. (*Ameer Ali, J.*) BASIL *v.* CORPORATION OF CALCUTTA. **71 C.L.J. 403.**

——**(III of 1923)**, *Assessment and Collection Manual—Rules in—If have the force of law.*

The rules in "The Assessment and Collection Manual of the Corporation of Calcutta" published in 1917 cannot be described as statutory rules. These rules have not the force of law and may be ignored if inconsistent with the provisions of the Act, *i.e.*, the Calcutta Municipal Act. (*S. K. Ghose and Guha, JJ.*) CORPORATION OF CALCUTTA *v.* MOTI CHAND CHOWDHURY. **63 Cal. 1215=40 C.W.N. 818.**

——**Ss. 24 (3), 26 and 46 (b), Proviso**—*Scope —Voter entered in electoral roll more than once under different numbers—Right to vote more than once—Voting several times—If offence.*

It cannot be held that Proviso (*b*) to S. 46 of the Calcutta Municipal Act does not justify the exercise of a second vote by a voter, even though it is wrongly recorded in the electoral roll. When a person's name is entered more than once in the electoral roll, in different capacities, such as, first as *mutwalli*, secondly as executor, and again in his personal capacity, each entry suggests a different capacity, although that person does not come within the category of the exceptions in the proviso to S. 24 (3) of the Municipal Act. An elector entered more than once in the electoral roll under different numbers does not commit any offence if he exercises the right of voting under the different numbers as he is entitled to

do so under S. 26 of the Act. (*McNair, J.*) NASIRUDDIN AHMED *v.* HAJI MAHAMMAD YUSUF. **63 Cal. 825=165 I.C. 489=9 R.C. 404=40 C. W.N. 741.**

——**S. 46**—*Construction—Election petition filed within eight days—Addition of further particulars of corrupt practices after such time—If barred.*

All that is intended by S. 46 of the Calcutta Municipal Act is that the application to have an election set aside should be filed at an early date (*i.e.*, within eight days of the publication of the result of the election in the Gazette), so that the person charged should be in a position to meet the charge at once, and to enable the matter to be enquired into, so that if the charges are upheld there may be a fresh election without delay. The application should, no doubt, set out the grounds on which the validity of the election is challenged; but there is nothing in the section which prevents the applicant after eight days from giving further particulars of corrupt practices, by adding other incidents of personation, etc. The guiding principle in ordinary particulars to prevent the defence from being embarrassed, and to insure a fair and effectual trial, has also to be followed in election petitions under the Act. There is nothing in the Act to show a departure from that principle. (*McNair, J.*) NASIRUDDIN AHMED *v.* HAJI MAHAMMAD YUSUF. **63 Cal. 825=165 I.C. 489=9 R.C 404=40 C.W.N. 741.**

——**S. 46**—*Election petition—Law applicable.*

In dealing with election petitions under the Calcutta Municipal Act, the Court is concerned solely with the provisions of that Act and the rules which have been framed thereunder. It may be that with regard to question of procedure, that the provisions of C. P. Code are applicable. (*McNair, J.*) CHAMPALAL GUPTA *v.* MOHANLAL MAKKAR. **41 C.W.N. 488.**

——**S. 46**—*Election petition—Limitation—Days on which offices of Court are open but Court does not sit—Court, if closed on such days.*

The names of successful candidates in the municipal elections were published in the Calcutta Gazette on 9th April, 1936. The High Court was closed for the Easter vacation from the10th to 17th April inclusive The following day was Saturday on which the offices of the Court were open, but the Court did not in fact sit. On an application filed in the High Court under S. 46 of the Calcutta Municipal Act more than eight days after the publication of the Gazette,

Held, that as that section provided for an application to be made to the Court, that application must be made to a Judge in open Court and if the Judges of the Court were not sitting in open Court, as in the present case, on the Saturday immediately after the vacation, the application might be legally made on the first day on which the Judges were so sitting. (*McNair, J.*) K. P. SINHA *v.* JATINDRA NATH BISWAS. **169 I.C. 921=10 R.C. 58=41 C.W.N. 492.**

——**S. 46**—*Election petition—Particulars withheld from petition but set out in affidavit in reply—If to be excluded.*

Particulars which were deliberately withheld from the election petition but set out in the affidavit in reply should not be excluded at the time of the trial. The respondent is, however,

entitled to an adjournment and to costs of the day as of a hearing. (*McNair, J.*) K. P. SINHA *v.* JATINDRA NATH BISWAS. **169 I.C. 921=10 R.C. 58=41 C.W.N. 492.**

——**S. 46**—*Election petition—Who can file.*

It is only a person enrolled in the electoral roll of the constituency in which the validity of the election is questioned who is entitled to make an application under S 46 of the Calcutta Municipal Act. (*McNair, J.*) CHAMPALAL GUPTA *v.* MOHANLAL MAKKAR. **41 C.W.N. 488.**

——**S 46**—*Election petition dismissed on withdrawal by petitioner—Subsequent application by another person for substitution of his name for original petitioner—Maintainability.*

After the dismissal of an election petition on the petitioner withdrawing the same, an application by another person for substitution of his name in place of the petitioner who has withdrawn is not maintainable, as there is no application on the record in which the applicant's name could be substituted. Further, where the applicant, who is a defeated candidate, was a respondent in the original petition and had every opportunity of knowing what had taken place and of making any application within time, there is no justification for the substitution being made. (*McNair, J.*) CHAMPALAL GUPTA *v.* MOHANLALMAKKAR. **41 C.W.N. 488.**

——**Ss. 71, 72 and 74**—*Resolutions passed by District Committee with regard to matters not delegated—Validity.*

The provisions of S. 71 read with S. 72, Calcutta Municipal Act, show that a District Committee is a Standing Committee, a particular kind of Standing Committee of the Corporation and therefore can only deal with such matters as have been each year, that is to say year by year, delegated to them by the Corporation. They cannot deal with any matter which has not been properly delegated to them under one or other of those sections. The District Committee can only deal with such matters as are delegated to them under the provisions of S. 72. Even then the proceedings of a District Committee are subject to confirmation or revision of the Corporation itself unless, as indicated in the Proviso to S. 71, at the time of the delegation the Corporation has directed that the decision of the District Committee shall be final. The resolutions therefore with regard to matters not delegated to the District Committee by the Corporation, if passed by the District Committee and also those passed by its Sub-Committee, and confirmed by the District Committee, are void and inoperative. (*Costello and Panckridge, JJ.*) ANIL KUMAR BHATTACHARYA *v* CORPORATION OF CALCUTTA. **I. L.R. (1937) 2 Cal. 397=174 I.C. 91=10 R.C. 618=A.I.R 1937 Cal. 603.**

——**S. 127**—*Letting value of land—Evidence afforded by return or assessment of neighbouring premises—Admissibility—Evidence Act, S. 9.*

In arriving at the letting value of a building the evidence afforded by the return or by the accepted assessment of the neighbouring premises is admissible in evidence. Those are relevant facts and admissible under S. 9, Evidence Act. (*R. C. Mitter and Mahamad Akram, JJ.*) CORPORATION OF CALCUTTA *v.* PROVINCE OF BENGAL. **I.L.**

R. (1940) 1 Cal. 168=44 C.W.N. 165=A.I.R. 1940 Cal. 47.

——S. 127—*Part of building ordinarily let and another part not ordinarily let—Method of valuation.*

S. 127 of the Calcutta Municipal Act classifies all buildings as falling within one or other of two mutually exclusive categories. Each building is treated as a unit of valuation and its value must be ascertained in conformity with one or other of the two prescribed methods. It cannot be valued as to one part under paragraph (*a*) of S. 127 as being ordinarily let and as to another part under paragraph (*b*) as not being ordinarily let. The only provision for dividing a building is in S. 135 which authorises the executive officer "in his discretion" to assess any portion of a building separately from the other portions of such building, whereupon the portion so separately assessed is to be deemed a separate building. Where the executive officer has not adopted this course, the entire building must be treated as a single building forming a unit of assessment. Of a building as to one half ordinarily let and as to one half not ordinarily let it cannot be predicated that it is ordinarily let, for only a part of it is ordinarily let. But it can be predicated of it that it is not ordinarily let if only a part of it is ordinarily let, for the whole of it is not ordinarily let. The test must be applied to every building as a whole and one or other method of valuation must be applied to it as a whole. There may possibly be cases where the portion ordinarily let or the portion not ordinarily let is so negligible in proportion to the whole of the building that the building might on the principle of *de minimis* be reasonably held as a matter of fact to be not ordinarily let or ordinarily let as the case may be. (*Lord Macmillan.*) CORPORATION OF CALCUTTA *v.* MOTI CHAND. 66 I.A. 42=I.L.R. (1939) 1 Cal. 277=11 R.P.C. 129=69 C.L.J. 249=I.L.R. (1939) Kar. 73 (P.C.)=1939 M.W.N. 998=50 L.W. 766=179 I.C. 324=20 P.L.T. 121=43 C.W.N. 314=A.I.R. 1939 P.C. 20=(1939) 1 M.L.J. 396 (P.C.).

[On appeal from 40 C.W.N. 818.]

——S. 127 (a) and (b)—*Small portion of building let out and rest in direct occupation of owner—Method of assessment.*

Where a small portion of a building is let out to tenants and the rest is in direct occupation of the owner himself assessment cannot be made partly under S. 127 (*a*) and partly under S. 127 (*b*). The assessment must be made under S. 127 (*b*) only. A.I.R. 1939 P.C. 20, Foll. (*R. C. Mitter and Mahamad Akram, JJ.*) CORPORATION OF CALCUTTA *v.* PROVINCE OF BENGAL. I.L.R. (1940) 1 Cal. 168=44 C.W.N. 165=A.I.R. 1940 Cal. 47.

——S. 127 (a) and (b)—*Construction and scope—Lands and buildings—Separate valuation—Necessity for.*

For the purpose of meeting the requirements of S. 127 (*b*), the value of the land appertaining to the premises to be assessed has to be separated and kept distinct from the value of the building standing on the land. The law requires that the valuation is to be on a basis other than the rental basis as indicated in S. 127 (*a*), and the rough and ready method of taking value of the land and building together on a rental basis, and then

giving a deduction of the value of the building, is not a method contemplated by law, in view of the definite provisions laying down rules for determining the value of different classes of property for the purpose of assessment to rates and taxes as stated in the different and separate Cls. (*a*) and (*b*), S 127. (*Guha and Nasim Ali, JJ.*) CORPORATION OF CALCUTTA *v.* JARDINE SKINNER & Co. I.L.R. (1937) 1 Cal. 576=169 I.C. 811=10 R.C. 34=41 C.W.N. 200=A.I.R. 1937 Cal. 14.

——S. 127 (b)—*Beneficial occupation—Method of assessment.*

It is not right to say that beneficial occupation is the sole consideration and that it is the beneficial occupier and the value of his occupation that has to be considered in all cases of assessment under the Calcutta Muncipal Act. The Calcutta Municipal Act provides in S. 127 (*b*) an independent method, a method independent of the method prescribed in Cl. (*a*) of that section. Beneficial occupation determined in terms of letting value is not the principle adopted by the Legislature in Cl. (*b*). In cases coming under Cl. (*b*) it would not therefore be legitimate to hold that the word "value" in that clause does not mean "sale value" and excludes the same. For finding the "estimated present value of land" the assessor is not bound to find out the reasonable hypothetical rent of the whole premises. Observations of *Roy, J*, in A.I.R. 1927 Cal. 659, Disappr. (*R. C. Mitter and Mahamad Akram, JJ.*) CORPORATION OF CALCUTTA *v.* PROVINCE OF BENGAL. I.L.R. (1940) 1 Cal. 168=44 C.W.N, 165=A.I.R. 1940 Cal. 47.

——S. 127 (b)—*Valuation of land—Principle as to.*

It is a well-established principle in rating that property must be valued as it exists at the time when the rate is made, with all the existing circumstances *rebus sic stantibus*. Prospective appreciation or depreciation cannot be taken into account by the rating authority, nor can a hypothetical state of things be assumed. The Legislature intended to give effect to this principle only when it used the phrase "land valued with the building" in S. 127 (*b*). The land is not to be regarded as bare land It is to be taken in its present disposition and valued. (*R.C. Mitter and Mahamad Akram, JJ.*) CORPORATION OF CALCUTTA *v.* PROVINCE OF BENGAL. I.L.R. (1940) 1 Cal. 168=44 C.W.N. 165=A.I.R. 1940 Cal 47.

——Ss 129 to 142—*Applicability—Liability to assessment not admitted.*

Ss. 129 to 142 of the Calcutta Municipal Act presuppose that the land and buildings which are the subject-matter of the valuation are assessable to the consolidated rate. In other words, they have reference to those cases where the liability to assessment and valuation is admitted, and the objection is to the quantum of the valuation, or the method in which it has been carried out. They have no application to cases where the right of the corporation to levy the consolidated rate is itself questioned. (*Panckridge, J.*) GARRISON ENGINEER OF FORT WILLIAM *v.* CORPORATION OF CALCUTTA. 42 C.W.N. 789.

——S. 133 (i)—*Applicability.*

X died leaving a will whereby he dedicated absolutely to certain deities the outer portion of

the premises in suit, and bequeathed the remaining portion to his sons in equal shares absolutely. The two portions of the premises were not structurally separate and independent and were not capable of separate enjoyment. The assessment of these two portions was divided under S. 133, Cl. (*i*) of the Calcutta Municipal Act.

Held, that the assessment was properly dealt with as coming under the provisions of S. 133, Cl. (*i*) of the Act, and that no such division of the assessment was possible except under its provisions. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* BON BEHARY SHAW. **I L.R. (1938) 2 Cal. 209=178 I.C. 99=11 R.C. 320=42 C.W.N. 582=A.I.R. 1938 Cal. 581.**

——**S. 139**—"Valuation"—*Meaning of.* *See* CALCUTTA MUNICIPAL ACT, SS. 141 AND 139. **43 C.W.N. 789.**

——**Ss. 141 and 139**—*Appeal to Small Cause Court—Question of liability to assessment—Jurisdiction of Court to deal with.*

In an appeal under S 141 of the Calcutta Municipal Act, the Small Cause Court has jurisdiction to deal not only with the quantum of the assessment but also with the question of liability to assessment.

Per *Nasim Ali, J.*—There is nothing in S. 139 of the Calcutta Municipal Act to limit the meaning of the word "valuation" to the quantum of valuation only. It includes the whole process of valuing as well. (*Derbyshire, C.J. and Nasim Ali, J.*) PROVINCE OF BENGAL *v.* CORPORATION OF CALCUTTA. **I.L.R. (1939) 2 Cal. 23=43 C.W.N. 789=185 I.C. 546=12 R.C. 381=A.I.R. 1939 Cal. 706.**

——**S. 157**—*Consolidated rate—Liability of owner—Allegations in plaint—Duty of Corporation.*

In order to make the owner of the premises liable for the entire consolidated rate under S. 157 of the Calcutta Municipal Act, it is necessary that the Carporation should show that the premises in question are ordinarily occupied by more than one person holding in severalty. Where the plaint filed by the Corporation contains no such allegation, nor is any reference made to S. 157, the Court would be right in refusing to allow the provisions of that section to be invoked by the corporation. The fact that some evidence bearing on the question of occupation by more than one person holding in severalty is adduced at the trial, is not sufficient to remedy this initial defect. (*Patterson, J.*) THE CORPORATION OF CALCUTTA *v.* SUSIL KUMAR GHOSE. **I.L.R. (1937) 2 Cal. 353=170 I.C. 373=10 R.C. 148=41 C.W.N. 701 =A.I.R. 1937 Cal. 363.**

——**(as extended to Howrah), S. 175**—*"Carries on trade"—Meaning of—Company with headquarters at Calcutta but having storage godown in Howrah and distributing goods in Howrah — Orders received and negotiations arranged in Calcutta—If carries on trade at Howrah—Necessity for licence in Howrah.*

A company receiving goods from various places and storing it in their premises in Howrah and distributing the goods to their customers from Howrah, the transactions being negotiated at Calcutta which is their headquarters undoubtedly carries on trade in Howrah within the meaning of S. 175 of the Calcutta Municipal Act

as extended to Howrah. It carries on business both in Howrah and in Calcutta, although the headquarters are in Calcutta and the business is arranged at Calcutta and although only deliveries are made from Howrah on delivery orders sent from the Calcutta Office. Whether the Company collects its profits at Howrah or not, the Company is liable to take out a licence from the Howrah Municipality. Storage and delivery of the goods in Howrah cannot be considered to be merely auxiliary to the business in Calcutta. (*Jack, J.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD. *v.* HOWRAH MUNICIPALITY. **63 Cal. 1203=166 I.C. 402=9 R.C. 513 =38 Cr.L.J 203=40 C.W.N. 766=1936 Cr.C. 699 (2)=A.I.R. 1936 Cal. 477.**

——**(as extended to Howrah), S. 175**—*Licence fee—If a tax on profits—Object of licence—Place of collection of profits—If relevant.*

The taking out of a licence for carrying on a trade is not meant to be a tax on the profits of the trade, but is intended to control the carrying of a trade. The liability to take out a licence does not depend on profits being made or collected at the place where the licence is taken out. (*Jack, J.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD *v.* HOWRAH MUNICIPALITY. **63 Cal. 1203=166 I.C. 402=9 R.C. 513 =38 Cr.L.J. 203 =40 C.W.N. 766=1936 Cr.C. 699 (2)=A.I.R 1936 Cal. 477.**

——**S. 175**—*"Trade"—Meaning of.*

The word "trade" in S. 175 of the Calcutta Municipal Act is used in its ordinary sense, that is to say, exchange of goods for money or goods for goods with the object of making a profit. (*Jack, J.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD. *v.* HOWRAH MUNICIPALITY. **63 Cal. 1203=166 I C. 402=9 R C. 513 =38 Cr.L.J. 203=40 C W.N. 766=1936 Cr.C. 699 (2)=A.I.R. 1936 Cal. 477.**

——**S. 205**—*Consolidated rate payable by occupier—First charge.*

Under S. 2 5 of the Calcutta Municipal Act, the consolidated rate payable in respect of any land or building is a first charge upon that land or building, whether it is payable by the owner or the occupier. But there is no first charge on the movable property within or upon such land or building except in respect of rates payable by the owner of such movable property. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* FOOLCOOMARI DASI. **I.L.R. (1937) 1 Cal. 251=169 I.C. 474=10 R C. 3=41 C.W.N. 353.**

——**S. 205**—*Division of assessment of premises under S. 133 (i)—Whole of premises, if subject to statutory charge.*

If the division of assessment of the premises is made under the provisions of S. 133, Cl. (*i*) of the Calcutta Municipal Act, the whole of the premises so affected remain subject to the statutory charge. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* BON BEHARY SHAW. **I.L R. (1938) 2 Cal 209=178 I.C. 99=11 R.C. 320=42 C.W. N. 582=A.I.R. 1938 Cal. 581.**

——**S. 250**—Scope—Breach of statutory duty under—If bar to claim for damages in respect of damage caused by negligent acts of another. *See* TORT—NEGLIGENCE. **63 Cal. 592.**

——**S. 271**—*"Premises"—Meaning of—Land belonging to one person built upon by another—*

CAL. MUNICIPAL ACT (1923), S. 359.

Notice on owner of land—Non-compliance—Liability to conviction.

"Premises" intended for human habitation in S. 271 of the Calcutta Municipal Act mean structures or buildings on the land and not the land itself. The requisition under S. 271 is therefore to be made on the owner of the structures erected upon the land and not on the owner of the land itself, where the land and the structures belong to different persons. The owner of the land who fails to comply with a requisition served on him under S. 271 cannot therefore be convicted. (*Jack, J.*) MST. KHAIRUNNISSA BIBI *v.* CORPORATION OF CALCUTTA 165 I.C 130=37 Cr.L.J. 1087=9 R.C. 345=40 C.W N. 797.

——S. 359 (6) and (7)—*Particular portion of bustee land declared non-bustee—Bustee standard plan with regard to that land—If nullity.*

Although a particular portion of the bustee may be declared non-bustee, the bustee standard plan with regard to that land is not a nullity, it is for the Corporation then to determine how much, if anything of the standard plan, should be cancelled or varied. The same view applies to streets. Sub-S. (6) of S. 359 applies to such a case. So also, sub-S. (7) has been specifically inserted to meet the case of a street, projected but not actually made, the alignment of which affects the land which under the earlier sub-sections is declared to be non-bustee. When the land is 'de-bustified', *i.e.*, declared a non-bustee land under the earlier sub-sections of S 359, the practical question arises as to how far, if at all, the alignment of the projected street should be varied. (*Ameer Ali, J.*) KISSORY LALL *v* CORPORATION OF CALCUTTA. A.I.R. 1938 Cal. 870.

——S. 363—*Erection of portion of building without sanction—Order of demolition by Magistrate—Power of latter to enquire into propriety of withholding sanction.*

The erection of a portion of a building without obtaining the written permission of the Corporation is unlawful and the Corporation can under S. 363 of the Calcutta Municipal Act obtain from the Municipal Magistrate an order for the demolition of such erection. The section does not give the Magistrate any power to enquire as to whether the sanction was righly withheld or not. (*Jack, J.*) TARAK CHANDRA DAS *v.* CHIEF EXECUTIVE OFFICER, CORPORATION OF CALCUTTA. 180 I.C. 907=11 R C. 757=68 C.L.J. 476=43 C.W. N. 186=A.I.R. 1939 Cal. 285.

——S. 363—*Reconstruction of building without sanction—Power of Magistrate to order demolition.*

The mere fact that there has been reconstruction of a building without sanction does not give the Magistrate a right to order demolition under S. 363 of the Calcutta Municipal Act, unless there has been erection of a new building or alteration of or addition to the existing building within the meaning of the Act. (*Derbyshire, C.J. and Bartley, J.*) SHAIK BADLI MEAH *v.* CORPORATION OF CALCUTTA. 180 I.C. 824=11 R.C. 756=40 Cr.L. J. 528=68 C L J. 478=A.I.R. 1939 Cal. 289.

——Ss. 363 and 493—*Scope and effect—Proceeding for demolition under S. 363—Magistrate, if can impose fine under S. 493.*

The proreedings under Ss. 363 and 493 of the Calcutta Municipal Act are mutually exclusive and resort to the one bars resort to the other. The Corporation is, therefore, prevented from instituting proceedings under both sections in the same case, whether simultaneously or one after the other. It does not, however, follow from this that if in a proceeding for demolition of an unauthorised structure under S. 393 the Magistrate is satisfied on the facts that a case exists for imposing a fine under S. 493, he may not make such a penal order, either in lieu of or in addition to an order for demolition. (*Biswas, J.*) CORPORATION OF CALCUTTA *v.* BANGSHIDAR BIDASARIA. 173 I.C. 303=10 R C. 496=41 C.W.N. 1373=A. I.R. 1938 Cal. 36.

CAL. MUNICIPAL ACT (1923), S. 371.

——Ss. 365 (1), 488 and Sch. XVII, R. 58—*Stop order to applicant who has obtained benefit of presumption raised in R. 58—Legality—Disobedience of stop order—If offence.*

An order to stop the progress of work under S. 365 (1) of the Calcutta Municipal Act can only be issued in cases in which work is proceeding unlawfully in the manner indicated in S. 363 of the Act If an applicant for permission to erect a building who has become entitled to the benefit of the presumption raised in R. 58 of Sch. XVII continues the building operations without contravening any of the provisions of the Act or of any rules or bye-laws made thereunder, even after belated refusal of his application by the Corporation, the work in connection with the erection of the applicant's building is not carried on unlawfully within the meaning of S. 365. The Corporation has, therefore, no authority to issue a stop order under that section to the applicant. If the applicant disregards an illegal stop order issued against him, he commits no offence under S. 365 read with S 488 of the Act. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. 44 C.W.N. 561=A.I.R. 1940 Cal. 292.

——S. 371—*Rubbish dumped by Corporation on private land with owner's consent—Liability of owner for nuisance.*

Per *Mukherjea, J.*—If the act of the Corporation in dumping refuse on a private land is privileged as coming within the protection afforded by S 371 of the Calcutta Municipal Act, the owner of that land by consenting to the act, cannot be made liable in law for nuisance, if any. (*Mukherjea and Roxburgh, JJ.*) CHENDRA SEKHAR *v* CORPORATION OF CALCUTTA. 186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I.R. 1940 Cal. 67.

——S. 371—*Selection of place for disposal of rubbish—Duty of Corporation—Interference by Civil Court.*

Per *Mukerjea, J.*—S. 371 of the Calcutta Municipal Act does not merely give a permissive right to the Corporation to do certain things; it enjoins the performance of certain obligatory duties. It cannot be said therefore that the powers under the section must be exercised without creating a nuisance. As this is an obligatory duty, it must be performed, but both in the selection of the site for disposal of the rubbish as well as in the method of doing its work, the Corporation is bound to see that the least practicable nuisance is created. The Corporation has got to approach the question from this standpoint, and if after considering these matters, it comes to a

particular decision as to the site for disposal of its rubbish, the decision in the absence of any *mala fides* on its part should not be interfered with by Civil Courts. (*Mukherjea and Roxburgh, JJ.*) CHANDRA SEKHAR *v.* CORPORATION OF CALCUTTA. **186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I.R. 1940 Cal. 67.**

——**S. 371 (1)**—*Place of dumping—If must be public or belong to Corporation.*

Under S. 371 (1) of the Calcutta Municipal Act, the place of dumping rubbish need not be public in the sense that it must be one which can be availed of or used by the public in general nor is it necessary that it must be owned by the Corporation itself. The section does not purport to say anything as to whom the place of depositing or disposing of the rubbish should belong, nor does it authorise the Corporation to do any act which would amount to trespass under ordinary law. An arrangement for controlled dumping in insanitary tanks belonging to private owners on receipt of payment from them by the Corporation is fully covered by its terms. (*Mukherjea and Roxburgh, JJ.*) CHANDRA SEKHAR *v.* CORPORATION OF CALCUTTA. **186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I.R. 1940 Cal. 67.**

——**S. 371 (1), Proviso (1)**—*Sanction under—If must be express.*

The sanction of the Corporation or of the officer to whom it has delegated its powers required under the first proviso to S. 371 (1) of the Calcutta Municipal Act need not be in any particular form or manner. If the Chief Executive Officer to whom the Corporation has delegated its powers under S. 371 approves in his note the line of action proposed in the report of the Chief Engineer as to the selection of a site as a convenient place for disposal of rubbish, his note can certainly be taken as an implied sanction or approval of the scheme. The defect, so far as the sanction is concerned, is in form, not in substance; and no Court would on that ground alone stay the hands of the Corporation. But in cases which affect the health and comfort of a large body of rate-payers, it is eminently desirable that sanction is taken in clear and express terms. (*Mukherjea and Roxburgh, JJ.*) CHANDRASEKHAR *v.* CORPORATION OF CALCUTTA. **186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I.R. 1940 Cal. 67.**

——**S. 391**—*Applicability—Cinemas—Necessity for licence—Cinematograph Act (II of 1918)—Scope—Power of Corporation to prevent opening of unlicensed Cinema.*

A cinematograph show is one which comes under the words "Theatre or Circus or other similar place of public resort or amusement" in S. 391 of the Calcutta Municipal Act. The applicability of the section to a cinema is not excluded by reason of the Cinematograph Act of 1918. Consequently the owner of cinema show is under an obligation to take out a licence from the Corporation before he opens a cinema or keeps it open. The fact that the owner has already taken out a licence from the Commissioner of Police as required by the Cinematograph Act does not relieve him of the necessity to take out a license from the Corporation. When such an owner fails to take out a licence, the Corporation is entitled under the law to suppress or prevent the

opening of the cinema, and its act in so doing is neither illegal nor *ultra vires* so as to entitle the aggrieved owner to claim damages. (*Ghose, J.*) THE CORPORATION OF CALCUTTA *v* THE MONARCH BIOSCOPE CO. **162 I.C. 666=8 R.C. 623=40 C.W.N. 497=63 C.L.J. 1=A.I.R. 1936 Cal. 145.**

——**Ss. 406 and 407**—*Scope—Storing mustard oil in transit as broker.*

Even if the accused had been storing the mustard oil in transit as a broker, that would not take him out of the provisions of Ss. 406 and 407. Sub-S. (1) of these two sections is wide enough to cover such a case. (*S. K Ghose, J.*) RAMESWAR MARWARI *v.* AMAR NATH SINHA. **187 I.C. 425=41 Cr.L.J. 460=12 R.C. 594=A.I.R. 1940 Cal. 76.**

——**S. 418 (2)**—*When can be invoked.*

Under S. 418 (2) of the Calcutta Municipal Act, the burden of proving that any food in respect of which the prosecution is instituted was not intended for human consumption is, no doubt, on the accused. But before this section could be invoked, it is necessary for the prosecution to prove that what is charged as unwholesome food is "food." (*Biswas, J.*) GANGADHAR NATH MULL *v.* CORPORATION OF CALCUTTA. **I.L.R (1938) 1 Cal. 558=172 I.C. 954=10 R.C. 481=39 Cr.L.J. 259=41 C.W.N. 1344=A.I.R. 1938 Cal. 15.**

——**S. 478 (17)**—*Bye-law 2 issued under Bengal Act III of 1899—Conviction for its violation—When sustainable.*

In order to sustain a conviction in respect of a violation of bye-law 2 which was issued under S. 559 (18) of the Bengal Act III of 1899 and which remains in operation even after the repeal of that Act by virtue of S. 25 of the Bengal General Clauses Act, it is necessary for the prosecution to show that the accused person has actually deposited building materials, etc., in a public street or on any land vested in the corporation and that he did so against the terms of a licence granted to him in this behalf or without having obtained a licence at all. Where, therefore, the evidence adduced is to the effect that the deposit of the building materials was actually made by a contractor who was engaged in building a house for the person in whose favour a licence for the deposit of building materials was issued by the corporation, and there is nothing to indicate that the licensee was actually responsible for depositing the materials, the conviction of the latter for violating the terms of his licence granted under the bye-law is not sustainable. (*Edgley, J.*) BENODE BEHARI DHAR *v.* THE CORPORATION OF CALCUTTA. **43 C.W.N. 223.**

——**S. 498 and Sch. XVII, R. 62**—*Grant of permission to build—Effect of—Permission infringing Sch. XVII.*

A written permission by the corporation to erect a building is not in itself conclusive proof that all the requirements of the Act have been complied with in respect of that building. It does not, protect the owner of the building from attack under S. 362 (1) (*c*), if the building is actually in breach of the provisions of the Act. If the building infringes any of the requirements of the Act, the permission would appear to be a nullity in face of S. 319. (*B. N. Rau, J.*) SHEIKH

CAL. MUNICIPAL ACT (1923), S. 498.

NIZAMUDDIN *v* CORPORATION OF CALCUTTA. **70 C. L.J. 311=A.I.R. 1940 Cal. 11.**

——**S. 498 and Sch. XVII, R. 62**—*Grant of permission—When becomes effective—Resolution by standing committee granting permission to build—Revocation—Power of Committee before issue of permission.*

Under S. 498 of the Calcutta Municipal Act, every written permission granted under the Act must be signed by the Executive officer, and if there has been any delegation by the Executive officer under S. 12 (3), by the Municipal officer to whom the delegation has been made. In other words, the grant does not become effective until there is a properly signed written permission. If, therefore, the Building Standing Committee discovers, after it has confirmed its resolution granting permission to erect a building but before a written permission has actually issued over the signature of the proper officer, that the confirmation is in breach of the Act, there is nothing in the Act to prevent the Committee undoing the mistake and revoking the confirmation. (*B. N. Rau, J.*) SHEIKH NIZAMUDDIN *v.* CORPORATION OF CALCUTTA. **70 C.L J. 311=A.I.R. 1940 Cal. 11.**

——**S. 523 (1)**—*Construction—"Court having local jurisdiction, or by the High Court, as the case may be'—Meaning and effect of—Suit involving dispute as to compensation—Amount beyond jurisdiction of small cause suit—Jurisdiction—High Court or Small Cause Court.*

As between different Courts of Small Causes, *i,e.*, Presidency and Provincial, the jurisdiction is local whereas between the Court of Small Causes on the one hand and the High Court on the other the jurisdiction depends only upon the value of the claim. The words "having local jurisdiction" in S. 523 (1) refer to the Court of Small Causes only. The words "as the case may be" refer to the pecuniary jurisdiction. Where, in a suit involving a dispute as to compensation, the amount claimed is in excess of the pecuniary jurisdiction of the Court of Small Causes, the latter has no jurisdiction to entertain the suit though it may have local jurisdiction to deal with the matter. The High Court alone has jurisdiction to entertain and decide the suit. (*Nasim Ali and Henderson, JJ.*) BHUIYAN BHASKAR CHANDRA *v.* CORPORATION OF CALCUTTA. **40 C.W.N. 764.**

——**S. 533**—*Accused absent on adjourned date—Magistrate, if can hear case in his absence.*

The terms of S. 533 cannot be extended against the accused in such a manner as to entitle the Magistrate to hear the accused in his absence because he had not appeared on the subsequent date on which the case was adjourned. In the absence of any provision to the contrary in the Calcutta Municipal Act, the provisions of the Criminal Procedure Code will apply, and therefore the Magistrate is not entitled to hear and determine the case in his absence on the subsequent date. (*Jack, J.*) KUSUM KUMARI DEBI *v.* CORPORATION OF CALCUTTA. **168 I.C. 698=9 R.C. 872=38 Cr.L.J. 632=A.I.R. 1937 Cal. 218.**

——**S. 534**—*Prosecution under S. 488—Limitation—Duty of Corporation.*

The provisions of S. 534 indicate the necessity for prompt action and delay in prosecuting an offence under the Act is as little to the interest of the Corporation as to that of the rate-prayers. Where, therefore, Corporation seeks to prosecute certain persons under S. 488 of the Act and there is no evidence whatever on the record to show when the offence was first brought to its notice, it is the duty of the Corporation to establish that the proceedings although begun at a late stage are still within the period prescribed by law. (*Guha and Bartley, JJ.*) CORPORATION OF CALCUTTA *v.* GANESH CHANDRA DHAR. **1936 Cr.C. 111=A.I.R. 1936 Cal. 20.**

CAL. MUNICIPAL ACT (1923), S. 559.

——**S. 535**—*Applicability — Complaint against Corporation—Injunction against Corporation—If can be granted—Specific Relief Act, S. 56 (i).*

Per *Mukherjea, J.*—S. 535 of the Calcutta Municipal Act is not intended to be applicable to a case where the complaint is against the Corporation itself. But even if it is held that it allows a proceeding against the corporation and the Magistrate can pass a suitable order for removing or abating a nuisance committed by it, the Civil Court is not in any way prevented from granting injunction against the Corporation in a proper case of actual or apprehended nuisance under S. 56 (i) of the Specific Relief Act. (*Mukherjea and Roxburgh, JJ.*) CHANDRASEKHAR *v.* CORPORATION OF CALCUTTA. **186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I.R 1940 Cal. 67.**

——**S. 538**—*Suit against corporation—Necessity for notice.*

Upon proper construction of S. 538, the limitation or qualification "in respect of any act purporting to be done under this Act" occurring in that section applies not only to persons acting under the directions of the corporation, or any Municipal officer or servant but also to the corporation, any Municipal officer or servant. Therefore for a suit against the corporation notice contemplated by S. 538 is only required if the suit is in respect of acts purporting to be done under the Act. (*Lort Williams, J.*) BANDO & Co *v.* CALCUTTA CORPORATION. **184 I C 562=12 R.C. 246 (2)=43 C. W.N. 1173=AI.R. 1939 Cal. 614.**

——**S. 538**—*Suit against corporation for money payable under contract—Notice, if necessary.*

Each issue arising out of the construction and application of sections in statutes relating to the powers and obligations of public authorities, must be decided upon the facts and the wording of the section in each particular case. Generally speaking such provisions in statute relating to the powers and obligations of public authorities do not apply to suits arising *ex contractu*. Therefore a suit against the corporation for money alleged to be payable under contract done and materials supplied and for compensation for breaches of those contracts is not one 'in respect of acts purporting to be done' by the corporation under the Act and is as such maintainable without previous notice to the corporation. (*Lort Williams, J.*) BANDO & Co. *v.* CALCUTTA CORPORATION. **184 I. C. 562=43 C.W.N. 1173=12 R. C. 246 (2)=A.I.R. 1939 Cal. 614.**

—— **S. 559 (52)**—*Bye-law 13—Validity.*

A bye-law to be valid must be (1) *intra vires* the authority who makes it; (2) certain in its terms and positive; (3) not repugnant to the general law, and lastly (4) reasonable. S. 559 (52), Calcutta Municipal Act, 1899, only gives the

CAL. MUNICIPAL ACT (1923), Sch. I.

Corporation power to make bye-laws with regard to places of amusement and entertainment owned or conducted by third parties. It does not give the power to make bye-laws for the regulation of public parks vested in the Corporation or of the tanks and bathing places situated therein. So bye-law 13, as framed under S. 559 (52) of the Act, restraining persons from bathing in public tanks or ponds in a public square or garden, does not fulfil the conditions required for a bye-law to be valid, and not being reasonable and *intra vires* of the authority of the Corporation to make such a bye-law under S. 559 of the Act, bye-law 13 as framed is void and inoperative. Such a bye-law being void and inoperative as from the time it was made, S. 25, Bengal General Clauses Act, does not apply and make the bye-law operative after framing of the new Act III of 1923, which repealed Act III of 1899, under which the bye law was framed. (*Costello and Panckridge, JJ.*) ANIL KUMAR BHATTA CHARYA *v.* CORPORATION OF CALCUTTA. **I.L.R. (1937) 2 Cal. 397=174 I.C. 91=10 R C. 618=A.I.R. 1937 Cal. 603.**

——**Sch. I**—*'Fort William'—Meaning of.*

The words 'Fort William' in Sch. I of the Calcutta Municipal Act bear their natural and ordinary meaning, that is to say, the fortification and the area enclosed thereby. They do not mean the area defined from time to time by notification of the Governor-General in Council under the Fort William Act. (*Panckridge, J.*) GARRISON ENGINEER OF FORT WILLIAM *v.* CORPORATION OF CALCUTTA. **42 C.W.N. 789.**

——**(as extended to Howrah), Sch VI, Cl. 5**—*Applicability—Business carried on partly in one and partly in another Municipality.*

Sch VI, S. 5 of the Calcutta Municipal Act as extended to Howrah only provides for cases where the trade is carried on at different premises within one and the same Municipality. It does not apply to the case of a company which carries on its trade partly in one and partly in another Municipality. In the latter case separate licences are required in each Municipality. (*Jack, J.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD. *v.* HOWRAH MUNICIPALITY. **63 Cal. 1203=166 I.C. 402=9 R.C 513=38 Cr L.J. 203=40 C.W.N. 766=1936 Cr.C. 699 (2)=A.I.R. 1936 Cal. 477.**

——**Sch. XVII, R. 56**—*Decision by Corporation on objections after applicant shows cause—Time limit.*

No precise period has been prescribed by the rules within which the corporation must come to a formal decision as to the validity of the objections raised by it after cause has been shown by the applicant. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A.I.R. 1940 Cal. 292.**

——**Sch. XVII, Rr. 56 and 57**—*Requisition to applicant to expose foundations for inspection—Nature of—Second inspection held within 15 days without further requisition—If entitles Corporation to extension of time for issuing order.*

If on an application under R. 52 for permission to erect a building the Corporation issues a requisition to the applicant to expose the foundations of the building in order that they might be inspected, the requisition is one for information under R. 56 and it cannot be regarded as an objection. The corporation cannot, by merely holding a second inspection within fifteen days of the first inspection without the issue of any requisition for further information under R. 56 (3), acquire a right to an extension of time within which it must issue the prescribed written order under the latter part of R. 57. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A.I.R. 1940 Cal. 292.**

CAL. MUNICIPAL ACT (1923), Sch. XVII, R. 58.

——**Sch. XVII, R. 56 (1)**—*Requisition for information and documents—Power of Corporation to issue.*

R. 56 (1) of Sch. XVII should not be read separately from the remaining sub-rules of R. 56 for the purpose of conferring upon the Corporation a general residuary power to issue requisitions for information and documents at any time, even after the procedure laid down in the remaining sub-rules of R. 56 has been exhausted. Sub-R. (1) is clearly intended to be read with the remaining sub-rules of R. 56 and the Corporation can issue only one initial requisition mentioning all the points on which further information and documents are required and all objections which it may find it necessary to formulate. Such a requisition must be issued within fifteen working days after the receipt of the application under R. 52 for permission to execute the work. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A.I.R. 1940 Cal. 292.**

——**Sch. XVII, Rr. 57 and 58**—*Order of Corporation—Communication to applicant—Necessity for.*

R. 57 contains no express provision on the point whether the order of the Corporation, in order to be valid, must be communicated to the applicant, but having regard to the particular emphasis which is laid on the expression "grant permission" in Rr. 57 and 58, it would appear to have been the intention of the framers of the rules that, as soon as the Corporation has come to a decision on this point, its order must be communicated to the applicant and the presumption raised under R. 58 will become operative if the order is not communicated to the applicant within fifteen working days of the date of the decision (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A.I.R. 1940 Cal. 292.**

——**Sch. XVII, R. 57**—*"Fifteen days"—If means working days.*

The period of fifteen days which is prescribed by R. 57 of Sch. XVII refers to working days. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A.I.R. 1940 Cal. 292.**

——**Sch. XVII, R. 58**—*Benefit of presumption—Waiver.*

An applicant for permission to erect a building who has become entitled to the benefit of the presumption raised in R. 58 of Sch. XVII, has a right to continue his building operations even after a belated refusal of his application by the Corporation, and he is not liable to be criminally prosecuted for it. He cannot be deemed to waive this right to immunity in respect of a criminal prosecution merely because he submits to the Corporation after the order of refusal, an application agreeing to abide by its decision. (*Edgley,*

CAL. MUNICIPAL ACT (1923), Sch. XVII, R. 62.

J.) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A.I.R. 1940 Cal. 292.**

——**Sch. XVII, R. 62**—Grant of permission to build—Effect of—Permission infringing Act. *See* CALCUTTA MUNICIPAL ACT, S. 498. **70 C.L.J. 311.**

——**Sch. XVII, R. 62**—Resolution by Standing Committee granting permission to build—Revocation—Power of Committee before issue' of permission. *See* CALCUTTA MUNICIPAL ACT, S. 498. **70 C L.J. 311.**

CALCUTTA POLICE ACT (IV OF 1866), S. 3—*Betting slips—If instruments of gaming.*

As gaming includes wagering or betting, the slips, if they are used for the express purpose of facilitating betting operations, would certainly come within the mischief of the definition of "instruments of gaming" under S. 3. (*Mukherjea, J.*) ABDUT LATIF *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 672=67 C.L.J. 82=174 I.C. 974=10 R C. 741=39 Cr.L.J. 500=A.I.R. 1938 Cal. 237.**

——**S. 3**—*"Common gaming house"—Meaning of.*

The premises occupied and kept by a person are not "common gaming house" within the meaning of S. 3 unless some fixed charge or profit accrues regularly to such person apart from any fluctuating profit which may occur from time to time between the gamblers themselves as a result of gambling. (*Cunliffe and Henderson, JJ.*) BEATTIE *v.* EMPEROR. **169 I.C. 87=9 R.C. 895=38 Cr.L.J. 706= A.I.R 1937 Cal. 84.**

——**S. 3**—"Keeping a common gaming house." *See* **42 C.W.N. 1222.**

——**S. 3**—*"Common gaming house"—Meaning of—Requisites to be proved—"Instruments of gaming"—Gain—Meaning.*

To make a house, room, place, etc., a common gaming house, two things are necessary, namely: (1) instruments of gaming must be kept or used there, and (2) such instruments must be kept or used for the purpose of gain of the person owning, occupying, using or keeping such house, room, place, etc. To satisfy the first element, slips of paper used for the purpose of facilitating betting operations, *e.g.*, papers on which bets had been recorded are instruments of gaming. To satisfy the second element, the intended gain must result to the person owning, occupying, using or keeping the place otherwise than as a result of betting by him. The chance of profit or the actual profit made by the successful gambler is not such gain as it is contemplated. To take instances: an entrance fee charged by a person owning, occupying or using the place would be gain within the meaning of the section. A commission charged by such a person from persons winning wagers as a result of betting in that place is such gain. A person running a proprietary club where he allows gaming or betting would be the keeper of a common gaming house, whether he himself takes part in betting or not. Such a person makes profit or intends to make profit from his establishment which profit is not the direct result of betting in which he himself may have taken part. The mere chance of winning wagers is not gain. (*Henderson and R.C. Mitter, JJ.*) RANGA LAL SEN *v.* EMPEROR. **41 C.W.N. 123 =I.L.R. (1937) 1 Cal. 610=167 I.C. 771=9 R.C. 759= 38 Cr.L.J. 449=1936 Cr.C. 1124=A.I.R. 1936 Cal. 788.**

CAL. POLICE ACT (1866), S. 44.

——**Ss. 3 and 45**—*Offence—Accused accepting marked five rupee note to put on certain horses—Liability to conviction.*

Accused was found to have accepted a marked five rupee note with instructions to put on certain horses. He was found with two others. There were no incriminating articles except a racing book.

Held, that the evidence was insufficient to show that the place was a common gaming house within the meaning of S. 3 and that the mere acceptance of the marked five rupee note was not sufficient to find the accused guilty under S. 45. (*Jack, J.*) HARI CHARAN BANERJEE *v.* EMPEROR. **163 I.C. 152=37 Cr..LJ. 851=8 R.C. 697 (3)=1936 Cr.C. 582=A.I.R. 1936 Cal. 355.**

——**Ss. 3 and 47**—*Slips containing records of bets on past events—If instruments of gaming.*

Slips of paper containing records of bets which are no longer current bets, the events on which the bets had been made having already taken place, are not instruments of gaming as defined in the Calcutta Police Act, when there is no proof that the accused or any of them were in the house in which they were found for the purpose of receiving money shown to be due by the slips. Such slips, therefore, are not in themselves evidence under S. 47 of the Act that the house in which the accused were found is a common gaming house or that they were there for the purpose of gaming. (*Jack, J.*) TORCATO *v.* EMPEROR. **66 C.L.J. 165=41 C.W.N. 1346.**

——**Ss. 44 and 47**—*Accused not present at search—Betting materials found in room—If sufficient for his conviction.*

Where a person charged with keeping a common gaming house and permitting a room to be used as a gaming house is not present in the room at the time of the search, the provisions of S. 47 do not apply to him personally and the mere fact that betting material is found in the room is not sufficient to warrant his conviction under S. 44 when there is no evidence to show that the accused is the owner or occupier of the room or that he realizes commission for allowing other persons to use the room for the purpose of carrying on the business of betting. (*Henderson, J.*) RANJIT SINGHA ROY *v.* EMPEROR. **174 I.C. 845=39 Cr.L.J. 493=10 R.C. 731=A.I.R. 1938 Cal. 273.**

——**Ss. 44 and 3**—*Keeping common gaming house—Liability of unauthorised book maker—Proof of profit apart from profits of betting—If necessary.*

It is forbidden by law to keep a book and to receive bets on hores-racing outside the enclosure of the race course. If a person takes a room outside the race course and receives bets from any one who comes to him and in fact makes himself an unauthorised book-maker, he would come under the mischief of keeping a common gaming house as defined in S. 3 of the Calcutta Police Act. In such a case, it would not be necessary to show that he, as an unauthorised book maker, was making any profit beyond what he made by his book-making. (*M.C. Ghose, J.*) KALI CHARAN BANIA *v.* S,K. BRAHMACHARI. **42 C.W.N. 1232.**

CAL. POLICE ACT (1866), S. 44.

——Ss. 44 and 47—*Search under S. 47—Effect and value of—If conclusive as to guilt.*

The result of a search under S. 47 is that there is evidence before the Magistrate which would entitle him as a Court of fact to find that the searched premises were in fact a common gaming house; but it would not entitle him in absence of direct evidence to presume anything whatsoever with regard to the guilt of a person charged with a specific offence under S. 44. (*Cunliffe and Henderson, JJ.*) BEATTIE *v.* EMPEROR. **199 I.C 87=9 R.C. 395=38 Cr.L.J. 706=A.I.R. 1937 Cal. 84.**

——S. 45—*Onus of proof.*

In a case under S. 45 the onus clearly lies upon the prosecution to show that the house in which the accused was found was a common gaming-house as defined in S. 3 of the Act. In order to satisfy the requirements of this section, it would be for the prosecution to show that instruments of gaming were kept or used in that house for the profit or gain of the person, owning, occupying, using or keeping such house. (*Edgley, J.*) SUDHIR KUMAR ROY *v.* EMPEROR. **182 I.C. 986=12 R.C. 123 (2)=40 Cr.L.J. 724=A.I.R. 1939 Cal. 326.**

——Ss. 46 and 47—*Canstruction and scope—Necessity of strict construction and compliance.*

Per *Henderson, J.*—In order to determine whether S. 47 of the Act applies it is necessary to see whether there was a proper search within the provisions of S. 46. Unless the provisions of these sections are strictly interpreted and complied with, there can be no doubt that persons will be improperly convicted. (*Henderson and R.C. Mitter, JJ.*) RANGA LAL SEN *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 610=167 I C. 771=9 R.C. 759=41 C.W.N. 123=38 Cr.L.J. 449=1936 Cr.C. 1124=A.I.R. 1936 Cal. 788.**

——S. 47—*Betting slips seized from a room—If evidence of common gaming house.*

Betting slips written out for the purpose of facilitating betting not within the race course with licensed book makers or by means of a totalisator, but within a room where they were seized, are instruments of betting and are, therefore, evidence under S. 47 of the Calcutta Police Act to show that the room in question was being used as a common gaming house, although the betting slips were seized at a time when betting operations were not going on. (*Nasim Ali, J.*) PHANI BHOOSHAN KUMAR *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 471=172 I.C. 146=10 R.C. 347=39 Cr.L. J. 89=A.I.R. 1937 Cal. 637.**

——S. 47—*Interpretation—If creates a presumption.*

Though the words "until the contrary is made to appear" in S. 47 are rather appropriate to a presumption in the technical sense of the word, yet the absence of any word like "may presume" or "shall presume" in the section is very much significant; the discovery of the instrument of gaming in the place on a proper search which is contemplated by the Act would be an evidence not only to prove the existence of these instruments in that place, as an element to constitute a common gaming house but it would be an evidence on the other point also, as regards the making of profits or gain by the owner or occupier, etc., of the place; although according to the

CAL. POLICE ACT (1866), S. 47.

ordinary law it cannot be treated as an evidence of the other fact. When the prosecution relies upon S. 47, the accused can certainly explain away the whole circumstances and "show the contrary" as the section lays down. If the explanation is sufficient, the evidence practically loses its force; if on the other hand no explanation or evidence to the contrary is coming from the side of the accused, a duty is cast upon the Court, to weigh and appraise the evidence in the best manner possible and he may if he thinks proper convict the accused on this evidence, though he is not bound to do so. A.I.R. 1936 Cal. 788, Rel. on. (*Mukherjea, J.*) ABDUL LATIF *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 672=67 C.L.J. 82=174 I.C. 974=10 R C. 741=39 Cr. L.J, 500=A.I.R. 1938 Cal. 237.**

——S. 47—*Scope and effect—Presumption under—Nature and effect.*

The expression "It shall be evidence, until the contrary is made to appear" in S. 47 does not create a presumption in the technical sense in which that term is used in the Indian Evidence Act. In that case the Magistrate would be bound to convict unless the defence gives rebutting evidence of a negative character. But in nearly every case, it would be difficult if not impossible for them to do so. The natural meaning of the words is that the finding of certain things shall be evidence that the place is a common gaming house. Packs of cards may be found in hundreds of places which are not common gaming houses and it would be transparently absurd to say that the finding of a pack of cards in a house would be evidence that that house is a common gaming house. This section was intended to create a special rule of evidence, because in view of the preliminary provisions, there is not this absurdity in a case when there had been a proper search under S. 46. S. 47 only raises a presumption of fact, and so a rebuttable presumption. If a search warrant is issued under S. 46, and if on a search made on the basis of a warrant, instruments of gaming are found at the place or on the person gaming, this fact would be evidence of the further fact that the place is a common gaming house. The effect of such evidence may be nullified by other evidence on the record. (*Henderson and R.C. Mitter, JJ.*) RANGA LAL SEN *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 610=167 I.C. 771=9 R.C. 759=41 C.W.N. 123=38 Cr.L.J. 449=1936 Cr.C. 1124=A.I.R. 1936 Cal. 788.**

——S. 47—*Search warrant by competent authority—Issue of—Effect—Presumption—Specific evidence as to recitals in warrant—Necessity for.*

Where a warrant under S. 47 is issued by a competent authority, and it recites the facts that an information on oath had been received and that an inquiry had been made, and then states that that authority had reason to believe that the place to be searched is a common gaming house, the presumption attaching to the regularity of official acts would be attracted, and it would not be incumbent on the Crown to lead evidence on the point indicated above. (*Henderson and R. C. Mitter, JJ.*) RANGA LAL SEN *v.* EMPEROR. **I.L. R. (1937) 1 Cal. 610=167 I.C. 771=9 R C. 759=41 C.W N. 123=38 Cr.L.J. 449=1936 Cr.C. 1124=A I.R. 1936 Cal. 788.**

CAL. PORT ACT (1890).

——**Ss. 47 and 3**—Slips containing records of bets on past events—If instruments of gaming. *See* CALCUTTA POLICE ACT, SS. 3 AND 47. **41 C. W.N. 1346.**

——**S. 78-A**—*Notice issued after commencement of trial—Validity*

The provisions of the Criminal Procedure Code regarding investigations by the Bengal police do not apply to investigations by the Calcutta police. The Calcutta Police Act itself does not contain any rules of procedure regarding the conduct of investigation by the Calcutta police. Hence, a notice issued under S 78-A after commencement of trial of some accused cannot be held as *ultra vires* because investigation cannot be supposed to have come to an end the moment a chalan is put up. (*Patterson, J.*) DWARIKA NATH *v.* EMPEROR. **177 I C. 171=11 R.C. 212=39 Cr.L.J. 842=A.I R. 1938 Cal. 545.**

CALCUTTA PORT ACT (III OF 1890)—*Exercise of statutory powers by railway owners and employees—Pipes of local authority under railway line—Agreement that work to be done to pipes by railway owners at local authority's expense—Local authority's property flooded through alleged negligent acts of railway owner's employees—Work done in exercise of statutory powers—Suit for damages—Claim based on omission to perform statutory duty—Liability.*

A statutory body constituted under the Calcutta Port Act of 1890 were the owners and operators of a double-track railway. A local authority had a pumping station near the railway to which water was led from a river by four pipes which passed beneath the railway. The railway owners having decided to lower the railway line at a certain point in order to do away with the inconvenience of a level crossing existing there, were obliged to lower the local authority's four pipes and duly did so, carrying the pipes below the railway line, as lowered, in three brick tunnels. Subsequently the local authority wished to increase their supply of water from the river, which involved the laying of an additional pipe line. As the new pipe also had to cross the railway line, it was agreed by letters passing between the parties that the railway owners' staff should do the work of laying it at the local authority's expense. As the result of a severe fall of rain flooding took place, and the local authority's pumping station was flooded and damaged. The local authority alleged that the flooding of the pumping station was due to two holes made and kept open by the railway owners' superintendent. The holes in question had been made by the superintendent directly in connection with the project of laying the additional pipe line for the local authority. The railway owners denied negligence and contended that they were in any event protected as the suit was not instituted within three months, which constituted the special period of limitation under S. 142 of the Calcutta Port Act, 1890.

Held, that the statutory body were not acting in the capacity of private contractors. The work that was done was of an exploratory character, and the above body did not divest themselves of their statutory capacity and did not assume some other capacity in having the work done.

Held also, without deciding the plea of negligence, that the local authority having requested the railway owners, a statutory body, to do certain work, and the railway owners and their employees having acted in exercise of their statutory powers, the action was barred by S. 142 of the Calcutta Port Act. The words "or purporting or professing to be done" in S. 142 of the Act postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection if the work professes or purports to be done in pursuance of the statute.

Held, further, that the Calcutta Port Act of 1890 afforded protection not only in respect of a claim based on alleged breach of a statutory duty but also in respect of one based on an alleged omission to perform such a duty. (*Derbyshire, C. J.* and *Costello, J.*) 63 C. 592, reversed. (*Lord Allness.*) COMMISSIONER FOR THE PORT OF CALCUTTA *v.* CORPORATION OF CALCUTTA. **I.L.R. (1938) 1 Cal. 440=64 I.A. 363=40 Bom.L.R. 6=31 S.L. R. 686=41 C.W N 1317=1937 A.L.R. 737=1937 O.L.R. 473=3 B.R. 777=10 R.P.C. 83=1937 A L.J. 1042=46 L.W. 721=1937 M.W.N. 1208=1937 A.W R. 1131=66 C.L.J. 188=170 I C. 332=A.I.R. 1937 P.C. 306=(1937) 2 M.L.J. 594 (P.C.).**

CAL. SURVEY ACT (1887), S. 22.

——**S. 84**—*Applicability — Illegal erection—Making additions to—Offence.*

Where the original wall itself is an illegal erection, the making of additions or re-erecting part of it brings the case within S. 84. It is no defence in such a case to plead that the accused was only re-erecting a part of it. (*Henderson and R. C. Mitter, JJ.*) GANGEYA NAROTHAM SASTRI *v.* EMPEROR. **I L R. (1937) 1 Cal. 603=168 I.C 972=38 Cr.L.J. 666=9 R.C. 887=A.I. R. 1937 Cal. 45.**

CALCUTTA SURVEY ACT (I OF 1887)—*Maps prepared by Municipality under—Entries in—Presumption of correctness—Evidence Act, S. 83.*

The Calcutta Survey Act, no doubt, contains no provision for a statutory presumption of correctness to attach to the entries in the maps prepared by a Municipality under the Act; but the maps being prepared under the authority of Government, a presumption of correctness attaches to them under S. 83 of the Evidence Act. (*Rowland, J.*) JAGAN KOERI *v.* CHAIRMAN OF THE GAYA MUNICIPALITY. **4 B.R. 71=10 R.P. 251=171 I.C.732=18 Pat.L.T. 464=A.I.R. 1937 Pat. 567.**

——**S. 22**—*Applicability—Suit for declaration of title and possession—Claim to area in excess of area included within demarcated boundaries—Suit brought beyond one year—If barred.*

It cannot be held that a mere declaratory suit, *i.e*, for declaration of title, is not a suit to set aside any demarcation of boundaries. The boundaries stated in the Survey are supposed to correspond with the title, and, therefore, any decision affecting the title necessarily affects the boundaries that have been demarcated. And where a plaintiff sues for a declaration that his title exists over an area in excess of the area included within the boundaries that have been demarcated, the suit in effect is one to set aside the demarcation of the boundaries, and will be barred if not brought within the period limited by the section. (*Agarwala, J.*) MUNICIPAL COMMISSIONER OF THE GAYA MUNICIPALITY *v*, MT RUPKALI. **3 B.R. 776=18 Pat.L.T. 466=171 I**

CAL. SURVEY ACT (1887), S. 22.

C. 45=10 R.P. 159=1937 P.W.N. 665=A.I.R. 1937 Pat. 516.

——**S. 22**—*Scope and effect—Failure to sue within one year—If fatal—Suit for declaration after one year—If barred—Bengal Tenancy Act—Distinction.*

S. 22 of the Calcutta Survey Act definitely bars any suit not brought within one year from the date of the notification approving the survey if the object of the suit is to set aside any demarcation of boundaries made under the Act. The scope of the section is quite different from that of the Bengal Tenancy Act. Under the latter Act, an entry in the record-of-rights merely provides a piece of evidence to which a statutory presumption attaches. No statutory consequence follows from neglecting to institute a suit to challenge an entry in the record-of-rights, except that in any litigation in which such an entry is put in evidence, it must be presumed to be correct until the contrary is proved by evidence. That is not the case under S. 22 of the Calcutta Survey Act. A suit for a declaration, if in effect it is one to set aside the demarcation of the boundaries, would be barred unless brought within one year. (*Agarwala, J.*) MUNICIPAL COMMISSIONER OF GAYA MUNICIPALITY *v.* RUPKALI. **171 I.C. 45=10 R.P. 159=1937 P.W.N. 665=3 B.R. 776=18 Pat.L T 466=A.I.R. 1937 Pat. 516.**

CANNING COLLEGE AND BRITISH INDIAN ASSOCIATION CONTRIBUTION ACT, Ss. 3 and 4—*Suit for declaration that plaintiff is not liable to make contributions but that defendant is liable—Maintainability—U. P. Land Revenue Act, S 233 (m)—Plaintiff obtaining under-proprietary rights under deed of gift from Talukdar—Liability to make contributions.*

A suit for a declaration that the plaintiff is not liable to make contributions towards the Canning College and the British Indian Association but that the defendant is liable for the same, is not barred by S. 233 (*m*) of the Land Revenue Act. The contributions in question are, no doubt, realizable as revenue within the meaning of Cl. (*m*) of S. 233, but the suit does not fall under that clause. Where under a deed of gift executed by the talukdar, the defendant is to hold the entire taluka as a superior proprietor and the plaintiff is to be proprietor of only under-proprietary rights in the villages gifted to him, the defendant alone is liable to make the contributions under S. 3 of the Canning College and British Indian Association Contribution Act and not the plaintiff who as under-proprietor is liable to pay the amount fixed by the deed of gift to the talukdar and is not liable to pay land revenue to Government as such. (*Nanavutty and Zia-ul-Hasan, JJ.*) MAHOMED IMTIAZ ALI KHAN *v.* MAHOMED AKBAR HUSAIN KHAN. **13 Luck. 279=168 I.C. 361=9 R.O. 474=1937 O.L.R. 277=1937 O.W.N. 566=1937 R.D. 281=A.I.R. 1937 Oudh 323.**

CANTONMENT—*Peshawar—Cantonment land—Ownership—Burden of proof.*

Where Government once owned land in a cantonment to which General Order No. 179 of 1836 applied, the occupiers of the buildings thereon are licensees and the onus is upon the occupiers of buildings to show that they are not licensees but owners of the land on which the buildings are situated. Where lands did belong to Government after the Peshawar cantonment came into existence, but before passing into private occupation and the General Order No. 179 of 1836 or any order or regulation embodying its principles applied to Peshawar Cantonment at and after its inception in 1851, the onus is on the occupiers to show that the original private occupation was not that of a licensee and that they themselves were not licensees holding under cantonment tenure. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SUJAN SINGH *v.* SECRETARY OF STATE. **A.I.R. 1936 Pesh. 217.**

CANTONMENTS ACT (1924), S. 84.

CANTONMENTS ACT (II OF 1924), Ss. 55 (2) and 68 (3)—*Invalid constitution of the Assessment committee—If cured by S. 55 (2)—Assessment proceedings—Legality.*

Where the Cantonment Board appointed an Assessment Committee under S. 68 (3) of the Cantonments Act to which nominations were permitted to be made by persons not belonging to the Cantonment Board, the Committee is not a validly constituted one. But the defect is not cured by S. 55 (2) of the Act for the words 'Committee of a Board' occurring therein means only a Committee appointed by the Cantonment Board under S. 44 (1) (*e*) of the Act. Hence the assessment proceedings of the Board are illegal. (*Norman.*) CANTONMENT BOARD, NASIRABAD *v.* SHRI NARAIN. **1939 A.M.L.J. 1.**

——**Ss. 66 and 104**—*Failure to enter amount of assessment—Illegality or irregularity—Condonation.*

When a list fails to show that which the law expressly directs, it should show, there is an illegality and not merely an irregularity such as might be condoned under S. 104 of the Cantonments Act. Hence the omission to enter in the list framed under S. 66 of the Caotonments Act. the amount of the assessment is an illegality affecting the merits of the case. (*Norman*). CANTONMENT BOARD, NASIRABAD *v.* SHRI NARAIN. **1939 A.M.L.J. 1.**

——**S. 68 (8)**—Assessment Committee on nominations by persons not belonging to Cantonment Board—Committee not validly constituted. *See* CANTONMENTS ACT, Ss. 55 (2) AND 68 (3). **1939 A.M.L.J. 1.**

——**Ss. 83 and 84**—*Scope—Jurisdiction of Civil Court—Suit for refund of tax levied by cantonment authority or for injunction restraining levy—Competency.*

Section 84, Cantonments Act, affords a remedy to an injured person against the levy of a tax from him, which has been imposed under the Cantonments Act. Not only that, but S. 88 of the Act provides that an order passed by the appellate authority mentioned in S. 84 shall be final. Under the circumstances, the remedy of a person to resort to a Civil Court for refund of the excess tax levied from him or for an injunction restraining the Cantonment Authorities to levy the alleged excess tax in future is clearly barred. (*Rupchand Bilaram, J.C. and Lobo, A.J.C.*) IBRAHIMJI ISMAILJI *v.* CANTONMENT BOARD, HYDERABAD. **172 I.C. 732=10 R.S. 182=A.I.R. 1937 Sind 305.**

——**S. 84**—*Scope of—'Assessment' and 'levy'—Construction.*

CANTONMENTS ACT (1924), S 84.

It is a very narrow construction of the words 'assessment' and 'levy', if S. 84 is construed to mean that an appeal lies only against the quantum of the tax or against the legality of its imposition. 'Levy' means imposition, but not merely general imposition of a tax but the particular imposition on the individual affected. It is difficult to hold that S. 84 applies only to valuations of immovable property or questions of the legality of a tax. S. 84 is a general section on giving a right of appeal in all cases. Nor is there any restriction on the grounds for such an appeal. (*Weston.*) KISHEN LAL *v.* CANTONMENT BOARD, NASIRABAD. **1938 A.M.L.J. 18.**

——**S. 84 (2)**—*Reference under—Several appeals—Procedure.*

A single refererce under S. 84 (2) of the Cantonment Act by the Income-tax Officer in respect of several appeals is irregular. He should either make as many references as there are appeals, or should make a reference in one of them and then decide the rest in accordance with the answer received. (*Norman.*) CANTONMENT BOARD, NASIRABAD *v.* SHRI NARAIN. **1939 A.M.L.J. 1.**

——**S. 88**—*Suit for refund of tax levied—Jurisdiction of Civil Court.*

In cases where the plaintiff is demanding a refund of the amount of assessment or tax levied under the Cantonments Act, if the Court is of opinion that the tax is *ultra vires* of the Act, then the Civil Court will have jurisdiction. If however the Court is of opinion that the tax is *intra vires* of the Act, then it would not be open to the Civil Court to go into the question whether the tax is excessive or whether it has been rightly levied. (*Abdul Rashid, J.*) ABDUL GHAFUR *v.* CANTONMENT BOARD, KASAULI. **184 I.C. 469=12 R.L. 230=41 P.L.R. 597=A.I.R. 1939 Lah. 147.**

——**S. 99 (2)**—*Water tax—If a tax on property.*

Water tax is payment for water received and not a tax on property, for the notification imposing the tax provides that the tax shall not be levied in respect of such period during which water, owing to shortage of supply or any other cause, has not been available. (*Norman.*) CANTONMENT BOARD, NASIRABAD *v.* SHRI NARAIN. **1939 A.M.L.J. 1.**

——**S. 104**—Illegality and irregularity—Condonation—Test. *See* CANTONMENTS ACT, SS. 66 AND 104. **1939 A.M.L.J 1.**

——**S. 106 (c)**—*If* ultra vires—*Government of India Act*, 1919, *Ss.* 45-*A and* 84 (2)—*India and Burma (Transitory Provisions) Order*, 1937 *and Government of India (Adaptation of Indian Laws) Order*, 1937—*Effect of.*

Under the Devolution Rules framed under the Government of India Act, 1919, 'cantonments' was a central subject and so were criminal law including procedure and all other matters not included among provincial subjects. On the other hand, 'administration of justice' was a provincial subject and in express terms included constitution, powers, maintenance and organisation of Civil and Criminal Courts, subject to legislation by the Indian Legislature as regards Courts of criminal jurisdiction. The Indian Legislature passed an enactment, the Cantonments Act (II of 1924), S. 106 (*c*) of which provided for the formation of cantonment funds to which were to be credited all fines recovered from persons convicted of certain offences committed within each cantonment. The United Provinces instituted a suit against the Central Government represented by the Governor-General in Council for a declaration that S. 106 (*c*) of the Cantonments Act was *ultra vires* the then Indian Legislature, that all fines imposed and realised by Criminal Courts for offences committed within the cantonment areas should be credited to the provincial revenues and that the plaintiffs were entitled to recover and adjust all such sums wrongly credited to the cantonment funds since 1924.

Held, (*i*) that under the Devolution Rules fines imposed by Criminal Courts could be properly credited to provincial revenues as receipts accruing in respect of the administration of justice only if not otherwise appropriated by competent authority; the central subject 'criminal law, including criminal procedure' included the power to legislate with respect to the destination of fines imposed for criminal offences, and S. 106 (*c*) of the Act was not *ultra vires*; (*ii*) even assuming that S. 106 (*c*) related to a provincial subject under the provisions of S. 84 (2) of the Government of India Act, 1919, the competence of Indian Legislature to enact that section could not be questioned in a Court of law; (*iii*) that as S. 106 (*c*) was a law in force immediately before the commencement of Part III of the Constitution Act, under the India and Burma (Transitory Provisions) Order, 1937, para. 4 (*a*), such fines credited to the contonment funds must be deemed not to form part of the revenues of the United Provinces till 31st of March, 1939; (*iv*) as S. 106 (*c*) has been deleted by the Government of India (Adaptation of Indian Laws) Order, 1937, all such fines must be credited to the provincial revenues from 1st April, 1939. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) THE UNITED PROVINCES *v.* THE GOVERNOR-GENERAL IN COUNCIL. **1939 F.C.R. 124=11 R.F.C. 44 (2)=180 I.C. 863=5 B.R. 554=40 Cr.L.J. 403=1939 O.L.R. 246=2 Fed.L.J. 123=50 L.W. 209=1939 P.W.N. 555=1939 M.Cr.C. 213=I.L.R. (1939) Kar. 98=1939 M.W.N. 750=A.I.R. 1939 F.C. 58=(1939) 2 M.L.J. (Supp.) 1.**

CANTONMENTS ACT (1924), S. 210.

——**Ss. 210 (1) (g) and 213**—*Person served with notice prohibiting him from selling fruit—Person allowed to continue business on representation—Person applying for licence without paying prescribed fee—No licence issued—Summary trial and conviction—Legality.*

A person was served with a notice by the Cantonment Authority prohibiting him from selling fruit in his shop. The person represented to the authority that he had been carrying on business for a long time whereupon he was allowed to continue business. He then applied to the authority for a licence but did not pay the prescribed fee and no licence was issued. He was tried summarily under Ss. 210 (1) (*g*) and 213 and was convicted.

Held, that the conviction could not be interfered with in revision as under the circumstances the person could not take advantage of S. 210 (3) owing to his own conduct in applying for licence and not taking it out subsequently.

Held, further, that the case should not have been tried summarily as the question of compensation might have arisen under certain circumstances. (*Jai Lal, J.*) NARU RAM *v.* EXECUTIVE

CANTONMENTS ACT (1924). S. 236.

OFFICER, CANTONMENT BOARD, MULTAN CANTONMENT. 175 I.C. 544=10 R.L. 742=39 Cr.L.J. 653=A.I.R. 1938 Lah. 427.

——S. 236 (1)—*Pimp—Liability to prosecution.*

There is nothing in the wording of S. 236 (1) which requires that the person importuning must importune to the commission of sexual immorality with himself or herself. A.I.R. 1926 Bom. 227, Rel. on. (*Allsop and Ganga Nath, JJ.*) EMPEROR *v.* NARAIN. 58 All. 684=160 I.C. 884=8 R A 670 (2)=37 Cr.L.J. 372=1936 A.L.J. 193=1936 A W.R. 115=1936 A.Cr.C. 38=1936 Cr.C. 132=1936 All. L.R. 189=A.I.R. 1936 All. 129.

——S. 236 (2)—*Proper complaint—Requirements.*

A complaint under S. 236 was sent in writing by a Regimental Provost Sergeant to a Sub-Inspector of Police who forwarded it in original to the Magistrate. The Magistrate acted upon the complaint. The Regimental Provost Sergeant was a member of the military police and was authorised to make complaints under S. 236. A part of the offence was committed in presence of this officer

Held, that a proper complaint was made to the Magistrate in accordance with the provisions of S. 236 (2). (*Allsop and Ganga Nath, JJ.*) EMPEROR *v.* NARAIN. 58 All. 684=160 I.C. 884=8 R.A. 670 (2)=37 Cr.L.J. 372=1936 A.L.J. 193=1936 All.L.R. 189=1936 A.W.R. 115=1936 A. Cr. C. 38=1936 Cr. C. 132=A.I.R. 1936 All. 129.

——S. 259—*Magistrate acting under—Jurisdiction—Limits.*

A Magistrate acting under S. 259 of the Cantonments Act has jurisdiction to decide whether the conditions under which the Cantonment Authority can resort to him are fulfilled or not. But he is not entitled to go into questions for which a separate remedy exists under the Act to the person from whom recovery is sought. (*Weston.*) KISHEN LAL *v.* CANTONMENT BOARD, NASIRABAD. 1938 A.M L.J. 18.

——S. 259—*Remission of tax—Revocation—Claim to recover money due—Nature of.*

Where there is a revocation of certain remission of tax and the Cantonment Board applies under S. 259 of the Cantonments Act for recovery of the amounts due, its claim is only for arrears of taxes. The circumstance that the amount was once remitted does not change the nature of the claim. (*Weston.*) TARA CHAND *v.* CANTONMENT BOARD, NASIRABAD. 1938 A.M.L.J. 106.

——S. 259—*Scope of—If confined to arrears prior to amendment.*

S. 259 of the Cantonments Act is not necessarily confined to arrears of taxes due prior to the amendment. The amendment creates no fresh liability to pay nor does it in any way enlarge the liability. It merely provides a procedure for recovery. (*Weston.*) TARA CHAND *v.* CANTONMENT BOARD, NASIRABAD. 1938 A.M.L.J. 106.

——S. 280—*Rules—Land Administration Rule, R. 13—Letter by Government of India and Resolution by Cantonment Board condoning encroachment—If confer title on person encroaching.*

When persons encroach on cantonment land, mere condonation by the Cantonment Board cannot confer on those persons title to the land encroached upon. A letter by the Government of India to the Cantonment Board reciting that the encroachments have been condoned by lapse of time does not confer any title to the land on the person encroaching; the letter is not law but only an executive instruction to the Board; nor does a resolution by the Cantonment Board passed in pursuance of such a letter reciting that the encroachment is "old and condonable", confer any legal title on the person encroaching. Title to land cannot be conferred by condonation. (*Norman*). NANGA *v.* AMRA AND CANTONMENT BOARD, NASIRABAD. 1936 A M.L.J. 44.

CARRIAGE OF GOODS BY SEA ACT (1925), S. 2.

CANTONMENTS (HOUSE ACCOMMODATION) ACT (VI OF 1923), S. 4—*Applicability—Licences given under General Order No.* 179.

Cantonments (House Accommodation) Act, 1923, S. 4, clearly does not apply to a licence under General Order No. 179 unless the Secretary of State and the other party entitled consent to be bound by the terms of the Cantonments (House Accommodation) Act and consent in writing. (*Young, C.J. and Monroe, J.*) SHAMAS-UL-NIHAR FAZAL ELAHI *v.* SECRETARY OF STATE. 164 I.C. 1046=9 R.L. 187=A I.R. 1936 Lah. 582.

——S. 7—*Reasonable rent—Criterion.*

The best criterion for arriving at a reasonable figure of rent of a house is to find out the rent of bungalows in the locality. (*Mir Ahmad, J.*) ATTAR SINGH *v.* SECRETARY OF STATE. 182 I.C. 566=12 R. Pesh. 6=A.I.R. 1939 Pesh. 22.

——S. 15—*Landlord contesting question of rent—Provision for payment to him of rent fixed by officer—Need for.*

There should be some provision in the Act that where a house has been taken over and the question of rent is contested by the landlord the amount fixed by the officer commanding should be paid to the landlord without prejudice to his right to fight in Court the question of the enhancement of the rate of rent. (*Mir Ahmad, J.*) ATTAR SINGH *v.* SECRETARY OF STATE. 182 I.C. 566=12 R. Pesh. 6=A.I.R. 1939 Pesh. 22.

——S. 15—*Reference under—Mortgagee not in possession of property acquired on lease—If necessary party.*

The Cantonments (House Accommodation) Act only refers to an owner. A notice is issued to an owner and if there is any person in occupation, to the occupier, and it is the owner alone who can make a reference to the Civil Court. Hence in a reference under S. 15 the owners are not bound to make a mortgagee who is not in possession of the property acquired on lease a party and his non-joinder will not defeat the suit, although it is advisable that the mortgagee should be added under O. 1, R. 10, C. P. Code, not as necessary party but as a person whose presence before the Court is necessary "in order to enable the Court effectually and completely to adjudicate and settle all the questions involved in the suit." (*Mir Ahmad, A.J.C.*) GANGA RAM *v.* SECRETARY OF STATE. 167 I.C. 158=9 R. Pesh. 80=A.I.R. 1937 Pesh. 17.

CARRIAGE OF GOODS BY SEA ACT (XXVI OF 1925), S. 2, Art. IV, R. 2 (q)—*Applicability and scope—Lighter transporting goods*

CARRIAGE OF GOODS BY SEA ACT (1925), Sch. I.

from wharf to steamer lying at anchor in the roads—Loss of goods due to fault of tindal—Liability of owners of lighter.

The rules made under the Carriage of Goods by Sea Act of 1925, apply by reason of S. 2 ot that Act, only to the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India. A lighter transporting goods from the wharf to a steamer lying at anchor in the roads does not come within the purview of S. 2 of the Act. Even if the lighter be held to be a "ship" cl. (*q*) of R. 2 of Art. IV of the schedule to that Act would make the owners of the lighter liable for the loss caused by the fault of their agent, the tindal. A common carrier is liable for the loss of goods entrusted to him for carriage unless the loss be due to an act of God or of the King's Enemies. (*Wadsworth, J.*) DHANAMMA *v.* COROMANDAL CO., LTD., COCANADA. **1939 M.W.N. 216=185 I.C. 16=12 R.M. 517=49 L.W. 341=A.I.R. 1939 Mad. 401=(1939) 1 M.L.J. 235.**

——**Sch. I, Art. III, Para. 6**—*Construction—Period of one year—If can be extended.*

The period of one year fixed in Para. 6, Art. 3, Sch. I is to be construed strictly and is not to be allowed to be extended by vague and indefinite arguments and pleas. Where a ship leaves the port on a particular date, she must be deemed to have delivered the cargo to the consignees within the meaning of para. 6, Art. 3, and it is not open to the consignees to take advantage of a survey, which has been unduly delayed, in order to extend the period of time. (*Davis, J.C. and Mehta, A.J.C.*) HAJI SHAKOOR *v.* VOLKART BROS. **168 I.C. 330=9 R.S. 233=30 S.L.R. 345=A.I.R. 1937 Sind 11.**

——**Sch. I, Art. III, Para. 6**—*Port trust—If agents of shipowners.*

The Port Trust are not the agents of the shipowners to hold identified and ascertained consignments indefinitely at the will of the consignees, so as to make the shipowners liable for the loss caused to the consignments, although in particular cases it may well be that they are agents of the shipowners for the limited purpose of identifying and delivering the consignments mixed together. (*Davis, J.C. and Mehta, A.J.C.*) HAJI SHAKOOR *v.* VOLKART BROS. **9 R.S. 233=30 S.L.R. 345=168 I.C. 330=A.I.R. 1937 Sind 11.**

——**Sch. I, Art. III, Para. 6**—*'Removal'—Meaning.*

The word 'removal' in Para. 6, Art. III, Sch. I, Carriage of Goods by Sea Act, means physical removal. (*Davis, J.C. and Mehta, A.J.C.*) HAJI SHAKOOR *v.* VOLKART BROS. **9 R.S. 233=30 S.L.R. 345=168 I.C. 330=A.I R. 1937 Sind 11.**

CARRIER—*Common carrier—Motor bus service essentially intended for carriage of passengers—Proprietor of—If common carrier in respect of goods—Consignment of goods handed to conductor of bus for delivery to person calling for it at specified place—Liability for loss.*

The proprietor of a motor bus service, which is essentially intended for the carrying of passengers and their luggage or goods, if any, cannot be regarded as a common carrier so far as transport of goods is concerned. If the conductor of a bus belonging to such a service on his own responsibility, accepts a consignment of goods from a person other than a passenger undertaking to deliver it to a person who would call for the same at a specified place, and takes payment for such transport, issuing a ticket to the consignor in the same way as to a passenger who has luggage, and the consignment miscarries, the proprietor cannot be treated as a common carrier so as to make him liable for the act of the conductor in his employ. The matter is one between the consignor ann the conductor, and the proprietor is not responsible on any such contract to which he is not a party. (*Abdul Ghani, J.*) MADDAPPA *v.* FIRM OF RAMIAH SETTY AND SRIKANTA SETTY. **17 Mys. L.J. 284.**

CATTLE TRESPASS ACT (1871), S. 10.

CARRIERS ACT (III OF 1865), S. 2—Applicability—State-Owned Railways. *See* LIMITATION ACT, ARTS. 30 AND 31. **I.L.R. (1937) 2 Cal. 614.**

——**S. 3**—*Public lorry—Loss of goods in—Liability for—Contract Act, Ss.* 151 *and* 152.

Where a passenger in a public lorry entitled to transport himself and certain luggage without extra charges, loses his luggage (in this case a hold all).

Held, that the owners of the lorry were common carriers, and so were liable for the loss of goods. (*D. R. Norman.*) VAKIL & CO. *v.* MAHA NARAIN. **1937 A.M.L.J. 56.**

——**S. 10**—*Notice under—If a part of the cause of action—Statement as to its issue if can be implied.*

In a suit against persons alleged to be common carriers within the meaning of the Carriers Act, for the loss or injury to goods entrusted to them for carriage. it is not necessary for the plaintiff, as in the case of S. 80, C. P. Code, to expressly state in the plaint that he has issued a notice under S. 10, Carriers Act. Such an averment is implied under O. 6, R. 6, C. P. Code, and it is for the defendants to deny in their written statement according to O. 8, R. 2, that they are common carriers or to raise the plea of the absence of notice. Where they fail to do so, the onus is on them to prove and to show that they took good care in the carriage of the plaintiff's goods. (*Roberts, C.J. and Dunkley, J.*) U BA TIN *v.* U TUN ON. **178 I.C. 739=11 R.R. 266=A.I.R. 1938 Rang. 437.**

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850)—Change of religion—Effect on guardianship of minor children—Inapplicability of rule in Jammu and Kashmir. *See* HINDU LAW—GUARDIANSHIP. **41 P.L.R. J. & K. 33.**

——Scope of. *See* MALABAR LAW—CONVERSION OF A MEMBER. **46 L.W. 772.**

——**S. 1**—*Person changing religion—Law governing succession of his children.*

The Caste Disabilities Removal Act of 1850 applies only for the benefit of the person who changes his religion. In other words, when once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. (*Bennet and Harries, JJ.*) MAHOMED ABDUL AZIZ KHAN *v.* MAHBUB SINGH. **160 I.C. 48=8 R.A 544=1936 A.L.J. 488=1936 A.W.R. 198=A.I.R. 1936 All. 202.**

CASTE PANCHAYAT—Defamation by excommunication. *See* PENAL CODE, S. 499, EXCEP. 9. **49 L.W. 268=1939 M.W.N. 127.**

CATTLE TRESPASS ACT (I OF 1871), S. 10—*Applicability—Proprietor of private protected*

CATTLE TRESPASS ACT (1871), S. 10.

forest or embankment—If "cultivator or occupier."

The proprietor of a private protected forest or of an embankment is an occupier of land within the meaning of S. 10 of the Cattle Trespass Act. There is no reason why he should not be regarded as the occupier of land which he has reserved for afforestation. Similarly the occupier of land used as an embankment who builds or maintains an embankment. In either case, S. 10 applies to cattle doing damage, whether in the forest or in the embankment. (*Courtney Terrell, C.J. and James, J.*) GOPAL SETHI *v.* HRUDANAND MAHAPATRA. **1939 P.W.N. 295=20 Pat.L.T. 340.**

——S. 10—Seizure—Legality — Extent of damage—Relevancy. *See* CATTLE TRESPASS ACT, Ss. 22 AND 10—RIGHT TO COMPENSATION. **1939 O.W.N. 150.**

—— Ss. 20 and 22—*Complaint under S. 22—Forum—Presentation to wrong Court—If cured by S. 537, Cr. P. Code.*

Where a complaint mainly under S. 22 of the Cattle Trespass Act, though Ss. 323 and 504 of the Penal Code were also mentioned, is presented to a panchayat Court within time, but which by reason of S. 17 of the U. P. Village Panchayat Act was not competent to entertain it, and it was subsequently transferred to the proper Court, the presentation is not proper and cannot be cured by S. 537, Cr, P. Code. (*Thomas, C.J. and Yorke, J.*) MEHDI HUSAIN *v.* EMPEROR. **175 I.C. 662=1938 O.W.N. 596=1938 A.Cr.C. 51=11 R.O. 2=1938 O.L.R. 303=39 Cr.L.J. 827=A.I.R. 1938 Oudh 183.**

——S. 21—*Requirements—Non compliance with—Effect on limitation.*

S. 21, Cattle Trespass Act, enjoins the District Magistrate to summon the person complained against and make an inquiry into the case; but non-compliance with provisions of this section does not affect the merits of the case. If the non-compliance with the provisions of S. 21 has the effect of making the order of District Magistrate illegal, any suit for compensation on that account would clearly be governed by Art 2, Limitation Act. If on the other hand it does not affect the legality of the District Magistrate's order, no suit would be competent. (*Addison and Din Mohammad, JJ.*) AMAR SINGH *v.* DEPUTY COMMISSIONER, GUJRANWALA. **169 I.C. 922=10 R.L. 57=39 P.L.R. 915=A.I.R. 1937 Lah. 748.**

——S 22—*Amount of compensation—Fees paid by complainant to pleader—If to be included.*

In assessing the amount of compensation to be awarded under S. 22 of the Cattle Trespass Act, a Magistrate is not at liberty to include in the compensation payable the fees paid by a complainant to the pleader employed by him for the purpose of the prosecution of his case. (*Pandrang Row, J.*) VENKATESALU NAIDU *v.* CHITTAPPA. **1938 M.W.N. 831=48 L.W. 214=177 I.C. 896 (1)=11 R.M. 390=39 Cr.L.J. 956 (1)=1938 M. Cr. C. 235=A.I.R. 1938 Mad. 820=(1938) 2 M.L.J. 285.**

——S. 22—*Award of compensation—Specific claim—Necessity—Imprisonment in default of payment of compensation—Legality.*

Compensation under S. 22 of the Cattle Trespass Act cannot be awarded unless a specific claim therefor is made by the complainant in respect of loss caused by the seizure of cattle. Further, it is not competent to a Magistrate to pass under S. 22 a sentence of imprisonment, for default in payment of compensation. (*Thomas, C.J.*) BAIJOO *v.* EMPEROR. **14 Luck. 325=178 I C. 722=11 R O. 125=40 Cr.L.J. 141=1938 O L.R. 512=1938 A.W.R. (C.C.) 123=1938 O.W.N. 1130=1938 O.A. 915=A.I.R. 1939 Oudh 37.**

CENTRAL PROVINCES BORSTAL ACT (1928), S. 5.

—— Ss. 22 and 10—*Right to compensation—Requisites—Smallness of damage, if makes seizure illegal.*

For compensation to be given under S. 22 of the Cattle Trespass Act, there must be a finding that the seizure or detention of the cattle was illegal, that is to say, the seizure was not in accordance with S. 10, Cattle Trespass Act. Where the question is whether the cattle were doing damage to the crop, the fact that the damage was likely to be small, cannot render the seizure illegal. If in law one is entitled to impound the cattle, the smallness of the damage or any consequent unreasonableness of the impounding, is no ground for awarding compensation. (*Hamilton, J.*) RAM CHANDRA SINGH *v.* EMPEROR. **1939 O.W.N. 150=1939 A.W.R. (C.C.) 56=1939 O.A. 289=1939 A.Cr.C. 81.**

——S. 24—*Conviction under—Finding of damage done by cattle—Necessity for.*

It is essential to a conviction under S. 24 of the Cattle Trespass Act that there should be a clear finding of damage done by the trepassing cattle. (*Dhavle, J.*) CHOKAT AHIR *v.* SURAJ SINGH. **186 I.C. 182=6 B.R. 301=12 R.P. 474=1940 P.W.N. 271=41 Cr.L.J 257=A.I.R. 1940 Pat. 299.**

CENTRAL PROVINCES ACTS, ETC.

Borstal Act (IX of 1928).
Civil Circulars.
Courts Act (I of 1917).
Court of Wards Act (XXI of 1899).
Debt Conciliation Act (II of 1933).
Excise Act (I of 1915).
Land Alienation Act (II of 1916).
Land Records Manual.
Land Revenue Act (XVIII of 1881).
Land Revenue Act (II of 1917).
Land Revenue Manual.
Local Fund Audit Act.
Local Self-Government Act (IV of 1920).
Money Lenders Act (XIII of 1934).
Motor Vehicles Taxation Act.
Motor Vehicles Taxation Rules (1927).
Municipal Act (II of 1922).
Protection of Debtors Act (1937).
Reduction of Interest Act (XXXII of 1936).
Revenue Book Circular.
Revenue Manual.
Tenancy Act (I of 1920).
C. P. and Berar Prohibition Act (1938).
C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act (1938).

CENTRAL PROVINCES BORSTAL ACT (IX OF 1928), S. 5—*Scope—Order of detention for non-payment of fine—Legality.*

S. 5 of the C. P. Borstal Act authorises detention only in lieu of transportation or imprisonment. There is no provision in it for any detention in default of payment of fine imposed. An order of detention in default of payment of fine is therefore illegal and liable to be set aside,

C. P. BORSTAL ACT (1928), S. 10.

(*Gruer, J.*) EMPEROR *v.* PANNALAL. **173 I.C. 899=10 R.N. 334=39 Cr.L.J. 427 (1)=1938 N. L.J. 8=A.I.R. 1938 Nag. 131.**

——**S. 10**—*Scope—Detention in Borstal institution—Term served—Subsequent order for detention—Legality.*

Under S. 10 of the C. P. Borstal Act, a person who has been once detained and has served his term in a Borstal institution cannot be detained again. A second order for such detention is illegal. (*Bose, J.*) EMPEROR *v.* RAMCHAND. **19 N.L.J. 162.**

CENTRAL PROVINCES CIVIL CIRCULARS—*Circulars 2-4, Para. 11—Suit dismissed against all defendants with costs—Only one counsel's fee should be awarded to them.*

Where there are more than one defendant, each represented by separate pleader, and there is a simple direction in the judgment that the suit is dismissed with costs, only one counsel's fee should be allowed and the fee is apportionable equally among all the defendants. (*Stone, C.J. and Vivian Bose, J.*) HARGOVIND DULLABH JIWAN *v.* KIKABHAI RAHIMTULLAH. **I.L.R. (1938) Nag. 348=176 I.C. 257=11 R.N. 45=A.I.R. 1938 Nag. 84.**

CENTRAL PROVINCES COURTS ACT (I OF 1917), Ss. 14 and 26—*District Judge and Additional District Judge—Distinction—Appeal presented to latter, when presentation should be to the former, if in order.*

S. 14 of the Central Provinces Courts Act only enumerates three classes of Subordinate Civil Courts. One of such classes is the District Court. When it is presided over by more than one Judge, the Chief Judge of that Court is called the District Judge and the others are called Additional District Judges. S. 26 of the Act makes a distinction between the District Court and the jurisdiction of the Additional Judge to that Court. So the Additional Judge is clearly a judge of the District Court although his power to exercise the jurisdiction of the District Court is restricted. Whenever the Additional Judge hears and determines an appeal, the appeal would be deemed to be heard and determined by the District Court to which he is an Additional Judge. So when an appeal is presented to an Additional Judge when it ought to have been presented to the District Judge it could not be said to have been presented to an improper Court. (*Niyogi, J.*) GHULABCHAND *v.* KISHANLAL. **I.L.R. (1939) Nag. 306=181 I C. 556=11 R.N. 476=1938 N.L. J. 454=A.I.R. 1939 Nag. 42.**

——**Ss. 16 and 26**—*Appeal filed before Additional District Judge—If properly presented.*

An appeal was wrongly filed before an Additional District Judge at one place and was admitted by him. The District Court transferred it to an Additional District Judge at another place, having proper jurisdiction.

Held, that Additional District Judges did not form separate Courts but were attached to the District Court and formed part of it. Their powers were not necessarily as extensive as those of the District Judge himself but a mere curtailment of powers by executive orders could not constitute a separate Court. A presentation to an AdditionalDistrictJudge was really a presentation to the District Court itself for purpose of limitation. (*Bose, J.*) ZUMBERLAL CHHOTILAL *v.* SITARAM. I.L.R. (1937) Nag. 219=171 I.C. 371 =10 R.N. 109=A.I.R. 1937 Nag. 80.

C. P. DEBT CONCILIATION ACT (1933), S. 2.

CENTRAL PROVINCES COURT OF WARDS ACT (XXI OF 1899), Ss. 30 and 27—Suit on behalf of Ward—Mistake in the name of Ward—Amendment, if can be allowed. *See* C. P. CODE, O. 1, R. 10—SCOPE OF. **175 I.C. 911=A.I.R. 1938 Nag. 458.**

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933)—*Execution sale—Conciliation Board if can to interfere after sale.*

Quaere:—Whether once a sale in execution has been held, the Debt Conciliation Board can interfere? (*N. Gordon, R.M.*) TUKARAM *v.* MOHANLAL. **19 N.L.J. 174.**

——*Jurisdiction of Debt Conciliation Board—Applicant not agriculturist—Jurisdiction of Board—Omission of decree-holder to object—Subsequent objection in Civil Court—If precluded.*

The C. P. Debt Conciliation Act was enacted to make provision for the setting up of Debt Conciliation Boards to give relief to agriculturist debtors. The Debt Conciliation Boards set up by the Act must confine their activities only to cases where the debtors are agriculturists. If the applicant for relief is not a debtor, *i.e.*, a person whose main source of livelihood is agriculture, the Act would not apply to him, and the Conciliation Board would have no power to afford him any relief. The Board has absolutely no jurisdiction in a case where the judgment-debtor applicant is not an agriculturist. The fact that the decree-holder omits to protest against the Board's exercising jurisdiction in the matter cannot confer on the Board a power which it did not possess under the Act and does not preclude him from raising the question of jurisdiction before the Civil Court sitting in execution or the Civil Court from considering and trying the issue as to jurisdiction. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. **182 I.C. 81=11 R.N. 499=1938 N.L.J. 17=A.I.R. 1938 Nag. 373.**

——*Nature of measure—Mode of interpretation.*

The Central Provinces Debt Conciliation Act is a coercive measure intended to affect vested interests and rights and to bring pressure to bear upon creditors to effect a settlement with their debtors; therefore however beneficent it may be to the debtors, it acts detrimentally to the creditors and hence the Act must in accordance with the usual rules of construction, be construed strictly. Any ambiguity in its clauses must therefore be resolved along lines which interfere as little as possible with existing rights unless the contrary is unmistakably indicated in other parts of the Act. (*Niyogi and Bose, JJ.*) AKBARI ALI *v.* SETH SOBHARAM. **I.L.R. (1939) Nag. 654=1939 N.L. J. 283=A.I.R. 1939 Nag. 282.**

——**Ss. 2 (e) and 8 (2)**—*"Debt"—Liability under partition decree.*

The definition of "debt" in Cl. (*e*), S. 2 is wide enough to include any liability for a cash payment on account of net cash and compensation for equalization of shares under partition decree,

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and the decree-holder entitled to realise such amount due is a creditor. (*Pollock, J.*) 'PANNALAL *v.* BAIJNATH. **I.L.R. (1937) Nag. 76=165 I. C. 412 (1)=9 R.N. 77=A.I.R. 1936 Nag. 145.**

——**S. 2 (e)**—*"Debt"—Liability to render accounts of village profits—Suit against Lambardar village profits—Reference to Conciliation Board—Competency—Jurisdiction of Civil Court.*

The word "debt" as defined by S. 2 (*e*) of the C. P. Debt Conciliation Act does not include a liability that may be found due on taking accounts of village profits. A suit for village profits, which is primarily one for rendition of accounts by the agent to the principal, cannot therefore be referred to the Debt Conciliation Board. Nor has the Board any jurisdiction to compel a lambardar to render accounts, which is a matter purely within the jurisdiction of the Civil Court. S. 16 (*a*) (1) of the Act is not a bar to the entertainment of the matter by the Civil Court which is the only authority having jurisdiction to enquire into the issue as to whether a special tribunal acts within its powers or not. (*Niyogi, A.J.C.*) BABU SAKHARAM *v.* SHRINANDAN LAL. **167 I.C. 843=9 R.N. 223=19 N.L.J. 16.**

——**Ss. 2 (e) and 15**—*Debt—Personal debts of deceased coparcener of joint Hindu family—Surviving coparceners' liability—Issue of a certificate in respect of—Effect.*

The surviving coparceners in a joint Hindu family are not liable for the personal debts of a deceased coparcener. As such they cannot apply under the Debt Conciliation Act for there is 'no debt' within the meaning of S. 2 (*e*) of the Act. But if they apply in respect of such a debt and obtain a certificate under S. 15 (1) of the Act, it is in respect of a debt which is not the debt of the applicants under the Act and hence is beyond the Board's jurisdiction and is ineffective. (*Grielle, J.*) BAPUSAHEB *v.* BHAGIRATHISAO. **1939 N.L.J. 458=A.I.R. 1940 Nag. 38.**

——**S. 2 (e)**—*'Debt' if excludes arrears of rent.*

The definition of 'debt' does not exclude arrears of rent. (*Niyogi, J.*) CHANDANLAL *v.* SAMBHAJI. **1938 N.L.J. 360.**

——**S. 4**—*Applicability—Insolvency proceedings.*

The expression "any suit or other proceedings" in S. 4 does not apply to insolvency proceedings because they are not in respect of any "debt". (*Niyogi, J.*) CHHOTELAL *v.* NATHURAM **I.L.R. (1938) Nag. 165=172 I.C. 697=10 R.N. 241=20 N.L.J. 252=A I R. 1937 Nag. 288.**

——**S. 4**—*Duty of Debt Conciliation Board—*Bona fides *of applicant—Scrutiny of.*

The Debt Conciliation Act lends itself to abuse and fraud very easily, and must be very strictly construed and vigilantly applied by the special authority created by the Act. The Debt Conciliation Boards should therefore be alert and should first satisfy themselves about the *bona fides* of every application for settlement of debts. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. **182 I.C. 81=11 R.N. 499=1938 N.L.J. 17=A I.R. 1938 Nag. 373.**

——**S. 4**—*Fraud on Court—Purchase of land for purposes of jurisdiction—Parties admittedly agriculturists.*

Where the parties were admittedly agriculturists, the fact that they bought a bit of property

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with a view to give jurisdiction to a particular Board, or to acquire the requisite qualification to apply, would not make the act of purchase a fraud upon the Court. (*Niyogi, J.*) BALWANT *v.* TUKARAM. **1938 N L.J. 235.**

——**S. 4**—*Right to apply to under—"Debtor"—Person earning livelihood as pleader's clerk for many years—Acquisition of tenancy for purpose of application—Right of such person to apply.*

A person who has been earning his livelihood as a pleader's clerk for many years and as a private servant and who acquires some tenancy land only to enable himself to apply for settlement of his debts, is not an agriculturist and is not a debtor entitled to apply under S. 4 of the Act. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. **182 I.C. 81=11 R.N. 499=1938 N.L.J. 17=A.I.R. 1938 Nag. 373.**

——**(as amended by Act XV of 1936), Ss. 7 and 7-A**—*Scope — If retrospective—Effect on power of Civil Court.*

S. 7-A, introduced by the amending Act XV of 1936, cannot have retrospective effect; but in cases where it applies the result is that it is not open to any Civil Court to say that the Board had not in fact jurisdiction. (*Pollock, J.*) SHIVDIN *v.* RAM RATTAN. **20 N.L.J. 57=170 I.C. 905=10 R.N. 85=A.I.R. 1937 Nag. 259.**

——**(as amended by Act XV of 1936), Ss. 7-A, 8 (1) and 8 (2)**—*Application for conciliation for debt—Notices issued to creditors—Creditors forming joint Hindu family, two of them being major and third minor—Mother of minor described as his guardian—No guardian appointed according to O. 32, C. P. Code, to represent minor—Order discharging minor's share—Suit by assignee of debt for its recovery—Civil Court's jurisdiction to question Board's procedure.*

When S. 7-A of the Act does not apply, the Civil Courts have jurisdiction to consider whether the Board acted with jurisdiction or not in a particular matter. On an application under the Act by a debtor, notices were issued to the creditors who formed a joint Hindu family but two of whom were major and the third a minor. The mother of the minor was described as his guardian both in the application and in the notices. No one appeared on behalf of the minor. The Board refused to accept the other two major members of the family as representatives of the minor and without appointing a guardian for the minor under O. 32, C. P. Code, passed an order under S. 8 (2) discharging the minor's share of the debt. On a suit being instituted by an assignee of the debt for its recovery, the lower Court dismissed the suit with respect to the minor's share in the debt holding that it had no jurisdiction to question the procedure of the Board.

Held, that the action of the Board was without jurisdiction and was not a mere irregularity in procedure. The minor was not represented by properly appointed guardian under O. 32, C. P. Code, and had been prejudiced by reason of his non-representation. The Civil Court had jurisdiction to consider validity of the procedure followed by the Board and it could proceed in respect of the minor's share. (*Bose, J.*) KANHAIYALAL HAJARIMAL *v.* GOVINDA TUKARAM. **174 I.C. 962=10 R.N. 429=A.I.R. 1938 Nag. 203.**

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——**S. 7-A**—*Scope—Retrospective operation—Order of Conciliation Board discharging debt before introduction of S. 7-A—Jurisdiction of Board—If can be questioned in Civil Court in execution.*

S. 7-A of the C. P. Debt Conciliation Act has no retrospective operation. An order of the Debt Conciliation Board discharging a decree-holder's debt before the introduction of S. 7-A into the Act, can therefore be challenged by the decree-holder as being without jurisdiction in the Civil Court executing the decree. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. **182 I.C. 81=11 R.N. 499=1938 N.L.J. 17=A.I.R. 1938 Nag. 373.**

——**(as amended by Act XV of 1936), S. 7-A**—*Scope—Retrospective operation—Pending proceedings—Application made prior to coming into force of section.*

S. 7-A of the Debt Conciliation Act, as amended in 1936, does not apply to pending proceedings, *i.e.*, proceedings arising out of an application under the Act presented prior to the date when the section came into force. The right of a party to have the question of the jurisdiction of the Debt Conciliation Board decided by the Civil Court is a substantive and vested right, which every party had before the enactment of S. 7-A. The section takes away the jurisdiction of the Civil Court to determine this question and vests it exclusively in the Board. S. 7-A cannot therefore have retrospective operation so as to affect the vested rights of parties in regard to pending proceedings. In the case of such proceedings, therefore, the Civil Court must itself determine whether the Board is legally seized of the proceedings and has jurisdiction or not, if such a question is raised. (*Bose and Puranik, JJ.*) LACHMANSINGH *v.* DURGAPRASAD. **20 N.L.J. 203.**

——**S. 8**—*Delivery of movables to avoid attachment—Discharge of judgment debt under S. 8 of the Act—Decree-holder found to have knowledge of proceedings—Right of judgment-debtor to restoration of movables.*

Where to avoid an attachment the judgment-debtor delivered certain movables to the decree-holder and later on the debt was discharged under S. 8 of the Debt Conciliation Act, the proceedings of which, the decree-holder was found to be cognizant of, the judgment-debtor is entitled to the restoration of the movables. (*Niyogi, J.*) AZIMMIYA *v.* NAYNYA. **1938 N.L.J. 233.**

——**Ss. 8 and 12**—*Discharge of debt—Subsequent wrong procedure—If affects discharge.*

S. 8 of the Central Provinces Debt Conciliation Act deals with an earlier stage in the proceedings than does S. 12. If a debt is discharged under S. 8 then clearly it is only the remaining debts to which an agreement of amicable settlement under S. 12 can apply. The phrase 'to whom not less than 40 per cent. of the total amount of the debtor's debts are owing' must only mean debts which are owing at the time when the settlement is being effected. Where a debt has already been discharged under S. 8, subsequent wrong procedure with reference to S. 12 cannot affect the discharge. (*Gruer, J.*) SITARAM *v.* JAGANNATH. **1939 N.L.J. 78.**

——**S. 8**—*Failure to file statement within time—Discharge of debt—Application to revive also dismissed—Re-agitation in Civil Court—If permissible.*

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Where after the service of the notice a creditor fails to file his statement within the time allowed and the debt is discharged, and an application by him to revive the debt on the ground that the delay in filing the statement was due to a mistaken idea of the practice of the Board is also dismissed, it is not open to the aggrieved creditor to come to a Civil Court and re-agitate the matter. (*Puranik, J.*) JAWARCHAND *v.* TAPIRAM. **1940 N.L.J. 256.**

——**S. 8 and Civil Procedure Code (V of 1908), O. 21, R. 2**—*Joint judgment-creditors—Right to a notice under S. 8—Release of debt by one—Others how affected.*

A joint judgment-creditor to whom notice was not issued is not bound by the proceedings taken before the Debt Conciliation Board. Hence where one of such joint creditors appears before the Board and says that he remits the debt and as a result no settlement is effected in respect of that debt, the others are not precluded when the debtor applies under O. 21, R. 2, C P. Code, from appearing and opposing the entering up of satisfaction. (*Niyogi, J.*) KAMA *v.* NARAYAN. **1939 N.L.J. 399.**

——**S. 8**—*Notice to manager of joint family of two brothers—Statement by manager alone—Sufficiency.*

Where notice was issued to the manager alone of a joint family of two brothers, and he submits a statement of account, it is on behalf of the two brothers and there is no point in having the same statement sent twice over. There is thus no failure to submit a statement on behalf of either. (*Gruer, J.*) TARACHAND *v.* SHRIKRISHNA. **1939 N.L.J. 225.**

——**Ss. 8 and 9**—*Relative scope—Suit in Civil Court pending—Application by debtor to Conciliation Board—Creditor filing statement but not producing document evidencing debt—Effect—Board declaring debt discharged—Legality—Jurisdiction of Court to proceed with suit.*

The penalties for failure to file a statement under S. 8, and for failure to produce the documents under S. 9 of the Debt Conciliation Act, are distinct. The debt would be deemed to be discharged only in case the statement is not filed; the scope of S. 8 (2) is strictly limited to what is required by the creditor to be done under S. 8 (1). When the creditor files a statement, but fails to produce the document, the case falls under S. 9 and goes out of the scope of S. 8 and the Debt Conciliation Board has no power to declare the debt having been duly discharged. Such an order is *ultra vires* and illegal and cannot affect the jurisdiction of the Civil Court in regard to a matter pending before it arising out of the same transaction. The Civil Court can therefore proceed with the pending suit as if the debt had not been discharged. (*Niyogi, J.*) RAMLAL *v.* SETH SHEOLAL. **169 I.C. 323=10 R.N. 2=20 N.L.J. 21.**

——**Ss. 8 and 15**—*Scope—Debt Conciliation Board—Jurisdiction to declare debt discharged—Conditions.*

A Debt Conciliation Board has no authority to say that a debt is deemed to have been duly discharged except where the creditor has failed to comply with the provisions of S.8 (1), Debt Con-

ciliation Act. There is no provision in the Act under which a Board is entitled to say that the claim is dismissed. When a creditor refuses to accept a reasonable offer, the Board can deal with the matter under S. 15. A civil suit therefore to recover the amount is not barred. (*Pollock, J.*) SARUPCHAND *v.* BARELAL RAMSINGH. I.L.R. (1937) Nag. 530=174 I.C. 991 (1)=10 R.N. 430 =A.I.R. 1937 Nag 195.

——— Ss. 8, 9 and 16—*Scope—Suit on mortgage —Subsequent proceedings before Debt Conciliation Board—Mortgage bond produced in Court and not filed before Board—Order declaring debt discharged—Legality—Suit—If barred.*

Where a mortgagee institutes a suit on his mortgage producing the mortgage bond in the Civil Court, and the mortgagor thereafter applies to the Debt Conciliation Board for settlement of the debt, the failure of the creditor to produce the mortgage deed before the Board will not authorise the Board to declare that the debt is duly discharged. It is not open to the Board to say that the debt is duly discharged under S. 8 (2) of the Debt Conciliation Act merely because plaintiff mortgagee has not, in the opinion of the Board, complied with S. 9 (1). The mortgage deed produced in the CivilCourt cannot be said to be in the possession or under the control of the plaintiff within the meaning of S. 9, because it has been filed in the Civil Court. Since the Board has no jurisdiction to pass an order declaring the debt discharged in such a case, the suit in the Civil Court is not barred by S. 16 of the Act, in spite of an order by the Board declaring the debt discharged. (*Pollock, J.*) MOTIRAM *v.* BHURMALSAO. 169 I.C. 268=9 R.N. 313=20 N.L.J. 29.

———S. 8—*Submission of statement of accounts —If could be sent by post.*

The submission of the statement of accounts by post is sufficient for the purposes of S. 8 of the Central Provinces Debt Conciliation Act. (*Gruer, J.*) TARA CHAND *v.* SHRIKRISHNA. 1939 N.L.J. 225.

———S. 8 (1) and (2)—*Failure to submit statement within two months—Subsequent filing of statement—Board accepting delayed statement without objection—If condonement of delay—Jurisdiction to declare debt discharged.*

Under the proviso to S. 8 (1) of the Debt Conciliation Act, the Debt Conciliation Board has power to extend the period for submission of a statement by a creditor, if it is satisfied that the creditor was, unable for good and sufficient cause to comply with the directions of the Board under S. 8 (1). Where the Board accepts a statement which was not filed by a creditor within but filed beyond two months as required by S. 8 (1), without taking exception to the delay, it must be held that the Board in effect condones the delay; and when the Board condones the delay, the debt cannot be deemed to be duly discharged under S. 8 (2) by reason of the failure to submit the statement within the period of two months. The Board in such a case would be acting without jurisdiction if it declares the debt duly discharged under S. 8 (2). (*Pollock, J.*) MOTIRAM *v.* BHURMALSAO. 169 I.C. 268=9 R.N. 313=20 N.L.J. 29.

———S. 8 (1)—*Notice under—Creditors who are omitted in the application under S. 4—Position of —Right to a decree.*

The notice contemplated in S. 8 (1) of the C. P. Debt Conciliation Act, presupposes that the debtor has disclosed the names of all his creditors. To construe that such an publication affects unknown creditors as well would result in grave injustice to creditors whose names were not disclosed in application under S. 4. The case of such creditors must be treated as lying outside the sphere of the Debt Conciliation Act. They are therefore entitled to a full decree. (*Niyogi, J.*) HAJI MOHAMAD *v.* HARBAJI. 1938 N.L.J. 141.

———S. 8 (1) and (2)—*Ambiguity in notice under S. 8 (1)—Statement filed within date fixed by notice but beyond two months prescribed—Effect—S. 8 (2)—If comes into operation.*

Where a notice issued under S. 8 (1) of the Debt Conciliation Act required the creditor to file his statement within two months from the date of the service of notice and at the same time mentioned the date within which he was to do it, which was clearly beyond the two months mentioned in the earlier portion and where a statement was filed within the date mentioned it was held that the statement was filed within time and that the action of the Board must be taken to be in effect a condonation of the delay coming under the proviso to S. 8 (1) and hence there was no scope for S. 8 (2) to come into operation and treat the debt as discharged. (*Clarke, J.*) SANGAI ANAND KUMAR *v.* HAR NARAYAN. 1938 N.L. J. 296.

———S. 8 (1) and (2)—*Notice fixing time less than that required by section—Filing of statement after time fixed but before time allowed by law—Discharge of debt—Legality.*

Where a notice under S. 8 (1) of the Central Provinces Debt Conciliation Act fixed a time for the filing of a statement of debts which was less than the 2 months as required by the section and where a creditor files his statement within the 2 months allowed but beyond the date fixed in the notice served on him, his debts cannot be discharged under S. 8 (2) of the Act. A discharge under the above circumstances is without jurisdiction and Civil Courts have jurisdiction to inquire and must inquire whether facts exist on proof of which it shall be deemed that the debt has been duly discharged under S. 8 (2) of the Act. (*Grille, J.*) GANGADHAR *v.* PANDURANG. 1939 N.L.J. 164.

———S. 8 (2)—*Applicability—Conditions—Jurisdiction to declare debt discharged—Condition precedent to.*

It is only when a creditor fails to comply with the provisions of S. 8 (1) of the Debt Conciliation Act that the debt is deemed to have been duly discharged under S. 8 (2); and if the creditor complies with S. 8 (1), the Conciliation Board has no jurisdiction to declare his debt duly discharged. (*Pollock, J.*) SHIVDIN *v.* RAM RATTAN. I.L.R. (1938) Nag. 489=170 I.C. 905=10 R.N. 85=20 N.L.J. 57=A.I.R. 1937 Nag. 259.

———S. 8 (2)—*Construction—"Debt" — Debt owed by several persons—Application to Debt Conciliation Board by one debtor only—Creditor failing to file statement to Board—Effect—Liabi-*

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lity of other debtors not applying—If extinguished.

The "debt" to which reference is made in S. 8 (2) of the Debt Conciliation Act refers only to a debt owed by a debtor who has applied to the Debt Conciliation Board and cannot be interpreted as referring to the liability to discharge a debt which lies on a person who has not applied to the Board and with whom the Board is not concerned. If several persons are jointly and severally liable in respect of a debt, and one of them makes an application to the Board, the liability of the others who do not apply to the Board, will not be extinguished by reason of the creditor's failure to file a statement before the Board in answer to the application made by one of the debtors only. (*Grille, J.C.*) PREMLAL MANNULAL *v.* JIWAN. 20 N.L.J. 25.

——S. 8 (2) and Civil Procedure Code, O. 21, R. 15—*Joint decree—Application to Debt Conciliation Board—Issue of notice to one of the decree-holders only—Failure to comply with—Discharge under S. 8 (2) of entire debt—Other decree-holder, if can apply for execution of whole decree.*

There was a decree in favour of two persons. Though the debtor applied to the Debt Conciliation Board for the settlement of his debts and mentioned the names of both the decree-holders, notice was issued to only one of them and on his failing to comply with the notice the entire debt was discharged under S. 8 (2) of the Act. The other decree-holder was held entitled to execute his decree, but only to the extent of his own interest in the decree. Under O. 21, R. 15, C. P. Code, the decree-holder cannot apply for execution of the whole decree when by a special Act part of the decree has been declared satisfied. (*Gruer, J.*) VITHALRAO *v.* LALLOO DOMA. 1938 N.L.J. 361.

——S. 8 (2)—*Minor creditor—Discharge of debt due to—Absence of formal appointment of guardian—Sufficient representation of interest—Validity of the discharge of debt.*

Where in the case of minor creditor though there was no formal order appointing a guardian, yet his interest were sufficiently represented and protected by the elder brother, and an order discharging his debt is made, the proceedings before the Board are quite valid and the absence of a formal order as to guardianship could not render them void, inasmuch as there has been no prejudice to the minor. (*Puranik, J.*) JAWARCHAND *v.* TAPIRAM. 1940 N.L.J. 256.

——S. 8 (2) and Rr. 47 and 18—*Minor creditor—Procedure to be followed by debtor—Minor not duly represented—Discharge of debt—Legality—If curable under S. 18—Power of Civil Court to revive debt.*

Where a creditor is a minor, according to R. 47 of the rules framed under Central Provinces Debt Conciliation Act, the debtor applicant to the Board has to follow the procedure indicated in O. 32, C. P. Code. Where owing to the failure to get a minor properly represented before the Board, his debt is discharged, it is an illegality not curable under R. 18 of the rules. A Civil Court can treat the order of discharge as null and void and revive the debt under S. 8 (2) of the Central Provinces Debt Conciliation Act. (*Niyogi, J.*) PITAMBER RAMCHANDRA *v.* SAHEB CHAND HARAKCHAND. I.L.R. (1939) Nag. 697=1939 N.L.J. 472=185 I.C. 418=12 R.N. 155=A.I.R. 1939 Nag. 277.

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——S. 8 (2)—*Proper service of notices—Statements filed out of time—Some of the debts conciliated by agreement thereafter—Propriety—Discharge of other debts—Aggrieved creditors, if can plead that delay in filing statement had been condoned by the Board.*

Where after the due services of notices, the statements were not filed in time and acting on the warning of the chairman of the Board that the debts were liable to be discharged, most of the creditors agreed to an arrangement of conciliation of their debts, and the other debts were discharged it is not open to the aggrieved creditors to plead, that the action of the Board was either improper or that its action in conciliating some of the debts after the expiry of the period for filing the statement amounted to a condonation of the delay in the filing of their statements. The order of the Board discharging the debts is quite in order and could not be declared *ultra vires*. (*Stone, C. J. and Bose, J.*) SETH KISHANLAL *v.* ABDUL HALIM. 1940 N.L.J. 252.

——S. 8 (2), Proviso—*Discharge of debt—Creditor's remedy—Independent application to Civil Court, if competent.*

When a debt is discharged under S. 8 of the Central Provinces Debt Conciliation Act, the creditor can, according to the proviso to sub-S. (2) to S. 8 of the Act, apply for its revival either to the Board or a Civil Court. But an application to a Civil Court can only be made when either a suit or execution proceedings about the debt are in progress. An independent application for its revival is incompetent. A dismissal of such an application does not debar a Court from determining the question when the creditor brings a suit on the debt. (*Gruer, J.*) LAXMAN *v.* ABUKHAN. 1939 N.L.J. 62.

——S. 9—*Applicability and construction—Suit by creditor on bond—Subsequent proceedings before Debt Conciliation Board—Omission by creditor to file bond before Board as bond filed in Court—Order by Board declaring bond not relevant in suit—Legality—If binding on Civil Court.*

It is clear from the wording of S. 9 (3) that the section would not apply to the case of a creditor who has filed a suit already on the basis of the instrument of obligation. When a creditor has filed the document along with the plaint, as he is bound to do under the law, it cannot be said that the document is either in his possession or under his control. In such a case, therefore, the bond cannot be treated as being not admissible in evidence. If the Debt Conciliation Board in such a case wrongly declares that the bond filed by the creditor in the suit, but not filed before the Board, will not be relevant for proving his claim in the suit already filed by him, the Civil Court would be guided not by the order of the Board, but by the terms of sub-S. (3) of S. 9 of the Debt Conciliation Act only. (*Niyogi, J.*) RAMLAL *v.* SETH SHEOLAL. 169 I.C. 323=10 R.N. 2=20 N. L.J. 21.

——S. 9 (3)—*Order under—Effect of.*

The effect of an order under S. 9 (3), is not to invalidate the transaction but merely to shut out certain document from evidence. Where there-

fore an order is made under S. 9 (3) excluding a mortgage deed from evidence in any suit by the creditor, the order though effectually precludes a suit on mortgage does not invalidate the mortgage but keeps it alive. Hence the creditor cannot fall back upon original consideration and sue on that cause of action so long as the mortgage is alive. (*Vivian Bose, J.*) RATILAL *v.* RAJARAM. 177 I. C. 698=11 R N. 165=1938 N.L.J. 276=A.I.R. 1938 Nag. 251.

——Ss. 9-A and 18—*Effect of S. 9-A—Signing and verification—Provision as to, if mandatory—Order though harsh, if can be interfered with.*

The only reason why S. 9-A of the Central Provinces Debt Conciliation Act is not embodied in S. 8 (1) is because it refers also to S. 9 (1) of the Act and so was put after both sections, but its effect clearly is that S. 8 must be read along with S. 9-A. A statement without signature or verification as prescribed is not in proper form. The word 'shall' used in S. 9-A is mandatory. S. 18 clearly provides that no appeal or application for revision shall lie against any order passed by a Board, and when the Civil Court finds that the order though harsh, is technically correct it cannot interfere. (*Gruer, J.*) BABOO *v.* HERALAL. 1939 N.L.J. 171.

——S. 12—*Agreement between creditor and debtor—Mode of enforcing—Separate civil suit—Maintainability.*

Where the creditor and the debtor arrive at an agreement before the Debt Conciliation Board by which certain lands were to be transferred to the creditors according to S. 12 of the Debt Conciliation Act, it can be executed as if it were a decree and also the agreement like a decree is binding on the parties and they cannot go behind it. The filing of a separate civil suit to enforce the settlement is unnecessary and not contemplated by the Act. The Collector could act on the agreement and effect the necessary partition. (*Gruer, J.*) SHANKARDAS *v.* NANDLAL. 1939 N.L.J. 85.

——S. 12—Agreement to settle debt—Failure to carry out—Suit on original debt—Maintainability. *See* CONTRACT ACT, S. 62 AND CENTRAL PROVINCES DEBT CONCILIATION ACT, S. 12. 1939 N.L.J. 256.

——Ss. 12 and 15—*Scheme of S. 12—A separate agreement by creditors whose debts were less than 40 per cent. of total debts—Value—Certificate, if could be issued.*

The scheme of S. 12 of the Central Provinces Debt Conciliation Act is that efforts should be made to arrive at an amicable settlement, and that it shall be put into form and that, that form shall be signed by all the parties to the settlement. It was never contemplated that there should be as many agreements as there were creditors. Where originally creditors whose debts amounted to more than 60 per cent. of the total debts agreed to the conciliation but subsequently when separate agreements were executed by each creditor one of the major creditors refused to sign the agreement and thereby reduced the amount of debt conciliated to less than 40 per cent. of the total debt, it was held that the agreements executed were not binding and a certificate under S. 15 of the Act could not be issued in such a case. (*Stone, C. J. and Bose, J.*) GOPIKISAN *v.* AMARCHAND. 1940 N.L.J. 67.

——Ss. 12 and 13—*Scope and applicability of—Jurisdiction of Civil Courts—When arises.*

The settlements contemplated by the Central Provinces Debt Conciliation Act are not restricted within their scope and payment of the debts can be agreed to be made either in cash or in kind. Further, if the 'amounts' due are made payable in cash, then the provisions of S. 13 are attracted and in that case the jurisdiction of the Civil Courts does not arise until the provisions of S. 13 (3) of the Act have been complied with but if the amounts are payable in kind, then the agreement is enforceable as a decree by the Civil Courts the moment it is registered. (*Stone, C.J. and Bose, J.*) SHRIDHAR KRISHNARAO *v.* NARAYAN NAMAJI. I.L.R. (1939) Nag. 503=184 I.C. 864=1939 N.L.J. 218=A.I.R. 1939 Nag. 227.

——S. 12 and Civil Procedure Code, S. 47 (2)—*Settlement of debt—Promise to transfer property—Registered agreement—Non-compliance with—Suit for specific performance—Relief—Basis.*

Where a settlement of a debt was effected by a registered agreement involving the transfer of property and on a failure to so transfer the property a suit was filed for specific performance of the agreement it was held that the Court was justified in operating under the powers conferred by S. 47 (2), C. P. Code, alternatively under its inherent powers and treating the suit as a proceeding to enforce the agreement as a decree of Civil Court and giving relief to the plaintiff. (*Stone, C. J. and Bose, J.*) ABDUL RASHID KHAN *v.* SINGHAI BANSILAL. 1939 N.L.J. 500=A.I.R. 1940 Nag. 92.

——Ss. 12 and 15—*Some of the creditors not agreeing to accept conciliation—Power to issue certificate as against them—Jurisdiction—Limits.*

Where the debts due to the creditors who accept the award does not come to the 40 p.c. of the total liability as required by S. 12 (1) of the Act, the Debt Conciliation Board would be acting without jurisdiction and would have no power to make any conciliation and issue the certificate under S. 15 as against those creditors who do not agree to conciliate. They are entitled to pursue their remedy by suit in the usual way. (*Stone, C. J. and Bose, J.*) SADASHEO RAO *v.* ROOPCHAND. 184 I.C. 719=1939 N.L.J. 142=A.I.R. 1939 Nag. 136.

——S. 12 (1) and (2)—*"Amicable settlement"—Special oath—Agreement to abide by—Effect of.*

When a creditor relinquishes his claim to a sum of money due to him on the debtors taking a special oath proposed by him, that amounts to an amicable settlement between the creditor and debtor within the meaning of S. 12 (1) of the Debt Conciliation Act; a decree obtained by the creditor in respect of the debt prior to the oath therefore ceases to exist and is replaced by the agreement to take the oath which under S. 12 (2) takes effect on registration as if it were a decree of a Civil Court. The decree previously obtained by the creditor cannot, therefore, any longer be executed. (*Pollock, J.*) CHETRAM BAGRI *v.* HARILAL. 20 N.L.J. 27.

——S. 13—*Settlement—Death of debtor and default in instalments—Recovery—Proper procedure.*

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When a debtor whose debts have been settled in an agreement registered under S. 12 (3) of the C. P. Debt Conciliation Act, dies and there is a default in the payment of any amount due under the agreement, the proper course is for the Deputy Commissioner to bring the names of the legal representatives of the deceased debtor on record and to proceed with the recovery of the amount in default in accordance with sub-S. (1) of S. 153 of the Act. The death of the defaulter does not prevent the recovery of the amount in default. (*Burton, F C.*) RATANSINGH *v.* SETH SAMARTHMAL. **1940 N.L.J. 417.**

——**S. 13 and Berar Land Revenue Code (1928), S. 164** (c)—*Sale under S. 13 of the former Act read with S.* 164 (c) *of Berar Land Revenue Code—Creditor or his agent, if prohibited from bidding.*

Where a sale is held under S. 13 of the Debt Conciliation Act read with Cl. (*c*) of S. 164 of the Berar Land Revenue Code, there is nothing in the above two provisions which restricts in any way, a creditor or his agent from bidding for and purchasing property put up for sale. (*Greenfield, F.C.*) SITARAM *v.* RAMRAO. **1938 N.L.J. 473.**

——**S. 15**—Certificate in respect of the personal debts of a deceased coparcener—Validity. *See* CENTRAL PROVINCES DEBT CONCILIATION ACT, Ss. 2 (*e*) AND 15—'DEBT.' **1939 N.L.J. 458.**

——**Ss. 15 and 16**—*Certificate under S.* 15—*Finding as to reasonableness of settlement offered—If can be re-agitated in Civil Court.*

The Debt Conciliation Board has jurisdiction to decide whether the offers made for the settlement of the debt were reasonable or not and when once it has issued a certificate under S. 15 of the Debt Conciliation Act stating that the creditor had refused to accept a reasonable offer, the Civil Court is powerless to go into the question whether the offer was reasonable or not. Such an enquiry is excluded by S. 16 (*a*) (ii) of the Act. (*Gruer, J.*) GOVINDRAMJI *v.* GUNAGI DOMAJI. **1939 N.L.J. 322.**

——**Ss. 15 and 21**—*Execution sale prior to application under Debt Conciliation Act—Confirmation, if can be interfered with under Ss.* 15 *and* 21.

Neither S. 15 nor S. 21 of the Central Provinces Debt Conciliation Act affects the power of a Civil Court under O. 21, R. 92, C. P. Code, to confirm a sale held in execution proceedings when such sale has taken place before an application under S. 4 of the above Act has been made to the Debt Conciliation Board. (*Niyogi and Bose, JJ.*) AKBARI ALI *v.* SETH SOBHARAM. **I.L.R. (1939) Nag. 654 =1939 N.L.J. 283=A.I.R. 1939 Nag. 282.**

——**S. 15**—*Power to issue certificate—When could be exercised—Scope and applicability of sub-Ss.* (2) *and* (3) *of S.* 15.

S. 15 (1) of the C. P. Debt Conciliation Act gives the Board power to issue a certificate at any time, if the creditor has refused to accept what the Board considers to be a fair offer and it is in no way dependent on the making of an agreement under S. 12. Sub-S. (2) of S. 15 comes into force where such a certificate has been issued and the Court shall not allow the plaintiff any costs in the suit or any interest on the debt after the date of such certificate in excess of simple interest at 6 per cent. per annum. Sub-S. (3) comes into force only when there is an agreement and in that

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case it is only the execution of the decree that is stayed but it has nothing to do with interest or costs. (*Pollock, J.*) JANKIPRASAD *v.* BALMUKUND. **1940 N.L.J. 261.**

——**Ss. 15 and 12**—*Scope and effect of.*

Ss. 15 and 12 (1) of the Debt Conciliation Act must be read together. If the 40 per cent. rule did not apply, the alternative stand could not be taken that S. 15 could be independently brought into action against any individual creditor who when questioned under S. 10 did not agree to a reasonable settlement. (*Gruer, J.*) GOVINDRAMJI *v.* GUNAJI DOMAJI. **1939 N.L.J. 322.**

——**(as amended in 1935), Ss. 15 (1) and 21, Proviso**—*Scope—Execution sale—Purchase by decree-holder—Subsequent issue of certificate under S.* 15 (1)—*If ground for refusing confirmation of sale—C. P. Code, O.* 21 *R.* 92.

The confirmation of a sale held in execution is not a proceeding to execute a decree so as to fall within the ambit of S.21 of the Debt Conciliation Act, proviso. When the property has been sold in execution, the title vests in the purchaser from the date of sale subject to confirmation, and the proviso to S. 21 cannot be held to prevent the executing Court from confirming the sale. The fact that the decree-holder is the purchaser makes no difference. The executing Court cannot therefore refuse to confirm the sale on the ground that after the sale the Debt Conciliation Board issues a certificate under S. 15 (1) of the Act. Under O. 21, R. 92, C. P. Code, the purchaser in execution has an absolute right to have the sale confirmed when there has been no objection under R. 89, 90 or 91. (*Pollock, J.*) HAJI HASAN *v.* PANNALAL. **19 N.L.J. 296.**

——**S. 15 (2)**—*Applicability—Decree—Execution—Certificate from Debt Conciliation Board—Effect of.*

S. 15 (2) of the Debt Conciliation Act applies only where the creditor is suing for recovery of a debt in respect of which a certificate has been granted. It does not apply where the creditor is applying in execution for the recovery of a decretal debt. (*Pollock,J.*) BHABUTMAL *v.* BALWANTRAO. **I.L.R. (1937) Nag. 344=169 I.C. 294=9 R.N. 318=20 N.L.J. 28=A.I.R. 1937 Nag. 120.**

—— **S. 15 (3)**—*Construction—'Sues'—Meaning.*

The words 'sues for the recovery of a debt' include the prosecution of a suit for the recovery of a debt, even if the suit was instituted before registration of the agreement. (*Pollock, J.*) RISHABKUMAR *v.* BHOLAY SINGH. **I.L.R. (1937) Nag. 37=166 I.C. 459=9 R.N. 124=A.I.R. 1936 Nag. 267.**

—— **S. 15 (3)** — *Construction—Words 'such agreement has ceased to subsist' meaning of.*

The words 'such agreement has ceased to subsist' occurring in S. 15 (3) of the Debt Conciliation Act cannot mean 'such agreement has ceased to subsist *in part.*' Where the rest of the agreement is still in force, its effect must remain (*Gruer, J.*) SYED ISMAIL BALIRAMJI. **1939 N.L.J. 38**

——**S. 15 (3)**—Effect on surety—Remedy against principal debtor. *See* CONTRACT ACT, Ss. 134 AND 139. **A.I.R. 1938 Nag. 413**

——**S. 16**—Applicability—Order without jurisdiction—Order declaring debt discharged—Suit

—If barred. *See* C. P. DEBT CONCILIATION ACT, Ss. 8, 9 AND 16. 20 N.L.J. 29.

——S. 16—*Construction and scope—Jurisdiction of Civil Court to enquire into validity of orders passed by Debt Conciliation Board.*

If the Debt Conciliation Board had no jurisdiction to try to effect a settlement, all proceedings before it would be completely invalid and the Civil Courts would have jurisdiction to enquire whether those proceedings were invalid for want of jurisdiction, but if the Board had jurisdiction, then the Civil Courts would not have jurisdiction to inquire whether that jurisdiction was properly exercised and the legality or validity of any orders passed by the Board cannot be questioned in any Civil Court at all except perhaps on the ground of fraud. (*Pollock, J.*) SHIVDIN *v.* RAM RATTAN. **I.L.R. (1938) Nag. 489=170 I.C. 905 =10 R.N. 85=20 N.L.J. 57=A.I.R. 1937 Nag. 259.**

——S. 16—*Intention of Legislature—Civil Court, if can examine the reasons for issue of certificate under S.* 15.

The intention of the Legislature in S. 16 of the Central Provinces Debt Conciliation Act was to preclude the Civil Courts from examining the reasons, whether right or wrong, which induced the Debt Conciliation Board to issue a certificate under S. 15 of the Act. It may be that if fraud was practised on the Board, the Civil Courts could set the matters right. Where in spite of the allegations of a creditor a certificate is issued under S. 15 it could not be questioned by the Civil Court. (*Gruer, J.*) JANBA DAYARAM PARDESHI *v.* MANNOOKASHIRAM KIRAD. **185 I.C. 888 =12 R.N. 177=1939 N.L.J. 486=A.I.R. 1939 Nag. 312.**

——S. 16—*Interference by Civil Court.*

Though, if the Conciliation Board exceeds its jurisdiction and such action is questioned, the Civil Court will enquire into the question of jurisdiction, it will not interfere with the proceedings of the Board, if they are with jurisdiction. (*Puranik, J.*) JAWARCHAND *v.* TAPIRAM. **1940 N.L.J. 256.**

——S. 16—*Jurisdiction—Civil Court sitting in execution—Power to question jurisdiction of Debt Conciliation Board to entertain application under S.* 4.

A Civil Court sitting in execution has power to inquire into the question whether the Debt Conciliation Board had jurisdiction to entertain and hear an application under S. 4 of the Debt Conciliation Act made by a person who was not an agriculturist. (*Niyogi, J*) TIKA RAM *v.* GANPAT SAHAI. **182 I.C. 81=11 R.N. 499=1938 N.L.J. 17=A.I.R. 1938 Nag. 373.**

——S. 16 (1)—*Intention and scope of—Suit by creditor prior to debtor's application—Proper disposal.*

Giving the best construction to Ss. 16, 21 and 23 of the Central Provinces Debt Conciliation Act, the true intent appears to be as follows: Where in point of fact proceedings are pending before a Debt Conciliation Board at the time of the presentation of a plaint, the Court has no jurisdiction to dispose of the matter. If, however, thereafter the proceedings before the Debt Conciliation Board terminate without a settlement of that debt, the power of the Court to deal with the suit

revives and no defence based on limitation and on defendant counting the time during which the matter has been pending before the Board (at least after the abortive filing occurred) can be considered (S. 23). The application before the Board being terminated without settlement the debt remains. That debt can now be sued for. If a plaint has already been filed it will be treated as filed immediately after the application before the Board terminated and no new Court-fee will be payable. A suit by a creditor in ignorance of a prior application by his debtor under the Debt Conciliation Act could not be dismissed straightaway on the production of a certificate from the Board. (*Niyogi, J. on difference between Stone C.J. and Clarke, J.*) BALKRISHNA RAJARAM *v.* BAIJNATH. **I.L.R. (1939) Nag. 185=182 I.C. 662 =12 R.N. 24=1939 N.L.J. 173=A.I.R. 1939 Nag. 150.**

——S. 16 (a) (i)—Suit against lambardar for village profits—Jurisdiction of Debt Conciliation Board to compel lambardar to render accounts—Civil Court's jurisdiction. *See* C. P. DEBT CONCILIATION ACT, S. 2 (e). **19 N.L.J. 16.**

——S. 18—Interference by Civil Court—Order technically correct but harsh. *See* C. P. DEBT CONCILIATION ACT, Ss. 9-A AND 8. **1939 N.L.J. 171.**

——S. 19—*Agreement before the Board—Subsequent unforeseen events lightening burden of debtor—Effect—Power to revise agreement.*

Where an agreement has been entered into before the Board, and owing to the happening of certain unforeseen events, the burden of the debtor is lightened, there is nothing in the C. P. Debt Conciliation Act to suggest that the agreement should be deemed to have ceased to subsist, either wholly or in part. It is but equitable that it should be revised but it is the Board alone that has the power to do so under S. 19 of the Act. (*Gruer, J.*) SYED ISMAIL *v.* BALIRAMJI. **1939 N.L.J. 38.**

——S. 21 (as amended by Act XIV of 1935)—*Amendment, if retrospective.*

Looking at the question as a whole, it is clear that the amendment of S. 21 by Act XIV of 1935 is not merely procedural, but that it affects substantive rights and so in the absence of express words to that effect, it ought not to be applied to pending proceedings. (*Stone, C.J. and Bose, J.*) GANESH PRASAD *v.* GOPAL. **1938 N.L.J. 101.**

——S. 21—*Applicability—"Debt"—Meaning—Joint decree against several persons—Application under S. 4, by some only—Sale of property of others in execution—Confirmation of—If can be stayed.*

"Debt" in S. 21 of the C. P. Debt Conciliation Act means a debt of the debtor who applies under S. 4. Where in the case of a joint decree against several persons only one of them applies under S. 4, S. 21 cannot come into operation, so as to stay the confirmation of the execution sale of the properties of the other judgment-debtor who have not so applied under S. 4. (*Niyogi, J.*) MADHO *v.* RAMCHANDRA. **I.L.R (1939) Nag. 104=11 R.N. 216=178 I.C. 268=1938 N.L.J. 60 =A.I.R. 1938 Nag. 273.**

——S. 21—*Applicability—Debtor—Person adjudicated insolvent—Right to apply under.*

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If a debtor who is adjudged an Insolvent applies to the Debt Conciliation Board for settlement of his debt, the proceedings pending in the Insolvency Court cannot be suspended under S. 21, Debt Conciliation Act. S. 6 of the Act presupposes that the debtor has some property of his own and that his creditors have a remedy available to them in ordinary Civil Courts. When a debtor is divested of all his property in consequence of his having been adjudged insolvent, he no longer remains a "debtor" as such and he cannot possibly describe the property vested in the Insolvency Court as his property in the application which is required to be made in terms of S. 6 of the Act. (*Niyogi, J.*) CHHOTELAL *v.* NATHURAM. **I. L R. (1938) Nag. 165=172 I.C. 697=10 R.N. 241=20 N.L.J. 252=A.I.R. 1937 Nag. 288.**

——**S. 21**—*Applicability—Insolvency proceedings, if could be stayed—'Other proceedings' in S. 21, meaning of.*

Proceedings in insolvency cannot be suspended under S. 21 of Central Provinces Debt Conciliation Act. An insolvent after adjudication, though he might continue to be debtor for the purposes of those proceedings, cannot be a debtor for the purposes of the Debt Conciliation Act, as his property is vested in the Insolvency Court which strips him of the essential ingredient of his status as a debtor. The expression 'other proceedings' in S. 21 of the Act must be taken to be those contemplated in S. 16 (*i e.*) execution proceedings. (*Niyogi, J.*) SHRIDHAR *v.* GANESH. **1938 N.L.J. 133**

——**S. 21**—*Applicability—Passing of foreclosure decree—Effect—Execution, if affected by proceedings under Debt Conciliation Act.*

With the passing of a final foreclosure decree, the debt comes to an end. The decree is not a money decree and cannot be regarded as a debt of record so that the decree is not a debt at all. The old debt has merged in the decree and hence no debt left which can confer jurisdiction on a Debt Conciliation Board. An execution of such decree could proceed unhampered by S. 21 of the Central Provinces Debt Conciliation Act. (*Stone, C.J. and Bose, J.*) MAHEMAJI *v* CHANDRABHAN. **1939 N.L.J. 451=A.I.R. 1940 Nag. 42.**

——**S. 21**—*Applicability—Proceedings subsequent to execution sale.*

S. 21 of the Central Provinces Debt Conciliation Act cannot come into operation to suspend proceedings subsequent to execution sale. The reason seems to be that when the sale is held the sale proceeds are set off against the judgment-debt. The debt being not in existence, the debtor cannot say he is debtor in respect of this judgment debt. (*Niyogi, J.*) HARI SADASHEO *v.* WAMAN VITHAL. **1938 N.L.J. 229.**

——**S. 21**—*Certificate produced after confirmation of sale in execution—Effect of.*

By virtue of S. 21 of the Central Provinces Debt Conciliation Act any suit or proceeding in respect of any debt for the settlement of which an application under S. 4 has been made to the Board, shall be stayed till the disposal of such application. The date of the presentation of the certificate issued under R. 11 of the rules framed under the Act is immaterial. The certificate is a stay order and is imperative and hence the confirmation of sale should be stayed. (*Grille, J.*) THAKUR PRASAD *v.* RAGHURAJSINGH. 1938 **N.L.J. 150.**

C. P. DEBT CONCILIATION ACT (1933), S. 21.

——**S. 21**—*'In respect of any debt'—A sale having for its origin the conciliation of a debt—Suit in respect of, if can be stayed.*

Simply because the transaction of sale in suit had its origin in the settlement of a debt, the suit does not become one 'in respect of that debt' and so could not be stayed under S. 21 of the Central Provinces Debt Conciliation Act. A suit for a declaration and possession of fields conveyed under a sale by a mortgagor in satisfaction of the debt due, is not such a suit that could be stayed under S. 21 when the mortgagor subsequently applies for conciliation of his suit and shows the vendee as a creditor therein. (*Grue r, J.*) HIRAMAN *v.* LAXMAN. **1938 N.L.J. 475.**

——**S. 21**—*Property sold by Civil Court before filing of Boards certificate—Subsequent confirmation of sale—Validity.*

Under S. 21 of the Debt Conciliation Act, the Civil Court is not bound to stay proceedings until it has been brought to its notice that there are proceedings pending before the Board by production of a certificate before it. In the absence of such certificate, it is open to the Court to continue the proceedings. Where, therefore, such certificate is not filed in the Court until the property has been sold in execution of a decree, the subsequent confirmation of the sale is not barred by any provision in the Act, and both the sale and confirmation of the sale are valid. (*Pollock and Digby, JJ.*) MAHTABSINGH *v.* KRISHNACHANDRA. **10 R.N. 227=172 I.C. 592=A.I.R. 1938 Nag. 109.**

——**S. 21**—*Scope—Application to Civil Court—Objection to jurisdiction of Debt Conciliation Board—Maintainability—Civil Court's power to enquire into and decide.*

An application under S. 21 of the Debt Conciliation Act necessarily contemplates an application which it is competent for the applicant to make under the Act. and the Board referred to there means a Board which has jurisdiction to entertain the application. The Civil Court to which the application is made has the power to examine the competency of the Board to adjudicate on matters which are also before them. No separate suit is necessary in order to determine these questions. The Civil Court must ordinarily proceed with matters pending before it upon which it is competent to adjudicate. Any party relying upon a bar to these powers must establish the same, and the Court has then naturally to enquire into and determine the validity of the objection raised. This may involve an enquiry into the jurisdiction of the Debt Conciliation Board to entertain the matters before the Court, and the Civil Court itself is the tribunal competent to decide these matters. (*Bose and Puranik, JJ.*) LACHMANSINGH *v.* DURGA PRASAD. **20 N.L.J. 203.**

——**S. 21**—*Scope—Certificate under—Suit for possession of land—If can be stayed.*

The certificate under S. 21 of the Central Provinces Debt Conciliation Act can stay only suits in respect of any debt for the settlement of which application has been made, but it cannot justify the stay of a suit for possession of land.

C. P. DEBT CONCILIATION ACT (1933), S. 21.

(*Pollock, J.*) AMARCHAND *v.* MT. SAMBAI. 20 N.L.J. 218.

——S. 21—*Scope—Certificate under Act as applied in Berar—If to be recognised and acted upon in Central Provinces.*

Though Berar is not British India, and though a certificate issued by a Debt Conciliation Board in Berar is not *ipso facto* valid in the Central Provinces, such a certificate, as a matter of judicial comity and commonsense, ought to be recognised and acted upon in the Central Provinces. (*Gruer, J.*) MURLIDHAR *v.* KHUSHAL CHAND. 20 N.L.J. 240.

——S. 21—*Scope—If controls O. 21, R. 92, C. P. Code—"Proceedings"—Meaning of—Sale in execution held prior to debtor's application under S. 4—Confirmation of sale—If precluded.*

The word "proceedings" in S. 21 of the Central Provinces Debt Conciliation Act must be understood as referring to proceedings in which the creditor and debtor, *i.e.*, the decree-holder and the judgment-debtor alone are concerned, and cannot be extended to cover the case of an auction-purchaser in execution. The term is not comprehensive enough to cover a proceeding for confirmation of sale under O. 21, R. 92, C. P. Code, the terms of which are mandatory and are not controlled by S. 21 of the Debt Conciliation Act. The latter section does not preclude the executing Court from confirming an execution sale held prior to an application made by the debtor under S. 4 of the Debt Conciliation Act. (*Niyogi, J.*) MADHO *v.* RAM CHANDRA. I.L.R. (1939) Nag. 104=11 R.N. 216=178 I.C. 268=1938 N.L.J. 60=A.I.R. 1938 Nag. 273.

——S 21—*Suspension of proceedings in Civil Court—When takes place.*

The suspension of proceedings contemplated by S. 21 of the Central Provinces Debt Conciliation Act does not take place until by the production of the appropriate certificate the Civil Court has been informed of the pendency of the proceedings before the Board. (*Stone, C.J. and Bose, J.*) MAHEMAJI *v.* CHANDRABHAN. 1939 N L.J. 451=A.I.R. 1940 Nag. 42.

——S. 21, Proviso—*Nature of agreement referred to—Conciliation of debt by transfer of land—If contemplated by the Act.*

It is only an agreement as contemplated by S. 12 of the Central Provinces Debt Conciliation Act, that is referred to in the proviso to S. 21 of the Act. Neither is a conciliation of debt by transfer of land contemplated by the Act, nor does any agreement of such a nature that may be arranged by the Board come within its purview. (*A.L. Binney, F.C.*) DAJIBA JAGANNATH JOSHI *v.* NARAYAN GOVINDRA SHAHADANI. 1938 N.L.J. 472.

——(as amended in 1935), S 21, Proviso—*Scope—Executing a decree — Proceedings for confirming sale—If amount to.*

After the sale in execution of a decree has been held and the sale price has been set off against the judgment-debtor deposited in Court subsequent proceedings for confirming the sale are proceedings between the judgment-debtor and the auction-purchaser, just as are proceedings for the delivery of possession to the auction-purchaser. In these proceedings, the decree-holder plays no part, and these proceedings do not amount to executing a decree so as to fall within the ambit of the proviso to S. 21. The property has been sold in execution of the decree and the title of the auction-purchaser vests in him from the date of sale, subject to confirmation, which is inevitable in the absence of any objection. Hence there is nothing in the proviso to S. 21, as amended, to prevent the Court confirming the sale. (*Pollock, J.*) HAJI DADA KACHHI MALIK *v.* PANNA LAL. 169 I.C. 99=9 R.N. 300=19 N.L.J. 296=A.I.R. 1937 Nag. 98.

C. P. LAND ALIENATION ACT (1916), S. 16.

——S. 23—*Applicability—Principal debtor alone applying under the Act—If extends time as against surety.*

Where a principal debtor alone has chosen to seek relief under the Debt Conciliation Act, that cannot have the effect of extending the time for filing a suit against the surety, for the debt of the surety was never before the Board and hence S. 23 of the Conciliation Act will not extend time as against him. (*Pollock, J.*) KESHEORAO *v.* LAXMAN. 186 I.C. 763=12 R.N. 253=1939 N. L.J. 604=A.I.R. 1940 Nag. 91.

——S. 24-A—Board's proceedings—Nature of—Board if can pass an order under S. 195, Cr. P. Code. *See* CR. P. CODE, S. 195 AND C. P. DEBT CONCILIATION ACT, SS. 24-A AND 18. 1940 N.L.J. 23.

CENTRAL PROVINCES EXCISE ACT (I OF 1915), S. 2 (6) and (13)—*Diluted denatured spirit—If an excisable article.*

Under S. 2 (6) of the Central Provinces Excise Act 'liquor' includes spirit and under S. 2 (13) of the same Act 'excisable article' means any liquor or intoxicating drug. Therefore, diluted denatured spirit is an excisable article under the Act. (*Pollock, J.*) AHMAD KHAN *v.* EMPEROR. 1939 N.L.J. 75.

——S. 62—*Rules under, R. 6—Agreement of partnership in liquor contract—Validity.*

An agreement of partnership in liquor contract is void *ab initio* being opposed to public policy. Further such a partnership is clearly prohibited by R. 6 made under S. 62, C. P. Exise Act. (*Gruer, J.*) NANDLAL *v.* THOMAS. J. WILLIAM. I.L.R. (1937) Nag. 376=171 I.C. 948=10 R.N. 145=A.I.R. 1937 Nag. 250.

CENTRAL PROVINCES LAND ALIENATION ACT (II OF 1916)—*Scope of—If prohibits only sale and not attachment.*

If properties cannot be sold then it cannot be attached. The Land Alienation Act when it prohibits sale prohibits attachment also. (*Bose, J.*) DEPUTY COMMISSIONER, HOSHANGABAD *v.* FIROZ KHAN. I.L.R (1940) Nag. 261=176 I.C. 163=11 R.N. 38=A.I.R. 1938 Nag. 504.

——S. 16—*Money decree against member of an aboriginal tribe—Prohibition against sale of his property—If applies to attachment or appointment of receiver.*

Attachment is not an end in itself, but is only an adjunct to sale. So it follows that where the Court is for any reason prohibited from selling the property or dealing with it otherwise in lieu of sale, the attachment must be raised. In the case of an aboriginal, the prohibition against interference with his property is complete; not only can there be no sale but even a receiver cannot be appointed to manage his property. An

C. P. LAND ALIENATION ACT (1916), S. 16.

attachment of his property must be raised. (*Bose and Puranik, JJ.*) DAULAT SHAH BAPU *v.* SARASWATI BAI. **I L.R (1939) Nag. 398=173 I.C. 877=10 R.N. 327=A.I.R. 1938 Nag. 281.**

——**S. 16**—*Property not saleable under—Civil Court's power to attach.*

No Civil Court has power to attach, even for the purpose of temporary alienation, a judgment-debtor's property which is not saleable in execution under S. 16, C. P. Land Alienation Act. (*Niyogi, J.*) BALARAM MISRA *v.* MANOOSINGH. **I.L.R. (1937) Nag 261=167 I.C. 807=9 R.N. 214=A.I.R. 1937 Nag. 41.**

——**S. 25**—*Object of—Presentation of appeal to High Court by the Deputy Commissioner in person, if necessary.*

The object of S. 25 of the C. P. Land Alienation Act is to bring to the notice of the Court an illegality in its decree or order and thus to save the property of certain class of persons. The Act does not contemplate that rules of procedure with reference to presentation, etc., are to be followed and as such all that is necessary is that the application under S. 25 (3) should arrive either by post or by personal presentation. It does not matter how it reaches the High Court. (*Bose, J.*) DEPUTY COMMISSIONER, HOSHANGABAD *v* FIROZ KHAN. **I.L.R. (1940) Nag. 261=176 I. C. 163=11 R N. 38=A.I.R. 1938 Nag. 504.**

——**S. 25 (2)**—*Right to apply under when arises—Simple money decree—Attachment—Effect.*

In the case of a simple money decree, the order of attachment involves permanent alienation, mortgage or lease of land. So copies of such order should be sent to Deputy Commissioner under S. 25 (1) of the Land Alienation Act. If it is not sent, he can under S. 25 (2), apply within two months of his being informed of such order, the manner of his obtaining information being immaterial. (*Bose, J.*) DEPUTY COMMISSIONER, HOSHANGABAD *v.* FIROZ KHAN. **I L.R. (1940) Nag. 261=176 I.C. 163=11 R.N. 38=A.I.R. 1938 Nag. 504.**

CENTRAL PROVINCES LAND RECORDS MANUAL—"Banjar" *land—Meaning of—Cultivated land allowed to lie fallow—If* banjar.

Banjar is a generic term which means village waste land and includes both *pahad* as well as *zudpi* jungle. Land may be either occupied or unoccupied. Unoccupied land may or may not be *banjar*. Though unoccupied land covers waste-land, all unoccupied land is not waste-land. The unoccupied land is divided into 7 sub-heads of which only 4 constitute *banjar* or village waste. Occupied land is land belonging to definite persons in the sense that it is or has been in their actual physical occupation. The rest of the area is the village area which does not belong to specific persons, though owned by the malguzars. Of this area certain portions form the village waste, and that is what comprises the *banjar*. *Banjar*, however, does not include land, which, having been under cultivation, has been allowed to lie fallow either for a period under or over three years. (*Bose, J.*) SHANKER *v.* DEVIDAS. **19 N.L.J. 112.**

CENTRAL PROVINCES LAND REVENUE ACT (XVIII OF 1881), S. 65-A (5) and (7)—*Construction and scope—Protected thikadar in*

C. P. LAND REVENUE ACT (1917).

Sambalpur District—Failure to pay thika jama—Liability to ejectment on ground of—"In accordance with any law for the time being in force"—Meaning of.

It is impossible to construe S. 65-A (7) of the C. P. Land Revenue Act as giving the landlord a right to eject the protected thikadar merely for non-payment of thika-jama or upon the grounds mentioned in cl. (*b*) of the sub-section. S. 65-A (5) clearly contemplates that the liability of a protected thikadar is something less than the liability of an unprotected thikadar to be so ejected. A thikadar, gaontia or farmer in the Sambalpur District holds an interest very similar to that of a permanent tenure. There can be no ejectment for non-payment of rent unless the lease or agreement contains something in the nature of a proviso for re-entry. A landlord in India has no common law right to eject a tenure-holder for non-payment of rent. His right to eject depends in each case upon the terms of the agreement of lease. In the absence of a right to eject the tenure-holder given by the agreement or lease, mere failure to pay the thika jama does not entitle the landlord to eject the thikadar. The form of S. 65-A (7) suggests that the legislature intended to save existing rights rather than to create new rights. All that the sub-section does is to save for the landlord any rights which he might have, in accordance with the law for the time being in force and not inconsistent with the Act, to eject his thikadar on either of the grounds mentioned in Cls. (*a*) and (*b*). If by the general law he has no such right, then the protected thikadar cannot be ejected in the absence of a provision to that effect in the lease or agreement. The words "decree for ejectment passed in accordance with any law for the time being in force," cannot be construed as meaning a decree for ejectment in accordance with the law of procedure for the time being in force. (*Harries, C.J., Wort and Dhavle, JJ.*) LAL SADANAND SINGH *v.* MADAN MOHAN SAHU. **18 Pat. 509=182 I.C 721=12 R.P. 48=20 Pat. L.T. 497=5 B. R. 803=1939 P.W.N. 407=A.I. R. 1939 Pat. 305 (F.B.).**

——**S. 87**—*Scope and effect of—Settlement award mentioning shares of members of family in estate—If bars claim to estate as impartible.*

The fact that the award at a proprietary settlement of an impartible estate specified the notional shares of the members of the family cannot debar a party to the settlement from setting up a claim that the estate is impartible. S. 87 bars a claim only if it was made or tabled as the subject of consideration and expressly decided. Where there is nothing to show that an issue was ever raised before the settlement officer or that there was an express decision, the section cannot operate as a bar to the claim. (*Niyogi and Gruer, A.J.Cs.*) RATANSINGH *v.* JAIRAMSINGH. **31 N.L.R. (Supp.) 191=162 I.C. 577=8 R.N. 278=A.I R. 1936 Nag. 80.**

——**(II OF 1917) and Central Provinces Tenancy Act**—"*Land*" *as used in the Act, if includes abadi.*

The term 'land' is not used in its ordinary sense in the Central Provinces Land Revenue and Tenancy Acts and as used in the Act does not include house sites in the abadi. (*Stone, C.*

J. and Bose, J.) GANGAPRASAD *v.* ITWARSINGH. **1939 N.L.J. 429=A.I.R. 1939 Nag. 287.**

——Malguzar—*Rights to take water from jointly owned village tank.*

The mere fact that a person is a malguzar and that the tank is in joint ownership of the proprietary body does not give the person the right of using the water for irrigating his fields. Such right must be proved *aliunde.* (*Stone, C.J. and Clarke, J.*) RAMJI SAHEBLAL *v.* TANYABAPU. **A.I.R. 1940 Nag. 178.**

——*Revision—Long delay in filing—Change in law or ignorance as to forum—If grounds for excusing.*

A delay in filing a revision cannot be excused on the ground of either a change in the law or ignorance on the part of the party as to the proper forum for the presentation of the revision in Collector's cases. (*N. J. Roughton, F. C.*) KISAN *v.* ADKU. **1938 N.L.J. 127.**

——*Settlement record—Entry as to rent—Presumption as to—If to be preferred to jamabandi entry—Suit for rent of field jointly assessed with another—Absence of apportionment—Jurisdiction of Civil Court.*

A certain field was separately assessed for a certain rent as evidenced by the jamabandi entry but was jointly assessed with another field as evidenced by the settlement entry. A suit for recovery of arrears of rent in respect of the field was brought on the basis of the jamabandi.

Held, that the settlement entry must be presumed to be correct and should prevail over the jamabandi entry.

Held, further, that as there was no apportionment of rent between the two fields, the Civil Court was incapable of awarding a decree for arrears of rent in respect of one of the fields. (*Gruer, J.*) URKUDA BAPU *v.* SHRAWAN JAIRAM. **I.L.R.. (1937) Nag. 384=171 I.C. 733=10 R.N. 129=A.I.R. 1937 Nag. 156.**

——*Third appeal—Mutation proceedings—Concurrent findings of fact—Interference by Financial Commissioner—Grounds for.*

The Financial Commissioner would not ordinarily interfere in third appeal, especially in mutation cases, with the concurrent findings of the Courts below on questions of fact as the same can be challenged in the Civil Court. But where the lower Courts have not only erred in appreciating the evidence on the main issue in the case, but have approached the matter from an entirely wrong point of view, and when the finding of the Commissioner in second appeal is of a purely negative character, the case is one in which the Court of the Financial Commissioner will interfere. (*Greenfield, F. C.*) RUKHMABAI *v.* SADASHIVA. **20 N.L.J. 191.**

——**Ss. 2 (6) and 186**—*Lambardar—Appointment of—Person whose name is recognised by Revenue Court in mutation—Right of—Persons challenging such appointment—Duty to get decision from Civil Court on title.*

The person in whose name mutation has been sanctioned by a Revenue Court is, for the purpose of the Revenue Courts, the proprietor of the Mahal and is the only person entitled to be appointed lambardar. If any one else obtains a final decision from the Civil Court in his favour as to his superior title, he gets the right to be

appointed a lambardar; but until he gets such a decision, he is not a proprietor under the Land Revenue Act and cannot be legally appointed as lambardar. (*Greenfield, F. C.*) MT. RUKHMABAI *v.* SADASHIV. **20 N.L.J. 250.**

——**Ss. 2 (8) and (12), 97 and 106 (j)** Bhogra Bhogi *land—Suit for rent of—Civil Court's jurisdiction—If barred.*

Bhogra Bhogi holder is the owner of a plot or plots of land separately assessed to land revenue in a mahal. *Bhogra Bhogi* land which is akin to *malik makbuza* plot is therefore excluded from the definition of mahal given in S. 2 (8). C. P. Land Revenue Act. Since patti is defined to mean lands held in a mahal, *malik makbuza* plot or what is the same thing as a *bhogra bhogi* plot cannot form part of a mahal and therefore cannot form a patti under S. 2 (12). A *malik makbuza* plot or a *bhogra bhogi* plot does not therefore form a patti and is not separate patti within the meaning of S. 97. The jurisdiction of the Civil Court to entertain a suit for recovery of rent of *bhogra bhogi* land is not therefore ousted under S. 106 (*j*) of the Act. (*Vivian Bose, J.*) DULARSINGH *v.* SITARAM. **I.L.R. (1938) Nag. 167=10 R.N. 134=171 I.C. 783=A.I.R. 1937 Nag. 184.**

——**S. 23 and C. P. Tenancy Act, S. 24**—*'Service', meaning of—Procedure for service of notice—Proceedings under S. 24 of Tenancy Act—Knowledge of order of ejectment—Necessity.*

The word 'Service' in S. 23 of the C. P. Land Revenue Act implies and means something more than mere tendering or delivering a copy of the notice; it means securing that the person concerned receives and gives an acknowledgment of the receipt of the copy. If this could not be done substituted service should be resorted to. It is of the essence of proceedings under S. 24, C. P. Tenancy Act, especially, that the tenant should be apprised of the order of ejectment and the date fixed for paying up the arrears to avoid it. Mere tendering of the notice cannot secure this. (*Burton, F. C.*) SARJA TUKARAM *v.* ISHWARGIR. **1939 N.L.J. 358.**

——**S. 25**—*What is condoned by.*

S. 25 of the C. P. Land Revenue Act, does not condone any irregularity in respect of service of notices, but only in respect of immaterial errors in designation of persons or description of property. (*Burton, F. C.*) SARJA TUKARAM *v.* ISHWARGIR. **1939 N.L.J. 358.**

——**S. 29**—If controlled by S. 6, proviso, C. P. Tenancy Act. *See* C. P. TENANCY ACT, S. 6, PROVISO. **20 N.L.J. 87.**

——**S. 33 (2)**—Scope—Ejectment order by Tahsildar confirmed by Sub-Divisional Magistrate—Second appeal. *See* C. P. TENANCY ACT, S 24 (3). **20 N.L.J. 220.**

——**S. 39**—*Revision when remedy by way of appeal was open—If and when entertainable.*

S. 39 of the C. P. Land Revenue Act does not provide for an application being made for revision in lieu of an appeal or otherwise. The initiative is left with the Revenue Officer to revise an order or not. Ordinarily the powers of revision would not be used where an appeal could have been filed, but was not in fact filed, unless good reasons are given for not so doing and unless on

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the facts of each case the interests of legality and propriety require that the orders in question should be varied or reversed. (*Burton, F. C.*) KISLAL *v.* HARNAMSINGH. **1939 N L.J. 559.**

——**S. 40**—*Rejection of application for review—If appealable.*

An appellate Court has no jurisdiction to entertain an appeal against an order rejecting an application for review. (*A. L. Binney, F. C.*) DAJIBA JAGANNATH JOSHI *v.* NARAYAN GOVINDRA SHAHADANI. **1938 N.L.J. 472.**

——**S. 40**—*Review—Grounds—Importance of question involved.*

No principles are laid down in S. 40 of the C. P. Land Revenue Act to regulate in what cases review may be allowed. The practice seems to suggest that the test in such cases is the importance of the question involved. (*Burton, F. C.*) KALKAPRASAD *v.* THAKUR BUDHASING. **1939 N. L.J. 293.**

——**S. 45**—*Khasra and village administration paper—Contents of—Conflict between—Preference.*

The village administration paper is expressly intended to record irrigation rights; the purpose of the khasra however is merely to record the conditions of the cultivation of the fields and hence the entry of irrigation right in the remarks column of the khasra must be treated as incidental. Greater value should therefore attach to the entries in the village adminstration paper if there is a conflict between the two documents. (*Stone, C.J. and Clarke J.*) RAMJI SAHEBLAL *v.* TANYABAPU. **A.I.R. 1940 Nag. 178.**

——**S. 45**—*Record-of-rights—What is included in.*

Under S. 45 the record-of-rights includes both the khasra and the village administration paper. Khasra falls under S. 45 (2) (*b*) and the village administration paper under S. 45 (2) (*c*). (*Stone, C.J. and Clarke, J.*) RAMJI SAHEBLAL *v.* TANYABAPU. **A I.R. 1940 Nag 178.**

——**Ss. 47 and 49**—*Enquiry under—Mutation—Dispute between nephew of deceased proprietor and daughter of deceased—Possession with nephew—If material.*

In the case of a disputed succession to a deceased proprietor, possession of a competing candidate carries little or no weight; especially where the fight is unequal, *e.g.*, as between the nephew of the deceased and the daughter of the deceased, possession of the nephew can carry no weight. (*Greenfield, F.C.*) RUKHMABAI *v.* SADASHIVA. **20 N.L.J. 191.**

——**Ss. 47 and 49**—*Scheduled estate—Pandharia Zemindari—Incidents of—Succession to—Rule—If impartible and governed by Hindu Law—Burden of proof—Wajib-ul-arz.*

The Pandharia zemindari in Bilaspur District is an estate, scheduled under S. 2 (3) of the C. P. Land Revenue Act and is not an ordinary mahal or holding. This being a privileged tenure held on special terms, its conditions and the rule of succession are regulated by the conditions of the wajib-ul-arz of the zemindari. In the face of a clear provision in the wajib-ul-arz laying down that the estate devolves on the widow in default of a direct heir for her lifetime, and on her demise to the nearest male heir, it must be held that the widow of the late zemindar is entitled to the zemindari on his death in preference to the brother's sons of the late zemindar. Mutation cannot therefore be effected in favour of the nephews of the zemindar. If a person alleges that the estate is a Raj Goud family governed by the Hindu Law that it is impartible and descends by the rule of primogeniture and not by any special rules of succession, it is for him to establish the same. In the absence of such proof, the Hindu Law affords no guidance to the succession and mutation. (*G. P. Burton, R. M.*) DHARAMRAJ SINGH *v.* MANKUWARI DEVI. **20 N.L.J. 47.**

C. P. LAND REVENUE ACT (1917), S. 49.

——**S. 47 (1)**—*Scope—Mining lease—Expiry of—Order restoring prior occupancy tenant to possession—Appeal—Competency.*

An order by the Deputy Commissioner directing that an occupancy tenant over whose land mining rights had been assigned to another, should be restored to possession on the expiry of the mining lease, is only a direction made in his executive capacity for setting right an irregularity in the preparation of the annual papers referred to in S. 47 (1) of the C.P. Land Revenue Act, and is not appealable. (*E. Raghavendra Rao, H. M.*) FORRESTER *v.* COWASJI. **19 N.L.J. 203.**

——**Ss. 47 (4) and 49 (1)**—*Mutation proceedings started on report of Kanungo--Legality—Enquiry into possession—Necessity for.*

S. 47 (4) of the C. P. Land Revenue Act requires that mutation proceedings must be started on the report of the person lawfully entering into possession. Proceedings started on the report of a Kanungo are not legal and valid. And when both parties claim to be in possession, an enquiry ought to be made into the fact of legal possession, and a finding arrived at on the point as required by S. 49 (1). The omission to do so vitiates the proceedings. (*Raghavendra Rao, H.M.*) HIRALAL *v.* LAXMANSINGH. **19 N.L.J. 49.**

——**Ss 47 (4) and 49 (3)**—*Mutation—Right to—Party failing to appear and lay claim in spite of notice—Right of to be recorded as proprietor.*

The acquisition of proprietary rights, and the recognition by Government, of a person as a proprietor involve the assumption of liabilities and responsibilities. And when a person, despite full notice of the proceedings, fails to lay claim to those rights and thereby to express willingness to accept those responsibilities and liabilities, it is not possible for a revenue officer in mutation proceedings to direct that he or she shall assume them The party so failing to appear and lay claim must be left out of account. (*Greenfield, F. C.*) RUKHMABAI *v.* SADASHIVA. **20 N.L.J. 191.**

——**S. 49 (1)**—*Duty of Revenue Court under—Possession—Meaning and nature of.*

Where an applicant for mutation before a Revenue Court has obtained lawful possession and title against the recorded proprietor, he is entitled to mutation, and the Revenue Court is bound under S. 49 (1) of the Land Revenue Act to record mutation in his name. If another party ousts the applicant subsequently from lawful possession illegally in execution of a decree by which the applicant is not bound, such ouster cannot be recognised by the Revenue Court. (*Greenfield, F.C.*) GOPIDAS *v.* SETH MISHRILAL. **1938 N.L.J. 45.**

C. P. LAND REVENUE ACT (1917), S. 49.

——S. 49 (3)—*Order of Revenue Court under —Effect of—If can be nullified by temporary injunction from Civil Court.*

A temporary injunction issued by a Civil Court can have no operation against the order of a Revenue Court passed under S. 49 (3) of the C. P. Land Revenue Act. Under S. 49 (4), the Revenue Courts must recognise a final decision of a Civil Court on a question of title; but until such final decision is recorded, the authority of the Revenue Courts under the other sub-sections of S. 49 prevails. (*Greenfield, F. C.*) MT. RUKHMABAI *v.* SADASHIV. **20 N.L.J 250.**

——S. 68 (3)—Khudkasht *land subject to mortgage—If can be recorded* sir.

Though *khudkasht* land is subject to a mortgage it can be recorded as *sir* land if it otherwise satisfies the conditions laid down in sub-S. (3) of S. 68 of the Central Provinces Land Revenue Act. (*Burton, F. C.*) BALMUKUND *v.* DAULAT. **1939 N.L.J. 499.**

——S. 70—*Scope.*

S. 70 only deals with what the khasra is to contain as far as tenancy lands are concerned. It does not touch what it is to contain in the case of home-farm lands. (*Stone, C. J and Clarke, J.*) RAMJI SAHEBLAL *v.* TANYABAPU. **A.I.R. 1940 Nag. 178.**

——S. 71—*Abadi—Licensee failing to build house—Forfeiture—Revocation—Easements Act, S. 62 (h).*

S. 71 of the C. P. Land Revenue Act makes it clear that the abadi of a village is reserved for the residence of the inhabitants or for purposes ancillary thereto. A person who has a licence to occupy the abadi site must use it for the purpose of residence, that is, he must erect a building on it for his dwelling. His failure to do so would be treated as an infringement of the terms of the licence and bring about forfeiture of the licence. Where the site stood without a house upon it for such a long period as 30 years,

Held, that it could well be regarded as good evidence to prove that licensee had no intention of ever building house on it and hence licence could be revoked. S. 62 (*h*) of the Easements Act is applicable to abadi sites as much as to any other class of land. (*Niyogi, J.*) CHHAGANLALSA *v.* NATHUSING. **I.L.R. (1938) Nag 326=176 I. C. 936=11 R.N. 92=A.I.R. 1937 Nag. 338.**

——Ss. 73 and 80—*Decision of Settlement Officer—If final.*

A Settlement Officer has under the C. P. Land Revenue Act power to allow a reduction or exemption from rent and his decision is binding on the landlord during the currency of the settlement. (*Pollock, J.*) KAMLUSAO *v.* KISAN. **164 I.C. 941=9 R N. 46=A.I.R. 1936 Nag. 221.**

——S. 75 (1)—Muafi *recorded as* "Ba waj hissedari wa rishtedari"—*Subsequent settlement recording same as to continue in perpetuity "so long as land remains in the family and is not alienated"—Usufructuary mortgage by* muafidar *—Effect of—If suspends* muafi.

A *muafi* grant was stated to be *"Ba waje hissedari wa rishtedari"* at a previous settlement, *i.e.*, that the land revenue was foregone because the land was taken by a member of the proprietor's family in lieu of a proprietary share. At the next settlement the settlement officer recorded that it

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should continue in perpetuity "so long as the land remains in their own family and is not alienated." The *muafidar* transferred the land to a stranger by way of a usufructuary mortgage.

Held, that the land being no longer in the possession of the family must be held to have been alienated, and that consequently the *muafi* right should be regarded as having ceased to exist so long as the mortgagee remained in possession, and the proprietor would be entitled to collect the revenue assessed upon the land.

Held, further, that on the owner resuming possession by redemption, the *muafi* would revive. (*Greenfield, F. C.*) SETH MEGHRAJ *v.* KASHIRAM. **1938 N.L.J. 52.**

——S. 75 (3)—*Reference under by Civil Court —Revenue Courts' power to question propriety of.*

Under S. 75 (3) of the C. P. Land Revenue Act, when a reference is made by the Civil Court, the Revenue Courts must act upon it. It is not open to them to say that the reference is improper and that the point upon which the reference has been made is one to be decided by the Civil Court itself. (*Greenfield, F. C.*) SETH MEGHRAJ *v.* KASHIRAM. **1938 N.L.J. 52.**

——S. 76—*Cesses—Patwari's remuneration.*

The remuneration that is payable to the patwari or a lambardar does not fall under the head of cesses. (*Niyogi, J.*) SHRINIVAS GOVIND *v.* SADASHEO SAKHARAM. **171 I.C. 658=10 R.N. 127= 20 N.L.J. 173=A.I.R. 1937 Nag. 211.**

——S. 80—*Applicability.*

S. 80 of the Central Provinces Land Revenue Act deals with settlement decisions only and does not apply to year to year khasra entries made by the patwari. (*Gruer, J.*) BABA RAMCHANDRA KOMTI *v.* KONDOO JAGNA WADHAI. **1939 N.L.J. 496=A.I.R. 1940 Nag. 7.**

——S. 80—*Burden of proof—Suit to challenge settlement record after one year—Plea that no inquiry was held—Onus.*

The object of nazul proceedings is, no doubt, that disputed matters should be determined then and there, and unless the decisions arrived at are promptly questioned, they must stand good. The settlement entries are binding if not set aside within one year under Art. 14, Limitation Act, read with S. 80, C. P. Land Revenue Act. Where a parcha is given to a person as *malik makbuza* after settlement, and the entry regarding the area is challenged after more than one year from the offering of settlement record to proprietor, the burden of proof lies upon such person who asserts that no inquiry was made (*Gruer, J.*) SECRETARY OF STATE *v.* HABIBULLA **I.L R. (1938) Nag. 377=176 I.C. 346=11 R.N. 48=A.I.R. 1937 Nag. 407.**

——S. 80—*Entry of Settlement Officer—Presumption of due inquiry—Finality.*

It is the duty of the Settlement Officer under S. 70 of the C. P. Land Revenue Act of 1917 to ascertain and record the status and rights of all persons occupying land as tenants; and under S. 80 of the Act, it must be presumed in the absence of evidence to the contrary that the Settlement Officer did so, and any order or entry under S. 70 is conclusive under S. 80. (*Pollock, J.*) KANCHEDILAL *v.* ZABBARSHAH **166 I.C. 686=9 R.N. 141=19 N.L.J. 123=A.I.R. 1936 Nag. 171.**

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——**S. 80**—*Right of tenant to collect and sell tendu leaves*—Wajib-ul-arz—*Entry restricting right of tenant—No usage or contract to that effect proved—Right of tenant to sue for declaration of right and for amendment of* wajib-ul-arz *—C. P. Tenancy Act, S.* 95

The ownership in trees growing on land is with the owner of the land, and enjoyment of those trees, whether from their shade or their produce, is with him who, being entitled to present possession of the land, has the right to enjoy the land These rights are not cut down by S. 95, C. P. Tenancy Act. The section does not purport to deal with the position which arises when the trees are of a kind other than those mentioned therein; nor does it purport to create statutory easements that will permit the owner to get at trees in the possession of the tenant. It is designed to add to, rather than subtract from the tenant's rights and gives statutory expression to the tenant's rights in fruit trees. It also creates a statutory right in the tenant to fell and take certain timber and clear shrub. This right cannot be given up even by contract. If neither usage nor contract to the contrary be proved, the tenant has the produce of the tree, whatever the tree and whatever the produce growing on the land of which he has the tenancy. A tenant has therefore the right to pluck and collect the leaves of tendu trees in his holding and sell them to anybody he chooses, and the zemindar has no exclusive right or monopoly to purchase them. A tenant is certainly harmed by an entry in the village administration report unless that entry gives him rights greater than those that arise under the general law. So far as tendu leaves are concerned, unless the landlord has got rights by usage or contract, the right to them would be in the tenant, though the trees themselves belong to the zemindar. When there is no usage or contract limiting the tenant s rights, the zamindar can .have no right to the produce. An entry in the *Wajib-ul-arz* of the village to the effect that the tendu leaves cannot be sold to anybody else other than the malguzar or the kadar or zemindar cannot in such a case be supported and is wrong. The tenant is consequently entitled to sue under S. 80 of the C. P. Land Revenue Act for a declaration of his right and for amendment of the *Wajib-ul-arz.* (*Stone, C.J. and Niyogi. J.*) BAHORAN *v.* LAL BHUWANPAL SINGH. **20 N.L.J. 131.**

——**S. 80**—*Scope—If retrospective.*

S. 80, C. P. Land Revenue Act of 1917, which requires the defeated party to sue within one year, cannot have retrospective operation. (*Niyogi and Subhedar, A.J.Cs.*) YADGAR HUSSAIN *v.* MUHAMMAD IBRAHIM RAZA. **31 N L.R. (Supp) 202=163 I.C. 179=8 R.N. 299=A.I.R. 1936 Nag. 71.**

——**S. 97**—*Bhogra bhogi*—If separate patti. *See* C. P. LAND REVENUE ACT, Ss. 2 (8) AND (12), 97 AND 106 (*j*). **A.I.R. 1937 Nag. 184.**

——**S. 106 (j)**—Scope—*Bhogra bhogi* land—Suit for rent of—Jurisdiction of Civil Court—If ousted. *See* C. P. LAND REVENUE ACT, Ss. 2 (8) AND (12), 97 AND 106 (*j*). **A.I.R. 1937 Nag. 184.**

——**S. 109**—*Succession to tenure of protected thekadar—Principle governing.*

It is laid down in S. 109 of the Central Provinces Land Revenue Act, that the succession to the tenure of a protected thekadar shall be regulated by the personal law of the deceased thekadar subject to certain conditions which to some extent modify the personal law applicable to Hindus. Hence the law applicable is the ordinary law of Hindu succession as modified in minor details and irrespective of any idea of notional jointness which might arise from the principle that the tenure is impartible (*Grille, J.*) NARHARI *v.* MST. MAHARANI. 187 I.C. 750=12 R.N. 299=1939 N.L.J. 605=A.I.R. 1940 Nag. 102.

C. P. LAND REVENUE ACT (1917), S. 138.

——**S. 112**—*Scope of—Applicability to forfeiture of protected status.*

S. 112 of the Central Provinces Land Revenue Act is not applicable to a case where protected status is to be forfeited. The procedure for the latter case is provided in S. 111 and obviously it was neither intended nor provided that in a case in which the Commissioner has sanctioned forfeiture, an application under S. 112 should operate to forestall the formal declaration of forfeiture, S. 112 only applies to the case of a thekadar who is deprived of his status on the application of an entitled member of the family and not upon declaration of forfeiture. (*Burton, F.C.*) HAIDAR ALI *v.* KUVARLAL SINGH. **1940 N. L.J. 30.**

——**Ss. 125 and 128**—*Sale for arrears of land revenue—Absence of notice to mortgagee not in possession—Sale, if invalid—'Assigns' in S.* 125, *meaning of.*

A sale for non-payment of arrears of land revenue is not bad for failure to conform to the requirements of S. 128 of the C. P. Land Revenue Act, simply because a notice of demand had not been served on the mortgagee of the village as a defaulter. S. 125 in stating who are defaulters has included the 'assigns' of a person with whom the settlement was made, but by an explanation, has made it plain that 'assigns' includes a mortgagee in possession only. (*Pollock and Niyogi, JJ.*) SURAJDEEN *v.* ISHWARI PRASAD. **I.L.R. (1938) Nag. 550=1938 N.L.J. 342=181 I.C. 478 =11 R.N. 462=A.I.R. 1938 Nag. 554.**

——**Ss 128 and 146**—*Proclamation of sale not in accordance with Act—Effect.*

Where the proclamation for sale was issued as for a sale under C. P. Code, it is not in any way a compliance with R. 17 of the rules framed under S. 128, C. P. Land Revenue Act. It is not an informality curable under S. 25 of the Act. Where there is no proper proclamation according to the Land Revenue Act, a sale held under such a proclamation is not a sale which could be deemed to be held or which could be confirmed under the Land Revenue Act. (*Burton, F.C.*) BORDA COOPERATIVE SOCIETY *v.* YADAO. **1939 N.L.J. 405.**

——**S. 138**—*Sale proclamation in terms of—Sale, if free from encumbrances—Presumption.*

Under S. 138 of the Land Revenue Act, sale free of encumbrances is the rule and sale subject to encumbrances is an exception. When a Deputy Commissioner, signs a proclamation in terms of S. 138, it is unnecessary to pass an express order that the sale is to be free of encumbrances. (*Pollock and Niyogi, JJ*) SURAJDEEN *v.* ISHWARI PRASAD. **I.L.R. (1938) Nag. 550=181 I.C. 478= 11 R.N. 462=1938 N.L.J. 342=A.I.R. 1938 Nag, 554.**

C. P. LAND REVENUE ACT (1917), S. 138.

——S. 138—*Scope—Order for sale by Deputy Commissioner free of incumbrances—Subsequent order by Sub-Divisional Officer for sale subject to incumbrances— Legality—Sale—If void—Subsequent confirmation of sale by Deputy Commissioner—If validates sale.*

When the Deputy Commissioner orders the sale of a village for arrears of revenue free of incumbrances, a subsequent order by the Sub-Divisional Officer directing that the village should be sold subject to incumbrances is incompetent and without jurisdiction under S. 138 of the C. P. Land Revenue Act. It is an illegality which vitiates the sale and renders the sale void. The fact that Deputy Commissioner approves of and confirms the sale does not cure the illegality. (*Roughton.*) BHAYYALAL *v.* GANGAPRASAD. **19 N.L.J. 299.**

——Ss. 144 and 145—*Sale set aside by S.D.O. but upheld by D. C.—Deposit by defaulter—Time.*

Though an application of S. 144 of the Land Revenue Act is made dependent upon an application not being filed under S. 145 of the Act, one object underlying the two sections is, that the defaulter shall have at least 15 days, after the payment of the purchase-money by the purchaser, in which to make his deposit, in order to set aside the sale. So where a sale is set aside by a S.D O. but upheld by D.C., and the price is paid by the purchaser thereafter, the defaulter is within time if he deposits his amount within 15 days of payment by the purchaser. (*Burton, F.C.*) KALKAPRASAD *v.* THAKUR BUDHASING. **1939 N.L.J. 293.**

——S. 144 (1)—*Scope—Balance of purchase money—Non-payment within 15 days—Effect—Sale—If void—Absence of prejudice.*

The non-deposit by the purchaser at a sale in arrears of taccavi of the balance of purchase-money within 15 days as required by S. 144 (1) of the C. P. Land Revenue Act is a mere irregularity, and does not, in the absence of prejudice to the tenant or to the heirs of a deceased tenant, render the sale void. HARISHANKAR *v.* RAMLAL. **19 N.L.J. 269.**

——S. 144 (1)—*Scope—Non-compliance—Failure to deposit balance purchase money within 15 days—If renders sale void—Absence of prejudice to tenant—Effect.*

The mere fact that the purchaser of a tenant's holding fails to deposit the balance of the purchase-money within the period of 15 days as required by S. 144 of the C.P. Land Revenue Act does not make the sale void, when no prejudice is thereby caused to the tenant. (*Bose, J.*) RANI SONA BAHU *v.* SOBHAGSINGH. **167 I C. 848=9 R. N. 226=38 Cr. L.J. 467=19 N.L.J. 264.**

——S. 145—*Construction—"Person whose immovable property has been sold"—Charge-holder—Right to apply under.*

A charge-holder cannot be treated in respect of the property charged as a "person whose immovable property has been sold" within the meaning of S. 145 of the C. P. Land Revenue Act of 1917 prior to its amendment in 1936, and has therefore no *locus standi* to apply under the section. (*Burton R.M.*) SETH GHASIRAM *v.* RAMLAL. **20 N.L.J. 97.**

C. P. LAND REVENUE ACT (1917), S. 157.

——S. 151—*Order by Civil Court allowing pre-emption — No objection raised — Subsequent objection before Governor-in-Council—Maintainability.*

Where an order granting pre-emption has been passed by the Civil Court and has been given effect to by the Collector, a party who has failed to appeal and object in the Civil Court cannot be allowed to raise objections in that behalf afterwards in the Revenue Court. The Governor-in-Council has no authority to exercise revisional powers in respect of orders of the Civil Court allowing pre-emption. (*Gordon, R.M.*) MAHADEO *v.* NARAYAN. **19 N.L.J. 76.**

——S. 151—*Pre-emption by decree-holder—Deposit of purchase-money—Necessity—Right to set-off—Failure to deposit—Irregularity—Revision.*

Under S. 151, Land Revenue Act, a decree-holder pre-empting the property and thereby becoming the purchaser need not deposit the purchase-money before the Collector but is entitled to set-off his claim in the case against the price money to be deposited. The failure to deposit would at the most amount to an irregularity, but when such irregularity causes no material loss, the Governor-in Council will not interfere in revision. (*Gordon, R.M.*) MAHADEO *v.* NARAYAN. **19 N.L.J 76.**

——S. 152—*Applicability—Jurisdiction of Civil Court—Suit by lambardar for recovery of amount of revenue paid by him on behalf of co-sharers as zabti bhogra—Jurisdiction of Civil Court—Contract Act, S.* 69.

Clause (10), S. 152, deals with claims arising from actual collections or from the processes to enforce the realization of arrears of revenue or arrears of sums realizable as revenue To come within this clause, the matter complained of and which gives rise to the suit must actually be connected with or arise out of an actual collection or some process for the recovery of arrears of revenue. The cause of action must be intimately connected with the collection or with the process for the recovery of revenue. Where a lambardar pays the whole revenue and then sues the co-sharers for amounts paid by him on their behalf as zabti bhogra, his claim is not one connected with or arising out of actual collection or anything connected with collection, but rather from payment made by him to co-sharers use; and in view of S. 33 which presupposes that Civil Courts have jurisdiction to try suits by lambardars for arrears of revenue payable through them by the proprietors whom they represent. S. 152 is not applicable. Such a suit falls under S. 69, Contract Act and can be entertained by Civil Courts. (*Harries, C.J. and Wort, J.*) HARIHAR DORA *v.* UPENDRA PATI. **6 B R. 218=185 I.C. 602=12 R. P. 384=A.I.R. 1939 Pat. 497.**

——S. 157—*Failure of co-sharer lambardar to pay Sadar lambardar—Payment by him to Government—Recovery under S. 157—Remedy of patti lambardar.*

Where a patti lambardar who held her share free from assessment, failed to collect and pay the land revenue to the Sadar lambardar, and the sadar lambardar paid it and on application to the Tahsildar under S. 157, recovered the amount from the patti lambardar, her remedy is not by

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a suit against the Sadar lambardar for it would not be maintainable; but to sue the other co-sharers for their share of the land revenue or to apply to the Tahsildar to recover it for her or to sue the sadar lambardar for her share of village profits. (*Pollock, J.*) THAKURSINGH *v.* MST. PARWATIBAI. 179 I.C. 12=11 R.N. 278=1938 N.L.J. 292=A.I.R. 1938 Nag. 490.

——S. 157—*Payment by Sadar lambardar—Sale of co-sharer's land—If free from encumbrances—Nature of right conveyed.*

If a Sadar lambardar fails to get in and pay over the land revenue to the Government, he is liable to have his land sold. But he is given a right over against the co-sharer whose revenue is in arrear. He may sell that co-sharer's land. Inasmuch as he had paid to Goverments, the first charge given by the statute to the Government passes to him. But it cannot wipe away a mortgagee's right. The Sadar lambardar has priority over the mortgagee standing in the Government shoes to the extent of the land revenue due in respect of the mortgagor's land, paid by him. Hence he can sell the land giving to the purchaser a like priority unless the mortgagee redeems the charge by payment. (*Stone, C.J. and Bose, J.*) ZALLIRAM BATTOLAL *v.* MANGAL SINGH. 185 I.C. 780=12 R.N. 173=1939 N.L.J. 477=A.I.R. 1939 Nag. 302.

——S. 169 (1) (a). (b) and (c)—*Scope—Sub-Divisional Officer—Order rejecting objections as too late—Effect of.*

There was nothing in the terms of an order of a Sub-Divisional Officer to show that he declined to entertain objections until the question had been determined by the Civil Court; all that he said was that the plaintiffs had failed to avail themselves of the opportunity of putting forward their objections at the time when they were called for by proclamation and that the objection was made so late that it could not be entertained In passing such order the Sub-Divisional Officer added certain observations and suggested that the remedy of the objectors lay against the vendors in the Civil Court.

Held, the order did not fall under S. 169 (1) (*a*), (*b*) or (*c*). (*Niyogi, J.*) UMRAO ZUNGAR *v* SHIWA LAXMAN. I.L.R. (1937) Nag. 476=170 I.C. 601=10 R.N. 68=A.I.R. 1937 Nag. 177.

——Ss. 169 (1) (b) and 220 (n)—*Order to file civil suit within six months—Suit filed beyond that period—If entertainable.*

Where in an order under S. 169 (1) (*b*) of the C. P. Land Revenue Act a party is asked to file a civil suit within six months but he fails to do so and files it beyond that period the Civil Court cannot entertain the suit, it being barred under S. 220 (*n*). Such party has to face the consequences under S. 169 (2) (*b*) and take his chance before Revenue Court. (*Stone, C.J. and Puranik, J.*) MADHORAO DINKARRAO *v.* LAXMIBAI. I.L.R. (1940) Nag. 110=176 I.C. 952=11 R.N. 95=A.I.R. 1938 Nag. 241.

——S. 169 (1) (b)—*Partition—Party asked to file civil suit within six months—Case kept pending—Order sent to Deputy Commissioner for information—Order of Deputy Commissioner asking case to be filed—Which is the operative order.*

In a partition proceeding before a competent Sub-Divisional Officer, he passed an order under

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S. 169 (1) (*b*) as follows: "*A* is asked to establish his rights in Civil Court by filing suits within six months from this date. Till then the case be kept pending. Record forwarded to Dupty Commissioner for information." Deputy Commissioner endorsed on this as follows: "Case need not be kept pending so long. It be filed. Parties can reopen it in due course." Question was if Deputy Commissioner's order was final or that of the Sub-Divisional Officer's and did the superior officer's endorsement convert the Sub-Divisional Officer's order from S. 169 (1) (*b*) to S. 169 (1) (*a*).

Held, that the order of the Sub-Divisional Officer under S. 169 (1) (*b*) was final and that the Deputy Commissioner to whom the order was sent for information had no right to vary it in any way so as to bring it under S. 169 (1) (*a*), as the order was sent to him not by way of appeal or revision but in his administrative capacity only for information and the endorsement by Deputy Commissioner was his administrative act. (*Stone, C.J, and Puranik, J.*) MADHORAO DINKARRAO *v.* LAXMIBAI. I.L.R. (1940) Nag. 110=176 I.C. 952=11 R.N. 95=A.I.R. 1938 Nag. 241.

——S. 187—*Lambadari Rules—Rr.* 11 (1) (b) (*ii*) *and* 11 (1) (b) (*iii*)—*Scope of.*

The qualification for lambardarship laid down in Rr. 11 (1) (*b*) (ii) and 11 (1) (*b*) (iii) of the Lambardari Rules are to be only a guide to the Revenue Officers in making the appointment and the rules should not be read as attaching more weight to one consideration than to another. The decision has to be made after taking into account all the considerations. (*Roughton, F.C.*) GHANARAM *v.* DASRATHRAO. 1938 N.L.J. 365.

——Ss. 187 and 189—*Mahal imperfectly partitioned—Lambardar—Effect on status of.*

Per *Grille, J.C., agreeing with Gruer, A.J.C., Subhedar, A.J.C.*, contra.—On an imperfect partition of mahal, a lambardar, does not cease automatically to exercise his powers when his proprietary interest in a patti of that mahal is lost. The mahal continues to be the mahal and does not lose its character as such on an imperfect partition into pattis, and lambardar of a mahal continues to be the lambardar until he has been removed. A lambardar is appointed by statute and is only removable by statute.

Per *Subhedar, A.J.C.*—A person who has been appointed lambardar of a mahal ceases to be a lambardar when the mahal is imperfectly partitioned. The legislature obviously contemplated that while the appointment of a lambardar must be expressly made for each mahal or patti, it left the formal removal of a lambardar so appointed absolutely in the discretion of the appointing authority and did not cast upon it the duty of formally removing him whenever, in the eye of the law, he ceases to function as such. (*Pollock, A.J.C., afterwards Grille, J C. on difference between Subhedar and Gruer, A.J.Cs.*) KESHO JAGANNATH *v.* RAOJI GOPAL. 31 N.L.R. (Supp.) 132=161 I.C. 806=8 R.N. 240=A.I.R. 1936 Nag. 44.

——Ss. 187 and 188—*Scope of—Respective duties of lambardar and sadar lambardar.*

S. 187 of the C P. Land Revenue Act lays a primary responsibility on the sadar lambardar to collect the land revenue from the lambardars and

pay it to Government, though his ultimate responsibility may be no more and no less than that of other co-sharers who are all jointly and severally liable for the entire land revenue of the village. Under S. 188 (1) it is the duty of every lambardar to collect and pay to the sadar lambardar so much of the land revenue as may be payable through him. (*Pollock. J.*) THAKURSINGH *v.* MST. PARWATIBAI. **179 I.C. 12=11 R.N. 278 =1938 N.L.J. 292=A.I.R. 1938 Nag. 490.**

——**S. 187**—*Temporary lambardar—If can be appointed.*

There is no provision in the Central Provinces Land Revenue Act enabling the appointment of a temporary lambardar pending mutation proceedings. (*Burton, F.C.*) GOPINATH SUNDERLAL *v.* CHUNILAL SUNDERLAL. **1939 N.L.J. 290.**

——**S. 187 (3)**—'Duties', meaning of. *See* C. P. LAND REVENUE ACT, SS. 189, 188 AND 187 (3). **1940 N.L.J. 199.**

——**S. 188 (2) (c)**— *Lambardar—Right to commission—When arises.*

The fact that the lambardar must render an account within six months does not affect the date when the cause of action arises for a suit for commission by the lambardar. The lambardar becomes entitled to his commission when he has paid the land revenue and the fact that he is bound to render accounts within six months does not prevent him from suing for the recovery of that commission before the lapse of six months. (*Pollock, A.J.C., afterwards Grille, J.C., on difference between Subhedar and Gruer, A.J.Cs.*) KESHO JAGANNATH *v.* RAOJI GOPAL. **31 N.L.R. (Supp.) 132=161 I.C. 806=8 R.N. 240=A.I.R. 1936 Nag. 44.**

——**S. 188 (2) (c) and (d)**—*Lambardar—Suit against co-sharer in possession if* sir *and* khudkasht *land for rental assessment—Maintainability.*

S. 188 (2) of the Land Revenue Act lays on the lambardar the duty of collecting the village profits; and he can, for the purpose of paying off the land revenue, which it is his duty to pay, ask the co-sharers in possession of *sir* and *khudkasht* land to contribute the rental assessment. Whether or not, it is reasonable on his part to demand payment from the co-sharers of this assessment before he furnishes them accounts, he has the right under S. 188 (2) (*c*) to collect the village profits and under S. 188 (2) (*d*) he is empowered to institute a suit to enforce this right. (*Pollock, J.*) RAOJI *v.* MADHORAO. **20 N.L.J. 77=171 I.C. 956 =10 R.N. 147 (2)=A.I.R. 1937 Nag. 201.**

——**S. 188 (2) (c)**—*"Proprietor" meaning of.*

The word 'proprietor' in S. 188 (2) (*c*) is not restricted to a recorded proprietor only. The omission of the word 'recorded' must be deemed to have been made deliberately and with a purpose. The purpose appears to be to leave the door open to the unrecorded proprietor to sue in a civil Court which alone has the jurisdiction to try suits for village profits. (*Niyogi and Subhedar, A.J. Cs.*) YADGAR HUSSAIN *v.* MUHAMMAD IBRAHIM RAZA. **31 N.L.R. (Supp.) 202=163 I.C. 179=8 R.N. 299=A.I.R. 1936 Nag. 71.**

——**Ss. 188 (2) and 203 (3)**—*Scope—Transfer of site by tenant to co-sharer—Validity—Implied consent of lambardar—Sufficiency.*

A co-sharer has no right to choose any site in the abadi he wishes unless he has obtained the consent of the lambardar to that choice. But the consent of the lambardar need not be express. It can be implied from the fact that the lambardar is present at the time of selection of a site and does not object to it. A tenant can therefore validly transfer to a co-sharer a site in the abadi, if he selects it, with the consent, express or implied, of the lambardar. Such a transfer is not absolutely prohibited by S. 203 (3), but is permissible under S. 203 (3) read with S. 188 (2) of the C. P. Land Revenue Act. (*Stone, C.J.*) GULABSING *v.* CHHATARSING. **I.L.R. (1937) Nag. 58= 166 I.C. 563=9 R.N. 125=19 N.L.J. 211=A.I.R. 1936 Nag. 283.**

——**S. 189**—*Relation of lambardar and co-sharer—Nature of—Principal and agent.*

The jural relation between a lambardar and the co-sharers is that of agent and principal. (*Niyogi and Subhedar, A.J.Cs.*) YADGAR HUSSAIN *v.* MUHAMMAD IBRAHIM RAZA. **31 N.L.R. (Supp.) 202=163 I.C. 179=8 R.N. 299=A.I.R. 1936 Nag. 71.**

——**Ss. 189, 188 and 187 (3)**—*Lambardar gumasta—Failure to discharge duties and exercise powers—If entails removal of lambardar—'Duties' in S.187 (3), meaning of—Distinction between powers and duties.*

The meaning of the two Ss. 189 and 188 of the C. P. Land Revenue Act taken together, is that the gumashta is responsible for the duties of the officer of the lambardar and he may be dismissed for failure to discharge them and not the lambardar or lambardarini in whose place he has been appointed to perform the duties. The word 'duties' in S. 187 (3) of the Act must be taken to mean the whole of the functions which lambardar has to perform whether it be the duty specified in S. 188 (1) or the exercise of such of the powers which the lambardar has to undertake under sub-S. (2) as the gumashta can exercise. The distinction between 'duties' and 'powers' is marked more by the side headings than by the actual contents of the two sub-sections. It follows, that the lambardar is required to perform the function of collecting village profits and rendering an account to the proprietor and if there be a gumashta lambardar, it is the latter's duty. As it is the gumashta's own duty, the lambarder himself cannot be held responsible for his gumashta's failure to discharge it. (*Burton, F.C.*) MUNGABAI *v.* REOTIBAI. **1940 N.L.J. 199.**

——**Ss. 190 and 197**—*Mukaddam gumashta—Remuneration of—When recoverable as arrear of land revenue.*

Only the remuneration of such mukaddam gumashtas as are appointed by the Revenue Officer in accordance with the provisions of S. 190 (4) of the Central Provinces Land Revenue Act is recoverable as an arrear of land revenue in the terms of S. 197 of the Act and not that of a gumashta appointed by the mukaddam himself. (*Burton, F.C.*) TRILOKINATH *v.* KHUSHALRAO. **1939 N.L.J. 167.**

——**Ss. 190, 192**—*Scope—Mukaddam—Right to apply for fixing remuneration.*

There is nothing in the C. P. Land Revenue Act to suggest that the person appointed as mukaddam should move the Deputy Commissioner for his remuneration to be fixed. The

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duty of fixing remuneration under S. 192, C. P. Land Revenue Act, is as obligatory as the duty of appointing a mukaddam. If so, any delay on the part of the Deputy Commissioner in fixing the remuneration cannot prejudice the person who is entitled to receive it. And the Deputy Commissioner's order fixing the remuneration must relate to the whole period of service. (*Niyogi, J.*) SHANKAR RAO SADASHEO *v.* MADHO NARAYAN RAO. 173 I.C. 7=10 R.N. 283=A.I.R. 1937 Nag. 411.

——S. 192—*Lambardar or mukkaddam—Fixing of remuneration under S.* 192—*Right to claim for period anterior to date of such fixing.*

In a suit for village profits, a lambardar or mukaddam is entitled to claim whether as plaintiff or as defendant, remuneration for his services for such years prior to the year in which his remuneration has been fixed by the Deputy Commissioner under the provisions of S 192 of the Land Revenue Act as are within the period of limitation. (*Stone, C.J. and Bose, J.*) MAHADEO *v.* JANARDAN. I.L.R. 1938 Nag. 509=181 I.C. 5=11 R.N. 420=1938 N.L.J. 448=A.I.R. 1939 Nag. 75.

——S. 196—*Rules framed under—R.* 3—*'Relative'—Meaning of.*

The word 'relative' occurring in R. 3 of the rules framed under S. 196 of the C. P. Land Revenue Act for the appointment of village watchman as interpreted in the explanation. is used in its most general sense to cover any relationship whether traceable through the male or the female side and includes even relations by marriage. (*Burton, F.C.*) TIKWADYA ANDHARU *v.* LAWHA BUAHA 1940 N.L.J. 109.

——S. 197—Remuneration of mukaddam gumashta—When recoverable as arrear of land renenue. *See* C. P. LAND REVENUE ACT, Ss. 190 AND 197. 1939 N.L.J. 167.

——Ss. 202 and 220—*Bar of jurisdiction of Civil Court—Scope and extent.*

S. 220 of the C. P. Land Revenue Act bars a Civil Court from entertaining any suit with reference to any question connected with or arising out of the powers under S. 202. Where a plaintiff seeks to obtain damages for the breaches of certain conditions in a contract with reference to the lease of his forest, it is not a matter which the Revenue authority is empowered to decide under S. 202. The mere fact that the same set of facts give rise to a civil action for damages as well as to revenue proceedings under S. 202 does not confer jurisdiction upon the Revenue authorities to usurp the functions of Civil Courts. (*Bose, J.*) JAMESHED *v.* KUNJILAL. 181 I. C. 177=11 R.N. 444=1938 N.L.J. 392=A.I.R. 1938 Nag. 530.

——S. 202—*Rules framed under—R.* 3 (2), *proviso—Notice of clearing given—Expiry of period of 2 months—Starting of operations—Subsequent order restraining clearance—Completion of clearance—Legality*

It is true that the proviso to sub-R. (2) of R. 3 of the rules framed under S. 202, of the C. P. Land Revenue Act, speaks of clearing operations not being started until the two months period has expired, but it is obvious that if, after the two months' period has expired, the proprietor is entitled to start operations he is also entitled to complete them. Once the period of two months has expired the proprietor has discharged his obligation and is free to take the action of which he has given notice. Any subsequent order after the two months is invalid. (*Greenfield.*) RAMJILAL AGRAWALA, *In re.* 1940 N.L.J. 316.

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——S. 203—*Foreclosure of* malguzar *share*, sir *and house—Mortgagor, if entitled to fresh site—Procedure to be followed—Right to materials of house.*

Where a mortgagor's *malguzari* share *sir* and house are foreclosed by a mortgagee under the mortgage decree, the mortgagor no doubt becomes entitled to a fresh site. In order to enable him to make other arrangements, the decree may be directed to be suspended. But he is not entitled to remove any of the materials of the house, for it has become the property of the mortgagee. (*Stone, C.J. and Rose, J.*) GANGAPRASAD *v.* ITWARSINGH. 1939 N.L.J. 429=A.I.R. 1939 Nag. 287.

——Ss. 203 and 188—*Lambardar—Right to deal with house sites in* abadi.

Since the letting out of house sites in the *abadi* has not been placed among the duties of lambardars and since a clear cut distinction has been made between his duties and powers, it is clear that the lambardar has no statutory authority to deal with house sites in the *abadi* so far as S. 188 (1) is concerned. (*Stone, C.J. and Bose, J.*) GANGAPRASAD *v.* ITWARSINGH. 1939 N.L.J. 429=A.I.R. 1939 Nag. 287.

——S. 203—*Malguzar mortgaging his proprietary rights and house in* abadi—*Foreclosure—Mortgaged house, if exempt from attachment—Mortgagor's right to house site—Limits.*

A malguzar mortgaged his village which included his *sir* lands. He also mortgaged his house in the *abadi*. Mortgagee obtained decrees on his mortgages and foreclosed the proprietary interest, on which the mortgagor became an exproprietary tenant of the *sir* lands. When the mortgagee sought to execute his decree against the house the mortgagor contended that under S. 203 of the C. P. Land Revenue Act he was entitled to a house in the *abadi* and as such the house was not attachable.

Held, that the mortgagor was only entitled to a house site of reasonable dimensions in the *abadi* as a tenant and not to any particular site or house and hence the house was attachable. (*Bose, J.*) RAMADHIN *v.* SHEODUTT. 180 I.C. 690=11 R.N. 389=1938 N.L.J. 445=A.I.R. 1938 Nag. 544.

——S. 203—*Obtaining of site for building house to live in—Right of transfer—Presumption.*

Where a man obtains land in order to build a residential house in a growing town, the ordinary presumption would be that the land was acquired with a right of transfer. If a landlord contends that the tenant has no right to transfer his building, it is for him to show that the right of the tenant was so expressly limited. (*Pollock, J.*) GANPATRAO *v.* MOTILAL. 178 I.C. 535=11 R.N. 236=1938 N.L.J. 144=A.I.R. 1938 Nag. 480.

——S. 203 — *Proprietor mortgaging village share and house in* abadi—*Foreclosure—Right to retain house in* abadi.

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Where a proprietor mortgages his village share (without cultivating rights in *sir*) and his house in the *abadi*, he cannot after the mortgage had been foreclosed claim to retain possession of the house in the *abadi*, on the ground that he is entitled under S. 203 of Central Provinces Land Revenue Act. He is only entitled to a house site and not a particular house site. The mortgagee's rights are statutory and S. 203 cannot derogate from them. (*Niyogi and Gruer, JJ.*) DUKHURAM *v.* KHANDERAO. **I.L.R. (1939) Nag. 59=181 I.C. 577=11 R.N. 478=1939 N.L.J. 9=A.I.R. 1939 Nag. 83.**

——S 203—*Scope and applicability--Restrictions on transfer, if applies to proprietors.*

S. 203 of the C. P. Land Revenue Act regulates the rights of the proprietor of the mahal *vis a vis* the persons specified in the section and has nothing to do with the rights and liabilities of the proprietors, when there are more than one, as between themselves. The restrictions on transfer do not apply to the proprietors. (*Stone, C.J. and Bose, J.*) GANGAPROSAD *v.* ITWARSINGH. **1939 N.L.J. 429=A.I.R. 1939 Nag. 287.**

——S. 203—*'Transfer' if limited to cases of sales—Mortgage of house and site in abadi—Right of re-entry, if arises,*

The term 'transfer' in S. 203 of Central Provinces Land Revenue Act cannot be understood as being limited to a conveyance of all the transferor's interest in the property, but it includes such limited form of conveyance as a mortgage. Where the right to occupy the house and the site in the abadi on which it is built, is conveyed to another for a certain number of years such transfer is forbidden by S. 203 and a right of re-entry arises in favour of the malguzar. (*Grille, J.*) THAKUR CHHATARSING *v.* THAKUR HAMERSING. **I.L.R (1940) Nag. 167=186 I.C. 250=12 R.N. 193=1940 N.L.J. 44=A.I.R. 1940 Nag. 182.**

——S. 203 (1)—*Execution—Sale of house in* abadi—*Purchaser's right to site of house—Custom to the contrary—Onus of proof.*

An auction sale of a house in the *abadi* in execution of a decree does not convey to the purchaser therein any right to the site in the *abadi*, but passes only a right to the materials of the house, under S. 203, C.P. Land Revenue Act. The burden of proving any local custom to the contrary is on the purchaser who claims a right to the site. (*Gruer, J.*) BABUKANHU *v.* GANPAT RAO. **I.L.R. 1937 Nag. 350=169 I.C. 524=10 R. N. 12=A.I R. 1937 Nag. 107.**

——S. 203 (3)—*"Such site"—Meaning of.*

The words "such site" in sub-S. (3) of S. 203, C. P. Land Revenue Act, must be taken to refer to the words "a house-site of reasonable dimensions in the *abadi*" mentioned in sub-S. (1) of S. 203. (*Gruer, J.*) BABUKANHU *v* GANPAT RAO. **I.L.R. 1937 Nag. 350=169 I.C. 524=10 R.N. 12 =A.I.R. 1937 Nag. 107.**

——S. 203 (3)—*Usufructuary mortgage—Position of mortgagee—Suit to eject him and for possession—Limitation—If Art. 142 or 144 or 120 of the Limitation Act applies.*

As an usufructuary mortgage is a 'transfer' within the meaning of S. 203 (3) of the United Provinces Land Revenue Act, and as the interest of the mortgagee though only of a limited interest, yet in relation to the land the mortgagee

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is only a trespasser. As such a suit to eject him and for possession by the landlord is governed either by Art. 142 or 144 of the Limitation Act but not by Art. 120. (*Stone, C. J. and Bose, J.*) KUWARJI *v.* BHURELAL. **182 I.C. 527=12 R.N. 9 =1939 N.L J. 136=A.I.R. 1939 Nag. 163.**

——S. 203 (4)—*Jurisdiction of Civil Court—Dispute as to allotment of house site in* abadi—*Jurisdiction to decide—Revenue Court or Civil Court.*

The question of the adequacy of a site in the *abadi. i.e*, as to whether a tenant is in possession of a house-site of reasonable dimensions as provided by S. 203 (1) of the C. P. Land Revenue Act, is one involving a question of allotment and the proper venue for its decision is the Revenue Court under S. 203 (4). It is the proprietor of the *mahal* who is initially entitled to allot sites in the *abadi*. If the landlord and tenant disagree on the matter, the revenue officer is the proper authority to decide it under S. 203 (4). A Civil Court has no jurisdiction to settle the matter. (*Gruer, J.*) BABUKANHU *v.* GANPAT RAO. **I.L.R. (1937) Nag. 350=169 I.C. 524=10 R.N. 12=A. I R 1937 Nag 107.**

——S. 203 (5), (6) and (7)—*Scope and effect.*

Sub-Ss. (5) to (7) of S 203, C.P. Land Revenue Act, can hardly help an individual resident who to acquire the rights of transfer would have to get declaration made by the Local Government under sub-S. (5) of S. 203. In the absence of any Notification by the Local Government under sub S. (5) of S. 203, the fact that the activities in the village are mainly commercial will avail nothing. (*Niyogi, J.*) CHHAGANLALSA *v.* NATHUSING. **I L R. (1938) Nag. 326=176 I.C. 936=11 R N. 92=A.I.R. 1937 Nag. 338.**

——S. 218 (4)—*Deputy Commissioner's power to refer to Civil Court for making award—Limits.*

S. 218 (4) of the C. P. Land Revenue Act requires that the compensation shall be calculated by the Deputy Commissioner (or if necessary by the Civil Court) as nearly as may be in accordance with the provisions of the Land Acquisition Act. It does not require that the provisions of that Act shall be strictly followed. A reference by him to a Civil Court of the question of the amount to be awarded is within his powers. (*Roughton, H.M.*) HANUMANTRAO *v.* CHOUBEY MADAN MOHAN. **1938 N.L.J. 326.**

——S. 218 (5)—*Order to furnish security prior to entering on land—If legal.*

S 218 (5) of the C. P. Land Revenue Act requires the Deputy Commissioner's sanction to be given before land can be entered upon prior to payment of compensation and as such it is open to him to attach any reasonable condition as to security, to the sanction given (*Roughton, H.M.*) HANUMANTRAO *v.* CHOUBEY MADAN MOHAN. **1938 N.L.J. 326.**

——S 218—*Mining lease over land held by occupancy tenant—Rights of—Right to possession of land after expiry of lease.*

When Government assigns mining rights over land held by an occupancy tenant, the assignee is only an assignee of surface rights under S. 218 of the Land Revenue Act and he does not become an occupancy tenant of the land leased to him in mining rights—his rights cease on the expiry of his lease, and thereafter the occupation of the

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original tenant must be restored. (*E. Raghavendra Rao, H. M.*) FORRESTER *v.* COWASJI. **19 N. L.J. 203.**

——**S 218 (4) and (5)**—*Scope—Lessee of mine—Non-payment of compensation to surface owner—Right to sue sub lessee for wrongful removal of minerals—Measure of damages.*

A lessee or licensee of a mine can sue his sub-lessee and claim damages for trespass, working and wrongful removal of minerals, although he has not paid the compensation due to the surface owner and accordingly lawfully enter into and quarry. Although he may not, owing to such non-payment, enter and quarry it does not follow that the surface owner, or any one else claiming through him, can remove minerals, the right to remove which, during the period of the lease is in lessee or licensee. The measure of damages to which the lessee is entitled for wrongful removal by the sub-lessee, is the value of the minerals *in situ*, when there is no evidence to show that the removal was wilful and with knowledge that he had no right. (*Stone, C. J. and Niyogi, J.*) HARI PRASAD *v.* HANUMANT RAO. **I L R. 1936 Nag. 115=170 I.C. 554=10 R.N. 71=A.I R. 1937 Nag. 74.**

——**S. 219**—*Order under—Condition precedent to—Finding as land encroached upon being communal—Necessity for.*

In the absence of a finding on the record that a co-proprietor has encroached upon land which has been set apart by an entry in the village administration paper for communal purposes, no order can be passed under S. 219 of the Land Revenue Code. A finding as to the nature of the land alleged to be encroached upon is essential before such an order can be passed. (*G. P. Burton, R. M.*) BHARGAVRAO *v.* SECRETARY, NOTIFIED AREA COMMITTEE, SINDI DISTRICT, WARDHA. **20 N.L.J. 83.**

——**S. 220**—*Jurisdiction of Civil Court—Decision of Revenue Court as to the basis of a partition.*

Where a Revenue Court decides the dispute between parties as to the basis of a partition to be made, it is not for the Civil Court to say whether in so doing the Revenue Court has acted *ultra vires* or not. But whether the decision of the Revenue Court is *intra vires* or *ultra vires* the Civil Court's jurisdiction has not been barred under S. 220 of the C. P. Land Revenue Act for the purpose of declaring the titles of the parties. (*Stone, C. J. and Clarke, J.*) LAKHANDAR *v.* HARLALPURI. **I.L R. 1940 Nag. 16=180 I.C 797=11 R.N. 394=1938 N.L.J. 463=A.I.R. 1939 Nag. 5.**

——**S. 220** — *Perfect partition proceedings—Powers of Settlement Officer—Question of title—Jurisdiction of Civil Courts.*

The C. P. Land Revenue Act does not oust the Civil Court's jurisdiction altogether. Chapter XI of the Act dealing with partition distinguishes perfect from imperfect partition. A Settlement Officer has no power to decide questions of title in perfect partition proceedings under Ch. XI, and therefore in that respect the Civil Courts have jurisdiction. In imperfect partitions the Deputy Commissioner has certain limited powers to deal with questions of title. An order for perfect partition does not oust the jurisdiction of the Civil Courts as regards the title to the properties,

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though the Civil Courts are precluded from considering whether a partition should have been made under the circumstances or whether the partition should have been in the way it has been effected or in some other way. (*Bose, J.*) HARLALPURI *v* LAKHANDHUR. **170 I.C. 34=10 R.N. 55=19 N.L.J. 168=A I R. 1937 Nag. 163.**

——**S. 220 (n)**—*Scope and effect of—Proceedings instituted in Revenue Court—Suit in Civil Court—Bar of.*

Once the co-sharers who seek partition of their village invoke the jurisdiction of the Revenue Officer under the C. P. Land Revenue Act, they become bound by the special procedure of that statute and their rights and privileges thereon depend upon the compliance or non-compliance with the special procedure which is imperative on them to follow in the manner laid down by that statute. Where the co-sharers move the Revenue Court for partition, they bring themselves within the provisions of Ch. 11, C. P. Land Revenue Act, and unless the remedy in the Civil Court is available to them under that chapter, they will be precluded by S. 220 (*n*) of the Act from questioning the partition. Such co-sharers therefore have no independent right to institute a suit in Civil Court, for seeking any remedy which, if given, would upset the partition. (*Niyogi, J.*) UMRAO ZUNGAR *v.* SHIWA LAXMAN. **170 I.C. 601 =10 R.N. 68=I.L.R. 1937 Nag. 476=A.I.R. 1937 Nag. 177.**

——**S. 220 (p)**—*Civil Courts—Jurisdiction—Remuneration of mukaddam for period preceding fixation—Power of Civil Court to award.*

A mukaddam's right to remuneration for services rendered by him is independent of the fixation of it, since it has relation to the performance of the statutory duties imposed on a mukaddam by S. 193, C. P. Land Revenue Act, and the rules framed thereunder. On principles of natural justice a servant must be paid from the time that he begins to render service. Consequently the presumption must be made that a mukaddam is entitled to get his remuneration as soon as he is appointed. Therefore a mukaddam of a village, who is not a lambardar, is entitled to recover his remuneration for a period prior to the order of the Deputy Commissioner fixing his remuneration under S. 192, C. P. Land Revenue Act, subject of course to the Limitation Act, and the Civil Courts are not precluded by S. 220 (*p*) of the Act from awarding such remuneration. He is also entitled to his remuneration on the principle of *quantum meruit*. (*Niyogi, J.*) SHANKAR RAO SADASHEO *v.* MADHO NARAYAN RAO. **173 I.C. 7=10 R.N. 283=A.I.R. 1937 Nag. 411.**

——**S. 222**—*Applicability—"Waste land"—Meaning of—Demarcation—Inference—Presumption.*

The question of the applicability of S. 222 is one of law after the facts have been ascertained. No special meaning is to be attached to the phrase "waste land" and it will apply to the site which is vacant and unoccupied. Demarcation is to be inferred from the preparation of the maps which show that the land must have been measured. Demarcation is a necessary and implied operation in the settlement work and there is a presumption that steps were duly taken according to law. (*Gruer, J.*) SECRETARY OF

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STATE *v.* HABIBULLA. **I.L.R. (1938) Nag. 377=176 I.C. 346=11 R.N. 48=A.I.R. 1937 Nag. 407.**

——**S. 227 (2) (k)**—Rules under—Warrant without seal—Arrest under—Legality. *See* PENAL CODE, S. 225-B. **20 N.L.J. 219.**

CENTRAL PROVINCES LAND REVENUE MANUAL VOL. II, Page 43—*Instructions in—If has the force of law.*

The Central Provinces Land Revenue Manual contains mere executive instructions and they have not the force of law. Failure to observe the instructions does not amount to an illegality so as to invalidate a sale. (*Pollock and Niyogi, JJ.*) SURAJDEEN *v.* ISHWARI PRASAD. **I.L.R. (1938) Nag. 550=181 I.C. 478=11 R.N. 462=1938 N.L.J. 342=A.I.R. 1938 Nag. 554.**

CENTRAL PROVINCES LOCAL FUNDS ACT (1933), Ss. 8 and 13—*Procedure laid down by—If condition precedent to filing civil suit.*

There is nothing in the C. P. Local Funds Act to indicate that the procedure laid down in it is exclusive or must necessarily be followed before a civil suit is launched. (*Gruer, J.*) AMRAOTI T. M. COMMITTEE *v.* MINAMAL. **184 I.C. 494=12 R.N. 113=1939 N.L.J. 327=A.I.R. 1939 Nag. 247.**

CENTRAL PROVINCES LOCAL FUND AUDIT ACT, Ss. 10 (1) and 8 (b) (c)—*Surcharge—Notice—Conditions necessary.*

Before a notice can be served under S. 10 (1) of the C. P. Local Fund Audit Act, the Examiner, in cases which fall under cls. (*b*) and (*c*) of S. 8 of the Act must be satisfied that the loss has been occasioned or caused by gross negligence or misconduct. (*Stone, C J. and Bose, J.*) ATMARAM *v.* ACCOUNTANT-GENERAL, C. P. **I.L.R. (1939) Nag. 51=11 R.N. 184=177 I.C. 902=1938 N.L.J. 220=A.I.R. 1938 Nag. 422.**

——**S. 14**—*Application to Dt. Judge—When lies—Procedure to be followed.*

When a person is surcharged under S. 10 he has under S. 14 the right to apply to the Dt. Judge. The Judge must consider whether in point of fact there was gross negligence or misconduct. In order to arrive at a conclusion of that nature, he must consider the evidence, case by case and not take a lot of cases all together, decide one, and say that all are the same. (*Stone, C.J. and Bose J.*) ATMARAM *v.* ACCOUNTANT-GENERAL, C.P. **I.L.R. (1939) Nag. 51=11 R.N. 184=177 I.C. 902=1938 N.L.J. 220=A.I.R. 1938 Nag. 422.**

C.P. LOCAL SELF-GOVERNMENT ACT (IV OF 1920), Ss. 21, 36, 47 and 79—Vice-Chairman of Local Board—If public servant under S. 21 (10), I.P. Code. *See* PENAL CODE, S. 21 (10), **19 N.L.J. 221.**

——**Ss. 23 and 24**—*Construction and scope—"Toll"—Meaning—Cattle brought within public market—Charge of ground rent by Malguzar—Legality—Suit for injunction—Right of.*

Where a market is notified so as to become a public market, S. 23 (1) applies and the effect of that section is *inter alia* to vest in the District Council the exclusive right to levy tolls. "Toll" means a sum of money which is taken in respect of some benefit, *viz.*, the temporary use of land. Where a malguzar having title to the land over which a public market was situated charged ground rent in respect of the cattle that were brought within the market.

Held, that the action amounted to levying toll and was thus in violation of the exclusive right of the District Council to levy it. The fact that the District Council could not itself levy such toll under S. 24 did not entitle the malguzar to levy it as only one kind of toll could be levied and that could be levied only by the District Council.

Held further, that the District Council was the proper authority to bring a suit for an injunction restraining malguzar from violating its exclusive rights. (*Stone, C J.*) MT. BAYABI *v.* DIST. COUNCIL, NAGPUR. **I.L.R. (1937) Nag. 246=165 I.C. 849=9 R N. 98=A.I.R. 1936 Nag. 258.**

——**S. 23 (1)**—*Applicability to any market.*

S. 23 (1), C. P. Local Self-Government Act, applies to any market which corresponds to the definition of market given in S. 2 (2) of the Act whatever it may happen to be called. (*Bose, J.*) KRISHNARAO GOPALRAO *v.* SECRETARY OF STATE. **I.L.R. (1939) Nag. 408=176 I.C. 736=11 R.N. 75=A.I.R. 1938 Nag. 188.**

——**S. 23 (1) and (3)**—*Rights of owner of market—Notification under S. 23 (1) of C. P. Local Self-Government Act—Rights of owner, if affected—Test—Remedy.*

In general, the owner of a market has a right to levy fees and tolls which are usually known as stallage, piccage, pennage and rent and no one can erect a stall on any portion of the land or otherwise claim exclusive occupation of it without a license from the owner. But these rights can be curtailed in various ways one of which is custom. The word 'control' as used in connotation with market means to manage or to regulate, but, in the case of markets these rights are very considerably curtailed. The only right which the owner has is to levy fees and tolls and if that is taken away by custom or statute or other means his right of control in this sense vanishes. A suit was brought by the owner of a market to cancel the Notification by Government issued under S. 23 (1), C. P. Local Self-Government Act on the ground that his rights were affected by levy of fees and toll and that his rights to levy fees for nistar were infringed by the Notification. According to the wazib-ul-arz of the village no person had right to make collections from the bazaar; the jungle tank and wells lay outside the boundaries of the market.

Held, that the rights of the owner were not affected by the Notification and the suit did not lie under S. 23 (3). (*Bose, J.*) KRISHNARAO GOPALRAO *v.* SECRETARY OF STATE. **I.L.R (1939) Nag. 408=176 I.C. 736=11 R.N. 75=A.I.R. 1938 Nag. 188.**

——**S. 23 (3)**—*Who can sue under—Notification when to be cancelled.*

Any person, whose rights are prejudicially affected in some way by the notification under S. 23 (1) of the C. P. Local Self-Government Act, is entitled to sue under S. 23 (3) and the Notification must be cancelled if the prejudice is established. (*Bose, J.*) KRISHNARAO GOPALRAO *v.* SECRETARY OF STATE. **I.L.R. (1939) Nag. 408=176 I.C. 736=11 R.N. 75=A.I.R. 1938 Nag. 188.**

C. P. LOCAL SELF-GOVT. ACT (1920), S. 68.

——**S. 68**—*Offence for violating rule made under S. 79—Prosecution—If should be only by local body.*

Where a person breaks Rule 16-A (2) made under S. 79 (1) (iv), C. P. Local Self-Government Act, and is convicted, what he has broken is not any section of the Act nor any bye-law under the section which are the only cases mentioned in S. 68 in respect of which prosecution by a District Council or Local Board or Market Committee is necessary, but a rule made by the Local Government. There is no provision in S. 68 that prosecution for a breach of such rule can only be initiated by a local body. Where therefore a complaint is made by a Magistrate and it is taken cognizance of under S. 190, Cr. P. Code, and the person is prosecuted and convicted for breach of Rule 16-A (2), such prosecution is not illegal. (*Grille, J.*) EMPEROR *v.* GULAB SINGH. **I.L.R. (1938) Nag. 420=10 R.N. 121=171 I.C. 620=38 Cr.L.J. 1093=A.I.R. 1937 Nag. 387.**

——**S. 73 (2)**—*Limitation under—Computation of period—Starting point—Suit for damages for wrongful dismissal.*

When an aggrieved party obtains relief at one time but as a result of some proceeding he is deprived of it and he is relegated to his original position, a new cause of action should be deemed to accrue in his favour. In pursuance of a resolution, the Chairman of a District Council issued an order to an employee informing him that his services were dispensed with. The employee appealed to the Deputy Commissioner who set aside the Chairman's order. The Deputy Commissioner's order was upheld by the Commissioner. The District Council thereupon moved the Local Government for revision of Commissioner's order and the Minister for Local Self-Government reversed the Commissioner's order and restored that of the Chairman, District Council. The employee filed a suit challenging the legality of the order of the Chairman as well as that of the Minister for Local Self-Government and prayed for damages for wrongful removal from service:

Held, that the period of limitation, *viz*, six months prescribed by S. 73 (2) of the C. P. Local Self-Government Act must be computed from the date of the Minister's order as the cause of action for the suit arose on the day on which the Minister passed his order which had the effect of making the Chairman's order final and effective. (*Niyogi, J.*) DISTRICT COUNCIL OF SEONI *v.* NANHARIYARAM SHARMA. **I.L.R. (1939) Nag. 312=179 I.C. 434=11 R.N. 292=A.I.R. 1938 Nag. 499.**

——**S. 79 (1) (iv)**—Rules under—R. 16-A (2)—Violation of—Prosecution—Procedure. *See* C. P. LOCAL SELF-GOVERNMENT ACT, S. 68. **A.I.R. 1937 Nag. 387.**

CENTRAL PROVINCES MONEY-LENDERS ACT (XIII OF 1934, as amended by Act XIX of 1937), S. 9—*Applicability and scope—Mortgage—If "loan"—Mortgoge executed and suit instituted before 1934—Preliminary decree and final decree prior to amendment—If can be re-opened—Retrospective operation.*

As from 19-3-1937, the C.P. Money-Lenders Act (as amended in 1937) applies to mortgage transactions made with money-lenders, as a mortgage would clearly fall within the term "loan", although the Act of 1934, before its amendment was not applicable to a loan transaction which was in substance a mortgage, a charge or a sale of immovable property. A Court should therefore be very slow to give retrospective effect to S. 9 of the Act as amended in the case of a transaction of loan which was not a loan within the meaning of the Act at the time when the suit was brought. The Amending Act of 1937 is not retrospective in operation and does not affect transactions prior to it. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR. I.L.R (1938) Nag. 91=179 I.C 129=11 R N. 271=20 N.L.J. 285=A.I.R. 1938 Nag. 112.

C. P. MONEY-LENDERS ACT (1934), S. 11.

——**S. 9**—*Total interest paid, if relevant.*

According to S. 9 of the Central Provinces Money-Lenders Act, no Court shall decree on account of arrears of interest a sum greater than the principal of the loan. The fact that the total interest paid up to date may amount to more than the principal, is quite beside the point. (*Gruer, J.*) RAMCHANDRA *v.* MADHORAO. **1938 N.L.J. 364.**

——**S. 11**—*Applicability--Conditions—Relationship of decree-holder and judgment-debtor—Sufficiency—Debt in respect of sale and purchase of cotton—Decree-holder not money-lender—Effect.*

Before the benefit of S. 11 of the Money-Lenders' Act can be availed of, it must be shown by the applicant that the decree-holder is a money-lender and that the transaction giving rise to the decree was a loan as defined by the Act. It is not enough that the relationship of decree-holder and judgment-debtor exists between the parties. A debt in respect of the sale and purchase of cotton is not a loan under the Act. (*Stone, C.J, and Puranik, J.*) GULABCHAND UTTAMCHAND *v.* BRUEL & Co. **1938 N.L.J. 9.**

——**S. 11**—*Application under for instalments—Forum.*

An application under S. 11 of the Central Provinces Money-Lenders' Act for instalments must be made to the Civil Court exercising ordinary jurisdiction. Obviously, an executing Court cannot vary the decree. The Court empowered by S. 11 to vary the decree is the Court that passed the decree (*Stone, C.J. and Bose, J.*) GANPATRAO *v.* JAGANNATHRAO. **1940 N.L.J. 187=A.I.R. 1940 Nag. 196.**

——**S. 11**—*Construction—"At any time"—Application for instalments after acceptance of bid at execution sale—Competency—S. 11. if controls O. 21, R. 92, C. P. Code.*

S. 11 of the Money-Lenders' Act has to be construed strictly, as it restricts existing rights under the law, and should not be allowed to override the provisions of the existing law, *i.e.*, the provisions of O. 21, R. 92, C. P. Code, S. 11 cannot be interpreted so as to permit of an application for instalments being entertained after the bid at an auction sale in execution of a decree has been accepted and when the confirmation of the sale has become inevitable. Once the bid has been accepted, the Court has to confirm the sale under O. 21, R. 92, C. P. Code, unless good cause is shown under Rr. 89, 90 or 91 of O. 21. (*Roughton, F.C.*) KRISHNARAO *v.* BHANU. **1938 N.L.J. 15.**

C. P. MONEY-LENDERS ACT (1934), S. 11.

——**S. 11**—*Powers conferred by, discretionary.*

The power conferred by S. 11 of the Central Provinces Money-Lenders' Act (1934) is a discretionary power. (*Stone, C.J. and Bose, J.*) GANPATRAO *v.* JAGANNATHRAO. **1940 N.L.J. 187=A.I.R. 1940 Nag. 196.**

——**S. 11**—*Scope and applicability—Secured creditors, if can be compelled to accept instalments.*

S. 11 of the C. P. Money Lenders Act is applicable to a case where a decree has been passed and an application has been made in respect of that decree by the Judgment-debtors. Though the creditors who prove their debts in insolvency and get their names entered in the schedule, may be said to be decree holders, the same thing cannot be said of a secured creditor who only gets his security valued. Such a secured creditor can not be compelled by the Court to accept any payment of the debt by instalments (*Puranik, J.*) BALIRAM *v.* LAXMAN. **1940 N.L.J. 387.**

——**S. 11**—*Scope—Executing Court—Power to direct payment by instalments.*

S. 11 of the Money-lenders Act gives power to an executing Court to direct that any decree which comes before it for execution shall be made payable by instalments. In cases to which S. 11 applies, the Court, quite apart from S. 42 read with O. 20, R. 11 (2), C. P. Code, has power to direct payment by instalments. (*Stone, C.J and Bose, J.*) JIWANDAS *v.* LILAWATIBAI. **I L.R. (1938) Nag. 407=172 I.C. 671=10 R.N. 231=20 N.L.J. 141=A.I.R. 1937 Nag. 409.**

CENTRAL PROVINCES MOTOR VEHICLES TAXATION ACT (as amended in 1935), S. 3 (1), Proviso—*Effect of amendment—'Tax' in Central Provinces Municipalities Act, meaning of.*

By an amending Act in 1935 the words "rent or fees" were deleted from the proviso to S. 3 (1), Central provinces Motor Vehicles Taxation Act. This clearly raises the implication that a person residing within one Municipality would not be liable to pay any tax on his motor vehicles which any other Municipal Committee might impose under the provisions of S. 66, Municipalities Act, as applied to Berar, but would be liable for any other fee imposed by its bye-laws. The definition of 'tax' in the Central Provinces Municipalities Act, would not include any toll, rate, due or fee of any kind whatever in addition to whatever kind of impost is mentioned in S. 66. Licence fee for motor lorry imposed by Amraoti Town Muncipality is not tax and hence a person residing within Chandur Bazar Notified Area Committee would be liable for licence fees imposed by Amraoti Town Municipality in respect of motor lorries plying between Chandur Bazar and Amraoti. (*Grille, J.*) AMRUTLAL *v.* PRESIDENT, TOWN MUNICIPAL COMMITTEE, AMRAOTI. **181 I.C. 520=11 R.N. 466 =1939 N.L.J. 262=40 Cr.L.J. 556=A.I.R. 1939 Nag. 171.**

——**R 29 (i)**—*Offence under—What has to be proved.*

R. 29 (*i*) of the Central Provinces Motor Vehicles Rules, 1927, does not prohibit the taking of liquor. To bring a driver under the rule it must be shown that the driver was under the influence of alcohol. (*Pollock, J.*) RAMLAL *v.* EMPEROR. **1939 N.L.J 204.**

C. P. MUNICIPALITIES ACT (1922).

CENTRAL PROVINCES MUNICIPALITIES ACT (XVI OF 1903), S. 39—*Levy of tax by Municipality—Notice by Municipal Committee defining rate of tax—Validity of resolution—Approval by special Committee.*

The appellants instituted two suits against the respondent Committee disputing the validity of a tax purporting to be imposed under the Central Provinces Municipalities Act, 1903, on the trade of ginning and pressing cotton by means of steam or mechanical process. Sub-S. (1) of S. 39 of the said Act provides as follows: "A Committee may resolve at a special meeting to propose the imposition of any tax for purposes of this Act; and sub-S (2) provides that "where a resolution has been passed under sub-S. (1) the Committee shall publish . . . . a notice defining . . . the amount of the tax to be imposed." The respondent Committee published a notice defining the amount or rate of tax to be imposed on the trade of ginning and pressing cotton by means of steam or mechanical process. The Judicial Committee remanded the case for the respondent Committee to let in evidence as to the contents of the resolution passed at the special meeting of the Committee.

Held, on the evidence, that the respondent Committee had failed to prove that the amount or rate of tax had been resolved upon at the special meeting and that the tax had therefore not been validly imposed. Decision of the Judicial Commissioner of the Central Provinces reversed. (*Lord Thankerton.*) RADHA KISHAN JAIKISHAN *v.* MUNICIPAL COMMITTEE, KHANDWA. **64 I.A. 118=172 I.C. 461=10 R P.C. 150=4 B.R 244= 1938 A.L R 63=1938 O L R. 38=(1937) 2 M.L. J. 792 (P.C.).**

——**(II OF 1922) and Bye-laws**—*'Gross annual letting value'—Meaning of—If includes payments by tenants as taxes.*

The expression 'gross annual letting value' or 'gross rent' as used in the C P Municipalities Act and the bye-laws does not include the sums paid by the tenant on account of conservancy tax or water rate, unless the tenant agrees to pay a lump sum as rent including taxes or rates without specifying their amounts. When a tenant pays specific sums on account of taxes or rates in addition to what he pays for use and occupation of the premises demised to him, to the Municipal Committee directly or through the owner, such sums cannot be included in the calculation of the 'letting value' or rent. (*Pollock and Niyogi, JJ.*) P V. DIXIT *v.* MUNICIPAL COMMITTEE, NAGPUR. **1940 N L.J. 112.**

——*Notice issued by Health Officer—Affixing of rubber stamp by municipal servant in the presence and with consent of Health Officer—Validity of notice.*

A notice issued by the Health Officer of the Municipality, who is empowered in that behalf is not invalidated by the fact that a subordinate municipal servant impressed the Health Officer's rubber stamp on the notice, when it is proved that the subordinate servant used it in that officer's presence and with his consent. (*Grille, J.C.*) RAMCHANDRA *v.* EMPEROR. **19 N.L J. 195.**

C. P. MUNICIPALITIES ACT (1922).

——*Property tax—Assessment—House standing on* nazul *land—Value of land—If to be deducted.*

In valuing a house which stands on *nazul* land, the value of the land must be excluded, as the lessee is liable to ejected from the land on the expiry of the term of the lease. A person cannot be treated as a lessee when he is to be ejected and as an owner when he is to be taxed. A. V. WAZALWAR *v.* MUNICIPAL COMMITTEE, NAGPUR. **20 N.L.J. 175.**

——*Property tax—Assessment—Valuation of dilapidated house unfit for human habitation—Principles.*

In the case of dilapidated house unfit for human habitation, which is used only for storing lumber, fuel, etc., it is not correct to value the house for purposes of taxation as a good living house deducting a certain percentage for deterioration. Nor is it correct to assess it on the mere value of the material. A. V. WAZALWAR *v.* MUNICIPAL COMMITTEE, NAGPUR. **20 N.L.J. 175.**

——*Tax imposed by Municipal Committee, Nandura, on trade of ginning—Nature of.*

The tax on ginning and pressing of cotton imposed by the Municipal Committee, Nandura, under Notification No. 399-130, M-VIII dated 2nd February, 1934 and published in the Local Gazette is not a tax on income derived from the trade but on the process of ginning and pressing. It does not seek to take anything out of the income. (*Grille and Niyogi, JJ.*) ONKARSA *v.* THE MUNICIPAL COMMITTEE, NANDURA. **I.L.R. (1940) Nag. 446.**

——**S. 3**—*"Owner"—Malguzar—If owner—Inclusion of malguzari land in Municipal area—Effect.*

Inclusion of malguzari land within a Municipal area does not change the rights and liabilities of the malguzar and the tenants *inter se*. Nor is the malguzar an owner as defined in S. 3 of the C. P. Municipalities Act. (*B.G. Khaparde.*) KESHEORAO *v.* CIVIL STATION SUB-COMMITTEE, NAGPUR. **20 N.L.J. 238.**

——**S. 23**—Curability under—Meeting convened by issue of notice signed by secretary. *See* C. P. MUNICIPALITIES ACT, SS. 31 (2) AND 23. **I.L.R. (1940) Nag. 446.**

——**S. 25**—*R. 7 of rules framed under—Scope of—Payment to Counsel to represent committee in appeal by a dismissed employee, without sanction—Liability to refund.*

R. 7 of rules framed under S. 25 of the C. P. Municipalities Act, makes no provision for representation by Counsel on behalf of the Committee, but only for the employee in special cases. As such, any payment made to Counsel without previous sanction, for representing the committee before the Local Government in an appeal by a dismissed employee of the Municipality, is not covered by any provision of the Act or rules thereunder and as such is recoverable from those who were responsible for its expenditure. (*Gruer, J.*) AMRAOTI T. M. COMMITTEE *v.* MINAMAL. **184 I.C. 494=12 R.N. 113=1939 N.L.J. 327=A.I.R. 1939 Nag. 247.**

——**S. 25 (1), Proviso**—*Scope—Post of Secretary to Civil Station Sub-Committee—If protected post.*

The post of a Secretary to the Civil Station Sub-Committee in a Municipal Committee is virtually a post of additional Secretary in the Municipality and is therefore covered by the proviso to S. 25 (1) of the C. P. Municipalities Act. (*D.P. Mishra.*) CIVIL STATION SUB-COMMITTEE, NAGPUR *v.* G. T. MESHRAM. **1938 N.L.J. 34.**

C. P. MUNICIPALITIES ACT (1922), S. 45.

——**S. 25 (7)**—*Rules under, R. 2 (1) (a)—Appeal—Employees under S. 25 (1), Proviso—Dismissal by Municipal Committee—Right of appeal.*

Employees referred to in the proviso to S. 25 (1) of the C. P. Municipalities Act have no right of appeal against their dismissal by Municipal Committees under R. 2 (1) (*a*) of the rules framed uuder S. 25 (7) of the Act. (*D.P. Mishra.*) CIVIL STATION SUB-COMMITTEE, NAGPUR *v.* G. T. MESHRAM. **1938 N.L.J. 34.**

——**Ss. 31 (2) and 23**—*'To convene' in S. 31 (2), meaning of—Issue of notices signed by the secretary—Presumption—Failure to convene by president—If curable by S. 23—Validity of meeting if affected.*

'To convene' in S. 31 (2) of the C.P. Municipalities Act means to call together or to assemble, and not to issue notice. There is no law, rule, or bye-law laying down any special procedure to regulate the exercise of the president's power to covene meetings. When notices are sent to every member or circulated among members by the secretary, it must be presumed that it was with the consent of the chairman, particularly to the imposition of the tax and precludes any objection to its regularity or legality. (*Grille and Niyogi, JJ.*) ONKARSA *v.* THE MUNICIPAL COMMITTEE, NANDURA. **I.L.R. (1940) Nag. 446.**

——**S. 45**—*Intention underlying—'Interested'—Interpretation.*

The intention underlying S. 45 (1) of the C. P. Municipalities Act is to prevent jobbery and impure administration. As such, the word 'interested' occuring in S. 45 (1) of the Act is to be interpreted in its ordinary wide sense and not confined to interest in money. Where the interest proved could not possibly lead to corruption then the word could be interpreted in favour of the accused. Where one member of a Municipal Committee helps another member merely out of friendship in respect of a contract in which the latter was found to have an 'interest,' the former also becomes a person interested in the contract within the meaning of the section. (*Niyogi and Gruer, JJ.*) HAZARIMAL *v.* EMPEROR. **I.L.R. (1940) Nag. 133=187 I. C. 161=12 R.N. 278=41 Cr. L. J. 424=1939 N.L.J. 567=A. I. R. 1940 Nag. 81.**

——**S. 45 (1) and Sale of Goods Act, S 64**—*Acquisition of interest in a contract of sale subject to conditions after date of sale—If makes a member of Municipal Committee 'interested' in a subsisting contract.*

Though no doubt according to S. 64 of the Sale of Goods Act a sale becomes complete in the case of an auction, when the hammer falls, yet if the sale is one with conditions, until those are fulfilled the contract remains in force and is subsisting. Where a member of a Municipal Committee acquires an interest with reference to certain manure sold in public auction and bought by somebody else, and the auction sale is subject to certain conditions, the member becomes interested in a contract with the committee with-

in the meaning of S. 45 (1) of the Central Provinces Municipalities Act, inasmuch as the contract of sale remains in force till the conditions are fulfilled. (*Niyogi and Gruer, JJ.*) HAZARIMAL *v.* EMPEROR. I.L.R. (1940) Nag. 133=187 I. C. 161=12 R.N. 278=41 Cr.L.J. 424=1939 N. L.J. 567=A.I.R. 1940 Nag. 81.

——S. 48—*Applicability—Enhancement within powers but procedure irregular—Suit to recover tax collected.*

It is true that if a Municipal Committee exercises powers which it did not possess, it should not be regarded as acting in pursuance of the statute governing its powers, and its acts should not be regarded as being those done under the statute. But there is a difference between a case when a corporate body exercises a power which is wholly absent and a case where it has power but it exercises it illegally or with material irregularity. In the former case the Municipal Committee's act from beginning to end is illegal; whereas in the latter case the act is quite legal in the beginning but becomes illegal in the end. Where the Municipal Committee has power to enhance the tax on animals brought to slaughter-house and follows the procedure laid down in S. 68, Central Provinces Municipalities Act, but in doing so it lapses into an irregularity, namely omission to consider the objections filed by the butchers, the Municipal Committee is certainly exercising, although irregularly, the power conferred on it by S. 68 and to that extent the Municipality is acting under the statute. Hence, the suits to recover amounts collected in excess of lawful rate are governed by S. 48 and if not filed within six months are barred by time. (*Niyogi, J.*) AMROATI TOWN MUNICIPAL COMMITTEE *v.* BHIKAN SHEKH. I.L.R. (1939) Nag. 216=179 I. C. 817=11 R. N. 319=A. I. R. 1938 Nag. 455.

——S. 58—*Scope—If confers a power of review.*

S. 58 of the C. P. Municipalities Act provides for the control of the Deputy Commissioner and commissioner by the Provincial Government, and of the Deputy Commissioner by the Commissioner and nothing more. It does not provide for a review of one's own orders of the above mentioned persons. There being no other section, it is evident that the Act has no provision for review. (*Mishra.*) MUNICIPAL COMMITTEE, NAGPUR *v.* WAZALWAR. 1938 N.L.J. 205.

——Ss. 66, 77 and 78—*Applicability—Right to interest apart from S. 77 (1)—Interest claimed independently of tax—Recovery of—Procedure under S. 78—Recourse to—Permissibility.*

There is nothing in the C. P. Municipalities Act apart from S. 77 of the Act which gives a right to the Municipal Committee to recover interest on any tax which falls into arrears. The claim for interest which the Committee is entitled to make is only ancillary to the claim to recover the arrears of tax, and Ss. 77 and 78 as well as the rules framed under S. 77 (1) only speak of arrears of municial tax which refers to a tax payable under S. 66 (1) (*a*). S. 66 does not however give the Committee any right to recover interest as a part of the tax. Interest cannot therefore be regarded as an arrear of

tax; nor can it be regarded as "any other money claimable by the Committee under this Act" within the meaning of S. 77 (1). The procedure laid down in S. 78 is consequently not applicable or available to a Municipal Committee for recovery of interest which is claimed independently of the amount payable as tax. (*Niyogi, J.*) MUNICIPAL COMMITTEE, AKOT DT. *v.* SURAJMAL SHRIRAM GINNING FACTORY. I.L.R. (1938) Nag. 482=175 I.C. 476=10 R.N. 448=20 N.L.J. 145 =A.I.R. 1938 Nag. 119.

——S. 66, Rules under, R. 12 (a)—*Non-domestic purpose—Test—Water used by inpatients in doctor's house—Nature of user.*

The true test to determine whether water is used for non-domestic purpose is to see whether the water is directly used for any trade or business. If the trade or business requires for its prosecution the direct use of water, that use is clearly non-domestic; but when the business is of a nature where the use of the water is only incidental although it may be necessary so far as the persons connected with the business are concerned then it does not cease to be a domestic purpose. Thus when a medical practitioner uses a part of his dwelling-house for providing accommodation for the residence of his inpatients, he does not use the water directly for his business. The water is used incidently by persons for the same purpose for which he himself uses it as a part of the amenities of the building temporarily occupied by them. The water does not cease to be domestically used, only because it is used by the patients as opposed to the owner or his family or that the part of the dwelling house is used for professional or business purposes. (*Niyogi, J.*) LAXMAN VASUDEO *v.* MUNICIPAL COMMITTEE, NAGPUR. I L R. (1939) Nag. 330=178 I.C. 755 =11 R.N. 250=A.I.R. 1938 Nag. 466.

——S. 66 (1)—*Assessment of conservancy cess and water rate—Land held on lease from Municipality—Gross letting value—If to be taken into account.*

Where a person holds land under a lease from the Municipality, whether there is a building or not, for the purpose of assessing the conservancy cess and water rate, the gross annual letting value of the land has to be taken into consideration. (*Niyogi and Pollock, JJ.*) SUMATIBAI DEO *v.* MUNICIPAL COMMITTEE, NAGPUR. 188 I.C. 541 =1940 N.L.J. 303.

——S. 66 (2)—*Terminal tax—Liability for—'Chemical'—What it includes.*

Ammonium Sulphate and Sulphate of Potash are 'chemicals' taxable under Sch. II (*e*) of Notification No. 5931-1934-M-viii, dated 25th October, 1932. The mere fact that they were to be used as manure cannot take them out of the category of chemicals. Neither do they cease to be chemicals because they contain impurities. (*Gruer, J.*) KAMURUDDIN *v.* THE MUNICIPAL COMMITTEE, KHANDWA. 183 I.C. 443=12 R.N. 61=1939 N. L.J. 265=A.I.R. 1939 Nag. 195.

——S. 67 (7) and (8)—*Notification—Failure to mention sub-Cl. (7)—Failure to mention date from which tax was to come into effect—If affects validity of notification.*

The omission to mention sub-S. (7) in the notification under S. 67 of the Municipalities Act is not material because Local Government could

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not publish a notification under any other provision except that one. The failure or omission to mention the date from which the tax was to come into force, cannot invalidate the notification The rule of interpretation bearing on the commencement of statutes, that a statute takes effect from the first moment of the day on which it was passed unless another day is expressly named for the beginning of its operation, will have to be applied to the notification. In any case the omission to specify the date cannot deprive the notification itself of its presumptive force bearing on the proceedings relating to the imposition of the tax. Under sub-S. (8) of S. 67, notification of the imposition of a tax is conclusive evidence that the tax has been imposed in accordance with the provision of the Act. That serves to validate the entire proceeding relating when he attends the meeting. If there is evidence of the president's assent to the calling of any meeting, he must be deemed to have convened the meeting. His assent is inferable from his presence at the meeting. Even if there was any irregularity it could not, in its nature affect the validity of the meeting itself and is cured by S. 23 of the Municipal Act. *(Grille and Niyogi, JJ.)* ONKARSA *v.* THE MUNICIPAL COMMITTEE, NANDURA. **I.L.R (1940) Nag. 446.**

——**S. 67 (8)**—*Notification of imposition of tax —Effect of—If conclusive.*

Under S. 67 (8), C. P. Municipalities Act, a notification of the imposition of a tax is conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. Therefore under S. 4, Evidence Act, the Court must regard it as proved that the tax was imposed in accordance with the provisions of the Act and must not allow evidence to be given for the purpose of disproving it. *(Pollock, J.)* JAGANNATH *v.* SECRETARY, MUNICIPAL COMMITTEE, MEHKAR. **I.L.R. (1937) Nag 414=170 I.C. 133=10 R N. 47=A.I.R 1937 Nag. 168.**

——**S. 77**—*Applicability and scope—Application to Magistrate for distress and sale of moveable property — Maintainability — Conditions—Strict compliance with section—Necessity for.*

The C. P. Municipalities Act provides a special procedure which the Municipal Committee has to follow before applying to a Magistrate for a warrant for recovery by distress and sale of movable property. Under S. 78 of the Act which lays down that procedure, it is incumbent on the committee, to cause a bill for the amount due to be delivered to the person liable to pay the sum, and if the bill remains unpaid for ten days it is empowered to issue a notice of demand for payment, and it is only if the payment is not made within seven days from the date of service of that notice that the sum is deemed to be an arrear of tax. Unless and until this procedure is strictly followed the committee acquires no right to approach a Magistrate to recover the tax in arrears. *(Niyogi, J.)* MUNICIPAL COMMITTEE, AKOT DT. *v.* SURAJMAL SHRIRAM GINNING FACTORY. **I.L.R. (1938) Nag. 482 =175 I.C. 476=10 R.N. 448=20 N.L.J. 145=A. I.R. 1938 Nag. 119.**

——**S. 77**—*Jurisdiction of Civil Court—Claim to interest independently of tax—Claim rejected by Deputy Commissioner—Suit in Civil Court—Bar of.*

C. P. MUNICIPALITIES ACT (1922), S. 84.

It is not open to a Civil Court to grant a decree for interest after the Deputy Commissioner has refused to grant it under S. 77 (1) of the C. P. Municipalities Act. The power to award interest is given by the Act to the Magistrate alone and the Municipal Committee has no right to recover it independently of the Act. Further the Civil Court cannot entertain a claim for interest after the creditor has recovered his principal debt unless it is due under a contract. *(Niyogi, J.)* MUNICIPAL COMMITTEE, AKOT DT. *v.* SURAJMAL SHRIRAM GINNING FACTORY. **I.L.R. (1938) Nag. 482=175 I.C. 476=10 R.N. 448=20 N.L. J. 145=A.I.R. 1938 Nag. 119.**

——**S. 77 (1)**—"Any other money claimable by the Committee under this Act"—Meaning of. *See* C. P. MUNICIPALITIES ACT, SS. 66, 77 AND 78. **20 N.L.J. 145.**

——**S. 78**—Applicability—Interest—Claim to independently of tax—Procedure for recovery. *See* C. P. MUNICIPALITIES ACT, SS. 66, 77 AND 78. **20 N.L.J. 145.**

——**S. 79 and Berar Land Revenue Code (1928), S. 141**—*Sale for arrear of municipal tax —Property, if transferred free of prior encumbrances.*

An arrear of municipal tax is made by S. 79 of the C. P. Municipalities Act (as applied to Berar) recoverable as if the property were assessed to land revenue and the arrear were an arrear of land revenue due thereon. If a sale is resorted to in this connection, it will be under S. 141 *(c)* of Berar Land Revenue Code, and the result would be that in accordance with S. 149 (2) of the Land Revenue Code, the sale would transfer the property free of all prior encumbrances imposed upon it. *(Burton, R.M.)* MUNICIPAL COMMITTEE, AKOLA *v.* VITHAL. **1939 N.L.J. 362.**

——**S. 83**—*Applicability—Interest recovered by Municipality as tax—Right of appeal—Jurisdiction to decide legality of levy.*

It cannot be held that S. 83 of the C. P. Municipalities Act comes into operation only when there has been levy of a tax and not when there has been levy of *interest.* Where the Municipal Committee purports to recover the interest as a tax under the special procedure of distress and sale, the party aggrieved is indisputably entitled to avail himself of the right of appeal given by S. 83. The Deputy Commissioner on appeal has full jurisdiction to decide whether the levy of the sum by resorting to S. 77 (1) was or was not according to law. *(Niyogi, J.)* MUNICIPAL COMMITTEE, AKOT DT. *v.* SURAJMAL SHRIRAM GINNING FACTORY. **I.L.R (1938) Nag. 482=175 I.C. 476=10 R.N. 448=20 N.L.J. 145=A.I.R. 1938 Nag. 119.**

——**S. 83**—*Reference to High Court—When could be availed of.*

The advantage of the provisions of S. 83, C. P. Municipalities Act could be taken only by Government when hearing revision petition against order of the commissioner and not after it had been decided. *(Mishra.)* MUNICIPAL COMMITTEE, NAGPUR *v.* WAZALWAR. **1938 N.L.J. 205.**

——**Ss. 84 (3) and 85 (2)**—*Refund of taxes—Jurisdiction of Civil Court.*

C. P. MUNICIPALITIES ACT (1922), S. 85.

It is the duty of the Municipal Committee to assess each house, to decide who is the owner or occupier liable to assessment, and to recover that assessment. Whether that assessment has been correctly calculated or not or whether it is being levied on the right person is a matter for the Municipal Committee to decide, and it cannot be said that its action is *ultra vires* if it decides it wrongly. In view of the provisions of Ss. 84 (3) and 85 (2) of the C. P. Municipalities Act, no civil suit will lie for a refund of the taxes paid when there are no allegations in the pleadings to show that the Municipal Committee has acted *ultra vires*. (*Pollock, J.*) SECRETARY, MUNICIPAL COMMITTEE, NAGPUR *v.* RAMCHANDRA. **185 I. C. 893=12 R.N. 179=A.I.R. 1940 Nag. 174.**

——**S. 85**—*Rules framed under—Applicability—Application for refund of sums recovered as tax.*

The refund of an amount recovered as a tax by the municipality, even if that amount was calculated on a wrong basis is governed by the rules made under S. 85 of the C. P. Municipalities Act, (*Pollock, J.*) RAMLAL BHUNYADIN *v.* MUNICIPAL COMMITTEE, NAGPUR. **184 I C. 489 =12 R.N. 114=1939 N.L.J. 493=A.I R. 1940 Nag. 73.**

——**S. 106**—*"Land"—Meaning of.*

The word "Land" in S. 106 of the C. P. Municipalities Act is used in opposition to "House," and indicates sites uncovered by structures belonging to the same or different owners taking, or having a right to take, rents for the said use of land and paying cesses and taxes to the Municipality. There is no warrant for holding that the section applies to open or covered lands the malguzars of which does not receive rents or pay taxes for such lands as such malguzar. (*B. G. Khaparde.*) KESHEORAO *v.* CIVIL STATION SUB-COMMITTEE, NAGPUR. **20 N. L.J. 238.**

——**S. 106**—*Scope—Abadi within Municipality Responsibility for sanitation—Right of Municipal Committee to make malguzars responsible.*

A Municipal Committee which collects taxes in order to be able to discharge certain statutory duties laid on them cannot expect others to discharge these duties for them; and they cannot claim to make the malguzars responsible for the sanitation of their *abadi* lands on the mere ground that those lands are included in the municipal area. The municipality are not consequently entitled to call on the malguzars of a village situated with the municipal limits to construct a latrine in the *abadi* for the use of the inhabitants of the Basti. (*B.G. Khaparde.*) KESHEORAO *v.* CIVIL STATION SUB-COMMITTEE, NAGPUR. **20 N. L.J. 238.**

——**Ss. 168 and 199**—*Order of appointment of Health Officer as Secretary for issue of notice of Health Department, if* ultra vires—*Notice not signed as "Secretary, Municipal Committee"—Validity—Non-compliance with—Offence.*

There is nothing in the C. P. Municipal Act to prevent the appointment of two Secretaries and allocation of duties between them. The appointment of the Health Officer of the Municipality as Secretary to the Municipal Committee, for the purpose of issuing notices relating to the Health Department, which appointment is sanctioned by the Government, cannot be regarded as a delegation prohibited by S. 168 of the Act. It is merely a distribution of the duties which is perfectly legal and *intra vires*. A notice issued by the Health Officer under his signature under S. 199 of the Municipal Act is therefore perfectly legal, and non-compliance with it is an offence under the Act. Even if the Health Officer does not state that he signs it as "Secretary, Municipal Committee," it is a mere defect in form covered by S. 168 (4) and not an illegality. (*Gruer and Bose, JJ.*) LOCAL GOVERNMENT *v.* GANPATRAO. **167 I.C. 729=9 R.N. 204=38 Cr.L J. 437=19 N.L.J. 192=A.I.R. 1937 Nag. 119.**

C. P. MUNICIPALITIES ACT (1923), S. 180.

——**S. 178 (3)**—*Scope and effect of.*

By reason of S. 178 (3) of the Municipal Act, a bye-law does not become effective until it has been confirmed by the Local Government. But the bye-laws are made by the Municipal Committee at a special committee and not by the Government. All that the Government can do is to prevent the bye-laws made from taking effect by refusing to confirm it. (*Grille. J.C.*) RAMCHANDRA *v.* EMPEROR. **19 N.L.J. 195.**

——**S. 178 (5)**—*Rules under—Offence—"Manufacture"—Bullock cart.*

A bullock cart with pneumatic rubber tyres composed largely of iron, but which has also wooden planks in it does not fall under the vague heading of 'manufacture' and is not liable to octroi duty, and statutes imposing pecuniary burden must be strictly construed and failure to make payment of octroi duty in respect of such a cart is not an offence under R. 47 of the rules read with S. 178 (5) of the Municipal Act. (*Gruer, J.*) MAROTI RAO *v.* MUNICIPAL COMMITTEE, KAMPTEE. **A.I.R 1937 Nag. 11.**

——**(as applied to Berar), S. 179 (g)**—*Rules under—R. 1—Words "plying for hire within limits of Amraoti Town Municipality"—Interpretation.*

The word "plying for hire within the limits of Amraoti Town Municipality," occurring in R. 1, cannot be confined to the narrow interpretation that the whole of the service which is offered must take place within the limits of the Municipality and that otherwise the rules do not apply. Hence vehicles operating as a regular service between Amraoti Town and Chandur Bazar and picking up passengers within limits of the Amraoti Town Municipality ply for hire within the limits of the Amraoti Town Municipality. (*Grille, J.*) AMRUTLAL *v.* PRESIDENT, TOWN MUNICIPAL COMMITTEE, AMRAOTI. **181 I.C. 520= 11 R.N. 466=1939 N.L.J. 262=40 Cr.L.J. 556= A I R. 1939 Nag. 171.**

——**S. 180, Proviso**—*"At the time of the making of such bye-law"—Meaning of.*

The words "at the time of the making of such bye-law," in the proviso to S. 180 of the C. P. Municipal Act, must refer to the making of the bye-law by the Municipal Committee and can have no reference to the confirmation of any bye-law by the Government. Government has no power to make bye-laws or alter them. It can only accept or reject them. The making must therefore refer to the final resolution of the Municipal Committee in respect of the bye-laws. (*Grille, J.C.*) RAMCHANDRA *v.* EMPEROR. **19 N. L.J. 195.**

C. P. MUNICIPALITIES ACT (1922), S. 199.

——**S. 199**—*Applicability—Erection of building without sanction—Conviction under—Sustainability.*

The mere erection of a building without the sanction of the Municipal Committee is not an offence for which a conviction can be sustained under S. 199 of the C. P. Municipalities Act. The correct procedure in such a case is for the Municipal Committee to take action under S. 103 of the Act; and when this necessary step has not been taken, a conviction under S. 199 is unsustainable. (*Grille, J.*) PANDURANG KOMTI *v.* SECRETARY, MUNICIPAL COMMITTEE, CHANDA. **I.L.R. (1936) Nag. 56=164 I.C. 939=9 R.N. 47=37 Cr.L.J. 1038 (2)=19 N.L.J. 81=A.I.R. 1937 Nag. 79.**

——**S. 218**—*Delegation to Health Officer to institute prosecutions—Framing of new bye-laws afterwards—Fresh delegation—Necessity for.*

Where the Health Officer of a Municipality is empowered by the Municipal Committee to institute prosecution for and to compound offences under certain sections of the Act, and the then bye-laws framed under the Act, that delegation applies to new bye-laws framed subsequently also. It is not necessary for the Municipal Committee to give a fresh delegation each time a bye-law is made. (*Grille, J.C.*) RAMCHANDRA *v.* EMPEROR. **19 N.L.J. 195.**

CENTRAL PROVINCES PROTECTION OF DEBTORS ACT (IV OF 1937), S. 3—*Molestation—Resort to violence, when does not amount to.*

Where owing to the annoyance caused by a debtor in asking the creditor to go to a Civil Court for his money, the creditor resorts to violence against the debtor, he does so not to compel the debtor to pay the debt when he was not disposed to pay but only as a punishment for his impertinence and as such it would not amount to an offence under S. 3 of the Central Provinces Protection of Debtors Act. (*Niyogi, J.*) LAXMAN NAMDEO *v.* EMPEROR. **185 I.C. 348=12 R.N. 156=41 Cr.L.J. 168=1939 N.L.J. 455=A.I.R. 1939 Nag. 281.**

CENTRAL PROVINCES REDUCTION OF INTEREST ACT (XXXII OF 1936)—*Scope—If retrospective.*

The C. P. Reduction of Interest Act clearly retrospective in its operation. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR. **I.L.R. (1938) Nag. 91=179 I.C. 129=11 R.N. 271=20 N.L.J. 285=A.I.R. 1938 Nag. 112.**

——**S. 2 (d)**—*Secured debt—Attachment after judgment.*

An attachment of the judgment-debtor's property after judgment does not cause the judgment-debt to be a 'secured debt' for no 'lien' is created thereby so as to attract S. 2 (*d*) of the Central Provinces Reduction of Interest Act. (*Stone, C.J. and Bose, J.*) SETH LAXMINARAYAN *v.* SETH GHASIRAM. **1939 N.L.J. 257=A.I.R. 1939 Nag 267.**

——**S. 3**—*Applicability—Renewal in* 1933 *of bond executed in* 1930.

Where the debt was incurred in 1930, though the renewal of the bond took place in 1933, the Court could ascertain the principal due on 1st January, 1932, and grant the debtor a relief.

C. P. REV. BOOK CIRC. III-8.

(*Puranik, J.*) SHEOSHANKER SAHAI *v.* SETH SURAJMAL. **1940 N.L.J. 325.**

——**S. 3 (3)**—*Applicability—If confined to decrees passed before the Act came into force.*

The scheme of S. 3 of the C. P. Reduction of Interest Act is first to provide for claims not decreed and then for decrees already passed. S. 3 (3) is intended to apply only to decrees passed before the Act came into force. (*Pollock, J.*) ABDUL HUSAIN *v.* SETH DWARKADAS. **1940 N.L.J. 260=A.I.R. 1940 Nag. 159.**

CENTRAL PROVINCES RELIGIOUS AND CHARITABLE TRUST ACT (1937), S. 10—*What orders Court can pass—Enquiry into past administration—If within the scope of the Act.*

The Court is empowered under S. 10 of the Central Provinces Religious and Charitable Trust Act to pass orders for the proper management or administration of the trust property. Hence an enquiry into past administration is beyond the scope of the Act, and it is a civil suit that is the proper remedy in such a case. (*Gruer, J.*) SITARAM PAMAJI *v.* HARI KANHUJI. **188 I.C. 320=1940 N.L.J. 173.**

——**S. 12**—*Report under-signed only by two—Defect, if curable.*

S. 12 of the Central Provinces Religious and Charitable Trust Act requires that the report should be signed by three persons. Where it was signed only by two, the defect is not curable, as the application was bad at its inception and amendment could not better it. (*Gruer, J.*) SITARAM PAMAJI *v.* HARI KANHUJI. **188 I.C. 320=1940 N.L.J. 173.**

CENTRAL PROVINCES REVENUE BOOK CIRCULAR—*Sale by Collector—Confirmation—Appeal—Order by appellate Court without hearing purchaser—Legality.*

When a sale by the Collector has been confirmed, and an appeal is preferred, the auction-purchaser must be heard before an order to his disadvantage can be passed by the appellate Court. (*Gordon, R.M.*) RAJARAM *v.* BIBHUTSING. **19 N.L.J. 74.**

——Sale by Collector—Confirmation—Subsequent compromise between parties—Procedure—Order referring decree-holder to Civil Court—Propriety. *See* C. P. CODE, S. 70. **20 N.L.J. 93.**

——**Vols. II-III, 8**—Collector's sale—Proclamation not specifying mortgage—Collector directing sale subject to mortgage on mortgagee's application without inquiry on old proclamation—Propriety—Sale—If to be set aside. *See* **C. P. CODE, O. 21, R. 90. 20 N.L.J. 181.**

——**Vols. II-III, 8**—*Mortgage mentioned in proclamation—Declaration of invalidity prior to sale—If ground for setting aside sale.*

The fact that a mortgage mentioned in the sale proclamation as existing on the property sold is declared void after the proclamation and before the sale renders the sale liable to be set aside. (*Raghavendra Rao, H.M.*) LAXMAN BAPUJI TELI *v.* GANPAT NAGOJI TELI. **20 N.L.J. 179.**

——**Vols. II-III, R. 10**—Scope—If modifies O. 21, R. 69 (2), C. P. Code. *See* C. P. CODE, O. 21, R. 69 (2). **20 N.L.J. 80.**

——**Circular III-8, rules 10 to 15**—*Auction sale—Inadequacy of price—If justifies refusal of confirmation.*

C. P. REV. BOOK CIRC. III-8.

Once a bid has been accepted, inadequacy of price is no ground for refusal to confirm a sale, even if there be no specific order accepting the bids. (*Gordon, R.M.*) WAMANRAO *v.* MANKUARBAI. **19 N.L.J. 134.**

——**Circular III-8**—Sale by Collector—Setting aside—Grounds—Irregularity in publishing sale—Objection not raised before sale—Failure to prove substantial injury—Sale—If liable to be set aside—C. P. Code, O. 21, R. 90, as amended in Central Provinces. *See* C. P. CODE, O. 21, R. 90 (AS AMENDED IN C. P.) **19 N.L.J. 318.**

——**Circular III-8**—Scope—Duty of Collector under—C. P. Code, O. 21. R. 90, as amended in Central Provinces—Applicability to Collector's Cases. *See* C. P. CODE, O. 21, R. 90 (AS AMENDED IN C. P.). **19 N.L.J. 282.**

——**Circular III-8**—*Rules in—Collector's sale—Irregularities in sale proclamation—Omission to publish at Collector's Court or Tahsil—If vitiates sale.*

The rules framed under the C. P. Code, and referred in the C. P. Revenue Book Circular issued after the amendment of O. 21, R. 90, C. P. Code, must be construed to mean the rules under O. 21, R. 90, as adapted by the High Court of Nagpur. Omission of details in the sale proclamation and the omission to affix the proclamation on the Collector's notice board and on the Tahsil notice board are not such irregularities as will vitiate the sale. The objection to such irregularities must be raised before the sale. When they are not so raised, they are not grounds on which the sale can be set aside. (*Burton, R.M.*) GIRDHARILAL *v.* RATIRAM. **19 N.L.J. 312.**

——**Circular III-8,R. 10**—*Discretion of Collector under—Acceptance of bids—Order for fresh sale—Reference to Civil Court.*

The reference prescribed by R. 10 of Revenue Book Circular III-8, is for the purpose of determining whether the last bid in the auction held by the Tahsildar is adequate. If the Collector has reason to believe that that bid was inadequate, he has power to order a fresh auction, and can order a fresh enquiry and also make a reference to the Civil Court. (*Gordon, R.M.*) BHIKUBAI *v.* GANGADHAR. **19 N.L.J. 156.**

——**Circular III-8, Rules 14 and 15**—*Collector's case—Revision to Deputy Commissioner—Competency.*

Under rules 14 and 15 of the Revcnue Book Circular III-8, the Deputy Commissioner has only power of appeal but not of revision in Collector's case. (*Gordon, R.M.*) MAHADEO *v.* NARAYAN. **19 N.L. J. 76.**

——**Circular III-8, Rr. 14-17**—*Execution by Collector—Order for sale by Sub-Divisional Officer—Omission to appeal—Revision to Deputy Commissioner—Competency.*

When no appeal is filed within time to the Deputy Commissioner against an order for sale passed by the Sub-Divisional Officer, an application in revision to the Deputy Commissioner against that order is incompetent. (*E. Gordon, R.M.*) TUKARAM *v.* MOHANLAL. **19 N.L.J 174.**

——**Circular III-8, Rr. 15 and 16**—*Order of Deputy Commissioner refusing to restore appeal dismissed for default—Revision by Governor-in-Council—If competent.*

C. P. TENANCY ACT (1898), S. 41.

Proceedings in Collector's cases are governed by the rules in the Revenue Book Circular III-8, and the provisions of the C. P. Code, only apply because of the directions in those rules. Every order passed by a Revenue Officer in such proceedings is subject, in the matter of appeals and revisions, to Rr. 14 and 15 of the Revenue Book Circular. R. 15 allows revision by the Governor-in-Council only in the case of orders passed in appeal. An order of the Deputy Commissioner dismissing an application refusing to restore an appeal dismissed for default is not an order passed in appeal and therefore is not open to revision by the Governor-in-Council. (*Burton, R.M.*) RAMLAL *v.* GHASIRAM. **19 N.L.J. 314.**

CENTRAL PROVINCES REVENUE MANUAL, Vol. I, p. 119 R. 1, Explanation—Malik makbuza *losing rights in holding under S. 41, C. P. Tenancy Act—Liability to pay patwari's dues—Levy of dues—Right to recover from occupancy tenant.*

The *malik makbuzas* who have lost their right to cultivate their holding under S. 41, C. P. Tenancy Act, stand only in the position of proprietors who have forgone their right to cultivate the land. The person that is to be deemed to be proprietor for purposes of payment of patwari's dues is not the *malik makbuza* but the occupancy tenant who actually cultivates the land. Hence if such patwari's dues have been wrongly recovered by the Tahsildar from the *malik makbuza*, he is entitled to recover the same from the occupancy tenant in actual cultivation of the holding. (*Niyogi, J.*) SHRINIVAS GOVIND *v.* SADASHEO SAKHARAM. **171 I.C. 658=10 R.N. 127=20 N. L.J. 173=A.I.R. 1937 Nag. 211.**

CENTRAL PROVINCES TENANCY ACT (XI OF 1898), S. 2 (2)—Lac cultivation—If agriculture—Lease of lac trees for three years—Registration. *See* T. P. ACT, S. 107. **A.I.R. 1937 Nag. 289.**

——**Ss. 11 and 13**—*Admission of two to tenancy—Tenancy not divided by metes and bounds—Payment of rent jointly—Death of one of the tenants—Rights of landlord.*

Where an owner of property carves a lesser interest, such as a tenancy, out of his rights, the reversion, of course, remains in him, but when the reversion falls in, there is no transfer of title from the tenant to himself. When a landlord chooses to let in two people on the land giving each a right to uninterrupted possession of the whole upon their paying him jointly the whole rent, his reversion cannot fall in until the rights of both have determined. (*Bose, J.*) AMERGIR *v.* RAMBHAJAN. **I.L.R. (1940) Nag. 255=175 I.C. 536=10 R.N. 459.**

——**S. 41 (2) and (3)**—*Scope—Absolute occupancy holding—Mortgage without landlords consent—Subsequent mortgage in favour of landlord—Suit on former—Latter impleaded as puisne mortgagee—Plea that prior mortgage is invalid and not binding on him—Landlord discharged from suit—Declaration that mortgage did not bind him—Effect of—Subsequent suit on landlord's mortgage—Maintainability against purchaser in execution of decree on prior mortgage.*

In a suit on a mortgage executed by a tenant in respect of his absolute occupancy fields, the land-

lord who was impleaded as a party to the suit as a subsequent mortgagee of the fields pleaded that the suit mortgage, not having been effected with his consent as required by S. 41 (3), C. P. Tenancy Act, did not bind him He was discharged from the suit with the declaration that the mortgage did not bind him as it was ineffectual. The landlord subsequently brought a suit to enforce his mortgage against the mortgagor's legal representatives and against the prior mortgagee who had purchased the fields in execution of his own decree on his mortgage which was the subject of the former suit. The mortgagee-purchaser pleaded that the plaintiff landlord has lost his right to enforce his mortgage by setting up a paramount title in the prior suit and in declining to redeem the prior mortgage in his favour.

Held, (1) that the mortgage effected by the tenant without the landlord's consent did not bind him, and therefore the subsequent mortgage in his favour operated on the entire interest of the mortgagor-tenant as if it had not been burdened with a prior incumbrance; (2) that the transfer of a prohibited nature under S. 41 (2) of the C. P. Tenancy Act which was not permitted by the landlord would remain valid as between the tenant and his transferee until avoided by the landlord, so far as the landlord was concerned. Unless he consented to it, the mortgage effected without his consent, though prior in time, would be postponed to the landlord's later mortgage, and the mortgagee would be bound to redeem the landlord's mortgage; (3) the declaration given in the prior suit that the mortgage did not bind the landlord did not deprive him of his right as a subsequent mortgagee to enforce his own mortgage against the prior mortgagee. (*Stone, C.J. and Niyogi, J.*) RAMKARAN *v.* SETH KANHAIYALAL. **170 I.C. 71=I.L.R. (1937) Nag. 208=10 R.N. 40=19 N.L.J. 290=A.I.R. 1937 Nag. 189.**

——**S. 41 (7)**—*Scope—Occupancy tenant—Mortgage without landlord's consent—If void.*

S. 41 of the C. P. Tenancy Act of 1898 (repealed by Act I of 1920) conceded to the absolute occupancy tenant the right to transfer his right in the holding within certain limits; beyond those limits, the transfer to be binding on the landlord required the concurrence of the landlord. If the landlord withheld his consent the transfer did not become void *ab initio*, but operated as a valid transfer between the tenant and his transferee though it did not affect the landlord. The transfer is valid until it is avoided by the landlord. (*Stone, C. J. and Niyogi, J.*) RAMAKARAN *v.* KANHAYALAL. **I.L.R. 1937 Nag. 208=170 I.C. 71=10 R.N. 40=19 N.L.J. 290=A.I.R. 1937 Nag. 189.**

——**S. 46**—*Applicability—Lands ceasing to be agricuttural and treated as non-agricultural.*

S. 46 of the C. P. Tenancy Act has no application to a case where the lands have ceased to be connected with any agricultural holding. and are residential house property and have been treated as non-agricultural and transferable land. (*Rowland, J.*) PARMESHWAR PRASAD *v.* WALJI CHHATRI. **6 Cut.L.T. 62.**

——**S. 92**— *Scope—"Tenant" — Usufructuary mortgagee from recorded tenant—Ejectment of from holding—Suit for restoration of possession*

under S. 9, Specific Relief Act—Jurisdiction of Civil Court.

A mortgage of a tenancy is not an absolute assignment and does not create privity of estate between the lessor and the mortgagee. The relationship of landlord and tenant does not therefore exist between a landlord and a usufructuary mortgagee from the recorded tenant of the holding. The mortgagee is not a tenant within the meaning of S. 92 of the C. P Tenancy Act, where such a mortgagee in possession is ejected from the holding, a suit by him under S. 9 of the Specific Relief Act for restoration of possession is maintainable in the Civil Court and is not barred by S. 92. (*Rowland, J.*) BALMAKUND MISRA *v.* LALIT MOHAN MISRA. **6 Cut.L.T. 64.**

——**(I OF 1920)**—*Applicability and scope.*

The C. P. Tenancy Act fastens itself upon the original contract between the parties, and regulates their future rights and liabilities, the moment there is a transaction which falls within its purview. (*Vivian Bose, J.*) BABURAO *v.* SANDU. **I.L.R. 1936 Nag. 5=165 I.C. 122=9 R.N. 62=A.I.R. 1936 Nag. 180.**

——*Construction—Rights under the old Act—How affected.*

The provisions of the new Act must not be so construed as to take away rights that have accrued under the old Act. (*Pollock, J.*) PACHO *v.* NIHELAL. **1940 N.L.J. 377.**

—— *Interpretation — Notions derived from English and ordinary Indian Law, with reference to landlord and tenant, to be excluded.*

The Central Provinces Tenancy Act creates special tenures which are unknown to the ordinary law. Unless one follows closely the spirit and the provisions of the Act and excludes from consideration, pre-conceived notions gathered from English Law or from ordinary Indian Law with reference to landlord and tenant, one will be landed in considerable difficulties to arrive at the true meaning and intention of its provisions. (*Stone, C. J., Niyogi and Bose, JJ.*) PUNJARAM JAGOBA *v.* RAMU CHINTOO. **I.L.R. 1940 Nag. 348 =186 I.C. 731=12 R.N. 234=1940 N.L.J. 121=A.I.R. 1940 Nag. 49 (F.B.).**

——*Policy of—Gift of* sir *land—Surrender of occupancy right to donee— Validity—Duty of Court.*

The policy of the C. P. Tenancy Act is to secure and preserve to a proprietor whose proprietary rights are transferred a right of occupancy in his *sir* lands. This policy cannot be defeated by the proprietor making a gift of his *sir* land and then as part of the same transaction surrendering his occupancy right to the donee. Whenever it appears that a transaction is void as contrary to the policy of a statute, the Court should take notice of the nullity and proceed accordingly. (*Stone, C.J.*) SIDNATH *v.* JASODA BAI. **10 R.N. 287=173 I.C. 145 (2)=A.I.R. 1938 Nag. 185.**

——*Scope—If retrospective—Vested rights acquired under prior Act of* 1898*—If affected or taken away—Permanent lease of* Sir *lands under old Act—Foreclosure by mortgagee of land after new Act and ejectment of mortgagor—Rights of lessee to possession—If lost.*

Certain fields in a Mauza were *Sir* lands of *T*, who held 8 annas share in the village. The cultivating rights in these fields were permanently

leased out in 1917, when the old Tenancy Act XI of 1898 was in force, by *T* to the adoptive father of the plaintiff appellant, who remained in possession and paid rent to *T*. In 1921, after the new Act I of 1920 came into force, the respondent, who held a mortgage over this village share, foreclosed it and in 1930, he obtained a decree for arrears of rent against *T's* son *D*, who was recorded as an occupancy tenant after the loss of the proprietary rights. In execution of the decree the respondent in 1931 took actual possession of the fields thereby dispossessing the appellant who thereupon sued for possession.

Held, that the rights obtained by the respondent over *Sir* land by his foreclosure were subject to the perpetual lease granted by *T* in 1917 to appellant's adoptive father, which was binding on the respondent and that the absolute right which was conferred on the appellant by the old Tenancy Law could not be worsened or prejudicially affected by the new Tenancy Act of 1920, which should not be given retrospective effect, and the appellant should therefore be held entitled to be restored to possession of the fields in question. (*Gruer, J.*) KAMTANATH *v.* CHUDAMANSINGH. **20 N.L.J. 35.**

——**S. 2 (5) (d)**—*Improvement—House built in* abadi—*If amounts to—House built in holding when amounts to.*

Where an occupancy tenant builds a house in the *abadi* though with a view to live near the holding and protect it, is not an improvement. Though built on the holding itself, it cannot be an improvement unless it is 'required' by the holding. (*G. P. Burton, R. M.*) MT. BUDHANBAI *v.* THENGU. **1938 N.L.J. 136.**

——**S. 2 (9) and (11)**—*"Rent"—"Tenant"—Registered* kabuliyat *to cultivate* malikmakbuza *land for fixed period at fixed annual payment—Creation of tenancy.*

Where defendants executed a registered *kabuliyat* to plaintiff (a *malikmakbuza-holder*) to cultivate plaintiff's land for a particular period agreeing to pay a certain sum every year in return.

Held, that the defendants were tenants of the plaintiff and that the money they bound themselves to pay was rent within the meaning of the Act. (*Vivian Bose, J.*) BABURAO *v.* SANDU. **I. L.R. 1936 Nag. 5=165 I.C. 122=9 R.N. 62=A.I.R. 1936 Nag. 180.**

——**S. 3**—*"Tenant"—If includes sub-tenant.*

The word 'tenant' in the Act includes a "sub-tenant". A person, therefore, who is a 'sub-tenant' is a 'tenant' under S. 3 of the Act. Such a person cannot be a 'thalwa'. (*Pollock, J.*) RAMKRISHNA BHAU *v.* BISRAM. **171 I.C. 909=10 R. N. 147 (1)=A.I.R. 1937 Nag. 160.**

——**S. 5**—*Devise in contravention of—Devisee taking possession—Dispute between co-devisees—Validity of will, if can be raised.*

A will violating the provisions of S. 5 of the C.P. Tenancy Act though it is void in law, yet if a devisee has taken possession under the will and has acted under the will, he cannot in a suit by a co-devisee to enforce the will plead the invalidity of the will. (*Pollock, J.*) NAROTTAMDAS *v.* GURUPRASAD. **1938 N.L.J. 181.**

——**Ss. 6 and 105**—*Absolute occupancy holding pre-empted by landlord—Mortgagee—Suit by impleading landlord pre-emptor—Pre-emptor discharged—Decree—Mortgagee purchasing holding in execution—Suit by to recover possession against landlord—Competency—Right to pre-emption money.*

The substantative right of pre-emption given to the landlord under S. 6 (4) (*c*) is independent of the right of any mortgagee of the tenant right and is paramount. In addition to this the value of the absolute occupancy holding as if it were not mortgaged or charged as fixed by the Revenue Officer is conclusive and cannot be challenged in the Civil Court in view of S. 105 (*a*). But the Revenue Officer has not been given any special powers to distribute or dispose of the deposit made by the landlord. Consequently S. 105 (*a*) will not operate to deprive the Civil Courts of their indisputable jurisdiction to direct how the sum deposited by the landlord should be disposed of. An absolute occupancy tenant's field was sold in an execution of money-decree passed against him and under S. 6 the property was pre-empted by the landlord at price fixed under S. 6 (5) free of all incumbrances. A motgagee of the tenant rights brought a suit on his mortgage after the pre-emption proceedings and obtained a final decree thereon in execution of which he purchased the field for himself. The landlord was discharged from that suit in consequence of his having asserted his paramount title under S. 6. The mortgagee thereafter brought a suit against the landlord for recovering possession of the field, alleging that he not being a party to the pre-emption proceedings, they were not binding on him and as the landlord was a party to his mortgage suit and he having failed to redeem the mortgage, possession could be recovered.

Held, that the mortgagee could not recover possession, as on pre-emption proceedings taking place, the landlord took the property free of all incumbrances and the mortgage or other charge if any shifted from the holding and went over to the pre-emption price leaving the land free to the landlord. But the mortgagee could recover the money deposited in Court which was only a security substituted for land. And the fact that he had failed to ask for a decree against the pre-emption price in his previous suit on mortgage could not preclude him from doing so. (Change in S. 6 to remedy defect suggested.) (*Stone, C. J. and Niyogi, J.*) RAMKARAN BONDRU *v.* SURAJMAL KANHAIYALAL. **I.L.R. 1938 Nag 268=174 I.C. 762=10 R.N. 413=A.I.R. 1938 Nag. 80.**

——**S. 6**—*Acquiescence by landlord—What amounts to—Landlord and others creditors of tenant—Transfer of absolute occupancy land to one of the creditors as part of agreement before the Conciliation Board.*

Where the landlord along with others are creditors of his tenant and where as part of the agreement before the Conciliation Board the absolute occupancy land is transferred to one of the creditors on his undertaking to pay the debt due to the landlord, the whole arrangement including the landlord's part in it is one transaction and the only inference that can be drawn from his connection and part is that he did consent to the transfer. (*Burton, F.C.*) JAGDEORAO BALAJI *v.* MAHADEORAO ANYAJI. **1939 N.L.J. 170.**

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——S. 6—*Applicability—"Transfer"—Sub-tenant in possession continuing in possession under agreement of sale of occupancy right—If transfer—Registered transfer—If necessary.*

Where a sub-tenant in possession of an occupancy holding gets a right of occupancy in the holding in pursuance of an agreement of sale and continues in possession of the holding the transaction is a transfer to which S. 6 of the C. P. Tenancy Act applies. S. 6 is not intended to be limited to such transfers as have duly registered. (*G. P. Burton, R.M.*) MANNU *v.* YESHWANT RAO. 20 N.L.J. 84.

——S. 6—*Mortgage—Purchase of mortgaged holding—Rights and liabilities of—Failure to redeem mortgage—Pre-emption by landlord—Effect on rights of mortgage.*

The purchaser of the mortgaged property is not personally liable to pay anything in excess of the value of the mortgaged property. If the purchaser of the mortgaged property fails to redeem, he loses his right to the mortgaged property which in the case of landlord pre-empting under S. 6, C. P. Tenancy Act (1920) is the pre-emption money. (*Stone, C.J. and Niyogi, J.*) RAMKARAN BONDRU *v.* SURAJMAL KANHAIYALAL. I.L.R. (1938) Nag. 268=174 I.C. 762=10 R.N. 413=A.I.R. 1938 Nag. 80.

——S. 6—*Scope—Notice to incumbrancer—If necessary.*

S. 6 does not provide for notice to any incumbrancer and hence it is not imperative on the Revenue Officer to give a notice to any incumbrancer. (Compulsory issue of notice by Revenue Officer of pre-emption proceedings to all incumbrancers is urged by legislative amendment of the section.) (*Stone, C.J. and Niyogi, J.*) RAMKARAN BONDRU *v.* SURAJMAL KANHAIYALAL. I.L.R. (1938) Nag. 268=174 I.C. 762=10 R.N. 413=A.I.R. 1938 Nag. 80.

——S. 6—*Transfer of absolute occupancy holding—No notice to landlord—Landlord not taking steps to avoid it—Sale in execution of rent decree—Transferee if affected.*

A transfer of an absolute occupancy holding is valid unless and until it is avoided by the landlord in the manner and to the extent provided by S. 6 of the C. P. Tenancy Act. The sale of such a holding in execution of rent decrees to which the transferee was not a party when he was the tenant of the holding does not bind him. The transferee obtains a good title and becomes a tenant from the date of transfer. (*Grille and Bose, JJ.*) MADHORAO *v.* SETH PANNALAL. I.L.R. (1940) Nag. 190=177 I.C. 173=11 R.N. 131=1938 N.L.J. 152=A.I.R. 1938 Nag. 292.

——S. 6—*Transfer of occupancy holding—Liability for rent.*

On the transfer of an occupancy holding, the tenant ceases to be a tenant from the date of transfer. Hence he is not liable for the rent after that date. Irrespective of the fact whether the transferee is a tenant or not between the date of the transfer and the date on which it is avoided, one thing is clear and that is he is liable either for rent or for damages for use and occupation. (*Pollock, J.*) SHREE VITHAL BHAGWAN *v.* NARAYAN RAO. 182 I.C. 617=12 R.N. 23=1939 N.L.J. 196=A.I.R. 1939 Nag. 175.

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——S. 6 (2)—*Failure of tenant to defer transfer—Effect—If raises a presumption of waiver of intention to transfer.*

There is nothing in S. 6 of the C. P. Tenancy Act, that detracts from the written notice once delivered to the landlord or to show that it is affected in any way by the subsequent conduct of the tenant, and there is nothing to justify the suggestion that the act of the tenant in proceeding with the transfer before the expiry of the month can raise a presumption on the part of the landlord that the notice of the intended transfer has been waived. (*Burton, F.C.*) GOVINDRAO *v.* KRIPARAM. 1939 N.L.J. 107.

——S. 6 (5)—*Deposit in Court of pre-emption price—Charge for rental arrears—Mode of realisation.*

Where there is a deposit in Court of amount fixed as the pre-emption price, though it is charged with the rental arrears the landlord could not proceed against the money simply by obtaining an order from the Revenue Court to hand it over to him. He must first execute the decree for arrears already obtained and should obtain a decree for arrears for which no decree had been obtained. He must proceed to enforce his rights against the money in the same way as he would enforce them against the land. (*Roughton, F.C.*) TODAR *v.* RAMBHADRA. 1938 N.L.J. 164.

——S. 6, Proviso—*Construction and scope—"Costs"—If include costs of appeals as well—If overrides S. 29, Land Revenue Act.*

The costs incurred, by a landlord in his application mentioned in the proviso to S. 6 of the C. P. Tenancy Act do not extend to and do not include costs incurred in appeals arising out of that application. The proviso does not override the provisions of S. 29 of the Land Revenue Act as regards apportionment of costs. (*G. P. Burton, R.M.*) PHUSRAJ *v.* GULSINGH. 20 N.L.J. 87.

——S. 9—*Nature and scope of the charge created by—Rights of subsequent mortgagees paying the rent due by the tenant.*

The charge given in S. 9 of the C. P. Tenancy Act is a special statutory right (*i.e.*) it is a charge created by operation of law. The extent to which the ordinary law as to charges is set aside is indicated in S. 9 itself and it cannot be carried further by implication. The object of S. 9 is to give the landlord precedence for his rent. That object is completely attained the moment the holding is sold in the manner specified in the section. The 'first charge' enures no further than that. S. 9 does not confer any rights of subrogation. Therefore where certain subsequent mortgagees pay the rent due by the tenant, to save the security, have only to rely on S. 92 read with S. 100, T. P. Act. (*Stone, C.J. and Bose, J.*) SITARAM *v.* KRISHNARAO. 1940 N.L.J. 179=A.I.R. 1940 Nag. 156.

——S. 9—*Payment of decree amount after actual sale—If sufficient.*

Where an absolute occupancy holding is sold in execution of a decree for arrears of rent, the charge in favour of the landlord is satisfied and the purchaser of the holding gets the holding free of that charge. Any one who claims to have any interest in the holding can pay up the decretal amount during the execution proceedings until the holding is sold in execution. Once the holding

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is sold the right of such person to redeem the charge is barred and he is not thereafter entitled to pay the amount of decree for arrears of rent. (*Niyogi, J.*) SHANKER NATH *v.* BABULAL. I L R (1936) Nag. 138=164 I.C. 931=9 R.N. 44=A.I.R. 1936 Nag. 148.

——S. 9—*Sale in execution of decree for rent of absolute occupancy holding—If free from encumbrances.*

Where an absolute occupancy holding is sold in execution of a rent decree the sale is not one free from encumbrances and hence a mortgagee of the holding can enforce his mortgage which is prior to the date of the decree for rent. (*Pollock and Digby, JJ.*) BHIKULAL *v.* BHAIYALAL. 187 I.C. 785=12 R.N. 313=1939 N.L.J. 601=A.I.R. 1940 Nag. 97.

——S. 9—*Sale under rent decree—Auction-purchaser—Rights.*

Where in an execution of a rent decree the absolute occupancy fields are sold, the auction-purchaser is in no better position than that of an ordinary auction-purchaser in execution of a money decree and so he does not take the fields free from encumbrances. (*Gruer, J.*) GANBA PAIKU KUNBI *v.* GANPATSAO. I.L.R. (1937) Nag. 498=176 I.C. 155=11 R.N. 35=A.I.R. 1937 Nag. 376.

——S 12—*Exemption from attachment—Nazul plots cultivated by judgment-debtor.*

The mere fact that the word 'occupancy' or 'maurusi' is used in the Nazul settlement records would not give the occupants a right to claim that the land was not liable to attachment in execution of a decree and it was never intended by Government to deal with these persons as tenants governed by the Tenancy Act. (*Pollock, J.*) SAMBHSHIO *v.* LAXMAN ZINGAJI. 1940 N.L.J. 162=A.I.R. 1940 Nag. 210.

——Ss. 12 and 13—Plea of transfer being in violation of S. 12—Onus. *See* EVIDENCE ACT, Ss. 101 AND 102. 1938 N.L J. 474.

——S. 12—*Scope—Tripartite agreement between* malguzar *tenants and latter's creditors—Surrender of occupancy fields by tenants—Lease of same by* malguzar *to creditor in discharge of tenant's debt due to creditor—If void.*

Defendants 1 and 2 owed money to the plaintiffs on accounts, but had no money to pay to their creditor. They therefore offered to surrender their occupancy fields to the 3rd defendant who was the *malguzar* and undertook to induce him to lease the fields to the plaintiffs. The *malguzar*, on being approached, agreed to this and in pursuance of this tripartite arrangement, the defendants 1 and 2 surrendered the fields to the 3rd defendant who on the same day leased them to the plaintiffs. Plaintiffs set off the major portion of the amount due to them as consideration for the transaction giving the balance. After a time plaintiffs sued for refund of consideration money on the ground that the lease was fraudulently foisted on them, and that the lease was also void being a transfer in contravention of the C. P. Tenancy Act.

Held, (1) that the transaction was not transfer, but a surrender and release, and was not prohibited under the Act; (2) that S. 12 of the C. P. Tenancy Act, which did not prohibit transfers as such, but permitted them to a limited extent,

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limited them to persons specified there, was not enacted for the benefit of the tenant, but for the protection of his co-tenants and heirs and did not prohibit the transaction; and (3) that the transaction was therefore not void and the suit must therefore fail. (*Bose, J.*) SETH RAMNARAYAN *v.* BATTULAL. 170 I.C. 170=10 R.N. 50=20 N. L.J. 89=A.I.R. 1937 Nag. 235.

——Ss. 12 and 13—*Setting aside of transfer by occupancy tenant—Deed of transfer illegally registered—Jurisdiction of Civil Court.*

A Revenue Court alone has jurisdiction to set aside a transfer by an occupancy tenant, although the deed of transfer may have been illegally registered in spite of the prohibition contained in S. 12, C. P. Tenancy Act. The party who is prejudiced by the transfer must have recourse to the provisions of S. 13 and cannot invoke the jurisdiction of the Civil Court. (*Niyogi, A.J.C.*) KANHAIYA KUNBI *v.* SITARAM KUNBI. 31 N.L.R. (Supp.) 96=159 I.C. 862 (2)=19 N.L.J. 44=8 R.N. 144=A.I.R. 1936 Nag. 18.

——Ss. 12 and 89—*Transfer in S. 12 if includes surrender.*

Per *Stone, C.J.*—'Transfer' in S. 12 does not include the 'surrender' referred to in S. 89 of the C. P. Tenancy Act. (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDESHWAR. I.L.R. (1939) Nag. 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B.).

——S. 12—*Transfer of undivided share—When permissible.*

Under S. 12 of the C. P. Tenancy Act an occupancy tenant may transfer any right in his holding to a co-tenant or person who, if he survived the tenant without nearer heirs, would inherit his right. (*Pollock, J.*) ABDUL JABBAR *v.* MST. RAMMA. 1940 N.L.J. 164=A.I.R. 1940 Nag. 160.

——S. 12 (1)—*Acquisition of tenancy by adverse possession by remote heir—Ejectment, if can be resisted.*

Where a person has acquired the tenancy by adverse possession against the admitted tenant, if he happens to be in the time of the tenant's heirs, cannot be ejected by the landlord. (*Stone, C.J., Niyogi and Bose, JJ*) PUNJARAM JAGOBA *v.* RAMUCHINTOO. I.L.R. (1940) Nag. 348=186 I. C. 731=12 R N 234=1940 N.L.J. 121=A.I.R. 1940 Nag. 49 (F.B.).

——S. 12 (1)—*Transfer—What is included in.*

Bose, J.—The word transfer in S. 12 (1) is not confined to the narrow types of transfer with which Transfer of Property Act deals. It would include a 'transfer' by prescription. (*Stone, C.J., Niyogi and Bose, JJ.*) PUNJARAM JAGOBA *v.* RAMUCHINTOO. .L R (1940) Nag. 348=186 I.C. 731=12 R.N. 234=1940 N.L. J. 121=A.I.R. 1940 Nag. 49 (F.B.).

——S. 12 (4)—*Scope—Deed of relinquishment by one tenant in favour of other in settlement of dispute—If prohibited.*

S. 12 prohibits certain transfers mentioned in the body of the section. A deed of relinquishment by an occupancy tenant for valuable consideration in favour of another claiming a right to the holding of a deceased tenant in settlement of a dispute with him is not a transfer and therefore there is no contravention of S. 12. Hence such a document can rightly be admitted to registration. (*Bose and Puranik, JJ.*) SAHAUDRA BAI *v.* SHRI

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DEO RADHA BALLABHJI. I.L.R. (1940) Nag. 94=176 I.C. 57=11 R.N. 24=A.I.R. 1938 Nag. 30.

——S. 13—*Landlord—Who is—Basis of decision.*

In deciding who is the landlord of the tenant for the purposes of S. 13 of the C. P. Tenancy Act, the Revenue Court should have regard solely to the record-of-rights and the annual village records alone and it should not seek to decide who the landlord concerned is. (*Burton, F.C.*) KISLAL *v.* HARNAMSINGH. 1939 N.L.J. 559.

——S. 13—*Scope of—Surrender obtained by co-sharer—Lambardar resorting to remedy under S. 13—Equitable relief to co-sharer.*

S. 13 of the C.P. Tenancy Act enables the tenant's heirs or the lambardar to apply for an order for possession. It does not enable the tenant to get such an order. Thus the Act accepts the position that the tenant by his surrender has divested himself but makes provision for his heirs to get back in his place, alternatively it empowers the lambardar to apply for possession. The surrender is not one void *ab initio*. Where a co-sharer obtained a surrender from a tenant and the lambardar thereafter obtained possession by virtue of an order under S. 13, in a suit by the co-sharer who took the surrender for contribution among other reliefs, it was held that on equitable considerations the plaintiff should be recompensed not necessarily the amount he expended for the surrender, but such amount as a reasonable man would have paid less the costs his co-sharers would have incurred in the proceedings under S. 13. (*Stone, C.J. and Clarke, J.*) LACHHAMANSINGH *v.* MOTISINGH. 1940 N.L.J. 404.

——S. 13—*Surrender to co-sharer.*

Document drawn in the form of surrender to a co-sharer amounts to transfer. A.I.R. 1925 Nag. 259; A.I.R. 1927 Nag. 161, Foll. (*Niyogi, A.J.C.*) KANHAIYA KUNBI *v.* SITARAM KUNBI. 31 N.L.R. (Supp.) 96=159 I.C. 862 (2)=19 N.L.J. 44=8 R.N. 144=A.I.R. 1936 Nag. 18.

——S. 23—*Construction—"All arrears in respect of such holding"—Meaning—If include arrears subsequent to decree but prior to ejectment.*

According to the natural meaning of S. 23 the exprssion "All arrears in respect of such holding" means not only all arrears covered by the decree under execution, but also all arrears up to ejectment whether decreed or not; therefore all arrears of rent, whether decreed or not, must be deemed to be satisfied when the defendant is ejected in execution under the section. (*Pollock, J.*) SOBHARAM *v.* JAGMOHAN SINGH. I.L.R. (1937) Nag. 161=168 I.C. 62=9 R.N. 236=19 N.L.J. 237=A.I.R. 1936 Nag. 269.

——Ss. 23 to 25—*Scope—Recorded co-tenants—Decree for arrears of rent against one only—The other not impleaded—Ejectment proceedings—If binding on latter or his heirs.*

B and *R* were recorded as co-tenants of a certain holding. A decree for arrears of rent was passed against *R* only. *B* though living at the time of suit against *R*, was not made a party to the rent suit. In ejectment proceedings the landlord obtained actual possession of the holding. The heirs of *B* offered to pay the rent due during the ejectment proceedings, but the landlord refused to accept it even though the offer was made within the time allowed under S. 24 of the Act. The heirs of *B* then brought a suit for possession of the holding on the ground that the rent decree and the subsequent ejectment proceedings were not binding on them as their predecessor in title, *i.e.*, *B* was not made party to the rent suit against *R*.

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Held, that the suit for possession by the heirs of *B* was proper as they could not be deemed to have been constructively ejected from the holding by the landlord in a decree for arrears of rent against *R* to which *B* was not a party (*Bose, J.*) SHYAMLAL DEBIDIN *v.* GOND SINGH. 171 I.C. 935=10 R.N. 143=A.I.R. 1937 Nag. 175.

——S. 24—*Applicability—Joint decree for arrears of rent in respect of occupancy holding and absolute occupancy holding—Order of ejectment—Legality—Executability by Revenue Officer.*

S. 24, C.P. Tenancy Act, only applies to a decree that falls within the scope of S 23. S. 24 contemplates the execution by the Revenue Officer by ejectments of a decree for arrears of rent due on an occupancy holding and for no other arrears. The section cannot be construed to apply to a decree for arrears due on an absolute occupancy holding, and no decree passed even in part for these latter arrears can be legally executed by ejectment of the tenant from his occupancy holding. An order of ejectment passed in respect of a joint decree for arrears of rent due upon an occupancy as well as of an absolute occupancy holding is *ultra vires* and cannot be maintained or put into effect by a Revenue Officer under S. 24. (*Burton, R.M.*) MEGHRAJ *v.* GHANSHYAM SINGH. 20 N.L.J. 156.

——S. 24—*Ejectment with reference to more than one holding—Procedure to be adopted by the Revenue Officer.*

As S. 24 (2) of the C. P. Tenancy Act empowers a Revenue Officer to deal with only one holding of a tenant on the receipt of a decree for ejectment from a Civil Court, where the decree and ejectment order relate to more than one holding, the Revenue Officer could not legally proceed with the ejectment under S. 24 and he must refer the order back to the civil Court concerned. (*Burton, F.C.*) MANGESHARAO *v.* SHRIRAM DALPAT. 1939 N.L.J. 291.

——S. 24—*Period of four months—Computation—Starting point.*

The period of four months allowed to a tenant under S 24 begins not from the date of service of notice; but from the expiry of a month after that date. (*Burton, R.M.*) MARKANDI *v.* BALAJI. 19 N.L.J. 250.

——S. 24—*Powers of Revenue Officer executing order of ejectment — Jurisdiction to question order of ejectment.*

There can be no doubt that a Revenue Officer receiving an order for ejectment of an occupancy tenant may question whether it is such as may be executed in the particular manner under S. 24 of the C. P. Tenancy Act, if it is apparent that the case is not one falling under S. 25, and fulfilling the conditions of S. 23 of the Act. Where the grounds for questioning the order are contained in order passed by a competent Civil Court in appeal against the decree upon which the ejectment order is based, the Revenue Officer is on stronger ground. (*Burton, R.M.*) BHAGWANT ATMARAM *v.* RAMCHANDRA. 20 N.L.J. 124.

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——S. 24—Proceedings under — Tenant, if should have been apprised of order of ejectment. *See* C. P. LAND REVENUE ACT, S. 23 AND C. P. TENANCY ACT, S. 24. 1939 N.L.J. 358.

——S. 24—*Revenue Officer—Power to question validity of ejectment order of Civil Court.*

An executing Court can within certain limits question the validity of a decree when the question of jurisdiction is involved. And a Revenue Officer, acting under S. 24, C. P. Tenancy Act, is competent, when the question of legality of a decree or an ejectment order based on it, passed by a Civil Court is raised and the defects are patent on the record, to question the validity of the order by reference, if necessary, to the proceedings which led to the decree being passed and to the order of ejectment being issued. (*Burton, R. M.*) MEGHRAJ *v.* GHANSHYAM SINGH. 20 N.L.J. 156.

——S. 24—*Scope—Final order of ejectment—Execution—Power of Revenue Officer to accept arrears after period of grace and set aside ejectment order.*

Once the period of four months mentioned in sub-R. (3) of S. 24, C. P. Tenancy Act, has expired, the ejectment proceedings must take their course, and the tenant has thereafter no right to have the order of ejectment set aside on payment of the decretal arrears. The order of ejectment passed at the end of the period of grace is a final order of the Revenue Officer and must be carried out. Payment by the tenant on a subsequent date of the arrears does not justify the Revenue Officer in setting aside the order of ejectment. It is not correct to hold that the Revenue Officer can accept the decretal amount from the tenant at any time up to the issue of the warrant of possession. (*Gordon, R.M.*) GANGADHAR KRISHNA *v.* MOTIRAM KESHEORAO. 19 N.L.J. 99.

——S. 24—*Service of notice — Procedure — Order on the basis of first notice when a second one has been issued—Legality.*

It is essential for the procedure laid down by S. 24 of the C. P. Tenancy Act that the notice of ejectment shall be served upon the tenant. Where an order for ejectment is passed on the basis of a first notice which was not properly served and a second one had been issued, the procedure is irregular and prejudicial to the tenant, (*Burton, F. C.*) MANGESHARAO *v.* SHRIRAM DALPAT. 1939 N.L.J. 291.

——S. 24—*Service of notice on tenant—If condition precedent to taking possession.*

According to S. 24 (2) of the C. P. Tenancy Act, the landlord is not entitled to take possession of the fields in execution for arrears of rent, without giving notice to the tenant. All tenants including recognized or recorded co-tenants are entitled to a notice under that section before they can be legally ejected. (*Pollock, J.*) ABDUL JABBAR *v.* MST. RAMMA. 1940 N.L.J. 164=A.I.R. 1940 Nag. 160.

——S. 24 (2)—*Notice under—Error in description of khasra numbers—Effect—If renders notice void.*

A notice under S. 24 (2) of the C. P. Tenancy Act is not void on the ground that there is an error in describing a khasra number and in stating its area. There must be a substantial error such as has in fact misled or was likely to mislead the tenant, otherwise the defect or error is not fatal. (*Greenfield, F. C.*) LACHHMAN *v.* SETH PARTAPCHAND. 20 N.L.J. 274.

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——S. 24 (3)—*Order of ejectment by Tahsildar—Appeal to Sub-Divisional Officer rejected—Second appeal — Competency — Interference by Commissioner—If* ultra vires.

Where an order of ejectment under S. 24 (3) of the C. P. Tenancy Act has been passed by the Naib Tahsildar, and an appeal from that order has been rejected by the Sub-Divisional Officer, a second appeal does not lie to the Commissioner in a matter of the exercise of discretion, as the same does not fall under any of the clauses of sub-S. (2) of S. 33, C. P. Land Revenue Act. If the Commissioner entertains the second appeal and interferes, his order is *ultra vires.* (*Greenfield, F.C.*) MT. SAVITRIBAI *v.* SHEONARAYANLAL. 20 N.L.J. 220.

——S. 24 (3) and R 2—*Scope—Order of ejectment—Second appeal beyond four months—Jurisdiction of Commissioner to extend time for payment.*

Where the matter is one of mere discretion, the Commissioner in second appeal has no power to exercise a discretion beyond that which is vested in the trial Court. Where the second appeal against an order of ejectment under S. 24 (3) of the C. P. Tenancy Act is filed only after the expiry of the maximum period of four months fixed by S. 24 (3) read with R. 2 of the notification under that section, the power to grant further time is exhausted by the expiry of the time, and an order by the Commissioner extending the time for payment is illegal. (*Greenfield, F.C.*) MT. SAVITRIBAI *v.* SHEONARAYANLAL. 20 N.L.J. 220.

——S. 24, proviso—*Period of grace if absolute—Power of Revenue Officer to extend—Omission to claim value of improvements—Failure of Revenue Officer to ascertain and determine compensation—If vitiates ejectment—Ss.* 30, 31 *and* 32.

The plain meaning of the proviso to S. 24 of C. P. Tenancy Act is that no circumstances, even subject to the provisions of S. 30, can the Revenue Officer allow a period beyond that specified in S. 24. The procedure required under S. 30 and the other sections mentioned must be concluded within the periods specified. It is open to the tenant, and it is incumbent on him, if he has made an improvement in respect of which he would be entitled to compensation, to claim such compensation. S. 30 refers to the improvement "claimable." The failure of the Revenue Court to ascertain and determine the amount of compensation, if any, cannot be held to vitiate the ejectment which has been effected; and a tenant cannot be allowed to take advantage of his own failure to claim compensation so as to secure the setting aside of an ejectment to which he was liable and thereby a further extension of the period of grace beyond the maximum prescribed. The ejectment ordered and incurred cannot be avoided unless the contingency mentioned in S. 32 occurs. (*Burton, R. M.*) SAKHARAM GOND *v.* RAMPRASADA. 20 N.L.J. 18.

——S. 25—*Ex-proprietary tenant of* sir *land held in severalty—Ejectment in execution of decree for arrears of rent—Right of lambardar to eject.*

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Under S. 25, C. P. Tenancy Act, only the landlord as such may eject a tenant for arrears of rent. A tenant of ex-proprietary occupancy land which was formerly *sir* land held in severalty is the tenant of the vendee of his former share and not of the whole proprietary body, and, therefore, the lambardar of the patti cannot claim to be the landlord and to execute his decree by ejectment of the tenant. (*Burton, R.M.*) BHAGWANT ATMARAM *v.* RAMCHANDRA. **20 N.L.J. 124.**

——**S. 25 (b)**—*Decree under—Ejectment under—Effect on occupancy tenancy—Delivery of possession under—If only symbolical.*

The ejectment contemplated by the decree under S. 25 (*b*) of the C. P. Tenancy Act is a permanent one, and unless it is set aside, the legal effect of termination of the tenancy by law comes into existence from the moment of dispossession. When the decree is executed, and the parties and the process server proceed to the land and actual possession is given to the decree-holder with the acquiescence of the judgment-debtor (tenant), the latter cannot contend that only formal possession or symbolical possession is given to the decree-holder. (*Gruer, J.*) PYARELAL *v.* HAZARILAL BANIA. **20 N.L.J. 8.**

——**S. 25 (b)**—*Diversion of part of land to non-agricultural purposes—Decree for ejectment—If can be passed validly—Decree not set aside on appeal—Right to question validity in other proceedings.*

Under S 25 (*b*) of the C. P. Tenancy Act, a decree for ejectment can validly be made even though the occupancy tenant has diverted not the whole, but only a small part of the holding to non-agricultural purposes. It is not necessary under the section that every particle of the land should be diverted before ejectment can be ordered, and the section does not provide for ejectment from a part of the holding only. A decree for ejectment under the section remains valid and binding unless set aside in appeal and its validity cannot afterwards be questioned in other proceedings. (*Gruer, J.*) PYARELAL *v,* HAZARILAL BANIA. **20 N.L.J. 8.**

——**S. 30**—*Scope—Duty of Revenue Officer to ascertain improvements and determine value—Tenant—If bound to put forward claim.*

It is the duty of the Revenue Officer to determine the amount of compensation due to a tenant for improvements before he ejects him. The Act does not cast a duty on the tenant to make a claim. The officer even at the commencement of the proceedings should take steps to ascertain whether improvements have been effected in the holding, and not leave it to the tenants to claim compensation. The tenants are entitled as of right not to be ejected until the issue of compensation is decided and the amount determined as compensation is paid into Court. (*Greenfield, F. C.*) LALSING *v.* BISHNOOPRASAD. **20 N.L.J. 268.**

——**Ss. 30, 31 and 32**—Scope and effect of—Ejectment—If affected by omission to ascertain compensation for improvements—Period of grace under S. 24—If can be extended. *See* C.P. TENANCY ACT, S. 24, PROVISO. **20 N.L.J. 18.**

——**Ss. 30 and 32**—*Scope and effect of—Procedure as to ascertainment of improvements—Non-observance—Ejectment—Legality.*

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Where a tenant has made an his holding, he cannot be ejected until he has received compensation. Under S. 30 of the C. P. Tenancy Act, if it is not so paid within the time fixed, he cannot be ejected and the decree has to be returned as unsatisfied. The absence of the tenant does not absolve the Revenue Officer from carrying the provisions of S. 32 of the Act, without which he is not competent to take action to eject a tenant. An ejectment effected in violation of them cannot be maintained. (*Burton, F.C.*) JAIRAM LAHOOJI *v.* KULPAT DALPAT KIRAR. **1939 N L.J. 237.**

——**S. 35**—*Abandonment by widow—Challenging by reversioner—Onus.*

Where the landlords have taken possession of a holding in conformity with the provisions of S. 35 of the C. P. Tenancy Act, on an abandonment by a widow, and a reversioner claims possession on the ground that the abandonment amounted to a surrender and was invalid for want of legal necessity, the burden is on such a reversioner to allege and prove that the abandonment was only a device to defeat the rights of the reversioners or that it was a result of a collusion with the landlord. The burden that would ordinarily lie on the landlord when a surrender is impeached, does not lie on him when he has come into possession by operation of law. (*Niyogi, J.*) MURLIDHAR *v.* HAJARILAL. **1939 N.L.J. 60.**

——**S. 41**—*Scheme of the section as regards mortgages.*

The scheme of S. 41 of the C. P. Tenancy Act so far as mortgages are concerned is to require mortgages above a certain figure, varying with rent, to be notified in writing to the landlord. This is to give the landlord time to consider whether he will or will not pre-empt. If he pre-empts he gets the land free of encumbrances and the mortgagee gets a charge on the purchase-money to the extent of his debt. But a transfer without notice is voidable. All through, the scheme appears to keep the land in the occupation of the tenant or failing him to give the landlord the right to acquire it at a fair market price. If the option is not exercised the transfer is good. (*Stone, C.J. and Clarke, J.*) DARYAO SINGH *v.* KUKDAY. **182 I C 263=11 R. N. 1=1938 N.L.J. 366=A.I.R. 1939 Nag. 91.**

——**S. 42**—*Village servant—Blacksmith—Status of—Lambardar's power to appoint.*

A blacksmith is a servant of the malguzar and not a village servant. He can be appointed only by the malguzar of the patti in which he is to render service. The lambardar as such cannot appoint him for the patti of which another person is malguzar. (*Niyogi, J.*) DARBARI LOKNATH *v.* HARLAL. **173 I.C. 272=10 R.N. 294=A.I.R. 1937 Nag. 416.**

——**S. 45 (1)**—*Scope—Lease—*Sir *land—Debtor recorded as occupancy tenant and creditor as landlord—Creditor put in possession and allowed to recover debt from usufruct—No reservation of rent—Effect of.*

Where a lease by a debtor put the creditor into the possession of usufruct and allowed the creditor to recover his debt from it, without containing any reservation as to the rent and the

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debtor was recorded as an occupancy tenant and creditor was shown as proprietor.

Held, that the lease transferred both the cultivating as well as the proprietary interests in the *sir* land and as such fell within the purview of S. 45, C. P. Tenancy Act. (*Vivian Bose, J.*) GANGARAM *v.* KANCHANBAI. I.L.R. (1936) Nag. 60=164 I.C. 792=9 R.N. 34=A.I.R. 1936 Nag. 168.

——Ss. 46 and 47—*Construction—Acquisition of land in possession of recorded tenant—Heir of recorded tenant—Right to object—Land Acquisition Act, S.* 18.

S. 46 is a general provision which prohibits the transfer by an occupancy tenant of his holding. And S. 47 being an exception to general rule in S. 46, gives the heir a bare right to be put into possession by the Revenue Officer but creates no interest in the heir under the general rule. Hence where land belonging to a woman who is a recorded tenant has been acquired under the Land Acquisition Act, her son cannot be said to have any interest in the land within the meaning of Land Acquisition Act and as such he cannot object to the award of compensation. (*Wort and Fazl Ali. JJ.*) S. M. DE SOUZA *v.* SECRETARY OF STATE. 165 I.C. 585=9 R.P. 191 (2)=18 Pat.L.T. 125=3 B.R 56=A.I.R. 1936 Pat. 542.

——S. 46—*Effect of—Mortgage of occupancy fields—If void.*

Under S. 46, Tenancy Act of 1898, mortgages of occupancy fields are not void, but voidable at the instance of certain persons only and when such persons who have the right to avoid the transaction do not do so, the mortgage subsists and Art. 1 to Sch. II, Tenancy Act, 1920, cannot apply. Under S. 46, the transfer is not void but voidable only in the manner and to the extent provided by the Act, and no further. (*Bose, J.*) DEONARAIN BALRAM *v.* KAMTA. I.L.R. (1936) Nag. 167=171 I.C. 174=10 R.N. 96=A.I.R. 1937 Nag. 43.

——S. 46—*Scope—Mortgage of occupancy field—Effect—Right of mortgagor to redeem.*

In a suit for redemption of a mortgage of an occupancy field, assuming the mortgage is invalid for some reason or other, the tenant's rights still remain intact in the mortgagor, and the mortgagee merely becomes a licensee of the mortgagor; the mortgagor's right to redeem therefore subsists unless it is barred by limitation. (*Bose, J.*) DEONARAIN BALRAM *v.* KAMTA. I. L. R (1936) Nag. 167=171 I C. 174=10 R. N. 96=A.I.R. 1937 Nag. 43.

——S. 46—*Scope*—Muafi-khairati *land—Mortgage by tenant by registered deed—If void—Remedy of landlord—Landlord taking surrender ignoring mortgage—Suit for possession—Maintainability.*

Where lands recorded as *muafi-khairati* or as *khairati mokasa*, is mortgaged by the tenant for consideration, the parties believing that the mortgagor has proprietary interest in the land, and the deed of mortgage contains nothing on the face of it to indicate to the registering officer that the transaction is one prohibited by the Tenancy Act, the registration of the deed of mortgage is not invalid and cannot be ignored or reopened except on the ground of fraud. The mortgage, however, is voidable by the under landlord or the heirs of the mortgagor under S. 46 (3) of the C. P. Tenancy Act, in the manner and to the extent provided by Ss. 47 and 48 of the Act. If the landlord does not avail himself of that remedy, it is not open to him subsequently to ignore the mortgage and take a gratuitous surrender from the tenant mortgagor. In spite of the surrender the tenancy has to be considered to continue for the purpose of preserving the rights of the mortgagee. The landlord is not entitled to recover possession of the land without redeeming the mortgage, and in the absence of an offer to redeem his suit for possession must fail. (*Pollock, J.*) KANCHEDILAL *v.* ZABBARSHAH. 166 I C. 686=9 R.N. 141=19 N L J. 123=A.I.R. 1936 Nag. 171.

——Ss. 46, 47 and 48—*Transfer in contravention of S.* 46 (3)—*Effect—Landlord's remedy—Failure to avail remedy—Effect.*

A transfer by an occupancy tenant in contravention of the provisions of S. 46 (3) is not void but voidable by the landlord whose proper and only remedy is to proceed in the Revenue Court under Ss. 47 and 48. But, if such a voidable transfer is not avoided by persons who can avoid it under S. 47, it would be a perfectly good transfer, and any gratuitous surrender in favour of the landlord by the tenant with the sole object of defeating his mortgagee cannot affect the tenancy which must be deemed to continue to preserve the rights of the mortgagee. (*Stone, C J. and Clarke, J.*) JABBARSHAH *v.* KANCHHEDI LAL. 182 I.C. 239=11 R N. 514=1939 N.L.J. 308=A.I.R. 1939 Nag. 166.

——S. 46 (3) and (5)—*Scope—Validity of transfer—How determined.*

Sub-S. (5) of S. 46 of the C. P. Tenancy Act does not determine the question of validity or otherwise of the transaction itself. For that purpose, reference must be made to sub-S. (3) of that section, which alone interdicts certain transfers. Sub-s. (5) merely shuts out the evidence, which would furnish a proof of the transfer, but does not enlarge the sphere of the prohibition. The registration or non-registration of the document does not affect the inherent character of the transfer, which is to be judged by another provision. (*Sir Shadi Lal*) PARASHRAM BALAJI *v.* ASARAM. I.L R. (1936) Nag. 104=9 R.P.C. 119=41 C.W N. 101=64 C.L.J. 301=17 Pat L.T. 937=164 I C. 345=19 N.L.J. 228=45 L.W.7=1937 M W.N. 135=3 B.R. 6=1936 All. L.R. 861=1936 Pat.W.N. 895=1936 O L.R. 522=A.I.R. 1936 P.C. 301=71 M.L.J. 856 (P.C.).

——S. 46 (5)—*Duty of registering officer—Transfer of doubtful validity—Registration—Jurisdiction.*

The language of sub-S. (5) of S. 46 of the C. P. Tenancy Act shows that the registering officer is forbidden to register a document "which purports to transfer the right of an occupancy tenant in his holding or in any portion thereof." He is not required to enter upon an inquiry as to whether a certain property sought to be transferred would, or would not, amount to an occupancy right. Such an inquiry would obviously be beyond his province. His function is to peruse the instrument and to see whether it purports to make a prohibited transfer, and if he thinks that it does not embody any such transfer, he is bound to admit it to registration. It cannot be held that the registering officer has no jurisdiction to register the document because it includes a trans-

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fer which is of doubtful validity. (*Sir Shadi Lal.*) PARASHRAM BALAJI *v.* ASARAM. I.L.R. (1936) Nag. 104=9 R.P.C. 119=41 C.W N. 101 =64 C.L.J. 301=17 Pat.L.T. 937=45 L.W. 7=3 B.R. 6=1937 M.W.N. 135=1936 All.L.R 861= 1936 Pat.W.N. 895=1936 O.L.R. 522=164 I.C. 345=19 N.L.J. 228=A.I.R. 1936 P.C. 301=71 M.L.J. 856 (P.C.).

——S. 49—*Land declared* sir *between date of mortgage and suit—Effect—Right to benefit conferred by S.* 49—*If can be claimed in execution—C. P. Code, S.* 74 *and O.* 21, *Rr.* 97 *and* 98.

Any rights conferred upon the mortgagor subsequent to the mortgage are normally subject to the mortgage. But where a statute intervenes and creates rights, the rights of both parties are subject to the provisions of the statute. Where between the date of the mortgage and a suit thereon the land is declared *sir* under S. 68 of the C. P. Tenancy Act, the mortgagor becomes entitled to the protection afforded by S. 49 of the Act. The benefits thereunder can be claimed in execution though it is not conferred by the decree. S. 74 and O. 21, Rr. 97 and 98, C. P. Code, entitle a judgment-debtor to resist execution for any just and sufficient cause and the rights created by statute would certainly come under just and sufficient cause. In the result the decree-holder would get possession of the proprietary rights in the land subject to the occupancy rights that have accrued to the judgment-debtor. (*Stone, C.J. and Bose, J.*) GANGAPRASAD *v.* ITWARSINGH. 1939 N.L.J. 429=A.I.R. 1939 Nag. 287.

——S. 49—*Scope and object of—Device to evade law—Duty of Court.*

Per *Stone, C. J.*—It is the policy of the law to prevent the land-working classes being driven into the state of landless proletariates so far as may be, and accordingly it is provided by S. 49, C. P. Tenancy Act, that alienation of *sir* land, that is homefarm land in cultivation, shall be ineffective unless the sanction of the appropriate official has first been obtained. It is of the utmost importance that this safeguard should be maintained in full force and effect. It is likewise desirable that collusive actions having as their real object to defraud alienees who have given consideration should fail.

Per *Vivian Bose, J.*—The anxiety of the Legislature to protect this class is so great that S. 49 (2) of the Act prohibits registration of any document which does not reserve "the right of occupancy specified in sub-S. (1)". The object of this prohibition is clearly to bring to the notice of the parties exactly what their bargain amounts to under the law and if they have understood the position aright to enable them to amend their document so as to make their meaning clear beyond all possibility of doubt, and if not, then to let them realize that they have entered into a transaction one of whose objects is prohibited by law. The illegal part of the transaction is not the sale of the *sir* but the arrangement or device which attempts to evade the provisions of the Act.

Per *Digby, J.*—Where a surrender and a sale-deed of proprietary right are both executed on the same date and it has been arranged to make the surrender before the sale-deed is executed,

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the surrender deed is the execution of "device which is void and illegal". (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDESHWAR. I.L.R. (1939) Nag. 1=177 I.C. 6=11 R. N. 109=A.I. R. 1938 Nag. 335 (F.B.).

——Ss. 49 and 110—*Scope and effect of—Rights of permanent lessee of* sir *fields—How affected.*

Where a proprietor after mortgaging his proprietary share grants a permanent lease of his *sir* fields and thereafter the mortgagee obtains a foreclosure decree in 1921, and where on the proprietor's default in payment of rent to his landlord the former mortgagee, he obtains an order for ejectment and also obtains possession, it was held as regards the rights of the permanent lessee who was not made a party either to the mortgage suit or ejectment proceedings, that the rights which had accrued to him under the old Act were expressly saved by S. 45 (5) and that hence those rights were acquired under the old Act and consequently are deemed to have been acquired by S. 110 of the present Act. His rights are saved to him and remain as they were before. S. 49 has not the effect of destroying those rights. (*Stone, C.J. and Bose, J.*) THAKUR CHUDAMAN *v.* BABU KAMTANATH. 183 I.C. 695=12 R.N. 76=1939 N.L.J. 347=A.I.R. 1939 Nag. 230.

——S. 49—*Surrender—Suit to set aside illegal surrender—Surrenderee holding as* quasi-*trustee —Limitation—Law applicable.*

Per *Stone, C.J. and Vivian Bose, J.*—In a suit to set aside surrender which was found to be illegal on account of its being part of a transaction which was against the provisions of S. 49, it is not Sch. II, Art. 1, Tenancy Act, that applies to determine limitation but it is Limitation Act that governs such suit. As the surrenderee holds land as a *quasi*-trustee, he cannot set up a title adverse to the *cestui que trust* and hence it is Art. 142 and not Art. 144, that will govern the suit.

Per *Digby, J.*, contra.—Such a case is a clear case of exclusion from possession and it is Art. 1 of Sch. II, C. P. Tenancy Act, that will govern limitation and not any Article of the Limitation Act. (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDHESHWAR. I.L.R. (1939) Nag 1=177 I. C. 6=11 R N. 109=A.I.R. 1938 Nag. 335 (F. B.).

——S. 49—*Surrender found illegal—Surrenderee, position of—Suit to set aside surrender—Powers of Court.*

Where a person sells his proprietary rights in a village and then surrenders his holding of *sir* lands in which he has acquired occupancy rights, and the surrender was illegal, the surrenderee holds the surrendered land for the benefit of surrenderor—a *cestui que trust*—because surrenderee is supposed to hold the lands burdened with an obligation in the nature of trust. In a suit to set aside the surrender Court can not only declare the surrenderee as a sort of trustee but can place the parties in the position they ought to be. (*Stone, C.J. Bose and Digby, JJ.*) ASARAM *v.* LUDESHWAR. I.L.R. (1939) Nag. 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F,B.).

——S. 59 and Transfer of Property Act, S. 53-A—*Surrender under S.* 59 *of the Tenancy Act—If a transfer—Doctrine of part performance, if applies.*

C. P. TENANCY ACT (1920), S. 62.

A surrender by a tenant under S. 59 of the C. P. Tenancy Act is not a transfer and as there is no question of title passing between the parties, S. 53-A of the Transfer of Property Act can have no application at all to such a surrender. (*Grille, J.*) SAKHARAM *v.* DARYAO SINGH. **I.L. R. (1940) Nag. 177=1940 N.L.J. 87=A.I.R. 1940 Nag. 175.**

——S. 62—*Reduction of rent—Application for—Limitation—Limitation Act, Art.* 181.

An application under S. 62 of the C. P. Tenancy Act for reduction of rent on the ground of deterioration of land due to the construction of a canal is not governed by Art. 181 of the Limitation Act, and is not barred because it is made more than three years after the construction of the canal. The case would be one of continuing wrong under S. 23 of the Limitation Act. (*Gordon, R.M.*) NIRANJAN BAHADURI *v.* KUAR PRATAPSING. **19 N.L.J. 101.**

——S. 63-A (3)—*Right in the diverted holding—Extent—Building of a house—Mortgagee of house placed in possession in execution of his decree—Rights of the occupancy tenant.*

Although S. 63-A of the C. P. Tenancy Act retains the rights of the tenant in the diverted holding it does not follow that the tenant's rights as such continue to subsist in the object which has been the mode of diversion of the holding. Where an occupancy tenant builds a house and a mortgagee of it is placed in possession of it in execution of his mortgage decree, the occupancy tenant retains only the right to the mere site of the house and it will not become available until the house is removed. (*G. P. Burton, R. M.*) MT. BUDHANBAI *v.* TENGU. **1938 N.L.J. 136.**

——Ss. 74 and 75—*Applicability and construction—"Levy" of interest—Meaning of—Sums paid by tenant credited as interest on arrears—Tenants not paying voluntarily or agreeing to pay interest—Effect—Penalty under S. 74, if incurred—Presumption as to payments.*

Ss. 74 and 75 of the Tenancy Act refer to the levy and payment of the rent legally payable and the presumption with regard to such payment. Rent as defined in S. 2 (9) is what is paid or payable on account of the use or occupation of land; the rent payable is what is fixed in accordance with S. 15 and Ch. VIII, and does not include interest. Under S. 75 (1) when rent is due, every payment by the tenant to his landlord must be presumed to be a payment on account of rent unless the tenant otherwise agrees in writing. Interest clearly is not included and interest must therefore be held to be something in excess of rent and the landlord cannot therefore plead custom or tacit or oral understanding or agreement to cover a deduction or accounting of any sum paid by the tenant as interest unless he holds the tenant's agreement in writing to that effect. The same is the case with regard to S. 74, and the taking of interest must, therefore, come within the mischief of S. 74 in the sense "that it is something in excess of the rent legally payable." The recovery of interest without the free and binding consent of the tenant amounts to levy of interest and makes the landlord liable to penalty under S. 74. Where the tenants pay the interest not volutarily and they do not agree to pay interest, but pay it fearing that if they do not pay they would be liable to ejectment, it cannot be pleaded that there was any agreement or consent on the part of the tenant to the crediting of the payment to interest or to anything else than rent. Ss. 74 and 75 apply to such case, and the action of the landlord falls within the mischief of S. 74 and the sums paid by the tenant must be presumed to be a payment on account of rent under S. 75. (*G. P. Burton, R.M.*) THAKUR PRASAD *v.* SHAMLAL. **20 N.L.J. 54.**

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——(as amended in 1923), S. 83—*Suit for arrears of rent less than Rs.* 100—*Decision by Subordinate Judge of second class—Appeal.*

As an appeal was competent from the decision of a Munsiff in a suit for rent less than Rs. 100 and as the word Munsif has been replaced by the words 'Subordinate Judge of the Second Class', by the amendment of 1923, an appeal would lie from the decision of a Subordinate Judge of the Second Class. (*Gruer, J.*) URKUDA BAPU *v.* SHRAWAN JAIRAM. **I.L.R. (1937) Nag. 384=171 I.C. 733=10 R N. 129=A.I.R 1937 Nag. 156.**

——S. 89—*Compliance—Deed of relinquishment by occupancy tenant in favour of landlord temple—Tenant being panch of temple and holding deed on behalf of trustees of temple—If sufficient delivery.*

An occupancy tenant executed a deed of relinquishment in favour of the landlord temple. The tenant was one of the panchas of the temple and therefore *prima facie* had authority to hold the deed on behalf of the trustees of the temple till they were in a position to consider the matter.

Held, that this amounted to a sufficient delivery of the deed and hence the provisions of S. 89 were satisfied. (*Bose and Puranik, JJ.*) SAHAUDRA BAI *v.* SHRI DEO RADHA BALLABHJI. **I.L.R. (1940) Nag. 94=176 I.C. 57=11 R.N. 24 =A I.R. 1938 Nag 30.**

——S. 89—*Occupancy holding—Co-tenants—Rights of—Surrender by one alone of undefined portion—Competency—Landlord's right to eject one from undefined part.*

A co-tenant is entitled to cultivate the entire holding and has the right to pay its rent if he so desires. A co-tenant cannot surrender an undefined portion of an entire holding to the detriment of his co-tenants. The landlord therefore cannot eject a co-tenant from an undefined portion of the holding. A co-tenant is therefore entitled to the possession of the whole holding. (*Bose, J.*) SHYAMLAL DEBIDIN *v.* GOND SINGH. **171 I.C. 935=10 R.N. 143=A.I.R. 1937 Nag. 175.**

——S. 89—*Surrender—Registration, if necessary for its validity.*

There cannot be a valid surrender of an absolute occupancy or an occupancy holding without a registered instrument even though the landlord and the tenant are both agreed. (*Stone, C.J. and Bose, J.*) KASHI PRASAD *v.* BED PRASAD. **1939 N.L.J. 216=A.I.R. 1940 Nag. 113.**

——S. 89—*Surrender by tenant in favour of landlord—Effect of.*

When there is a determination of the tenancy by a surrender to the landlord, there is only a blotting out of the intervening interest and no transfer of any title from one to another and hence in such a case a landlord cannot be said to

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obtain title from the tenant. (*Bose, J.*) HINDUSINGH *v.* KHETSINGH. **1938 N.L.J. 123.**

——**S. 89**—*Surrender—Validity—Tenant out of possession.*

Surrender signifies the merger of the tenant-right in the proprietary right so as to convert the tenancy holding into the landlord's khudkasht. The tenant-right which means the right to cultivate the land is distinct from actual cultivation just as title is from possession. Delivery of possession is not a necessary ingredient of a validity of a transfer of title or any kind of right recognized by law. *A fortiori* a relinquishment of a right to be valid need not be accompanied by delivery of possession. There is nothing in law to preclude the tenant from relinquishing his tenant-right, because he is out of possession. (*Niyogi, J.*) DATTU RAMJI *v.* WAMAN RAGHUNATH. **187 I.C. 247=12 R.N. 273=1940 N.L.J. 208=A.I.R. 1940 Nag. 247.**

——**S. 93, Proviso**—*Scope of—When comes into operation.*

The proviso to S. 93 of the Central Provinces Tenancy Act is not to be interpreted as requiring that, on the mere raising of objections on the basis of title by a non-applicant, the case necessarily must be postponed for the decision of those objections by the Civil Court. The proviso only means that in the face of a clear and genuine dispute existing as to the right of the parties in the tenancy, it must be referred to the Civil Court. (*Burton, F. C.*) SARSWATIBAI *v.* RAMCHANDRA. **1939 N.L.J. 460.**

——**S. 94**—*Scope and object of.*

S. 94 of the C. P. Tenancy Act was inserted apparently in order to enable a landlord to recover possession of *sir* land which he had leased out with other land so that the tenant became the occupancy tenant of the entire holding, in other words, it was inserted in order to avoid the position created by S. 69 (*c*) of the old Act which gave the landlord the right to eject the tenant only when the entire holding consisted of *sir* land. There is, however, no indication that it was intended to confer such a right on the landlord in respect of a lease granted before the new Act came into force and to take away from tenants the right which they had acquired as ordinary tenants not to be ejected except on the grounds stated in S. 69 (*c*). (*Pollock, J.*) PACHO *v.* NIKHELAL. **1940 N.L.J. 377.**

——**S. 95**—Scope and effect—Tenant's right to tendu leaves—*Wajib-ul-arz*—Entry restricting tenant's rights—Suit for amendment and for declaration of right—Maintainability—Land Revenue Act, S. 80. *See* C. P. LAND REVENUE ACT, S. 80. **20 N.L.J. 131.**

——**S. 105 (a)**—Scope—Pre-emption money—Disposal of—Civil Court's jurisdiction. *See* C. P. TENANCY ACT, SS. 6 AND 105. **A.I.R. 1938 Nag. 80.**

——**S. 106, Proviso**—*Scope of—Suit for arrears of rent due by sub-tenant—Jurisdiction of Civil Court.*

The Court of an Additional Sub-Judge is a Civil Court and has jurisdiction to entertain a suit for arrears of rent due by a sub-tenant. The proviso to S. 106 limits the jurisdiction of regular Civil Courts (that is, presided by Judges who

C.P. & BERAR SALES OF MOTOR SPIRIT & LUB. TAXN. ACT (1938), S. 3.

are not also Revenue Officers) to hearing suits for arrears due by a sub-tenant, but it does not purport to restrict in any way the powers of Judges of a Civil Court who are also Revenue Officers. (*Grueer, J.*) URKUDA BAPU *v.* SHAWAN JAIRAM. **I.L.R. (1937) Nag. 384=171 I.C. 733=10 R.N. 129=A.I.R. 1937 Nag. 156.**

——**S. 110**—Scope and effect of—Rights of permanent lessee of *sir* fields—How affected. *See* C. P. TENANCY ACT, SS. 49 AND 110, SCOPE AND EFFECT OF. **1939 N.L.J. 347.**

——**Sch. II, Art. 1**—*Applicability—Co-tenants Exclusion of one and denial of title—Suit by excluded co-tenant for possession of undivided share in holding—Limitation.*

A co-tenant is a tenant within the meaning of Art. 1, Sch. II of the C. P. Tenancy Act. Where a co-tenant is excluded from possession and his title is denied, a suit by him for possession is governed by Art. 1 of Sch. II of the Act, and must be brought within two years. The article applies to a suit for possession of an undivided share in a holding (*Pollock, J.*) ABDUL AZIM *v.* SHEIKH GAFOOR. **I.L.R. (1937) Nag. 346=172 I.C. 934=10 R.N. 263=20 N.L.J. 143=A.I.R. 1937 Nag. 265.**

——**Sch. II, Art. 1**—*Applicability—Co-tenant in exclusive possession.*

Art. 1 of Sch. II has no application to a co-tenant claiming to be in exclusive possession of a holding. The ordinary law of limitation applies to such a case. (*Niyogi, J.*) RAMJI *v.* MADKI. **173 I.C. 103=10 R.N. 278=A.I.R. 1938 Nag. 89.**

——**Sch. II, Art. 1**—*Intention—Attaining quick finality in revenue record.*

Per *Digby, J.*—The intention of the C. P. Tenancy Act is evidently to secure freedom from the disputes regarding tenancy land, and set some short time limit to claims stirred up in villages, and to attain quick finality in the revenue records. (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDHESWAR **I.L.R. (1939) Nag. 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B.).**

——**Sch. II, Art. 2**—*Applicability—Art. 116, Limitation Act—If excluded.*

Where a suit for arrears of rent falls under both Art. 2, C. P. Tenancy Act, and also Art. 116, Limitation Act, the former Article is to be applied even if the instrument is a registered one. (*Vivian Bose, J.*) BABURAO *v.* SANDHU. **I.L.R. (1936) Nag. 5=165 I.C. 122=9 R.N. 62=A.I.R. 1936 Nag. 180.**

CENTRAL PROVINCES AND BERAR PROHIBITION ACT (1938), S. 19—*Interpretation—Bond in lieu of sentence—Validity.*

The execution of a bond as contemplated by S 19 of the Central Provinces and Berar Prohibition Act is in addition to and not in lieu of the sentence. (*Pollock, J.*) PROVINCIAL GOVERNMENT *v.* HARI. **1939 N.L.J. 289.**

CENTRAL PROVINCES AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT (1938), S. 3—Scope—If *ultra vires*. *See* GOVERNMENT OF INDIA ACT (1935), S. 100 (1) AND (3). **A.I.R. (1939) F.C. 1=(1939) 1 M.L.J. (Supp.) 1.**

CENTRAL PROVINCES AND BERAR TEMPORARY POSTPONEMENT OF EXECUTION OF DECREES ACT (XVI OF 1938), S. 3—*Section complid with by Judgment-debtor—Release of livestock from attachment—Right of judgment-debtor.*

If a judgment-debtor complies with the terms of S. 3 of the Act, he is entitled to the release of his livestock from attachment. The Court has no power to confine the attachment on the ground that the judgment-debtor was a dishonest debtor whose object was merely to avoid payment of the debt. (*Puranik, J.*) GADI *v.* TRILOK CHAND. **188 I.C. 432.**

——**S. 3 (3)**—*"Livestock"—Cattle of judgment-debtor.*

Cattle belonging to the judgment-debtor are "livestock" within the meaning of S. 3 (3) of the C. P. and Berar Act XVI of 1938. The words "of a perishable nature" in that clause qualify other movable property and should not be read along with the word "livestock". (*Puranik, J.*) GADI *v.* TRILOK CHAND. **188 I.C. 432.**

CERTIORARI—*Administrative Act — Madras Hindu Religious Endowments Board—Order assessing and demanding costs and expenses of legal proceedings under S. 70 of the Hindu Religious Endowments Act—Costs paid by Board to other party in legal proceedings included in demand—Jurisdiction — Writ—If can be issued—Remedy under S. 70 (2) availed of—Effect.*

A writ of *certiorari* does not lie to quash an order, merely ministerial; it is intended for the purpose of adjudication on the validity of acts judicial. The term "judicial" does not necessarily mean the act of a judge or legal tribunal sitting for the determination of matters of law. "Judicial" act means an act done by competent authority and imposing a liability or affecting the rights of others. An order passed by the Hindu Religious Endowments Board under S. 70 of the Madras Hindu Religious Endowments Act assessing and demanding the amount of costs and expenses incurred by the Board in connection with legal proceedings in respect of an endowment is only an adminstrative or ministerial order; not involving the determination of any question of the rights of subjects or any duty to act judicially, and consequently a writ of *certiorari* cannot be granted to quash such an order. Further the writ is not available because another remedy is provided for under S. 70 (2) of the Act. The fact that the Board in assessing the costs and expenses demands not only the amount spent by the Board in defending legal proceedings but also the amount which the Board has paid to others by way of costs is no ground for holding that the Board has exceeded its jurisdiction under the law, because S. 68 is wide enough to take in all these amounts. When the party has availed himself of the remedy under S. 70 (2), the order that can be the subject of a writ, if at all, is the one passed under S. 70 (2) and not the earlier order of assessment and demand. (*K.S. Menon, J.*) SRI MARIAMMAN KOIL DEVASTHANAM, IRRUKANGUDY *v.* HINDU RELIGIOUS ENDOWMENT BOARD, MADRAS. **166 I.C. 169=9 R.M. 339=1936 M.W.N 1186=A.I.R. 1937 Mad. 103=71 M.L.J. 594.**

——*Administrative Act—Madras Hindu Religious Endowments Board—Order directing trustee to distribute* theertham *and other honours in a particular order of precedence—Application for issue of writ—Maintainability—Observance of judicial forms and procedure—If makes act judicial—Madras Hindu Religious Endowments Act, S. 79.*

A writ of *certiorari* does not lie in respect of administrative acts. Wherever a body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the Court exercised in the writ of *certiorari*. The rights of the subjects mean rights which can be legally enforced and not mere honours or precedence claimed or recognised as a matter of courtesy or usage. An order passed by the Madras Hindu Religious Endowments Board to the effect that certain persons are entitled to the *9th theertham* and 9th place in the distribution of honours in a temple and directing the trustee of the temple to observe the order of distribution of *theertham* as stated in the order, is not an order determining questions affecting the rights of subjects, nor a judicial order. The distribution of *theertham* and o her honours in temple is a matter of internal management and a matter of administration of the temple; and consequently no writ of *certiorari* can issue in such a case, especially when the Board has jurisdiction to control the discretion of the trustee in the matter of distribution of *theertham* and other honours. The mere fact that in coming to their decision the Board observes certain judicial forms and judicial procedure does not make the decision a judicial one. Nor is the position in any way changed by reason of the provisions of S. 79 of the Madras Hindu Religious Endowments Act. (*Pandrang Row, J.*) SRI EMBERUMANAR JEER SWAMIGAL *v.* HINDU RELIGIOUS ENDOWMENT BOARD, MADRAS **166 I.C. 256=9 R.M. 355=1936 M.W.N. 954=44 L.W. 539=A.I.R. 1936 Mad. 973=71 M.L.J 588.**

——*Election dispute—Decision of election commissioner—Failure to determine questions arising—Power of High Court to issue writ—If confined to cases of want or defect of jurisdiction.*

Where the election commissioner entirely misapprehends the real question arising for decision in an election matter on a mistaken hypothesis and declares an election void without considering and without determining the very question upon which his jurisdiction to so declare depends, that is a proper case for interference by *certiorari* and the High Court will quash the order of the commissioner.

Per *Venkatasubba Rao, J.*—It is wrong to hold that nothing short of some sort of defect connected with jurisdiction can afford ground for a writ of *certiorari*; and the remedy by way of *certiorari* is not restricted to cases of jurisdiction strictly so called. If the election commissioner has exercised the jurisdiction entrusted to him *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the High Court cannot interfere, though it has power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to him by law and also the refusal of the true jurisdiction by the adoption of extraneous considerations in arriving at a conclusion or deciding a point other than that brought before

him, in which case the Court will regard him as declining jurisdiction. It is equally clear that it is not every mistake in law that can be remedied by this writ. In the case of tribunals exercising under the statute summary jurisdiction, the writ in actual practice can naturally lie only to correct errors of jurisdiction. In such cases emphasis is naturally laid on the question of jurisdiction. (*Venkatasubba Rao and Cornish, JJ.*) MAHABALESWARAPPA *v.* RAMACHANDRA RAW. **I L R. (1937) Mad. 132=165 I C. 433=9 R.M. 238=44 L.W. 101=1936 M W.N. 720=A.I R. 1936 Mad. 669=71 M.L.J. 199.**

——Election dispute—Order by election commissioner in contravention of rules and on consent of parties—Legality—Jurisdiction to issue writ. *See* MADRAS LOCAL BOARDS ACT—ELECTION RULES. **43 L W. 47=A.I.R. 1936 Mad. 105.**

——Jurisdiction of High Court—Election to Village Panchayat—Decision of Collector—Finality—Failure to take evidence in election petition—If ground for interference. *See* MADRAS VILLAGE PANCHAYAT ACT, S. 41. **A.I.R. 1936 Mad. 969.**

——*Other remedy open—Writ—If can be granted*

It is well-settled that a writ of *certiorari* should only be granted when no other suitable remedy exists. (*K. S. Menon, J.*) SRI MARIAMMAN KOIL DEVASTHANAM, IRRUKKANGUDY *v.* HINDU RELIGIOUS ENDOWMENT BOARD, MADRAS. **166 I.C. 169 =9 R.M. 339=1936 M.W.N. 1186=A.I.R. 1937 Mad. 103=71 M L.J. 594.**

——Revenue matters—Jurisdiction of High Court—Proceedings for collection of income-tax—Application for writ—Maintainability. *See* GOVERNMENT OF INDIA ACT, S. 106 (2). **70 M.L.J. 343.**

——Writ of—Discretion of High Court—Decision of Hindu Religious Endowments Board in respect of distribution of *theertham* in temple and temple honours—If decision on legal right—Writ—If can issue. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 18. **1939 M.W.N. 442.**

——Writ of—High Court's power—Order of Madras Debt Conciliation Board scaling down debt in case where it has no jurisdiction to do so—Issue of writ quashing order. *See* MADRAS DEBT CONCILIATION ACT, SS. 4 AND 17. **(1939) 2 M L.J. 789.**

——Writ of—High Court's power to issue—Order without jurisdiction—Election to Madras Legislative Assembly—Candidate declared elected to Assembly as being the only nominated candidate at primary election—Order by District Magistrate declaring election void—If *ultra vires—Certiorari*—If can issue. *See* GOVERNMENT OF INDIA ACT (1935) SCH. V, PARA. 20. **45 L.W. 623.**

——*Writ of—Jurisdiction of High Court.*

Wherever any person or body of persons is invested with legal authority to determine questions affecting the rights of subjects and has the duty in exercising that authority to act judicially he or they are subject to the controlling jurisdiction of the High Court of Justice exercised in the writ of *certiorari*. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MAUNG PYU, *In the matter of.* **1940 Rang. L.R. 325=188 I C. 422=12 R.R. 365 =A.I.R. 1940 Rang. 84 (S.B.).**

——Writ of—Jurisdiction of High Court—Election Commissioner acting without jurisdiction—Order declaring order of Government illegal and *ultra vires*—Order of Government neither *ultra vires* nor *mala fide*—Writ—Issue of—Order of Election Commissioner—Quashing of. *See* MADRAS LOCAL BOARDS ACT, ELECTION RULES, R. 35 (2). **(1937) 2 M.L.J. 700.**

——Writ of—Jurisdiction of High Court to issue—Decision of Chief Judge of Bombay Small Causes Court—Decision in Municipal appeal—High Court's power to issue writ—Grounds for. *See* BOMBAY CITY MUNICIPAL ACT, SS. 217 AND 219. **41 Bom.L.R. 984.**

——Writ of—Jurisdiction—Suit in Revenue Court by holder of village office—Claim to emoluments attached to office—Application for it to quash proceedings—Competency. *See* MADRAS HEREDITARY VILLAGE OFFICES ACT, SS. 13 (1) AND 21. **(1937) 1 M.L.J. 37.**

——*Writ of—Madras Hindu Religious Endowments Act, S. 18—Orders under by Hindu Religious Endowments Board addressed to temple Committee—If administrative or judicial—Writ—If can issue—Member of temple committee and aspirant to office of temple trustee*—Locus standi *to apply for writ.*

Orders passed by the Hindu Religious Endowments Board in the exercise of general powers of Superintendence and control vested in the Board by S. 18 of the Madras Hindu Religious Endowments Act, addressed to a subordinate body, such as a temple committee and not purporting to decide any rights of parties are only administrative orders; they cannot be said to be orders of a judicial nature merely because they may have the effect of prejudicing the rights of private parties. The High Court will not therefore issue a writ of *certiorari* in respect of such orders. A member of the temple committee in question and an aspirant to the office of a trustee in a temple under the temple committee have no *locus standi* to apply for a writ of *certiorari*, especially when none of their rights have been prejudicially affected by the orders in question. (*Pandrang Row, J.*) SREENIVASA AYYANGAR *v.* H. R. E. BOARD, MADRAS. **171 I.C. 990=10 R.M. 419=1937 M.W.N. 610=45 L.W. 323=A.I.R. 1937 Mad. 456=(1937) 1 M.L.J. 442.**

——Writ of—Powers of High Court to issue—Conditions—Discretion—Delay in applying—Dispute between Co-operative Society and ex-officer—Decision by tribunal without jurisdiction—Party contesting the matter on merits and taking chance of success before that tribunal—Execution of award—Subsequent application for writ—Interference. *See* MADRAS CO-OPERATIVE SOCIETIES ACT, S. 51. **(1937) 2 M.L.J. 858.**

——*Writ of—Power of High Court to issue—Regular exercise of* quasi *judicial powers—Enforcement—Issue of writs of* certiorari *and prohibition for the purpose of.*

The power of the High Court to issue writs of *certiorari* and prohibition to enforce the regular exercise of *quasi*-judicial powers by departments of Government, is unquestioned. (*Panckridge, J.*) INDUMATI DEBI *v.* BENGAL COURT OF WARDS. **I. L. R. (1938) 1 Cal. 476=181 I. C. 973=11 R. C. 879=42 C.W.N. 230=A.I.R. 1938 Cal. 385.**

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———*Writ of—Principle underlying the issue of —Failure of Election Commissioner to record finding that the election has been materially affected in its result—Irregularity and illegality, patent —Interference.*

If a statutory tribunal performs its duties in disregard of the ordinary law or of the procedure and conditions imposed upon it by the law which gives its jurisdiction, the High Court can and should interfere to prevent an abuse of the power conferred by the statute; but it does not follow that the tribunal which obviously is the only tribunal having jurisdiction loses it by such disregard Where in an election dispute the irregularity and illegality that attended the election, was so open and patent that it was not even contested, the mere fact that the Election Commissioner did not in so many words say that the rejection of certain votes by the election officer had materially affected the result of the election, could not vitiate the order and make it one without jurisdiction. (*Pandrang Rao, J.*) VENKATA MANIKYARAO *v.* BHADRACHALAM. **178 I.C. 467=11 R.M. 458=(1938) M.W.N. 196=47 L.W. 338=A.I.R. 1938 Mad. 507=(1938) 1 M.L.J. 375.**

———*Writ of—Rent Settlement Officers—Rangoon High Court—Power to issue.*

Rangoon High Court is the King's Court with general jurisdiction throughout Burma, and therefore it must have inherent power to issue the King's writs unless that power has been taken away by His Majesty by express terms, There is nothing in the Letters Patent which in terms deprives High Court of the power to issue the high prerogative writs. Hence, the Rangoon High Court has power to issue the high prerogative writs and Rent Settlement Officers appointed under the Burma Tenancy Act are amenable to that jurisdiction. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MAUNG BYU, *In the matter of.* **1940 Rang.L.R. 325=188 I.C. 422=12 R.R. 365=A.I.R. 1940 Rang. 84 (S.B.).**

———Writ of—Revenue Court—Suit by holder of office of village blacksmith for possession of inam land attached to office alienated by previous holder—Decree by Revenue Court—If without jurisdiction—Application for writ of *certiorari* to High Court—Competency. *See* MADRAS HEREDIDARY VILLAGE OFFICES ACT, SS. 13 AND 21. **(1938) 1 M.L.J. 406.**

———*Writ of—When can be issued.*

A proceeding is none the less a judicial proceeding subject to prohibition or *certiorari* though it is subject to confirmation or approval by some other authority. An application for prohibition or *certiorari* is never too late as long as there is something left for it to operate upon. *Rex* v. *Electricity Commissioners*, (1924) 1 K.B. 171 and In re *London Scottish Permanent Building Society*, (1894) 63 L.J.Q.B. 112, Rel. on. (*Lord Maugham.*) ESTATE AND TRUST AGENCIES *v.* SINGAPORE IMPROVEMENT TRUST. **46 L.W. 232=10 R.P.C. 60=170 I.C. 425=A.I.R. 1937 P.C. 265 (P.C.).**

CEYLON CIVIL PROCEDURE CODE, S. 349—*Scope.*

S. 349 relates only to decrees for the payment of money. (*Lord Maugham.*) DOROTHY MARGARET *v.* HENRY PETER. **162 I.C. 8=8 R.P.C. 234=44 L.W. 640=1936 A.W.R. 460=1936 O.W.N. 390=1936 O.L.R. 261=38 P.L,R. 407=A.I.R. 1936 P.C. 126 (P.C.).**

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———**S. 605—***Divorce proceedings—Decree absolute—Who can apply.*

The law of Ceylon in regard to making a decree absolute rests on S. 605, C. P. Code, and differs in an important respect from the English law and well settled practice, The application in England can only be made by the innocent party, In Ceylon if the conditions in S. 605 have been complied with (*i.e.*, if no cause has been shown and the time fixed has elapsed) the Court is bound to make the decree absolute, and there is nothing either in the law or the practice to prevent the application being made by the innocent or by the guilty spouse. (*Lord Maugham.*) DOROTHY MARGARET *v.* HENRY PETER. **162 I.C. 8=8 R.P.C. 234=44 L.W. 640=1936 A.W.R. 460=1936 O.W.N. 390=1936 O.L.R. 261=38 P.L.R. 407=A.I.R. 1936 P.C. 126 (P.C.).**

CEYLON ORDINANCE (XIV OF 1891), S. 17—*Registration—Priority—Fraud or collusion —Proof.*

In Ceylon mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud so as to deprive a person of a priority conferred by law as laid down by Ordinance No. 14 of 1891. Where however a father who has tranferred certain property to his son by a deed of gift, which is not registered, attempts to deprive his son of it, by subsequently transferring it to another person by a registered deed, and where the transferee is fully aware of his intentions and for his own purposes joins the father in the transaction, the transferee is guilty of collusion to deprive the son of his lawful rights in respect of the property under the prior instrument, and will not obtain priority by reason of prior registration. (*Lord Maugham.*) E ABEYESUNDERA *v.* CEYLON EXPORTS, LTD. **165 I.C. 417=9 R.P.C. 124=A.I.R. 1936 P.C. 259 (P.C).**

———**(XVIII OF 1923), S. 5—***Transfer of property to husband—Capacity of wife.*

Whatever may have been the capacity of a wife in Ceylon prior to the year 1923 as regards a disposition, transfer or settlement of movable or immovable property in favour of her husband, under S. 5 of Ordinance XVIII of 1923, a wife is under no disability as regards coverture in disposing of her movable or immovable property in favour of her husband. (*Lord Maugham*) DOROTHY MARGARET *v.* HENRY PETER. **162 I.C. 8=8 R.P.C. 234=44 L.W. 640=1936 A.W.R. 460=1936 O.W.N. 390=1936 O.L.R 261=38 P.L.R. 407=A.I.R. 1936 P.C. 126 (P.C.).**

CHAMPERTY — Champertous agreement by applicant for leave to sue in *forma pauperis*—Right to leave. *See* C. P. CODE, O. 33, R. 5 AND R. 9 (c).

——— Plea of—Person not party to agreement—If can set up champertous nature of agreement. *See* CONTRACT ACT, SS. 201 AND 202. **1938 M.W.N. 259.**

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———Bona fide *purchaser — Notice— Onus — Decree declaring charge, if operates as notice.*

Where a charge falls squarely under S. 100, T. P. Act, or whether it comes under a more general rule of law the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice. When a decree provides for the payment of future maintenance and makes provision expressly or impliedly for its

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own execution, then it does not put an end to the suit and consequently whether the matter be placed on the ground of *lis pendens* or on that of estoppel by record the result is the same. But when the decree is merely declaratory and inexecutable, the suit *qua* suit is at an end and then these rules do not apply and decree *qua* decree does not operate as notice. (*Stone, C. J. and Bose, J.*) GHASIRAM *v.* KUNDANBAI. **1940 N.L.J. 1=A.I.R. 1940 Nag. 163.**

——Creation—Money lying in Court to credit of party—Attachment of, before judgment in suit against party—Latter admitting claim and agreeing to amount being called for and paid to plaintiff—Effect of. *See* C. P. CODE, S. 73. **1937 A.W.R. 284=A.I.R. 1937 All. 424.**

——*Enforceability—Failure of charge on account of defect.*

If, for want of registration or any other defect, a charge fails of its effect, it cannot be enforced against a subsequent transferee even with notice. (*Kichlu and Wazir, JJ.*) BANK OF NORTHERN INDIA *v.* BHAGAT RAM. **39 P.L.R.J. and K. 167.**

——*Decree declaring—Purchaser without notice—If takes free of charge.*

Where a decree for maintenance declares that the property in the hands of the judgment-debtor in the suit is charged with the payment of a particular amount, under the law a *bona fide* purchaser of such property for value without notice of the charge takes it free of the charge: the reason being that the legal estate prevails over a mere equity except when the legal owner takes with notice. (*Stone, C. J. and Bose, J.*) GHASIRAM *v.* KUNDANBAI. **1940 N.L.J. 1=A.I.R. 1940 Nag. 163.**

——Equitable charge—Creation of—Agreement between debtor and creditor that fund should be applied in particular way—Charge on future property—Validity. *See* C. P. CODE, O. 21, R. 46. **42 C.W.N. 971.**

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920)—*Decision under—Nature and effect of—If operates as* res judicata.

The decision of the District Judge under the Charitable and Religious Trusts Act—a decision from which by S. 12 of the Act there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit which has not been made final by any provision of the Act, and in respect of which the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act. The terms of S. 6 of the Act are intended to define the consequences of the failure to comply with any order that may be passed under S. 5 (5) of the Act, but the words "if a trustee without reasonable excuse fails to comply" in the section cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant, to a suit under S. 92, C. P. Code. (*Sir George Rankin.*) BHAGWAN DIN *v.* GIR HAR SAROOP. **67 I.A. 1=I.L.R. (1940) Kar. (P.C.) 25=15 Luck. 1=185 I.C. 305=12 R.P.C. 89=6 B.R. 179=51 L.W. 4=1940 M.W.N 3=44 C.W.N. 294=42 Bom. L.R. 190=71 C.L.J. 169=1940 P.W.N. 156=1939 A.W.R. (P.C.) 188=1939 O.W.N. 1078=1940 A.L.J. 533=A.I.R. 1940 (P.C.) 7=(1940) 1 M.L.J. 1 (P.C.).**

CHARIT. AND RELIG. TRUSTS ACT (1920), S. 3.

——S. 3—*Applicability—Test—Wakf.*

There can be no doubt that on the wording of the statute that the Charitable and Religious Trusts Act applies only to those cases where the entire benefit under the wakf in trust is allotted to public purposes and not where the purpose of the trust is partly public and partly private. In every case, the real substance of the trust and the primary intention of the creator of the trust have to be looked at. If the intention of the creator was the creation of a trust for a public purpose, the dedication in favour of the poor relations of creator who are classed with the helpless widows in the neighbourhood will not destroy the public nature of the trust. (*Guha and Bartley, JJ.*) EMDAD ALI CHAUDHURI *v.* TABUBULLA. **10 R.C. 522=173 I.C. 453=A.I.R. 1937 Cal. 313.**

——S. 3—*Applicability—Trust, partly public and partly private.*

S. 3 applies to a mixed trust partly for a public and charitable purpose and partly for private purpose. (*Ganga Nath, J.*) NAGESHAR PRASAD SINGH *v.* RAM SARUP SINGH. **163 I.C. 234=8 R.A. 948=1936 A.L.J. 546=1936 A.W.R. 420=1936 All.L.R 536=A.I.R. 1936 All. 411.**

——S. 3—*Construction—"Trust....for a public purpose of a charitable or religious nature"—Meaning of—Deed or will creating trust—Part of property or income set apart for private purposes—Specified part definitely set apart for public purposes—If falls under Act.*

Act XIV of 1920 is not inapplicable to a trust merely because a small sum is reserved for purposes which may not be strictly public purposes. Where under the same deed or will either a specified part of the property, for example, a defined share in the property, or a specified part of the income has been definitely set apart for public purposes, then the mere fact that any other part of the property or any other specified part of the income is for private purposes would not take the case out of the provisions of the Act. (*Sulaiman, C.J. and Harries, J.*) PRATAP SINGH *v.* BRIJNATH DAS. **1937 A.L.J. 1183=1937 A.W.R. 873=I L.R. (1938) All. 1=172 I.C. 945=10 R.A. 437=1938 A.L.R. 46=A.I.R. 1937 All. 786.**

——S. 3—*Order under—Revisability.*

The provisions of S. 115, C. P. Code, and S. 44, Punjab Courts Act, are very wide and an order of the District Judge under S. 3, Charitable and Religious Trusts Act, is revisable. (*Bhide, J.*) MAHOMED YAR *v.* KHALIL-UL-RAHMAN. **17 Lah. 768=165 I.C. 664 (1)=9 R.L. 281 (1)=38 P.L.R. 900=A.I.R. 1936 Lah. 695.**

——S. 3—*Orders under—Revision under S. 115, C.P. Code—If lies.*

Where a Judge passes an order under S. 3 of the Charitable and Religious Trusts Act directing a mutawalli to file accounts within a certain time, it cannot be said that in law no revision would lie from such order. (*Zia-ul-Hasan and Yorke, JJ.*) GANGA RAM JAITLEY *v.* J. N. JAITLEY. **1938 O.W.N. 1054=11 R O. 92=178 I.C. 167=1938 O.A. 800=1938 A.W.R. (C.C.) 85=1938 O.L.R. 467=A.I.R 1938 Oudh 262.**

——S. 3—*"Public trust"—Mosque built by public subscription and used by Mahomedan public.*

CHARIT. AND RELIG. TRUSTS ACT (1920), S. 3.

Where a mosque was built with public subscriptions and used by the Mahomedan public for offering prayers and further was admitted by the respondent to be a religious trust in a prior suit.

Held, that such a mosque was a public trust and that an application under S. 3 calling upon the respondent to furnish certain information should be decided on merits. (*Bhide, J.*) MAHOMED YAR *v.* KHALIL-UL-RAHMAN. 17 Lah. 768=165 I.C 664 (1)=9 R.L. 281 (1)=38 P.L.R. 900=A.I.R. 1936 Lah. 695

——S. 3—*Public trust—What constitutes.*

To constitute a trust "created or existing for a public purpose of a charitable or religious nature" the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover the purpose of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust if required. 57 A. 330=62 I. A. 446, Rel. on. (*Sir Shadi Lal.*) PARMA NAND *v.* NIHAL CHAND. 65 I A. 252=32 S.L.R. 821=175 I.C. 459=48 L.W. 62=42 C.W.N. 1013=1938 O.L.R. 309=1938 P.W.N. 578=11 R.P.C. 6=1938 O.W.N. 693=67 C.L.J. 540=4 B.R. 673=1938 A.L.R. 502=40 P.L.R 829=40 Bom L.R. 907=1938 M.W.N. 885=1938 A.L.J. 799=1938 O.A. 711=19 Pat L.T. 712=I.L.R. (1938) Lah. 453=1938 A.W.R. (P.C.) 145=A.I.R. 1938 P.C. 195=(1938) 2 M.L.J. 228 (P.C.).

——S. 3 (2)—*Audit of accounts—Power of Court to direct.*

Under Cl. (2) to S. 3, the Court is enabled to direct the examination and audit of the accounts in whosoever's hands the funds or the properties of the trust may be, quite apart from whether he is a trustee or not. (*Agarwala and Varma, JJ.*) RAMSAROOP DAS *v.* RAMESHWAR DAS. 175 I.C. 636=4 B.R. 622=11 R.P. 5=19 Pat.L.T. 639=A.I.R 1938 Pat. 280.

——Ss. 5 (3) and (4)—*Jurisdiction of District Judge under—Limits—Decision as to nature of trust—When justified.*

S. 5 (4) of the Charitable and Religious Trusts Act in terms gives the Court of the District Judge jurisdiction to decide, under certain circumstances, the question whether a trust is one to which the Act applies. When either its existence or its being a trust to which the Act applies, is denied, and no undertaking as contemplated by sub-R. (3) is given, the District Judge is exercising a jurisdiction vested in him, if he decides as to the nature of the trust. (*Zia-ul-Hasan and Yorke, JJ.*) GANGA RAM JAITLEY *v.* J. N. JAITLEY. 11 R.O. 92=178 I C. 167=1938 O W.N. 1054=1938 O.A. 800=1938 A.W.R. (C.C.) 85=1938 O. L R. 467=A.I.R. 1938 Oudh 262.

——S. 7—*Powers of District Judge under—Extent of—Wakf property—Dispute between mutwallis—District Judge appointing defendant to collect rents—Suit against him by mutwalli—Notice under S. 80, C. P. Code—If necessary.*

On a dispute arising between the plaintiff and his brother who succeeded as mutwallis, the District Judge arranged that the defendant should take charge of the property, manage it, collect rents and divide the profits between the two brothers. The District Judge passed an order to the effect that a power of attorney should be drawn up and executed in the terms of the agreement which he set forth in his order. The plaintiff refused to execute the power. The District Judge then passed an order that he would execute it himself on behalf of the plaintiff and he did so. The plaintiff instituted a suit in order to obtain his share of the profits from the defendant. One of the pleas taken by the defendant was that no suit should be instituted against him unless notice had been given to him under S. 80, C. P. Code.

Held, that the District Judge had no authority to execute the power of attorney on behalf of the plaintiff under the provisions of the Mussalman Wakf Act, and that even supposing that he was acting under the provisions of S. 7 of the Charitable and Religious Trusts Act and those of O. 21, R. 34, C. P. Code, he had no power to compel a trustee to follow his advice given under that section or to carry out any direction so given and that the trustee was entitled to seek advice for his own protection and if he followed that advice, he was protected, but if he did not choose to follow it, he could not be compelled to do so, although his failure to follow it would be at his own risk, and that in that view the action of the District Judge was without jurisdiction and the defendant had no right to collect the profits at all, and if he collected them, he was liable to be called to account by the person who was entitled.

Held, also, that assuming that the District Judge was acting properly in accordance with the provisions of S. 7 of the Charitable and Religious Trusts Act and those of O. 21, R. 34, C. P. Code, the District Judge was acting merely on behalf of the plaintiff, and the defendant was in the same position as he would have been if the plaintiff had executed the power of attorney himself and that in other words, the defendant was not an officer of the Court but merely the agent of the plaintiff, and that in that view of the matter he was also liable to be sued without the issue of any notice to him. (*Allsop, J.*) ABDUL RAB *v.* MOHAMMAD HASAN KHAN. 165 I.C. 681=9 R. A. 296=1936 A.W.R. 1012=1936 A.L.J. 1112=1936 All.L.R. 948=A.I.R. 1936 All. 801.

CHARTER PARTY. *See* CONTRACT—CHARTER PARTY.

CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929)—*Marriage contravening Act—Validity.*

The marriage of a Child in contravention of the provisions of the Child Marriage Restraint Act is not declared by that Act to be an invalid marriage. The Act merely imposes certain penalties on persons bringing about such marriages. (*Thom, J.*) MOTI *v.* BENI. 166 I.C. 847=9 R. A 455=38 Cr L J. 301=1937 All.L.R. 90=1936 A.L.J. 1097=1936 A W.R. 920=1936 A Cr.C. 192=1936 Cr.C. 1111=A.I R. 1936 All. 852.

——*Offence beyond British India—Charged in British India—Sanction of Local Government or certificate of political agent—Necessity for—Cr. P. Code, S.* 188.

A charge in respect of an offence under the Child Marriage Restraint Act alleged to have been committed in French territory cannot be inquired into in British India except on the certificate of the Political Agent or the sanction of the Local Government, as required by the proviso to

CHILD MARRIAGE RESTRAINT ACT (1929).

S. 188, Cr. P. Code. There is nothing to the contrary in the Child Marriage Restraint Act. (*Lakshmana Rao, J.*) SUBBA RAO *v.* KAMARAJU. **183 I.C. 708=12 R.M. 368=40 Cr.L.J. 822 (2)=1939 M.W.N 742=49 L.W. 656=1939 M.Cr.C. 198=A.I.R. 1939 Mad 577.**

——*Scope of—District Magistrate—Transfer of case for disposal to Sub-Divisional Magistrate without inquiry—Legality.*

S. 10 of the Child Marriage Restraint Act requires a Court taking cognizance of an offence under the Act either itself to make an inquiry under S. 202, Cr. P. Code, or to direct a Magistrate of the 1st class subordinate to it to make such an inquiry. A transfer of such a case by a District Magistrate to a Sub-Divisional Magistrate for disposal without any such inquiry is therefore illegal. (*Lakshmana Rao, J.*) SIVAGAMI AMMAL *v.* MUTHU IYER. **180 I.C. 902=11 R.M. 766=1938 M.W.N. 1312=40 Cr.L.J. 514 (2)=1939 M.Cr.C. 11=48 L.W. 774=A.I.R. 1939 Mad. 294=(1939) 1 M.L.J. 111.**

——*Scope and object of—Child Marriage—Application to Court for funds for purpose of—If to be sanctioned—Considerations.*

Although the Child Marriage Restraint Act does not render a child marriage void, a Court of law ought not to sanction expenditure of funds in the hands of the Court, though its receiver, for the purpose of meeting a child marriage, of which the Legislature has clearly expressed its disapproval by the Act. (*Panckridge, J.*) PAN MAL LODHA *v.* GOD MAL LODHA. **63 Cal. 1153=170 I.C. 309=10 R.C. 147=A.I.R. 1937 Cal. 257.**

——*Scope and object of—If affects validity of marriages solemnized.*

The Child Marriage Restraint Act aims at the restraint of solemnization of child marriages. It does not affect the validity of the marriages after they have been performed. There may no doubt be cases where the Court in the exercise of its discretion, may refuse to give a declaration in the case of a marriage performed in contravention of the Act. (*Bennet and Ganga Nath, JJ.*) RAM BARAN UPADHIA *v.* SITAL PATHAK. **182 I.C. 568=12 R.A. 72=1939 A.Cr.C. 69=1939 A.W.R. (H.C.) 246=1939 A.L.J. 173=A.I.R. 1939 All. 340.**

——**Ss. 5 and 6**—*Applicability—Promotion of child marriage by parents—If offence under S. 5 or under both Ss. 5 and 6.*

S. 5 of the Child Marriage Restraint Act only applies to solemnisation of a child marriage by persons other than the parents of the minor and S. 6 alone applies to parents who promote a child marriage or negligently fail to prevent it. (*Pandrang Row, J.*) PUBLIC PROSECUTOR *v.* RATTAYYA. **I.L.R. (1937) Mad. 854=9 R.M. 633=38 Cr.L.J. 594=168 I.C. 723=1937 M.W.N. 212=45 L.W. 437=1937 M.Cr.C. 73=A.I.R. 1937 Mad. 490.**

——**Ss. 5 and 6**—*Complaint under—Finding that either or both contracting parties were infants—Duty of Magistrate.*

In cases of complaints of offences under Ss. 5 and 6 of the Act it is essential that trying Magistrate should find definitely that either or both of the contracting parties to the marriage were infants within the meaning of the Act, that is to say, that the bridegroom was under the age of 18 or that the bride was under the age of 14. (*Bartley and Henderson, JJ.*) SEW RATAN LAL BINANI *v.* EMPEROR. **181 I.C. 916=11 R.C. 874=40 Cr.L.J. 605=A.I.R. 1939 Cal. 288.**

CHILD MARRIAGE RESTRAINT ACT (1929), S. 5.

——**Ss. 5 and 6**—*Conviction under for celebration of marriage in Frenchpet—Doubt at the time of marriage as to Frenchpet being British territory*—Bona fide *mistake of fact—Plea in defence—If available—Operation of Act—If extra territorial.*

The Child Marriage Restraint Act makes it an offence to celebrate a child marriage. This penal law applies not only to the celebration of such a marriage in British India by any one, but also to the celebration of such marriages even outside British India by native Indian subjects. The petitioners were convicted under Ss. 5 and 6 of the Act. They pleaded that at the time of marriage, it was doubtful whether Frenchpet, where the marriage was celebrated for which they were convicted, was part of British India, and therefore they were not liable to be convicted.

Held, that the Act was extra territorial and that the mistake of fact under which they were labouring, namely that Frenchpet was French territory and not British India, even if *bona fide*, did not render the celebration of the marriage innocuous or innocent, and it did not follow that the proceedings were void or that the conviction was wrong. A mistake of fact like the one could be pleaded successfully only if on account of such mistake, an act which otherwise would be an offence ceased to be an offence. There was consequently nothing illegal in the conviction. (*Pandrang Row, J.*) SREERAMAMURTHI *v.* RANGANAYAKALU. **168 I.C. 736=9 R.M. 628=38 Cr.L.J. 587=1937 M.W.N. 22=45 L.W. 210=1937 M.Cr.C. 98=A.I.R. 1937 Mad. 273=(1937) 1 M.L.J. 388.**

——**S. 5**—*Duty of purohit solemnising marriage—Enquiry into age of parties—Failure to make—Effect—Mere look at parties and forming opinion as to age—Sufficiency of.*

A purohit prosecuted under S. 5 of the Sarda Act has the burden on him to prove that he had reason to believe that neither of the parties to the marriage was a child as defined by the Act. The section contemplates that the person solemnising a marriage must make some reasonable inquiry and satisfy himself that neither of the participants is a child. It is not enough if he merely looks at the bride and bridegroom and forms his own opinion. The law casts on him the duty of making reasonable inquiry and if he makes none, he renders himself liable to conviction. (*Pandrang Row, J.*) PUBLIC PROSECUTOR *v.* RATTAYYA. **168 I.C. 723=I.L.R. (1937) Mad. 854=9 R.M. 633=38 Cr.L.J. 594=1937 M.W.N. 212=45 L.W. 437=1937 M.Cr.C. 73=A.I.R. 1937 Mad. 490.**

——**Ss. 5 and 6**—*Marriage in Native State—Accused living in British India—Certificate under S. 188, Cr. P. Code, if necessary.*

Where it is alleged that the accused lived in British India and arranged for a marriage in contravention of the provisions of the Child Marriage Restraint Act, to take place out of British India, the offence is committed inside British India and hence no certificate under S. 188, Cr. P. Code, is necessary. (*Davies.*) MOOL CHAND *v.* BANSI DHAR. **1939 A.M.L.J. 130.**

——**S. 5**—*Offence under—Application for permission to conduct festivities at marriage.*

CHILD MARRIAGE RESTRAINT ACT (1929), S. 5.

The mere submission of an application to the Municipal Board for permission to hold a *nach* with music and fire-works, etc., on the occasion of a marriage would not amount to an offence under S. 5 of the Act. (*King, C J.*) BACHCHU LAL *v.* EMPEROR. 12 Luck. 263=162 I.C. 389 (2)=8 R.O. 376=36 Cr.L.J. 616=1936 O.W.N. 480=1936 Cr.C. 712=1939 O.L.R. 254=A.I.R. 1936 Oudh 311.

——S. 5—*Preliminary acts—If punishable*

S. 5 of the Child Marriage Restraint Act takes account only of performing, conducting or directing a child marriage, that is to say, the actual marriage ceremony itself, and not of any negotiation, preparation or any other preliminary acts. Hence these are not covered by S. 5 of the Act. (*Grille, J.*) SHEIKH HAIDER *v.* SYED ISSA. I.L.R. (1939) Nag. 241=175 I.C. 615=39 Cr.L.J. 651=11 R.N. 2=A.I.R. 1938 Nag. 235.

——S. 6—*Applicability—Bride under 14 years—Parents of bridegroam—Liability to conviction.*

The parents of a bridegroom are not liable to conviction under S. 6 of the Sarda Act, on the ground that the bride is under 14 years of age; they are liable to conviction only if the bridegroom, that is their own son, who was in their charge, be under 18 years at the time of the marriage. (*Pandrang Row, J.*) PUBLIC PROSECUTOR *v.* RATTAYYA. I.L.R. (1937) Mad. 854=9 R.M. 633=38 Cr.L.J. 594=168 I.C. 723=1937 M.W.N. 212=45 L.W. 437=1937 M. Cr.C. 73=A.I.R. 1937 Mad. 490.

——S. 6—*Scope—Bridegroom below 18 years—Conviction of both father and mother at same time—Sustainability—"Person having charge of a minor."*

The offence punishable under S. 6 of the Child Marriage Restraint Act is confined only to the person who has actual charge of the minor either as parent or as guardian at the time. Where the father of a bridegroom has been convicted of an offence under S. 6 on the ground that the bridegroom was below 18 at the time of the marriage, the mother of the bridegroom cannot be convicted at the same time under S. 6. The mother has no authority to prevent the marriage promoted by the father, and it cannot be said that she had charge of the bridegroom. Her mere participation in the marriage cannot be regarded as constituting an offence punishable under S. 6. (*Pandrang Row, J.*) PUBLIC PROSECUTOR *v.* RATTAYYA. I.L.R. (1937) Mad. 854=9 R.M. 633=38 Cr.L.J. 594=168 I.C. 723=1937 M.W.N. 212=45 L.W. 437=1937 M.Cr.C. 73=A.I.R. 1937 Mad. 490.

——S. 6—*Scope of—Promotion of child marriage outside British India—If punishable.*

S. 6 of the Child Marriage Restriant Act has reference only to a marriage that is prohibited. As child marriage outside British India is not prohibited, its promotion is not an offence punishable under the Act. (*Grille, J.*) SHEIKH HAIDER *v.* SYED ISSA. I.L.R. (1939) Nag. 241=175 I.C. 615=39 Cr.L.J. 651=11 R.N. 2=A.I.R. 1938 Nag. 235.

——S. 8—*Jurisdiction—Additional District Magistrate—Jurisdiction to try offence under Act—Cr. P. Code, S. 10* (2).

Reading S. 8 of the Child Marriage Restraint Act with S. 10 (2) of the Cr. P. Code, it must be held that an Additional District Magistrate who is empowered with all the powers of a District Magistrate under S. 10 (2) of the Cr. P. Code, is empowered to try cases under the Child Marriage Restraint Act. (*Horwill, J.*) ABDUR RAHIMAN KUTTY, *In re.* I.L.R. (1937) Mad. 1034=169 I.C. 71=9 R.M. 679=38 Cr.L.J. 664=1937 M.W.N. 321=1937 M.Cr.C. 114=45 L.W. 435=A.I.R. 1937 Mad. 637=(1937) 1 M.L.J. 498.

CHILD MARRIAGE RESTRAINT ACT (1929), S. 10

——S. 9—*Complaint—Case under S. 5 sent by Magistrate to police officer for investigation—Letter by police officer to Magistrate if a complaint.*

When a police officer investigates a non-cognizable case under orders of a Magistrate, the report which he makes at the end of his investigation is of the same nature as a report made under S. 157, Cr. P. Code, and such report being a police report is not a 'complaint' though if a police officer, acting without instructions from a Magistrate, reports a non-cognizable offence to a Magistrate with a view to the Magistrate taking action, this is a complaint. An offence under S. 5, Child Marriage Restraint Act, being punishable only with simple imprisonment up to one month or a fine of Rs. 1,000 or both, under Sch. III, Cr. P.Code, is not cognizable. Hence, when, such case is forwarded to an Assistant Superintendent of Police for investigation, a letter written on behalf of the Assistant Superintendent of Police to the District Magistrate is a 'Police Report' and not a 'complaint.' (*Baguley, J.*) JAGDEO PANDAY *v.* N. C. HILL. 1938 Rang.L.R. 150=176 I.C. 694=11 R.R. 74=39 Cr.L.J. 776=A.I.R. 1938 Rang. 257.

——S 9—Marriage in Native State—Complaint within one year but certificate obtained after one year—Trial, if legal. *See* CR. P. CODE, S. 188 AND CHILD MARRIAGE RESTRAINT ACT, S. 9. 1940 N. L.J. 304.

——S. 9—*Scope and effect of—Complaint beyond one year—If saved by prior unsuccessful complaint filed within time — Limitation Act, S.* 14.

S. 14 of the Limitation Act is in terms restricted to civil proceedings and cannot be availed of in respect of proceedings under the Child Marriage Restraint Act. A complaint preferred beyond a year of the solemnisation of the marriage cannot be taken cognizance of under S. 7 of the Child Marriage Restraint Act. The fact that another unsuccessful complaint had been made to another Magistrate within time would not help to make the second complaint filed beyond time a valid one. (*Lakshmana Rao, J.*) VENKATANARASIMHAM *v.* SATYANARAYANA RAO. 183 I.C. 595=12 R.M. 317=40 Cr.L.J. 816 (1)=1939 M.W.N. 415=1939 M.Cr.C. 106=49 L.W. 547 (1)=A.I.R. 1939 Mad. 512=(1939) 1 M.L.J. 775.

——(as amended by Act VII of 1938), S. 10 and Criminal Procedure Code, S. 537—*Preliminary enquiry not held—Trial and conviction, if vitiated—S.* 537, *if cures defect.*

Where in respect of an offence under the Child Marriage Restraint Act the accused are tried and convicted without a preliminary enquiry being held as required by S. 10 of the Act, and no prejudice had thereby been caused to the accused, the trial and conviction is not on that ground in any way vitiated and the defect is

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cured by S. 537, Cr. P. Code. (*Gruer, J.*) EMPEROR *v.* MEHTAR DHANWA. I.L.R. (1940) Nag. 488 =1940 N.L.J. 224.

——Ss. 10 and 11—Scope—If mandatory—Non-compliance—Effect on trial—If irregularity curable by S. 537, Cr P. Code. *See* CR. P. CODE, S. 537. 20 N.L.J. 115.

——S. 10—*Scope—Non-compliance—Failure to hold preliminary inquiry—Conviction—If liable to be set aside—Failure of accused to object to trial—Effect.*

S. 10 of the Child Marriage Act no doubt requires that a preliminary inquiry must be held. But where a Court finds that there is a *prima facie* case and also holds the offence established after a proper trial, it cannot be held that the conviction must be set aside for the technical reason that no preliminary inquiry was held as required by S. 10. This does not mean that Magistrates are entitled to disregard the provisions of S. 10. But where the accused does not object to the trial, he cannot benefit by an objection which is entirely technical in its nature. (*Agarwala, J.*) HARIHAR TIWARI *v.* ETWARI GOPE. 184 I.C 230 =6 B R 24=40 Cr.L.J. 887 (1)=12 R.P 231= 1939 P.W.N. 670=20 Pat.L.T. 495=A.I.R. 1939 Pat. 525.

——S. 10—*Scope—Omission to hold enquiry—Effect of.*

S. 10 of the Child Marriage Restraint Act is mandatory and clearly prohibits a Court from taking cognizance of an offence under the Act without a preliminary inquiry being held. A process issued without holding an inquiry as required by S. 10, is therefore unauthorised and illegal. (*Pandrang Rao, J.*) JAGGU NAIDU, *In re.* 183 I C. 581=12 R.M. 343 (1)=40 Cr.L J. 818 (1)=1939 M.W.N 411=1939 M.Cr.C. 139 =49 L.W. 552=A.I.R. 1939 Mad. 530=(1939) 1 M.L.J. 900

——S. 11—*Security bond defective—Trial, if vitiated.*

The mere fact that the security bond executed by the complainant under S. 11 of the Child Marriage Restraint Act is defective does not affect the merits of the case and, therefore, does not vitiate the trial. (*King, C.J.*) BACHCHU LAL *v.* EMPEROR. 12 Luck. 263=162 I.C. 389 (2) =8 R.O. 376=37 Cr.L.J. 660=1936 O.W.N. 480 =1936 O.L.R 254=1936 Cr.C. 712=A.I.R. 1936 Oudh 311.

CHIT FUND.

CHIT FUND—Assignment of rights by subscriber with consent of stake-holder—Suit by assignee for declaration of rights as assignee—Competency—Right to declaration as against stake-holder. *See* SPECIFIC RELIEF ACT, S. 42. 44 L.W. 704.

——*Kuri—Successful bidder—Receipt of bid amount—Mortgage bond by bidder and her sons to secure payment of future subscriptions—Construction of—Kuri collapsing after two or three instalments—Bond assigned to another by stake-holder—Suit by assignee for return of bid amount less amounts subscribed—Maintainability.*

One *R* had been conducting a kuri chit with 18 members which was expected to run for 18 years. *V* the 1st defendant was a subscriber holding 1½ tickets and became the successful bidder at the first auction. As per the chit fund rules she got the money after executing a security bond to the stake-holder *R*, along with her sons the other defendants under which the properties of *V's* sons were mortgaged to *R* to secure the payment by *V* of the future instalments of subscriptions due by her. The chit thereafter was conducted only for two more years. *R* assigned his rights under the security bond executed by the defendants and the assignee sued the defendants on the mortgage to recover the amount.

Held, that the security bond in suit must be interpreted in the light of the rules of the chit fund, and the obligations undertaken by it were not repayment of the benefit already received but the payment of future subscriptions, that a reasonable interpretation of the bond as against the sons of the 1st defendant, who were not parties to the chit fund arrangement could only be that it was intended to secure the 1st defendant's obligation on the assumption that the chit fund would run its normal course; and therefore the suit brought before the termination of the kuri, on the basis that the kuri had callapsed, and that the benefited subscribers should refund the amount drawn by them with interest subject to their right to take back the amounts actually subscribed by them with a certain rate of interest, must fail. (*Varadachariar and Mockett, JJ.*) MARUDA KONAR *v.* VEERAMMAL. 168 I.C. 402=9 R.M. 571=1936 M.W.N. 1370=44 L W. 710= A.I.R 1936 Mad. 985=(1937) 2 M L.J. 17.

——*Nature of transaction—Agreement by subscriber to pay subscription—Breach—Suit by stake-holder—If one for specific performance of contract to lend—Maintainability.*

Semble.—A suit by a stake-holder or starter of a chit fund for recovery of subscriptions from a subscriber cannot be regarded as a suit for specific performance of a contract to lend. The stake-holder is not a borrower nor the subscriber a lender. A chit fund transaction cannot possibly be regarded as in any sense a contract entered into by a subscriber to lend money to the stake-holder. It is more in the nature of a contract on the part of the subscriber to pay a certain sum of money to the stake-holder under the rules of the chit fund; and when he breaks his contract, there is nothing at all to prevent the stake-holder from suing for the money which the subscriber has contracted to pay. (*Beasley, C. J.*) RAMANADHA AIYAR *v.* NARAYANASWAMI AYYAR 169 I. C. 692=10 R.M. 92=1937 M.W.N. 439=45 L. W. 609=A.I.R. 1937 Mad. 364=(1937) 1 M.L J. 163.

——*Price—Kuri—If a lottery—Suit by subscriber to recover subscriptions paid—Maintainability—Penal Code, S. 294-A.*

A kuri or chit-fund, started with the object of creating a fund for a temple consisted of 625 chits, the subscription for each chit being Rs. 3. A ticket was to be drawn every month for 50 months, and the subscriber who drew the winning ticket was to be paid Rs. 150, without any liability for future subscriptions. After the 50th month the non-winning subscribers were to be paid Rs. 150 each, *i.e.*, the amount actually subscribed by them, in a particular order, and the fund was to be closed. The plaintiff who had subscribed for two tickets for 45 instalments and who had not won a prize sued the promoters of the fund for recovery of the amount subscribed by him the

kuri having terminated after the 45th month. The defendants pleaded that the Kuri was a lottery and the suit was not maintainable.

Held (per *Cornish, Varadachariar, Wadsworth and Lakshmana Rao, JJ.*), (1) that the chit-fund was a lottery within the meaning of S 294-A, I P. Code, and that the keeping of a place for conducting the kuri, and the publication of the same, were sufficient, so far as the promoters were concerned, to bring the matter within S. 294-A, I.P. Code; (2) that the suit was maintainable because the subscribers, of whom plaintiff was one were not guilty; the suit not being one for recovery of the prize or for enforcement of the other terms of contract but for refund of money paid was not one for enforcement of an illegal contract; (3) that the doctrine of *in pari delicto* would not apply so as to disentitle the plaintiff from suing; (4) that the claims of the subscribers would be governed by S 84, Trusts Act; and (5) that in so far as the term of the contract made the liability of the promoters specific in the case, their personal liability was not excluded.

Per *Venkataramana Rao, J.*—The chit-fund in question was not a lottery, so as to constitute an offence under S. 294-A, I. P. Code, and that the plaintiff was clearly entitled to get back the subscriptions paid by him and also to get a personal decree against the promoters, and the case would be governed by S. 84, Trusts Act (*Cornish, Varadachariar, Wadsworth, Venkataramana Rao and Lakshmana Rao, JJ.*) SESHA AIYAR *v.* KRISHNA AIYAR. **59 Mad. 562=162 I.C. 68=8 R.M. 908=43 L.W. 77=1936 M.Cr.C. 98=1936 M.W.N. 89 (2)=A.I.R. 1936 Mad. 225=70 M. L.J. 36 (F.B.).**

———*Rules—Construction—Company carrying on chit fund—Auction—Bidders required to execute bonds for future subscriptions—Provision for payment of prize amount on furnishing of security and execution of bond within two months—Company ceasing to carry on business within two months of bid—Effect.*

The rules of a chit fund conducted by a company provided, *inter alia*, that the respective successful bidders would be given their prize amounts (chit-amount-less discount) on their furnishing security to the satisfaction of the company for payment of future subscriptions, that if they failed to furnish security and execute the necessary bond within two months from the date of auction, the prize amount might, at the option of the company, be retained by the company or given to any other person prepared to furnish security, etc. There was also another rule which provided that the successful bidders were entitled to receive payment of the prize amount one week after the date of the next instalment. It was further provided that if through default of the company the chit should collapse, the subscribers who had won and received prizes would be bound to pay their subscriptions only on the dates on which subscriptions would have fallen due if the chit had not collapsed.

Held, that the time within which a successful bidder should furnish security was two months, and no default would be committed by a successful bidder until two months had elapsed from the auction. If the company in fact ceased to carry on business, a successful bidder in an auction held by the company within two months prior to

the date of cessation of business would not be in default if he failed to furnish security to obtain the prize money; and in respect of such an auction held within two months prior to the date of the company ceasing to carry on business, no discount should be debited against the successful bidders during that time. (*Gentle, J.*) SUNDARAVARADAN *v.* NARASIMHACHARI. **1940 M.W.N. 545.**

———Stakeholder taking mortgage security bond from successful bidders—Effect of—Trust—Insolvency of stakeholder and sale of his properties by receiver—Suit by purchaser on security bonds—Maintainability. *See* TRUSTS ACT, S. 59. **1938 M.W.N. 523.**

CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI OF 1876)—*Object of.*

The object of the Chota Nagpur Encumbered Estates Act is to protect the estate and at the same time do justice to its creditors by administering it in such a manner as to satisfy all claims against it in respect of debts antecedently incurred by the proprietor. For these claims all other remedies are barred except one which is to apply to the manager and get the debt entered on the schedule of debts and paid by the manager; failing recourse to this procedure, not only all remedies are barred, but the debt itself is barred. The aim of the whole proceedings is to hand back the property to the proprietor unencumbered by any of his old liabilities. (*Dhavle and Rowland, JJ.*) BENI MADHAB MAHTO *v.* GANESH SINGH SARDAR. **16 Pat 459=1937 P.W.N. 392=18 Pat L.T. 717 =3 B R. 801=171 I.C. 65=10 R.P. 162=A.I.R. 1937 Pat. 486.**

———**S. 2-B**—*Scope—Order under in respect of undivided interest of Hindu coparcener—Legality.*

The undivided interest of a member of a Hindu joint family cannot be protected under the provisions of the Chota Nagpur Encumbered Estates Act. The holder of an undivided interest is not a holder of immovable property within the meaning of the Act. An order of protection under S. 2-B of the Act cannot therefore be passed in respect of the undivided interest of a member in joint family property (*Harries, C.J. and Dhavle, J.*) GOPAL BUX RAI *v.* SHYAMBEHARI SINGH. **188 I.C. 269=12 R.P. 689=6 B.R. 630.**

———**Ss. 3 and 7**—*Relative scope and effect of.*

S. 7, Chota Nagpur Encumbered Estates Act, expressly declares that every debt or liability other than those mentioned in the section and which is not duly notified to the manager shall be barred. S. 3 merely bars all proceedings pending in Courts and institution of new proceedings in respect of such debt during the continuance of the management of the estate of the proprietor under the Act. S. 7 thus does, not merely, like para. 1, S. 3, create a bar not restricted to the continuance of the management, but takes away the very foundation for any proceedings by the creditors after the release of the estate (*Dhavle and Rowland, JJ.*) BENI MADHAB MAHTO *v.* GANESH SINGH SARDAR **16 Pat 459=18 Pat.L.T. 717= 3 B.R. 801=171 I.C 65=10 R.P. 162=1937 P. W.N. 392=A.I.R. 1937 Pat. 486.**

———**S. 3 (b)**—*Scope—Mortgagor's estate taken under management under Act pending appeal from decree on mortgage—Decree—Execution against manager.*

CHOTA NAG. ENC. EST. ACT (1876), S. 12.

Pending appeal from a decree on a mortgage against the mortgagor proprietor, the mortgagor's estate was taken under management in accordance with the provisions of the Chota Nagpur Encumbered Estates Act, and the manager was made a party to the appeal. On appeal being dismissed, the decree-holder sought to execute it against the manager as he was made a party to the litigation.

Held, that the decree could not be executed against the manager as the decree was not on a debt contracted by the manager, but by the proprietor himself. (*Dhavle and Rowland, JJ.*) BENI MADHAB MAHTO *v.* GANESH SINGH SARDAR. 16 Pat 459=1937 P.W N. 392=18 Pat.L.T. 717=3 B.R. 801=171 I.C. 65=10 R.P. 162=A.I.R. 1937 Pat. 486.

——(as amended by Act VIII of 1922), S. 12, paras. 1, 2, 3 and 6—*Applicability—Restoration of estate to proprietor—Revival of debts.*

S. 12, para 6, Chota Nagpur Encumbered Estates Act, does not apply to a case to which para. 2, as amended by Act VIII of 1922, does not in terms apply. The revival of debts is expressly confined to the case dealt with in para. 2, S. 12 There is no revival of barred proceedings and debts if the restoration takes place under para. 1 or under para. 3, S. 12. (*Dhavle and Rowland, JJ.*) BENI MADHAB MAHTO *v.* GANESH SINGH SARDAR. 16 Pat. 459=18 Pat. L.T. 717=3 B.R. 801=171 I. C. 65=10 R.P. 162=1937 P.W.N. 392=A.I.R. 1937 Pat. 486.

——S. 12-A—*Applicability—Execution sale—Sanction of Commissioner—Necessity.*

A sale in execution of a decree is an alienation within the meaning of S. 12-A of the Chota Nagpur Encumbered Estates Act and an execution sale held without the sanction of the Commissioner is void. (*Wort and Agarwala, JJ.*) MAHADEO PRASAD *v.* BHAGWAT NARAIN. 177 I.C. 810=5 B.R. 18=11 R.P. 187=1938 P.W.N. 400=A.I.R. 1938 Pat. 427.

——S. 12-A—*Construction—"Holder"—Application by manager of Hindu joint family as manager for protection—Effect—Whole family—If holders—Mortgage by some members of family without sanction—Validity of.*

The word "holder" in S. 12-A of the Chota Nagpur Encumbered Estates Act is expressly used to mean a landholder who has a title to the property in question as owner in possession. It is a compendious way of describing the proprietors or owners of the estate which is going to be assumed charge of. It is not confined to a single person, and is capable of including a joint Mitakshara Hindu family. Where the estate belonging to a joint Hindu family is placed under the management of the Collector or some other officer under the provisions of the Act upon the application of the person who happens to be the karta of the family, he being described as a "holder" in the notification issued under S. 2, the disqualification referred to in S. 12-A of the Act applies not merely to the karta who has made the application but extends to the entire body of the co-parceners. The members other than the karta are no less "holders" of the estate, as the description given to the karta in the notification is given only in a representative capacity and must be held to apply to the entire family. There is nothing in the Act to prevent the manager of a joint Hindu family from applying for protection under the Act on behalf of the entire family, and where such an application is made by him in a representative capacity, the whole family and not he alone must be deemed to be the holder of the estate. Nor is there anything in the Act to suggest that a Mitakshara joint family is not entitled to protection under the Act. A mortgage executed by a member of the family without sanction is therefore invalid under S. 12-A and no mortgage decree can be passed on such a mortgage. (*Fazl Ali and Manohar Lall, JJ.*) RAMESHWAR DAYAL SINGH *v.* RAM DASS SAHU. 18 Pat. 434=184 I.C. 597=12 R.P. 255=6 B.R. 56=1939 P.W.N. 273=20 Pat.L.T. 619=A.I.R. 1939 Pat. 451.

CHOTA NAGPUR TENANCY ACT (1908), S. 4.

——S. 12-A—*Sales in execution come under S. 12-A.*

Sales in execution come within the provisions contained in S. 12-A, Chota Nagpur Encumbered Estates Act. (*Wort, Ag.C.J. and Manohar Lall, J.*) MT. SUMITRA KUER *v.* BHAGWAT NARAIN SINGH. 180 I.C. 736=5 B.R. 482=11 R.P. 530=A.I.R. 1939 Pat 19.

——S. 12-A—*Scope of—Mortgage without sanction—Right to personal decree.*

S. 12-A of the Chota Nagpur Encumbered Estates Act only prohibits an alienation of the property concerned or the creation of a charge thereon, it does not debar the persons affected or disqualified from borrowing money. Though therefore a person taking a mortgage from a disqualified person cannot get a mortgage decree, he is entitled to enforce the personal covenant in the mortgage deed and to get a personal decree provided his claim is made within the period of limitation. (*Fazl Ali and Manohar Lall, JJ.*) RAMESHWAR DAYAL SINGH *v.* RAM DASS SAHU. 18 Pat. 434=184 I.C. 597=12 R.P. 255=6 B.R. 56=1939 P.W.N. 273=20 Pat.L.T. 619=A.I.R. 1939 Pat 451.

——S 21-B—*Construction and scope—Party to litigation represented by manager—Death of—Failure to implead heirs—Abatement—Presence of manager on record—If prevents abatement.*

The fact that a party to a suit or appeal is represented by a manager under the Chota Nagpur Encumbered Estates Act does not dispense with the necessity of bringing on record his legal representatives on his death within the prescribed period of limitation. Though the manager continues on the record he only represents the holder for the time being, and not as principal. If therefore the heirs of the deceased holder are not impleaded there would be abatement though the manager is on record and though he will have to represent the heirs also. (*Harries, C.J. and Fazl Ali, J.*) MAHOMED MURTAZA *v.* CYRIL INDERNATH DAY. 19 Pat. 111=12 R.P. 407=185 I.C. 671=6 B.R. 232=A.I.R. 1940 Pat. 482.

CHOTA NAGPUR TENANCY ACT (VI OF 1908), S. 4—*Applicability—Person inducted on land by co-sharer thicadar without consent of others—Status of.*

Under the Chota Nagpur Tenancy Act non-occupancy rights can arise only in the case of a holding which means "parcel or parcels of land" which is the subject-matter of a separate tenancy and not an undivided share. Hence a person who has been inducted on the land by one of the co-

CHOTA NAGPUR TENANCY ACT (1908), S. 5.

sharer thicadars without the consent of others is not a non-occupancy raiyat. (*Wort and Manohar Lall, JJ.*) NARAYAN RAM SAHU *v.* KARTIC SINGH. **174 I.C. 207=4 B.R. 411=10 R.P. 487=A.I.R. 1938 Pat. 113.**

——S. 5—*Tenure-holder and* raiyat—*Distinction—Test—Patta granting all rights in land except right to receive rent—If tenure or occupancy* raiyati—*If protected from avoidance under S.* 208.

The question whether a tenant is a *raiyat* or a tenure-holder depends ultimately upon the question of facts and the Court must look to the attendant circumstances and the terms of the grant or lease. No importance should be attached to the mere form of the *kabuliyat* or to the use of the word 'cultivator' in it. Nor is fixity of rent any criterion, for a *raiyati* holding may be held at a fixed rent equally with a tenure. There is of course nothing in the Chota Nagpur Tenancy Act which is inconsistent with there being a *raiyat* at fixed rate though the Act itself does not mention such a class of *raiyat*. Such a *raiyat* would under the Act be an occupancy *raiyat* with all its incidents, rights and liabilities but cannot have the special right given to a *raiyat* at fixed rate by the Bengal Tenancy Act. There is, again, under the Chota Nagpur Tenancy Act, no presumption as to a tenant being a tenure-holder or a *raiyat*, as the case may be, arising on the basis of area, unlike under the Bengal Tenancy Act. One of the incidents of a *raiyati* under the Chota Nagpur Tenancy Act is that if a *raiyat* dies intestate leaving no heir, the right comes to an end. Where there is an out and out transfer of land under a *patta* which in unequivocal terms grants to the lessee all the rights in the land except the right to receive the rent payable to the superior landlord, the only reservation being a quit rent of Rs. 21 per annum, the tenancy created cannot be said to be a *raiyati* tenancy; the grantee is a tenure-holder within the meaning of S. 5 of the Chota Nagpur Tenancy Act. The grantee has no occupancy right which is protected under S. 208 of the Act, and the lease can therefore be avoided under S. 205. (*Khaja Mahammad Noor, J.*) BUX JAGDAMBA PRASAD *v.* MAHANAND OJHA. **18 Pat.L.T. 206.**

——S. 6—*"Cultivation"—Tenant taking settlement for gathering fruits from existing orchard—If raiyat.*

There is no difference between taking settlement of land for purpose of planting an orchard, which may be held to be cultivation, and taking settlement of a land upon which an orchard already exists: in other words, taking settlement for gathering all the fruit from an existing orchard. (*Wort and Rowland, JJ.*) KAMAKYA NARAIN SINGH *v.* INDERMAN RAM SAHU. **162 I.C. 981=8 R.P. 601=1936 P.W.N. 463=A.I.R. 1936 Pat. 265.**

——S. 14—*Scope—Tenure-holder creating zarpeshgi—Death of tenure-holder without heirs—Resumption by owner and grant of zarpeshgi to another—Suit by latter to eject original zarpeshgidar—Competency.*

The landlord granted a certain tenure to a person who created a zarpeshgi in respect of the land. On the death of the tenure-holder without heirs, the landlord resumed the land and granted a zarpeshgi to another. The new zarpeshgidar sued for possession of the land from the original zarpeshgidar and the landlord was impleaded as defendant.

CHOTA NAGPUR TENANCY ACT (1908), S. 46.

Held, that even though the landlord was not plaintiff, the suit was properly constituted and that even if the landlord was not impleaded the plaintiff as the transferee of the landlord could equally enforce the rights under S. 14 just as much as the landlord. (*Rowland, J.*) BHAIRODAYAL SAHU *v.* JAGESHWAR SAHU. **174 I C. 627 =4 B.R 464=10 R.P. 540=A.I.R. 1938 Pat. 118.**

——S. 21 (b)—*Construction—'Irrespective', meaning of.*

The word 'irrespective' in Cl. (*b*) of S. 21 of the Chota Nagpur Tenancy Act cannot be held to mean 'subject to'. (*Wort, Ag.C.J. and Manohar Lall, J.*) RAMJAP DUBE *v.* JAGADISH CHANDRA DEO DHABAL. **178 I C. 274=11 R.P. 237=5 B. R 78=A.I.R. 1939 Pat 161.**

——S. 22—Breach of—Finding that land had been rendered unfit for tenancy—Interference in second appeal. *See* C. P. CODE, S 103—FINDING OF FACT—FINALITY. **178 I.C. 274=A.I.R. 1939 Pat. 161.**

——Ss. 46 and 47—*Mortgage of occupancy homestead—Suit on and decree—Execution sale—Legality—Duty of Court.*

It is true that under S. 46 of the Chota Nagpur Tenancy Act, an occupancy tenant can mortgage his homestead land forming part of his holding for a period not exceeding five years. But the holding or any portion of it cannot be sold in execution of a decree that might be passed on the mortgage Once it is found that the lands sought to be sold form a *raiyati* holding, the holding cannot be sold and it is the duty of the Court to give effect to the plain provisions of S. 47, whether or not the judgment-debtor objects to the sale. (*Macpherson and Fazl Ali, JJ.*) MT. JAMUNI *v.* BHOLARAM. **15 Pat. 414=165 I.C. 574=9 R.P. 181=17 Pat.L T. 650=1936 P.W. N. 710=A.I.R. 1936 Pat. 561.**

——Ss. 46 and 47—*Scope and effect—Mortgage of* raiyati *land in contravention of law—Validity—Subsequent change of land from* raiyati *to* chhaparbandi—*If validates transaction.*

A mortgage entered into in violation of S. 46 of the Chota Nagpur Tenancy Act cannot under S. 46 or S. 47 of the Act form the basis of a valid decree for sale. The fact that subsequent to the mortgage transaction the mortgaged property has ceased to be *raiyati* land and has become *chhaparbandi* will not validate a transaction in respect of the land which was invalid previously. (*Agarwala and Rowland, JJ.*) MAKSUDAN LAL SAHU *v.* NIRANJAN NATH DAS. **19 Pat. 507=187 I.C. 266=12 R.P 575=21 Pat.L.T. 219=6 B.R. 446 =A.I R. 1940 Pat. 494.**

——S. 46 (2)—*Applicability—Occupancy tenant—Sub-lessee from, erecting buildings—Liability to ejectment by landlord.*

S. 46 (2) of the Chota Nagpur Tenancy Act entitles a landlord to maintain a suit as against persons taking a lease from occupancy tenants. Sub-lessees from occupancy tenants who erect buildings on the land after the sub-lease are liable to be ejected by the landlord under S. 46 of the Act. (*Das and Ross, JJ.*) GOBINDA KOET *v.* SHIBA PROSAD SINGH. **18 Pat.L.T. 374.**

CHOTA NAGPUR TENANCY ACT (1908), S. 47.

——S. 47—*Applicability.*

Land which is merely part of the compound of a house and shop does not come within the purview of S. 47 of the Chota Nagpur Tenancy Act and is therefore not exempt from sale in execution. (*Agarwala and Madan, JJ.*) GHASIRAM MARWARI *v.* SHIBA PRASAD SINGH. **16 Pat. 316=1937 P.W.N. 521=169 I.C. 872=3 B.R. 638=10 R.P. 55=18 Pat.L.T. 341=A.I.R. 1937 Pat. 321.**

——S. 47—*Scope and object of—Sale of* raiyati *lands in execution of decree in mortgage—Permissibility.*

The object of the Chota Nagpur Tenancy Act is to prevent the improvident *raiyats* of the area governed by the Act from mortgaging their property in time of need and from having their race gradually displaced by more or less wealthy persons from other parts of the country. Such lands cannot be sold in execution of a decree. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) MANU MANDAL *v.* JUGAL KISHORE. **18 Pat.L.T. 430.**

——(as amended in 1938), S. 63—*Applicability—Offence when committed.*

S. 63 (1) (*a*) of the Chota Nagpur Tenancy Act makes it an offence for the landlord or his agent to levy certain due, and it is no offence if the person levying is neither a landlord nor a landlord's agent. (*Harries, C. J. and Manohar Lall, J.*) ANGELO *v.* KANDAN MANJHI. **185 I.C. 738=6 B.R. 241=12 R.P. 440=1940 P.W.N. 233=41 Cr.L.J 221=A I.R. 1940 Pat. 316.**

——S. 63 (1) (a)—*Scope—Offence under—Trial—Procedure—Criminal Procedure Code—Applicability—Cr. P. Code, S.* 197.

There is nothing in S. 63 of the Chota Nagpur Tenancy Act which deprives the ordinary Criminal Courts of jurisdiction to try all offences under that section. S. 63 (1) (*a*) creates an offence, and *prima facie* the Code of Criminal Procedure including S. 197, Cr. P. Code, will apply to the trial of such an offence, as there is nothing in S. 63 which deals with the method of investigation and trial Nor does S. 258 of the Chota Nagpur Tenancy Act deprive a Criminal Court of its jurisdiction to try a criminal offence. It only contemplates proceedings of a civil nature. (*Harries, C. J. and Manohar Lall, J.*) ANGELO *v.* KANDAN MANJI. **185 I.C. 738=6 B.R. 241=12 R.P. 440=1940 P.W.N. 233=41 Cr.L.J. 221=A.I.R 1940 Pat. 316.**

——S. 64—Applicability—Land held by occupancy raiyat for purpose of cultivation—Bulk of land brought under cultivation—Trespasser reclaiming part of area—Status of—Right to remain in possession as against occupancy raiyat. *See* LIMITATION ACT, ART. 142. **1938 P.W.N. 194=19 Pat.L.T. 133.**

——Ss. 64, 65 and 66—*Applicability and scope—Occupancy raiyat—Dispossession from plot of* korkar *land—Suit for declaration of title and for possession from trespasser within* 12 *years of dispossession—Plea of conversion into paddy land and acquisition of occupancy rights—Sustainability.*

It is not intended by the Chota Nagpur Tenancy Act that an occupancy *raiyat* should be deprived of his land by a person who trespasses upon it and converts it into paddy land, unless, of course, the trespasser acquires a title by adverse

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possession for the statutory period. The Act confers occupancy rights on persons to whom S. 64 of the Act applies. In a suit by a *raiyat* for a declaration of his title to and for possession of a plot of land which he alleged was part of his *raiyati* holding and from which he alleged dispossession of himself by the defendant, the latter pleaded that he had converted the land which was *korkar* into paddy land and had therefore acquired occupancy rights in the same under S. 64 of the Chota Nagpur Tenancy Act. The suit was admittedly within 12 years of the dispossession of the plaintiff.

Held, that S. 66 was a bar to the acquisition of *korkar* rights in the disputed land and barred the defence.

Quaere.—Whether S. 65 applied to the land of a tenant. (*Agarwala and Madan, JJ.*) BARA CHHATU RAJWAR *v.* ANANDA RAJWAR. **170 I.C. 94=10 R P. 74=3 B R. 655=18 Pat.L.T. 275=A I.R. 1937 Pat. 367.**

——S. 64—*No occupancy right under another occupancy* raiyat—*Acquisition of—If recognised.*

Obiter.—There cannot be the acquisition of an occupancy right under another occupancy *raiyat.* A right of occupancy under a landlord is a right subordinate to him, but if such a right is acquired against a man who himself is an occupancy *raiyat* the right so acquired is the complete annihilation of right of the *r iyat* and that can only be acquired after 12 years under the general law. So if a man trespasses upon the holding of an occupancy *raiyat* and makes korkar therein, he acquires no occupancy right even if no application for ejectment is made within two years of the commencement of the korkar. (*Mahomed Noor, J.*) CHANDRA MOHAN SINGH *v.* BATU MIAN. **170 I C. 385=3 B.R. 711=10 R.P. 118=A.I.R. 1937 Pat. 422**

——S. 64—Pardhani *village—Right of proprietor to settle land—Position of* pardhan.

No doubt, a proprietor has a right to settle his land in any way he likes, but this right is subject to the right which others have acquired either by contract or custom. The position is similar to the position of a proprietor who creates a tenure and thereby limits his right over the land of such a tenure. *Pardhani* villages are something like tenures though not exactly so. A *pardhan* partakes the position of a tenure-holder and also of a *raiyat* of a privileged class in respect of the lands actually held by him. He is for some purposes an agent of the proprietor, though of course a hereditary agent not removable according to the will of the proprietor. At the same time, he is for certain purposes an agent of the *raiyats* also and custodian of their interest. When a village is *pardhani*, it is obvious that the rights of the proprietor in that village must be subject to the rights of the *pardhan* and of the *raiyats* of the village of which the *pardhan* is the custodian. Under S. 64 of the Chota Nagpur Tenancy Act, a custom is recognized under which *raiyats* are entitled to bring land under cultivation without the consent of the landlord This clearly shows that the legislature has recognized custom in derogation to the theoretical right of the landlord. Where, therefore, the entries in the record-of-rights show that the *pardhan* has a right to settle the uncultivated lands of the village and

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that the *raiyats* can reclaim the land with his permission, the rights of the proprietor to reclaim the waste lands of the village are subject to the consent of the *pardhan*, and the proprietor cannot make a *raiyati* settlement of the land ignoring the *pardhan*. (*Macpherson and Mohammad Noor, JJ.*) CHAND MUL *v.* NAKU MANJHI. 163 I.C. 24=8 R.P. 623=17 Pat.L.T. 467=1936 P.W.N. 493=A.I R 1936 Pat. 508.

——Ss. 64 (3) and 67—*Person reclaiming land belonging to another — If acquires occupancy rights.*

A person who prepares a paddy field by reclaiming land belonging to another, acquires an occupancy right therein, even though his reclamation involved a trespass on the land of the other. (*Dhavle, J.*) DOMAN MIA *v.* GUNARAM MAHATA. 159 I.C. 350=8 R P. 274=A.I.R. 1936 Pat. 39.

——S. 69—*Tenant transferring holding—Misuse by transferee—If incapable of remedy.*

S. 69 of the Chota Nagpur Tenancy Act cannot be construed to mean that when a tenant has transferred his holding, whatever the nature of the use or misuse of it is, it becomes incapable of being remedied. It is rather the nature of the misuse to which the section is directed and not to the person who is guilty of the misuse. If, therefore, a tenant transfers his holding to another person and the latter builds a house on it contrary to the terms of the tenancy, the misuse is capable of remedy. (*Wort, Ag C. J.*) SURJA GORAIN *v.* GNANENDRA NATH BANERJI. 5 B R. 237=179 I.C. 482=11 R.P. 380=A.I.R. 1939 Pat. 149.

——S. 72 (5)—*Scope — Partial surrender of holding.*

S. 72 (5) contemplates cases of partial surrender of a holding by arrangement between a *raiyat* and his landlord. (*Agarwala, J.*) RAM RANJAN RAY *v.* HAKU MIAN. 159 I.C. 490 (2)=8 R.P. 284=A.I.R. 1936 Pat. 52.

——S. 74-A—*Appointment of village headmen —Power of Deputy Commissioner—Surrender of tenancy by the last headman—Effect of.*

The Deputy Commissioner can appoint a village headman on an application under S. 74-A of the Chota Nagpur Tenancy Act, even though the last headman had surrendered his tenancy. The village headmanship is a tenancy to which an office is attached or *vice versa* and in which not only the headman but the raiyats are also interested. A headman may surrender his own interest but he cannot surrender interest of his successors nor can he terminate the tenancy and deprive the *raiyats* of their customary right to have a headman. (*Macpherson and Mohammad Noor, JJ.*) JAGDISH CHANDRA DEO *v.* SHANKARSHAN BHUMIJ. 15 Pat 488=162 I C 582=8 R P. 552=17 Pat L.T. 445=1936 P.W.N. 421=A.I. R. 1937 Pat. 202.

——S. 74 (a)—*Interpretation — Application under—Limitation—S. 231, if applicable.*

S. 74 (*a*) according to ordinary interpretation is not dealing with a cause of action at all; it is defining the right to apply to the Deputy Commissioner to make an appointment of a village headman in the event of a vacancy and that application may be made either by the landlord or by the tenants. It presupposes that there is a custom requiring the appointment of a village headman

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and what is dealt with by the section is not in the nature of a litigation or a dispute, but it is the calling into operation of an administrative duty on the part of the Deputy Commissioner. It would appear, therefore, more natural to say that as there is not in the strict sense a cause of action under S. 74 (*a*) but merely a right to invoke an administrative operation which may be exercised by either the landlord or the tenants, S. 231 is incapable of application. Even assuming that S. 231 does apply, the right of application under S. 74 (*a*) must be construed as a continuing right which endures as long as there is a vacancy. This would fit in with the exigencies of the case and indeed with the language of S. 74 (1) which does not fix any specific time at which the application should be made and accordingly from which the period of limitation would run. On the contrary the section makes the right of applying conditional on a state of facts, namely where a tenancy has been vacated. While that condition exists there is no ground for fixing on any specific moment of time. (*Lord Wright.*) JAGADISH CHANDRA DEO DHABAL DEB *v.* SANTAL. 17 Pat. 110=172 I.C. 649=19 Pat.L.T. 74=1938 O.L R. 53=1938 P.W.N. 107=1938 A L.R. 71=4 B.R. 234=1938 O.W.N. 52=10 R.P.C. 156=67 C. L.J 179=32 S.L R. 298=A.I.R. 1938 P.C. 61=(1938) 1 M.L J. 302 (P.C.).

——(as amended in 1920), S. 74-A—Pradhani —*New* pradhani *if to be treated as ancient* pradhani.

Pradhani is the custom of the locality and when a new *pradhani* is formed and treated as the ancient *pradhani* it will be governed by the same custom. So where even though certain newly formed *pradhani* were not in existence in 1788, yet these *pradhanis* will be governed by the same custom if they are treated as the ancient *pradhani*. (*Mahomed Noor and Saunders, JJ.*) DEBNATH MAHATA *v.* JAGADISH CHANDRA DEO. 15 Pat. 644 =165 I.C 378=9 R.P. 176=18 Pat.L T. 46=3 B.R. 44=1936 P.W.N. 885=A.I.R. 1936 Pat. 563.

——Ss. 74-A and 208—Pradhani *rights—Nature of—If liable to be sold in execution of decree for rent.*

Though the *pradhans* recorded in *satwalipis* are tenure-holders in their relations to the superior landlord, they are also his permanent agents for certain purposes, as for instance, for the supply of rasad, etc. They are landlords of the raiyats of the village and also their headmen and holders of an office and are in this capacity their representatives. The raiyats are vitally interested in having a *pradhan* who should be their headman according to the prevailing custom. This right of the raiyats to have a *pradhan* intervening between them and the superior landlord was recognized by the legislature in S. 74-A. This section authorises any three or more tenants of the village to have a *pradhan* appointed by the Deputy Commissioner in case there is a vacancy and this they can do even if there is a *pradhan* appointed by the landlord. Hence according to this right of the raiyats the *pradhans* cannot be changed at the instance of the landlord only and a right in which third persons are interested cannot, therefore, be sold behind their back. Hence *pradhan*

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rights are not saleable in execution of rent decree. (*Mahomed Noor and Saunders, JJ.*) DEBNATH MAHATA *v.* JAGADISH CHANDRA DEO. **15 Pat 644=165 I.C. 378=9 R.P. 176=18 Pat. L. T. 46=3 B.R. 44=1936 P.W.N. 885=A.I.R. 1936 Pat. 563.**

——**S. 74-A**—*Scope—Appointment of village headman—Vacancy arising before enactment of section.*

S. 74-A of the Chota Nagpur Tenancy Act is general, and an appointment of a village headman can be made even if the vacancy occurred before its enactment in 1920. (*Macpherson and Mohammad Noor, JJ.*) JAGDISH CHANDRA DEO *v.* SHANKARSHAN BAUMIJ. **15 Pat. 488=162 I.C. 582=8 R.P. 552=17 Pat. L,T. 445=1936 P.W.N. 421=A.I.R. 1937 Pat. 202.**

——**S. 74-A**—*Scope*—Pradhani *tenancy—Saleability—Custom allowing—Validity.*

A custom recognizing saleability of *pradhani* tenancy cannot be given effect to as such custom is by necessary implication inconsistent with S. 74-A of the Act. (*Mahomed Noor and Saunders, JJ.*) DEBNATH MAHATA *v.* JAGADISH CHANDRA DEO. **15 Pat. 644=165 I.C. 378=9 R. P. 176=18 Pat.L T. 46=3 B. R. 44=1936 P.W. N. 885=A.I.R. 1936 Pat. 563.**

——**Ss. 74-A (5) and 258**—*Scope—Order of Deputy Commissioner appointing a headman—Suit for declaration that it is without jurisdiction—Maintainability.*

Sub-S. (5) of S. 74-A of the Chota Nagpur Tenancy Act does not bar a suit for a declaration that the order of the Deputy Commissioner appointing a village headman under that section is without jurisdiction. Such a suit is expressly permitted by S. 258 of the Act. (*Macpherson and Mohammad Noor, JJ.*) JAGDISH CHANDRA *v.* SHANKARSHAH BHUMIJ. **15 Pat. 488=162 I C 582=8 R.P. 552=17 Pat.L.T. 445=1936 P.W. N. 421=A.I.R. 1937 Pat. 202.**

——**S. 76**—*Scope—Custom of non-transferability of 'dwami thicas'—If affected.*

The non-transferability of 'dwami thicas' is not inconsistent with any provision of the Chota Nagpur Tenancy Act and therefore the custom of non-transferability of 'dwami thicas' is not affected by S. 76, Chota Nagpur Tenancy Act. (*Mohamad Noor, J.*) SOMAR RAM *v.* BUDHU RAM. **171 I.C. 115=10 R.P. 181=3 B.R. 811=18 Pat. L.T. 575 =1937 P.W.N. 446=A.I.R. 1937 Pat. 463.**

——**S. 78**—*Object and scope of—Tenant parting with raiyati land—Effect on homestead.*

S. 78, Chota Nagpur Tenancy Act, was enacted as a protection to the cultivating tenant, so that he may not be turned out of his homestead as long as he holds his raiyati land. If he parts with the raiyati land, his tenancy of the homestead becomes subject to the ordinary incidents and does not suffice to keep up his status as a raiyat. The Legislature could not possibly have meant that though a raiyat may hold one homestead otherwise than as part of his holding as a raiyat and use it for carrying on his cultivation, the incidents of his tenancy of some other homestead held somewhere else for other business shall be regulated by the provisions of the Act applicable to land held by a raiyat. (*Wort and Dhavle, JJ.*) SECRETARY OF STATE *v.* BENI PRASAD SAHU. **170**

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I.C. 677=10 R.P. 138=3 B.R. 748=1937 P.W. N. 649=A.I.R. 1937 Pat. 444.

——**S. 87**—*Suit under—Scope—Decision in—If bars civil suit for declaration of title and possession—S. 258.*

The scope of a suit under S. 87 of the Chota Nagpur Tenancy Act is a limited one. Such a suit has to be instituted before the Revenue Officer, and it must be a suit for the decision of a dispute regarding an entry made in, or omission from, the record-of-rights. There is nothing either in Ch. XII or in any of the other provisions of the Chota Nagpur Tenancy Act to justify the view that a party can be debarred from instituting a suit in the Civil Court to establish his title to and recover possession of his property merely because of there having been a proceeding under S. 87 with regard to such property. The record-of-right does not by itself create or extinguish title; it is only a piece of evidence, and the provisions of Ch. XII of the Act are intended to make it as perfect and immune from attack as possible. Under S. 87, a Revenue Officer cannot entertain a suit for possession, and the decision in a suit under S. 87 will not bar a suit for possession or other reliefs which the Revenue Officer is not competent to grant. The presumption of correctness attaching to the record-of-rights does not become irrebuttable after a decision under S 87. Consequently S. 258 does not bar a civil suit for possession even though incidentally it may have to be shown in that suit that the entry in the record-of rights is not correct, and the consequence of such a suit may be to some extent to vary, modify, or even indirectly set aside a decision, order or decree of a Deputy Commissioner. (*Fazl Ali and Luby, JJ.*) GOBARDHAN SAHU *v.* LALMOHAN KHARWAR. **15 Pat. 229=166 I C 86=9 R.P. 252=3 B.R. 120=17 Pat.L. T. 956=A.I.R. 1936 Pat. 611.**

——**S. 139 (4)**—*Scope—Suit by landlord to restrain occupancy tenant from using land in a way detrimental to tenancy—Jurisdiction of Civil Court.*

A suit by a landlord for ejecting an occupancy raiyat for having used the land occupied by him in a way to render it unfit for purpose of the tenancy is entertainable exclusively by the Deputy Commissioner under S. 139 (4), Chota Nagpur Tenancy Act.

Quaere.—Whether under the Tenancy Law of Chota Nagpur, a suit lies in a Civil Court against an occupancy raiyat for an injunction to restrain him from using the land in a way detrimental to the tenancy. The landlord by bringing such a suit circumvents the jurisdiction of the Deputy Commissioner. (*Mohammad Noor and Varma, JJ.*) NITAI LAL DUTTA *v.* GOBINDA BHUSHAN SEN. **161 I.C. 695=8 R.P. 469=A.I.R. 1936 Pat. 142.**

——**S 139 (4-A)**—*Applicability—'Trespasser', meaning of.*

What the Legislature intended to provide for in S. 139 (4-A), was the class of cases in which the person whom it was sought to eject has gone upon the land with no sort of right and was a trespasser *ab initio*. So the section would not be applicable to the case of persons who were originally put in possession under a lease. (*Wort and Varma, JJ.*) KABIR RAM *v.* GIRO MAHTO. **16 Pat.**

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682=19 Pat.L.T. 63=1938 P.W.N. 69=174 I.C 283=4 B.R. 421=10 R.P. 497 (2)=A.I.R. 1938 Pat. 174.

——S. 139 (5)—*Scope—Suit involving question of title depending on applicability of Hindu Law of Inheritance (Amendment) Act—Jurisdiction of Civil Court—If barred.*

The question as to whether a party is entitled to avail himself or herself of the provisions of the Hindu Law of Inheritance (Amendment) Act in support of his or her title is one which cannot be decided in a summary proceeding for possession in a Revenue Court. S. 139 (5) of the Chota Nagpur Tenancy Act does not therefore oust the jurisdiction of the Civil Court from trying a suit involving such a question. (*Fazl Ali, Khaja Mahomed Noor, James, Dhavle and Varma, JJ.*) POKHAN DUSADH *v.* MT. MANDA. 16 Pat. 215=167 I.C. 17=9 R.P. 387=18 Pat.L.T. 8=1937 P.W.N. 22=3 B.R. 291=A.I.R. 1937 Pat. 117 (F.B.).

——S. 177—*Applicability—Suit commenced before Deputy Commissioner but transferred to Civil Court—Procedure—Question of title—Appeal—Forum.*

S. 177 of the Chota Nagpur Tenancy Act applies only to a case tried before the Deputy Commissioner. It does not apply to a suit which though it commenced in his Court has been transferred under the proviso to S. 139 to a Civil Court. In such a suit the question of title can be determined and an appeal lies to the Judicial Commissioner under the ordinary rules of the Code of Civil Procedure which govern the procedure of the Civil Court, and thence to the High Court. (*Wort, J.*) CHINTAMAN MAHTON *v.* AMAR SINGH. 179 I.C. 954=5 B.R. 324=11 R.P. 430=20 Pat.L.T. 161=A.I.R. 1939 Pat. 369.

——S. 181—*Applicability—"Decree passed .. under the Act"—Meaning of—Decree not executable under S. 208—Limitation for execution—Procedure.*

In order that a decree may be "a decree..... passed under the Act," it is not necessary that it should be a "rent decree, that is one capable of execution under S. 208. There is no basis for holding that a decree is not passed under the Act unless it is capable of execution by the special method set out in S. 208. The Act is a complete Code in itself, and it contemplates that all decrees passed by the Deputy Commissioner in suits for arrears of rent are decrees passed under the Act, irrespective of the manner in which such decrees may be executed; and the rule of limitation prescribed by S. 181 of the Act will apply. If the decree cannot be executed under S. 208, the decree-holder may, with the permission of the Deputy Commissioner, proceed against any other property of the judgment-debtor, movable or immovable, as prescribed by S. 210 (3). It cannot be executed by a Civil Court. (*Macpherson and Fazl Ali, JJ.*) MAHARAJA PRATAP UDAINATH SAHI DEO *v.* BARAIK LAL SAHI. 15 Pat. 439=165 I.C. 959=9 R.P. 241=1936 P.W.N. 669=18 Pat.L.T. 36=3 B.R. 112=A.I.R. 1936 Pat. 615.

——Ss. 181, 182 and 231—*Construction and scope—Decree of Deputy Commissioner—Transfer to Civil Court for execution—Legality—Limitation for execution—Application to renew old execution.*

S. 182 and the notification regarding maintainability of an execution case in a prescribed Court must be given a wider meaning. It is impossible to say that only a Rent Court or a Deputy Commissioner can hear proceedings under the Act. Hence the transfer of decrees of Deputy Commissioner to Civil Court for execution is legal. But when an application for execution is transferred to a Civil Court it will not lose its character as a proceeding under the Act and will not be governed by the rules and statutes which regulate the procedure of the Civil Court, including the Civil Procedure Code and the Limitation Act. The limitation for an application to execute a decree would be that provided by S. 181, Chota Nagpur Tenancy Act, even if the decree has been lawfully transferred to a Civil Court for execution and an application to renew old execution would be governed by S. 231. (*Varma and Rowland, JJ.*) INDERJIT NATH SAHI DEO *v.* MAHARAJA PRATAP UDAI NATH SAH DEO. 18 Pat. 378=182 I.C. 821=5 B.R. 830=1939 P.W.N. 641=12 R.P. 74=20 Pat L.T. 726=A.I.R. 1939 Pat. 230.

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——S. 182—*Decree passed by Deputy Commissioner—Transfer for execution—Court to which it can be transferred—Civil Court.*

Under S. 182 of the Chota Nagpur Tenancy Act the Deputy Commissioner has jurisdiction to transfer a decree for rent passed by him for execution to another Court; but he can only transfer the decree to a Court under the Act and not to a Civil Court. (*Macpherson and Fazl Ali, JJ.*) MAHARAJA PRATAP UDAINATH SAHAI DEO *v.* BARAIK LAL SAHI. 15 Pat 439=165 I.C. 959=9 R.P. 241=1936 P.W.N 669=18 P L.T. 36=3 B.R. 112=A.I.R. 1936 Pat. 615.

——S. 190 (1)—*Applicability and scope—Omission to issue notice under—Execution sale—If void.*

Failure to issue a notice required under S. 190 (1), Chota Nagpur Tenancy Act, is a matter of jurisdiction and renders void the subsequent execution sale. The section applies to all warrants or notices, whether against the person or movable property or immovable property. (*Courtney-Terrell, C. J. and Madan, J.*) BARAIK RAM GOVIND SINGH *v* CHOWRA URAON. 16 Pat 632=1938 P.W.N. 78=173 I.C. 644=4 B.R. 315=19 Pat L.T. 259=10 R.P. 430=A.I.R. 1938 Pat. 97.

——S. 208—*Applicability—Suit for rent—Non-joinder of some tenure holders—Decree—Nature of—Sale in execution—If affects shares of parties not impleaded in suit.*

A sale in execution of a decree in a suit in which all the tenure-holders were not represented is not a sale under S. 208, Chota Nagpur Tenancy Act and does not affect the shares in the tenure of persons not parties to the suit, although their names have not been recorded in the landlord's sherister. (*Harries, C. J. and Fazl Ali, J.*) MAHOMED MURTAZA *v* CYRIL INDERNATH DAY. 19 Pat. 111=12 R.P. 407=185 I.C. 671=6 B.R. 232=A.I.R. 1940 Pat. 482.

——S. 208— Encumbrance — Lease — Patta granting all rights in land except right to collect rent—Out and out transfer reserving merely quit rent—Interest created—If occupancy *raiyati* or

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tenure—If protrcted from avoidance. *See* CHOTA NAGPUR TENANCY ACT, S. 5. **18 Pat.L.T. 206.**

——**Ss. 208, 213-A and 214**—*Scope*—Ex parte *rent decree—Sale of holding in execution—Suit by raiyat for setting aside on ground of fraud—Decree—Finding of fraud throughout the proceedings—Right of auction-purchaser to compensation—Latter not party to fraud—If material.*

James, J.—The right to institute a suit to set aside a sale on the ground of fraud or want of jurisdiction is expressly saved by the provisions of S. 214 of the Chota Nagpur Tenancy Act. In a case where fraud has been proved throughout the proceedings in the suit and in the sale, the revenue officer cannot be said to have any jurisdiction at all under S. 208 of the Act. Where the suit of a raiyat to set aside an *ex parte* rent decree, and the sale of his holding in execution is decreed on the ground of fraud—it being found that the proceedings in the suit and in the sale were vitiated by fraud and that the raiyat came to know of the suit and the sale long after the period of limitation prescribed by S. 213 of the Act had expired—the auction-purchaser is not entitled to compensation by way of equitable relief, even though he might not be a party to the fraud.

Dhavle J.—An execution brought about by the fraud of the decree-holder is liable to be set aside on that ground even though it is not established that the auction-purchaser has participated in or has been congnisant of the fraud. S. 213-A of the Chota Nagpur Tenancy Act is of no avail to the auction-purchaser, because that section is confined to cases where a decree for rent is set aside under that Act; but a suit for setting aside a decree on the ground of fraud, though saved by S. 258, is no more a bar to a suit under the Act than a suit for a declaration that a sale held in execution of a rent decree has been fraudulently confirmed and for possession which is saved by S. 214 of the Act. (*James and Dhavle, JJ.*) NITAI DUTTA *v.* GANESH MAHTO. **172 I.C. 147=10 R.P. 289=18 Pat.L.T. 728=1937 P.W.N. 780=A.I.R. 1937 Pat. 644.**

——**Ss. 208 and 213**—*Scope—Separate* pattis *held by different persons in* thicca—*Partition of* thicca *recognised by landlord—Suit and decree for rent against Hindu widow holding one* patti—*Reversioner holding other* patti *not impleaded—Objection by latter to sale—Maintainability.*

In order to entitle a person to object under S. 213 of the Chota Nagpur Tenancy Act to a sale in execution under S. 208 on the ground that he had not been made a party to the proceedings leading to the sale, it has to be demonstrated that he was the person who owned the property sold immediately before the sale, and also that his application is not barred by limitation. The owner of one separate *patti* in a *thicca* is not the owner of another *patti* in the same *thicca*, when there has been a partition by metes and bounds, even though there may be a joint liability for rent especially when the division has been recognised. Nor can a person claiming a right of succession as reversioner to the husband of a Hindu widow have any vested interest so long as the widow lives; he cannot be regarded as the owner of the *patti* held by the widow in that capacity. Such a person is not a necessary party to a suit for rent against the widow holding a *patti*, and cannot

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object under S. 213 to a sale of the widow's holding in execution of a rent decree against the widow under S. 208. (*James and Dhavle, JJ.*) BHAGWAT PRASAD *v.* SUDHARSAN BHAGAT. **16 Pat. 643=172 I.C. 115=10 R.P. 279=18 Pat.L.T. 753=1937 P.W.N. 803=A.I.R. 1937 Pat. 621.**

——**S 210 (2)**—*Scope—Permission under—Grant of—If to be express—If can be implied.*

The permission of the Deputy Commissioner required by S. 210 (2) of the Chota Nagpur Tenancy Act is not a mere formality; nor can it be implied from the mere fact that the Court allows execution to proceed. The section expressly requires the permission to be granted for reasons to be recorded in writing. It is not given as a matter of course. (*Dhavle, J.*) SUKRA URAON *v.* MANGHI LAL BISWANATH SAHAI DEO **180 I.C. 423=11 R.P. 515 (1)=5 B.R. 405 (1)=19 Pat. L.T. 280=A.I.R. 1938 Pat. 464.**

——**Ss. 211 and 214**—*Applicability and scope—Rent decree—Execution—Non-joinder of necessary parties—Sale by Revenue Court—Validity—Suit to set aside—Jurisdiction of Civil Court.*

If all the necessary parties are not joined or represented in the proceedings relating to a sale in execution of a rent decree, S. 211 of the Chota Nagpur Tenancy Act will not apply and the Revenue Court has no jurisdiction to order a sale; consequently S. 214 of the Act is no bar to the Civil Court entertaining a suit to set that sale aside. (*Fazl Ali and Varma, JJ.*) MANKI KANAK RATAN *v.* SUNDAR MUNDA **179 I.C. 834=5 B.R 298=1939 P.W.N. 41=11 R.P. 413=20 Pat.L.T. 346=A.I.R. 1939 Pat. 225.**

——**S. 211**—*Scope—Transferee of holding—Failure to get recorded in landlord's* sherista—*Effect on suit under S.* 211 (2)—*If gives right to landlord to treat transferor tenant as representative of transferee.*

There is nothing in S. 211 of the Chota Nagpur Tenancy Act to show that the failure of the transferee of a holding to get himself recorded in the landlord's *sherista* shall in every case and as a matter of law amount to a representation to the landlord that in any suit which may be brought by him for rent he is to assume that the transferee is represented by the old tenant (transferor). Nor shall such failure defeat the claimant (transferee) in a suit brought by him under S. 211 (2) (corresponding to O. 21, R. 63, C. P. Code). (*Harries, C.J. and Fazl Ali, J.*) MAHAMED MURTAZA *v.* CYRIL INDERNATH DEY. **19 Pat. 111=12 R.P. 407=185 I.C. 671=6 B.R. 232=A.I.R. 1940 Pat. 482.**

——**Ss. 212 and 214 (b)**—*Deposit beyond* 30 *days—Order setting aside sale—If* ultra vires—*Suit to suit aside order—Jurisdiction of Civil Court.*

Where the deposit for setting aside a sale of a holding held under S. 208 is made beyond the period of 30 days prescribed by S. 212 of the Act, the order accepting the deposit and setting aside the sale is *ultra vires* and without jurisdiction. S. 214 (*b*) is no bar to a suit in the Civil Court to set aside the order so setting aside the sale. The application of S. 212, which is analogous to S. 174 of the Bengal Tenancy Act, is confined to the statutory period of 30 days and a Court passing an invalid order after that period cannot be said to be acting under that section. S. 214 (*b*) does

not bar the inherent right of the Civil Court to set aside a decree or order obtained by fraud or passed without jurisdiction. This right is expressly recognized in S. 258 of the Act in relation to orders and decrees passed under the Act. (*Agarwala and Madan, JJ.*) JAINANDAN RAM TEWARI *v.* PURIA URAON. **15 Pat 698=3 B.R. 82=1936 P.W.N. 607=165 I.C. 812=9 R P. 217 (2) =17 Pat.L,T. 673=A.I.R. 1936 Pat. 590.**

——S. 213—Applicability—Rent decree and sale in execution—Suit to set aside on ground of fraud—Decree— Claim by auction-purchaser to compensation—Sustainability. *See* CHOTA NAGPUR TENANCY ACT, Ss. 208, 13-A AND 214. **18 Pat. L.T. 728.**

——Ss. 213 and 258—*Scope—Decree for rent in suit against non-tenant—Sale of holding in execution—Purchase by stranger—Suit by tenant for recovery of holding—If barred—Prior unsuccessful application under S. 213—Effect of—Purchaser's right to order of refund.*

Where a landlord brings a suit against a person, who is not his tenant, and obtains a decree, and the holding is sold in execution of the decree and is purchased by a third person having no knowledge of the fraud alleged to have been practised by the landlord, a suit by the tenant for recovery of the holding is not barred by S. 258, the plaintiff merely claiming what undoubtedly belongs to him. So also, an application by the tenant to set aside the sale under S. 213 is not a bar to the recovery of the property. The purchaser of the holding is not entitled to an order for refund of the purchase price paid by him and withdrawn by the landlord. (*Wort, J.*) SHIB CHARAN *v.* RAGHAB SANTAL. **182 I.C. 446=5 B.R. 745=12 R.P. 13 =A.I.R. 1939 Pat. 171.**

——Ss. 213 and 214—*Scope—Rent sale—Application to set aside—Dismissal—Subsequent suit on ground of want of jurisdiction to sell—If barred.*

S. 213 of the Chota Nagpur Tenancy Act applies to irregularity or fraud in conducting the sale, but has no application to cases where the Court has no jurisdiction to sell. The dismissal of an application under S. 213 of the Act is no bar to a suit under S. 214, on the ground that the sale is void as being without jurisdiction owing to the omission to issue the notice required under S. 190 (2). (*Courtney-Terrell, C.J. and Madan, J.*) BARAIK RAM GOVIND SINGH *v.* CHOWRA URAON. **16 Pat. 632=1938 P.W.N. 78=173 I.C. 644=4 B.R. 315=19 Pat.L.T. 259=10 R.P. 430=A.I.R. 1938 Pat. 97.**

——S. 214—Scope—Suit to set aside sale in execution of *ex parte* rent decree on ground of fraud—Maintainability—Decree—Right of auction-purchaser to compensation. *See* CHOTA NAGPUR TENANCY ACT, Ss. 208, 213-A AND 214. **18 Pat.L.T. 728.**

——S. 215 (3)—*Applications to set aside sale —Order on—Appeal.*

The terms of S. 215 (3) make it clear that orders passed on applications to set aside sales are within the section. An appeal therefore lies in such case. (*Harries, C.J. and Manohar Lall, JJ.*) PRATAP UDAI NATH *v.* SUKHDEO PRASAD. **18 Pat. 649=186 I.C. 291=12 R.P. 481=6 B.R. 324=A.I.R. 1940 Pat. 54.**

——S. 215 (3)—*Construction and scope—Application to set aside sale in execution of rent decree —Order on—Appeal and second appeal—Competency.*

Orders passed on applications for setting aside sales in execution of rent decrees fall within S. 215 (3) of the Chota Nagpur Tenancy Act, and are subject to appeal and second appeal.

Manohar Lall, J.—The Legislature in enacting S. 215, intended to depart from the interpretation put upon similar words in S. 47, C. P. Code, the language of S. 215 (3) of the Chota Nagpur Tenancy Act is wide enough to make an appeal competent in the case of applications for setting aside sales. (*Harries, C.J. and Manohar Lall, J.*) MAHARAJA PRATAP UDAI NATH SHAH DEO *v.* SUKHDEO PRASAD BHAGAT. **18 Pat. 649=186 I.C. 291=12 R.P. 481=6 B.R. 324=A.I.R. 1940 Pat. 54.**

——S. 218 (2)—*Rent suit—Preliminary issue if suit barred under S. 11—Decision in favour of plaintiff—Appealability.*

S. 218 (2), Chota Nagpur Tenancy Act, allows an appeal only where the suit had been tried and decided. Where in a rent suit the Deputy Collector decided as a preliminary issue that the suit was not barred under S. 11 of the Act and proceeded with its trial, no appeal lies from his decision as from a decree, for it did not, so far as the Court that made it was concerned, conclusively determine the rights of the parties with regard to any of the matters in controversy in the suit. Only one issue has been decided and it remained to be decided whether the plaintiff was entitled to a decree for rent. The position would, of course, be different, if the Deputy Collector had decided the issue against the plaintiff and dismissed his suit. The plaintiff would then have a right of appeal. (*Saunders, J.*) RAMRACHHYA SINGH *v.* DAMAR SINGH. **8 R.P. 468=161 I.C. 694=A.I.R. 1936 Pat. 356.**

——S. 233—*Construction—"Date of misuse or breach complained of"—Meaning of—Continuing wrong—Erection of huts on agaicultural land—Suit for ejectment—Limitation—Starting point—Suit filed more than two years after erection of huts—If barred—Limitation Act, S. 23.*

There is nothing in the Chota Nagpur Tenancy Act inconsistent with S. 23 of the Limitation Act which defines the period of limitation in the case of continuing wrongs. S. 23 of the Limitation Act would therefore apply to suits under the Chota Nagpur Tenancy Act, where the latter Act is silent as to when time begins to run in the case of continuing wrongs. There can be little doubt that where wrong is capable of being corrected and is not corrected it is a wrong which continues. The erection and maintenance of huts on an occupancy holding, which is not authorised by S. 21 of the Chota Nagpur Tenancy Act, is a misuse of that holding which continues as long as the huts remain standing. That is in the nature of a continuing wrong and the landlord can maintain a suit as long as the misuser continues and within two years after it has ceased. The "date of misuse or breach complained of" in S. 233 of the Chota Nagpur Tenancy Act does not mean the actual commencement of the misuser and time does not run from the date of the erection of the huts. A period of two

CHOTA NAGPUR TENANCY ACT (1908), S. 257.

years can be calculated from any day during which the misuser or breach complained of continued. (*Harries, C.J. and Agarwala, J.*) GAYA PRASAD SINGH *v.* JAGDISH CHANDRA. **188 I.C. 495=6 B.R. 701=1940 P.W.N. 394.**

——**Ss. 257 and 72 (5)**—*Scope and applicability —Joint landlords—Each receiving his share of rent by arrangement—Surrender of part of holding to one of landlords entitled to that part—Subsequent settlement of that part by that landlord with another—Validity.*

Although S. 257 requires that when two or more persons are joint landlords, they must act jointly in respect to acts required or authorised under the Act, the section cannot apply where by arrangement between the parties each of the landlords is in receipt of his own share of rent, so that their possession in law is that of co-owners. The fifth sub-section of S. 72, contemplates cases of partial surrender of a holding by arrangement between a *raiyat* and his landlord. There can, therefore, be no objection in law to a surrender of a portion of a holding to the landlords of that portion or to a subsequent settlement of that portion with another by those landlords. (*Agarwala, J.*) RAM RANJAN RAY *v.* HAKU MIAN. **159 I.C. 490 (2)=8 R.P. 284=A.I R. 1936 Pat. 52.**

——**S. 258**—*Appointment of headman under S. 74-A—Deputy Commissioner failing to find existence of custom--Jurisdiction of Civil Court.*

If in appointing a headman under S. 74-A, the Deputy Commissioner omits to decide the existence of custom, the omission does not take away his jurisdiction to appoint a headman. For, the foundation of the jurisdiction of the Deputy Commissioner is the existence of the custom and not the decision that such a custom existed. It is, therefore, competent to the Civil Court to examine whether the foundation of jurisdiction existed, *i.e.*, whether the custom existed. If the Civil Court finds that the custom existed, the order of the Deputy Commissioner cannot be interfered with simply on the ground that he failed to decide a fact which it was necessary to decide before the appointment could be made. (*Macpherson and Mohammad Noor, JJ.*) JAGDISH CHANDRA *v.* SHANKARSHAN BHUMIJ. **15 Pat. 488=162 I.C 582=8 R.P 552=17 Pat L.T. 445 =1936 P.W.N. 421=A.I.R. 1937 Pat. 202.**

——**S. 258**—*Appointment of headman under S. 74-A—Deputy Commissioner deciding question of limitation wrongly—Jurisdiction of Civil Court.*

S. 258 of the Chota Nagpur Tenancy Act no doubt does not bar a suit in respect of the appointment of a headman by the Deputy Commissioner under S. 74-A of the Act, if it is instituted on the ground of want of jurisdiction. But whether an application under S. 74-A for the appointment of a headman is barred by limitation or not is a matter to he decided by the Deputy Commissioner, and if he decides the question wrongly, the remedy is an appeal to the higher authority, and not a suit in the Civil Court. If a Deputy Commissioner makes an appointment which is out of time, he cannot be said to exceed his jurisdiction and an order passed on a barred application is not a nullity or *ultra vires*. (*Macpherson and Mohammad Noor, JJ.*) JAGDISH CHANDRA *v.* SHANKARSHAN BHUMIJ. **15 Pat. 488**

C. P. CODE (1859), S. 269.

=8 R.P. 552=162 I.C. 582=17 Pat.L.T. 445= 1936 P.W.N. 421=A.I.R. 1937 Pat. 202.

——**S. 258**—*Appointment of headman under S. 74-A—Finding by Deputy Commissioner as to custom—If can be questioned in Civil Court.*

If while appointing a headman under S. 74-A of the Chota Nagpur Tenancy Act, the Deputy Commissioner decides that there is a custom of having a headman in the village, that decision cannot be questioned in a Civil Court, and the Civil Court cannot examine the correctness of that finding. (*Macpherson and Mohammad Noor, JJ.*) JAGDISH CHANDRA *v.* SHANKARSHAN BHUMIJ. **15 Pat. 488=162 I.C. 582=8 R.P. 552=17 Pat. L.T. 445=1936 P.W.N. 421=A.I.R. 1937 Pat. 202.**

——**S. 258**—Construction and scope—Decision in suit under S. 87—Subsequent civil suit for possession or reliefs not grantable by Revenue Court—If barred. *See* CHOTA NAGPUR TENANCY ACT, S 87. **15 Pat. 229.**

——**S. 258**—Scope—Order setting aside sale of holding on deposit beyond the period of 30 days —Suit to set aside—Jurisdiction of Civil Court—If barred. *See* CHOTA NAGPUR TENANCY ACT, Ss. 212 AND 214 (*b*). **17 Pat.L.T. 673.**

——**S. 258**—Scope—Sale of holding in execution of decree for rent passed against person not tenant—Suit by tenant for recovery of holding against stranger purchaser—Bar of—Unsuccessful application to set aside sale—Effect of. *See* CHOTA NAGPUR TENANCY ACT, Ss. 213 AND 258. **A.I.R. 1939 Pat. 171.**

——**S. 265**—Scope—Sale by Deputy Commissioner in execution of rent decree—Suit against certified purchaser—Maintainability—If barred by S. 66, C. P. Code. *See* C. P. CODE, S. 66. **18 Pat.L.T. 397=A.I.R. 1937 Pat. 324.**

CHRISTIAN MARRIAGE ACT (XV OF 1872), Ss. 4 and 77—*Scope—Marriage solemnised by Registrar having authority—False declaration as to age of one party and as to residence—If renders marriage illegal and liable to be declared void.*

A marriage solemnised by an official authorised in this respect cannot be declared void under S. 4 of the Christian Marriage Act. The fact that one of the parties induced the Marriage Registrar to solemnise the marriage as the result of a false declaration as to the age of the other party to the marriage and as to their residence, does not render the marriage illegal. (*Leach, C.J. and Varadachariar, J.*) LALA GOKULDAS *v.* JOHU KANTARAJ. **I.L.R. (1938) Mad. 113=174 I C. 195=10 R.M. 674=1937 M.W.N. 1054=46 L.W. 481=A.I.R. 1937 Mad. 895=(1937) 2 M.L.J. 590.**

CINEMATOGRAPH ACT (II OF 1918)—Scope—Cinema in city of Calcutta within Corporation limits—Police licence taken for—Further licence from Corporation under Municipal Act—If obligatory. *See* CALCUTTA MUNICIPAL ACT, S. 391. **40 C.W.N. 497.**

CIVIL PROCEDURE CODE (VIII OF 1859), S. 260—Applicability—Auction-purchase made under Code of 1859—Suit to declare benami after Code of 1908—Maintainability. *See* C. P. CODE (V OF 1908), S. 66. **40 C.W.N. 470.**

——**S. 269**—*"Certified purchaser"—Meaning of.*

The words "certified purchaser" in S. 269 of the C. P. Code of 1859, which has to be strictly

construed cannot be held to include the heirs of the certified purchaser. (*Rau, J.*) MANIR AHMAD *v.* MUNSHI OBEDAL HAQUE. **40 C W.N. 470.**

——(V OF 1908)—*Arbitration—Interference—Wrong view as to what constitutes misconduct—If a ground.*

The scope of S. 115, C. P. Code, is very limited and the High Court cannot interfere in revision merely because the lower Court has taken mistaken view as to what does or does not constitute misconduct on the part of the arbitrator. (*Puranik, J.*) KESHOLAL *v.* LAXMAN RAO. **1940 N.L.J. 393.**

——*Scheme underlying—Body and schedule—Relation between—Conflict—Preference.*

The C P. Code must be regarded a whole and it came into being as a whole as its first section will show. The scheme was to make the body of the Code confer jurisdiction and the schedules to detail the mode in which that jurisdiction is to be exercised. Therefore, if there is any conflict between the body and the schedules the former must prevail. (*Stone, C. J. Grille and Bose, JJ.*) REMDAYAL MUNNALAL *v,* SHEODAYAL. **I.L.R. (1939) Nag 250=183 .C. 128=12 R.N. 43 (2)=1939 N.L.J. 228=A.I.R. 1939 Nag. 186 (F.B.).**

——*Scope of—Provisions, if subject to those of Limitation Act.*

The provisions of the Civil Procedure Code are subject to the provisions of the Limitation Act. Both Acts are general Acts and are *in pari materia.* The two Acts therefore must be read together and must be treated as complimentary of each other. (*Thom, C. J., Iqbal Ahmad and Bajpai, JJ.*) DURAG PAL SINGH *v.* PANCHAM SINGH. **I.L.R. (1939) All. 647=1939 A W.R. (H C.) 498=1939 A L J. 522=12 R.A 98=1939 O.L.R. 472=183 I.C. 242=A.I.R. 1939 All. 403 (F.B.).**

——S. 2—*Judgment—After preliminary decree, decree-holder filing application for final decree and judgment-debtor filing application for extension of time—Two applications heard together—Diary note rejecting prayer for extension and ordering final decree to be drawn up—If amounts to judgment.*

A preliminary decree for sale was passed in a mortgage suit in 1934. Early in 1935, the Court had before it two applications, one by the judgment-debtor asking for more time to pay off the decretal amount and another by the decree-holder for a final decree for sale. The two applications were heard together and on 8th May 1935 the Judge recorded in the diary a note as follows: "No enlargement of time can be given: Draw up final decree as applied for by the decree-holder." The typed decree form which was filled up did not contain at the bottom the usual note "given under my hand and seal, this day", etc. The Judge signed that form on the reverse and put 29th June 1935 as the date of signature. On 25th June, 1938, the decree-holder applied for the sale of the property.

Held, that the diary note of 8th May 1935, was a judgment within the meaning of S. 2 and the decree which had no date of its own must by virtue of O. 20, R. 7 be held to be dated on the day on which the judgment was pronounced, *i.e.*, 8th May 1935 and hence the execution application of 25th June 1938 was time barred. (*Baguley, J.*) G. M. EUSOOF *v.* S. V. S. T. CHETTIAR FIRM. **1940**

Rang.L.R. 72=183 I.C. 894=12 R.R. 119=A.I.R. 1939 Rang. 294.

——S. 2 (2)—Applicability to Agra Tenancy Act. *See* AGRA TENANCY ACT, SS. 249 AND 3, CL. (14). **1938 A.L.J. 63.**

——S. 2 (2)—"Decree"—Calcutta High Court Original Side Rules, Ch. 26, R. 50—Reference by Registrar—Opinion of Judge on—Appeal. *See* LETTERS PATENT (CALCUTTA) CL. 15. **40 C.W.N. 1264.**

——S. 2 (d)—"Decree"—Application for ascertainment of mesne profits under O. 20, R. 12—Order rejecting—If decree. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), SCH. II, ART. 11. **49 L.W. 652.**

——S. 2 (2)—*Decree—Appeal memo. stamped after limitation, under an extension of time—Dismissal as time barred.*

Where an appeal presented with insufficient stamp was after the period of limitation stamped with the full fee on an extension of time by the Court, a dismissal of the appeal as time barred is a decree within the meaning of S. 2 (2), C. P. Code. (*Pollock, J.*) SONBA KESHAO SONAR *v.* RODRIGUES. **177 I.C. 505=11 R.N. 142=1938 N.L.J. 155=A.I.R. 1938 Nag. 322.**

——S. 2 (2)—'Decree'—Conditional decree in pre-emption suit—Subsequent order dismissing suit for default—Appeal. *See* C. P. CODE, S. 115—OTHER REMEDY OPEN. **41 P.L.R. 381.**

——S. 2 (2)—Decree—Decision holding that court-fee paid sufficient—Appeal. *See* COURT-FEES ACT, S. 12. **63 C.L.J. 16.**

——S. 2 (2) and O. 43, Rr. 9 and 11—*Decree—Dismissal of appeal before admission.*

Obiter.—It is the nature of the order and not the stage at which it is passed that must determine its character as a decree within the meaning of S. 2, C. P. Code. An order dismissing an appeal as being time-barred before it has been admitted or registered is a decree. (*Biswas, J.*) SUDUANSU BHUSAN PANDEY *v.* MAJHO BIBI. **176 I.C. 361=11 R.C. 92=42 C.W.N. 72=A.I.R. 1937 Cal. 732.**

——Ss. 2 (2) and 148—*"Decree"—Dismissal of suit—Order directing plaint to stand rejected on default of payment of deficient court-fee within fixed time—Appeal—Time given by appellate Court for payment of court-fee—Payment within such time—Sufficiency—Plaint if to be deemed rejected for non-payment within time fixed by trial Court—Powers of appellate Court to extend time.*

An order rejecting a plaint in case of non-payment of deficient court-fee is a decree as defined by S. 2 (2), C. P. Code, and an appeal lies from that order. Where the trial Court, while dismissing a suit, on the merits, directs that on failure of the plaintiff to pay the deficiency in court-fee within a certain time, the plaint should stand rejected, and on appeal the plaintiff makes good the deficiency in court-fee within the time allowed by the appellate Court, it cannot be said that there was no decree on the merits from which an appeal would lie because the plaintiff failed to pay the court-fee within the time allowed by the trial Court. Once the appeal was filed, the power of the trial Court to extend the time for payment under S. 148, C. P. Code, which it could do before the filing of the appeal, is gone, and thereafter, the appellate Court which becomes seized of the

case can give an extension, under the powers conferred upon it by O. 41, Rr. 32 and 33, C. P. Code. If the court-fee is paid within the extended time given by the trial Court, there is sufficient compliance with the order for payment of court-fee and the plaint cannot be regarded as having been rejected under the order of the trial Court. (*Ganga Nath, J.*) KASHI KURMI *v.* BANSRAJ KURMI. **174 I.C. 298=10 R.A. 564=1938 A.L.R. 262=1937 A.L.J. 1346=1938 A.W.R. 13 (H.C.) =A.I.R. 1938 All. 150.**

——**Ss. 2 (2) and 96**—*"Decree"—Essentials of—"Matters in controversy in the suit"—Meaning of—Partition suit by son against father—Alienation of some items of property by father pending suit—Preliminary decree—Application for allotment of alienated properties to father—Order rejecting—Appealability.*

When after the preliminary decree and before the final decree in a partition suit by a son against his father an application is made to the Court praying that certain items of property alienated by the defendant pending suit should be allotted to the defendant so that the alienee may not be disturbed in his possession, an order rejecting that application is not a decree and is not appealable, as it does not deal with a matter in controversy in the suit. (*Mockett and Krishnaswami Ayyangar, JJ.*) NANDESAM CHOWDARI *v.* BALAKRISHNAMA CHOWDARI. **I.L.R. (1940) Mad. 394=50 L.W. 541=1939 M.W.N. 1121=A.I.R. 1939 Mad. 897.**

——**Ss. 2 (2) and 47**—*Decree—Fight between judgment-debtor and decree-holder auction-purchaser—Order—Appeal.*

The case of a judgment-debtor when he is fighting with the decree-holder auction-purchaser falls under S. 47 and an order passed against the judgment-debtor is a decree under S. 2 (2) and as such appealable. (*Stone, C.J. and Puranik, J.*) MST. SEMABI *v* GANPATRAO YADORAO. **I.L.R. (1938) Nag. 583=177 I.C. 643=11 R.N. 155= A.I.R. 1938 Nag 212.**

——**S. 2 (2)**—*"Decree"—Memorandum of appeal—Rejection for non-compliance with O. 41, R. 1—Appealability—O. 43, R. 1.*

It cannot be laid down as a universal proposition that an order rejecting a memorandum of appeal under O. 41, R. 3, C. P. Code, for failure to amend it so as to be in accordance with O. 41, R. 1 is appealable. Only in those cases in which it finally disposes of the disputes between the parties would be appealable as a "decree" O. 43, R. 1 does not provide for an appeal from an order rejecting the memorandum of appeal for non-compliance with O. 41, R. 1. (*Wort and Varma, JJ.*) RAMDHARI AHIR *v.* KHEDU AHIR. **17 Pat. 245=177 I.C. 326=4 B.R. 814=11 R.P. 146=A.I.R. 1938 Pat. 461.**

——**S. 2 (2)**—*"Decree"—Mortgage decree for sale—Application by prior mortgagee under O. 34, R. 12, C. P. Code—Order allowing—If decree—Appeal—Applicant not party to suit—Effect.*

An order passed under O. 34, R. 12, C. P. Code, is not appealable at all. Such an order, though made after full enquiry, cannot amount to a decree as defined by S. 2 (2), C. P. Code, especially when the prior mortgagee who applies for an order under R. 12 is not a party to the suit in which the property has been directed to be sold. (*Horwill, J.*) THALUPULLAMMA *v.* MANGAMMA.

170 I.C. 932=10 R.M. 248=1937 M.W.N. 353= 45 L.W. 646=A.I.R. 1937 Mad. 554.

——**S. 2 (2) and (14)**—*"Decree"—"Order"—Distinction—Dismissal of appeal under O. 41, R. 11 (1) and (2)—Second appeal—Appeal summarily dismissed after hearing appellant—No judgment—Effect—Dismissal—If ceases to be a "decree."*

The essence of the distinction between a decree and order seems to be in the nature of the decision, whether it is an adjudication of a particular kind or not, rather than in the manner of its expression. Since the words "formal expression" appear in both the definitions, S. 2 (2) and S. 2 (14) the presence or absence of a formal expression cannot be the true criterion of the difference between a decree and an order. The dismissal of an appeal under O. 41, R. 11 (1), C. P. Code, is a decree and appealable as such, whereas the dismissal of an appeal under O. 41, R. 11 (2) is not. The dismissal under R. 11 (1) has, so far as the Court pronouncing it is concerned, the finality which is an essential ingredient of a decree as defined in S. 2 (2); and in substance it expresses an adjudication, within that definition to the effect that the appeal is without merit. In dismissing an appeal under R. 11 (1) of O. 41, C. P. Code, the appellate Court is not required by law to write a judgment, though it would be better to give reasons for the dismissal. Even if the appellate Court only says "Heard. The appeal is summarily dismissed," that is sufficient. The dismissal is none the less a decree open to second appeal, provided the other conditions are satisfied. In so dismissing the appeal, the appellate Court must be held to have intended to accept the finding of the trial Court on the question at issue. (*Rowland, J.*) JAMUNA PRASAD RAI *v.* RAJBALLAM RAI. **169 I.C. 359=3 B.R. 558=10 R.P. 9=18 Pat.L.T. 321=1937 P.W.N. 340=A. I.R. 1937 Pat. 349.**

——**S. 2 (2)**—*Decree—Order amending decree under Ss. 151 and 152—Not appealable—Revision.*

An order of amendment of a decree made under Ss. 151 and 152, C. P. Code, does not in itself amount to a decree and is not appealable. An application for revision is therefore maintainable against the order of amendment. (*Lokur, J.*) LAXMAN MAHADEV *v.* MARUTI RAMBHAU. **184 I.C. 775=41 Bom.L.R. 800=A.I.R. 1939 Bom. 389.**

——**S. 2 (2)**—*"Decree"—Order by appellate Court under O. 41, R. 5 refusing to stay execution—Appealability—Ss. 47 and 96.*

No appeal lies from an order passed by an appellate Court under O. 41, R. 5, C. P. Code, refusing to stay execution of the decree under appeal, pending disposal of the appeal. Such an order is not a decree as defined by S. 2 (2), nor is it an order passed by a Court of original jurisdiction within the meaning of S. 96, C. P. Code. It does not also fall under S. 47, C. P. Code, as it cannot be said to have been passed by a Court executing the decree. (*Sen, J.*) RAICHAND *v.* TANIBAI. **180 I.C. 34=11 R.B. 276=40 Bom. L. R. 1198=A.I.R. 1939 Bom. 65.**

——**S. 2 (2)**—*'Decree'—Order discharging defendants—Appealability.*

A lambardar brought a suit against certain persons for recovery of the amount of revenue paid by him to the Government and for a charge on the property in their hands. The Court found

C. P. CODE (1908), S. 2.

that there could be no charge on the property in the hands of some of them and therefore discharged them from the suit.

Held, that the order discharging the defendants from the suit was a final adjudication of the most important point of issue between the parties and therefore amounted to a decree within the meaning of S. 2 (2) and was appealable. (*Vivian Bose, J.*) CHETANLAL PURSHOTTAM *v* G. S. GUPTA. 175 I.C. 33=11 R.N. 22=A.I.R. 1938 Nag. 233.

——S. 2 (2)—*"Decree"—Order dismissing execution for non-prosecution—Appeal—Revision.*

No appeal lies with reference to an order directing an execution case to be dismissed for non-prosecution. Such an order does not fall within the scope of those sections of the C. P. Code, which relate to appealable orders, nor can it be said to be a decree. Such an order is in the nature of one for dismissal for default and is open to revision. (*S. K. Ghose and Edgley, JJ.*). AMARENDRA NATH MULLICK *v.* BALAI CHAND GHATAK. 162 I.C. 777=8 R.C. 652=A.I.R. 1936 Cal. 267.

——S. 2 (2)—*"Decree"—Order rejecting appeal for non-payment of additional court-fee—Appealability—O.* 43, *R.* 1.

No appeal lies against an order rejecting a momorandum of appeal for non-payment of additional court-fee demanded. Such an order is not a decree as defined by S. 2 (2), C. P. Code; nor is it made appealable under O. 43, R. 1, C. P. Code. The remedy of the party is by way of revision. (*Stone, C.J., Bose and Gruer, JJ.*) BALAJI DHUMNAJI *v.* MST. MUKTABAI. I.L.R. (1938) Nag. 106=173 I.C. 329=10 R.N. 298=1938 N.L.J. 1=A.I.R. 1938 Nag. 122 (F.B.).

——S. 2 (2)—*"Decree"—Order rejecting appeal for insufficiency in court-fee without giving time to make up deficiency—Appealability.*

An order rejecting a memorandum of appeal on the ground that it is insufficiently stamped as soon as the deficiency is brought to the notice of the Court and without giving the appellant any time to make up the deficiency is clearly a "decree" as defined by S 2 (2), C. P. Code, and is appealable as such Such a rejection is not a rejection in any of the circumstances specified in any of the clauses of O. 7, R. 11, C. P. Code, in which cases alone R. 13 of O. 7 will apply. (*Dhavle and Agarwala JJ.*) RAM SAWARI KUER *v.* MOTIRAJ KUER. 1939 P.W.N. 162=17 Pat. 687=19 Pat.L.T. 885=11 R.P. 220=178 I.C. 150=5 B.R. 59=A.I.R. 1939 Pat. 83.

——S. 2 (2)—*'Decree'—Order rejecting memorandum of appeal as deficient court-fee was not paid.*

The rejection of a memorandum of appeal on the ground that the deficient court-fee has not been paid is not a decree and no further appeal lies from it. (*Middleton, J.C. and Mir Ahmad. A.J.C.*) MUKARAB KHAN *v.* RAB NAWAZ KHAN, 163 I.C. 462=9 R. Pesh. 3=A.I.R. 1936 Pesh. 140.

——Ss. 2 (2), 115 and 144—*Decree—Order rejecting application for restitution on ground of limitation if decree and appealable—High Court, power of, under S.* 115.

A rejection of a prayer for restitution under S. 144 on the ground of limitation amounts to a decree, and the order dismissing the application

C. P. CODE (1908), S. 2.

is therefore appealable; as such the High Court has no jurisdiction to interfere under S. 115. (*Lodge, J.*) DEBENDRA NATH SADHU KHAN *v.* RAI RAM PROTAP CHAMARIA. 167 I.C. 167=9 R.C. 651=41 C.W.N. 182=A.I.R. 1936 Cal. 812.

——S. 2 (2)—*Decree—Order that cross objection abates—If appealable.*

An order that a suit abates is appealable as a decree. That being so, it would seem that an order that an appeal abates is also appealable as a decree and if so there is no reason why an order that the cross-objection abates should not be held to be a decree for the same reasons. (*Stone, C.J. and Clarke, J.*) PURUSHOTTAMDAS *v.* DEOKA RAN. 181 I.C. 411=11 R.N. 459=1938 N.L.J. 399=A.I.R. 1939 Nag. 39.

——S. 2 (2)—*"Decree"—Order under S.* 47—*Order allowing amendment of execution petition—Appealability—S.* 47.

Every order in execution under S. 47, C. P. Code, is not a decree within the meaning of S. 2 (2) so as to be appealable. The order to be appealable, must amount to a final adjudication, conclusive as regards the Court expressing it, determining the rights of the parties. It is well settled that no appeal lies from an interlocutory order which is only in the nature of a finding. An order by the executing Court giving the decree-holder leave to amend his execution petition by inserting a prayer for attachment of immovable property on an application made after 12 years from the date of the decree, is only an incidental and interlocutory order and not a final order. An appeal from such an order is incompetent. (*Venkatasubba Rao, J.*) BEERANKUTTY *v.* MAMMU. 164 I.C. 217=9 R.M. 96=1936 M.W.N. 1220=44 L.W. 99=A.I.R. 1936 Mad. 623=71 M.L.J. 256.

——S. 2 (2)—*'Decree'—Order under O.* 21, *R.* 90—*Second appeal.*

An order passed on an application under O. 21, R. 90, C. P. Code, is not a decree, the order being one from which an appeal is provided under O. 43, R. 1 (*j*), and no second appeal lies from such an order. (*Sulaiman, C.J. and Bennet, J.*) DEBI CHARAN LAL *v.* KUSHLAL RAI RATAN LAL. 165 I C 654=9 R.A. 292=1936 A.W.R. 869=1936 A.L.J. 959=1936 All.L.R. 934=A.I.R. 1936 All. 763.

——S. 2 (2)—*Decree—Order under O.* 21, *R.* 93—*Appealability—Ss* 47 *and* 144.

An order under O. 21, R. 93, C. P. Code, is not open to appeal. It is not a decree and is not an order falling under S. 47 or S. 144, C. P. Code. (*Broomfield and Divatia, JJ.*) GANGADHAR DHANJISHET *v.* BALWANT KASHIRAO. I.L.R. (1940) Bom. 370=42 Bom.L.R. 367=A.I.R. 1940 Bom. 210.

——S. 2 (2) and O. 22, Rr. 3, 4 and 11—*Order that cross-appeal has abated—If a decree and appealable.*

An order that a suit abates is appealable as a decree. It would seem that an order that an appeal abates is also appealable as a decree and if so, there is no reason why an order that the cross-objections abate should not be held to be a decree for the same reason. There is no doubt that such an order conclusively determines the rights of the party concerned on his cross-objections. (*Stone, C.J. and Clarke, J.*) PURU-

C. P. CODE (1908), S. 2.

SHOTTAMDAS *v.* DEO KARAN. **I.L.R. (1940) Nag. 324.**

——**S. 2 (2)** — *Preliminary decree — What amounts to—Partition decree.*

Where a compromise provided for a division of the property according to the respective share of the parties as per their degree of relationship and in effect not only declared the rights of the several parties in the property, but also required further proceedings to be taken before the plaintiffs could get the relief claimed, it was held that it amounted to preliminary decree of partition. (*Zia-ul-Hasan and Yorke, JJ.*) CHINTAMANI TEWARI *v.* BHAGIRATHI. **14 Luck. 223=177 I.C. 556=1938 O.W.N. 916=11 R.O. 52=1938 O.L.R. 430=1938 O.A. 688=A.I.R. 1938 Oudh 229.**

——**S. 2 (2)**—*"Rejection" of a plaint—Meaning of—Order by appellate Court calling on plaintiff-appellant to pay court-fee due on plaint in trial Court—Plaintiff allowed to sue as pauper but appealing paying court-fee—Non-payment of court-fee on plaint—Rejection of appeal—Legality —C. P. Code, O. 7, R. 11 (c).*

"Rejection" referred to in the definition of a decree in S. 2 (2), C. P. Code, is such rejection as is permissible under the Code. Before an order can amount to a "rejection" it must be a rejection authorised by some provision of the Code. If a plaint or a memorandum of appeal is rejected for a cause for which the Code does not empower the Court to do so, it will not be a decree as defined by the Code, though the Court may use the word "reject" in disposing of the suit or appeal. O. 7, R. 11 (*c*), C. P. Code, contemplates only cases in which the court-fee on the plaint or the memorandum of appeal, as the case may be, is not paid; it has no application to a case in which though the court-fee payable on the memorandum of appeal has been paid, the plaintiff appellant has not paid the court-fee on the plaint, having been allowed to sue as a pauper originally, and his suit having been dismissed eventually on the merits. The memorandum of appeal in such a case cannot be said to be written upon paper insufficiently stamped. The appellate Court cannot in such a case reject the appeal for non-payment of court-fee due on the plaint in accordance with an order by it, because it has no power to make the order for payment of that court-fee. (*Niamatullah, J.*) AMBA SHANKAR *v.* MST. SHEOTI. **168 I.C. 676=9 R.A. 666=I.L.R. (1937) All. 484=1937 A.L.R. 389=1937 A.L.J. 171=1937 A.W.R. 113=A.I.R. 1937 All. 280.**

——**Ss. 2 (3) and O. 21, R. 10**—*Scope—"Decree-holder" and "holder of a decree"—Meaning of—If synonymous—Right to execute decree —Decree obtained benami in name of another—Right of real owner to execute.*

There is no provision in the Code of Civil Procedure which allows a person to come forward and claim to execute a decree on the ground that he is the real owner of the decree as being in fact and substance the holder of the decree and the decree-holder mentioned in the decree is a mere non-entity and a benamidar. A person who is not a decree-holder as defined by S. 2 (3), C. P. Code, and who is neither the holder of a decree under O. 21, R. 10, nor a person to whom the decree has been transferred by assignment or by operation of law under O. 21, R. 16, C. P. Code, is not entitled to execute the decree. There is no difference between a decree-holder as defined by S. 2 (3) and the holder of a decree referred to in O. 21, R. 10. (*Harries, C. J. and Fazl Ali, J.*) SATYENDRA NARAIN *v.* WAHIDUDDIN KHAN. **186 I.C. 355=12 R.P. 491=6 B.R. 357=21 Pat.L.T. 146=A.I.R. 1940 Pat. 472.**

——**Ss. 2 (11), 50 and 53 and O. 21, R. 22**—*Decree against Hindu father—Attachment of joint family property in execution—Subsequent insolvency and death of father—Application for execution against sons—Latter, if "legal representatives"—Whole property—If vests in Official Assignee.*

Plaintiff having obtained a money decree against one *J*, attached the joint family properties of *J* and his two sons who constituted a Hindu undivided family. Objections having been raised to other attachments on other properties, plaintiff was directed to file suits to establish her right to attach them. She (plaintiff) then filed a suit against one of the sons *J*. Pending these the firm in which *J* was a partner was adjudicated insolvents, the plaintiff's case being that *J*'s name in that partnership represented the joint family of himself and his two sons. *J* subsequently died, and later plaintiff got a decree in the suit against *J*'s son declaring that the property in that suit was joint family property. Plaintiff then applied under O. 21, R. 22, C. P. Code, to implead the Official Assignee and *J's* sons as his legal representatives and to execute the decree against *J* against them. The sons objected and contended that on the insolvency of *J*, as partner of the firm, the Official Assignee became his legal representative and that they were not liable to be brought on record as his legal representatives.

Held, (1) that the definition of the term "legal representative" in S. 2 (11), C. P. Code, was not exhaustive, as that definition was merely of the ordinary meaning of the term, and that it should be qualified by S. 53 of the Code; and having regard to the provisions of Ss. 50 and 53, C. P. Code, the sons were the "legal representatives" of their father *J*, for the purposes of O. 21, R. 22 and should therefore be brought on record as such for the purpose of execution of the decree against the joint family properties; (2) that on the insolvency of the father *J*, the only property that vested in the Official Assignee was the right, title and interest of the deceased *J*, and that the sons' right, title and interest in the joint ancestral estate did not vest in him, although by suitable proceedings the Official Assignee could avail of their interests in the joint family estate for the benefit of the creditors of the insolvent father; (3) and consequently it was necessary that the sons of *J* should be brought on record as his legal representatives under S. 50 and O. 21, R. 22, C. P. Code, although it would have to be proved as a matter of fact that they hold any property as mentioned in S. 53, C. P. Code. (*Kania, J.*) BAI PREMABAI *v.* JIVANDAS. **167 I.C 203=9 R.B. 281=38 Bom.L.R. 977=A.I.R. 1936 Bom. 456.**

——**S. 2 (11)**—*Executor—When becomes legal representative.*

Ordinarily a grant of probate refers back to the date of the death of the deceased and the executors become the legal representatives from the time of the death. (*Weston.*) KISHAN LAL *v.* KANHAIYA LAL. **1938 A.M.L.J. 91.**

C. P. CODE (1908), S. 2.

——S. 2 (11)—*Legal representative—Claim as —Position as regards a rival claimant.*

Where a person, not in possession of the property of a deceased person, claims it as the legal representative of that person, the fact that a rival claimant has not taken possession of the property, cannot assist him to claim as legal representative. His duty is to take possession of the estate. (*Wort, J.*) JADUNATH MITRA *v.* ISAR JHA. 178 I.C. 198=5 B.R. 65=11 R.P. 229=A.I.R. 1939 Pat. 47.

——S. 2 (11)—*Legal representative—Decree against holder of impartible estate for compensation in lieu of specific performance—Death of the holder and devolution of estate on his son—Decree, if executable against him as legal representative.*

Where a decree for compensation in lieu of specific performance is passed against a holder of an impartible estate and on his death the estate devolves on his son, he is legal representative of the deceased judgment-debtor and the decree could be executed against the estate. (*Stone, C.J. and Bose, J.*) RAO BHIMSINGH *v.* GANGARAM. 1940 N.L.J. 275.

——S. 2 (11)—"Legal representatives"—Meaning of—Joint Hindu family—Death of manager —Surviving coparceners—If legal representatives. *See* NEGOTIABLE INSTRUMENTS ACT, S. 8. 40 Bom.L R. 964.

——S. 2 (11)—*Legal representative—Member of a joint Hindu family.*

There is no doubt that in a joint Hindu family the law of inheritance does not apply to the joint family property, and on the death of a coparcener the property passes to the remaining coparceners by right of survivorship; but even in a joint family a coparcener may be possessed of separate property which will be governed by the law of succession and in such a case a member of the joint Hindu family can be added as legal representative under S. 2 (11), C. P. Code. (*Thom, C.J., Alsop and Ganga Nath, JJ.*) RAM UGRAHA-JHA *v.* GANESH SINGH. I.L.R. (1940) All. 153= 186 I.C. 542=12 R.A. 412=1940 O.L.R. 132= 1940 A.L.J. 32=1940 A.W.R. (H.C.) 45=A.I.R. 1940 All 99 (F.B.).

——S. 2 (11)—*Legal representative—Mere intermeddling with estate—Sufficiency.*

Mere intermeddling with the estate of a deceased person would not give the intermeddler the status of a legal representative. (*Pollock, J.*) BALKISAN *v.* MST. JATNABAI. I.L.R. (1939) Nag. 526=177 I.C. 531=11 R.N. 146=1938 N.L.J. 168=A.I.R. 1938 Nag. 298.

——S. 2 (11)—*'Legal representative'—Person who is not lawful heir.*

Where a mortgage decree-holder has died leaving her daughter as lawful heir and collaterals who are not lawful heirs, the collaterals cannot be considered to be legal representatives of the deceased within the definition of that term given in S. 2 (11) if they are not shown to be in possession, of the property which is the subject of the mortgage. Moreover, even if they are in possession the definition cannot help them. Because a person who has merely managed to obtain unlawful possession of the property of a deceased person should not be entitled to execute decrees in favour of the deceased on the strength of such possession, when he is not the lawful heir. A

C. P. CODE (1908), S. 2.

person who intermeddles with the property of a deceased person has been probably included in the definition of a 'legal representative' in the Civil Procedure Code merely to enable persons who wish to obtain relief against the property to proceed against it in the hands of such a person. This cannot affect the substantive rights of the lawful heirs. A.I.R. 1924 All. 717, Rel. on. (*Bhide, J.*) JAI KISHEN DAS *v.* KARIMUDDIN. 41 P.L.R. 814=A.I.R. 1939 Lah. 321.

——S 2 (11)—*Legal representative—Scope of the definition—If restricted to legal heir—Coparcener getting property by survivorship—If covered by definition.*

In order to be a legal representative under S. 2 (11), C. P. Code, it is not necessary that a person should be a legal heir of the deceased person. The last portion of the section is wide enough to cover the case of a coparcener who gets property by survivorship on the death of a coparcener who sues or is sued in a representative character. (*Ganga Nath, J.*) GYAN DATT *v.* SADA NAND LALL. 174 I.C. 307=10 R.A. 560= 1938 A.L.R. 264=1938 A.L.J. 56=1938 A.W.R. (H.C.) 58=A.I.R. 1938 All. 163.

——S. 2 (11)—*Scope—If controls O. 22, R. 5—Intermeddler—Right to be impleaded in preference to true legal representative.*

When more than one person claim to be the legal representatives of a deceased, the Court under O. 22, R. 5, C. P. Code, is required to decide which of the rival claimants is in fact the legal representative. An intermeddler with the estate, though a "legal representative" as defined by S.2 (11), C. P. Code, is not entitled to be preferred to a person who is found to be the true legal representative. (*Agarwala, J.*) SURAJ PRASAD *v.* LUKHER KUER. 180 I.C. 812=11 R.P. 540=5 B. R. 495=1938 P.W.N. 803=A.I.R. 1939 Pat. 117.

——S. 2 (11)—Suit against wrong legal representative—Decree—Binding nature of—Duty of plaintiff in such cases. *See* C. P. CODE, S. 50. 40 P.L.R. 25.

——S. 2 (12)—*Construction—'Wrongful', meaning of.*

The word 'wrongful' in S. 2 (12) of C. P. Code is used in a special sense. It does not mean possession which is wrongful for all purposes. It only means that the person who has no right to possession as against the party claiming it, is in wrongful possession as against that party for certain purposes including mesne profits, but not wrongful for all purposes. (*Bose, J.*) RAMNATH HAJARIMAL *v.* MOHANLAL RADHAKISAN. 181 I.C. 106=11 R.N. 424=1939 N.L.J. 21=A.I.R. 1939 Nag. 23.

——S. 2 (12)—*Mesne profits—Interest—Proper rate.*

When there is no mention as to the rate of interest that should be allowed on the amount of mesne profits, nor is there any stipulation in the contract bearing on the subject the rate is in the discretion of the Court but that discretion should proceed on sound principles. The rate of interest depends on a variety of circumstances, but in the absence of special circumstances, which would justify the Court to award a higher rate of interest, interest at a uniform rate of 6 per cent. per annum is the reasonable rate of interest which should be allowed for the whole period

C. P. CODE (1908), S. 2.

during which the person entitled to mesne profits was deprived of the use of the money which was due to him. In the absence of a statutory provision or a special contract, there is no reason to make any distinction between the rate of interest payable on mesne profits up to the date of delivery of possession and the rate of interest thereafter and there is no valid ground for awarding interest at a higher rate during the period prior to such delivery of possession and at a lower rate thereafter. A.I.R. 1935 P. C. 49, Rel. on. (*Sir Shadi Lal.*) KEDARNATH GOENKA *v.* MAHARAJ KUMAR BABU BAGESHWARI PRASAD SINGH. 64 I. A. 240=16 Pat. 382=168 I.C. 145=1937 O.L. R. 260=1937 A.W.R. 1017=39 Bom.L.R. 782=1937 A.L.J. 1051=41 C.W.N. 809=1937 P.W. N. 434=9 R.P.C. 265=65 C.L.J. 374=3 B.R. 470=46 L.W. 67=1937 O.W.N. 694=1937 A.L.R. 353=31 S.L.R. 360=1937 M.W.N. 712=18 Pat. L.T. 401=A.I.R. 1937 P.C. 143=(1937) 2 M.L. J. 202 (P.C.).

——S. 2 (12)—*Mesne profits—Liability for—Auction-purchaser — Position, with reference to.*

The mere fact that possession was obtained through the instrumentality of the Courts, by an auction-purchaser would not avail either the decree-holder or the auction-purchaser as against persons who were not parties to the decree. So far as they are concerned the rule of *caveat emptor* applies and the auction-purchaser even though a stranger to the decree under which he purchased, would have to yield up possession provided he also was not a party to the decree. That being so the rule about mesne profits could not be otherwise. (*Bose, J.*) RAMNATH HAJARIMAL *v.* MOHANLAL RADHAKISAN. 181 I.C. 106=11 R.N. 424=1939 N.L.J. 21=A.I.R. 1939 Nag. 23.

——S. 2 (12)—*Possession referable to title as purchaser at revenue sale—Liability for mesne profits.*

A large number of proprietors, who owned specific but undivided shares in a mahal, availed themselves of the provisions of the Bengal Land Revenue Sales Act, with the result that the Collector opened separate accounts with them in respect of their liabilities for the payment of their shares of the land revenue. A large area of the estate, however, remained ijmali or joint share, and the owners of the ijmali share were still jointly liable for the payment of the land revenue in respect of it. In 1901 there was an arrear of land revenue payable in respect of the joint share and the Collector then sold the share by auction. The appellant's father purchased the same at auction and took possession in 1902. Thereupon the respondents with some of their co-sharers in the joint share brought a suit in the Civil Court for the annulment of the sale and for possession of the property sold. They obtained a decree for possession with mesne profits. In 1876 some proceedings for the partition of the mahal were commenced but were not concluded till 1908. The respondents were awarded on partition three villages in lieu of their share in the mahal. The respondents had 6 annas and odd interest in these three villages which were put to sale in 1901 and purchased by the appellant's father and the remaining interest stood to their separate account. The appellant's father on purchase

C. P. CODE (1908), S. 4.

took possession of the whole of one of the three villages only and not of the other two. In 1915 the appellant was entered as co-sharer in respect of 6 annas share in the three villages, while the respondents were entered as co-sharers in respect of remaining interest. On obtaining the decree in the suit, the respondents sought to execute the decree and obtained possession of the land in 1908. They further sought to recover the mesne profits.

Held, that during the period from 1908 when the partition was completed and the time when the appellant was recorded as co-sharer in 1915, the possession of the appellant of the village in question was referable only to his title as purchaser at the revenue sale and he received profits on that basis only, and not as a trespasser. The appellant was therefore liable to the respondents for the mesne profits of the whole of the village he was in possession during the period mentioned above. (*Sir Shadi Lal.*) KEDARNATH GOENKA *v.* MAHARAJ KUMAR BABU BHAGESHWARI PRASAD SINGH. 64 I.A. 240=16 Pat. 382=1937 A.L.R. 353=168 I.C. 145=1937 O.L.R. 260=18 Pat.L. T. 401=41 C.W.N. 809=1937 P.W.N. 434=9 R.P.C. 265=65 C.L.J. 374=3 B.R. 470=46 L. W. 67=31 S.L.R. 360=1937 M.W.N. 712=1937 O.W.N. 694=39 Bom. L.R. 782=1937 A.W.R. 1017=1937 A.L.J. 1051=A.I.R. 1937 P.C. 143=(1937) 2 M.L.J. 202 (P.C.).

——S. 2 (12)—*Wrongful possession—If implies possession obtained by improper Act.*

It is not necessary that possession in order to be wrongful for purposes of a claim for mesne profits, must have been obtained in consequence of some improper Act. (*Bennet and Verma, JJ.*) TULSI RAM *v.* GOBIND SINGH. 184 I.C. 91=12 R. A. 175=1939 R.D. 292=1939 A.L.J. 433=1939 A.W.R. (H.C.) 344=A.I.R. 1939 All. 529.

——S. 2 (17) (e)—'Public officer'—Agent of Railway Company—Railways Act, S. 131. *See* EVIDENCE ACT, S. 124. 43 C.W.N. 664.

——S. 2 (17)—Elected member of Provincial Legislature—If public officer. *See* C. P. CODE, O. 21, RR. 48 AND 46—SALARY OF M.L.A.—LIABILITY TO ATTACHMENT. 69 C.L.J. 267=43 C.W.N. 512.

——S. 2 (17) (g) and (h)—'Public officer'—Court of Wards manager. *See* C. P. CODE, S. 80. 43 C.W.N. 1212.

——S. 2 (17) (h)—Public officer—Liquidator of a Co-operative Society—If one. *See* C. P. CODE, SS. 80 AND 2 (17) (*h*). 1939 N.L.J. 215.

——(Second Amendment Act IX of 1937), S. 3—*Insolvency case—If a proceeding arising out of suit.*

An insolvency case cannot be described as a suit or any proceeding arising out of it within the meaning of S. 3. (*Mukherjea and Biswas, JJ.*) JNANENDRA KUMAR *v.* AKASH CHANDRA. 177 I. C. 352=11 R C. 233=A.I.R. 1938 Cal. 325.

——S. 3 (17)—Public officer—Liquidator of Co-operative Society appointed by Registrar of Co-operative Societies. *See* C. P. CODE, S. 80. 52 L.W. 131=(1940) 2 M.L.J. 241.

——Ss. 4 and 9—*Money attached by order of Criminal Court—Declaratory suit in Civil Court—Maintainability.*

Where certain Jagir money is attached by a Magistrate for realisation of arrears of maintenance due under an order under S. 488, Cr. P.

C. P. CODE (1908), S. 6.

Code, a suit in the Civil Court for a declaration that the money attached is not liable to seizure, attachment or sequestration in satisfaction of an order of the Criminal Court is not maintainable, as the Civil Court has no jurisdiction to go into the matter. (*Tek Chand, J.*) NATHA SINGH *v.* MT. BACHINT KAUR. **39 P.L.R. 100=169 I.C. 944=10 R.L. 65=A.I.R. 1937 Lah. 367.**

——**S. 6**—*Scope—Incidental issue in suit as to property of value exceeding pecuniary jurisdiction of Court—Power to try.*

There is no warrant in the Code for saying that a Court cannot try incidentally an issue as to property the value of which is beyond its jurisdiction. All that S. 6, C. P. Code, says is that no Court shall have jurisdiction over suits the value of which exceeds the limits of its pecuniary jurisdiction. It is the valuation of the suit and not of an incidental issue raised by the defence which determines the jurisdiction. (*Mosely, J.*) A.M. K.M. CHETTYAR FIRM *v.* MA SHWE EIN. **169 I.C. 933=10 R.R. 40=A.I.R. 1937 Rang. 219.**

——**S. 6**—*Scope of—'Suits' if includes proceedings in execution.*

S. 6. C. P. Code, governs the whole Code, that is to say, the word 'suits' means not only all proceedings up to the stage of decree, but includes, proceedings in execution. Its position, appearing as it does under the part headed 'preliminary' indicates that it is designed to govern the whole Code. (*Stone, C.J. and Bose, J.*) NILKANTHRAO *v.* KRISHNARAO. **1940 N.L.J. 244.**

——**S. 9**—*Bar of civil suit—Burden of proof—Owner of land—Infringement of right by acts done under colour of statute—Suit for declaration—If barred.*

Where person's right as owner of land is invaded by proceedings taken under colour of a statute he is entitled to sue in a Civil Court for a declaration of his right and for an injunction to protect it. Where the statements in the plaint sufficiently comply with the provisions of O. 7, R. 1, sub-Cl. (*f*), C. P. Code, the terms of S. 9, C. P. Code, lay down a general rule in favour of the jurisdiction of a Civil Court and the burden of proof is on the party who maintains an exception to the general rule. (*Venkataramana Rao, J.*) SEESAI ODAYAR *v.* SWAMINATHA IYER. **165 I. C. 508=9 R.M. 266=44 L.W. 334=1936 M. W. N. 900=A I.R. 1936 Mad. 522=71 M.L.J. 227.**

——**S. 9**—Bar of suit—Right of landlord to recover balance of transfer fee—Suit to enforce—Maintainability—B. T. Act, Ss. 26-J and 188, proviso (1). *See* B. T. ACT, SS. 26-J AND 188, PROVISO (1). **63 C.L.J. 105.**

——**S. 9**—*Denial of right of inheritance—Cause of action.*

A suit merely to declare a person an heir does not lie. A.I.R. 1928 Lah. 831, Rel. on. Plaintiff alleged in the plaint that the widow of *A* who upon the death of her husband took only a life tenancy in her husband's property, colluded with defendant 3 and that he had got his name entered in the column of ownership in the Municipal register, as owner of some of the property with the object of depriving the plaintiff of his share in the property of *A* which would come to him after the death of the widow. The plaint further stated that the widow had been asked to admit plaintiff's right of succession on her death but she did not agree and hence the plaintiff had brought the suit for a declaration that the entries in the column of the ownership in the register should be null and void.

C. P. CODE (1908), S. 9.

Held, that the denial of plaintiff's right of inheritance as evidenced by the entries did not furnish a cause of action and hence the suit was liable to be rejected. (*Dalip Singh and Skemp, JJ.*) GHULAM MOHY-UD-DIN *v.* MT. RUQIYA. **41 P.L.R. 615=A.I.R. 1939 Lah. 158.**

——**S. 9**—If bars suit against Municipality for recovery of tax illegally recovered. *See* U. P. MUNICIPALITIES ACT, S. 164 AND C. P. CODE, S. 9. **1939 A.W.R. (H.C.) 230.**

——**S. 9**—*Jurisdiction conferred by—Provincial Legislature, if can take away.*

S. 9, C. P. Code, itself postulates the barring of jurisdiction of Civil Courts by a competent legislature with respect to particular class of suits of a civil nature. It is, therefore, open to a Provincial Legislature to bar the jurisdiction of Civil Courts with respect to particular class of suits, provided in doing so it keeps itself within the field of legislation confided to its charge and does not contravene any provision of the constitution Act. (*Iqbal Ahmad, Bajpai and Mohammad Ismail, JJ.*) ATIQA BEGAM *v.* ABDUL MAGHNI KHAN. **188 I.C 586=3 Fed.L.J. (H.C.) 83=1940 A.W. R. (H.C.) 208=1940 A.L.J. 274=1940 R.D. 135 =A.I.R. 1940 All. 272 (F.B.).**

——**S. 9**—Jurisdiction—Mahant of math—Disqualification or removal for bad behaviour—Power of Civil Court. *See* RELIGIOUS ENDOWMENT—MATH. **39 Bom.L.R. 867.**

——**S. 9**—Jurisdiction of Civil Court—Removal of Mahant from religious duties. *See* C. P. CODE, S. 92. **44 C.W.N. 177 (P.C.).**

——**S. 9**—*Municipal Committee vested by statute with power to improve drainage—Its act, if can be questioned in Civil Court.*

Where a Municipal Committee is invested by statute with power of executing works for improving the drainage of the town, it is for the Committee to determine as to how the work can best be done, and any act done or intended to be done by it in furtherance of this object can only be questioned in a Civil Court if it is shown that the Committee is not acting *bona fide* or that the act complained of is oppressive, wanton and capricious. (*Tek Chand, J.*) CHATAR BHUJ *v.* MUNICIPAL COMMITTEE, BHAWANI. **172 I.C. 336= 10 R.L. 298=39 P.L.R. 480=A.I.R. 1937 Lah. 252.**

——**S. 9**—*Order of Revenue Courts—Suit to declare as without jurisdiction—If lies.*

No civil suit lies for mere declaration that a decree of a Revenue Court was without jurisdiction. (*Bennet, J.*) JIT SINGH *v.* GHETLU. **182 I.C. 911=12 R.A. 66=1939 R.D. 363=1939 A.L. J. 382=1939 A.W.R. (H. C.) 404=A. I. R. 1939 All. 446.**

——**S. 9**—*Provision for special remedy—If bars right of suit.*

Where a right of action exists, a suit is maintainable to enforce that right independently of the special remedies provided by the Code. (*Cornish, J.*) RAMAYYA *v.* KOMARAPPA. **160 I.C. 209= 1935 M.W.N. 1207=8 R.M. 614=43 L.W. 262= A.I.R. 1936 Mad. 421.**

C. P. CODE (1908), S. 9.

——S. 9—Revocation of probate—Suit for—Jurisdiction of High Court. *See* LETTERS PATENT (CALCUTTA), CL. 12. I.L.R. (1940) 1 Cal. 14.

——S.9—*Statutory body—Infringements of civil rights of—Remedy—Jurisdiction of Civil Court.*

The District Board in whom the property in respect of public streets, is vested, in however limited a manner, have a right to see that their civil rights in respect of these are not affected by the use of those roads, by persons who have not obtained the necessary authority or permission. As such there is no reason why the District Board should not bring a suit for damage caused to its roads by the unauthorised use. (*Horwill, J.*) PRESIDENT, DISTRICT BOARD, KISTNA *v.* LAKSHMAYYA. 177 I.C. 126=11 R.M. 252=1937 M.W.N. 1223 (2)=A.I.R. 1938 Mad. 227=(1938) 1 M.L.J. 391.

——S. 9—Suit for a declaration that certain debts shown by a debtor as due to creditors are baseless and fictitious and for an injunction to restrain the alleged creditors from proving their debts before the Debt Conciliation Board—Civil Court—If impliedly barred from entertaining such a suit. *See* PUNJAB RELIEF OF INDERTEDNESS ACT (VII OF 1934), S. 21 (*a*) (i). 39 P.L.R. 891.

——S. 9—*"Suit of a civil nature"—Claim by temple archakas to prostrate twice before deity during service—Trustees forbidding archakas to prostrate more than once on pain of dismissal—Suit by archakas—Maintainability.*

A suit by archakas of temple who are hereditary officeholders and temple servants to establish their right to prostrate themselves twice before the deity while performing certain ceremonies as archakas, as they had been doing from time immemorial, is one of a civil nature. The act of the trustee in directing the archakas to prostrate only once and not twice on pain of dismissal is an outrage on their religious sentiment and gives rise to a cause of action for suit. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. 189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.

——S. 9—*"Suit of civil nature"—Claim to* Vedaparayanam *miras in temple with emoluments and honours attached.*

A suit in which a claim is made in respect of a religious office, called *Vedaparayanam* miras to which certain emoluments and honours appertain, is a suit of a civil nature, and can be taken cognizance of by the Courts. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. 189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.

——S. 9—*'Suit of civil nature' — Communal festival in public temple—Suit by members of community in respect of ritual observances—Jurisdiction of Court.*

The Civil Courts have no jurisdiction to decide matters of ritual except in so far as a decision on such matters is a necessary incident to the decision of a civil right. The general rule is that once the general right to worship is conceded or established, the Courts will not endeavour to lay down the ritual which is to be followed, nor will they prescribe the manner in which the worship is to be conducted. Certain members of the Senguntha community in a village sued to establish rights known as *Kappu Kattu* and *Diparathana* in a public temple. It appeared that the claim related to certain ritual observances in the cummunal festival, but neither the right to worship nor the right to any office or perquisites attaching thereto was in issue.

Held, that the suit was not a suit of a civil nature and could not therefore be entertained by the Court. (*Wadsworth, J.*) NARAYANA MUDALI *v.* PERIYA KALATHI MUDALI. 185 I.C. 239=12 R.M. 534=1939 M.W.N. 273=49 L.W. 295=A.I.R. 1939 Mad. 494=(1939) 1 M.L.J. 199.

——S. 9—*Suit of "civil nature"—Dispute as to mode of placing jewel with mark on deity—Suit in respect of—If lies.*

A dispute as to the way in which a particular jewel with a particular mark should be placed on the God or Goddess in a temple, is one in respect of a trivial matter of religious observance and no right of a civil nature is involved in it. A suit in respect of such a matter is not maintainable under S. 9, C. P. Code. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. 189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.

——S. 9—*Suit of a "civil nature"—Dispute as to propriety of placing namam or mark on Godhead—Jurisdiction of Court.*

A question as to whether a particular namam or mark should be placed on the Godhead is at best one pertaining to religious ritual and as such is excluded from the cognizance of a Civil Court. To allow it to be tried would amount to an abuse of the process of the Court. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. 189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.

——S. 9—*Suit of "civil nature"—Right of worship.*

A suit does not cease to be one of a civil nature because in order to decide it, the Court has to decide questions as to religious rites or ceremonies. The right of worship is a civil right which the Court will take cognizance of. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. 189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.

——S. 9—*Suit of a "civil nature"—Right to office—Test—Right to lead horse on particular festival in temple—If office or mere honour—Suit in respect of—Maintainability.*

One test which is necessary to constitute an office is a corresponding compellable duty; but if that is absent there is no office but only an honour which cannot be made the subject of a suit by reason of S. 9, C. P. Code. A right to lead a horse on a particular festival in a temple whenever that festival is performed, cannot be held to be a right to an office, when there is no compellable duty on the part of the claimant. (*Leach, C.J. and Somayya, J.*) RAMASWAMI GOUNDAN *v.* LAKSHMANA REDDI. I.L.R. (1940) Mad. 40=186 I.C. 437=12 R.M. 633=50 L.W. 206=1939 M.W.N. 792=A.I.R. 1939 Mad. 886=(1939) 2 M.L.J. 420.

——S. 9—*Suit of a "civil nature"—Service in temple and prayer—Right to stand in particular position—Suit to declare—Maintainability.*

It is unquestionable that the Civil Courts in India have no ecclesiastical jurisdiction and that they cannot decide questions of ritual except in so far as the decision of such questions is a necessary incident to the decision of civil rights. It is well

C. P. CODE (1908), S. 9.

established that a right to worship in a particular temple is a civil right and that a right to perform a religious office to which obligations and emoluments are attached is also a civil right. It has been recognised that the Court in adjudicating on a right of worship or a right to a religious office not infrequently is obliged to decide incidentally questions of ritual; but it follows that the Court will not, on a mere pretence that a right to worship has been infringed, arrogate to itself a jurisdiction which it does not possess to prescribe forms of prayer, rights to religious precedence and questions of that nature. The Civil Courts have neither the prayer nor the duty to attempt to draft a prayer book for a temple. A Civil Court cannot also be required to declare the rights of persons to stand in any particular show of the congregation. (*Wardsworth, J.*) APPADORAI AYYANGAR *v.* ANNANGARACHARIAR. 183 I.C. 258=12 R.M. 247=1938 M.W.N. 1206=48 L.W. 722=A.I.R. 1939 Mad. 102=(1939) 1 M. L.J. 124

——S. 9—*Suit of a "civil nature"—Suit to declare right to first honours at a festival in a temple—Maintainability.*

A claim to first honours at a festival in a temple is only a right to a dignity or precedence and cannot be regarded as a right of civil nature, whether it is in a temple or elsewhere so long as it was not attached to an office. A suit in respect of such a right is not maintainable. (*Pandrang Row and Abdul Rahman, JJ.*) THATHACHARIAR *v.* SRINIVASARAGHAVA IYENGAR. 173 I.C. 986 =10 R.M. 654=47 L.W. 459=1938 M.W.N. 18 (2)=A.I.R. 1938 Mad. 334=(1938) 1 M.L.J. 174.

——S. 9—*Suit of "civil nature"—Temple honours—Right to obtain theertham and honours in particular order of precedence—If subject of civil suit.*

The right to obtain theertham or honours in a particular order of precedence in a temple is not a civil right which can be enforced or declared in a Civil Court. (*Pandrang Rao, J.*) SRI EMBERUMANAR JEER SWAMIGAL *v.* HINDU RELIGIOUS ENDOWMENT BOARD, MADRAS. 166 I.C. 256=9 R.M. 355=1936 M.W.N. 954=44 L.W. 539=A.I.R. 1936 Mad. 973=71 M L.J. 588.

——S. 9—*Special tribunal appointed by statute —Civil Court's jurisdiction.*

Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. (*Roberts, C.J., Dunkley and Braund, JJ.*) H.C. DEY *v.* BANGALEE YOUNG MEN'S CO-OPERATIVE CREDIT SOCIETY, LTD. 178 I.C. 674=11 R.R. 259=1939 Rang.L.R. 50=A.I.R. 1938 Rang. 392 (F.B.).

——S. 9—*Taxation by local self-governing body—Jurisdiction of Civil Court.*

Suits are of civil nature if they are suits between subject and subject dealing with civil rights. A suit for a declaration that the assessment of town-tax by a Panchayat is illegal and *ultra vires* is not between subject and subject but between a subject and a branch of a Local Self-Government and it does not deal with civil rights but it deals with a question of taxation, and as such is

C. P. CODE (1908), S. 10.

not a suit of civil nature and Civil Courts have jurisdiction in a suit of that nature. 27 Cal. 849, Dist. (*Sulaiman, C.J. and Bennet, J.*) SHEO NARAIN *v.* TOWN AREA PANCHAYAT, CHHIBRAMAN. 1935 A.L.R. 1209=1936 A.L.J. 33=1936 A.W.R. 107=159 I.C. 897=8 R.A. 523=A.I.R. 1936 All. 117.

——S. 9, Expl.—*"Office"—Right to lead horse and hold Kalasum at Amman festival and to receive honours—If office—Absence of financial remuneration or other duties attached—If material—Suit claiming such rights—Maintainability.*

A claim to a right to lead a horse and the right of holding a Kalasam at the time of an Amman festival, by persons who are not temple servants, and to receive as reward for these religious offices the honours, such as ceremonial gifts of pansupari before any other worshippers received them, is a claim to an office within the meaning of the explanation to S. 9, C. P. Code. The fact that the claimant does not receive any remuneration or any financial value or that the office may be in abeyance whenever no festival is being held or that it has no other duties attached to it cannot prevent it from being the performance of the duties of an office. A suit claiming the said rights is therefore maintainable under S. 9. (*King, J.*) RAMALINGACHI REDDI *v.* ELAYAPERUMAL GOUNDAN. 1937 M.W.N. 143 (2)=10 R.M. 381=171 I.C. 684=45 L.W. 384=A.I.R. 1937 Mad. 403.

——S. 10—*Applicability—Court in which previously instituted suit pending—If should be competent to grant relief claimed in later suit—"Relief claimed"—If refer to earlier suit or later suit.*

For the application of S. 10, C. P. Code, it is necessary that the Court in which previously instituted suit is pending must be a Court of jurisdiction competent to grant the relief claimed in the subsequent suit. The words "relief claimed" in the section should apply to the suit which is to be stayed and not to the earlier suit. (*Pandrang Row, J.*) SOMASUNDARAM CHETTIAR *v.* VENKATASUBBAYYA. 177 I.C. 102=11 R.M. 248=1938 M.W.N 353=47 L.W. 525=A.I.R. 1938 Mad. 602=(1938) 1 M.L.J. 873.

——S. 10—*Applicability—Parties neither same, nor litigating under same title.*

Where the parties to the two series of litigations are not the same and they are not suing under the same title, either of the suits could not be stayed under S. 10, C. P. Code. (*Darling, S.M. and Mehta, J.M.*) RAM LAL *v.* NAWAL KISHORE. 1938 R.D. 935 (1)=1939 A.W.R. (B.R.) 60.

——S. 10—*Applicability and scope—"Matter in issue"—Meaning—Suit and appeal concerning same plot of land but in respect of rents of different periods—Stay—If to be granted.*

The provisions of S. 10, C. P. Code, are mandatory in character and when the facts of a particular case involve the operation of that section, the Courts have no other alternative but to give effect to it and stay the suit. The expression "matter in issue" does not mean any matter in issue in the suit but refers to the entire subject-matter in dispute, and not merely to one of the issues, however important it may be for the decision of the suit. Where an earlier appeal and a subsequent suit between the same parties relate to the same piece of land, that fact alone

C. P. CODE (1908), S. 10.

cannot be a ground for stay under S. 10, C. P. Code, when the amount claimed in the later suit is for a different period from that claimed in the former suit out of which the appeal has arisen. The matters in issue are not the same in both and hence S. 10 does not apply. (*Abdur Rahman, J.*) MUNUSWAMI MUDALIAR *v.* RAGHUPATHI. **50 L.W. 334=1939 M.W.N. 793=(1939) 2 M.L.J. 290=A.I.R. 1940 Mad. 7.**

——**S. 10**—Applicability and scope—Partition proceedings in Revenue Court—Suit in Civil Court as to title—Procedure—Trial when barred. *See* U. P. LAND REVENUE ACT, SS. 111 AND 233 (*k*). **1936 R.D. 128.**

——**S. 10 and Succession Act (1925), S. 295**—*Applicability of S. 10, C. P. Code, to proceedings under S. 295 of the Succession Act—Applications for probate and caveats filed in different Courts on different dates—Which of the rival suits is 'previously instituted'—Test to be applied.*

Where in respect of the same will two applications for probate were made by different persons to different Courts on different dates and caveats were also filed in both Courts on different dates and an application was made by one of the applicants for probate to one of the Courts for stay of the proceedings in that Court. Under S. 10, C. P. Code, it was held that S. 10, C. P. Code, was not in terms applicable to proceedings under S. 295, Succession Act, for they were not 'suits' and that even assuming it applied in principle, it would not be possible as between rival applications for probate, to treat as the date of the institution, the date on which the caveator might have chosen to allow the proceedings to become contentious. It was further held that the only date which could be regarded as the date of institution for the purpose of deciding which of the two rival 'suits' was 'previously instituted' must be the date on which the petition was filed. The principle governing such cases was stated by his Lordship to be that any application which is subsequently converted into a plaint or is to be treated as a plaint and the foundation of a suit must be considered to date back as a plaint to the date on which it was filed as an application. (*Yorke, J.*) *In re* VIOLET PERTERSON. **15 Luck. 290=12 R.O. 224=185 I.C 377=1940 O.W.N. 1=1940 O.A. 35=1940 A.W.R. (C.C.) 28=A.I.R. 1940 Oudh 113.**

——**S. 10**—*'Matter in issue'—Meaning of.*

The expression 'matter in issue' in S. 10 of C. P. Code has reference to the entire subject-matter in controversy between the parties, and is not equivalent to 'any of the questions in issue'. The section does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit which is pending, although the same question may be involved in both the suits. A.I.R. 1917 Cal. 248, Foll. (*Abdul Rashid, J.*) ROSHAN DIN *v.* MALAN BIBI. **178 I.C. 821=11 R.L. 493=A.I.R. 1938 Lah. 502.**

——**S. 10**—*Pendency of suit—Judgment pronounced but decree not drawn up—Suit, if still pending.*

A suit was referred to arbitration and the arbitrators submitted an award. The Court directed that the award would be made part of the decree. No decree, however, was drawn up as the necessary stamps were not filed.

C. P. CODE (1908), S. 11.

Held, that the suit was still pending. (*Henderson, J.*) GIRISH CHANDRA SEN *v.* BRAJALAL SEN. **71 C.L.J. 190.**

——**S. 10**—*Scope and effect of—Bar under—Waiver of by parties—Effect.*

The institution of a second suit is not barred by S. 10; all that it says is that the trial of the suit cannot be proceeded with. It is consequently a rule of procedure pure and simple and rules of procedure in civil cases can be waived with the consent of the parties. When the parties expressly ask the Court to proceed along with a subsequent suit, neither side can afterwards turn round and challenge the validity of these proceedings because of S. 10. (*Bose, J.*) GANGAPRASHAD *v.* MST. BANASPATI. **I.L.R. (1937) Nag 6=173 I.C. 124=10 R.N. 280=A.I.R. 1937 Nag. 132.**

——**S. 10**—*"Suit"—Includes appeals.*

Obiter.—In S. 10 which is closely connected with S. 11, "suit" must include appeal. The section refers to suits pending before His Majesty in Council. (*Davis, J.C. and Tyabji, J.*) BADALDAS *v.* GURDINOMAL. **I.L.R. (1940) Kar. 15=186 I.C. 533=12 R.S. 203=A.I.R. 1939 Sind 329.**

——**S. 10 (as amended by Government of Burma Adaptation of Laws Order, 1937)**—*Retrospective effect—Power of Courts in British Burma to stay suits before them by reason of pendency of suits founded on same cause of action in British India.*

According to S. 10, as amended by the Adaptation of Laws Order, 1937, the Courts in British Burma have no power to stay suits before them by reason of the pendency of suits founded on the same cause of action in British India. The amendment to S. 10 being an alteration in the form of procedure has a retrospective effect. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) ARUNACHALAM CHETTYAR *v.* VALLIAPPA CHETTYAR. **1938 Rang. L.R. 176=175 I.C. 275=10 R.R. 474=A.I.R. 1938 Rang. 130 (F.B.).**

——**S. 11—RES JUDICATA.**

Adverse finding.
Applicability.
Arbitration proceedings.
Causes of action different.
Co-defendants.
Competent Court.
Compromise decree.
Conflicting decrees.
Connected appeals, cases or suits.
Consent decree or order.
Constructive *res judicata*.
Co-plaintiffs.
Decision on question of law.
Directly and substantially in issue.
Erroneous decision.
Execution proceedings.
***Ex parte* decree.**
Findings.
Former suit.
Heard and finally decided.
Insolvency proceedings.
Jurisdiction.
Landlord and tenant.
Litigating under same title.
Might and ought (*See* Explanation IV).
Miscellaneous proceedings.

C. P. CODE (1908), S. 11.

Mortgages.
Parties and representatives.
Plea of.
Prior decision.
Pro forma defendant.
Representative suit (*See* Explanation VI).
Scope.
Successive suits for same relief.
Explanation IV—Might and ought.
Explanation V.
Explanation VI—Representative suit.

Adverse finding.

——S. 11—*Adverse finding—Decision favourable—Not* res judicata.

A finding adverse to a defendant in a suit cannot be treated as *res judicata* if the suit be dismissed. (*James and Rowland, JJ.*) BAIJNATH SAHU *v.* JAIMANGAL PRASAD SINGH. **164 I.C. 851=9 R.P. 139=A.I.R. 1937 Pat. 56.**

——S. 11—*Adverse finding—No appeal or cross-objection filed*—Res judicata.

Where a point which was specifically raised in the pleadings was found by the trial Court against the defendant respondent, and no appeal was preferred by him against that finding nor was any cross-objection filed in the appeal brought by the plaintiff, the point is *res judicata* between the parties. (*Zia-ul-Hasan, J.*) BADRUL NISSA *v.* MUZAFFAR HUSAIN. **1937 O.W.N. 429.**

——S. 11—*Adverse finding*—Res judicata.

Where the previous judgment contains an adverse finding against a party but the decree is wholly in his favour, he has no right of redress against the finding by way of appeal, so such a previous finding cannot operate as *res judicata* in a subsequent suit. (*Srivastava, C.J.*) PATESHWARI DIN *v.* SARJU DASS. **171 I.C. 596=10 R.O. 137=1937 O.L.R. 567=1937 O.W.N. 1127=A.I.R 1938 Oudh 18.**

——S. 11—*Adverse finding on one issue against successful party—If* res judicata.

Any issue decided by a Court in favour of the plaintiff whose suit is ultimately dismissed on another ground cannot operate as *res judicata* as against the defendant in a subsequent suit. (*Niamatullah and Rachhpal Singh, JJ.*) PARATHNATH *v.* RAMESHWAR PRATAP SAHI. **177 I.C. 373=11 R.A. 190=1938 A.L.J. 834=1938 A.W.R. (H.C.) 610=1938 A.L.R. 739=A.I.R. 1938 All. 491.**

Applicability.

——S. 11—*Applicability—Assessment proceedings under Income-tax Act*—Res judicata—*Income-tax Officer—If "Court".*

The doctrine of *res judicata* cannot operate in respect of an assessment to tax made by an Income-tax Officer. The Income-tax Officer is not a Court, and therefore the doctrine has no application. His assessments are, however, final, unless they can be reopened under some provision of the Income-tax Act. (*Leach, C.J., Varadachariar and King, JJ.*) TRICHY TENNORE H. P. FUND, LTD. *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **I L.R. (1938) Mad. 183=1938 M.W.N. 171=173 I.C. 998=10 R.M. 648=5 I.T.R. 703=47 L.W. 24=A.I.R. 1938 Mad. 148=(1938) 1 M.L.J. 130 (F.B.).**

——S. 11—Applicability—Applications under S. 20-A, Madras Estates Land Act. *See* MADRAS ESTATES LAND ACT, S. 20-A. **(1939) 2 M.L.J. 292.**

C. P. CODE (1908), S. 11.

——S. 11—*Applicability to appeals—Connected suit in different Courts—Absence of appeal against decision in one—Effect on appeal from the other.*

The rule of *res judicata* contained in S. 11 applies to appeals as well as to trials in original Courts. Hence, where pending a suit between certain parties in certain Court another suit is instituted in another Court between the same parties and relating to same subject-matter and the decision of latter Court becomes final, there being no appeal from it, an appeal from the decision of first Court is barred by *res judicata.* (*Davis, J.C. and Tyabji, J.*) BADALDAS *v.* GURDINOMAL. **I.L.R. (1940) Kar. 15=186 I.C. 533=12 R.S. 203=A.I R. 1939 Sind 329.**

——S. 11—*Applicability — Construction of statute—Decision on applicability of S. 12-A—Chota Nagpur Encumbered Estates Act—If* res judicata.

The third sub-section of S. 12-A renders void any transaction to which it is applicable, but the question as to whether it applies to a particular transaction entitles the Court to consider the construction of the section and the determination of its applicability rests with the Court. Where the decision of the Court in a previous suit determined that the section had never applied to a transaction a Court in a new suit between the same parties with regard to the same transaction cannot try anew the issue as to its applicability in face of the express prohibition in S. 11 of the Code. A.I.R. 1928 Cal. 777, Ref ; 12 Pat. 147, Rev. (*Lord Thankerton.*) BINDESWARI CHARAN SINGH *v.* BHAGESHWARI CHARAN SINGH. **63 I.A. 53=15 Pat. 203=160 I.C. 68=1936 A.L.J. 104=17 Pat.L.T. 28=8 R.P.C. 140=38 Bom.L.R. 339=62 C.L.J. 521=38 P.L.R. 325=40 C.W.N. 289=1936 O W.N. 127=1936 M.W.N. 321=43 L.W. 159=1936 O L.R. 67=1936 All. L.R. 98=1936 P.W.N. 17=1936 A W.R. 84 (2)=A.I.R. 1936 P.C. 46=70 M.L.J. 122 (P.C.).**

——S. 11—*Applicability—Decision in execution proceedings under decree in one suit—Subsequent suit between same parties—Execution of decree in—Decision in execution under prior decree—If* res judicata.

There is no warrant for holding that there is no *res judicata* in respect of a decision in an execution petition under a former decree when the same matter arises for decision in an execution petition under a subsequent decree between the same parties. In such a case the principle of S. 11, C. P Code, directly applies. (*Wadsworth, J.*) CHINNAPPAYAN *v.* NARAYANA PATTAR. **187 I.C. 852=12 R.M. 761=1939 M.W.N. 1145=50 L.W 677=A.I.R 1940 Mad. 59=(1940) 1 M.L. J. 143.**

——S. 11—*Applicability—Decree against sons on foot of—Mortgage by Hindu—Father—Subsequent suit by latter's sons questioning alienation—If barred by* res judicata.

The decision in a suit against Hindu sons on a mortgage executed by their father upholding the mortgage cannot operate as *res judicata* in a suit by the sons of the defendants in the former suit (grandsons of the alienor) to set aside the mortgage. The effect of holding the decision to be *res judicata* would be that the sons have no right to institute a suit at all questioning the alienation made by their father or grandfather. That clearly is not the law. (*Madhavan Nair, J.*) MUTHU-

C. P. CODE (1908), S. 11.

RANGA CHETTI *v.* LAKSHMIPATHI NAIDU. 162 I. C. 876=8 R.M. 1062=1936 M.W.N. 272=43 L.W. 677=A.I.R. 1936 Mad. 488=70 M.L.J. 627.

——S. 11—Applicability—Dispute under Co-operative Societies Act—Second award in respect of same debt—If nullity—Bar of *res judicata*. *See* BIHAR AND ORISSA CO-OPERATIVE SOCIETIES ACT, S. 48. 21 Pat.L.T. 343.

——S. 11—Applicability—Foreign judgment—*Res judicata*—Conditions of. *See* C. P. CODE, S. 13. 40 Bom.L.R. 77.

——S. 11—*Applicability—Issues.*

Per *Bhide, J.*—S. 11, C. P. Code, applies not only to the final decision but also to issues. (*Young, C.J., Bhide and Din Mahommad, JJ.*) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. 175 I.C. 945=11 R.L. 91=40 P.L.R. 319=A.I.R. 1938 Lah. 369 (F.B.).

——S. 11—*Applicability—Judgment obtained by fraud or collusion—Evidence Act, S.* 44.

It is open to any party to show that the judgment was obtained by fraud or collusion or that there was want of jurisdiction and in such case S. 11, C. P. Code, would not apply. (*Sulaiman, C.J. and Bennet, J.*) PARBATI *v.* GAJRAJ SINGH. 166 I.C. 624=9 R.A. 431=1937 A.L.R. 61=1936 A.W.R. 1009=1936 A.L.J. 1162=A.I.R. 1937 All. 28.

——S. 11—*Applicability—Parties not same—No* res judicata.

There can be no *res judicata* when the parties are not the same in both the suits. (*Drake Brockman, S.M. and Knox, J.M.*) AJUDHIA PRASAD *v.* UDAIRAJI. 1936 R.D. 80.

——S. 11—*Applicability—Previous suit tried according to summary procedure then in force.*

Per *Bhide, J.*—Where the previous suit was tried according to the procedure then in force, the mere fact that the procedure then in force was of summary character is immaterial for the purposes of S. 11, C. P. Code. (*Young, C.J., Bhide and Din Mohammad, JJ.*) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. 175 I.C. 945=11 R.L. 91=40 P.L.R. 319=A.I.R. 1938 Lah. 369 (F.B.).

——S. 11—Applicability—Proceedings under Land Acquisition Act. *See* LAND ACQUISITION ACT, S. 31 (2), PROVISO. A.I.R. 1939 Sind 66.

——S. 11—*Applicability—Second suit for redemption of mortgage—Maintainability—Decree in prior suit by melcharthdar—Non-payment of mortgage money—If bar to second suit by jenmi.*

B held certain property under a marupat executed by his predecessor in title in favour of *A*. *A* afterwards granted a melcharth over the same property. A suit for eviction was filed by both *A* and the melcharthdar in which a decree was passed in favour of the latter that if within three years he paid into Court the value of *B's* improvements *B* should surrender possession of the property to him. Such payment was never made and *B* remained in possession. Subsequently a suit was filed by *A*, the jenmi, to evict *B* and the defence was that the suit was barred by reason of the previous decree in which *A* was a party.

Held, that the decree in the previous suit did not bar the suit by *A* inasmuch as the decree in the previous suit was in favour of the melcharthdar and not of *A* and *A* could not himself execute that decree and that by reason of the melcharthdar failing to execute the decree *A*, jenmi, would not lose his right to redeem. (*King, J.*) GOVINDAN *v.* J. S. DESILVA. 169 I.C. 247=9 R.M. 726=1936 M.W.N. 759=A.I.R. 1937 Mad. 213.

——S 11—*Applicability—Suit for rent by landlord against tenant—Plea of partial dispossession and suspension of rent—Decision negativing plea—Subsequent plea in later suit—When barred by* res judicata.

Where in a suit between a landlord and a tenant, a plea is raised by the defendant-tenant that there was partial dispossession or eviction and consequent suspension of rent and found against and negatived by the Court, the rule of *res judicata* has no application in a case of eviction from the same lands subsequent to that suit, so as to bar the tenant from raising the plea in a subsequent suit. But where the tenant's plea in the later suit is that the dispossession pleaded in the prior suit is still continuing in respect of the same lands, the plea cannot be allowed to be agitated by the tenant in the later suit. The rule of *res judicata* will apply in such a case, as there can be no continuance of dispossession of property of which there has been no dispossession according to the prior decision, and the tenant cannot consequently be permitted to go into the question of dispossession. (*Guha and Bartley, JJ.*) MAHARAJA JAGADISH NATH ROY BAHADUR *v.* SURENDRA PROSAD LAHIRI. 40 C.W.N. 166.

Arbitration proceedings.

——S. 11—*Arbitration proceedings.*

The word 'suit' in S. 11, C.P.Code, includes arbitration proceedings, and matters which have been fully dealt with in those proceedings could not be reopened in a subsequent suit. 26 C.W.N. 940, Ref. to. (*McNair, J.*) MAYADAS BHAGAT *v.* COMMERCIAL UNION ASSURANCE CO., LTD. I.L.R. (1937) 1 Cal. 541=169 I.C. 788=10 R.C. 49=41 C.W.N. 193.

——S. 11—*Arbitration proceedings—Award filed under Arbitration Act*—Res judicata.

It is difficult to see why an award filed under the Arbitration Act should not have the same force with regard to the question of *res judicata* as a decree based on award under Sch. II, C. P. Code. (*McNair, J.*) BAL KRISHNA MOHTA *v.* BRIJMOHAN BIANI. 42 C.W.N. 367.

——S. 11—*Arbitration proceedings—Objection decided in*—Res judicata.

Where objections have been preferred during the arbitration proceedings and disallowed, the principle of finality applies and the same matter cannot be agitated in a separate civil suit. 1926 Sind 42; 1930 Sind 195 and 1928 Sind 20, Rel. on. (*Abdul Rashid and Addison, JJ.*) DAMODAR DAS AND SONS, LTD. *v.* BASHESHAR NATH. 167 I.C. 730=9 R.L. 541 (2)=A.I.R. 1936 Lah. 865.

——S. 11—*Arbitration proceedings—Question as to validity of submission—Decision on—If* res judicata *in subsequent suit.*

As the Court has power to hear and decide the question as to the validity of submission, and if it hears and decides the question, the principle of *res judicata* applies and the party aggrieved should not be allowed to re-agitate the same question in a subsequent suit. (*Davis, J.C. and Mehta, A.J*

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C.) ROCHANBAI *v.* MOTUMAL. 31 S.L.R. 55=169 I.C. 623=10 R.S. 10=A.I.R. 1937 Sind 110.

——S. 11—*Arbitration proceedings—Suit by some residents of village claiming irrigation rights—Reference to arbitration—Award—Decree based on—Subsequent suit by other residents of same village not parties to reference claiming similar rights against same defendants—If* res judicata.

Where a suit by certain residents of a village claiming a right of irrigation in respect of their fields from a particular tank is decided not on contest, but on the basis of an award on a reference by the parties to arbitration, and no one outside the parties to that suit has agreed to refer the matter to arbitration, the decree in such a suit cannot be binding on persons other than those who made the reference, and cannot operate as *res judicata* so as to bar a subsequent suit by other residents of the same village against the same defendants, claiming rights similar to those in the prior suit. (*Niamatullah, J.*) NAMDAR KHAN *v.* NAIMUL KHAN. 169 I.C. 388=1937 A.L.R. 522=10 R.A. 16=1937 A.L.J. 293=1937 A.W.R. 258=A.I.R. 1937 All. 289.

——S. 11—*Arbitration proceedings—Unregistered award—Omission to raise objection to filing of—Constructive* res judicata.

If an application is made to the Court to file an unregistered award which requires registration, then the Court must reject it. Hence this is one of the ground which can be urged against the filing of an award and if it is not urged and the award is filed, then the question is barred in a subsequent suit on the principle or *res judicata*. (*Bose, J.*) GANGAPRASHAD *v.* MST. BANASPATI. I.L.R. (1937) Nag. 6=173 I.C. 124=10 R.N. 280 =A.I.R. 1937 Nag. 132.

Causes of action different.

——S. 11—*Causes of action different—Decision when may become* res judicata.

S. 11 does not require that the causes of action in both the suits should be the same for the application of the rule of *res judicata*. The causes of action may be different or the subject-matter may be different, but if the issue involved in both the cases is the same and if it was directly and substantially in issue in the former case between the same parties or between parties under whom they or any of them claim, litigating under the same title, the decision of such an issue in the former case will operate as *res judicata* provided the other conditions laid down in S. 11 are satisfied. (*Stone, C.J. and Puranik, J.*) SITABAI *v.* HARI. I.L.R. (1938) Nag. 496=180 I.C. 922=11 R.N. 406=A.I.R. 1938 Nag. 401.

——S. 11—*Cause of action, different—Prior suit on the footing that a release was of no legal effect—Subsequent suit for damages for breach of covenant of title contained in the same release.*

The plaintiff obtained a release from the Official Assignee in respect of an insolvent's share in a certain property. Bnt a mortgagee of that share of the property brought it to sale and it was bought by a stranger. Thereupon the plaintiff sued the Official Assignee for a refund of sum paid to him as consideration for the release on the ground that the release was of no legal effect. But it was dismissed. The present suit was

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brought by the plaintiff against the Official Assignee, for damages for breach of covenant of title contained in the deed of release. On a plea that the later suit is barred by *res judicata*.

Held, that the causes of action in the two suits were entirely different and that the second suit was not barred by the rule of *res judicata*. (*Leach, C.J. and Varadachariar, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* VEDANARAYANA NAICKER. 177 I.C. 579=11 R.M. 348=47 L.W. 46=1938 M.W.N. 10=A.I.R. 1938 Mad. 221=(1938) 1 M. L.J. 92.

——S. 11, O. 2, R. 2—*Cause of action distinct—Gift of certain property to wife in lieu of dower—Widow remarrying after husband's death—Suit for pre-emption by husband's brother dismissed—Subsequent suit for declaration of title to property on ground of re-marriage of widow and for avoidance of gift—If barred.*

A Mahomedan gifted certain property to his wife in lieu of dower. After the death of the husband the widow remarried and the brother of her husband brought a suit for pre-emption alleging that the transaction was a sale and not a gift. The suit was dismissed. Subsequently he brought a suit for declaration that he had acquired a title to the property on the ground of re-marriage of the widow and that the gift was null and void against him.

Held, that as the plaintiff was challenging in his previous suit what the husband had done in relation to the property and as in the subsequent suit he was basing his right of ownership on what had been done by the widow herself, the reliefs in the two suits were based on two separate causes of action and the subsequent suit was not barred either under S. 11 or under O. 2, R. 2.

Held, further, that the plaintiff was debarred from challenging the gift in the subsequent suit as by bringing the suit for pre-emption he should be taken to have consented to the transaction in the eye of the law. A.I.R. 1914 Lah. 460, Foll. (*Din Mohammad, J.*) MT. ALAM KHATUN *v.* HAYAT KHAN. 181 I.C. 87=11 R.L. 750=40 P. L.R. 794=A.I.R. 1938 Lah. 492.

Co-defendants.

——S. 11—*'Co-defendants'—Absence of controversy* inter se—*Joint defence to suit by rival claimant—Inconsistent and alternative pleas raised—Suit dismissed in part—Mention that claim of one defendant is dismissed—If* res judicata *in subsequent suit by one co-defendant against another.*

It is open to co-defendants putting up a joint defence to resist the claim of a rival on any ground which they may be able to prove; and it is open to them to raise alternative and even inconsistent pleas in defence to the suit of the rival claimant. And when there is no point in controversy between the co-defendants *inter se*, and no difference between them on any point, a finding by the Court on a point in favour of one of them and adverse to the other, cannot operate as *res judicata* in a subsequent suit between them. If all that the co-defendants in the prior suit are anxious about is to defeat the claim of the plaintiff, it does not matter to them whether the claim of any one of them is defeated on any ground. The decree which in any way non-suits the plaintiff is for the benefit of both of them, and the mere

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mention in the judgment that the claim of one of them is dismissed, does not affect his rights as against the other, and cannot operate as *res judicata*. (*Harries and Rachhpal Singh, JJ.*) GANPAT RAI *v.* BHAGWAT DAYAL. 1937 A.W.R. 805=1937 A.L.J. 1141.

——S. 11—*Co-defendants—Applicability of* res judicata—*Conditions necessary.*

The plea of *res judicata* can prevail, even if the contesting parties in the subsequent suit or those through whom they claim were ranged as co-defendants in the previous suit. But before this plea can prevail, three conditions are necessary to be fulfilled:—(1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. Where in a suit by the plaintiff claiming tenancy rights against defendants 1 and 2, who asserted priority over both the plaintiff and the defendants was impleaded as defendant No. 3, and the Court dismissed the suit on account of the finding that *X* was entitled to succeed to the tenancy rights in suit in preference to both the plaintiff and the defendants, all the above three conditions are fulfilled and the question of *X's* title to succeed to the tenancy rights is, therefore, *res judicata* and cannot be re-opened in a subsequent suit by *X* against defendants 1 and 2. The fact that former suit was dismissed as against defendants 1 and 2 is immaterial, as they could appeal against the decision arrived at in that suit if they wanted to escape its consequences. (*Coldstream and Din Mohammad, JJ.*) GAHRA *v.* MST. PANAH BIBI. I.L.R. (1938) Lah. 75=40 P.L.R. 1030.

——S. 11—*Co-defendants—Conflict of interests between co-defendants—Finding necessary issues* —Res judicata.

A proprietor of land brought a suit for ejectment and also another suit for rent against the patta-holder *A* and the shikmi tenant under him *B*, alleging that the patta granted to *A* had expired. *A* contested the claim on the ground that though he had been given a patta, what he really had taken was the right of occupancy. *B* on the other hand contended that the land was his *guzashta* ancestral holding, and that he was not a shikmi tenant of *A* and therefore was not liable to ejectment on the expiry of *A's* lease. The trial Judge held the patta to be a colourable one and negatived *A's* right of occupancy but dismissed the suits on the ground that *B* was the independent shikmi tenant on his own account and not under *A*. Subsequently *A's* assignee brought a suit for rent against *B* claiming, that *B* was the shikmi tenant under the occupancy tenant *A*.

Held, that there was conflict of interest and titles between the co-defendants *A* and *B* in the former suits and it was necessary to decide that conflict in order to give the plaintiff in those suits appropriate relief. Though the suits were dismissed, yet *A's* right of occupancy tenancy, and consequently his right to demand rent from *B*, was definitely negatived, and *A* could have appealed against that decision on the ground that notwithstanding the dismissal of the suits, he was adversely affected by the pronouncement in favour of the co-defendant. He having not done so, the decision in the former suits negativing his

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right of occupancy tenancy operated as *res judicata* in the subsequent suit between his assignee and *B*. (*Dhavle, J.*) PARAMESHWAR PANDEY *v.* RAMDHARI. 167 I.C. 141=9 R.P. 380=3 B.R. 276=A.I.R. 1937 Pat. 27.

——S. 11—*Co-defendants — Conditions necessary.*

The circumstances in which a decision operates as *res judicata* between co-defendants are firstly, that there was a conflict of interest between them; secondly that it was necessary to decide that conflict in order to give the plaintiff the relief which he claimed; and thirdly, the question between the co-defendants was finally decided. Therefore a decision in a former suit in which there was a conflict of interest between co-defendants but it became unnecessary to decide that conflict because the plaintiffs were not given any relief as they failed to establish their title and therefore the question that arose between the co-defendants was not decided, cannot operate as *res judicata* in a subsequent suit. (*Wright, J.*) MA TO *v.* MAUNG E BYU. A.I.R. 1940 Rang. 136.

——S. 11—*Co-defendants—Decision not necessary to give plaintiff relief*—Res judicata.

Where in order to give the plaintiffs the relief they claimed, it was not necessary for the Court to decide the question of the liability of the co-defendants *inter se* the decision does not operate as *res judicata* in a subsequent suit between the co-defendants. (*Nanavutty and Zia-ul-Hasan, JJ.*) VIQAR ALI BEG *v.* MOHAMMAD SAADAT ALI KHAN. 1936 O.W.N. 982.

——S. 11—*Co-defendants—Decision, when* res judicata.

To establish *res judicata* between co-defendants it should be established that there was conflict of interests between co-defendants; that it was necessary to decide that conflict in order to give plaintiff the relief which he claimed; that the question between the co-defendants was finally decided. A.I.R. 1931 P.C. 114, Rel. on. In a suit by *K* for partition against *J* and *X*, *J* who was in possession of the entire property did not put in any appearance and it was decided that *K* was entitled to a certain share in accordance with a particular pedigree table. Thereafter *X* put in applications for their shares under a different pedigree table, whereupon *J* brought a suit for a declaration that *X* would be entitled to those shares only which were in accordance with the pedigree table relied on in *K's* suit, which fact being disputed by *X*, *J* claimed that that point was *res judicata* as between *J* and *X* both being co-defendants in *K's* suit.

Per *Bhide and Dalip Singh, JJ. Skemp, J.*, contra.—*Held*, that the question of preference between the two pedigree tables was neither raised nor decided as between the co-defendants in *K's* suit, nor was it necessary to decide that in that suit, hence decision in *K's* suit, was not *res judicata* in favour of *J* in his suit against *X*. (*Bhide, J., on difference between Dalip Singh and Skemp, JJ.*) RURA *v.* BANTA. 181 I.C. 199=11 R.L. 790=40 P.L.R. 600=A.I.R. 1938 Lah. 227.

——S. 11—*Co-defendants—Issue decided as between defendants—If* res judicata.

A issued *B*, *B*-1 and *C* for partition of joint family estate held by *B*. The estate was in the name of *B*-1 who was the son of *B*. *B* at first denied any joint estate but later on entered into a

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compromise with *A* thus admitting the jointness of the estate. The compromise was admitted to Court and a decree was passed on it. In a suit by *C* against *B* and *B*-1 to get his share of property,

Held, that the former decision was *res judicata* as to the jointness of the property because that issue was finally decided as between the co-defendants in that suit. So in the suit by *C*, *B* and *B*-1 or any one claiming through them cannot deny the right of *C* to a share. A.I.R. 1919 Mad. 893; A.I.R. 1932 P.C. 161 and A.I.R. 1931 P.C. 114, Foll. (*Venkataramana Rao, J.*) SOORAYYA *v.* SOORANNA. **168 I.C. 1005=9 R.M. 682=A.I.R. 1936 Mad. 252.**

——S. 11—*Co-defendants—Joint decree passed against some partners in respect of debt contracted by them—Defence that other partners are necessary parties negatived—Question whether debt is partnership debt—If* res judicata *in suit between defendants.*

Where in a suit instituted by a creditor against some of the partners of a firm in respect of a debt contracted by them, a joint decree was passed against them negativing their contention that the other partners were necessary parties to the suit, the decision is not *res judicata* on the question as to whether it was a partnership debt or otherwise in a subsequent litigation between the defendants. (*Mukerjea and Roxburgh, JJ.*) DEBESH CHANDRA MUKHERJEE *v.* BENOY KRISHNA. **43 C.W.N. 1214.**

——S. 11—*Co-defendants members of one family—Conflicting interests—Decision as to relationship—Subsequent revenue proceedings—Question as to relationship—If* res judicata.

Where in a civil suit the co-defendants were all members of one family and they had conflicting interests a decision as to the relationship of one of them is *res judicata* in subsequent revenue proceedings as between the members of that family in regard to that question of relationship. (*Mehta, S. M.*) KAMTA AHIR *v.* PHAGU. **1939 A.W.R. (B.R.) 9=1939 R.D. 82.**

——S. 11—*Co-defendants*—Res judicata—*Absence of conflict of interests between defendants* inter se.

If there is no conflict of interests between the defendants *inter se*, and therefore no question to be decided between them, in order to give the plaintiff relief in the suit, there can be no *res judicata* between co-defendants. (*Leach, C. J. and Varadachariar, J.*) DHANAPALA CHETTI *v.* GOWR CHAND SOWCAR. **182 I.C. 312=12 R.M. 48=1938 M.W.N. 938=A.I.R. 1938 Mad. 959=(1938) 2 M.L.J. 775.**

——S. 11—*Co-defendants*—Res judicata—*Conditions.*

For a decision to operate as *res judicata* between co-defendants, there must be a conflict of interest between the defendants; it must be necessary to decide this conflict in order to give the plaintiff the relief he claims and the question between the defendants must have been finally decided. Where all these ingredients are present the finding operates as *res judicata* between co-defendants even if in the former suit the plaintiff's case was dismissed *in toto*. (*Almond, J.C.*) GHULAM ALI AMIR KHAN *v.* AMIR KHAN. **179 I.C. 13=11 R. Pesh. 61=A.I.R. 1939 Pesh. 1.**

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——S. 11—*Co-defendants*—Res judicata—*Conditions*—Pro forma *defendant not contesting but supporting plaintiff's claim—Dismissal of suit—Decision—If* res judicata.

It is clear that neither the fact that a defendant did not contest but supported the plaintiff's claim, nor the fact that he was merely joined as *pro forma* defendant, nor again the fact that the suit finally ended in a dismissal is a good reason for negativing a plea of *res judicata* between co-defendants if they in fact occupied a position of conflict in the prior suit. (*Pandrang Row and Krishnaswami Ayyangar, JJ.*) APPASAMI PILLAI *v.* THAYAMMAL. **189 I.C. 215=1940 M.W.N. 632=50 L.W. 166=A.I.R. 1939 Mad. 830=(1939) 2 M.L.J. 236.**

——S. 11—*Co-defendants*—Res judicata—*Conflict of interests* inter se—*Necessity.*

In the absence of any controversy specifically raised between the defendants *inter se* the Court should not apply the doctrine of *res judicata* as between co-defendants. (*Stone, C.J. and Niyogi, J.*) ISHAKALLI *v.* THAKUR PRASAD. **20 N.L.J. 159.**

——S. 11—*Co-defendants*—Res judicata—*Conflict of interests between defendants* inter se—*Necessity.*

The doctrine of *res judicata* cannot apply between co-defendants unless it is impossible for the plaintiff to get his right without the matter having been tried and decided between the co-defendants *inter se*. A decision operates as *res judicata* between co-defendants provided that (1) there was a conflict of interests between them; (2) it was necessary to decide that conflict in order to give the plaintiff the relief which he claims; and (3) the question between the co-defendants was finally decided. It is not enough if a conflict was merely possible; there must have been an actual conflict between the co-defendants *inter se* before the principle of *res judicata* can apply as between them. Where a defendant allows the suit to proceed *ex parte* and runs away from the claim of the plaintiff, no conflict can arise so far as he is concerned, and there can be no actual decision of any conflict which did not actually arise; there can therefore be no *res judicata*. (*Pandrang Row and Abdur Rahman, JJ.*) RAMASWAMI *v.* VENKATAKRISHNAYYA. **1938 M.W.N. 224 (2)=47 L.W. 374.**

——S. 11—*Co-defendants—When bound by decision.*

If a plaintiff cannot get at his right without trying and deciding a case between the co-defendants, the Court will try and decide the case and the co-defendants will be bound by the decision. But if the relief given to the plaintiff does not require or involve a decision of any case between the co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. In such a case three conditions are requisite: (1) there must be a conflict of interest between the defendants concerned: (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. A.I.R. 1932 P.C. 161; A.I.R. 1931 P.C. 114 and *Cottingham* v. *Earl of Shrewsbury*, (1843) 3 Hare 627, Foll. (*Mackney, J.*)

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A. L.A. R. CHETTYAR FIRM *v.* A. K. R. M. M. K. CHETTYAR FIRM. **164 I.C. 468=9 R.R. 97=A.I. R. 1936 Rang. 308.**

Competent Court.

——**S. 11**—*Competent Court—Court deciding prior suit to be competent to try subsequent suit.*

For the bar of *res judicata* under S. 11, C. P. Code, to apply, one of the essential conditions is that the Court which decided the former suit must be competent to try the subsequent Court. (*Noor and Chatterji, JJ.*) KAMLAPATI DEVI *v.* JAGESHWAR DAYAL. **18 Pat. 342=183 I.C. 400=5 B.R. 938=12 R.P. 143=1939 P.W.N. 8=A.I. R. 1939 Pat. 375.**

——**S. 11**—*Competent Court—Court trying previous suit not competent to try subsequent suit—Finding—If* res judicata.

Where the finding is by a Court not competent to try the subsequent suit it cannot operate as *res judicata*, but the finding creates a paramount duty on the party against whom it is given to displace it. (*D. N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v.* BRAJENDRA KISHORE RAI CHOUDHURY. **168 I.C. 249=9 R.C. 780=64 C.L.J. 458=A.I.R. 1936 Cal 629.**

——**S. 11**—*Competent Court—Decision of Tahsildar in suit for arrears of rent—If* res judicata *in subsequent suit for ejectment.*

The decision of a Tahsildar in a suit for arrears of rent does not operate as *res judicata* in a subsequent suit for ejectment. 17 R.D. 314, followed. (*Drake Brockman S. M. and Knox, J. M.*) MT. SURJIA *v.* KALLOO SINGH. **1936 A.W. R. 30=1936 R.D. 1.**

——**S. 11**—*Competent Court—If refers to territorial jurisdiction.*

Competency of a Court in connection with S. 11, C. P. Code, has no reference to territorial jurisdiction. (*Collister, J.*) RANG LAL *v.* GAJRAJ SINGH. **181 I.C. 80=11 R.A. 549 (2)=1939 A. W.R. (H.C.) 9=A.I.R. 1939 All 202.**

——**S. 11**—*Competent Court—Insolvency Court—Decision on title to property—If* res judicata.

Where a question regarding the title to certain property of the insolvent has been decided under S. 4, Provincial Insolvency Act, at the instance of a person who submits to it, the finding operates as *res judicata* where the same question is raised in a subsequent suit by the same person for a declaration that it belongs to the insolvent. A.I. R 1932 Cal. 642 and A.I.R. 1929 All. 150 (F.B.), Rel. on. (*Bose, J.*) KAUSHALYABHAI *v.* BAISAKHU. **I.L.R. (1936) Nag. 28=164 I.C. 694=9 R.N. 25=A.I.R. 1936 Nag. 112.**

——**S. 11**—*Competent Court—Meaning of.*

Section 11 operates to exclude the jurisdiction of a Court to try a subsequent suit only if the first suit was tried by a Court which was competent to try the second or subsequent suit. The competence of a Court is to be determined irrespective of any provision as to the right of appeal from the decisions of that Court, and the competence of a Court and the finality of a decision is not dependent upon whether an appeal was or was not made. A Court may be competent and a decision final within the meaning of S. 11 even if no appeal is made. It is the competing jurisdictions of the original Courts which are to be regarded. (*Davis, J.C. and Tyabji, J.*) BADALDAS *v.* GURDINOMAL. **I.L.R. (1940) Kar. 15=186 I.C. 533=12 R.S. 203=A.I.R. 1939 Sind 329.**

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——**S. 11**—*Competent Court—Prior decision by Court not competent to try later suit—When* res judicata.

Where a suit involving title to certain property has been decided between the parties, it is not open to the defeated party to institute another suit including therein not only the property involved in the prior suit but also a much larger property, in a Court of a higher grade and thereby attempt to get a different decision from that Court on the question of title. In such a case the subject-matter of the previous suit which had been decided adversely against him should be excluded from the later suit and the subsequent suit can only go on with regard to the subject-matter which did not form part of the subject-matter of the previous suit. A party who has lost in one Court cannot be permitted to add causes of action or prayers for reliefs in another suit for the purpose of swelling the valuation of his suit and claim that the decision in the prior suit does not operate as *res judicata*. But if it appears that his subsequent suit proceeds upon a cause of action which did not exist or which he could not have availed at the date of the previous suit, the bar of *res judicata* will not apply. If it is possible to treat the entire cause of action upon which the later suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied upon, then the previous decision will stand as a bar to the extent of the matter involved in the prior suit. (*Mukerji and S.K. Ghose, JJ.*) SEKENDAR ALI MIRDHA *v.* SADARUDDIN BHUNIYA. **40 C.W.N. 174.**

——**S. 11**—*Competent Court—Prior suit for arrears of rent in Court of Assistant Collector, II class, under Agra Tenancy Act of* 1901—*Decision on proprietary rights—Subsequent suit for ejectment under Tenancy Act (III of* 1926) *in Court of Assistant Collector, I class—If* res judicata.

For the application of the rule of *res judicata*, the Court which decided the former suit should have been competent to decide not only the issue which arises in the subsequent suit but the subsequent suit itself. The decision of an Assistant Collector of II class, in a suit for arrears of rent *inter partes* under the Agra Tenancy Act of 1901, holding that the defendant was a proprietor and not a tenant, does not operate as *res judicata* in a subsequent suit for ejectment under S. 82 of the Tenancy Act of 1926 before the Assistant Collector of I class, and does not preclude the latter from referring an issue to the Civil Court and deciding it on the merits. In any case, the Civil Court, to whom the issue of proprietary right is to be referred, is not bound by the decision of the Assistant Collector, II class, in the prior suit for arrears of rent. (*Thom, Ag.C.J. and Niamatullah, J.*) SHEODARSHAN LAL *v.* BALMAKUND. **I.L.R (1938) All. 184=1938 R.D. 43=174 I.C. 62=10 R.A. 537=1938 A.L.R. 229=1937 A.W.R. 1215=1937 A.L.J. 1339=A.I.R. 1938 All. 82.**

——**S. 11**—*Competent Court—Prior suit in Civil Court for joint possession of holding, mesne profits and declaration of share—Civil Court incompetent to decide and grant first and last reliefs—Subsequent suit in Revenue Court for share of holding—Decision in prior suit—If* res judicata.

C. P. CODE (1908), S. 11.

In a previous suit in the Civil Court, the reliefs claimed were joint possession of a holding, mesne profits for three years, and a declaration of right to shares to the extent of $\frac{3}{6}$ of the holding. That suit was when the Agra Tenancy Act (II of 1901) was in force. In 1930 after the Act of 1926 came into force, a suit was brought in the Revenue Court under S. 37 of the Agra Tenancy Act of 1926, for division of a holding claiming a two-third share in the holding.

Held, that under Act III of 1926, the Civil Court was not competent to decide the questions involved in the prior suit except the one as to mesne profits, and as that suit was misconceived and brought in a Court which had no jurisdiction to decide two out of the three claims made in it, the decision therein could not operate as *res judicata* in the subsequent suit in the Revenue Court on the question of the extent of the shares. (*Drake Brockman, S.M. and Knox, J.M.*) KESHO SARAN *v.* RAGHUNATH DAS. **1936 R.D. 568.**

——S. 11—*Competent Court—Probate Court—Contentious proceedings for letters of administration—Finding as to nearest heir*—Res judicata.

Where in contentious proceedings for letters of administration it has been found that a certain person is the nearest heir of the deceased, that decision is binding in a subsequent suit upon the parties to the earlier proceedings, and those claiming under them. A.I.R. 1930 P.C. 22, Rel. on. (*Mya Bu and Dunkley, JJ.*) U BA LIN *v.* MA SEIN. **164 I.C. 743=9 R.R. 136=A.I.R. 1936 Rang. 401.**

——S. 11—*Competent Court—Probate Court—Finding as to genuineness or otherwise of will—If* res judicata.

The finding of a Court under the Succession Act with regard to the genuineness or otherwise of a will is conclusive and operates as *res judicata* against the parties affected. 1914 Bom. 8 (F.B.), Foll. (*Mir Ahmad, A.J.C.*) AMIR SINGH *v.* ATTAR SINGH. **161 I.C. 47=8 R. Pesh. 153=A.I.R. 1936 Pesh. 39.**

——S. 11—*Competent Court—Property identical in two suits—Increase in its value in the interval—If affects question of* res judicata.

Where property in two suits is identical, the mere fact that its value has arisen in the interval between the two suits and the subsequent suit is, therefore, beyond the pecuniary jurisdiction of the former Court, cannot affect the question of *res judicata*. (*Coldstream and Bhide, JJ.*) SULTAN ASAD JAN *v.* SECRETARY OF STATE. **18 Lah. 100=167 I.C. 867=9 R.L. 567=A.I.R. 1936 Lah. 998.**

——S. 11—*Competent Court — Question of status of tenant—Finding of Civil Court—If* res judicata *in Revenue Court.*

The finding of a Civil Court in a suit for possession that the defendant is a sub-tenant of his mortgagor being on a question of tenancy, is not final, but is only a pure *obiter dictum*. It cannot therefore operate as *res judicata* in a suit for ejectment in the Revenue Court. (*Drake Brockman, S.M. and Knox, J.M.*) SUNDAR KOERI *v.* MANGAL RAI. **1936 R.D. 457.**

——S. 11—*Competent Court—Rent suit—Variation in the rent—Compromise decree by Tahsildar—If* res judicata *in subsequent suit—Agra Tenancy Act, S. 47.*

C. P. CODE (1908), S. 11.

A decree or order which sanctions a variation from the recorded cash rent must be the decree or order of a Court of competent jurisdiction. A Tahsildar is not a Court of competent jurisdiction to give any decision as to the rent payable, having regard to the provisions of S. 47 of the Agra Tenancy Act where in a suit for arrears of rent, a compromise is filed providing *inter alia* that the rent payable would be *batai* and not cash rent, an order of the Tahsildar recording the compromise and passing a decree in terms of the compromise is without jurisdiction, especially when the compromise never states the rate at which *batai* should be taken, confers no benefit at all on the tenant, contains no specific admission as to the cash rent recorded being wrong, contains no bargain and makes no change in the papers. Such a decree cannot operate as *res judicata* between the parties in a subsequent suit; and the fact that the tenant has in a subsequent suit remained *ex parte* and allowed a decree to be passed against him on the basis of the compromise decree cannot estop him from challenging the validity of the same in a subsequent suit. (*Darling, S.M. and Bomford, J.M.*) RAJ KUMAR RAI *v.* RAM LAKHAN. **1938 A.W.R. (B.R.) 105=1938 R.D. 169.**

——S. 11—*Competent Court—Revenue Court—Decision on question of title—If* res judicata*—Decision without jurisdiction—Effect of.*

It is not the law that the decision of a Revenue Court upon a question of title cannot operate as *res judicata* in a subsequent suit in a Civil Court between the parties. The decision of a competent Revenue Court on a question of title must be regarded as the decision of a Civil Court and can operate as a bar by way of *res judicata* upon the same issue in a Civil Court in a subsequent suit. But if the Revenue Court has no jurisdiction at all to determine the question of title in issue between the parties, the decision cannot be regarded as a final decision and cannot operate by way of *res judicata*, as it is a nullity. (*Harries and Rachhpal Singh, JJ.*) UBAID-ULLA KHAN *v.* ABDUL JALIL KHAN. **I.L.R. (1937) All. 628=10 R.A. 142=1937 R.D. 302=170 I.C. 657=1937 A.L.R. 699=1937 A.L.J. 979=1937 A.W.R. 539 =A.I.R. 1937 All. 481.**

——S. 11—Competent Court—Revenue Court—Title to melwaram right—Decision as to—*If res judicata* in Civil Court suit. *See* MADRAS ESTATES LAND ACT, S. 112. **71 M.L.J. 227.**

——S. 11—*Competent Court--Settlement Officer—Decision construing Government grant—If* res judicata *in subsequent civil suit—Oudh Settlement Circular No. 20 of* 1863.

The decision of a Settlement Officer construing a grant by the Crown and declaring the nature of the grant and the status and rights of the grantee in accordance with Settlement Circular No. 20 of 1863, is not *ultra vires*, and clearly operates as *res judicata* in a subsequent civil suit between the parties or their representatives. (*King, C.J. and Nanavutty, J.*) AMJAD HUSAIN *v.* NAWAB ALI. **161 I.C. 158=8 R.O. 307=1936 R.D. 35=1936 O.W.N. 100=1936 O.L.R. 147=A.I.R. 1936 Oudh 225.**

——S. 11—*Competent Court—Small Cause Court—Decision in rent suit—If* res judicata *in regular title suit.*

C. P. CODE (1908), S. 11.

The decision of a Small Cause Court in a rent suit cannot possibly be allowed to bar a decision in a regular title suit in a case which the Small Cause Court is not competent to decide. (*Jack, J.*) LACHMIRAM KANU *v.* BALADEB PRASAD BHAKAT. **41 C.W.N. 1019.**

——S. 11—*Competent Court—Small Cause Court—Decision on title*—Res judicata.

There is one apparent exception to the rule that the first Court must be a Court competent to try the subsequent suit, and that is where the first Court is a Court of exclusive jurisdiction, its decision on any matter on which it has exclusive jurisdiction is binding on the other Court. An instance of this is a decision by a Revenue Court on a matter on which it has exclusive jurisdiction. Similarly, if a Small Cause Court decides a matter on which it has exclusive jurisdiction, then that decision is binding on subsequent Courts. In a suit for rent the Small Cause Court has no exclusive jurisdiction to decide the question of title. Hence the decision of Small Cause Court on title in suit for rent cannot be *res judicata* in the subsequent suit for rent and for ejectment, because the prayer for ejectment takes the suit away from the jurisdiction of the Court of Small Causes. (*Skemp, J.*) HAYAT MOHAMMAD *v.* BAR GAUSHALA, LYALLPUR. **I.L.R. (1939) Lah. 183=181 I.C. 814=11 R.L. 890=41 P.L.R. 509=A.I.R. 1938 Lah. 811.**

——S. 11—*Competent Court—Small cause and regular suit between same parties heard by same Judge—Separate judgments—Common question—Appeal against original suit—Finding in small causes suit—If* res judicata.

Where a small cause suit and an original suit as between the parties and involving a common question is decided by separate judgments by the same Judge exercising separate jurisdictions and an appeal is preferred against the decision in the original suit, as the Small Causes Court is not competent to try the matters involved in the original suit, there is no *res judicata*. (*Pollock, J.*) KRISHNAJI *v.* ANUSUYA BAI. **183 I.C. 689=12 R.N. 78=1939 N.L.J. 87=A.I.R. 1939 Nag. 130.**

——S. 11—*Competent Court—Suit in Munsiff's Court—Subsequent suit by same plaintiff against same defendant for same relief in Subordinate Judge's Court—Plea of* res judicata—*Contention by plaintiff that former suit not really triable by Munsiff's Court—If open—S.* 21—*Suits Valuation Act, S.* 11—*Principle of constructive* res judicata *—Extent and scope of.*

A judgment of a Court without jurisdiction is a nullity and want of jurisdiction cannot be waived. To this fundamental rule there are two exceptions recognized by law: (1) S. 11, Suits Valuation Act, which deals with defects of jurisdiction due to wrong pecuniary valuation, and (2) S. 21, C. P. Code, which deals with a wrong place of suing. These two sections recognise that there may be a waiver on the part of the defendant in regard to the pecuniary or territorial jurisdiction of a Court, as the case may be, and the absence of jurisdiction in such cases would not render the decree a nullity. In other words, there is a distinction between inherent incompetency in a Court and irregular exercise of jurisdiction, the defects contemplated by S. 11 of the Suits Valuation Act and S. 21, C. P. Code, being treated as

C. P. CODE (1908), S. 11.

mere irregularities which can be waived. The principle of waiver of objection to jurisdiction under these sections extends to execution proceedings also. Under both these sections even in the absence of waiver, that is to say, even if objection is taken in the Court of first instance, there must further be consequent failure of justice before the objection can be given effect to. Where no such objection is taken or where failure of justice has resulted, the decree cannot be impeached either in appeal or in revision or in a subsequent suit; and the decree would operate as *res judicata* in a subsequent suit. An objection which a defendant is precluded from raising is *a fortiori* not open to the party who was the plaintiff in the former suit. Where a plaintiff invoked the jurisdiction of a Court of lower grade on the former occasion and subsequently files a suit for the same reliefs in a Court of higher grade, he cannot escape the bar of *res judicata* in the subsequent suit by pleading that the former suit was tried by a Court which had no jurisdiction to try it. Since the decision in the former can be challenged as incompetent or without jurisdiction, that decree would, if other conditions are satisfied, operate as *res judicata*.

Newsam, J.—Assuming that the former suit, if the plaintiff had valued its property, would have been beyond the penuniary jurisdiction of the Court in which it was instituted and tried, the principle of constructive *res judicata* embodied in S. 11 of the Suits Valuation Act and S. 21, C. P. Code, applies and cannot be evaded. The matters of valuation of a suit and of choosing the place of suing are primarily the province of parties who, within limits, may choose their own forum, *e.g.*, by under-valuing or overvaluing their claim or by suing in one district or in another. The jurisdiction of Court is only artificially limited by minor considerations such as the value of the suit or the place where the cause of action arose. Inherent defects stand on an entirely different footing. Once a party has chosen the forum which shall bear his cause, he must abide by his choice. (*Venkatasubba Rao and Newsam, JJ.*) KAMMARAN NAMBIAR *v.* VALIA KAMUNI. **177 I.C. 91=11 R.M. 240=48 L.W. 679=1937 M.W. N. 1292=A.I.R. 1938 Mad. 257=(1938) 1 M.L. J 193.**

——S. 11—*Competent Court—Suit instituted in Munsiff's Court—Decision of Chief Court in second appeal—If* res judicata *in later suit—Which is beyond the pecuniary jurisdiction of the Munsiff.*

Where the earlier suit was instituted in the Court of the Munsif and came before the Chief Court in second appeal and the Munsif lacked pecuniary jurisdiction to try the later suit, the decision of the Chief Court in that suit cannot operate as *res judicata* in the later suit. (*Srivastava and Nanavutty, JJ.*) PARTAB BAHADUR SINGH *v.* JAGATJIT SINGH. **12 Luck. 371=1936 O.L.R. 412=164 I.C. 118=9 R.O 40=1936 O.W.N. 784 =1936 R.D. 416=A.I.R. 1936 Oudh 387.**

——S. 11—Competent Court—Suit in Revenue Court under S. 77, Madras Estates Land Act—Dismissal on ground of absence of relationship of landlord and tenant—Subsequent suit in Civil Court for declaration of right to resume land—If barred—*Res judicata. See* MADRAS ESTATES LAND ACT, S. 189. **A.I.R. 1937 Mad. 303.**

C. P. CODE (1908), S. 11.

——S. 11—*Competent Court—Suit in Revenue Court under N.W.F. Rent Act (XII of* 1881)—*Decision on proprietary right—If* res judicata *in subsequent suit for ejectment under Agra Tenancy Act of* 1901 *and Act of* 1926.

The N.-W.F. Rent Act (XII of 1881) did not empower the Revenue Courts to decide any question of proprietary right, except incidentally, nor did that Act provide for an ejectment suit of the nature contemplated by the present Agra Tenancy Act of 1926. Revenue Courts have been empowered by the Agra Tenancy Acts of 1901 and 1926 to decide conclusively a question of proprietary right or to have such an issue decided by the Civil Court. The decision of a Revenue Court under Act XII of 1881 on a question of proprietary right in a suit for arrears of rent cannot operate as *res judicata* in a suit for ejectment under the later Acts on the issue of proprietary right, and is no bar to the Revenue Court taking action under the procedure prescribed by Act II of 1901 or under the Act III of 1926. (*Thom, Ag. C.J. and Niamatullah, J.*) SHEODARSHAN LAL *v.* BALMAKUND. I.L.R. (1938) All. 184=1938 R. D. 43=10 R.A. 537=1938 A.L.R. 229=174 I.C. 62=1937 A.W.R. 1215=1937 A.L.J. 1339=A.I R. 1938 All. 82.

——S. 11—*Competent Court—Test—Competency to try subsequent issue—If enough—Large valuation in subsequent suit—Effect of.*

A decree in a previous suit cannot be treated as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised. In spite of a large valuation in the subsequent suit, there would be *res judicata* at least with regard to so much of the property as was dealt with in the previous suit. (*S. K. Ghose and Patterson, JJ.*) GONESH CHANDRA DEUTY *v.* RAJKUMAR DEUTY. 67 C.L. J. 223.

——S. 11—*Competent Court—Test—Decision of Assistant Collector of second class in rent suit —If* res judicata *in subsequent suit for ejectment before Assistant Collector of first class—Agra Tenancy Act.*

It is expressly provided by S. 11, C. P. Code, that in order that a decision in a former suit may operate as *res judicata* in subsequent suit, it is necessary that the Court which tried the former suit was a Court competent to try the subsequent suit. Mere competency to try the issue raised in the subsequent suit is not enough. Further, it is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which that suit was ultimately decided on appeal, Again, regard must be had to the jurisdiction of that Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. It follows, therefore, that an order in a rent suit of an Assistant Collector of the second class confirmed on appeal first by the Collector and then by the District Judge that the defendant was not a tenant but a proprietor of the land in dispute, does not operate as *res judicata* in a subsequent suit before an Assistant Collector of the first class for ejectment of the defendant under S. 82 of the Agra Tenancy Act, as such a suit could not have been heard and determined by the

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Assistant Collector of second class who has no jurisdiction under that Act to try a claim for ejectment of a tenant. (*Harries, J.*) KALYAN DAS *v.* SUDERSHAN LAL. 166 I.C. 807=9 R.A. 446=1936 A.L.J. 1313=1936 R.D. 547=1936 A. W.R. 1091=1937 A.L.R. 75=A.I.R. 1937 All. 20.

——S. 11—*Competent Court—Test—Prior suit to declare adoption invalid in Munsif's Court—Decree declaring adoption invalid—Subsequent rise in value of properties—Suit for possession after death of widow in Sub-Court—Decision on validity of adoption—If* res judicata—*Specific Relief Act, S.* 43.

In determining the question of competency for the purpose of S. 11, C. P. Code, the Court need not take into account any change in the valuation resulting from a mere rise in the market value if the properties concerned in the two suits are substantially the same, the fact that some years ago they were worth only such an amount as would have brought a suit relating to them within the jurisdiction of a Munsif's Court is no reason for holding a pronouncement of the Munsif's Court in respect of title not final or *res judicata* merely because according to the market-value of the properties on the date of the later suit they are worth more than the limit of the pecuniary jurisdiction of that Court. The reversioners to the estate of one *S*, a Hindu, sued in 1883 for a declaration in the Court of the District Munsiff that an adoption made by *S's* widow was invalid; and the adoption was finally held to be invalid as not having been authorised by *S* or assented to by the Sapindas. Subsequently in 1927, after the death of the widow the reversioners again sued for possession of the properties, which were substantially the same as those concerned in the prior suit; but the properties then being worth more according to the then market-value, the suit was filed in the Subordinate Judge's Court. It was found that after making due allowance for a few items of properties, newly added in the later suit, the suit would be within the limits of the Munsif's jurisdiction if valued as in 1883.

Held, the decision on the validity of the adoption was *res judicata* and that it was not open to the adopted son who was a party to the prior suit to reopen the issue in the later suit; and that apart from S. 11, C. P. Code, the trial of the issue was also barred by reason of the express provisions of S. 43, Specific Relief Act, and that a declaration once obtained should not become futile merely because of some difference in the pecuniary jurisdiction of the Courts concerned. (*Varadachariar and Mockett, JJ.*) SUBBAYYA *v.* ANANTARAJU NAGAYYA. 166 I.C. 75=9 R.M. 330 =1936 M.W.N. 1086=44 L.W. 530=A.I.R. 1936 Mad. 951=71 M.L.J. 619.

——S. 11—Competent Court—Transfer of decree of Court of Native State to British Indian Court for execution—Refusal of execution—Decision that decree null as being without jurisdiction—Suit on foreign judgment—If barred. *See* C. P. CODE, SS. 13 AND 44. 40 C.W.N. 591.

——S. 11—*Competent Court—Trial and decision of issue in former suit—If bars trial of same issue in subsequent suit involving property of larger value.*

If a question arises upon an issue framed in a suit in respect of a property of inconsiderable value which may be dealt with by the Court in

which that question arises, and if a decision is arrived at on that question, that decision would not affect property of a much larger value beyond the jurisdiction of that Court when in respect of such property the same question arises in a subsequent suit. So far, therefore, as the trial of an issue is concerned, a prior decision by a Court which had no jurisdiction to try the subsequent suit can never be regarded as operating as *res judicata* when the same issue arises in such subsequent suit. (*Mukerji and S.K. Ghose, JJ.*) SEKENDAR ALI MIRDHA *v.* SADARUDDIN BHUNIYA. **40 C.W.N. 174.**

Compromise decree.

——**S. 11**—*Compromise decree—Compromise between certain parties only—Decree based on—Party to suit not party to compromise—Subsequent suit by*—Res judicata.

Where a suit ultimately ends in a compromise, a party to the suit who is not a party to such compromise is not bound by it, and the decree passed thereon, based as it is on the compromise cannot operate as *res judicata* against him in a subsequent suit. (*Fazl Ali and Varma, JJ.*) MANKI KANAK RATAN *v.* SUNDAR MUNDA. **179 I.C. 834 =11 R.P. 413=5 B.R. 298=1939 P.W.N. 41=20 Pat.L.T. 346=A.I.R. 1939 Pat. 225.**

——**S. 11**—*Compromise decree—If can operate as* res judicata *in later suit.*

It cannot be said that a consent decree can never operate as *res judicata* in a subsequent suit. It is binding upon the parties and would operate as *res judicata* in a subsequent suit unless there are some special reasons for holding that the compromise and decree were void. (*Zia-ul-Hasan and Hamilton, JJ.*) PASHPAT PRATAP SINGH *v.* UDAI BHAN PRATAP SINGH. **14 Luck. 763=183 I.C. 808=1939 O.A. 674=1939 O.L.R. 558=1939 A.W.R. (C.C.) 153=1939 O.W.N. 809 =12 R.O. 62=A.I.R. 1939 Oudh 269.**

——**S. 11**—*Compromise decree—Suit in personal capacity for personal relief by limited owners—Compromise—If* res judicata *as against reversioners.*

Where a suit was brought by two daughters of a Hindu father in their personal capacity and for a personal relief, any compromise of that suit, cannot operate as *res judicata* as against the reversioners. (*Bennet and Verma, JJ.*) HAR NARAIN SINGH *v.* NAND RAM. **181 I.C. 33=11 R.A. 544=1939 R.D. 61=1939 A.W.R. (H.C.) 27 =1939 A.L.J. 199=A.I.R. 1939 All. 197.**

——**S. 11**—*Compromise in prior suit—Agreement to pay rent—Subsequent suit for arrears of rent—Right to payment of rent, if can be denied.*

Where in a previous suit for arrears of rent, a compromise is entered into, by which the tenant agreed to pay the plaintiff a certain annual rent, and it had been acted upon, it is not open to the tenant in a subsequent suit for arrears of rent to plead that the plaintiff is not his landlord to whom the rent is payable. (*Darling, S.M. and Mehta, J.M.*) ALLAHDIA *v.* MANI RAM. **1938 R. D. 917.**

Conflicting decrees.

——**S. 11**—*Conflicting decrees—Prior decision of inferior Court and later decision of superior Court—Latter to prevail.*

When there are two conflicting decisions upon the rights of parties to a litigation, the later decision must prevail particularly when that decision is that of a superior Court. It is the latter decision and not the earlier one of the inferior Court which would operate as *res judicata*. (*Harries and Rachhpal Singh, JJ.*) UBAID-ULLAH KHAN *v.* ABDUL JALIL KHAN. **I.L.R. (1937) All. 628=10 R.A. 142=1937 R.D. 302=170 I.C. 657=1937 A.L.R. 699=1937 A.L.J. 979=1937 A.W.R. 539 =A.I.R. 1937 All. 481.**

——**S. 11**—*Conflicting decrees*—Res judicata.

Where there are two conflicting decrees *inter partes* the later decree must, for purposes of *res judicata*, be taken to prevail. (*Dhavle, J.*) HIRA LAL SINGH *v.* MATIKDHARI SINGH. **176 I.C. 570 =11 R.P. 88=4 B.R. 741=1938 P.W.N. 502=19 Pat.L.T. 456=A.I.R. 1938 Pat. 359.**

Connected appeals, cases or suits.

——**S. 11**—*Connected appeals—Common judgment in two appeals—Appeal against one of the appellate decrees—Other, if would operate as* res judicata.

It cannot be said that in every case where two connected appeals are disposed of by a common judgment and an appeal is preferred against only one of the decrees, the other becomes final and operates as *res judicata*. (*Zia-ul-Hasan and Bennet, JJ.*) BANKEY LAL *v.* NAND LAL. **15 Luck. 126=184 I.C. 771=1939 O.L.R. 657= 1939 A.W.R. (C.C.) 245=1939 O.W.N. 955= A.I.R. 1940 Oudh 45.**

——**S. 11**—*Connected case—Common trial—Dismissal of one suit and decreeing of the other—Appeal against one decree only*—Res judicata.

A suit was instituted by *A* against *B* for recovery of certain amount. Another suit was instituted by *B* against *A*. The two suits were consolidated and tried together as the issues were practically identical. The Court dismissed *A's* suit but decreed that of *B*. *A* appealed against the decree passed in *B's* suit but did not appeal against decree passed in his own suit.

Held, that the unappealed decree did not operate as *res judicata*. The existence of a contradictory decision was not fatal and it was the later decision of the highest Court that would be binding on the parties. (*Bhide, J.*) RAM SARUP *v.* SARNU MAL. **177 I.C. 305=11 R.L. 294=40 P.L.R. 198=A.I.R. 1938 Lah. 114.**

——**S. 11**—*Connected cases—Cross-suits involving same issue—Appeal against decree in one of them alone—Maintainability.*

In cross-suits involving the same issue the party feeling aggrieved by the decision cannot be allowed to appeal against the decree in one of them alone without appealing against the decree in the other. (*Mya Bu and Dunkley, JJ.*) U BA LIN *v.* MA E SEIN. **164 I.C. 743=9 R.R. 136=A. I.R. 1936 Rang. 401.**

——**S. 11**—*Connected suits—Common judgment in two suits tried together—Appeal in one only—Decision in other—If* res judicata.

If two suits involving common issues are disposed of one judgment, and an appeal is filed against the decree in one and not from the decree in the other, the matter decided in the latter suit cannot become *res judicata*. The bar of *res judicata* cannot apply to such a case so as to prevent the Court from re-opening the matter decided in

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the unappealed suit. (*Mukherji and S. K. Ghose, JJ.*) BAHADUR SINGH *v.* JYOTIPUPA DEBI. **40 C.W.N. 1176=64 C.L.J. 431.**

——S. 11—*Connected suits—Restoration after dismissal for default—Appeal in one suit only—Final order in the other suit—If* res judicata.

Where on the restoration of two connected suits dismissed for default, an appeal against the order restoring the suit is filed in one suit only, the principle of *res judicata* bars the appellate authority from setting aside the order of restoration in one suit when the order in the other suit had become final. (*Bomford, S.M. and Mehta, J.M.*) AYUB ALI H. *v.* SHANTI DEVI. **1939 R.D. 60=1939 A.W.R. (B.R.) 141.**

Consent decree or order.

——S. 11—*Consent decree—Compromise giving effect to prohibited transaction—If operates as* res judicata.

The plea of estoppel by *res judicata* may prevail even when the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. If the legality of an act is a point substantially in dispute, it may be a fair subject of compromise in Court like any other disputed matter; and a decree passed on such compromise is valid and binding until it is set aside, and will operate as *res judicata*. (*Broomfield and Wadia, JJ.*) BASANGOUDA *v.* BASALINGAPPA. **164 I.C. 703 (2)=9 R.B. 92=38 Bom.L.R. 593=A.I.R. 1936 Bom. 301.**

——S. 11—*Consent decree—Effect of—If* res judicata *as to all findings or only as to conclusion—Subsequent suit in respect of different subject-matter—If barred.*

A consent decree or order is as effective as a decree or order passed on contest, not only with reference to the conclusions arrived at in the suit in which it is passed, but with regard to every step in the process of reasoning on which the conclusion is founded, *i.e.*, the findings on the essential facts on which the judgment on the ultimate conclusion is founded. In other words the finding which it was necessary to arrive at for the purposes of sustaining the judgment in the particular case will operate as estoppel by judgment. The fact that the subject-matter in the subsequent suit is different from that in the prior suit does not in any way affect the question of *res judicata*. (*D. N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v.* ATEENDRANATH DAS. **63 Cal. 550.**

——S. 11—*Consent decree—If can operate as* res judicata.

It is not essential in order to create *res judicata* that the matter should have been fought to its conclusion or indeed fought out at all. The Court, if the matter is in any way challenged, should be careful to see that the decree, if by consent, is not vitiated by fraud or otherwise. (*Ameer Ali, J.*) PASHUPATINATH SEAL *v.* PRADYUMNAKUMAR MALLIK. **63 Cal. 454.**

——S. 11—*Consent decree*—Res judicata—*Conditions—Defendant in prior suit not denying fundamental assertion of right and consenting to decree without raising issue on point—Plea in subsequent suit denying such right—If barred.*

A consent decree cannot, merely because it is a consent decree, prevent the application of the doctrine of *res judicata*. If, as is very often the case, the parties in consenting to the decree, do not really intend that the decree should be the final decision of their disputes, it would not operate as *res judicata*. Where the plaintiff in the prior suit asserted a right to recover certain taxes from the defendant, but the latter did not deny it and did not put the matter in issue, and consented to a decree being passed against him, the defendant must be taken to have admitted the claim of the plaintiff, and it could not be said that he did not intend the decree to decide that dispute once for all in favour of the plaintiff. The admission of a fact fundamental to the decision arrived at cannot be withdrawn, and the defendant in a subsequent suit cannot be permitted to plead his non-liability to pay the taxes. Such a plea is barred by *res judicata* by reason of the prior decision and by virtue of his pleading in the prior suit. (*King, J.*) VENKATACHALAPATHY IYER *v.* THE CITY CINEMA CO., LTD. **176 I.C. 649=11 R.M. 144=1937 M.W.N. 1281=A.I.R. 1938 Mad. 225.**

——S. 11—Consent order—Appointment of trustee by consent of parties to suit—If bars claim of any claimant in future. *See* C. P. CODE, S. 92 (1) (*a*) AND (*b*). **41 C.W.N. 298.**

Constructive *res judicata*.

——S. 11—Constructive *res judicata*. *See* EXECUTION PROCEEDINGS, *infra*.

——S. 11—*Constructive* res judicata—*Applicability—Consent decree.*

Davis, J.C.—There is no difference within the meaning of S. 11, C. P. Code, between a certain definite and material issue which has been raised, and one which should have been raised. There is no difference in this matter between a consent decree and a decree passed *per invitum*. (*Davis, J.C. and Rupchand, A.J.C.*) ALLAHBUX *v.* NUSSERWANJI & CO. **29 S.L.R. 455=164 I.C. 43=9 R.S. 30=A.I.R. 1936 Sind 99.**

——S. 11—*Constructive* res judicata—*Applicability—Land acquisition proceedings—Person not party—If affected.*

The doctrine of constructive *res judicata* cannot apply to any person who is not a party to the land acquisition proceedings just as it would not apply to a person who is not a party to a civil suit. The Land Acquisition Act cannot go further than the C. P. Code. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) GUL MIR KHAN *v.* HABIBULLA KHAN. **160 I.C. 1010=8 R. Pesh. 148=A.I.R. 1936 Pesh. 29.**

——S. 11—Constructive *res judicata*—Original order of Court allowing mortgagor to be in a portion of the house—Subsequent order to vacate—No constructive *res judicata*. *See* C. P. CODE, O. 40, RR. 1 AND 2 AND S. 11. **(1938) 1 M.L.J. 249.**

See also **1937 M.W.N. 1292** (*supra*).

Co-plaintiffs.

——S. 11—*Co-plaintiffs*—Res judicata *between.*

Where no rights of the plaintiffs *inter se* were decided in a former suit which was compromised, no question of *res judicata* arises by virtue of the compromise in a subsequent suit between them. (*Nanavutty, J.*) MOHAMMAD ABDUL HASEEB *v.* ZIA UDDIN AHMAD. **1937 O.W.N. 423.**

——S. 11—*Co-plaintiffs*—Res judicata *between—Contest between them—If necessary.*

C. P. CODE (1908), S. 11.

An issue may be *Res judicata* between co-plaintiffs as well as co-defendants, and for an issue to be *res judicata* between co-plaintiffs it is not necessary that there must be a real contest between them. When the interests of various plaintiffs are common, and no question of adopting two conflicting positions as between themselves arises, the decision arrived at by the united efforts of all will bind them for ever, especially when the only person concerned in holding the opposite position has had a full right. (*Addison, A.C.J. and Din Mahomed, J.*) RAM BHAJ *v.* AHMAD SAID AKHTAR KHAN. **178 I.C. 302=11 R.L. 440=40 P.L.R. 591=A.I.R. 1938 Lah. 571.**

——**S. 11**—*Co-plaintiffs—Suit by two persons for declaration that certain plots were not* sir *and that they were joint occupancy tenants—Suit decreed—Subsequent suit by one of them against other that he alone is tenant*—Res judicata.

Two persons sued for a declaration that the plots in suit were not *sir* and that they were joint occupancy tenants, and this suit was decreed. Subsequently one of them sued for a declaration against the other that he alone was the tenant.

Held, that the decision in the previous suit did not operate as *res judicata* as the intention of the plaintiffs in that suit was merely to get a declaration that the land was not *sir* but land in which they had acquired occupancy rights. (*Darling, S.M. and Bomford, J.M.*) JOKHU *v.* JOKHAN. **1937 R.D. 256.**

——**S. 11**—*Decision on question of law—Correctness of decision—If material.*

The correctness or otherwise of a judicial decision has no bearing upon the question whether it does or does not operate as *res judicata*. A party taking the plea of *res judicata* has to show that the matter directly and substantially in issue has also been directly and substantially in issue in a previous suit and has been heard and decided. The principle of *res judicata* is not to be ignored merely on the ground that the reasoning whether in law or otherwise of the previous decision can be attacked on a particular point. It is not correct to say that a previous decision on a question of law is not *res judicata* in a subsequent suit. (*Puranik, J.*) SHEORAM *v.* MULCHAND. **I.L.R. 1940 Nag. 181=175 I.C. 693=11 R.N. 7=A.I.R. 1938 Nag. 195.**

——**S. 11**—Decree for possession in favour of Melcharthdar in prior suit—Subsequent suit in ejectment by Jenmi—If barred. *See* MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT, S. 5 (2). **47 L.W. 236.**

——**S. 11**—Decree on ward—*Res judicata. See* C. P. CODE, SCH. II, PARA. 20. **42 P.L.R. 77.**

——**S. 11**—*Decision directly and substantially in issue—Determination of amount due in mortgagee's suit for possession—Subsequent suit for redemption—Prior decision as to amount due, if* res judicata *in later suit.*

Where in a prior suit by the mortgagee for possession of the mortgaged property, it became necessary to decide as to the amount due on the mortgage and the sum due was in fact determined, it would operate as *res judicata* so far the amount due on the mortgage is concerned, in a subsequent suit for redemption of the mortgage. (*Zia-ul-Hasan and Hamilton, JJ.*) DARSHAN LAL *v.* MUNNU SINGH. **188 I.C. 623=1940 O.L.R. 361=1940 A.W.R. (C.C.) 182=1940 O.A. 354=1940 O.W.N. 391=A.I.R. 1940 Oudh 273.**

C. P. CODE (1908), S. 11.

Directly and substantially in issue.

——**S. 11**—*Directly and substantially in issue—Adoption by Hindu widow—Suit by adopted son to recover property alienated by widow—Dismissal—Finding that alienation good for widow's lifetime—Suit by adopted son's transferee after death of widow—If* res judicata*—Plea that cause of action arose before widow's death and therefore suit barred by limitation—Competency—If barred by prior decision—Estoppel.*

A, a Hindu having died without issue, his widow *S*, transferred her husband's property in 1877 to one *B*, a cousin of the husband, *B* agreeing to pay her maintenance as long as she lived. In 1900 *S*. adopted a son, *I* who in 1902 brought a suit to recover possession of the property alienated to *B*. The suit was dismissed finally, the High Court in second appeal holding that *I* had no cause of action then to sue and that *B* was entitled to hold the property as long as *S* lived. *I* subsequently sold the property to his natural father who in turn sold it to the plaintiff. *S* died in 1925 and in 1927, plaintiff sued for possession of the property, impleading the natural father of *I* the adopted son *I* and *B* the alienee from the widow, and others. *B* resisted the suit pleading *res judicata* and limitation and adverse possession on the ground that the cause of action arose on the adoption of *I* in 1900 itself.

Held, (1) that the suit was not barred by *res-judicata* by reason of the decision in the prior suit, there having been no decision which would bar *I* or the plaintiff who derived title through him from claiming possession after the death of the widow; (2) that the plea of limitation and adverse possession on the ground that the cause of action arose in 1900 on the adoption of *I*, was barred by *res judicata* by reason of the decision in the prior suit that the cause of action would arise only after the death of the widow, which point was directly and substantially in issue; (3) that the decision in the prior suit, though wrong in law and subsequently overruled nevertheless operated as *res judicata* and was conclusive between the parties; (4) and that the plea of *B* was further barred by estoppel and by the principle that a man cannot be allowed to approbate and reprobate. (*Broomfield and Tyabji, JJ.*) SHANKAR *v.* PRABHAKARDIXIT. **60 Bom. 1008=165 I.C. 987=9 R.B. 192=38 Bom.L.R. 853=A.I.R. 1936 Bom. 402.**

——**S. 11**—*Directly and substantially in issue—Adverse finding on unnecessary issue*—Res judicata—*Rule as to.*

Though a finding on an issue may not be necessary for disposal of the suit, yet if a party invites the decision of the Court on that issue and the Court also considers it necessary to go into it and gives findings thereon, the decision on that issue will constitute *res judicata* in a subsequent suit, provided that the party against whom there was a finding on that issue, would be in a position to carry the matter in appeal. A landlord instituted a suit against his tenant for ejectment and recovery of possession. The tenant denied the lease and title of the landlord and claimed adverse possession. In a previous litigation between them the Court found in favour of landlord as regards the lease, title and adverse possession

C. P. CODE (1908), S. 11.

but dismissed the suit on the ground that the landlord failed to serve a notice on the tenant to quit. The tenant who was not given costs appealed, but the appeal was dismissed on the ground that he raised false pleas.

Held, that the tenant by his appeal invited the appellate Court to give a decision on the question of title and of the lease and that the finding as regards the title, lease and adverse possession and the order relating to costs were related to each other as cause and effect and hence the findings in the previous suit operated and *res judicata* in the subsequent suit by landlord against the tenant for ejectment and recovery of possession. (*Venkataramana Rao, J.*) KOTAYYA *v.* SUBBAYYA. **168 I.C. 306=1936 M.W.N. 1162=45 L.W. 531 =9 R.M. 561=A.I.R. 1937 Mad. 114.**

———S. 11—*Directly and substantially in issue—Decision of question raised incidentally—If* res judicata.

A question of title raised only incidentally in a previous suit can be re-agitated in a subsequent suit. (*Wort and Fazl Ali, JJ.*) DALIP NARAIN SINGH *v.* DEOKINANDAN PRASAD SINGH. **182 I.C. 329=5 B.R. 813=12 R.P. 11=A.I.R. 1939 Pat. 519.**

———S. 11—*Directly and substantially in issue—Finding on unnecessary issues—If* Res judicata.

Where, although, all the issues framed in a former suit are decided against the plaintiff yet eventually the decision of the suit is based on the decision of one issue only, it cannot be said that the other matters raised in the suit were directly and substantially in issue or were finally decided and the principle of *res judicata* does not apply. 17 A. 174; 1922 P. C. 241 and 1925 Oudh 386, Ref. to. (*Almond, J.C. and Mir Ahmad, A.J.C.*) TULSI DAS SINGH *v.* YUSAF SHAH. **161 I.C. 63= 8 R. Pesh. 155=A.I.R. 1936 Pesh. 61.**

———S. 11—*Directly and substantially in issue—Finding on unnecessary issue*—Res judicata.

A finding on a question in a prior suit which was unnecessary for the purposes of that litigation, and on which the decision in the prior suit was not based cannot operate as *res judicata* in a subsequent litigation. (*Nasim Ali and Henderson, JJ.*) HRISHIKESH LAW *v.* SATISH CHANDRA PAUL. **170 I.C. 634=10 R.C. 160=A.I.R. 1936 Cal. 203.**

———S. 11—*Directly and substantially in issue—Incidental finding on alternative issue by trial Court—Appellate Court holding that issue did not arise at all*—Res judicata.

When the matter was not directly and substantially in issue in the former suit, an incidental finding by the trial Court in that suit cannot operate as *res judicata* in a later suit especially when the appellate Court, *held*, that the question did not arise at all in the former suit. (*Courtney Terrell, C. J. and Dhavle, JJ.*) NOKHE LAL JHA *v.* RAJESHWARI. **3 B.R. 14=1936 P.W.N. 689= 165 I.C. 213=9 R.P. 161=17 Pat.L.T. 677=A. I.R. 1937 Pat. 141.**

———S. 11—*Directly and substantially in issue—Landlord and tenant—Decision of question of title—If* res judicata *in later suit as to nature or amount of payment to be made by tenant—Title merely collateral and incidental.*

A previous judgment on title in a suit between a landlord and his tenant cannot operate as *res judicata* in a subsequent suit on the question as to the nature of or the rate of the amount payable by the tenant, when the question of title in the later suit is collateral and incidental to suit and not directly in issue. (*Wort, J.*) BIKAN MAHURI *v.* MT. BIBI WALIAN. **183 I.C. 763=5 B.R. 983= 12 R.P. 189=20 Pat.L.T. 671=A.I.R. 1939 Pat. 633.**

———S. 11—*Directly and substantially in issue—Landlord and tenant—Kabuliyat accepted as genuine in prior suit—Genuineness not in issue in that suit—Finding as to genuineness—If* res judicata—*Its evidentiary value in subsequent suit.*

In a prior suit by the tenant against the landlord, a kabuliyat, executed by the tenant's predecessor and stating the area of land in the possession of the tenant and rent payable by him, was produced by the landlord and it was accepted by the Court as a genuine document. On finding that the subsequent record of rights showed the tenant in possession of area more than that leased to him, the landlord brought a suit for recovery of additional rent for additional area. To prove that the tenant was in possession of excess area, the landlord produced the kabuliyat and contended that the decision as to genuineness of the document was *res judicata*, but the appellate Court refused to consider it at all as it disbelieved the document.

Held, that the question of genuineness of the document not being in issue in the prior suit, the finding as to its genuineness could not operate as *res judicata* in a subsequent suit. The finding however being evidence of the highest value ought to have been considered in the subsequent suit between the same parties, and in not doing so the appellate Court misdirected itself both on facts and law.

Held also, that the document could be taken as an admission by the tenant regarding the area leased and rent payable. (*M. C. Ghose and Mukerji, JJ.*) ADMINISTRATOR-GENERAL, BENGAL *v.* SACHINDRA KUMAR ROY. **65 C.L.J. 90=171 I. C. 834=10 R.C. 315=A.I.R. 1937 Cal. 237.**

———S. 11—*Directly and substantially in issue—Notice of ejectment by landlord against tenant—Plea of occupancy right by tenant—Decision adverse to tenant—Claim to occupancy of tenant's successors in subsequent proceedings—If barred.*

In answer to a notice of ejectment by the landlord, the predecessor of the appellants' (tenant) pleaded that he was a tenant with a right of occupancy. The Court decided against the tenant upholding the landlord's notice of ejectment. The appellants again claimed the right of occupancy in subsequent proceedings.

Held, that the question having been directly and substantially in issue in the former proceedings and having been decided adversely to the appellant's predecessor, the decision operated as *res judicata* against the appellants in the subsequent proceedings. (*Drake Brockman, S. M. and Knox, J.*) WAJID KHAN *v.* RAGHO INDRA PRATAP SAHI RAO. **1936 R.D. 271.**

———S. 11—*Directly and substantially in issue—Observation by Court on point not in issue—Effect of.*

A mere suggestion by the Court in a judgment passed by it on a point which is not in controversy and in respect of which no issue has been framed

does not operate as *res judicata* as it has no binding effect. (*Niyogi, J.*) SHANKERNATH *v.* BABULAL. I.L.R. 1936 Nag. 138=164 I.C. 931=9 R. N. 44=A.I.R. 1936 Nag. 148.

——S. 11—*Directly and substantially in issue—Person in possession of some lands under agreement to lease encroaching upon other lands of same owner—Decision in Land Acquisition proceedings in respect of latter lands—Finding that he is tenure-holder—If* res judicata *in suit in respect of former lands.*

Where a person is in possession of certain lands belonging to another under an agreement to lease, and has also encroached upon other lands of the same owner and is wrongfully in possession of such other lands a finding in Land Acquisition proceedings with regard to the latter land that the person in possession is a tenure-holder cannot operate as *res judicata* in a suit for ejectment with respect to the former lands of which he is in possession under the agreement to lease. (*Harries, C. J. and Manohar Lall, J.*) SHIVA PRASAD SINGH *v.* MANDIRA KUMARI DEBI. 21 P.L.T. 277 =A.I.R. 1940 Pat. 438.

——S. 11—*Directly and substantially in issue—Point not raised in pleadings—Parties joining issues—Decision, if* res judicata.

Where though a point is not properly raised by the plaint but both parties have without protest chosen to join issue upon that point, the decision on that point would operate as *res judicata* between the parties. (*Stone, C. J. and Puranik, J.*) SITABAI *v.* HARI. I.L.R. 1938 Nag. 496=180 I.C. 922=11 R.N. 406=A I.R. 1938 Nag. 401.

——S. 11—*Directly and substantially in issue—Previous suit under S. 127 of Oudh Rent Act dismissed on ground that plaintiff cannot sue alone—Subsequent suit for arrears of rent treating defendant as statutory tenant*—Res judicata.

Where a previous suit by the plaintiff under S. 127 of the Oudh Rent Act was dismissed on the ground that the plaintiff was not entitled to bring the suit alone, a subsequent suit by him for arrears of rent against the same defendant treating him as a statutory tenant is not barred by *res judicata.* The question which is directly and substantially in issue in the subsequent suit is whether or not the defendant is a statutory tenant of the plaintiff. This question was never directly and substantially in issue in the previous suit, much less was this question heard and finally decided in that suit which was disposed of on a preliminary point. (*Zia-ul-Hasan, J.*) MAHABAL KHAN *v.* MAHOMED AHMAD ALI KHAN. 172 I.C. 647=1938 O.L R. 19=1938 O.A. 31=1938 R.D. 219=10 R.O. 185=1938 A.W.R. (C.C.) 18=1938 O.W.N. 126=A.I.R. 1938 Oudh 54.

——S. 11—*Directly and substantially in issue—Prior suit alleging partition—Dismissal of suit negativing partition—Later suit on basis of joint status—Plea of partition by defendant—If* res judicata—*Plaintiff raising contradictory contentions—If can invoke rule of* res judicata.

In a prior suit by plaintiff against his brother *V*, for possession of a house he alleged that there was a partition in 1910 between him *V* and another brother *S*, at which the house fell to the share of *S*, who later sold it to plaintiff *V*, admitted that *S* was divided from the family in 1910, but that he and plaintiff remained joint and

jointly purchased the house from *S* and that later on at a division between himself and plaintiff the house fell to his (*V s*) share. The suit was dismissed, the Courts finding that plaintiff had not proved his right, the sale deed being in the names of plaintiff and *V*, and that the parties remained joint till 1910. The appellate Court also found that the subsequent partition set up by *V* was false and never did take place. The plaintiff filed another suit in 1926 against *V's* widow for possession of properties on the ground that they had devolved on him by survivorship on *V's* death. The defendant, *V's* widow, pleaded that there was a prior partition 20 years ago between the brothers and that the house fell to the share of *V*.

Held, that the question whether *V* and plaintiff were joint or divided could not be said to have been directly and substantially in issue in the former suit, and that the rule of *res judicata* could not be invoked by the plaintiff whose contentions in the two suits were mutually contradictory. (*King, J.*) LAKSHMI DEVAMMA *v.* ROSAYYA. A.I.R. 1936 Mad. 988.

——S. 11—*Directly and substantially in issue—Rent suit*—Ex parte *decree—If* res judicata *as to relationship of landlord and tenant.*

The relationship of landlord and tenant is the very foundation of a degree in a suit for rent and therefore when such a suit has been decreed the Courts must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. It cannot be relegated to the category of matters only indirectly, collaterally and incidentally decided. This principle is true even if the decree passed is an *ex parte* one. Hence in a subsequent suit between the same parties the question of relationship of landlord and tenant is barred by the principle of *res judicata.* (*James and Rowland, JJ.*) PIRTHI SINGH *v.* RAMSARAN MAHTO. 3 B.R. 67=1936 P.W.N. 621=165 I.C. 623=9 R.P. 201=17 Pat.L.T. 633=A.I.R. 1936 Pat. 556.

——S. 11—*Directly and substantially in issue—Rent suit—No dispute as to relationship or rate of rent—Issue as to whether all the plots covered by the* jamas *are included—Decision on—If* res judicata *in subsequent suit by tenant.*

In a rent suit by a landlord against a tenant, there being no dispute as to the relationship of landlord and tenant, or as to the rate of rent or of the period in arrears, an issue as to whether the landlord has included in the suit all the plots of land covered by the *jamas* in question, is only an incidental or collateral issue. The decision on such an issue in favour of the landlord would not operate as *res judicata* in a later suit by the tenant for a declaration that all the lands constitute but one *jama*, because even if the decision on the issue in the prior case had been the other way, and in favour of the tenant, the Court would be bound to decree the suit as there was no dispute as to relationship or rate of rent or period of arrears. (*R.C. Mitter, J.*) EUSUF MONDAL *v.* GOLAPJAN. 166 I.C. 1001=9 R.C. 645=62 C. L.J. 517=A.I.R. 1936 Cal. 772.

——S. 11—Directly and substantially in issue—Rent suit—Plea of non-fixation of rent and of absence of possession—Decree for arrears—If

C. P. CODE (1908), S. 11.

res judicata as to status of defendant. *See* AGRA TENANCY ACT, S. 132. 1936 R.D. 538 (1).

——S. 11—*Directly and substantially in issue—Rent suit—Plea that holding comprised further area at fixed rent—Finding upholding defendant's plea—Subsequent suit by landlord for same area as before*—Res judicata.

If the matter in issue was directly and substantially in issue between the parties in the former suit and actually formed the basis of the decision in the former suit, the decision in the former suit would operate as *res judicata* in the subsequent suit. In a suit for produce rent for the area contained in two khatians instituted by certain landlords, the tenants defendants raised the plea that their holding included a futher area of 1½ acres of another plot settled with them and that they occupied a holding of 9 bighas at a cash rent of Rs. 42-14-0. The finding was in favour of the defendants and the suit for produce rent was dismissed. The landlords again instituted another suit for recovery of rent of the same two khatian numbers and the defendants again resisted the suit on the ground that their holding included a further area 1½ acres, and that the same had been settled with them at a total rent of Rs. 42-14-0.

Held, that the decision in the former suit as to the extent and area of the holding was *res judicata* in the later suit. (*Courtney-Terrell, C.J., Fazl Ali, Khaja Mohammad Noor, James and Manohar Lall, JJ.*) JEONANDAN SINGH *v.* JANKI SINGH. 17 Pat. 451=177 I.C. 676=5 B.R. 6=11 R P. 171=1938 P.W.N. 379=19 Pat.L.T. 325=A.I.R. 1938 Pat. 306 (S.B.).

——S. 11—*Directly and substantially in issue—Rent suit—Question of title—Decision—If* res judicata *in subsequent title suit.*

If, in a suit for rent, question of title is raised, not directly, but incidentally, then any decision on the question of title cannot operate as *res judicata* in a subsequent suit between the parties based upon title between them. But if a question of title is raised and has a direct bearing upon the decision of the Court, then a subsequent suit between the parties based on title would be barred by *res judicata* even though the earlier suit be one for rent. (*Rangnekar, J.*) JAMBU TAVANAPPA ADAKE *v.* GOPALAKRISHNAMACHARYA. 175 I.C. 866=11 R.B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.

——S. 11—*Directly and substantially in issue—Suit for rent of land in estate—Plea of rent-free tenure—Finding of rent-free holding—Subsequent suit by purchaser of estate more than 12 years later for rent*—Res judicata—*Adverse possession—Acquisition of rent-free title.*

In 1903, when the Court of Wards was in charge of an estate, a suit was filed to recover rent from the occupant of the land who pleaded that the land had been granted rent-free. The plea was upheld and there was a specific finding that the land was rent-free. In 1932, the person who purchased the estate in Court auction sued the then occupant, a descendant of the prior occupant, for rent.

Held, (1) that the decision in the prior suit operated as *res judicata* on the question of liability to pay rent; (2) that apart from *res judicata*, the judgment was the starting point for adverse possession in favour of the occupant of the land, and he must therefore be deemed to have held the land rent-free for the requisite period to establish his rent-free tenure by adverse possession. (*Wadsworth J.*) ADILAKSHMI DEVAMMA GARU *v.* APPA RAO GARU. 182 I.C. 944=12 R.M. 189=1938 M.W.N. 1134=48 L.W. 701=A.I.R. 1939 Mad. 94=(1938) 2 M.L.J. 934.

——S. 11—*Directly and substantially in issue—Test—Identity of issues or subject-matter.*

The doctrine of *res judicata* does not depend on the identity of the subject-matter of the dispute, but depends on the identity of issues, and the question to be considered is whether the matter in controversy in the later suit was substantially the matter in controversy in the previous suit. (*D.N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v.* ATTENDRANATH DAS. 63 Cal. 550.

——S. 11—*"Directly and substantially in issue"—Test.*

Before a matter can be said to operate as *res judicata* it is necessary, *inter alia*, to establish that the matter was directly and substantially in issue in the earlier suit, and that it was heard and finally disposed of by the Court in the earlier suit. It is, of course, not necessary that before a matter can be said to be *res judicata*, it should form the subject-matter of a definite issue. If the Court can gather from the materials before it namely, the pleadings, the judgment and the decree, that that matter was directly and substantially in issue and formed the basis of the judgment arrived at in the earlier suit, either expressly or by necessary implication, then the principle of *res judicata* would apply. It is difficult to lay down a hard and fast rule as to what matters can be said to be arising directly and substantially. The Court can only look at the manner in which that particular matter is dealt with by the parties themselves, having regard to the course of the litigation, the conduct of the parties and manner in which the Court itself has dealt with it. Where it is impossible to show for want of proper materials as to whether an issue was raised and heard and finally disposed of, or whether it formed the basis of the decree in the suit or that it was necessary for the Court to decide it, the plea of *res judicata* must fail. (*Rangnekar, J.*) JAMBU TAVANAPPA ADAKE *v.* GOPALAKRISHNAMACHARYA. 175 I.C. 866=11 R B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.

Erroneous decision.

——S. 11—*Erroneous decision—Construction of decree or document—If conclusive in subsequent suit.*

Though the construction of a document may for certain purposes be regarded as involving a question of law, a construction once placed on a document by a competent Court before which the question was directly and substantially in issue is conclusive between the parties, and it is immaterial that the property involved in the subsequent suit is not the same as that which formed the subject-matter of the first suit. This principle of finality of construction is equally applicable to decrees, and the interpretation placed by a Court on a decree is conclusive between the parties in a subsequent litigation, even if that interpretation be erroneous in law. (*Varada-*

C. P. CODE (1908), S. 11.

chariar and Mockett, JJ.) ALAGAPPA CHETTIAR *v.* SOMASUNDARAM CHETTIAR. 1937 M.W.N. 465 (2).

——S. 11—*Erroneous decision—Decision opposed to provisions of statute*—Res judicata.

The doctrine of *res judicata* is only a form of estoppel, and there can be no estoppel against a statute. If a law prohibits the levy of a sum by a landlord from his tenant, a previous judgment entitling him to recover the same cannot stand in the way of the defence of the defendant denying liability. (*Wort, J.*) BIKAN MAHURI *v.* MT. BIBI WALIAN. 183 I.C. 763=5 B.R. 983=12 R.P. 189=20 Pat.L.T. 671=A.I.R. 1939 Pat. 633.

——S. 11—*Erroneous decision—Finding based on mistaken view of law*—Res judicata.

The decision in a former suit between the parties, though based on a mistaken view of the law, nevertheless operates as *res judicata* in a subsequent suit. The fact that the finding was based on a wrong view of the law and that the reasons on which the decision was based were unsound does not affect the conclusiveness or binding nature of the decision as to the rights of the parties. (*Broomfield and Tyabji, JJ.*) SHANKAR *v.* PRABHAKARADIXIT. 60 Bom. 1008=165 I.C. 987=9 R.B. 192=38 Bom.L.R. 853=A.I.R. 1936 Bom. 402.

——S. 11—*Erroneous decision—Point of law*—Res judicata.

An erroneous decision on a point of law is *res judicata* between the parties. (*R. C. Mitter, J.*) RAJMOHAN DAS *v.* SARADA CHARAN CHAUDHURY. 162 I.C. 709=8 R C. 635=40 C.W.N. 627=A I. R. 1936 Cal. 200.

——S. 11—*Erroneous decision on point of law—Suit for rent by landlord against tenant—Plea of non-liability for additional rent on ground of having planted cocoanut garden—Decision holding cocoanut garden not an improvement and making tenant liable for increased rent—Subsequent suit for rent—Plea of non-liability on ground of cocoanut garden being an improvement—Sustainability*—Res judicata.

Where in a suit for rent by a landlord in respect of certain faslis the tenant pleads that he is not liable for any additional rent on the ground that the holding comprises a cocoanut garden and is the subject of an improvement under S. 3 (4) (*f*) of the Madras Estates Land Act, but the Court rejects the plea holding that the cocoanut garden is not an improvement, the decision on that question of law will operate as *res judicata* in a subsequent suit between the same parties for rent in respect of subsequent faslis, notwithstanding that the view of law holding a cocoanut garden to be not an improvement under the Act is subsequently declared to be erroneous in later decisions of the Court. The principle of *res judicata* on a question of law should, however, be confined to matters which actually existed at the time of the former decision, and therefore areas and trees to which it was not applied at the time of the former decision would be governed by the correct principle of law as laid down in later decisions. (*Beasley, C.J. Ramesam and King, JJ.*) NARAYANA AIYANGAR *v.* SUBRAMANIAN CHETTIAR. 45 L. W. 15=168 I.C. 24=I.L.R. 1937 Mad. 364=1936 M.W.N. 1362=9 R.M. 539=A.I.R. 1937 Mad. 254=(1937) 1 M.L.J. 233 (F.B).

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Execution proceedings.

——S. 11—Execution proceedings—Application for execution rejected before notice to judgment-debtor—*Res judicata. See* LIMITATION ACT, ART. 182 (5). 1936 A.L.J. 571=A.I.R. 1936 All. 467.

——S. 11—*Execution proceedings—Application by party to suit under O. 21, R. 58—Dismissal as late and as being not maintainable under O. 21, R. 58—Subsequent application under S. 47—If barred — Constructive* res judicata — *Applicability.*

Where a party instead of applying under S. 47, C. P. Code, applies under O. 21, R. 58, C. P. Code, and such application is dismissed as having been filed late and as being under O. 21, R. 58, C. P. Code, he is not barred by the rule of constructive *res judicata* from afterwards filing proper applications under S. 47, C. P. Code. If suits are filed instead of applications, the suits have to be treated only as applications under S. 47. (*Manohar Lall and S.C. Chatterji, JJ.*) G. B. SOLANO *v.* UMESHWARI KUER. 175 I.C. 120=4 B.R. 529=10 R P. 584=19 Pat. L.T. 157=1938 P.W.N. 239=A.I.R. 1938 Pat. 216.

——S. 11—*Execution proceedings—Application for execution dismissed for default after notice to judgment-debtor—Objection that it was barred by limitation—If can be taken in subsequent application.*

Where on an application made for the execution of a decree, a notice was issued upon the judgment-debtor and there was no appearance on his behalf and no further step was taken by the decree-holder and the application was dismissed for default.

Held, that the fact that the judgment-debtor did not raise any objection that that application was barred by limitation did not preclude him from raising that objection in a subsequent application for execution. (*M. C. Ghose, J.*) SURESWAR PRASAD *v.* MAHARAJ BAHADUR SINHA. 173 I.C. 584=10 R.C. 547=67 C.L.J. 92=41 C.W.N. 1151=A.I.R. 1937 Cal. 581.

——S. 11—*Execution proceedings—Application for execution of rent decree filed impleading heirs of deceased judgment-debtor—Application dismissed against them on ground they had no assets, deceased having conveyed all his properties in trust—Decree realised from another co-sharer judgment-debtor—Suit by him for contribution against trustees and heirs of deceased—If barred.*

An application for execution of a rent decree making the heirs of one of the judgment-debtors parties was dismissed as against them on the ground that they had no assets of the deceased in their hands, the deceased having executed a deed of trust in respect of all his properties during his lifetime. The decree-holder realised thereafter the amount of the decree from another co-sharer judgment-debtor personally. The latter sued the trustees and heirs of the deceased for contribution and the Court held that the deceased had not divested himself of the ownership of the properties by the deed of trust and the trustees were no better than mere managers and the plaintiff was, therefore, entitled to contribution from the assets in the hands of any one of the defendants either as managers or as heirs of the deceased.

Held, that the suit for contribution was not barred by *res judicata* by reason of the order

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passed in the execution proceeding dismissing the application against the heirs of the deceased. (*Mukherjea and Roxburgh, JJ.*) RADHA RANI *v.* BRINDARANI. **43 C.W.N. 940.**

——S. 11—*Execution proceedings—Assignment of decree—Recognition after notice to judgment-debtor—Failure to object—Objection at subsequent stage—Competency—Power of executing Court.*

Where notice of the assignment of the decree is given to the judgment-debtor, but he does not appear and does not contest the assignment and the assignment being proved, the Court substitutes the assignee in execution proceedings, the judgment-debtor is precluded from questioning the validity of the assignment at a later stage; it is not open to the executing Court to question the validity of the assignment or to find that the assignment was a collusive affair. (*D. N. Mitter and S. K. Ghose, JJ.*) SAILENDRA KRISHNA CHOUDHURY *v.* HARENDRA KUMAR ROY. **167 I.C. 430=9 R.C. 686=40 C.W.N. 1393=A. I.R. 1937 Cal. 4.**

——S. 11—*Execution proceedings—Certain objection to execution not raised in first application—Such objection raised in appeal from order dismissing such application but not decided—Second application raising such objection—If barred by* res judicata.

Where the judgment-debtor did not raise a certain objection in his application under S. 47, C. P. Code, objecting to the execution of the order against him but raised it in a second application filed by him and also in the grounds of appeal filed by him against the order dismissing the first application but the appellate Court did not go into that objection on the ground that it was pending in the lower Court.

Held, that the second application raising the objection was maintainable and was not barred by the principle of *res judicata*. (*Henderson and Sen, JJ.*) K. G. M. FAROQUI *v.* HABIBUR RAHAMAN CHOWDHURY. **44 C.W.N. 749.**

——S. 11—*Execution proceedings—Constructive* res judicata.

In an execution proceeding the decree-holder cannot adopt a line of attack which was either not taken up during the earlier execution proceedings, or which, if taken, was given up. Where, therefore, the decree-holder admitted in an earlier proceeding that ancestral property was not liable to attachment and sale in execution of his decree, the doctrine of constructive *res judicata* fully applies. (*Abdul Rashid, J.*) LAL MOHAMMAD *v.* KHEM CHAND RADHA KISHAN. **166 I.C. 982=9 R.L. 441=A.I.R. 1936 Lah. 167.**

——S. 11—*Execution proceedings—Constructive* res judicata.

The principles of constructive *res judicata* are applicable to execution proceedings. Thus where the plaintiff makes an application for execution of a decree as a trustee on behalf of the insolvent and Official Receiver and the Court decides that he has no *locus standi*, he cannot come forward and apply for execution on the strength of credentials, which he could very well have relied upon while prosecuting the former application. A.I.R. 1935 Lah. 200, applied. (*Agha Haidar, J.*) PANNA LAL *v.* RAM CHAND.

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167 I.C. 354=9 R.L. 485=39 P.L.R. 368=A.I.R. 1936 Lah. 942.

——S. 11—*Execution proceedings—Constructive* res judicata.

Though S. 11, C. P. Code, does not in terms apply to execution proceedings, the general principles underlying the rule of *res judicata* are applicable to them and the applicability of the rule is not limited to matters which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but the principle of constructive *res judicata*, as embodied in Expl. 4 of S. 11 is also applicable to such proceedings. If an objection which might and ought to have been taken in the earlier execution proceedings is not so taken and the matter is heard and decided, the party concerned is debarred from raising it in subsequent proceedings. 15 Lah. 869, referred to. (*Tek Chand, J.*) NANAK CHAND RAMJI DAS *v.* IBRAHIM. **174 I.C. 965=10 R.L. 646=40 P.L.R. 38=A.I.R. 1937 Lah. 772.**

——S. 11—*Execution proceedings—Constructive* res judicata.

Principles of constructive *res judicata* apply in execution proceedings. If a man with eyes open undertakes not to raise any objection of any kind to a certain position on the score of which he has secured a substantial advantage, he should not be allowed to reprobate it in the course of the same proceedings and to re-agitate the matter. (*Din Mohammad, J.*) MUSHARAF HUSSAIN *v.* AGHA MUNAWAR ALI KHAN. **186 I.C. 881=12 R.L. 436=A.I.R. 1940 Lah. 7.**

——S. 11—*Execution proceedings—Constructive* res judicata—*Applicability—Conditions of—Failure to raise plea of payment or to object to correctness of amount for which execution is sought—If bar to plea or objection being raised at later stage.*

Caution has to be exercised in applying the principle of constructive *res judicata* to execution proceedings. It can only apply to cases where the Court could not have acted as it did if the judgment-debtor had successfully raised the points which are sought to be held by this principle against him. A Court, in general, cannot order execution unless it is satisfied (*i*) that the petitioner has a right to execute; (*ii*) that the judgment-debtor is liable to satisfy the decree; (*iii*) that the decree is executable; and (*iv*) that it is not barred by limitation. If therefore an executing Court orders execution to proceed it must be presumed to have held that all these conditions are satisfied. If a judgment-debtor with due notice of the proceedings fails to raise any objection on any of these grounds it must be held by the principle of constructive *res judicata* that his failure to do so has the same legal effect as if it had been raised and decided against him. The mere failure of a judgment-debtor to dispute, at the first opportunity, the correctness of the figure or sum for which the decree is sought to be executed would not bar him by the principle of constructive *res judicata* from raising the point in subsequent proceedings or at some later stage of the same proceedings. Failure to raise a plea of payment at a prior stage will not be a bar to the plea being raised at a later stage. (*Beasley, C.J. and Horwill, J.*) BAPANNA *v.* VEN-

C. P. CODE (1908), S. 11.

GAYYA. 1937 M.W.N. 529=171 I.C. 581=10 R. M. 369=45 L.W. 291=A.I.R. 1937 Mad. 511=(1937) 1 M.L.J. 296.

——S. 11—*Execution proceedings—Constructive* res judicata—*Applicability—Omission to raise objection and order in previous execution making properties liable in execution—If binding in subsequent execution.*

Where a judgment-debtor has failed to raise all his objections, they will be deemed to have been impliedly decided against him, and he is therefore precluded from raising the same objections in a later execution of the same decree. To this extent the doctrine of constructive *res judicata* is applicable to execution proceedings. An order in a previous execution that the decree-holder is entitled to proceed against certain property must be held binding on the parties in subsequent execution proceedings, and it is not open to the judgment-debtor to raise in a subsequent execution the contention that execution against that property cannot proceed. (*Harries, C.J. and Rowland, J.*) BULA BIBI *v.* PARMANANDA DAS. 5 C.L.T. 39.

——S. 11—*Execution proceedings—Constructive* res judicata—*Application of.*

The doctrine of constructive *res judicata* is applicable to execution proceedings to this extent that where a judgment-debtor fails to raise all his objections to the application in execution made by the decree-holder which he might and ought to have raised and the application is ordered to proceed, all such objections will be deemed to have been impliedly decided against him and he will be precluded from raising the same objections in a later execution of the same decree. (*Harries, C.J. and Rowland, J.*) DULA BIBI *v.* PARMANANDA DAS. 188 I.C. 672=6 B.R. 711=A.I.R. 1940 Pat. 251.

——S. 11—*Execution proceedings—Constructive* res judicata—*Basis of principle—Order for substitution in place of decree-holder—No notice served on judgment-debtor—Latter, if can challenge order.*

Per *Mitter, J.*—The principle of constructive *res judicata* has been applied to execution proceedings, but the basis on which the principle rests is this, that if a judgment-debtor had an opportunity to prefer a certain objection, he would not be entitled at a later stage of the same execution proceedings or at a later execution proceeding in respect of the same decree, to prefer it if the order that had already been passed be inconsistent with the validity of his objection. If therefore, an order for substitution of a certain person in the place of the decree-holder is passed without notice to the judgment-debtor and in his absence, it is open to the latter to challenge that order, as he had no opportunity of presenting his objections before the order was made. (*Mitter and Khundkar, JJ.*) ANIL KUMAR *v.* JUGAL KISHORE. 43 C.W.N. 374.

——S. 11—*Execution proceedings—Constructive* res judicata—*Execution application not in accordance with law—Judgment-debtor ignorant of defect and not raising objection—Objection subsequently on discovery of defect—If barred.*

A judgment-debtor, who does not object to the validity of an execution application as being not in accordance with law, is not precluded from raising the objection afterwards on discovery of the defect on the principle of constructive *res judicata.* There is no duty cast on the judgment-debtor, nor upon any party to the proceeding to ascertain by an examination of the records, or otherwise, whether the application is in proper form. It is the duty of the Court to see that it is made according to law. The judgment-debtor is entitled to assume that the Court has done its duty. (*Horwill, J.*) APPAJI CHETTI *v.* GOVINDASWAMY REDDI. 174 I.C. 28=10 R M. 661=1937 M.W.N. 355=A.I.R 1937 Mad 760.

——S. 11—*Execution proceedings—Constructive* res judicata—*Objection not taken at earlier stage of same execution application.*

The rule of constructive *res judicata* applies to execution proceedings. The circumstance that the omission to take the objection was not in a previous application for execution but only at an earlier stage of the same execution application makes no difference. (*Skemp, J.*) BISHAN SINGH *v.* JAISHI RAM 188 I.C 207=12 R.L. 513 =42 P.L.R. 189=A.I.R. 1940 Lah. 161

——S. 11—*Execution proceedings—Constructive* res judicata—*Omission to raise plea in bar of execution—When operates as* res judicata *on later occasion in the course of same proceedings—Test—Rule.*

If on an application for execution the decree-holder obtains some relief by way of part satisfaction of the decree, the judgment-debtor should be deemed to have taken, but unsuccessfully, all objections, which, if successful, would have prevented the decree-holder from obtaining satisfaction in part of the decree. Where however, the decree-holder fails to obtain any relief and his application becomes abortive, the judgment-debtor is not debarred from taking any plea which, if successful, would defeat a second application for execution. Where there has been only one application for execution which is still pending, and the judgment-debtor successively objects on various occasions in the course of the same proceedings, an order dismissing the judgment-debtor's objection on one ground and directing execution to proceed cannot be taken to have impliedly decided all such objections as would be fatal to the execution of the decree if they were upheld by the Court. The principle of *res judicata* cannot be extended so far. In the absence of express adjudication, and during the pendency of the same execution proceeding there is nothing to prevent the judgment-debtor from taking any objection which might have been taken on the earlier occasion but was not taken. There is no rule of law which makes it incumbent on the judgment-debtor to raise all possible objections under S. 47, C. P. Code, at a given time. While the Court possesses ample powers to prevent the abuse of its process it must decide all objections under S. 47, C. P. Code, when they are raised if they are not barred by any rule of law. (*Niamatullah and Allsop, JJ.*) ALE RASUL *v.* BALKISHAN. 169 I.C. 997=10 R.A. 92=1937 A.L.J. 482=1937 A.W.R. 409=1937 All. L.R. 613=A.I.R. 1937 All. 446.

——S. 11—*Execution proceedings—Constructive* res judicata—*Order transmitting decree for execution—Notice of application for transmission not personally served—Absence of declaration of*

C. P. CODE (1908), S. 11.

due service—Effect—Plea by judgment-debtor in transferee Court of discharge and limitation—If barred by res judicata—*C. P. Code, O. 5, R. 19.*

An order passed by the Court which passed a decree transmitting it for execution to another Court would operate as *res judicata* if it is passed after due service of notice on the judgment-debtor, so as to preclude the judgment-debtor from raising in the transferee Court pleas of limitation or discharge, etc., which ought to be raised in the transferring Court. In a case where the notice of the application for transmission is not personally served on the judgment-debtor the Court has to make declaration, as required by O. 5, R. 19, C. P. Code, that the notice has been duly served; the omission to make such a declaration is fatal when it is sought to apply the principle of constructive *res judicata* against the judgment-debtor. In the absence of a proper declaration of due service of notice as required by law, no decision can be implied to have been given by the Court on the pleas raised by the judgment-debtor in the transferee Court. (*Pandrang Rao, J.*) PALANIAPPA CHETTIAR *v.* THAIVANAI ACHI. **165 I.C. 59=9 R.M. 206=1936 M.W.N. 1037=44 L.W. 460=A.I.R. 1936 Mad. 812=71 M.L.J. 317.**

——**S. 11**—*Execution proceedings—Constructive* res judicata—*Plea of limitation.*

The principle of *res judicata* constructively applies to execution proceedings. A judgment-debtor is, therefore, debarred from agitating a question of limitation which he could and should have taken but failed to take in the earlier stages of the proceeding. (*Din Mohammad, J.*) BARKAT RAM *v.* BHAGWAN SINGH. **42 P.L.R. 404=A.I.R. 1940 Lah. 394.**

——**S. 11**—*Execution proceedings—Constructive* res judicata—*Rule as to—Applicability to restitution.*

Where the execution of the decree has been allowed to proceed without any objection by the judgment-debtor which was open to him and which he had opportunity to make in such proceedings, he is not entitled to raise such objection in subsequent execution proceedings as the principle of *res judicata* debars him from doing so. But the above principle has no application to restitution or even to an application for execution of a portion of the decree. (*Jai Lal, J.*) PUNJAB NATIONAL BANK, LTD. *v.* NANHIMAL JANKI DAS. **163 I.C. 97=8 R.L. 1007=38 P.L.R. 723=A.I.R. 1936 Lah. 246.**

——**S. 11**—*Execution proceedings—Co-judgment-debtors—Execution against properties of one—Objection by latter—Order overruling—If* res judicata *against others in subsequent execution.*

An order overruling the objections raised by one judgment-detor whose property is sought to be sold in execution does not operate as *res judicata* so as to preclude the other judgment-debtors from raising a similar objection in a subsequent execution application as against their property. (*Wort, C.J. and Manohar Lall, J.*) BANARSI PRASAD *v.* MAHABIR PRASAD SAHU. **177 I.C. 689=11 R.P. 170=5 B.R. 11=1938 P.W.N. 710=A.I.R. 1939 Pat. 41.**

——**S. 11**—*Execution proceedings—Decision, if a person is a legal representative of judgment-debtor—If* Res judicata.

C. P. CODE (1908), S. 11.

The doctrine of *res judicata* applicable to execution proceedings does not rest on S. 11 of the Code, and distinctions are sometimes made between positive decisions and mere dismissals for default. Where there was no mere dismissal for default but on the contrary the question whether a certain person was not the representative of the judgment-debtor which was directly raised by him, was dealt with by the Court and decided adversely to him, the decision, whether right or wrong operates as *res judicata* on general principles. (*Wort, Ag.C.J. and Dhavle, J.*) KHARTAR SHAH *v.* SHYAM LAL SINGH. **1936 P.W.N. 594=8 R.P. 628=163 I.C. 38=A.I.R. 1936 Pat. 616.**

——**S. 11**—*Execution proceedings—Decision in previous application on unnecessary issue.*

A finding on an issue which was not necessary for the decision of the dispute in a previous application for execution does not operate as *res judicata* between the parties in a subsequent application for execution of the same decree. (*Skemp, J.*) GOBIND RAM *v.* GURBAKHSH SINGH. **172 I.C. 487=10 R.L. 337=39 P.L.R. 189=A.I.R. 1937 Lah. 638.**

——**S. 11**—*Execution proceedings—Decision regarding judgment-debtor's liability to arrest—* Res judicata.

The principles of *res judicata* as laid down in S. 11, C. P. Code, constructively apply to execution proceedings. Where on the judgment-debtor failing to avail himself of an opportunity allowed to show cause why he is not liable to be arrested, an *ex parte* decision adverse to him is given by the executing Court, the matter of the liability of arrest is "heard and finally decided" within the meaning of S. 11, and a subsequent objection by the judgment-debtor is barred. (*Din Mohammad, J.*) BABU RAM *v.* HARI RAM DAULAT RAM. **42 P.L.R. 374.**

——**S. 11**—*Execution proceedings—Decision that house of judgment-debtor is exempt from attachment—Subsequent application to attach that house in hands of legal representative of judgment-debtor—If barred.*

A decision by the Executing Court that a certain house belonging to the judgment-debtor is exempt from attachment under S. 60 (1) proviso Cl. (*c*), C. P. Code, operates as *res judicata* in a subsequent application by the decree-holder for attachment of that house in the hands of the legal representatives of the deceased judgment-debtor. (*Addison and Din Mohammad, JJ.*) GURPARSHAD DEWAT RAM *v.* KISHEN CHAND. **177 I.C. 835=11 R.L. 369=40 P.L.R. 409=A.I.R 1938 Lah. 608.**

——**S. 11**—*Execution proceedings—Decision that property is saleable—Claim as to right of residence, if can be raised in subsequent execution proceedings.*

Where in prior execution proceedings it was decided that a certain property is saleable, it decides by implication that all the judgment-debtor's rights in it are saleable and operates as *res judicata* so far as subsequent execution petitions are concerned. Hence a claim of a right to residence cannot be raised in later execution petitions. (*D.R. Norman*) ALE RASUL ALI KHAN *v.* BAL KISHAN. **1939 A.M.L.J. 61.**

——**S. 11**—*Execution proceedings—Different objection at different stage—If can be raised.*

C. P. CODE (1908), S. 11.

In the course of the same execution proceedings a different objection can be raised at a different stage thereof. (*Din Mohamed, J.*) GANGA RAM TRUST SOCIETY *v.* SUNDAR LAL. **186 I.C. 653=12 R.L. 409=A.I.R. 1940 Lah. 27.**

——S. 11—*Execution proceedings—Dismissal for default—If can operate as* Res judicata.

An order in execution proceedings to operate as *res judicata* must decide some question which has been brought before the Court. An order dismissing an execution for default cannot operate as *res judicata* (*Mir Ahmad, A. J. C.*) GHULAM RAZA *v.* MT. IKBAL SULTAN. **160 I.C. 835=8 R. Pesh. 132=A.I.R. 1936 Pesh. 41.**

——S. 11—*Execution proceedings—Dismissal for default—Omission to raise objection— If* Res judicata *in later application.*

Where no objection is taken, but the application for execution does not fructify being dismissed for default, the judgment-debtor is not debarred by the principle of *res judicata* from raising the objection in a later application. (*Dunkley, J.*) MA TIN *v.* KO BA THET. **1939 Rang.L.R. 152=184 I.C. 74=12 R.R. 121=A.I.R. 1939 Rang. 245.**

——S 11—*Execution proceedings—Dismissal for default or as not pressed—Effect—If* res judicata.

It is settled law that the dismissal of an execution petition for default or on the ground that it is not pressed does not operate as *res judicata* in respect of a fresh application, unless it can be said that there is a decision or adjudication which either directly decides the question on which the parties are at issue or which must be deemed to impliedly decide it on the ground that the order cannot have been made without such an implied decision, the rule of *res judicata* cannot apply and there is no bar in the way of a fresh application being made, if necessary, the very next day with the same prayer. Where the order passed on an execution application is "not pressed. Dismissed with costs"; the only point decided is that the application is to stand dismissed and that the judgment-debtor is to be paid his costs by the decree-holder. The order cannot be construed as meaning that the decree-holder has abandoned his case or has accepted the objection raised by the judgment-debtor so as to debar him from making a fresh application for execution containing the identical prayer. The difference between the dismissal of suits for default and dismissal of execution petition for default must be taken into account. (*Pandrang Row, J.*) LACHIRAM SANTHOKCHAND AMEECHAND *v.* TARACHAND JAYARUPJI. **166 I C. 72=9 R M.332=1936 M. W.N. 840=44 L.W. 565=A I.R. 1937 Mad. 289 =71 M.L J. 490.**

——S. 11—*Execution proceedings—Execution application dismissed as not maintainable in form in which it was brought*—Res judicata.

Where an application for execution is dismissed as being not maintainable in the form in which it is brought and the judgment is confined purely to the procedure which has been adopted and does not consider the liability of judgment-debtor, it is not *res judicata* regarding liability of judgment-debtor. (*McNair. J.*) SUDHAMOYEE BOSE *v.* BHUJENDRA NATH. **172 I.C. 121=10 R. C. 337=A.I.R. 1937 Cal. 226.**

C. P. CODE (1908), S. 11.

——S. 11—*Execution proceedings—Execution application—Judgment-debtor found liable for decretal debt but remedy by suit suggested—Liability of judgment-debtor—If* res judicata *in subsequent suit.*

Where in an execution application, the Court holds that the judgment-debtor is liable for the decretal debt but suggests that the proper remedy of the decree-holder is by way of suit, the liability of the judgment-debtor is *res judicata* in such suit by the decision in the execution proceedings. (*McNair, J.*) SUDHAMOYEE BOSE *v.* BHUJENDRA NATH. **172 I.C. 121=10 R C. 337=A.I.R. 1937 Cal. 226.**

——S. 11—*Execution proceedings—Failure of judgment-debtor to appear and object—When bar to plea at subsequent stage—Notice affixed—Omission to declare service sufficient—Effect.*

A decree-holder applied for execution of a decree. A notice was ordered on judgment-debtor and later on the notice having been refused and therefore affixed, an order for attachment was passed. Subsequently this execution petition was dismissed as a result of a revision petition against an order for rateable distribution. At this time a previous application for execution was already pending and the judgment-debtors contended that the execution of the decree was barred by limitation. It was contended on the part of the decree-holder that the order of attachment coupled with the judgment-debtor's failure to object to the execution of the decree in subsequent execution, operated as *res judicata.*

Held, that as there was no personal service nor was there any declaration by the Court that there was sufficient service, the order of attachment on non-objection in the subsequent petition could not operate as *res judicata.* (*Pandrang Rao and Menon, JJ.*) RAMANADHAN CHETTIAR *v* VEERAPPA CHETTIAR. **173 I.C. 468=10 R.M. 591=A.I.R. 1937 Mad. 84.**

——S. 11—*Execution proceedings—Finding in* —Res judicata—*Sameness of subject matter—If necessary.*

A finding in a previous execution proceeding is not *res judicata* in a subsequent execution proceeding, when the subject-matter of both the proceedings is not the same. Consequently a decision in a previous execution proceeding that the judgment-debtor was not proved to be an agriculturist is not *res judicata* in a subsequent execution proceeding, when the properties attached in both the proceedings are different. (*Dalip Singh, J.*) BALDEV SINGH *v.* SHER SINGH. **185 I.C. 609=12 R.L. 306=41 P.L.R. 524=A.I.R. 1939 Lah. 556.**

——S. 11—*Execution proceedings—Finding of trial Court not questioned before Appellate Court —If can be questioned in execution proceedings.*

A finding of the trial Court which was not questioned before the Appellate Court, is not open to question in the execution proceedings under the decree. (*Sir George Rankin.*) HAR KISHEN DAS *v.* SATGUR PRASAD. **32 S.L.R. 401=1938 A.L.R. 175=40 Bom.L.R. 760=1938 A.L. J. 200=4 B.R. 365=42 C.W.N. 385=10 R.P.C. 219=178 I.C. 412=1938 A W.R. (P.C.) 67=1938 O.L.R. 127=1938 O A. 87=1938 O.W.N. 138=A.I.R. 1938 P.C. 98 (P.C).**

——S. 11—*Execution proceedings—Limitation —Notice issued to judgment-debtor under O. 21,*

C. P. CODE (1908), S. 11.

R. 22—Judgment-debtor failing to appear—Objection by him on ground of limitation at next date of hearing—Maintainability.

On an execution petition filed by the decree-holder, the Court issued a notice to the judgment-debtor under O. 21, R. 22, C. P. Code. The judgment-debtor not appearing on the date fixed for his appearance, a further rule was issued for attaching the property fixing another date. On that date the judgment-debtor appeared and made an objection that the execution was barred by limitation. He was then within time to appeal against the order passed on the date fixed for his appearance and also to file a petition for review.

Held, that the Court was within its jurisdiction to entertain the objection on the ground of limitation and that the rule of constructive *res judicata* did not apply to the facts of the case. (*Costello and M.C. Ghose, JJ.*) BAIDYANATH SIL *v.* BEJOY CHANDRA KUNDU. **156 I.C. 604=8 R. C. 10=39 C.W.N. 583=68 C.L.J. 105=A.I.R. 1935 Cal. 306.**

——**S. 11**—*Execution proceedings—Matter not decided on merits.*

Ordinarily, when once a matter has been decided for any reason whatsoever, it should not be re-opened in the same proceedings, but this is merely a rule of procedure and does not amount to a legal bar. The rule of *res judicata* does not come into operation unless the matter which is subsequently decided by a Court is expressly or impliedly decided on the merits in the previous proceedings. (*Jai Lal, J.*) RAJA BALBHADAR SINGH *v.* SHANKAR DAS. **172 I.C. 426=10 R.L. 318=39 P.L.R. 434=A.I.R. 1937 Lah. 211.**

——**S. 11**—Execution proceedings—Mortgage suit—Final decree for sale not in conformity with preliminary decree—Omission to object to terms of latter or to execution thereof—Sale of property confirmed—Subsequent objection by judgment-debtor — Sustainability. *See* C. P. CODE, O. 34, R 5. **1938 P.W N. 776.**

——**S. 11**—*Execution proceedings—Objection under S.* 60 (1) (c) *dismissed for default—Repetition of the objection in subsequent execution proceedings—If barred.*

In execution of his decree, the decree-holder attached certain houses belonging to the judgment-debtor. The judgment-debtor raised objections on the ground that he was an agriculturist and the houses under S. 60, C. P. Code, were not liable to attachment and sale. He subsequently made a statement that he would pay the decretal amount by a certain date, failing which his objections would stand dismissed with costs. Payment was not made and the objections were accordingly dismissed. Subsequently in the course of the execution proceedings against the same houses he repeated his objections under Ss. 60/47, C. P. Code.

Held, that as in the previous application there was no decision at all of the question whether the houses were exempt under S. 60, C. P. Code, the judgment-debtor was not precluded by the principles of *res judicata* from raising the objections. (*Agha Haidar, J.*) RAMCHAND *v.* CO-OPERATIVE SOCIETY OF KHARAR. **166 I.C. 266=9 R.L. 356=38 P.L.R. 691=A.I.R. 1936 Lah. 930 =A.I.R. 1937 Lah. 265.**

C. P. CODE (1908), S. 11.

——**S. 11**—*Execution proceedings—Objection under O. 21, R. 58 summarily dismissed—Second objection under S. 47—If competent.*

If an objection purporting to be under O. 21, R. 58, C. P. Code, and treated as such by the Court is summarily dismissed without notice to the opposite side on the ground that it appeared to be collusive, a second objection under S. 47, C. P. Code, is certainly competent, as no question of *res judicata* can arise in such circumstances. (*Bhide, J.*) DAULAT RAM *v.* ANANT RAM. **187 I.C. 165=12 R.L. 444=41 P.L.R. 821=A.I.R. 1940 Lah. 67.**

——**S. 11**—*Execution proceedings—Omission to object to executability of decree by applicant in prior application*—Res judicata.

Where no objection was taken to the executability of a decree by the applicant in a prior application for execution by him, that objection cannot be raised in a subsequent application. (*Skemp, J.*) MST. DURGA DEVI *v.* MATHRA DAS. **166 I.C. 929=9 R.L. 434=38 P.L.R. 580=A.I. R. 1937 Lah. 18.**

——**S. 11**—*Execution proceedings—Omission to oppose substitution of assignee of decree—Judgment-debtor, if precluded from questioning assignee's right to execute.*

The judgment-debtor's omission to oppose the substitution of the assignee of a decree in place of the original decree-holder does not preclude the judgment-debtor from questioning the rights of such assignee to proceed to execution of the decree by reason of any bar imposed by law. 60 Cal. 1181, Ref. to. (*Dunkley, J.*) MA TIN *v.* KO BA THET. **1939 Rang.L.R. 152=184 I.C. 74=12 R.R. 121=A.I.R. 1939 Rang. 245.**

——**S. 11**—*Execution proceedings—Omission to raise objection—When* res judicata.

The principle of S. 11 has been applied to execution proceedings, and judgment-debtors are bound to put forward all defences that would effectually prevent execution against them But as long as no steps are taken against a particular judgment-debtor or his property, there is no reason why he should resist execution of the decree. It would unduly stretch the application of the principle of *res judicata* to execution proceedings, if it were applied to the non-appearance of a judgment-debtor when no relief is claimed against him or against his property. (*Horwill, J.*) SATYANARAYANAMURTHI *v.* MAHESAM. **1937 M.W.N. 361.**

——**S. 11**—*Execution proceedings—Omission to raise plea of limitation*—Res judicata.

An order passed in execution on the question of limitation cannot operate as *res judicata* unless the point has been specifically decided or unless it must be inferred as a matter of necessary implication that a decision has been arrived at that the application for execution was within time. Where an application for execution is made and is finally dismissed as infructuous, it cannot be inferred necessarily that the question of limitation has been decided. (*Niamatullah, Ag.C.J. and Allsop, J.*) COLLECTOR OF BENARES *v.* JAI NARAYAN RAI. **173 I.C. 428=10 R.A. 480=1938 A.L.R. 142=1937 A.L.J. 1349=1937 A.W.R. 1222=A.I.R. 1938 All. 89.**

——**S. 11**—*Execution proceedings—Order dismissing objection by judgment-debtor to attach-*

C. P. CODE (1908), S. 11.

ability of land—Continuation of proceedings—Subsequent reversal of order—Res judicata.

Executing Court dismissed the objection of the judgment-debtor and held that the ancestral land in the hands of the son was liable to attachment in execution of decree against deceased father. The proceedings continued and the executing Court began to arrange for the lease of the land. But before it had arranged for the lease, the Punjab Debtors' Protection Act came into force and the executing Court relying on its provisions reversed its decision.

Held, that the order of the executing Court dismissing judgment-debtor's objection was not final and hence it was not precluded from reversing its erroneous order. No question of *res judicata* therefore arose. (*Abdul Rashid, J.*) NAND MAL-DURGA DAS *v.* NAZIR AHMAD. **41 P.L.R. 635=A.I.R. 1939 Lah. 168.**

——**S. 11**—*Execution proceedings—Order for attachment—Subsequent objection by judgment-debtor under S. 18, Punjab Colonization of Government Lands Act*—Res judicata.

Under S. 11, C. P. Code, which also applies to execution proceedings, even a wrong decision on an issue of law operates as *res judicata*, inasmuch as S. 11 makes no distinction between an issue of fact and an issue of law, especially when there is identity of the matter in issue and also of the cause of action. So where a Judge, in execution proceedings, passed an order for attachment and sale of certain crops of the judgment-debtor and subsequently objection to attachment under S. 18, Punjab Colonization of Government Lands Act, is brought by the judgment-debtor, he is barred under S. 11, C. P. Code, from revising the previous order. (*Agha Haidar, J.*) QURBAN HUSSAIN SHAH *v.* FAZAL SHAH. **173 I.C. 218=10 R.L. 419=39 P.L.R. 718=A.I.R. 1937 Lah. 393.**

——**S. 11**—*Execution proceedings—Order for execution in presence of judgment-debtor—Judgment-debtor, if can question validity of decree in subsequent proceeding.*

An order for execution of a decree passed in a previous execution proceeding to which the judgment-debtor was a party operates as *res judicata* in a subsequent execution proceeding, and it is not, therefore, open to the judgment-debtor to question the validity of the decree for the first time in the subsequent proceeding. (*Mukherjea, J*) BISWANATH LAHIRI *v.* THE CHATRA-SERAMPUR CO-OPERATIVE CREDIT SOCIETY, LTD. **41 C.W.N. 887.**

——**S 11**—*Execution proceedings—Order in execution*—Res judicata.

Where a wrong order in execution has become final because an appeal therefrom has been dismissed as time-barred, principles of *res judicata* come into play and that order cannot be set aside in subsequent execution. (*Middleton, J.C. and Mir Ahmad, J.*) AMIR KHAN *v.* KHAIR MOHAMMAD. **178 I.C. 275=11 R. Pesh. 50=A.I.R. 1938 Pesh. 77.**

——**S. 11**—*Execution proceedings—Order in execution confirmed by High Court—If can be questioned as illegal.*

A party to a proceeding before the execution Court cannot be allowed to question an order passed by that Court in those proceedings as not being in accordance with law, after such an order has been affirmed by the High Court. (*Saunders, J.*) DHANOO LAL *v.* SARDAPAT. **162 I.C. 987=8 R.P. 599=1936 P.W.N. 284=A.I.R. 1936 Pat. 305.**

——**S. 11**—*Execution proceedings—Orders in—When not* res judicata.

Where no objection to execution is taken and the application for execution does not fructify but is withdrawn and dismissed, no order for execution having been made the judgment-debtor is not debarred by principles of estoppel or *res judicata* from raising the question of limitation at a later stage. (*Roberts, C.J. and Dunkley, J.*) MAUNG MAUNG *v.* V. V. R. CHETTYAR FIRM. **1940 Rang.L.R. 82=185 I.C. 70=12 R.R. 178=A.I.R. 1939 Rang. 296.**

——**S. 11**—*Execution proceedings—Order under O. 21, R. 48—Subsequent application contesting its validity—If barred.*

Where an order under O. 21, R. 48, C. P. Code, directing attachment of judgment-debtor's salary has been made and no appeal is filed assailing the validity of the order, the order becomes final as against the parties and subsequent application contesting the validity of the order of attachment is barred by the general principles of *res judicata*. (*Mya Bu and Dunkley, JJ.*) U NYUN TIN *v.* SAW EU HOKE. **186 I.C. 252=12 R.R. 255=A.I.R. 1939 Rang. 384.**

——**S. 11**—*Execution proceedings—Plea of adjustment of decree in bar of execution—Rejection on the ground of delay in raising plea—Appeal—Ground of appeal raised but not pressed—Subsequent execution—Plea of adjustment—Bar of* res judicata.

When a plea of adjustment of decree in bar of execution is rejected by the executing Court as having been raised too late, and a ground of appeal regarding the adjustment is raised but not pressed in the appeal, with the result that the order of the executing Court is confirmed by the appellate Court, the judgment-debtor is precludted from raising the same plea in a subsequen-execution, on the principle of *res judicata*. (*Verma and Rowland, JJ.*) SAH RADHA KRISHNA *v.* MT. BECHNI DEBI. **186 I.C. 187=12 R.P. 456=6 B.R. 302=1939 P.W.N. 716=A.I.R. 1940 Pat. 56.**

——**S. 11**—*Execution proceedings—Plea of limitation not raised by judgment debtor—Dismissal of application for default—Subsequent application—Plea of limitation—Competency.*

In a previous proceeding in execution the Court issued a notice under O. 21, R. 22, C. P. Code, fixing the case for hearing on 19—1—1932. The notice was not returned by that date, and the time of return was therefore extended to 26—1—1932. On that date, the application for execution was dismissed for default, the judgment-debtor too not appearing.

Held, that the judgment-debtor was not debarred from raising the objection on another and subsequent occasion that the execution was barred by limitation. (*Guha and Bartley, JJ.*) IBRAHIM MIA DEWAN *v.* JAMIN ALI MORHAL. **40 C.W.N. 510.**

——**S. 11**—*Execution proceedings—Plea of limitation not raised—Plea, if can be raised in subsequent execution proceedings.*

Even if an execution proceeding be time-barred, the judgment-debtor cannot rely upon that plea

in a subsequent execution proceeding if he failed to do so in the first or in any intermediate proceeding. Where the judgment-debtors were notified of the execution proceedings and they did appear in the proceedings, had opportunity to raise any plea which might have been available to them, and did not raise the plea of limitation, they are debarred to raise a plea of limitation in subsequent proceedings. 8 Cal. 51, Foll.; A. I. R. 1934 Pesh. 64 and A. I. R. 1935 Pesh. 119, Dist. (*Middleton, J.C.*) NAND RAM SHAH *v.* KABUL SHAH. **160 I.C. 448=8 R. Pesh. 111=A.I.R. 1936 Pesh. 9.**

——**S. 11**—*Execution proceedings—Prior execution case—Judge dismissing objection on ground of vagueness—Application for review dismissed as incompetent—Decision, if* res judicata.

Where in a prior execution case of the same decree, the Judge dismissed the objection by *A* on the ground that it was vague but did not raise the question whether *A* was authorized to appear for *B* in his personal capacity and when *A* subsequently made an application to have his order reviewed, the application was dismissed on the ground that it was incompetent, *A* having no power to represent *B* personally.

Held, that this decision could not operate as *res judicata* in subsequent execution case. It was only the general principles of *res judicata* that applied in execution proceedings and as the order rejecting an application for review was under O. 47, R. 7 (1), C. P. Code, it was not appealable. Hence the question whether *A* was authorized to appear for *B* in his personal capacity could not be said to have been finally decided. (*Addison and Abdul Rashid, JJ.*) ALLAHABAD BANK, LTD *v.* RATTAN LAL. **169 I.C. 854=10 R.L. 44=39 P. L.R. 202=A.I.R. 1937 Lah. 21.**

——**S. 11**—*Execution proceedings—Question whether decree is declaratory in nature decided against in earlier application*—Res judicata.

The question whether the decree is declaratory in nature and cannot be executed cannot be governed by the principle of *res judicata* as it involves a question of jurisdiction. (*Almond, A.J.C.*) QUTBUDDIN KHAN *v* NAWABZADA SARDAR SADULLAH KHAN. **169 I.C. 942=10 R. Pesh. 12 =A.I.R. 1937 Pesh. 62.**

——**S. 11**—*Execution proceedings—Rateable distribution becoming final*—Res judicata.

Where an order allowing a claim to rateable distribution is not challenged by way of appeal or any other proceeding and it becomes final, the general doctrine of *res judicata* applies and it cannot be attacked in a subsequent suit. (*Agha Haidar, J.*) MOHAN LAL *v.* SHIB CHARAN DAS. **167 I.C. 910=9 R.L. 569=A.I.R. 1936 Lah. 891.**

——**S. 11**—*Execution proceedings*—Res judicata—*Applicability.*

The principle of *res judicata* applies to execution proceedings. Where a particular question is raised in the execution proceedings although not decided, the matter becomes *res judicata.* (*Wort, Ag C.J. and Manohar Lall, J.*) MT. SUMITRA KUER *v.* BHAGWAT NARAIN SINGH. **180 I.C. 736=5 B.R. 482=11 R.P. 530=A.I.R. 1939 Pat. 19.**

——**S. 11**—*Execution proceedings*—Res judicata—*Applicability—Conditions—Order against decree-holder subsequent to sale—If* res judicata *against a purchaser in later proceedings.*

S. 11, C. P. Code, no doubt applies to orders passed in execution proceedings, but such orders would affect only the parties or their privies and not strangers not deriving title from such parties. An order passed against the decree-holder after an auction-sale, to which the auction-purchaser is not a party cannot operate as *res judicata* as against the auction-purchaser in a subsequent proceeding. (*Niyogi, J.*) MADHAO *v.* RAMCHANDRA. **I.L.R. (1939) Nag. 104=11 R.N. 216 =178 I.C. 268=1938 N.L.J. 60=A.I.R. 1938 Nag. 273.**

——**S. 11**—Execution proceedings—Sale proclamation—Judgment-debtor having knowledge and omitting to object to property being included—Objection after sale—Maintainability. *See* C. P. CODE, O. 21, R. 66 (2). **40 C.W.N. 428.**

——**S. 11**—Execution proceedings—Settlement of terms of proclamation—Decision on issues raised by parties—*Res judicata. See* C. P. CODE, S. 47. **50 L.W. 578.**

——**S. 11**—*Execution proceedings—Wrong decision against judgment-debtor on point raised by him—If* res judicata.

Where an objection that the transfer by Rent Court of application for execution to Civil Court was without jurisdiction was agitated and was decided against the judgment-debtors in the earlier execution and an appeal was presented from that decision and failed, it is no longer open to the judgment-debtors to raise it, the principle of *res judicata* being a bar to the contention even though the Court before whom the previous execution was presented may or may not have taken a wrong view of the law. (*Varma and Rowland, JJ.*) INDERJIT NATH SAHI DEO *v.* MAHARAJA PRATAP UDAI NATH SAH DEO. **18 Pat. 378=182 I.C. 821=5 B.R. 830=1939 P.W. N. 641=12 R.P. 74=20 Pat.L.T. 726=A.I.R. 1939 Pat. 230.**

Ex parte decree.

——**S. 11**—*Ex parte* decree—Subsequent suit to declare decree void on ground of want of jurisdiction—If barred—*Res judicata.* **A.I.R. 1937 All 251.**

Findings.

——**S. 11**—*Findings—Findings not necessary but only incidental—Effect.*

In a suit for letters of administration, an order while affirming the claimant's status as the legal son of the deceased and granting him letters of administration, also incidentally contained a finding that the rival claimant was the legal wife and heir of the deceased. But as the claimant was entitled to 14 annas share and rival claimant to only 2 annas share, the former was entitled to the letters.

Held, that the finding regarding claim of rival claimant was merely incidental and unnecessary to arrive at and was therefore not *res judicata.* All that the Court should have done was to express an opinion that the evidence proved the rival claimant to be the legal married wife of the deceased. (*Mosely and Dunkley, JJ.*) FATIMA BIBI *v.* MA TOKE. **177 I.C. 155=11 R.R. 100= A.I.R. 1938 Rang. 275.**

——**S. 11**—*Findings — Judgment reversed in appeal—Finding not disturbed—If* res judicata.

A finding in a judgment that a certain party is governed by Hindu Law and not by custom is

not *res judicata* in a later proceeding, when on appeal by him the judgment is reversed, although the appellate Court does not specifically disturb the finding. (*Din Mohammad, J.*) JETHU MAL-HARI PARSHAD *v.* TELU. 185 I.C. 232=12 R.L. 282 (1)=41 P.L.R. 596=A.I.R. 1939 Lah. 540.

——S. 11—*Findings—Suit remanded on appeal for fresh decision—Findings given by Appellate Court—If* res judicata *in subsequent appeal against fresh decision.*

If a suit is remanded on appeal for a fresh decision, it is clearly open to any party dissatisfied with the fresh decision to challenge all points decided at any stage of the suit. Consequently any finding given by the appellate Court ordering remand is not necessarily *res judicata* in a subsequent appeal against the final decision after remand. (*Mitchell, F.C.*) PAINDA KHAN *v.* MAHOMED AZIM KHAN. 18 Lah.L.T. 24.

Finding on title.

——S. 11—*Finding on title—Decision on ground that defendant has not shown title to resume as against plaintiff—Subsequent suit—Value of prior decision.*

Where in a suit for recovery of possession against the heir of the jagirdar who had resumed it on the ground that the grantee had died without leaving a male heir, the Court while finding that the plaintiff was the owner of the estate and that the defendant had failed to prove that the plaintiff was the sub-jagirdars of the original jagirdars, decided the case on the ground that the defendant had not shown any right to resume as against the plaintiff, and where the defendant subsequently filed a suit in the Revenue Court against the plaintiff for recovery of rent on the ground that he was holding the land as his tenant, it was held that though the previous decision may not operate as *res judicata* yet as the judgment had been admitted in evidence being *inter partes*, it was unnecessary to repeat the reasons given in the prior judgment for holding that the plaintiff was an owner and not sub-jagirdar. (*Sir Shadi Lal.*) GIRWAR PRASAD NARAYAN SINGH *v.* RAMESHWAR LAL BHAGAT. 1938 O.W.N. 242=1938 O.A. 164=1938 A.L.R. 190=19 Pat.L.T. 224=1938 P.W.N. 311=1938 M.W.N. 469=10 R.P.C. 231=4 B.R. 405=173 I.C. 447=1938 R.D. 321=1938 O.L.R. 135=1938 A.W.R. (P.C.) 50.

Former suit.

——S. 11—*Former suit—Causes of action different—Prior suit relating to ⅓ share in property—Later suit relating to remaining ⅔ share—Questions involved not substantially and directly in issue in prior suit*—Res judicata.

A suit relating to a ⅔ share in property covered by a deed of gift is not barred by *res judicata* by reason of a previous litigation relating to ⅓ share retained by the donor, when the cause of action is distinctly different and the questions involved in the suit were not substantially and directly in issue in the previous suit. (*King, C.J. and Thomas, J.*) JANGU SINGH *v.* JOT SINGH. 1936 R.D. 275=1936 O.W.N. 582.

——S. 11—"*Former suit*"—*Final decision in suit pending appeal in another suit—If operates as* res judicata.

The doctrine of *res judicata* so far as it relates to prohibiting the re-trial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. The rule of *res judicata* is not limited to the Court of first instance but it applies equally to the procedure of the first and second appellate Courts and indeed, even to miscellaneous proceedings. Where therefore in a suit for ejectment the tenant sets up the title of a third person to the leased property as against the landlord suing him in ejectment, and pending the second appeal from the decision in ejectment suit, a suit between the landlord and such third person decides that the landlord is entitled to leased property and not the third person, such decision is binding on the tenant even though he is not party to such suit, and the tenant is concluded by the decision on title given in such judgment against the third person whose title he pleads in the ejectment suit. (*Venkataramana Rao, J.*) KRISHNAN NAIR *v.* KAMBI. 172 I.C. 268=10 R.M. 443=1937 M.W.N. 299=A.I.R. 1937 Mad. 544.

——S 11—*Former suit—Two suits between the same parties in different Courts—Decision in one—Revision—Decision in the other becoming final during pendency of revision—If* res judicata *for purposes of revision.*

Judgments coming into existence during the pendency of proceedings by way of appeal or revision are not excluded from the operation of the rule of *res judicata*, if such judgments are allowed to become final. Therefore if a suit is decided between the same parties by a Court establishing the title of one of them to the property in dispute, and such decision has become final, the decision constitutes the question of title *res judicata*, even for the purpose of an appeal or revision from a decree in another suit between the same parties in another Court though the decision relied on as *res judicata* has been given only after the decision appealed against or sought to be revised. (*Varadachariar, J.*) RANGACHARIAR *v.* RANGASWAMI AIYANGAR. 59 Mad. 777=161 I.C. 219 (1)=8 R.M. 803 (2)=1936 M.W.N. 243 (1)=43 L.W. 189=A.I.R. 1936 Mad. 190=70 M.L.J. 223.

Heard and finally decided.

——S. 11—*Heard and finally decided—Abandonment of claim by plaintiff.*

Where the plaintiffs in a suit abandon their claim, there is no trial of issues arising between the parties and consequently there is no decision which can operate as *res judicata*. To prevent the defendants being harassed unnecessarily a second time on the same cause of action, the law however prescribes that the plaintiff shall not sue again on the same cause of action, unless the suit is withdrawn under O. 23, R. 1, C. P. Code, owing to some technical defect, and the permission of the Court is obtained. (*Bhide, J.*) NAND LAL *v.* MT. LAKMI. 187 I.C. 865=12 R.L. 500=A.I.R. 1939 Lah. 414.

——S. 11—*Heard and finally decided—Adverse finding against successful party—When* res judicata.

There is really no ground for holding that an adverse finding against a successful party can never be *res judicata*, though a finding on an issue is not *res judicata* if the decree had been made in spite of the finding and not in conse-

C. P. CODE (1908), S. 11.

quence of it. Even a successful party may be bound by *res judicata*; and a party cannot be permitted to take up two inconsistent positions in Court especially when the one proceeding arises out of the other. The principle of *res judicata* is mutual. A judgment, if binding upon one party, is binding upon both, and not merely as against the person who is defeated in the suit. (*Broomfield and Tyabji, JJ.*) SHANKAR *v.* PRABHAKARDIXIT. **60 Bom. 1008=165 I.C. 987=9 R.B. 192=38 Bom.L.R. 853=A.I.R. 1936 Bom. 402.**

——**S. 11**—*Heard and finally decided—Application for amendment of decree—Dismissal by trial Court on ground of no error—Second appellate Court not deciding the matter, holding that it is concerned with execution—Matter, if* res judicata.

Where the trial Court dismisses an application by the judgment-debtor for amendment of the decree on the ground that there is no error in the judgment or the decree, but the second appellate Court, rightly or wrongly thinking that it is dealing with execution proceedings, disposes of the appeal without deciding the question whether the decree should be amended or not, it cannot be said that it "heard and finally decided" the judgment-debtor's application for amendment of the decree, and the matter is not, therefore, *res judicata*. (*Nanavutty and Zia-ul-Hasan, JJ.*) UMA SHANKAR *v.* MURARI DAS. **13 Luck. 186=167 I.C. 586=9 R.O. 391=1937 O.L.R. 125=1937 O.W.N. 268=A.I.R. 1937 Oudh 246.**

——**S. 11**—Heard and finally decided—Application to set aside *ex parte* decree—Dismissal on ground of want of sufficient cause—Application also wrongly laid—Appeal against decree—Propriety of refusal of adjournment of case—If can be gone into in appeal—Order under O. 9, R. 13—If final and conclusive. *See* C. P. CODE, O. 9, R. 13. **(1937) 2 M.L.J. 666.**

——**S. 11**—*Heard and finally decided—Appeal filed against a decision—Appellate Court deciding suit on a point different from that decided by the lower Court—Refusal to decide any other point—Decision of the trial Court, if* res judicata *in later suit.*

Where a person sued for possession of certain properties as belonging to a Sangat and that he was its representative, and that a document under colour of which the defendant remained in possession was void on account of fraud, undue influence, etc., and where the trial Court while deciding the first point against the plaintiff, decreed the suit on the ground that the deed under which the defendant was in possession was void owing to undue influence, etc., and the appellate Court decided only the later point and refrained from deciding the question as to whether the property belonged to the Sangat or not, a later suit by another representative of the Sangat against the same defendant for possession of the properties on the ground that it belonged to the Sangat is not barred by *res judicata* as the decree of the trial Court merged in that of the appellate Court, and as the latter had disposed of the case on a ground totally different from that of the trial Court, the finding of the trial Court is no bar. (*Zia-ul-Hasan and Yorke, JJ.*) HAR KISHAN DAS *v.* SATGUR PRASAD. **14 Luck. 277=177 I.C. 785=11 R.O. 73=1938 O.L.R. 446=1938 O.A. 746=1938 O.W.N. 962=A.I.R. 1939 Oudh 2.**

C. P. CODE (1908), S. 11.

——**S. 11**—Heard and finally decided—Arbitration—Award—Effect of—No finding on particular point of dispute—If entitles parties to reagitate the same. *See* ARBITRATION—AWARD. **1937 A.W.R. 805=1937 A.L.J. 1141.**

——**S. 11**—*Heard and finally decided—Conflicting decisions in same proceedings at different stages—If permissible.*

Where a question is already decided by a Judge and the same Judge subsequently arrives at a contrary decision on the same question in the same proceeding, the reopening of the question is barred by *res judicata*. (*Rowland, J.*) JAGARNATH LAL *v.* LAL BABU. **164 I.C. 282=9 R.P. 104=17 Pat.L.T. 756=1936 P.W.N. 805=A.I.R. 1936 Pat. 447.**

——**S. 11**—*Heard and finally decided—Connected cases—Appeal in one only—Effect—Suit on mortgage after insolvency of mortgagor—Application by Official Receiver to set aside mortgage—Decree in suit and dismissal of application—Appeal by Official Receiver against dismissal of application alone—If* res judicata—*Provincial Insolvency Act, Ss. 4 and 53—Scope.*

Appellant had a mortgage executed by a person who subsequently became insolvent. The mortgage was executed on 9—12—1927 and the mortgagor was adjudicated insolvent in October, 1930. In June, 1931, the appellant sued on his mortgage in the Subordinate Judge's Court, the amount involved in the suit being Rs. 11,200. In August, 1931, the Official Receiver applied in insolvency before the same Judge under Ss. 4 and 53 of the Provincial Insolvency Act to have the mortgage set aside. The Subordinate Judge, in October, 1934, decreed the appellant's suit and dismissed the application of the Official Receiver. No appeal was preferred by the Official Receiver from the decree in the suit, but an appeal was filed in the District Court against the order dismissing the application under the Provincial Insolvency Act. The District Judge allowed the appeal holding that the mortgage was not good against the general body of creditors and overruled the appellant's plea of *res judicata* based on the absence of appeal against the decree in the suit on the ground that the governing litigation was one on the insolvency side and that the Court executing the mortgage decree was bound to give effect under S. 4 of the Provincial Insolvency Act to the decision in the insolvency inquiry.

Held, (1) that there having been a decree of a competent Court on the mortgage which had not been appealed against and had therefore become final, the District Judge ought to have recognised it and given effect to the plea of *res judicata* and dismissed the appeal of the Official Receiver; (2) that the mortgage having been executed more than two years before the date of the insolvency, S. 53 of the Provincial Insolvency Act did not apply, and the only order that could possibly be passed under the Act to set aside the mortgage must be one under S. 4 of the Act; (3) that it could not be held that the subject-matter of S. 4 was one with which the Insolvency Court alone was concerned, and that the existence of insolvency proceedings did not take away the jurisdiction of the ordinary Civil Court; (4) that the

C. P. CODE (1908), S. 11.

District Judge was not competent to decide an appeal against the mortgage decree as the amount involved was about Rs. 11,200 and an appeal therefrom would only lie to the High Court; and (5) that the subject-matter of the appeal in the Official Receiver's application was already *res judicata*. (*King, J.*) SEVADAPPA GOUNDAR *v.* NARAYANASWAMI AYYAR. **1940 M.W.N. 365=51 L.W. 429=A.I.R. 1940 Mad. 564=(1940) 1 M. L.J. 647.**

——**S. 11**—*Heard and finally decided—Declaratory suit—Question of plaintiff's title raised in appeal but suit dismissed on other ground—Question of title*—Res judicata.

Where in appeal to the High Court in a declaratory suit, the plaintiff's title is challenged but the High Court dismisses the plaintiff's suit entirely not going into those grounds because it accepts another ground that the procedure of the lower Court is entirely wrong, the question of title became subjudice by reason of the appeal and cannot act as *res judicata* in a subsequent suit. (*Dalip Singh and Skemp, JJ.*) KARTAR SINGH *v.* MST. BHAGAN. **11 R.L. 395=178 I.C. 60=40 P.L.R. 662=A.I.R. 1938 Lah. 179.**

——**S. 11**—*Heard and finally decided—Declaratory suit based on title, dismissed on appeal without question of title having been gone into—Question of title—If* res judicata *in subsequent suit.*

Where a suit for a declaration based upon the title of the plaintiff was dismissed on appeal without the question of title having been gone into at all, the question of title is not *res judicata* in a subsequent suit between the parties or their legal representatives, as that question cannot be said to have been heard and finally decided within the meaning of S. 11, C. P. Code, in the former suit. (*Baguley, J.*) MA SEIK *v.* MAUNG SAN PE. **1937 Rang.L.R. 136=173 I.C. 565=10 R.R. 352=A.I.R. 1937 Rang. 421.**

——**S. 11**—*Heard and finally decided—Decision in*—Qabiz ghair quabiz *proceedings—If* res judicata.

The decision in *qabiz ghair qabiz* proceedings cannot operate as *res judicata*, when the parties are not present and no issues are struck. (*Drake Brockman, S. M. and Knox, J.M.*) DUBARI *v.* SHAMDEO MISIR. **1936 R.D. 44.**

——**S. 11**—*Heard and finally decided—Decision not on merits—If* res judicata.

The dismissal of an application under Ss. 5 and 30 of Agriculturists Relief Act on the ground that no evidence in proof of the applicant being an agriculturist was produced and not after a consideration of the parties' evidence on the point, is not a bar under S. 11, C P. Code, to a subsequent similar application. (*Zia-ul-Hasan, J.*) GOPAL DAS *v.* PUTTU LAL. **1939 O.A. 425.**

——**S. 11**—*Heard and finally decided—Decision on preliminary plea—If* res judicata *as to title.*

Whether a particular plea could be allowed to be raised or not is a question in the nature of a preliminary plea; and a decision on such a question is not a decision on the merits which can be regarded as *res judicata*. The dismissal of a suit on the ground that the plaintiff was not entitled to raise the plea on which he founded the suit, without any enquiry into his title, cannot be taken to be a decision that for all time and in all proceedings between the parties it must be taken that the plaintiff had no title. (*Varadachariar and Pandrang Row, JJ.*) ARIYAPUTRA NAICKEN *v.* MUTHU CHETTY. **160 I.C. 753=8 R.M. 713=43 L.W. 116=A I.R 1936 Mad. 165.**

——**S. 11**—*Heard and finally decided—Decision under O. 22, R. 5—If* res judicata.

A decision under O. 22, R. 5 that a certain person is not the legal representative of the deceased party is not *res judicata* because this order is not subject to appeal and the matter decided is therefore not finally decided. A.I.R. 1934 Lah. 465, Rel. on. (*Skemp, J.*) MOHAMMAD KHAN *v.* JAN MOHAMMAD **186 I.C. 145=12 R. L. 367=A.I.R. 1939 Lah. 580.**

——**S. 11**—*Heard and finally decided—Decision under O. 22, R. 5—If* res judicata.

A decision in a summary proceedings under O. 22, R. 5, C. P. Code, that certain persons are entitled to be substituted as personal representatives of a deceased party to a suit is not a final determination of the matter and does not constitute a bar on the ground of *res judicata*. 28 All. 109, Foll.; 24 A.L.J. 546, Diss from. (*Harries and Rachhpal Singh, JJ.*) ANTU RAI *v.* RAM KINKAR RAI. **58 All. 734=163 I.C. 283 =9 R.A. 1=1936 A.L.J. 622=1936 A.W.R. 597=1936 All. L.R. 556=A.I.R. 1936 All. 412.**

——**S. 11**—Heard and finally decided—Decree for cess under Bengal Cess Act—If final on question of defendant's status—*Res judicata* in subsequent suit for ejectment. *See* BENGAL CESS ACT, S. 41 (2). **21 Pat.L.T. 277.**

——**S. 11**—Heard and finally decided—Dismissal of suit for *khas* possession—Declaration of plaintiff's title to land and to get rent assessed in properly framed suit—Assessment of rent otherwise than by suit—If precluded. *See* BENGAL LAND REVENUE SETTLEMENT REGULATION AND REGULATION IX OF 1825. **40 C.W N. 341.**

——**S. 11**—*Heard and finally decided—Final judicial pronouncement on issue—Necessity.*

No matter can be said to operate as *res judicata* unless there is a final judicial pronouncement upon it. (*Rangnekar, J.*) JAMBU TAVANAPPA ADAKE *v.* GOPALAKRISHNAMACHARYA. **175 I.C. 866=11 R B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.**

——**S. 11**—*Heard and finally decided—Findings of lower Court not dealt with by Court of appeal*—Res judicata.

Where a suit is "finally decided" on a particular point by a superior Court, and finding recorded by the Courts below, which has not been dealt with by the Court of appeal would not have the binding effect of *res judicata*. 8 C. 631; 24 C. 616 and 45 C. 442, Rel. on. (*Agha, Haidar, J.*) MIRAN BAKHSH *v.* MAHOMED AKRAM KHAN. **164 I.C. 610=9 R.L. 146=A I.R. 1937 Lah. 167.**

——**S. 11**—*Heard and finally decided—Finding on several issues—Suit disposed of on the basis of finding on one issue—Finding on other issues—If* res judicata.

Merely because the suit fails on one issue and can be dismissed, it cannot be said that the decision of another issue which is raised and decided, is not necessary for the purpose of the decision in the suit. A suit was brought for mesne profits, the right to which depended upon proof of plaintiff's title to certain land. The issue as regards plaintiff's title to the land was raised and decided against him but the suit was dismissed with

regard to mesne profits on concurrent findings of fact relating to accounts and the veracity of witnesses. The plaintiff contended in second appeal that the decision with regard to issue relating to title to land was not necessary.

Held, that merely because the suit failed as to mesne profits, on another issue, the decision on the question of title which was raised and decided, as being necessary for the decision of the suit, could not be re-agitated again merely on the ground that its decision was not necessary for the determination of the suit. (*Davis, J.C. and Mehta, A.J.C.*) KARAMCHAND *v.* VALI MUHAMMAD. **31 S.L.R. 5=170 I.C. 310=10 R.S. 59=A.I.R. 1937 Sind 157.**

——**S. 11**—*Heard and finally decided—Identical transactions—Decree passed in suit—If bars award of earlier date.*

An award in respect of a certain transaction is barred under S. 11, C. P. Code, by a decree passed in a suit in respect of the same transaction, even though the decree is of a subsequent date to the date of the award. (*Tek Chand, J.*) JAWALA SAHAI *v.* HARI RAM BAL MOKAND. **175 I.C. 572=10 R.L. 749=39 P.L.R. 117=A.I.R. 1937 Lah. 649.**

——**S. 11**—*Heard and finally decided—Insolvency proceedings—Court finding that secured creditor has relinquished his security for benefit of creditors—Order not appealed against*—Res judicata.

Where it has been found as a fact by the Court that a secured creditor has relinquished his security for the general benefit of the creditors and the order has not been appealed against, the question whether the creditor has relinquished the security or not is *res judicata* having been finally and conclusively determined and cannot be re-agitated subsequently. (*Roberts, C.J. and Baguley, J.*) BANK OF CHETTINAD, LTD. *v.* KO TIN. **14 Rang. 529=164 I.C. 1061=9 R.R.175=A.I.R. 1936 Rang. 393.**

——**S. 11**—*"Heard and finally decided"—Issue decided by trial Court but not decided by appellate Court*—Res judicata.

Where in a former suit between the same parties an issue was decided by the trial Court but the appellate Court refrained from deciding it, the issue cannot be deemed to have been finally decided and it can be raised in a subsequent suit between the same parties. (*Cornish, J.*) MAHOMMAD ABDUL AZIZ *v.* GULAM JULANI. **176 I.C. 590 =11 R.M. 118=A I.R. 1937 Mad. 709.**

——**S. 11**—*Heard and finally decided—Issue neither raised nor decided—If* res judicata.

A suit was brought by an inam holder for a declaration that the whole village except certain minor inams and communal porambokes was granted to him. The decree declared the right of the inam holder to the entire village excluding minor inams and communal porambokes. Whether tanks or tank beds were communal porambokes was a question that was neither raised nor decided.

Held, that the decree did not make the title to the tank-beds *res judicata*. (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE. **181 I.C. 688=11 R.M. 832=1938 M. W.N. 244=47 L.W. 438=A.I.R. 1938 Mad. 193 =(1938) 2 M.L.J. 434.**

——**S. 11**—*Heard and finally decided—Issue raised but not decided*—Res judicata.

M created an equitable mortgage in favour of *N*. Subsequently *M* mortgaged the same property to *K*. *M* executed another mortgage of the same in favour of *I*. *N* instituted a title suit against *M* impleading *K* and *I* to enforce his rights under the mortgage. Issue was raised in this suit as to the validity of the mortgage. While the suit was pending *I* purchased the right of *N* on the equitable mortgage and got himself substituted as plaintiff and a compromise decree was passed in terms of compromise against *M*, but the suit was dismissed against the other defendants. Subsequent to this *K* executed a conveyance to *R* who brought a suit to enforce his mortgage and to get a declaration that his rights under it were not subject to the equitable mortgage.

Held, that the compromise decree in the previous suit was no bar to the plaintiff's obtaining a declaration that his mortgage was not subject to the equitable mortgage but on the other hand it helped the plaintiff in obtaining such declaration. (*S. K. Ghose and Patterson, JJ.*) EBRAHIM HAZI *v.* OFFICIAL TRUSTEE. **I.L.R. (1938) 1 Cal. 187= 176 I.C. 580=11 R.C. 128=A.I.R. 1937 Cal. 741.**

——**S. 11**—*Heard and finally decided—Judgment set aside in appeal*—Res judicata.

An appeal destroys the finality of the decision of the original Court and the judgment of the original Court is superseded by that of the Court of appeal. Where, therefore, a judgment operating as *res judicata* in a subsequent case is set aside by the appellate Court while the subsequent case is pending in appeal, the matter is not *res judicata* in appeal and the case should be disposed of on the merits. (*Addison and Din Mohammad, JJ.*) JASPAT RAI *v.* KAHAN CHAND. **181 I.C. 389=11 R.L. 821=40 P.L.R. 128=A.I.R. 1938 Lah. 232.**

——**S. 11**—Heard and finally decided—Malabar Kanom—Suit for redemption by holder of melcharth—Decree allowed to lapse—Fresh suit by subsequent melcharth holder—Maintainability. *See* MALABAR LAW—KANOM. **51 L.W. 569.**

——**S. 11**—*Heard and finally decided—Mortgage suit—Person holding prior and subsequent mortgages impleaded as puisne mortgagee—No relief claimed in derogation of priority—Decree for sale without adjudicating on priority—Subsequent suit on prior mortgage—If barred*—Res judicata.

The appellant had a usufructuary mortgage dated 30—11—1910, and had also a simple mortgage dated 29—10—1919 over the same property. The respondents had obtained a simple mortgage over the same property on 12—5—1913 and in 1926 they brought an action on that mortgage impleading the appellant as a puisne mortgage, but no relief was claimed against the appellant in his capacity as a prior mortgagee under the mortgage of 1910. The appellant, however, mentioned in his written statement his prior mortgage of 1910. A decree for sale was passed without any reference to the prior mortgage, and there was no adjudication about his claim as a prior mortgagee. The property was sold in execution and purchased by the respondents. Subsequently the appellant brought a suit on his

C. P. CODE (1908), S. 11.

usufructuary mortgage claiming possession of the property. He claimed that the respondents were liable to pay the amount due to him under the mortgage of 1910. The decree in the former suit was pleaded in bar of the appellant's claim on the ground of *res judicata*.

Held, that the claim was not barred on the principle of *res judicata*, and that in order to sustain the plea of *res judicata* it was necessary for the respondents in their former suit to allege or claim some relief against the appellant as the holder of a prior mortgage and to allege a distinct case in derogation of his priority, and that not having been done, they were not entitled to rely on and invoke the principle of *res judicata*. (*Wort and Varma, JJ.*) SHAIKH TAHIR HUSSAIN *v.* SYED BASIRUL HAQUE. **17 Pat. 180=11 R.P. 209=178 I.C. 33=5 B.R. 46=A.I.R. 1938 Pat. 444.**

——S. 11—*Heard and finally decided*—Obiter dicta.

Where the opinion expressed in a case is really *obiter* for the purposes of that case, that opinion in that case does not operate as *res judicata*. (*Addison and Sale, JJ.*) NARAIN SINGH *v.* WARYAM SINGH. **38 P.L.R. 780=A.I.R. 1936 Lah. 18.**

——S. 11—*Heard and finally decided—Observations made* obiter—*Point arising for decision and actually decided*—Res judicata.

If a point arising in a case has to be decided for the determination of the particular litigation, and is so decided, the observations made *obiter* will not prevent the decision from operating as *res judicata*. The parties are not entitled to reopen the point decided. (*Rowland, J.*) BHUNESHWAR NATH PANDEY *v.* GUDAR NATH PANDEY. **17 Pat. L.T. 356.**

——S. 11—*Heard and finally decided—Order, when final.*

An order is not final until the time of appeal has lapsed or till the appeal has been finally decided. 48 P.R. 1916, Appr. (*Addison and Din Mohammad, JJ.*) JASPAT RAI *v.* KAHAN CHAND. **181 I.C. 389=11 R.L. 821=40 P.L.R. 128=A.I.R. 1938 Lah. 232.**

——S. 11—*Heard and finally decided—Point in issue not raised or decided—If can operate as* res judicata.

In order to operate as *res judicata* there must be an order or decision of a Court on a point in issue. Where no issue on the point has even been raised and the point has not been decided by any Court, the principle of *res judicata* does not apply. (*Zia-ul-Hasan, J.*) SHAHZAD KUNWAR *v.* DEPUTY COMMISSIONER, PARTABGARH. **164 I.C. 466=9 R.O. 72=1936 R.D. 388=1936 O.W.N. 717=1936 O.L.R. 456=A.I.R. 1937 Oudh 43.**

——S. 11—*Heard and finally decided—Prior decision between parties declared not to be* res judicata—*Decision, if* res judicata.

Where a decision between the parties was considered by the Court and declared not to be *res judicata*, the latter decision, even if erroneous in law, operates as *res judicata*. 19 C.W.N. 1280, Foll. (*Tek Chand, J.*) JAWALA SAHAI *v.* HARI RAM BAI. MOKAND. **175 I.C. 572=10 R.L. 749=39 P.L.R. 117=A.I.R. 1937 Lah. 649.**

——S. 11—*Heard and finally decided—Rejection of application for a rule—If bars fresh application.*

C. P. CODE (1908), S. 11.

An application for a rule and its rejection does not make the matter *res judicata* and does not prevent a Court on a subsequent occasion, if the occasion arises, from granting a rule in the interests of justice. (*Wort, J.*) NASIRUDDIN HAIDER *v.* HAKIM MUHAMMAD TAHIR. **161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.**

——S. 11—*Heard and finally decided—Rent suit—Issue as to constitution of holding—Decision on—If* res judicata *in subsequent suit as to actual holding.*

A decision in a rent suit in which the constitution of the holding is expressly put in question and pronounced upon would operate as *res judicata* in a subsequent suit between the parties on the question of the actual holding of the tenants. (*Dhavle, J.*) HIRA LAL SINGH *v.* MATIKDHARI SINGH. **19 Pat.L.T. 456=176 I.C. 570=11 R.P. 88=4 B.R. 741=1938 P.W.N. 502=A.I.R. 1938 Pat. 359.**

——S. 11—*Heard and finally decided—Representative suit disposed of under O. 17, R. 3—If* res judicata.

A decision under O. 17, R. 3, C. P. Code, in a previous suit of a representative character and conducted without any negligence is to be deemed to be a decision on merits and such a decision falls within the scope of S. 11 of C. P. Code. (*Bhide, J.*) NILA *v.* PUNUN. **165 I.C. 808=9 R.L. 273=38 P.L.R. 809=A.I.R. 1936 Lah. 385.**

——S. 11—*Heard and finally decided—Second suit for redemption—Usufructuary mortgage—Prior suit for redemption—Preliminary decree—Final decree dismissing suit for non-payment of commission fee—Second suit—If barred.*

A final decree of 1919 a suit for redemption of a usufructuary mortgage which orders the suit to be dismissed owing to non-payment by the plaintiff of the fee payable to the commissioner appointed to take accounts is not one which either in terms or by implication extinguish the right of redemption; although the preliminary decree does provide that on non-payment of the money fixed within the date fixed the right of redemption shall be lost or that the plaintiff shall be debarred from redemption. The actual extinction of the right to redeem is to be effected only by the final decree which is passed in terms laid down by O. 33, R. 8, C.P. Code (as it was in 1919) —unless a decree had been passed in a prior suit under O. 33, R. 8 (2), as in force in 1919, it cannot be said that the mortgage debt is discharged or that the right of redemption is actually lost or extinguished. A second suit for redemption is therefore not barred by *res judicata* in the absence of such a decree under O. 33, R. 8, C. P. Code. (*Pandrang Row and Abdur Rahman, JJ.*) ADINARAYANA CHETTY *v.* SRIRANGACHARIAR. **1940 M.W.N. 404=51 L.W. 666.**

——S. 11—Heard and finally decided—Suit against Hindu father and sons—Son's exonerated and decree passed against father alone—Effect of—Son's shares—If can be proceeded against in execution. *See* HINDU LAW—DEBTS. **(1940) 1 M.L.J. 363.**

——S. 11—*Heard and finally decided—Suit by unregistered firm for price of goods sold and delivered—Dismissal on ground of firm being unregistered—Second suit on same cause of action after registration—If barred.*

C. P. CODE (1908), S. 11.

For the operation of the principle of *res judicata* it is not enough that the former suit has been heard and determined. The cause of action must be heard and determined. Where therefore a suit was brought by a firm to recover price of goods and was dismissed under S. 69 (2), Partnership Act, on the ground that the firm was unregistered and the second suit was instituted on the same cause of action after the registration of the firm.

Held, that the suit was not barred by *res judicata* as S. 69 (2), Partnership Act, prevented the institution of a suit, and that therefore there was no determination of the subject-matter of the previous suit. (*Pollock, J.*) SONLAL-HANSRAJ *v.* SADASHIV DASARAS KOSHTI. **169 I.C. 818=10 R.N. 24=I.L.R. (1937) Nag. 430=A.I.R. 1937 Nag. 146.**

——**S. 11**—Heard and finally decided—Suit decreed—Reversal on appeal and remand—Subsequent rejection for failure to give valuation and pay deficit Court-fee—Fresh suit—If *res judicata*. *See* C. P. CODE, O. 7, RR. 11 AND 13. **40 C.W.N. 1390.**

——**S. 11**—*Heard and finally decided—Suit dismissed against one of two defendants—Decision not appealed against—Decision, if liable to attack on appeal from decree relating to other matters left undecided.*

A decree-holder instituted a suit under O. 21, R. 63, C. P. Code, against father and son for a declaration that the son had a saleable interest in *A*, *B* and *C* properties and that all the three properties were liable to attachment. The suit was dismissed as against the son in respect of all the properties and against the father in respect of *B* and *C* properties. It was held however that suit as regards *A* could proceed against the father only. No appeal was filed against this decision

Held, that the decision was clearly a final adjudication between the parties relating to these matters and was therefore a "decree" as defined in S. 2, Cl. (2), C. P. Code. An appeal from this decree lay under S. 96 of the Code but no such appeal was filed within the period of limitation prescribed by law and therefore the decree had become final and was not liable to attack on appeal from the decree relating to other matters which had been left undecided.

Held, further, that as the suit was a composite suit, relating to different subject-matters in which different reliefs were claimed against the two defendants, it was therefore competent to the Court to decide the dispute relating to the various properties separately. (*Tek Chand and Dalip Singh, JJ.*) SAIN DASS CHAWLA *v.* UJAGAR SINGH. **I.L.R. (1940) Lah. 171=186 I.C. 646=12 R.L. 438=A.I.R. 1940 Lah. 1.**

——**S. 11 and O. 9, R. 8**—*Heard and finally decided—Suit dismissed refusing plaintiff's advocate's prayer for adjournment—Advocate taking no further part in proceedings*—Res judicata.

If an advocate for a plaintiff merely asks for an adjournment on behalf of his client, and, on an adjournment being refused, takes no further part in the proceedings, the plaintiff cannot be held to have appeared within the meaning of O. 9, C. P. Code, and the dismissal of the suit in such circumstances falls within the purview of O. 9, R. 8, C. P. Code, and does not operate as *res judicata*.

C. P. CODE (1908), S. 11.

(*Panckridge, J.*) BISWA NATH *v.* GOSTO BEHARI. **44 C.W.N. 576.**

——**S. 11**—*Heard and finally decided—Suit for partition of portion of property as co-heir—Appellate Court holding that suit for partial partition did not lie—Subsequent suit for possession of whole property claiming as absolute owner*—Res judicata.

Per *Leach and Spargo, JJ.*—A suit was instituted for partition of a portion of property on the ground that the plaintiff was a co-heir. The suit was decreed but in appeal the Court held that the suit could not be brought for partition of part of the estate only. A subsequent suit was instituted claiming possession of the whole property as an absolute owner.

Held, that the suit was not barred by *res judicata*, as the matter in former suit was not finally decided. (*Dunkley, J.*, on difference between *Leach and Spargo, JJ.*) MA PWA SHIN *v.* U PO SIN. **170 I.C. 946=10 R.R. 117=A.I.R. 1937 Rang. 324.**

——**S. 11**—*Heard and finally decided—Suit for possession on basis of sale deed—Property wrongly described—Dismissal of suit on ground that possession could not be granted without rectification of deed—Subsequent suit for rectification and possession—If barred—O. 2, R. 2.*

In pursuance of an agreement for sale certain property, namely, No. I in a Khewat, a sale deed was executed, which however, owing to a mutual mistake described the property as property No. II in the Khewat. The plaintiff vendee having sued for possession of the property, he was nonsuited on the ground that he could not sue for possession without rectification of the sale. Plaintiff then instituted a suit for rectification of the sale deed and for possession and mesne profits.

Held, (*i*) that the prior suit having been dismissed on the ground of non-maintainability of the same without rectification of the sale deed, and claim for possession not being sustainable at that time, no question was "heard and finally decided" between the parties in the first suit, and the doctrine of *res judicata* did not, therefore, apply; (*ii*) that O. 2, R. 2, C. P. Code, did not also apply, because though both the reliefs to which the plaintiff was entitled arose out of the same transaction, and though it was open to him to claim both in the former suit if he liked, yet they were quite distinct and separate reliefs, which it was not obligatory on the plaintiff to join together in the prior suit, and the second suit was consequently not barred by O. 2, R. 2, C. P. Code. (*Harries and Rachhpal Singh, JJ.*) CHANDRA SARUP *v.* KANHAIYA LAL. **1937 A.L.J. 280=169 I.C. 570=I.L.R. (1937) All. 489=10 R.A. 48=1937 A.L.R. 569=1937 A.W.R. 245=A.I.R. 1937 All. 401.**

——**S. 11**—*Heard and finally decided—Suit for possession and mesne profits—Claim to future mesne profits—Omission to award—Absence of direction for enquiry in execution—Second suit for such mesne profits—Maintainability—S. 47.*

The mere omission in suit for possession of immovable property with mesne profits to award the claim for future mesne profits will not be a bar to the maintainability of a second suit for the same either on the ground of *res judicata* or under S. 47, C.P. Code. Where the decree merely declares the right of the plaintiff to mesne profits

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as from a certain date which is fixed for payment of an amount by him, but no direction is made for an inquiry as to mesne profits, no further proceedings in that suit or in execution could be taken. A second suit for future mesne profits is therefore not barred either on the ground of *res judicata* or on the ground of any supposed bar under S. 47, C. P. Code. (*Varadachariar, J.*) GANGAMMA *v.* MAHABALA BHATTA. **176 I.C. 920 =11 R.M. 191=46 L.W. 676=A.I.R. 1937 Mad. 879.**

——S. 11—*Heard and finally decided—Suit for proprietary possession of holding dismissed by Civil Court—Subsequent suit in Revenue Court to eject tenant for illegal sub-letting—If barred.*

Where a suit by a zemindar claiming to be put in proprietary possession of a certain holding was dismissed by the Civil Court, a subsequent suit by him for the ejectment of the recorded tenant under S. 82 of the Agra Tenancy Act on the ground of illegal sub-letting is barred by *res judicata*, the question of proprietary possession having been settled by the decision of the Civil Court. (*Darling, S.M.*) NANNU PRASAD *v.* RAM CHARDRA SINGH. **1937 R.D. 591.**

——S. 11—Heard and finally decided—Suit under O. 21, R. 63, redundant by reason of withdrawal of attachment—Dismissal of suit on the ground that matter was one under S. 47—If *res judicata*. *See* C. P. CODE, O. 21, R. 63. **A I.R. 1936 Pesh. 41.**

Insolvency proceedings.

——S. 11—*Insolvency proceedings—Applicability to.*

The principles of *res judicata* are not confined to suits and exist independently of the provisions of the C. P. Code. They apply to proceedings under the Insolvency Acts. (*Weston, J.*) AJAI PAL *v.* OFFICIAL RECEIVER. **1937 A.M.L.J. 77.**

——S. 11—*Insolvency proceedings—Finding by Insolvency Court that a certain firm was a branch of insolvent firm*—Res judicata.

The principle of *res judicata* is that when two parties have litigated with regard to any point before a competent Court, no other Court shall allow the matter to be litigated afresh before it. Where, therefore, in a prior proceeding between the Official Assignee and a third person it was found by the Insolvency Court that a certain firm was a branch of the insolvent firm and the finding was necessary for the decision of the question before it, and such finding was upheld by the High Court on appeal, that finding is *res judicata* as between the parties. (*Mya Bu and Baguley, JJ.*) M. R. M. S. CHETTIAR FIRM *v.* OFFICIAL ASSIGNEE, RANGOON. **14 Rang 652=169 I.C. 491 =10 R.R. 5 (2)=A.I.R. 1937 Rang. 214.**

——S. 11—Insolvency proceedings—Official Receiver's objections as to the fraudulent nature of a transfer of a decree not upheld, and final decree passed—Official Receiver, if can later on apply under S. 53 of Provincial Insolvency Act. *See* PROVINCIAL INSOLVENCY ACT, S. 53. **1938 A. W.R. (H.C.) 566=1938 A.L.J. 878**

——S. 11—*Insolvency proceedings—Question of title to property decided by Civil Court—Whether can be raised again before Insolvency Court—Provincial Insolvency Act, S. 4.*

Where a question of title to a certain property was directly and substantially in issue in a previous suit between the parties and had been heard and decided by a Court of competent jurisdiction, it is not open to them to raise the same matter once again on an application under S. 4 of the Provincial Insolvency Act before the Insolvency Court, which has concurrent jurisdiction with ordinary Civil Courts to try questions of title relating to property, alleged to belong to the insolvent. This, of course, is so, not under the provisions of S. 11, C. P. Code, which does not in terms apply as the proceedings before the Insolvency Court are not a "suit" within the meaning of that section, but under the general principles of the rule of *res judicata*. (*Tek Chand, J.*) LAHORI SINGH *v.* OFFICIAL RECEIVER, SIALKOT. **9 R.L. 19=38 P.L.R. 757=163 I.C. 520=A.I.R. 1937 Lah. 4.**

——S. 11—*Insolvency proceedings—Question whether certain land belonging to insolvent was exempt from attachment, decided in connection with application for discharge—Decision, if* res judicata *at later stage.*

Where the question whether a certain land belonging to the insolvent was exempt from attachment and sale was decided by the Insolvency Court in connection with an application for discharge, the decision operates as *res judicata* at a later stage of the insolvency proceedings and the question cannot, therefore, be subsequently reopened in an application under S. 68 of the Provincial Insolvency Act. (*Bhide, J.*) KALYAN SINGH *v.* RAM JAS. **39 P.L.R. 744.**

Jurisdiction.

——S. 11—*Jurisdiction—Decision on a point of jurisdiction*—Res judicata.

A Court, before whom a cause is brought, has always jurisdiction to decide for itself whether it has jurisdiction to try the suit and its decision thereon is as much *res judicata* in a subsequent suit relating to the same subject-matter as on any other point. (*Tek Chand, J.*) JAWALA SAHAI *v.* HARIRAM BAL MOKAND. **175 I C 572=10 R.L. 749=39 P.L.R. 117=A.I.R. 1937 Lah. 649.**

——S. 11—Jurisdiction—Omission to raise plea of want of. *See* S. 11, EXPL. IV, *infra*. **A.I.R. 1937 All. 251.**

——S. 11—*Jurisdiction—Prior suit for share of profits under S. 108 (15) of Oudh Rent Act and also for canal dues—Decision that both claims could not be joined—No question raised as to jurisdiction of Civil Court—Subsequent suit for canal dues—Defendant, if estopped from questioning jurisdiction of Civil Court.*

Where in previous suit the plaintiff had claimed a share of profits under S. 108 (15) of the Oudh Rent Act and also the canal dues which are claimed in the subsequent suit, and all that was decided in it was that both the claims could not be joined in that suit, and no question of jurisdiction was raised by the defendant in that suit, the defendant is not estopped from questioning the jurisdiction of the Civil Court to try the subsequent suit. (*Srivastava, Ag.C.J.*) KUNJ BEHARI LAL *v.* SANT PRASAD. **13 Luck. 190=167 I.C. 274=9 R.O. 369=1937 O.L.R. 96=1937 R. D. 141=1937 O. W.N. 239=A.I.R. 1937 Oudh 322.**

Landlord and tenant.

——S. 11—*Landlord and tenant—Acceptance of decision as to nature of tenancy as regards certain*

C. P. CODE (1908), S. 11.

plots—Appeal regarding other plots—Bar of res judicata.

An accepted decision as regards the nature of the tenancy with reference to certain plots only regarding which there is no appeal, would act as a bar to an appeal against the decision as regards other plots, when the same entries in the Revenue Records have to be construed. (*Darling, S.M. and Mehta, J.M.*) PURAN LAL *v.* BALBHADDAR PRASAD. **1938 R.D. 883.**

——S. 11—Landlord and tenant—Decree against landlord—If *res judicata* against tenant. *See* C. P. CODE, S. 11—PARTIES AND REPRESENTATIVES. **1937 M.W.N. 299=A.I.R. 1937 Mad. 544.**

——S. 11—*Landlord and tenant—Landlord's title not denied in first suit for arrears of rent—Denial in subsequent suit—If open.*

Where in a suit for arrears of rent, the tenant does not object to the title of the landholder, it is not open to him, in a suit for arrears for a later period, to raise the plea that the plaintiff was not a landholder. A plea that should have been taken when the matter in issue first arose could not be taken up again when the first matter was decided on the basis of pleadings that were then put forward. This is the essence of the principle of *res judicata*. (*Bomford, S.M. and Mehta, J.M.*) HABIB AHMAD *v.* BHAGWANT. **1939 R.D. 174=1939 A.W.R. (B.R.) 43.**

——S. 11—*Landlord and tenant—Notice of ejectment against non-statutory tenant—Suit to contest—Decree—Effect of—Subsequent ejectment notice by representative of zamindar—Bar of.*

A zamindar having issued a notice of ejectment on his tenant as a non-occupancy tenant under S. 67 (1) (*b*) of the Oudh Rent Act the latter instituted a suit to contest the notice. The suit was decreed and the notice of ejectment cancelled. Some years later the representative in interest of the zamindar sought to eject the successor-in-interest of the prior tenant.

Held, that the cancellation of the notice of ejectment as a result of the previous suit was binding on the present zamindar who was consequently estopped from seeking to eject his tenant on the same ground. (*Darling, S.M.*) PARMAL BISWAS *v.* RATI PAL SINGH. **1938 R.D. 162=1938 A.W.R. (B.R.) 90.**

——S. 11—Landlord and tenant—Proceeding under S. 26 (*j*), B. T. Act—Decision holding tenant liable for transfer fee on particular transfer fee—Subsequent suit by tenant to declare non-liability for transfer fee and to declare holding mukrari—If barred by *res judicata*. *See* B. T. ACT, S. 26 (*j*). **41 C.W.N. 149.**

——S. 11—*Landlord and tenant—Some only of the interested persons litigating—Decision, if binds all.*

When different people are interested in the decision of an issue, and only some care to come forward to contest, the decision when once given is binding on the others interested, as well, who merely watched the result of the litigation. Such persons cannot come forward again to reagitate the whole matter. (*Mehta, J.M.*) KANDHAIYA LAL *v.* LALTA PRASAD. **1938 A.W.R. (B.R.) 332=1938 R.D. 615.**

——S. 11—Landlord and tenant—Suit for ejectment—Tenant pleading the title of third party—Suit between landlord and the third party—Decision given in favour of landlord—If *res judicata*. *See* 'FORMER SUIT' *supra*. **A.I.R. 1937 Mad. 544.**

——S. 11—Landlord and tenant—Suit for rent—Decision regarding nature of holding—Subsequent suit for rent—Erroneous decision on question of law—Whether operates as *res judicata*. *See* ERRONEOUS DECISION ON POINT OF LAW, *infra*. **(1937) 1 M.L.J. 233 (F.B.).**

——S. 11—*Landlord and tenant—Suit for rent in respect of land alleged to be within plaintiff's patti—Suit dismissed—Subsequent suit for rent or alternatively for assessment of fair rent in respect of same land*—Res judicata.

The suit for rent in respect of land alleged to be within plaintiff's patti was dismissed because the fact that land fell within plaintiff's patti was not proved. The plaintiff brought a second suit and claimed rent, or alternatively an assessment of fair rent, in respect of the same land but now alleging that he had a separate patti and the land was within that patti.

Held, that the second suit was barred by *res judicata*. (*Wort, J.*) JAI NARAIN LAL *v.* KASHI-LAL. **163 I.C. 136=8 R.P. 619=17 Pat.L.T. 715=1936 P.W.N. 487=A.I.R. 1936 Pat. 511.**

Litigating under same title.

——S. 11—*Litigating under same title—Decree against widow and attachment—Suit by donee who was also reversioner—Decision as to legal necessity—Subsequent suit as reversioner to set aside sale—If* res judicata—*Divisible cause of action—Extent of bar.*

A widow of a deceased incurred some debts and the creditor obtained a decree and attached deceased's property. A suit was instituted by reversioner claiming release of the property from attachment or the ground firstly because the debts being without legal necessity were not binding on his reversionary interest and secondly because he had become owner of the property in pursuance of a gift in his favour by the widow. Thus the suit was a composite suit by the plaintiff claiming release in both capacities, one as reversioner and another as donee. The issue as to legal necessity was decided against the plaintiff and the suit was dismissed. The property was sold. A subsequent suit by the plaintiff for declaration that the sale was not binding on his reversionary interest as the debts were without legal necessity was held to be barred by *res judicata*. It was further held that if it was possible to treat the entire cause of action upon which the later suit was founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied on, then the previous decision would stand as a bar to the extent of the matter involved in the earlier suit. (*Stone, C.J. and Puranik, J.*) SITABAI *v.* HARI. **I.L.R. (1938) Nag. 496=180 I.C. 922=11 R.N. 406=A.I.R. 1938 Nag. 401.**

——S. 11—Litigating under the same title—Decree for rent against assignee from lessee—Decree not satisfied—Subsequent suit for rent against original lessee—If barred. *See* LEASE—ASSIGNMENT BY LESSEE. **40 Bom.L.R. 497.**

——S. 11—*Litigating under the same title—Different capacities—What is—Different suits by same person as a decree-holder and as a zamindar—Compromise as a decree-holder—If bars suit as zamindar.*

In the eye of the law a person occupies the same capacity so long as he sues or is sued for

C. P. CODE (1908), S. 11.

for himself and in his own interest. If he sues in one case as a decree-holder and in another as a zamindar that could not make any difference in his capacity which in each case is his individual capacity. The difference is not one of capacity or title as contemplated by S. 11 of the C. P. Code but that of causes of action. That change in capacity or title which alone matters in the eye of the law takes place only when in one case he sues or is sued for himself in his individual capacity and in another as a trustee or a person representing the interest of another. Where a compromise by a decree-holder permitted another to remain in possession of a property, a subsequent suit by the same person as a zamindar claiming recovery of possession of the same property from that other person, cannot succeed, for the compromise puts up a bar of estoppel by agreement. (*Mulla, J.*) RAM NARAIN *v.* RAM NARAIN. **180 I.C. 65=11 R.A. 420=1938 A.W.R. (H.C.) 798=1938 A.L.J. 1157=A.I.R. 1939 All. 110.**

——**S. 11**—*'Litigating under the same title'—Ex-minor—Suit against guardian's legal representative as assignee of bond executed by guardian to Court—Subsequent suit for accounts under S. 37 of the Guardian and Wards Act*—Res judicata.

Plaintiff, a ward who had come of age, obtained from the Court an assignment of the bond executed by her former guardian under S. 34 of the Guardians and Wards Act, filed a suit against the latte 's legal representatives and got a decree. Subsequently she filed another suit against the legal representatives for accounts under S. 37 of the Guardian and Wards Act. Defendants raised the plea of *res judicata*.

Held, that the prior suit was based on a single cause of action under the bond, and the subsequent suit was for accounts under the general statutory right given by S. 37 of the Guardian and Wards Act; the plaintiff was not litigating under the same title, in the first suit the plaintiff suing as assignee of the bond, and in the second the plaintiff suing for herself; and consequently the decision in the first suit cannot operate as *res judicata* in the second suit. (*Barlee and Divatia, JJ.*) KISANDAS *v.* GODAVARIBAI. **I.L.R. (1937) Bom. 636=170 I.C. 647=39 Bom.L.R. 351=10 R.B. 111=A.I.R. 1937 Bom. 334.**

——**S. 11**—*Litigating under same title—First suit setting up purchase from defendant alleging that defendant inherited property from grandfather—Second suit alleging that defendant inherited property from father who obtained it by deed of gift from grandfather.*

It is well settled that the expression "same title" in S. 11, C. P. Code, means same capacity, the test being whether the party litigating is in law same or a different person. Where in the first suit the plaintiff set up his purchase of property from the defendant alleging that the defendant had inherited that property from his grandfather, and in the second suit the plaintiff alleged that the defendant had inherited the property in question from his father who had obtained it under a deed of gift executed in his favour by the defendant's grandfather,

Held, that in both suits the plaintiff occupied the same capacity that of a purchaser from the defendant, and that, therefore, the plaintiff was litigating under the same title in the second suit as that which was set up in the first suit.

Held, further, that the question raised in the second suit was not directly and substantially in issue in the first suit, as in the second suit the matter upon which the plaintiff's claim was founded was the deed of gift executed by the defendant's grandfather in favour of his father, a matter about which there was neither allegation nor traverse in the first suit. (*Khundkar, J.*) FAKIR CHANDRA BISWAS *v.* EKKARI SARKAR. **42 C.W.N. 560.**

——**S. 11**—*Litigating under same title—Former suit by* A *against trustees of temple that certain property attached to temple belonged to him—Suit decreed in favour of* A—*Subsequent suit by worshippers of temple against* A's *heirs—If barred—Plea of collusion in former suit—Onus.*

A suit was brought by *A* against the trustees of a certain temple that certain property attached to the temple belonged to him. The trustees defended the suit on the ground that the title in the property in suit was in the temple. The suit was finally decreed in favour of *A*. Later on, the plaintiffs alleging themselves to be the worshippers of the temple brought a suit against *A's* heirs for a declaration that the property which was the subject-matter of the former suit was the property belonging to the temple. On a contention being raised by *A's* heirs that the former decision operated as *res judicata*, the plaintiffs contended that it was obtained collusively and could not therefore be *res judicata* and also because they were not the successors of the trustees defendants in the former suit,

Held, that the plaintiffs being the worshippers of the temple were persons interested in it and had therefore the *locus standi* to sue to protect the property of the temple from being wrongfully claimed by third persons.

Held also, that though the plaintiffs were not the successors of the defendants in the former suit, the title litigated under in both the suits was the same, as they both claimed the title to the property in the temple. The plaintiffs were therefore litigating under the same title, even though the agency asserting the title in the former suit was different from the one in the subsequent suit. The suit was therefore barred by *res judicata*.

Held, further, that the burden of proving collusion, negligence and want of *bona fides* on the part of the defendants in the former suit lay on the plaintiffs as they asserted that the decision in the former suit was not *res judicata*. (*Tek Chand, J.*) PIARE LAL *v.* SHER GIR. **181 I.C. 267=11 R.L. 797=40 P.L.R. 867=A.I.R. 1938 Lah. 499.**

——**S. 11**—*Litigating under same title—Previous suit against certain persons in personal capacity—Subsequent suit against same persons, as shebaits and managers—Whether barred.*

A decision in a suit for possession and management of a certain estate against certain persons in their personal capacity does not bar a subsequent suit against the same persons as shebaits and managers and in respect of the property of the idol. A.I.R. 1927 P. C. 128, Foll. (*Thom and Iqbal Ahmad, JJ.*) GOPAL DAS *v.* SRI THAKURJI. **A.I.R. 1936 All. 422.**

——**S. 11**—*Litigating under the same title—Prior suit by Hindu father against son—Decree*

C. P. CODE (1908), S. 11.

declaring property to be father's self-acquisition —Subsequent suit by father against son and his attaching creditor—If res judicata.

In a prior suit by a Hindu father against his son there was a decree passed declaring that certain properties were the father's self-aquisitions and that the son had no manner of right or claim over them. A creditor of the son having attached one of the properties involved in the former suit in execution of a decree against the son, the father sued for a declartion against the creditor and the son that the property was his self-acquired property and could not be attached in execution of a decree against the son who had no right therein.

Held, though the creditor was not a party to the prior suit, he must be deemed to claim under the son litigating under the same title, as the son represented all interests in the property in the prior suit, and the bar of *res judicata* would therefore arise so far as the question whether the property was self-acquired was concerned, the issues in both suits being identical.

Held, further, that the rule of law applicable to cases of *jus tertii* might be applied to the case, *viz.*, 'whatever would estop or bar the person whose title is set up must also bar the pleading *jus tertii* whether the estoppel is by record, deed or *in pais*." Since the son was barred, the creditor setting up the latter's title was equally barred and precluded from asserting the son's title by reason of the decree in the prior suit. (*Venkataramana Rao, J.*) VENKATACHARIAR *v.* SOUTH INDIAN BANK. **1937 M.W.N 167=10 R.M. 338 =171 I.C. 369=45 L.W. 495=A I.R. 1937 Mad. 651=(1937) 1 M L.J. 575.**

——**S. 11**—*Litigating under the same title—Prior suit for redemption of mortgage on basis of purchase from nearest reversioners of mortgagor —Finding that vendors were not competent to sell as another person was nearest reversioner—Latter not party to suit—Dismissal of suit—Subsequent suit impleading also heirs of latter nearest reversioner—If one not between same parties—Mortgagees acquiring rights of heirs of nearest reversioner before second suit—If litigating under different title*—Res judicata.

The appellant brought a suit in 1925 for redemption of a mortgage and recovery of possession of the properties from respondents 1 to 13 to whose ancestor they were usufructually mortgaged by the owner, one *S* who died without issue in 1877. *S's* widow who succeeded to his properties died in 1921. In March, 1925, the appellant purchased the properties from respondents 14 to 16, who were alleged to have inherited in the properties as the nearest reversioners of *S* on the death of his widow. It was on the basis of this purchase that he brought the suit against respondents 1 to 13, impleading also his vendors respondents 14 to 17, as *pro forma* defendants. Respondents 1 to 13 pleaded that the respondents 14 to 16 were not the nearest reversioners competent to sell the properties but that one *P*, an agnate relation of *S*, was the nearest reversioner entitled to succeed after the death of *S's* widow, and therefore the sale by respondents 14 to 16 did not confer title on the appellant. This plea was upheld and the suit was dismissed, the dismissal being confirmed in appeal. *P* was not a party to that litigation. An application by the sons of *P*, who had died in the meanwhile, to

C. P. CODE (1908), S. 11.

implead themselves as respondents in the appeal from the decision of the trial Court dismissing the suit, was dismissed. In 1933, appellant brought another suit, impleading also as parties, the sons of *P*, who were respondents 17 to 20. After the decision in the first suit and before the second suit, respondents 1 to 13 obtained a transfer of all such rights as respondents 17 to 20 might have to the properties.

Held, (1) that the suit did not cease to be a suit between the same parties as the previous suit so far as respondents 1 to 13 were concerned and, that notwithstanding the addition of the new parties, respondents 17 to 20, the suit must be regarded as one between the same parties as the prior suit so far as the really substantial reliefs of redemption and possession, which were prayed for only against respondents 1 to 13, were concerned and therefore the rule of *res judicata* applied; (2) that the fact that respondents 1 to 13 claimed to have acquired the rights of respondents 17 to 20 after the prior suit did not make any difference, and respondents 1 to 13, could not, on that ground, be deemed to be litigating now under a different title so as to exclude the operation of the doctrine of *res judicata*, because it was unnecessary for the respondents 1 to 13 to rely on their purchase from respondents 17 to 20 in any manner or to any extent, as they were in possession, and that the decision in the prior suit that the appellant had no title to redeem the properties as against defendants 1 to 13 was conclusive of the same question in the later suit. (*Patanjali Sastri, J.*) LATCHAYYA *v.* VENKATAPATIRAJU. **50 L.W. 809=1940 M.W.N. 197=A.I.R. 1940 Mad. 201=(1939) 2 M.L.J. 836.**

——**S. 11**—*Litigating under same title—Prior suit in personal capacity—Later suit in capacity of mutwali of endowment—If barred.*

A decision in a prior suit against a party in his personal capacity cannot operate as *res judicata* against him in a later suit by him as Mutawalli of a certain endowment. (*Syed Nasim Ali and Henderson, JJ.*) SITANATH SAHA *v.* MANORANJAN ROY. **68 C.L.J. 293=A.I.R. 1939 Cal. 148.**

——**S. 11**—*Litigating under the same title—Will conferring life-estate on widow and reversion on son—Suit against widow on promissory note executed in personal capacity—Decree—Attachment of properties willed—Suit by widow to declare trust properties—Decree declaring properties private and liable to attachment and sale—Sale of properties in execution—Death of widow—Suit by son for possession from purchaser in execution—If barred by* res judicata.

Where a widow taking a life-estate in certain properties under the will of her husband files a suit as a trustee and not as executrix, for a declaration that the properties are trust properties and therefore not liable to be attached in execution of a decree passed against her personally on a promissory note executed by her in her personal capacity, and the suit is dismissed on the ground that the properties are private properties burdened with a trust and therefore liable to attachment and sale, the decision cannot operate as *res judicata* in a subsequent suit by her son who is the remainderman under the will, for possession of the properties after the death of the widow from the purchaser in execution of the decree passed against the widow. The widow

C. P. CODE (1908), S. 11.

cannot be said to have litigated under the same title as the remainderman, the son, nor can be the interest of the latter be said to have been adjudicated upon. Further, the nature or extent of the interests of the beneficiaries not having arisen for consideration in the prior suit, the suit by the son, remainderman, was not barred by *res judicata*. (*Burn and Lakshmana Rao, JJ.*) RADHA KRISHNA CHETTIAR *v.* NARAYANASWAMI AIYAR. **166 I.C. 727=9 R.M. 391=45 L.W. 35=1936 M.W.N. 1154=A.I.R. 1937 Mad. 153=71 M.L.J. 823.**

——**S. 11**—*Litigating under the same title—Suit by plaintiff in a capacity different from that in prior suit—Matter in issue different*— Res judicata.

Where the capacity in which plaintiff sued in the prior suit was different and the matter directly, and substantially in issue in that case was different from that in the subsequent case.

Held, that the previous decision did not operate as *res judicata*. (*Niyogi and Subhedar, A.J. Cs.*) YADGAR HUSAIN *v.* MUHAMMAD IBRAHIM RAZA. **31 N.L.R. (Supp.) 202=163 I C. 179=8 R.N. 299=A.I.R. 1936 Nag 71.**

——**S. 11**—Litigating under the same title—Suit under O. 21, R. 103 by defeated purchaser—Decree—Delivery of possession — Execution under writ—Report of process-server that well, house and trees not actually delivered—Subsequent application for re-issue of writ—Dismissal—Decision that dispossession alleged took place subsequent to delivery under writ—Fresh suit for possession—*Res judicata*. *See* LIMITATION ACT, S. 14. **19 Pat.L.T. 250.**

Might and ought.

——**S. 11**—Might and ought. *See* C. P. CODE, S. 11, EXPL. (IV).

Miscellaneous proceedings.

——**S. 11**—*Miscellaneous proceedings— Berar Patels and Patwaris Law—Proceedings in respect of appointment of patel—Finding not based on full and fair enquiry—Subsequent vacancy—Prior finding, if* res judicata.

Where in respect of the appointment of a Patel, in a previous proceeding, a finding against a system of rotation of the office is given without a full and proper enquiry and in ignorance of the amended law on the subject, it cannot operate as *res judicata*, when on a subsequent vacancy the question of rotation is once again raised. (*Roughton, F. C.*) SAKHARAM DATTAJI *v.* WAMAN RAMACHANDRA. **1938 N.L.J. 171.**

——**S. 11**—*Miscellaneous proceedings—Case involving different plots of land in different villages—Omission to appeal against decision as regards plot in one village—If* res judicata *as to plots in the other also.*

In a case involving different plots of land in different villages the failure to file an appeal as regards one plot in one village, cannot have the effect of making the whole question *res judicata* in respect of the plots involved. Merely because an appellant disregards his claim in regard to one plot in one village, that is no reason why his claim should be decided against him automatically in another village. (*Drake Brockman, S. M. and Knox, J. M.*) NAGESHWAR SHAH *v.* BHULAI. **1936 R.D. 110 (2).**

——**S. 11**—*Miscellaneous proceedings—Correction case under U. P. Land Revenue Act*—Res judicata.

C. P. CODE (1908), S. 11.

A correction case under S. 39 of the U. P. Land Revenue Act cannot operate as *res judicata*. (*Darling S. M. and Bomford, J. M.*) RAM DAYAL *v.* BINDESHWARI PRASAD. **1938 R D. 121=1938 A.W.R. 72 (B.R.).**

——**S 11**—*Miscellaneous proceedings—Correction case under S. 42, U. P. Land Revenue Act*—Res judicata—*Subsequent suit for declaration under S.* 121 *of U. P. Land Revenue Act—Maintainability.*

Where a correction suit filed by a tenant is taken under S. 42 of the U P. Land Revenue Act, the zamindars being made parties to the suit, and an issue is fixed as to who is in possession the land and in which capacity, a decision in such suit holding the plaintiff to be an occupancy tenant and dismissing the zamindars' objections operates as *res judicata*, and bars a suit by the zamindars under S. 121 of the Act to declare the tenant to be a sub-tenant under them. The zamindars have no shadow of right to re-open the prior litigation which they lost. (*Darling, S. M. and Bomford, J. M.*) SASTI HAJJAM *v.* GAURI HAJJAM. **1938 R.D. 132=1938 A.W R. 77 (B.R.).**

——**S. 11**—*Miscellaneous proceedings— Decision of Asst. Settlement Officer prior to the date of introduction of C. P. Code—If* res judicata *in subsequent proceedings.*

Prior to the introduction of the C. P. Code into Oudh, jurisdiction about the rights to land was of the Courts of revenue. Where an Asst. Settlement Officer has decided about a matter, his decision is *res judicata* in any subsequent suit between the representatives of the original parties. (*Hamilton, J.*) JADUNATH SINGH *v.* BISHESHAR SINGH. **178 I.C. 950=1938 O.W.N. 1267=1939 O.A. 2=1938 O.L.R. 527=11 R.O. 127=A.I.R. 1939 Oudh 17.**

——**S. 11**—*Miscellaneous proceedings— Decision of Settlement Officer—Cis-Sutlej and Trans-Sutlej territories.*

In Cis-Sutlej and Trans-Sutlej territories, during the period between 1849 and 1865, Settlement Officer was the only judicial authority competent to decide the question of title relating to agricultural land. So the Settlement Officer's decision of the year 1853 on a question of title operates as *res judicata* and that question cannot be re-agitated in Civil Courts. (*Tek Chand and Dalip Singh, JJ.*) CHANDA SINGH *v.* PRITHI SINGH. **169 I.C. 847=10 R.L. 47=17 Lah. 787=39 P.L.R 141=A.I.R. 1937 Lah. 19.**

——**S. 11**—*Miscellaneous proceedings—Decision under S.* 158, *B. T. Act—If* res judicata *in subsequent regular suit.*

A decision under S. 158 of the Bengal Tenancy Act cannot be said to be a decree so as to operate as *res judicata* in a subsequent regular suit between the parties. (*Dhavle, J.*) HIRA LAL SINGH *v.* MATIKDHARI SINGH. **176 I.C. 570=11 R.P. 88=4 B.R. 741=1938 P.W.N. 502=19 Pat.L.T. 456=A.I.R. 1938 Pat. 359.**

——**S. 11**—*Miscellaneous proceedings—Findings in proceedings under S. 30-A of the Oudh Rent Act—Civil suit to declare order, not affecting plaintiff—If barred by* res judicata.

Where certain findings are arrived at by the Deputy Commissioner for the purpose of making an order in what is practically an executive matter under S. 30-A of the Oudh Rent Act, those findings cannot operate as *res judicata* in a subsequent

C. P. CODE (1908), S. 11.

civil suit brought to obtain a declaration that the order of the Deputy Commissioner had no adverse effect upon the right of the plaintiffs and to declare their title to the land in question. (*Yorke, J.*) SITA RAM *v.* CHHEDA. **14 Luck. 416 =179 I.C. 580=1939 O.L.R. 55=1939 R.D. 54= 1939 O.W.N. 89=11 R.O. 184=1939 O.A. 300= A.I.R. 1939 Oudh 73.**

——S. 11—*Miscellaneous proceedings—Order in correction of record case—If operates as* res judicata.

A brief and a casual order passed in a correction of records case, without taking any evidence and without considering the nature of the plots, cannot operate as *res judicata* in subsequent proceedings. (*Darling, S.M. and Mehta, J.M.*) BINDHACHAL RAI *v.* MOTI RANI. **1938 R.D. 627 and 675=1938 A.W.R. (B.R.) 282 (2)=1938 A.L.J. (Supp) 91.**

——Ss. 11 and 47—*Miscellaneous proceedings —Order of stay under S. 21 of the Debt Conciliation Act—Appeal held incompetent—Fresh application for execution if barred.*

Where an executing Court stayed proceedings under S. 21 of the Debt Conciliation Act and an appeal therefrom was held incompetent, it is open to the decree-holder to apply afresh for execution. The prior order is not one under S. 47, C. P. Code, and it did not in the least affect the rights of parties and such an order cannot possibly be regarded as having the effect of *res judicata.* (*Niyogi, J.*) HARI SADASHEO *v.* WAMAN VITHAL. **1938 N.L.J. 229.**

——S. 11—Miscellaneous proceedings—Order under Bengal Tenancy Act, S. 26—If *res judicata* on question of status of tenant. *See* BENGAL TENANCY ACT, S. 26-I—ORDER UNDER—EXTENT OF FINALITY. **43 C.W.N. 1046.**

——S. 11—*Miscellaneous proceedings—Prior suit under Agra Tenancy Act of* 1901—*Later suit under Tenancy Act of* 1926—*Change in Law—Bar of* res judicata.

Where the previous suit brought to eject a subtenant was under the old Act of 1901 a second suit brought under the new Act, 1926, in which the law has been changed, is not barred by reason of any decision in the prior suit. (*Darling, S.M. and Bomford, J.M.*) MAHESH SINGH *v.* MT. MOOLA. **1938 R.D. 656=1938 A.W.R. (B.R.) 239=1938 A.L.J. (Supp.) 86.**

——S. 11—*Miscellaneous proceedings--Proceeding not susceptible of appeal—Doctrine of* res judicata.

There is no justification for holding that the doctrine of *res judicata* can have no application as a consequence of a decision in proceedings which are in themselves final in the sense that they are conclusive between the parties, because they are not susceptible of appeal. (*Costello and Panckridge, JJ.*) KRISHNA CHANDRA *v.* MANIKLAL. **I.L.R. (1938) 2 Cal. 418=182 I.C. 69=11 R.C. 888=67 C.L.J. 363=42 C.W.N. 793=A.I.R 1939 Cal. 169.**

——S. 11—*Miscellaneous proceedings—Proceeding under O. 9, R. 13 to set aside* ex parte *decree on ground of fraud in service of process—Decision in—If* res judicata *in subsequent suit to set aside decree on same ground.*

A decision in a proceeding under O. 9, R. 13, C. P. Code, to set aside an *ex parte* decree on the ground of fraud in the service of process, operates as *res judicata* in a subsequent suit to set aside the decree on the same ground. (*Tek Chand, J.*) GHULAM MAHOMED *v.* MT. BAKHTAWARAN. **172 I.C. 1007=10 R.L. 386 (2)=39 P. L.R. 506=A.I.R. 1937 Lah. 614.**

——S. 11—*Miscellaneous proceedings—Proceeding under O. 21, R. 100—Finding of fact in—* Res judicata.

A finding of fact arrived at in a proceeding under O. 21, R. 100, C. P. Code, would not be *res judicata* in a subsequent suit. (*Henderson, J.*) BISWESWAR BANERJEE *v.* NABA KUMAR SINGH. **12 R.C. 442=186 I.C. 98=44 C.W.N. 251=70 C. L.J. 111=A.I.R. 1940 Cal. 16.**

——S. 11—Miscellaneous proceedings— Proceeding under O. 22, R. 5—Decision that certain person is legal representative of deceased party—If *res judicata. See* C. P. CODE, O. 22, R. 5. **169 I.C. 798=1937 O.W.N. 782.**

——S. 11—*Miscellaneous proceedings—Suit by Mahanth in Revenue Court for ejectment of lessees—Prior decision in Civil Court—Leases found to be permanent and unregistered and hence invalid—How far binding on Revenue Courts.*

Where in a civil suit certain leases executed by a Mahanth were declared to be not binding on the successor as they were permanent alienations, and also that as they were unregistered, they were ineffective, in a later suit by the Mahanth's successor in the Revenue Court for ejectment of the lessees, the decision of the Civil Court while so far as the second point was concerned is binding on the Revenue Court, as regards the first point decided it is not so binding. (*Marsh, J.M.*) GORAKH NATHJI *v.* SWAMI NATH LAL. **1938 R. D. 623=1938 A.W.R. (B.R.) 315.**

——S. 11—*Miscellaneous proceedings—Suit for profits under S.* 108 (15) *of Oudh Rent Act—Finding that lambardar was guilty of negligence in not getting rent assessed on ex-proprietary tenancy—If* res judicata *in subsequent suit.*

A finding in a suit for profits under S. 103 (15) of the Oudh Rent Act that the lambardar was guilty of negligence in not getting rent assessed on ex-proprietary tenancy, does not operate as *res judicata* in a subsequent suit for profits between the same parties. (*Hamilton, J.*) MUNIR AHMAD *v.* ABDUL KHALIQ. **1938 R.D. 388=1938 O.W.N. 306=1938 O.A. 478=1938 A.W.R. (C.C.) 34.**

——S. 11—Miscellaneous proceedings—Suit under S. 99 of Agra Tenancy Act—Finding as to status of plaintiff—If *res judicata. See* AGRA TENANCY ACT, S. 99. **1937 R.D. 373 (2).**

Mortgages.

——S. 11—*Mortgage—Successive suits on—Suit for sale—Omission to implead puisne mortgagee of part of property—Second suit for sale against puisne mortgagee—If barred.*

A mortgagee who omits by mistake to implead the subsequent mortgagees of a part of the mortgaged property in his suit for sale is not debarred from afterwards bringing a second suit on the same mortgage against the subsequent mortgagees who have been so left out in the prior suit. (*Sulaiman, C.J. and Bennet, J.*) NANHE LAL *v.* RAM BHAROSE. **174 I.C 315=10 R.A. 557=1938 A.L.R. 265=1937 A.W.R. 648=A.I.R. 1938 All. 115.**

——S. 11—*Mortgage—Successive suits for redemption—If barred.*

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The mortgagors brought suits for redemption of their usufructuary mortgages. The suits ended in a decree fixing the amount to be paid by them within a stated time. The payment was not made within that particular time. A suit for redemption was subsequently filed by their successors. It was contended that the right of redemption was extinguished and the suit barred by *res judicata*.

Held, that final decree not having been passed the right of redemption was not extinguished and the suit was not barred by *res judicata*. (*Agarwala and Rowland, JJ.*) JOTI LAL SAH *v.* SHEODHAYAN PRASHAD. **15 Pat. 607=163 I.C. 908=9 R.P. 50=1936 P.W.N. 447=17 Pat.L.T. 564=A.I.R. 1936 Pat. 420.**

——**S. 11 and O. 2, R. 2**—Mortgage—Successive suits on separate and successive mortgages—Maintainability. *See* MORTGAGE — SUCCESSIVE MORTGAGES. **63 C.L.J. 110.**

——**S. 11**—Mortgage—Suit on. *See* C. P. CODE, S. 11, EXPL. IV. **A.I.R. 1937 All. 251.**

——**S. 11**—*Mortgage—Suit on—Preliminary and final decrees passed without any objection by mortgagors—Sale of properties—Suit by mortgagors for declaration that preliminary and final decrees were void for want of jurisdiction, dismissed—Application for personal decree against mortgagors — Question as to jurisdiction—Whether* res judicata.

A preliminary decree was passed in a mortgage suit without any objection by the mortgagor and was followed by a final decree and the decree was transferred by consent to another district for execution, and certain properties were duly sold. The mortgagors instituted a suit for a declaration that the preliminary and the final decrees were null and void by reason of the Court not having inherent jurisdiction to try the suit, but the suit was dismissed. Subsequently an application for a personal decree against the mortgagors was made. The application was made pursuant to the final decree in the mortgage suit. The mortgagors objected *inter alia* that the Court had no inherent jurisdiction to entertain the mortgage suit and therefore had no jurisdiction to pass a personal decree against the mortgagors.

Held, that the effect of the dismissal of the mortgagor's suit was that the question of jurisdiction became *res judicata* between the parties and could not be raised again by the mortgagors or considered by the Court, in any subsequent proceedings in the mortgage suit. (*Page, C.J., Mia Bu and Dunkley, JJ.*) BANK OF CHETTINAD *v.* S.P.K.P.V.R. CHETTIYAR FIRM. **14 Rang. 94=161 I.C. 989=8 R.R. 528=A.I.R. 1936 Rang. 87 (S.B.).**

Parties and representatives.

——S 11—*Parties and representatives—Attaching creditor, if claims under debtor—Decision against debtor's estate—Binding nature.*

An attaching creditor claims only under the debtor and hence is bound by any decree that might be passed against the debtor's estate. The decision in such a suit would operate as *res judicata*. (*D. R. Norman.*) MANNA LAL *v.* MST. MANNA. **1939 A.M.L.J. 51.**

——**S. 11**—*Parties and representatives—Attaching decree-holder—Whether representative of judgment-debtor.*

The share of one *X* in a certain property was sold in execution of a decree after disallowing the objection filed by *X*. After the sale, the plaintiff sought to attach and sell the property in dispute as the share of *X* in execution of his decree against *X*.

Held, that the order disallowing the objection of *X* had become final and binding on him and also on the plaintiff as the representative of *X*, no suit having been filed under O. 21, R. 63, and that in the face of that order and the sale that subsequently took place, *X* had no interest left in the property in dispute and that consequently it was not liable for attachment and sale as that of *X* in execution of the plaintiff's decree. (*Ganga Nath, J.*) RAM JIWAN *v.* INDER BAHADUR SINGH. **163 I.C. 239=8 R.A. 945=1936 A.W.R. 447=1936 All. L.R. 535=1936 A.L.J. 295=A.I.R. 1936 All. 722.**

——**S. 11**—*Parties and their representatives—Decision as to legal representative—If* res judicata.

An order that a certain person shall be brought on record as the legal representative of a decree-holder, is not a decree and does not operate as *res judicata*. (*Pollock, J.*) SULEMAN *v.* ABDUL SHAKOOR. **188 I.C. 292=12 R.N. 328=1939 N.L.J. 577=A.I.R. 1940 Nag. 99.**

——**S. 11**—*Parties and representatives—Decree against landlord—If* res judicata *against tenant.*

A lessee is bound by a judgment given against his lessor in the absence of any fraud or collusion on his part. A lawful judgment, therefore, which deprives the landlord of the estate deprives tenant, of necessity, of his subordinate right. (*Venkataramana Rao, J.*) KRISHNAN NAIR *v.* KAMBI. **172 I.C. 268=10 R.M. 443=1937 M.W.N. 299=A.I.R. 1937 Mad. 544.**

——**S. 11**—Parties and representatives—Ejectment suit and decree under S. 44, Agra Tenancy Act, against uncle—Subsequent suit for declaration of tenant rights by nephew—If barred. *See* AGRA TENANCY ACT (1926), S. 44. **1936 R.D. 119.**

——**S. 11**—*Parties and representatives—Hindu father or manager—Adverse decision against—If* res judicata *against sons or other coparceners.*

A Hindu father or manager sufficiently represents his sons or the other members of the joint family in a suit instituted against the father or manager on a mortgage executed by him. The latter must be considered to be fighting the battles of the entire family, especially where there is no suggestion and nothing to show that the mortgage sued on was not for legal necessity, and the entire family stands to lose or gain by the decision in such a suit. If, therefore, a mistake is made at the stage of final decree, and more property than is mortgaged is wrongly included in the final decree, and objections thereto by the father or manager taken in execution are dismissed, not only the father or manager but the sons and other members are bound by such decision. The suit in a mortgage action continues right up to the time that the final decree is prepared. Consequently a subsequent suit by the sons or other members to recover possession of the excess property included in the final decree and sold in execution is barred by *res judicata*, because the sons or other members must be deemed to have been represented in the former litigation by their father or manager. (*Collister and Bajpai, JJ.*) KAZIM ALI KHAN *v.* OM PRA-

C. P. CODE (1908), S. 11.

KASH. 172 I.C. 337=10 R.A. 389 (2)=1937 A. L.J. 1095=1937 A.W.R. 841=1937 All.L.R. 952 =A.I.R. 1937 All. 731.

——S. 11—*Parties and representatives—Identity of parties—If essential.*

A judgment to operate as *res judicata* must, among other things, be between the same parties. But merely because a certain person is a party to one suit and is one of a number of persons who constitute the party in a second case, it cannot be said that the parties are the same in both the suits so as to make the decision in the one suit *res judicata* in the other. (*Drake Brockman, S. M.*) SHIB CHARAN *v.* SURAJ PRASAD. 1936 R.D. 345.

——S. 11—*Parties and their representatives—Judgment-debtor's title to particular property found against in earlier suit—Decree-holder attaching same property—Objection—Previous judgment, if* res judicata.

Where a judgment-debtor's title with reference to a particular property was found against him in earlier suit by him for possession of that property, and the decree-holder attaches that identical property in execution of his decree as against the judgment-debtor and another objects that it is not the judgment-debtor's property, the judgment in the earlier suit by the judgment-debtor operates as *res judicata* as between the objector and the decree-holder, for the judgment-creditor or decree-holder must be held to represent his judgment-debtor in respect to the particular property with reference to which his claim was negatived in the earlier suit. (*Collister, J.*) RANG LAL *v.* GAJRAJ SINGH. 181 I.C. 80=11 R. A. 549 (2)=1939 A.W.R. (H.C.) 9=A.I.R. 1939 All. 202.

——S. 11—*Parties and representatives—Plaintiff's suit based on title and possession decreed against defendants* 1 *and* 2*—Appeal filed by defendant No.* 1 *without impleading defendant No.* 2*—Defendant No.* 1 *claiming title by purchase from defendant No.* 2*—Trial Court's finding as to plaintiff's title and possession—If* res judicata *against defendant No.* 1.

A suit filed by the plaintiff claiming to have title to and to be in possession of the suit land was decreed in the trial Court, and defendants Nos. 1 and 2 were restrained by injunction from interfering with his enjoyment of the same. Defendant No. 1, who claimed title to the land by purchase from defendant No. 2, and who had no other basis of title, appealed, but neglected to make defendant No. 2 a respondent to the appeal.

Held, that the decision against defendant No. 2 having become a final decision, operated as a bar to the defendant No. 1's attempt to reopen that decision. In other words, there being no appeal by defendant No. 2 against the trial Court's finding as to the plaintiff's title to and possession of the property, that finding has become *res judicata* against defendant No. 1 who claimed through defendant No. 2. (*Cornish, J.*) RAKKA KUDUMBAN *v.* ARULAYI. 1936 M.W.N. 789=169 I.C. 318=10 R.M. 2=A.I.R. 1937 Mad. 228.

——S. 11—*Parties and representatives*—Pro forma *defendant—Decision in prior suit not granting any relief against him—If* res judicata.

The decision in a prior suit to which certain parties are impleaded as *pro forma* defendants, without any relief being claimed against them cannot operate as *res judicata* as against them in a subsequent suit, when there has been no issue between them and the plaintiff or between them and the principal defendants in the prior suit. (*R. C. Mitter, J.*) RAKHAL DASS ROY *v.* HARIDAS SARKAR. 40 C.W.N. 1208=64 C.L.J. 3.

——S. 11—*Parties and representatives*—Pro forma *defendant—Suit for rent by one co-sharer against tenant impleading other co-sharer as formal defendant—No claim to relief against latter—Latter* ex parte *but supporting tenant—Decree—Subsequent suit on title by latter co-sharer—If barred by* res judicata.

When a person is impleaded as a party to a suit as a formal or nominal defendant and no relief is prayed for against him, any decision in the suit as between the principal parties will not operate as *res judicata* as against the formal defendant in a subsequent suit, though the prior decision might be on a point affecting his interests. *A*, as heir of his father *B*, sued *C*, the tenant, for a third share of the rent of certain sheds on the ground that *B*, had purchased a third share in the sheds in question. He impleaded certain others, namely the other co-sharers as *pro forma* defendants, one of whom was *D*. No relief was claimed against the *pro forma* defendants. *D* did not appear in the suit but gave evidence in favour of *C*, who denied *A's* title as also the relation of landlord and tenant. The Court decided in favour of the purchase by *B* and, holding that there was relationship of landlord and tenant between *A* and *C*, decreed the suit. *D* afterwards brought a suit for a declaration of his right to the same sheds as against *A*, and impleaded *C*, as *pro forma* defendant to the suit.

Held, the decision in the prior suit respecting the purchase of a share in the sheds by *B*, could not operate as *res judicata* against *D*, in the later suit. (*R.C. Mitter, J.*) GAJANAN AGARWALA *v.* HAMIDAR RAHAMAN. 165 I.C. 662=9 R.C. 441 =40 C.W.N. 1205.

——S. 11—*Parties and representatives—Suit by daughter claiming estate as sole daughter—Father found to have executed will in suit by widow to which executors were not parties—Plea by executors setting up will—If* res judicata*—Procedure for revoking will as forgery.*

Where a suit is instituted by a daughter, on the death of her mother, claiming certain property as the sole daughter of her father, on the ground that he died intestate and without any male issue, but it is found during the trial of the suit that the father had executed a will of which probate was taken, a decision in a previous suit to which the plaintiff's mother and the defendants were parties, but in which the executors of the will, as representative of the estate of the testator, were not impleaded, does not operate as *res judicata*, so as to estop the defendants from putting forward the will in defence to the suit. If the plaintiff alleges that the will is a forgery and prays that it should be revoked, she must take recourse to proceedings properly constituted and brought under the testamentary jurisdiction. No decree or decision in proceedings to which the executors are not parties can be binding against them or can obliterate the will. (*Costello and Panckridge, JJ.*) SIVA MOHAN KUNDU *v.*

C. P. CODE (1908), S. 11.

BECHUMOYEE DASI. 168 I.C. 487=9 R.C. 827=A.I.R. 1936 Cal. 585.

——S. 11—*Parties and representatives—Suit by widow—Decision, if* res judicata *against reversioners.*

A decision in a suit by a widow or a limited owner, in respect of and for the protection of her own rights in certain property, bars a subsequent suit by reversioners in respect of that property even though such a suit may not be of a representative character. 42 I.A. 125 and A.I.R. 1924 P.C. 247, Foll. (*Thom and Iqbal Ahmad, JJ.*) GOPAL DAS *v.* SRI THAKURJI. A.I.R. 1936 All. 422.

——S. 11—*Parties and representatives—Title suit against vendor and vendee—Decree holding that vendor had no title—Appeal by vendee impleading plaintiff alone—Vendor not party to appeal—Vendor not appealing—Effect—Finding against vendor—If* res judicata *against vendee so as to bar his appeal.*

Plaintiff filed a suit against defendants 1 and 2, claiming the suit property. The second defendant claiming to be the owner sold it to the 1st defendant who therefore claimed it as the purchaser from the 2nd defendant. The trial Court held that the plaintiff and not the second defendant was the owner and passed a decree in favour of the plaintiff. The 1st defendant appealed impleading the plaintiff alone and without making the 2nd defendant a party to the appeal the appellate Court allowed the appeal and reversed the decree and dismissed the suit. The plaintiff filed a second appeal and the High Court held that the trial Court's decree negativing the 2nd defendant's title became final in the absence of an appeal by the latter and operated as a bar to the 1st defendant's attempt to reopen the decision and that the trial Court's finding on title, not having been appealed against by the 2nd defendant became *res judicata* against the 1st defendant who claimed through the 2nd defendant. The second appeal of the plaintiff was therefore allowed.

Held, in Letters Patent Appeal, that the 1st defendant in assailing the decree of trial Court in appeal must be deemed to do so not only on his own behalf but also on behalf of his vendor, the 2nd defendant, that his success in the appeal would operate not only to his advantage but also to the advantage of the absent party. There was consequently no bar of *res judicata* against the 1st defendant's appeal. 1936 M.W.N. 789, reversed. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ARULAYI *v.* RAKKA KUDUMBAN. 178 I.C. 717=11 R.M. 489=47 L.W. 467=1938 M.W.N. 450=A.I.R. 1938 Mad. 501.

Plea of res judicata.

——S. 11—*Plea of* res judicata—*If can be raised for first time in appeal or second appeal.*

The plea of *res judicata* can be raised for the first time in appeal or even in second appeal provided it can be clearly maintained from the undisputed facts on the record. (*Wright, J.*) MA TO *v.* MAUNG E BYU. A.I.R. 1940 Rang. 136.

——S. 11—*Plea of* res judicata—*Availability observation in judgment in earlier litigation that party is prevented from raising such plea.*

If the circumstances of the earlier litigation entitle the defendant to raise the plea of *res judicata*, the observations contained in the judgment

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of the Court in that litigation that the defendant was prevented from raising any plea of *res judicata* in any subsequent suit would not preclude another Court from considering that plea and examining the circumstances upon which it rests. (*Khundkar, J.*) FAKIR CHANDRA BISWAS *v.* EKKAI SARKAR. 42 C.W.N. 560.

——S. 11—*Plea of* res judicata—*Decree—Evidentiary value.*

The decree is not sufficient evidence to support an estoppel by record. The decree, according to the Code, is only to state the relief granted, or other determination of the suit. It does not afford any information as to the matters which were in issue or have been decided. (*Cornish, J.*) RAM RAO *v.* HONNAMMA SHETHI. 161 I.C. 748=8 R.M. 866=43 L.W. 676=1936 M.W.N. 124=A.I.R. 1936 Mad. 469.

——S. 11—*Plea of* res judicata—*How to establish—Decision as to title of person to receive compensation under Land Acquisition Act—If operates as* res judicata.

In order successfully to establish a plea of *res judicata* or estoppel by record it is necessary to show that in a previous case a Court having jurisdiction to try the question came to a decision necessarily and substantially involving the determination of the matter in issue in the later case. Where a dispute as to the title to receive the compensation under the Land Acquisition Act has been referred to a Court, and it has been determined, the matter is *res judicata* and binds the parties in any later suit involving that issue. (*Lord Porter*) BHAGWATHI *v.* RAM KALI. 66 I.A. 145=I.L.R. (1939) All. 460=181 I.C. 211=1939 R.D. 285=43 C.W.N. 677=5 B.R. 583=1939 O.L.R. 293=11 R.P.C. 217=1939 O.W.N. 543=I.L.R. (1939) Kar. 199 (P.C.)=1939 P.W.N. 775=1939 A.W.R. (P.C.) 58=50 L.W. 66=20 P.L.T. 523=1939 A.L.J. 564=70 C.L.J. 23=41 P.L.R. 638=1939 M.W.N. 894=41 Bom.L.R. 1028=A.I.R. 1939 P.C. 133=(1939) 2 M.L.J. 98 (P.C.).

Prior decision.

——S. 11—*Prior decision — Construction of will—Suit by one of testator's daughters—Decision that daughters acquired only a life-interest in property—Other daughters not parties to suit—Decision, if* res judicata *in later suit by granddaughters of latter.*

In a suit by *A*, one of the daughters of a testator, the High Court on appeal gave a decision that she acquired under the will only a life-interest in a certain property. The other daughters of the testator, *B* and *C*, were not parties to this suit. The suits filed by *B* and *C* which were pending in the lower Court were disposed of upon the footing of the decision given by the High Court in *A's* suit. In a subsequent suit filed by the grand-daughters of *B*, the question arose whether the plaintiffs were precluded from agitating the question as to whether or not their grandmother acquired an absolute interest in the property.

Held, that although in one sense the decision of the High Court in *A's* suit was not *res judicata* in asmuch as neither the plaintiffs nor their grandmother were parties to that suit, it was a judicial decision given not merely on an analogous set of facts but on a set of facts which were identical with the facts in the present suit and that in the

circumstances of the case, it was not open to the plaintiffs to argue that their grandmother acquired anything else but a life interest as regards the property. (*Derbyshire, C.J and Costello, J.*) BIBHA BATI DEBEE *v.* MAHENDRA CHANDRA LAHIRI. I.L.R. (1937) 1 Cal. 400=173 I.C. 857 =10 R.C. 574=A.I.R. 1938 Cal. 34.

——S. 11—*Prior decision—Decree deciding dispute not given effect to by agreement of parties—Effect of—Decision in suit under S. 9, Specific Relief Act—Effect of.*

A decree for partition obtained in 1919 by *A* against her sister *B* and brother (the parties being Christians) was not executed as the parties had agreed not to take any advantage of the decree and they continued to be in joint possession of the properties as if the decree was not in existence. The parties having fallen out in 1932, *A* successfully instituted a suit under S. 9, Specific Relief Act, to recover possession of the properties, of which she was dispossessed by *B* through her husband and her son. *B* thereafter filed a suit for partition and possession of her share which was contested by *A* as being barred by *res judicata* by reason of the decree in the suit of 1919 and the findings in the suit under S. 9, Specific Relief Act.

Held, that the parties not having given effect to the decree in the suit of 1919 and having continued in joint possession of the properties as per subsequent agreement the second suit for partition was not barred. The decision in the suit under S. 9, Specific Relief Act, operated as *res judicata* only to the extent of the finding given therein that *A* was in possession of the properties on the day she alleged in that suit that she was dispossessed and nothing more, and did not operate as a bar to the second suit. (*Leach, C. J. and Varadachariar, J.*) ABHIRAMI AMMAL *v.* CHELLAMMAL. 182 I.C. 348=12 R.M. 63=A.I. R. 1938 Mad. 287.

——S. 11—*Prior decision—Mortgagee's suit for possession—Amount due to mortgagee fixed by decree—If operates as* res judicata *in subsequent suit for redemption.*

Where a mortgagee sued for possession of the mortgaged property in terms of the mortgage deed and his suit was decreed where by the amount due to the mortgagee was fixed, in default of payment of which the mortgagee was to be put in possession of the mortgaged property, the amount so fixed by the decree operates as *res judicata* in a subsequent suit for redemption by the purchaser of the equity of redemption. (*Zia-ul-Hasan and Hamilton, JJ.*) SHEO KUMAR *v.* MUNNU SINGH. 1940 A.W.R. (C.C.) 340= 1940 O.A. 676=1940 O.W.N. 604.

——S. 11 and O. 2, R. 2—Prior decision—Prior suit for rectification of sale deed and for possession of portion of property wrongly shown as exempted from sale—Subsequent suit for possession of property shown as sold in sale deed—Whether barred. *See* C. P. CODE, O. 2, R. 2 AND S. 11. 167 I.C. 414=1937 O.W.N. 252.

——S. 11—*Prior decision—Two suits disposed of at same time—One of them instituted prior to the other*—Res judicata.

Where two suits are disposed of at the same time, there is no prior decision which can operate as *res judicata*, though one of them was filed before the other. (*Darling, S.M. and Bomford, J.M.*) RENUKA RAI *v.* SHYAM DUTT RAI. 1938 R.D. 133=1938 A.W.R. 81 (B.R.).

Pro forma defendant.

——S. 11—Pro forma *defendant—Finding, if* res judicata.

A finding in favour of a party joined as *pro forma* defendant and not a necessary party in previous suit does not operate as *res judicata* in subsequent suit. (*Addison, Ag. C. J. and Din Mohammad, J.*) SIKANDAR *v.* MT. KARAM NISHAN. 182 I.C. 209=11 R.L. 908=A.I.R. 1938 Lah. 842.

Rent suit.

——S. 11—*Rent suit—Question of title*—Res judicata—*Observation in judgment—Title of* pro forma *defendants left open—Effect.*

In a rent suit, it is not absolutely necessary to decide the question of title as between the plaintiffs on the one hand and the *pro forma* defendants on the other in order to give the plaintiffs any relief against the tenants defendants. If an appeal filed by the *pro forma* defendants is dismissed by the appellate Court with the observation that the decision will not operate as *res judicata* on any question of title in any future litigation between the parties, the observation indicates clearly that the Court does not intend to decide the question of title finally. In other words, the rent decree is made operative between the plaintiffs and the tenants defendants with regard to the period in suit leaving the question of title between the plaintiffs and the *pro forma* defendants open. The plaintiffs cannot, therefore, raise the plea of *res judicata* in a subsequent litigation between them and the *pro forma* defendants. (*Mukherjea, J.*) KALIMUDDIN MIA *v.* EAKUTENNESA BIBI. 71 C.L.J. 232=A.I.R. 1940 Cal. 347.

Representative suit.

——S. 11—Representative suit. *See* EXPLANATION VI TO S. 11 (P.C.).

Scope.

——S. 11—*Scope.*

S. 11, C. P. Code, is not exhaustive and the bar of *res judicata* operates as much on general principles as on the wording of the section. The *raison d'etre* of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule. (*Addison, A.C.J. and Din Mahomed, J.*) RAM BHAJ *v.* AHMAD SAID AKHTAR KHAN. 178 I.C. 302=11 R.L. 440 =40 P.L.R 591=A.I.R. 1938 Lah. 571.

——S. 11—*Scope—General principle of* res judicata—*Decision by competent Court—Such Court not competent to try subsequent suit—Decision, if* res judicata.

S. 11, C. P. Code, applies when two Courts concerned have 'concurrent' jurisdiction; but the general principle of *res judicata* is of wider application. It governs cases where the matter in issue is the same and has been previously decided by a competent Court. Hence, when a Court having jurisdiction to decide certain matter has decided, its decision on that point will operate as *res judicata* when the same matter arises in another suit though the former Court is not

C. P. CODE (19 8), S. 11.

competent to try the subsequent suit. (*Bhide, J.*) ISHWAR DUTT CHURAMANI *v.* GENERAL ASSURANCE SOCIETY, LTD. **174 I.C. 761=10 R.L. 598=A.I.R. 1937 Lah. 346.**

——**S. 11**—*Scope—If exhaustive.*

S. 11, C. P. Code, is exhaustive in respect of all cases falling within its terms, and with regard to such cases, the Court is not entitled to travel outside the section and apply the general principles. (*Mukerji and S.K. Ghose, JJ.*) SEKENDAR ALI MIRDHA *v.* SADARUDDIN BHUNIYA. **40 C.W.N. 174.**

——**S. 11**—*Scope—Nature of plea—Estoppel and* res judicata—*Distinction.*

Davies, J.C.—There is a difference between *res judicata* and estoppel. *Res judicata* ousts the jurisdiction of the Court, while estoppel does no more than shut the mouth of a party. Estoppel means nothing more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over; and a plea of *res judicata* can prevail even where the result of giving effect to the plea will be to sanction what is illegal in the sense of being prohibited by statute. (*Davis, J.C. and Rupchand, A.J.C.*) ALLAHBUX *v.* NUSSERWANJI & Co. **29 S.L.R. 455=164 I.C. 43=9 R.S. 30=A.I.R. 1936 Sind 99.**

Successive suits for same relief.

——**Ss. 11 and 47**—*Successive suits for same relief and between same parties and identical cause of action—Bar of.*

A subsequent suit for the same relief and on the same cause of action and between the same parties as a former suit is barred, being affected by the prohibition contained in Ss. 11 and 47, C. P. Code (*Macklin and Wasoodew, JJ.*) BHOGILAL *v.* RATILAL. **183 I.C. 482=12 R.B. 103=41 Bom.L.R. 497=A I.R. 1939 Bom. 261.**

——**S. 11, Expl. IV**—*Applicability—Execution proceedings.*

Expl. IV to S. 11, C. P. Code, embodying the rule of constructive *res judicata* applies to execution proceedings as well. (*Bose, J.*) LAXMIBAI *v.* SEWAKRAM. **I.L.R. (1936) Nag. 30=165 I C. 948=9 R.N. 111 (2)=19 N.L.J. 129=A.I.R. 1936 Nag. 123.**

——**S. 11, Expl. IV**—*Applicability—Execution proceedings.*

The ordinary rules of *res judicata* apply by analogy to execution proceedings. The principle applies to matters falling under Expl. IV to S. 11. Where, therefore a person brought on record as a judgment-debtor in execution of a decree, and served with notice as such, does not raise an objection that the decree-holder is merely a benamidar, his legal representatives brought on record after his death are estopped from raising the objection. (*Mosely and Mackney, JJ.*) K. M. ESOOF *v.* HAMIDA BIBI. **163 I.C. 671=9 R.R. 43 =A.I.R. 1936 Rang 218.**

——**S. 11, Expl. IV**—*Applicability—Execution proceedings—Omission to raise point decided in suit—Point raised but not decided*—Res judicata.

The doctrine laid down in Expl. IV to S. 11 of the C. P. C. is applicable to execution proceedings and must be applied in execution arising out of the same judgment so as to put an end to the

C. P. CODE (1908), S. 11, Expl. IV.

litigation. If a point is decided in favour of the plaintiff in the suit itself, and the defendant does not raise the point in execution, it operates as *res judicata*, because it must be assumed that though it is not raised, when it can be raised, it must be deemed to be decided by implication in the proceedings in execution where an objection under S. 47, C. P. Code, is raised but not decided, and the execution is allowed, the point is nonetheless *res judicata*, though no decision has been given on the same. (*Wort and Agarwala, JJ.*) MAHADEO PRASAD *v.* BHAGWAT NARAIN. **177 I C. 810=5 B R. 18=11 R.P. 187=1938 P. W.N. 400=A.I.R. 1938 Pat. 427.**

——**S. 11, Expl. IV and O. 2, R. 2**—*Applicability—Mortgage—Deposit by mortgagor not accepted by mortgagee—Suit by mortgagee—Nature and scope of—Omission to claim excess profits realised by mortgagee—Subsequent suit—If barred.*

Where a mortgagee resists the right of the mortgagor to get a release of the mortgaged property and to give up possession, in cases in which he is in possession, the suit which the mortgagor has to substitute is a suit for redemption. It would still be a suit for redemption if a tender made by the mortgagor has been refused or if a deposit of money by the mortgagor under S. 83, T. P. Act, has been refused by the mortgagee, or if the mortgagee, being in possession, has had his dues satisfied by the amount of the usufruct received by him or where by such receipt he has overpaid himself. Such a suit must include the entire accounts between the parties in relation to the mortgage; the claim of the mortgagor for overpayments to the mortgagee or excess profits received by the latter must also be included, and if they are not included, a subsequent suit in respect of such claims would be barred by reason of S. 11, Expl. IV and O. 2, R. 2, C. P. Code. (*R.C. Mitter, J.*) RAJMOHON DAS *v.* SARADA CHARAN CHAUDHURY. **162 I.C. 709=8 R.C. 635 =40 C W.N. 627=A.I.R. 1936 Cal. 200.**

——**S. 11, Expl. IV**—*Applicability—Point raised in prior suit.*

The principle of constructive *res judicata* as laid down in Expl. IV of S. 11, C. P. Code, does not apply if the point was actually raised in the prior suit. (*Syed Nasim Ali and Henderson, JJ.*) MIDNAPORE ZEMINDARY CO., LTD *v.* CHANDRA SINGH DUDHORIA. **181 I.C. 674==11 R.C. 828= 68 C.L.J. 305=A.I.R. 1939 Cal. 1.**

——**S. 11, Expl. IV**—*Applicability—Prior suit for declaration of title and possession as owner under sale deed—Dismissal on ground that plaintiff was only* benamidar *and that transaction was only a mortgage and not sale—Subsequent suit by* benamidar *and real owner to enforce mortgage*—Res judicata—*Same parties.*

A brought a suit for declaration that he was owner of certain immovable properties covered by a sale deed and that he was in possession as owner, and also prayed that if, pending the suit, possession was lost, he should be restored to possession. The suit was dismissed on the grounds that *A* was only a *benamidar*, the real owners being *B*, *C* and *D*, and that the transaction on which the suit was based was not a sale but only a mortgage. Subsequently *A*, along with *B*, *C* and *D* brought a suit to enforce the mortgage as mortgagees. The defendants raised

the plea that the decision in the prior suit operated as *res judicata*.

Held, (1) that though the right sought to be enforced in both the suits was based on the same document, the nature of the two suits was entirely different and the two suits were based on two different titles and constituted entirely different causes of action, and it was not obligatory on the part of the plaintiff in the prior suit to join the two causes of action, though it was permissible; (2) that S. 11, C. P. Code, did not apply and the plea of bar of *res judicata* must therefore fail. (*Kania and Vassoodew, JJ.*) GURUSANGAPPA BASAPPA *v.* BASLINGAPPA BASAPPA. **42 Bom.L.R. 470.**

——**S. 11, Expl. IV**—*Constructive* res judicata *—Defendant trying to set aside* ex parte *decree under O. 9, R. 13—Failure to prove want of due service of summons—Defendant, if barred from agitating same question in appeal or revision and* vice versa.

A defendant who has applied under O. 9, R. 13, C. P. Code, for setting aside a decree on the ground that proper service has not been carried out and has failed, is barred from agitating the same point later on in an appeal from that decree or in a petition for revision against the order passing the decree. The order of the Court will stand in his way. Conversely a defendant who has failed in an appeal or revision on that point cannot subsequently have recourse to proceedings under O. 9, R. 13, C. P. Code, for decision on it. (*Mir Ahmad, A.J.C.*) SIRI KRISHAN SAIGAL *v.* ARJAN SINGH. **160 I.C. 462=8 R. Pesh. 113=A.I.R. 1936 Pesh. 1.**

——**S. 11, Expl. IV**—*Constructive* res judicata—*Doctrine of—When can be invoked.*

In order to invoke in aid the doctrine of constructive *res judicata*, there must be a decision by the Court either in express terms or by necessary implication. So where in an application, the decree-holder wrongly applied for a final decree under O. 34, R. 5 (3), C. P. Code, and also prayed for execution and the Court made an order that, "as final decree has already been passed, the present application is rejected", but passed no order on the prayer for execution.

Held, that there was no decision given by the Court either in express words or by necessary implication on the matter of execution and the order could not operate constructively as *res judicata* against the subsequent application for execution. (*Agha Haider, J.*) JODH SINGH *v.* BHAGWAN DAS NANAK CHAND. **173 I C. 185= 10 R.L. 399=39 P.L R. 680=A.I.R. 1937 Lah. 404.**

——**S. 11, Expl. IV**—*Directly and substantially in issue—Framing of issue—If necessary.*

It is not necessary for the purpose of S. 11, Expl. IV, that an issue should be framed to make the point raised by the defendant to be matter in issue. Where the defendant claimed right of way over a plot in suit and made a claim to it in his written statement and the point was argued and decided by the trial Court in his favour.

Held, the right of way claimed by the defendant as against plaintiff was a ground of defence in the suit and must be deemed to have been thus a matter in issue in that suit. (*Cornish, J.*) MOHAMMAD ABDUL AZIZ *v.* GULAM JULANI. **176 I.C. 590=11 R.M. 118=A.I.R. 1937 Mad. 709.**

——**S. 11, Expl. IV**—*Former suit as exclusive owner—Subsequent suit as co-sharer for accounts —If barred.*

A person filed a suit as exclusive owner against persons in wrongful possession. This suit being dismissed, he instituted another suit for accounts as a co-sharer. It was contended that he was barred from instituting the subsequent suit for accounts.

Held, that the two suits were brought in different capacities. The right to accounts was not in issue in his former suit and hence the rule of constructive *res judicata* embodied in Expl. IV to S. 11, C. P. Code, was inapplicable to the case. (*Coldstream and Monroe, JJ.*) VIDYA WANTI KAUR *v.* SARDAR SHAHDEV SINGH. **182 I C. 426= 12 R.L. 24=A.I.R. 1938 Lah. 139.**

——**S. 11, Expl. IV**—*Might and ought—Alternative claim—Prior suit on title for possession—Defendants pleading possession as heirs—Dismissal of suit—Later suit for joint possession—Bar of* res judicata.

Where a suit by the plaintiff claiming certain property was dismissed on the defendants pleading that they had succeeded to it as heirs, it is not open to such plaintiff to file a second suit, for joint possession with the defendants, as he ought to have asserted this right in the earlier suit in answer to the defendants' exclusive claim. Not having done so, he is barred from raising it afresh by Expl. IV to S. 11, C. P. Code. (*Puranik, J.*) ABDUL MAJID KHAN *v.* ABDUL AHIM KHAN. **I.L.R. (1939) Nag. 544=174 I.C. 777=10 R.N. 418.**

——**S. 11, Expl. IV**—*'Might and ought'—Alternative plea inconsistent with main plea—If ought to be raised.*

The question whether an alternative plea ought to have been made a ground of attack depends on the facts of each case. If the alternative plea is inconsistent with the main plea and would thus create confusion it cannot be said that the alternative plea ought to have been raised in the previous suit or application. Application under S. 9, Punjab Debtors' Protection Act, is inconsistent with the plea of the judgment-debtor that property attached is his personal property. Hence, failure of the judgment-debtor to raise the plea under S. 9 in an application based on personal claim, does not debar him from raising the plea subsequently. (*Din Mohammad, J.*) GANGA RAM TRUST SOCIETY *v.* SUNDAR LAL. **186 I.C. 653=12 R.L. 409=A.I.R. 1940 Lah. 27.**

——**S. 11, Expl. IV**—*Might and ought—Applicability.*

In an application by the receiver under S. 4 of the Provincial Insolvency Act for the possession of the house of the insolvent it was resisted by the son of the insolvent on the ground that his father's debts were incurred for immoral purposes and as such not binding on his share. The son had in a previous suit against the receiver asked for a declaration that the house belongs to him under a family arrangement and an adoption, but it was dismissed.

Held, that the plea of the debts being immoral and not binding on him, might and ought to have been raised by the son in the declaration suit. So it could not be raised in the insolvency proceedings. (*Weston, J.*) AJAI PAL *v.* OFFICIAL RECEIVER. **1937 A.M.L.J. 77.**

C. P. CODE (1908), S. 11, Expl. IV.

——S. 11—*Might and ought—Available defence not raised*—Res judicata.

Where a person fails to plead a matter in defence in a previous suit, he is barred by *res judicata* from raising the same matter in a subsequent suit. (*Bennet, Ag. C.J. and Verma, J.*) KANHAIYA LAL *v.* BANKE BEHARI. 178 I.C. 66=11 R.A. 249=1938 A.W.R. (H.C.) 596=1938 A.L.J. 940=1938 A.L.R. 808=A.I.R. 1938 All. 542.

——S. 11, Expl. IV—*Might and ought—Earlier suit under S.* 57 (d) *of Agra Tenancy Act of* 1901, *and later suit under S.* 86 *of Agra Tenancy Act,* 1926—*Non-occupancy character of tenancy—If ought to have been taken in the earlier suit.*

The 'matter which might and ought' to have been made a ground of defence or attack according to Expl. IV to S. 11, C. P. Code, must be matters connected with the cause of action and the issues in dispute between the parties at the time. Where the earlier suit was one under S. 57 (*d*) of the Tenancy Act of 1901 for ejectment on the ground of an illegal transfer and the later suit was one under S. 86 of the Tenancy Act of 1926 for his ejectment as a non-occupancy tenant, the ground of attack in the later suit is not one which ought to have been made in the earlier suit. Hence the later suit is not barred by Expl. IV to S. 11, C. P. Code. (*Darling, S.M. and Bomford, J.M.*) MACKINNON *v.* SAMPAT KUMAR SINHA. 1938 R.D. 4=1938 A.W.R. 16 (B.R.).

——S. 11—*Might and ought—Hindu joint family—Alienee from member of share in one item of family property—Suit for partition—Co-parceners impleaded as defendants—Omission to raise pleas usually open in partition suit—Constructive* res judicata—*Rule—Partial partition.*

There can of course be no compulsory partial partition under the Hindu Law whether at the instance of a member of a joint family or at the instance of an alienee from a coparcener of one item of family property. Though the proper course for an alienee is to sue for partition of all the family properties, the coparceners who may be impleaded in his suit are not bound to insist upon an adjudication in that very litigation of all questions which may properly be agitated in a partition suit between the members of the family. There is nothing to compel the coparceners either to insist on a division being effected *inter se* between themselves or to have all questions in dispute between them settled once for all in the alienee's suit itself. Even in a suit instituted by a coparcener the other parceners might well be content to continue undivided and leave the only one to separate the plaintiff from them. There is no principle of law which prevents the coparceners defendants in an alienee's suit from restricting the scope of the suit to what may be necessary for the grant of the relief claimed by the plaintiff. Where the alienee only claims a division if the particular item in which he has acquired a share, the coparceners who are impleaded are bound to plead only what would be an answer to the claim made by the plaintiff. The fact that they do not raise other pleas which are not necessary in that suit cannot therefore operate as *res judicata* in a subsequent suit by a coparcener for partition. It would also follow that what is actually decided by the decree passed in the suit cannot be reopened at the instance of

C. P. CODE (1908), S. 11, Expl. IV.

any of the persons who are parties to that suit or their representatives. A plea of constructive *res judicata* must be determined only with reference to the suit as framed and not with reference to what under the law the suit must have been. (*Varadachariar and Abdur Rahman, JJ.*) CHIDAMBARAM CHETTIAR *v.* NACHIAPPA CHETTIAR. 184 I.C. 17=12 R.M. 394=48 L.W. 485=1938 M.W.N. 1092=A.I.R. 1939 Mad. 70.

——S. 11, Expl. IV—*'Might and ought'—House sold in execution of decree against certain members of family—Suit by another member challenging sale on ground that house, on partition of joint family, belonged to him—Suit dismissed—Subsequent suit challenging sale on ground that debts in connexion with which decree was obtained were incurred for illegal purpose—If barred by* res judicata.

Certain house was sold in execution of a decree against certain members of a family. Another member brought a suit challenging the execution sale on the ground that the house could not be sold as it had, on partition of the joint property, fallen to his share. The suit was dismissed. He brought a subsequent suit challenging the same sale on the ground that the debts in connexion with which the decree had been obtained were incurred for illegal purposes and hence the house was not liable to be sold in execution of the decree.

Held, that the relief claimed in the subsequent suit ought to have been raised in the previous suit. The subsequent claim could not be considered to be so dissimilar that its union with the claim in the previous suit would have led to confusion. The suit was therefore barred by constructive *res judicata*. (*Bhide, J.*) GOBIND *v.* NARAIN SINGH. I.L.R. (1938) Lah. 729=181 I.C. 41=11 R.L. 743=40 P.L.R. 556=A.I.R. 1938 Lah. 443.

——S. 11, Expl. IV—Might and ought—Landlord and tenant—Latter advancing moneys and selling goods to former—Understanding to set-off—Rent suit by landlord ignoring arrangement—Tenant if bound to plead and claim set-off—Separate cross suit for moneys due to him—If barred. *See* C. P. CODE, O. 8, R. 6. 5 B.R. 296=179 I.C. 828.

——S. 11, Expl. IV—*Might and ought—Mokarari lease by Mohant—Suit by his successor for ejectment of successor of tenant on ground that he is heir of tenant and alternatively that tenant held only life interest—Suit dismissed—Subsequent suit by another Mohant for assessment of fair and equitable rent—If barred by constructive* res judicata.

A Mohant granted a mokarari lease of the property of a deity. His successor instituted a suit against the successor of the tenant for ejectment on two alternative grounds, *viz.*, that he himself was the heir of the tenant and that the tenant held only a life interest. This suit was dismissed. Another succeeding Mohant brought subsequently the present suit for assessment of fair and equitable rent after a declaration that the mokarari lease was void after the death of the grantor.

Held, that the suit was barred by the principle of constructive *res judicata*. (*Jack, J.*) TIKANDAS MOHUNT *v.* RAM KISHORE. 43 C.W.N. 437.

——S. 11, Expl. IV—*Might and ought—Mortgage by occupancy tenant to stranger without land-*

C. P. CODE (1908), S. 11, Expl. IV.

lord's consent—Subsequent mortgage to landlord —Suit by stranger mortgagee—Landlord impleaded as subsequent mortgagee—Plea that mortgage void against him—Plea upheld and landlord exonerated—Decree and purchase in execution by mortgagee—Subsequent suit by landlord on his own mortgage—If barred by reason of mortgage not having been set up in prior suit—Election of rights—C. P. Tenancy Act, S. 41 *(7).*

Appellants who held a mortgage from an occupancy tenant sued to enforce the mortgage impleading as parties to the suit the plaintiffs (respondents) who were the landlords of the mortgagor and who also held a mortgage executed by the mortgagor subsequent to the mortgage in favour of the appellants. The respondents pleaded that the mortgage in suit not having been effected with their consent as required by the C. P. Tenancy Act did not bind them, but they did not set up their subsequent mortgage. They were discharged from the suit the Court declaring that the suit mortgage was ineffectual and not binding on them. The appellants got a decree in execution of which they purchased the property mortgaged. Respondents subsequently sued on their mortgage and impleaded the appellants as defendants as execution purchasers. The latter raised the plea that the respondents having elected between their rights as landlords and their right as subsequent mortgagees in the prior suit, lost their rights to enforce their mortgage.

Held, that it could not be held that the respondents had made an election in the former suit between their rights as landlords and as subsequent mortgagees, their only plea being the invalidity of the prior mortgage as against them, and that their claim in the present suit was to enforce their mortgage as being the prior one, though later in date, as against persons (appellants) who purchased the property subsequent to their mortgage; and that as they were not under any obligation to redeem the mortgage of the appellants, the omission to put forward their mortgage in the prior suit or to offer to redeem the appellants' mortgage was no bar to their suit on their mortgage.

Held, further, that the declaration, in the prior suit about the invalidity of the mortgage against the landlords-respondents did not deprive them of their rights under their mortgage or restrict them only to the course of ejecting the appellants under S. 41 (7) of the C. P. Tenancy Act of 1898. (*Stone, C.J. and Niyogi, J.*) RAMKARAN *v.* KANHAYALAL. I.L.R. (1937) Nag. 208=170 I.C. 71=10 R.N. 40=19 N.L.J. 290=A.I.R. 1937 Nag. 189.

——S. 11, Expl. IV—*Might and ought—Mortgage suit—Claim to title paramount—Failure to assert—If operates as* res judicata.

In a mortgage suit, a claim by a person claiming by a title paramount to the title asserted by the mortgagee should not be gone into generally. But it is not an invariable and inflexible rule. The claim by title paramount, strictly speaking, connotes that it is a claim adverse both to the mortgagee and the mortgagor. The title paramount that is asserted may be a title derived from the mortgagor or in derogation of his title. If it is the former it must be one prior to the creation of the mortgage. If it is derived subsequent to the mortgage it must be in derogation of the title

C. P. CODE (1908), S. 11, Expl. IV.

of the mortgagor and independent of any act of his. In such cases it may be said that the claim sought to be asserted in virtue of such a title would be a paramount claim outside the controversy of the suit, and it is not necessary for a person to assert such a claim in a mortgage, and if he fails to do so he cannot be met by the plea of *res judicata* as he is not bound to assert such a claim. But even in such cases, if he is made a party and his title paramount is sought to be challenged, it is incumbent upon him to have it litigated; if he fails to do so, the bar of *res judicata* will affect him. (*Venkataramana Rao, J.*) NAGAPILLAI *v.* MUTHUSAMI PILLAI. 1937 M.W.N. 60.

——S. 11, Expl. IV—Might and ought—Mortgage suit—Defendant claiming title paramount—If bound to set it up. *See* C. P. CODE, O. 34, R. 1. A.I.R. 1940 Sind 103.

——S. 11, Expl. IV—Might and ought—Mortgage suit—Plea of paramount title—Omission to raise—If bar to plea in later suit. *See* C. P. CODE, S. 47. A.I.R. 1936 Mad. 733.

——S. 11, Expl. IV—*Might and ought—Mortgage suit—Transferee from mortgagor before mortgage impleaded as party defendant—Omission to raise plea of want of jurisdiction—Decree* ex parte—*Subsequent suit to declare decree void on ground of want of jurisdiction—If barred—Transferee—If proper party to suit—O. 34, R.* 1.

A person claiming a paramount title may be impleaded as a defendant in a mortgage suit if that paramount title is impugned by the plaintiff mortgagee. There is nothing in the Civil Procedure Code which forbids a mortgagee to implead a person claiming a paramount title to the mortgaged property. Nor is there any reason in law or equity for holding that the question of a prior transferee's paramount title should not be decided in a suit on a mortgage executed after the transfer. The mortgagee can properly implead as a party to his suit any person who impugns his title, such as a prior transferee from the mortgagor. If in such a suit in which the prior transferee from the mortgagor is made a defendant, the latter fails to raise a plea of want of jurisdiction in the Court to decide his title, he cannot afterwards be allowed to set up that plea in a subsequent suit. If an *ex parte* decree is passed against him and becomes final, a subsequent suit by him challenging that decree as not binding on him on the ground that the Court which tried the prior suit had no jurisdiction to try it and that he was not a proper or necessary party to that suit, is barred on the principle of *res judicata*. (*Thom and Allsop, JJ.*) BISHESHWAR DAYAL *v.* JAFRI BEGAM. 1937 A.W.R. 157=1937 A.L.J. 536=169 I.C. 609=10 R.A. 36=1937 A.L.R. 556=A.I.R. 1937 All. 251.

——S. 11, Expl. IV—*Might and ought—Omission to plead—Suit against manager of joint Hindu family in possession of a property as a mortgagee—Failure to plead mortgagee rights—Subsequent suit by representative of the family to enforce those mortgagee rights—Decision in prior suit, if* res judicata.

Where a certain person had been impleaded in a suit as the manager of a joint Hindu family and he fails to put forth certain mortgagee rights in defence by virue of which he was in possession

and the suit is decreed against the defendants, a representative of the joint Hindu family could not subsequently sue to enforce the mortgagee rights in respect of that property on behalf of the joint family for the decision in the prior suit operates as *res judicata*. (*Bennet and Verma, JJ.*) BISHAMBAR LAL *v.* BRIJ RATAN LAL. 180 I.C. 658 =11 R.A. 500=1939 A.W R. (H.C.) 84=A.I.R. 1939 All. 203.

——S. 11, Expl. IV—*Might and ought—Omission to raise plea of* res judicata—*Effect.*

Where in an appeal by the plaintiffs from a suit which has been dismissed, although it is open to the defendants to support the order of dismissal on the ground of *res judicata*, they do not do so and the suit is remanded to be heard on merits, they are precluded from raising the plea of *res judicata* subsequently. (*Cunliffe and Henderson, JJ.*) KHAJE HABIBULLA *v.* BEPIN CHANDRA. 168 I.C. 375=9 R.C. 811=A.I.R. 1936 Cal. 454.

——S. 11, Expl IV—*Might and ought—Omission to raise question of jurisdiction—Effect.*

In a case where a person fails to appear in the original suit or if he appears but fails to raise the issue of jurisdiction, the decision of the Court will be binding upon him as *res judicata*, and it will not be open to him to re-agitate the same point in another suit. A.I R. 1926 Bom. 481, Foll. (*Rupchand Bilaram, A. J.C.*) EBRAHIMJEE MULLA *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. 161 I.C. 324=8 R.S. 137=A.I.R. 1936 Sind 34.

——S. 11, Expl. IV—*Might and ought—Party not aware at the time of first suit of the right relied on in second suit—Bar of* res judicata.

In all litigation there are innumerable matters that might be made ground of defence or attack but whether they ought to be so made would depend largely upon the circumstances of each case. The question whether a party had at the time of the previous suit knowledge of the matter relied on in the subsequent suit is of great importance. If he had at the date of the former suit neither knowledge nor means of knowledge of the right relied on in the second suit, the second suit is not barred by the rule of constructive *res judicata* embodied in S. 11, Expl. IV, C. P. Code. (*Khundkar, J.*) FAKIR CHANDRA BISWAS *v.* EKKARI SARKAR. 42 C.W.N. 560.

——S. 11, Expl. IV—*Might and ought—Plaintiff undertaking to give credit for certain amounts—Agreement not to execute decree—Execution in breach of agreement—Judgment-debtor depositing money to prevent execution sale—Suit to recover money so deposited—Maintainability*—Res judicata—*C. P. Code, S.* 47.

In a suit brought by the appellant against the respondent, it was agreed between them that although a decree should be passed against the respondent the decree should not be executed by the appellant decree-holder. A decree was passed and in breach of the agreement, appellant executed the decree and brought the respondent's property to sale. The respondent deposited money to save his property from sale in execution, and then brought an action to recover the amount deposited by him, on the ground that the appellant had not given credit for certain payments which he undertook to give credit for.

Held, (1) that the matters alleged should have been raised as a defence to the action; and failing

to do was *res judicata*; (2) that the appellant had executed a perfectly valid decree, and money recovered under a decree or judgment could not be recovered back in a fresh suit or action whilst that decree or judgment remained in force; and (3) that consequently the suit did not lie. (*Wort and Manohar Lall, JJ.*) ABDUL HAMID KHAN *v.* DHANI DUSADH. 16 Pat. 748=173 I.C. 123=4 B.R. 217=10 R.P. 378=18 Pat.L.T. 896= 1937 P.W.N. 904=A.I R. 1938 Pat. 41.

——S. 11, Expl. IV—*Might and ought—Question of law not raised in prior suit—Compromise decree—Binding nature.*

Davis, J.C.—If the legality of an act is a point in dispute substantially, it may be a fair subject of compromise in Court like any other disputed matter, and thus become *res judicata*; and if it is abandoned and not put forward by a party, it is not open to him to subsequently raise that question of law, which should have been raised and heard and decided in the prior suit. The matter becomes *res judicata* and cannot be reopened. (*Davis, J.C. and Rupchand, A.J.C.*) ALLAHBUX *v.* NUSSERWANJI & Co 29 S.L.R. 455=164 I.C. 43=9 R.S 30=A.I.R. 1936 Sind 99.

——S. 11, Expl. IV—*Might and ought—Question of title—Impossibility of raising in earlier suit—O. 2, R. 2.*

The plaint properties belonged in jenm to the *K* tarwad. They were held on kanom by the *P* tarwad. One *V*, a member of *P* tarwad, assigned the kanom interest to the plaintiff's uncle *S* and later *S* assigned the interest to the plaintiff *A*. After the assignment to *S* by *V*, the *K* tarwad instituted a suit against the karnavan and certain members of the *P* tarwad for arrears of michavaram and got a decree. In execution of that decree, *K* tarwad brought the kanom interest to sale and a member of that tarwad bought it and afterwards assigned that interest to *N*, the present defendant 1. Prior to the assignment by *S* to plaintiff *A*, one *R* was on the land as a tenant, and as *A* suspected that after the Court-sale in execution *R* was colluding with *N* and her assignor, she took the precaution of impleading *N* and her assignor in a suit by her for ejectment against *R*. The plaint in that suit was framed as one on tenancy and not on title. She also took care to claim relief against *N* and her assignor who were defendants 3 and 2 in that suit only on the ground of their having got into possession or attempting to get possession in collusion with the tenant *R*. In the course of the trial of the suit, *A* distinctly stated that she did not want the question of title raised in the suit. The Court found that there was no collusion between the tenant and *N*, but it also found that *N* and her assignor had got into possession of the items now in question after the purchase in execution of the decree in the first suit and dismissed the suit. The plaintiff then instituted the present suit based on title to eject *N*.

Held, that the present suit based on title was not barred by the previous suit as the present suit was not based on the same cause of action as the former suit nor the claim put forward in the present suit was one that might and ought to have been put forward in the former suit.

Held also, that a person who gets into possession in collusion with the tenant in possession is so far as the landlord is concerned placed under

C. P. CODE (1908), S. 11, Expl. IV.

the same disability as the tenant from calling his landlord's title in question. Therefore in the former suit *N* having been added only in the position of the tenant, any question of title being raised in that suit is precluded. (*Varadachariar, J.*) NANIKUTTI AMMA *v.* LAKSHMIAMMAL. 175 I.C. 925=11 R.M. 20=A.I.R. 1937 Mad. 804.

——S. 11, Expl. IV—Might and ought—Suit against agriculturist—Omission to apply for relief under Agriculturists' Relief Act—Application for relief after Act—If barred. *See* U. P. AGRICULTURISTS' RELIEF ACT, S. 30 (2). 1937 A.L.J. 842.

——S. 11, Expl. IV—*Might and ought—Suit by* A *against* B—*Areement that* A *should pay certain sum to* B—*Question of return of some ornaments left open*—B *bringing suit against* A *for recovery of sum agreed on—Omission to plead claim for return of ornaments—Effect.*

In a certain suit by *A* against *B*, it was agreed that *A* should pay a certain sum to *B* and the question of return of some ornaments by *B* to *A* should be decided thereafter. When *B* brought a suit against *A* for recovery of the sum so agreed, *A* pleaded that he had no defence and that he was bound to pay. Thereafter *A* brought another suit against *B* for the recovery of the ornaments. It was contended by *B* that *A* should have raised the defence of the return of the ornaments in the suit by *B* and as he did not do so the suit of *A* was not competent.

Held, that *A* was not bound to raise that defence in the suit by *B* and hence *A's* suit was competent. (*Davis, J.C. and Mehta, A.J.C.*) BAGAKHAN *v.* MONGHILAL. 170 I.C. 116=10 R.S. 31=A.I.R. 1937 Sind 155.

——S. 11, Expl. IV—Might and ought—Suit by prior mortgagee for sale—Omission to claim benefit of S. 101, T. P. Act, as against puisne mortgagee—If bars claim being raised in defence to suit by puisne mortgagee—*Res judicata. See* C. P. CODE, O. 2, R. 2. 70 M.L.J. 506.

——S. 11, Expl. IV—*Might and ought—Suit for possession on basis of ostensible sale deed by defendant to plaintiff—Omission to plead that transaction was really mortgage—Plea in later suit—If* res judicata.

No mortgagor can be compelled to ask for redemption if he is not willing to redeem the mortgage, and so long as the mortgage subsists, the mortgagee can recover possession of the mortgaged property. Although the mortgagor in a suit for possession by the mortgagee who claims to be a vendee might urge that the transaction was a mortgage and might ask for redemption, of the mortgage, he is not bound to do so, so as to bar him by the rule of constructive *res judicata*, from raising the plea in a subsequent suit by the mortgagee for a declaration of his title as owner and for possession, as it cannot be held that the question regarding the nature of the transaction is constructively in issue in the first suit for possession. (*Lokur, J.*) BALAKRISHNA *v.* GAJA JAITYA. 184 I.C. 506=12 R.B. 181=41 Bom.L.R. 422=A.I.R. 1939 Bom. 303.

——S. 11, Expl. IV—*'Might and ought'—Suit for possession based on title—Claim for compensation for improvements not set up in defence——Subsequent suit for such compensation—If barred.*

C. P. CODE (1908), S. 11, Expl. IV.

In a suit for possession of land based on title, a claim for compensation for the improvements made by the defendant *ought* to be set up by him in defence. If it is not so set up, a decree for possession passed in the suit would operate as a bar to the further agitation of the question of compensation in a subsequent suit. (*M. C. Ghose and Mitter, JJ.*) MAJUDDIN *v.* LANGLA SYLHET TEA CO. 42 C.W.N. 110.

——S. 11, Expl. IV—Might and ought—Title suit for possession dismissed—Subsequent suit for redemption of mortgage—If barred. *See* C. P. CODE, O. 2, R. 2 AND S. 11, EXPL. IV. I.L.R. (1940) 1 Cal. 544.

——S. 11, Expl. IV—Mortgage suit—Preliminary decree—Omission to reserve and provide for personal liability—Subsequent application for personal decree—If barred—*Res judicata. See* C. P. CODE, O. 34, R. 6. 48 L.W. 758.

——S. 11, Expl. IV—*Mortgage suit—Defendant claiming paramount title—Failure to plead*—Res judicata.

A purchaser of the equity of redemption who is made a defendant in a mortgage suit is not bound to set up in that suit any independent or paramount title that he may claim, when there is nothing in the plaint of the mortgage suit which impugns such title. The omission to set up such title does not, therefore, preclude him from setting it up in a subsequent suit. (*Mukherjea and Roxburgh, JJ.*) SURAJ CHANDRA MONDAL *v.* BEHARI LAL. I L.R. (1939) 2 Cal. 551=188 I.C. 17=12 R.C. 633=43 C.W.N. 1126=A.I.R. 1939 Cal. 692.

——S. 11, Expl. IV—*Pre-decree compromise not presented to Court in previous suit—Whether can be pleaded in subsequent suit.*

Where parties fail to present to the Court a compromise arrived at between them but proceed with the suit, they are debarred from pleading the compromise in a subsequent suit in view of Expl. IV to S. 11, C. P. Code. The compromise must be held to be superseded by the decree in that suit. (*Coldstream and Bhide, JJ.*) ROBERT HERCULES SKINNER *v.* R. M. SKINNER. 18 Lah. 209=171 I.C. 189=10 R.L. 167=39 P.L.R. 29=A.I.R. 1937 Lah. 537.

——S. 11, Expl. IV—*Previous suit by plaintiff's predecessors claiming partition of whole shamilat—Subsequent suit by plaintiff claiming that certain well and land in shamilat was not liable to be partitioned—If barred by* res judicata.

A suit was instituted by the plaintiff's predecessors in which they claimed that entire shamilat was liable to be partitioned. A subsequent suit was brought by the plaintiff to the effect that certain well and land in the shamilat should be excluded from partition.

Held, that this plea ought to have been raised and made a ground of attack in the previous suit by the plaintiff's predecessors. As it was not so raised, the subsequent suit was barred under Expl. IV to S. 11. (*Addison and Abdul Rashid, JJ.*) MEHAR LANGAH *v.* MEHAR ALLAH YAR. 181 I C. 262=11 R.L. 802=40 P.L.R. 940=A.I.R. 1938 Lah. 671.

——S. 11, Expl. IV—*Rent suit—Denial of relationship—Prior rent decrees between same parties*—Res judicata.

In all cases for recovery of rent the relationship of landlord and tenant is the foundation of a

C. P. CODE (1908), S. 11, Expl. IV.

decree and therefore when such a suit is decreed the Court must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. Where therefore in a rent suit brought by the landlord the tenant denies the relationship of landlord and tenant and pleads that he is a tenant of some other person and it is found that there are many rent decrees against the tenant in favour ot the landlord in respect of the holding the decision in previous suits operates as *res judicata* under S. 11, Expl. IV. (*Puranik, J.*) SHEORAM *v.* MULCHAND. I.L.R. (1940) Nag. 181 =175 I.C. 693=11 R.N. 7=A.I.R. 1938 Nag. 195

——S. 11, Expl. IV—*Subsequent mortgagee acquiring rights under prior mortgage—Suit by puisne mortgagee impleading him as subsequent mortgagee—Validity of prior mortgage admitted* —Ex parte *decree—Suit on basis of prior mortgagee rights*—Res judicata.

Under the Expl. of O. 34, R. 1, C. P. Code, it is not necessary for a puisne mortgagee to implead a prior mortgagee and he may without impugning such a mortgagee claim to sell the property subject to such a mortgage. Consequently a person who has taken a subsequent mortgage and also possesses prior mortgagee's rights by satisfaction of the decree on the prior mortgage has a dual capacity; he is a necessary party in his capacity as a subsequent transferee but not necessary party in his capacity as a prior mortgagee or as possessing prior mortgagee rights. If, therefore, the validity of the prior mortgage is admitted in the plaint and he has been professedly impleaded as a subsequent transferee there is no reason to require that such subsequent mortgagee must of necessity appear in Court and set up rights under the prior mortgage which is not disputed by the plaintiff. And in the circumstances a decree in such a suit *ex parte* against such subsequent mortgagee does not operate as *res judicata* in a suit on the basis of the prior mortgagee rights as such by satisfaction of the prior mortgage decree (*Sulaiman, C.J., Bennet and Harries, JJ.*) RAM DHAN *v.* CHUNNI KUNWAR. 58 All. 1056=165 I.C. 7=9 R.A. 261=1936 A.L.J. 774= 1936 All.L.R. 917=1936 A.W.R. 653=A.I.R. 1936 All. 578 (F.B.).

——S. 11, Expl. IV and O. 2, R. 2—*Suit by plaintiff for possession of certain shops decreed in respect of one-fourth share—Subsequent suit by him for mesne profits from date of possession to date of suit—Defendant pleading set off in respect of improvements in former suit but withdrawing plea in the end—Same plea, if barred in subsequent suit.*

The plaintiff brought a suit against the defendant for possession of certain shops and the suit was decreed in respect of a one-fourth share in them. The plaintiff obtained formal delivery of possession in pursuance of this decree and also realized mesne profits awarded to him by the decree up to the date of the delivery of possession. Some years after, the plaintiff again brought a suit for recovery of mesne profits from the date of delivery of possession to him in pursuance of the former decree up to the date of the suit. The defendant claimed a set-off in respect of certain sums of money spent by him on the reconstruction and repairs of the shops. In the previous suit also, the defendant raised the same plea but withdrew it in the end saying that he would bring a separate suit.

Held, that the defendant's plea of set-off in the subsequent suit was not barred either by S. 11 or by O. 2, R. 2, C. P. Code and that it was not incumbent on the defendant to raise the plea of set-off in the previous suit for possession brought by the plaintiff. (*Zia-ul-Hasan, J.*) RADHEY SHIAM *v.* MOHAMMAD NASIR KHAN. 13 Luck. 323=168 I.C. 472=9 R.O. 481=1937 O.W.N. 831=1937 O.L.R. 285=A.I.R. 1937 Oudh 394.

C. P. CODE (1908), S. 11, Expl. V.

——S. 11, Expl. IV—*Suit brought against step-mother that plaintiff is exclusive owner of certain land dismissed—Subsequent suit that step-mother is entitled to $\frac{1}{6}$ share and not to $\frac{1}{2}$—If barred.*

On the death of the plaintiff's father, his land passed by mutation to the plaintiff and his step-mother in equal shares. The plaintiff instituted a suit against his step-mother for a declaration that he was the exclusive owner of the land on the allegation that his step-mother had been divorced by his father many years before his death. The Court held that the divorce was not proved and dismissed the suit. The plaintiff sued again for a declaration that his step-mother was only entitled to one-fifth share in his father's land in lieu of maintenance as his widow and not to one-half.

Held, that the ground of action now taken by the plaintiff ought to have been made a ground of attack in the previous suit and that the present suit was barred by Expl. IV to S. 11, C. P. Code. (*Skemp, J.*) MT. JIO *v.* NABI BAKHSH. 18 Lah. 496=175 I.C. 283=10 R.L. 697=39 P.L.R. 829 =A.I.R. 1937 Lah. 872.

——S. 11, Expl. V—*Applicability—Claim made but withdrawn—Effect—If* res judicata.

Expl. V to S. 11, C. P. Code, can be invoked only in respect of any adjudication made by the Court. The fact that the plaintiff who, in the first instance, asks for a decree against the joint family property so far as the interests of the minor sons therein are concerned, subsequently withdraws his claim as against them, can only bring the case under O. 23, R. 1, C. P. Code. The result of such a withdrawal is not to bring in the operation of the rule of *res judicata* embodied in S. 11 but only to entail the statutory penalty enacted in O. 23, R. 1 itself, *viz.*, that no fresh suit can be instituted against those defendants on the same cause of action. (*Varadachariar and Pandrang Row, JJ.*) PERIASWAMI *v.* VAIDHILINGAN PILLAI. 176 I.C. 359=11 R.M. 73=47 L.W. 60=1937 M.W.N. 1313=A.I.R. 1937 Mad. 718.

——S. 11, Expl. V—*Application for personal decree under O. 34, R. 6—Relief not granted—Fresh application, if barred.*

An application under O. 34, R. 6, C. P. Code, is not an application in execution but a substantive original application for a new decree in the suit. The procedure applying to this application would be governed by S. 141, C. P. Code. Where, therefore, a definite application had been made for a decree under O. 34, R. 6 and no prayer was granted by the Court for passing of a personal decree, the provisions of Expl. V, S. 11, C. P. Code, would apply with the result that the relief which was not expressly granted shall be deemed to have been refused. (*Agha Haidar, J.*) DES RAJ

C. P. CODE (1908), S. 11, Expl. V.

v. FASAL KARIM. **163 I.C. 119=8 R.L. 1014=38 P.L.R. 700=A.I.R. 1936 Lah. 388.**

——**S. 11, Expl. V**—If controls O. 2, R. 2. *See* C. P. CODE, O. 2, R. 2. **A.I.R. 1939 Sind 367.**

——**S. 11, Expl. V**—*Maintenance suit—Prayer that it should be charged on property not granted—Subsequent suit for such charge—Subsequent suit—If* res judicata.

Where a widow in her suit for maintenance asks that her maintenance should be made a charge on the property left by her husband and the Judge assesses the amount of maintenance but does not charge it on any property, she cannot subsequently ask the Court to declare that she is entitled to recover from the property in suit her maintenance which has fallen into arrears or that which will fall due in the future as it is tantamount to a request to charge the property with her maintenance. (*Almond, J.C. and Mir Ahmad, J.*) MT. HOWANI BAI *v.* DEVI DIAL. **177 I.C. 1005=11 R. Pesh. 44=A.I.R. 1938 Pesh. 68.**

——**S. 11, Expl. V**—*"Relief"—Prior suit for partition and possession and mesne profits, past and present—Claim to future mesne profits not awarded—Second suit for mesne profits from date of suit or decree in prior suit*—Res judicata.

The "relief" referred to in Expl. V to S. 11, C. P. Code, means relief arising out of a cause of action accrued at the date of the institution of the suit, and such relief does not cover future mesne profits in respect of which the cause of action accrued subsequently to the suit. Where a suit for partition and possession of lands and mesne profits, past and future, has been brought and decided, and the decree fails to award the claim to future mesne profits, a second suit to recover mesne profits from the institution of the first suit or the date of the decree till delivery of possession is maintainable and is not barred by Expl. V to S. 11, C. P. Code. (*Beaumont, C.J., Broomfield and Wassoodew, JJ.*) GANGADHAR GOPALRAO *v.* SHRIPAD ANNARAO. **I.L.R. (1938) Bom. 655=174 I.C. 773=10 R.B. 499=40 Bom. L.R. 324=A.I.R. 1938 Bom. 231 (F.B.).**

——**S. 11, Expl. VI**—*Applicability.*

Certain persons instituted a suit for declaration that the defendant was not authorized to close a thoroughfare used by them from time immemorial. In a previous suit by certain other persons against the same defendant the same right of thoroughfare was claimed. The previous suit was not instituted in the interest of any other person other than the plaintiffs in that suit, nor was any private right claimed by the plaintiffs in that suit in common for themselves and others. The notice enjoined in R. 8 of O. 1, C. P. Code, was not issued.

Held, that a subsequent suit was not barred under either Expl. VI to S. 11 or O. 1, R. 8, C. P. Code. (*Addison and Din Mahomed, JJ.*) MEHR MAHOMED KHAN *v.* JAMADAR ADALAT KHAN. **18 Lah. 629=39 P.L.R. 707=175 I.C. 405=10 R.L. 713=A.I.R. 1937 Lah. 425.**

——**S. 11, Expl. VI**—*Applicability—Conditions.*

In a representative suit instituted under O. 1, R. 8, C. P. Code, the decision in a former suit does not operate as *res judicata* by force of S. 11, Expl. VI, unless the former suit was instituted in compliance with the above rule, namely, by permission of the Court, the Court giving notice

C. P. CODE (1908), S. 11, Expl. VI.

as therein prescribed to all persons interested. There is possibly an exception, where the former suit having been litigated *bona fide* on behalf of the plaintiff and others with a common right, the omission to comply with the rule has been inadvertent, and no injury therefrom has been sustained by the plaintiff, in the second suit. Where, therefore, the former suit had not been instituted or conducted as a representative suit but was fought out by the plaintiffs in their individual capacity, the decision in that suit does not bar a subsequent suit brought in a representative capacity under O. 1, R. 8, C. P. Code. 56 M. 657 (P.C.), Foll. (*Tek Chand, J.*) MAGAN NATH *v.* HARBANS SINGH. **163 I.C. 817=9 R.L. 52=A.I.R. 1936 Lah. 965.**

——**S. 11, Expl. VI**—*Applicability—Conditions—Plaintiffs in prior suit guilty of gross negligence—Decision, if* res judicata—*No collusion or want of* bona fides.

The provisions of S. 11 of the Code are mandatory and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of S. 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from facts. Other factors in Expl. VI to S. 11 being present, the section lays down a condition that the persons must be litigating *bona fide* and the fulfilment of this condition is necessary for the applicability of the section. A representative suit was brought by some persons on behalf of public interest for declaring certain temples public temples and for setting aside alienation of endowed property by the manager thereof. A similar suit was brought some years ago by two persons and the suit was dismissed on the ground that the temples were private temples, and the property endowed to the temples being a private endowment, the alienations thereof were valid. The plaintiffs admitted that they could be deemed to be persons claiming under the plaintiffs in prior suit and the issue in both the suits was the same. It was contended however by them that the finding in the prior suit could not be *res judicata* as against them inasmuch as there was gross negligence on the part of the plaintiffs in that suit in not producing the documents necessary for the decision of the suit in their favour and in not placing their evidence before the Court.

Held, that no case of fraud apart from collusion being suggested, the plaintiffs were bound to establish either that the decree in prior suit was obtained by collusion between the parties or that the litigation by the plaintiffs in prior suit was not *bona fide*. The plaintiffs based their case entirely on inferences to be drawn from alleged gross negligence on the part of the plaintiffs in prior suit. The finding of gross negligence by the trial Court was far from a finding of intentional suppression of the documents which would amount to want of *bona fides* or collusion on the part of the plaintiffs in prior suit. There being no evidence in the suit establishing either want of *bona fides* or collusion on the part of plaintiffs in prior suit, the decision in the prior suit was binding on the plaintiffs as *res judicata*. (*Lord Thankerton.*) VENKATA SESHAYYA *v.* KOTESWARA RAO. **64 I.A.**

17=I.L.R. (1937) Mad. 263=1937 A.W.R. 42=1937 O.W.N. 42=18 Pat.L.T. 27=41 C.W.N. 257=45 L.W. 43=166 I.C. 1=1937 M W.N. 66=9 R.P.C. 135=1937 A.L.J. 240=39 Bom.L.R. 317=65 C.L.J. 14=1937 O.L.R. 12=1937 P.W.N. 123=3 B.R. 223=1937 A L.R. 54=A.I.R. 1937 P.C. 1=(1937) 1 M.L.J. 113 (P.C.).

——S. 11, Expl. VI—*Applicability—Procedure under O. 1, R. 8 not followed in former suit—Decision—If binds persons not parties*—Res judicata.

Where the procedure prescribed by O. 1, R. 8, C. P. Code, has not been taken in a suit, the decision therein cannot be binding on persons who are not actually parties thereto, and cannot therefore operate as *res judicata*, in a suit claiming a similar relief. (*Niamatullah, J.*) NAMDAR KHAN *v.* NAIMUL KHAN. 1937 A.L.J. 293=1937 A.W.R. 258=169 I.C. 388=1937 A.L.R. 522=10 R.A. 16=A.I.R. 1937 All. 289.

——S. 11, Expl. VI—*Applicability—Representative suit—If confined to suit under O. 1, R. 8—Party suing in representative capacity and leading defendant to believe same—If estopped from afterwards denying representative character.*

Expl. VI to S. 11, C. P. Code, is not confined to suits under O. 1, R. 8, but extends to any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves. A suit may still be a representative suit within the meaning of S. 11, Expl. VI, though it need not come under O. 1, R. 8. The decree in such a suit will bind not only the plaintiff, but those persons who are absent but are held by the Court to be represented by the person or persons on record. Where a plaintiff allows the defendant to proceed with the suit on the footing that he is suing in a representative capacity, assuming that position and taking the chance of a decree in his favour, clear estoppel arises against the plaintiff to prevent him from afterwards contending in a later suit that he was not suing in a representative capacity in the former litigation. There can be no stronger case of an absolute waiver, or election or conduct rendering it wholly inequitable to permit him to resile from the position adopted by him. (*Rangnekar, J.*) GURUSHIDDAPPA *v.* GURUSHIDDAPPA. I.L R (1937) Bom. 326=169 I.C. 934=10 R.B. 45=39 Bom.L.R. 130=A.I.R. 1937 Bom. 238.

——S. 11, Expl. VI—*Construction — Words "claimed in common for themselves and others"—If govern "public right."*

The words "claimed in common for themselves and others" in S. 11, Expl. VI, C. P. Code, govern only the words "private right" and not "public right." The words "public right" stand by themselves. (*Addison and Din Mahomed, JJ.*) MEHR MAHOMED KHAN *v.* JAMADAR ADALAT KHAN. 18 Lah. 629=39 P.L.R. 707=175 I.C. 405=10 R.L. 713=A.I.R. 1937 Lah 425.

——S. 11, Expl VI—*Construction— Words 'claiming in common for themselves and others'—Litigation* bona fide *in respect of public right—Decision, if* res judicata.

The expression "claimed in common for themselves and others" in Expl. VI to S. 11 does not also govern a claim in respect of a public right. A public right always implies that it is enjoyed by the plaintiff in common with others. With regard to such public right if the litigation is *bona fide* on the part of the plaintiff the decision would be *res judicata* against others who claim to be entitled to the right. (*Jai Lal, J.*) MIR MAHOMED KHAN *v.* JAMADAR ADALAT KHAN. 171 I.C. 866=10 R. L 244=39 P.L.R 353=A.I.R. 1937 Lah. 70.

——S. 11, Expl. VI—*Decree against Municipality in respect of Government land transferred in trust and vested in Municipality—If* res judicata *in subsequent suit by Government.*

Government land was transferred in trust and vested in the Municipal Committee. According to the provisions of S. 74, Punjab Municipal Act, 1884, the land not only vested but also belonged to the Municipality. A decree was passed against the Municipality granting plaintiffs a declaration that they had obtained indefeasible title by adverse possession of the land.

Held, that the Municipal Committee being constituted a trustee, it represented the title for the time being and the decree obtained against it operated as *res judicata* in subsequent suit by the Government. (*Coldstream and Bhide, JJ.*) SULTAN ASAD JAN *v.* SECRETARY OF STATE. 18 Lah. 100=167 I.C. 867=9 R.L. 567=A.I.R. 1936 Lah. 998.

——S. 11, Expl. VI—*Hindu joint family—Suit by member of—Relief claimed for benefit of entire family—Decree, if* res judicata *against minor member.*

Where a member of a joint family acting in the interest of all the members and claiming a relief for the benefit of the entire family institutes a suit which is dismissed, the decree operates as *res judicata* even against a minor member of the family, whether or not he is impleaded in the suit. (*Sulaiman, C.J. and Bennet, J.*) MUSTAFAI BEGAM *v.* RAGHURAJ SINGH. 169 I.C. 577=1937 A.L.R. 544=10 R A. 28=1936 A.W.R. 1191=A. I.R. 1937 All. 108.

——S. 11, Expl. VI—*Joint Hindu family—Interests of member represented by manager of his branch—Decision in suit if binding on that member.*

Where the interests of a member of joint Hindu family in respect of the matters raised in the suit are represented by the manager of his branch, the decision in the suit would be binding on that member. (*Bhide, J.*) PANNA LAL *v.* RAM RICHHPAL. A I.R. 1940 Lah. 120.

——S. 11, Expl. VI—*Representative suit — Decision in—When binds persons other than plaintiffs.*

A decision in a representative suit binds all persons other than the plaintiffs expressly named in the plaint only when, (*a*) if the suit relates to a private right, the formalities as laid down in O. 1, R. 8, C P. Code are observed, and (*b*) if the suit relates to a public right, the formalities laid down in S. 91, C. P. Code, are observed. A.I.R. 1933 P. C. 183, Rel. on. (*Addison and Din Mahomed, JJ.*) MEHR MAHOMED KHAN *v.* JAMADAR ADALAT KHAN. 18 Lah. 629=175 I.C. 405=10 R.L. 713=39 P L.R. 707=A.I.R. 1937 Lah. 425.

——S. 11, Expl. VI—*Representative suits—Action by or on behalf of family—When binds absent or future members.*

An action by or on behalf of a family may result in *res judicata*, but such an action, if it is to bind absent or future members of the family, must be so constituted according to the local rules of procedure or by a representation order or in

some other way that all such members can be regarded as represented before the Court. (*Lord Maugham.*) EFFUAH AMISSAH *v.* EFFAUAH KRABAH 162 I.C. 461=8 R.P.C. 257=44 L.W. 73=A.I.R. 1936 P.C. 147 (P.C.).

——S. 11, Expl. VI— *Representative suit—Leave to sue on behalf of others not obtained in prior suit—Later representative suit—If barred.*

Where certain persons brought a representative suit on behalf of a community for establishing their rights connected with a temple and where it was contended that the suit was barred by reason of the decision in an earlier suit brought by certain persons of the same community with reference to similar rights in the same temple it was held that the mere fact that the persons who filed the prior suit belonged to the same community, could not make it a representative suit, and they were only asserting their personal claim and the omission to follow the provisions of S. 30 of the old Code, deprived the decision in that suit of all binding force, so far as people who were not parties to that are concerned. (*Bennet and Verma, JJ.*) NARHARI SHASTRI *v.* BASUDEO NAMBURI. 177 I.C. 653=11 R.A. 205=1938 A.W.R. (H.C.) 500=1938 A.L.R. 770=1938 A.L.J. 680=A.I.R. 1938 All. 523.

——S 11, Expl. VI—Representative suit—Suit by Hindu father for benefit of himself and sons—Dismissal on oath taken by defendant—Effect on sons—Fresh suit by latter on same cause of action—*Res judicata. See* OATHS ACT, SS. 8 AND 11. 40 Bom.L.R. 1005.

——S. 11, Expl. VI—*Representative suit—Suit by reversioner—Finding in*—Res judicata.

A suit brought by a reversioner is for the benefit of all the reversioners entitled to sue and just as any finding given in favour of a reversioner benefits all members of the reversionary body, a finding arrived at against him injures every body concerned. (*Addison, A.C.J. and Din Mahomed, J.*) RAM BHAJ *v.* AHMAD SAID AKHTAR KHAN. 178 I.C. 302=11 R.L. 440=40 P.L.R. 591=A.I.R. 1938 Lah. 571.

——S. 11, Expl. VI— *Representative suit—What is—Suit for some inhabitants of village claiming right of irrigation from certain tank—No evidence that right was claimed for all villagers—Dismissal—Subsequent suit by other villagers claiming same right against same defendants—If* res judicata.

The fact that the relief claimed by a body of persons in the subsequent suit is similar to the relief claimed in a former suit cannot make the former suit a representative suit for purposes of *res judicata.* It is only if the relief claimed in the prior suit is so comprehensive that, if granted, it will confer a benefit on a class of persons including the parties in the subsequent suit that the decision in the former can operate as *res judicata* in the later suit against those not actually impleaded in the former suit. The dismissal of a suit by certain residents of a village for an injunction to restrain the residents of an adjoining village from interfering with the rights of the plaintiffs to irrigate their fields from certain tanks cannot operate as *res judicata* so as to bar a subsequent suit by other residents of that village against the same defendants, for a perpetual injunction to restrain the defendants from interfering with the taking of water from the tanks to

their fields, when there is nothing to show that the plaintiffs in the prior suit claimed the right for themselves as well as for all the other residents of the village in question. (*Niamatullah, J.*) NAMDAR KHAN *v.* NAIMUL KHAN. 1937 A.L.J. 293=1937 A.W.R. 258=10 R.A. 16=169 I.C. 388=1937 A.L.R. 522=A.I.R. 1937 All. 289.

——S. 11, Expl. VI—Res judicata—*Requisites of.*

In order to determine whether the former suit operates as a bar by *res judicata* to the present suit, it is necessary to examine carefully not only the form and the substance of the former suit but also the plaint, the pleadings and the judgment thereof and compare them with those of the present suit. Moreover it is necessary to determine whether the former suit was between the same parties or between parties who litigated *bona fide* in respect of a private right claimed in common for themselves and others, *viz.*, the present plaintiffs. The plaintiffs in the former suit must be found to have carried on the litigation *bona fide* and in a representative character on behalf of the plaintiffs in the present suit. MOOLSINGH *v.* SANGIDANSINGH. 1939 M.L.R. 1 (I.K.).

——S. 11, Expl. VI—*Reversioner—Decree obtained by, in declaratory suit—His status as next heir—If* res judicata.

A person who succeeds in obtaining a declaratory decree that an alienation made by the widow of the last male-holder will not affect his reversionary rights need not necessarily be the next person entitled to succeed to the property after the death of the widow, and the matter cannot therefore be taken as *res judicata.* It is, however, clear that he must have been found to be an heir in the declaratory suit, and to that extent the matter is *res judicata* as between the parties. (*Bhide, J.*) KHAN GUL KHAN *v.* KARAM NISHAN. 42 P.L.R. 14=A.I.R. 1940 Lah. 172.

——S. 13—*Foreign Court—Jurisdiction—Submission to—What amounts.*

A resident in British India who files suits in a foreign Court against residents of the foreign state which the foreign Court has jurisdiction to try cannot thereby, by implication, be taken to submit to the jurisdiction of that Court in regard to a later suit against him in that Court where that Court has no jurisdiction. (*Beasley, C.J. and King, J.*) OOMER HAJEE AYOOB SAIT *v.* THIRUNAVUKKARASU PANDARAM. 59 Mad. 918=162 I.C. 904=8 R.M. 1071=1936 M.W.N. 478=43 L.W. 607=A.I.R. 1936 Mad. 552=71 M.L.J. 93.

——S. 13—*Foreign Court—Jurisdiction against absent foreigners—Cause of action if a ground of jurisdiction.*

No territorial legislation can give jurisdiction, which any foreign Court ought to recognise, against absent foreigners who owe no allegiance or obedience to the power which so legislates. The rule is that cause of action is not a general ground of jurisdiction recognised by International Law. The case may be otherwise where the non-resident foreigner is a subject of the same sovereign power which legislates, although even in such a case there must be an express power of legislation conferred by statute. (*R. C. Mitter, J.*) CHORMAL BALCHAND *v.* KASTURI CHAND SERAOGI. 63 Cal. 1033=63 C.L.J. 175=40 C.W.N. 591.

C. P. CODE (1908), S. 13.

——S. 13—*Foreign Court—Non-resident foreigner — Submission to jurisdiction — What amounts to.*

If a non-resident defendant appears in a foreign Court, and pleads that that Court has no jurisdiction, and also pleads to the merits, he submits to the jurisdiction of that Court voluntarily. Having taken the chance in that Court he cannot be allowed to turn round and impeach that judgment on the ground of incompetency of the Court passing it when it is sought to be enforced in another country. It may be that he voluntarily submits to its jurisdiction even when he only appears but does not plead to the merits. (*R. C. Mitter, J.*) CHORMAL BALCHAND *v.* KASTURI CHAND SERAOGI. **63 Cal. 1033=63 C.L.J. 175=40 C.W.N. 591.**

——S. 13—*Foreign judgment— Absence of jurisdiction—Submission to jurisdiction— What constitutes—Inference from conduct of defendant during pendency of suit.*

A foreign Court clearly has no jurisdiction to pass a decree against a defendant in a personal action for money where the defendant on the date of the suit is not a resident of the foreign state at all, but a resident of British India. But though a defendant who remains *ex parte* does not, by that mere fact, submit to the jurisdiction of the foreign Court, his conduct both before and after the decree is passed may afford evidence of his submission to jurisdiction and his intention is remaining *ex parte*. Where in a suit in a foreign Court against a defendant residing in British India, the plaintiff effects an attachment before judgment of moneys belonging to the defendant in the hands of a third person, and the defendant writes a letter to the plaintiff praying that he may be allowed to collect a portion of the money and stating that the plaintiff may collect the rest of it, and the defendant therefore allows the suit to proceed *ex parte*, there is a submission to jurisdiction of the foreign Court, and the defendant cannot at the time of execution object to the decree as being without jurisdiction. (*Beasley, C. J. and King, J.*) OOMER HAJEE AYOOB SAIT *v.* TIRUNAVUKKARASU PANDARAM. **59 Mad. 918=162 I.C. 904=8 R.M. 1071=1936 M.W.N. 478=43 L.W. 607=A.I.R. 1936 Mad. 552=71 M.L.J. 93.**

——S. 13—*Foreign judgment—Conditions of validity in British India*—Res judicata—*Operation of.*

Before a foreign judgment can be regarded as having extra-territorial validity, at least one of the following conditions must be satisfied:—(1) The defendant should be a subject of the foreign country; (2) the defendant should be resident in the foreign country at the time when the action is begun against him; (3) the defendant must have been served with process while temporarily present in the foreign country; (4) the defendant in his character as plaintiff in the foreign action must himself have selected the *forum* where the judgment was given against him; (5) the defendant must have voluntarily appeared; or (6) the defendant must have contracted to submit to the jurisdiction of the foreign Court. A foreign judgment may operate as *res judicata* except in the six cases specified in S. 13, C. P. Code, and subject to the other conditions specified in S. 11, C. P. Code. Where the defendant voluntarily submits to the jurisdiction of the foreign Court even if that Court has no jurisdiction over him on the ground of his being a resident of British India, and consents to have a decree made against him, the foregin Court has, upon the well recognised "principle of submission" jurisdiction over him, and any decree made by it would be given not only territorial recognition but extra-territorial recognition also by Courts of all civilised countries. Such a judgment is clearly a judgment of a competent foreign Court, and as such is binding on the defendant unless it is subject to the infirmities specified in S. 13, C. P. Code. (*Rangnekar and Macklin, JJ.*) MALLAPPA *v.* RAGHAVENDRA. **40 Bom.L.R. 77=I.L.R. (1938) Bom. 16=174 I.C. 615=10 R.B. 470=A.I.R. 1938 Bom. 173.**

——S. 13—*Grant of probate and subsequent revocation by foreign Court—Effect of—Proof of will in British India—If precluded.*

A judgment of a foreign Court granting probate of a will is conclusive evidence that the instrument proved was testamentary according to the law of that foreign country. It proves nothing else. The subsequent revocation of that probate by that Court proves no more than that the instrument before it was not testamentary according to the law of that place. Such a judgment cannot be treated as a judgment *in rem* so as to make it incumbent on a Court in British India to hold that the deceased left no will or died intestate. A Court in British India can still hold that the will left by the deceased is true, valid and binding in respect of the properties left by him in British India, the devolution of which is governed by the law of British India; and not by the law of the place where the owner of the properties resided and died. (*Burn and K.S. Menon, JJ.*) FATMA KANI AMMAL *v.* SHEIK DAWOOD. **160 I.C. 733=8 R.M. 712=43 L.W. 75=1936 M.W.N. 82=A.I.R. 1936 Mad. 197.**

——Ss. 13 and 44—*Scope—Foreign judgment—Decree of Court of Native State transferred for execution to British Indian Court—Powers of latter—Refusal of execution on ground of decree being without jurisdiction—Subsequent suit to enforce—Maintainability*—Res judicata.

The analogy of a transferee Court does not apply in the case of a British Indian Court to which the decree of a Court of Native State is sent for execution under S. 44, C. P. Code. A decree of a Court of a Native State does not cease to be the decree of a foreign Court simply because a notification has been issued under S. 44, C. P. Code. The provisions of the Code relating to transfer of decrees for execution apply only to decrees made by British Indian Courts and transferred to other British Indian Courts. When a notification has therefore been issued under S. 44, C. P. Code, with respect to decrees of a Native State Court, the sole remedy of the plaintiff who has obtained a decree in such Native State, is to apply for execution of his decree and not to institute a suit under S. 13 for its enforcement in British India. Even if it be held that he has two remedies, *e.g.*, to sue under S. 13 or to apply for execution under S. 44, the two are of the same nature and scope and therefore alternative. If he elects the remedy by way of execution, he cannot again sue under S. 13. Further when the British Indian Court to which the decree of the Court of the

C. P. CODE (1908), S. 13.

Native State is sent for execution refuses execution holding that the decree is a nullity as having not been passed by a Court of competent jurisdiction, such decision is final between the parties and operates as *res judicata* so as to bar a suit on the foreign judgment under S. 13, C. P. Code. The British Indian Court as executing Court has jurisdiction to decide the question whether the Court of the Native State is a Court of competent jurisdiction. (*R.C. Mitter, J.*) CHORMAL BALCHAND *v.* KASTURI CHAND SERAOGI. **63 Cal. 1033 =63 C.L J. 175=40 C.W.N. 591.**

——**S. 13**—Scope—Foreign judgment—Question as to validity of will—Decision by foreign Court—When conclusive in British India—Legatees in British India—If bound. *See* EVIDENCE ACT, S. 41. **40 Bom.L.R 571.**

——**S. 13 (a)**—*Applicability—"Court of competent jurisdiction"—Suit on mortgage in foreign Court—Defendant minor living with husband in British India—Husband appointed guardian* ad litem *failing to appear—Appointment of Court nazir as guardian—Legality—Decree against assets of deceased in hands of defendant—If one passed by Court of competent jurisdiction.*

A Court has no jurisdiction to pass any decree against the property of the mortgagor (by way of a personal decree) situate outside its jurisdiction. A personal decree in a mortgage suit against the legal representative of the mortgagor limited to the assets of the deceased mortgagor cannot be passed so far as such assets are not situate within its own jurisdiction; where the defendant in such a suit in a foreign Court, is a minor daughter of the deceased living with her husband in British India and such defendant does not appear at the hearing an *ex parte* decree passed against her is a nullity. The fact that the foreign Court appoints its own nazir as the guardian *ad litem* of the minor defendant and that such guardian files a written statement contesting the plaintiff's claim would not be sufficient to hold that the defendant submitted to the jurisdiction of the Court. The foreign Court has no jurisdiction to appoint its own nazir as the guardian *ad litem*, when the husband of the minor defendant, who is her *de jure* and *de facto* guardian has never expressed his unwillingness to act as her guardian. The fact that he was originally appointed guardian and failed to appear would not confer jurisdiction on the foreign Court to appoint its own officer as guardian *ad litem*, so long as the husband does not refuse to be guardian, by reason of O. 32, R. 4, C. P. Code. The Court by appointing its own nazir guardian *ad litem* acts against the interests of the minor and against natural justice by indirectly compelling her to appear in the suit by appointing its own officer as guardian *ad litem*. Her appearance is not a voluntary submission to the jurisdiction of the Court. The *ex parte* decree against the minor is a nullity and does not bind the minor, and a suit based on such judgment is not maintainable in British India. (*Lokur, J.*) GAJANAN SHESHADRI *v* SHANTABAI. **187 I.C. 57=12 R B. 404=41 Bom.L R. 818=A. I.R. 1939 Bom. 374.**

——**S. 13 (a)**—*Court of competent jurisdiction—Competency—How determined—Test—Law of foreign state or private international law—Jurisdiction in personal action.*

C. P. CODE (1908), S. 13.

The question whether a foreign Court is a Court of competent jurisdiction within the meaning of S. 13 (*a*). C. P. Code, must be determined, so far as personal actions are concerned, not by the territorial law of the foreign state, but by the rules of Private International Law. A foreign Court has jurisdiction in personal actions in an international sense in the following cases, *viz.*, (1) where the defendant is the subject of the foreign country in which the judgment is obtained; (2) where the defendant is the subject of that foreign country when the action is commenced; (3) where the defendant, in the character of a plaintiff, has selected the former in which he is afterwards sued; (4) where the defendant has voluntarily appeared in the foreign Court and submitted to its jurisdiction; and (5) where the defendant has contracted to submit himself to the foreign forum in which the judgment is obtained. There may be also another class of cases in which the foreign Court would have jurisdiction, *i e.*, where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action has arisen during his stay within that jurisdiction. Unless a defendant falls within one or other of these possible cases, the foreign Court has no jurisdiction to entertain and decide a personal action against him, and its judgment would not be that of a Court of competent jurisdiction within the meaning of S. 13 (*a*). (*R. C. Mitter, J.*) CHORMAL BALCHAND *v* KASTURI CHAND SERAOGI. **63 Cal. 1033=63 C.L.J. 175=40 C W N. 591.**

——**S. 13 (a)**—*Court of competent jurisdiction—Test of—Power of British Indian Court in suit on foreign judgment.*

Whether a foreign Court is or is not a Court of competent jurisdiction is to be determined by principles of international law. Ordinarily it is not open to the Courts in British India to sit in appeal over a foreign judgment, and to refuse to recognise a foreign judgment because it proceeds on grounds which would not be adequate in British India unless it offends against the rules of S. 13, C. P. Code. (*Rangnekar and Macklin, JJ.*) MALLAPPA *v.* RAGHAVENDRA. **I.L.R. (1938) Bom. 16=174 I.C. 615=10 R.B. 470=40 Bom. L.R. 77=A.I.R. 1938 Bom. 173.**

——**S. 13 (a)**—*Foreign Court*—Ex parte *judgment—Defendant not appearing—Executability in British India—Submission to jurisdiction—What amounts to—Defendant owning business in foreign state and filing suits in foreign Court on prior occasions—If submission to jurisdiction.*

If the defendant in a foreign suit has appeared before the foreign Court in the suit, thus recognising the jurisdiction of the Court, he cannot afterwards in proceedings in execution of the decree, taken in British India, be heard to say that the foreign Court had no jurisdiction. But the mere fact that a party has once appeared before the foreign Court in the character of plaintiff is not sufficient to regard him for ever afterwards as having submitted to the jurisdiction of the foreign Court in any subsequent action, by any person or upon any cause of action, which may be brought against him. The fact that a party has got a business in a foreign territory, and has filed suits in the Court of that foreign territory before is no reason for coming to the conclusion that he has submitted to its

C. P. CODE (1908), S. 13 (b).

jurisdiction in respect of a suit instituted against him later on in that Court, in which he never appears at all. The *ex parte* decree passed against him in such a case, although it may be executed against movable or immovable property possessed by him within the limits of the foreign Court's jurisdiction is not executable against him in British India. (*Cornish, J.*) THIRUNAVUKKARASU PANDARAM *v.* PARASURAMA AIYAR. **167 I.C. 13=9 R.M. 444=1936 M.W.N. 1165=44 L.W. 752=A.I.R. 1937 Mad. 97=71 M.L.J. 838.**

——S. 13 (b)—*Applicability—Test—"Given on the merits of the case"—Meaning of.*

The test to determine whether a foreign judgment was given on the merits is to find out whether it was given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's case on the evidence. Where the foreign Court has given a decree to the plaintiff not because the defendant was unrepresented or that he did not raise any objection to the plaintiff's claim, but it considered the plaintiff's claim on its merits, and after taking evidence it came to the conclusion that the claim was proved, the suit must be held to have been disposed of on the merits and the defendant cannot get the benefit of the exception contained in Cl. (*b*) of S. 13, C. P. Code. (*Lokur, J.*) GAJANAN SHESHADRI *v.* SHANTABAI. **187 I.C. 57=12 R.B. 404=41 Bom.L.R. 818=A.I.R. 1939 Bom. 374.**

——S. 13 (b)—*"Merits of the case"—Power of British Indian Court to enquire into.*

One of the objections, among others, to the validity of a foreign judgment is that it was not given on the merits. Under S. 13 (*b*), C. P. Code, the Courts in British India have a right to examine the foreign judgment to see whether it has been given on the merits. The law in India in this respect is more elastic and wider than in England. (*Rangnekar and Macklin, JJ.*) MALLAPPA *v.* RAGHAVENDRA. **I.L.R. (1938) Bom. 16=174 I.C. 615=10 R.B. 470=40 Bom.L.R. 77 =A.I.R. 1938 Bom. 173.**

——S. 13 (c) and (f)—*Foreign judgment—Validity—Refusal to give effect to valid plea of* res judicata—*Disregard of international law—Effect of.*

A foreign judgment is impeachable for breach of any of the conditions specified in S. 13, C. P. Code; and a foreign judgment which totally disregards the comity of nations or which knowingly and perversely disregards the rights given to a British subject by the law of his country will not, and cannot, be held to be of any effect in British India. A refusal to give effect to a valid plea of *res judicata*, which a British Court would give effect to under the prevailing law in British India and a complete disregard of international law by ignoring "the principle of submission" to jurisdiction which is recognized by all civilized countries would render a foreign judgment of no effect in British India. (*Rangnekar and Macklin, JJ.*) MALLAPPA *v.* RAGHAVENDRA. **I.L.R. (1938) Bom. 16=174 I.C. 615=10 R.B. 470=40 Bom. L.R. 77=A.I.R. 1938 Bom. 173.**

——S. 15—"Court of the lowest grade"—Meaning of—If includes village Court governed by special Act. *See* LIMITATION ACT, S. 4. **(1940) 1 M.L.J. 220.**

C. P. CODE (1908), S. 17.

——S. 17—*Advantage conferred by—When can be availed of.*

Where a plaintiff has two or more causes of action in the suit he can take advantage of the provisions of S. 17, C. P. Code, if the joinder of such causes of action is permitted by the succeeding provisions of the Code, for instance, O. 1, R. 3 and O. 2, R. 3. If he cannot do so and the joinder of the causes of action is had for multifariousness, then the suit cannot be tried in either of the Courts within whose jurisdiction the properties are situate. (*Iqbal Ahmad and Bajpai, JJ.*) SATRUHAN SINGH *v.* COLLECTOR OF GORAKHPUR. **188 I.C. 486=1940 A.L.J. 110=13 R.A. 25 =1940 A.W.R. (H.C.) 109=A.I.R. 1940 All. 205.**

——S. 17—*Applicability—Conditions—'Courts'—Meaning—Properties situate within the jurisdiction of a British Indian and a foreign Court—Jurisdiction.*

S. 17 of the C. P. Code does not confer jurisdiction on a Court unless the defendants are in possession of some property within the jurisdiction of that Court. Further, it is necessary for the section to apply, that the 'different Courts' should be Courts in British India. Where a suit was for possession of two items of property one of which was within the jurisdiction of a British Indian Court, while the other was within the jurisdiction of a foreign Court.

Held, that a British Indian Court would have no jurisdiction to entertain the suit as regards the item of property situated within the jurisdiction of the foreign Court. (*Broomfield and Macklin, JJ.*) KARUSINGA *v.* NARSINHA. **I.L.R. (1937) Bom. 895=174 I.C. 116=10 R.B. 426=39 Bom. L.R. 1287=A.I.R. 1938 Bom. 121.**

——S. 17—*Applicability—Courts in Berar—C. P. Code, extended to Berar under Indian Foreign Jurisdiction Act* (1890).

The Berars are not within the definition of 'British India' in S. 3 (7) of the General Clauses Act (1897). The Courts in Berar are foreign Courts. The words in S. 17 'within the jurisdiction of different Courts' mean Courts to which the Code applies *pro prio vigore* and as such, the mere fact that the Code has been applied under the Foreign Jurisdiction Act, would make no difference to the application of S. 17 of the Code. (*Broomfield and Macklin, JJ.*) KARUSINGA *v.* NARSINHA. **I.L.R. (1937) Bom. 895=174 I.C. 116=10 R.B. 426=39 Bom.L.R. 1287=A.I.R. 1938 Bom. 121.**

——S. 17—*Applicability to Courts established under Bengal, Agra and Assam Civil Courts Act.*

The C. P. Code, including S. 17, extends to Courts established under the Bengal, Agra and Assam Civil Courts Act. (*Sir Shadi, Lal.*) NRISINGHA CHARAN NANDY *v.* RAJNITI PRASAD SINGH. **63 I.A. 311=15 Pat. 567=163 I.C. 49 =40 C.W.N. 1061=38 Bom.L.R. 768=44 L.W. 88=8 R.P.C 301=17 Pat.L.T. 461=63 C.L.J. 476=1936 All.L.R. 577=1936 O.L.R. 346=1936 P.W.N. 483=A.I.R. 1936 P.C. 189=71 M.L.J. 60 (P.C.).**

——S. 17—*Choice under—When available.*

The choice given by S. 17 can be utilised only if the C. P. Code applies to both the Courts. (*Sir Shadi Lal.*) NRISINGHA CHARAN NANDY *v.* RAJNITI PRASAD SINGH. **63 I.A. 311=15 Pat. 567=163 I.C. 49=40 C.W.N. 1061=38 Bom. L. R. 768=44 L.W. 88=8 R.P.C. 301=17 Pat.L.T.**

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461=1936 All.L.R. 577=1936 O L.R. 346=1936 P.W.N 483=63 C.L.J. 476=A.I.R. 1936 P. C. 189=71 M.L.J. 60 (P.C.).

——S. 17—*Suit in respect of house and land in Court within whose jurisdiction house alone is situate—Appeal from decree filed in proper Court—Claim in respect of house abandoned in appeal—Appeal relating only to land which does not lie within jurisdiction of appellate Court—Appeal, if can be heard.*

Where a suit in respect of a house and certain land was filed in a Court within whose jurisdiction the house alone was situate and an appeal from the decree in the suit was filed in the Court to which appeals lie from the decrees of that Court, the fact that the plaintiff abandoned his claim in respect of the house in appeal and the appeal related only to the land which did not lie within the jurisdiction of the appellate Court would not affect the jurisdiction of that Court to hear the appeal. (*Zia-ul-Hasan and Smith, JJ.*) SUNDAR LAL *v.* GUR SARAN LAL. 172 I.C. 637=1938 O A. 34=1938 O.L R. 14=10 R.O. 187=1938 O.W.N. 104=A.I.R. 1938 Oudh 65.

——Ss. 19 and 20—*Applicability—Wrongful receipt by defendant of money belonging to plaintiff—Suit in respect of—Option of plaintiff—Jurisdiction.*

Where the defendant has, by means of a tort, become possessed of a sum of money at the expense of the plaintiff, the plaintiff may elect to sue either for damages for tort, or for the recovery of the money wrongfully obtained by the defendant; the latter, *i. e.*, an action for money had and received by the defendant to the use of the plaintiff, is based on an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent and to have failed to pay it over to his principal, the plaintiff. In the former case jurisdiction would be determined by S. 19, C. P. Code, and in the latter by S. 20. (*Davis, J.C. and Lobo, A. J. C.*) MULSING DOULATRAM *v.* FATEHCHAND ANRAJ. 30 S.L.R. 182=166 I.C. 347=9 R S. 138=A.I.R. 1936 Sind 229.

——Ss. 19 and 20—*Scope—Suit in tort for wrongful conversion of Hundi—Cause of action—Jurisdiction—Place of suing.*

S. 20 is subject to the limitations of S. 19 of the Code. An action in tort for wrongful conversion of a hundi, is subject to the rule laid down in S. 19, and must be instituted in the Court within the limits of whose jurisdiction the wrongful act is done or the defendants wrongdoers reside or carry on business or personally work for gain. The Court within whose jurisdiction the hundi is endorsed over to the plaintiff will not have jurisdiction to entertain the suit when it is one in tort. If the suit, however, is one for money received upon an implied contract, the position would be different, for in that case S. 20 would determine jurisdiction. (*Davis, J. C. and Lobo, A.J.C.*) MULSINGH DOULATRAM *v.* FATEHCHAND ANRAJ. 30 S.L.R. 182=166 I.C. 347=9 R.S. 138=A.I.R. 1936 Sind 229.

——S. 20—Banker and customer—Suit by fixed depositor for repayment—Forum. *See* BANKER AND CUSTOMER. 1940 A.W.R. (H.C.) 72.

——S. 20—*"Carry on business"—Insurance Company having office at* B *making contract of indemnity at* B—*Amount payable thereunder also to be paid at* B—*Sub-agency at* K—*Agent authorized merely to take orders and transmit to* B *for acceptance—If carries on business at* K.

An insurance company having its office at *B* made a contract of indemnity at *B*. The amount to be paid thereunder was also to be paid at *B* only. The company had a sub-agency at *K*. The agent had no power to accept any offer and all he could do was to canvass business which was accepted by the company at *B*. Even where premia were forwarded through him they were accepted by the company at *B*. The agent got commission on the business canvassed by him and nothing more in the shape of office allowance or otherwise.

Held, that the company could not be deemed to carry on business at *K* and hence the Court at *K* had no jurisdiction to try a suit based on a policy issued at *B*. (*Rupchand Bilaram, A.J C.*) HASI *v.* INDUSTRIAL AND PRUDENTIAL ASSURANCE CO. 167 I.C. 669=9 R.S. 202=A I.R. 1937 Sind 17.

——S. 20—*"Carry on business"—Meaning of—Firm abroad having agent in India—Agent securing orders for firm and looking after its contracts and getting commission on business done by him—Firm—If carries on business in India.*

A firm having an office at a place at which a partner or manager is in control of the business carried on can be considered to carry on business at that place. But if a firm has only an office where business for the firm is done by an agent, the question whether it carries on business at that place depends on the authority and powers of the agent. If the agent has authority merely to take orders and to transmit them to his firm or show samples, it is not carrying on business. If, however, he has power to conclude contracts binding on his principal firm on his own initiative for and on behalf of the firm, that could be sufficient. He must be an agent in the strict and correct sense of the term. Business done through a commission agent or brother or general agent is insufficient and cannot constitute carrying on business as contemplated by S. 20, C. P. Code. An agent who secures orders for a firm abroad and looks after the contracts of the firm, and is remunerated by a commission on the business done by him, is not an agent in the strict and correct sense of the term, and the firm whom he represents cannot be consequently considered as carrying on business at the place where the agent works and does his business. (*Rupchand Bilaram, A.J.C.*) FLEMING SHAW & Co. *v.* BAHADUR & Co. 29 S.L.R. 292=164 I.C. 1015=9 R.S. 83=A.I.R. 1936 Sind 121.

——S. 20—*Carry on business—Partnership contract by* P *and* D *firms with head offices at Calcutta—*P *firm having branch in Muzaffarpur district—Contract that jute be purchased by* P *at* K *in Muzaffarpur and sold at Calcutta by* D—*Suit by* P *for dissolution and accounts—Jurisdiction of Muzaffurpur Court.*

A contract of partnership was entered into by *P* firm with *D* firm both of whom had their head offices at Calcutta. The *P* firm had a branch in the district of Muzaffarpur; the contract was that jute was to be purchased by the *P* firm at *K* in the Muzaffarpur district; and was to be sent to Calcutta to the *D* firm for sale. A suit for dissolution of partnership and rendition of accounts was instituted in the Muzaffarpur Court by the *P* firm; accounts of partnership, *i.e.*, the accounts

of sale and of profit and loss of the business were kept at Calcutta.

Held, that the purchase of jute for the purposes of business could not necessarily be the carrying on of the business of the partnership. Hence there was no place of business of the partnership in Muzaffarpur, but it was at Calcutta where the accounts were maintained. Therefore Muzaffarpur Court had no jurisdiction to try the suit. A. I.R. 1926 Mad. 427, Dist. (*Macpherson and Mahomed Noor. JJ.*) RAGHUNATH KAI RAMBILAS *v.* SURAJMAL NAGARMAL. 160 I.C. 353=8 R.P. 359=A.I.R. 1936 Pat. 6.

——S. 20—*Cause of action—Agent supplying goods to principal—Suit in respect of—Jurisdiction of Court at agent's place of business.*

The agent is entitled to file a suit for recovery of the amount due to him in respect of the business done by him as agent at the place where he carries on his business. The presumption in such cases is that a part of the cause of action arises in the place where the agent carries on his business as he is required to do a part of the work of agency in that place. Where firm *A* carrying on business at Shikarpur as commission agent of firm *B* at Amritsar, gave instructions to their (*A's*) branch at Duzdap to buy the goods on account of *B* and forward them to *B* on account of firm *A*.

Held, that the firm *A* and not its branch at Duzdap had the right to sue for commission for the goods supplied and hence it was within the competence of *A* firm to file a suit at Shikarpur, where it carried on business and from where it placed the order of *B* as its commission agent. (*Lobo, A. J. C.*) THAKURDAS MUICHAND *v.* UTTAMSING. 173 I.C. 62=10 R.S. 194=A.I.R. 1937 Sind 317.

——S. 20—*Cause of action—Agreement to pay maintenance—Absence of recital as to place of payment—Suit at promisee's place of residence—Maintainability.*

A suit by a lady against her father-in-law and her husband on a written agreement entered into at Lucknow, to pay her a monthly allowance of Rs. 10 if her husband failed to pay her this allowance in the event of her husband's turning her out, was brought at Khandwa where plaintiff resided.

Held, that Khandwa Court had jurisdiction to entertain the suit against both of them as there was no express agreement to pay her at any particular place and as they were under an implied obligation to find the creditor and pay her where they found her. (*Pollock, J.*) MT. KANIJI JOHRA *v.* RAJA HUSSAIN. I.L.R. (1937) Nag 97=167 I.C. 700=9 R.N. 201=A.I.R. 1937 Nag. 39.

——S. 20—*Cause of action—Contract of insurance against burglary—If arises in place where burglary takes place.*

Where a person gets certain ornaments insured with a company for a certain sum with a guarantee that if the articles be lost by burglary the company should make good such loss or damage not exceeding the sum specified, part of the cause of action for a suit based on the contract arises at the place where the burglary takes place. (*Sulaiman, C J. and Bajpai, J.*) GUARDIAN ASSURANCE COMPANY, LTD. *v.* SHIVA MANGAL SINGH, 167 I.C. 897=9 R.A. 585=1937 A.L.J.

98=I.L.R. (1937) All. 234=1937 A.L.R. 265=1937 A.W.R. 52=A.I.R. 1937 All. 208.

——S. 20—*Cause of action—Insurance company having head office at Calcutta—Agent at Erode securing proposal and effecting policy—Policy accepted and money payable at Calcutta—Death of assured at Bangalore—Suit in Court having jurisdiction over Erode—Jurisdiction of latter Court—Cause of action—Where arises.*

An Insurance Company having its head office at Calcutta had an agent at Erode within the limits of the jurisdiction of the Coimbatore Subordinate Judge's Court, whom it authorised to canvass proposals for insurance; but the agent was not authorised to accept any proposal. In the course of his agency he secured a proposal, got the proposal form correctly filled up, and sent it to the head office at Calcutta for disposal. The policy was accepted by the company at Calcutta. The money was payable at Calcutta only. The assured died at Bangalore and his widow sued the company for the policy amount in the Subordinate Judge's Court of Coimbatore within whose jurisdiction was Erode.

Held, (*i*) that until the proposal reached the head office of the company at Calcutta there was no offer, and therefore the offer was made at Calcutta and accepted at Calcutta; and the policy money being also payable at Calcutta the cause of action arose wholly in Calcutta; (*ii*) that though a part of the cause of action arose at Bangalore where the assured died, that did not confer any jurisdiction on the Coimbatore Court; (*iii*) and that no part of the cause of action having arisen at Erode within the jurisdiction of the Coimbatore Court, the latter had no jurisdiction to entertain or decide the suit. (*Cornish and King, JJ.*) BENGAL INSURANCE AND REAL PROPERTY CO., LTD. *v.* VELAYAMMAL. I.L.R. (1937) Mad. 990=1937 M.W.N. 303=45 L.W. 616=170 I.C. 279=10 R M. 170=A.I.R. 1937 Mad. 571.

——S. 20—*'Cause of action'—Interpretation.*

The Court must attribute to the expression 'cause of action' in S. 20 (*c*) of the present Code of 1908 the ordinary meaning applied to it, and not confine it within the narrow categories which were specified in the amending Act of 1888 which had been intentionally removed by the Legislature. The words should be understood to mean as defined in the English Courts and accepted in India. (*Sulaiman, C J. and Bajpai, J.*) GUARDIAN ASSURANCE CO., LTD. *v.* SHIVA MANGAL SINGH. I.L.R. (1937) All 234=167 I.C. 897=9 R.A. 585=1937 A.L.J. 98=1937 A.L.R. 265=1937 A.W.R. 52=A.I.R. 1937 All. 208.

——S. 20—*"Cause of action"—Meaning—Territorial jurisdiction—Test.*

A cause of action consists of the entire set of facts which gave rise to a claim. It includes everything which, if not proved, gives the defendant an immediate right to judgment. It includes every fact which is material to be proved to entitle the plaintiff to succeed. A liquidator of a Co-operative Credit Society at Midnapore sent a registered letter to a member residing at Alipore demanding money due by the member to the Society. The member instituted a suit in Alipore Court claiming that he had long ago ceased to be a member and was not liable for any debt to the Society. The Alipore Court holding

C. P. CODE (1908), S. 20.

that cause of action arose within its jurisdiction entertained the suit.

Held, that the plaintiff, in order to succeed in the suit, had only to show that the assessment made upon him by the liquidator was wrong. As soon as he had proved it, he would be entitled to succeed. It was not necessary for him to prove that he received a registered letter of demand. The Alipore Court therefore was wrong in holding that there was territorial jurisdiction of Alipore in the suit. The suit should have been laid at Midnapore. (*M. C. Ghose, J.*) BENI MADHAB SIKDAR *v.* SARAT CHANDRA JANA. 176 I.C. 221=11 R.C. 54=A.I.R. 1937 Cal. 643.

——S. 20—*Cause of action—Meaning of.*

The term "cause of action" means every fact which, if traversed, it would become necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It is, in other words, a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed in the suit. (*Davis, J.C. and Lobo, A.J. C.*) MULSING DOULATRAM *v.* FATEHCHAND ANRAJ. 30 S.L.R. 182=166 I.C. 347=9 R.S. 138=A.I.R. 1936 Sind 229.

——S. 20—*Cause of action—Promissory note payable on demand—Promissory note handed over to promisee at* B*—Promisee resident at* M*—Court at* M*—Jurisdiction of.*

Where a promissory note, payable on demand, describes the promisee as resident of *M*, but the note is handed over to the promisee at *B*, it cannot be implied in such circumstances that there is any promise to pay at the place of the promisee's residence. As the demand to pay can be made only at *B*, and as the promisor is not bound to pay till such demand is made, no cause of action arises at *M* and therefore the Court at *M* has no jurisdiction to entertain a suit on such a promissory note. (*Pollock, J.*) JANKIRAM *v.* BHAULAL. 171 I.C. 278=10 R.N. 108=A.I.R. 1937 Nag. 241.

——S. 20—*Cause of action—Restitution of conjugal rights—Suit by Hindu husband against wife and wife's father—Forum.*

A Hindu husband is entitled to maintain a suit against his wife for restitution of conjugal rights in the Court having jurisdiction at the place where he lives. It is the breach, without lawful cause, of the wife's duty to live with her husband that gives rise to the cause of action, and the fact that the wife has not previously lived with her husband at that place, or that she lives elsewhere or that the marriage which has not been consummated took place elsewhere, makes no difference. The breach is committed at the place where the husband is living as that is the place where the wife should live. But the suit so far as it is against the wife's father for an injunction to restrain him from preventing his daughter to return to the plaintiff, cannot be maintained at the place of the husband's residence, when the father lives beyond the jurisdiction of the Court of that place. (*Beasley, C.J. and Stodart, J.*) VENUGOPAL NAIDU *v.* LAKSHMI AMMAL. 59 Mad. 392=161 I.C. 485=8 R.M. 832=43 L W. 307=1936 M.W.N. 19=A.I.R. 1936 Mad. 288=70 M. L.J. 288.

——S. 20—*Cause of action—Suit for price of goods supplied—Court disallowing part of claim as arising outside its jurisdiction—Absence of plea of want of jurisdiction—Effect.*

A vendor brought a suit to recover certain amount as due for supply of goods at places within the jurisdiction of the Court. The vendee admitted that the places were within jurisdiction of the Court but denied to have made any purchase. The Court, however, found that a part of the claim arose outside British India and hence disallowed the claim to that extent.

Held, that the Court ought not to have disallowed part of the claim as there was no plea that part of the claim arose outside British India and hence there was no necessity to take evidence on that point. But even assuming that the vendee had chosen to take such plea, the payment made could have been appropriated by the vendor towards part of the claim arising outside British India even at the last moment. Therefore the Court was wrong in disallowing that part of the claim. (*Pollock, J.*) RAGHUNATHJI PIROOLAL *v.* KISANLAL TULSIRAM. 168 I.C. 714=9 R.N. 268=A.I.R. 1937 Nag. 94.

——S. 20—*Cause of action—Suit to set aside decree as having been fraudulently obtained after declaring it illegal, fraudulent and a nullity—Decree obtained at one place—Suit to set aside in another place—Jurisdiction of Court at latter place—Proper forum.*

Plaintiffs who resided and carried on business within the jurisdiction of the Subordinate Judge's Court, at *S* executed a mortgage in favour of the defendants who were residing and carrying on business in Bombay the properties mortgaged being situate in *S*. The defendants sued on the mortgage in the High Court of Bombay and got an *ex parte* preliminary decree. Thereafter, they caused a notice to be sent through their attorney to the plaintiffs, by which the plaintiffs were informed that the Bombay High Court would be moved for certain reliefs in the matter of sale of the mortgaged properties. The plaintiffs received this notice on 15—3—1939 and on 17—3—1939, they instituted a suit in the Subordinate Judge's Court at *S*, for a declaration that the decree obtained by the defendants at Bombay was illegal, fraudulent and a nullity, and was liable to be set aside and for an order to set aside the decree. The Subordinate Judge of *S* returned the plaint for presentation to the proper Court on the ground that he had no territorial jurisdiction to entertain it.

Held, (1) that the receipt of the notice by the plaintiffs on 15—3—1939 was no part of the cause of action for the suit at all, and could not possibly change the venue of trial to *S*; (2) that the cause of action set up in the plaint, *viz.*, the fraudulent obtaining of the decree, was a matter which was done in Bombay; (3) that there being no definite allegation in the plaint which could constitute a cause of action arising at *S*, the Subordinate Judge of *S* was right in returning the plaint, the place where the plaintiffs' cause of action arose being Bombay. (*Rowland and Chatterjea, JJ.*) SAMPAT LALL *v.* KALURAM BRIJMOHAN. 21 Pat.L.T. 259=A.I.R. 1940 Pat. 444.

——S. 20—*Commission agency business—Suit by principal against agent—Forum.*

In the case of a commission agency business, a suit by the principal against the agent can be ins-

C. P. CODE (1908), S. 20.

tituted under Cl. (*c*) of S. 20, either where the contract was made or where the accounts are to be rendered and payment is to be made. (*Dunkley, J.*) ANNAMALAI CHETTYAR *v.* DAW HNIN U. **163 I.C. 397 (2)=9 R.R. 9=A.I.R. 1936 Rang. 251.**

——**Ss. 20, 23 and 151**—*Leave granted under S. 20 (b) without notice to opposite party—Objections against such leave—If can be heard.*

Where leave under S. 20 (*b*) is granted without issuing notice to the opposite party, the Court cannot hear objection against such leave by exercising its inherent jurisdiction and pass orders in the ends of justice, as the opposite party can approach the Court for an order under S. 23 (3), which is the proper remedy for him. (*Almond, J.C. and Mir Ahmad, J.*) BHAGWAN DAS *v.* KISHAN CHAND. **174 I.C. 815=10 R.Pesh. 74=A.I.R. 1938 Pesh. 15.**

——**S. 20**—*Lease—Lands outside Madras City—Lease executed and registered outside—Agreement of lease in Madras and lessor resident in Madras—Place of payment of rent not specified—Intention of parties—Suit in Madras—Maintainability—Contract Act, S. 49.*

If from the circumstances a contract is entered into, it is reasonable to infer that the intention of the parties was that performance was to be in a certain place, that inference should be drawn whether the rule of the English Common Law which requires the debtor to seek the creditor applies or not to India. Under S. 49 of the Contract Act, it is the duty of the promisor when no place is fixed in the contract for the performance of it to apply to the promisee to appoint a reasonable place for performance of the promise and to perform it at such place. Disregard or neglect by him to perform this statutory duty imposed on him cannot better his position. The S. P. G. Mission having its local office in the City of Madras had certain lands in Shiyali taluk in Tanjore District. An agreement for leasing the lands to the defendant was entered into in Madras. The defendant executed a counter-part of lease in favour of the Superintendent of the Mission who resided in Madras and who was described as such in the lease. But the lease deed itself was executed and registered in Shiyali taluk. The rent was fixed in cash. The lease, however, did not fix any specific place where payment was to be made. A suit for rent was instituted in the City Civil Court, Madras, but that Court returned the plaint holding that it had no jurisdiction as the cause of action did not arise in Madras.

Held, that the intention of the parties must have been that the payment of rent was to be made in Madras which was the place where the local office of the Mission wassituated and where the Superintendent lived. The cause of action therefore arose wholly or partly in Madras under S. 20 (*c*), C. P. Code, and the City Civil Court had jurisdiction to entertain the suit. (*Pandrang Row, J.*) SOCIETY FOR THE PROPAGATION OF THE GOSPEL *v.* SAMA RAO NAIDU. **182 I.C. 116=12 R.M. 3=1938 M.W.N. 979=48 L.W. 438=A.I.R. 1938 Mad. 977.**

——**S. 20**—*Leave to sue—Granting of—Considerations.*

The leave under S. 20 (*b*) cannot be given arbitrarily and when the defendants who reside outside jurisdiction do not appear the Court is bound to consider their position before granting leave. This obligation is in no way lessened when they do appear and object and especially when the objecting defendant seems to be the real person against whom the plaintiff wants to proceed, (*Vivian Bose, J.*) DALSUKH NATHMAL *v.* MOTILAL. **182 I.C. 842=12 R.N. 29=A.I.R. 1938 Nag. 262.**

——**S. 20**—*Leave under—Grant of—Effect—Suit on same cause of action against many defendants—Some resident beyond Court's jurisdiction and one outside British India—Suit instituted after obtaining leave of Court—Decree—Validity—Suit by non-resident foreigner to declare decree void—Competency—Propriety of grant of leave—If can be challenged.*

There is no reason to read Cl. (*b*) of S. 20, C.P. Code, as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India, when in some respects the Code is to be construed as giving jurisdiction to British Indian Courts even in actions *in personam* as against non-resident foreigners. In the case of suit against a number of defendants, some of whom are not resident within the limits of the jurisdiction of the Court, and one of whom is resident beyond British India, the cause of action being the same as against all of them, where leave has been obtained under S. 20 (*b*) of the C. P. Code to implead them in the suit, the suit is properly instituted against all the defendants including those resident beyond the Court's jurisdiction, and it makes no difference for that purpose whether these latter are residents of British India though outside the local limits of the Court's jurisdiction or are persons residing outside British India. The decree passed in the suit cannot be attacked in a subsequent suit as being void for want of jurisdiction as against the non-resident foreigner. Any argument as to whether the leave was or was not properly granted under S. 20 (*b*), C. P. Code, in the particular circumstances is not one which can be advanced in a separate suit attacking the validity of the decree passed in that suit. (*Varadachariar and Horwill, JJ.*) SWAMINATHAN CHETTIAR *v.* SOMASUNDARAM CHETTIAR. **I.L.R. (1938) Mad. 1080=181 I.C. 757=11 R.M. 845=47 L.W. 552=1938 M.W.N. 558=A.I.R. 1938 Mad. 731.**

——**S. 20**—*Place of suing—Commission agent directed to sell goods—Agent intimating terms of business and asking for custom.*

When a merchant or commission agent sends his quotations or terms of business to other people it is merely an intimation on his part of his readiness to transact business with them on those terms. Where a merchant residing in Hoshangabad District asked, by correspondence, a commission agent in Bombay what his charges were for selling coal and the commission agent wrote a letter stating his charges in detail and saying "let us have your transaction once. Then you shall have reliance on us."

Held, that the letter written by the commission agent stating the terms on which he did business was not an offer but an invitation of offer. The fact that the letter included the words "let us have your transaction once" would not convert it into an offer to be bound by acceptance for there had been no indication up till then what business

C. P. CODE (1908), S. 20.

the merchant residing in Hoshangabad wished to transact. The cause of action therefore did not arise in Hoshangabad District but in Bombay. (*Pollock, J.*) SHYAMSUNDER RAMDAS *v.* ABDUL SATTAR. 173 I.C. 943=10 R.N. 331=A.I.R. 1938 Nag. 186.

———S. 20—*Place of suing—Promissory note signed at one place—Delivery at another place—Forum.*

A suit was instituted in the Lahore Court by a Bank of Lahore on the basis of a pronote executed by *A*, *B*, *C* and *D*. *A* signed the pronote at Nawansher in the Hazara District and sent it to *C* at Lahore. *B* under *C's* instructions delivered it to the Bank.

Held, that the delivery was made by *B* with implied authority of *A* and therefore Lahore Court had jurisdiction to try the suit against *A*. (*Bhide, J.*) PUNJAB CO-OPERATIVE BANK *v.* LALA ISHAR DAS. 175 I.C. 153=10 R.L. 695=40 P.L. R. 134=A.I.R. 1937 Lah. 800.

———S. 20—*Principal and agent—Suit for accounts by principal against agent—Cause of action—Place of business of agent or of principal.*

It cannot be laid down absolutely that the principle that the debtor is bound to seek out his creditor and pay his debt is applicable in India even for the purpose of determining the local jurisdiction of a particular Court to entertain a suit. Assuming that that rule of English law either in terms or by analogy could be applied in India, it cannot be extended to a case not arising out of the relationship of debtor and creditor, as for example, a contract of agency. Where a person employs an agent to do acts for him at a particular place, the legitimate inference is that the contract is to be performed at that place. S.213 of the Contract Act cannot be read as laying down that the agent should render accounts at the principal's place. The principal has to demand accounts at the agent's place of business. A suit by a principal against his agent for accounts should therefore be instituted at a Court having jurisdiction over the place of business of the agent. (*Varadachariar, J.*) AUDINARAYANA RAO *v.* LAKSHMINARAYANA RAO. 1940 M.W.N. 254 =51 L.W. 747=A.I.R. 1940 Mad. 588=(1940) 1 M.L.J. 558.

———S. 20—*Residence—Abandonment— Burden of proof.*

Where a person actually and voluntarily retains his residence at *X* and has not abandoned it, but he occasionally goes to another place for business, the Civil Courts at *X* have jurisdiction to try suits concerning that person. The onus of proving that he has abandoned his residence at *X* lies on him who so alleges. (*Jai Lal, J.*) RAM DAS *v.* LACHHMAN DAS. 169 I.C. 321=9 R.L. 733=A.I.R. 1936 Lah. 853.

———S. 20—*Suit for accounts against commission agent—Place of suing.*

The general rule is that a suit for accounts against a commission agent must be filed at the place where the commission agent works. (*Tek Chand, J.*) RAM DITTA MAL-SANT LAL *v.* SETH JOT RAM-KIDAR NATH. 188 I C. 299=12 R.L. 518=42 P.L.R. 203=A I.R. 1940 Lah. 171.

———S. 20—*Suit against agent for amount due—Cause of action—Where arises.*

An Insurance Company having its office at Lahore appointed certain person working at

C. P. CODE (1908), S. 20.

Meerut as the chief agent for Rajputana and Bundelkhand area. The appointment was made at Lahore and all the payments were to be made at Lahore and all accounts were to be rendered at Lahore. Subsequently disputes arose between the parties and the appointment was cancelled. The company instituted suit at Lahore against the agent for recovery of certain sum due by the agent.

Held, that cause of action arose at Lahore and the Court at Lahore had jurisdiction to try the latter suit. (*Din Mahomed, J.*) LAKSHMI INSURANCE CO., LTD. *v.* B. K. KAULA. A.I.R. 1940 Lah. 85.

———S. 20—*Suit against resident of Indian State—Decree, if effective in that State.*

An Indian State, like the Bhopal State, whose Legislature is not subject to the Legislature of British India is a distinct and separate political entity. Such a State is, therefore, a foreign country in relation to British India within the meaning and for the purpose of C. P. Code. S. 20, C. P. Code, gives jurisdiction to British Indian Courts to pass a decree against residents of such a foreign State if the cause of action against them arose within the territorial jurisdiction of such Courts. But the decree has no effect against State subjects within the territorial limits of that State and, should be considered an absolute nullity. It follows, therefore, that a decree passed by a British Indian Court against a subject of the Bhopal State who at the time of the commencement of the suit did not reside or carry on business within the jurisdiction of such Court either personally or through a properly constituted agent and who did not submit to the jurisdiction of such Court is a nullity, and is not enforceable against the defendant in the forum of that state, wherever the cause of action might have arisen. (*Mahomed Ahmad Khan, C. J.*) KESRI SINGH *v.* HAR KUNWAR BAI. 187 I.C. 19.

———S. 20—*Suit based on loan—Place of suit.*

Where the suit is not based upon the promissory note but the real basis of the suit is the loan in regard to which it was merely incidentally mentioned that a promissory note was executed as collateral security to such transaction, the English doctrine that the debtor must seek his creditor for the purpose of making payment in discharge of the liability is applicable. The creditor has therefore the right of filing the suit in the Court within the territorial limits of which the cause of action accruing from non-payment arises. (*Mya Bu and Mackney, JJ.*) PALANIAPPA CHETTYAR *v.* SUBBIAH CHETTYAR. 172 I.C. 606=10 R.R. 262 =A.I.R. 1937 Rang. 433.

———S. 20—*Suit on hand-note—Place of suing—Place of contract.*

Cause of action for a suit on a hand-note arises either at the place where the transaction takes place or where it is agreed to be performed. But where it is not urged on behalf of the defendant that he was to repay the loan at any place other than the one where the transaction was made, it may be taken that the money was to be repaid to the plaintiff where the transaction took place. (*Dhavle J.*) BRIJU PANDEY *v.* GANGU AHIR. 182 I.C. 569=5 B.R. 777=12 R.P. 26=A.I.R. 1939 Pat. 294.

———S. 20—*Suit for dower—Forum — Place where plaintiff resides—Jurisdiction.*

C. P. CODE (1908), S. 21.

A suit on a contract can be instituted in the Court which has territorial jurisdiction over the place where the contract has to be performed. On the principle that when the creditor is residing in the realm, the debtor must follow the creditor unless there is a different contract between them, the place of performance must be taken to be the place where the creditor resides. The only limitation to the principle is that the creditor must reside within the realm. The above principle of English law is applicable in India. Where therefore a suit for prompt dower by a Mahomedan wife against her husband is instituted in the Court, within whose jurisdiction the wife resides, the place of performance must be taken to be the place where the plaintiff resides and the Court has jurisdiction to entertain the suit. (*R. C. Mitter, J.*) TULSIMAN BIBI *v.* ABDUL LATIF MIA. **63 Cal. 726=161 I.C. 427=8 R.C. 517=40 C.W.N. 392=A.I.R. 1936 Cal. 97.**

——**S. 21**—*Applicability—Execution proceedings.*

S. 21, C. P. Code, applies by virtue of S. 141, to execution proceedings. An objection relating to the territorial jurisdiction of the executing Court cannot be raised, therefore, for the first time in appeal or revision. (*Din Mohammad, J.*) BABU RAM *v.* HARI RAM DAULAT RAM. **42 P.L.R. 374.**

——**S. 21**—*Applicability—Objection as to want of jurisdiction in respect of restitution application—If falls under S. 21.*

S. 21, C. P. Code, is applicable only to objections as to want of territorial jurisdiction. It does not apply to cases of want of pecuniary jurisdiction or of exclusive jurisdiction. Where the objection is not as regards want of territorial jurisdiction, but that the Court to which an application for restitution is presented has no jurisdiction in the matter, not being the Court which passed the decree in the suit, and that the Court which passed the decree has exclusive jurisdiction, S. 21, C. P. Code, does not apply. (*Harries and Rachhpal Singh, JJ.*) SKINNER *v.* SKINNER. **1937 A.L.J. 588=1937 A.L.R. 713=I.L.R. (1937) All. 670=170 I.C. 706=10 R.A. 157=1937 A.W.R 510=A.I.R. 1937 All. 515.**

——**S. 21**—*Applicability—Suit on original side of High Court—Failure to object to jurisdiction—Effect of.*

S. 21, C. P. Code, can have no application to a suit brought on the original side of the High Court, which for purposes of jurisdiction, is governed not by S. 20, C. P. Code, but Cl. 12 of the Letters Patent. If the Court finds that the conditions of Cl. 12 of the Letters Patent are not satisfied, the High Court would have no jurisdiction and cannot deal with the matter or attempt to apply S. 21, C. P. Code. In a case, therefore, where the High Court has no jurisdiction under Cl. 12 of the Letters Patent, S. 21, C. P. Code, cannot give it jurisdiction; and the omission to raise the objection as to the jurisdiction at the earliest possible opportunity would not preclude the defendant from raising it at the appellate stage. (*Derbyshire, C.J. and Costello, J.*) MAHARAJA BAHADUR OF HATHWA *v.* H. E. BEAL. **164 I.C. 907=9 R.C. 308=40 C.W.N. 65.**

——**S. 21**—*Applicability—Suit to set aside decree on ground that Court had no territorial jurisdiction—If lies.*

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A separate suit would always lie to have a decree set aside or to get it declared a nullity on the ground that the Court passing the decree had no territorial jurisdiction as regards the subject-matter of the suit. The provisions of S. 21, C. P. Code, are inapplicable, as the question does not arise before the Appellate or Revisional Court. (*Mukherjea, J.*) KUMAR SARAT KUMAR ROY *v.* DHARMADAS BHATTACHARJEE. **174 I.C. 522=10 R.C. 685=42 C.W.N. 375=A.I.R. 1937 Cal. 738.**

——**S. 21**—*Objection to place of suing—If can be allowed in revision.*

An objection as to the place of suing cannot be allowed in a revisional Court where there has not been a consequential failure of justice. (*Abdul Rashid, J.*) G. P. CHATTERJEE *v.* DHANPAT MAL DIWAN CHAND. **40 P.L.R. 234.**

——**S. 21**—*Preliminary decree for accounts—Reversal of—Power of appellate Court.*

S. 21, C. P. Code, is no bar to an appellate Court reversing a preliminary decree for accounts passed by a Court of first instance against a commission agent, when the latter Court has done nothing more than deciding the issue of jurisdiction and passing a preliminary decree as a matter of course on the defendant admitting that he is the accounting party as the real trial of the suit is to begin only hereafter when accounts are to be taken. (*Tek Chand, J.*) FIRM RAM DITTA MAL-SANT LAL *v.* FIRM SETH JOT RAM-KIDAR NATH. **188 I.C 299=12 R.L. 518=42 P.L.R. 203=A.I.R. 1940 Lah. 171.**

——**S. 21**—Principle of—Applicability and scope—Constructive *res judicata* as to jurisdiction of Court—Right of party to challenge jurisdiction of Court chosen by himself. *See* C. P. CODE, S. 11. **1937 M.W.N. 1292.**

——**S. 21**—*Scope and effect of—Non-compliance with Ss. 15 to 20—If renders decree a nullity.*

S. 21 of the Code makes it abundantly clear that non-compliance with the provisions of Ss. 15 to 20 is, in no way, fatal to the jurisdiction of the Court, and does not render the decree passed by a Court of competent jurisdiction a mere nullity so as to empower the executing Court to refuse to execute it on that ground. (*Davis, C.J. and Lobo, J.*) SHINGOMAL *v.* KHUSHALDAS FIRM. **A.I.R. 1940 Sind 150.**

——**S. 21**—*Scope—Jurisdiction—Trial by Court without jurisdiction—Interference by appellate Court—Prejudice to defendant—Necessity for—Proof of.*

Before an appellate Court will interfere with a decree on the ground of want of jurisdiction of the trial Court to entertain the suit, the defendant must show that he has been prejudiced by the trial being held within the particular jurisdiction and not merely that the objection has been taken at the earliest opportunity. (*Cornish and King, JJ.*) BENGAL INSURANCE AND REAL PROPERTY CO., LTD. *v.* VELAYAMMAL. **I.L.R. (1937) Mad. 990=1937 M.W.N. 303=46 L.W. 616=170 I.C. 279=10 R.M. 170=A.I.R. 1937 Mad. 571.**

——**S. 21**—*Scope and applicability.*

It is an established principle of law that in a case which the Court is competent to try, if the parties without objection join issue and go to trial, the defendant cannot subsequently dispute its jurisdiction upon the ground that there were irregularities in the initial procedure which if

C. P. CODE (1908), S. 20.

the merchant residing in Hoshangabad wished to transact. The cause of action therefore did not arise in Hoshangabad District but in Bombay. (*Pollock, J.*) SHYAMSUNDER RAMDAS *v.* ABDUL SATTAR. 173 I.C. 943=10 R.N. 331=A.I.R. 1938 Nag. 186.

——S. 20—*Place of suing—Promissory note signed at one place—Delivery at another place—Forum.*

A suit was instituted in the Lahore Court by a Bank of Lahore on the basis of a pronote executed by *A*, *B*, *C* and *D*. *A* signed the pronote at Nawansher in the Hazara District and sent it to *C* at Lahore. *B* under *C's* instructions delivered it to the Bank.

Held, that the delivery was made by *B* with implied authority of *A* and therefore Lahore Court had jurisdiction to try the suit against *A*. (*Bhide, J.*) PUNJAB CO-OPERATIVE BANK *v.* LALA ISHAR DAS. 175 I.C. 153=10 R.L. 695=40 P.L. R. 134=A.I.R. 1937 Lah. 800.

——S. 20—*Principal and agent—Suit for accounts by principal against agent—Cause of action—Place of business of agent or of principal.*

It cannot be laid down absolutely that the principle that the debtor is bound to seek out his creditor and pay his debt is applicable in India even for the purpose of determining the local jurisdiction of a particular Court to entertain a suit. Assuming that that rule of English law either in terms or by analogy could be applied in India, it cannot be extended to a case not arising out of the relationship of debtor and creditor, as for example, a contract of agency. Where a person employs an agent to do acts for him at a particular place, the legitimate inference is that the contract is to be performed at that place. S.213 of the Contract Act cannot be read as laying down that the agent should render accounts at the principal's place. The principal has to demand accounts at the agent's place of business. A suit by a principal against his agent for accounts should therefore be instituted at a Court having jurisdiction over the place of business of the agent. (*Varadachariar, J.*) AUDINARAYANA RAO *v.* LAKSHMINARAYANA RAO. 1940 M.W.N. 254 =51 L.W. 747=A.I.R. 1940 Mad. 588=(1940) 1 M.L.J. 558.

——S. 20—*Residence—Abandonment— Burden of proof.*

Where a person actually and voluntarily retains his residence at *X* and has not abandoned it, but he occasionally goes to another place for business, the Civil Courts at *X* have jurisdiction to try suits concerning that person. The onus of proving that he has abandoned his residence at *X* lies on him who so alleges. (*Jai Lal, J.*) RAM DAS *v.* LACHHMAN DAS. 169 I.C. 321=9 R.L. 733=A.I.R. 1936 Lah. 853.

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An Insurance Company having its office at Lahore appointed certain person working at Meerut as the chief agent for Rajputana and Bundelkhand area. The appointment was made at Lahore and all the payments were to be made at Lahore and all accounts were to be rendered at Lahore. Subsequently disputes arose between the parties and the appointment was cancelled. The company instituted suit at Lahore against the agent for recovery of certain sum due by the agent.

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An Indian State, like the Bhopal State, whose Legislature is not subject to the Legislature of British India is a distinct and separate political entity. Such a State is, therefore, a foreign country in relation to British India within the meaning and for the purpose of C. P. Code. S. 20, C. P. Code, gives jurisdiction to British Indian Courts to pass a decree against residents of such a foreign State if the cause of action against them arose within the territorial jurisdiction of such Courts. But the decree has no effect against State subjects within the territorial limits of that State and, should be considered an absolute nullity. It follows, therefore, that a decree passed by a British Indian Court against a subject of the Bhopal State who at the time of the commencement of the suit did not reside or carry on business within the jurisdiction of such Court either personally or through a properly constituted agent and who did not submit to the jurisdiction of such Court is a nullity, and is not enforceable against the defendant in the forum of that state, wherever the cause of action might have arisen. (*Mahomed Ahmad Khan, C. J.*) KESRI SINGH *v.* HAR KUNWAR BAI. 187 I.C. 19.

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Cause of action for a suit on a hand-note arises either at the place where the transaction takes place or where it is agreed to be performed. But where it is not urged on behalf of the defendant that he was to repay the loan at any place other than the one where the transaction was made, it may be taken that the money was to be repaid to the plaintiff where the transaction took place. (*Dhavle J.*) BRIJU PANDEY *v.* GANGU AHIR. 182 I.C. 569=5 B.R. 777=12 R.P. 26=A.I.R. 1939 Pat. 294.

——S. 20—*Suit for dower—Forum—Place where plaintiff resides—Jurisdiction.*

C. P. CODE (1908), S. 21.

A suit on a contract can be instituted in the Court which has territorial jurisdiction over the place where the contract has to be performed. On the principle that when the creditor is residing in the realm, the debtor must follow the creditor unless there is a different contract between them, the place of performance must be taken to be the place where the creditor resides. The only limitation to the principle is that the creditor must reside within the realm. The above principle of English law is applicable in India. Where therefore a suit for prompt dower by a Mahomedan wife against her husband is instituted in the Court, within whose jurisdiction the wife resides, the place of performance must be taken to be the place where the plaintiff resides and the Court has jurisdiction to entertain the suit. (*R. C. Mitter, J.*) TULSIMAN BIBI *v.* ABDUL LATIF MIA. **63 Cal. 726=161 I.C. 427=8 R.C. 517=40 C.W.N. 392=A.I.R. 1936 Cal. 97.**

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——**S. 21**—*Applicability—Suit on original side of High Court—Failure to object to jurisdiction—Effect of.*

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——**S. 21**—*Applicability—Suit to set aside decree on ground that Court had no territorial jurisdiction—If lies.*

C. P. CODE (1908), S. 21.

A separate suit would always lie to have a decree set aside or to get it declared a nullity on the ground that the Court passing the decree had no territorial jurisdiction as regards the subject-matter of the suit. The provisions of S. 21, C. P. Code, are inapplicable, as the question does not arise before the Appellate or Revisional Court. (*Mukherjea, J.*) KUMAR SARAT KUMAR ROY *v.* DHARMADAS BHATTACHARJEE. **174 I.C. 522=10 R.C. 685=42 C.W.N. 375=A.I.R. 1937 Cal. 738.**

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An objection as to the place of suing cannot be allowed in a revisional Court where there has not been a consequential failure of justice. (*Abdul Rashid, J.*) G. P. CHATTERJEE *v.* DHANPAT MAL DIWAN CHAND. **40 P.L.R. 234.**

——**S. 21**—*Preliminary decree for accounts—Reversal of—Power of appellate Court.*

S. 21, C. P. Code, is no bar to an appellate Court reversing a preliminary decree for accounts passed by a Court of first instance against a commission agent, when the latter Court has done nothing more than deciding the issue of jurisdiction and passing a preliminary decree as a matter of course on the defendant admitting that he is the accounting party as the real trial of the suit is to begin only hereafter when accounts are to be taken. (*Tek Chand, J.*) FIRM RAM DITTA MAL-SANT LAL *v.* FIRM SETH JOT RAM-KIDAR NATH. **188 I.C 299=12 R.L. 518=42 P.L.R. 203=A.I.R. 1940 Lah. 171.**

——**S. 21**—Principle of—Applicability and scope—Constructive *res judicata* as to jurisdiction of Court—Right of party to challenge jurisdiction of Court chosen by himself. *See* C. P. CODE, S. 11. **1937 M.W.N. 1292.**

——**S. 21**—*Scope and effect of—Non-compliance with Ss.* 15 *to* 20—*If renders decree a nullity.*

S. 21 of the Code makes it abundantly clear that non-compliance with the provisions of Ss. 15 to 20 is, in no way, fatal to the jurisdiction of the Court, and does not render the decree passed by a Court of competent jurisdiction a mere nullity so as to empower the executing Court to refuse to execute it on that ground. (*Davis, C.J. and Lobo, J.*) SHINGOMAL *v.* KHUSHALDAS FIRM. **A.I.R. 1940 Sind 150.**

——**S. 21**—*Scope—Jurisdiction—Trial by Court without jurisdiction—Interference by appellate Court—Prejudice to defendant—Necessity for—Proof of.*

Before an appellate Court will interfere with a decree on the ground of want of jurisdiction of the trial Court to entertain the suit, the defendant must show that he has been prejudiced by the trial being held within the particular jurisdiction and not merely that the objection has been taken at the earliest opportunity. (*Cornish and King, JJ.*) BENGAL INSURANCE AND REAL PROPERTY CO., LTD. *v.* VELAYAMMAL. **I.L.R. (1937) Mad. 990=1937 M.W.N. 303=46 L.W. 616=170 I.C. 279=10 R.M. 170=A.I.R. 1937 Mad. 571.**

——**S. 21**—*Scope and applicability.*

It is an established principle of law that in a case which the Court is competent to try, if the parties without objection join issue and go to trial, the defendant cannot subsequently dispute its jurisdiction upon the ground that there were irregularities in the initial procedure which if

objected to at the time would have led to the dismissal of the suit. S. 21, C. P. Code, applies to such a case. But S. 21 has no applicability to a case in which a Court, which has no jurisdiction over the subject-matter of the action, passes a decree which is wholly void and the maxim applies that consent cannot give jurisdiction. (*Subhedar, Niyogi and Staples, A.J.Cs.*) MURLIDHAR SHRINIVAS *v.* GORAKHRAM SADHURAM. **31 N.L.R. (Supp.) 57=161 I.C. 877=8 R.N. 252=A.I.R. 1936 Nag. 1 (F.B.).**

——**Ss. 22 and 23**—*Scope of—Power of High Court to transfer case pending in a Court subordinate to it, to a Subordinate Court of another High Court.*

Ss. 22 and 23, C. P. Code, are concerned with a case where a plaintiff has the choice of two or more Courts in which he may properly institute a suit. In cases to which Ss. 22 and 23 apply, the power to transfer is conferred by S. 22 and the forum to which the necessary application has to be made is provided by S. 23. The High Court has jurisdiction to transfer a suit pending in a Court subordinate to it, to a Court subordinate to another High Court. (*Stone, C.J. and Bose. J.*) KANHAIYALAL DAGA *v.* ZUMBERLAL. **1940 N.L.J. 231=A.I.R. 1940 Nag. 145.**

——**Ss. 22 and 23**—*Transfer of suit—Convenience of parties.*

Although the plaintiff has a right to choose the *locus* for the decision of his suit and the exercise of his right should not be restricted except for cogent reasons, yet where two suits between the parties are instituted at two different places and the interests of the majority of the parties are such that the balance of convenience is undoubtedly that the two suits should be tried in the same place and the trial of the suit in the other place would cause so much inconvenience as would amount to an abuse of the process of Court, an application for transfer of suit from such place to the place where the trial of both the suits would be more convenient should be allowed. (*Middleton, J C.*) LLOYDS BANK, LTD. *v.* RAJINDER NATH. **160 I.C. 522=8 R. Pesh. 118=A.I.R. 1936 Pesh. 5.**

——**Ss. 22 to 24**—*Transfer of suit—Considerations—Balance of convenience.*

In cases of transfer, the convenience of parties is indeed a factor which enters into consideration, but the convenience of both parties have to be weighed and the decision would ultimately turn on the balance of convenience. A plaintiff is the *dominus litis* and he has a right to institute the suit at a place of his choice. Where a defendant wants a transfer, it must be seen whether the considerations of convenience are so overwhelming on the side of the defendant as to override the claims of right. (*Stone, C.J. and Bose, J.*) KANHAIYALAL DAGA *v.* ZUMBERLAL. **1940 N.L.J. 231=A.I.R. 1940 Nag. 145.**

——**S. 24**—*Applicability—'Other proceeding' if covers claim under the Encumbered Estates Act—Retransfer after decision, if comes under sub-S. (1) (iii).*

The phrase 'other proceeding' in S. 24, C. P. Code, is sufficiently general to cover the case of the transfer of the disposal of one claim under the U. P. Encumbered Estates Act from the Court of one Special Judge to the Court of another. Further the provision relating to the

transfer contained in sub-S. (1) (*iii*) of S. 24 is sufficient to cover the retransfer of the decided case, back to the Special Judge from whose Court it was originally transferred. (*Yorke, J.*) GOVIND PRASAD *v.* MUSTAFA BEGAM. **177 I.C. 136=11 R.O. 27=1938 A.W.R. (C.C.) 77=1938 O.L.R. 382=1938 O.A. 621=1938 O.W.N. 775=A.I.R. 1938 Oudh 217.**

——**Ss. 24 and 115**—*Case transferred under—Revision, if lies.*

Where a case is transferred under S. 24, no revision lies from the order of transfer; but if it is found that the application for transfer is not *bona fide* one, the case can be retransferred. (*Bhide, J.*) KESHO DAS *v.* N. C. GOYAL & Co. **175 I C. 525=10 R.L. 735=39 P.L.R. 654=A.I.R. 1938 Lah. 95.**

——**S. 24**—*Court of Small Causes—Suit instituted in—Transfer to another Court with pecuniary limits less than value of suit—Jurisdiction of latter Court.*

Where a suit instituted in a Court of Small Causes having pecuniary jurisdiction to try it, is transferred under S. 24, C. P. Code, to another Court with Small Cause Court jurisdiction whose pecuniary limit is less than the value of the suit, the latter Court has jurisdiction to try the suit. (*Edgley, J.*) BARADA KANTA *v.* JITENDRA NATH. **183 I.C. 264=12 R.C. 152=43 C.W.N. 440=A.I.R. 1939 Cal. 345.**

——**S. 24**—*Discretion under—Three suits tried by same Court and decided by one judgment—Two appeals filed before District Judge and one before High Court—Application to transfer all appeals to High Court—If to be granted.*

Where three suits were heard together by the consent of the parties and only one judgment was delivered, but separate appeals were filed, two before the District Judge and one before the High Court, the High Court refused to transfer the appeals before the District Judge to itself because, although many of the grounds in the appeals were the same, one was raised specifically in the appeal before the District Judge and also because no great hardship was to be caused to the parties by allowing the appeals where they were. (*Varma, J.*) SHIVA PRASAD SINGH *v.* RAMJAS AGARWALA. **163 I.C. 962= 9 R.P. 73 (1) =A.I.R. 1936 Pat. 345.**

——**S. 24**—*Execution proceeding—Transfer of objection proceedings to another Court without transferring execution proceedings—Legality.*

Obiter:—Where in execution of a decree certain property of the judgment-debtor is attached and a third person files an objection to the attachment on the ground that the property belongs to him, the objection can be decided only by the executing Court and therefore the transfer of the objection proceedings alone to another Court without transferring the execution proceedings to that Court is not in accordance with law. (*Bhide, J.*) KESHO DAS *v.* N. C. GOYAL & Co. **175 I.C. 525=10 R.L. 735=39 P.L.R. 654=A.I.R. 1938 Lah. 95.**

——**S. 24**—*Ground for transfer—Judge deciding particular question of fact or law in previous case.*

The mere fact that the Judge had decided a particular point of law in a previous case is no reason for a transfer in a subsequent case; otherwise a Judge would eventually become unfit to decide most cases. If the question is one partly or

C. P. CODE (1908), S. 24.

wholly of fact, still less does there seem to be any reason for a transfer, because the decision will depend upon the evidence in the particular case. A.I.R. 1930 Lah. 176, Foll. (*Pollock, J.*) NATHABAI *v.* BAIJNATH KUNJILAL. I.L.R. (1939) Nag. 631=172 I.C. 910=10 R.N. 260=A.I.R. 1938 Nag. 126.

——S. 24—If controls S. 23 (5) of Bombay Civil Courts Act. *See* BOMBAY CIVIL COURTS ACT, S. 23 (5). 41 Bom.L.R. 892.

——S. 24—*Jurisdiction—Two suits in Courts of different jurisdictions—Consolidation and trial in superior Court after transfer—Decree—Appeal by party aggrieved by decree in suit of lower value—Forum.*

Two suits for partition of eight annas and two annas shares in the same property were filed by two persons in the Court of First Class Sub-Judge and Second Class Sub-Judge respectively and the Second Class suit was transferred to the Court of the First Class Sub-Judge who framed separate issues but consolidated the two suits and decided them by one judgment and drew up one decree against which the party to the Second Class suit who was not a party to the First Class suit appealed to the Judicial Commissioner's Court.

Held, that the consolidation of the two suits must be considered as one First Class suit, and that there being one decree which could not be divided, there could not be separate forums for appeals relating to a particular finding given in one judgment and decree, and hence the appeal relating to a finding on an issue in the Second Class suit could not be treated as an appeal from the Second Class Court decree which did not exist, and that the appeal was properly filed in the Judicial Commissioner's Court. (*Davis, J.C. and Weston, J.*) TILLUMAL *v.* MICHUMAL. I.L.R. (1939) Kar. 563=181 I.C. 982=12 R.S. 16=A.I.R. 1939 Sind 128.

——S. 24—*Power of Chamber Judge—Transfer of proceeding under S. 317, Succession Act.*

Under S. 24 a Judge in Chambers has got jurisdiction to transfer a proceeding under S. 317, Succession Act, to his own Court at any stage and he can *suo motu* examine the accounts filed under that section so as to pass an order under Cl. (4) of that section. (*Young, C.J. and Blacker, J.*) GULATI *v.* REEVES BROWN. 186 I.C. 39=12 R.L. 337=41 P.L.R. 872=A.I.R. 1939 Lah. 463.

——S. 24—*Powers of transfer—Suit filed in Court lacking pecuniary jurisdiction.*

Under S. 24, C. P. Code, a transfer cannot be made from one Court to another unless the suit has in the first instance been brought in a Court having jurisdiction. There is no reason to make a distinction between lack of inherent jurisdiction and lack of pecuniary or territorial or any other kind of jurisdiction in that Court. (*Thomas, C.J. and Zia-ul-Hasan, J.*) KANHAIYA LAL *v.* HAMIDALI. 12 R.O. 243=185 I.C. 467=1940 O.L.R. 16=1940 O.A. 408=1940 O.W.N. 462=1940 A.W.R. (C.C) 207=A.I.R. 1940 Oudh 164.

——S. 24—*Refusal to transfer by District Court—Further application to High Court—If lies.*

The High Court is given general powers of superintendence over inferior Courts and it is not natural to suppose that the powers given by

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S. 24, C. P. Code, are exactly parallel in the case of both the District and High Court. Hence where an application for transfer is rejected by the District Court, the High Court can entertain a further application for transfer. (*Davies*). ALE RASUL ALI KHAN *v.* BAL KISHAN. 1939 A.M.L.J. 114.

——S. 24—Same judgment governing several suits—Appeals filed in some to High Court and in others in District Court—Application for transfer of all appeals to High Court—Separate application and Vakalatnama for each appeal—If necessary. *See* COURT FEES ACT, SCH. II, ART. 1 (*d*). 43 C.W.N 836.

——S. 24—*Scope—Suit pending in Madras Court of Small Causes—Application to High Court for transfer to City Civil Court for trial along with suit pending in latter Court—Competency—Madras City Civil Court Act, Ss. 3 and 5.*

There is no ground for holding that an application to the High Court for the transfer of a suit pending in the Madras Small Causes Court to the Court of City Civil Judge to be tried along with a connected suit pending in the latter Court is not maintainable under S. 24, C. P. Code. S. 3 of the Madras City Civil Court Act does not bar such transfer. In view of S. 5 of the City Civil Court Act, the City Civil Judge has jurisdiction to try such a suit which may be transferred to his file. (*Pandrang Row and Abdur Rahman, JJ.*) ABDUL KHADER SAHEB *v.* PACHAIYAPPA CHETTY. I.L.R. (1940) Mad 251=188 I.C. 680=50 L.W. 634=1939 M.W.N. 1082=A.I.R. 1940 Mad. 9=(1939) 2 M.L.J. 841.

——S. 24—*Suit filed in Court of Munsif having jurisdiction—Munsif subsequently succeeded by another having no pecuniary jurisdiction to try suit—Power of District Judge to transfer suit.*

Where a suit valued at Rs. 2,500 was filed in the Court of a Munsif having jurisdiction to try suits up to the valuation of Rs 5000 and that Munsif was subsequently transferred and was succeeded by a Munsif whose jurisdiction was only up to Rs. 2,000, the District Judge has power to transfer the suit to another Court under S. 24, C.P. Code. All that the section requires is that the suit should be pending in a subordinate Court which had jurisdiction at the time the suit was filed. (*Altsop and Ganga Nath, JJ.*) BECHAN MISIR *v.* MARKANDE MISIR. 162 I.C. 903=8 R.A. 911 (2)=1936 A.W.R. 254=1936 A.L.J. 452=1936 All. L.R. 511=A.I.R. 1936 All. 335.

——S. 24—*Transfer of case—Application made after Court informs Counsel of order before it is pronounced.*

Where the application for transfer of a case was not a *bona fide* one, having been made after the Court informed the Counsel for a party as to the order it was going to pronounce before it was actually signed and pronounced in open Court to the parties, and the record does not show that the party had any real apprehension that the case would not be decided on merits, an order transferring the case under S. 24, C. P. Code, should not be made. (*Bhide, J.*) KESHO RAM *v.* N. C GOYAL & CO. 175 I.C. 525=10 R.L. 735=39 P.L.R. 654=A.I.R. 1938 Lah. 95.

——S 24—*Transfer of case by District Judge—Revision—Re-transfer—Permissibility.*

No revision is competent from an order of a District Judge transferring a case under S. 24, C.

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P. Code, but the case could be re-transferred by the High Court under the same section. (*Bhide, J.*) KESHO RAM *v.* N. C. GOYAL & Co. **175 I.C 525 =10 R.L. 735=39 P.L.R. 654=A.I.R. 1938 Lah. 95.**

——S. 24—*Transfer by High Court of mortgage suit or execution — Transferee Court, if should have territorial jurisdiction.*

It is not necessary that a Court to which a suit is transferred in the proper sense of the word (*i.e.*, transferred by the High Court under S. 24 of the Code), should have concurrent territorial jurisdiction and the High Court may transfer a suit to a Court which has pecuniary jurisdiction though it may not have territorial jurisdiction to try the suit. Hence where mortgage suit or execution proceeding is transferred under S. 24 by the High Court to a Court which has otherwise no territorial jurisdiction, the Court can order sale of the property lying outside its local limits. (*Mya Bu and Mosely, JJ.*) U MAUNG MAUNG *v.* U NYO. **189 I.C. 166=A.I.R. 1940 Rang. 133.**

——S. 24 and Provincial Small Cause Courts Act, S. 35—*Transfer to Munsif prior to abolition of Small Cause Court—Decision of Munsif—If appealable.*

Where cases are transferred under S. 24, C. P. Code, prior to the abolition of a Small Cause Court, from that Court to a Munsiff, the latter acts with reference to that suit as a Court of small causes and hence his decision therein is not appealable. (*Allsop, J.*) ANANT PRASAD SINGH *v.* CHUNNU TEWARI. **183 I.C. 426=12 R.A. 132 =1939 A.L.J. 335=1939 A.W.R. (H.C.) 325= A.I.R. 1939 All. 452.**

——S. 24 (a)—"Competent to try and dispose of such suit"—Meaning of—Suit pending in Court of Small Cause—Transfer to City Civil Court—Power of latter to try. *See* MADRAS CITY CIVIL COURT ACT, SS. 3 AND 5 (1). **1938 M.W.N. 565.**

——S. 24 (2)—*Applicability to execution proceeding—"Suit".*

The word 'suit' where it occurs for the second time in sub-S. (2), S. 24, must be taken to include a proceeding; otherwise parts of the sub-section would be quite meaningless. Where therefore certain execution proceedings are transferred from one Court to another Court, the Court to which the proceedings are transferred may either re-try it or proceed from the point at which it was transferred and an order of the Court to hear the execution application *de novo* is perfectly correct. (*Almond, J. C.*) HABIB GUL *v.* SIRI CHAND SINGH. **161 I.C. 54=8 R. Pesh. 157= A.I.R. 1936 Pesh. 56.**

——S. 24 (4)—Applicability — Suit pending before Munsif with small cause powers—Munsif transferred and succeeded by another Munsif with small cause powers for amount less than claim in suit—Suit tried under orders of District Judge by latter on regular side—Appeal from his decree—If lies. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 35. **168 I.C. 785=A.I.R. 1937 Oudh 398.**

——S. 24 (4) — *Scope — Transfer of Judge invested with Small Cause Court powers but succeeded by one not vested with such powers—Transfer of case to another not having small cause powers, if gives jurisdiction to try such*

C. P. CODE (1908), S. 34.

case as small cause case—Order passed on transfer if appealable.

S. 24 (4), C. P. Code pre-supposes a transfer from a Court of Small Causes to another and where a Judge invested with powers of a Small Cause Court and trying the case as one of small cause nature, is transferred and succeeded by another who was not vested with powers of a Court of Small Causes, and he transfers the case to another Court under orders of the District Judge and that Court also is not a Court of Small Causes which though it had jurisdiction to deal with a case under the provisions of S. 35, Provincial Small Cause Courts Act, could do so only on the regular side, such a Court cannot be invested with Small Cause Court powers by the mere transfer of the case to it, and any order passed by such a Court must be regarded as having been passed by it in the exercise of its regular jurisdiction and is appealable as such. A.I.R. 1931 All. 574 (F.B.) Foll. (*Coldstream, J.*) RAM PARKASH *v.* HUKAM CHAND RAJ KUMAR. **167 I.C. 303=9 R.L. 475=A.I.R. 1936 Lah. 883.**

——S. 34—*Applicability — Mortgage decree—Interest from date fixed for payment to date of realisation—Power of Court to award—O. 34—Effect of.*

S. 34. C. P. Code, applies also to mortgage decrees governed by O. 34, C. P. Code, and authorises the allowance of interest upon the decretal amount from the expiry of the date of grace fixed in the preliminary decree until the date of realisation. O. 44 does not in any away exclude the discretion of Court to allow such interest on the decree. Even in a case to which old R. 4 (1) of O. 34, before its amendment in 1929, applies, the Court has got such power. R. 11 of O. 34 as amended in 1929, which in Cl. (*b*) specifically allows "subsequent interest up to the date of realisation" only gives effect to previous judicial decisions. (*Sir George Lowndes.*) KUSUM KUMARI *v.* DEBI PROSAD DHANDHANIA. **63 I.A. 114=15 Pat. 210=38 Bom L.R. 349=1936 O.W.N 283=1936 A.W.R. 204=160 I.C. 285=43 L.W. 268=8 R.P.C. 146=17 Pat.L.T. 89=1936 A.L.J. 108=1936 M.W.N. 308=63 C.L.J. 154=1936 O.L.R 91=1936 A.L.R. 155=1936 P.W.N. 122 =40 C.W.N. 328=A.I.R. 1936 P.C. 63=70 M.L.J. 355 (P.C.).**

——S. 34—*"Decree for payment of money"—Meaning of—Interest on damages—Award of—Discretion of Court.*

The word "money" in the section should not be understood in the limited sense of an ascertained sum of money. The expression "decree for payment of money" is very general and must be construed as including a claim to unliquidated damages, and cannot be restricted in its operation to a claim to liquidated damages. The section leaves the question of granting or refusing interest on damages to the discretion of the Court. (*Mackin and Wassoodew, JJ.*) BHAGWANT GENUJI *v.* GANGABISAN RAMGOPAL. **42 Bom. L.R. 750.**

——S. 34—*Discretion of Court to award interest.*

Courts are entitled to give interest in their discretion. This can be given under S. 34, C. P. Code, and also under S. 73, Contract Act. (*Baguley and Mackney, JJ.*) MUTHUKARUPPAN CHETT-

C. P. CODE (1908), S. 34.

YAR *v.* ANNAMALAI CHETTYAR. 162 I.C. 352=8 R.R. 558=A.I.R. 1936 Rang. 141.

——S. 34—*Interest* pendente lite—*Duty of Court.*

Where a claim is held to be proved, there is no reason for refusing to the plaintiff, interest for the period during which recovery was delayed by defendant contesting the suit. (*Weston.*) RAJ MAL *v.* CHHAGAN MAL. 1938 A.M.L J. 39.

——S. 34—*Interest* pendente lite—*Power of Court to grant.*

Court can grant interest *pendente lite* at the stipulated rate without the plaintiff's asking for it. (*Mohammad Noor and Varma, JJ.*) APURBA KRISHNA MITRA *v.* RAM BAHADUR. 161 I.C. 862=8 R.P. 489=1936 P.W.N. 155=A.I.R. 1936 Pat. 191.

——S. 34—*Interest* pendente lite—*Right of plaintiff.*

In money suits, the question of interest for the period subsequent to the institution of the suit passes from the domain of contract into that of judgment and the plaintiff cannot as a matter of right claim interest for the period during which the suit has been pending. There is no hard and fast rule that the interest *pendente lite* must be allowed in every case. Every case has to be decided on its merits. (*Mohammad Noor and Varma, JJ.*) APURBA KRISHNA MITRA *v.* RAM BAHADUR. 161 I.C. 862=8 R.P. 489=1936 P. W.N. 155=A.I.R. 1936 Pat. 191.

——S. 34 (2) — *Applicability — Maintenance decree creating charge and directing payments in future also—Omission to award interest—Effect —Suit for interest in respect of maintenance accruing due in future—Maintainability.*

A decree granting maintenance at a certain rate per month from the date of plaint and also future maintenance and which gives the plaintiff a charge in respect of maintenance on immovable property is none the less a decree for money within the meaning of S. 34, C. P. Code, the fact that it directs the payment of money in the future as well as money immediately rendered due by the decree and that it creates a charge does not render S. 34 (2) inapplicable to it. Where such a decree does not award interest in respect of future maintenance a suit claiming interest in respect of such maintenance is barred by S. 34 (2). (*Pandrang Row and King, JJ.*) DURGA MADHAVA DEO GARU *v.* RAJENDRA DEO GARU. 11 R.M. 450=178 I C. 414=1938 M.W N. 309=47 L.W. 327=A.I.R. 1938 Mad. 522=(1938) 1 M L.J. 437.

——Ss. 34 (2) and 152—*Scope and effect of—"Accidental slip or omission"—Decree in accordance with judgment—Omission to award further interest—Amendment—Powers of Court.*

Where a decree is in accordance with the judgment, it cannot be held that there has been an accidental slip or omission which would empower the Court to correct it under S. 152, C.P. Code. If the decree is silent as to the payment of further interest, the Court, uuder S. 34 (2), C. P. Code, must be deemed to have refused the same. The Court cannot rectify it in the face of S. 34 (2) even if the decree-holder ought to have had further interest granted and this was accidentally overlooked. (*Leach, C.J. and Patanjali Sastri, J.*) THIRUGNANAVALLI AMMAL *v.* VENUGOPALA PILLAI. 186 I.C. 468=12 R.M. 644=1939 M.W. N. 1165=50 L.W. 719=A.I.R. 1940 Mad. 29=(1939) 2 M.L.J. 751.

C. P. CODE (1908), S. 35.

——S. 35—Applicability — Mortgage suit—Costs—Rule as to—Order making mortgagee liable for costs—Justification for—Right of appeal. *See* C. P. CODE, O. 34, R. 10. (1939) 1 M.L.J. 687.

——S. 35—*Award of costs—Discretion of Court —Plaintiff not accepting tender of part payment.*

The question of costs is not affected by the fact that the plaintiff had refused to accept a tender of part payment. A creditor is under no obligation to reduce the costs of proceedings for the benefit of the debtor by accepting a tender of part payment and, thus bringing the amount for which proceedings have to be taken, within the jurisdiction of a less costly tribunal. The fact that the tender was subject to no conditions and it was accompanied by a statement that, if accepted, it would be without prejudice to the creditor's claim to sue for the balance, is immaterial. (*Panckridge, J.*) ISMAILBHAI RAHIM *v.* ADAM OSMAN I L.R. (1938) 2 Cal 337=181 I C. 539=11 R.C. 816=42 C.W.N. 1023=A I.R. 1939 Cal. 131.

——S. 35—*Award of costs—If includes pleader's fees.*

Pleader's fees are costs of the suit and unless pleader's fees are specifically excluded an award of costs of the suit must be taken to include pleader's fees. There is no distinction between awarding costs of the suit and decreeing a suit with costs. (*Weston*) BHAG CHAND *v.* BENI PARSHAD. 1938 A.M.L.J. 47.

——S. 35—*Costs—Costs of witnesses summoned but not examined—If can be awarded.*

In awarding costs, the Court should not include the costs of witnesses who were summoned but were not examined in Court. (*Jai Lal, J.*) KHERATI LAL *v.* JANKI PARSHAD. 164 I.C. 689 (1)=9 R.L. 52=38 P.L.R. 219=A.I.R. 1936 Lah. 681.

——S. 35—*Costs—Diet money of witnesses summoned but not examined—If can be awarded.*

Where a party had actually paid diet money to the witnesses on certain occasions when the Court could not examine them, there is no justification for disallowing costs incurred in that manner, especially when the summoning of those witnesses had been necessitated by a false plea raised by the opposite party. (*Din Mahomed, J.*) PURANMAL *v.* PARMESHRI DAS. 42 P.L.R. 263=A.I.R. 1940 Lah. 182.

——S. 35—*Costs—Discretion—Interference in appeal—Dismissal of suit—Disallowance of costs —Defendant raising same plea in suit as he raised in reply to notice of demand—If to be deprived of costs.*

The Court, although holding that the plaintiff was not entitled to any relief, passed an order disallowing costs to the defendants on the ground that they were not entirely free from blame so far as the institution of the suit was concerned. The Court did not hold that the defendant had conducted the defence in a manner so as to disentitle them to their costs. There was evidence on record that the defendants had raised the very objections which they had raised in their letter to the plaintiff prior to suit.

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Held, that the order disallowing costs and the observations in the judgment relating to the defendants were not justified. (*Rupchand Bilaram and Mehta, A.J.Cs*) NARAINDAS & Co *v.* DETARAM. 162 I.C. 837=8 R.S. 174=A.I.R. 1936 Sind 52.

———S. 35—*Costs—Execution for—Advocate of party entitled to—If can apply personally.*

Parties are the recipients of costs and not their pleaders. The duty of an advocate is to file an execution application on behalf of his client. Though he has to sign it in the course of his duties, it is only on behalf of his client. The execution must be in the name of the person to whom costs have been awarded (*i.e.*) the client. (*Davies.*) CHOUTH MAL BROS. *v.* RAM CHANDRA AIRUN. 1940 A.M.L.J. 18.

———S. 35—Costs—Personal liability—Order awarding costs against party and making same a first charge on sale proceeds of specific property —Personal liability—If taken away. *See* DECREE —CONSTRUCTION. 1937 M.W.N. 292.

———S. 35—*Costs—Separate defendants appearing by separate Counsel—Right to separate sets of costs—Rule as to.*

When two sets of defendants in a suit put forward substantially the same defence, but engage separate Counsel merely because they are not on good terms, they cannot get, in the event of their success, separate sets of costs, because the plaintiff should not be made to suffer for the quarrels of the defendants. The Court in such cases will allow only one pleader's fee. (*Norman, J.*) LAL CHAND *v.* RAM BILAS. 1936 A.M.L.J. 63.

———S. 35—*Discretion of Court—Claim found to be substantially false—Defendant's claim for set-off allowed in full—Award of costs to defendant and refusal to plaintiff—Propriety*

Where in a suit for recovery of a certain amount alleged to be due from an employee dismissed from service, the plaintiff's claim has been found to be substantially false and the defendants claim for set-off on account of arrears of pay is allowed in full, the Court is justified in giving defendant his costs and refusing costs to the plaintiff. (*Nasim Ali and Henderson, JJ.*) JITENDRA NATH ROY *v.* JNANADA KANTA DAS. 167 I.C. 265=9 R.C. 672=A.I.R. 1936 Cal. 277.

———S. 35—*Discretion of Court—Interference in appeal.*

It is the duty of the appellate Court to interfere with the trial Court's order about costs, where the discretion exercised by it is based on an erroneous view of the law. (*Nanavutty and Zia-ul-Hasan, JJ.*) MATHURA PRASAD *v.* THE DEPUTY COMMISSIONER OF KHERI. 13 Luck. 171 =166 I.C. 928=9 R.O. 351=1937 O.L.R. 77= 1937 O.W.N. 165=A.I.R. 1937 Oudh 282.

———S. 35—*Discretion of Court—"Misconduct" of successful party—Right to costs—Proper rule.*

Where the plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts, for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce

C. P. CODE (1908), S. 35.

the Court to refuse costs. In a suit on a pronote executed by *R* for the benefit of *T's* estate, the plaintiff was not awarded costs, as he had claimed a personal decree against *R's* family and in the alternative against *R's* property, though he was quite aware of the true character of the pronote. The plaintiff failed to establish the case and the Court asked the parties to bear their own costs. The plaintiff appealed claiming costs.

Held, that the plaintiff was guilty of misconduct and under those circumstances should have been made to pay costs of the issue, which was decided against him. He was entitled only to institution fees. (*Rupchand Bilaram and Haveliwala. A.J.Cs*) KUNDANSINGH *v.* KUSHALDAS. 170 I.C. 9=10 R.S. 56=A.I.R. 1937 Sind 159.

———S. 35—Discretion—Suit by vendor for specific performance—Dismissal on ground of imperfect title of vendor—Costs—Discretion of Court to refuse. *See* SPECIFIC RELIEF ACT, S. 18 (*d*). 1940 M.W.N. 14.

———S. 35—*Failure of suit on technical ground raised in appeal—Proper order as to costs.*

Where a suit fails on a technical ground taken for the first time in appeal, which if it had been taken earlier would have avoided the waste of time and money, but the suit would in any event have failed because the plaintiff chose a wrong remedy, the circumstances were held to be such that each party should be ordered to bear its own costs. (*Stone, C.J. and Bose, J.*) BADRIDAS *v.* RAJA PRATAPGIR. 188 I.C. 23=12 R.N. 304= 1939 N.L.J. 525=A.I.R. 1940 Nag. 8.

———S. 35—*"Incident to all suits"—Meaning of —Costs incurred in application for leave to sue—If awardable as costs of suit—Power of Court.*

S. 35, C. P. Code, does not limit the powers of the Court to award only such amounts as are incurred by a party as costs from the institution of the suit to its termination. The words *"incident to all suits"* are wide enough to cover costs incurred by a party before the institution of the suit, but naturally or intimately connected with the suit. Where a receiver appointed by the Court applies for leave to institute a suit and incurs costs, the Court has power to award such costs as costs of the suit. (*R.C. Mitter, J.*) SERMAL DALMIA *v.* MANINDRA LAL. 40 C.W.N. 762.

———S. 35—*Mortgage suit—Costs—Liability of purchaser of property subject to mortgage.*

Certain property was purchased subject to a mortgage. Subsequently the mortgagee brought a suit on his mortgage. The purchaser, who was in possession of the property, had tried to put off the mortgagee and thus wanted to make as much money out of the delay as he could.

Held, that the purchaser should bear half the taxed costs of the suit. (*Agha Haidar, J.*) SAMPURAN SINGH *v.* DEVI DAYAL. 167 I.C. 65= 9 R.L. 448=38 P.L.R. 896=A.I.R. 1936 Lah. 705.

———S. 35—*Mortgage suit—Puisne mortgage contesting claim—Liability for costs—Discretion of Court.*

A mortgagee sued on his mortgage, the mortgagor, impleading therein the puisne mortgagees as defendants. The puisne mortgagees contested the claim of the prior mortgagee. In the decree passed in the above suit costs were allowed against all the defendants. It was contended

C. P. CODE (1908), S. 35.

that as it was a mortgage suit costs could not be saddled on the puisne mortgagees.

Held, that S. 35, C. P. Code, is clear that the Court has discretion in the matter of costs. There is no principle of law which make it wrong or improper for a Court to saddle with costs the real contesting defendants to a suit. The discretion is absolute. In a case where the puisne mortgagees, the real contesting defendants, are made liable for costs together with the other defendants, there is nothing improper in law in such an order. A.I.R. 1933 Rang. 335, Diss. (*Young, C. J. and Monroe, J.*) SITAL DAS *v.* PUNJAB SINDH BANK, LTD., LAYALLPUR. **17 Lah. 520=164 I C. 841=9 R.L. 166=38 P.L.R. 1024 =A.I.R. 1936 Lah. 607.**

——**S. 35**—*Person whose suit is dismissed successful in appeal—Case remanded for retrial—Costs of appeal—Proper order.*

Where a person whose suit has been dismissed by the trial Court is successful in appeal and the appellate Court remands the case for trial in accordance with law, he is entitled to his costs if he ultimately succeeds in the trial Court, but it is fairer order to direct that the costs of appeal in the appellate Court should abide the final result of the suit. (*Mackney, J.*) SURYA NATH SINGH *v.* SHIO KARAN SINGH. **164 I.C. 133=9 R.R. 59 =A.I.R. 1936 Rang. 316.**

——**S. 35**—Power of Court—Arbitration proceedings—Award—Absence of provision as to fees of arbitrator—Power of Court to award fees to arbitrator. *See* C. P. CODE, SCH. II, PARA. 13. **I.L.R. (1940) Kar. 34.**

——**S. 35**—*Scope—Proceedings in muffasil Courts—Proceedings for compulsory winding up of company—Incidental or interlocutory proceeding in—Costs of—Order as to—Jurisdiction of Court—Nature of—Jurisdiction of Taxing Officer and of Court in appeal from Taxing Officer—Distinction—Bombay High Court Rules (Original Side), R. 767—Duty of parties and advocates.*

A Court in the mufassal, when making an incidental or interlocutory order in a larger proceeding, such as compulsory winding up of a company under the Companies Act, has a twofold jurisdiction as regards costs: (*a*) under S. 35, C. P. Code, the discretion to determine by whom and out of what property and to what exent the costs are to be paid, and to give all necessary directions for the purpose; and (*b*) it has also the jurisdiction under R. 767 of the Bombay High Court (O.S.) Rules to "specially direct" that the practitioner shall be entitled to charge and be allowed the fees on a scale other than that set forth in the second schedule to the Rules. But the Taxing Officer in the muffasal has not this twofold jurisdiction in taxing a bill of costs; nor the Judge sitting in appeal over the Taxing Officer the said twofold jurisdiction at that stage; when he sits in appeal to hear objections from the Taxing Officer, he has merely to determine whether the Taxing Officer has rightly taxed the costs in accordance with the rules and practice and the orders that the Court had already made. This distinction must be clearly borne in mind by the Judge and the Taxing Officer in the muffasil. In proceedings in muffasil Courts, the costs of which have to be taxed in accordance with the original side scale in the

C. P. CODE (1908), S. 35-A.

High Court, the muffasil Courts should make special orders and give specific directions relating to the costs of each order; and they should exercise the twofold jurisdiction under S. 35, C. P. Code, and under R. 767 of the High Court Rules (O.S.) at the time when the particular order (whether incidental to the proceedings or necessitated by an interlocutory application) is being made. The procedure relating to orders about costs followed on the Original Side of the High Court has to be kept in mind by the advocates as well as the Courts, as the duty lies upon the parties and their advocates to apply for directions and orders as to costs, and to make such applications at the proper time. The practice on the Original Side cannot, however, be applied in the muffasil rigorously. (*Barlee and Tyabji, JJ.*) CHHOTALAL *v.* SOMESHWAR. **173 I.C. 489=10 R. B. 337=39 Bom.L.R. 820=A.I.R. 1938 Bom. 10.**

——**S. 35**—*Several plaintiffs—Separate costs—If can be awarded.*

It is not in any circumstances possible, in a case where there is more than one plaintiff, for such plaintiffs to appear and act separately. If any of them is not disposed to act with, and to appear by the same advocate as, the others then the only proper course open is to apply to strike him out as a plaintiff and to add him as a defendant. The plaintiffs are entitled to one set of costs only between them, and one plaintiff cannot ask for his costs to the exclusion of the others or other. "One set" means the amount of the costs which would have been incurred if the parties separately represented had appeared by the same solicitor. (*Braund, J.*) SEEDAT *v.* MARIAM BIBI. **1938 Rang L.R. 252=180 I.C. 841=11 R.R. 437 =A.I.R. 1939 Rang. 108.**

——**S. 35**—*Suit by executors on legal advice—Absence of malice—Executors, if can be asked to pay costs personally.*

It is not usual to impose the burden of costs on executors or trustees personally, where the litigation is undertaken not maliciously or with the sole desire to annoy the defendant but was considered on legal advice necessary in the interests of the testator's estate and charities. (*Stone, C.J. and Bose, J.*) JAGANNATH PRASAD *v.* B. K. RAI. **1939 N L.J. 421=185 I.C. 210=12 R.N. 141=A.I.R. 1939 Nag. 274.**

——**S. 35 (2)**—*Disallowance of costs to successful party—Duty to record reasons—Omission to state reason—Effect.*

If a Judge decides that costs shall not follow the event, he is bound under S. 35 (2), C. P. Code, to give his reasons. An order disallowing costs to a successful party for no valid reason cannot be upheld. (*Norman, J.*) LAL CHAND *v.* RAM BILAS. **1936 A.M.L.J. 63.**

——**S. 35-A**—*Applicability—Revision.*

S. 35-A, C. P. Code, does not apply to "Revision". It looks as if the power conferred by that section is intended to be confined to the original hearing of suits and proceedings. Consequently the High Court as a Court of revision has no power to award compensation in respect of the proceedings before it. (*Ameer Ali, J.*) M. S. COHEN *v.* SIRDAR SAHEB IQBAL SINGH. **42 C.W. N. 658.**

——**S. 35-A**—*Special compensatory costs—If can be awarded in addition to heavy counsel's fee.*

C. P. CODE (1908), S. 37.

Where such a large sum as Rs. 2,275 have been awarded to the plaintiffs for counsel's fee, it is not proper to award special costs under S. 35-A of the C. P Code. (*Bennet and Ganga Nath, JJ.*) GOPAL DAS *v.* JAGANNATH PRASAD. **I.L.R (1938) All. 370=176 I.C. 118=11 R.A. 53=1938 A.L.R. 552=1938 A L.J. 390=1938 A.W.R. (H.C.) 209=A I.R. 1938 All. 266.**

——S. 37—*Applicability—Transferee Court.*

S. 37 has no reference to a Court to which a decree has been transferred for execution. (*Mackney, J.*) M. P. L. CHETTYAR FIRM *v.* S. A. L. L. A. VANAPPA CHETTYAR. **162 I.C. 865=8 R. R. 596=A.I.R. 1936 Rang. 184.**

——S. 37—*Scope—Decree passed by sub-Court of Berhampore and confirmed by Madras High Court prior to constitution of Orissa Province—Execution application after that date—Jurisdiction of Court which passed decree—Order in Council, S. 20—Notification under—Effect of.*

On 1—4—1936, the Province of Orissa was constituted and the Court of the Subordinate Judge ot Berhampore became thenceforward a Court within the jurisdiction of that province. The respondent who had obtained a decree against the predecessor-in-title of the appellants in that Court before 1—4—1936, and whose decree had been confirmed by the High Court, Madras, which was the appellate Court then, filed an application after 1—4—1936, in the Court of the Berhampore Subordinate Judge to execute the decree. There was a notification by the Governor-General in Council in exercise of the powers under S. 20 of the Order in Council constituting the Province of Orissa, to the effect that every proceeding pending in a Court other than the High Court in any area transferred to Orissa should be continued as if the said order had not been made.

Held, that as the execution petition was not a pending proceeding, the Berhampore Court ceased to have jurisdiction to entertain it, and that it should therefore be presented to the Court at Chicacole within the Province of Orissa. (*King and Stodart, JJ.*) BEHARANI *v.* RAGHU BEHARA. **184 I.C. 86=12 R.M 404=49 L.W. 338=1939 M.W.N. 268=A.I.R. 1939 Mad. 463 =(1939) 1 M.L.J. 340.**

——S. 38—*Court of Deputy Commissioner of Garo Hills— If a 'Court.'*

The Court of the Deputy Commissioner of the Garo Hills is a Court within the meaning of S. 38, C. P. Code. (*Costello, Ag C.J. and Edgley, J.*) KRISHNA PROSANNA LAHIRI *v.* SAROJINI DEBI. **I.L.R (1937) 2 Cal. 734=174 I.C. 12=10 R.C. 633 =66 C.L.J. 216=41 C.W.N. 1243=A.I.R. 1937 Cal. 557.**

——S. 38 and O. 21, R. 10—*Court which passed decree—Right to execute decree after transfer.*

There is nothing in S. 38 and O. 21, R. 10 to prevent the Court, which passed the decree, executing the decree, though it has transferred it to another Court for execution and the copy of the decree with a certificate of satisfaction has not been returned to it. (*Davis, J.C. and Weston, J.*) SUNDERDAS *v.* KALIANDAS. **I L.R. (1940) Kar. 46=186 I.C. 365=12 R.S 194=A.I.R. 1940 Sind 11.**

——S. 38—*Jurisdiction to execute—Decree by Revenue Court under Chota Nagpur Tenancy Act —Application for transmission to Civil Court—*

C. P. CODE (1908), S. 38.

Rejection—Subsequent application for execution in Civil Court—Competency.

Appellant obtained a decree for rent under the Chota Nagpur Tenancy Act, but his application for execution was dismissed on the ground that all persons interested in the tenure had not been made parties to the suit. He then applied for a transfer of the decree for execution to the Court of a Munsif, which again was rejected by the Deputy Commissioner. He then applied direct to the Munsif for execution of the decree,

Held, that the Munsif had no jurisdiction under S. 38 to execute the decree, as it had neither been passed by him nor had been transferred to him for execution. (*Macpherson and Fazl Ali, JJ.*) MAHARAJA PRATAP UDAINATH SAHI DEO *v.* BARAIK LAL SAHI. **15 Pat. 439= 165 I.C. 959=9 R.P. 241=18 Pat.L.T. 36=3 B. R. 112=1936 P.W.N. 669=A I.R. 1936 Pat. 615.**

——S. 38—*Order transferring decree for execution to Deputy Commissioner of Scheduled District—Legality—Certain sections of Civil Procedure Code alone in operation in that District.*

A decree was transferred for execution to the Deputy Commissioner of Garo Hills which was a Scheduled District. Some of the sections and provisions of the C. P. Code relating to execution were in operation in that district and the Deputy Commissioner was the principal Court of Civil jurisdiction. The question having arisen whether the transferring Court had jurisdiction to transfer the decree to such Court.

Held, that the transferring Court had jurisdiction to transfer the decree for execution to the Deputy Commissioner, Garo Hills, and it was not necessary that the whole of the Civil Procedure Code should be in operation there. (*Costello, Ag.C.J and Edgley, J.*) KRISHNA PROSANNA LAHIRI *v.* SAROJINI DEBI. **I.L.R. (1937) 2 Cal. 734=174 I.C. 12=10 R.C. 633=66 C.L.J. 216= 41 C.W.N. 1243=A.I.R. 1937 Cal. 557.**

——Ss. 38 and 63—*Relative scope—S. 63, if controlled by S. 38—Property attached by different Courts—Superior Court calling up proceedings from inferior Court—Power of superior Court to sell property attached by inferior Court—"Realize such property."*

There is no warrant for holding that S. 63, C. P. Code, does not give jurisdiction to a Court to sell attached property except in execution of its own decree. The jurisdiction of the Court of the highest grade to sell property attached by an inferior Court in execution of a decree, proceedings in which have been called up to the superior Court under S. 63, is necessarily included in the use of the word "realize". "Realize such property" in S. 63 must obviously refer to bringing such property to sale. Nowhere in S. 63 is there any restriction as to how and in what manner and in what petition the Court of highest grade should realize the property; in this respect as in respect of claim petitions S. 68 must be held to override S. 38. S. 38 is after all a general section dealing with execution. It contemplates only one decree-holder and one decree. S. 63 deals with more decree-holders than one and the same property being attached by more Courts than one. Where the facts come within the definition of the situation as given by S. 63, it is obviously S. 63 which must be applied, and S. 63, cannot be con-

C. P. CODE (1908), S. 38.

trolled or governed by S. 38. (*King and Krishnaswami Ayyangar, JJ.*) VENKATA REDDI *v.* VENKATARATNAM. I.L.R (1939) Mad. 248=180 I.C. 44=11 R.M. 652=1938 M.W.N. 1098=48 L.W. 664=A.I.R. 1939 Mad. 169=(1939) 1 M. L.J. 112.

——Ss. 38 and 39—*Sale of property situated outside territorial jurisdiction—Validity—No objection raised by judgment-debtor—Effect—Right of another execution-creditor to execute decree against property sold.*

An executing Court has no jurisdiction to sell property situate outside the local limits of its jurisdiction, and if it so sells, the purchaser acquires no title to it. Although the judgment-debtor, who does not object to the jurisdiction of the Court to sell the property before the sale is confirmed, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate to prevent another execution creditor of the same judgment-debtor from proceeding against that property in execution of his decree. (*Fazl Ali and Manohar Lall, JJ.*) KHIROD CHANDRA GHOSH *v.* PANCHU GOPAL. 18 Pat 670 =20 Pat.L T. 585=5 B.R. 783=182 I.C. 610= 12 R.P. 23=1939 P.W.N. 850=A.I.R. 1939 Pat. 532.

——Ss. 38 and 39—*Transfer of decree—Concurrent execution in two Courts—Permissibility.*

Where a decree is passed by one Court and is transferred to another for execution against the property of judgment-debtor, the decree-holder is entitled to make an application to the former Court for execution by arrest of the judgment-debtor. (*Harries and Ganga Nath, JJ.*) MAKHAN LAL *v.* MST. BHAGWANA KUER. 162 I.C 51=8 R. A 818=1936 A W.R. 342=1936 All.L.R. 362= 1936 A.L.J. 277=A.I.R. 1936 All. 655.

——S. 39—*Application for transfer of decree for execution—Form of—Application framed as one under O. 21, R. 11 with all requisite particulars—Clerical error in name of judgment-debtor—Effect—Court feeling no difficulty in tracing decree and granting certificate—If one "in accordance with law"—Limitation Act, Art. 182 (5).*

An application for transmission of a decree for execution to another Court under S. 39, C. P. Code, is not required to be in any particular form, unlike in the case of a regular execution application under O. 21, R. 11, C. P. Code. S. 39 only requires that an application should be made to the Court passing the decree to transfer it for execution. If the application gives sufficient particulars of the decree to be transferred so as to indicate precisely the decree which the Court is to transfer, that is sufficient to make the application one in accordance with law within the meaning of Art. 182 (5) of the Limitation Act. Where the application for transfer of the decree is drawn up in the form of an application under O. 21, R. 11, giving all the particulars required by that rule but there is a clerical error in the description of the name of the defendant, *e.g.*, the defendant being described as "Firm Atma Ram" instead of as it should be "R mchand Atma Ram", such a clerical error will not make the application otherwise than one "in accordance with law", especially when the Court has no difficulty in tracing the decree to be transferred and granting the certificate under S. 39. (*Niamatullah J.*) HAFEEZ UDDIN *v.* RAM CHANDER DAS. 169 I.C. 225=10 R A. 2=1937 A W R. 239=1937 A.L J. 278=1937 All. L.R. 493=A.I. R. 1937 All. 397.

C. P. CODE (1908), S. 39.

——S. 39—*Application under—Form—Notice to judgment-debtor — Necessity—Requirements of O. 21, R. 11—Compliance with—Necessity.*

S. 39 of the C. P. Code does neither provide that notice to judgment-debtor is necessary, nor prescribe a particular form for an application under that section. Though it is an application in execution proceedings, it is not an application for execution and hence the formalities laid down by O. 21, R. 11 are not necessary for such an application. (*Weston.*) JASRAJ RIKHRAJ *v.* GHISOO LAL 1937 A M.L.J. 113.

——S. 39—*Copy of decree sent to another Court for execution—Right of decretal Court to proceed with execution.*

The Court that passed a decree can itself proceed with its execution although a copy of the decree has been sent to another Court for execution. (*Baguley, J.*) U MAUNG MAUNG *v.* SHAHUL HAMID. 1939 Rang L.R. 587=186 I.C 42=12 R.R. 243=A I R 1939 Rang. 433.

—— Ss. 39 and 42—*Decree passed in suit excepted from cognisance of Small Cause Court—Transfer to Small Cause Court—Jurisdiction of latter Court to execute—Provincial Small Cause Courts Act, Sch. II, Art. 8.*

A decree made in a suit which is excepted from the cognisance of a Court of Small Causes under Cl. (8) of Sch. II of the Provincial Small Cause Courts Act may be transferred to a Court of Small Causes for execution under S. 39, C. P. Code. Once such a decree is so transferred by a Court of competent civil jurisdiction, the Small Cause Court would, under S. 42, C. P. Code, be entitled to execute it. (*Ghose and Lodge, JJ.*) NANI GOPAL MUKERJI *v.* SRISH CHANDRA NANDI. I.L.R (1939) 1 Cal. 233=185 I.C. 300=12 R.C. 353=A.I.R. 1939 Cal. 600.

——S. 39—*Discretion of Court—Exercise of.*

Section 39 indicates that the Court which passed the decree must apply its mind to the matter when an application has been made by the decree-holder for transfer of the decree to another jurisdiction for execution, and exercise its discretion vested in it by that section in a judicial manner. (*Mitter and Mohamad Akram, JJ.*) MANMATHA PAL *v.* SARADA PROSAD. 187 I.C. 67 =12 R.C. 539=A I.R. 1939 Cal. 651.

——S 39—*Execution—Courts to which decree may be transferred for.*

The Court executing the decree must be of a grade competent to entertain the suit itself. The words 'of competent jurisdiction' in S. 39, C. P. Code. mean, of jurisdiction pecuniarily competent to try the suit in accordance with the provisions relating to the pecuniary jurisdiction of Courts and territorially competent to deal with the execution application in accordance with the rules relating to the execution of the decree. (*Stone, C.J. and Bose, J.*) NILKANTHRAO *v.* KRISHNARAO. 1940 N.L.J. 244.

——S. 39—Order under—Simultaneous execution in two Courts—Order allowing—Notice to judgment-debtor—Necessity—O. 21, R. 6. *See* C. P. CODE, S. 47. 41 Bom.L.R. 481.

——S. 39—*Scope.*

The provisions of S. 39, C. P. Code, are permissive and not mandatory. (*Costello, Ag.C.J.*

C. P. CODE (1908), S. 39.

and Edgley, J.) H N. DUTTA & Co. v. TARUBALA DASSI. 174 I.C. 936=10 R.C. 735=A.I.R. 1937 Cal. 570.

——S. 39—Scope—Transfer of decree—Power of transferring Court to execute or to make fresh transfer—If exhausted. *See* LIMITATION ACT, ART. 182 (5). A.I.R. 1937 Nag. 305.

——S. 39—*Scope—Transfer of execution from one Subordinate Court to another—Procedure.*

Under S. 39, C. P. Code, it is the decree itself which can be transferred for execution. But a Subordinate Court dealing with an execution cannot either of its own motion or at the bidding of another Court, transfer the darkhast or a suit pending before it, unless an order for transfer is duly passed either by the District Court or by the High Court. (*Lakur, J.*) NINGAPPA *v.* ADIVEPPA. 186 I.C. 372=12 R.B. 324=41 Bom.L.R. 997=A.I R. 1939 Bom. 468.

——S. 39—*Transfer of decree—Certificate, if must be signed by Judge.*

A certificate of transfer of a decree need not be signed by the Judge who passed it. (*Jai Lal, J.*) SHIV DIAL BAKHTAWAR LAL *v.* KANGA & Co. 162 I.C. 489=8 R.L. 908=38 P.L.R. 1101=A.I.R. 1936 Lah. 369.

——S. 39—*Transfer of decree for execution—Transferring Court—If retains jurisdiction.*

Even after the transfer of a decree for execution to another Court, the transferring Court retains jurisdiction over the execution, though for certain specific purposes only. (*S.K. Ghose and Edgley, JJ.*) AMERENDRA NATH MULLICK *v.* BALAI CHAND GHATAK. 162 I.C. 777=8 R.C. 652=A.I.R. 1936 Cal. 267.

——S. 39—*Transfer of decree to another Court—When proper.*

Under S. 39, C. P. Code, an order transferring a decree to another Court is not proper when no allegation is made by the decree-holder that the judgment-debtor has property within the jurisdiction of that Court or is residing there, and the Court does not record any other reasons for transferring the decree to that Court. (*Jai Lal, J.*) CHAMAN LAL *v.* RAM KANWAR GANESH DAS. 41 P.L.R. 186.

——Ss. 39 and 42—*Transfer for execution—Executing Court—Powers—Relief in excess of sum in certificate—Competency to give.*

A Court executing a decree sent to it, has the same powers in executing it, as if it had been passed by itself. It only executes the decree and not the certificate sent by the Court passing the decree. As such it is not bound by any amount mentioned in it. It is the decree itself which is to be the guide in these matters for the executing Court. It is competent to execute it for the amount due though it may be in excess of that mentioned in the certificate. (*Misra, J.*) MANGAL CHAND *v.* MT. DULARI BIBI. 178 I C. 740=11 R. A. 333=1938 All.L R 899=1938 A.W.R. (H.C.) 667=1938 A.L J. 980=A.I.R. 1938 All. 654.

——S. 39—*Transferee Court—Pecuniary jurisdiction—If must be same as transferor Court.*

The transferee Court contemplated by S. 39, C. P. Code, must be a Court of competent jurisdiction, that is. a Court which has the same pecuniary jurisdiction as the transferor Court. (*Nasim Ali and Rau, JJ.*) GANESHDAS BADRINARAIN *v.* AMULUK CHAND OSWAL. 187 I.C. 895

C. P. CODE (1908), S. 39.

=12 R.C. 628=70 C.L.J. 438=A.I.R. 1940 Cal. 161.

——Ss. 39 and 49—*Transferee of decree applying for transfer of decree to another Court for execution—Court, if can go into question of equities under S.* 49.

Where a transferee of a decree applies for the transfer of a decree from one Court to another for execution, the question whether a set-off can be taken into consideration or not, can only arise at the time when a decree is actually being put to execution. The Court to which the application for transfer is made cannot therefore go into the question of equities under S. 49, C. P. Code, and dismiss the application on such ground because the decree will be actually put into execution in the transferee Court if at all the decree is transferred. (*Costello, Ag.C.J. and Edgley, J.*) H.N. DUTTA & Co. *v.* TARUBALA DASSI. 174 I.C. 936 =10 R.C. 735=A.I.R. 1937 Cal. 570.

——S. 39 (1)—*Transfer of decree—Competency of transferee Court—Test—Amount of the decree or original value of the suit.*

There is nothing in the C. P. Code which makes it necessary that the Court to which the decree is transferred for execution should be aCourt having a limit of pecuniary jurisdiction which would include the original valuation of the suit. When once a decree has been passed the question of execution of one decree is the same as the execution of another of the same amount and no question of the original valuation of the suit has any real bearing on the question of execution of a decree. It is the value of the decretal amount which determines the importance of the case for the limits of pecuniary jurisdiction. (*Bennet and Varma, JJ.*) SHANTI LAL *v.* JAIMINI KUER. I.L.R. (1940) All. 318=1940 A.W.R. (H.C.) 292=189 I.C. 376=1940 A.L.J. 381=A.I.R. 1940 All. 331.

——Ss. 39 (1) (a) (b) and (c) and 42—*Executing Court, powers of—Decree transferred for execution—Immovable properties of defendant lying within transferee Court—Property sold but no report sent under S.* 41—*Application to transferee Court for arrest of defendant—If made to "proper Court"—Jurisdiction of transferee Court to entertain.*

S. 42, C. P. Code, confers on a Court executing a decree all the powers which the Court which passed the decree has in respect of the decree under execution. Those powers are not in any way limited or restricted by anything contained in S. 39, Cls. (*a*), (*b*) and (*c*) of S. 39 (1) only deal with the circumstances justifying a transfer of the decree and do not necessarily define the powers of the transferee Court. Unless there is, in the order of transfer, any express limitation of the purpose for which the transfer is made, there is no reason to limit the powers of the Court to which the decree is transferred for execution. The mere fact that a decree is transferred to another Court for execution on the ground that the judgment-debtor has immovable property within the jurisdiction of the transferee Court is no ground for holding that that Court, after the sale of those properties has no jurisdiction to entertain an application to execute the decree by arrest of the judgment-debtor, at any rate, when that Court has not sent any report of execution under S. 41, C. P. Code. An applica-

C. P. CODE (1908), S. 39.

tion made to the transferee Court for arrest under such circumstances is one made to a "proper Court" within the meaning of Art. 182 (5) of the Limitation Act, so as to be a step-in-aid. (*Varadachariar, J.*) ABDUL HAFIZ SAHEB *v.* ABDUL SUKKUR SAHEB. 176 I.C. 327=11 R.M. 61=46 L.W. 565=1937 M.W.N. 1086=A.I.R. 1938 Mad. 27=(1937) 2 M.L.J. 602.

——S. 39 (i) (b)—*Transfer of decree for execution—Fresh application to transferee Court—Necessity.*

Where an application for execution is made to the Court which passed the decree, that Court will transmit the same to the Court where the immovable property sought to be sold is situate along with the other papers required by O. 21, R. 5 or R. 6, Civil Procedure Code, and then the latter Court will make an order for sale. It is not necessary in such a case to have a fresh application for execution before the Court where immovable property sought to be sold in execution is situate. (*S. K. Ghose and Edgley, JJ.*) AMARENDRA NATH MULLICK *v.* BALAI CHAND GHATAK. 162 I.C. 777=8 R.C. 652=A.I.R. 1936 Cal. 267.

——S. 39 (1) (b)—*Transfer under—Execution in transferee Court—If limited to execution against judgment-debtor who satisfies that condition.*

Where the condition justifying transfer is that set out in S. 39, sub-S. (1) (*b*), the intention of S. 39 is that execution should be limited to execution against the judgment-debtor who satisfies that condition. To hold that a judgment-creditor may obtain an order for transfer on the ground that one judgment-debtor has no property within the local limits of the Court which passed the decree, and has property within the local jurisdiction of another Court, and may then execute the decree through such other Court not against that judgment-debtor but against another judgment-debtor who does not fulfil that condition, is absurd. (*Panckridge, J.*) CHHATRAPAT SINGH *v.* KHARAJ SINGH. 63 Cal. 1210=168 I.C. 391=9 R.C. 817=A.I.R. 1936 Cal. 521.

——S. 39 (1) (c)—*Court passing mortgage decree for sale—Power to sell property outside territorial jurisdiction.*

The word 'may' in S. 39, C. P. Code, does not mean 'must', but implies a discretion in the Court. Sub-S. (1) (*c*) of that section does not, therefore, oust the jurisdiction of the Court which had passed a decree for sale in a mortgage suit to sell any portion of the mortgaged property or any independent item situated outside its territorial jurisdiction, it having had jurisdiction to entertain the suit and to pass the decree by reason of part of the mortgaged property or some other items of mortgaged property being within its territorial limits. (*Mitter and Khundkar, JJ.*) SAKTI NATH ROY CHOUDHURY *v.* REGISTERED JESSORE UNITED BANK, LTD. I.L.R. (1939) 1 Cal. 493=70 C.L.J. 47=184 I.C. 786=43 C.W.N. 453=A.I.R. 1939 Cal. 403.

——S. 39 (2)—"*Competent jurisdiction*"—*Meaning of.*

The words "competent jurisdiction" in S. 39 (2) refer to territorial and pecuniary jurisdiction to deal with the decree and do not mean competency to try the original suit; otherwise it would follow that where an award had been filed under the

C. P. CODE (1908), S. 40.

Arbitration Act and was sent to a place to which the Arbitration Act did not apply, there would be no Court competent to try the original suit and therefore no Court competent to execute the decree. This could hardly be the meaning or intention of the Legislature. (*Dalip Singh, J.*) RADHA KISHAN RUP LAL *v.* BOMBAY CO., LTD., AMRITSAR. I.L.R. (1939) Lah. 551=183 I.C. 241=12 R.L. 105 (1)=41 P.L.R. 774=A.I.R. 1939 Lah. 258.

——S. 39 (2)—*Transferee Court—Competency to execute—Test.*

The words 'of competent jurisdiction' clearly indicate, that the competence of a Court to execute a particular decree, must be determined by a reference to its competence to try a suit of similar valuation in which the decree sought to be transferred was passed. (*Iqbal Ahmad, J.*) SITA RAM RAI *v.* MADHO PRASAD. I.L.R. (1939) All. 97=180 I.C. 403=11 R.A. 459=1938 A.W.R. (H.C.) 763=1938 A.L.J. 1128=A.I.R. 1939 All. 57.

——S. 39 (d)—*Decree directing sale—Execution by removal of obstruction.*

Provisions of Cl. (*d*), S. 39, have not to be considered at all where the decree directing sale is to be executed not only by sale of property but by removal of obstruction. (*Davis, J.C. and Mehta, A.J.C.*) BRITISH INDIA STEAM NAVIGATION CO., LTD., *v.* A.M. JIWANJEE & CO. 30 S.L.R. 290=161 I.C. 524=8 R.S. 149=A.I.R. 1936 Sind 11.

——S. 39 (2) (d)—*Small Cause Court transferring execution application to its regular side—Jurisdiction to proceed against immovable property.*

It is a principle of the interpretation of statutes that where a list of certain circumstances in which a particular act can be done is followed by a general clause, that clause must be interpreted as referring to circumstances *ejusdem generis* as those which have been recited in the foregoing clauses. Sub-cl. (*d*) of S. 39 must be interpreted on these principles and it was not intended by the Legislature that this sub-clause should be utilized in order that a Court should proceed in execution in a matter which was not otherwise permitted by law. The Legislature has provided in various ways that a Small Cause Court shall have no jurisdiction over immovable property. Hence a Small Cause Court cannot by transferring execution application to its regular side under S. 39 confer upon itself jurisdiction to proceed against the immovable property. (*Almond, J.C. and Mir Ahmad, J.*) SITAL RAM *v.* THAKUR DAS. 178 I.C. 127=11 R. Pesh. 47=A.I.R. 1938 Pesh. 70.

——S. 40—*Decree sent for execution to Court of another province—Law governing such executions.*

Where a decree of a Court of one province is transferred to a Court in another province, for purposes of execution, according to S. 40, C. P. Code, the rules governing executions in the latter province are the rules which would apply to executions of decrees sent from anywhere outside that province. (*Addison and Din Mahomed, JJ.*) MURLI DHAR *v.* BASHESHAR LAL MOTI LAL. I.L.R. (1938) Lah. 264=177 I.C. 487=11 R.L. 330 (2)=40 P.L.R. 14=A.I.R. 1938 Lah. 126.

C. P. CODE (1908), S. 41.

——S. 41—*Certificate under—Effect of—Certificate sent erroneously and prematurely to Court which passed decree—Transferee Court retaining copy of decree and intending to take further proceedings in execution—Jurisdiction to further execute decree—If ousted.*

The mere sending of a certificate by the transferee Court to the Court which passed the decree, under S. 41, C. P. Code, does not oust the jurisdiction of the transferee Court to further execute the decree. Where the transferee Court retains the copy of the decree and intends to take further proceedings in execution, but prematurely and erroneously sends a certificate under S. 41 to the Court which passed the decree, it cannot be said that it ceases to have any jurisdiction to execute the decree. (*Bennet, J.*) JWALA PRASAD *v.* SRI THAKUR DWARKA DHISHJI. **170 I.C. 28=1937 A.L.R. 641=10 R.A. 102=1937 A.L.J. 393=1937 A.W.R. 385=A.I.R. 1937 All. 474.**

——S. 41—*Jurisdiction of the transferee Court—When terminates—Striking off of execution application—Effect.*

S. 41 of the C. P. Code states that the Court to which a decree, is sent for execution *shall certify* to the Court which passed it, not merely that it shall make an order that such a certificate shall be prepared. Where a transferee Court on the application of the decree-holder to strike off the execution in part satisfaction, did order it to be struck off and directed that the result be communicated to the Court which sent the decree, does not thereby put an end to its jurisdiction, for the order does not amount to a certificate as contemplated by S. 41, C. P. Code. (*Bennet and Verma, JJ.*) RAM BABU *v.* SANWAL DAS. **176 I.C. 412=11 R.A. 105=1938 A.L.R. 617=1938 A.L.J. 553=1938 A.W.R. (H.C.) 371=A.I.R. 1938 All. 412.**

——S. 41—*Requirements — Compliance with—Sufficiency.*

Where a transferee Court dismissed the execution case pending before it and directed that the Court passing the decree should be informed and a certified copy of this order was actually filed in the latter Court together with the decree-holder's petition in which he asked that his decree should be transferred to another Court for execution.

Held, that this was sufficient compliance with the requirements of S. 41, C.P. Code. (*Costello, Ag. C.J. and Edgley, J.*) KRISHNA PROSANNA LAHIRI *v.* SAROJINI DEBI. **I.L.R. (1937) 2 Cal. 734=174 I.C. 12=10 R.C. 633=41 C.W.N. 1243 =66 C.L.J. 216=A.I.R. 1937 Cal. 557.**

——S. 41—*Scope—Certificate under—What amounts to—Arrangement in transferee Court between decree-holder and judgment-debtor—Time given to latter to pay up certain amount in full satisfaction—Attachment kept alive and decree-holder having liberty to proceed to execute for whole amount on default—Report sent by Court to transferor Court relating true facts—Jurisdiction of transferee Court to execute—If terminates.*

Where the Court to which a decree has been transferred for execution has neither executed the decree nor finally failed to execute the decree, it does not cease to have jurisdiction to execute the decree merely because it sends a report, to the transferring Court of the true facts about an arrangement between the parties under which the judgment-debtor is given time to pay up an amount to the decree-holder in full satisfaction, the attachment being at the same time being kept alive and the decree-holder being at liberty to recover the full amount by execution on default of such payment. Such a report is not properly a certificate under S. 41, C. P. Code, which would operate to re-transfer the jurisdiction for execution of the decree from the transferee Court to the transferor Court. There is no necessity for a report of this kind at all; it is only if such circumstances as are referred to in S. 41, C. P. Code, exist and a certificate is sent relating those circumstances that the transferee Court does cease to have jurisdiction. (*Niamatullah and Allsop, JJ.*) SHIVA DAYAL MAL *v.* RAJESHWAR PRASAD. **172 I.C. 753=10 R.A. 424=1938 A.L.R. 424=1937 A.W.R. 910=1937 A.L.J. 1168= A.I.R. 1937 All. 766.**

C. P. CODE (1908), S. 42.

——S. 41—*Transferee Court sending certificate of non-satisfaction to central Court—Latter not transmitting it to decretal Court—Application for execution in decretal Court—Maintainability.*

The transferee Court sent a certificate of non-satisfaction to the central Court for communication to the decretal Court. But the central Court did not transmit it to the decretal Court, which it was required to do. An application for execution presented to the transferee Court was returned on the ground that the proper Court to entertain it was the decretal Court, and the application was then presented to the decretal Court.

Held, that the transferee Court had no seisin of the case and the application was maintainable in the decretal Court. (*Mitter and Khundkar, JJ.*) JATINDRA KUMAR *v.* RAMESH CHANDRA. **43 C.W. N. 412.**

——S. 42—Executing Court—Powers of—If limited or controlled by S. 39 (1) (*a*), (*b*) and (*c*) —Purpose of transfer—If limits powers of transferee Court. *See* C. P. CODE, SS. 39 (1) (*a*), (*b*) AND (*c*) AND 42. **(1937) 2 M.L.J. 602.**

——Ss. 42 and 145—*Execution of decrees against surety—Jurisdiction of transferee Court.*

The transferee Court has jurisdiction to execute the decree against the surety but it should in the first instance issue notice to him to show cause why this should not be done. (*Addison, J.*) RAHIM-UD-DIN *v.* MURLI DHAR. **I.L.R. (1938) Lah. 624=177 I.C. 879=11 R.L. 372=40 P.L.R. 530=A.I R. 1938 Lah. 593.**

——S. 42—*Powers of transferee Court—Question of liability under O. 21, R. 50 (2)—Jurisdiction to decide.*

A decree against a firm was transferred for execution to another Court. Decree-holder, wanting to execute the decree against third persons alleged to be liable under the decree, presented a petition to the executing Court under O. 21, R. 50 (2), C. P. Code, for leave to proceed against such other persons.

Held, that S. 42 which conferred powers on Court executing a decree did not confer on the executing Court power to decide questions under R. 50 of O. 21, because R. 50 dealt with determination of the liability of a person before proceedings in execution were commenced. Hence only the Court which passed the decree could decide the question under O. 21, R. 50 (2), and petitions should be presented to that Court and not to the executing Court. (*Almond, J.C.*) MOHAN LAL

C. P. CODE (1908), S. 42.

v. RAJPUT HOSIERY WORKS, SIALKOT. **171 I.C. 779=10 R.Pesh. 34=A.I.R. 1937 Pesh. 96.**

——**S. 42 and O. 21, Rr. 95 and 97**—*Property in Karachi Court's jurisdiction sold in execution by Bombay High Court—Decree-holder auction-purchaser obstructed in possession—Decree sent for execution to Karachi Court—Power of Karachi Court to remove obstruction.*

In execution of a decree of the Bombay High Court against a firm certain properties within jurisdiction of the Karachi Court were sold and purchased by the decree-holder. The auction-purchaser was however resisted in possession thereof. The decree was then sent for execution to the Karachi Court.

Held, that once it was proved that removal of obstruction was part of the execution of the decree, the High Court was not debarred from removing it merely because it did not pass the decree or sell the property. (*Davis, J.C. and Mehta, A.J C.*) BRITISH INDIA STEAM NAVIGATION CO., LTD. *v.* A M. JIWANJEE & CO. **30 S.L.R. 290 =161 I.C. 524=8 R.S. 149=A.I.R. 1936 Sind 11.**

——**S. 42**—*Small cause decree transferred to Sub-Judge with small cause powers—Application filed for execution against immovable property—Sub-Judge, if exercises small cause or original jurisdiction.*

Where a Small Cause Court decree is transferred for execution to a Subordinate Judge having small cause powers, and the application for execution is primarily an application to execute the decree against the immovable property of the judgment-debtor, the Subordinate Judge in dealing with it acts in the exercise of ordinary jurisdiction and not in the exercise of his small cause jurisdiction, and his order is, therefore, subject to the ordinary rules in respect of appeals as provided by S. 42, C. P. Code. (*Edgley, J.*) ABINASH CHANDRA *v.* BIBHUTI BHUSAN. **44 C.W.N. 587.**

——**S. 42**—*Transferee Court—Power to consider question of limitation.*

The Court to which a decree is transferred for execution has no jurisdiction to go behind the order transmitting the decree and decide whether the application for transfer was within time or not, and whether the execution of the decree is barred by law by reason of the invalidity of the order of transmission, although such Court is not only competent, but bound to consider whether the application for execution made to itself is in time or not. 14 R. 550, Appr. (*Mya Bu and Mackney, JJ.*) KANNAPPA *v.* ISHAAR SINGH. **1937 Rang L. R. 287=173 I.C. 160=10 R.R. 316=A.I.R. 1937 Rang. 477.**

——**S. 42**—*Transferee Court—Power to consider question of limitation.*

Although the executing Court to which a decree has been transferred for execution has jurisdiction to decide whether the application to it is barred by limitation or not, it cannot, in considering the question of limitation, look further back than the order transferring the decree of the Court which passed the decree; for an order transferring a decree is a step-in-aid of execution and consequently provides a starting point for a fresh period of limitation. If the judgment-debtor desires to question the order transferring the decree then the proper course for him is to apply to the transferee Court under O. 21, R 26, C. P. Code, for a stay of execution to enable him to make the necessary objecti n in the Court transferring the decree. (*Dunkley, J.*) ARJUNDAS BISUMEL *v.* U KA YA. **14 Rang. 550=163 I.C. 403=9 R.R. 17=A.I.R. 1936 Rang. 271.**

C. P. CODE (1908), S. 46.

——**S. 42**—*Transferee Court—Power to stay execution.*

The expression "powers in executing such decree" in S. 42 means "powers in carrying out the purpose of executing such decree." Although an order staying an execution may be passed while a Court is engaged in executing a decree, yet a power to order stay in execution cannot be held to be a power exercised to carry out execution of a decree. Power to stay execution is not included in S. 42. It is the duty of the Court to which a decree has been sent for execution to execute that decree. It has the powers necessary for that purpose, but it certainly has not the power to refuse to execute the decree even for a short period save and except in the circumstances set out in O. 21, R. 26, Civil Procedure Code. The executing Court has no jurisdiction to pass an order purporting to be passed under O. 21, R. 29, staying execution of a decree which has been transferred to it for execution by other Court, merely on the institution of a suit before it by the judgment-debtor for a declaration that the decree passed against him is null and void having been obtained by fraud. 60 Cal. 1119, Diss. from. (*Mackney, J.*) M. P. L. CHETTIYAR FIRM *v.* VANAPPA CHETTIYAR. **162 I.C. 865=8 R.R. 596= A.I.R. 1936 Rang. 184.**

——**S. 44**—Notification under—Decree of Native State—Execution in Burma after separation—Law as to. *See* GOVERNMENT OF BURMA (ADAPTATION OF LAWS) ORDER, PARA. 9 AND GOVERNMENT OF BURMA ACT, SS. 144 AND 149. **1938 Rang.L.R. 463=A.I.R. 1938 Rang. 352.**

——**S. 44**—Notification under—Effect of—Decree of Court of Native State transferred to British Indian Court—Position and powers of latter Court—Jurisdiction to decide whether Native State Court is competent to pass decree. *See* C. P. CODE, SS. 13 AND 44. **40 C.W.N. 591.**

——**S. 46**—*Money attached under precept—Payment to another decree-holder who attaches it after two months—Validity.*

When money is attached in execution of a decree it cannot be paid over to another decree-holder who subsequently attaches it, but when money is not attached in execution of a decree but it is attached in pursuance of a precept under S. 46, C. P. Code, the effect of which is limited only for two months, after which period the attachment no longer exists, the money attached under a precept can be paid over to anther decree-holder who subsequently attaches it. 161 I.C. 418 =1935 Lah. 914, Reversed. (*Jai Lal, J.*) GURDIAL SINGH *v.* KHAZAN CHAND. **163 I.C. 374=9 R.L. 13=A.I.R 1936 Lah. 486.**

——**S. 46**—*Object of—Indefinite order making permanent attachment—Validity.*

The object of S. 46 is to attach property of the judgment-debtor in another Court in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for the sale of the property in pursuance of an application for execution can be taken, and it is for this reason that the effect of an attachment in pursuance of a

precept is limited to two months and power is given to the Court which passed the decree to extend this period of two months in order to meet contingencies which may arise due to the delay in transferring the decree to the Court to which the precept has been sent. An indefinite order stating that an attachment is made permanently is not one contemplated by S. 46. (*Jai Lal, J.*) GURDIAL SINGH *v.* KHAZAN CHAND. **163 I.C. 374=9 R.L. 13=A.I.R. 1936 Lah. 486.**

——S. 47.

Appeal.
Applicability.
Bar of suit.
Construction.
Defence to suit.
Executability of decree.
Executing Court.
Execution, discharge or satisfaction of decree.
Execution proceedings.
Necessary parties.
Parties and representatives.
Parties to suit.
Question relating to execution.
Question relating to satisfaction.
Representative.
Scope.

Appeal.

——S. 47—*Appeal—Adjournment of sale to enable sanction of Chief Commissioner being obtained—Nature of order—If appealable.*

Where an execution sale is adjourned to enable the sanction of the Chief Commissioner being obtained under S. 17 of the Ajmer Government Wards Regulation, the order is not merely one for stay of execution. It is an order refusing execution unless some condition is complied with and is therefore appealable. (*D. R. Norman.*) BENI PRASAD *v.* SARFRAZ ALI. **1939 A.M.L.J. 85.**

——Ss. 47 and 115—*Appeal—Amendment on application under Ss. 151 and 152—Appeal if lies—Revision, competency.*

Where the order amending a decree for a certain sum is not passed in execution proceedings but on a separate application under Ss. 151 and 152, the application does not fall under S. 47 and no appeal from the order is competent. But the mere fact that the order amending the decree is not itself appealable and the mere fact that an appeal could be presented from the amended decree is no bar to the entertainment of a revision petition of the order in question, if it is passed without jurisdiction. (*Bhide, J.*) MITTER SEN-GANESHI LAL *v.* KALYAN RAI. **178 I.C. 677 =11 R.L. 483=A.I.R. 1938 Lah. 4.**

——S. 47—*Appeal—Appeal by judgment-debtor against surety—Competency.*

P obtained a decree against *M*. The amount of decree was paid by *M*. On appeal the decree in favour of *P* was set aside by the High Court and *M* applied to the executing Court praying that *P* should be ordered to repay the amount received by him under the decree. It was also stated that one *B* had stood surety for *P* and that the execution should issue against him also. *B* denied having stood surety for *P*. The executing Court held that he did not stand surety and dismissed the application as against him. *M* did not appeal to the High Court against this decision but *P* went on appeal on the ground that the executing Court should have held that *B* was a surety.

Held, that no appeal was competent on behalf of *P*, the judgment-debtor, as against *B*, the surety. By getting a decision against *B* so far as the question of suretyship was concerned *P* could not compel *M* to take out execution against *B*. (*Abdul Rashid, J.*) MATHRA DAS PURI *v.* ADMINISTRATOR OF LAHORE MUNICIPALITY. **A.I.R. 1939 Lah. 137.**

——S. 47—*Appeal—Application for enquiry as to how much money was due from judgment-debtor—Application referring to S. 151 in the heading—Order on—Appealability.*

The mere fact that an application refers to S. 151, C. P. Code, in the heading is not conclusive and the Court must look to the substance of the application in order to do substantial justice between the parties. An application asking the Court to enquire how much money was due by the judgment-debtor, though purporting to be one under S. 151, is in reality and substance an application under S. 47, C. P. Code, as it relates to a matter touching the discharge or satisfaction of the decree. The order of the executing Court on such an application is, therefore, appealable, especially when the Court does not purport to act under S. 151 and in fact, there is no suggestion in the order that it was acting under the provisions of that section. (*Agha Haider, J.*) BUR SINGH *v.* ANJUMAN DEHI SOHAL. **161 I.C. 21=8 R.L. 662=A.I.R. 1936 Lah. 725.**

——S. 47—*Appeal—Application for transfer of decree—Order on objection opposing transfer.*

An application to the Court which passed the decree for transfer of decree is an application relating to execution of a decree. The Court to which the application for transfer is made does not merely function as a post office but it has judicial duties to perform. It is required by statute to exercise judicial discretion. An objection raised by a judgment-debtor opposing the transfer will be an objection relating to execution of the decree. The words "relating to execution of the decree" used in S. 47, are wide enough to cover the case. An order passed on such objection is an order coming within the scope of S. 47 of the Code and is therefore appealable. (*Mitter and Mohammad Akram, JJ.*) MANMATHA PAL *v.* SARADA PROSAD. **187 I.C. 67 =12 R.C. 539=A.I.R. 1939 Cal. 651.**

——S. 47 and O. 21, R. 90—*Appeal—Application to set aside sale compromised on certain terms—Sub-Judge setting aside sale holding that judgment-debtor had complied with terms of compromise—District Judge on appeal setting aside order of Sub-Judge—Second appeal—Maintainability.*

An application by the judgment-debtor for setting aside the sale under O. 21, R. 90 C. P. Code, was compromised on condition that the sale would be set aside without any evidence if the judgment-debtor paid the decretal amount within a certain date and that in case of default by the judgment-debtor, his application would be dismissed and the sale confirmed without any evidence. The Subordinate Judge set aside the sale holding that the judgment-debtor had complied substantially with the terms of compromise. On appeal by the decree-holder auction-purchaser, the District Judge set aside the order of the Sub-

C. P. CODE (1908), S. 47.

ordinate Judge setting a side the sale. He, however, did not confirm the sale but ordered the case for setting aside the sale to be heard on merits as he was of opinion that the compromise was not binding on the judgment-debtor.

Held, that the order of the District Judge was not an order under S. 47, C. P. Code, and consequently a second appeal to the High Court was not maintainable. (*Nazim Ali and R. C. Mitter, JJ.*) RADHARAMAN SAHA *v.* MAKHOM LAL GANGOLY. **41 C.W.N. 890=170 I.C. 917=10 R.C. 207 =A.I R. 1937 Cal. 461.**

——S. 47—*Appeal—Application under S. 19, Madras Agriculturists' Relief Act—Order on—Appealability.*

An order on an application under S. 19 of the Madras Agriculturists' Relief Act, made while no proceedings in execution are pending is not appealable. It cannot be considered to be a question under S. 47, C. P. Code, in the absence of any execution proceedings. (*Burn and Stodart, JJ.*) SUBBARAIDU. *In re.* **50 L.W. 537=1939 M. W.N. 1160 (1)=(1939) 2 M.L.J. 609 (1).**

——S. 47—*Appeal—Application under S. 20, Madras Agriculturists' Relief Act—Order on—Appealability.*

An order passed on an application under S. 20 of the Madras Agriculturists' Relief Act is not an appealable order under S. 47, C. P. Code. The question which arises under S. 20 is a question which arises between the executing Court and the applicant and not a question between the parties to the suit. (*Burn and Stodart, JJ.*) SWAMINATHA ODAYAR *v.* SRINIVASA IYER. **186 I.C. 424=12 R.M. 629=1939 M.W.N. 910=50 L.W. 411=A.I.R. 1939 Mad. 942=(1939) 2 M. L.J. 495.**

[*Note.*—Rules since framed make orders on applications under Ss. 19 and 20 of Agriculturists Relief Act appealable.]

——S. 47—Appeal—Application under S. 23 of Madras Agriculturists' Relief Act—Order on—Appealability. *See* MADRAS AGRICULTURISTS' RELIEF ACT, S. 23. **1939 M.W.N. 735 (2).**

——S. 47—*Appeal—Application under O. 21, R. 2—Order holding that it is time-barred—Appeal.*

An order by the executing Court holding that an application under O. 21, R. 2, C. P. Code, is time-barred, falls within S. 47, C. P. Code, and an appeal therefrom is competent. (*Lokur, J.*) NARAYAN DATTATRAYA *v.* MURLIDHAR PUNAMCHAND. **183 I.C. 419=12 R.B. 100=41 Bom.L. R. 417=A.I.R. 1939 Bom. 255.**

——S. 47—*Appeal—Appointment of Commissioner to take accounts in execution—Order giving directions to Commissioner as to taking of accounts—Appealability.*

An order by the executing Court giving directions to a Commissioner appointed in the execution proceedings to investigate and take accounts as to certain amounts payable to the parties and directing him to complete the investigation in the light of the directions given, is not appealable under S. 47, C. P. Code. It is in the nature of an interlocutory order and not a final order, and therefore there can be no appeal from it. It is only when the final order is passed after the Commissioner makes his report acting upon the instructions given to him that there can be an appeal. (*Harries, C.J. and Fazl Ali, J.*) PRABHA-

C. P. CODE (1908), S. 47.

BATI DEBI *v.* LILA SINGH. **12 R.P. 428=185 I.C. 852=6 B.R. 267=20 Pat.L.T. 796=A.I.R. 1940 Pat. 75.**

——S. 47—Appeal—Assignment of decree after its attachment—Assignee applying to execute decree—Objection by attaching creditor who is also the judgment-debtor, under S. 64 and O. 21, R. 53—Order dismissing the objection—Second appeal. *See* C. P. CODE, O. 21, RR. 16 AND 53. **1936 A.W.R. 1167=A.I.R 1937 All. 63.**

——S. 47—*Appeal—Attachment — Judgment-debtor claiming attached land as* debutter—*Order on objection—Appealability—O. 21, R. 58—Reversal of order on appeal—Revision.*

O. 21, R. 58, C. P. Code must be held to apply in all cases where the judgment-debtor objects to an attachment not in his personal capacity, but in a representative capacity. Where a judgment-debtor objects to the attachment on the ground that the attached property is *debutter* and that he holds it not in his private or personal capacity, but as *shebait* on behalf of a deity to whom the property has been dedicated in consideration of his performing certain services to that deity, the objection falls under O. 21, R. 58, C. P. Code; and not under S. 47. No appeal therefore lies against the order passed on the objection. If an appeal is entertained against the order and allowed, it is without jurisdiction, and the order on appeal is liable to be set aside in revision. (*James, J.*) BARARI CO-OPERATIVE BANK, LTD. *v.* SINGHESWAR JHA. **163 I.C. 397 (1)=9 R.P. 5= 17 Pat.L.T. 810=1936 P.W.N. 195=A.I.R. 1936 Pat. 256.**

——S. 47—*Appeal — Auction-purchaser — If necessary party.*

The auction-purchaser is not a necessary party, in a proceeding arising under S. 47, C. P. Code as between the parties to the suit; nor is his non-joinder in an appeal from an order in such proceedings fatal to it. (*Grille and Niyogi, JJ.*) AZHAR HUSSAIN *v.* MOHAMMAD SHIBLI. **I.L.R. (1939) Nag. 548=187 I.C. 791=12 R.N. 309= 1939 N.L.J. 270=A.I.R. 1939 Nag. 183.**

——S. 47—*Appeal — Auction-purchaser, if necessary party.*

An objection to attachment under S. 47, C. P. Code, by the legal representative of the judgment-debtor was dismissed and the property was then put to sale and purchased by a third person in auction-sale. In appeal from the order of dismissal of the objection, the auction-purchaser was not added as a respondent.

Held, that the auction-purchaser was not a necessary party to the appeal, as his right came into existence after the matter had been decided by the trial Court. (*Jai Lal, J.*) NABI BAKHSH *v.* IDA. **174 I.C. 320=10 R.L. 551=A.I.R. 1937 Lah. 263.**

—— S. 47—*Appeal—Award under Co-operative Societies Act—Execution by Civil Court—Proceedings set aside—Order under S. 151, C.P. Code, remitting award for rectification—Appeal—Revision.*

Where the execution proceedings taken in the Civil Court in pursuance of an award under the Co-operative Societies Act are set aside, and the Court passes an order under S. 151, C. P. Code, remitting the award to the arbitrator for rectification of certain errors therein, the order is not one falling under S. 47, C. P. Code, and is there-

C. P. CODE (1908), S. 47.

fore not appealable. The order being one which the Court has no jurisdiction to make under the Co-operative Societies Act and the rules framed thereunder, the matter falls under S. 115, C. P. Code, calling for interference in revision. (*Mc Nair, J.*) NILMANI MAITY *v.* KUMAR NARAYAN JANA. 164 I.C. 802=9 R.C. 284=40 C.W.N. 89.

——S. 47—*Appeal—Decision on application under O.* 34, *R.* 5.

The decision of an executing Court on an application under O. 34, R. 5, C. P. Code, falls within the purview of S. 47, C P. Code, and is appealable. (*Addison and Abdul Rashid, JJ.*) SURAJ BHAN *v.* ALLAHABAD BANK, DELHI. 164 I.C. 53 =9 R.L. 75=38 P.L.R. 259=A.I.R. 1936 Lah. 562.

——S. 47—*Appeal—Decree—Execution for sum less than that mentioned in decree after reduction under S.* 15, *Bihar Act* (*IX of* 1938)—*Appeal—If lies.*

Where the Court refuses to execute the decree for the sum mentioned in it, and proceeds to execute it only after reducing the amount of the decree in accordance with the direction in S. 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act of 1938, the matter falls under S. 47, C. P. Code, and an appeal lies against the order. (*Khaja Mohamed Noor and Chatterji, JJ.*) RAZAUR RAHMAN *v.* UDIT SINGH. 18 Pat. 694=20 Pat L.T. 492=1939 P. W.N. 530=185 I.C. 135=12 R.P. 303=A.I.R. 1939 Pat. 570.

——S. 47—*Appeal—Decree against legal representatives of deceased—Execution against his property—Application under S.* 151 *by posthumous son to be brought on record as legal representative—Order rejecting—Appeal—Revision.*

Where an application under S. 151 is filed on behalf of a posthumous son of a person, against whose property a decree obtained against his legal representatives is sought to be executed, praying that he should be brought on record as one of the legal representatives of the deceased, and that the sale of the property should be stayed till the application is granted, the question raised in the application does not fall within the purview of S. 47 as it is not a question arising between parties to the suit, and an order refusing such application is not a decree. Hence no appeal lies from it; nor is such order open to revision being merely an interlocutory order and there being no case decided. (*Davis, J.C. and Lobo, A.J.C.*) ESAK HAJI ABUBAKAR *v.* JIMABAI. 30 S.L.R. 170=165 I.C. 305 (2)=9 R.S. 96=A.I.R. 1936 Sind 166.

——S. 47—*Appeal—Decree-holder directed to file a petition for appointment of guardian of minor judgment-debtor—Failure of decree-holder to comply with order—Dismissal of execution petition—Second appeal.*

An order dismissing an execution petition for failure of the decree-holder to comply with the order of the Court directing him to file a petition and affidavit for appointment of a guardian of a minor judgment-debtor, is one under S. 47, C. P. Code, and a second appeal is competent against such an order. (*Nasim Ali and R.C. Mitter, JJ.*) BROJENDRA KISHORE ROY CHAUDHURY *v.* SHAMSERALI. 41 C.W.N. 531=I.L.R. (1937) 2 Cal. 127=171 I.C. 435=10 R.C. 268=A.I.R. 1937 Cal 259.

——S. 47 and Sch. II, para 21 (2)—*Appeal—Decree under Sch. II, para.* 21 (2)—*Question relating to its execution—Appeal, if lies from decision.*

When a decree passed under Sch. II, para. 21 (2), C. P. Code, is executed, if any question relating to its execution, discharge or satisfaction is raised by any of the parties to the decree, the determination of such a question is a decree within the meaning of the Code, and an appeal is therefore competent from the order deciding the question. (*Nasim Ali and Rau, JJ.*) BRINDABAN CHANDRA *v.* KIRAN BALA DEVI. 44 C.W.N. 231.

——S. 47—Appeal—Decree under S. 227, Agra Tenancy Act—Execution—Order of Collector in —Appeal—Forum—Commissioner or District Judge. *See* AGRA TENANCY ACT, S. 227. 1936 R. D. 197.

——S. 47—*Appeal—Execution—Application by judgment-debtor to raise attachment—Order refusing—Appealability.*

An order refusing an application by the judgment-debtor to raise the attachment effected in execution is appealable as a decree, as the question decided is one relating to the execution, discharge or satisfaction of the decree under S. 47, C. P. Code. The fact that the order is passed not on the execution petition itself but on an application by the judgment debtor does not make any difference. (*Pandrang Row, J.*) PALANIAPPA CHETTIAR *v.* THAIVANAI ACHI. 165 I C. 59=9 R. M. 206=1936 M.W.N. 1037=44 L.W. 460=A.I. R. 1936 Mad. 812=71 M.L J. 317.

——S. 47—*Appeal—Insolvent judgment-debtor —Annulment of adjudication—Execution by creditor—Objection by person appointed under S.* 37 *of the Provincial Insolvency Act to take charge of properties—Order on—Appeal and second appeal.*

Quaere:—Whether an appeal or second appeal lies against an order on objections to the execution of a decree against the judgment-debtor raised by the person in whom the properties are vested by the Court under S. 37 of the Provincial Insolvency Act on the annulment of the adjudication of the judgment-debtor? (*R. C. Mitter, J.*) ABDUL LATIF *v.* J. R. PERCIVAL. I.L.R. (1937) 1 Cal. 264=166 I.C. 509=9 R.C. 546=40 C.W.N. 1229=A I.R. 1936 Cal. 573.

——S. 47—*Appeal—Matter in issue between decree-holder and judgment-debtor—Order on—Appealability.*

Where a decree-holder who attaches the surplus profits of a ghatwal estate raises objections to certain items in the estimate of receipts and expenditure of the estate, the question is one between the decree-holder and the judgment-debtor, falling under S. 47, C. P. Code, and an order passed on such objections is appealable. (*Rowland and Chatterji. JJ.*) BANSIDHAR SHROFF *v.* ASHUTOSH DEO. 180 I.C. 8=5 B.R 344=11 R P. 436=1939 P.W.N. 86=A.I.R. 1939 Pat. 242.

——S. 47—*Appeal—Mortgage bond—Provision for instalment payment—Default clause giving mortgagee right to sue for whole amount in case two consecutive instalments be kept in arrears—Default—Suit for defaulted instalments only—Decree—Sale—Objection that sale should not be.*

C. P. CODE (1908), S. 47.

subject to remaining instalments—Order on—Appealability.

Where in execution of a decree obtained by a mortgagee for two overdue instalments under a mortgage deed which provides for instalments and contains a default clause giving the mortgagee a right to sue for the whole amount in case of default in payment of two consecutive instalments, the mortgaged property is put up for sale, if the mortgagor raises an objection that the sale cannnot be held subject to the remaining instalments of the mortgage debt, that is a dispute between the parties arising out of execution and affecting the substantial rights of the judgment-debtor, and the order on such objection is therefore appealable. (*Wadsworth, J.*) SUBBAYYA *v.* VENKATASUBBAYYA. 50 L.W. 775=1939 M.W.N. 1239=A.I.R. 1940 Mad. 296=(1939) 2 M.L.J. 932.

———S. 47—*Appeal—Order accepting security tendered by judgment-debtor and directing stay of execution.*

Where the execution Court accepts a hypothecation bond tendered by the judgment-debtor as sufficient security in spite of the objection of the decree-holder, and directs stay of execution proceedings as ordered by the High Court, the order of the executing Court is not a final order, but merely in the nature of an interlocutory order and does not come within the purview of S. 47, C. P. Code, and no appeal, therefore, lies against such an order. (*Nanavutty and Smith, JJ.*) SURAJ MOHAN DAYAL *v.* SARUP NARAIN. 164 I.C 424=9 R.C 67=1936 O.W.N. 664=1936 O.L.R. 450=A.I.R. 1936 Oudh 369.

———S. 47—Appeal—Order allowing amendment of execution petition—If "decree"—Appealability. *See* C. P. CODE, S. 2 (2). 71 M.L.J. 256.

———S. 47—*Appeal—Order bringing legal representatives of deceased decree-holder on record in execution—Appealability.*

An order on application in execution to bring the legal representatives of a deceased decree-holder on record falls under S. 47, and is appealable and provisions of O. 22, Rr. 12, 3 and 4 are not applicable (*Davis, J.C. and Tyabji, J.*) GOPIBAI *v.* CHUHERMAL. I.L.R. (1939) Kar. 509=183 I.C. 717=12 R.S. 71=A.I.R. 1939 Sind 234.

———S. 47—*Appeal—Order directing issue of warrant for arrest of judgment-debtor.*

An order issuing a warrant for the arrest of a judgment-debtor is an order passed under S. 47, C. P. Code, and is appealable as a decree. A.I.R. 1924 Lah. 360, Rel. on. (*Skemp, J.*) SARDAR KHAN *v.* SUNDAR SINGH. 169 I.C. 613=10 R.L. 25=39 P.L.R. 690=A.I.R. 1937 Lah. 706.

———S. 47—*Appeal—Order directing judgment-debtor to be sent to civil jail.*

To arrest and send a judgment-debtor to a civil jail is one of the modes of executing a decree, and hence the order to send the judgment-debtor to jail on failure to give security comes within the purview of S. 47 and is therefore appealable. (*Ba U. J.*) TAN KYIN HIN *v.* AHMED JAMAL. 164 I.C. 459=9 R.R. 103=A.I.R. 1936 Rang. 367.

———S. 47 and O. 34, R. 4—*Appeal—Order directing sale of mortgaged properties in particular order—If appealable.*

The question whether an order regulating the order in which the mortgaged properties are to be sold is an appealable one was held by the

C. P. CODE (1908), S. 47.

Court to be one in which there was divergence of judicial opinion and the question was left undecided at it was unnecessary for the decision of the case. (*Iqbal Ahmad and Verma, JJ.*) KARIMUL RAHMAN KHAN *v.* SARASWATI SUGAR SYNDICATE, LAHORE. I.L.R. (1939) All. 150=182 I.C. 493=12 R.A. 23=1939 A.W.R. (H.C.) 17=1939 A.L.J. 53=A.I.R. 1939 All. 314.

———S. 47—*Appeal—Order directing security for stay of delivery of possession pending appeal—Order by executing Court accepting security—If appealable.*

The question whether an appeal lies against an order of a Subordinate Court accepting the security for stay of delivery as sufficient can arise only if the order is passed by the Subordinate Court *suo motu* as a Court of execution, and not when the order is passed on a direction from the appellate Court. (*Fazl Ali and Madan, JJ.*) ANAND DAS *v.* RAM BHUSAN DAS. 3 B.R. 663=18 Pat L.T. 621=170 I.C. 139=10 R.P. 86=1937 P.W.N. 216=A.I.R. 1937 Pat. 380.

———S. 47—*Appeal—Order disallowing plea of limitation.*

An order disallowing a plea raised by the judgment-debtor that the execution petition is barred by limitation is an appealable decree under S. 47, C. P. Code. (*Beasley, C.J. and Stodart, J.*) RAMA RAO *v.* SREE RAMAMOORTHY. 164 I.C. 670=9 R.M. 162=1936 M.W.N. 575=44 L.W. 486=A.I.R. 1936 Mad. 801=71 M.L.J. 388.

———S. 47—*Appeal—Order for repayment of purchase-money to auction-purchaser under O. 21, R. 93, on sale being set aside—Appealability.*

An order on an application by the auction-purchaser under O. 21, R. 93, C. P. Code, for repayment of the purchase-money to him when the sale has been set aside does not fall under S. 47; it is not a question between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree, as it has no legal effect on the rights and liabilities as between the decree-holder and the judgment-debtor. Hence the order is not one which is appealable. (*Leach, C.J. and Somayya, J.*) RAMASWAMI CHETTIAR *v.* MEYYAPPAN SERVAI. 188 I.C 187=12 R.M. 810=50 L.W. 159=1939 M.W.N. 700=A.I.R. 1939 Mad. 740=(1939) 2 M.L.J. 353.

———S. 47—*Appeal—Order of restitution under inherent powers—Order between parties and relating to execution—Appealability.*

An order passed under the inherent powers of the Court is not *per se* appealable. But if the order is in fact an order passed on an application made by one party to the suit as against the other and relates to the execution, discharge or satisfaction of the decree in the suit, it falls under S. 47 and for that reason it is appealable. S. 47 only provides for the procedure and the *forum* whereby a decision has to be reached. It does not give the Court the powers by virtue of which the Court decides; those powers have to be sought elsewhere in the C. P. Code, either under S. 144 or S. 151. An order for restitution under S. 144 falls under S. 47 and is appealable. Similarly an order under S. 151 for something analogous to restitution made as between the parties would also fall under S. 47 and be subject to appeal. S. 47 must be held to cover all cases of restitution. (*Wadsworth, J.*) RAMIREDDI *v.* SATYAM. 167 I.C. 356=

C. P. CODE (1908), S. 47.

9 R.M. 446=1936 M.W.N. 503=43 L.W. 773=A.I.R. 1936 Mad. 636.

——S. 47—*Appeal—Order on application under O. 21, R. 95 by decree-holder auction-purchaser.*

An order passed on an application under O. 21, R. 95, C. P. Code, by a decree-holder auction-purchaser is an order under S. 47, C. P. Code, and appealable as such. 53 Cal. 781 (F.B.), Foll. (*Agha Haidar, J.*) KINAD DEV *v.* PARTAP SINGH. 169 I.C. 242=9 R.L. 728=38 P.L.R. 621=A.I.R. 1937 Lah. 145.

——S. 47—*Appeal—Order purporting to be under S. 47, but wrongly made—Matter not falling under section—Appeal—If barred.*

An order which purports to be made under S. 47, C. P. Code, though it is wrongly made as being on a plea which ought not to be entertained in execution, is still an order under S. 47, and therefore is appealable. (*Mockett and Horwill, JJ.*) SETHURAJAN *v.* GURUSWAMI PATHAR. I.L.R. (1937) Mad. 834=1937 M.W.N. 227 (2)=170 I.C. 86=10 R.M. 131=45 L.W. 401=A.I.R. 1937 Mad. 509=(1937) 2 M.L.J. 37.

—— S. 47—*Appeal—Order refusing execution and directing the filing of a fresh application—Appeal.*

An order directing an applicant to file another execution while refusing to execute the decree as asked, is undoubtedly appealable as a decree under S. 47, C. P. Code, and that right of appeal is not taken away merely because execution is subsequently filed and unsatisfied. (*Middleton, J.C. and Almond, A.J.C.*) KRIPAL SINGH *v.* SYED ASHRAF ALI SHAH. 160 I.C. 812=8 R. Pesh. 130 =A.I.R. 1936 Pesh. 46.

——S. 47—*Appeal—Order refusing to execute decree—Appeal, if can be filed by agent competent to execute decree.*

Where an agent of the decree-holder is competent to execute the decree, he is entitled to have any objection to execution removed either in the executing Court or in the appellate Court. He is, therefore, competent to appeal from an order refusing to execute the decree. (*Jai Lal, J.*) BASANTI DEVI *v.* OFFICIAL RECEIVER. 164 I.C. 463 =9 R.L. 130 (2)=A.I.R. 1936 Lah. 508.

——S. 47—*Appeal—Order rejecting objection questioning legality of issue of warrant—No appeal filed against the order—Appeal against order in execution which has nothing to do with such objection, on the ground that warrant was illegal—Maintainability.*

Where an objection under S. 47, C. P. Code, questioning the legality of the issue of a second warrant of attachment was rejected by an order passed on the back of the application, but the judgment-debtor did not file any appeal against that order, an appeal by him directed against the order of the Court in the execution case which has nothing to do with such objection, on the ground that the issue of a second warrant of attachment without a fresh application for execution was illegal, is not maintainable. (*Srivastava and Thomas, JJ.*) HAFIZ ABDUL RAZZAQ HAJI *v.* BINI MADHO BASANT RAI. 161 I.C. 393 (1)=8 R.O. 320=1936 O.L.R. 173=1936 O.W.N. 47= A.I.R. 1936 Oudh 240.

——S. 47—*Appeal—Order setting aside sale—Notice received by Civil Court under S. 34, Bengal Agricultural Debtors Act immediately after execution sale—Sale set aside under S. 151.*

C. P. CODE (1908), S. 47.

Where a Civil Court receiving a notice under S. 34 of the Bengal Agricultural Debtors Act immediately after the judgment-debtor's property had been sold in execution, passes an order purporting to be made under S. 151, C. P. Code, to the effect that the sale should be set aside the order in effect is essentially an order which ought to be made under S. 47, C. P. Code, and is, therefore, appealable. (*Edgley, J.*) NIBARAN CHANDRA *v.* SK. BELATALI. 43 C.W.N. 419=A.I.R. 1939 Cal. 334.

——S. 47 and O. 21, R. 53—*Appeal—Order setting aside sale at instance of rival decree-holders—A and N, decree-holders of G, attaching mortgage decree obtained by G against R—Property sold in execution of A's decree against G—N objecting to A's execution—Sale set aside by Court—Appeal against said order by A—If competent.*

A and *N*, decree-holders, attached in execution of their decrees against *G*, the mortgage decree obtained by *G* against *R*, and property mortgaged was sold in execution of *A's* decree against *G*, but later on *N* objected to the execution of *A's* decree on certain grounds and the Court set aside the sale. *A* appealed against the order setting aside the sale to the District Judge but the appeal was dismissed by the Court on the ground that no appeal lay inasmuch as the question was one between rival decree-holders and so no appeal was competent as the order could not fall within the provisions of S. 47.

Held, that inasmuch as *A* attached the mortgaged decree obtained by *G*, he was the representative of *G* in mortgage decree in view of O. 21, R. 53. The order setting aside the sale, even though arrived at by the Court on objection raised by *N*, the rival decree-holder, and thus the question though between rival decree-holders was one that affected the judgment-debtor *R*, and it was therefore one between parties to the suit within the meaning of S. 47, and hence appeal against the order setting aside the sale was competent. 11 C.W.N. 403, Dist. (*D. N. Mitter, J.*) HARI KISHEN RATHI *v.* GOPESHWAR DEGHURIA. 171 I.C. 517=10 R.C. 282=A.I.R. 1937 Cal. 177.

——S. 47—*Appeal—Order setting aside sale for want of attachment—Second appeal—If competent.*

An order setting aside a sale on the ground that the executing Court had on jurisdiction to sell the property without attachment, in the first instance, falls under S. 47 and a second appeal is competent against such an order. (*Bhide, J.*) MATAB MAL JINDA SHAH *v.* DARYA RAM GURANDITTA. 164 I.C. 140=9 R.L. 91=A.I.R. 1936 Lah. 573.

——S. 47—*Appeal—Order setting terms of sale proclamation—Appeal—Decision on rights and liabilities of parties with regard to execution—*Res judicata—*Omission to appeal—If can be objected to at later stage.*

It is well established that the mere settlement of the terms of a proclamation of sale, where no dispute between the parties as to their rights or liabilities is decided judicially, cannot be deemed to be an order under S. 47, C. P. Code, from which an appeal would lie. But it is equally well-settled that when at the stage of settling the terms of the proclamation the parties put into issue a question affecting their relative rights and liabilities with regard to execution, and this matter is heard and decided, that decision is a judicial decision, and

the parties will not be allowed in the course of execution to canvass the same matter again. The party aggrieved by that order must take it up in appeal, and if he does not do so, he cannot be heard to raise the matter at a later stage. (*Wadsworth, J.*) NAMASIVAYA MUDALIAR *v.* SRINIVASA IYENGAR. 50 L.W. 578=1939 M.W.N. 1148=A.I.R. 1940 Mad. 54=(1939) 2 M.L.J. 782.

——S. 47—*Appeal—Order refusing stay of execution—Revision, if competent.*

An order staying or refusing to stay execution of a decree upon the ground that execution is or is not barred by some special law is subject to appeal as a decree. An application in revision filed against an order refusing to stay execution is, therefore, misconceived. (*Edgley, J.*) ABINASH CHANDRA *v.* BIBHUTI BHUSAN. 44 C.W.N. 587.

——S. 47—*Appeal—Order staying or refusing to stay execution under Bengal Agricultural Debtors' Act.*

The question whether the execution of a decree is or is not barred, whether temporarily or permanently, by reason of some special law as (*e.g.*) by the Bengal Agricultural Debtors Act—is a question within S. 47, C. P. Code, and its determination is accordingly a decree within the meaning of S. 2 (2) of that Code. It follows that an order staying or refusing to stay execution upon the ground that the execution is or is not barred by the special law in question is subject to appeal as a decree. (*Nasim Ali and Rau, JJ.*) NAFAR CHANDRA SARDAR *v.* KALIPADA DAS. I.L.R. (1940) 1 Cal. 393=188 I.C. 483=13 R.C. 1=44 C.W.N. 364=A.I.R. 1940 Cal. 257.

——S. 47—*Appeal—Order that executing Court had jurisdiction to hear objection application of judgment-debtor.*

If an order passed in execution proceedings decides a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree, it falls within the scope of S 47 and is a decree. But orders that are merely incidental and refer to the conduct of the proceedings are not within the section. The decision, that the executing Court had power to hear the objection application of judgment-debtor under S. 47, is an order which finally and conclusively determines, so far as the Court passing such order is concerned, a very important and substantial right which, according to the decree-holder, the Court had no jurisdiction to make. The decision is one of substance and is not an ordinary interlocutory order, or one merely incidental to the conduct of the proceedings. The assumption of the jurisdiction where the Court has no jurisdiction is a decision which can be said to be more important than any other decision except a decision on the merits. It follows that the order is one which is appealable under S 2 (2) and S. 47, C.P. Code. (*Addison and Ram Lall, JJ.*) LLOYDS BANK, LTD., LAHORE *v.* MT. REHMAT BIBI. 183 I.C. 697=12 R.L. 129=41 P L.R. 555=A.I.R 1939 Lah. 177.

——S. 47—*Appeal—Order transferring decree to another Court under S. 39.*

An appeal lies under S. 47, C. P. Code, from an order under S. 39 transferring a decree to another Court for execution, as the order is one relating to the execution of the decree though itself is not an order executing the decree. (*Jai Lal, J.*)

CHAMAN LAL *v.* RAM KANWAR GANESH DAS. 41 P.L.R. 186.

——S. 47—Appeal—Order under S. 11, Bihar Money-Lenders Act *See* BIHAR MONEY-LENDERS ACT, S. 11. 1940 P.W.N. 492.

——S. 47—*Appeal—Order under S. 39, allowing simultaneous execution in two Courts—Appeal—Notice to judgment-debtor—If condition precedent to validity of order.*

A mere order transmitting a decree for execution to another Court may be said to be a purely ministerial order, but an order which amounts to the grant of a certificate and allows simultaneous execution proceedings to go on in more than one Court is not a mere ministerial order. Such an order is a judicial order falling under S. 47, C. P. Code, and is appealable. Such an order cannot be made without notice to the judgment-debtor and without hearing him under O. 21, R. 6, C. P. Code. (*Divatia, J.*) LAKSHMAN HARI *v.* V. G. VIRKAR 183 I.C. 333=12 R.B. 81=41 Bom.L.R. 481=A.I.R. 1939 Bom. 258.

——S. 47—*Appeal—Order under O. 21, R. 16.*

An order passed under the provisions of O. 21, R. 16 is an order determining a question between the judgment-debtor and the representative of the decree-holder because it determines the right of a representative of the decree-holder to execute the decree. This is a question falling within the provisions of S. 47 of the Code and is therefore a decree under the provisions of S. 2. An appeal therefore lies from the order and an application in revision is incompetent. (*Dunkley, J.*) MAUNG KHIN MAUNG *v.* S. K. R. KARUPPAYYA PILLAI. 186 I.C. 322=12 R.R. 261=A.I.R. 1939 Rang. 376.

——S. 47—*Appeal—Order under O. 21, R. 66—Appeal—Decision as to—Whether sale is to be held by Court or Collector—If judicial order or administrative act.*

Proceedings held under O. 21, R. 66, C. P. Code, in relation to the proclamation of sale are not orders falling under S. 47, and are therefore not appealable; but an order as to whether a sale is to be held by the Court itself, or by the Collector on the ground of the judgment-debtor being an agriculturist, is a judicial order relating to the execution of the decree, and as such falls under S. 47, and an appeal lies therefrom. (*Lokur, J.*) MAHADEO SUNDER MEHTA *v.* KHANDERAO SITARAM. 186 I.C. 61=12 R B. 290=41 Bom.L.R. 1166=A.I.R. 1939 Bom 526.

——S. 47—*Appeal—Order under O. 21, R. 66 overruling objection to sale of entire property—Appealability.*

An order under O. 21, R. 66, C. P. Code, overruling the objection of the judgment-debtor that only part of the property should be sold is not an interlocutory order, but one against which an appeal lies. (*Norman.*) GARJI DAS *v.* SURAJMAL. 1936 A.M.L.J. 13.

——S. 47—*Appeal—Order under O. 21, R. 66, C. P. Code, refusing to direct value of property to be stated in sale proclamation—If decree.*

An order refusing to direct the value of the property to be stated in the sale proclamation under O. 21, R. 66 is not a decree and is not appealable. Nor, is it a "judgment" within the meaning of cl. 15 of the Letters Patent. (*Beaumont, C. J. and Lokur, J.*) CHARANDAS VASANJI *v.* DOSSABHOY MAGANLAL. I.L.R. (1939) Bom.

389=182 I.C. 409=12 R.B. 12=41 Bom.L.R. 328=A.I.R. 1939 Bom. 182.

——S. 47—Appeal—Order under O. 21, R. 93—Appealability. *See* C. P. CODE, S. 2 (2). 42 Bom. L.R. 367.

——S. 47—*Appeal—Order under O. 21, R. 93—Appeal and second appeal—Competency.*

An order on an application by an auction-purchaser under O. 21, R. 93. C. P. Code, for refund of the sale price is subject to appeal and second appeal. (*Horwill, J.*) RAMASWAMI CHETTIAR *v.* MEYYAPPAN SERVAI. 172 I.C. 468=10 R.M. 460=46 L.W. 280=1937 M.W.N. 749=A.I.R. 1937 Mad. 779.

——S. 47—*Appeal—Party impleaded in one capacity—Objections by, in other capacity—If fall under S. 47—Order on—Appeal or separate suit.*

Where the impleading of a party in a suit was in one capacity and questions (claims) are raised in execution objecting to the decree in another capacity, they are not matters falling under S. 47 and should be decided in a regular suit and no appeal lies against an order in execution, or in other words the capacity in which a party is impleaded has got to be looked to in applying S. 47, the only exception to this rule being where the question is raised by a person as legal representative when, though there is apparently a different capacity, the question should be settled in execution. Similarly, if a party is impleaded in a mortgage suit by reason of one capacity, and if he has got other points which he wishes to raise in another capacity but was not impleaded in the latter capacity, these other points could not only be not raised in the suit as is well recognised, but could not be raised even in execution proceedings, because the capacity would then be different and should be agitated only in a regular suit. If a claim is made it will be in the nature of a claim petition by a stranger and there cannot be an appeal, but only a regular suit should follow 2 P.L.J. 219, Foll.; 42 C. 440, 14 M.L.J. 377 and 23 Mad. 118, Rel. on. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO. 169 I.C. 456=10 R.M. 43=A.I.R. 1936 Mad. 733.

——S. 47—*Appeal—Person dismissed as unnecessary party to suit—Subsequent addition in execution as legal representative of judgment-debtor—Claim in own right to property sold in execution—Order on—Appeal.*

Where, on the death of the judgment-debtor, a person who was dismissed from the suit as being an unnecessary party is brought on record as the judgment-debtor's legal representative, and that person claims to be entitled to the property sold in execution as his own in his own right, the question can be determined by the executing Court. An order by the executing Court on that claim refusing to determine the question of title is appealable. (*Cornish, J.*) PEER BATHUMMAL BEEVI *v.* MEERAMMAL BEEVI. 167 I.C. 113=9 R.M. 424=1936 M.W.N. 1369=44 L.W. 698=A.I.R. 1937 Mad. 108=71 M.L.J 725.

——S. 47—*Appeal—Question between auction-purchaser and judgment-debtor—Former, if can appeal.*

An auction-purchaser is the representative of the judgment-debtor and therefore any question arising between him and the judgment-debtor cannot be said to be one between the parties to the suit or their legal representatives within the meaning of S. 47 and therefore the auction-purchaser has no *locus standi* to maintain an appeal as from a decree passed under the provisions of S. 47. (*Agha Haidar, J.*) SADHU MAL KHAZANA MAL *v.* DEVI CHAND. 173 I.C. 505=10 R.L. 450=A.I.R. 1937 Lah. 347.

——S. 47—Appeal—Rateable distribution—Order allowing in respect of money paid into Court by surety for judgment-debtor—Appealability. *See* C. P. CODE, S. 73. 41 Bom.L.R. 176.

——S. 47—*Appeal—Rateable distribution—Order as to.*

A decree-holder purchased the property of his judgment-debtor in execution of his decree. By the amount of his bid the entire amount of his decree was satisfied and he paid into Court the excess of the bid over the decretal amount. After the auction but before the excess amount was deposited in Court or the auction sale confirmed, another decree-holder of the same judgment-debtor made an application for a rateable share in the assets to be realised in execution of the decree of the first decree-holder. The Court held that he was entitled to a rateable share in the full price.

Held, that the order of the Court must be deemed to have been passed only under S. 73, C. P. Code, and not under S. 47 of the Code and consequently no appeal lay. (*Jai Lal, J.*) ROSHAN LAL *v.* SHIV DAS MAL. 162 I.C. 309=8 R.L. 878 (1)=A.I.R. 1936 Lah. 181.

——Ss. 47 and 73—*Appeal—Rateable distribution—Order as to.*

An order under S. 73 determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under S. 47 and is not appealable. (*Mya Bu and Baguley, JJ.*) AGA M. SHERAZEE *v.* R. M. P. M. CHETTIAR FIRM. 169 I.C. 644=10 R.R. 24=A.I.R. 1937 Rang. 134.

——S. 47—*Appeal—Rateable distribution—Order as to, under S. 73—Appealability.*

Where an order of rateable distribution under S. 73, C. P. Code, involves questions which affect not only the various decree-holders *inter se*, but affects also the judgment-debtor, the order falls under S. 47 read with S. 73, C. P. Code, and is therefore appealable. (*Lokur, J.*) NINGAPPA *v.* ADIVEPPA. 186 I.C. 372=12 R.B. 324=41 Bom. L.R. 997=A.I.R. 1939 Bom. 468.

——S. 47—*Appeal—Rateable distribution—Order by executing Court—Appeal—Maintainability—Revision.*

Where the executing Court sells the property attached and proceeds to decide the claims of decree holders and the essence of the order is one which determines the rights of the decree-holders *inter se* and rateably distributes the assets available amongst them, the order is one under S. 73 and not under S. 47, and no appeal lies against it and as the party aggrieved by it has a remedy provided by S. 73 (2), the High Court will not interfere in revision. (*Almond, A.J.C.*) HEM RAJ *v.* BALU RAM AND SONS. 160 I.C. 892 =8 R. Pesh. 134=A.I.R. 1936 Pesh. 52.

——Ss. 47 and 73—Appeal—Rateable distribution—Question as to *locus standi* of decree-holder's agent. *See* C.P. CODE, Ss. 73 AND 47. A.I.R. 1938 Pesh. 63.

C. P. CODE (1908), S. 47.

——S. 47—*Appeal — Rateable distribution—Question between rival decree-holders as to right to—Order on—Applicability.*

A question relating to a dispute between rival decree-holders in regard to the right to rateable distribution, in which the judgment-debtor is not interested, is not one which arises under S. 47, C. P. Code, and the decision thereon is not, therefore, appealable. (*Madhavan Nair and Burn, JJ.*) VISWANATHAM KRISHTIAH *v* VENKATA REDDY. 59 Mad. 399=160 I.C. 573=8 R. M. 669=1936 M.W.N. 44=43 L.W. 31=A.I.R. 1936 Mad. 136=70 M L.J. 33.

——S. 47—Appeal—Reference to arbitration in execution — Jurisdiction — Difference between arbitrators—Decision by Court as umpire—Legality—Appealability. *See* C. P. CODE, SCH. II. 38 Bom.L.R 1303.

——S. 47—*Appeal — Right of — Test—Final decree for sale in mortgage suit—Order by District Court in execution directing sale of properties outside district—Order, if appealable.*

The true test to be applied in determining the appealability of an order is whether the order is a decree within the meaning of S. 2 (2). A determination made under S. 47, in order that it would be tantamount to an order which amounts to a decree within meaning of S. 2 (2), must affect the rights of parties with regard to all or any of the matters in controversy. Where in a suit on mortgage a final decree for sale was passed and the District Court, in execution, passed an order directing the sale of mortgaged properties situate within the jurisdiction of other District Courts.

Held, that the order directing the sale of the mortgaged properties situated in the other districts did not affect the rights of the parties at all, because the primary order for sale of the mortgaged properties was in the final decree for sale, and, therefore, whether such properties were liable to be sold or not was not a matter in controversy before the Court at the time when it directed the sale. The order therefore did not amount to a decree and hence was not appealable. It could not be interfered with in revision also. A.I.R. 1924 All. 808, Rel. on. (*Mya Bu and Mackney. JJ.*) L. A. R. LUTCHUMANAN CHETTYAR *v.* HAJI ISMAIL NOOR MOHAMMAD. 171 I.C. 636=10 R.R. 169=A.I R. 1937 Rang. 157.

——S. 47—*Appeal—Second appeal—Dismissal of appeal in execution under O.* 41, *R.* 11 (1)—*Suit of Small Cause nature not exceeding Rs.* 500 *in value—Second appeal, S.* 102.

Though the dismissal of an appeal from an order in execution, under O. 41, R. 11 (1), C. P. Code, is a decree and is open to second appeal, if the suit in execution of whose decree the appeal arises is a suit of a small cause nature, of the value not exceeding Rs. 500 a second appeal is barred under S. 102, C. P. Code. (*Rowland, J.*) JAMUNA PRASAD RAI *v* RAJBALLAM RAI. 18 Pat L.T. 321=1937 P.W.N. 340=169 I.C. 359=3 B. R. 558=10 R.P. 9=A.I.R. 1937 Pat. 349.

——S. 47—Appeal — Second appeal — Order under O. 21, R. 90. *See* C. P. CODE, O. 21, R. 90. 163 I.C 765=17 Pat.L T. 712.

——S. 47—*Appeal—Surety—Question raised by as to executability of decree—Decision on—Appeal.*

S. 145, C. P. Code, puts the surety on the same footing as an original party to the suit; and if S. 145 and S. 47, C. P. Code, be read together, the inquiry of the Court into a question raised by the surety as to the executability falls under S. 47, C. P. Code, and the decision thereon is appealable. Even if S. 145 does not in terms apply, as for instance where the surety is not personally liable but the money which he has deposited as security is sought to be made liable, the surety has an equal right of appeal. (*Horwill, J.*) RANGASWAMI CHETTI *v.* NARAYANA IYENGAR. 176 I.C. 964=11 R.M. 207=1937 M.W.N. 1259 =A.I.R. 1938 Mad. 215.

C. P. CODE (1908), S. 47.

Applicability.

——S. 47—Applicability—Application for refund of excess recovered—If relates to execution discharge or satisfaction of decree *See* C. P. CODE, SS. 144, 151 AND 47. A.I R. 1939 Nag. 101.

——S. 47—*Applicability—Application to set aside sale on ground of material irregularity—Decree-holder, purchaser—Rule applicable—If falls under S.* 47.

S. 47, C. P. Code, though very wide in terms and includes in one sense all questions relating to execution, discharge or satisfaction of the decree, ought not to be applied in such a way as to render redundant other provisions contained in the Code. An application to set aside an execution sale which in terms and in fact and substance falls under O. 21, R. 90, cannot be regarded as an application under S. 47, though the decree-holder himself is the purchaser. It is only when an application to set aside the sale, as between the decree-holder and the judgment-debtor, does not fall under O. 21, Rr. 89, 90 and 91, that it will come within the purview of S. 47 (*Iqbal Ahmad and Bajpai, JJ.*) HARINDRA NATH *v* BHOLA NATH. 170 I.C. 559=10 R.A. 167=1937 A.L R. 724=1937 A.L.J. 288=1937 A.W.R. 262=A.I.R. 1937 All. 407.

——S. 47—*Applicability—Claim on ground that certain decree is not binding on claimant—If one to be decided in execution.*

Where property is claimed not under or in execution of a decree, but the claim is for delivery of property on the ground that the decree is not binding on the claimant the question is one that cannot be tried in execution, and therefore S. 47 has no application. (*Burn and Lakshmana Rao, JJ.*) THANGACHAMI NAICKER *v.* VEERAPPA CHETTIAR. 173 I.C. 90=10 R.M. 509=A.I.R. 1937 Mad. 268.

——S. 47 — *Applicability — Dispute between heirs of judgment-debtor—Decree satisfied*

Where the dispute is between persons claiming in their own right and as heirs of a judgment-debtor, and is raised after the decree is satisfied, the question is not one fallin ; under S. 47 of the C. P. Code. (*E. Weston.*) GOPAL LAL *v.* MITHAN LAL. 1937 A.M.L.J. 80.

——S. 47—*Applicability—Dispute between two decree-holders—Second appeal.*

S. 47, C. P. Code, applies to a dispute between two decree-holders who are parties to the suit, and a second appeal is, therefore, competent. (*M C. Ghose, J.*) JAGADAMBA LOAN CO , LTD. *v.* SATYENDRA CHANDRA GHOSE I.L.R (1938) 1 Cal. 175=173 I.C. 516=10 R.C. 532=41 C.W. N 1248=A I R. 1937 Cal. 730.

——S. 47 and O. 21, R. 2 (3)—*Applicability—Instalment decree with default cause—Applica-*

C. P. CODE (1908), S. 47.

tion for execution—Plea of payment—Burden of proof—Payments alleged beyond 90 days—If can be recognised—Decree-holder—If bound to prove default.

When no payment or adjustment of a decree has been certified under O. 21, R. 2, C. P. Code, and the decree-holder applies for execution of his decree for the entire amount due under the decree, the executing Court has to assume that there has been no payment or adjustment and cannot after the lapse of the period of 90 days prescribed by Art. 174 of the Limitation Act permit the judgment-debtor to plead any adjustment or payment. The fact that the decree is an instalment decree with a default clause does not take the case out of O. 21, R. 2 (3) or bring it under S. 47, C. P. Code. If the holder of the instalment decree applies for execution, it must be taken that his case is that default has been made, and the judgment-debtor must prove payment. As this has to be done in the executing Court, O. 21, R. 2 (3) comes into play, and the judgment-debtor cannot evade it by invoking S. 47. It is not open to the executing Court to recognise payments made beyond 90 days. (*Dhavle and Varma, JJ.*) DARSAN ALI *v.* SURAJ MAL. 17 Pat. 128=180 I.C. 319=11 R.P. 491=5 B.R. 471=1938 P W.N. 393=19 Pat.L.T. 428=A.I R. 1938 Pat. 465.

——S. 47—*Applicability—Maintenance decree in favour of Hindu widow declaring her right to maintenance and declaring charge on property—Executability—Separate suit to enforce charge by sale—If necessary.*

Where a decree has been passed declaring the right of a Hindu widow to maintenance and also declaring that the maintenance be a charge on the joint family properties, it is not necessary for the widow to bring a separate suit to enforce the charge by sale of the properties. When the decree for maintenance has the effect of a decree for sale, the decree-holder is entitled to proceed to execution without any further action. If the charge is created by the decree in the action then a separate suit would be necessary to enforce the charge by way of sale of the properties charged. But when the charge has arisen not by reason of the decree made on the maintenance action but under the Hindu Law, bringing the action for the declaration of the right to maintenance and obtaining a decree to that effect would result in the decree having the effect of a decree for sale of the charged property; and it is not at all relevant what language was used by the Court declaring the charge to exist. No separate suit is therefore necessary to enforce the charge. (*Wort and Varma, JJ.*) SAH RADHA KRISHNA *v.* BECHNI DEBI. 172 I.C. 234=1937 P.W.N. 830=10 R.P. 319=18 Pat.L.T. 834=A.I.R. 1937 Pat. 654.

——S. 47—*Applicability—Mortgage decree—Application for sale—Death of mortgagor—Objection by legal representative that property belonged to him—Objection if falls within S. 47—Proper remedy.*

The mortgagee after the passing of the final decree applied for sale. During the pendency of the application the mortgagor died. His legal representative who was then brought on record raised an objection to the sale on the ground that the mortgaged property belonged solely to him

C. P. CODE (1908), S. 47.

and that the mortgagor had no right, title or interest therein.

Held, that the objection did not fall within the purview of S. 47. The objection being to the validity of the decree itself the proper remedy was by way of separate suit. (*Dunkley, J.*) RAMASWAMY CHETTYAR *v.* U TUN THA. 1940 Rang.L.R. 402=A.I.R. 1940 Rang. 161.

——S. 47—*Applicability—Mortgage decree—Objection by legal representative of judgment-debtor based on independent title.*

There is a clear distinction between a money decree and a mortgage decree in cases where the legal representative of the judgment-debtor raises an objection which was not open to the judgment-debtor but which is based on an independent title of the legal representative. In the case of money decrees it is for the executing Court to determine how the decretal amount is to be recovered from the judgment-debtor and which property, if any, has to be sold in execution of the decree. In the case of mortgage decrees the method of recovery is determined by the trial Court, and forms a part and parcel of the decree itself. Any claim by the judgment-debtor or his legal representative that certain property is not liable to sale in execution of the mortgage decree is a claim challenging the validity of the decree and such a claim even though based on his own independent title, cannot be entertained by the executing Court under S. 47 but must be put forward by means of a separate suit. (*Addison and Abdul Rashid, JJ.*) LLOYDS BANK, LTD., LAHORE *v.* MT. REHMAT BIBI. I L.R. (1939) Lah. 493=186 I.C. 168=12 R.L. 371=41 P.L.R. 533=A.I.R. 1939 Lah. 178.

[Reversing A.I.R. 1939 Lah. 51.]

——S. 47—*Applicability—Mortgage suit—Quession of paramount title—Omission to raise—Subsequent suit—Plea of paramount title—If barred.*

In a mortgage suit some of the defendants claimed paramount title in the mortgaged property by claiming for themselves occupancy rights. Such question of title cannot be decided in mortgage suit, and it is no duty of the defendants to raise such question. When in a later suit between the parties the same question was again raised, it was contended that S. 47, C. P. Code, is a bar to such suit because this question could only be decided in an execution proceeding.

Held, that the question can be decided in a separate suit. The bar of S. 47 can only apply to cases where there is a duty to raise the question in the earlier proceedings. The duty to raise the question in the earlier proceedings and the bar in the later suit are co-extensive and each complements the other. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO. 169 I.C. 456=10 R.M. 43=A.I.R. 1936 Mad 733.

——S. 47—*Applicability—Objection by judgment-debtor to an order of attachment—Remedy—Application under S. 47 or an appeal.*

Where a judgment-debtor objects to an order allowing the application for attachment of movables as illegal, an application under S. 47, C. P. Code, can be entertained. He need not file an appeal against the order. (*S. K. Ghose, J.*) AZIZ RAHAMAN MOLLA *v.* BEPIN BEHARI MUKHERJEE. 174 I.C. 589=10 R.C. 687=66 C.L.J. 57=A.I.R. 1938 Cal. 162.

C. P. CODE (1908), S. 47.

——S. 47 and O. 21, R. 58—*Applicability—Objection by legal representative that property is his own—If falls under S. 47—Appeal.*

Where a decree is passed against the assets of a certain person in the hands of his legal representative, and the legal representative makes an objection that the assets in question belong to her personally, the objection should be treated as one under S. 47, C. P. Code and not as one under O. 21, R. 58. Accordingly, an appeal lies from the order dismissing the objection, but no regular suit is maintainable. (*Bennet, J.*) BADRI PRASAD *v.* MST. JANKI SHIVA PRASAD. **167 I.C. 394=9 R. A. 531=1936 A.W.R. 1270=1937 A.L.J. 13=1937 All.L.R. 187=A.I.R. 1937 All. 97.**

——S. 47 and O. 21, R. 58—*Applicability—Objection by sub-tenant to attachment of rent payable by him to judgment-debtor—Rejection—Appeal or revision.*

An objection by a sub-tenant to the attachment of the rent payable by him to the judgment-debtor, is an objection by a third party and is covered only by O. 21, R. 58 and does not come under S 47, C. P Code. Hence it is not appealable but only revisable under S. 252 of the Tenancy Act. (*Darling, S.M. and Bomford, J. M.*) RAMCHANDRA *v.* RAGHUNATH SINGH. **1938 R.D. 175=1938 A.W.R. 42 (B.R.).**

——S. 47—Applicability—Order confirming sale set aside—Application by auction-purchaser for compensation for improvements. *See* C. P. CODE, **Ss. 151, 144 AND 47. A.I.R. 1940 Lah. 59.**

——S. 47—*Applicability—Order refusing to stay execution—Appeal, if lies.*

When an Amending Act changes the phraseology of the old Act it must, as a rule, be assumed that the Legislature was intending to make some change. Questions relating to stay of execution are no longer within the purview of S. 47. Hence no appeal lies from an order staying or refusing to stay execution of a decree. (*Baguley and Mosely, JJ.*) CHIDAMBARAM CHETTYAR *v.* SOMASUNDARAM CHETTYAR. **1938 Rang.L R. 580=177 I.C. 942=11 R.R. 186=A.I.R. 1938 Rang. 317.**

——S. 47—*Applicability — Plaintiffs against whom suit was dismissed filing claim in execution of decree passed against others—Claim dismissed for default—No appeal filed—Right to reagitate question by suit or otherwise.*

A suit was dismissed as against the plaintiffs and decreed as against certain others. The decree-holders took out execution of the decree. The plaintiffs filed a claim case alleging that the property attached by the decree-holders included property belonging to them and not belonging to the judgment-debtors. The claim case was dismissed for default and an application for its restoration was also dismissed. The plaintiff instituted a suit for a declaration that certain of the properties attached in execution were not liable to attachment and sale in execution of that decree. The lower Court held that S. 47, C. P. Code, was a bar to the suit as the matter in dispute was a matter relating to the execution of the decree and as the plaintiffs were parties to the suit which that decree had been passed. It, however, treated the plaint as an application under S. 47 and held in favour of the plaintiffs that the properties were not liable to sale. On appeal, setting aside the order,

C. P. CODE (1908), S. 47.

Held, that the claim case had been rightly held by the Court below to have been in fact an application under S. 47, that the plaintiffs, therefore, on the dismissal of their claim case had a remedy open to them by way of an appeal from the order under S. 47, and that as they did not avail themselves of that remedy, they were not entitled to reagitate the question. (*Agarwala and Varma, JJ.*) BHAN KUMAR CHAND *v.* AJHODHYA PRASAD SINGH. **159 I.C. 960=8 R.P. 316=A.I.R. 1936 Pat. 268.**

——S. 47—*Applicability—Question relating to delivery of possession to auction-purchaser.*

The question relating to the delivery of possession of the property purchased by an auction-purchaser is not a question relating to the execution, discharge or satisfaction, of the decree and hence such a matter does not come under S. 47, C. P. Code. (*Wort, Ag. C.J. and Manohar Lall, J.*) SUGAN MAL BOTHRA *v.* PURAN MALL MARWARI. **177 I.C. 692=5 B.R. 8=11 R.P. 173.**

——S. 47 and O. 21, R. 2—*Applicability and scope—Payment to decree-holder out of Court by one judgment-debtor—Execution by decree-holder by sale of properties of another—Application by latter to set aside sale on ground of satisfaction of decree by former judgment-debtor—Limitation—Period of 90 days—If can be enlarged—Limitation Act, Art. 174.*

A judgment-debtor who pays out of Court is not at liberty to plead in the executing Court that the decree-holder has been guilty of fraud in failing to have the payment recorded, because Cl. (2) of rule 2 of O. 21, C. P. Code, enables him to protect himself by having the payment recorded. An omission on the part of the decree-holder to certify a payment, even if he may have promised to do so, does not entitle the judgment-debtor to get over or overrule the 90 days limitation under Art. 174 of the Limitation Act, for making an application under O. 21, R. 2 (2), C. P. Code, and to secure an investigation of the same matter by invoking S. 47, C. P. Code. The position is the same whether the decree is only against one judgment-debtor or against several, and one of the judgment-debtors who does not pay cannot be in a stronger position to assail the execution proceedings on the ground of payment by another than the one who does pay. Consequently, where the decree-holder executes the decree against one judgment-debtor by sale of his properties, an application by that judgment-debtor to have the sale set aside on the ground that the decree has been satisfied by the payment made by another judgment-debtor, is governed by O. 21, R. 2, C. P. Code, and Art. 174, Limitation Act, and the 90 days rule of limitation applies. The applicant cannot seek to invoke S. 47, C. P. Code. A party who is already barred under O. 21, R. 2, C. P. Code, cannot move for the same relief under S.47, C. P. Code. (*Macpherson and Dhavle, JJ.*) HARIHAR PRASAD SINGH *v.* BHUBNESHWARI PRASAD SINGH. **15 Pat. 422=162 I.C. 849=8 R.P. 588=1936 P.W.N. 267=17 Pat.L.T. 195=A.I.R. 1936 Pat. 270.**

——S. 47—*Application under O. 21, R. 22—If falls under S. 47.*

Application under O. 21, R. 22 falls under S. 47 and can be enquired into by the executing Court. (*Mosely and Dunkley, JJ.*) S.T.R.M. FIRM *v.*

C. P. CODE (1908), S. 47.

ANDATHAL. 178 I.C. 118=11 R.R. 199=A.I.R. 1938 Rang. 292.

Bar of suit.

——Ss. 47 and 145—*Bar of suit—Adjustment of decree—Suit for declaration by surety—Maintainability.*

Where a decree is sought to be executed against a surety for non-appearance of the judgment-debtor and the surety makes an application under O. 21, R. 2, C. P. Code, to the executing Court that an adjustment had taken place between the decree-holder and the judgment-debtor and therefore he is discharged from the liability but the application is dismissed without going into merits on the ground of limitation, the surety can bring a suit for declaration that the decree cannot be executed against him in view of the adjustment; such suit is not barred by S. 47, C. P. Code, as a surety, unlike a judgment-debtor, is a party to the suit or execution proceedings only for the limited purpose of appeal in view of S. 145 of the Code. (*Tek Chand and Abdul Rashid, JJ.*) DEWAN CHAND *v.* PINDI DAS. I.L.R. (1938) Lah. 140=175 I.C. 480=10 R.L. 724=39 P.L.R. 872 =A.I R. 1937 Lah. 658.

—— S. 47—Bar of suit — Agreement before decree to give credit to certain payments and not to execute decree if passed—Breach—Execution —Deposit of money to save sale in execution—Suit to recover money deposited—Maintainability —*Res judicata.* See C. P. CODE, S. 11, 18 Pat.L. T. 896=A I.R. 1938 Pat. 41.

——S. 47—*Bar of suit—Adjustment of decree by next friend of minor decree-holder without sanction of Court—Suit to set aside—Maintainability — Proper remedy — S.* 151 *and O.* 47, *R.* 1.

Where an order recording a compromise or an adjustment of a decree effected by next friend of a minor, without the sanction of the Court, during the execution of a decree in favour of the minor, is sought to be set aside on the ground that compromise has been obtained by fraud, S. 47 bars a fresh suit for setting aside the adjustment and the proper remedy is by an application for review or by invoking the inherent jurisdiction of the Court. Such an application comes under S. 47 and the Court has power to take action under S. 151 independently of O. 47, R. 1. (*Rowland and Varma, JJ.*) LAL BABU *v.* RANG BAHADUR SINGH. 3 B.R. 94=165 I.C. 857=9 R.P. 226= 17 Pat.L.T. 743=1936 P.W.N. 565=A.I.R. 1936 Pat. 506.

——S. 47—*Bar of suit—Application for temporary alienation of judgment-debtor's land—Mortgage created and mortgagee given possession —Decree recorded as fully satisfied by mortgage —Subsequent suit by decree-holder against mortgagee—If barred.*

In execution of his decree the decree-holder applied for a temporary alienation of the land of the judgment-debtor. The land was attached and a reference was made to the Collector. A mortgage was created and the mortgagee given possession; but neither the executing Court nor the Collector realized the mortgage money from the mortgagee. On application of the judgment-debtor, the decree was recorded as completely satisfied by the creation of a valid mortgage even though the mortgagee tried to back out from the

C. P. CODE (1908), S. 47.

transaction. Subsequently the decree-holder filed a regular suit against the mortgagee for the money. It was contended by the mortgagee that the suit was barred by S. 47.

Held, that the mortgage was in the nature of a judicial hypothec which had satisfied completely the decree. If either of the parties to this hypothec wanted to enforce its rights against the other, the remedy was obviously by a regular suit and not in execution of the decree to which the mortgagee was not a party and which was already judicially satisfied. The decree having been held to have been satisfied, the question between the decree-holder and the mortgagee could not possibly be said to be one "relating to the execution, discharge or satisfaction of the decree", This being so, no question of bar by S. 47 could arise. (*Tek Chand and Abdul Rashid, JJ.*) ANJUMAN IMDADI BANK *v.* UJAGAR SINGH. 181 I.C. 55=11 R.L. 736=40 P.L.R. 569=A.I.R. 1938 Lah. 214.

——S. 47—*Bar of suit—Assignment of decree —Application by assignee under O.* 21, *R.* 16—*Objection that assignment not valid—Order recognising assignment and allowing execution—Suit to declare assignment sham and collusive—Maintainability.*

The objection that the transfer of a decree by the decree-holder is not valid, but collusive and sham, and that the transferee is therefore not a representative of the decree-holder as there has been vesting in him of the decree, must be raised and decided by the Court in the application by the transferee under O. 21, R. 16, C. P. Code, for permission to execute the decree. When the objections are determined and execution is ordered on recognition of the transfer, that is a decree within the meaning of S. 47, C. P. Code. A separate suit for a declaration that the assignment is a sham and collusive transaction is barred under S. 47, C. P. Code. (*Venkataramana Rao, J.*) VENKATARAMAYYA *v.* VENKATARAMAYYA. 176 I.C. 628=11 R.M [135=1937 M.W.N. 1043 =A.I.R. 1938 Mad. 78.

——S. 47—*Bar of suit — Attachment before judgment—Claim or objection by defendant—Order on—If one under S.* 47—*Suit to set aside—If barred—O.* 38, *R.* 8—*Applicability.*

The operation of O. 38, R. 8, C. P. Code, is not confined to claims preferred by persons who are not parties to the suit. An objection raised by a defendant to an attachment before judgment also falls under R. 8 of O. 38. A decision on such objections is not final and can be challenged in a separate suit filed within the time limited. Such a decision, even where the claim is by the defendant, does not fall under S. 47, C. P. Code, so as to bar a separate suit, because S. 47 can come into play only when there is an application for execution pending before the Court, (*Thom and Iqbal Ahmad, JJ.*) AHMAD ALI KHAN *v.* ANAND SARUP. 1937 A.W.R 587=1937 A.L.J 705=171 I C. 409=1937 A.L.R. 843=10 R.A. 262=A.I.R. 1937 All 635.

——S. 47—*Bar of suit—Auction sale—Decree-holder purchaser in mortgage suit—Application for possession—Question as to what passed under the sale—If one under S.* 47,

A question between the auction-purchaser who is also the decree-holder in a mortgage suit and the judgment-debtor in that suit as to what passed

under the auction sale and arising in an application by the auction-purchaser for possession of the property sold should be held to be not a question between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge and satisfaction of the decree or to the stay of execution thereof. (*Sulaiman, C.J., Thom and Allsop, JJ.*) KEDAR NATH *v.* ARUN CHANDRA SINHA. **I L R. (1937) All. 921=172 I.C. 57=10 R.A. 360=1937 A.L.J. 889=1937 All. L R. 923=1937 A.W.R. 937=A.I.R. 1937 All. 742 (F.B).**

——**S. 47**—*Bar of suit—Auction sale—Decree-holder purchaser—Remedy for recovery of possession.*

The execution proceedings do not in fact terminate on a sale being confirmed in favour of a decree holder auction-purchaser, and the mere fact that the decretal amount has been set off against the purchase money does not necessarily mean that the decree is finally satisfied and the execution proceedings have terminated. The decree-holder continues to be a party to the suit and a remedy for recovery of possession of the property purchased by him in the execution of the decree is still a remedy relating to the execution, discharge and satisfaction of the decree and a separate suit for the same does not lie. 1925 Pat 478 and 43 M. 107 (F.B.), Foll.; 1 P L. J. 232; 3 P.L J. 571; 1918 Lah. 204; 31 All. 82 (F.B.); 1924 Bom. 429 (F.B.) and Mulla's C. P. Code, 8th Edn., p. 139, not foll. (*Fraser, J.C. and Saad-ud-din Khan, A.J.C.*) HUKAM CHAND *v.* MIR HASSAN. **A.I.R. 1936 Pesh. 85.**

——**S. 47**—*Bar of suit—Auction sale—Suit by decree-holder auction-purchaser for possession.*

Where a decree-holder, who is himself the auction-purchaser at a Court sale held in execution of his decree seeks to get possession of the purchased property, he does not do so in execution of his decree but by virtue of the title acquired as purchaser, his claim based on such title not relating to the execution, discharge or satisfaction of the decree and the provisions of S. 47 therefore not preventing his instituting a suit for possession. (*Addison and Ram Lall, JJ.*) SARDAR MAL *v.* KARYAR SINGH. **I.L.R. (1939) Lah. 295=183 I.C. 475=12 R.L. 118=41 P.L.R. 546=A.I.R. 1939 Lah. 211.**

——**S. 47**—*Bar of suit—Auction sale—Suit by decree-holder purchaser for possession—If barred.*

A separate suit by a decree-holder auction purchaser for the possession of the property purchased is competent and is not barred by S. 47, C. P. Code. The decree-holder auction-purchaser does not seek to get possession in execution of his decree but by virtue of his being declared an auction-purchaser at the auction sale. (*Abdul Qayoom, C.J. and Kichlu, J.*) MEHDA BAT *v.* MOHI-UD-DIN. **41 P.L.R. J. & K. 71.**

——**S. 47**—*Bar of suit—Award on arbitration—Court merely passing order directing award to be filed—No judgment passed in accordance with award—Effect—Suit for relief in respect of matters covered by award—If barred—Plaintiff treating order as decree and executing in part—Effect—If estopped from contending that there is no executable decree.*

Where there is no judgment according to an award made in arbitration and no decree following thereon, but there is only an order which simply directs that the award should be filed without incorporating the terms of the award in the order, the order is not executable as a decree, though it is styled as a decree. A separate suit for relief in respect of the matters covered by the award is not barred under S. 47, C. P. Code. The fact that the plaintiff treats the order as a decree and files an application to execute it and also obtains some relief by way of execution though not exactly in terms of the decree, does not bring S. 47, C. P. Code, into operation, because there is no document which in law can operate as a decree in terms of the award, which alone would bar a separate suit. Nor would the fact that the plaintiff erroneously treats the order as a decree and executable as such, and obtains some relief disentitle or estop him from contending subsequently that he has been mistaken in treating it as a decree if in law it did not amount to such. There can be no estoppel against a statute and the doctrine of approbate and reprobate cannot apply. It applies only to the conduct of parties, and the conduct of the parties is immaterial when the question of the legality of a document is concerned. (*Divatia, J.*) GANESH SHANKERBHAT *v.* GANGABAI. **181 I. C. 608=11 R.B. 347=41 Bom.L R. 170=A I.R. 1939 Bom. 114.**

——**S. 47**—*Bar of suit—Compromise embodied in decree—Suit to enforce compromise—Maintainability.*

The plaintiff instituted a suit against the defendant for a declaration of his title to a moiety share of a certain estate purchased by the latter. The suit culminated in a compromise which was made the basis of a decree. Under the compromise the defendant was declared the full owner of the estate but he was to grant a *mourashi* lease in respect of the 8 annas share of the same to the plaintiff. As the defendant did not execute the *mourashi* patta, the plaintiff brought a suit for specific performance.

Held, that the compromise sought to be enforced was within the scope of the previous suit and hence came within the operative part of the decree that was passed therein, that the remedy of the plaintiff was by way of execution of that decree and that, therefore, the suit was barred under S. 47, C. P. Code. (*Mukerjea and Latifur Rahman, JJ.*) RABINDRA NATH ROY *v.* DHIRENDRA NATH ROY. **186 I.C. 673=12 R.C. 509=43 C.W. N. 1007=70 C.L.J. 286=A.I.R. 1940 Cal. 82.**

——**S. 47**—Bar of suit—Compromise not an adjustment under O. 21, R. 2—Separate suit on—If lies. *See* C. P. CODE, O. 21, R. 52 AND S. 47—ADJUSTMENT. **1939 A.M.L.J. 21.**

——**S. 47**—*Bar of suit—Contract to sell property—Attachment of property—Subsequent sale—Suit by vendee for declaration of title—If barred—"Representative."*

Where subsequent to a contract to sell certain property, it is attached by a decree-holder of the vendor and the sale in pursuance of the contract takes place, the vendee is not representative of the judgment-debtor within the meaning of S. 47, and, as such, a suit by him (vendee) for a declaration that the property is not liable to attachment is not barred by S. 47. (*Pollock, J.*) GHUSARAM *v.* PARASHRAM. **I.L R. (1936) Nag. 172=166 I.C. 950 (2)=9 R.N. 152=A.I.R. 1936 Nag. 163.**

C. P. CODE (1908), S. 47.

——S. 47—*Bar of suit—Cross-suits—Agreement to take decrees for equal amounts and to set-off each against other and to refrain from execution—Decrees passed accordingly—Subsequent execution by one party—Suit by other for damages—If barred.*

Plaintiff filed a suit against the defendant for arrears of rent due to him. The defendants filed another suit against the plaintiff in the same Court for amounts due on a promissory note executed by the plaintiff in favour of the defendants. Consent decrees were passed on both the suits for equal amounts as a result of an agreement between the parties to the effect that the amount due on each was to be equalised, and the amounts of the two decrees should be set off against each other and that no execution proceedings should be taken by either party against the other. The plaintiff acted up to the agreement and did not execute his decree. But the defendants, just a day before the expiry of limitation for execution, applied to execute the decree and realised the full amount from the plaintiff, who was not in a position to set up the pre-decree agreement by reason of 90 days having elapsed from the date of the agreement, as under O. 21, R. 2, C. P. Code, the adjustment could not be recognised after the expiry of the period of limitation for certifying the adjustment. Plaintiff thereupon filed a suit against the defendants for damages.

Held, that the agreement between the parties was not merely one not to execute the decree, but that in effect each should take the amount of the decree obtained against him as payment towards the deceee obtained by him and satisfaction entered thereon. The moment the decrees were obtained by each against the other, they operated as payment of each against the other, and there was an obligation to enter up satisfaction. Since there was a breach of that obligation, a suit for damages would lie, whether the obligation be viewed as an implied promise or one arising under the provisions of O. 21, R 2, C.P Code. S. 47, C. P. Code, was no bar to such a suit. (*Venkataramana Rao, J.*) MADHAVA SAHU *v.* SATRUGHANA SAHU. **186 I.C. 606=12 R M. 658 =1939 M.W.N. 447=49 L.W. 360=A.I.R. 1939 Mad. 499=(1939) 1 M.L J. 473.**

——S. 47—*Bar of suit—Declaration that property is not liable to be sold—Party against whom no relief is asked or given, if can sue for.*

A party against whom no relief is either asked for or given cannot sue for a declaration that certain property is not liable to be sold in execution of the decree as it is not the property of the judgment-debtor. S. 47 is a bar to such a suit. He can only make an application under that section. (*Nasim Ali and Mukherjea, JJ.*) NIRODE KALI ROY CHOUDHURY *v.* RAI HARENDRA NATH. **I.L R. (1938) 1 Cal. 280=178 I.C. 540=11 R.C. 367=42 C.W.N. 87=A.I.R. 1938 Cal. 113.**

——S. 47—*Bar of suit—Decree declaratory—Declaration of joint liability of plaintiff and defendant for debt without direction for payment—If bars fresh suit.*

Where a decree merely declares the joint liability of the plaintiff and the defendant in respect of a certain debt without any direction for payment of any sum of money by the one to the other, it is incapable of execution. S. 47, C. P. Code, is no bar in such a case to a fresh suit between the parties to work out their rights. (*Mitter, J.*) DHIRENDRA NATH CHOUDHURY *v.* HARENDRA NATH CHOUDHURY. **64 C.L.J. 55.**

——S. 47—*Bar of suit—Decree passed against person in representative capacity—Omission by him to raise in execution objection in his own capacity regarding property—Subsequent suit—If barred.*

Where a decree is against a person in a representative capacity and proceedings have been taken under it to obtain execution against the property in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree. Hence, when a decree has been passed against a person in his representative capacity, he should, in execution proceedings, in his own capacity, raise any objection with regard to the property against which the decree is being executed. If he has failed to do so his subsequent suit for declaration that his share in the property is not affected by the decree is barred by S. 47. (*Wright, J.*) R. M. S. V. CHETTYAR FIRM *v.* MA OHN MYAING. **187 I.C. 254=12 R.R. 313=A.I.R. 1940 Rang. 27.**

——S. 47—*Bar of suit—Decretal amount realised twice over by decree-holder and his assignee—Suit by judgment-debtor to recover extra amount realised—If barred.*

Where after the assignee of the decree had received the entire decretal amount, the decree-holder also realised the decretal amount from the judgment-debtor who was thus made to pay the same sum twice over, a suit by the judgment-debtor claiming refund of the extra amount realized from him is not barred under S. 47 (1), C. P. Code. (*Addison and Din Mohammad, JJ.*) SARAB SUKH *v.* PREM DATT. **18 Lah. 162=171 I C. 91=10 R.L. 157 (2)=39 P.L.R. 904=A.I.R. 1937 Lah. 465.**

——S. 47—*Bar of suit—Decree-holder auction-purchaser dispossessed by judgment-debtor after conclusion of execution proceedings—Suit by him for possession against judgment-debtor—Maintainability—Defendant, if can alter nature of case by his defence.*

Where a decree-holder purchases certain property belonging to the judgment-debtor in a sale held in execution of his own decree but is dispossessed by the judgment-debtor after the execution proceedings have concluded, a subsequent suit by the decree-holder for possession against the judgment-debtor cannot be said to fall within the scope of S. 47, as the matter in dispute does not relate to execution or satisfaction of the decree, having arisen after the satisfaction of the decree. The defendant cannot alter the nature of the case by the defence which he chooses to make. The provisions of S. 47 preclude him from raising in a separate suit a defence which opens such a question as is referred to in S. 47. A.I.R. 1929 Cal. 247 and A.I.R. 1931 Rang. 117 (F.B.), Rel. on. (*Mackney, J.*) KO TAIK ON *v.* N. S. A. R. FIRM. **164 I.C. 260 (1)=9 R.R. 72=A.I.R. 1936 Rang. 298.**

——S.47—*Bar of suit—Dispute between decree-holder and judgment-debtor—Dispute with stranger—Distinction.*

Section 47 is a bar to a regular suit if the object of that suit is to decide a question between

C. P. CODE (1908), S. 47.

a decree-holder purchaser and the judgment-debtor. But where the object of the suit is to settle dispute between decree-holder purchaser and persons other than the judgment-debtor, S. 47 cannot be a bar, and it is no objection to say that there was no delivery under O. 21, R. 96. There is no rule of law which says that there must be some kind of delivery. The only rule of law is one requiring that all disputes between the decree-holder purchaser and the judgment-debtor should be settled in execution proceedings, and only indirectly this rule of law involves the need for obtaining some delivery under Rr. 95 and 96. But if the dispute itself is not as against the judgment-debtor but against some other persons the need for delivery as against the other persons goes and there is no bar to a regular suit. All that is obligatory on the decree-holder purchaser is the pursuit of a proceeding for obtaining delivery to have an outstanding dispute between him and the judgment-debtor. 26 Mad. 740 and 28 Mad. 87, Dist. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO. **169 I.C. 456=10 R.M. 43=A.I.R. 1936 Mad. 733.**

——**S. 47**—*Bar of suit—Excess delivery—Restoration—Remedy if in executing Court.*

No separate suit can lie for the recovery of lands taken by the decree-holder in excess of the terms of the decree; if the decree-holder has been put in possession of excess land by the officer of the Court executing the decree, it is but just and proper that the executing Court itself must undo the wrong by ordering the decree-holder to restore it back under S. 47. (*Digby, J.*) CHAGANLAL *v.* MIRZA YAD ALI. **179 I.C. 529=11 R. N. 301=A.I.R. 1938 Nag. 276.**

——**S. 47**—*Bar of suit—Execution sale—Purchase by decree-holder—Failure to take delivery of possession—Property held by tenant of judgment-debtor from before attachment—Surrender by tenant to judgment-debtor after sale—Subsequent lease by judgment-debtor to another—Suit for possession by decree-holder's assignee against judgment-debtor and tenant—Maintainability.*

A decree-holder purchaser cannot of course institute a suit for recovery of possession from the judgment-debtor or some one who stands in the shoes of the judgment-debtor, and his remedy is confined to three years. But where the property sold in execution has been held by a tenant under the judgment-debtor from before the date of attachment of the property in execution, and subsequent to the sale the tenant surrenders the property to the judgment-debtor who again leases it to another, the decree-holder purchaser who has not obtained either actual or symbolical possession after the execution sale, or his assignee can maintain a suit for possession against the judgment-debtor and his tenant. S. 47, C. P. Code, does not bar such a suit, because the judgment-debtor by the surrender does not obtain possession in the same capacity as he held it at the time of the execution sale. (*Leach, C.J., Wadsworth and Krishnaswamy Aiyangar, JJ.*) KRISHNA IYER *v.* SUBRAMANIA IYER. **I.L.R. 1939 Mad. 456=1939 M.W.N. 427=180 I.C. 855=11 R.M. 752=49 L.W. 243=A.I.R. 1939 Mad. 369 =(1939) 1 M.L.J. 468 (F.B.).**

C. P. CODE (1908), S. 47.

——**S. 47**—*Bar of suit—Fraud in respect of application under O. 21, R. 89—Suit to set aside—sale—Maintainability.*

A suit to set aside an execution sale on the ground of fraud in respect of an application under O. 21, R. 89, C. P. Code, is barred by S. 47, C. P. Code. The matter is really within the provisions of S. 47 and could only be decided under that section and not by a separate suit. (*Bhide, J.*) RAM CHAND *v.* SHAMAS DIN. **178 I.C. 594=11 R.L. 481=40 P.L.R. 615=A.I.R. 1938 Lah. 690.**

——**S. 47**—*Bar of suit—Judgment-debtor executing trust deed for benefit of creditors appointing plaintiff as trustee—Plaintiff added as party but not substituted in execution case—Trust property purchased by defendants in execution sale—Suit by plaintiff for declaration of title and possession—If barred—Trustee, if representative of judgment-debtor.*

A debtor, after a money decree was obtained against him by a creditor, executed a trust deed for the benefit of his creditors whereby he appointed the plaintiff as trustee of his entire estate for paying off his debt. In the petition for execution of the decree, the plaintiff was added as a judgment-debtor along with the author of the trust but was not substituted in his place. No notice was served upon the plaintiff and he was not aware of this execution case at all. The trust properties were thereafter attached in execution of the decree and were purchased by the defendants who obtained delivery of possession through Court. The plaintiff instituted a suit for a declaration that his title was not in any way affected by the sale at which the defendants purchased and he also prayed for possession.

Held, that the plaintiff was not a representative of the judgment-debtor as the suit in which the decree was obtained did not relate to any property and the trust was created before attachment, that the question of the plaintiff being the representative of the judgment-debtor was neither raised nor determined in the execution proceedings and that, therefore, the suit was not barred under S. 47, C. P. Code. (*Nasim Ali and Henderson, JJ.*) HIMANSU KUMAR *v.* HASEM ALI KHAN. **181 I.C. 854=11 R.C. 862=42 C.W.N. 1131=A.I.R. 1938 Cal. 818.**

——**S. 47**—Bar of suit—Mortgage by Hindu father—Preliminary decree—Death of father—Sons impleaded as legal representatives—Sons not permitted to question existence or binding nature of debt—Final decree—Sale in execution—Purchase by mortgagee and possession—Suit by sons for possession impeaching mortgage, decree and sale—Maintainability. *See* HINDU LAW—DEBTS. **1939 M.W.N. 918.**

——**S. 47**—*Bar of suit—Mortgage decree—Execution—Party failing to raise question of paramount title—Sale in execution—Separate suit claiming paramount title—Maintainability.*

A party to a mortgage decree can raise the question of paramount title in proceedings in execution of that decree; and when he does not raise it in the execution proceedings leading up to the sale of the property, he is precluded from raising that question afterwards in a separate suit. A subsequent suit by such party claiming paramount title to the property sold is barred under S. 47, C. P. Code. (*Madhavan Nair and*

C. P. CODE (1908), S. 47.

Stodart, JJ.) CHINNATHAYEE *v.* LAKSHMI ACHI. **163 I.C. 619=9 R.M. 37=1936 M.W.N. 449=43 L.W. 740=A.I.R. 1936 Mad. 675=71 M.L.J. 511.**

——S. 47—*Bar of suit—Mortgage decree—Execution sale—Suit for declaration of invalidity on ground of wrongful and fraudulent inclusion of properties not comprised in the mortgage—Maintainability.*

The question whether a sale in execution of a mortgage is valid and binding or not is clearly a question relating to execution arising between the parties to the mortgage suit, and as such should be determined by the Court executing the mortgage decree and not by a separate suit at all. Consequently a suit for declaration that the sale is not valid and binding on the ground that the mortgagee fraudulently and wrongfully caused to be sold properties which were not included in the mortgage and which could not lawfully be sold in execution, is not maintainable and is barred under S. 47, C. P. Code. (*Derbyshire, C. J. and Costello, JJ.*) SARADA CHURN *v.* PRATIVA SUNDARI. **40 C. W.N. 428.**

——S. 47—*Bar of suit—Mortgage suit—Application for final decree—Objection by judgment-debtor alleging payment—Objection dismissed and final decree passed—Suit for declaration by judgment-debtor that decree should not be executed—If barred.*

In a mortgage suit, the decree-holder made an application for final decree. The judgment-debtor brought an objection that he had made payment in satisfaction of the debt. The objection was disallowed and a final decree was passed. Thereupon the judgment-debtor filed a suit for declaration that he had made payment to the decree-holder and hence the decree should not be executed.

Held, that the declaration that the decree should not be executed was barred by S. 47, C. P. Code.

Held also, that if the payment had been actually made the judgment-debtor had *prima facie* cause of action to recover it by suit as money paid under mistake. (*Almond, J. C. and Mir Ahmad, J.*) HAJI HABIB GUL *v.* GOPI CHAND SINGH **174 I.C. 295=10 R. Pesh. 61=A.I.R. 1938 Pesh. 12.**

——S. 47—*Bar of suit—Objection by legal representative of judgment-debtor in personal capacity—Dismissal of—Right of suit—C. P. Code, O. 21, Rr. 58 and 53.*

If a person has two capacities, there is no reason why he should be limited to one. If a representative of a judgment-debtor claims the property which the decree-holder seeks to sell in execution as his personal property, there is no reason why he should be limited to the objection under S. 47, C. P. Code. He is entitled to adopt the procedure laid in O. 21, R. 58, and if he fails in the claim case, to bring a suit under O. 21, R. 63. (*Wort and Agarwala, J.*) LACHHMI LAL *v.* SRINIWASH RAM KUMAR. **5 B.R. 238=179 I. C. 538=11 R.P. 388=A.I.R. 1939 Pat. 354.**

——S. 47—*Bar of suit—Order recording satisfaction of decree on petition of adjustment—Suit to rectify petition of adjustment—Maintainability—Limitation.*

A suit by the decree-holder for rectification of a petition of adjustment, in which a mistake has crept in and upon which an order recording satisfaction of the decree has been passed, is maintainable and not barred by the provisions of S. 47, C. P. Code. To such a suit the limitation applicable is that prescribed by Art. 96 of the Limitation Act. (*Guha and Bartley, JJ.*) ABDUL SATTAR CHOUDHURY *v.* ABDUL RUSAN. **165 I C 756=9 R.C. 457=40 C.W.N. 914=A.I R. 1936 Cal. 400.**

——S 47—*Bar of suit—Partition suit in joint Hindu family—Compromise decree—Land left in common pending another litigation—Property lost to family subsequently and money acquired in its stead—Division of money among sharers—Separate suit—Maintainability.*

Where a compromise decree in a partition suit between the members of a Hindu family provides that a certain item of property about which there is a pending litigation should for the time being be retained in common and undivided and that after the determination of the said litigation, the same should be divided specifically according to the respective shares of the parties, and subsequently in the litigation it ultimately turns out that the family loses the property, but instead the family gets money which is taken out by some of the parties, a suit by the other parties to recover their shares is not barred by S. 47, C. P. Code. The decree contemplates the division by metes and bounds of specific immovable property, but after the decree, the property is lost, and money was acquired in its stead, and thus cannot be partitioned in execution of the decree. Hence a separate suit is not barred under S. 47. (*Lokur, J.*) LAXMAN MANJUNATHAYA *v.* VENKATRAO. **41 Bom.L.R. 836=185 I.C. 13=12 R.B. 222=A.I. R. 1939 Bom. 386.**

——S. 47—*Bar of suit—Person obtaining property of another agreeing to pay his decretal debt—Right of decree-holder to proceed against him by way of execution application.*

Where certain persons obtain possession of certain properties on relinquishment by a female limited owner, expressly agreeing to pay certain decretal debt due against her, they are, upon the principles of justice, equity and good conscience, bound to pay the decretal debt in execution of the decree. There is no necessity on the part of the decree-holder to take recourse to a separate suit to establish the contractual liability in view of the scope of S. 47, C. P. Code. They can proceed by way of an application under S. 47. The decree-holder, although stranger to the contract which is to his benefit is entitled to enforce the agreement to his benefit apart from the position that the party concerned accepted liability in the matter of satisfaction of the debt due to the decree holder. 62 C.L.J. 55, Rel. on. (*Guha and Bartley JJ.*) BHUJENDRA NATH BISWAS *v.* SUSHAMOYEE BASU. **166 I C. 786=9 R.C. 624=40 C.W.N. 601=63 C. L.J. 25=A.I R. 1936 Cal. 67.**

——S. 47—*Bar of suit—Pre-decree compromise—Whether can be pleaded in execution—Suit for declaration of rights on basis of compromise—Maintainability.*

The executing Court can only go into matters relating to the execution, discharge or satisfaction of the decree which arise after the decree came into existence and result in its discharge or satisfaction and not into a pre-decree compromise which is not embodied in the decree and which practically nullifies the decree. Such a compromise could not, therefore, be pleaded as a bar in execution proceedings and a separate suit for

declaration of rights on the basis of the compromise is maintainable. (*Coldstream and Bhide, JJ.*) ROBERT HERCULES SKINNER *v.* R. M. SKINNER. **39 P.L.R. 21=18 Lah. 171=170 I C 245=10 R. L. 89=A I R. 1937 Lah 507.**

——S. 47—*Bar of suit—Property purchased by decree-holder in execution—Suit by him or by purchaser from him for possession—Maintainability.*

S. 47, C. P. Code, bars a suit by a decree-holder for possession of the property purchased by him in execution of his own decree against the judgment-debtor or any one claiming under him, and the bar is equally applicable to a purchaser from the decree-holder. The Code provides that if the property is in the possession of the judgment-debtor or any one claiming under him the decree-holder purchaser must obtain actual delivery of possession under O. 21, R. 95, but if it was in the possession of a tenant entitled to be in occupation of the same he must obtain symbolical possession under O 21, R. 96. Where this is not done within three years from the date when the sale became absolute, a suit for possession is not maintainable in view of the bar of S. 47. (*Venkataramana Rao, JJ.*) SUBRAMANIA IYER *v.* KRISHNA IYER. **1936 M.W.N 325=8 R M. 1057=162 I C. 856=A.I. R. 1936 Mad 571.**

——S. 47—*Bar of suit—Purchase in execution—Obstruction to delivery by parties to suit and by strangers—Suit by purchaser—If barred.*

Where a purchaser of land in execution while taking possession is obstructed by certain persons, some of whom were parties to the suit and who claimed occupancy rights therein, in so far as such a dispute was raised by the parties to the suit, the question should be decided in execution proceedings, but as to others who were not parties to that suit, a regular suit must be the only remedy and S. 47 is no bar. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO **169 I.C. 456=10 R.M. 43=A.I. R. 1936 Mad. 733**

——S. 47—*Bar of suit—Refusal to recognize assignee decree-holder—Separate suit to declare right—If barred.*

Where in an application under O. 21, R. 16, C. P. Code, the executing Court refuses to recognize the assignee decree-holder, on the objection of the judgment-debtor, the dispute is between a transferee of the decree-holder and the judgment-debtor and is fully covered by the provisions of S. 47, C. P. Code, and hence a separate suit to declare the assignment valid is barred. (*Grille, J.*) BALCHAND *v.* KACHRU. **I.L.R. (1939) Nag. 54=176 I C 445=11 R.N. 58=1938 N.L.J. 117 =A.I.R. 1938 Nag. 267.**

——S. 47—*Bar of suit—Representative—Purchaser from auction-purchaser at sale in execution of money decree—Application for delivery—Obstruction by purchaser in execution of money decree in another small cause suit—Dismissal of application—Suit for possession—Bar of*

The second plaintiff had a mortgage over the property of a joint Hindu family consisting of an adult and two minor members. He sued on the mortgage and got a decree on 23—1—1928, in execution of which the property was put up for sale and purchased by the second plaintiff himself on 1—5—1931. He got delivery in execution of the property except one item, with regard to which he

was obstructed by the defendant; and an application by the second plaintiff for removal of resistance was dismissed. On 6—9—1931, second plaintiff sold all his rights to the first plaintiff, who on 17—10—1931 applied for removal of the obstruction of the defendant with regard to the one item which had not been delivered to the second plaintiff. But that application was also dismissed on 6—1—1932. The defendant who was the obstructor claimed title to the item in dispute under a purchase in execution of a small cause decree obtained by a stranger against the adult member only of the joint family, who was one of the mortgagors against whom the second plaintiff had obtained the mortgage decree. The defendant's purchase was on 20—1—1930, before the sale in execution of the mortgage decree, but after the decree in that suit, while the small cause decree in execution of which the defendant purchased was passed on 3—5—1928, after the mortgage decree. The plaintiffs instituted a suit against the defendant for recovery of the item, which had not been delivered to them in execution.

Held, that the first plaintiff was a representative of the auction-purchaser, and the defendant was a representative of the mortgagors, and the matter being covered by S. 47 (1), C. P. Code, the suit was barred

Held, further, that the plaintiff should, however be given leave to treat the suit as an application under O. 21, R. 95, C. P. Code, in view of S. 47 (2), C. P. Code, there being no obstacle by way of limitation or otherwise, on payment of additional court-fee, if that be required. (*Gentle, J.*) PADALINGA MUDALIAR *v.* ARUMUGHA MUDALIAR. **1939 M.W.N. 857=A.I R. 1939 Mad. 944=(1939) 2 M.L.J. 415.**

——S. 47—*Bar of suit—Sale, in between the order for and the actual attachment—Purchaser's claim under O. 21, R. 58 upheld—Separate suit to declare that property liable to attachment and sale —Maintainability.*

Where after an order for attachment but before the actual attachment, the property sought to be attached is transferred by a sale deed to a third person and the purchaser thereupon preferred a claim under O. 21, R. 58, C. P. Code and the property was released from the attachment by the executing Court, it is certainly open to the decree-holder to file a separate suit to get it declared that the property is liable to be attached and sold in execution of his decree and it cannot be said that such a suit is barred by S. 47, C. P. Code. (*Bennet, and Verma, JJ.*) BANSRAJ PANDEY *v.* RAM LAL PANDEY. **I.L.R. (1939) All. 354=181 I.C. 817= 11 R.A. 614=1939 A W.R (H.C.) 197=1939 A.L. J. 221=A.I.R. 1939 All. 264.**

——S. 47—Bar of suit—Second suit for same relief and on same cause of action and between same parties—Maintainability. *See* C. P. CODE, Ss. 11 AND 47. **41 Bom.L R. 497.**

——S. 47—*Bar of suit—Suit for possession by decree-holder auction-purchaser against judgment-debtor and another—Latter claiming to have purchased property from judgment debtor before attachment.*

S. 47, C P. Code, can only apply where a dispute arises between the parties to the suit; it does not apply where the contest is between the parties to the suit and also a stranger. A suit by the

C. P. CODE (1908), S. 47.

decree-holder auction-purchaser for possession of property against the judgment-debtor and another person who claims that he had purchased that property from the judgment-debtor before the attachment proceeding is, therefore, not barred by the provisions of that section. (*Sen, J.*) BADAN CHANDRA BARWA *v.* RAMJIBAN SOHANLAL. **44 C.W.N. 827.**

——S. 47—Bar of suit—Suit for possession and mesne profits—Claim for future mesne profits—Omission to grant—No direction as to inquiry into mesne profits—Second suit for such mesne profits. If barred. *See* C. P. CODE, S. 11. **46 L. W. 676.**

——S. 47—*Bar of suit—Suit for possession of land—Execution barred—Second suit—Maintainability—Land on river bank subject to annual inundation during rainy season by reason of flooding of river—If dispossession of defendant, or constructive possession of plaintiff.*

A decree obtained by a person for possession of land, which is left unexecuted by leaving the defendants in possession until the execution of the decree is barred by limitation, bars a second suit for possession by reason of S. 47, C P. Code. The fact that the land is on the banks of a river which spills over its bank during the annual rainy season in times of flood and makes agricultural operations impossible during the period of inundation, is no ground for holding that there is any dispossession by *vis-major* of the defendants or that the plaintiff at that time enjoys constructive possession such as would give him a right to institute a new suit so as to get over the bar of S. 47, C. P. Code. The decree for possession cannot be satisfied unless the plaintiff gets actual possession of the land, and it is only if the land becomes derelict that it would be unnecessary to apply for execution. (*James and Chatterji, JJ.*) JUGAL KISHORE PRASAD SINGH *v.* MANAKA SINGH. **180 I.C. 76=5 B.R. 330=11 R.P. 442=A.I.R. 1939 Pat. 260.**

——S. 47—*Bar of suit—Suit for possession by mortgagee decree-holder auction-purchaser.*

The mortgagee decree-holder does not have a right to possession of the property ordinarily speaking and therefore an application for possession of the property by the auction-purchaser even though he happens to be the decree-holder himself is not in the same capacity and the auction-purchaser must therefore remain the decree-holder. This being so such application must be taken to be made by the right accruing to him for possession by virtue of that sale. Therefore if a party claiming under the judgment-debtor resists the auction-purchaser, the question neither relates to the execution, discharge or satisfaction of the decree, nor is it between the parties to the suit in the sense that the parties arrayed against each other are representatives in interest of the decree-holder and judgment-debtor or *vice versa* respectively in the original suit. Therefore it would follow that a suit by the auction-purchaser for possession of the property is not barred by reason of the provisions of S. 47. (*Dalip Singh and Sale, JJ.*) ABDUL GHANI *v.* LALA LAL CHAND. **A.I.R. 1940 Lah. 230.**

——S. 47—*Bar of suit—Suit on sale but decree as on mortgage—Defendant failing to pay amount decreed and plaintiff put in possession as per decree—Subsequent suit by defendant for possession alleging satisfaction of mortgage out of income—Maintainability.*

Where in a suit on the basis of a sale, the Court held that the transaction was a mortgage and not a sale and passed a decree directing that defendant should pay a certain amount with interest to plaintiff within a certain time and in default, the plaintiff to be put in possession of the property and the plaintiff was so put in possession, a subsequent suit by the representatives of the defendant for possession on the ground that the former plaintiff was in possession as usufructuary mortgagee and that the amount due has been paid off out of the income, is not maintainable inasmuch as the claim relates to the execution of the former decree. (*Pollock, J.*) PANDARI *v.* DIGAMBARDAS. **1940 N.L.J. 331.**

——S. 47—*Bar of suit—Transfer by defendant pendente lite—Decree against defendant—Enforcement against transferee—Remedy—Execution—Separate suit—If barred—"Representative."*

A transferee of the defendant *pendente lite* is a representative of the defendant, and a decree in the suit passed against the defendant-transferor must be enforced against the transferee in execution and not by a separate suit. A separate suit is barred by S. 47. (*Beaumont, C.J and Wassoodew, J.*) GOPAL SATTU *v.* DNYANU MARUTI. **I.L.R. (1938) Bom 649=177 I C. 499=11 R B. 96=40 Bom L.R. 512=A.I.R 1938 Bom. 367.**

——S. 47—*Bar of suit—Wrong inclusion of property in sale certificate—Remedy—Suit for correction, if lies.*

Where in a suit on a mortgage of a share of a property, another sharer is added as the legal representative of the deceased mortgagor and in execution of the decree, the share of the other person also is included in the proclamation of the property to be sold and in fact was sold without any objection by that person either at the time of the proclamation of sale or its confirmation, he cannot thereafter file a regular suit to correct the sale certificate. His remedy was only by objections in the execution Court. (*Bennet and Verma, JJ.*) RAHIM BUKHSH *v.* KISHEN LAL. **I L.R. (1939) All. 385=183 I.C. 415=12 R.A. 127=1939 A.L.J. 211=1939 A.W.R. (H.C.) 242=A.I.R. 1939 All. 368.**

Construction.

——S. 47—*Construction—Liberal construction.*

S. 47 should be liberally construed and the decree-holder should get his relief as expeditiously as possible. 19 Cal. 683 (P.C.), Foll (*Mohammad Noor and Varma, JJ.*) NAROTTAM DAS *v.* KRISHNA PRASAD. **15 Pat. 545=162 I.C. 830=8 R.P. 580=1936 P.W.N. 473=17 Pat.L T. 434=A.I.R. 1936 Pat. 289.**

Defence to suit.

——S. 47—*Defence to suit—If also barred.*

S. 47, C P. Code, bars both a suit and defence. The section debars a party to the suit or his representative from raising otherwise than in the execution proceedings any question of the class described in the section which arises between himself and the other party to the suit. He cannot raise it either as a plaintiff or as defendant in any separate suit between himself and the other party or his representative. (*Zia-ul-Hasan, J.*) RAM SARUP SINGH *v.* BUDDHU LAL. **1939 O.A.**

C. P. CODE (1908), S. 47.

518=1939 A.W.R. (C.C.) 94=1939 O.W.N. 653.

Executability of decree.

——S. 47—*Executability of decree—Objection to executability of decree as being incompetent—If open.*

A puisne mortgagee against whom a personal decree has been passed, behind his back, when there was no prayer for a personal decree in the plaint, can in execution take an objection to the executability of such a decree under S 47, within 30 days of the sale of the property of the puisne mortgagee, and relief cannot be refused to him (*Mohammad Noor and Rowland, JJ.*) BILAT ROUT *v* MAHBUB SAFI 162 I C. 867=8 R.P. 592=1936 P.W.N 281=A.I R. 1936 Pat. 303.

——S. 47—Executability of decree—Scheme decree under S. 92—Executability. *See* C. P. CODE, S. 92. A.I.R. 1937 Mad. 326.

Executing Court.

—— S. 47—*Executing Court—Description of property in decree incorrect—Amendment—Power of executing Court—Refusal by Court passing decree to amend—Appealability—C.P. Code, S. 151 and O. 43, R. 1.*

Where the description of property directed to be sold by a mortgage decree is incorrect, in the decree itself, the executing Court has no power to amend or rectify it. It is only the Court which passed the decree that can correct the mistake in the exercise of its inherent power under S. 151, C. P. Code. If it corrects the mistake and amends the decree, the amended decree is appealable, but if it refuses to do so, the order of refusal is not a decree and is not appealable. Nor would an appeal lie against the order under O. 43, R. 1, as it is not one of the orders mentioned in that rule. (*Lokur, J.*) KRISHNAYA PARBHAYA *v.* MEGHRAJ PAPARAM. I.L.R (1939) Bom. 708=186 I.C. 70 =12 R.B. 292=41 Bom L.R. 1170=A.I.R. 1940 Bom. 10.

——S. 47—Executing Court—Duty of—Objection by debtor on ground that purchase by decree-holder of part of mortgaged property after decree on mortgage has proportionately discharged decree debt—If can be raised. *See* MORTGAGE—DECREE ON. A.I.R 1936 Cal 537.

——S. 47—*Executing Court—Order of full satisfaction—Subsequent order vacating order of satisfaction—Absence of notice to judgment-debtor—Effect.*

Where the Court executing a decree disposes of the execution case on full satisfaction making an order of full satisfaction of the decree, it has no jurisdiction to vacate that order without notice to the judgment debtor. (*Guha and Lodge, JJ.*) DURGA CHARAN DAS *v.* CHAIRMAN OF THE LABANGA SAMABAI SAMITY. 162 I.C. 135=8 R C. 570= 40 C.W.N. 143=62 C.L.J. 372=A.I.R. 1936 Cal. 171.

——S. 47—Executing Court—Powers of—Amendment of decree more than three years after passing—Execution application within three years of amendment—If barred—Power of executing Court to look into nature of amendment or necessity for same. *See* LIMITATION ACT, ART. 182 (4). 18 Pat.L.T. 18.

——S. 47—*Executing Court—Powers of—Attachment under O. 21, R. 52—Dispute as to right to money attached between decree-holder and judgment-debtor—Jurisdiction to decide—Executing Court or custody Court.*

Under the proviso to O. 21, R. 52, when a dispute as to title or priority arises between the decree-holder and a third party as regards money in the custody of a Court other than the executing Court, then the custody Court shall determine that dispute. When, however, the dispute is between the decree-holder and the judgment-debtor, the matter has to be decided by the executing Court under S. 47, C. P. Code, and not by the custody Court. (*Bose, J.*) NANDKUMAR *v.* KALURAM. 19 N.L.J. 287.

——S. 47—*Executing Court—Powers—Contract as to rights and obligations under decree—Enforceability—Bar of separate suit.*

The C. P. Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree the provisions of S. 47 involve that questions relating to such terms may fall to be determined by the executing Court. A fair and ordinary bargain for time in consideration of a reasonable rate of interest, cannot be regarded as an attempt to give jurisdiction to a Court to amend or vary the decree. It has its effect on the parties' rights under the decree and the executing Court under S. 47, C. P. Code, has jurisdiction to ascertain its legal effect and to order accordingly. It is not possible to regard O. 20, R. 10 as excluding any possibility of the parties coming to a valid agreement for time, to which the Court under S. 47, will have regard. Such agreements or bargains may take different forms. If it appears to the Court acting under S 47 that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce it in execution proceedings but will leave the creditor to bring a separate suit on the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement. It is a matter to be dealt with under S. 47, C. P. Code. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view and functions of an executing Court, (*Sir George Rankin.*) OUDH COMMERCIAL BANK. LTD. *v* BIND BASINI KUER. 66 I.A 84=14 Luck. 192=I.L R (1939) Kar. 136 (P.C)=11 R.P.C. 176=69 C.L.J. 317=50 L W. 39=1939 A.L.J. 481=41 Bom.L.R 708=1939 P.W.N. 784=1939 M.W N. 692=1939 O.W.N. 313=43 C.W N 501 =180 I.C. 378=1939 R.D. 208=1939 O.L.R. 187 =1939 O A. 352=1939 A.W.R. (P.C.) 43=5 B. R. 476=A.I.R. 1939 P.C. 80=(1939) 1 M.L.J. 652 (P.C.).

——S. 47—Executing Court—Powers of—Decree against karnavan of Malabar tarwad—Executability against tarwad—Power of executing Court to determine. *See* MALABAR LAW—TARWAD. 1939 M.W.N. 1229.

——S. 47—*Executing Court—Powers of—Decree against minor—Question whether minor was properly served or represented—If can be gone into.*

C. P. CODE (1908), S. 47.

It is not open to an executing Court to sit in judgment over the Court which passed the decree which has to be executed. It cannot, except in certain limited cases, conduct inquiries as to whether the decree was properly passed. If on the face of the record it is clear that some illegality has been committed the executing Court can refuse to execute the decree. But where there is nothing to show that there has been such illegality the executing Court has to presume that the decree was properly made, and take the decree as it stands and execute it. Where a decree made on an award in arbitration against a minor contains nothing on the face of it to show that the minor was not served or properly represented in the arbitration proceedings, the executing Court has no power to hold an inquiry as to whether the minor was served or represented, and cannot refuse to execute the decree on the ground that he was not served or properly represented or on the ground that the minor cannot be made liable. If the minor is not really liable his remedy lies elsewhere. (*Horwill, J.*) VILLUPURAM URBAN CO-OPERATIVE BANK *v.* BALASUBRAMANIA MUDALI. **178 I C. 808=11 R.M. 500=1938 M W.N. 567 =48 L.W. 285=A.I.R. 1938 Mad. 809=(1938) 2 M.L.J. 186.**

——**S. 47**—*Executing Court—Powers of—Plea by judgment-debtor that he is a minor and was wrongly impleaded as major—If open—Power of executing Court to entertain plea and inquire into.*

S. 47, C. P. Code, is not intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree. An executing Court cannot entertain an objection to the execution of the decree against a minor on the ground that the decree was passed against him who was impleaded as a major. Where the judgment-debtor appears in execution and asserts that he is a minor, he is in fact saying that he was not a party to the decree, and the executing Court is precluded from making an enquiry under S. 47, C. P. Code. The proper remedy in such cases is by way of suit. (*Mockett and Horwill, J.*) SETHURAJAN *v.* GURUSWAMI PATHAR. **I.L.R. (1937) Mad. 834=1937 M.W N. 227 (2)=45 L.W. 401 =170 I.C. 86=10 R.M. 131=A.I.R. 1937 Mad. 509=(1937) 2 M.L.J. 37.**

——**S. 47 and O. 32, R. 1**—*Executing Court—Powers of—Validity of decree—Power to question—Case of no jurisdiction—Dismissal of suit on behalf of alleged minor with costs—Plaintiff really a major—Procedure to be followed—Decree for costs—If executable.*

Ordinarily a Court executing a decree cannot go behind the decree and has no power to entertain any objection as to the validity of the decree or as to legality of the character of the decree, but that is only true in a case when the Court passing the decree had got jurisdiction to pass it; but where the Court passing the decree was inherently incompetent to pass the decree and had absolutely no jurisdiction to pass it, its decree is a nullity and no question of validity of the decree arises in such a case. Where a suit is brought by guardian on behalf of an alleged minor, the Court which was dealing with such a case if it found that the plaintiff had attained majority more than three years prior to the suit, has no jurisdiction to proceed with the suit as it was not properly brought and should have either dismissed it, or allowed the plaintiff to amend the plaint and file it as major. But without doing so, if the Court dismisses the suit with costs, the decree for costs against the plaintiff, cannot be executed as the Court has no power to pass a decree against the plaintiff who strictly was no party to the proceedings before it. Costs ought to have been awarded against the guardian. (*Zia-ul Hasan and Yorke, JJ.*) SURAJ BAKHSH SINGH *v.* PHALDAN SINGH. **177 I.C. 69=11 R.O. 20=1938 O.A. 612=1938 O.L.R. 369=1938 O.W.N. 779=A.I.R. 1938 Oudh 213.**

——**S. 47**—Executing Court—Power to go behind decree—Decree for instalments—Subsequent consent decree for instalments coupled with hypothecation—Execution—Plea that contract of security and hypothecation is without consideration and unenforceable—Competency. *See* C. P. CODE, O. 20, R. 11 (1) AND (2). **18 Pat. 719.**

——**Ss. 47 and 68**—*Executing Court—Transfer to Collector for execution—Objection to sale on ground of fraud—To which Court to be made.*

S. 68, C. P. Code, does not state that the Collector shall become the Court executing the decree. The Court executing the decree remains the Court which sends the decree for execution to the Collector and the powers conferred by the C. P. Code on the Court executing the decree remain with that Court and do not pass to the Collector. Hence the question whether a sale in execution of a decree was brought about by fraud, being a question relating to execution, discharge or satisfaction of a decree within the meaning of S. 47, C. P. Code, can be entertained by an executing Court even though the decree had been transferred to the Collector under S. 68, C. P. Code, and the sale had been confirmed. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RADHA RAWAN PRASAD *v.* RAJENDRA PRASAD. **14 Luck. 213=177 I C. 77=11 R.O. 21=1938 O A. 598= 1938 O.L.R. 371=1938 O.W.N. 758=A.I.R. 1938 Oudh 188.**

Execution.

——**Ss. 47 and 48**—*Execution—Adjustment of decree during—Power of Court to recognize—Revival of execution application—Test.*

On an application for execution of a final decree for sale, a date was fixed for sale. But on a day prior to the one so fixed the parties agreed upon an arrangement of payment by instalments and that in case of default in payment, the whole amount was to become recoverable by sale. The compromise or arrangement was presented to the Court with a prayer for the postponement of execution. The execution was accordingly postponed. There was subsequently default in the payment of instalments and an application for execution was presented more than 3 years after the date of the default. It was contended that executing Court could not recognize the arrangement and that the execution application was barred by limitation. It was held that the executing Court had jurisdiction to recognize such an arrangement and that the subsequent execution application was really one in continuation and was a revival of the first application and that hence no question of limitation arose.

C. P. CODE (1908), S. 47.

Held, further, the mere fact that the Court ordered a case to be struck off does not show that the application came to an end, nor does the fact that an application is on the usual tabular form suggest that it is a fresh application. The question whether an application is a fresh application or is merely one to revive the previous execution proceedings, has always to be decided upon the circumstances of each case and in each case the substance of the matter must prevail over the form of the application. (*Iqbal Ahmad, Bajpai and Ismail, JJ.*) MAHENDRA RAO *v.* BISHAMBHAR NATH. I.L.R. (1940) A. 377=188 I.C. 323=13 R A. 1=1940 A.L J. 301=1940 A.W.R. (H.C) 281=A.I R 1940 All. 270 (F.B.)

Execution, discharge or satisfaction.

——S. 47—Execution, discharge or satisfaction—Application for final decree in mortgage suit—Objection to sale on ground that property mortgaged is inalienable—Competency. *See* C. P. CODE, O. 34, R. 5. 46 L.W. 544=A.I.R. 1937 Mad. 918.

——S 47—*Execution, discharge or satisfaction—If controlled by O.* 21, *R.* 19.

O. 21, R. 19, C. P. Code, cannot and should not be taken to be applicable and exhaustive in regard to questions arising for consideration under S. 47 of the Code relating to execution, discharge or satisfaction of decrees. (*Guha and Bartley, JJ.*) BANK OF DACCA, LTD. *v.* GOUR GOPAL SAHA. I.L.R. (1937) 1 Cal. 57=166 I.C. 855=9 R.C. 602=65 C.L.J. 74=A.I.R. 1936 Cal. 409.

Execution proceedings.

——S. 47—Execution proceedings—Judgment-debtor not bound to raise all possible objections at a given time—Duty of Court to decide all objections raised. *See* C. P. CODE, S. 11—EXECUTION PROCEEDINGS. 1937 A.L.J. 482=A.I.R. 1937 All. 446.

——S. 47—*Execution proceedings—Order for transfer of decree made* ex parte—*Judgment-debtor's right to prefer objections.*

The judgment-debtor can prefer objections under S. 47, at any stage of the execution proceedings. Those objections have to be determined on their merits, unless a particular objection had been adjudicated upon by the Court earlier, or unless the judgment-debtor is debarred from agitating the particular objection. Hence, where the objection, namely that the decree ought not to have been transferred to another Court as the judgment-debtors had properties within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree, had not been adjudicated upon at a previous stage of the proceedings and the order of transfer was made *ex-parte*, and without giving judgment-debtors an opportunity to contest the decree-holder's prayer for transfer, the Judge ought to consider the objection on its merits. (*Mitter and Mohamad Akram, JJ.*) MANMATHA PAL *v.* SARADA PRASAD. 187 I.C. 67=12 R.C. 539=A.I.R. 1939 Cal. 651.

Necessary parties.

——S. 47—Necessary parties—Auction-purchaser if necessary party to appeal—*See* S. 47, APPEAL—AUCTION-PURCHASER.

——S. 47—*Necessary parties—Revision against order dismissing objection to attachability of property—Auction-purchaser—If necessary party.*

C. P. CODE (1908), S. 47.

An auction-purchaser is not a necessary party to an application for revision filed against an order dismissing an objection of the judgment-debtor to the attachability of the property. (*Addison, J.*) INAYAT *v.* KARTYAR SINGH. 41 P.L.R. 288=A.I R. 1939 Lah. 256.

Objection as to saleability of property.

——S. 47—*Objection as to saleability of property—When could be raised.*

An objection by a judgment-debtor as to the saleability of his property in execution could be raised under S. 47, C. P. Code, at any time prior to sale of the property and even if made later, it would be within time, if made within 30 days from date of sale under Art. 166 of Limitation Act. (*Gruer, J.*) MAROTI *v.* KISANLAL, 180 I.C. 553=11 R.N. 367=1938 N.L.J. 389=A.I.R. 1938 Nag. 558.

Parties and representatives.

——S. 47—*Parties and representatives—Attachment of undivided interest of judgment-debtor before his death—Subsequent dismissal of execution case followed by its restoration—Revival of attachment—Nephews of judgment-debtor in possession of property as survivors—Whether legal representatives of judgment-debtor.*

Where the undivided interest of a deceased judgment-debtor was attached in execution before his death and subsequently the execution case was dismissed for want of prosecution but was, however, restored, the effect of the order setting aside the order of dismissal is to revive the attachment which ceased when the order was made dismissing the execution case for default. If the nephews of the judgment-debtor who are the survivors of the family are in possession of the property which by reason of the revival of attachment is not theirs, they are intermeddling with the estate of the deceased judgment-debtor and, therefore, are his representatives within the meaning of S. 47, C. P. Code. (*Wort, J.*) RAMESHWAR PRASAD SINGH *v.* BASDEO SINGH. 8 R.P. 332=160 I.C. 119=1936 P.W.N. 14=A.I.R. 1936 Pat. 126.

——S. 47—*Parties and representatives—Auction-purchaser—If representative of judgment-debtor—Right to intervene in further execution by decree-holder.*

Where property is sold in execution of a mortgage decree for a price mentioned in the C form, the auction-purchaser (though stranger) can, in a fresh application for execution of the decree for further interest against the same property by issue of a fresh C form, intervene under S. 47, he being a representative of the judgment-debtor as regards the liability of the land for a second sale. (*Gruer, J.*) TRIMBAK LAXMAN *v.* BALIRAM PANDUSA. I.L.R. (1937) Nag. 156=168 I.C 221=9 R.N. 244=A.I R. 1937 Nag. 59.

——S. 47—*Parties and representatives—Auction-purchaser of property pending suit on mortgage—Whether representative of mortgagor.*

An auction-purchaser of a half share of zamindari property in execution of a simple money decree during the pendency of a suit by the mortgagee of such property, is a representative of the mortgagor, and can properly be impleaded as a party in the execution proceedings of the decree passed on the mortgage. (*Harries and Ganga Nath, JJ.*) RAM AUTAR SAHU *v.* BATE KRISHNA.

C. P. CODE (1908), S. 47.

163 I.C. 926=9 R.A. 101=1936 A.L.J. 541=1936 All.L.R. 670=1936 A.W.R. 422=A.I.R. 1936 All. 479.

——S. 47—*Parties and representatives—Auction-purchaser under money decree—Subsequent sale of same property in enforcement of charge under security bond for satisfaction of prior decree—Rights of prior purchaser.*

When a money decree is being executed against a property given in security for the satisfaction of a decree, it is not being executed as a simple money decree but as a decree against the property on which it is a charge. Hence where such property is subsequently purchased by another decree-holder in execution of his money decree, the property is transferred to him only subject to the charge and hence in execution proceedings by the former decree-holder against such property, the purchaser decree-holder should be present as he is a representative of the judgment-debtor within S. 47, C. P. Code, so that he may be given an opportunity to redeem the property by paying off the amount due to the prior decree-holder. (Case-law discussed.) (*Mohammad Noor and Varma, JJ.*) NAROTTAM DAS *v.* KRISHNA PRASAD. 15 Pat. 545=162 I.C. 830=8 R.P. 580=17 Pat. L.T. 434=1936 P.W.N. 473=A.I.R. 1936 Pat. 289.

——S. 47—*Parties and representatives—Execution of decree by attaching creditor—Objection by transferee decree-holder—If comes within S. 47.*

One *M* obtained a preliminary decree for sale of the property covered by the security bond. The judgment-debtor *F* obtained a decree against *M* in respect of certain costs and attached *M's* decree. *M* transferred his decree to *R*. Subsequently *F* applied for execution of the decree which he had attached in execution of his own decree against *M*. *R* put an objection to *F's* application for execution.

Held, as transferee of original decree-holder *M*, *R* represented *M*, and his objection therefore came within the scope of S. 47, C. P. Code. A.I.R. 1937 All. 63, Rel. on. (*Nanavutty and Smith, JJ.*) FAQIR BAKHSH *v.* MT. MARIYAN. 13 Luck. 237=168 I.C. 154=9 R.O. 445=1937 O.L.R. 224=1937 O.W.N. 519=A.I.R. 1937 Oudh 365.

——S. 47—*Parties and representatives—Execution of decree stayed on judgment-debtor executing security bond — Another decree-holder attaching property covered by bond and purchasing it in execution—If representative of judgment-debtor.*

The execution of a decree passed in favour of *C* was stayed on the judgment-debtor executing a security-bond. *B*, another decree-holder, attached the property covered by the bond along with other properties belonging to the judgment-debtor, and purchased it in execution, subject to the charge created by the bond. *C* then applied for the sale of the property covered by the security bond and prayed that *B* might be added as a party to the execution proceeding.

Held, that *B* should be added as a party to the execution case, as he is a representative of the judgment-debtor within the meaning of S. 47, C. P. Code. (*Nasim Ali and Mitter, JJ.*) UPENDRA LAL PAL *v.* BINOD LAL PAL. 43 C.W.N. 1100.

——S. 47—*"Parties and their representatives"—Hindu widow—Suit against by husband's creditor for recovery of debt out of estate—Surrender of whole estate by widow in favour of daughters pending suit—Subsequent decree against widow—Attachment and sale of estate—Suit by daughters to declare property not liable to attachment and sale—If barred.*

A transferee of the interest of a party before a decree is passed against him or in his favour is not a representative of that party within the meaning of S. 47, C. P. Code. Where a Hindu widow pending a suit against her by a creditor of her husband to recover the debt from the estate in his hands, surrenders the entire estate in favour of her daughters and a decree is subsequently passed against the widow, the daughters are not the representatives of the widow within the meaning of S. 47, so as to bar a suit by them for a declaration that the property is not liable to attachment and sale in execution of the decree against the widow. (*Sen, J.*) SHIVU SHIDDA CHAUGULA *v.* LAKMICHAND TULAJARAM KOTHARI. 187 I.C. 96=12 R.B. 412=41 Bom.L.R. 1007=A.I.R. 1939 Bom. 496.

——S. 47—*Parties and representatives—Insolvent judgment-debtor—Annulment of adjudication—Person in whom properties are vested by Court—If "representative" of judgment-debtor—Objection to execution of decree against insolvent—If under S. 47.*

Obiter.—Where an order adjudicating a judgment-debtor as an insolvent is annulled and a person is appointed by the Court under S. 37 of the Provincial Insolvency Act and an order is made vesting the properties of the debtor in him, an objection by such appointee to an execution petition by a creditor does not fall under S. 47, C. P. Code, as he is not a "representative" of the judgment-debtor within the meaning of S. 47. (*R. C. Mitter, J.*) ABDUL LATIF *v* J. R. PERCIVAL. I.L.R. (1937) 1 Cal. 264=166 I.C. 509=9 R.C. 546=40 C.W.N. 1229=A.I.R. 1936 Cal. 573.

——S. 47—*Parties and representatives—Mortgage suit—Original attaching creditor of mortgaged property impleaded as party—Death of—Failure to bring legal representatives on record—Legal representatives sought to be impleaded in execution proceedings—Permissibility.*

Where in a suit on a mortgage, a person impleaded as a party, by reason of his having attached the mortgaged property in execution of a money decree dies and no steps are taken to bring his legal representatives on record, but it is sought to implead them as judgment-debtors in the execution proceedings, they are entitled to be discharged from the array of the judgment-debtors in the execution proceedings of the mortgage decree. A.I.R. 1934 All. 1027, Foll. (*Agarwala and Varma, JJ.*) DULAR CHAND RAM *v.* KAMAKHYA NARAIN SINGH. 159 I.C. 1073=8 R.P. 320=A.I.R. 1936 Pat. 110.

——S. 47—*Parties and representatives—Mortgagee decree-holder purchasing property— If representative of mortgagor.*

One *U* executed a mortgage in favour of a firm. On remarriage of *U* his son filed a suit for partition. Later on, the firm filed a suit for sale of the property mortgaged to it, obtained a decree and purchased the property. Meanwhile the son of *U* got a decree in the partition suit and applied for its execution. When the Commissioner went on to make the division the firm objected pointing

out that it had purchased the property. The Court disallowed the objection by asking the firm to file a separate suit,

Held, that by buying the title of *U* in execution arising under the mortgage suit, the firm stepped into the shoes of *U* and thereby became his representative. The firm, as the representative of *U* was entitled to come for settlement of the question whether the partition decree left anything at all to the partition as between *U* and his son. The firm therefore came under S. 47 and the executing Court should not have referred the firm to a separate suit. (*Baguley and Mosely, JJ.*) A. L. A. CHETTYAR FIRM *v.* MAUNG PO TAW. 1938 Rang.L.R. 583=177 I.C. 435=11 R.R. 128=A.I.R. 1938 Rang. 250.

——S. 47—*Parties and representatives—Occupancy holding--Purchaser at certificate sale- Right to object to execution sale of holding under mortgage decree.*

The purchaser of an entire occupancy holding at a certificate sale under the Public Demands Recovery Act for arrears of rent is not a representative of the occupancy tenant within the meaning of S. 47, C P. Code, such purchaser has therefore no *locus standi* to intervene in proceedings in execution of a decree on a mortgage of a part of the holding by the tenant, and object to the sale of the holding in execution. (*Macpherson and Fazl Ali, JJ.*) MT JAMUNI *v.* BHOLARAM. 15 Pat. 414=3 B.R. 53=1936 P.W.N. 710=165 I.C. 574=9 R.P. 181=17 Pat.L.T. 650=A.I.R. 1936 Pat. 561.

——S. 47—*Parties and representatives—Purchaser from judgment-debtor during attachment —If representative of judgment-debtor.*

A purchaser from a judgment-debtor of property belonging to him during its attachment is a representative of the judgment-debtor within the meaning of S. 47, C. P. Code. (*Ghose, J.*) DHIRENDRA NARAIN GHOSE *v.* BASANT KUMAR DAS. 43 C.W.N. 1091.

——S. 47—*Parties and representatives—Purchaser of mortgaged property pending suit on mortgage—If representative of judgment-debtor —Question as to delivery of possession between him and decree-holder purchaser if relates to execution—Separate suit—Bar of—Limitation.*

Persons who purchase mortgaged property pending a suit on the mortgage are representatives of the judgment-debtor-mortgagor, and if a question arises between them and the decree-holders-purchasers as to the delivery of possession of the mortgaged property, that is a question relating to the execution of the decree under S. 47, C. P. Code, and a separate suit is barred Such a suit brought about 4 years after the delivery proceedings must be held barred by limitation, because, if treated as an application under S. 47, C. P. Code, it is clearly barred by limitation. (*Burn, J.*) LAKSHMINARAYANA *v.* HANUMAYYA. 171 I.C. 925=10 R M 410=1937 M.W.N. 232=46 L.W. 683=A.I.R. 1937 Mad. 580.

——S. 47—*Parties and representatives—Receiver of the properties of the judgment-debtor —Objection to attachment of moneys in h s hands —Order allowing—Appealability—C. P. Code, O. 21, R. 58.*

A receiver of the estate of the judgment-debtor is not a representative of the judgment-debtor under S. 47, C. P. Code. When the

receiver objects to the attachment of moneys in his hands, the objection falls under O. 21, R. 58, C. P Code, and not under S. 47. No appeal therefore lies from an order allowing the objection and raising the attachment. (*Davis, J.C. and Mehta, A. J. C.*) GHANSHAMDAS *v.* SHIVALDAS. 30 S.L.R. 288=160 I.C. 383=8 R.S. 126=A.I.R. 1936 Sind 2.

——S. 47—*Parties and representatives—Second mortgage pending first mortgagee's suit—Whether representative of mortgagor.*

A person in the position of a second mortgagee who has obtained his mortgage during the pendency of the suit by the first mortgagee, is a representative of the mortgagor, and can be impleaded as a party in the execution proceedings of the decree passed on the first mortgage. (*Harries and Ganga Nath, JJ.*) RAM AUTAR SAHU *v.* BATE KRISHNA. 163 I.C. 926=9 R.A. 101=1936 A.L.J. 541=1936 All.L.R. 670=1936 A.W.R. 422=A.I.R. 1936 All. 479.

——S. 47—*Parties and representatives—Transfer of mortgaged property pending foreclosure suit—Transferee, if representative in-interest of mortgagor judgment-debtor—Mortgagee decree-holder, if can proceed to execute decree against transferee.*

Where the mortgagor transfers the mortgaged property pending the suit for foreclosure on the mortgage and the transferee takes actual possession of the same, the mortgagee-decree-holder on the making of the final decree can proceed to execute the decree against the transferee for recovery of possession of the property transferred to him inasmuch as the transferee is on account of the transfer *pendente lite*, a representative-in-interest of the mortgagor judgment-debtor and is bound by the decree passed against him. (*Sir Shadi Lal.*) PARMESHARI DIN *v.* RAM CHARAN. 31 S.L.R. 652=169 I.C. 657=41 C.W.N. 1130=46 L.W. 198=1937 O.W.N. 708=18 Pat.L.T 615=1937 O L.R. 409=1937 P.W.N. 628=1937 A.L.R. 643=1937 A.W.R. 834=10 R. P.C. 53=3 B.R 733=39 Bom.L.R. 1019=1937 A.L.J. 1376=A.I.R. 1937 P.C. 260=(1937) 2 M. L.J. 359 (P.C.).

——S. 47—*Parties and representatives—Transferee from mortgagor after mortgage decree—Transferee questioning in execution validity both of mortgage and of decree—If representative of judgment-debtor—Order allowing execution to proceed—Second appeal.*

A transferee from mortgagor after the mortgage decree, who questions in the execution proceeding the validity of the mortgage and also of the decree in the mortgage suit is a representative of the judgment debtor. Accordingly an order by the appellate Court allowing the execution to proceed falls within the purview of S. 47, C. P. Code, and a second appeal by the transferee against that order is competent. (*S. K. Ghose, and Mitter, JJ.*) RASHBEHARI DAS *v.* MAHINDI PAL. 173 I.C. 634=10 R.C. 551=67 C.L.J. 7=41 C.W.N. 1162=A.I.R. 1937 Cal. 565.

——S. 47—*Parties and their representatives—Who are included—Their position, if similar to that of shebait.*

The term 'representatives 'occurring in S. 47, C. P. Code, includes not only legal representatives in the sense of heirs, executors or administrators, but also representatives in interest, that is any

C. P. CODE (1908), S. 47.

transferee of the decree-holder's or judgment-debtor's interest, who so far as such interest is concerned is bound by the decree. A legal representative is not a mere figure head as the shebait is. He is one to whom the rights and obligations of the deceased are transmitted. He is a real party to the suit, though he represents the rights and liabilities of a deceased person. A shebait on the other hand is a nominal party who is in Court as the representative of an ideal person, namely, the idol. The idol, it is that is the real party in the eye of the law. (*Grille and Niyogi, JJ.*) AZHAR HUSSAIN *v.* MOHAMAD SHIBLI. **I.L.R. (1939) Nag. 548=187 I.C. 791=12 R.N. 309=1939 N.L.J. 270=A.I.R. 1939 Nag. 183.**

——**S. 47**—*Parties and representatives—Widow added as legal representative of judgment-debtor—Widow objecting to sale on the ground that it was given to her in dower—If entitled.*

Where a widow was added along with the sons as legal representatives of a deceased judgment-debtor her position is that of a representative of the dead judgment-debtor and it remains the same even when she claims that the property which had been attached and sold did not belong to the judgment-debtor but in fact belonged to her, having been given to her in dower. Being a party to the proceedings she had every right to object to the sale under S. 47, C. P. Code (*Mir Ahmad, A.J.C.*) BIPI ROSHAN JAN *v.* KAHAN CHAND GOBIND RAM. **10 R. Pesh. 53=173 I.C. 704=A.I.R. 1937 Pesh. 82.**

Parties to suit.

——**S. 47**—*Parties to suit—Decree-holder and assignee—Suit relating to validity of assignment—If competent.*

A dispute between an assignee and the decree-holder is not a dispute between the parties within the meaning of S 47, C. P. Code, and a separate suit relating to the validity of the assignment of the decree is competent. The assignee is, therefore, not barred under the provisions of that section, from urging in a suit in which his assignment is being challenged that his assignment was valid, even though the executing Court had decided against him. (*Addison and Din Mohammad, JJ.*) SORAB SUKH *v* PREM DATT. **18 Lah. 162=171 I.C. 91=10 R.L. 157 (2)=39 P.L.R 904=A I.R. 1937 Lah. 465.**

——**S. 47**—*Party to suit—Exonerated defendant.*

S. 47 does not apply unless the question arises between the parties to the suit in which the decree was passed or their representatives and relates to the execution, satisfaction or discharge of the decree. A defendant who was not a necessary party would not be a party to the suit within the meaning of S. 47 if he is exonerated without his claim being adjudicated upon. (*Burn and Lakshmana Rao, JJ.*) THANGACHAMI NAICKER *v.* VEERAPPA CHETTIAR. **173 I.C. 90=10 R.M. 509=A.I.R. 1937 Mad. 268.**

——**S. 47**—*Parties to suit—Mortgage suit—Some of defendants sued in personal capacity and as shebaits—Decree passed against them in personal capacity—Suit dismissed against them as shebaits—Such defendants, if parties to suit—Objection by them to sale on ground that property is debutter—Maintainability.*

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In a mortgage suit, some of the defendants were impleaded both in their personal capacity and as shebaits of an idol. The Court passed a decree against them in their personal capacity and dismissed the suit as against them as shebaits, without deciding the issue raised by them as to the validity of the mortgage. They filed an objection under S. 47, C. P. Code, to the execution sale on the allegation that all the properties were debutter.

Held, that the question raised by them was one relating to execution and as they in their capacity as shebaits were by virtue of the Explanation to S. 47, parties to the suit, their objection to the sale was maintainable. (*Mitter and Khundkar, JJ.*) SAILENDRA KUMAR *v.* BRAJA GOPAL. **43 C. W.N. 371.**

——**S. 47**—*Parties to suit—Person against whom no relief was either prayed for or granted.*

Section 47 speaks of parties to suit and so applies to persons who are made parties though as against them relief is neither asked for nor granted by the decree. (*Nasim Ali and Mukherjea, JJ.*) NIRODE KALI ROY CHOUDHURY *v.* RAI HARENDRA NATH. **I L.R. (1938) 1 Cal. 280=178 I.C. 540=11 R.C. 367=42 C.W.N. 87=A.I.R. 1938 Cal. 113.**

——**S. 47**—*Party to suit—Prior mortgagee's suit impleading puisne mortgagee—Claim against latter abandoned and suit dismissed against him—Objection by latter to sale—If falls under S. 47—"Party"—Puisne mortgagee's encumbrance—If to be mentioned in sale proclamation.*

The prior mortgagee instituted a suit impleading his mortgagors and the puisne mortgagee. The latter resisted the suit. The prior mortgagee abandoned his claim and suffered it to be dismissed so far as the puisne mortgagee was concerned. He obtained a compromise decree against the mortgagors for sale. Later on he sought to put up the property for sale without any reference to any right or claim of the puisne mortgagee. The latter objected that the property put up for sale was his property and could not be sold in execution of prior mortgagee's decree. It was contended on behalf of the prior mortgagee that the puisne mortgagee not being a judgment-debtor had no *locus standi* to contest the application; and secondly that the application was not maintainable as it was not an application relating to the execution, discharge or satisfaction of the decree, but one going to the root of the decree itself,

Held, that the puisne mortgagee was still a party to the suit notwithstanding that it was dismissed against him.

Held also, that the puisne mortgagee's objection was to the whole decree and did not come within S. 47, C. P. Code.

Held, further that when the prior mortgagee put his decree into execution, the puisne mortgagee's encumbrance was a matter which ought to be mentioned in the sale proclamation. (*James and Rowland, JJ.*) SONU LAL *v.* RAMNANDAN SINGH. **3 B.R. 32=165 I.C. 317=9 R.P. 171=1936 P.W.N. 581=A.I.R. 1936 Pat. 552.**

——**S 47**—*Parties to suit—Proper party against whom no relief is claimed - Objection by him in execution dismissed—Right of suit.*

A person against whom no relief is claimed but who has been impleaded as a proper party, must

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be deemed to be a party to the suit for the purposes of S. 47, C. P. Code, though he is not a judgment-debtor. If, therefore, an objection by him to the execution of the decree against a certain property is dismissed, his remedy is by way of appeal. He cannot institute a suit under O. 21, R. 63, C. P. Code, although his objection was dismissed under O. 21, R. 58. (*Abdul Rashid, J.*) MALAK CHAND *v.* HARI CHAND KISHEN CHAND. 183 I.C. 816=12 R.L. 140=41 P.L.R. 126=A.I.R. 1939 Lah. 207.

——S. 47—*Parties to suit—Property held by judgment-debtor claimed to be wakf—Question as to—If one between parties.*

The question as to whether the property held by a judgment-debtor, which is sought to be sold in execution of a decree is wakf property, in which the judgment-debtor has no beneficial interest, is a question arising between parties to the suit in which the decree was passed and can be determined in execution proceedings. (*Tyabji, J.*) HEMRAJ RADHOWJI *v.* SHAHBHAN. 179 I.C. 692 =11 R.S. 148=A.I.R. 1939 Sind 22.

Question relating to execution.

——S. 47—*Question relating to execution—Attachability of the property.*

The question as to whether a particular property is liable to be attached and sold for satisfaction of the decree, is a question relating to the satisfaction of the decree. It cannot be said that the section contemplates that the question must relate to the execution of the decree as between the attaching decree-holder on the one hand and the objecting defendants on the other. (*Nasim Ali and Mukherjea, JJ.*) NIRODE KALI ROY CHOUDHURY *v.* RAY HARENDRA NATH. I.L.R. (1938) 1 Cal. 280=178 I.C. 540=11 R.C. 367=42 C.W. N. 87=A.I.R. 1938 Cal. 113.

——S. 47—*Question relating to execution—Decree against assets of deceased—Objection that attached property was not an asset of the deceased—If one under S. 47.*

Where in the case of a decree against the legal representatives in respect of the assets of a deceased, a purchaser from such legal representatives after the attachment of the property, objects to its attachment in execution of the decree against the legal representatives, on the ground that it was not part of the assets of the deceased, he is raising a question which relates to the execution of the decree in the suit, which clearly falls under S. 47, C. P. Code. (*Grille and Niyogi, JJ.*) AZHAR HUSSAIN *v.* MOHAMMAD SHIBLI. I.L.R. (1939) Nag 548=187 I.C 791=12 R.N. 309=1939 N.L.J 270=A.I.R. 1939 Nag. 183.

——S. 47—*Question relating to execution—Decree-holder taking possession of property not covered by decree—Application by judgment-debtor for restoration of possession—If competent.*

If the decree-holder takes into possession under the decree some property in excess of what has been granted to him by the decree, it will be a matter relating to execution. Where, therefore, by the decree cultivating rights in *sir* lands were expressly excl[illegible] and yet in execution of his decree the decr[illegible]der has taken possession of the judgment-de[illegible]'s cultivating rights in *sir* lands, the judgment-debtor can apply under S. 47, C. P. Code, for restoration of possession of

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those rights. (*Puranik, J.*) ANANDRAO *v.* BENDU. I L.R. (1939) Nag. 521=173 I.C. 563= 10 R.N. 312=A.I R. 1938 Nag. 193

——S. 47—*Question relating to execution—Ex parte order of transfer of decree—Objection filed by judgment-debtor without filing appeal—Maintainability—Order on objection—Appeal.*

There is nothing in the law which precludes a judgment-debtor from filing an objection against an *ex parte* order of transfer of decree under S. 47, C. P. Code, although he did not file an appeal against that order in time. This objection is an objection relating to the execution of the decree as it is an objection relating to the first step in execution. An order overruling the objection is an order under S. 47 and is consequently appealable. (*Nasim Ali and Rau, JJ.*) GANESHDAS BADRINARAIN *v.* AMULUK CHAND OSWAL. 187 I.C. 895=12 R.C. 628=70 C.L.J. 438=A.I.R. 1940 Cal. 161.

——S. 47—*Question relating to execution—Movables—Release from attachment—Return of property—If can be decided by a separate suit.*

Where a car was attached in execution of a decree and subsequently as a result of an agreement between the parties, the car was released from attachment, the matter of the return of the car is patently a question relating to the execution of the decree arising between the decree-holder and the judgment-debtor and has therefore to be determined by the Court executing the decree and not by a separate suit. Further a Court attaching a car is bound to give the owner every aid in recovering it when the attachment has been removed. (*Norman, I.C.S.*) SURAJ MAL *v.* KAILASH. 1939 A.M.L.J. 25.

——S. 47—*Question relating to execution—Objection that scheme sanctioned under S. 153, Companies Act, is a bar to execution of decree.*

An objection by the judgment-debtor that a scheme sanctioned by the Court under S. 153 of the Companies Act has superseded the decree which has, therefore, become incapable of execution, relates to the execution or discharge of the decree and consequently comes within S. 47, C. P. Code. (*Nasim Ali and R.C. Mitter, JJ.*) MAHIGANJ LOAN OFFICE, LTD. *v.* BEHARI LAL CHAKI. 41 C.W.N. 406=65 C.L.J. 361=I.L.R. (1937) 1 Cal. 781=10 R.C. 239=171 I.C. 198=A.I.R. 1937 Cal. 211.

——S. 47—*Question relating to execution—Payment prior to decree—If can be enquired into in execution.*

Where a payment made prior to a decree, is pleaded in bar of execution, the executing Court cannot go into that question as it is not one relating to execution, discharge or satisfaction of a decree. In putting forward such a claim the judgment-debtor is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as modified by parties. (*Pollock, J.*) BHASKAR DATTATRAYA *v.* NILKANTH DATTATRAYA. 177 I.C. 673=11 R.N. 159=1938 N.L.J. 148=A.I.R. 1938 Nag. 265.

——Ss. 47 and 68—*Question relating to execution—Sale by Collector—Application to set aside —Forum.*

Where a sale held by the Collector, is sought to be declared void on the ground that it was held after an order staying proceedings by the Court

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had been passed, the Civil Court is the only authority to determine whether or not the execution sale was valid. The proceeding is one under S. 47 as it related to the execution of the decree. (*Niyogi, J.*) ZIBAL ISWARA *v.* MUKA. 1940 N.L. J. 473.

——S. 47—*Questions relating to execution—What constitute.*

Where on the one hand the decree-holder alleges that a particular property in the possession of a party to the decree can be proceeded against in execution, and the judgment-debtor or his legal representative, as the case may be, states that it cannot be, that precisely is the type of question that must be settled only under S. 47, C. P. Code. (*Stone, C.J. and Bose, J.*) SHALIGRAM *v.* DHURPATI. I.L.R. (1939) Nag. 165=182 I.C. 285=11 R.N. 6=1939 N.L.J. 82=A.I.R. 1939 Nag. 147.

Question relating to satisfaction.

——Ss 47 and 68—*Question relating to satisfaction—Decree transferred to Collector for execution—Decree-holder certifying payment through mistake or fraud of judgment-debtor—Collector entering satisfaction—Jurisdiction of trial Court.*

In a case where a decree was transferred to the Collector for execution under S. 68, C. P. Code, the decree-holder certifies payment by mistake or through fraud of the judgment-debtor, and the Collector orders the case to be filed as fully satisfied, the decree-holder should seek redress in the trial Court which has jurisdiction to deal with the matter under S. 47, C. P. Code, as it undoubtedly relates to the discharge or satisfaction of the decree. (*Nanavutty and Zia-ul-Hasan, JJ.*) GAJRAJ SINGH *v.* DEBI SINGH. 167 I.C. 401=9 R.O. 385=1937 O.L.R. 111=1937 O.W.N. 231=A.I.R. 1937 Oudh 298.

——S. 47—*Question relating to satisfaction of decree—Separate suit—Necessity.*

In execution of a decree the agent of the decree-holder along with the judgment-debtor applied to the Collector before whom the decree was sent for execution that the decree was fully satisfied and that execution be struck off. Shortly after this the decree-holder applied stating that his agent was cheated by the judgment-debtor and that the decree was not satisfied and prayed that the case be restored to the file. The Collector thinking that it required an investigation into question of law and facts referred it to the Civil Court.

Held, that the Collector had authority to refer to the Civil Courts under R. 13 (Revenue Book Circular, Vol. 2, S. 3, serial No. 8) of the rules under S. 70 (1), C. P. Code, and that such application raised a question as to the satisfaction of a decree and as such lay under S. 47, C. P. Code., and no separate suit was necessary. (*Pollock, J.*) BHAGIRATHIBAI *v.* RAUPRAO RANUJI. 173 I. C. 718=10 R.N. 323=A.I.R. 1938 Nag. 49.

Representative.

——S. 47—*'Representatives'—Meaning of.*

The word "representatives" in S. 47, C. P. Code, is not limited to legal representatives of a deceased person but includes persons on whom an interest has devolved by assignment, transfer or otherwise. (*Agarwala and Rowland, JJ.*) AJODHEYA LAL MAHASETH *v.* BRIJ KISHORE DASS. 186 I.C. 786=12 R.P. 529=6 B.R. 393.

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——S. 47—*"Representative"—Final decree in partition suit—Purchaser of share of defendant subsequent to final decree—If representative of judgment-debtor — Application for delivery in execution against purchaser—Competency.*

A final decree was passed in a suit for partition and subsequently the defendants executed a sale deed in favour of the respondent by which they transferred to the respondent their entire share in the partitioned properties. The plaintiff-decree-holder applied for delivery of possession in execution of the final decree and made the respondent a party to the application.

Held, that the respondent was a representative of the judgment-debtors under S. 47, C. P. Code, and was bound by the decree, and the application for delivery as against the respondent was therefore competent.

Held, further, that the decree-holder was not executing the decree against the respondent, but was merely asking for delivery of the portion of the joint property which had been awarded to him by the final decree, and that the executing Court was merely required to deliver possession of the property to the decree-holder as determined by the final decree. (*Courtney Terrell, C. J. and Manohar Lall, J.*) SARAN BIHARI SAHAY *v.* HAMED HOSSAIN. 178 I.C. 912=11 R.P. 319=5 B.R. 184=1938 P.W.N. 124=19 Pat.L.T. 820=A.I.R. 1938 Pat. 478.

Restitution.

——S. 47 — Restitution — Decree passed by Court *A*—Purchase of judgment-debtor's property by decree-holder in execution at *A*—Sale set aside—Decree transferred to Court at *B*—Appeal against order setting aside sale allowed—Meanwhile decree executed in Court at *B*—Application by judgment-debtor for restitution in Court *B*—If lies. *See* C. P. CODE, SS. 144, 147 AND 151. A.I.R. 1938 Cal. 554.

Scope.

——S. 47 and O. 21, R. 2—*Scope—Adjustment of decree by executory agreement—Validity—Agreement varying time or manner of enforcement of decree and agreement totally adjusting and immediately extinguishing decree—Distinction—Application to execute decree on ground of repudiation of agreement—Maintainbility.*

A decree can be adjusted or extinguished by an executory agreement if that is the intention of the parties. A compromise agreement varying the time or manner of enforcement of a decree may be a partial adjustment of a decree and can, therefore, be enforced in execution proceedings in satisfaction of that part of the decree which remains yet unsatisfied, but if the compromise agreement is a total adjustment of a decree, though that agreement may be the subject-matter of a separate suit, it cannot be enforced in execution of a decree which is totally adjusted or satisfied. Where it is found that there was a compromise agreement between the parties whereby the balance of the decretal amount due on the mortgage debt was to be paid off within twelve months, failing which one of the mortgaged properties was to become the p—perty of the plaintiff who was to release the other mortgaged property, and that it was the intention of the parties that this new contract was to extinguish the rights and liabilities under the decree, it must be

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held that there was an immediate extinguishment and total adjustment of the decree, and not an extinguishment dependent on some future contingency. An application for execution of the original decree on the basis of a repudiation of such an agreement has to be rejected by the executing Court which can order the adjustment to be recorded. (*Davis, J.C. and Lobo, J.*) LACHHUMAL *v.* ATTA MAHOMED KHAN. I.L.R. (1939) Kar. 725=187 I.C. 428=12 R.S. 239=A.I.R. 1939 Sind 343.

——S. 47—*Scope—Application to set aside decree on ground of death of plaintiff before hearing and decision in suit—Competency.*

The executing Court cannot set aside a decree on the ground that it is null and void; but it is open to that Court to see whether the decree under execution was or was not null and void. The question whether a decree is null and void on the ground of the death of a party is one which can be raised in execution, and it is open to a judgment-debtor to apply under S. 47, C. P. Code, to have an execution sale set aside on the ground that the plaintiff had died before the hearing and decision of the suit and therefore the decree passed therein is null and void. (*Dhavle and Rowland, JJ.*) RAM KHELAWAN *v.* RAMUDAR CHOUDHURY. 182 I.C. 208=5 B.R. 732=12 R.P. 9=A.I.R. 1939 Pat. 534.

——S. 47—Scope—Applications under Ss. 19 and 20, Madras Agriculturists' Relief Act—If fall under S. 47, C. P. Code. *See* MADRAS AGRICULTURISTS' RELIEF ACT, SS. 19 AND 20. 50 L.W. 851 =(1939) 2 M.L.J. 853.

——S. 47—*Scope — Decree for maintenance creating charge—Prior mortgagee of properties charged subsequently purchasing them—Decree, if can be executed against—S. 50 and O. 22, R. 10.*

S. 47, C.P. Code, does not confer upon a decree-holder any right to proceed in execution against persons who are not judgment-debtors themselves. Such a right is conferred by S. 50 which allows execution against legal representative under certain circumstances. A person who is a prior mortgagee of some of the properties on which a charge is created for maintenance under a decree and who subsequently purchases those properties outright is neither a judgment-debtor nor a legal representative of any judgment-debtor, when he has not been impleaded as a party to the suit in which the decree is passed. The decree-holder is not entitled to execute the decree as against him by making him a party to the execution proceedings, especially when there has been no application beforehand to make him a party judgment-debtor in the execution application.

Quaere.—Whether O. 22, R. 10, C. P. Code, applies to execution proceedings, and whether apart from that rule the Court has power to add a party for purposes of execution. (*Pandrang Row, J.*) SUBRAMANIA SASTRI *v.* SUBBALAKSHMAMMA. 166 I.C. 941=9 R.M. 413=44 L.W. 444=1936 M.W.N. 1028=A.I.R. 1936 Mad. 870 =71 M.L.J. 385.

——S. 47—*Scope of—Decree-holder auction-purchaser if a party till delivery of possession—Resistance by judgment-debtor—Question, if falls under S. 47 or O. 21, R. 103.*

C. P. CODE (1908), S. 47.

S. 47 should be construed liberally. A decree-holder purchasing the property sold in execution of his decree with the permission of the Court retains his character of a party to the suit and continues to be a party to the suit till the delivery of possession to him of the property purchased by him and if any question is raised by the judgment-debtor at the time of delivery of possession relating to the nature of the rights purchased and resistance to delivery of possession is offered, the question will be one relating to the execution, discharge and satisfaction of the decree, arising between the parties to the suit and falling under S. 47 and an appeal would lie from an order passed in relation to the question. The case is not governed by O. 21, R. 103. (*Stone, C.J. and Puranik, J.*) MST. SEMABI *v.* GANPATRAO YADORAO. I.L.R. (1938) Nag. 583=177 I.C. 643=11 R.N. 155=A.I.R. 1938 Nag. 212.

——S. 47—*Scope — Disputes between rival decree-holders regarding attachment or distribution of assets.*

Disputes between rival decree-holders seeking to attach the same property or claiming against each other in the distribution of the assets or disputes between joint decree-holders *inter se* are not within the purview of S. 47. (*King, C.J. and Nanavutty, J.*) MAHOMED SALAMATULLAH *v.* MURLIDHAR. 163 I.C. 175 (2)=8 R.O. 416=1936 O.W.N. 559=1936 O.L.R. 336=A.I.R. 1936 Oudh 277.

——S. 47—Scope—Duty of Court to work out right finally in execution. *See* T. P. ACT, SS. 60 AND 82. 21 Pat. L.T. 227.

——S. 47—*Scope of—Execution struck off, decree having been fully satisfied—Reopening—Permissibility.*

Where an execution case was struck off at the request of the decree-holder, as the decree was fully satisfied, and a subsequent application is made questioning the propriety of the satisfaction on a question whether the executing Court can reopen execution proceedings after they were struck off.

Held, that the wording of S. 47, C. P. Code, was comprehensive enough to include a case where an objection is raised to the order regarding satisfaction of decree and striking off the execution proceedings. An application made after decree is satisfied is as much an application under S. 47 as it is when made before it. (*Niyogi, J.*) KACHRU *v* LAXMAN. 11 R.N. 218=178 I.C. 308 =1938 N.L.J. 162=A.I.R. 1938 Nag. 363.

——S. 47—*Scope—Objection after confirmation of sale—Maintainability.*

An objection under S. 47, C. P. Code, to the effect that the sale should be set aside, cannot be taken after the confirmation of the sale. (*Addison and Ram Lall, JJ.*) WASTI RAM GURDITTA MAL *v.* GANESHI. I.L.R. (1939) Lah. 116=184 I.C. 846=12 R.L. 260=41 P.L.R. 175=A.I.R. 1939 Lah. 405.

——S. 47—*Scope—Objection to attachability of property by legal representatives of deceased debtor sued as such.*

An objection that a certain property is exempt from attachment under S. 60, C. P. Code (read with S. 35 of the Punjab Relief of Indebtedness Act) raised by the legal representative of a deceased debtor, against whom a decree was obtained as representing the estate of the de-

C. P. CODE (1908), S. 47.

ceased, falls under S. 47, C. P. Code, and the question can be raised before the Executing Court prior to the date of confirmation of the sale. (*Addison, J.*) INAYAT *v.* KARTAR SINGH. **41 P.L.R. 288=A.I.R. 1939 Lah. 256.**

—— **S. 47**—*Scope—Objection under S. 60 after sale and before confirmation—Maintainability.*

The Court has power to take notice of any objection under S. 47, relating to property until the sale of that property is confirmed, as it is not till then that the sale becomes absolute and title passes. It is the duty of the Court to follow the law as long as it can, *i.e.*, as long as it is not *functus officio*. Until the sale is confirmed and becomes absolute the Court is not *functus officio*. It is not necessary that the application under S. 47 must be made before the auction of the property has taken place. Until therefore the sale becomes absolute, it is the duty of the Court to decide an objection under S. 47 to the effect that the property is not liable to sale An objection under S. 60 (1) (*c*) falls under S. 47. Where such objection is raised before the sale is confirmed it is the duty of the Court to decide it and to see if it has jurisdiction to sell the property. If it has no jurisdiction, it is its duty to end the execution proceedings by refusing to confirm the sale which so far has not becomes absolute. (*Addison and Ram Lall, JJ.*) RAM CHANDAR *v.* SARUPA. **I L. R. (1939) Lah. 103=184 I.C 393=12 R.L. 218 =41 P.L R 436=A.I.R. 1939 Lah. 113.**

——**S. 47**—Scope—Order by appellate Court refusing to stay execution proceeding appeal from decree—If falls under—"Decree"—Appeal. *See* C. P. CODE, S. 2. **40 Bom L.R. 1198.**

——**S. 47**—Scope—Order under O. 21, R. 50 (2) and (3)—If falls under S. 47. *See* COURT-FEES ACT (AS AMENDED IN BOMBAY), SCH. I, ART. 1 AND SCH II, ART. 11 **A.I R. 1939 Sind 161 (F B.).**

——**S. 47**—Scope—Party to suit—Objection under O 21, R. 58—Dismissal as barred and as not maintainable—Subsequent suit—Bar—If can be treated as application under S. 47 and entertained—*Res judicata*. *See* C. P. CODE, S. 11. **19 Pat. L.T. 157.**

——**S. 47**—*Scope—Plea of debtor—Instalment mortgage bond—Default clause giving right to sue for whole amount on default in payment of two consecutive instalments—Default—Suit for overdue instalments only—Decree for sale—Execution—Plea that suit should have been for whole amount—Competency*

Where in a suit on a mortgage bond providing for payment in instalments with a default clause giving the mortgagee the right to sue for the whole amount in case of default in payment of two consecutive instalments, the mortgagee claims the amount of the defaulted instalments only and the Court passes a decree making the property liable to be sold for the amount due in respect of the two instalments alone, it is not open to the mortgagor to plead in execution, that the mortgagee ought to have sued for the entire amount due on the mortgage, and that the mortgagee not having done so, the sale cannot be held subject to the remaining instalments of the mortgage debt in respect of which no suit has been filed. The objection is really not one to the manner of execution so much as to the decree which has been obtained, and must therefore be raised in the suit itself and not in the process of execution. (*Wadsworth, J.*) SUBBAYYA *v.* VENKATASUBBAYYA. **50 L W. 775=1939 M.W.N. 1239=A.I.R. 1940 Mad. 296.**

——**S. 47**—*Scope—Question if attached property belongs to deceased debtor or his son—Decree obtained against latter as representing estate of deceased.*

The question whether an attached property belongs to the deceased debtor or his son against whom a decree has been obtained as representing the estate of the deceased, falls under S. 47, C. P. Code, and can be raised up to the date of the confirmation of the sale. (*Addison, J.*) INAYAT *v* KARTAR SINGH. **41 P.L.R. 288=A.I.R. 1939 Lah. 256.**

——**S. 47**—Scope—Question under S. 52—If one falling under—Separate suit—If lies. *See* C. P. CODE, O. 21, R. 63. **A.I.R. 1937 Rang. 531.**

——**S. 47**—Scope—Question whether decree is in contravention of Santhal Parganas Settlement Regulation and as such invalid—If can be raised in execution. *See* SANTHAL PARGANAS SETTLEMENT REGULATION, S. 6 (*b*). **1938 P.W.N. 617.**

——**S. 47**—Scope — Uncertified adjustment—Subsequent mortgage by judgment-debtor—Suit on mortgage—Plea of non-certification of adjustment in bar and consequent invalidity of mortgage—Power of Court to recognize adjustment. *See* C. P. CODE, O. 21, R. 2. **19 N.L.J. 175.**

——**S. 47 and U. P. Temporary Postponement of Execution of Decrees Act, S. 3**—*Appealability—Test—Order under S. 3 of the U. P. Act X of 1937—If appealable.*

The test to be applied in determining whether an order passed in execution is appealable or not is this—does the order conclusively determine the rights and liabilities of parties in a controversy which has arisen between them and which relates to the execution, discharge or satisfaction of a decree. Where an order is passed under S. 3 of the U. P. Temporary Postponement of Execution of Decrees Act staying the execution of a decree, the decree-holder has thereafter no right to apply to the Court for the execution of his decree. There is a conclusive determination of a question arising between the parties, and which related to the execution, discharge or satisfaction of a decree. The order therefore is appealable. (*Thom, C.J., Allsop and Ganga Nath, JJ.*) HAR NARAIN LAL *v.* MATHURA PRASAD. **1940 A.L.J. 377=1940 A.W R. (H.C.) 357=A.I.R. 1940 All. 326 (F.B.).**

——**S. 47 (1)**—*Applicability—Parties being both judgment-debtors and decree-holders.*

Sub-S. (1), S. 47, C. P. Code, should not be restricted to parties ranged against each other on opposite sides. It also applies where the parties are both judgment-debtors and decree-holders. Appeal lies from an order under the section and even second appeal lies where the parties are both decree-holders and judgment-debtors at the same time. (*Skemp, J.*) ISHAR DAS *v.* BHANA MAL. **174 I C. 862=10 R.L. 620=A.I.R. 1937 Lah. 592.**

——**S. 47 (2)**—*Applicability—Original Side of the High Court—Suit, if can be treated as application*

Quaere.—Whether S. 47 (2) applies to proceeding on the Original Side of the High Court and whether a Judge sitting on the original side is justified in treating an original suit as it were a

C. P. CODE (1908), S. 47.

proceeding in execution under S. 47 (2). (*Derbyshire, C.J and Costello, J.*) SARADA CHURN *v.* PRATIVA SUNDARI DEBI. **40 C.W.N. 428.**

——S. 47 (2)—*Application of—Partition proceedings—Award declaring rights of parties without giving possession—Decree on award—Application for execution claiming possession with alternative prayer to treat application as a suit.*

In a partition proceeding the award declared the rights of the parties without giving them possession. A decree was passed in accordance with the award. In a *bona fide* application for execution of the decree, the applicant claimed possession of the property and made an alternative prayer that in case possession might not be given, the application should be treated as a suit under S. 47 (2), C. P. Code, on payment of additional court-fee.

Held, that the question of payment of additional court-fee could arise only when the Court had decided that application for execution did not lie. After this had been done, the applicant could have been called upon to make good the deficiency in the court-fee. The case was a fit one in which the salutary provisions of S. 47 (2) should h ve been applied. (*Tek Chand and Abdul Rashid, JJ.*) SANT LAL *v.* RAMAYA RAM. **178 I C 547=11 R.L. 474=40 P.L.R. 619=A.I. R. 1938 Lah. 177.**

——S. 47 (2)—*Conversion—Appellate Court, if can exercise power.*

It is open to an appellate Court to exercise the power given under S. 47 (2), of treating an application for execution as a suit. (*Hamilton and Radhakrishna, JJ.*) SAT NARAIN *v.* CHANDRA MOHAN. **12 R.O. 162=184 I.C. 850=1939 O.L. R. 671=1939 O.W.N. 936=1939 A.W.R. (C.C.) 233=A.I.R. 1940 Oudh 27.**

——S. 47 (3) and O. 21, R. 16—*Appeal—Order dismissing application for execution by assignee.*

An appeal lies from order dismissing an application for execution of a decree by an assignee on the ground that the assignee has not acquired any title to the decree by the deed of assignment. The question before the Court is whether the assignee is a representative of the decree-holder and as such entitled to execute the decree, and it clearly comes under S. 47 (3), C. P Code. (*Nasim Ali and Mitter, JJ.*) SURJA NARAIN ROY *v.* KASHINATH ROY. **70 C.L.J. 124.**

——S. 47 (3)—*Bar of suit—Legal representative—Decision as to.*

According to the third clause of S, 47, C. P. Code, the question as to whether a person is or is not a representative of a party, shall, for the purposes of this section, be determined by the Court. The only meaning that can be attached to this is that the question whether a person is or is not a representative of a party to a decree must be decided by the executing Court and not in a separate suit and that once decided, it becomes final, so far as matters relating to the 'execution, discharge or satisfaction' of that decree is concerned. (*Stone, C.J. and Bose, J.*) SHALIGRAM *v.* DHURPATI **I.L.R. (1939) Nag. 165=1939 N. L.J. 82=182 I.C. 285=12 R.N. 6=A.I.R. 1939 Nag. 147.**

——S 48—Applicability—Application for personal decree. *See* C. P. CODE, O. 34, R. 6. **1937 A.M.L.J. 99.**

C. P. CODE (1908), S. 48.

——S. 48—*Applicability—Application to revive made after 12 years—If barred*

On an application for execution, certain property of the judgment-debtor was sold, but subsequently the sale was set aside under O. 21, R. 90, C. P. Code, 12 years after the date of decree. Then the decree-holder filed an execution application praying for re-sale of the property.

Held, that the subsequent application for re-sale of the property which was not declared to be incapable of being sold under the decree was an application for revival of the previous execution. S. 48 is applicable only to fresh application and not to revival applications. (*Mahomed Noor and Madan, JJ.*) SAUKHI SINGH *v.* THAKUR PRASAD SINHA. **166 I.C. 950 (1)=9 R.P. 369=3 B.R. 238 (2)=18 Pat.L.T. 90=A.I.R. 1937 Pat. 43.**

——S. 48—*Applicability—Application to revive a prior application—Compromise of execution proceedings—Failure to carry out terms—Application to continue execution—If one for revival.*

S. 48, C. P. Code, bars only a fresh application for execution and not an application by which a prior execution application is revived. Where certain execution proceedings were compromised and on the failure of the judgment-debtor to pay the instalments as agreed, the decree-holder applies for continuation of his prior execution application, the bar under S. 48 does not apply to it. It is clearly an application to revive an execution application which remained suspended for some time. (*Zia-ul-Hasan and Bennet, JJ.*) BHAGWAN DAS *v.* PYARE LAL. **1939 O W N. 947 =184 I.C. 845=1939 O A. 817=1939 O.L.R. 669 (2)=12 R.O. 159=1939 A.W.R. (C.C.) 240= A I.R. 1940 Oudh 26.**

——S. 48—*Applicability—Decree not capable of execution until the happening of a contingency—Execution—Starting point of limitation.*

S. 48, C. P Code, deals with decrees and the execution thereof and obviously must relate to a decree which is capable of execution. In the case of a decree which is not executable except on the happening of a particular contingency, the time under S. 48, C. P. Code, will not begin to run until that contingency occurs. (*Broomfield and Norman, JJ.*) RANGO RAMA CHARYA *v.* GOPAL NARAYAN. **I.L.R (1939) Bom. 87=183 I.C 45 =11 R B. 277=40 Bom.L.R. 1278=A.I.R. 1939 Bom. 75.**

——S. 48—*Applicability—Decree under Chota Nagpur Tenancy Act—Execution by Civil Court—Limitation applicable.*

Quaere.—Whether, even if a decree passed by the Deputy Commissioner under the Chota Nagpur Tenancy Act can be executed in a Civil Court by transfer, the more liberal provisions as to limitation obtaining therein will apply rather than those contained in the Tenancy Act. (*Macpherson and Fazl Ali, JJ.*) MAHARAJA PRATAP UDAINATH SAHI DEO *v.* BARAIK LAL SAHI. **15 Pat. 439=165 I.C. 959=9 R.P. 241=18 Pat. L.T. 36=3 B.R. 112=1936 P.W.N. 669=A.I R. 1936 Pat. 615.**

——S. 48—*Applicability — Execution—"Case struck off as transferred to Collector"—Sale of three out of six properties by Collector—Amount realised insufficient—Subsequent application for*

C. P. CODE (1908), S. 48.

issue of second C form for sale of remaining properties after three years—If fresh application.

A decree was transferred to Collector for realization of decretal amount mentioned in the C form, and the executing Court ordered the case to be struck off as transferred to Collector. The Collector sold three out of the six items of landed property attached, but found that the sum could not satisfy the decretal amount due to claim for rateable distribution. Therefore an application for issue of second C form was filed in the Civil Court for sale of remaining properties. It was contended that there being no execution application pending at that time, the application for issue of the second C form was a fresh application for execution and was therefore barred by time.

Held, that the order of the Civil Court striking off the case was clearly not an order dismissing the case. The case was bound to go back to the Civil Court when the decree was returned by the Collector to the Civil Court with the sale proceeds, and the order was merely one adjourning the proceeding until that date. A subsequent application for the sale of the remainder of the attached property was not a fresh application for execution, either in form or substance, but merely an application ancillary to the substantive application. The application therefore for the sending of a second form C to the Collector was not barred by limitation. (*Pollock, J.*) RUPCHAND BALMUKUND *v.* MOTILAL NATHUSA BANIA. **I. L.R. 1937 Nag 522=169 I.C. 974=10 R.N. 36= A.I.R. 1937 Nag. 92.**

——S. 48—*Applicability—"Fresh application"—Execution application presented within 12 years—Application beyond 12 years for amendment to include property or person not named or specified in original application—Maintainability—If "fresh" applications or only in continuation of original application.*

An application by which it is sought to proceed against properties other than those mentioned in the first execution application or against a person not impleaded or mentioned in the first execution application must be regarded as a fresh application within the meaning of S. 48, C. P. Code, and no such application can therefore be entertained after 12 years from the date of the decree. There is no difference in principle between an attempt to proceed at a late stage in the execution proceedings against properties which it was not sought to proceed against in the original application and an attempt at a late stage to proceed against a person other than the person against whom it was originally sought to execute the decree. Applications for amendment of an execution application, by which the decree-holder seeks to execute his decree against a person who was not named in the original application as presented to Court within the period of limitation or to execute his decree against property which was not specified in the application as originally presented, must be regarded as "fresh" applications and not as being in continuation of the application already on the file; and if made after the expiry of 12 years from the date of the decree, they must fail as time-barred and cannot be allowed. Where the date on which an application to amend an execution petition is presented is a date on which a fresh application to execute the decree would

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have been barred by S. 48, C. P. Code, then the Courts, will apply the same principles as they would in dealing with an application which is in form a fresh application. (*Agarwala and Rowland, JJ.*) RAM RAN BIJAY PRASAD SINGH *v.* KESHO PRASAD SINGH. **21 Pat.L.T. 407=A.I.R. 1940 Pat. 571.**

——S. 48—*Application for execution—If fresh or in continuance—Test.*

The question whether an application for execution is a fresh application or one in continuation of a former execution must be determined on the facts of a particular case, regard being had to the substance rather than to the form of the application. In order that an application may be treated as one to continue an earlier execution, the first condition necessary is that the earlier execution case must not have been finally disposed of. If it was so disposed of, no question of continuing it can arise. If, on the other hand, there was an interruption in the earlier proceeding by reason of which the Court, being unable to grant the appropriate relief, struck off the case, it cannot be said to have been finally disposed of. It will then be considered to be still pending, and may, if proper case is otherwise made out, be revived and continued. A second application will not, however, be considered to be a continuation of a former one if it is found to be different in its scope, or if the former execution is found to have been abandoned by the decree-holder or to have been dismissed through his default or laches. (*Rowland and Chatterji, JJ.*) HARIHAR GIR *v.* DULHIN. **186 I.C. 385=6 B.R. 359=12 R.P. 494=A.I.R. 1940 Pat. 432.**

——S. 48—Bar of limitation—Extent. *See* LIMITATION ACT, S. 15 AND C. P. CODE, S. 48. **A. I.R. 1939 All. 403 (F.B.).**

——S. 48—*Construction—"Decree sought to be executed"—Decree subsequently amended—Effect on starting point of 12 years.*

The period of 12 years under S. 48, C. P. Code, is final and cannot be extended by any amendment of the decree. Art. 182 (4) of the Limitation Act cannot be invoked to find the starting point for the 12 years period under S. 48, C. P. Code. The "decree sought to be executed" cannot be interpreted as meaning the decree as amended. (*James and Rowland, JJ.*) MT. DULHIN *v.* HARIHAR GIR. **18 Pat. 395=1939 P.W N. 611=185 I. C. 373 (2)=6 B.R. 172 (2)=20 Pat.L.T. 932= 12 R.P. 364=A.I.R. 1939 Pat. 607.**

——S. 48—*Construction and scope—"Decree"—If includes appellate decree dismissing appeal for want of prosecution—Starting point for execution—Date of decree of trial Court or appellate Court—Limitation Act, Art. 182 (2).*

The word "decree" in S 48, C. P. Code, is not limited to the decree of the Court of first instance when there has been an appeal from the decree of the first Court, and the appeal is dismissed for want of prosecution, the date of the decree of the appellate Court dismissing the appeal is the starting point of limitation as provided by Art. 182 (2) of the Limitation Act. S. 48 only provides the maximum period during which an application for execution can be taken out, but the time from which limitation would run is that which is provided by the Limitation Act. (*Wort, C.J. and Manohar Lall, J.*) RAM RAN BIJAYA PRASAD SINGH *v.* KESHO PRASAD SINGH. **175 I.C.**

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558=4 B.R 612=10 R.P. 638=19 Pat. L.T. 424 =1938 P.W.N. 449=A.I R 1938 Pat. 401.

——Ss. 48 and 51—*Decree-holder attaching agricultural land and applying for temporary alienation—Subsequent application for appointment of receiver—If one in continuation of previous application.*

The five separate methods for executing a decree, provided for by S. 51 are quite distinct from each other and *prima facie* an application asking that one method should be adopted is not in continuation of a previous application asking for some other methods. Where the character of the second application is different from that of the former the second application will be deemed to be a fresh application within the meaning of S. 48. Where therefore a person attaching certain agricultural land and applying for temporary alienation thereof, subsequently applies for the appointment of a receiver of the attached properties, the characters of the two applications are different in that they seek totally different remedies and as such the second application cannot be deemed to be in continuation of the previous one, and if made after the expiration of 12 years from date of decree is barred by time. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) BHAGWANDAS *v.* MAHOMED AKRAM. **166 I.C. 683=9 R. Pesh. 72=A.I.R. 1936 Pesh 209.**

——S. 48—*Execution against minor—Minor not described as such—Guardian* ad litem *appointed after period of limitation—Execution—If barred.*

In proceedings for execution of a decree against a minor, the fact that the minor is not described as a minor in the execution petition, and that the guardian *ad litem* is not appointed till after the expiry of the period of limitation will not make the application barred by limitation. Execution under the C. P. Code, is intended to be less, rather than more, formal than in a suit. (*Agarwala and Madan, JJ.*) GHASIRAM MARWARI *v.* SHIBA PRASAD SINGH. **16 Pat 316=18 Pat. L. T. 341=1937 P. W. N. 521=169 I C. 872=3 B R. 638=10 R.P. 55=A.I.R. 1937 Pat. 321.**

——S. 48—*Execution application dismissed in default—Second application—If revival of prior application.*

Where an application for execution is dismissed in default on account of non-appearance of decree-holder, a second application cannot be said to be in revival of the prior application and would be barred when it is presented more than three-years after the date of the last application. (*Din Mahomed, J.*) KUNDO MAL *v.* DAULAT RAM VIDYA PARKASH. **A.I.R. 1940 Lah. 75.**

——S. 48—Execution — Limitation—Revival. *See* LIMITATION ACT, ART. 182. **1937 A.M.L.J. 53.**

——S. 48—*'Fresh application'—Test—Substance and not form*

The question of the character of an application for the purposes of ascertaining whether it is a 'fresh application' or not for purpose of S. 48, C. P. Code has to be decided upon the circumstances of each case. The substance of the matter must prevail over the form of the application. (*Sir George Rankin.*) OUDH COMMERCIAL BANK, LTD. *v.* BIND BASNI KUER. **66 I A. 84=14 Luck. 192=I.L.R. (1939) Kar. 136 (P.C.)=11**

C. P. CODE (1908), S. 48.

R.P.C. 176=69 C.L.J. 317=50 L.W. 39=1939 A.L.J. 481=41 Bom.L.R. 708=1939 M.W.N. 692=1939 P.W.N 784=1939 O.W.N 313=43 C.W.N. 501=180 I.C. 378=1939 R D. 208=1939 O.L.R. 187=1939 O A. 352=5 B.R. 476=1939 A.W.R. (P.C.) 43=A.I.R. 1939 P.C. 80=(1939) 1 M.L.J. 652 (P.C.).

——S. 48—*Instalment decree for money—Default clause—Execution on default—Limitation.*

A decree which provides that the whole decree shall become payable in the event of a default in the payment of any instalment is not a decree for money payable on a certain date within the meaning of the first part of S. 48. Such a decree does not cease to be an instalment decree when a default takes place; therefore after 12 years from the date of the default only that instalment will become barred in respect of which the default is made under the latter portion of S. 48. 1928 All. 629, Rel. on. (*Tek Chand and Bhide, JJ.*) SHANKAR DAS *v.* DESA MAL MULA MAL. **162 I.C. 673 =8 R.L. 938=A.I.R. 1936 Lah. 159.**

——S. 48—*Judgment-debtor's property under the control of the Collector in execution of a decree for a certain period—Exclusion of period —Execution of another decree.*

Where the entire property of a judgment-debtor was under the control of the Collector for some period, commencing from a certain date, in execution of a decree and another decree was obtained against the same judgment-debtor subsequent to that date, and various applications for execution were put in, the period referred to above should be excluded from the period of twelve years prescribed by S. 48 of the C. P. Code. (*Thomas and Zia-ul-Hasan, JJ.*) MAHOMED AMIR MIRZA BEG *v.* BISHUNATH. **1937 O. W.N. 1116.**

——S. 48—Objection under—When to be taken —Plea of limitation after sale and before confirmation of sale—If can be considered—Refusal to confirm sale on ground of limitation—Power of Court. *See* C. P. CODE, O. 21, RR. 89, 90 AND 91. **1937 A.W.R. 1222.**

——S. 48—*Previous application for execution dismissed for default—Second application for same relief—If revival of prior application.*

Where a previous application for execution has been dismissed for default on the part of the decree-holder, a subsequent application cannot be said to be for revival of the old application merely because the relief prayed for is the same. (*Bhide, J.*) GOPAL DASS *v.* HAFIZABAD MUNICIPALITY. **186 I.C. 860=12 R.L. 428=A.I.R. 1940 Lah. 35.**

——S. 48—*Release of property from attachment on objection—Effect on execution proceedings—Application for reattachment after dismissal of objection—If a fresh application for execution.*

The right of a decree holder to obtain execution of the decree will not necessarily be defeated by objections raised by the judgment-debtor, or proceedings taken by the Court for which the decree-holder is not responsible, which prevent the completion of execution proceedings initiated by an application made within the period of limitation. Accordingly a temporary release of property from attachment because a person had raised the objection that he was not a partner of the judgment-debtor firm does not bring the proceedings taken upon an execution application

C. P. CODE (1908), S. 48.

to a final adjudication but postpones them. A request by the decree-holder for re-attachment of the property after the Court holds such a person to be a partner is, therefore, not a fresh application for execution. (*Coldstream, J.*) TULSI RAM *v.* E. D. SASOON & CO., LTD. **161 I.C. 960=8 R.L. 827=39 P.L.R. 8=A.I.R. 1936 Lah. 843.**

——**S. 48**—*Scope—Application for execution made within time-limit—Order on after period—If precluded.*

S. 48, C P. Code, only prohibits a Court from passing orders on an execution petition filed after the time-limit prescribed by the section, but it does not prohibit orders being passed on applications, like applications to issue notice to a judgment debtor, which are only ancillary to an execution petition which itself has been filed within the time limited. An application made within the 12 years' time does not preclude an order being made on it after that period. (*Cornish, J.*) VENKATRAJU *v* GANGARAJU. **166 I.C. 648=9 R.M. 385 (1)=1936 M.W.N. 1366=44 L.W. 805=A.I.R. 1937 Mad. 113=71 M.L.J. 808.**

——**S. 48**—*Scope—Execution application not properly filed within 12 years—Amendment—Powers of Court.*

Ordinarily an execution application which has not been properly made within the 12 years' period prescribed by S. 48, C. P. Code, should not be allowed to be amended so as to deprive the respondent of right of putting forward the plea of limitation. But the Court is not powerless to order amendment in special circumstances. The Court has a discretion in the matter. (*King and Krishnaswami Ayyangar, JJ.*) JHORAMA *v.* LATCHANNA DORA. **187 I.C. 334=12 R.M. 702=1939 M.W.N. 988=A.I.R. 1940 Mad. 19.**

——**S. 48**—*Scope—If affected by Art. 182, Limitation Act — Time-barred decree—Amendment under S. 152, C. P. Code—If furnishes starting point of limitation for execution*

Art. 182 of the Limitation Act leaves the provisions of S. 48, C. P. Code, untouched, and there can be no execution of a decree governed by S. 48, C. P. Code, when twelve years have passed from the date of the decree, amendment or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an accidental slip or omission under S. 152, C. P. Code, but that does not affect the law of limitation. A correction made in a time-barred decree leaves the decree still time-barred. (*Leach, C. J., Krishnaswami Aiyangar and Somayya, JJ.*) RAMACHANDRA RAO *v* PARASURAMAYYA. **I.L.R. (1940) Mad. 349=187 I C. 176=12 R.M. 688=1940 M.W N. 181=51 L.W. 173=A.I.R. 1940 Mad. 127=(1940) 1 M.L.J. 235 (F.B.).**

——**S. 48**—Scope—If controlled by S. 15, Limitation Act. *See* LIMITATION ACT, S. 15. **40 Bom. L.R. 1278.**

——**S. 48**—Scope—Period of 12 years—If affected or controlled by S. 78 (2), Provincial Insolvency Act. *See* PROVINCIAL INSOLVENCY ACT, S. 78 (2). **48 L.W. 881.**

——**S. 48 and Limitation Act, S. 6**—*Scope—Period of 12 years—If extended by S. 6 of Limitation Act.*

C. P. CODE (1908), S. 48.

S. 6 of the Limitation Act only purports to control the periods prescribed by the 1st schedule to Limitation Act. The period of limitation for execution application is provided by Art. 182, Limitation Act, but it does not provide the limit or the number of such applications which could be made. S. 48, C. P. Code, does that by prohibiting any application, after the first, which is made more than 12 years after the date of the decree. S. 48, C. P. Code, therefore clearly controls Art. 182. If the period of 12 years fixed by S. 48 is allowed to be enlarged by S. 6 of the Limitation Act it would amount to S. 6 of Limitation Act controlling periods of limitation prescribed by other enactments which it does not purport to do. (*Stone, C.J. and Bose, J.*) YADORAO *v.* GOBINDRAO. **I.L.R (1939) Nag. 559=184 I.C. 72=12 R.N. 91=1939 N.L.J. 387=A.I.R. 1939 Nag. 245.**

——**S. 48 (1) (b)**—*Limitation—Decree amount payable in instalments under compromise in execution proceedings—Starting point.*

Where the decree amount is payable in yearly instalments by virtue of a compromise entered into between the parties in execution proceedings, the starting point for the period of 12 years fixed by S. 48, C. P. Code, is not the date of the decree but the date of default in the payment of the instalments. (*Thom, C.J. and Ganga Nath, J.*) CHHATRAPATI PRATAP BAHADUR *v.* HARI RAM. **1940 A.W R. (H.C.) 396=1940 A.L.J. 439=A.I.R. 1940 All. 423.**

——**S. 48 (1) (b)**—*"Subsequent order"—Decree modified by compromise between parties—Order of competent Court in terms of compromise—If a subsequent order—Limitation for execution—Starting point.*

Where the parties to a decree enter into a compromise by which it is agreed that the decretal amount would be payable by instalments and on default to be realised by execution, and a competent Court passes an order in terms of the compromise, the order is in the nature of a subsequent order under S. 48 (1) (*b*), C. P. Code, and the limitation for execution runs against the decree-holder from the date of that order, and not from the date of the original decree. (*S. K. Ghose and Patterson, JJ.*) KARTIC CHANDRA MUKHERJEE *v.* BATAKRISHNA ROY. **I.L.R (1937) 2 Cal. 373=176 I.C. 212=11 R.C. 49=65 C.L.J. 403=A.I.R. 1938 Cal. 25.**

——**S. 48 (1) (b)**—*"Subsequent order"—Meaning of.*

The words "subsequent order" in S. 48 (1) (*b*) show that the order must be subsequent to the decree. Hence the order which the section contemplates must be passed not in the suit but in execution. A mere variation as to the time or mode of paying the decretal debt cannot be considered a substitution of one decree for another or any material alteration in the decree which the Civil Procedure Code forbids. But where the parties, keeping the decretal liability unaltered, enter into a compromise by which the method of satisfying the decree is changed and the executing Court by its order records the compromise and directs the parties to act upon it, the order must be deemed to be a "subsequent order to pay" within the meaning of S. 48 (1) (*b*) and a fresh period of 12 years runs from the date of such order. (*Davis, J.C. and Tyabji, J.*) KAZI ALI

C. P. CODE (1908), S. 48.

MAHOMED *v.* GANGARAM CHATOMAL. **I.L.R. (1939) Kar. 502=181 I.C. 264=11 R.S. 212=A.I.R. 1939 Sind 93.**

——**S. 48 (1) (b)**—*"Subsequent order"—Order of executing Court regarding realization of decretal sum by instalments—Whether amounts to.*

An order passed by an executing Court regarding the realization of a decretal sum by means of instalments does not amount to a "subsequent order" within the meaning of S. 48 (1) (*b*), C P, Code. The subsequent order must be an order made by the Court which passed the decree and not an order made in the course of execution. 54 All. 573 (F. B), Foll. (*King, C. J.*) NIHAL HUSAIN *v.* SYED AHMED. **12 Luck. 244=162 I C. 715=8 R.O. 400=1936 O.W.N. 517=1936 O.L. R. 293=A.I.R. 1936 Oudh 266.**

——**S. 48 (2) (a)**—*'Fraud'—Fraudulent transfer of property—If amounts to.*

A fraudulent transfer of property by the judgment-debtor amounts to fraud within the meaning of S. 48 (2) (*a*), C P. Code (*Din Mohammad, J.*) ISMAIL *v.* ANJUMAN IMDAD QARZA, MAUZA BANGA. **188 I.C. 891=42 P.L.R. 10=A. I.R. 1940 Lah. 178.**

——**S. 48 (2) (a)**—*'Fraud'—Raising of objections so as to prolong execution proceedings beyond limitation.*

The mere raising of objections so as to prolong execution proceedings beyond the period of limitation cannot, in all cases, be regarded as fraud for the purposes of S. 48, C P. Code. If the objections are patently frivolous, they can ordinarily and ought to be disposed of speedily by the Court, if the decree-holders are diligent. An objection by a person to the attachment on the ground that the Executing Court had no jurisdiction to adjudicate on the question whether he was or was not a partner of the judgment-debtor firm cannot be regarded as dishonest. But where his objection that he was not a partner of the judgment-debtor firm is false and was adopted as a trick by which the decree-holders were forced by no fault of their own to delay execution proceedings until the period of 12 years had expired, his conduct in raising the plea is fraudulent and has the effect of enlarging the period of limitation. (*Coldstream, J.*) TULSI RAM *v.* E. D. SASSOON & CO., LTD. **161 I C. 960=8 R.L. 827=39 P.L R. 8=A.I R. 1936 Lah. 843.**

——**S. 49 and O 21, R. 18**—*Applicability and scope—Execution by assignee—Claim to set-off—Principles.*

There is no inconsistency between S. 49 and O. 21, R. 18, C P. Code. If there be any, S. 49 will prevail. *G. P.* obtained a money decree against *B.N.* and *M.P. B N.* obtained a decree against *D* and three others. *G.P.* subsequently assigned his rights under the decree obtained by him to *D. B.N.* afterwards assigned his decree to *S. S.* applied for execution of the decree against *D.* and others. *D.* then claimed a set-off of the decretal amount due under the decree assigned to him by *G.P.* against the decretal amount claimed by *S.*

Held, that on a correct application of O. 21, R. 18 and S. 49, C. P. Code, the rights of the parties were adjustable by a set-off. (*Niamatulla and Allsop, JJ.*) BRIJ MOHAN LAL *v.* MANMOHAN DAS. **1937 A.L.J. 258=1937 A.W.R. 191=169 I.C. 385=I.L.R. 1937 All. 553=1937 A.L.R. 521=10 R.A. 11=A.I.R. 1937 All. 351.**

C. P. CODE (1908), S. 50.

——**S. 49**—*Decree for costs in favour of A against B—In another suit B obtaining decree for rent against A—During pendency of latter suit A assigning his decree to C who had no notice of pending rent suit—B, if entitled to set-off decree for rent against decree for costs.*

A held a decree for costs against *B*. Subsequently in another suit *B* obtained a decree for rent against *A*. During pendency of the latter suit *A* transferred his decree to *C* who had no notice of the pending rent suit. When *C* applied for execution of the decree for costs, *B* claimed to set-off against it the decree for rent.

Held, that inasmuch as there was debt in the form of rent and as a suit was pending to enforce payment, there was an equity and *C* took the transfer subject to it. The question of want of notice on part of *C* was immaterial. *B* was therefore entitled under S. 49, C. P. Code, to claim set-off. (*Roberts, C.J. and Leach, J.*) DAW AYE *v.* U AYE MAUNG. **172 I.C. 241=10 R R. 236=A.I.R. 1937 Rang. 316.**

——**S. 49 and O. 21, R 29**—*Scope—Equitable set-off—Assignee of decree—If takes subject to rights of judgment-debtor to get stay and set-off.*

An equitable set-off can be and has been recognised in India; in fact the right of a judgment-debtor to ask for a stay under O. 21, R. 29, C. P. Code, is an equity which binds the assignee of the decree; and when both decrees arose out of one transaction no Court of equity can reject the request of the judgment debtor. The assignee can only take subject to the judgment-debtor's equitable right to have execution stayed until his suit shall have been decided and therefore to set-off his decree which may be passed in his suit. (*Barlee and Macklin, JJ.*) GURUSHANTAPPA *v.* NAGAPPA. **I L.R. (1938) Bom. 263=175 I C. 427=10 R.B. 560=40 Bom.L R. 188=A.I. R. 1938 Bom. 253.**

——**S. 50**—*Judgment-debtor dying during execution—Executing Court—Power to proceed with execution against legal representatives—Fresh order from Court passing decree—Necessity for.*

If a judgment-debtor dies during execution, it is irregular for the Court which has not passed the decree to proceed with the execution against the representatives of the deceased judgment-debtor, without fresh orders from the Court which passed the decree; under S. 50, the application for such execution is to be made to the Court which passed the decree. (*Mohammad Noor and Madan, JJ.*) OFFICIAL TRUSTEE OF BENGAL *v.* BASDEO BHAGAT. **168 I.C. 346=3 B.R. 421=9 R.P. 481=A.I.R. 1937 Pat. 239.**

——**S. 50**—*Legal representative—Alienee from legal representative—Liability to be proceeded against in execution.*

A mere alienee from a legal representative is not a legal representative for purposes of execution, though such alienee may have intermeddled with the property. The question of liability of property transferred to a stranger cannot be decided in execution. (*Horwill, J.*) THIAGARAJA IYER *v.* NARAYANASWAMI PILLAI. **182 I.C. 333=12 R.M. 58=47 L.W. 782=1938 M.W N. 518=A.I.R. 1938 Mad. 684=(1938) 1 M.L.J. 867.**

——**S. 50**—"Legal representative"— Decree against Hindu father—Execution against joint

C. P. CODE (1908), S. 50.

family property in the hands of sons—Attachment of joint family property—Subsequent insolvency and death of father—Sons—If legal representatives. *See* C. P. CODE, Ss. 2 (11), 50 AND 53 AND O 21, R. 22. **38 Bom L R. 977.**

——S. 50—*Legal representative—Extent of liability—Security deposit of deceased judgment-debtor in hands of his employer—If can be attached.*

The provision of the Code are to be strictly observed and there is no provision under S. 50, C. P. Code, for attachment in execution against a legal representative, of either a debt due to him or of movable property that has not yet come into his possession. The security deposit therefore of a deceased judgment-debtor in deposit with his employer cannot be attached by a prohibitory order under O. 21, R. 48 of the Code in execution against the legal representative of the judgment-debtor (*Mosely, J.*) LEONG AH CHOY *v.* T. D. FINDLAY & SONS. **170 I.C. 766=10 R.R. 106=A.I.R. 1937 Rang. 274.**

——S. 50—*Legal representative—Possession of assets, if necessary.*

Legal representative merely means the person who in law represents the estate of the deceased, and it is immaterial whether such a person has actually obtained possession of the estate or even whether the deceased left any estate. The extent of liability has to be decided in execution. (*D. R. Norman.*) SRI LAL *v.* MST. JHAMKU. **1939 A. M L J. 69.**

——S. 50—Legal representative—Prior mortgagee of property charged under maintenance decree—Mortgagee purchasing such property subsequently—If can be proceeded against in execution. *See* C. P. CODE, S. 47. **71 M L J. 385.**

——S. 50 and O. 22, Rr. 11 and 12—*Relative scope of—S. 50, if applies to appeals from execution proceedings—O. 22, R. 11, if applies—And if controlled by R. 12.*

It is because of the special provision in S. 50, C. P. Code, that R. 12 of O. 22 excludes the execution proceedings from the operation of Rr. 3, 4 and 8 of that order. R. 12 of O. 22 must therefore be construed as referring only to the proceedings in the executing Court and not to those in the appellate Court which hears appeals from execution proceedings. S. 50, C. P. Code, does not apply to appeals arising from execution proceedings but only to those in the original Court. It is not correct to say that R. 11 of O 22 is controlled by R. 12 of the same order. There is no reason why R. 11 of O. 22 should not apply to an appeal under S. 47, C. P. Code, as the C. P. Code does not make a distinction between appeals arising from execution proceedings and those preferred against decrees. (*Stone, C. J. and Niyogi, J.*) MADHORAO *v.* BALIRAM. **I.L R. (1939) Nag. 119=178 I.C. 568=11 R N. 237=1938 N.L. J. 312=A I.R 1938 Nag 502.**

——S. 50 and O 21. R. 22—*Scope—Order for sale—Subsequent death of judgment-debter—Sale without impleading legal representatives—If void.*

Where, after the attachment of the immovable properties of the judgment-debtor in execution of a decree against him, and after the Court has passed an order for sale, the judgment-debtor dies and the sale is held without impleading the judgment debtor's legal representatives, the sale is null and void and not merely irregular. (*Cornish, Varadachariar, Wadsworth, Venkataramana Rao and Lakshmana Rao, JJ.*) KANCHAMALAI PATHAR *v.* SHAHAJI RAJA SAHIB. **59 Mad. 461 =162 I.C. 156=8 R.M. 946=43 L.W. 238=1936 M.W.N. 60=A.I.R. 1936 Mad. 205=70 M.L.J. 162 (F.B.).**

C. P. CODE (1908), S. 51.

——Ss. 50, 52 and 53—*Scope and effect of—Hindu father—Death undivided from son—Administration suit by creditor—Maintainability in the absence of separate property left by father,*

A creditor is not entitled to bring a suit for the administration of the estate of a deceased Hindu who was joint with his son and died leaving no property apart from his interest in the family estate. There is nothing in Ss. 50, 52 and 53, C.P. Code, which would sustain an administration suit where the Hindu father dies leaving no property of his own. (*Leach, C.J. and Somayya, J.*) MEENAKSHI ACHI *v.* RAMASWAMI CHETTIAR **I.L.R. (1939) Mad. 820=184 I.C. 183=12 R.M. 420= 49 L.W 701=1939 M.W.N. 493=A.I.R. 1939 Mad. 552=(1939) 2 M.L.J. 653.**

——S. 50—*Suit against wrong legal representative—Decree—Binding nature of—Duty of plaintiff in such cases.*

In a suit against the estate of a deceased person, represented by his legal representative, the plaintiff must be diligent and careful to implead all the ordinary legal representatives under the law applicable, if he wishes to bind them by any decree that might be passed. Nevertheless, if a plaintiff has impleaded the ordinary legal representative, and owing to ignorance of facts or circumstances by reason of which it turns out that the proper legal representatives were in fact others than those ordinarily impleaded and there is no fraud or collusion, the estate will still be bound. (*Tek Chand, J.*) MT. HARBANSO *v.* MUNSHI RAM. **40 P.L.R. 25.**

——S. 50—*Transfer of decree—Application to add legal representative—To which Court to be made—Matter one of procedure and not jurisdiction.*

The addition of the legal representative after a decree is transferred for execution, is a matter of procedure not of jurisdiction. The jurisdiction of the executing Court over the subject-matter continues as before, but it has to be exercised according to certain prescribed procedure. If there was a non-compliance with such procedure the defect might be waived. (*Baguley and Mosely, JJ.*) K. K. K. M. CHETTYAR *v.* SELLAMI ACHI. **1938 Rang.L.R. 355=179 I.C. 374=11 R.R. 313=A.I.R. 1938 Rang. 385.**

——S. 51—Applicability—Scheme decree directing trustee to pay certain amounts—Execution—Appointment of receiver to collect—Legality. *See* C. P. CODE, S. 92. **71 M.L.J. 87.**

——S. 51—*Appointment of receiver—Lands exempt from attachment—Ajmer Courts Regulation, S. 24.*

Execution by appointment of a receiver under S. 51, C. P. Code, is a distinct and different mode of execution from that of attachment and sale. In the case of lands exempt from attachment under S. 24 of Ajmer Courts Regulation, if they were leased to lessees, a receiver could be appointed to recover the rents. But if the lands were being cultivated by the judgment-debtor personally an appointment of a receiver would

C. P. CODE (1908), S. 51.

probably be inappropriate. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L. 89.**

——**S. 51 and O. 21, R. 11 and O. 40, R. 1**—*Execution by appointment of receiver—Power of Court—Considerations.*

Appointment of a receiver for the purpose of execution of a decree has been held to be equitable execution. It is not always necessary that legal execution should be exhausted before equitable execution by this mode is resorted to. Where the decree debt would not only be satisfied as in any other way and at the same time the judgment-debtor will be saved from great prospective loss, a Court may appoint a receiver. It can also be made where the interests of both the judgment-debtor and decree-holder can be safeguarded, or where that is the only way in which the decree-holder can hope to realise his decree or any part of it. (*Thomas, C.J. and Yorke, J.*) JAI DAYAL *v.* JAGDEO NARAIN. **14 Luck. 538=180 I.C. 29=11 R O. 226=1939 O.A. 248=1939 O L.R. 118=1939 O.W.N. 206=A.I.R. 1939 Oudh 116.**

——**S. 51**—Indirect execution — Receiver—Availability. *See* C P. CODE, S. 60 (*n*). **A.I.R. 1937 Mad. 864.**

——**S. 51**—*Power of temporary alienation.*

The power to grant a temporary alienation under S. 51 is derived from the power of sale and if the power of sale is taken away by the legislature all powers derived therefrom are similarly taken away. (*Middleton, J. C. and Almond, A. J. C.*) JETHA NAND *v.* KHUDA BAKHSH. **161 I.C. 628=8 R. Pesh. 176=A.I.R. 1936 Pesh. 90.**

——**S. 51**—*Scope—Appointment of receiver in respect of certain property—Right of decree-holder to proceed against other properties also.*

There is no reason why the decree-holder should not take out any or all the forms of execution which the Code of Civil Procedure entitles him to pursue against various items of the judgment-debtor's property. Consequently, where by a consent order a receiver is appointed of certain properties, treating the appointment of receiver as a form of equitable execution, there is no reason why the decree-holder should not proceed or be entitled to proceed against properties which are not the subject-matter of the order appointing receiver. (*Wort and Varma, JJ.*) SHYAM SUNDER SINGH *v.* DHIRENDRA NATH. **17 Pat. 248=174 I.C. 34=4 B.R. 377=19 Pat.L.T. 359=10 R.P. 473=A.I.R. 1938 Pat. 130.**

——**S. 51**—*Scope—Right of decree-holder to choose mode of execution—Discretion of Court to interfere.*

Section 51, C. P. Code, lays down the mode in which a Court may execute a decree. It does not however give the Court any discretion to choose one particular mode of execution as against another. The Court has therefore no jurisdiction to direct a decree-holder to proceed against the property of the judgment-debtor, when he desires to proceed against the person. A.I.R. 1926 Lah. 110; A.I.R. 1934 Nag. 140, Foll.; 48 M. 494 and 11 I. C. 848, Dist.; 29 I.C. 152, Diss. (*Middleton, J. C. and Almond, A. J. C.*) KRIPAL SINGH *v.* SYED ASHRAF ALI SHAH. **160 I.C. 812==8 R. Pesh. 130=A.I.R 1936 Pesh. 46.**

C. P. CODE (1908), S. 51.

——**S. 51 and O. 21, Rr. 30 and 64**—Scope—Sale without attachment—If nullity. *See* EXECUTION—SALE **41 Bom.L.R. 463.**

——**S. 51 (d) and O. 40, R. 1**—*Appointment of receiver—Discretion of Court.*

No doubt S. 51, C. P. Code, prescribes the appointment of a receiver as one of the modes in which a decree can be executed but the appointment of a receiver in all cases is subject to the provisions of O. 40, R 1 of the Code and no receiver can be appointed in any case unless it appears to the Court that it is just and convenient that a receiver should be appointed. (*Nanavutty and Zia-ul-Hasan, JJ.*) MANRAJ KUNWAR *v.* S. P SHUKLA. **167 I.C. 302=9 R O 381=1937 O. W.N. 243=1937 O.L.R. 105=A.I.R. 1937 Oudh 232.**

——**S. 51 (d) and O. 40, R. 1**—*Execution—Receiver of properties outside jurisdiction—Power of Court to appoint.*

The Court has no doubt jurisdiction to appoint a receiver of immovable properties in execution of a decree although such properties be situate outside the jurisdiction of the Court. But if the judgment-debtor objects to the appointment of a receiver in execution and if there is a reasonable chance of the decree-holder being able to satisfy his decree by attachment and sale, he should be relegated to that remedy. In a case, however, where the properties of the judgment-debtor prove to be saleable, the Court is entitled to appoint a receiver in execution of properties outside the jurisdiction notwithstanding the judgment-debtor's objection thereto. (*Panckridge, J.*) JAWLA PROSAD BHARTIA *v.* HANUMANBUX PODDAR. **40 C.W.N. 1065.**

——**S. 51 (d)**—*Execution—Service inam lands—Judgment-debtor—Execution against—Receiver to collect income—Power of Court to appoint.*

Though inam fields granted to a person partly for maintenance and partly for remuneration of services rendered as kazi cannot be alienated or attached and sold, a receiver can be appointed in execution of a decree against such person to realize the income from such fields to satisfy the decree-holder's claim. But it is open to the judgment debtor to apply for an allowance to maintain his family. (*Pollock, J.*) SYED WAZIRUDDIN *v.* SYED BASIRUDDIN. **I L.R. (1937) Nag. 534=167 I. C. 878=9 R. N. 229=A.I.R. 1936 Nag. 288.**

——**S. 51 (d) and O. 40, R. 1**—*Judgment-debtor possessing share in firm—Receiver, if can be appointed.*

In execution of a decree against a person possessing a share in a firm it is doubtful if a receiver under S. 51 can be appointed because a receiver cannot be appointed for the custody of the property which the judgment-debtor himself cannot take possession of. In order to ascertain the approximate value of the shares of the judgment-debtor, it may be open to the Judge to appoint a Commissioner to make an inventory of the assets of the firm and its liabilities. (*Jai Lal, J.*) MOHAN LAL LAKSHMI DAS *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **174 I.C. 692=10 R.L. 583=A.I.R. 1937 Lah. 313.**

——**S. 51 (d)**—*Property in foreign territory—Power of Court to appoint receiver.*

The Court can appoint receiver over property out of its jurisdiction. This power is based upon

C. P. CODE (1908), S. 51.

the doctrine that the Court acts *in personam*. The Court does not and cannot attempt by its order to put its own officer in possession of property in foreign territory, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign territory. (*Bhide, J.*) SUNDER SINGH GIYANI *v.* GANGA RAM. I.L.R. (1938) Lah. 305=175 I.C. 734=11 R.L. 34=39 P.L.R. 415=A.I.R. 1938 Lah. 93.

——S. 51 (d)—Scope—Wakf property—Receiver in execution—Power of Court to appoint. *See* C. P. CODE, O. 40, R. 1. **1937 A.W.R. 903.**

——Ss. 51 (e) and 72—*Execution of decree—Powers of Civil Court—Sale of land prohibited by S. 16 of the Bundelkhand Land Alienation Act—If could be leased.*

Where the lands of the judgment-debtor were prohibited from being sold by S 16 of the Bundelkhand Land Alienation Act on a question whether a Civil Court can in execution of a simple money decree, lease such property.

Held, that an executing Court is bound by the methods laid down in S. 51, C. P. Code, and those methods were subject to conditions and limitations prescribed by the rules under the Code and by the Code itself. S. 51 does not authorise a Civil Court to grant a lease. Sub-S. (*c*) of S. 51 does not mean anything else than a reference to the particular method of execution which a particular relief granted requires. S. 72 could not apply as it comes into opeation only after an order for sale has been made and no notification has been made under S. 68 It applies only to property which could be sold in execution of a decree. (*Bennet, Iqbal Ahmad and Allsop, JJ.*) BHAGWATI SINGH *v.* KASHI NARAIN. **I.L.R. (1938) All. 528=175 I. C. 238=10 R. A. 658=1938 A. L. R. 387=1938 A. W. R. (H. C.) 310=1938 A.L.J. 444=A.I.R. 1938 All. 290 (F.B.).**

——S. 51 (e)—*Scope—Lease in satisfaction of decree—Power of Court to grant in execution.*

Quaere.—Whether the Civil Court has a general right to grant a remedy in execution by itself giving a lease of the property of the judgment-debtor for the purpose of satisfying the decree. But the Code does not make any provision for such a procedure. (*Sulaiman, C.J. and Bennet, J.*) BASORE SINGH *v.* SANT KUMAR. **10 R.A. 338=171 I.C. 903=1937 R.D. 422=1937 A.L.R. 905=1937 A.W.R. 686=1937 A.L.J. 801=A.I.R. 1937 All. 699.**

——S. 51, Proviso—*Capacity of judgment-debtor to pay—Determination of— Judgment-debtor an agriculturist—His agricultural lands and residential houses—If can be taken into account.*

Under the newly introduced proviso to S. 51, C. P. Code, in determining the question of the capacity of a judgment-debtor who is an agriculturist to pay the amount of a decree, his agricultural lands and his residential houses cannot be taken into account. (*Din Mahomed, J.*) ABDUL HAMID *v.* AMRIT LAL. **183 I.C. 133=12 R.L. 100=41 P.L.R. 101=A.I.R. 1939 Lah. 299.**

——S. 51, Proviso, Explanation—*Applicability—Judgment-debtor transferring after suit land not liable to attachment with dishonest intention—Forfeiture of protection.*

C. P. CODE (1908), S. 51.

The explanation applies only to Cl. (*b*) of the proviso. By virtue of the explanation, property which could not be attached or sold was not to be considered only when deciding as to whether the judgment-debtor had any means to pay the money decreed. Obviously, the explanation has nothing to do with Cl. (*a*) and therefore it cannot be said that a gift by the judgment-debtor after the institution of the suit of his land not liable to attachment and sale does not make him forfeit the protection afforded to him by the amendment of S. 51 by Act XXI of 1936 even if the gift was made with a dishonest intention. (*Mir Ahmad, J.*) ATTAR CHAND *v.* ABDUL MAJID. **189 I.C. 371=A.I.R 1940 Pesh. 33.**

——S. 51, Proviso (a) (ii)—*Fraudulent concealment or transfer of property—What amounts to.*

Where a defendant against whom a decree for price of plaintiff's car has been passed makes a hypothecation of the plaintiff's car along with other cars, that have been left with him for sale or for custody, to a third party, and he then brings a suit against the third party and abandons it, and the transaction of hypothecation appears to be fictitious, his conduct amounts to making a fraudulent concealment or transfer of his properties and comes within proviso (*a*) (*ii*) to S. 51 as amended by S. 2, C.P. Code (Amendment) Act (XXI of 1936). (*Ameer Ali, J.*) ELLIS STELLA BEAUMONT *v.* ENGLISH MOTOR CAR CO. **177 I C. 1008=11 R.C. 312=A.I.R. 1938 Cal. 448 (2).**

——S. 51, Proviso (b)—*Burden of proof of means to pay debt.*

The onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the debt within the meaning of sub-Cl. (*b*) of the Proviso to S. 51. (*Wort, Ag.C.J.*) JUGAL KISHORE *v.* PAHLAD RAI. **5 B.R. 16=11 R. P. 182 (1)=177 I C. 797=A.I.R. 1939 Pat. 22.**

——S. 51, Proviso, Cl. (b)—*Judgment-debtor after decree selling his property but neglecting to pay decretal amount—If liable to be detained in civil prison.*

Where a judgment-debtor after the date of the decree sells his property, receives the consideration but neglects to pay the decretal amount or a substantial part thereof, Cl. (*b*) of the Proviso to S. 51 comes into play and he is liable to be detained in civil prison. (*Mir Ahmad, J.*) SURJAN SINGH *v.* RAM SINGH. **174 I.C. 629=10 R. Pesh. 70=A.I.R. 1938 Pesh. 17.**

——S. 51, Proviso, Cl. (b)—*Means of judgment-debtor—Maintenance expenses of debtor—If must be taken into account.*

In the calculation of the means of the judgment-debtor for the purpose of S. 51, proviso, cl (*b*), C.P. Code, the necessary expenses of maintaining the life of the debtor and of his dependants must be taken into account and deducted from his income. (*Mitter and Khundkar, JJ.*) MAHOMED NABIBAKHSH *v.* ABDUL BASED. **43 C. W.N. 427.**

——S. 51, Proviso, Cl. (b)—*Means of judgment-debtor—Property under attachment in execution of another decree—If can be taken into account.*

In the calculation of the means of the judgment-debtor for the purpose of Cl. (*b*) of the proviso to S. 51, C. P. Code, the value of the property under attachment in execution of another

C. P. CODE (1908), S. 52.

decree, cannot be taken into account. (*Mitter and Khundkar, JJ.*) MAHOMED NABIBAKHSH *v.* ABDUL BASED. **43 C.W.N. 427.**

——**S. 52**—*Applicability—Decree passed against company taking over assets and liabilities of another company.*

S. 52 (2), C. P. Code, simply enacts a rule of procedure in accordance with natural justice. If a debtor dies and his properties are taken by his legal representatives, they are bound to pay his debts to the extent of the assets they have taken. Consequently if a creditor has obtained a decree for the payment of money out of the property of the deceased, and proves in the execution proceedings that the debtor died leaving properties which came into the hands of his representatives, then it is for these representatives to account for those properties, and if they fail to do so, they become personally liable to the extent of the assets not accounted for. The principle of the section applies to a decree passed against a company which has taken over the entire assets and liabilities of another company when the latter went into liquidation, and its liability is expressed in the form adopted in decrees against legal representatives of deceased persons. As regards the mode of execution of such a decree, it does not in principle differ from a decree passed against the legal representatives of a person who has died a natural death. (*Mahomed Noor and Dhavle, JJ.*) BARABONI COAL CONCERN, LTD. *v.* RAM CHANDRA MARWARI. **5 B.R. 664=181 I.C 721=11 R.P. 626=20 Pat.L.T. 685=A.I.R. 1939 Pat. 580.**

——**Ss. 52 and 53**—*Award against son as legal representative of father—Execution against ancestral property in his hands—Permissibility.*

If an award is made by the Registrar under the Co-operative Societies Act against a son as representing the estate of his father, the ancestral property in the hands of the son and his sons is liable to be attached and sold in execution of the award. (*Fazl Ali and Varma, JJ.*) SHEOSARAN SINGH *v.* GAYA AMLA CO-OPERATIVE SOCIETY. **5 B.R 600=181 I.C. 512=11 R.P. 597=A.I.R. 1939 Pat. 500.**

——**S. 52**—Decree against assets of deceased debtor—Share of offerings made at temple in hands of legal representative—If attachable. *See* C. P. CODE, SS. 60 AND 52. **58 All. 457.**

——**S. 52**—*Decree against estate in the hands of heirs—Income accruing after death of debtor—Liability.*

Where the estate in the hands of the heirs of the original debtor against whose estate the decree was passed is liable for the satisfaction of the decree, then even the produce and income of that estate which has accrued after the death of the original debtor is liable to attachment and sale in satisfaction of such decree. (*Jai Lal, J.*) MANZUR HUSSAIN *v.* RAM RATTAN SHAH. **165 I. C. 802=9 R.L. 304=A.I.R. 1936 Lah. 236.**

——**S. 52**—*Decree against legal representative—Substitution of his legal representative on his death—Liability for decree—Test—Possession of assets.*

Where on the death of a legal representative against whom a decree has been passed to the extent of the assets of the deceased in his hands, his legal representative is added, he cannot escape the liability for the decree so long as the assets

C. P. CODE (1908), S. 52.

are in his hands. (*Stone, C.J. and Bose, J.*) JAGDISH *v.* PUNAMCHAND. **1938 N.L.J. 176.**

——**S. 52**—*Decree against widow as legal representative of deceased husband—Minor son not impleaded in suit—If bound by decree.*

A decree obtained against a widow as legal representative of the estate of her deceased husband without making the minor sons, who are the proper legal representatives, as parties to the suit, is binding upon such sons, when there is nothing to show that the widow was negligent of the interests of her sons or that she did not defend the case properly. (*Dalip Singh, J.*) JHARU *v.* PARDHANA. **183 I.C. 487=12 R.L 123=41 P.L.R. 147=A.I.R. 1939 Lah. 277.**

——**Ss. 52 and 53**—*Mortgagee executed by two members of joint Hindu family—Death of one of them—Suit by mortgagee decreed against estate of deceased executant in hands of his sons and against other executant personally—Suit dismissed as against grandsons of deceased executant—Decree, if can be executed against interest of grandsons—Mortgagee's proper remedy.*

Two members of a joint Hindu family governed by the Mitakshara executed a mortgage deed in favour of the appellant. One of them having died, the appellant brought a suit to enforce the mortgage against the sons and grandsons of the deceased and against the other executant. The Court passed a simple money decree against the estate of the deceased executant in the hands of his sons and against the other executant personally. The suit was dismissed as against the grandsons. The appellant applied for execution of the decree even as against the interest of the grandsons in the family property.

Held, that the grandsons having been dismissed from the suit could not be made liable under the decree, that if the debt in question was not contracted for purposes regarded as immoral by the Hindu Law and if the grandsons were liable therefor to the extent of their interest in the joint family property, the trial Court's decree was erroneous and that the appellant should have appealed therefrom claiming a decree against the grandsons in like manner as against the other defendants, and that such a decree passed in accordance with S. 52, C. P. Code, would have attracted the operation of S. 53 and the grandsons' interests in the joint property would have been liable to attachment under the decree notwithstanding that such interests were not "property of the deceased" in the strict meaning of those words. (*Sir George Rankin.*) RAJA RAM *v.* RAJA BAKHSH SINGH. **13 Luck. 61=42 C.W.N 200=1938 M.W.N. 1=1938 A.W.R. (P. C.) 1=19 Pat.L.T. 1=172 I.C. 5=47 L.W. 1=10 R.P.C. 119=1937 O.W.N. 1199=A.I.R. 1938 P.C. 7=32 S.L.R. 221=66 C.L.J. 422=1937 O. L.R. 614=1937 All.L.R. 982=4 B.R. 169=1938 O.A. 84=40 Bom.L.R. 277=(1938) 1 M.L.J. 41 (P.C.).**

——**S. 52**—*Principle of section—Decree for dower against all heirs of deceased taluqdar in Oudh—Decree realized only out of non-taluqdari property—Suit for contribution against succeeding taluqdar—If lies—Proper method of allocation of debts.*

The principle or method of which S. 52, C. P. Code, is an expression has always been so operated as not to prejudice the rights *inter se* of

C. P. CODE (1908), S. 52.

beneficiaries or legatees over whom the creditor has priority. In the ordinary case of a Muslim whose whole property descended according to his personal law it would be impossible to suggest that an heir was without remedy against his co-heirs if by the action of the judgment-creditor under a decree obtained under S 52, C. P. Code, in a suit brought against all the heirs of the deceased Mahomedan, he was left with less than his proper share of the net estate of the deceased. His right to contribution would be plain. As a beneficiary, he would have the right that the deceased's estate should be duly administered, that it should be cleared of debts and valid legacies, and that he should be given possession of his share therein. For this purpose his suit could take various forms according to the circumstances of the case. It might be denominated an administration suit or a suit for partition or a suit for contribution. but the basis of his claim would be the same in each case, *viz.*, the right to have due administration of the deceased's estate. This right might also be enforced in a proper case by an application for the appointment of an administrator under S. 218, Succession Act. A proper administration of the deceased's estate involves and requires a proper allocation of the debts as between properties to which different rules of descent apply. A Mahomedan widow of a taluqdar in Oudh obtained a decree under S. 52, C. P. Code, for dower against all the heirs of the deceased including the taluqdar succeeding the deceased. The decree-holder realized the decretal amount only out of the partible or non-taluqdari estate in the hands of the heirs. The latter brought a suit against the existing taluqdar for contribution contending that as both taluqdari and non-taluqdari properties were liable for the debt, the taluqdari estate should be made to contribute according to its value. The taluqdar had obtained the necessary permission under S. 3, Oudh Settled Estates Act, and declared that certain portion of the taluqa was to be held subject to the provisions of he Act.

Held, that the rights of the plaintiffs could not be concluded by the choice of the execution creditor. Their claim to their proper share in the partible estate of the late taluqdar made them co-beneficiaries with the existing taluqdar in respect of assets all of which were answerable for the debts of the deceased and the fact that different portions of the assets devolved on different principles in no way defeated the plaintiff's right to contribution.

Held also, that for the purpose of the allocation of debts of the late taluqdar between taluqdari and non-taluqdari properties, the value of his interest in the taluqa was to be taken as it stood at the date of his death. The value of the property comprised in the declaration subsequently made by the taluqdar under the Oudh Settled Estates Act could not be excluded, as "to be or to have vested" in S. 15 of the same Act could not be interpreted to be operating retrospectively. (*Sir George Rankin.*) MAHOMED KASIM ALI *v.* SADIQ ALI. **65 I.A. 219=13 Luck. 494=1938 M.W.N 545=42 C.W.N. 901=48 L.W. 16=10 R.P.C. 295=4 B.R. 606=67 C.L.J. 350=1938 O A. 508=1938 P.W.N. 514=1938 O.L.R. 282=1938 O W.N. 581=1938 A.L.R. 415=40 Bom.L.R. 843=1938 A.L.J. 843=174 I.C. 977=**

C. P. CODE (1908), S. 52.

1938 A.W.R. (P.C.) 138=32 S.L.R. 772=A.I.R. 1938 P.C. 169=(1938) 2 M.L.J. 210 (P.C.).

——S. 52—*Profits of property of deceased accruing after death--If form part of his estate.*

Rents and profits of the property of a deceased person accruing after the property has devolved on his heirs form part of the estate of the deceased. (*Zia-ul-Hasan and Smith, JJ.*) SHAHANSHAH BEGAM *v.* AKBAR HUSSAIN. **13 Luck. 689=172 I.C. 306=1938 O.A 48=10 R.O. 170=1937 O.W.N. 1243=1937 O.L.R. 604=A.I.R. 1938 Oudh 45.**

——S. 52—*Property of deceased in hands of his widow as executrix—Right of decree-holder to proceed against it in execution.*

Where property of the deceased is in the hands of his widow as executrix and it is not proved that it belongs to her in her personal capacity, the property may be attached in execution of decree against her as executrix. The decree-holder may not file an administration suit because a decree-holder has rights which he may work out in execution proceedings, and the cumbrous method of filing an administration suit when he desires to attach property *prima facie* in the hands of the judgment-debtor as such may not appeal to him (*Roberts, C.J.*) SARAB SAUL SOFAER *v.* W. M. EZEKIEL. **187 I.C. 370=12 R.R. 327=A.I.R.1940 Rang. 78.**

——S. 52—*Scope—Property devolving on heir of debtor—Mortgage by heir—Priority over debt due by deceased.*

When property devolves upon a heir it becomes the property of the heir who is entitled to deal with it as his own. He may execute a mortgage of the property as his own property; and unless the alienation is proved to be *mala fide*, it will prevail against right of a creditor of the ancestor, who has not taken proper proceedings to seize the property before the mortgage (*Venkataramana Rao, J.*) NAMBIAR *v.* CHANDUKUTTY. **186 I.C. 323=12 R.M. 622=1939 M.W.N. 1041=50 L.W. 655=A.I.R. 1940 Mad. 22.**

——S. 52—*Scope—Property transferred by legal representative to stranger—Right of creditor to proceed against in execution—Limits to.*

S. 52 (1), C. P. Code, gives a creditor a right to proceed against the property of the deceased in the hands of a legal representative and sub-S. (2) of that section gives the creditor the right to proceed personally against the legal representative if the latter cannot satisfy the Court that he has properly accounted for the property in his hands. It does not give the creditor a right to proceed against property which is no longer in the hands of the judgment-debtor. To proceed against such a transferee, the creditor must establish his equitable right to do so in a separate suit. It would not be competent to an executing Court to attach the property of a stranger on purely equitable considerations. But any interest which the legal representative has in such property, such as an equity of redemption can be attached by the creditor. (*Horwill, J.*) THIAGARAJA IYER *v* NARAYANASWAMI PILLAI. **182 I.C. 333=12 R.M. 58=47 L.W. 782=1938 M.W.N. 518=A.I.R. 1938 Mad. 684=(1938) 1 M.L.J. 867.**

——S. 52—*Suit against personal representatives—Proof that they did not receive assets of deceased—Duty of Court.*

C. P. CODE (1908), S. 52.

If in a suit on a bond instituted after the death of the executant against his personal representatives, the Court is satisfied that at the time when the suit was brought the defendants had received no part of the assets of the deceased, the only course open to it is to dismiss the suit. (*Harries, J.*) TARA CHAND *v.* DHARMAN. **1936 A.W.R. 32.**

——**S. 52**—*Void alienation by legal representatives—Right of decree-holder to pursue property.*

S. 52, C. P. Code, merely provides that if the legal representative of a judgment-debtor has improperly disposed of any property of the deceased he would himself become personally liable. That does not mean that if an alienation is made by the legal representative which is void in law, the property in the hands of the alienee could not be pursued by the decree-holder. (*Bhide, J.*) JAGIR CHAND *v.* BABU RAM. **41 P.L.R. 362=A.I.R. 1939 Lah. 373.**

——**S. 52 (2)**—*Personal liability of legal representative for decretal amount.*

It is for the decree-holder to satisfactorily establish that any property belonging to the deceased had actually been disposed of by the legal representative before the latter can be held personally responsible for the payment of the decree under S 52 (2), C.P. Code. (*Abdul Qayoom, C.J.*) HUSSAIN KHAN *v.* KALU MAL. **39 P.L.R. J. & K. 48.**

——**S. 52 (2)**—*When comes into operation.*

S. 52 (2), C. P. Code, does not come into operation and there can be no execution against the legal representative personally until it is proved that the property inherited by the legal representative from the deceased judgment-debtor is no longer in his possession. (*Middleton, J.C.*) SHIV LAL *v.* AKBAR KHAN. **169 I.C. 445=10 R. Pesh. 3=A.I.R. 1937 Pesh. 80.**

——**S. 53** — Applicability — Privy Council—Appeal to—Death of respondent—Decree against dead respondent—Executability against heirs of dead respondent. *See* PRIVY COUNCIL—PRACTICE. **18 Pat.L.T. 341=A.I.R. 1937 Pat. 321.**

——**S. 53**—*Applicability and scope—If limited to property devolving by survivorship—Property falling to share of son on partition with father—Liability for debts of father.*

S. 53, C. P. Code, is as comprehensive as it can be, and it does not limit the liability of ancestral property to property devolving by survivorship. The section would equally apply to ancestral or joint family property which comes into the possession of the son or other descendant on a partition between him and his father or ancestor. It is deemed to be the property of the father or ancestor (judgment-debtor) for the purpose and within the meaning of S. 53, C P. Code. There is nothing in S. 53 which limits the scope of the enquiry or the remedy to property devolving by survivorship. (*Davis, J. C. and Weston, J.*) NATIOMAL HASSANAND *v.* TIRITHMAL KUNDANMAL. **I.L.R. (1939) Kar. 300=184 I.C. 582=12 R.S. 119=A.I.R. 1939 Sind 258.**

——**S. 53**—Joint Hindu family—Decree against member of—Execution against shares of other members except sons—Rights of creditor—Other members—If legal representatives. *See* HINDU LAW—JOINT FAMILY. **(1937) 1 M.L.J. 224.**

C. P. CODE (1908), S. 53.

——**S. 53**—*Joint Hindu family—Decree against deceased member—Execution against surviving brother—Permissibility.*

S. 53, C. P. Code, imposes the liability to pay the decree on the son or other descendant of the judgment-debtor and not on any collateral of the judgment-debtor. Accordingly on the death of a member of a joint Hindu family against whom a personal decree is passed, the decree-holder can proceed only against the assets of the deceased in the hands of his sons and not against the property belonging to the surviving brother. (*Nanavutty and Thomas, JJ.*) SHEO GOPAL *v.* GANESH DAS RAMGOPAL. **13 Luck. 241=168 I.C. 268=9 R.O. 456=1937 O.L.R. 245=1937 O.W.N. 516=A.I.R. 1937 Oudh 327.**

——**S. 53**—*Legal representative—If includes Hindu son becoming owner of his father's property by survivorship.*

The definition of the term "legal representative" does include a son becoming owner of his father's property by virtue of survivorship, for he does represent in law the estate of the deceased and at any rate it is he who intermeddles with the estate of the deceased. He, as a Hindu son, is legally bound to provide out of the estate, which descends to him, maintenance for those persons, whom the late proprietor was legally or morally bound to maintain. It cannot be said that the particular property specifically charged for the maintenance can alone be proceeded against. According to Hindu law the property inherited by the heir is liable for the maintenance of the persons entitled to maintenance. If a charge is placed upon a specified property, it is only for the sake of convenience, and it does not amount to surrender of the right given by law on the entire property. (*Almond, J C. and Soofi, J.*) AUTAR SINGH *v.* MT. JOGINDAR KAUR. **184 I.C. 456=12 R. Pesh. 27=A.I.R. 1939 Pesh. 45.**

——**S. 53**—*Scope and applicability of—Decree for compensation in lieu of specific performance.*

S. 53, C P. Code, is creating a fiction for purposes. The purposes are the purpose of S. 50 and the purpose of S. 52. The fiction created by S. 53 is that in certain circumstances property, not the property of the deceased and not therefore in *A* as the deceased's personal representative, shall be deemed to be property held by *A* as a legal representative. S. 53 seems to be limited to cases where the decree that is being executed is a decree passed in a suit on a debt. Hence it will not apply to a case where a decree for compensation in lieu of specific performance has been passed, for, the decree may only be regarded as creating a debt of record without its being a decree on a debt. (*Stone, C. J. and Bose, J.*) RAO BHIMSINGH *v.* GANGARAM. **1940 N.L.J. 275.**

——**S. 53**—*Scope— Hindu father — Decree against in respect of pre-partition debt—Executability against joint family property in the hands of son after partition.*

Per *Cornish, J.*—Apart from S. 53, C. P. Code, a Hindu son cannot be made liable in execution as his father's legal representative in respect of property which was not property in which the father had any right or title at the time of his death. The language of S. 53 is wide enough to include a liability incurred by the father which is enforceable against the property in the hands of his son, whether the liability was incurred by the

father in his capacity of manager or personally. In both cases it is the Hindu law which attaches to the property this liability. S. 53 covers a case where there is a decree against the father in respect of pre-partition debt binding on the share of property allotted to the son in the partition. The word 'debt' as used in the text is wide enough to include a pre-partition debt which will include a liability for mesne profits incurred by the father before partition, although the actual liability is not determined in a suit until after the partition. (*Venkatasubba Rao, Cornish and Venkataramana Rao, JJ.*) VENKATANARAYANA RAO *v.* VENKATA SOMARAJU. **1937 M.W.N. 427=46 L.W. 112=171 I.C. 101=10 R.M. 262=I.L.R. (1937) Mad. 880=A.I.R. 1937 Mad. 610=(1937) 2 M L.J. 251 (F.B.).**

———**S. 53**—Scope—If qualifies S. 2 (11)—Decree against Hindu father—Attachment of joint family property—Insolvency and death of father—Execution of decree against sons—Application for—Competency—If affected by insolvency of father. *See* C. P. CODE, SS. 2 (11), 50 AND 53 AND O. 21, R. 22. **38 Bom.L.R. 977.**

———**S. 53**—Scope—Mortgage decree against father—Plea by son that no debt existed—If precluded. *See* HINDU LAW—DEBTS. **1939 M.W.N. 918.**

———**S. 53**—Scope and effect of—Undivided Hindu son—Suit against by creditor for administration—Competency. *See* ADMINISTRATION—SUIT FOR. **46 L.W. 321=A.I R. 1937 Mad. 785.**

———**S. 55**—*Arrest where salary not attachable—Propriety.*

Where the salary of a judgment-debtor is such that no portion of it would be attachable under S. 60, C. P. Code, to allow a decree-holder to proceed by way of arrest of such a judgment-debtor, would be to make the law ridiculous. (*D. R. Norman.*) ISMAIL *v.* WALI MOHAMMAD. **1939 A. M.L.J. 75.**

———**S. 55**—*Bond under—Judgment-debtor to appear when ordered by Court—Court permitting him to absent himself—Latter absconding—Liability of surety under bond.*

The fact that a judgment-debtor for whose appearance a person has stood surety absconds does not necessarily involve a breach of the condition in the surety bond executed by the surety, if that bond provides that he should appear only when ordered by the Court; if the Court has permitted the judgment-debtor to absent himself, and if he then absconds the bond cannot be enforced against the judgment-debtor. But if there is a disobedience by the judgment-debtor of an order of Court, whether express or implied, to appear, *prima facie*, the surety is liable under the bond. (*Davis, J. C. and Tyabji, J.*) PEOPLE'S BANK, ETC. *v.* NANIKRAM. **I.L.R. (1939) Kar. 401=185 I.C. 573=12 R.S. 166=A.I.R. 1939 Sind 270.**

———**S. 55**—*Execution of bond by surety—If necessary.*

Under S. 55, C. P. Code, all that is necessary is that security 'to the satisfaction of the Court' should be furnished. It is not provided that the surety will become effective only if a bond is formally executed. In such cases the liability of the surety is determined by the undertaking that is given to the Court by means of the agreement or statement made by him and accepted by the

Court, and non-compliance with the undertaking renders the surety liable under S. 145, C. P. Code. (*Tek Chand, J.*) NANAK CHAND RAMJI DAS *v.* IBRAHIM. **174 I.C. 965=10 R.L. 646=40 P.L.R. 38=A.I.R. 1937 Lah. 772.**

———**S. 55**—*Surety under—Bond by—Construction—Surety—When to be proceeded—Right of decree-holder—Option of executing Court—Court discharging surety—Subsequent execution against surety—Jurisdiction.*

A surety bond has to be interpreted according to the conditions expressly mentioned in it, and not independently of them. The fact that it is executed under S. 55, C. P. Code, makes no difference. In case the conditions laid down in the section are not fulfilled, the option lies not with the decree-holder but with the executing Court to proceed against the surety under the section or against the judgment-debtor. When once the Court exercises its option and discharges the surety, it cannot afterwards re-open the matter and proceed against him. If it does so, it acts without jurisdiction and the High Court will interfere under S. 115, C. P. Code. (*Fazl Ali, J.*) SATYA NARAIN *v.* MAHABIR PRASAD TEWARI. **18 Pat. L.T. 357=170 I.C. 955=3 B.R. 791=10 R.P. 158=A.I.R. 1937 Pat. 476.**

———**S. 55 (3)**—*Failure to inform judgment-debtor that he could apply for insolvency—Legality of warrant.*

The failure of the Court to inform the judgment-debtor under S. 55 (3), C. P. Code, that he can apply for insolvency, does not invalidate the warrant of arrest which is otherwise legally issued. (*Din Mohammad, J.*) BABU RAM *v.* HARI RAM DAULAT RAM. **42 P.L.R. 374.**

———**S. 55 (4)**—*Bond under—Construction—Undertaking that judgment-debtor would be present on specified date and that in default surety would produce him—Failure to produce after specified date when called on by Court—Liability of surety—Time granted to judgment-debtor by Court—If exonerates surety.*

Where a surety executes a bond to the Court stipulating that the judgment-debtor will be present in Court on a particular date, and that if he failed to be present the surety will produce him, the liability of the surety is not confined to producing him merely on that date. He is liable to produce the judgment-debtor on some date after that date, and if he fails to produce him on a subsequent date when called upon by the Court, he is *prima facie* liable under the bond. The fact that the Court grants time to the judgment-debtor several times cannot have the effect of exonerating the surety, as the grant of time by the Court cannot impair the decree-holder's security, unless it can be shown that the *decree-holder* granted time to the judgment-debtor. (*Burn and Lakshmana Rao, JJ.*) SAMBASIVA SASTRIAL *v.* MUTHURAMAN NAIDU. **1937 M.W.N. 1165.**

———**S. 55 (4)**—*Construction—Surety—Liability of—Both conditions—If to be broken.*

A surety is liable under S. 55 (4), C.P. Code, if there is a breach of either of the two conditions, that is to say, if the judgment-debtor fails to apply in insolvency or fails to appear before the Insolvency Court or the executing Court. It is not necessary that both the conditions should be

C. P. CODE (1908), S. 55.

broken. (*Norman.*) SHAM LAL *v.* BABU RAM. **1937 A.M.L.J. 49.**

——S. 55 (4)—*Security bond—Liability of surety when arises.*

Where a surety bond has been executed under S. 55 (4), C. P. Code, unless there has been failure in both respects, namely, in applying for adjudication and in appearance, the decree-holder is not entitled to proceed against the surety. Where the judgment-debtor applies for adjudication, one of the conditions is complied with and the decree-holder is not thereafter entitled to ask the Court to realise the security. (*Bennet and Verma, JJ.*) LACHHMAN DAS *v.* BABU LAL. **I.L.R. (1940) All. 338=188 I.C. 869=1940 A.W.R. (H.C.) 266=1940 A.L.J. 344=A.I.R. 1940 All. 304.**

——S. 55 (4)—*Surety bond—Breach—Condition that judgment-debtor would appear on all days fixed for hearing of his insolvency petition—Petition adjourned for mention as to arrangement between him and his creditors—Failure of judgment-debtor to appear on adjourned date—Liability of surety.*

A judgment-debtor who was arrested in execution of a money decree was ordered by the Court to be released "on execution of the necessary bond". The bond executed by the sureties was in common form, and under it, the judgment-debtor was bound to appear on all the days to which the hearing of his insolvency application was adjourned until its disposal. The judgment-debtor succeeded in obtaining adjournment after adjournment of the hearing of the petition upon one pretext or another, the main pretence being that he was on the point of making an arrangement with his creditors. On the last hearing date his counsel stated that he had received instructions from him saying that he had nearly completed all the terms of his arrangement with his creditors and that within 7 days he would be prepared to withdraw the petition. Thereupon the petition was again adjourned for a week "for mention" On the adjourned date, the judgment-debtor was absent and his counsel withdrew from the case for want of instructions. The decree-holder filed an application seeking to have the amount of the surety bond escheated for non-compliance with the condition set out therein. It was contended on behalf of the surety that it was only when some special notice calling upon the debtor to appear on any particular occasion had been served upon him that he was "called upon" to appear within the meaning of S. 55 (4), C. P. Code. Overruling that contention,

Held, that it was sufficient to satisfy the requirements of S. 55 (4) that the counsel who had represented the judgment-debtor on many previous occasions in the insolvency proceedings should have been informed on his behalf that the judgment-debtor would have to state on the adjourned date whether or not an arrangement had been arrived at between him and his creditors, and that as he did not instruct an advocate or pleader to appear for him and did not appear himself on that occasion, there was a failure on his part to appear when called upon on a day fixed for his attendance within the meaning of the condition in the bond. (*Page, C.J. and Mya Bu, J.*) L. V. COLATO *v.* U AUNG DIN. **14 Rang. 190=162 I.C. 251=8 R.R. 554=A.I.R. 1936 Rang. 168.**

C. P. CODE (1908), S. 55.

——S. 55 (4)—*Surety under—Bond by—Contents of.*

A bond executed by a surety under S. 55 (4), C. P. Code, cannot be made to contain conditions not covered by the section. (*Davis, J.C. and Lobo, A.J.C.*) SADIKLALI MOOSAJI *v.* HASSASING TAHILSING. **30 S.L.R. 177=165 I.C. 268=9 R.S. 133=A.I.R. 1936 Sind 244.**

——S. 55 (4)—*Surety under—Bond by—Enforcement against surety—Power of Court to reduce amount of bond.*

In enforcing a bond executed by a surety under S. 55 (4), C. P. Code, the Court has no power to reduce the amount for which the bond is executed. The security in such a case is not forfeited by way of penalty. It is part of the fruits of the decree obtained by the decree-holder, and the Court is not entitled to deprive the decree-holder of the fruits of his decree. (*Davis, J.C. and Lobo, A.J.C.*) SADIKLALI MOOSAJI *v.* HASSASINGH TAHILSING. **30 S.L.R. 177=166 I.C. 268=9 R.S. 133=A.I.R. 1936 Sind 244.**

——S. 55 (4)—*Surety under—Bond by—Undertaking to cause judgment-debtor to file insolvency petition and to get him to prosecute it to its very end—Meaning of—Extent of liability—If ends with adjudication or continues up to discharge.*

A surety for a judgment debtor under S. 55 (4), C. P. Code, executed a security bond whereby he undertook to produce the debtor before the Court whenever directed, "to cause him to file an insolvency petition within one month from that date, and to get him to prosecute it to its very end and also to produce him in the meantime." The debtor presented his insolvency petition and was duly adjudicated an insolvent; but on failure to apply for his discharge within the prescribed time, his insolvency was annulled.

Held, that the liability under the bond was satisfied by the adjudication of the debtor upon his petition, and that it did not continue after that up to the final discharge. The very end of the insolvency petition means either its dismissal by the Court or an order of adjudication on it by the Court. Though it is possible for a surety by adequate words to extend his liability beyond the point of dismissal or adjudication, in the absence of such a provision, he could not be made liable to the decree-holder once the petition resulted in an adjudication. (*Cornish, J.*) KARUPPANA GOUNDAR *v.* CHIDAMBARAM CHETTIAR. **165 I.C. 864=9 R.M. 311=1936 M.W.N. 1031=44 L.W. 647=A.I.R. 1936 Mad. 963=71 M.L.J. 646.**

——S. 55 (4)—*Surety under—Bond by—Undertaking to produce judgment-debtor on date fixed—Surety failing to appear and failing to produce judgment-debtor on date fixed—Plea of illness of judgment-debtor—Absence of evidence to show physical impossibility to appear—Effect—Liability of surety.*

Appellants were sureties for a judgment-debtor and undertook to produce him in Court on a specified date, but failed to produce him on that date. They themselves did not also appear in Court on that date and did not put forward any explanation for the non-production. They subsequently pleaded that the judgment-debtor was suffering from fever and therefore unable to appear in Court on the date fixed. It was however not established that he was so ill that it was

C. P. CODE (1908), S. 55.

physically impossible for him to appear or to be produced.

Held, that the surety bond not having provided for such a contingency or for absolving the sureties from liability in such a contingency, they were not absolved from liability and hence were liable to be proceeded against under the bond in execution of the decree. (*Pandrang Row, J.*) KUMARASWAMY REDDIAR, *In re*. 178 I.C. 511=11 R.M. 463=47 L.W. 408=1938 M.W.N. 321=A.I.R. 1938 Mad. 530.

——S. 55 (4)—*Surety under—Execution—Procedure—Death of surety pending sale—Substitution of heirs—If essential before sale—Notice under O. 21, R. 22—Necessity.*

An execution proceeding cannot be continued against the estate of a dead man without bringing on record his legal representatives. Where in execution proceedings against a surety for a judgment-debtor under S. 55 (4), C. P. Code, the surety dies after the issue of the sale proclamation and before sale, the decree-holder should, in order that he may continue the proceedings, substitute, in the place of the deceased surety, his legal representatives. The Court should issue notice to them under O. 21, R. 22, C. P. Code, whilst substituting them, and their objections should be heard before the execution proceeding can be further continued against them. The circumstance that the legal representatives have already entered appearance in the execution proceeding does not dispense with the issue of notice under O. 21, R. 22 or of hearing their objections, if any.

Rowland, J.—There can be no short cuts in matters of procedure. The correct procedure for taking proceedings against a surety for the judgment-debtor is first to call on him to produce the judgment-debtor, then, on his failure to do so, to call on him to show cause against forfeiture and execution, and next on his failure to show cause to the satisfaction of the Court, to obtain an order of the Court directing execution to proceed against the person and property of the surety. The correct procedure after the death of the surety is to substitute his heirs in the execution proceeding and to obtain the leave of the Court to continue the execution against them; thereafter to serve them with notices under O. 21, R. 22, C. P. Code, and on their appearance, the Court, after hearing and determining any objections that they may make, would permit or disallow the continuance of the execution. A sale cannot proceed without the legal representatives being brought on the record. (*Rowland and Chatterji, JJ*) MAZHARUL HAQ *v.* RAGHUBER SINGH. 18 Pat. 761 =187 I.C. 52=12 R.P. 558=6 B.R. 418=1940 P.W.N. 163=21 Pat.L.T. 369=A.I.R. 1940 Pat. 142.

——S. 58—*Applicability—'Detention'—Meaning of—If includes detention in Court-house.*

Words 'such detention' in proviso (1) and 'detention under this section' in proviso (2), S. 58 refer to and mean 'detention in civil prison.' Civil prison means civil jail and not Court-house. Detention therefore in the Court-house cannot be said to be detention in a civil prison. A judgment-debtor was committed to the civil prison in execution of a decree but was released during the pendency of the appeal by him against the decree. The decree-holder withdrew the balance of the subsistence allowance deposited by him on release of the judgment-debtor. On dismissal of his appeal he was detained by the appellate Court for the whole day but was released as no subsistence allowance was deposited by the decree-holder. He was ordered to appear before the lower Court on a fixed date and on appearance it was contended by the judgment-debtor that he could not be re-arrested in view of proviso (2), S. 58.

Held, that as at the time of the decree-holder's omission to pay the subsistence allowance the judgment-debtor was not detained in the civil prison but in the Court-house, S. 58 did not apply. The judgment-debtor was not therefore exempt from being committed to the civil prison to undergo the remaining term of imprisonment. (*Skemp, J.*) KESAR SINGH *v.* KARAM CHAND. 172 I.C. 510=10 R.L. 334=39 P.L.R. 471=A.I.R. 1937 Lah. 253.

——S. 58 (2)—*Scope and effect of—Joint decree for arrears of rent against eight persons—Arrest and imprisonment of one in execution—Subsequent release within 6 months—Effect—Attachment of crops raised by all—Right of decree-holder.*

The only effect of a release under S. 58, C. P. Code, is to protect from re-arrest the judgment-debtor who has been released from prison. The incarceration of one judgment-debtor out of eight judgment-debtors in execution of a joint decree for arrears of rent and his release before the expiry of 6 months cannot discharge his debt; nor can it clear the liabilities of the other seven. Crops raised by all the judgment-debtors are consequently attachable in execution of the decree notwithstanding the imprisonment and release of one of the judgment-debtors. (*Darling, S. M. and Bomford, J.M.*) JAIRAM SINGH *v.* TRIBENI LONIA. 1937 R.D. 13.

——S 60—*Amendment to S. 60 introducted by Act IX of 1937—Retrospective effect—"Suit" in S. 3 of Act IX of 1937—Meaning—Proceedings resulting on award in arbitration*

The word 'suit' in S. 3 of the Amending Act IX of 1937 is not necessarily confined to execution proceedings arising out of suits which are initiated by the presentation of a plaint, but is also applicable to execution proceedings resulting on an award in arbitration. The Legislature never intended that the word 'suit' in S. 3 should be used in a restricted sense. (*Lobo, J.*) KARACHI URBAN CO-OPERATIVE BANK, LTD. *v.* MAHOMEDSHAH. 177 I.C. 504=11 R.S. 63=A.I.R. 1938 Sind 176.

——S. 60—Applicability—Crown grant of village—Conferment of successive life estates on grantee and his heirs—Prohibition on alienation—Attachability—Rights of creditor. *See* CROWN GRANTS ACT, S. 3. 1938 M.W.N. 440.

——S. 60—*Applicability to distraint.*

Distress is not permitted under C. P. Code, and provisions of S. 60 cannot be applied by analogy to distraint. (*Davis, J.C. and Weston, J.*) GHULAM KHADIR *v.* MOHIDIN HAJI AHMED. I.L.R. (1939) Kar. 566=184 I.C. 698=12 R.S. 131=A.I.R. 1939 Sind 276.

——S. 60—*Applicability—Mortgage by agriculturist.*

Where an agriculturist himself mortgages his house, S. 60 does not apply. A.I.R. 1935 Lah. 164,

C. P. CODE (1908), S. 60.

Rel. on. (*Bhide, J.*) KHAZANCHI SHAH *v.* HAZI NIAZ ALI. **A.I.R 1940 Lah. 126.**

———Ss. 60, 4 and Electricity Act, S. 5 (f)—*Attachment of property of licensee whose licence has been revoked—C.P. Code, how affected by the Electricity Act—Scope of S. 5 (f) of the Electricity Act.*

Where the judgment-debtor is a licensee whose licence under the Electricity Act has been revoked, the Court when it has to consider whether under S. 60, C. P. Code, his property is or is not liable to attachment and sale in execution of the decree, has to bear in mind S. 4, C. P. Code. As the Electricity Act is a special law, the provisions under the C.P. Code are subject to any conditions regulating that procedure by the provisions of the Electricity Act. When a licence is revoked certain provisions laid down by S. 5 of the Act have an imperative effect and under those provisions the licensee has the option of disposing the property of the undertaking in such manner as he thinks fit under Cl. (*f*) only. That clause is more or less residuary and comes into operation only when the preceding provisions in the earlier clauses have been complied with. (*Iqbal Ahmad and Bajpai, JJ.*) RADHA KRISHNA BENI PRASAD *v.* KISHORE CHAND SHIVA CHARAN LAL. **I L R (1939) All. 901=186 I.C. 689=12 R.A. 442=1939 A.L J. 983 =1939 A.W.R. (H.C.) 848=A.I.R. 1940 All. 24.**

———S. 60—*Compensation money in hands of Collector awarded under Land Acquisition Act—Liability to attachment.*

Compensation money awarded under the Land Acquisition Act is not liable to attachment at the instance of the creditors of the persons whose lands have been acquired until the amount is tendered to them under S. 31 of Land Acquisition Act. The money in the hands of the Collector is money belonging to the Government until the tender is made and no relationship of creditor and debtor can be said to have been established between the Collector on the one side and the owners of the lands on the other. S. 60, C. P. Code, does not therefore apply to such a case and the amount in the hands of the Collector cannot be attached by creditors holding money decrees against the persons to whom the compensation has been awarded. (*Addison and Abdul Rashid, JJ.*) SUNDAR DAS *v.* SECRETARY OF STATE. **I L R. (1938) Lah. 548=178 I.C. 443=11 R.L. 456 (2)=40 P. L.R. 817=A.I.R. 1938 Lah. 533.**

———S. 60—Decree against real owner—Attachment of property in the hands of *benamidar*—Validity. *See* BENAMI—PRESUMPTION. **A.I.R. 1936 Pesh. 88.**

———S. 60—*'Debt'—Meaning of.*

The word 'debt' in S. 60, C. P. Code, means an actually existing debt, that is, a perfected and absolute debt. A sum of money which might, or might not, become due, or the payment of which depends upon contingencies which may or may not happen, is not a debt. (*Tek Chand, J.*) BRIJ KUNWAR *v.* NAURANGI LAL. **176 I.C. 634=11 R. L. 218=40 P.L.R. 73=A.I.R. 1938 Lah. 336.**

———S. 60—*House in Istimrari estate—Attachability.*

The occupant of a house in an Istimrari estate, is entitled on eviction, to remove the materials of the house and hence to that extent, he has an attachable and saleable interest in the house. (*D.*

C. P. CODE (1908), S. 60.

R. Norman.) MOOL CHAND *v.* DURGA PERSHAD. **1939 A.M.L.J. 102.**

———S. 60—*Implements of husbandry—Motor tractor, if one.*

A motor tractor is not indispensable for agriculture and therefore it cannot be regarded as being essential to it and hence is not exempt from attachment. (*Niyogi, J.*) SHALIGRAM *v.* SHEOPRATAP. **I.L.R (1939) Nag. 355=179 I.C. 656= 11 R.N. 306=1938 N.L.J. 416=A.I.R. 1939 Nag. 3.**

———S. 60—Jagir—Grant to person to enjoy so long as any descendant should survive—Prohibition against transfer—Effect—Saleability in execution of money decree. *See* GRANT—ALIENABILITY. **18 Pat. 370.**

———S. 60—*Mere right to give lease—Attachability.*

A mere right to give a lease is not property which can be transferred. So it is not attachable under S. 60, C. P. Code. (*Middleton, J.C. and Almond, A J.C.*) JETHA NAND *v.* KHUDA BAKHSH. **161 I.C. 628=8 R.Pesh. 176=A.I.R. 1936 Pesh. 90.**

———S. 60—Mortgage—Unpaid balance of consideration in mortgagee's hands—Attachability. *See* MORTGAGE. **17 Lah. 270.**

———S. 60—*Mutual Benefit Fund—Moneys subscribed by member payable under rules to nominee or legal heirs—Decree against member's assets after his death—Amount in Fund—Attachability in execution.*

Where moneys are subscribed by a person to a Mutual Benefit Fund or Society under a contract between that person and the Fund of which he is a member, under which the Society undertakes to pay a particular person, or *nominee* of the member, that person or *nominee* is entitled to the money and not the member subscribing although the member may have the power to select any person he chooses as his nominee. The money subscribed by the member to the Fund cannot form part of his assets on his death, but is money available for payment to the *nominee* or the legal heirs, in case the nominee dies before the member, according to the rules of the Fund or Society by which the member agreed to be bound when he became a member and entered into a contract with the Fund. The member has no property in the amount payable after his death; it does not form part of his estate and he has no disposing power over the same, and therefore it is not liable to be attached in execution of a decree against him. Even if it be held that the contract between the member and the Fund is not enforceable by the *nominee* or the legal heirs, it does not follow that the moneys form part of the estate of the member.

Obiter.—The contract can be enforced by the nominee or the legal heirs on the ground that they are in the postion of *cestui que trust*, a recognised exception to the rule that a stranger to a contract cannot sue upon it. (*Venkataramana Rao, J.*) THIAGARAJAN *v.* VENKATARAMA AYYAR. **162 I.C. 889=8 R.M. 1066=43 L.W. 527=1936 M.W.N. 333=70 M.L.J. 581.**

———S. 60—*Mutual Relief Fund—Policy in—Appointment of nominee—Effect—Decree against employee during life—Attachment of amount under policy after death—Sustainability.*

C. P. CODE (1908), S. 60.

A railway employee who was a member of the Mutual Relief Fund had appointed his wife as nominee of his policy. The certificate of membership provided for the payment of pecuniary relief in the case of death or retirement from service to the member or "his nominee or the legal heirs of the nominee." The employee died during service and his creditors who had obtained a decree against him in his lifetime proceeded to execute the decree by attachment of the amount of the policy of the deceased in the hands of the fund.

Held, that the deceased had no interest in the Relief Fund which passed on his death to his legal representatives, as the ownership of the Relief Fund and therefore the interest of the deceased therein had been transferred to the trustee of the fund and there was a vested trust in favour of the nominee; and although the trust in favour of the nominee was a contingent trust, the contingency having occurred before the judgment-creditor affected any attachment, the trust in favour of the nominee ceased to be contingent and hence the amount payable by the Mutual Relief Fund became payable to the nominee and was not liable to attachment by the creditors of the deceased A.I.R. 1931 Bom. 300, Rel. on. (Case-law referred.) (*Lobo, J.*) KASHIBAI *v.* PARSRAM. **179 I. C. 296=11 R.S. 128=A.I.R. 1939 Sind 15.**

——S. 60—*Partial redemption—Property owned jointly by two tarwads—Separate mortgage by each of undivided share to same mortgagee—Suit for redemption by one tarwad alone without claiming partition—Maintainability.*

A Malabar tarwad became divided into two tarwads. Each of them possessed an undivided moiety in certain properties and each of them separately mortgaged its undivided half to the same person. One of the tarwads sought to redeem its half-share without suing for partition.

Held, that it was not open to the mortgagee to resist redemption and the plaintiff tarwad was entitled to redemption of the undivided half mortgaged by it. (*Pandrang Row and Venkataramana Rao, JJ.*) KAMMARAN NAMBIAR *v.* KOMAN. **182 I.C. 916=12 R M. 163=47 L.W. 686 =1938 M.W.N. 78=A.I.R. 1938 Mad. 562.**

——S. 60—*Pay of soldier in regular forces governed by Army Act—Attachability.*

The pay of a soldier of His Majesty's regular forces subject to the Army Act of 1881 is not liable to attachment under a decree of the Civil Court. (*Davis, J.C. and Mehta, J.*) PREMIER CLOTHING CO. *v.* FRUSHER. **I.L.R. (1939) Kar. 160=178 I.C. 793=11 R.S. 111=A.I.R. 1938 Sind 237.**

——S. 60—*Property—Preliminary decree for dissolution of partnership and accounts—Attachability—Mode of attachment—O. 21, R. 53 (4).*

A preliminary decree for dissolution of partnership and for accounts is property which is capable of attachment within the meaning of S. 60, C. P. Code; though it may not be capable of immediate execution, it nevertheless creates rights which must be regarded as property. Such a decree falls under O. 21, R. 53 (4) and can be attached in the manner provided therein. (*Fazl Ali and Chatterji, JJ.*) RATANSHI HIRJI BHOJRAJ *v.* TRICUMJI JIWANDAS. **18 Pat. 688=186 I. C. 623=12 R.P. 519=6 B.R. 383=1939 P.W.N. 839=A.I.R. 1940 Pat. 107.**

C. P. CODE (1908), S. 60.

——S. 60—Property — Thiccadar — Decree against for arrears of thicca rent—Saleability of thicca in execution. *See* LANDLORD AND TENANT —THICCADAR. **19 Pat.L.T. 280.**

——S. 60—*Property of judgment-debtor—Meaning of—Hindu father—Suit on mortgage—Exoneration of sons—Partition—Subsequent personal decree against father—Executability against son's shares—Properties allotted to sons —If property of father—Judgment-debtor.*

In so far as the substantive law is concerned, that dealing with the actual rights and liabilities of the parties, *e.g.*, son's liability for his father's debts, it is of course regulated by the Hindu law, but as regards the procedure to be followed, the old Hindu law of procedure under which these rights could once have been enforced no longer applies, and Courts are governed in these matters by the Code of Civil Procedure. Where in a mortgage suit against the father and sons, the suit is dismissed against the sons and a decree given against the father alone and before an application for personal decree is made under O. 34, R. 6, C. P. Code, partition takes place, the property of the sons cannot be taken in execution of the personal decree even if the debt was not incurred for immoral or illegal purpose. To say a son is under a pious obligation to pay certain debts is one thing; to say his property can be taken in execution is another. Property of the sons can only be attached and sold in execution if it falls within the kind of property that can be attached and sold under S. 60, C. P. Code. After partition, the share that goes to the son does not belong to the father and the father has no disposing power over it. Therefore such property does not fall within S. 60. Thus it cannot be attached. But the son can be made liable for his father's debts if he has become a surety; he can be made liable under the pious obligation rule also. In neither of the cases however could his liability take the form of having his property taken in execution and sold without any prior proceedings brought against him, leaving him to raise the question whether his liability as surety or under the pious obligation rule precluded him from claiming in execution. (*Stone, C.J. and Bose, J.*) JAINARAYAN *v.* SONAJI. **I.L.R. (1938) Nag. 136=174 I.C. 621=10 R.N. 408=A.I.R. 1938 Nag. 24.**

——S. 60—*Rights of patentee—Saleability.*

Obiter.—The rights of a grantee under a Letters Patent are covered by S. 60, C. P. Code, and can be attached and sold in execution of a decree. (*Panckridge, J.*) RADHA KISSEN *v.* HIRALAL BANJARA. **I.L.R. (1938) 2 Cal. 618= 181 I C. 909=11 R.C. 869=42 C.W.N. 1086= A.I.R. 1939 Cal. 283.**

——Ss. 60 and 52—*Right to receive offerings made at temple—Attachability—Decree against assets of deceased debtor—Share of offerings in hands of legal representative—If attachable.*

A right to receive the offerings made at a temple is liable to attachment and sale in execution of a decree, when such right is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship. Where a decree is passed against the assets of a deceased debtor in the hands of his legal representative, not only the collections which had been received during the

lifetime of the debtor could be attached in execution of that decree but also the share of the offerings in the hands of the legal representative. What is in the hands of the legal representative of the debtor is by inheritance his share, and as the share produces a certain annual income, that income may be attached as it is one of the assets of the deceased. 50 All. 394 Foll. (*Sulaiman, C. J. and Bennet, J.*) NAND KUMAR DATT *v.* GANESH DAS. **58 All. 457=159 I.C. 812=8 R.A. 512=1935 A.W.R. 1506=1935 All.L.R. 1205=1936 A.L.J. 409=A.I.R. 1936 All. 131.**

——(as amended in 1937), S. 60—Scope—If affects S. 73. *See* C. P. CODE, S. 73. **A.I.R. 1938 Sind 144.**

——S. 60 (1)—*'Debt'—Money left with vendee for payment to creditor.*

Money left by a judgment-debtor with a vendee to whom he had sold some immovable property for payment to his creditors but which was not so paid within a reasonable time, can be looked upon as a debt due to the judgment-debtor and attached and sold in execution of a decree against him, even though no time limit had been fixed for its payment to the creditors. (*Bhide, J.*) GUJAR MAL KUNDAN LAL *v.* PARASRAM SUNDAR LAL. **172 I.C. 438=10 R.L. 325=39 P.L.R. 201=A.I.R. 1937 Lah. 608.**

——S. 60 (1)—*"Debt"—Money payable under policy of life assurance—Attachability.*

The amount due under a policy of life assurance is a debt within the meaning of S. 3, T. P. Act, and it is attachable under S. 60, C. P. Code, though it becomes payable only on the death of the assured. (*Wadia, J.*) VARJIWANDAS *v.* MAGANLAL. **39 Bom L.R. 493=170 I.C. 850=10 R.B. 140=A.I.R. 1937 Bom. 382**

——S. 60 (1)—*Debt—Share of debt due to judgment-debtor—Attachability.*

The word 'debts' in S. 60, C. P. Code, includes share of debts. A debt due to the judgment-debtor and other persons jointly can, therefore, be attached and sold in execution. (*Nasim Ali and R.C. Mitter, JJ.*) UPENDRA MOHAN PAL CHOWDHURY *v.* NALINI MOHAN RAY CHOWDHURY. **I.L.R. (1937) 2 Cal 48=41 C.W.N. 410=171 I.C. 119=10 R.C. 226=67 C.L.J. 35=A.I.R. 1937 Cal. 199.**

——S. 60 (1) (c)—*'Agriculturist'.*

A judgment-debtor is not an agriculturist under S. 60 (1) (*c*), C. P. Code, if agriculture is only a subsidiary occupation of his. (*Henderson, J.*) UMES CHANDRA *v.* BHARAT KUMAR. **A.I.R. 1940 Cal. 5.**

——S. 60 (1) (c)—*Agriculturist—Burden of proof.*

A judgment-debtor objected to the attachment of his house on the ground that he was an agriculturist. It was established by evidence that he owned some land which was not situated near the house in dispute but in another village. It was not proved what the area of that land was. It was conceded that he did not cultivate the land himself but got it cultivated by servants. It was also proved that he was doing contractor's work and also that in a portion of the house in dispute there was a shop in which he was selling flour and grain.

Held, that the burden was upon the judgment-debtor to prove that he was an agriculturist in the strict sense of the term, and that in the

circumstances of the case it was impossible to hold that he was an agriculturist in spite of the fact as alleged by him that he was a member of an agricultural tribe. (*Jai Lal, J.*) MAHOMED AKBAR *v.* HARBANS SINGH. **161 I.C. 16=8 R.L. 664=A.I.R. 1936 Lah 532.**

——S. 60 (1) (c)—*'Agriculturist'—Determination of status—Material time—Property attached when in possession of legal representative of debtor—Status of legal representative—If material.*

The question whether the judgment-debtor is an "agriculturist" within the meaning of S. 60, C. P. Code, has to be decided with reference to his status at the date of the attachment. If he becomes an agriculturist at the date of the attachment, his property cannot be attached although at the time of the decree he was not an agriculturist. Similarly if he ceases to be an agriculturist at the time of the attachment, his property can be attached although he was an agriculturist at the date of the decree. Where, therefore, property is attached while in possession of the legal representative of the debtor, it is the status of the legal representative and not that of the original debtor that determines the attachability or otherwise of the property. (*Dalip Singh, J.*) BALDEV SINGH *v.* SHER SINGH. **41 P.L.R 524=185 I.C. 609=12 R.L. 306=A.I.R. 1939 Lah. 556.**

——S. 60 (1)(c)—*'Agriculturist'—Meaning of.*

A person who is proved to have cultivated land in one year and who admits not to have cultivated any land in the subsequent year cannot be said to be an 'agriculturist' within the meaning of S. 60, C. P. Code. (*Din Mahomed, J.*) BANARSI DAS *v.* RULIA. **42 P.L.R. 261.**

——S. 60 (1) (c)—*'Agriculturist'—Meaning of.*

While there is no justification in the wording of S. 60, C. P. Code, for holding that for the purpose of that section the term 'agriculturist' excludes a large land owner or a person who does not depend solely or mainly on cultivation for his livelihood, there is no doubt that a person who does not himself till land and earn his living thereby wholly or partly is not an agriculturist within the meaning of the section. (*Coldstream, J.*) GURBAKHSH SINGH *v.* LAL CHAND DARSHAN CHAND. **164 I.C. 690=9 R.L. 149=38 P.L.R. 333=A I R. 1936 Lah. 737.**

——S. 60 (1) (c)—*'Agriculturist'—Meaning of.*

A man who has been cultivating for many years and who has his cattle tethered beneath his house and a granary at the back of it has all the insignia of a cultivator. Where he occupies the house sought to be attached, and uses it directly for agricultural purposes in housing his cattle, his implements and his seed, paddy and his labourers, he must be regarded as occupying the house as an agriculturist, and is entitled to exemption from attachment. The mere fact that the judgment-debtor owns 150 acres of land makes no difference when there is evidence to the effect that he cultivates only 25 acres, while the rest of the land is cultivated by his son who devotes all the profits to paying off his father's debts; that does not render the judgment-debtor a zamindar or a rent receiving landlord. (*Baguley and Mosely, JJ.*) MAUNG TUN AYE *v.* MAUNG HLA HAN. **162 I.C. 694 (2)=8 R.R. 579=A.I.R. 1936 Rang. 215.**

C. P. CODE (1908), S. 60.

——S. 60 (1) (c)—"*Agriculturist*"—*Who is—Test to decide.*

The protection under S. 60 (1) (*c*), C. P. Code, is intended to be given to those who are real tillers of the land; and an "agriculturist" within the meaning of S. 60 (1) (*c*) is a person who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. The test is not whether agriculture is the sole, main, chief or principal source of his income. (*Beasley, C.J., Venkataramana Rao and Lakshmana Row, JJ.*) LAKSHMAYYA *v.* OFFICIAL RECEIVER OF KISTNA. **I.L.R. (1937) Mad. 777=1937 M.W. N. 524=170 I.C. 198=10 R.M 147=45 L.W. 704=A.I.R. 1937 Mad. 551=(1937) 2 M.L.J. 11 (F.B.).**

——S. 60 (1)—*Agriculturist—Who is—Tests to be applied.*

In determining whether a person is an agriculturist the following factors should be noted: (1) Whether a person is an agriculturist or not is not a question turning on source of income but on nature of occupation. (2) A person may have many occupations. If one of them is agriculture and for that purpose a house or building is occupied, protection can be claimed. (3) A person who owns and lets it reserving either money or produce is not an agriculturist but a landlord (4) A person who cultivates the land as a labourer, though neither a landowner nor a tenant, is an agriculturist. (5) If a man cultivates the land with his own hands or by means of labourers whose activities he directs, he is an agriculturist whether he operates on a large or a small scale. If he has no connexion with the land except that he owns it and people work for him, he may or may not be an agriculturist according to circumstances. (Case-law discussed.) Hence an owner of land is not an agriculturist, if he lets out on batai (reserving share of produce instead of money rent). (*Stone, C.J. and Puranik, J.*) GOWARDHANDAS *v.* MOHANLAL. **I L.R. (1938) Nag. 461=179 I.C. 688=11 R.N. 309= A.I.R. 1938 Nag. 366.**

——S. 60 (c)—'*Agriculturist*'—*Meaning.*

The term 'agriculturist' as used in S. 60 must be strictly construed. It denotes a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land. 47 P.R. 1897. Foll. (*Bhide, J.*) SANT RAM *v.* BUTA KHAN. **I.L.R (1938) Lah. 374=177 I.C. 60=11 R.L. 251 (2)=40 P.L.R. 984=A.I.R 1938 Lah 72.**

——S. 60 (1) (c)—"*Agriculturist*"—*Meaning of.*

Protection given by S. 60 is intended to be given to those who are real tillers of the land. An agriculturist, within the meaning of S. 60, is a person who is really dependent for his living on tilling of soil and unable to maintain himself otherwise; main, chief or principal sources of income are not the proper tests. Where the person claiming protection under S 60, is a large landlord whose main source of income is rents from tenants and a jagir of Rs. 3500, he is not an agriculturist within the meaning of S 60. A.I.R. 1937 Mad. 551 (F.B.), Rel. on; A.I.R. 1936 Lah. 737, Not foll. (*Skemp, J.*) BALWANT SINGH *v.* ANJAMAN IMDAD BAHAMI QARZA. **180 I.C 242=11 R.L. 666=41 P.L.R. 225=A I.R 1939 Lah. 40.**

——S. 60 (1)—"*Debt*" — *Attachability—Conditions of—If should have become payable before attachment — Advocate engaged by government to conduct government case—Stipulation of fixed daily fee—Direction to submit bills for payment at end of month—Advocate entering upon duties —Remuneration earned by advocate—Attachability before end of month.*

A debt, in order to be attachable, need not necessarily have become payable. It should not be an uncertain sum; nor merely a right to sue. If it is an existing property vested in the judgment-debtor, though the time of its realisation has not come, it can be attached and sold. Where the Government engages an advocate to conduct a case on behalf of the government in a particular Court, stipulating a certain daily fee payable to him, and directing the advocate to submit his bills for payment of his fees at the end of each month, it must be held that after each day's work the daily fee stipulated becomes due to the advocate from the government, and that all the daily fees of a month become payable to him at the end of the month. The daily fees earned by the advocate become a debt after the day's work, and are therefore liable to be attached and sold in execution of a decree against him, though such fees become payable only at the end of the month. (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. **17 Pat. 706=11 R.P. 211=1939 P.W.N. 103=178 I.C 141=5 B.R. 61=19 Pat.L.T. 768= A.I.R. 1939 Pat. 77.**

——S. 60 (1)—Disposing power—Properties allotted to wife and daughter in partition—Liability to be proceeded against. *See* HINDU LAW—DEBTS. **(1937) 1 M L.J 249.**

——S. 60 (1)—*Disposing power—State lands—Interest of occupier—Attachability.*

An occupier of State lands possesses the right of cultivating them and of reaping and selling the crops, which gives him a disposing power over the profits. As the right of occupancy of State lands has value and as the Government expressly permits the right to be transferred, the occupier has a saleable interest in the property which can be attached and brought to sale in execution of a decree against him. The fact that the Government may step in and deprive the transferee of the benefit of the purchase does not alter the position. (*Leach and Spargo, JJ.*) B. K. HALDAR *v.* MA PWA ME. **14 Rang 619=167 I.C. 920=9 R.R. 335=A.I.R. 1937 Rang. 74.**

——S. 60 (1)—Grant of absolute hereditary estate—Liability to attachment. *See* GRANT—CONSTRUCTION. **A.I.R. 1937 Nag. 248.**

——S. 60 (1)—"*Property*"—*Suit for unpaid consideration under mortgage deed—Preliminary decree—If "property" or "decree"— Procedure after attachment—O. 21, Rr. 53 and 64—Applicability.*

A preliminary decree passed in a suit for recovery of the unpaid consideration money due under a mortgage bond is not such a decree as is contemplated by O. 21, R. 53, C. P. Code, and the procedure under that rule is not therefore applicable to such a decree when attached. Such a decree is saleable property within the meaning of S. 60, C. P. Code, and the proper procedure is for the Court to sell the decree attached, as property under O. 21, R. 64 (*Collister and Bajpai, JJ.*) ISMAIL *v.* JOHRI MAL SITAL PRASAD. **171 I.C. 782=10 R.A. 317 (1)=1937 A.L.R. 894=I.L.R**

C. P. CODE (1908), S. 60.

(1937) All. 823=1937 A.L.J. 776=1937 A.W.R. 649=A.I.R. 1937 All. 652.

——S. 60 (1), Provisos. (a) to (p)—*Exemptions under—If cumulative.*

All the sub-heads running from (*a*) to (*p*) under S. 60 (1), proviso, C. P. Code, are on the same footing, and the exemptions provided thereunder are cumulative, and any man is entitled to all the benefits and not confined to one only, if he is qualified to do so. (*Baguley, J.*) MUNICIPAL CORPORATION OF RANGOON *v.* RAM BEHARI. 1939 Rang.L R. 504=185 I.C. 460=12 R.R. 194=A.I.R. 1939 Rang 432.

——S. 60, Proviso (1) (b)—*Construction—"Implements of husbandry"—Engine or water-pump used by agriculturist for irrigation of fields.*

The term 'implements of husbandry' in Cl. (*b*) to Proviso (1) to S. 60 should be interpreted in a fair and reasonable and even a generous spirit and not in a narrow and mean manner. The clause is not intended to force agriculturists back to primitive ways but to protect them in their livelihood as agriculturists by preventing the attachment even of those mechanical means whereby they plough and irrigate and cultivate the soil and obtain their livelihood as agriculturists. An engine or a water-pump is necessary for the agriculturist to irrigate and cultivate his fields and earn his livelihood as an agriculturist and therefore it comes within the term 'implements of husbandry'. (*Davis, J.C. and Tyabji, J.*) UDHARAM DALUMAL *v.* ROZI SHAMBE. I.L.R. (1939) Kar. 499=181 I C. 250=11 R.S. 205=A.I.R. 1939 Sind 96.

——S. 60 (1) (b) and (c)—*"Agriculturist"—Test.*

The word 'agriculturist' in S. 60, C. P. Code, may be defined as meaning a person who personally engages himself in the occupation of tilling the soil and who derives his livelihood from that occupation and cannot or does not maintain himself from other sources. It is not meant thereby that the sole source of his income or the main source of his income must be this occupation of tilling the soil. No doubt in most cases a rough and ready test would be afforded by considering the main source of income or the sole source of income; but that is not an absolutely correct test. The true test is whether a man personally engages in tilling and whether this occupation is essential to his maintenance. (*Dalip Singh, Monroe and Ram Lall, JJ.*) NIHAL SINGH *v.* SRI RAM. I.L.R. (1940) Lah. 23=184 I.C. 261=12 R.L. 190=41 P.L.R. 560=A.I.R. 1939 Lah. 388 (F.B.).

——S. 60 (1) (c) (as amended by Punjab Act VII of 1934)—*Applicability—Property vested in Official Receiver in* 1933.

The amendment to S. 60 (1) (*c*), C. P. Code, introduced by S. 35, Punjab Relief of Indebtedness Act (VII of 1934), which came into force in 1935 does not divest the Official Receiver of property which is validly and legally vested in him in 1933. Nor can the legal representatives of the insolvent claim exemption under S. 60 (1) (*c*) when succession to them opened out long after the vesting of the property in the Official Receiver. (*Tek Chand, J.*) KALA SINGH *v.* BOOTA SINGH. 11 R.L. 418=178 I.C. 195=40 P.L.R. 793=A.I.R. 1938 Lah. 459.

C. P. CODE (1908), S. 60.

——S. 60 (1) (c)—*Construction—'Occupied by'—Meaning of—All occupied houses, if exempt.*

The words 'occupied by' in S. 60 (1) (*c*), C. P. Code, mean that it is something more than a dwelling-house. It is a building occupied by him when he is following his avocation of an agriculturist. The use of the word 'houses' make it clear that all houses occupied by him, as such, are exempt. (*Darling, S. M. and Mehta, J. M.*) AMAR SINGH *v.* GANGA PRASAD. 1938 R.D. 840.

——S. 60 (1) (c)—*Decree against non-agriculturist legal representative—Original debtor an agriculturist—Property, if liable to attachment.*

Where for the debts of a person a decree is passed against his legal representative who is non-agriculturist his property derived from original debtor is liable to attachment even if the original debtor was an agriculturist. A.I.R. 1939 Lah. 556, Affirm. (*Tek Chand and Bhide, JJ.*) SHER SINGH *v.* BALDEV SINGH. A I.R. 1940 Lah. 320.

——S. 60 (1) (c)—*Exemption under*—Bona fide *occupation for agricultural purposes—Need for proof.*

In order to claim exemption from attachment or sale under S. 60 (1) (*c*) it is not sufficient merely to show that the house in question belonged to an agriculturist, or was being lived in by him, but it must be established further that it was being used or occupied *bona fide* for purposes of agriculture. (*Tek Chand, J.*) BALWANT SINGH *v.* JAGDISH SARAN. 172 I.C. 412=10 R L. 316=39 P.L.R. 418=A.I.R. 1937 Lah. 200.

——S. 60 (1) (c)—*Exemption under—Scope of—Person ceasing to be a Zamindar and becoming an 'Agriculturist' between dates of attachment and sale—If can claim.*

The house of an agriculturist is under S. 60 (1), C. P. Code, exempt both from an attachment and sale in execution of any decree. Where on the date of attachment the judgment-debtor had two sources of livelihood (1) rent payable to her by tenants and (2) profits arising from the cultivation of her *Khudkasht* lands and was therefore not considered an agriculturist, but owing to a subsequent sale of Zamindari she became an agriculturist before the date of sale.

Held, that as the main source of her livelihood namely, Zamindari had passed out of her hands, after the attachment of her house but before its sale so as to make agriculture the only source of her livelihood her residential house could not be sold. (*Niamatullah, J.*) ARAZ BIBI *v.* MUBARAK ALI KHAN. 173 I.C. 337=10 R.A. 474=1938 R.D. 32=1937 A.L.J. 1314=1937 A.W.R. 1220=1938 A.L.R. 114=A.I.R. 1938 All. 85.

——S. 60 (1) (c) (as amended by S. 35 of the Punjab Relief of Indebtedness Act, VII of 1934)—*House mortgaged with possession by agriculturist and taken on rent from mortgagee—Liability to attachment.*

Where a house belonging to an agriculturist is exempted from attachment and sale in execution of a decree under S. 60 (1) (*c*), C. P. Code, as amended by S. 35, Relief of Indebtedness Act, the mere fact that the judgment-debtor has mortgaged the house with possession and taken it on rent from the mortgagees, does not disentitle him to the protection afforded by S. 60 (1) (*c*), as the judgment-debtor never gave up possession of the house and has been using it throughout for

C. P. CODE (1908), S. 60.

purposes subservient to agriculture. A.I.R. 1933 Lah. 893, Rel. on. (*Abdul Rashid, J.*) DULLA *v.* RAM CHAND. 180 I.C. 92=11 R.L. 660=A.I.R. 1938 Lah. 736.

——S. 60 (1) (c)—*House of agriculturist—Dismissal of father's objection in execution—Sons, if can re-agitate it, by separate suit.*

Where in execution of a decree against a father of a joint family, the father objects to the sale of his house on the ground of its being exempted under S. 60 (1) (*c*), C. P. Code, from such a sale, but it is dismissed for default and the house is sold, it is not open to the sons later on to file a regular suit to restrain the purchasers from interfering with their possession, on the ground that the house could not be sold in execution; the reason being that inasmuch as the father had represented the sons in the execution proceedings, the decisions in those proceedings are as much binding on them as on their father. (*Thom, C.J., Collister and Ganga Nath, JJ.*) THAKUR DIN *v.* SITA RAM. I.L.R. (1939) All. 602=183 I.C. 434=12 R.A. 139=1939 O.L.R. 521=1939 A.L.J. 450=1939 A.W.R. (H.C.) 431 =A.I.R. 1939 All. 399 (F.B.).

——S. 60 (1) (c)—*House of agriculturist—Voluntary transfer to satisfy decree—If prohibited.*

S. 60, C. P. Code, does not prohibit a voluntary transfer of a house of an agriculturist for satisfaction of a decree against him. (*Bhide, J.*) SITA RAM *v.* PHUSAL SINGH. 170 I.C. 896=10 R.L. 152 (1)=A.I.R. 1937 Lah. 939.

——S. 60 (1) (c) (as amended by Punjab Relief of Indebtedness Act)—*House of insolvent—Exemption.*

If the insolvent was not engaged in the occupation of tilling the land on the date of order of his adjudication and there is nothing to indicate that he maintained himself solely or mainly on agriculture at that time, his house is not exempt from attachment and sale under S. 60 (1) (*c*), C. P. Code, as amended by the Punjab Relief of Indebtedness Act. (*Tek Chand, J.*) AMAR SINGH *v.* INDER MAL. 41 P.L.R. 663=A.I.R. 1939 Lah. 537.

——S. 60 (1) (c)—*House of judgment-debtor attached in his lifetime—Judgment-debtor not an agriculturist—His legal representative, an agriculturist—Right of latter to claim exemption from attachment.*

A decree for money was executed against the deceased debtor during his lifetime and his non-ancestral house was attached. The judgment-debtor was not an agriculturist. Subsequently his legal representative inherited it and occupied it as an agriculturist and claimed exemption from attachment,

Held, that in deciding the question whether the house is or is not exempt from sale under S. 60, it was not the profession of the legal representative but that of the deceased debtor against whom the decree was and against whom it was being executed, that should be taken into consideration. Therefore, the house could not be released on the finding that the heir occupied it as an agriculturist. (*Jai Lal, J.*) HIRDA RAM *v.* MOHAMMAD DIN. 167 I.C. 457=9 R.L. 493=A.I.R. 1936 Lah. 895.

——S. 60 (1) (c) (as amended by S. 35 of Punjab Relief of Indebtedness Act)—

C. P. CODE (1908), S. 60.

Judgment-debtor's house lent to and occupied by his sons who are independent proprietors—Exemption from attachment.

Where the house of the judgment-debtor was not occupied by him but was lent to and occupied by his sons who were independent proprietors and were living at a different place.

Held, that the house was not exempt from attachment as the sons came under the word 'others' in S. 35 of the Punjab Relief of Indebtedness Act. (*Bhide, J.*) SULTAN *v.* OFFICIAL RECEIVER. 182 I.C. 631=12 R.L. 61=41 P.L.R. 377 (1)=A.I.R. 1939 Lah. 50.

——S. 60 (1) (c)—*Object of—'Agriculturist', who is—Test—Burden of proof.*

The object of proviso (*c*) to sub-S. (1) to S.60, C. P. Code, is to prevent the deprivation of his means of livelihood from an agriculturist by having his house and other buildings taken from him. The word 'agriculturist' means a person who earns his livelihood wholly or principally by cultivating land either personally or through servants. The test is what is the chief source of his livelihood. If it is other than by cultivation of land he is not an agriculturist though he may also cultivate lands. (*Darling, S. M. and Mehta, J. M.*) AMAR SINGH *v.* GANGA PRASAD. 1938 R.D. 840.

——S. 60 (1) (c)—*Objection under, belated—If can be entertained.*

Objections under S. 60, C. P. Code, even if belated could be entertained, and where, therefore, objections under S. 60 (1) (*c*) were raised two days prior to the sale, the Court ought not to dismiss them on that ground. (*Agha Haidar, J.*) FATA *v* SHAM SUNDER. 38 P.L.R. 669.

——S. 60 (1) (c)—*Person living upon trade—Pleasure garden appurtenant to house—House and garden—If exempt from attachment.*

A person relied for his livelihood upon trade and contractor's work. He had no agricultural land except a pleasure garden appurtenant to his house nor was this garden used as a source of livelihood.

Held, that neither the house nor the garden was exempt from attachment under S. 60. (*Middleton, J.C.*) SAFDAR ALI KHAN *v.* MIAN UMAR BAKHSH. 163 I. C. 621=9 R. Pesh. 7= A.I.R. 1936 Pesh. 151.

——S. 60 (1) (c)—*Protection under—If can be waived—Mortgage by agriculturist—If amounts to waiver.*

The protection given under S. 60 is for the benefit of the judgment-debtor and can be waived by him. Therefore, if he chooses specifically to mortgage his agricultural houses he must be taken to have waived the privilege conferred upon him by this section. (*Bose, J.*) RAMADHIN *v.* SHEODUTT. 180 I.C. 690=11 R. N. 389=1938 N.L.J. 445=A.I.R. 1938 Nag. 544.

——S. 60 (1) proviso, cl. (c)—*Property exempt from attachment in hands of judgment debtor—If also immune from attachment in hands of his legal representatives.*

Under cl. (*c*) of the proviso to sub-S. (1) of S. 60, C.P. Code, exemption attaches to the property itself and not to the person holding the property for the time being. Consequently if a property is exempt from attachment under the said clause in the hands of the judgment-debtor, it is also immune from attachment in the hands of his legal

C. P. CODE (1908), S. 60.

representatives, although they are not agriculturists. (*Addison and Din Mohammad, JJ.*) GURPARSHAD DEWAT RAM *v.* KISHEN CHAND. 11 R.L. 369=177 I.C. 835=40 P.L.R. 409=A.I.R. 1938 Lah. 608.

——S. 60 (1) (c)—*Scope—Agriculturist waiving objection to attachment and sale of house—Effect.*

There is no statutory bar to an agriculturist voluntarily alienating his houses. The bar under S. 60 is against the compulsory sale of such a house in execution of a money decree. Where therefore an agriculturist waives objection to attachment and agrees to the sale of the houses in execution of the decree, S. 60 does not protect the houses from attachment and the sale. A I.R. 1935 Lah. 164, Foll. (*Tek Chand, J.*) NATHA SINGH *v.* BHAG MAL. 42 P.L.R. 398=A.I.R. 1939 Lah. 316.

——S. 60 (1) (c)—*Waiver of right by agriculturist.*

An agriculturist may waive the right vested in him under S. 60, C. P Code, by voluntarily surrendering his house in favour of the decree-holder. (*Din Mahomed, J.*) BANARSI DAS *v.* RULIA 42 P.L.R. 261.

——S. 60 (1) (e)—*Mere right to sue—Co-sharer's share of village profits before accruing due—Attachment and sale—Validity.*

The right of a co-sharer to village profits does not accrue till the end of the agricultural year. The rights are not ascertainable until the year has ended and consequently any attachment of the share of a co-sharer in village profits before the first day of the agricultural year next following that to which the village profits refer, is an attachment of a mere right to sue and a sale held in pursuance of such attachment being of a mere right to sue is invalid and of no effect. (*Vivian Bose, J.*) JAGANNATH *v.* JAMNAVALLABH. 168 I. C. 266=9 R.N. 247=A.I.R. 1936 Nag. 218.

——S. 60 (1) (f)—*Right of personal service.*

The rights of personal service within the meaning of proviso (*f*) to S. 60, C. P. Code, cannot be either heritable or partible or transferable. (*Courtney Terrell, C.J. and Dhavle, J.*) RAMSARAN PANDEY *v.* ISWAR PANDEY. 160 I C. 355=8 R.P. 360=17 Pat.L.T. 77=A.I.R. 1936 Pat. 10.

——S. 60 (1) (i) (as amended) and S. 73—*Decrees in suits prior and subsequent to amendment of S. 60—Salary of judgment debtor—What portion attachable and how to be distributed.*

Where there were two decrees against the same judgment-debtor, one obtained in suit instituted before the 1st June of 1937 to which the amendment of S. 60, C P. Code by Act IX of 1937 would not apply, and another subsequent to that date, to which the amendment would apply, the half salary of the judgment-debtor, has to be attached and distributed rateably between the two decree-holders. (*Davies*) RAM PARTAP *v.* RAM CHANDRA. 1939 A.M.L.J 157.

——S. 60 (1)(g) and (n)—*Applicability—Grant in consideration of right as Deshmukh, Deshpandia and Sir mukaddam.*

The word 'pension' as used in the C. P. Code implies periodical payments of money by Government to the pensioner; it cannot apply to one who draws rent as a limited owner of the properties which yield them Hence a grant in consideration of the grantee's right as Deshmukh, Deshpandia and Sir mukaddam, is not affected by Cl. (*g*) of S. 60 (1), C. P. Code. Nor is it affected by Cl. (*n*) either for the right of the holder is not future or contingent, but present and vested. (*Pollock, J.*) DEORAO *v.* RAMBHAU NILKANTRAO, I L.R. (1939) Nag. 679=181 I.C. 65=11 R.N. 418=1938 N L.J. 112=A.I.R. 1938 Nag. 269.

——S. 60 (1) (g)—*Jagir—Government granting income of certain water mills as jagir—Jagirdar leasing out water mills—Income from lease—Attachability.*

No distinction can be drawn between the right of a jagirdar, who has been granted the income as jagir of certain water mills, to recover a certain sum per year as revenue, jagir or royalty and his right to recover rent from the lessee to whom he has granted lease of the water mills. The only right he has in the water mills is the right to recover rent from the occupants of the water mills and the rent is really the royalty for the use of water. The occupation of the water mills is merely a subsidiary right to the principal right and the principal rights is conferred upon him as a jagir by the Government. Consequently his income from the lease cannot be attached. (*Jai Lal, J.*) RAJA BALBHADAR SINGH *v.* SHANKAR DAS. 172 I.C. 426=10 R.L. 318=39 P.L.R. 434=A.I.R. 1937 Lah. 211.

——S. 60 (1) (g)—*'Pension'—Jagir.*

The words 'pension' as used in S. 60 (1) (*g*), C. P. Code, is wide enough to cover all sorts of periodical payments in whatever shape they are made by the Government. A Jagir that is realised in the shape of an assignment of land revenue is a pension within that clause, and is, therefore, exempt from attachment in execution of a decree. (*Addison and Din Mohammad, JJ.*) ACHHRUMAL *v.* BALWANT SINGH. 18 Lah. 415=171 I.C. 6=10 R.L. 177=39 P.L R. 80=A.I.R. 1937 Lah. 178. [On appeal from 38 P.L.R. 531.]

——S. 60 (1) (g)—*'Pension'—Meaning of—Grant of cash allowances and inam lands to person holding office of Deshpandia for his maintenance—Share in such 'inam lands'—If exempt from attachment.*

The word 'pension' as used in the C. P. Code "implies periodical payments of money by Government to the pensioner", and it does not apply to a person who draws rents not as a pensioner, but as a limited owner of the properties which yield them. By a grant of land the Government made a grant of certain cash allowances and landed inams to a person for having held the office of Deshpandia and with a view to provide for his proper maintenance according to his status. The judgment-debtor inherited a share in such inam lands. In execution of a decree against the judgment-debtor, the said share was attached. The judgment-debtor raised an objection that the share was not liable to attachment as it was a political pension within the meaning of S. 60 (1) (*g*)

Held, that as the rents and profits realized by the judgment-debtor from such inam lands were not drawn by him as a pensioner, but as a limited owner thereof till the resumption of such lands by the Government on the breach of conditions mentioned in the grant, the share could not fall under S. 60 (1) (*g*) of the Code so as to be exempt from attachment. (*Vivian Bose, J.*) YADEO NILKANTH DESHPANDE *v.* JANKIDAS NAR-

C. P. CODE (1908), S. 60.

SINGDAS. 170 I.C. 78=10 R.N. 37=A I.R. 1937 Nag. 202.

——(as amended in 1937), S. 60 (1) (h)—*Construction and scope of.*

On a consideration of the entire S. 60, C. P. Code, there is no doubt that the latter part of Cl. (*h*) of sub-S. (1) protects from attachment in execution of a decree salary of all persons in receipt thereof other than public officers and servants of a railway company or local authority. (*Lobo, J.*) HORMASJI JAMSHEDJI, *In re.* 182 I. C. 185=12 R.S. 1=A.I.R. 1939 Sind 134.

——(as amended in 1937), S. 60 (1) (h)—*Interpretation—Principle of.*

Cl. (*h*) of sub-S. (1) of S. 60 should be interpreted with reference to the entire section, and any interpretation founded upon that clause alone would be unsafe and unwarranted by all canons of interpretation. (*Lobo, J.*) HORMASJI JAMSHEDJI, *In re* 182 I.C. 185=12 R.S. 1=A.I.R. 1939 Sind 134.

——S. 60 (1) (h) and (i)—*"Salary"—If includes daily wages or fees of temporary employee.*

The word "salary" in Cls. (*h*) and (*i*) of S 60 (1), C. P. Code, before the Amendment Act IX of 1937, cannot be construed as being restricted to an emolument which is payable monthly or to a man who holds a permanent or semi-permanent employment. The remuneration of a temporary employee engaged on daily fee is "salary" within the meaning of Cls. (*h*) and (*i*) of S. 60 (1). (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. 17 Pat. 706=11 R.P. 211=1939 Pat.W.N. 103=178 I.C. 141=5 B.R. 61=19 Pat.L.T. 768=A.I.R. 1939 Pat. 77.

——(as amended by Act IX of 1937), S. 60 (1) (h) and (i)—*Scope—If retrospective.*

Cls. (*h*) and (*i*) of S. 60 (1), C. P. Code, as amended by Act IX of 1937 have no application to proceedings arising out a suit instituted before the first day of June, 1937. (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. 17 Pat. 706=11 R.P. 211=178 I.C. 141=5 B R. 61=19 Pat.L.T. 768=1939 P.W.N. 103=A.I.R. 1939 Pat. 77.

——S. 60 (1) (i)—*Applicability—Ghatwali estate—Profits accruing to ghatwal—Attachability in execution of decree against him.*

The profits accruing to a ghatwal from his estate are not his salary within the meaning of S. 60, C. P. Code, and is not on that account exempt from attachment. The surplus profits of the estate after all the necessary outgoings are to be regarded as the personal property of the ghatwal and are therefore liable to attachment in execution of a decree against him. (*Rowland and Chatterji, JJ.*) BANSIDHAR SHROFF *v.* ASHUTOSH. 180 I C. 8=5 B R. 344=11 R.P. 436=1939 P.W.N. 86=A.I R. 1939 Pat. 242.

——S. 60 (1) (i)—*Attachment of salary—Compromise by judgment-debtor waiving objection—Validity.*

It is open to a judgment-debtor to enter into a compromise contracting himself out of any benefit that S. 60, C P. Code, confers on him in the matter of the attachment of his salary. (*Ram Lall J.*) JAGAN NATH *v.* ALLAH DAD. 41 P.L.R. 631=185 I.C. 317=12 R.L. 273 (2)=A.I.R. 1939 Lah. 539.

C. P. CODE (1908), S. 60.

——S. 60 (1) (i)—*Construction and scope—Salary—If restricted to salary of officers entitled to allowance under Cl.* (h).

There is no reason to restrict the scope of Cl. (*i*) of S. 60 (1), C. P. Code, and to hold that the salary mentioned in Cl. (*i*) refers to the salary of one who is entitled to get allowances mentioned in Cl. (*h*). Though Cl. (*i*) refers to Cl. (*h*), that is only to avoid the repetition of the description of officers whose salaries have been exempted. It does not follow that their salary for the period for which they are on duty is not covered by Cl. (*i*), sub-S (1). (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. 17 Pat. 706=11 R.P. 211=178 I.C. 141=5 B.R. 61=19 Pat.L.T. 768=1939 P.W.N. 103=A.I.R. 1939 Pat. 77.

——S. 60 (1) (i) and (j)—*Pay of Assistant Surgeon of Indian Medical Department—Attachability.*

The pay of an Assistant Surgeon of the Indian Medical Department is not liable to attachment in execution of an order for maintenance and alimony passed by a Civil Court, whether he be a person to whom the Indian Articles of War apply or a person to whom the provisions of the Army Act of 1881 apply. (*Sulaiman, C.J., Thom and Bennet, JJ.*) NORBERT EDWIN NUGENT *v.* MARJORY JULIA NUGENT. 167 I.C. 179=9 R.A. 495=1937 A.L.R. 145=I.L.R. (1937) All. 350=1936 A.W.R. 1239=1936 A.L.J. 1291=A.I.R. 1937 All. 129 (F.B.).

——S. 60 (1) (i)—*Public officer—Advocate engaged by Government to conduct Government suit—If public officer.*

Conduct of a suit on behalf of the Government by an advocate for the recovery of public money is performing a public duty which the advocate undertakes. An advocate who is appointed by the Government as a lawyer to conduct a suit on its behalf is an officer and a public officer within the meaning of S. 60 (1) (*i*), C. P. Code. (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. 17 Pat. 706=11 R.P. 211=178 I.C. 141=5 B.R. 61=19 Pat.L.T. 768=1939 P.W.N. 103=A.I.R. 1939 Pat. 77.

——S. 60 (1) (k)—*Applicability—Provident Fund of aided college—Fund existing before notification by Government—Deposits in—Attachability—Immunity from attachment—Extent of—If ceases on payment to depositor—Provident Funds Act, S.* 3.

A Provident Fund maintained by the authorities of an aided college, provided it is constituted by the authority of Government is a Government P ovident Fund as defined by the Provident Funds Act, and as long as the money remains in the Fund it is immune from attachment under S. 60 (1) (*k*), C. P. Code, read with S. 3 of the Provident Funds Act (1925) as amended in 1927. The fact that a Provident Fund has been in existence before the Government issued a Notification introducing a Provident Fund makes no difference; when the Fund is constituted under the authority of the Government, the entire amount of the Fund, both the amounts subscribed before and the amounts subscribed after the notification becomes consolidated into one Fund, and the whole deposit is exempt from attachment.

Quaere:—Whether the immunity from attachment lasts only as long as the money is in the

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Fund and whether it comes to an end when it reaches the depositor. (*Khaja Mohammad Noor and Madan, JJ.*) KRITYANAND SINGH BAHADUR *v.* SAILESWAR SEN. **15 Pat. 779=166 I.C. 499=9 R.P. 305 (2)=3 B R. 181=1936 P.W.N. 756=17 Pat.L.T. 731=A.I.R. 1937 Pat. 22.**

——**S. 60 (1)(k)**—*Applicability—Railway guard—Allowances of over and above salary—Attachability—Advance from Provident Fund—Repayment in monthly instalments—Instalments—If deductible from attachable salary.*

The allowances of a Railway guard over and above his salary are not exempt from attachment. Where an advance taken by a guard from his Provident Fund is being recovered from him in monthly instalments, such instalment payment by him are not deposits, though they may be compulsory deductions or recoveries, and there can be no deduction of this amount from the salary available for attachment under S. 60 (1) (*k*), C. P. Code. (*Horwill, J.*) KONDAYYA NAIDU *v.* MARIANAN. **52 L W. 69=1940 M.W.N. 555=A.I.R. 1940 Mad. 766=(1940) 1 M.L.J. 936.**

——**S. 60 (1) (k)**—*Exemption from attachment—Amount standing to Imperial Bank employee's credit in Provident Fund.*

Under S. 60 (*k*), C. P. Code, the amount standing to the credit of an employee of the Imperial Bank of India in the Provident Fund established by that Bank for the benefit of its employees is exempt from attachment. (*Jai Lal and Dalip Singh, JJ.*) MAI DHAN SITA RAM *v.* IMPERIAL BANK OF INDIA, RAWALPINDI **165 I.C. 767=9 R. L. 303=38 P.L.R. 1155=A.I.R. 1936 Lah. 694.**

——**S. 60 (1) (k)**—*Provident fund money—Appointment of receiver—Permissibility.*

Although S. 60, C.P. Code, prohibits the attachment of provident fund money, it is open to a decree-holder against the estate of the deceased to apply for the appointment of a receiver in execution. (*McNair, J.*) BARAMDEO PANDEY *v.* MRS. FAY SMITH. **44 C.W.N. 637.**

——**S. 60 (1) (k)**—*Subscriptions payable to Provident Fund—Exemption.*

The definition of "Compulsory deposit" in S. 2 of the Provident Funds Act applies to "Compulsory deposits" referred to in S. 60 (1) (*k*), C. P. Code, and they mean "subscriptions *to* or deposits *in*" a Provident Fund. A judgment-debtor is, therefore, entitled to claim exemption from attachment the amount of subscription payable out of his salary to the Provident Fund. Before the time of payment the money is not his. At the time of payment it becomes a subscription to the Fund and a subscription to the Fund is a compulsory deposit and therefore exempted. There is no intervening moment when it is susceptible of attachment. (*Baguley, J.*) MUNICIPAL CORPORATION OF RANGOON *v.* RAM BEHARI. **1939 Rang.L.R. 504=185 I C 460=12 R.R. 194=A.I.R. 1939 Rang. 432.**

——**S. 60 (1) (l)**—*Attachment of salary in contravention of—Consent of judgment-debtor—Effect of.*

S. 60, C. P. Code, is a prohibition only against forcible attachment or sale, and there is nothing in law to prevent a judgment-debtor from consenting to the attachment of half of his salary although the attachment contravenes the section as amended by Act XI of 1937. (*Bhide, J.*)

C. P. CODE (1908), S. 60.

RAJINDAR KUMAR *v.* CHETAN LAL. **188 I.C. 639=41 P.L.R 834=A.I.R. 1940 Lah. 65.**

——**S. 60 (1) (m)**—*Applicability—Contingent interest—Attachability.*

A clause in a codicil provided that the income from certain property was to be divided between *A* and his wife *B*, in a certain proportion so long as they were both alive. In case one of them died, his or her share of income was to belong to their four children or the survivors of them in equal proportions and, when the living parent died, the capital and income were to belong to children then living in equal proportion. The testator was dead and *A* and *B* were alive. The question arose as to whether *D*, one of the four children referred to in the codicil, received merely a contingent interest in the legacies within the meaning of S. 60 (*m*), C. P. Code.

Held, that the bequest in favour of *D* was a contingent interest within the meaning of S 60(*m*) and not a vested remainder and was not liable to attachment and sale. 1930 P.C. 17; 1865 W.R. 87; 14 M.I.A. 40 (P.C.); In re *Clarke Coombe* v. *Carter*, (1887) 37 Ch.D. 348, Ref.; 18 Cal. 164, Dist. (*Rupchand Bilaram and Mehta, A.J.Cs.*) PESTONJI BHICAJI *v.* PATRICK H. ANDERSON. **30 S.L.R. 50=163 I.C. 206=8 R.S. 190=A.I.R. 1936 Sind 65.**

——**S. 60 (1) (m)**—*Applicability—Will—Life-estate to widow and absolute grant of residue to daughter after widow's death—Daughter dying before widow leaving husband—Interest of latter—Attachability.*

Where a testator after making specific bequests grants the residual estate to his widow for her lifetime, and then to his daughter absolutely, and the daughter dies during the lifetime of the widow, leaving her husband as her sole heir, the interest of the husband in the property is not a mere expectancy of succession and is not exempt from attachment and sale, under S. 60, Proviso 1, Cl. (*m*) in execution of a decree obtained against the widow and the husband. The right to the property vests absolutely in the daughter after the testator's death and though a life-interest is bequeathed to the widow, the interest of the daughter is not a mere possibility but a vested remainder. So long as the daughter is alive her heir, *i.e.*, the husband, has only an expectancy of succession to the vested remainder, but after her death, it devolves on him by inheritance. The fact that the husband's right depends upon a contingency, namely, the death of the widow, makes no difference for a contingent interest is something different from a mere possibility of succession. (*Guha and Nasim Ali, JJ.*) MATIMALA DEBI *v* SURENDRA NATH MUDI. **I L.R. (1937) 1 Cal. 583=168 I.C. 102=9 R.C. 763=A.I.R. 1936 Cal. 802.**

——**S. 60 (m) and O. 21, R. 52**—*Contingent interest—Right of judgment-debtor to surplus sale proceeds prior to confirmation.*

Where in execution of a mortgage decree the sale proceeds are deposited in Court pending confirmation of sale, to which the judgment-debtor does not object, the surplus amount of the sale proceeds which is payable to the judgment-debtor after confirmation of the sale is not a contingent interest as contemplated by S. 60 (*m*), C.P. Code, and can be attached under O. 21, R. 52 of the Code. A Court passing a prohibitory order for

C. P. CODE (1908), S. 60.

attaching such property acts within its jurisdiction. The mere fact that the confirmation of sale is stayed at the instance of another person who has filed a suit against the judgment debtor will not entitle the latter to raise the contention that the property is not attachable. (*Puranik, J.*) TUKARAM RAGHUNATH *v.* BHIKU BAI I.L.R. 1938 Nag. 402=173 I.C. 215=10 R.N. 289=A.I.R. 1937 Nag. 391.

——S. 60 (1) (m)—*"Contingent or possible right or interest"—Bequest of income of property to husband and wife for life—Gift over of income and corpus to children—Interest of children—Attachability during lifetime of parents.*

A testator by his will directed that the residue of his estate should be divided into sixteen shares and he bequeathed three of such shares to his nephew *A* and *W*, his wife and their issue. By a codicil of later date the testator revoked his bequest and in lieu thereof directed: "The income from these three-sixteenths shall so long as *A* and *W*, his wife, are both alive, be divided two-thirds to the wife and one-third to the husband. If one of them dies, his or her share of the income shall belong to their four children or the survivor of them in equal proportions and when the remaining parent dies, the capital and income shall belong to the children then living in equal proportions." After the death of the testator and while both *A* and *W* were alive, a creditor attached the interest of *P* one of the sons of *A* and *W* in the three-sixteenths shares in the testator's residuary estate.

Held, that the interest of *P* under the codicil was, during the joint lives of *A* and *W*, unquestionably contingent both as to the income and as to the corpus, and that it was exempt from attachment and sale under S. 60 (1) (*m*), C. P. Code. (*Lord Romer.*) PESTONJI BHICAJEE *v.* ANDERSON. I.L.R. (1939) Bom. 36=32 S.L.R. 963=179 I.C. 995=11 R.P.C. 156=41 Bom.L.R. 1=1939 O.A. 185=1939 A.W.R. (P.C.) 15=1939 O.W.N. 196 =1939 O.L.R. 129=5 B.R. 402=1939 M.W.N. 551=68 C.L.J. 339=48 L.W. 912=1938 P.W.N. 882=A.I.R. 1939 P.C. 6=(1938) 2 M.L.J. 906 (P.C.).

——S. 60 (1) (n)—*Applicability—"Right to future maintenance"—Person having vested right to rents in inam land granted to office-holder for maintenance—Land—If exempt from attachment.*

The rule in S. 60 (1) (*n*) is no more than an application of the general principle that only present rights can be dealt with as property and not inchoate future rights which have not accrued, such as a *spes successionis* or a right to future rents. A grant of land as inam was made by Government to the ancestor of the judgment-debtor for his own maintenance in consideration of his family history and the office of Deshpandia which he held. The judgment-debtor inherited a share in such lands and in execution of a decree against the judgment-debtor, the share was attached. On a contention being raised by the judgment debtor that the inam was a right to future maintenance and was not therefore attachable under S. 60 (1) (*n*).

Held, that the property in question, *i.e.*, the inam lands, were in existence and were owned by the judgment-debtor, till they were resumed by the Government on breach of any of the conditions mentioned in the grant. The right of the judgment-debtor in the property was not future or contingent, but present and vested, the judgment-debtor having a right to deal with the property as he liked during the period of his life. The right to the inam land, therefore, could not fall under S. 60 (1) (*n*) of the Code, so as to be exempt from attachment. (*Vivian Bose, J.*) YADEO NILKANTH DESHPANDE *v.* JANKIDAS NARSINGDAS. 170 I.C. 78=10 R.N. 37=A.I.R. 1937 Nag. 202.

——S. 60 (1) (n)—*Future maintenance—Allowance to disinherited son—Exemption from attachment.*

A wealthy father disinherited his son in the sense that he did not give him any share in his property under his will, but provided for his food and lodging. The testator further provided that out of the income of his property his son should get Rs. 100 per month as his pocket money. On a construction of the will,

Held, that the sum of Rs. 100 which was described as pocket money of the son might be treated as his "future maintenance" out of which he was to supply himself with such necessaries of life as, having regard to his position in life, would be required for his sustentation and physical well-being, and was, therefore, exempt from attachment under S. 60 (1) (*n*), C. P. Code. (*Agha Haider, J.*) TARA CHAND *v.* BAKHSHI SHER SINGH. 167 I.C. 844=9 R.L. 559=38 P.L.R. 702=A.I.R. 1936 Lah. 944.

——S. 60 (n)—*Judgment-debtor having only a life estate with a restraint on alienation—Saleability in execution—Relief by way of indirect execution.*

A settlement deed settled the property on a widow out of the income of which she had to maintain the settlor himself, and his other relatives. It also provided that the widow was not to alienate the property and that subsequent to her death it was to devolve on settlor's and settlee's heirs. It did not contain any provision for the maintenance of the widow. The property was sought to be attached in execution of a decree against the widow, and the execution was contested on the ground that the property was not attachable under S. 60 (*n*), C. P. Code.

Held, that the document did not confer on the widow anything more than a life estate and since there was a restraint on alienation imposed, the property was not property over which the widow had a disposing power and therefore it could not be attached in execution of a decree against her. But the decree-holder was entitled to have a receiver of the income of the property, although he could not bring that property to sale. (*Beasley, C. J.*) JANAKI AMMAL *v.* MARUDAI CHETTI. 175 I.C. 305=10 R.M. 766=A.I.R. 1937 Mad. 864.

——S. 60 (1) (n)—*Right of maintenance—Attachability—Test.*

Where a right of maintenance is sought to be attached, the true test to lay down is whether such a right is purely personal, non-heritable and non assignable, or it is an alienable and heritable right which takes the shape of an annuity or has been granted in lieu of a share in an estate. If it is the former, it will be protected under the provisions of the C. P. Code, but if it is the latter it will not be exempt from attachment. In a family governed by rule of primogeniture, a dis-

pute between the two brothers *K* and *J* was decided by arbitration by which *K* was entitled to the whole of his father's property and *J* to a certain maintenance with a right of residence. On the award being challenged by *J's* son an agreement was entered into by the parties under which the monthly allowance of *J* was increased. *J* was given Rs. 20,000 and promised Rs. 3,000 on the occasion of marriage of each child and *J* and his son and descendants relinquished all rights to the property which they possessed and undertook to be bound by the agreement for all time to come. *J* was later on declared insolvent and the Official Receiver proceeded to attach the amount of maintenance recoverable by him (*J*) under the agreement.

Held, that the allowance payable to *J* was not a right to future maintenance which was exempt from attachment under the provisions of C. P. Code, but was in the form of annuity and was not therefore immune from attachment. (*Addison, A.C.J. and Din Mahomed, J.*) CHUNI LAL *v.* JAI GOPAL. **17 Lah. 378=163 I.C. 103=8 R.L. 1002 =38 P.L.R. 707=A.I.R. 1936 Lah. 55.**

——**S. 60 (1) (n)**—*Right of residence—Equitable execution—Permissibility.*

Although the right of residence enjoyed by a judgment-debtor in certain landed property, is not attachable and saleable, such right is, in a proper case, liable to be dealt with in execution of a decree by adopting the remedy of equitable execution, namely, the appointment of a receiver who would act under the orders and supervision of the Court, and realize the income of the property, and after defraying the incidental expenses and his own remuneration would devote the proceeds towards the satisfaction of the decretal amount. (*Agha Haidar, J.*) SAIN DAS *v.* TIKKA SANT SINGH. **165 I.C. 519=9 R.L. 254=A.I.R. 1936 Lah. 830.**

——**Ss. 63 and 73**—*Applicability and relative scope—Several decree-holders—Attachment of same and several properties of same judgment-debtor in different Courts—Rateable distribution —Entire sale proceeds—If divisible among all—Rule.*

S. 73, C. P. Code, is not to be regarded as the only section for rateable distribution in the Code. The section must be read in conjunction with S. 63 of the Code. While both Ss. 63 and 73 aim at the fair distribution of the proceeds of sale among the judgment-creditors of the common judgment-debtor, there is a fundamental distinction between the two sections. The fund available for distribution under S. 73 is the entire fund realised or received by the executing Court, leaving out of consideration the proviso to the section. On the other hand the funds available for distribution under S. 63 are the proceeds of common property attached by the judgment-creditors. It is the fact of attachment, and attachment of the identical properties by the several decree-holders that bring S. 63 into operation. Where one of several decree-holders executes his decree against the judgment-debtor in a particular Court and sells his properties, if other persons holding decrees against the same judgment-debtor apply for execution to the same Court before the receipt of the proceeds of sale, the whole sale proceeds will have to be rateably distributed among all the decree-holders under S. 73. The

latter decree-holders need not take any further steps beyond applying for execution to the Court which sells and realises to the assets. Where *A*, holding a decree against *J*, executes his decree in one Court and attaches and sells his properties *X*, *Y* and *Z*, and *B*, *C*, *D*, who also hold decrees against *J* execute their decrees in other Courts of lower grade and attach respectively the same properties, *X*, *Y* and *Z* before the sale proceeds are received by the former Court, but they do not apply for execution to the former Court attaching and selling all the properties *X*, *Y* and *Z*, and do not transfer their executions to that Court before the receipt of assets, but they bring the fact of the attachment to the notice of that Court, the entire proceeds of all the properties cannot be distributed among all of them. The proceeds of the sale of *X* alone has to be distributed between *A* and *B*, those of *Y* between *A* and *C*, and those of *Z* between *A* and *D*. That is the effect of S. 63 of the Code. (*R. C. Mitter, J.*) SURENDRA KUMAR GUHA *v.* JAMINI KUMAR GUHA. **I L.R. (1937) 1 Cal. 391=166 I.C. 178 (2)=9 R.C. 484=40 C.W.N. 1307=A.I.R. 1936 Cal. 723.**

——**S. 63**—*Applicability — Decrees of same Court under execution by different Courts.*

The fact that the several decrees under execution by different Courts are passed by the same Court does not make S. 63 inapplicable. S. 63 would still apply to the case; the words "if more Courts than one" in the section must be read as qualifying the word "attachment" and n t the word "decrees". The object of the section is to deal with several attachments no matter whether the decrees are passed by the same Court or by different Courts. The phrase 'in execution of decrees' is explanatory of the word "attachment." (*Venkatasubba Rao and Cornish, JJ.*) MEGRAJ ISWARADAS *v.* CORPORATION OF MADRAS. **59 Mad. 1028=166 I.C. 769=9 R.M. 400=44 L. W. 358=1936 M.W.N. 655=A.I.R. 1936 Mad. 797=71 M.L.J. 328.**

——**S. 63**—"*Court of highest grade*"—*Small Cause Court having higher pecuniary jurisdiction than additional Small Cause Court—If Court of higher grade.*

A Small Cause Court, which has a higher pecuniary jurisdiction than the Additional Small Cause Court in the same area is a Court of higher grade within the meaning of S. 63, C. P. Code, and the additional Court has no jurisdiction to deal with an application for a share in the assets realised by the former Court. (*Pollock, J.*) WASUDEO BALIRAM *v.* LAXMAN RAMCHANDRA. **I. L.R. 1937 Nag. 122=167 I.C. 156=9 R.N. 167= A.I.R. 1936 Nag. 270.**

——**Ss. 63 and 73**—*Decree-holder seeking rateable distribution—If must apply to Court where realization of assets takes place.*

S. 73, C. P. Code, does not require the transfer of a decree to the Court where the process of realization of assets takes place as a condition precedent to an application under S. 63, C.P.Code, and therefore *a fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realization takes place. If such realization takes place in a Court of inferior grade, it is the duty of that Court to send the sale proceeds to the superior Court. (*Zia-ul-Hasan, J.*)

C. P. CODE (1908), S. 63.

RAM RACHHPAL SHIAM LAL *v.* GUR NARAIN BROTHERS. **171 I.C. 222=10 R.O. 97=1937 O. L.R. 534=1937 O.W.N. 1040=A.I.R. 1938 Oudh 12.**

——**Ss. 63 and 73**—*Relative scope*—*'Any claim' in S. 63—Meaning of second application for execution, if necessary in Court of highest grade.*

Ss. 63 and 73 of the Code must be read together and since the Court of highest grade has been empowered to determine 'any claim' in respect of property, it must include claims for rateable distribution under S. 73. Consequently there is no need for second application for execution in the Court of the highest grade by the decree-holder applying for rateable distribution in that Court. (*Bose, J.*) ZUMBERLAL CHHOTELAL *v.* SITARAM. **I.L.R. (1937) Nag. 219=171 I.C. 371=10 R.N. 109=A I.R. 1937 Nag. 80.**

——**Ss. 63 and 73**—*Relative scope—Attachment of same property in execution of decrees of several Courts—Right to rateable distribution.*

S. 73 of the C. P. Code cannot be regarded as a self-contained rule. To so read the section would defeat and render nugatory the provisions of S. 63, C. P. Code. S. 63 must be treated as constituting an exception to S. 73. Where, as stated in S. 73, the property is under attachment in execution of decrees of more Courts than one, if the other conditions specified in S. 73 are fulfilled, the right to rateable distribution arises. (*Venkatasubba Rao and Cornish, JJ.*) MEGRAJ ISWARADAS *v.* CORPORATION OF MADRAS **59 Mad. 1028=166 I.C. 769=9 R.M. 400=44 L.W. 358=1936 M.W.N. 655=A.I.R. 1936 Mad. 797=71 M.L.J. 328.**

——**Ss. 63 and 73**—*Right under—Conditions of—Prior attachment—If essential.*

Prior attachment of the property is not essential under S. 63. Under S. 73 also prior attachment is not necessary so far as the creditors seeking rateable distribution are concerned. All that is required is an application for execution before the assets are received by the Court entitled to receive them. (*Bose, J.*) ZUMBERLAL CHHOTELAL *v.* SITARAM. **I.L.R. (1937) Nag 219=171 I.C. 371=10 R.N. 109=A.I.R. 1937 Nag. 80.**

——**Ss. 63 and 73 and O. 21, R. 72**—*Scope—Sale in contravention of S. 63 (1)—If void—Set-off allowed by Court against prior decree-holder's right to rateable distribution—Validity.*

The right of set-off under O. 21, R. 72, C. P. Code, is subject to the provisions of S. 73. The application under S. 73 must be made before the sale and it is not enough to say that it should be made before the entire sale proceeds are paid. If there is no application to the Court which holds sale and the Court allows set-off, the order of the Court is not improper, although in contravention of S. 63. *A* attached some property in execution of the decree of *X* Court against *C* and *B*; another decree-holder subsequently attached the same property in execution of his decree of *Y* Court against *C*, and *Y* Court brought the property to sale; on date of sale *A* applied to that Court for not allowing set-off to *B*; the Court rejecting the application, allowed set-off to *B*.

Held, though the sale of property by *Y* Court was in contravention of S. 63, it being validated by sub-S. (2) of S. 63 there being no application by *A* for rateable distribution before date of sale, the order of Court in allowing the set-off to *B* was not illegal. (*Ghose and Mukherjea, JJ.*) AHINATH GANGULAI *v.* NEPAL CHANDRA. **65 C.L.J. 399=169 I.C. 713=10 R.C. 21=41 C.W.N. 350=A.I.R. 1937 Cal. 55.**

——**S. 63**—Scope—If controlled by S. 38—"Realize such property"—Superior Court calling up proceedings from inferior Court—Jurisdiction to sell property attached by inferior Court. *See* C. P. CODE, Ss. 38 AND 63. **48 L.W. 664.**

——**Ss. 63**—*Scope and applicability.*

In order to bring a case within the purview of S. 63, C. P. Code, it is necessary that several decree-holders, who are executing their decrees against the same judgment-debtor, in different Courts, must have attached the same property or certain common properties belonging to the judgment-debtor. In such cases, the sale proceeds of the attached property would have to be distributed amongst all the attaching decree-holders by the superior Court or the Court which has first made the attachment in accordance with the section. Where, therefore, the rival decree-holders have not attached any of the properties belonging to the judgment-debtor, they cannot invoke the provision of S. 63. (*S. K. Ghose and Mukherjea, JJ.*) FATIMA KHATUN *v.* ASHANANDA BEHARA. **I.L.R. (1939) 1 Cal. 488.**

——**Ss. 63 and 73**—*Scope and effect of—Several decrees against same judgment-debtor passed by same Court—Transmission for execution to Courts of different grades—Attachment by both Courts—Sale by inferior Court and set-off by decree-holder—Application by rival decree-holder to superior Court to call for sale proceeds and for rateable distribution—Maintainability.*

Where several decrees, some in favour of one decree-holder and others in favour of another, are passed by the same Court and sent for execution to different Courts one of which is a superior and the other an inferior Court, and both those executing Courts attach the same properties, each decree-holder acting in ignorance of the proceedings taken by the other, the fact that the inferior Court holds the sale in pursuance of its attachment and allows the decree-holder to set-off the purchase price against the decree amount before the date fixed for sale by the superior Court will not deprive the decree-holder in the superior Court of his right to apply to the superior Court under S. 63, C. P. Code, on his becoming aware of the sale, to call for the proceeds of the sale from the inferior Court and to distribute them rateably. In such a case the decree-holder purchaser in the inferior Court may properly be given a choice either to elect to have a re-sale, or to pay into Court so much of the price as may become due to the rival decree-holder on rateable distribution. (*Venkatasubba Rao and Cornish, JJ.*) MEGRAJ ISWARADAS *v.* CORPORATION OF MADRAS. **59 Mad. 1028=166 I.C. 769=9 R.M. 400=44 L.W. 358=1936 M.W.N. 655=A.I.R. 1936 Mad. 797=71 M.L. J. 328.**

——**S. 63**—*Scope and object of—Attachment of same property by different decree-holders in Courts of different grades—Sale by inferior Court—Validity—Rateable distribution—Proper Court—Procedure.*

S. 63 contemplates a case where attachments of the same property have been made by different Courts at the instance of different decree-holders,

of the common judgment-debtor, and provides for the distribution among them of the proceeds of the attached property by one of such Courts only. The distribution is to be made by the superior Court; but if all the Courts are of the same grade, the distribution is to be made by the Court which first attached the property. In such a case a sale by an inferior Court of the property under attachment by a superior Court or by the Court of the same grade, which attached later in point of time a sale under later attachment pending an earlier attachment is valid; but it is the duty of the Court which sells the property to send the sale proceeds to the Court of superior grade or the Court which attached the property first, as the case may be. When the assets are not so sent by the Court selling the property, the procedure according to the view of the Calcutta High Court is to move the District Judge for asking the Court holding the sale to send the sale-proceeds to the proper Court for distribution. (*R. C. Mitter, J.*) SURENDRA KUMAR GUHA *v.* JAMINI KUMAR GUHA. **I.L.R. (1937) 1 Cal. 391=166 I. C. 178 (2)=9 R.C. 484=40 C.W.N. 1307=A.I.R. 1936 Cal. 723.**

——**Ss. 63 (1) and 73 (1)**—*Attachments by Courts of different grades—Sale and realization by superior Court—Attaching decree-holder of inferior Court if can apply to superior Court for rateable distribution.*

Where the holder of a Munisif's Court decree obtains from that Court an order for attachment in execution, of certain property of the judgment-debtor and the holder of a decree in the Subordinate Judge's Court against the same judgment-debtor, obtains an attachment of the same property from the Subordinate Judge's Court and the property is sold by that Court and assets are realised, the Munsif's Court decree-holder could apply to the Subordinate Judge's Court for rateable distribution without following strictly the procedure laid down by S 73 (1). His case is governed by the language of S. 63 (1), C. P. Code, and the question of rateable distribution is one which will come under the words 'shall determine any claim thereto' occurring therein. (*Bennet and Verma, JJ.*) CHAND MAL RUP CHAND *v.* GURDIAL PRASAD. **I.L.R. (1939) All. 162=180 I.C. 714= 11 R.A. 516=1938 A.W.R. (H.C.) 870=1939 A. L.J. 4=A.I.R. 1939 All. 159.**

——**S. 64**—*Applicability—Adjustment within meaning of O. 21, R. 2.*

Where there is an adjustment within the meaning of O. 21, R. 2, the provisions of S. 64 have no application to a transfer by way of mortgage effected by the judgment-debtor for satisfaction of the decree under which the property was attached in execution; for a transfer made contrary to the provisions of S. 64 is only void as against claims enforcible under the attachment. When there is an adjustment for full satisfaction of the decree out of Court, there is no further claim which could be enforced under the attachment and therefore the transfer cannot be void. (*Almond, J.C.*) GHULAM NABI *v.* AZIZULLAH. **188 I.C. 757=A.I.R. 1940 Pesh. 18.**

——**S. 64**—*Applicability—Attachment before judgment—Contract of sale—Attachment—Subsequent sale in pursuance of contract—If void.*

The word "right" in O. 38, R. 10 is not restricted to rights in property. It includes a right to

claim specific performance of a contract of sale. Hence where a contract of sale between parties is entered into before attachment takes place, such right to enforce the contract of sale is unaffected by the attachment and the subsequent sale in pursuance of the contract is not void under S 64, C. P. Code. (*Pollock, J.*) GHUSARAM *v.* PARASHRAM. **I.L.R. (1936) Nag. 172=166 I.C. 950 (2)= 9 R.N. 152=A.I.R. 1936 Nag. 163.**

——**S. 64**—*Applicability and scope—Attachment before judgment—Requisites of validity—Mere order of attachment—Sufficiency—Private transfer—When void—Non-compliance with formalities of due attachment—Effect on private alienation.*

An attachment before judgment, under O. 38, R. 7, C. P. Code, has to be effected in the same manner as in attachment in execution of decree; and in the case of immovable property, the provisions of O. 21, R. 54, C. P. Code, must be complied with. A mere order of attachment is not enough; unless all the processes of attachment required by law to effect a valid attachment have been served, there is no attachment of the property which would invalidate its transfer under S. 64, C. P. Code. (*Lokur, J.*) BAI HAKIMBU *v.* DAYABHAI. **185 I.C. 655=12 R.B. 258=41 Bom.L.R. 1104=A.I.R. 1939 Bom. 508.**

——**S. 64**—*Applicability—"Contrary to such attachment"—Attachment in execution of decree—Application by another decree-holder without attachment—Private sale by judgment-debtor and satisfaction of former decree—Sale—If void as against latter decree-holder.*

Plaintiff held a simple money decree against judgment-debtor. *R* also had a simple money decree against the same judgment-debtor and attached his property in execution of his decree. Plaintiff applied for rateable distribution in January, 1933, but did not apply for attachment of the property of the judgment-debtor. On 11-4-1933, the judgment-debtor sold his property privately to a stranger who under the terms of the sale deed paid off the decree amount due to *R*. On 19-4-1933, *R* applied to the Court under O. 21, R. 2, acknowledging satisfaction of his decree and the attachment was accordingly struck off. Plaintiff did not apply for attachment until 13-4-1933, *i.e.*, after the sale deed.

Held, that the sale by the judgment-debtor was not "contrary to such attachment" within the meaning of S. 64, C. P. Code, and was not void as against the plaintiff. The plaintiff consequently was not entitled to question the alienation under S. 64. (*Sulaiman, C.J. and Bennet, J.*) RADHA BALLABHA *v.* MAKHAN LAL. **1937 A.W.R. 600= 1937 A.L.J. 785=10 R.A 321=171 I.C. 799= 1937 A.L.R. 893=A.I.R. 1937 All. 641.**

——**S. 64**—*Applicability—Conveyance in obedience to Court's decree—If void.*

S. 64, which declares private alienation of property after attachment to be void, does not cover the enforced execution of a conveyance in obedience to a decree of a Court. (*Pollock, J.*) GHUSARAM *v.* PARASHRAM. **I.L.R. (1936) Nag. 172= 166 I.C. 950 (2)=9 R.M. 152=A.I.R. 1936 Nag. 163.**

——**S. 64**—Applicability—Sale deed of property executed prior to attachment but registered after attachment—If void. *See* REGISTRATION ACT, S. 47. **A.I.R. 1937 Nag. 143.**

C. P. CODE (1908), S. 64.

———S. 64—Attachment—If confers charge or other interest in favour of decree-holder. *See* C. P. CODE, O. 34, R. 1. **A.I.R. 1936 Nag. 209.**

———S. 64—*Attachment subject to mortgage—Subsequent agreement by mortgagor to transfer portion of mortgaged land to mortgagee—Legality.*

Where an attachment in execution of a decree is made subject to the mortgagee rights, a subsequent compromise, whereby the mortgagors agree to transfer a portion of the mortgaged property to the mortgagee in consideration of his reducing the mortgage charge and releasing the rest of the property from the mortgage is not illegal by reason of S. 64, C. P. Code, more specially so when the mortgagee had already become entitled to possession even prior to the attachment. (*Bhide, J.*) KISHAN SINGH *v.* PRITAM SINGH. **182 I.C. 353=12 R.L. 19=A.I.R. 1938 Lah. 737.**

———S. 64—*"Claims enforceable under the attachment"—Meaning of.*

A property was attached by a decree-holder but the assets were not brought to the Court. Pending this attachment, the property was transfered; but the attachment was raised later on. Subsequently another decree-holder attached the same property and the transfer being held valid, he contended that he could enforce his claim under the attachment by the other decree-holder,

Held, that he was not entitled to do so as the attaching creditor under the prior attachment, which had been raised, never got the assets into the executing Court and further the present attaching creditor under the latter attachment never applied for rateable distribution. (*Stone, C. J. and Niyogi, J.*) KASTURCHAND *v.* MT. WAZIR BEGAM. **167 I.C. 48=9 R.N. 160=I.L.R. (1937) Nag. 291=A.I.R. 1937 Nag. 1.**

———S. 64—*Construction—"Private transfer"—Transfer by arrangement between parties effected in form of award—Application to Court to pass decree in terms—Decree—Effect—If private transfer.*

The meaning of "private transfer" in S. 64, C. P. Code, is a transfer which is brought about solely by the act of parties and not as a result of a judicial decision. If in reality there has been a transfer by the private act of parties, it does not cease to be private by being given the appearance of a public adjudication *e.g.*, where the parties intimate the arrangement to the Court in the form of an award and pray for a decree in terms of the same. Such a transfer is essentially a private one and the Court is merely asked to give its permission to it. (*Broomfield and Norman, JJ.*) DAMODAR SUKRAM *v.* KASHINATH. **183 I.C. 313=12 R.B. 90=41 Bom.L R. 473=A I.R. 1939 Bom. 212.**

———Ss. 64 and 73—*Construction and scope—"Claims enforceable under the attachment"—Attachment—Subsequent private alienation—Subsequent attachment in another decree—Effect of on prior alienation—Sale in execution of latter decree—Title of purchaser—If prevails over the private alienee.*

Per *C. J., Pandrang Row and Patanjali Sastri, JJ.*:—Under S. 64, C. P. Code, when a property has been attached, any subsequent alienation is against all claims enforceable under that particular attachment. The section does not go beyond this. An attachment effected after a

C. P. CODE (1908), S. 64.

private alienation is not assisted by an attachment before the alienation. If the execution proceedings in which the second attachment has been made have been instituted before assets have been brought into Court, the creditor would be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation a person who buys the property at the Court auction would not obtain a good title,

Abdur Rahman and Krishnaswami Aiyangar, JJ.—A private transfer made after and during the pendency of an attachment in one suit is void against the title of an auction-purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remains unsatisfied and the attachment therein is subsisting. (*Leach, C. J., Pandrang Row, Abdur Rahman, Krishnaswami Ayyangar and Patanjali Sastri, JJ.*) NANA RAO *v.* ARUNACHALAM CHETTIAR. **I.L.R. (1940) Mad. 526=188 I.C. 81=12 R.M. 776=1940 M.W.N. 207=51 L.W. 270=A.I.R 1940 Mad. 385=(1940) 1 M.L.J. 482 (F.B.).**

———S. 64—*Part of attached property vesting in judgment-debtor only after attachment—Validity of attachment—Subsequent sale of such property by judgment-debtor—If can be impugned.*

An attachment is not ineffective in relation to that part of the property which does not vest in the judgment-debtor at the time of the attachment but vests in him immediately after the attachment. As soon as it vests in him any defect that existed in the attachment before is *ipso facto* removed. If, therefore, the judgment-debtor transfers that property thereafter by sale, the transfer can be impugned under S 64, C. P. Code. (*Din Mohammad, J.*) LADHA RAM *v.* DAS MAL **42 P.L.R. 356.**

———S. 64—*Properties mortgaged to a person—Personal decree passed against the owner of the properties—Attachment of properties—Mortgagee purchasing the properties during the continuance of attachment—Validity of purchase—Mortgage if extinguished—Suit on mortgage, if lies.*

Where certain items of property which were already mortgaged to *A*, were attached by *B* in execution of a personal decree against their owner, and *A*, the mortgagee purchased the properties while the attachment was subsisting and he had no knowledge of the attachment, and the consideration for the sale was credited to the mortgage-debt by way of partial discharge, *B* brought those items to sale in pursuance of their attachment, and was resisted in delivery proceedings by *A*, *A* subsequently brought a suit for sale of the properties, being unsuccessful in the claim petition.

Held, that in view of the terms of S. 64, C. P. Code, the purchase by *A* must be deemed to have been non-existent from the point of view of *B*. The effect of the attachment is that so far as *B* was concerned the mortgage exists over the property just as it did prior to the sale. The sale being void, *A* becomes a simple mortgagee and can bring a mortgage suit. (*Horwill, J.*) MARIYAPPA NADAR *v.* RAMANUJA NAICK. **180 I.C. 908=11 R M. 757=1938 M.W.N. 60=A.I.R. 1938 Mad. 465.**

C. P. CODE (1908), S. 64.

——S. 64—Scope—Assignment or charge in favour of attachment creditor—If invalid. *See* C. P. CODE, S. 73. 1937 A.W.R. 284=A.I.R. 1937 All. 424.

——S. 64—*Scope—Attachment in execution of one decree—Sale in execution of another decree obtained later—If void—Sale without notifying prior attachment—Material irregularity.*

The rule enacted in S. 64 refers only to a private transfer of the attached property by the judgment-debtor. It does not extend to a transfer or sale under an order of Court in execution of a decree, though the decree in execution of which the property is sold is passed subsequent to the attachment under the prior decree. The sale is not void. The mere fact that the previous attachment is not notified in the sale proclamation does not render the sale liable to be set aside. An attachment is not an incumbrance or a charge on the property and the omission to notify a prior attachment in the sale proclamation is not a material irregularity vitiating the sale. (*Varma and Rowland, JJ.*) DURGA PRASAD SHRAFF *v.* MAHADEB LAL SINGHANIA. 166 I.C. 873=9 R.P. 348=3 B.R. 229=17 Pat.L.T. 847=1936 P.W.N. 785=A.I.R. 1937 Pat. 50.

——S. 64—*Scope—Attachment of land before judgment—Decree — Subsequent mortgage of attached land—Attachment of rents of land in execution after mortgage—Right of decree-holder to rents and profits as against mortgagee—Mortgage if invalid by reason of second attachment.*

Under S. 64, C. P. Code, any private alienation of property pending an attachment thereon would be void only as against all claims enforceable under that attachment, and no other. On 11—11—1927, *K*, who had filed a suit against *R*, attached the latter's land before judgment, and on 8—12—1927, the suit was decreed and the attachment confirmed. On 24—6—1928, the attached land was mortgaged to *S*, and on 12—9—1928, *K* attached the rents due in respect of the land for a particular term, and got himself appointed as receiver in execution for the purpose of collecting the rents which had been attached. The mortgagee having laid claim to the rents,

Held, that the right of the decree-holder-receiver to the rents was under the second attachment and not under the first, and since the mortgage was executed prior to that second attachment, the mortgagee's right to the rents of the mortgaged land was not affected by reason of the subsequent attachment. (*Venkatasubba Rao and Venkataramana Rao, JJ.*) AMBI *v.* KELAN. 1937 M.W.N. 1001=I.L.R. (1937) Mad. 970=176 I.C. 218=11 R.M. 42=46 L.W. 375=A.I.R. 1937 Mad. 843=(1937) 2 M.L.J. 728.

——S. 64—*Scope—Attachment of movable property in British India—Subsequent adjudication of judgment-debtor as insolvent by foreign Court—Effect of—Private international law—Attachment subsequent to adjudication—If prevails against foreign receiver.*

An adjudication of a person as insolvent by a foreign Court operates as a private transfer within the meaning of S. 64, C. P. Code. On such adjudication, the only property that vests in the receiver is the movable property which the insolvent was free to assign on the date of the adjudication and such property vests by virtue of private international law. But the adjudication does

C. P. CODE (1908), S. 64.

not affect the rights of a creditor who has attached, before adjudication, the movable property of the insolvent. He remains entitled to the benefits of his attachment. But an attachment after adjudication by a foreign Court is entirely a different matter. The receiver of the foreign Court is entitled to all the free assets of the insolvent, assets which were free at the date of the adjudication, and they must be deemed to be the moneys left over after satisfaction of the claims of the creditors who had attached before the adjudication. The provisions of Ss. 64 and 73 do not override the rule of private international law, and creditors who attach after the foreign adjudication cannot claim anything out of the assets on the ground that they have claims enforceable under the attachment. (*Leach, C.J. and Kunhi Raman, J.*) VEERANNA SHA *v* OFFICIAL RECEIVER OF SECUNDERABAD. 50 L.W. 701=1940 M.W.N. 195=A.I.R. 1940 Mad. 47=(1939) 2 M.L.J. 859.

——S. 64—*Scope and effect of—Contract by judgment-debtor for sale of property to another—Subsequent attachment of property—Sale in pursuance of contract—If void against attaching creditor—Insolvency of judgment-debtor—Sale by Official Receiver in terms of contract under order of Insolvency Court—Effect of as against attaching creditor.*

All that S. 64, C. P. Code, provides is that any private transfer by the judgment-debtor of the property attached shall be void as against the attaching creditor and shall not prejudice his rights. The section cannot be read as putting an end to the power of sale altogether. Where a sale is made in pursuance of a contract entered into prior to the attachment, cannot be said to be contrary to the terms of S. 64, C. P. Code. The right of the judgment-debtor in the property which is all that is attached, is on the date of the attachment qualified by his obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation. A sale in pursuance of pre-existing contract is only the fulfilment of the obligation to which the judgment-debtor was already subject, whether the sale is carried out by him or by the Official Receiver in insolvency under the orders of the Insolvency Court on the insolvency of the judgment-debtor. A sale by the Official Receiver in pursuance of an order of Court would be all the more effective, as the order of Court would in effect be a decree for specific performance, though passed by the Insolvency Court. (*Varadachariar and Gentle, JJ.*) DIRAVYAM PILLAI *v.* VEERANAN AMBALAM. I.L.R. (1939) Mad. 853=1939 M.W.N 329=185 I.C 562=12 R M. 554=49 L.W. 460=A.I.R. 1939 Mad. 702=(1939) 2 M.L.J. 822.

——S. 64—*Scope—If controlled by O. 38, R. 10—Attachment before judgment—Sale of property subsequently in pursuance of contract made prior to attachment—Priority over attachment.*

S. 64 and O. 38, R. 10, C. P. Code, must be read together. S. 64 applies to an effective attachment; under O 38, R. 10, an attachment before judgment is not effective as against rights subsisting at the date of the attachment. A conveyance of property executed after its attachment before judgment by a creditor, in pursuance of a contract made before the attachment, should prevail over the attachment. (*Beaumont, C.J.*) BASAPPA *v.*

C. P. CODE (1908), S. 64.

HANMAPPA. 41 Bom.L.R. 943=185 I.C. 225=12 R.B.235=A.I.R. 1939 Bom. 492.

——S. 64—*Scope—If invalidates sale in execution of another decree.*

Under S. 64, C. P. Code, the attachment only serves to prevent a private transfer of the property and cannot invalidate a judicial sale in execution of another decree. (*Bhide, J.*) PREM CHAND *v.* MULKH RAJ. 188 I.C. 529=12 R.L. 535=41 P.L.R 305=A.I.R. 1939 Lah. 380.

——S. 64—Scope—Order allowing claim to attached property—Transfer by successful claimant before suit to set aside claim order—If void. *See* C. P. CODE, O. 21, R. 63. 17 Pat 588.

——S. 64—Scope—Order of attachment—Subsequent mortgage by judgment-debtor—Completion of mortgage before affixture of order of attachment—If void. *See* C P. CODE, O. 21, R. 54 (3) (NAGPUR). 19 N.L J 94.

——S. 64—*Scope—Private transfer — Charge created by compromise decree subsequent to attachment—If void.*

A charge created under a compromise decree is no better than a private transfer for purposes of S. 64, C. P. Code, and must be deemed to be void as against a decree-holder who has got the property attached prior to such compromise decree (*K. S. Menon, J.*) SINGARAVELU NAIDU *v.* DESIKA IYENGAR. 1937 M.W.N. 45.

——S. 64—Scope—Sale after attachment—If void against all creditors of judgment-debtor. *See* PROVINCIAL INSOLVENCY ACT, S 51. 1937 M. W.N. 366.

——S. 64, Expl.—*'Claims enforceable under attachment'—If include possible claims for rateable distribution.*

No doubt under Explanation to S. 64, C. P. Code, claims enforceable under an attachment include claims for the rateable distribution of assets. But a right to rateable distribution is conditional upon there being assets in the hands of the Court. Where the property had never been sold by the Court but had been sold by private treaty between the judgment-debtor and the decree-holder and consequently no proceeds came into the hands of the Court, there is no right to rateable distribution and, therefore, no claim enforceable under an attachment. (*Wort, J.*) KEDARWATI *v.* RADHEY LAL 170 I.C. 353=3 B. R. 705=10 R.P. 101=1936 P.W.N. 898=A.I.R. 1937 Pat. 609.

——S. 64, Expl.—*Effect of.*

The combined effect of S. 64, C. P. Code, and the explanation which has been added thereto is to extend the protection of that section to the claimants for rateable distribution against private alienations of property after attachment, just as much as to the decree-holder at whose instance the attachment is made. (*Srivastava, Ag.C.J. and Zia-ul-Hasan, J.*) BISMOHAN SINGH *v.* JAGAT BAHADUR SINGH. 12 Luck. 365=164 I.C. 1031 =9 R.O. 126=1936 O W.N. 861.

——S. 65—*Auction-purchaser's right to possession—When accrues—Right to mesne profits.*

The title to the property after the sale is made absolute vests in the auction-purchaser from the date of the sale according to S. 65 and it is wrong to say that the right to possession only accrues from the date of the sale certificate. Where the auction-purchaser had applied for possession and is resisted by person claiming under judgment-debtor the latter can be said to have had notice of the claim of the auction-purchaser to possession. It is not necessary that a separate notice should be given that if he did not give up possession, he would be liable for mesne profits. The auction-purchaser is thus entitled to mesne profits from the date of the sale. (*Dalip Singh and Sale, JJ.*) ABDUL GHANI *v.* LALA LAL CHAND. A.I.R. 1940 Lah. 230.

C. P. CODE (1908), S. 65.

——S. 65—*Co-sharer—Sale of rights of—Property—When vests in purchaser—Right of co-sharer to profits after sale and before confirmation—Agra Tenancy Act, S. 227.*

Where the proprietary rights of a co-sharer are sold in auction, the property vests in the purchaser under S. 65, C. P. Code, from the actual date of sale, though the sale itself becomes absolute only later on. The co-sharer-judgment-debtor is therefore entitled to the profits in respect of his share only up to the date of actual sale and not thereafter. (*Drake Brockman, S.M. and Knox, J.M.*) BHOOP RAM *v.* KEDAR SINGH. 1936 R.D. 49.

——S. 65—*Property purchased by auction-purchaser—Date of vesting—Proceedings by judgment debtor in connection with confirmation of sale—Effect.*

Where a person purchases certain property in a Court auction held in execution of a decree and the sale is subsequently confirmed in his favour, the property vests in him from the date of confirmation of sale, whatever proceedings may be taken in connexion with the confirmation of the sale by the judgment-debtor whose property is sold. The vesting of the property in auction-purchaser is not postponed till the final decision of the proceedings started by the judgment-debtor. (*Mir Ahmad, J.*) RAM DITTA MAL *v.* CHARAT SINGH. 177 I.C. 555=11 R. Pesh. 29=A.I.R. 1938 Pesh. 49.

——S. 65—Sale of share in village—Auction-purchaser—Right to profits from date of sale—Mutation effected in village papers only later on—If disentitles him to profits prior to mutation. *See* AGRA TENANCY ACT, S. 226 (1). 1937 A.W. R. 650=A.I.R. 1937 All. 661.

——S. 65—*Scope and effect of—Sale—If complete without confirmation—Order prohibiting sale—If prohibits confirmation sale of already held but not confirmed.*

The words of S. 65, C. P. Code, make it clear that confirmation of a sale, is an integral part of the transaction of a sale, as the purchaser can acquire no title without confirmation. An order prohibiting the sale would therefore prohibit confirmation of a sale which has taken place already but which had not been confirmed before the prohibitory order was passed. (*Harries, C.J. and Dhavle, J.*) GOPAL BUX RAI *v* SHYAMBEHARI SINGH. 188 I.C. 269=12 R.P. 689=6 B.R. 630= A.I.R. 1940 Pat. 565.

——S. 65—*Scope and effect—Title of purchaser—Relation back—Payment of rent by tenant of judgment-debtor to latter before confirmation of sale—If protected.*

Although the purchaser in execution gets title to the property from the date of sale and not merely from the date of its confirmation by the fiction of the relation back of the vesting, a tenant of the judgment-debtor is entitled to pay rents to the latter until the sale has been comfirm-

C. P. CODE (1908), S. 65.

ed. That will, however, not deprive the purchaser of the rent from the date of purchase to the date of confirmation,—as he can recover it from the judgment-debtor who has received it—but the tenant is protected until such time as the sale is confirmed in regard to any payment that he has made to his former lessor prior to confirmation. (*Beasley, C.J.*) KONDAVA NAYAKAR *v.* CHINNA RAMASWAMI NAICKER **178 I.C. 647=11 R.M. 486=1937 M.W.N. 1009=A.I.R. 1938 Mad. 317.**

——**S. 65**—Vesting of property in auction-purchaser—Point of time. *See* U. P. AGRICULTURISTS RELIEF ACT, S. 5 (1) PROVISO. **1937 O.W.N. 1153.**

——**S. 66**—*Applicability—Auction-purchase in* 1874—*Suit after* 1908 *to declare* benami—*Maintainability—Law applicable.*

A suit for a declaration that an auction-purchase made in the name of the defendant's predecessor in 1874 was *benami* for the predecessor of the plaintiff, the suit being instituted under the C. P. Code of 1908, is not barred by S. 66 of the Code of 1908. The auction purchase having taken place while the Code of 1859 was in force, the suit would be governed by S. 260 of that Code and not S. 66 of the new Code, and is therefore maintainable. (*Rau, J.*) MANIR AHMAD *v.* MUNSHI OBEDAL HOQUE. **40 C.W.N. 470.**

——**S. 66**—*Applicability—Certified purchaser being benamidar even before auction sale.*

The fact that the certified purchaser was a benamidar for the plaintiff even before the auction sale is no answer to an objection under S. 66, C. P. Code. (*S. K. Ghose and Patterson, JJ.*) ALI AHMED *v.* SHAMSHUNNESSA. **181 I.C. 102=11 R.C. 783=42 C.W.N. 1059=A.I.R. 1938 Cal. 602.**

——**S. 66**—*Applicability—Plaintiff already in possession seeking its confirmation.*

S. 66, C. P. Code, applies although the plaintiff is already in possession and is seeking for its confirmation and not for recovery of possession on the strength of the auction-purchase. (*S. K. Ghose and Patterson, JJ.*) ALI AHMED *v.* SHAMSHUNNESSA. **181 I.C. 102=11 R.C. 783=42 C.W.N. 1059=A.I.R. 1938 Cal. 602.**

——**S. 66**—*Applicability—Purchase out of joint fund at Court auction—Certificate in the name of one—Suit by others, for possession, if barred by S.* 66.

Where three persons agree to purchase certain property at a Court auction sale and it is so bought out of funds contributed by each in certain agreed shares, but the certificate was issued in the name of one of them, a suit by the others for possession is not affected by S. 66, C. P. Code, for it has no application to such a case. It is not a case of some agreement secret or otherwise whereby *A* buys in *B's* name. The plaintiff's right springs out of the fact that the purchase was made out of joint fund contributed to by the three persons. (*Stone, C.J. and Bose, J.*) BHUDARSAO *v.* SAMARATHMAL. **187 I.C. 60=12 R.N. 267=1939 N L J. 539=A.I.R. 1940 Nag. 1.**

——**S. 66**—*Applicability—Rent decree under Chota Nagpur Tenancy Act—Execution sale by Deputy Commissioner—Suit against certified purchaser—If barred—Chota Nagpur Tenancy Act, S.* 265.

S. 66, C. P. Code, is not applicable to sales in execution of rent decrees under the Chota Nagpur Tenancy Act, held by the Deputy Commissioner. There is no rule under S. 265 of the

C. P. CODE (1908), S. 66.

Chota Nagpur Tenancy Act applying S. 66, C. P. Code, to matters before the Deputy Commissioner; and the first clause of S. 265, Chota Nagpur Tenancy Act, by implication renders the provisions of C. P. Code, inapplicable to matters before the Deputy Commissioner except in so far as they are made applicable by rules. Consequently a suit against the certified purchaser at sale held by the Deputy Commissioner under the Chota Nagpur Tenancy Act is not barred by S. 66, C. P. Code. (*Agarwala and Madan, JJ.*) RAJAB ALI *v.* AKBAR ALI. **169 I.C. 736=3 B R. 615=10 R. P. 33=1937 P.W.N. 305=18 Pat.L.T. 397=A.I. R. 1937 Pat. 324.**

——**S. 66**—*Applicability—Suit against assignee of certified purchaser.*

The objection under S. 66, C. P. Code, applies to a suit against an assignee of the certified purchaser. (*S. K. Ghose and Patterson, JJ.*) ALI AHMED *v.* SHAMSUNNESSA. **181 I.C. 102=11 R.C. 783=42 C.W.N. 1059=A.I.R. 1938 Cal. 602.**

——**S. 66**—*Applicability—Suit brought after present Code came into force—Execution sale held and confirmed before its enactment.*

A suit for a declaration of title brought after the present Code of 1908 came into force against the transferee from the heir of the certified purchaser, where the sale took place and was confirmed before its enactment, is governed by S. 317 of the old Code, and not by S. 66 of the present Code, and is, therefore, maintainable. (*Tek Chand, J.*) JAI KISHAN SINGH *v.* PARMESARI DAS. **39 P.L.R. 152=171 I.C. 856=10 R.L. 240=A.I. R. 1937 Lah. 471.**

——**S. 66**—*Effect of.*

The consequence of S. 66 is that unless the auction sale could be impugned on the ground of fraud or of some other grave irregularity which made it a nullity, the plaintiff's suit that the purchase was on plaintiff's behalf cannot be maintainable. Fraud must be strictly pleaded and particulars of any fraud relied upon must be stated in the pleading. It is very important that one who seeks to set aside a purchase completed under sanction of the Court should state the grounds on which he claims to impeach it and should not be allowed after trial of the case to rely on other grounds which had not been the subject of trial or adjudication in the Court which took the evidence. (*Roberts, C.J. and Mosely, J.*) CHIN AH ON *v.* CHIN AH FOO. **181 I.C. 94=11 R.R. 451=A.I.R. 1939 Rang. 122.**

——**S. 66**—*Purchase benami for plaintiff—Sale set aside with consent of benamidar on application by judgment-debtor—Plaintiff dispossessed by judgment-debtor—Suit against benamidar and judgment-debtor—If maintainable.*

Certain property was sold in execution of a money-decree against defendants 2 and 3 and purchased by the plaintiff's predecessor in the benami of defendant 1 and was taken possession of by him. The sale was subsequently set aside with the consent of defendant 1 on an application under O. 21, R. 90, C. P. Code, filed by defendants 2 and 3 who dispossessed the plaintiff. The plaintiff sued the defendants to recover possession of the property.

Held, that the suit was not barred under S. 66, C. P. Code, as it was not really against any person claiming title under a purchase certified by the

C. P. CODE (1908), S. 66.

Court, as contemplated by that section. Defendants 2 and 3 relied on their original title as judgment-debtors, the execution sale having been set aside Defendant 1 made common cause with the other defendants and his case was that as the execution sale was set aside, the title of the judgment-debtors had revived and there was no subsisting title in him as a certified purchaser. (*Mukherjea, J.*) THAKUR DAS NATH *v.* KESHAB CHANDRA GHOSH. **42 C.W.N. 497.**

——S. 66—*Scope—Bar of suit—Claim by person alleging purchase to be for himself solely or for himself jointly with certified purchaser—Maintainability.*

S. 66, C P. Code, is a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise; and the fact that the principal claims only to have provided a part of the purchase-money and to be entitled to only a share in the property purchased does not make any difference in principle. (*Harries, C.J and Agarwala J.*) SHIVA SHANKAR SAHI *v.* MANABHARAN RAY. **18 Pat. 181=11 R.P. 340=179 I. C. 295=5 B.R. 215=20 Pat.L.T. 117=A.I.R. 1939 Pat. 207.**

——S. 66—*Scope—Purchase benami for plaintiff—Plaintiff dispossessed by certified purchaser—Suit, if maintainable.*

What brings a case within the purview of S. 66, C. P. Code, is that there must be a suit against the certified purchaser or anybody deriving title from him, on the ground that the purchase was made on behalf of the plaintiff or his predecessor. If relief is sought against the certified purchaser or his representative, and the plaintiff claims title on the ground that the purchaser was his *benamidar*, the mere fact that the plaintiff once got possession of the property and was subsequently dispossessed by the certified purchaser or his representative, would not enable him to get round the bar of S. 66, C. P. Code, unless the possession continued for twelve years and thus gave the plaintiff a title quite independent of the purchase made at the execution sale (*Mukherjea, J.*) THAKUR DAS NATH *v.* KESHAB CHANDRA. **42 C.W.N. 497.**

——S. 66—*Scope—Relief in suit dependent on declaration of title as against certified purchaser—Suit, if barred.*

A suit for a relief which can only be given on declaration of title as against persons claiming title under a purchase certified by the Court, such persons being parties and contesting the claims, is barred under S. 66, C. P. Code. (*S.K. Ghose and Patterson, JJ*) BANWARI MUKUND DAS NANDI DALAL *v.* AJIT KUMAR NANDI. **182 I.C. 201=12 R.C. 12=67 C.L.J. 320=A.I.R. 1938 Cal. 874.**

——S. 66—*Scope—Suit for joint possession over one-half of property purchased—Maintainability.*

The primary object of S. 66, C. P. Code, is that the certified purchase should be deemed to be conclusive and no one should be allowed to challenge it, unless he comes within the exceptions mentioned in the section itself, and those exceptions are contained in sub-S. (2) under which a wrong insertion of the name of the purchaser in

C. P. CODE (1908), S. 66.

the sale certificate made fraudulently or without the consent of the real purchaser can be rectified and under which third persons are absolutely protected. It is immaterial whether the plaintiff claims the whole of the property purchased at the auction or only a share in that property. Where, therefore, the plaintiff brings a suit claiming joint possession over one-half of the property on the ground that it was purchased by the auction-purchaser on his own behalf and on behalf of the plaintiff, the suit is not maintainable. (*Sulaiman, C.J. and Bajpai, J.*) BISHAN DAYAL *v.* KESHO PRASAD. **167 I.C. 683=9 R.A. 572=1937 A.L.J. 52=I.L.R. (1937) All. 113=1937 A L.R. 232=1936 A W.R. 1254=A.I.R. 1937 All. 176.**

——S. 66—*Scope—Suit for money advanced—Plaintiff not challenging defendant's title to property purchased by him at Court sale.*

In a suit for recovery of money, the case of the plaintiff was that that was the share contributed by him for the purchase of certain land in which he, the defendant and other parties were concerned as *ijaradars* and which was going to be sold in Court auction. The plaintiff did not even seek to challenge the title of the defendant to the property purchased by him at the Court sale. He did undoubtedly say that the arrangement was that the property was to be purchased for all the *ijaradars* who contributed the purchase-money, but he did not in this suit endeavour to assert his title to his share of the land. The suit was based on the footing that the defendant had no longer any title to keep the money that had been advanced to him by the plaintiff.

Held, that the suit did not come within S. 66, C. P. Code. (*Dhavle, J.*) NISAN SINGH *v.* RAMCHANDRA SAO. **8 R.P. 544=17 Pat.L.T. 591=162 I.C. 553=1936 P.W.N. 526=A.I R. 1936 Pat. 429.**

——S. 66—*Scope and applicabilty.*

S. 60, C. P. Code, applies only when the plaintiff attempts to enforce his secret title *as against* the certificated purchaser. It has no application if the heirs of the ostensible purchaser do not appear in the case and deny plaintiff's 'benami' purchase. 75 I.C. 197, Foll. (*Thom and Smith, JJ.*) ASGHARI BEGAM *v.* KANHAIYA LAL. **165 I.C. 709 (2)=9 R.A. 297=1936 A.L.J. 1169=1936 A.W R 844=1936 All.L R. 936=A.I.R. 1936 All. 750.**

——S 66 (1)—*Applicability—Benami purchase of house at Court sale—Subsequent contract by benamidar to sell house to beneficial owner—Suit to rectify sale deed—If barred.*

Section 66 (1) has to be strictly applied. Its object is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the section. It does not render benami transactions illegal. If the cause of action is not based on the benami purchase but on a contract or title acquired subsequent thereto, S. 66 is not a bar. Where therefore a person purchased a house benami for the mortgagor at a Court sale and by a subsequent contract sold the same by a sale deed to the mortgagor, and a suit was brought for rectification of the sale deed.

Held, that the cause of action was the title under the conveyance, an event which happened subsequent to the Court-sale and the fact that the basis of contract embodied in the sale deed was a prior benami purchase did not affect the title

under the conveyance. S. 66 therefore was no bar to the suit. (*Venkataramana Rao, J.*) MUNIAPPA MUDALI *v.* THANGAVELU MUDALI. **173 I.C. 387=10 R.M. 580=A.I.R. 1937 Mad. 362.**

——**Ss. 68, 69, 70, 71 and 72**—*Applicability—Decree of Revenue Court under Agra Tenancy Act—Execution—Procedure—O.* 21, *C. P. Code—Revenue Manual, Ch,* 40—*Applicability.*

The rules in Ch. 40 of the Revenue Manual do not apply to the execution of Revenue Court decrees, because Ss. 68 and 72 of the C. P. Code do not apply to the Agra Tenancy Act, in view of List I of Schedule II of that Act. Such decrees of the Revenue Courts passed under the Act must be executed, therefore, in the manner laid down in O. 21, C. P. Code. (*Drake Brockman, S.M. and Knox, J.M.*) MUQADDAM ALI *v.* MAHERUDDHUJ SINGH. **1936 R.D. 197.**

——**Ss. 68 to 72 and O. 21**—*Applicability—Revenue Court—Decree by, under Agra Tenancy Act — Execution—Mode of — U. P. Revenue Manual, Ch* 40—*Application of.*

The rules in Ch. 40 of the Revenue Manual do not apply to the execution of decrees of Revenue Courts because Ss. 68 to 72, C. P. Code, have been specifically excluded by the Second Schedule to the Agra Tenancy Act. Decrees of the Revenue Courts passed under the Agra Tenancy Act must be executed in the manner laid down in O. 21, C. P. Code. (*Darling, S.M and Bomford, J.M.*) KALYAN SINGH *v.* BHAGWAN SINGH. **1937 R.D. 37.**

——**S. 68 and O. 21, R. 2**—*Collector executing decree—Adjustment of decree—Jurisdiction to record—Court or Collecter—Collector, if Court.*

The Collector executing a decree, which a Civil Court transferred to him under S. 68, C. P. Code, is not a Court; and he is not competent to entertain an application under O. 21, R. 2 to record adjustment of the decree. The application to record adjustment of the decree, in a case where the decree has been transferred to the Collector for execution, must be made to the Court which alone has jurisdiction, to recognize the adjustment, (*Broomfield and Wadia, JJ.*) SHANKAR ATMARAM *v.* KESHAV GOVIND. **60 Bom. 729=164 I.C. 9=9 R.B. 70=38 Bom.L.R. 505=A I.R. 1936 Bom. 277.**

——**Ss. 68 and O. 21, R. 2**—*Collector executing decree—Power to certify adjustment of decree—"Court."*

The Collector executing a decree transferred to him under S. 68, C. P. Code, is not a Court, and he has no power to certify an adjustment of the decree under O. 21, R. 2, C. P. Code. An adjustment recorded by the Collector during execution cannot consequently be treated as certification under O. 21, R. 2, C. P. Code. (*Stone, C.J. and Niyogi. J.*) RAGHOJI *v.* VITHOBA. **169 I.C. 110=9 R N. 302=19 N.L.J. 175=A.I.R. 1937 Nag. 217.**

——**Ss. 68 and 70**—*Collector proceeding—Relative powers of Collector and Civil Court.*

The transfer of the decree to the Collector does not oust the jurisdiction of the Civil Court in all matters. A Collector ceases to have jurisdiction to sell or to confirm the sale after the Court passing the decree recalls it. Whether the Collector fails to comply with the Civil Court's order in disregard or in ignorance of it, that order must prevail against anything done by the Collector subsequent to that order. The Collector's power to proceed with the case is suspended by virtue of any order of stay that might be passed by the Court passing the decree. A Civil Court's order comes into effect as soon as it is passed so as to suspend the Collector's power to proceed with the execution, irrespective of its being comunicated to the Collector. (*Niyogi, J.*) ZIBAL ISWARA *v.* MUKA. **1940 N.L.J. 473.**

——**S. 68**—Decree satisfied by sale of some of the villages under Collector's control—Mortgage of exempted villages without Collector's permission—Validity. *See* CIVIL PROCEDURE CODE, SCH, III. PARA 11 (1), AND S. 68. **1937 O.W.N. 784=A.I.R. 1937 Oudh 410.**

——**S. 68**—Decree transferred to Collector for execution — Decree-holder certifying payment through mistake or fraud of Judgment-debtor—Collector entering satisfaction—Jurisdiction of trial Court. *See* C. P. CODE, SS. 47 AND 68. **167 I.C. 401=1937 O.W.N. 231.**

——**Ss 68, 70 and O. 21, R 72**—*Execution transferred to Collector—Judgment-debtor minor—Leave to bid—Grant of—By whom to be made—Civil Court or Collector.*

When execution proceedings are transferred to the Collector under S. 68, C. P. Code, for sale of immovable property, and the judgment-debtor is a minor, the Civil Court, and not the Collector, has the power to give permission to the decree-holder to bid at the sale, which is required under O. 21, R. 72. (*Beaumont, C.J. and Macklin, J.*) ZIPRU KRISHNA *v.* PANNALAL BAHIRUDAS. **60 Bom. 688=162 I.C. 806=8 R.B. 428=38 Bom. L.R. 276=A I.R. 1936 Bom. 189.**

——**S. 68**—*Mortgage decree- Mortgaged property ancestral—Transfer of execution proceedings to Collector—Duty of Court.*

Where the mortgaged property is ancestral, the Civil Court is bound under S. 68, C. P. Code, to transfer the proceedings in execution of the mortgage decree to the Collector. (*Srivastava and Nanavutty, JJ.*) BHOLA NATH *v.* MAHRANI KUAR. **162 I.C. 362=8 R.O 364=1936 O.W.N. 489=1936 O.L.R. 242=A.I.R. 1936 Oudh 280.**

——**S. 68**—*Notification under, by Punjab Government—Notification No.* 365-*R (Revenue Department) dated* 17*th January*, 1939—*Land falling within its purview ordered to be sold—Execution of entire decree—If should be transferred to Collector.*

The executing Court does not become *functus officio* entirely after land covered by the notification is ordered to be sold. Hence, it is not necessary to transfer the execution of the decree as a whole to the Collector merely because some land falling within the purview of the notification had been ordered to be sold. However, as soon as any land falling within the purview of the notification is ordered to be sold, the execution of the decree so far as that land is concerned must be transferred to the Collector. (*Bhide, J.*) NARAIN DASS GULAB SINGH *v.* PATIALA DURBAR. **A.I.R. 1940 Lah. 345**

——**S. 68**—*Notification under, by Punjab Government—Notification No.* 365-*R (Revenue Department) dated* 17*th January*, 1939—*Applicability—Pending execution proceedings.*

The Notification under S. 68, No. 365-R (Revenue Department), dated 17th January 1939

applies even to pending execution proceedings in which an order for sale of such land has been passed, provided, of course the sale had not been actually carried out before the notification. (*Bhide, J.*) NARAIN DASS GULAB SINGH *v.* PATIALA DURBAR. **A.I.R. 1940 Lah. 345.**

——**S. 68**—Order for sale and transfer of execution to Collector—Powers of Collector and Court. *See* C. P. CODE, SCH. III, PARA. 1. **38 Bom.L.R. 221.**

——**Ss. 68 and 70**—*Powers and duties of Collector—Sale by Collector — Debtor producing certificate from Debt Conciliation Board before Civil Court—Latter staying proceedings—Power of Court to confirm sale.*

The jurisdiction of the Collector, when executing a Civil Court decree under Ss. 68 and 70, C. P. Code, is derived from the Civil Court, and when that Court directs a stay of execution, the Collector is deprived of his jurisdiction to proceed further, and the order of stay can be avoided only by a reference to the Civil Court. It is not open to the Collector to proceed after the proceedings have been stayed by the Civil Court from which the decree was transferred for execution. Where, therefore, after a sale by the Collector but before its confirmation, the Civil Court, on production of a certificate from a Debt Conciliation Board under S. 21 of the C. P. Debt Conciliation Act, orders a stay, the Collector is bound to stay his hands and has no power to proceed to confirm the sale. (*Greenfield, F.C.*) GANPATRAO *v.* BALMUKUND. **20 N.L.J. 242.**

——**Ss. 68 and 72**—*Relative scope— Court's powers.*

S. 72 must be read as alternative to S. 68 and so read it only indicates the source of the authority of the Collector to exercise powers under Sch. III in local areas where the Local Government has not issued a notification under S. 68. The Civil Court has under S. 72 power to authorize the Collector exactly as the Local Government has it under S. 68. The Civil Court cannot under S. 72 exercise the powers of Collector under Sch. III due to the express provisions of Ss. 72 (2) and 70 (2), (*Niyogi, J.*) BALARAM MISRA *v.* MANOO SINGH. **I.L.R. (1937) Nag. 261=167 I. C. 807=9 R.N. 214=A I.R. 1937 Nag. 41.**

——**S. 68**—Sale by Collector—Insolvent judgment-debtor—*Locus standi* to appear and to be heard. *See* PROVINCIAL INSOLVENCY ACT, S. 28. **20 N.L.J 179.**

——**S. 68**—Scope—If controls S. 45, Madras Court of Wards Act, *See* MADRAS COURT OF WARDS ACT, S. 45. **(1937) 2 M.L.J. 540.**

——**S 68**—*Scope—Status of judgment-debtor as agriculturist — When to be considered—Material date—Compromise agreeing to give up plea as to status—Order for sale—Subsequent claim for transfer of proceedings to Collector—If barred—Duty of Court.*

Under S. 68, C. P. Code a Court is bound to transfer execution proceedings to the Collector if it finds that at the date of the order for sale the judgment-debtor or any one of several judgment-debtors (when there are more than one) is an agriculturist. The date at which the status of the debtor is to be considered is the date on which the order for sale is passed. If on a date prior to the order for sale the judgment-debtor agrees under a compromise to give up his contention regarding his status, he cannot be regarded as having waived his right to claim the transfer of the proceedings to the Collector, after the order for sale is passed, if he could prove that on the date of the order for sale he was an agriculturist. But if the judgment-debtor fails to put forward his contention that he is an agriculturist to claim transfer of proceedings to the Collector when he is given notice under O. 21, R. 66 for settlement of the terms of the proclamation, and the Court makes an order for sale and issue of proclamation, that order becomes binding on the judgment-debtor and conclusive unless he takes steps to appeal from that order and get it set aside. It is not open to him subsequently after the lapse of a long time to claim a transfer to the Collector. (*Lokur, J.*) MAHADEO SUNDER MEHTA *v.* KHANDERAO SITARAM. **186 I.C. 61=12 R.B. 290=41 Bom. L.R. 1166=A.I.R. 1939 Bom. 526.**

——**S. 68**—Transfer to Collector for execution —Effect—Objection to sale—To which Court to be made. *See* C. P. CODE, SS. 47 AND 68—EXECUTING COURT. **1938 O.W.N. 758.**

——**Ss. 68 and 70**—*U. P, Rules, R. 3—Execution of mortgage decree sent to Collector—Sale of property — Application by judgment-debtor to Court before confirmation under Agriculturists' Act—Order of Court staying sale proceedings—Confirmation of sale by Collector in contravention of order of Court—Legality.*

An application for execution of a mortgage decree for sale was sent to the Collector under S. 68, C.P. Code, the property being such as could be sold only by the Collector under that section. The Assistant Collector to whom the Collector delegated the power of sale held the sale, but before it was confirmed by the Collector, the judgment-debtor applied to the Court which passed the decree under S. 5 of the U. P. Agriculturists' Relief Act praying for reduction of interest and for an order for the payment of the decree amount in instalments and also for recall of the proceedings from the Collector. The Court thereupon sent an order to the Collector staying further proceedings for confirmation of the sale. The Collector, however, confirmed the sale in spite of the order either in disregard or in ignorance of that order.

Held, that the order for stay passed by the Court was in effect an order recalling the proceedings under R. 3 of the U. P. Government Rules in respect of sale of agricultural land by the Collector, and that the Collector on the making of that order ceased to have jurisdiction to sell or to confirm the sale already held. The order of confirmation of the sale consequently did not confer any right on the auction-purchaser. (*Niamatullah and Bennet, JJ.*) KADHEY MAL *v.* MURTAZA ALI. **I L.R. (1937) All. 766=1937 A. L.J. 723=1937 R.D. 365=171 I.C. 359=10 R.A. 256=1937 A.L.R. 825=1937 A.W.R. 608=A.I. R. 1937 All. 550.**

——**S. 70**—*Duty and functions of Collector—Sale confirmed—Subsequent compromise between decree-holder and judgment-debtor in face of appeal by latter—Procedure—Duty of Collector—Collector leaving judgment-debtor in possession and referring decree-holder to Civil Court—Propriety of—C. P. Revenue Book Circular, Vol. 2-III-8.*

C. P. CODE (1908), S. 70.

The function of the Collector on receipt of a C Form issued by the Civil Court according to the rules prescribed under the C. P. Code and in the C. P. Revenue Book Circular, Vol. 2—III 8, is either to execute it by sale of the land attached or to realise the amount due under the decree by a lease or similar arrangement. It is beyond his function, when the sale is closed and the auction confirmed to entertain a compromise relating to the sale. If after the confirmation of the sale and in face of an appeal to be filed by the judgment-debtor regarding the sale, the decree-holder and the judgment-debtor enter into a compromise the Collector must either give effect to the compromise or to give effect to the sale certificate issued by him and place the decree-holder in possession. He cannot leave the case incomplete, leave the judgment-debtor in possession and refer the decree-holder to the Civil Court to seek his remedy for the fulfilment of the compromise. (*Burton, R.M.*) GANGADHAR KRISHNA RAO *v.* ANANDRAO. **20 N.L.J. 93.**

——**Ss. 70 and 9**—*Revenue Manual, Rr*, 998 *and* 1011—*Order of Commissioner setting aside sale on grounds not covered by rules—Jurisdiction of Civil Court.*

Where a decree is transferred to the Collector for execution under S. 68, C. P. Code, the jurisdiction of the Collector and the Commissioner to confirm or set aside a sale is restricted by Rr. 998 and 1011 of the Manual of the Revenue Department. If therefore the Commissioner in an appeal from the order of the Collector sets aside the sale on a ground which is not provided for by any of the rules, the order of the Commissioner is without jurisdiction and is subject to adjudication by the Civil Court under the general provisions of S. 9, C. P. Code. The cognizance of the suit by the Civil Court is not barred by Cl. 3 of R. 998. (*Thomas and Zia-ul-Hasan, JJ.*) RAM CHANDRA *v.* MAKHDOOM SINGH. **172 I.C. 655= 1938 O.L.R. 21=1938 O.W.N. 40=1938 O.A. 26=10 R.O. 193=A.I.R. 1938 Oudh 62.**

——**S. 70**—*Sale by Collector—Acceptance of bid after receipt of order of High Court staying proceedings—Validity—Cancellation—Legality.*

Where a Collector accepted a bid after the receipt of the order of the High Court staying proceedings, the acceptance is in contravention of the order of stay and as such its cancellation is quite legal. (*Roughton, F.C.*) SETH BALKRISHNA *v.* GOVERDHANLAL. **1938 N.L.J. 120.**

——**S. 70 (1)**—*Rules framed under by C. P. Government R.* 11 (ii)—*Procedure to be followed after bid—Collector, if can ignore last bid and hold informal sale himself.*

Rule 11, Cl. (*ii*) of rules framed by the C. P. Government under S. 70 (1), C. P. Code, requires the Tahsildar who conducts the sale to adjourn it to the Collector before the final bill is accepted. It is meant to secure the approval of the Collector. It is meant to secure the approval of the Collector. But this does not authorise the Collector, when he does not accept the last bid, to hold an informal sale for the disposal of the property. If he wants to obtain fresh bids, the procedure laid down for holding sales ought to be followed. (*Burton, F.C.*) NARAYAN *v.* KESHAOSA. **1938 N.L.J. 105.**

——**S. 70 (1)**—Rules framed under R. 13 (C P. Government)—Authority to refer to Civil Court

C. P. CODE (1908), S. 72.

Limits. *See* C. P. CODE, S. 47—QUESTION RELATING TO SATISFACTION OF DECREE. **A.I.R. 1938 Nag. 49.**

——**S. 70 (c)**—*Rules framed under (C. P.)—R.* 16—*Scope and extent of power to revise.*

In respect of the execution of decrees transferred to the Collectors, the power to revise is vested in the Financial Commissioner's Court under R. 16 of the rules framed by the Governor in Council under S. 70, C. P. Code. It limits the power of revision to such matters as are provided for in S. 115, C. P. Code. (*Greenfield, F.C.*) SITARAM *v.* RATANLAL. **1938 N.L.J. 262.**

——**S. 72**—*Applicability—Conditions of.*

The intervention of the Collector contemplated by S. 72 is a preliminary requisite to the application of that section. S. 72, however, can only be applied in cases where the land is saleable. Where the land is protected from sale by a special enactment, S. 72 can have no application. (*Middleton, J.C. and Almond, A.J.C.*) JETHA NAND *v.* KHUDA BAKHSH. **161 I.C. 628=8 R. Pesh. 176=A.I.R. 1936 Pesh. 90.**

——**S. 72**—Applicability—Land prohibited from sale by S. 16 of Bundelkhand Land Alienation Act. *See* C. P. CODE, S. 51 (*e*). **1938 A.L.J. 444 (F.B.).**

——**Ss. 72 and 73**—*Application by a decree-holder for temporary alienation of judgment-debtor's land, referred by Court to Collector—Another decree-holder applying to Court for rateable distribution in temporary alienation, before Collector made his proposal—Proper course to be adopted by Court.*

Where a decree-holder took out proceedings in execution of his decree and applied for a temporary alienation of the land of the judgment-debtor and the executing Court granted the application and referred the matter to the Collector for suggesting the period for which temporary alienation could be effected, and before the Collector made his proposal, another decree-holder took out proceedings in his own decree and applied under S. 73, C. P. Code, for "rateable distribution" in the temporary alienation, the proper course for the Court is to refer that application also to the Collector and to ask him to suggest a method of temporary alienation which will provide as far as possible for the satisfaction of both the decrees. An order sanctioning a temporary alienation of the judgment-debtor's land in favour of the former decree-holder alone in full satisfaction of his decree is erroneous and cannot be sustained. (*Tek Chand, J.*) BHANA RAM HARI KISHAN *v.* BHAGWAN SINGH. **169 I.C. 511=10 R.L. 18**

——**Ss 72 and 36**—*Execution proceedings—Farming of land belonging to judgment-debtor—Power of Civil Court—Order making lease money payable in instalments—Enforceability.*

A Civil Court is competent in execution proceedings to grant a farm of the land of a judgment-debtor belonging to an agricultural tribe. If the Court in granting such a lease makes the lease money payable by instalments, it might be said that the Court has acted in an unwise or indiscreet manner by not demanding the entire lease money at once but it cannot be said that the Court has passed an order which it had no jurisdiction to pass. Such an order is not illegal or without jurisdiction to pass. Such an order is

C. P. CODE (1908), S. 72.

not illegal or without jurisdiction and the provisions of S, 36 apply to the case and the Court can enforce payment of the lease money by applying the provisions of the Code relating to execution of decrees. A.I.R. 1920 Lah. 456. Foll. (*Addison and Abdul Rashid, JJ.*) PUNJAB NATIONAL BANK, AMRITSAR *v.* SHAMSHER SINGH. **166 I.C. 391=9 R.L. 369=38 P.L.R. 936=A.I.R. 1936 Lah. 696.**

——S. 72—*Powers of Collector.*

The Collector has no authority to suggest satisfaction of the decree in part by transfer of certain debts from the judgment-debtors to the decree-holders, or that mortgagee rights should similarly be transferred to the decree-holder. He has also no right to compel the decree-holder himself to take the lands on lease at a valuation fixed by the Collector. (*Almond, A.J.C.*) MAKHAN SINGH *v.* ROSHAN LAL. **160 I.C. 571=8 R. Pesh. 121=A. I.R. 1936 Pesh. 14.**

——S. 72—*Scope—Lease of property for term of years in satisfaction of decree—Power of Court to authorise Collector to grant.*

S. 72, C. P. Code, clearly empowers the Court to authorize the Collector to grant a lease of the property for a term of years in full satisfaction of the decree. (*Sulaiman, C.J. and Bennet, J.*) BASORE SINGH *v.* SANT KUMAR. **1937 A.W.R. 686=1937 A.L.J. 801=1937 A L.R. 905=10 R. A. 338=171 I.C. 903=1937 R.D. 422=A.I.R. 1937 All. 699.**

——S. 72—Scope and effect of—Powers of Court—S. 68. *See* C. P. CODE, SS. 68 AND 72. **A. I.R. 1937 Nag. 41.**

——S. 73.

Agreement.
Appeal.
Applicability.
Assets.
Charge.
Costs of realization.
Crown debts.
Order under if judicial.
Receipt of assets.
Right under.
Same judgment-debtor.

——S. 73—*Agreement—Construction— Money decree-holder and mortgage decree-holder agreeing to sale in execution of money decree and to rateable distribution at the time of sale—Rights of mortgage decree-holder.*

There were three decrees against the same judgment-debtors, one, a simple money decree and the other two, decrees for sale based on mortgage. In the course of execution proceedings, the money decree-holder and one of the mortgage decree-holders agreed as follows:—"Sale proceedings be carried out in the execution case of money decree-holder and in the remaining two executions, at the time when sale takes place, rateable distribution be made."

Held, that the reasonable interpretation to be placed upon the agreement was that when the sale took place in execution of the money decree, the mortgage decree-holder would be entitled to the same interest in the proceeds of the sale of the property mortgaged with him as he had in the property sold, in accordance with S. 73 (1) proviso (*b*), C. P. Code. (*Srivastava, Ag. C.J. and Smith, J.*) BRIJ MOHAN *v.* THE DEPUTY COMMISSIONER, PARTABGARH. **166 I.C. 714=9 R.O. 333**

C. P. CODE (1908), S. 73.

=1937 OW.N. 127=1937 O.L.R. 42=A.I.R. 1937 Oudh 270.

——S. 73—*Appeal—Order between rival decree-holders.*

If an order is made under S. 73 it is an order in execution proceedings and not a decree, being between two rival decree holders and is therefore not appealable, the judgment-debtor being not concerned with the dispute. (*Ram Lall, J.*) FATEH DIN *v.* DIWAN CHAND. **181 I.C. 22=11 R.L. 761=A.I.R. 1938 Lah. 801.**

——S. 73—Applicability—Absence of application by decree-holder—Order for distribution—Legality. *See* C. P. CODE, O. 21, R. 48 AND SS. 73 AND 151. **1940 Rang.L.R. 421.**

——S. 73 — Applicability — Application for execution "struck off" as infructuous, but attachment kept pending—If pending—Right of decree-holder to rateable distribution of assets received subsequently. *See* C. P. CODE, O. 21, R. 59. **I.L. R. (1938) Nag. 346.**

——S. 73—*Applicability—Attachment before judgment followed by decree under O. 12, R. 6—Court calling for amount from custody Court to pay same to decree-holder—Subsequent suit and attachment before judgment of same amount by another creditor—Decree—Application by latter for payment—Relative rights—First decree-holder—If solely entitled by reason of assignment or charge in his favour.*

In a suit for recovery of Rs. 451, from the defendant, the plaintiff *A*, applied for attachment before judgment of a sum of Rs. 1,000 lying to the credit of the defendant in a Magistrate's Court, being the amount awarded to him out of the fine imposed on an accused in a defamation case instituted by the defendant. The suit was fixed for 18-12-1929, on which date the defendant through his Counsel admitted the claim of the plaintiff and stated that the sum of Rs. 451 might be sent for out of the amount of Rs. 1,000 attached by the plaintiff and paid to the plaintiff in satisfaction of the decree passed or to be passed that day. The Court recorded an order, that same day, under O. 12, R. 6, C. P. Code, decreeing the claim and requisitioning the amount of Rs. 451 from the Magistrate's Court for payment to the plaintiff *A*. The requisition was sent but the money was not however received before 30-1-1930. In the meantime another creditor of the same defendant, *B*, sued the defendant for recovery of Rs. 1010, on 20-12-1929, and obtained an order for attachment of the very same Rs. 1,000 lying to the credit of the defendant in the Magistrate's Court, *B's* suit was eventually decreed, and he applied for execution of the decree and claimed payment of the amount of Rs. 451, held by the Court, but *A* objected to the payment of Rs. 451, which, he claimed, belonged solely to him.

Held, that *A* acquired an absolute interest to the sum of Rs. 451, which was requisitioned from the Court of the Magistrate on 18-12-1929, and that the second creditor *B* did not acquire any interest by taking out an attachment under a subsequent order after the defendant-debtor ceased to have any interest left in that amount. S. 73, C. P. Code, did not apply and there could be no rateable distribution of the amount.

C. P. CODE (1908), S. 73.

Per *Niamatullah, J.*—Though the attachment before judgment would not create any interest in favour of the attaching creditor, the declaration of the defendant made on 18-12-1929 and given effect to by the Court attaching the amount amounted to an assignment of the said amount of Rs. 451 in favour of creditor *A*, the validity of which was in no way affected under S. 64, C. P. Code, by reason of the pendency of his own attachment; and the assignment having been in satisfaction of the suit claim, and requiring, as it did, no particular form or words, conferred an absolute right on *A*. Even if the declaration of the defendant be held not to amount to a legal assignment, *A* certainly acquired a charge which give him the same right at law.

Per *Sulaiman, C.J.*—An oral assignment of a debt was legally valid. Though it might be difficult to hold that there was an out and out assignment, the intention of the judgment-debtor was to give the sum to his creditor *A*, who was consequently entitled to the payment of it as against *B*. (*Sulaiman, C.J. and Niamatullah, J.*) RAM GOVIND PANDEY *v.* BRIJ RATAN DAS. **169 I.C. 836=1937 A.L.R. 594=10 R A. 74=1937 A. L.J. 348=1937 A.W.R. 284=A.I R. 1937 All. 424.**

——**S. 73 and O. 21, R. 18**—*Applicability and relative scope—Attachment of decree—Judgment-debtor under attached decree holding cross-decree against holder of such decree—Set-off—Procedure.*

S. 73, C P. Code, which in general provides for rateable distribution between a number of decree-holders only applies when two or more decree-holders execute their decrees against other properties of the judgment-debtor; but when a decree-holder desires to execute his decree by attaching in execution a decree obtained by his judgment-debtor against another person, and that other person has a cross-decree against the holder of the attached decree, the provisions of O. 21, R. 18, come into play and a set-off has to be allowed. S. 73 does not come into play in such a case. (*Bennet, J.*) GIRDHAR DAS *v.* TRILOKI NATH. **174 I.C. 53=1938 A.L.R. 224=10 R A. 536=1938 A.W.R. (H.C.) 3=1937 A.L.J. 1371=A.I.R. 1938 All. 130.**

——**S. 73**—*Applicability—Attachment of same decree for money by several decree-holders—Attachment effected prior to deposit of money under attached decree—Right of rateable distribution—O. 21, R. 53 (2)—Effect.*

If more persons than one holding a decree against the same judgment-debtor attach one and the same decree obtained by the judgment-debtor against another before the money due under the attached decree is deposited in Court by the judgment-debtor of the attached decree, *i.e.*, before the assets are paid into Court, the provisions of S. 73, C. P. Code, are attracted, and the assets after the deduction of the costs of realisation are to be rateably distributed among the several decree-holders. The decree-holder who starts the first execution cannot claim the benefit of the entire amount deposited by reason of O. 21, R. 53 (2), which rule contemplates only cases where a decree for money is attached by a sole decree-holder. (*Nasim Ali and Edgley, JJ.*) JAGABANDHU ROY *v.* JAGABANDHU SAHA SARDAR. **40 C.W.N. 1249.**

C. P. CODE (1908), S. 73.

——**S. 73**—Applicability—Attachment under prior decree—Later decree against same decree-holder and attachment of same property—Sale under later decree—Procedure—Duty of Court to rateably distribute assets—Executing Court allowing later decree-holder to set-off sale price—Propriety—Effect on sale. *See* C P. CODE, O. 21, RR. 72 AND 90. **17 Pat.L.T. 847.**

——**S. 73**—*Applicability*—"*Before the receipt of such assets*"—*Effect on—Application for rateable distribution on same day as deposit of sale proceeds—Sufficiency.*

Before rateable distribution can be ordered to an applicant it must be found as a fact whether the application was made before or after the deposit of sale proceeds. It is not enough if the application is made on the same day as when the sale proceeds are deposited into Court. It cannot be assumed from that that the application was made prior to the deposit. (*Venkataramana Rao, J.*) RAMAYYA *v.* RANGARAJU. **1937 M.W. N 239=45 L.W. 501=170 I.C. 883=10 R.M. 253=A.I.R. 1937 Mad. 504=(1938) 1 M.L.J. 325.**

——**S. 73**—*Applicability — Conditions—Execution application—If must be pending on date of rateable distribution.*

Where persons holding decrees against the same judgment debtor have applied for execution and for rateable distribution prior to the receipt of assets by the Court executing the decree, S. 73 is complied with, and it becomes the duty of the executing Court to see that rateable distribution of the assets is effected. The fact that the execution applications of some of the applicants for rateable distribution are dismissed for default later, *i.e.*, before the rateable distribution is actually effected is immaterial and does not deprive them of their right to such distribution. (*Khaja Mohammad Noor and Madan, JJ.*) BIMALA NANDA TARAKATIRTHA *v.* DHIRENDRA NATH CHANDRA. **167 I C. 613=9 R P. 418=3 B.R. 307=17 Pat.L.T. 855=A.I.R. 1937 Pat. 92.**

——**S. 73** — Applicability — Cross-decrees—Executability of smaller decree in the presence of larger decree. *See* C. P. CODE, O. 21, R. 18. **1937 A.W.R. 441=A.I.R. 1937 All. 422.**

—— **S. 73**—*Applicability—Decree against Hindu co-parcener—Attachment of undivided share—Death of co-parcener—Sale of share in execution after death—Application for rateable distribution by other decree-holders without prior attachment of share of co-parcener—Maintainability.*

Where a creditor has obtained a decree against a Hindu co-parcener and attached his undivided interest in the joint family property during his lifetime, and the undivided interest is sold in execution after the death of the co-parcener-judgment debtor, other creditors who have obtained decrees against the same co-parcener but have not obtained attachment of the undivided interest during his life time cannot claim rateable distribution under S. 73, C. P. Code, from out of the sale proceeds. The assets realised by the sale are liable to rateable distribution only among such creditors as have attached the co-parcener's share during his lifetime in execution of their decrees against him. (*Divatia, J.*) URBAN CO-OPERATIVE BANK, LTD. *v.* HONAVAR HAVIK CO-OPERATIVE BANK, LTD. **I.L.R. (1940)**

C. P. CODE (1908), S. 73.

Bom. 146=188 I.C. 433=13 R.B. 9=42 Bom.L R. 218=A.I.R. 1940 Bom. 190.

——S. 73—*Applicability—Decree against Hindu father preceded by attachment of entire joint family property—Subsequent insolvency of father —Subsequent suit against father and sons with leave of Insolvency Court—Attachment of sons' shares—Decree—Execution—Sale of sons' shares —Application by prior decree-holder for execution sale of entire family property and application for rateable distribution—Maintainability—Effect of insolvency.*

S, a Hindu and his three sons constituted an undivided Hindu family. The respondent sued *S* alone, got an attachment before judgment of all the joint family properties of *S* and his sons and in due course got a decree on 12—7—1933. In November 1933, *S* was adjudicated an insolvent. Subsequently the petitioner with the leave of the Insolvency Court sued both *S* and his sons, got an attachment before judgment of the shares of *S's* sons in the joint family property on 4—2—1933 and in due course got a decree as sued for on 21—3—1934. On 31—7—1934 he applied to execute his decree by sale of the son's shares and the sale proceeds were realised and deposited in Court on 19—4—1935. Meanwhile the respondent applied on 13—3—1935 to execute his decree by sale of the entire family properties which he had attached before judgment, and applied for rateable distribution from out of the assets realised in the execution sale held under the decree of the petitioner.

Held, that though the respondent might not be entitled to sell the interest of *S* without leave of the Insolvency Court, he could sell the shares of his sons, which could not be regarded as the property of *S*, and the Official Receiver could not sell the shares of the sons because of the attachment before judgment. The fact that the respondent prayed for attachment and sale of the entire family properties did not take away his right to sell the son's shares, and he was therefore entitled to rateable distribution, the decrees being in law against the same judgment-debtor, (*Venkataramana Rao, J.*) PALANIAPPA CHETTIAR *v.* PALANI GOUNDAN. 165 I.C. 664 (2)=1936 M. W.N. 1142=9 R.M. 286=44 L.W. 615=A.I.R. 1936 Mad. 948=71 M.L.J. 541.

——S. 73—*Applicability—Decree of Small Cause Court—Execution—Court of Small Causes attaching salary of judgment-debtor and realizing money—Other decree-holders subsequently applying to High Court for execution—Attachment of salary—Garnishee sending monthly instalment to High Court—Former decree-holder applying to High Court for rateable distribution—Right of.*

Certain decree-holders applied for execution of decree in a Court of Small Causes, their decrees being of that Court. The Small Cause Court attached the salary of the judgment-debtor and money was actually being realized by the Court. Subsequently other decree-holders holding decrees against the same judgment-debtor, having applied to the High Court for execution by attachment of the salary of the judgment-debtor, the garnishees began to send the monthly instalments to the High Court and discontinued sending instalments to the Small Cause Court. Thereupon the decree-holders executing their decrees in the Court of Small Causes filed their application for execution in the High Court. It was contended that they were not entitled to rateable distribution with regard to money received prior to their applications being received in the High Court.

Held, that the decree-holders were entitled to rateable distribution along with other decree-holders in all the money received in the High Court by attachment of the salary of the judgment-debtor. (*Lobo, J.*) HINDU CO-OPERATIVE BANK *v.* MAHADEO KALIANJI. 177 I.C. 195=11 R.S. 51=A.I.R. 1938 Sind 175.

——S. 73—Applicability — Distribution of attachable portion of salary of judgment-debtor —Decrees in suits before 1st June, 1937 and after. *See* C. P. CODE, S 60 (1) (*i*) AND S. 73. 1939 A. M.L.J. 157.

——S. 73—*Applicability—Execution application —Court granting time to judgment-debtor and dismissing petition—If a judicial termination of the application—Application, if pending and entitles decree-holder to claim rateable distribution.*

Where in pursuance of an execution application the judgment-debtor is arrested and brought to Court, but is released at his request for the grant of time to pay off the decree amount on furnishing security, a formal order dismissing the execution petition cannot be taken to be a judicial order legally or validly disposing of the execution application, but has to be regarded only as an order for administrative or statistical purposes. The execution application must therefore be deemed to be still pending for purposes of S. 73, C. P. Code, in spite of the grant of time to the judgment-debtor and in spite of the dismissal orders. The decree-holder would therefore be entitled to claim rateable distribution on the basis of that application in the case of a sale and realisation of assets at the instance of another decree-holder brought about subsequent to the dismissal. (*Pandrang Row, J.*) RAMANATHAN CHETTIAR *v.* ALAGANAN CHETTIAR. 163 I.C. 209=8 R.M. 1117=1936 M.W.N. 223=43 L.W. 703=A.I.R. 1936 Mad. 437=70 M.L.J. 683.

——S. 73—Applicability—Execution of award under Bombay Co-operative Societies Act—Right to rateable distribution. *See* BOMBAY CO-OPERATIVE SOCIETIES ACT, S. 59 (1) (*b*). A.I.R. 1938 Sind 157.

——S. 73—Applicability—If subject to S. 63. *See* C.P. CODE, SS. 63 AND 73. 40 C.W.N. 1307.

——S. 73—*Applicability—Pendency of execution application—If condition precedent—Dismissal of execution application but attachment kept alive—If sufficient.*

A Court has power to dismiss an execution application and to continue the attachment. Hence merely because the Court after dismissing the application, orders the attachment to continue, it cannot be said that the application is pending. The following order was passed on an application for execution: "Sale notice not served. Case struck off as wholly infructuous at the instance of the decree-holder. House shall remain under attachment for three months".

Held, that the application must be held to have been dismissed and not merely adjourned to a future date. Hence the application could not be deemed to be pending for purpose of claiming rateable distribution. (*Pollock, J.*) GULABCHAND

C. P. CODE (1908), S. 73.

v. DONGARMAL. **168 I.C. 475=9 R.N. 257 (1)= A.I.R. 1936 Nag. 277.**

——**S. 73**—*Applicability — Sale by Collector during Civil Court vacation—Application to Court after re-opening—Right to rateable distribution.*

In execution of the decree of *A*, property was sold by the Collector during Civil Court vacation. On the reopening day of the Court one *B*, who had a decree against the same judgment-debtor, applied for rateable distribution with *A*. It was contended on behalf of *A* that as the assets were already realized during the vacation and as *B's* application was not made before the realization of the assets, it was not maintainable. On behalf of *B* it was contended that the application for execution filed by *B* when the Civil Courts reopened, must be deemed to have been filed before the realization of assets in the vacation. For this reliance was placed on S. 10, General Clauses Act,

Held, that there was no prescription of a certain day or a certain period. All that S. 73 prescribes is that there must be an application for execution before the assets are received. Hence S. 10, General Clauses Act, will not help *B*, nor will any section of the Limitation Act as no question of limitation was involved; the assets having been received prior to the application made by *B*, *B* was not entitled to rateable distribution. (*Pollock, J.*) NARHAR GOPAL KOMTI *v.* LAHANU PUNJAJI BHOI. **I.L.R. (1937) Nag. 420=9 R.N. 237 (2)=168 I.C. 158=A.I.R. 1937 Nag. 16.**

——**S. 73**—*Applicability—Subsisting execution application at time of receipt of assets—If necessary.*

The meaning of S. 73 must be that there should be a subsisting application for execution at the time when the assets are received. (*Pollock, J.*) NARHAR GOPAL KOMTI *v.* LAHANU PUNJAJI BHOI. **I.L.R. (1937) Nag. 420=9 R N. 237 (2)=168 I.C. 158=A I.R. 1937 Nag 16.**

——**S. 73 and 115 and O. 22, Rr. 8 and 12 and Provincial Insolvency Act, S. 28**—*Application for rateable distribution of assets—Maintainability—Interference in revision when other remedies open—Jurisdiction.*

Where an insolvent after adjudication and before discharge presented an application for rateable distribution in execution of a decree obtained by him prior to the insolvency, on the question as to the maintainability of the application by him.

Held, that the application was competent. 68 M.L.J. 392, Foll.

Held, *also* that a revision lay to the High Court. 49 M.L.J. 753; 19 M.L.J. 307: 32 Mad. 334, Ref. (*Abdur Rahman, J.*) SANKARANARAYANA AIYAR *v.* YEGNALAKSHMI AMMAL. **183 I.C. 576=12 R.M. 332=48 L.W. 807=1938 M.W.N. 1247=A.I.R. 1939 Mad. 196=(1938) 2 M.L.J. 1001.**

——**S. 73**—*Assets—Amount deposited by judgment-debtor under O. 21, R. 89—Liability to rateable distribution.*

Obiter.—A deposit made by a judgment-debtor for the purpose of setting aside an execution sale under O. 21, R. 89, C. P. Code, is an asset liable to rateable distribution under S. 73, C. P. Code, 40 C. 619, Doubted. (*S. K. Ghose and Edgley, JJ.*) CHITTAGONG URBAN CO-OPERATIVE BANK, LTD. *v.* THE INDI BURMA TRADES BANK, LTD. **176 I C. 607=11 R.C. 132=42 C.W.N. 840 =A.I.R. 1938 Cal. 521.**

C P. CODE (1908), S. 73.

——**S. 73**—*"Assets"—Meaning of—If confined to those realised by sale or otherwise in execution of decree.*

The word "assets" in S. 73 is not confined to those only which were realised 'by sale or otherwise in execution of a decree". Money realised by sale of attached property for arrears of revenue is available for rateable distribution, Where a decree-holder attaches property in execution of his decree but part of attached property is sold for arrears of revenue and the amount realised by such sale, over and above the arrears due, is attached by another decree-holder, the decree-holder attaching the property can follow the money realised by sale as the attachment of the property by him continues and fastens itself on to the money in spite of sale. Such decree-holder can therefore apply for rateable distribution in the money realised by sale. (*Bose, J.*) ZUMBERLAL CHHOTELAL *v.* SITARAM. **I.L.R. (1937) Nag. 219=171 I.C. 371=10 R.N. 109= A.I.R. 1937 Nag. 80.**

——**S. 73**—*"Assets"—Money paid by judgment-debtor for specific purpose of payment to particular decree-holder—Liability to distribution.*

Where a judgment-debtor pays an amount into Court for a specific purpose, *e.g.*, for payment to a particular decree-holder for the purpose of postponing an execution sale, that cannot be regarded as assets held by the Court liable to rateable distribution under S. 73, C. P. Code. (*Lokur, J.*) NINGAPPA *v.* ADIVEPPA. **186 I.C. 372=12 R.B. 324=41 Bom.L.R. 997=A.I.R. 1939 Bom. 468.**

——**S. 73**——*"Assets"—Preliminary mortgage decree obtained by judgment-debtor—Attachment by holder of money decree—Attaching decree-holder obtaining final decree for sale and bringing properties for sale—Sale proceeds—If assets available for distribution—Right of rival money decree-holder against mortgagee (judgment-debtor) to rateable distribution.*

A preliminary mortgage decree obtained by a person is his asset or property; if the holder of a money decree against such person attaches the preliminary decree and is allowed to proceed on the mortgage action, and in due course obtains a final decree for sale and brings the mortgaged properties to sale in execution of the final decree as attaching decree-holder, another money-decree-holder of the judgment debtor (mortgageee holder) can claim and is entitled to rateable distribution under S. 73, C. P. Code, from out of the sale proceeds. The method by which the attaching decree-holder comes to execute the mortgage decree of his judgment-debtor is only a method of procedure. The decree is an asset of the judgment-debtor and its money equivalent after the various processes of the Court have been resorted to, would also amount to assets which would still remain the property of the judgment-debtor available for distribution among the holders of decrees against that same judgment-debtor. (*Wort and Varma, JJ.*) DEBI BUX *v.* RAMESHWAR PRASAD NARAIN SINGH. **172 I.C. 195=1937 P.W.N. 823=10 R.P. 305=18 Pat.L.T. 817=A.I.R. 1937 Pat. 651.**

C. P. CODE (1908), S. 73.

——S. 73—*"Assets held by a Court"—Meaning of—Money deposited in Court by surety for judgment-debtor by way of security in respect of stay of execution of* ex parte *decree*—Ex parte *decree set aside—Fresh decree passed after re-trial—Application for execution—Right of other decree-holders to rateable distribution—Order of rateable distribution—Appeal—S. 47.*

S. 73, C.P. Code, does not apply to monies paid into Court in a suit when no question of execution arises. The expression "assets held by a Court" in the section means assets received in execution; and when the assets have been paid in for a specific purpose, they cannot be applied generally in exection so as to defeat the specific purpose. If a Court receives money on terms that it is to be applied for payment of the debt of *A*, it is clear that it cannot apply the money in payment of the debt of *B*. The Court cannot commit what would be in substance a breach of trust. The plaintiffs who held an *ex parte* decree against the defendant applied to execute it. The defendant asked for a stay of execution and the Court granted a stay on condition that he gave security. The defendant produced a surety who executed a surety bond for a sum of Rs. 3,400, agreeing that the defendant should submit to and discharge his liabilities on the decree or order which decree or order would be passed. He also undertook that if the defendant failed to act accordingly the surety could himself pay into Court the sum of Rs. 3,400. The *ex parte* decree was subsequently set aside, but on re-trial the Court passed a decree in favour of the plaintiffs. On an application by the latter for execution the surety deposited the sum of Rs. 3,400 into Court. Two other persons who had obtained decrees against the same defendants in other suits long after the stay of execution in respect of the plaintiff's decree applied for rateable distribution out of the sum of Rs. 3,400.

Held, that the Court having received the amount on terms that the Court should apply it in payment of the plaintiff's debt, should not now apply the same in payment of somebody else's debt as well as the plaintiff's debt, and the amount of Rs. 3,400 deposited by the surety was not therefore assets subject to rateable distribution.

Held further, that the question involved affected not only the creditors *inter se* but affected the surety to a considerable extent and the judgment-debtor to a lesser extent, and an appeal therefore lay under S. 47. C. P. Code, read with S. 145, C.P. Code. (*Beaumont, C.J. and Sen, J.*) LALCHAND RADHAKISAN *v.* RAMDAYAL RAMNARAYAN. **I L.R. (1939) Bom. 133=181 I.C. 246=11 R.B. 331=41 Bom.L.R. 176=A.I.R. 1939 Bom. 112.**

——S. 73—*"Assets held by a Court"—Money paid under O. 21, R. 55—Liability to rateable distribution.*

Under S. 73, C. P. Code, rateable distribution is not confined to cases where the assets are realised by sale or by some other process of execution. The words of the section are wide enough to cover not only the money which the judgment-debtor is compelled to pay, but also money voluntarily paid into Court by him to satisfy a decree under execution. The expression "assets held by a Court" obviously mean any fund in possession of a Court or its disposal which may be applied by it for the payment of a judgment-debtor's debt.

C. P. CODE (1908), S. 73.

Money paid by a judgment-debtor under O. 21, R. 55, C. P. Code, though made for the satisfaction of a particular debt, is subject to rateable distribution under S. 73, where there are several decree-holders and when all the requirements of S. 73 are complied with, O. 21, R. 55 must be read subject to S. 73, and the judgment-debor cannot prevent rateable distribution by merely earmarking his payment for the benefit of one of the decree-holders. The assets are distributable by operation of law and there is nothing in law which would compel the Court to deal with them according to the wishes of the judgment-debtor. (*Fazl Ali and Manohar Lall. JJ.*) SATNARAIN PRASAD *v.* MAHABIR PRASAD CHOWDHURY. **18 Pat. 404=183 I.C. 409=5 B.R. 914=11 R.P. 137=1939 P.W.N. 242=20 P.L.T. 646=A.I,R. 1939 Pat. 392.**

——S. 73—*Assets held by the 'Court'—Moneys received by Collector executing decrees sent to him for execution.*

Even though the Collector to whom the decree is transferred for further execution. by a Civil Court, is not a Court, still in view of the duties of the Collector in this matter, though he is not an agent of such Court. the moneys received by him in execution of such decree are moneys received by him for and on behalf of such Court. The moneys so received, while they are in his hands, are "assets" held by such Civil Court. (*Stone, C.J.*) JAYANARAYAN *v.* DHANRAJ. **I.L.R. (1939) Nag. 285=173 I.C. 98=10 R.N. 276=A I.R. 1938 Nag. 14.**

——Ss. 73 and 115—*Assets held by the Court—Sum brought into Court by attachment in execution by one of the decree-holders—Another decree-holder who had applied to execute, if entitled to rateable distribution—Refusal to order—If failure to exercise jurisdiction.*

Where a decree-holder by attachment in execution of his decree brings into Court a sum of money, and another decree-holder who had already put in his execution application, seeks to obtain rateable distribution, a refusal to so rateably distribute the sum is a failure to exercise a jurisdiction, for the sum is an asset in the hands of the Court and the other requisite is also present, and hence should be set aside. (*Wort, A.C.J. and Manohar Lall, J.*) JAGDEO SAHU *v.* BHIMRAJ BANSIDHAR. **177 I.C. 269=4 B.R. 803=11 R.P. 138.**

——S. 73 and O. 21, R. 48—*Attachment of salary—Rateable distribution—If applies.*

The rule relating to rateable distribution applies to attachment of salary. No inference can be drawn from O. 21, R. 48, C.P. Code, to the effect that the intention was to make an exception from that rule. Further O. 21, R. 48 cannot override the substantive provision in the earlier portion of the Code, S. 73. (*Ameer Ali, J.*) HONGKONG AND SHANGHAI BANKING CORPORATION *v.* PARESH LAL ROY. **I.L.R. (1939) 1 Cal. 40=183 I.C. 444=12 R.C. 158=43 C.W.N. 169=A.I.R. 1939 Cal. 485.**

——S. 73—*Charge—Immovable property given as security—Creation of charge on such property for decree-debt—Effect—Right of other decree-holders to rateable distribution out of sale proceeds.*

C. P. CODE (1908), S. 73.

Where immovable property is given as security and a charge is created on it in favour of the decree-holder concerned, the effect of that is something more than attachment; it makes the property and sale-proceeds applicable solely in discharge of the particular judgment-debt in question, and the sale proceeds are not liable to rateable distribution among other judgment-creditors. (*Mockett and Horwill, JJ.*) KRISHNAMURTHY AYYAR *v.* MUNISWAMI. **170 I.C. 15=10 R.M. 189=1937 M.W.N. 206=45 L.W. 432=A.I.R. 1937 Mad. 531.**

——**S. 73**—*Compliance with—Requisites—Application for rateable distribution—Necessity.*

S. 73, C.P. Code, only requires that applications for execution should have been made to the Court. The Code does not provide for an application for rateable distribution. The duty of distribution is cast on the Court whenever more persons than one have applied for execution of decrees passed against the same judgment-debtor. The fact that a decree-holder claims payment of the whole amount to himself cannot deprive him of his right to a share, if that is all that he is entitled to under the law. (*Varadachariar and Mockett, JJ.*) SOMASUNDARAM CHETTIAR *v.* ALAMELU ACHI. **1937 M.W.N. 480.**

——**S. 73**—*Construction — 'Decrees passed against the same judgment-debtor'—Separate decrees against father and sons, but executable against same estate.*

The language of S. 73 (1), C. P. Code, is clear and unambiguous and as it stands it is not possible to hold that a decree obtained against a father and a decree obtained after his death against his sons upon a promissory note executed by them in respect to a debt of their father are 'decrees passed against the same judgment-debtor' within the meaning of the section, though both the decrees are executable against the same estate. (*Collister, J.*) LAL SINGH NAYAL *v.* JIWA NAND. **184 I.C. 589=12 R.A. 253=1939 A.W.R. (H.C.) 427=A.I.R. 1939 All. 545.**

——**S. 73**—*Costs of realization—Goods attached by creditors remaining in possession of Nazir in premises occupied by judgment-debtor as lessee—Landlord's right to rent during period of occupation as costs of relization.*

Where goods of a judgment-debtor attached by creditors remain in the possession of the Nazir in premises occupied by the judgment-debtor as lessee, and the lease is not terminated after the atachment, there is no privity between the Nazir and the landlord. But the landlord is entitled to claim the rent for the period during which the attached goods were kept in the premises as part of the costs of realization to be deducted from the sale proceeds before distribution to the creditors under S. 73. (*Tyabji, J.*) NUSSERWANJI & CO. *v.* ROYAL TOYLAND. **187 I.C. 55=12 R.S. 217=A.I.R. 1940 Sind 17.**

——**S. 73**—*Crown debts—Priority—Claim to attached property by Collector acting under S. 46 (2), Income-tax Act, and under S. 45, Lower Burma Land and Revenue Act.*

It is a rule of law that Crown has priority over unsecured creditors in the payment of debts. The powers given to the Collector on behalf of the Crown under the Income-tax Act, S. 46 (2) and the Lower Burma Land and Revenue Act, S. 45,

C. P. CODE (1908), S. 73.

are sufficient to accomplish the purpose of the rule. So the Court holding the assets is bound to recognize the claim of the Collector acting under those sections. The claim cannot be deemed to fall under S. 73, C. P. Code. S. 73 applies only to Civil Courts and although the Collector is empowered in respect of recovery of arrears of income-tax to exercise all the powers conferred on a Court executing a decree, he does not thereby become a Civil Court. There can be no rateable distribution between decree-holders who come within the scope of S. 73 and the Collector. (*Mya Bu and Mackney, JJ.*) SECRETARY OF STATE *v.* MA NYEIN ME. 1937 Rang.L.R. 344=172 I.C. 422=10 R.R. 248=A.I.R. 1937 Rang. 380.

——**Ss. 73 and 63**—Decree-holder seeking rateable distribution—If must apply to Court where realization of assets takes place. *See* C. P. CODE, SS. 63 AND 73. **1937 O.W.N. 1040.**

——**S. 73 and Companies Act, S. 186**—*'Decree' in S. 73, C. P. Code, if includes order under S. 186, Companies Act.*

An order passed under S. 186 of the Companies Act cannot be deemed to be a decree within the meaning of that word in S. 73, C. P. Code. Any person in whose favour such an order has been passed, cannot claim rateable distribution. (*Zia-ul-Hasan and Yorke, JJ.*) LYALLPUR BANK, LTD. *v.* RAMJI DAS. **15 Luck. 332=12 R.O. 270=185 I.C. 889=1940 O.A. 132=1940 A.W.R. (C.C.) 63=1940 O.L.R. 75=1940 O.W.N. 132=A.I.R. 1940 Oudh 237.**

——**S. 73**—*Executing Court—Powers.*

In a case where a decree shows on the face of it that the judgment-debtor is an 'agriculturist' or it may be, if the decree shows on the face of it that it is time barred, the executing Court can refuse to allow rateable distribution. (*Beaumont, C.J.*) KRISHNAJI VISHNU *v.* VISHNU PANDHARINATH. **I.L.R. (1938) Bom. 98=173 I.C. 561=10 R.B. 362=39 Bom.L.R 1212=A.I.R. 1938 Bom. 90.**

——**S. 73**—*Jurisdiction under—Court holding assets—If bound to transfer same to another Court.*

Under S. 73, C. P. Code, it is the Court which holds the assets that can distribute them rateably. That Court is not bound to transfer the darkhast pending before it to another Court at its bidding. (*Lokur, J.*) NINGAPPA *v.* ADIVEPPA. **186 I.C. 372=12 R.B. 324=41 Bom.L.R. 997=A.I.R. 1939 Bom. 468.**

——**S. 73 and 47**—*Order refusing prayer for rateable distribution—Appeal.*

An order refusing a prayer for rateable distribution is one under S. 73 and not under S. 47, C.P. Code; sub-S. (2) of S. 73 gives the aggrieved party a right to bring a regular suit. No appeal is allowed from such order. (*Tek Chand, J.*) MAHBOOB HUSSAIN SHAH *v.* PUNJAB NATIONAL BANK, LTD. **176 I.C. 459=11 R.L. 219=40 P.L.R. 49=A.I.R. 1938 Lah. 307.**

——**S. 73**—*Order under—If judicial or administrative.*

An order under S. 73, C. P. Code, is a judicial and not an administrative order. (*Zia-ul-Hasan and Yorke, JJ.*) LYALLPUR BANK, LTD. *v.* RAMJI. **15 Luck. 332=12 R.O. 270=185 I.C. 889=1940 O.A. 132=1940 A.W.R. (C.C.) 63=1940 O.L.R. 75=1940 O.W.N. 132=A.I.R. 1940 Oudh 237.**

C. P. CODE (1908), S. 73.

———S. 73—Procedure—Application for execution—Necessity—Attachment by Munsiff's Court and Sub-Court—Realisation by Sub-Court—Munsiff's Court decree-holder, if should follow procedure laid down by S. 73 (1). *See* C. P. CODE, SS. 63 (1) AND 73 (1). **1938 A.W.R. (H.C.) 870.**

———S. 73—*Rateable distribution—Amount received by way of—Appropriation of—Right of decree-holder—Costs payable under decree—If reduced* pro tanto.

The holder of a decree who receives a sum of money by way of rateable distribution cannot appropriate that sum in any way he likes. It is because of the total of the decree debt, namely, the amount of the decree proper and the costs awarded, that he is able to get as much as he does get by way of rateable distribution. It would be clearly unequitable and unfair for him to claim after he has received the money that it must all go towards the satisfaction of the first item only. He must admit that what he has received goes towards the payment of every rupee of his debt if the entire decree amount be regarded as a single debt or equally towards the payment of both the debts contained in the decree if the decree amount proper and the costs are regarded as two debts. (*King, J.*) GOPALA RAO *v.* LAKSHMINARASAMMA. **I.L.R (1939) Mad. 301=181 I.C. 388=11 R.M. 804=50 L.W. 908=1938 M.W.N. 1210=A.I.R. 1939 Mad. 268=(1939) 1 M.L.J. 137.**

———Ss. 73 and 47—*Rateable distribution—Appeal—Question as to* locus standi *of decree holder's agent.*

Where the question of rateable distribution is solely between the two rival decree-holders, the decision of that question is purely one under S. 73, C. P. Code, and no appeal having been allowed from an order under that section, the aggrieved person has no right to appeal. Of course S. 73 (2), C. P. Code, gives him a right of suit. But where the judgment-debtor is directly or indirectly interested in the order under S. 73, C.P. Code, it falls under S. 47, C. P. Code, as well and is therefore appealable. The question as to the *locus standi* of the agent of the decree-holder is one in which the judgment-debtor is pre-eminently interested and a decision on that question is no doubt one which will also have effect between the decree-holder and the judgment-debtor so far as the execution, discharge or satisfaction of the decree is concerned. Therefore an order of the execution Judge treating an execution application as *ultra vires* holding that the agent who filed it has no *locus standi* is appealable under S. 47. (*Almond, J.C. and Mir Ahmad, J.*) PUNJAB NATIONAL BANK LTD. *v.* HUKAM CHAND SHAH. **177 I.C. 872=11 R.Pesh. 39=A.I.R. 1938 Pesh. 63.**

———S. 73 and O. 38, R. 11—*Rateable distribution—Procedure — Application for execution—Necessity—Mere attachment before judgment and decree thereafter, not enough.*

Where a decree-holder had already obtained an attachment before judgment of certain money in the hands of a third person belonging to the judgment-debtor and had not taken any further step after obtaining his decree, but a later decree-holder against the same judgment-debtor, who had also attached, the same money, before judgment, applied after obtaining his decree to direct the said third person to pay the attached amount into Court and it was in fact so deposited, the former decree-holder, though he had obtained his decree earlier in point of time, is not entitled to rateable distribution out of the deposit in Court as he had not applied for execution of his decree, before the realisation of the assets. He could not invoke O. 38, R. 11 in his favour as it does not excuse an application for execution in any circumstances whatever. It only says that upon an application for execution re-attachment of the property need not be applied for if it has already been attached under that order. (*Sharpe, J.*) R. N. PANDAY *v.* MOHAMMAD KASIM KHAN. **1938 Rang.L.R. 565=179 I.C. 987=11 R R. 373=A.I.R. 1939 Rang. 20.**

C. P. CODE (1908), S. 73.

———S. 73—*Rateable distribution—Right to—Crucial date—Dismissal of execution application after the receipt of assets—Right, if affected.*

The crucial date for determining the right for rateable distribution under S. 73, C. P. Code, is the date on which the assets are received. On this date all the decree-holders whose applications were pending for execution in the Court and who had not received satisfaction became entitled to share the assets rateably. Their right to share having accrued to them, it could not be lost by the mere fact that their application was dismissed in default later on. (*Puranik, J.*) BULAKHIDAS *v.* MURLIDHAR. **1940 N.L.J. 340.**

———S. 73—*Rateable distribution—Right to—Decree-holder purchaser allowed to set-off decretal amount against sale price—Court, if holds assets.*

Under O. 21, R. 72, C. P. Code, a decree-holder purchaser is allowed an indulgence of setting off the purchase price against the decree, but a purchaser who has obtained this indulgence cannot take advantage of it so far as it affects the rights of other creditors or to alter the substance of the transaction, the substance of the transaction being that the Court instead of actually taking and then giving back the money to the decree-holder makes a sort of debit and credit paper transaction. That being so, where the Court passes an order under O. 21, R. 72, it must be regarded as holding assets at that time available for rateable distribution and if it passes an order for rateable distribution, it can enforce that order by a summary process in execution. (*Bose, J.*) KESHEORAO *v.* MULCHAND. **I.L.R. (1937) Nag. 466=172 I.C. 370=10 R.N. 202=A.I.R. 1937 Nag 383.**

———Ss. 73 and 145—*Realisation from surety—Another decree-holder against same judgment-debtor—If can claim rateable distribution.*

Where there has been a realisation from the surety in respect of a decree, a different decree-holder as against same judgment-debtor, is not entitled to rateable distribution out of that realisation. (*Pollock, J.*) SAKHARAM *v.* MAHADEO. **186 I.C. 583=12 R.N. 229=1939 N.L.J. 534=A.I.R. 1940 Nag. 79.**

———S. 73—*Receipt of assets—Date of—Decree against father and son—Official Receiver directed to sell son's share also within time fixed—Failure to sell—Sale subsequently by receiver afterwards ratified by Court—Application by holder of decree for execution after receipt of money by receiver but before payment by him to Court—Right to rateable distribution.*

The petitioner, the 1st respondent and the 2nd respondent, were all holders of decrees against the 3rd respondent and his father who became an insolvent. The 1st respondent executed his decree on 15-10-1934 and on 5-1-1935, the Court ordered a sale of the entire properties of the father and the son. Subsequently at the instance of the Official Receiver who was impleaded, the Court on 13-2-1935 passed an order permitting the Official Receiver to sell the entire property within three months and to deposit into Court the share of the non-insolvent son, the 3rd respondent. The sale did not take place within the time fixed, and the executing Court was approached to withdraw the sale from the Official Receiver and to sell through Court. Pending correspondence on this proposal between the Court and the Official Receiver, the latter actually sold the property on 28-10-1935. The price was received by the Official Receiver in two instalments on 29-10-1935 and on 7-11-1935. Petitioner filed his execution petition on 30-11-1935, and the 2nd respondent filed his execution petition on 20-12-1935. No sale deed was drawn up until on 30-3-1936 the Official Receiver paid the son's share of the sale proceeds into Court, and on 8-4-1936 the sale was finally ratified by the Court,

Held, that for purposes of S. 73, C. P. Code, the date of receipt of the assets by the Court was not the date of receipt of the price by the Official Receiver as the agent of the Court, but the date on which the Official Receiver paid the son's share actually into Court. The sale by the receiver beyond the time fixed was unauthorised and irregular, as also the receipt by him of the sale proceeds, and the subsequent ratification by the Court could not transmute the unauthorised receipt of the money by the Official Receiver into a receipt by the Court. Therefore the petitioner and the 2nd respondent were entitled to rateable distribution as they had applied before the date of payment by the Official Receiver into Court, which must be held to be the date of receipt by the Court. (*Wadsworth, J.*) ANNAMALAI CHETTIAR *v.* VELLAYAN CHETTIAR. **1940 M.W.N. 699=52 L.W. 191=(1940) 2 M.L.J. 23.**

——**S. 73**—*"Receipt of assets"—Date of—Purchase by decree-holder with right of set-off—Date of sale—If date of realisation — Rule in such cases.*

Whenever there is a pending application for execution, the applicant in which would be entitled to rateable distribution, there cannot be any receipt of assets or realisation of assets by the Court unless the decree-holder purchaser's rateable share (when the purchase is by him) is determined and the balance is deposited by him into Court. The rule under which, in an ordinary case, where no question of rateable distribution can arise and a set-off has been allowed to a decree-holder purchaser, the date of sale is to be regarded as the date of realisation of assets, cannot apply to a case where there is a valid claim to rateable distribution. There can be no set-off except subject to the right of rateable distribution and in such cases the assets cannot be deemed to have been realised by the Court till the amount has actually been deposited under orders of the Court. (*Pandrang Row, J.*) RAMANATHAN CHETTIAR *v.* ALAGANAN CHETTIAR.

163 I.C. 209=8 R.M. 1117=1936 M.W.N. 223=43 L.W. 703=A.I.R. 1936 Mad. 437=70 M.L.J. 683.

——**S. 73**—*Receipt of assets—Date of—Purchase of property by decree-holder who sets off sale proceeds against his decree.*

Where a decree-holder purchases the property, brought to auction by himself, and, thereby sets off the proceeds of the sale against his decree, and particularly where he obtains an exemption from payment of 25 per cent., the assets are received by the Court within the meaning of S. 73, on the date on which the sale is confirmed, as it is on that date, the decree-holder should be supposed to have finally made the payment and to have been reimbursed in satisfaction of his decree. Consequently applications presented by other decree-holders before the date of the confirmation of the sale are within time and they are entitled to have a *pro rata* share in the sale proceeds of the property. (*Mir Ahmad, A.J.C.*) MAKHAN SINGH *v.* MOTI RAM. **164 I.C. 568=9 R. Pesh. 19=A.I.R. 1936 Pesh. 164.**

——**S. 73**—*Receipt of assets—Execution by Collector—Assets when realised.*

For purposes of rateable distribution of assets under S. 73, C. P. Code, in cases of execution by the Collector, the assets must be deemed to have been received by the Court on the date when they were received by the Collector. (*Pollock, J.*) NARHAR GOPAL KOMTI *v.* LAHANU PUNJAJI BHOI. **I.L.R. (1937) Nag. 420=168 I.C. 158=9 R.N. 237 (2)=A.I.R. 1937 Nag. 16.**

——**S. 73**—*Right to apply—Holder of mortgage decree.*

A mortgage decree passed under the provisions of O. 34, which directs that the amount due to the decree-holder shall first be paid out of the sale-proceeds of the mortgaged property is not a personal decree at first instance even as regards costs and hence the holder of such a decree cannot claim rateable distribution. (*Bhide, J.*) ALLAHABAD BANK, LTD. *v.* PUNJAB NATIONAL BANK. **42 P.L.R. 249=A.I.R. 1939 Lah. 303.**

——**S. 73**—*Right to rateable distribution—Applicant's decree describing judgment-debtor as 'Agriculturist'—Same judgment-debtor, held not an 'agriculturist' in opponent's decree—Realisation of assets in the latter by sale of immovable property—Applicant's right to rateable distribution in such assets—Dekkhan Agriculturists' Relief Act* (1879), *S.* 22.

Where there are two decrees against the same judgment-debtor, in one of which he is described as an 'agriculturist' while in the other he was held to be not an 'agriculturist' and where in execution of the latter decree, assets are realised by sale of the immovable property of the judgment-debtor, the former decree-holder is not entitled under S. 73 of the C. P. Code to rateable distribution out of such assets, for the reason that his decree cannot be executed against the immovable property of the judgment-debtor by virtue of S. 22 of the Dekkhan Agriculturists' Relief Act. (*Beaumont, C.J.*) KRISHNAJI VISHNU *v.* VISHNU PANDHARINATH. **I.L.R. (1938) Bom. 98=173 I.C. 561=10 R.B. 362=39 Bom.L.R. 1212=A.I.R. 1938 Bom. 90.**

——**Ss. 73 and 63**—*Right to rateable distribution—Attachment in Court of lower grade—*

C. P. CODE (1908), S. 73.

Assets realised by Court of superior grade—Transfer of execution proceedings.

Where a decree-holder who has obtained a decree against the same judgment-debtor and attached the same property in a Court of lower grade has the execution proceedings transferred to the Court of superior grade in which the assets are realised, he is entitled to a rateable share in the assets realised by the latter Court without a fresh application for execution or even for grant of a rateable share. *(Jai Lal, J.)* BALMOKAND *v.* RAM SARAN DAS. **163 I.C. 59=8 R.L. 990=38 P.L.R. 281=A.I.R. 1936 Lah. 519.**

——**Ss. 73 and 47**—*Right to rateable distribution—Decree-holder failing to refund amount withdrawn, on sale being set aside—Attachment of his property already attached by another—Auction-purchaser if entitled to rateable distribution of the sale proceeds, of that property.*

On an execution sale being set aside the decree-holder was directed to refund the amount withdrawn by him and on his failure to do so his property which was already attached in execution of a decree obtained against him by a third party, was again attached. It was held that the auction-purchaser whose money was not refunded was entitled to claim under S. 73, C. P. Code, rateable distribution of the sale proceeds of the attached property, inasmuch as the order directing the decree-holder to refund came under S. 47, C. P. Code, and hence amounted to a decree. *(Pollock, J.)* BHIORAJ *v.* SHIOLAL. **188 I.C. 380=12 R.N. 337=1940 N.L.J. 215=A.I.R. 1940 Nag. 267.**

——**S. 73**—Right under—Application for rateable distribution before date of sale—If necessary—Sale by Court attaching later—Absence of application by prior attaching decree-holder—Selling Court allowing set-off—Legality. *See* C. P. CODE, SS. 63 AND 73 AND O. 21, R. 72. **A.I.R. 1937 Cal. 55.**

——**S. 73**—*Sale proceeds held by Sub-Judge, First Class—Power of senior Sub-Judge to call for them to his Court.*

Where sale proceeds are held by the Sub-Judge, First Class, the Senior Sub-Judge is competent, without intervention of the District Judge, to call for the sale proceeds to his Court to be rateably distributed amongst decree-holders qualified under S. 73. *(Ram Lall, J.)* FATEH DIN *v.* DIWAN CHAND. **181 I.C. 22=11 R.L. 761=A.I.R. 1938 Lah. 801.**

——**S. 73**—*'Same judgment-debtor'—Decree against a firm and a decree against a partner in his individual capacity—If against the same judgment-debtor.*

Where *A* obtained a decree against *B* and proceeded to execution, *C* who held a decree against a firm of which *B* was one of the partners, applied for distribution in the assets realised in execution of *A's* decree.

Held, that *A's* decree against a partner in his individual capacity and *C's* decree against the firm, are not decrees against the 'same judgment-debtor' within the meaning of S. 73 of the C. P. Code. *(Coldstream and Jai Lal, JJ.)* SADHU RAM *v.* DHANPAT RAI TELU RAM. **18 Lah. 637=175 I.C. 334=10 R.L. 723=40 P.L.R. 419=A.I.R. 1937 Lah. 937.**

——**S. 73**—*"Same judgment-debtor"—Decree against Hindu father and decree against father and son—Sale of son's share in execution of latter decree—Right of holder of former decree to rateable distribution.*

A decree against a Hindu father and a decree against the father and his son, are decrees against the same judgment-debtor for purposes of S. 73, C. P. Code. If the son's interest in the family property is sold in execution of the decree against the father and son, the holder of the decree against the father alone is entitled to rateable distribution under S. 73. *(Leach, C.J. and Krishnaswami Ayyangar, J.)* SUBRAMANIA CHETTIAR *v.* ANNAMALAI CHETTIAR. **51 L.W. 357=1940 M.W.N. 286=A.I.R. 1940 Mad. 525=(1940) 1 M.L.J. 553.**

——**S. 73**—*"Same judgment-debtor"—Decree against a person as legal representative and decree in his personal capacity—If against same judgment-debtor.*

A decree passed against a person as the legal representative of another is a decree against the same judgment-debtor as another decree passed against the said individual in his personal capacity for purposes of S. 73, C. P. Code, when the former decree makes the legal representative personally liable. *(Varadachariar and Mockett, JJ.)* ALAGAPPA CHETTIAR *v.* SOMASUNDARAM CHETTIAR. **1937 M.W.N. 465 (2).**

——**S. 73**—*"Same judgment-debtor"—Decree against Hindu father—Decree against father and sons—If against same judgment-debtor.*

A decree obtained against a Hindu father and a decree against the father and his sons are decrees against the same judgment-debtor for purposes of S. 73, C. P. Code. *(Venkataramana Rao, J.)* PALANIAPPA CHETTIAR *v.* PALANI GOUNDAN. **165 I.C. 664 (2)=9 R.M. 286=1936 M.W.N. 1142=44 L.W. 615=A.I.R. 1936 Mad. 948=71 M.L.J. 541.**

——**S. 73**—*"Same judgment-debtor"—Decree against Hindu father and decree against father and son—If against same judgment-debtor.*

A decree against a Hindu father on a promissory note executed by the father alone and a decree against the father and his son cannot be said to be decrees "against the same judgment-debtor" for purposes of S. 73, C. P. Code. The former decree-holder is not entitled to rateable distribution out of sale proceeds representing the son's share in execution of the latter decree, at any rate when the former decree-holder has not made the son a party to his execution and when it has not been found whether his decree was on debt binding on the son. *(Horwill, J.)* ARUNACHALAM CHETTIAR *v.* KALAYAPPA CHETTIAR. **167 I.C 503 (1)=9 R.M. 464=45 L.W. 203=1936 M.W.N. 1212=A.I.R. 1937 Mad. 253=(1937) 1 M.L.J. 180.**

——**S. 73**—*"Same judgment-debtor"—Decree against Hindu father—Decree against father and sons—If against same judgment-debtors.*

Where there is a decree against a Hindu father and there is also a decree against the father and sons, and where it is admitted that the property from which the assets are realised by the sale was the property of the joint family of which the father and sons are undivided members, the decrees must be held to be decrees against "the same judgment-debtors" for purposes of S. 73, C. P. Code. *(Venkataramana Rao, J.)* RAMAYYA *v.* RANGARAJU. **1937 M.W.N. 239=170 I.C. 883**

C. P. CODE (1908), S. 73.

=10 R.M. 253=45 L.W. 501=A.I.R. 1937 Mad. 504=(1938) 1 M.L.J. 325.

——S. 73—*"Same judgment-debtor"—Decree against party personally—Separate decree against him as heir of another—If against same judgment-debtor—Rateable distribution.*

If a decree is obtained against a man as heir of a deceased person and another decree is obtained against him in his personal capacity, the two decrees are against the same judgment-debtor within the meaning of S. 73 of the Code of Civil Procedure. Consequently, if one of the two decree-holders takes out execution and assets are realised, the other is entitled to rateable distribution. (*Nasim Ali and Henderson, JJ.*) HEMENDRA NATH RAY CHOWDHURY *v.* EAST BENGAL COMMERCIAL BANK. **63 Cal. 923=162 I. C. 702=8 R.C. 648=40 C.W.N. 570=A.I.R. 1936 Cal. 210.**

——S. 73—*"Same judgment-debtor" — Interpretation—One decree against manager of joint family—Another decree against members of family and against fam ly property—Whether both decrees are against same judgment-debtor.*

A literal interpretation should not be given to the word "judgment-debtor" in S. 73, C. P. Code. Where therefore person is sued as family manager it must be taken that he represents all the members of the family (even if consisting of father and sons) and they are constructively parties to the suit and hence must be deemed to be judgment-debtors for the purpose of the suit. A decree obtained against two persons *eo nominee* as members of the family and as against family properties and another decree obtained against one of them as a manager of the joint family are therefore against the same judgment-debtor within the meaning of S. 73, C. P. Code. A.I.R. 1936 Mad. 40, Foll. (*Venkataramana Rao, J.*) SWAMINATHA AYYAR *v.* SAIVU ROWTHAN. **160 I. C. 559=8 R.M. 665=43 L.W. 624=1936 M.W. N. 343=A.I.R. 1936 Mad. 123.**

——S. 73—*"Same judgment-debtor"—Meaning of—Decree against person during his lifetime—Decree against his legal representative after his death—If against same judgment-debtor—Rateable distribution.*

A decree against a person during his lifetime and another decree against his legal representative after his death are not decrees against the "same judgment-debtor" for purposes of S. 73, C.P. Code, though both are capable of execution against the same estate. The expression "same judgment-debtor" cannot be construed as if the section provided that decrees capable of execution against the same estate must result in the assets being rateably distributed amongst all the decree-holders. (*Barlee and Tyabji, JJ.*) CHUNILAL RAI CHAND *v.* BROACH URBAN CO-OPERATIVE BANK, LTD. **I.L.R. (1937) Bom. 795=172 I.C. 92=10 R B. 249=39 Bom.L.R. 815=A.I.R. 1937 Bom. 461.**

——S. 73—*"Same judgment-debtor"—Several judgment-debtors—Some of them only common.*

For rateable distribution it makes no difference in law that the parties are two in one case and three in the other so long as the same share of the two parties, who are common in both decrees, is sought to be attached. Hence where there is a decree by a decree-holder against three persons and another decree-holder obtains a decree against two of them and a sale is held in execution of his decree, former decree-holder is entitled to rateable distribution in the sale proceeds. (*Ram Lall, J.*) FATEH DIN *v.* DIWAN CHAND. **181 I.C. 22=11 R.L. 761=A.I.R. 1938 Lah. 801.**

——S. 73—*"Same judgment-debtor"—X obtaining decree against firm by surviving summons on two persons as partners—Y obtaining another decree against these two and three others individually—Y bringing certain properties to sale in execution—Right of X to get rateable distribution of sale proceeds.*

X obtained a decree against a firm by serving summons in the suit against two persons as partners of that firm. *Y* obtained another decree against these two persons and three others individually and attached certain properties in execution and brought them to sale. Before the properties were actually sold, *X* applied for rateable distribution of the sale proceeds.

Held, that the decree of *X* against the firm was in effect a decree against the two partners individually and consequently they were the common judgment-debtors in the two decrees and *X* was, therefore, entitled to get rateable distribution of the sale proceeds. (*Bartley and Nasim Ali, JJ.*) RADHA KANTA PAL *v.* PULIN KRISHNA PAL. **177 I.C. 812=11 R.C. 277=42 C.W.N. 310=A.I.R. 1938 Cal. 316.**

——Ss. 73 and 63—*Same property of judgment-debtor attached by two Courts of same grade and sold by one—Right of decree-holder in other Court to rateable distribution.*

S. 73 is to be read together with S. 63. Where the property of a judgment-debtor has been attached by two Courts of the same grade but the property has been sold by one of them, the proceeds so received shall be deemed to have been received by it on behalf of all the Courts in which there have been attachments in execution of the decrees, prior to the actual receipt of the assets, and the decree-holders in all such Courts are entitled to rateable distribution under S. 73. In such cases no application for execution is necessary to be made to the Court which held the assets, before the receipt of the assets. (*Tek Chand, J.*) SIMLA BANKING AND INDUSTRIAL CO., LTD *v.* INDO SWISS TRADING CO., LTD. **179 I.C. 376=11 R.L. 556=41 P.L.R. 91=A.I.R. 1938 Lah. 754.**

——S. 73—*Scope—Claim by secured creditor—Order for rateable distribution—Power of Court to make.*

It is clearly contemplated by S. 73 that an order for rateable distribution can be made even when one or more of the decree-holders is a secured creditor and special provisions are embodied in the section for the purpose of dealing with their claims. (*Almond, A.J.C.*) HEM RAJ *v.* BALU RAM & SONS. **160 I.C. 892=8 R. Pesh. 134=A.I.R. 1936 Pesh. 52.**

——S. 73—*Scope—If affected by Amending Act IX of* 1937.

The amendment of S. 60 by S. 3 of Act IX of 1937 does not affect the provisions of S. 73. Thus a decree-holder has still a right under S. 73 to come in for a share in the rateable distribution of salary attached under a decree, though his suit in which the decree is obtained may have

C. P. CODE (1908), S. 73.

been brought after June, 1937. (*Lobo, J.*) KEWALMAL *v.* RODRIGUES. **176 I.C. 682=11 R.S. 31=A.I.R. 1938 Sind 144.**

——S. 73—Scope—If controlled by S. 63. *See* C. P. CODE, SS. 63 AND 73. **71 M.L.J. 328.**

——S. 73—*Scope—If exhaustive—Power of Court apart from section to allow rateable distribution.*

Where the parties are not entitled to claim rateable distribution under S. 73, C. P. Code, by reason of the fact that none has applied for execution before the date of receipt of assets, to the Court having the custody of the assets, but all the same have made attachments, the attachment does not create any lien in favour of any of them, and the Court holding the assets can divide the same amongst all of them *pro rata*. (*R.C. Mitter, J.*) KUSUM KUMARI DEVI *v.* GAYANATH PRAMANICK. **166 I.C. 814=9 R.C. 587=A.I.R. 1936 Cal. 390.**

——S. 73 (2)—*Remedy—Order that decree-holder is not competent to apply for rateable distribution—Remedy of decree-holder.*

An order that a certain decree-holder is not competent to make an application for rateable distribution under S. 73, C. P. Code, is final and is not appealable by him. He has his remedy by instituting a suit against other decree-holders for getting a share in the assets. (*Thom and Rachhpal Singh, JJ.*) BEHARI LAL *v.* ALE NABI. **162 I.C. 349=8 R.A. 866=1936 A.W.R. 489=1936 All.L.R. 429=1936 A.L.J. 559=A.I.R. 1936 All. 626.**

——S. 73 (2)—*Scope of.*

The terms of sub-S. (2) to S. 73, C. P. Code, are wide enough to cover a case where the plaintiff claims that he is entitled to all the assets in the custody of the Court and that the defendant, who claims and obtains rateable distribution, is not entitled thereto. (*Collister, J.*) LAL SINGH NAYAL *v.* JIWA NAND **184 I.C. 589=12 R.A. 253=1939 A.W.R. (H.C.) 427=A.I.R. 1939 All. 545.**

——S. 73 (2)—*Sale in favour of decree-holder purchaser confirmed—Prior applications by other creditors for rateable distribution not disposed of—Remedy of latter.*

A creditor in execution of his decree sold land of his judgment-debtor and purchased it himself but he made no deposit in connexion with the sale. He set off the sale money against his debt. Prior to the sale three applications for rateable distribution had been put in by other creditors. The sale was however eventually confirmed without the applications for rateable distribution having been disposed of.

Held, that any remedy open to other creditors for rateable distribution was by a separate suit under S. 73. (*Almond, J.C.*) SUKH RAJ SHAH *v.* PIR GAUHAR SHAH. **A I.R. 1940 Pesh. 36.**

——S. 73 (2)—*Suit under—Limitation.*

A suit under S. 73 (2), C. P Code, to compel refund of money wrongly distributed is not governed by Art. 11 of the Limitation Act. To an order denying rateable distribution no conclusiveness is attached by law such as is done in the case of a claim order by O 21, R. 63. A suit under S. 73 (2) may therefore be brought within three years of the actual distribution. (*Varadachariar and Mockett, JJ.*) SOMASUNDARAM CHETTIAR *v.* ALAMELU ACHI. **1937 M.W.N. 480.**

C. P. CODE (1908), S. 73.

——S. 73 (2)—*Suit under—Power to award interest prior to suit.*

A suit under S. 73 (2) is in substance one in which the plaintiff claims to be placed in the same position in which he would have been placed had the Court which originally dealt with the application for rateable distribution not made a mistake, and it is governed by the principle that it is the duty of the Court "to take care that the act of the Court does no injury to any of the suitors." The Court has therefore power in such a suit to award interest even prior to suit. (*Varadachariar and Mockett, JJ.*) ALAGAPPA CHETTIAR *v.* SOMASUNDRAM CHETTIAR. **1937 M.W.N. 465 (2).**

——S. 73 (3)—*Decree in favour of Crown—Priority.*

When the Crown and a private individual both execute their decrees against the same judgment-debtor and seek to be satisfied out of the same fund, the rules as to rateable distribution laid down in S. 73 (1) do not apply and the decree in favour of the Crown has priority. In such cases it is not necessary for the Crown or its representative to attach the fund before claiming payment. A pauper appeal filed by the judgment-debtor from a decree passed against him was dismissed and he was ordered to pay the amount of Court-fees. In the execution application of the decree-holder, the house of the judgment-debtor was sold and the sale proceeds deposited in Court. Before the sale, however, the nazir applied for execution of the appellate decree for recovering the amount of court-fees but the application was subsequently withdrawn. When the decree-holder applied for taking out the amount deposited in Court, the nazir appeared and claimed priority and subsequently made a formal application under O. 21, R. 11 for execution of the appellate decree asking for the attachment of the amount lying in Court. No order was passed on this applicatian but in the execution proceeding started by decree-holder the Court passed an order that the Crown had a prior right for the satisfaction of the amount of Court-fees and directed that the amount deposited be paid over to the nazir:

Held, that the order was proper as even in such circumstances the Crown had priority over the decree-holder in respect of the amount of Court-fees. (*Tek Chand, J.*) MUNI LAL *v.* DIWAN CHAND. **I.L.R. (1940) Lah. 124=186 I.C. 590=12 R.L. 402=42 P.L.R. 96=A.I.R. 1939 Lah. 488.**

——S. 73 (3) and O. 33, Rr. 10 and 13—*Scope and effect of—Pauper suit—Portion of Court-fee ordered to be paid by defendants—Sale of defendant's property in execution of another decree against them—Right of Government to recover Court-fee from out of sale proceeds—Crown debts—Priority.*

There is nothing in the Code of Civil Procedure which precludes the application of the doctrine that in respect of decree debts, the Secretary of State is entitled to invoke the doctrine of priority of Crown debts. Where in a pauper suit the defendants are ordered to pay to the Government a portion of the Court-fee that would be payable by the plaintiff, and the properties of the same defendants are brought to sale by a third party in execution of a decree for money obtained by him against them, if an application is made on behalf

C. P. CODE (1908), S. 75.

of the Government that out of the sale proceeds the amount directed to be paid as Court-fee in the pauper suit may be paid in preference to the claim of the third party decree-holder, the application must be allowed, because the Government is entitled to recover the Court-fee out of the sale proceeds by virtue of the claim being a crown debt. O. 33, R. 10 does not have the effect of restricting the right of the Government to the subject-matter of the pauper suit. S. 73 (3) refers to cases in which the Government is in the same position as any other decree-holder and its obvious intention is that the Government is entitled to the benefit of the doctrine of priority. (*Varadachariar, J.*) VARADACHARI *v.* THE SECRETARY OF STATE. **59 Mad. 872=162 I.C. 868=8 R.M. 1059 =43 L.W. 725=1936 M.W.N. 76=A.I.R. 1936 Mad. 602=70 M.L.J. 601.**

——**S. 75**—Suit for specific movable properties —Commission to ascertain their value—Power of Court to issue. *See* C. P. CODE, O. 20, R. 10 AND O. 21, R. 31 AND 75. **44 C.W.N. 304.**

——**S. 79**—*Suit under—Duty of Government before instituting.*

The Government while filing a suit through the Secretary of State against a private person should not regard itself as standing in the same position as a private litigant. In the public interests, it should insist that its officers should take upon themselves a due share of responsibility in satisfying themselves that the allegations on which the suit is sought to be founded are reasonably true and not be led away by emphatic assertions made by private parties or even by their offer of indemnity as to costs. (*Varadachariar, J.*) SECRETARY OF STATE *v.* NARAYANA AYYAR. **1937 M.W.N. 145=169 I.C. 597=10 R.M. 71=46 L.W. 748=A.I.R. 1937 Mad. 523=(1937) 2 M.L.J. 178.**

——**S. 80**—*Applicability—Absence of notice, if fatal to whole suit—Dismissal of suit or rejection of plaint—C. P. Code, O. 7, R. 11 (d).*

The requirement as to notice under S 80 of the C. P. Code applies to all cases in which the Secretary of State is a defendant. Absence of such a notice entails a failure of the whole suit, irrespective of the existence of other defendants. In such a case the plaint is defective and should be rejected as a whole under O. 7, R. 11 (*d*), C. P. Code. Such a course is preferable to dismissal of the suit. (*Rowland, J.*) BALDEO PRASAD *v.* SUKHI SINGH. **174 I.C. 358=10 R P. 500=4 B.R. 435 =1937 P.W.N. 694=18 Pat.L.T. 921=A.I.R. 1938 Pat. 127.**

——**S. 80**—*Applicability—Good faith on part of officer—If material.*

S. 80, C. P. Code, which extends the period of limitation by two months applies whether an officer acts in good faith or bad faith. (*Davis, J. C. and Haveliwala, A.J.C.*) UDHARAM VASSANMAL *v.* GRAHAMS TRADING CO., LTD. **32 S.L.R. 106=172 I.C. 622=10 R.S. 171=A.I.R. 1937 Sind 281.**

——**S. 80**—*Applicability—Mortgage suit—Some of the properties mortgaged to Secretary of State under Land Improvement Loans Act—Secretary of State impleaded as party defendant—Notice of suit—Omission to serve—Effect of—If fatal.*

S. 80, C. P. Code, applies to all forms of suit and whatever the relief sought. The section is express, explicit and mandatory and admits of

C. P. CODE (1908), S. 80.

no implications or exceptions. Where a suit is filed for sale in enforcement of a mortgage to which the Secretary of State for India in Council is a party as being a mortgagee of some of the properties under the Land Improvement Loans Act, notice under S. 80, C. P. Code, is necessary; and in the absence of such notice the suit must be dismissed as against him. (*Pandrang Row and King, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RANGASWAMI NAIDU. **182 I.C. 767=12 R.M. 153=1938 M.W.N. 280=A.I.R. 1938 Mad. 583.**

——**S. 80**—*Applicability — 'Public Officer'—Liquidator of Co-operative Society—Suit against —Notice—Necessity.*

A liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private Co-operative Society is not an officer in the service of the Government and is not a "public officer" within the meaning of S. 3 (17) and S. 80, C. P. Code and a suit against him cannot be defeated on the plea that no notice was given as required by S. 80, C. P. Code. (*Pandrang Row and Horwill, JJ.*) GOVINDA CHETTIAR *v.* UTTUKOTTAI CO-OPERATIVE SOCIETY. **52 L.W. 131= 1940 M.W.N. 782=(1940) 2 M.L.J. 241.**

——**S. 80** — *Applicability—Receiver — Suit against for royalty of lands in his possession—Notice—Necessity.*

Chatterji, J.—Though a receiver appointed in a suit is a public officer within the meaning of S. 80, C. P. Code, non-payment of royalty by the receiver in respect of the lands in his possession is not an official act done by him. S. 80, therefore, does not apply to a suit against the receiver for royalty arising out of an individual or a private contract between him and the plaintiff. (*Fazl Ali and Chatterji, JJ.*) JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON. **19 Pat. 433=A.I.R. 1940 Pat. 516.**

——**S. 80**—*Applicability and scope—Secretary of State impleaded as* pro-forma *defendant without any claim for relief—Notice of suit—Necessity.*

S. 80 of the C. P. Code is clear and peremptory that notice must be served on the Secretary of State as a condition precedent to the institution of a suit against him, although he is impleaded only as a *pro forma* defendant and although no relief is claimed as against him. The section applies to all suits in which the Secretary of State is made a party defendant, whether or not any relief is claimed against him. (*Agarwala and Varma, JJ.*) SECRETARY OF STATE FOR INDIA *v.* AMARNATH. **15 Pat. 353=161 I.C. 690=8 R.P. 467=1936 P.W.N. 206=17 Pat.L.T. 152= A.I.R. 1936 Pat. 339.**

——**S. 80**—*Compliance—Notice of suit—Suit by manager of Court of Wards on behalf of wards of Court against ex-Receiver of Ward's estate—Postal acknowledgment giving sender's name and address as manager, Court of Wards, etc.—If sufficient compliance.*

The defendant was a former Receiver of an estate which belonged to certain minors and which was subsequently taken over by the Court of Wards. The manager of the Court of Wards sent by registered post a notice of suit under S. 80, C. P. Code. It was addressed to the ex-Receiver and sent by the manager of the Court of Wards as next friend of the minors and in the postal acknowledgment sent along with the notice

C. P. CODE (1908), S. 80.

the sender's name and address was given as manager, Court of Wards, etc.

Held, that the postal acknowledgment contained a sufficient description of the address of the manager of the Court of Wards, and that there was a substantial compliance with S. 80, C. P, Code, and that the notice was not defective by reason of there having been no precise description or statement of the places of residence of the minor plaintiffs. (*D. N. Mitter and Patterson, JJ.*) BAIDYA NATH ROY CHOWDHURY *v.* RAM CHANDRA BANERJEE. **41 C.W.N. 92.**

——S. 80—*Compliance—Notice under—Essentials of validity—Statement of cause of action.*

To state a cause of action it may be sufficient to give a legal description by which a particular cause of action is known, such as, damages for breach of contract, and damages for negligence. Where a notice, after stating that the plaintiff has been served with a notice by the Deputy Magistrate purporting to act for the District Magistrate, under S. 15 (4) of the Police Act, making a demand of a certain amount of money as an apportioned amount payable by him for the upkeep of additional police force, proceeded that my client asserts that the assessment of costs against him is illegal and *ultra vires* and secondly the sum assessed is too high.

Held, that the notice did sufficiently comply with the requirements of S. 80, C. P. Code, and that there was a sufficient indication of the cause of action for the suit contemplated. (*Wort and Varma, JJ.*) SRINIVAS MULL *v.* SECRETARY OF STATE. **17 Pat. 345=178 I.C. 571=11 R.P. 273=5 B.R. 116=A.I.R. 1938 Pat. 556.**

——S. 80—*Different causes of action united in suit—Suit bad for want of notice in regard to one of them—Entire suit, if liable to be dismissed.*

It is quite true that if two or more causes of action are united in one suit and with regard to one of them the suit fails for want of notice under S. 80 there is no reason why the entire suit should be dismissed. But where in a suit against a person for declaration of title to certain property the receiver of that property is added as party and there are definite allegations against him of collusion with that person in granting rent receipts and setting up a claim to possession in the disputed property and the defence of both the defendants in answer to the plaintiff's claim is identically the same, it is not possible to sever one part of the case from the other. (*Mukherjea and Roxburgh, JJ.*) BHUBAN MOHINI *v.* BIRAJ MOHAN. **186 I.C. 584=12 R.C. 495=44 C.W.N. 74=A.I.R. 1940 Cal. 1.**

——S. 80—*Notice—Contents—Alternative claim not mentioned—If can be claimed in suit.*

An alternative and a lesser claim which is not mentioned in the notice under S. 80 cannot derogate from the plaintiff's right to have the suit tried on the issue which is claimed in the notice. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO. **I.L.R. (1939) Nag. 206=179 I.C. 711=11 R.N. 313=A.I.R. 1938 Nag. 415.**

——S. 80—*Notice of suit—Cause of action—Description of—Claim in notice for larger amount—Suit for smaller amount—Notice, if invalid or defective.*

All that a notice under S. 80, C. P. Code, should contain is a statement of the cause of action, meaning thereby the bundle of facts on which the claim of the plaintiff or plaintiffs is founded. Where a claim is made in the notice for a larger amount of money as due from the defendant, the fact that in the suit the claim is reduced to a smaller amount does not change the cause of action for the suit or render the notice invalid, especially when the notice recites the circumstances under which the claim is made and when the reduction does not operate to the prejudice of the defendant but operates to his benefit. Though the notice should in every case state with precision the cause of action, the mere reduction of the claim does not make the notice defective. (*D. N. Mitter and Patterson, JJ.*) BAIDYA NATH ROY CHOWDHURY *v.* RAM CHANDRA BANERJEE. **41 C.W.N. 92.**

——S. 80—*Object of.*

S. 80 was intended to afford protection to officials against personal responsibility for official acts. If it is sought to make an officer personally liable for certain acts done or purporting to be done by him in his official capacity it is essential before a suit is commenced that there should be a notice served upon him under S. 80. The object of the notice is to give him an opportunity to reconsider his position with regard to the claim and to make amends or settle the claim if he is so advised. (*Mukherjea and Roxburgh, JJ.*) BHUBAN MOHINI *v.* BIRAJ MOHAN. **186 I.C. 584=12 R.C. 495=44 C.W.N. 74=A.I.R. 1940 Cal, 1.**

——S. 80—*Object of notice—Contents—Interpretation—Rule as to.*

The object of giving two months' notice to the Government, which is prescribed in S. 80, is to give Government sufficient warning of a case which is about to be brought against it, so that Government may, if it so wishes, compromise the case, or afford restitution if it considers that the restitution is due, without recourse being had to a Court of law in which Government might be mulcted in costs. It is necessary to import a little commonsense into notices under S. 80. The Court should look at the wording of the notice and interpret it in the light of commonsense. It is not necessary for the plaintiff to state in his notice the full details of his claim. When the object of the notice is plain and is achieved, and there has not been any violation of the spirit and intention of S. 80, the notice should be treated as valid notice. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO. **I.L.R. (1939) Nag. 206=179 I.C. 711=11 R.N. 313=A.I.R. 1938 Nag. 415.**

——S. 80—*Official Assignee—Suit against, in respect of release of an insolvent's right—Notice, if necessary.*

Where a suit was brought against the Official Assignee for damages for breach of a covenant of title contained in a deed of release executed by the Official Assignee in respect of an insolvent's interest in a property, on a plea that the suit is bad for absence of notice under S. 80, C. P. Code.

Held, that notice under S. 80, C. P. Code, was not necessary, as the Official Assignee in executing the deed of release was not doing an act in his official capacity and further the suit was not against him in respect of any act done by him in that capacity. (*Leach, C. J. and Varadachariar, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* VEDANARAYANA NAICKER. **177 I.C. 579=47 L.W. 46=11**

C. P. CODE (1908), S. 80.

R.M. 348=1938 M.W.N. 10=A.I.R. 1938 Mad. 221=(1938) 1 M.L.J. 92.

——S. 80—*Official Receiver—Notice—Necessity for.*

Obiter.—S. 80, C. P. Code, applies to all forms of action and to all kinds of relief as against a public officer, and a suit against an Official Receiver is, therefore, liable to be dismissed if no notice was served on him under the section. (*Akram, J.*) ASIA KHATUN *v.* AMARENDRA NATH. **44 C.W.N. 586=71 C.L.J. 594.**

——S. 80—*Official Receiver—Right to notice—Rival claims by Official Receiver and other creditors—Interpleader suit by debtor—Official Receiver if entitled to notice under S. 80.*

Where a certain amount due under a promissory note is claimed by the Official Receiver and by certain assignees of the note, and the debtor filed an interpleader suit and where the Official Receiver raised a plea that he ought to have been given notice under S. 80 C. P. Code, it was held that the mere setting up of a claim to property on behalf of the estate which a Receiver represents could not be considered to be an act purporting to be done by a public officer in his official capacity so as to attract the application of S. 80, C. P. Code. (*Niyogi, J.*) NARAYANCHANDRA *v.* SURENDRANATH. **I.L.R. (1939) Nag. 200=178 I.C. 602=11 R.N. 240=1938 N.L.J. 264=A.I.R. 1938 Nag. 449.**

——S. 80 and Registration Act, S. 77—*Official Receiver—Suit under S. 77, Registration Act against receiver in insolvency—Notice, if necessary.*

Where on the refusal of a District Registrar to register a document executed by a receiver in insolvency acting under the orders of the District Court and a suit is filed against him under S. 77 of Registration Act, the receiver cannot plead that he is entitled to notice under S. 80, C. P. Code. The cause of action is no doubt the action of a public officer in refusing to register the document, but the public officer is the District Registrar and the suit is not brought against him but against the receiver and as such no notice under S. 80, C. P. Code, is necessary. Further the Registration Act is a 'special law' and S. 80, C. P. Code, will not apply in view of the provision of 30 days limitation, under S. 77 of the Registration Act, as the period of 30 days is less than the 2 months provided by S. 80, C. P. Code. (*Bennet and Verma, JJ.*) SULTAN AHMAD *v.* GOHAR BEGAM. **186 I.C. 505=12 R.A. 400=1939 A.L.J. 1151=1939 A.W.R. (H.C.) 878=A.I.R. 1940 All. 108.**

——Ss. 80 and 2 (17)—*Public officer—Receiver.*

It is the duty of a receiver to take charge of the properties in suit on behalf of the Court. He exercises his functions under the supervision and control of the Court and is remunerated under its orders. He can thus be deemed to be an officer of a Court of Justice whose duty it is to take charge or dispose of any property within the meaning of S. 2 (17) (*d*). Even if he is not an "officer" he is clearly a person especially authorized by a Court of Justice to perform such duties and therefore a public officer. (*Mukherjea and Roxburgh, JJ.*) BHUBAN MOHINI *v.* BIRAJ MOHAN. **186 I.C. 584=12 R.C. 495=44 C.W.N. 74=A.I.R. 1940 Cal. 1.**

C. P. CODE (1908), S. 80.

——Ss. 80 and 2 (17) (g) and (h)—*'Public officer'—Court of Wards manager.*

A manager of an estate appointed under the provisions of the Court of Wards Act, 1879, is not a public officer within the meaning of S. 2 (17) (*g*), C. P. Code, but is a public officer within the meaning of S. 2 (17) (*h*), C. P. Code, being an officer in the service of the Government. He is, therefore, entitled to the benefit of a notice under S. 80, C. P. Code. (*Edgley, J.*) GOKUL CHANDRA DAS *v.* MANAGER OF B. M. W. ESTATE. **I.L.R. (1940) 1 Cal. 73=188 I.C. 637=13 R.C. 13=43 C.W.N. 1212=A.I.R. 1939 Cal. 720.**

——Ss. 80 and 2 (17) (h)—*Public officer—Liquidator of a co-operative society appointed under S. 42 of the Co-operative Societies Act—Suit against under O. 21, R. 63—Notice—Necessity.*

The liquidator appointed under S. 42 (1) of the Co-operative Societies Act is appointed by Government and performs public duties and hence he is an officer in the service of Government, when acting as liquidator and is therefore a "public officer" as defined in S. 2 (17) (*h*), C. P. Code. In a suit under O. 21, R. 63 against such liquidator, notice should be given as required by S. 80, C. P. Code. (*Pollock, J.*) LIQUIDATOR OF THE SOCIETY, SANGAKEDA KALAN & CO. *v.* AYODHYA PRASAD. **182 I.C. 514=12 R.N. 8=1939 N.L.J. 215=A.I.R. 1939 Nag. 232.**

——S. 80—"Public officer"—Wakf property—Dispute between Mutwallis—District Judge appointing defendant to collect rents—Suits against him by Mutwalli—Notice, if necessary. *See* CHARITABLE AND RELIGIOUS TRUSTS ACT, S. 7. **1936 A.L.J. 1112.**

——S. 80—*Scope—Mandatory nature of—Compliance—Requirements.*

The provisions of S. 80, C. P. Code, are mandatory and contain a clear and unqualified prohibition upon the institution of suit without the statutory notice. It is not in the public interest that the provisions as to notice can be waived at the whim of the officer concerned. Where there is an averment in plaint that a notice under S. 80 is 'sent' to the officer concerned, the averment is not in compliance with S. 80 as the words 'delivered' or 'left' are not used as provided by S. 80. (*Davis, J. C. and Haveliwala, A.J.C.*) GANGARAM AND RUPCHAND & CO. *v.* SECRETARY OF STATE. **32 S.L.R. 67=172 I.C. 722=10 R.S. 184=A.I.R. 1937 Sind 291.**

——S. 80—*Scope—Suit against two persons—Notice required as against one only—Limitation as against other—If extended.*

Where a suit for damages is brought against joint tort-feasors and one of them requires a notice under S. 80, C. P. Code, which extends the period of limitation by two months as against him, time must be calculated in the same manner as against both even though notice under S. 80 is not necessary to the other tort-feasor. (*Davis, J. C. and Haveliwala, A. J. C.*) UDHARAM VASSANMAL *v.* GRAHAMS TRADING CO., LTD. **32 S.L.R. 106=172 I.C. 622=10 R.S. 171=A.I.R. 1937 Sind 281.**

——S. 80—*Strict compliance with—Necessity—Notice to Registrar, Co-operative Societies—Proper service—Test.*

The provisions of S. 80, C. P. Code, are imperative and must be strictly complied with. Where

a notice to the Registrar of Co-operative Societies was sent by post through the Secretary of the Central Co-operative Bank, unless it is proved that it was as a matter of fact conveyed to the Registrar, it cannot be taken to be a proper service of the notice. (*James, J.*) REGISTRAR, CO-OPERATIVE SOCIETIES *v.* RAMKISHUN MANDAR. **177 I.C. 709=5 B.R. 13=11 R.P. 180=A.I.R. 1939 Pat. 32.**

——**S. 80**—*Suit against estate in hands of receiver—Notice, if necessary.*

No estate vests in the receiver by virtue of his appointment. He collects rents or profits, income or capital on the title of the persons who are parties to the suit and he defends the suit because of the powers given to him by the Court under O. 40, R. 1 (*d*). In cases when no relief is claimed against the receiver personally and the suit is really against the estate which does not vest in the receiver, but which is held by him under orders of the Court who made the appointment, the suit cannot be said to be one against the receiver within the meaning of S. 80. In other words, S. 80 contemplates a suit against the receiver which seeks to make him personally liable for acts, done or purporting to be done by him in his official capacity and it does not contemplate a case where a suit for possession is brought against the owners of the estate in respect of which he has been appointed a receiver and which suit he has got to defend under powers conferred on him by the Court. In such cases it is undoubtedly necessary to take the leave of the Court which appointed the receiver before the latter can be made a party to the proceedings and that is on the principle that interference with the possession of the receiver without leave would amount to a contempt of the Court whose officer the receiver is. But there is no necessity to serve upon him a notice under S. 80. (*Mukherjea and Roxburgh, JJ.*) BHUBAN MOHINI *v.* BIRAJ MOHAN. **186 I.C. 584=12 R.C. 495=44 C.W.N. 74 =A.I.R. 1940 Cal. 1.**

——**S. 80**—*Suit against Official Receiver of estate for arrears of rent—Notice—If necessary.*

In a suit against an Official Receiver of an estate for recovery of arrears of rent notice under S. 80 is not necessary as omission of receiver to pay rent is not an act purporting to have been done by him in his official capacity. (*Nasim Ali and Remfry, JJ.*) DEBENDRA NATH ROY *v.* OFFICIAL RECEIVER. **174 I.C 576=10 R.C. 716= 65 C.L.J. 561=A.I.R. 1938 Cal. 191.**

——**S. 80**—*Suit against receiver—Notice, when necessary.*

Although a receiver is a public officer, in the case of a suit against him it is only where the plaintiff complains of some act purporting to have been done by him in his official capacity that notice to him under S. 80, C. P. Code, is enjoined. Where the plaintiff makes no such complaint but simply impleads him in the suit in his capacity as a receiver in possession of some of the properties in suit, no notice need be given to him under S. 80, C. P. Code (*Derbyshire, C.J. and D. N. Mitter, JJ.*) HARIDAS CHATTERJEE *v.* MONMOTHO NATH MULLICK. **I.L.R. (1937) 2 Cal. 265=41 C.W.N. 322.**

——**S. 80**—*Suit against receiver for arrears of rent—Notice, if necessary.*

No notice under S. 80, C. P. Code, is necessary for the institution of a suit against a receiver for recovery of arrears of rent. The omission of the Receiver to pay rent is not an act purporting to have been done by him in his official capacity. (*Nasim Ali and Remfry, JJ.*) PURNA CHANDRA SARKAR *v.* OFFICIAL ASSIGNEE, HIGH COURT, CALCUTTA. **174 I.C. 576=10 R.C. 716= 65 C.L.J. 561=A.I.R. 1938 Cal. 191.**

——**S. 80**—*Suit attacking sale by Official Receiver—Notice to Official Receiver—If necessary.*

Where the plaintiffs instituted a suit for declaration that the sale carried out by the Official Receiver was invalid and ineffective as against them and impleaded him as a defendant.

Held, that the Official Receiver was a necessary party to a suit of that nature and that the suit was not maintainable against him without notice under S. 80, C. P. Code. (*Jai Lal and Abdul Rashid, JJ.*) HAVELI RAM *v.* JAGAN NATH. **173 I.C. 220=10 R.L. 416=39 P.L.R. 726=A.I.R. 1937 Lah. 386.**

——**S. 80**—*Suit within two months of notice—Dismissal—Fresh suit after two months on the same notice—Maintainability.*

The dismissal of a suit filed within two months from the date of notice under S. 80, C. P. Code, on the ground of the insufficiency of the notice is no bar to the maintainability of a fresh suit brought after the expiry of two months from the date of the notice. The second suit would be maintainable on the same notice. (*D. N. Mitter and Patterson, JJ.*) BAIDYA NATH ROY *v.* RAM CHANDRA BANERJEE. **41 C.W.N. 92.**

——**S. 80**—*Two notices—Suit filed before expiry of two months from second notice—If premature.*

A suit brought after the expiry of two months from the date of service of the first notice but before the expiry of two months from the date of service of the second notice would not be premature, if the second notice does not cancel or annul the first one, but merely amplifies it. (*Sen, J.*) SECRETARY OF STATE *v.* DISTRICT BOARD OF RANGPUR. **185 I.C. 454=12 R.C. 373=70 C.L.J. 126=A.I.R. 1939 Cal. 758.**

——**S. 85**—*Construction—Suit on behalf of Native State by person not duly authorised—Competency—Dismissal—Subsequent obtaining of authority pending appeal from dismissal—If cures defect and makes suit regular.*

The provisions of S. 85, C. P. Code, are specially enacted for a privileged class of persons, such as a Sovereign Prince or a Ruling Chief, who are parties to suits or legal proceedings, and are subject to the rule of strict construction and must be rigidly followed. A suit instituted on behalf of a Ruling Prince or an Indian State by a person who is not an authorised agent under O. 3, R. 2, C. P. Code, and without the authority required by S. 85, C. P. Code, is a defective suit and has to be dismissed. A subsequent authority obtained under S. 85 for the first time after the presentation of an appeal upon the dismissal of the suit cannot cure the defect so as to make the suit a properly instituted suit. (*Wassoodew and Indarnarayan, JJ.*) ABDUL LATIF GULAM NABI *v.* JAWHAR STATE. **I.L.R. (1940) Bom. 225=188 I.C. 805=13 R B. 22=42 Bom.L.R. 262=A.I.R. 1940 Bom. 172.**

C. P. CODE (1908), S. 85.

——S. 85—*Order signed by Chief Secretary—Validity.*

An order dated 20th June, 1935, and signed by the Chief Secretary of the Punjab Government appointing a person to prosecute or defend all suits on behalf of or against the Jammu and Kashmir State unless it is revoked is valid even after the Government of India (Adaptation of Indian Laws) Order, 1937. (*Addison and Ram Lall, JJ.*) MAHARAJA OF JAMMU AND KASHMIR *v.* SIALKOT MUNICIPALITY. 184 I.C. 488 (1)=12 R. L. 229 (1)=42 P.L.R. 228=A.I.R. 1939 Lah. 279.

——S. 86—*Applicability—Insolvency proceedings—Insolvency petition by debtor of Ruling Chief—Certificate, if necessary.*

S. 86, C. P. Code, in terms applies only to suits, and cannot be made applicable to insolvency proceedings initiated by a petitioning debtor merely by reason of the fact that a Sovereign Prince or Ruling Chief is one of the creditors. An insolvency petition filed by a debtor of a Sovereign Prince or Ruling Chief is, therefore, maintainable without the certificate mentioned in that section. (*Nasim Ali and Rau, JJ.*) MADAN LAL JHUN *v.* RULER OF RAMPUR STATE. I.L.R. (1940) 1 Cal. 344=71 C.L.J. 316=44 C.W.N. 333=A.I.R. 1940 Cal. 244.

——S. 86—*Applicability—Proceedings under Ss. 184, 186 and 187 of Companies Act.*

S. 86, C.P. Code, does not apply to the proceedings under S. 184 but applies to all the proceedings under Ss. 186 and 187 of the Companies Act. If the Court makes an order under S. 184 of the Companies Act and places the name of a Native Prince or a Regent of an independent State upon the list of contributories, it does not thereby enforce a jurisdiction against that Native Prince or against the Regent or President of the independent State. The proceedings under Ss. 186 and 187, however, stand on a different footing. An order under S. 186 for payment of money due from a person can be made by the Court only in cases where a suit to recover the amount would be maintainable and the Court cannot override the provisions of S. 86, C. P. Code, by making an order under S. 186 of the Companies Act. No order under S. 187 can be made against the Sovereign Prince or the Ruling Chief at all, and no question of any consent of the Governor-General in Council can arise, because such a case does not fall in any of the three classes mentioned in sub-S. (2) ot S. 86, C. P. Code. (*Sulaiman, C.J. Thom and Iqbal Ahmad, JJ.*) OFFICIAL LIQUIDATORS, DEHRA DUN MUSOORIE ELECTRIC TRAMWAY CO., LTD. *v.* THE PRESIDENT, COUNCIL OF REGENCY, NABHA STATE. 58 All. 742=166 I.C. 98=9 R.A. 364=1936 All. L.R. 998=1936 A.W.R. 1059=1936 A.L.J. 1134=A.I.R. 1936 All. 826 (F.B.).

——Ss. 86 and 87—*Scope of—Suit in reality though not in form against sovereign prince—Absence of certificate—Effect—Waiver, if possible.*

Ss. 86 and 87, C. P. Code, relate to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed. Where a suit was brought against the Gaekwar of Baroda State Railway through the Manager and Engineer in Chief—and the plaintiff admitted that it was owned and managed by His Highness the Gaekwar and

C. P. CODE (1908), S. 89.

where no certificate under S. 86, C. P. Code, was obtained and the suit was decreed on the ground that the Railway was a corporation capable of being sued, it was held that there was no evidence on record to support the contention that the Railway was a corporation and that it was directly contrary to the admission of the plaintiff. It was further held that the suit was in reality though not in form, a suit against His Highness the Gaekwar and if the judgment of the High Court was allowed to stand it might have far reaching results and might have the effect of nullifying the provisions of Ss. 86 and 87 of the C.P. Code. The fact that the Railway was allowed to defend the suit on the merits could not amount to a waiver of privilege as the provisions of Ss. 86 and 87, C. P. Code, are imperative, and having regard to the purpose which they serve, they could not be waived in such a manner. (*Sir Lancelot Sanderson.*) GAEKWAR OF BARODA STATE RAILWAY *v.* HAFIZ HABIB UL-HAQ. 65 I.A. 182=I.L.R. (1938) All. 601=4 B.R. 524=10 R.P.C. 262=1938 A.L.R. 352=67 C.L.J. 254=1938 P.W.N. 535=32 S.L.R. 531=40 Bom.L.R. 811=19 Pat.L.T. 689=174 I.C. 551=(1938) M.W.N. 481=1938 O.W.N. 521=1938 A.L.J. 488=42 C.W.N. 705=1938 O.L.R. 218=47 L.W. 753=1938 A.W.R. (P.C.) 123=A.I.R. 1938 P.C. 165=(1938) 2 M.L.J. 11 (P.C.).

——S. 89—*"Any other law for the time being in force"—Interpretation—If covers O. 23, R. 3.*

The words "by any other law for the time being in force" in S. 89, C. P. Code, refer to some law extraneous to the Code and cannot be legitimately held to cover O. 23, R. 3. In other words, once S. 89 is held to apply, no reliance can be placed for any purpose on O. 23, R. 3. The only remedy left is either to proceed with the arbitration, or if the Court supersedes the arbitration, to proceed with the hearing of the suit or the appeal, as the case may be, on the merits, as required by para. 8 of the Second Schedule read with para. 19. (*Sale, J.*) SITA RAM *v.* HARBANS LAL. 160 I.C. 287=8 R.L. 517=38 P.L.R. 102=A.I.R. 1936 Lah. 374.

——S. 89—*"Any other law"—If includes O. 23, R. 3.*

The words "any other law for the time being in force" in S. 89, C. P. Code, cannot include O. 23, R. 3, C. P. Code. (*Roberts, C.J., Mya Bu and Mosely, JJ.*) MAUNG HLAY *v.* U GE. 1939 Rang. L.R. 280=183 I.C. 343=12 R.R. 71=A.I.R. 1939 Rang. 300 (F.B.).

——S. 89 and O. 23, R. 3—*Arbitration and award out of Court—If can be given effect to—'Any other law' in S. 89 if includes O. 23, R. 3.*

Where during the pendency of a suit parties took time to settle out of Court through an arbitrator, and an award is made subsequently, it cannot be recorded as an adjustment of the suit under a lawful compromise under O. 23, R. 3, C. P. Code. The words 'any other law' occurring in S. 89, C. P. Code, do not include the provisions of O. 23, R. 3 But there is no conflict between S. 89 and O. 23, R. 3. (*Stone, C.J., Grille and Bose, JJ.*) RAMDAYAL MUNNALAL *v.* SHEODAYAL. I.L.R. (1939) Nag 250=183 I.C. 128=12 R.N. 43 (2)=1939 N.L.J. 228=A.I.R. 1939 Nag. 186 (F.B.).

——S. 89—*Scope of—Whether covers all references to arbitration.*

C. P. CODE (1908), S. 91.

S. 89, C. P. Code, covers all references to arbitration whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow. (*Sale, J.*) SITA RAM *v.* HARBANS LAL. **160 I.C. 287=8 R L. 517=38 P.L.R. 102=A.I.R. 1936 Lah. 374.**

——**S. 91 and O. 1, R. 8**—*Applicability—"Public nuisance"*—Osara *on village lane or pathway—If a public nuisance—Suit by private person—Competency without sanction—Special damage—Proof of—Necessity—Highway.*

A village pathway, or lane is of the class of a public highway and has its origin in dedication and not in custom. It is not a private way or of a class over which only certain classes of persons or certain portions of the public have rights which have their origin in custom. An *osara* built on such a village-path or lane is a public nuisance within the meaning of S. 91, C.P. Code. A suit in respect of such an *osara* can only be brought by observing the conditions laid down in the section—consent in some form as required by the section is necessary. Even if the pathway or lane be treated as a private pathway or one over which only limited persons have a right, notice and leave of Court under O. 1, R. 8, C. P. Code, are necessary. A suit by a private person without sanction under S. 91, or without leave under O. 1, R. 8, or without allegation or proof of special damage is not maintainable. (*Wort, J.*) BISSESSAR PATHAK *v.* HARBANS LAL. **166 I.C. 538=9 R.P. 308=3 B.R. 179=17 Pat.L.T. 842=A.I.R. 1937 Pat. 54.**

——**S. 91 and O. 1, R. 8**—*Applicability and relative scope—Village pathway — Obstruction — Right of action—Proof of special damage—Necessity—Sanction of Advocate-General—Necessity—S. 91—If overrides O. 1, R. 8.*

While it is necessary to prove special damage in cases where the plaintiff sues merely as a member of the public in respect of a public right in the full sense, it is not necessary to prove it in the case of quasi public rights, where the plaintiff sues as a member of the limited class whose special rights have been infringed. The doctrine of special damage is based upon the principle of English Common law that there can be no private action for a public wrong. To give a right of suit the wrong must be in some way special or peculiar to the person who sues, and it is based on the sound rule that no man should be harassed by a multiplicity of suits in respect of a single wrong. The principle has been adopted by the Courts in India as a matter of equity and good conscience. The wording of S. 91, C. P. Code, also makes it clear that the Legislature contemplated that this doctrine of special damage should apply in India. The doctrine has, however, two very definite limitations: firstly, it applies only to cases regarding public rights in the full sense; secondly, an invasion of special rights will provide a cause of action without special proof of damage, for in such a case the law will presume damage. It is by reason of these limitations that it has been held not to apply to cases of quasi-public rights, such as village roads, and where the plaintiff sues either for himself as a member of the limited class of persons having special rights in common, or on behalf of that limited class in a representative suit under O. 1, R. 8, C. P. Code for infringement of those rights. O. 1, R. 8 is merely an enabling provision. It provides no new right of suit, but merely a right of representation where a right of suit already exists, and that right of suit is provided by the invasion of the special rights of the limited class represented. S. 91, C. P. Code, on the other hand gives a new right of suit, namely, a right to sue for the removal of a public nuisance, even where there is no special damage, and no invasion of any special right. Obstruction to a village pathway is a public nuisance under S. 91, C. P. Code, though it may not be a public highway in the full sense. S. 91, however, does not take away any independent right of suit which may exist and it does not override the provisions of O. 1, R. 8, and it does not take away any right of suit under O. 1, R. 8, even when it is a case of public nuisance. The special restrictions of S. 91 can be overcome by proof of special damage and by proof of the invasion of the special rights of a limited class which will give an independent right of action. This latter right of suit is independent of both S. 91 and O. 1, R. 8, C. P. Code. Therefore, in the case of suits relating to obstructions to village ways, if the plaintiff does not utilise the special provisions of S. 91, C. P. Code, or prove special damage, but purports to sue under O. 1, R. 8, C. P. Code, he must plead and show, (1) that he sues not on behalf of the public generally, but on behalf of a limited and clearly defined class with which he has a common interest and a common right, and (2) that the pathway in question is not a public highway in the full sense in which all the members of the public who happen to go to the place have equal interest; he must show that it is a way or path of a quasi public type, in which the class he represents has got special rights as distinct from those of the public generally. (*Fazl Ali and Meredith, JJ.*) BIBHUTI NARAYAN SINGH *v.* GURU MAHADEV ASRAM PRASAD SAHI. **19 Pat. 208=A.I.R. 1940 Pat. 449.**

——**S. 91**—*Applicability — Taking of Granth Sahib to cremation ground—If amounts to public nuisance—Suit with reference to.*

Where a suit is, brought to restrain certain persons from taking the Granth Sahib to the cremation ground S. 91, C. P. Code, does not apply to such a suit as the taking of the Granth Sahib is not a public nuisance. (*Almond, J.C.*) RAM CHAND LACHMAN DASS *v.* ISHAR SINGH. **10 R. Pesh. 57=173 I.C. 813=A.I.R. 1937 Pesh. 81.**

——**S. 91**—Scope—Absence of sanction—If bar to maintainability of suit—Failure to raise plea of want of sanction—Effect—Plea in second appeal—If open. *See* TORT—NUISANCE. **1938 M.W.N. 262.**

——**S. 91**—*Scope—Public way—Obstruction—Suit for establishing public right of way and for removal of obstruction—Maintainability without sanction of Advocate-General—Proof of special damage—Necessity.*

A suit for establishing a public right of way and removal of obstruction which constitutes a public nuisance can be maintained by a plaintiff without the sanction of the Advocate-General under S. 91, C. P. Code, and without proof of special damage. S. 91, C. P. Code though it provides a remedy by getting the sanction of the Advocate-General—a remedy which in many of

these cases will be financially out of reach of the parties expressly safeguards any other remedies which may exist. The English rule requiring proof of special damage in cases in which a member of the public prays for the removal of an obstruction to a public way does not apply to India. (*Wadsworth, J.*) MUNISAMI CHETTY *v.* KUPPUSAMI CHETTY. I L.R. (1939) Mad. 870=186 I.C. 208=12 R.M. 601=49 L.W. 334=1939 M.W.N. 259=A.I.R. 1939 Mad. 691=(1939) 1 M.L.J. 392.

——S. 91—*Scope—Suit by particular class of public claiming right of way over village path—Maintainability—Sanction of Advocate-General—Necessity—Proof of special damage.*

Under S. 91 C. P. Code, the consent of the Advocate-General is necessary for a suit with regard to a public right, but an action brought by a particular section or class of the public, claiming a right of way over certain land alleged to be a village pathway, is an exception to that general rule. Such an action is maintainable without proof of special damages. (*Wort, J.*) RAMDAHIN PANDE *v.* PARMESHWAR SINGH. 188 I.C. 249=12 R.P. 681=6 B.R. 617=20 Pat. L.T. 414=A.I.R. 1940 Pat. 160.

——S. 91—*Suit in respect of a personal right to use a passage—If affected by S. 91.*

Where a particular passage or way is not a public highway and where certain persons bring a suit in their personal right to the use of the passage or way, it is not barred by S. 91, C. P. Code, for the plaintiffs have a personal cause of action to bring the suit. (*Thom, C.J. and Ganga Nath, J.*) RAM KALI *v.* MUNNA LAL I.L.R. 1939 All. 754=184 I.C. 620=12 R.A. 260=1939 A.L.J. 821=1939 A.W.R. (H.C.) 515=1939 R.D. 390=A.I.R. 1939 All. 586.

——S. 92.

Appeal.
Applicability.
Burden of proof.
Charitable trust.
Construction.
Interest.
Jurisdiction of Civil Court.
Parties.
Public or Private trust.
Relief.
Removal of heads of Religious Endowment.
Right to sue.
Scheme decree.
Scope and effect.
Suit under.

Appeal.

——S. 92—*Appeal—Death of mutwallis of wakf appointed by Court—Applications by some persons for their own appointment—Order appointing applicants—Appeal—Revision.*

On the death of the mutwallis of a wakf appointed by the Court in a suit under S. 92, C. P. Code, some persons applied to the Court to be appointed mutwallis of the wakf, and the Court passed an order appointing the applicants. Against this order and the order regarding the maintainability of the applications, an appeal was brought.

Held, that the appeal was incompetent and that neither S. 96 nor S. 47, C. P. Code, was applicable

to the case, but that a revision lay against the orders passed by the Court. (*Thomas and Zia-Ul-Hasan, JJ.*) ABUL HASAN KHAN *v.* JAFAR HUSSAIN. 13 Luck. 523=168 I.C. 803=9 R.O. 505=1937 O.L.R. 324=1937 O.W.N. 730=A.I.R. 1937 Oudh 381.

——S. 92—*Appeal—If competent by one of the plaintiffs only—Sanction—Institution of suit, if should conform to.*

Where the consent in writing of the advocate-general, or collector has been obtained to a suit by three persons, the suit as instituted must conform to that consent. If after the institution by three persons as plaintiffs, two die, the suit does not become defective or incompetent. There is no provision at all in the Code for recourse being had to the advocate-general or collector during the course of a suit or proceedings in appeal. The consent is a condition of the valid institution of a suit and has no reference to any other stage. The persons who filed the suit within the leave of the advocate-general or collector are not to be deemed to be one plaintiff and as such there is no reason why one of the plaintiffs in the case should not appeal alone on the same terms and conditions as are applicable to suits in general. (*Sir George Rankin.*) ALI BEGAM *v.* BADR-UL-ISLAM ALI KHAN. 65 I.A. 198=1938 A.L.J. 825=40 Bom.L.R. 835=42 C.W.N. 845=1938 O.L.R. 278=67 C.L.J. 266=1938 P.W.N. 470=48 L.W. 1=10 R.P.C. 290=4 B.R. 593=1938 O.A. 958=1938 A.L.R. 430=40 P.L.R 740=1938 M.W.N. 757=1938 O.W.N. 698=I.L.R. (1938) Lah. 383=32 S.L.R. 749=1938 A.W.R. (P.C.) 131=174 I.C. 870=A.I.R. 1938 P.C. 184=(1938) 2 M.L.J. 1 (P.C.).

——Ss. 92 and 47—*Appeal—Orders for carrying out scheme.*

Where orders are passed merely for carrying out a scheme, they are orders in execution, and appeals lie from such orders under S. 47. (*Mosely and Dunkley, JJ.*) U PO SEIN *v.* U PU. 177 I.C. 919=11 R.R. 184=A.I.R. 1938 Rang. 363.

Applicability.

——S. 92—*Applicability—Conditions—Suit to declare certain properties as trust properties and to restrain defendant from alienating the same—Sanction—Necessity.*

There are only two classes of cases to which S. 92 applies, (1) where there is any alleged breach of any express or constructive trust for public purposes of a charitable or religious nature; (2) where the directions of the Court are deemed necessary for the administration of any such trust; further, in order that the suit should fall within the section, any one or more of the reliefs of the nature described in clauses (*a*) to (*h*) of the section must be the subject of the prayer in the suit. All these conditions must be satisfied before a suit can be said to fall within the purview of S. 92 A suit for a declaration that the property in the suit is a public charitable property and that neither the defendant nor any one else is entitled to alienate the same and for an injunction restraining the defendant from alienating the same or any portion of it to any person, is a suit to which S. 92 applies, because the relief prayed for falls within Cl. (*h*) of the section; consequently sanction under the section is neces-

sary. (*Davis, J.C. and Lobo, A.J.C.*) MULCHAND BASSAAR MAL *v.* DEVIGIR MOTIGIR. **30 S.L.R. 104 =165 I.C. 158=9 R.S. 87=A.I.R. 1936 Sind 179.**

——S. 92—*Applicability—Conditions—Suit for removal of trustee* de son tort—*If falls under S.* 92.

In order to invoke the application of S. 92, C. P. Code, four conditions are necessary: (1) the trust in suit must be for public purposes of a charitable or religious nature, (2) the plaint must allege a breach of trust or that the direction of the Court is necessary for the administration of the trust; (3) the suit must be not only in the interest of the plaintiff individually, but in the interest of the public, or in the interest of the trust itself (for where the trust is a public one the interest of the trust will be the interest of the public); and (4) the relief claimed in the suit must be one of the reliefs mentioned in the section. A prayer for removal of a trustee is a relief contemplated by the section and falls under it. The fact that the defendant sought to be removed on the ground of misconduct and misappropriation is a self-constituted trustee, that is to say, a trustee *de son tort* is immaterial, because if the defendant is a person who is not a trustee and purports to act as a trustee, he is a trustee *de son tort*, and a suit to remove such a person, is a suit for the removal of a trustee within the meaning of S. 92, C. P. Code. (*Wort and Meredith, JJ.*) RAMDAS BHAGAT *v.* KRISHNA PRASAD TEWARI. **186 I.C. 359=6 B.R. 351=12 R.P. 486=1940 P.W.N. 123=21 Pat.L.T. 155= A.I.R. 1940 Pat. 425.**

——S. 92—*Applicability—Hindu leaving widow and large properties—Wills left by deceased giving considerable properties to trusts and charities and maintenance to widow—Suit by latter claiming higher maintenance according to Hindu Law and challenging wills—Sanction—Necessity.*

A Hindu died leaving his widow and considerable movable and immovable properties. He disposed of his properties by four wills and a trust deed, whereby he bequeathed considerable properties to certain trusts and charities and gave specific amounts of money to his wife for maintenance. After his death, she sued the executors under the wills and the trustees under the trust deed, contesting the validity of the wills, etc. and claiming maintenance suitable to her requirements and status in life under the Hindu law. It was pleaded that the suit was bad for want of sanction under S. 92, C. P. Code, because the plaintiff claimed some reliefs falling under S. 92 (1).

Held, that the suit was not one to enforce the trust, but one claiming what the plaintiff considered reasonable maintenance not on the basis of the trust but in spite of the trust, relying on Hindu Law. She was not asking the Court to administer the trust but to administer her husband's estate in accordance with Hindu Law for the purpose of giving her proper maintenance. S. 92, did not therefore govern the case and no sanction was necessary. (*Broomfield and Macklin, JJ.*) MAHANT NARSIDASJI *v.* BAI JAMNA. **185 I.C. 44=12 R.B. 211=41 Bom.L.R. 787=A. I.R. 1939 Bom. 354.**

——S. 92—*Applicability—Matter pertaining to administration of religious trust—Temple trustee removing namams in temple and on temple articles and putting different namams—Suit in respect of—Suit to compel trustee to take out deity in procession on certain occasions—Sanction—Necessity.*

Matters pertaining to the administration of a religious trust must be distinguished on the one hand from matters of ritual and on the other from the individual right of worship. Where the complaint is that the trustees of a temple have removed certain namams from the temple, temple articles and certain idols, by erasing them and replaced them with other namams of a different category, it must be treated as one relating to the administration of a religious trust. A suit in respect of such a matter is not competent unless the procedure prescribed by S. 92, C. P. Code, is adopted. So also a claim to compel the trustees of a temple to take in procession certain idols within the precincts of the temple on certain occasion, is one falling within S. 92, C. P. Code, and is not maintainable without sanction. (*Venkatasubba Rao and Abdur Rahman JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. **189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.**

——S. 92—*Applicability—Public or charitable trust—Allotment of property to poor members of specific community—Trust—Suit in respect of—Sanction—Necessity.*

Allotting property for the benefit of poor members of a particular community is a purpose of a public or charitable nature within the meaning of S. 92. Where a suit relates to such property sanction of the Advocate-General under S. 92 prior to the institution of the suit is essential, although such property forms a small part and is divisible from the rest of the trust property in respect of which the suit is brought. Sanction under S. 92 is all the more necessary when the suit is not divisible and it is not possible for the plaintiff to omit the relief which he claims relating to charitable part of the trust and in such a case the whole suit is governed by S. 92. (*Lobo and Weston, JJ.*) VISHRAM MANJI *v.* GANGARAM LADHA. **I.L.R. (1939) Kar. 325= 178 I.C. 897=11 R.S. 114=A.I.R. 1939 Sind 13.**

——S. 92—*Applicability—Suit by new trustee against ex-trustee—Sanction—Necessity.*

A suit by a plaintiff claiming to be a newly appointed trustee of a temple for recovery of movable properties and cash of the temple and for an account of trust money received by the defendant, the previous trustee, who is alleged to have been lawfully removed from office is outside the scope of S. 92, C. P Code, and is not bad for want of sanction under S. 92. (*Lakshmana Rao, J.*) GURUNATHASAMI KOIL *v.* ALANGARAM PILLAI. **1939 M.W.N. 255=49 L.W. 495=A.I. R. 1939 Mad. 594=(1939) 1 M.L.J. 517.**

——S. 92—*Applicability—Suit by person claiming to be trustee of property against rival trustee —Relief claimed in individual capacity.*

Where a suit is instituted by a person claiming to be a trustee of property dedicated for religious purposes, for a declaration that he is a trustee and is entitled to manage the institution as such but the relief he claimed is in his individual capacity and not in a representative capacity and the suit is against a rival trustee or one who claims to be a trustee, such a suit does not fall under S. 92 (1). No injury to public right or

C. P. CODE (1908), S. 92.

interest is involved; whoever happens to succeed will hold the property as trustee and not in his own right. The dispute between the rival trustees *inter se* is neither a suit for removal of any trustee nor one for appointing a new trustee nor for vesting any property in a trustee and does not fall under any heads from (*d*) to (*g*) or under head (*h*) of S. 92. A suit by a person claiming to be a mutawalli of a certain mosque against a registered corporation which has been managing the mosque, for a declaration that he is the mutawalli of the mosque and as such entitled to manage all the affairs connected with it, does not therefore fall under S. 92, C. P. Code, and does not require the sanction of the Collector required by S. 92 and the institution of the suit in such a form does not amount to a circumvention of law. (*Addison and Din Mohammad, JJ.*) JAMIAT DAWAT *v.* MOHAMMAD SHARIF. **180 I.C. 799=11 R.L. 711=A.I.R. 1938 Lah 869.**

——S. 92—*Applicability—Suit for accounts by trustees against past trustees—Consent of Advocate-General—If necessary—Suit against some only of them—Maintainability.*

S. 92, C. P. Code, does not apply to a suit by the trustees of a property against the past trustees for accounts, and the consent of the Advocate-General is, therefore, not necessary to institute such a suit. The section applies only where the suit brought is representative in its nature, that is to say, where the suit is brought by two or more persons as representing the general public in order to secure the proper administration of a public trust. A suit by trustees on their own behalf and in the discharge of their own functions as trustees, not being a representative suit, is outside the scope of the section. A suit for accounts by the trustees against some only of the past trustee is maintainable, if some only of them are known to have committed a breach of trust. (*Rau and Mukherjea, JJ.*) INDU BHUSAN SEN *v.* KIRON CHANDRA SEN. **44 C.W.N. 327=A.I.R. 1940 Cal. 376.**

——S. 92—*Applicability—Suit for declaration, injunction and possession of property as private property—Nature of—Test—Plea by defendant that property is public charitable and religious trust—Effect.*

A suit in which a claim is made to property as the plaintiff's private property is not a suit to which S. 92, C. P. Code, applies. The nature of a suit is determined by the plaint and not by the written statement. A suit for declaration, injunction and possession of certain property as the plaintiff's own property is not a suit under S. 92. The fact that the defendant in his written statement pleads that the property is a public charitable and religious trust cannot make the suit one under the section. (*Davis, J.C. Mehta, A.J.C.*) GANGA RAM *v.* KESHAVDAS. **170 I.C. 102=10 R.S. 32=30 S.L.R. 478=A.I.R. 1937 Sind 174.**

——S. 92—*Applicability—Suit for declaration that property is* wakf.

A suit for a declaration that the suit property is *wakf* and not the private property of the defendants is competent without the sanction required by S. 92. (*Tekchand and Coldstream, JJ.*) RAM RUP *v.* SARN DAYAL. **160 I.C. 289=8 R.L. 524=A.I.R. 1936 Lah. 283.**

——S. 92—*Applicability—Suit for possession of trust property against alienee.*

C. P. CODE (1908), S. 92.

S. 92, C. P. Code, does not apply to a suit by a managing committee of a thakardwara to recover possession of the property originally belonging to it, and mortgaged by a previous mahant, and no sanction is, therefore, necessary for such a suit. (*Skemp, J.*) BACHINT SINGH *v.* GAJPAT RAI. **172 I.C. 319=10 R.L. 297=39 P.L.R. 355=A.I.R. 1937 Lah. 660.**

——S. 92—*Applicability—Suit of trustee against co-trustees for accounts—Sanction of Advocate-General—Necessity—Test.*

A suit by a trustee of a public, charitable or religious trust against his co-trustees for accounts is not a suit falling within S. 92, C. P. Code, and does not require the sanction of the Advocate-General before institution.

Varadachariar, J.—To attract the operation of the section the suit must be brought by individuals as representatives of the general public, and the relief sought must be in the larger interests of the public, besides being of a kind mentioned in S. 92 (1), and not merely for the purpose of vindicating the private rights of one of the trustees. (*Leach, C.J. and Varadachariar, J.*) SHANMUKHAM CHETTY *v.* GOVINDA CHETTY. **I.L.R. (1938) Mad. 39=176 I.C. 26=11 R.M. 53=1937 M.W.N. 849=46 L.W. 426=A.I.R. 1938 Mad. 92.**

——S. 92—*Applicability — Test — Prayer in plaint as on date of institution—If deciding factor—Amendment or abandonment subsequently—If material.*

It is incumbent upon the Court to see what were the prayers in the plaint at the date the suit was instituted in order to satisfy itself whether S. 92 has been complied with and for this purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit. (*Lobo and Weston, JJ.*) VISHRAM MANJI *v.* GANGARAM LADHA. **I.L.R. (1939) Kar. 325=178 I.C. 897=11 R.S. 114=A.I.R. 1939 Sind 13.**

——S. 92—*Applicability—Test—Suit as originally framed falling under section—Sanction not obtained—Effect—Amendment to omit prayer to get over absence of sanction—Permissibility.*

The question whether S. 92 of the C. P. Code has to be applied to suit must depend upon the prayers in the plaint at the date when the suit is instituted, and the section cannot be evaded by an amendment of the plaint at a later date. A suit which, as originally instituted, is obnoxious to S. 92 cannot, by amendments in the plaint, be altered and rendered not obnoxious to the section. (*Broomfield and Tyabji, JJ.*) ANNAPPA RAMCHANDRA *v.* KRISHNA NARAYAN. **9 R.B. 202=165 I.C. 1001=38 Bom.L.R. 808=A.I.R. 1936 Bom. 412.**

——S. 92—*Applicability—Tope inam—If public charitable or religious trust—Grant of tope inam to person as* dharmakartha—*Condition that tope to be preserved and produce to be applied to charity—Nature of grant—If to be deemed to be dedicated to use of public.*

Tope inams are a familiar class of charitable grants made by ancient rulers for the benefit of the public or a section of the public, for example, the villagers of a particular locality. In the case of tope inam consisting of 13-78 acres in a village, the date of the original grant was not known, and the grant too was not forthcoming. The

C. P. CODE (1908), S. 92.

inam register showed the grant as a dharmadayam grant, the grantee being described as *dharmakartha*. In the remarks column appeared the statement: "Subject to the condition of the tope being preserved and the produce applied to charity." The evidence showed that the tope was being utilised as a place of shelter for the villagers, for the cattle and for way-farers. It was also found that the produce of the tope was being distributed among the villagers.

Held, that both from the nature of the grant and from the enjoyment in regard thereto, the tope in question must be intended to have been dedicated to the use of the public and was clearly a public charitable trust to which S. 92, C. P. Code, would apply. (*Venkataramana Rao, J.*) APPAMMA *v.* BHUJANGARAYUDU. **174 I.C. 199=10 R.M. 673=45 L.W. 804=1937 M.W.N. 1089=A.I.R. 1937 Mad. 862=(1937) 2 M.L.J. 505.**

——S. 92—Applicability—Trust funds deposited with banker by trustee—Misapplication to private account of trustee—Suit by co-trustee against banker and trustee—Sanction of Advocate-General — Necessity. *See* BANKER AND CUSTOMER—LIABILITY OF BANKER. **48 L.W. 577=A.I.R. 1938 Mad. 999.**

——S. 92—*Applicability— Trust properties—Breach of trust by female trustee—Suit by person claiming to succeed to office as next trustee for relief on ground of breach of trust—If falls under section.*

A suit in respect of properties forming the subject-matter of a public charitable trust, seeking relief on the ground of a breach of trust by the defendant trustee falls under S. 92, C. P. Code and is not maintainable unless instituted in conformity with the provisions of S. 92. The fact that the trustee-defendant is a woman and that the plaintiff is a reversioner who has a chance of becoming a trustee in the future makes no difference. There is no difference between a male holder and female holder of the office as regards trusteeship in respect of the status of or the remedies open to the next successor to the office. (*Varadachariar and Pandrang Row, JJ.*) SUNDARAMMAL *v.* JAGADAMBAL AMMAL. **180 I.C. 35=11 R.M. 649=48 L.W. 543=1938 M.W.N. 1060=A.I.R. 1939 Mad. 65=(1938) 2 M.L.J. 1013**

——S. 92—*Applicability—Trust for public purposes—Meaning of—Properties held by Mahant of temple—Legal title vesting in him—Obligation to maintain temple—If trust.*

Although it would be unreasonable to hold, having regard to the evidence in a particular case, that the properties held by the Mahant of a temple belong to any idol or to the temple, or to the members of the *panth* or to anybody except the Mahant for the time being the fact that the legal title is in the Mahant cannot dispose of the matter. If the general effect of the evidence is that the ownership of the properties is so restricted by the obligation to maintain the institution for purposes which can only be regarded as public charitable purposes it may fairly be said that a suit has been created for such purposes within the meaning of S. 92, C. P. Code. S. 92 is not limited to trusts in the sense defined by the Trusts Act but must certainly include them. (*Broomfield and Sen, JJ.*) DHORIBHAI DADABHAI *v.* PRAGDASJI. **178 I.C. 926=11 R.B. 207=40 Bom.L.R. 1041=A.I.R. 1938 Bom. 471.**

C. P. CODE (1908), S. 92.

——S. 92—*Applicability—Wakf partly private and partly public—Suit for removal of trustee alleging breach of private trust—Consent of Advocate-General—If necessary—'Breach of trust'—Meaning of.*

By a deed of wakf, a Mahomedan lady created a primary trust for the benefit of the poor members of her family, and subject thereto, a secondary trust for certain charitable or religious objects, and appointed the defendant as the sole trustee of the wakf property. The plaintiffs who were relatives of the settlor, pleading their interest as members of her family, instituted a suit for the removal of the defendant alleging breaches of the primary trust.

Held, that the word 'trust' in the context 'breach of trust' in S. 92, C. P. Code, denoted the abstract obligation to administer property in a certain defined way which attached to a trustee in whom property was vested upon trust, that by "breach of trust" was meant a breach by the trustee of the confidence or duty that the law or equity imposed on him in the particular respect complained of in the case, that, therefore, as the allegations of the plaint were made by the plaintiffs only as objects of the primary or non-public purpose and as there was no allegation of a breach of the secondary trust which was of a public nature, the case did not fall within S. 92 (1), C. P. Code, and the consent of the Advocate-General was not necessary to the institution of the suit. (*Braund, J.*) I. E. ABOO *v.* G. H. S. ABOO. **1939 Rang.L.R. 140=184 I.C. 413=12 R.R. 142=A.I.R. 1939 Rang. 254.**

Burden of proof.

——S. 92—*Burden of proof—Right to relief.*

In proceedings under S. 92, C. P. Code, the onus of establishing a case for the reliefs asked for is on the plaintiff. It is for the plaintiff to prove that there is an endowment or trust for public of charitable or religious nature. But the question of onus is immaterial when evidence on both sides is adduced. (*Mukerjee and Jack, JJ.*) PRAKASH CHANDRA NAG *v.* SUBODH CHANDRA NAG. **I.L.R. (1937) 1 Cal. 515=170 I.C. 290=10 R.C. 133=64 C.L.J. 341=A I R. 1937 Cal. 67.**

Charitable trust.

——S. 92—*Charitable trust—What constitutes.*

Where the words used in a trust are "charitable and benevolent" purposes, any object to be benefited must possess both characteristics. Accordingly these words will constitute a good charitable trust, that is to say, a charitable trust of a public character. But where the words are "public, benevolent or charitable purposes" the gift is expressed in another form admitting non-charitable objects, for example objects of private benevolence only, or public non-charitable purposes and the trust will fail. A bequest to charitable purposes may by its very terms show that those purposes are of a private nature. In such a case the bequest would not fall under S. 92. Where a gift is to purposes which are charitable, whatever else they may be in addition, then unless the charitable purposes expressed are clearly stated to be of a private nature, the Courts will administer the trust as one for public purposes of the charitable nature. Where the testator's intention is to benefit only the members of his own family who are poor, this is not "a public purp ose

of a charitable nature" within the meaning of S. 92. But, where charity, *prima facie* for public purposes, is the expressed object of the settlor, these purposes are not in any way defeated by the reminder that members of his own family are eligible to benefit with other members of the public at large. (*Roberts, C.J. and Mosely, J.*) TAW CHEW KEAN *v.* TAW KOCK TYON. **1939 Rang. L.R. 520=184 I.C. 333=12 R.R. 140=A.I.R. 1939 Rang. 203.**

Construction.

——**S. 92**—*Construction—Principles—Duty of Court.*

The provisions of S. 92, C. P. Code, are of a restrictive nature, and must, therefore, be construed strictly; and before the Court can bar a suit for want of necessary sanction, it has to be satisfied that the suit comes actually within the four corners of the section. But though the section has to be construed strictly, it should not be construed in such a way that a fraud is perpetrated on the section itself. (*Davis, J.C. and Lobo, A.J.C.*) MULCHAND BASSAAR MAL *v.* DEVIGIR MOTIGIR. **30 S.L.R. 104=165 I.C. 158=9 R.S. 87=A.I.R. 1936 Sind 179.**

Interest.

——**S. 92**—*'Interest'—Meaning of.*

'Interest' in S. 92, C. P. Code, denotes an interest which must be a present and substantial and not a remote and fictitious or purely illusory interest. (*Mya Bu and Sharp, JJ.*) M. E. MITCHLA *v.* A. M. MITCHLA. **1938 Rang.L.R. 276=177 I.C. 851=11 R.R. 175=A.I.R. 1938 Rang. 339.**

Jurisdiction of Civil Court.

——**S. 92**—*Jurisdiction of Civil Court—Removal of mahant from religious duties.*

Where the secular and religious duties of a mahant of a public endowment are inter-dependent and inseparably blended, as it must be the case in any well-organised institution, a Civil Court has jurisdiction under S. 92, C. P. Code, in fit cases to remove the mahant not only from the trusteeship and management of the temporal affairs of the endowment but also from his spiritual duties. But even if the two capacities of the office can be separated, and the mahantship on its spiritual side regarded as purely an office or dignity, there is no doubt that the office is of such a nature that a suit relating to it must fall within the purview of the explanation to S. 9, C. P. Code—the spiritual portion of the office being intimately connected with the exercise of rights to property. There may, however, be cases where the duties of an office are purely spiritual and moral, entirely unconnected with any particular temple or place. The office may be such that no pecuniary benefit is attached to it or its emoluments are purely voluntary contributions, or the duties attendant to it are the exercise of spiritual and moral supervision over the voluntary actions of the worshippers. In such cases, it may be futile for a Civil Court to interfere with the exercise of the duties of the office. No rights of property are connected with it and there is no machinery by which the Court can control the voluntary action of the worshippers or the mahant. (*M.R. Jayakar.*) SATISH CHANDRA *v.* DHARANIDHAR. **67 I.A. 32=44 C.W.N. 177 (P.C.)=I.L.R. (1940) 1 Cal. 266=I.L.R. (1940)**

Kar. (P.C.) 47=185 I.C. 616=12 R.P.C. 117=51 L.W. 49=1940 O.A. 112=1940 O.L.R. 64=6 B. R. 291=1940 A.W.R. (P.C.) 33=1940 O.W.N. 104=21 P.L.T. 91=1940 P.W.N. 110=71 C.L.J. 1=1940 M.W.N. 172 (2)=42 Bom L.R. 295=42 P.L.R. 158=1940 A.L.J. 409=A.I.R. 1940 (P.C.) 24=(1940) 1 M.L.J. 371.

Parties.

——**S. 92**—*Parties—Suit for removal of trustee—Ijaradar from trustee—If necessary party.*

In a suit for the removal of a trustee under S. 92, C. P. Code, the ijaradar from the trustee is not a necessary party. (*S. K. Ghose and Patterson, JJ.*) MASSIRAT HOSSAIN *v.* HOSSAIN AHMAD CHOWDHURY. **176 I.C. 842=11 R.C. 182=42 C.W.N. 345=A.I.R. 1938 Cal. 278.**

——**S. 92 and O. 1, R. 10(2)**—*Parties—Suit for settling scheme—Person related to founder of trust and qualified to be trustee—If necessary party.*

In a suit under S. 92, C.P. Code, for settling a scheme for a trust, it is necessary to implead as a defendant a person who is not merely a beneficiary but is a near relation of the founder of the trust and has got the necessary qualification which, under the terms of the trust-deed, entitles him to be made a trustee, in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. If he is not so impleaded, he will have no right of appeal against the decree of the trial Judge affecting the trust properties. (*Nanavutty and Zia-ul-Hasan, JJ.*) LAL SURESH SINGH *v.* LEGAL REMEMBRANCER TO GOVERNMENT, U. P. **13 Luck. 255=167 I.C. 828=9 R.O. 402=1937 O.L.R. 160=1937 O.W.N. 271=A.I.R. 1937 Oudh 229.**

Public or private trust.

——**S. 92**—*Public charitable trust—Trust for poor members of testator's family.*

A trust for the benefit of the poor members of a particular testator's family is not a trust "for a public purpose of a charitable nature" within the meaning of S. 92. Accordingly a suit relating to such a trust does not require for its commencement the sanction of the Government Advocate, even though the suit is for relief of one of the kinds mentioned in that section. (*Braund, J.*) ATTIA *v.* MADHA. **14 Rang. 575.**

——**S. 92**—*Public or private trust—Provisions in favour of both private individuals and public.*

There is no hard and fast rule that, merely because there are certain provisions in favour of private individuals and certain others in favour of the public, therefore, the case falls within or without the class of public trusts to which S. 92, C. P. Code, applies. The Court must look to the real substance of the trust and the primary intention of the creator of the trust in every case. (*S. K. Ghose and Patterson, JJ.*) MASSIRAT HOSSAIN *v.* HOSSAIN AHMAD CHOWDHURY. **176 I.C. 842=11 R.C. 182=42 C.W.N. 345=A.I.R. 1938 Cal. 278.**

——**S. 92**—*"Public trust"—Scheme of loans for educational purposes at low interest to Anglo-Indian youths of Madras Presidency—If public trust.*

A trust created by a private person formulating a scheme to help Anglo-Indian youths of the Madras Presidency in their studies, providing for the grant of loans at a low rate of interest to the

C. P. CODE (1908), S. 92.

youths of that community who wished to qualify for professions or obtain higher education generally, is not a private trust, but a public trust governed by the provisions of S. 92, C. P. Code. A scheme of loans for educational purposes at low interest must be regarded as a scheme of a charitable nature. The fact that the founder has placed certain restrictions as regards the age and other qualifications of the recipients of the benefit does not make the trust any the less a public trust. An order of Court permitting a deviation from the trust can only be made in proceedings taken with the sanction of the Advocate-General under S. 92, C. P. Code, and not by way of an originating summons under O. 45 of the Original Side Rules of the High Court. (*Leach, C.J. and Patanjali Sastri, J.*) EDWARD H. M. BOWER *v.* HESTERLOW. I.L.R. (1940) Mad. 300=189 I C. 96=13 R.M. 135=50 L.W. 534=1939 M.W.N. 1015=A.I.R. 1939 Mad. 920=(1939) 2 M.L.J. 714.

——S. 92—*Public trust—Temple—Mahant—Properties held by—Dedication—Evidence of.*

Public user for a long period without objection can be relied upon as strong evidence of a public trust. Where properties have been acquired by a Sadhu, *mahant* of a temple and have descended from chela to chela there is a presumption that they have been dedicated to religious uses. (*Broomfield and Sen, JJ.*) DHORIBHAI DADABHAI *v.* PRAGDASJI. 178 I.C. 926=11 R.B. 207=40 Bom.L.R. 1041=A.I.R. 1938 Bom. 471.

——S. 92—*Public trust—Wakf—Bulk of income reserved for family and family religious purposes.*

Where the bulk of the income from the wakf properties is to be spent for the family or family purposes, some portion for religious purposes which cannot be regarded as wholly public in Mahomedan Law like *Mohurram* and *Ramzan* expenses, and the surplus, if any, is to go to *haj* expenses of the *mutawalli*, the wakf is not a trust created for public purposes within the meaning of S. 92, C.P. Code. (*Ameer Ali, J.*) ABDUL HALIM *v.* NASIBUNNESSA BIBI. 44 C.W.N. 969.

Relief.

——S. 92—*Relief—Relief of ejectment of lessee—If can be asked for in the suit under the section.*

In a suit under S. 92, C. P. Code, reliefs in the nature of ejectment cannot be asked for as against a lessee in respect of the trust property. (*Mukerji and Jack, JJ.*) FAIZUNNESSA *v.* MOULVI ASAD BUKHT. 41 C.W.N. 298.

Removal of heads of Religious Endowment.

——S. 92—*Removal of heads of religious endowment from office—Matters for consideration of Court.*

No general rule can be laid down befitting the different kinds of religious heads of varying sanctity and eminence. It must depend upon the facts of each case. It may be that mere mismanagement or incapacity is. in the case of certain high dignitaries, not ordinarily sufficient for their removal from the performance of their religious duties, as distinct from their duties as managers of the properties of the institution. It may also be that a Court, in certain cases, exercises a wise discretion in not directing their total exclusion from their religious office, where (*e.g.*) the lapses are due to causes like a misconception of their position or obligations. The Court may sometimes not order their total removal, but may associate with them a committee of management. But these are all matters for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements of the case. The true rule in such matters can be stated to be that if it be found by the Court that the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal, if need be, from both his offices. (*M.R. Jayakar.*) SATISH CHANDRA *v.* DHARANIDHAR. 67 I.A. 32=I L R. (1940) 1 Cal. 266=I.L.R (1940) Kar. (P.C.) 47 =185 I.C. 166=12 R.P.C. 117=51 L.W. 49=6 B. R. 291=1940 O.A. 112=1940 O.L.R. 64=1940 A.W.R. (P.C.) 33=1940 O.W.N. 104=21 Pat.L. T. 91=1940 P.W.N. 110=71 C.L.J. 1=1940 M. W.N. 172 (2)=42 Bom.L.R. 295=42 P.L.R. 158 =1940 A.L.J. 409=44 C.W.N. 177=A.I.R. 1940 P.C. 24=(1940) 1 M.L.J. 371 (P.C.).

——S. 92—*Removal of mahant from office—Moral character of mahant—Power of Court to consider.*

In a suit under S. 92, C. P. Code, for the removal of a mahant from his office, the Court can consider the moral character of the mahant as directly relevant to the issues arising in the suit, (*e.g.*) his fitness to remain in office and his liability to be removed therefrom. (*M. R. Jayakar.*) SATISH CHANDRA *v.* DHARANIDHAR. 67 I.A. 32= I.L.R. (1940) 1 Cal. 266=I.L.R. (1940) Kar. (P.C.) 47=185 I.C. 166=12 R.P.C. 117=51 L. W. 49=6 B.R. 291=1940 O.A. 112=1940 O.L. R. 64=1940 A.W.R. (P.C.) 33=1940 O.W.N. 104=21 Pat.L T. 91=1940 P.W.N. 110=71 C.L. J. 1=1940 M.W.N. 172 (2)=42 Bom.L.R. 295= 42 P L.R. 158=1940 A.L.J. 409=44 C.W.N. 177 =A. I. R. 1940 P. C. 24=(1940) 1 M. L. J. 371 (P.C.)

——S. 92—*Removal of mutawalli—Discretion of Court—Interference in appeal.*

A mutawalli had persistently disobeyed the directions of the settlor. He failed to publish accounts and had, in fact, not kept proper accounts of the receipts and disbursements of the trust for which he was prosecuted and acquitted only on a technical ground. He had disobeyed the directions of the settlor regarding the disposal of the income of the trust property. He had *locus penitentiae* but had not profited by the warning which he received and failed to reform. His negligence resulted in great loss to the trust funds. The income of the trust was amply sufficient to meet the charitable objects specified by the donor and yet the charities had not received their dues under the trust deed for many years and payments were in arrears. The lower Court, while finding mutawalli grossly negligent, was influenced by sentiment and sympathy and merely warned him.

Held, that the mutawalli had shown by his conduct to be entirely unfit to administer wakf and should be removed. The discretion of lower Court not being influenced by sound reasoning or exercised judicially, could be interfered with by the High Court. (*Mosely and Dunkley, JJ.*) U

C. P. CODE (1908), S. 92.

MYE DIN *v.* U MYA. 177 I.C. 234=11 R.R. 107 =A.I.R. 1938 Rang. 166.

Right to sue.

——S. 92—Right to sue—Founder of religious endowment divesting himself of all interest and appointing another as manager—Subsequent suit to remove him to re-appoint himself—Maintainability. *See* HINDU LAW—RELIGIOUS ENDOWMENT. **A.I.R. 1936 Nag. 223.**

——S. 92—*Right to sue—Trust for maintenance of choultry and building of temple—Temple not built—Suit by two members of public for framing scheme for management of trust—Maintainability.*

A trust provided for the building of a Vishnu temple, and establishment of a choultry for feeding the poor. It was established that the main object of the trust was maintaining a choultry and that the temple was not built. Two members of the public brought a suit for framing a scheme for the management of the trust. It was contended by the defendant that as the plaintiffs are not poor people, and not directly interested in the choultry, the suit was not maintainable so far as the choultry is concerned; and as regards the temple it was a matter for the Hindu Religious Endowments Board.

Held, that as there was no temple in being, it was not a matter at this stage for the Hindu Religious Endowments Board, and so any member of the public who was interested in the building of a Vishnu temple was entitled to bring the scheme suit. Having brought this scheme suit in right of their interest, in having the trust relating to the temple carried out, it is necessary to consider a trust as a whole. It would be idle and a waste of the Court's time to split the trust into two, restricting these plaintiffs to the litigation of matters relating to the temple and leaving somebody else to litigate matters so far as the feeding choultry was concerned at some subsequent date. So the suit was maintainable. (*Stone and Varadachariar, JJ.*) RAMAYYA *v.* SATYANARAYANAMURTHI. **165 I.C. 63=9 R.M. 208 (2)=1935 M.W.N. 1172= A.I.R. 1936 Mad. 495.**

Scheme decree.

——Ss. 92 and 151—*Scheme decree—If can be modified by application under S.* 151.

A scheme, particularly one relating to a Muslim wakf, can be modified by an application under S. 151, C. P. Code. (*Zia-ul-Hasan and Radha Krishna, JJ.*) FAIYAZ ALI KHAN *v.* SAIFULLAH SHAH SOHARWARDI. **1940 O.A. 582=1940 A.W. R. (C.C.) 298=1940 O.W.N. 639.**

——S. 92—*Scheme decree — Application for removal of trustee and for tracing of funds misappropriated by him—Power of Court to take action.*

The Court cannot remove a trustee from his office for alleged misconduct on a mere application made to it for his removal, when it is impossible for it to entertain the application conformably with the provisions of the scheme. The remedy of the persons interested in the trust is to institute a suit under S. 92, C. P. Code, with the permission of the Legal Remembrancer, for his removal. No action can be taken by the Court on a miscellaneous application for tracing the funds misappropriated by him, nor can it give any directions in respect of the proper

C. P. CODE (1908), S. 92.

management of the affairs of the trust. (*Niamatullah and Bajpai, JJ.*) RANGACHARYA *v.* GANGA RAM. **58 All. 538=160 I.C. 1091=8 R.A. 698= 1935 A.W.R. 1338=1936 All.L.R. 228=1936 A.L.J. 398=A.I.R. 1936 All. 97.**

——S. 92 — *Scheme decree — Construction—Management vested in trustees nominated by District Judge—District Judge given general control over trustees and their management of the trust—Power to remove any trustee for unfitness, incompetence or negligence—Power to remove all trustees—Power to remove for breach of trust or dishonesty—Suit for removal—Necessity—Power to suspend trustees pending inquiry or to appoint interim receiver—Order removing trustees and appointing receiver—Appeal.*

A scheme of management drawn up by the Bombay H gh Court by a decree in a suit under S. 92, C. P. Code, in respect of a Sansthan vested the management of the institution in three trustees nominated by the District Judge of Poona, giving the District Judge a general control over the engagement of the establishment by the trustees and provided *inter alia*: "The said trustees shall hold office for life, but it shall be competent to the District Judge of his own motion or on the application or representation of any person interested in the said Devasthan to remove from the management any trustee who may be found to be unfit or incompetent for the management of the Sansthan or negligent in the discharge of his duties." A Government audit of the accounts of the Devasthan having disclosed serious frauds and malpractices on the part of certain clerks employed by the trustees, and suggested that the trustees or some of them might have been privy to the frauds. The District Judge, pending a formal inquiry by him into the matter, suspended the three trustees and appointed a receiver under O. 40, R. 1, C.P. Code, to carry on *interim* administration. After hearing the trustee, and other interested parties and taking evidence, the District Judge exonerated all the trustees of breach of trust, but finding that one of the trustees had been negligent and had failed to exercise proper supervision over the clerks, and that another was unfit by reason of his quarrelsome and obstructive conduct, ordered them to be removed. He found that the third trustee was not to blame in any respect and ordered him to be reinstated.

Held, (1) that the power to remove the trustees conferred on the District Judge under the scheme included power to suspend them pending necessary inquiries; (2) that since the District Judge had power to remove any trustee for unfitness he must also be held to have the power to remove all the trustees if circumstances should make it necessary; (3) that the power to remove for unfitness implied a power to remove for dishonesty or breach of trust, and S. 92, C. P. Code, was no bar to such removal; (4) that the District Judge under the scheme had a general control over the trustees and over their management of the trust, and if in the exercise of his powers under the scheme he found it necessary to remove the trustees, he must be credited with the power to make emergency measures for temporary management pending reconstitution of the board of trustees and the appointment of a receiver was therefore not *ultra vires*, as the appointment

C. P. CODE (1908), S. 92.

could be justified by the inherent powers of the Judge under the scheme; and (5) that the orders passed by the District Judge in accordance with the powers conferred on him by the scheme were not open to appeal on the merits. (*Broomfield and Tyabji, JJ.*) MAHADEV *v.* GOVINDRAO. **168 I. C. 577=9 R.B. 375=38 Bom.L.R. 1137=A.I.R. 1937 Bom. 124.**

——S. 92—*Scheme decree—Construction—Provision regarding election of trustee and his qualification—Scheme empowering trustee, worshippers or voters of temple to apply to Court for directions—Worshippers—Right of, to apply to Court for determination whether person nominated for election as trustee was eligible—Court's power to determine question.*

A decree framed a scheme for the management of a temple and provided for the election of trustee whenever a vacancy occurred. A clause in the scheme stated the qualifications of trustee for being eligible to election and provided that nominations should be delivered to the remaining trustee on a certain date. Another clause in the scheme empowered any trustee, worshippers or registered voters of the temple to apply to the High Court for such further directions as might be necessary for carrying out the scheme. A vacancy having occurred, the nomination for the office of trusteeship of a certain person was received by the remaining trustee. Thereupon worshippers and voters of the temple applied to the Court for determination whether the person nominated was eligible for election.

Held, that the applicants were entitled to apply to the Court for determination whether the person nominated for trusteeship was eligible for it. The Court had power to determine the question and direct the trustee to reject the nomination paper. Such direction was necessary for the carrying out of the scheme.

Held, further, that it was unnecessary to ask for the relief prayed for in the plaint and it need not be specifically provided in the decree. The relief asked for was with reference to a provision made for the management of the trust and it was inconceivable that every direction for carrying out a particular provision of the trust should be asked for in the suit or provided in the decree. There was no necessity to wait until an election took place and file a suit to declare the election void. (*Venkataramana Rao, J.*) GOVINDASWAMI NAIDU *v.* KANDASWAMI CHETTY. **1939 M. Cr.C. 252=1939 M.W.N. 1009=A.I.R. 1939 Mad. 605.**

——S. 92—*Scheme decree—Court making appointment of trustees—If acts as "Court" or* persona designata—*Powers of review.*

A Court or a Judge carrying out the provisions of a scheme decree passed under S. 92, C. P. Code, acts as a Court and not as a *persona designata*. The Court or Judge has power in such cases to appoint trustees to vacancies in the office of trustees which have arisen, but there is no power to cancel an order of appointment or to review the same on the ground that some party alleges that he was misled by reason of wrong information given to him that the case was adjourned and therefore was not present at the time the order was made, when it is not proved that either the Court established or the Judge was at fault. The inherent powers of a Court cannot be extended to such a case. (*Burn, J.*) LAKSHMANA PILLAI *v.* GOVINDAM PILLAI. **50 L. W. 460=1939 M.W.N. 915=A.I.R. 1939 Mad. 969=(1939) 2 M.L.J. 475.**

——S. 92—*Scheme decree—Decree setting out conditions of management—No provision to remove manager on failure to perform conditions—Mismanagement by manager—Application for execution, if competent.*

In the absence of a provision in the conditions of management set out in the scheme decree that the manager would be liable to be removed on his failure to perform the conditions, action cannot be taken to remove the manager even on proof of his mismanagement by means of an application for execution. (*Jai Lal, J.*) OMA SHANKAR DAS *v.* BHOLA DASS. **174 I.C. 574=10 R.L. 585=A.I.R. 1937 Lah. 490.**

——S. 92—*Scheme decree—Executability.*

Once the decree settling a scheme has been passed the Court has done its duty, and is not to be called upon in the execution department to make the scheme work. Where a scheme decree provides that the manager shall deposit the Kattalai Funds in a Bank, but makes no provision for the decision of any dispute as to the amount to be deposited, and while ordering an annual audit, makes no provision for scrutiny of the report of the auditor by the Court or for enforcing any conclusions arrived at by the auditor or the Court, there is nothing of an executable character in those provisions. (*Burn and Lakshmana Rao, JJ.*) RAMANATHAN CHETTIAR *v.* MADURA SRI MEENAKSHI SUNDARESWARAR DEVASTHANAM. **174 I.C. 934=10 R.M. 746=1937 M. W.N. 1159=46 L.W. 701=A.I.R. 1938 Mad. 256=(1937) 2 M.L.J. 887.**

——S. 92—*Scheme decree — Executability—Clause directing trustee to pay certain amounts—Failure to pay—Application in execution—Maintainability—Appointment of receiver—If justified.*

A provision in a scheme decree to the effect that "the trustees of the respective kattalais shall hand over all the cash proceeds of their property to the treasurer," is inexecutable. Neither S. 51 nor O. 21, R. 32, C P. Code, can be applied to such a clause in the decree. No receiver can be appointed to execute it by way of equitable execution. Per *Cornish, J.*—There is no short cut of a remedy by application to the Court where a trustee refuses to carry out his duties under the scheme. The only remedy available is a suit to remove him or to have the scheme modified. (*Venkatasubba Rao and Cornish, JJ.*) VAITHILINGA MUDALIAR *v.* BOARD OF CONTROL, SRI THIAGARAJASWAMI DEVASTHANAM, TIRUVARUR. **59 Mad. 751=165 I.C. 820=9 R.M. 303=1936 M.W.N. 673=44 L.W. 93=A.I.R. 1936 Mad. 581=71 M.L.J. 87.**

——S. 92—*Scheme decree — Executability—Decree allowing arrears of pay and paditharam expenses of archakas from date of suit to date of judgment—If form part of scheme—Executability.*

Where a decree provides for a scheme the proper way of dealing with such decree is to separate the scheme part from the rest of the decree and when that is done, no provision in the scheme part is executable, whether it is directory or declaratory. Where a decree when laying down a scheme regulating the constitution of a

C. P. CODE (1908), S. 92.

temple allowed the arrears of pay and paditharam expenses of archakas from the date of the suit to the date of the judgment.

Held, that such payments did not form part of the scheme and therefore could be recovered by way of execution of the decree.

Held, further, that from the date of the decree the archakas became entitled to their salary and the padithāram expenses under the scheme and therefore those amounts becoming due subsequent to the decree could not be recovered by way of execution. (*Venkatasubba Rao and Venkataramana Rao, JJ.*) TRUSTEE OF TEMPLE OF SREE VENUGOPALASWAMIVARU *v.* VEDANTHAM SEETHARAMANUJACHARYULU. **168 I.C. 715=9 R.M. 627 (2)=1937 M.W.N. 611=45 L.W. 230=A.I.R. 1937 Mad. 326.**

——**S. 92**—*Scheme decree—Nature of—Clause in scheme providing for alterations by Court from time to time—Validity.*

Tyabji, J.—It is open to the Court to include in schemes for the administration of charitable institutions clauses providing that the schemes may, from time to time and as occasion arises, be altered by the Court according to the practice of the Bombay High Court. Such a clause is a valid provision. Where a decree includes a scheme for the administration of a charitable institution, the decree is in its substance very different from the generality of decrees. Whereas ordinary decrees require a particular act to be done by the defendant for the benefit of the plaintiff, a scheme, on the other hand, provides for continued action in regard to the administration of the charity, it being intended to lay down a plan of lasting character for the working of the institution. It contemplates a series of acts extending over many years during which its terms are to be put into operation. (*Broomfield and Tyabji, JJ.*) MAHADEV *v.* GOVINDRAO. **38 Bom.L.R. 1137=168 I.C. 577=9 R.B. 375=A.I.R. 1937 Bom. 124.**

——**S. 92**—*Scheme decree—Provision for amendment on application by party interested—Right to apply—If confined to parties or representatives of parties to original litigation.*

It is not the law that an application for amendment of a scheme of management framed in a suit under S. 92, C. P. Code, can only be made by parties to the suit in which the scheme was originally framed. The scheme cannot be regarded as a continuation of the suit, at any rate in the sense that applications under the scheme can only be made by parties to the scheme. Where the scheme provides for modification of the scheme by the Court on the application of parties interested in the institution, any person who may have an interest in the institution from time to time, whether or not he was a party or a representative of a party to the original litigation, is entitled to make an application for amendment or modification of the scheme. (*Broomfield and Tyabji, JJ.*) MAHADEV *v.* GOVINDRAO. **168 I.C. 577=9 R.B. 375=38 Bom.L.R. 1137=A.I.R. 1937 Bom. 124.**

——**S. 92**—*Scheme decree—Provision for removal of trustee for unfitness—Trustee found guilty of breach of trust—Removal in proceedings arising out of the scheme—Power of Court—Suit for removal—Necessity.*

C. P. CODE (1908), S. 92.

S. 92, C. P. Code, does not say that a trustee guilty of a breach of trust can be removed only by a suit. A suit may be brought to remove him in the manner prescribed by the section. But if a suit has once been brought under the section, and a scheme has been framed, which provides for the removal of trustees for unfitness, the exercise of that power in the course of proceedings arising out of the scheme, is not contrary to S. 92, even though the trustee be found unfit by reason of a breach of trust. (*Broomfield and Tyabji, JJ.*) MAHADEV *v.* GOVINDRAO. **38 Bom. L.R. 1137=168 I.C. 577=9 R.B. 375=A.I.R. 1937 Bom. 124.**

——**S. 92**—*Scheme decree—Provision for removal of trustees without recourse to Court—Power given to District Judge as* persona designata *to remove trustees—Validity of scheme.*

Tyabji, J.—If a scheme is so drafted as to make directions of the Court unnecessary, or to preclude breaches of trust, or at any rate, to provide fewer opportunities for breaches of trust, it cannot be suggested that the scheme offends S. 92, C. P. Code. Nor can the validity of the scheme be endangered if the scheme provides for a constitution which makes it unnecessary to obtain some of the specified reliefs, and consequently make it unnecessary to institute suits for obtaining those reliefs. A scheme providing a means for the removal of a trustee without recourse to the Court does not offend any law. S. 92, C. P. Code, does not render invalid or ineffectual a clause in a scheme that the trustee may be removed from his office by the District Judge of his own motion speaking of the District Judge as an individual, not the District Court. The District Judge may be validly empowered as a *persona designata* to remove trustees. (*Broomfield and Tyabji, JJ.*) MAHADEV *v.* GOVINDRAO. **38 Bom.L.R. 1137=168 I.C. 577=9 R.B. 375=A.I.R. 1937 Bom. 124.**

——**S. 92**—*Scheme decree—Provision giving Court authority to appoint successor to deceased trustee—Whether* ultra vires.

A provision in a scheme settled under S. 92, C. P. Code, giving the Court authority to appoint a successor in place of a deceased trustee, is not a provision which can be regarded as constituting a modification of the original scheme and is not, therefore, *ultra vires*. (*Srivastava, Ag. C.J. and Smith, J.*) SAADAT HUSAIN *v.* MOHAMMAD HAIDAR. **13 Luck 81=166 I.C. 215=9 R.O. 291=1936 O.L.R. 725=1937 O.W.N. 39=A.I.R. 1937 Oudh 193.**

——**S. 92**—*Scheme decree—Provision reserving power to modify it—Whether* ultra vires—*Inherent power of Court apart from such provision.*

The power of the Court to settle a scheme for the administration of a trust is sufficiently comprehensive to include a provision in the scheme which makes the scheme alterable by the Court, if it is found necessary in future. There is nothing in S. 92, C. P. Code, which makes the reservation of a power to modify the scheme in future *ultra vires*. If the scheme is amended subsequently by the Court within the limits laid down by the decree, the Court should be deemed to be giving effect to its own decree rather than amending it. Apart from the exercise of the Court's power reserved by the scheme itself, the

only section in C. P. Code which can justify amendment of the scheme is S. 151. The inherent power of the Court under that section to modify a scheme prepared by itself should be exercised only where it is necessary to prevent abuse of the process of the Court or where the ends of justice plainly demand it. (*Niamatullah and Bajpai, JJ.*) RANGACHARYA *v.* GANGA RAM. 58 All. 538 =160 I.C. 1091=8 R.A. 698=1935 A.W.R. 1338=1936 All.L.R. 228=1936 A.L.J. 398=A.I. R. 1936 All. 97.

Scope and effect.

——S. 92—*Scope and effect.*

The real intention and meaning of S. 92, C. P. Code, is that by virtue of the specific categories of relief mentioned in paras. (*a*) to (*g*) and the general relief mentioned in para. (*h*), it intends and is effective to catch all those cases in which any declaration, order or other relief is asked for by way of carrying into execution and administering a trust for public purposes of a charitable or religious nature as opposed to relief claimed adversely to the trust altogether, as for example a claim that no valid wakf exists or that certain property does not form part of the trust property. (*Braund, J.*) ATTIA *v.* MADHA. 14 Rang. 575.

——S. 92—*Scope—Public charitable trust—Management vested in members of family—Dispute among parties—Reference to arbitration—Award dealing with management and laying down scheme for future management—Suit to make award decree of Court—If falls under S. 92.*

Where an arbitrator is required to investigate the nature of the management of various charitable trusts by the parties in management thereof and is also asked to lay down a scheme for the future management of the institutions, that cannot be regarded as a matter arising out of the private rights of any particular individual. The fact that the disputing parties belong to the family or families in which the management of the institutions is vested will not of itself take the case out of the purview of S. 92, C. P. Code, if the object of the proceeding is to safeguard the interests of the institutions or obtain directions for their proper management. A suit to have such an award made a decree of Court cannot lie when the procedure prescribed by S. 92 has not been complied with. (*Varadachariar and Pandrang Row, JJ.*) LAKSHMIKANTAM *v.* RAMALINGAYYA. 183 I.C. 170=12 R.M. 244=1938 M. W.N. 1176=48 L.W. 742=A.I.R. 1939 Mad. 170 =(1938) 2 M.L.J. 972.

——S. 92—*Scope—Relief against third parties—Admission of trust by defendant—If necessary—Nature of suit—Determination.*

S. 92, C. P. Code, is no doubt inapplicable to the case of actions or suits relating to charities brought against third parties; but if the relief is claimed against persons who are constructive trustees, who have intermeddled with the charitable or trust property and made themselves trustees, then the action is within the section. The fact that the defendant does not admit the property to be trust property will not take the suit out of the section, as the nature of the suit is determined by the allegations in the plaint and not by the contentions in the written statement. The plaint and not the written statement should

be looked to in order to determine the jurisdiction of the Court. (*Davis, J.C. and Lobo, A.J. C.*) MULCHAND BASSAAR MAL *v.* DEVIGIR MOTIGIR. 30 S.L.R. 104=165 I.C. 158=9 R.S. 87=A.I.R. 1936 Sind 179.

——S. 92—*Scope—Suit instituted claiming reliefs under S. 92—Sanction—Necessity—Subsequent amendment or abandonment of reliefs—If makes suit maintainable without sanction.*

The use of the word "instituted" in S. 92, C. P. Code, makes it incumbent on the Court to see what the prayers were in the plaint at the date the suit was instituted in order to satisfy itself whether S. 92 (2), C. P. Code, had been complied with, and for that purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit. If the suit as instituted falls under S. 92, it cannot lie if brought without the sanction of the Advocate-General or the Collector. The fact that by subsequent amendment the relief or reliefs falling under S. 92 are struck would not make the suit maintainable.

Broomfield, J.—If a suit claims the reliefs specified in S. 92 and should therefore have been brought under that section, the difficulty cannot be got rid of by amending the plaint or abandoning those reliefs. It would make no difference in principle whether a particular relief is given up after a formal amendment of the plaint or whether it is abandoned without it. (*Broomfield and Divatia, JJ.*) GAJRAMJI JASRAMJI *v.* SOMNATH BHUDARDAS. 42 Bom.L.R. 443=A.I. R. 1940 Bom. 242.

Suit under.

——S. 92—*Suit under—Frame and reliefs of—Suit primarily for settlement of scheme and appointing trustees—Prayer for possession of properties from strangers—If proper—Order striking off such strangers—If proper.*

In a suit primarily for settling a scheme and for the initiation of a trust and for appointing trustees of the trust, with a prayer for vesting of the trust property in the trustees to be appointed, it is wrong to enlarge the area of the case from creating a trust to determining what property belongs to that trust and passing decrees for possession of that property against outside parties. The case becomes undesirable for multifariousness. Once a trust has been constituted and trustees have been appointed together with a declaration vesting the property of the endowment in the trustees, there will be nothing to stop those trustees from bringing suits, not under S. 92, C. P. Code, but under the ordinary law, for recovering property which is vested in them by way of charity of which they are trustees, and for such suit no fiat of the Advocate-General is necessary. If there is added in a suit under S. 92, a prayer for possession against outside parties which can be sought after the trustees are appointed those outside parties can be struck out from the suit which mainly seeks to have a scheme settled. (*Baguley and Shaw, JJ.*) U KYAI *v.* SHWEBONTHA S. E. L. ASSOCIATION. 172 I.C. 976=10 R.R. 302=A.I.R. 1937 Rang. 483.

——S. 92—*Suit under—Costs—If to be made payable out of wakf estate.*

In a suit under S. 92, C. P. Code, for removal of mutwallis of a mosque and other consequential

C. P. CODE (1908), S. 92.

reliefs, which has been instituted *bona fide* and in which after protracted proceedings it is found that the allegations of the plaintiffs are well-founded and substantiated, it is only proper that the plaintiffs should get all their costs out of the funds of the wakf estate. There is no justification for refusing to allow the plaintiffs their costs out of the funds of the estate. (*Mukerji, A.C.J. and S.K. Ghose, J.*) WARES ALI *v.* SHEIKH SAMSUDDIN. **168 I.C. 260=9 R.C. 790=63 C.L.J. 573.**

——**S. 92**—*Suit under—Death of mutwallis of wakf appointed by Court in suit under—Applications by some persons for their own appointment—Wakf property actually in possession of certain persons who were managing it as mutwallis—Applications, if maintainable—Suit, if necessary.*

In a suit brought under S. 92, C. P. Code, the District Court appointed certain persons mutwallis of a wakf. On the death of all of them, some persons applied to the Court by means of separate applications to be appointed mutwallis of the wakf. Certain persons were actually in possession of the wakf property and managing it as mutwallis.

Held, that although the applicants did not specifically pray for the removal of the persons who were in actual possession of the wakf property from trusteeship, yet that was really their purpose, and that the applications were barred by S. 92, C. P. Code, by necessary implication, as it was hardly conceivable that when the Legislature deemed it necessary that a suit brought for the purposes mentioned in the section should be incompetent unless brought with the consent in writing of the Advocate-General, they meant to permit a mere application to be brought by a private individual without any official sanction whatever for the same purpose, and that, therefore, the prayer of the applicants for their own appointment as trustees could not be granted by the Court without the necessity of a suit under S. 92, C. P. Code. (*Thomas and Zia-ul-Hasan, JJ.*) ABDUL HASAN KHAN *v.* JAFAR HUSSAIN. **168 I.C. 803=9 R.O. 505=1937 O.L.R. 324=1937 O.W.N. 730=A.I.R. 1937 Oudh 381.**

——**S. 92**—Suit under—Death of one of several plaintiffs—Effect—Abatement. *See* C. P. CODE, O. 22. **17 Pat.L.T. 926.**

——**S. 92**—Suit under—Defect in sanction—Dismissal of suit—Restoration under Public Suits Validation Act—Subsequent dismissal on absence of valid consent. *See* C. P. CODE, S. 93. **62 C.L.J. 70=A.I.R. 1936 Cal. 815.**

——**S. 92**—*Suit under—Maintainability—Allegation as to breach of trust—Necessity.*

The argument that in the absence of an allegation of breach of trust in the plaint the suit is not maintainable, is untenable. A suit under that section lies not only in the case of any alleged breach of trust, but also where the direction of the Court is deemed necessary for the administration of a trust, if it be a trust for public purposes of a charitable or religious nature. (*Mya Bu and Sharpe, JJ.*) M. E. MITCHLA *v.* A. M. MITCHLA. **1938 Rang.L.R. 276=177 I.C. 851=11 R. R. 175=A.I.R. 1938 Rang. 339.**

——**S. 92**—*Suit under—Parties—Alienee of trust property denying trust and its title to property in his possession—If proper or necessary party.*

C. P. CODE (1908), S. 92.

Although in a suit under S. 92, C. P. Code, no relief can be granted against third parties, it does not necessarily follow from this that the Court is not competent to bring before the forum any such person. Alienees being in possession of trust property and denying the existence of the trust and its title to the property in their possession are certainly proper, though not necessary, parties to a suit under the section, though no relief or remedy can be given as against them, because in their absence the Court cannot effectually and completely adjudicate the question of the existence of the trust and of the title of the trust to the property in question. (*Varadachariar and Stodart, JJ.*) ANJANEYA SASTRI *v.* KOTHANDAPANI CHETTIAR. **164 I.C. 615=9 R.M. 137=1936 M.W. N. 245 (2)=43 L.W. 409=A.I.R. 1936 Mad. 449 =(1937) 2 M.L.J. 437.**

——**S. 92**—*Suit under—Reference to arbitration—Competency—Matters of public rights—If can be made subject of arbitration on reference in suit regarding private rights—Award declaring property to be trust property—If illegal—Scheme for administration of trust property—Jurisdiction to frame.*

Where a suit could not be brought under S. 92, C. P. Code, except upon the conditions therein specified, the section cannot be evaded merely by a reference to arbitration upon contentions raised in the written statement, and the arbitrators cannot decide upon matters of public right which the law provides shall be brought into issue only in a particular manner. Matters of public right cannot be decided by arbitration, and it makes little difference whether the public rights are determined as a result of their specific inclusion in the terms of reference, or whether they are decided by arbitrators upon a reference in a suit the plaint in which relates to private property. It is only matters in difference in litigation which affect private rights that may be referred to arbitration; a suit under S. 92, C. P. Code, is not a suit for the determination of private rights and matters in difference in such suit cannot be referred to arbitration. Where the jurisdiction to decide a particular matter is given by law to specific tribunals only, determination of that matter by other tribunals is excluded. But a suit for a declaration that certain property is trust property does not fall under S. 92, C. P. Code, and therefore, a declaration in the award of the arbitrators to that effect does not offend against law. But an award which grants reliefs which could only be granted in a suit under S. 92 is without jurisdiction, *e.g.*, the framing of a scheme for the administration of trust property, is beyond the powers of the arbitrators. (*Davis, J.C. and Mehta, A.J.C.*) GANGA RAM *v.* KESHAVDAS. **30 S.L.R. 478=170 I.C. 102 =10 R.S. 32=A.I.R. 1937 Sind 174.**

——**S. 92**—Suit under—Right to have a scheme framed or accounts examined—If flows from the preliminary decree. *See* BENGAL WAKF ACT, SS. 71 AND 83. **I.L.R. (1937) 1 Cal. 673=A.I.R. 1937 Cal. 150.**

——**S. 92**—*Suit under—Suit for removal for shebaits or trustees as founders—Right to relief—Grounds—Proof of breach of trust—Necessity.*

If any relief is to be granted in a suit under S. 92, C. P. Code, ordering the removal or

C. P. CODE (1908), S. 92.

interfering with the rights of the shebaits and trustees as founders, something substantial must be shown justifying their removal or interference. Where therefore members of the old managing committee of an ashram brought a suit against the founders of the institution on their forming a new managing committee on the expiry of the old one without even attributing breach of trust on the part of latter,

Held, that the founders were justified in taking proper steps for the management of the institution and in forming a new committee and there being no breach of trust attributed to them, the suit was not proper. (*Mukerji and Jack, JJ.*) PRAKASH CHANDRA NAG *v.* SUBODH CHANDRA NAG. **I.L.R. (1937) 1 Cal 515=64 C.L.J. 341=170 I.C. 290=10 R.C. 133=A.I.R. 1937 Cal. 67.**

——**S. 92 (1)**—*Construction—Any other Court "empowered in that behalf" by the Local Government—Meaning of—Notification empowering Judge of Court, to hear suits under S. 92—Judge mentioned by name—If empowers him as* persona designata *or empowers Court presided over by him—Limits of jurisdiction not mentioned—If invalidates notification—Power of Court to entertain plaints in suits under S. 92—If also conferred.*

Where a Local Government, purporting to act under S. 92 (1), C. P. Code, issues a notification which empowers the presiding Judge of particular Court, specifically meaning the Judge, to hear suits which may be instituted under S. 92, C. P. Code, it is only reasonable to assume that the Government intends to comply with the section and to confer the necessary powers to the Court over which the named Judge presided and presides. The Court presided over by that Judge is a Court duly "empowered in that behalf" within the meaning of S. 92 (1), C. P. Code. The jurisdiction may, however, be limited in time, *i.e.*, only so long as that Court is presided over by the particular named Judge. The notification cannot be taken as merely empowering the particular named Judge as a *persona designata*, so as to make it not in conformity with S. 92 (1) and invalid on that account. The fact that the limits of the jurisdiction of the Judge are not mentioned in the notification will not also invalidate the notification. The notification in question would also empower the Court presided over by that Judge to entertain plaints, as the power to entertain plaints is included in the general grant of jurisdiction. (*Barlee, Wadia and Mackin, JJ.*) GOVIND SHRIPAD *v.* SHRINIVAS KRISHNA. **I.L.R. (1937) Bom. 655=170 I.C. 1=10 R.B. 79=39 Bom.L.R. 548=A.I.R. 1937 Bom. 275 (F.B.).**

——**S. 92 (1) (a) and (b)**—*Trustee—Appointment of new trustee—Notice to interested parties—If necessary—Order appointing a trustee by consent of parties to suit—If bars claim of any claimant in future.*

There can be no question that ordinarily when a trustee is removed in accordance with the provisions of S. 92, C. P. Code, the Judge should issue notice to parties interested and also give public notice in such a way as to enable claimants to the office to come forward and put in their respective claims. The law, however, does not make any provision of this nature; and, therefore, it cannot be laid down as a hard and fast rule that in all suits under S. 92 of the Code that is the procedure necessarily to be restored to. Where the Judge appoints a new trustee by consent of the parties to the suit without making any enquiry or resorting to any elaborate proceeding, the appointment is not an appointment which is the result of a judicial proceeding and can only be justified as an appointment made with the consent of the parties and on no other footing. That being the position, there can be no question that the order which the Judge has made in respect of the appointment will not operate as *res judicata* barring the claim of any claimant in future. (*Mukerji and Jack, JJ.*) FAIZUNNESSA *v.* MOULVI ASAD BUKHT. **41 C.W.N. 298.**

——**S. 92 (1) (a) and (d)**—*Trustee—Removal of—Decree directing accounts—Court, if bound to pass.*

It is not obligatory on the court to pass a decree directing accounts on the removal of a trustee in a suit under S. 92, C. P. Code. If upon a consideration of the facts and circumstances of the case, when the income of the endowment is quite small and the expenditure does not leave much in the shape of balance, the Court comes to the conclusion that it would not be profitable to make an order for accounts, it is very difficult for the appellate Court to say that that order is not justifiable or that it would be interfered with. (*Mukerji and Jack, JJ.*) FAIZUNNESSA *v.* MOULVI ASAD BUKHT. **41 C.W.N. 298.**

——**S. 92 (1) (b)**—*Trustee—Appointment of new trustee—Departure from arrangement contemplated by deed of trust—Permissibility.*

In making an appointment of a trustee in a suit under S. 92, C. P. Code, although regard must be paid to the line of devolution that may have been prescribed in the deed of endowment, it is permissible to the Court, in peculiar circumstances having regard to the exigency of the case, to make an appointment which may involve a departure from the arrangement contemplated by the deed of trust itself. (*Mukerji and Jack, JJ.*) FAIZUNNESSA *v.* MOULVI ASAD BUKHT. **41 C.W.N. 298.**

——**S. 92 (1) (g)**—*Scheme—Settling of—Discretion of Court.*

The discretion which is conferred upon a Court by the terms of S. 92, C. P. Code, is very wide and the law does not make it obligatory upon a Court in a suit under that section to make all the orders that are contemplated by the different clauses of that sub-section. It is quite open to the court not to frame a detailed scheme, if it thinks that certain directions given by it to the newly appointed trustee for the proper carrying out of the endowment would be quite enough. (*Mukerji and Jack, JJ.*) FAIZUNNESSA *v.* MOULVI ASAD BUKHT. **41 C.W.N. 298.**

——**S. 92 (1) (h)**—*Applicability and scope—Person claiming property as his but admitting execution of trust—Suit against—If falls under S. 92.*

Cl. (*h*) of sub-S. (1) of S. 92, C. P. Code, does not so widen the provisions of S. 92 as to make S. 92 not otherwise applicable to suits against strangers, applicable to such suits. Where the person in possession asserts the property to be his, but admits that he is executing the trust, such person is a trustee either constructive or *de son tort* and in either case he is not a stranger. Therefore a suit under S. 92 can be brought

C. P. CODE (1908), S. 92.

against him. (*Davis J. C. and Lobo, A. J. C.*) SUKHUMAL-MANUMAL *v.* UTTAMCHAND. **171 I. C. 344=10 R.S. 102=31 S.L.R. 510=A.I.R. 1937 Sind 230.**

——**S. 92 (h)**—"*Such further or other relief*"—*Meaning of—If includes injunction to restrain alienation by trustee.*

The words "such further or other relief" in 92 (*h*) cannot be held to imply necessarily some relief in addition to the reliefs specified in Cls. (*a*) to (*g*) of S. 92. Clause (*h*) clearly indicates a relief which while falling under it does not fall under any of the clauses (*a*) to (*g*). A prayer asking that the trustees be restrained from alienating the trust property is one which may well be included under S. 92 (*h*). (*Davis, J.C. and Lobo, A. J. C.*) MULCHAND BASSARMAL *v.* DEVIGIR MOTIGIR. **30 S.L.R. 104=165 I.C. 158=9 R.S. 87 =A.I.R. 1936 Sind 179.**

——**S. 93**—*Defect in sanction—Dismissal of suit —Restoration under Public Suits Validation Act —Subsequent dismissal on absence of valid consent—Legality.*

A suit which has been dismissed under S. 93, C. P. Code, on the ground that the consent required by the section is not in order may be restored under S. 3 of the Public Suits Validation Act of 1932, if an appeal from the decree dismissing the suit is competent and open at the time of the latter Act. Once the order of restoration is made, the suit has to be proceeded with and tried in accordance with law. The suit cannot again be dismissed on the ground that there has been no valid consent given by the Collector. (*Mukerji and S. K. Ghose, JJ.*) BHABATARAN CHAKRAVARTY *v.* RAMLAL DAS. **166 I.C. 954=9 R.C. 631 =63 C.L.J. 70=A.I.R. 1936 Cal. 815.**

——**S. 93**—*Powers of Collector—Grant of sanction for suit—Jurisdiction to impose conditions —Condition that suit to be filed within two months—Legality—Suit filed beyond two months —If barred—Limitation—Computation — Period of two months—Starting point—Date of order or date of receipt of order.*

The Collector exercising under S. 93, C. P. Code, the powers conferred on the Advocate-General under S. 92, C. P. Code, has no jurisdiction to impose by his order granting sanction for a suit any time limit for the institution of the suit. The only restrictions which can be imposed are in respect of the persons who can institute the suit and in respect of the reliefs which are sought and are obtainable in such suit; any other restrictions either in the matter of the institution or in the conduct of the suit would be *ultra vires*. A condition imposed by the Collector that the suit should be instituted within two months is illegal and may be ignored, although if the suit is filed long after the grant of sanction, the Court has a discretion to refuse to pass a decree in the suit on the ground of unnecessary delay. In any case, assuming that the Collector can impose such time limit the period would not commence to run until the order of sanction is made known to the parties. (*Venkataramana Rao, J.*) RAMACHANDRAYYA *v.* NARASIMHAM. **1937 M.W.N. 1319.**

——**S. 94**—Construction—'If it is so prescribed'. *See* C. P. CODE, O. 39 AND S. 94. **1937 M. W.N. 1229.**

——**S. 9 4 (c) and O. 39**—*Scope—Application for attachment by defendant—Undertaking by*

C. P. CODE (1908), S. 95.

defendant—Acceptance by Court and dismissal of application for attachment—Subsequent breach of undertaking—Power of Court to commit to jail —Jurisdiction.

When a Court accepts an undertaking given by the defendant in a suit and dismisses an application for attachment before judgment, the order of the Court amounts in substance to an injunction restraining him from acting in breach thereof. The form only implies that the Court is prepared to deal with him honourably in the expectation that he will treat his undertaking as equivalent to an order of Court. It is not open to the defendant to afterwards say that because the Court did not pass an order of its own after accepting his undertaking he is not in the position of a person bound by an order of Court. If the defendant commits a breach of his undertaking, the Court has jurisdiction to commit him to jail for contempt of Court and for violating the undertaking. (*Varadachariar, J.*) GURUMURTHI CHETTI *v.* SELLA PERUMAL PILLAI. **165 I.C. 747 =9 R.M. 297=1936 M.W.N. 519=44 L.W. 714 =A.I.R. 1936 Mad. 651.**

——**S. 95**—*Burden of proof—Compensation for wrongful attachment—Application for—Onus—Duty of applicant.*

It is incumbent on an applicant under S. 95, C. P. Code, for compensation for wrongful attachment, to prove affirmatively that the attachment was applied for on insufficient grounds. It is not sufficient for this purpose to show that he has properties which are greater in value than the amount at stake in the suit. He must show that the plaintiff was unjustified in suggesting to the Court that he the defendant was about to defeat the object of the suit by making alienations. (*Wadsworth, J.*) PALANISAMI GOUNDAR *v.* KALIAPPA GOUNDAR. **1939 M.W.N. 1084=50 L.W. 640=A.I.R. 1940 Mad. 77=(1940) 1 M.L.J. 782.**

——**S. 95**—*Construction—"Expense or injury" —Wrongful attachment—Claim to compensation —Proof of special damage—If essential.*

In an application for compensation for wrongful attachment under S. 95, C. P. Code, it is not necessary to prove special damage. The words "expense or injury" indicate that either the particular damage upon which a monetary value can obviously be placed or the more general damage which the Court endeavours to assess in terms of money, is contemplated by the section. It is not necessary to prove more than general damage, *e.g.*, mental pain, general loss of reputation, etc. (*Wadsworth, J.*) PALANISAMI GOUNDAR *v.* KALIAPPA GOUNDAR. **1939 M.W.N. 1084 =50 L.W. 640=A.I.R. 1940 Mad. 77=(1940) 1 M.L.J. 782.**

——**S. 95**—*Order of attachment passed but attachment not effected—Compensation, if can be allowed.*

Compensation will be granted only where damage has resulted. Where only an order of attachment before judgment has been passed but the property has not been actually attached in pursuance of the order, it cannot be said that the mere order of attachment has resulted in damages and hence the person whose property has been ordered to be so attached cannot claim compensation under S. 95. (*Ba U, J.*) MOHAMAD

C. P. CODE (1908), S. 95.

ISMAIL & Co. *v.* ASHGAR & Co. **183 I.C. 174=12 R.R. 65=A.I.R. 1939 Rang. 260.**

——**S. 95**—*Right to compensation under—Question to be decided.*

The question to be decided under S. 95 is whether there are no sufficient grounds for applying for attachment and not whether there are no reasonable grounds stated in the creditor's application for attachment. *A* sued *B* on a promissory note. *B* was heavily indebted and transferred all the transferable immovable property to his relations after the execution of the promissory note. *A* applied under O. 38, R. 5 for attachment of a part of the sale proceeds in *B's* favour in possession of Collector. The application was granted. *B* applied under S. 95 for compensation.

Held, that it was clear that *A* had reason to suspect that *B* was likely to remove the whole of the attachable property and if it had been stated in the application that all his other property had already been transferred, then the Court would have been justified in granting the application. The grounds, though not stated in the application, were undoubtedly sufficient grounds, and therefore *B* was not entitled to compensation under S. 95. (*Pollock, J.*) RAJARAM CHIMNAJI KALE *v.* BALKRISHNA NILKANTH. **I.L.R. (1938) Nag. 361=169 I.C. 614=16 R.N. 14=A.I.R. 1937 Nag. 126.**

——**S. 95**—*Scope—Application for compensation for wrongful attachment—Absolute order of attachment and non-setting aside of order of attachment—If bar to claim to compensation.*

The setting aside of an order of attachment is not an essential preliminary to the grant of compensation for wrongful attachment under S. 95, C. P. Code. Nor would the passing of an absolute order of attachment be a bar to an application under S. 95 for compensation for wrongful attachment. No such preliminary step has been prescribed in S. 95 which alone governs the procedure in a summary application for compensation for wrongful attachment and a Court would not be justified in hedging this remedy round with restrictions which the section itself does not import. (*Wadsworth, J.*) PALANISAMI GOUNDAR *v.* KALIAPPA GOUNDAR. **1939 M.W.N. 1084=50 L.W. 640=A.I.R. 1940 Mad. 77=(1940) 1 M.L.J. 782.**

——**S. 96**—*Applicability—Appeals from decrees passed by High Court on original side.*

S. 96, C. P. Code, does not apply to appeals from decrees passed by a High Court in exercise of its original jurisdiction, but provides for appeals from other Courts exercising original jurisdiction. The original side of a High Court is just as much the High Court as the appellate side, and rights of appeal are given not by the Code but by the Letters Patent. (*Roberts, C.J. and Leach, J.*) HAJEE SHAKUL HAMID *v.* MOHAMAD IBRAHIM. **1937 Rang.L.R. 97=170 I.C. 822=10 R.R. 107=A.I.R 1937 Rang. 268.**

——**S. 96**—*Applicability—Suit for accounts under S. 33 of the U. P. Agriculturists Relief Act—Trial by Munsif—Right of appeal.*

Where a suit for accounts under S. 33 of the United Provinces Agriculturists Relief Act is tried by a Civil Court of original jurisdiction, a Munsif, the trial Court does not exercise any special jurisdiction under United Provinces Agriculturists Relief Act and hence the right of appeal will be governed by S. 96, C. P. Code. (*Ganga Nath, J.*) DURGA CHARAN *v.* MARKANDE MISIR. **181 I.C. 282=11 R.A. 558=1939 A.W.R. (H.C.) 105=1939 R.D. 71=A.I.R. 1939 All. 233.**

C. P. CODE (1908), S. 96.

——**S. 96**—Decree—Application after preliminary decree in partition suit raising matters not raised in pleadings—Order on—If "decree"—Appealability. *See* C. P. CODE, SS. 2 (2) AND 96. **50 L.W. 541.**

——**S. 96**—"Decree"—Execution—Order refusing to direct value of property to be stated in sale proclamation—Appealability. *See* C. P. CODE, S. 47. **41 Bom.L.R. 328.**

——**S. 96**—*"Decree"—Order by City Civil Judge under S. 7, Madras City Tenants' Protection Act, fixing reasonable rent—Appealability.*

An order passed by the Judge of the City Civil Court, Madras, under S. 7 of the Madras City Tenants' Protection Act fixing a reasonable rent is not appealable. Such an order is not a decree under S. 96, C. P. Code, the scheme of the Act is to make such orders not appealable. (*Burn and Stodart, JJ.*) PERUMAL CHETTIAR *v.* KONDAL CHETTY. **I.L.R. (1939) Mad. 213=183 I.C. 494=12 R.M. 307=49 L.W. 118=1939 M.W.N. 129=A.I.R. 1939 Mad. 430=(1939) 1 M.L.J. 80.**

——**S. 96**—"Decree"—Order under O. 41, R. 5, refusing stay of execution pending appeal—Appealability. *See* C. P. CODE, S. 2 (2). **40 Bom. L.R. 1198.**

——**S. 96**—*Decree in favour of plaintiff imposing conditions—His right to appeal against imposition of conditions—Adverse finding—Applicability—Test.*

Where a decree in favour of the plaintiff allows his claim in its entirety provided a certain condition is fulfilled and dismisses it in its entirety if that condition is not carried out within a specified time, in either event the rights of the parties are conclusively determined by the decree. The plaintiff is entitled to appeal from the order imposing the condition of which he complains. A party in whose favour a decree has been passed may nevertheless have a right to appeal against a finding adverse to him—the test to be applied in each particular case being whether the finding sought to be appealed against is one to which the rule of *res judicata* may be held to be applicable so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding. (*Khundkar, J.*) TARAPADA GHOSE *v.* SAKHI KANTA BEHARA. **42 C.W.N. 492.**

——**S. 96**—*"Decree"—Partition suit—Preliminary decree—Order after and before final decree—If decree—Appealability.*

No appeal lies from an order passed in a partition suit after the preliminary decree and before the passing of the final decree. Such an order cannot amount to a decree so as to be appealable. In a suit for partition there are only two decrees, *viz.*, the preliminary decree and the final decree and no third or further decree can be passed by the Court between these two. (*Bennet and Harries, JJ.*) BANWARI LAL *v.* BENI PRASAD. **10 R.A. 333=171 I.C. 839=1937 A.W.R. 692=1937 A.L.J. 809=1937 A.L.R. 903=A.I.R. 1937 All. 694.**

——**S. 96**—Right of appeal—Party to suit—Suit against manager of Hindu joint family—Co-

parcener impleaded as party as member of family —Right to appeal from decree. *See* HINDU LAW —JOINT FAMILY — MANAGER. **A.I.R. 1937 Sind 94.**

——S. 96 (2)—*Scope — Defendant not filing written statement on date fixed and failing to appear—Pleader's request to make oral statement refused*—Ex parte *decree—If justified—Appeal after dismissal of application to set aside* ex parte *decree—Power of appellate Court to set aside* ex parte *decree and remand suit—C. P. Code, O.* 10, *R.* 2.—*Right of pleader to make oral statement.*

A suit proceeded *inter partes* up to a certain point and the defendant was given time to file a written statement. He, however, was absent on that date and no statement was filed. His pleader offered to make an oral statement but was not allowed to do so. Further adjournment for filing written statement was also refused. The Court proceeded *ex parte* and decreed the suit. An application under O. 9, R. 13 for setting aside the *ex parte* decree was made but was dismissed in default of parties and there was no finding on merits. The lower appellate Court set aside the decree and remanded the case under S. 151, C. P. Code, holding that the trial Court was wrong in passing *ex parte* decree.

Held, that the order of the trial Court was injudicious as the defaulting party to have been penalized by costs and that the lower appellate Court was competent to consider the propriety of passing an *ex parte* order.

Held, further, that O. 10, R. 2, C.P. Code, could not be used to enable counsel to evade a clear direction of the Court. (*Gruer, J.*) RAMBALLABH JASRAJ *v.* DHARAMSI JETHA & Co. **I.L.R. (1937) Nag. 519=173 I.C. 547=10 R.N. 308=A.I.R. 1937 Nag. 268.**

——S. 96 (3)—Applicability — Oath taken in pursuance of offer to be bound by—Decree thereon. *See* OATHS ACT, S. 11. **172 I.C. 421.**

——S. 96 (3)—Consent decree—Parties inviting Court to adopt special procedure—Court adopting and deciding suit—Appeal from decision—Maintainability. *See* APPEAL—COMPETENCY. **71 M.L.J. 281.**

——S. 96 (3), O. 23, R. 3 and O. 43, R. 1 (m) —*Order recording compromise under O. 23, R. 3 if decree by consent—Appeal.*

In construing a particular provision of the Code the Courts should, as far as possible, give to the other provisions of the Code their proper and effective meaning to attain their proper and effective purpose. There is a distinction between a decree passed by consent of parties to which S. 96 applies, and a compromise of suit under O. 23, R. 3. S. 96 does not in all cases bar an appeal which involves a consent decree. Where an order recording a compromise is passed under O. 23, R. 3, an appeal lies from it under O. 43, R. 1, Cl. (*m*) and S. 96 (3) is not a bar to such appeal. 1933 Bom. 205, not foll. (*Davis, J.C. and Dadiba C. Mehta, A.J.C.*) GHANSHAMDAS LOKUMAL *v.* NANIKRAM KHUBCHAND. **29 S.L.R. 437=163 I.C. 240=9 R.S. 2=A.I.R. 1936 Sind 59.**

——S. 97—*Appeal from preliminary decree—Final decree passed during its pendency—Appeal, if competent.*

An appeal filed from a preliminary decree is competent, although during its pendency a final decree is passed but it is not appealed against.

(*Addison and Din Mohammad, JJ.*) JOTI PARSHAD *v.* GIRNARI MAL. **40 P.L.R. 123.**

——S. 97—*Scope—Mortgage suit—Preliminary decree also providing for personal liability—No appeal—Appeal from final decree—Right to challenge provision as to personal liability.*

A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed. Even though an application under O. 34, R. 6, C. P. Code, by the mortgagee is necessary for an order for a personal decree for the balance due, still when the preliminary decree contains a statement that the mortgagor is liable for any deficiency that may be found due and the mortgagor prefers no appeal against such decree and a final decree, is subsequently passed, in an appeal by him against such final decree, not only the preliminary decree itself but even such statement cannot be questioned or altered in view of S 97 of the Code. (*Baguley and Shaw, JJ.*) MAUNG KHIN *v.* L. AHCHOY. **173 I.C. 770=10 R.R. 368 =A.I.R. 1937 Rang 494.**

——S. 98—Difference of opinion among Judges hearing first appeal—Procedure to be adopted. *See* LETTERS PATENT (ALL.), CL. 27 AND C. P. CODE, S. 98. **1938 A.W.R. (H.C.) 712=A.I.R. 1938 All. 641 (F.B.).**

——S. 98 (3)—Consent decree—Meaning of—Right of appeal in cases decided by Court on procedure not warranted by the Code. *See* PRACTICE—APPEAL. **1939 P.W.N. 151.**

——S. 99—*Applicability—Absence of both parties—Allowing of appeal on statement of person not duly accredited—If can be condoned.*

The law does not contemplate the acceptance of an appeal in the absence of the appellant unless the respondent is present and pleads judgment against himself. Where both the parties were absent, but the Court acting on the statement of a relative of the appellant who was not however his duly accredited representative and on the facts as disclosed in the evidence on record allowed an appeal, it was held that such an order should be reversed as the passing of that order is not such an irregularity as could be condoned under S. 99, C. P. Code. (*Darling, S.M. and Mehta, J.M.*) YAQUB KHAN *v.* JAGMOHAN SINGH. **1938 R.D. 745=1938 A.W.R. B.R. 372.**

——S. 99—Applicability—Award—Order filing award and judgment combined into one—No separate judgment and order as required by Sch. II, para. 21—If illegal—Irregularity—If cured. *See* C. P. CODE, SCH. II, PARA. 21. **A.I.R. 1936 Nag. 246.**

——S. 99—*Applicability — Plaint presented by agent without valid power of attorney—Decree—If to be reversed.*

A plaint was presented on behalf of a person by an agent who had no valid power-of-attorney and the suit proceeded without the plaint being signed by that person and a decree was passed.

Held, S. 99, C. P. Code, applied and cured the defect of this kind. (*Roberts, C.J. and Leach, J.*) A. S. ANNAMALAI CHETTYAR *v.* S.R.M.M.C.T.M. CHIDAMBARAM CHETTYAR. **172 I.C. 492=10 R.R. 337=A.I.R. 1937 Rang. 482.**

——S. 99—*Applicability—Privy Council appeal —Objection to amendment of plaint on ground of*

C. P. CODE (1908), S. 99.

misjoinder of causes of action—Objection wrongly overruled by High Court—Decree of High Court, if liable to be reversed.

Even though the High Court has erred in overruling an objection to the amendment of plaint on the ground of misjoinder of causes of action, their Lordships of the Privy Council would not, on that ground, reverse the decree granted by the High Court, when the alleged misjoinder has affected neither the merits of the case nor the jurisdiction of the Court. The provisions contained in Civil Procedure Code, do not regulate the procedure of their Lordships in hearing appeals from India, but there can be no doubt that the rule embodied in S. 99 proceeds upon a sound principle and is calculated to promote justice, and their Lordships would not be prepared to adopt a course which would merely prolong litigation. (*Sir Shadi Lal.*) MAHOMED HUSAIN KHAN *v.* KISHVA NANDAN SAHAI. **64 I.A. 250=I.L.R. (1937) All. 655=1937 M.W.N. 683=41 C.W.N. 1029=46 L.W. 1=1937 O.W.N. 573=18 Pat.L.T 495=65 C.L.J. 438=1937 P.W.N. 553=1937 A.L.R. 527=10 R.P.C. 1=1937 A.W.R. 631=1937 O.L.R. 367=3 B.R. 603=39 P.L.R. 698=39 Bom.L.R. 979=1937 A.L.J. 1032=169 I.C. 1=31 S.L.R. 590=A.I.R. 1937 P.C. 233=(1937) 2 M.L.J. 151 (P.C.).**

——S. 99—*Applicability and scope—Revisional Court—If bound by section—Plaint presented by stranger to suit—Defect—If curable.*

S, 99, C. P. Code, refers only to Courts of appeal and not to a Court of revision. The section also does not condone every irregularity. The presentation of a plaint by a person who is a stranger to the suit is no valid presentation; and the defect cannot be cured under S. 99, C. P. Code. (*Norman.*) MISRI LAL *v.* CHANDAN MAL. **1937 A.M.L.J. 41.**

——S. 99—*Defect or irregularity not affecting the merits—Meaning of.*

A properly constituted rent suit was decreed by the Court having jurisdiction and in execution of that decree property which was purchased by plaintiff in execution of a money decree, was brought to sale. The plaintiff then brought a suit for possession and for declaring that the rent decree and sale thereunder were fraudulent and therefore void.

Held, the plaintiff not having proved that the rent decree was obtained by fraud, the rent decree, having been passed by the Court having jurisdiction, could not be varied or modified in his suit for possession, even though the court passing the rent decree might have acted irregularly in exercise of its juridiction. (*Dhavle and Varma, JJ.*) RATANDEO NARAYAN *v.* JAMUNA PRASAD TEWARY. **169 I.C. 304=3 B.R. 536=9 R.P. 548=1936 P.W.N. 901=A.I.R. 1937 Pat. 147.**

——S. 99—*Order of Honorary Assistant Collector on a public holiday—If* ultra vires.

There are standing orders of the Government of India that no work of a civil nature can be done on a public holiday and if it is done then it amounts to a nullity. Accordingly an order passed by an Honorary Assistant Collector on a public holiday dismissing an application or execution of a decree is clearly *ultra vires* and is liable to be set aside in revision. (*Nanavutty, J.*) AJHODHYA NATH *v.* DEBI DAYAL. **167 I.C. 280=**

C. P. CODE (1908), S. 99.

9 R.O. 373=1937 O.W.N. 247=1937 O.L.R. 104=A.I.R. 1937 Oudh 272.

——S. 99—Scope—Appeal from decree—Court allowing unreasonable extension of time for payment of Court-fee—Wrong exercise of discretion—If ground of attack in appeal—Proper remedy. *See* C. P. CODE, S. 149. **18 Pat.L.T. 665=A.I.R. 1937 Pat. 550 (S.B.)**

——S. 99—Scope—Decree when could not be attacked on ground of irregularities. *See* C. P. CODE, O. 26, R. 9 AND S. 99. **1938 N.L.J. 392.**

——S. 99—*Scope—Suit by Hindu sons impeaching a large number of alienations by their father in favour of various persons—Allegation of vice, extravagance and immorality—Impleading all alienees 78 in number as defendants—Plea of misjoinder raised in written statement but not pressed or proceeded with further—Court dealing with all transactions and coming to correct conclusion—Decree confirmed by High Court—Objection in appeal to Privy Council—Competency.*

The mere fact of misjoinder is not by itself sufficient to entitle the defendant to have the proceedings set aside or action dismissed. S. 99, C. P. Code, is in plain words; joinder of parties and of causes of action is discretionary in the sense that if they are joined there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right. Three plaintiffs, the sons of a Hindu, brought a suit against no fewer than 78 defendants: and the plaint which contained 69 paragraphs alleged that their father, the manager of the joint family governed by the *Mitakshara*, embarked on a career of vice and extravagance, that the alienations effected by him were not binding on them as they were not made for family necessity, and the debts in respect of which the alienations were alleged to have been made were not binding upon them, having been for immoral purposes, and it impeached all the various alienations made in favour of the various defendants on the ground of their father's bad character and habits. All the alienations were fully investigated by the trial Court who decided that the plaintiffs were entitled to succeed in respect of three-fourths interest in the property and his decision was confirmed by the High Court on appeal. An objection was raised in the written statement of certain defendants that the suit was bad for misjoinder and multifariousness, but no appropriate and serious steps were taken at any time before trial for an order requiring the plaintiffs to amend by discarding portions of their claim. The objection having again been raised before the Privy Council.

Held, that there was good reason to think that the joinder of so many distinct causes of action against so many sets of defendants might well have led the trial Court to decline to entertain so many matters in one suit and though the inconvenience and expense avoided by the plaintiffs had been much exceeded by the inconvenience and expense caused to the defendants, the heavy task which fell to the trial judge was ably and fairly discharged, and that no effect could be given to the objection of misjoinder, the merits of the case having been satisfactorily disposed of in spite of the complication of the proceedings. (*Sir George Rankin.*) RAMDHAN PURI *v.* LACHMI NARAIN. **166 I.C. 649=16 Pat. 149=1937 P.W.N. 87=3 B.R. 318=9 R.P.C. 167=45 L.W. 191**

C. P. CODE (1908), S. 100.

=1937 O.W.N. 155=1937 A.W.R. 184=41 C.W. N. 418=1937 O.L.R. 68=1937 A.L.R. 119=1937 A.L.J. 556=1937 M.W.N. 251=65 C.L.J. 47=18 Pat.L.T. 54=39 Bom.L.R. 363=A.I.R. 1937 P. C. 42 (P.C.)

——S. 100.

Adverse Possession—Finding.
Benami.
Burden of proof.
Concurrent finding.
Construction of document.
Custom.
Discretion.
Equitable relief.
Error of law.
Evidence.
Finding of fact.
High Court—Power of.
Intention of parties.
Jurisdiction
Malicious prosecution.
Misreading of document.
Misreading evidence.
Mixed question of fact and law.
New case.
New plea.
Presumption.
Procedure.
Question of fact.
Question of law.
Scope.
Second appeal.

Adverse possession.

——S. 100—*Adverse possession—Finding—Finality—Interference.*

A finding of adverse possession must, to some extent, be a finding of fact, but more particularly in a case where the judgment of the lower appellate Court is a judgment of reversal, the High Court may inquire into the method adopted by the lower appellate Court in coming to its conclusion, and enquire whether the adverse possession as found is supported by evidence and whether the finding, which is said to be based on the proper legal conclusion to be drawn from the settlement and mutation records, is justified. (*McNair, J.*) BEROJULLAH SARKAR *v.* AYATULLAH AKAND. 176 I.C. 706=11 R.C. 159=66 C.L.J. 455=A.I.R. 1938 Cal. 117.

——S. 100—*Adverse possession—Finding—Finality—Scrutiny of evidence in second appeal.*

The question of adverse possession is a mixed question of law and fact and hence in second appeal, there is no finality about the finding and the evidence can be scrutinised to find out if a correct inference has been drawn therefrom. (*Mehta, S M. and Harper, J.M.*) RAJ BAHADUR SINGH *v.* RAM HARAKH. 1939 R.D. 15=(1939) A.W.R. (B.R.) 124 (2).

——S. 100—*Adverse possession—Inference from facts—Question of law.*

It is a question of fact whether adverse possession has been proved, but where the decision is whether adverse possession shall be inferred from facts, it is not a question of fact; it is a question of the legal inference to be drawn from facts. (*Davis, J.C. and Mehta, J.*) TAHILRAM TACKCHAND *v.* MT. MIRAL I.L.R. (1939) Kar. 18=176 I.C. 549=11 R.S. 22=A.I.R. 1938 Sind 132.

C. P. CODE (1908), S. 100.

Benami.

——S. 100—Benami—*Question of—Finding of* benami *by trial Court on circumstantial evidence—Reversal on appeal without consideration of evidence—If binding in second appeal.*

The question whether a transaction is a *benami* or not is no doubt a question of fact; and when there is circumstantial evidence on which the trial Court justifiably infers that a transaction is *benami*, it is not open to the lower appellate Court to reverse that finding unless it considers that evidence. The finding of the lower appellate Court under such circumstances that it is not *benami* without considering the evidence is not therefore a proper finding which can be regarded as binding in second appeal. (*Cunliffe and Henderson, JJ.*) RAMESH CHANDRA GUHA *v* DINANATH MESTARI. 63 Cal. 846=162 I.C. 348 =8 R.C. 600=62 C.L.J. 483=A.I.R. 1936 Cal. 178.

Burden of proof.

——S. 100—*Burden of proof—Finding based on mistaken view of burden of proof—Interference.*

Where the evidence has been viewed in the lower appellate Court on a mistaken application of the rule as to burden of proof, its judgment is vitiated on a point of law and is open to attack in second appeal. (*Beckett, J.*) HARCHAND *v.* HIRA LAL. 180 I.C. 138=11 R.L. 663=40 P.L.R. 682 =A.I.R. 1938 Lah. 760.

——S. 100—*Burden of proof—Finding of fact based on wrong view as to burden of proof —Finality.*

A finding of fact of first Court even if confirmed by the first appellate Court can be set aside in second appeal if such finding has proceeded upon a wrong basis as to burden of proof. (*Bose, J.*) PREMRAJ BHEORAJ *v.* NATHUMAL RUPCHAND. I.L.R. 1936 Nag. 142=164 I.C. 740=9 R.N. 31 =A.I.R. 1936 Nag. 130.

——S. 100—*Burden of proof—Finding of fact or law—Finding arrived at by misapplying law.*

A finding arrived at by misapplying the law, by wrongly placing the burden of proof, is not merely a finding of fact but is one of mixed law and fact, and it can be set aside in second appeal. (*Dunkley, J.*) S. P. L. S. CHETTIYAR FIRM *v.* MA PU. 14 Rang. 697=163 I.C. 604=9 R.R. 33=A. I.R. 1936 Rang. 262.

——S. 100—*Burden of proof—Finding of fact —Onus wrongly laid—Omission to consider all the facts and circumstances—Finality of finding.*

A finding of fact which is not properly arrived at is not binding in second appeal when the lower Courts lay the onus of proof on the wrong party and do not consider all the facts and circumstances on both sides, the finding arrived at cannot be said to be a proper finding so as to be binding on the High Court in second appeal. (*Pollock, J.*) MOHAMMAD MUSTAFAKHAN *v.* WAMANRAO. 19 N.L.J. 301.

——S. 100—*Burden of proof—Question of law.*

Where a Court considers the case and the evidence of one side only and disbelieving the evidence dismisses the claim on the ground that the assertions made have not been proved, the case is being solely decided on the question of onus and no amount of lip service to a rule which is ignored in the letter and in the spirit will serve to turn what is then a question of law into one of

C. P. CODE (1908), S. 100.

fact. (*Bose, J.*) UDHEBAN *v.* VITHOBA. I.L.R. (1939) Nag. 160=180 I.C. 443=11 R.N. 358=1938 N.L.J. 459=A.I.R. 1939 Nag. 78.

Concurrent finding.

——S. 100—*Concurrent findings of fact—Duty of second appellate Court.*

Where the entries in the papers as between the *khasra* and *khatauni* are discrepant, the evidence also is undoubtedly confused and the pleadings of both parties are partially wrong and the lower Courts have done their best to extricate the truth from out of all these, there can be no justification in second appeal to go against the concurrent findings of the lower Courts. (*Harper, S M.*) IQBAL BAHADUR *v.* RAM LAL. 1940 O.A. 491=1940 A.W.R. (B.R.) 106.

——S. 100—*Concurrent findings—Question of fact—Question as to validity of permanent lease of waste lands of trust—Interference.*

It is not an absolute rule of law that in no circumstances should a permanent lease be granted in respect of waste lands belonging to a trust. The question is one of degree, depending upon a number of circumstances and therefore a question of fact; where the lower Courts have not fallen into any error of law and have not lost sight of any rule of law in dealing with the question of the validity of a permanent lease of waste lands belonging to a trust, the concurrent finding of the lower Courts that a particular lease was granted for a justifiable cause cannot be interfered with in second appeal, although some of the observations made by the lower Courts may be open to criticism. (*Varadachariar, J.*) NELLAYAPPAR KANTHIMATHI AMBAL TEMPLE, TINNEVELLY *v.* ARUNACHALAM PILLAI. 1937 M.W.N. 1188.

Construction of document.

——S. 100—*Construction of documents—Document of title—Meaning of word.*

The question as to which of two alternative meanings of a certain word appearing in a document should in the context be held applicable, is one of interpretation of the document, and if the document is one of title it would be open to second appeal. (*Dalip Singh, J.*) HANS RAJ *v.* TULSI. 41 P.L.R. 326=A I.R. 1939 Lah. 264.

——S. 100—*Construction of document—Finding as to meaning of certain words used in a document—Finality.*

A finding by the lower appellate Court as to the meaning of certain words used in a document must be regarded as a finding of fact. It is doubtful if its interpretation is open to question in second appeal. (*Smith, J.*) PARMESHWAR SINGH *v.* BAIJ NATH. 167 I C. 295=9 R.O. 374 =1937 O.L.R. 106 (2)=1937 O.W.N. 356=A.I. R. 1937 Oudh 295.

——S. 100—*Construction of documents—Finding based on documents of title—If can be challenged.*

A finding based on *khatauni and khasras* which are instruments of title can be challenged in second appeal even if it is a finding of fact. (*Zia-ul-Hasan, J.*) GULAI *v.* SRIPAL. 12 Luck. 155=162 I.C. 334=8 R.O. 363=1936 R.D. 172=1936 O.W.N. 375.

——S. 100—*Construction of documents—Finding based on—Interference.*

A finding of the lower appellate Court based upon documents which are instruments of title

C. P. CODE (1908), S. 100.

and not merely historical material, even if it be a finding of fact, can clearly be challenged in second appeal. (*King, C.J. and Nanavutty, J.*) AMJAD HUSAIN *v.* NAWAB ALI. 11 Luck. 642=161 I.C. 158=8 R.O. 307=1936 R.D. 35=1936 O.L.R. 147=1936 O.W.N. 100=A.I R. 1936 Oudh 225.

——S. 100—*Construction of document of title—If can be gone into.*

The construction of a document of title is a question of law or at any rate of mixed fact and law and the second appellate Court can go into such matter. (*Mohammad Noor and Rowland, JJ.*) JYOTI PRASAD SINGH *v.* RAJENDRA NARAYAN SINGH DEO. 162 I.C 838=8 R P. 586=1936 P. W.N. 458=A.I.R. 1936 Pat. 287.

——S. 100—*Construction of document—If ground for second appeal.*

Misconstruction of a document in the sense of misinterpretation of a term of it so as to lead to a wrong legal inference is certainly a matter for second appeal. (*Gruer, J.*) SANTOSHRAO *v.* SHEOLAL. 20 N.L.J. 39.

——S. 100—*Construction of documents—Interference in second appeal.*

Where the construction placed by the lower appellate Court upon the documents which it considers is not an unreasonable one, no point arises in second appeal for interference. (*Fazl Ali, J.*) NARAIN PANDEY *v.* SURAJBHAN LAL. 18 Pat.L.T. 289=1937 P.W.N. 98=169 I.C. 897=3 B.R. 678=10 R.P. 91=A.I.R. 1937 Pat. 414.

——S. 100—*Construction of documents—Interference.*

The fact that certain documents which are not documents of title have been misconstrued by the lower appellate Court, would not be a good ground for second appeal. (*Tek Chand, J.*) MANGAL DAS *v.* MOOL RAJ. 39 P.L.R 376.

——S. 100—*Construction of documents—Interference.*

Even though the lower appellate Court may not have placed a correct construction on the documents exhibited that would not entitle the High Court to interfere with its finding of fact in a second appeal. (*Jack, J.*) GOPI MOHAN JEO THAKUR *v.* BEPIN BEHARI BHAKAT. 173 I.C. 358 =10 R.C. 507=65 C L.J. 325=A.I.R. 1937 Cal. 371.

——S. 100—*Construction of documents—Mere pieces of evidence—Inference—Challenging in second appeal.*

When the Court only considers various documents as mere pieces of evidence involving no question of construction, its inference of fact is not open to challenge in second appeal. (*Niyogi, J.*) RAJLU NAIDU *v.* MALAK. I.L R (1939) Nag. 580=186 I.C. 155=12 R.N. 187=1939 N.L.J. 297=A.I.R. 1939 Nag. 197.

——S. 100—*Construction of documents—Question of fact.*

The interpretation of documents which are not instruments of title is a question of fact. (*Skemp, J.*) DEVI DAS *v.* YARAN KHAN. 168 I.C. 638=9 R.L. 661=39 P.L.R. 482=A.I.R. 1937 Lah. 656.

——S. 100—*Construction of document—Question of law.*

Per *Rupchand Bilaram, A. J. C.*—Where a suit is founded on an agreement between the vendee and the vendor, its construction is a question of law and not of fact. (*Rupchand Bilaram and Haveliwala, A. J. Cs.*) DAYARAM CHAINRAI *v.*

C. P. CODE (1908), S. 100.

KARMUMAL KOTUMAL. 172 I.C. 322=10 R.S. 141=A.I.R. 1937 Sind 263.

——S. 100—*Construction of documents—Question of law.*

The construction of documents is a question of law which may be considered in second appeal. But where there is no error in the construction of a document, and it is argued that there is a mistake in drawing an inference from the document, that is not an error of law, but an error of fact, and High Court will not interfere with a finding of fact by the lower appellate Court merely because it is erroneous. (*Davis, J.C. and Mehta, A.J.C.*) GULABRAI DAYARAM *v.* INDIA EQUITABLE INSURANCE CO. 30 S.L.R. 371=167 I.C. 929=9 R.S. 207=A.I.R. 1937 Sind 51.

——S. 100—*Construction of document—When question of law.*

A decision as to how much area was the subject matter of settlement of a touzi at the time of its settlement, which is arrived at on the construction of a Rubkari is a question of law so far as the question of construction of Rubkari is concerned. (*Wort and Agarwala, JJ.*) RAM RAMBIJAYA PRASAD SINGH *v.* KRISHNA MADHO. 182 I.C. 982=5 B.R. 864=12 R.P. 89=20 P.L.T. 677 =A.I.R. 1939 Pat. 364

——S. 100—*Construction of documents which are not documents of title—Erroneous decision as to effect—Interference.*

Where none of the documents filed in a case is a document of title, nor is there any question or any decision of the Court with regard to the documents which is a decision on a question of law, an erroneous decision by the Court as to the import of such document is not error of record, but is merely an erroneous decision by the Court on a question of fact, and is binding in second appeal. A.I.R. 1918 P.C. 92, Rel. on. (*Wort and Rowland, JJ.*) SUDHAKAR MISRA *v.* NILKANTHA DAS. 161 I.C. 465=8 R.P. 446=A.I.R. 1936 Pat. 129.

——S. 100—*Construction of plaint—Question of law.*

The construction of plaint is a question of law. (*Dhavle and Varma, JJ.*) LADHURAM MARWARI *v.* BANSIDHAR MARWARI. 16 Pat. 527=4 B.R. 78 =18 Pat.L.T. 640=1937 P.W.N. 677=10 R.P. 260=171 I.C. 881=A.I.R. 1937 Pat. 572.

Custom.

——S. 100—*Custom—Finding as to existence—When open to interference.*

Where a question as to the existence of a custom has been decided by a lower Court, what has to be seen is not merely whether the decision arrived at is one of fact but whether in arriving at it, the Court has committed an error in law or not; for instance, if it was based upon the acceptance of evidence which was inadmissible, it could be questioned in second appeal but if it was so based because the Judge believed the evidence of some and disbelieved that of the others, it could not be questioned in second appeal. (*Hamilton, J.*) RAM DIN *v.* BALBHADDAR SINGH. 14 Luck. 515=181 I.C. 70=11 R.O. 280=1939 O.L.R. 235=1939 R.D. 250=1939 O.A. 364= 1939 O.W.N. 372=A.I.R. 1939 Oudh 210.

——S. 100—*Custom—Finding as to existence of custom—Plea that it is qualified—If open in second appeal.*

Where the lower Courts have found that according to the village custom as recorded in the Wajib-ul-arz the groves of the judgment-debtor are inalienable and cannot be attached and sold in execution of the decree, and the decree-holder did not plead in the Courts below that the custom was qualified in the sense of the restraint against alienation being merely for the benefit of the proprietor, it is not open to him to raise that plea in second appeal which is concluded by the finding of the lower Courts about the existence of the custom. (*Srivastava and Nanavutty, JJ.*) KANDHAI LAL *v.* SHEO NATH. 12 Luck. 59=161 I.C. 266=8 R.O. 316=1936 O.W.N. 260=1936 R.D. 113=1936 O.L.R. 153=A.I.R. 1936 Oudh 235.

——S. 100—*Custom—Finding as to proof of—High Court, if and when can interfere in second appeal.*

The finding of lower Court that a custom has not been proved, is a finding on a mixed question of fact and law. The High Court sometimes interferes with such a finding on the ground that the evidence is so considerable in favour of the existence of the custom that the lower Court should have found, the custom proved. But if it is in accordance with the weight of evidence, it would be impossible to reverse it in second appeal. (*Bennet and Verma, JJ.*) PAUHARI BISHUNATH JATI *v.* RAMLAGAN JATI. 183 I.C. 471=12 R.A. 143=1939 R.D. 234=1939 A.W.R. (H.C.) 313= 1939 A.L.J. 617=A.I.R. 1939 All. 500.

——S. 100—*Custom—Finding that custom set up is not established—Interference.*

A finding of the lower Courts that a custom set up by a party has not been established by him is one of law and cannot be interfered with in second appeal when it is not vitiated by any error of law. (*Niamatullah, J.*) MATHURA PRASAD *v.* BHOLA NATH. 174 I.C. 433=1938 R.D. 233=10 R.A. 575=1938 A.L.R. 272=1937 A.L.J. 1301= 1937 A.W.R. 1228=A.I.R. 1938 All. 144.

——S. 100—*Custom or usage—Existence of—Question as to—If open in second appeal.*

The question whether the facts found in any particular case prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal. (*Agarwala and Madan, JJ.*) RUDRA NARAIN SINGH *v.* KEDAR NATH SINGH. 18 Pat.L.T. 477 =1937 P.W.N. 526=3 B.R. 762=10 R.P. 148= 170 I.C. 754=A.I.R. 1937 Pat. 458.

——S. 100—*Custom—Question as to—Mixed question of law and fact.*

Custom is a mixed question of law and fact. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB *v.* LAXMANAPPA RAMAPPA. 178 I.C. 854= 11 R.B. 198=40 Bom. L.R. 1015=A.I.R. 1938 Bom. 492.

——S. 100—*Custom—Reasonableness of custom—Question of law.*

A question as to the reasonableness or otherwise of a custom is a question of law and it is open to the High Court in second appeal to look into the facts found by the lower appellate Court, for the purpose of deciding as to whether the custom alleged is reasonable or not. (*M. C. Ghose and Mukherjea, JJ.*) ASRABULLA *v.* KIAMATULLA HAJI CHOUDHURY. I.L.R. (1937) 2 Cal. 86=41 C.W.N. 503=66 C.L.J. 284=10 R.C. 305 =171 I.C. 785=A.I.R. 1937 Cal. 245.

——S. 100—*Custom or usage—Question whether usual practice prevails and duration of its existence—If one of law.*

C. P. CODE (1908), S. 100.

Whether a usual practice prevails or not, and the length of its existence are questions of fact; although the legal inferences which follow from them may be questions of law. 1931 All. 499 (F.B.), Foll. (*Bose, J.*) GANGADHAR MARTI *v.* SHRI SUNDAR NARAIN SANSTHAN. **I.L.R. 1936 Nag. 13=164 I.C. 825=9 R.N. 39=A.I.R. 1936 Nag. 95.**

Discretion.

——S. 100—*Discretion—Calling of witness by lower appellate Court—Interference in second appeal.*

Where the lower appellate Court examines of its own motion under O. 41, R. 27, C. P. Code, a witness who, in its opinion, should have been examined by one of the parties, there is nothing illegal in the exercise of its discretion, and it is not open to the Court on second appeal to decide whether the discretion has not been rightly exercised. (*Jai Lal, J.*) ROSHAN LAL *v.* CHARAN DAS. **168 I.C. 466=9 R.L. 637=38 P.L.R. 449 =A.I.R. 1937 Lah. 115.**

——S. 100—*Discretion—Exercise of, by Trial and Appellate Courts—Power of High Court in second appeal.*

The discretion given to the trying Court is not one to be exercised arbitrarily but with due regard to the facts of the case and general principles of justice. High Court in second appeal has power to see which of the two Courts exercised discretion properly in accordance with the judicial principles. (*Niyogi. J.*) BALIRAM *v.* UTTAM CHAND. **I.L.R. (1939) Nag. 452=182 I. C. 52=11 R.N. 495=1939 N.L.J. 157=A.I.R. 1939 Nag. 110.**

——S. 100—*Discretion—Grant of specific performance—Discretion of lower Court—Interference in second appeal.*

Per *Haveliwala, A.J.C.*—Under S. 22, Specific Relief Act, discretion in the grant of specific performance of the contract depends on the facts and circumstances of each case and where discretion has been exercised by the first appellate Court on the consideration of the evidence recorded, the Judicial Commissioner's Court should not interfere unless it is shown that the discretion was perverse and against judicial principles. More so in second appeal in which questions of fact which are the basis for the exercise of the discretion cannot be gone into. Where the interference in the discretion of the trial Court, by the first appellate Court, rests on the consideration of the whole of the evidence and its decision is on the findings of fact both on the evidence and on the documents which is within the competence of the first Appellate Court to challenge, the Judicial Commissioner's Court cannot and should not interfere unless those findings are vitiated by some error of law.

Per *Rupchand Bilaram, A.J.C.*—Where the appellate Court interferes with the discretion of the trial Court and the basis of the interference is wrong and arbitrary, not judicial, the Judicial Commissioner's Court is justified in interfering with the discretion exercised by the appellate Court. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) DAYARAM CHAINRAI *v.* KARMUMAL KOTUMAL. **172 I.C. 322=10 R.S. 141=A.I.R. 1937 Sind 263.**

C. P. CODE (1908), S. 100.

——S. 100—*Discretion—Interference—Exercise of discretion on misapprehension of legal principles—Power of High Court in second appeal.*

Where the lower Courts have exercised their discretion not on the special facts of the case but on a misapprehension of the legal principles on which the discretion given by a provision of law should be exercised, it is competent to the High Court in second appeal to interfere and overrule that exercise. (*Norman.*) SHAM LAL *v.* BABU RAM. **1937 A.M.L J. 49.**

——S. 100—*Discretion — Interference with—Limitation Act, S. 5.*

It is only when the lower appellate Court exercises a judicial discretion, that the High Court will not entertain a second appeal on a plea that the lower appellate Court was wrong in applying the provisions of S. 5, Limitation Act. If the reasoning of the lower appellate Court is based wholly upon an erroneous view of law, or the Court rejects such a plea arbitrarily without exercising judicial discretion, the High Court will interfere in second appeal. (*Agha Haidar, J.*) LADHA MAL-BISHEM DAS *v.* NADAR. **166 I. C. 698=9 R.L. 407=A.I.R. 1936 Lah. 742.**

——S. 100—*Discretion—Interference in second appeal—High Court's powers.*

The High Court does not ordinarily interfere in second appeal with the discretion of the Court below when such discretion has been exercised judicially on a full consideration of the evidence in the case. But where the lower appellate Court has not directed its mind to the evidence in the case at all, but has disposed of the suit on a preliminary objection, there is no bar to the High Court interfering with the decision of the lower Court in such a case (*Agarwala and Rowland, JJ.*) SATRUHAN PRASAD SINGH *v.* UDAI PRATAP NARAIN SINGH. **187 I.C. 207=6 B.R. 433=12 R.P. 573=A.I.R. 1940 Pat. 502.**

——S. 100—*Discretion—Refusal of application for adjournment and dismissal of appeal for want of prosecution—Interference in second appeal.*

An appellate Court has a discretion to grant or refuse an adjournment prayed for by the appellant or his pleader; and the exercise of that discretion is not a matter which can be made the subject of a second appeal. A refusal of an adjournment and the consequent dismissal of the appeal for want of prosecution cannot therefore be interfered with in second appeal. (*Niamatullah, J.*) MOHAMMADI HUSAIN *v.* CHANDRO. **168 I.C. 1001=9 R.A. 697=1937 A. L.R. 439=1937 A L.J. 174=1937 A.W.R. 122= A.I.R. 1937 All. 284.**

——S. 100—*Discretion—Wrong exercise of—Interference—Amendment of plaint.*

Where a judge allowing an amendment of the plaint has proceeded on a wrong view of the law so that he could not have applied his mind to the question whether he should or should not, in his discretion allow the amendment, the High Court would interfere in second appeal though the matter was one in the discretion of the lower Court. (*Stone, C.J. and Bose, J.*) LACHHMANSING *v* MAHENDRA LAL. **I.L.R. (1939) Nag. 194 =176 I.C. 728=11 R.N. 72=1938 N.L.J. 198= A.I.R. 1938 Nag. 388.**

C. P. CODE (1908), S. 100.

Equitable relief.

——S. 100—*Equitable relief — Lower Court wrongly refusing equitable relief—Interference.*

The High Court will always interfere in second appeal where a lower Court has wrongly refused to grant an equitable relief. (*Horwill, J.*) NARAYANAN NAIR *v.* CHEKUNNI. 1937 M.W.N. 245=45 L.W. 648=10 R.M. 164=170 I.C. 242=A.I.R. 1937 Mad. 520.

Error of Law

——S. 100—*Error of law—Finding by appellate Court in reversal of trial Court's decision without giving reasons and without discussing evidence—Interference in second appeal.*

A provisional finding upsetting a very closely reasoned and elaborate judgment of the trial Court without any discussion of evidence whatever or without giving any reason except the general reason that the evidence is not satisfactory is contrary to law and will be set aside in second appeal. (*Pandrang Row, J.*) VEERAMMA *v.* VEERAPPA. 173 I C. 333=10 R.M. 565=A.I.R. 1937 Mad. 282.

——S. 100—Error of law—Improper rejection of evidence—Collection papers to rebut presumption under S. 50 (2), B. T. Act—Exclusion from consideration—If vitiates finding—Interference. *See* B. T. ACT, S. 50 (2). A.I.R. 1936 Cal. 483.

——S. 100—*Error of law—Test—High Court, if can hear appeal on facts.*

There is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case, when several facts admitted or proved are not considered in their relation to each other and weighed as whole, when a certain legal consequence which naturally follows from admitted and proved facts is overlooked, or when a material part of admissible evidence which vitally bears on the point at issue is disregarded. A case which involves such an error of law must fall within the ambit of S. 100, C. P. Code. Where therefore lower Court's judgment is based on an error of law it cannot attain finality and High Court in appeal can hear it on facts. (*Niyogi, J.*) MT. ANUPA BAI *v.* BHAGWANT SINGH. I.L.R. (1938) Nag. 535=179 I.C. 285=11 R.N. 283=A.I.R. 1938 Nag. 470.

Evidence.

——S. 100—*Evidence—Respondent in lower appellate Court not attacking points decided against him—Evidence on those points, if can be gone into in second appeal.*

The right which a respondent in the lower appellate Court has under O. 41, R. 22, C. P. Code, to support the trial Court's decree in his favour on any points which were decided against him, if not availed of, cannot be used to ask the Court in second appeal to go into evidence bearing on that issue. (*Niyogi, J.*) PANNALAL *v.* SUMRANLAL. I.L.R. (1939) Nag. 624=185 I.C. 108=12 R.N. 133=1939 N.L.J. 391=A.I.R. 1939 Nag. 260.

Finding of fact.

——S. 100—*Finding of fact—Absence of—Power of second appellate Court to arrive at finding of fact.*

The High Court in second appeal is entitled to come to a finding of fact where the lower appellate Court has omitted to arrive at such a finding.

C. P. CODE (1908), S. 100.

(*Bennet and Verma, JJ.*) DAULATA KUER *v.* RAM DAS RAI. 1940 A.W.R. (H.C.) 276=1940 A.L.J. 366=A.I.R. 1940 All. 349.

——S. 100—*Finding of fact—Alienation by mahant—Legal necessity—Question as to—Nature of—Finding on—Finality.*

The question of legal necessity for an alienation by way of a permanent lease by the *mahant* of a *math* is a question of fact. The finding of the lower appellate Court on such a question is binding in second appeal, though the question is disposed of by that Court by applying a principle of law to the proved facts of the case. (*Wort and Rowland, JJ.*) DARBAR SAHEB *v.* BARE LAL KANDARP NATH SAH DEO. 162 I.C. 797=8 R.P. 567=17 Pat.L.T. 488=A.I.R. 1936 Pat. 275.

——S. 100—*Finding of fact—Appellate Court erring in law in arriving at conclusion upon facts.*

Where the lower appellate Court errs in law in holding on the facts of a case that the descent has not been from preceptor to disciple, the finding can be interfered with in second appeal. (*Dalip Singh and Skemp, JJ.*) GHULAM MOHYUD DIN *v.* MT. HAJRAN BIBI. 178 I.C. 58=11 R.L. 393=A.I.R. 1938 Lah. 182.

——S. 100—*Finding of fact—Concurrent findings—Rule as to non-interference with—Meaning of.*

On second appeal it is not the concurrent finding of fact which cannot be interfered with; it is the finding of fact of the first appellate Court, and there is no question of it being within the discretion of the second appellate Court to interfere; the second appellate Court cannot interfere, however erroneous it may think this finding of fact to be. (*Dunkley and Wright, JJ.*) U RAI GYAW THOO, LTD. *v.* MA HLA U PRU. 1940 Rang.L.R. 180=A.I.R. 1940 Rang. 126.

——S. 100—*Finding of fact—Construction of deed—Interference.*

Where it is clear that the lower appellate Court has wrongly interpreted a deed in the same manner as the trial Court and the other facts relied on by the appellate Court are insufficient to sustain the legal inference arrived at by it, the second Appellate Court is bound to interfere and may set aside the judgment and decree. (*Davis, J.C. and Weston, J.*) DOLUMAL *v.* PARMESHARIBAI. A.I.R. 1940 Sind 74.

——S. 100—*Finding of fact—Date of termination of agency—Finding as to—If final.*

A finding by the lower appellate Court as to when an agency terminated is binding in second appeal. (*Bajpai, J.*) HINGU LAL *v.* SARJU PRASAD. 169 I.C. 135=1937 A.L.R. 449=9 R.A. 706=1937 A.L.J. 264=1937 A.W.R. 163=A.I.R. 1937 All. 363.

——S. 100—*Finding of fact—Decision reached after interpreting documents.*

The conclusions of the lower appellate Court that the rights of a party in certain maufi jagirs are not connected with any grant of pension within the meaning of the Pensions Act is essentially a finding in fact which cannot be disturbed in second appeal. It is no less a finding in fact because in reaching his decision the lower Court had to interpret a number of documents. (*Thom, C.J., Collister, Allsop, Ganga Nath and Braund, JJ.*) SAADAT HUSAIN *v.* RAM KISHAN DAS. 1940 A.W.R. (H.C.) 397=1940 A.L.J. 420=A.I.R. 1940 All. 373 (F.B.).

C. P. CODE (1908), S. 100.

——S. 100—*Finding of fact—Dismissal of appeal under O. 41, R. 11, C. P. Code—Finding of fact recorded in judgment consisting only of a few lines—If conclusive—Interference.*

A finding of fact of the lower appellate Court is conclusive in second appeal and the mere fact that the judgment of the lower appellate Court consist only of a few lines does not make the finding of fact any the less binding. There is nothing in the Code of Civil Procedure to take out of this rule a case in which the lower appellate Court records a finding of fact while dismissing an appeal under O. 41, R. 11, C. P. Code. The High Court will not interfere in the absence of any errer of law or of defect in procedure. (*Rowland and Chatterji, JJ.*) BAIJOO LALL KATARAYAR *v.* RAJENDRA NATH BHATTACHARIYA. **179 I.C. 803=5 B.R. 295=11 R.P. 405=A.I.R. 1939 Pat. 267.**

——S. 100—*Finding of fact—Evidence—Failure to refer to—Interference.*

Where the High Court is not satisfied with the finding of the fact on the point of possession because the appellate Court had not categorically made reference to the statements of the defendant's witnesses whom it purported to disbelieve nor had it made any reference to the witnesses of the plaintiff on the question of possession, the High Court can look into the evidence of the case and if satisfied that the finding was correct, should not interfere. (*Manohar Lall, J.*) PALAKDHARI MAHTON *v.* PURANDRA PRASAD. **173 I.C 228=4 B.R. 224=10 R.P. 387=A.I.R. 1938 Pat. 10.**

——S. 100—*Finding of fact—Fact assumed but not established by evidence—Finality.*

An assumption of a fact which is not established by evidence is not a finding of fact binding in second appeal. (*D. R. Norman*) INDRA BHAN *v.* KALA BHAWAN. **1937 A.M.L.J. 7.**

——S. 100—*Finding of fact—Finality.*

A finding of fact of the first appellate Court is binding upon the High Court however gross and in excusable that finding may be. 17 I.A. 122, Foll. (*Wort and Rowland, JJ.*) MOHAN LAL RAM GOPAL *v.* UDAI RAM SEWA RAM. **161 I.C. 516=8 R.P. 454 (2)=A.I.R. 1936 Pat. 140.**

——S. 100—*Finding of fact—Finality of.*

In second appeal the High Court has no jurisdiction to reverse or alter a finding of fact. A question of fact cannot be agitated in second appeal. (*Niyogi, J.*) SHEIKH NUROO *v.* SETH MEGHRAJ RAMKARAN. **I.L.R. (1937) Nag. 214=170 I.C. 790=10 R.N. 91=A.I.R. 1937 Nag. 139.**

——S. 100—Finding of fact—Finality—Finding based on inadmissible materials and achieved by unjustifiable procedure—If binding in second appeal. *See* C. P. CODE, O. 18, R. 18. **48 L.W. 595.**

——S. 100—*Finding of fact—Finality—Failure to consider part of evidence—Interference.*

Where the lower appellate Court records findings of fact, the High Court cannot re-open the matter merely because some items of evidence may not have been considered. (*Rowland, J.*) KUNJ BIHARI THAKUR *v.* UMASHANKAR PRASAD. **173 I.C. 237=10 R.P. 388=4 B.R. 228=A.I.R. 1938 Pat 38.**

——S. 100—*Finding of fact—Finality—Failure to consider material evidence—Effect.*

C. P. CODE (1908), S. 100.

If an appellate Court, while reversing a well considered judgment of the trial Court, fails to advert to, or in any way indicate that it has considered, a most material piece of evidence which militates against its own view, its finding cannot be accepted as an unassailable finding of fact in second appeal. (*Venkatasubba Rao and Abdur Rahman, JJ.*) BAPAYYA *v.* RAMAKRISHNAYYA. **179 I.C. 265=11 R.M. 560=1938 M.W.N. 354=47 L.W. 477=A.I.R. 1938 Mad. 568=(1938) 1 M.L.J. 582.**

——S. 100—*Finding of fact—Finality—Finding on point not pleaded based on slender evidence.*

The lower appellate Court as the final Court of fact is entitled to draw such inferences from facts as it thinks proper, and in second appeal there is no power in High Court to interfere with those findings; but when the Appellate Court, on the slenderest of evidence, makes out a case which is not in the pleadings, its finding of fact cannot be binding in second appeal. (*Agarwala, J.*) BINDESHWARI RAI *v.* RAM PALAK SINGH. **175 I.C. 91=4 B.R. 521=10 R.P. 580=1938 P.W.N. 741=A.I.R. 1938 Pat. 181.**

——S. 100—*Finding of fact—Finality—Finding that land had been rendered unfit for tenancy.*

Where a tenant builds cooly huts on the land and the lower Court comes to the conclusion that by reason of such construction the land has been rendered unfit for the purpose of tenancy and that there has been a breach of S. 22 of Chota Nagpur Tenancy Act, the finding is one with which the High Court is not entitled in second appeal to interfere. (*Wort, Ag.C.J. and Manohar Lall, J.*) RAMJAP DUBE *v.* JAGADISH CHANDRA DEO DHABAL. **11 R.P. 237=178 I.C. 274=5 B.R. 78=A.I.R. 1939 Pat. 161.**

——S. 100—*Finding of fact—Finality of—Powers of High Court.*

The High Court, in dealing with second appeals under S. 100, C. P. Code, is confined strictly to questions of law, and is bound to accept the lower Court's findings of fact. The High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law, although, if it were dealing with the case as a Court of fact, it might take a different view of the evidence in the case. (*Agarwala and Varma JJ.*) JOALA PRASAD SINGH *v.* CHANDERJOT KUER. **17 Pat. 430=4 B.R. 656=175 I.C. 783=11 R.P. 47=1938 P.W.N. 250=19 Pat.L.T. 281=A.I.R. 1938 Pat. 278.**

——S. 100—*Finding of fact—Finality—Question whether tenancy is permanent or not—Lower appellate Court not weighing and discussing evidence—Interference in second appeal.*

The question to decide whether a certain tenancy is permanent or not, when it depends entirely upon the oral and documentary evidence evidencing series of transactions in the absence of a document of title, is always a question of difficulty and in such cases the lower Appellate Court, being the final Court of fact, should be careful to give its reasonings in its judgment, so that the superior Court may be able to see that the evidence, both oral and documentary, in the case has been properly weighed. Where the judgment of the lower appellate Court merely reiterates the findings of the trial Court and does not discuss the oral or documentary evidence, the

C. P. CODE (1908), S. 100.

judgment cannot be said to be a proper judgment. (*Manohar Lall, J.*) CHHAGANMAL MARWARI *v.* INDRA KEOT. 179 I.C. 176=11 R.P. 337=5 B.R. 205=A.I.R. 1938 Pat. 609.

——S. 100—*Finding of fact—Finality—Weak evidence.*

A finding on a question of fact which is supported by evidence, however weak, cannot be challenged in second appeal. (*Ismail, J.*) RAM ADHAR MISIR *v.* JAGNOO MISIR. 174 I.C. 82=1938 A.L.R. 237=10 R.A. 546=1937 A.W.R. 1223=1937 A.L.J. 1311=A.I.R. 1938 All. 100.

——S. 100—*Finding of fact—Finding arrived at without Court applying its mind to facts and circumstances of the case—Finality.*

A finding of fact arrived at by the lower appellate Court without applying its mind to the facts and circumstances on which the trial Court has based its decision cannot be accepted as binding in second appeal. (*Nasim Ali and Edgley, JJ.*) A. H. MOHAMMAD ISMAIL & CO. *v.* SACHIDANANDA BHATTACHARJEE. 40 C.W.N. 769.

——S. 100—*Finding of fact—Finding as to document being tampered with.*

A finding that a document has been tampered with is a finding of fact and is binding upon the High Court in second appeal. (*Mohamad Noor and Dhavle, JJ.*) JANARDAN PARIDA *v.* PRANDHAN DAS. 5 C.L.T. 45=A.I.R. 1940 Pat. 245.

——S. 100—*Finding of fact—Malicious arrest—Finding as to absence of reasonable and probable cause and existence of malice—Suit for damages for—Interference in second appeal*

The finding of the lower appellate Court as to the absence of reasonable and probable cause and to the existence of malice in a suit for damages for malicious arrest, is not a finding of fact conclusive in second appeal. The question is one of law and the High Court has therefore jurisdiction to interfere in second appeal. (*Manohar Lall, J.*) MADAN LAL *v.* LAKSHMI NARAIN. 179 I.C. 790=11 R.P. 401=5 B.R. 286=20 P.L.T. 367=1938 P.W.N. 783=A.I.R. 1939 Pat. 13.

——S. 100—*Finding of fact—Finding as to malice in suit for malicious prosecution.*

A finding in a suit for malicious prosecution that the defendant did not act without any reasonable or probable cause or with malice, is a finding of fact. 25 Bom. 332 (336) P.C., relied on. (*Ganga Nath, J.*) NARAIN DAS *v.* MUNICIPAL BOARD, GORAKHPUR. 161 I.C. 443=8 R.A. 736=1936 A.W.R. 31=1936 All. L.R. 277=A.I.R. 1936 All. 441.

——S. 100—*Finding of fact—Finding as to status of tenant.*

Findings that the tenants are raiyats and they have acquired rights of occupancy are findings of fact. (*S. K. Ghose and Edgley, JJ.*) PRODYOT COOMAR TAGORE *v.* MAYNUDDIN MIA. 68 C.L.J. 435=A.I.R. 1938 Cal. 724.

——S. 100—*Finding of fact—Finding based on entries in* 'Khatauni' *and* 'Khasras'—*Interference.*

Unless instruments of title are involved, findings of fact arrived at by a Court of first appeal cannot be questioned in second appeal, although documentary evidence has to be considered. "*Khataunis*" and "*Khasras*" cannot always be regarded as instruments of title. Where the entries in the "*Khatauni*" and the "*Khasra*" are relied on by the parties with reference to the question whether a certain plot was occupied by the plaintiff alone or by him and the defendant jointly, such entries are mere items of evidence and cannot be regarded as instruments of title. Accordingly a finding based on those entries is a finding of fact which cannot be challenged in second appeal. (*Nanavutty and Smith, JJ.*) SRIPAL *v.* GOLAI. 168 I.C. 302=9 R.O. 464=1937 O.L.R. 247=1937 O.W.N. 544=1937 R.D. 258=A.I.R. 1937 Oudh 370.

——S. 100—*Finding of fact—Finding based on erroneous approach to case—If final.*

A finding of fact based on an obviously erroneous approach to the case cannot be accepted as binding in second appeal. (*Varadachariar, J.*) THIRUMALAPPA *v.* RAMAPPA. 176 I.C. 639=11 R.M. 140=1937 M.W.N. 1285=46 L.W. 910=A.I.R. 1938 Mad. 133=(1937) 2 M.L.J. 511.

——S. 100—*Finding of fact—Finding based on legal error—Inference of fraud from circumstances—Interference in second appeal.*

Though a Court of second appeal is not competent to question the soundness of the finding of fact by the Court below, and the decision of the lower Court as to the effect of the evidence must stand final as to the fact, yet the soundness of the conclusions derived from the findings of fact may involve a matter of law and may, therefore, be questioned by a Court of second appeal. Where in a case fraud is alleged, but there is no direct evidence of fraud and only an inference drawn from circumstances, such a finding involves a legal question as to whether the circumstances are such that the necessary inference can legally be derived. If the lower Court proceeds upon a wrong legal view of the nature of the circumstantial evidence from which fraud can be inferred, the finding is based upon a legal error and can be interfered with in second appeal. (*Fazl Ali and Meredith, JJ.*) RAJA SINGH *v.* CHAICHOO SINGH. 185 I.C. 816=12 R.P. 423=6 B.R. 262=20 Pat L.T. 957=A.I.R. 1940 Pat. 201.

——S. 100—*Finding of fact—Finding based on wrong assumption—Interference.*

A finding recorded by the lower appellate Court based wholly upon wrong assumptions would not be binding on the High Court in second appeal. (*Agha Haidar, J.*) BHAGWAN DAS *v.* PARABH DIAL. 167 I.C. 704=9 R.L. 528=A.I.R. 1936 Lah. 1005.

——S. 100—*Finding of fact—Finding marked by error of law—Presumption ignored.*

A finding of fact is not binding in second appeal if it is marked by errors of law as that of ignoring the presumption of correctness attaching to the record-of-rights. (*Dhavle and Agarwala, JJ.*) BHUP NARAYAN SINGH *v.* HIRA LAL. 161 I.C. 709=8 R.P. 475 (2)=17 Pat L.T. 405=A.I.R. 1936 Pat. 185.

——S. 100—*Finding of fact—Finding not based on evidence—Question whether a drain constituted nuisance.*

The plaintiffs sued the defendants for a permanent injunction for the closing of a drain from their latrine. The lower appellate Court based its finding on a sweeping statement that water discharged from latrines in Indian homes should as a rule be treated as nuisance and granted the injunction,

C. P. CODE (1908), **S. 100.**

Held, that the finding of the lower appellate Court about the drain in question constituting a nuisance was given without reference to the evidence bearing on the point and its order for the closing of the drain must be set aside. (*Srivastava, J.*) RIYASAT ALI *v.* ZAMIN ALI. **12 Luck. 94=161 I.C. 411=8 R.O. 324=1936 O.W.N. 310=1936 O.L.R. 175=A.I.R. 1936 Oudh 211.**

——**S. 100**—*Finding of fact—Finding on question of title.*

A finding on the question of title is one of fact and cannot be challenged in second appeal. (*Nasim Ali and Henderson, JJ.*) RAMESH CHANDRA TALUKDAR *v* PRAMATHA NATH SANYAL. **162 I.C. 522=8 R.C. 610=63 C.L.J. 591=40 C.W.N. 758=A.I.R. 1936 Cal. 245.**

——**S. 100**—*Finding of fact—Finding opposed to weight of evidence—Interference.*

Although a Court of second appeal is, as a rule loath to interfere with a finding of fact, where the finding is very much against the weight of evidence in the case, the Court in second appeal will interfere. (*Drake Brockman, S. M. and Knox, J. M.*) HARAKH CHAND B. *v.* SUMER TEWARI. **1936 R.D. 119.**

——**S. 100**—*Finding of fact—Finding supported by evidence—Interference.*

Where there is evidence on record which would justify the lower appellate Court in arriving at a particular finding and it has considered the evidence, the High Court will not interfere in second appeal merely because it comes to the conclusion that if the matter had been raised before it, it might have come to a conclusion different from the conclusion arrived at by the lower appellate Court. If there is no evidence upon which the finding could be supported, then the matter becomes not a question of fact but a question of law. (*Davis, J,. C. and Mehta, A, J. C.*) SUJANDAS *v.* SHANKERDAS. **167 I C. 355=9 R.S. 176=A.I.R.1937 Sind 36.**

——**S. 100**—*Finding of fact—Finding that account book is one kept in regular course of business.*

A finding that a book of account is one kept in the regular course of business is a finding of fact within the competence of the lower appellate Court. (*James, J.*) BAIDYANATH DUTTA *v.* KANHAI LAL MARWARI. **5 B.R. 296=179 I.C. 828=11 R.P. 412=A.I.R. 1939 Pat. 264.**

——**S. 100**—*Finding of fact—Finding that certain suit was not collusive.*

A finding by the lower Appellate Court that a certain suit was not collusive is a finding of fact which cannot be disturbed in second appeal. (*Addison and Ram Lall, JJ.*) KISHORI LALL *v.* PIARE LALL. **I.L.R. (1940) Lah. 60=41 P.L.R. 462.**

——**S. 100**—*Finding of fact—Finding that contract was not acted upon—Interference.*

A conclusion of the lower appellate Court that a certain contract was not acted upon by the parties is a finding of fact which cannot be attacked on second appeal. (*Jai Lal, J.*) ALI GAUHAR *v* MAHAND. **38 P.L.R. 590.**

——**S. 100**—*Finding of fact—Finding that lands were totally unfit for cultivation—Interference*

The question whether lands were totally unfit for cultivation for the years in suit is a matter for the Court below and where the lower Appellate Court has accepted the finding of trial Court that the entire land had been diluviated and no area was cultivable in the years in suit the High Court has no jurisdiction to interfere. (*Wort, J.*) NRIPENDRA NATH CHATTERJI *v.* JUGAL PRASAD MANDAL. **185 I.C. 144=12 R.C. 306=A.I.R. 1939 Pat. 386.**

——**S. 100**—*Finding of fact—Finding that mortgage deed alleged in plaint not proved—If can be challenged.*

A finding by the lower appellate Court that the mortgage deed alleged in the plaint is not proved, is a finding of fact which cannot be challenged in second appeal. (*Nanavutty, J.*) RAM SAMUJH *v.* LAL SARAN. **167 I.C. 724=9 R.O. 401=1937 O.L.R. 146=1937 O.W.N. 266.**

——**S. 100**—*Finding of fact—Finding that party did not get possession of property under agreement of partition—Finality—If can be challenged in second appeal.*

A finding of the lower appellate Court that the Court was not satisfied on the evidence that a party got possession of his share of the properties in pursuance of an agreement of partition, is a finding of pure fact and cannot be attacked in second appeal, however liable it might be to be set aside if the evidence could be discussed. (*Burn, J.*) BAPAYYA *v.* RAMAKRISHNAYYA. **1937 M.W.N. 393.**

——**S. 100**—*Finding of fact—Finding that suit bond was executed owing to undue influence—If can be disturbed.*

A finding by the lower appellate Court that the bond in suit was executed owing to undue influence, is not a pure finding of fact. It is rather a legal inference from the facts of the case. Such a finding can, therefore, be disturbed in second appeal. (*Nanavutty and Zia-ul-Hasan, JJ.*) GANGA PRASAD *v.* JANGBAHADUR KHAN. **167 I.C. 424=9 R.O. 387=1937 O.L.R. 114=1937 O.W.N. 277=A.I.R. 1937 Oudh 254.**

——**S. 100**—*Finding of fact—Finding that there is evidence of agreement—Interference.*

The question whether there is evidence of an agreement is a question of fact. But if the Court comes to the conclusion that there is no evidence or that the evidence in no circumstances could be held to be evidence of an agreement, a question of law might arise. But where on the facts as found, and in the circumstances the Court finds there was an agreement, no question of law arises. (*Wort, J.*) DEO NARAIN SINGH *v.* MT. LILA KUER. **160 I.C. 1079=8 R.P. 414=1936 P.W.N. 52=17 Pat.L.T. 360=A.I.R. 1936 Pat. 96.**

——**S. 100**—*Finding of fact—Finding that transaction was intended to defeat and delay creditors.*

A finding by the lower appellate Court that a certain transaction was intended to defeat and delay the creditors and was collusive, is a finding of fact which is conclusive in second appeal. (*Bhide, J.*) DAULAT RAM *v.* BISHAN DASS. **38 P.L.R. 577.**

——**S. 100**—*Finding of fact—Fraud in connection with service of sale proclamation—Non-service of proclamation—Finding as to, not based on evidence—Finality.*

A finding as to the existence of fraud in connection with the service of a sale proclamation or as to non-service of the same, which is not based on evidence is not binding in second appeal and

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can be interfered with. (*Courtney-Terrell, C. J. and James, J.*) RAMKESHWAR SINGH *v.* KESHO PRASAD SINHA. 180 I.C. 740=5 B.R. 483=11 R.P. 528=1938 P.W.N. 202=19 Pat.L.T. 645=A.I.R. 1938 Pat. 622.

——S. 100—*Finding of fact—Hindu coparcener—Intention to separate from joint family—Suit for partition—Finding that institution of suit was not voluntary act and did not evidence clear intention to separate—If conclusive in second appeal.*

A finding by the lower appellate Court, that a Hindu coparcener in filing a plaint for partition was under the influence of profligate persons who were bent upon ruining him, and that in effect the institution of the suit for partition was their act rather than his act, and that therefore the institution of the suit did not evidence an unequivocal intention on the part of the member concerned to separate from the other members of the joint family, is one of fact, and the High Court in second appeal cannot disregard the same, but must accept it as conclusive. (*Agarwala and Varma, JJ.*) JOALA PRASAD SINGH *v.* CHANDERJOT KUER. 17 Pat. 430=4 B.R. 656=175 I.C. 783=11 R.P. 47=1938 P.W.N. 250=19 Pat.L.T. 281=A.I.R. 1938 Pat. 278.

——S. 100—*Finding of fact—Inferences derived from documentary evidence.*

A finding based on inferences derived from documentary evidence is as good a finding of fact as that based on oral and documentary evidence. (*Niamatullah, J.*) ALAKH NARAIN SINGH *v.* DAYAL SINGH. 167 I.C. 851=9 R.A. 583=1936 A.W.R. 1287=1937 A.L.R. 263 (2)=A.I.R. 1937 All. 197 (1).

——S. 100—*Finding of fact—Inferences derived from documents.*

The rule that the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law, is applicable to cases in which such findings are based on inferences drawn from the documents exhibited in evidence. (*Thomas, J.*) DAN BAHADUR SINGH *v.* TALEWAND SINGH. 167 I.C. 870=9 R.O. 412=1937 O.L.R. 175=1937 O.W.N. 330=A.I R. 1937 Oudh 226.

——S. 100—*Finding of fact—Inference from evidence—If binding in second appeal.*

A finding of fact resting on evidence is an inference of fact from the evidence, and is binding in second appeal, unless it can be shown to be impossible in law. (*Dhavle, J.*) MOHAMMAD YAQUOOB ALLY *v.* CHHOTEY LAL MISTRI. 179 I.C. 583=5 B.R. 244=11 R.P. 396=A.I.R. 1939 Pat. 218.

——S. 100—*Finding of fact—Inference from exhibits—Interference.*

It is open to the lower appellate Court as a Court of fact to draw such inference as could be drawn from the various parts of the exhibits before it, and if it had materials before it on which it could base its finding, the finding cannot be interfered with in second appeal. (*Mahomed Noor, J.*) JAGAT MOHAN PRASAD *v.* L. W. BION. 167 I.C. 817=9 R.P. 431=3 B.R. 338=1937 P.W.N. 236=A.I.R. 1937 Pat. 479.

——S. 100—*Finding of fact—Inference from record-of-rights.*

The inference as to the nature of a holding to be drawn from the record-of-rights is an inference of fact with which the High Court cannot interfere in second appeal. (*Wort, J.*) MOHIT TEWARI *v.* RAM NARAIN DUBE. 166 I.C. 454=9 R.P. 296=3 B.R. 170 (1)=A.I R. 1938 Pat. 110.

——S. 100—*Findings of fact—Interference.*

Definite findings on questions of fact by the lower appellate Court cannot be questioned in second appeal. The question whether a person has been admitted to the tenancy or not by the zamindar is a question of fact and the findings on it must be accepted unless it is shown that it is without any basis of evidence. (*Sathe, J.M.*) SUKHRANI *v.* DIN DAYAL. 1940 A.W.R. (B.R.) 89.

——S. 100—*Finding of fact—Interference.*

In second appeal the Court has no jurisdiction to question the findings of fact however gross or inexcusable the error may seem to be. (Case law discussed.) (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) DAYARAM CHAINRAI *v.* KARMUMAL KOTUMAL. 172 I.C. 322=10 R.S. 141=A.I.R. 1937 Sind 263.

——S. 100—*Finding of fact—Interference.*

Finding of fact based on misapprehension as regards real point at issue cannot be upheld in second appeal. (*Bhide, J.*) CO-OPERATIVE SOCIETY DHINGRANWALI *v.* MUHAMMAD DIN. 42 P.L.R. 273=A.I.R 1939 Lah. 301.

——S. 100—*Finding of fact—Interference—Absence of evidence.*

A finding on a point of fact is open to consideration in a second appeal when there is no evidence to justify such a finding. (*Hamilton, J.*) BANARSI DAS *v.* KALKA. 1938 R.D. 256=1938 O.A. 482=1938 A.W.R. (C.C.) 20=1938 O.W.N. 171.

——S. 100—*Finding of fact—Interference—Chance of appellate Court coming to different conclusion on same evidence—If a ground.*

Where a lower appellate Court has not discarded defence evidence on any general grounds, but has attempted to discuss the evidence and to arrive at a reasoned conclusion, the mere fact that, that conclusion may be different from the conclusion to which the second appellate Court might arrive, if it considers the matter *de novo* is not enough ground for discarding the finding of fact arrived at by the lower appellate Court. (*Sathe, J.M.*) SAIKWA *v.* RAM PAL. 1940 R.D. 246 (1).

——S. 100—*Finding of fact—Interference—Error of law—What is.*

A finding of fact can be reversed in second appeal when it is vitiated by some error of law. A mistake of law is not confined to a decision based on inadmissible evidence. A finding of fact in order to be binding and conclusive on a Court of second appeal must be one based on evidence legally sufficient to support it. The decision of the lower appellate Court on a point of fact must be proper and judicial. For instance, it must consider all the important evidence; it must correctly state what the witnesses said and what the documents contain. There is a difference between interpretation of a document and giving a meaning to it which cannot possibly be given in view of the contents of the documents, for the interpretation must be a meaning which the document can bear although of course it need not be the meaning which the Court of second appeal would give to it. To find against a party because he has

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not produced before the Court some material exhibits which were not within his power to produce, and which would prove nothing is obviously an error of law. To disregard the evidence of a witness on the ground that he has made a statement which he has in fact not made is also a mistake of law. (*Zia-ul-Hasan and Hamilton, JJ.*) DUKHHARAN NATH *v.* COMMERCIAL CREDIT CORPORATION, LTD. **15 Luck. 191=184 I.C. 521=1939 O.L.R. 630=12 R.O. 125=1939 O.W.N. 1114=A.I.R. 1940 Oudh 35.**

——S. 100—*Finding of fact—Interference—Failure to appreciate legal effect of recitals of necessity in ancient documents.*

A finding of the lower appellate Court based upon a failure to appreciate the true legal effect of recitals of necessity in ancient documents and omission to consider other documents of recent origin consistent with those recitals, cannot be supported in second appeal. (*Jack and Khundkar, JJ.*) LAKSHMI NARAYAN JIE *v.* JAGADISH CH. SUR. **177 I.C. 477=11 R C. 247=42 C.W.N. 837 =A.I.R. 1938 Cal. 541.**

——S. 100—*Finding of fact—Interference—Failure to consider documentary evidence.*

Where the lower appellate Court has failed to consider a certain document which had been relied upon by the trial judge, its finding of fact is not binding in second appeal, (*Skemp, J.*) DEBI SINGH *v.* SIS RAM. **41 P.L.R. 120=A.I.R. 1939 Lah. 188.**

——S. 100—*Finding of fact—Interference—Finding as to relationship vitiated by misapprehension of pedigree table.*

. Where a finding of fact as to the relationship of parties is vitiated by an entire misapprehension of the pedigree table, it is a finding not based on any legal evidence, and can, therefore. be interfered with in second appeal. (*Skemp, J.*) GHULAM MOHAMMAD *v.* MIRAJ DIN. **176 I.C. 464 =11 R L. 220=40 P.L.R. 162=A.I.R. 1938 Lah. 303.**

——S. 100—*Finding of fact—Interference—Finding based on conjectures.*

Finding of fact by lower Appellate Court based partly on conjectures and partly on a misunderstanding of the evidence is liable to be set aside in second appeal. (*Bhide, J.*) GHULAM HUSSAIN *v.* SECRETARY OF STATE. **185 I C. 137 (1)=12 R. L. 270=A I.R. 1939 Lah. 510.**

——S 100—*Finding of fact—Interference—Finding based on assumptions and conjectures.*

A finding of fact based purely upon unwarranted assumptions and unjustified conjectures is not binding in second appeal. (*Tek Chand, J.*) LAL CHAND *v.* REHMAN. **39 P.L.R. 361.**

——S. 100—*Finding of fact—Interference—Finding that house formed part of joint family property.*

The finding that a house was no part of the assets of the firm but formed part of the joint family property is a clear finding of fact and cannot be disturbed on second appeal. (*Din Muhammad, J.*) PUNNUM MAL *v.* BISHAMBAR DAYAL. **A.I.R. 1940 Lah. 205.**

——S. 100—*Finding of fact—Interference—Finding that sale is not fictitious.*

A finding that a sale is not fictitious, right or wrong, is a finding of fact which cannot be interfered with in second appeal. (*Bhide, J.*) DAYAL DAS *v.* SANT RAM. **42 P.L.R. 246**

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——S. 100—*Finding of fact—Interference—Grounds—Findings not recorded on objections specifically raised before lower appellate Court.*

If the lower appellate Court fails to consider and record findings on objections specifically mentioned in the grounds of appeal filed before it, its order is liabe to be set aside. (*Abdul Qayoom, C.J. and Wazir, J.*) MT. JAINTI *v.* LUDAR MANI **42 P.L.R.J. & K. 21.**

——S. 100—*Finding of fact—Interference—Grounds.*

A finding of fact arrived at by the first appellate Court is final if there is evidence on record to support it but such finding can be questioned in second appeal, if there is no evidence to support it and it can be interfered with in second appeal. (*Mohammad Noor, J.*) BENGAL NAGPUR RY. CO. *v.* HARIJIBAN ISWAR PATHAK. **169 I.C. 354=3 B.R. 554=10 R.P. 4=1937 P.W.N. 71= A.I.R. 1937 Pat. 289.**

——S. 100—*Finding of fact—Interference—Inference from facts—Question of law.*

A finding of fact based on oral evidence cannot be gone into in second appeal; but the legal inference to be drawn from proved or admitted facts is a matter of law. (*Kania, J.*) VAZIRBHAI SULTANBHAI *v.* GADMAL NATHMAL. **I.L R. (1940) Bom. 505=42 Bom.L.R. 511=A.I.R. 1940 Bom. 263.**

——S. 100—*Finding of fact—Interference—Lower appellate Court differing from trial Court without good reason.*

Where a lower appellate Court without giving very cogent reasons differs from the finding of the trial Court which had the best means of judging the weight to be attached to the evidence tendered before it, it can be set aside in second appeal by the Board. (*Marsh, S.M. and Mehta, J.M.*) SHYAM LAL *v.* ISWARI DAYAL. **1939 R.D. 325=1939 A.W.R. (B.R.) 277.**

——S. 100—*Finding of fact—Interference—Lower Court admitting inadmissible evidence—Evidence Act, S. 167.*

Where there is legal evidence on record in support of the finding of fact by the lower appellate Court, the finding is binding in second appeal even if the lower Court has admitted inadmissible evidence. 19 Cal. 249 (P.C.), Rel. on. (*Agha Haidar, J.*) MAHOMED ALI *v.* LABH SINGH. **169 I C. 940=10 R.L. 62=39 P.L.R. 184=A.I.R. 1937 Lah. 26.**

——S. 100—*Finding of fact—Interference—Lower Court omitting to consider all available evidence.*

A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all the available evidence has not been considered, the High Court will interfere and should interfere in second appeal. (*Skemp, J.*) GOBIND RAM *v.* KAJU RAM. **185 I.C. 652=12 R.L. 310=42 P.L.R. 232=A.I. R. 1939 Lah. 504.**

——S. 100—*Finding of fact—Interference—Lower Court omitting to consider circumstances erroneously holding them to be inadmissible.*

A finding on a question of fact is open to challenge in second appeal if the lower appellate Court has in arriving at that finding refused to consider certain circumstances erroneously holding them to be either inadmissible or irrelevant.

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(*Beckett, J.*) KRISHAN CHAND *v.* KANSHI RAM. 40 P.L.R. 705.

——S. 100—*Finding of fact—Interference—Lower Court omitting to mention certain evidence.*

The mere fact that the lower Court omits to mention certain pieces of evidence does not go to show that he did not consider them. In any case where the finding is based on evidence, it is not liable to be set aside in second appeal, even if the High Court is inclined to come to a contrary conclusion. (*Addison and Ram Lall, JJ.*) RANJIT SINGH *v.* NAWAB KHAN. 185 I.C. 395=12 R.L. 284=41 P.L.R. 826=A.I.R. 1939 Lah. 548.

——S. 100—*Finding of fact—Interference—Omission to refer to some documents.*

A finding of fact given by the lower appellate Court cannot be challenged in second appeal on the mere ground that certain documents are not referred to in its judgment, unless those documents conclusively prove the case of the appellant. (*Abdul Rashid, J.*) PITAM CHAND *v.* KALLU SINGH. 42 P.L.R. 94.

——S. 100—*Finding of fact—Interference—Principles.*

No second appeal has any chance of success where the only ground is that the lower Appellate Court has omitted to mention this or that piece of evidence. The Legislature rightly or wrongly has decided that the first Appellate Court is to be trusted and it behoves first Appellate Judges to bear in mind the fact that their findings of fact are conclusive and that they therefore have a great responsibility and should be especially careful in such cases. If they are not, it may be a matter for administrative discipline but a second Appellate Court cannot put the matter right in second appeal. (*Stone, C.J. and Bose, J.*) MADHODASS GULABDAS *v.* APPAJI RAOJI. I.L.R. (1939) Nag. 510=183 I.C. 492=12 R.N. 71=1939 N.L.J. 329=A.I.R. 1939 Nag. 221.

——S. 100—*Finding of fact—Interference—Shifting of onus—Unhappy remark by lower Court.*

A finding of fact is not liable to interference in second appeal merely because the lower appellate Court's remark about the shifting of the onus is not happily worded, if it has not really affected the decision on merits. (*Bhide, J.*) DAULAT RAM *v.* BISHAN DASS. 38 P.L.R. 577.

——S. 100—*Finding of fact—Interference—When justified.*

It is true that a finding of fact arrived at by a lower appellate Court is binding on the High Court, however erroneous it might be. But this dictum presupposes that the finding is honest, that it has been arrived at on the facts of the case uninfluenced by any extraneous considerations, that it is the result of a correct appreciation of the material on the record and that it is based on evidence and not on surmises and conjectures. Any finding of fact which does not satisfy any of the requirements stated above will not be binding on the High Court. Every finding of fact is not sacrosanct and if findings of fact are arrived at on mere surmises and conjectures or on evidence that it is inadmissible or otherwise legally insufficient, those findings can be disturbed. (*Din Mohammad, J.*) BHARPURA *v.* DIWAN CHAND. A.I.R. 1940 Lah. 329.

C. P. CODE (1908), S. 100.

——S. 100—*Finding of fact—Interference—When justified.*

The High Court is not justified in reversing a finding in second appeal, unless of course it is a perverse finding for which there is no evidence whatever or is arrived at by casting the burden on the wrong party and thereby shutting out oral evidence. (*Stone, C.J.*) JAGOBA KASHIBA KASAR *v.* ANANDRAO. 169 I.C. 449=9 R.N. 6=A.I.R. 1937 Nag. 9.

——S. 100—*Finding of fact—Interpretation of facts found by lower Court.*

Where the lower Court has arrived at a certain finding of facts, and the facts are clear but the dispute relates not to the facts but to interpretation of facts by the lower Court, it can be dealt with in second appeal. (*Dalip Singh and Skemp, JJ.*) LABH SINGH *v.* MST. JASSO. 178 I.C. 81=11 R.L. 400=40 P.L.R. 506=A.I.R. 1938 Lah. 180.

——S. 100—Finding of fact—Minor—Decree against—Gross negligence of guardian—Finding as to—Interference in second appeal. *See* MINOR—DECREE AGAINST. (1937) 1 M.L.J. 224.

——S. 100—*Finding of fact—No evidence—Court in second appeal—If precluded from coming to different finding.*

Where there is no evidence on which a finding of fact arrived at by the lower Court, can properly be based, the Court in second appeal, is not, as a matter of law, precluded from coming to a different finding. (*Baguley and Dunkley, JJ.*) RAMANUJA NAIDU *v.* N. K. CHETTYAR FIRM. 167 I.C. 110=9 R.R. 293=A.I.R. 1936 Rang. 488.

——S. 100—*Finding of fact—Omission to consider materials having obvious bearing on case—If vitiates finding—Finality in second appeal.*

A finding of fact arrived at without considering the materials on record which has an obvious bearing on the case cannot be accepted in second appeal. The omission to consider such materials vitiates the finding. (*Dhavle and Agarwala, JJ.*) SURAJ KUMAR SINGH *v.* SHRI SHRI RADHAKRISHNAJI. 168 I.C. 129=9 R.P. 461=3 B.R. 394=1936 P. W.N. 796=17 Pat. L.T. 774=A.I.R. 1937 Pat. 78.

——S. 100—*Finding of fact—Omission to consider piece of evidence—Effect*

Mere omission to consider a piece of evidence will not alter the character of a finding of fact. (*Agarwala and Rowland, JJ.*) RADHA MOHAN MISSIR *v.* KAMALDHARI MISSIR. 162 I.C. 21=8 R.P. 505=A.I.R. 1936 Pat. 243.

——S. 100—*Finding of fact—One witness preferred to another—Interference.*

A finding of fact cannot be challenged in second appeal unless it can be shown that there is no evidence supporting it. It is open to a Court to accept evidence of one witness in perference to that of others and a finding arrived at on such evidence cannot be said to be supported by no evidence. (*Rupchand Bilaram and D. C. Mehta, A. J.Cs.*) ABDUL RAHIM *v.* GHULAM MAHAYADI. 161 I.C. 501=A.I.R. 1936 Sind 7.

——S. 100—*Finding of fact—Power of High Court to direct enquiry into same matter.*

Where it had been already decided by the lower Court that a certain wall and a door did not encroach on the plot in suit.

C. P. CODE (1908), S. 100.

Held, that it was not open to the High Court in second appeal to direct the lower Court to hold an enquiry as to the same matter. This would be in effect to re-open and try for a second time a claim for a mandatory injunction in respect of the door and the wall. (*Sir George Rankin.*) BALLABH DAS *v.* NUR MAHOMED. 40 C.W.N. 449 =160 I.C. 579=17 Pat.L.T. 177=8 R.P.C. 161= 38 P.L.R. 182=1936 A.W.R. 317=1936 A.L.J. 480=43 L.W. 685=1936 O.L.R. 100=1936 A.L.R. 203=1936 P.W.N. 225=1936 R.D. 147=1936 O.W.N. 153=A.I.R. 1936 P.C. 83=70 M.L.J. 455 (P.C.).

——S. 100—*Finding of fact—Question as to when arrears of pay became due.*

The question as to when the arrears of pay claimed by a person became due is one of fact, depending upon the contract between the parties. (*Nasim Ali and Henderson, JJ.*) JITENDRA NATH ROY *v.* INANADA KANTA DAS GUPTA. 167 I.C. 265=9 R.C. 672=A.I.R. 1936 Cal. 277.

——S. 100—*Finding of fact—Question of consideration in pre-emption suit.*

The finding on the question of consideration by a lower appellate Court in a suit for pre-emption is a finding of fact and when based upon the evidence in the case is binding on the second appellate Court. (*Iqbal Ahmad, J.*) JAIRAJ SINGH *v.* HAR NARAIN SINGH. 1940 A.L.J. 360=1940 A.W.R. (H.C.) 341=A.I.R. 1940 All. 414.

——S. 100—*Finding of fact—Question whether execution of document is genuine.*

It is true that a document is said to be executed only if it is proved to have been consciously signed or thumb-marked after the alleged executant had become aware of its contents and that the mere presence of a signature or a thumb-mark on a document may not in certain cases in itself amount to a proof of its execution. But where the Judge has not been impressed by the mere presence of the thumb marks on the document in question, but there are certain other attending circumstances which have influenced his mind while formulating his conclusions that execution of document is genuine, his decision cannot be interfered with in second appeal. (*Addison and Din Mohammad, JJ.*) HUKAM CHAND *v.* RAMJI DAS 180 I.C. 555=11 R.L. 699 =A.I.R. 1938 Lah. 357.

——S. 100—*Finding of fact—Question whether tenancy is permanent or not—Finding on—Interference.*

The question whether a tenancy is permanent or precarious is a legal inference from facts and not itself a question of fact, and the High Court in second appeal can therefore decide the case for itself on the facts found by the lower appellate Court. (*Dhavle, J.*) JUGESH CHANDRA BOSE *v.* MAQBUL HOSSAIN. 163 I.C. 415=9 R.P. 9= 17 Pat.L.T. 202=1936 P.W.N. 333=A.I.R. 1936 Pat. 384.

——S. 100—*Finding of fact—Question whether there has been family settlement among members —"Fact"—Meaning of.*

The word "fact" in S. 100, C. P. Code, must bear the meaning given to it in S. 3, Evidence Act. The question whether there has been a family settlement among the members of a joint Hindu family is one of fact. Whether two persons agree on a certain matter is a thing which is capable of being perceived by the senses, and whether

C. P. CODE (1908), S. 100.

they had the requisite mental intention necessary to give validity to their outward forms or acts of agreement, is a mental condition of which a person can be conscious, and a finding on a matter of this kind is one of fact and not of law. Even if such a finding is based on inferences derived from other facts, it would still be a finding of fact, provided it is possible for a prudent man to come to such a conclusion, for a fact can be proved not only by direct evidence but also by inferences from other proved or accepted facts. It does not cease to be a fact as defined in S. 3 simply because it is proved in this way. A.I.R. 1931 All. 499, Rel. on. (*Vivian Bose, J.*) DATTATRAYA GOVIND *v.* NARAYAN GANGARAM. 165 I.C. 217= 9 R.N. 70=A.I.R. 1936 Nag. 186.

——Ss. 100 and 101—*Findings of fact—Respondent's right to challenge.*

There is nothing in the language of Ss. 100 and 101 which gives countenance to the view that a respondent in appeal under S. 100, C. P. Code, is debarred from challenging the correctness of the ffndings of fact of the first appellate Court which in spite of such findings, dismissed the appeal. (*Mya Bu and Sharpe, JJ.*) MA LON *v.* MA MYA MAY. 179 I.C. 946=11 R.R. 363=A.I.R. 1939 Rang. 59.

——S. 100—*Finding of fact—Suit for enhancement of rent—Finding that no prevailing rate existed—B. T. Act, S.* 30.

In a suit for enhancement of rent, the lower Courts come to the conclusion that there was no prevailing rate of rent.

Held, that the High Court could not interfere in second appeal with the finding. (*Wort, J.*) JAGDEO NARAIN SINGH *v.* TULA SINGH. 160 I.C. 1102=8 R P. 423=A.I.R. 1936 Pat. 54.

——S. 100—*Finding of fact—View of appellate Court—Finality of—Appellate Court concurring in the judgment of trial Court—Nature of judgment.*

An appellate Court disposing of an appeal is not bound to repeat *in extenso* the arguments of the trial Judge which it accepts. But a party is entitled to a considered opinion of the appellate tribunal. It is not the first Court's view but that of the second Court that is final if the question is one of fact. (*Venkatasubba Rao and Madhavan Nair, JJ.*) VENKAYYA *v.* VENKATARATTAMMA. 174 I.C. 669=10 R.M. 733=47 L.W. 66=A.I.R. 1938 Mad. 253=(1937) 2 M L.J. 916.

——S. 100—*Finding of fact—When final.*

In a case in which the findings of fact of the lower appellate Court are to be final, it is necessary that the Court should examine the entire evidence, and its judgment should indicate that it had done so. (*Tek Chand, J.*) BHIM SINGH *v.* RAMJI. 42 P.L.R. 136.

Intention of parties.

——S. 100—*Intention of parties to contract—Question of fact or question of law.*

Per *Rupchand Bilaram, A.J.C.*—Intention of parties is the inference to be drawn from proved facts. That is a question of law.

Per *Haveliwala, A.J.C.*—Intention to be gathered from evidence as to whether damages or specific performance should be granted on breach of agreement to sell is a question of fact. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) DAYARAM CHAINRAI *v.* KARMUMAL KOTUMAL. 172 I.C. 322=10 R.S. 141=A I.R. 1937 Sind 263.

C. P. CODE (1908), S. 100.

Interference.

——S. 100—*Interference with findings of fact—Rule against—Applicability to findings based on inferences of facts drawn from documents.*

The rule against interference in second appeal with the findings of fact of the lower appellate Court apply equally to the case of findings of fact based on inferences of fact drawn wholly or in part from documents. (*Zia-ul-Hasan and Yorke, JJ.*) DAYAVAT ULLAH *v.* ATTA KHANAM. 186 I.C. 766=12 R.O. 339=1940 O.W.N. 193=1940 O.L.R. 145=1940 O.A. 200=1940 A.W.R. (C.C) 103=A.I.R. 1940 Oudh 217.

——S. 100—*Interference — Power of High Court—Error in procedure—Effect of.*

It does not follow that in second appeal an error of procedure will always lead to reversal of the lower Appellate Court's decision. It must be an error affecting the merits of the case, but under S. 100, C. P. Code, High Court can interfere on the ground of any substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. (*Rowland, J.*) BHAGWAN SINGH *v.* UJAGIR SINGH. A.I.R. 1940 Pat. 33.

Jurisdiction.

——S. 100 — *Jurisdiction — Incompetence of lower Court—Interference in second appeal.*

Where a District Judge assumes a jurisdiction which he does not possess, any order which he passes on such assumption can be set aside by the High Court in second appeal. (*Misra, J.*) SHEO NANDAN SINGH *v.* SURAJ PRASAD SINGH. 179 I.C. 39=11 R.A. 348=1938 A.L.R. 932=1938 A.L J. 988=1938 A.W.R. (H.C.) 682=1938 R.D. 829=A.I.R. 1939 All. 22.

Malicious prosecution.

——S. 100—*Malicious prosecution—Existence or absence—If a question of law.*

The presence or absence of reasonable and probable cause is a question relating to the state of the mind of the accuser and has to be inferred from the facts of each particular case. The question whether the inference from certain facts is correct or not is a question of law. (*Radhakrishna, J.*) FATEH CHAND *v.* KUNJ BEHARI LAL. 186 I C. 293=1940 O.L.R. 113=12 R.O. 302=1940 O.A. 195=1940 O.W.N. 201=1940 A.W.R. (C.C.) 108=A.I.R. 1940 Oudh 320.

Misreading of document.

——S. 100—*Misreading of document—If ground for second appeal.*

Misconstruction of a document which is not a document of title is, no doubt, no ground for a second appeal. But where a document has been held to contain an admission by a party when as a matter of fact no such admission exists, it is not entirely a question of drawing a wrong inference from a certain document, not being a question of title, but a question of misreading of evidence and a second appeal would, therefore, lie. (*Dalip Singh, J.*) MUNSHI *v.* BHAGAT SINGH. 42 P.L. R. 216=A.I.R. 1940 Lah. 278.

Misreading of evidence.

——S. 100—*Misreading of evidence—Correction in second appeal.*

Where a certain convincing evidence has been set aside in the lower Appellate Court on a ground that can have no legal basis whatever, such a glaring misapplication of law of evidence is open to correction in second appeal. (*Grille, J.*) KISAN ISARAMJEE *v.* MT. JAIWANTI. I.L.R. (1939) Nag. 324=178 I.C. 920=11 R.N. 260=A.I.R. 1938 Nag. 385.

Mixed question of fact and law.

—— S. 100—*Mixed question of fact and law—Application if "fresh" within meaning of S. 48.*

The question whether an application in question is a fresh application within the language of S. 48 is a mixed question of fact and law and a second appeal is competent. (*Bhide, J.*) GOPAL DAS *v.* HAFIZABAD MUNICIPALITY. 186 I.C. 860=12 R.L. 428=A.I.R. 1940 Lah. 35.

——S. 100—*Mixed question of fact and law—Creation of new tenancy.*

Whether a new tenancy has been created can never be said to be a pure question of law; it is a question of mixed fact and law and a question which certainly depends upon a number of facts. (*Wort, Ag. C.J.*) MT. BUNA BIBI *v.* KESHAB RAI JI THAKUR. 163 I.C. 538=9 R.P. 25=A.I.R. 1936 Pat. 411.

——S. 100—*Mixed question of fact and law—Negligence.*

Per *Sulaiman, C. J.*—Negligence is at least a mixed question of law and fact and unless it is shown that the Court has approached the question from a wrong stand-point or that the evidence is such that there was no option but to draw the converse conclusion or unless the finding is vitiated by some other legal defect, it may be difficult to upset such a finding in second appeal. (*Sulaiman, C. J. and Bennet, J.*) B. B. AND C. I. RAILWAY *v.* DWARKA NATH. 58 All. 771=1936 A.L.R. 964=165 I.C. 882=9 R.A. 324=1936 A. L.J. 262=1936 A.W.R. 301=A.I R. 1936 All. 771.

——S. 100—*Mixed question of law and fact—Question of good faith—Limitation Act, S. 14.*

The question whether a party acted in good faith within the meaning of S. 14, Limitation Act, is a mixed question of law and fact and can be questioned in second appeal, provided that the lower Court's findings of fact are not interfered with. 36 I.C. 702, followed. (*Skemp, J.*) MAYA SINGH *v.* UDHAM SINGH. 181 I.C. 290=11 R.L. 807=40 P.L.R. 631=A.I.R. 1938 Lah. 704.

——S. 100—*Mixed question of fact and law—Question of adverse possession.*

The question of adverse possession is a mixed question of law and fact and the Court has to draw its inference from the proved facts in the case. (*Agha Haidar, J.*) MT. BHANI *v.* UJAGAR SINGH. 166 I.C. 607=9 R.L. 395=A.I.R. 1936 Lah. 741.

New case.

——S. 100—*New case—Estoppel—Not set up in written statement and no issue—If can be raised in second appeal.*

Where no case of estoppel was set up in the written statement and no issue was framed on the point, it is too late to set up such a new case in second appeal as there could be no findings of fact on which any estoppel could be based. (*Bennet and Verma, JJ.*) ANJUMAN ISLAMIA *v.* RADHEY LAL. 180 I.C. 621=11 R.A. 486=1939 A.W.R. (H.C.) 141=1938 A.L.J. 1238=A.I.R. 1939 All. 194.

——S. 100—*New case—Interference—Lower Court basing judgment on new case made out for*

C. P. CODE (1908), S. 100.

first time in appeal—Failure to adequately consider, more important aspect—Effect of the case.

Where a Judge sitting in appeal bases his judgment on a new case made out for the first time in appeal, and it is clear that the new case has coloured and influenced his consideration of the facts and his decision on another aspect of the case, which, although treated by the appellate Court as a minor aspect, turns out in fact to be the most important aspect of the case, and it appears that the Court has not adequately considered that aspect and consequently has arrived at a wrong conclusion, his judgment is liable to be set aside in second appeal. (*Davis, J.C. and Mehta, J.*) ARAB JHANGLU *v.* PUNJAL SHAH. **I.L.R. (1939) Kar. 111=178 I.C. 690=11 R.S. 104=A.I.R. 1938 Sind 198.**

New plea.

——S. 100—*New plea--Admissibility of evidence.*

Even if the question of the admissibility of evidence is not raised in the lower Courts and particularly in the lower appellate Court, that question can be agitated at the stage of second appeal. A.I.R. 1927 Lah. 448, Foll. (*Agha Haidar, J.*) BHAGWAN DAS *v.* FARABH DIAL. **167 I.C. 704=9 R.L. 528=A.I.R. 1936 Lah. 1005.**

——S. 100—*New plea—If can be raised in second appeal for first time.*

The High Court should not in second appeal entertain a new point for the first time when all materials for the decision of such point are not before it. If it is necessary to frame an issue and call upon the lower Court to record a finding on such issue before the new point can be decided, the Court should not permit such a new point to be raised in second appeal. (*Harries, J.*) KISHUN PRASAD *v.* SHUBRATAN. **171 I.C. 910=10 R.A 335=1937 A W.R. 718=1937 A.L.J. 855=1937 A.LR 907=A.I.R. 1937 All. 696.**

——S. 100—*New plea—Lower appellate Court not noticing in judgment point taken in grounds—Presumption—Point, if entertainable in second appeal.*

Where a point was taken in the grounds of appeal to the lower appellate Court but not noticed by it in its judgment, it must be presumed that the point was abandoned, in the absence of an affidavit to the contrary by the Advocate who argued the case before it, and it would not be entertained in second appeal. (*Skemp, J.*) FATTA *v.* NAZAR HUSSAIN. **39 P.L.R. 312.**

——S. 100—*New point—Plea not taken in Courts below and necessitating fresh evidence—If may be raised in second appeal.*

A point which has not been taken in either of the Courts below and which necessitates the taking of evidence for its decision cannot be allowed to be raised in second appeal. (*Beaumont, C.J. and Wadia, J.*) SECRETARY OF STATE FOR INDIA *v.* GANESH NARAYAN. **I.L.R. (1937) Bom. 801=172 I.C. 194=10 R.B. 257=39 Bom. L.R. 885=A.I.R. 1937 Bom. 456.**

——S. 100—*New plea—Plea of estoppel—If can be raised for first time.*

Estoppel is always a mixed question of fact and law. and a plea of estoppel cannot be allowed to be raised for the first time in second appeal, when it would necessitate the taking of further evidence of facts. (*Rangnekar, J.*) JAMBU TAVANAPPA *v.* GOPALAKRISHNAMACHARYA. **175 I.C. 866=11 R.B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.**

C. P. CODE (1908), S. 100.

——S. 100—*New plea—Plea of estoppel—If can be entertained.*

A plea of estoppel which was not made up in the plaint or disclosed by the evidence cannot be raised for the first time in second appeal. (*Agarwala and Rowland, JJ.*) BANSIDHAR SETH *v.* GOPI LAL SETH. **6 B.R. 395=186 I.C. 793=12 R.P. 527=A.I.R. 1940 Pat. 480.**

——S. 100—*New plea—Plea of estoppel not raised in the trial Court—If can be raised in second appeal.*

A plea of estoppel which is not raised in the trial Court and which depends for its decision on many questions of fact which are necessary to be investigated cannot be allowed to be raised for the first time in second appeal. (*Manohar Lall, J.*) BINDESHWARI PRASAD *v.* LAL MUNGARI LAL. **10 R.P. 315=172 I.C. 198=1937 P.W.N. 762=18 Pat.L.T. 814=A.I.R. 1937 Pat. 642.**

——S. 100—*New plea—Plea of invalidity of deed of assignment of decree for want of registration—If can be raised in second appeal for first time.*

When, in both the lower Courts, the plea that the assignment of decree, though requiring registration, was not registered and that the assignee proceeding to execute the decree on the basis of such assignment, had no right to do so on account of the deed of assignment not being admissible in evidence for want of registration, was not raised.

Held, that the question involved a question of fact as to whether the deed of assignment was registered or not and so the plea could not be entertained in second appeal. (*Stone, C.J. and Bose, J.*) BHAGWANSINGH *v.* BEHARILAL. **I.L.R. (1938) Nag. 221=172 I.C. 43=10 R.N. 153=A.I.R. 1937 Nag. 237.**

——S. 100—*New plea—Plea of limitation.*

When the question of limitation depends upon the findings of fact, such question, when not raised in the grounds of appeal, cannot be allowed to be raised in second appeal. (*Vivian Bose, J.*) DULARSINGH *v.* SITARAM. **171 I.C. 783=A.I.R. 1937 Nag. 184.**

——S. 100—*New plea—Plea of limitation—If can be raised in second appeal for first time.*

A suit was instituted on 29th July, 1932, with a defective power-of-attorney. The correct power was filed on 23rd September, 1932, on which date the suit was held to be instituted. In second appeal the defendant contended that the suit, in so far as it related to the transactions more than three years before the date, should be taken as time-barred. The point was not taken in the lower Courts and not also in pleadings, after the correct power was filed.

Held, that the question was not a pure question of law. It involved fact as well. The plea of limitation could not therefore be allowed to be taken, under the circumstances, for the first time in the second appeal. (*Vivian Bose, J.*) AGARWAL JORAWARMAL *v.* KASAM. **I.L.R. 1937 Nag. 28=174 I.C. 179=10 R.N. 350=A.I.R. 1937 Nag. 314.**

——S. 100—*New plea—Plea of limitation not pleaded or argued in the lower Courts—If can be raised in second appeal.*

C. P. CODE (1908), S. 100.

A new point of limitation, no mention of which is made in the pleadings, in argument or in any memorandum of appeal cannot be raised for the first time in second appeal. (*Harries J.*) KISHUN PRASAD *v.* SHUBRATAN. 1937 A.W.R. 718=1937 A.L.J. 855=10 R.A. 335=171 I.C. 910=1937 A.L.R. 907=A.I.R. 1937 All. 696.

——S. 100—*New plea—Plea of* res judicata *withdrawn in trial Court.*

The High Court will not entertain in second appeal a plea of *res judicata* which was raised by the defendant in her written statement but withdrawn by her counsel on the date of issue and which was not raised in the grounds of appeal filed by her in the lower appellate Court or in the High Court. (*Srivastava, Ag.C.J. and Smith, J.*) BARFO *v.* NARAIN PRASAD. 13 Luck. 167=167 I.C. 72=9 R.O. 361=1937 O.W.N. 229=1937 O.L.R. 94=A.I.R. 1937 Oudh 243.

——S. 100—New plea—Plea of want of sanction under S. 91, C P Code—If may be raised in second appeal. *See* TORT—NUISANCE. 1938 M.W.N. 262.

——S. 100—New plea—Plea that anonymous comment is not admissible under S. 90 of the Evidence Act without proof as to its writer—If open in second appeal. *See* EVIDENCE ACT, S. 90. (1939) 2 M.L.J. 593.

——S. 100—*New plea—Point not one of pure question of law* (viz.) *failure of justice, if caused —If can be raised in second appeal for the first time.*

The question whether there has been a failure of justice or not is not a pure question of law and cannot be decided without finding facts and as such if the point was not taken in the lower Courts, it cannot be raised in second appeal in the High Court for the first time. (*Bennet and Verma, JJ.*) ABDUL RAHMAN *v.* FIRM SALAMAT ULLAH. I.L.R. (1939) All. 167=180 I.C. 409=11 R.A. 457=1939 A.L.J. 50=1938 A.W.R. (H.C.) 873=A.I.R. 1939 All. 163.

——S. 100—*New plea—Point not pleaded and involving questions of fact—If can be raised.*

A point which was never pleaded and which involves questions of fact cannot be raised for the first time in second appeal. (*Bose, J.*) SETH RAMNARAYAN *v.* BATTULAL. 20 N.L.J. 89=170 I.C. 170=10 R.N. 50=A.I.R. 1937 Nag. 235.

——S. 100—*New plea—Point not raised in written statement or anywhere—Maintainability in second appeal.*

A point not taken anywhere, not even in the written statement, cannot be urged for the first time in second appeal. (*Divatia, J.*) WAMAN ANANT *v.* CHUNILAL. 181 I.C. 183=11 R.B. 330 =41 Bom.L.R. 205=A.I.R. 1939 Bom. 117.

——S. 100—*New plea—Point of law—If can be raised.*

A point of law on the facts held to be proved by the lower appellate Court may be entertained for the first time in second appeal. (*Bennet, Ag. C.J., Iqbal Ahmad, Collister, Bajpai and Ganga Nath, JJ.*) DULAR PANDEY *v.* NANDA BUDHAI. I.L.R. (1938) All. 563=11 R.A. 61=1938 A.L.R. 578=1938 A.L.J. 585=1938 A.W.R. (H.C.) 385 =176 I.C. 226=1938 R.D. 628=A.I.R. 1938 All. 396 (F.B.).

——S. 100—*New plea—Point of law—If can be raised for first time in second appeal.*

It is well settled that the Court will allow, even in second appeal, a question of law to be raised for the first time, if it can do without any unfairness to the opponents, and if a question of law is such that it does not necessitate the taking of further evidence, the High Court in second appeal would allow it to be raised for the first time in second appeal. (*Rangnekar, J.*) JAMBU TAVANAPPA *v.* GOPALAKRISHNAMCHARYA. 175 I.C. 866=11 R.B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.

——S. 100—*New plea—Point of law necessitating remand.*

The High Court will not entertain a point of law raised for the first time in second appeal if the point cannot be decided without remanding the case for further evidence. (*Dunkley, J.*) PAPA AMMAL *v.* PANCHAVARNAM AMMAL 14 Rang. 738=163 I.C. 364=9 R.R. 7=A.I.R. 1936 Rang. 260.

——S. 100—*New plea—Point of law not dependent on fact—Maintainability.*

A point of law not dependent on any question of fact can be raised in second appeal though not raised before. (*Mahomed Noor and Saunders, JJ.*) JOKHIRAM SAGARMAL *v.* CHAMAN CHOUDHRY. 15 Pat. 356=160 I.C. 1096=8 R.P. 420=17 Pat. L.T. 57=A.I.R. 1936 Pat. 104.

——S. 100—*New plea—Point of law setting up a new right.*

A point of law cannot be taken for the first time in scond appeal if it sets up a new right differing in kind from that asserted throughout the trial. 18 Bom. 679, Foll. (*Dunkley, J.*) PAPA AMMAL *v.* PANCHAVARNAM AMMAL. 14 Rang. 738=163 I.C. 364=9 R.R. 7=A.I.R. 1936 Rang. 260.

——S. 100—*New plea—Point of law—Question whether suit falls under S. 92, C. P. Code—If can be raised in second appeal.*

A point of law can be taken at any time, and though the question whether a suit falls under S. 92, C. P. Code, is a mixed question of law and fact, if all the material facts are on the record, the question whether such facts do or do not show the trust to be a trust within the provisions of S. 92 is a question of law which can be taken at any time. (*Davis, J.C. and Lobo, A.J.C.*) SUKHUMAL-MANUMAL *v.* UTTAMCHAND. 171 I.C. 344=10 R.S. 102=31 S.L.R. 510=A.I.R. 1937 Sind 230.

——S. 100—*New plea—Point of law—When open.*

A point of law can be raised for the first time in second appeal only when a finding favourable to the appellant would entitle him to a decree on the evidence as it stands. (*D.R. Norman.*) HIRA LAL *v.* KANHAIYA LAL TIWARI. 1937 A.M.L.J. 71.

——S. 100—*New plea—Point requiring further findings of fact—If can be taken.*

It is not open to an appellant in second appeal to take a new point which requires further findings of fact before such point can be determined. (*Harries, J.*) SHYAM LAL *v.* SUNDER LAL. 1937 A.W.R. 650=1937 R.D. 387=1937 A.L.R. 872=171 I.C. 686=10 R.A. 299 (2)=1937 A.L.J. 769 =A.I.R. 1937 All. 661.

——S. 100—*New plea—Question of law.*

Where the question is purely one of law, not requiring any additional evidence for its decision, there can be no legal objections to its being

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raised in second appeal. (*Bhide, J.*) GURDIT SINGH *v* SHER KHAN. 164 I.C. 30=9 R.L. 105 =38 P.L.R. 608=A.I.R. 1936 Lah. 448.

——S. 100—*New plea—Question of law.*

Where a highly technical point is not raised by the appellant either in the lower Courts or in the grounds of appeal before the High Court it is open to the High Court, in second appeal, not to allow the appellant to raise it for the first time. Where, however, the question is of importance, the High Court may allow the parties to argue on the point especially if it is a pure question of law apparent on the face of the record and does not depend upon the evidence. (*Agha Haidar, J.*) DHALA BAHLAK *v.* DHALA KAKHAN. 165 I.C. 66 =9 R.L. 202=A.I.R. 1936 Lah. 612.

——S. 100—*New plea—Question of law—If can be raised.*

Per *Mackney, J.*—When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. (*Mackney, Mya Bu and Spargo, JJ.*) MAUNG PO ZAW *v.* MAUNG AN. 1939 Rang L.R. 83=179 I. C. 6=11 R.R. 303=A.I.R. 1938 Rang. 376.

——S. 100—*New plea—Question of law—If can be raised for the first time in second appeal.*

Where a new question of law that a suit for pre emption must fail because all that was sold could not be pre-empted, is raised for the first time in second appeal, it is not only competent but expedient in the interests of justice to entertain it. (*Hamilton and Srivastava, JJ.*) ABDUL HAFIZ *v.* MANOHAR LAL. 14 Luck. 678=183 I. C. 604=12 R.O. 44=1939 O.W.N. 736=1939 O A. 583=1939 A.W.R. (C C.) 111=1939 R.D. 455=1939 O.L.R. 537=A.I R. 1939 Oudh 233.

——S. 100—*New plea—Question of law—If can be raised.*

A question of pure law can be raised in second appeal, especially when the other party knows all the relevant facts which the latter himself has mentioned in his pleadings. (*Niamatullah, Ag.C. J. and Allsop, J.*) GAYA DEEN MISIR *v.* TIRBHUWAN SINGH. 1937 A.W.R. 1183=1937 A.L.J. 1252.

Presumption.

——S. 100—*Presumption—Wrong statement of law by appellate Court as to—Evidence approached from a wrong standpoint—Interference in second appeal.*

Where the judgment of the appellate Court is extremely brief and the Judge is shown to have started the discussion of the evidence with a wrong statement of the law as to presumptions applicable to the case, and the whole question is shown to have been approached from a wrong standpoint, the High Court can set aside the finding in second appeal. (*Venkatasubba Rao and Madhavan Nair, JJ.*) VENKAYYA *v.* VENKATARATTAMMA. 174 I.C. 669=10 R.M. 733=47 L. W. 66=A.I.R. 1938 Mad. 253=(1937) 2 M.L.J. 916.

Question of fact.

——S. 100—*Question of fact.*

Questions of fact cannot be entered upon in second appeal. (*Mehta and Lobo, A.J.Cs.*)

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CHATOMAL RANJHOMAL *v.* ABDUL HAMID KHAN. 173 I C. 862=10 R.S. 231=A.I.R. 1937 Sind 312.

——S. 100—*Question of fact—Acceptance of gift by donee.*

The question whether a donee had accepted a gift in the lifetime of the donor is not purely a question of law but would involve evidence as to whether there was or there was not acceptance, and it cannot, therefore, be considered in second appeal when it was not taken in the Courts below. (*Thomas, C.J. and Hamilton, J.*) LAKHPAT LAL *v.* MT. SUKHRAJI. 1940 O.A. 509=1940 A W.R. (C.C.) 264=1940 O.W N. 600=1940 O.L.R 373 =188 I.C. 666=13 R.O. 10=A.I.R. 1940 Oudh 318.

——S. 100—*Question of fact—Adequacy of damages to be awarded*

There can be no doubt that questions about the adequacy of damages are ordinarily questions of fact which cannot be entertained in second appeal. (*Bose, J.*) JANSA TANSA KALAR SIRRI *v.* BANOO. 161 I.C. 593=8 R.N. 228=A I.R. 1936 Nag. 70.

——S. 100—*Question of fact—Amalgamation of several holding of lands into single holding—Question as to—Finding on—Conclusive character of.*

The question whether several holdings of land have been amalgamated, so as to create a single holding in respect of which a single suit can be instituted for rent is substantially a question of fact, and the finding of the lower appellate Court on that question is conclusive in second appeal. (*James and Rowland, JJ.*) SIDHESHWAR PRASAD *v.* RAM CHARITER CHOUDHURY. 182 I.C. 454=12 R.P. 19=5 B.R. 746=1939 P.W.N. 217=A.I.R. 1939 Pat. 269

——S. 100—*Question of fact*—Bona fide *transferee for consideration.*

The question whether or not a certain transferee is a *bona fide* transferee for consideration is a question of fact. (*Zia-ul-Hasan and Hamilton, JJ.*) RAM RATAN LAL *v.* AKHTARI BEGAM. 181 I C. 181=11 R O. 287=1939 O L R. 241= 1939 O W.N. 398=1939 O.A. 375=A.I.R. 1939 Oudh 230.

——S. 100—*Question of fact—Entry in record-of-right describing defendant as a settled raiyat—Question of correctness of—Interference in second appeal.*

The question whether an entry in the record-of-rights describing the defendant as a settled *raiyat* is correct or incorrect is purely one of fact, and a finding of the Court below that it is incorrect is final in second appeal. The mere fact that there are features in the case from which a different conclusion may be drawn about the status of the defendant will not entitle the High Court to interfere with the finding of the Court below. (*Harries, C.J. and Agarwala, J.*) HALADHAR MAHTO *v.* KESAR MAHTO. 179 I.C. 593=5 B.R. 248=11 R.P. 397 (2)=A.I.R. 1939 Pat. 229.

——S. 100—*Question of fact—Inference from documents—Documents containing explicit words and requiring no construction—Second appeal—Competency.*

Where the question is what is the proper inference to be drawn from documents whose construction is not open to any controversy—the words used being explicit and requiring no construction—the question is a question of fact and a

C. P. CODE (1908), S. 100.

second appeal is not competent to the High Court. (*Kania and Wassoodew, JJ.*) MOTICHAND HIRACHAND *v.* KHUDABAKSH GULAMHUSEN. 189 I C. 545=42 Bom.L.R. 462=A.I.R. 1940 Bom. 255.

——S. 100—*Question of fact—Instances of burial proved in particular cases—Sufficiency for inference of dedication.*

Whether instances of burial proved in any particular cases are adequate in character, number and extent to justify an inference of dedication is undoubtedly a question of pure fact. (*Lobo, J.C. and Sullivan, J.*) DOST MOHOMED *v.* CHAINRAI. I.L.R (1940) Kar 174=187 I.C. 227 =12 R.S. 233=A.I.R. 1940 Sind 43.

——S. 100—Question of fact—Lease—Question whether rate of rent not enforceable as being in contravention of S. 29, B. T. Act *See* PRACTICE —APPEAL, SECOND. A.I.R. 1937 Cal. 8.

——S. 100—*Question of fact—Ownership of a house—Decision as to—Interference.*

A finding that a house belonged to a person is a pure finding of fact and as such it is not within the jurisdiction of a learned Judge hearing second appeal to reverse the first appellate Court's finding on that point. (*Zia-ul-Hasan and Yorke, JJ.*) RAM DAS *v.* CHEDI LAL. 14 Luck. 138=177 I.C. 48=11 R O. 17=1938 O.L.R. 359=1938 O.A 561=1938 O.W.N. 706=A.I.R. 1938 Oudh 186.

——S. 100—*Question of fact—Payment made by debtor to creditor—Whether gift or discharge of debt—Question as to.*

The question whether a certain payment was made by way of gift or by way of satisfaction of a debt is question of fact. (*Venkataramana Rao, J.*) SULTAN NACHI *v.* SALAMA BIBI. 176 I C. 747 =11 R.M. 160=1937 M.W.N. 1166=46 L.W. 617=A.I R. 1938 Mad. 25.

——S. 100—*Question of fact—Point not decided by lower Court—High Court, when can decide in second appeal.*

Per *Mackney, J.* (in the S. A. under L. P, Appeal)—The question whether the interest of a guardian was adverse to that of the minor is a question of fact and even if the question has not been considered by the lower Courts, the High Court, if there is sufficient material before it on which to form an opinion on the matter, is entitled to decide the matter in second appeal. (*Dunkley and Braund, JJ.*) R. M. A. R. M. CHETTYAR FIRM *v.* MG. SHWE HMUN. 180 I. C. 489=11 R.R 404=A.I R. 1938 Rang. 468.

——S. 100—*Question of fact—Question as to fraud—Finding on—Finality.*

The question whether there was any fraud or not in a transaction is a question of fact, and a finding thereon by the lower appellate Court on the evidence produced by the parties is conclusive and cannot be challenged in second appeal. (*Ganga Nath, J.*) KASHI KURMI *v.* BANSRAJ KURMI. 174 I.C. 298=10 R.A. 564=1938 A.L. R. 262=1937 A L J. 1346=1938 A.W.R. (H.C.) 13=A I.R. 1938 All. 150.

——S. 100—*Question of fact—Question regarding rebuttal of presumption.*

The question whether the presumption attaching to a document is or is not rebutted in a particular case is a question of fact and cannot be agitated in second appeal. (*Coldstream and Bhide, JJ.*) DIWAN SINGH *v* NATHA SINGH. 173 I.C. 993=10 R.L. 513=A.I,R. 1937 Lah. 468.

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——S. 100—*Question of fact—Question of rebuttal of—Presumption—Record-of-rights.*

The question whether the presumption arising out of an entry in the record of-rights is rebutted by the evidence adduced by a party, is entirely a question of fact which does not come within the jurisdiction of the High Court in second appeal. (*Wort and Rowland, JJ.*) JYOTI PRASAD SINGH *v.* JATAL MUKHOPADHYAYA. 165 I C. 763=9 R. P. 210=3 B.R. 79.

——S. 100—*Question of fact—Question whether lands from part of inam lands—Finality of finding on.*

Where the question to be decided is whether the lands in suit form part of a person's inam lands, that is a pure question of fact; and the finding of the lower appellate Court on such a question is binding and cannot be interfered with in second appeal, when there is evidence to support that finding, especially when it is not suggested that the lower appellate Court wrongly admitted or refused to receive evidence which ought to have been received. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable that error may seem to be. (*Beasley, C.J. and Stodart, J.*) THIRAPATIRAYUDU *v.* SECRETARY OF STATE. 163 I.C. 93=8 R M. 1091 =1936 M W.N. 348=43 L.W. 369.

——S. 100—*Question of fact—Question whether place is town or village.*

The question whether a particular place is a town or a village is one of fact and the finding on such question cannot be disturbed in second appeal. But if the lower Court while basing its finding upon such question completely ignores the entire oral and documentary evidence, then such a finding is not binding on the High Court and can be interfered with in second appeal. (*Abdul Rashid, J.*) NAWAB KHAN *v.* RANJIT. 41 P.L.R. 227=A I.R. 1939 Lah. 88.

——S. 100—*Question of fact—Question whether properties attached in execution are personal properties of judgment-debtor's legal representative.*

The question whether certain properties proceeded against in execution of a decree are or are not the personal properties of the legal representative of the judgment-debtor is a question of fact and cannot be raised in second appeal in the High Court. The decision of the lower appellate Court is final. (*Fazl Ali and Agarwala, JJ.*) SARJU SINGH *v.* BHAGWAT PRASAD SINGH. 176 I.C. 566=4 B.R. 738=11 R.P. 91=1938 P. W.N. 259=19 Pat. L.T. 193=A.I.R. 1938 Pat. 372.

——S. 100—*Question of fact—Question whether presumption that tenancy was fixed rate one can or cannot arise from tenant having held at uniform rate of rent and other circumstances—Finality.*

The question whether a tenant has held at a uniform rate for a number of years, and the further question whether a presumption could or could not arise, from a tenant having held at uniform rate for a very long period and from other circumstances, that the tenancy was one of which the rent was fixed, are questions of fact and the decision of the final Court of fact must be taken to be conclusive between the parties concerned. (*Guha and Bartley, JJ.*) FERDINAND

C. P. CODE (1908), S. 100.

PERIER *v.* KUMAR KRISHNA NANDY 167 I.C. 596 =9 R.C. 705=A.I.R 1936 Cal. 582.

——S. 100—*Question of fact--Reasonable care and caution under S.* 41, *Transfer of Property Act—Question as to—Finding on—If final.*

The question whether a transferee has exercised reasonable care and caution within the meaning of S. 41, Transfer of Property Act, is one of fact, and the finding of the lower appellate Court on it is final in second appeal. (*Agarwala and Rowland, JJ.*) BANSIDHAR SETH *v.* GOPI LAL SETH. 6 B.R. 395=186 I.C 793=12 R.P. 527= A.I.R. 1940 Pat. 480.

——S. 100—*Question of fact—Reasonable and probable cause—Finding, if open to attack in second appeal.*

The finding of the lower Court on the question of the absence of reasonable or probable cause is a question of fact and cannot be reopened in second appeal (*Bennet and Ganga Nath, JJ.*) DHARAM NATH *v.* MAHOMED UMAR KHAN. I.L. R. (1939) All 424=184 I.C. 247=12 R.A. 205= 1939 A.L.J. 367=1939 A. Cr C. 77=1939 A.W. R. (H.C.) 299=A.I.R. 1939 All. 554.

——S. 100—*Question of fact--Rebuttal of statutory presumption.*

Whether a statutory presumption was rebutted by the rest of the evidence or not is a question of fact. A.I.R. 1930 P.C. 91, Foll. (*Addison and Din Mohammad, JJ.*) GHULAM MOHAMMAD *v.* SECRETARY OF STATE 180 I.C. 969=11 R L. 732 =40 P.L.R. 655=A I.R. 1938 Lah. 445.

Question of law.

——S. 100—*Question of law—Conclusions from findings of fact.*

A second appellate Court, though it cannot entertain an appeal upon any question as to the soundness of findings of fact by the lower appellate Court, can nevertheless adjudicate as matter of law upon the soundness of the conclusions which have been derived from those findings. 19 I.A. 228, Rel. on. (*Srivastava, Ag C.J. and Zia-ul-Hasan, J.*) RAM KHELAWAN *v.* RAM PAL SINGH. 166 I.C. 232=9 R.O. 281=1936 O.L.R. 729=1936 R.D. 504=1936 O.W.N. 1057=A.I.R. 1937 Oudh 47.

——S. 100—*Question of law—Construction of receipt.*

The true construction of a receipt upon which the whole matter in issue between the parties depends, is not a question of fact, but is a question of law. (*Braund, J.*) JAINTI PRASAD *v.* NANAK CHAND. 1940 A.W.R. (H.C.) 372=A.I. R. 1940 All. 441.

——S. 100—*Question of law—Contract of partnership—Inference from proved facts.*

Under S. 5, Partnership Act, partnership is a legal relationship arising from contract, and when there is no deed of partnership setting out the terms of the contract, the question whether that legal relationship existed between the parties has to be inferred, by consideration of the provisions of S. 6, Partnership Act, from the facts as to the manner in which the business, in which the parties were concerned, was conducted and as to their relationship with one another in connexion with that business. It is a legal conclusion to be drawn from the findings as to the simple facts and the correct inference to be drawn from the proved facts, as to the relationship of

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the parties towards one another in the business must be a matter of law. (*Dunkley, J.*) MA SEIN *v.* MAUNG BA HMU. 164 I.C. 1100=9 R.R. 180=A.I R. 1936 Rang. 383.

——S. 100—*Question of law—Construction of decree.*

The construction of a decree is a pure question of law. (*Mockett, J.*) GOPALAKRISHNAYYA *v.* SREERAMAMURTHI. 1937 M.W.N. 292.

——S. 100—*Question of law—Decision based on surmises.*

Where a decision is based purely on surmises when there is evidence on the record which should have been considered, it entails a question of law. It is a first principle of law that a decision must be based on evidence and not on surmises. (*Davies.*) HABIBULLAH KHAN *v.* MOHOMAD UMAR KHAN. 1939 A.M.L.J. 116.

——S. 100—*Question of law—Facts necessary for the decision should also be raised and decided.*

In appeals from appellate orders the facts necessary for those decisions should also be raised and decided. Where that is not done, it would not be in the ends of justice for the High Court to decide those questions. (*Wort, Ag. C. J. and Manohar Lall, J.*) MT SUMITRA KUER *v.* BHAGWAT NARAIN SINGH. 180 I.C. 736=5 B.R. 482=11 R.P. 530=A.I.R. 1939 Pat. 19.

——S. 100—*Question of law—Inference from circumstantial evidence.*

The question as to whether the lower Courts drew the correct inference or not from the circumstantial evidence on a certain point is a pure question of law. (*Nanavutty and Smith, JJ.*) MAHOMED YUNUS KHAN *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. 167 I.C. 962=9 R.O. 421=1937 O.L.R. 188=1937 O.W. N. 438=A.I.R 1937 Oudh 301.

——S. 100—*Question of law—Inferences from facts.*

Whether legal inferences arise from certain facts, whether conclusions in law arising from certain facts are or are not correct, are questions of law which can be considered in second appeal. (*Davis, J.C. and Mehta, J.*) NARAINDAS PIRUMAL *v.* BHOJRAJ PREMCHAND. I.L.R (1939) Kar. 269 =181 I.C. 888=11 R.S. 244=A.I.R. 1939 Sind 97.

——S. 100—*Question of law—Inferences from fact—Interference.*

While a Court in second appeal will not interfere with findings of fact of the lower appellate Court, whether right legal inferences have been drawn from those facts, whether, for instance, the possession is adverse or not, whether a transfer is made with intent to defeat or delay within the meaning of S. 53, are questions of law which can be dealt with in second appeal. (*Davis, J.C. and Mehta, J.*) PARMANAND JHANGULDAS *v.* JAIRAMDAS SADHURAM. I.L.R. (1939) Kar. 136= 178 I.C. 469=11 R.S. 91=A.I.R. 1938 Sind 215.

——S 100—*Question of law—Inference from facts—Interference.*

Though the High Court has no jurisdiction to interfere with findings of fact in second appeal, it is the duty of the High Court to carefully disentangle the findings of fact from inferences which may be drawn from those facts and to review the legal conclusion, if erroneous. The proper effect of a proved fact is essentially a

question of law. (*Dhavle and Manohar Lal, JJ.*) NRISINGHA CHARAN NANDY *v* TRIGUNAND JHA. 17 Pat. 507=177 I.C. 564=4 B.R. 841=11 R.P. 161=1938 P.W.N. 818=19 Pat.L.T. 309=A.I.R. 1938 Pat. 413.

——S. 100—*Question of law—Inference from proved facts.*

Where certain facts are found and an inference is drawn from the facts so found, it is open to the Court in second appeal to consider whether as a matter of law such inference is justified by the facts found. Whether the evidence is directed to prove fraud or conspiracy, this principle will equally apply because that principle applies to all circumstantial evidence and amounts simply to this that the inference drawn from such evidence must be one which necessarily flows from it. (*Fazl Ali, J.*) NARAIN PANDE *v.* GAYA RAI. 174 I.C. 388=4 B.R. 429=10 R.P 510=19 Pat.L.T. 398=A.I.R. 1938 Pat. 147.

——S. 100—*Question of law—Inference from proved facts - Interference.*

Where a Court is dealing with the question as to whether from the facts found the legal inference drawn by the lower Courts is correct in cases such as of adverse possession, or under S. 53, Transfer of Property Act, or S. 82, Trusts Act, it is entitled to consider in second appeal whether the facts found by the lower Court justified the conclusions in law that they have drawn. (*Davis, J.C. and Mehta, J.*) VIRANBAI *v.* PARMANAND JHANGALDAS. I.L.R. (1939) Kar. 140=178 I.C. 801=11 R.S. 108=A.I.R. 1938 Sind 206.

——S. 100—*Question of law—Inference from proved facts.*

The proper legal inference to be drawn from the proved facts of a case is a point of law. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASHEB *v.* LAXMANAPPA RAMAPPA. 178 I.C. 854=11 R.B. 198=40 Bom.L.R. 1015=A.I.R. 1938 Bom. 492.

——S 100—*Question of law—Inference from proved facts—Question whether tenancy is permanent or precarious.*

The inference to be drawn from the proved facts of a case is not a question of fact, but a question of law. The question whether a tenancy is permanent or precarious, which is a legal inference from facts, is not itself a question of fact. It is an inference of law and a question of law for purposes of second appeal. (*Harries, C.J. and Noor, J.*) ZAYAUDDIN *v.* SHAIKH DARGAHAN. 18 Pat. 571=184 I.C. 363=12 R.P. 242=6 B.R. 45=1939 P.W.N. 394=20 Pat.L T. 579=A.I.R. 1939 Pat. 448.

——S. 100—*Question of law—Inference of partnership from proved facts.*

The proper legal effect of a proved fact is essentially a question of law, so also s the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. The Judge of the lower appellate Court in his judgment stated: "There is no evidence of any express contract of partnership but a contract may be implied in the circumstances under which the parties worked together." He then reviewed the circumstances under which the parties worked together and made use of

three arguments: the fact of working together, the use of the hammer mark and the fact that no remuneration was paid to person alleging partnership, to justify him in concluding that a partnership between these persons should be implied.

Held, there was nothing in the evidence from which a partnership could be implied as a question of law. The legal effects of the proved facts did not amount in law to partnership, or to put in another way, there was no evidence in law from which the Judge could come to the conclusion that a partnership had been established. He therefore misdirected himself on points of law and as such a second appeal lay. (*Roberts, C.J. and Leach, J.*) MAUNG BA HMU *v.* MA SEIN. 171 I.C. 718=10 R.R. 183=A.I.R. 1937 Rang. 225.

——S. 100—*Question of law—Legal effect of proved facts.*

Question as to the proper legal effect of proved facts are questions of law for purposes of second appeal. (*Lord Maugham.*) GUJRAT GINNING AND MANUFACTURING CO. LTD., AHMEDABAD *v.* MOTI LAL HIRABHAI SPINNING AND MANUFACTURING CO., LTD. 63 I.A. 140=63 C.L.J. 160=40 C.W.N. 417=1936 A.L.J. 145=1936 A.W.N. 169=160 I.C. 837=1936 R.D. 63=43 L.W. 289 =38 Bom.L.R. 353=8 R.P.C. 169=1936 O.L.R. 133=1936 A.L.R 237=1936 M.W.N. 314=A.I.R. 1936 P.C. 77=70 M.L.J. 190 (P.C.).

——S. 100—*Question of law—Legal effect of proved or admitted facts.*

Where the lower appellate Court has failed to properly appreciate the legal effect of certain proved or admitted facts, the question is one of law and therefore it is a good ground for a second appeal. A.I.R. 1930 P.C. 91, Foll (*Jai Lal and Sale, JJ.*) PARMODH CHAND *v.* NARAIN SINGH. 163 I.C. 81=8 R.L. 991=A.I.R. 1936 Lah. 104.

——S. 100—*Question of law—Lower Court stating law correctly and coming to particular conclusion—If question of law.*

Where the lower Court Judge states the law correctly and does not misdirect himself and comes to a particular conclusion, he decides the point as a question of law and not as a question of fact. (*Wort and Rowland, JJ.*) MT. BIBI ZAINAB *v.* MUHAMMAD AYUB. 161 I.C. 331 (2) =8 R.P. 443=17 Pat.L.T. 366=1936 P.W.N. 140=A.I.R. 1936 Pat. 136.

——S. 100—*Question of law—Malicious prosecution—Suit for damages—Absence of reasonable and probable cause and presence of malice—Finding on—Finality — Interference in second appeal.*

Though the basis for a finding of absence of reasonable and probable cause and the presence of malice, in a suit for damages for malicious prosecution, consists in matters of fact, the inference that should be drawn from the proved facts and the question whether these facts are sufficient to establish the absence of reasonable and probable cause and the presence of malice, are matters of law upon which interference in second appeal is permissible. (*Wadsworth, J.*) NARAYANA MUDALI *v.* PERIA KALATHI. 49 L.W. 664= 188 I.C. 801=41 Cr.L.J. 677=1939 M.W.N. 593 =A.I.R. 1939 Mad. 783=(1939) 2 M.L.J. 296.

——S. 100—*Question of law—Nature of property—Mosque, if private or public.*

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The question whether a building is a private mosque or a public mosque is not question of fact, but a question of law, that is a question of inference from proved facts. (*Thomas, C.J. and Yorke, J.*) MUSAHEB KHAN *v.* RAJKUMAR BAKHSHI. **1938 O.A. 722=177 I.C 718=11 R. O. 62=1938 O L.R. 435=1938 O.W.N 937=A. I.R. 1938 Oudh 238**

——**S. 100**—*Question of law—Question as to misconduct.*

The question whether misconduct can be inferred from a set of facts is a question of law. (*Mohammad Noor, J.*) BENGAL NAGPUR RY. CO. *v.* HARIJIBAN ISWAR PATHAK. **1937 P.W.N. 71 =169 I C. 354=3 B.R. 554=10 R.P. 4=A.I.R. 1937 Pat. 289.**

——**S. 100**—Question of law—Question as to nature of tenancy—If can be gone into in second appeal *See* LANDLORD AND TENANT—PERMANENT TENANCY. **A.I.R 1938 Pat. 333.**

——**S. 100**—*Question of law—Question as to nature of tenancy.*

The question whether on the facts found a particular tenancy is a permanent one or not is a mixed question of law and fact. (*Agarwala, J.*) ANANT TELI *v.* RAMDHAN PURI. **179 I.C. 940=5 B R. 327=11 R.P. 427=A.I.R. 1939 Pat. 350.**

——**S. 100**—*Question of law—Question, if grove had lost its character as such.*

The nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law. Where a Court has misdirected itself on this point, it is impossible to maintain its finding as a finding of fact. (*Thomas, C.J.*) CHANDRA BHAN SINGH *v.* HUBBA. **14 Luck. 269=178 I.C. 882=11 R.O. 126=1938 A W.R. (C.C.) 133= 1938 O W.N. 1211=1938 O.A. 966=1938 R.D. 922=A.I.R. 1939 Oudh 48.**

——**S 100**—*Question of law—Question of onus.*

A question of law does not arise every time an inference is made from a set of proved facts. It can only arise if the ultimate inference is itself a question of law and not one of fact. Where the onus is used as the determining factor in the whole case because the tribunal finds the evidence pro and con so evenly balanced or so equally worthless that it can come to no sure conclusion, then the question of onus becomes one of law and not one of fact as it would otherwise be. (*Bose, J.*) BHAGIRATH BIRDI CHAND *v.* VISHWASRAO PANDALIK. **181 I.C. 226=11 R.N. 448=A.I.R. 1938 Nag. 522.**

——**S. 100**—*Question of law—Question whether entry of rent in settlement rent roll is correct and conclusive—Finding on—If binding in second appeal.*

Where an obvious point of law arises, the practice of some lower Courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a point of law with the appearance of a finding of fact ought to be deprecated. The question whether an entry of rent in the settlement rent roll is conclusive or whether a party can prove by evidence that it is incorrect, is undoubtedly a point of law which an appellant is perfectly competent to raise in second appeal. The finding of the lower appellate Court on such a question cannot be regarded as binding as a finding of fact. (*Harries, C.J. and Rowland, J.*) SIDHAKAMAL RAMANUJ DAS *v.*

C. P. CODE (1908), S. 100.

BATAKRISHNA MAHAPATRA. **18 Pat. 204=183 I.C. 428=5 B.R. 935=12 P.R. 150=5 C.L.T. 10 =1939 P.W.N. 37=A.I.R. 1939 Pat. 402.**

——**S. 100**—*Question of law—Question whether Hindu family has separated in status—Finding on—Second appeal.*

Inferences from facts are not always questions of law. The proper legal effect of a proved fact is essentially a question of law, so also is the question whether any evidence has been offered on one side or the other; but the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. The question whether there was an intention among the members of a Hindu family to separate is a pure question of fact even when it is based on inferences drawn from other facts. The actual severance of status is sometimes effected by a forma document such as a deed of partition or by the use of words indicating unequivocal intention to separate. There can be no doubt that that the actual severance, the actual breaking of the legal tie, is a matter of law, just as much as the actual act of transfer in case of sale or gift or mortgage. The construction of the document which effects this legal severance or the interpretation to be placed upon the actual words used when they are known is therefore a question of law. But when there is no document which in itself purports to effect the severance or when we do not know the actual words used. then we are thrown back on other kinds of evidence to determine whether there ever was such a severance; not whether it could be legally effected by the particular form of words used but whether such a transaction ever took place. That is a question of fact pure and simple, and once it is found that there was such a transaction then in the absence of proof of the actual words used, the law presumes that everything was done legally and so the transaction was a legal one. Where it is an admitted fact that there has been cesser of commensality, the parties lived in separate houses, had separate messes, kept separate accounts and ran separate shops, all this is evidence, and very strong evidence of partition in the legal sense of the term. But not one of these facts can itself break the legal tie or legally effect the actual severance in the same way as a deed of partition or the unequivocal expression of an intention to separate nor can they when all are taken together. They are therefore no more than evidence of the main question which in its ultimate issue is simply this: did the parties ever come together and agree to sever their joint status; or did any one of them express an unequivocal intention to do so. Whether they did that or not is a question of fact and not of law. Hence where the question as to partition has been considered of all facts, the decision of the two lower Courts that the family did not separate is conclusive and cannot be the subject of a second appeal. (*Bose, J.*) GANGA DIN *v.* BAHORANLAL. **171 I.C. 860=10 R.N. 139 =A.I R. 1937 Nag. 230.**

——**S. 100**—*Question of law—Question whether property forms part of village or urban immovable property—Punjab Pre-emption Act, S. 3.*

The question whether a particular property comes within the definition of village immovable

C. P. CODE (1908), S. 100.

property or urban immovable property as contained in S. 3, is a question of law, but its determination wholly depends on a finding of fact and the legal definition necessarily follows from this finding of fact. So a second appeal does not lie. (*Jai Lal, J.*) RAM RUP *v.* DALIP SINGH. 174 I.C. 136=10 R.L. 528 (1)=A.I.R. 1937 Lah. 284.

——S. 100—*Question of law—Wall erected by co-owner on top of joint wall, if joint wall.*

Where one of the owners of a joint wall erects a wall on the top of the joint wall, the question whether the wall so erected acquires the character of a joint wall is a question of law and can be raised in second appeal. (*Bhide, J.*) ONKAR NATH *v.* LALA MUNI LAL. 182 I.C. 498=12 R.L. 50=41 P.L.R. 267=A.I.R. 1939 Lah. 28.

Scope.

——S. 100—*Scope—If to be read with O. 41, R. 23—Suit for rent by proprietor—Dismissal by trial Court and appellate Court for want of registration of plaintiff's name under S. 78, Bengal Land Registration Act—Registration pending second appeal—If can be taken into account for decreeing suit.*

A Court of second appeal is entitled to take into consideration the effect of the registration of a proprietor's name under S. 78 of the Bengal Registration Act, during the pendency of the second appeal and to decree the suit for rent though the suit has been dismissed by the Courts below for want of registration. S. 100, C. P. Code, must be read with O. 49, R. 33, which is wide enough to enable the appellate Court to take into consideration the fact of subsequent registration under S. 78 of the Land Registration Act. O. 41, R. 33 applies to second appeals as well. (*Fazl Ali and Chatterji, JJ.*) DOMAN SAHU *v.* GANGA NAYEK. 185 I.C. 638=6 B.R. 229=1940 P.W.N. 566=12 R.P. 404=21 P.L.T. 165=A.I.R 1940 Pat. 300.

Second appeal.

——S. 100—Second appeal—Appeal to District Judge under S. 16, Gujarat Talukdars' Act—Decision on—If subject to second appeal. *See* GUJARAT TALUKDARS' ACT, S. 16. 39 Bom.L.R. 444.

——S. 100—*Second appeal—"Decree"—Appellant's pleader applying for time being unable to go on with appeal—Refusal of adjournment and dismissal for want of prosecution—If dismissal for default—Remedy of appellant—Second appeal—If lies—Application for restoration—If competent.*

Where the appellant's pleader appears when the appeal is called on for hearing and applies for an adjournment of the appeal on the ground that owing to other engagements he could not prepare the appeal, the file of which is very heavy but the Court rejects his application and dismisses the appeal "for want of prosecution", the disposal of the appeal clearly amounts to a decree, and a second appeal lies under S. 100, C. P. Code. The dismissal is not a dismissal for default, and the appellant has no right in such a case to apply for restoration of the appeal under O. 41, R. 19, C. P. Code. (*Niamatullah, J.*) MOHAMMADI HUSAIN *v.* CHANDRO. 1937 A.L.J. 174=1937 A.W.R. 122 =168 I.C. 1001=9 R.A. 697=1937 A.L.R. 439=A.I.R. 1937 All. 284.

C. P. CODE (1908), S. 100.

——S.100—*Second appeal—Dismissal of appeal under O. 41, R. 11—Right of second appeal.*

The mere fact that an appeal is dismissed summarily under O. 41, R. 11, C. P. Code, is no ground for holding that no second appeal lies. Where the lower appellate Court has in effect written a judgment giving reasons for the dismissal, a second appeal is necessarily maintainable if the other requirements of S. 100, C. P. Code, are satisfied. Where the merits of the case are not dealt with in accordance with law, a second appeal lies and the High Court will interfere. (*Manohar Lall and S. C. Chatterji, JJ.*) RAJA MANDAR *v.* REWAT MAHTO. 174 I.C. 159=4 B.R. 389=10 R.P. 484=19 Pat.L.T. 305=A.I.R. 1938 Pat. 330.

——S. 100—*Second appeal—Finding of absence of reasonable and probable cause in suit for malicious arrest—Interference in second appeal.*

The High Court has jurisdiction to interfere in second appeal with the findings of Courts below as to absence of reasonable and probable cause and as to the existence of malice in a suit for damages for malicious arrest. (*Manohar Lal, J.*) MADAN LALL *v.* LAKSHMI NARAIN. 179 I.C. 790=20 P.L.T. 367=11 R.P. 401=1938 P.W.N. 783=5 B.R. 286=A.I.R. 1939 Pat. 13.

——S. 100—*Second appeal—Order of abatement of appeal.*

An order that the appeal abates not only with regard to the respondent who has died but with regard to all the respondents, comes within the definitian of a decree and as such is appealable. (*S. K. Ghose and Patterson, JJ.*) SABITRIBAI *v.* JUGAL KISHORE. 179 I C 95=11 R.C. 468=43 C.W.N. 41=A.I.R. 1938 Cal. 639.

——S. 100—Second appeal—Order under O. 21, R. 90. *See* C. P. CODE, S. 2 (2) AND ALSO O. 21, R. 90 1936 A.L.J. 959.

——S. 100—*Second appeal—Order under O. 21, R. 92, allowing deposit and setting aside sale.*

A second appeal does not lie from an order of the Court allowing a deposit and setting aside a sale in execution under O. 21, R. 92, C. P. Code. (*Wort, J.*) NASIRUDDIN HAIDER *v.* HAKIM MUHAMMAD TAHIR. 161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.

——S. 100—*Second appeal—Question of costs—Competency—Interference—Principles.*

It cannot be said that no second appeal lies against an order for costs. Where in the Courts below wrong principle have been applied or there is some error in awarding costs, then the High Court can interfere in second appeal. If the High Court is satisfied that the lower appellate Court has considered the matter from the right point of view, it would not be open to the High Court to interfere in second appeal. The trial Court has a discretion in the matter of costs and that discretion can be inferred with in appeal only if the trial Court has exercised its discretion improperly. Where the lower Court does not keep this principle in view but considers the matter of costs as if it had been trying the suit itself, that is not the proper way of approaching the question, and the High Court will therefore interfere in second appeal. (*Horwill, J.*) KOZHUVAMMAL AHMAD *v.* PARU AMMA. 51 L.W. 538=1940 M.W.N. 445=A.I.R. 1940 Mad. 589=(1940) 1 M.L.J. 764.

C. P. CODE (1908), S. 100.

——**S. 100**—*Second appeal—Summary dismissal of appeal under O. 41, R. 11—Second appeal—If lies.*

Quaere.—Whether a second appeal lies to the High Court against the dismissal of an appeal summarily under O. 41, R. 11, C. P. Code? (*Manohar Lall, J.*) CHOTOO LAL *v.* MIST. BIBI SEKINA. **179 I.C. 292=5 B.R. 208=11 R.P. 339 =19 Pat.L.T. 210=A.I.R. 1938 Pat. 608.**

——**S. 100**—*Summary rejection of second appeal —If justified.*

A Court before whom a second appeal is filed is entitled to reject it, if in its opinion the case is not covered by the provisions of S. 100, C. P. Code. (*Sathe, J.M.*) MEWA LAL *v.* PARAGA. **1940 O. W.N. 550=1940 O.A. 643=1940 A.W.R. (B.R.) 113 (2).**

——**S. 100 (1) (c)**—*Procedure—Defect in—Second appeal—When maintainable*

In order that a second appeal might be maintainable under S. 100 (1) (*c*), C. P. Code, it is not sufficient to show that there was a defect in the procedure of the trial Court. It is necessary to show that the alleged defect in procedure may possibly have praduced error or defect in the decision of the case upon the merits by the lower appellate Court. (*Sulaiman, C.J. and Bennet. J.*) NANDAN SINGH *v.* PHUNESH SINGH. **167 I.C. 397=9 R.A. 528=1936 R.D. 543=1936 A.W.R. 1085=1937 A.L.J. 46=1937 A.L.R. 188=A.I.R. 1937 All. 105.**

——**S. 100 (1) (c)**—*"Substantial error or defect in procedure, etc."—Question as to genuineness of document—Finding on—Lower appellate Court requiring too high a standard of proof and differing from trial Court—Interference in second appeal.*

The question whether a document, such as a promissory note is genuine or not, is purely a question of fact, and a decision on that question, being a finding of fact, cannot be interfered with in second appeal. But if the lower appellate Court requires too high a standard of proof for the establishment of any particular fact,—a standard of proof than that laid down by S. 3 of the Evidence Act—that is an error of law or procedure justifying interference under S. 100 (1) (*c*), C. P. Code. If the lower appellate Court differs unnecessarily from the appreciation of the evidence by the trial Court which saw and heard the witnesses, on a mistaken view as to the standard of proof, the High Court will interfere in second appeal. (*King J.*) PRACASARAONAIDU *v.* RAMAMURTINAIDU. **1937 M.W.N. 188.**

——**S. 102**—*Applicability—Money suit* bona fide *framed as mortgage suit.*

S. 102, C. P. Code, does not apply to a suit *bona fide* framed as a mortgage suit, although the only claim which could be established by the plaintiff is a money claim. (*Jack, J.*) KALIPADA BHATTACHARJEE *v.* KALI KUMAR PAL. **I.L.R. (1938) 2 Cal. 81=11 R.C. 148=176 I.C. 681=66 C.L.J. 541=42 C.W.N. 381=A.I.R. 1938 Cal. 336.**

——**S. 102**—*Applicability—Order in execution under S. 47—Second appeal by surety for judgment-debtor—Bar of.*

S. 102, C. P. Code, not only applies to appeals, but to orders in execution under S. 47, C. P. Code. The section applies also to second appeals from orders in execution under S. 47. Since a surety for a judgment-debtor is, for the purposes

C. P. CODE (1908), S. 102.

of appeal, deemed a party within the meaning of S. 47, by reason of S. 145, C. P. Code, the bar of appeal under S. 102, would also apply to a surety for a judgment-debtor. (*Davis, J.C. and Tyabji, J.*) KHANCHAND *v.* PESSUMAL. **I.L.R. (1939) Kar. 342=185 I.C. 486=12 R.S. 165=A.I.R. 1939 Sind 360.**

——**S. 102**—*Applicability—Suit for money and for injunction—Second appeal.*

S. 102, C. P. Code, bars a second appeal in suits for small sums of money, if the claim is merely to rocover money. But if in addition, the suits are also, and perhaps mainly, for an injunction, a second appeal would lie and would not be barred. (*Burn and Stodart, JJ.*) AUDIAPPA CHETTI *v.* TALUK BOARD OF DEVAKOTTA. **182 I.C. 908=12 R.M. 208=48 L.W. 512=1938 M.W.N. 931=A. I R. 1938 Mad. 941=(1938) 2 M.L.J. 589.**

—— **S. 102**—*Applicability—Suit of small cause nature—Co-sharer—Suit for rent against tenant—Dispute as to share of plaintiff in land—Other co-sharers made parties to suit—Decision in—Second Appeal—If barred.*

Where in a suit for rent by one of several co-sharers against the tenants, a question arises as to the proper share which the plaintiff is entitled to in the land, and for the purpose of determination of that share, the co-sharers who, though not originally parties, are impleaded as parties to the suit, the suit in substance, so far as the co-sharers are concerned, is one for a declaration of the plaintiff's share to the land. The suit is not of a small cause nature under S. 102, C. P. Code, so as to bar a second appeal. (*Venkataramana Rao, J.*) VIZIA RAMA MURTI *v.* SURYA NARAYANA MURTI. **1940 M.W.N. 60=A.I.R. 1940 Mad. 507.**

——**S. 102**—*Cases covered by—Revision.*

As a rule, the Court is not in favour of entertaining revisions from orders of the lower appellate Courts in cases which are covered by S. 102, C. P. Code. These orders are intended by the legislature to be final and to allow an appeal against such orders amounts to circumventing the policy of the legislature. (*Agha Haidar, J.*) GIRDHARI LAL *v.* RATTAN CHAND. **165 I.C. 137= 9 R.L. 213 (2)=A.I.R. 1936 Lah. 293.**

——**S. 102**—Scope—Suit for rent—Alternative claim for money below Rs. 500—Latter claim cognizable by Small Cause Court—Second appeal in rent suit barred by S. 153, Bengal Tenancy Act —Joinder of two claims for purposes of second appeal—Permissibility. *See* BENGAL TENANCY ACT, S. 153. **40 C.W.N. 698.**

——**S. 102**—Scope—Suit of small cause nature of value not exceedings Rs. 500—Appeal from order in execution of decree—Dismissal under O. 41, R. 11 (*a*)—Second appeal. *See* C. P. CODE, S. 47. **18 Pat.L.T. 321=A.I.R. 1937 Pat. 349.**

——**S. 102**—*Suit for recovery of money of value of bhaoli produce of mahua trees—If Small Cause Suit.*

A suit for recovery of money value of bhaoli produce of some mahua trees standing on a plot of land, is not a suit for rent but is a suit for money, and not being outside the jurisdiction of the Court of Small Causes, no second appeal lies from it under S. 102. A.I.R. 1927 Rang. 94 and A.I.R. 1914 Mad. 362, Foll. (*Varma, J.*) JHAKAR SAHU *v.* RAJ KUMAR TEWARI. **160 I.C. 186=8 R.P. 351=17 Pat.L.T. 88=A.I.R. 1936 Pat. 102.**

C. P. CODE (1908), S. 102.

——**S. 102**—*Suit of Small Cause nature—Cutting of trees—Suit for damages—Second appeal.*

Before Art. 35 (2) can be deemed to apply to a suit for damages for cutting of trees, it must be shown and alleged not merely that there was a cutting or damage done to trees or other objects, but that it was done with some criminal intent. Where there is no allegation of criminal act or intent, the suits are cognizable by the Court of Small Causes. S. 102 applies and no second appeal lies. (*Stone, C.J.*) TIKARAM GAJRAJ *v.* SANTAN LALITA. **168 I.C. 596=9 R.N. 261 (1)=A.I.R. 1936 Nag. 276.**

——**S. 102**—*Suit of small cause nature—Inamdar—Suit to recover dues from khatedar—Second appeal.*

Sums payable by a khatedar to an inamdar as a superior holder are "dues," and a suit to recover such dues is not cognizable by a Court of Small Causes and a decree passed in such suit is therefore subject to a second appeal under S. 102, C.P. Code. (*Lokur, J.*) NARHAR SONAJEE *v.* TRIMBAK SHRIDAR. **185 I.C. 608=12 R.B. 255=41 Bom L.R. 1174=A.I.R. 1940 Bom. 12.**

——**Ss. 102 and 115**—*Suit of small cause nature—Small Cause Court returning plaint to be presented on regular side—Decision of trial Court—Second appeal—Revision.*

Under S. 102, C. P. Code, if a suit is of the nature cognizable by Courts of Small Causes and the value of the suit does not exceed Rs. 500, no second appeal would lie, although the suit has not been tried in a Small Cause Court and although the Small Cause Court returns the plaint under S. 23 of the Provincial Small Cause Courts Act to be presented on the regular side. A second appeal filed in such circumstances cannot be treated as an application for revision under S. 115, C. P. Code, and the decision of the trial Court cannot be reversed on the ground that as the Court had no jurisdiction to try the suit on the regular side, its proceedings are vitiated by lack of jurisdiction, for the simple reason that it is the nature of the suit and not the Court in which the suit is tried that determines the right of second appeal conferred upon a party. (*Nanavutty, J.*) RAM CHARAN *v.* KEDAR NATH. **13 Luck. 204=167 I.C. 557=9 R.O. 397=1937 O.L.R. 149=1937 O.W.N. 263=A.I.R. 1937 Oudh 244.**

——**S. 102**—*Suit of small cause nature—Suit by landlord for recovery of price of trees cut and misappropriated by defendant-tenant—Second appeal.*

Where in a suit for recovery of the price of certain trees said to have been cut from the land of the plaintiff landlord and misappropriated by the defendants, upon the facts stated in the plaint, the case against the defendants is one of wrongful or illegal cutting of trees which is not necessarily penal so as to bring him within the purview of Ch. 17, I. P. Code, the jurisdiction of the Court of small causes to try the suit is not barred and a second appeal to the High Court from such suit is barred under S. 102, C. P. Code, if the value of the subject-matter of the suit does not exceed Rs. 500. (*Dhavle, J.*) MAHESHWARI PRASHAD BHAGAT *v.* MAHADEO ROY. **182 I.C. 708=12 R.P. 57=5 B.R. 814=A.I.R. 1939 Pat. 216.**

——**S. 102**—*"Suit of Small cause nature"—Suit for damages for wrongful attachment and negligence—Second appeal.*

C. P. CODE (1908), S. 103.

The jurisdiction of a Small Cause Court to try suits for damages for wrongful attachment and negligence is barred by Cl. (*j*) of Art. 35, Provincial Small Cause Courts Act. A Second appeal in such a case is not barred by S. 102, C. P. Code. (*Pollock, J.*) MOTIRAM TUKARAM *v.* NILKANTHRAO. **I.L.R. (1937) Nag. 19=168 I.C. 463=9 R.N. 254=A.I.R. 1936 Nag. 257.**

——**S. 102**—*'Suit of small cause nature'—Suit for recovery of terminal tax on movable property valued at less than Rs. 500—Second appeal.*

It is the nature of the suit and not the Court in which it is tried that determines the right of appeal within the provisions of S. 102. Where a suit is for recovery of taxes upon movable property and the subject-matter of the suit is also less than Rs. 500, no second appeal lies. (*Davis, J.C. and Mehta, J.*) LARKANA MUNICIPALITY *v.* GOKALDAS. **I.L.R. (1939) Kar. 134=179 I.C. 927=11 R.S. 165=A.I.R. 1939 Sind 35.**

——**S. 102**—Suit of Small cause nature—Suit for value of *dhani* leaves cut from plaintiff's land—No mention of theft or trespass—Second appeal. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 35. **1940 Rang.L.R. 1.**

——**S. 103**—*Finding based on improperly admitted evidence—Power of High Court to dispose of appeal without remand.*

Where the lower appellate Court has improperly admitted any evidence, the High Court has no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted is sufficient to warrant the finding of the Court below. The only cases which can with propriety be disposed of under such circumstances without a remand, are those where independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusions upon other grounds. (*Henderson and Biswas, JJ.*) NARENDRA NARAIN *v.* JNANADA DASSI. **176 I.C. 429=11 R.C. 106=67 C.L.J. 488=A.I.R. 1937 Cal. 537.**

——**S. 103**—*Lower Court deciding question of title on inadmissible and other evidence—Courses open to High Court.*

Where the lower Court has decided a question of title, which is one of fact on inadmissible evidence and other evidence, there are two courses which are open to the High Court in second appeal. It can remand the case to the lower appellate Court directing it to record a fresh finding after eliminating and confining itself to the other evidence in the case; or it may proceed under S. 103, C. P. Code, and arrive at its own finding on a perusal of the relevant and admissible evidence. (*Agha Haidar, J.*) MT. MULKH BANO *v.* MAHAMMAD BANARAS KHAN. **166 I.C. 647=9 R.L. 409=A.I.R. 1936 Lah. 788.**

——**S. 103 and O. 41, R. 25**—*Scope of O. 41, R. 25—Remand for further evidence—Finding—High Court if can interfere.*

Order 41, R. 25 refers primarily to first appeals though the rule so far as possible can be applied to second appeals. The rule as it stands allows reference only to the Court from whose decree the appeal is preferred, which in the case of second appeals would be the lower appellate Court. Therefore, it does not follow in the case of second appeals that a finding from a first Court is to be treated on the same footing as a

C. P. CODE (1908), S. 104.

finding from an appellate Court. Where an issue has not been determined by the first appellate Court and in second appeal that issue is remitted on remand to the trial Court the evidence having been found to be insufficient and the trial Court after recording such evidence and giving its finding on that issue returns the case to the High Court, the issue cannot be said to have been determined by the lower appellate Court. Therefore High Court has jurisdiction to determine such issue of fact under S. 103. (*Gruer and Pollock, JJ.*) BRIJMOHAN *v.* CHANDRA CHAGABAI. **182 I.C. 12=11 R.N. 502=1939 N.L.J. 315=A.I.R. 1939 Nag 173.**

——**S. 104**—Applicability—Order in contentious proceedings under S. 295, Succession Act. *See* C. P. CODE, O. 41, R. 1, AND S. 104. **A.I.R. 1938 Sind 36 (F.B.).**

——**S. 104**—*Private reference to arbitration—Agreement subsequently filed in Court—Court finding award of majority to be bad and refusing to make it decree of Court—Appeal.*

Certain persons made a private reference to arbitration. Subsequently they made an application to the Court under para. 17 (1) of Sch. II, C. P. Code, that the agreement to refer to arbitration should be filed in Court. That application was dismissed but on appeal the agreement was ordered to be filed in Court. There were three arbitrators. Two of them made one award and the third made a different award. The Court found that the award of majority was bad and refused to make that award a decree of the Court.

Held, that no appeal lay from the order of the Court. (*Addison and Ram Rall, JJ.*) MUL RAJ *v.* TULSI RAM. **I.L.R. (1939) Lah. 541=185 I.C. 632=12 R.L. 309=A.I.R. 1939 Lah. 542.**

——**Ss. 104 and 105 (1)**—*Return of plaint for want of jurisdiction—Remand by appellate Court—Decree—Dismissal of appeal—Second appeal—Competency—Question of jurisdiction—If can be raised.*

In a suit brought in Munsif's Court the defendant pleaded that the Civil Court had no jurisdiction and he amplified that plea by arguing that the Revenue Court had exclusive jurisdiction. The Munsif accepted this argument and ordered the plaint to be returned to the plaintiff for presentation to the proper Court. A first appeal was brought and the appellate Court held that the Civil Court had jurisdiction and remanded the suit for disposal on the merits. The Munsif then decreed the suit and an appeal was brought to the District Judge and the District Judge dismissed that appeal. The defendant then brought a second appeal and took as his first ground that the lower Court had erred in holding that the Civil Court had jurisdiction.

Held, that no appeal lay from the order of the lower appellate Court for the first time when the jurisdiction question came before it, but that as the case had been concluded, a second appeal lay from the decree of the lower appellate Court and under S. 105 (1), C. P. Code, the question of jurisdiction could be raised in second appeal. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH. **I.L.R. (1938) All. 754=177 I.C. 450=11 R.A. 199=1938 A.L.R. 747=1938 A.L.J. 720=1938 A.W.R. (H.C.) 522=1938 R.D. 714=A.I.R. 1938 All. 511.**

C. P. CODE (1908), S. 104.

——**S. 104 and O. 43, R. 1**—Scope—Calcutta High Court—Original Side Rules—Reference by Registrar under R. 50 of Ch. 26—Opinion of Judge on—Appeal. *See* LETTERS PATENT (CAL.) CL. 15. **40 C.W.N. 1264.**

——**S. 104 (1) (a) and (c)**—*Order rejecting objections to award and passing decree on it—Appealability.*

No appeal lies against an order rejecting objections made to an award and passing a decree on the award. Such an appeal cannot be said to be an appeal from a decree nor can it be said to be an appeal under Cl. (*a*), S. 104, as S. 104 (*a*) only refers to orders superseded and not to orders refusing to supersede. Nor can the order be said to be one modifying or correcting the award; it is an order refusing to do so. (*Baguley and Mosley, JJ.*) MA NGWE *v.* U MIN SIN. **163 I.C. 590=9 R.R. 29=A.I.R. 1936 Rang. 240.**

——**S. 104 (1) (c)**—*Scope of appeal under—Objection to award on the ground that arbitrator had no jurisdiction to allow amendment of plaint previously refused by Court—If open.*

An appeal under S. 104 (*c*), C. P. Code, from an order modifying an award on arbitration under para. 12 of Sch II, C. P. Code, is one the scope of which is limited; the appellant in such an appeal can attack the order of the Court only in so far as it modifies the award, and must confine himself to points which have a bearing on the modification in the award. Though it is open to the appellant to show that the award could not be modified, he has no right to appeal against the award itself; nor can he attack the proceed ngs before the arbitrator after a decree has been passed on the basis of the award. He cannot, for instance raise an objection to the award on the ground that the arbitrator had no power to allow an amendment of the plaint which had previously been refused by the Court which referred the suit to arbitration. (*Harries, C. J. and Fazl Ali, J.*) TEJPAL MARWARI *v.* KEDARNATH HIMAT SINGHA. **20 Pat.L.T. 700=1939 P.W.N. 703=6 B.R. 144=185 I.C. 273=12 R.P. 336=A.I.R. 1939 Pat. 597.**

——**S. 104 (1) (f)**—*Order filing award given in private arbitration—Second appeal.*

No second appeal lies against the decision of the appellate Court dismissing an appeal under S. 104 (1) (f), C. P. Code, against an order filing an award given in a private arbitration. (*Tek Chand, J.*) JAWALA SAHAI *v.* HARIRAM BAL MOKAND. **175 I.C. 572=10 R.L. 749=39 P.L.R. 117=A.I.R. 1937 Lah. 649.**

——**S. 104 (1) (f) and (2)**—*Application under Sch. II, para. 20—Decree passed on award without recording formal order filing award—Appeal filed against whole decision but directed against only award and not decree—Second appeal—If competent.*

Where on an application filed under para. 20 of Sch. II, C. P. Code, the Court neglected to pass an explicit order filing the award but passed a decree upon the award, and the aggrieved party filed an appeal from the whole decision but directing his objections only against the award and not against the decree, the appeal must be treated as an appeal filed under S. 104 (1) (*f*), C. P. Code, from an implied order filing the award. That being so, the order passed in the appeal is governed by S. 104 (2), C. P. Code, which prohibits a

C. P. CODE (1908), S. 104.

second appeal. (*Sen, J.*) TRAILOKYA NATH *v.* SUKUMAR. 44 C.W.N. 1034.

——S. 104 (1) (f) and (2)—*Order filing award—Validity of reference challenged—Second appeal—If competent.*

The prohibition against a second appeal from an order filing or refusing to file an award contained in S. 104 (2), C P Code, is not removed even though the validity of the reference to arbitration itself is challenged. (*Sen, J.*) TRAILOKYA NATH *v.* SUKUMAR. 44 C.W.N. 1034

——S. 104 (1) (f) and Sch. II, Para. 21—*Relative scope of—Filing followed by judgment and decree—Appeal—Competency.*

S. 104 (f), C. P. Code, permits an appeal from an order filing or refusing to file an award in an arbitration without the intervention of Court. Sch. II, para. 21 does not take away this right of appeal, but only enacts that if a person wants to file an appeal against the decree though the decree is in accordance with the award and not in excess of it, such an appeal will be incompetent. Though the filing of the award is followed by a judgment and decree, the person aggrieved is not thereby disentitled from filing an appeal. (*Puranik, J.*) KESHOLAL *v.* LAXMAN RAO. 1940 N.L.J. 393.

——S. 104 (2)—Order under O. 21, R. 90—Second appeal. *See* C. P. CODE, O. 21, R. 90. 163 I.C. 765.

——S. 104 (2) and O. 43, R. 1—*Return of plaint—Reversal in appeal—Second appeal—Competency—Revision.*

Where an order returning a plaint for presentation to proper Court, is reversed in appeal, no further appeal lies against that order in view of S. 104 (2), C. P. Code, read with O. 43, R 1. But as the matter is one which relates solely to the question of jurisdiction, it can be taken up in revision. (*Zia-ul-Hasan and Yorke, JJ.*) GULZARI SINGH *v.* RAM ADHIN. 1938 R.D. 723=14 Luck. 218=177 I.C. 131=11 R O. 29=1938 O.L R. 376 =1938 O.A. 618=1938 A.W.R (C.C.) 75=1938 O.W.N. 801=A.I.R. 1938 Oudh 224.

——S. 104 (2)—Scope—If affects Cl 15 of the Letters Patent. *See* LETTERS PATENT (BOMBAY), CL. 15. 42 Bom.L R. 428.

——S. 105—*Applicability to appeals against orders.*

Though S. 105 refers only to decrees, the provisions of that section also apply to appeals against orders as well. (*Menon, J.*) SWAMINATHA SASTRIAL *v.* NARAYANASWAMI SASTRIAL. 168 I. C. 413=9 R M. 570=A.I.R. 1936 Mad. 936.

——S. 105—*Order refusing to accept award of arbitrators on reference made by Court—If one affecting decision of case.*

The words "affecting the decision of the case" in S. 105, mean affecting the merits or affecting questions bearing upon the merits of the case and an order refusing to accept an award of the arbitrators, on a reference made by the Court, is an order affecting the decision of the case. (*Mackney, J.*) U PAW *v.* MAYE. 181 I.C. 942=11 R. R. 505=A.I.R. 1939 Rang. 164.

——S. 105—*Scope—Order directing amendment of plaint and payment of additional Court-fee—Plaint amended but Court-fee not paid—Court returning plaint for presentation to proper Court—Appeal—Competency—Order directing amendment—If can be questioned.*

The Court directed the plaintiff to amend the plaint by adding a prayer for a declaration and to

C. P. CODE (1908), S. 105.

pay additional Court-fee. The plaint was accordingly amended, but no additional Court-fee was paid. As the Court found that the plaint as amended was beyond its precuniary jurisdiction, it returned it for presentation to the proper Court. Plaintiff filed an appeal from this order and challenged the order directing the amendment.

Held, that the order of the trial Court directing the plaintiff to amend the plaint was not appealable. All that the plaintiff could have done was to file a petition in the High Court to revise that order. It could not be said that because he did not take that extraordinary step, he was estopped or precluded from questionin the correctness of that order.

Held further, that plaintiff did not fully comply with the directions of the Court for he did not pay the requisite Court-fee, but only got the plaint amended. It was not as if a person, having obtained the benefits conferred by an order and stood by it, subsequently challenged its correctness. (*Menon, J.*) SWAMINATHA SASTRIAL *v.* NARAYANASWAMI SASTRIAL. 168 I.C. 413=9 R. M. 570=A.I.R. 1936 Mad. 936.

——S. 105—*Scope—Validity of order setting aside award in—If one affecting decision of case on merits.*

The validity or otherwise of an order setting aside an award affects the decision of the case as a simple question of jurisdiction would affect the decision of a case. Hence the validity of an order setting aside an award can be attacked in appeal under the provisions of S. 105. (*Davis, J. C., Lobo and Weston, JJ.*) KISHINCHAND *v.* TAKHITRAM. I L R. (1940) Kar. 22=183 I.C. 724=12 R S. 75=A.I.R. 1939 Sind 241 (F.B.).

——S. 105 (1)—"*Affecting the decision of the case*"—*Arbitration—Award—Order setting aside and directing trial of suit by Court—If can be challenged in appeal from decree in suit.*

An order setting aside the award of an arbitrator and deciding that the suit shall be tried by the Court is an order affecting the decision of the case within the meaning of S. 105 (1), C P. Code, and is therefore liable to be challenged in an appeal against the decree in the suit. (*Harries, J.*) KANCHEDDMAL *v.* GANGA PRASAD. 171 I.C. 398=1937 A.L R. 837=1937 A.L.J. 651=10 R. A. 271=1937 A.W.R. 589=A.I.R. 1937 All. 582.

——S. 105 (1)—"*Affecting the decision of the case*"—*Meaning—Order setting aside* ex parte *decree—If can be set aside in appeal from final decree.*

The words "affecting the decision of the case" in S. 105 (1), C. P. Code, mean affecting the decision of the case on its merits. An order setting aside an *ex parte* decree does not constitute an order affecting the decision of the case and cannot, therefore, be set aside in an appeal from the decree finally passed in the suit after the hearing on the merits. 5 R. 80, Overr. (*Roberts, C. J. Leach and Spargo, JJ.*) YEIK LEE *v.* AIHOOR BIBI. 170 I C 43=10 R.R. 62=1937 Rang.L.R. 207= A.I.R. 1937 Rang. 334 (F.B.).

——S. 105 (1)—*Appeal against order of remand—Objection to jurisdiction of lower appellate Court to entertain appeal—Maintainability.*

In an appeal against an *order* of remand, no objection could be taken on the ground that the lower appellate Court had no jurisdiction to

C. P. CODE (1908), S. 105.

entertain the appeal which had abated and to order for substitution of names. The proper stage for such an objection is when the *decree* itself is appealed from. (*Harries and Bajpai, JJ.*) ZAHOOR MOHAMAD KHAN *v.* M. X. DE-NORONHA. 164 I.C. 730=9 R.A. 190=1936 A.W.R. 520=1936 A.L.J. 538.

——S. 105 (1)—*Appeal from* ex parte *decree—Matters that can be raised in.*

In an appeal from an *ex parte* decree, S. 105 (1), C. P. Code, entitles the appellant to refer to the order of the trial Court refusing him an adjournment which prevented him from putting up a defence. The refusal did affect the decision of the case. (*Bennet and Verma, JJ.*) JHANDOO MAL & SONS *v.* KHALSA SINGH SAHI. I.L.R. (1940) All. 192=1940 A.L.J. 269=1940 A.W.R. (H.C.) 161=A.I.R. 1940 All. 305.

——S. 105 (1) and (2)—Applicability to suits and appeals under Agra Tenancy Act. *See* AGRA TENANCY ACT, S. 249. 1937 A.W.R. 1075=1937 A.L.J. 1237.

——S. 105 (1)—*Construction—"Affecting the decision of the case"—Meaning of—Preliminary issue in suit decided for plaintiff—Reversal by High Court in revision—Suit dismissed in consequence—Appeal to High Court—Order in revision—Correctness of—If can be considered in appeal.*

In a suit by certain worshippers of a temple in the District Court for obtaining the settlement of a scheme under a decree of the Court, the defendant trustee pleaded, *inter alia*, that the Court had no power to frame a scheme. A preliminary issue was framed on this point and the Court found on it in favour of the plaintiff. The defendant applied to the High Court in revision and the High Court held that the suit did not lie and therefore allowed the revision petition and dismissed the suit. The District Judge acting on this, formally dismissed the suit. In an appeal to the High Court against the decree of the District Judge dismissing the suit, a preliminary objection was raised by the respondent to the effect that the order passed in revision was final and therefore no appeal lay.

Held, that the order of the High Court in revision affected the decision of the case, as the District Judge was left with no other course but to dismiss the suit, and the order directly fell with S. 105 (1), C. P. Code, and it was clearly open to the High Court in appeal to consider its correctness by virtue of S. 105, C. P. Code. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) PICHU AYYANGAR *v.* RAMANUJA JEER SWAMIGAL. 51 L.W. 727=(1940) M.W.N. 575=A.I.R. 1940 Mad. 756=(1940) 1 M.L.J. 882.

——S. 105 (1)—*"Error, defect or irregularity"—Meaning of.*

An error, defect or irregularity within the meaning of S. 105 must mean an error, defect or irregularity in procedure or in law and not in matters of fact (*Pollock, A. J. C.*) TATYARAO *v.* SHRIKRISHNA LAKSHMINARAYAN. 31 N.L.R. (Supp.) 72=160 I.C. 202=8 R.N. 160=A.I.R. 1936 Nag. 8.

——S. 105 (1) and O. 23, R. 3—*Order refusing to record adjustment—If can be challenged under S.* 105.

C. P. CODE (1908), S. 107.

The use of the word 'affect' in S 105 renders it necessary that the word 'decision' should be taken to mean 'a decision upon merits.' An order refusing to record an adjustment is not an order affecting the decision of a case, but is merely an order ensuring that the merits of the case should be determined. It is not therefore open for an appellant to challenge such order in appeal under S. 105 when it has not been appealed against. (*Pollock, A. J. C.*) TATYARAO *v.* SHRIKRISHNA LAXMINARAYAN. 31 N. L. R. (Supp.) 72=160 I.C. 202=8 R.N. 160=A.I.R. 1936 Nag. 8.

——S. 105 (1)—Question of jurisdiction—If can be raised. *See* C. P. CODE, SS. 104 AND 105 (1). 1938 A.L.J. 720=A.I.R. 1938 All. 511.

——S. 105 (1) and O. 43, R. 1 (o)—*Scope of sub-S.* (1) *of S.* 105—*Right of appeal how affected—Order of refusal to extend time—If appealable after the passing of final decree.*

The opening words of S. 105 (1), C. P. Code, 'save as otherwise expressly provided', govern the whole sub-section and not merely the words which immediately follow them. The sub-section enlarges rights and does not curtail them; on the contrary it expressly saves rights already conferred, that is to say, among other things, the rights of appeal already conferred by S. 104, C. P. Code. Where an application for extension of time fixed by a preliminary mortgage decree is dismissed and a final decree is passed, the order of refusal to extend time is appealable as an order. (*Stone, C.J. and Bose, J.*) SYED ISHAK *v.* KUNJBIHARI SINGH. 188 I.C. 273=12 R.N. 324=1939 N.L.J. 514=A.I.R. 1940 Nag. 104.

——S. 107 and O, 23, R. 1—*Applicability—Appeal—Right to withdraw—Memo of objection by respondent—If bar to withdrawal—Power of appellate Court to permit withdrawal of appeal—O.* 41, *R.* 22 (4).

There is no express provision in the Code of Civil Procedure as to the withdrawal of an appeal. O. 23, R. 1, C. P. Code, does not in terms apply, nor is the case in any way improved by S. 107, C. P. Code, which merely confers on the appellate Court the powers of an original Court, but none on the parties to an appeal. But an appellant is entitled as of right to withdraw his appeal, provided that the respondent has not acquired any interest thereunder. The fact that there is a cross-objection by the respondent is no bar to the withdrawal in view of the provisions of O. 41, R. 22 (4). But if the respondent has obtained any right under the appeal it is not open to the appellant to withdraw his appeal without permission. The Court, when granting leave to withdraw the appeal may, in proper cases, transpose the parties, making the respondent-appellant and the appellant-respondent, though it is not bound to adopt that course in every case where the appellant withdraws. But it cannot be said that the appellate Court has no jurisdiction to allow the appeal to be withdrawn. (*Beaumont, C. J. and Wasoodew, J.*) DHONDO *v.* ANNAJI. I.L.R. (1939) Bom. 66=11 R.B.168=178 I.C. 463=40 Bom.L.R 895=A.I.R. 1938 Bom. 442.

——S. 107 and O. 1, R. 10 (2)—Power of Court—Addition of party as respondent in the appeal. *See* C. P. CODE, O. 1, R. 10 (2) AND S. 107. 1938 M.W.N. 75.

C. P. CODE (1908), S. 107.

——**S. 107**—*Scope — High Court—Inherent power to remand.*

The High Court has inherent power to remand when the provisions of S. 107 do not apply. (*Vivian Bose, J.*) BALAJI SADASHIV *v.* VISHNU GANAJI. **I.L.R. 1936 Nag. 188=179 I.C. 527=10 R.N. 63=A.I.R. 1936 Nag. 140.**

——**Ss. 109 and 110**—*Application for leave to appeal—Leave asked for purpose of raising new point for first time—If to be granted.*

Leave to appeal cannot be given in an application for leave to appeal to His Majesty in Council when that leave is asked for for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending, either in the trial Court or the High Court. Such an application for leave to appeal for raising a point for the first time after the whole case has been disposed of would be an abuse which should not be encouraged. (*Pandrang Row and Abdur Rahman, JJ.*) MUHAMMAD SHADAK KOYI SAHIB *v.* VENKATA KOMARAJU. **52 L.W. 463=1940 M.W.N. 717=(1940) 2 M.L.J. 433.**

——**S. 109**—*Final order—Meaning.*

There is a vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on appeal. The latter may be included in the former but the former is necessarily not the same as the latter. (*Wort, Ag. C. J. and Dhavle, J.*) KRISHNA CHANDRA DEB *v.* RAJENDRA NARAYAN. **15 Pat. 659=164 I.C. 287=9 R.P. 107=17 Pat.L.T. 760=A.I.R. 1936 Pat. 465.**

——**S. 109**—*Final order — Order dismissing appeal as premature.*

An order dismissing an appeal as premature cannot be said to be a final order within the meaning of S. 109, C. P. Code. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RAGHURAJ SINGH *v.* LALA HARI KISHAN LAL **173 I.C. 865=10 R.O. 231=1938 O.L.R. 143=1938 R.D. 405 (2)=1938 O.A. 231=1938 A.W.R. (C.C.) 26=1938 O.W.N. 331=A.I.R. 1938 Oudh 107.**

——**S. 109**—*"Final order"—Second appeal rejected under O. 41, R. 10 (3)—(Allahabad Amendment) and dismissed for want of prosecution—Subsequent application for restoration also dismissed—Application for leave to appeal from subsequent order—Competency.*

A second appeal was rejected under O. 41, R. 10 (3) (Allahabad Amendment) and was dismissed for want of prosecution. A subsequent application for restoration of appeal was also dismissed. An application for leave to appeal to the Privy Council from the subsequent order, refusing to restore application, was filed, as the application for leave to appeal against the first order was already barred.

Held, that inasmuch as no cardinal point between the parties was decided by the subsequent order nor had the rights of the parties been adjudicated upon in that order, the order in question was not a final order within the meaning of S. 109 (*a*), C. P. Code. Nor was it a fit case for certifying under S. 109 (*c*).

Held also, that the order was not an order passed in appeal, though it was an order passed in the exercise of appellate jurisdiction. (*Sulaiman, C.J. and Bennet, J.*) KRISHNA KANT *v.* LALA AMARNATH. **171 I.C. 29=1937 A.L.J. 796=1937 A.L.R. 815=10 R.A. 243=1937 A.W.R. 695=A.I.R. 1937 All. 566**

C. P. CODE (1908), S. 109.

——**S. 109**—*Leave to appeal—Validity—Committal for finding of contempt for breach of injunction*

A committal for a finding of contempt for breach of an injunction is not criminal in its nature and is properly dealt with under the C. P. Code. Hence in such a case certificate to appeal granted under S. 109 to person inhibited by such injunction is quite valid.

Quaere—Whether a contempt committed not by any person inhibited by injunction for breach of that injunction but by a person said to have aided and abetted a person so inhibited in breaking the injunction is of such a criminal nature as to prevent an appeal. (*Lord Porter.*) BANNERJEE *v.* KUCHWAR LIME AND STONE CO. LTD. **17 Pat. 770=I.L.R.(1939) Kar. 42=43 C.W.N. 197=178 I.C. 490=11 R.P.C. 111=1938 O.L.R. 514=41 Bom.L.R. 136=1938 O.W.N. 1256=1938 A.W.N. 216=1938 A.L.R. 914=5 B.R. 171=1939 M.W.N. 18=68 C.L.J. 488=49 L.W. 10=41 P.L.R. 168=19 Pat.L.T. 857=1938 P.W.N. 895=A.I.R. 1938 P.C. 295=(1939) 1 M.L.J. 715 (P.C.).**

——**Ss. 109 and 110**—*Leave to appeal to Privy Council—Valuation of property — Property at stake a "bhaoli grove"—Proof required.*

It is essential that an applicant for leave to appeal to the Privy Council under Ss. 109 and 110, C. P. Code, should prove that the property at stake is worth Rs. 10,000. Where the property is a "bhaoli grove" which means that the zamindars take half the produce whether fruit or wood, the grove must be proved to be worth Rs. 20,000 before sanction could be given to the application. (*Darling, S.M. and Bomford, J.M.*) NAUBAT TEWARI *v.* JANGLI TEWARI. **1937 R.D. 198.**

——**Ss. 109 and 110**—*Order of winding up of company—Application for leave to appeal to Privy Council—Application not disclosing name of any respondent—Maintainability.*

A company was dissolved by an order of the High Court passed on a petition made by one of the creditors of the company. The petition for the winding up of the company was properly made under S. 162/166, Companies Act. An application was filed by one of the contributories of the company wound up, for leave to appeal to the Privy Council against the order of compulsory winding up. This application for leave to appeal was framed similar to the application made for the winding up of the company. This application did not specifically disclose the names of any respondent, although notices were issued to the Official Liquidator and the original petitioner on whose petition the company was wound up. The point of dispute was if application for leave to appeal was properly constituted and good in law.

Held (Per *Young, C.J., Addison, J.*) (*Tek Chand J.* contra), that an application for leave to appeal to the Privy Council from an order of winding up of a company is not a proceeding in winding up as contemplated by the Rules and Orders of the High Court, and must comply with the provisions of R. 1 of the Rules and Orders made by the Lahore High Court contained in Vol. 5, Chap. 8 in addition to the requirements of O. 45, R. 3 (1), C. P. Code. As such, each person who is sought to be made a respondent ought to be

C. P. CODE (1908), S. 109.

named in the petition. Moreover the company under winding up orders is also a necessary party which should be named in the petition. In all proceedings there should be a right litigated, a person asserting that right,and a person interested to deny it, *i e.*, an opposite party. If the petition failed to provide the name of even one respondent, such petition would be wholly bad and ought to be dismissed. (*Young, C.J., Addison and Tek Chand, JJ.*) BHARAT INSURANCE CO., LTD. *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **165 I C. 568=9 R.L. 259=A.I.R. 1936 Lah 322 (F.B).**

——Ss. 109 and 112—*Right of appeal—Scope of—Discretion under S. 112.*

S. 109 of the C. P. Code is not only qualified by its opening words and by S. 111 but also by S. 112. It is plain from the terms of the Code that the Indian Legislature was not claiming or proposing to abridge or extend the prerogative. The discretion which S. 112 affirms and maintains applies to the rejecting as well as to the receiving of appeals and the prerogative is not wholly or finally concluded for either purpose by the provisions of S. 109. (*Sir George Rankin.*) MOHAMMAD AZIM KHAN *v.* SAADAT ALI KHAN. **1939 A W.R. (P.C) 76=180 I.C. 1001=1939 O.W.N. 471=5 B.R 570=1939 O.L.R. 262=66 I A. 160 =14 Luck. 252=I.L R (1939) Kar. 234 (P.C.) =43 C.W.N. 733=11 R.P.C. 207=1939 O A. 497=70 C.L.J. 66=41 Bom.L.R. 1036=A.I.R. 1939 P.C. 122=(1939) 2 M.L J. 181 (P.C.).**

——Ss. 109 and 110 and Oudh Courts Act, S. 12—*Right of appeal within a chief Court, how affected.*

It is difficult to regard Ss. 109 and 110, C. P. Code, as directed to prohibit an appeal being brought within a chief Court in like manner as a Letters Patent appeal is brought within a Chartered High Court. The two sections taken together seem rather to be intended to provide an appeal to His Majesty on the footing that no further appeal in India is provided. The opening clause of sub-S. (1) of S. 12, Oudh Courts Act, makes the section give way only to a provision which negatives in the particular case either (*a*) the existence of any right to appeal, or (*b*) the right to go to the particular tribunal mentioned, *viz.*, a Bench of the chief Court. An appeal to the appellate Bench of Chief Court of Oudh, from decree passed by single Judge of that Court in exercise of original jurisdiction, is competent under S. 12, Oudh Courts Act, where requirements of S. 110, C. P. Code, as to value are satisfied. Therefore, an appeal from such decree passed by the single Judge does not lie directly to His Majesty in Privy Council. (*Sir George Rankin.*) MAHOMED AZIM KHAN *v.* SAADAT ALI KHAN. **66 I.A. 160=14 Luck 252=I.L R (1939) Kar. 234 (P C.)=43 C.W.N 733=11 R.P.C. 207 =1939 O A. 497=70 C L J. 66=41 Bom.L.R. 1036=180 I.C. 1001=1939 O.W.N. 471=5 B.R. 570=1939 O.L.R. 262=1939 A.W.R. (P C.) 76 =A.I.R. 1939 P.C. 122=(1939) 2 M.L.J. 181 (P.C.).**

——S. 109 (a)—*Construction—"Any otherCourt of final appellate jurisdiction"—District Judge hearing appeal from Subordinate Judge under S. 75, Provincial Insolvency Act if such a Court.*

A District Judge hearing and deciding an appeal from the decision of Subordinate Judge under S. 75 of the Provincial Insolvency Act is not a Court of final appellate jurisdiction within the meaning of S. 109 (*a*), C. P. Code. S. 75 of the Provincial Insolvency Act is all comprehensive and self-contained and there is a provision in it for the widest form of revision which enables a High Court to go into facts if it thinks fit. A Court expressly subject to wide powers of revisions and whose decision in certain cases can be questioned in second appeal cannot be regarded as a Court of final appellate jurisdiction for purposes of S. 109 (*a*), C. P. Code. (*Mockett and Horwill, JJ.*) OFFICIAL RECEIVER OF MADURA *v.* KUPPUSWAMI CHETTIAR. **177 I.C 177=11 R. M. 269=46 L.W. 416=1937 M.W.N. 762= A.I.R. 1937 Mad. 930.**

——S. 109 (a)—*Final order—Order of remand —If appealable.*

An order of an appellate Court is not a final order within the meaning of S. 109 (*a*), C. P. Code, unless it finally disposes of the rights of the parties in relation to the whole suit and hence an appeal does not lie from an order under O. 41, R. 23 reversing a decree which dismisses a suit upon a preliminary point and remanding the suit for trial. (*Zia-ul-Hasan, C.J. and Bennet, J.*) HARI SARAN DAS *v.* HAR KISHEN DAS. **14 Luck. 675= 182 I.C 1007=12 R.O. 15=1939 O.A. 568=1939 A.W.R. (C.C.) 92=1939 O.W.N. 659=A.I.R. 1939 Oudh 22.**

——S. 109 (a)—*"Final order"—Order of remand—Decision of one issue—If makes order final.*

An order of remand would not fall within the description of final order under S. 109 (*a*), C. P. Code, on the ground that one of the main points or cardinal points in issue has been decided in that order, when that does not dispose of finally the rights of the parties and when the suit is still alive and has to be tried in the ordinary way. The test of finality is whether the order finally disposes of the rights of parties. (*Madhavan Nair, O.C.J. and Krishnaswami Ayyangar, J.*) RAMANATHAN CHETTIAR *v.* PALANIAPPA CHETTIAR. **49 L.W. 713=188 I.C. 892=1939 M.W. N. 597=A.I.R. 1939 Mad. 697=(1939)2 M.L.J. 40.**

——S. 109 (a)—*Final order—Order refusing to admit appeal and order dismissing review appl cation.*

An order refusing to admit an appeal and an order dismissing an application for review of that order are both final orders within the meaning of S. 109 (*a*), C. P. Code. (*Drake Brockman, S.M. and Knox, J M.*) JAGDAMBA PRASAD *v.* RAM GOPAL SINGH. **1936 R.D. 120.**

——S. 109 (a)—*Final order—Order remanding execution proceeding.*

No appeal lies to His Majesty in Council against an order of the High Court remanding an execution proceeding for re-decision, as there is no final order. (*Addison and Abdul Rashid, JJ.*) SHANKAR DAS SADHU RAM *v.* GURBAKHSH SINGH. **38 P.L.R. 112.**

——S. 109 (a)—*Final order—Order under O. 41, R. 25.*

Under S. 109 (*a*), C. P. Code, the test of finality is whether the order finally disposes of the rights of the parties. An order of an appellate Court under O. 41, R. 25 remitting an issue to the trial Court whether a certain party rebutted the pre-

C. P. CODE (1908), S. 109.

sumption as to the applicability of a family custom, is not a "final order" within the meaning of S. 109 (*a*), as the rights of the parties have still to be determined and the suit is still a live suit. (*King, C.J. and Zia-ul-Hasan, J.*) HUZUR ARA BEGAM *v.* THE DEPUTY COMMISSIONER OF GONDA. 160 I.C. 811=8 R O. 280=1936 O.W.N. 218=A. I.R. 1936 Oudh 205.

——S. 109 (a)—*Final order—Test.*

Whether an order is a final order or not within S. 109 (*a*) of the C. P. Code depends upon the effect of the order as made; if it finally disposes of the rights of the parties, the order is final, and where the appellate Court has finally determined that the plaintiff has a good and subsisting cause of action and all that remains is to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order is in substance and effect a final order though the *quantum* of the rights or liability remains to be ascertained. An order of remand under O. 41, R. 23 was held to constitute a final order. (*Mya Bu and Sharpe, JJ.*) MAUNG SIN *v.* MAUNG BYAUNG. 177 I.C. 690=11 R.R. 158=1938 Rang. L.R 330=A.I.R. 1938 Rang. 333.

——S 109 (a)—*Order made in revision—Appeal to Privy Council.*

An order made in revision under S. 115, C. P. Code, is not an order made on appeal though it might have been made on the appellate side of the Court and hence High Court has no jurisdiction to give leave to appeal to His Majesty in Privy Council under S. 109 (*a*). (*Wort, Ag. C.J. and Dhavle, J.*) KRISHNA CHANDRA DEB *v.* RAJENDRA NARAYAN. 15 Pat. 659=164 I.C 287 =9 R.P. 107=17 Pat.L.T. 760=1936 P.W.N. 656=A.I.R. 1936 Pat. 465.

——S. 109 (a)—*Order passed under S. 34, N. W.F.P.Courts Regulation—Appealability to Privy Council.*

Orders passed after calling for the records under S. 34 of the N. W. F. Province Courts Regulation are not passed on appeal. They are passed in exercise of the power of superintendence vested in the Court by this provision of law. Hence the order is not appealable to His Majesty in Council under S. 109 (*a*), C. P. Code. (*Mir-Ahmad, J.*) FEROZ SHAH *v.* BUNDHELKHAND CYCLE AND MOTOR AGENCY, NOWSHERA. 183 I.C. 169=12 R. Pesh. 11=A.I.R. 1939 Pesh. 26.

——S. 109 (b)—*Applicability—Original civil jurisdiction—Proceedings for enhancement of rent under Madras Estates Land Act—Application to High Court for writ of* certiorari—*Order refusing—Appeal to Privy Council.*

An appeal lies to His Majesty in Council from an order of the High Court refusing to issue a writ of *certiorari* to the Board of Revenue in proceedings under Ch. XI of the Madras Estates Land Act enhancing the rents of certain villages. Such an order is one passed in the exercise of original Civil jurisdiction falling under S. 109 (*b*), C. P. Code. (*Leach, C.J. and Madhavan Nair, J.*) RYOTS OF GARABANDHA *v.* ZAMINDAR OF PARLAKIMEDI. I.L.R (1938) Mad. 816=48 L. W. 107=182 I C. 784=12 R.M. 155=1938 M. W.N. 706=A.I R. 1938 Mad. 722=(1938) 2 M. L.J. 154.

——S. 109 (c)—*Applicability—Full Bench decision of one High Court differing from that of another—If 'sufficient to make case fit for appeal to Privy Council.*

The fact that a Full Bench decision of one High Court differs from a decision of a Full Bench of another High Court is not in itself sufficient ground to make a case a fit one for appeal to the Privy Council under the provisions of S. 109 (*c*), C. P. Code. (*Davis, J C and Havelivala, A J.C.*) MAHOMED MAHRABKHAN *v.* DUR MAHOMED KHAN. 171 I.C. 630=10 R.S. 114 (2)=A.I.R. 1937 Sind 217.

——S. 109 (c)—*Applicability—Interlocutory order.*

S. 109 (*c*), C. P. Code, will apply even to an interlocutory order. (*Davis, J.C. and Havelivala, A.J.C.*) MAHOMED MAHRABKHAN *v.* DUR MAHOMED KHAN. 171 I.C. 630=10 R.S. 114 (2)=A.I. R. 1937 Sind 217.

——S. 109 (c)—*Applicability — Question whether certain tribal Chief residing within British territory is Ruling Chief under Ss. 84 and 87, C. P. Code—If fit for appeal.*

In an ejectment suit, the question whether a tribal Chief residing within British territory is a Ruling Chief within the provisions of Ss. 84 to 87, C. P. Code, is not a matter of such private or public importance either to himself or to the public generally or any class or section of the public that a certificate of fitness for appeal to the PrivyCouncil can be given within the provisions of S 109 (*c*), C. P. Code. (*Davis, J.C. and Havelivala, A.J.C.*) MAHOMED MAHRAABKHAN *v.* DUR MAHOMED KHAN. 171 I.C. 630=10 R.S. 114 (2) =A.I.R. 1937 Sind 217.

——Ss. 109 (c) and 115—*Applicability of S. 109 (c) to interlocutory orders—Exercise of discretion—Considerations—Substantial question of law being involved—If a ground for leave—Dismissal of revision against order superseding arbitration—Leave, if can be granted.*

Cl. (*c*) of S. 109, C. P. Code, applies even to interlocutory orders and in appropriate cases such orders can be made the subject of an appeal to His Majesty in Council. But before leave could be granted in such cases, the Court must be satisfied that the case is otherwise a fit one for appeal to His Majesty in Council. The discretion vested by Cl. (*c*) of S. 109 on the High Court is to be sparingly exercised and a case cannot be certified as a fit one for appeal on the mere ground that it raises a substantial question of law. It has invariably to be seen whether the permission to appeal is or is not calculated to unduly delay the disposel of the substantive dispute between the parties on the merits. Where an application to revise an order superseding an arbitration is dismissed by the High Court on the ground that there was no 'case' decided within the meaning of S. 115, C. P. Code, on a consideration of the facts of the case it was held that it was not a fit case in which leave to appeal to the Privy Council against the order of dismissal should be granted. (*Iqbal Ahmad and Ismail, JJ.*) GOVIND DAS *v.* INDRAWATI. I.L.R. (1940) All 11=12 R.A. 359=1939 A.L.J. 919=1939 A. W.R. (H.C.) 806=185 I.C. 854=A.I.R. 1940 All. 38.

——S. 109 (c)—*Application under O 21, R. 100, C. P. Code—Order on—If fit one for appeal.*

Where, in anticipation of delivery of possession to decree-holder, an application under O. 21,

C. P. CODE (1908), S. 109.

R. 100, C. P. Code, was made by the person in possession and was decided in his favour by the Court according to the principles laid down in Rr. 99 and 101 of O. 21, C. P. Code, the case, though it did not strictly come under O. 21, R. 100, did not raise any question of great public or private importance to which it is impossible to give a money value and hence leave to appeal to the Privy Council could not be granted under Cl. (*c*) of S. 109. (*Wort, Ag. C.J. and Dhavle, J.*) KRISHNA CHANDRA DEB *v.* RAJENDRA NARAYAN. **15 Pat. 659=164 I.C. 287=1936 P.W.N. 656=9 R.P. 107=17 Pat.L.T. 760=A.I.R. 1936 Pat. 465.**

——**S. 109 (c)**—*Certificate of fitness—Grant of—Different High Courts holding divergent views—If a ground.*

The fact that different High Courts in India have held divergent views in respect of matters similar to those before the Court is in itself no reason for certifying the case as one fit for appeal to His Majesty in Council. (*Middleton, J.C. Mir Ahmad, A.J.C.*) BISHAN DASS *v.* NAND RAM. **167 I.C. 165=9 R. Pesh. 81=A.I.R. 1936 Pesh. 194.**

——**S. 109 (c)**—*Fit case for appeal—Test to decide—Considerations—Pleader — Misconduct—Order striking off the roll — Application for certificate of fitness for appeal to Privy Council—If to be granted.*

When the Court certifies the case as fit for appeal, it is clearly intended to meet special cases such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion evinced by the fitting certificate. Leave therefore under S. 109 (*c*) is not to be granted as a matter of course but the applicant has to prove that his case is a fit one for appeal to His Majesty in Privy Council. Where a pleader's name was struck off from the roll of pleaders on the ground of misconduct.

Held, that the point in dispute was not measurable by money and that it was of great private importance to the applicant-pleader. There being some points of law also raised in the case, it was a fit case to be certified under S. 109 (*c*), as a special case fit for appeal to His Majesty in Council. (*Sulaiman, C.J. and Bajpai, J.*) P. A. PLEADER OF BANSI *v.* JUDGES OF ALLAHABAD HIGH COURT. **167 I.C. 666=9 R.A. 561=1936 A.W.R. 1007=1936 A.L.J. 1272=1937 A.L.R. 212=38 Cr.L.J. 410=A.I.R. 1937 All. 167.**

——**S. 109 (c)**—*Grant of certificate—Principles applicable.*

Under S. 109 (*c*), C. P. Code, a case can be certified to be a fit one for appeal to His Majesty in Council only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who are directly involved in the litigation but also to the public at large. A suit in which the questions for decision are whether the building in dispute is a public mosque or a private place of worship and whether the defendants have established adverse possession of the mosque, cannot be brought within the scope of the above principles. (*Thomas, C. J. and Yorke, J.*) MUSAHEB KHAN *v.* P. RAJ KUMAR BAKSHI. **189 I.C. 93=1940 O.A. 603=1940 O.W.N. 632=1940 A.W.R. (C.C.) 309=1940 O.L.R. 413.**

——**S. 109 (c)**—*Privy Council—Leave to appeal—Grant of—Finding of fact—Applicant alleging that lower Courts misinterpreted evidence in finding that applicant was not minor—Leave—If can be granted.*

In an application for leave to appeal to His Majesty in Council, the applicant contended that the various Courts misinterpreted the evidence and found wrongly that he had failed to prove his minority on a particular date. The Courts in fact had carefully considered the evidence led by the parties and came to the conclusion that the applicant had failed to prove that that he was minor, and that he had behaved as a major.

Held, that the case was not a fit one for the grant of a certificate of leave to appeal to His Majesty in Council, as no Court of appeal could interfere with the finding of fact. (*Drake Brockman, S.M. and Knox, J. M.*) JAGDAMBA PRASAD *v.* RAM GOPAL SINGH. **1936 R.D. 120**

——**S. 109 (c)**—*Question of importance—Test.*

A case could be certified to be a fit one for appeal to His Majesty in Council under Cl. (*c*) of S. 109, C. P. Code, only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who were directly involved in the litigation but to the public at large. (*Zia-ul-Hasan, C. J. and Bennet, J.*) HARI SARAN DAS *v.* HAR KISHEN DAS. **14 Luck. 675=182 I.C. 1007=1939 O.A 568=12 R.O. 15=1939 O.L.R. 490=1939 A.W.R. (C.C.) 92=1939 O.W.N. 659=A.I.R 1939 Oudh 224.**

——**S. 109 (c)**—*Question of jurisdiction of Civil Court — Question as to bar under Sea Customs Act—Appeal to Privy Council—Grant of certificate.*

In a suit in which the amount claimed was more than Rs. 20,000 an objection was taken to the jurisdiction of the Court on the ground that the suit was barred by the Sea Customs Act. The lower Court tried the issue as a preliminary issue, upheld the objection and dismissed the suit. In appeal, the High Court held that the Civil Court was not deprived of jurisdiction in the matter by the Sea Customs Act, and demanded the suit for trial on the merits. This question of jurisdiction was awaiting decision in other suits pending in the province, and there were also other claims of the same kind in which notice of suit had been given and some litigations were pending in other provinces.

Held, that in view of these facts and the fact that the question of jurisdiction was a substantial question of law and one of general importance, the case was a fit case to be certified under Cl. (*c*) of S. 109, C.P. Code. (*Varadachariar and Pandrang Row, JJ.*) SECRETARY OF STATE FOR INDIA *v.* MASK & CO. **182 I.C. 260=12 R.M 34=1938 M.W.N 1132=I.A.R. 1939 Mad. 95=(1938) 2 M.L.J. 904.**

[Reversed on appeal. 67 I.A. 222=(1940) 2 M.L.J. 140=I.L.R. (1940) Mad. 599.]

——**S. 109 (c)**— *Reference by—Income-tax Officer—Whether interest paid to partner on capital borrowed from him is allowable as deduction*

C. P. CODE (1908), S. 109.

from profits earned—Leave to appeal—If to be granted.

Before the High Court would grant leave to appeal to His Majesty in Council, it should be satisfied that the case is of such importance as would warrant a certificate under S. 109 (*c*). If it is not, it is justified in refusing the certificate. A reference submitted by the Income-tax Officer as to whether, in a particular case, the interest paid to a capitalist partner on the capital borrowed from him is an allowable deduction from the profits earned, under S. 10 (2) (*iii*) of the Income-tax Act, and the decision given by the Court on it is *prima facie* not of public importance, much less of great public importance so as to make the case, a fit one for granting leave to appeal to the Privy Council, more specially where the amount by which the assessee has benefited is only about Rs. 300. Advisability of the legislature conferring a power upon the High Court to impose a condition in a fit case requiring the appellant to Privy Council to bear the costs of the appeal irrespective of the result of the appeal, at the time of granting leave to appeal to the Privy Council (at any rate in cases falling under S. 66-A (2), Income-tax act) suggested. A.I R. 1927 P. C. 242, Foll.; A.I R. 1923 Mad. 232, Ref. (*Rupchand Bilaram and D.C. Mehta, A.J.Cs.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* TEJBHANDAS MOTUMAL. **163 I.C. 275=8 R.S. 193=A.I.R. 1936 Sind 68.**

——**S. 109 (c)**—*Scope—Application under O. 14, R. 2 and O. 15, R. 3 for disposal of certain issues as preliminary issues—Rejection—Revision petition to the High Court—Dismissal—Leave to appeal to Privy Council—If fit case for appeal.*

Where an application is made to a Court under O. 14, R. 2 and O. 15, R. 3, C. P. Code, praying the Court that certain issues, which were not clear cut issues of law but were mixed up with questions of fact, should be heard and disposed as preliminary issues, but the Court rejects the application holding that it was not a case in which it ought to direct those issues to be disposed of before going into the merits of the whole case, and a revision application against such rejection is dismissed by the High Court as no case was made out for interference in revision, it cannot be said that the decision of the High Court gives rise to any point of importance or difficulty which would warrant the grant of a certificate under S. 109 (*c*) of the Code of Civil Procedure. (*Harries, C.J. and Rowland, J.*) NANDAMANI *v.* HARIKRISHNA. **181 I C 644=5 B R 645=11 R. P. 624=1939 P.W.N. 341=A.I.R. 1939 Pat. 564.**

——**S. 109 (c)**—*Scope—Form of ritual in important public temple—Disputes between two religious sects—If of public and private importance—If certificate to be granted.*

The form of ritual in an important public temple in the country is a matter of both public and private importance falling within S 109 (*c*), C. P. Code, and when the case relates to religious rites and ceremonies at a temple of national importance and raises disputes between two religious sects of a community regarding the conduct and form of worship at the temple, the questions at issue are in themselves of great public importance, so as to justify the grant of a certificate under S. 109 (*c*) permitting an appeal to His Majesty in Council. (*Leach, C.J. and Patanjali Sastri, J.*) THIRUVENGADA RAMANUJA PEDDA JIYANGARLU *v.* VENKATACHARLU. **1939 M.W.N. 816=188 I.C. 41=12 R.M. 773=50 L.W. 252=A.I R. 1939 Mad. 847=(1939) 2 M L.J. 378.**

C. P. CODE (1908), S. 110.

——**S. 109 (c)**—*Scope—Order striking off name of pleader from roll for misconduct—Leave to appeal to Privy Council.*

Where a pleader's name is struck off the roll of pleaders for misconduct, it has been the practice of Allahabad High Court to treat such order as one falling under S. 109 (*c*), C P. Code, in contrast with the practice of Patna and Calcutta High Courts. (*Sulaiman, C.J. and Bajpai, J.*) P.A. PLEADER OF BANSI *v.* JUDGES OF ALLAHABAD HIGH COURT. **167 I.C. 666=1937 A.L.R. 212=9 R.A. 561=38 Cr.L.J. 410=1936 A.L.J. 1272=1936 A. W.R. 1007=A.I.R. 1937 All. 167.**

——**S. 109 (c)**—*Substantial question of law—Construction of—S. 70, T. P. Act.*

A Court ought not to grant a certificate under S. 109 (*c*), C. P. Code, unless a point of law is involved in the appeal which is not only substantial and important as between the parties but is one of general importance or of such a nature that the decision upon it may govern numerous cases. The question whether the words 'any accession is made to the mortgaged property' in S. 70, T. P. Act, mean any accession made to the mortgaged property by the mortgagor or his representatives in title or any accession to the mortgaged property by whomsoever made, is a question of great public importance having regard to the existing law in India and the large number of cases which must be affected by it. (*Page, C.J. and Mya Bu, J.*) SEIN HTAUNG *v.* V. E. A. CHETTYAR FIRM. **14 Rang. 86=160 I.C. 724=8 R.R. 422=A.I.R. 1936 Rang. 65.**

——**S 109 (c)**—*Two appeals disposed of by one judgment—Judgment proceeding on a common ground—One appeal valued above Rs. 10,000 and the other less—Certificate of fitness in latter case—Whether can be granted.*

Where two appeals arising out of the same suit were disposed of by the High Court by one judgment proceeding on one ground common to all the appellants, and the valuation of one of the appeals was above Rs. 10,000 while that of the other was less than Rs. 10,000.

Held, that as the point involved in both the appeals was a common one, a certificate of fitness can be granted in the latter case under S. 109 (*c*), C. P. Code, although the requirements of S. 110, C. P. Code, were not fulfilled. (*Sulaiman, C.J. and Bennet, J.*) MUKANDI LAL *v.* HASHMAT-UN-NISSA. **I.L.R. (1937) All 105=166 I C. 283=9 R A. 394=1937 A.L.R. 18=1936 A.W.R. 883=1936 A.L J. 1025=A.I.R. 1936 All. 832.**

——**S. 110.**

Affirming decree.
Applicability.
Construction.
Substantial question of law.
Valuation.

——**S. 110**—*Affirming decree—Decree for share in property and for account—Decree—Appeal—Property held not divisible and claim negatived—No finding on question of liability to account—Judgment—If one of affirmance as regards second point—Each claim, if separate and distinct subject-matter.*

C. P. CODE (1908), S. 110.

Plaintiff claimed a fourth share of the property in suit which she alleged belonged to herself and her three sisters, defendants 1 to 3. She also prayed for an account of the management of the property by the first defendant. The first defendant resisted the plaintiff's claim and asserted exclusive title in herself. The lower Court held that the property was divisible into four shares and that plaintiff had a right to a fourth share and as regards the other prayer, held that the first defendant was liable to account only to the property as it existed at the time of the suit. In appeal, the High Court held that the first defendant was solely entitled to the property and thus negatived the plaintiff's title, but gave no finding on the question of liability to account, as there was no need to do so.

Held, that the judgment of the High Court was really a reversing judgment in respect of the whole case, and that it could not be said that in respect of the second part of the claim it was an affirming one within the meaning of S. 100, C. P. Code.

Quaere.—Whether the two claims, one to property and the other to an account, are to be deemed two distinct subject-matters for the purpose of granting leave to appeal to the Privy Council under S 110. (*Venkatasubba Rao and Newsam, JJ.*) KAMALATHACHI *v.* MEENAKSHI ACHI. **175 I C. 236=10 R.M. 759=A I.R. 1937 Mad. 964=(1937) 2 M L J. 543.**

——S. 110—*Affirming decree—Decree modified only or single point and that in favour of applicant—Effect.*

Where the appellate decree affirms the decree of the lower Court in respect of all matters in dispute and modifies it only on a single point and that completely in favour of the applicant for leave to appeal upon the opposite party expressing his agreement that it should be so modified, the decree is one of affirmance, and the applicant cannot be granted leave to appeal to Privy Council in the absence of a substantial question of law. (*Coldstream and Bhide, JJ.*) BABOO LAL *v.* SIRI RAM. **18 Lah. 268=172 I.C 803=10 R. L. 370=39 P.L.R. 877=A.I.R. 1937 Lah. 712.**

——S. 110—*Affirming decree—High Court, on appeal increasing amount of compensation in land acquisition matter—If affirming decree.*

Where, on appeal, the High Court increased the amount of compensation awarded by the lower Court in a land acquisition matter, the High Court has only affirmed the decree of the lower Court and has not varied it and as such unless a substantial question of law is involved, leave to appeal to the Privy Council could not be granted. (*Bennet and Verma, JJ.*) SRI NARAIN KHANNA *v.* SECRETARY OF STATE. **185 I.C. 513=12 R.A. 334=1939 A L.J. 736=1939 A.W.R. (H.C.) 651=A.I.R. 1939 All. 723.**

——S. 110—*Affirming decree—Leave—Grounds.*

Even if the decree of the High Court affirms the decree of the Subordinate Judge, where the appeal involves substantial questions of law and the value of the subject-matter of the suit and of the appeal is above Rs 10 0(0, the High Court is justified in granting leave to appeal to the Privy Council. (*Sir Lancelot Sanderson.*) GAEKWAR BARODA STATE RAILWAY *v.* HAFIZ HABIB-UL HAQ. **65 I.A. 182=I L.R. (1938) All. 601=4 B.R. 524=10 R.P.C. 262=1938 A.L.R. 352=67 C.L.J. 254=1938 P.W.N. 535=32 S L.R. 531=40 Bom. L.R. 811=19 Pat.L.T. 689=174 I.C 551=1938 M.W N. 481=1938 O.W N 521=1938 A.L.J. 488=42 C.W N 705=1938 O L.R. 218=1938 A. W.R. (P.C.) 123=47 L.W 753=A.I.R. 1938 P. C. 165=(1938) 2 M.L J. 11 (P C.)**

——S. 110—*Affirming decree—Modification of decree in favour of applicant—Right of appeal.*

It would be anomalous to grant leave to appeal to His Majesty in Council to an applicant on matters in which a High Court has concurred with the trial Court on the mere ground that on other matters the High Court has modified the decree of the trial Court but in favour of the applicant. (*Jai Lal and Abdul Rashid, JJ.*) MT. SHAHZADI BI *v.* MT. RAHMAT BI **174 I.C. 893=10 R.L. 616=A.I R. 1937 Lah. 761.**

——S. 110—*Affirming decree—Only modification made by appellate Court being in favour of applicant—Effect.*

Where the only modification made by the Court of appeal is in favour of the applicant for leave to appeal to His Majesty in Council, and it is a modification of such a character as to leave the applicant without any further grievance so far as that particular matter is concerned, the applicant cannot, because of that modification, contend that it is not a judgment of affirmance and have a right to an appeal on other points on which both the Courts have been in agreement, without showing a substantial question of law. (*Wort, Ag C.J. and Dhavle, J.*) MAHABIR PRASAD *v.* BRIJ MOHAN PRASAD **15 Pat. 637=1936 P.W N. 587=163 I.C 139=8 R.P. 621=17 Pat L.T. 602=A I.R. 1936 Pat. 553.**

——S. 110—*Affirming decree—Rejection of appeal owing to insufficiency of court-fee.*

An order of the High Court rejecting an appeal on account of insufficiency of court-fee is one affirming the decision of the first Court within the meaning of S. 110, C. P Code. (*Thomas C. J. and Radha Krishna, J.*) DURGA BUX SINGH *v.* AMBIKA BUX SINGH. **189 I.C. 87=1940 A.W.R. (C C.) 263=1940 O.L.R. 410=1940 O.A. 506=1940 O.W.N. 616.**

——S. 110—*Affirming decree—Several subject-matters involved in suit—High Court decree confirming decree of lower Court in respect of some but varying it in respect of others—If reversing judgment—Leave to appeal in respect of subject-matters on which the decree of lower Court was confirmed—If can be granted.*

Where there are several subject-matters comprised in the lower Court's decree, each should be regarded separately for deciding whether the High Court's decree is or is not an affirming decree under S. 110, C. P. Code. A single decree may comprise several decisions, and each decision may relate to a distinct subject-matter. The decree embodying these severa decisions in respect of different subject-matters cannot be regarded as one and entire. Consequently where the High Court reverses the decisions in respect of some, but affirms the decision in respect of others, the decree of the High Court is an affirming judgment and not a reversing one in respect of the subject-matters as to which the High Court affirms the decision of the lower Court It cannot be held that because the decree has not been affirmed in its entirety, it cannot be regarded as an affirming decree on the ground that it is one

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and indivisible (*Venkatasubba Rao and Abdur Rahman JJ.*) VELAYYA *v.* PRESIDENT, H. R. E. BOARD. MADRAS. 181 I.C. 988=11 R M. 889= 1938 M.W.N 298=47 L.W. 393=A.I.R. 1938 Mad. 631=(1938) 1 M.L.J. 487.

——S. 110—*Affirming decree—Suit comprising different subject matters and different sets of defendants—Decree dismissing claim in respect of some and allowing claim in respect of others—Appeals by both parties—Decree allowing one appeal and dismissing other—If one of reversal—Leave to appeal.*

In cases where parties claiming under various alienations are brought before the Court, the mere fact that the rules of procedure permit the claims to be joined in one suit does not justify the decree being treated as one single and inseparable decree when the High Court confirms the lower Court's decree in respect of some of the parties and claims and reverses it as regards others. In a suit by a Hindu reversioner for possession of properties as belonging to the estate of the last male holder, there were two sets of defendants, *viz.*, alienees tracing their title to the mother of the last male holder and another set of alienees who traced their title to the widow of the last male owner. The trial Court dismissed the suit in so far as it related to the properties claimed through the mother of the last male owner, but decreed it in respect of the properties alienated by the widow of the last male owner. Two appeals were preferred one by the plaintiff against the dismissal of part of his claim, and the other by the alienees from the widow who were directed by the decree to surrender possession. The High Court by its decree allowed the plaintiff's appeal, but dismissed the appeal of the alienees from the widow of the last male-holder. The properties involved in each of the two appeals executed Rs. 10,000 in value.

Held, that so far as the decree allowed the plaintiff's appeal, the decision of the High Court was one of reversal and therefore a certificate should issue granting leave to appeal to His Majesty in Council; but the decision, so far as it dismissed the appeal of the alienees from the widow, affirmed the decree of the lower Court and therefore no leave to appeal could be granted unless the applicants for leave satisfied the Court that there was a substantial question of law involved. The fact that the two appeals arose out of the same Court was no ground for regarding the decision of the High Court as a single decree so as to entitle the defeated parties to appeal against the whole decree taking the appeals together on the ground that the High Court in part modified the decree of the lower Court. (*Varadachariar and Horwill, JJ.*) RAMAYYA *v.* LAKSHMAYYA. 47 L W. 514=1938 M.W.N. 439=177 I C. 248=11 R M. 301=A.I. R. 1938 Mad. 598=(1938) 1 M L.J. 492.

——S. 110—"*Affirming decree*"—*Suit comprising several subject-matters—Decisions confirming as regards some and varying as regards others—Right of appeal—If extends to whole decree—Variation of decree as against one of several defendants only—Right of appeal.*

In order to decide whether a decree affirms the decision of the Court below, as contemplated by S. 110, C. P. Code, what is to be regarded is not the decision as a whole, but the decision as it affects the subject-matter in dispute. That is the proper test. Where there are several decisions in respect of several subject-matters in the same suit, the decree embodying those decisions should not, by some fiction, be regarded as one and entire. The right way of construing S. 110 is to read the words "decree or final order" in the third clause in conjunction with, and to treat them as relating to, the subject-matter mentioned in the first clause. Where in a mortgage suit the lower Court passes a decree against *A* and *B* for the full amount claimed and against *C* and *D* for part of the amount, and the High Court on appeal confirms the decree against *A* and *B* and also *C*; but varies as against *D* by holding him liable for a larger amount than was decreed against him by the lower Court, it is open to *D* to appeal to the Privy Council, as the decree is one of reversal so far as he is concerned, but the decree being one of affirmance as against *C*, plaintiff could not be granted leave to appeal to the Privy Council as against *C*, in the absence of a substantial question of law. (*Venkatasubba Rao and Cornish, JJ.*) VENKATASWAMI CHETTIAR *v.* SEKKUTTI PILLAI. I L R (1937) Mad 121=166 I C 251=9 R.M. 351=1936 M.W.N. 1051=44 L.W. 533=A.I.R 1936 Mad 881=71 M.L.J. 580.

——S 110—*Affirming decree—Suit on mortgage—Trial Court decreeing suit in respect of certain items of properties and dismissing it with regard to others—High Court directing on appeal dismissal of entire suit—If affirming decree*

Where the trial Court decreed a suit on a mortgage bond in respect of certain items of the properties covered by the mortgage and dismissed it with regard to the other items, and on appeal by both the parties, the High Court directed the dismissal of the entire suit.

Held, that the decree of the High Court did not affirm the decision of the trial Court and that the decree could not be dissected by holding that in so far as the items of properties in respect of which the suit was dismissed by the trial Court were concerned, there was a decision of affirmance. (*S. K. Ghose and McNair, JJ.*) BANK OF KHULNA, LTD. *v.* JYOTI PRAKASH MITRA. 41 C.W.N 494.

——S. 110—*Affirming decree—Variation of decree in favour of applicant—Right of appeal.*

Where the High Court on appeal enhances the amount decreed by the trial Court to the applicant for leave to appeal, the variation of the trial Court's decree is no doubt all in favour of the applicant, and he cannot have any appealable grievance against such variation, but nonetheless, the decree of the High Court is not one of affirmance. The applicant is, therefore, entitled to appeal to the Privy Council as of right without showing that some substantial question of law is involved. (*Tek Chand and Skemp JJ.*) HAKIM RAI *v.* GANGA RAM. 181 I.C 248=11 R. L. 794=40 P.L R 399=A.I.R. 1938 Lah 836.

——S. 110—*Affirming judgment on merits—Judges of High Court differing on question of academic interest—If a good ground.*

Where both the Judges of the High Court agree on the merits with the judgment of the Court below, but differ as between themselves on a question of mere academic interest, leave should not on that ground be granted to appeal to

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His Majesty in Council. (*Wort, Ag.C.J. and Manohar Lall, JJ.*) JOGENDRA NARAIN SINGH *v.* RADHA PRASAD SINGH. **178 I.C. 203=5 B.R. 72 =11 R.P. 225.**

——S. 110—*Applicability—Suit for Rs.* 34,300—*Decree for Rs.* 11,950—*Appeal to High Court by both parties—Dismissal of plaintiff's appeal——Defendant's appeal allowed in part and amount reduced to Rs.* 6,080—*Leave to appeal—Grant of.*

In a suit for recovery of Rs. 34,000 the trial Judge passed a decree in favour of the plaintiff for Rs. 11,950. Both the parties appealed to the High Court. Both appeals were heard together and the plaintiff's appeal was dismissed while that of the defendant was accepted in part, the amount of Rs. 11,950 being reduced to Rs. 6,080 The plaintiff applied for leave to appeal and the questions raised in the memorandum of appeal were all questions of fact.

Held, that leave could not be granted as no appeal lay as of right under S. 110. The appeal and the cross-appeal could not be considered together for purposes of S. 110 nor did the fact that a composite decree was prepared in both the appeals make any difference. (*Tek Chand and Skemp, JJ.*) BANARSI DASS & SONS *v.* DELHI IRON SYNDICATE. **176 I.C. 314=11 R.L. 193= A.I.R. 1937 Lah. 916.**

——S. 110 - *Construction—"Directly or indirectly"—Possible future suits.*

If, in order to make up the prescribed limit of valuation for leave to appeal to the Privy Council, various claims indirectly connected with the subject-matter of the main suit are sought to be added, the indirect relation must not be too remote. The phrase 'directly or indirectly' in S. 110 refers to suits in existence and cannot be stretched to cover suits not yet brought. The indirect relation must be decided with reference to actual circumstances at the time and not to circumstances which are remote. On the other hand the possibility of future suits may be taken into consideration if such suits will be affected by the doctrine of *res judicata*. 35 All. 445; A.I.R. 1925 P.C. 159; A.I.R. 1932 Mad. 125 and A.I.R. 1922 P.C. 257, Disc. and Foll. (*Addison, A C.J. and Din Mahomed. J.*) BAL RAJ *v.* MT. MAHANTO. **170 I C. 469=10 R.L. 130=38 P L R. 767=A.I.R 1936 Lah 31.**

——S. 110—*Construction—"Indirectly"—Possibility of future suits—If enough.*

Under S. 110, C. P. Code, the question whether a decree involves indirectly a claim or question respecting property the value of which is Rs. 10,000 or upwards, must be decided with reference to actual circumstances at the time and not to circumstances, which are remote, and not in particular to a mere possibility that future suits as to all or part of the larger extent of the property alleged to be concerned may be instituted at some time in the future. 43 M.L.J. 728, Foll. (*Costello, Ag.C.J. and Edgley, J.*) KUMAR CHANDRA SINGH *v.* GOBINDA DAS. **42 C. W.N. 298.**

——Ss. 110 and 109 (c)—*Construction—S.* 110 *if to be construed widely—Questions of law involved though valuation less than Rs.* 10,000—*Leave, if can be granted*

'It must always be kept in view that no real mischief can arise from not allowing a very wide construction of S. 110 because such cases, if

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worthy of being tried by a higher tribunal, can always be dealt with under sub-S. (*c*) of S. 109. 52 C. 650 (P.C.). Where the value of the subject-matter in dispute on appeal to His Majesty in Council was not upwards of Rs. 10,000 but the value was shown to be about Rs. 9,750 and there were questions of law involved.

Held, leave ought to be granted under S. 109, sub-S. (*c*). (*Roberts, C J. and Dunkley, J.*) DAWSONS BANK, LTD. *v* MAUNG MYA THWIN. **178 I.C. 447=11 R.R. 236=A.I.R. 1938 Rang. 415.**

——S. 110—*Construction—"Some claim or question to or respecting property of like amount or value"—Meaning of—Increase in value of property between date of trial and date of appeal—If to be taken into account.*

The words "some claim or question to or respecting property, etc." in para. 2 of S. 110, C. P. Code, must be interpreted to mean some claim or question to or respecting property additional to or other than the actual subject-matter in dispute in the appeal. The words cannot be construed to mean that if there were an increase in the value of the property between the date of the trial and the date of the appeal, so that property which was worth less than Rs. 10,000 at the time of the original suit was worth more than that sum at the time of the appeal, there would for that reason be a right of appeal to the Privy Council. That would be a result which the legislature did not evidently intend. (*Broomfield and Tyabji, JJ.*) GOVINDBHAI *v.* DAHYABHAI. **I L.R. (1937) Bom 402=170 I.C. 717=10 R.B. 113= 39 Bom.L R. 332=A I.R. 1937 Bom. 326.**

——S. 110—*Substantial question of law.*

Where the questions sought to be agitated before His Majesty in Council have been subject of consideration by the Courts in the Punjab for a period of over 70 years and the Courts have uniformly arrived at one decision on them and the predecessor-in-interest of the petitioner was a party in several of the cases in which those questions arose and on the strength of those decisions titles have been created for a long time, no substantial question of law is involved in the appeal nor is the case otherwise fit for appeal to His Majesty in Council. (*Tek Chand and Skemp, JJ.*) AHMAD MUKHTAR *v.* HARI RAM. **174 I C 265= 10 R L. 363=39 P.L.R. 972=A.I.R. 1937 Lah. 758.**

——S. 110—"*Substantial question of law*"—*Application of legal principles authoritatively settled.*

Where the legal principles governing the case do not admit of any doubt having been settled authoritatively by the highest tribunal and the real question is one of the application of these principles to the particular facts of the case, no "substantial question of law" arises, on which a certificate for appeal to His Majesty in Council can be granted. (*Tek Chand and Dalip Singh, JJ.*) THE MUNICIPAL COMMITTEE, AMRITSAR *v.* RALLIA RAM. **165 I.C. 735=9 R.L. 296.**

——S. 110—*Substantial question of law—Construction of documents—Question whether property belongs to God or archaka service inam turning upon construction of inam papers—Leave to appeal—If can be granted.*

The question whether the property in suit was a gift to the God or was an archaka service inam,

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w..ch turns upon the effect of the inam proceedings and upon a construction of the various inam papers cannot be held to involve any substantial question of law so as to justify the grant of leave to appeal to His Majesty in Council. (*Venkatasubba Rao and Abbur Rahaman, JJ.*) VELAYYA *v.* PRESIDENT, H. R. E. BOARD, MADRAS. 181 I.C. 988=11 R.M. 889=1938 M.W.N. 298=47 L.W. 393=A.I.R. 1938 Mad. 631=(1938) 1 M.L.J. 487.

——S. 110—*Substantial question of law—Construction of statute—Decision based on clear language of statute and in accordance with prior Bench decisions—Leave to appeal—If to be granted.*

Where the decision on a point is based on the clear language of a section of a statute in accordance with the view taken previously by several Benches of the High Court, it is hardly proper to treat the matter as involving a substantial question of law within the meaning of S. 110, C. P. Code. (*Venkatasubba Rao and Abdur Rahman, JJ.*) VELAYYA *v.* PRESIDENT, H. R. E. BOARD, MADRAS. 181 I.C. 988=11 R.M. 889=1938 M.W.N. 298=A.I.R. 1938 Mad. 631=47 L.W. 393=(1938) 1 M.L.J. 487.

——S. 110—*Substantial question of law—Decree for arrears of rent against alleged minor—Question whether remedy of minor is suit under S. 99, Agra Tenancy Act, or suit to set aside original decree—If fit one for appeal.*

The applicant against whom a decree for arrears of rent had been obtained by his landlord brought a suit under S. 99 of the Agra Tenancy Act for recovery of possession, alleging that he was a minor on the date of the decree. He was nonsuited on the ground that his proper remedy was a suit to set aside the original decree for rent. Applicant applied for leave to appeal to His Majesty in Council contending that his remedy was a suit under S. 99 of the Agra Tenancy Act and that it was a substantial question of law.

Held, that it having been held by the Court that the proper remedy in such cases was to apply to have the decree set aside and not to sue under S. 99 for recovery of possession, that must be taken to be good law, and that the question involved was not an important or substantial question of law which required a reference to the Privy Council. (*Drake Brockman, S. M. and Knox, J. M.*) JAGADAMBA PRASAD *v.* RAM GOPAL SINGH. 1936 R.D. 120.

——S. 110—*Substantial question of law—Interpretation of previous decision.*

Where the decision regarding the title to certain property is contained in a decision to which the petitioner was a party but the petitioner seeks to show that no decision was given in respect of his title, this is not a question of law but is a question of the interpretation of that decision. (*Middleton, J. C. and Mir Ahmad, A.J. C.*) SECRETARY OF STATE *v.* RADHA DEVI. 169 I. C. 926=10 R. Pesh. 11=A.I.R. 1937 Pesh. 61.

——S. 110—*Substantial question of law—Matter in dispute settled by statute.*

Where the whole object of the appeal which is sought to be argued before the Privy Council is to challenge the act of the Executive Government in taking the estate of the applicant under the management and superintendence of the Court of Wards, a matter which is settle by statute

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law contained in the U. P. Court of Wards Act, the appeal does not involve a substantial question of law such as would justify the High Court in granting leave to the applicant to appeal to His Majesty in Council. (*Nanavutty and Zia-ul-Hasan, JJ.*) JAI INDRA BAHADUR *v.* DEPUTY COMMISSIONER, KHERI. 12 Luck. 15=160 I.C. 171=8 R.O. 249=1936 O.W.N. 191=A.I.R. 1937 Oudh 132.

——S. 110—*Substantial question of law—Misapplication of well defined legal principles.*

Where the legal principles such as were applied in the case are well defined a misapplication of such principles does not raise any substantial question of law. (*Stone, C. J. and Niyogi, J.*) GANPATRAO *v.* ISHWAR SINGH. I.L.R. (1940) Nag 29=180 I.C. 827=11 R.N. 399=A.I.R. 1938 Nag. 482.

——S. 110—Substantial question of law—Purchase of decree—Zarpeshgi lease for term of years in lieu of part consideration for sale—Interest on Zarpeshgi in shape of rents and profits—If expenditure incurred solely for earning income—If can be set-off against interest on decree amount—Quest on as to—If fit one for appeal to Privy Council. *See* INCOME-TAX ACT, Ss. 10 AND 12. 1939 I.T.R. 260.

——S. 110—*Substantial question of law—Question of proof of custom, though incidentally involving interpretation of documents.*

Where the proof of an alleged custom is confined to two documents, though their interpretation is challenged in appeal, it could not be said that a substantial question of law is involved within the meaning of S. 110, C. P. Code, as the real question is whether the custom set is proved or not an ! the interpretation of the documents was only incidental thereto. (*Thomas, C. J. and Zia-ul-Hasan, J.*) CHHAB NATH KUAR *v.* SETRAJ KUAR. 178 I.C. 658=11 R.O. 122=1938 O.W.N. 1132=1938 O.A 913=1938 A.W.R. (C.C.) 129=A.I R 1939 Oudh 60.

——S. 110—*Substantial question of law—Rejection of affidavit filed by debtor under R. 79, Calcutta Insolvency Rules.*

Where an Insolvency Judge rejected an affidavit of the debtor which purported to be a notice under R. 79, the Calcutta Insolvency Rules, 1910, on the ground that it was filed out of time.

Held, that there was no substantial point of law within the contemplation of S. 110, C. P. Code, whether or not the Judge was right in rejecting the affidavit. (*Costello, A. C. J. and Edgley, J.*) AHMAD MAHOMED PARUK *v.* PRAPHULLA NATH TAGORE. I.L.R. (1938) 1 Cal. 13=181 I.C. 251=11 R.C. 795=A.I.R. 1939 Cal. 35.

——S. 110 — *Valuation—Ascertainment—Immovable property — Multiples prescribed by United Provinces Encumbered Estates Act, if applicable.*

The market value of immovable property is usually determined with reference to instances of sales. The multiples prescribed by the Encumbered Estates Act were fixed. For the purposes of that particular act and as such they cannot be made the basis of calculating values of properties generally. (*Thomas, C. J. and Zia-ul-Hasan, J.*) RAFI UDDIN AHMAD *v.* KANIZ ABID. 1938 A.W.R. (C.C.) 112=1938 O.W.N. 1101=1938 O.L.R.

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478=1938 O A. 922=178 I.C. 250=A.I.R. 1939 Oudh 1.

——S 110—*Valuation—Amount or value of the "subject-matter" of the suit in the Court of the first instance—Meaning of.*

The words 'the amount or value of the subject-matter of the suit in the Court of the first instance' mean the amount or value at the institution of the suit, and not at the date of the decree in the Court of first instance which meaning is not affected by the alternative condition which follows in the section. 57 I A 56, Foll. (*Addison, A. C. J. and Din Mahomed, J.*) BAL RAJ *v.* MT. MAHANTO 170 I.C. 469=10 R.L. 130=38 P.L. R. 767=A.I R. 1936 Lah 31.

——S. 110 — *Valuation—Computation of—Mortgage decree—Appeal—Validity of mortgage affirmed but rate of interest varied—Amount of variation less than Rs.* 10,000—*Leave, if can be granted.*

Where a trial Court grants a decree on a mortgage, but the Court of appeal while affirming the validity of the mortgage, varies the rate of interest decreed but the amount of variation is less than Rs. 10,000 leave to appeal to the Privy Council cannot be granted, for the question of interest is not of sufficient value to amount to Rs. 10,000 and as to the validity of the mortgage the findings of both the Courts were concurrent. (*Bennet and Verma, JJ.*) WIQAR ALI KHAN *v.* NARAIN DAS. I.L R (1939) All. 443=182 I C 367=12 R.A. 1=1939 A.L J 62=1939 A.W.R. (H C.) 115=A I.R. 1939 All 322.

——S. 110—*Valuation—Construction of agreement embodied in compromise decree—Dispute as to—Decision affecting party's interest in property worth over Rs.* 10,000—*Right to grant of certificate.*

Where the construction of an agreement between the parties embodied in a compromise decree is in dispute and the decision of the High Court affects the interest of a party in the suit property, which is of far greater value than Rs. 10,000, that party is entitled to a certificate under the second clause of S. 110, C. P. Code, permitting an appeal to His Majesty in Council. (*Leach, C. J and Somayya, J.*) GURUVAPPA NAICKER *v.* MOUNAGURUSWAMI NAICKER. I.L.R (1939) Mad 838=1939 M.W.N. 607=187 I C. 731=12 R.M. 739=49 L.W 786=A.I.R. 1939 Mad. 742=(1939) 2 M.L.J 36 (2).

——S. 110—*Valuation—Partition suit—Whole estate valued at over Rs.* 25,000—*Plaintiff's share valued at less than Rs.* 10,000—*Dismissal of suit—Appeal—Decree allowing claim to property worth less than Rs.* 10,000—*Leave to appeal to Privy Council—Competency.*

In order to satisfy the conditions as to valuation in S. 110, C. P. Code, the suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 or upwards. In a partition suit it is the particular share claimed which has to be looked at and not the entire estate for purpose of valuation. In a suit for partition, the plaintiff valued the entire estate as a whole at over Rs. 25,000, and his own share at Rs. 8,662-5-4. The defendants denied that the plaintiff was a coparcener and their plea was upheld and the suit was dismissed. On appeal, the High Court held that the plaintiff was a coparcener and allowed his claim to property of the value of Rs. 5,162-5-4. The defendants applied for leave to appeal to the Privy Council.

Held, that the relief being at less than Rs 10,000, the decree in appeal did not involve any claim or question respecting property of the prescribed value, and that leave to appeal should not be granted; the fact that the decree in appeal directed partition of an estate worth over Rs. 25,000 did not bring the case within the second clause of S. 100 and did not justify the grant of leave to appeal. (*Leach, C.J. and Madhavan Nair, J.*) SUKKIRA GOUNDAN *v.* PALANI GOUNDAN. I.L.R. (1938) Mad. 923=47 L W. 591=182 I.C. 913=12 R.M. 166=1938 M.W.N. 433=A.I.R. 1938 Mad. 666=(1938) 1 M.L.J. 728.

——S. 110—*Valuation—Suit property worth less than Rs.* 10 000—*Decree for mesne profits of suit property obtained in separate suit—Decretal amount, if can be added.*

The subject-matter of a suit in the Court of the first instance was less than Rs. 10,000. In order to make up the prescribed valuation for appeal to the King in Council, it was sought to add the amount of the decree for mesne profits of the property, which decree was obtained in a separate suit.

Held, that the decretal amount could not be added so as to increase the value of the appeal to the Privy Council as it did not fall within Cl. 2, S. 110. 39 M. 843 and 57 I.A. 56, Rel. on. (*Addison, A.C.J. and Din Mahomed. J*) BAL RAJ *v.* MT. MAHANTO. 170 I C. 469=10 R.L. 130=38 P.L. R. 767=A.I.R. 1936 Lah. 31.

——S. 110—*Valuation—Partition suit—Share valued at Rs.* 5,500—*Decree awarding share to plaintiff and to one defendant—Appeal—Reversal and dismissal of suit—Shares of plaintiff and of one defendant—If to be taken into account for purposes of valuation for leave to appeal to Privy Council.*

A suit for partition and recovery of the plaintiff's one-sixth share which was valued at Rs. 5,500 for purposes of jurisdiction was decreed by the trial Court, the decree also providing that defendant No. 4, who was a brother of the plaintiff, should also recover his one sixth share, with mesne profits equally with the plaintiff, on payment of the necessary stamp duty. Defendants 1 to 3 appealed to the High Court, valuing the appeal at Rs. 5,500 for purposes of jurisdiction. The High Court set aside the decree of the trial Court and dismissed the suit. Plaintiff and defendant No. 4 applied for leave to appeal to the Privy Council.

Held, that for purposes of S. 110, the decree to be looked at was the decree as it affected the interests of the party or parties prejudiced by it, that the decree having affected the interests of both the plaintiff and defendant No. 4, it involved a question respecting property of the value of Rs. 10,000 or upwards, and that though the share of defendant No. 4 was only involved indirectly, that was sufficient for the purpose of the second paragraph of S. 110, C. P. Code, and the applicants were therefore entitled to leave under the section, irrespective of the question whether there was a substantial question of law, as the High Court had reversed the decree of the trial Court. (*Broomfield and Sen, JJ.*) APPA TRIMBAK *v.* VAMAN GOVIND. I.L.R. (1937) Bom. 705=168

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I.C. 599=9 R.B. 373=39 Bom.L.R. 156=A.I.R. 1937 Bom. 181.

——S. 110—*Valuation—Plaintiff putting lower valuation on plaint—Whether estopped from varying the valuation for purposes of appeal to Privy Council.*

The mere fact that a lower valuation was put on the plaint for the purposes of court-fee does not operate as estoppel against the plaintiff for the purposes of a Privy Council appeal so as to prevent him from showing that the real value of the subject-matter in suit in the Court of first instance was Rs. 10,000 or upwards, provided the question of valuation has not been raised and decided at an earlier stage by the Court and provided also the defendant has not been led to act upon such valuation for the purpose of choosing forum for his appeal. (*S. K. Ghose and McNair, JJ.*) RADHIKA NATH BISWAS *v* MIDNAPORE ZAMINDARI CO., LTD. **41 C.W.N. 289=64 C.L.J. 561=171 I.C. 163=10 R. C. 228=A.I.R. 1937 Cal. 292.**

——S. 110 — *Valuation—Rent suit — Decision allowing abatement of rent for diminished area.*

If the decision in a suit for rent goes to the root of the contractual relation between the parties and determines the rights and liabilities of the parties on the basis of the lease for all time to come, the real value of the subject-matter of the suit could be taken to be beyond its apparent value. But this principle has no application where what the Court decides in substance is that there was failure on the part of the landlord to put the tenant in possession of some part of the demised land, and for the period in suit, he is entitled to reduced rent corresponding to the area in actual possession of the tenant. In such a case, the sum of money actually at stake in the suit would represent its true value. (*S. K. Ghose and Mukherjea, JJ.*) RAM LAL DUTTA *v.* DHIRENDRA NATH ROY. **43 C.W.N. 239.**

——S. 110—*Valuation given in plaint—If can be enhanced by plaintiff applicant.*

Where the plaintiff applies for leave to appeal to the Privy Council, it is not open to him to allege that the valuation given by him in his own plaint was too low and ask for its enhancement for the purposes of S. 110, C. P. Code. (*Bennet and Varma, JJ.*) SRI KRISHNA MOHAN *v.* PURSHOTTAM DAS. **185 I.C. 690=12 R.A. 346=1939 A.W.R. (H.C.) 648=1939 A.L.J. 751=A.I.R. 1939 All. 695.**

——S. 110, Para. 1—*Valuation of subject-matter in suit and appeal—Suit for declaration, injunction, possession and mesne profits—Claim valued at less than Rs.* 10,0 0 *in suit and appeal—Application for leave to appeal—Value of properties exceeding Rs.* 10,000*—Right to certificate—Valuation in lower Court—If bar to right—Approbate and reprobate—Applicability of rule.*

In a suit for declaration of title to certain properties, for an injunction and possession and mesne profits, plaintiff valued his claim at Rs. 9,760-5-6 as follows: Rs. 200 for declaration and injunction; Rs. 4,427-5-6 for possession of the properties in defendant's possession calculated at 7½ times the assessment; Rs. 333 for his share of the properties sold; and Rs. 4,800 for mesne profits. The suit was dismissed and plaintiff appealed to the High Court adopting the same valuation. The appeal was also dismissed. The plaintiff then applied for leave to appeal to the Privy Council under para. 1 of S. 110, C. P. Code, claiming that the amount or value of the subject-matter of the suit and appeal was more than Rs. 10,000. It was found that the real value of the properties involved was far above Rs. 10,000.

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Held, that the prayer for a declaration could only be valued on a notional basis, and in the present case the suit as a whole could only have a notional valuation even for purposes of jurisdiction; that the plaintiff was not estopped nor barred by the rule that a man cannot approbate and reprobate from showing that the value of the subject-matter of the suit and the appeal was Rs. 10,000 or upwards within the meaning of S. 110, C. P. Code, and the plaintiff was consequently entitled to a certificate of leave to appeal under S. 110, para. 1. (*Broomfield and Tyabji, JJ.*) GOVINDBHAI *v.* DAHYABHAI. **I L.R. (1937) Bom. 402=170 I.C. 717=10 R.B. 113=39 Bom. L.R. 332=A.I R. 1937 Bom. 326.**

——S. 110, Para. 2—*Applicability—Conditions.*

The condition laid down in the second paragraph of S. 110, C. P. Code, is independent and self-sufficient and is not in any way dependent on the fulfilment of both or either of the conditions in the first paragraph. The requirements of the second paragraph will be complied with, if there is some claim or question directly or indirectly by the High Court's order either as to or respecting property of Rs. 10,000 or upwards. Where the plaintiff claims to enforce a charge and obtain a decree for sale with option to sell any part of the mortgaged property, there would be an appeal as of right under the second paragraph, if the total value of the property sought to be sold exceeds Rs. 10,000, even though the pecuniary liability of the property is limited to a sum less than Rs. 10,200. (*Sulaiman, C.J. and Bennet, J.*) NADIR HUSAIN *v* MUNICIPAL BOARD, AGRA. **I L.R. (1937) All. 405=167 I C. 670=9 R A. 558=1937 A.L.J 38=1936 A.W R. 1297=1937 A.L.R. 214=A.I.R. 1937 All 169.**

—— S. 110, second clause—*Construction.*

The second clause of S. 110, C. P. Code, does not authorise an appeal to His Majesty's Privy Council in respect of property for which no claim has ever been made or in respect of which no question has ever arisen in any Court. The words "or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value" refer to suits in existence and not to suits in *gremio futuri*. (*King, C.J. and Zia-ul-Hasan, J.*) MADHO PRASAD SINGH *v.* SHER BAHADUR SINGH. **12 Luck 27=160 I.C. 799=8 R.O. 274=1936 O.W N. 181=A I.R. 1936 Oudh 181.**

——S. 110 Para. (2)—*Interpretation.*

Where the value of the subject-matter in dispute on appeal to the Privy Council is admittedly below Rs. 10,000, but the petitioner alleges that there is another appeal pending on behalf of another party affected by the decree and that the value would be more than Rs. 10,000 if the value of the property in that appeal be taken into account but it is admitted that the decision in appeal, for which leave is sought, could have no effect on the other appeal whether by way of *res judicata* or in any other way, the order cannot be held directly or indirectly to involve a claim or question to or respecting property involved in the other appeal within the meaning of Cl. (2), S. 110

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and appeal to the Privy Council does not lie. (*Addison and Abdul Rashid, JJ.*) PUNJAB NATIONAL BANK, LTD. *v.* MT. JIWAN. 171 I.C. 433=10 R.L. 204=A.I.R. 1937 Lah. 95.

——S. 110, Para. (2)—*'Property'—Meaning of—Suit by some of heirs for maintenance allowances—Other heirs, though parties, not making claim—Plaintiffs, if can rely on value of entire allowances payable to all heirs.*

The word 'property' in the second paragraph of S. 110, C. P. Code, must be taken to be the property of the applicants and it is the extent to which the decree has operated to the prejudice of the applicants that determines the value of the property for the purpose of the section. In a suit by some of the heirs of a certain person for maintenance allowances, the plaintiffs are entitled to rely only upon the value of their own share and not upon the value of the entire monthly allowances payable to all the heirs, when the other heirs, though made parties, have not made any claim. In such circumstances, it cannot be said that the decision in the suit will involve directly or indirectly the interests of others who have made no claim. (*S.K. Ghose and Mukherjea, JJ.*) SAYEDULLA *v.* K. HABIBULLA. 43 C.W.N. 432.

——S. 111—*Scope—Decision of single Judge—Leave to appeal to Division Bench refused—Appeal to Privy Council.*

The prohibition in S. 111 is unconditional. Where therefore the decision sought to be appealed from is a decision of a single Judge of the High Court, leave to appeal from it to Division Bench having been rejected, an appeal to His Majesty in Council is prohibited by S. 111. (*Wort and Rowland, JJ.*) PARMESHWAR DAYAL SINGH *v.* BRINDABAN CHANDRA SARKAR. 160 I.C. 150 (1)=8 R.P. 343 (1)=17 Pat.L.T. 173=A.I.R. 1936 Pat 106.

——S 112—Scope of discretion under. *See* C. P. CODE, Ss. 109 AND 112—RIGHT OF APPEAL. 1939 A.W.R. (P.C.) 76=A.I.R. 1939 P.C. 122=(1939) 2 M.L.J. 181 (P.C.).

——Ss. 114 and O. 47, R. 1—*Applicability—Second appeal—Application for review on ground of discovery of material evidence—Maintainability.*

Though both S. 114 and O. 47, R. 1, C. P. Code, are general in their terms and apply to second appeals, yet it is not open to the High Court to entertain an application for review in a second appeal on the ground of discovery of material evidence, especially when the applicant for review is not shown to have acted diligently in the matter. (*Fazl Ali, J.*) BADRI DAS *v.* BEHARI LALL KAMANI. 1939 P.W.N. 909.

——S. 115.

Amendment of decree.
Appeal barred.
Appealable order not appealed against.
Applicability.
Application under.
Arbitration and award.
Burden of proof.
Case decided.
Commission.
Construction of document.
Conversion of appeal.
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Declaring ex parte.
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Delay.
Discretion.
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Error of law.
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Finding of fact.
Illegality or material irregularity.
Interference.
Interlocutory order.
Jurisdiction.
Leave to sue as pauper.
Limitation.
Locus standi.
Material irregularity.
Miscellaneous proceedings.
New case.
New issue.
New plea.
Other remedy open.
Powers of High Court.
Procedure.
Revision.
Scope.
Stay of suit.
Subordinate Court.

Amendment of decree.

——S. 115—*Amendment of decree—Application for—Rejection by lower Court—Revision.*

A revision lies against an order of the lower Court rejecting an application for amendment of a decree. A.I.R. 1929 Lah. 400, Ref. to. (*Coldstream, J.*) MT. SANTI *v.* MULKH RAJ. 39 P.L.R. 769=175 I.C. 634=10 R.L. 28=A.I.R. 1937 Lah. 894.

——S. 115—Amendment on application under Ss. 151 and 152—Amended decree appealable—Revision—Competency. *See* C. P. CODE (1908), Ss. 47 AND 115. A.I.R. 1938 Lah. 4.

——S. 115—Amendment of decree—Substantial amendment—If revisable. *See* C. P. CODE, Ss. 152 AND 115. 1938 A.M.L.J. 88.

——S 115—Amendment of pleadings—Interference—Grounds. *See* C. P. CODE, O. 6, R. 17 AND S. 115. 1940 O.W.N. 500.

Appeal barred.

——S. 115—Appeal barred—Order declaring appeal has abated—Second appeal and reference incompetent—Appeal—If can be treated as revision. *See* AJMERE COURTS REGULATION, S. 15. 1935 A.M.L.J. 102.

Appealable order not appealed against.

——S. 115—*Appealable order not appealed against—Revision—Interference.*

It is the settled practice of the Patna High Court that the revisional powers of the High Court are not exercised in cases in which a party entitled to appeal has not appealed. (*Khaja Mohamad Noor and Chatterji, JJ.*) RAZAUR RAHMAN *v.* UDIT SINGH. 18 Pat. 694=185 I.C. 135=12 R.P 303=20 Pat.L.T. 492=1939 P.W.N. 530=A.I.R. 1939 Pat. 570.

Applicability.

——S. 115—*Applicability—Application to Civil Court under S. 476, Cr. P. Code, in respect of offence committed in civil proceeding—Procedure governing—Revision—If governed by S. 115, C.P. Code or S. 439, Cr. P. Code.*

A Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476, Cr. P. Code, in respect of offences, alleged to have been committed in relation to a

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proceeding in that Court, and if for the purpose of that application it remains a civil Court, it must be governed by the provisions of the C. P. Code. An application for revision arising out of proceedings in a civil suit must therefore be dealt with as a civil revision petition and similar application arising out of a criminal proceeding must be dealt with as a criminal revision petition. (*Leach C.J., King and Krishnaswami Ayyangar, JJ.*) KUMARAVEL NADAR *v.* SHANMUGA NADAR. **51 L.W. 542 (2)=1940 M.W.N. 472 (2)=A.I.R. 1940 Mad 465=(1940) 1 M.L.J. 719 (F.B.).**

——**S. 115**—Applicability—Order of Civil Court under S. 476-B, Cr.P. Code—Revision—Procedure—If governed by S. 115 or S. 439, Cr. P. Code—Nature of proceedings. *See* CR. P. CODE, S. 439. **40 Bom.L.R. 297 (F.B.).**

——**S. 115**—Applicability—Order of Munsif refusing to set aside sale under S. 174, B. T. Act—Revision. *See* B. T. ACT, S. 174. **18 Pat.L.T. 938=A.I.R. 1938 Pat. 21 (S.B.).**

——**S. 115**—*Applicability—Presidency Small Cause Court*

S. 115, C. P. Code, applies to suits and proceedings in the Presidency Small Cause Court. 41 Cal. 323, Doubt, but Foll. (*Lort Williams, J.*) MAHOMED YUSUF *v.* ABDUL MAJID. **I.L.R. (1938) 2 Cal. 162=178 I.C. 111=42 C.W.N. 602=11 R. C. 322=A.I.R. 1938 Cal. 671.**

——**S. 115**—*Applicability—Proceedings under Madras Estates Land Act—Revision—Order refusing to set aside rent under Ss.* 131 *and* 205.

It is open to the High Court to interfere in revision with an order of the Sub-Collector refusing to set aside a rent sale under S. 131 of the Madras Estates Land Act or with an order of the Collector under S. 205 of the Act on revision against it. (*Varadachariar, J.*) ELLAPPA NAIKER *v.* SIVASUBRAMANIA MANIAGARAN. **169 I.C. 244=9 R.M. 725=1936 M.W.N. 1175=44 L.W. 567=A.I.R. 1937 Mad. 293=71 M.L.J. 607.**

Application under.

——**S. 115**—*Application under—Omission to produce copy of decree or order sought to be revised—If fatal—Copy of decree should ordinarily be affixed to application—Failure to do so is not however fatal to application.*

In case of a revision application against an order confirming an award and ordering a decree to be drawn up, ordinarily a copy of the decree should be annexed to the application, for the decree is drawn up in the terms of the award, and it is the decree which is to be set aside if the application is successful, but failure to do so is not fatal to the application and it should not be rejected on that ground alone. (*Davis, J. C. and Lobo, A J.C.*) HASSOMAL VILLAITRAI *v.* KISHINCHAND CHOTEMAL **30 S.L.R. 271=166 I.C. 365=9 R.S. 142=A.I.R 1936 Sind 172.**

Arbitration and award.

——**S. 115**—*Arbitration—Application to revoke submission on ground of want of jurisdiction of arbitrator—Refusal of Court to decide question of jurisdiction—Effect—Revision—Interference.*

Where a party to a submission to arbitration applies for leave to revoke the submission on the ground that the matter in dispute was beyond the jurisdiction of the arbitrators, it is essentially a question which the Court should decide; and if it refuses to decide the question of jurisdiction, the refusal amounts to a failure to exercise a

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jurisdiction affording a ground for interference by the High Court in revision under S. 115, C. P. Code. (*Cornish, J.*) MADURA MILLS CO., LTD. *v.* KRISHNA AYYAR. **1937 M.W.N. 518=45 L.W. 405=10 R.M. 390=171 I.C. 690=A.I.R. 1937 Mad. 405.**

——**S. 115**—*Arbitration—Arbitrators claiming certain amount as fees—Amount grossly reduced by Court without hearing them—Material irregularity.*

Arbitrators in a case claimed a certain amount as their fees for their work in the case. The Court thinking the fees excessive reduced the amount to less than 1/7th without giving any opportunity for the arbitrators to put up their case.

Held, that failure of the Court to hear the arbitrators fell within purview of Cl. (*c*) of S. 115, C. P. Code. 53 I.A. 27 Rel. on. (*Rupchand Bilaram and D. C. Mehta, A. J. Cs.*) KHAN CHAND GOPALDAS *v.* MULCHAND KHIALDAS. **110 I.C. 361 (2)=8 R.S. 121=A.I.R. 1936 Sind 1.**

——**S. 115**—*Arbitration—'Award'—Court referring matter to arbitrator and umpire on refusal of another arbitrator to act—Decree on such award—Revision—If lies.*

The parties to the suit agreed to refer their dispute to two arbitrators and on difference between them the award of the umpire agreeing with that of one of the arbitrators was to be final. On refusal of one of the arbitrators to act, the Court on the defendant's application asked the other arbitrator and the umpire to make the award in spite of an objection by the plaintiff. A decree on award was passed and the plaintiff came in revision.

Held, that the only remedy open to the plaintiff to challenge the order complained against was to go in revision after the decree was passed. The order passed by the Court complained against referring the dispute to arbitrator and the umpire being an interlocutory order would not have been open to revision before the decree on award. The revision after the decree on award was therefore proper. (*Rupchand Bilaram and Haveliwala, A J.Cs.*) KISHNOMAL HUNDOMAL *v.* WAPARIMAL JETHOMAL. **170 I.C. 487=10 R.S. 62=A.I.R. 1937 Sind 171.**

——**S. 115**—*Arbitration—Award—Court erroneously construing—Material irregularity.*

A Court acts with material irregularity in the exercise of its jurisdiction in placing a construction on an award which is not in accordance with the evidence given by the arbitrator himself. (*Bhide, J.*) KANHAYA *v.* SHEO KARAN. **39 P.L. R. 582.**

——**S. 115**—*Arbitration—Award—Revision.*

The High Court is generally reluctant to interfere with awards made in arbitration, the parties having been content to submit the matter in dispute to lay Judges of their own choosing. But if there is a question of jurisdiction involved which is important and which goes to the root of the matter, the High Court may and will interfere to remedy injustice. (*Davis, J.C. and Mehta, A.J C.*) GANGA RAM *v.* KESHAVDAS. **170 I C. 102=10 R. S. 32=30 S L.R. 478=A.I.R. 1937 Sind 174.**

——**S. 115**—*Arbitration—Award—Decree on—Revision.*

A revision should not be entertained against a decree passed in terms of an award, when the

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policy of the law is that there should be no appeal from such a decree. (*Agha Haidar, J.*) MUSLIM BANK OF INDIA, LTD., LAHORE *v.* MUHAMMAD H YAT 38 P.L.R. 783.

——S. 115—Arbitration—Award—Decree on, overruling objection to va idity of reference—Interference in revision. *See* C. P. CODE, SCH. II, PARAS. 15 AND 16. 1936 A.W.R 1223=1936 A.L.J. 1333=A I.R. 1937 All. 65 (F B.).

——S. 115—*Arbitration—Award—Execution of award which is a nullity—Revision.*

Where the executing Court dismissed the application for execution of an award as being nullity and District Judge on appeal directed that execution should proceed,

Held, the question went to the root of the jurisdiction. If decree was nullity no Court had jurisdiction to execute it and hence revision lay. (*Bhide, J.*) MT GHULAB BANO *v.* ANJUMAN IMDAD BAHMI QARZA. 169 I.C 879=10 R.L. 53 =39 P.L.R 139=A I.R. 1937 Lah. 63.

——S. 115—*Arbitration—Award—Objection to filing of unregistered award not taken in lower Courts—Award filed—Interference in revision.*

Where no objection was taken in the lower Courts to the filing of a priv te award on the ground that it was not registered,

Held, that powers of revision could not be exercised as had this point been raised in the trial Court the award could have been registered during the trial and this could have cured the irregularity. (*Jack and Patterson, JJ*) BRINDABAN CHANDRA *v.* KASHI CHANDRA. 171 I.C. 507 =10 R.C. 272=A I.R. 1937 Cal. 201.

——S. 115—*Arbitration—Award—Order on award—Interlocutory order*

The arbitration proceedings referred by a Court during the pendency of a suit or merely a ramification of the main suit which is still pending and which would be disposed of on the termination of these proceedings. The order of the Court passed on an award of the arbitrator is therefore an interlocutory order and no revision lies against it. (*Agha Haidar, J.*) ASA *v.* MT. BHURAN. 163 I.C. 380=9 R.L. 10=38 P.L.R. 725=A.I.R. 1936 Lah. 466.

——S. 115—*Arbitration—Award—Order refusing to set aside award—Revision.*

Though, ordinarily, a revision application will not lie to set aside an award, a revision application will lie under S. 115, C. P. Code, on the question of jurisdiction. (*Davis, J.C. and Lobo, A.J C.*) HASSOMAL VILLAITRAI *v.* KISHINCHAND CHOTEMAL 30 S L.R 271=166 I.C. 365=9 R.S. 142=A I.R 1936 Sind 172.

——S 115—*Arbitration—Award—Order setting aside award.*

An application for revision is not maintainable against an order setting aside an arbitration award while the case has not been fully decided. (*Sulaiman, C.J. and Bajpai, J.*) TULSHI RAM *v* BINDA BAN DAS. 58 All 946=164 I C. 722=9 R.A. 185=1936 A W.R 487=1936 A.L J. 547.

——S. 115—*Arbitration—Order superseding, reference to arbitration.*

Arbitration proceedings taken in the course of a pending suit are an integral part of the suit or a branch of the same and are not separate "cases" distinct from the main suit. An order superseding the reference to arbitration is, therefore, not

C. P. CODE (1908), S. 115.

open to revision. (*Agha Haidar, J.*) GULAB SINGH JOHRI MAL *v.* DHARMPAL DALIP SINGH. 160 I.C 1052=8 R.L. 655=38 P.L.R. 121=A I. R. 1936 Lah. 538.

——S. 115—Arbitration—Setting aside of award and supersession of arbitration—If a case decided. *See* C. P. CODE, S. 115—CASE DECIDED. 1938 A.L.J 813 (F.B.).

——S. 115 and Sch. II, Para. 15—*Arbitration—Award—Order setting aside—Revision, if lies.*

The proceedings for arbitration in the course of a pending suit are of an interlocutory character and part of the suit it-elf and hence an order setting aside an award filed by an arbitrator is not revisable by the High Court. (*Hamilton and Bennet, JJ.*) BAIJNATH *v.* CHANDIKA PRASAD, 1939 O.W N 751=183 I C 837=12 R O. 80 (1) =1939 O.L.R. 575=1939 O.A. 639=1939 A.W. R. (C.C) 108.

——S. 115—*Arbitration—Award—Revision—Powers of Court.*

The powers of a Court of revision are strictly confined within the limits prescribed by S. 115, C. P. Code, and, unless a judgment is vitiated by any of the defects specified therein, no interference with it can be made by the revising Court. This principle is all the more applicable in cases of revision from an order making an award a rule of Court. (*Addison and Din Mohammad, JJ.*) TEJA SINGH *v.* ATMA SINGH. 177 I.C. 351=11 R.L. 299=40 P L R. 651=A.I R. 1938 Lah 434.

——S. 115 and Sch. II, Para. 15—*Arbitration—Award—Setting aside award and superseding arbitration—Revision if lies.*

An order passed under Sch. II, Para. 15, C. P. Code, in a pending suit setting aside an award and superseding the arbitration, is not open to revision under S. 115. C. P. Code. The powers of the High Court are discretionary and in view of the fact that the order can be challenged in the appeal from the decree it would lead to unnecessary prolongation of the proceedings in the trial Court if a revision is entertained and so shoul l be avoided. (*Hamilton and Srivastava, JJ*) NABI MAHOMED KHAN *v.* MAHOMED HASAN. 183 I C. 378=1939 O.A. 594=1939 A W.R. (C C.) 101=1939 O.L. R. 503=12 R.O. 31=1939 O.W.N. 716=A.I.R. 1939 Oudh 238.

Burden of proof.

——S. 115—*Burden of proof—Mistake as to—Revision.*

A mistake as to onus of proof gives rise to a revision petition. (*Dalip Singh, J.*) SHIB LAL *v.* MST. GOPANDI 41 P.L R. 513=185 I.C. 613=12 R.L. 305=A.I.R. 1939 Lah. 562.

——S. 115 —*Burden of proof wrongly laid—Material irregularity.*

When there is a perverse decision on a question of law or procedure, a decision being perverse when it is a conscious departure of some ru'e of law or procedure, Courts will interfere. Where a mortgage bond was on the face of it discharged, and in the possession of the obligor,

Held, it was material irregularity to make the latter prove the fact of discharge. It was for the plaintiff, who sued on mortgage to prove the loss of the document and further to show that the debt was subsisting. (*Stodart, J.*) NATESAN CHETTIAR *v.* MARIYAYEE AMMAL. 163 I.C. 809= 9 R.M. 67=A.I.R. 1936 Mad. 526.

C. P. CODE (1908), S. 115.

Case decided.

——S. 115—*"Case decided"—Application for stay under S. 7 (1) (a), U.P. Encumbered Estates Act—Dismissal—Revision.*

The proceeding started by the filing of an application under S. 7 (1) (*a*) of the U. P. Encumbered Estates Act is a fresh proceeding and, therefore, a case which terminates as soon as the application is dismissed There is, therefore, a "case decided" within the meaning of S 115, C. P. Code, justifying interference by the High Court in revision. (*Sulaiman, C.J. and Harries, J.*) BABU RAM *v.* MANOHAR LAL. I.L.R. (1938) All. 22=173 I.C. 157=1938 A.L R 98=10 R.A. 466=1937 A.L.J 886=1938 R.D. 84=1937 A.W. R. 986=A.I R. 1938 All. 6.

——S. 115—*"Case decided"—Arbitration—Award—Order setting aside—Revision*

Whether an order does or does not decide a case within the meaning of S. 115, C.P.Code, must be considered in each case. An order of the Court setting aside an award under Para 15 of Sch. II, C. P. Code, and fixing the suit for final hearing does not decide a case within the meaning of S. 115. (*Davis, J.C., Lobo and Weston, JJ.*) KISHINCHAND *v.* TAKHITRAM. I.L.R. (1940) Kar. 22=183 I C. 724=12 R S. 75=A I R. 1939 Sind 241 (F.B.).

——S. 115—*'Case decided'—Arbitration—Award—Setting aside of award and supersession of arbitration—Revision—Competency*

A Court cannot be considered to have decided a case within the meaning of S 115, C. P. Code, where it has set aside the award and superseded the arbitration pending a suit which is consequently to be tried by the Court. (*Bennet, Ag C.J., Ismail and Verma, JJ.*) GOVIND DAS *v* INDRAWATI. I L.R (1938) All. 805=1938 A.L.J 813 =177 I.C 981=11 R.A. 238=1938 A.W R (H C.) 605=1938 A.L.R. 804=A.I.R. 1938 All. 557 (F.B.).

——S 115—Case decided—Arbitration—Reference through Court—Award—Award of fees to arbitrator by Court—Revision—Competency—Interference. *See* C. P. CODE, SCH. II, PARA. 13. I.L.R. (1940) Kar. 34.

——S. 115—*'Case decided'—Dismissal of application under S. 7 of the U. P. Encumbered Estates Act.*

The dismissal of an application under S. 7 of the U. P. Encumbered Estates Act is the termination of a proceeding and hence comes within the purview of the words 'case decided' within the meaning of S 115 C. P. Code. (*Rachhpal Singh and Ismail, JJ.*) MOHAMMAD MAQSUD ALI KHAN *v.* ROOP CHAND. 1940 A L.J. 351=1940 A.W.R. (H.C.) 364=A.I.R. 1940 All. 387.

——S. 115—*"Case decided"—Execution proceedings—Application for stay of stranger not party to suit or execution—Refusal—Revision*

Where in the course of execution of a decree, an outsider to the suit and to the execution proceedings, makes an independent application for stay of execution, the proceedings which begin with such an application for stay by a person not a party to the suit and not originally a party to the execution proceedings and which terminate with an order of refusal have the character of a 'Case' complete in itself; and an order passed on such an application, refusing to stay the execution is a "case decided" within the meaning of S. 115, C. P. Code, and is subject to revision by the High Court. (*Collister and Bajpai, JJ.*) JWALA PRASAD *v* HAR PRASAD. 172 I C. 285=10 R A 373=1937 A.L J. 877=1937 R.D. 498=1937 A.W.R. 778=A.I.R. 1937 All. 658.

——S. 115—Case decided—Final decision on application under O. 33, R. 1. *See* C. P. CODE, O. 33, R. 1 AND S. 115. 1938 O.W.N. 561.

——S. 115—*Case decided—Framing or refusing to frame issues.*

A Court in framing issues or refusing to frame issues is, in the language of S. 115, deciding a case, if the onus of proof is involved in the form of the issues. (*Stodart, J.*) NATESAN CHETTIAR *v.* MARIYAYEE AMMAL. 163 I.C. 809=9 R.M. 67 =A I.R. 1936 Mad. 526.

——S. 115—*'Case'—If includes interlocutory orders.*

The word 'case' used in S. 115 is wide enough to include an interlocutory order and the High Court will interfere even in the case of such orders provided they otherwise fulfil the requirements of S. 115. (*Bose, J.*) KRISHNA KUMAR *v.* RADHEDAL. 175 I.C. 107=I L R. (1940 Nag. 463=10 R.N. 433=A.I R. 1938 Nag. 210.

——S. 115—*Case decided—Leave to sue in forma pauperis—Application for—Rejection of —Revision.*

A revision is maintainable against an order rejecting an application for permission to institute a suit "*in forma pauperis*". (*Smith and Madeley, JJ.*) SUNDER BABU *v.* MOHAN DEI. 13 Luck. 560=170 I.C 956=10 R.O 61=1937 O. L.R. 494=1937 O.W.N. 971=A.I.R. 1937 Oudh 481.

——S. 115—*"Case decided"—Lower Court assuming jurisdiction not vested in it and threatening to interfere with vested rights of subject—Revision—High Court's powers of interference.*

A "case decided" within the meaning of S. 115, C. P. Code might fall within the category of orders passed in the assumption of jurisdiction not vested in the Court by law. Where an invasion of vested rights of the subject is threatened by a Court assuming a jurisdiction which it does not possess, and it is about to resort to the use of the machinery at its disposal, the High Court will, as a superior Court, exercise its powers under S. 115, C. P. Code, and will not restrict its jurisdiction. (*Wassoodew, J.*) BABURAO *v.* HARIHARRAO. 183 I C. 556=12 R.B. 113=41 Bom.L.R 490=A.I.R. 1939 Bom. 279.

——S. 115—*Case decided—Matter still under investigation and not finally decided by lower Court—Revision—Interference.*

Where the matter under revision is still under investigation and the lower Court has not finally decided any question, and the points raised by the petitioner can still be urged before the lower Court, it would be undesirable to interfere in revision even if the High Court had the power to interfere. (*Fazl Ali and Meredith, JJ.*) HRIDAYNATH SINGH *v.* LAHAR SINGH. 187 I.C. 838=6 B R. 558=12 R.P. 646=21 Pat.L.T 629.

——S. 115—*Case decided—Meaning of.*

The word 'case' in S. 115 has a wider connotation and includes something more than a suit. (*Davis, J. C. and Lobo, A.J.C.*) INDO PERSIAN TRADING CO. *v.* PERMANAND HARNAMSINGH. 166 I.C. 541=9 R.S. 146=A.I.R. 1936 Sind 205.

C. P. CODE (1908), S. 115

——S. 115—*'Case decided'—Order as to amendment of plaint—When 'case decided'.*

The question whether an order allowing an amendment of the plaint is a 'case decided' depends upon the facts of the particular case. Where a plaintiff is permitted to amend his plaint in order to sue on an entirely different legal relationship between himself and the defendant from that relied upon in the original plaint, and when the entire nature of suit is sought to be altered, the order allowing such an amendment is a 'case decided' for in effect the original suit has been withdrawn and has been displaced by a different suit. (*Weston.*) NIHAL CHAND *v.* AMAR CHAND. **1937 A.M.L.J. 104.**

——S. 115—*"Case decided"—Order by Judge reviewing decision of predecessor in exercise of inherent powers—Revision—Interference by High Court.*

Both O. 47, and S. 151 are to be construed strictly, and are not intended to be used, and are not to be used, to allow one Judge to sit in appeal on orders of his predecessor exercising an equal jurisdiction with his own. Where a Judge sets aside an order passed by his predecessor dismissing suit as against one of the defendants in a suit, his order is one without jurisdiction, inasmuch as he usurps an appellate jurisdiction which he does not possess. Such order, although alleged to be passed under S. 151, is in substance one reviewing the judgment of his predecessor Although an appeal against such order is not strictly maintainable, such an appeal, treated as revision application, is competent. The order sought to be set aside is not an interlocutory order so as to bar an application in revision, inasmuch as it sets aside an order which is not an interlocutory order. In any case, it is an order deciding a case within the meaning of S. 115, C.P. Code, and a revision application against it is maintainable. (*Davis, J.C. and Weston, J.*) MIR HAJI GHULAM SHAH *v.* KHANCHAND. **I L.R. (1939) Kar. 330=182 I.C. 154=11 R.S. 250= A.I R. 1939 Sind 137.**

——S. 115—*Case decided—Order disallowing amendment of pleading.*

No revision lies from an order merely refusing to allow an amendment of a pleading. Cases where the amendment comes under some other order of the Code, for example, the addition or substitution of parties, or striking off a pleading may amount to a case decided; but an order passed purely under O. 6, R. 17 is not. (*Sulaiman, C.J., Bennet and Bajpai, JJ.*) SURAJ PALI *v.* ARIYA PRETINIDHI SABHA, U. P. **I.L.R. (1937) All 17 =165 I C. 1=9 R.A. 257=1936 A.L.J. 923= 1936 A.W.R 776=A I.R 1936 All. 686 (F.B.).**

——S. 115—*Case decided—Order dismissing an application to be made a party to a suit under O. 34, R. 1.*

The order of a Court dismissing the application of a party to be made a party to a suit under O. 34, R. 1, though interlocutory, has decided a case and a revision petition lies against such an order. (*Srivastava, C.J. and Zia-ul-Hasan, J.*) SHEO PRASAD LAL *v.* PRAKASH RANI. **13 Luck 625=171 I.C. 434=1937 O.L.R. 558=1937 O.W. N. 1118=A.I.R 1938 Oudh 10.**

——S 115—*Case decided—Order giving leave to defend conditionally under O. 37, R. 3—Revision.*

C. P. CODE (1908), S. 115.

An order giving leave to defend conditionally under O. 37, R. 3, C. P. Code, is an interlocutory order and does not amount to a "case decided" within the purview of S. 115, C. P. Code. Even assuming the order not to be an interlocutory order, the Court cannot be said to act illegally or with material irregularity in the exercise of its jurisdiction in giving leave to defend conditionally, and the order is not, therefore, open to revision under S. 115, C. P. Code. (*Addison and Abdul Rashid, JJ.*) MANOHAR LAL *v.* KAROBAR KHANDAN MUSHTARKA. **I.L R (1938) Lah. 289 =177 I.C. 778=10 R.L. 361=40 P.L.R 69=A. I.R. 1938 Lah. 548.**

——S. 115—*"Case decided"—Order holding application competent.*

Quaere.—Whether a decision that an application is maintainable can be called "case decided" within the meaning of S. 115, is at least open to doubt. (*Pollock, J.*) RAMCHANDRA RAO *v.* MADHORAO **I.L.R. (1937) Nag. 428=167 I.C. 122=9 R.N. 166=A.I.R. 1936 Nag. 280.**

——S. 115—*Case decided — Order holding certain reliefs claimed as time-barred.*

An order by Court holding the suit of a plaintiff time barred in respect of certain reliefs claimed by him is a 'case decided' to that extent. (*Din Mohammad, J.*) DIWAN CHAND *v.* BEHARI LAL. **178 I.C. 799=11 R.L 498 (2)=A.I.R. 1938 Lah. 507.**

——S. 115—*Case decided—Order refusing to stay suit under S. 10, C. P. Code—Revision—Competency.*

No application in revision will lie against an order of a Judge under S. 10, refusing to stay proceedings and directing a suit to proceed. Such an order is not a case decided within the meaning of S. 115, C. P. Code. (*Davis, J.C. and Tyabji, J.*) RAMCHAND VIRMAL *v.* LILARAM. **185 I.C. 765=12 R.S. 175=A.I.R. 1939 Sind 291.**

——S. 115—Case decided—Order that suit cannot proceed against one of the defendants. *See* C. P. CODE, O. 7, R. 11. **A.I.R. 1937 Lah. 800**

——S. 115—*Case decided—Order under O. 6, R. 17, refusing amendment—Revision.*

An order refusing an amendment of a plaint is a "case decided" within the meaning of S. 115, C. P. Code, and a revision against such an order is therefore competent. (*Weston.*) CHAND MAL *v.* MOHAMMAD HUSSAIN. **1935 A.M.L.J. 100.**

——S 115—*Case decided—Order under O. 9, R. 13 setting aside* ex parte *decree—Revision.*

An order purporting to set aside an *ex parte* decree under O. 9, R. 13 is an order deciding a case within the meaning of S. 115, C.P. Code. and revision therefore lies. The fact that an appeal lies against an order made under O. 9, R. 13 refusing to grant an application to set aside an *ex parte* decree and that no appeal lies against an order granting an application to set aside a decree does not exclude the remedy by revision in the latter case, much more restricted though the remedy by revision is. (*Davis, J.C. and Lobo, J.*) ZENAB *v.* MAHOMED HAJI ALLAHDINO. **32 S.L.R. 703=174 I.C. 572=10 R.S. 264=A.I.R. 1938 Sind 76.**

——S. 115—*Case decided—Proceedings dismissed in default—Order on application for restoration.*

Orders relating to an application for restoration of proceedings dismissed in default consti-

C. P. CODE (1908), S. 115.

tute a 'case' within the meaning of S. 115, C. P. Code. (*Bhide, J.*) MAHOMED SADIQ *v.* MT. SAMI-UL-NISA 161 I.C. 212=8 R.L. 690=A.I.R. 1936 Lah. 618.

——S. 115—'Case decided'—Rejection of plaint in part. *See* C. P. CODE, O. 7, R. 11 (*a*). A.I.R. 1936 Lah. 1021.

——S. 115—*Case decided—Subordinate Court—Order by District Judge under S.* 36, *Legal Practitioners' Act declaring person tout—Revision—Jurisdiction of High Court—Interference—Grounds—Cr. P. Code, S.* 439—*Government of India Act, S.* 224 (2).

S. 36 of the Legal Practitioners' Act confers a special jurisdiction on Subordinate Court; and an order passed by a District Judge under S. 36 declaring a person a tout is an order which the High Court has power to revise under S. 115, C. P. Code, being a case decided by a Court subordinate to the High Court. S. 439 of the Cr. P. Code does not apply to such a case. Nor can it be revised under the Government of India Act, 1935. The jurisdiction to revise is, however, of an exceptional character and cannot be invoked except in furtherance of justice. If the Judge in passing the order had no clear conception of the law on the subject or if he has failed to apply the law to the facts of the case and bases his finding on mere suspicion or conjecture, the High Court would interfere with the order. (*Abdur Rahman, J.*) SOMANNA, *In re.* I L R. (1938) Mad. 988=177 I C. 456=11 R M. 334=1938 M.W.N. 426=47 L.W 578=A I.R. 1938 Mad. 634=(1938) 2 M.L.J. 100.

——S. 115 and O. 6, R. 17—*Case decided—What may amount to—Rejection of application to explain array of parties—Revision, if lies.*

Where an amendment comes under some provision other than O. 6, R. 17, C. P. Code, *e g.*, 'the addition or substitution of parties or striking off a pleading' the order may amount to a case decided. Where an application is in fact and in substance one to elucidate the array of the parties as described in the plaint, it is not an application for amendment of a pleading and the rejection of such an application constitutes the decision of a case within the meaning of S. 115, C P. Code and is revisable by the High Court. (*Iqbal Ahmad and Bajpai, JJ.*) JAGDISH SARAN *v.* BHAGWAT SARAN. 1940 A W.R. (H.C.) 410=1940 A L.J. 445=A.I.R. 1940 All 448.

Commission.

——S. 115—*Commission—Refusal to issue—Interlocutory order—Interference.*

An interlocutory order is subject to revision. An order refusing to issue without sufficient reason, a commission for the further cross-examination of a witness partly cross-examined and who happened to live more than 200 miles away, is also subject to revision, the ground being that much harm may accrue to a party from such a refusal. (*Davies, I. C. S.*) JAMNA DHAR POTDAR AND CO. *v.* GULAB CHAND. 1938 A.M.L.J. 123.

Construction of document.

——S. 115—*Construction of document—Omission to consider clause in bond—Revision.*

The High Court will interfere in revision with the decree of the lower Court where it has misunderstood the case and has not considered the effect of a clause in a bond on which the plaintiff relied. (*Bhide, J.*) GANPAT RAM DURGA PRASAD *v.* DEBI SAHAI. 41 P.L.R. 909.

——S. 115—*Construction of document—Revision.*

Where a document cannot possibly bear the construction that has been placed by the lower Court on it, the High Court has jurisdiction to revise its decree. (*Jai Lal, J.*) KAN LABHAYA *v.* FATEH ALI 164 I.C. 888=9 R.L. 179=38 P.L. R. 349=A.I.R. 1936 Lah. 801.

Conversion of appeal.

——S. 115—Conversion of app allowed—Second appeal not competent. *See* C. P. CODE, SS. 102 AND 115. A.I.R. 1937 Oudh 244.

Court.

——S. 115—"Court"—Collector's order under S. 20-A, Madras Estates Land Act—Revision—Jurisdiction to interfere. *See* MADRAS ESTATES LAND ACT, S. 20-A. 50 L.W. 162=(1939) 2 M. L.J. 292

——S. 115—"Court"—District Judge and Assistant Judge disposing of appeal relating to amendment of voters under Bombay District Municipal Act—Orders in—Revision. *See* BOMBAY DISTRICT MUNICIPAL ACT, SS. 11 (1) (*c*) (*iv*) AND 22. A.I.R 1938 Sind 153.

——S. 115—*"Court"—Judge of Civil Court acting as Commissioner under Workmen's Compensation Act—Order by—Revision.*

S. 115, C. P. Code, relates only to the records of cases decided by Courts subordinate to the High Court. A Commissioner under the Workmen's Compensation Act is not a Subordinate Court for the purpose of S. 115 A Judge of Civil Court passing an order as a Commissioner under the Workmen's Compensation Act is a *persona designata* and no revision application under S. 115 lies against an order passed by him. The effect of the amendment of the Workmen's Compensation Act by Act V of 1929 is not to make the Commissioner a subordinate Court for the purpose of S. 115. He is to be deemed a Court only for the limited purposes set out in S. 23, Workmen's Compensation Act. (*Davis, J.C. and Mehta, A J.C.*) CENTURY FLOUR MILLS, SHIKARPUR *v.* AMIR BAKHSH. 30 S L.R. 351=166 I.C. 986=9 R S. 161=A.I.R. 1937 Sind 6.

——S. 115—"Court"—Judge of Karachi Small Cause Court—Order in election dispute made under Ss. 16 and 17, Karachi City Municipal Act—Revision—Powers of High Court to interfere. *See* KARACHI CITY MUNICIPAL ACT, SS. 16 AND 17. I.L.R (1939) Kar. 131.

——S. 115—"Court"—Land acquisition—Collector acting under Land Acquisition Act—Order refusing to make reference under S. 18, Land Acquisition Act—Revision. *See* LAND ACQUISITION ACT, S. 18. A.I.R. 1937 Nag. 12.

——S. 115—Court—Land Acquisition Collector—Order declining to make reference—Revision. *See* LAND ACQUISITION ACT, S. 18. 41 C W.N. 1301.

——S 115—*Court subordinate to High Court—Collector acting under S.* 204, *Orissa Tenancy Act—Order in appeal in case valued below Rs.* 100—*Revision—High Court's powers*

The High Court has no power to revise the order of the Collector passed in appeal in a case in which the subject-matter is valued at less than Rs. 100 and to which the provisions of Cl. 3 of S. 204 apply as in these circumstances the Collec-

C. P. CODE (1908), S. 115.

tor cannot be held to be subordinate to High Court. (*Fazl Ali and Manohar Lall, JJ.*) PUNI SETHI *v.* GANGADHAR PATRO. **189 I C. 419=6 B. R. 804=A.I.R. 1940 Pat 249.**

Court-fee.

——**S. 115**—Court-fee—Appeal requiring *ad valorem* court-fee valued and miscellaneous appeal—Application by respondent after disposal of appeal and remand for order staying proceedings until payment of full court-fee—Rejection—Revision — Interference. *See* COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA) SCH. I, ART. 1 AND SCH II, ART. 11. **18 Pat L.T. 864.**

——**S. 115**—*Court-fee—Decision as to—Revision.*

Where the decision on a question of court-fee also bears upon the valuation of the suit for purposes of jurisdiction, and the suit may have to be filed in a higher Court if the court-fee question should be decided in a different way, the High Court is justified in interfering in revision, although the point has been decided in plaintiff's favour. (*Varadachariar, J.*) SELLAMMAL *v.* JOTHIMANI NADAR. **161 I C. 679=8 R.M. 851=43 L W. 582=1936 M W.N. 148=A.I.R. 1936 Mad. 411=70 M.L.J. 398.**

——**S. 115**—*Court-fee—Decision as to—Revision—Decision favourable to plaintiff and decision unfavourable to plaintiff—Distinction—Jurisdiction—Refusal to exercise.*

The High Court has power to interfere and will interfere in revision against an erroneous decision of the trial Court adverse to the plaintiff in the matter of Court-fee. The question of court-fee is not a matter which really concerns the defendant, though he may raise that question, and the Court in deciding a question of court-fee is deciding an issue not as between the plaintiff and the defendant, but is deciding an issue as between the Crown and the plaintiff. If the decision be adverse to the plaintiff, it amounts to a refusal to exercise the jurisdiction to try the issues as between the plaintiff and the defendant, and is subject to the revisional jurisdiction of the High Court under S. 115, C. P. Code. Where, however, the decision is in favour of the plaintiff, it is not open to the defendant to apply to the High Court in revision, because in the first place he is not a party to the dispute between the Crown and the plaintiff, and, secondly, he has a remedy, should the decision on the merits be against him, in bringing the matter of the court-fee duty to the notice of the appellate Court under S. 12 of the Court-Fees Act; and, thirdly and most important, as between the plaintiff and the defendant the trial Court has not refused to exercise its jurisdiction to decide the case on the merits. (*Courtney Terrell, C.J., James and Manohar Lal, JJ.*) RAMKHELAWAN SAHU *v* BIR SURENDRA SAHI. **16 Pat 766=172 I.C. 840=4 B R. 178=10 R P. 349=18 Pat L T 977=1937 P.W.N. 989=A.I.R. 1938 Pat. 22 (F B).**

——**S. 115**—*Court-fee—Erroneous decision as to Court-fees resulting in dismissal of appeal.*

The appellate Court undoubtedly has jurisdiction to decide the correct amount of court-fee but if its decision on the point results in its refusal to exercise jurisdiction in respect of the merits of the appeal before it, and if that decision is wrong, it results in a refusal to exercise jurisdiction vested in it. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MUKARAB KHAN *v.* RAB NAWAZ KHAN. **163 I.C. 462=9 R. Pesh. 3=A.I. R. 1936 Pesh 140.**

——**S 115**—*Court fees—Order as to.*

A revision petition is competent and lies against an order directing payment of additional court-fees. (*D R. Norman.*) JANWAT MAL *v.* MOHRI LAL. **1937 A M L J 28.**

——**S 115**—*Court-fee—Order demanding additional court fee for memorandum of appeal—Revision—Order favourable to appellant—Distinction.*

An order demanding additional court-fee on a memorandum of appeal is revisable under S. 115, C. P. Code, as it amounts to a refusal to exercise jurisdiction; but an order accepting the court-fee paid as sufficient is not open to revision as then there is no refusal to proceed with the appeal. In such a case jurisdiction is not affected, nor is the other side damnified. (*Stone, C J., Bose and Gruer, JJ.*) BALAJI DHUMNAJI *v.* MST. MUKTABAI. **I L R 1938 Nag 106=173 I C. 329=10 R N 298=1938 N.L J. 1=A.I R. 1938 Nag. 122 (F.B.).**

——**S. 115**—*Court-fee—Order determining and holding plaint to be insufficiently stamped—Revision.*

An order of a trial Court determining the proper court-fee payable on a plaint and holding that it is insufficiently stamped is not revisable by the High Court; and such an order, which by itself does not fall under S. 115, C. P. Code, cannot be revised by the High Court merely because it is bound to be followed by some other order which may be without jurisdiction. (*Burn, J.*) MANAITHUNAINATHA DESIKAR *v.* GOPALA CHETTIAR. **49 L.W. 270=186 I.C. 153=12 R.M 596=1939 M. W N. 205=A.I R. 1939 Mad. 380=(1939) 1 M. L.J 317.**

——**S. 115**—*Court-fee—Order of Court calling upon plaintiff to make good deficiency in court-fee—Revision, if lies.*

Where the trial Court requires the plaintiff to make good the deficiency in court-fees, no revision lies against such order either under S. 115, C. P. Code, as, on rejection of the plaint on non-compliance with such order, an appeal lies under S. 224, Government of India Act, 1935, as the High Court cannot interfere with the judicial order in the exercise of its administrative functions under that section. (*Bhide, J.*) PEOPLES BANK OF NORTHERN INDIA *v.* KANAYA LAL. **I L. R. (1938) Lah. 377=176 I.C. 764=11 R L. 234=40 P.L.R. 1039=A.I.R. 1938 Lah. 80.**

——**S. 115**—*Court-fee—Order to pay additional court-fee—Revision.*

An order to pay additional court-fee is an interlocutory order and cannot be the subject of a revision. (*Skemp, J.*) GHULAM ALI *v.* NIAZ ALI. **18 Lah. 430=172 I.C. 497=10 R.L. 333=39 P.L.R. 819.**

——**S. 115**—*Court-fee—Question of classification of suit—Decision adverse to plaintiff—Interference—Jurisdiction of High Court.*

The High Court has jurisdiction to interfere in revision with the decision of the lower Court on the question of the classification of the suit for purposes of Court-fee, where such decision has been adverse to the plaintiff. (*James and Rowland, JJ.*) SITAL PRASAD SAH *v.* RAMDAS SAH.

C. P. CODE (1908), S. 115.

18 Pat. 267=5 B R. 893=183 I.C. 281=12 R.P. 122=1939 P.W.N 197=A.I R. 1939 Pat. 274.

Declaring ex parte.

——S. 115—*Declaration as* ex parte—*If revisable—Subsequent* ex parte *decree, not appealed against—Remedy—Proper procedure.*

Where the petitioners were declared *ex parte*, even if the order was wrong on the merits, the High Court has no jurisdiction under S. 115, C. P. Code, to interfere with such an order. Where a decree is passed after declaring certain persons as *ex parte* the proper procedure f r those persons is to have preferred an appeal against the decree and not to come by way of revision under S. 115 against the order declaring them *ex parte*. (*Madhavan Nair, J.*) THAVASIKANNU THEVAR *v.* SANKARALINGAM PILLAI. 176 I.C. 825=11 R M. 169=1938 M.W.N. 17=A.I R. 1938 Mad. 217.

Defective judgment.

——S. 115—*Defective judgment—Interference.*

Where there had not been any real consideration of the evidence at all before the lower appellate Court and all that the Judge did was to seize hold of a rule of law about the burden of proof, a rule which incidentally loses most of its significance when there is evidence for consideration and then to seize hold of two or three superficial points in the case and rest content with that.

Held, that that was not what an appellate Judge was there for, especially when he was reversing a well considered finding of a lower Court and that interference in revision was necessary. (*Bose, J.*) KISANGOPAL *v.* UMRAO KESHEO RAO. 175 I.C. 430 =10 R.N. 456=A.I.R 1938 Nag. 216.

Delay.

——S. 115—*Delay—Practice of Oudh Chief Court.*

Interference in revision being discretionary the practice of the Chief Court is to refuse to entertain applications for revisi n if they are made too late and to demand an explanation from the applicant for the delay in case the application is made more than ninety days after the passing of the order. But where the applicant was not a party to the order which he seeks to revise and the order was passed behind his back and without notice to him, the delay is excusable and should be condoned. (*Srivastava and Nanavutty, JJ.*) BIRENDRA BIKRAM SINGH *v* BASDEO 12 Luck. 52 =160 I.C 814=8 R O 281=1936 O W.N. 262= 1936 O.L.R. 109=A.I R 1936 Oudh 185.

Discretion.

——S. 115—*Discretion—Exercise of discretion under S. 5, Limitation Act—Interference.*

Where the lower Court has purported to exercise a discretion vested in it by S. 5, Limitation Act, in admitting an appeal presented out of time, the High Court will not interfere in revision. (*Mir Ahmad, A.J C*) BUNDHELKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLES BANK OF NORTHERN INDIA, LTD, LAHORE 162 I.C. 416=8 R. Pesh. 197=A I R 1936 Pesh. 197.

——S. 115—*Discretion—Interference in revision.*

Where the question relates to the exercise of discretion which is vested by law in the lower Court except in very exceptional cases, it is not proper for a Court of revision to interfere with the way in which the lower Court has exercised its discretion. (*Varadachariar, J.*) VENKAYYA *v* VENKATA RAO. I.L.R. (1939) Mad. 317=179 I.C 963=11 R M. 644=1938 M.W.N. 925=48 L.W 517=A.I.R. 1938 Mad. 979=(1938)2 M L. J. 642.

——S. 115—*Discretion—Interference—Principles.*

In matters of judicial discretion, the revising Court will not interfere unless there are either no grounds whatever for its exercise or unless its exercise produces manifestly unfair result. (*Norman.*) AMAR CHAND *v.* BHOLA NATH. 1939 A.M L.J. 17.

——S. 115—*Discretion—Interference in revision—Limitation Act, S. 5.*

It is not the practice of the High Court to interfere in revision in the exercise of discretion by the Court below under S. 5, Limitation Act, even when the exercise of that discretion is founded on a mistaken view of the law. (*Agarwala, J.*) THAKUR SINGH *v.* DINANATH SAH. 4 B R. 54=10 R.P. 236=171 I.C. 700=A.I.R. 1937 Pat. 528.

——S. 115—*Discretion—Order accepting security—Interference.*

Accepting or refusing to accept security furnished by a person appointed as a guardian of property of a minor is a matter within the discretion of the Court. Where the Court in exercise of its discretion accepted the security and it is not shown that the Court has acted with material irregularity in the exercise of its jurisdiction, no revision lies against the order accepting the security. (*Bhide, J.*) MT. AMRATI *v.* BISHAMBER DAS. 41 P.L.R. 592=A.I.R. 1939 Lah. 170.

——S. 115—*Discretion—Order admitting evidence after close of case and pending judgment—Revision.*

Though an order allowing further evidence to be led will only be interfered with very reluctantly, if the Court, assuming that it has discretion to allow evidence to be led by a party at a late stage after the close of the ca e and pending judgment. has not exercised its discretion judicially, the order is revisable and liable to be set aside. (*Weston.*) SHEO CHAND *v.* GIRDHARI LAL. 1935 A.M.L.J. 118

——S 115—*Discretion—Order allowing amendment of plaint—Revision.*

No revision lies against an order allowing an amendment of the plaint. (*Tek Chand, J.*) ISMAIL *v* RULIA RAM. 41 P.L.R. 146.

——S. 115—*Discretion—Order disallowing application by person directly affected by suit to be impleaded as defendant—Interference.*

Where a Court does not apply its mind to the real dispute in the case and wanders into discussion of extraneous matters and disallows an application by a person who is directly affected by the result of the suit, to be impleaded as defendant, and, directs him to seek his remedy by separate suit and thus fails to apply the well-recognized rule that one object of impleading parties is to avoid multiplicity of suits, its order cannot be sustained and is open to revision. Certain persons claiming to be the rate-payers of a Municipality instituted a suit against the Secretary of Municipal Committee for a perpetual injunction against the defendant restraining him from paying a certain sum as pay and allowance to an Executive Officer of the Committee on the ground

that he was not a legally appointed servant of the Municipality, his term of office, having been illegally extended by the Ministry for Local Self-Government. The Secretary of State for India applied to be impleaded as a defendant in the suit contending that he was directly affected by the result of the suit, as the object of the plaintiff was to have the orders of the Government set aside by challenging their validity. The Court refused the application of the Secretary of State for India to be impleaded as party and decreed the suit on confession of judgment by the Municipal Committee. It appeared that the suit was a collusive suit to get round the orders of the Government by improper means.

Held, that the order of the Court refusing to implead the Secretary of State for India could not be sustained. The Local Government and, therefore, the Secretary of State, was directly affected by the result of the suit as it was the legality of the action of the Government in appointing and renewing the appointment of the officer that was the real matter in controversy in the suit and was a proper party to the suit. (*Young, C.J. and Jai Lal, J.*) SECRETARY OF STATE *v.* CH. JAMALUDDIN. **164 I.C. 882=9 R.L. 180=A.I.R. 1936 Lah. 619.**

——**S. 115**—Discretion—Order imposing condition of security in granting leave to defend under O. 37, R. 3 (2)—Revision. *See* C. P. CODE, O. 37, R. 3 (2). **70 M L J. 241.**

——**S. 115**—*Discretion—Order refusing stay of suit under S.* 19, *Arbitration Act—Interference in revision.*

Where the trial Judge, in the exercise of the discretion vested in him, refuses to stay the suit under S. 19 of the Arbitration Act on the ground that complicated questions of law are likely to arise which can better be determined by the Court than by the arbitrators, the High Court will not interfere in revision with the discretion exercised by him. (*Jai Lal, J.*) LAUL *v* GANGA SUGAR CORPORATION, LTD. **163 I.C. 854=9 R.L. 55=38 P.L.R. 846=A.I.R. 1936 Lah. 904.**

——**S. 115**—*Discretion—Order refusing to try preliminary issue of law—Interference.*

Interlocutory matters are certainly matters of discretion of the lower Court but that discretion must be exercised according to proper principles of justice but it is the duty of the High Court to interfere when the discretion has not been according to judicial principles. Where a Court summarily rejects a prayer to try a preliminary issue on a point of law and in its summary jurisdiction has not even expressed any opinion as to whether the question of law would be sufficient to dispose of the case, to refuse to exercise the revisional jurisdiction in such case might give rise to the gravest hardship. The injured party has no right of appeal and refusal to exercise jurisdiction would mean that the lower Court's unfetted decision might put the injured party to the enormous expense in going into the issues which were unnecessary on the mere contention that the ultimate decision would be open to appeal. (*Courtney Terrell, C.J.*) JANKI DAS *v.* KALU RAM. **162 I.C 486=8 R.P. 538=17 Pat.L.T. 253=1936 P. W.N. 209=A.I.R. 1936 Pat. 250.**

——**S. 115**—Discretion—Order rejecting application to be added as intervener of person depositing landlords fee under S. 26 (*o*), Bihar Tenancy Act. *See* BIHAR TENANCY ACT, S. 26 (*o*). **A.I.R. 1937 Pat. 38.**

——**S. 115**—*Discretion—Order rejecting application under O.* 1, *R.* 10 (2).

An order under O. 1, R. 10 can be revised under S. 115, C. P. Code, when the Court fails to exercise a discretion vested in it and when its failure is due to error. (*Stodart, J.*) RANGANAYAKI AMMAL *v.* JANAKI AMMAL. **1937 M.W.N. 375=171 I.C. 798=10 R.M. 399=A.I.R. 1937 Mad. 338.**

——**S. 115**—*Discretion — Order that advocate could not appear on behalf of party by reason of his interest in opposite party—Interference in revision.*

Where a Judge orders that an advocate could not with propriety appear on behalf of a party by reason of the fact of his having been interested on behalf of the other side in matters which were collateral to the suit in question and there was upon the record proof of ample material before him upon which he could make such an order and there was no suggestion that whether he was right or wrong he did not do so *bona fide*, then it is not a case for the High Court to intervene.

Per *Mosely, J.*—The order is admittedly a 'judgment' as defined in S. 2 (9) of the Code, and therefore the powers of the Court are restricted as laid down in S. 85, Government of Burma Act and the question cannot be agitated in addition as one of general superintendence over the Courts as provided in S. 85 (1) of that Act. (*Roberts, C.J., Mya Bu and Mosely, JJ.*) TAJENDRA CHANDRA DHAR *v.* TAJENDRA LAL GHOSH **1939 Rang. L.R. 514=182 I.C. 77=11 R.R. 512=A.I.R. 1939 Rang. 183 (S.B.).**

——**S. 115** — Discretion—Wrong exercise of discretion under S. 5, Limitation Act—Interference. *See* LIMITATION ACT, S. 5. **19 Pat.L.T. 309.**

Erroneous decision.

——**S. 115**—*Erroneous decision—Interference.*

If the facts and the law applicable to the case have been duly considered by the lower Court, then, although its decision may be erroneous, the error cannot be corrected on revision. If, on the other hand, the lower Court has failed to consider the law or the facts, it has acted illegally and its decision may be revised. (*Ba U, J.*) KO SAN PAW *v.* KO PO YI. **187 I.C. 350=12 R.R. 315=A.I R 1940 Rang. 75.**

——**S. 115**—*Erroneous decision—Order as to* locus standi *of person to apply under O.* 21, *R.* 89.

The Court has jurisdiction to decide whether a certain person is entitled to apply to have the sale set aside under O. 21, R. 89, C. P. Code. The Court may be wrong in its decision, but it cannot be said that in the exercise of its jurisdiction, it acted illegally or with material irregularity so as to call for any interference in revision. (*Nanavutty, J.*) SHANKAR PERSHAD *v* MOHAMMAD TAQI. **8 R.O 330=161 I.C. 424=1936 O.W.N. 344=1936 O.L R 179=A.I.R 1937 Oudh 108.**

——**S. 115**—*Erroneous decision—Point of law—Lower Court assuming jurisdiction and deciding wrongly—Revision.*

If a Judge assumes jurisdiction of the matter and proceeds to decide a question of law, however erroneous this decision may be, the High

C. P. CODE (1908), S. 115.

Court cannot interfere in revision. But if before assuming jurisdiction he determines a question of law or fact to determine the question of jurisdiction, a wrong decision in a case of this kind is certainly revisable by the High Court. (*Wort, J.*) NASIRUDDIN HAIDER *v.* HAKIM MUHAMMAD TAHIR. 161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.

——S. 115—*Erroneous decision—Revision.*

Jurisdiction necessarily gives the power to decide wrongly as well as to decide rightly. Hence the fact that the High Court, if it had been the trial Court, might have come to a different conclusion, is not sufficient to justify interference under S. 115. (*Davis, J.C. and Lobo, A.J.C.*) INDO PERSIAN TRADING CO. *v.* PARMANAND HARNAMSINGH. 166 I.C. 541=9 R.S. 146=A.I.R. 1936 Sind 205.

Error of Law.

——S. 115—*Error of law.*

Where the custody Court decided that certain person is not entitled to any priority, no revision is competent even if the decision is erroneous in law as the custody Court has jurisdiction to decide such question. Further the petitioner has remedy to file a regular suit. (*Addison and Abdul Rashid, JJ.*) SIMLA BANKING AND INDUSTRIAL CO., LTD. *v.* DITTA MAL HARDIAL. 163 I.C. 584=9 R.L. 23=38 P.L.R. 800=A.I.R. 1936 Lah. 521.

——S. 115—*Error of law.*

A revision petition is incompetent if the question involved is one of law and not of jurisdiction. (*Addison and Abdul Rashid, JJ.*) MAHABIR SINGH *v.* JAGAT SINGH. 40 P.L.R. 461.

——S. 115—*Error of law.*

Even where lower appellate Court has committed an error of law in drawing certain presumptions and in arriving at certain conclusions it would not afford any ground for revision. (*Addison and Din Mohammad, JJ.*) HUKAM CHAND *v.* RAMJI DAS 180 I.C. 555=11 R.L. 699 =A.I.R. 1938 Lah. 357.

——S. 115—*Error of law.*

Mere commission of error of law by the lower Court would not by itself be sufficient to justify interference in revision. (*Bhide, J.*) MT. MALAN *v.* DAYAL SINGH. 41 P.L.R. 578=A.I.R. 1939 Lah. 162.

——S. 115—*Error of law.*

No revision lies where the Courts have decided certain questions of law and of fact even though they might have decided them wrongly because they had jurisdiction to decide them and have not committed any illegality or material irregularity in the exercise of their jurisdiction. (*Spargo, J.*) MAUNG KO *v.* MAUNG LU DOKE. 167 I.C. 479 (2)=9 R.R. 321=A.I.R. 1937 Rang. 61.

——S. 115—*Error of law—If ground for revision.*

An error of law is not a ground for interference by the High Court under S. 115, C. P. Code. (*R. C. Mitter, J.*) BANKIM CHANDRA DEB SARKAR *v.* MADAN MOHAN DEB. 40 C.W.N. 698.

——S. 115—*Error of law—Ignoring or misreading of provision of law—Revision—Interference.*

If the Judge of a lower Court has, in coming to his conclusion, entirely ignored a provision of Statute law or if he has given to a provision of Statute law an obviously impossible interpretation that would justify interference in revision by the High Court. But if he has considered the law and his interpretation of it is a possible one, even though contrary to the interpretation put upon it in decided cases, there is no justification for interference in revision. (*Norman.*) KINTOO LAL *v.* DAULAT RAM. 1936 A.M.L.J. 4.

——S. 115—*Error of law—Misinterpretation of limitation law—If ground of revision.*

A mere error of law does not bring a case within the provisions of S. 115, C.P. Code, and misinterpretation of the law of limitation is not a ground for maintaining an application in revision under S. 115. (*Leach, C.J. and Somayya, J.*) RAMASWAMI CHETTIAR *v.* MEYYAPPAN SERVAI. 50 L.W. 159=1939 M.W.N. 700=188 I C. 187= 12 R.M. 810=A.I.R. 1939 Mad. 740=(1939) 2 M.L.J. 353.

——S. 115—*Error of law—Order on question of* res judicata.

The question whether the decision of a lower appellate Court that a suit was barred by *res judicata*, was correct, cannot be raised in revision. (*Tek Chand, J.*) MT. HASAN JAN *v.* QAMAR-UD-DIN. 11 R.L. 664=180 I.C. 126 (1) =41 P.L.R. 176=A.I.R. 1939 Lah. 48.

——S. 115—*Error of law—Order under S. 151 made without jurisdiction—Interference.*

The High Court will not generally interfere with a decision on a question of law, as the lower Court has jurisdiction to decide a question of law either rightly or wrongly. But the decision on a question of law can be interfered with if in fact a question of jurisdiction does arise. Where a lower Court makes an order under S. 151, C.P. Code, which it has no jurisdiction to make, the order will be set aside in revision. (*Wort and Varma, JJ.*) PHULCHAND RAM MARWARI *v.* NAURANGI LAL MARWARI. 16 Pat. 729=10 R.P. 320=172 I C. 225=1937 P.W.N. 836=18 Pat.L. T. 826=A.I.R. 1937 Pat. 647.

——S. 115—*Error of law—Revision.*

In a case under S. 115 even an error of law is not a sufficient ground for interference by the High Court. 11 Cal. 6, Rel. on. (*M. C. Ghose, J.*) MAJAHARALI *v.* MAFIJADDI SARDAR. 166 I.C. 127 =9 R.C. 474=A.I.R. 1936 Cal. 706.

——S. 115—*Error of law—Revision.*

Where the lower appellate Court decreed permanent reduction in assessment though according to the provisions of Municipal Act there could not be any permanent reduction in the assessment, once the assessment has been made.

Held, that at best it was a point of law and High Court would not be justified in interfering in revision. (*Varma, J.*) CHAIRMAN OF THE COMMISSIONERS OF CHAKRADHARPUR MUNICIPALITY *v.* MURLIDHAR MARWARY. 166 I.C. 743=9 R.P. 345 =3 B R. 221 (2)=A.I.R. 1937 Pat. 25.

——S. 115—*Error of law—Revision, if competent.*

The fact that the lower Court erred in law in coming to its findings, does not render a revision petition competent under S. 115, C. P. Code. (*Addison, J.*) EMPEROR *v.* GHANI. I.L.R. (1938) Lah. 125.

——S. 115—*Error in law—Scheme — Wrong construction of its terms—Revision.*

If a Court on an interpretation of a scheme framed under S. 92, C. P. Code, holds that it authorized the appointment of a trustee in place

C. P. CODE (1908), S. 115.

of a deceased trustee, no question of jurisdiction arises in the case. Even if it be assumed that it has not put a correct construction on its terms, it cannot be regarded as anything more than a mistake of law, but that cannot be a ground for interference with the order under S. 115, C. P. Code. (*Srivastava, Ag. C. J. and Smith, J.*) SAADAT HUSAIN *v.* MOHAMMAD HAIDAR **13 Luck. 81=166 I.C. 215=9 R.O. 291=1937 O.W.N. 39 =1936 O.L.R. 725=A.I.R. 1937 Oudh 193.**

——S. 115—*Error of law—When ground for revision.*

Where a Judge has refused to consider the objection to sale in the erroneous belief that it was not entertainable in view of Proviso 2 to O. 21, R. 90, C P. Code, the error of law in such case affects the jurisdiction of the Court and in the circumstances the petition for revision is competent. (*Bhide, J.*) SARWAN SINGH *v* MAN SINGH. **41 P.L.R. 553=A.I.R. 1939 Lah. 222.**

Failure to exercise jurisdiction vested by law.

——S. 115 and O. 21, R. 88—*Failure to exercise jurisdiction vested by law—Misconception as to law—Revision, if lies.*

Where a Court has proceeded on a wrong view of the law as regards the scope and object of O. 21, R. 88, C. P. Code, it must be deemed to have failed to exercise jurisdiction vested in it by law and must be interfered with in revision. (*Puranik, J.*) MUNNALAL *v.* GOPILAL. **1940 N.L. J. 453.**

Finding of fact.

——S. 115—*Finding of fact—Finding as to care taken by bailee—Contract Act, S.* 151.

A finding of the lower Court about the bailee having taken necessary care of the goods such as is required by S. 151 of the Contract Act is a finding of fact which is not open to question in revision. (*Srivastava, J.*) SITLA BAKHSH SINGH *v.* BAIJ NATH. **12 Luck. 128=161 I.C. 417=8 R. O. 327=1936 O.W.N. 334=1936 O.L.R. 176= A.I.R. 1936 Oudh 264.**

——S. 115—*Finding of fact—Genuineness of document.*

A finding of the appellate Court that a certain document is not genuine is a finding of fact, and a Court sitting in revision cannot go behind it. (*Agha Haidar, J.*) BUR SINGH *v.* ANJUMAN DEHI SOHAL. **161 I.C. 21=8 R.L. 662=A.I.R. 1936 Lah. 725.**

——S. 115—*Finding of fact—Interference—Findings arrived at in claim proceeding.*

The High Court will not interfere under its revisional powers with an order disallowing a claim preferred under O. 21, R. 58, C. P. Code, where the Court below has gone over the whole question and has arrived at certain findings of fact which so far as the proceeding is concerned are conclusive. (*Mohammad Noor, J.*) KAMALA BALA DEBI *v.* HARI GOPAL MAZUMDAR. **167 I.C. 672=9 R.P. 411=3 B.R. 302.**

——S. 115—*Finding of fact—Powers of interference—Concurrent finding of fact.*

The power of interference in revision is much more limited than that in case of second appeals. Hence a concurrent finding of fact of the lower Court based on evidence cannot be interfered with. (*Mahomed Noor, J.*) CHUNI LAL *v.* RAM RANVIJOY PRASAD SINGH. **167 I.C. 225=9 R.P. 393=3 B.R. 280=A.I.R. 1936 Pat. 558.**

C. P. CODE (1908), S. 115.

——S. 115—Finding of fact—Sufficient cause under O. 9, R. 13—Finding as to—Interference. *See* C. P. CODE, O. 9, R. 13. **1937 A.W.R. 726= A.I.R. 1937 All. 691.**

High Court.

——S. 115—*High Court—Interference—Order based on decided cases.*

Where the order of the lower Court is passed following certain reported ruling of the High Court, such an order should not be interfered with by the High Court in revision. (*Bennet and Verma, JJ.*) KALIAN DATT *v.* SITA RAM. **1940 A.W.R. (H.C.) 62.**

——S. 115—*High Court—Powers of—Application by party—If necessary.*

The powers of the High Court under S 115 are wide and action can be taken under S. 115 even without application by the party aggrieved. (*Agarwala and Madan, JJ.*) MT. BIBI MARIM *v.* SURAJMAL. **15 Pat. 738=165 I.C. 927=9 R.P. 228=1936 P.W.N. 694=18 Pat.L.T. 39=A.I.R. 1936 Pat. 591.**

——S. 115—*High Court—Powers of—Interference* suo motu.

Though the High Court does not ordinarily interfere in revision except at the request of one of the parties to a suit, the powers conferred upon it by S. 115, C. P. Code, are very wide and in fit cases it is open to the High Court to interfere even *suo motu* in order to remedy injustice. (*Rupchand Bilaram and J. C. Mehta, A.J.Cs.*) KHAN CHAND GOPALDAS *v.* MULCHAND KHIALDAS. **160 I.C. 361 (2)=8 R.S. 121=A.I.R. 1936 Sind 1.**

——S. 115—*High Court—Powers of—Remand under for further evidence and findings—Power to review evidence after return of findings.*

When High Court as a Court of revision, under its inherent powers remands a case for further evidence on an issue and findings, retaining seizin of the case, it has no power to scrutinize or review the evidence. The powers of that Court are limited by S. 115 and all it can do is to determine whether the lower Court exercised its jurisdiction with material irregularity in arriving at the finding it did on the issue remanded to it for trial. (*Vivian Bose, J.*) BALAJI SADASHIV *v.* VISHNU. **I.L.R. (1936) Nag. 188=170 I.C. 527 =10 R.N. 63=A.I R. 1936 Nag. 140.**

Illegality.

——S. 115 — *Illegality — Appeal — Dismissal under O.* 41, *R.* 11 (2) *summarily—Absence of judgment expressing acceptance of finding of trial Court—Revision—Interference.*

The law does not require that an appellate Court when dismissing an appeal summarily under O. 41, R. 11 (1), C. P. Code, should write a judgment, though it would be better if it says explicitly that the lower Court's decision appears to be correct for the reasons given therein. But S. 115, C. P. Code, will not justify interference by the High Court in revision simply on the ground that the appeal has been dismissed without expressing in definite words the appellate Court's acceptance of the findings of the first Court. (*Rowland, J.*) JAMUNA PRASAD RAI *v.* RAJBALLAM RAI. **18 Pat.L.T. 321=1937 P.W. N 340=169 I.C. 359=3 B.R. 558=10 R.P. 9= A.I.R. 1937 Pat. 349.**

——S. 115—*Illegality—Failure to apply obvious law.*

C. P. CODE (1908), S. 115.

Where the Judge omits to apply an obvious principle of law he acts illegally in the exercise of his jurisdiction and therefore revision lies. (*Jai Lal, J.*) IMAM DIN *v.* BHAG SINGH. 166 I. C. 302=9 R.L. 358 (2)=A.I.R. 1936 Lah. 746.

——S. 115—*Illegality—Lower Court refusing to follow ruling by which it is bound—Revision.*

When the lower Court commits an illegality in the exercise of its jurisdiction in refusing to follow a ruling of the Chief Court by which it is bound, it is incumbent on the High Court to interfere in revision. (*Mosely, J.*) C. T. A. C. T. FIRM *v* MAUNG AYE. 171 I.C. 527=10 R.R. 161 =A.I.R. 1937 Rang. 197.

——S. 115—Illegality—Order refusing to receive plaint insufficiently stamped on last day of limitation—Revision—Stamps of required denomination not available—Duty of Court. *See* COURT-FEES ACT, S. 27. 71 M.L.J. 804.

Illegality or material irregularity.

——S. 115—*Illegality or material irregularity—Court allowing application on wrong view of law—Revision—Interference.*

Where the Court passes an erroneous order on a wrong view of the law, allowing an application, when it ought to reject it for non-compliance with the requirements of the statute, the error amounts to such an illegality or material irregularity in the exercise of jurisdiction as to call for the interference of the High Court under S. 115, C. P. Code. That is a fit case for the exercise of the revisional jurisdiction of the High Court. (*Rowland, J.*) HANUMAN SINGH *v.* BAIJNATH PRASAD SINGH. 172 I.C 8=10 R.P. 298=4 B.R. 129=18 Pat.L.T. 409=1937 P.W.N. 497=A.I.R. 1937 Pat. 537.

——S. 115—*Illegality or with material irregularity—Erroneous decision—Interference.*

The Court certainly has jurisdiction to decide whether it has or has not jurisdiction to pass an order and even if it decides this question wrongly, there is no ground for revision. In an execution case an application to set aside the sale under O. 21, R. 89, C. P. Code, was dismissed as time barred. On appeal the Court found that the land sold being State land was not saleable under S. 60, C. P. Code, and therefore the sale must be set aside irrespective of the time when the deposit was made.

Held, no revision lay. The Court had jurisdiction to decide whether State land was saleable property and it did not extend limitation but merely pointed out that the period of limitation did not apply to such a case. The Court may have decided these questions wrongly. But that did not amount to exercising jurisdiction illegally or with material irregularity. (*Spargo, J.*) MA BI BI *v.* SAYA HATTIE. 174 I.C. 691=10 R.R. 418=A.I.R. 1937 Rang. 537.

——S. 115—*Illegality or material irregularity—Framing of issues—Jurisdiction—Wrong decision as to placing of burden of proof—Interference by High Court.*

It is by law the duty of the trial Court to frame issues in a suit. It is not any part of the legitimate duties of the High Court to help lower Courts to frame issues. They alone have jurisdiction to frame the issues in the suits which come before them for trial, and they have jurisdiction to decide wrongly as well as rightly. The fact that a wrong decision is made is never a ground for interference in revision under S. 115. (*Burn, J.*) MANICKAVACHAKAM CHETTIAR *v.* OFFICIAL RECEIVER, EAST TANJORE. 186 I.C. 120 =12 R.M. 590=1939 M.W.N. 608=50 L.W. 459 =A.I.R. 1939 Mad. 733=(1939) 2 M.L.J. 44.

——S. 115—*Illegally and with material irregularity—Allowing plea cutting at root of plaint but not raised in pleadings and deciding same without amendment of pleading or raising relevant issues—Revision—Interference*

A Court acts improperly when, without directing an amendment of the pleadings or revising the relevant issues, it allows a question to be argued before it which cuts at the very root of the plaintiff's suit, but which is not raised in the pleadings at all and decides it; in doing so it ignores some of the most material provisions of the C. P. Code. The High Court in such a case will interfere under S. 115, C. P. Code. (*Davis, J.C. and Weston, J.*) MIR. HAJI GHULAM SHAH *v.* KHANCHAND. I.L.R. (1939) Kar. 330=182 I. C. 154=11 R.S. 250=A.I.R 1939 Sind 137.

——S. 115—*Illegally or with material irregularity—Court having jurisdiction to decide but deciding wrongly—If ground for revision by High Court.*

If a Court has jurisdiction to decide a matter, it does not at all follow that if it has decided an issue wrongly it has acted illegally or with material irregularity in the exercise of its jurisdiction so as to call for interference under S. 115, C. P. Code. (*Harries, C J. and Rowland, J.*) NANDAMANI *v.* HARIKRISHNA. 181 I.C. 644=11 R P 624=5 B.R. 645=1939 P.W.N. 341=A.I.R. 1939 Pat. 564.

——S. 115—*Illegally and with material irregularity—Order based on no evidence—Lower Court having no clear conception of law and not applying law to facts—Revision.*

The High Court as a Court of revision is not expected to weigh the evidence which is led before the lower Court. But when it is found that there is no evidence at all from which the inference as drawn by the lower Court could be deduced, the High Court has no alternative but to interfere. Further where the lower Court has acted without any clear conception of the law on the subject or has failed to apply the law to the facts of the case, it acts illegally, and in any case with material irregularity, justifying interference by the High Court in revision. (*Abdur Rahman, J.*) ADIRAJU SOMANNA, *In re*. I.L.R. (1938) Mad. 988=47 L.W. 578=1938 M.W.N. 426=177 I.C. 456=11 R M. 334=A.I.R. 1938 Mad. 634= (1938) 2 M.L.J 100.

——S. 115—*Illegally or with material irregularity—Order dismissing application as barred by limitation—Disregard of S. 4, Limitation Act and refusal to apply it—Revision—Interference.*

Where a Court dismisses a suit or an application on the ground of limitation it does not refuse to exercise jurisdiction. On the contrary it takes cognizance of the suit and exercises jurisdiction by holding that on a point of law the suit fails. To ignore the plain terms of S. 4 of the Limitation Act is to deprive a litigant of the statutory privilege given to him by that section; and a refusal to apply the section in a case in which it does apply amounts to exercising jurisdiction illegally and with material irregularity, justify-

C. P. CODE (1908), S. 115.

ing interference in revision under S. 115, C. P. Code. (*Beaumont, C J*) VEERAPPA *v.* IRATAPPA. 175 I.C 221=10 R B 529=40 Bom.L.R. 152= A.I.R. 1938 Bom. 209.

——S. 115—*"Illegally or with material irregularity"—Order holding person pauper under O 33, R. 1—Revision—Wrong view as to "necessary wearing apparel"—If justifies interference.*

The High Court has no authority to interfere in revision with an order of a Court declaring a party to be a pauper for purposes of O. 33, R. 1, C. P Code. The fact that the lower Court wrongly holds that the ornaments worn by a female applicant are her necessary wearing apparel cannot be a ground for holding that it has acted illegally or with material irregularity in adopting that view. (*James, J.*) WASI AHMAD *v.* MT. JAMILA KHATOON. 180 I.C. 363=11 R.P 503 (1)=5 B.R 383=19 Pat.L.T. 844=1938 P.W.N. 804= A.I.R. 1939 Pat. 95.

——S. 115—*Illegally or with material irregularity—Refusal to decide some issue as preliminary issues in suit—Revision—Interference.*

A Court does not act illegally or with material irregularity in refusing to dispose of certain issues in a case as preliminary issues without going into the merits of the whole case, when the issues in question are not clear cut issues of law but are mixed up with questions of fact. (*Harries, C.J. and Rowland, J.*) NANDAMANI *v.* HARIKRISHNA. 181 I.C. 644=11 R.P. 624= 5 B.R. 645=1939 P.W N. 341=A.I.R. 1939 Pat. 564.

Interference.

——S. 115—Interference—Grounds—Failure to consider relevant point—If justifies interference. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 9 (5). A.I.R. 1938 Mad. 321.

Interlocutory order.

——S. 115 — Interlocutory order — Decree against legal representative—Execution—Order rejecting application by posthumous son to be impleaded as legal representative—Revision. *See* C. P. CODE, S. 47. A I.R. 1936 Sind 166.

——S 115—Interlocutory order—Interference. *See* C. P. CODE. S 115—COMMISSION—REFUSAL TO ISSUE. 1938 A.M.L J. 123.

——S. 115—*Interlocutory order—Interference—Principles.*

Though an order is interlocutory, if it goes to the root of all subsequent proceedings, the High Court would not decline to consider whether the Court passing the order in question had jurisdiction to pass it. (*Weston.*) KISHAN LAL *v.* MAN MAL. 1938 A.M.L.J. 97

——S. 115—*Interlocutory orders—Order allowing application for leave to sue* in forma pauperis *—Revision application by defendant—Interference—Discretion of High Court.*

According to the practice of the High Court of Patna a revision petition does lie under S. 115, C. P Code, against an order granting leave to sue *in forma pauperis*. The fact that the order is an interlocutory order or that the government have not moved in the matter is no bar to the High Court exercising its discretion in revision. (*Dhavle and Varma, JJ.*) BIHARI SAHU *v.* SUDAMA KUER. 175 I.C 505=1938 P.W.N. 163= 4 B.R. 598=10 R.P. 632=19 Pat.L.T. 101=A.I. R. 1938 Pat. 209.

C. P. CODE (1908), S. 115.

——S 115—Interlocutory order—Order on application under S. 19, Arbitration Act—Revision. *See* ARBITRATION ACT, S. 19. A.I.R. 1936 Sind 205.

——S. 115—*Interlocutory order—Order permitting plaintiff to continue suit without additional court-fee—Interference.*

The general practice in all the High Courts is not to interfere with interlocutory orders unless in exceptional circumstances when such order may result in irreparable injury to one or other of the litigant parties. An order permitting a suit to proceed does not injure any party. When a suit is allowed to proceed on an insufficient court-fee it is not either of the litigant parties who suffers but the revenue. It is not the object of a fiscal statute to enable litigants to be defeated on technicalities. (*Agarwala and Varma, JJ.*) RAGHUNANDAN GIR *v.* DEORAJ GIR. 15 Pat. 340=161 I. C. 22=8 R P. 431=17 Pat.L.T. 9=1936 P.W.N. 9=A.I.R 1936 Pat. 85

——S. 115—*Interlocutory order—Order refusing stay proceedings under S.* 10*—Revision.*

No revision lies from an order refusing to stay proceedings under S. 10, C. P. Code, as the order is an interlocutory one. A.I.R. 1924 Lah. 425 (F. B.), Rel. on. (*Jai Lal, J.*) DURGA DAS *v.* GOBIND SINGH 165 I.C. 131=9 R.L. 215 (1)=A.I.R. 1936 Lah. 569.

——S. 115—*Interlocutory order—Order refusing to stay suit.*

No petition for revision is competent against an order under S. 10, C. P. Code, refusing to stay a suit, as the order is of an interlocutory nature. (*Bhide, J.*) PUNJAB NATIONAL BANK, LTD. *v.* BIRI MAL JAIN. 41 P.L.R. 883.

——S. 115—*Interlocutory order—Order staying suit.*

An order staying further proceedings in a suit is an interlocutory order, and no revision petition can be preferred against such an order. (*Abdul Rashid, J.*) BIR BAL DAS *v.* CANTONMENT BOARD, LAHORE. 41 P.L.R. 55.

——S. 115—*Interlocutory order—Pendency of revision—Duty of trial Court.*

Where a trial Court is informed that a revision petition has been filed against an interlocutory order refusing an amendment asked for, it is the duty of that Court to postpone the dismissal of the suit until the decision of the revision petition. (*Davies.*) CHUCKERBUTTY *v.* SUKHLAL NAIKSE LAL. 1940 A M L.J. 45.

——S. 115—*Interlocutory order—Question of jurisdiction involved—Interference.*

Though an order is interlocutory, the Court will not decline to hear or interfere, if a question of jurisdiction is involved. (*Weston.*) HARI SINGH *v.* KUNDAN MAL. 1938 A.M.L.J. 74.

——S. 115—*Interlocutory order—Rejection of evidence by trial Court—Revision.*

The High Court will not entertain an application on the ground that evidence is being, or will be, rejected by the trial Court. No doubt an interlocutory order may decide a case and may be subject to revision if it does irreparable damage to a party, but that cannot be said in the case of rejection of evidence. It is open to the party to question the decision in appeal which is the proper time at which the error, if any, should be remedied. (*Mya Bu and Mosely, JJ.*) RAM OUDH *v.* GOVERNMENT OF BURMA. 1939 Rang.L.R. 591=

C. P. CODE (1908), S. 115.

185 I.C. 574=12 R.R. 207=A.I.R. 1939 Rang. 448.

——S. 115—*Interlocutory order—Revision.*

In order to justify interference with an interlocutory order, it must be shown that the order, besides otherwise falling within the scope of S. 115, C. P. Code, also causes irreparable injury. It is not the law that any and every order which would, if incorrect, cause irreparable injury, is open to revision by the High Court. (*Norman.*) KINTOO LAL *v.* DAULAT RAM. 1936 A.M.L.J. 4.

——S. 115—*Interlocutory order—Revision.*

The expression "case which has been decided" in S. 115 is wide enough to include an interlocutory order, and even though there may be an appeal from the final decree, that consideration will not prevent in a proper case interference in revision. The Court will not however interfere unless it seems that there has been a grave and culpable error likely to inflict grave injustice and cause irreparable injury. A.I.R. 1931 Rang. 136, Rel. on. (*Mackney, J.*) MAUNG PO NYEIN *v.* MAUNG THA SAING. 181 I.C. 527=11 R R. 471 =A.I.R. 1939 Rang. 92.

——S. 115—*Interlocutory orders—Revision—Preliminary order as to jurisdiction—Interference in revision—Jurisdiction of High Court.*

The High Court, while it should be very slow to interfere in its revisional jurisdiction with orders which are merely interlocutory, has certainly jurisdiction to do so, and the jurisdiction can be exercised in a proper case. A revision application is therefore competent in respect of a preliminary order passed by a Subordinate Court, where that preliminary order goes to the jurisdiction of the Court. (*Beaumont, C.J.*) JAMNADAS *v.* CHANDULAL. I.L.R. (1937) Bom. 623=168 I.C. 449=9 R.B. 369=39 Bom. L.R. 138=A.I.R. 1937 Bom. 167.

Jurisdiction.

——S. 115—Jurisdiction—Absence of—Appeal entertained against non-appealable order—Revision. *See* C. P. CODE, O. 21, R. 103. 17 Pat.L.T. 815.

——S. 115—Jurisdiction—Absence of—Appeal from decree dismissing pauper suit—Appellant paying court-fee on appeal—Order by appellate Court for payment of court-fee due on plaint and other costs of Government in trial Court—Default—Order dismissing appeal—Revision—Interference. *See* C. P. CODE, O. 33, RR. 12 AND 13. 1937 A.W.R 113=A I.R 1937 All. 280.

——S. 115—*Jurisdiction—Absence—Appeal incompetent but entertained—Order of appellate Court—Interference—Order of original Court itself without jurisdiction—Effect of—If can be restored.*

The High Court under S. 115, C.P. Code, ought not obviously to interfere in revision so as to restore an order which itself is without jurisdiction or founded on irregularity in the exercise of jurisdiction, although the order under revision is one without jurisdiction. (*Rowland, J.*) RAMESHWAR LAL JHUNJHUNWALA *v.* RAMCHARAN PRASAD SAHU. 178 I.C. 41=11 R.P. 204=1938 P.W.N. 313=5 B.R. 49=19 Pat.L.T. 111=A.I.R. 1938 Pat. 447.

——S. 115—Jurisdiction—Absence of—Appeal wrongly entertained against non-appealable order—Revision. *See* C. P. CODE, S. 47. 17 Pat L.T. 810.

C. P. CODE (1908), S. 115.

——S. 115—Jurisdiction—Absence of—Application for leave, to sue *in forma pauperis*—Court embarking one elaborate enquiry into complicated questions of *res judicata*, etc.—Revision—Interference. *See* C. P. CODE, O. 33, R. 7. 1937 M.W.N. 415.

——S. 115—Jurisdiction—Absence of—Award of arbitrator under Co-operative Societies Act—Execution by Civil Court—Proceedings set aside—Order remitting award for rectification—Revision. *See* C. P. CODE, S. 47. 40 C.W.N. 89.

——S. 115—*Jurisdiction—Absence of—Collector's order in appeal under S. 23 (2), Mamlatdars' Courts Act setting aside order of Mamlatdar on findings of fact—Revision—Interference.*

The High Court under S. 115, C. P. Code, has jurisdiction to interfere with an order passed by the Collector under S. 23 (2) of the Mamlatdars' Courts Act, setting aside in appeal the order of the Mamlatdar disagreeing with the latter's findings of fact. The Collector in setting aside the order of the Mamlatdar exercises a jurisdiction not vested in him and the case therefore falls within the terms of S. 115, C. P. Code. (*Beaumont, C.J.*) BAVAJI *v.* BALA FAKIRA MAHAR. I. L.R. (1938) Bom. 259=173 I.C. 808=10 R.B. 381 =40 Bom.L.R. 104=A.I.R. 1938 Bom. 159.

——S. 115—Jurisdiction—Absence of—Execution—Delivery of property effected—Subsequent obstruction—Fresh order for delivery—Jurisdiction—Revision. *See* EXECUTION—JURISDICTION. A.I.R. 1937 Rang. 449.

——S. 115—*Jurisdiction—Absence of—Grant of review in the absence of sufficient reason under O. 47, R. 1—Revision—Competency.*

Where a Court grants a review when there is no sufficient reason for granting a review under O. 47, R. 1, C. P. Code, it is certainly a case in which a question of jurisdiction is incidentally involved, which would entitle the High Court to interfere in revision under S. 115, C. P. Code, if the question of jurisdiction involved is not covered by O. 47, R. 7. (*Kunhi Raman, J.*) VENKAYYA *v.* SURYANARAYANA. 50 L.W. 903=A.I.R. 1940 Mad. 203.

——S. 115—*Jurisdiction—Absence of—Lower Court entertaining appeal which is incompetent—Revision.*

Where a Court entertains and decides an appeal which in law does not lie and is incompetent, the High Court will interfere in revision and set aside the decree and judgment passed by such Court. (*R. C Mitter, J.*) SIDHESWAR GHOSAL *v.* TARAK DAS MUKHERJEE. 62 C.L.J. 530.

——S. 115—*Jurisdiction — Absence—Interference—Duty of High Court even if no miscarriage of justice results—Deposit beyond time—Acceptance by Court—Effect.*

Where a Court acts without jurisdiction, *e.g.*, when it receives a deposit made by a party beyond the time fixed in a case where time is of the essence of the contract or compromise in pursuance of which it is made, the High Court must interfere in revision, though no real miscarriage of justice has occurred, because the acceptance of the deposit is clearly an act without jurisdiction. (*Harries, C. J.*) BISWAMBHER SAHU *v.* HARI NAIK. 5 C.L.T. 29.

C. P. CODE (1908), S. 115.

——S. 115—*Jurisdiction—Absence of—Judge setting aside order passed by his predecessor by way of review—Revision—Interference.*

Ordinarily, the Court of the Judicial Commissioner will not interfere in revision when a remedy will lie by way of appeal, but where one Judge sits in appeal on a judgment or decree of his predecessor and usurps a jurisdiction which he does not possess, it is the duty of the Judicial Commissioner's Court not to permit the case to proceed upon the jurisdiction so snatched, which has no basis or justification in law, and, it should set aside the order in revision as being one without jurisdiction. The Court has also power to set aside, in the revision proceedings, the original order when it is one deciding a case within the meaning of S. 115, and where the papers relating to the case are before the Court and it is necessary in the interests of justice to do so. (*Davis, J.C. and Weston, J.*) MIR HAJI GHULAM SHAH *v.* KHANCHAND. I.L.R. (1939) Kar. 330=182 I.C. 154=12 R.S. 250=A.I.R. 1939 Sind 137.

——S. 115—Jurisdiction—Absence of—Order allowing withdrawal of suit under O. 23, R. 1 on ground of defect of substance—Revision—Power of High Court to interfere. *See* C. P. CODE, O. 23, R. 1 (2) (*a*) AND (*b*). 42 Bom L.R. 143 (F.B.).

——S. 115—Jurisdiction—Absence of—Order of reference to arbitration in pending suit—Order in anticipation that if award is not filed by fixed date, trial must go on that day—Award not filed—Suit decreed *ex parte*—Jurisdiction—Refusal to set aside *ex parte* decree—Revision—Interference. *See* C. P. CODE, SCH. II, PARA. 8. 71 M.L.J. 648.

——S. 115—*Jurisdiction—Absence of—Order without jurisdiction—Revision.*

Where a Court makes an order which it has no jurisdiction to make, the order is revisable by the Court in revision. (*Wort, J.*) MIR SYED HUSAIN *v.* RASOO SINGH. 5 B.R. 704=181 I.C. 896=11 R.P. 647=A.I.R. 1939 Pat. 518.

——S. 115—Jurisdiction—Absence—Reference under S. 18, Land Acquisition Act—Termination by decree in suit declaring acquisition invalid—Subsequent order of compensation under S. 48 of Land Acquisition Act—Jurisdiction to make—Revision—Interference. *See* LAND ACQUISITION ACT, S. 48. 1938 N.L.J. 54.

——S. 115—Jurisdiction—Absence of—Summary dismissal of appeal under O. 41, R. 11—Revision—Interference. *See* C. P. CODE, O. 41, R. 11. 18 Pat.L.T. 812.

——S. 115—Jurisdiction—Absence of—Surety under S. 55—Court ordering discharge of—Subsequent order directing execution—Revision. *See* C. P. CODE. S. 115. 18 Pat.L.T. 357.

——S 115—Jurisdiction—Application for leave to appeal *in forma pauperis*—Rejection—Order for payment of court-fee and rejection of appeal for default in payment—Propriety—Revision. *See* C. P. CODE, S. 149 AND O. 44, R. 1. A.I.R. 1936 Pesh 69.

——S. 115—*Jurisdiction—Assumption of, owing to erroneous interpretation of law—Revision—Order by appellate Court setting aside execution sale—Misinterpretation of law—If ground for revision.*

Where a Court by a misinterpretation of a provision of law assumes jurisdiction in respect of a matter over which it would have no jurisdiction on a correct interpretation of the law, the High Court will interfere in revision under S. 115, C. P. Code, and set aside the order which is without jurisdiction. An order setting aside an execution sale by an appellate Court on a misunderstanding of the law with regard to execution sales is therefore liable to be set aside in revision. (*Varma, J.*) DEONANDAN THAKUR *v.* MST. HANSO KUER. 167 I.C. 63=9 R.P. 375=3 B.R. 261=1936 P.W.N. 825=17 Pat.L.T. 852=A.I.R. 1937 Pat. 104.

——S. 115—*Jurisdiction—Court having jurisdiction to decide—Revision.*

Where the lower Court undoubtedly has jurisdiction to decide the question and there has been no illegality or material irregularity in its decision, the application for revision must fail. (*Pollock, J.*) RAMCHANDRA RAO *v.* MADHORAO. I.L.R. (1937) Nag. 428=167 I.C. 122=9 R.N. 166=A.I.R. 1936 Nag. 280.

——S. 115—*Jurisdiction—Courts holding that they have no jurisdiction to try suit—Revision—Competency.*

Where the Court of a Munsif returns a plaint for presentation to the Revenue Court holding that it has no jurisdiction to try the suit, and on appeal the District Judge also holds the same view and dismisses an appeal, the aggrieved party is entitled to come up to the High Court in revision. The question involved, namely whether the Munsif's Court had jurisdiction to entertain and try the suit filed in his Court, is directly one relating to the jurisdiction of his Court, and the High Court in such a case has power to interfere in revision under S. 115, C. P. Code. (*Niamatullah and Harries, JJ.*) DEOKINANDAN PANDEY *v.* RAM CHANDRA TEWARI. I.L.R. (1938) All. 40=173 I.C. 180=10 R.A. 470=1938 A.L.R. 107=1937 A.L.J. 905=1937 R.D. 511=1937 A.W.R. 919=A.I.R. 1938 All. 17.

——S. 115—*Jurisdiction—Error affecting jurisdiction—Court setting aside sale contrary to proviso to O. 21, R. 90—Interference in revision.*

Where the Court below sets aside a sale contrary to the proviso to O. 21, R. 90, C. P. Code, without determining whether the applicant has sustained substantial injury, there is an error affecting jurisdiction calling for interference by the High Court in revision. (*Rowland, J.*) GAYA PRASAD SINGH *v.* PARICHHAN SAHU. 167 I.C. 492=9 R.P. 404=3 B.R. 301=1937 P.W.N. 489=A.I.R. 1937 Pat. 357.

——S. 115—Jurisdiction — Execution sale — Agreement by parties for payment by particular date—Provision for setting aside sale on payment and on default for confirming sale—Order on application—Revision. *See* C. P. CODE, O. 21, R. 89. 17 Pat.L.T. 940 (F.B.).

——S. 115—*Jurisdiction—Exercise of jurisdiction not vested—Appellate Court reversing finding of fact arrived at in another suit.*

Where in a suit by an assignee of a creditor against the debtor a simple money decree is passed against debtor in spite of his plea of payment but he does not appeal against it, the appellate Court in a separate suit by the debtor cannot reconsider the finding as to payment and give a finding that payment was made and cannot pass a declaratory decree in favour of the debtor particularly when there is no credible evidence to support such finding. If such finding is given, the appellate Court assumes jurisdiction not

C. P. CODE (1908), S. 115.

vested in it by law and revision is competent. (*Middleton, J.C.*) AMOLAK RAM *v.* MAHOMED ALI. 164 I.C. 856=9 R. Pesh. 29=A.I.R. 1936 Pesh. 176.

——S. 115—*Jurisdiction—Existence—Decision as to—Revision.*

Where the lower Court itself has to determine whether it has jurisdiction or not to try the case, and it exercises its discretion wrongly and proceeds to try the case, the High Court has power to interfere in revision. (*Pollock, J.*) NATIONAL PETROLEUM CO., LTD., BOMBAY *v.* MEGHRAJ RAMKARANJI GOLCHA. 174 I C. 582=10 R.N. 406=20 N.L.J. 247=A I.R. 1937 Nag. 334.

——S. 115—Jurisdiction—Failure to exercise—Application to set aside sale under O. 21, R. 90, by attaching creditor—Rejection on the ground of non-compliance with O. 21, R. 54 (2)—Revision. *See* C. P. CODE, O. 21, R. 90. 63 C.L.J. 560.

——S. 115—*Jurisdiction—Failure to exercise—Court declining jurisdiction wrongly—Revision.*

Where the orders of the lower Court amounted to refusing to try the case and to exercise a jurisdiction that is vested in it, the High Court has power to interfere under Cl. (*b*) of S. 115, C. P. Code. (*Pollock, J.*) MT. KANIJ JOHRA *v.* RAJA HUSSAIN. I.L.R. (1937) Nag. 97=167 I.C. 700=9 R.N. 201=A.I.R. 1937 Nag. 39.

——S 115—*Jurisdiction—Failure to exercise—Material irregularity—Lower appellate Court not dealing with points raised—Revision.*

It is the duty of an appellate Court to properly dispose of an appeal and this necessarily involves dealing with the points raised by the appellant and looking into the record, so far as may be necessary, after making an effort to understand and appreciate the appellant's case. Where the appellate Court fails to do so, its failure in these respects means either that there was no more than a colourable exercise of jurisdiction by it or that it acted with material irregularity and in either event the High Court has power to interfere in revision. (*Dhavle, J.*) MAHESHWARI PRASHAD BHAGAT *v.* MAHADEV ROY. 182 I.C. 708=5 B.R. 814=12 R P. 57=A.I.R. 1939 Pat. 216.

——S. 115—Jurisdiction—Failure to exercise—Refusal to enquire claim under O. 21, R. 58. *See* C. P. CODE, O. 21, R. 58—ENQUIRY. 1938 A.M.L. J. 23.

——S. 115—Jurisdiction—Failure to exercise—Refusal to order rateable distribution—Interference. *See* C. P. CODE, SS. 73 AND 115. 177 I.C. 269.

——S 115—*Jurisdiction—Failure to exercise—Trial Court granting alternative relief—Appellate Court dismissing appeal without going into question of right of plaintiff to primary relief—Revision.*

Where the plaintiff asks for an alternative relief, "in case of failure" (*ba surat digar*) of the primary relief and the alternative relief is granted by the trial Court, primary relief being refused, and the appellate Court dismisses the appeal by the plaintiff without going into the question whether the plaintiff is entitled to the primary relief on the ground that it is not necessary as the alternative relief is granted, it amounts to failure on the part of the appellate Court to exercise jurisdiction vested in it and the plaintiff is entitled to come up in revision. 4 P.R. 1915 and A.I.R. 1924 Cal. 445, Dist. (*Middleton, J.C.*)

C. P. CODE (1908), S. 115.

AMARDAS *v.* TAUS. 162 I.C. 658=8 R. Pesh. 201=A.I.R. 1936 Pesh. 38.

——S. 115—*Jurisdiction—Failure to exercise—Wrong view of law—Interference.*

Where the lower Court by a misunderstanding of the legal position and by a wrong interpretation of law fails to exercise its proper jurisdiction, the High Court will interfere in revision. (*Varma, J.*) PARYAG *v* CHANDRACHUR. 179 I.C. 845=11 R P. 416=1939 P.W.N. 50=5 B.R. 304=A I.R. 1939 Pat. 263.

——S. 115—*Jurisdiction—Illegal exercise of—Lower Court giving to litigant benefit of contract to which he was not party.*

There must be some limit to the latitude to be given to the principle that a Judge has jurisdiction to come to a wrong decision as well as to a right one. It is not possible to stretch the principle to the extent of holding that it precludes the High Court from interfering in a case where a Judge has given a litigant the benefit of a contract to which he has found that litigant was not a party. That is an illegal exercise of jurisdiction or at any rate a material irregularity. (*Panckridge, J.*) JOGENDRANATH DAS *v.* PURSHOTTAM SHAH. 41 C.W.N. 601.

——S. 115—Jurisdiction—Irregular exercise of—Application for commission—Pardanashin lady living beyond jurisdiction—Order refusing application and insisting an examination at place of Court—Revision. *See* C. P. CODE, O. 26, RR. 1 AND 4. A.I.R. 1937 Pat. 21.

——S. 115—*Jurisdiction—Meaning of—Finding that party is not competent to sue—If a finding which affects Court's jurisdiction.*

S. 115 of the Code clearly refers in Cls. (*a*) and (*b*) to jurisdiction, which means the jurisdiction of the Court and not the competence of any party to sue. A finding that a party is not competent to sue is not therefore a finding affecting the Court's jurisdiction. (*Blacker, J.*) LORINDA RAM *v.* BHAWANI MAL. 165 I C. 278=9 R.L. 235=38 P.L.R. 315=A.I.R. 1936 Lah. 783.

——S. 115—*Jurisdiction—Non-exercise of—Refusal by Court to entertain defence which law allows defendant to raise—Interference in revision.*

If the defendant has a defence which the law allows him to raise, and the Court refuses to entertain it, its action goes to the root of jurisdiction, whatever the reasons given. It is a case of non-exercise of jurisdiction, and the High Court has power to interfere under S. 115, C. P. Code. (*Bose, J.*) RAM NARAYAN *v.* RAMJIWAN. I.L.R. (1937) Nag. 159=165 I.C. 926=9 R.N. 100=A.I.R. 1937 Nag. 267.

——S. 115—*Jurisdiction—Order allowing rateable distribution—Revision.*

The Court executing the decree has jurisdiction to decide the question of rateable distribution as between rival decree-holders; and the High Court will not therefore interfere in revision with an order allowing rateable distribution, as no question of jurisdiction is involved in the matter. (*Wort and Varma, JJ.*) DEBI BUX *v.* RAMESHWAR PRASAD NARAIN SINGH. 172 I.C. 195=1937 P.W.N. 823=10 R.P. 305=18 Pat.L. T. 817=A.I.R. 1937 Pat. 651.

——S. 115—*Jurisdiction—Order as to starting point of limitation.*

C. P. CODE (1908), S. 115.

Jurisdiction is entirely independent of the manner of its exercise. The former involves the power to act at all, and is independent of the decision reached in the exercise of that power. The latter is confined to the authority to act in the particular way in which the Court does act. Where, therefore, what the Court has done is only to decide the starting point of limitation, it has every power to do so and such an order is not revisable. *(Vivian Bose, J.)* DEVIDAS *v.* NILKANTHRAO. I.L.R. (1936) Nag. 73=164 I.C. 848=9 R.N. 36=A.I.R. 1936 Nag. 157.

——S. 115—*Jurisdiction—Order declaring person to be tout under S. 36, Legal Practitioners Act—Jurisdiction to revise—Cr. P. Code, S. 439—Government of India Act* (1935), *S. 224 (2).*

S. 36 of the Legal Practitioners Act confers a special jurisdiction on Subordinate Courts, and inasmuch as the attendance in Court is an important valuable civil right of a citizen, it cannot be taken away from him by a Court if its jurisdiction has been exercised either illegally or with material irregularity. Consequently an order of a District Judge under S. 36 declaring a person to be a tout is capable of being revised by the High Court under S. 115, C. P. Code. The District Judge in making the order under S.36 of the Legal Practitioners Act is acting as a Court and not in an administrative capacity, and his order therefore falls within the scope of S. 115, C. P. Code. This revisional jurisdiction of the High Court is, however, necessarily of an exceptional character, and cannot be invoked except in furtherance of justice. S. 439 of the Cr. P. Code has no application to the case, and the order cannot be revised under that section. Nor can the order be revised under the Government of India Act of 1935, by reason of sub-cl. (2) to S. 224 of the Government of India Act of 1935. *(Abdur Rahman, J.)* SOMANNA, *In re.* I.L.R. 1938 Mad. 988=47 L.W. 578=1938 M.W.N. 426=177 I.C. 456=11 R.M. 334=A.I.R. 1938 Mad. 634=(1938) 2 M.L.J. 100.

——S. 115—Jurisdiction — Order dismissing appeal under O. 41, R. 10 (2)—Revision. *See* C. P CODE, O. 41, R. 10 (2). A.I.R. 1936 Rang. 109.

——S. 115—Jurisdiction—Refusal to exercise—Acting illegally and with material irregularity—Transferee of property pending sale in execution under mortgage decree—Order by Collector on application by transferee under S. 4, U. P. Encumbered Estates Act—Case forwarded to Special Judge—Application by transferee for stay of execution—Refusal by executing Court—Revision—Competency. *See* U. P. ENCUMBERED ESTATES ACT, S. 7. 1937 A.W.R. 778.

——S. 115—*Jurisdiction—Refusal to exercise—Application for scaling down debt under Madras Agriculturists' Relief Act, rejection on the ground that applicant not competent to apply—Revision—Interference.*

An order of a Court rejecting an application under the Madras Agriculturists' Relief Act on the ground that the applicant is not competent to apply for the benefits of the Act is in effect a refusal to exercise the jurisdiction invoked by the applicant, and the High Court will interfere in such a case under S. 115, C. P. Code. *(Wadsworth, J.)* SOORYANARAYANA *v.* RAMAMMA. 52

C. P. CODE (1908), S. 115.

L.W. 301=1940 M.W.N. 831=(1940) 2 M.L.J. 291.

——S. 115—Jurisdiction—Refusal to exercise—Application to set aside sale in execution—Prayer for permission to give landed property as security instead of cash deposit—Refusal without fixing amount of security and without applying mind to the case—Revision—Interference. *See* C P. CODE, O. 21, R. 90 (1) (PATNA AMENDMENT), PROVISO (1) (*b*). 17 Pat. 107

——S. 115—*Jurisdiction—Refusal to exercise—Court declining to further proceed with execution on wrong view of law—Revision—Interference.*

If a Court, taking a wrong view of the law, assumes jurisdiction or declines to exercise jurisdiction, it is a matter for interference under S. 115, C. P. Code. Where a Court refuses to proceed further with a pending application for execution, erroneously holding on a wrong view of the law, that it has no jurisdiction to deal with it, and dismisses the same, it acts illegally in declining to exercise its jurisdiction by refusing to proceed further; and its order is liable to revision by the High Court under S. 115, C. P. Code. *(Burn and Venkataramana Rao, JJ.)* KRISHNAN *v.* NARAYANAN NAYAR. 182 I.C. 515=12 R.M. 101=1938 M.W.N. 330=47 L.W. 786=A.I.R. 1938 Mad. 555=(1938) 1 M.L.J. 715.

——S. 115—*Jurisdiction—Refusal to exercise—Order erroneously rejecting reference under S. 18 of Land Acquisition Act as incompetent.*

An order of a District Judge rejecting a reference made under S. 18 of the Land Acquisition Act in the erroneous view that the party at whose instance the reference was made was not entitled to demand a reference, is open to revision under S. 115, C. P. Code. *(Mukherjea and Roxburgh, JJ.)* COMILLA ELECTRIC SUPPLY, LTD. *v.* EAST BENGAL BANK, LTD. I.L.R. (1939) 2 Cal. 401=43 C. W. N. 973=186 I. C. 17=12 R.C. 424=A.I.R. 1939 Cal. 669.

—— S. 115—Jurisdiction—Wrong exercise of—Erroneous decision on valuation of suit—Interference. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*). 42 C.W.N. 192.

Leave to sue

——S. 115—*Leave to sue—If revisable.*

An order allowing a person to sue as a pauper is revisable if it otherwise fulfils the provisions of S. 115. *(Bose, J.)* KRISHNA KUMAR *v.* RADHELAL. I.L.R. (1940) Nag. 463=175 I. C. 107=10 R.N. 433=A.I.R. 1938 Nag. 210.

——S. 115—*Leave to sue* in forma pauperis—*Order granting—Revision—Grounds.*

Where in an application under O. 33, R. 1, C. P. Code, the lower Court in deciding the question as to whether a cause of action is disclosed as required by cl. (*d*) of R. 5 of O. 33, does commit an irregularity in relying on a statement made by the defendant contesting the application and in fact in permitting him to be cross-examined with a view to elicit such an admission, that would not be a sufficient ground for setting aside in revision an order granting leave to sue *in forma pauperis* where apart from the admission of the defendant there was in fact sufficient material in the plaintiff's allegations to justify the lower Court in coming to the conclusion that it did. *(Hamilton and Yorke, JJ.)* DURGA PRASAD *v.* GUR DULAREY. 14 Luck. 116=175 I.C. 63=1938 O.A. 487=1938

C. P. CODE (1908), S. 115.

O.W.N. 561=1938 O.L.R. 265=10 R.O. 301=A.I.R. 1938 Oudh 146.

——S. 115—*Leave to sue as a pauper—Refusal—Revision.*

In the case of an application for leave to sue as a pauper, a Court has jurisdiction either to allow or disallow it and when once it has exercised its jurisdiction and decided whether rightly or wrongly, there can be no revision under S. 115, C. P. Code. (*Zia-ul Hasan and Hamilton, JJ.*) BADRI NATH *v.* RAMCHANDRA. 14 Luck. 442=179 I.C. 1001=1939 O.A. 231=11 R.O. 219=1939 O.L.R. 110=1939 O.W.N. 193=A.I.R. 1939 Oudh 129.

——S. 115—*Leave to sue* in forma pauperis—*When revisable.*

An order on an application for permission to sue *in forma pauperis* is not revisable by the High Court unless there has been an exercise of jurisdiction not vested by law, or failure to exercise a jurisdiction so vested or an exercise of jurisdiction illegally or with material irregularity in the sense in which the words "illegally or with material irregularity" have been construed by past decisions of the Chief Court of Oudh and of their Lordships of the Privy Council. (*Thomas, C.J., Zia-ul-Hasan and Hamilton, JJ.*) SUNDAR BHARTHI *v.* TRUST MANDIR NAGESHAR NATH. 1940 O W.N. 259=186 I C. 381=12 R. O. 306=1940 A.W.R. (C.C.) 133=1940 O.A 239=1940 O.L.R. 118=A.I.R. 1940 Oudh 148 (F.B.).

——S. 115 and O. 33, R. 1—*Leave to sue as pauper—Order on application—Revision if lies and when can succeed Decision that there was no cause of action—Revision, if lies.*

There could be a revision against an order on an application for leave to sue *in forma pauperis* but for it to succeed, there must be an exercise of jurisdiction not vested by law or a failure to exercise a jurisdiction vested by law or an exercise of jurisdiction illegally or with material irregularity, which depends on the facts of each case. Where a Court has refused to grant leave on the ground that the plaint did not disclose a cause of action, it is a decision on a question or point of law and it is not a ground on which a revision would lie. (*Thomas, CJ. and Hamilton, J.*) KANHAIYA LAL *v.* BISHESHWAR NATH. 189 I.C. 224=1940 O W.N. 626=1940 O.A. 501=1940 A.W.R. (C.C.) 259=1940 O.L.R. 416=A.I.R. 1940 Oudh 353.

Limitation.

——S. 115—Limitation—Decision on point of—Revision. *See* SCOPE, *infra.* A.I.R. 1936 Nag. 157.

——S. 115—Limitation—Erroneous decision on point of law—Wrong decision on question of limitation—Interference—Power of High Court—Provincial Small Cause Courts Act, S. 25—Distinction. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 25. 1936 A.M.L.J. 68.

——S. 115—*Limitation—Filing of revision—Practice of Rangoon High Court*

It is a rule of practice in Rangoon High Court that revisions may be filed at any time within 90 days of the date of the decree sought to be revised, and the applicant is entitled to untilize that rule of practice to the full. (*Dunkley, J.*) DAW PO *v.* U PO HMYIN. 1940 Rang.L R. 237=187 I.C. 875=12 R.R. 345=A.I.R. 1940 Rang. 91.

C. P. CODE (1908), S. 115.

——S 115—*Limitation—Order without adjudicating on question of limitation—Interference.*

High Court can interfere in revision in a case which is on the face of it time-barred and where the lower Court has made an order without adjudicating on the question of limitation. A.I.R. 1916 Cal. 651, Rel. on. (*Roberts, C J. and Sharpe, J.*) CHATTAL TRADING CO. LTD. *v* BABU MAHIM CHANDRA. 176 I.C. 134=11 R.R. 31 (1)=A.I.R. 1938 Rang. 87.

——S. 115—*Limitation—Practice—Application beyond three months—When entertainable.*

While ordinarily it is the practice of Courts not to entertain revision applications preferred more than three months after the order appealed against, in suitable cases this practice should not be rigorously enforced. (*Weston.*) MANGI LAL *v.* GOPI NATH. 1937 A M L.J 107.

Locus Standi.

—— S. 115—Locus standi *to apply under—One of many decree-holders applying for stay of execution—Dismissal—Judgment-debtor, if can seek to revise that order.*

Where one of many decree-holders applies for stay of execution proceedings against the judgment-debtor, and it is not granted, the person aggrieved by such an order is that decree-holder and if he does not choose to agitate it further the judgment-debtor has no *locus standi* to prefer a revision under S. 115 against that order. (*Wort, A C.J. and Manohar Lal, J.*) VASISTHA NARAIN SINGH *v.* KANDHAI LAL DURGA PRASAD. 177 I.C 138=4 B R. 793=11 R P. 129.

Material Irregularity.

——S. 115—*Material irregularity—Application for leave to appeal* in forma pauperis—*Order rejecting it on Munsiff's report without hearing applicant—Revision.*

Where on an application for leave to appeal *in forma pauperis* the District Judge directs the Munsif to make an enquiry and on his report that the applicant is not a pauper rejects the application without hearing the applicant, he acts in the exercise of his jurisdiction with material irregularity and the order passed by him cannot, therefore, be supported. Although the applicant has appeared before the Munsiff, he is entitled to show to the Judge that the report of the Munsiff is wrong. (*Fazl Ali, J.*) RAM JANAM MAHTO *v.* BENDHYACHAL KUER. 6 B.R. 300=186 I.C. 170=12 R.P. 455=A.I.R. 1940 Pat. 263.

——S. 115—Material irregularity—Application for leave to sue as pauper—Death of applicant—Application by heir to continue—Refusal—Revision. *See* C. P. CODE, O. 33, R. 1. A. I. R. 1936 Pat. 591.

——S 115—*Material irregularity—Application under S.* 30, *U. P. Agriculturists' Relief Act—Order on—Revision—Competency — Failure to consider material provisions of law—If justifies revision.*

Where a Court in an application under S. 30 of the U. P. Agriculturists' Relief Act fails to apply its mind to all the mandatory provisions of the law, it acts with material irregularity in the exercise of its jurisdiction and a revision petition would lie to the High Court. But if the Court merely decides the case wrongly no application in revision would lie. (*Sulaiman, C.J., Thom and Bennet, JJ.*) RAGHUBIR SINGH *v.* MULCHAND. I.L.R. 1937 All. 805=1937 A.W.R. 710=1937 A

C. P. CODE (1908), S. 115.

L.J. 671=170 I.C. 567=1937 A. L. R. 741=1937 R.D. 428=10 R.A. 175=A. I. R. 1937 All. 598 (F.B.).

——S. 115—*Material irregularity—Conclusions based on surmises.*

A Court acts with material irregularity in basing its conclusions on surmises for which there is no justification from the evidence on the record. (*Srivastava and Nanavutty, JJ.*) SABIHA KHATUN *v.* ANWARUL HASAN. 1936 O.W N. 237.

——S. 115—*Material irregularity — Discretionary order—Refusal to issue commission under O. 26, R. 4, to examine witness living more than 200 miles from Court house—Revision—Interference.*

Where a witness cited by a party to the suit is a public servant in Government employ and serving at a place more than 200 miles from the Court where the suit is pending, O. 16, R. 19, C. P. Code, is a bar to the Court obtaining the presence of the witness by summoning. In such a case, the Court should exercise its discretion by issuing a commission to examine that witness under O. 26, R. 4, C. P. Code, especially when the witness is an important witness though he may be the husband of a party to the suit. If the Court in such a case refuses a commission, it acts with material irregularity and the High Court will interfere in revision under S. 115, C. P. Code. (*Agarwala and Rowland, JJ.*) ZOHADA BEGUM SAHEBA *v.* HAJI DAWOOD AYUB. 189 I C. 463=6 B R 840=21 Pat.L.T. 197=A I. R. 1940 Pat. 437.

——S. 115—*Material irregularity—Dismissal of pauper application as barred by S. 47, C. P. Code—Irregular use of information regarding execution proceedings—Revision.*

Where the Court, to which an application under O. 33, R. 1 for leave to sue *in forma pauperis* is presented, dismisses the application although satisfied that the applicants are paupers, holding that the suit is not maintainable in view of the provisions of S. 47, and where in coming to this conclusion, it not only refers to certain proceedings mentioned in the proposed plaint but makes use of the information obtained therefrom, the use of such information is irregular and it amounts to a material irregularity in the conduct of the proceedings in the lower Court which vitiates the order passed therein.

Per *Mackney, J.*—Where the execution proceedings have been referred in the plaint, the Court may be entitled to look at these proceedings, but on looking into them, the Court can only discover what defence is likely to be used; it cannot at that stage, consider the validity of that defence. (*Mya Bu and Mackney, JJ.*) KARIM *v.* KYAUKTAGA GRANT LTD. 178 I. C. 896=11 R.R. 286=A I.R. 1938 Rang. 453.

——S. 115—*Material irregularity—Execution sale—Court committing mistakes which result in substantial injury—Interference.*

Where in execution proceedings for the sale of property there has been misunderstanding as regards the legal position and the Courts commit serious mistakes in ignoring many important factors in connection with the property put up for sale, and are largely carried away by the fact that there is no substantial injury but where the various material irregularities in fact cause substantial injuries, the irregularities must be deemed to have resulted in miscarriage of justice and High Court can in such case interfere by way of revision. (*Mir Ahmad, J.*) BUNDHELKHAND CYCLE AND MOTOR AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. 181 I. C. 542=11 R. Pesh 70=A.I.R. 1939 Pesh. 9.

C. P. CODE (1908), S. 115.

——S. 115—*Material irregularity—Ex parte decree—Order setting aside on insufficient grounds—Revision—Interference.*

The applicant sued for a declaration that she was validly divorced from her husband. The dispute was referred to arbitration and extension of time was granted until certain date. On that date applicant was present through her pleader but the defendant was not present and the reference was superseded. The case was fixed for hearing for a certain date. Again the defendant was not present and an *ex parte* decree was passed. The defendant applied to have the *ex parte* decree set aside alleging various grounds for his non-appearance. The Judge before whom the case then came allowed the application and set aside the *ex parte* decree on the ground that his predecessor made no order that the suit was to be put down for *ex parte* hearing.

Held, that the Judge acted with material irregularity in setting aside the *ex parte* decree. (*Davis, J. C. and Lobo, J.*) ZENAB *v.* MAHOMED HAJI ALLAHDINO 32 S L.R. 703=174 I.C. 572=10 R.S. 264=A I R. 1938 Sind 76.

——S. 115—*Material irregularity—Failure by appellate Court to notice important ground of appeal.*

An appellate Court failing to notice an important ground of appeal when dealing with the appeal, commits a meterial irregularity in the exercise of jurisdiction vested in it as an appellate Court, and orders passed by it in appeal are liable to interference on the revision side. (*Mir Ahmad, A.J.C.*) BUNDHELKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD., LAHORE. 162 I.C. 416=8 R. Pesh. 197=A.I.R. 1936 Pesh. 97.

——S. 115—Material irregularity—Grant of temporary injunction under O. 39, R. 1—Revision—Interference. *See* C. P. CODE, O. 39, R. 1. 1939 M.W.N. 621.

——S. 115—*Material irregularity — Lower Court decreeing suit on case inconsistent with pleadings.*

Where the lower COURT decrees the suit on a case which is not to be found in the pleadings and is inconsistent therewith, it acts illegally in the exercise of its jurisdiction and with material irregularity. (*Dunkley, J.*) MUTUSWAMY *v.* KAYAMBOO KONAR. 14 Rang. 511=163 I.C. 668 =9 R.R. 45=A.I.R. 1936 Rang. 235.

——S. 115—*Material irregularity—Misreading evidence.*

If the lower Court, misreads the evidence on record and failing to take notice of a vital fact appearing therein, comes to an erroneous conclusion, it would be deemed to have acted with material irregularity and its decision is open to revision by the High Court. (*Mackney, J.*) DWARIKA *v* BHAGAWATI. 186 I.C. 530=12 R.R. 270=A I.R. 1939 Rang. 413.

——S. 115—Material irregularity—Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted

C. P. CODE (1908), S. 115.

in lower Court—Interference. *See* C. P CODE, S. 151. A.I R. 1938 Rang. 241.

——S. 115—*Material irregularity—Omission to consider oral evidence.*

A lower appellate Court acts with material irregularity in the exercise of its jurisdiction in not considering the oral evidence produced by the parties. (*Bhide, J.*) DES RAJ *v* LADHA RAM. 172 I.C. 752=10 R.L. 366=39 P.L.R. 499 (2).

——S. 115—*Material irregularity—Omission to refer to material evidence.*

A Court acts with material irregularity in the exercise of its jurisdiction if it arrives at a finding without reference to unequivocal evidence on record. (*Addison, J.*) JUBLIEE CHAMBER OF COMMERCE, LTD., RAWALPINDI *v.* LALA AMRIT SHAH. 42 P.L.R. 48=A.I.R. 1940 Lah 180.

——S. 115—*Material irregularity—Omission to write judgment in accordance with law.*

It is obligatory on Court to record a proper judgment complying with the requirements of law even in dismissing an appeal under O. 41, R. 11, C. P. Code. Where the appellate Court simply dismisses the appeal with the remark that there was ample material to support the order passed by the trial Court, its order is liable to be set aside in revision. (*Bhide, J.*) MOHAMMAD ARIF *v.* MOHAMMAD ISHAQ. 168 I.C. 688=9 R.L. 664 =38 P.L.R. 431=A.I.R. 1937 Lah. 352.

——S. 115—*Material irregularity—Pre-emption suit—Court importing irrelevant considerations.*

Where in a pre emption suit the lower Courts import irrelevant considerations into the discussion of evidence and refuse to give the vendee the full sum proved to have been paid, merely because those considerations raise suspicions in the minds with regard to genuineness of the price paid, it commits a material irregularity. (*Mir Ahmad. A.J C.*) ALI AKBAR *v.* MULTAN. 160 I.C. 452=8 R. Pesh. 116=A.I.R. 1936 Pesh. 12.

——S. 115—*Material irregularity—Reference to arbitration by next friend of minor plaintiff—Failure to conform to O. 32, R. 7—Revision—Interference.*

A Court which does not follow the provisions of O. 32, R. 7, C. P. Code, in a matter of a reference to arbitration by the next friend of a minor plaintiff exercises its jurisdiction with material irregularity, and the High Court can and will interfere in revision under S. 115, C. P. Code, even though the question of jurisdiction was not raised in the Court below. (*Davis, J.C. and Weston, J.*) LOUNG TAHIR *v.* RAMSINGH TAKHATRAM. I. L.R. (1940) Kar. 327.

——S. 115—*Material irregularity—Refusal to give relief under Agriculturists' Relief Act—Revision.*

A Court acts with material irregularity in refusing to give an applicant the benefits and relief to which he is entitled under the Agriculturists' Relief Act. The High Court in such a case will interfere in revision. (*Thom, J.*) NARAIN SINGH *v.* BANKE BEHARI LAL. I.L.R 1937 All. 943=172 I C. 224=10 R.A. 386=1937 All.L.R. 974=1937 R.D 489=1937 A L.J. 842= 1937 A.W.R 849=A.I.R. 1937 All. 753.

——S. 115—*Material irregularity—Refusal to stay trial of suit pending decision of Special Judge under U. P. Encumbered Estates Act—If revisable.*

C. P. CODE (1908), S. 115.

S. 115, C. P. Code, gives the Chief Court a discretion to make such order in the case as it thinks fit where it is of opinion that the Subordinate Court has acted in the exercise of its jurisdiction illegally or with material irregularity. Where an ordinary Civil Court finds that its jurisdiction to proceed with the trial of a suit is temporarily ousted by the provisions of the U. P. Encumbered Estates Act, and it elects nonetheless to proceed with the hearing of the suit, it acts with material irregularity, and its order is revisable. (*Yorke and Radha Krishna, JJ.*) M. MOHAMMAD INTISHAM ALI *v.* LACHHMAN PRASAD. 1940 O L R 259=187 I C. 835=12 R O. 401=1940 O.A. 521=1940 O. W.N. 610=1940 A.W.R. (C.C.) 284=A.I.R. 1940 Oudh 342.

——S. 115—*Material irregularity—Suit on mortgage—Addition of new party and new issue—Order dissallowing question on new issue and striking off party added—Revision.*

In a suit brought on a mortgage executed by a father, his son was added as a defendant along with the father. After the son was added as a party, an issue was framed whether the mortgaged property was the self-acquired property of the father or the property of joint family. The trial Court however disallowed the question put on behalf of the defence whether the mortgaged property was the self-acquired property of the father or the property of the joint family and removed the name of the son from the category of the defendant on the imaginary ground of inconvenience and hardship.

Held, that the Court acted with material irregularity in disallowing the question and further, striking off the party, and hence his order was revisable under S. 115. (*Dhavle, J.*) DURGA DUTT JHA *v.* ASHARIFILAL MAHTHA. 180 I.C. 203 =5 B.R. 362=11 R P 475=A.I.R. 1939 Pat. 74.

——S. 115—*Material irregularity—Throwing burden of proof on wrong party in disregard of statute—Revision—Interference with order framing issues.*

Where a statute specifically puts the burden of proof upon a certain party, the Court in placing the burden of proof the other way is acting with material irreguiarity in the exercise of its jurisdiction, and the High Court may in a proper case interfere in revision to set right an issue framed in such a manner as to disregard the statutory provision regarding burden of proof. To disregard the direction of the statute with regard to burden of proof is a perverse decision and conscious departure from the rule of procedure. (*Mokett, J.*) VARISA MUHAMMAD ROWTHER *v.* MARUNGAPURI ESTATE. 1939 M.W N. 395=A.I. R. 1939 Mad. 644=(1939) 1 M.L.J. 334.

——S. 115—*Material irregularity—What is.*

It is a material irregularity in the exercise of jurisdiction, if the Court holds that the defendant has admitted a certain claim of the plaintiff when the defendant has not done any such thing; it is also a material irregularity to hold an item proved which the trial-Court has held not proved without stating on what evidence the appellate Court relies for the proof of the item. (*Dalip Singh, J.*) ABBAS TEA COMPANY *v.* ISHAR DAS. 41 P.L.R 492=A.I.R. 1939 Lah. 470.

Miscellaneous proceedings.

——S 115—Miscellaneous proceedings—Appellate order under S. 45, U. P. Encumbered Estates

C. P. CODE (1908), S. 115.

Act—Revision, if lies. *See* U. P. ENCUMBERED ESTATES ACT, S. 45 (5). **1940 O.A. 468 (F B.).**

——S. 115—Miscellaneous proceedings—Orders under S. 3, Charitable and Religious Trusts Act—If revisable. *See* CHARITABLE AND RELIGIOUS TRUSTS ACT, S. 3. **1938 O.W.N. 1054.**

New case.

——S. 115—*New case—Execution of instalment decree—Application based on default clause—New case that it relates to unpaid instalments within three years—If can be entertained in revision.*

Where in an application for execution of an instalment decree filed beyond three years from the date of the first default, the decree-holder bases his cause of action on the default clause in the decree and wants to save limitation by certain payments made by the judgment-debtor which he fails to prove he cannot set up in revision a new case that his application is for realisation of the unpaid instalments within three years from the date of his application. (*Bartley and Nasim Ali. JJ.*) K. C. MUKERJEE *v.* JOGIA LOHARIN. **42 C. W.N. 437.**

New issue.

——S. 115—*New issue—Framing of new issue—Practice.*

Where in revision the petitioner urged that a new issue which was already covered by the issues under consideration should be framed.

Held, that petitioner could not be granted a further opportunity of doing that which with common care and attention he must have known he had to do from the start. (*Middleton, J.C.*) ELAHI BAKHSH *v.* YAKUB. **164 I.C. 189=9 R. Pesh. 9 (2)=A.I.R. 1936 Pesh. 157.**

New plea.

——S. 115—*New plea—Interference—Practice.*

It is not the practice to interfere in revision on a point not raised or argued in the lower Court (*Puranik, J.*) BULAKHIDAS *v.* MURLIDHAR. **1940 N.L.J. 340.**

——S 115—*New plea—Question of jurisdiction.*

A question of jurisdiction can be raised even on revision. (*Mir Ahmad, A.J.C.*) BUNDHELKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD., LAHORE. **162 I. C.416=8 R. Pesh. 197=A.I.R.1936 Pesh. 97.**

Orders.

——S. 115—Order granting discharge to guardian—If revisable. *See* GUARDIAN AND WARDS ACT, S. 41 (3) AND (4). **(1938) M.W.N. 188 (F B.).**

——S. 115—*Order rejecting review application—Revision.*

An order of Court rejecting an application under O. 47, R. 1, C. P. Code, after considering the grounds of review is not open to revision. (*Wazir, J.*) HASHMAT ALI *v.* ISHER DASS. **40 P. L.R.J. & K. 31.**

——S. 115—Order returning appeal for presentation in proper Court—Revision. *See* C. P. CODE, O 43, R. 1 AND S. 115. **42 P.L.R. 364.**

——S. 115—Order of Revenue officer under S. 26-G (6) of Bengal Tenancy Act—If revisable by High Court under S. 115, C. P. Code. *See* BENGAL TENANCY ACT, S. 26-G (6). **44 C.W.N. 191.**

C. P. CODE (1908), S. 115.

——S. 115—Order under O. 41, R. 6 (2)—Revision. *See* C. P. CODE, O. 41, R. 6 (2). **44 C.W. N. 701.**

Other remedy open

——S. 115—*Other remedy—Appeal competent—Revision—Interference.*

It is the practice of the High Court to refrain from dealing with a matter in revision where a definite remedy is provided to the parties in the form of an appeal. (*Fazl Ali and Meredith, JJ.*) HRIDAYNATH SINGH *v.* LOHAR SINGH. **187 I.C. 838=6 B.R. 558=12 R.P. 646=21 P.L.T. 629.**

——S. 115—Other remedy open—Appealable order—Revision—Competency. *See* C. P. CODE, Ss. 2 (2), 115 AND 144. **A.I.R. 1936 Cal 812.**

——S 115—Other remedy—Appealable order not appealed against—Revision—Order under Ss. 144 and 151—If open to revision. *See* C. P. CODE, Ss 144 AND 151. **19 Pat.L.T. 118.**

——S. 115—*Other remedy open—Appeal—Conditional decree in pre-emption suit—Subsequent order dismissing suit for default—Revision.*

A decree passed in a suit for pre-emption in favour of the plaintiff for possession of the land in dispute on payment of a certain amount to the vendee on or before a certain date failing which the suit is to stand dismissed, is no doubt a conditional decree. But it is complete in itself and fully disposes of the suit. An order subsequently passed by the Court dismissing the suit for non-compliance with the terms of the decree cannot be treated as a decree against which an appeal could be preferred. Consequently a revision is competent against the subsequent order. (*Tek Chand, J.*) SHER SINGH *v.* DURGA DAS. **41 P. L. R. 381=A.I.R. 1939 Lah. 376.**

——S. 115—*Other remedy open—Appeal competent—Revision—Interference—When justified.*

Though the High Court will not ordinarily interfere in revision when a remedy lies by way of appeal, the High Court will interfere if a defect of law and a grave wrong are manifest, for the High Court will not permit a case to proceed on jurisdiction snatched, and having no basis or justification. (*Davis, J. C. and Weston, J.*) MIR HAJI GHULAM SHAH *v.* KHANCHAND. **I.L.R. (1939) Kar. 330=182 I. C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

——S. 115—*Other remedy open—Appeal competent to Subordinate Court not availed of—Revision—Erroneous view of law leading to non-exercise of jurisdiction—Powers of revision.*

Where a lower Court, by an erroneous decision on a point of law has refused to exercise a jurisdiction which is vested in law, the case falls undoubtedly under Cl. (*c*) of S. 115. C. P. Code, if not under Cl. (*b*); and the High Court can interfere in revision. The revisional power under S. 115 is a bar only when an appeal lies to the High Court itself. The fact that an appeal lies to a lower appellate Court will not take away the revisional powers of the High Court. (*R. C. Mitter, J.*) SASHI KANTA ACHARYA BAHADUR *v.* NASIRABAD LOAN OFFICE CO **168 I.C. 849=9 R. C. 819=63 C.L.J. 105=A.I.R. 1936 Cal 786.**

——S. 115—*Other remedy open—Appeal competent to District Court but no appeal to High Court—Revision—Jurisdiction of High Court.*

The High Court has jurisdiction to entertain a revision application under S. 115, C. P. Code, if no appeal lies to it; and it can interfere with the

C. P. CODE (1908), S. 115.

order of the first Court if no appeal lies to the High Court, although an appeal might lie from the first Court to the District Court. (*Sulaiman, C.J. and Harries, J.*) BABU RAM *v.* MANOHAR LAL. I.L.R (1938) All. 22=173 I.C. 157=10 R. A. 466=1938 A.L.R. 98=1937 A L.J 886=1938 R.D. 84=1937 A.W.R. 986=A.I.R. 1938 All. 6.

——S 115—*Other remedy open—Appeal not availed of*—Ex parte *decree—Application to set side—Order declining—Failure to appeal—Revision against order—Maintainability.*

A defendant who suffers an *ex parte* decree to be passed against him, and fails to appeal against an order refusing to set aside the *ex parte* decree under O. 9. R. 13, cannot thereafter invoke the revisional powers of the High Court to get the order declining to restore the suit set aside in revision. (*Das and Rois, JJ.*) GOBINDA KOET *v.* SHIBA PROSAD SINGH. 18 Pat.L.T. 374.

——S. 115—*Other remedy open*—Ex parte *decree—Revision against—Interference* — *"Case decided."*

The High Court will not entertain a revision application against a decree which could come before the High Court in second appeal. An *ex parte* decree passed by a Court which is subject to appeal and second appeal is not a decree which is subject to revision under S. 115, C. P Code. Such a case cannot be said to be a case which has been decided by any Court subordinate to the High Court and in which no appeal lies (*Collister and Bajpai, JJ.*) A. H. GHAZNAVI *v.* GURCHARAN SINGH. 172 I.C. 72=10 R.A. 369=1937 All.L. R. 932=1937 A.L.J. 831=1937 A.W.R. 726=A. I.R. 1937 All. 691.

——S. 115—*Other remedy open—Interference.*

Although there is no bar to the exercise of powers under S. 115, C. P. Code, yet the powers being discretionary the High Court should be reluctant to entertain an application for revision when the aggrieved party had a remedy by way of an appeal in the Subordinate Court which he failed to pursue. (*Wazir, J.*) JUMNA *v.* AHMED JOO. 40 P.L.R.J. & K. 29.

——S. 115—*Other remedy open—Interference in revision.*

Where a petitioner in revision has another remedy open, it depends upon the facts of each particular case whether or not the High Court will interfere in revision on that ground (*Varma, J.*) PARYAG *v.* CHANDRACHUR. 179 I.C 845=11 R.P. 416=1939 P.W.N. 50=5 B R. 304=A.I.R. 1939 Pat. 263.

——S. 115—*Other remedy open—Interference in revision—Practice.*

There is no inflexible rule that the High Court will not interfere in revision when other remedy is open by way of suit. High Court even in such cases can interfere in revision to avoid multiplicity of litigation and hardship to the parties. (*Tek Chand, J.*) MT. BHAGWANTI *v.* SANT SINGH. 182 I.C. 560=12 R.L. 58=41 P.L.R 374=A.I.R. 1939 Lah. 52.

——S. 115—*Other remedy open—Non interference—Limits of rule.*

High Court will not interfere in revision where there is another remedy open to the party. But the other remedy which is open to the applicant in revision must be a certain and conclusive remedy allowed by law. (*Roberts, C.J. and Dunkley, J.*) MAUNG AHMIN *v.* MAUNG SAUNG.

C. P. CODE (1908), S. 115.

178 I.C. 789=11 R.R. 281=A.I.R. 1938 Rang. 360.

——S. 115—*Other remedy—Order dismissing suit under O. 9, R. 8—Revision.*

No revision lies against an order dismissing a suit under O. 9, R. 8, C. P. Code, as another remedy is open to the plaintiff by way of an application for restoration of the suit with an appeal against the order, if that application is dismissed. (*Blecher, J.*) MAHOMED SHAH *v.* SHIB DYAL SINGH. 41 P.L.R. 102.

——S 115—Other remedy open—Order for rateable distribution under S. 73—Revision. *See* C. P. CODE, S. 47—APPEAL. A.I.R. 1936 Pesh. 52.

——S. 115—*Other remedy open—Order on application under O. 21, R. 100—Revision—Interference.*

A revision petition will no doubt lie at the instance of a party aggrieved by an order on an application under O. 21, R. 100, C. P. Code. But the High Court will not interfere unless there are cogent reasons for such interference. The normal remedy of a party aggrieved by such an order is by way of suit as laid down by O. 21, R. 103; and a suit is ordinarily as cheap as and more convenient than a revision petition, besides being a more satisfactory way of adjudicating on the dispute as well as on points of law. When the applicant has not lost his remedy by way of suit by lapse of time, and when it will not work any hardship on him, if he were driven to file a suit, the High Court will not interfere in revision. (*Horwill, J.*) VESAVALU NAIDU *v.* JAYAGANAPATI MUDALI. 167 I.C. 413=9 R.M. 449 (1)=1936 M. W.N. 1120=44 L.W. 703=A I.R. 1936 Mad. 940.

——S. 115—Other remedy open—Order on claim petition—Power of High Court to revise if precluded by right of suit under O. 21, R. 63. *See* C. P. CODE, O 21, RR. 58, 60 AND 63 AND S. 115. 1938 A.L J 1118=A.I.R. 1939 All. 117.

——S. 115—*Other remedy open—Order on claim petition—Revision.*

The High Court will not ordinarily interfere in revision with an order passed on a claim petition; but where the executing Court has not addressed itself properly to what it has to do in a claim petition, the High Court will interfere. (*Venkataramana Rao, J.*) VOIKARAN *v.* KOTHANDAPANI PILLAI. 1937 M.W.N. 320 (1).

——S. 115—*Other remedy open—Order passed in suit under S. 9 of the Specific Relief Act—Revision, if competent.*

No revision is competent against an order dismissing a suit brought under S. 9 of the Specific Relief Act, as the remedy by way of a regular suit is open to the plaintiff. (*Zia-ul-Hasan, J.*) SITLA DIN *v.* MOHAN. 13 Luck 18=165 I.C. 908 =9 R O. 271=1936 O.W N. 1228=1936 O.L.R. 700=A.I R 1937 Oudh 183.

——S. 115—*Other remedy open—Order rejecting application for amendment of decree—Revision.*

When an application for amendment of a decree under S. 152, C. P. Code, is dismissed, the proper remedy is to appeal against the decree. The order rejecting amendment is not open to revision. (*Norman, I.C.S.*) ABDUL RAHMAN *v.* DIDAR BUX. 1936 A.M.L.J. 117.

——S. 115—Other remedy—Order refusing delivery under O. 21, R. 99—Rent—Interference. *See* C. P. CODE, O. 21, R. 103. 18 Pat.L.T. 833.

C. P. CODE (1908), S. 115.

——S. 115—*Other remedy open—Order under S. 73—Interference in revision.*

Where the remedy by suit is open to the applicant under S. 73 (2), C. P. Code, the High Court should not exercise the revisional jurisdiction vested in it under S. 115. (*King, C.J. and Nanavutty, J.*) HAR NARAIN SETHI *v.* BIRD & CO. 12 Luck 19=8 R O. 240=1936 O.L.R. 35=160 I.C. 36=1936 O.W.N. 116=A.I.R. 1936 Oudh 132.

——S. 115—*Other remeds open—Order under S. 73—Interference in revision.*

An application under S. 115. C. P. Code, is not maintainable where the applicant has his remedy by a suit under S 73 (2), C. P. Code. (*Srivastava and Nanavutty, JJ.*) BIRENDRA BIKRAM SINGH *v.* BASDEO 12 Luck 52=160 I.C. 814=8 R.O. 281 =1936 O.W N. 262=1936 O.L.R. 109=A.I.R 1936 Oudh 185.

——S 115—*Other remedy open—Order under O. 21, R. 60—Revision, when competent.*

It is a general principle that an application under S. 115 will not ordinarily be entertained when there is another certain and conclusive remedy open to the aggrieved party. A party against whom an order under O. 21, R. 60 is passed has a special remedy by way of suit under O 21, R 63 and no application in revision can be entertained against an order made under Rr. 60 and 61 or R. 62, O. 21, although no appeal lies from it, unless it can be shown that the Judge passing the order has in passing it failed to exercise jurisdiction vested in him by Rr. 58 to 62, O. 21. Where the Court has so failed to exercise its jurisdiction its order is open to revision. (*Dunkley, J.*) VEDNATH SINGH *v.* U. BA DIN. 14 Rang 516=164 I.C. 638=9 R.R. 116=A.I.R. 1936 Rang 306

——S 115—*Other remedy open—Order under O. 21, R. 63—Revision.*

When a remedy lies by way of a suit the High Court will not interfere in revision. An order under O. 21, R. 63, allowing an objection to attachment preferred under O. 21, R. 58, C. P. Code, is not open to revision by the High Court, as the party adversely affected has a remedy by way of suit. (*Davis, J.C. and Mehta, A.J.C.*) GHANSHAMDAS *v* SHIVALDAS. 160 I C. 383=30 S L.R. 288=8 R.S. 126=A I.R. 1936 Sind 2.

——S. 115—*Other remedy open—Revision.*

Where a party to a civil proceeding seeks to exercise the discretionary powers of the High Court under S. 115, C. P. Code, he must satisfy the Court that he has no other remedy open to him to set right what he alleges to have been done illegally, irregularly or without jurisdiction by a Subordinate Court. 11 All 383 and 15 All. 405, Rel. on. (*Mackney, J.*) BANK OF CHETTINAD, LTD. *v.* MAUNG PO LU. 161 I.C. 258=8 R.R. 463 =A.I.R. 1936 Rang 12.

——S. 115—*Other remedy open—Revision.*

Ordinarily the High Court ought not to interfere in revision when another remedy is open to the applicant; but where the order of lower Court is obviously wrong, it is open to the High Court to interfere in revision if litigation will thereby be shortened (*Pollock, J.*) GHANSHYAMDAS BALKISAN *v* SHEOKISANDAS. I L.R. (1937) Nag. 82=167 I.C. 502=9 R.N. 189=A.I.R. 1937 Nag. 30.

——S. 115—*Other remedy open—Revision, if not maintainable.*

C. P. CODE (1908), S. 115.

It is not and should not be an invariable rule that revision should not be entertained whenever there is another remedy open to the party, for there seems to be no warrant for this either in S. 115 or in any other provision of the C. P. Code (*Zia-ul-Hasan and Yorke, JJ.*) LYALLPUR BANK, LTD. *v.* RAMJI. 15 Luck. 332=185 I.C. 889=12 R.O. 270=1940 O W.N. 132=1940 A W.R. (C. C.) 63=1940 O.L.R. 75=1940 O.A. 132=A.I.R. 1940 Oudh 237.

Powers of Court.

——S. 115—*Powers of Court—Amendment of decree*

The Chief Court has power under its revisional jurisdiction to amend a decree so as to make it conform with the judgment. (*Thomas, C J. and Zia-ul-Hasan, J.*) RAGHURAJ SINGH *v* LADA HARI KISHAN LAL. 14 Luck. 13=1938 O.A. 231 =1938 A.W.R. (C.C.) 26=1938 O.W.N. 331= 1938 O.L.R. 143=178 I.C. 865=1938 R.D. 405 (2)=10 R.O. 231=A.I.R. 1938 Oudh 107.

——S. 115—*Powers of Court—Power to act on its own motion.*

The Judicial Commissioner's Court in an appropriate case can exercise powers of revision on its own motion if it appears that there had been any material irregularity in the exercise of its jurisdiction by the lower Court. (*Almond, J.C.*) KANSHI RAM *v.* GOBIND RAM. 178 I.C. 776=11 R.Pesh. 58=A.I.R. 1938 Pesh. 81.

——S. 115—*Powers of High Court—Appeal from decree not immediately lying to it—Revision, if barred—"In which no appeal lies thereto"—Interpretation.*

Per *Nasim Ali, J.*—S. 115, C, P. Code, authorises the High Court to revise an order of a Subordinate Court in any case "in which no appeal lies thereto". Where a decree can be appealed against to the District Judge from whose decree a second appeal can be filed in the High Court, it is not a case in which no appeal lies to the High Court at all, although no appeal can be filed from the original decree of the first Court direct. There is no ground for restricting the scope of the words "in which no appeal lies thereto" to cases where no appeal lies from the order sought to be revised. So long as a party has a right to come up to the High Court by way of an appeal and has failed to avail himself of that opportunity by first going up to the District Judge and then coming up to the High Court, he cannot ask the High Court to interfere in revision.

Per *Rau, J.*—Are we to interpret the expression "in which no appeal lies" as if it were equivalent to the expression "in which no appeal lies or may in future lie"? I hesitate to place so wide a construction upon these words. According to the alternative interpretation, revision is barred only where an appeal, whether first or second, lies immediately to the High Court; where no such immediate appeal lies, the High Court has jurisdiction to intervene in revision, although whether it will exercise this jurisdiction or not, will depend upon the urgency of the need for intervention. (*Nasim Ali and Rau, JJ.*) NAFAR CHANDRA SARDAR *v.* KALIPADA DAS. I L.R. (1940) 1 Cal. 393=188 I.C. 483=13 R.C. 1=44 C.W.N 364= A.I.R 1940 Cal. 257.

——S. 115—*Power of High Court—Execution sale—Absence of application to set aside along*

C. P. CODE (1908), S. 115.

with deposit of decretal amount—Refusal to set aside—Interference in revision—Power of High Court—Hardship—If ground of interference.

The High Court has no power under S. 115, C. P. Code, to interfere with an order of a lower Court refusing to set aside an execution sale in the absence of an application to set aside the same though the full amount of the decree and compensation have been deposited in time. The fact that it is a hard case does not permit the High Court to interfere where it has no power so to do. (*Harries, C. J. and Rowland, J.*) BHARI JENA *v.* GAURANGA CHARAN SAHU. **18 Pat. 210 =186 I.C 143=6 B.R. 290=12 R.P. 453=A.I. R. 1940 Pat. 87.**

——S 115—Powers of High Court—Execution sale—Order confirming sale for want of application to set aside though deposit made under O. 21, R. 89—Order rejecting application for review—Revision—Interference, *See* C. P. CODE, O. 21, R. 89. **5 C.L.T. 27.**

——S. 115—*Powers of High Court—Order of Sessions Judge in revision from order of Magistrate under Bombay Municipal Boroughs Act—Revision to High Court—Interference—Grounds.*

The High Court has power to interfere in second revision from an order passed by a Sessions Judge in revision against an order of a Magistrate under the Bombay Municipal Boroughs Act, though such interference should be rare. When the question involved is one of construction of a General Act and is of considerable importance to Municipalities and rate payers, the High Court will interfere, (*Beaumont. C. J.*) BOROUGH MUNICIPALITY OF AHMEDABAD *v.* AHMEDABAD MANUFACTURING AND CALICO PRINTING CO., LTD. **I.L.R 1939 Bom. 701=41 Bom.L.R. 1015=186 I.C. 456=12 R.B. 341=A.I.R. 1939 Bom. 478.**

——S. 115—*Powers of High Court—Perverse order—Interference in revision.*

The High Court will not ordinarily exercise its revisional powers even though the lower Court has decided a question of fact or law erroneously; but its hands are not tied when it finds that the order of the Court below is entirely and absolutely unjustifiable and is almost perverse. (*Wort, J.*) DEOKI SINGH *v.* RAGHVINDRA BHAGWAN. **183 I.C. 371=5 B.R. 922=12 R.P. 135= 1939 P.W.N. 229=A.I.R. 1939 Pat. 430.**

Procedure.

——S. 115—Procedure—Error in procedure—Court entertaining application instead of suit without demanding *ad valorem* Court-fee—Revision—Interference. *See* B. T. ACT, S. 26-J. **63 C.L.J. 103.**

Revision.

——S. 115 and O. 41, R. 3—*Rejection of appeal before registration—Revision.*

Where the appellate Court rejects a memorandum of appeal on the ground that it is out of time before registering the appeal, the appellate Court assumes a jurisdiction which it does not possess, as the Civil Procedure Code does not authorize the appellate Court to pass such order at that stage. The order rejecting the appeal can therefore be interfered with in revision under S. 115 of the Code. (*Biswas, J.*) SUDHANSU BHUSAN PANDEY *v.* MAJHO BIBI. **176 I.C. 361= 11 R.C. 92=42 C.W.N. 72=A.I.R. 1937 Cal. 732.**

C. P. CODE (1908), S. 115.

——S. 115—*Remand order—Revision.*

An order of remand under O 41, R. 23, C. P. Code, will become final if not attacked by way of appeal or revision. A petition for revision of the order is, therefore, competent. (*Dalip Singh, J.*) FIRM RALLA RAM DAULAT RAM *v.* JASWANT RAI. **189 I.C. 464=42 P L.R. 201=A.I.R. 1940 Lah. 290.**

——S. 115—*Revision—Competency—Order rejecting auction purchaser's application for confirmation of sale.*

An order rejecting an auction purchaser's application for confirmation of the sale is not an appealable matter, nor can it be revised. (*Burn and Lakshmana Rao, JJ.*) SATYANANDAM *v.* NAMMAYYA. **183 I.C. 33=12 R M. 216=47 L. W. 51=1938 M.W.N. 656=A.I.R. 1938 Mad. 307.**

——S. 115—Revision — Competency— Orders under S. 5 of U. P. Agriculturists' Relief Act. *See* U. P AGRICULTURISTS' RELIEF ACT, S. 5 (2). **A.I.R. 1938 All. 456.**

——S. 115—*Revision—Competency— Revision against finding—Decision in favour of applicant.*

No revision lies against a finding where the decision of the Court is in favour of the party presenting the petition for revision. (*Mir Ahmad, A. J. C.*) BUNDHLKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD., LAHORE. **162 I.C. 416=8 R. Pesh. 197=A. I.R. 1936 Pesh. 97.**

——S. 115—*Revision—Competency— Suit of small cause nature.*

Where the decision of a suit involves the decision of legal inferences to be drawn from the established facts and the question is an important question of law, revision is competent even if the suit is of a small cause nature. (*Almond, J. C.*) SECRETARY OF STATE *v.* ATAULLAU KHAN. **163 I.C. 448=9 R. Pesh. 1=A.I.R. 1936 Pesh. 148.**

——S. 115—*Revision—Dismissal of objections under O 21, R. 58, C. P. Code—Interference.*

High Court will not, save in most exceptional cases, exercise its revisional jurisdiction in favour of a party to whom there is open another certain and conclusive remedy. Hence the High Court would not interfere in revision against the dismissal of objections of a party to attachment under O 21, R. 58, C. P. Code, as such party has a conclusive remedy by filing a suit under O 21, R. 63. (*Roberts, C. J. and Dunkley, J.*) T. K. ROY CHOWDHURY *v.* BIHARILAL. **177 I.C. 891=11 R.R. 181=A.I R. 1938 Rang. 319.**

——S. 115—*Revision—Expediency— Rejection of amendment.*

The mortgaged property had been erroneously described in the mortgage deed and the error therein had been repeated in the plaint, the preliminary decree, the final decree and in the execution application. Following upon the passing of the final decree, the plaintiffs applied to the Court for the amendment of the decrees, the plaint and the mortgage deed. This application was rejected. Subsequently a puisne mortgagee who claimed to be a transferee of the decree passed in favour of the plaintiffs made an application for amendment. The application being rejected, the applicant made an application under S. 115 against the order rejecting amendment.

Held, that in these circumstances it was not expedient that the High Court should interfere

C. P. CODE (1908), S. 115.

with the order of the lower Court in virtue of its powers under S. 115. (*Thom, C. J., Ganga Nath and Mohammad Ismail, JJ.*) GAURI SHANKER *v.* SHYAM SUNDER LAL. 176 I.C. 879 (1)=1938 A. L.J. 854=1938 A.L.R. 678=11 R.A. 152=1938 A.W.R. (H.C.) 460=A. I.R. 1938 All. 466 (F.B.).

——S. 115—*Revision—Grounds—New point not raised in Court below—If open as ground of interference.*

It is not the practice of the High Court to interfere in revision on a point, which has never been taken in the Court below (*Broomfield, J.*) SHRIPAD BAJI *v.* DATTATRAYA VITHAL. 183 I.C. 753=12 R.B. 128=41 Bom.L.R. 485=A.I.R. 1939 Bom 296.

——S. 115—*Revision—Interference — Finding on unrebutted oral evidence.*

Where a lower Court had come to the conclusion that a person is an agriculturist on the oral evidence of a plaintiff which was not rebutted on the other side by any evidence, the chief Court held that in the circumstances there was no reason to interfere with the findings of the lower Court. (*Zia-ul-Hasan, J.*) GOPAL DAS *v.* PUTTU LAL. 1939 O.A. 425.

——S. 115 and O. 9, R. 13—*Revision—Interference—Summons, duty served on defendant—Suit transferred at defendant's instance to another Court*—Ex parte *decree—District Judge in appeal restoring case to file on sufficient ground—Revision—Interference—Sufficient cause.*

In a suit the defendant was duly served. At his instance the suit was transferred to another Court. At the hearing the defendant not appearing, the suit was decreed *ex parte*. The defendant applied to set aside the *ex parte* on the ground that he had no notice of the date fixed for hearing in the transferee Court. The trial Court found he could not be excused for the gross negligence. In appeal the District Judge, finding sufficient ground for the appellant's non-attendance, restored the suit to file. In revision the plaintiff urged that the application to set aside *ex parte* decree was barred as the defendant was duly served.

Held, the circumstances of the case were peculiar and interference was not justified. The action of the trial Court bore a close analogy to proceeding *ex parte*. It was not unreasonable to treat the case as practically one of non-service of summons on the defendant. (*Macpherson, J.*) KAPILESWAR MAHARANA *v.* ABDUR RAHMAN. 164 I.C. 854=9 R P 142=A.I.R. 1936 Pat. 490.

——S. 115—*Revision—Interlocutory matter—Interference by High Court.*

The High Court would not ordinarily exercise its revisional jurisdiction in a purely interlocutory matter, namely, about the admission of a certain piece of evidence. It may however do so when the question is one of general importance and no objection is taken by the opposite party as to the competency of the Court to entertain the petition. But such case must not be regarded as a precedent for interference in purely interlocutory matters of procedure which do not affect jurisdiction, and do not inflict irreparable injury. (*Bose, J.*) BHAIYA SAHEB *v.* RAMNATH. I.L.R. 1940 Nag. 280=A.I.R. 1938 Nag. 358.

——S. 115—*Revision—Order granting review under inherent powers.*

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Where the Court discharges a defendant without his specifically asking for the same and without giving the plaintiff an opportunity to state his case and such order is set aside on review, the defendant has no right of revision from such order as the *status quo* is restored and his revision application is premature. (*Bose and Puranik, JJ.*) KARNIDAN HANSRAJ *v.* ASKARAN JHABAK. I,L.R. (1938) Nag. 395=172 I.C. 433 =10 R N. 208=A I.R. 1937 Nag. 385.

——S. 115—*Revision—Order returning plaint for presentation to proper Court—Appeal—Order rejecting—Revision.*

A plaint was returned for presentation to proper Court. Appeal against this order was dismissed by District Judge.

Held, a revision to the High Court was not competent. A.I.R. 1934 Lah. 536; A I.R. 1935 Pat. 191 and 11 Cal. 6 (P.C), Rel. on. (*Middleton, J. C.*) JAIMAL SINGH HARBANS SINGH *v.* KAMLA PARSHAD. 161 I.C. 355=8 R. Pesh. 172=A.I.R. 1936 Pesh. 78.

——S. 115—*Revision—Power of Board of Revenue under Oudh Rent Act.*

The Board of Revenue have no authority under S. 115 to call for the record of cases disposed of under the Oudh Rent Act and pass such orders thereon as it may think fit. [20 S. D. 1891; 1 R. D. (R. E.) 116, Foll] (*Darling, S. M. and Bomford, J. M.*) HARI NARAIN *v.* RAJ BAHADUR LAL. 1937 O.W.N. 1164=1937 R.D. 556.

——S. 115—Revision—Refusal to consolidate suits—Interference. *See* PRACTICE—CONSOLIDATION OF SUITS. 177 I.C. 799.

——S. 115—*Revision—Undue delay — Interference.*

Ordinarily the High Court does not entertain applications for revision made after undue delay. (*Niamatullah and Ismail, JJ.*) RAM SARAN DAS *v.* BANWARI LALL. I.L.R (1938) All. 148=173 I.C. 729=10 R.A 499=1938 A L.R. 171=1937 A L.J 1181=1937 A.W.R. 1116=A.I.R. 1938 All. 98.

Scope.

——S. 115—*Scope—Appeal expressly prohibited by law—Power to treat appeal as revision application—Question of law or construction of document or wrong decision—If sufficient ground.*

S 115, C. P. Code, was only intended to relate to questions of jurisdiction and not to questions of law or construction of document, or a wrong decision by a Judge. These are not matters affecting jurisdiction and cannot constitute sufficient grounds for treating an appeal as an application in revision, when an appeal is expressly prohibited by law. S. 115 is intended only to supplement the Code in relation to matters on which the Code is silent, and not to provide the parties with a right of second appeal. (*Davis, J. C. and Tyabji, J.*) KHANCHAND *v.* PESSUMAL. I.L.R. (1939) Kar 342=185 I C. 486=12 R. S. 165=A.I.R. 1939 Sind 360.

——S. 115—*Scope—Application under S. 32, Land Acquisition Act, for investment of money in purchase of lands—Dismissal—Applications for review and for opportunity to adduce fresh evidence—Rejection—Revision against latter orders —Competency—Proper Procedure.*

On an application made by the trustees of a Devaswom under S 32 of the Land Acquisition Act for the investment of moneys in deposit in

C. P. CODE (1908), S. 115.

the purchase of other lands for the Devaswom, the Court, acting on the report of the Collector who stated that the lands proposed to be purchased were insufficient for the amount in deposit, refused to make an order for the purchase and dismissed the application. The trustees then filed petitions for review of the order of dismissal and for an opportunity of adducing fresh evidence as to the sufficiency of the land. The Court holding that it was bound by the Collector's report declined to review the order and rejected the applications. Against that rejection the trustees applied to the High Court under S. 115, C. P. Code.

Held, that the revision applications against the latter orders were incompetent and that the proper procedure was to have the order dismissing the original application corrected by the High Court. (*Venkataramana Rao, J.*) NARAYANAN NAMBUDRI *v.* SUB-COLLECTOR AND LAND ACQUISITION OFFICER, MALAPURAM. **173 I.C. 502=10 R. M. 597=1937 M.W.N. 1167=46 L.W. 403=A.I. R. 1937 Mad. 948=(1937) 2 M L.J. 429.**

——**S. 115**—Scope—Case under S. 9, Specific Relief Act — Competency of revision. *See* SPECIFIC RELIEF ACT, S. 9. **1938 A.W.R. (H.C.) 588=1938 A L.J. 864.**

——**S. 115**—*Scope—Case under S. 9, Specific Relief Act—Revision—Interference.*

Although the High Court will not ordinarily interfere in revision in a case under S. 9, Specific Relief Act, where there has really been no trial of the case at all and the suit has been dismissed under a misapprehension of the scope of S. 9, the High Court will interfere in revision. (*Pollock, J.*) AJODHIYA PRASAD *v.* GHASIRAM. **173 I.C. 746=10 R.N. 324=20 N.L.J. 189=A.I.R. 1937 Nag. 326.**

——**S. 115**—Scope—Execution case—Order of dismissal for non-prosecution—Revision. *See* C. P. CODE, S. 2 (2). **A.I.R. 1936 Cal. 267.**

——**S. 115**—*Scope—High Court, when may interfere.*

Clause (*c*) of S. 115, C. P. Code, means that a High Court may interfere in a case where a Court subordinate to it has performed some action, even though while correctly exercising its jurisdiction, contrary to the law or in such a manner as to import a material irregularity into the proceedings. The High Court will not necessarily interfere in every case of illegality or irregularity and ordinarily it will make any order as it thinks fit only where the illegality or irregularity is serious or where material injustice has been caused thereby. (*Davis, J.C.S.*) GIRDHAR LAL *v.* BISHEN DEI. **1938 A.M.L.J. 115.**

——**S. 115**—*Scope—Decision on point of limitation—Revision.*

Even Cl. (*c*) cannot be invoked "when the question of jurisdiction is not involved" or at least a question of procedure, for example, proceeding in the absence of a necessary party to the suit. It must be something independent of the decision itself, an irregularity or illegality in the manner of arriving at it, not in the conclusion reached. A good working test is whether if the decision had been the other way, the illegality would still be there. If not, the flaw must lie in the decision, and not in the manner in which it is reached. Consequently it would not be revisable, and this test would not work in every case. But where it

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does, it could be decisive. The decision, whether on the question of limitation, or the character of the suit, or the starting point of limitation, is therefore not revisable under S. 115. (*Vivian Bose, J.*) DEVIDAS *v.* NILKANTHRAO. **I.L.R. (1936) Nag. 73=164 I.C. 848=9 R.N. 36=A.I.R. 1936 Nag. 157.**

——**S. 115**—*Scope—Interference—Principles—Award—Order refusing to set aside—Revision.*

Where the High Court is invited to exercise jurisdiction under S. 115, it will not deal with the case as if it is dealing with objections to a Commissioner's report or an appeal on facts in first or even in second appeal. Jurisdiction under S. 115 is not to be lightly exercised. It is an extraordinary jurisdiction and should be used only on appropriate occasions. The Court should not exercise its revisional jurisdiction in case of an application for setting aside an award in view of the principle of finality in cases of arbitration. 29 Cal. 167 (P.C.), Ref. (*Davis, J.C. and Lobo, A.J.C.*) HASSOMAL VILLAITRAI *v.* KISHINCHAND CHOTEMAL. **30 S.L.R. 271=166 I.C. 365=9 R. S. 142=A.I.R. 1936 Sind 172.**

——**S. 115**—Scope—Order amending decree under Ss. 151 and 152—Revision—Maintainability. *See* C. P. CODE, S. 2 (2). **41 Bom.L.R. 800.**

——**S. 115**—*Scope—Order filing award and directing decree to be drawn up after overruling objection on ground of want of leave under O. 32, R. 7, C. P. Code—Revision.*

Where a Court overrules objections raised against the validity of an award in arbitration on the ground that no leave of Court was obtained under O. 32, R. 7, C. P. Code, and directs a decree to be drawn up in terms of the award, dismissing an application to set aside the award under Sch. II, para. 15, its order is revisable by the High Court under S. 115, C. P. Code, provided it is shown that the Court below has exercised a jurisdiction not vested in it by law, or failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity. The order of reference to arbitration which has been made without the leave of the Court being expressly recorded is itself open to revision. (*Broomfield, J.*) SHRIPAD BAJI *v.* DATTATRAYA VITHAL. **183 I.C. 753=12 R.B. 128=41 Bom. L.R. 485=A.I.R. 1939 Bom. 296.**

——**S. 115**—*Scope—Order granting permission to withdraw suit with permission to file fresh suit under O. 23, R. 1—Interference.*

Where a Court gives leave to withdraw a suit with liberty to bring a fresh suit under O. 23, R. 1, C. P. Code, in a case in which it has no power to grant leave to file a fresh suit, it acts without jurisdiction. Where the Court does not at all purport to consider whether it has jurisdiction or not, and does not indicate any ground for granting permission and gives no finding that there was a defect in the plaint, the High Court can interfere in revision. (*Horwill, J.*) JAGADAMBAL *v.* SUNDARAMMAL. **1940 M.W.N. 806=(1940) 2 M.L.J. 398.**

——**S. 115**—*Scope—Order under S. 151—Revision—Power of High Court.*

An order passed under S. 151, C. P. Code, is capable of being revised by the High Court under S. 115, C. P. Code. (*Varma, J.*) RAGHUNANDAN

C. P. CODE (1908), S. 115.

LOHAR *v.* BACHU SINGH. 6 B.R. 397=186 I.C. 798=12 R.P. 531=A.I.R. 1940 Pat. 475.

Stay of suit.

——S. 115—*Stay of whole suit under S. 7 of Encumbered Estates Act—Plaint disclosing two sets of causes of action—Failure to order separate trial—Revision, if lies.*

Where the plaint disclosed two sets of causes of action, but the Court had ordered the stay of the suit in its entirety under S. 7 of the Encumbered Estates Act.

Held, that the Court had acted with material irregularity and also that it failed to exercise a jurisdiction which it undoubtedly possessed in ordering a separate trial of the two sets of causes of action and as such the High Court could interfere in revision under S. 115 of the C. P. Code. (*Niamatullah and Ismail, JJ.*) MUKAND SARUP *v.* KRISHNA CHANDRA SINGH. I.L.R. (1938) All. 153=173 I. C. 654=10 R.A. 488=1938 R D. 34 =1938 A L.R. 155=1937 A.L.J. 1139=1937 A. W.R. 1118=A.I.R. 1938 All. 86.

Subordinate Court.

——S. 115 — *Subordinate Court — Appellate officer appointed under S. 40 of Bengal Agricultural Debtors Act.*

There is no connecting authority under which an appellate officer appointed by the Local Government under S. 40 of the Bengal Agricultural Debtors Act may be said to be subordinate to the High Court. Consequently the jurisdiction of the High Court under S. 115, C. P. Code, cannot be invoked against his order. (*Nasim Ali and Edgley, JJ.*) MD. ABDULLA SHAH *v.* GIRDHARI LAL MUNDA. 176 I.C. 616=11 R.C. 138=68 C. L.J. 407=42 C.W.N. 507=A.I.R. 1938 Cal. 448 (1).

——S. 115—Subordinate Court—Assistant Collector of second class—Powers of Chief Court. *See* OUDH RENT ACT, S. 116. 163 I.C. 930.

——S. 115—*"Subordinate Court"—Chief Judge of Small Causes Court deciding appeal under S. 217 of the City of Bombay Municipal Act—If Court subordinate to High Court — Revision—Competency.*

The Chief Judge of the Bombay Small Causes Court acting under S. 217 of the City of Bombay Municipal Act acts as a *persona designata*, and not as a Court hearing an appeal, and hence an application for revision under S. 115, C. P. Code, against his decision is not competent. (*Macklin and Lokur, JJ.*) MULJI SICKA & Co. *v.* MUNICIPAL COMMISSIONER OF BOMBAY. 187 I.C. 8=12 R.B. 395=3 Fed. L.J. 61 (H.C.)=41 Bom. L.R. 984=A.I.R. 1939 Bom. 471.

——S. 115—Subordinate Court — Collector under S. 18, Land Acquisition Act. *See* LAND ACQUISITION ACT, S. 18. A.I.R. 1940 Lah. 299.

——S. 115—Subordinate Court—Commissioner appointed under Workmen's Compensation Act. *See* WORKMEN'S COMPENSATION ACT, S. 23. A.I. R. 1938 Lah. 855.

——S. 115—*Subordinate Court—District Judge acting under R. 62 (1) of Burma Municipal Rules —Transfer by him of case without jurisdiction—Interference.*

No doubt whatever a District Judge does within the exercise of his powers as a *persona designata* cannot be questioned by the High Court in revision but he must not go beyond the limits of these powers as laid down. Where on a petition

C. P. CODE (1908), S. 115.

being filed before him as a *persona designata* under R. 62 (1) of the Burma Municipal Rules by an unsuccessful candidate at an election in the municipality, the District Judge transfers the case in contravention of R. 62 (1)(*a*) to the Additional District Judge, who is not subordinate to him but is co-ordinate with him, for being heard and disposed of, whatever the Additional District Judge does in that behalf, if it were a ministerial action, can only be regarded as nullity and the High Court is entitled to interfere in revision, inasmuch as it has before it what purports to be an order passed without jurisdiction of a Court subordinate to the High Court in a case within the meaning of S. 115, C P. Code. The absence of jurisdiction would be the want of power to transfer the case to the Additional District Judge. (*Roberts, C.J. and Mosely, J.*) HABIB SAHIB *v.* SHEIK BUDHOO. 180 I.C. 931=11 R.R. 445=A.I. R. 1939 Rang. 143 (S.B).

——S. 115—*Subordinate Court — District Magistrate acting under special Act.*

Obiter.—A District Magistrate when normally functioning as a Court exercises jurisdiction in criminal matters and not in civil matters. When therefore some new function is imposed upon him by some special Act, although he acts as a Court and not as an individual, that Court is not subject to the civil jurisdiction of the High Court within the contemplation of S. 115, C. P Code. (*Costello, Ag.C.J. and Edgley, J.*) SACHINDRA NATH DAS *v.* SURYA KANTA MISRA. 176 I.C. 515 =11 R.C. 114=42 C.W.N. 54=A.I.R. 1937 Cal. 720.

——S. 115—*"Subordinate Court"—Judge or presiding officer of Court exercising functions but as distinguished from Court itself—If "Court" or* persona designata.

It is clear that where a Judge or presiding officer of a Court, as distinguished from the Court itself, is performing any function as vested in him, such a Judge may be considered as a *persona designata*, and cannot be regarded as a Civil "Court subordinate" to the High Court, within the meaning of S. 115, C. P. Code. In considering whether the Judge acts as a Court or as a *persona designata*, the important point to be investigated is what is the source of his authority. The nature of the proceedings and the action taken therein may also be relevant and may be considered. (*Wassoodew, J.*) BABURAO *v.* HARIHARRAO. 183 I.C. 556=12 R.B. 113=41 Bom.L.R. 490=A.I.R. 1939 Bom. 279.

——S. 115—*Subordinate Court—Land Acquisition Collector—Land Acquisition Act, S. 18.*

A Land Acquisition Collector, assuming that he is a Court while dealing with applications under S. 18 of the Land Acquisition Act, is not a Court subordinate to the High Court, and the High Court has, therefore, no jurisdiction to interfere with his order under that section in revision under S. 115, C. P. Code. (*Bartley and Nasim Ali, JJ.*) GOPINATH SHAH *v.* FIRST LAND ACQUISITION COLLECTOR, CALCUTTA. 177 I.C. 866 =11 R.C. 284=42 C.W.N. 212=A.I.R. 1938 Cal. 250.

——S 115—*Subordinate Court—Land Acquisition Deputy Collector—Order refusing to make reference to Civil Court under S. 18, Land Acquisition Act—Interference by High Court—Jurisdiction.*

C. P. CODE (1908), S. 115.

The High Court has no jurisdiction under S. 115, C. P. Code, to revise an order passed by the Land Acquisition Deputy Collector refusing to refer an objection to an award under the Land Acquisition Act for determination by the Civil Court. Even assuming that the Collector acts judicially in making or declining to make a reference under S. 18 of the Land Acquisition Act, he cannot be regarded as necessarily a Court. Even if he is a Court, it is clear that he is not a Court subordinate to the High Court under S. 115, C. P. Code. The mere fact that the Deputy Collector might have been acting judicially gives the High Court no right whatsoever to interfere with his order under S. 115. Nor would the fact that the aggrieved party may have no remedy unless revision lies be a ground for holding that the High Court can interfere in its revisional jurisdiction. (*Harries, C.J., Dhavle and Manohar Lall, JJ.*) JAGARNATH LALL *v.* LAND ACQUISITION DEPUTY COLLECTOR. PATNA. **19 Pat. 321=186 I.C. 560=12 R P. 514=21 Pat L.T. 29=6 B R. 373=1940 P.W.N. 9=A.I.R. 1940 Pat. 102 (F.B.).**

——**S. 115**—*"Subordinate Court"—Meaning of.*

For the purposes of S. 115, C. P. Code, a Court subordinate to a High Court is one over which the High Court has appellate jurisdiction. (*King, C.J. and Nanavutty, J.*) HAR NARAIN SETHI *v.* BIRD & Co. **12 Luck. 19=8 R.O. 240=1936 O. L.R. 35=160 I.C. 36=1936 O.W.N. 116=A.I.R. 1936 Oudh 132.**

——**S. 115**—*Subordinate Court — Order by Sessions Judge under S.* 111, *Bombay Municipal Boroughs Act—Revision to High Court—Competency—Interference—Grounds.*

A Sessions Judge acting under S. 111 of the Bombay Municipal Boroughs Act in revision from a decision of the Magistrate under S. 110 of that Act, is a Court subordinate to the High Court within the meaning of S. 115, C. P. Code, and a revision application would therefore lie to the High Court under S. 115, against an order passed by the Sessions Judge under S. 111 of the Municipal Boroughs Act; but such an application being a second application in revision, the High Court would not interfere unless it appears that there has been some grave abuse of its power by the Sessions Court, or the decision is manifestly erroneous or unjust. (*Norman, J.*) SURAT BOROUGH MUNICIPALITY *v.* HAMIDUDDIN. **175 I.C. 891=11 R.B. 6=40 Bom.L.R. 387=A.I.R. 1938 Bom. 301.**

——**S. 115**—Subordinate Court—Order of Revenue Officer—Revision. *See* B. T. ACT, S. 26-G (6). **44 C.W.N. 191.**

——**S. 115**—*Subordinate Court—Revenue Court—Orders of—If revisable by Chief Court.*

As no Court of revenue can be said to be subordinate to the chief Court, in a matter in which no appeal lies to that Court, an order passed by an Assistant Collector is not revisable by the Chief Court under S. 115, C. P. Code. (*Zia-ul-Hasan, J.*) RIYASAT RAM NAGAR *v.* SOEMBER SINGH. **181 I.C. 58=1939 O.W.N. 412=1939 R.D. 258=11 R O 278=1939 A W.R. (C.C.) 77 =1939 O.L.R. 239=1939 O.A. 386=A.I.R. 1939 Oudh 177.**

——**S. 115**—*"Subordinate Court" — Sessions Judge—Order under S.* 111, *Bombay Municipal Boroughs Act in revision from Magistrate's order under S.* 110—*Jurisdiction of High Court to entertain.*

The High Court has jurisdiction under S. 115, C. P. Code, in a proper case to entertain an application in revision against an order in revision passed by the Sessions Judge under S. 111 of the Bombay Municipal Boroughs Act against an order of a Magistrate under S. 110 of that Act, but such applications should be very sparingly entertained. (*Beaumont, C.J. and Wadia, J.*) LOKMANYA MILLS, LTD. *v.* MUNICIPAL BOROUGH OF BARSI. **I.L.R. (1939) Bom. 571=185 I C. 519=12 R.B. 247=41 Bom.L.R. 937=A.I.R. 1939 Bom. 477.**

C. P. CODE (1908), S. 116.

——**S. 115**—*Technical defect—Interference—Order granting permission to sue in* forma pauperis.

The High Court will not be justified in interfering in revision with an order granting permission to the plaintiff to sue in *forma pauperis* on the ground that the power of attorney granted by the plaintiff to the Mukhtar who filed the application was technically defective, when the plaintiff has been in fact found to be a pauper. (*Bhide, J.*) DWARKA DAS *v.* BIBI NAND RANI. **42 P.L.R. 227.**

——**Ss. 115 and 151**—*United Provinces Encumbered Estates Act—Agreement as to the forum for settlement of disputes—Suit as per agreement —Special Judge if can restrain party by injunction from proceeding with.*

Where the parties to a mortgage transaction agree that in case of disputes, suit should be instituted only at Bombay, there is nothing in the agreement which is forbidden by the United Provinces Encumbered Estates Act. When such a suit is filed and the other party applies under the United Provinces Encumbered Estates Act and obtains from the Special Judge an order restraining the opposite party from proceeding with his suit at Bombay, the order of the Special Judge is not in consonance with the spirit of S. 151, C.P. Code, under which he has purported to act and as such is revisable by the High Court under S. 115, C. P. Code. No Court has unrestricted jurisdiction under S. 151, C. P. Code. (*Thom, C.J. and Ganga Nath, J.*) GOVIND RAM GORDHANDASS *v.* MAJOR A. U. JOHN. **185 I.C. 791=12 R.A 353=1939 A.W.R. (H.C.) 489=1939 R D. 372=1939 A.L.J. 675=A.I.R. 1939 All. 668.**

——**S. 115 (c)**—*Court-fee — Decision as to court-fee but affecting jurisdiction—Revision—Interference—Power of High Court.*

The High Court, no doubt, generally does not interfere with a decision in a matter of court-fee which is favourable to the plaintiff, when there is only a simple question involved as to how much court-fee the plaintiff shall pay. But where a question of jurisdiction is raised and that expressly depends on a decision as to proper court-fee, the High Court can and will interfere in revision to prevent the trial of a case by a Court which has no jurisdiction, when an appellate Court has wrongly directed that Court to assume a jurisdiction which it has not got. (*Wadsworth, J.*) SYED SABJUMIAH HUSAIN *v.* KALAYIGAR ABDUL VAHAB SAB. **1940 M.W.N. 817=52 L.W. 146=(1940) 2 M.L.J. 176.**

——**S. 116**—Interlocutory order—Order refusing commission to examine witness under O. 26,

C. P. CODE (1908), S. 129.

R. 5—Interference. *See* C. P. CODE, O. 26, RR. 4 AND 5. (1938) 1 M.L.J. 769.

——S. 129—*Bombay High Court Rules, R. 874—Payment order in favour of solicitor—Executability as decree.*

S. 129, C. P. Code, expressly authorizes the Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. A payment order under R. 874 in favour of a solicitor when validly made can be executed as a decree. (*Jai Lal, J.*) SHIV DIAL BAKTAWAR LAL *v.* KANGA & CO. 162 I.C. 489=8 R.L. 908=38 P.L.R. 1101=A.I.R. 1936 Lah. 369.

——S. 135 (2)—*Scope and object of—Reasonable time — Wide interpretation of section if justified.*

The plain interpretation of S. 135 (2) of C. P. Code is that the exemption from arrest under civil process is limited in point of time taken by a party, witness, etc., in going to or attending or in returning from the tribunal mentioned in the clause. As to what is a reasonable time, it is a question of fact and must depend on the circumstances of each case. S. 135 has been enacted in public interest with a view to ensure smooth and speedy administration of justice and so cannot be given a wide interpretation to help a judgment-debtor who has deliberately managed to avoid execution of the decree. (*Iqbal Ahmad and Harries, JJ.*) ACHUTA NAND *v.* MAHABIR PRASAD. 175 I.C. 781=11 R.A 24=1938 A.L.R. 521 =1938 A.W.R. (H.C.) 317=1938 A.L.J. 500= A.I.R. 1938 All. 356.

——S. 136—*Issue of order of attachment to Court other than District Court—Legality.*

Under S. 136, C. P. Code, the order of attachment is to be sent to the District Court within the local limits of whose jurisdiction the property is situate. No District Court or a Court with the powers of a District Court under the Civil Procedure Code has been established in the Shan States to which the order of attachment before judgment in question can be sent. Where therefore the Court of Mandalay sent an order of attachment before judgment to the Court of Assistant Superintendent at Kalaw.

Held, that such Court was not a District Court and hence the issue of order was wrong. (*Mosely, J.*) DESRAJ CHANAN LAL *v.* RAMJASHAR MADANCHAND. 171 I.C. 806=1937 Rang L.R. 249=10 R.R. 190=A.I.R. 1937 Rang. 367.

——S. 136—*Scope—Warrant of arrest endorsed not to District Court but to Munsif of District where it is to be executed—Propriety—Arrest in pursuance of—Legality—Escape from custody of arresting officer—Offence—Penal Code, S. 225-B.*

When a Court exercises the extraordinary powers conferred on it by S. 136 (1), C. P. Code, the provisions of that section must be strictly observed; the warrant of arrest must be endorsed to the District Court outside the jurisdiction of the issuing Court, in which the warrant is to be executed. If such a warrant is endorsed not to the District Judge, but to a Munsif in that District, it is defective warrant, and the persons arrested in execution of such a warrant cannot be treated as being in lawful custody for purposes of S. 225-B, I. P. Code. If the arrested person escapes from custody, he cannot be convicted under the section. (*James and Madan, JJ.*) BANSROPAN SINGH *v.* EMPEROR. 171 I.C. 894=10 R P. 258=4 B.R. 85=39 Cr.L.J. 2=18 Pat.L.T. 760=A.I R. 1937 Pat. 603

C. P. CODE (1908), S. 144

——S. 141—*Applicability—Execution proceedings—Sch. II—Application of.*

S. 141, C.P. Code, does not apply to applications for execution of a decree which are proceedings in the suit. It applies only to original matters in the nature of suits, such as proceedings in probate, guardianship and so forth, S. 141 cannot therefore be invoked to make Sch. II of the Code applicable to execution proceedings. (*Rangnekar, J.*) NARAYAN RAMCHANDRA *v.* DHONDIBA TUKARAM. I.L.R. (1937) Bom. 144=167 I.C. 750=9 R.B. 338=38 Bom.L.R. 1303=A.I.R. 1937 Bom. 111.

——S. 141—Scope—Execution proceedings—Application by transferee of decree to be brought on record as transferee-decree-holder—If proceeding in suit or original proceeding. *See* C. P. CODE, O 26, R. 4. 49 L.W. 549.

——S. 144.

Appeal.
Applicability.
Application for.
Award of interest.
Consequential claims.
Construction.
Costs.
Court-fee.
Decree passed by Court.
Inherent powers of Court.
Jurisdiction.
Limitation.
Mesne profits.
Order under.
Pre-emption suit.
Principle of restitution.
Refund.
Restitution.
Right to apply.
Scope.
Stranger.

Appeal.

——S. 144—*Appeal — Application under on Original Side of High Court—Long delay—Order thereon—Appealability.*

A application on the Original Side of the High Court under S. 144, C. P. Code, for restitution in execution proceedings made long after the suit has been determined and the rights of the parties fully settled by a final judgment is not an application in a suit at all nor is the order made on it a judgment. It is not a final judgment, such a judgment having been already delivered; it cannot be said to be either preliminary or interlocutory judgment. It is merely an order and not a judgment under the Letters Patent and is not appealable. Even if the order be regarded as a decree, there would be no right of appeal, the matter being governed by the Letters Patent and not by C. P. Code. (*Roberts, C.J. and Braund, J.*) VISUVASAM *v.* NADAR MAHAJANA CO-OPERATIVE CREDIT SOCIETY, LTD. 178 I.C. 562=11 R.R. 246=A.I.R. 1938 Rang. 446.

——S 144—Appeal—Order not strictly coming under S. 144, passed under S. 151—If appealable. *See* C. P. CODE, Ss. 151 AND 144. 1939 O.W.N. 765.

Applicability.

——S. 144—*Applicability—Decree affected by a subsequent decree passed in another suit.*

C. P. CODE (1908), S. 144.

S. 144, C. P. Code, applies where a decree has been reversed or varied upon appeal, revision or by a review. Where the consequence of a decree has been affected by a subsequent decree passed in another suit, there is no variation or reversal of the earlier decree within the meaning of this section, and it has, therefore, no application. (*Harries, J.*) BHAWANI SHANKAR *v.* MAHMUD ALI. 168 I.C. 148=1937 A.L.J. 34=9 R.A. 620=1937 A.L.R. 301=1937 A.W.R. 34=A.I.R. 1937 All. 232.

——S. 144—*Applicability—Decree for possession of estate—Reversal on appeal—Execution—Subsequent restoration of decree of original Court on appeal to Privy Council—Right to restitution—Extent of right—Trial Court refusing to pass decree for future mesne profits—If bars claim to future mesne profits by way of restitution.*

The plaintiff sued to recover an estate as the son of the last holder and got a decree in the trial Court. His claim for mesne profits for the period before and after suit till date of delivery was, however, disallowed on the ground that no issues were framed on the point and that the question as to mesne profits must be deemed to have been given up. Both parties appealed to the High Court, and pending the appeal a receiver was appointed and he took possession. The original defendant having died, his widow was brought on the record and carried the appeal. The High Court allowed the defendant's appeal and dismissed the plaintiff's suit. Pending an appeal against this decision to the Privy Council the defendant (widow) was handed over possession on furnishing security. Plaintiff's appeal to the Privy Council succeeded and the trial Court's judgment was restored. Plaintiff executed the decree and obtained possession of the estate. He then applied for restitution, impleading as parties to the application, the widow (defendant) and the sureties who had executed the security bonds in the High Court. The plaintiff claimed (1) the restoration of the amounts drawn as allowances by the widow during the litigation. (2) restoration of the amounts wrongly appropriated by the defendant while in possession, (3) return of records and the accounts from the receiver, and (4) for recovery from the sureties the amounts covered by their security bonds. Prayers 1 and 3 were not pressed. It was pleaded that S. 144, C. P. Code, did not apply, and that in any case no order for restitution could be made against the sureties.

Held, by *Wadsworth, J.*, on difference of opinion between *Burn and Stodart, JJ.*, (*i*) that S. 144, C. P. Code, applied in terms and that the plaintiff was entitled to claim restitution of any profits realised by the defendant's legal representative (widow) which could be called properly consequential upon the wrong decree unless she was entitled to resist the claim either by showing that she had a superior claim to those profits or by showing that the plaintiff's claim was barred by reason of the failure to establish his right to future profits in the trial Court; (*ii*) that the correct procedure was to take the position as stood immediately before the wrong decree and to award to the successful party restitution in the shape of any profits wrongfully received under the erroneous decree or as a direct consequence thereof; (*iii*) that it was impossible to hold on the facts of the case that the widow would be entitled to appropriate the whole of the amounts due to her for arrears of and future maintenance on the basis of the provisional orders passed pending appeal to the High Court, that those orders came to an end on the termination of that appeal and the plaintiff was therefore entitled to restitution on that basis, and on the basis of the position immediately before the wrong decree; (*iv*) that there was no bar to the plaintiff's claim by reason of his failure to get a decree for future profits before the trial Court. The High Court having passed an erroneous decree as a result of which the receiver was dispossessed and the widow was put in possession, the profits which accrued due to her as a result of this erroneous decree were not profits which could have been claimed in the original suit. (*Wadsworth, J., on a difference of opinion between Burn and Stodart, JJ.*) ZAMINDAR OF SANNOKHEMIDI *v.* SUSI IAMALA PATTA MAHADEVI. 1940 M.W.N. 723=52 L.W. 214=(1940) 2 M.L.J. 47.

C. P. CODE (1908), S. 144.

——Ss. 144 and 151—*Applicability—Execution sale—Purchase money paid to decree-holder—Subsequent decree holding title to property in third person—Refund of money to purchaser—Order for restitution—Appeal—If falls under S. 144.*

S. 144, C. P. Code, is confined to cases in which the decree of a trial Court has been varied or reversed by some superior Court or by reason of some order passed by a superior Court. In other cases the order for restitution would come under S. 151, and is not appealable unlike an order under S. 144. After an execution sale was confirmed and the money deposited by the purchaser paid out to the decree-holder, a third party brought a suit and got a decree establishing his title to the property sold in execution. The auction purchaser applied to the Court to get back his money, and the Court passed an order allowing him to recover the amount which the decree-holder had drawn out. An appeal was preferred against this order, and the appellate Court reversed it.

Held, (1) that the order of the first Court for restitution was one passed under S. 151, C. P. Code, in the exercise of inherent powers and was not appealable, and the order of the appellate Court setting aside that order was without jurisdiction, the remedy of the decree-holder if aggrieved, being by way of revision in the High Court; (2) that though the order of the first Court was unsustainable as it stood, for the reason that the execution sale not having been set aside, the purchaser had no independent right to obtain a refund, the petitioner should not be penalised for the mistake, and that it was a case for allowing such an amendment to be made as would enable the matters in controversy to be properly heard and decided; and (3) that the order of the appellate Courts should in the interests of justice be set aside and the purchaser should be allowed to amend his application for refund by adding a prayer for setting aside the sale and adding facts relied on for avoiding the bar of limitation. (*Rowland, J.*) RAMESHAWAR LAL JHUNJHUNWALA *v.* RAMCHARAN PRASAD SAHU. 178 I.C. 41=11 B.P. 204=5 B.R. 49=

C. P. CODE (1908), S. 144.

1938 P.W.N. 313=19 Pat.L.T. 111=A.I.R. 1938 Pat. 447.

——Ss. 144 and 151—*Applicability*—Ex parte *decree for arrears of rent against tenant—Ejectment in execution—Subsequent setting aside of* ex parte *decree—Application for restitution and restoration of possession—Competency—Suit under S.* 108 (10), *Oudh Rent Act.*

S. 144, C. P. Code, only applies when the original order has been reversed by a superior Court in appeal, revision or reference. A tenant who has been ejected in execution of an *ex parte* decree for arrears of rent, but who gets the *ex parte* decree set aside and files a suit under S. 108 (10) of the Oudh Rent Act cannot invoke S. 144, C. P. Code, for restoration of possession. Nor will the Board of Revenue interfere under S. 151, C. P. Code, because S. 108 (10) provides an adequate remedy for the tenant. (*Bomford, J.M.*) PHULBASA *v.* MURLIDHAR. **1936 R.D. 563.**

——S. 144—*Applicability—Liability to restore.*

In a suit for possession of certain property, *A*, the plaintiff, got a decree against *B* and his usufructuary mortgagees. That decree being reversed on appeal *B* was given possession instead of mortgagees. The mortgagees in execution petition filed by them claimed from *B* the property by way of restitution.

Held, that it was *A* who obtained possession under the wrong decree and not *B* who was given possession not under the reversed lower Court's decree, but under the reversing appellate Court's decree, that the mortgagees misconceived their remedy and *B* was not bound to restore property. (*Venkatasubba Rao and Cornish, JJ.*) ANANTHARAM SINGH *v.* THARA CHAND. **164 I.C. 379=9 R.M. 111=1936 M.W.N. 973=44 L.W. 265=A.I.R. 1936 Mad. 634.**

——S. 144—*Applicability—Mortgage suit*—Ex parte *decree—Subsequent setting aside and retrial ending in new decree—Execution taken out by mortgagee decree-holder prior to re-trial—Sale—New decree awarding amount less than that realised by decree-holder by sale—Restitution—Right to—Application by mortgagee defendant—Limitation—Limitation Act, Art.* 182 (7).

Where an *ex parte* decree in a mortgage suit is set aside and a fresh trial is ordered, there is, strictly speaking, no variation or reversal of the decree that has been set aside. The decree made on re-trial is a new decree, and when the new decree declares that the plaintiff is only entitled to an amount less than what he has actually realised by a sale of the mortgaged property under the prior *ex parte* decree which has been set aside, he is in equity bound to restore the excess to the defendant. Though S. 144, C. P. Code, may not strictly apply to the case, on the equitable principle underlying S. 144 and in pursuance of the inherent power of the Court, an order for restitution can be made by the Court. An application for restitution is in reality an application for execution of a decree to which Art. 182 and not Art. 181 of the Limitation Act is the appropriate article. When the new decree as in the case of a mortgage decree, fixes a date for payment of the amount declared due, the application for restitution is governed by Cl. (7) of Art. 182 of the Limitation Act; and limitation for an application for restitution begins to run not from the date when the *ex parte* decree is set aside, but from the date fixed for payment in the new decree passed after re-trial. (*Cornish, J.*) KANDASAMI MUDALI *v.* ANNAMALAI REDDI. **167 I.C. 258=9 R.M. 438=1936 M.W.N. 1119=44 L.W. 798=A.I.R. 1937 Mad. 150=71 M.L.J. 795.**

——S. 144—Applicability—Order confirming sale set aside—Application by auction-purchaser for compensation for improvements. *See* C. P. CODE, Ss. 151, 144 AND 47. **A.I.R. 1940 Lah. 59.**

——S. 144—*Applicability—Order on appeal setting aside sale of judgment-debtor's property.*

An order passed on appeal setting aside the sale of a judgment-debtor's property is a decree and S. 144 is wide enough to cover such order. (*Jai Lal, J.*) TELU *v.* RAJA RAM. **177 I.C. 430=11 R.L. 322=40 P.L.R. 692=A.I.R. 1938 Lah. 456.**

——S. 144—Applicability—Order under O. 21, R. 93—If falls under—Appeal—Competency. *See* C.P. CODE, S. 2 (2). **42 Bom.L.R. 367.**

——S. 144—*Applicability—Party taking possession of property unlawfully in pursuance of injunction order—No delivery through Court—Application for restitution—If barred—Proper remedy—Suit.*

No application for restitution can properly lie where a party, taking advantage of an order of injunction, unlawfully takes possession of properties to which he is not entitled. The proper remedy of the persons aggrieved by such unlawful act is by way of suit and not by way of restitution. No question of restitution arises when there has been no delivery of property through Court. (*Venkataramana Row, J.*) GOVINDA CHETTIAR *v.* MUNISWAMI CHETTIAR. **1937 M.W.N. 409=45 L.W. 398=168 I.C. 926=9 R.M. 59=A.I.R. 1937 Mad. 315.**

——S. 144—*Applicability—Pauper suit—Order on defendant to pay court-fees to Government—Reversal on appeal—Restitution—Award of interest—Power of Court—S.* 151—*Discretion to refuse interest.*

Money paid by a defendant in a pauper suit as court-fees due to Government under an order of Court which is reversed on appeal is not money liable to be dealt with by way of restitution under S. 144 of the C. P. Code, and therefore no interest can be awarded on such amount under S. 144, S. 151 will, however, apply to such a case; but that section being discretionary the Court may refuse to award interest in view of the particular circumstances of the case. (*Mockett and Lakshmana Rao, JJ.*) MAHALAKSHMAMMA *v.* RAMAYYA. **44 L.W. 873=168 I.C. 717=9 R.M. 627 (1)=A.I.R. 1937 Mad. 178=(1937) 1 M.L.J. 21.**

——S. 144—*Applicability — Payment under O.* 21, *R.* 89 *to set aside Court sale—Subsequent reversal of decree on appeal or setting aside of decree in suit brought for the purpose—Claim for restitution by refund of amount paid—Maintainability—Contract Act, S.* 72.

If a judgment-debtor or any other person bound by a decree makes a deposit under O. 21, R. 89, C. P. Code, to have a sale of his property held in execution set aside, it cannot be held that his claim for restitution made either under S. 144, C. P. Code, or under the general law, after the decree has been reversed in appeal or set aside in a suit brought for the purpose is unsustainable. There can be no pretence for saying that the payment made by him was voluntary. It would be a

C. P. CODE (1908), S. 144.

clear case for awarding relief to him under S. 72 of the Contract Act. (*Patanjali Sastri, J.*) RAMAN ADIYOTY *v.* KANNAN NAMBIAR. 1940 M. W.N. 657=52 L.W. 226=A.I.R. 1940 Mad. 725 =(1940) 1 M.L.J. 340.

——S. 144—*Applicability—Property of* takia *handed over by Court to a certain person—Objection by F who claimed it as Mutwalli overruled—F subsequently obtaining decree declaring him as Mutwalli—Remedy by way of restitution.*

In a dispute about *takia*, a person was declared to be a Sajjadanashin and another a Mutwalli. They were allowed to take over the property of the *takia* and give security for the same till the decision of an appeal from the order declaring them to be Mutwalli and Sajjadanashin. The Mutwalli took charge of some of the property and died. The Court allowed the Sajjadanashin to take over the remaining property in spite of the objections of one *F* who claimed to have been appointed as a Mutwalli. Afterwards this *F* obtained a decree declaring him to be a Mutwalli, and made an application under S. 144, C.P. Code, for restitution to him of the property of the *takia*.

Held, that a declaratory decree to the effect that a person is a Mutwalli was incapable of execution and that a Mutwalli entitled to get the property under a declaratory decree could not have his remedy under S. 144, C. P. Code. (*Bhide, J.*) FATEH MAHOMED *v.* SARDAR ALI SHAH. 161 I.C. 444=8 R.L. 752=A.I R. 1936 Lah. 48.

——S. 144—*Applicability—Right to apply under —Conditions of—Decree—Setting aside in a different suit not between same parties—Restitution—Application for—Competency.*

In order to entitle a party to apply under S. 144, C. P. Code, he has to show that there was a decree in consequence of which some party to the record had obtained a benefit to the detriment of the applicant; and, secondly, that that decree having been varied or reversed, the applicant is entitled to be restored to the position in which he would have been but for the decree which ultimately has been declared to be erroneous. It is also clear that the reversal or variation must be in the same proceedings between the parties,—it may be as the result of a successful appeal or an application for review or in any other manner provided by the Code—and it is also clear that the decree must be between the same parties and the reversal or modification must be in favour of the applicant or some one claiming under him. If in some other suit not connected with the suit in which the application for restitution is made, the decree under which a party has been deprived of property or other benefit is set aside, the section cannot apply. If a decree is set aside by a decree in a different suit between some of the parties to the former decree and strangers, an application for restitution under S. 144 will not lie. (*Rangnekar, J.*) SHIVAPPA DHONDAPPA *v.* RAMLINGAPPA. 39 Bom.L R. 112=168 I.C. 810=9 R. B. 401=A.I.R. 1937 Bom. 173.

——S. 144—*Applicability—Sale set aside after confirmation—Application by judgment-debtor for mesne profits.*

S. 144 contemplates restitution, where, and in so far as, a decree has been varied or reversed. An order of the executing Court confirming a sale which is afterwards set aside does not amount to a decree and therefore the application

C. P. CODE (1908), S. 144.

for mesne profits payable in consequence of that order cannot be made under S. 144. (*Tek Chand and Abdul Rashid, JJ.*) GANESH DATTA *v.* MODEL TOWN SOCIETY. 185 I.C. 125=12 R.L. 268=A.I. R. 1939 Lah. 508.

——S. 144—*Applicability—Specific performance refused in trial Court but decreed on appeal—Execution for costs in the meanwhile—Delay in execution of sale deed owing to defendant's objections—Compensation for if can be obtained by application under S.* 144—*Proper remedy—Refund of costs recovered— Limitation—Suspension — Rule as to.*

Pending an appeal against the dismissal of a suit for specific performance, one of the defendants realised by execution the costs awarded to him. The appellate Court decreed specific performance and directed the necessary deposits within a specified time and also decreed costs only in case the deposit was made in time. The deposit was so made but owing to the objections of the defendants which were upheld by the lower Court but which were ultimately rejected by the appellate Court the execution of the sale deed was considerably delayed. The plaintiff applied under S. 144, C. P. Code, not only for the refund of the costs recovered from him, but also for compensation for the loss occasioned by the delayed execution of the sale deed. It was held that the use of the words 'damages, compensation and mesne profits' in S. 144, C. P. Code, indicated that the possession obtained under an erroneous decree subsequently reversed is wrongful possession and hence on a reversal of the decree the judgment-debtor would be entitled not only to possession but also to mesne profits during the period he was kept out of possession, but that as the suit was for specific performance of a contract to sell which did not by itself create any interest in the property and the decree only entitled the decree-holder to the execution of a sale deed, S. 144 had no application. Further, any loss that might have been suffered by the plaintiff owing to the delay caused by the defendant's objections in the matter of the execution of the sale deed, could not be said to be 'properly consequential' on the reversal of the decree; it would be a remote and indirect loss which was outside the scope of S. 144, C. P. Code. The remedy of the decree-holder if any was by way of suit and not by way of restitution under S. 144. That as regards the refund of costs recovered, the period during which the objections of the defendants were being agitated should be deducted in computing the period of limitation on the general principles of suspension of limitation applicable to cases where a party is prevented under certain circumstances from taking action in pursuance of his rights. (*Harries and Misra, JJ.*) BADRUDDIN KHAN *v.* MAHYAR KHAN. I.L.R. (1939) All. 103 =180 I.C. 633=11 R.A. 491=1939 A.W.R. (H. C.) 87=1938 A.L.J. 1189=A.I.R. 1939 All. 66.

——S. 144—*Applicability—Sureties.*

S. 144 was not intended to apply to sureties but only to the parties to the suit or their representatives. The surety only undertakes to return the property, namely, the material object and not the liability for safeguarding the rights of the owner in respect of the property. If any loss is caused to the owner by reason of the property not being returned in the condition in which it was

C. P. CODE (1908), S. 144.

when it was taken, or if for any other reason the owner suffers damages, that has nothing to do with the execution of the decree as such. (*Stone, C.J. and Niyogi, J.*) SYED FAKIR SYED HUSSAIN *v.* ABDUL SAMAD KHAN. **I.L.R. (1938) Nag. 354 =10 R.N. 285=173 I.C. 155=A.I.R. 1938 Nag. 101.**

——**S. 144**—Applicability—Tenants ejected in proceedings under S. 79, Agra Tenancy Act—Order of ejectment cancelled—Subsequent restoration of ejected tenants to possession. *See* AGRA TENANCY ACT, SCH. IV, GROUP F, SERIAL No. 5. **1937 R.D. 509.**

Application for.

——**S. 144**—*Application for—Order to file in record-room—Effect — Restitution application—Nature of—Course of proceedings—Applicability of Limitation Act.*

Where on receipt of an order from the High Court staying all proceedings with reference to an application for restitution, the lower Court merely directed that it should be filed for the present in the record room, it is merely an administrative order and not a judicial one. It is in no sense a final disposal of the case. An application under S. 144, C. P. Code, is a miscellaneous case and once initiated that miscellaneous case does not give rise to any application of the Limitation Act during the course of its disposal. As long as that remains pending, there is no question of the application of the Limitation Act to its proceeding. Attention of the Court that orders may be passed on the pending application, is all that is necessary and for that there can be no limitation. (*Bennet and Verma, JJ.*) RAMAKANT MALVIYA *v.* SATYA NARAIN. **177 I.C. 695 =11 R.A. 213=1938 A.L.R. 776= 1938 A.W. R. (H.C.) 542=A.I.R. 1938 All. 552.**

——**Ss. 144 and 102**—*Application for restitution relating to rent decree—Order on—Second appeal—B. T. Act, S. 153.*

A second appeal from an order passed on an application for restitution under S. 144, C. P. Code, relating to a rent decree, is not barred either by S 102, C. P. Code or by S. 153, B. T. Act. (*Edgley, J.*) SATISH CHANDRA *v.* PROTIVA NATH ROY. **43 C.W.N. 859=A.I.R. 1939 Cal. 612.**

——**S. 144**—*Application under—Form of—O. 21, R. 11—Applicability.*

Application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21, R. 11, C. P. Code. (*Venkataramana Rao, J.*) PALANIYANDI PILLAI *v.* RASAPPA PILLAI. **167 I.C. 458=9 R.M. 453=45 L.W. 522=1936 M.W. N. 1122=A.I.R. 1937 Mad. 173=(1937) 2 M.L. J. 108.**

——**S. 144**—*Application under—Nature of.*

An application under S. 144, C. P. Code, being in substance one made for seeking the aid of the Court in working out the final decree should be regarded as an application for execution of the decree passed in appeal. 7 O.W.N. 1153, Foll. (*Srivastava and Nanavutty, JJ.*) BIRENDRA BIKRAM SINGH *v* BASDEO. **12 Luck. 52=160 I.C. 814=8 R.O. 281=1936 O.W.N. 262=1936 O.L. R. 109=A.I.R. 1936 Oudh 185.**

——**S. 144**—Application under—Nature of—Limitation applicable. *See* LIMITATION ACT, ARTS. 181 AND 182. **71 M.L.J. 795.**

C. P. CODE (1908), S. 144.

Award of interest.

——**S. 144**—*Award of interest—Power of Court—Deposit by judgment-debtor on condition of stay of execution—Decrec-holder unable to furnish security for withdrawing amount deposited—Reversal of decree in appeal—Application for restitution—Right to interest.*

The basis of restitution is the loss suffered by the judgment-debtor by reason of the wrongful decree and the orders resulting therefrom. A judgment-debtor apprehending steps in execution applied for stay of execution pending his appeal and stay was ordered on condition of his furnishing security for the decree amount. He found difficulty in furnishing security and instead deposited the full amount of the decree in Court requesting the Court to take security from the decree-holder before permitting him to withdraw the amount from Court. The Court accordingly made such an order; the decree-holder was unable or unwilling to furnish security with the result that the money remained in Court and the decree remained stayed. Eventually the decree was reversed in appeal and the judgment-debtor applied for restitution claiming interest, on the amount deposited by him for the period it remained in Court.

Held, though the act of the judgment-debtor in making the deposit instead of furnishing security as ordered by the Court was due to his own initiative, the Court having accepted the deposit and treated it as the basis for the stay order and imposing certain terms on the decree-holder, the order of the Court for the retention of the money in Courts formed part of an act of the Court resulting directly from the decree which had been held to be erroneous. Since that order in fact deprived the judgment-debtor of the use of the money, he was entitled to interest on the amount from the decree-holder. (*Wadsworth, J.*) SITARAMAYYA *v.* VENKANNA. **187 I.C 30=12 R.M. 700=1939 M.W.N 961=50 L.W. 432=A.I R 1940 Mad. 15=(1939) 2 M.L.J. 509.**

Consequential claims.

——**S. 144**—*Consequential claims—Decision of Court—Reversal of decree for possession—Restitution—Claims to mesne profits—When to be made—If arises immediately on reversal of decree or only on decree after trial on remand of suit—Considerations for Court.*

Ordinarily, upon reversal of a decree for possession, the judgment-debtor would be entitled to possession, if claimed. He would also be entitled to mesne profits during the period he was wrongfully kept out of possession. But it cannot always be said upon reversal of the decree unless it gives a clear indication of the fact that the possession taken under the decree is wrongful. S. 144 makes a distinction between restitution which is properly consequential on the variation or reversal of the decree and restitution which is not. Discretion is vested in the Court to make an order for mesne profits which are properly consequential on such variation or reversal. There may be a reversal which does not imprint on the possession taken a wrongful character within the meaning of the definition of "mesne profits" contained in S. 2 (12), C. P. Code. If in the order of reversal the character of that possession has been determined, then the question

C. P. CODE (1908), S. 144.

ceases. But if it is not, and the Court remands the suit for the determination of that question afresh or further inquiry, then it would be premature for the Court of restitution to make an order for mesne profits in the application for restitution, as that would amount to determining a question which is *sub judice*. S. 144 does not enunciate the doctrine of restitution in an unqualified form and does not contemplate a complete and unqualified restitution with all consequential reliefs. The Court has to regard the nature of the claim, the relief granted, the variation introduced in appeal, and the manner in which the ultimate decision might affect the rights of the parties to the subject-matter in dispute. These considerations have to be borne in mind in exercising the discretion vested in the Court in determining the claim to ancillary relief by way of refund of costs, payment of interest, damages or compensation and mesne profits. (*Wassoodew, J.*) GANPAT GATLU *v.* NAVNITLAL. **187 I.C 354=12 R.B. 426=41 Bom.L.R. 1204=A.I.R. 1940 Bom. 30.**

Construction

——S. 144—*Construction—"Any party"—Right to restitution—If confined to parties in appeal which reversed decree or order—Party to suit in trial Court not impleaded in appeal—Right to apply—Party to suit—Recovery of costs under decree—Reversal of decree on appeal—Party not impleaded in appeal—Right to restitution.*

The expression "any party" in S. 144, C. P. Code, is not confined to parties in the appeal in which the decree has been reversed or modified. It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person. The conditions on which restitution can be granted under S. 144 are: (1) that the applicant must be a party to the litigation which has terminated according to law; (2) that he has lost, or been deprived of something by reason of the decree or order which has been subsequently varied or reversed; and (3) that on the final pronouncement of his rights, the party applying is entitled to the benefit of restitution. The section does not in terms state or require that the applicant must be a party to the proceeding which has resulted in the original decree being reversed or varied; nor does it require that the final decree should provide for a right in him to apply for restitution. All that is necessary is that the final decree must be such that it would be inequitable to allow his opponent to retain what he has obtained from the former on the strength of a decree which ultimately is held to be erroneous or wrong. A party to the suit from whom costs have been recovered, is therefore entitled to apply for restitution on the reversal of the decree finally in appeal, though he himself has not been a party to the subsequent stages of the litigation in appeal. (*Rangnekar, J.*) GURUNATH *v.* VENKATESH. **I.L.R. (1937) Bom. 150=38 Bom.L.R. 1326=168 I.C. 629=9 R.B. 886=A.I.R. 1937 Bom. 101.**

——S. 144—*Construction—"Place the parties in the position which they would have occupied but for such a decree"—Meaning of.*

The words "place the parties in the position which they would have occupied but for such a decree," in S. 144, C. P. Code, must be construed as meaning that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. There is nothing in the section which would justify the Court in holding that the claimant to restitution has to be given any better position than that which he occupied at the time when the wrong decree was passed or that he must base his claim on the theory that he is entitled only to what he would have got had there been no decree at all and had the proceedings been pending right up to the time when the final decision set the matter at rest. (*Wadsworth, J., on a difference of opinion between Burn and Stodart, JJ.*) ZAMINDAR OF SANNOKHEMIDI *v.* SUSI IAMALA PATTA MAHADEVI. **1940 M.W.N. 723=52 L.W. 214=(1940) 2 M.L.J. 47.**

Costs.

——S. 144—Costs—Right of party to restitution of, though not impleaded in appeal. *See* S. 144 — CONSTRUCTION, *Supra*. **I.L.R. (1937) Bom. 150.**

Court-fee.

——S. 144—*Court-fee—Appeal against order under section.*

A memorandum of appeal against an order of restitution passed under S. 144, C. P. Code, must be stamped *ad valorem*. It does not come under the exempting provision of Financial Department Notification No. 41, dated the 19th September, 1921, which reduces the fee chargeable on appeals from orders under S. 47, C. P. Code. An application under S. 144 does not execute an existing decree, but it unexecutes a decree which had ceased to exist. (*Baguley and Mosely, JJ.*) MA HTWE *v.* U TOKE. **1938 Rang.L.R. 635=179 I.C. 464=11 R.R. 319=A.I.R. 1939 Rang. 32.**

——S. 144—*Court-fee—Appeal against order under section.*

An appeal against an order made on an application under S. 144, C. P. Code, ought to bear an *ad valorem* court-fee. (*Henderson, J.*) BIRENRA NATH *v.* SURENDRA NATH. **42 C.W.N. 152.**

—— S. 144—*Court-fee - Order rejecting application for restitution—Appeal—Court-fee payable—Restitution proceedings—Nature of—If execution proceedings—Bengal Government Notification, No. 1872-J, dated 23rd May, 1921—Applicability.*

Restitution proceedings are not execution proceedings. They are miscellaneous proceedings in the nature of suits, where large amounts claimed as damages might be involved. A memorandum of appeal from an order refusing restitution must be stamped with *ad valorem* Court-fee under Sch. I, Art. 1 of the Court-Fees Act. Art. 11 of Sch. II has no application to the case. The notification of the Bengal Government, No. 1872-J, dated 23rd May, 1921, providing for a court-fee of rupees two under Art II. Sch. II, in respect of appeals from orders under S, 47, C. P. Code, cannot be held to include appeals from order under S. 144, C. P. Code. Even where an application for restitution is taken as falling under S. 151, C. P. Code, there is no difference as regards court-fee on appeal, as an order under S. 151, is not appealable. It is only an order under S. 144 that is appealable, and the appeal must be stamped under Sch. I, Art. 1, Court-Fees Act. (*M. C. Ghose and Mukerjea, JJ.*) TARAK CHANDRA RAY *v.* PANCHANAN BANERJEE. **I.L.R. (1937) 1 Cal.**

C. P. CODE (1908), S. 144.

637=65 C.L.J. 165=171 I.C. 212=10 R.C. 242=41 C.W.N. 157=A.I.R. 1937 Cal. 152.

Decree passed by Court.

——Ss. 144, 47 and 151—*Decree passed by Court* A—*Purchase of judgment-debtor's property by decree-holder in execution at* A—*Sale set aside* —*Decree transferred to Court at* B—*Appeal against order setting aside sale allowed—Meanwhile decree executed in Court at* B—*Application by judgment-debtor for restitution in Court* B—*If lies.*

A decree was passed in the Court at *A* and was executed by the sale of the judgment-debtor's property which was purchased by the decree-holder. Subsequently the sale in the Court at *A* was set aside and hence the decree-holder appealed against the order setting aside the sale and simultaneously got the decree transferred to another Court at *B* and executed it there and realized the amount on the decree at *B*. His appeal against the order setting aside the sale in the Court at *A* was allowed and he got the sale confirmed in his name. The judgment-debtor finding that he had paid the decree-holder twice over, once by sale of his property in the Court at *A* and again in execution in the transferee Court at *B*, applied for restitution to the Court at *B* alleging that he was entitled to restitution under Ss. 47, 144 and 151, C. P. Code.

Held, that the Court at *B* could not grant restitution because as soon as it executed the decree its purpose was finished and it no longer remained an executing Court; so S. 47 was of no use. Again that Court not being the Court of first instance, proper remedy if available under S. 144 was to the Court at *A* and as other remedy was available S. 151 could not be invoked. (*Derbyshire, C.J. and Mukerjea, J.*) KISHORI MOHAN SHADHU *v.* KUMAR BRAHMA NIRANJAN CHAKRAVARTY. **A.I.R. 1938 Cal 554.**

——Ss. 144 and 151—*Decree varied in appeal by compromise—Restitution—Inherent power.*

Even if a decree is varied by the appellate Court not after contest but by a compromise between the parties, the Court can allow compensation on the principle of S. 144, C. P. Code, in the exercise of inherent jurisdiction. The measure of compensation will be the profit which the party in possession actually derived or could have derived by exercise of due diligence from the date on which he should have surrendered possession under the compromise. (*Tek Chand and Bhide, JJ.*) ALLAH JOWAI *v.* JINDAN BIBI. **42 P.L.R. 429.**

——S. 144 and Oudh Rent Act (1886), S. 108 (9)—Ex parte *ejectment—Restoration of suit by appellate Court—Claim for compensation—Proper remedy.*

Where by an *ex parte* decree under S.. 61 of the Oudh Rent Act, a defendant is ejected but the suit is ultimately restored by the appellate Court and the defendant regains possession under a compromise during the rehearing of the suit, a claim by him for compensation does not come within the provisions of S. 144, C. P. Code. There is no doubt that an application under S.144 can lie when the original order has been varied or reversed by a superior Court. If varied or reversed by the original Court the proper remedy is by a regular suit under S, 108 (9) of the Rent Act. (*Harper, S.M. and Sathe, J.M.*) DEO

C. P. CODE (1908), S. 144.

NARAIN *v.* MADAN MOHAN LAL. **1940 R.D. 245=1940 O.W.N. 506=1940 O.A. 697.**

Inherent power of Court.

——S. 144—Inherent power of Court—Order holding surety liable for payment—Reversal—Application by surety for restitution. *See* C. P. CODE S, 151—RESTITUTION. **40 P.L.R. 289.**

Interest.

——S. 144—*Interest—Award of—Power of Court.*

Although ordinarily interest is a part of the normal relief given in restitution, it would not be proper to allow interest when there is no direction for its payment in the order of the final Court of appeal. (*Mitter and Roxburgh, JJ.*) BIRENDRA NATH BASU *v.* SURENDRA KUMAR BASU. **I.L.R. (1940) 1 Cal. 486=44 C.W.N. 438=71 C. L.J. 127=A.I.R. 1940 Cal. 260.**

Jurisdiction.

——S. 144—*Jurisdiction—"Court of first instance"—Meaning of—Court which passed decree ceasing to have jurisdiction over area owing to transfer of territorial jurisdiction in respect of future business—Transfer not affecting pending cases—Decree passed in pending suit—Appeal—Reversal after notification—Application for restitution—Jurisdiction to entertain.*

The words "Court of first instance" as used in S. 144, C. P. Code, are used in contradistinction to a "Court of appeal" and mean the Court which passed the decree, or if that Court has ceased to exist, the Court to which the proceedings are transferred in substitution for the Court which passed the decree. Where, however, Government issues a notification redistributing the jurisdiction of Courts in a district and transferring certain areas from one Court to another in respect of "future business" and the notification expressly provides that it should not affect suits or cases pending in the Court, at the time, an application for restitution arising out of a suit which was pending in one Court at the time of the notification must be presented to that Court and that Court only, because when that Court still exists, and the suit giving rise to the application has not been transferred to any other Court, the Court which passed the decree is the only Court, and the proper Court, which can entertain the application, being the "Court of first instance" within the meaning of S. 144, C. P. Code. An application for restitution is not "future business" contemplated by the notification, though the cause of action for the application might arise only after the Notification. (*Harries and Rachhpal Singh, JJ.*) SKINNER *v* SKINNER. **I.L.R. (1937) All. 670=1937 A.W.R. 510=1937 A.L.J. 588=1937 A.L.R. 713=170 I.C. 706=10 R.A. 515=A.I.R. 1937 All 515.**

——S. 144—Jurisdiction—Objection to jurisdiction on the ground that Court which passed decree in suit alone has exclusive jurisdiction —Omission to raise at early stage—If fatal. *See* C. P. CODE, S. 21. **1937 A.W.R. 510.**

Limitation.

——S. 144—Limitation—Application for restitution—If one in execution—Limitation—Starting point. *See* LIMITATION ACT. ART. 182. **41 Bom.L.R. 1204.**

——S. 144—*Limitation—Commencement of—Application under—Nature of—"Where and in so far as a decree is varied or reversed"—Meaning*

C. P. CODE (1908), S. 144.

of—Application for mesne profits by successful party—Starting point of limitation.

An application under S. 144, C. P. Code, is not an application for execution and is governed for purposes of limitation by Art. 181 of the Limitation Act; and time runs from the date of the decree of the appellate Court when the first Court's order was "reversed" and the right to apply for restitution accrued. But where the application is for the recovery of mesne profits time does not begin to run till possession has been restored to the successful party. The words "where and in so far as a decree is varied or reversed" in S. 144 must be construed as meaning where the decree is reversed either temporarily or finally. (*Darling, S.M. and Bomford, J.M.*) KADIR BUX *v.* BEHARI. **1937 R.D. 21.**

——**S. 144**—Limitation—Restitution—Application for, in consequence of order of His Majesty in Council. *See* LIMITATION ACT, ARTS. 181 AND 183. **44 C.W.N. 438=71 C.L.J. 127.**

——**S. 144**—Limitation—Suspension—Principles governing. *See* C. P. CODE, S. 144—APPLICABILITY. **1938 A.L.J. 1189=A.I.R. 1939 All. 66.**

——**S. 144**—Limitation—Tenant ejected but restored to possession on appeal or revision—Application for mesne profits for period of dispossession—Limitation — Starting point. *See* LIMITATION ACT, ART. 181. **1938 R.D. 182=1938 A.W.R. (B.R.) 113.**

Mesne profits.

——**S. 144**—*Mesne profits—Landlord taking possession of tenanted land in execution of decree in ejectment—Decree subsequently reversed—Mesne profits payable to tenant—Assessment of—Landlord's right to deduction of rent.*

When a landlord has taken possession of the tenanted land in execution of a decree in ejectment against his tenant, and the decree is subsequently reversed, the landlord must pay to the tenant by way of mesne profits under S. 144, C. P. Code, the amount of rents and profits which he could have, with due diligence, realised from the sub-tenants on the land in suit during the period that he was in possession. He is, however, entitled to claim by way of deduction the rent payable to himself by the tenant during that period. (*S. K. Ghose and R. C. Mitter, JJ.*) P. C. TAGORE *v.* MATHURA KANTA DAS. **173 I.C. 391=10 R.C. 512=41 C.W.N. 1015=A.I.R. 1937 Cal. 478.**

——**S. 144**—Mesne profits—Right to, by way of restitution—Sale of property on wrong date. *See* SCOPE, *infra*. **A.I.R. 1937 Mad. 694.**

Order under.

——**Ss. 144 and 151**—*Order under—Appeal—Revis on.*

In a proceeding started under S. 144, C. P. Code, the Court held that S. 144 did not apply but granted relief under S. 144 read with S. 151.

Held, that the Court having decided the rights of the parties and in effect given a decre which was capable of execution, the order was appealable, though it was styled as falling under S. 144 or S. 151 or under both Ss. 144 and 151 No application in revision lay againt such order. (*Manohar Lall, J.*) JAGANRATH DAS *v.* SRIKANT MISSIR. **19 Pat.L.T. 118=1938 P.W.N. 310.**

Pre-emption suit.

——**S. 144**—*Pre-emption suit—Order permitting creditors of pre-emptor to withdraw deposit in Court—Reversal—Liability to refund.*

C. P. CODE (1908), S. 144.

Where the creditors of the pre-emptors were parties to an order permitting them to withdraw amount deposited in Court, when that order is reversed, are in justice and equity liable to make restitution and refund the amount withdrawn by them. They cannot resist restitution on the plea that they were not parties to the pre-emption suit, for the word 'parties' in S. 144, C P. Code, must be taken to include their representatives and further representative does not mean only a party's legal representative but means his representative in interest. (*Thomas, C J and Zia-ul-Hasan, J.*) BADRI DAS *v.* RAJA BIRENDRA BIKRAM SINGH **14 Luck. 106=175 I.C. 169=1938 O A. 461=1938 O.L.R. 276=10 R.O. 313=1938 A.W. R. (C.C.) 61=1938 O.W.N. 722=1938 R.D. 708 =A.I.R. 1938 Oudh 169.**

Principle of restitution.

——**S. 144**—*Principle of restitution.*

The power of a Court to direct restitution is inherent in the Court itself. It rests on the principle that a Court of justice is under a duty to repair the injury done to a party by its Act. The right of a party to have restitution and the duty of the Court to give him restitution do not rest on the provisions of S. 144 of the Code. which defines the procedure only in one class of cases requiring restitution by enacting that the application for restitution is to be made in the Court of first instance. The other part of the section gives the measure of restitution and empowers that Court to determine the form and amount of restitution. (*Mitter and Roxburgh, JJ.*) BIRENDRJ NATH BASU *v.* SURENDRA KUMAR BASU. **I.L.R. (1940) 1 Cal. 486=44 C.W.N. 438 =71 C.L.J. 127=A.I.R. 1940 Cal. 260.**

Refund.

——**S. 144**—*Refund—Right of auction-purchaser.*

The right of the auction-purchaser to a refund of the money paid by him arises both under S. 144, C.P. Code, and also on principles of equity and justice and if the case does not come under S. 144, the Court can exercise its inherent jurisdiction to direct a refund of the money to the auction-purchaser. (*Jai Lal, J.*) RANBIR SEN *v.* MOHAMMAD DIN. **166 I.C. 381=9 R.L. 362=A. I.R. 1936 Lah. 497.**

Restitution.

——**Ss. 144 and 151**—*Restitution—Decree not reversed or varied—Court cannot grant restitution.*

Where a decree has not been varied or reversed a Court has no power to grant restitution under S. 144, C. P. Code, or under its inherent powers under S. 151. (*Bose, J.*) NARAYAN *v.* MST. RADHABAI. **169 I.C. 311=9 R.N. 319=I.L.R. 1937 Nag. 153=A.I.R. 1937 Nag. 151.**

——**Ss. 144 and 145**—*Restitution—Joint and several decree against two defendants—Appeal by both—Stay of execution—Deposit of decree amount by one—Amount drawn out by plaintiff on execution of surety bond by sureties—Bond reciting that "if the defendants succeed in the appeal" they would be liable for the amount—Construction—Appeal successful as regards one defendant only—Right of latter to restitution—Liability of sureties, if arises—Undertaking—If to both defendants jointly.*

Appellant, who was the second defendant, was sued along with his mother-in-law, the 1st defen-

dant, for conversion of certain article, and a decree was made against them fixing them with a joint and several liability. They appealed, and applied for stay of execution pending appeal. The Court ordered them to deposit the decree amount in Court. The appellant paid the amount into Court. The plaintiff was directed to take it out on furnishing security for the amount. The 1st and 2nd respondents became sureties for the plaintiff and executed a surety bond for the amount which recited that 'the defendants deposited the said amount in Court," and that "if the *defendants* should succeed in the appeal, we agree that the said amount may be recovered, etc." The appellant, 2nd defendant alone succeeded in the appeal, the decree against him being set aside, but the decree against the 1st defendant was confirmed. Appellant then applied for restitution, under S. 144, C. P. Code, of the money he had paid into Court, both against the plaintiff and against the sureties under the surety bond.

Held, (1) that the appellant was entitled to restitution of the money from the plaintiff; (2) that the surety bond must be construed as an undertaking by the obligors to the obligees jointly, and that the liability of the sureties was conditioned upon the "*defendant*", *i.e.*, both of them, succeeding in the appeal, and that as only one of the defendants had succeeded, the appellant was not entitled to restitution as against the sureties by enforcement of their bond against them, because the sureties could not, upon the language of the bond, be held to have undertaken a liability except upon the condition that the appeal of both the defendants succeeded. (*Cornish, J.*) VEERASALINGAM *v.* SUBBARAYUDU. **166 I.C. 890=9 R.M. 406=44 L.W. 838=A.I.R. 1937 Mad. 229.**

——**S. 144**—*Restitution—Right to—Realisation from surety—Refund on reversal, if can be ordered when surety is not a party.*

Where the security, furnished by a surety in the matter of the result of a pending appeal, was after the dismissal of the appeal sold and the money realised by the decree holder and the decree was subsequently reversed by the High Court, an application under S. 144, C. P. Code, by the original juggment-debtor for refund of the amount realised could not be ordered in the absence of the surety concerned whose property was sold. (*Davies, I.C.S.*) BAL KISHAN *v.* ALE RASUL ALI KHAN. **1938 A.M.L.J. 127.**

——**Ss. 144, 151 and 47**—*Restitution in a case not falling under S.* 144—*Relief—Basis—Execution and realisation pending appeal—Remand on appeal—Decree for smaller amount on remand—Application for refund of excess recovered—Limitation—Starting point.*

Restitution in a case not strictly falling within the terms of S. 144, C. P. Code, should be made upon the equitable principle underlying S. 144 and in exercise of the inherent power of the Court to prevent abuse of its process. A decree passed against a defendant was set aside in appeal preferred by him and the case was remanded for trial on 23rd November, 1931. In the meantime, plaintiff applied for execution of the decree and the defendant deposited a certain amount which was subsequentiy withdrawn by the plaintiff. On remand, the Court passed a decree on 25th March, 1933, for an amount lesser than what defendant had deposited. So, on 16th March, 1936, defendant applied for refund of so much of the amount as was received by the plaintiff in excess of what was due to him under the fresh decree.

Held, that although S. 144 did not in terms apply, Court could grant refund upon the principle of S. 144 under its inherent powers.

Held, further, that defendant's application was in time as the right to claim refund accrued to him only when the fresh decree was passed after remand and not from the order of appellate Court remanding the suit.

Held also, that S. 47 also applied to the facts of the case, as the defendant was claiming only the surplus left after satisfying the decree and as such the matter related to execution, discharge and satisfaction of the decree. (*Niyogi, J.*) W. R. PANDIT *v.* S. R. PANDIT. **I.L.R. (1939) Nag. 492=182 I.C. 66=11 R.N. 497=1939 N.L.J. 193 =A.I.R. 1939 Nag. 101.**

Revision.

——**S. 144**—Revision—Order rejecting application under—Competency. *See* C. P. CODE. Ss. 2 (2), 115 AND 144. **A.I.R. 1936 Cal. 812.**

Right to apply.

——**S. 144**—*Right to apply—Preliminary mortgage decree—Amendment—Revision—Final decree during pendency of—Possession obtained—Amendment set aside—Application under S.* 144, *C. P. Code, if competent.*

Where a revision has been preferred against the amendment of a preliminary decree in a suit for foreclosure and during its pendency a final decree in terms of the amended preliminary decree is passed and possession obtained in execution thereof, and subsequently the revision is allowed and the amendment set aside, it is competent to the judgment-debtor to apply under S. 144, C. P. Code, for restitution. (*Collister and Bajpai, JJ.*) GOBIND BEHARI *v.* SHUJAAT-MAND KHAN. **I.L.R. (1938) All. 494=176 I.C. 81=1938 A.L.R. 537= 11 R.A. 29=1938 A.L.J. 477=1938 A.W.R. (H. C.) 304=A.I.R. 1938 All. 364.**

Sale.

——**S. 144**—*Sale in execution of* ex parte *decree —Judgment-debtor setting it aside by deposit under O.* 21, *R.* 89—Ex parte *decree also afterwards set aside—Judgment-debtor's right to refund of compensation deposited for auction purchaser.*

If a judgment-debtor against whom an *ex parte* decree was passed chooses to set aside the sale held in execution of that decree by making the necessary deposit under O 21, R. 82, C. P. Code, and afterwards the *ex parte* decree also is set aside, the judgment debtor would not be entitled to claim a refund of the amount which he had deposited as the auction-purchaser's compensation. Such a deposit is not made by him directly in connection with the decree which has been passed against him but is made in order that he may obtain a special privilege which the law provides. This being the case, he is not entitled to a refund of such compensation money as a benefit by way of restitution within the meaning of S. 144, C. P. Code. (*Edgley, J.*) GORAKHYANATH *v.* NARAYAN CHANDRA. **43 C.W.N. 104.**

Scope.

——**S. 144**—*Scope.*

S. 144, C. P. Code, contemplates a case in which the decree, or it may be, the order, of a trial

C. P. CODE (1908), S. 144.

Court has been put in execution and the decree or order has afterwards been varied or reversed in appeal. Restitution sought under S. 144 must be in respect of the decree which has been reversed or varied. (*Zia-ul-Hasan, C.J. and Srivastava, J.*) BRIJ MOHAN SINGH *v.* RAMESHAR SINGH. **183 I. C. 709=12 R.O. 58=1939 A.W.R. (C.C.) 127= 1939 O.W.N. 765=1939 O.A. 636=1939 O.L.R. 544=A.I.R. 1939 Oudh 273.**

——**Ss. 144 and 151**—*Scope—Decree against Hindu father and sons based on compromise—Sale of family property in execution—Purchase by decree-holder—Full satisfaction of decree entered—Subsequent suit by sons to declare compromise decree not binding on them—Decree releasing half share in property—Decree and sale remaining as a whole—Application by decree-holder for compensation—Maintainability.*

In execution of a compromise decree against a Hindu father and his sons, joint family property of the father and sons, was put up for sale and purchased by the decree-holder, the sale was duly confirmed and full satisfaction of the decree entered. The minor sons then commenced an action claiming that the compromise decree was not binding on them and succeeded in it with the result that their share in the property, amounting to eight annas interest was released, though the decree stood against the father as a joint and several decree and the sale, which itself was not affected, stood as a whole. The decree-holder then made an application for compensation to the extent of half the amount purchased by him under S. 151, C. P. Code. He had previously applied for execution of the decree, but that was refused on the ground that he could not take out execution of the decree which had already been satisfied.

Held, (1) that an auction purchaser at an execution sale must abide by his bargain, that the Court selling the property would not guarantee the title, and the maxim *caveat emptor* applied; (2) that the fact that the sons brought an action for declaration of the invalidity of the decree as against them did not affect the principle of *caveat emptor*, and that the case had to be considered as if there was no decree at all against the sons; (3) that restitution on the analogy of S. 144, C. P. Code, could, if at all, be claimed only against the sons and not against the father and that on no principle was the decree-holder entitled to compensation against the father judgment-debtor under S. 151, C. P. Code. (*Wort and Varma, JJ.*) PHULCHAND RAM MARWARI *v.* NAURANGI LAL MARWARI. **172 I.C. 225=16 Pat. 729=10 R.P. 320=1937 P.W.N. 836=18 Pat.L.T. 826= A.I.R 1937 Pat. 647.**

——**S. 144**—*Scope of—Decree entitling party to take charge of institution—Execution—Possession of building in which institution is located also taken under colour of decree—Reversal of decree—Duty to restore possession of building—Plea that building was taken possession of by force or otherwise—If open.*

A party taking possession of any thing under colour of his decree is bound to make restitution of everything that he takes possession under colour of the decree on reversal of that decree. Where a party entitled under his decree to hold charge of an institution, also takes possession of the building in which the institution is located

C. P. CODE (1908), S. 144.

under colour of the decree, such possession naturally and necessarily following the taking of charge, he is under an obligation to restore possession of the building, or reversal of the decree, to the persons who were admittedly in possession at the time the suit was instituted. He cannot be allowed to plead that he took possession only of the institution under the decree, and that he took possession of the building by force or otherwise and thus resist restitution. The object and purpose of S. 144, C. P. Code, is that the parties shall be restored to the position which they originally occupied. (*Collister, J.*) ARYA PRATINIDHI SABHA *v.* CHHOTTEY LAL. **171 I.C. 709= 10 R.A. 305=1937 A.W.R. 912=1937 A.L.J. 1107=1937 A.L.R. 878=A.I.R. 1937 All. 728.**

——**S. 144**—*Scope—Money due under decree—Payment to vakil of party—Subsequent reversal of decree—Application for restitution against party—Maintainability—Payment to vakil not certified to Court—If bar to restitution.*

Where money due to a party under a decree is paid to his vakil whose vakalat implies a power to receive money out of Court on his client's behalf that is sufficient to support an application by the opposite party on reversal of the decree to apply for restitution against the party to whose vakil the money was paid. S. 144 of the C. P. Code is sufficiently wide to cover such a case. The fact that payment to the vakil is not certified to the Court will not defeat the application for restitution. (*Burn and Stodart, JJ.*) HANUMANTHAPPA *v.* GOOLAPPA. **179 I.C. 994=11 R.M. 646=1939 M.W.N. 736 (2)=48 L.W. 945=A.I. R. 1939 Mad 176.**

——**Ss. 144 and 151**—*Scope — Restitution—Powers of Court—Sale of property on wrong date—Setting aside—Restitution—Power to award mesne profits by way of restitution.*

The rule that a *bona fide* purchaser at a sale held under a Court's decree or order which is subsequently reversed is not affected by the reversal and the remedy by way of restitution does not lie against him, has no application to cases where through a mistake or material irregularity of the Court the property has been sold, such as when one property has been attached and another has been sold or where the property is sold on the one date whereas it ought to have been sold on another date. In such cases restitution is ordered not strictly under S. 144 but under the inherent powers of the Court under S. 151, C. P. Code; in ordering restitution of the property under S 151, C. P. Code, it is open to the Court to grant restitution also of the profits of the said property. If the Court has jurisdiction to grant restitution, there is no reason why the restitution should be limited to the property alone and the judgment-debtor denied the restitution of the profits which he has been deprived of. A sale was set aside on an application by the Judgment-debtor on the ground of material irregularity committed by the Court se ling the property on the old date fixed instead of the date to which it was postponed. The judgment-debtor filed an application for restitution by re-delivery of possession and mesne profits of the property from the auction-purchaser.

Held, that that judgment-debtor was entitled to mesne profits for the period during which he was out of possession of the property. (*Venkatara-*

C. P. CODE (1908), S. 144.

mana Rao, J.) RADHA BAI *v.* JAGANNADHA NAIDU. 169 I.C. 783=10 R M. 113=1937 M.W. N. 342=A.I.R. 1937 Mad. 694.

——Ss. 144 and 151—*Scope—Suit for declaration of title—Property in custody of Court—Plaintiff given possession for harvesting crops—Undertaking to pay value of crops whenever called upon—Decree ultimately in favour of defendants—Application by latter for mesne profits during suit and appeal—Power to order restitution.*

Pending a suit for declaration of title to land and for an injunction or in the alternative for possession, the parties agreed not to enter on the suit property which was in *custodia legis*. The Court gave the property over to the plaintiff for specific purposes subject to the control of the Court, for raising and harvesting crops. Plaintiff undertook to the Court to pay the Court the value of the crops raised whenever ordered by the Court to do so. The suit ended in the trial Court in a decree in the plaintiff's favour and he was found to be in possession, but on appeal the defendants were found to have title. The latter then applied to the Court for mesne profits by way of restitution during the period of the suit and of the appeal.

Held, that the plaintiff having put himself under the direction of the Court could not be heard to say that the Court had no power to make orders for the disposal of the money which he undertook to pay; and though S. 144, C. P. Code, was not strictly applicable to the case the Court was under S. 151, entitled to make such orders as were just and proper for the disposal of the profits enjoyed by the plaintiff under the orders of the Court during the suit and the appeal. (*Wadsworth, J.*) RAMIREDDI *v.* SATYAM. 167 I.C. 356 =9 R M. 446=1936 M.W.N. 503=43 L.W. 773 =A.I.R. 1936 Mad. 636.

Strangers.

——S. 144—*Strangers—Restitution—Principles of—Power of Court under inherent jurisdiction—Payment made to wrong person—Duty to order restitution.*

One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. This statement of the law is general enough to cover a case where the executing Court has been made to take a wrong step by an erroneous decision passed by another Court. The non-applicability of S. 144 would not prevent a Court from granting restitution in the exercise of its inherent powers. Where a Court has wrongly paid the money to a person not entitled thereto, it has not only the power but it is also its duty to recover it from him. *A* brought a suit against *B* for possession of property and mesne profits for one particular year. Receiver was appointed in the suit who collected profits for the year pending the suit and deposited them in Court. *A* claimed those profits but Court refused to grant the relief because *A* had not claimed future profits. *A* appealed. During the pendency of the appeal one *C* also obtained a decree against *B* and attached the deposit in Court, and was given over the money that was in Court deposit. Ultimately *A* succeeded in his appeal after contest with *B* and claimed restitution from *C*. *C* contended that as he was not a party to the appeal by *A*, any order passed on the appeal was not binding on him.

C. P. CODE (1908), S. 145.

Held, that the claim of *C* to the deposit was in the right of *B* and as the order passed in appeal was passed after active contest between *B* and *A*, *C* must take the deposit subject to the decision of the appeal. As the order in appeal negatived the title of *B*, *C* also lost his title and was bound to make restitution to *A*. (*Venkataramana Rao, J.*) RATNAJI CHANDANMALL *v.* RAMAKRISHNAYYA. 167 I.C. 67=9 R.M. 417=1936 M.W.N. 1199= A.I.R. 1937 Mad. 95.

——S. 144—*Successive applications—Maintainability—Application after reversal of decree on appeal—Grant of—Subsequent reversal of appellate decision—Appellate decision restored on Letters Patent Appeal—Fresh application for restitution—If lies.*

In a suit by *A* for recovery of an annuity, a decree was passed in his favour and a property was put to sale, *A* himself being the purchaser. *B* who had purchased the property pending the suit made an application under O. 21, R. 89 and the sale was set aside. The decree in favour of *A* was reversed on appeal by the District Judge. Consequently *B* made an application for restitution of the amount deposited by him and the application was granted. *A* preferred an appeal against the decision of the District Judge and the decision was reversed, but on Letters Patent appeal the decree of the District Judge was restored. *B* therefore made a second application for restitution of the amount deposited. The trial Court dismissed the application on the ground that there was already an order for restitution and *B* ought to have made an application for execution. On appeal,

Held, that the decision was wrong. The first application for restitution was filed by virtue of the decision of the District Judge. That decision was upset in appeal. Therefore *B* could not maintain the first application which had become infructuous. Till the decision in Letters Patent appeal *B* could not have applied for restitution. Therefore the second application for restitution after decision in the Letters Patent appeal was sustainable. (*Venkataramana Rao, J.*) PALANIYANDI PILLAI *v* RASAPPA PILLAI. 167 I.C. 458= 9 R M. 453=1936 M.W.N. 1122=45 L.W. 522= A.I.R. 1937 Mad. 173=(1937) 2 M.L.J. 108.

——S. 145—*Applicability—Bond under O. 32, R. 6—Enforcement—Mode of—Suit—Maintainability.*

A bond given to the Judge of a Court in pursuance of an order of the Court under O. 32, R. 6, C. P. Code, must be enforced by a suit upon the bond. Such a bond is not enforceable by execution in the manner provided by S 145, C P. Code. A suit is the proper means of enforcing it. (*Cornish, J.*) SATYAM *v.* SATYANARAYANA. 167 I.C. 692 (2)=9 R M. 473=1936 M.W.N. 1127= 44 L.W. 621=A.I.R. 1936 Mad. 953=71 M.L.J. 675.

——S. 145 and O. 38, R. 5—*Attachment before judgment—Surety — Bond undertaking to pay amount under decree that may be passed—If illegal—Liability of surety—Objection to validity of bond—If competent.*

O. 38, R. 5 no doubt contemplates security for the production in Court of the property sought to be attached before judgment or its value at a

C. P. CODE (1908), S. 145.

future time when called upon and the amount of the security demanded should ordinarily be commensurate with the value of the property sought to be attached, and not the decretal amount. But the object of the legislature for providing for attachments before judgment was to secure the prospective decree-holder in matter of realisation of the money that might be eventually found by the Court to be due to him. Where, therefore, a Court makes a demand for and takes security for the prospective decretal amount, at most it is only an irregular manner of the exercise of its jurisdiction. But the surety who has executed the surety bond in that form cannot raise the objection to the bond in the course of execution proceedings started against him under the provisions of S. 145 of the Code. (*R. C. Mitter, J.*) AMULYA RATAN *v.* PROSAD CHANDRAKAR. **162 I. C. 619=8 R.C. 614=40 C.W.N. 657=A.I.R. 1936 Cal. 143.**

——**S. 145**—*Bond by custodian of attached goods—Undertaking to deliver on Court's order—*Bona fide *delivery without Court's order—Liability to pay compensation.*

Where after attachment the goods are delivered to a custodian in pursuance of an order of Court for safe custody on his executing a bond undertaking to produce the goods in Court when required or to deliver them to judgment-debtor if so ordered and binds himself to pay compensation on his failure to discharge the liability under the bond, such custodian is liable to pay compensation if without the orders of Court he delivers the goods of others although he *bona fide* believed such others to be entitled to the goods as their claims to such goods had been allowed in execution proceedings. (*R. C. Mitter and Khundkar, JJ.*) GURMUKH RAI GHANASYAMDAS *v.* E. F. LAWSON. **182 I.C. 865=12 R C. 114=A. I.R. 1939 Cal. 316.**

——**S. 145, O. 21, R. 43 and O. 21-A (Cal.), R. 3**—*Custodian to whom goods are delivered by attaching officer on Court's order—If a surety.*

A surety is one who takes upon himself, and guarantees the performance of an obligation which rests primarily upon another. His obligation is an accessory one. S. 145 has no application unless the person sought to be proceeded against has taken upon himself the liability of another. It need not be the liability of either the judgment-debtor or the decree-holder but it may be the liability of an officer of the Court charged with the conduct of the execution proceedings. It is however essential that he should have undertaken to discharge another's obligations. When an officer of the Court seizes the goods under O. 21, R. 43 the attachment is complete, and at once an obligation on that officer is imposed by law. This obligation means that he must keep it safe and produce it in Court for being made available for sale. When the attaching officer exercises his discretion under R. 3 of O. 21-A and leaves the property in the custody of a custodian, the latter undertakes to perform the duty (*i.e.*, to produce the attached goods in Court) which the law had cast upon the Court's officer who had attached the goods. The obligation of the custodian is in such a case not an original but an accessory one. But where in leaving the goods in the custody of such person the attaching officer does not exercise his discretion but acts upon an order of the Court directing the goods to be delivered to such person on his furnishing security and the goods are so delivered in pursuance of the said order, the normal liability of the attaching officer to keep safe the attached goods and to produce them in Court is discharged and the responsibility is transferred from his shoulders to that of the custodian whose liability under the bond cannot be regarded as an accessory one. In such circumstances the custodian is not a surety and S. 145 has therefore no application. (*R. C. Mitter and Khundkar, JJ.*) GURMUKH RAI GHANASYAMDAS *v.* E. F. LAWSON. **182 I.C. 865=12 R. C. 114=A.I.R. 1939 Cal. 316.**

——**S. 145**—*Decree against judgment-debtor—Execution against surety.*

A decree against the judgment-debtor can be executed against his surety who has, by means of a statement made before the Court, undertaken to satisfy the liability of the judgment-debtor. It does not matter that the name of the surety is not mentioned in the decree. (*Jai Lal, J.*) PARKASH CHAND MAHAJAN *v.* MADAN THEATRES, LTD. **164 I.C. 281=9 R.L. 98=38 P.L.R. 623=A.I.R. 1936 Lah. 463.**

—— **S. 145**—*Execution against surety—Notice to surety—Necessity of.*

There must be notice to the surety of some kind before his property can be attached in execution of the decree, attachment of the surety's property without notice being *ultra vires*. It is immaterial however whether such notice is given by the Court which passed the decree or the Court to which it is sent for execution. (*Addison, J.*) SHEIKH RAHIM-UD-DIN *v.* MURLI DHAR. **I.L R. 1938 Lah 624=177 I C. 379=11 R.L. 372 =40 P.L.R. 530=A.I.R. 1938 Lah. 593.**

——**S. 145**—*Father's liability as surety—Son's interest—If can be proceeded against.*

S. 145 permits the execution of a decree (passed against a stranger) against the surety as though it were a decree passed against the surety. It may be that he is a party only for a limited purpose. Hence where a father has become liable as surety for a decree passed against a stranger, the interest of surety's sons can be taken in execution of the decree. The fact that the decree-holder has power to sue the surety instead of taking recourse to execution under S. 145 does not preclude the decree-holder seeking a shorter and less expensive remedy of execution under S. 145. (*Stone, C.J. and Puranik, J.*) PANDURANG GADIBA KUNBI *v.* ABDUL HUSSAIN ISAJI BOHRI. **I.L R (1939) Nag. 536=173 I.C. 950=10 R.N. 333=A.I.R. 1938 Nag. 148.**

——**S. 145**—*Liability of surety—Compromise of suit under O. 21, R. 63—Default in payment undertaken by plaintiff—Execution of decree against him—If open.*

Where a suit under O. 21, R. 63 is compromised and the plaintiff defaults in making the payment undertaken by him, it is certainly open to the decree-holder to take out execution against such a plaintiff also; for his position is that of a surety who by virtue of the compromise became liable for the payment of the decree amount (*Rachhpal Singh and Ismail, JJ.*) RAJ BAHADUR *v.* SOHAN PAL MUNNA LAL. **184 I.C. 815=1939 A. W.R. (H.C.) 462=1939 A.L.J. 801=A.I.R. 1939 All. 517.**

C. P. CODE (1908), S. 145.

——S. 145—*Notice of attachment in writing—If necessary*

S. 145, C. P. Code, does not lay down that the notice of attachment should be in writing. All that is necessary under the law is that before the attachment actually takes place, the surety should have notice of the order directing attachment, the object being that he may be able to raise objections, if any, to the validity of the order. If the objection of want of notice is not raised before the executing Court, it must be taken to have been waived. (*Tek Chand, J.*) NANAK CHAND RAMJI DAS *v* IBRAHIM. **174 I. C. 965=10 R.L. 646=40 P.L.R. 38=A.I.R. 1937 Lah. 772.**

——S. 145—*Property given in security—Extent to which security can be enforced.*

Where the property is given in security for due performance of decree in particular amount the effect of the subsequent transfer of the property is that the decree-holder can enforce the security bond only to the extent of the amount secured thereunder by the sale of the property specified therein, and any sale for more than the amount specified in the bond will be without jurisdiction in the absence of the transferee and will not bind him, and such a sale can be set aside on the alienee depositing the amount due under the bond. (*Venkataramana Rao, J.*) JAGANNATHA KONE *v.* RAMACHANDRA NAIDU. **165 I.C. 453=9 R.M. 251=1936 M.W.N. 443=A I.R. 1936 Mad. 589.**

——Ss. 145 and 47—*Regular suit against surety—If barred.*

S. 145 simply enables a party for whose benefit security has been given to enforce the surety bond against the surety by way of execution to the exent to which the surety has rendered himself personally liable, and no more. If an order for or in the course of execution is made against a surety who is within the ambit of S. 145. he is at liberty to appeal against that order as though he were a party to the suit within the meaning of S. 47; but in other respects he is not deemed to be a party within S. 47. Hence S. 145 does not bar a regular suit against surety. (*Skemp, J.*) BHAGHAT RAM KHANNA *v.* MOHAMMAD BAKHSH. **I.L.R. (1939 Lah 470=183 I.C. 495=12 R.L. 121=41 P.L.R. 589=A.I.R. 1939 Lah. 175.**

——S. 145—*Scope—Application for execution against surety—Breach of particular condition of bond alleged—Breach of another condition pending proceedings—Power of Court to order execution on basis of latter breach.*

An application for execution of a decree against a surety under S. 145, C. P. Code, is an application for the enforcement of the bond as such, and even if it is occasioned by and mentions only the breach of one condition, execution can be ordered by the Court if, in the course of the proceedings arising out of that application, it appears that a breach of any one or other of the conditions has occurred. (*Davis, J.C. and Lobo, A.J.C.*) SADIKLALI MOOSAJI *v.* HASSASINGH TAHILSINGH. **30 S.L.R. 177=166 I.C. 268=9 R.S. 133=A I.R. 1936 Sind 244.**

——S. 145—Security bond — Procedure for enforcement. *See* SURETY—SECURITY BOND. **I. L.R. (1937) 2 Cal. 698.**

——S. 145—*Security bond under—Enforcement—Procedure—Execution—Suit—If necessary.*

C. P. CODE (1908), S. 145.

Where defendant furnishes security for the performance of a decree in a particular sum, being the probable amount of mesne profits and costs, by executing a security bond in favour of the Court by which certain immovable property is given as security for the amount, the security bond does not constitute a mortgage within the meaning of the Transfer of Property Act so as to attract the procedure laid down in that Act and consequent necessity of a suit to enforce it. The bond can be enforced in execution by sale of the property. And even if the property is alienated subsequent to giving the bond, it makes no difference, and the same procedure obtains in spite of alienation (*Venkataramana Rao, J.*) JAGANNATHA KONE *v* RAMACHANDRA NAIDU **165 I.C. 453=9 R.M. 251=1936 M.W.N. 443=A.I.R. 1936 Mad 589.**

——S. 145—*Supurdar—Duty of.*

A supurdar cannot exonerate himself from the liability imposed on him on the ground that he in good faith handed over the properties which had been given under his charge to a third person. It is his duty to obtain the instructions of the Court before handing them over. (*Sulaiman. C.J. and Bennet, J.*) GENDA MAL *v.* SUKHDARSHAN LAL. **164 I.C. 200=9 R.A. 125=1936 A.L.J 736=1936 A W.R. 531=1936 A.L.R. 713=A I.R. 1936 All. 555.**

——S. 145—*Surety—Liability of—If ceases on dismissal of execution application against judgment-debtor.*

There is nothing in S. 145, C. P. Code, or in any other section to prevent the decree holder from proceeding against a surety by reason of the dismissal of his execution application against the judgment-debtor, in respect of a liability incurred by the surety before the dismissal of the execution application. Such dismissal has no retrospective effect so as to excuse the surety from any liability incurred before the dismissal. (*Davis, J.C. and Tyabji, J.*) PEOPLE'S BANK NORTHERN INDIA *v.* NANIKRAM. **I.L.R (1939) Kar. 401=185 I.C. 573=12 R.S. 166=A.I.R. 1939 Sind 270**

——S 145—Surety bond—Construction—Liability—Decree against two defendants—Appeal—Deposit of decree amount pending appeal—Withdrawal by plaintiff—Sureties undertaking to repay if "the defendants" succeed in the appeal—Appeal successful only as regards one defendant—Right to enforce bond. *See* C. P. CODE, Ss. 144 AND 145. **44 L W. 838.**

——S. 145—*Surety bond for costs of appeal—Appellant unsuccessful in appeal—Execution against surety—Separate decree against surety—If necessary.*

A person became surety for another who was ordered to give security for the costs of an appeal. No property was specifically mortgaged in the surety bond. On the dismissal of the appeal, the respondent proceeded against the surety in execution.

Held, the respondent can take execution against the property of the surety without obtaining a separate decree against the surety, if he fails to get his money from the unsuccessful appellant. (*Darling, S.M. and Bomford, J.M.*) IMAMUDDIN BEG *v.* GAZAFFAR HUSAIN. **1937 R. D. 518.**

C. P. CODE (1908), S. 145.

——S. 145—*Surety bond—Enforcement—Procedure.*

Where a person has executed a bond as surety for a receiver and has become liable under the bond, the order of the Court to pay up the amount due on the bond falls within the scope of S. 145 and can be enforced by procedure prescribed in that section. (*Roberts, C.J. and Dunkley, J.*) M. L. R. M. LETCHMANAN CHETTYAR *v.* T. S. N. CHOCKALINGAM CHETTYAR. **189 I.C. 177= A.I.R. 1940 Rang. 151.**

——S. 145—*Surety for judgment-debtor—Judgment debtor given time to pay decree, without surety's consent—Liability of surety.*

Where a judgment-debtor was without the consent of the surety, given time after time to pay the decretal amount, the surety cannot be held liable for the decretal amount on the failure of the judgment-debtor to appear on a particular hearing. (*Addison and Ram Lall, JJ.*) CHHAKKAN RAM *v.* JOINT HINDU FAMILY OF UDHO DAS. **188 I.C. 172=12 R.L. 504=41 P.L.R. 282=A.I.R. 1939 Lah. 368.**

——S. 145—*Surety for judgment-debtor—Liability.*

Where the judgment-debtor was not told specially to be in attendance on a particular day on which he was absent, but his counsel who could have done all that was required was present, there is no default which renders the surety liable to pay the decretal amount. If his personal attendance is necessary on that day, the surety should be given notice to produce him. (*Addison and Ram Lall, JJ.*) CHHAKKAN RAM *v.* JOINT HINDU FAMILY OF UDHO DAS. **188 I.C. 172=12 R.L. 504=41 P.L.R. 282=A.I.R. 1939 Lah. 368.**

——Ss. 145 and 147—*Surety, position of—Enforcement of surety bond—Jurisdiction—Determination of.*

The right to enforce a surety bond in execution is conferred by S. 145, C. P. Code. The surety must be regarded as a party to the suit as well as to the decree, by reading Ss. 145 and 147 together, and the same consideration which apply to the judgment-debtor should also apply to him as well in matters of execution. (*Stone, C. J. and Bose, J.*) NILKANTHRAO *v.* KRISHNARAO. **1940 N.L.J. 244.**

——S. 145—Surety under—Discharge of—Execution barred against principal judgment-debtor—Effect of. *See* CONTRACT ACT, Ss. 134 AND 137. **40 C.W.N. 465.**

——S. 145, Proviso—*Notice under—Service of—Proof—Record of service and of appearance of party in order of Court—Sufficiency.*

A mere record in the order-sheet of the Court that a notice has been served on a particular person may not be evidence of service of such notice. But when the order in the order-sheet records that the party served has appeared in Court, the order is proof of his appearance, and the effect of the order is conclusive of the fact that the person has in fact been served with a notice. (*R. C. Mitter, J.*) BIRENDRAJIT SAHA *v.* RENUPADA SAHA. **40 C.W.N. 465.**

——S. 145, Proviso—*Notice to surety—Fresh notice in respect of each execution—Necessity.*

Obiter.—The law requires one notice to be served on the surety under S. 145, C. P. Code, and if such a notice has been served, other execution proceedings are maintainable against the surety without fresh service of such a notice. (*R.C. Mitter, J.*) BIRENDRAJIT SAHA *v.* RENUPADA SAHA. **40 C.W.N. 465.**

C. P. CODE (1908), S. 146.

——S. 145 (c)—*Powers of Court—Suit for permanent injunction—Application for temporary injunction—Agreement by parties to allow defendant to be in possession—Undertaking to pay profits to plaintiff, if latter succeeded in suit—Security bond and consent order—Decree in favour of plaintiff—Jurisdiction of Court to enforce bond.*

Immediately after filing a suit for a permanent injunction restraining the 1st defendant from interfering with the plaintiff's possession of the suit property, the plaintiff applied for a temporary injunction restraining the 1st defendant from interfering with his possession during the pendency of the suit. The parties entered into an agreement in and by which the 1st defendant was to be in possession of the land in dispute pending suit, and to pay plaintiff the profits of the land in case plaintiff's title was declared. A consent order was passed by the Court and the 2nd respondent executed a security bond which was accepted and which stipulated that in case plaintiff succeeded the amount of bond could be recovered from him in execution, "treating this as part of such decree and by executing such decree." The suit resulted in a decree in favour of the plaintiff who accordingly applied to recover the amount of the profits.

Held, that the plaintiff was clearly entitled to ask for the relief by way of a temporary injunction, and that the Court having general jurisdiction over the subject-matter of the suit had jurisdiction to pass such order in question which it deemed fit to give proper relief to the plaintiff during the pendency of the suit, that it was competent to the parties to come to an understanding and for the Court to give effect to it, and the Court had jurisdiction to enforce the obligation under the bond, which under the circumstances must be considered as "proceedings in Court imposing a certain liability to be enforced in the suit against the defendant to that suit."

Held, further, that the 1st defendant and the 2nd defendant having undertaken the obligation, it would not be open to them to resile from it. (*Venkataramana Rao, J.*) MUTHUSWAMI PILLAI *v.* MANIKKA MOOPAN. **166 I.C. 670=9 R.M. 390=1936 M.W.N. 1160=44 L.W. 717=A.I.R. 1936 Mad. 990.**

——S. 146—*Applicability—Hindu co-parcener—If claims under manager.*

S. 146 is not intended to apply to a co-parcener while the manager or *karta* in a joint Hindu family is alive so as to allow the co-parcener to sue in his place. There is no devolution of interest in such a case as is contemplated by S. 146 of the Code. (*Davis, J. C. and Mehta, A. J.C.*) KALLIANESHWAR BHAGWANDAS *v.* SHEWARAM NANDARAM. **30 S.L.R. 467=168 I.C. 801=9 R.S. 246=A.I.R. 1937 Sind 94.**

——S. 146—*Power of Court under—Suit by benamidar—Dismissal—Appeal by real owner—Permissibility.*

A real owner can be allowed under S. 146, C. P. Code, to file an appeal against the dismissal of a suit instituted by his benamidar who has released

C. P. CODE (1908), S. 148.

his right in the property claimed in the suit by a deed which recites that the appellant is the real purchaser of the property. The Court has ample powers under S. 146 to permit the person in whose favour the plaintiff has released his rights in the property to file an appeal. (*Wadsworth, J.*) SIVASWAMI CHETTIAR *v.* MARUDAIYA GOUNDAN. **186 I.C. 632=12 R.M. 660=50 L.W. 429=1939 M.W.N. 962=A.I.R. 1940 Mad. 16=(1939) 2 M.L.J. 759.**

——**S. 148**—*Applicability—Failure to pay deficit Court-fee under O. 7, R. 11 (c)—Power to extend time.*

In view of S. 148 the time granted to pay deficit Court-fee can be enlarged from time to time. This section expressly empowers the Court to extend any time fixed by it even after the expiry of the period originally fixed. (*Mukerji and S. K. Ghose, JJ.*) MAHOMMED FATEH NASIB *v.* SARADINDU MUKHERJEE. **162 I.C. 689=8 R.C. 643=40 C.W.N. 747=A.I.R. 1936 Cal. 221.**

——**S. 148**—*Applicability—Final order in judgment—Order that sale would be set aside if money is deposited within certain time—Jurisdiction to extend time.*

If on an application by the judgment-debtor for setting aside a sale, an order is passed that if the decretal amount is deposited within a certain time the sale would be set aside and on failure to deposit that sum within the stipulated period, the application would stand dismissed, the Court ceases to have jurisdiction and has no power to grant the judgement-debtor an extension of time to put in the decretal amount, unless he files a properly constituted application for the review of the order. S. 148, C. P. Code, can have no application in a case of this nature in which a final order has been passed in a judgment. The provisions of O. 20, R. 3, would apply. (*Edgley, J.*) SYED MAHOMED ASRAF ALI *v.* NABIJAN BIBI. **I.L.R. (1939) 1 Cal. 468=12 R.C. 317=184 I.C. 848=43 C.W.N. 417=A.I.R. 1939 Cal. 581.**

——**S. 148**—Applicability — Periods fixed in O. 45, R. 7 (1), C. P. Code, as applied to Federal Court appeal—Extension of—Power of Court. *See* LIMITATION ACT, S. 4. **1939 P.W.N. 807 (F. B.)**

——**S. 148**—Applicability—Time for deposit of decretal amount fixed in order of Court—Extension of—Jurisdiction of Court. *See* BENGAL TENANCY ACT, S. 174 (3) (*b*). **44 C.W.N. 449.**

——**S. 148**—Conditional order granting leave to withdraw suit with liberty to file fresh one—Extension of time. *See* C. P. Code, O. 23, R. (2) **66 C.L.J. 275.**

——**Ss. 148 and 149**—*Discretion of Court—Time for payment of deficit Court-fee on plaint—Grant of—Extension—Right of plaintiff to claim.*

When time is fixed by the Court for payment of deficit Court-fee on a plaint, it is not open to the plaintiff to demand as a matter of right that the time should be extended. The power to grant extension vests in the Courts either under S. 148 or S. 149, C. P. Code, under either of these sections the question is one of the Court's discretion and not the plaintiff's right. S. 149 expressly provides for defective documents being retrospectively validated. The Court must, however, exercise its discretion, not capriciously, but judicially and reasonably. (*Venkatasubba Rao, J.*) VENKANNA *v.* ATCHUTARAMANNA. **182 I.C.**

C. P. CODE (1908), S. 148.

953=12 R.M. 195=1938 M.W.N. 259=47 L.W. 492=A.I.R. 1938 Mad. 542=(1938) 1 M.L.J. 610.

——**S. 148**—*Excuse of delay—Execution application—Delay in re-presentation—Condonation of delay—If to be implied from registration of application.*

The mere registration of a darkhast which is re-presented beyond the time fixed by the Court does not *per se* amount to condonation of delay. Condonation of delay is a judicial act to be performed after hearing both parties. The registration of the darkhast only means that the delay is condoned subject to objections by the judgment-debtor at hearing. (*Norman, I.C.S.*) RAM DUTT *v.* CHATUR BHUJ. **1936 A.M.L.J. 110.**

——**S. 148**—Expiry of time to pay deficit court-fee—Power to grant further extension of time. *See* C. P. CODE, O. 7, R. 11 (*c*) AND S. 148. **66 C. L.J. 78.**

——**S. 148**—Power of Court—Conditional order under O. 9, R. 9—Extension of time. *See* C. P. CODE, O. 9, R. 9. **1936 A.L.J. 566=A.I.R. 1936 All. 477.**

——**Ss. 148 and 149 and O. 20, Rr. 3 and 6**—*Power to extend time—Existence of jurisdiction—Necessity—Preliminary decree fixing time for payment of deficient court-fee—If can be extended.*

To extend time under Ss. 148 and 149, C. P. Code, the Court must have a case before it in regard to which it has jurisdiction. The expressions 'from time to time' in S. 148 and 'at any stage' in S. 149 clearly indicate this. The jurisdiction of a Civil Court commences when a plaint is filed and comes to an end when judgment is pronounced under O. 20, R. 3. Where a preliminary decree for dissolution of partnership fixed a time for payment of deficient Court-fee and stated, that on default the decree would become a nullity, the time so fixed cannot be extended either under S. 148 or S. 149, C. P. Code, as the jurisdiction of the Court has come to an end on pronouncing of the judgment and signing of the same. Such a judgment cannot according to O. 20, R. 3 which is imperative, be altered except as provided by S. 152 or by review. Because of O. 20, R. 6 during the time between the signing of the judgment and the decree, nothing could be altered. (*Bennet and Verma, JJ.*) BENI PRASAD *v.* OM. PRAKASH. **177 I.C. 824=1938 A.W.R. (H.C.) 495=11 R.A. 218=1938 A.L.R. 785=1938 A.L.J. 673=A.I.R. 1938 All. 497.**

——**S. 148**—*Scope—Compromise decree fixing time for deposit—Power of Court to extend time on the application of one party only.*

When there is decree based on an agreement between the parties, an essential term of that agreement embodied in the decree cannot be changed by an act of the Court on the application of only one of the parties, but the consent of both the parties to the original agreement would be necessary for its modification. Where a definite period is fixed for the performance of an obligation as an essential part of the contract, the Court has no power to vary the terms and to grant an extension of time, if the time stipulated is an essential part of the terms of the contract embodied in the decree and not a mere threat of a penal nature. (*Wadsworth, J.*) MOORIANTHA-

C. P. CODE (1908), S. 148.

KATH *v.* MATHANKANDY VATTAKKAYIL POKKAN. 52 L.W. 336=1940 M.W.N. 720=(1940) 2 M.L.J. 311.

——S. 148—Scope—Extension of time for payment of deficit court-fee—Jurisdiction to grant after appeal is filed. *See* C. P. CODE, Ss. 2 (2) AND 148. 1937 A.L.J. 1346=1938 A.W.R. (H.C.) 13.

——S. 148—*Scope—Time for payment of deficit court-fee—Power of Court to extend.*

It is a general rule that where a party is required to do something under a decree and time limit is prescribed for doing it, the Court which passed the decree has no jurisdiction to extend the time limit, but it is subject to the qualification that where the decree or order which fixes the time is not intended to be final and the Court still retains control over the proceeding, the Court may extend time under S. 148. Whether the Court still retains control over the proceeding or not must be determined upon the nature of the proceeding and the order passed therein. Where the Court decreed a suit and made an order for deficit Court-fees in these words: "The plaintiffs must file deficit court-fee within a fortnight from to-day otherwise they will not be entitled to have the aforesaid decree and the suit will be dismissed."

Held, that a final order had not been passed in the suit and so the Court having still retained control over the proceeding, had jurisdiction to accept the deficit court-fee after the period fixed. (*Harries, C.J. and Fazl Ali, J.*) SURAJMAL MARWARI *v.* BHUBANESHWAR PRASAD. 186 I.C. 870=12 R.P. 548=6 B.R. 410=A.I.R. 1940 Pat. 50.

——S. 149—*Appeal — Deficient Court-fee in appeal—Extension of time to pay—Discretion of Court.*

Where an application for extension of time to make up the deficient Court-fee is not made by the pleader till after about 7 months since the discovery of deficiency and the appeal is time-barred by that time, the question of Court-fee not being difficult and the error of Counsel not being *bona fide*, it is not a fit case for granting extension of time. (*Bhide, J.*) GHULAM MOHAMMAD *v.* BARKAT ALI. 167 I C. 756=9 R.L. 552=39 P.L.R. 443=A.I.R. 1936 Lah. 935.

——S. 149 and O. 7, R. 11 (c)—*Appeal on insufficiently stamped paper filed within limitation—Prayer along with appeal to grant time to make good deficiency—Order dismissing appeal as time barred ignoring prayer—Legality.*

The appellate Court has discretion under S. 149, C. P. Code, to allow the appellant reasonable time within which to make good the deficiency before dismissing his appeal under O. 7, R. 11 (*c*) of C. P. Code. Where the appellant filed an appeal within limitation but on an insufficiently stamped paper and along with the appeal he prayed for granting him time to make good the deficiency, but without taking any notice of the prayer the appellate Court dismissed the appeal as time-barred for not having made up the deficiency within limitation.

Held, that the order dismissing the appeal was bad as the appellate court could have granted time to the appellant not only under S. 149 but also under O. 7, R. 11 (*c*). (*Thomas and Zia-ul-Hasan, JJ.*) HUSSAIN ALI KHAN *v.* AMBIKA PRASAD. 13 Luck. 397=169 I.C. 794=10 R.O. 3=1937 O.L.R. 384=1937 O.W.N. 804=A.I.R. 1937 Oudh 414.

C. P. CODE (1908), S. 149.

——S. 149—*Appeal presented with deficient Court-fee—Pleader misled by Court documents—Time to make good deficiency—Duty of Court to grant.*

Where the copies applied to a pleader who filed an appeal showed the value of the suit at a certain amount which was less than the correct amount, and Court-fees was paid thereon, the mistake is clearly *bona fide*, and the Court should allow the deficiency to be made good and not dismiss the appeal. (*Addison, C.J. and Din Mahomed, J.*) GAHRA *v.* MT. PANAH BIBI. 38 P.L.R. 262.

——S. 149—*Appellate Court finding court-fee fixed by trial Court to be insufficient—Duty to grant time.*

Where in the trial Court the defendants themselves had stated that the court-fee was payable on a certain amount and the Court after enquiry had fixed that amount as the proper value of the suit, the appellate Court, when it finds this value to be insufficient, should grant the plaintiffs time to make good the deficiency. This is eminently a case to which the provisions of S. 149, C. P. Code, apply. (*Tek Chand, J.*) ABDUL RAHMAN KHAN *v.* MOHAMMAD AMIR. 40 P.L.R. 33.

——S. 149 — *Applicability — Application for leave to sue* in forma pauperis—*Refusal—Order for costs of defendant—Prayer for time to pay court-fee—Grant of—Payment of Court-fee alone —Sufficiency—Costs ordered to defendant not paid—Effect—Payment at subsequent stage of suit —If validates suit—Dismissal of suit under O. 33 R. 15—If justified.*

S. 149 of the C P. Code cannot empower a Court after refusing to allow a petitioner to sue *in forma pauperis*, to pay court-fee and treat his application for leave to sue *in forma pauperis* as a plaint. If such an applicant files a suit, whether with the original document contained in his petition or with a plaint subsequently drafted, he can do so only by strict compliance with the provisions of O. 33, R. 15, under which rule alone the suit comes into existence. Where a petitioner, on being refused leave to file his suit *in forma pauperis* and ordered to pay the defendant's costs asks for time for paying court-fee, and pays the Court-fee on a subsequent day to which the matter is adjourned and at a later stage of the suit the defendant who till then makes no mention of his costs, pleads non-payment of the costs and an issue is framed on the point as to whether the suit is barred by O. 33, R. 18, C. P. Code, if the plaintiff pays such costs, S. 149, C. P. Code cannot apply, and the suit cannot be held to be properly filed under O. 33, R. 15, on the date on which the court-fee has been paid. But though O. 33, R. 15, C.P. Code, is imperative, a suit in which the costs have in fact been paid must be treated as one instituted on the day on which the costs are paid, and cannot thereafter be dismissed as barred under O. 33, R. 15. (*King, J.*) UTHAMAN PILLAI *v.* MAHOMED USUF THARAGANAR. 1939 M.W.N. 178=49 L.W. 323=A.I.R. 1939 Mad. 316=(1939) 1 M.L.J. 738.

——S. 149—*Applicability—Decree on payment of court-fee—Court-fee deposited after three years—Execution of decree—Starting point—Limitation Act, Art. 182.*

C. P. CODE (1908), S. 149.

Where in a suit for dissolution of partnership, a defendant is given a final decree for a certain sum on his paying the requisite court-fee, the proceedings in that Court do not become final until that Court either accepts the court-fee or holds that the claim is dismissed for non-payment of the court-fee. Until this court-fee is paid there is no decree capable of execution, and when there is no decree capable of execution limitation cannot begin to run under Art. 182 of the Limitation Act. As S. 149, C. P. Code, gives the Court absolute discretion, at any stage, to allow the person by whom court-fee is payable to pay it, its acceptance of court-fee though after three years from the date of the order directing the payment of the necessary court-fee, is quite valid and time for execution of the decree begins to run only after the date when the court-fee was paid. (*Bennet, A.C J. and Verma, J.*) BABU RAM *v.* GOPAL SAHAI. **I.L R. (1938) All. 848=177 I.C. 875=11 R.A. 234=1938 A.L.J. 917=1938 A.L. R. 799=1938 A.W.R. (H.C.) 538=A.I.R. 1938 All. 539.**

——**S. 149**—*Applicability—Executing Court—Execution application filed within time—Court-fee payable in decree, paid after limitation but within time allowed by executing Court—Effect.*

There is nothing in the wording of S. 149, C.P. Code, to support the view that it does not apply to an executing Court. Where court-fee is payable in a decree but no time is fixed for its payment in the decree itself, there is no reason why the executing Court could not allow time for the payment. An application for execution of that decree filed within time is not, therefore, barred by limitation by reason of the court-fee having been paid after limitation, if it was paid within the time allowed by the executing Court. (*Bhide, J.*) LORIND CHAND *v.* LORIND CHAND-PARMA NAND. **173 I.C. 33 (1)=10 R.L. 386 (1)=39 P.L.R. 581=A.I.R. 1937 Lah. 720.**

——**S. 149 and O. 44, R. 1**—*Application for leave to appeal* in forma pauperis—*Appellate Court dismissing application and directing Court-fees to be paid by specified date and on default rejecting appeal—Jurisdiction—Revision.*

The provisions of O. 33 apply to applications for appealing *in forma pauperis* by virtue of O. 44, R. 1 and an application alone is before the Court for decision in either case. There is no plaint in the original case and no appeal in the appellate case before the Judge at the moment. Up to the stage of the decision as to whether the plaintiff should be allowed to proceed *in forma pauperis* or not, there is no plaint before the Court. So also there is no appeal before the Court until the appellate Judge has allowed or disallowed the application to appeal *in forma pauperis*. Where therefore the appellate Court after dismissing the application for permission to appeal *in forma pauperis* directs the Court-fees to be paid on or before a particular date and on default to pay the Court-fees, rejects the appeal, it cannot be said that there was an appeal before the Court and that therefore the Court acted under S. 149 in giving the appellant time to provide Court-fees. The order directing the appellant to provide Court-fees by the particular date is *ultra vires* as also, the order dismissing the appeal because Court-fees had not been paid. The Judge should have left the matter where it

C. P. CODE (1908), S. 149.

was on the date on which he rejected the application to appeal *in forma pauperis*. The only order which can be made subject-matter of revision is that rejecting the application for permission to appeal *in forma pauperis* and it is open to revision. (*Mir Ahmad, A.J.C.*) MT. JAMNA DEVI *v.* BALURAM. **161 I.C. 954=8 R. Pesh. 187=A.I.R. 1936 Pesh. 69.**

——**S. 149 and O. 33, Rr. 5 and 7**—Application for leave to sue as pauper rejected—Power of Court to allow applicant to pay Court-fees—Separate and subsequent order—Legality. *See* C. P. CODE, O. 33, RR. 5 AND 7. **A.I.R. 1936 All. 584 (F.B.).**

——**S. 149 and O. 33, R. 15**—*Application to sue as pauper dismissed—Court-fee paid beyond limitation but within time granted by Court—Date of institution of suit.*

Where a person files a suit *in forma pauperis* within the period of limitation but his application to sue as pauper is dismissed and he is required to pay court-fee on a date which went beyond the limitation period and the court-fee is so paid at a time granted under S. 149, C. P. Code, the suit should be regarded as filed when the pauper application was first made. However, if it is to be regarded as filed when court-fees were paid, then the period during which the applicant was busy in prosecuting his pauper application should be excluded in counting the period of limitation and no question of limitation arises under O. 33, R. 15. (*S. K. Ghose and Petterson, JJ.*) KALI DASI DASI *v.* SANTOSH KUMAR PAL. **I.L.R. (1939) 1 Cal. 112=179 I.C. 271=11 R.C. 513=A.I.R. 1938 Cal. 730.**

——**S. 149**—*Applicatian to appeal* in forma pauperis *to High Court dismissed as barred by time—Division Bench extending time for paying court-fee on appeal—Court-fee paid—Objection that appeal is barred by time—If can be raised at the hearing.*

An application to appeal *in forma pauperis* was dismissed as barred by time by a Division Bench of the High Court which, however, extended the time for paying court-fee on the memorandum of appeal filed along with the application. The court-fee was duly paid. A preliminary objection was taken at the time of the hearing of the appeal that in the circumstances the appeal was barred by time, because at the date of the order extending time there was no appeal before the Court at all but only an unstamped piece of paper, the memorandum of appeal, and therefore no time could be extended and that anyhow the appeal remained barred by time even if the Court passed an order extending time. Overruling that objection.

Held, that the order of the Division Bench impliedly held that there was an appeal and that time should be extended and that the order not being *ex parte* was binding upon the parties. (*Dalip Singh and Skemp, JJ.*) KANWAL SHRI *v.* BABU LAL. **172 I.C. 508=10 R.L. 335=39 P.L. R. 660=A.I.R. 1937 Lah. 819.**

——**S. 149 and O. 33, R. 2**—*Application under O. 33, R. 2 to sue as pauper—Order rejecting the application also requiring the plaintiff to pay court-fee within a certain date—Suit when taken to have been instituted.*

Where the plaintiff preferred an application under O. 33, R. 2 of the C. P. Code for permission

C. P. CODE (1908), S. 149.

to sue *in forma pauperis* and this application was dismissed and the order of dismissal required the plaintiff to pay the full court-fee within a certain period fixed by the Court under S. 149, C. P. Code, and the court-fee was paid within the time so fixed.

Held, by virtue of S. 149 of the Code, the suit must be taken to have been instituted on the date of the application for permission to sue *in forma pauperis* since the order rejecting the pauper application and the order requiring the plaintiff to pay the full court-fee were passed simultaneously. 17 L. 831, Dist. (*Jai Lal and Abdul Rashid, JJ.*) RAM HET GIR *v.* BANWARI LAL. **171 I.C. 412=10 R.L. 193=A.I.R. 1938 Lah. 41.**

———**S. 149**—*Court-fee made up within time allowed—Effect of.*

Where within the time allowed, the proper Court-fee and printing fee are paid up, the document on which the Court-fee is so made up must be taken to date back to the date on which it was originally, presented. A.I.R. 1929 P C. 147, Foll. (*Tek Chand and Dalip Singh, JJ.*) NIHAL CHAND *v.* DISTRICT BOARD, MIANWALI. **166 I.C. 575=9 R.L. 390=A.I.R. 1936 Lah. 564.**

———**S. 149 and Sch. II, Para. 17**—*Court-fee on objections to award not paid through inadvertence—Requisite Court-fee paid at earliest opportunity—Objections, if liable to be dismissed.*

Where the Court-fee payable on a memorandum of objections to an award has not been paid through inadvertence, owing to a *bona fide* mistake of the objector's Counsel but the requisite Court-fee is paid at the earliest opportunity, the Court should, under S. 149, C. P. Code, accept the Court-fee and should not dismiss the objections as not properly stamped. (*Tek Chand, J.*) PIARE LAL *v.* GOPI RAM. **174 I.C. 21=10 R.L. 519 (2) =A.I.R. 1937 Lah. 276.**

———**S. 149**—*Delay in filing deficient Court-fee—When can be condoned.*

In the certified copies of the judgment and the decree of the lower appellate Court, the value of the suit for purposes of jurisdiction was given, as Rs. 5 and on this amount the appellant paid Court-fee while presenting the appeal. Subsequently it transpired that the real value of the suit was much more and therefore, the appellant was called upon to pay the deficient Court-fee which he made good within the time allowed but after the period prescribed by law for presentation of the appeal had passed.

Held, that this was eminently a fit case in which the delay in filing the deficient Court-fee should be condoned under S. 149, C. P. Code. (*Tek Chand, J.*) IHSAN ALI *v.* ATTA ULLAH. **172 I.C. 769=10 R.L. 367=39 P.L.R. 389=A.I.R. 1937 Lah. 688.**

———**S. 149**—*Discretion of Court — Court-fee paid after limitation—Court receiving after limitation—Effect.*

S. 149, C. P. Code, gives wide and unfettered discretion to the Court to accept Court-fees at any stage, and if the Court receives the Court-fee after the expiry of the period of limitation, the instrument is validated retrospectively as from the date of its presentation. (*Thomas, J.*) MATA BAKSH SINGH *v.* AJODHIA BAKHSH SINGH. **163 I.C. 770=9 R.O. 1=1936 O.L.R. 378=A.I.R. 1936 Oudh 340.**

C. P. CODE (1908), S. 149.

———**S. 149**—*Discretion of Court—Exercise of—Appeal memo stamped with a moiety of court-fee payable—Plea of inability to pay—Extension of time—Powers.*

A Court has a discretion to extend time for payment of the requisite court-fee due on a memorandum of appeal, when the appellant had paid a substantial portion of the court-fee and pleaded poverty as a ground for extension of time. (*Pollock, J.*) SONBA KESHAO SONAR *v.* RODRIGUES. **177 I.C. 505=11 R.N. 142=1938 N. L.J. 155=A.I.R. 1938 Nag. 322.**

———**S. 149**—*Discretion of Court—Exercise of—Interference on appeal—Court allowing extension unreasonably — Remedy of aggrieved party—Failure to apply in revision—Suit allowed to proceed—Appeal from final decree in suit—Wrong exercise of discretion in extending time for payment af court-fee—If can be made a ground of attack—C. P. Code, S. 99.*

If the discretion allowed to a Court under S. 149, C. P. Code, to allow time for payment of court-fees is exercised in an outrageous fashion which prejudices the defendant, it is quite open to the injured defendant to go to the High Court for relief in revision; and the High Court, in an application for revision against the order allowing time, would, by virtue of its general powers of superintendence, interfere and check the action of the lower Court. But if the injured party takes no such step, he is not entitled in an appeal from the final decree in the suit to attack the ultimate decree or order of the trial Court on the basis of the wrongful exercise of discretion by the lower Court in allowing extension of time, Such wrong exercise of discretion, whether by the trial Courts or first appellate Courts, must be remedied, if at all, at once by the High Court on the application of the aggrieved party, and it would be too late if that party allows the suit to proceed and then seeks to interfere with the discretion in appeal. (*Courtney-Terrell, C.J., Khaja Mohammad Noor and Manohar Lall, JJ.*) BAIJNATH PRASAD SINGH *v.* UMESHWAR SINGH. **18 Pat.L.T. 665=172 I C. 138=10 R.P. 284=16 Pat. 600=1937 P.W.N. 667=A.I.R. 1937 Pat. 550 (S.B.).**

———**S. 149**—*Discretion of Court—Exercise of—Principles.*

The discretion conferred on the Court by S. 149, C. P. Code, is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive *mala fides* or reasons of a similar kind. The question of *bona fides* in this connection should be construed in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act. A thing should be presumed to be done *bona fide*, if it is done honestly whether it is done negligently or not for the purposes of judging whether the discretion under S. 149 should or should not be exercised in favour of the litigant. (*Dalip Singh, Monroe and Din Mohammad, JJ.*) JAGAT RAM *v.* KHARAITI RAM. **175 I.C 699=11 R L. 36=40 P.L.R. 413=A.I.R. 1938 Lah. 361 (F.B.).**

———**S. 149**—Discretion under—Exercise of—Rejection of application for leave to sue as pauper—Time for payment of court-fee. *See* C. P. CODE, O. 33, RR. 5 AND 15. **19 Pat.L.T. 8.**

C. P. CODE (1908), S. 149.

——S. 149—*Discretion of Court—Extension of time for payment of deficient Court-fee—Inability to raise funds owing to famine conditions.*

Inability of a party to raise funds is not ordinarily a sufficient ground which would entitle the Court to exercise its discretion under S. 149, C. P. Code, and to permit payment of the deficit Court-fees. But that rule has reference only to normal conditions. But where it is shown that the party seeking the Court's discretion lives in a district where an acute famine prevails and that in consequence he was unable to procure the necessary funds, an exception should be made to the rule, and the Court in such a case will exercise its discretion in his favour under S. 149. (*D. N. Mitter and S. K. Ghose, JJ.*) SOURESH CHANDRA SARKAR *v.* GOSTA BEHARI DUTT. **40 C.W.N. 1294.**

——S. 149—*Discretion of Court—Extension of time for payment of court-fee—Power to grant—Payment of court-fee after extension of time—Effect—Plaint, when to be deemed to be filed—Merits of case—Relevancy.*

The Court has a double function; it has its judicial function to hear and determine cases; it has also the function of acting as a collector of revenue for the Government in the shape of court-fees according to the statutes provided, and in exercising that function it has a discretion granted to allow time. Under S. 149, C, P. Code, the Court has a clear discretion to allow time to a plaintiff for the payment of court-fee, and when the court-fee has been paid, the plaint upon which it was paid must be deemed as having been filed on the day on which it was actually filed. The provision for payment of court-fees has really nothing to do with the litigation as such or with the merits of the case, and is merely a provision enforcing the payment of revenue by a denial of judicial process to a person who does not pay the provided fees. (*Courtney-Terrell, C. J., Khaja Mohammad Noor and Manohar Lall, JJ.*) BAIJNATH PRASAD SINGH *v.* UMESHWAR SINGH. **18 Pat. L T. 665=1937 P.W.N. 667=16 Pat. 600=172 I.C. 138=10 R.P. 284=A.I.R. 1937 Pat. 550 (S.B.).**

——S. 149 and O. 7, R. 11—*Discretion of Court—Plaint insufficiently stamped — Extension of time—Duty of Court—Consideration.*

O. 7, R. 11, C. P. Code, necessarily implies an obligation on the part of the Court to grant an extension of time for payment of deficient court-fee in respect of plaint insufficiently stamped. It is manifestly a convenient rule for the disposal of justice. Nevertheless in applications for extension of time, the Court as regards the period of extension, must have regard to the justice of each particular case, and should not automatically grant long extensions of time, because of the duty owed by judicial authorities to protect the revenue. That, however, is not a matter which concerns the defendant; the matter is as between the Crown and the plaintiff.

Khaja Mohammad Noor, J.—Before rejecting a plaint under O. 7, R. 11, C. P. Code, the Court is bound to give some time to the plaintiff to make the deficiency; it cannot straight away reject the plaint without giving any time.

Manohar Lall, J.—A Court's duty is to interpret the plain meaning of the words deliberately used in O. 7, R. 11 (*c*), C. P. Code, and not to guess the possible intention of the Legislature. The rule lays down two conditions, both of which must be satisfied, before a plaint can be rejected; some time must be given before the plaint can be rejected. (*Courtney-Terrell, C.J., Khaja Mohammad Noor and Manohar Lall, JJ.*) BAIJNATH PRASAD SINGH *v.* UMESHWAR SINGH. **18 Pat.L. T. 665=1937 P.W.N. 667=16 Pat. 600=172 I.C. 138=10 R.P. 284=A.I.R 1937 Pat. 550 (S.B.).**

——S. 149 and O. 7, R. 11—*Discretion of Court—Plaint presented on last day of limitation with insufficient court-fee—Return for payment of proper court-fee within time fixed—Re-presentation within time fixed with request for further time—Order granting same—Payment of full court-fee and re-presentation in time—Effect of—If barred by limitation.*

Under O. 7, R. 11, C. P. Code, the Court may admit a plaint though written on paper insufficiently stamped, if the plaintiff on being required by the Court supplies the requisite stamp paper within the time allowed by the Court, the plaint is a valid plaint and must be regarded as having been filed on the date on which it was originally presented. The Court has a discretion under S. 149, C. P. Code, to grant time for payment or to extend the time granted for payment and the discretion of the trial Court in the matter should not be interfered with by the Court of appeal. A plaint was presented on the last day of limitation which was 4—10—1928, with only a one rupee stamp. On 5—10—1928, it was returned directing payment of the deficient court-fee within two weeks. On 19—10—1928, it was re-presented with a prayer for a further two weeks for payment. That was granted on 20—10—1928, and the plaint was re-presented on 3—11—1928 with the required stamp duty, and was accepted.

Held, that the plaint should be regarded as having been presented on 4—10—1928 and not on 3—11—1928, and that regarding O. 7, R. 11 with S. 149, the suit was not barred by limitation. (*Madhavan Nair and Stodart, JJ.*) DURAIRANGAM PILLAI *v.* GOVINDARAJULU NAIDU. **11 R.M. 434=178 I.C. 238=1938 M.W.N. 257=48 L.W. 244=A.I.R. 1938 Mad. 560=(1938) 2 M.L.J. 135.**

——S. 149 and O. 33, R. 7—Dismissal of pauper application—Permission granted to pay Court-fees—Date of institution of suit. *See* C. P. CODE, O, 33, Rr. 7 AND 15. **43 C.W.N. 686.**

——S. 149—*Judge distributing plaints—Power to extend time.*

A Judge acts ministerially in distributing plaints and does not constitute a Court for the purpose of extension of time under S. 149, C. P. Code. But the mere fact that the deficiency in court-fee is made up on his requisition is not material, as even if the plaint is sent to the trial Court with deficient court-fee, that Court would be bound to ask the plaintiff under O. 7, R. 11, C. P. Code, to make up the court-fee within a period to be fixed by it, and could reject the plaint only if the deficiency is not made up within that period. (*Bhide, J.*) JAGAT RAM *v.* KHARATI RAM **39 P.L.R. 199=10 R.L. 228=171 I.C. 764=A.I.R. 1937 Lah. 392.**

——S. 149—*Memorandum of appeal filed with insufficient court-fee—Application under S. 149 rejected—Appeal if filed in t me.*

C. P. CODE (1908), S. 149.

Where a memorandum of appeal was filed within the time allowed by law, with insufficient Court-fee, the valuation of the appeal was subsequently reduced and an application filed by the appellant under S. 149, C. P. Code, for extension of time to pay the deficient court-fee was rejected.

Held, that the memorandum of appeal cannot be held to have been presented in time. In the absence of an order granting time under S. 149, presentation of the unstamped or insufficiently stamped memorandum of appeal will not amount to a valid presentation. (*Varadachariar and Pandrang Row, JJ.*) SITHARAMAYYA *v.* RAMAYYA. **177 I.C. 453=11 R.M. 341=47 L.W. 211=1938 M.W.N. 71=A.I.R. 1938 Mad. 316=(1938) 1 M. L.J. 514.**

———**Ss. 149 and 115**—*Objections filed against award without affixing court-fee—Court disposing of matter without taking notice of objections—Objector not given opportunity to make good court-fee—Material irregularity—Revision.*

Where objections were filed against an award without affixing court-fee stamp, and the Court disposed of the matter without taking any notice of the objections and without giving the objector any opportunity whatsoever to make good the court-fee stamp.

Held, in revision, that the Court had acted with material irregularity in the exercise of its jurisdiction in ignoring the provisions of S. 28 of the Court-Fees Act and S. 149, C. P. Code, and its order was, therefore, liable to be set aside. (*Agha Haidar, J.*) ABDUL GHAFFAR ALI *v.* ROSHAN ARA BEGUM. **169 I.C. 672=10 R.L. 42=38 P.L. R. 1163.**

———**S. 149**—*Order granting time—If can be reviewed subsequently.*

If a plaintiff obtains a grant of time by an entirely false representation, as for example, by saying that he had on the previous day been robbed of his money or that the stamp-vendor's stock was exhausted, it would certainly be inequitable to allow the plaintiff to take advantage of his own fraud, in view of the principles that fraud vitiates consent and that no party should be prejudiced by an order made behind his back An insufficiently stamped plaint was filed on the last day of limitation with an application for granting time for payment of full court-fee alleging that plaintiff was not possessed of the amount required. The Court granted an extension of time for paying the full stamp and within the time allowed the requisite court-fees were paid; but subsequently on the date of hearing, the defendant contended that time was obtained by plaintiff on false pretences and the Court reviewed its order granting time, and finding that it was obtained by plaintiff under false pretences, set it aside and dismissed the suit as barred by limitation.

Held, that the Court had power to review its order granting time under S. 149 and reject the plaint as barred by limitation. (*Pollock, J.*) REVANSIDDAPPA *v.* SHANKAR. **I.L.R. (1938) Nag. 359=171 I.C. 460=10 R.N. 113=A.I.R. 1937 Nag. 87.**

———**S. 149 and O. 33, R. 15**—*Pauper application rejected—Power of Court to grant time to pay Court-fee—Date of institution of suit.*

When the application for leave to sue as a pauper is rejected, the proceedings before the Court are terminated completely. The plaint can

C. P. CODE (1908), S. 149.

only be considered as a plaint if the application for leave is allowed. On the failure of the application for leave, the document cannot be considered any further by the Court. The plaint falls with the application to sue, and the only recourse of the applicant in such an event is to pay the court-fees and institute the suit in the ordinary way. When that is done, S, 149, C. P. Code, cannot be invoked so as to enable the Court to deem the suit to have been instituted at the time the application for leave to sue as a pauper was made, inasmuch as the two proceedings are entirely distinct and the one is commenced after the termination of the other. A petitioner in an application for leave to sue *in forma pauperis* desiring to take advantage of the provisions of S. 149 must make his application for permission to pay the court-fees on the proposed plaint or for a grant of time for such payment before his application for leave to sue *in forma pauperis* is finally rejected. A.I.R. 1929 Pat. 637 and A.I.R. 1936 Cal. 28, Diss. (*Mya Bu and Mackney, JJ.*) MA SAW YIN *v.* S. P. K. A. A. M. FIRM **169 I.C. 890=10 R.R. 42=1937 Rang L R. 331=A.I.R. 1937 Rang. 185.**

———**Ss. 149 and O. 33, R. 2**—Pauper petition—Subsequent application to pay Court-fees—Effect of—Discretion of Court. *See* C. P. CODE, O. 33, R. 2 AND S. 149. **1938 Rang.L.R. 629**

———**S. 149**—*Plaint rejected for non-payment of deficit court-fee—Subsequent order setting aside order of rejection and granting time for payment—Validity.*

If, without an application for review, a Court sets aside its own previous order rejecting a plaint for non-payment of deficit Court-fees and gives a further extension of time under S. 149, C. P. Code, its subsequent order is not a nullity but remains a perfectly good order until it is set aside by a superior Court or in proper proceedings. (*Henderson, J.*) DHARMANATH SARMA *v.* MADHU CHANDRA MAHANTA. **69 C.L.J. 379=A. I.R. 1939 Cal. 722.**

———**S. 149**—*Plaint with deficient Court-fee presented within limitation—Deficiency made good and accepted by Court after limitation—Court, if can be deemed to have granted time.*

A plaint which did not bear the requisite Court-fee stamp was presented on a day previous to the date on which the limitation for the suit expired, but it was accompanied by an application for an extension of time for the payment of the Court-fee. The plaintiff did not obtain an express order from the Court granting him time but made up the deficiency in the Court-fee stamp on a subsequent date.

Held, that even assuming that the Court-fee was made good after the expiry of the period of limitation, the Court must be deemed to have granted time by accepting the Court-fee, and the plaint having been presented within limitation, the suit was not barred by time. (*Jai Lal, J.*) HIRA LAL *v.* FAYAZ KHANAM. **167 I.C. 291=9 R. L. 478=38 P.L.R. 445=A.I.R.1937 Lah. 111.**

———**S. 149**—Powers of Court—Application for leave to sue as pauper—Subsequent payment of court-fee—Excuse of delay—Power of Court—Suit—When instituted—Considerations. *See* LIMITATION ACT, S. 3, EXPL. **A.I.R. 1937 Nag. 36.**

C. P. CODE (1908), S. 149.

——S. 149—Power of Court to extend time for payment of Court-fee—Refusal of permission under O. 33, R. 5—Rejection of application under O. 33, R. 7 (3). *See* C. P. CODE, O. 33, RR. 5, 7 AND S. 149.

——S. 149—*Power of Court—Order to pay deficit Court-fees within particular period—Suit to stand dismissed in case of failure—Plaintiff applying for extension of time before expiry of period—Power to extend.*

Where the appellate Court orders the plaintiff in a suit to put in additional Court-fee within a particular time and directs that in case of failure to do so on his part the suit is to stand dismissed, and the plaintiff applies for extension of time for putting in the deficit Court-fee before expiry of the period, the appellate Court has jurisdiction under S. 149 to extend the time as the appeal is not finally disposed of, before the order of extension of time is made. (*Nasim Ali and Henderson, JJ.*) RAMESH CHANDRA TALUKDAR *v.* PRAMATHA NATH SANYAL. **162 I.C. 522=8 R.C. 610 =63 C.L.J. 591=40 C.W.N. 758=A.I.R. 1936 Cal. 245.**

——S. 149—Scope—Set-off—Written statement not stamped—Trial Court ordering payment of Court-fee, but not realising full Court-fee—High Court's power to direct payment of deficit Court-fee in second appeal. *See* COURT-FEES ACT, SS. 12 (*ii*) AND 28. **A.I.R. 1936 Cal. 277.**

——S. 150—*Applicability—Transfer of business—Meaning of—Transfer of jurisdiction as regards future business—Pending cases not transferred or affected—Application for restitution arising out of such pending cases—Jurisdiction to entertain.*

S. 150, C. P. Code, only applies to cases where the business of a court is transferred to another Court on account of the abolition of that Court or the transfer of any local area from the jurisdiction of one Court to that of another. It cannot be invoked to meet a case where there has neither been a transfer of the entire business of a Court owing to its abolition, nor a transfer of any particular case from one Court to another. Where there has only been a transfer of jurisdiction as to future business subject to an express reservation as regards pending cases, the Court in which a suit was pending and which passed the decree has exclusive jurisdiction to entertain and decide applications for restitution arising out of such suit. (*Harries and Kachhpal Singh, JJ.*) SKINNER *v.* SKINNER. **I.L.R. (1937) All. 670= 1937 A.W.R. 510=1937 A.L.J. 588=1937 A.L.R. 713=170 I.C. 706=10 R.A. 157=A.I.R. 1937 All. 515.**

——S. 151.

Abuse of process.
Addition of parties.
Amendment.
" Second application for.
Appeal.
Applicability.
Compromise decree.
Consent decree.
Ends of justice.
Execution.
Execution sale.
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C. P. CODE (1908), S. 151.

Limitation.
Order under.
Other remedy.
Powers of High Court.
Remand.
Restitution.
Restoration.
Review.
Scope.
Stay of execution.
Stay of suit.

Abuse of process.

——S. 151—*Abuse of process of Court—Court incorrectly fixing period of grace for payment of arrears of rent—Payment after date fixed but within proper time—Ejectment—Power of Court to redress wrong.*

Where a decree for ejectment wrongly fixed the period of grace for payment of the arrears and the tenant in ignorance of his remedy kept quiet and paid the arrears after the date but within the proper time allowable under the law, but the landlord nevertheless applied under S. 61 of the Oudh Rent Act and obtained an order of ejectment, such an order amounts to an abuse of the process of the Court and S. 151, C. P. Code, is the only section under which the tenant could get redress of the wrong done and the Court can remedy the injustice done by reason of the wrong order and cancel the decree of ejectment (*Mehta, J.M.*) HARI KISHEN DAS *v.* BADAL SINGH. **1939 A.L.J. (Supp.) 10=1938 R.D. 758 =1938 O.W.N. 931=1938 A.W.R. (B.R.) 383.**

Addition of parties.

——Ss. 151 and 153—*Addition of parties—Appeal filed against dead respondent—Addition of legal representatives of deceased party and amendment of record—Powers of Court.*

A Court has jurisdiction in an appeal to order the addition as parties to the appeal legal representatives of respondents who were not parties to the appeal in the sense that they were dead. Though the appeal might be one against a dead person or persons, the Court has power under Ss. 151 and 153 to add the legal representatives and amend the record in order to prevent injustice being done to either side. (*Wadia and Wassoodew, JJ.*) ALABHAI VAJSURBHAI *v.* BHURA BHAYA. **I.L.R. (1937) Bom. 602=39 Bom.L.R. 444=10 R.B. 207=171 I.C. 536=A.I.R. 1937 Bom. 401.**

——Ss. 151, 152, 153 and Evid. Act, S. 94—*Amendment—Application to amend mistake in mortgage deed, preliminary and final decrees as to extent of interest mortgaged—If permissible.*

Where after the passing of a final decree on a mortgage an application is made under Ss. 151, 152 and 153, C. P. Code, to amend the mortgage deed, preliminary and final decrees with reference to the extent of the interest mortgaged, namely, from 'five pies' to 'five shares' on the ground that a mistake which crept in the mortgage was repeated in the plaint and in the decrees, it cannot be granted for the mortgagees cannot be allowed to obtain by this application what they could not have obtained in the suit itself. This is a case which is governed by the rule laid down in S. 94 of the Evidence Act. (*Bennet and Verma, JJ.*) UMA SHANKER RAI *v.* RAM AGYAN THAKUR. **I.L.R. (1939) All. 399=181 I.C. 153=11 R.A.**

C. P. CODE (1908), S. 151.

552=1939 A.W.R. (H.C.) 173=1939 A.L.J. 193 =A.I.R. 1939 All. 231.

Amendment.

——**S. 151**—*Amendment—Sale in execution of mortgage decree—Property wrongly described in sale certificate due to mistake in mortgage deed—Amendment of sale certificate—Jurisdiction.*

The decree-holders purchased the property in execution of their mortgage decrees. By an application, they alleged that though they had obtained a sale certificate from the Court they could not get mutation made in their favour as the sale certificate showed as if the property purchased by them was situated in one *mahal* only while as a matter of fact it was in two *mahals*. They, therefore, prayed that the sale certificate be amended so as to describe the property in detail as given in the application specifying the property of each of the two *mahals* separately. It was contended by the opponent that the description given in the sale certificate being in accordance with that given in the mortgage-deed itself, the Court had no jurisdiction to amend the sale certificate.

Held, that the Court had power under S. 151, C. P. Code, to make the amendment in question. (*Zia-ul-Hasan, J.*) SURAJ DIN *v.* RAM PRASAD SINGH. **12 Luck. 167=8 R.O. 361=1936 O.W. N. 575=162 I.C. 233=1936 O.L.R. 239=A.I.R. 1937 Oudh 144.**

——**Ss. 151 and 152**—*Amendment of decree—Question of costs raised in both first and second appeals—Dismissal of appeals—Effect of—Amendment of first appellate decree relating to costs—If competent.*

Where the question of costs was raised by the applicant for an amendment of the decree in both the first and second appeals which were dismissed, the matter must be presumed to have been adjudicated upon adversely to him. In such circumstances, no application by him for amendment of the decree relating to costs is competent in the first appellate Court. (*Bhide, J.*) SADHU RAM *v.* LAKHMI DASS. **183 I.C. 144=12 R.L. 103=41 P.L.R. 136=A.I.R. 1939 Lah. 312.**

——**Ss. 151 and 152**—*Amendment of decree—Second application—Maintainability.*

It is not open to a Court to entertain a second application for amendment of a decree, when a prior application on the same question has been dismissed. (*Bhide, J.*) SADHU RAM *v.* LAKHMI DASS. **183 I.C. 144=12 R.L. 103=41 P.L.R. 136=A.I.R. 1939 Lah. 312.**

——**Ss. 151 and 152**—*Amendment of decree—Third party acquiring interest in property affected by decree—Application for amendment of decree long after—If can be allowed.*

A decree should not be amended in the exercise of the powers conferred under Ss. 151 and 152, C. P. Code, long after it was passed so as to prejudice the rights acquired by third parties in the property affected by the decree. The principles which apply to the amendment of pleadings cannot be extended to the amendment of a decree after interest of third parties has accrued. (*Lokur, J.*) LAXMAN MAHADEV *v.* MARUTI RAMBHAU. **184 I.C. 775=41 Bom.L.R. 800=A.I.R. 1939 Bom. 389.**

Appeal.

——**S. 151**—*Appeal.*

C. P. CODE (1908), S. 151.

No appeal lies from an order passed under S. 151, C. P. Code. (*Tek Chand and Abdul Rashid, JJ.*) GANESH DATTA *v.* MODEL TOWN SOCIETY. **185 I.C. 125=12 R.L. 268=A.I.R. 1939 Lah. 508.**

——**S. 151**—Appeal—Amendment of decree to correct description of property—Power of Court—Refusal to amend—Appealability. *See* C. P. CODE, S. 47. **41 Bom.L.R. 1170.**

——**S. 151**—Appeal—Application for enquiry as to how much money was due from judgment-debtor—Application referring to S. 151 in the heading—Order on—Appealability. *See* C. P. CODE, S. 47. **161 I.C. 21.**

——**S. 151**—*Appeal—Application under O. 21, R. 90—Order restoring possession to judgment-debtor pending its decision—Appeal—Revision.*

An appeal was filed against an order rejecting as incompetent an application filed by the judgment-debtor under O. 21, R. 90, C. P. Code. In the meantime the sale was confirmed and the auction-purchaser took possession. The Appellate Court allowed the appeal and remanded the case to be heard on the merits. The lower Court passed an order restoring possession of the property to the judgment-debtor acting under S. 151, C. P. Code.

Held, (i) that the order was really in the nature of an interlocutory order and was not in any sense a "decree" within the meaning of S. 2 (2), C. P. Code, as the eventual rights of the parties would depend upon the result of the decision of the application under O. 21, R. 90, that no appeal lay against the order, and that, therefore, an application for revision was competent; (ii) that it could not be said that the order was made without jurisdiction. (*Henderson and Latifur Rahman, JJ.*) SURPAT SINGH *v.* RATANCHAND. **I.L.R. (1939) 2 Cal. 378=186 I.C. 600=12 R. C. 489=70 C.L.J. 160=43 C.W.N. 1028=A.I.R. 1940 Cal. 92.**

——**S. 151**—*Appeal—Objection to passing of final decree on mortgage—Claim for payment made—Dismissal for default—Refusal to restore—If appealable.*

Where an objection to the passing of a final decree on a mortgage is raised on the ground that certain payment made after the preliminary decree has not been given credit to, but the objections are dismissed owing to default in appearance, a refusal to restore such application is not appealable, for it is an order passed on an application to exercise the Court's inherent jurisdiction under S. 151, C. P. Code. (*Mulla, J.*) MUNNI SINGH *v.* COLLECTOR OF BENARES. **179 I. C. 70=11 R.A. 349=1938 A.W.R. (H.C.) 711 =1938 A.L.J. 1055=A.I.R. 1939 All. 28.**

——**S. 151**—*Appeal—Order amending final decree under S. 151—Right of appeal—Proper procedure—Appeal from amended decree—Competency.*

The nature of an order is not determined by the provision of law to which it may wrongly have been assigned. The true test is, what is the order itself. A Court cannot change its true order merely because it is given a wrong name. Where a Court amends a final decree passed by it purporting to do so under S. 151, C. P. Code, it cannot be said that no appeal lies in the matter on the ground that an order under S. 151, C. P.

C. P. CODE (1908), S. 151.

Code, is not appealable. A Court cannot evade the appellate jurisdiction of the Court above it by arbitrarily placing its order under a provision of law, orders under which are not appealable. The appellate Court should not treat the amending decree as an appealable order but it should regard the decree as amended by the order and the amended decree being appealable the appellate Court should deal with the matter as an appeal from the amended decree and proceed to hear and determine the same. *(Davis, J.C. and Tyabji, J.)* KHODROMAL JERAMDAS *v.* MENGHAMAL. **I.L.R. (1939) Kar. 428=185 I.C. 67=12 R.S. 141=A.I.R. 1939 Sind 303.**

———**Ss. 151 and 144**—*Appeal—Orders for restitution after setting aside order of confirmation of sale—Principle involved.*

Simply because an order is passed under the inherent powers it does not necessarily become appealable. If however the inherent powers are used to expand a remedy in order to do justice to cover a case not within the exact words of but within the purpose of a procedural section, the Court is in effect using its inherent powers to act as if the orders were made under the section in question. In such a case, even justice demands that one side should be given a remedy and the other side should, as a matter of justice, be allowed the right to appeal that would have existed had a particular section really applied instead of its being applied by means of a fiction. Therefore an order for restitution passed after setting aside an order of confirmation of sale in execution proceedings is in fact not an order under S. 144 but an order under S. 151, and by analogy is appealable. *(Stone, C.J. and Digby, J.)* MT. CHAMPABAI *v.* DAULATRAM SHARMA. **I. L. R. (1939) Nag. 350=179 I.C. 677=11 R.N. 307=A.I.R. 1938 Nag. 326.**

———**S. 151**—*Appeal—Order in exercise of inherent jurisdiction in execution.*

No appeal lies from an order made by the Court in exercise of its inherent jurisdiction under S. 151 in execution proceedings. *(Davis, J.C. and Lobo, A.J.C.)* ESAK HAJI ABUBAKAR *v.* JIMABAI. **30 S.L.R. 170=165 I.C. 305 (2)=9 R.S. 96=A.I.R. 1936 Sind 166.**

———**Ss. 151 and 144**—*Appeal—Order not strictly coming under S. 144, passed under S. 151—If appealable—Right of appeal—Nature and extent of.*

An order under S. 151, C. P. Code, is not appealable. It is not correct to say that when an order which does not strictly come under S. 144, C. P. Code, is passed under S. 151, it is appealable. The right of appeal is a creature of the statute and unless there are express provisions of law relating to the maintainability of an appeal, it would not be correct to say that because an appeal is allowed by statute in certain cases it must be allowed by way of analogy in other similar cases. Where an application for restitution is made under S. 151, C. P. Code, and is treated as such by the Court and an order is passed, it is not appealable. *(Zia-ul-Hasan, C.J. and Srivastava, J.)* BRIJ MOHAN SINGH *v.* RAMESWAR SINGH. **183 I.C. 709=12 R.O. 58=1939 A.W.R. (C.C.) 127=1939 O.W.N. 765=1939 O.A. 636=1939 O.L.R. 544=A.I.R. 1939 Oudh 273.**

———**S. 151**—Appeal—Order of restitution under inherent powers—If appealable—If covered by S. 47. *See* C. P. CODE, S. 47. **43 L.W. 773=A.I.R. 1936 Mad. 636.**

———**S. 151**—*Appeal—Order passed under S. 151—Power of High Court to set aside.*

No appeal lies from an order passed by a Court in exercise of its inherent jurisdiction under S. 151, C. P. Code. Where the lower appellate Court has heard such an appeal, it is open to the High Court to set aside the order entertaining the appeal, and therefore an appeal lies to High Court merely on the question of jurisdiction. *(Jai Lal, J.)* MAGHI MAL *v.* GANPAT RAI. **163 I.C. 121=8 R.L. 1010=38 P.L.R. 717=A.I.R. 1936 Lah. 212.**

———**S. 151**—Appeal—Remand under S. 151. *See* REMAND, *infra.* **A.I.R. 1936 Pat. 491.**

———**S. 151**—Appeal—Restitution—Order for—Appealability—Remedy—Revision. *See* C. P. CODE, Ss. 144 AND 151. **19 Pat.L.T. 111.**

———**S. 151**—Appeal—Restitution—Order under S. 144 read with S. 151—Appealability—Revision. *See* C. P. CODE, Ss. 144 AND 151. **19 Pat. L.T. 118.**

Applicability.

———**S. 151**—*Applicability—Absence of other remedy.*

S. 151, C. P. Code, is to be invoked when no other remedy under the law is available and one party or other is entitled to relief in equity. *(Mehta, S.M. and Harper, J.M.)* RAM AUTAR *v.* QADIR. **1940 A.W.R. (B.R.) 55=1940 R. D. 159.**

———**S. 151**—*Applicability—Appeal dismissed for failure of appellant to file appellant's list or make printing deposit in time—Restoration—Application for—Inherent power of Court to entertain—If application for review under O. 47, R. 1—O. 41, R. 19—Application of Patna High Court Rules, Part II, Chap. IX, R. 23.*

An application for the restoration of an appeal dismissed for failure to file the appellant's list cannot be treated as an application for review. Under O. 47, R. 1, C. P. Code, the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and secondly, the error or mistake referred to in the rule should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps. A failure to file the appellant's list cannot be treated as being an omission of the same kind or description as an omission to produce a matter or evidence subsequently discovered or a mistake or error apparent on the face of the record. Nor would O. 41, R. 19, C. P. Code, apply to such an application for restoration of an appeal dismissed under R. 23 of Ch. IX, Part II of the rules framed by the Patna High Court for failure to file the appellant's list. The failure to file the list stands on no worse footing than the default referred to in Rr. 11, 17 and 18 of O. 41; and although there is no provision in the Code covering the case of restoration of an appeal dismissed for failure to file the list or to deposit the printing cost, the Court is not powerless to restore the appeal. If the Court has power to dismiss an appeal for such

C. P. CODE (1908), S. 151.

failure, it also has the power to restore the appeal in a proper case. S. 151, C. P. Code, expressly saves the inherent power of the Court, and every Court must be deemed to possess as inherent in its very constitution all such powers as are necessary to do right and undo a wrong in the course of the administration of justice. An application to set aside an order dismissing an appeal for not filing the appellant's list within the time allowed may be entertained under S. 151, C. P. Code, and neither O. 41, R. 19 nor O. 47, R. 1 would apply. (*Harries, C.J., Fazl Ali and Agarwala, JJ.*) RAM KHELAWAN SINGH *v.* MONILAL SAHU. **19 Pat. 159=12 R.P. 371=6 B.R. 184=185 I.C. 480=20 Pat.L.T. 883=1939 P.W.N. 832=A. I. R. 1939 Pat. 678 (F.B.).**

———**S. 151**—*Applicability—Inherent powers—When to be exercised.*

It is a well-recognised principle that where a party has another remedy, and will not adopt or negligently fails to pursue it, the Court will not, as a general rule, grant him relief under its inherent powers under S. 151. (*Rowland, J.*) RAMESHAWAR LAL JHUNJHUNWALA *v.* RAMCHARAN PRASAD SAHU. **178 I.C. 41=5 B.R. 49=11 R.P. 204=1938 P.W.N. 313=19 Pat.L.T. 111=A.I.R. 1938 Pat. 447.**

———**S. 151 and O. 7, R. 10**—*Applicability—Order returning plaint on ground of pecuniary jurisdiction—Appeal.*

O. 7, R. 10 is not restricted only to those cases in which the Court for want of territorial jurisdiction returns the plaint. A plaint returned on the ground of pecuniary jurisdiction is also to be considered as returned under this provision and not under S. 151. Hence the order returning the plaint on this ground for presentation to proper Court is appealable. (*Dadiba C. Mehta and Lobo, JJ.*) KHIOMAL *v.* GOPALDAS. **I. L. R. (1939) Kar. 50=175 I.C. 684=11 R.S. 5=A.I.R. 1938 Sind 124.**

———**S. 151**—*Applicability—Power of Revenue Court to invoke against weight of evidence.*

S. 151, C. P. Code, is not to be lightly invoked or intended to permit a Revenue Court to decide a case against the weight of evidence, even if it appears equitable. (*Drake Brockman, S.M. and Knox, J.M.*) SUNDAR KOERI *v.* MANGAL RAI. **1936 R.D. 457.**

———**S. 151**—Application under—Modification of scheme—Maintainability. *See* C. P. CODE, Ss. 92 AND 151. **1940 O.A. 582.**

———**S. 151**—*Arbitration—Order of reference—Power of Court to revoke.*

The Court cannot revoke its order of reference to arbitration in the exercise of its inherent power under S. 151, C. P. Code. Such a power does not exist apart from the provisions contained in Sch. II, C. P. Code. (*Niamatullah, Harries and Collister, JJ.*) MANNI LAL *v.* PAHLAD DAS. **167 I.C. 171=9 R.A. 512=1937 A.L.J. 29=1937 A. W.R. 30=1937 A.L.R. 157=A.I.R. 1937 All. 141 (F.B.).**

———**S. 151**—Award under Co-operative Societies Act—Mistakes in—Correction—Jurisdiction of Civil Court executing award to direct rectification. *See* CO-OPERATIVE SOCIETIES ACT (II OF 1912), S. 43 AND BENGAL R. 22 (6). **40 C.W.N. 89.**

C. P. CODE (1908), S. 151.

Compromise decree.

———**S. 151**—Compromise decree—Power to set aside for fraud, misrepresentation or mistake—Procedure. *See* COMPROMISE—CONSENT DECREE. **41 Bom.L.R. 994.**

Consent decree.

———**S. 151**—*Consent decree—Setting aside of—Inherent jurisdiction.*

The remedy of a party who impeaches a consent decree on the ground that his consent was induced by fraud is to institute a regular suit for the purpose. S. 151, C. P. Code, is not applicable in such a case. In the first place, the section being a residuary section should not be applied at all unless there is no other remedy open to the litigants. In the second place, the matter for enquiry in such matters is something extraneous to the suit itself and the same kind of investigation is necessary as in a contested suit. Further it cannot be said that there was any fraud practised *upon the Court* which would justify it in exercising its inherent power. (*Mukherjea and Roxburgh, JJ.*) SURESH CHANDRA SEN *v.* JOGESH CHANDRA SEN. **186 I.C. 276=12 R.C. 462=69 C.L.J. 533=43 C.W.N. 969=A.I.R. 1939 Cal. 658.**

Court-fee.

———**S. 151**—*Court-fee—Excess amount—Powers of High Court to direct refund.*

In cases which are not governed by Ss. 13, 14 and 15, Court-Fees Act, the High Court has inherent powers to direct a refund under S. 151, C. P. Code, of excess Court-fee, where Court-fee has been paid in excess of the amount payable, and obvious injustice has been done. Where in a suit for enhancement of rent under S. 7, B. T. Act, the plaintiff paid Court-fees on the basis of the enhanced rent both on the plaint and the memorandum of appeal, and the proper Court-fee payable was the amount payable on the difference between the rate claimed and rate paid under Sch. I, Art. 1, the High Court interfering under its inherent powers directed refund of the excess amount paid. (*D. N. Mitter and Narasing Rao, JJ.*) KUMUD NATH DAS SAHA *v.* GOVERNMENT PLEADER. **163 I.C. 222=8 R.C. 724=39 C.W.N. 1074=A.I.R. 1936 Cal. 347.**

———**S. 151**—*Court-fees—Refund—Form of order.*

Where the Court has inherent power to order the refund of excess Court-fees, a direct order for a refund ought to be passed. If the Court does not possess jurisdiction to pass an order for refund, it is not its duty or function to issue eleemosynary recommendations for the purpose of enabling a litigant to present a memorial *ad misericordiam* to the Revenue Authorities. 55 M. 641 and 57 M. 542 (544), Disappr. (*Page, C.J., Mosely and Ba U, JJ.*) CHOCKALINGAM AMBALAM *v.* MAUNG TIN. **14 Rang. 173=163 I.C. 340=9 R.R. 1=A.I.R. 1936 Rang. 208 (F.B.).**

———**S. 151**—*Court-fee—Refund—Powers of Court—Order of remand under inherent powers.*

Where a Court-fee has been paid by a litigant of a larger amount than that exigible under the Court-Fees Act, the Court has inherent jurisdiction to order that the excess Court-fee be refunded *ex debito justitiae*. But where a specific Court-fee exigible under the Court-Fees Act has duly been paid, and in the Act express provisions are

C. P. CODE (1908), S. 151.

inserted setting forth the circumstances in which a Court-fee can be refunded, the Court has no jurisdiction in the exercise of its inherent powers or otherwise than as therein prescribed to order that the Court-fee chargeable and paid shall be refunded to a litigant. Where, therefore, an order of remand passed by the Court does not come within S. 13 of the Court-Fees Act but is one purported to have been passed under its inherent powers, the Court has no jurisdiction either under the Court-Fees Act or in exercise of its inherent powers to refund the Court-fee paid by the appellant. (*Page, C.J., Mosely and Ba U, JJ.*) CHOCKALINGAM AMBALAM *v.* MAUNG TIN. **14 Rang. 173=163 I.C. 340=9 R.R. 1=A.I.R. 1936 Rang. 208 (F.B.).**

———**S. 151**—Court-fee—Refund of unspent process fee or custody fee deposited in respect of attachment of movables. *See* COURT-FEES ACT, Ss. 13, 14 AND 20. **A.I.R. 1937 Cal. 86.**

Ends of justice.

———**S. 151**—*Ends of justice—Agreement by parties in suit—Power of Court to give effect to —Procedure not contemplated by Code—If can be adopted—Money found due by one defendant to another in suit by plaintiff against them—Transposition of defendant as plaintiff and decree for sum found due—If can be passed—C. P. Code, O. 1, R. 10.*

In a suit by the plaintiff against her son, the 1st defendant and his principal, the 2nd defendant, to recover a sum of money belonging to her and used by the 1st defendant for the purpose of the 2nd defendant's business, the plaintiff applied for the appointment of a Commissioner to settle the accounts of defendants 1 and 2, expressing her willingness to take whatever was found due on accounting. Both the defendants endorsed this application with a statement showing consent, each agreeing to pay the other what might be found due on taking accounts and stating that the Court might pass a decree for the amount found due. A Commissioner was accordingly appointed and he sent in a report finding that a certain amount was due by the 1st defendant to the 2nd defendant on accounts. Plaintiff then applied under O. 1, R. 10, C. P. Code, to transpose the 2nd defendant as plaintiff for the purpose of enabling a decree to be passed in his favour, but the 2nd defendant attempted to resile from the agreement.

Held, (1) that though O. 1, R. 10, C. P. Code, did not in terms apply, the transposition should be made in the interests of justice and a decree granted to the 2nd defendant after such transposition, it being always the policy of the Court to enforce, if possible, any agreement entered into between the parties; and in special circumstances where a grave injustice would be done if the Court did not exercise its inherent powers, the Court is entitled under S. 151, C. P. Code, to do justice by giving effect to the agreement of the parties; (2) that the 1st defendant should not be allowed to resile from the agreement entered into freely by him to pay whatever might be found due by the Commissioner; and when he agreed to pay the 2nd defendant or plaintiff such sum as might be found due, he impliedly agreed to such changes being made in the nature or frame of the suit as to give effect to the finding of the Commissioner; and that (3) though the procedure adopted was not contemplated by the Code, the Court in virtue of the agreement became an arbitrator, and the parties were bound by their agreement. (*Horwill, J.*) MOOSA SAHIB *v.* SUBBAMMA. **1937 M.W.N. 382=45 L.W. 764=170 I.C. 819=10 R.M. 235=A.I.R. 1937 Mad. 563=(1937) 1 M. L.J. 672.**

———**S. 151**—*Ends of justice—Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted in lower Court—Interference.*

Where in a suit a party objects that a pleader engaged by the opposite party should not be allowed to appear, as he had been previously engaged by him in connexion with the same litigation, and the lower Court after hearing both the parties, accepts the objection, an application by the pleader to set aside an order does not lie either under S. 151 or S. 115, C. P. Code or under S. 85, Government of Burma Act. (*Baguley and Mosely, JJ.*) MAUNG THA TUN *v.* BRAJAHORI WADDADER. **1939 Rang. L. R. 14=177 I.C. 511 =11 R.R. 137=A.I.R. 1938 Rang. 241.**

———**S. 151**—*Ends of justice—Other remedy open—If bar to Court from exercising powers under S. 151—Duty of Court in respect of minors and widows.*

The fact that a minor has a remedy to have an adverse order set aside by a suit does not exclude the remedy which the Court possesses under S. 151 if the Court thinks that it is essential in the interests of justice that this power under S. 151 should be exercised. It is of course easy in the quiet atmosphere of the Court to say that this and that should be done, and another suit should be brought; but any one who has any experience of the difficulties of litigation in India, particularly where a widow or a minor is concerned, can realize that where two courses are open, one in which the Court can take immediate action in a suit that is before it and the other in which the Court can merely say that another suit should be filed, the Court is bound in the exercise of its duty and in answer to its own conscience to direct that course should be taken which would lessen the difficulties and remove obstructions in the way of widows and orphans. (*Davis, J.C.* and *Mehta, A.J.C.*) MOHANLAL TEJMAL *v.* SH. KHUSHALIBAI. **31 S.L.R. 32=169 I.C. 918=10 R.S. 28 =A.I.R. 1937 Sind 101.**

———**Ss. 151 and 152**—*Error not due to slip but due to negligence of party—Amendment of decree, if justified.*

Where the trial Court is of the opinion that the error if any was not one arising from any accidental slip or omission but rather arising from the negligence of the parties, it would not be proper for the High Court to say that there is such an error as would justify an amendment. Further where it cannot be amended under S. 152, it could neither be amended under S. 151. (*Ziaul-Hasan and Yorke, JJ.*) SHEO NARAIN *v.* LACHHMAN PRASAD. **186 I.C. 667=12 R.O. 321=1940 O.W.N. 213=1940 O.A. 207=1940 O.L.R. 138=1940 A.W.R. (C.C.) 116=A. I.R. 1940 Oudh 298.**

Execution.

———**S. 151**—Execution—Injunction to stay execution sale—Grant of—Inherent powers. *See* C.P. CODE, O. 39, R. 1. **16 Pat. 738.**

C. P. CODE (1908), S. 151.

———**S. 151**—*Execution proceedings—Portion of property released from attachment with consent of parties—Decree-holder executing against whole property fraudulently—Power of Court to restore property wrongfully attached.*

In execution proceedings a formal order was passed with the consent of the parties releasing certain portion of property from attachment. In further proceedings in the collectorate the Collector, on application by the decree-holder, executed the decree by leasing out the whole property without excepting the portion ordered to be exempt from attachment.

Held, that the order being a consent order was final and not appealable. Hence the portion ordered to be exempt from attachment finally and completely passed out of the ambit of execution proceedings and therefore the proceedings after the order could not be held to be those under S. 47, C.P. Code, in respect of the portion exempt from attachment. They were the results of fraud perpetrated by the decree-holder, and the Court could restore the property wrongfully attached in exercise of its inherent powers under S. 151. (*Agha Haidar, J.*) **JALAL DIN *v.* SANT RAM. 169 I.C. 870=10 R.L. 51=39 P.L.R. 210=A.I.R. 1937 Lah. 29.**

———**S. 151**—*Execution—Proceedings in.*

The provisions of S. 151 should not be applied to execution proceedings. (*Fraser, J.C. and Saad-ud-Din, A.J.C.*) PIARA RAM *v.* SOMA RAM **A.I.R. 1936 Pesh. 115.**

———**S. 151**—*Execution—Recalling of order made* ex parte *without notice.*

A judicial order which may affect or prejudice any party cannot be finally made unless he has been afforded opportunity to be heard; and if such an order is made *ex parte*, that is to say, without notice to the opposite party, it would be made subject to the implication that it may be revoked at the instance of any party prejudiced thereby; and the Court has inherent power to give such directions as the justice of the case may require. In an execution proceeding an application was made by a stranger under O. 21, R. 58. The Court passed an order registering the application and ordering that the application be put up on the date of hearing of the execution proceedings and that the decree-holder should be informed of the application and of the date fixed for hearing. The officers of the Court failed to inform the decree-holder as required. On the date fixed for hearing an order on the application under O. 21, R. 58 was passed in the absence of the decree-holder. The decree-holder moved the Court—the successor of the Judge who passed the order—to recall the order under its inherent jurisdiction.

Held, that since the ignorance of the decree-holder was due to the default of the officers of the Subordinate Judge's Court, the Judge had power to recall the order by invoking the powers conferred on it by S. 151, C.P. Code. 17 C.W.N. 862 and A.I.R. 1921 Pat. 293 and 491, App. (*James, J.*) MOHARMANI KUER *v.* BHANKUMAR CHAND. **161 I.C. 933=8 R.P. 492=1936 P.W.N. 118=A.I.R. 1936 Pat. 176.**

———**S. 151**—Execution—Set-off—Equitable set-off—Claim arising under same decree—Power of Court. *See* C.P. CODE, O. 21, R. 19. **44 L.W. 34=A.I.R. 1936 Mad. 626.**

———**S. 151**—Execution—Set-off not falling under O. 21, R. 19—Power of executing Court to entertain. *See* C.P. CODE, O. 21, R. 19. **A.I.R. 1936 Cal. 409.**

———**S. 151**—*Execution—Stopping of sale—Inherent powers.*

Under S. 151, C.P. Code, the Court has full power to correct *suo motu* defects which it discovers in its proceedings. It cannot be said that a Court is bound to proceed with the sale of property when it has been brought to its notice that by reason of the absence of attachment, misdescription in the proclamation or other defect any sale held is bound to be set aside. The Court is entitled to pause and require that the party concerned should correct an obvious defect. (*Weston, I.C.S.*) KISHEN LAL *v.* MAN MAL. **1938 A.M.L.J. 97.**

Execution sale.

———**S. 151**—*Execution sale—Power to set aside before confirmation.*

No doubt the Court has inherent power under S. 151, C.P. Code, to set aside an execution sale before its confirmation, where there is an abuse of the process of the Court. But there is certainly no jurisdiction to set aside the sale under that section on the application of a third party on the ground that owing to a misapprehension due to the conduct of another third party he failed to be present on the day of the sale and therefore was unable to bid. It might be otherwise if that had been due to some omission or wrong procedure on the part of the Court. (*Jack, J.*) SUBODH CHANDRA MALLICK *v.* AJODHYA HATUI. **182 I.C. 649=12 R.C. 92=43 C.W.N. 250=A.I.R. 1939 Cal. 161.**

———**S. 151**—*Execution sale—Setting aside—Power of Court—Sale in execution of mortgage decree without protecting prior mortgagee's rights.*

Where the Court directed that the property should be sold in execution of a mortgage decree free from a prior mortgage but the sale-proceeds should be deposited in Court for payment to the prior mortgagee and that the decree-holder would be entitled to the surplus alone, if any, but the decree-holder who purchased the property did not implead the prior mortgagee in the course of execution proceedings and did not deposit in Court any amount for him, the decree-holder did not conduct himself in an honest manner and the sale is liable to be set aside. (*Addison and Din Mohammad, JJ.*) JASPAT RAI *v.* KAHAN CHAND. **181 I.C. 389=11 R.L. 821=40 P.L.R. 128=A.I.R. 1938 Lah. 232.**

Inherent powers.

———**S. 151**—*Inherent powers—Appeal—Party exonerated by trial Court not made party to appeal—Power of Court to decree claim as against him.*

Where a suit is dismissed as against a particular defendant by the trial Court, and his name does not appear in the memorandum of appeal filed by the plaintiff-appellant, the appellate Court cannot decree the suit as against that party; neither S. 151, nor Rr. 20 and 33 of O. 41, C. P. Code, can properly be applied to the case. Unless the Court of appeal

C. P. CODE (1908), S. 151.

extends the period of limitation for appeal under S. 5 of the Limitation Act as against him, the appeal is incompetent as against him and hence he cannot be made liable in appeal. (*Fazl Ali and Luby, JJ.*) BISAMBHARDEO NARAYAN SINGH *v.* HITNARAYAN SINGH. **15 Pat. 219=160 I.C. 976 =16 Pat.L.T. 813=8 R.P. 399=2 B.R. 264= A.I.R. 1936 Pat. 49.**

———**S. 151**—Inherent powers—Appeal relating to part of decree only—Memorandum accompanied by copy of that part of decree only—Copy of unnecessary portions of decree—Power of Court to dispense with. *See* C. P. CODE, O. 41, R. 1. **40 C.W.N. 1298.**

———**S. 151**—*Inherent powers—Conversion of suit into application.*

Where legislature provides a procedure of a summary nature by an application without expressly barring any suit in that behalf, it is always within powers of Courts, when instead of application a suit is filed, to treat the suit as an application and decide accordingly. (*Jack, J.*) ANANDA PROSAD GHOSE *v.* RONENDRA LAL. **165 I.C. 715= 9 R.C. 453=40 C.W.N. 856=A.I.R. 1936 Cal. 342.**

———**Ss. 151 and 152**—*Inherent power—Exercise of—Another remedy open—Amendment of decree—Powers of—Decree of Subordinate Court merged in appellate decree.*

A resort to inherent jurisdiction is not permissible where another remedy is open to the person preferring an application under S. 151. Thus where a remedy by way of appeal from a decree is clearly open to a person, he cannot invoke the inherent jurisdiction of the Court. But the mere fact that there is no appeal or that there is considerable delay in appealing is no bar to the District Judge entertaining an application to amend the decree of the Subordinate Court under S. 151, if in fact there is an error in the decree. The District Judge can amend the decree even under S. 152, if the decree of the Subordinate Court has merged in the appellate decree. But this cannot be asked to be done as of right. The matter is one of discretion with the Court and the discretion has to be exercised after duly considering all the circumstances. (*Bhide, J.*) MITTER SEN-GANESHI LAL *v.* KALYAN RAI. **178 I.C. 677=11 R.L. 483 =A.I.R. 1938 Lah. 4.**

———**S. 151**—*Inherent powers—Exercise of.*

The Court is bound to exercise its inherent powers cautiously and with circumspection, and it is not at liberty to do so where the order proposed would contravene any principle of the common law or equity, or would affect a matter in respect of which provision has been made by statute either expressly or according to the true intendment thereof. (*Page, C.J., Mosely and Ba U, JJ.*) CHOCKALINGAM AMBALAM *v.* MAUNG TIN. **14 Rang. 173=163 I.C. 340=9 R.R. 1= A.I.R. 1936 Rang. 208 (F.B.).**

———**S. 151**—*Inherent powers—Exercise of—Conditions—Ends of justice—Test of.*

S. 151, C. P. Code, should be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of the section to a particular case, the Court has to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under the section. (*Harries, C.J., Fazl Ali and Agarwala, JJ.*) RAM KHELAWAN SINGH *v.* MONILAL SAHU. **19 Pat. 159=12 R.P. 371=6 B.R. 184=185 I.C. 480= 20 Pat.L.T. 883=1939 P.W.N. 832=A.I.R. 1939 Pat. 678 (F.B.).**

———**S. 151**—Inherent power—Exercise of—Limits. *See* C. P. CODE, O. 21, R. 48 AND Ss. 73 AND 151. **1940 Rang.L.R. 421.**

———**S. 151**—*Inherent powers—Extent of—Power to give compensation to decree-holder purchaser for loss of part of property purchased as the result of another suit.*

S. 151, C. P. Code, cannot be interpreted as giving the Courts power which under the general law they do not possess. A Court has no power under the section to give compensation to a decree-holder, who after purchasing property in execution in satisfaction of his decree loses part of that property as the result of another suit. (*Wort and Varma, JJ.*) PHULCHAND RAM MARWARI *v.* NAURANGI LAL MARWARI. **16 Pat. 729=10 R. P. 320=172 I.C. 225=1937 P.W.N. 836=18 Pat.L.T. 826=A.I.R. 1937 Pat. 647.**

———**S. 151**—*Inherent powers*—Interim *injunction in execution.*

The provisions of S. 151, C. P. Code, are very wide and where the interests of justice so require, it is competent to the Court to order an *interim* injunction to issue even in execution proceedings. (*Lobo, A.J.C.*) KEWALRAM DEWANDAS *v.* GULABSING AND SONS. **172 I.C. 131=10 R.S. 136=A.I.R. 1937 Sind 315.**

———**S. 151**—*Inherent power—Limits of.*

Unless a matter could be brought under S. 115, C. P. Code, S. 151 could not be used to set aside an order of a lower Court against which no appeal or revision lies. (*Pollock, J.*) GHANASHYAM PRASAD *v.* VISHWANATH. **1940 N.L. J. 93.**

———**S. 151**—*Inherent power—Limits of—Decree absolute for dissolution—Setting aside at instance of third party.*

Where a decree for dissolution of marriage has been made absolute, it is not open to a third party to seek the aid of the Court under S. 151, C. P. Code, to set it aside on the ground that one of the parties to the divorce proceedings was a minor and has not been represented by a guardian *ad litem.* Nor is there any provision in the Divorce Act to set aside a decree absolute in the manner in which a decree *nisi* could be attacked. (*Yorke, J.*) ALEXANDER *v.* M. S. JALIL. **15 Luck. 350=12 R.O. 274=185 I.C. 884=1940 O.A. 140=1940 O.L.R. 71=1939 O.W.N. 139 =1940 A.W.R. (C.C.) 69=A.I.R. 1940 Oudh 279.**

———**S. 151**—*Inherent powers—Minor (auction-purchaser) subsequently applying for setting aside sale on ground of his minority—Power of Court to set aside sale.*

Where a minor himself bid at an auction-sale but subsequently applied for not confirming the sale on the ground that he was a minor, and the Court after finding that he was a minor declined to set aside the sale on the ground that there was no such provision in law, and the appellate Court also dismissed the appeal.

Held, it was doubtful whether second appeal lay; confirmation of sale would give rise to com-

C. P. CODE (1908), S. 151.

plications as the sale was in favour of a minor and would ultimately have to be set aside as a void transaction. In the absence of any other provision of law for setting aside the sale, the appeal was treated as an application for revision and sale was set aside under S. 151. (*Jai Lal, J.*) RAM PARKASH *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **10 R.L. 205=171 I.C. 478 =39 P.L.R. 364=A.I.R. 1937 Lah. 72.**

——**S. 151**—Inherent power—Orders for protection of property, the subject-matter of litigation—Jurisdiction to pass. *See* C. P. CODE, O. 39 AND S. 151. **1940 A.W.R. (H.C.) 74.**

——**S. 151**—Inherent powers—Particulars in petition or affidavit—Power of Court to direct. *See* C. P. CODE, O. 6, RR. 1 AND 4. **40 C.W.N. 913.**

——**S. 151**—*Inherent powers—Payment of money in Court to party entitled—Money realised by execution sale of attached property—Application for payment by Crown towards arrears of income-tax due by judgment-debtor—Powers and duty of Court to order payment—Separate suit by Crown—Necessity—Attaching creditor—If secured creditor—Income-tax Act, S.* 46*—If a bar to application for payment—Crown debt—Priority.*

The Crown has priority over unsecured creditors in the payment of debts and the Court can, on application and without a formal attachment being issued, order payment of a Crown debt due by the debtor where there are funds in Court belonging to the debtor. Where in execution of a decree the judgment-debtor's property is sold in Court-auction and money is realised, the Court can on the application of the Government order payment out of the sale proceeds money due by the judgment-debtor on account of income-tax assessed on and due by the judgment-debtor. It is not necessary for the Crown to file a suit for the amount due, when the debt is not disputed and is indisputable. The right to payment being indisputable, justice requires that it should be paid to the Crown when formal application for payment has been made. Both right and convenience demand that the Court should exercise its inherent power. No special act of the Legislature is required to enable the Crown to apply to the Court for payment of money to which it has an undoubted right. The decree-holder who brings the property to sale is not, by reason of his attachment before sale, placed in the position of a secured creditor. Nor does S. 46 of the Income-tax Act operate as a bar to the payment by the Court on mere application. S. 46 is not exhaustive and it cannot, without express words to that effect, take away from the Crown the right of enforcing payment by any other method open to it.

Mockett, J.—The Court under such circumstances can rightly invoke its power under S. 151, C. P. Code, in making the payment to the person entitled to it. (*Leach, C.J., Varadachariar and Mockett, JJ.*) MANICKAM CHETTIAR *v.* INCOME-TAX OFFICER, MADURA. **I.L.R. (1938) Mad. 744=174 I.C. 423=10 R.M. 702=47 L.W. 368 =1938 M.W.N. 197=A.I.R. 1938 Mad. 360= (1938) 1 M.L.J. 351 (F.B.).**

——**S. 151**—*Inherent power—Power to go behind order of predecessor.*

C. P. CODE (1908), S. 151.

Where a presiding officer of a Court has passed an order, his successor cannot and should not go behind that order and hold that order to be *ultra vires.* (*Zia-ul-Hasan and Hamilton, JJ.*) SRI KRISHEN *v.* JAMNA NARAIN. **173 I.C. 980=10 R.O. 248=1938 O.L.R. 154=1938 O.A. 240= 1938 O.W.N. 348=A.I.R. 1938 Oudh 103.**

——**S. 151**—Inherent powers—Power to act *ex debito justitiae* in order that real justice may be done. *See* C. P. CODE, O. 9, R. 9—"SUFFICIENT CAUSE." **40 Bom.L.R. 238=A.I.R. 1938 Bom. 199 (S.B.).**

——**S. 151**—*Inherent powers—Power to set aside wrong or illegal order—If limited to cases of fraud or deception practised on Court.*

A Court has always got an inherent power to vacate or set aside an order made by it when it is brought to its notice that the order is one which is null and void and should never have been made. Its power to so rescind or vacate such an order is not limited to cases of fraud or deception practised upon the Court. (*Davis, J.C. and Lobo, J.*) DHOLANDAS GIDUMAL *v.* SADHUMAL DOLUMAL. **32 S.L.R. 215.**

——**S. 151**—*Inherent powers—Recalling of invalid orders.*

A Court has inherent jurisdiction to re-call and cancel its invalid orders. (*Iqbal Ahmad and Allsop, JJ.*) CHAMPA DEVI *v.* ASA DEVI. **I.L.R. (1938) All. 71=172 I.C. 956=10 R.A. 441= 1937 R.D. 577=1938 A.L.R. 53=1937 A.W.R. 933=1937 A.L.J. 945=A.I.R. 1938 All. 8.**

——**S. 151**—*Inherent power—Re-calling of orders passed by Court—Order passed within jurisdiction and not illegal—Facts rendering order invalid or irregular not brought to notice of Court—Effect—Power to re-call order passed under mistake or by inadvertence—Bihar Tenancy Act, Ss.* 26-*M and* 174.

Petitioners purchased a certain holdings belonging to their judgment debtors at a sale in execution of a mortgage sale on 20th May, 1935. The sale was confirmed on 29th June, 1935. In the meantime, however, on 10th June, 1935, the new Bihar Tenancy (Amended) Act came into operation, S. 26-M of which Act provided that a sale should not be confirmed unless the auction purchasers filed a certain notice and deposited in Court a certain sum for payment to the landlord of the holding. This was not done by the purchaser, and the Court confirmed the sale without probably noticing S. 26-M of the Act. On 24th September, 1936, the respondent obtained a decree for rent and brought the same holding to sale and purchased it himself on 17th March, 1937. On 12th April, 1937, the petitioners applied under S. 174 of the Act, offering to make a deposit and on 23rd April, 1937, this was accepted by the Court and the sale set aside by the Court, though *ex parte.* The landlord respondent then moved the Court on 14th May, 1937, under S. 151, C. P. Code, to re-call the order of 23rd April, 1937, setting aside the sale under his rent decree on the ground that the petitioners had no *locus standi* to apply to set aside his sale as they had not deposited the landlord's fee at the time of their application under S. 174 of the Bihar Tenancy Act. The Court thereupon re-called the order setting aside the sale allowing the application of the landlord-respondent.

C. P. CODE (1908), S. 151.

Held, in revision, (1) that the order setting the sale passed on 23rd April, 1937, was one which it had jurisdiction to pass though the Court may have taken an erroneous view of the law, or not followed the correct procedure in having proceeded *ex parte*; (2) that the order being within jurisdiction, the Court could not re-call it, and the remedy of the respondent, if aggrieved, was by way of appeal or revision and not by applying under S. 151, C. P. Code; (3) that there having been no application to set aside the sale of 1935, the Court was bound to confirm the sale under O. 21, R. 92, C. P. Code; and the order of confirmation was perfectly legal and within jurisdiction in spite of the enactment of S. 26-M of the Bihar Tenancy Amendment Act, which was not brought to the notice of the Court; (4) that the non-compliance with S. 174, *i.e.*, non-deposit of fees at the application on 12th April, 1937, did not make the order setting aside the sale without jurisdiction, when that fact was not brought to the notice of the Court; and (5) that therefore the order under S. 251, re-calling the order setting aside the sale was wrong and without jurisdiction and must be set aside. (*Manohar Lall, J.*) RAM KISHUN LAL *v.* MANZURUL HOQUE. **180 I.C. 304=11 R.P. 483=5 B.R. 379=1938 P.W. N. 192=A.I.R. 1938 Pat. 593.**

———**S. 151**—Inherent power—Reference in pending suit to arbitration—Order that if award not filed by particular date trial must go on that day—Award not filed in time—Decree *ex parte*—Setting aside—Procedure—Proper remedy—Application under O. 9, R. 13—If proper. *See* C. P. CODE, SCH. II, PARA. 8. **71 M.L.J. 648.**

———**S. 151**—Inherent powers—Refund of Court-fee—Plaint rejected for non-payment of proper Court-fee—Refund of Court-fee originally paid—Power of Court. *See* COURT-FEES—REFUND. **1937 A.W.R. 389=1937 A.L.J. 481.**

———**S. 151**—*Inherent powers—Restitution—Duty of Court—Other remedy open—If bar to restitution under inherent powers—Property wrongly taken away in execution against another under erroneous order—Duty to take restitution on establishment of title.*

Where property has been taken away from a third party under an erroneous order of the Court, and that party has subsequently established by a suit that the property belongs to him, and not to the judgment-debtor in execution of a decree against whom the property was so taken, the Court must use its inherent powers to restitute to such innocent party his property of which he has been deprived by the erroneous order of the Court. The fact that a suit is maintainable at the instance of that party is no ground for refusing redress under S. 151 when the wrong has been done under the order of the Court. (*Khaja Mohammad Noor, J.*) RAMESHWAR LAL JHUNJHUNWALA *v.* MST. SUBDI. **180 I.C. 326=11 R. P. 498=5 B.R. 467=19 Pat.L.T. 119=A.I.R. 1938 Pat. 468.**

———**S. 151**—Inherent powers—Restitution—Powers of Court—Execution sale—Property subsequently held to be third person's in separate suit—Restitution to purchaser of purchase money. *See* C. P. CODE, Ss. 144 AND 151. **19 Pat.L.T. 111.**

C. P. CODE (1908), S. 151.

———**S. 151**—Inherent powers—Restoration of case dismissed for default—Grounds. *See* C. P. CODE, O. 9, R. 9. **40 Bom.L.R. 238.**

———**S. 151**—*Inherent powers—Review—Power of Subordinate Judge to review order of predecessor—O. 47 and S. 151—Construction.*

S. 151, C. P. Code, is not intended to constitute one Subordinate Judge an appellate authority over his predecessor of like jurisdiction as himself. If one Judge reviews the order of another, he cannot escape the provisions of O. 47, C. P. Code, by placing his order under S. 151. Both S. 151 and O. 47 are to be construed strictly and are not intended to be used to allow one Judge to sit in appeal on orders of his predecessor exercising an equal jurisdiction with his own. (*Davis, J.C. and Weston, J.*) MIR HAJI GHULAM SHAH *v.* KHANCHAND. **I.L.R. (1939) Kar. 330=182 I.C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

———**S. 151**—*Inherent powers—Security for costs—Revision application to High Court—Security for costs—Order for—Power to make—Civil Procedure Code, O. 25, R. 1 and O. 41, R. 10.*

There is no provision in the C. P. Code or in the Provincial Insolvency Act which specifically empowers the High Court in revisional applications under S. 115, C. P. Code, or S. 75 of the Provincial Insolvency Act to pass an order calling on the applicant to furnish security for costs. But under S. 151, C. P. Code, it is competent to the High Court to make such an order as is contemplated by O. 25, R. 1, or O. 41, R. 10, C. P. Code. (*Rangnekar, J.*) HIRALAL RAMSUKH *v.* MONGHIBAI. **I.L.R. (1938) Bom. 743=178 I.C. 774=11 R.B. 191=40 Bom.L.R. 1025=A.I.R. 1938 Bom. 510.**

———**S. 151**—*Inherent powers—When to be exercised.*

The powers of S. 151 have to be exercised sparingly. Where there is specific provision of law, or a specific procedure provided by law, which has not been followed by a party, or of which advantage has not been taken by a party, the Court would certainly hesitate before exercising its inherent jurisdiction under S. 151. (*Rangnekar, J.*) HIRALAL RAMSUKH *v.* MONGHIBAI. **I. L.R. (1938) Bom. 743=178 I.C. 774=11 R.B. 191=40 Bom.L.R. 1025=A.I.R. 1938 Bom. 510.**

Injunction.

———**S. 151**—*Injunction—If the section can be invoked to add to the powers conferred by O. 39.*

Whatever may be said as to the power of the High Court to issue injunction for purposes other than those mentioned in O. 39, and to punish disobedience thereof in exercise of its own inherent power as a Court of record, the power of the Subordinate Courts must be found within the four corners of the Code and it seems to be too much to suggest that when the Code has expressly dealt with injunction in O. 39, S. 151 can be invoked to add to the powers conferred. (*Varadachariar, J.*) MURUGESA MUDALI *v.* ANGAMUTHU MUDALI. **176 I.C. 688=11 R.M. 149=46 L.W. 956=1937 M.W.N. 1229=A.I.R. 1938 Mad. 190=(1937) 2 M.L.J. 888.**

———**S. 151**—*Injunction—Inherent power.*

The petitioner applied under O. 41, R. 5, C. P. Code, praying to issue order preventing the order of the Judicial Commissioner from taking effect during the pendency of the appeal, O. 41, R. 5 and

C. P. CODE (1908), S. 151.

also O. 39, R. 2, C. P. Code, were not applicable. The only alternative was whether S. 151 could be invoked.

Held, that the applicant did not come to Court with clean hands and no equitable relief could be granted to him by way of injunction. (*Agha Haidar, J.*) JESWANT SINGH *v.* SHIROMANI GURDWARAS PRABANDHAK COMMITTEE. **164 I.C. 16 =9 R.L. 106=A.I.R. 1936 Lah. 567.**

——**S. 151**—Insolvency Court—Inherent powers to rectify omissions. *See* PROVINCIAL INSOLVENCY ACT, Ss. 37 AND 43 (1). **40 C.W.N. 1229.**

Jurisdiction.

——**S. 151**—*Jurisdiction—Absence of—Order of Subordinate Judge reviewing predecessor's order on ground of error of law—Revision—Interference.*

Where a Subordinate Judge usurps an appellate jurisdiction which he does not possess and reviews an order made by his predecessor on the ground of an error of law, the order reviewing the predecessor's order is one without jurisdiction and is liable to be set aside in revision by the High Court. The fact that the order is made under S. 151, C. P. Code, make no difference. (*Davis, J.C. and Weston, J.*) MIR HAJI GHULAM SHAH *v.* KHANCHAND. **I.L.R. (1939) Kar. 330=182 I.C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

Limitation.

——**S. 151**—Limitation—Excusing delay in filing application for restoration of appeal dismissed for default—Powers. *See* C. P. CODE, O. 41, R. 19 AND S. 151. **1938 A.M.L.J. 124.**

——**S. 151**—*Mistake—Rectification of—Inherent power of Court.*

Where rights of third parties have not intervened, it is not only in the power, but it is the duty of the Court to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes or defaults of its officers inadvertently committed. (*R.C. Mitter, J.*) GADADHAR SARKHAL *v.* GOPAL CHANDRA DAS. **63 Cal. 1079=166 I.C. 641=9 R.C. 570=40 C.W.N. 680=A.I.R. 1936 Cal. 343.**

Order under.

——**S. 151**—*Order under—Appealibility—Order passed on appeal—Revision.*

As there is no specific provision in the Code of Civil Procedure for an appeal against an order passed under S. 151, no appeal lies from such an order and therefore the order of an appellate Court passed on appeal from such order is passed without jurisdiction. And where such an order has been passed without jurisdiction a further appeal or a revision application can be entertained to set aside the order which has been passed without jurisdiction. (*Almond, J.C.*) KANSHI RAM *v.* GOBIND RAM. **178 I.C. 776=11 R. Pesh. 58=A.I.R. 1938 Pesh. 81.**

Other remedy.

——**S. 151**—*Other remedy not availed of—Inherent power—Resort to—Permissibility.*

When there are specific provisions in the Code for the remedy which a party seeks, it is not open to him, after his failure to adopt those remedies, within the period allowed by law, to appeal to the

C. P. CODE (1908), S. 151.

inherent powers of the Court to obtain that remedy. Hence where a party has not applied under O. 21, Rr. 89, 90 or 91 it is not open to him to seek the inherent power of the Court to set aside the sale. (*Mya Bu and Mackney, JJ.*) ARUMUGAM CHETTIAR *v.* RAMANATHAN CHETTIAR. **179 I.C. 162=11 R.R. 301=A.I.R. 1938 Rang. 433.**

——**S. 151**—*Other remedy open—Execution struck off in full satisfaction—Aggrieved party not appealing—If can later on apply under S.* 151.

Where certain orders were passed on an execution application and it was finally struck off in full satisfaction, the orders passed were under S. 47, C. P. Code and hence appealable. If the party aggrieved by those orders fails to pursue the remedy by way of appeal, that party could not invoke the inherent powers of the Court under S. 151 later on. (*Mulla, J.*) MOHAMMAD TAHAR *v.* INTIZAR FATIMA. **180 I.C. 960=11 R.A. 542=1938 A.W.R. (H.C.) 733=1938 A. L. J. 1041=A.I.R. 1939 All. 25.**

——**S. 151**—*Restitution—Other remedy open—Exercise of inherent powers—If justified.*

When the law of the land has provided ample remedies—statutory and otherwise—for the redress of a wrong suffered by a party owing to the conduct of his opponent or the mistakes committed by the Court, a party is not entitled to invoke, and the Court ought not to exercise, the inherent jurisdiction of the Court. (*Rangnekar, J.*) SHIVAPPA DHONDAPP v. RAMLINGAPPA. **168 I.C. 810=9 R.B. 401=39 Bom.L.R. 112=A.I.R. 1937 Bom. 173.**

——**S. 151**—*Other remedy open—Interference under inherent power.*

An order which can be set aside in appeal cannot be set aside under the inherent power of the Court. (*Nasim Ali and R. C. Mitter, JJ.*) ABDUL JABBAR PALWAN *v.* AZIZAR RAHMAN MEA. **172 I.C. 682=10 R.C. 406=67 C.L.J. 129=41 C.W.N. 893=A.I.R. 1937 Cal. 425.**

——**S. 151**—*Other remedy open—Order by execution Court—Inherent powers—Resort to—Permissibility.*

An order by the execution Court under S. 47, C. P. Code, is an appealable order. The execution Court has no jurisdiction to set aside that order except perhaps on an application for review. It cannot do so under S. 151, especially when the order is open to appeal. (*Jai Lal, J.*) LEHNA SINGH *v.* MST. JASSI. **38 P.L.R. 331.**

——**S. 151**—*Other remedy open—Order of sale in contravention of Punjab Land Alienation Act—Inherent power of executing Court to set aside sale.*

It is well established that recourse to inherent powers is not justifiable when another remedy is provided by law, for setting aside an illegal order. The Punjab Alienation of Land Act itself provides for such a remedy in an application by the Deputy Commissioner to set aside any order passed in contravention of the Act by a civil Court. The executing Court therefore is not justified in resorting to inherent jurisdiction under S. 151, C. P. Code, to set aside the sale which has been confirmed. (*Bhide, J.*) BUDH SINGH *v.* DITTU. **175 I.C. 319=10 R.L. 701= 39 P.L.R. 710=A.I.R. 1937 Lah. 416.**

C. P. CODE (1908), S. 151.

———**S. 151**—*Other remedy open—Resort to inherent jurisdiction—Permissibility.*

The party cannot invoke the special powers under S. 151, C. P. Code, when there is a legal remedy open to him. (*Beckett, J.*) HARCHAND SINGH *v.* SALEKH CHAND. **38 P.L.R. 373.**

Powers of High Court.

———**S. 151**—*Powers of High Court under—Stay of connected suits.*

The High Court has ample jurisdiction under S. 151, C. P. Code, to stay the proceedings in connected suits. (*Roughton, F.C.*) SETH BALKRISHNA *v.* GOVERDHANLAL. **1938 N.L.J. 120.**

———**S. 151**—*Powers under—Orders in contravention of S. 7 (1) (a) of U. P. Encumbered Estates Act—If can be set aside.*

Where a delivery of possession has been made in contravention of S. 7 (1) (*a*) of the United Provinces Encumbered Estates Act, though an application for restitution may not come under S. 144, yet it can be set aside under S. 151, C. P. Code. (*Zia-ul-Hasan and Yorke, JJ.*) SHEO NATH *v.* MADAN MOHAN LAL. **177 I.C. 543=11 R.O. 50=1938 R.D. 765=1938 A.W.R. (C.C.) 119=1938 O.W.N. 911=1938 O.L.R. 422=1938 O.A. 684=A.I.R. 1938 Oudh 221.**

———**S. 151**—Refund—Court-fee. *See* S. 151, COURT-FEES.

———**S. 151**—*Refund—Lessee paying to lessor's decree-holder—Lease failing—Right of lessee to refund.*

Where the lessee pays money to decree-holders of the lessor on the basis of a lease which is subsequently set aside and through no fault of his, the lessee has a right to get a refund of the money from the person to whom he paid the money. (*Jai Lal, J.*) MAGHI MAL *v.* GANPAT RAI. **163 I.C. 121=8 R.L. 1010=38 P.L.R. 717 =A.I.R. 1936 Lah. 212.**

Remand.

———**S. 151**—*Remand—Inherent powers—Decision by trial Court on merits and on preliminary point—O. 41, R. 23.*

Where the trial Court has decided the case on the merits as well as on the preliminary point, the appellate Court cannot remand the case under O. 41, R. 23. If the case is remanded the remand is not under O. 41, R. 23, but under the inherent powers of Court under S. 151. (*Wort, J.*) GOBARDHAN MAHTON *v.* SITA RAM SINGH. **164 I. C. 1085=9 R.P. 149=1936 P.W.N. 233=A.I.R. 1936 Pat. 491.**

———**S. 151**—Remand—Power of High Court in revision to remand. *See* C. P. CODE, S. 107. **A.I.R. 1936 Nag. 140.**

———**S. 151**—Remand—Power to—Resort to inherent power, when not justified. *See* C. P. CODE, O. 41, R. 23 AND S. 151—INHERENT POWER. **1940 N.L.J. 350.**

———**S. 151**—*Remand order under S. 151—Appeal.*

Where the appellate Court remands the case to be begun as *de novo*, the remand is under S. 151 and not under O. 41, R. 23 and no appeal lies from such order of remand. (*Wort, J.*) GOBARDHAN MAHTON *v.* SITA RAM SINGH. **164 I.C. 1085=9 R.P. 149=1936 P.W.N. 233=A.I.R. 1936 Pat. 491.**

C. P. CODE (1908), S. 151.

———**S. 151**—*Remand under inherent power—Appeal.*

The C. P. Code makes no provision for an appeal where a suit has been remanded under the inherent powers of the Court and hence no appeal can lie in such a case. (*Davies.*) HAZARI *v.* PARTABA. **1939 A. M.L.J. 110.**

Restitution.

———**S. 151**—Restitution—Case not falling under S. 144—Relief under inherent powers. *See* C. P. CODE, Ss. 144, 151 AND 47. **A.I.R. 1939 Nag. 101.**

———**S. 151**—Restitution—Court-fee in pauper suit—Payment by defendant under order of Court—Order reversed on appeal—Restitution—Award of interest—Power of Court—Discretion to refuse. *See* C. P. CODE, S. 144. **(1937) 1 M.L.J. 21.**

———**S. 151**—Restitution—Inherent powers of—Absence of reversal or variation of decree. *See* C. P. CODE, Ss. 144 AND 151. **A.I.R. 1937 Nag. 151.**

———**S. 151**—Restitution—Inherent powers—Powers of Court to award mesne profits. *See* C. P. CODE, Ss. 144 AND 151. **A.I.R. 1937 Mad. 694.**

———**S. 151**—Restitution—Inherent powers. *See* C. P. CODE, Ss. 144 AND 151. **43 L.W. 773=A. I.R. 1936 Mad. 636.**

———**Ss. 151, 144 and 47**—*Restitution—Order confirming sale set aside—Application by auction-purchaser for compensation for improvements.*

The order of the executing Court confirming a sale which is set aside on appeal does not amount to a decree and therefore an application by auction-purchaser for improvements payable in consequence of that order cannot be said to fall within the purview of S. 144 as that section contemplates restitution where a decree has been varied or reversed. Nor does the application fall under S. 47 as the question of improvements is one between the auction-purchaser and judgment-debtor and does not relate to the execution, satisfaction or discharge of the decree as such. The application can therefore fall only under S. 151. The question of improvements by auction-purchaser is a question incidental to and consequential on the setting aside of the sale. The executing Court under S. 151 has jurisdiction to go into the question of improvements. The judgment-debtor cannot be allowed to retain the benefit of the improvements made *bona fide* by the auction-purchaser without paying for them. The case therefore is a fit one for the exercise of the inherent powers of the Court under S. 151. (*Tek Chand and Abdul Rashid, JJ.*) A. R. DAWAR *v.* GANESH DATTA. **A.I.R. 1940 Lah. 59.**

———**S. 151**—*Restitution—Order holding surety liable for payment—Reversal—Application by surety for restitution—Inherent power of Court.*

A surety who is a party to an order holding him liable for payment to the decree-holder can, on reversal of that order on appeal, apply to the Court for restitution under the inherent jurisdiction of the Court, apart from S. 144, C. P. Code. (*Dalip Singh, J.*) MUKAT BEHARI LAL TEJ PAL *v.* DINA NATH. **179 I.C. 336=11 R.L. 552=40 P.L.R. 289=A.I.R. 1938 Lah. 833.**

C. P. CODE (1908), S. 151.

——S. 151—Restitution—Powers of Court—Money paid to wrong party—Duty to make restitution. **A.I.R. 1937 Mad. 95.**

Restoration.

——S. 151—*Restoration—Application under O. 21, R. 90—Dismissal for defallt—Inherent power of Court.*

Although it is true that S. 141 does not apply to proceedings in execution of decrees, and therefore O. 9, Rr. 4 and 9 are inapplicable, the Court has inherent power under S. 151, C.P. Code, to restore an application in execution proceedings which has been dismissed for default, notwithstanding the fact that the applicant had an alternative remedy open. The judgment-debtor, a purdanashin lady, filed an objection petition under O. 21, R. 90 for setting aside sale. When her application was called out for hearing neither she nor her pleader was present. Consequently her application was dismissed and order confirming the sale was passed. A few minutes after the order was passed, judgment-debtor's pleader appeared and presented an application under O. 9, Rr. 4 and 9 and Ss. 141 and 151 for setting aside the order. The Court did not apply its mind to the merits of the application for restoration but dismissed it *in limine* on the technical ground that no such application lay after the sale was confirmed.

Held, that the order of the Court dismissing the application for restoration was wrong as in the peculiar circumstances of the case the order dismissing the objection petition for default should have been set aside and the objection petition heard on merits. (*Tek Chand, J.*) ACHARJI BIBI *v.* SWAMI SHESH SAHAI. **41 P.L.R. 544 =A.I.R. 1939 Lah. 223.**

——S. 151—*Restoration—Inherent power of Court—Execution application consigned to record for default—Fresh application barred by time.*

The Courts have no inherent jurisdiction under S. 151 to restore an application for execution consigned to record room on account of default of appearance on the part of the decree-holder, merely on the ground that a fresh application is not competent on account of 12 years having elapsed since the decree was passed. A.I.R. 1926 Mad. 980 and 5 P.L.J. 208, Foll.; A.I.R. 1921 Lah. 67 and A.I.R. 1928 Oudh 478, Not Folld. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) ABDULLAH KHAN *v.* HARI CHAND-DAULAT RAM. **165 I.C. 268=9 R. Pesh. 45=A.I.R. 1936 Pesh. 191.**

——S. 151—*Restoration — Order dismissing for default petition of compromise.*

Where a petition for recording a compromise presented by a party to a suit is dismissed owing to the absence of the petitioner on the date of hearing of the petition, his proper remedy is by way of an application under S. 151, C.P. Code, to have the order of dismissal set aside. It is doubtful whether an appeal lies against the order under O. 43, R. 1 (*m*), C.P. Code. (*Derbyshire, C.J. and Nasim Ali, J.*) SURAJMALL KESHAN *v.* R. A. WOOD. **43 C.W.N. 1113.**

——S. 151 and O. 7, R. 13—*Restoration—Powers of—Rejection of plaint under O. 7, R. 13.*

Though a plaint is rejected under O. 7, R. 13, a Judge has jurisdiction under S. 151, C.P. Code, to restore the suit. (*Allsop, J.*) ANANT PRASAD SINGH *v.* CHUNNU TEWARI. **183 I.C. 426 =12 R.A. 132=1939 A.L.J. 335=1939 A.W.R. (H.C.) 325=A.I.R. 1939 All. 452.**

——S. 151—*Restoration—Suit dismissed for default on date fixed for filing objections to Commissioner's report.*

A Court has inherent jurisdiction to restore a suit, which has been dismissed in default owing to a mistake of the Court itself. Where the lower Court dismissed a suit in default on the plaintiff's absence on that date, which had been fixed merely for filing objections against the report of the Commissioner appointed in pursuance of the preliminary decree.

Held, that the suit should be restored. A.I.R. 1928 Lah. 534 and 6 I.C. 208, Appl. (*Tek Chand, J.*) DHANPAT RAI *v.* BADRI DASS. **166 I.C. 102 =9 R.L. 337=A.I.R. 1936 Lah. 759.**

Review.

——S. 151—Review—Inherent power—Adjustment of decree in favour of minor by next friend without sanction of Court—Remedy of minor—Review—Power of Court. *See* C.P. CODE, S. 47. **A.I.R. 1936 Pat. 506.**

——S. 151—*Review—Order due to inadvertence—Power of Court.*

Where in an execution case the Court had allowed the auction-purchaser to withdraw the deposit made by him on furnishing a security for re-depositing it when asked to do so and a surety bond was accordingly executed, and the Court having asked the purchaser to deposit the amount made an order that if the amount was not deposited within certain period the property be resold and short-fall be recovered from him but on the next date on becoming aware of the surety bond the Court reviewed and modified its order and directed the surety to pay the amount.

Held, that the Court had an inherent power to review its previous order as the error was patent on the face of the record and the previous order was made by the Court *suo motu* through oversight. (*Bhide, J.*) MOHAMMAD RAMZAN *v.* MT. KHADIJA SULTAN BEGUM. **181 I.C. 429 =11 R.L. 834=40 P.L.R. 755=A.I.R. 1938 Lah. 472.**

——S. 151—*Review—Order obtained by practising fraud upon Court—Power to vacate.*

Where an order permitting withdrawal of the suit was obtained by practising fraud upon the Court by a defendant acting in collusion with a minor plaintiff's next friend and the Court subsequently vacated its order.

Held, that the Court had power under S. 151, C.P. Code, to vacate an order obtained by misleading and practising fraud upon Court and hence the order of the Court vacating its previous order was right. (*Davis, J.C. and Mehta, A.J.C.*) MOHANLAL TEJMAL *v.* SH. KHUSHALIBAI. **31 S.L.R. 32=169 I.C. 918=10 R.S. 28=A.I.R. 1937 Sind 101.**

——S. 151—*Review—Power of Court—Order fixing Court-fees—Court-Fees Act, S. 12.*

Although S. 12 of the Court-Fees Act lays down that the decision of the trial Court on the amount of fees chargeable on a plaint is final as between the parties to the suit subject to the provisions

of the second part of that section, that does not prevent the trial Court from reviewing its order fixing Court-fees, a power which is granted to it by S. 151, C.P.Code. Where, therefore, the Court reopens and takes up the question of appropriate Court-fees for a second time, it does not amount to material irregularity. (*Middleton, J.C.*) SHIV SAHAI *v.* DEVI SAHAI. **166 I.C. 178 (1)=9 R. Pesh. 59=A.I.R. 1936 Pesh. 213.**

———**Ss. 151 and 115**—*Revision—Order refusing to amend decree—Power of High Court to interfere.*

Even if upon a strict construction of S. 115, C.P.Code, the High Court is precluded from interfering in revision with an order of a lower Court refusing to amend a decree, it is still open to it to interfere under S. 151, C.P. Code. 1935 O.W.N. 968, Rel. on. (*Nanavutty and Zia-ul-Hasan, JJ.*) UMA SHANKAR *v.* MURARI DAS. **13 Luck. 186=167 I.C. 586=9 R.O. 391=1937 O.L.R. 125=1937 O.W.N. 268=A.I.R. 1937 Oudh 246.**

Scope.

———**S. 151**—*Scope.*

It is a mistake to suppose that S. 151 confers any special jurisdiction on Civil Courts. It is merely a saving clause which saves inherent power of the Court which may exist independently of that section from being limited by the provisions of the Code. (*Sulaiman, C.J. and Bennet, J.*) GENDA MAL *v.* SUKHADARSHAN LAL. **164 I.C. 200=9 R.A 125=1936 A.L.J. 736=1936 A.W.R. 531=1936 A.L.R. 713=A.I.R. 1936 All. 555.**

———**S. 151**—Scope—Administration suit—Decree—Power of Court to pass appropriate order. *See* C.P. CODE, O. 20, R. 13. **1938 M.W.N. 1127.**

———**S. 151**—*Scope of—'Ends of justice' or 'abuse of the process of the Court'—Construction.*

Per *Blagden, J.*—S. 151 does not empower the Court to make any order which the particular individuals who at a given moment happen to compose it think just or calculated to prevent an abuse of its process. The words "ends of justice" and "abuse of the process of the Court", must, in fact, be construed with due regard to the rest of the provisions of the Code, the section being really intended to prevent the Courts being rendered impotent by any omission in the Code. The section empowers the Court to make "necessary orders", and no other orders. (*Roberts, C.J. Dunkley ond Blagden, JJ.*) U AUNG GYI *v.* GOVERNMENT OF BURMA. **1940 Rang. L.R. 512=189 I.C. 338=A.I.R. 1940 Rang. 162 (F.B.).**

———**Ss. 151 and 154**—*Scope—Power to vacate prior order made by Court—Interests of justice.*

It is perfectly competent to a Court to vacate its own prior order. The provisions of Ss. 151 and 154, C.P. Code, are wide enough to allow this being done. Where the Court feels that it is necessary in the interests of justice to vacate a previous order made by it, it can do so, and such an order vacating a prior wrong order cannot be said to be improper or without jurisdiction.

(*Macklin and Sen, JJ.*) HASAN *v.* ISAP **I.L.R. (1939) Bom. 27=180 I.C. 784=11 R.B. 311=40 Bom.L.R. 1180=A.I.R. 1939 Bom. 51.**

———**S. 151**—Scope of—Powers under, when to be exercised. *See* U. P. ENCUMBERED ESTATES ACT. S. 6. **1938 R.D. 365.**

———**Ss. 151 and 152**—*Scope and applicability.*

Ss. 151 and 152, C.P. Code, cannot apply to a case where there is no accidental slip or error or omission on the part of the Court or there is no accidental slip, error or omission or slip in the plaint which intended one thing and owing to an accidental slip stated another, but the parties were labouring under a mistake at the time of the decree and the mistake was embodied in the decree. (*Dalip Singh, J.*) ABDUL SATTAR *v.* FAZAL-UL-RAHMAN. **181 I.C. 28=11 R.L. 765=40 P.L.R. 100=A.I.R. 1938 Lah. 331.**

———**S. 151**—*Scope of inherent jurisdiction—Application to set aside execution sale under S. 151—If maintainable.*

S. 151 of the C.P. Code does not confer an unlimited jurisdiction on the Courts to do what they please and further when another remedy was or is open to a party, he has no right to invoke the inherent jurisdiction of the Court. An application under S. 151 by a decree-holder purchaser to set aside the sale in execution of the materials of a house only, is incompetent where the decree-holder had submitted to the sale and had acquiesced in it and had allowed his other remedies to be barred by time. (*Bennet and Verma, JJ.*) RAHMAT BIBI *v.* CHANDU LAL. **1939 A.W.R. (H.C.) 365=1939 A.L.J. 398=A.I.R. 1939 All. 497.**

———**S. 151**—*Scope and object of—If justifies ignoring or overriding express provision of law.*

S. 151, C.P. Code, was not intended to permit the Court to ignore or override the provisions of the C.P. Code, nor was it intended to oust the provision of the law. It was intended merely to supplement the provisions of the Code and to provide a means of serving justice when the law provided none. It was intended to override the plain and express enactment of the law. (*Davis, J.C. and Weston, J.*) MIR HAJI GHULAM SHAH *v.* KHANCHAND. **I.L.R. (1939) Kar. 330=182 I.C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

———**S. 151**—*Stay—Stay of suit—High Court's powers.*

A mining lease was granted in respect of certain land, the lessee covenanting to start the development of the prospective coal mine as soon as possible after the commencement of the lease. The lessee having failed to do so, the lessor brought a suit against him for damages for breach of the covenant. The lessee applied for stay of the suit pending the disposal of another suit instituted by the Secretary of State against the lessor and the lessee, claiming a declaration that the lessor had no right to the minerals in the land and that the lessee had not acquired any title to them. The trial Court declined to stay the suit and the High Court's inherent powers to stay the procedings were invoked.

Held, that under the circumstances it was desirable that the lessor's suit against the lessee should be stayed on proper terms pending the

C. P. CODE (1908), S. 151.

suit by the Secretary of State. (*Agarwala and Rowland, JJ.*) BENGAL COAL CO., LTD. *v.* BRIJDEO NARAYAN SINGH. **163 I.C. 895=9 R.P. 49 =A.I.R. 1936 Pat. 408.**

Stay of execution.

———S. 151—*Stay of execution—Case not coming under O.* 45, *R.* 13—*Inherent powers.*

It is open to the High Court to exercise its powers under S. 151 and stay the execution of the decree, although the matter may not be strictly within the terms of O. 45, R. 13. Defendant appealed against a decree passed against him and also applied for stay of execution of the decree. The application for stay was dismissed and leave to appeal to the Privy Council was also refused. In the meantime, plaintiff applied for execution of the decree and it was fixed on 7th January, 1939, for final orders. Defendant had taken steps to file an application to the Privy Council for special leave to appeal and for stay of execution. But, it was not physically possible for the defendant to file his application before 16th January, 1939. He therefore filed an application to the High Court to make an order directing stay of execution until his application for special leave was filed and orders thereon obtained.

Held, that in the circumstances of the case the High Court should stay the execution under its inherent powers. (*S. K. Ghose and B. K. Mukerjea, JJ.*) JEWAN RAM GANGARAM & Co. *v.* COMMISSIONERS FOR PORT OF OF CALCUTTA. **183 I.C. 565=12 R.C. 168=A.I.R. 1939 Cal. 308.**

Stay of suit.

———S. 151—*Stay of suit.*

S. 151, C.P. Code, cannot be invoked to stay a suit which cannot be legally stayed under S. 10, C.P. Code, (*Din Mahomed, J.*) LAKSHMI INSURANCE CO., LTD. *v.* B.K. KAULA. **A.I.R. 1940 Lah. 85.**

———S. 151—*Stay of suit—Application for—Plea of jurisdiction involving difficult questions—If can be dealt with.*

A plea as to the jurisdiction of a Court to entertain a suit involving questions of difficulty and importance should not be dealt with by an application for stay of the suit. It may be set down as a preliminary question of law for determination when the suit comes on for trial. (*Derbyshire, C.J. and Lort Williams, J.*) ABDUL SHAKOOR *v.* EBRAHIM SHAKOOR. **I.L.R. (1940) 1 Cal. 497=44 C.W.N. 460.**

———S. 151—*Stay of suit—Balance of convenience.*

In order to justify a stay of a suit it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceeding in some other place. It must be proved to the satisfaction of the Court that either the expense or the difficulties of trial of the suit in the place in which it is brought are so great for the litigant applying for stay as to result in injustice being done. (*Sen, J.*) ALI MAHOMED EBRAHIM SHAKOOR *v.* ADAM HAJEE PEER MOHAMED ESSACK. **I.L.R. (1939) 2 Cal. 199=187 I.C. 356=12 R.C. 569=A.I.R. 1940 Cal. 134.**

C. P. CODE (1908), S. 152.

———S. 151—*Stay of suit—Court in United Provinces—If can issue stay order to a Court in another province.*

A Court in the United Provinces is not competent under S. 151, C.P. Code, to issue a stay order to a Court in another province. (*Collister and Bajpai, JJ.*) DARBAR PATIALA *v.* NARAIN DAS GULAB SINGH. **I.L.R. (1938) All. 650=176 I.C. 625=11 R.A. 139=1938 A.L.R. 666= 1938 R.D. 561=1938 A.L.J. 481=1938 A.W. R. (H.C.) 313=A.I.R. 1938 All. 434.**

———S. 152—*Accidental omission—Preliminary decree against legal representatives of mortgagor —Correction of error—Power of Executing Court —Omission by legal representatives to object in previous execution application—Effect of.*

Where in a suit instituted against the legal representatives of a deceased mortgagor as such, the Court passes a personal decree against them, there is an accidental omission in the decree in failing to limit their liability. The Court has power under S. 152, C.P. Code, which it should exercise, to correct the omission in the decree, The Court is not debarred from exercising its power merely because that error has been brought to its notice in the course of an application in which the decree-holder is seeking to execute the decree.

An executing Court has power to rectify such error when it is the same Court which passed the decree. The omission by the legal representatives to raise an objection to the form of the decree in a previous execution application, does not operate as *res judicata.* Nor can the doctrine of estoppel be introduced when there is no ground for suggesting that the decree-holder has thereby altered his position to his detriment. (*McNair, J.*) GANESH PROSAD AGARWALLA *v.* MONOHARLAL. **I.L.R. (1939) 1 Cal. 305=187 I.C. 801 =12 R.C. 614=43 C.W.N. 490=A.I.R. 1940 Cal. 202.**

———S. 152—"Accidental slip or omission"—Omission to award further interest—Amendment —Power of Court when decree in accordance with judgment. *See* C. P. CODE, Ss. 34 (2) AND 152. **50 L.W. 719=(1939) 2 M.L.J. 751.**

———S. 152—Amendment of decree after expiry of 12 years—If revives right to execute decree. *See* C.P. CODE, S. 48. **(1940) 1 M.L.J. 235 (F.B.).**

———S. 152—*Amendment of decree—Application for—If can be made after decree is barred.*

Although there is no limitation for an application to amend a decree under S. 152, C.P. Code, it is obvious that such an application must be made before the decree has become unexecutable owing to the 12 years limitation provided by S. 48, C.P. Code. (*Norman, I.C. S.*) JOHRI LAL *v.* AZIMAN. **1939 A.M.L.J. 27.**

———S. 152—*Amendment of decree—Effect on rights acquired after decree and before amendment.*

If a decree is subsequently amended, the amendment does not take effect from the date of the decree so as to affect the rights of a purchaser who has acquired the property after the decree and before the making of the amendment. (*Srivastava, Ag. C.J., Nanovutty and Zia-ul-Hasan, JJ.*) INDRANI *v.* MAHARAJ NARAIN. **13 Luck. 101=166 I.C. 662=9 R.O. 324=1937 O.L.**

C. P. CODE (1908), S. 152.

R. 38=1937 O.W.N. 25=A.I.R. 1937 Oudh 217 (F.B.).

———S. 152—Amendment of decree—Effect of—Appeal from decree—Limitation—Starting point—If extended up to date of amendment. *See* LIMITATION ACT, ART. 152. 40 C.W.N. 83.

———S. 152—*Amendment of decree—Limitation—Discretion of Court.*

The question of limitation does not arise in an application for amendment of a decree under S. 152, C.P. Code, and such amendment can be made at any time. But a party has no right under the Code to have a mistake corrected, whatever the circumstances may be, and the matter is left to the discretion of the Court and this discretion has to be exercised in view of the particular facts of each case. (*Coldstream, J.*) MT. SANTI *v.* MULKH RAJ. 175 I.C. 634=10 R.L. 28=39 P.L.R. 769=A.I.R. 1937 Lah. 894.

———S. 152—*Amendment of decree—Right of purchaser of decree.*

A person who purchases a decree purchases the rights in the decree and if one of these rights vesting in the vendor is a right to have the decree amended under the law, this right also passes to vendee. (*Blecher, J.*) JAI BHAGWAN DAS *v.* OM PARKASH. 182 I.C. 830=12 R.L. 77=41 P.L.R. 99=A.I.R. 1939 Lah. 255.

———S. 152—Amendment of decree—Subordinate Court's decree merged in appellate decree *See* C.P. CODE, SS. 151 AND 152. A.I.R. 1938 Lah. 4.

———S. 152—*Applicability—Consent decree or order—Mistakes in—Power of Court to correct.*

S. 152, C.P. Code, applies also to a consent decree; and a Court has jurisdiction under S. 152 to correct clerical or arithmetical mistakes in a consent decree or consent order. (*Beaumont, C.J.*) KARIMUNNISSA BEGAM *v.* KAJI MIR JAMALUDDIN. I.L.R. (1937) Bom. 837=39 Bom. L.R. 915=172 I.C. 170=10 R.B. 252=A.I.R. 1937 Bom. 457.

———S. 152—Applicability and scope—Correction of accidental slip in decree—Effect of—Review—Distinction—Order correcting mistake in decree but passed on review application—If falls under S. 152 or O. 47—Original decree—If superseded. *See* APPEAL—COMPETENCY. 1938 M.W.N. 250.

———S. 152—*Applicability—Decree against dead persons—Amendment and decree against legal representatives—Appeal filed against first decree and not against second—Maintainability—Amendment.*

Where a decree passed against persons who are dead is amended on an application for review and a decree is passed against the legal representatives of the deceased and an appeal is filed against the first decree, the test in deciding whether the appeal has been correctly filed is not whether the error or accidental slip to be corrected in the first decree does or does not fall under S. 152, C.P. Code, but whether for the first decree a second decree is substituted. Where it appears that the first decree has been substituted by a second one, an appeal against the first decree is not competent. The matter which is before the appellate Court for decision is an appeal not against the first decree but an appeal against the second decree. 1929 Bom. 183, Rel. on. (*Davis, J.C. and Mehta, A.J.C.*) LACHMIBAI *v.* DOULATRAM. 29 S.L.R. 445=163 I.C. 30=8 R.S. 182=A.I.R. 1936 Sind 53.

C. P. CODE (1908), S. 152.

———S. 152—*Applicability—Decree in suit to enforce charge—Form of—Duty of Court—O. 34, Rr. 4 and 15—Decree in wrong form—Amendment.*

Where a suit is to enforce a charge, it is incumbent on the Court to pass a decree in terms of O. 34, R. 4, by reason of O. 34, R. 15, C.P. Code. If the Court fails to pass a decree in that form and directs a decree in wrong form to be passed, S. 152, C.P. Code, applies and the judgment and the decree must be amended. (*Venkatasubba Rao, J.*) PARTHASARATHY RAYANIMGAR *v.* SEETHARAMARAYANIMGAR. 1937 M.W.N. 1013.

———S. 152—*Application for amendment of decree—If entertainable in absence of opposite party.*

A Court has no jurisdiction to entertain an application for amendment of a decree on the merits in the absence of the opposite party. (*Din Mahomed, J.*) PURAN MAL *v.* PARAMESHRI DAS. 42 P.L.R. 263=A.I.R. 1940 Lah. 182.

———S. 152—Application under, to amend the decree—A defendant taxed with full pleader's fee, while it should have been one-fourth of the legal fee. *See* OUDH CIVIL RULES, CHAP. VII, R. 289, PARA. 6. 1937 O.W.N. 1110.

———S. 152—*Costs—Application for amendment of decree—Maintainability.*

An application for amendment of a decree is maintainable under S. 152, where the question of award of costs is not in dispute but only the method of assessment or any item awarded is in controversy. (*Mir Ahmad, A.J.C.*) JAGDISH LALL *v.* SECRETARY OF STATE. 165 I.C. 904 (1)=9 R. Pesh. 52 (2)=A.I.R. 1936 Pesh. 196.

———Ss. 152 and 115—*Decree substantially amended—Remedy—Ground of jurisdiction, if open.*

Where a decree is amended and the amendment is substantial in that it alters the amount declared due on a mortgage, at least so far as the additional amount is concerned, there is a new decree from which there is an appeal. It canot therefore be revised. But in the appeal it is open to the appellant to challenge the decree on the ground of jurisdiction. (*Weston, I.C.S.*) KANAK MAL *v.* MYER NISSIM CO., LTD. 1938 A.M.L.J. 88.

———S. 152—*Delay in applying—If bar to amendment of decree.*

Person against whom decree for costs had been passed did not appear in Court and hence had no knowledge of the discrepancies between judgment and decree. Consequently there was great delay in making the application for amendment of the decree.

Held, that in these circumstances the equities were not so much against the applicant and therefore the application should be granted. (*Mukerjee, Ag. C.J. and Ghosh, J.*) HEMANGINI DEVI *v.* SARAT CHANDRA BASU. 171 I.C. 207=10 R.C. 245=A.I.R. 1937 Cal. 96.

———S. 152—*Delay—Correction of error as to costs.*

C. P. CODE (1908), S. 152.

An application to correct an error made in a decree awarding costs will be refused, if the applicant is guilty of laches. (*Din Mahomed, J.*) PURAN MAL *v.* PARMESHRI DAS. **42 P.L.R. 263 =A.I.R. 1940 Lah. 182.**

———**S. 152**—*Delay—Third party acquiring interest in decree—Its subsequent amendment—Permissibility.*

An application for amendment of a decree to bring it into conformity with the judgment will be rejected, if it is made long after a third party acquires an interest in the decree by taking an assignment of the decree without being aware of the defect in it. (*Nasim Ali and Rau, JJ.*) JOY CHANDRA DAS *v.* GOBINDA CHANDRA DHAR. **44 C.W.N. 708.**

———**S. 152**—*Mistake made in both judgment and decree—Power of Court to correct.*

The Court has power to correct a mistake made in both the judgment and the decree. It should not refuse to correct the error on the ground that since the mistake appears in the judgment, the error in the decree is not accidental. (*Monroe, J.*) KISHEN LAL *v.* SURJA. **41 P.L.R. 119.**

———**S. 152**—*Mistake on part of Court officers—Decree-holder, if must show absence of laches on his part—Time limit for amendment of decree.*

There is no time limit prescribed by law within which an application for amendment of a decree under S. 152, C.P. Code, has got to be made. It is true that when there are undue laches on the part of the decree-holder or the interest of third parties has intervened, the Court should be reluctant in allowing amendments of this description. But where the omission of the schedule of the mortgaged properties in the final decree for sale was due to a mistake, if any, on the part of the Court officers and the misdescription in the name of the decree-holder was also a palpable error apparent on the face of it, the decree-holder applying for amendment of the decree is under no obligation to satisfy the Court that really there were no laches on his part. (*Derbyshire, C.J. and Mukherjea, J.*) MANOHAR CHANDRA BANDOPADHYAY *v.* SUDHI PRIYA ROY. **41 C.W.N. 1330 =65 C.L.J. 455.**

———**S. 152**—*Omission—Suit for possession and mesne profits—Court accepting oral request to determine mesne profits in execution—No mention as to mesne profits in judgment and decree—Amendment, whether can be granted.*

In a suit for possession and mesne profits, the plaintiff made an oral statement requesting the Court to determine the amount of mesne profits in the execution department and this prayer was accepted by the Court. The suit was decreed for possession but nothing was said either in the judgment or in the decree as to mesne profits. The plaintiff applied to the Court to add in the judgment and decree words to the effect that the amount of mesne profits would be determined on a separate application in the execution department.

Held, that the application must be allowed and that S. 152, C.P. Code, was wide enough to cover the case which was undoubtedly one of accidental omission of an order as to mesne profits in the judgment. (*Srivastava, Ag. C.J. and Zia-ul-Hasan, J.*) PUTTU LAL *v.* SRIPAL SINGH. **12**

C. P. CODE (1908), 152.

Luck. 759=165 I.C. 799=9 R.O. 263=1936 O.W.N. 1229=A.I.R. 1937 Oudh 191.

———**S. 152**—*Power of Court—Decree in conformity with judgment—Judgment and decree a bit ambiguous—Amendment, application for—Maintainability.*

Where the decree follows the judgment in its entirety and there is no incidental slip or omission, an application for amendment of the decree under S. 152, C.P. Code, is not maintainable. If the judgment and the decree are a bit ambiguous, it is a matter of interpretation of the decree, having regard to the pleadings of the case and the other relevant papers, but it is not a matter for which an application for amendment could be made. (*Mukherjea, J.*) HARSHAMUKHI DASI *v.* YUNUS MOLLA, **175 I.C. 177=10 R.C. 762=65 C.L.J. 452 A.I.R. 1938 Cal. 187.**

———**S. 152**—*Power of Court—Decree not agreeing with judgment—Amendment.*

The judgment in appeal directed 'the costs in appeal would be costs in the suit' and no mention was made of the costs of the lower Court. The decree was drawn up stating that costs of the original hearing and costs of re-trial ordered by the decree and the costs of appeal should abide by the result of the re-trial.

Held, that the language of the decree was different from that of judgment and as doubts and difficulties arose thereby, the decree could be amended to be in agreement with judgment. (*Mukerjee, Ag. C.J. and Ghosh, J.*) HEMANGINI DEVI *v.* SARAT CHANDRA BASU. **171 I.C. 207= 10 R.C. 245=A.I.R. 1937 Cal. 96.**

———**S. 152**—Revision—Order rejecting amendment—Proper remedy. *See* C.P. CODE, S. 115. **1936 A.M.L.J. 117.**

———**S. 152**—*Scope—Alteration of decree on the strength of accounts filed—If justified.*

Where after the passing of a decree, an application for its amendment on the strength of certain accounts newly filed, is allowed, and the decree amount is reduced, the Court in so doing has not merely corrected any clerical error but has altered the decree in a substantial manner, in the light of accounts produced; at a stage when the Court had no jurisdiction to receive fresh documentary evidence. The procedure is not justified by the powers of the Court under S. 152, C.P. Code. (*Mulla, J.*) BALCHAND *v.* NARAIN DASS. **179 I.C. 810=11 R.A. 390=1938 A.W.R. (H.C.) 773=1938 A.L.J. 1080=A.I.R. 1939 All. 96.**

———**S. 152**—*Scope—Error in consent decree—Rectification—Power of Court—Amended decree being appealable—Maintainability of revision.*

S. 152, C. P. Code, does not empower a Court to rectify a decree merely because the decree is wrong or unfair or because the parties have not realised their rights and put them before the Court in such a way as to enable a correct decree to be passed. The powers given under that section only relate to arithmetical mistakes or errors arising from an accidental slip or omission. And the Court has no jurisdiction under S. 152 to add to a term in a consent decree without the consent of both parties to the decree. Ordinarily the High Court will not entertain a revision petition when a remedy by way of appeal is available.

C. P. CODE (1908), S. 152.

But in very special circumstances if there is a clear error relating to jurisdiction it may at its discretion do so. (1901) I.L.R. 24 Mad. 646, considered. (*Wadsworth, J.*) ADINARAYANA RAO NAIDU *v.* KOTHANDARAMMAYYA NAIDU. **1940 M.W.N. 184=51 L.W. 252=A.I.R. 1940 Mad. 538=(1940) 1 M.L.J. 310.**

———S. 152—*Wrong assessment of costs—Amendment of decree.*

The award of costs to which the party successful may be entitled is neither an arithmetical mistake nor an accidental slip or omission under S. 152, C. P. Code. A decree cannot, therefore, be amended under that section, if the method of assessment of costs is wrong. (*Din Mahomed, J.*) PURAN MAL *v.* PARMESHRI DAS. **42 P.L.R. 263=A.I.R. 1940 Lah. 182.**

———S. 153—*Appeal—Dead man made party by mistake—Discretion of Court to implead legal representatives.*

The fact that a dead man had been made a party by mistake does not deprive the Court of the power to implead his legal representatives and proceed with the hearing of the appeal. S. 153 allows the Court a discretion to do so in a fit case, *e.g.*, where the mistake is a *bona fide* one. (*Mir Ahmad, A.J.C.*) MUBARAK SHAH *v.* ACHARAJ RAM. **165 I.C. 201=9 R. Pesh. 44=A.I.R. 1936 Pesh. 192.**

———S. 153—*Duty of Court—Application for leave to appeal as pauper not verified—Rejection—Propriety—Duty to give opportunity to correct defect.*

The verification in an application for leave to appeal *in forma pauperis* not being in the manner prescribed by the Code, the Court rejected it.

Held, in revision, that it was the duty of the Court to allow the applicant a chance to correct the defect in the verification before rejecting the application itself. (*Pollock, J.*) BISANLAL GUJRATHI *v.* KISAN VITHOBA GUJRATHI. **169 I.C. 894=10 R.N. 32=A.I.R. 1937 Nag. 108.**

———S. 153 and O. 1, Rr. 9 and 10—*Power of Court under—Suit in name of non-existing or non-juristic person—Amendment by substitution—Power of Court—Misdescription—Dismissal of suit on ground of plaintiff being non-juristic person—Propriety.*

The plaint in a suit described the plaintiff as "Mandir Shri Deo Radhavallabji Bulakhichandji of Saugor" through Managers or trustees B.G. and nine others. The trial Court dismissed the suit on the ground that a temple was a non-juristic person and that the Muhatimimkars could not represent a person who was non-existent. The lower appellate Court held that it was at the most a case of a misdescription of the plaintiff, the real person being the deity through its trustee and allowed an amendment by striking the word "Mandir."

Held, in second appeal, that it would be possible to allow amendment of a plaint mistakenly brought in the name of a non-existing or non-juristic person, and that in any case the order allowing amendment could be upheld on the ground of misdescription.

Held further, that in a case where it would be still open to the plaintiff to bring another suit, there being no question of limitation involved, there was no injustice to the defendant in allowing the suit to proceed. S. 153, C. P. Code, being very wide in the general power of amendment which it gave. Courts are to be reluctant to non-suit parties on purely technical grounds if a way of escape can be found. (*Gruer, J.*) RAGUNATH SINGH *v.* RADHAVALLABHJI. **20 N.L.J. 65=10 R.N. 132=171 I.C. 763=I.L.R. (1937) Nag. 514 =A.I.R. 1937 Nag. 173.**

C. P. CODE (1908), O. 1, R. 1.

———S. 153—*"Proceeding"—Meaning of—Application for challan for depositing amounts for setting aside execution sale under O. 21, R. 89—Amount deposited and receipt filed along with memo. by depositor for purpose of setting aside sale—If "proceeding"—Absence of formal prayer for setting aside sale—Separate application not filed—Application to amend memorandum for including prayer to set aside sale beyond one month—Power of Court to allow.*

The term "proceeding" in S. 153, C. P. Code, must be interpreted as any application to a Court of justice, however made, "for aid in the enforcement of rights, for reliefs, for redress of injuries, for damages or for any remedial object." An application for a challan for depositing the necessary amounts for the purpose of setting aside an execution sale, and a memorandum accompanying the receipt obtained for the deposit are "proceedings" within the meaning of S. 153, C. P. Code, though they may or may not be treated as applications to set aside the sale under O. 21, R. 89, C. P. Code, for want of a formal prayer to set aside the sale. Such a challan or memorandum may be amended so as to add a prayer therein that the sale be set aside, under S. 153, C. P. Code. The fact that the period of limitation for making an independent application for setting aside the sale has expired is no ground for refusing the amendment under S. 153. (*Venkataramana Rao, J.*) ASAN KUTTI *v.* KOYYAMAN KUTTI. **171 I.C. 646=1937 M.W.N. 277=45 L.W. 633=10 R.M. 377=A.I.R. 1937 Mad. 342=(1937) 1 M.L.J. 658.**

———Sch. I—*Rules in—Force of.*

Rules framed under Orders in the C. P. Code have the force of law and should be observed. It is incorrect to say that the Rules framed in the Code are not so imperative as the main sections of the Code. (*Varma, J.*) MUKHRAM MARWARI *v.* BATESWAR MAHTON. **169 I.C. 805=10 R.P. 46=3 B.R. 621=A.I.R. 1937 Pat. 307.**

———O. 1, R. 1—*Applicability to joinder of causes of action.*

Rule 1 applies not only to the joinder of plaintiffs, but also to the joinder of causes of action in one suit. Where the defendant was the agent of two sets of principals appointed at different times and by different acts, and the principals sued him for rendition of accounts and having regard to the scope of agency some common questions of fact and law were bound to arise.

Held, that the principals could join their causes of action in one suit, and hence there was no misjoinder of parties. (*R. C. Mitter, J.*) MONINDRA LAL CHATTERJEE *v.* HARI PADA GHOSE. **166 I.C. 608=9 R.C. 555=64 C.L.J. 587=41 C.W. N. 27=A I.R. 1936 Cal. 650.**

———O. 1, R. 1—*Co-sharers—Suit for ejectment—Non-joinder of mortgagee of share—Effect.*

The law lays down that where there are two or more co-sharers in any right, title or interest, all

things permitted to be done by the possessors of the same must be done conjointly unless they have appointed an agent. The only exception allowed is in connection with a right to a separate share of rent or the right to bring a suit separately for a share of rent. The mortgagee of a share is a co-sharer, and he must therefore join the sharers in a suit for ejectment. A suit by the other co-sharers without joining the mortgagee is therefore incompetent. (*Drake Brockman, S.M. and Knox, J.M.*) FATIMA *v.* SIRAJUDDIN. 1936 R.D. 85.

——O. 1, R. 1—*Same transaction—Relief in respect of, claimed by defendant against co-defendant—Such defendant if can be added as plaintiff.*

Where a defendant in a suit claims relief as against a co-defendant, in respect of the same transaction as that with reference to which the suit is brought, he could be added as a co-plaintiff for, if he brought a separate suit a common question of law and fact would arise. (*Wort, Ag. C. J. and Manohar Lall, J.*) NILURIPPATRA COAL CO., LTD. *v.* NORTH BURRAKKAR COAL CO., LTD. 178 I.C. 286=5 R.R. 79=11 R.P. 238=A.I.R. 1939 Pat. 157.

——O. 1, R. 3—Applicability—Different mortgages on same property to same person—Single suit on both, joining both mortgagors—Competency. *See* T. P. ACT, S. 67-A. A.I.R. 1937 Nag. 99.

——O. 1, R. 3—*Joinder of defendants—Suit for damages for breach of contract against one defendant and for damages in tort against another.*

A decree for damages for breach of contract against one defendant and a decree for damages in tort against another defendant in respect of damages arising out of the same transaction can be passed in the same action. Defendants against whom damage is claimed on these two causes of action can be joined in the same suit. O. 1, R. 3 covers such a case and there is no misjoinder of defendants. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) P. B. BOSE *v.* M. R. N. CHETTIAR FIRM. 1938 Rang.L.R. 303=175 I.C. 804=11 R.R. 1=A.I.R 1938 Rang. 185 (S.B.).

——O. 1, R. 3—*Joinder of several defendants—Conditions—Suit for possession against several defendants—Different causes of action—Breaches of tenancy agreements—Trespasses—Misjoinder of causes of action—O. 2, R. 6—If applies.*

O. 1, R. 3, C. P. Code, is the rule that makes provision for what must be the exceptional case of combining in one suit separate causes of action against several defendants. But it provides that, before that ought to be done, the right to relief must arise in respect of or out of the same 'act or transaction or series of acts or transactions.' In order to qualify under this rule, the case must be one in which the issue—be it an issue of fact or an issue of law on both—against each of the defendants is substantially the same. Where a plaintiff sued as an owner for possession of property, different defendants or sets of defendants who were in possession on the ground of either breaches of tenancy agreements, or trespasses, it was held that the suit in reality was an attempt to combine in one suit different suits against different defendants in respect of different pieces of property and upon different causes of action. Separate lettings to each tenant and separate 'squatting' by each squatter did not constitute the same act or the same series of acts or transactions. It was further held that the case is not one covered by O. 2, R. 6 for that rule does not apply to cases of misjoinder of causes of action but to cases where several causes of action have been properly joined in one suit and the causes of action so joined cannot conveniently be tried together. (*Braund, J.*) DAW HLA GYI *v.* MAUNG PO THAUNG. 1938 Rang.L.R. 397=178 I.C. 918=11 R.R. 291=A.I.R. 1938 Rang. 420.

——O. 1, Rr. 3 and 5—*Misjoinder of defendants and causes of action—Every defendant if to be interested in all reliefs—Suit by son against father and alienees to declare debts not binding.*

Where the sons of a Hindu father sued him and his creditors and alienees for a declaration that the father's debts are immoral debts and hence not binding on them, the suit is not bad for misjoinder of defendants and causes of action, for the several alienations made by the father constitute 'series of acts or transactions' and they are the same series of acts or transactions because, as alleged by the plaintiffs, they were all vitiated by one circumstance, namely, that they were incurred for immoral purposes. This feature put all debts in one category, and the successive borrowings formed one series of acts or transactions. O. 1, R. 3 contemplates not only joinder of defendants but also causes of action. O. 1, R. 5 is to be read with R. 3 and hence it is not necessary for every defendant to be interested in all the reliefs in suit. (*Niyogi, J.*) PURUSHOTTAM *v.* BHAGWAN SAO. I.L.R. (1939) Nag. 229=11 R.N. 211=1938 N.L.J. 210=178 I.C. 215=A.I.R. 1938 Nag. 461.

——O. 1, R. 3—*Necessary party—Test for determination of.*

The allegations in the plaint alone should be looked into in order to come to a finding whether a certain defendant is or is not a necessary party. (*Abdur Rahman. J.*) DEVENDRA AYYAR *v.* MUTHU CHETTIAR. 178 I C. 191=47 L.W. 760=11 R.M. 416=1938 M.W.N. 75=A.I.R. 1938 Mad. 329.

——O. 1 R. 3—*Suit for recovery of possession of land—Defendant claiming possession as tenant of another person—Such person and his predecessor-in-title, if proper parties.*

Where in a suit for recovery of possession of land, the defendant claims to be in possession of the land as a tenant of another person, such person may be a proper party to the suit but his predecessor-in-title can never be a proper party to the suit and an order directing him to be impleaded in suit is wrong. (*Baguley, J.*) N. E. S. P. A. CHETTYAR FIRM *v.* LETCHMANAN KONAN. 163 I.C. 630=9 R.R. 38=A.I.R. 1936 Rang. 241.

——O. 1 R. 3—*Suit on promissory note—Subsequent surety, if can be joined with executants.*

The execution of a promissory note and the subsequent guarantee of the debt on that promissory note are a series of transactions within the meaning of O. 1, R. 3, C. P. Code. Hence in a suit on a promissory note the subsequent surety can be joined with the co-executants of the promissory note. (*Mosely, J.*) C. T. A. C. T. FIRM *v.* MAUNG AYE. 171 I. C. 527=10 R. R. 161=A.I.R. 1937 Rang. 197.

——O. 1, Rr. 3 and 9—*Suit to declare easement right over pathway—Parties—Non-joinder of necessary party—Effect.*

C. P. CODE (1908), O. 1, R. 8.

Where the plaintiff claims a declaration that he is entitled to a right of easement in respect of a certain pathway, every owner of the servient tenement who denies the plaintiff's right, or is concerned in the obstruction of the pathway, is a necessary party; and any decree obtained in the absence of any such person is infructuous. (*Edgley, J.*) RAKHALDAS MUKHERJI *v.* KALIPADA BHATTACHARJI. 168 I.C. 164=9 R.C. 768=A.I.R. 1936 Cal. 534.

——O. 1, R. 8—*Applicability—Arbitration proceedings—Application to set aside award under S.* 14, *Arbitration Act—Leave under O.* 1, *R.* 8—*If can be granted.*

O. 1, R. 8, C. P. Code, is a rule of procedure made for the purposes of convenience and saving of trouble and expense, and there is no reason why its provisions should not be applied to an application under S. 14 of the Arbitration Act to set aside an award on the ground of misconduct of the arbitrator. The Court has power to grant leave under O. 1, R. 8, to a petitioner applying under S. 14, Arbitration Act. A petition under S, 14 is one which can be heard and tried as a suit. (*B. J. Wadia, J.*) ABDUL GANI SUMAR *v.* THE RECEPTION COMMITTEE OF THE 48TH INDIAN NATIONAL CONGRESS. 60 Bom. 645=163 I.C. 532=9 R.B. 29=38 Bom.L.R. 380=A.I.R. 1936 Bom. 259.

——O. 1, R. 8—*Applicability—Suit against several defendants as representing large body of villagers—Prayer for declaration, possession and injunction and mesne profits—Maintainability—Decree for consolidated sum for mesne profits—Sustainability—Land held by defendants under* karaiyedu *tenure.*

A representative suit would lie as much in respect of a declaration as for an injunction. But the law is quite clear that the procedure pertaining to representative suits is inapplicable to action of debt to money claims or its liabilities in contract or in tort. The defendants were sued under O. 1, R. 8, C. P. Code, as representing a large number of villagers too numerous to be impleaded, individually, for a declaration, injunction and possession and mesne profits in respect of lands held by them under the *Karaiyedu* tenures, under which the lands were temporarily cultivated in separate shares by the co-sharers and were subject to periodic redistribution. The defendants' case was that in virtue of their holding certain other lands in the village under the *Karaiyedu* system, they were entitled to similar rights in the suit land. The lower Court decreed the suit and granted a decree for a consolidated sum as representing the mesne profits.

Held, that though on the facts found the plaintiffs were entitled to have recourse to O. 1, R. 8, C. P. Code, as there was sufficient community of interest as to render the rule applicable, the lower Court was wrong in passing a decree for mesne profits, as no attempt had been made to apportion the liability and as what had been found due was the amount supposed to be payable by the entire group. (*Venkatasubba Rao and Abdur Rahman, JJ.*) RATNASWAMI NADAR *v.* PRINCE OF ARCOT'S ENDOWMENTS, TRICHINOPOLY. 181 I C. 117=11 R.M. 775=1938 M.W.N. 740=48 L W. 109=A.I.R. 1938 Mad. 755=(1938) 2 M.L.J . 148.

C. P. CODE (1908), O. 1, R. 8.

——O. 1, R. 8—*Applicability—Suit on behalf of panchayat.*

The provisions of O. 1, R. 8, C. P. Code, are applicable to a suit brought on behalf of a panchayat of a village. If in such a suit all the members of the panchayat are not upon the record, and those who are upon the record have not obtained permission under O. 1, R. 8 to represent the other members of the panchayat who are interested in the suit, the suit is liable to be dismissed. (*Davis, J.C. and Lobo, J.*) NARUMAL MULCHAND *v.* RAIS HASHIM. I.L.R. (1940) Kar. 190=187 I.C. 883=12 R.S. 263=A.I.R. 1940 Sind 63.

——O. 1, R. 8—*Applicability—Various plaintiffs putting forward varying legal claims in support of right—Leave to maintain representative suit—If can be granted.*

O. 1, R. 8, C. P. Code, cannot be applied unless the plaintiffs truly represent the persons whom they seek to represent. Where in a suit by certain persons claiming to be representatives of a large body of persons entitled to be in occupation of the property in suit, varying legal claims are put forward, some claiming to be owners, some to be permanent tenants, some to be tenants entitled to certain benefits under the City Tenants' Protection Act and others having no other title than that of being mere trespassers, the Court will not allow the various plaintiffs to continue the suit, because they cannot be said truly to represent the whole body of occupants, unless they reduce themselves to the level of those among the occupants who have the weakest case to put forward, *i.e.*, unless the plaintiffs describe themselves as trespassers and nothing else, the Court will not be justified in granting permission to them under O. 1, R. 8, C. P. Code. (*King, J.*) KUPPUSWAMY *v.* COMMISSIONER, CORPORATION OF MADRAS. 49 L.W. 165=1939 M.W.N. 440=A.I.R. 1939 Mad. 428.

——O. 1, R. 8—Applicability—Village-path or lane—*Osara* on—Suit in respect of—Right of private person—Leave under O. 1, R. 8—Proof of special damage—Necessity. *See* C. P. CODE, S. 91 AND O. 1, R. 8 17 Pat L.T. 842.

——O. 1, R. 8—*One plaintiff withdrawing from suit—Procedure.*

Where one of the plaintiffs permitted under O. 1, R. 8, C. P. Code, to bring a suit on behalf of a proprietary body intimates to the Court that he does not wish to prosecute the suit, the proper course for the Court to follow is to decide whether it will permit the remaining plaintiff or plaintiffs to continue to prosecute the suit, or whether it will insist upon the original number, in which case it should notify to the members of the proprietary body so that they may authorise another person to conduct the case on their behalf as a co-plaintiff. 54 M. 527, Foll. (*Tek Chand, J.*) GIRDHARI *v.* RAM KALA. 173 I.C. 679=10 R.L. 465=39 P.L.R. 407=A.I.R. 1937 Lah. 601.

——O. 1, R. 8—*Parties to suit—Who are not.*

Where persons are not among those who have been appointed by the Court to defend a suit under O. 1, R. 8 on behalf of any class and they have not applied under sub-R. (2) of R. 8 to be impleaded as defendants in their own name, they are not parties to the suit in the real sense of the term and their absence from the record is wholly

C. P. CODE (1908), O. 1, R. 8.

immaterial. (*Tek Chand and Dalip Singh, JJ.*) FAZL RAHIM KHAN *v.* HUSSAINA. I.L.R. (1940) Lah. 199=188 I.C. 189=12 R.L. 507=A.I.R. 1939 Lah. 572.

——O. 1, R. 8—*Representative suit—Death of some of representatives—Procedure.*

Two of the defendants who died *pendente lite* were out of the twelve representatives appointed under O. 1, R. 8.

Held, that the remaining representative defendants should have applied to the Court for directions as to whether they should conduct the case on behalf of all the defendants as before or whether any other persons should be added. (*Bhide, J.*) MEHTAB *v.* AHMAD KHAN. A.I.R. 1940 Lah. 272.

——O. 1, R. 8—*Representative suit—Principle underlying—Scope and object of O. 1, R. 8.*

The principle of a representative suit is to prevent a defendant from being vexed and molested by other similar suits by other persons of a particular body. Personal service cannot, obviously, be made, on non-existing persons and it is only when such existing persons are numerous that there may be another form of service such as public advertisement. Hence O. 1, R. 8, C. P. Code deals with persons in existence at the time the suit is brought and is to prevent an actual existing danger, namely the bringing of suits by such persons and not merely a possible future danger which may never mature, namely, the coming into existence at some unknown period of persons who become creditors of the defendant in that suit. (*Hamilton, J.*) SURAJ BAKHSH SINGH *v.* THAKUR DAS. 187 I.C. 90=1940 O.A. 260=1940 O.W.N. 285=12 R.O. 355=1940 O. L.R. 167=1940 A.W.R. (C.C.) 148=A.I.R. 1940 Oudh 200

——O. 1, R. 8—*"Same interest"—Meaning of.*

What O. 1, R. 8, C. P. Code, contemplates is that the plaintiff or plaintiffs must have a common interest with those whom he or they claim to represent. All that is necessary is that there must be a common interest and a common grievance. (*Venkatasubba Rao and Abdur Rahman, JJ.*) MANAVEDAN *v.* VEERAYAN UNNI. 189 I.C. 66=1939 M.W.N. 458=A.I.R. 1939 Mad. 751.

——O. 1, R. 8—*Scope.*

O. 1, R. 8 does not draw a distinction between cases (1) in which the public or a large part of the public, are interested in the subject-matter of dispute and some persons sue, or are sued, on behalf of this indeterminate body; and (2) cases in which the persons interested are named in the record and only some of them have been permitted to sue or defend the suit as a matter of convenience, because after an order under O. 1, R. 8 has been passed, the only effective parties to the suit or appeal are the nominees of the Court and not the other persons interested even though their names are allowed to remain on the record. (*Tek Chand and Dalip Singh, JJ.*) FAZAL RAHIM KHAN *v*, HUSSAINA. I.L R (1940) Lah. 199=188 I.C. 189=12 R.L. 507=A.I.R. 1939 Lah. 572.

——O. 1, R. 8—Scope and effect of—If creates new right of suit—If over-ridden by S. 91—Village pathway—Obstruction—Right of individuals to sue in respect of. *See* C. P. CODE, S. 91 AND O. 1, R. 8. 19 Pat. 208.

C. P. CODE (1908), O. 1, R. 8.

——O. 1, R. 8—*Scope—Suit in their own right by some members of a community—If affected.*

O. 1, R. 8, C. P. Code is only an enabling section and it does not debar some of the members of a community from maintaining a suit in their own right; but it may not affect persons who are no parties to it. (*Thom, C.J. and Ganga Nath, J.*) RAM KALI *v.* MUNNA LAL. I.L.R. (1939) All. 754=184 I.C. 620=12 R.A. 260=1939 A.W.R. (H.C.) 515=1939 R.D. 390=1939 A.L.J. 821=A.I.R. 1939 All. 586.

——O. 1, R. 8—Scope—Suit under O. 21, R. 63, by decree-holder—Prayer for declaration of bogus character of sale-deed and for setting aside the same as a fraud on creditors—Leave of Court to sue on behalf of all creditors—If essential. *See* T. P. ACT (AS AMENDED IN 1929), S. 53. 51 L.W. 608=(1940) 1 M.L.J. 872.

——O. 1, R. 8—*Scope—Village temple—Alienation of properties by* pujaries—*Decree for sale—Representative suit on behalf of villagers for declaration of invalidity of alienation and for injunction to restrain sale—Maintainability.*

A suit by certain persons on behalf of the villagers of a village for a declaration that the suit property is Devadayam inam land belonging to a temple in the village, and that certain alienations thereof by the defendants, *pujaries* are void and not binding on the temple and for a permanent injunction restraining the alienees from bringing the property to sale in execution of a mortgage decree obtained by them, can be maintained under O. 1, R. 8, C. P. Code, apart from the provisions of S. 92, C. P. Code. The existence of a more effective remedy is obviously no answer to the suit and cannot justify its dismissal. (*Patanjali Sastri, J.*) SRI VEERABHADRASWAMI *v.* MAYA KONE 50 L.W 658=1939 M.W.N. 1137=A.I.R. 1940 Mad. 81=(1939) 2 M.L.J. 920.

——O. 1, R. 8—*Suit against a member of unregistered body—Procedure laid down by R. 8 not followed—Binding nature of decree.*

It is well settled that where a suit is brought on behalf of or against an association or an unregistered body, no one member thereof can alone sue or be sued. The suit must be brought by or against all the members thereof. A decree passed against one of the members will not be binding upon the unregistered body unless the procedure laid down by O. 1, R. 8, C. P. Code, has been followed. If that procedure is not followed, the result of the suit has no binding effect on those who are not on the record. An objection as to the procedure under O. 1, R. 8 not having been followed is not an objection as to non-joinder, or misjoinder of parties but goes to the root of the case. The prejudice is obvious if all the members of an association are made bound by a decree although they were never either parties to the suit or properly represented by some one else. (*Radha Krishna, J.*) THAKUR PRASAD SAKSENE *v.* SADIQ HUSAIN MEHDI HUSAIN FIRM. 15 Luck. 253=12 R.O. 215=1940 A.W.R. (C.C) 38=1939 O.L.R. 735=185 I.C. 330=1940 O.W.N. 7=A.I.R. 1940 Oudh 129.

——O. 1, R. 8—*Suit for declaration that there is no public right of way over plaintiff's land—Members of public not impleaded—Defendants alone interested in opposing plaintiff's right—Suit, if bad.*

C. P. CODE (1908), O. 1, R. 8.

A suit for a declaration that there is no public right of way over the lands in suit belonging to the plaintiff is not bad although members of the public have not been impleaded in the way contemplated by O. 1, R. 8, C. P. Code, when according to the plaintiff the defendants alone are interested in opposing or resisting his rights. Whatever conclusion the Court may come to in the case, the decision can be binding only as between the parties to the suit. Other members of the public not being represented will not be affected one way or the other. (*Biswas, J.*) JAMINI RANJAN *v.* PROMODE RANJAN. **44 C.W.N. 1029.**

——O. 1, R. 8—Suit under—Death of one of several plaintiffs—Omission to implead legal representatives—Abatement. *See* C P. CODE, O. 22. **17 P.L.T. 926.**

——O 1, R. 8—*Suit under—Frame of Suit by plaintiff in representative capacity for declaration of right of fishery against defendants in representative capacity—Direct claim by plaintiff against defendant for damages for actual trespass and for injunction against further trespass — If can be joined.*

There is no reason why a relief which neither the plaintiff claims in a representative capacity himself nor seeks to enforce against the defendants in any representative capacity should not be joined with the claim against the defendants in a representative capacity in respect of a declaration of right. There is no objection to the plaintiff maintaining his representative suit for a declaration of a right of fishery along with his direct claim for an injunction against the defendants restraining them from further trespass or for damages for trespass actually committed by them. (*Harries, C.J. and Rowland, J.*) RAJA BRAJA SUNDER DEB *v.* MANI BEHERA. **189 I.C. 543=6 B.R. 836=5 C.L.T. 35=A.I.R. 1940 Pat. 247.**

——O. 1, R. 8—Tort—Damages—Representative suit—Maintainability. *See* TORT—DAMAGES. **49 L.W. 664.**

——O. 1, R. 9—Applicability to mortgage suit. *See* C.P. CODE, O. 34, R. 1. **1940 O.A. 191=1940 O.W.N. 209.**

——O. 1, Rr. 9 and 10—*Applicability—Addition of party—Right of plaintiff to add at late stage—Duty of Court—Considerations.*

O. 1, R. 9, C. P. Code, lays down the general principle that a suit shall not be dismissed merely because of the non-joinder of some person necessary to suit; but admittedly an exception has been made by the Courts to those cases in which the plaintiff has persisted in two or more Courts in not adding the necessary party, even when he was given an opportunity to do so. It cannot be said that there is any rule of thumb by which a Court can say whether the plaintiff shall be allowed to add a party at a late stage or not, O. 1, R. 9, is still the rule to be applied at any stage of a proceeding, and a plaintiff should only be refused that equitable relief when his conduct has been such as to disentitle him to it. Nor will the Courts lightly dismiss a plaintiff's suit unless his conduct has been such that he does not deserve the consideration of the Courts. If he has behaved in a fair and straightforward manner and the adding of a party would not unduly prejudice the defendant, his suit should not be dismissed because of some technicality such as the adding

C. P. CODE (1908), O. 1, R. 9.

of a party even if it be at a very late stage of the litigation. (*Horwill, J.*) NARAYANAN NAIR *v.* CHEKUNNI. **1937 M.W.N. 245=45 L.W. 648=170 I.C. 242=10 R.M. 164=A.I.R. 1937 Mad. 520.**

——O. 1, R. 9—*Joinder of parties—Power of Court—Party in whose favour joinder is necessary, refusing to allowing addition.*

Though a Court has a power to join a party under O. 1, R. 9 it cannot join a party which the litigant in whose interest the joinder is to be made refuses to have the necessary parties joined. (*Stone, C.J. and Bose, J.*) GIRDHAR *v.* MOTILAL CHAMPALAL FIRM. **1940 N.L.J. 151.**

——O. 1, R. 9 and O. 34, R. 9—*Scope—Mortgage—Suit for redemption—Omission to implead some of the proprietors interested in equity of redemption—If fatal.*

It is not correct to say that O. 1, R. 9, C. P. Code, is subordinate to O. 34, R. 1, C. P. Code. The rule laid down in O. 34, R. 1, is merely a rule of procedure enacted with the object of avoiding multiplicity of suits. The combined effect of O. 1, R. 9 and O. 34, R. 1, is that all persons whose rights and interests may be adjudicated upon and determined in a mortgage suit ought to be added as parties, but the failure to add one or more such persons cannot have the effect of defeating the suit, if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. Whether the Court can do so or not must depend upon whether the presence of those not added is essential to enable the Court to adjudicate on the rights and interests of those actually before it. If no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and must be dismissed. Otherwise the suit can proceed and the Court can determine the matters in controversy between the parties actually present, though the other parties might properly have been added as parties to the suit. Since it is beyond controversy that any one of several co-mortgagors can redeem a mortgage, the omission to implead some of the proprietors interested in the equity of redemption as parties to a suit for redemption of the mortgage is not fatal to the suit, when the presence of those persons is not essential to enable the Court to decide the matter in controversy in suit. (*Fazl Ali, J.*) NARAIN PANDEY *v.* SURAJBHAN LAL. **1937 P.W.N. 98=169 I.C. 897=3 B.R. 678=10 R.P. 91=18 Pat. L.T. 289=A.I.R. 1937 Pat. 414.**

——O. 1, R. 9—*Scope—Non-joinder, if can entail dismissal of suit.*

O. 1, R. 9, C. P. Code, is wide in its scope and is subject to no qualification whatever. No suit whatever is to be defeated by the non-joinder of parties, and in every suit the Court is to proceed to do justice as between the parties thereto, no matter if there has been non-joinder. It is for the Court to decide in each case, whether it is possible to do justice as between the parties despite non-joinder. The answer to the question as to whether the suit falls to be dismissed in case of non-joinder because it is barred by limitation as against the party not impleaded, must depend on the facts and circumstances of each case. (*Thom, C.J. and Ganga Nath, J.*) KUNJ BEHARI LAL *v.* JAMNA KUNWAR. **181 I.C.**

C. P. CODE (1908), O. 1, R. 9.

448=11 R A. 566=1939 A.L.J. 123=1939 A.W. R. (H.C.) 214=A.I.R. 1939 All. 235.

——O. 1, R. 9—*Scope—Non-joinder of necessary party in spite of objection at earliest stage—Effect—Dismissal of suit—If justified.*

O. 1, R. 9 does not do away with the necessity for bringing a necessary party on the record. If a necessary party is not on the record the proper course is to apply to have him joined. If he is not brought on the record at all, or if when he is brought on the record the suit as against him is barred by limitation, the suit will be dismissed especially where the defendant has taken the objection even at the earliest possible moment and the plaintiff has not asked for amendment of the plaint for bringing on record such party. An executant of a promissory note governed by the Bengal School of Hindu Law died leaving two widows. Plaintiff impleaded one of them as defendants in his suit on the note. Even at the earliest moment, the impleaded widow pleaded that the other widow was a necessary party but the plaintiff did not implead her.

Held, that she was a necessary party and as she was not on record, the suit should be dismissed. (*McNair, J.*) PROBODH LAL MUKERJEE *v.* NILARATAN ADHIKARY. **62 Cal. 324=162 I.C. 323=8 R.C. 597=A.I.R. 1936 Cal. 193.**

——O. 1, R. 9—*Scope—Omission to follow procedure of amendment—Suit allowed to proceed to decree—Effect—Waiver of defect.*

Once a multifarious suit is allowed to proceed to trial and results in a decree, without the procedure for amendment prescribed by O. 1, R. 9, C. P. Code, being followed, the defect of multifariousness is considered to have been waived. (*Rowland, J.*) JANKI RAI *v.* RAM RAN BIJAYA PRASAD SINGH. **187 I.C. 49=12 R.P. 560=6 B.R. 416=20 Pat.L.T. 889=A.I.R. 1940 Pat. 145.**

——O. 1, Rr. 9 and 10—*Scope—Partnership—Suit for accounts—Non-joinder of one partner—Subsequent joinder as* pro forma *defendant after limitation—Dismissal of whole suit—Propriety and legality of.*

The fact that a claim is barred against a particular person does not prevent that person from being impleaded as a *pro forma* defendant to the suit. In a suit for accounts of a partnership a member of the partnership was not originally made a party. On a plea of non-joinder being raised, he was impleaded as a *pro forma* defendant, but that was not till after the period of limitation for the suit had expired. The lower Courts dismissed the suit on the grounds that (*i*) that the suit for accounts should be dismissed if all the partners were not impleaded; (*ii*) that a party could not be impleaded at all if any claim which might have been made against him be barred by limitation.

Held, that neither of the grounds was valid or correct and that the dismissal was consequently wrong and must be set aside. (*Allsop, J.*) JAMNA KUER *v.* KUNJ BEHARI LAL. **1937 A.W.R. 527=170 I.C. 743=1937 A.L.J. 571=10 R.A. 171=1937 A.L.R. 728=A.I.R. 1937 All. 502.**

——O 1, Rr. 9 and 10—Scope—Powers and duties of Court—Suit in name of non-existing or non-juristic person — Dismissal — Propriety—Amendment to rectify misdescription—Permissibility *See* C. P. CODE, S. 153 AND O. 1 RR. 9 AND 10. **20 N.L.J. 65.**

C. P. CODE (1908), O. 1, R. 10.

——O. 1, R. 9—*Scope—Suit by one of two persons jointly interested—Competency — Death of other party interested pending suit—Power of Court to decree suit—Subsequent events—Duty of Court to take notice of.*

The provisions of O. 1, R. 9, C. P. Code, are clear enough and make it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It may be that a Court would in certain exceptional cases refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject-matter of the suit have not been impleaded. But this rule can have no possible application to a case in which on account of the death of the other party jointly interested with the plaintiff, though it occurred during the pendency of the suit, the plaintiff has become the only person, when the case is taken up for trial, entitled to the relief claimed. Courts can take notice of events happening after the institution of the suit and at times it is essential for the Court to do so in order to avoid a further unnecessary litigation and to do complete justice between the parties. (*Abdur Rahman, J.*) SORNAMMAL *v.* THANGAVELU MUDALIAR. **1940 M.W.N. 429=A.I.R. 1940 Mad. 412=(1940) 1 M.L.J. 240.**

——O. 1, R. 10—*Addition of parties—Limits to Court's powers.*

Although under O. 1, R. 10, C. P. Code, the Court has wide powers to add parties to a suit or proceeding, merely because a person claims to be interested in a suit and wants to be added as a party, the Court would not ordinarily make him a party without the concurrence of the plaintiff. (*Wadia and Wassoodew, JJ.*) VIRBHADRAPPA *v.* SHEKABAI. **I.L.R. (1939) Bom. 232=182 I.C. 539=12 R.B. 15=41 Bom.L.R. 249=A.I.R. 1939 Bom. 188.**

——O. 1, R. 10 and O. 41, R. 23—*Addition of parties—Partition action—Necessary parties not impleaded—Procedure to be followed by appellate Court.*

Where the Appellate Court is of opinion that a certain person is a necessary party and ought to have been impleaded in a partition suit the proper procedure is to remand the case to the Court of first instance with a direction that the Court should implead that person and then proceed to dispose of the case. (*Braund, J.*) NOOR MOHAMMAD *v.* ZAINUL ABDIN. **1940 A.W.R. (H.C.) 375=A.I.R. 1940 All. 399.**

——O. 1, R. 10—*Addition of party in appeal—If subject to appeal or revision.*

An order made by an appellate Court adding a third person as a party is not appealable as an order under O. 1, R. 10 does not find a place in O. 43, R. 1. It is also not one which can be assailed in revision because it is clearly an interlocutory order. (*Thomas, C.J. and Yorke, J.*) BRIJ MANOHAR *v.* RAMANAND. **14 Luck. 447=179 I.C. 1004=1939 O.A. 228=1939 O.L.R. 105=11 R.O. 223=1939 O.W.N. 181=A.I.R. 1939 Oudh 102.**

——O. 1, R. 10—*Applicability — Defendant dead prior to suit—Joinder of heir—Procedure—O. 22, R. 10—Applicability.*

A suit was instituted against a person who was however subsequently found already dead. The person in whom the property of the deceased

C. P. CODE (1908), O. 1, R. 10.

vested was made a party to the suit under O. 1, R. 10. No application was made under O. 22.

Held, that O. 22, R. 10 of the Code had no application as the person sued was already dead before the institution of suit. If the plaintiff, being ignorant of the death of defendant, joined him as a party to the suit he was in no worse position than that in which he would have been had he failed to join defendant if alive. He could at any time before the period of limitation for instituting the suit against defendant join him if he was alive and could likewise join persons who had succeeded to his estate if he was dead. A person in whom the property of deceased vested could therefore be joined as party to the suit under O. 1, R. 10. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) GORDHANDAS *v.* RIJHIBAI. **168 I.C. 860=9 R.S. 251=A.I.R. 1937 Sind 47.**

——**O. 1, R. 10 and O. 6, R. 17**—*Applicability—Plaint instituted by living person in name of and verified on behalf of, dead person—Substitution of name of living person—Permissibility—Gross neglect—Effect of.*

Where a person, who had instituted a suit in the name of a dead person and had verified the plaint on behalf of the dead person, applied under O. 1, R. 10, O. 6, R. 17 and S. 151 for leave to amend the description in the plaint, and it was found that he was guilty of gross neglect in misdescribing himself.

Held, that a living person's name could not be substituted in the place of a dead person under O. 1, R. 10. Nor would it be proper for the Court to exercise its discretionary jurisdiction in favour of the applicant to amend the plaint under O. 6, R. 17 as he was guilty of gross neglect. (*Rupchand Bilaram, A.J.C.*) NOORBHOY ALIBHOY HALAI *v.* SECRETARY OF STATE. **168 I.C. 784=9 R.S. 244=31 S.L.R. 406=A.I.R. 1937 Sind 92.**

——**O. 1, R. 10**—Applicability and scope—Suit for money against two defendants—Agreement between parties to take accounts, each agreeing to pay other what might be found due—Amount found due to one defendant by another—Transposition of former as plaintiff and decree for sum in his favour against other defendant—Power of Court to make—Inherent powers. *See* C. P. CODE, S. 151. **(1937) 1 M.L.J. 672.**

——**O. 1, R. 10**—*Application under—Court disposing it of under O. 22, R. 10—Appeal.*

When an application is made under O. 1, R. 10 but it is dealt with by the Court also under O. 22, R. 10, an appeal lies against the order on the application. (*Venkataramana Rao, J.*) MEYYAPPA CHETTIAR *v.* SEETHACHI ACHI. **171 I.C. 145=10 R.M. 280=A.I.R. 1937 Mad. 200=(1937) 2 M.L.J. 279.**

——**O. 1, R. 10**—Ex parte *decree—Application by necessary parties not impleaded as such for addition and for permission to apply to set aside* ex parte *decree—Maintainability—Duty of Court.*

Where a suit is decreed *ex parte* and persons entitled to be added as parties to the suit make an application to add them as parties and to set aside the *ex parte* decree, the Court should add them as parties and give them an opportunity to set aside the *ex parte* decree. (*Rowland, J.*) RAMESHWAR BHAGAT *v.* THAKUR JEBAN NARAYAN SINGH. **166**

C. P. CODE (1908), O. 1, R. 10.

I.C. 794=9 R.P. 353=3 B.R. 231=18 Pat.L.T 278=1936 P.W.N. 708=A.I.R. 1937 Pat. 49.

——**O. 1, R. 10**—*Grounds for permitting amendment—Suit on behalf of a Government Ward—Plaintiff's name wrongly given—Amendment, if can be allowed—C. P. Court of Wards Act* (1889), *Ss. 30 and 27.*

O. 1, R. 10, C. P. Code, on a plain reading only contemplates that a suit should have been filed in the name of a wrong person irrespective of whether he is a living or a dead person. Such a defect is capable of being cured, if the mistake is shown to have occurred in good faith and provided that in permitting the amendment no injustice results to the defendant. In a suit on behalf of a Government Ward under S. 30 of the C. P. Court of Wards Act, the real plaintiff is the manager and he sues on behalf of the Ward. Any mistake in the name of the Ward does not affect the substance of the suit and its correction cannot prejudice the defendant. (*Niyogi, J.*) KARIMULLAH KHAN *v.* BHANU PRATAP SINGH. **175 I.C. 911=11 R.N. 14=A.I.R. 1938 Nag. 458.**

——**O. 1, R. 10 and O. 41, R. 20**—*Joinder of parties in appeal—Provision of law applicable—Party to suit not impleaded in appeal—Addition after right of appeal is time barred.*

The proper Order and Rule applicable to the joinder of parties in appeal is O. 41, R. 20 and not O. 1, R. 10. A party against whom a suit has been dismissed and as against whom the right of appeal has become barred, is not interested in the result of the appeal and hence cannot be added in appeal under O. 41, R. 20. (*Davis, J.C. and Lobo, A.J.C.*) THADHI *v.* ABDUL HUSAIN. **31 S.L.R. 486=171 I.C. 315=10 R.S. 100=A.I.R. 1937 Sind 236.**

——**O. 1, R. 10**—*Mortgage by Hindu father—Suit on—Son—If necessary party—Application by son to be joined as party—If to be allowed.*

A member of a joint Hindu family who contends that the action of the manager was beyond his powers as manager is not properly represented by the manager, and ought to be joined as a party. A son is not a necessary party to a suit against his father on a mortgage of joint family property as he can bring a suit for declaration that the mortgage decree is not binding on his share. But when he himself applies to be made a defendant contesting the binding nature of the mortgage, he should be joined as a proper party to the suit under O. 1, R. 10, C. P. Code, to effectually and completely settle the questions involved in the suit and to avoid multiplicity of proceedings. (*Pollock, J.*) MOTIRAM *v.* LAL CHAND. **I.L.R. (1937) Nag. 366=170 I.C. 192=10 R.N. 52=A.I.R. 1937 Nag. 121.**

——**O. 1, R. 10**—*Mortgage suit—Final decree—Subsequent addition of equitable mortgagee not impleaded in suit—Powers of Court.*

The Court has ample power under O. 1, R. 10, C. P. Code, even after the passing of the final decree in a mortgage suit to order that a person whose presence may be necessary to enable the Court effectually and completely to adjudicate upon the questions involved in the suit be added as a party to the proceedings. If it appears that there is an equitable mortgagee who, under O. 34, R. 1, C. P. Code, was a necessary party, and that he ought to be joined as a party, the Court can add him as a party although the final judgment

has been passed in the suit. (*MacNair, J.*) ANNAPURNA ROY *v.* RAM RANJAN MULLICK. **40 C.W.N. 1173.**

——**O. 1, R. 10**—Mortgage suit—Holder of money decree against mortgagor getting receiver appointed in execution—Power of Court to implead him as party in mortgage suit. *See* C.P. CODE, O. 34, R, 1. **40 C.W.N. 974.**

——**O. 1, R. 10**—Mortgage suit—Omission to implead interested party—If fatal. *See* C. P. CODE, O. 34, R. 1. **A.I.R. 1936 Pat. 153.**

——**O. 1, R 10**—*Necessary parties added as co-defendants instead of as co-plaintiffs—Grant of appropriate relief.*

One or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is chaltenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Nor indeed would it matter that a wrong person had originally sued though he had no cause of action. Once all the parties are before the Court the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants. A person executed a mortgage in favour of a firm. Subsequently some of the partners retired assigning their interest in favour of the remaining partners by unregistered deed. The remaining partners brought a suit on the mortgage and as an objection was brought to the maintainability of the suit, the plaint was amended bringing on record the retiring partners as defendants.

Held, that it would have been more satisfactory that the retiring partners should have been made co-plaintiffs instead of co-defendants, but even otherwise as whole of the necessary parties were before the Court, appropriate relief could be granted.

Held, also, that the judgment should be given in favour of all the original partners, though some of them had been made defendants. (*Lord Porter.*) MONGHI BAI *v.* COOVERJI UMERSEY. **66 I.A. 210=I.L.R. (1939) Bom. 503=I L.R. (1939) Kar.(P.C.) 295=1940 P.W.N. 19=11 R.P.C. 295 =1939 O.W.N. 626=1939 A.W.R. (P.C.) 136= 70 C.L.J. 261=41 Bom L.R. 1127=50 L.W. 926 =1939 A.L.J. 863=182 I.C. 1=1939 O.L.R. 392 =5 B.R. 750=43 C.W.N. 869=A.I.R. 1939 P.C. 170=(1939) 2 M.L.J. 366 (P.C.).**

——**O. 1, R. 10**—*Parties improperly added—Order 'discharging' them—Propriety—Order for costs—Power of Court.*

Where parties are added as defendants at the instance of a co-defendant, and no cause of action is found against them, the proper order to pass is to strike off the names of those defendants under O. 1, R. 10 (2), C. P. Code, and not to discharge them. When such defendants are struck off under O. 1, R. 10 (2) as being improperly added, Court can impose such terms as it considers proper and can order the party to pay costs to such defendants. This power of the Court is analogous to its power of adjourning proceedings in which case the Court is empowered to make the defaulting party to pay costs to other party and there is no limitation as to the amount which can be awarded under such circumstances. (*Jai Lal, J.*) ALLAHABAD BANK, LTD., LAHORE *v.* RAJA RAM. **171 I.C. 570=39 P.L.R 342=10 R L. 215= A.I.R. 1937 Lah. 67.**

——**O. 1, R. 10**—Pro forma *defendant becoming co-plaintiff on his own application—If adopts all the statements made in plaint.*

When a *pro forma* defendant becomes on his own application a co-plaintiff, he adopts all the statements made in the plaint which support the cause of action and those statements only. He does not adopt statements made therein which are not essential to the cause of action as stated in the plaint. (*R. C. Mitter, J.*) SURAJ SINGH *v.* KALIDASI DASI. **41 C.W.N. 501.**

——**O. 1, R. 10**—Reference under Cantonments House Accommodation Act (V1 of 1923), S. 15—Mortgagee not in possession of property acquired on lease—If to be added as party. *See* CANTONMENTS HOUSE ACCOMMODATION ACT, S. 15. **167 I.C. 158=9 R. Pesh. 80=A.I.R. 1937 Pesh. 17.**

——**O. 1, R. 10**—*Rent suit—Claim by intervener alleging purchase of holding to be added as party—Statutory recognition taking effect after suit—If bar to joinder.*

A Court has, under O. 1, R. 10, C. P. Code, power to add any person as party whose presence is necessary in order to enable a Court efficiently and completely to adjudicate upon and settle the questions involved in the suit. This power is given to the Court at any stage of the proceedings. Where in a rent suit the intervener, alleging purchase of the holding claims that he should be added as party to the suit, the Court must add the intervener as party even though statutory recognition as transferee has taken place after the institution of the suit. (*Rowland, J.*) RAMESHWAR BHAGAT *v.* THAKUR JEBAN NARAYAN SINGH. **166 I.C. 794=9 R.P. 353=3 B.R. 231= 18 Pat.L.T. 278=1936 P.W.N. 708=A.I.R. 1937 Pat. 49.**

——**O. 1, R. 10**—*Striking out name of necessary party—Propriety—Proper procedure.*

When O. 1, R. 10, C. P. Code, provides that the Court may strike out the name of party who has been improperly joined as plaintiff or defendant, these words have reference to the suit as framed. It was certainly never intended that the claim of a necessary party should be first tried and that his name should then be struck off the record on the ground that his claim ought to be dismissed before any decree has been passed. Such a procedure can only lead to multiplicity of proceedings. Where, therefore, several persons claiming to be owners of the equity of redemption sue for redemption of the mortgage, the Court cannot strike out the names of some of them under O. 1, R. 10, C. P. Code, on the ground that they had not been properly joined as parties to the suit. The correct procedure would be to keep the names of all the plaintiffs on the record until a preliminary decree is passed. If the Court is then of opinion that any of the claims have failed, these claims can then be dismissed as part of the preliminary decree. (*Beckett, J.*) MANOHAR LAL *v.* ROSAN LAL 179 **I.C. 685=11 R.L. 608 =40 P.L.R. 805=A.I.R. 1938 Lah. 799.**

——**O. 1, R. 10 and O. 30, Rr. 3 and 8**—*Suit against firm—Person interested in firm but not served with summons—Right to intervene and defend on merits—Denial of being partner—Effect*

C. P. CODE (1908), O. 1, R. 10.

—*Power of Court to implead against plaintiff's wishes.*

In a suit against a firm under O. 30, C. P. Code, it is not possible for a person who has not been served with a writ but who apprehends that at some future time the plaintiff will eventually seek to hold him liable in execution proceedings on the basis of partnership, to enter appearance and defend the suit on the merits unless he admits that he is not in fact a partner. Neither O. 30, C. P. Code, nor R. 20 of the Calcutta High Court Rules (Original Side), Ch. VIII, permits of such a course. But when such person is interested in some way or other in the assets of the firm, and denies that he is a partner in the firm, he can apply to the Court under O. 1, R. 10, C. P. Code, and it will be proper for the Court to add him as a party to the suit even in opposition to the wishes of the plaintiff. (*Panckridge, J.*) DHAI *v.* BHADARBULL HARGOBINDROY. **40 C. W. N. 677.**

——**O. 1, R. 10**—*Suit by assignee of bond under void assignment—Assignor, if can be substituted as plaintiff.*

A suit instituted by an assignee of a bond under an assignment which is void under S. 136, T. P. Act, can be said to have been instituted in the name of a wrong person, and where the assignee has acted under a *bona fide* mistake, the Court can remove the name of the assignee and order substitution of the name of the assignor as plaintiff under O. 1, R. 10, C. P. Code. (*Srivastava and Nanavutty, JJ.*) SITLA BUX SINGH *v.* MAHABIR PRASAD. **12 Luck. 150=162 I.C. 229=8 R.O. 359=1936 O. W. N. 414=A.I.R. 1936 Oudh 275.**

——**O. 1, R. 10**—*Transposition of defendant as plaintiff—When to be made.*

O. 1, R. 10 is in the widest possible language and transposition of a defendant to the side of the plaintiff should be adopted in all cases where it is necessary for the complete adjudication upon the question involved in the suit and to avoid multiplicity of proceedings. A.I.R. 1932 Pat. 346, Ref. (*Wort, J.*) LAL NARAIN SINGH *v.* UGESHWARDHARI SINGH. **160 I.C. 149=8 R.P. 340=A.I.R. 1936 Pat. 107.**

——**O. 1, R 10**—*Transposition of parties—If can be permitted in second appeal.*

The Court, including the High Court in second appeal has power at any stage to permit a transposition of parties under O. 1, R. 10, C. P. Code. This power is discretionary and its use will, of course, depend upon the circumstances of each case. The purpose of the rule is to enable the Court to be in a position to determine the real questions in controversy between the parties and avoid allowing a mere technical objection successfully to defeat a just claim. A respondent may be transposed as an appellant or a defendant made a plaintiff. (*Verma and Rowland, JJ.*) RADHABALLABH PRASAD *v.* RAGHUNATH LAL. **180 I.C. 833=5 B.R. 496=11 R.P. 543=1939 P.W. N. 829=A.I.R. 1939 Pat. 397.**

——**O. 1, R. 10**—*Transposition of parties—Suit by assignee of mortgage right—Mortgagee impleaded as defendant — Assignment found invalid owing to registration being void—Application to transpose mortgagee as plaintiff in appeal and for decree on mortgage—Maintainability.*

C. P. CODE (1908), O. 1. R. 10.

Where in a suit brought by an assignee of a mortgage right to enforce the mortgage, impleading the mortgagee assignor also as a defendant, it is found that the assignment deed is invalid as a result of invalid registration, if an application is made in appeal to transpose the mortgagee-assignor as a plaintiff and to grant a decree on the foot of the mortgage, the Court will not grant the application at that stage, when the result is to change the character of the suit which has proceeded on the footing that the mortgagee has accepted the assignment as binding on him. If that is reopened and transposition effected at that stage, it would complicate matters and hence the transposition should not be made. (*Pandrang Row and Krishnaswamy Ayyangar, JJ.*) LAKSHMI NARASIMHACHARIAR *v.* MANGAMMAL. **49 L.W. 387 (2)=1939 M.W.N. 554=A.I.R. 1939 Mad. 467.**

——**O. 1, R. 10**—*Written statement requesting* inter alia *to add parties—If an application.*

A written statement which *inter alia* requests the Court to add certain persons as parties is an application under O. 1, R. 10, C. P. Code. (*Mya Bu and Baguley, JJ.*) MAHOMED SULTAN *v.* ABDUL RAHMAN. **171 I.C. 876=10 R.R. 194=A.I.R. 1937 Rang. 175.**

——**O. 1, R. 10 (1)**—*Applicability*—"Bona fide *mistake" — Redemption of mortgage—Suit by grandson of mortgagor impleading sons as defendants—Allegation that latter having also right to redeem refused to join in suit—Finding that plaintiff had no right to sue—Dismissal of suit—Propriety—Sons* ex parte—*Power of Court to transpose as plaintiffs or to decree in their favour.*

In a suit for redemption of a mortgage filed by the grandson of the mortgagor, it was alleged in the plaint that defendants 8 and 9, the sons of the mortgagor were also entitled to redeem but that they refused to join the plaintiff in the suit as they themselves claimed no interest in the property. The defendants 8 and 9 remained *ex parte* and did not ask for any relief or put forward any claim. The Court found that the plaintiff had no cause of action and that the only persons entitled to redeem were defendants 8 and 9 and dismissed the suit.

Held, that it could not be said that there was any *bona fide* mistake as contemplated by O. 1, R. 10, C. P. Code, and that in the absence of an application or request by the defendants 8 and 9 the Court could neither transpose them as plaintiffs nor pass a decree in their favour and the only right and proper course was to dismiss the suit. (*Horwill, J.*) ALAGIRISAMI NAIK *v.* SIKANDAR ROWTHER. **166 I.C 730=9 R.M. 393=1936 M.W.N. 1184=44 L.W. 563=A.I.R. 1936 Mad. 960=71 M L.J. 614.**

——**O. 1, R. 10 (2)**—*Addition of new party—Conditions justifying.*

The Court in making an order directing a new party to be added under O. 1, R. 10 (2), C. P. Code, must be satisfied either that the party ought to have been joined as plaintiff or defendant, or that the presence of that party is necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, so that they shall not again be raised in that or any other suit between the parties to the suit or any of them and third parties. (*Kunhi Raman, J.*) MANGACHARYULU *v.*

C. P. CODE (1908), O. 1, R. 10.

KRISHNAMACHARYULU. 50 L.W. 777=1939 M. W.N. 1233=A.I.R. 1940 Mad. 225=(1939) 2 M.L.J. 872.

——O. 1, R. 10 (2)—*Addition of parties—Suit under S. 92, for framing of scheme—Close relation of creator of trust claiming voice in management of trust properiy applying to be impleaded.*

In a suit under S. 92, the plaintiff proposed a scheme for the management of a certain charitable trust. The Deputy Commissioner being in charge of the trust property was made a defendant. He did not object to the proposed scheme. A close relation of the person who created the trusts moved the lower Court to be added as a defendant in the suit on the ground that he possessed the necessary educational qualification for being appointed as one of the trustees for the trust created by his ancestor and if he was not so added, the scheme would go unchallenged and would be accepted by the Court, in which case he would have no right of appeal. It was contended by the applicant that he was not only a beneficiary but was also a person entitled to have some voice in the settlement of any scheme for the management of the trusts created by his ancestor.

Held, such a person should be added as a defendant in suit in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. (*Nanavutty and Zia-ul-Hasan, JJ.*) SURESH SINGH *v.* LEGAL REMEMBRANCER U. P. GOVERNMENT. 1937 O.W. N. 271=167 I.C. 828=9 R.O. 402=1937 O.L.R. 160=A.I.R. 1937 Oudh 229.

——O. 1, R. 10 (2)—*Discretion of Court—Addition of parties—Claim to vacant site against Municipality—Plea of title in Government—Latter—If necessary party—Addition as party—If justified.*

In cases where a plea of *jus tertii* is set up, it is generally destrable to make the person whose title is set up a party to the suit to avoid multiplicity of litigation. In cases where the interests of the public or involved and the ownership of the Government is in question, it is very desirable and sometimes necessary that the Government should be made a party to the suit. In a suit for declaration of the plaintiff's title and ownership to a vacant site, the defendant Municipality pleaded that the site in question was "kuntha" and "rastha", a public pathway, that the title thereto was in the Government and that the latter should therefore be made a party. The lower Court ordered that the Government should be made a party to the suit.

Held, in revision, that since a declaration of absolute title was claimed as against the Municipality in whom the property was for the time being vested for specific purposes, without the freehold vesting in them, it was desirable that the person really interested in the property *i.e.*, Government, should be made a party to the suit; and since the lower Court had exercised its discretion correctly, the High Court would not interfere with such exercise in revision. (*Venkataramana Rao, J.*) KRISHNASWAMI NAIDU *v.* MUNICIPAL COUNCIL BELLARY. 45 L.W. 731=170 I.C. 919=10 R.M. 249=A.I.R. 1937 Mad. 641=(1937) 1 M.L.J. 597.

——O. 1, R. 10 (2)—*Object and scope of—Suit for rent by* thicadar *against tenant—Application by another to be impleaded as party as being the present* thicadar *entitled to rent—If to be allowed.*

O. 1, R. 10, C. P. Code, has been enacted for the purpose of avoiding multiplicity of suits. In a suit for rent by a *thicadar* against some tenants, the defendants pleaded that the plaintiff's *thica* lease had expired long before the suit, that the petitioner was the present *thicadar* to whom they were paying rent. The petitioner, who was also actually summoned as a witness to prove that he was the present *thicadar* applied to be added as an intervener, but his application was rejected.

Held, that if it was important to decide who should pay rent, it might be equally important to decide who should receive rent, and the petitioner should therefore be added as a defendant. (*Varma, J.*) NAGENDRA PRASAD *v.* BADRI LAL. 21 Pat L.T. 329.

——O. 1, R. 10 (2)—*Order awarding costs—Appeal.*

No appeal lies from an order awarding costs under O. 1, R. 10 (2), C. P. Code.(*Jai Lal, J.*) ALLAHABAD BANK LTD, LAHORE *v* RAJA RAM. 171 I C. 570=10 R. L. 215=39 P. L. R. 342=A.I.R. 1937 Lah. 67.

——O. 1, R. 10 (2)—*Partition suit—Mortgagee of undivided share—Power of Court to add as party.*

Under O. 1, R. 10 (2), C. P. Code, the Court has power to add as a party in a partition suit a mortgagee of an undivided share of the property, where the extent of the mortgagor's share is in dispute. There can be no doubt that the addition of the mortgagee as a party in the suit would avoid multiplicity of proceedings. (*Rau and Akram, JJ.*) PROFULLA KUMAR *v.* DHIRENDRA LALL. I.L.R. (1940) 2 Cal. 37=189 I.C. 90=71 C. L.J. 549=44 C.W.N. 589=A.I.R. 1940 Cal. 284.

——O 1, R. 10 (2)—*Person added as plaintiff—Interest adverse to plaintiff—Striking out as plaintiff and transposing as defendant as necessary party—Expediency.*

Where the petitioner was added as the second plaintiff in a suit by the first plaintiff for recovering a certain amount from the defendants who were the owners of certain villages charged with the payment of an annuity and the petitioner alleged that the first plaintiff added him without his knowledge and that the first plaintiff's interests were adverse to that of his own,

Held, that since there was no right to relief alleged to exist in the petitioner jointly, severally or in the alternative, and as the petitioner claimed adversely also to the first plaintiff in the suit, it would be expedient to strike out his name as second plaintiff. But as he was clearly a person whose presence before the Court was necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit, he could be transposed as a defendant in the suit. *Mathews*: In re, *Oates* v. *Mooney*, (1905) 2 Ch. 460, followed. Where several disputes arise out of one subject matter, all the parties interested in such disputes should be brought before the Court and all questions in controversy between them should be completely settled in that action. (*Patanjali Sastri, J.*) VANJIAPPA GOUNDAN *v.* ANNAMALAI CHETTIAR. 188 I.C. 379=13 R.M. 11=1939 M.W.N. 948=50 L.W. 494=A.I.R. 1940 Mad. 69=(1939) 2 M,L J. 551.

C. P. CODE (1908), O. 1, R. 10.

——O. 1, R. 10 (2) and S. 107—*Power of Court —Addition of party as respondent in the appeal.*

The Court has ample powers under the provisions of O. 1, R. 10 (2) read with S. 107, C. P. Code, to implead any person in the appeal as a respondent who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court to adjudicate upon all the questions involved in the appeal. effectively. (*Abdur Rahman, J.*) DEVENDRA AYYAR *v.* MUTHU CHETTIAR. 178 I.C. 191=11 R.M. 416=47 L.W, 760=1938 M.W.N. 75=A.I R. 1938 Mad. 329.

——O. 1, R. 10 (2)—*Power of Court to act* suo motu—*Grounds for adding party.*

Under O. 1, R. 10 (2) it is not necessary that there should be an application from the parties; the rule, however, does suggest that the Court will not act on its own initiative unless the presence of the party added is necessary in order to settle effectually and completely and to adjudicate upon and settle all the questions involved in the suit. (*Darling, S.M. and Bomford, J. M.*) HIRA LAL ROY CHOWDHURY *v.* ANNAPURNA. 1938 A.L.J. (Supp.) 9=1938 A.W.R. B.R. 97=1938 R.D. 188.

——O. 1, R. 10 (2)—*Scope—Attachment of Hindu joint family property in execution of decree—Subsequent suit by female member claiming charge—Sale of part of property to attaching decree-holder—Application by latter to be added as party to maintenance suit—If to be allowed.*

A attached all the joint family property of two minors in execution of his money decree. Subsequently a maintenance suit was brought by the grandmother of the minors claiming a charge on the same property. The guardian of minors conveyed some property to *A* to avoid the Court-sale. *A* therefore applied to be joined as a party to the maintenance suit. The application was rejected by the Court on ground that the sale to *A* was *pendente lite*. On revision,

Held, that *A* was a proper party to the suit since at the time the suit was filed the property which the grandmother sought to be made the subject of the charge in her suit was under attachment at the instance of *A* and it was obviously just and convenient to decide in her suit whether the grandmother's right could override that of *A's*. (*Stodart J.*) RANGANAYAKI AMMAL *v.* JANAKI AMMAL. 1937 M.W.N. 375=10 R.M. 399=171 I.C. 798=A.I.R. 1937 Mad. 338.

——O. 2, Rr. 1 and 3—*Joinder of causes of action—Improper sale under S. 69, T. P. Act—Claim by mortgagor against mortgagee in respect of amount of mortgage and against purchaser on ground of fraud—If can be joined together.*

In the case of an unauthorised or improper or irregular exercise of the power of sale under S. 69, T. P. Act, the only remedy of the aggrieved mortgagor in the absence of fraud, is by way of damages against the mortgagee who has brought the property to sale. If there is fraud, there may be a cause of action for a suit to have the sale declared void or set aside. But it will be improper to club together a suit against the purchasers on the ground of fraud and a suit against the mortgagee on the question of the amount still due on the mortgage. (*Horwill, J.*) GOVINDASWAMI NAICKER *v.* PUKRAJ SOWCAR. 52

C. P. CODE (1908), O. 2, R. 2.

L.W. 324=1940 M.W.N. 772=(1940) 2 M.L.J. 281.

——O. 2, Rr. 1 and 6—*Plaintiff joining in one suit two independent claims—Permissibility—Duty of Court to ask plaintiff to elect.*

Where the plaintiff sues in one suit for a declaration of his title as proprietor in respect of a portion in certain land and for partition of his share after the declaration of his title and also sues in the same suit the admitted raiyats of the land, calling upon them to remove a building from his holding and thus joins two claims and causes of action which are absolutely independent and unconcerned with one another, the suit should not be tried in the form in which it is instituted. The Court should ask the plaintiff to eiect to proceed with one of the claims. (*Mohammad Noor and Varma, JJ.*) NITAI LAL DUTTA *v.* GOBINDA BHUSHAN SEN. 161 I.C. 695=8 R.P. 469=A.I.R 1936 Pat. 142.

——O. 2, R. 2—Applicability—Contract of sale by instalments—Defaults—Separate suits in respect of each default—If barred. *See* SALE OF GOODS ACT, S. 38 (2). A.I.R. 1938 Rang. 364.

——O. 2, R. 2—*Applicability—Lease deed with default clause—Lessee not taking advantage of—Successive suits on defaults—If barred.*

Where in a covenant there is a clause exclusively for the benefit of a party, it is to be treated not as an obligation but as an option which may be exercised according to the choice that such party may make in that behalf. Where therefore there is a default clause in a lease giving to the lessor on any default by the lessee in the payment of his monthly rent, a right to eject the lessee and to realize the rent from the lessee for the remaining unexpired period of the lease, at an increased rate of rent, if, in spite of such default clause, the lessor finds that it would be beneficial to him to keep the lease subsisting, he cannot be compelled to put an end to the agreement by reason of the default. If, therefore, in such a case, in spite of the default clause, the lessor does not sue for ejectment and for recovery of rent for the period remaining unexpired on default, but merely brings a suit for rent due from date of defalt to date of suit, he will be deemed to have exercised the option not to claim under the default clause but to keep the lease subsisting. If after such suit there is again a default and the lessor brings a suit for the recovery of rent for a further period for which cause of action had not arisen at the time of the previous suit, such cause of action is different from the cause of action in the previous suit, and therefore such subsequent suit is not barred by the provisions of O. 2, R. 2, C. P. Code. (*Dadiba C. Mehta and Lobo, A.J. Cs.*) THADHOMAL *v.* HOLOMAL. 32 S.L.R. 80=172 I.C. 712=10 R.S. 179=A.I.R. 1937 Sind 300.

——O. 2, R. 2—*Applicability—Mortgage—Subsequent sale of mortgaged properties and others by mortgagor to mortgagee for amount of mortgage debt and cash consideration—Covenant that in case vendee was ejected or dispossessed vendors would pay the whole sale price with interest—Sale cancelled by Collector and vendee dispossessed—Suit by vendee for recovery of amount of cash consideration paid and decreed—Subsequent suit for amount due under mortgage—If barred—Mortgage if superseded by sale.*

C. P. CODE (1908), O. 2, R. 2.

A mortgage bond was executed to the plaintiff and his father by the 1st defendant, and the father of defendants 2 and 3, for Rs. 440, on which interest was payable at 6¼ seers of paddy a rupee. A year later the mortgagees took a *kobala* from the mortgagors for the sale of the mortgaged and other properties for the sum of Rs. 1,000. The consideration of Rs. 1,000 recited in the *kobala* was made up of the mortgage amount of Rs. 440, and another mortgage for Rs. 178, thus making up Rs. 618 which was due to the plaintiff from the mortgagors and a cash payment of Rs. 382. The *kobala* stipulated that in case the purchaser was ejected or dispossessed from the lands sold to him, the whole sale price of Rs. 1,000 was to be repaid to him with interest from the date of execution of the *kobala*. The sale was however, cancelled by the Collector as being inoperative against defendants 1 to 3, and the plaintiff was dispossessed from the properties sold. He realised the sum of Rs. 382 paid by him in cash under the *kobala* with interest by suit. He then brought another suit to enforce the mortgage for R. 440.

Held, that the effect of the *kobala* was to create and substitute a new contract between the parties, extinguishing their rights under the mortgages, the amounts under which formed part of the consideration for the sale, which contract was one and indivisible, and which superseded the existing contracts of mortgage. The plaintiff having chosen to sue for and obtain a money decree for Rs. 382 and interest, which was part of the claim under the *kobala*, and not having included the whole of the claim which he could make under the *kobala*, must be taken to have abandoned and relinquished the rest of the claim under it, and consequently the suit for Rs. 440 under mortgage which had been superseded by the *kobala* was barred by the provisions of O. 2, R. 2, C. P. Code. (*Guha and Bartley, JJ.*) KAMARUDDIN SHAH *v.* SHAIK DILJAN. **166 I.C. 996=9 R. C. 646=64 C.L.J. 62=A.I.R. 1937 Cal. 57.**

——O. 2, R. 2—Applicability—Prior suit for possession under sale deed—Mistake in description of property—Dismissal—Subsequent suit for rectification of sale deed and for possession—If barred. *See* C. P. CODE, S. 11. **1937 A.W.R. 245 =A.I.R. 1937 All. 401.**

——O. 2, R. 2—*Applicability—Sale deed—Covenant as to land being free from encumbrances—Undisclosed mortgage—Decree and sale—Suit on ground of dispossession by purchaser at sale—Dismissal as dispossession found to be false—Second suit on ground of plantiff having been compelled to pay claim of prior mortgagee—If barred.*

Although a sale deed contains a single covenant to the effect that the land sold is free from encumbrances, there may be two distinct causes of action giving rise to different suits, arising out of the breach of the same covenant. The dismissal of a suit by the vendee on the ground of dispossession by the purchaser at a sale in execution of a decree on an undisclosed prior mortgage—the dispossession being found to be false—is no bar under O. 2, R. 2, C. P. Code, to a second suit on a separate cause of action, namely, that the vendee, at a time anterior to the date of the alleged dispossession, was compelled to pay off the claim under the undisclosed mortgage.

C. P. CODE (1908), O. 2, R. 2.

(*Horwill, J.*) ARUMUGHAM CHETTIAR *v.* MARIAPPAN CHETTIAR. **1937 M.W.N. 1256=176 I.C. 809 =11 R.M. 178=A.I.R. 1938 Mad. 255=(1938) 1 M.L.J. 184.**

——O. 2, R. 2—*Applicability—Test—"Cause of action"—Three sale deeds executed by same person in favour of same vendees on same day for different considerations—Successive suits to set aside on ground of want of consideration and undue influence—If barred.*

"Cause of action" means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove such fact, but every fact which is necessary to be proved to entitle the plaintiff to a decree. It is, in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit. A cause of action founded on contract, is different from the cause of action founded on another contract, although both of them are made by the same person at the same time. It does not follow because two claims arise out of one transaction that the cause of action for both would be identical. *M* owned about 5 bighas of land. On 13—1—1930 he executed three sale deeds in respect of these lands, one for Rs. 600, another for Rs. 200, and the third for Rs. 300 in favour of the defendants. In 1933, the plaintiffs claiming to be the heirs of *M*, who died on 19—1—1930, brought a suit to set aside the first two sale-deeds and for possession of the properties covered by them, alleging that they were executed without consideration and under the undue influence of the defendants. The suit was decreed. Subsequently in 1935, the plaintiffs brought another suit to set aside the third sale-deed for Rs. 300, and for confirmation or in the alternative, recovery of possession, substantially on the same allegations or want of consideration and undue influence. The defendant raised a plea that the suit was barred by O. 2, R. 2, C. P. Code, by reason of the prior suit.

Held, (1) each sale represented a distinct and separate contract, and the three sale-deeds, though executed on the same date, furnished different causes of action, having been executed for different considerations. (2) Facts necessary to establish want of consideration of each separate sale-deed must necessarily be different, and it was not at all necessary for the plaintiffs to allege and prove in the first suit that the consideration for the third sale-deed impeached in the second suit was not paid, and the cause of action in the second suit being thus quite different from that in the previous suit, O. 2, R. 2, C. P. Code, did not apply so as to bar the second suit. (*Rowland and Chatterjee, JJ.*) SHEOKUMAR SINGH *v.* BECHAN SINGH. **18 Pat. 789=12 R.P. 263= 184 I.C. 714=6 B.R. 74=1939 P.W.N. 794=A.I. R. 1940 Pat. 76.**

——O. 2, R. 2—*Applicability—Test—Plaintiff wrongly basing her claim as co-heir and claiming partition of half of property—Suit dismissed on technical ground—Subsequent suit for possession of entire property basing claim as absolute owner —If barred.*

Per *Braund and Spargo, JJ.*—The 'cause of action' consists of the facts upon which the plaintiff is entitled to base a 'claim' in a suit with

C. P. CODE (1908), O. 2, R. 2.

reference to the subject-matter of the dispute. The claim he actually does make cannot be material because what the rules makes the deciding factor is the claim which he is 'entitled' to make. It is most important to appreciate that it is the claim which he is entitled to 'make' and not the claim he makes that is made the criterion under O. 2, R. 2, C. P. Code. The application of O. 2, R. 2 is not made to depend upon the success or failure of the first suit. It depends upon 'omission to sue' and that omission may occur whenever a suit is started, be it successful or not, in which the claim subsequently sought to be sued for again might have been raised in respect of the same cause of action, but was not. On the death of her grandfather the plaintiff was entitled to the estate as the sole heir. Being wrongly advised she brought a suit claiming not the whole property but the partition of half of the property basing the claim as co-heir. The suit was dismissed on technical ground. She therefore brought a subsequent suit for possession of the entire property now basing her claim as absolute owner.

Held, O. 2, R. 2, sub-R. 2, applied and she could not claim portion of the property which she omitted in the first suit. (*Dunkley, J.*, on difference between *Leach and Spargo, JJ.*) MA PWA SHIN *v.* U PO SIN. **170 I.C. 946=10 R.R. 117=A.I.R. 1937 Rang. 324.**

——**O. 2, R. 2**—*Applicability—Transaction giving rise to two different claims based on different causes of action—Separate suits—Bar of—Illegal distress by mamlatdar—Suit for recovery of amount levied and interest—Subsequent suit for compensation and damages—If barred.*

Where a transaction gives rise to two different claims founded on two different causes of actions they need not be included in the same suit under O. 2. R. 2, C.P. Code, though they arise out of the same transaction. The test is whether they can be supported by different kinds of evidence. If they are, a suit in respect of one claim only, would not be a bar to a subsequent suit in respect of the other. A sum of money was illegally seized and forcibly removed from the plaintiff's possession by the defendant who was a mamlatdar, under a warrant of distraint for arrears of land revenue which was due from certain other persons. The action of the mamlatdar was illegal and *ultra vires*. Plaintiff brought a suit against the defendant to recover the sum removed from him under the illegal distress with interest. Subsequently he brought another suit for compensation or damages for illegal distraint. The defendant pleaded O. 2, R. 2, C. P. Code, in bar of this suit by reason of the fact that the second claim should and could have been included in the first suit.

Held, that the transaction gave rise to two different claims for the loss sustained; first, the claim to recover back the amount with consequential loss of interest due thereon; and, secondly, the claim for loss of reputation and business, that they were founded on different causes of action and need not have been included in the same suit, and O. 2, R. 2 was not therefore a bar to the second suit. (*Wassoodew, J.*) SHRIDHAR MAHADEO *v.* GODULAL JETHMAL. **I. L. R. 1939 Bom. 721=186 I. C. 509=12 R. B. 343=41 Bom.L.R. 1223=A.I.R. 1940 Bom. 20.**

C. P. CODE (1908), O. 2, R. 2.

——**O. 2, R. 2**—*Bar of fresh suit—If extinguishes right—Mortgagee omitting to include portion of mortgaged property in suit on mortgage—Right to rely on security of that portion by way of defence—Proceeding under S. 51, Provincial Insolvency Act.*

A bar of fresh suit which O. 2, R. 2, C. P. Code, creates does not extinguish the right but merely bars the remedy. Therefore, where a mortgagee omits to include in his suit on the mortgage a portion of the mortgaged property but brings the entire property to sale in execution of his decree and purchases it himself, he can rely by way of defence on the security of the portion of the property omitted in the suit in a proceeding brought under S. 51 of the Provincial Insolvency Act by the Receiver of the estate of the judgment-debtor who has been adjudicated insolvent, although he is precluded by the provisions of O. 2, R. 2, C. P. Code, from filing a fresh suit in respect of that portion. (*Bhide, J.*) PUNJAB NATIONAL BANK, LTD. *v.* OFFICIAL RECEIVER, KARNAL. **188 I.C. 833=42 P.L.R. 29=A.I.R. 1940 Lah. 166.**

——**O. 2, R. 2**—*Cause of action, different—Suit for land on ground of purchase—Subsequent suit on basis that transaction is mortgage—If barred.*

O. 2, R. 2 does not bar *per se* a subsequent suit brought on a different cause of action. It only purports to bar suits for claim omitted from former suits and arising from the transaction under which the claim was made in the former suit and splitting up of the reliefs in respect of the same cause of action. It does not require that where several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. The rule is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions. Where, therefore, a suit for possession of land on the ground that the plaintiff had bought it fails, on the ground that the transaction really amounts to a mortgage by conditional sale and not to an agreement to purchase coupled with an agreement for resale, it is not a bar to a subsequent suit on the basis that the transaction was a mortgage. 41 I.A. 142 (P.C.), Rel. on. (*Mosely and Ba U, JJ.*) U PO KE *v.* U PO THEIN. **161 I.C. 820=8 R.R. 515=A.I.R. 1936 Rang. 167.**

——**O. 2, R. 2**—Cause of action—If same—Test. *See* C. P. CODE, S. 11, EXPL. IV. **A.I.R. 1937 Mad. 804.**

——**O. 2, R. 2**—*Conditions for application—Separate suits for rent of different periods—Return for presentation to proper Court—Presentation to proper Court simultaneously as different suits—Bar of O. 2, R. 2—If applies.*

Where a suit for rent presented by a landlord against tenant is returned by the Civil Court for presentation to the Revenue Court on the ground that the Civil Court has no jurisdiction to try it, and is then re-presented to the Revenue Court, S. 14 of the Limitation Act would save the suit from the bar of limitation. Where the plaintiff, who is obliged to present them to the Revenue Court, so presents them, he must be deemed to have claimed for all the years up to the date of the presentation: where another suit filed by him for rent of a period anterior or subsequent to the

period of the suit is also returned for presentation to the Revenue Court and is presented to the Revenue Court along with the other suit, O. 2, R. 2, C. P. Code, will not come into operation on the ground that the plaintiff has omitted to claim the rent for the period anterior or subsequent as the case may be. O. 2, R. 2 will only apply if the plaintiff has omitted in respect of, or intentionally relinquished, any portion of his claim. The fact that the Court numbers the suit separately or that the plaintiff omits to ask the Court to treat the two as one suit and give it one number will not amount to an omission to sue or relinquishment of any portion of the claim within the meaning of O. 2, R. 2, C. P. Code, and the rule therefore cannot operate as a bar. (*Venkataramana Rao, J.*) SATYANARAYANAMURTHY *v.* MAHARAJA OF PITHAPUR. **189 I.C. 204=50 L.W. 139=A.I.R. 1939 Mad. 724=(1939) 2 M.L.J. 329.**

——**O. 2, R. 2**—*Default clause in mortgage—Suit for interest alone—Second suit for interest accruing subsequent to first suit—Maintainability.*

A mortgage provided for payment of the principal in five years and interest thereon every year. It further provided that if there was default in the payment of the annual interest or in the payment of the principal amount on the due date, the mortgagee would be entitled to sue for the recovery of the whole principal and interest by sale of the mortgaged property. The default having been made in the payment of the interest the mortgagee instituted a suit for recovery of the interest by sale of the mortgaged property and obtained a decree. Before the term of five years for the payment of the principal expired, the mortgagee instituted another suit for recovery of the amount of interest which fell due after the date of the previous suit by sale of the mortgaged property.

Held, that the second suit was not barred by O. 2, R. 2. The mortgagee was not bound to sue for recovery of the whole amount, principal and interest, when he filed the first suit and it was at his option to waive the default and to sue for interest alone. When the mortgagee asked in second suit for sale of the mortgaged property in default of payment of interest, he should be deemed to have based his claim on his normal right independently of the default clause to recover overdue interest by the sale of the mortgaged property. (*Jai Lal, J.*) MANGAL RAM *v.* SAT DEO. **175 I.C. 927=11 R.L. 89=39 P.L.R. 995=A.I.R. 1937 Lah. 767.**

——**O. 2, R. 2**—Dismissal of suit—Rejection of plaint after refusal of permission to withdraw—Failure to give proper valuation and to pay deficit Court-fee—Subsequent suit on the same cause of action—If barred. *See* C. P. CODE, O. 7, RR. 11 AND 13. **40 C.W.N. 1390.**

——**O. 2, R. 2**—*First suit for maintenance—Second suit to have maintenance charged on property—If barred.*

A wife who brings a suit for maintenance against her husband and obtains a decree, cannot again bring a suit for getting the maintenance fixed in the former suit charged on the property of the husband, as such a suit is barred by O. 2, R. 2, C. P. Code. The relief for a charge is connected with the relief for maintenance and both the reliefs arise out of the same cause of action. The mere ground that the wife entertains any

apprehensions as regards the husband's transferring his property would not afford her a new cause of action for the relief sought for by her in the second suit. (*Harries and Ganga Nath, JJ.*) JWALA PRASAD *v.* PADMAWATI. **I.L.R. (1937) All. 269=167 I.C. 123=9 R.A. 491=1936 A.W.R. 1096=1937 A.L.R. 143=A.I.R. 1937 All. 56.**

——**O. 2, R. 2**—Gift of certain property to wife in lieu of dower—Widow remarrying after husband's death—Suit for pre-emption by husband's brother dismissed—Subsequent suit for declaration of title to property on ground of remarriage of widow and for avoidance of gift—If barred. *See* C. P. CODE, S. 11 **A.I.R. 1938 Lah. 492.**

——**O. 2, R. 2**—*Instalment payment creditor given liberty to sue for entire debt on default by debtor—Suit for arrears of instalments alone—Second suit for entire balance—If barred.*

Where although a cause of action for the recovery of the whole amount of the debt exists, the creditor agrees to forbear and not to sue upon that cause of action so long as the debtor pays him a certain sum a month and until the monthly instalments are at least three months in arrears, the remedy of the creditor in the event of the failure of the debtor to pay three consecutive instalments is to sue for the whole balance of the debt. If, on the other hand, he sues only for the arrears of instalments, a subsequent suit by him for the balance of the debt is barred by O. 2, R. 2, C. P. Code. (*Dunkley, J.*) MAHOMED AFZAL *v.* MAHMED ISMAIL. **1939 Rang.L.R. 180=183 I.C. 425=12 R.R. 75=A.I.R. 1939 Rang. 251.**

——**O. 2, R. 2**—*Mesne profits—Separate suit for—Different cause of action*

The claim for mesne profits accruing subsequent to the institution of the suit for possession is a separate cause of action and not one arising out of the same cause of action on which the claim for possession is based. In a claim for possession it is the specific restitution of the property that is sought, but in an action for mesne profits the claim is for all loss suffered during the period of dispossession. The cause of action arises from day to day and is a continuing one and under the common law of England an action for mesne profits would not lie until after the plaintiff had re-entered and recovered the possession of the land. Evidence required to prove the claim for mesne profits is different from that which is required to prove the claim for possession of the property dispossessed. Therefore a separate suit for mesne profits alone would not be barred under O. 2, R. 2, C. P. Code. (*Venkataramana Rao, J.*) RAMIAH *v.* THATHIAH. **174 I.C. 181=10 R.M. 669=47 L.W. 547=1938 M.W.N. 643=A.I.R. 1937 Mad. 849=(1938) 1 M.L.J. 320.**

——**O. 2, R. 2**—*Mortgage—Suit by mortgagee for possession—Subsequent suit for mortgage money—Bar of.*

Suit for return of mortgage money on the ground of failure of security is barred under O. 2, R. 2, if the mortgagee first sues for possession and having failed there, institutes the second suit for the money. A.I.R. 1924 Oudh 147; A.I.R. 1925 Oudh 524; A.I.R. 1932 Lah. 523; A.I.R. 1921 Lah. 309 and A.I.R. 1926 Pat. 87, Foll. (*Mir Ahmad, A.J.C.*) LAIQA RAM *v.* GOKAL CHAND. **161 I.C. 698=8 R. Pesh. 180=A.I.R. 1936 Pesh. 86.**

C. P. CODE (1908), O. 2, R. 2.

——O. 2, R. 2—Mortgage—Suit for redemption after mortgagee's refusal to accept deposit by mortgagor—Claim to excess profits realised by mortgagee not included—Suit for such profits afterwards—Maintainability. *See* C. P. CODE, S. 11, EXPL. IV AND O. 2, R. 2. **40 C.W.N. 627.**

——O. 2, R. 2—*Mortgage—Suit for sale by prior mortgagee—Omission to claim benefit of S. 101, T. P. Act, as against puisne mortgagee—Subsequent suit by latter—Prior mortgagee if precluded from making claim under S. 101.*

In a suit for sale by a perior mortgagee for the balance due to him after giving credit to the amount discharged by sales of portions of mortgaged property in his favour, he did not set up as against a subsequent mortgagee who was a party defendant, a claim to the benefit of S. 101, T. P. Act. He got a decree for sale. Subsequently the puisne mortgagee filed a suit on his mortgage for sale and the prior mortgagee who was impleaded as defendant set up his claim to the benefit of S. 101.

Held, that there was no need to raise this plea in the prior suit, and hence there was no basis for the plea of *res judicata*; that O. 2, R. 2, C. P. Code, did not also bar the plea, as the same was set up by a party only as a defendant. (*Cornish and Varadachariar, JJ.*) RAMA AIYAR *v.* BAGAVATHIMUTHU PILLAI. **163 I C. 834=9 R.M. 76=43 L.W. 478=1936 M.W.N. 374=A.I.R. 1936 Mad. 473=70 M.L.J. 506.**

——O. 2, R. 2—*Mortgage by conditional sale—Suit for foreclosure and mesne profits—No prayer for possession – Decree— Subsequent suit for future mesne profits—If maintainable.*

Where a mortgagee who is entitled to sue both for mesne profits and possession sues only for mesne profits and does not sue for possession and obtains a decree, he cannot subsequently sue for possession. And when his right to sue for mortgagee possession becomes barred, he is disentitled to sue for mesne profits also, for a claim for mesne profits presupposes that the person seeking it has a right to possession. (*Misra, J.*) TAYYAB HASAN *v.* SAGHIR HASAN. **180 I.C. 356=11 R.A. 453=1938 A.L.J. 997=1938 A. W.R. (H.C.) 728 =A.I.R. 1939 All. 52.**

——O. 2, R. 2—*Omission of claim—Absence of leave—Effect.*

Where a person failed to include in his suit the whole of the claim which he was entitled to make in respect of a cause of action and also omitted to claim the relief of a declaration and restoration of possession in respect of the land sold in execution, and failed to obtain the leave of the Court to sue for such relief, a subsequent suit for those relief is barred by the provisions of O. 2, R. 2, C. P. Code. (*Mosely, J.*) A. S. CHETTYYAR FIRM *v.* P. R. S. MEERA PILLAI. **178 I C. 157=11 R. R. 209=A.I.R. 1938 Rang. 290.**

——O. 2, R. 2—*Omission of claim—Claim not known to plaintiff at time of suit—Non-inclusion —If bars subsequent suit.*

To constitute an omission to sue by the plaintiff under O. 2, R. 2, C. P. Code, it is necessary that the claim must be known to the plaintiff. It is only a claim or remedy known at the time of the institution of the suit, which if omitted will be barred under O. 2, R, 2. Actual knowledge of the claim, and not constructive knowledge, is necessary in order that the relief may be barred in a subsequent suit. Where a plaintiff is unaware of a claim at the time of his suit, though he may, by proper inquiry make himself aware of its existence, the noninclusion of that claim will not preclude him from subsequently suing in respect of that claim. (*Venkataramana Rao, J.*) VENKATACHANDIKAMBA *v.* VISWANADHAMMAYYA. **164 I.C. 717=9 R. M. 159=44 L. W. 379=1936 M. W.N. 671=A.I.R. 1936 Mad. 699=71 M.L.J. 264.**

——O. 2, R. 2—*Plaintiff though entitled to claim whole property, claiming partition of half property—Suit dismissed on technical ground—Subsequent suit for possession of entire property—Decree for half-share—If can be granted.*

Per *Dunkley J., agreeing with Leach, J.*—Plaintiff though entitled to claim whole property, claimed partition of half of the property. Her suit was dismissed on a technical ground. Subsequently plaintiff filed a suit as absolute owner for possession of the entire property.

Held, that O. 2, R. 2 applied to the two suits.

Held, further, that plaintiff could not be given even a decree for a half-share of the property in the second suit. (*Dunkley, J.*, on difference between *Leach and Spargo, JJ.*) MA PWA SHIN *v.* U PO SIN. **170 I.C. 946=10 R.R. 117=A.I.R. 1937 Rang. 324.**

——O. 2, R. 2 and S. 11—*Prior suit for rectification of sale-deed and for possession of portion of property wrongly shown as exempted from sale —Subsequent suit for possession of property shown as sold in sale-deed—Whether barred.*

Where the prior suit by the plaintiff was for rectification of the sale-deed on the allegation that in the map attached to the sale-deed a certain portion of the property sold was wrongly shown as exempted from sale and for possession over that portion and the subsequent suit by him was for possession of a portion of the property which according to the sale deed and the plan attached to it had been sold to him on the allegation that the defendant had failed to deliver possession of the same.

Held, that although both the suits arose out of the same transaction of sale, they were not in respect of the same cause of action and that, therefore, the subsequent suit was not barred either by the provisions of S. 11, C. P. Code or under O. 2, R. 2, C. P. Code. (*Nanavutty and Zia-ul-Hasan, JJ.*) ZAKIA BEGAM *v* THE LUCKNOW IMPROVEMENT TRUST. **13 Luck. 192=167 I. C. 414=9 R.O. 382=1937 O.W.N. 252=1937 O.L.R. 115=A.I.R. 1937 Oudh 263.**

——O. 2, Rr. 2 and 3—*'Same cause of action'—Interferences with the ownership of same property at different times—Obligation to claim relief in respect of all known interferences—Failure—Bar of suit.*

Where there have been repeated interference with the ownership of the same property of a person at different times, they are not different causes of action entitling the owner to bring separate suits. In such a case the real cause of action is the interference with the ownership and every known interference should be pleaded in a plaintiff's suit and relief claimed in respect of all of them. If it is not so done fresh suits in respect of each of such interferences would be barred by O. 2, R. 2, C. P. Code. (*Madeley, J.*) KISHEN NARAIN *v.* NIZAMUDDIN. **1937 O.W.N. 1146.**

——O. 2, R. 2—*Scope—Duty of plaintiff.*

C. P. CODE (1908), O. 2, R. 2.

A plaintiff is not obliged to put forward in one suit every claim which he may have against the defendant, as the causes of action in such cases may be different, but he must include the whole claim based on the particular cause of action. (*Pollock, J.*) PARASHRAM *v.* SADASHEO. I. L. R. (1937) Nag. 94=167 I.C. 703=9 R. N. 200=A.I. R. 1936 Nag. 268.

——O. 2, R. 2—Scope—If controls S. 130, T. P. Act. *See* T. P. ACT, SS. 6 AND 130. 18 Pat. 839.

——O. 2, R. 2—*Scope—If subject to Expl. V to S.* 11—*Partition suit—Failure to ask for mesne profits from date of suit until delivery—Fresh suit for recovery of mesne profits—If barred.*

O. 2, R. 2 must be read with Expl. 5 to S. 11 and the relief claimed under Expl. 5 to S. 11 is a relief arising from the same cause of action. The fact that a plaintiff may under O. 2. R. 4 join in one suit two causes of action, does not mean that he must necessarily do so, or fall under the bar imposed by O. 2, R. 2 and S. 11, Expl. 5. A plaintiff may of course anticipate in a suit for partition that certain property will fall to his share; he may anticipate that after the final decree he will not be given delivery of possession and he may in his suit for partition ask for mesne profits from the date of suit until delivery of possession. But if he does not do so another suit for recovery of mesne profits is not barred. (*Davis, J.C. and Tyabji, J.*) TIKAMDAS HOTUMAL *v.* KISHNOMAL JESSOMAL. I L.R. (1940) Kar. 36=185 I.C. 702 =12 R.S. 174=A.I.R. 1939 Sind 367.

——O. 2. R. 2—*Scope—Prior suit for cancellation of lease—Decree—Subsequent suit for mesne profits—Maintainability.*

An earlier successful suit for cancelling a lease of immoveable property does not bar a subsequent suit for past mesne profits under O. 2, R. 2, C. P. Code, especially when the plaintiff has stated in the earlier plaint that he intends to bring a separate suit for mesne profits. A claim for mesne profits need not be included in a suit for possession. (*Pandrang Row and Abdur Rahman, JJ.*) VENUGOPAL PILLAI *v.* THIRUGNANAVALLI AMMAL. 52 L W. 533=1940 M.W.N. 901=(1940) 2 M.L. J. 427.

——O 2, R. 2 and O. 23, R. 1—*Scope—Suit on mortgage—Agreement between plaintiff and sub-mortgagee to omit properties sub-mortgaged from suit and to file fresh suit in that behalf within time fixed—Court omitting properties and fixing time —No express application or order under O. 23—Effect—Fresh suit in time if barred.*

In a suit in the Bombay High Court for sale on a mortgage, the plaintiff and his sub-mortgagee who was impleaded as a party to the suit, agreed to omit from that suit their claim to certain lands in the suit, which were in Madras, and to bring a suit for the same within three months in Madras. An *interim* decree was passed by consent as between these two parties. The period was extended later by another fifteen days and it was ordered that if such a suit was not filed within the said fifteen days the parties should be barred from filing such a suit. There was, however, no express written application to withdraw the claim nor any express order allowing withdrawal or granting permission to file a fresh suit. A fresh suit was filed by the sub-mortgagee within the time fixed in Madras in the proper Court. It was contended that the suit was barred under O. 2, R. 2 and O. 23, R. 1.

C P. CODE (1908), O. 2, R. 2.

Held, that the suit was not barred either under O. 2, R. 2 or O. 23, R. 1, C. P. Code and it must be held that the Bombay Court acted under O. 23, C. P. Code, and gave permission to the institution of a fresh suit and that the order was duly complied with. (*Madhavan Nair and Stodart, JJ.*) RAMANATHAN CHETTIAR *v.* SHRI DOWLAT SINGJEE THAKORE SAHIB. 181 I.C 827=11 R.M. 854= 1938 M.W.N. 785=48 L.W. 292=A.I.R. 1938 Mad. 865=(1938) 2 M.L.J. 534.

——O. 2, R. 2—*Scope—Suit for* rabi *rent under S.* 132, *Agra Tenancy Act*—Kharif *rent due but not included in claim—Distraint proceedings for* Kharif *proving infructuous—Subsequent suit for* Kharif *rent—If barred.*

A landholder sued his tenant under S. 132 of the Agra Tenancy Act for the recovery of *rabi* rent of a certain *fasli*, but did not sue for the *Kharif* rent of that *fasli*, though that was also due; as the landholder wanted to recover the particular instalment by distraint, he did not include the *Kharif* rent in the plaint. The distraint proceedings proved infructuous, and the plaintiff then brought a suit for recovery of the *Kharif* rent of that *fasli*.

Held, that the suit was barred by O. 2, R. 2, C. P. Code. (*Darling, S. M. and Bomford, J. M.*) KISHAN LAL *v.* SHRI RAM. 1937 A.W.R. 867= 1937 R.D. 394.

——O. 2, R. 2—*Separate suits by husband and wife for divorce decreed without going into merits —Court remarking that it would not prejudice parties in subsequent suit—Suit for partition of marriage property by wife—Husband, if debarred from proving wife's misconduct.*

In two separate suits for divorce one brought by husband against wife on the ground of adultery and another brought by wife against husband on the ground of cruelty the Judge without going into merits of case and without inquiring into the alleged matrimonial misconduct passed two decrees for divorce. He added that the decision would not prejudice the parties with regard to anything that they might desire to establish in a snbsequent suit in connexion with the property of the marriage. Subsequently the wife brought a suit against the husband for partition and separate possession of the joint property of the marriage.

Held, that the remark of the Judge in suit for divorce that the suit was decreed without prejudice to what each party may have to prove in a subsequent case would be of no effect.

Held further, that in the suit for divorce although the husband did not insist upon proving his wife's guilt to obtain a divorce, he was not debarred from raising this point in a subsequent suit where the property of the marriage was involved. It was open to him to prove misconduct on the part of his wife which would disentitle her from obtaining any of the joint property. (*Dunkley and Wright, JJ.*) MAUNG PO SEIK *v.* MA PWA TIN. 187 I.C. 380=12 R.R. 324=A.I.R. 1940 Rang. 29.

——O. 2, R. 2—*Specific performance of contract of sale—Suit for—Separate suit for possession—If barred.*

In a suit for specific performance of a contract of sale the cause of action that first arises is one for performance of that contract by execution of a registered deed of sale. It may be that possession will be handed over after a decree for

C. P. CODE (1908), O. 2, R. 2.

specific performance has been granted, and the question of possession is a contingency that need not necessarily arise until a decree for specific performance has been passed and is then a new and distinct cause of action arising from the deed itself. (*Mosely, J.*) A. S CHETTYAR FIRM *v.* P. R. S. MEERA PILLAI. 178 I.C. 157=11 R.R. 209 =A.I.R. 1938 Rang. 290.

——O. 2, R. 2 and S. 11, Expl. IV—Suit by plaintiff for possession of certain shops decreed in respect of one-fourth share—Subsequent suit by him for mesne profits from date of possession to date of suit—Defendant pleading set-off in respect of improvements in former suit but withdrawing plea in the end—Same plea, if barred in subsequent suit. *See* C. P. CODE, S. 11, EXPL. IV AND O. 2, R. 2. 168 I.C. 472=A.I.R. 1937 Oudh 394.

——O. 2, R. 2 and S 11—*Suit for decree for redemption alleging mortgage by conditional sale —Subsequent suit to declare sale deed void on ground of executant's minority—If barred.*

In an earlier suit for a decree for redemption, plaintiff alleging that the arrangement between the parties was a mortgage by conditional sale pleaded that the sale deed did not stand alone but was to be read in the light of the unregistered agreement for re-purchase. The question of the minority of the executant was also raised and pleaded but was not decided. The suit failed because the unregistered agreement was inadmissible in evidence. Subsequently plaintiff filed another suit to declare the sale-deed void by reason of the minority of the executant. The defence was that the decision in the previous suit operated as *res judicata* and the plaintiff was also barred by O. 2, R. 2, C. P. Code.

Held, that the question of minority was not finally decided in the former suit. Hence the plea of *res judicata* could not stand.

Held also, that the cause of action in the subsequent suit was entirely different from the cause of action in the earlier suit. The earlier suit proceeded entirely on the basis that the sale-deed was a valid document. In the subsequent suit the plaintiff had to prove that she was minor when she signed the deed and so the deed was void. So O. 2, R. 2 did not bar the subsequent suit. (*Leach, J.*) MA HLA ON *v.* KO U. 171 I.C. 913=10 R. R. 204=A.I.R. 1937 Rang 204.

——O. 2, R. 2—*Suit for dissolution of partnership—Subsequent suit for accounts—If barred.*

A suit for accounts brought subsequent to a suit for dissolution of partnership is not barred under O. 2, R. 2, C. P. Code, as the two suits are not based on the same cause of action. (*Tek Chand, J.*) JHANDU MAL-BHAG MAL *v.* RULIA MAL: 168 I.C. 692=9 R.L. 666 (2)=39 P.L.R. 197=A.I.R. 1937 Lah. 633.

——O. 2, R. 2 and O. 9, R. 9—*Suit to set aside sale under Bengal Revenue Sales Act on ground of irregularities in sale—Allegation that irregularities were due to fraudulent conduct of defendant—Suit dismissed for default—Subsequent suit for declaration that defendant has bought property fraudulently and for directing him to reconvey property—Maintainability.*

The plaintiff instituted a suit for setting aside a sale under S. 33 of the Bengal Revenue Sales Act as having been made contrary to the provisions of that Act. He alleged that the irregularities in the sale were due to the fraudulent conduct of the defendant who has purchased the property at the sale. This suit was dismissed for default and an application to have that dismissal set aside was also unsuccessful. The plaintiff subsequently brought another suit for a declaration that the defendant has fraudulently bought the property and for a decree directing him to execute a deed of re-conveyanee in favour of the plaintiff.

Held, that the suit was not barred, under O. 2, R. 2 (3) or O. 9, R. 9 (1), C. P. Code, as the cause of action is not the same in the two suits. (*S. K. Ghose and Patterson, JJ.*) GOURHARI ADAK *v.* SARAT CHANDRA LAHIRI. I.L.R. (1937) 2 Cal. 651=65 C.L.J. 513=41 C.W.N. 1179.

——O. 2, R. 2 and S. 11, Expl. IV—*Title suit for possession dismissed—Subsequent suit for redemption of mortgage—If barred.*

The defendant who was a mortgagee of certain lands obtained a mortgage decree and in execution of that decree purchased the lands. The plaintiff who was not a party to the suit instituted a title suit for the recovery of possession of the lands. Upon the allegation that the mortgagor having only a non-transferable occupancy right the auction purchase under the mortgage decree conferred no title upon the defendant. The suit was, however, dismissed. The plaintiff subsequently instituted the present suit for redemption of the mortgage. It was contended by the defendant that the plaintiff having asserted a title paramount was not entitled to redeem and that the plaintiff's claim was barred under O. 2, R. 2 and S. 11, Expl. IV, C. P. Code.

Held, that the decision in the title suit did not preclude the plaintiff from claiming redemption in the present suit and that neither O. 2, R. 2 nor S. 11, Expl. IV, C. P. Code, operated as a bar to the suit. (*Akram, J.*) KALI NATH SHAHA *v.* MANINDRA NATH DAS. I.L.R. (1940) 1 Cal. 544.

——O. 2, R. 2—*Two suits filed on same day—Order in which they were filed—Presumption.*

Two suits were simultaneously filed under S. 226 of the Agra Tenancy Act against a Lambardar. In one the plaintiffs sued for the profits from the weighing dues in a Bazaar in one *patti*, in the other they sued for profits on account of other weighing dues, and *sir* plot in three *pattis* of the same *mahal*. The *patti* was the same in both suits.

Held, that where suits were filed on the same day it must be presumed until the contrary was proved that they were presented and admitted in the order in which their numbers appeared in the register and that the second suit was barred by O. 2, R. 2, C. P. Code. (*Darling, S.M. and Bomford, J.M.*) RAM CHARAN RAWAT *v.* AITMAD ALI KHAN. 1937 R D. 86.

——O. 2, R. 2 (3)—*Leave of Court—What amounts to.*

Where there has been an omission to sue for all reliefs in respect of the same cause of action, the remark of the Court in its judgment that a suit in respect of the omitted relief could be brought later on, does not amount to the leave of the Court in the sense in which it is used in O. 2, R. 2 (3) C. P. Code. (*Madeley. J.*) KISHEN NARAIN *v.* NIZAMUDDIN. 1937 O.W.N. 1146.

——O. 2, R. 2 (3)—*Leave under—When to be applied for—Grant of leave at late stage of suit—Legality of.*

C. P. CODE (1908), O. 2, R. 2.

Under O. 2, R. 2, C. P. Code, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked; it only entails a disability as regards subsequent proceedings. There is no reason for insisting that the application for leave to omit must precede, or at least be contemporaneous with the plaint in the first suit. It cannot be said that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. The Court, when called upon to deal with such an application has ordinarily to consider whether the grant of leave to reserve certain remedies would in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with by the Court during the pendency of the suit as before its institution. The legislature did not wish to insist upon leave being obtained before the first hearing. (*Varadachariar, J.*) VENKAYYA *v.* VENKATA RAO. **I.L.R. (1939) Mad. 317=179 I.C. 963=11 R.M. 644=1938 M.W.N. 925=48 L.W. 517=A.I.R. 1938 Mad. 979=(1938) 2 M.L. J. 642.**

——**O. 2, R. 2 (3)**—*Omission to sue for all reliefs—Absence of leave—Effect.*

If a person entitled to more than one relief in respect of the same cause of action, omits to sue for all the reliefs without the leave of Court, he loses his rights in respect of those reliefs and it cannot be restored to him by the exercise of the inherent powers of the Court. (*Madeley, J.*) KISHEN NARAIN *v.* NIZAMUDDIN. **1937 O.W.N. 1146.**

——**O. 2, R. 2 (3)**—*Splitting of claim—Right of plaintiff.*

Per *Baguley, J.*—There is no provision of law by which a plaintiff can reserve the right to split his claim arising out of the same cause of action. He may ask the Court to allow him to do so under O. 2, R. 2 (3), C. P. Code, but the Code gives no unilateral right to reserve a claim of this sort. (*Baguley and Sharpe, JJ.*) MA MA NYUN *v.* MAUNG MYA. **1937 Rang.L.R. 447=174 I.C. 794=10 R.R. 428=A.I.R. 1938 Rang. 76.**

——**O. 2, R. 3**—Applicability—Different mortgages on same property by different persons in favour of same mortgagee—Single suit by mortgagee joining both causes of action—Maintainability. *See* T. P. ACT, S. 67-A. **A.I.R. 1937 Nag. 99.**

——**O. 2, R. 3**—*Suit for redemption of mortgage with possession—Claim for rent paid by mortgagor to mortgagee's use—If can be joined.*

A mortgagor suing for redemption of a mortgage with possession can join with that claim a claim for rent paid by him to the mortgagee's use. (*Wort, J.*) SUBEDAR MIAN *v.* SHEO SHANKAR MISSIR. **6 B.R. 765=189 I.C. 109=A.I.R. 1940 Pat. 579.**

——**O. 2, R. 6**—Applicability. *See* U. P. ENCUMBERED ESTATES ACT, S. 7. **1937 A.L.J. 1139.**

——**O. 2, R. 6**—Applicability—Misjoinder of causes of action. *See* C. P. CODE, O. 1, R. 3—JOINDER OF SEVERAL DEFENDANTS. **1938 Rang. L.R. 397.**

C. P. CODE (1908), O. 3, R. 1.

——**O. 2, R. 6**—*Multifariousness—If always fatal to suit—Suit against mortgagors and others who had rendered the security insufficient—If proper.*

The joinder of causes of action and parties is not invariably fatal to the suit. No doubt the misjoinder of claims and parties is to be discouraged when it is calculated to defeat the ends of justice; but such joinder would be unexceptionable unless it is apparent that the defence will be embarrassed by confusing different issues and proofs in the same litigation. Where a mortgagee files a suit against the mortgagors and also against others who had damaged and thereby rendered the mortgage security insufficient, the suit cannot be said to be bad for multifariousness. (*Niyogi, J.*) HARIDAS NARAYANDAS *v.* JAGANNATH. **I.L.R. (1940) Nag. 63=184 I.C. 579=12 R.N. 115=1939 N.L.J. 338=A.I.R. 1939 Nag. 256.**

——**O. 3, Rr. 1 and 2**—*Construction and scope—Agent appointed under power-of-attorney to appear and conduct suit—Right of audience in Court—Principal appointing advocate to appear—Agent's right to notice—Right to act and charge fees to principal as solicitor or agent.*

An agent with a power-of-attorney to appear and conduct judicial proceedings has no right of audience in Court. Nor is he entitled to notice if his principal wants to appear and conduct the proceedings himself in person or appoints an advocate to appear for him. Such a power-of-attorney agent cannot carry on business as a solicitor or attorney, drafting, engrossing and filing plaint, Judge's summons, affidavits and generally issuing legal process and charge fees to the principal. (*Beasley, C.J., Venkatasubba Rao and Mockett, JJ.*) THAYARAMMAL *v.* KUPPUSWAMY NAIDU. **I.L.R. (1938) Mad. 12=172 I.C. 489=10 R.M. 469=46 L.W. 734=1937 M.W.N. 1060=A.I.R. 1937 Mad. 937=(1937) 2 M.L.J. 552 (F.B.).**

——**O. 3, Rr. 1 and 4**—*Pleader not appointed in writing—Power to file application for restoration of suit.*

A pleader who puts in an application on behalf of a litigant acts for him and cannot, therefore, do so unless he is authorized in writing by him. Consequently an application for restoration of a suit dismissed for default cannot be made by a pleader whose appointment has not been made in writing. (*Addison and Din Mahomed, JJ.*) BASHER AHMAD *v.* MARY NINCK. **I.L.R. (1938) Lah. 417=40 P.L.R. 235=179 I.C. 755=11 R.L. 625=A.I.R. 1938 Lah. 698.**

——**O. 3, R. 1**—*Recognised agent—Right to argue and plead.*

The language of O. 3, R. 1, C. P. Code, means no more than that a recognised agent can appear, make applications and take such steps as may be necessary in the course of the litigation for the purpose of the case of the principal being properly laid before the Court. It cannot justify his being allowed to argue and plead. (*Srivastava and Nanavutty, JJ.*) JIVAN LAL *v.* PROPERTY OF RAM RATAN. **12 Luck. 123=161 I.C. 538 (1)=8 R.O. 332=1936 O.W.N. 351=A.I.R. 1936 Oudh 261.**

——**O. 3, R. 1**—*Scope—Darkhast—Presentation by pleader without power from decree-holder—If legal presentation—Defect—If fatal.*

C. P. CODE (1908), O. 3, R. 2.

The presentation of a darkhast on behalf of the decree-holder by a pleader who holds no vakalatnama from the latter is not a legal presentation, and the defect is fatal. (*Norman.*) SHAMBOO NATH *v.* MT. UDAI KANWAR. **1937 A M.L.J. 47.**

——**O. 3, R. 2**—*Applicability—Proceedings under Madras Estates Land Act—Application to set aside rent sale—Presentation by person looking after factory of applicant and doing general business—If proper—"Recognised agent"—"Carrying on business."*

O. 3, R. 2, C. P. Code, is applicable to proceedings under the Madras Estates Land Act by reason of S. 192 (*c*) of the Estates Land Act. A person who is looking after a factory on behalf of his master and is doing general business for him in the off-season cannot be regarded as a recognised agent of his master for the purpose of presenting an application on behalf of that another under S. 131 of the Madras Estates Land Act to set aside a sale of a holding for arrears of rent. Such a person cannot be held to be a person "carrying on business" under O. 3, R. 2, in respect of the management of the land of his master, so as to entitle him to apply on behalf of his master under S. 131 of the Estates Land Act. An application to set aside the sale presented by such a person is not validly presented. (*Varadachariar, J.*) ELLAPPA NAIKAR *v.* SIVASUBRAMANIA MANIAGARAN. **169 I.C. 244=9 R.M. 725=1936 M.W.N. 1175=44 L.W. 567=A.I.R. 1937 Mad. 293=71 M.L.J. 607.**

——**O. 3, R. 2 (a), Bombay Amendment**—*Construction—Recognised agent—Attorney of High Court—Competency to act under general power-of-attorney.*

The word "persons" in the first part of O. 3, R. 2 (*a*), Bombay Amendment, is comprehensive and does not exclude an attorney of the High Court. What is meant under the second part is that an attorney of the High Court can also appear under a special power of attorney. A person who is not an attorney can only act under general power of attorney. The words "requisite power of attorney" do not mean that only a special power of attorney is required, but they mean that the special power of attorney must be a proper one. An attorney of the High Court can therefore act both under a general and a special power of attorney, but a person who is not an attorney can only act under a special power. (*Wadia, J.*) PERFORMING RIGHT SOCIETY, LTD. *v.* INDIAN MORNING POST RESTAURANT **I.L.R. (1939) Bom. 295=184 I.C. 673=12 R.B. 192=41 Bom.L.R. 530=A.I.R. 1939 Bom. 347.**

——**O. 3, R. 2 (b)**—*"Carrying on business"—Meaning of.*

The expression "carrying on business" in O. 3, R. 2 (*b*), must be interpreted in a restricted sense, *viz.*, as relating to commercial business, as in S. 20, C. P. Code. The appearance, application or act made or done must relate to matters connected with the trade or business only. (*Varadachariar, J.*) ELLAPPA NAIKAR *v.* SIVASUBRAMANIA MANIAGARAN. **169 I.C. 244=9 R.M. 725=1936 M.W.N. 1175=44 L.W. 567=A.I.R. 1937 Mad. 293=71 M.L.J. 607.**

——**O. 3, R. 4**—*Duty of Court—Counsel not duly authorized through* bona fide *and reasonable mistake—Effect—Procedure—Duty to give litigant chance to set matter right—Extension of time—Limitation Act, S. 5.*

C. P. CODE (1908), O. 3, R. 4.

It is contrary to the spirit of justice that a litigant should fail simply because, through some perfectly *bona fide* and reasonable mistake, the Counsel appearing for a party is not duly authorized. Where it appears that he is not duly authorized, it will doubtless be the duty of the Court in question to treat the proceedings that he has set on foot as of no effect; still the Court should, so far as is possible, safeguard the litigant from his litigation coming to so unsatisfactory a conclusion, by pointing out to him the desirability of making the necessary application to set the matter on foot again, and, if an application is made, be indulgent as regards time, and should give effect to the provisions, in a suitable case, of S. 5, Limitation Act. (*Stone, C.J.*) RAMDEO TILOKCHAND *v.* LALU NATHA. **I.L.R. (1937) Nag. 494=169 I.C. 117=9 R.N. 305=A.I.R. 1937 Nag. 65.**

——**O. 3, R. 4**—*Functions of ministerial nature—Power of pleader to delegate.*

To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court. But there is nothing in O. 3, R. 4, which prohibits a pleader from delegating some of his functions, and the Code plainly contemplates that certain functions of a ministerial nature may be delegated. A ministerial act, in relation to this matter, is an act which does not require the personal skill or attention of the pleader and which can be done without consideration of facts or circumstances. To such acts the maxim *qui facit per alium facit per se* must be held to apply. When a plaint or memorandum of appeal has been drawn up and signed by a pleader duly authorized under O. 3, R. 4, there is nothing contrary to the provisions or the spirit of that rule in the mechanical act of handing over the papers to the Court, or the officer appointed, being performed by a clerk or another pleader to whom the duty of performing that act has been delegated by the duly authorized pleader. The presentation of the plaint or appeal must be taken to be that of the signatory thereto. (*Roberts, C.J. and Dunkley, J.*) SAWARMAL *v.* KUNJILAL. **1939 Rang.L.R. 108=180 I. C. 565=11 R.R. 418=A.I.R. 1939 Rang. 1.**

——**O. 3, R. 4**—*Power to appoint another Counsel—Party appointing general agent by power-of-attorney giving him all powers necessary for proper conduct of suit—Agent appointing pleader giving power to appoint another pleader—Such pleader appointing another pleader by vakalatnama signed by himself—Appeal filed by latter—If proper.*

A party appointed a general agent to conduct litigation on his behalf and gave him all powers necessary for conduct of case. The agent appointed a pleader by a vakalatnama duly signed and filed and give him power to appoint another pleader if necassary. The pleader in his turn appointed another pleader by a vakalatnama duly signed by himself and such pleader filed the appeal.

Held, that the appeal was properly constituted as the agent was duly authorized under the power of attorney to give a pleader a power to

appoint another pleader and the pleader who filed the appeal had been duly authorized by the pleader engaged by the agent. (*Stone, C. J.*) RAMDEO TILOKCHAND *v.* LALU NATHA. I.L.R. (1937) Nag. 494=169 I.C. 117=9 R.N. 305=19 N.L.J. 207=A.I.R. 1937 Nag. 65.

——O. 3, R. 4—*Scope*—Mukhtar *appointed by party presenting nomination on behalf of party*—Mukhtar *accepting* mukhtarnama *and actually acting for client—Omission to write name of* mukhtar *in body of* mukhtarnama—*If fatal—Power of* mukhtar *to act on behalf of party.*

The presentation of an application or a nomination by a *mukhtar* appointed by the party under a *mukhtarnama* signed by the *mukhtar* in token of acceptance is a valid presentation, although by oversight the name of the *mukhtar* is not written in the body of the *mukhtarnama*. Where a *mukhtar* or vakil is actually intended by a party to act on his behalf and does so act, formal defects of this nature, such as the omission to write the name of the vakil or *mukhtar* in the body, are of no importance and cannot invalidate the presentation by him. (*Darling, S. M. and Bomford, J.M.*) KRISHNA PRATAB SINGH *v.* EMPEROR. 1937 R D. 5.

——O. 3, R. 4—*Vakalat filed in suit—How long remains in force—Collector's cases—Fresh vakalat —Necessity.*

Collector's cases are regulated by rules framed under S. 70, C. P. Code. Being part of execution proceedings they are part of proceedings in suit. As a vakalatnama filed by a pleader in the suit remains in force throughout the proceedings in the suit and as a fresh vakalatnama is not necessary for his appearance in execution proceedings, so also in Collector's cases which are only part of those proceedings in the suit, a fresh vakalatnama is not necessary for the pleader's appearance. (*G. P. Burton, F. C.*) THE CO-OPERATIVE SOCIETY *v.* RAMCHANDRA BHAGWATT. 1938 N.L.J. 122.

——O. 3, R. 4—*Vakalatnama—Construction—Appointment for "prosecution" of all proceedings —Power to file execution petition.*

In construing a vakalatnama the circumstances in which it is given must be looked to. When a pleader is appointed for the "prosecution" (pervi) of all proceedings connected with a case, and is engaged especially for the purpose of a darkhast, the pleader has power to file darkhasts or execution applications. (*Norman, I. C. S.*) KHAIRAT MOHAMMED *v.* HIRA CHAND. 1936 A.M.L.J. 138.

——O. 3, R. 4—Vakalatnama *not executed by party or any one on his behalf—Order based on verbal compromise intimated to Court by pleader of that party—If liable to be set aside.*

Where the *vakalatnama* lodged in Court by the pleader of one of the parties was not actually executed either by that party or by any one on his behalf, an order of Court based on a verbal compromise intimated to it by that pleader is liable to be set aside. (*Darling, S. M. and Bomford, J.M.*) MAHOMED TAQI KHAN *v.* DHANPATI. 1937 R.D. 99.

——O. 3, R. 4—Vakalatnama—*Signature of appellant in it proved to be forgery—Appeal, if competent.*

Where the signature which purported to be of the appellant on the *vakalatnama* is proved to be a forgery, the appeal filed by the pleader who is said to have acted on his behalf in the lower Court is incompetent. (*Edgley, J.*) ABDUL JAMADAR *v.* LAL BEHARI SARKAR. 65 C.L.J. 418.

——O. 3, R. 4 (1)—*Appellant executing power-of-attorney in favour of a certain advocate—Presentation of appeal by another advocate on behalf of latter—Whether proper—"Acting" and "pleading"—Distinction between.*

A pleader who appears on behalf of another pleader engaged by a party, can appear for the latter pleader only "to plead" on behalf of the party, but he has no power "to act" on his behalf without a document in writing being executed in his favour in the manner prescribed by O. 3, R. 4, C. P. Code. The presentation of an appeal amounts to "acting" and not "pleading". If the appellant engages a certain advocate for filing the appeal and duly executes a power of attorney in his favour, he alone could present the appeal. Where the memorandum of appeal presented in Court is not signed by him but by another advocate for him, there is no proper appeal before the Court. (*Agha Haidar, J.*) K. L. GAUBA *v.* THE INDO SWISS TRADING COMPANY, LTD. 17 Lah. 610=163 I.C. 141=8 R.L. 1024=38 P.L.R. 258 =A.I.R. 1936 Lah. 500.

——O. 3, R. 4 (1)—*Appointment of pleader—Agent under power-of-attorney—Power to appoint.*

A person who is authorized under a power-of-attorney to appoint a pleader for the principal can validly appoint a pleader, and such a pleader can act on that appointment on behalf of the principal. (*Norman, I.C.S.*) KHAIRAT MOHAMMED *v.* HIRA CHAND. 1936 A.M.L.J. 138.

——O. 3, R. 4 (1)—Scope—Advocate of High Court—Appearance in mofussil Court to plead—Memorandum signed by himself—Sufficiency—Vakalatnama—Necessity—Bombay High Court Rules, R. 4. *See* BOMBAY HIGH COURT RULES (ORIGINAL SIDE), R. 40. 42 Bom L.R. 515.

——O. 3, R. 4 (1)—*Scope—Pleader filing petition without* vakalat—*Subsequent filing of* vakalat *without accepting it—Acceptance of* vakalat *later—Sufficiency—Petition if in order and duly filed.*

An application for execution of a decree duly signed and verified by the decree-holder was filed in Court and acted on by the Court. The pleader had not, however, filed a *vakalatnama* along with the petition and on the omission being noticed he filed a *vakalatnama* duly stamped, but without having been accepted by him. Later the omission was made good, the pleader signing his acceptance in the back of the *vakalatnama* with the permission of the Court.

Held, that the application was in order and was duly filed on the date it was presented to the Court, and that there was nothing wrong about it. (*M. C. Ghose, J.*) JAGADISH CHANDRA DHABAL DEB *v.* SATYA KINKAR SAHANA. 63 Cal. 733=40 C.W.N. 730.

——O. 3, R. 4 (1)—*Scope—Pleader having no* vakalat *from client—Presentation of execution application—Effect—If has any legal effect—Limitation Act, Art. 182 (5)—"In accordance with law".*

A pleader who has not been appointed by a document in writing as required by O. 3, R. 4, is wanting in capacity or competence to act. If a

pleader purports to do something which he has no power or capacity to do, it can have no legal effect. The presentation of an execution petition by a pleader who holds no *vakalat* from the decree-holder is a nullity. An execution petition presented by such a pleader though in proper form and duly signed by the decree-holder is not an application "in accordance with law" within the meaning of Art. 182 (5) of the Limitation Act, and cannot therefore operate as a step-in-aid, especially when the application was ultimately withdrawn and dismissed without any execution really taking place.

Quaere: Whether if anything has really been done upon such an application, it can be treated as mere waste paper. (*Burn and K. S. Menon, JJ.*) NANDAMANI ANANGA BHIMA DEO *v.* MADANA MOHANA DEO. I.L.R. (1937) Mad. 320=165 I.C. 659=9 R.M. 280=1936 M.W.N. 957=44 L.W. 528=A.I.R. 1937 Mad. 239=71 M.L.J. 604.

——O. 3, R. 4 (1)—Vakalatnama *signed by party and by vakil whom he intended to act—Mention of name of another vakil in body of document—Effect of.*

Where a *vakalatnama* was signed by the party and also by the vakil who was actually intended by him to act on his behalf and who did, in fact, so act, the fact that by an error the name of another vakil remained in the body of the document is a formal defect of no importance. (*Sulaiman, C.J. and Bennet, J.*) RAM SARUP *v.* BHAGWATI PRASAD. 58 All. 912=164 I.C. 725=9 R.A. 187=1936 A.W.R. 516=1936 A.L.J. 586=A.I.R. 1936 All. 636.

See also (*Abdul Rashid, J.*) SINGH RAM *v.* KHUBI RAM SHEO RAM. 30 P.L.R. 639=A.I.R. 1937 Lah. 719.

——O. 3, R. 4 (2)—*Pleader validly representing party in lower Court—Authority to file appeal.*

O. 3, R. 4 (2), C. P. Code, provides that every appointment of a pleader shall be filed in Court and shall be deemed to be in force until all proceedings in the suit are ended so far as the client is concerned. So where a pleader validly represents a party in the trial Court, he can present a memorandum of appeal on behalf of his client and prosecute the appeal. (*Agha Haidar, J.*) RASUL SHAH *v.* DIWAN CHAND. 165 I.C. 274=9 R.L. 234=A.I.R. 1936 Lah. 583.

——O. 3, R. 4 (3) and O. 9, R. 9—*Interpretation of sub-R. (3) of R. 4 of O. 3—Application for restoration of suit dismissed for default—Fresh appointment of pleader—Necessity.*

The maxim *expressio unius est exclusio alterius* cannot be applied to the interpretation of the terms of sub-R. (3) of R. 4 of O. 3 as R. 1 authorises a pleader to make any application on behalf of the party he represents. As a suit terminates only by a decree, an application for restoration of a suit dismissed for default must be regarded as a proceeding in the suit. So a pleader is entitled to present such an application without fresh appointment. (*Niyogi, J.*) MST. BORO BAI *v* RAMSUNDER. 177 I.C. 409=11 R.N. 141=1938 N.L.J. 98=A.I.R. 1938 Nag. 272.

——O. 4, R. 1—*Presentation of plaint—Same Judge presiding at two places.*

Where the same Judge has to preside over two Courts in different places, the presentation of a plaint to him when presiding at one place, with reference to property within the jurisdiction of the other Court, is a valid presentation. The Judge has jurisdiction to accept such a plaint. (*Pollock, J.*) RIKHIRAM *v.* MATHURA PRASAD. 1939 N.L.J. 503.

——O. 4, R. 1—Presentation of plaint—Time and place—Presentation to clerk outside Court house and outside Court buildings—Validity. *See* BOMBAY CIVIL COURTS ACT, S. 40. 38 Bom.L.R. 1196=A.I.R. 1937 Bom. 25.

——O. 5, Rr. 15 and 17 (as amended in Bengal)—*Notices under O. 21, R. 22 issued on heirs of judgment-debtor—Eldest son accepting only notice in his name—Notices in names of others affixed on door—Validity of service.*

Where notices issued under O. 21, R. 22, C. P. Code, on the heirs of a deceased judgment-debtor who were substituted in his place, were tendered to the eldest son who took the notice in his name and signed an acknowledgment but refused to take the notices in the names of his brothers, and those notices were then affixed on the main door of the house,

Held, that there was good service on the other legal representatives of the judgment-debtor under O. 5, Rr. 15 and 17, C. P. Code, as amended in Bengal in 1928. (*Mitter and Khundkar, JJ.*) RANGPUR LOAN OFFICE, LTD. *v.* TARIT BHUSAN ROY. I.L.R. (1939) 1 Cal. 530=70 C.L.J. 97=186 I.C. 174=12 R.C. 447=43 C.W.N. 539=A.I.R. 1939 Cal. 369.

——O. 5, R. 15—*Service on defendant's brother living with him—If service on defendant.*

Where summons is handed over to the defendant's brother who lives with him, service on the defendant should be deemed to have been made in accordance with O. 5, R. 15, C. P. Code. (*Abdul Qayoom, C.J.*) BASU SHAH *v.* KANSHI RAM. 39 P.L.R. J. & K. 133.

——O. 5, R. 17—*Applicability—Notice after first hearing.*

The provisions of O. 5, R. 17, C. P. Code, are not strictly applicable to the service of notice after the first hearing in the case. (*Hamilton and Radhakrishna, JJ.*) SAHEBA KHATUN *v.* ANWARUL HASAN. 1939 A.W.R. (C.C.) 141=1939 O.W.N. 787=1939 O.A. 699.

——O. 5, R. 17—Applicability—Service of notice under S. 112, Madras Estates Land Act—Service by affixture—When to be ordered—Due and reasonable diligence—If to be proved. *See* MADRAS ESTATES LAND ACT, S. 112. (1939) 1 M.L.J. 618.

——O. 5, R. 17—*Duty of process-server—Service under—When due service.*

The serving peon before he can take advantage of the provisions of O. 5, R. 17 of C. P. Code, must attend at the right place and he must attend at a time when he may reasonably expect that the defendant will be present, and if he fails to find the defendant, he must take reasonable steps to discover where the defendant may happen to be. Where in a case the process-server went to the house of the defendant on three different dates, but the summons was not served and on the fourth date as neither the defendant nor his agent nor any adult member of his family was found, the process-server posted the summons on the house.

Held, that the defendant was not duly served as due and diligent search was not made. (*Ba U, J.*) A. S. P. L. V. S. RAMASWAMY CHETTYAR *v.* SUNI

C. P. CODE (1908), O. 5, R. 17.

MOHAMED ROWTHER. **173 I.C. 794=10 R.R. 375 =A.I.R. 1937 Rang. 475.**

——**O. 5, R. 17**—*Notice—Service—Endorsement of refusal—Copy of notice neither offered to person to be served nor affixed to his residence—Sufficiency of service.*

Where on the reverse of a notice it is noted that the person to be served with that notice refused to affix his thumb impression thereto in token of his having been informed of the contents of the notice, but where no copy of the notice was either offered to that person or affixed to his abode, the service cannot be said to comply with the provisions of O. 5, R. 17, C. P. Code. (*Darling, S. M. and Mehta, J. M.*) MAM RAJ *v.* MANGAL SEN. **1938 R.D. 929=1939 A.W.R. (B.R.) 54.**

——**O. 5, R. 17**—*Scope—Proper service under —Proof—Peon sending summons through maid servant—Father not examined—Effect of—Proper service—If can be inferred.*

Where the report of the peon entrusted with the service of summons on a defendant is to the effect that he sent the summons to the defendant through a maid servant, and the latter is not examined to prove that the defendant refused to accept the summons, there is no ground for holding that there has been a proper service under O. 5, R. 17, C. P. Code, which can be accepted as a substitute for personal service. (*Varma, J.*) SNEHALATA DEVI *v.* JANARDHAN PRASAD SINGH. **21 Pat.L.T. 340=A I.R. 1940 Pat. 563.**

——**O. 5. R. 17**—*Summons—Service by affixture when justified—Reasonable diligence to find out party—Party though not present, expected to return—Affixture—Summons if duly served.*

The procedure of affixing a copy of the summons to the outer door of a defendant's house, can come into operation only when certain conditions have been fulfilled, one of them being the inability of the serving officer to find out the defendant after using all due and reasonable diligence. Where the process-server was told that the defendant had gone out on business and would be back in the evening and he thereupon affixed the summons to the door of the house, it cannot be said that the summons has been duly served, for it could not be said that reasonable diligence had been used to find out the defendant. (*Mulla, J.*) SALIG RAM *v.* JUMNA SAHAI. **180 I.C. 514=11 R.A. 474=1938 A.W.R. (H.C.) 750=1938 A.L.J. 1166=A.I.R. 1939 All. 180.**

——**O. 5, R. 19**—*Scope—Compliance with—Duty of Court—Affidavit of process-server and verification—If can be acted upon—Express declaration of due service—Necessity for.*

Rule 19 of O. 5. C. P. Code, casts a duty on the Court, when a summons is returned under R. 17, to either declare that the summons has been duly served or to order such service as it thinks fit. It is not enough for the Court to merely act mechanically on the affidavit of the service officer. The rule requires that the Court ought to be satisfied on the affidavit of the serving officer and on the verification in the return that it can safely declare the summons properly served. When there is no such declaration, the mere fact that the Court declares the defendant *ex parte*, does not lead to the conclusion that the Court has impliedly made such a declaration of due service. There must be a strict compliance with R. 19. (*Venkataramana Rao, J.*) V. GOPALA CHETTIAR *v.* MARIASUSAI PILLAI. **1937 M.W.N. 184 (2).**

C. P. CODE (1908), O. 5, R. 20.

——**O. 5, R. 19**—Scope—Duty of Court—Summons not personally served—Omission to declare service sufficient—Effect. *See* C. P. CODE, S. 11. **71 M.L.J. 317.**

——**O. 5, R. 19**—*Scope—Express declaration of sufficiency of service of summons—Absence of —Effect of—If ground for holding that summons has not been duly served—Implied declaration—Inference from circumstances.*

It is of course desirable that all Courts should observe the mandatory provision in O. 5, R. 19, C. P. Code, and "either declare that the summons has been duly served or order such further service as it thinks fit." But it cannot be said that the absence of such an express declaration will involve as a necessary consequence a finding that a summons has not been duly served. There may be circumstances which would justify an inference that there has been an implied, though not express, declaration of sufficiency of service. (*Burn and Stodart, JJ.*) VENKATA RAYANIM VARU *v.* CHINNA BAPANNA. **1939 M.W.N. 1197=50 L.W. 938=A.I.R. 1940 Mad. 213=(1939) 2 M.L.J. 934.**

——**O. 5, R. 19**—*Scope—Non-compliance—Effect.*

The provision of O. 5, R. 19, will apply to all cases in which return of summons is made under O. 5, R. 17 whether due to absence or refusal of person to be served. Even in the case of a refusal, unless there is a declaration by the Court that the service under O. 5, R. 17, is sufficient as required by the provisions of O. 5, R. 19, any order passed by the Court in the absence of judgment debtor will not constitute as *res judicata*. (*Pandrang Row and Menon, JJ.*) RAMANADHAN CHETTIAR *v.* VEERAPPA CHETTIAR. **173 I.C. 468= 10 R.M. 591=A.I.R. 1937 Mad. 84.**

——**O. 5, R. 20**—*Substituted service—Propriety —House found to be locked—Avoiding of service —If can be inferred.*

From the mere fact that when the notice of execution was taken to the house of the judgment-debtor for the first time, the house was found to be locked, it is very unsafe to infer that he was avoiding service; and it is not proper to order substituted service in such case. (*Harper, S M. and Sathe, J.M.*) KHALIL UDDIN *v.* ABDUL ALI. **1940 R.D. 332=1940 A.W.R. (B.R.) 141 =1940 O.A. 864.**

——**O. 5, R. 20**—*Substituted service—When could be ordered—Conditional order to serving officer—Legality.*

Where in an order for fresh summons a Court remarked that if the defendant evaded service or could not be found after due care and diligence substituted service would be effected, it was held that such a conditional order was illegal, as it was for the Court and not for the serving officer to determine whether there was evasion of service. O. 5, R. 20 allows substituted service only when the Court is satisfied that defendant is evading service. (*Weston, I.C.S.*) GOVIND RAM *v.* NIRANJAN LAL. **1938 A.M.L.J. 43.**

——**O. 5, R. 20**—*Substituted service—When not sound service.*

Substituted service may or may not be sound service. It is not sound service if the person on whom the notice was sought to be served can prove that in actual fact he was not evading service and knew nothing whatever about the

C. P. CODE (1908), O. 5, R. 20.

hearing in question. (*Davies, I.C.S.*) MUNSHI RAM *v.* RAJ KUMAR. 1938 A.M.L.J. 124.

——O. 5, R. 20 (2)—"Effectual"—Meaning of. *See* LIMITATION ACT, ART. 164. 1939 Rang.L.R. 606.

——O. 5, R. 20 (2)—*Scope and effect of—Substituted service—Adequacy of service—If can be questioned.*

Under O. 5, R. 20 (2), C. P. Code, service substituted by the order of the Court is as effectual as if it had been made on the defendant personally, but, it does not follow that substituted service is necessarily due service, the adequacy of which can never be questioned by the party concerned. (*Smith, J.*) GAJADHAR *v.* UMA DUTTA. 171 I.C. 617=10 R.O. 139=1937 O.L. R. 572=1937 O.W.N. 1141=A.I.R. 1938 Oudh 11.

——O. 5, R. 21—*Service by post on defendant living in British India—Legality.*

There is no provision of law by which summons may be issued by post on a defendant residing within British India. (*D. R. Norman.*) RANI VESHNI *v.* GANESH MAL SARDAR MAL. 1937 A.M.L.J. 70.

——O. 6, Rr. 1 and 4—*Scope—Particulars of allegation in petition or affidavit—Power of Court to direct.*

The Court, under its inherent jurisdiction, is entitled to interfere and direct particulars if it considers that a litigant is substantially embarrassed owing to lack of precision in a petition or affidavit; and a party disregarding his opponent's request for particulars will be doing so at his own risk. Any relevant statement which could have been incorporated in the petition or furnished by way of particulars will not, on failure to furnish particulars, be allowed to be imported in an affidavit in reply at the hearing of the petition. (*Panckridge, J.*) SITARAM PODDAR *v.* HARIRAM PODDAR. 165 I.C. 24=9 R.C. 370 (1)=40 C.W. N. 913.

——O. 6, R. 4—*Pleadings—Deed impeached as 'fraudulent' and 'bogus'—Necessity to keep the two distinct.*

To call a deed both 'fraudulent' and 'bogus' is not a clear piece of pleading. Though fraud may be present in both cases, a deed may be fraudulent without being bogus and hence it is better to keep the two distinct. (*Gruer and Niyogi, JJ.*) GODBOLE *v.* MST. NANIBAI. I.L.R. (1940) Nag. 293=181 I.C. 297=11 R.N. 452=1938 N.L.J. 279=A.I.R. 1938 Nag. 546.

——O. 6, R. 5—*Filing of replication—Discretion of Court to reject.*

O. 6, R. 5, C. P. Code, only permits a better statement of the claim being put in when it is ordered by the Court. If the Court considers that no replication is called for, it has the discretion to reject it. (*Bhide, J.*) BIHARI LAL *v.* CHANDU LAL. 41 P.L.R. 650=A.I.R. 1939 Lah. 386.

——O. 6, Rr. 5 and 7—*Further statement of claim based on different cause of action—Permissibility.*

O. 6, R. 5, C. P. Code, permits merely a further and better statement of the nature of the claim or further and better particulars of any matter stated in any pleading, and not the submission of new material altogether based on an entirely different cause of action. This would be really

C. P. CODE (1908), O. 6, R. 6.

repugnant to R. 7 of the same order which unequivocally prohibits the raising of any new ground of claim or the alleging of any fact inconsistent with previous pleadings. (*Addison and Din Mohammad, JJ.*) MEHNGA DASS *v.* MAYA SINGH. 175 I.C. 382=10 R.L. 706=40 P. L.R. 881=A.I.R. 1937 Lah. 795.

——O. 6, R. 5—*Opportunity under not availed of—Subsequent formal amendment of plaint—Further pleadings—Case for.*

In a certain suit the defendant was given an opportunity to make a detailed statement under O. 6, R. 5, C. P. Code, on condition of his paying some amount as adjournment costs. The defendant refused this conditional offer. Subsequently the plaintiff applied for an amendment of the plaint and it was allowed. The amendment was of a formal nature, the parties being well aware of their position throughout. On such amendment, the defendant submitted his detailed statement previously refused by him but the Court refused to accept it as being belated.

Held, that the amendment of the plaint being of a formal nature, did not reopen the case so as to give the defendant a fresh opportunity irrespective of what had happened before. No case for further pleadings arose on such amendment and the Court in refusing to accept defendant's statement rightly disallowed him to take advantage of the technical plea. (*Gruer, J.*) GANBA PAIKU KUNBI *v.* GANPATSAO. I.L.R. (1937) Nag. 498=176 I.C. 155=11 R.N. 35=A.I.R. 1937 Nag. 376.

——O. 6, R. 5—*Particulars—Power to order and to dismiss suit, if not furnished—Order of dismissal—Interference by appellate Court—Attitude of Courts with reference to failure to give particulars.*

Where a plaintiff is ordered to give particulars one of the terms of the order may be that the action shall be dismissed unless the particulars are delivered within a certain time. Where a trial Judge makes an order of dismissal and makes it fairly giving every kind of chance, an appellate Court, if indeed it has any power at all to interfere with such a discretion so judicially exercised, should be exceedingly slow to do so. Broadly speaking, it is not desirable that cases should be lost in this way. It is not desirable that Judges should be stringent where it comes to dealing with litigants who may have gone wrong because of ignorance or wrong advice. It is not advisable on the other hand to allow litigants to take up a contumacious attitude, holding their facts back until they have an opportunity of fishing about in their opponent's evidence. (*Stone, C.J. and Bose, J.*) GAJADHAR *v.* GOKULDAS. 1940 N.L.J. 307=A.I.R. 1940 Nag. 261.

——O. 6, R. 5—*Scope—Further and better particular not asked for—Effect—Objection on the score of vagueness—Maintainability in appeal.*

It is not open to a defendant to make a grievance of any vagueness in the plaintiff's pleadings at an appellate stage because if they so desired, it would be open to them to apply for further and better particulars under O. 6, R. 5, C. P. Code. (*Edgley, J.*) K. C. DE *v.* HIRA BEWA. I.L.R. (1937) 1 Cal. 491=167 I.C. 461=9 R.C. 695=41 C.W.N. 88=A.I.R. 1937 Cal. 51.

——O. 6, R. 6—*Contract—Breach—Suit by seller for damages against buyer for failure to take*

C. P. CODE (1908), O. 6, R. 7.

delivery—Averment as to readiness and willingness—Necessity.

Where in suit by the seller against the buyer for failure to take delivery of goods, it was pleaded that there was no averment in the plaint as to readiness and willingness.

Held, that the actual allegations coupled with the fact of the pleadings being moffussil pleadings and that some latitute should be allowed, are enough, to show that the claim cannot fail for failure to comply with technical rules of pleading. (*Stone, C.J. and Niyogi, J.*) ARJUNSA *v.* MOHANLAL. I.L.R. (1938) Nag. 308=172 I.C. 812=10 R.N. 246=A.I.R. 1937 Nag. 345.

——O. 6, R. 7—Applicability to minors. *See* C. P. CODE, O. 8, R. 9 AND O. 6, R. 7. A.I.R. 1937 Pat. 625.

——O. 6, R. 10—*Plea of insanity—Pleadings—Contents—Duty of final Court of fact.*

Though it may be that a party seeking to avoid the effect of a deed by pleading insanity at the time of execution of the deed is not bound to plead circumstances from which he was bound to establish insanity and though it is permissible for him to lead evidence in proof of general insanity from which an inference of unfit mental condition at the time of the deed could be drawn and the burden lay on the opposite party to prove the contrary, that does not absolve the Court from the liability to scrutinise the pleadings of the parties when pleas have been made and if these pleas appear to be destructive of the case of usual insanity it will not be proper for the final appellate Court of fact to infer usual insanity from the statement of some witnesses ignoring the pleading. (*Puranik, J.*) MST. HAZRA BI *v.* MST. FATMABI. 177 I.C. 80=11 R.N. 103=A.I.R. 1938 Nag. 204.

——O. 6, R. 14—*Co-plaintiff though named in plaint not signing plaint—Effect.*

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. The defect is not such as to justify the rejection of the plaint, but the co-plaintiff should be allowed to sign it. 17 Cal. 580 (P. C.), Rel. on. (*Mir Ahmad, A.J.C.*) GANGARAM *v.* SECRETARY OF STATE. 167 I.C. 158 =9 R. Pesh. 80=A.I.R. 1937 Pesh. 17.

——O. 6, Rr. 14 and 15—Scope—If excluded by O. 29, R. 1. *See* C. P. CODE, O. 29, R. 1. 41 Bom.L.R. 530.

——O. 6, R. 14—*Signing of pleadings—Rule, if merely one of procedure—Authorization—Signing, if necessary.*

R. 14 of O. 6, C. P. Code, which requires a pleading to be signed by the parties is merely a matter of procedure. So, where it is found that a suit was duly authorized by a person, the question whether his signature was made by him or by somebody else on his behalf becomes immaterial. (*Grille and Niyogi, JJ.*) SARJU PRASAD *v.* BADRI PRASAD. I.L.R. (1939) Nag. 515=188 I.C. 405=12 R.N. 338=1939 N.L.J. 333=A.I.R. 1939 Nag. 242.

——O. 6, Rr. 14 and 15—Suit by limited company—Plaint signed and verified by Secretary—Sufficiency—Affidavit testifying to Secretary's fitness to verify—Necessity. *See* C. P. CODE, O. 29, R. 1. 40 C.W.N. 930.

C. P. CODE (1908), O. 6, R. 17.

——O. 6, R. 15—Applicability to petitions to High Court in criminal revision. *See* PATNA HIGH COURT RULES, CH. III, R. 3. 19 Pat. 263.

——O. 6, R. 17 and United Provinces Encumbered Estates Act, S. 9—*Addition of claim—If permissible—Amendment of written statement after period fixed by S. 9 of United Provinces Encumbered Estates Act—Additional claims—If can be allowed.*

O. 6, R. 17, C. P. Code, would not enable a party to alter the nature of his suit by the substitution or the addition of a claim founded on a different cause of action. Where a creditor seeks to amend his written statement of the period permitted by S. 9 of the United Provinces Encumbered Estates Act for the filing of a written statment, by the addition of certain claims on previously not mentioned mortgages, he cannot be permitted to amend his written statement as it makes a material change in the claim made in the written statement. (*Zia-ul-Hasan, C.J. and Bennet, J.*) NAZIR HASAN KHAN *v.* GANGA DIN. 14 Luck. 701=183 I.C. 436=1939 O.W.N. 755=1939 A. W.R. (C.C.) 123=1939 R.D. 467=1939 O.L.R. 523=12 R.O. 34=A.I.R. 1939 Oudh 245.

——O. 6, R. 17—*Amendment — Considerations.*

The provisions of the Civil Procedure Code allow a wide discretion to the Courts in the matter of amendment of pleadings. The main considerations to be borne in mind while allowing amendment of pleadings are the advancement of the interest of substantial justice and the avoidence of the multiplicity of litigation. (*Srivastava, Ag.C.J. and Zia-ul-Hasan, J.*) MOHD. ATA HUSAIN KHAN *v.* NAWAB BAGAR MIRZA. 13 Luck. 584=171 I.C. 33=10 R.O. 66=1937 O.L. R. 514=1937 O.W.N. 1131=A.I.R. 1937 Oudh 484.

——O. 6, R. 17—*Amendment—Considerations—Inconsistent case, involving fresh trial.*

O. 6, R. 17, C. P. Code, restricts amendments to matters necessary for determining the real question in controversy between the parties. Where the amendment sought would introduce a new and inconsistent case involving fresh trial with fresh pleadings and fresh evidence, it ought not to be allowed. (*Stone, C.J. and Bose, J.*) BADRIDAS *v.* RAJA PRATAPGIR. 188 I.C. 23=12 R.N. 304=1939 N.L.J. 525=A.I.R. 1940 Nag. 8.

——O. 6, R. 17—*Amendment—Discretion of Court—Amendment adding another ground of exemption from limitation.*

The amendment of pleadings is no doubt in the discretion of the Court. But that discretion must be exercised on judicial principles. Where a party seeking amendment does not propose to substitute one cause of action for another or to change the subject-matter of the suit but simply wants to add another ground of exemption from limitition, the amendment should be allowed. (*Nasim Ali and Edgley, JJ.*) JOGENDRA *v.* DEBENDRA. 173 I.C. 707=10 R.C. 564=41 C.W.N. 1084 =A.I.R. 1937 Cal. 485.

——O. 6, R. 17—*Amendment—Power of Court to order—Party allowed time to pay deficit Court-fees.*

The Court has undoubtedly power to allow abandonment of part of a claim on the part of the plaintiff, or to order an amendment of the pleadings under O. 6, R. 17, C. P. Code, at any time

after institution of the suit. The Court does not lose this power by reason of the fact that the party has been allowed a certain time for payment of the deficit Court-fees. (*S. K. Ghose and D. C. Patterson, JJ.*) MST. SAIYADUNNESSA KHATUN *v.* THE GAIBANDA LOAN CO., LTD. 172 I.C. 897=10 R.C. 471=65 C.L.J. 199=A.I.R. 1937 Cal. 562.

——O. 6, R. 17—*Amendment—If in the complete discretion of Court—When obligatory—Pronote forming part of the cause of action found inadmissible—Amendment to permit falling back upon the original debt—If can be allowed.*

Though, O. 6, R. 17, C. P. Code, begins with the words 'the Court may', the latter portion indicates that if the amendment is permissible under the law otherwise the Judge has no discretion but to allow it, if it is necessary for determining the real question in controversy between the parties. Where a suit was for monies due on a mortgage as evidenced by a pronote and a deposit of title deeds, but the pronote was found to be inadmissible in evidence, the plaintiff could be permitted to amend his plaint, so as to base his cause of action on the original debt for which the defective pronote was given. There could be no prejudice to the other party such as could not be compensated by costs, and the suit, would still remain after the amendment, a suit to recover money on a mortgage created by deposit of title deeds. (*Baguley and Mosely, JJ.*) NIEMEYER *v.* E. M. MAMOOJI. 1938 Rang.L.R. 521=180 I.C. 519=11 R.R. 411=A.I.R. 1938 Rang. 461.

——O. 6, R. 17—*Amendment in appeal—Amendment not changing character of suit and not unfair—If can be made in appeal.*

An amendment which is not of such a character as to be objectionable either as changing the subject-matter of the suit or as being otherwise unfair is within the competence of the Court under O. 6, R. 17 and can be made even in appeal. (*Sir George Rankin.*) RAMDHAN PURI *v.* LACHMI NARAIN. 16 Pat. 149=166 I C. 649=9 R.P.C. 167=45 L.W. 191=1937 O.W.N. 155=18 Pat.L.T. 54=1937 A.W.R. 184=41 C W.N. 418=1937 M.W.N. 251=1937 P.W.N. 87=3 B.R. 318=65 C L.J. 47=39 Bom.L.R. 363=1937 O.L.R. 68=1937 A.L.J. 556=1937 A.L.R. 119=A.I.R. 1937 P.C. 42 (P.C.).

——O. 6, R. 17—*Amendment in appeal — Propriety.*

An amendment of the plaint may be allowed even at the appellate stage. It is for the Court to consider whether the amendment should be allowed under the circumstances of the case; and if it comes to the conclusion that the amendment sought does not alter the substance or nature of the suit, but merely its form, the Court cannot be said to act erroneously if it allows the amendment even in appeal (*Wort, J.*) MATHURA SAO *v.* RAM LAL JUGAL KISHORE. 176 I.C. 870=4 B. R. 781=11 R.P. 125=1938 P.W.N. 398=A.I.R. 1938 Pat. 400.

——O. 6, R. 17—*Amendment in appeal on ground of mistake in typing—Permissibility.*

Where the plaintiff-appellant prays in appeal for amendment of the plaint on the ground of mistake having been made in the typing of the draft plaint, but no sufficient explanation is offered why the alleged mistake was not discovered by the plaintiff till after the disposal of the case by the lower Court, it is not a case in which the High Court would in appeal exercise its discretion in allowing the amendment. (*Mahommad Noor and Varma, JJ.*) APURBA KRISHNA MITRA *v.* RAM BAHADUR. 161 I.C. 862=8 R.P. 489=1936 P.W.N. 155=A.I.R. 1936 Pat. 191.

——O. 6, R. 17—*Amendment in second appeal—Permissibility—Principles.*

There is nothing to preclude the Court from allowing an amendment necessary for the purpose of determining the real question in controversy between parties even in second appeal but except under exceptional circumstances it should not be allowed. In exercising discretion whether such an amendment should be allowed or not, the first principle to be observed is that an amendment is not permissible when it would prejudice the right of the opposite party existing on the date of such amendment. It is not a question whether the defendant would be taken by surprise by such an amendment or not, but whether by allowing such amendment, prejudice and injustice would be caused to him. The second principle to be observed is whether the conduct of the party seeking the amendment has been *bona fide* and he has come to Court with clean hands and whether by the exercise of due diligence the relief for amendment could have been sought earlier. (*Venkataramana Rao, J.*) RAMASWAMI CHETTI *v.* ANAIYA PADAYACHI. 165 I.C. 737=9 R.M. 293=1936 M.W.N. 411=A.I.R. 1936 Mad. 545.

——O. 6, R. 17—Amendment in second appeal—Permissibility—Suit for bare declaration—Plea of non-maintainability raised in trial Court—Application for amendment in second appeal—Competency. *See* SPECIFIC RELIEF ACT, S. 42. 1938 M.W.N. 274=A.I.R. 1938 Mad. 331.

——O. 6, R. 17—*Amendment in second appeal—Power of Court to allow.*

The Court should not at the stage of second appeal allow the plaintiff to change the whole nature of the suit, particularly when even at this late stage the materials for deciding this new case are not before the Court. (*Harries, C.J. and Dhavle, J.*) DHANU LAL *v.* KULDIP NARAYAN SINGH. 186 I.C. 852=12 R.P. 539=6 B.R. 403=A.I.R. 1940 Pat. 88.

——O. 6, R 17—*Amendment of plaint—Considerations—Legal relationship and nature of suit—Alteration of—If permissible.*

An amendment of the plaint should not be allowed when plaintiff seeks to amend in order to sue on an entirely different legal relationship between himself and the defendant from that relied upon in the original plaint, and when the entire nature of the suit is sought to be changed. (*Weston.*) NIHAL CHAND *v.* AMAR CHAND. 1937 A.M.L.J. 104.

——O. 6, R. 17—*Amendment of plaint—Introduction of fresh details—Permissibility.*

It is not by a mere change in the wording of the plaint or the introduction of fresh details that the nature of a suit is altered. The alteration which affects the case is one where the original suit is wholly displaced by the proposed amendment or where a totally different or inconsistent case is introduced. But where this is not the case, leave to amend cannot be refused

merely on the ground that the words which did not find place in the original plaint had been introduced in the subsequent plaint, even though the effect of those words is not to introduce a new or an inconsistent case. (*Addison and Din Mohammad, JJ.*) MEGH RAJ *v.* FIRM, RAGHBAR DAS. 178 I.C. 1005=11 R.L. 514=A.I.R. 1938 Lah. 712.

——O 6, R. 17—*Amendment of plaint—Limitation—No new cause of action introduced.*

Where an amended plaint did nothing more than furnish particulars and did not introduce any new cause of action, no question of limitation could arise in such a case. (*Bose, J.*) RAMNATH HAJARIMAL *v* MOHANLAL RADHAKISAN. 181 I. C. 106=11 R.N. 424=1939 N.L.J. 21=A.I.R. 1939 Nag. 23.

——O. 6, R. 17—*Amendment of plaint—Misdescription of opposite party.*

A firm brought a suit against another firm working in the Patiala State. The description of the opposite party was given as "firm *S* situate at Patiala State through *C*, manager and proprietor of the said firm." An objection being brought that O. 30, R. 1 benefited firms in British India only and not the firms working in the Indian States, the plaintiff applied that the plaint should be allowed to be amended by substituting the name of *C*, the sole proprietor and manager of the firm in place of firm *S*.

Held, that in view of the fact that the name of *C* was already on the record and that the only defect in the plaint was that the opposite party had been wrongly described, the amendment ought to be allowed. (*Addison, Ag.C.J. and Din Mohammad, J.*) KISHEN SINGH *v.* SALIG RAM. 181 I. C. 713=11 R.L. 880=A.I.R. 1938 Lah. 718.

——O. 6, R. 17—*Amendment of plaint—Permissibility—Plaint reading certain document in particular way—Amendment by reading the document in another way.*

When a claim is made on a document the fact that at one stage when a plaint was presented it was read in a particular way and at another time, when it is sought to be amended, it is sought to be read in another way, will certainly not justify the view that a new and inconsistent claim is sought to be introduced. These are really alternative ways of reading the document and it will be for the Court ultimately to decide what its correct construction is, and in such a case amendment of the plaint should be allowed. (*Varadachariar, J.*) SUBRAMANIAN NAMBOODRIPAD *v* VASUDEVAN NAMBOODRIPAD. 160 I.C. 989=8 R.M. 739 (1)=A.I.R. 1936 Mad. 151.

——O. 6, R. 17—Amendment of plaint—Revision. *See* C. P. CODE, S. 115—'CASE DECIDED.' 1937 A.M.L.J. 104.

——O. 6, R. 17—*Amendment of plaint—When not permissible.*

Although the Court has wide powers to allow amendment under O. 6, R. 17, it is well established that an amendment which changes the whole aspect of the suit and introduces a different cause of action cannot be allowed. Where a plaintiff sues for a declaration that the properties in dispute are trust properties, but subsequently seeks an amendment that she has a life interest in the property or at any rate a charge for maintenance, the claim sought to be introduced by way of

amendment is wholly inconsistent with the original plaint. (*Bhide, J.*) NAZIR AHMAD *v.* TAJ MAHAL BEGUM. 186 I.C. 828=12 R.L. 425 =A.I.R. 1940 Lah. 63.

——O. 6, R. 17—*Amendment of plaint—When to be disallowed—New case—Late stage.*

It is wrong for a Court considering amendment to regard the new cause of action as in time if it was in time when the original suit was brought. Where a suit was originally brought on an acknowledgment and after the case was all over except for the arguments the plaintiff seeks to amend his plaint so as to found his claim on an earlier agreement, the prayer for amendment should be refused as being not only out of time, but made at a very late stage. It is an amendment that introduces a new case, a new cause of action, a new contract, a contract made at a different time having a different period of limitation and having different legal consequences and so ought not to be allowed. (*Stone, C.J. and Bose, J.*) LACHHMANSINGH *v.* MAHENDRALAL. I.L.R. (1939) Nag. 194=176 I.C. 728=11 R.N. 72=1938 N.L.J. 198=A.I.R. 1938 Nag. 388.

——O. 6, R. 17 — Amendment — Seeking to substitute one legal entity for another—If to be permitted after limitation. *See* LIMITATION ACT, S. 22. I.L.R. (1939) Kar. 275=A.I.R. 1939 Sind 172.

——O. 6, R. 17—*Amendment without notice to other side—Propriety.*

Where a plaint was returned for amendment and was amended without notice to the other side, and the amendments were all important, the order was set aside and case remanded for trial on the original plaint. (*Davies.*) GOPAL *v.* KANI RAM. 1939 A.M.L.J. 112 (1).

——O. 6, R. 17—*Appeal—Decree against two defendants—Appeal by one only—Appeal in form against whole decree—Court-fee paid only as regards part—Application to amend valuation and to pay additional court-fee—Duty of Court.*

Where an appeal by one defendant only from a decree against two is objected to on the ground that the valuation of the appeal is restricted to that part only which relates to the appellant, if the appellant offers to amend the valuation and pay the difference of Court-fee, the same must be accepted by the Court especially when the appeal in form is against the whole decree. (*Courtney-Terrell, C. J. and James, J.*) SARAT CHANDRA PATNAIK *v.* BAIDYANATH. 181 I.C. 840=11 R.P. 646=5 B.R. 682=1938 P.W.N. 523=A.I.R. 1939 Pat. 162.

——O. 6, R. 17—Applicability — Insolvency petition by creditor—Amendment by inclusion of fresh acts of insolvency not pleaded or relied on originally—Power of Court to allow. *See* PROVINCIAL INSOLVENCY ACT, S. 9 (1) (*e*). (1937) 2 M.L.J. 737.

——O. 6, R 17—*Applicability—Party deliberately omitting to join necessary party to application and concealing existence—Subsequent application to amend—If can be allowed.*

Where an applicant under S 4 of the U. P. Encumbered Estates Act does not join in his application all the necessary parties as required by law, and asserts that there are no other parties to be added, wilfully concealing the existence of some persons who ought to be impleaded, he cannot be permitted to amend his application by

adding the omitted parties, when the omission is brought to light by a creditor. The benefit of O. 6, R. 17 cannot be given to such a party. (*Darling, S. M. and Bomford, J. M.*) HAR PRASAD *v.* PARMESHWARI DAS. **1938 R.D. 137=1938 A.W. R. 44 (B.R.).**

——O. 6, R. 17—*Cause of action—Amendment introducing new cause of action—Suit for ejectment and for damages for use and occupation—Amendment to include prayer in the alternative for possession on title—Permissibility.*

A vendee of property sued for ejecting the tenant on the property and for damages for use and occupation, alleging that the defendant was his vendor's tenant and had refused to attorn to him, asserting his own title. After the death of the original defendant, his legal representatives came on the record and pleaded that they were in possession in their own rights. Plaintiff applied for leave to amend the plaint to sue in the alternative for possession on the basis of his title.

Held, the amendment could not be allowed as it sought to introduce a different cause of action and as moreover its refusal would not prejudicially affect the plaintiff in a future suit based on title even if he failed in the present suit. (*Weston.*) CHAND MAL *v.* MOHAMMAD HUSSAIN. **1935 A.M.L.J. 100.**

——O. 6, R. 17—*Cause of action—Changing of—Suit for recovery of land based on unprovable usufructuary mortgage—Amendment to base suit on title—Permissibility.*

Where a person brings a suit for recovery of possession of land but it is found that in fact his claim is for redemption of an unprovable usufructuary mortgage, such person cannot be allowed an amendment of the pleadings by basing his suit on his title, the causes of action for the two suits being different. (*Baguley, J.*) U NAING *v.* KO SEIN. **176 I.C. 631=11 R.R. 64=A.I.R. 1938 Rang. 125.**

——O. 6, R. 17—*Cause of action—Suit on promissory note—Amendment to base claim on original cause of action—Permissibility.*

A suit was filed on a promissory note bearing a certain date. In the plaint several previous promissory notes were mentioned with respective dates of their execution. The plaintiff, in order to avoid the provisions of the Indian Paper Currency Act, 1923, applied for leave to amend his plaint basing his claim on an original promissory note and treating subsequent notes including the suit note as acknowledgments of the original debt. As one of these notes was time-barred being executed more than three years after the preceding note, the plaintiff applied for further leave treating the time-barred note as one containing promise to pay a time-barred debt and basing his cause of action on that note. These amendments were allowed by Court.

Held, that the fresh promise to pay the time-barred debt was the original cause of action in respect of the suit on the promissory note and the Court in granting the amendments, only allowed the plaintiff to fall back upon the original cause of action. (*Venkatasubba Rao, J.*) CHELLAM SAKKA RAJA *v.* MUTHUSWAMY MOOPAR. **165 I.C. 503=9 R.M. 264=44 L.W. 267=1936 M.W. N. 486=A.I.R. 1936 Mad. 632=71 M.L.J. 166.**

——O. 6, R. 17—*Conditional order—Amendment allowed subject to applicant's paying costs before particular date—Non-applicant's appeal against order before date—Subsequent acceptance of costs by him—Right to have appeal heard.*

Where an application is sought to be amended and the amendment is allowed conditional upon the applicants paying costs before a particular date but before that date the non-applicant prefers an appeal against the order of amendment, the appeal is valid though the non-applicant accepts the costs when tendered on the due date. A.I.R. 1934 Nag. 163, Dist. (*Grille, J.C.*) SADASHIV RAO *v.* BALMUKUND. **A.I.R. 1936 Nag. 20.**

——O. 6, R. 17—Delay—Omission to state in plaint ground of exemption from limitation—Subsequent amendment in second appeal—Permissibility. *See* C. P. CODE, O. 7, R. 6. **20 N.L. J. 42.**

——O. 6, R. 17—*Discretion—Amendment, at late stage to avoid payment of Court-fee—If can be allowed.*

No party has an absolute right to abandon any portion of his claim at any stage. It is always in the discretion of the Court whether to allow an amendment of the plaint or memorandum of appeal or refuse it. Where a party has obtained an adjudication of his claim from the trial Court or has argued his case in respect of it in the Court of appeal, he cannot thereafter be permitted to amend his plaint or memorandum of appeal by abandoning a part of his claim with a view to save himself from the payment of Court-fee. (*Srivastava and Zia-ul-Hasan, JJ.*) IBN-UL-HASAN *v.* USMAN AHMAD. **178 I.C. 635=11 R. O. 119=1938 O.L.R. 499=1938 O.W.N. 1138=1938 A.W.R. (C.C.) 131=1938 O.A. 917.**

——O. 6, R. 17—*Discretion—Power of Court—Amendment after claim barred by limitation—If can be allowed.*

The right of allowing an amendment, although a matter of discretion, should not be exercised where the party affected thereby has acquired a valuable right and not unless in very special circumstances. Where in a mortgage suit the mortgagor makes no claim to money decree, allows time to go by and makes no application for leave to amend till his claim is barred by limitation, but subsequently applies for leave to amend, although there is still a discretion in the Court to allow amendment, the discretion will as a general rule be more wisely exercised by refusing it. (*Wort and Rowland, JJ.*) RAMKARAN THAKUR *v.* BALDEO THAKUR. **17 Pat. 168=173 I C. 292=4 B.R. 256=10 R.P. 398=A.I.R. 1938 Pat. 44.**

——O. 6, R. 17—*Discretion of Court—Leave to amend—When to be granted—Considerations for Court.*

O. 6, R. 17, C. P. Code, leaves it to the discretion of the Court to grant an amendment. Leave to amend would generally be granted to enable the Court to determine the real question in issue between the parties, provided that the amendment will occasion no injury to the opposite party except such as can be compensated for by costs or other terms to be imposed by the Court. If the defendant is in no way prejudiced and is not deprived of any legitimate plea that he can raise, including the plea of limitation, and if no new cause of action is introduced by the amendment, leave to amend should be granted. (*Madhavan Nair, J.*) KONDAMMA *v.* VENKATARAYUDU. **183 I.C. 882=12 R.M. 378=1938 M.W.N. 875=48**

C. P. CODE (1908), O. 6, R. 17.

L.W. 498=A.I.R. 1939 Mad. 34=(1938) 2 M.L. J. 846.

——O. 6, R. 17—*Discretion of Court—Suit for accounts—Conversion into one on account—Permissibility.*

A suit was instituted for an account and amendment of the plaint was sought by the plaintiff to convert the suit into one on account. The plaint required amendment in many particulars and the plaintiff would have been in no better position as far as limitation was concerned by the amendment. The suit was purposely brought in the form of a suit for an account.

Held, that amendment was a discretionary relief and taking into consideration the facts of the case amendment could not be allowed. (*Ruphand Bilaram and Mehta, A. J. Cs.*) MULOMAL KHEMCHAND *v.* TARACHAND DASSUMAL. **161 I.C. 505=8 R.S. 147=A.I.R. 1936 Sind 9.**

——O. 6, R. 17—Discretion of Court—Suit to avoid patni sale—Plaint not framed in accordance with Patni Sale Law—Objections by defendant in written statement—Application for amendment at the close of suit—Competency—Rejection by Court—Interfernece in appeal. *See* BENGAL PATNI REGULATION, S. 14. **40 C.W.N. 1233.**

——O. 6, R. 17—*Discretion of Court to allow amendment—Principles governing.*

The general principles on which the discretion vested in the Courts under O. 6, R. 17, C. P. Code, is to be exercised, are: (1) The Court does not allow a party by amendment as a rule to raise against his opponent a new case. It allows him in certain circumstances and upon certain conditions to implement or to perfect some case which he has already pleaded but in which for some reason or other there is a defect. What it does not allow him to do as a rule is to raise a fresh case. (2) Whenever it is necessary for the purpose of doing justice, it will strive to allow amendments in all cases where the opposite party can be compensated in costs. (3) The Court will not as a rule permit a party by amendment to take away from his opponent some legal right that that opponent has acquired. By far the most frequent illustration of that principle arises in connexion with limitation. It may be that, before the time comes at which a plaintiff asks to amend his plaint, the defendant has acquired a complete legal answer to the amended claim under the statute of limitation. The general principle is that, unless in very exceptional circumstances, the Court will not allow a defendant to be dispossessed of that legal statutory defence by the expedient of the plaintiff making an amendment and then antedating that amendment to the date of the delivery of the original plaint. A plaintiff sued on equitable mortgage for debt due on a promissory note at a time when the limitation had almost run out. As the stamps on the promissory note were defective, the promissory note could not be admitted. The plaintiff applied for amendment of the plaint by alleging some anterior or collateral obligation to the promissory note itself. The result of the refusal would have been merely to deprive him of a personal right against the defendant, leaving the plaintiff's remedy against the defendant's property intact.

Held, that there were no special circumstances to deprive the defendant of the legal defence of limitation and that the amendment should not be allowed. (*Braund, J.*) MARY NIEMEYLR *v.* EBRAHIM MOOSAJI. **178 I.C. 144=11 R.R. 203=A.I.R. 1937 Rang. 413.**

——O. 6, R. 17—*Discretion of trial Court—Interference.*

The trial Court has complete discretion whether to allow or refuse a prayer for an amendment of pleadings and where the discretion has not been exercised injudiciously or arbitrarily, the High Court will not interfere. (*Addison and Din Mahomed, JJ.*) JAINI BROTHERS & Co. *v.* SHANKAR LAL. **178 I.C. 176=11 R.L. 414=A.I.R. 1938 Lah. 270.**

——O. 6, R. 17—*Late stage—Belated application—If sufficient to justify refusal of amendment.*

Where in a suit for his share in a partnership which the plaintiff alleged was dissolved prior to date of suit but which was denied by the defendants, and the plaintiff applied to amend the plaint after considerable delay, so as to enable him to obtain an alternative relief for partition of the assets in case there was no dissolution of the partnership.

Held, that in the matter of rectifying defects in pleadings which do not affect any substantial rights, it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay.

Held, further, that in the circumstances of the case the lower Court ought to have allowed the amendment of the plaint. (*Pandrang Row and Venkataramana Rao, JJ.*) SAMBASIVA IYER *v.* NATESA IYER. **176 I.C. 821=11 R.M. 167 (2)=1938 M.W.N. 22=A.I.R. 1938 Mad. 388=(1938) 1 M.L.J. 106.**

——O. 6, R. 17—*Limitation—Powers of Court—Claim barred on date of application to amend—Amendment—If can be allowed.*

Where on the date of the application for leave to amend the plaint, the claim in the suit was barred by limitation, the Court has power to make amendments in the plaint under the special circumstances of the case. (*Venkatasubba Rao, J.*) CHELLAM SAKKA RAJA *v.* MUTHUSAMY MOOPAR. **165 I.C. 503=9 R.M. 264=44 L.W. 267=1936 M.W.N. 486=A.I.R. 1936 Mad. 632=71 M.L.J. 166.**

——O. 6, R. 17—*Limitation—Promissory note—Settlement of accounts—Suit on—Amendment to include claim on original consideration—If can be allowed—Promissory note barred.*

Where all the facts of the original loan and all its terms are set out in the plaint, but the plaint is based on a promissory note which is either insufficiently stamped or barred by limitation, the plaintiff is entitled to succeed alternatively on the original loan, although there is no such prayer in the plaint. Where in a suit on a promissory note executed in settlement of accounts between the parties the defendant pleads discharge and limitation, but the discharge is found against, and the claim is found to be in time on account of certain payments made by the defendant, though the promissory note itself may be barred, the defendant cannot in any way be prejudiced by allow-

C. P. CODE (1908), O. 6, R. 17.

ing an amendment of the plaint so as to include a prayer for a decree in the original cause of action, irrespective of the promissory note. Such an amendment ought to be allowed and the plaintiff given a decree on that basis. (*Beasley, C.J., King and Gentle, JJ.*) OFFICIAL ASSIGNEE OF MADRAS *v.* KUPPUSWAMI NAIDU. 165 I C. 301=9 R.M. 229=1936 M.W.N. 912=44 L.W. 258=A. I.R. 1936 Mad. 785=71 M.L.J. 250 (F.B.).

——O. 6, R. 17—*Limitation—Promissory note—Suit on—Amendment basing cause of action on original consideration—Whether can be allowed after limitation.*

The plaintiff instituted a suit on a promissory note just before the expiry of the period of limitation. It was then discovered that two of the stamps on the promissory note had not been properly cancelled and that, therefore, it could not be acted upon. The plaintiff thereupon applied to be allowed to amend the plaint so as to base the cause of action on the original consideration for the promissory note, and this amendment was allowed. At the date of the amendment the claim was barred by limitation.

Held, that the amendment was properly allowed, for in the original plaint an alternative claim based upon the original consideration could have been made and then no question of limitation could have arisen, and that it would be monstrous that the plaintiff should lose his money merely because of a technical error in the execution of the promissory note. (*Dunkley, J.*) KRISHNA PRASAD SINGH *v.* MA AYE. 14 Rang. 383=165 I. C. 810=9 R.R. 223=A.I.R. 1936 Rang. 508.

——O. 6, R. 17—*Limitation—Suit filed in firm name—Cause of action arising after its dissolution by death of partner—Substitution of individual names of partners and of legal representative of deceased partner—If may be allowed after limitation.*

A suit was filed in the name of a partnership firm in respect of a cause of action which accrued after the partnership was dissolved by the death of one of the partners. An application for the amendment of the plaint by substitution of the individual names of the partners and of the legal representative of the deceased partner, was filed after the period of limitation.

Held, that the amendment should be allowed only in regard to persons who were entitled to institute the suit in their individual names, but not in regard to the legal representative of the deceased partner. (*Panckridge, J.*) BISSESWARLAL BUDHMULL *v.* SUKHDEODAS BAIJU. 44 C. W.N. 806.

——O. 6, R. 17—*Nature of suit changed—Amendment of plaint in second appeal—Permissibility.*

Where the amendment of the plaint asked for is not an amendment merely in the form of relief which could be granted without further investigation, but is one which entirely changes the character of the suit and introduces matters which have not been tried in the Courts below and on which it is not possible to give a satisfactory finding on the record as it stands, it should not be allowed in second appeal. (*Tek Chand and Bhide, JJ.*) FAZAL BIBI *v.* ABDUL RAHIM. 42 P. L.R. 479.

C. P. CODE (1908), O. 6, R. 17.

——O. 6, R. 17—*New case.*

Where a plaintiff brought a suit for redemption and failed to establish the mortgage set up by him in the plaint and asked for permission to amend the plaint so as to convert the suit into a suit for redemption of an earlier mortgage, and if he instituted a fresh suit, it would be within limitation.

Held, it would be proper for him to institute a fresh suit. (*Srivastava, C.J.*) GAURI SHANKAR *v.* LALA. 13 Luck. 669=10 R.O. 123=171 I.C. 437=1937 O.L.R. 557=1937 O.W.N. 1121=A. I.R. 1938 Oudh 16.

——O. 6, R. 17—*New case—Surprise to defendant—Duty of Court.*

Courts must be careful not to allow a *volte de face* which would completely change the complexion of the pleadings and confront the defendant with a surprise attack, for which he cannot be expected to be prepared. Where a plaintiff in a suit under S. 86 of the Agra Tenancy Act sues as an occupancy tenant, the defendant being treated as sub-tenant but later gets himself styled *sir* holder, cannot thereafter seek to amend his pleadings and ask for the ejectment of the defendants as heirs of a statutory tenant. (*Mehta, J.M.*) PAUHARI SARAN *v.* SUNDAR AHIR. 1939 A.W.R. (B.R.) 78=1939 R.D. 274=1939 A.L.J. (Supp.) 66.

——O. 6, R. 17—*Plea not raised at the beginning—No ground for omission—Later amendment, if can be allowed.*

Where there has been no valid ground or excuse for the omission to raise certain pleas at the very beginning of the proceedings, amendment to permit those pleas being raised at a late stage, should be refused. (*Stone, C.J., and Bose, J.*) BADRIDAS *v.* PRATAPGIR. 188 I.C. 23=12 R.N. 304=1939 N.L.J. 525=A.I.R. 1940 Nag. 8.

——O. 6, R. 17—*Powers of Court—Limits to.*

No doubt the powers of the Court to permit amendments under O. 6, R. 17 are very wide and should be freely exercised, but the exercise of this jurisdiction must not be resorted to where prejudice is likely to result to the other side which cannot be compensated in costs. (*Davis, J.C. and Lobo, J.*) GOPAL DAS MOTHARAN *v.* LOKAMAL CHELLARAM. I.L.R. (1939) Kar. 602= 182 I.C. 718=12 R.S. 25=A.I.R. 1939 Sind 173.

——O. 6, R. 17—*Power of Court—Plaint for possession based on title — Power to compel amendment so as to allege possession and dispossession.*

Where the plaintiff bases his claim for possession on his title and defendant alleges adverse possession, the Court must determine the rights of the plaintiff on the plaint as it is framed and not on one which in the opinion of the Court would be proper. It is not open to the Court to compel the plaintiff to amend the plaint so as to allege possession and dispossession. (*Abdul Rashid, J.*) MEHTAB SINGH *v.* DAYAL SINGH. 183 I.C. 140=12 R.L. 99=41 P.L.R. 715=A.I.R. 1939 Lah. 172.

——O. 6, R. 17—Power of Court—Plaint in name of dead man—Application to amend by insertion of living man's name—If can be allowed — Gross neglect—Effect of. *See* C. P. CODE, O. 1, R. 10 AND O. 6, R. 17. A.I R. 1937 Sind 92.

——O. 6, R. 17—*Powers of Court—Substitution of cause of action.*

C. P. CODE (1908), O. 6, R. 17.

No power has been given to Courts to enable one distinct cause of action to be substituted for another nor can the subject-matter of a suit be changed by an amendment. (*Din Mohammad, J.*) KHUSHI RAM *v.* MUNSHI LAL. 189 I.C. 418=42 P.L.R. 194=A.I.R. 1940 Lah. 225.

——O. 6, R. 17—*Powers of Court—Suit against two defendants alleging them to be partners in business—Amendment of plaint on basis that defendant* 1 *carrying on business as guardian of defendant 2—If can be allowed.*

In the interests of justice even where a question of limitation might arise a Court can allow amendment; where a suit was instituted against two defendants alleging that they were partners in a business and all the necessary facts and circumstances under which the suit debt was incurred were clearly set out in the plaint and the amendment as sought and allowed by the lower Court was in accordance with the true facts that defendant 1 carried on the trade as guardian of defendant 2 in pursuance of a direction in the will of the father.

Held, that the amendment was properly allowed. (*Venkataramana Rao, J.*) PERUMAL AYYAR *v.* RAMASUBRAMANIAN CHETTIAR. 182 I.C. 340=12 R.M. 60=A.I.R. 1938 Mad. 265.

——O. 6, R. 17—*Power of Court—Suit for declaration of Maharki watan—Subsequent amendment for reliefs of possession and injunction—Permissibility.*

Where a person brought a suit for declaration of his Maharki watan but subsequently he was allowed by Court to amend the plaint by adding reliefs of possession and injunction,

Held, that as suit for possession on refusal of amendment would have been in time and as possession of field was consequential relief on title, allowing of amendment was not contrary to law. (*Gruer, J.*) MOTIRAM DANAJI *v.* SHENU. I.L.R. (1937) Nag. 151=9 R.N. 252=168 I.C. 351=A.I.R. 1937 Nag. 84.

——O 6, R. 17—*Power of Court—Suit for specific performance—Amendment to add prayer for compensation or damages in Letters Patent appeal—Sustainability.*

A Court cannot at a late stage convert a suit for specific performance into a suit for compensation or damages, and a Court should not in Letters Patent appeal grant an amendment by adding a prayer for compensation or damages in a suit for specific performance unless such relief is asked for at an early stage. (*Harries, C.J. and Fazl Ali, J.*) KUBAD MIA *v.* GUHI. 19 Pat. 90=187 I.C. 198=12 R P 566=6 B.R. 435=1939 P.W.N. 880=A.I R. 1940 Pat. 92.

——O. 6, R. 17 and S. 115—*Power to allow amendment—Object of — Amendment, changing nature of suit—Interference in revision.*

The power to allow an amendment of pleadings has been conferred on Courts in the interests of justice, with a view to correcting mistakes and bringing out the real matters in issue between the parties. But this power should not be exercised in favour of one party so as to cause prejudice to the other party—where an amendment is very drastic and changes the nature of the suit itself, a Court, if it allows such an amendment, exercises its jurisdiction with material irregularity, if not illegality and its order is liable to be set aside in revision. (*Zia-ul-Hasan and Yorke, JJ.*) LACHMIN *v.* BHAIRON BAKSH SINGH. 188 I.C. 893=13 R.O. 14=1940 A.W.R. (C C.) 248=1940 O.L.R. 393=1940 O.W.N. 500=1940 O. A. 465=A.I.R. 1940 Oudh 367.

C. P. CODE (1908), O. 6. R. 17.

——O. 6, R. 17—*Scope—Amendment introducing new and distinct cause of action—If can be allowed.*

Amendments which introduce an entirely distinct cause of action should not generally be allowed. Amendments introducing a new cause of action are sometimes allowed, *e.g.*, in a suit on a promissory note, if the instrument turns out to be inadmissible in evidence, the plaintiff may be allowed to amend his plaint so as to fall back on the original loan. But in such cases there is an intimate connection between the two causes of action. Where there is no such connection between the cause of action alleged in the plaint and the new cause of action sought to be substituted or introduced, the amendment should not be allowed. (*D.R. Norman.*) SHYAM LAL *v.* KANHAIYA LAL. 1937 A.M.L.J. 16.

—— O. 6, R. 17—*Scope—If exhaustive—Application for leave to sue* in forma pauperis—*Property omitted from schedule—Amendment to include —Power of Court to allow.*

O. 6, R. 17, C. P. Code, is not exhaustive of the powers of the Court in the matter of amendment; a Court has therefore jurisdiction to allow an amendment of an application for leave to sue *in forma pauperis*, by including an item of property which was originally omitted from the application or annexure thereto. Such an amendment cannot be held to be illegal or without jurisdiction on the ground that O. 6, C. P. Code, applies only to pleadings and not to applications to sue *in forma pauperis*. (*Dhavle and Varma, JJ.*) BIHARI SAHU *v.* SUDAMA KUER. 175 I.C. 505=10 R.P. 632=1938 P.W.N. 163=4 B.R. 598=19 Pat.L.T. 101=A.I.R. 1938 Pat. 209.

——O. 6, R. 17—Scope—If to be read with O. 7, R. 11. *See* C. P. CODE. O. 7, R. 11. 41 Bom. L.R. 787.

——O. 6, R. 17—Scope—Suit for declaration of right in certain moneys held by deceased in provident fund and for injunction—Amendment to include prayer for administration—Permissibility. *See* C. P. CODE, S. 42. A.I.R. 1939 Sind 107.

——O. 6, R. 17—Scope—Suit for declaration of title and possession—Amendment to strike out prayer for possession to avoid payment of additional Court-fee— Permissibility. *See* COURT-FEES ACT, S. 7(IV) (*c*). 1939 P.W.N. 61.

—— O. 6, R. 17—*Scope—Suit for partition—Amendment to make it administration suit—Permissibility.*

A suit for administration of an estate is a different kind of suit from a suit for partition of a piece of land. Different considerations arise in the two cases. It is not possible that a suit for partition should be tried as a suit for administration by amending the plaint. (*Spargo, J.*) MA WAING MA GYI *v.* MA BU GYI 174 I.C. 39=10 R.R. 384=A.I.R. 1937 Rang. 525.

——O. 6, R. 17—Scope—Suit on promissory note—Note found to be forged—Amendment in second appeal—If to be allowed. *See* NEGOTIABLE INSTRUMENTS ACT, S. 87. 16 Pat. 527=18 Pat. L.T. 640.

C. P. CODE (1908), O. 6, R. 17.

——O. 6, R. 17—*Scope—Suit under O. 21, R. 103, C. P. Code, for declaration and possession—Amendment of plaint by deleting claim for possession to avoid payment of additional court-fee—Application for leave to re-amend plaint in second appeal by including claim for possession—Sustainability.*

Plaintiff brought a suit under O. 21, R. 103, C. P. Code, claiming a declaration and possession. The trial Court having demanded additional court-fee, the plaintiff amended the plaint by deleting the claim for possession. The suit was decreed and the decree was confirmed in appeal. In second appeal by the defendant, the plaintiff applied for permission to again amend his plaint by adding the claim for possession though for the purposes of the second appeal it was not necessary.

Held, that the plaintiff having been put to his election and having abandoned the claim for possession was now seeking to reverse the decision with regard to that matter and that, therefore, leave to amend should not be given at this late stage. (*Wort, A.C.J. and Varma, J.*) RAMCHANDRA GANGA BUX *v.* SUNDER LAL SINGH. 176 I.C. 862=4 B.R. 771=11 R.P. 120=19 P.L.T. 916=1938 P.W.N. 455=A.I.R. 1938 Pat. 558.

——O. 6, R. 17—*Second appeal—Amendment of plaint—Suit for sale on mortgage—Finding that mortgage is opposed to statute and unenforceable—Amendment to include prayer for possession on the basis of acquisition of title as owner by prescription—Permissibility.*

A plaint cannot be amended in second appeal in such a way as to alter the character of the suit to a degree which is not permissible. Where a plaintiff who had a usufructuary mortgage over certain raiyati land and had been dispossessed brings a suit for sale on his mortgage, but, on the Courts holding that the mortgage being in contravention of the statute cannot be enforced, prays for permission to amend his plaint in second appeal so as to enable him to claim possession as a person who has by prescription acquired an absolute title as owner, the amendment cannot be allowed. (*Agarwala and Rowland, JJ.*) MAKSUDAN LAL SAHU *v.* NIRANJAN NATH DAS. 19 Pat. 507=187 I.C. 266=12 R.P. 575=21 Pat.L.T. 219=6 B.R 446 =A.I.R. 1940 Pat 494.

——O. 6, R. 17—*Striking out parties—Absence of notice under S. 80, C. P. Code—Amendment to discharge—Secretary of State.*

Where the notice under S. 80 of the C. P. Code was not given, permission to amend the pleadings by discharging the Secretary of State from the record and allow the suit to proceed against the orders could not be given in a case where it would not be possible to proceed without a material change in the nature of suit, the cause of action and the relief sought. (*Rowland, J.*) BALDEO PRASAD *v.* SUKHI SINGH. 174 I.C. 358=10 R.P. 500=4 B.R. 435=1937 P.W.N. 694=18 Pat.L.T. 921=A.I.R 1938 Pat. 127.

——O. 6, R. 17—*Suit on bond—Co-obligee suing for his share of money impleading the other as defendant—Amendment of plaint to include whole amount due—Permissibility.*

Where under wrong advice, one of the co-obligees sues to recover his half-share of the money due on a bond impleading the legal representative of the other as a defendant, and on

C. P. CODE (1908), O. 7, R. 1.

objection taken to the maintainabillity of the suit in view of the provisions of S. 45 of the Contract Act, applies to amend the plaint so as to claim the whole amount due on the bond, and if the suit is dismissed a fresh suit would be barred by limitation, it is proper for the ends of justice that the plaintiff should be given permission to amend the plaint. The proposed amendment would not make any charge in the cause of action. All that it is intended to do is to include the whole claim arising out of the cause of action based on the bond in suit. (*Srivastava, Ag. C.J. and Smith, J.*) RAGHUNATH PRASAD *v.* MST. PRANA. 13 Luck. 157=166 I.C. 992=9 R.O. 360=1937 O.L.R. 81 =1937 O.W.N. 163=A.I.R. 1937 Oudh 290.

——O. 6, R. 17—*Suit on contract of sale of land—Contract found to be void—Refund of purchase money—Amendment of plaint—Permissibility.*

A suit was brought on a contract of sale of land which was subject to the conditions of the Punjab Colonization of Government Lands Act. The sale was discovered to be void owing to invalid sanction. The purchaser had not claimed an alternative relief in the plaint for the recovery of the purchase money which he had paid under the contract.

Held, that the purchaser should be permitted to amend his plaint in order to obtain the refund of the purchase money and should not be referred to a separate suit. (*Dalip Singh and Skemp, JJ.*) HAKAM ALI *v.* HASHU. 181 I.C. 624=11 R.L. 867=A.I.R 1938 Lah. 244.

——O. 6, R. 17—*Technical defect—Amendment of plaint in second appeal—Permissibility.*

Where a subsequent mortgagee instituted a suit for possession by redemption of the prior mortgage after that mortgage had ceased to exist having been previously redeemed by the mortgagor, the defect in the frame of the suit is a technical one, and the second mortgagee can be allowed even in second appeal to amend the plaint so as to convert the suit into a mere suit for possession as mortgagee. (*Bhide, J.*) HARDIAL *v.* GURDITTA. 188 I.C. 608=13 R.L. 26=42 P.L. R. 139=A.I.R. 1940 Lah. 201.

——O. 6, R. 18—*Failure to amend plaint after order—Effect of.*

Under O. 6, C. P. Code, failure to amend merely involves loss of right to amend and therefore not to the determination of the suit as expressed in the original plaint. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) FEROZ SHAH *v.* KALU RAM. 164 I.C. 181=9 R.Pesh. 15=A.I.R. 1936 Pesh. 155.

——O. 7—*Applicability to appeals.*

Provisions of O. 7 by reason of S. 141 of the Code, apply *mutatis mutandis* to memoranda of appeals as well as to plaints. (*Davis, J.C. and Weston, J.*) MOOLOMAL *v.* LAL SINGH. I.L.R. (1939) Kar. 527=183 I.C. 757=12 R.S. 80=A.I.R. 1939 Sind 221.

——O. 7, R. 1—*Particulars in plaint—Suit for breach of conditions in contract—Particulars as to the conditions and manner in which they had been violated—Necessity to give.*

A defendant is entitled to know exactly what case he has to meet and he must have an opportunity to investigate the details of the claim, with a view to prepare the materials for his defence. Where the breach of certain conditions of a agreement forms the subject matter of the plaintiff's complaint, the defendant is entitled to know

C.P. CODE (1908), O. 7, R. 6.

the conditions and the exact manner in which they have been violated. (*Bose, J.*) JAMSHED *v.* KUNJILAL. 181 I.C. 177=11 R.N. 444=1938 N.L.J. 392=A.I.R. 1938 Nag. 530.

——O. 7, R. 6—*Exemption from limitation—Plaint should show.*

As a general principle, a plaintiff must show in his plaint how his suit is in time; for, the question whether the suit is in time must, if denied, be one of the issues in the case, and if the plaintiff does not explain how his suit is in time, it is impossible for the defendant to meet his case. (*Horwill, J.*) MADAPPAYA *v.* MAHABALA RAO. 176 I.C. 939 =11 R.M. 198=A.I.R. 1937 Mad. 826.

——O. 7, R. 6—*Exemption from limitation not pleaded in plaint—If available.*

It is obligatory as a matter of pleading to show the grounds upon which exemption from limitation is claimed. Consequently unless the plaint is amended, it will not be open to a party to rely on an exemption not pleaded in the plaint. (*Venkataramana Rao, J.*) RAMASWAMI CHETTI *v.* ANAIYA PADAYACHI. 165 I.C. 737=9 R.M. 293 =1936 M.W.N. 411=A.I.R. 1936 Mad. 545.

——O. 7, R. 6—*Period of limitation expiring during Court holidays—Plaint presented on re-opening—Plaint not specifically mentioning exemption under S. 4, Limitation Act—Effect.*

Where a plaint is presented on the re-opening date after Court holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4, Limitation Act was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays. (*Middleton, J.C.*) GHULAM HUSSAIN *v.* GHULAM SARWAR. 168 I.C. 384=9 R. Pesh. 125=39 P.L.R. 528=A.I.R. 1937 Pesh. 41.

——O. 7, R. 6—*Scope—Exemption from limitation — Ground of — Omission to specifically allege—Effect—Subsequent amendment of plaint in second appeal—Permissibility.*

Where in a suit against a mortgagor's surety for loss caused by a defect in the mortgagor's title to the mortgaged property, the suit appears to be barred by limitation as having been filed more than six years after the date of the mortgage, if the plaintiff claims exemption from limitation on the ground that he had knowledge of the defect in title only on a date subsequent to the date of the mortgage, it is incumbent on him to specifically state in his plaint the exact date on which he came to know about the mortgagor's title being defective and to prove the same. If he fails to make such an averment in the plaint, he cannot be permitted in second appeal to amend his plaint by specifically mentioning the date on which he acquired knowledge of the defect in the mortgagor's title, especially when it is found as a fact that he knew of the defect even on the date of the mortgage. (*Niyogi, J.*) BHIKARILAL *v.* SITARAM. 20 N.L.J. 42.

——O. 7, R. 7—*Applicability—Relief different from that in plaint—Addition of new parties—New relief in appeal—Permissibility.*

The relief in the plaint related to an unascertained sum of money which was to be ascertained on taking account from the defendants and the plaintiff claimed a decree against them for the amount found due from them to him.

C. P. CODE (1908), O. 7, R. 10.

Later on, some more defendants were added but the plaintiffs claimed no relief against them. The suit being dismissed for some technical defect, the plaintiff appealed. In the appeal he gave up his claim for rendition of accounts and for money decree, but claimed declaration that he was entitled to a specific portion of the amount held in deposit by the original defendants and he also claimed a relief against the defendants that were later on added,

Held, that the declaratory relief claimed in appeal was wholly outside the claim as set forth in the plaint and moreover it was against the added defendants against whom no claim was made in the suit after adding them. O. 7, R. 7, could not therefore apply to such a case and it was therefore proper to refuse the claim set up in appeal. (*Srivastava, Ag. C. J. and Zia-ul-Hasan, J.*) MOHD. ATA HUSAIN KHAN *v.* NAWAB BAGAR MIRZA. 13 Luck. 584=171 I.C. 33=1937 O.L.R. 514=10 R.O. 66=1937 O.W.N. 1131= A.I.R. 1937 Oudh 484.

——O. 7, R. 7—*Scope—Suit for dissolution of marriage or in the alternative for declaration of nullity—Claim found not maintainable—Relief of judicial separation not prayed for in plaint—If can be granted by way of general or other relief.*

Where a suit for divorce or dissolution of marriage on the ground of the other party's unsoundness of mind or in the alternative for a declaration of nullity of the marriage is found to be not maintainable, it is not open to the plaintiff to claim the relief of judicial separation, when that relief has not been prayed for in the plaint. Such a relief claiming judicial separation is not a general relief falling under such further and other relief within the meaning of O. 7, R. 7, C. P. Code. No such relief can be granted without an amendment of the plaint. (*Wadia, J.*) PHIROZE *v.* SHIRINBAI. 173 I.C. 395=10 R.B. 329= 39 Bom.L.R. 1146=A.I.R. 1938 Bom. 65.

——O. 7, R. 10—Applicability—If confined to cases of return of plaint for want of territorial jurisdiction. *See* C. P. CODE, S. 151 AND O. 7, R. 10. A.I.R. 1938 Sind 124.

——O. 7, R 10—Power of Court—Return of plaint under—Grant of time for presentation to proper Court—Legality of—Effect on limitation. *See* LIMITATION ACT, S. 14. 18 Pat.L.T. 250.

——O. 7, R. 10—*Return of plaint—Allegations as to jurisdiction found after trial to be incorrect—Return if permissible.*

The question of jurisdiction at the initial stages is decided by the allegations in the plaint. The allegations in the plaint, may make the suit cognizable by a Court. But if those allegations are found after trial to be incorrect or false, then the suit should have to be dismissed—A plaint could not be returned at that stage. (*Mohammad Ismail, J.*) DURGA PRASAD SETH *v.* OM PRAKASH. 174 I.C. 605=1938 A.L.R. 296=10 R.A. 594= 1938 R.D. 49=1937 A.W.R. 1090=A.I.R. 1938 All. 39.

——O. 7, R. 10—*Return of plaint—When to be made and when not to be made.*

If on the face of the plaint the Court finds that it has no jurisdiction to try the case, it will return the plaint at any stage of the case; if the Court fails to detect want of jurisdiction in it to begin with, but where the plaint *prima facie* is triable by the Court and in spite of the challenge

C. P. CODE (1908), O. 7, R. 10.

of the other side the plaintiff sticks to his own allegations in the plaint, the Court proceeds to try the case on merits and not to decide any preliminary question of jurisdiction. If then the Court comes to the conclusion that plaintiff's contention is false and the suit as laid cannot be maintained, the Court ought to dismiss the suit and no question of returning the plaint under O. 7, R. 10 arises in such a case. If the Court returns the plaint in such case, instead of dismissing the suit, it will be failing to exercise a jurisdiction vested in it by law. (*Puranik, J.*) MANGIA HAGRIA *v.* SAKIA. **1940 N.L.J. 380.**

——**O. 7, R. 10**—*Return or rejection of plaint—Power of Court—Suit triable by some other Court—If a ground.*

A Court cannot return or reject a plaint under O. 7, R. 10, C. P. Code, merely because the suit is triable by some other Court. It can do so only if the suit is not triable by itself. (*Norman, I.C.S.*) HEERA LAL *v.* KALU. **1936 A.M.L.J. 67.**

——**O. 7, R. 10**—*Scope—Order returning plaint for presentation to proper Court—Power of Court to fix time for such presentation—Limitation—If can be extended.*

A Court returning a plaint for presentation to the proper Court cannot fix a time for such presentation, so as to extend the period of limitation for the suit. Such an order allowing a period for presentation is clearly illegal; and if the presentation is made beyond the period of limitation for the suit, the suit will be barred, although it is presented within the time fixed. (*Norman, I.C.S.*) HEERA LAL *v.* KALU. **1936 A.M.L.J. 67.**

——**O. 7, R. 10**—*Suit filed in Court having no jurisdiction—Order of dismissal—Propriety.*

If a suit is filed in a Court having no jurisdiction, the proper order is to return the plaint to the plaintiff for presentation to the proper Court and not to dismiss the suit. (*Tek Chand, J.*) FIRM RAM DITTA MAL SANT LAL *v.* FIRM SETH JOT RAM KIDAR NATH. **188 I.C. 299=12 R.L. 518=42 P.L.R. 203=A.I.R. 1940 Lah. 171.**

——**O. 7, R. 10**—*Time for return of plaint—Order returning plaint at stage of arguments—Propriety.*

A Court can return a plaint for presentation to the proper Court even at the stage of arguments, when the question of jurisdiction is raised, especially when the suit has not proceeded very far. (*Collister and Bajpai, JJ*) BRIJ BEHARI LAL *v.* GOPI NATH. **173 I.C. 913=10 R.A. 524=1938 R.D. 102=1938 A.L.R. 200=1937 A.W.R. 1171=1937 A.L.J. 1224=A.I.R. 1938 All. 76.**

——**O. 7, R. 10 (1)**—*Suit as framed cognizable by Court—Jurisdiction found to be barred on findings arrived at by Court—Dismissal of suit—Propriety.*

Where the suit as framed by the plaintiff is cognizable by the Civil Court and it is only on the finding arrived at by the Court that it is found that the jurisdiction of the Court is barred in respect of the major portion of the relief claimed, the Court would be right in dismissing the suit, and it is not necessary for it to return the plaint for presentation to the proper Court. (*Zia-ul-Hasan, J.*) SITLA BIN *v.* MOHAN. **13 Luck. 18=165 I.C. 908=9 R.O. 271=1936 O.W.N. 1228=A.I.R. 1937 Oudh 183.**

——**O. 7, R. 11**—*Applicability—Absence of jurisdiction as regards one of the defendants—*

C. P. CODE (1908), O. 7, R. 11.

Rejection of plaint as against him—Appeal—Revision.

A suit was instituted against four persons on the basis of a pro-note executed by them. The Court ordered that the suit could not proceed against one of them as the pro-note was signed by that person at a place which was beyond jurisdiction of that Court,

Held, that the order was tantamount to rejection of the plaint so far as that person was concerned and was therefore appealable,

Held, further, that even if an appeal was not competent, a revision would be competent as the proceedings terminated so far as that person was concerned and therefore there was a case decided within the meaning of S. 115, C. P. Code. (*Bhide, J.*) PUNJAB CO-OPERATIVE BANK, LTD. *v.* LALA ISHAR DAS. **175 I.C. 153=10 R.L. 695=40 P.L.R. 134=A.I.R. 1937 Lah. 800.**

——**O. 7, Rr. 11 and 13**—*Applicability—Suit for declaration—Decree—Appeal—Remand for amendment—Amendment allowed—Direction for valuation of property and for payment of deficit Court-fee — Non-compliance — Application for withdrawal of suit with liberty—Rejection—Subsequent dismissal of suit for default—Propriety—Fresh suit—If barred—O. 2, R. 2; O. 9, R. 9, and O. 23, R. 1 (3)*—Res judicata.

A suit for a declaration of title having been decreed by the trial Court, the defendant preferred an appeal. The appellate Court, holding that the suit as framed was not maintainable for want of a prayer for possession, allowed the appeal and remanded the suit for fresh trial after amendment of the plaint. The amendment was allowed by the trial Court on remand and the plaintiff was directed to give the proper value of the property within a week and to put in the deficit Court-fee. The plaintiff did not do this, but applied instead to withdraw the suit with liberty to bring a fresh suit on the same cause of action. That was refused. The plaintiff having taken no further steps the suit was dismissed for default with costs to the defendants including costs of the appellate Court. Plaintiff thereafter brought a fresh suit on the same cause of action. It was pleaded that it was barred.

Held, that the order dismissing the suit for default must be regarded as a rejection of the plaint under O. 7, R. 11, C. P. Code, though the Court acted improperly in making an order of dismissal of the suit; O. 7, R. 13 gave the plaintiff the right to institute a fresh suit on the same cause of action and therefore the suit was not barred under O. 2, R. 2; O. 9, R. 9 or O. 23, R. 1 (3). There was also no scope for the application of the doctrine of *res judicata*, even with regard to the findings of the appellate Court in the prior litigation. (*R.C. Mitter, J.*) KIRANCHANDRA PRAMANIK *v.* PURNA CHANDRA PRAMANIK. **40 C.W.N. 1390.**

——**O. 7, R. 11**—*Application under—Scope of enquiry.*

In deciding an application under O. 7, R. 11, C. P. Code, the Court is not entitled to go outside the pleading. (*McNair, J.*) MAYADAS BHAGAT *v* COMMERCIAL UNION ASSURANCE CO., LTD. **169 I.C. 788=10 R.C. 49=I.L.R. (1937) 1 Cal. 541=41 C.W.N. 193.**

——**O. 7, R. 11**—*Duty of Court—Appeal—Deficiency in court-fee—Proper procedure—Dismis-*

sal without proper order directing appellant to pay deficient court-fee.

If an appeal presented in time is insufficiently stamped or is otherwise defective, it can only be dismissed after the Court has fixed a day by which the deficiency must be made up or the defect remedied, under penalty of the appeal being dismissed. It is essential that a formal order should issue from the Court informing the appellant of the date fixed for payment of the deficiency in stamps or for remedying the defect. If he fails to comply with that order, the appeal is dismissed for such failure to comply with the order of the Court. There is no question of limitation in such a case. The best course for the Court is to wait till the expiry of the period fixed, and then issue a formal order of rejection or dismissal in case of failure of the appellant to comply with the order directing him to pay the deficient court-fee or to remedy the defect. (*Darling, S.M. and Bomford, J.M.*) CHANDIKA *v.* NAZIR HASANKHAN. **1938 R.D. 179=1938 A. W.R. (B.R.) 112.**

——**O. 7, R. 11, and S. 107 (2)**—*Insufficiently stamped memorandum of appeal—Procedure to be followed—Granting of time to make good deficiency—Necessity.*

According to O. 7, R. 11, C. P. Code, where a plaintiff has properly valued the relief, he must be given an opportunity to make good the deficiency in the court-fee before his plaint is rejected, and the same rule applies to a memorandum of appeal by reason of the effect of S. 107 (2), C. P. Code. (*Wort and Agarwala, JJ.*) SARJUG PRASAD SAHU *v.* SURENDRAPAT TEWARI. **178 I.C. 976=5 B.R. 160=11 R.P. 318=1939 P. W.N. 166=20 Pat.L.T. 79=A.I.R. 1939 Pat. 137.**

——**O. 7, R. 11**—Power of Court under—Plaint insufficiently stamped—Return for payment of proper court-fee within fixed time—Request for further time granted—Payment within such time—Sufficiency—Suit when deemed to be instituted—Date of original presentation or date of payment of full court-fee. *See* C. P. CODE, S. 149 AND O. 7, R. 11. **1938 M.W.N. 257.**

——**O. 7, R. 11 and S. 149**—Relative scope of. *See* C. P. CODE, S. 149 AND O. 7, R. 11. **1940 O A. 699.**

——**O. 7, R. 11**—Scope—If controls Court-Fees Act, S. 7 (*iv*) (*c*) and (*d*). *See* COURT-FEES ACT (AS AMENDED IN BOMBAY), S. 7 (*iv*) (*c*) AND (*d*). **A.I.R. 1937 Sind 241.**

——**O. 7, R. 11**—Scope—If controls S. 7 (*iv*) (*f*), Court-Fees Act—Suit for accounts of partnership—Final decree—Appeal—Valuation — Right of appellant—Power of Court to revise valuation and levy additional Court-fee. *See* COURT-FEES ACT, S. 7 (*iv*) (*f*). **31 S L.R. 37.**

——**O. 7, R. 11**—*Scope—Mandatory character of—If absolute—Power of Court to amend plaint in case of non-compliance—O. 6, R. 17—If to be read along with O. 7, R. 11.*

O. 7, R. 11, C. P. Code, no doubt uses the words "shall reject" which are mandatory words. But *prima facie* the rule is mandatory only *rebus sic stantibus*, that is to say, when the Court has to deal simply with the position referred to in the rule and would not preclude an amendment of the plaint which under O. 6, R. 17, C. P. Code, may be made at any stage of the proceedings.

The two rules, O. 6, R. 17 and O. 7, R. 11, should be read together. (*Broomfield and Macklin, JJ.*) MAHANT NARSIDASJI *v.* BAI JAMNA. **185 I.C. 44=41 Bom.L.R. 787=A.I.R. 1939 Bom. 354.**

——**O. 7, R. 11**—*Scope—Rejection of plaint after remand by appellate Court—Power of Court.*

A plaint can be rejected at any stage of the suit even after its registration. The fact that the suit is registered, heard by the trial Court, and by the appellate Court and remanded is of no moment; a plaint not correctly valued or stamped can be rejected under O. 7, R. 11, at any stage of the suit; and the provisions of O. 7, R. 11 are mandatory. (*R.C. Mitter, J.*) KIRAN CHANDRA PRAMANIK *v.* PURNA CHANDRA PRAMANIK. **40 C.W.N. 1390.**

——**O. 7, R. 11 (a)**—*Rejection of plaint in part—Legality—Revision.*

Where in a suit for money including interest, the Court framed issues and appended a note to one of them to the effect that the plaint did not show cause of action regarding the claim for interest and rejected the plaint to that extent,

Held, there is no provision in the C. P. Code for rejection of the plaint in part and note recorded by the trial Court did not therefore amount to rejection of plaint as contemplated by C. P. Code. The note therefore did not give a right of appeal. If no appeal lay, a revision would be the only remedy open to aggrieved party.

Held, further, that in recording the note the Court must be held to have acted in the exercise of its jurisdiction illegally and with material irregularity, that the note decided the claim so far as interest was concerned and this note therefore came within the meaning of words 'case decided' as contemplated by S. 115 of the Code. The order in the note therefore could be attacked in revision. (*Jai Lal and Abdul Rashid, JJ.*) MAGSUD AHMAD *v.* MATHRA DATT & CO. **167 I. C. 376=9 R.L. 487=39 P.L.R. 299=A.I.R 1936 Lah. 1021.**

——**O. 7, R. 11 (b)**—Scope—If controls S. 7 (*iv*), Court-Fees Act. *See* COURT-FEES ACT, S. 7 (*iv*). **A.I.R. 1936 Sind 25.**

——**O. 7, R. 11 (c)**—*Applicability—Appeal insufficiently stamped—Procedure—Duty of Court—Summary rejection—Propriety.*

Where memorandum of appeal is insufficiently stamped, the Court should call upon the appellant to make good the deficiency within a stated period, as provided by O. 7, R. 11 (*c*), C. P. Code, which is applicable to appeals by reason of S. 107, C. P. Code. An order summarily rejecting the memorandum of appeal without giving the appellant an opportunity either to explain or make good the deficiency is erroneous in law and unsustainable. (*Harries, C.J. and Rowland, J.*) RAMGATI SINGH *v.* SHITAB SINGH. **180 I.C. 791=11 R.P. 539=20 Pat.L.T. 426=5 B.R. 488=A.I.R. 1939 Pat. 432.**

——**O. 7, R. 11 (c)**—Applicability—Pauper suit—Dismissal—Appeal by plaintiff paying full Court-fee—Order by appellate Court for payment of Court-fee on plaint—Competency—Non-compliance—"Rejection" of appeal—If warranted. *See* C. P. CODE, S. 2 (2). **1937 A.W.R. 113=A.I.R. 1937 All. 280.**

——**O. 7, R. 11 (c)**—*Applicability to appeals.*

The weight of authority is decidedly against the applicability of the provisions of O. 7, R. 11

C. P. CODE (1908), O. 7, R. 11.

(*c*) to appeals. 27 M.L.J. 677; 61 Cal. 663; 1 Lah. 234; 3 Pat.L.J. 74; 50 All. 980, Ref. to. (*Varadachariar and Pandrang Row, JJ.*) SITHARAMAYYA *v.* RAMAYYA. 177 I.C. 453=11 R.M. 341=1938 M.W.N. 71=47 L.W. 211=A.I.R. 1938 Mad. 316=(1938) 1 M.L.J. 514.

——O. 7, R. 11 (c)—Construction—Rejection of plaint—Conditions to be satisfied before—Duty of Court to grant time to pay deficiency in Court-fee. *See* C. P. CODE, S. 149 AND O. 7, R. 11. 18 Pat. L.T. 665=A.I.R. 1937 Pat. 550 (S.B.).

——O. 7, R. 11 (c)—*Dismissal under—When justified—Appeal insufficiently stamped and presented in time—Duty of Court—Dismissal without order requiring payment of deficiency within fixed period—Legality.*

Before a suit or an appeal can be rejected for insufficiency in court-fee under O. 7, R. 11 (*c*), C. P. Code, the law requires that there shall be a definite order of the Court, fixing a day for payment of the deficiency and non-compliance with such order. The dismissal of the suit or appeal for non-payment of the necessary court-fee before the expiry of the period of limitation is not warranted. If the suit or appeal is filed in time, it is open to the Court to give time to the party for paying the necessary court-fee even in instalments. The fact that the counsel for the plaintiff or appellant promises to pay the deficiency within a period does not take the place of the order of the Court which is prescribed by law. Dismissal under R. 11 (*c*) of O. 7, C. P. Code, should be regarded in the light of a punishment for contempt of Court for failure to comply with the orders of the Court for payment of the difficiency in stamp. (*Darling, S.M. and Bomford, J.M.*) JANARDAN CHAUBE *v.* KANTIKA TEWARI. 1938 R.D. 235=1938 A.W.R. (B.R.) 89.

——O. 7, R. 11 (c)—Expiry of time fixed under—Extension—Powers of Court. *See* C. P. CODE, S. 148. 40 C.W.N. 747=A.I.R. 1936 Cal. 321.

——O. 7, R. 11 (c)—*Insufficiency of stamp—Duty of Court—Making up of deficiency—Effect—Application for making good deficiency—Necessity.*

Under O. 7, R. 11, C. P. Code, when a plaint is presented insufficiently stamped the Court is bound to give plaintiff time to make good the deficiency; and under S. 149, C. P. Code, the deficient stamp when paid within the period allowed, must be taken to have been paid at the time of the original presentation of the plaint. No application is required to be made under O 7, R. 11. (*Weston.*) MAHADEO *v.* RAM PRATAB. 1938 A.M.L.J. 60.

——O. 7, R. 11 (c)—*Plaint insufficiently stamped—Plaintiff not acting* bona fide—*Plaint, if can be rejected.*

Under the provisions of O. 7, R. 11, C. P. Code, when a plaint is insufficiently stamped, the Court is bound to ask the plaintiff to make up the court-fee within a period to be fixed by it and the plaint could only be rejected if the deficieny in the court-fee is not made up within the period. It is immaterial that the action of the plaintiff in instituting a plaint on a deficient court-fee is not *bona fide*, and the worst that the Court can do is to ask the plaintiff to make up the court-fee on the very day on which the plaint is presented. (*Bhide, J.*) JAGAT RAM *v.* KHARATI RAM. 171 I.C. 764=10 R.L. 228=39 P.L.R. 199=A.I.R. 1937 Lah. 392.

C. P. CODE (1908), O. 7, R. 11.

——O. 7, R. 11 (c)—*Rejection of plaint—Duty of Court—Insufficiently stamped memorandum of appeal—Granting of time to make up deficit—Considerations.*

Before rejecting a plaint under O. 7, R. 11 (*c*), it is the duty of the Court to require the plaintiff to make good the deficiency in stamp within a time to be fixed. Where a memorandum of appeal is insufficiently stamped, either because there is a doubt as to the court-fee payable or that it could not be ascertained before the receipt of the records, and an honest attempt had been made by the appellant to comply with the requirements of law, the memorandum of appeal may be received and time granted to make up the deficiency that may be found to be due. (*Dhavle and Agarwala, JJ.*) RAM SAWARI KUER *v.* DULHIN MOTIRAJ KUER. 17 Pat. 687=178 I.C. 150=5 B.R. 59=11 R.P. 220=19 Pat.L.T. 885=1939 P.W.N. 162=A.I.R. 1939 Pat. 83.

——O. 7, R. 11 (c)—*Scope and effect of—Plaint insufficiently stamped—Duty of Court—Rejection of plaint—Order of—When to be made.*

Where a plaint is insufficiently stamped, the Court is bound under O. 7, R. 11, C. P. Code, to give the plaintiff time to make up the deficit; only when he fails to comply with the order, the Court can reject the plaint. That the plaint is presented on the last day of limitation makes no difference at all. Whether the payment of insufficient court-fee has been by design or due to inadvertence, the Court is bound by the mandatory terms of it to give effect to the provision of law. (*Venkatasubba Rao, J.*) VENKANNA *v.* ATCHUTARAMANNA. 182 I.C. 953=12 R.M. 195=1938 M.W.N. 259=47 L.W. 492=A.I.R. 1938 Mad. 542=(1938) 1 M.L.J. 610.

——O. 7, R. 11 (c) and S. 148—*Suit registered in the ordinary way—Extension of time twice—Application for further extension pending consideration—Plaintiff filing an application to continue the suit of a pauper—If maintainable—Power to grant time under S.* 148.

A suit was registered as an ordinary suit and court-fee was paid on the valuation of the part by the plaintiff on the plaint. On objection being taken by the defendant the Court assessed the value of the suit at a higher figure and directed the plaintiff to pay in the deficit court-fee within one month. This time was extended twice. On the last day fixed for payment, the plaintiff applied for further time. On the day when the application was put up for orders, the plaintiff applied for permission to continue the suit as a pauper. The Court rejected both the applications and also the plaint.

Held, that even where the suit had already been registered as an ordinary suit, the application to continue it *in forma pauperis* could be entertained. In view of S 148 of the Code the time granted by the Court can be enlarged from time to time and the Court is also empowered to extend any time fixed by it even after the expiry of the period originally fixed. As the application for further time was pending consideration at the time when the application to continue the suit *in forma pauperis* was made and as the Court could, if it so wished, grant further time, O. 7, R. 11 (*c*) cannot be said to have operated *ipso facto*.

C. P. CODE (1908), O. 7, R. 11.

The mandatory provision of O. 7, R. 11 is intended for cases when no other complications intervene and the Court has a sufficient inherent power to depart from the normal procedure to suit the exigencies of the situation. An application to continue the suit as pauper can be entertained within one of the periods allowed for payment of deficit court-fee or even beyond it but before the plaint is rejected or before circumstances have arisen under which it is bound to be rejected. (*Mukherji and S.K. Ghose, JJ.*) HAFIZ MAHOMED FATEH NASIB *v.* SARADINDU MUKHERJEE. 66 C.L.J. 78=162 I.C. 689 =8 R.C. 643=40 C.W.N. 747=A.I.R. 1936 Cal. 221.

——O. 7, R. 11 (d)—Applicability—Non-compliance with requirements of S. 80, C. P. Code. *See* C. P. CODE, S. 80. 18 Pat.L.T. 921.

——O. 7, R. 13—Rejection under—Restoration —Power under S. 151. *See* C. P. CODE, S. 151 AND O. 7, R. 13—RESTORATION. 1939 A.W.R. (H.C.) 325.

——O. 7, Rr. 14 and 18—*Failure to produce Khatta with plaint—Effect—O. 23, R. 1.*

In a suit on a loan the failure of the plaintiff to produce the Khatta along with his plaint may entail the penalty prescribed under R. 18 of O. 7 but, it is not a 'formal defect' in the suit in respect of which, the Court should order a withdrawal of the suit with liberty to file fresh suit. (*E. Weston.*) MISRI LAL *v.* PATASI. 1937 A.M. L.J. 75.

——O. 7, R. 14 (2) and O. 11, Rr. 15 and 18 (2)—*List of documents relevant as evidence—If pleadings—Right of inspection of such documents —Procedure to be followed.*

Though a defendant can insist on inspection of documents forming part of the pleadings, before he files his written statement, he cannot except in special cases insist upon inspection with reference to documents referred to in O. 7, R. 14 (2). They do not form part of the pleadings and defendant has not to plead to them any more than he has to plead to any other evidence in support of the plaintiff's case. It is therefore entirely unnecessary as a general rule to see these documents before he files his own statement. It may in certain circumstances be necessary, but then the procedure laid down in O. 11, R. 18 (2) must be observed. But whether the appplication is made under O. 11, R. 15 or O. 11, R. 18 (2), he must act promptly and delay in itself may be a ground for refusing to grant time for filing written statement until after inspection has been made. (*Bose, J.*) THE NAGPUR GLASS WORKS CO., LTD. *v.* SHRU ONAMA GLASS WORKS CO., LTD. I.L.R. (1940) Nag. 331.

——O. 7, R. 14 (2)—List filed under—Right to inspect—Limits. *See* C. P. CODE, O. 11, RR. 15 AND 16. A.I.R. 1938 Nag. 239.

——O. 7, Rr. 14 (2) and 18—*Production of documents not included in list—Adverse inference.*

In a suit on a promissory note for cash consideration, the defendant denied the receipt of consideration and therefore the plaintiff, in answer, produced before recording of evidence bonds not included in the list of documents filed with the plaint.

Held, that in these circumstances no inference could be drawn against the plaintiff from the non-production of the bonds with the plaint or the omission from the list of the documents on which the plaintiff intended to rely, which list had also been filed with the plaint. (*Tek Chand, J.*) SANDHURA SINGH *v.* KEHR SINGH. 169 I.C. 228 =9 R.L. 725=39 P.L.R. 396=A.I.R. 1936 Lah. 1016.

C. P. CODE (1908), O. 8, R. 5.

——O. 7, R. 18 (1) and (2)—*Document not produced under R. 14—Whether can be used to contradict defendant in cross-examination—Evidence Act, S. 145.*

The penalty to the non-production of a document under O. 7, R. 14, C. P. Code, is contained in R. 18 (1), and sub-R. (2) is an exception to sub-R. (1). When the defendant is giving evidence, it is open to the plaintiff to tender in cross-examination a previous statement in writing by the defendant to contradict him under S. 145 of the Evidence Act, even though the document comes under O. 7, R. 14 (2), C. P. Code, and ought to have been presented with the plaint. (*Bennet, J.*) LAKHPAT PATHAK *v.* GHIRAN PATHAK. 167 I.C. 46=9 R.A. 477=1937 A.L.R. 126=1936 A.L.J. 1195=1936 A.W.R. 983=A.I.R. 1937 All. 55.

——O. 7, R. 18—*Scope—Powers of Court under—Document not forming basis or foundation of suit—If can be produced.*

The only ground contemplated by R. 18 of O. 7, C. P. Code, for allowing a document which has not been produced in accordance with R. 14 to be produced at a later stage is that it may be used as evidence. The rule does not allow a plaintiff to put forward as creating rights a document on which he has not in terms sued. (*Cornish, J.*) NARAYANAMURTI *v.* SURYANARAYANA. 168 I.C. 98=1936 M.W.N. 1210=9 R.M. 527=44 L.W. 840=A.I.R. 1937 Mad. 122.

——O. 8, R. 2—Question of limitation—Raising of—When duty of Court and of defendant. *See* LIMITATION ACT, S. 3 AND C. P. CODE, O. 8, R. 2. 1940 Rang.L.R. 273.

——O. 8, R. 2—*Scope—Plea that suit not maintainable as not having been brought as a representative suit—Omission to raise in written statement—If can be raised in appeal.*

A plea by the defendant that a suit is not maintainable on the ground that it should be brought by the plaintiff in a representative capacity, must be pleaded in the written statement under O. 8, R. 2, C. P. Code. When it is not so pleaded, it ought not to be allowed to be raised in appeal. (*Beaumont, C. J.*) GULJARKHAN *v.* HUSENKHAN. 172 I.C. 165=10 R.B. 253 (1)= 39 Bom.L.R. 917=A.I.R. 1937 Bom. 476.

——O. 8, Rr. 3 and 5—*Plaint allegations as to terms of lease—Absence of specific denial—Lease inadmissible in evidence—Effect.*

Where a lessor of a house sued the lessee for damages for breach of the lease agreement which was reduced to writing, but which though compulsorily registrable was not registered and his allegations in the plaint as to the terms of the lease were not specifically denied as required by C. P. Code, O. 8, Rr. 3 and 5, the effect is that the suit could be decreed as on an admission. (*Yorke, J.*) MRS. J. H. MATHEWS *v.* MIRZA ISMAIL BEG. 1938 O.A. 785=1938 O.W.N. 1080.

——O. 8, R. 5—*Applicability and scope—Defendant failing to plead—Effect—If bound by all allegations in plaint.*

C. P. CODE (1908), O. 8, R. 5.

A defendant who does not put in any defence is bound by all the allegations in the plaint; under O. 8, R. 5, C. P. Code, every allegation of fact in a plaint must be taken as admitted unless denied or stated to be not admitted in the pleading of the defendant. The rule is not confined to a case where a pleading has been put in by the defendant, it equally applies to a case in which the defendant puts in no pleading. (*Beaumont, C. J. and Rangnekar, J.*) SHRIRAM SURAJMAL *v.* SHRIRAM. 60 Bom. 788=164 I.C. 189 (1)=9 R.B. 64=38 Bom.L.R. 577=A.I.R. 1936 Bom. 285.

——O. 8, R. 5—*Denial by necessary implication—Inconsistent statements.*

There is not a denial by necessary implication of the statements in the plaint when the language which can be looked to to find that denial is a statement which is in itself so inconsistent as not to be capable of admitting or denying anything. (*Roberts, C.J. and Dunkley, J.*) S. K. MITRA, HIGHER GRADE PLEADER, *In re*. A.I.R. 1940 Rang. 190.

——O. 8, R. 5—*Non-admissions—When admissions.*

The principle that non-admissions in certain cases are equivalent to admissions does not apply to a case where the averments in the plaint to which the principle is sought to be applied are vague and inconclusive. (*Davis, J.C. and Mehta, A.J.C.*) HAJI SHAKOOR *v.* VOLKART BROS. 9 R. S. 233=30 S.L.R. 345=168 I.C. 330=A.I.R. 1937 Sind 11.

——O. 8, R. 6—*Accounts of same person in different names—Set-off—If can be claimed.*

If the accounts are of one and the same person, the mere fact of the accounts being separate or in different names would not attract the provisions of O. 8, R. 6, C. P. Code, and a set-off can be claimed. (*Dalip Singh, J.*) FIRM RALLA RAM DAULAT RAM *v.* JASWANT RAI. 189 I.C. 464=42 P.L.R. 201=A I.R. 1940 Lah. 290.

——O. 8, R. 6—*Applicability—Legal and equitable set-off—Suit for ejectment and rent—Claim to value of improvements effected by defendant—Allegation of right to remain in possession until payment of costs of improvements—Nature of set-off—Court-fee—If payable.*

For a legal set-off under O. 8, R. 6, C. P. Code, the money claimed by the defendant must be legally recoverable from the plaintiff, in other words it must be money for which the defendant could sue the plaintiff. But where the defendant sets up a right to remain in possession of plaintiff's property until the costs of improvements effected by him are paid, and claims such amount in an action for ejectment and rent the claim is not a legal set-off, but only an equitable set-off which does not fall under O. 8, R. 6, and for which no Court-fee is payable. (*Norman.*) SOLEMON D'ROZARIO *v.* JAMES ROZARIO. 1936 A. M.L.J. 60.

——O. 8, R. 6—*Applicability—Suit on mortgage—Claim by mortgagor defendant to abatement of mortgage consideration—Set-off or counter-claim—Permissibility—Remedy of mortgagor.*

A claim by the mortgagor, in the mortgagee's suit on the mortgage, to have some sort of abatement of the consideration of the mortgage—the mortgagee not seeking to set aside the contract of mortgage—is in the nature of an unliquidated

C. P. CODE (1908), O. 8, R. 6.

claim, and set off of such a claim is not permissible under O. 8, R. 6, C. P. Code. The mortgagor's right, if any, must be the subject-matter of a separate litigation, and no counter-claim can be brought. (*Wort, A.C.J. and Manohar Lall, J.*) BIBI SHAIMA *v.* BANK OF BIHAR, LTD. 178 I.C. 383=11 R.P. 258=1938 P.W.N. 603=19 Pat.L.T. 585=A.I.R 1938 Pat. 484.

——O. 8, R. 6—Applicability to insolvency or liquidation proceedings. *See* PROVINCIAL INSOLVENCY ACT, S. 46. 1939 M.W.N. 1231.

——O. 8, R. 6—*Claim for set-off—Conditions to be fulfilled.*

According to O. 8, R. 6, C. P. Code, before a set-off can be claimed, it must be presented in a written statement which shall have the same effect as a plaint, and it must be shown that it is an 'ascertained' sum of money legally recoverable by the defendant from the plaintiff, and that both parties fill the same character as they fill in the plaintiff's suit. A claim for commission over reduction of losses, stated approximately, was held to be not an 'ascertained sum' of money. (*Gruer, J.*) GIRDHRILAL *v.* SURAJMAL. 1940 N. L.J. 176=A.I.R. 1940 Nag. 177.

——O. 8, R. 6—*Equitable set-off—Claim arising out of same contract—Court-fee, if necessary.*

In a suit when the defendant claims an equitable set-off by claiming damages arising out of the same contract on which the plaintiff bases his claim, no separate court-fee is necessary. (*Bhide and Din Mohammad, JJ.*) BASHESHAR NATH KHANNA & SONS *v.* GRINDLAY & CO., LTD. 171 I.C. 649=39 P.L.R. 345=10 R.L. 220=A.I.R. 1937 Lah. 73.

——O. 8, R. 6—*Equitable set-off—Court-fee.*

When there are different demands arising out of the same transaction or so connected in their nature and circumstances that they can be looked upon as part of one transaction, there arises an equitable set-off on which no Court-fees are payable. (*Norman.*) APAJI *v.* NOOR MOHAMAD. 1936 A.M.L.J. 10.

——O. 8, R. 6—*Equitable set-off—Discretion of Court.*

Equitable set-off cannot be claimed as of right and the Court has a discretion to refuse to allow it. If a protracted enquiry is necessary for determination of the sum due, it may be a ground for refusing it. (*Gruer, J.*) GIRDHARILAL *v.* SURAJMAL. 1940 N.L.J. 176=A.I.R. 1940 Nag. 177.

——O. 8, R. 6—Equitable set-off—Time barred debt—Right to set-off—Suit for partition of joint estate—Debt due to one co-sharer barred by limitation—Right to set-off against shares of inheritance of others. *See* HINDU LAW—DAYABHAGA—PARTITION. 62 C.L.J. 430=40 C.W.N. 75.

——O. 8, R. 6—*Plea of set-off—Claim, if should be within limitation.*

In order that a set-off might be pleaded, it would have to be within the period of limitation at the time the action of the plaintiff is brought. (*Wort, Ag. C. J.*) BUDHU *v.* SITAL SINGH. 5 B.R. 202=11 R.P. 331=179 I.C. 172=A.I.R. 1939 Pat. 142

——O. 8, R. 6—*Right of set-off—Parties not filling same character.*

In a suit for recovery of money against the defendants as the reversioners of one *A*, the de-

fendants are not entitled to claim set-off for the amount of a decree to which they had become entitled not merely as the reversioners of *A* but also as heirs of a third person who has nothing to do with the plaintiff's suit, as they do not fill the same character in the two suits. (*Henderson, J.*) SURENDRA NATH *v.* KRISHNA CHANDRA. 44 C.W.N. 924.

——O. 8, R. 6—*Scope—If exhaustive—Equitable set-off—Conditions of—Ascertained sum—If can be subject of equitable set-off.*

It is not the law that a claim to set-off a definite sum of money can only be put forward under R. 6 of O. 8, C. P. Code. Nor is it the case that an equitable set-off can only be urged when the claim is to an unascertained amount. The claim by way of equitable set-off can be urged when the claim of the defendant is to an ascertained amount also. But a claim for equitable set-off will not, however, arise simply because there are cross-demands; there must be some connection between them which will make it inequitable to drive the defendant to a separate suit. The two claims must arise out of the same transaction, and there must be knowledge on both sides of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it. (*R. C. Mitter, J.*) HARI ANANDA SHAHA *v.* MUHAMMAD ESAHAK MIA. 40 C.W.N. 751.

——O. 8, R. 6—*Scope—Landlord taking advances and buying goods from tenant—Understanding to set-off dues against rent—Rent suit by landlord—Tenant not claiming set-off, but filing cross-suit—Cross suit, if barred—C. P. Code, S.* 11.

Plaintiff, a shopkeeper and a tenant of the defendant, from time to time advanced moneys and sold goods to the defendants, on the understanding that the amounts due to him from the defendant in respect of these transactions should be set-off against the rent payable to the defendant as they fell due. In spite of this arrangement, defendant sued the plaintiff for arrears of rent. The plaintiff while he mentioned these advances in his written statement in that suit, did not claim a set-off under O. 8, R. 1, C. P. Code, but instituted a cross suit against the defendant for the amounts due to him. Both the suits went side by side and both were decreed. Defendant appealed against the decree in the plaintiff's suit on the ground that the plaintiff not having claimed a set-off in his (defendant's) suit, as he might and ought to have done, was precluded from claiming the amounts in a separate suit.

Held, that though the plaintiff could have claimed a set-off under O. 8, R. 6, C. P. Code, in the defendant's suit, his filing a cross-suit was not illegal since the two claims were not essentially of the same nature and he was not obliged, on pain of losing his advances, to claim a set-off in the rent suit. (*James, J.*) BAIDYANATH DUTTA *v.* KANHAI LAL MARWARI. 179 I.C. 828=5 B.R. 296=11 R.P. 412=A.I.R. 1939 Pat. 264

——O. 8, R. 6—*Scope—Set-off falling under—Claim barred by limitation—If can be made subject of equitable set-off.*

An equitable set-off can be pleaded only in respect of an unascertained sum, and there is no ground for extending the meaning of equitable set-off to a claim for ascertained sums. Even assuming that a defendant may claim an ascertained sum by way of equitable set-off, such a set-off should not be allowed where the claim is barred by limitation. (*Pollock, J.*) HARGOVIND *v.* SHRI KRISHNADAS I.L.R. (1937) Nag. 481=170 I.C. 1004=10 R N. 92=A.I.R. 1936 Nag. 290.

——O. 8, R. 6—*Set-off—Ascertained sum—Claim in respect of boarding and lodging.*

A claim for a sum in respect of the boarding and lodging of another, when no fixed amount either monthly or for any period, had been agreed upon between the parties, cannot be called one, in respect of an 'ascertained sum' and so cannot be claimed to be set-off. (*Davies.*) CHAMELI *v.* CHHITER MAL. 1939 A.M.L.J. 159.

——O. 8, R. 6—*Set-off—Barred by time—Maintainability—Conditions of.*

Where the set-off claimed is not legally recoverable being time-barred and the parties do not fill the same characters in respect of the set-off as they do in respect of the suit set-off cannot be granted. 32 Cal. 576, Ref.; 5 Cal. 333 and A.I.R. 1934 All. 427, Foll. (*Middleton, J. C. and Almond, A.J.C.*) ALLIANCE BANK OF SIMLA, LTD. *v.* FEROZE SHAH. 160 I.C. 908=8 R. Pesh. 135=A.I.R. 1936 Pesh. 57.

——O. 8, R. 6—*Set-off—Barred claim—If can be pleaded.*

Set-off is a creature of statute and is governed by O. 8, R. 6, C. P. Code, although the latter part of the rule indicates that there may be a set-off other than that provided by the rule. Under this rule, a claim barred by the law of limitation cannot be pleaded by the defendant by way of set-off. The fact that the transactions which were the subject-matter of the claim and of the set-off were with regard to the same estate is immaterial. (*Wort, J.*) UMA PRASAD SINGH *v.* SHIVA KANT PRASAD SINGH. 5 B.R. 705=181 I.C. 1006=11 R.P. 651=A.I.R. 1939 Pat. 567.

——O. 8, R. 6—*Set-off—Nature of—Counter-claim — Distinction — "Legally recoverable"—Meaning of.*

A set-off is either legal or equitable. O. 8, R. 6 is restricted to legal set-off. Equitable set-off is allowed if the demands arise out of the same transaction or are so connected that they can be looked upon as part of the same transaction and when the amount is unascertained. O. 20, R. 19 (3) recognises equitable set off. A set-off may be purely defensive, that is, it may amount to an adjustment or satisfaction of the plaintiff's claim or it may be a counter-claim under which the defendant claims a decree for the surplus amount due to him. In a defensive set-off, the set-off claimed must be recoverable at the date of the plaintiff's suit. In a counter-claim the sum claimed by the defendant should be legally recoverable at the date when he makes the claim, *i.e.*, at the date when he files the written statement. The words "legally recoverable" in O. 8, R. 6, mean legally recoverable at the date of the institution of the suit in one case and mean legally recoverable at the date when the counter-claim is made in the other case. Although in O. 8, R. 6 and O. 20, R. 19, there is no clear distinction between a mere set-off, *i.e.*, a defensive set-off and a counter-claim, a distinction has been made in Indian Courts in accordance with the law of England, as it is based on a sound principle.

C. P. CODE (1908), O. 8, R. 6.

(*Nasim Ali and Henderson, JJ.*) JITENDRA NATH ROY *v.* JNANADA KANTA DAS GUPTA. 167 I.C. 265=9 R.C. 672=A.I.R. 1936 Cal. 277.

——O. 8, R. 6 and Court-Fees Act, Sch. I, Art. 1—*Set-off—Payment of court-fee—Necessity—Amount.*

It is clear from Art. I. of Sch. 1 of the Court-Fees Act that fees must be paid on a set-off, and it must be paid on the full amount of the set-off and not only on the amount claimed in excess of that claimed by the plaintiff court-fees should be paid also on an equitable set-off. (*Gruer, J.*) GIRDHARILAL *v.* SURAJMAL. 1940 N.L.J. 176=A.I.R. 1940 Nag. 177.

——O. 8, R. 6—*Set-off and counter-claim—Suit for money due in partnership business—Defendant pleading discharge and payment of loan to plaintiff and claiming same—If set-off or counter-claim.*

In a suit for recovery of amount due to the plaintiff in a partnership business between him and the defendant, the defendant pleaded that the amount already due to the plaintiff was paid off by him and that on the date of such payment he advanced a further loan to the plaintiff and that it was due from the plaintiff instead.

Held, that the claim was a counter-claim and not a set-off as the allegation of loan was put forward not as a ground of defence but as a ground of attack and the claim having been made more than three years from the date of such loan, was barred by time. (*Pollock, J.*) SUNDERMAL *v.* GANESH NARAYAN. 171 I.C. 502=10 R.N. 120=A.I.R. 1937 Nag. 210.

——O. 8, R. 6 (2)—Decree for costs—Execution—Costs taxed and paid into Court—Application by solicitor for lien—Claim of set-off by opposite party for costs due under another decree—Maintainability. *See* SOLICITOR — LIEN FOR COSTS. 40 C.W.N. 458.

——O. 8, R. 9 and O. 6, R. 7—*Applicability to minors.*

Except for the special provisions in O. 32, Rr. 12-14 which govern the relations between a minor and his next friend, the C. P. Code does not make any difference between minors and others so far as general rules of pleadings are concerned. The provisions of O. 8, R. 9 and O. 6, R. 7 apply to minors also and do not cease to apply to a minor merely because during the pendency of the suit he comes of age. Hence, where a guardian *ad litem* representing the minor defendant files a written statement and the minor attains majority during the pendency of the suit, he cannot claim to file a fresh written statement so as to supersede that filed by his guardian *ad litem*. (*Rowland, J.*) RAMKHELAWAN SINGH *v.* GANGA PRASAD. 172 I.C. 513=10 R.P. 337=1937 P.W.N. 720=A.I.R. 1937 Pat. 625.

——O. 9—Applicability — Application under S. 84, Madras Hindu Religious Endowments Act —Dismissal for default—Restoration—Application for—Maintainability. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 84. 45 L.W. 695.

——O. 9 and O. 17—*Applicability—Application under O. 34, R. 5—Order directing notice to opposite party—Failure to pay costs of notice—Dismissal—If justified.*

An application under O. 34, R. 5, C. P. Code, is not an execution proceeding, and is governed by the provisions of O. 9 and O. 17, C. P. Code. When an applicant under O. 34, R. 5 fails to comply with the order of the Court directing notices to issue by omitting to pay the costs of the notices, the provisions of Rr. 2 and 4 of O. 9 become applicable and the Court acts rightly in dismissing the application. (*Davis, J.C.*) PREMOMAL *v.* KHUDA BAKHSH. 31 S.L.R. 180=172 I.C. 520=10 R.S. 163=A.I.R. 1937 Sind 273.

C. P. CODE (1908), O. 9, R. 3.

——O. 9, R. 2—*Plaintiff failing to get minor defendant properly served—Dismissal of suit against other defendants duly served—If justified.*

The fact that the plaintiff through his negligence had failed to get a minor defendant properly served and to get a guardian appointed for him, does not justify the dismissal of the suit under O. 9, R. 2, C. P. Code, as against the other defendants who had been duly served. (*Srivastava, C.J.*) GANESH KUER *v.* SHEORAJ SINGH. 170 I.C. 982=10 R.O. 64=1937 O.L.R. 504=1937 O.W.N. 977=A.I.R. 1937 Oudh 502.

——O. 9, Rr. 2 and 4—*Power of Court—Date not fixed for appearance of defendant—Order requiring plaintiff to file process fees and copies of plaint—Non-compliance—Dismissal of suit—Legality.*

A Court has no power to require a plaintiff to file process fees or copies of the plaint before fixing a date for the appearance of the defendant. Such an order is illegal and failure to comply with it does not entail dismissal of the suit. A dismissal of the suit for failure to comply with such an order is without jurisdiction. (*James, J.*) SRIPATI SARAN PRASAD SINGH *v.* INDARJIT MAHTON. 179 I.C. 563=5 B.R. 264=11 R.P. 397 (1)=19 Pat.L.T. 854=A.I.R. 1939 Pat. 160.

——O. 9, Rr. 3 and 4—*Applicability—Plaintiff's pleader stating that his client would not proceed with case—Court recording that plaintiff's pleader had no instructions and defendant was absent and dismissing suit—Application for restoration—If maintainable.*

Where the plaintiff's pleader appeared before the Court and made a statement to the effect that his client's agent had informed him that he would not proceed with the case, but the Court expressly recorded that the plaintiff's pleader had no instructions and no steps were taken by the plaintiff and that the defendant was absent and dismissed the suit for default, the order passed is clearly one under O. 9, R. 3, C. P. Code, and an application for restoration is, therefore, maintainable under O. 9, R. 4, C. P. Code. (*S. K. Ghose and Edgley, JJ.*) JAHARLAL *v.* JYOTI PROSAD. 177 I.C. 401=11 R.C. 242=42 C.W.N. 806=A.I.R. 1938 Cal. 547.

——O. 9, R. 3—*Dismissal of suit—Discretion of Court.*

The provisions of O. 9, R. 3, C. P. Code, are not obligatory, but merely give the Court a discretion to make an order in suitable circumstances that the suit be dismissed. (*Fazl Ali, J.*) RAMCHANDRA-FARAYA LAL *v.* BHAIA DHARMAN SAHI. 162 I.C. 557 (1)=1936 P.W.N. 359=8 R.P. 546 (1)=A.I.R. 1936 Pat. 437.

——O. 9, Rr. 3 and 8—*Dismissal—When justified—Date fixed for filing list of witnesses—Failure to appear on that date—Effect—'Hearing'—Meaning.*

C. P. CODE (1908), O. 9, R. 3.

The utmost result of the failure of a party to give a list of witnesses within the time fixed would be that the Court might decline to hear the evidence of any witnesses whom he might subsequently call; failure to file a list of witnesses by the date fixed could under no circumstances result in the dismissal of a suit. O. 9, Rr. 3 and 8 refer to the dismissal of a suit on the failure of parties to appear when the suit is called on for hearing, and clearly a date fixed solely as the last day on which a list of witnesses may be filed is not a date fixed for hearing. The word 'hearing' in these rules although does not mean solely the recording of evidence, it means what it says, that is, "when the suit is called for hearing before the Court" and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all. (*Roberts, C J. and Dunkley, J.*) MAUNG AHMIN *v.* MAUNG SAUNG. **178 I.C. 789=11 R.R. 281=A.I.R. 1938 Rang. 360.**

——**O. 9, R. 3**—*Proceedings for final decree pending—Dismissal of suit for default — Propriety.*

Where a preliminary decree for partition has been passed and the Court takes proceedings for passing the final decree, the suit should not be dismissed for default. The suit should be adjourned *sine die* and made revivable on payment of costs. (*Mir Ahmad, J.*) VIDYAWATI *v.* GOVINDI BAI. **176 I.C. 32=11 R. Pesh. 3=A.I.R. 1938 Pesh. 27.**

——**O. 9, Rr. 3 and 4**—*Transfer of suit to another Court without notice to plaintiff—Suit dismissed for default—Restoration.*

Where in the course of adjustment of business a case was transferred to the file of another Court but no notice of the transfer was given to the plaintiff, and when the case came up for hearing none of the parties was present and the suit was dismissed under O. 9, R. 3, C. P. Code, the Court should, on the application of the plaintiff, restore the case. (*Agha Haidar, J.*) JINDA RAM RAMKISHAN *v.* FAQIRA. **165 I.C. 563 =9 R.L. 258=38 P.L.R. 1118.**

——**O. 9, R. 4**—*Construction—Remedies under —If mutually exclusive—Dismissal of application to restore suit—If bar to fresh suit.*

R. 4 of O. 9, C. P. Code, does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with his original suit. The alternative provisions of the rule are not mutually exclusive; and a plaintiff whose application for restoration of the dismissed suit has been rejected is not thereby precluded from bringing a fresh suit, subject to the law of limitation. (*James and Rowland, JJ.*) BALKESIA *v.* BHAGWAN GIR. **15 Pat. 716=17 Pat.L.T. 644=166 I.C. 451=9 R.P. 297=3 B.R. 167=A.I.R. 1937 Pat. 9.**

——**O. 9, R. 4**—*Restoration of suit—Duty of Court.*

In the matter of restoration of suits dismissed for default, Courts should be anxious to see that litigants obtain justice without being hampered by rules of procedure, unless such are imperative or there is contumacious obstruction or deliberate delay with a view deliberately to lengthen proceedings. The dismissal of suits without considering whether payment of costs will not meet the situation so far as the opposite side, if any, is concerned, must be deprecated. (*Dalip Singh, J.*) MAHOMED RAMZAN *v.* MAHOMED AKBAR. **186 I.C. 306=12 R.L. 384=41 P.L.R. 571=A I.R. 1939 Lah. 592.**

C. P. CODE (1908), O. 9, R. 6.

——**O. 9, R. 4**—*Suit by shebait in name of idol dismissed for default—Application for restoration by another shebait—Maintainability.*

Where a suit brought by a shebait in the name of an idol is dismissed for default under O. 9, R. 3, C. P. Code, an application for restoration under O. 9, R. 4, C. P. Code, is maintainable by another shebait who is the shebait at the time of the application. The real plaintiff in the suit must be held to be the idol and not the shebait who was suing in his name. (*S. K. Ghose and Edgley, JJ.*) JAHARLAL *v.* JYOTI PROSAD. **177 I. C. 401=11 R.C. 242=42 C.W.N. 806=A.I.R. 1938 Cal. 547.**

——**O. 9, R. 5**—*Order for issue of fresh notice to* pro forma *defendant—Plaintiff not complying with order—Dismissal of suit even as against contesting defendant—Propriety.*

The action of an Assistant Collector in dismissing a suit for profits under S. 227 of Agra Tenancy Act against both defendants merely because the plaintiff failed to comply with the Court's order for the issue of a fresh notice for the appearance of the *pro forma* defendant is high-handed in character. Under Cl. (1) of R. 5 of O. 9, C. P. Code, the Court is at liberty to "make an order that the suit be dismissed as against such defendant", namely, the *pro forma* defendant. The Assistant Collector is not justified in dismissing the suit against the contesting defendant who is duly represented from the very beginning, and his order is, therefore, liable to be set aside in revision. (*Darling, S.M. and Bomford, J.M.*) BANWARI LAL *v.* MADAN GOPAL. **1937 R.D. 384.**

——**O. 9, R. 5**—*Order staying suit—Legality—Report on summons that defendant is absconding.*

An order staying proceedings under O. 9, R. 5, C. P. Code, is illegal, where the report on the summons which was attempted to be served is that the defendant is absconding. (*Jai Lal, J.*) SULTAN SINGH *v.* RAM SARUP. **38 P.L.R. 197.**

——**O. 9, R. 6 and O. 17, R. 2**—*Applicability—Date fixed for hearing of suit after framing of issues—Defendant absent—Application by pleader for adjournment—Refusal of—Pleader withdrawing—Decree—If* ex parte—*"Appearance."*

O. 17, R. 2 applies only to a case where a suit comes on for hearing on a date to which it is adjourned and any party fails to appear. It does not apply to a case where the suit comes up for disposal on the date which is the date for the first hearing. A distinction has to be made between a first hearing and an adjourned hearing. The Court, after framing the issues in a suit, fixed 24-9-1934 for hearing; the date was later changed to 5-9-1934. On that date the defendant, through his lawyer, applied for an adjournment on the ground that he was not well. The Court dismissed the application whereupon the lawyer withdrew from the case reporting that he had no further instructions to proceed. The Court proceeded with the case without the defendant and passed a decree against him expressly stating that it was *ex parte*. But when the defendant applied to have the *ex parte*

C. P. CODE (1908), O. 9, R. 6.

decree set aside, it rejected the application without going into the merits on the ground that the case fell under the explanation added by the Allahabad High Court to O. 17, R. 2, C. P. Code, holding that the defendant had appeared.

Held, that O. 17, R. 2 did not apply as the defendant was absent and had not appeared, and the decree was therefore an *ex parte* decree under O. 9, R. 6, C. P. Code, and it was therefore open to the defendant to apply, to have it set aside. (*Sulaiman, C.J. and Bennet, J.*) TILAK SINGH *v.* PRADYUMNA SINGH. 1937 A.L.J. 239=1937 A.W.R. 151=168 I.C. 943=9 R A. 683=1937 A.L.R. 427=A.I.R. 1937 All. 347.

——O. 9, R. 6—Ex parte *decree—Duty of plaintiff and of Court.*

In the case of *ex parte* decrees. it is the duty of the plaintiff to adduce *prima facie* evidence in support of his case, and before an *ex parte* decree is passed it is the duty of the Court to record a finding in favour of the plaintiff in the light of evidence adduced by the plaintiff in support of his case. (*Srivastava, C.J. and Smith, J:*) BABA DIN *v.* SURAJ BAKSH SINGH. 169 I.C 226=10 R.O. 2=1937 O.L.R. 360=1937 O.W.N. 620.

——O. 9, R. 6—Ex parte *suit—Proof of plaintiff's case—Necessity.*

Ex parte suit is as much a judicial proceeding as a contested suit. Plaintiff has to prove his case by evidence and it is for the Judge to hear and decide on it. This cannot be left to the Reader of the Court. (*D. R. Norman.*) SUKH RAM *v.* LALTA PERSHAD PERBHU DAYAL. 1939 A.M.L.J. 72.

——O. 9, Rr. 6 and 7—*Scope—If to be enforced as penal provisions—Defendant declared* ex parte *—Right to appear afterwards and file written statement and take part in trial—Suit not past the stage of framing of issues—Powers of Court.*

The object of Rr. 6 and 7 of O. 9, C.P. Code, will be frustrated if defendants could be allowed to absent themselves with impunity at the earlier stages of a litigation. But where, by reason of causes for which none of the parties is responsible, the case has not made much progress, there is no reason why these rules should be applied as penal provisions depriving parties of the opportunity of putting forward their defence. It will not, in any sense, be reopening what has happened in the past if a defendant who has been declared *ex parte* should be permitted to file a written statement, when the case is only at a stage when the other defendants has filed their written statements and certain issues framed but no evidence has yet been recorded, even if the filing of the proposed written statement might raise other issues. In such a case a defendant who has been declared *ex parte* is entitled to file a written statement and proceed with the trial by cross-examining the plaintiff's witnesses and also by leading evidence on his own behalf. In the absence of a statutory restriction in the Code corresponding to O. 6, R. 2 of the High Court Original Side Rules, mofussil Courts cannot impose any restriction on a defendant set *ex parte* continuing the suit at the stage at which it stands when he appears so long as he does not thereby reopen anything that has been done already. (*Varadachariar, J.*) PERUMAL NAICKEN *v.* KONDAMA NAICKEN. 185 I.C. 247=12 R.M. 525=1939 M.W.N. 110=49 L.W. 372=A.I.R. 1939 Mad. 385=(1939) 1 M.L.J. 64.

C. P. CODE (1908), O. 9, R. 8.

——O. 9, R. 7—Ex parte *order—Setting aside—Direction for costs.*

Where in the case of an *ex parte* order, the applicant to set it aside states that he did not receive the summons.

Held, that, if the applicant knew of the suit, the *ex parte* order should not be set aside and if the applicant did not know, she ought not to be made to pay costs. (*D. R. Norman.*) RANI VESHNI *v.* GANESH MAL SARDAR MAL. 1937 A.M.L.J. 70.

——O. 9, R. 7—*"Good cause"—Non-service of summons—If amounts to.*

"Good cause" in R. 7 of O. 9, C. P. Code, includes non-service of summons. (*Norman.*) BIRDI CHAND SETH *v.* NORAT MAL. 1936 A.M.L.J. 18.

——O. 9, R. 8—Applicability — Dismissal for default in deposit and appearance on day fixed. *See* C. P. CODE, O. 9, R. 1 (1). 1938 R.D. 614.

——O. 9, R. 8—*Applicability—Plaintiff's counsel asking for adjournment—Adjournment being refused, reporting no further instructions.*

Where the plaintiff's Counsel confines himself to asking for an adjournment and, when it is refused, retires from the case and states that he has no further instructions, R. 8 of O. 9 applies and the plaintiff will not be held to have appeared. However, exact language used by the Counsel to that effect is not of great importance and one must look at all the circumstances to see in any particular case whether Counsel retired from the case so as not to prejudice his client by appearing or whether he, for reasons which commended themselves to him, abandoned his claim in the suit. (*Panckridge, J.*) BAIJNATH BOTHRA *v.* KEDARNATH. I.L.R. (1938) 1 Cal. 213=174 I.C. 657=10 R.C. 703=A.I.R. 1938 Cal. 74.

——O. 9, Rr. 8 and 9—*Date fixed for payment of costs of adjournment by defendant to plaintiff—Suit dismissed for non-appearance of plaintiff—Application for restoration by his counsel on same day—Plaintiff, if entitled to restoration.*

A certain date was fixed for payment of costs of adjournment by the defendant to the plaintiff. On that date, no other proceedings had to take place except the fixing of a date for recording the evidence. Neither the plaintiff nor his Counsel appeared in Court on that day and the suit was dismissed in default. On the same day an application was made by the plaintiff's Counsel for the restoration of the suit. It was alleged that the plaintiff could not appear as he was ill and that the Counsel was present in Court waiting for the case to be called and did not hear when the case was called.

Held, that the circumstances of the case were such that the plaintiff was entitled to the restoration of his suit. (*Jai Lal, J.*) BIR BAT *v.* JIWAN SINGH. 168 I.C. 350=9 R.L. 625=38 P.L.R. 484=A.I.R. 1937 Lah. 118.

——O. 9, R. 8—*Dismissal for default—Propriety—Suit transferred to another Court—Notice of hearing served on pleader.*

A suit during administrative changes was transferred from one Court in one town to another Court in a different town. The transferee Court issued notice to the pleaders of the parties intimating to them new date fixed for hearing in

C. P. CODE (1908), O. 9, R. 8.

the transferee Court. The pleader for the plaintiff in that suit informed that he was engaged to appear in one particular Court only. The Court did not inform the transfer to the party. On the date of hearing neither the plaintiff nor his pleader appeared and consequently the suit was dismissed for default. On revision against the order of dismissal,

Held, that the pleader ought to have conveyed information to his client that the date had been changed and that the case would be heard at a different Court, when he was not prepared to appear. But it did not justify the action of the Court in refraining from serving notice upon the party and conveying to him the date which had been fixed for hearing as well as the name of the Court before which he was to appear. A.I.R. 1934 Lah. 91, Rel. on. (*Agha Haidar, J.*) TILAK SINGH *v.* MOHAMMAD RASHID. **164 I.C. 142=9 R.L. 89=A.I.R. 1936 Lah. 560.**

——**O. 9, R. 8**—*Dismissal of suit for default on date fixed for submission of Commissioner's report—Legality—Hearing of the suit—Meaning of.*

An order dismissing the suit of the plaintiff for default on a date fixed for the submission of the report of the Commissioner as to the market value of the property in suit for purposes of court-fees, is without jurisdiction, as such date is not the date of the hearing within the meaning of O. 9, R. 8, C. P. Code. By the hearing of the suit is meant the hearing at which the judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it. (*Agha Haidar, J.*) MANOHAR DASS *v.* BARADRI SHIKARPURIAN. **161 I.C. 790=8 R.L. 807=38 P.L.R. 88=A.I.R. 1936 Lah. 280.**

——**O. 9, R. 8 and O. 17, R. 2**—*Exercise of powers under—Respective stages.*

Courts should not lightly dispose of litigation without going into the merits. It is also equally plain that Courts are bound in certain circumstances to dismiss cases for default. One case is that indicated in O. 9, R. 8. It is true that when a case reaches the stage where the issue stage has in part been passed, the Court is not compelled to exercise its powers under O. 9, R. 8 but is given power to make another order under O. 17, R. 2, and in any doubtful case the Court should so act. (*Stone, C.J. and Bose, J.*) MANEKLAL BHIMRAJ *v.* PHULABAI. **I.L.R. (1939) Nag. 574=184 I.C. 102=12 R.N. 93=1939 N.L.J. 351=A.I.R. 1939 Nag. 213.**

——**O. 9, Rr. 8 and 9**—*Plaintiff's counsel applying for adjournment during plaintiff's absence—Court refusing adjournment and dismissing suit for default—Plaintiff's remedy.*

Where in the absence of the plaintiff, his Counsel puts in an application for adjournment and that application is refused, the Court should, in view of the Explanation to O. 17, R. 2, proceed as though the plaintiff is present, and decide the suit on the merits. Where, however, this is not done and the Court dismisses the suit for default, it must be deemed to decide the matter upon its merits and not act merely under O. 9, R. 8. The proper remedy of the plaintiff, in such circumstances, is to file an appeal, and not to make an application under O. 9, R. 9. (*Allsop, J.*) JAFRI

C. P. CODE (1908), O. 9, R. 9.

BEGAM *v.* ASGHAR ALI KHAN. **164 I.C. 1059=9 R.A. 222=1936 A.L.J. 635=1936 A.W.R. 499=A.I.R. 1936 All. 659.**

——**O. 9, R. 8**—*Pleader telling Court that he has no instruction—If tantamounts to default of appearance by party.*

When the pleaders appear and intimate to the Court that they have no instructions from their client, it is tantamount to default of appearance by the party. 22 A. 66 (F.B.), Foll. (*Agha Haidar, J.*) GULAM HAIDAR *v.* DIWAN IQBAL NATH. **167 I.C. 520 (1)=9 R.L. 504=A.I.R. 1936 Lah. 1000.**

——**O. 9, R. 9**—Applicability—Amendment of plaint and direction to pay deficit Court-fee after proper valuation—Rejection of application to withdraw suit with liberty—Failure to take steps—Dismissal of suit—Subsequent suit—If barred. *See* C. P. CODE, O. 7, RR. 11 AND 13. **40 C.W.N. 1390.**

——**O. 9, R. 9**—*Applicability—Objections under S. 47 dismissed for default—Another application containing some objections—Maintainability.*

The combined effect of Ss. 2 (2) and 47 of C. P. Code, is that an application under S. 47 stands on the footing of a suit and the determination of such an application is tantamount to a decree. The provisions of O. 9, R. 9, C. P. Code, are applicable to objections made under S. 47, C. P. Code, and where such objections filed by the judgment-debtors were dismissed for default, another application under S. 47 containing the same objections is not maintainable. (*Srivastava, Ag.C.J. and Smith, J.*) RAM HARAKH *v.* BANWARI LAL. **13 Luck. 309=168 I.C. 314=9 R.O. 461=1937 O.L.R. 251=1937 O.W.N. 503=A.I.R. 1937 Oudh 337.**

——**O. 9, R. 9**—*Applicability—Pauper application—Duty of Court to decide on merits.*

O. 9, R. 9, C. P. Code, does apply to a pauper petition by reason of S. 141, C. P. Code, if the Court has jurisdiction to decide a petition under O. 9, R. 9 and S. 141, C. P. Code, it has a duty to decide such a petition on its merits, and cannot decline to exercise its jurisdiction merely because there is an alternative remedy. (*Wadsworth, J.*) KRISHNA RAO *v.* JANAKI AMMAL. **1939 M.W.N. 408=49 L.W. 543=A.I.R. 1939 Mad. 681=(1939) 1 M.L.J. 728.**

——**O. 9, R. 9**—*Applicability—Probate proceedings—Application for probate dismissed for default—Order dismissing application for its restoration—Appeal.*

The proceedings referred to in S. 141, C. P. Code, include original matters in the nature of suits, such as proceedings in probates, guardianships and so forth. The provisions of O. 9, R. 9 are therefore applicable to probate proceedings and an application for grant of probate can be dismissed in default and restored and an order dismissing such application under O. 9, R. 9 is appealable under O. 43, R. 1 (*c*) and certainly under S 299 of Succession Act. [164 I.C. 334=9 R.L. 156=38 P.L.R. 263=A.I.R. 1936 Lah. 712, Affirmed.] (*Addison and Abdul Rashid, JJ.*) RUP LAL *v.* MANOHAR LAL. **167 I.C. 526=9 R.L. 500=38 P.L.R. 973=A.I.R. 1936 Lah. 863.**

——**O. 9, R. 9**—*Applicability—Proceedings under Provincial Insolvency Act.*

The provisions of O. 9, R. 9, C. P. Code, must be held to be applicable to insolvency proceedings

under the Provincial Insolvency Act, in view of the provisions of S. 5 of the latter Act. (*Rowland and Chatterjee, JJ.*) RAM DAYAL BABU LAL *v.* LAKHU SAO. 1939 P.W.N. 699=20 Pat.L.T. 768=12 R.P. 427=185 I.C. 857=6 B.R. 270=A.I.R. 1940 Pat. 58.

——O. 9, R. 9—Applicability—Suit adjourned for production of plaintiff's witnesses—Plaintiff's pleader absent on adjourned date--Application for adjournment by another advocate refused—Plaintiff not giving evidence—Dismissal of suit—If one for default or on merits. *See* C. P. CODE, O. 17, RR. 2 AND 3. 50 L.W. 430.

——O. 9, R. 9 and O. 47, R. 1—*Applicability—Suit dismissed for default—Remedy for restoration—Review application—Competency.*

Where a suit is dismissed for default, the remedy of the plaintiff is by way of application under O. 9, R. 9, C. P. Code, and not an application for review. (*Darling, S.M. and Bomford, J.M.*) BALWANTI *v.* BADAL. 1938 R.D. 184=1938 A.W.R. (B.R.) 115.

——O. 9, R. 9 and S. 141—*Application for restoration of previous application dismissed for default—Maintainability.*

An application lies under O 9, R. 9, read with S, 141, C. P. Code, for the restoration of a previous application under that order and rule which has been dismissed for default. A.I.R. 1923 Oudh 146, Foll. (*Nanavutty and Smith, JJ.*) RAMESHAR DUTT SINGH *v.* HARI HAR. 13 Luck. 246=168 I.C. 47=1937 O.L.R. 186=9 R.O. 441=1937 O.W.N. 372=A.I.R. 1937 Oudh 344.

——O. 9, R. 9—*Application under—Essentials to be proved.*

In an application for restoration under O. 9, R. 9 the plaintiff must show some fact which was either not known to the Court when it dismissed the suit, or at least at that stage lacked satisfactory proof. (*Panckridge, J.*) BAIJNATH BOTHRA *v.* KEDARNATH. I.L.R. (1938) 1 Cal. 213=174 I.C. 657=10 R.C. 703=A.I.R. 1938 Cal. 74.

——O. 9, R. 9—Application under—Pleader on record, if can make—Fresh appointment, necessity. *See* C. P. CODE, O. 3, R. 4 (3) AND O. 9, R. 9. 1938 N.L.J. 98.

——O. 9, R. 9 and O. 43, R. 1 (c)—*Application for restoration of suit—Order of dismissal for non-prosecution—Appeal.*

Where on dismissal of a suit for default of appearance, the plaintiff applied for restoration of the suit, and his application for restoration was dismissed for non-prosecution, the order of dismissal of the application is one under O. 9, R. 9, and an appeal therefore lies against that order to the District Judge under O. 43, R. 1 (*c*). There is no warrant for confining the operation of R. 9 of O. 9 to an application dismissed on the merits. (*Harries and Bajpai, JJ.*) UMA DATT UPADHAYA *v.* ZAKIA BIBI. 161 I.C. 840=8 R.A. 788=1936 A.L.J. 305=1936 A.W.R. 454=1936 A.L.R. 332=A.I.R. 1936 All. 737.

——O. 9, R. 9 and S. 148—*Conditional order—Legality—Extension of time—Power of Court.*

Where a Court passes an order for restoration of a suit dismissed for default on condition of payment of costs to the opposite party within a time fixed by the order and directs that in case of default the application for restoration is to stand as dismissed, the order is legal and valid. The effect of the order on the expiry of the time fixed for the payment of the costs is that the application stands as dismissed, and the Court no longer remains seized of the application but becomes *functus officio*, and has, therefore, no power to extend the time for payment of costs. (*Allsop and Ganga Nath, JJ.*) GAYA DIN *v.* LALTA PRASAD. 163 I.C. 554=9 R.A. 35=1936 A.W.R. 414=1936 A.L.J. 566=A.I.R. 1936 All. 477.

——O. 9, R. 9—*Dismissal in default—Restoration—Adequate ground.*

Where a plaintiff appears with only one day's delay and files an affidavit explaining his absence and this explanation is not contested by the other party at the subsequent hearing, it should be accepted as adequate ground for restoration. (*Harper, S.M. and Sathe, J.M.*) CHANDRA BHAGA *v.* ISHAQ HUSAIN. 1940 A.W.R. (B.R.) 132 (2) =1940 O.A. 783.

——O. 9, R. 9—*Dismissal for default—Restoration—Duty of advocates.*

Advocates who are engaged in cases which are fixed for hearing at a given time and place cannot be allowed to treat the Court before which the hearing is to take place with contumely or indifference, and then apply casually for reinstatement of a suit dismissed in their absence merely because they hoped or believed that they might attend the hearing. They must take reasonable precautions, and the provisions of O. 9, R. 9 become meaningless if it can afterwards be urged that although none were taken and there was no sufficient cause for their non-attendance the suit can still be restored to the file because the litigant would suffer if it were not. (*Roberts, C.J., Dunkley and Blagden, JJ.*) U AUNG GYI *v.* GOVERNMENT OF BURMA. 1940 Rang.L.R. 512=189 I.C. 338=A.I.R. 1940 Rang. 162 (F.B.).

——O. 9, R. 9 and S. 151—*Dismissal for default—Sufficient cause not shown—Inherent power to restore.*

Apart from the powers under O. 9, R. 9 the Court cannot exercise the inherent jurisdiction under S. 151, C. P. Code, in a case to which O. 9, R. 9 does not apply. Hence, where sufficient cause is not shown for non-appearance there can be no grounds for the application *ex debito justitiae* of any inherent power outside the rule. (*Roberts, C.J., Dunkley and Blagden, JJ.*) U AUNG GYI *v.* GOVERNMENT OF BURMA. 1940 Rang. L.R. 512=189 I.C. 338=A.I.R. 1940 Rang. 162 (F.B.).

——O. 9, R. 9—*Procedure—Application for restoration not accompanied by affidavit—Summary rejection of—Propriety—Duty of Court—Absence of affidavit—If fatal.*

An application under O. 9, R. 9, C. P. Code, for the restoration of a case dismissed for default, made on the same date as that of the dismissal and within a very short time of the dismissal ought not to be summarily rejected by the Court on the ground that it is not accompanied by an affidavit. Neither O. 9, R. 9 nor any rule having the force of law prescribes or requires an affidavit. Applications under the rule are not to be disposed of summarily and it is the duty of the Court to give the applicant an opportunity to remove any doubts in the mind of the Court. The hasty rejection of applications for restoration merely increases the work of the Court in the long run instead of clearing the file of the Court. (*Darling,*

C. P. CODE (1908), O. 9, R. 9.

S.M. and Bomford, J.M.) BHAGWATI PRASAD AGARWAL *v.* LAL MOHAMMAD. 1937 R.D. 7.

——O. 9, R. 9—*Restoration of suit—Non-appearance on account of missing of train—Duty of Court.*

Where a suit has been dismissed in default under O. 9, R. 8 on account of the failure of the representative of plaintiff firm to appear on the date of hearing and the representative alleges that he was unable to appear on the due date by reason of his missing the last train available by a few minutes, the question to be considered by the Court, is whether the representative honestly intended to be in Court, and did his best to get there in time. Once the Court is satisfied that the man did try to get there, and that he would have been there but for the fact of having missed his train by a few minutes, it is the duty of the Court to set aside the order of dismissal after directing him to pay costs to the other party. 1923 Mad. 63, Foll. (*Baguley and Mosely, JJ.*) K.S.R.M. CHETTIAR FIRM *v.* PREM SINGH. 162 I.C. 842=8 R.R. 593=A.I.R. 1936 Rang. 204.

——O. 9, R. 9—*Restoration of suit—Question to be considered.*

In deciding whether a suit dismissed for default should be restored under O. 9, R. 9, what has really to be considered is whether the party was really trying to appear on the date fixed for the case and if he honestly intended to be represented though in his own stupid way, not being guilty of anything in the way of misconduct or gross negligence, then he should not be deprived of his chance of being heard. A.I.R. 1923 Mad. 63, Foll. (*Baguley and Parker, JJ.*) RAMAN CHETTIYAR *v.* K. A. P. ARUNACHALAM CHETTIYAR. 164 I.C. 236 (2)=9 R.R. 71=A.I.R. 1936 Rang. 335.

——O. 9, R. 9—*Scope of—Application under O. 21, R. 13—Dismissal on failure to satisfy condition imposed—Subsequent application to restore prior application — Competency — Dismissal—Appeal against order of dismissal—Competency—C. P. Code, O. 43, R. 1.*

A suit was decreed *ex parte*. The defendant applied under O. 9, R. 13, C. P. Code, to set aside the *ex parte* decree. A conditional order was passed setting aside the *ex parte* decree if the defendant deposited a sum of money within a fixed time. The petition was later dismissed on the ground that the condition was not fulfilled. There was no appeal from this order, but an application was filed under S. 151 and O. 9, R. 9, C. P. Code, to restore the earlier petition which had been dismissed for non-compliance with the condition. The Court considered the application on the merits and dismissed if holding that the defendant did not show sufficient cause for re-opening the earlier petition. On appeal from this order, the appellate Court held that the defendant had substantially complied with the condition and therefore his petition should have been granted and allowed the appeal. The plaintiff did not raise any objection to the maintainability of the appeal.

Held, in revision by the plaintiff, that the application under O. 9, R. 13, C. P. Code, not having been dismissed for default, no petition would lie to re-open the previous order dismissing that application; (2) that the appeal against the order dismissing the second application was not maintainable under O. 43, R. 1, C. P. Code; (3) that the mere fact that the plaintiff did not object to the maintainability of the appeal did not make the order in appeal valid, and there could be no waiver with regard to jurisdiction, although the failure to raise the plea in the Court below would be a circumstance to be taken into account in considering whether the High Court should interfere in revision; and (4) that since no substantial injustice was done to the plaintiff, the High Court was not called upon to interfere with the order restoring the suit. (*Horwill, J.*) VENKATACHARIAR *v.* MAHOMED FAIZUDDEEN. 1940 M.W.N. 833=52 L.W. 375=(1940) 2 M.L.J. 374.

——O. 9, R. 9—*"Sufficient cause"—Case dismissed for non-appearance—Restoration—Considerations—Discretion—Discretion exercised on wrong basis—Interference on appeal—Inherent powers of Court under S. 151.*

Per *Beaumont, C.J. and Rangnekar, J.*—In cases of discretion it is very undesirable to act on precedents, as every Judge has to deal with the cases which come up before him on the particular facts of each case. If a person whose case has been dismissed for non-appearance summarily, appears on the same day, and produces some not unreasonable excuse for his absence, *prima facie* the Court ought to exercise its discretion in his favour. Of course the applicant has no absolute right to ask the Court to waive its rules in his favour, but it is a good working rule that if he applies at once, and thereby shows that his failure to appear was not due to a desire to cause delay, but was *bona fide*, he ought generally to be given the right to have his case restored on payment of costs thrown away. It is, after all, a very serious matter to dismiss a man's suit or summons or whatever it may be without hearing it, and that course ought not to be adopted unless the Court is really satisfied that justice so requires. There is nearly always some degree of negligence or carelessness on the part of an applicant whose case has been dismissed for non-appearance, but that by itself would not disentitle him to have his case restored to the file. Where the negligence is exceedingly slight, the case ought to be restored, if he is not guilty of either misconduct or gross negligence. If the Court exercises its discretion on a wrong basis, the appellate Court will interfere and make the necessary orders.

Blackwell, J.—Whether the matter is to be dealt with as falling under O. 9, R. 9 or under S. 151, C. P. Code, and the inherent jurisdiction of the Court, it is in every case a matter for the discretion of Court. If the Court dealing with the matter cannot be said to have acted either capriciously or in disregard of any legal principle in exercise of its discretion, the appellate Court ought not to interfere, though it may come to a different conclusion if it were to deal with the same matter.

Rangnekar, J.—O. 9, R. 9, C. P. Code, does not take away the inherent power of the Court to restore a suit or summons, if there is just and reasonable cause for restoring it, even if no sufficient cause is shown within the meaning of the rule for the non-appearance of the plaintiff. The Code is not exhaustive and it is for that purpose that the Legislature by S. 151, has indicated that the Court has an inherent power to act *ex debito justitiae* in order that real and substantial justice

C. P. CODE (1908), O. 9, R. 9.

may be done. Rules of procedure are meant to secure the ends of justice and not override them. (*Beaumont, C.J., Blackwell and Rangnekar, JJ.*) P. D. SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD. **I.L.R. (1938) Bom. 829=174 I.C. 534=10 R.B. 458=40 Bom.L.R. 238=A.I.R. 1938 Bom. 199 (S.B.)**

——**O. 9, R 9**—*Sufficient cause—Minority of plaintiff—Dismissal, if to be set aside on that sole ground.*

The fact of minority of a plaintiff is not by itself a sufficient cause for setting aside any order of dismissal that may be passed owing to the absence of the next friend, irrespective of the reasons for such absence. There is nothing in the C. P. Code to warrant a distinction in the procedure to be followed where the suit is filed on behalf of a minor. The question of what is sufficient cause within the meaning of O. 9, R. 9, C. P. Code, has to be decided with reference to various circumstances and the fact of the minority of the plaintiff is only one of such circumstances to be taken note of. (*Hamilton and Radhakrishna, JJ.*) SAHEBA KHATUN *v.* ANWARUL HASAN. **1939 A W.R. (C.C.) 141=1939 O. A. 699=1939 O.W.N. 787.**

——**O. 9, R. 9**—*Sufficient cause shown—Reopening, if mandatory.*

Under O. 9, R. 9 when sufficient cause is shown reopening is mandatory, but when sufficient cause is not shown it is discretionary with Judge. (*Baguley and Parker, JJ.*) RAMAN CHETTIYAR *v.* ARUNACHALAM CHETTIYAR. **164 I.C. 236 (2)=9 R.R. 71=A.I.R. 1936 Rang. 335.**

——**O. 9, R. 9 (1)**—*Dismissal of suit for default—Plaintiff, if precluded from setting up his claim as defence to suit.*

In a suit on a first mortgage, the third mortgagee who was impleaded as one of the defendants claimed priority over the second mortgagor under S. 78 of the T. P. Act. A suit previously filed by the third mortgagee to obtain a declaration of his priority was dismissed for default.

Held, that the third mortgage was not prevented from raising the contention as to priority in this suit and that O 9, R. 9 (1), C. P. Code, had no application because its provisions only precluded a plaintiff from bringing a fresh suit on the same cause of action. (*Panckridge, J.*) SUKUMARI BISHNU *v.* RAGHUNATH HAZRA. **42 C.W.N. 853.**

——**O. 9, Rr. 9 (1) and 8**—*Fresh suit—Bar of—Default in deposit and appearance on day fixed—Dismissal—Fresh suit with addition of new defendant—Maintainability.*

Where in a suit for ejectment the plaintiff was granted time to add a new defendant on condition that a sum was deposited on a certain date as damages, and where on his default in so depositing and failing to appear on the day fixed the suit was dismissed, any fresh ejectment suit by such a plaintiff with the addition of a new defendant, is clearly barred by O. 9, R. 9 (1), C. P. Code, as the order of dismissal is clearly one under O. 9, R 8. (*Mehta, J. M.*) RAM RAO KRISHNA JATAR *v.* DUDH NATH. **1938 R.D. 614=1938 A.W.R. (B. R.) 322.**

——**O. 9, R. 9 (1)**—Suit to set aside sale under Bengal Revenue Sales Act on ground of irregularities in sale—Allegation that irregularities were due to fraudulent conduct of defendant—

C. P. CODE (1908), O. 9, R. 13.

Suit dismissed for default—Subsequent suit for declaration that defendant has bought property fraudulently and for directing him to re-convey property—Maintainability. *See* C. P. CODE, O. 2, R. 2 AND O. 9, R. 9. **41 C.W.N. 1179.**

——**O. 9, R. 9 (2)**—*Notice under—Necessity for—Dismissal of—Suit under O. 9, R. 8.*

When a case is dismissed for the absence of the plaintiff under O. 9, R. 8 and he applies for restoration of the case, under R. 9, notice must be given to the opposite party. The provisions of O. 2, R. 9 (1) are mandatory and the grave irregularity in not issuing a notice to the opposite party before the suit is restored is one that cannot be condoned. (*Darling, S. M. and Bomford, J. M.*) MAHOMED ABBAS *v.* BAQUR HUSAIN. **1937 R.D. 521.**

——**O. 9, R. 13**—*Applicability—Case adjourned for evidence—Absence of defendant—Decree on consideration of evidence—Restoration.*

Where a case is adjourned after the framing of issues on which date parties were to produce their evidence, and on that date the plaintiff appears but the defendant fails to appear, and the Court passes a decree on a consideration of the evidence, the case is governed by O. 17, R. 2 and hence it could be restored under O. 9, R 13—(*Harper, S. M. and Sathe, J.M.*) SHAFIULLAH *v.* BHAGWATI MISRA. **1940 A.W.R. (B.R.) 95.**

——**O. 9, R. 13**—Applicability—Court purporting to act under O. 17, R. 3 on the date fixed for final hearing. *See* O. 17, R. 3 AND O. 9, R. 13. APPLICABILITY OF O. 17, R. 3. **1940 A.L.J. 200.**

——**O. 9, R. 13**—*Applicability—Execution proceedings.*

O. 9, R. 13 has no application to execution proceedings, but only to decrees in suits or in proceedings in administration or guardianship akin to suits. 17 All. 106 (P.C.), Rel. on. (*Baguley and Mosely, JJ.*) U PO MYA *v.* FATHER RIOUFREYT. **1939 Rang.L.R. 134=181 I.C. 841=11 R.R. 498 =A.I.R. 1939 Rang. 115.**

——**O. 9, R. 13**—*Applicability*—"Ex parte *decree"—Defendant directed to file written statement but not filing—Effect*—*Defendant and pleader not prevented from addressing Court at hearing—Decree—If* ex parte—*Application to set aside—Maintainability.*

Where a defendant is directed to file a written statement by a certain date but fails to do so, and his application for further time is rejected, the Court should direct the case to be heard in default of written statement. An order fixing the case for hearing *ex parte* is not justified. A defendant is not bound to put in a written statement; if he does not file it, he is taken to admit the allegations in the plaint. He is, however, entitled to appear at the hearing and submit any argument open to him on the plaint, for instance that the plaint discloses no cause of action or that the claim is time barred. If at the hearing the defendant and his pleader are present and are not prevented in any way from addressing the Court, and a decree is passed after hearing the evidence on behalf of the plaintiff, there is no *ex parte* decree which can be set aside on an application under O. 9, R. 13, C. P. Code. (*Beaumont, C. J. and Wassoodew, J.*) VINAYAK SHREEDHAR *v.* CHINTAMAN VAMAN. **178 I.C. 816 (2)=11 R.B. 195=40 Bom.L.R. 972=A.I.R. 1938 Bom. 470.**

——O. 9, R. 13—*Applicability*—Ex parte *final decree for foreclosure—Power to set aside.*

Where a final decree for foreclosure is passed in the absence of the defendant, it is an *ex parte* decree and as such the provisions of O. 9, R. 13 apply to it. A Court has jurisdiction to set it aside if the conditions necessary are proved. (*Thomas, C. J. and Zia-ul-Hasan, J.*) PRATAB NARAIN *v.* BHAGWATI SINGH. **14 Luck. 435=11 R.O. 212=179 I.C. 928=1939 O.L.R. 96=1939 O.A. 204=1939 O.W.N. 155=A.I.R. 1939 Oudh 111.**

——O. 9, R. 13—*Applicability to insolvency proceedings*—Ex parte *order of adjudication on debtor's application—Creditor's right to apply to set aside* ex parte *order.*

O. 9, R. 13, C. P. Code, is applicable to proceedings under the Provincial Insolvency Act; and the Insolvency Court has therefore power to entertain an application by a creditor to set aside an *ex parte* order of adjudication made on the debtor's application. (*Fazl Ali and Meredith, JJ.*) RAMPRATAP MARWARI *v.* LACHMAN MISTRI. **6 B.R. 567=187 I.C. 794=12 R.P. 649.**

——O. 9, R. 13—*Application for setting aside* ex parte *decree—Opposite party contending that application is barred by limitation—Court, if can invoke justice, equity and good conscience.*

Justice, equity and good conscience cannot be invoked to overrule the law of limitation. Where on an application for setting aside an *ex parte* decree under O. 9, R. 13 on the ground that the applicant had not been properly served with summons, the opposite party contends that the application is barred by limitation, and the Court without touching on the question of limitation, passes an order setting aside the *ex parte* decree on the ground that it considers it justifiable in the interest of justice, equity and good conscience that the applicant should be given a chance to contest the suit, the order cannot be sustained. A. I.R. 1935 Rang 466, Rel. on. (*Baguley, J.*) JAGADAMMA PANDIT *v.* NARESH PANDEY. **164 I.C. 286 =9 R R. 73=A.I.R. 1936 Rang 305.**

——O. 9, R. 13—*Application by way of motion —Limitation.*

An *ex parte* decree was passed on 5th April, 1939. The defendant applied by way of motion to have the decree set aside and presented the application in the Court on 5th May, 1939. The application was endorsed by the Assistant Registrar of the Court having been made on 5th May, 1939, *i.e.*, the date of presentation, but notice of motion was served on 9th May, 1939.

Held, that the application was made within 30 days of the decree and was therefore in time. (*Sen, J.*) RAJAGOPALAN *v.* UNIQUE ASSURANCE Co. **A.I.R. 1940 Cal. 373.**

——O. 9, R. 13—*Application under—Also appeal against* ex parte *decree—Dismissal of appeal—Effect on* ex parte *decree—C. P. Code, O. 41, R. 11.*

When an appellate Court judicially considers the grounds impeaching the correctness of the decree under appeal and dismisses the appeal by an order which so far as thatCourt is concerned is conclusive, that dismissal of the appeal supersedes the subordinate Court's decree. A person applied to the original Court to set aside an *ex parte* decree under O. 9, R. 13, C. P. Code, and at the same time filed an appeal against the *ex parte* decree. The appeal was dismissed under O. 41, R. 11, C. P. Code, and later on the original Court also dismissed the applications under O. 9, R. 13 on the ground that the *ex parte* decree had merged in the appellate Court decree and ceased to exist,

Held, that the *ex parte* decree ceased to exist as soon as the appeal was dismissed and hence the lower Court was right in holding that it had no jurisdiction to deal with the application to set aside the *ex parte* decree.

Held, further, that the appropriate course which a party ought to take in such a case is to request the appellate Court to keep the appeal pending until the disposal of the application under O. 9, R. 13, C. P. Code or to apply to the appellate Court immediately after the dismissal of his appeal to withdraw the application to itself under S. 24 (1) (*b*), C. P. Code. The Court may after so withdrawing it re-transfer the same under sub-S. (1) (*b*) (iii) to the Court from which it was withdrawn if it does not itself wish to try or dispose of it under sub-S. (1) (*b*). (*Niyogi and Pollock, JJ.*) KIKABHAI *v* MT. SAFIA BI. **172 I.C. 608=10 R.N. 228=A.I.R. 1937 Nag. 381.**

——O. 9, R. 13—Application under—Right of—Necessary parties not impleaded in suit—Application by them after *ex parte* decree for addition as parties and for setting aside decree—Competency. *See* C. P. CODE, O 1, R. 10. **A.I.R. 1937 Pat. 49.**

——O. 9, R. 13—*Application to set aside* ex parte *decree—Applicant found to have evaded service—Application, if liable to be rejected.*

Where it is clear from the record that everything that was possible for the trial Court to secure the service of the defendant applicant was done but the applicant persisted in evading service and deliberately refrained from attending the Court, his application to set aside the *ex parte* decree is liable to be rejected. (*Abdul Qayoom, C.J.*) DESRAJ *v.* MANIRAM. **39 P.L.R. J. & K. 113.**

——O. 9, R. 13—*Costs—Neither plaintiff nor defendant to blame.*

In proceedings to set aside an *ex parte* decree, it was found that neither the plaintiff nor the defendant was to blame. The *ex parte* decree was passed on account of the negligence of the clerk of the defendant's counsel who also was not to blame.

Held, that the defendant who had employed the offending agency, *i.e.*, the clerk, should pay the costs. (*Bose, J.*) J. E. BILLIMORIA & SONS *v.* GOPINATH. **179 I.C. 471=11 R.N. 295=A.I.R. 1938 Nag. 370.**

——O. 9, R. 13—*Costs—Setting aside an improper* ex parte *order.*

Where there is no service and an improper *ex parte* order is passed, an applicant seeking to set it aside should not be required to pay costs. (*Weston.*) GOVIND RAM *v.* NIRANJAN LAL. **1938 A.M.L.J. 43.**

——O. 9, R. 13—"*Due service*"—*Meaning of—Major defendant—Service on guardian—Sufficiency.*

The service of summons against a major defendant upon a person who is described to be his guardian cannot be said to be a proper service on the defendant though the supposed guardian may be his brother. (*Mahomed Noor and Madan, JJ.*) KEDAR NATH SINGH *v.* KESRI MULL. **166 I.C. 635**

C. P. CODE (1908), O. 9, R. 13.

=9 R.P. 327=1936 P.W.N. 696=3 B.R. 202=18 Pat.L.T. 72=A.I.R. 1937 Pat. 17.

——O. 9, R. 13 (Oudh)—*Due service—Power of appellate Court to go into question of.*

Due service is not the same thing as personal service. It has to be decided with reference to the provisions of the C. P. Code bearing on the point. It is not beyond the jurisdiction of an appellate Court to go into the merits of the question whether an order of substituted service was correct or not. (*Radha Krishna, J.*) ASHIQUE HUSAIN *v.* LACHHMI NARAIN. 15 Luck. 150=12 R.O. 175=184 I.C. 884=1939 O.L.R. 685=1939 O.W.N. 950=1939 O.A. 766=1939 A.W.R. (C.C.) 242=A.I.R. 1940 Oudh 81.

——O. 9, R. 13—*Due service—Suit against members of joint Hindu family—Service of summons on manager—If service on all members.*

A service of summons on the karta is not a service on other members of the family who are impleaded in the suit as they may have their own defence to make. (*Mahomed Noor and Madan, JJ.*) KEDAR NATH SINGH *v.* KESRI MULL. 166 I.C. 635=9 R.P. 327=3 B.R. 202=18 Pat.L.T. 72 =A.I.R. 1937 Pat. 17.

——O. 9, R. 13—*Duty of Court—Reasons for setting aside* ex parte *decree—If to be stated.*

Where a Court decides to set aside an *ex parte* decree under O. 9, R. 13, although it is not obligatory on the Court to state reasons, it is most desirable that it should state why it thinks the *ex parte* decree should be set aside. (*Stodart, J.*) VENKATARAMA IYER *v.* RAMASWAMI IYER. 163 I.C. 732=9 R.M. 55=A.I.R. 1936 Mad. 524.

——O. 9, R. 13—Ex parte *decree—Application to set aside within time—Affidavit not questioned—Rejection for not having been put in earlier—Legality.*

Where an application to set aside an *ex parte* decree is made within the time allowed by law and accompanied by an affidavit the accuracy of statements in which is not questioned, it cannot be rejected on the ground that it should have been put in earlier. (*Marsh, S.M. and Mehta, J.M.*) RADHEY SHAM *v.* SATISH CHANDER. 1939 R.D. 525=1939 A.W.R. (B.R.) 225.

——O. 9, R. 13—Ex parte *decree—Meaning of—Test to decide whether decree* ex parte *or not—Recital in decree as to presence of party—If conclusive.*

The question whether a particular decree is or is not *ex parte* is a mixed question of law and fact. The Court must examine the records of the case and examine the circumstances under which the decree was passed, and if it is found that a particular defendant was not present at the time of the hearing of suit, the decree must be taken to be *ex parte* against him, in spite of the fact that decree as drawn up mentions his presence. The recital in the records is not conclusive. Thus where the guardian *ad litem* of the defendant was absent during the trial of the suit and the decree drawn up mentioned his presence.

Held, that non-appearance of the guardian during trial made the decree *ex parte* and the application to set it aside was maintainable. (*Mahomed Noor and Madan, JJ.*) KEDAR NATH SINGH *v.* KESRI MULL. 166 I.C. 635=9 R.P. 327=3 B.R. 202=1936 P.W.N. 696=18 Pat.L.T. 72=A.I.R. 1937 Pat. 17.

C. P. CODE (1908), O. 9, R. 13.

——O. 9, R. 13—Ex parte *decree—Payment of punitive costs as condition precedent to restoration order for—Propriety—Procedure to be followed.*

Where an application for restoration of a suit after setting aside an *ex parte* decree, is made on the next day the Court ought not to make the payment of punitive costs by way of damages to the other party, a condition precedent to the restoration of the suit. The Court should first satisfy itself that under O.9,R.13, there was a *prima facie* case and then fix a reasonable payment as costs. (*Darling, S.M. and Mehta, J.M.*) PARTAP *v.* SHEO KEDAR SINGH. 1938 R.D. 939=1939 A.W.R. (B.R.) 84 (2).

——O. 9, R. 13—Ex parte *decree—Setting aside—Power of trial Court after passing of appellate decree.*

In a suit against several defendants a decree was passed on contest against some and *ex parte* against others. The contesting defendants appealed against the decree, making parties to the appeal all persons who were parties to the suit. The value of the appeal was the same as that of the suit. The decree of the trial Court was one indivisible against all defendants and proceeded upon a ground common to them all. The grounds of appeal were such that if the appellate Court would have reversed the decree of the trial Court against the appellants, it would have been reversed against the other non-appealing defendants. The appellate Court affirmed the decree of the trial Court against all the defendants except one. Pending appeal the defendants against whom an *ex parte* decree was passed had applied to set aside the *ex parte* decree. After the appellate decree, they sought to continue their application.

Held, that under the circumstances the appeal involved the whole subject-matter of the suit as well as the decree of the trial Court. The decree of the trial Court therefore merged in the decree of the appellate Court and it then ceased to exist. The trial Court therefore could not, after such appellate decree, entertain the application to set aside the *ex parte* decree, filed by the defendants. (*Nasim Ali and Edgley, JJ.*) MONO MOHAN KUNDU *v.* NRIPENDRA NATH. 172 I.C. 729=10 R.C. 414=41 C.W.N. 1278=A.I.R. 1937 Cal. 548.

——O. 9, R. 13—*Limitation—Application to set aside* ex parte *decree, beyond time.*

Where an application to set aside an *ex parte* rent decree is made beyond the time fixed, it has to be dismissed as time barred. (*Marsh, S. M. and Mehta, J.M.*) TIKA RAM *v.* SOBARAM. 1939 R.D. 215=1939 A.W.R. (B.R.) 121.

——O. 9, R. 13—*Order under—Finality of—Suit on mortgage—Case taken up for hearing after some adjournments—Senior vakil for defendant absent being engaged elsewhere—Junior unwilling to proceed with case—Plaintiff's evidence taken in chief and suit decreed—Application to set aside* ex parte *decree—Rejection on ground of want of sufficient cause—Appeal from decree—Propriety of refusal of adjournment if can be agitated.*

A suit on a mortgage deed, after some adjournments, came on for hearing on a particular day and was called on at first between 11 and 12 noon. The contesting defendants, a Mahomedan lady and her minor son had engaged two vakils, a senior and a junior. The junior vakil represented to the Court that the senior vakil had gone to another Court because he had been led to think

that the sessions case in the Court before which the suit came on would take some time. That case did not, for some reason, take as long as it was expected. The case was again called later and the Court waited for about half an hour, but would not adjourn the suit any further than 1 P.M. The lady who was acting for herself and her minor son was present in Court at the time. The junior vakil was not prepared to take the responsibility of cross-examining the plaintiff's witnesses or of leading evidence on behalf of his clients in the absence of the senior who had not yet returned. The result was that the Judge recorded the examination in chief of the witnesses tendered on behalf of the plaintiff and delivered judgment immediately for the plaintiff. The next day an application was filed under O. 9, R. 13, C. P. Code, to set aside the *ex parte* decree and was allowed on terms. But in revision the High Court set aside the order setting aside the *ex parte* decree on the ground that there was no sufficient cause for non-appearance. A regular appeal against the decree having been preferred,

Held, that though some finality should, on general principles, attach to the order passed in proceedings under O. 9, R.13, C. P. Code, yet such finality was limited to matters within the scope of O. 9, R. 13, and the Court, in appeal, was not precluded from considering the merits of the question whether in the circumstances of the case the Court should not have granted an adjournment. The application under O. 9, R. 13, was wrongly put in, and the appellants were not therefore precluded from agitating that point in the appeal. Further the point in the appeal was not whether there was sufficient cause for non-appearance, but whether in the interests of justice, having regard to the facts, it would not have been better for the Court to have adjourned the case.

Mockett, J.—The position of the Judge sitting in appeal against the decree passed *ex parte* to canvass the correctness of refusal to adjourn is very similar to that of Judge sitting in revision considering an application under O. 9, R. 13. (*Varadachariar and Mockett, JJ.*) PEER AMMAL *v.* NALLUSWAMI PILLAI. **176 I.C. 995=11 R.M. 217=1937 M.W.N. 946=A.I.R. 1937 Mad. 922=(1937) 2 M.L.J. 666.**

——O. 9, R. 13—*Power of Court under—Order for deposit of costs or security for decree amount pending trial of application—Legality.*

A Court has no power, pending trial of an application under O. 9, R. 13, C. P. Code, to order the applicant to deposit the costs of the suit or furnish security for the decree amount or to dismiss the application for failure to furnish the security ordered. (*Burn and Lakshmana Rao, JJ.*) NARAYANAN CHETTIAR *v.* CHIDAMBARAM CHETTIAR. **51 L.W. 574=1940 M.W.N. 483=A.I.R. 1940 Mad. 585=(1940) 1 M.L.J. 710.**

——O. 9, R. 13—*"Prevented by any sufficient cause from appearing"—Meaning of.*

The words "prevented by any sufficient cause from appearing" in O. 9, R. 13, C. P. Code, mean causes other than lack of knowledge of the proceedings. (*Mya Bu and Mosely, JJ.*) K.K.N. K. A. R. CHETTYAR FIRM *v.* AGA ME SHEERAZEE. **185 I.C. 663=12 R.R. 211=1939 Rang.L.R. 606=A.I.R. 1939 Rang. 436.**

——O. 9, R. 13 and O. 17, R. 2 Expl. (Allahabad)—*Refusal of adjournment*—Ex parte *decree—Remedy.*

Where on the day fixed, the defendant appeared and asked for time to enable him to file the written statement, but the Court refused it and passed an *ex parte* decree, the defendant is entitled only to appeal against the *ex parte* decree, and not to apply under O. 9, R. 13 to set it aside. The reason is, that in view of the Expl. (Allahabad) to R. 2 of O. 17, the defendant could not be said to have not appeared, or failed to appear. (*Bennet and Verma, JJ.*) JHANDOO MAL AND SONS *v.* KHALSA SINGH SAHI. **I.L.R. (1940) All 192=1940 A.L.J. 269=1940 A.W.R. (H.C.) 161=A.I.R. 1940 All. 305.**

——O. 9, R. 13—*Revision—Refusal to set aside* ex parte *decree—Interference.*

It is true that whether there was sufficient cause for non-appearance is a question of fact and the High Court cannot interfere in such matter in revision in the absence of perversity or something of the like nature. But where the Judge has concentracted his attention on the negligence of counsel instead of on the conduct of the party, interference is called for. (*Bose, J.*) J. E. BILLIMORIA & SONS *v.* GOPINATH. **179 I.C. 471=11 R.N. 295=A.I.R. 1938 Nag. 370.**

——O. 9, R. 13—*Right to apply*—Ex parte *decree against one of the defendants—Appeal by other defendants — Dismissal — Defendant not party to appeal, if can apply.*

Where a decree is passed against several defendants, is *ex parte* as against one, and an appeal is preferred against the decree by the other defendants without impleading the *ex parte* defendant, which was dismissed, and whereafter the *ex parte* defendant applied to the Court which passed the decree to set it aside.

Held, that there was no legal bar to the Court's setting aside the *ex parte* decree. (*Smith, J.*) GAJADHAR *v.* UMA DUTTA. **171 I.C. 617=10 R.O. 139=1937 O.L.R. 572=1937 O.W.N. 1141=A.I.R. 1938 Oudh 11.**

——O. 9, R. 13—Scope—Application by Official Receiver—Dismissal—Separate suit by creditors to declare decree not binding—Maintainability. *See* PROVINCIAL INSOLVENCY ACT, S. 56 (4) (*c*). **1936 M.W.N. 79=A.I.R. 1936 Mad. 161=70 M.L.J. 90.**

——O. 9, R. 13—*Scope—If exhaustive—Suit to set aside—Maintainability.*

Before the falsity of the claim on which an *ex parte* decree is based can be gone into in a fresh suit filed for the purpose of getting it vacated, it must be shown that the decree was obtained from the Court either by collusion of both parties, or by fraud committed by the plaintiff which prevented the defendant from appearing in the first suit. But where the defendant has been duly served with the summons and has failed to appear for no fault of the plaintiff, it is not open to him to file a fresh suit and challenge the decree on the ground of the falsity of the claim on which it is based. His remedy if any in such a case is to apply in the same proceedings to have the decree set aside within the time allowed by law. If he satisfies the Court that he had sufficient reasons for not attending the Court when the decree was passed he may obtain relief but not otherwise. (*Rupchand Bilaram, A.J.C.*) ROCHIRAM LOKMANDAS

C. P. CODE (1908), O. 9, R. 13.

v. DAYARAM. **30 S.L.R. 405=166 I.C. 906=9 R. S. 157=A.I.R. 1937 Sind 18.**

——**O. 9, R. 13**—*Scope—Power of Court to set aside* ex parte *decree apart from rule—Duty of applicant under.*

A Court has no power apart from the provisions of O. 9, R. 13, C. P. Code, to set aside an *ex parte* decree passed by itself, and an applicant seeking to avail himself of the rule must comply with the conditions laid down in the rule, *i.e.*, he must satisfy the Court either that the summons was not duly served or that he was prevented by any sufficient cause from appearing in Court when the suit was called on for hearing. (*Collister and Bajpai, JJ.*) A. H. GHAZNAVI *v.* GURCHARAN SINGH. **172 I.C. 72=10 R.A. 369=1937 All.L.R. 932=1937 A.L.J. 831=1937 A.W.R. 726=A.I.R. 1937 All. 691.**

——**O. 9, R. 13 and O. 23, R. 1**—*Scope—Suit—against several defendants—One remaining* ex parte*—Plaintiff withdrawing against others and getting* ex parte *decree against one only—Subsequent setting aside of* ex parte *decree—Right of plaintiff to proceed against others—Procedure.*

The plaintiff who purchased certain lands from the 1st defendant was unable to obtain possession of the lands which the 3rd defendant claimed as his by virtue of long possession. The plaintiff therefore brought a suit against the 1st defendant (vendor), the 2nd defendant (a tenant) and the 3rd defendant who claimed to have been in enjoyment for possession and in the alternative for refund of sale price. The 1st defendant was declared *ex parte*, and the 1st plaintiff was content to have a decree against him for the purchase-money and damages and withdrew the suit against defendants 2 and 3. Later on, however, the 1st defendant got the *ex parte* decree set aside on a technical ground. The plaintiff now prayed for permission to proceed against defendants 2 and 3 also.

Held, that though it would be equitable and just to allow the plaintiff to proceed against defendants 2 and 3, the Court had no power to do so either under O. 9, R. 13 or O. 23, C. P. Code. There was no decree against defendants 2 and 3 which could be set aside under O. 9, R. 13 and O. 23 did not provide for withdrawing a withdrawal of a suit; the only thing which could be done for the plaintiff was to grant permission under O. 23, R. 1, C. P. Code, to file a fresh suit against defendants 2 and 3. (*Horwill, J.*) RAJAGOPALA RAO *v.* BHANOJI RAO. **1940 M.W.N 488=51 L.W. 631=A.I.R. 1940 Mad. 765=(1940) 1 M.L.J. 811.**

——**O. 9, R. 13**—*Setting aside of* ex parte *decree—Jurisdiction of Court.*

Unless the defendant had sufficient cause for not appearing when the case was called on for hearing, the Court has no jurisdiction to set aside an *ex parte* decree under O. 9, R. 13, C. P. Code. (*M. C. Ghose, J.*) RADHIKA MOHAN KARMAKAR *v.* SURENDRA NATH ACHARJEE. **179 I.C. 203=11 R.C. 489=67 C.L.J. 519=A.I.R. 1938 Cal. 797.**

——**O. 9, R. 13**—Substituted service—If due service. *See* LIMITATION ACT, ART. 164. **1939 Rang.L.R. 606.**

——**O. 9, R. 13**—*"Sufficient cause"--Application for time to compromise by both parties—Rejection and* ex parte *decree—Application to set aside—Defendants not ready owing to illness of one of them in charge of case—Dismissal—Propriety—* Ex parte *decree—If to be set aside.*

The plaintiffs and defendants in a mortgage suit applied for a month's time for effecting a compromise of the suit. The Court summarily rejected the application, and the plaintiffs being ready but the defendants not being ready, the Court passed an *ex parte* decree. The defendants then applied to have the *ex parte* decree set aside, and were ready on the adjourned date, but the plaintiffs were not ready. The matter was again adjourned, but on the adjourned date, the defendant who was in charge of the case was ill and unable to attend Court, and a medical certificate to that effect was produced in Court. The Court, however, summarily rejected the request for time and dismissed the application. The defendants having appealed, *held*, that there was reasonable ground for the defendants asking for restoration of the suit, in view of the fact that a petition for time to compromise had been filed on behalf of both the parties and had been refused; and that the application under O. 9, R. 13 should be allowed and the *ex parte* decree set aside. (*Khaja Mohammad Noor and Madan, JJ.*) NATHUNI SINGH *v.* KHUB LAL SINGH. **167 I.C. 496=9 R.P. 405=3 B.R. 300=17 Pat.L.T. 793=A.I.R. 1937 Pat. 85.**

——**O. 9, R. 13**—*Sufficient cause—Attorney's illness and death.*

A defendant had no knowledge about the date fixed for hearing of the suit and was not informed about the progress of the suit by his attorney owing to the attorney's grave illness and subsequent death. The suit was decreed *ex parte* against him.

Held, that the defendant had shown sufficient cause for not appearing on the date the suit was taken up for hearing. (*Sen, J.*) RAJAGOPALAN *v.* UNIQUE ASSURANCE CO. **A.I.R. 1940 Cal. 373.**

——**O. 9, R. 13**—*Sufficient cause—Counsel waiting in bar room—Instructions to clerk to call him when case was called—Clerk remaining absent when case was called.*

It setting aside an *ex parte* decree attention must in the first instance be concentrated on the conduct of the party and not merely on that of the counsel. If a party cannot be present himself when his case is called on for hearing, he must of course make adequate provision for his proper representation by some agency. If he employs counsel for this purpose he must ensure that, the person he employs undertakes to be present when the case is called, or that there is somebody else there to represent him. If he wants to have the *ex parte* proceedings set aside, he must show sufficient cause and that means he must show that counsel undertook to represent him at all necessary hearings for the fees agreed upon or paid, and also that there was no qualifying clause in the agreement. He need not show an express undertaking by counsel to be present either personally or through some other authorized person at all hearings; that is necessarily implied in the contract, but he must bring the responsibility definitely home to counsel if he wants to succeed and on that ground. A party engaged a counsel to appear for him when the case would be called. On previous hearings the counsel had appeared regularly and on the day of hearing in question he undertook no other work in any other Court but was ready to appear

as soon as the case was called up. The accommodation in the Court being inadequate he remained waiting in the bar room and left his clerk in the Court with instructions to call him as soon as the case was called up. The clerk had been with the counsel for several years and no previous instance of his negligence had been suggested. When the case was called up, the clerk remained absent and a decree *ex parte* was passed.

Held, that neither the party nor his counsel were to be blamed for the negligence of the clerk and there was sufficient cause for non-appearance and hence the *ex parte* decree should be set aside. (*Bose, J.*) I. E. BILLIMORIA & SONS *v.* GOPINATH. **179 I.C. 471=11 R.N. 295=A.I.R. 1938 Nag. 370.**

——**O. 9, R. 13**—*Sufficient cause—Duty of Court.*

Once the Court is satisfied that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court to set aside the judgment passed *ex parte* mulcting in proper cases the delinquent man in costs. It should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right so far as the other side is concerned, by making the man to blame, pay for it. A break down of the lorry on the way was considered sufficient cause for setting aside the *ex parte* decree. (*Mir Ahmad, J.*) SAIHGAL BROTHERS *v.* JAI RAM JUGATRI LAL. **176 I.C. 223=11 R.Pesh. 2=A.I.R. 1938 Pesh. 39.**

——**O. 9, R. 13**—*Sufficient cause*—Ex parte *decree against minor—Absence of guardian* ad litem—*If ground for setting aside decree.*

The mere absence of a guardian *ad litem* of a minor defendant is not by itself a sufficient cause for allowing an application under O. 9, R. 13, C. P. Code, when there is nothing to show that the guardian has betrayed the interests of the minor. (*Burn and Lakshmana Rao, JJ.*) RAMANATHAN *v.* MAYYAPPA CHETTIAR. **166 I.C. 70 (2)=9 R. M. 334 (2)=1936 M.W.N. 1261=44 L.W. 702= A.I.R. 1936 Mad. 961=(1937) 1 M.L.J. 36.**

——**O. 9, R. 13**—*Sufficient cause—Mistake of Counsel—Defendant not informed of date of hearing by counsel—Latter thinking that posting was merely formal and not for trial.*

Where the counsel for the defendant does not inform him of the posting of the suit to a particular date, thinking that that posting was merely formal and not for trial, it can fairly be said that the defendant was prevented by sufficient cause from appearing, within the meaning of O. 9, R. 13. (*Burn and Abdur Rahman, JJ.*) VENKATACHALAM *v.* MALLIKARJUNA ROW. **1937 M.W.N. 976.**

——**O. 9, R. 13**—*"Sufficient cause"—Question as to—Finding on—Interference in revision.*

The question whether a party was prevented by "sufficient cause" within the meaning of O. 9, R. 13, C. P. Code, from appearing when the suit was called on for hearing is essentially one of fact; and the High Court cannot interfere in its revisional jurisdiction in a case where the Courts below have come to the conclusion that the party was himself to blame for not appearing before the Court. (*Collister and Bajpai, JJ.*) A. H. GHAZNAVI *v.* GURCHARAN SINGH. **172 I.C. 72=**

10 R.A. 369=1937 All.L.R. 932=1937 A.L.J. 831=1937 A.W.R. 726=A.I.R. 1937 All. 691.

——**O. 9, R. 13**—Sufficient cause—Suit transferred to another Court after service of summons on defendant—*Ex parte* decree—Absence of notice of hearing in transferee Court—If ground for setting aside *ex parte* decree. *See* C. P. CODE, S. 115 AND O. 9, R. 13. **A.I.R. 1936 Pat. 490.**

——**O. 9, R. 13, Proviso**—*Applicability*—Ex parte *decree against Hindu manager and brother—If can be set aside as against one only—Considerations.*

The proviso to R. 13 of O. 9, C. P. Code, shews sufficiently that in cases where a decree is passed against the karta and members of a joint Hindu family, the point for consideration is not the identity of the defences of the defendants, but the nature of the decree passed. On the facts it was held that the *ex parte* decree should be set aside as against all. (*Weston.*) SURAJ MAL *v.* MOOL CHAND. **1938 A.M.L.J. 59.**

——**O. 9, R. 13, Proviso (Peshawar)**—*Applicability*—Ex parte *decree passed after sending summons by registered post.*

There is no legal justification for proceeding *ex parte* against the defendant on the ground that the summons was sent to him by post irrespective of the fact whether he received it or not. And O. 9, R. 13 as amended by the Judicial Commissioner's Court, Peshawar, does not apply to an *ex parte* decree so passed. For, that rule applies only when there is irregularity in the service of summons. In this case there is no service of summons. (*Mir Ahmad, A.J.C.*) MOHAMMAD ISMAIL MAULA BAKHSH *v.* GOPAL SINGH MANMOHAN SINGH. **165 I.C. 947=9 R. Pesh. 58=A. I.R. 1936 Pesh. 199.**

——**O. 9, R. 13, Proviso**—*Mortgage decree—Setting aside in part—Permissibility.*

A mortgage debt being indivisible, a mortgage decree passed *ex parte* cannot be set aside in part, because complications will arise at the time of execution and anomalous results may follow. (*Mahomed Noor and Madan, JJ.*) KEDAR NATH SINGH *v.* KESRI MULL. **166 I.C. 635=9 R.P. 327 =3 B.R. 202=1936 P.W.N. 696=18 Pat.L.T. 72 =A.I.R. 1937 Pat. 17.**

——**O. 9, R. 13, Proviso**—*Suit against firm through* G—Ex parte *decree against firm and* G—*Application to set it aside by* G—*Decree, if can be set aside against firm only.*

A suit was instituted against a firm through one *G* in which *G* was also made a defendant. On *G's* failure to appear on the date of hearing, an *ex parte* decree was passed both against the firm and *G*. *G* applied for setting aside the *ex parte* decree on the ground that he had not been properly served. The District Judge allowed *G's* application and set aside the decree but added that the decree had been set aside only against the firm.

Held, that the order of the District Judge was illegal and the decree ought to be set aside both against the firm and *G*. (*Din Mohammad, J.*) CHANDU LAL *v.* SARASWATI SUGAR SYNDICATE. **180 I.C. 911=11 R.L. 728=A.I.R. 1938 Lah. 823.**

——**O. 9, R. 14**—*"Opposite party"—Mortgage suit*—Ex parte *decree for sale—Application to set aside—Subsequent purchaser of part of mortgaged property—Whether entitled to notice.*

C. P. CODE (1908), O. 10, R. 2.

An *ex parte* decree for sale on a mortgage was set aside without notice to one *M*, a subsequent purchaser of a part of the mortgaged property who was impleaded as a necessary party in the mortgage suit. After the *ex parte* decree was passed, the property was put to sale and *M* purchased a part of it. He had also obtained an order that the sale of the property originally purchased by him should be postponed to the sale of the other property. The other property fetched a sufficient price to discharge the liability and consequently *M's* property was not put to sale It was argued on behalf of *M* that he had obtained a definite advantage under the *ex parte* decree and that it should not have been set aside behind his back.

Held, that it did not appear from the decree itself that *M* had acquired any advantage under the decree and the fact that he might have obtained some subsequent advantage by sale of the property or by purchasing the property sold possibly at a favourable price was no reason for regarding him as a person benefited by the decree itself and he could not, therefore, properly be decribed as an opposite party who was entitled to be served with a notice of the application to set aside the *ex parte* decree under O. 9, R. 14. (*Allsop and Ganga Nath, JJ.*) MANDAN SINGH *v.* SUNDAR KUAR. **163 I.C. 226=8 R.A. 949=1936 A.W.R. 522=1936 A.L.R. 538=1936 A.L.J. 544 =A.I.R. 1936 All. 410.**

——**O. 10, R. 2**—Scope—Court directing defendant to file written statement within specified time—Party failing to do so—Right of pleader to make oral statement. *See* C. P. CODE, S. 10 (2). **A.I.R. 1937 Nag 268.**

——**O. 11, R. 1**—*Order declining to re-issue interrogatories—Revision.*

Under S. 44, Punjab Courts Act, High Court has no jurisdiction to entertain an application for revision from an interlocutory order declining to re-issue interrogatories but as the High Court's powers under S. 107, Government of India Act, are not merely administrative but also judicial, it can interfere to prevent injustice where the lower Court in an interlocutory order wrongly declines to re-issue interrogatories. (*Tek Chand, J.*) JOWAHIR SINGH SUNDAR SINGH *v.* FLAMING SHAW & CO. **169 I.C. 687=10 R.L. 38=39 P.L. R. 250=A.I.R. 1937 Lah. 28.**

[Under S. 224, Government of India Act 1935, the powers of revision under S. 107 are taken away].

——**O. 11, R. 12**—*Order for discovery of documents—Rights of adversary.*

It is true that in a suitable case a defendant may object to the production of a document on the ground that it relates solely to his title, but if, on the other hand, that document may have some bearing in support of the plaintiff's title, such objection cannot be validly raised. If an order for discovery is made under O. 11, R. 12 all the documents relating to the case should be embodied in the affidavit of documents by the person against whom the order for discovery is made. If however the defendant considers that he is entitled to protection in respect of the production of any particular documents which may be entered in the affidavit under O. 11, R. 13 of the Code, he will be at liberty to raise such objection at the proper stage of the proceedings if and when he is ordered to produce such documents under O. 11, R. 14 or to give inspection of them under O. 11, R. 18. (*Edgley, J.*) GOBINDA MOHUN *v.* MAGNERAM BANGUR AND CO. **I.L.R. (1940) 1 Cal. 504= A.I.R. 1940 Cal. 331.**

C. P. CODE (1908), O. 11, R. 14.

——**O. 11, R. 12**—*Right to obtain discovery of documents—Extent of.*

R. 12 of O. 11 is considerably wider than O. 13, R. 1 of the Code. The right to obtain discovery of an adversary's documents is a very wide one and is not limited merely to those documents which may be held to be admissible in evidence when the suit is ultimately tried. (*Edgley, J.*) GOBINDA MOHUN *v.* MAGNERAM BANGUR AND CO. **I.L.R. (1940) 1 Cal. 504=A.I.R. 1940 Cal. 331.**

——**O. 11, R. 12 and S. 30**—*Decision of case depending upon documentary evidence—Duty of Court.*

Where it is obvious not only to the parties concerned but also to the presiding Judge that the decision of the matter would depend to a very large extent upon documentary evidence, the case is essentially a case in which recourse should be taken to the provisions of O. 11, and in the absence of any application to this effect by either of the parties, the Judge should himself record the requisite orders for this purpose under S. 30. (*Edgley, J.*) GOBINDA MOHUN *v.* MAGNERAM BANGUR AND CO. **I.L.R. (1940) 1 Cal. 504=A.I.R. 1940 Cal. 331.**

——**O. 11, R. 14**—*Applicability—Order to produce documents—Power of Court to make—Suit on promissory note—Defendant not putting in any defence—Order calling on plaintiff to produce accounts—If justified.*

Under O. 11, R. 14, C. P. Code, the Court may order the production of any documents in the possession of any party relating to any matter in question in such suit, but until it is known what the plea is and what the points at issue are, it is impossible for the Court to say that the plaintiff's accounts are relevant. In a suit on a promissory note to which the defendant has as yet not raised any defence there is no justification for the Court to make an order directing the plaintiff to produce his accounts. (*Pollock, J.*) LAXMANRAO TRIMBAKRAO *v.* GAYADIN SHAH PRASAD. **I.L.R. (1937) Nag. 266=170 I.C. 48=10 R.N. 57=A.I. R. 1937 Nag. 136.**

——**O. 11, R. 14**—*Suit against Secretary of State for India in Council represented by Collector—Petition directing Collector to produce* paimash *registers in his custody—Maintainability.*

The plaintiff in a suit filed against the Secretary of State for India in Council applied under O. 11, R. 14 of the C. P. Code, directing the defendant to produce *paimash* registers, etc., in the custody of the Collector.

Held, that the Collector cannot be required by the terms of O. 11, R. 14 to produce the registers in original on the ground that he was an agent of the Secretary of State for India in Council, as every document in his possession cannot be deemed to be in his possession in his capacity as agent of the Secretary of State for India in Council. (*Pandrang Row, J.*) SECRETARY OF STATE *v.* KRISHNASWAMI AYYAR. **179 I.C. 988=11 R.M. 643=48 L.W. 646=1938 M.W.N. 1103=A.I.R. 1939 Mad. 52=(1938) 2 M.L.J. 815.**

C. P. CODE (1908), O. 11, R. 14.

——**O. 11, R. 14**—*Suit by husband for restitution of conjugal rights relying upon correspondence between parties—Production of correspondence—Duty of plaintiff.*

Where the plaintiff in his plaint relies upon certain documents, *prima facie* the defendant is entitled to have inspection before he files her defence. It is not open to the plaintiff to withhold it from inspection by the other side at the proper time and then to spring a surprise on him or her as the case may be at a subsequent stage of the proceedings. A husband instituted a suit against his wife for restitution of conjugal rights relying upon certain correspondence between the parties. The wife insisted on its production in Court before she offered her defence. The husband refused to claim absolute privilege not to produce the correspondence altogether in Court, but claimed the privilege of not producing the correspondence for some time, but promised to do so thereafter.

Held, that it was not open to him to do so and that the wife was entitled to inspect the document before she filed her defence. (*Rupchand Bilaram, A.J C.*) DAYARAM AMBRITRAI *v.* MOHINI RAMCHAND. **169 I.C. 588=9 R.S. 6=A.I.R. 1937 Sind 97.**

——**O. 11, Rr. 15 and 18**—*Application under—When to be made—Right of inspection—Limits.*

Whether a party proceeds under O. 11, R. 15 or under O. 11, R. 18 (2) he must act promptly, and delay in itself may be a good ground for refusing to grant time for the filing of the written statement until after the inspection has been made. Where the documents of which inspection is sought have not been referred to in the pleadings or affidavits of the plaintiff and appear only in the list filed under O. 7, R. 14 (2) the defendant, unless he proceeds under O. 11, R. 18 (2), cannot insist that he has a right to inspect these documents before he can be called upon to file his written statement. (*Vivian Bose, J.*) NAGPUR GLASS WORKS CO., LTD. *v.* ONAMA GLASS WORKS CO. **175 I.C. 40=10 R.N. 431=A.I.R. 1938 Nag. 239.**

——**O. 11, R. 18**—*Order providing for inspection "forthwith"—Meaning of—Order not drawn up—Effect.*

An order providing for inspection "forthwith" contemplates that it would be given without unreasonable delay. The order takes effect although it is not drawn up. (*Lort Williams, J.*) GULRAJ SHROFF *v.* KANIRAM SUREKA. **I.L.R. (1938) 2 Cal. 14=178 I.C. 734=11 R.C. 402=42 C.W N. 457=A.I.R. 1938 Cal. 353.**

——**O. 11, R 21**—Applicability—Insolvency proceedings—Petition by creditor—Non-production of account books—Power to dismiss petition. *See* PROVINCIAL INSOLVENCY ACT, S. 25. **A.I.R. 1936 Nag. 130.**

——**O. 11, R. 21**—*Conditional order of dismissal of suit—Propriety.*

The terms of O. 11, R. 21, C. P. Code, seem to contemplate that ordinarily there will be two orders; first an order for discovery, and second, on default, an order of dismissal of the suit for want of prosecution. But where there has been a previous order for discovery, it is proper and also according to the practice both in England and India, to make a subsequent conditional order, for example, an order for discovery within a prescribed time, and upon default that the suit be dismissed or stand dismissed. There is no difference in effect between the terms "stand dismissed" and "be dismissed." The order becomes on default a final order dismissing the suit. (*Lort Williams, J.*) GULRAJ SHROFF *v.* KANIRAM SUREKA. **I.L.R. (1938) 2 Cal. 14=178 I.C. 734=11 R.C. 402=42 C.W.N. 457=A.I.R. 1938 Cal. 353.**

C. P. CODE (1908), O. 13, R. 4.

——**O. 13, Rr. 1 and 2**—*Filing of documents—Stage—Special hearing or* wajeh-sabut—*Legality.*

The practice of giving a hearing known as *wajeh-sabut, i e.*, a hearing specially fixed for presentation of documents that may be required, is nowhere warranted by any of the provisions of the C. P. Code, Rr. 1 and 2 of O. 13, C. P. Code, clearly prescribe the procedure to be followed in the filing of the documents. (*Davies, I.C.S.*) MANNING *v.* DHIRAJ LAL. **1938 A.M.L.J. 120.**

——**O. 13, R. 2**—*Discretion of Court—Documents put in at late stage—If may be accepted—Discretion of trial Court—Interference in appeal.*

Though O. 13, R. 2, C. P. Code, requires the parties to put in their documentary evidence at the first hearing of the suit, the Court has still a discretion under the rule to accept documents at a later stage; and when the trial Court has exercised its discretion by allowing documents to be put in, the appellate Court should not lightly interfere with it especially when the document is put in support of an amendment which the Court considered justifiable. (*Agarwala, J.*) KAMESHWAR SINGH *v.* MODH NARAIN CHOWDHURI. **21 Pat.L.T. 440.**

——**O. 13, R. 2**—*Document to prove fraud produced at late stage—Admissibility.*

A trial Court cannot base its decision on an allegation of fraud never set up by the defendants in their written statement, nor in issue, and based on documents put for the first time in cross-examination of the plaintiff's witnesses and can be disregarded by the appellate Court if so admitted by the trial Court without reasons. (*Baguley and Mosely, JJ.*) KHARWAR *v.* MOTIWALA. **1939 Rang.L.R. 18=181 I.C. 792=11 R.R. 489=A.I.R. 1939 Rang. 98.**

——**O 13, R. 2**—*Evidence admitted by trial Court—Power of appellate Court to refuse its admission.*

An appellate Court cannot refuse to admit evidence admitted by the trial Court on the ground that the evidence was produced late and was not admissible under O. 13, R. 2, C. P. Code. (*Jack, J.*) SM. SUNITI BALA DAS GUPTA *v.* MAHARAJA BAHADUR SIR PRADYOT KUMAR TAGORE. **67 C.L. J. 133.**

——**O. 13, R. 3**—Scope—If subject to S. 36, Stamp Act—Document admitted in evidence—Power of Court to afterwards reject. *See* STAMP ACT, S. 36. **45 L.W. 515=A.I.R. 1937 Mad. 431.**

——**O. 13, R. 4**—*Document initialled by Judge—Duty to make clear whether it is admitted or marked for identification.*

Where a document is produced in Court and is initialled by the Judge, he should make it quite clear whether he is admitting it in evidence or only marking it for identification. (*Norman.*) PHOOL CHAND *v.* LIKIMICHAND. **1936 A.M.L.J. 22.**

——**O. 13, R. 4**—*Non-compliance with—Effect of—Document, if inadmissible.*

C. P. CODE (1908), O. 13, R. 7.

The fact that the provisions of O. 13, R. 4 have not been strictly complied with in regard to endorsement on an exhibit does not make it inadmissible in evidence. (*Wort and Rowland, JJ.*) MUKHI RAM *v.* KAMTA PRASAD BALAM DAS. **161 I.C. 164=8 R.P. 437=A.I.R. 1937 Pat. 222.**

——**O. 13, R. 7 and Oudh Civil Rules, Rr. 38 and 39**—*Recording as "admitted" and return of rejected documents—Procedure.*

The language of O. 13, R. 7, C. P. Code, and of Rr. 38 and 39 of the Oudh Civil Rules, shows that the document must be either placed on the record or returned to the person producing it. There is no alternative. It is highly desirable and even necessary for the ends of justice, that a disputed document should be placed on the record and should not be returned to the person producing it. Therefore, as soon as formal or *prima facie* evidence of its genuineness has been given, it should be endorsed as "admitted in evidence" and placed on the record. Subsequently the Judge might find, upon a consideration of the whole evidence, that the document was a forgery, or that its genuineness was not proved to his satisfaction. In that event the Judge should, in order to avoid any possible misunderstanding add a further endorsement "genuineness not established" or words to that effect, but he should not endorse it as "rejected" which implies that the document should not form part of the record and should be returned to the person producing it. (*King, C.J. and Zia-ul-Hasan, J.*) KEOLAPATI *v.* HARNAM SINGH. **12 Luck. 568=162 I.C. 527 =8 R.O. 387=1936 O W.N. 619=1936 O.L.R. 271=A.I.R. 1936 Oudh 298.**

——**O. 14, R. 1**—*Failure to frame issue—If can be condoned.*

The word "shall" in Cls. (3) and (5) of O. 14, R. 1 does not leave any discretion to the Court and makes it mandatory that every proposition affirmed by one party and denied by the other, whether of fact or of law, should be made the subject-matter of an issue. Even if substantial justice is done, the failure to frame an issue should not be overlooked, because an act which is obligatory under the statute must be done and the omission to do it cannot be condoned by the fact that substantial justice has been done. (*Mir Ahmad, J.*) DHANPAT RAI *v.* HARI CHAN GOBIND RAM. **184 I.C. 433=12 R. Pesh 26=A.I.R. 1939 Pesh. 44.**

——**O. 14, R. 1**—*Issue—Framing of—Absence of written statement—Effect.*

Under O. 14, R. 1, issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. Such affirmation or denial must be contained in the pleadings as defined in O. 6, R. 1. Where there is no written statement the only issues would be those arising out of the plaint which allegations are put in issue when not admitted. (*Stone, C.J. and Niyogi, J.*) VITHAL MADHO *v.* NARAYAN RAMCHANDRA. **165 I.C. 29=9 R.N. 68=A.I.R. 1936 Nag. 177.**

——**O. 14, R. 2**—*Decision of question of jurisdiction—Finality—If can be reopened by Court at later stage—Right of succeeding Judge to reconsider decision of predecessor in office—Proper procedure.*

Where a question of jurisdiction to entertain the suit has been decided by the trial Court as a preliminary issue, that decision is final so far as that Court is concerned and cannot be called in question in that Court at a later stage. It is not open to a Judge succeeding the Judge who has decided the question to reopen that question at a later stage and decide it afresh. The proper stage to challenge that decision is when the decree in the suit is under appeal. (*Harries and Rachhpal Singh, JJ.*) KALYAN DAS *v.* KASHI PERSHAD. **I L.R. (1938) All. 198=1938 A.L.R. 225=174 I.C. 55=10 R.A. 532=1937 A.W.R. 1188=1937 A.L.J. 1272=A.I.R. 1938 All. 113.**

C. P. CODE (1908), O. 16, R. 1.

——**O. 14, R. 2**—*Object of—Discretion of Court—Principles.*

In deciding the question as to whether the Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try cases piecemeal and the specific and wholesome provision of O. 14, R. 2, C. P. Code, which is for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the simple decision on a point of law might render the investigation of the facts unnecessary. (*Courtney-Terrell, C.J.*) JANKI DAS *v.* KALU RAM. **162 I.C. 486=8 R.P. 538=1936 P.W.N. 209=17 Pat.L.T. 253=A.I.R. 1936 Pat. 250.**

——**O. 14, R 2**—*Scope—If mandatory.*

O. 14, R. 2 is mandatory; the only thing left open to the Court is to form and express an opinion of whether the case can be disposed of on the issue of law, but the opinion even if expressed must be expressed upon some reasonable materials. (*Courtney-Terrell, C.J.*) JANKI DAS *v.* KALU RAM. **162 I.C. 486=8 R.P. 538=1936 P.W.N. 209=17 Pat.L.T. 253=A.I.R. 1936 Pat. 250.**

——**O. 14, R. 5**—*Amendment or framing of additional issues—Powers of Court—Restrictions—Issue not arising on the pleadings, if can be framed.*

Under O. 14, R. 5, C. P. Code, the Court has power to amend the issues or to frame additional issues on such terms as it thinks fit, but this power is controlled by R. 3 of the same order which provides that the issues are to be framed from the allegations by the parties or their counsel and the contents of documents. Hence it is not open to a Court to frame an issue on a point that does not arise out of such material. (*Pollock, J.*) NANDLAL *v.* DEORAO. **185 I.C. 881=12 R.N. 178 =1939 N.L J. 591=A.I.R. 1940 Nag. 94.**

——**O. 16, R. 1**—*Application made late—Power of Court to refuse summons.*

The word 'may' in O. 16, R. 1, C.P. Code, means "it shall be lawful" unless an application, on the face of it, is frivolous and vexatious, the Court has no discretion except to summon the witnesses. If an application is made too late and the service on the witness cannot be effected in time, it is no doubt within the discretion of the Court to adjourn the date of the hearing or not, but that is no reason whatsoever why a party should not be given an opportunity, if he is prepared to take the chance of having the presence of the witness secured by serving a notice upon him. (*Agha Haidar, J.*) MEHR CHAND *v.* DAYAL CHAND. **17 Lah. 775=167 I.C. 169=9 R.L. 461=39 P.L.R. 60 (2).**

C. P. CODE (1908), O. 16, R. 1.

——**O. 16, R. 1**—*Payment of process fees—Procedure—Failure to pay on due date—Result.*

Process-fees can be paid to the officer of the Court who is designated under the orders of the Court to receive them, and can be paid at any time, subject to the time-limit fixed by the Court, and it is plainly unnecessary for the party paying such fees to appear in Court to pay them, and in fact, it would be highly inconvenient if parties did so. The only result of the failure of a party to pay the fees by the date fixed by the Court would at the most be that summonses would not be issued to his witnesses, and he would run the risk of not having his evidence recorded if he could not persuade the witnesses to attend Court without the issue of summons. But a case cannot be dismissed for failure of a party to appear in Court on a date before which process-fee was to be paid. (*Roberts, C.J. and Dunkley, J.*) MAUNG AHMIN *v.* MAUNG SAUNG. **178 I.C. 789=11 R. R. 281=A.I.R. 1938 Rang. 360.**

——**O. 16, R. 10**—*Proceedings under—Nature and object of—Party moving Court to attach property of witness—Property attached really belonging to another—Suit by latter for damages for wrongful attachment—Maintainability—Absence of malice—Liability to damages for trespass.*

The main purpose of proceedings taken under O. 16, R. 10, C.P. Code, is to indicate the authority of the Court, though incidentally a party who secures the presence of a witness may also benefit, if, as a result of the proceedings, the witness should ultimately appear. A person who asks the Court to attach certain property as the property of a witness under O. 16, R. 10, C. P. Code, cannot be placed on the same footing as a decree-holder who moves the Court to attach certain properties as the properties of his judgment-debtor, because the proceedings to enforce the attendance of a witness are the act of the Court. The same legal consequences cannot therefore follow if the property attached happens to be not of the witness but of another. A party therefore who moves the Court under O. 16, R. 10 and gets attached wrongly and carelessly properties of some other person as properties of the witness, cannot be held liable for damages for trespass in a suit by the owner of the properties, especially when the party is not shown to have acted maliciously. (*Varadachariar and Pandrang Row, JJ.*) SRINIVASAYYA *v.* LAKSHMAYYA. **173 I.C. 548=10 R.M. 606=46 L.W. 266=1937 M.W.N. 918=A. I.R. 1937 Mad. 811=(1938) 1 M.L.J. 73.**

——**O. 16, R. 17**—*Applicability—Witness orally directed to attend Court on future date—Absence of definite order in writing directing him to attend—Witness not appearing on date—Proceedings under O. 16, R. 17—If justified.*

Unless it can be clearly held that a witness was expressly directed to re-attend the Court on a particular date, and that he understood that he was so required by the Court, and that he in spite of it failed to re-attend as required, he cannot be liable to be dealt with under O. 16, R. 17, C. P. Code. In the absence of any definite order of the Court borne out by the record pointing to the existence of any such direction requiring him to attend, a mere impression on the part of the Judge that the witness had so been ordered to attend, does not justify the Court in proceeding under O. 16, R. 17, for his failure to attend. (*Mohammad Noor and Dhavle, JJ.*) AVADH BEHARI SARAN *v.* S. K. P. SINHA. **180 I.C. 102=5 B.R. 337=11 R.P. 451=A.I.R. 1939 Pat. 285.**

——**O. 16, R. 19**—Scope—If controls O. 26, R. 1. *See* C. P. CODE, O. 26, R. 8. **63 Cal. 914.**

——**O. 17**—Applicability—Application under O. 34, R. 5. *See* C. P. CODE, O. 9 AND O. 17. **31 S.L.R. 180.**

——**O. 17, R. 1**—Discretion of Court—Adjournment of suit at instance of third party—Propriety—Practice. *See* PRACTICE—ADJOURNMENT. **17 Pat.L.T. 329 (S.B.).**

——**O. 17, R. 1**—*Illness of counsel—Refusal of adjournment—Prejudice.*

Where the counsel of a plaintiff was admittedly ill on the date fixed for the hearing of a case, and it was difficult for a new counsel to get ready on short notice, it was held that a refusal to adjourn such a case was not proper and the case was remanded for trial. (*Davies.*) BHUREY SINGH *v.* B. B. AND C. I. RY. **1939 A.M.L.J. 118.**

——**O. 17, R. 1**—*Power of Court under—Costs of adjournment—Costs of the day or whole costs incurred up-to-date—Proper order.*

O. 17, R. 1, C. P. Code, gives the Court power to make an order as to costs only in respect of the costs occasioned by the adjournment and not the costs of the suit generally. The rule does not entitle the Court to demand payment of the entire costs of the suit incurred up to the date on which the adjournment is asked for. What can be allowed is only the costs of the day including a reasonable fee to the legal practitioner engaged by the opposite party, which in a Subordinate Judge's Court is Rs. 20. (*Pandrang Row, J.*) S. A. RAMANATHAN CHETTIAR *v.* S. N. ALAGAPPA CHETTIAR. **177 I.C. 431=11 R.M. 319=47 L.W. 780=1938 M.W.N. 502=A.I.R. 1938 Mad. 711 =(1938) 1 M.L.J. 793.**

——**O. 17, Rr. 1 and 3**—*Powers of Court under—Scope and extent.*

The word 'may make such orders as it thinks fit' occurring in sub-R. (2) of R. 1 of O. 17, C. P. Code, are sufficiently wide to cover a condition to be imposed as a penalty if the costs of an adjournment are not paid. An order of dismissal can be made under R. 1 and R. 1 cannot be restricted by R. 3 of the same order. (*Gruer, J.*) JANI *v.* SONI. **186 I.C. 473=12 R.N. 201=1940 N.L.J. 104=A.I.R. 1940 Nag. 158.**

——**O. 17, R. 1 (2)**—*Adjournment—Costs—Pleader asked to admit genuineness of document—Right to adjournment to consult client.*

When a pleader is asked to admit the genuineness of certain documents there and then, he is entitled to consult his client; and the Court, simply because the pleader wants a short adjournment to receive proper instructions, should not burden him with costs. (*Agha Haidar, J.*) SAMPURAN SINGH *v.* DEVI DAYAL. **167 I.C. 65=9 R. L. 448=38 P.L.R. 896=A.I.R. 1936 Lah. 705.**

——**O. 17, Rr. 2 and 3**—*Applicability—Case adjourned for evidence—Parties and vakils absent—Vakil applying for adjournment and stating no instructions—If appearance.*

The proper way of construing rule 3 of O. 17, C. P. Code, would be that where no default occurring under rule 2, default occurs, under rule 3, the Court should proceed under the latter rule and dispose of the case on the merits; but if the

C. P. CODE (1908), O. 17, R. 2.

default consists in non-appearance, rule 2 which specifically deals with such a case must, in terms apply. Where a suit is adjourned to a date for production of evidence by the defendant, and the latter and his vakil are absent on that date, but another vakil applies for an adjournment on behalf of the vakil on record, and that being refused, reports that he has no further instructions, the decree passed by the Court must be deemed to be an *ex parte* decree and not a decree on the merits. When the vakil who appears states that he has no instructions beyond applying for an adjournment, it is a contradiction in terms to hold that he does in fact appear, though he says he does not appear. (*Venkatasubba Rao and Cornish, JJ.*) ELLAMMAL *v.* KARUPPAN CHETTI. **162 I.C. 759=8 R.M. 1047=1936 M.W.N. 589=43 L.W. 738=A.I.R. 1936 Mad. 625=70 M.L.J. 688.**

——**O. 17, R. 2**—Applicability—Date of first hearing of suit—Defendant absent—Pleader's application for adjournment refused—Pleader withdrawing from case—Decree—If *ex parte* or on merits—Application to set aside—Maintainability. *See* C. P. CODE, O. 9, R. 6 AND O. 17, R. 2. **1937 A.W.R. 151=A.I.R. 1937 All. 347.**

——**O. 17, R. 2**—*Applicability — Defendant absent and declared* ex parte—*Judgment reserved —Application to set aside* ex parte *decree believing that* ex parte *decree has been made—Subsequent delivery of judgment—Dismissal of application as incompetent—Propriety.*

On an adjourned date, the defendant being absent, the Judge declared him *ex parte* and reserved judgment. Immediately the defendant appeared and made an application for setting aside the *ex parte* decree, wrongly believing that such decree was passed. After some days the Judge delivered judgment. The Judge treated the application of the defendant as an application for setting aside the decree and made an order "as the suit was not decided *ex parte*, no petition lies for restoration."

Held, that the application of the defendant could be treated as one for setting aside the *ex parte* decree. The Court having held the defendant *ex parte*, the provisions of O. 17, R. 2, C. P. Code, became applicable and hence the Judge was wrong in saying that no petition lay for setting aside the *ex parte* decree. (*Venkatasubba Rao, J.*) LINGA REDDI *v.* GURU SINGH. **172 I.C. 256=10 R.M. 442=1937 M.W.N. 422=A.I.R. 1937 Mad. 674.**

——**O. 17, Rr. 2 and 3**—*Applicability—Plaintiff filing documents and Commissioner's report—Failure to produce witnesses on adjourned date—Duty of Court.*

Where the plaintiff had taken various steps in order to bring the suit to a hearing, had filed documents, cited witnesses and paid a large sum as costs of the local investigation and further the Commissioner's report was already on the record and time had been granted to him to produce his witnesses, the Court should not dispose of the suit under R. 2 of O. 17, C. P. Code, but might proceed to decide the suit under R. 3 of O. 17 on the plaintiff failing to produce his witnesses on the date of hearing. (*S. K. Ghose and Nasim Ali, JJ.*) KAZIMADDI SARDAR *v.* MAKRAMALI MOLLA. **67 C.L.J. 516=A.I.R. 1938 Cal. 789.**

C. P. CODE (1908), O. 17, R. 2.

——**O. 17, Rr. 2 and 3**—*Applicability—Suit adjourned for plaintiff's witnesses—Plaintiff's advocate absent on adjourned date—Application for adjournment by another advocate refused—Plaintiff not giving evidence—Dismissal of suit—If one under R. 2 or R. 3—Restoration under O. 9, R. 9—Competency.*

A plaintiff was granted time for production of witnesses and the suit was adjourned. On the adjourned date, the plaintiff's advocate was absent as he was away from the station. Another practitioner applied for an adjournment, which being refused, he took no further part in the proceedings, as he was not instructed to conduct the suit. The plaintiff also not giving evidence, the suit was dismissed. The suit was subsequently restored on an application under O. 9, R. 9, C. P. Code.

Held, that the case fell under O. 9, R. 9 as the mere physical presence of the plaintiff could not take it out of O. 9, R. 9, as it was not an appearance under O. 17, R. 3, so as to preclude an application for restoration. The disposal must be held to fall under O. 17, R. 2, C. P. Code. (*Somayya, J.*) VENKATESWARA RAO *v.* SUBRAMANYAM. **186 I.C. 455=12 R.M. 640=50 L.W. 430=1939 M.W.N. 951=A.I.R. 1939 Mad. 974=(1939) 2 M.L.J. 611.**

——**O. 17, R. 2 and O. 9, Rr. 8 and 9**—*Applicability—Two suits adjourned and parties asked to file list of witnesses before certain date—On date of hearing one suit dismissed "for default" and other dismissed "for want of prosecution" as list of witnesses not filed by plaintiff.*

Two suits were adjourned to a certain date for hearing and the parties were asked to file the list of witnesses within a week of the order. On the date of hearing, however, one of the two suits was dismissed "for default" and the other was dismissed for "want of prosecution" as the plaintiff did not file the list of witnesses as required by the Court. On applications being filed for setting aside the orders of dismissal and for restoration of the respective suits,

Held, that the order of dismissal in each case was an order under O. 17, R. 2, C. P. Code, read with O. 9, R. 8 and not under O. 9, R. 8 simply. An application for setting aside the dismissal in each case and for restoration of the suits could be made under O. 9, R. 9. The dismissal of the other suit "for want of prosecution" did not alter the applicability of O. 17, R. 2, read with O. 9 R. 8. (*Mya Bu and Spargo, JJ.*) MA HLA NYUN *v.* MA AYE MYINT. **173 I.C. 48=10 R.R. 303=A.I.R. 1937 Rang. 437.**

——**O. 17, R. 2**—*Order under—Appeal.*

If an order is made under O. 17, R. 2 read with O. 9, R. 8 then it is as though it were an order, under O. 9, R. 8, and is not appealable at all. (*Stone, C. J. and Bose, J.*) MANEKLAL BHIMRAJ *v.* PHULABAI. **I.L.R. (1939) Nag. 574=184 I.C. 102=12 R.N. 93=1939 N.L.J. 351=A.I.R. 1939 Nag. 213.**

——**O. 17, Rr. 2 and 3**—*Right course for Court to proceed under R. 2—Judgment mentioning R. 3—Presumption.*

Where the right course for a Judge in the circumstances of a case was to decide the case under O. 17, R. 2, C. P. Code, but the judgment mentioned O. 17, R. 3, it must be presumed that the Judge intended to act under R. 2 and that the

entry of R. 3, was an accidental slip for R. 2. The fact that the Judge also mentioned O. 9, R. 6, in his order bears out the same conclusion. (*Srivastava, C. J. and Smith, J.*) BABA DIN *v.* SURAJ BAKSH SINGH. **169 I.C. 226=10 R.O. 2=1937 O.L.R. 360=1937 O.W.N. 620.**

——**O. 17, R. 2 Expl. (Allahabad.)**—Failed to appear—Meaning. *See* C. P. CODE, O. 9, R. 13 & O. 17, R. 2. **1940 A.W.R. (H.C.) 161.**

——**O. 17, R. 2, Expl. (Allahabad)**—*Filing of list of witnesses—If amounts to appearance.*

The mere filing of the list of witnesses before the case has been called on for hearing does not amount to an appearance within the meaning of the explanation to O. 17, R. 2. The failure to appear takes place only when the suit is called on for hearing even though it be an adjourned hearing. If at the time the case is called on for hearing the party is present or is represented in Court by an agent or pleader then he has not failed to appear, but if at that time he is neither present nor represented by an agent or pleader, he has failed to appear. The mere fact that at an earlier stage, something almost mechanical as the filing of a list of witnesses, is done by a pleader on his behalf before the case is called on for hearing, cannot amount either to appearance or being represented in Court by an agent or pleader at the time when the case is called on for hearing. A decree passed against a defendant in a suit, under such circumstances in the absence of the defendant and his pleader, is therefore *ex parte* although passed under O. 17, R. 3 and he is entitled as of right to show cause for his non-appearance under O. 9, R. 13. The Court holding that it has no jurisdiction to consider the matter errs in the exercise of its jurisdiction. (*Sulaiman, C. J. and Collister, J.*) BHAJAN SINGH *v.* PREM NARAIN. **164 I C. 541=9 R.A. 166=1936 A.L.J. 1274=1936 A.W.R. 835=A.I.R. 1936 All. 619.**

——**O. 17, R. 2, Expl. (Allahabad)**—Plaintiff's counsel applying for adjournment during plaintiff's absence—Court refusing adjournment and dismissing suit for default—Plaintiff's remedy. *See* C. P. CODE, O. 9, RR. 8 AND 9. **1936 A.L.J. 635=1936 A.W.R. 499.**

——**O. 17, R. 3**—*Applicability—Hearing adjourned in ordinary course.*

O. 17, R. 3, C. P. Code, applies only where the hearing is adjourned not in the ordinary course, but at the specified request of a party for one of the acts specified in the rule. Where, therefore, the hearing is adjourned in the ordinary course to a certain date for the defendants to file a list of witnesses who are to be summoned for a date which is to be fixed later, the Court cannot pass on that date an *ex parte* decree under O. 17, R. 3 on failure of the defendants to appear and file the list of witnesses. (*Tek Chand, J.*) GANESHAM LAL *v.* KESAR SINGH. **40 P.L.R. 1014.**

——**O. 17, R. 3 and O. 9, R. 13**—*Applicability of O. 17, R. 3—Absence of defendant on date fixed for final hearing—Decree after examination of plaintiff's witnesses—If could be set aside under O. 9, R. 13.*

Where after several adjournments a case was posted to a particular date for final hearing and on that date was once again adjourned to a later date owing to the transfer of the Judge concerned and on such later date the plaintiff alone appeared and neither the defendant nor his counsel appeared and the Court thereupon proceeded to examine such of the witnesses as were produced by the plaintiff and passed a decree purporting to act under O. 17, R. 3, C. P. Code, it was held that in as much as the Court had not granted time to the defendants for any of the purposes mentioned in R. 3 of O. 17, it could not be said that the defendants had failed to take any step for which time had been allowed and that hence O. 17, R. 3 never came into play. It was further held that the mere fact that the Court remarked that it was acting under O. 17, R. 3 could not make O. 17, R. 3 applicable and the decree could be set aside by an application under O. 9, R. 13. (*Bennet and Verma, JJ.*) RAJA SINGH *v.* MANNA SINGH. **188 I.C. 414=13 R.A. 19=1940 A.L.J. 200=1940 A.W.R. (H.C.) 196=A.I.R. 1940 All. 217.**

——**O. 17, R. 3**—*Applicability—Suit for partnership accounts — Preliminary decree—Trial Court ordering plaintiff to deposit Commissioner's fees—Deposit not made — Dismissal of suit—Appeal—Appellate Court admitting appeal on condition of plaintiff making required deposit—Propriety of.*

In a suit for taking partnership accounts a preliminary decree was passed and a commissioner was appointed for settling partnership accounts. The trial Court ordered the plaintiff to deposit a certain sum towards the commissioner's fees. The plaintiff did not make the deposit and obtained adjournment. On the adjourned date, the plaintiff was warned that if the deposit was not made within a week the suit was liable to be dismissed for want of prosecution. No deposit having been made within the time allowed, the Court dismissed the suit. On appeal against this order the appellate Court admitted the appeal on condition that the plaintiff deposited the required sum.

Held, (1) that the order of the appellate Court in so far as it interfered with the discretion exercised by the trial Court was unjustifiable; (2) that the order of the trial Court dismissing the suit fell under O. 17, R. 3. Hence in dismissing the suit because of the failure of the plaintiff to deposit the sum and without reference to the materials on the record the trial Court acted against the provisions of O. 17, R. 3; (3) that the preliminary decree having been passed, the Court had no jurisdiction thereafter to dismiss the suit; (4) that the suit should be restored to file on the deposit being made, and proceeded with. (*Mehta and Lobo, JJ.*) MENGHOMAL *v.* VARUMAL. **176 I.C. 503=11 R.S. 20=A.I.R. 1938 Sind 142.**

——**O. 17, R. 3 (Allahabad amendment)**—*Applicability—Time granted at the instance of both parties—Failure to appear—Court, if can decide suit on merits.*

Where at the instance of both parties time was extended for the final hearing and on the adjourned date the plaintiff's advocate states that he has no instruction, the Court has ample power under the amended R. 3 of O. 17, C. P. Code, to proceed to decide the suit on the merits, whether the party who has failed to do that for which time had been granted to him, is present or not. Nor does the fact that time was granted to both parties make the rule inapplicable. (*Bennet and Verma, JJ.*) NARAIN DAS *v.* MADAN MOHAN. **183 I.C. 703=12 R.A. 161 (2)=1939 A L J. 371 =1939 A.W.R. (H.C.) 318=A.I.R. 1939 All. 524.**

C. P. CODE (1908), O. 17, R. 3.

——O. 17, R. 3—Order of dismissal under—Remedy—Appeal or review. *See* C. P. CODE, O. 47, R. 1. 1938 R.D. 184=1938 A.W.R. (B. R.) 115.

——O. 17, R. 3—*Plaintiff's Counsel meaning for adjournment on date fixed for final disposal—Court refusing adjournment and passing decree on merits—Application for restoration—If competent.*

Where the Counsel for the plaintiff moved for an adjournment on a date fixed for the final disposal of the suit and stated that he had no instructions except to move for adjournment, but the Court passed the order that the case must proceed under O. 17, R. 3 with the result that it heard no evidence on behalf of the plaintiff, as none was produced, but heard witnesses tendered on behalf of the opposite party and passed a decree disposing of the suit on the merits.

Held, that the case came under R. 3, of O.17. C, P. Code, and that being so no application lay for restoration and, therefore, there can be no revision, or first appeal from the order refusing restoration under O. 9, R. 13. (*Sulaiman, C. J. and Bennet, J.*) LACHMI NARAIN *v.* SHANKAR LAL. 164 I.C. 927=9 R.A. 207=1936 A.W.R. 791=1936 A.L.J. 902=A.I.R. 1936 All. 670.

——O. 17, R. 3—*Scope—Decision of suit under—Restoration under O. 9. R. 13 if possible.*

R. 3 of O. 17, C. P. Code means that the Court has discretion either to decide the case that day or not, but if it does decide the suit, it will be a decision on the merits and appearance on behalf of the defendant would be assumed, whether he was in fact present or not and the decree passed cannot be regarded as *ex parte* decree so as to entitle the defendant to apply for restoration under O. 9, R. 13, C. P. Code. (*Collister, J.*) SHEO PUJAN KALWAR *v.* BISHNATH KALWAR. 186 I.C 102=12 R.A. 377=1939 A.L.J. 627=1939 A.W.R. (H.C.) 590=A.I.R. 1939 All. 642.

——O. 18, R. 1—*Right to begin—Issue of facts—Burden on defendant—Defendant's right.*

If on the issue or issues of facts, the burden of proof is on the defendant, he has the right to begin. (*Panckridge, J.*) M. D'CRUZ *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. 40 C.W.N. 865.

——O. 18, R. 13—*Recording of evidence of witness—If mandatory.*

It is not enough that the Judge should refer to the evidence in his judgment. It is mandatory that he should make a separate memorandum of the evidence given by each witness and shall sign it. (*Mir Ahmad, J.*) DASSA RAM *v.* ZAFFARYAB ALI. 177 I.C. 157=11 R. Pesh. 18 (1)=A.I.R. 1938 Pesh. 46.

——O. 18, R. 18—*Local inspection—Decision based solely on without allowing parties to legal evidence on points arising from inspection—Validity.*

It is improper and objectionable for a judge to base his judgment solely on the impressions formed by him at the time of his local inspection and to come to a conclusion quite contrary to the evidence in the case. Where the judge does not make any notes of inspection and has not placed on record what he found on inspection, his decision, arrived at without putting the points observed by him at the inspection to the parties and eliciting their answers, cannot be upheld by the appellate Court. (*Somayya, J.*) PADMASANI

C. P. CODE (1908), O. 19.

BAI *v.* SABAPATHY MUDALIAR. 1939 M.W.N. 723=50 L.W. 148=(1939) 2 M.L.J 284.

——O. 18, R. 18—*Local inspection—Object of—Procedure—Judge making inquiries of people present at inspection and basing decision thereon—Propriety of—Finding of fact—Finality in second appeal.*

It is a quite unobjectionable procedure for a Judge to make a local inspection; in fact O. 18, R. 18, C. P. Code, expressly provides for it. But it is not a justifiable procedure for a Judge at such local inspection to welcome the presence of crowds of anonymous villagers and indulge in formal inquiries amongst the people in those crowds for the purpose of obtaining guidance in deciding the rights of the parties. If a judge does so and treats the result of these enquiries as evidence in the case, there is an end of all judicial procedure. A judgment must be based on evidence which is admissible in law. There is no objection to a Judge viewing the locality in dispute in order to enable him to visualise the same and to appreciate the evidence before him. But there is no warrant for the procedure whereby the Judge converts himself into an unofficial investigator and inquires of all and sundry regarding their views on the rights of the parties with the object of founding a judgment on what he has heard. No finding of fact based on such materials and achieved by such procedure can be supported or be held to be binding in second appeal. (*Wadsworth J.*) ACHUTHARAMAYYA *v.* SOORAPPAYYA. 180 I.C. 543=11 R.M. 719=1938 M.W.N. 1066=48 L.W. 595=A.I.R. 1939 Mad. 61=(1938) 2 M.L.J. 894.

——O. 18, R. 18—*Observation of Judge made as result of local inspection—Value of.*

Observations by a Judge in the course of his local inspection cannot be substituted for the evidence of witnesses examined on the subject. It is obvious that in the case of a Judge's observations, the parties never get a chance of either cross-examining him on the various points raised or setting right his views if they are found to be erroneous. (*Varma, J.*) HARI PRASAD SAHU *v.* ROPNA KHARIA. 175 I.C. 698=4 B.R. 625=11 R.P. 9=A.I.R. 1938 Pat. 288.

——O. 18, R. 18—*Scope—Local inspection—Object of—Duty of Court.*

The function of a Judge in exercising his right of local inspection granted by the statute, *i.e.*, under the C. P. Code, is for the purpose of understanding the evidence and for no other purpose. By "understanding the evidence" is not meant "contradicting a witness". A witness may make a statement which from the local inspection may appear to be untrue, but a Judge is not entitled to say that it is untrue from what he himself observes. (*Wort, J.*) ABDUL BAQI *v* FAKHRUL ISLAM. 3 B R 677=170 I.C. 187=10 R.P. 89=1937 P. W.N. 261=A.I.R. 1937 Pat. 333.

——O. 19—*Affidavits—Use of—Duty of Court to summon witnesses for cross-examination.*

Affidavits should not properly be acted upon unless both parties agree to have them treated as evidence. Where one of the parties requests the Court to summon the witnesses for cross-examining them on their affidavits, the Court should summon them and not merely act on the affidavits. (*Burn, J.*) NARAYANA *v.* LAKSHMAYYA. 185 I. C. 421=12 R.M. 543=1939 M.W.N. 735 (1)=

C. P. CODE (1908), O 20.

50 L.W. 654=A.I.R. 1939 Mad. 927=(1939) 2 M.L.J. 399.

——O. 20—Scope of—Extension of principle underlying—Rules to be observed. *See* TORT—DAMAGES. **1938 A.L.J. 571.**

——O. 20, R. 1—*Judgment delivered without notice to parties—Counsel for party informed subsequently — Limitation for appeal —Starting point.*

Where a Court delivers a judgment without having previously fixed a date for pronouncing the judgment, and the defendant being absent on that date, the judgment is informed to his counsel on some later day, this later day must be regarded as the date for pronouncing judgment and period of limitation for appeal must be deemed to run from that date and not from the date on which the judgment is actually pronounced. A.I.R. 1925 All. 293, Rel. on. (*Abdul Rashid, J.*) MOHAMMAD ZAMAN *v.* HANS RAJ SHAH. **182 I.C. 108=11 R.L. 906=A.I.R. 1938 Lah. 707.**

——O. 20, R. 2—*Judgment written by ex-Judge —If can be pronounced by his successor-in-office.*

A judgment written by an ex-judge after he has ceased to be a Judge is valid as a judgment, which may be pronounced by his successor-in-office under O. 20, R. 2. (*Page, C.J., Mya Bu and Baguley, JJ.*) HARGULAL *v.* ABDUL GANY. **14 Rang. 136=161 I.C. 967=8 R R. 523=A.I.R. 1936 Rang. 147 (F.B.).**

——O. 20, R. 2—*Judgment written by ex-Judge —Discretion of his successor.*

Under O. 20, R. 2, it is not necessarily incumbent upon the successor of the Judge, who wrote the judgment after he had ceased to be a Judge of the Court in which the trial was held to pronounce the judgment that had been written by his predecessor. He has a discretion in the matter, and if he is in doubt as to the correctness of the judgment that has been written by his predecessor he ought either to act in accordance with the provisions of O. 18, R. 15, or to hear the case *de novo*. (*Page, C.J., Mya Bu and Baguley, JJ.*) HARGULAL *v.* ABDUL GANY. **14 Rang. 136=161 I.C. 967=8 R.R. 523=A.I.R. 1936 Rang. 147 (F.B.).**

——O. 20, R. 3—*Judgment setting aside* ex parte *small cause decree, delivered and signed—Finding that claim in that suit not proved to be true—Subsequent order restoring that suit to file for trial on merits—If without jurisdiction.*

Where in a suit to set eside an *ex parte* decree passed in a Small Causes Court suit, the Court delivers and signs in open Court a judgment setting aside that decree recording a finding to the effect that the defendant has failed to prove that his claim in the previous suit was a true one, it has no jurisdiction to pass a subsequent order directing the Small Causes Court suit to be restored to file and to be tried on the merits again. (*Ghose, J.*) DHARANIDHAR *v.* NITYA GOPAL. **43 C.W.N. 1148=A.I.R. 1939 Cal. 732.**

——O. 20, R. 3—Scope of. *See* C. P. CODE, SS. 148 AND 149 AND O. 20, RR. 3 AND 6. **1938 A. L.J. 673.**

——O. 20, R. 4 (1)—*Construction—Reasons for conclusion or discussion of evidence—If necessary.*

C. P. CODE (1908), O. 20, R. 4.

O. 20, R. 4 (1), C. P. Code, does not require that either the reasons for arriving at a conclusion or discussion of the evidence should be given by the Small Cause Court. The points for determination in order to arrive at the result and the resulting decision thereon alone need be stated. If all that is set out is the ultimate result without an indication of the points for determination, there is no compliance with the rule. A statement of issues only does not necessarily indicate the points to be determined although in some cases it may well do so. Each case must be judged by itself. (*Mockett, J.*) AYYAPPA, *In re*. **166 I.C. 550=9 R.M. 380=A.I.R. 1936 Mad. 913.**

——O. 20, R. 4 (1)—*Judgment in small cause suit—Contents of.*

Where the judgment in a small cause suit shows that the Judge has applied his mind to the points for determination and he has also recorded his decisions thereon, there is sufficient compliance with the law. (*Stodart, J.*) MUTHUSWAMY PILLAI *v.* VEERASWAMY PILLAI. **163 I.C. 251=8 R.M. 1119=1936 M.W.N. 572=43 L.W. 514=A.I.R. 1936 Mad. 486=70 M.L.J. 433.**

——O. 20, R. 4 (1)—*Judgment of a Court of Small Causes—Contents—Duty of Judge.*

Under O. 20, R. 4 (1), C. P. Code, the judgment of a Court of Small Causes must contain the point for determination and the decision thereon. Though a Judge of the Small Cause Court need not write lengthy judgments and can reduce his remarks to a minimum, yet this minimum must be intelligible so as to enable the High Court in revision to satisfy itself that the decision is according to law. The Judge is expected to apply his mind to the decision of a Small Cause Court case as carefully as he would apply his mind to the decision of a regular suit. (*Thomas, C.J.*) PUTTOO LAL *v.* EWAZ ALI. **14 Luck. 211=177 I. C. 59=11 R.O. 16 (1)=1938 O.A. 611=1938 O. L.R. 366=1938 O.W.N. 805=A.I.R. 1938 Oudh 225.**

——O. 20, R. 4 (1)—*Small Cause Court—Judgment—Contents of.*

Although a Judge of a Small Cause Court may reduce his remarks to a minimum and they need not contain any more than the points for determination and decision thereon, this minimum must be intelligible, enabling the High Court in revision to satisfy itself that the decree or order was according to law, without the necessity of perusing the whole record. When, therefore, there is a suit for breach of contract, it is not always sufficient to state as a point for determination, "did defendants commit breach of contract", because what the Court of Small Causes may have had to decide is whether disputed facts as a result of which it is said the breach of contract arises and is proved are themselves proved. (*Mehta, A.J.C.*) BHOJOMAL SHAMDAS *v* ASWANI & Co. **171 I.C. 648=10 R.S. 115=A.I.R. 1937 Sind 243.**

——O. 20, R. 4 (1)—*Small cause suit—Judgment—Contents of—Duty of Court to record evidence or summary of evidence relied on in judgment—Judgment not supported by evidence as recorded—Facts and circumstances relied on not recorded—Effect—Interference in revision.*

A Small Cause Court is of course not bound to record the evidence *in extenso*, but it is incumbent upon that Court to record such statements of the

C. P. CODE (1908), O. 20, R. 4.

witnesses, or to make a summary of those statements, in the deposition, as recorded, on which the Court relies in its judgment. Where the judgment in a small cause suit is not supported by the evidence as recorded, and the evidence has not been recorded in such a way as to enable the High Court to form any opinion as to the respective cases of the parties before the Court, and on what material circumstances the Court has relied upon in support of the judgment, the judgment is liable to be set aside in revision under S. 25 of the Provincial Small Cause Courts Act. It is not enough for the Judge trying a small cause suit to say that he finds for or against a party from the facts and circumstances; he must take care to note those facts and circumstances when recording the evidence of the witnesses who come and depose before him. (*R.C. Mitter, J.*) SHAIK ILIMADDIN *v.* SHAIK ABIDULLA. **169 I.C. 512=64 C.L.J. 456=10 R.C. 11=41 C.W.N. 412 =A.I.R. 1937 Cal. 308.**

——**O. 20, R. 4 (2)**—Judgment—Contents. *See* C. P. CODE, O. 41, R. 31 AND O. 20, R. 4 (2). **A.I.R. 1938 Pat. 69.**

——**O. 20, R. 6**—Scope and effect of. *See* C.P. CODE (1908), SS. 148 AND 149 AND O. 20, RR. 3 AND 6. **1938 A.L.J. 673.**

——**O. 20, R. 6 (2)**—*Order as to costs—Several parties—Proper order.*

When there are several parties in a suit, the judgment and decree should make it clear which parties are to receive costs and how many sets are allowed. (*Norman, I.C.S.*) ABDUL RAHMAN *v.* DIDAR BUX. **1936 A.M.L.J. 117.**

——**O. 20, R. 10 and O. 21, R. 31 and S. 75**—*Suit for specific movable properties—Form of decree—Commission to ascertain their value—Power of Court to issue.*

In a suit for recovery of specific movable properties, the decree ought to be a decree for the delivery of the movables enforceable under O. 21, R. 31, C. P. Code, but in accordance with O. 20, R. 10 of that Code the decree has to state the amount of money to be paid by the defendant as an alternative if delivery cannot be had. S. 75, C. P. Code, does not authorise the Court to issue a commission to ascertain the value of the movables. (*Mitter and Roxburgh, JJ.*) SRIS CHANDRA NANDY *v.* SUPRAVAT CHANDRA. **I.L.R. (1940) 1 Cal. 372=71 C.L.J. 215=44 C.W.N. 304=A.I.R. 1940 Cal. 337.**

——**O. 20, R. 11**—*Power of Court under—If affected by U. P. Agriculturists' Relief Act.*

Under the Agriculturists' Relief Act it is imperative on the Court to pass an instalment decree in certain circumstances. The Act, however, does not derogate from the provisions of O. 20, R. 11, C. P. Code, under which the Court is entitled to pass an instalment decree. (*Allsop, J.*) GIRWAR SINGH *v.* HAR PRASAD. **173 I.C. 897=10 R.A. 518=1938 R.D. 65=1938 A.L.R. 189=1937 A.W.R. 1074=1937 A.L.J. 1247=A.I.R. 1938 All. 52.**

——**O. 20, R. 11 (1) and (2)**—*Scope—Jurisdiction of Court—Money suit—Decree for instalments—Subsequent decree by consent of parties for instalments coupled with hypothecation of immovable property—If without jurisdiction—Objection that contract of security is without consideration and unenforceable and that decree is without jurisdiction—Competency.*

C. P. CODE (1908), O. 20, R. 11.

The fact that a Court passes an instalment decree under O. 20, R. 11 (1), C. P. Code, does not make it *functus officio* or and its jurisdiction to pass a further and a different kind of instalment decree coupled with a hypothecation of immovable property. O. 21, R. 11 (2) is wide enough to include and to apply to the fixing of instalments and the taking of security after the passing any decree for the payment of money, whether the form of the original decree was for instalments or for a lump sum, when the new direction is made by consent of both parties. The judgment-debtor cannot in execution contend that such a decree is without jurisdiction or that the contract of security was without consideration and therefore unenforceable. The Executing Court is precluded from going behind the decree. (*Rowland and Chatterji, JJ.*) LALITA PRASAD CHAUDHURY *v.* SYED MUHAMMAD MANSOOR. **18 Pat. 719=20 Pat.L.T. 924.**

——**O. 20, R. 11 (2) and S. 42**—*Application under O. 20, R. 11 (2)—To which Court to be made.*

An application under O. 20, R. 11 (2), C. P. Code, must be made to the Court which passed the decree and S. 42 does not confer concurrent powers on the Court executing the decree. (*D. R. Norman.*) CHAMPA LAL *v.* KEDAR MAL. **1939 A.M.L.J. 104.**

——**O. 20, R. 11 (2)**—*Compromise between parties that decretal amount should be paid by instalments—Court accepting compromise and dismissing execution case—Terms of compromise—If can be enforced in execution.*

Where after the decree parties agreed that the decretal amount should be paid by instalments and that if the judgment-debtor failed to pay three consecutive instalments in time, the decree-holder would have the right to realise the entire money by execution, and the Court accepted the compromise and dismissed the execution case in terms of the compromise,

Held, that the Court must be deemed to have directed that the payment of the amount decreed should be made by instalments under O. 20, R. 11 (2), C. P. Code, and that, therefore, the decree-holder was not bound to enforce the terms of the compromise by a separate suit but could do so by execution.

Held, further, that if by the compromise there was an adjustment of the decretal amount within the meaning of O. 21, R. 2 of the Code, there was no inherent want of jurisdiction in the executing Court over the subject-matter and the parties by agreement had the right to arrange their own procedure and to give jurisdiction to the Court to adopt that procedure, and that, therefore, it would not be illegal to allow the decree-holder, on default of payment of three consecutive instalments, to realise the decretal amount by execution, which was the procedure agreed upon between the parties at the time of the compromise. (*Nasim Ali and R. C. Mitter, JJ.*) MONMOHAN SANYAL *v.* KHALISHKALI CO-OPERATIVE BANK. **170 I.C. 767=10 R.C. 205=41 C.W.N. 480=A.I.R. 1937 Cal. 236.**

——**O. 20, R. 11 (2)**—*Executing Court passing order under—Validity—Acquiescence, if can cure illegality.*

If the executing Court passes an order under O. 20, R. 11 (2), C. P. Code, altering the terms of

the decree to be executed, it usurps the jurisdiction of the trying Court. The acquiescence of the judgment-debtor will not avail the decree-holder and he cannot execute the altered or amended decree. (*D. R. Norman.*) CHAMPA LAL *v.* KEDAR MAL. 1939 A.M.L.J. 104.

——O. 20, R. 11 (2)—*Order on time-barred application—If binding on parties.*

Even though the petition on which an order for payment of the decretal amount by instalments is made, is not made within six months of the decree, the order is not a nullity. The proper remedy of the person who objects to the order is to take appropriate steps for getting that order set aside and so long as that order is not set aside, it is binding on him. (*Nasim Ali and R. C. Mitter, JJ.*) MONMOHAN SANYAL *v.* KHALISHKALI CO-OPERATIVE BANK. 41 C.W.N. 480=170 I.C. 767=10 R.C. 205=A.I.R. 1937 Cal. 236.

——O. 20, R. 11 (2)—*Order under—Application time barred—Legality—Limitation—Matter of procedure.*

An order passed under O. 21, R. 11 (2) postponing the date of payment of the decretal amount on terms, on an application filed after six months of the date of the decree, is not an order passed without jurisdiction. Limitation is a matter of procedure and an order passed on a time-barred application is not one without jurisdiction. (*Weston.*) SOHAN RAJ *v.* KESHA. 1938 A.M.L.J. 86.

——O. 20, R. 12—Court-fee—Application for ascertainment of future mesne profits claimed in suit and left open by decree—Rejection—Appeal—Valuation—Court-fee. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), SCH. II, ART. 11. 49 L.W. 652.

——O. 20, R. 12—*Decree for mesne profits from date of suit until delivery of possession of property—Direction for its ascertainment in execution—Legality—Duty of executing Court.*

If a Court passing a decree for delivery of possession of immovable property directs that an enquiry should be made in *execution* as to the amount of mesne profits from the institution of the suit till delivery of possession to the plaintiff, the executing Court has no jurisdiction to question the propriety of the direction. It should enquire into the amount of mesne profits and forward its report to the Court which passed the decree and it would then be the duty of the Court to pass a final decree in conformity with the provisions of O. 20, R. 12 (2), C.P. Code.

Per *Derbyshire, C.J., Mukherjea, J.* (*contra*).—There is nothing improper or wrong in law in the suit Court directing that such an inquiry shall be made by the executing Court, and there is much to be said in favour of it from the point of view of convenience. (*Derbyshire, C. J. and Mukherjea, J.*) COMMISSIONERS FOR THE PORT OF CALCUTTA *v.* PROHLADRAI. 67 C.L.J. 473=42 C.W.N. 748.

——O. 20, R. 12—*Mesne profits—Calculation of—Deduction of collection charges.*

Even where the dispossession is wanton and malicious in calculating the amount of mesne profits the collection charges are to be deducted from the gross realization. Where there is no evidence as to the actual amount spent for collection, the customary rate in India is 10 per cent. (*R. C. Mitter and Biswas, JJ.*) RAJENDRA NARAYAN RAY *v.* BHAIRABENDRA NARAYAN RAY. 179 I.C. 298=11 R.C. 522=68 C.L.J. 152=A.I.R. 1938 Cal. 563.

——O. 20, R. 12—*Mesne profits—Interest—Mode of calculation.*

When profits are earned or might have been earned by the wrongdoer yearly, interest on those profits must be calculated yearly and year by year. (*R. C. Mitter and Biswas, JJ.*) RAJENDRA NARAYAN RAY *v.* BHAIRABENDRA NARAYAN RAY. 179 I.C. 298=11 R.C. 522=68 C.L.J. 152=A.I.R. 1938 Cal. 563.

——O. 20, R. 12—*Mesne profits—Interest—Rate.*

Mesne profits include interest, but it is settled law that the Court may in its discretion either refuse to give interest or give interest at such a rate as it thinks fit. There is no reason for making any distinction between different periods for calculation of interest. In absence of special circumstances six per cent. is the usual rate. (*R. C. Mitter and Biswas, JJ.*) RAJENDRA NARAYAN RAY *v.* BHAIRABENDRA NARAYAN RAY. 179 I.C. 298=11 R.C. 522=68 C.L.J. 152=A.I.R. 1938 Cal. 563.

——O. 20, R. 12—*Mesne profits before and after suit—Power of Court to pass decree beyond jurisdiction.*

In a ruit for recovery of possession of immovable property and mesne profits, it is the value of the property plus the mesne profits for the period up to the date of the suit that would determine the jurisdiction of the Court. The mesne profits accruing *pendente lite* would not enter as an element in determining the value of the suit at the time when the suit is filed. It would, therefore, be quite competent to the Court to award in the shape of *pendente lite* mesne profits a sum of money which might exceed its pecuniary jurisdiction. But as regards mesne profits accruing prior to the date of the suit, the Court can award mesne profits only to the extent of such an amount, which together with the value of the land would come up to an amount which is within its pecuniary jurisdiction. (*M. C. Ghose and Mukherjea, JJ.*) HEMANGA BHOOSHAN RAY CHAUDHURI *v.* BHEEM GHARAMI. I.L.R. (1937) 2 Cal. 176=172 I.C. 591=10 R.C. 402=A.I.R. 1937 Cal. 761.

——O. 20, R. 12—*Partition suit—Preliminary decree passed on compromise—No provision for mesne profits—Power of Court to direct enquiry into mesne profits.*

It cannot be denied that a decree can be varied by consent of parties. Although the preliminary decree passed on a compromise in a partition suit makes no provision for payment or ascertainment of any mesne profits, the Court would be justified in appointing a commissioner to determine the amount of mesne profits, when the applications and the proceedings of the Court clearly show that the intention of both the parties was that mesne profits should be paid to each other. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI KRISHEN *v.* JAMNA NARAIN. 173 I.C. 980=10 R.O. 248=1938 O.L.R. 154=1938 O.A. 240=1938 O.W.N. 348=A.I.R. 1938 Oudh 103.

——O. 20, R. 12—*Preliminary decrees granting mesne profits before suit—Exact date from which they were to be assessed not specified—Right of*

C. P. CODE (1908), O. 20, R. 12.

plaintiff to mesne profits from 3 years anterior to suit.

Where preliminary decrees gave the plaintiff mesne profits before suit but did not specify the exact date from which mesne profits were to be assessed, the decrees entitle the plaintiff to mesne profits before suit for such period as the law entitles him to, that is to say, from three years anterior to the suit if profits had been received or might have been received by the defendant within that period. (*R.C. Mitter and Biswas, JJ.*) RAJENDRA NARAYAN RAY *v.* BHAIRABENDRA NARAYAN RAY. **179 I.C. 298=11 R.C. 522=68 C.L.J. 152=A.I.R. 1938 Cal. 563.**

——**O. 20, R. 12**—*Proper procedure under—Ascertainment of mesne profits.*

The correct procedure under O. 20, R. 12, C. P. Code,is for the Court to direct an inquiry as to the mesne profits, and then pass a final decree for the amount found due on inquiry. The Court which is directed to make the inquiry in execution ought merely to determine the amount and not pass an order for its recovery. It is for the trial Court to pass a final decree for recovery of the amount due. (*Beaumont, C.J.*) BALARAM CHARYA *v.* CHIDAMBARAGAUDA. **176 I.C. 254=11 R.B. 33=40 Bom.L.R. 416=A.I.R. 1938 Bom. 320.**

——**O. 20, R. 12**—Scope—Award of mesne profits within inquiry being directed—Award at time of decree itself—If in contravention of rule—Executability of such decree without fresh final decree. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), S. 11. **1938 M.W.N. 286.**

——**O. 20, R. 12**—*Suit for damages and arrears of rent—Plaintiff not pressing claim for damages—Court, if bound to pass preliminary decree.*

Where in a suit for damages and arrears of rent, the plaintiff makes it clear that he would not press his claim for damages and confines his relief to the recovery of the fixed rents which had been agreed upon between the parties, the amount becomes definitely ascertained, and the Court is, therefore, not bound to pass a preliminary decree in the first instance. (*Sulaiman, C.J. and Bennet, J.*) BHAGCHI *v.* MORGAN. **166 I.C. 897=9 R A. 461=1936 A.W.R. 1212=1937 A.L.R. 104=A.I.R. 1937 All. 36.**

——**O. 20, Rr. 12 and 18**—*Suit for partition and possession—Preliminary decree silent regarding mesne profits—Award of mesne profits by final decree—Permissibility.*

The C. P. Code has not expressly laid down any procedure in regard to a composite action for partition and possession and in such a case the Court may pass a final decree for mesne profits even if it was not preceded by a preliminary decree relating to them. The mere fact that the preliminary decree for partition was silent as to the claim for mesne profits does not preclude the parties from applying or the Court from awarding mesne profits by its final decree; and this is specially so where the party liable has in the course of the suit undertaken to pay mesne profits to the successful party. (*Venkatasubba Rao and Vekataramana Rao, JJ.*) SWAMINATHA ODAYAR *v.* GOPALASWAMI ODAYAR. **183 I.C. 545=12 R.M. 318=1938 M.W.N. 1214=A I.R. 1939 Mad. 81=(1938) 2 M.L.J. 704.**

——**O. 20, R. 12 (c)**—*Construction— Future mesne profits—Liability for—Extent of—Absence of direction in decree—Effect of.*

C. P. CODE (1908), O. 20, R. 13.

The provision of O. 20, R. 12 (*c*), C. P. Code, suggest, that when a person obtains a decree for possession of immovable property, the defendant would be answerable to the plaintiff for mesne profits either until he delivers up possession or relinquishes possession with notice to the decree-holder through Court. It is immaterial that the decree itself contains no direction as to future mesne profits. (*Varadachariar, J.*) MUTHAYYA KONE *v.* RAKAPPAN AMBALAM. **160 I.C. 729=8 R.M. 724=1936 M.W.N. 175 (1)=43 L.W. 221=A.I.R. 1936 Mad. 137=70 M.L.J. 87.**

——**O. 20, R. 12 (c) (Mad.)**—Mesne profits—Application for ascertainment—Necessity—Limitation. *See* LIMITATION ACT, ART. 181. **71 M.L.J. 388.**

——**O. 20, R. 12 (3) (Madras Amendment)**—*Construction and scope—Procedure—Direction by appellate Court to Court of first instance to hold inquiry as to mesne profits—Proper course to be followed—Application by decree-holder for inquiry—If obligatory—Limitation—Limitation Act, Art.* 181.

The word application in sub-R. (3) to R. 12 of O. 20, C. P. Code, added by the Madras High Court, should be read as meaning a motion entirely free from the mischief of Art. 181 of the Limitation Act; and the words "and in every case the Court of first instance shall, on the application of the decree-holder, inquire and pass a final decree" must necessarily be subject to this limitation, 'irrespective of any other limitation.' On an appellate Court directing a Court of first instance under O. 20, R. 12 (3), C. P. Code, to make an inquiry into mesne profits the proper course for the Court of first instance to adopt on receipt of the record from the appellate Court is to fix a date for the appearance of the parties. If the decree-holder does not appear, the Court of first instance has no right to pass a final decree depriving him of the mesne profits awarded by the appellate decree, but should adjourn the matter *sine die*. It is not obligatory on the decree-holder to file an application asking for an inquiry into mesne profits and for the passing of a final decree, within three years of the final decree as required by Art. 181 of the Limitation Act. There is no question of limitation in such a case. (*Leach, C. J., Krishnaswami Aiyangar and Somayya, JJ.*) RAMASUBRAMANYA PATTAR *v.* KARIMBIL PATI. **I.L.R. (1940) Mad. 372=1940 M.W.N. 118=186 I.C. 474=12 R.M. 641=50 L.W. 933=A.I.R. 1940 Mad. 124=(1940) 1 M.L.J. 54 (F.B.).**

——**O. 20, R. 13**—Administration suit—Assets insufficient to pay debts in full—Rateable distribution—Creditor not coming in and proving claim—Suit by for rateable re-distribution and for refund from creditors who have received dividends—Maintainability. *See* ADMINISTRATION—SUIT BY CREDITOR. **38 Bom.L.R. 864.**

——**O. 20, R. 13**—*Administration suit—Decree in—Consequences of—Power of Court to pass order staying or restraining execution by creditor of his decree—C. P. Code, S.* 151 *and O. 39, Rr. 1 and 2—Application of.*

Though an administration suit is filed only by one creditor, the decree passed in the suit is in favour of all the creditors of the deceased debtor. No one should be allowed to have an advantage over another with respect to the enforcement of his claim against the estate of

the deceased. The Court passing the administration decree has jurisdiction to pass appropriate orders to prevent the execution of his decree by any particular creditor, so that the Court may administer the entire estate for the benefit of all the creditors—all of whom after the preliminary decree should be considered as having become parties to the suit. It can pass orders staying execution by a creditor of his decree, or an order, in the nature of injunction restraining him from executing his decree. Such orders are consequential orders and have to be passed to give full effect to the decree in the suit. It is unnecessary to invoke S. 151 or O. 39, Rr. 1 and 2, C. P. Code, for the purpose of passing such orders. An applicant for such order need only invoke the decree in the suit in their aid. (*Madhavan Nair, J.*) NICHOLSON TOWN BANK, LTD., TANJORE *v.* VARADARAJULU NAIDU. **182 I.C. 254=12 R.M. 29=48 L.W. 849=1938 M.W. N. 1127=A.I.R. 1939 Mad 204.**

——**O. 20, R. 13**—*Scope—Administration decree—Distribution of dividends to creditors rateably—Creditor not coming in and receiving payment—Right of—Remedy—Procedure.*

The right of an unsatisfied or unpaid creditor, who has not come in under an administration decree to obtain payment in respect of his debt, unless he is precluded from exercising it by reason of negligence, default or laches or any other circumstance which would make it inequitable for the Court to make a decree in his favour is not by way of action but by way of a petition under the administration action itself; such a petition can, however, succeed only if the fund is in Court or subject to the control of the Court, and further the claim can only be made against satisfied legatees and can never succeed against the creditors who have already been paid in respect of their debts. (*Rangnekar, J.*) KISONDAS PREMCHAND *v.* JIVATLAL PRATAPSHI & Co. **167 I.C. 529=9 R.B. 313=38 Bom.L.R. 864=A.I.R. 1936 Bom. 423.**

——**O. 20, R. 13**—*Suit for administration—Final decree—Contents—Order after preliminary decree determining dispute but refusing to frame final decree—If appealable.*

The Code of Civil Procedure nowhere lays down what are to be the contents of a final decree in an administration suit. The contents must depend upon the nature of dispute in each case. Where after passing of a preliminary decree in an administration suit the Court passed an order which determined all the matters in dispute between the parties but refused to frame a final decree, such order must be construed as a final decree to that extent, and is appealable. (*Jai Lal and Dalip Singh, JJ.*) MT. SHAHZADI BI *v.* MT. RAHMAT BI. **168 I.C. 105=9 R.L. 594=A.I.R. 1936 Lah. 879.**

——**O. 20, R. 13**—*Suit for rents and profits of property held in trust which is alleged to have failed—Nature of decree.*

It is only where it is necessary that the estate should be administered by theCourt that the Court may make payment of the liabilities of the estate and all persons who would be entitled to be paid may come in under the preliminary decree and make their claims against the estate. Where it is not alleged that there are any debts due to the estate nor is the Court asked to administer the estate but the suit is one for rents and profits of certain property held by the defendant under trust which is alleged to have failed and all that the Court is asked to do is to decide, if the wakf is found to be invalid, whether plaintiff is entitled to what he claims, such a suit is not an administration suit; and the Court if it finds that the wakf is invalid should only grant the plaintiff's claim and pass a preliminary decree accordingly and for rents. (*Mya Bu and Mosely, JJ.*) DAW EIN *v.* DAWN CHAN THA. **1940 Rang L.R. 136=186 I.C. 210=12 R.R. 251=A.I.R. 1939 Rang. 365.**

——**O. 20, R. 14**—*Scope—Pre-emption decree—Direction to deposit certain amount within certain time—Costs awarded to pre-emptor and vendee—Right of pre-emptor to deduct costs out of purchase price—Deposit after deducting entire costs awarded to pre-emptor—Validity—Costs of vendee not taken into account—Effect.*

It is well established that a pre-emptor can deduct the costs awarded to him from the sum which he is directed to deposit in Court, although the Civil Procedure Code does not expressly permit a pre-emptor to deduct the amount of costs awarded to him from the sum which he is directed to deposit in Court. The rule permitting such deduction of costs awarded to the pre-emptor from the purchase price in a rule of equity. Where there are cross-decrees as to costs, *i.e.*, where both the pre-emptor and the vendee are awarded costs, the pre-emptor should in equity, only deduct from the purchase price deposited by him the actual amount of costs which he could recover, that is, the balance due to him after deducting the costs payable by him to the vendee under the decree. It would be unjust to permit the pre-emptor to deduct from the decree amount to be deposited the whole amount of costs awarded to him and to leave the vendee to recover the costs awarded to him from the pre-emptor subsequently. If the pre-emptor in such a case deducts the whole amount of costs awarded to him from the purchase price and not merely the balance after deducting the costs awarded to the vendee, the deposit is not valid deposit. (*Harries, J.*) BHAGWATI DEVI *v.* CHANDRIKA PRASAD. **172 I.C. 765=10 R.A. 426=1938 A.L.R. 37=1937 A.L.J. 1114=1937 A.W.R. 782 =A.I.R. 1937 All. 756.**

——**O. 20, R. 14**—Scope of—Significance of its provisions. *See* PRE-EMPTION—RIGHT, NATURE OF. **1939 N.L.J. 13.**

——**O. 20, R. 14**—Time fixed in decree under—Power of appellate Court to extend. *See* PRE-EMPTION—DECREE FOR. **I.L.R. (1940) Nag. 157.**

——**O. 20, R. 15**—*Scope—Taking of accounts by Commissioner—Agreement between partners as to payment of interest on capital of partners—If can be proved.*

The proof of an agreement between the partners of firm, which forms an exception to the general rule of law that no interest is to be allowed on the capital account of each partner after dissolution, is not a matter concerning the mode of taking accounts. Even if such an agreement is pleaded in the plaint, it has to be proved before the Court and not before the Commissioner who takes accounts in accordance with the preliminary decree of the Court. A Commissioner taking accounts has no power to decide questions relating to the terms of the partner-

ship, its duration or the shares of the partners. He is bound by the terms of the decretal order of reference. (*Wadia, J.*) MOTILAL *v.* SARUP CHAND. 167 I.C. 208=9 R B. 284=38 Bom.L.R. 1058=A.I.R. 1937 Bom. 81.

——O. 20, Rr. 15 and 17—*Procedure—Partnership—Dissolution—Accounts—Preliminary decree—Subsequent order of Court awarding damages to partner and giving directions as to taking of accounts—Nature of—If supplemental preliminary decree or interlocutory order.*

Obiter.—Under O. 20, R. 15, the Court is by its preliminary decree to direct such accounts to be taken as it thinks fit, while R. 17 of O. 20 enables the Court by any subsequent order to give any special directions with regard to the mode in which the account is to be taken. An order by the Court made after the preliminary decree, awarding certain amounts to a partner as damages or compensation for breach of covenant by another partner and giving directions to the Commissioners as to the taking of accounts cannot be said to be a supplementary preliminary decree, but is only in the nature of an interlocutory order which can be passed under O. 20, R. 17, C. P. Code. (*Dhavle, J., on difference of opinion between Mahomed Noor and Manohar Lall, JJ.*) BANWARI LAL *v.* SHAIKH SHUKRULLAH. 19 Pat. 1=188 I.C. 337=6 B.R. 653=12 R.P. 697=A.I.R. 1940 Pat. 204.

——O. 20, Rr. 15 and 17—*Scope—Powers of Court—Partnership — Dissolution — Accounts—Preliminary decree—Subsequent application for damages for breach of covenant by partner subsequent to suit—Power of Court to deal with and to award damages—Inclusion in final account.*

A suit by one partner against another for damages for breach of a covenant of the partnership deed, brought before the dissolution, is liable to be defeated on the ground that a suit between partners should be a suit for general accounts in which the defaulting partner could be debited with any loss that might have been caused by his act. On the other hand a claim for damages for breach of covenant by a partner does not disappear when accounts are taken (upon a dissolution or otherwise), though where the claim is advanced in the suit for (dissolution or) general accounts, it may be included in the decree under "just allowances". If the breach is subsequent to the institution of the suit for dissolution, and the claim is advanced while accounts are being taken under the preliminary decree, the aggrieved party get his damages or compensation, where the preliminary decree is in sufficiently wide terms, by an application in the proceedings leading to the final decree. Where the preliminary decree passed in the suit is not an ordinary one in an ordinary partnership action with accounts in common form, but the Court has proceeded to pass it as if it had to settle all claims between the parties, and the decree is intended to settle all such claims between the parties, it cannot be said that the Court has no jurisdiction to award damages subsequent to the suit on application made to it in that behalf and to order the amount to be shown in the final account. (*Dhavle, J., on difference of opinion between Mahomed Noor and Manohar Lall, JJ.*) BANWARI LAL *v.* SHEIKH SHUKRULLAH. 19 Pat. 1=188 I.C. 337=6 B.R. 653=12 R.P. 697=A.I.R. 1940 Pat. 204.

——O. 20, R. 16—*Preliminary decree for accounts—Proceeding under, to obtain final decree—Nature of.*

Under the Code of 1908, the proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and are not proceedings in execution in the technical sense of that word as used in the Code. (*Sir George Rankin.*) VAISHNO DITTI *v.* RAMESHRI. 64 I.A. 191=168 I.C. 427=41 C.W.N. 814=39 P.L.R. 472=1937 A.L.J. 1000=46 L.W. 52=1937 A.L.R. 412=1937 O.L.R. 308=18 Lah. 502=1937 O.W.N. 699=39 Bom. L R 787=31 S.L.R. 367=1937 A.W.R. 1021=9 R.P.C. 295=18 Pat.L.T. 445=65 C.L.J. 387=1937 P.W.N. 473=3 B.R. 503=1937 M.W.N. 678=A.I.R. 1937 P.C. 163=(1937) 2 M L.J. 1 (P.C.).

——O. 20, R. 16—*Suit for accounts—Preliminary decree if and when necessary.*

Although in O. 20, R. 16, C. P. Code, the expression "shall pass a preliminary decree" is used, there are two clear qualifications to it: (1) the rule says "where it is necessary . . . that an account should be taken" and (2) that the Court is to direct "such accounts to be taken as it thinks fit." Accordingly, where it is not necessary, the Court need not pass a preliminary decree and the words "such account to be taken as it thinks fit" obviously mean that the Court need not order any account to be taken unless it thinks fit. No hard and fast rule can be drawn between cases which are simple where a preliminary is unnecessary and cases which are complicated where a preliminary decree is necessary. (*Stone, C.J. and Clarke, J.*) HUKUMCHAND *v.* MOHAMMADJI. I.L.R. (1940) Nag. 569=1940 N.L.J. 295=A.I.R. 1940 Nag. 207.

——O. 20, R. 16—*Suit by principal against agent for accounts—Decree in favour of defendant—Permissibility.*

In a suit for rendition of accounts brought by a principal against a commission agent, it is permissible to a Court to pass a decree in favour of the defendant, if it turns out that a balance is due to him. (*Collister and Bajpai, JJ.*) BHAWANI SAHAI SELIG RAM *v.* CHHAJJU MAL. 1937 A.L.J. 115=1937 A.W.R. 16=168 I.C. 983=9 R.A. 693=1937 A.L.R. 433=A.I.R. 1937 All. 276.

——O. 20, R. 17—Scope—Effect of on Rr. 114 to 120 of the Madras Civil Rules of Practice—Validity of latter rules. *See* MADRAS CIVIL RULES OF PRACTICE, RR. 114 TO 120. (1938) 1 M.L.J. 495 (F.B.).

——O. 20, R. 18—*Partition decree—Essentials—Duty of Courts.*

O. 20, R. 18 enjoins the Court first to ascertain judicially who all the persons are who are interested in the property to be partitioned and then in its decree to declare who they are and also what their rights are. It goes to the whole root of the matter that at the outset the entire interests in the property should be ascertained and fixed. Not only must the parties themselves to the partition suit take care that they bring before the Court all persons who are or may be interested in what it is proposed to divide but the duty lies upon the Court itself in matters such as these to see that it has before it every one whose presence is necessary to enable it to make the declaration which it is required to make by O. 20, R. 18. The rights of the parties cannot be judi-

C. P. CODE (1908), O. 20, R. 18.

cially determined in the absence of the persons interested to contest them. When O. 20, R. 18 lays upon the Court the duty of declaring what the rights of the parties interested in the property are it means that there shall be a judicial declaration and not a mere *ex parte* declaration in the absence of some of the parties. (*Braund, J.*) NOOR MAHAMMAD *v.* ZAINUL ABDIN. **1940 A.W.R. (H.C.) 375=A.I.R. 1940 All. 399.**

——**O. 20, R. 18**—*Revenue-paying property—Partition—How to be effected.*

The partition of revenue-paying properties is to be effected by the Collector or by his subordinate in accordance with S. 54 read with O. 20, R. 18, C. P. Code. It is only if the Collector is unable or declines to effect the partition, the Court will appoint a Commissioner to partition the same by metes and bounds. (*R.C. Mitter and Akram, JJ.*) RANADA KISHORE ROY *v.* SWARNAMOYEE DEBI. **188 I.C. 761=12 R.C. 24=70 C.L.J. 355=44 C.W.N. 114=A.I.R. 1940 Cal. 33.**

——**O. 20, R. 18** (1)—*Limitation—Partition of lands assessed to Government revenue—Order decreeing partition and directing Collector to carry out division and to put parties in possession—Application by parties to send papers to Collector—If one in execution—Limitation.*

Where in a parition suit, an order is made decreeing partition of lands assessed to Government revenue and directing the parties to be put into possession and referring it to the Collector to carry out the partition, the duties of the Court are finished, and it is for the Collector to partition the property and put the parties into possession. The Court would send the papers to the Collector without being asked. But if as a matter of practice the parties ask the Court to send the papers to the Collector in the form of an ordinary darkhast, that is not an application in execution at all, for there is nothing in a case of this sort for the Court to execute. Asking the Court to send the papers to the Collector is really asking the Judge to do a ministerial act. There is no article of the Limitation Act relating to an application of that sort, and Art. 182 of the Limitation Act does not apply to such an application. (*Beaumont, C.J. and Wadia, J.*) JACINTO *v.* FERNANDEZ. **186 I.C. 119=12 R.B. 297=41 Bom.L.R. 921=A.I.R. 1939 Bom. 454.**

——**O. 20, R. 19**—*Lease of supply of water—Expenses connected with repairs of embankments—Lessee's right to set-off against arrears of rent.*

Where under a lease of a supply of water the lessor is bound to carry out the usual repairs of the embankments which resulted in such supply, the lessee, in a suit for arrears of rent against him, is entitled to claim a set-off on account of the expenses connected with the repairs which he had to do. Such a claim is admissible within the provisions of O. 20, R. 19, and it is not necessary for a set-off that it should be limited to O. 8, R. 6. (*Bennet and Smith, JJ.*) KAMAL DEVI *v.* KHUDADAD. **163 I.C. 872=9 R.A. 94=1936 R.D. 254=1936 A.L.J. 625=1936 A.W.R. 533=A.I.R. 1936 All. 522.**

——**O. 20, R. 19** (3)—Set-off—Legal set-off and equitable set-off—Set-off and counter-claim—Distinction. *See* C. P. CODE, O. 8, R. 6. **A.I.R. 1936 Cal. 277.**

——**O. 21**—Applicability—Execution of—Revenue Court decree under Agra Tenancy Act—Procedure—U. P. Revenue Manual, Ch. 40. *See* C. P. CODE, Ss. 68, 69, 70, 71 AND 72. **1936 R.D. 197.**

See also **1937 R.D. 37.**

——**O. 21**—Applicability—Order for costs by Registrar under S. 75 (4), Registration Act—Execution—Procedure *See* REGISTRATION ACT, S. 75 (4). (1937) 1 M.L.J. 635.

——**O. 21**—*Attachment—Formalities.*

O. 21, C. P. Code, is a very formal matter, and no property can be declared to be attached until all the formalities prescribed by the Code and the rules are complied with. (*Mockett, J.*) BALUSAMI *v.* OFFICIAL ASSIGNEE OF MADRAS. **189 I.C. 406=1939 M.W.N. 573=A.I.R. 1939 Mad. 811.**

——**O. 21, R 1**—*Applicability—Compromise of claim proceedings—Agreement to receive in instalments—In default of payment on due dates, whole amount to be paid—Default on due date, a holiday—Tender into Court next day—Right to apply for full amount, if arises.*

The agreement between parties was that the amount due should be paid in instalments, and if there was any default in such payment, the whole of the amount is to become payable. In such a case where the due date fell on a holiday and the instalment was not paid, it could not be deposited in Court on the next working day relying upon O. 21, R. 1, C. P. Code, for where two alternatives are provided one cannot be chosen in such a manner as to prejudice the rights of the other party. One could not commit a default and thereby extend the time in derogation of the terms settled between the parties. In such a case the entire amount becomes payable. (*Bennet, Ag.C.J. and Ganga Nath, J.*) ROSHAN LAL *v.* GANPAT LAL. **I.L.R. (1938) All. 337=174 I.C. 986=10 R.A. 641=1938 A.L.R. 365=1938 A.L.J. 121=1938 A.W.R. (H.C.) 93=A.I.R. 1938 All. 199.**

——**O. 21, Rr. 1 (1) (a) and 2**—*Joint decree-holders—Payment to one and admission of satisfaction by him—If binds the rest.*

Payment of the decree amount to one of several decree-holders and admission of satisfaction by him will not bind the others in the absence of evidence to prove that he received it on behalf of all. (*Norman, I.C.S.*) MUHAMMAD AZIZ ULLAH *v.* ABDULLAH. **1936 A.M.L.J. 32.**

——**O. 21, R. 1**—*Payment into Court—Decree-holder if entitled to interest up-to-date of notice of payment.*

Where a decree awards interest till date of payment and the judgment-debtor pays the decree amount into Court, interest ceases to run from that date and the decree-holder cannot claim interest up to the date of the notice to him under O. 21, R. 1 (2), C. P. Code. (*Stone, C. J. and Bose, J.*) SETH LAXMINARAYAN *v.* SETH GHASIRAM. **183 I.C. 256=1939 N.L.J. 211=A.I.R. 1939 Nag. 191.**

——**O. 21, R. 2**—*Adjustment—Acceptance of mere agreement.*

A decree can be adjusted or satisfied by the making of an agreement between the decree-holder and the judgment-debtor. An obvious instance is the taking of a negotiable instrument which is nothing but a particular form of promise. The decree-holder may accept and the parties may have recorded in lieu of the performance of the terms of the decree an agreement to perform something else. In that case it is the new agree-

C. P. CODE (1908), O. 21, R. 2.

C. P. CODE (1908), O. 21, R. 2.

ment itself which has been accepted and which is recorded and not the performance or terms of the agreement. The latter would be substituting a new decree. (*Ameer Ali, J.*) SURPUT SINGH *v.* MAHARAJ BAHADUR SINGH. 172 I.C. 282=10 R. C. 356=42 C.W.N. 519=A.I.R. 1936 Cal. 222.

——O. 21, R. 2—*Adjustment—Adjustment of decree pending appeal—Adjustment not certified—Court, if debarred from recognising the adjustment.*

When there is an executable decree and an adjustment of that decree, O. 21, R. 2 requires that adjustment to be certified, quite regardless of whether there is or is not an appeal pending against that decree; for, the fact that an appeal is pending does not prevent the lower Court's decree from being executed, and if any adjustment is come to after the decree and before the decision of the appeal and is not certified or recorded as required under O. 21, R. 2, the Court is debarred by sub-R. 3 from recognizing such an adjustment. (*Wadsworth, J.*) KRISHNAMACHARI *v.* APPALACHARYULU. 161 I.C. 751=8 R M. 865=1936 M. W.N. 123=43 L.W. 601=A.I.R. 1936 Mad. 494.

——O. 21, R. 2—*Adjustment—Certification—Presumption as to—Burden of proving non-certification*

An adjustment of a decree must be presumed to have been duly certified, regard being had to the cardinal rule of evidence that all things are presumed to have been rightly done; and until the contrary is proved the burden of proving that an adjustment has not been duly certified is on the party who says that it has not been so certified. (*Stone, C.J. and Niyogi, J.*) RAGHOJI *v.* VITHOBA. 169 I.C. 110=9 R.N. 302=19 N.L.J. 175=A.I.R. 1937 Nag. 217.

——O. 21, R. 2— *Adjustment—Compromise under which judgment-debtor makes over certain decrees to decree-holder in partial adjustment of claim and agrees to pay balance in instalments—Compromise, if adjustment.*

Where a compromise states that certain decrees which are the property of the judgment-debtor had been made over to the decree-holder in partial adjustment of his claim and that the balance would be paid by means of instalments, the compromise amounts to an adjustment. The provision regarding instalments does not amount to substitution of a new decree for the old decree. (*Abdul Rashid, J.*) DARU MAL *v.* TODAR. 181 I. C. 243=11 R.L. 796=40 P.L.R. 264=A.I.R. 1938 Lah. 602.

——O. 21, R. 2—*Adjustment—Conditions of validity—Actual payment—If necessary.*

It is not necessary that there should be an actual payment in order to constitute a valid adjustment within the meaning of O. 21, R. 2, C. P. Code. (*Broomfield and Wadia, JJ.*) SHANKAR ATMARAM *v.* KESHAV GOVIND. 60 Bom. 729=164 I.C. 9= 9 R.B. 70=38 Bom.L.R. 505=A.I.R. 1936 Bom. 277.

——O. 21, R. 2—*Adjustment—Contract that judgment-debtor will do something in future.*

A promise to do something in future is legal consideration, and if the decree-holder chooses to accept such a promise by the judgment-debtor there is nothing in law to prevent him from doing so, and such a promise by the judgment-debtor and acceptance thereof by the decree-holder is a legal adjustment of the decree. Thus if *A* holds

C. P. CODE (1908), O. 21, R. 2.

a decree against *B* and *B* offers to transfer certain property to *A*, and *A* accepts that promise to transfer in whole or part satisfaction of his decree that is a binding contract which constitutes an adjustment of the decree in whole or in part and can be pleaded by *B* in bar of execution. But if *A*, as is usually the case, agrees to accept the transfer of the property in whole or part satisfaction of his decree, at that stage there is no concluded agreement between the parties, but *A* has really made a counter-offer which can be accepted by *B* only by performance, *i.e.*, by the actual transfer of the property. In this latter case there is no adjustment until the property has been actually transferred. (*Roberts, C.J., Dunkley and Braund, JJ.*) ARUNACHALAM CHETTYAR *v.* V.M.R.P. FIRM. 1938 Rang L.R. 385=175 I.C. 498=10 R.R. 500 =A.I.R. 1938 Rang. 202 (F.B).

——O. 21, R. 2—*Adjustment—Execution—Reference to arbitration—Award—Validity—Power of Court to give permission for reference and file award in execution—Sch. II.*

There is no illegality in adopting the procedure provided by Sch. II, C. P. Code, to execution proceedings, if those proceedings are regarded merely as a means to the adjustment of the decree. It is open to the parties to adjust their differences under O. 21, R. 2, C. P. Code, in execution proceedings and it is perfectly competent to the executing Court to give permission to the parties to refer their disputes to arbitration. The award would be valid and the result of the award would be only an adjustment of the original decree, and not the passing of a new decree which the executing Court cannot do. The order of the Court directing the award to be filed and a decree to be drawn up accordingly is a sufficient record of the adjustment. (*Broomfield and Macklin, JJ.*) ZUMAKLAL MOTIRAM *v.* FULCHAND TARACHAND. 42 Bom.L.R. 867.

——O. 21, R. 2—"Adjustment"—Executory agreement—If can be "adjustment"—Agreement varying time or manner of enforcement of decree —Enforceability in execution—Agreement totally adjusting decree and extinguishing decree immediately—Effect of—Right to execute original decree. *See* C. P. CODE, S. 47 AND O. 21, R. 2. I.L.R. (1939) Kar. 725.

——O. 21, R. 2—*Adjustment—Executory contract.*

An executory contract may form the subject of an adjustment. But where a compromise does not completely extinguish the rights of the plaintiff under the preliminary decree, but provides for their revival in cases of default, such a compromise is not an adjustment. (*Baguley and Mosely, JJ.*) V.N.A. FIRM *v.* BANK OF CHETTINAD, LTD. 179 I.C. 875=11 R.R. 351=A.I.R. 1938 Rang. 353.

——O. 21, R. 2 and S. 47—*Adjustment—Executory contract—Compromise not an adjustment—Remedy of decree-holder—Execution or separate suit.*

An executory contract is not an adjustment within the meaning of O. 21, R. 2, C. P. Code, and cannot be pleaded as a bar in execution. A compromise which is not an adjustment within the meaning of O. 21, R. 2, C. P. Code, clearly does not extinguish the original decree, since it can be executed in spite of the compromise. Hence a separate suit on the compromise is barred by

C. P. CODE (1908), O. 21, R. 2.

S. 47, C. P. Code. (*Norman, I.C.S.*) GOPI *v.* RATAN LAL. **1939 A.M.L.J. 21.**

——**O. 21, R. 2**—*Adjustment—Executory contract—If enough.*

A decree can be lawfully adjusted by a contract. It is not necessary that there must be a completed transaction. It is enough if the decree-holder enters into a fresh contract with the judgment-debtors for the satisfaction of the decree and if the contract is lawfully enforcible even though executory, it might operate as an adjustment of the decree. Distinction must be made, however, between a case where the decree-holder accepts as an immediate satisfaction or adjustment of the decree a promise of the judgment-debtors to do something in future and the case where the agreement is to accept a decree as adjusted or satisfied only if the thing promised is actually done at a future date. (*Mukherjea, J.*) SERAJUL HAQUE *v.* NOABALI MEAH. **42 C.W.N. 313.**

——**O. 21, R. 2**—*"Adjustment"—Meaning and effect of.*

Adjustment of a decree within the meaning of O. 21, R. 2, C. P. Code, means the extinguishing of a decree by satisfaction out of Court. It is to all intents and purposes executed and no question of the execution of the adjusted decree is possible. The wording of O. 21, R. 2, C. P. Code, implies a finality which excludes any future application in execution to the Court. A decree can be adjusted within the meaning of R. 2 of O. 21, C. P. Code only by an executed agreement and not by an executory agreement. It is not an adjustment of a decree within the meaning of R. 2 for one decree requiring execution by the Court to be substituted by agreement of the parties for the decree of the Court, for, if this principle were accepted, the Court might be called upon to execute not the decree it passed, but a hundred decrees, not one of which it passed or which any other Court passed, but which the parties choose to substitute by mutual agreement for the decree of the Court. Hence where by a subsequent agreement the decree is varied, the substituted decree cannot be executed. (*Davis, J.C. and Lobo, A.J.C.*) RAMIBAI JETHMAL *v.* REWACHAND SANTOKRAM. **171 I.C. 477=10 R.S. 107=31 S.L.R. 491=A.I.R. 1937 Sind 229.**

——**O. 21, R. 2**—*Adjustment—Statement by decree-holder that understanding has been arrived at which judgment-debtor and that time has been given to complete it—If amounts to.*

Where on the statement of the decree-holder's agent that an understanding had been arrived at with the judgment-debtor and at his request he was being allowed to complete it and that in case of non-completion of the understanding proper application for further proceedings would be presented, the executing Court adjourned the case to a certain date and on that date consigned the proceedings to the record room.

Held, that the alleged adjustment was merely an inchoate agreement; and adjustment was under consideration and was to be made on the fulfilment of certain conditions; and that it was not an adjustment actually made and completed, based on a future promise; and it did not therefore, come within the purview of O. 21, R. 2, C.P. Code. (*Addison and Din Mahomed, JJ.*) BHARAT NATIONAL BANK, LTD. *v.* BHAGWAN SINGH. **I.L.R. (1938) Lah. 470.**

C. P. CODE (1908), O. 21, R. 2.

——**O. 21, R. 2**—Adjustment—Validity—Adjustment before sale—Application to be recorded after sale. *See* C. P. CODE, O. 21, RR. 92 AND 2. **41 P.L.R. 220**

——**O. 21, R. 2**—*"Agreement"—Arrangement by judgment-debtor with decree-holder providing for satisfaction of decree in different mode from that in decree.*

An act of the parties agreeing to vary the decree is not an adjustment of the decree; but an agreement made by a judgment-debtor with a decree-holder providing for the satisfaction of a decree which differs from the one mentioned in the decree itself is not a variation of the decree directing payment of money, but is merely an adjustment to the satisfaction of the decree-holder as contemplated by O. 21, R. 2 (1). (*Guha and Bartley, JJ.*) KURANI DEBYA *v.* JOGAMAYA DEBYA. **167 I.C. 285=9 R.C. 680=66 C.L.J. 21 =A.I.R. 1936 Cal. 518.**

——**O. 21, R. 2**—*Agreement—Contract by judgment-debtor to assign property to decree-holder in future—If amounts to adjustment.*

There is no reason why a decree should not be adjusted or extinguished by a new contract in which the judgment-debtor agrees to do something in future. A contract under which it is agreed that the judgment-debtor should for a certain sum of money assign a certain property to the decree-holder is an adjustment coming under O. 21, R. 2, C. P. Code. (*Courtney-Terrell, C.J. and Saunders, J.*) SATYABADI SAHU *v.* MANI SAHU. **15 Pat. 390=165 I.C. 940=18 P.L.T. 110=3 B.R. 106=9 R.P. 236=A.I.R. 1936 Pat. 619.**

——**O. 21, R. 2**—*Agreement—Decree-holder promising to cancel decree if judgment-debtor does something in future—If amounts to.*

Where in execution of a decree for money the decree-holder agrees that if the judgment-debtor transfers some land and pays a certain sum of money to him, the decree would be regarded as fully adjusted but the judgment-debtor, neither transfers the land nor prays the sum agreed upon. it cannot be said that there has been an adjustment of the decree. The alleged adjustment, if sought to be proved, is not an adjustment at all within the meaning of O. 21, R. 2. It is nothing more than a promise to cancel the decree if the judgment-debtor shall have done something in the future. A.I.R. 1933 Mad. 28, Appl. (*Baguley and Mosely, JJ.*) S. T. R. M. CHETTYAR FIRM *v.* ANDATHAL. **164 I.C. 106=9 R.R. 58=A.I.R. 1936 Rang. 289.**

——**O. 21, R. 2**—*"Agreement"—Oral agreement between decree-holder and judgment-debtor that former will accept some acres of land in satisfaction of decree—If adjustment.*

O. 21, R. 2 contemplates an adjustment which is capable of execution and which extinguishes the decree. There was an oral agreement between the decree-holder and the judgment-debtor that the former shall accept some acres of land in satisfaction of the decree.

Held, that the oral agreement was not capable of being enforced or executed and hence could not constitute an adjustment within the meaning of O. 21, R. 2. (*Haveliwala and Lobo, A.J.Cs.*) UDHARAM BAHARMAL *v.* MURARI LAL. **167 I.C. 417=9 R.S. 182=30 S.L.R. 249=A.I.R. 1936 Sind 191.**

C. P. CODE (1908), O. 21, R. 2.

——O. 21, R. 2—*Agreement—Substitution of fresh contract in place of decree.*

The parties to a decree are competent to substitute a fresh contract for the decree, and when such a contract comes into existence it is open to the judgment-debtor to apply under O. 21, R. 2, C. P. Code, to record the adjustment. But an agreement that at some future time on delivery of property the decree would be considered satisfied cannot amount to an "adjustment" of the decree as contemplated by O. 21, R. 2. (*Weston.*) MALA *v.* AWANA. 1935 A.M.L.J. 97.

——O. 21, R. 2—*Agreement between parties superseding decree, recorded as adjustment—New agreement so recorded—If capable of execution.*

The main principle is that a decree once made cannot be varied; so where a decree has been made, and a subsequent agreement between the parties superseding the original decree is recorded as adjustment, the new agreement is not *prima facie* capable of execution because, if it is made capable of execution, it would automatically vary the decree. The same principle applies even where the decree-holder has accepted in satisfaction an agreement which itself contains a condition or term that the subsequent agreement shall be capable of execution. Logically, if the effect of a subsequent agreement containing such a clause is, as it must be, to vary the old decree, it is not the proper subject matter of an application to record an adjustment because it produces in effect what the law precludes. Put otherwise, the agreement is capable of being recorded as an adjustment but incapable of being the subject matter of execution. It is an agreement merely. (*Ameer Ali, J.*) SURPUT SINGH *v.* MAHARAJ BAHADUR SINGH. 172 I.C. 282=10 R.C. 356=42 C.W.N. 519=A.I.R. 1937 Cal. 222.

——O. 21, R. 2—*Agreement relating to time and manner of enforcement of decree—If can be recorded.*

An agreement intended to govern the liability of the debtor under the decree and to have effect upon the time and manner of its enforcement is a matter to be dealt with under S. 47, C. P. Code, and cannot be properly recorded by the Court. 43 C.W.N. 501 (P.C.), Rel. on. (*Mitter and Rau, JJ.*) PATTU KUMARI *v.* NIRMAL KUMAR. 185 I. C. 691=12 R.C. 392=70 C.L.J. 5=43 C.W.N. 907=A I.R. 1939 Cal. 569.

——O. 21, R. 2—*Agreement that decree should be executed in certain way—Agreement recorded in Court—Objection by third party to execution in such way—Permissibility.*

When the parties have agreed that a decree should be executed certain way and that agreement has been recorded in Court, it is not permissible for a third party to object to execution in the way the parties to the suit have chosen. (*Panckridge, J.*) MANNALAL SRIMAL *v.* NEHALCHAND SAMSUKHA. 41 C.W.N. 1133.

——O. 21, R. 2—*Applicability—Decree for possession.*

The words "the decree" in O. 21, R. 2, surely mean 'a decree of any kind' and would include a decree for possession of a house. No adjustment of such decree can be recognised by the Court unless it is certified and no application for certification can be made except within 90 days (*Jai Lal, J.*) SHADI *v* RAM DITTA. 165 I.C. 35.

C. P. CODE (1908), O. 21, R. 2.

(1)=9 R.L. 246=39 P.L.R. 6=A.I.R. 1936 Lah. 842.

——O. 21, R. 2—*Applicability—Execution by attachment of decrees in favour of judgment-debtor—Realisation—If a payment out of Court.*

Where a decree-holder applied for execution by attachment of certain decrees in favour of his judgment-debtor and in pursuance of an order of Court proceeded to realise the amounts due in respect of the attached decrees, the payments made by the judgment-debtor under the attached decrees, are to be deemed to have been made in Court and not outside Court. Hence O. 21, R. 2 has no application to cases of such payments. (*Rachhpal Singh and Ismail, JJ.*) THOMAS SKINNER *v.* RAM RACHPAL. I.L.R. (1938) All. 294=174 I.C. 439=1938 A.L.R. 276=10 R.A. 572=1938 A.L.J. 59=1938 A.W.R. (H.C.) 80=A.I.R. 1938 All. 141.

——O. 21, R. 2—*Applicability—Payment prior to decree—If can be pleaded.*

O. 21, R. 2, C. P. Code, applies only where money payable under a decree is paid out of Court. But where money is paid at a time when there was no decree in existence, O. 21, R. 2 cannot apply. (*Pollock, J.*) BHASKAR DATTATRAYA *v.* NILKANTH DATTATRAYA. 177 I.C. 673=11 R. N. 159=1938 N.L.J. 148==A.I.R. 1938 Nag. 265.

——O. 21, R. 2—(Patna Amendment)—*Applicability—Pending execution.*

O. 21, R. 2 refers to the stage when there is no execution case pending and when the judgment-debtor comes to notify to the Court an adjustment outside the Court. The rule therefore does not apply when an execution case is pending. (*Mohamad Noor, J.*) SURAJMAL *v.* MANBODH BHAGAD LALL CHAND RAM. 4 B.R. 501=174 I.C. 1007=10 R.A. 563=A.I.R. 1938 Pat. 204.

——O. 21, R. 2—*Applicability—Preliminary decree under O. 34, R. 4.*

A preliminary decree passed in a mortgage suit for sale under O. 34, R. 4, C. P. Code, not being executable the provisions of O. 21, R. 2, C. P. Code, do not apply. (*Bhide, J.*) RAJA RAM *v.* ALLAHABAD BANK, LTD. I.L.R. (1939) Lah. 313=185 I.C. 75=12 R.L. 263 (2)=41 P.L.R. 26=A.I.R. 1939 Lah. 79.

——O. 21, R. 2—Certification—Decree under execution by Collector—Certification of adjustment—Jurisdiction—Collector's powers. *See* C. P. Code, S. 68 and O. 21, R. 2. 19 N.L.J. 175.

——O. 21, R. 2—*Certification—Forum—Decree transferred to another Court for execution.*

When a decree has been transferred for execution and execution has been taken out in the transferee Court, the judgment-debtor can make an application to that Court for the certification of a satisfaction of the decree and such transferee Court has jurisdiction to record the satisfaction, if it finds after due enquiry that the satisfaction has been made. Certification of adjustment is governed by O. 21, R. 2. In construing the expression 'the Court' occurring in sub-R. (2) of R. 2 of O. 21, reference must be made to sub-R. (1) of the same rule, and sub-R. (1) says that the Court is the Court whose duty it is to execute the decree. (*Roberts, C.J. and Dunkley, J.*) JAGADISH MISHRA *v.* SAW EU HOKE. 1940 Rang.L.R. 356=A.I.R. 1940 Rang. 236.

C. P. CODE (1908), O. 21, R. 2.

——O. 21, R. 2—*Certification—Statement of decree-holder in reply to judgment-debtor's application under O. 21, R. 2 (2)—If amounts to certification.*

Where a judgment-debtor applies under O. 21, R. 2 (2) for recording of certain payments and the decree-holder in reply files a statement that certain sums of money were received but that they were paid on account of interest, not allowed by the decree, but agreed to be paid in consequence of a separate agreement entered into after the passing of the decree, it cannot be an admission that the payments were in satisfaction of the money due under the decree and cannot therefore amount to a certification. (*Verma, J.*) ABID HUSAIN *v.* KUNJ BEHARI LAL. 184 I.C. 668=12 R.A. 269=1939 A.W.R. (H.C.) 635=A.I.R. 1939 All. 581.

——O. 21, R. 2—*Compromise after decree—Recording of—If barred.*

Where an alleged compromise was admittedly subsequent to the passing of a final decree in a suit, and it was filed under O. 23, R. 3, C. P. Code, to be recorded and the application was rejected, it was held that there was no bar in law to the recording of that compromise under O. 21, R. 2, C. P. Code. (*Bennet and Verma, JJ.*) GAYA PRASHAD *v.* RAM CHARAN. I.L.R. (1940) All. 190=187 I.C. 805 =12 R.A. 569=1940 A.W.R. (H.C.) 105=1940 A.L.J. 88=A.I.R. 1940 All. 184.

——O. 21, R. 2—Decree-holder—If includes attaching decree-holder—Holder of attaching decree—If competent to certify satisfaction of attached decree. *See* C. P. CODE, O. 21, R. 53 (3). 51 L.W. 148=(1940) 1 M.L.J. 292.

——O. 21, R. 2—*Joint decree-holders—Receipt of payment and certification of satisfaction by one only—Competency.*

One of several decree-holders cannot, by receiving payment of the decretal amount out of Court, certify satisfaction of the entire decree, if he is not authorised by his co-decree-holders to do so. (*R. C. Mitter, J.*) ARSHEDALI SHEIK *v.* MEKTAUDDIN SHEIKH. 62 C.L.J. 560.

——O. 21, R. 2—*Jurisdiction to record satisfaction—Power of executing Court to record satisfaction of decree outside its jurisdiction.*

An executing Court has no power to record satisfaction of a decree over which it has no jurisdiction and a report to the executing Court of satisfaction of some decree pending before another Court is of no effect. (*Wadsworth, J.*) AHAMAD IBRAHIM ROWTHER *v.* ALLAPICHAI ROWTHER. 51 L.W. 148=1940 M.W.N. 505=A.I.R. 1940 Mad. 534 =(1940) 1 M.L.J. 292.

——O. 21, R. 2—Limitation—Application by one judgment-debtor to certify payment by another—Limitation—Execution sale of properties of one judgment-debtor—Application to set aside on ground of satisfaction of decree by uncertified payment by co-judgment-debtor—Maintainability after 90 days—S. 47—If applicable. *See* C. P. CODE, S. 47 AND O. 21, R. 2. 17 Pat.L.T. 195.

——O. 21, R. 2—*Limitation—Certification by decree-holder—Right of judgment-debtor to have satisfaction recorded.*

There is no limitation for a decree-holder to certify payments received by him under the decree, and if the decree-holder has really certified at one stage, the judgment-debtor is entitled to take advantage of it and request the Court to record satisfaction to that extent. (*Somayya, J.*) MUTHUKRISHNA RAJA *v.* VISWALINGA KADAVARAYAR. 1940 M.W.N. 547.

——O. 21, R. 2—*Payment or adjustment—Inquiry as to, if contemplated.*

O. 21, R. 2, C. P. Code, does contemplate and inquiry into an alleged payment or adjustment by the Court to which an application is made under that provision and that Court is bound to hold such inquiry. (*Zia-ul-Hasan and Yorke, JJ.*) BAIJNATH *v.* BISHWANATH. 189 I.C. 271=1940 O.W.N. 629=1940 O.L.R. 426=1940 O.A. 499 =1940 A.W.R. (C.C.) 257.

——O. 21, R. 2 and Limitation Act (IX of 1908), Art. 174—*Payment of decree amount—Decree-holder applying to record satisfaction of decree—Absence at the time of enquiry—Dismissal of application—Subsequent application by judgment-debtor to enter satisfaction—Dismissal of it as being time-barred—If sustainable—Proper procedure.*

A decree-holder was alleged to have received the decree amount. Within 30 days of the alleged payment he himself applied to record satisfaction of the decree. A third party who had attached the decree raised objection and an enquiry was held in that connection. Then the decree-holder denied the payment but was absent from the enquiry and his vakil reported no instructions. The Court struck off the decree-holder's petition but reserved the judgment-debtor's right to claim full satisfaction in proper proceedings. The judgment-debtor accordingly applied for satisfaction of the decree being recorded. The lower Court dismissed the application as being time-barred.

Held, on revision, that the application if treated as an independent application was not saved by S. 5 or S. 14 of the Limitation Act; but the lower Court was not justified in striking off the application of the decree-holder. At any rate at the later stage, the Court ought to have proceeded with the original application of the decree-holder, treating the application of the judgment-debtor only as an application to continue the former proceeding. (1918) 35 M.L.J. 253, Foll. (*Varadachariar, J.*) KAILASA PADIACHI *v.* DURAIPPA KACHIRAYAR. 180 I.C. 437=11 R.M. 705=48 L.W. 916=1938 M.W.N. 1245=A.I.R. 1939 Mad. 163 =(1938) 2 M.L.J. 936.

——O. 21, R. 2—*Predecretal agreement—Mortgage suit—Agreement between preliminary and final decree—If could be pleaded in bar of execution.*

Where an unregistered agreement was alleged to have been executed by the decree-holder after the passing of the preliminary decree and before the final decree whereby he agreed not to execute the decree against some of the items of the hypotheca, it was held that there was nothing in the above agreement which showed that it was intended to attack the decree sought to be executed, for it could not be said that it was intended to attack the final decree which had not yet been passed. Any agreement which merely relates to the execution or the decree and does not attack decree itself could be pleaded in bar of execution. (*Pandrang Row and Abdur Rahman, JJ.*) MEENAKSHISUNDARAM AYYAR *v.* SWAMINATHA IYER. I.L.R. (1938) Mad. 451=1938 M.W.N. 193=174

C. P. CODE (1908), O. 21, R. 2.

I.C. 681=10 R.M. 737=48 L.W. 448=A.I.R. 1938 Mad. 456=(1938) 2 M.L.J. 404.

——O. 21, R. 2—*Power of Court—Certification by decree-holder—Enquiry by Court as to actual amount of payment—Jurisdiction to hold.*

Although there is no specific provision in the Code in that behalf, when a decree-holder certifies part satisfaction and the materials put before the Court by the decree-holder are such as to put the Court on notice that there was a dispute between the parties as to whether the amount certified was less than the amount which had been actually paid, it is quite competent for the Court to give notice to the judgment-debtor and enter into an enquiry as to whether more has been paid than that which the decree-holder certifies. (*Wadsworth, J.*) VEERARAGAVIAH *v.* VENKATA LAKSEMAYYA, 164 I.C. 434 (1)=9 R.M. 123=1936 M. W.N. 140=A.I.R. 1936 Mad. 468.

——O. 21, Rr. 2 and 16—*Proceeding under R. 16—Judgment-debtor if can plead uncertified adjustment—Relation between parties to adjustment not that of decree-holder and judgment-debtor—Effect of.*

In a proceeding on notice under O. 21, R. 16, C. P. Code, the judgment debtor cannot plead an uncertified adjustment for the purpose of showing that the decree having been satisfied before its assignment, the assignee got nothing by the assignment, there being then nothing to assign. The fact that at the time of the adjustment the relations between the parties to it was not that of decree-holder and judgment-debtor does not make the provisions of O 21, R. 2 inapplicable. (*Guha and Bartley, JJ.*) SHAHEDAN BIBI *v.* MIR ALI. 10 R.C. 17=169 I.C. 602=40 C.W.N. 301 =62 C.L.J. 316=A I.R. 1937 Cal. 31.

——O. 21, R. 2—*Adjustment between judgment-debtor and third party—If can be recognised—Plea that decree-holder is some one other than the one named in the decree as such—If open to judgment-debtor.*

It is not open to a judgment-debtor in execution proceedings to assert that the real holder of the decree is some one other than the person named as the decree-holder in the decree, unless there has been an assignment or devolution by process of law; and under O. 21, R. 2, C. P. Code, he can only claim entry of satisfaction of the decree when payment has been made either to the decree-holder or to some other person definitely held out by the decree-holder as his agent for the purpose of payment.

Rowland, J.—An adjustment to which the decree-holder is not a party cannot be recognised by the executing Court. O. 21, R. 2 does not recognise any payment or adjustment to the satisfaction of some third party. (*James and Rowland, JJ.*) RANBAHADUR SINGH *v.* AWADHBEHARI PRASAD SINGH. 18 Pat. 318=11 R.P. 575 =181 I. C. 184=21 Pat. L.T. 138=5 B.R. 537= A.I.R. 1939 Pat. 411.

——O. 21, R. 2—*Scope—Certification of adjustment—Effect of—Refusal of Court to record adjustment—If justifies decree-holder in executing decree.*

Once the decree-holder has certified the fact of an adjustment, an error of the Court in refusing or neglecting to record the same cannot be held to prejudice the parties. Where both the decree-holder and the judgment-debtor certified to the Court an adjustment of the decree by a joint application, but the Court refused to record the compromise and the decree-holder thereupon sold the property obtained under the compromise and proceeded to realize the balance of the decretal amount.

Held, the decree-holder could not under the circumstances proceed to execute the decree. (*Roberts, C. J. and Leach, J.*) SWAMINATHA PADIACHI *v.* SAMBASIVAM PADIACHI. 174 I.C. 18 =10 R.R. 383=A.I.R. 1937 Rang. 507.

——O. 21, R. 2—*Scope—Certification by decree-holder—Form of and limitation for—Certification in execution application—Sufficiency.*

There is no limit of time within which and no particular form in which the decree-holder is required to certify a payment or adjustment under O. 21, R. 2, C. P. Code. He may do so at any time, and if an execution application is made within three years from the date of the payment or adjustment, he may certify the same even in his application for execution. That will be a valid certification by him and the executing Court should record the payment so certified. (*Fazl Ali and Manohar Lall, JJ.*) SONYA BISOI *v.* ANANDA PADHANO. 6 Cut.L.T. 7=21 P.L.T. 650.

——O. 21, R. 2—*Scope—Certification—What amounts to—Form of—Admission by decree-holder to executing Court of receipt of payment—Effect—Right to execute for that sum over again.*

A decree-holder who admits to the executing Court that he has received a payment cannot be allowed by that Court to execute his decree for the same amount over again. If the payment is brought by the decree-holder to the notice of the executing Court, that is enough to constitute certification and would satisfy the requirements of O. 21, R. 2, C. P. Code. It does not matter under what circumstances the payment is brought to the notice of the Court by the decree-holder. If it is brought to the notice of the Court that is sufficient to prevent him from executing over again for the sum that he admits having received and he cannot contend that is an uncertified payment. (*Beasley, C J. and Horwill, J.*) BAPANNA *v.* VENGAYYA. 45 L.W. 291=1937 M.W.N. 529 =171 I.C. 581=10 R.M 369=A.I.R. 1937 Mad. 511=(1937) 1 M.L.J. 296.

——O. 21, R. 2—*Scope—Decree for specified amount against two persons and for costs against them and another—Receipt by decree-holder of amounts by way of rateable distribution amounting to half of decree-amount—Appropriation—Right of decree-holder to adjust towards decree-amount proper excluding costs—Liability in respect of costs—If reduced* pro tanto.

A decree awarded to the decree-holder a certain sum payable by defendants 1 and 2, and also a further sum by way of cost payable by defendant 3 as well as by defendants 1 and 2. The decree was executed by the decree-holder and, in his own execution as well as in another execution by another creditor of defendants 1 and 2, the decree-holder realised a sum amounting roughly to about one-half of the total decree amount including costs, by way of rateable distribution.

Held, that the decree-holder was able to get as much as he did by way of rateable distribution because of the total of the two debts (the decree amount and the costs), and it would clearly be

inequitable and unfair for him to claim after receiving the money that it must all go towards the satisfaction of the first of these two debts, the amount received by him must go towards the payment of every rupee of his debt, and the decree for costs as against the third defendant must therefore be regarded as having been reduced by half, so that the third defendant could, on payment of the balance of costs, claim to have full satisfaction entered in his favour with regard to that portion of the decree for which he was liable, namely, costs. (*King, J.*) GOPAL RAO *v.* LAKSHMINARASAMMA. I.L.R. (1939) Mad. 301=181 I.C 388=1938 M.W.N. 1210=11 R.M. 804=50 L.W. 908=A.I.R. 1939 Mad. 268=(1939) 1 M.L.J. 137.

——O. 21, Rr. 2 and 16—*Scope—Payment towards decree uncertified—Assignment of decree—Deed reciting payment and transferring right to execute for balance—Application by transferee for recognition of assignment—If certification—Right of assignee to ignore payment and to execute for entire amount.*

A decree-holder who had received certain sums due under the decree from the judgment-debtor out of Court, some of which were not certified, transferred the decree to another, the deed of transfer reciting that specified sums had been collected towards the decree amount and that the right to execute for the balance was transferred to the transferee. The transferee filed an execution application for recognition of the assignment asking the Court to peruse the records, and after examining the deed of transfer to issue notice to the defendant under O. 21, R. 16, C. P. Code, and then to recognise the transfer, with a further prayer to transfer the decree to another Court for execution.

Held, that this was sufficient to draw the attention of the Court to the deed of transfer which recited that there was a payment by the judgment-debtor and that the right conferred by the decree-holder on the assignee was one to execute for such amount as might be due after deducting that payment, and that the assignee decree-holder could not ignore the payment and claim to execute for the entire amount on the ground that the payment was uncertified. The deed with the recital and the execution application would be sufficient to constitute a certification as required by O. 21, R. 2, C. P. Code, and Cl. (3) of O. 21, R. (2) did not, therefore, stand in the way of the payment being recognised by the executing Court. Neither the transferee decree-holder nor the executing Court could ignore the terms of the transfer deed and the rights which the transferee obtained under the deed. (*Beasley, C. J. and Horwill, J.*) BAPANNA *v.* VENGAYYA. 45 L.W. 291=1937 M.W.N 529=171 I.C. 581=11 R.M. 369=A.I.R. 1937 Mad. 511=(1937) 1 M.L.J 296.

[On appeal from. 161 I. C. 830=43 L.W. 585=8 R.M. 879=1936 M.W.N. 138=A.I.R. 1936 Mad. 472.]

——O. 21, R. 2—*Scope of—Preliminary decree for sale on mortgage—Adjustment with reference to—If can be recorded under O. 21, R. 2—Provision of law applicable.*

O. 21, R. 2, C. P. Code, is confined in its operation to decrees that are capable of execution. Where an alleged adjustment relates only to a preliminary decree for sale on a mortgage in which no final decree for sale had yet been passed it could not be recorded by the Court under O. 21, R. 2 for the reason that the preliminary decree is not a decree capable of execution. Such an application falls within the purview of either R. 1 or R. 3 of O. 23. (*Iqbal Ahmad and Bajpai, JJ.*) RAM NIWAS *v.* RAM DAYAL. 180 I.C. 244=11 R.A. 435=1938 A.W.R. (H.C.) 859=1938 A.L.J. 1231=A.I.R. 1939 All. 174.

——O. 21, R. 2—*Scope—Scheme sanctioned under S. 153, Companies Act, superseding decree—If an adjustment of decree.*

A scheme which is sanctioned by the Court under S. 153 of the Companies Act and which supersedes a decree, is not an adjustment of the decree as contemplated by O. 21, R. 2, C. P. Code, and is not, therefore, required to be certified or recorded by that rule. The rule contemplates an adjustment which is binding between the decree-holder and the judgment-debtor as an agreement by reason of their consent to it. It does not contemplate an adjustment which, although not consented to, is made binding by operation of law. (*Nasim Ali and R.C. Mitter, JJ.*) MAHIGANJ LOAN OFFICE, LTD. *v.* BEHARI LAL CHAKI. I.L.R. (1937) 1 Cal. 781=65 C. L. J. 361=10 R. C. 239=171 I.C. 198=41 C.W.N. 406=A.I.R. 1937 Cal. 211.

——O. 21, Rr. 2 and 16—*Scope—Transfer of decree by assignment—Subsequent adjustment of decree between decree-holder and judgment-debtor and certification by former without knowledge of transferee—Application by transferee for execution—Competency—Plea of adjustment by judgment-debtor—If bar to execution—"Decree-holder"—Remedy of transferee.*

Where a decree-holder transfers his decree and then makes an adjustment of the decree with the judgment-debtor and certifies satisfaction of the decree without the knowledge of the transferee before the latter applies to have the assignment recognised, that is a valid adjustment binding on the transferee. If the transferee applies thereafter for recognition of the transfer under O. 21, R. 16, C. P. Code, the judgment-debtor can successfully plead the adjustment in bar of the application. "Decree-holder" in O. 21, R. 2, C. P. Code, means the person in whose favour a decree has been passed, and until the transferee has taken steps under O. 21, R. 16, for sanction to execute the decree, the executing Court cannot recognise any other person than the decree-holder on record. The transferee has his remedy by way of suit against his transferor but the executing Court is not concerned with it. (*Cornish, J.*) RANGAYYA SETTI *v.* VENKATA SUBBA REDDI. 10 R.M. 93=45 L.W. 562=169 I.C. 704=1937 M.W.N. 372=A.I.R. 1937 Mad. 605.

——O. 21, R. 2—*Uncertified adjustment—Application for execution by assignee of decree—Adjustment not duly certified—If can be pleaded as bar.*

An adjustment of the whole decree, not certified within the period prescribed, cannot be pleaded by the judgment-debtors as an objection to the execution of the decree by the assignee of the decree. 1932 Mad. 372, Foll. (*Mosely and Mackney, JJ.*) K. M. ESOOF *v.* HAMIDA BIBI. 163 I.C. 671=9 R.R. 43=A.I.R. 1936 Rang. 218.

C. P. CODE (1908), O. 21, R. 2.

——O. 21, R. 2—*Uncertified payment—Double payment to avoid execution—Suit for damages—Maintainability.*

Where a decree-holder executes his decree, notwithstanding the payment of the decree amount by the judgment-debtor, and the latter pays the amount once over to avoid the sale of his property, he can maintain a separate suit against the decree-holder to recover damages for breach of contract represented by the adjustment or payment, for the executing Court is debarred from going into the question, when the alleged payment is uncertified. It is not a case where the plaintiff seeks to set aside a decree or to recover any money paid thereunder; all that he wants is to recover damages for loss incurred by the payment twice over in respect of the same liability. (*Manohar Lall, J.*) RAM DAS SAHU *v.* SUKHDEO RAM. 178 I.C. 196=5 B.R. 71=11 R.P. 228=A.I.R. 1939 Pat. 156.

——O. 21, R. 2—*Uncertified adjustment—Duty of Court to take notice of in execution—Limitation for execution—Starting point.*

If there is an adjustment of decree between the parties and even if that adjustment is not certified, the Court is bound to take notice of that adjustment and call for evidence to prove it when an application for execution is made by the decree holder. Limitation for such execution application runs from the dates of various payments according to adjustment. (*Gruer, J.*) BAIJNATH *v.* KANHAIYALAL. I.L.R. (1937) Nag. 106=165 I.C. 804=9 R.N. 94=A.I.R. 1936 Nag 281.

——O. 21, R. 2—*Uncertified adjustment—Omission to record adjustment—Effect—Mortgage by judgment-debtor of attached property after adjustment of decree—Suit on mortgage—Plea of non-certification of adjustment—Power of Court to recognize adjustment.*

The only effect of an adjustment not being certified as required by O. 21, R. 2, C. P. Code, is that it cannot be recognized by the executing Court; but it does not prevent a Court trying a suit on a mortgage in respect of the property attached in execution, executed by the judgment-debtor after an uncertified adjustment of the decree, from recognizing that adjustment in the course of the suit. S. 47, C. P. Code, is no bar to the recognition of the adjustment by the Court trying the suit. (*Stone, C.J. and Niyogi, J.*) RAGHOJI *v.* VITHOBA. 169 I.C. 110=9 R.N. 302=19 N.L.J. 175=A.I.R. 1937 Nag. 217.

——O. 21, R. 2—*Uncertified payments—Suit for recovery—Cause of action, when arises.*

Where, on a failure to get all the payments alleged to have been made by a judgment-debtor to the decree-holder certified, the judgment-debtor files a suit against the decree-holder for the recovery of such of the payments not certified, he has no cause of action and his suit is premature. It is in substance a suit for damages for breach of contract though no damages have in fact resulted so far. The plaintiff will have a cause of action only if the defendant puts the decree into execution and realises any amount from the plaintiff over and above the payments alleged to have been made by him. (*Mulla, J.*) JAGDEO DUBE *v.* DEOKI NATH TEWARI. 183 I.C. 450=12 R.A. 142=1939 A.W.R. (H.C.) 402=1939 A.L.J. 403=A.I.R. 1939 All. 495.

C. P. CODE (1908), O. 21, R. 2.

——O. 21, R. 2 (1)—*Adjustment—Instalment decree—Execution — Compromise providing for payment by instalments—Compromise recorded by Court and execution case dismissed as partly satisfied—Payments according to compromise—Default—Execution for entire debt—Maintainability.*

On an application for execution of a decree which provided for payment of the decretal debt by instalments, and in the course of the proceedings in execution, a compromise was arrived at between the parties, providing for satisfaction of the original decree by instalments. The terms of the compromise were set out in a petition and filed in Court. The Court recorded the compromise, and ordered dismissal of the execution case on part satisfaction crediting Rs. 100 in the decree. Some instalments were subsequently paid in accordance with the compromise but default was made and entire decretal amount fell due as per compromise. Decree-holder applied for execution. Judgment-debtor thereupon raised an objection under S. 47, application was barred by limitation.

Held, that the application was not barred by limitation. The compromise petition and the order of the executing Court thereon amounted to an adjustment of the decree in part to the satisfaction of the decree-holder within O. 21, R. 2 (1), and the payments made in accordance with the compromise were by way of adjustment of the decree as contemplated by law and the compromise did not create a decree at variance with the original decree. (*Guha and Bartley, JJ.*) KURANI DEBYA *v.* JOGAMAYA DEBYA. 167 I.C. 285=9 R.C. 680=66 C.L.J. 21=A.I.R. 1936 Cal. 518.

——O. 21, R. 2 (1)—*Compliance—Certificate by decree-holder—Validity — Order by Court—If essential—Enquiry into truth or otherwise of adjustment—If necessary—Recording of satisfaction—What amounts to—Duty of Court.*

In order that a certification of adjustment by the decree-holder may have effect, it is not necessary that there should be any specific order by the Court. A certificate presented by the decree-holder is none the less operative and enures none the less for the benefit of the judgment-debtor, because the Court has passed no order recording satisfaction of the decree. The record contemplated under O. 21, R. 2 (1) is merely an order that the certificate of the decree-holder be placed on the record. The Court is not required to go into the question whether there has or has not been an adjustment as stated. The certificate is sufficient and all that the Court need do is to say that the certificate shall be kept upon the record. It is only under sub-R. (2) of O. 21, R. 2, when the judgment-debtor makes an application that it is necessary for the Court to go into the question whether his allegations are or not true. (*Allsop, J.*) CHAMPI BAI *v.* PEAREY LAL. 174 I C. 254=1938 A.L.R. 249=10 R.A. 555=1937 A.W.R. 1200=1937 A.L.J. 1305=A.I.R. 1938 All. 116.

——O. 21, R. 2 (1)—*Limitation—Certification by decree-holder.*

Certification to Court under O. 21, R. 2 (1) by a decree-holder of payments or adjustments is not governed by Art. 181, Limitation Act, nor expressly limited by any other article. Such

certification can take place where execution of the decree is barred but for the payment certified. (*Gruer, J.*) BAIJNATH *v.* KANHAIYALAL. I. L.R. (1937) Nag. 106=165 I.C. 804=9 R.N. 94 =A.I.R. 1936 Nag. 281.

——O. 21, R. 2 (1)—*Application by judgment-debtor—Notice to decree-holder—Duty of Court to issue.*

When a judgment-debtor applies under cl. (2) of R. 2, of O. 21, C. P. Code, the executing Court is bound to issue a notice to the decree-holder to show cause why the payment or adjustment alleged to have been made by the judgment-debtor should not be recorded as certified. (*Kichlu, J.*) KAPOOR & CO. *v.* AGHA ZAFFAR ALI. 39 P.L.R. J. & K. 164.

——O. 21, R. 2 (2)—*Burden of proof—Adjustment by agreement.*

In an application under O. 21, R. 2 (2), C. P. Code, the burden is on the judgment-debtor to prove the adjustment set up. When he asks the Court, in the face of a denial by the decree-holder, to hold that the latter has agreed to substitute for his decree an oral agreement for delivery of some property when admittedly no property has as yet been delivered, the burden is heavily on the judgment-debtor to prove the agreement and the factum of adjustment of the decree. Nor is the burden discharged by evidence of talk of compromise or by proof of the terms which he was putting forward to secure such a compromise. (*Weston.*) MALA *v.* JAWANA. 1935 A.M.L.J. 97.

——O. 21, R. 2 (3)—*Adjustment and payment — Difference between — Limitation — Starting point.*

Per *Mya Bu, J.*—That there is a substantial distinction between an adjustment and a payment cannot be doubted; for such distinction is recognized by Art. 174, Limitation Act. A payment is not a contract of an executory nature whereas an adjustment is a contract of such nature. Art. 174 fixes the time of commencement of the period of limitation at the date of the making of the adjustment. (*Mya Bu and Sharpe, JJ.*) CHOKALINGAM CHETTYAR *v.* NARAYANA CHETTYAR. 178 I.C. 20=11 R.R. 215 =A.I.R. 1938 Rang. 328.

——O. 21, R. 2 (3)—*Agreement between judgment-debtor and decree-holder that balance of decree would be paid by instalments and that decree-holder will not be entitled to interest amount to adjustment—If cannot be recognised unless certified.*

The obvious policy of the legislature is to prevent a controversy during execution proceedings as to whether the dispute between the parties has been settled and the legislature enacting O. 21, R. 2 has used words which are of widest implication. Reference has been made not merely to payment but a payment of a part or a whole. Where part payment of the amount due under a decree is made by the judgment-debtor and it is agreed between the parties that not only the balance of the decree but also another decree should be paid by instalments and that the decree-holder would accept the instalments without interest, the arrangement amounts to an agreement which is certifiable under O. 21, R. 2, although only part of the decree is paid. Such an agreement affects the right of the decree-

holder to execute the decree and it amounts to an adjustment and cannot be recognised unless certified. (*Wort, J.*) BANARSI LAL *v.* BORHO SAHU. 162 I.C. 482=8 R.P. 534 (2)=1936 P.W.N. 219 =A.I.R. 1936 Pat. 253.

——O. 21, R. 2 (3)—*Agreement, not certified—If can be urged as objection to execution—Application for certification to be before objection to execution.*

Sub-Cl. (3) of R. 2, O. 21, clearly contemplates a certification before the objection is taken to the execution on the basis of an adjustment or payment in satisfaction of the decree or when the executing Court is about the business of execution, and, as such it is too late to apply for certification under O. 21. It is too late, when an objection is taken to the proceedings in execution, to assert that there is an agreement which has not so far been certified. (*Wort, J.*) BANARSI LAL *v.* BORHO SAHU. 162 I.C. 482=8 R.P. 534 (2)=1936 P.W.N. 219=A.I.R. 1936 Pat. 253.

——O. 21, R. 2 (3)—Applicability and scope—Instalment decree with default clause—Execution —Plea of payment and non default—Burden of proof—Power of executing Court to inquire into payments. *See* C. P. CODE, S. 47 AND O. 21, R. 2 (3). 17 Pat. 128.

——O. 21, R. 2 (3)—*Scope—Maintenance decree charging properties—Execution against one property—Sale and purchase by decree-holder—Sale subsequently set aside—Subsequent execution against another item in the hands of purchaser in execution of money decree—Plea that decree was satisfied by receipt of usufruct by decree-holder between sale and its setting aside—Maintainability.*

The respondent, a Hindu widow, got a maintenance decree on 27—9—1932 charging her maintenance on all the properties of the members of the joint family. One of those properties was put up for sale in execution of a money decree obtained by the appellant against the joint family and was purchased by himself on 19—12—1932, the sale being confirmed on 24—8—1933. The respondent in execution of her decree put up for sale one item of family property, other than that purchased by the appellant, and purchased it herself. The sale was confirmed and she got possession on 12—11—1933. The sale was, however, set aside on 30—6—1934, when she lost possession. In a subsequent execution, the respondent sought to enforce her charge against the property purchased by the appellant, and the latter pleaded that the respondent decree-holder, in the interval between the sale and its setting aside, was enjoying the usufruct of the property which was more than sufficient to satisfy her entire dues under the decree, and that therefore that decree was not executable any longer.

Held, that the plea raised by the appellant fell under O. 21, R. 2 (3), of a payment or adjustment, which was not certified or recorded in the manner provided for in the rule, and that no such payment or adjustment could be recognised by the executing Court.

Held, further, that the objection was without merit also as the objector was not the owner of the property in question, the sale of which was set aside. (*Varma and Rowland, JJ.*) SAH RADHA KRISHNA *v.* MT. BECHNI DEBI. 186 I.C.

C. P. CODE (1908), O. 21, R. 2.

187=6 B.R. 302=12 R.P. 456=1939 P.W.N. 716 =A.I.R. 1940 Pat. 56.

——O. 21, R. 2 (3)—*Scope and effect of—Uncertified payment—If can be taken note of to save limitation for execution.*

A decree-holder cannot certify an alleged payment by the judgment-debtor in order to save limitation for execution after an objection has been taken either by an officer of the Court before issue of notice to the judgment-debtor or by the judgment-debtor when he appears to contest the application for execution on the score of limitation. A payment which is not previously certified by the decree-holder as required by O. 21, R. 2, C. P. Code, cannot be relied on by him or regarded by the Courts as saving limitation. (*Harries, C. J.*) BHOBANI NAIK *v.* BALARAM DHAL. 6 Cut.L.T. 5.

——O. 21, R. 2 (3)—*Uncertified adjustment—Claim to restitution—Adjustment of claim—Non-certification—Effect.*

An adjustment of a claim to restitution consequent on the variation of a decree on appeal is not the same thing as the adjustment of a decree, though it is no doubt based on the appellate Court's decree. A claim for restitution before it is allowed by the Court of first instance, cannot be regarded as a decree or order of the Court and an adjustment of a claim to restitution, which is uncertified, is not hit by O. 21, R. 2, (*Pandrang Row, J.*) SUNDARARAJAN CHETTIAR *v.* SETHURAMA SWAMI CHETTY. 1936 M.W.N. 758 =166 I.C. 911=9 R.M. 408=44 L.W. 287=A.I.R. 1936 Mad. 840=71 M.L.J. 344.

——O. 21, R. 2 (3)—*Uncertified payment—If will be recognised.*

O. 21, R. 2 (3) is mandatory and means that, if there is a question of any payment in satisfaction of the decree or adjustment of the decree which has not been certified, the Court shall refuse to recognise it in execution proceedings. (*Wort, J.*) BANARSI LAL *v.* BORHO SAHU. 162 I.C. 482=8 R.P. 534 (2)=1936 P.W.N. 219=A.I.R. 1936 Pat. 253.

——O. 21, R. 4—*Decree in suit excluded from cognisance of Small Cause Court—Order transferring decree for execution to Small Cause Court—Validity of order—Jurisdiction of Small Cause Court to question.*

Where an application is made under O. 21, R. 4, C. P. Code, for transmission of a decree to a Small Cause Court for execution by the latter, it is the function of the transferring Court to decide whether the transfer can or cannot be made, and if it does transfer the decree, the Court to which it is transferred is not competent to reopen that order, on the ground that in its opinion the suit in which the decree in question has been passed was one exempted from the cognisance of the Small Cause Court and that it has no jurisdiction to execute the decree. Once the decree has been transferred after notice to the judgment-debtor, the transferee Court must take the transfer to be valid and execute the decree; it has no jurisdiction to determine the correctness or propriety of the order transferring the decree to it for execution. (*McNair, J.*) JYOTESWAR BANERJEE *v.* SURENDRA NATH GHOSE. 165 I.C. 625=9 R.C. 436=40 C.W.N. 267.

——O. 21, Rr. 5 and 8—*Applicability and scope—Decree—Transfer to another Court for execution—Order of transfer when takes effect—Transfer to District Court for transmission to Court of execution or transfer to District Court for execution—Distinction.*

Rr. 5 and 8 of O. 21, C.P. Code, are distinct and independent. R. 8 applies only to those cases in which a decree is sent for execution to the District Court in the same or another District, in which cases the District Court is not obliged to execute the decree itself. When the decree is not sent to the District Court for execution, but for transmission to a Subordinate Court for execution, the District Court cannot execute decree. In such cases, the order of transfer takes effect from the date on which the order for transfer is made. (*Burn and Stodart, JJ.*) VENKATARATNAM *v.* CHINNAYYA. 187 I.C. 758=12 R.M. 759=1939 M.W.N. 1244=50 L.W. 764=A.I.R. 1940 Mad. 214.

——O. 21, R. 5—*Decree not transferred through District Court—Effect.*

The provisions of O. 21, R. 5, C. P. Code, are mandatory, and a decree cannot but be sent to the District Court. Consequently if it is sent to any other Court that Court has no jurisdiction at all from the very start. (*Din Mohammad, J.*) BARKAT RAM *v.* BHAGWAN SINGH. 42 P.L.R. 404 =A.I.R. 1940 Lah. 394.

——O. 21, R. 5—*Munsiff transferring decree for execution to Sub-Judge in same district—Legality.*

A Munsiff transferred a decree for execution to the Subordinate Judge in the same district, though there was no express prayer for the transfer by the decree-holders. There was some irregularity in the manner of transfer but the decree-holders acquiesced in it.

Held, that the Munsiff could transfer the decree as both the Courts were situate in the same district, and the irregularity in the manner of transfer did not prevent the Subordinate Judge from having seisin over the execution. (*R. C. Mitter, J.*) KSHIRODE CHANDRA PAL *v.* BRAHMANATH PAL. 166 I.C. 374=9 R.C. 508= 64 C.L J. 47=A.I.R. 1936 Cal. 571.

——O. 21, R. 5—*Transfer of decree to another district—Omission to send it through District Court—Irregularity, if can be waived.*

There is no justification for the view that if the mode of transfer laid down in O. 21, R. 5 is not strictly followed, the proceedings of the Court to which the decree had been transferred must of necessity be without jurisdiction and become a nullity. Where a decree is transferred to another district for execution the omission to transfer the decree through the Court of the District Judge as required by the rule, is an irregularity in procedure which could be waived. Where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party who allows the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation and negligence. (*Coldstream, J.*) CHETAN LAL *v.* JAGAT PRASAD. 164 I.C. 917=9 R.L. 173=39 P.L.R. 284=A.I.R. 1937 Lah. 174.

——O. 21, Rr. 5 and 6—*Transfer on decree to another District—Certificate of non-satisfaction sent to Senior Subordinate Judge instead of to District Judge—Irregularity.*

C. P. CODE (1908), O. 21, R. 6.

If a decree is transferred to another district for execution, the certificate of non-satisfaction should no doubt be addressed to the District Judge of that district. But where it is addressed to the Senior Subordinate Judge but is actually presented to the District Judge who transferred the same for execution of the decree to a Subordinate Court of the district, the mistake in the certificate is an accidental one, and the proceedings in execution taken before the Subordinate Court are not illegal and *ultra vires*, especially when no objection is taken at the earliest opportunity by the judgment debtor. (*Jai Lal, J.*) DUNI CHAND GOKAL CHAND *v* BRIJ LAL & SONS. **164 I.C. 693=9 R.L. 153 (1)=38 P.L.R. 505=A.I.R. 1936 Lah. 765.**

——**O. 21, R. 6**—Order under S. 39, allowing simultaneous execution in two Courts—Notice to judgment-debtor—Necessity. *See* C. P. CODE, S. 47. **41 Bom.L.R. 481.**

——**O. 21, R 6 (b)**—*Scope—Mistake as to number of suits and names of judgment-debtors in certificate—Effect—If fatal—Application for execution—If not in accordance with law—Omission of decree-holder to correct mistake—If invalidates application for execution—Limitation Act, Art.* 182 (5).

Where the Court transmitting a decree for execution to another Court has fully complied with all the requirements of O. 21, R. 6, C.P. Code, and the copy of the decree sent to the executing Court contains all the correct particulars as to the number of suit and the names of the judgment-debtors, the mere fact that there is a mistake in the certificate of non-satisfaction of the decree as to the number of the suit and the names of the judgment-debtors would not affect the jurisdiction of the execution Court to proceed with the execution. The mistake is a mere irregularity. Even an omission to send the certificate of non-satisfaction would only be an irregularity and would not affect the jurisdiction of the transferee Court to entertain an application for execution of decree. Neither the mistake in the certificate of non-satisfaction nor the omission of the decree-holder to have the mistake in the certificate corrected would render his application for execution one not in accordance with law. Any default on the part of the decree-holder in prosecuting his application for execution after it has been filed cannot invalidate his application which is otherwise in accordance with law. (*Fazl Ali and Agarwala, JJ.*) KAMESHWAR PRASAD SINGH *v.* LALU MAL. **178 I.C. 624=11 R P. 279=5 B.R. 124=1938 P.W.N. 73=A.I.R. 1938 Pat. 513.**

——**O. 21, R. 6 (2) (Allahabad)**—*Decree-holder returning copy and certificate to issuing Court—Effect of.*

It is open to a decree-holder, who obtains personally the certificate and copy of the decree in accordance with O. 21, R. 6 (2), either to take them to the Court to which they are sent, or, if for some reason he does not desire to do so, to return the copy and the certificate to the Court which issued them. If he takes the latter action, then the Court which passed the decree becomes again seized of the matter, and is either able to grant execution itself, or to grant a new certificate for transfer. (*Sulaiman, C.J. and Bennet, J.*) MANSA RAM *v.* BADRI PRASAD. **163 I.C. 231=8 R.A. 950=1936 A.L.J. 254=1936 A.W.R. 294=A.I.R. 1936 All. 369.**

C. P. CODE (1908), O. 21, R. 11.

——**O. 21, R. 7**—*Transfer of decree for execution—Jurisdiction of transferee Court—Power to go behind decree—Jurisdiction of Court which passed the decree—If can be question.*

A Court to which a decree has been transferred for execution under O. 21, R. 7, C. P. Code, has no power to go behind the decree and to question, or to enquire into, the jurisdiction of the Court which passed the decree. (*Wadia and Macklin, JJ.*) JAGANNATH *v.* SHIVNARAYAN. **166 I.C. 961=9 R. P. 262=38 Bom.L.R. 1023=A.I.R. 1937 Bom. 19.**

——**O. 21, R. 10**—Decree transferred for execution—Power of transferring Court to execute decree subsequently before return of certificate of satisfaction. *See* C. P. CODE, S. 38 AND O. 21, R. 10. **A.I R. 1940 Sind 11.**

——**O. 21, R 10**—*Execution application presented after office hours—Validity.*

An application for execution presented to a clerk duly authorised to receive it, is valid though it is presented beyond the office hours, provided the clerk has accepted it. (*Puranik, J.*) KISHAN LAL RAM NIWAS *v.* NARAEN KISAN. **I.L R. (1938) Nag. 451=174 I.C. 597=10 R.N. 404=A.I.R. 1938 Nag. 46.**

——**O. 21, R. 10**—Holder of decree—If decree-holder as defined by S. 2 (3). *See* C. P. CODE, S. 2 (3) AND O. 21, R. 10. **21 Pat.L.T. 146.**

——**O. 21, R 10**—Holder of a decree—Meaning. *See* C. P. CODE, O. 21, R. 16. **A.I.R. 1937 Pat. 607.**

——**O. 21, Rr. 10 and 11**—*Transfer of British Indian decree to Burma Court for execution—Transfer prior to 1st April, 1937, but application for execution after that date—Effect.*

Where a decree of a British Indian Court is transferred for purposes of execution to a Court in Burma before the 1st of April, 1937, the date on which Burma became separated, but the application for execution as required by O. 20, Rr. 10 and 11 was in fact made after that date, it cannot be executed by Courts in Burma as after the 1st of April, 1937, the British Indian Court has become a foreign Court and its decree cannot be executed when there is no reciprocal arrangement between India and Burma for purposes of execution. (*Baguley and Mosely, JJ.*) K. K. K. M. CHETTIAR *v.* SELLAMI ACHI. **1938 Rang.L R. 355=179 I.C. 374=11 R R. 313=A.I.R. 1938 Rang. 385.**

——**O. 21, R. 11**—*Absence of verification and particulars—Effect.*

Where an execution application was not verified, nor contained the particulars required by R. 11 of O. 21 it should not be entertained. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L.J. 89.**

——**O 21, R. 11**—*Amendment of execution application—Form.*

An application to amend an existing or pending execution application, should be in the form prescribed by O. 21, R. 11. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L.J. 89.**

——**O. 21, R. 11**—Applicability—Decree for payment of money--Proceedings between husband and wife under Guardians and Wards Act for custody of minor children—Consent order for payment of maintenance and school expenses of children to wife or school authorities—Executability as money decree. *See* GUARDIANS AND WARDS ACT. **41 Bom.L.R. 625.**

C. P. CODE (1908), O. 21, R. 11.

——O. 21, R. 11—Applicability—Restitution—Application for—Form of. *See* C. P. CODE, S. 144. A.I.R. 1937 Mad. 173.

——O. 21, R. 11—*Application for arrest of judgment-debtor—High Court on revision directing judgment-debtor to pay certain sum monthly as condition for exemption from arrest—Subsequent application by decree-holder for arrest of judgment-debtor—Discretion of lower Court.*

Where on application by the decree-holder under O. 21, R. 11 for leave to execute a decree by the arrest and imprisonment of the judgment-debtor, the judgment-debtor, although it is open to him under O. 21, R. 11 to apply for instalments does not file a formal application to that effect but merely relies on an affidavit praying for instalments and the Court orders payment of decree by instalments but the High Court on revison from the order, passes an order, directing the judgment-debtor to pay a certain sum monthly as a condition for his exemption from arrest and imprisonment and it appears that the High Court in passing the order regarded the application before it as being what was the right order for the lower Court to pass on an application under O.20, R. 11 and that it did not purport to consider the case on the footing that the order sought to be revised was one under O. 21, R. 40, the discretion of the lower Court on a subsequent application for execution under O. 21, R. 11 is not fettered by the order of the High Court and it is open to it to pass on order which it, in its discretion, deems fit. (*Page, C.J. and Ba U, J.*) MAHOMED SIDDIQUE AHMED *v.* KARAM ALI KHAN. 163 I.C. 578=9 R.R. 31=A.I.R. 1936 Rang. 280.

——O. 21, R. 11—*Application for execution—Application for sale of goods attached before judgment—If one for execution—Order at time of decree that attachment before judgment shall continue—If one in execution—Calcutta High Court Rules (O.S.), Ch. 27, R. 10—C. P. Code, O. 39, R. 6.*

An order by the Court at the time of the decree that the attachment effected before the judgment shall continue is not an order in execution. Nor can an application made by the plaintiff under O. 39, R. 6, C. P. Code, for sale of the goods attached before judgment be regarded as an application for execution of a decree as contemplated by O. 21, R. 11, C. P. Code, or by R. 10 of Ch 27 of the High Court (O.S.) Rules. (*Mc Nair, J.*) GRAHAMS TRADING CO., LTD. *v.* NARROTTAMDAS HARJEEBANDAS. I.L.R. (1937) 2 Cal. 1=40 C. W.N. 1317.

——O. 21, Rr. 11 and 17—*Application not complying with provisions laid down—Effect of.*

An application to take effect under O. 21 should be presented in accordance with the provisions as laid down therein, and unless the Court rejects the application or calls upon the decree-holder to amend it under sub-R. (1) of R. 17, there is no proper application before the Court. (*Addison and Din Mahomed, JJ.*) PIR TAJ-UD-DIN *v.* KHAMBATTA. 179 I.C. 146=11 R.L. 536=40 P. L.R. 857=A.I.R. 1938 Lah. 515.

——O. 21, R. 11—Requirements of—If necessary for applications under S. 39, C. P. Code. *See* C. P. CODE, S. 39. 1937 A.M.L.J. 113.

——O. 21, R. 11 (2)—*Application presented by son of decree-holder—No mention in application that son was acquainted with facts of case—If properly made.*

Where an application for execution was presented by the son of a decree-holder on his behalf and the Court returned the application for amendment as not being made by the proper person under O. 21, R. 11 (2), C. P. Code, no mention being made in the application that the son was acquainted with the facts of the case.

Held that the application was rightly returned by the Court under O. 21, R. 11 (2), C. P. Code, and such application could not be said to be pending in Court when it was not filed afterwards by making proper amendment. (*Davis, J.C. and Mehta, A.J.C.*) LAKHMICHAND *v.* GOKALDAS. 31 S.L.R. 14=170 I.C. 493=10 R.S. 60=A.I.R. 1937 Sind 108.

——O. 21, R. 11 (2)—*Construction and scope—Right to apply for execution—Application not signed by decree-holder and presented by vakil without authority—Sufficiency of.*

O. 21, R. 11 (2) only describes the form of an execution application and merely sets out the forms in which the application is to be drafted. Any person acquainted with the facts can sign or verify the written application, but only the holder of the decree can apply to the Court for execution. An execution application which is not signed by the decree-holder and presented by a vakil without proper authority is not a proper application at all. It cannot be regarded as effective as having been presented by a person acquainted with the facts. (*Horwill, J.*) APPAJI CHETTI *v.* GOVINDASWAMY KEDDI. 174 I.C. 28=10 R.M. 661=1937 M.W.N. 355=A.I.R. 1937 Mad. 760.

——O. 21, R. 11 (2)—*Execution application—Ground of extension of limitation—Omission to mention—If fatal.*

It is only under O. 7, R. 6, C. P. Code, that the ground of exemption from the law of limitation should be expressly urged but no corresponding provision is made in the case of applications for execution. Consequently an omission to mention the ground of extension of the period of limitation in an application for execution cannot be treated as fatal. (*Din Mohammad, J.*) ISMAIL *v.* ANJUMAN IMDAD QARZA, MAUZA BANGA. 188 I.C. 891=13 R.L. 64=42 P.L.R. 10=A.I.R. 1940 Lah. 178.

——O. 21, R. 11 (g)—*Particulars of interest due—When may be furnished.*

Particulars of interest due are not required by O. 21, R. 11 (*g*) or by any other provision of the Code; that is to say, as it is not required that applications for execution shall contain these particulars they can be furnished by the decree-holder at any time after issue of notice to the judgment-debtor, when evidence is taken or before orders are passed for the purpose of ascertaining the amount due. (*Mya Bu and Mosely, JJ.*) P. L. S. P. CHETTYAR *v.* U. THAN PE. 184 I.C. 769=12 R.R. 170=A.I.R. 1939 Rang. 345.

——O. 21, R. 11 (2) (i)—*Decree against firm—Execution against partner—Right of decree-holder.*

In the case of a decree against a firm, the decree-holder or a transferee decree-holder has a right to apply for execution against any one or more of the partners of the firm, the firm being only a collective name of the individuals who are the members of the partnership. (*Wadia, J.*)

C. P. CODE (1908), O. 21, R. 12.

BAIJNATH RAMCHANDER *v.* BINJRAJ JOOWARMAL BATIA & Co. **I.L.R. (1937) Bom. 691=39 Bom. L.R. 540=170 I.C. 877=10 R.B. 143=A.I.R. 1937 Bom. 365**

——**O. 21, R. 12**—*Application for attachment of movable property in possession of judgment-debtor—Decree-holder, if bound to supply inventory of articles or their value.*

Where the movable property sought to be attached is in the possession of the judgment-debtor, the decree-holder cannot reasonably be called upon to supply either an inventory with an accurate description of the articles sought to be attached or their approximate value. (*Bartley and Nazim Ali, JJ.*) MUNICIPAL COMMISSIONER OF HOWRAH *v.* SHAIK MOSAFIR. **174 I.C. 878 (1)=10 R.C. 739 (1)=42 C.W.N. 285=A.I.R. 1938 Cal. 235.**

——**O. 21, R. 12**—Scope and applicability. *See* C. P. CODE, S. 5[illegible] AND O. 22, RR. 11 AND 12. **1938 N.L.J. 312.**

——**O. 21, R. 13**—Applicability—Arbitration—Reference in pending suit—Order that if award not filed by specified date trial to go on that day—Award not filed—Suit decreed *ex parte*—Application to set aside—Proper procedure. *See* C. P. CODE, SCH. II, PARA. 8. **71 M.L.J. 648.**

——**O. 21, R. 13**—Scope—Omission to give proper description of property—Effect—Application, if not in accordance with law. *See* LIMITATION ACT, ART. 182 (5). **(1940) 1 M.L.J. 477.**

——**O. 21, R 13 (7)**—*Property attached specified as owned by judgment-debtors—Share of each judgment-debtor—If should be mentioned.*

A decree-holder asked the Court to bring to sale certain properties described as a half-share belonging to the judgment-debtors in certain specified holdings. What was the exact interest of each of the judgment-debtors individually in the property was not specified. It was stated that the whole of this half-share belonged to the judgment-debtors. The sale was challenged on the ground that it had not been specified exactly what share each of the different judgment-debtors possessed.

Held, that it was not necessary that this should be done. The decree-holder held a decree against each of the judgment-debtors. He had brought this property to sale because it was the property of one or other or all the judgment-debtors and that was sufficient for his purpose. What the Court sells is the right, title and interest of the judgment-debtors in this property. It is no part of the Court's duty to enter into an enquiry as to the exact proportion of each of the judgment-debtor's interest in this property. (*Mya Bu and Mackney, JJ.*) ARUMUGAM CHETTIAR *v.* RAMANATHAN CHETTIAR. **179 I.C. 162=11 R.R. 301=A.I.R. 1938 Rang. 433.**

——**O. 21, R. 14** — *Applicability—Mortgage decree.*

O. 21, R. 14, C. P. Code, is inapplicable to a mortgage decree. The opening words of the rule clearly show that it applies only to cases where an application is made for attachment of any land, and no attachment is required in the case of a decree for sale based on a mortgage. (*Srivastava, Ag. C.J. and Smith, J.*) CHANDIKA *v.* KAMLA PRASAD. **13 Luck. 162=167 I.C. 34=9 R.O. 358 =1937 O.W.N. 169=1937 O.L.R. 86=A.I.R. 1937 Oudh 233.**

C. P. CODE (1908), O. 21, R. 15.

——**O. 21, R. 15**—*Duty of Court under—Application for execution by some decree-holders only.*

K and *G* brought a redemption suit against the mortgagee. While an appeal to the High Court was pending, certain persons purchased the right, title and interest of *K* and *G* in the mortgaged property and were added as parties in the appeal. A decree was passed by the High Court in favour of all including *K* and *G*. Subsequently *K* and *G* applied for payment to themselves the costs incurred in the litigation but the Court rejected their prayer.

Held, that as the names *K* and *G* appeared as decree-holders in the High Court's decree. *K* and *G* could claim the costs incurred in the litigation under O 21,R. 15. The Court should have allowed *K* and *G* to execute the decree after protecting the interest of the remaining decree-holders. (*Rowland, J.*) GUPTESWAR MISSIR *v.* RADHA MOHAN. **3 B.R. 656=10 R.P. 76=170 I.C. 99=A.I.R. 1937 Pat. 253.**

——**O. 21, R. 15**—*Joint decree—Application for execution not on behalf of all—Defect, if fatal.*

Where an execution application although filed by only one of two joint decree-holders, does not purport to have been filed on behalf of both, such a defect is fatal to the application. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L.J. 89.**

——**O. 21, R. 15**—*Joint decree-holders—Application by one to execute decree—Competency—Conditions.*

In order to comply with R. 15 of O. 21, C. P. Code, it is necessary to state in the application by one joint decree-holder that the application is taken out on behalf of the applicant and for the benefit and on behalf of the other persons entitled to the decree. (*Wort and Varma, JJ.*) SHEIKH MOHAMMAD ANAS *v.* BHUPENDRA PRASAD SHUKUL. **17 Pat. 223=177 I.C. 992=11 R.P. 199=19 Pat.L.T. 901=5 B.R. 41=A.I.R. 1938 Pat. 457.**

——**O. 21, R. 15**—*Joint decree-holders—Execution by one in respect of his share only—Competency.*

It is not open to one of several decree-holders to apply for execution of a joint decree in respect of his share only; nor can the Court allow such execution for a share only. (*Norman, I.C.S.*) MUHAMMAD AZIZ ULLAH *v.* ABDULLA. **1936 A.M.L.J. 32.**

——**O. 21, Rr. 15 and 22**—Notices under—If "revivor"—Limitation Act, Art. 183. *See* LIMITATION ACT, ART. 183, PROVISO. **15 Pat. 102.**

——**O. 21, R 15**—*Omission to state that execution is for benefit of all decree-holders—Application, if invalidated—Execution application by one partner of decree in favour of firm—Effect.*

Where one or any of the decree-holders file an execution application without stating on that application that they are acting in the interests of the whole body of the decree-holders, their action does not necessarily invalidate the execution application and if any such defect is pointed out amendment of the application should be allowed. But these remarks do not apply strictly where a firm is concerned. So soon as the name of the firm is entered in an application, this entry automatically signifies that the application is being made on behalf of all the partners in the firm. (*Davies.*) KISHAN DAS *v.* NOOR MOHAMED. **1939 A.M.L.J. 154.**

C. P. CODE (1908), O. 21, R. 15.

——O. 21, R. 15—*Partition decree—Execution by one of defendants for benefit of all—Permissibility.*

A partition decree cannot be regarded as one passed jointly in favour of all the defendants so as to enable one of them to apply for its execution for the benefit of all under O. 21, R. 15, C. P. Code. (*Skemp, J.*) BRAHM DUTT *v.* NARSI RAM. 183 I.C. 100=12 R.L. 102=41 P.L.R. 135=A.I.R. 1939 Lah. 302.

——O. 21, R. 15—*Scope—Application by one of several decree-holders—Omission to state that application is on behalf of all—If fatal.*

In an application to execute a joint decree by one of several joint decree-holders, it is incumbent on the applicant to state specifically in the application that it is filed on behalf of all the decree-holders. Omission to so state is fatal to the application. (*Norman. I.C.S.*) MUHAMMED AZIZ ULLAH *v.* ABDULLA. 1936 A.M.L.J. 32.

——O. 21, R. 15—*Scope—Non-compliance with—If fatal—Several decree-holders—Execution application by one only—Omission to mention existence of others—Effect—Applicant acting honestly—Power of Court to direct amendment.*

The omission in an application for execution by one of several decree-holders to mention that there are other decree-holders does not necessarily invalidate the application. Where the applicant has acted honestly in filing such an application, the Court should not dismiss the application, but should allow him to amend the application so as to bring it in conformity with the requirements of R. 15 of O 21. (*Burn and Stodart, JJ.*) VEERAMMANI *v.* RAJAVEERABASAVA CHIKKA ROYAL. I.L.R. (1939) Mad. 338=49 L.W. 115=1939 M.W.N. 9=185 I.C. 500=12 R.M. 550=A.I.R. 1939 Mad. 278=(1939) 1 M.L.J. 39.

——O. 21, R 16—Applicability—Award under Co-operative Societies Act—Execution by assignee. *See* MADRAS CO-OPERATIVE SOCIETIES ACT, S. 51 AND R. 15. (1940) 2 M.L.J. 216.

——O. 21, R. 16—*Applicability—Decree against several persons—Death of one judgment-debtor—Right of deceased surviving to decree-holder and some judgment-debtors — Executability of decree.*

In a suit on a promissory note by the assignee thereof, a decree was passed against the executants and the assignor of the note was a Hindu female. The assignor died later on leaving the plaintiff and defendants 8 to 10 as her reversionary heirs. Plaintiff having applied for execution of the decree, defendants 8 to 10 pleaded that the decree had become inexecutable by reason of O. 21, R. 16, C. P. Code.

Held, (i) though O. 21, R. 16, did not in terms apply to the case, the principle underlying the section applied, namely, that where the decree-holder's right and the judgment-debtor's liability became united in one and the same individual, the decree should be treated as satisfied; (ii) that since plaintiff became entitled only to a one-fourth share of the properties of the 7th defendant, the decree became inexecutable only to that extent, and that defendants 8 to 10 could be proceeded against for the three-fourths of the amount of the decree. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SANKARALINGAM PILLAI *v.* ARUMUGHAM PILLAI. I.L.R. (1939) Mad. 73=177 I.C. 331=11 R.M. 307=1938 M.W.N. 572=48 L.W. 32=A.I.R. 1938 Mad. 814=(1938) 2 M.L.J. 156.

C. P. CODE (1908), O. 21, R. 16.

——O. 21, R. 16—*Applicability—Decree in favour of father of joint Hindu family—Execution by sons—C. P. Code, O. 21, R. 10.*

A joint Hindu family consisted of father and sons. Partition was effected by metes and bounds between the father and sons by a decree based on as arbitration award. The father subsequently obtained a decree against the judgment-debtor in respect of a joint family debt. Subsequently one of the sons filed an application for execution of the decree.

Held, that as there was no assignment in writing, the provisions of O. 21, R. 16 did not apply and no notice was necessary.

Held also, that as the debt on which the decree was based was a debt due to a joint family, the son, had an interest in the decree and they were the holders of the decree within the meaning of O. 21, R. 10. The fact that no mention of the decree was made in the arbitration award was immaterial. The application was therefore in accordance with law. (*Wort and Varma, JJ.*) RAMSEWAK PRASAD *v.* SARAN SINGH. 172 I.C. 100=10 R.P. 277=1937 P.W.N. 717=A.I.R. 1937 Pat 607.

——O. 21, R. 16—*Applicability—Decree obtained by Hindu father—Death of father—Execution by sons—Necessity for recognition by Court which passed decree.*

The sons of a deceased Hindu who was the sole decree-holder are not decree-holders who can execute the decree without recognition by the Court which passed the decree on the devolution upon them of the decree. The decree is, on their father's death, transferred to them by operation of law, and O. 21, R. 16, C. P. Code, is applicable. (*Burn and Stodart, JJ.*) NARAYANAN CHETTY *v.* PANCHANATHAN CHETTIYAR. I.L.R. (1940) Mad. 79=187 I.C. 352=12 R.M. 724=50 L.W. 605=1939 M.W.N. 1046 (1)=A.I.R. 1940 Mad. 89=(1939) 2 M.L.J. 758.

——O. 21, R. 16—*Applicability—Decree transferred for execution to another Court—Death of decree-holder before starting of proceedings in transferee Court—Procedure—Right of legal representative to continue proceedings in transferee Court—Necessity for application to Court which passed decree under O. 21, R. 16.*

A legal representative of a deceased decree-holder is deemed a transferee of the decree by operation of law, and as such is entitled to apply for the execution of the decree to the Court which passed the decree, under O. 21, R. 16, C. P. Code. The transferee of a decree or the heir of a decree-holder cannot present an application for its execution unless he first obtains an order under O. 21, R. 16, that he is the person entitled to execute the decree as the transferee or the legal representative of the original decree-holder, as the case may be. Where a decree has been transferred for execution to another Court, but the decree-holder dies before starting the execution proceedings in that Court, his legal representative cannot continue the proceedings in the Court to which the decree has been transferred; he has to start fresh proceedings in the Court which passed the decree under O. 21, R. 16. He has to seek an order under O. 21, R. 16 from the Court which passed the decree and have that

order remitted to the Court to which the decree has been transferred for execution under O. 21, R. 6 (*c*). If the application under O. 21, R. 16 is granted by the Court which passed the decree, it may make an endorsement of that order on the decree and send a copy of the order along with the other papers to the Court to which the decree is transferred. It is after such an order is passed that the legal representative is clothed with the status of a decree-holder, and is then empowered to institute execution proceedings in the Court to which the decree is transferred. If the decree has ceased to be capable of execution by being time-barred, then the legal representative is not entitled to have an order passed in his favour under O. 21, R. 16. (*Lokur, J.*) BRIJMOHANDAS DAMODARDAS *v.* SADASHIV LAXMAN. **187 I.C. 85=12 R.B. 407=41 Bom.L.R. 1190=A.I.R. 1940 Bom. 5.**

——**O. 21, R. 16**—*Applicability—Preliminary decree for mesne profits—Application for ascertainment—Assignment pending inquiry—Assignee brought on record and final decree passed—Application for execution—If falls under O. 21, R. 16.*

O. 21, R. 16, C. P. Code, is primarily intended for those cases where the name of the applicant for execution of the decree does not appear as a decree-holder in the decree but in which he bases his claim to execute on the ground that he is an assignee or transferee of one or more decree-holders. Where a preliminary decree for mesne profits is assigned pending an inquiry into the mesne profits, and the assignee is substituted and gets a final decree passed, an application by him to execute that final decree is not governed by O. 21, R. 16 or the provisos thereto. (*Fazl Ali and Agarwala, JJ.*) NAND KISHORE LALL *v.* CHANDRIKA PRASAD SINGH. **17 Pat. 206=177 I.C. 830=11 R.P. 189=5 B.R. 26=A.I.R. 1938 Pat. 462.**

——**O. 21, R. 16**—*Application by assignee of decree—Separate application for notice to assignor—If necessary.*

Where an assignee of a decree applies for execution of the decree and requests in the application itself for notice to the assignor it is a sufficient compliance with the law. No separate application for notice to the assignor is required. (*Norman, I.C.S.*) GULAB CHAND *v.* RAM NIWAS. **1936 A.M.L.J. 79.**

——**O. 21, R. 16**—*Application under—Forum—Decree transferred to another Court for execution — Objection to execution by transferee of decree—If can be entertained by executing Court.*

An application under O. 21, R. 16, C. P. Code can be entertained only by the Court which passed the decree and not by the Court to which the decree is sent for execution. If the judgment-debtor wants to contend that the transferee of the decree is merely a benamidar for the judgment-debtor and the decree could not, therefore, be executed against him, he is bound to raise that objection in the course of proceedings taken on the application under O. 21, R. 16. Such an objection could not be entertained by the Court to which the decree is transferred for execution. (*Srivastava, A.C.J. and Narayutty, J.*) JOGENDRA SINGH *v.* OUDH COMMERCIAL BANK, LTD. **12 Luck. 755=165 I.C. 891=1936 O.L.R. 696=9 R. O. 267=1936 O.W.N. 1236=A.I.R. 1937 Oudh 111.**

——**O. 21, R. 16**—Application by transferee under—Certification by decree-holder of adjustment without knowledge of transferee—If bar to application by transferee—Remedy of latter. *See* C. P. CODE, O. 21, RR. 2 AND 16. **45 L.W. 562.**

——**O. 21, R. 16**—Assignment—Validity of—Right of judgment-debtor to question—Decree in favour of minor assigned by guardian *ad-litem* without leave of Court. *See* C. P. CODE, O. 32, RR. 6 (1) (*b*) AND 7 (1). **43 C.W.N. 962.**

——**O. 21, R. 16**—"*Assignment in writing*"—*Form of—What amounts to—Joint application by holder of decree and another to recognise title of latter to the monies due under decree—Court sanctioning arrangement and passing decree in terms—Effect of.*

Where a joint application is made to the Court by the holder of a decree and another wherein it is stated that the former has no objection to surrender all his rights to the latter and that the Court should confirm that arrangement by a decree declaring the latter's title to the monies claimable under the former's decree, and the Court sanctions such arrangement, there is in effect an assignment in writing as contemplated by O. 21, R. 16, C. P. Code. There is no provision in law prescribing a particular form of such an assignment. Some written authority proceeding from the transferor of the decree is sufficient for the Court to take action on the application of the transferee. (*Wassoodew and Sen, JJ.*) ASUNDI *v.* VIRAPPA ANDANEPPA. **I.L.R. (1939) Bom. 271=182 I.C. 779=12 R.B. 44=41 Bom.L.R. 371=A.I.R. 1939 Bom. 221.**

——**O. 21, Rr. 16 and 53, Ss. 47 and 64**—*Assignment of decree after its attachment—Assignee applying to execute decree—Objection by attaching creditor who is also the judgment-debtor, under S. 64 and O. 21, R. 53—Maintainability—Order dismissing the objection—Second appeal.*

N had a decree against *M*, and *M* had a decree against *N* and both of them were decrees for payment of money. *N* attached *M's* decree, and after the attachment, *M* assigned his decree to *G*. *G* made an application under O. 21, R. 16, C. P. Code, for substitution of his name in the place of *M* and for execution of the decree.

Held, that as *N* had a claim enforceable under his attachment, he was entitled to take an objection under the provisions of S. 64, C. P. Code, that the assignment of the decree was void, and that it was also open to him to take an objection under O. 21, R. 53 (6) and show that the decree could not be executed against him.

Held, further, that the order dismissing *N's* objection fell within the scope of S. 47, C. P. Code, and as such a second appeal was competent. (*Ganga Nath, J.*) NARAIN SAHU *v.* GOPI NATH NAIK. **167 I.C. 116=9 R.A. 490=1936 A.W.R. 1167=1937 A.L.R. 128=1936 A.L.J. 1355=A.I.R. 1937 All. 63.**

——**O. 21, R. 16**—*Assignment of decree—Court passing decree making definite order of substitution—Transfer for execution to Court of that province—Power of latter Court to question right of transferee.*

Where the decree-holder has assigned the decree in favour of a person in another province and the Court passing the decree makes a definite

C. P. CODE (1908), O. 21, R. 16.

order of substitution having complied with the provisions of O. 21, R. 16 and transmits the decree for execution to the Court of that province, the executing Court has to presume that the Court passing the decree has acted according to law, that it complied with the provisions of O. 21, R. 16 and gave notice to the judgment-debtor. Once it is so presumed the executing Court cannot question the transferee's right to the execution of the decree. If there is any defect in the execution application the judgment-debtor should make his objection to the Court which passed the decree. Where he does not do so he cannot object that he had no notice of the transfer and that the executing Court was not competent to execute the decree. (*Haveliwala and Lobo, A.J.Cs.*) UDHARAM BAHARMAL *v.* MURARI LAL. **167 I.C. 417=9 R.S. 182=30 S.L.R. 249=A.I.R. 1936 Sind 191.**

——**O. 21, R. 16**—*Assignment of decree—Form of.*

No particular form of assignment is prescribed in the case of decrees either under O. 21, R. 16 or by any other provision of law. Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient. What is required is an assignment in substance which is in writing. (*Pandrang Row and Menon, JJ.*) PERIAKATHA NADAR *v.* MAHALINGAM. **1936 M.W.N. 553=166 I.C. 922=9 R.M. 409=44 L.W. 336=A.I.R. 1936 Mad. 543=71 M.L.J. 161.**

——**O. 21, R. 16**—*Assignment of decree pending suit by judgment-debtor against decree-holder with notice of suit—Execution—Right of judgment-debtor to set-off.*

Where the assignee of a decree, has at the time of assignment knowledge of a suit pending at the instance of the assignor's judgment-debtor against the assignor, he purchases the decree subject to the right of the judgment-debtor to claim a set-off when he comes to execute his decree. (*Almond, A.J.C.*) GOPALDAS *v.* BEHARILAL. **161 I.C. 45=8 R. Pesh. 154=A.I.R. 1936 Pesh. 33.**

——**O. 21, R. 16**—*Assignment of decree—Sale of decree by Court—If amounts to—Formal deed of assignment—If necessary.*

Where pending a partnership suit, the Court with a view of protecting the assets of the partnership, itself sells a decree in Court, by auction through Commissioner to the highest bidder from amongst the parties, a formal assignment in the sense of document which in form purports to assign the decree is not required by law provided the orders of the Court amount to an assignment of the decree in substance. (*Pandrang Row and Menon, JJ.*) PERIAKATHA NADAR *v.* MAHALINGAM. **166 I.C. 922=9 R.M. 409=1936 M.W.N. 553=44 L.W. 336=A.I.R. 1936 Mad. 543=71 M.L.J. 161.**

——**O. 21, R. 16**—*Assignment of decree—What amounts to.*

In a partition suit a decree was passed in favour of the plaintiff. In lieu of the costs incurred by the plaintiff to his solicitors, he executed an indenture in favour of the solicitors. The indenture purported to assign and transfer the full benefit in four sums of money recoverable from the defendants as a result of a decree passed in the partition suit. The solicitors made

C. P. CODE (1908), O. 21, R. 16.

an application for transfer of the decree for its execution as assignees of the decree.

Held, that as the indenture contained no words which purported to assign the decree itself, the solicitors could not ask for transfer of decree as assignee decree-holders. (*Costello, Ag.C.J. and Edgley, J.*) H. N. DUTTA & Co. *v.* TARUBALA DASSI. **174 I.C. 936=10 R.C. 735=A.I.R. 1937 Cal. 570.**

——**O. 21, R. 16**—*Construction—"Court which passed the decree"—Award under Co-operative Societies Act—Execution by Civil Court—Assignment—Power of Civil Court to recognise.*

A Civil Court to which an award made by a Registrar of Co-operative Societies under the Co-operative Societies Act has been transmitted for execution has jurisdiction to recognise an assignment of the award under O. 21, R. 16, C. P. Code. (*Wadsworth, J.*) KANNAPPA MUDALI *v.* VARADACHARIAR. **188 I.C. 204=12 R.M. 816=1939 M.W.N. 986=50 L.W. 507=A.I.R. 1940 Mad. 38=(1939) 2 M.L.J. 596.**

——**O. 21, R. 16**—*Construction—"Transfer by operation of law"—"Assignment in writing" if included—Holder of decree declaring title to another decree passed previously—If transferee "by operation of law."*

The phrase "transfer by operation of law" in O. 21, R. 16, C. P. Code, should receive a restrictive interpretation and not an extensive or comprehensive meaning. The expression "assignment in writing" cannot be regarded as illustrative of the supposed general term comprised in the expression "operation of law," the specific import of the two expressions remains unaffected by their connection with one another in O. 21, R. 16. Transfers "by operation of law" are intended to be confined to testamentary and intestate succession, forfeiture, insolvency, and the like. A decree declaring the title of a party to a decree passed previously cannot be regarded as sufficient to effect a transfer "by operation of law" of the right to execute the decree within the meaning of O. 21, R. 16; nor does it *ipso facto* constitute an assignment. At best it creates a right to obtain an assignment of the decree for the purpose of realization of the debt to which the title is conferred. A person who obtains a right to obtain an assignment of a decree already obtained or the monies recoverable thereunder is not a transferee "by operation of law." (*Wassoodew and Sen, JJ.*) ASUNDI *v.* VIRAPPA ANDANEPPA. **I.L.R (1939) Bom. 271=181 I.C. 779=12 R. B. 44=41 Bom.L.R. 371=A.I.R. 1939 Bom. 221.**

——**O. 21, R. 16**—*Construction—"Transfer by operation of law".*

The words "operation of law" cannot apply to a case where a person has become the owner of a decree by some transaction *inter vivos*. (*Pandrang Row and Menon, JJ.*) PERIAKATHA NADAR *v.* MAHALINGAM. **166 I.C. 922=9 R.M. 409=1936 M.W.N. 553=44 L.W. 336=A.I.R. 1936 Mad. 543=71 M.L.J. 161.**

——**O. 21, R. 16**—*Construction—"Transferee"—Assignment of decree by deed in writing in name of one benami for another—Benamidar—If transferee—Application by real assignee—If one "in accordance with law"—Limitation Act, Art. 182 (5).*

C. P. CODE (1908), O. 21, R. 16.

Where a decree is transferred by a deed of assignment in writing the person named as the assignee in the deed is the "transferee" who is entitled to apply for execution under O. 21, R. 16, C. P. Code, though the assignment in his name is *benami* for another. The real or beneficial transferee is not the "transferee." An application by the real assignee for execution is not in "accordance with law" which would save limitation for a later application under Art. 182 (5) of the Limitation Act. The mere fact that the real assignee gets a decree in a suit declaring that he is the real owner of the decree or the real assignee cannot entitle him to apply in execution or to make his application one in accordance with law. (*Wort and Varma, JJ.*) SHAIKH MOHAMMAD ANAS *v.* BHUPENDRA PRASAD SHUKUL. **17 Pat. 223=177 I.C. 992=11 R.P. 199=19 Pat.L.T. 901=5 B.R. 41=A.I.R. 1938 Pat. 457.**

——**O. 21, R. 16 and S. 146**—*Decree-holder dying pending execution application—Transfer of decree before his death—Right of transferee and his legal representative to continue pending application.*

A pending execution application does not abate by reason of the death of the decree-holder. In these circumstances, S. 146, C. P. Code, would appear to indicate that the continuation of proceedings which was open to the deceased decree-holder, is also open to the person claiming under him. O. 21, R. 16 no doubt lays down that the transferee of a decree may apply for its execution to the Court which passed it, but it should not be interpreted as implying that he must make a regular and fresh application. O. 21, R. 16 primarily applies in the case where no execution application is already pending, in which case even the original decree-holder can only seek for execution by an application. S. 146, C. P. Code, however refers not only to applications made, but also to proceedings which may be taken. In a case of this nature the decree-holder has the right to proceed with his pending application, and S. 146 gives authority for the person claiming under him to do the same. It is true that S. 146 is qualified by the words "save as otherwise provided by this Code," but there being no express provision of the Code regarding continuance of pending execution application upon the death of the decree-holder, this proviso does not prevent S. 146 being applied to continuation of pending execution application. A.I.R. 1931 Bom. 423; A.I.R. 1930 Cal. 614; A.I.R. 1926 Cal. 957; 3 I.C. 324; 26 Cal. 250; A.I.R. 1932 Mad. 73 (F.B.); A.I.R. 1921 Pat. 180; A.I.R. 1924 Pat. 576 and A.I.R. 1930 Sind 283, Rel. on; A.I.R. 1927 All. 165 (F.B.) Diss. (*Middleton, J. C.*) MT. WAZIR JAN *v.* GHULAM HUSSAIN. **167 I.C. 575=9 R. Pesh. 97=A.I.R. 1937 Pesh. 18.**

——**O. 21, R. 16**—*Decree obtained by Bank transferred to another Court for execution—Bank going into liquidation—Right of official liquidator to apply to transferee Court for execution.*

A decree obtained by a Bank was transferred to another Court for execution. In the meantime the Bank went into liquidation and the official liquidator applied to transferee Court for execution. It was contended that O. 21, R. 16, does apply to the facts of the case, as the official liquidator does not come within the ambit of the expression 'transferee of the decree.'

C. P. CODE (1908), O. 21, R. 16.

Held, that the official liquidator was merely the agent of the Court for the purposes of liquidation of the Bank. The decree did not vest in him. He could not take any proceedings in execution in his own name. S. 179, Companies Act, makes it quite clear that the official liquidator was not the transferee of the decree and therefore the decree could be executed by the transferee Court on his application made on behalf of the Bank in liquidation and in its name. (*Jai Lal, J.*) LYALLPUR BANK, LTD. *v.* MANOHAR LAL. **161 I.C. 662=8 R.L. 783 (1)=A.I.R. 1936 Lah. 152.**

——**O. 21, R. 16**—*Non-service of notice—Assignors and judgment-debtor waiving right—Validity of execution sale.*

The notices to which reference is made in O. 21, R. 16, C. P. Code, are merely for the benefit of the transferors and the judgment-debtors and it was apparently the intention of the Legislature to ensure that execution proceedings should not be continued unless the transferors and the judgment-debtors had had a suitable opportunity of coming forward to contest the validity of the assignment if they wished to do so. If, however, the persons directly interested waive their right, acknowledge the validity of the assignment and raise no objection so far as the execution proceedings are concerned, non-compliance with the technical requirements of O 21, R. 16 would not render a sale a nullity, which had been held in the course of execution proceedings in which notices under O. 21, R. 16 had not been served. (*Edgley, J.*) CHARUBALA DEI *v.* BAIKUNTHA NATH JANA. **43 C.W.N. 743=182 I.C. 980=12 R.C. 124=A.I.R. 1939 Cal. 419.**

——**O. 21, R. 16**—*Non-service of notice—Validity of sale.*

The service of notice under O. 21, R. 16, C. P. Code, is an essential pre-requisite to the assumption of jurisdiction by the Court in a proceeding to execute the decree, if the application for execution purports to have been made by one who is not the original decree-holder but describes himself as an assignee of the decree-holder. The non-service of such notice makes the sale held in execution of that decree void *ab initio*, although the purchaser is not the decree-holder himself but an absolute stranger. (*Mukherjea, J.*) SURIFA KHATOON *v.* ASSIMANNESSA BIBI. **178 I.C. 257=42 C.W.N. 949=11 R.C. 336=A.I.R. 1938 Cal. 734.**

——**O. 21, R. 16**—*Person obtaining decree against decree-holder entitling him to share in decretal amount—If transferee of decree.*

A person cannot be regarded as transferee of a decree by operation of law by his merely obtaining a decree against the decree-holder entitling him to a certain share in the decretal amount. Such a person, therefore, has no *locus standi* to maintain an application under O. 21, R. 16, C. P. Code. (*Srivastava, C.J. and Madeley, J.*) TAQIR HUSAIN *v.* MAHOMED AKHTAR. **13 Luck. 549=170 I.C. 904=10 R.O. 58=1937 O.L.R. 489=1937 O.W.N. 882=A.I.R. 1937 Oudh 471.**

——**O. 21, R. 16**—*Procedure—Execution by transferee—Procedure—Preliminaries—Jurisdiction to issue notice and to recognise assignment—Court which passed the decree or transferee Court.*

C. P. CODE (1908), O. 21, R. 16.

The proper procedure to be followed by the transferee of a decree under O. 21, R. 16, C. P. Code, is that he must first apply for execution of the decree to the Court which passed the decree, and pray that the usual notice do issue. After the objections, if any, are heard and the notice is made absolute, the decree may be executed by the transferee in the same manner and subject to the same conditions as if the application were by the decree holder. The transferee must then apply for execution in the usual mode under O. 21, R. 11, specifying the mode or modes in which the Court's assistance is required. If he desires the decree to be transmitted for execution to another Court he must make the application therefor to the Court which passed the decree. But the mode in which execution is sought need not be stated at first in the application under R. 16. The notice required by that rule must first be issued by the Court which passed the decree. Such a notice cannot be issued by the transferee Court. It is only when the notice is made absolute that the transferee acquires a right to apply for execution under R. 11 (2). (*Wadia, J.*) BAIJNATH RAMCHANDER *v.* BINJRAJ JOOWARMAL BATIA & Co. **I.L.R. (1937) Bom. 691=39 Bom.L.R. 540=170 I.C. 877=10 R.B. 143=A.I.R. 1937 Bom. 365**

——**O. 21, R. 16**—*Recording of assignment of decree—Application for—Maintainability.*

There is no justification for reading into O. 21, R. 16, C. P. Code, provision for anything more than a single application for execution by a transferee of a decree. An application by him for merely recording the assignment of the decree is therefore not competent. (*Sen, J.*) RADHA NATH DAS *v.* PRODUMNA KUMAR SARKAR. **I.L.R. (1939) 2 Cal. 325.**

——**O. 21, Rr. 16 and 18**—*Relative scope—Cross decrees—Assignment of one—If bar to set-off.*

O. 21, R. 18, C. P. Code, is not inapplicable to the case of an assignee of a decree, and R. 16 of O. 21, is no bar to the application of R. 18. When a question of cross-decrees arises the provisions of R. 18 of O. 21 cannot be ignored. (*Bennet, J.*) GIRDHAR DAS *v.* TRILOKI NATH. **174 I.C. 53=10 R.A. 536=1938 A.L.R. 224=1937 A.L.J. 1371=1938 A.W.R. (H.C.) 3=A.I.R. 1938 All. 130.**

——**O. 21, R. 16**—*Right of assignor—Right to execute.*

There is no authority for the proposition that from the date of assignment of his decree the assignor-decree-holder is precluded from executing the decree. Until the necessary application under O. 21, R. 16, C. P. Code, is made to the Court which passed the decree by the assignee thereof, the only person who can execute it is the person whose name appears on the record as the decree-holder, *i.e.*, the assignor. (*Dunkley, J.*) MA TIN *v.* KO BA THET. **1939 Rang.L.R. 152=184 I.C. 74=12 R.R. 121=A.I.R. 1939 Rang. 245.**

——**O. 21, R. 16**—Scope—"Decree"—Assignment of—Necessity for writing—Oral assignment—Validity. *See* SALE OF GOODS ACT, S. 2 (7). **41 Bom.L.R. 33.**

——**O. 21, R. 16**—*Transfer by operation of law—Notice to judgment-debtor—Necessity.*

Under O. 21, R. 16, in the case of a decree transferred by operation of law, it is not necessary that notice to the judgment-debtor should issue. (*Bennet, A.C.J. and Ganga Nath, J.*) NARAIN SARUP *v.* DAYA SHANKER. **I.L.R. (1938) All. 425=175 I.C. 590=10 R.A. 700=1938 A.L.R. 450=1938 A.L.J. 308=1938 A.W.R. (H.C.) 160=A.I.R. 1938 All. 256.**

C. P. CODE (1908), O. 21, R. 17.

——**O. 21, R. 16**—Transferee decree-holder—Rights—Payment made to decree holder uncertified but recited in deed of transfer—Right of transferee to execute for whole amount ignoring payment as uncertified. *See* C. P. CODE, O. 21, RR. 2 AND 16. **(1937) 1 M.L.J. 296.**

——**O. 21, R. 16 second proviso**—*Applicability—Conditions—Decree for mesne profits—If money decree before ascertainment of amount.*

Before the second proviso to O. 21, R. 16, C. P. Code, can apply, it must be shown that that the decree transferred, is a money decree and that the transfer took place after the decree sought to be executed was passed.

Quaere.—Whether a decree for mesne profits, before the amount is ascertained, can be regarded as a money decree. (*Fazl Ali and Agarwala, JJ.*) NAND KISHORE LALL *v.* CHANDRIKA PRASAD SINGH. **17 Pat. 206=177 I.C 830=5 B.R. 26=11 R.P. 189=A.I.R. 1938 Pat. 462.**

——**O. 21, R. 16, proviso 2**—*Applicability to mortgage decrees.*

A mortgage decree is not a decree for the payment of money within the meaning of proviso 2 to O. 21, R. 16. The proviso therefore does not apply to mortgage decrees as such, but it comes into operation only after the property is sold and a personal decree is passed. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) PRIBHOL NARUMAL *v.* JETHANAND SANTDAS. **31 S.L.R. 47=70 I.C. 46=10 R.S. 38=A.I.R. 1937 Sind 112.**

——**O. 21, R. 16, second proviso**—*Decree for payment of money—If includes mortgage decree for sale.*

The phrase "decree for the payment of money" occurring in the second proviso to O. 21, R. 16 does not include a decree for sale passed in a mortgage suit. Hence there is no bar to the assignee of the decree proceeding on with the execution, although before the assignment of the decree in his favour, he had acquired the interest of one of the judgment-debtors, and the property in his hands was liable to be sold in execution thereof. (*R.C. Mitter and Khundkar, JJ.*) C. K. BEZBARUA *v.* GOLAK CHANDRA BIZBARUA. **183 I.C. 792=12 R.C. 187=70 C.L.J. 143=A.I.R. 1939 Cal. 425.**

——**O. 21, R. 16, second proviso**—*Order substituting purchaser of decree—Subsequent objection that he is benamidar for one of judgment-debtors—If barred by* res judicata.

An objection by a judgment-debtor under the second proviso to O. 21, R. 16, C. P. Code, that the purchaser of the decree whose name has been ordered to be substituted is a benamidar for one of the judgment-debtors, is not barred by *res judicata* by his failure to raise that objection when notice of the application for substitution was served on him, if he was not aware of that fact at that time. (*Zia-ul-Hasan and Hamilton, JJ.*) SHEO DARSHAN SINGH *v.* RAJENDRA SINGH. **173 I.C. 880=1938 O.L.R. 146=10 R.O. 230=1938 O.W.N. 346=1938 O.A. 246=A.I.R. 1938 Oudh 106.**

——**O. 21, R. 17**—*Amendment—Powers of Court—Application for execution by attachment*

C. P. CODE (1908), O. 21, R. 17.

—Particulars of property to be attached not specified—Application to amend by giving particulars after limitation—If can be allowed.

Under O. 21, R. 17, C. P. Code, it is open to the Court at any time, up to and including the hearing, to make an amendment of an application for execution under the terms of the rule. Where an application for execution by attachment of immovable property, does not specify any property, an application to amend by giving the particulars of the property to be attached may be allowed at the hearing of the application. Rule 17 gives express power to the Court to make amendments and the fact that limitation has expired is irrelevant. Even apart from O. 21, R. 17, the Court has a general jurisdiction to allow amendments. (*Beaumont, C.J. and Wadia, J.*) MAHOMEDBHAI *v.* DAWOODBHAI & Co. **I.L.R. (1938) Bom. 708=177 I.C. 989=11 R.B. 142=40 Bom.L.R. 676=A.I.R. 1938 Bom. 405.**

——**O. 21, R. 17**—Amendment of execution application—Final decree in mortgage suit—Execution—Subsequent decision of appeal from preliminary decree—Necessity to amend final decree or for fresh final decree—Amendment of execution petition in accordance with modification in appeal—Procedure. *See* LIMITATION ACT, ART. 182 (2). **(1937) 1 M.L.J. 407.**

——**O. 21, R. 17**—Amendment of execution petition—Power of Court—Application to amend made after 12 years from date of decree—Competency. *See* EXECUTION—LIMITATION. **71 M.L.J. 256.**

——**O. 21, R. 17**—*Application for execution for a certain relief—Second application asking for a different kind of relief—If one for amendment of the previous application—Decree barred on the date of the second applications—Second application ordered—Legality—Conditions for the applicability of O. 21, R. 17.*

A decree-holder filed an application for execution and asked for the arrest of the judgment-debtor and sale of the holding, if necessary. About nine months afterwards he filed another application for attachment of movables which was ordered.

Held, that the second application is not one for amendment of the previous application under O. 21, R. 17. It is an independent application, asking for a different kind of relief. It marks a substantial departure from the previous application and not a continuation of the execution initiated by that application. It cannot be treated as an application presented on the date on which the original application was presented. As the decree was barred on the date of the second application the attachment is without jurisdiction. The provisions of O. 21, R. 17 require that that the application for execution be returned for amendment for non-compliance with the provisions of Rr 11-14 and the application is thus amended. (*S. K. Ghose, J.*) AZIZ RAHAMAN MOLLA *v.* BEPIN BEHARI MUKHERJI. **174 I.C. 589=10 R.C. 687=66 C.L.J. 57=A.I.R. 1938 Cal. 162.**

——**O. 21, R. 17**—*Scope—Amendment—Powers of Court—Nature of amendment permissible under rule.*

Rowland, J.—The C. P. Code does not make provision for amendment of applications to execute a decree except for the purpose of removing formal defects by reason of which the

C. P. CODE (1908), O. 21, R. 18.

applications fail to conform to the requirements of O. 21, Rr. 11 to 14 and the decree-holder applies to amend the application under R. 17. Otherwise there is nothing in the Code itself to warrant an execution proceeding being carried on in a different form from that in which it is started. (*Agarwala and Rowland, JJ.*) RAM RAN BIJOY PRASAD SINGH *v.* KESHO PRASAD SINGH. **21 Pat.L.T. 407=A.I.R. 1940 Pat. 571.**

——**O. 21, R. 17 (1)**—*Scope—Power of Court under—Application for amendment of application after limitation—Application for execution made in time—Amendment—If may be allowed—Discretion of Court—Exercise of—Considerations.*

O. 21, R. 17 (1) requires a substantial compliance with Rr. 11 to 14, and if an application is defective, the Court can in its discretion allow the defect to be remedied either then and there or within a time to be fixed by it. It can allow an amendment under the rule, where the amendment is applied for after the expiry of the statutory period of limitation, provided the execution application has been made within time. An amendment of the application made after the period of limitation, should not be dismissed on that ground, but must be considered on its merits, having regard to all the circumstances of the case. The Court has a discretion which it must exercise with regard to all the circumstances. If the amendment will not prejudice the rights of the other parties existing at the time of the application for amendment, the Court can allow it; and the amendment, if allowed, relates back to the date of the application for execution which must have been made within time. (*Wadia, J.*) BAIJNATH RAMCHANDER *v.* BINJRAJ JOOWARMAL BATIA & Co. **I.L.R. (1937) Bom. 691=170 I.C. 877=10 R.B. 143=39 Bom.L.R. 540=A.I.R. 1937 Bom. 365**

——**O. 21, R. 17 (2)**—*Applicability—Execution application—Return for amendment—Re-presentation after due amendment—Effect—Original application not containing list of properties—If bars application of R. 17 (2).*

Under O. 21, R. 17, C. P. Code, where an execution application returned for satisfying any of the requirements of O. 21, Rr. 11 to 14, is re-presented, the effect is that the re-presentation dates back to the date of the original presentation. The mere fact that a list of the properties to be sold for realising the decree amount was not given in the original application would not deprive the decree-holder of the benefit of O. 21, R. 17 (2). (*Somayya, J.*) MUTHUKRISHNA RAJA *v.* VISWALINGA KADAVARAYAR. **1940 M.W.N. 547.**

——**O. 21, R. 18**—Applicability—If affected by S. 73. *See* C. P. CODE, S. 73 AND O. 21, R. 18. **1937 A.L.J. 1371=1938 A.W.R. (H.C.) 3.**

——**O. 21, R. 18**—Applicability to assignee of decree—Set-off—Right to. *See* C. P. CODE, O. 21, RR. 16 AND 18. **1937 A.L.J. 1371=1938 A.W.R. (H.C.) 3.**

——**O. 21, Rr. 18-20**—*Mortgage decree and simple money decree—If can be set-off.*

All that R. 20 lays down is that the provisions of Rr. 18 and 19 shall apply to cross-mortgage decrees, *i.e.*, if two contending parties hold mortgage decrees against each other then they will be able to set off decrees one against the other. There is nothing in the provisions of R. 20 which will warrant the Court in holding that a decree

obtained on the foot of a mortgage becomes a decree for payment of money and therefore it can be set off against a simple money decree held by the opposite party. (*Thom and Rachhpal Singh, JJ.*) NAGESAR RAM *v.* RAJNET RAM. **58 All. 907=162 I C. 289=8 R.A. 857=1936 A.W. R. 405=1936 A.L.J. 562=A.I.R. 1936 All. 639.**

——**O. 21, Rr. 18 to 20**—*Right of set-off—Principle of the rules.*

If *X* has a decree against *A* and *A* and *B* have a decree against *X*, it is clear from illustration (*b*) to R. 18 of O. 21, C. P. Code, as well as on principle, that *X* cannot insist on a set-off. But if *B* and *A* both ask for the set-off and it appears that *A* incurred the debt to *X* on behalf of himself and *B*, the set-off need not necessarily be refused. It is true that under Rr. 18 to 20 of O. 21, C. P. Code, the set-off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstances that both decrees arise out of the same transaction. Whatever they arise from, circuity of proceedings thereunder can be avoided and should be avoided—this is the principle of the rules. (*Sir George Rankin.*) HAZARIRAM MARWARI *v.* BANSIDHAR DHANDANIA. **64 I.A. 67=16 Pat. 127=65 C.L.J. 56=1937 A.L.J 553=1937 A.L.R. 117=39 Bom.L.R. 369=1937 P.W.N. 133=1937 O.L.R. 65=3 B.R. 269=166 I.C. 653=1937 A.W.R. 180=45 L.W. 198=18 Pat. L.T. 127=1937 M.W.N. 248=41 C.W.N. 449= 9 R.P.C. 156=1937 O.W.N. 150=A.I.R. 1937 P.C. 39=(1937) 1 M.L.J. 254 (P.C.).**

——**O. 21, R. 18**—*Scope—Cross-decrees—Smaller decree—Executability by attaching creditor of smaller decree-holder—Rateable distribution in respect of such decree.*

Under O. 21, R. 18, C. P. Code, in the case of cross-decrees, the smalier decree must always be set off against the larger decree; a creditor who attaches the smaller decree has no greater rights than the holder of such smaller decree, and cannot claim to execute it in spite of the existence of the larger decree held by the judgment-debtor under the attached decree which is smaller. The rule laid down by O. 21, R. 18, C. P. Code, has first to be applied before any question of rateable distribution can arise under S. 73, C. P. Code. The smaller decree merges in the larger decree and cannot be executed. (*Sulaiman, C.J. and Bennet, J.*) RAJMAN RAM *v.* SARJOO PRASAD. **1937 A.L.J. 473=1937 A.W.R. 441=169 I.C. 639=10 R.A. 47=1937 A.L.R. 567=A.I.R. 1937 All. 422.**

——**O. 21, Rr. 18 and 19**—*Scope—If exhaustive—Different claims arising at different stages in same suit or proceeding—Set-off—Inherent powers of Court.*

Rr. 18 and 19 of O. 21, C. P. Code, are not exhaustive of the cases in which a set-off may be allowed in execution proceedings. The Court, apart from these rules, has inherent jurisdiction on equitable principles to allow a set-off of claims arising at different stages in the same suit or proceeding, and this even if the right to recover the claim sought to be set off is barred by time. Costs payable to one party by another in an appeal from a final decree in a partition suit can be set off against the amount payable by that party to the other under final decree, when the latter applies to execute the decree in his favour.

(*Rupchand Bilaram, Ag. J.C. and Lobo, J.*) MT. NONIBAI *v.* JETHANAND. **32 S.L.R. 162=10 R.S. 218=173 I.C. 574=A.I.R. 1938 Sind 31.**

——**O. 21, R. 18**—Scope—If inconsistent with S. 49. *See* C. P. CODE, S. 49 AND O. 21, R. 18. **1937 A.W.R. 191=A.I.R. 1937 All. 351.**

——**O. 21, Rr. 18 and 19**—*Scope of—If exhaustive.*

The provisions of the Code regarding a set-off are contained in Rr. 18 and 19 of O. 21. It is clear that those rules have been specifically restricted in their application and unless a case can be brought strictly within the terms of those provisions, no set-off can be allowed. (*Almond, J.C.*) CHANDAR BHAN *v.* KUDA BAKSH. **10 R. Pesh. 55=173 I.C. 719=A.I.R. 1937 Pesh. 83.**

——**O. 21, Rr. 18 and 19**—*Set-off of time barred claims—Inherent jurisdiction of Court.*

Apart from the provisions of Rr. 18 and 19 of O. 21, the Court has inherent jurisdiction to allow set-off of the claims arising at different stages in the same suit or proceeding even if the right to recover the claim sought to be set off is barred by limitation. (*Bhide, J.*) BADRI NATH MEHRA *v.* MOTI RAM MEHRA. **183 I.C. 61=12 R.L. 94=41 P.L.R. 385=A.I.R. 1939 Lah. 85.**

——**O. 21, R. 18 (2)**—*Applicability—Claim to set off by assignee of decree—Maintainability—Conditions.*

There is no room for the application of O. 21, R. 18 (2) unless the person claiming the set-off has come on the scene in time. The assignee claiming set-off must have got the assignment before applications are made to execute the decrees. (*Stone, C.J.*) MIRTUNJAYA PRASAD *v.* BIHARILAL. **20 N.L.J. 70.**

——**O. 21, R. 19**—*Applicability—Creditors of parties also concerned.*

O. 21, R. 19 deals with a case in which only the two parties are entitled to recover sums of money from each other. As such it cannot cover a case in which the creditors of one of the parties are also concerned. (*Thomas, C. J. and Zia-ul-Hasan, J.*) BADRI DAS *v.* RAJA BIRENDRA BIKRAM SINGH. **14 Luck. 106=175 I.C. 169=1938 O.A. 461=1938 O.L R. 276=10 R.O. 313=1938 A.W. R. (C.C.) 61=1938 O.W.N. 722=1938 R.D. 708=A.I.R. 1938 Oudh 169.**

——**O. 21, R. 19**—Applicability and scope—If exhaustive in regard to questions relating to execution, discharge or satisfaction under S. 47. *See* C. P. CODE, S. 47. **A.I.R. 1936 Cal. 409.**

——**O. 21, R. 19**—*Applicability—Mortgage suit—Decree for amount recoverable from mortgaged properties—Decree for smaller sum by way of costs in favour of mortgagor personally against mortgagee—Set-off—Right of mortgagor—Defendant to execute his decree.*

O. 21, R. 19, C P. Code, only requires that the two parties must be held entitled to recover sums of money from each other. A decree to *A* against *B* for a sum of money to be recoverable from his property is as much a decree to recover the sum of money from *B*. The decree need not necessarily be a decree directing *A* to recover the sum of money from *B* personally. The section does not say or provide in what manner the decree is to be executed. The rule would apply even to the case of a decree for sale in enforcement of a mortgage or charge. Where a decree for sale in a mortgage suit provides that *A* shall

recover certain sums of money from certain properties belonging to *B* and mortgaged by *B* to *A*, and also provides that *B* should be entitled to recover a smaller amount of money from *A* personally for the proportionate costs decreed in *B's* favour, O. 21, R. 19, C. P. Code, would apply, and *B* is not entitled to execute the decree in his favour. The two decrees can be set off under O. 21, R. 19, C. P. Code. (*Burn and Venkataramana Rao, JJ.*) DAMODAR SHANBHOGUE *v.* GANGE. 177 I.C. 464=11 R.M. 338=1938 M. W.N. 277=47 L.W. 382=A.I.R. 1938 Mad. 638=(1938) 1 M.L.J. 417.

——O. 21, R. 19—*Scope—Decree for specific performance—Direction to plaintiff to deposit certain amount within specified time—Direction that on such deposit defendant was to execute and register deed of conveyance—Costs allowed to plaintiff—Right of plaintiff to deduct costs and interest out of amount to be deposited—Inherent power of Court to allow set-off.*

A decree for specific performance provided that on the plaintiff depositing into Court Rs. 500 within the time mentioned there, the defendant was to execute and get registered a deed of conveyance in the plaintiff's favour; the decree further provided that the defendant was to pay the plaintiff a certain amount by way of costs. Plaintiff deposited into Court within the time limited not the full amount of Rs. 500, but that amount *less* (1) the costs awarded by the decree; (2) a further sum representing certain other costs by way of restitution which accrued in virtue of the same decree; and (3) the interest at 6 per cent. on the costs.

Held, that the plaintiff was entitled to make the above deductions by way of equitable set-off and that the deposit made was proper; assuming that O. 21, R. 19, C. P. Code, was inapplicable to the case, independent of that rule on general principles and in the exercise of the Court's inherent powers such a claim to set off could be given effect to. (*Venkatasubba Row and Cornish, JJ.*) CHINNAMMAL *v* CHIDAMBARA KOTHANAR. I.L.R. (1937) Mad. 59=165 I.C. 484=9 R.M. 262=1936 M.W.N. 703=44 L.W. 34=A.I.R. 1936 Mad. 626=71 M.L.J. 506.

——O. 21, R. 19—*Scope—Set-off not falling under—Power of executing Court to entertain.*

On general principles and in the exercise of its inherent power, an executing Court can entertain and give effect to a claim to set-off even in cases which do not come strictly under O. 21, R. 19, C. P. Code. (*Guha and Bartley, JJ.*) BANK OF DACCA, LTD. *v.* GOUR GOPAL SAHA. I.L.R. (1937) 1 Cal. 57=166 I.C. 855=9 R.C. 602=65 C.L.J. 74=A.I.R. 1936 Cal. 409.

——O. 21, R. 19 (b)—Applicability—Pre-emption decrees. *See* PRE-EMPTION—DECREE FOR. 1939 A.L.J. 48.

——O. 21, R. 20—*Applicability—Decree for sale in enforcement of charge and decree for mesne profits—Right of set-off.*

The application of R. 20 of O. 21, C. P. Code, is not confined to cases where both decrees are mortgage decrees. A decree for sale in enforcement of a charge can, therefore, be set off against a decree for mesne profits. (*Sir George Rankin.*) HAZARIRAM MARWARI *v* BANSIDHAR DHANDANIA. 64 I.A. 67=1937 A.L.J. 553=1937 A.L.R. 117=16 Pat. 127=65 C.L.J. 56=39 Bom.L.R. 369=1937 P.W.N. 133=1937 O.L.R. 65=3 B.R. 269=166 I.C. 653=1937 A.W.R. 180=45 L.W. 198=18 Pat.L.T. 127=1937 M.W.N. 248=41 C.W.N. 449=9 R.P.C. 156=1937 O.W.N. 150=A.I.R. 1937 P.C. 39=(1937) 1 M L.J. 254 (P.C.).

——O. 21, R. 20—"*Decrees for sale in enforcement of a mortgage or charge*"—*If can be restricted to personal judgments.*

The words of O. 21, R. 20, C. P. Code, "decrees for sale in enforcement of a mortgage or charge" —cannot be restricted to personal judgments such as may be given under O. 34, R. 6. (*Sir George Rankin.*) HAZARIRAM MARWARI *v.* BANSIDHAR DHANDANIA. 64 I.A. 67=1937 A.L.J. 553=1937 A.L.R. 117=16 Pat. 127=65 C.L.J. 56=39 Bom.L.R. 369=1937 P.W.N. 133=1937 O.L.R 65=3 B.R. 269=166 I.C. 653=1937 A.W.R. 180=45 L.W. 198=18 Pat.L.T. 127=1937 M.W.N. 248=41 C.W.N. 449=9 R.P.C. 156=1937 O.W.N. 150=A.I.R. 1937 P.C. 39=(1937) 1 M.L.J. 254 (P.C.).

——O. 21, R. 21—Application under—Decree under execution by Collector—Jurisdiction to recognize adjustment—Collector or Court. *See* C. P. CODE, S. 68 AND O. 21, R. 2. 38 Bom.L.R. 505.

——O. 21, R. 22—"*Against the party*"—*Meaning.*

Expression "against the party" means adverse to the party. Hence an order directing the execution proceedings to be struct off for the default of the decree-holder cannot be held to be an order made against the judgment-debtor within the meaning of the proviso to O. 21, R. 22. (*Fazl Ali and Rowland, JJ.*) BRAJOBALA DEBI *v.* THAKUR MADHUSUDAN SINGH. 174 I.C. 463=4 B.R. 446=10 R.P. 523=A I.R. 1938 Pat. 162.

——O. 21, R. 22—*Construction—"Date of decree"—Decree amended—Period of one year—Starting point of—Date of original decree or amended decree.*

The decree contemplated in O. 21, R. 22 must be the decree to be executed not only when it is an appellate decree dealt with in Cl. (2) but also when it is a decree which has been reviewed or amended, as dealt with in Cl. (3) and Cl. (4) of Art. 182, Limitation Act. Hence where a decree is amended the period of one year is to be counted from the date of the amended decree and not the date of the original decree. (*Dhavle and Meredith, JJ.*) MAHESH SINGH *v.* GAJADHAR SINGH. 187 I.C. 79=6 B.R. 421=12 R.P. 557=A.I.R. 1940 Pat. 5.

——O. 21, R. 22—*Decree against father and son—Son dying before execution—Execution taken out against father personally and not as heir of son—Notice under O. 21, R. 22 is not necessary.*

Where a decree is passed against father and son and the son dies before the institution of the execution proceedings and execution is taken out against the father not as heir of his son but against him personally, notice under O. 21, R. 22 is not necessary. (*Wort, J.*) BANARSI LAL *v.* BORHO SAHU. 162 I.C. 482=19 P.W.N. 219=8 R.P. 534 (2)=A.I.R 1936 Pat. 253.

——O. 21, R. 22—*Execution against property of deceased judgment-debtor—Substitution of wrong person by Court passing decree—If final—Jurisdiction of executing Court to hold otherwise.*

C. P. CODE (1908), O. 21, R. 22.

It is a serious irregularity to proceed in execution against the property of a deceased judgment-debtor in the absence of his proper legal representative. The executing Court is not precluded from deciding that a person is not the proper legal representative by reason of the fact that the Court which passed the decree has already substituted that person as legal representative after notice to him but in his absence. When the proper legal representative is some other person, namely, the widow of the judgment-debtor, the order substituting a wrong person cannot be taken to be a decision to the effect that the widow is not the legal representative of the judgment-debtor. (*Fazl Ali and Agarwala, JJ.*) SARJU SINGH *v.* BHAGWAT PRASAD SINGH. 176 I.C. 566 =1938 P.W.N. 259=4 B.R. 738=11 R.P. 91=19 Pat.L.T. 193=A.I.R. 1938 Pat. 372.

——O. 21, R. 22—Legal representatives—Hindu father—Decree against—Execution against sons—Insolvency and death of father after attachment of joint family property—Sons—If liable to be proceeded against. *See* C. P. CODE, Ss. 2 (11), 50 AND 53 AND O. 21, R. 22. 38 Bom L.R. 977.

——O. 21, R. 22—*Notice—Absence of—Objection as to—When to be raised.*

As the absence of notice under O. 21, R. 22 goes to the root of the jurisdiction of the executing Court, the objection can be taken at any time. (*Fazl Ali and Rowland, JJ.*) BRAJOBALA DEBI *v.* MADHUSUDAN SINGH. 174 I.C. 463=4 B.R. 446 =10 R.P. 523=A.I.R. 1938 Pat. 162.

——O. 21, R. 22—*Notice—Omission to give to one of legal representatives—Validity of sale.*

Where one of the judgment-debtors has died at the time of the execution of the decree, and one of his sons is substituted for him in the application for execution, but another son is left out, the sale must be held to be void for want of notice under O. 21, R. 22, in so far as the share of the latter son is concerned. But as regards the shares of other judgment-debtors the sale cannot be held to be void. (*S. K. Ghose, J.*) ANIL KUMAR ROY *v.* AHAMMED ALI. 187 I.C. 121=12 R.C. 546=A.I.R. 1940 Cal. 23.

——O. 21, R. 22—*Notice—Omission to issue or to record reasons—Irregularity—Notice issued under R.* 66—*Effect of.*

Ordinarily, the failure to issue a notice under O. 21, R. 22, C. P. Code, or to record reasons for not issuing such notice would be fatal, and a sale concluded in such circumstances would be void. But where notice of the execution proceedings and sale thereunder is issued under O. 21, R. 66 and the judgment-debtor appears and contests these proceedings, it is unnecessary to give the judgment-debtor notice of proceedings that he is already well aware of, and failure to give notice under O. 21, R. 22 and the omission to record reasons dispensing with this notice is no more than an irregularity which does not take away the jurisdiction of the Court. (*Ram Lall, J.*) LADLI PRASHAD *v.* CHAMAN LAL. I.L.R. (1940) Lah. 231=185 I.C. 843=12 R.L. 324=41 P.L.R. 632 =A.I.R. 1939 Lah. 473.

——O. 21, R. 22—*Notice—Waiver of—Judgment-debtor putting in appearance and asking for adjournment of sale—If can plead want of notice.*

Where the judgment-debtor has put in appearance and repeatedly asked for adjournment of the sale, obviously with the knowledge of the sale, he cannot plead want of notice under O. 21, R. 22 for setting aside the sale. (*S.K. Ghose, J.*) ANIL KUMAR ROY *v.* AHAMMED ALI. 187 I.C. 121=12 R.C. 546=A.I.R. 1940 Cal. 23

——O. 21, R. 22—*Scope—Compliance—Minor judgment-debtor attaining majority — Notice issued to him as minor—Decree-holder and Court unaware of true age of judgment-debtor—Sale—If nullity—Irregularity—If ground for setting aside sale.*

The issue of a notice to a major judgment-debtor as if he were a minor is not necessarily fatal to further proceedings in execution, and a sale in execution cannot be held to be null and void on that ground. If no notice of any kind is issued to a judgment-debtor, there is a refusal to carry out the plain duty imposed upon the Court by O. 21, R. 22, C. P. Code, and the Court has no jurisdiction to conduct the sale subsequently. But there is a very clear distinction between a case in which no notice is issued at all to a particular defendant and a case in which notice is issued to him as if he were still a minor. Where notice of execution of a decree against a father and his son is issued to the son as minor represented by his guardian, the father, after he has become a major, the reason for issuing such notice being that both the decree-holder and the Court are aware of the true age of that defendant, there is sufficient compliance with the provisions of O. 21, R. 22 and no question of jurisdiction arises, if the facts subsequently show that the defendant was not a minor but a major, the issuing of the notice might amount to an irregularity, which, if it results in substantial loss, would be a ground for setting aside of the sale. (*King and Krishnaswami Aiyangar, JJ.*) KODANDARAMA REDDIAR *v.* PARTHASARATY AYYANGAR. 180 I.C. 549=11 R.M. 718=1938 M.W.N. 1061=48 L.W. 586=A.I.R. 1939 Mad. 5=(1939) 1 M.L.J. 93.

——O. 21, R. 22—Scope—Execution against surety for judgment-debtor—Death of surety pending sale—Notice to heirs to show cause against continuance of execution — Necessity. *See* C. P. CODE, S. 55 (4). 18 Pat. 761.

——O. 21, R. 22—*Scope—Major judgment-debtor allowing himself to be described as minor represented by guardian* ad litem—*Notice sent to guardian* ad litem—*Sale—If a nullity—Right of judgment-debtor to plead invalidity on ground of non-compliance with O. 21, R. 22.*

Where a defendant judgment-debtor is in fact a major but is described in the execution application as a minor represented by his guardian *ad litem* without any objection being raised by him, and notice under O. 21, R. 22, C. P. Code, is sent not to him direct, but to his guardian *ad litem*, he cannot be heard to say that O. 21, R. 22, C. P. Code, has not been complied with and therefore the execution sale held under such circumstances is a nullity. He himself having led the Court to believe that a notice directed to the guardian *ad litem* would be properly served, by holding himself out to be a minor, cannot turn round and challenge the sale on that ground. There is no non-compliance with O. 21, R. 22 in such a case. (*Agarwala and Rowland, JJ.*) RAJENDRA PRASAD *v.* DEBI PRASAD. 19 Pat. 393=188 I.C. 725=6 B.R. 729=13 R.P. 18=(1940) P.W.N. 105=21 Pat.L.T. 223=A.I.R. 1940 Pat. 303.

——O. 21, R. 22—*Scope — Non-compliance—Effect on sale.*

Once the Court has found that the legal conditions do not exist for proceeding with an execution, there is a lack of jurisdiction in the carrying on of that execution; and all the proceedings taken in the execution which was not properly constituted in the absence of proper notice under O. 21, R. 22 must fall to the ground. In a suit against members of a joint family the minor members were represented by a pleader *M* appointed by the Court to be their guardian *ad litem*; but in the execution application no reference was made to the above named pleader. Execution was sought to be taken against the minors describing them as under the guardianship of *G*. No notice was issued to *M* under O. 21, R. 22 and to the minors through him. There was no order of the Court either removing him or appointing *G* as guardian *ad litem* so as to authorize the latter to represent the minors in the execution proceedings and to make any admissions on their behalf or any terms with the decree-holders with reference to the proceedings in the execution and to such matters as adjournments on conditions:

Held, that the sale of the share of the minors was unsustainable. (*Rowland and Chatterji, JJ.*) BACHOO PRASAD *v.* GOBARDHAN DAS. **187 I C. 492 =12 R.P. 599=6 B.R. 478=A.I.R. 1940 Pat. 62.**

——O. 21, R. 22—Scope—Non-compliance with —Sale after death of judgment-debtor without impleading legal representatives—Validity. *See* C. P. CODE, S. 50 AND O. 21, R. 22. **43 L.W. 238 =1936 M.W.N. 60=A.I.R. 1936 Mad. 205=70 M.L.J. 162 (F.B.).**

——O. 21, R. 24—*Execution of process—Delegation—Power of Nazir.*

Ministerial acts can always be delegated where such acts do not require the exercise of any discretion or judgment. A Nazir can, therefore, delegate the execution of the process to his subordinates. (*Tek Chand and Dalip Singh, JJ.*) PILADA RAM *v.* TULSI DAS ASA NAND. **186 I.C. 633=12 R.L. 407=41 P.L.R. 838=A.I.R. 1940 Lah. 30.**

——O. 21, R. 24—*Return of warrant to process-server for endorsement — Process-server re-executing warrant—Legality — Process-server if protected.*

The bailiff has power to delegate the execution of the warrant to the process-server. But where the bailiff did not delegate his authority to arrest to the process-server but merely returned the warrant to him for endorsement and not for further execution and the process-server re-executed the warrant instead of endorsing it, the re-arrest is unlawful. But the process-server would be protected under S. 79, I. P. Code, as he made a genuine mistake of fact and thought that the process was returned to him for re-execution and was not actuated by malice. (*Mosley, J.*) MAUNG HTWE *v.* BA THANT. **1940 Rang.L.R. 253=188 I.C. 303=41 Cr.L.J. 567=12 R.R. 364 =A.I.R. 1940 Rang. 112.**

——O. 21, R. 24—*Warrant of arrest—When deemed to be executed.*

When the judgment-debtor is arrested and brought before the Court the warrant of arrest is executed, that is to say, the arrest has been

carried out, though it may not have been carried out in accordance with law and may have resulted in the discharge of the judgment-debtor. (*Mosley, J.*) MAUNG HTWE *v.* BA THANT. **1940 Rang.L.R. 253=188 I.C. 303=41 Cr.L.J. 567= 12 R.R. 364=A.I.R. 1940 Rang. 112.**

——O. 21, R. 24 (2)—Warrant without seal of Court—Validity. *See* PENAL CODE, S. 225-B. **1939 Rang.L.R. 445.**

——O. 21, R 26—Surety under—Liability of—Dismissal of execution petition on ground of stay order—If final disposal—Surety—If discharged. *See* EXECUTION—APPLICATION FOR. **46 L.W. 350 =A.I.R. 1937 Mad. 721.**

——O. 21, R. 28—*Parent Court directing stay of all proceedings relating to confirmation of sale —Executing Court merely postponing confirmation of sale and dismissing objections by judgment-debtor for setting aside sale—Order, if* ultra vires.

An *ex parte* decree obtained at *L* was transferred to *P* for execution and certain property belonging to the judgment-debtors was sold. The judgment-debtors put in objections before the executing Court for setting aside the sale and at the same time applied in the Court at *L* for setting aside the *ex parte* decree. The Court at *L*, at the instance of the judgment-debtors, issued a robkar to Court at *P* directing that proceedings with respect to the confirmation of the sale should be stayed, the words used being 'karwai-manzuri multawi-ki-jawe'. The executing Court ordered that the confirmation of the sale was to be postponed but rejected the objections by the judgment-debtors. The sale was confirmed by successor of the Judge.

Held, that the robkar clearly meant that all proceedings leading up to the confirmation of the sale were to be stayed and that the executing Court in holding that the order merely directed postponement of confirmation of sale put a wrong interpretation on it.

Held, further, that the executing Court had no jurisdiction to consider the objections of the judgment-debtor after it had received the robkar and its order dismissing the objections was *ultra vires* and the order of confirmation of sale was also without jurisdiction. The executing Court having assumed jurisdiction not vested in it the orders were open to revision. (*Mir Ahmad, A. J. C.*) BUNDHELKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLES BANK OF NORTHERN INDIA, LTD., LAHORE. **162 I.C. 416=8 R. Pesh. 197=A.I.R. 1936 Pesh. 97.**

——O. 21, R. 29—*Applicability—Suit by judgment-debtor against assignee decree-holder — Claim for damages for breach of contract to get satisfaction entered up—Application for stay of execution— Maintainability.*

A suit by the judgment-debtor against the assignee-decree-holder for damages for breach of an agreement between them whereby the defendant agreed to receive in satisfaction of the assigned decree certain bonds and to get satisfaction entered up, is one to which O. 21, R. 29, C. P. Code, applies and an order can therefore be made in such suit staying the execution of the decree assigned pending disposal of the suit. (*Beasley, J.*) KANNAMMAL *v.* MUTHUKUMARASWAMI CHETTY. **160 I.C. 563=8 R.M. 667=43 L.W.,**

C. P. CODE (1908), O. 21, R. 29.

493=1936 M.W.N. 349=A.I.R. 1936 Mad. 102 =70 M.L.J. 120.

——O. 21, R. 29—Equitable right under—If available against assignee of decree. *See* C. P. CODE, S. 49 AND O. 21, R. 29. **40 Bom.L.R. 188.**

——O. 21, R. 30—*Simultaneous execution by two or more methods—Discretion of Court.*

No doubt, cases may conceivably occur in which simultaneous execution by two or more methods might be reasonable and feasible; but where there is already sufficient security for the realisation of the decretal amount and the procedure of the decree-holder savours rather of harassment than a genuine desire to realise the decretal amount, the Court may in its discretion refuse the relief against the person of the judgment-debtor. (*Macpherson and Mahomed Noor, JJ.*) ADITYA PRASAD *v.* ISHWAR SINGH. **160 I.C. 685=8 R.P. 377=A.I.R. 1936 Pat. 28.**

——O. 21, Rr. 30 and 21—*Decree for money—Warrant of arrest—Right of decree-holder.*

The discretion given to the Court by O. 21, R. 21, C. P. Code, to refuse simultaneous execution against the person and the property does not extend to compelling the decree-holder to take either one of these methods. The executing Court should not disallow an application for the arrest of a defaulting judgment-debtor on the ground that the latter has sufficient properties against which the decree-holder might proceed in the first instance. A debtor who is able to pay but does not pay is in the position of a person in contempt of Court. The proper course for such a person is to purge his contempt by fulfilling the order of the Court and pay the decretal amount. (*James and Rowland, JJ.*) KAMALDHARI LAL *v.* KAMLESHWARI SAHAY. **18 Pat. 366=5 B.R. 485 =180 I.C. 767=11 R.P. 531=1939 P.W.N. 604= A.I.R. 1939 Pat. 380.**

——O. 21, Rr. 30 and 64—Scope and effect of —Power of Court to sell without attachment. *See* EXECUTION SALE. **41 Bom.L.R. 463.**

——O. 21, R. 31—*Decrees executable under.*

A decree for delivery of specific movable property which can be enforced by the stringent method prescribed by O 21, R. 31, C. P. Code, can be passed only in a suit where the plaintiff alleges and proves facts which give him a right to compel its delivery under the provisions of S. 11 of the Specific Relief Act. 39 M. 1 (F.B.), Rel. on. (*S. K. Ghose and Nasim Ali, JJ.*) KARNANI INDUSTRIAL BANK, LTD. *v.* BARABANI COAL CONCERN, LTD. **178 I.C. 833=11 R.C. 411=42 C.W. N. 523=A.I.R. 1938 Cal. 471.**

——O. 21, R. 31—*'Specific movable'—If includes money.*

The words "specific movable' in R. 31 do not include money. 37 M. 381, Rel. on. (*S. K. Ghose and Nasim Ali, JJ.*) KARNANI INDUSTRIAL BANK, LTD. *v.* BARABANI COAL CONCERN, LTD. **178 I.C. 833=11 R.C. 411=42 C.W.N. 523=A.I.R. 1938 Cal. 471.**

——O. 21, R. 32—Applicability to scheme decree—Clause in decree directing payment by trustee—Executability. *See* C. P. CODE, S. 92. **71 M.L.J. 87.**

——O. 21, R. 32 (as amended in Rangoon)—*Decree for restitution of conjugal rights—Property attached and sold within three months from date of attachment—Sale, if void.*

C. P. CODE (1908), O. 21, R. 32.

The Code of Civil Procedure does not empower the Court to change a decree for the restitution of conjugal rights into a decree for the payment of money. All that it empowers the Court to do is to sell the property attached and out of the proceeds allow the decree-holder compensation. But this is subject to the condition that the attachment must have been in force for a period of three months or for such further period not exceeding twelve months as the Court may have decided. Where in a case a decree for restitution of conjugal rights was passed and the property of the judgment-debtor was attached and the Court ordered the property to be sold before it had been under attachment for three months wrongly treating the decree as one for the payment of money.

Held, that the Court had no jurisdiction to order the property to be sold and that the sale therefore was void. (*Leach, J.*) MA WE GYAN *v.* MAUNG THAN BYU. **1937 Rang.L.R. 164=169 I.C. 967=10 R.R. 48=A.I.R. 1937 Rang. 126.**

——O. 21, R. 32—*Restitution of conjugal rights—Decree for—Mode of enforcement.*

Under O. 21, R. 32, C. P. Code, as amended, a decree for restitution of conjugal rights can be enforced by attachment of property and not by imprisonment. (*Abdul Qayoom, C.J. and Wazar, J.*) KHATUNI *v.* RAMZAN MIR. **41 P.L.R.J. and K. 80.**

——O. 21, R. 32—*Scope—Decree for injunction—Execution—Application by decree-holder for issue of notice to defendant embodying terms of decree—Maintainability.*

There is no provision of law which entitles the holder of a decree for an injunction to apply to the Court for the issue of a special order or notice embodying the terms of the decree and for having it served through Court on the defendant. It may be that the Court has an inherent power to do so, but the decree-holder has no right to ask the Court to do so. Where it is not shown that the defendant has done any act which can be construed as disobedience or failure to obey the decree of the Court, no such application is maintainable, under O. 21, R. 32, C. P. Code, especially when it is admitted that the time for enforcing the injunction has not yet arrived. (*Pandrang Row, J.*) RANGAYYA NAIDU *v.* SUBBAYYA NAIDU. **164 I.C. 668=9 R.M. 166=1936 M.W.N. 773=44 L.W. 308=A.I.R. 1936 Mad. 706=71 M.L.J. 286.**

——O. 21, R. 32—*Scope—Prohibitory injunction—Disobedience by defendant—Remedy of plaintiff—Fresh suit—Necessity.*

Where a decree granting a prohibitory injunction is disobeyed by the defendant, the plaintiff is not bound to bring a fresh suit to convert the prohibitory injunction into a mandatory injunction so as to enable him to apply under O. 21, R. 32 (5), C. P. Code. The relief to which the plaintiff is entitled is laid down by R. 32 itself, that is, detention of the defendant in the civil prison, or attachment of his property or both. The plaintiff can apply for any of those reliefs or for both, and the fact that he claims relief under O. 21, R. 32 (5) would not preclude him from claiming the proper relief by applying to the proper Court. (*Wort, A.C.J. and Manohar Lall, J.*) TOON LAL *v.* SONOO LAL. **178 I.C. 807=5 B.R. 139=11 R.P. 300=1938 P.W.N. 625=A.I.R. 1938 Pat. 522.**

C. P. CODE (1908), O. 21, R. 32.

——O. 21, R. 32 (5)—*Applicability—Prohibitory injunctions.*

The act required to be done by O. 21, R. 32 (5) has reference only to a positive act such as is required to be done under a mandatory injunction. Hence, Cl. 5 of R. 32 of O. 21 does not apply to prohibitory injunctions. (*Thom, C.J. and Ganga Nath, J.*) ANGAD *v.* MADHO RAM. I. L.R. (1938) All. 673=1938 A.W.R. (H.C.) 368 =176 I.C. 488=10 R.A. 108=1938 A.L.J. 558= 1938 A.L.R. 628=A.I.R. 1938 All. 416.

——O. 21, R. 32 (5)—*Applicability—Prohibitory injunction—Relief under R. 32 (5)—Availability.*

The injunction contemplated by O. 21, R. 32 (5) is a mandatory injunction and not a prohibitory injunction, and the relief to which a party is entitled under Cl. (5) of R. 32 can be claimed only in the case of a mandatory injunction and is not available in the case of a prohibitory injunction. (*Wort, A.C.J. and Manohar Lall, J.*) TOON LAL *v.* SONOO LAL. 178 I.C. 807=5 B.R. 139=11 R. P. 300=1938 P.W.N. 625=A.I.R. 1938 Pat. 522.

——O. 21, R. 34—*Decree absolute for divorce directing judgment-debtor to secure to his wife a certain amount and to execute proper instrument—Judgment-debtor not complying with direction—Power of Court to execute on behalf of judgment-debtor special power-of-attorney authorising wife to withdraw amount decreed out of provident fund of judgment-debtor—Provident Funds Act, S. 3 (1).*

Where a decree absolute for divorce directs the jugment-debtor to secure to his wife a certain amount and to execute a proper instrument securing that payment, and the judgment-debtor does not take any steps to comply with the direction, the Court can under O. 21, R. 34, C. P. Code, execute a special power of attorney in favour of the wife authorising her on behalf of the judgment-debtor to withdraw the amount decreed out of the provident fund of the judgment-debtor in a railway company in which he was employed. The execution of such a special power of attorney does not contravene the provisions of S. 3 (1) of the Provident Funds Act. (*Zia-ul-Hasan and Madeley, JJ.*) N. A. M. MOORE *v.* A. R. MOORE. 13 Luck. 466=170 I.C. 656=10 R.O. 55 =1937 O.L.R. 476=1937 O.W.N. 863=A.I.R. 1938 Oudh 48.

——O. 21, R. 34—*Decree for execution of document—If may be passed in any suit.*

There is no foundation for the view that an order under O. 21, R. 34, C. P. Code, can be made only when a decree for execution of a document is made in a suit for specific performance of contracts. The rule simply contemplates that there should be a decree for execution of a document. It may be passed in any suit. (*Bartley and Nasim Ali, JJ.*) BIRENDRA NATH ROY BAHADUR *v.* PURAN CHAND NOHATA. 178 I.C. 998=11 R.C. 457=67 C.L.J. 235=A.I.R. 1938 Cal. 767.

——O. 21, R. 35—*Applicability—Final decree in foreclosure suit—Execution against party in possession not bound by decree—Legality.*

Under O. 21, R. 35, C. P. Code, a final decree for foreclosure and possession can only be executed against the person bound by the decree. When a person not bound by the decree is in possession of his share in the property, the decree for possession cannot be legally executed against such person. If the Police assist the decree-holder in removing that person from possession they exceed the powers given by O. 21, R. 35 (3), C. P. Code. (*Greenfield, F.C.*) GOPIDAS *v.* SETH MISHRILAL. 1938 N.L.J. 45.

C. P. CODE (1908), O. 21, R. 35.

——O. 21, R. 35—*Delivery of possession of land—If includes crops standing thereon.*

Where the decree-holder is put in possession of land such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land. (*Mya Bu, J.*) MAUNG KAN *v.* MAUNG PO TOK. 1940 Rang. L.R. 157= 12 R.R. 183=185 I.C. 119=41 Cr.L.J. 123=A.I.R. 1939 Rang. 388.

——O. 21, R. 35 (2)—*Decree for joint possession—Nature—Effect of—Actual physical possession—How obtainable.*

A decree for joint possession can be executed only in the mode prescribed by O. 21, R. 35 (2), C. P. Code. Such possession cannot be actual physical possession. Nor can such a decree entitle one to take actual physical possession to the ouster of the persons in actual possession of the plot in dispute. If such a decree-holder wishes to obtain actual physical possession he has to bring a suit for partition. (*Mulla, J.*) JAINTI PRASAD *v.* SHEO SAHAI. 1939 A.W.R. (H.C.) 311=1939 A.L.J. 375=1939 R.D. 264.

——O. 21, R. 35 (2)—*Decree for joint possession—Possession not delivered in manner prescribed—Effect of.*

In giving joint possession to a party in execution of a decree, the procedure prescribed by O. 21, R. 35 (2) must be strictly followed. Joint possession under a decree granting joint possession, can only be delivered in the particular manner prescribed by the legislature in O. 21, R. 35 (2). It is not within the competence of anybody to attempt to give joint possession in any other manner, and if the patwari or any other person takes upon himself to deliver such joint possession in a manner contrary to the express language of the legislature, their action would not have any legal effect. Such possession is not effective for purposes of limitation and does not provide a fresh starting point for limitation. A.I.R. 1933 Lah. 427, Rel on. (*Agha Haidar, J.*) BHAGAT RAM *v.* ALI BAKHSH. 166 I.C. 377=9 R.L. 363=A.I.R. 1936 Lah. 749.

——O. 21, R. 35 (2)—*Decree-holder obtaining symbolical possession—Possession of judgment-debtor—If adverse.*

Where, in execution of a decree, the decree-holder is given only a symbolical possession of property, actual possession of it being impossible, the possession of it by the judgment-debtor cannot be adverse to that of the decree-holder. A.I.R. 1917 P.C. 197, Rel. on. (*Sulaiman, C.J. and Bennet, J.*) MT. MAHARAJI *v.* BHAGWATI PRASAD. 160 I.C. 1037=8 R.A. 689=1936 A.W.R. 69=1936 A.L.J. 80=1936 A.L.R. 224=A.I.R. 1936 All. 85.

——O. 21, R. 35 (2)—*Decree-holder put in symbolical possession—Judgment-debtor continuing in possession—Effect of—Suit by decree-holder for possession—Limitation.*

The passing of a decree for joint possession and handing over of symbolical possession in pursuance thereof under O. 21, R. 35, C. P. Code, terminates all claims to adverse title previously

C. P. CODE (1908), O. 21, R. 35.

put forward by the defendants. But the fact that the person in possession continues to be in enjoyment of the property just after the formality under O. 21, R. 35 is over, does to all intents and purposes amount to an immediate dispossession of the decree-holder after he has been put in possession. The decree-holder must under Art. 142, Limitation Act, come within 12 years to recover possession again and if he does not, his suit is time barred. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MT. JAN SULTAN *v.* ABDUL MANAN. **160 I.C. 441=8 R. Pesh. 108 (2)=A.I.R. 1936 Pesh. 7.**

——**O. 21, R. 35 (2)**—*Delivery of possession proclaimed merely by beat of drum with consent of judgment-debtor—Copy of warrant not affixed on property—Effect of.*

Where with the approval and consent of the judgment-debtor, delivery of possession was proclaimed merely by beat of drum without affixing a copy of the warrant on the property as required by O. 21, R. 35 (2), C. P. Code, the delivery of possession must be deemed to be valid and effective as against the judgment-debtor. (*Srivastava, Ag. C.J.*) HARDEO SINGH *v.* HIRA SINGH. **13 Luck. 96=166 I.C. 404=9 R.O. 313=1937 O.L.R. 22=1937 R.D. 33=1937 O.W.N. 58=A.I.R. 1937 Oudh 275.**

——**O. 21, R. 35 (2)**—*Joint undivided property—Mode of delivery of possession.*

Where the property covered by the decree is joint undivided property, the proper mode of delivery of possession in execution proceedings is in the manner provided by O. 21, R. 35 (2), C. P. Code. (*Guha and Mitter, JJ.*) DWARIKA NATH MONDAL *v.* RAM NATH BARMAN. **67 C.L.J. 39.**

——**O. 21, R. 37**—*Warrant for arrest of judgment-debtor at place* A—*Judgment-debtor arrested at place* B *within Court's jurisdiction—Legality of arrest.*

If a warrant is addressed to the bailiff authorising him to arrest a judgment-debtor at a place *A* and the judgment-debtor happens to be found at the place *B* within the jurisdiction of the Court, the bailiff is authorised to make the arrest at the place where the judgment-debtor is actually found. (*Din Mohammad, J.*) BABU RAM *v.* HARI RAM DAULAT RAM. **42 P.L.R. 374.**

——**O. 21, R. 40**—*Arrest of judgment-debtor—Person not earning more than Rs.* 40—*Arrest, if can be ordered.*

As the normal limit under which a man cannot reasonably be expected to support himself and a family should be taken to be Rs. 40, because of S. 60 (1) (*i*), C. P. Code, unless there is anything on the record from which it can be said to have been proved that a judgment-debtor earns more than Rs. 40 a month, and fails to pay the excess to the decree-holder the Court should not order arrest of a judgment-debtor. (*Baguley and Mosley, JJ.*) SATYANARAYANA *v.* SEETHA RAMASWAMY. **178 I.C. 989=11 R.R. 293=A.I.R. 1938 Rang. 477.**

——**O. 21, Rr. 41 and 42**—*Applicability—Decree directing inquiry into damages—Application for an order for examination of judgment-debtor—Competency.*

A decree directing an inquiry as to damages is a decree for money within the meaning of O. 21, R. 42, C. P. Code, and a plaintiff who has obtained such a decree directing an inquiry as to damages is entitled to invoke the aid of O. 21, R. 41 and apply for an order for the examination of the judgment-debtor in order to enable him to effect an attachment in pursuance of the right given to him under O. 21, R. 42. The Court is vested with the discretion whether to give the relief under R. 41 or not, and it must exercise its discretion after considering the circumstances of the case. (*Venkataramana Rao, J.*) UNITED MOTOR FINANCE CO. *v.* FIAT MOTORS EASTERN INDIA AGENCY. **189 I.C. 294=49 L.W. 696=13 R.M. 231=1939 M.W.N. 627=A.I.R. 1939 Mad. 699=(1939) 2 M.L.J. 80.**

C. P. CODE (1908), O. 21, R. 42.

——**O. 21, R. 41**—*Scope and object of—"Any other person"—Garnishee denying debt—Power of Court to summon and to order to produce account books.*

Rule 41 of O. 21, C. P. Code, is in effect a provision to obtain delivery in aid of the execution of the decree which the decree-holder has obtained. The expression "any other person" might include a garnishee, *i.e.*, a person who owes or is alleged to owe a debt to the judgment-debtor. The Court is empowered to summon any person including the garnishee whom it thinks necessary and may require the person summoned to produce any document in his possession or power. But this power should be cautiously exercised. The discretionary power vested in the Court under R. 41 of O. 21, to examine the garnishee must ordinarily be limited to cases where the garnishee admits the debt, and the Court may find out the exact amount of the debt before ordering the execution. But if the debt is totally denied, the Court ought not ordinarily to examine the garnishee or direct him to produce account books unless it is satisfied on the affidavits or on the examination of the judgment-debtor that in the interests of the decree-holder the garnishee should be examined and his books produced to better enable him to proceed with the execution and to prevent a possible fraud or collusion between the judgment-debtor and the garnishee. For that purpose the alleged garnishee may be examined with reference to the books or other documents which he may be directed to produce for finding out whether there were dealings between him and the judgment-debtor probabilising a debt. The garnishee ought not to be subjected to any examination or cross-examination for the purpose of determining whether the liability subsists or not. Further only those books or documents which would throw light on the question of debt should be ordered to be produced. Any order for further production would be oppressive. (*Venkataramana Rao, J.*) MATHIAM BIVI AMMAL *v.* UNION BANK, LTD., KUMBAKONAM. **48 L.W. 157=178 I.C. 212=1938 M.W.N. 702=11 R.M. 422=A.I.R. 1938 Mad. 771.**

——**O. 21, R. 42**—*"Any other matter"—If includes preliminary decree for accounts in partnership suit.*

The words "any other matter" in O. 21, R. 42, C. P. Code, cannot include a preliminary decree directing the taking of accounts in a partnership suit. (*D. N. Mitter and S. K. Ghose, JJ.*) SAILENDRA KRISHNA CHOUDHURY *v.* HARENDRA KUMAR ROY. **167 I.C. 430=9 R.C. 686=40 C.W.N. 1393=A.I.R. 1937 Cal. 4.**

C. P. CODE (1908), O. 21, R. 44.

———O. 21, R. 44—*Compliance with rule—Presumption.*

An attachment which is not in accordance with the provisions of O. 21, R. 44, C. P. Code, would, no doubt, not operate to transfer possession of the property to the Court. But the presumption of law is that anything which is done by the officer of the Court is properly done until the contrary is shown. *Omnia praesumuntur rite acta.* (*Allsop, J.*) RAM BAHAL AHIR *v.* EMPEROR. **162 I.C. 653=8 R.A. 882=37 Cr.L.J. 675=1936 A.W.R. 325=1936 A. Cr. C. 105=1936 A.L.J. 283=1936 Cr.C. 428=1936 A.L.R. 462=A.I.R. 1936 All. 364.**

———O. 21, R. 46—*Attachment of debt due to judgment-debtor—Equitable charge already created by judgment-debtor over such debt—Position of attaching creditor—Equitable charge—What amounts to—Charge on future property—Validity.*

In a garnishee proceeding, the attaching creditor stands in the shoes of the judgment-debtor. No attachment could be made, when there is no existing debt due by the garnishee to the judgment-debtor, and if the judgment-debtor has already parted with his interest in the debt by assignment or created an equitable charge in respect of the same in favour of another person, the attaching creditor acquires no larger rights than his debtor. An agreement between a debtor and a creditor that a fund should be applied in a particular way will not create a valid equitable charge upon the fund. It is further necessary that an obligation should be imposed in favour of the creditor to pay the debt out of the fund. The test really is whether there was an intention to assign or create a charge, which will give the assignee an equitable interest in the fund itself. An assignment by way of charge on future property is a perfectly valid assignment in equity, which will attach to the property, when it comes into existence. Where *X* advanced money to *Y* for the purpose of enabling the latter to carry out his contracts with *Z* and it was stipulated that all bills made out by *Y* against *Z* would be forthwith made over to *X* who would have the exclusive right to collect the monies due on the bills under an irrevocable power of attorney executed by *Y* in his favour and the amounts thus realised would be appropriated by *X* towards repayment of the advances made by him.

Held, that there was an intention to create a charge in favour of *X* in respect of the money due on the bills and that an attachment of the bills by a creditor of *Y* must be taken to be subject to that charge. (*Mukherjea, J.*) LEGDIR NANJI *v.* SURENDRA MOHAN. **177 I.C. 920=11 R.C. 289=68 C.L.J. 97=42 C.W.N. 971=A.I.R. 1938 Cal. 606.**

———O. 21, R. 46—*Attachment of patent—Service of prohibitory order on Controller of Patents—Sufficiency.*

It is impossible to hold that the Controller of Patents is a "person in possession of the same" within the meaning of O. 21, R. 46, C. P. Code. Therefore, the service of a prohibitory order upon the Controller of Patents is not an attachment of the patent within the meaning of S. 51, C. P. Code. (*Panckridge, J.*) RADHA KISSEN

C. P. CODE (1908), O. 21, R. 46.

v. HIRALAL BANJARA. **I.L.R. (1938) 2 Cal. 618=181 I.C. 909=11 R.C. 869=42 C. W. N. 1086=A.I.R. 1939 Cal. 283.**

———O. 21, R. 46—*"Debt"—Dividend payable in insolvency to creditor not yet declared—If attachable.*

A dividend payable to a creditor in insolvency is not a debt liable to be attached under O. 21, R. 46; when no dividend has at all been declared, there is nothing to attach. (*Mockett, J.*) BALUSAMI *v.* OFFICIAL ASSIGNEE OF MADRAS. **189 I.C. 406=1939 M.W.N. 573=A.I.R. 1939 Mad. 811.**

———O. 21, R. 46—*Debt outside jurisdiction—Attachment of—Power of Court.*

It is not competent to a Court to attach in execution of a decree a debt payable to the judgment-debtor outside its jurisdiction by a person not resident within its jurisdiction. (*Baguley, J.*) SHEERAZEE *v.* REDDY. **1939 Rang.L.R. 694=187 I.C. 105=12 R.R. 305=A.I.R. 1940 Rang. 34.**

———O. 21, R. 46—*Debt payable to judgment-debtor outside jurisdiction—Attachment of—Jurisdiction of Court.*

A debt payable to the judgment-debtor outside the jurisdiction of the Court by a person not resident within its jurisdiction, cannot be attached under O. 21, R. 46, C. P. Code. (*Derbyshire, C.J. and Nasim Ali, J.*) SATYAPRIYA BANERJEE *v.* KUNDAN MULL BASU. **I.L.R. (1939) 1 Cal. 523 =183 I.C. 818=12 R.C. 196=69 C.L.J. 267=43 C.W.N. 512=A.I.R. 1939 Cal. 428.**

———O. 21, R. 46—*Garnishee denying debt—Enquiry into the truth or existence of debt—Power of executing Court.*

Where a debt is attached in execution and the garnishee denies that any debt is due by him to the judgment-debtor, it is not for the executing Court to enquire into or decide whether the debt attached is really due or not. Consequently, when an objection by the garnishee denying the debt is disallowed, the objection and the order of the executing Court disallowing the objection and ordering him to pay into Court do not come within the purview of O. 21, Rr. 58 to 63, C. P. Code, so as to preclude him from denying the debt in a suit subsequently instituted against him by the decree-holder as receiver for realising the debts on the basis of the attachment. (*Burn and K. S. Menon, JJ.*) BUTCHAYYA CHETTY *v.* KRISHNAMACHARI. **59 Mad. 966=160 I.C. 534=8 R. M. 663=1936 M.W.N. 54=43 L.W. 68=A. I. R. 1936 Mad. 152=70 M.L.J. 20.**

———O. 21, R. 46—*Garnishee denying debt and objecting to jurisdiction of Court—No investigation or decision—Sale—Subsequent suit by purchaser—Plea of denial of debt—If open.*

Where a garnishee denies the debt and objects to the jurisdiction of the Court to compel him to deposit the debt, but does not ask to have the matter investigated and there is no investigation or decision on the point raised by him, and the Court orders sale of the debt for whatever it is worth, the garnishee can raise the matter in the subsequent suit by the purchaser. (*Vivian Bose, J.*) JAGANNATH *v.* JAMNAVALLABH. **168 I. C. 266=9 R.N. 247=A.I.R. 1936 Nag. 218.**

———O. 21, Rr. 46 and 58—*Garnishee—No denial of debt—Plea of set-off as between himself*

C. P. CODE (1908), O. 21, R. 46.

and judgment-debtor—If can be gone into in execution.

A decree-holder sought to attach some moneys owing to his judgment-debtor from a third party. The third party objected to the attachment on the ground that the judgment-debtor owed him a sum or sums of money which extinguished his debt to the judgment-debtor and further contended that the set-off had been recognized in other cases by the Court. He claimed therefore to have the question of set-off considered. The executing Court refused to investigate into the question.

Held, that though the existence of the debt due by the garnishee to the judgment-debtor could not in execution proceedings be challenged, yet the garnishee was entitled to give evidence to prove that there was a debt owing to him by the judgment-debtor either diminishing or extinguishing the debt in question and such matters could be gone into in execution proceedings. (*Beasley, C.J.*) SATYANARAYANAMURTY *v.* VENKATESWARA RAO. **175 I.C. 513=10 R.M. 789=A.I.R. 1937 Mad. 848.**

———**O. 21, R. 46**—*Joint debt—Attachability—Royalty payable under mining lease jointly to judgment-debtor and another—Judgment-debtor's share, if can be attached—Preliminary decree passed in partition suit between judgment-debtor and the other—Effect of.*

Garnishee proceedings cannot be had in respect of a joint debt. Where, therefore, the debt is in respect of royalty payable under a mining lease jointly to the judgment-debtor and another, the creditor has no right to obtain a *garnishee* order attaching the share of the judgment-debtor. The fact that a preliminary decree has been passed in a partition suit between the judgment-debtor and the other does not alter the position. Any change in the rights of the lessors *inter se* by reason of the partition cannot affect their lessee. The latter is entitled to rely on his lease which contemplates a joint debt. (*McNair, J.*) LAKSHMINARAIN *v.* AMAR NATH. **I.L.R. (1937) 2 Cal. 440=41 C. W.N. 1074.**

———**O. 21, R. 46**—*Judgment-debtor having share in shop—Mode of attachment.*

Where in execution a decree-holder seeks to attach the share of the judgment-debtor in a shop, attachment can be made only by prohibiting the judgment-debtor from transferring his share and subsequently such share can be sold in execution of the decree, but specific goods in the shop can neither be attached nor sold. (*Jai Lal, J.*) MOHAN LAL-LAKSHMI DAS *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **174 I.C. 692=10 R.L. 583=A.I.R. 1937 Lah. 313.**

———**O. 21, R. 46**—*Jurisdiction—Prohibitory order to garnishee residing beyond jurisdiction—Power of Court to issue.*

A Court is not competent, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside its jurisdiction by a person not resident within the jurisdiction of that Court. It cannot directly issue a prohibitory order to a garnishee resident beyond its jurisdiction. (*Mockett, J.*) BALUSAMI *v.* OFFICIAL ASSIGNEE OF MADRAS. **189 I.C. 406=1939 M.W.N. 573=A. I.R. 1939 Mad. 811.**

C. P. CODE (1908), O. 21, R. 47.

———**O. 21, R. 46**—*Share of debt—Prohibitory order, if can be issued.*

Even if a share of a debt (*i.e.*) a debt due to the judgment-debtor and other persons jointly, cannot be attached under O. 21, R. 46, C. P. Code, or under any other rule prescribed, a prohibitory order similar to one under R. 46 can be made under the inherent powers of the Court where the Court finds it necessary for the ends of justice. (*Nasim Ali and R.C. Mitter, JJ.*) UPENDRA MOHAN PAL CHOWDHURY *v.* NALINI MOHAN RAY CHOUDHURY. **I.L.R. (1937) 2 Cal. 48=41 C.W.N. 410=171 I.C. 119=10 R.C. 226=A.I.R. 1937 Cal. 199.**

———**O. 21, R. 46 (1) (a) and (c)**—*Applicability—Deposit by member of East India Cotton Association to the Association under the Rules—Attachability.*

A deposit made by a member of the East India Cotton Association with that Association under their rules is not liable to attachment in execution of a decree against the depositor-member under O. 21, R. 46 (1) (*a*) or (*c*). The interest which the member has in the deposited sum is not "movable property not in the possession of the judgment-debtor" within the meaning of Cl. (*c*) of O. 21, R. 46 (1); nor is it "debt" within the meaning of Cl. (*a*). It is a sum of money which is repayable only in certain contingencies. (*Beaumont, C. J. and Rangnekar, J.*) GAJROJ SHEOKARAN *v.* HUKAMCHAND. **I.L.R. (1939) Bom. 109=180 I.C. 360=11 R.B. 296=41 Bom. L.R. 19=A.I.R. 1939 Bom. 90.**

———**O. 21, R. 46 (3)**—*"Payment"—Meaning of—Payment contrary to attachment—If effective.*

Payment contemplated in O. 21, R. 46 (3) is payment into the attaching Court so as to be available for the attaching decree-holder and not payment into the particular Court even when the payment is earmarked for some other purpose. S. 64, C. P. Code, provides that any payment to the judgment-debtor of the attached debt contrary to the attachment shall be void as against all claims enforceable under the attachment. The mere fact that the debtor does not pay money into the hands of the judgment-debtor but to somebody else will not make it any the less payment contrary to the attachment if payment is made at the instance of or for the benefit of the judgment-debtor. If therefore such a debtor pays the amount not in attaching Court but in another Court not under compulsion on behalf of the judgment-debtor, such payment is not sufficient to discharge him from his liability to the attaching creditor. (*Varadachariar, J.*) NARAYANASWAMI AYYAR *v.* A. MALLU. **161 I.C. 473=8 R.M. 829 =43 L.W. 713=1936 M.W.N. 147=A.I.R. 1936 Mad. 251=71 M.L.J. 243.**

———**O. 21, R. 47**—Applicability—Decree for rent obtained by lambardar under C. P. Tenancy Act. *See* C. P. CODE, O. 21, RR. 53, 60 AND 47. **1940 N.L.J. 56.**

———**O. 21, R. 47**—*Applicability—Judgment-debtor member of joint Hindu family.*

Quaere.—Whether O. 21, R. 47, C. P. Code, applies to the members of a Hindu coparcenery, one of whom happens to be a judgment-debtor? (*Venkatasubba Rao, J.*) KOLLIVENKATARATNAM *v.* THE COLLECTOR OF KISTNA. **163 I.C. 480 (2) =9 R.M. 23=37 Cr.L.J. 836=43 L.W. 760=**

C. P. CODE (1908), O. 21, R. 48.

1936 M.W.N. 728=1936 Cr.C. 672=A.I.R. 1936 Mad. 560=70 M.L.J. 717.

———O. 21, R. 48 and Ss. 73 and 151—*Issue of prohibitory order at the instance of one of the decree-holders—Nature of his rights—Existence of other decree-holders, if a ground to cancel order—Order directing distribution among all creditors—Legality—Inherent powers—Limits.*

Where on the application of one of the decree-holders a prohibitory order under O. 21, R. 48 attaching a portion of the salary of the judgment-debtor has been issued, that decree-holder is lawfully entitled to receive the whole amount deducted from the judgment-debtor's salary under the prohibitory order, save and in so far as a proper order under S. 73, C. P. Code, if any, that might have been passed. In the absence of any such order the Judge has no jurisdiction to cancel the prohibitory order at the instance of the judgment-debtor and direct that a sum fixed to be deposited by the judgment-debtor should be *pro rata* distributed amongst all the decree-holders, when no one of them has asked for it. The inherent powers of the Court cannot be used for the purpose of overriding the rights of one party for the benefit of the other. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) SOLOMON NAHOME *v.* A. E. MCCANN. **1940 Rang.L.R. 421=A.I.R. 1940 Rang. 201 (S.B.).**

———O. 21, Rr. 48 and 58—*Notice for attachment of salary of Government servant—Objection raised by Secretary of State—Order of Court holding salary to be attachable—Revision, if competent.*

Notice under O. 21, R. 48, C. P. Code, was issued to the Secretary of State for attachment of salary of a Government servant. The Secretary of State objected to it, but the Court ordered that it was attachable. No appeal was filed by the Secretary of State from this order.

Held, that as the Secretary of State raised the objection that the salary was not attachable, the procedure came within the purview of O. 21, R. 58, C. P. Code, and unless it was challenged by a regular suit under O. 21, R. 63, the order of the executing Court was conclusive and the revision application must fail.

Held, further, that the order passed under O. 21, R. 48 was an order passed in execution of the decree under S. 47, C. P. Code, and as such was subject to an appeal and hence revision was incompetent. A.I.R. 1933 Bom. 185, Rel. on. (*Agha Haidar, J.*) SECRETARY OF STATE *v.* ISHAR DAS. **166 I.C. 214=9 R.L. 354=A.I.R. 1936 Lah. 761.**

———O. 21, Rr. 48 and 46—*Salary of M.L.A.—Liability to attachment.*

An elected member of the Provincial Legislative Assembly is not a 'public officer' within the meaning of S. 2 (17), C. P. Code, and consequently his salary cannot be attached under O. 21, R. 48. Nor can it be attached under O. 21, R. 46 as a debt, before it becomes payable. The amendments to S. 60, C. P. Code, introduced by the Act of 1937, may alter the position somewhat in a case of this kind. (*Derbyshire, C.J. and Nasim Ali, J.*) SATYAPRIYA BANERJEE *v.* KUNDAN MULL BASU. **I.L.R. (1939) 1 Cal. 523=183 I.C. 818 =12 R.C. 196=69 C.L.J. 267=43 C.W.N. 512 =A.I.R. 1939 Cal. 428.**

C. P. CODE (1908), O. 21, R. 50.

———O. 21, R. 49—*Appointment of receiver under—Matters to be decided prior to—Absence of service of notice of application—Effect.*

Unless the questions whether the judgment-debtor was a partner of the partnership and whether any money was due to him from it, are decided, no receiver could be appointed. Further any order passed would be unsupportable, if notice of the application had not been served as required by R. 49 (4) of O. 21. (*Ganga Nath, J.*) PIRTHI NATH *v.* NIRANJAN LAL BHARGAVA. **189 I. C. 24=1940 A.L.J. 120=13 R.A. 75=1940 A. W.R. (H.C.) 153 (1)=A.I.R. 1940 All. 250.**

———O. 21, R. 49—*Interest of partner in partnership assets—If movable property.*

An interest of a partner in partnership assets is intended to be treated as movable property under R. 49 of O. 21. (*Addison and Din Mohammad, JJ.*) BARKAT RAM *v.* BHAGWAN SINGH. **177 I.C. 116=11 R.L. 269=A.I.R. 1938 Lah. 65.**

———O. 21, R. 49 (2)—*Interest of a partner—Meaning.*

O. 21, R. 49 (2) charges the interest of the partner in the partnership property and profits. The partner's interest is his right to participate in the net assets of the firm, that is, in the value or proceeds of the assets less the liabilities to third parties and not less any liability to himself; for any liability to himself only increases his interest in the property at the expense of other partners. An advance is but an item in the partnership account. The Court charges and orders the sale of whatever the partner is entitled to from the partnership business as between that partner and the other partners, as if on dissolution of the firm. (*Mosely and Sharpe, JJ.*) T. R. M. RAMASWAMY CHETTIAR *v.* M. M. K. KUITAIN CHETTYAR. **189 I.C. 446=A. I. R. 1940 Rang. 153.**

———O. 21, R. 50—*Applicability—Award—If "decree."*

The provisions of O. 21, R. 50, C. P. Code, apply to an award against a firm passed in arbitration proceedings; an award stands on the same footing as a decree. (*Davis, J.C. and Mehta, A.J.C.*) PIARALAL NANAK CHAND *v.* THE BOMBAY CO. **30 S.L.R. 6=165 I.C. 826=9 R.S. 108 =A.I.R. 1936 Sind 211.**

———O. 21, R. 50—*Applicability—Joint Hindu family firm.*

O. 21, R. 50, C. P. Code, applies to a joint Hindu family firm. (*Rowland and Chatterji, JJ.*) NATHUNI PRASAD *v.* RADHA KISHUN DUTT RAI FIRM. **6 B.R. 64=184 I.C. 701=21 Pat.L.T. 618=12 R.P. 261=A.I.R. 1940 Pat. 149.**

———O. 21, R. 50—*Decree against limited liability Company—Order making shareholders liable—If a nullity.*

No order under O. 21, R. 50, C. P. Code, could be passed making the shareholders liable when the decree is against a limited liability company. Such an order must be deemed to be a nullity and must be ignored by the Executing Court. (*Jai Lal, J.*) NIHAL CHAND *v.* KHARAK SINGH-SUNDAR SINGH. **164 I.C. 513=9 R.L. 134=39 P.L.R. 163=A.I.R. 1937 Lah. 59.**

———O. 21, R. 50—*Decree obtained against firm by serving summons in suit upon two persons as partners—Execution petition stating three others*

C. P. CODE (1908), O. 21, R. 50.

as remaining partners—Leave not obtained from Court—Validity of execution.

Where a decree is obtained against a firm by serving summons in the suit upon two persons as partners of that firm, the mere fact that three other persons are stated to be the remaining partners of the firm in the petition for execution of the decree cannot make the execution invalid. These other persons do not, no doubt, come under O. 21, R. 50 (1) (*b*) and (*c*), C. P. Code. The decree-holder cannot execute the decree against them unless he has obtained leave from the Court which has passed the decree. If this leave has not been obtained, he is entitled to proceed against the other two judgment-debtors, and the execution petition is valid so far as they are concerned. (*Bartley and Nasim Ali, JJ.*) RADHA CANTA PAL *v.* PULIN KRISHNA PAL. **177 I.C. 812=11 R.C. 277=42 C.W.N. 310=A.I.R. 1938 Cal. 316.**

——O. 21, R. 50 (2)—*Application for leave under—Limitation—Execution against partner more than three years after date of decree—Competency—Limitation Act, Arts.* 181 *and* 182.

An application for leave to execute a decree against a partner of a firm under O. 21, R. 50 (2), C. P. Code, is an application in execution of the decree against the firm, and falls under Art. 182 and not Art. 181 of the Limitation Act. The application can be made at any time during which the decree remains capable of being executed; and a decree-holder can apply for execution against an individual partner, obtaining leave if necessary, even if more than three years have elapsed since the passing of the decree, provided the execution is not barred in any other way. (*Davis, J.C. and Lobo, A.J.C.*) KISHINCHAND BUTAMAL *v.* DHANIRAM JAMNADAS. **30 S.L.R. 88=164 I.C. 1011=9 R.S. 82=A.I.R. 1936 Sind 138.**

——O. 21, R. 50 (2)—*Duty to grant leave under—Decree transferred for execution to another Court.*

A decree against a firm was sought to be executed against a person alleged as being a partner of the firm. The Bombay High Court sent the decree for execution to Karachi Court and imposed upon it the duty to grant leave under R. 50 (2) and determine the liability of the person.

Held, that so far as the duty imposed was concerned the order of the first High Court was *ultra vires* and that part could not be executed by the latter High Court, as under O. 21, R. 50 (2) it is for the Court which passed the decree to grant leave or to decide the disputed liability of the partner. (*Davis, J.C. and Mehta, A.J.C.*) BRITISH INDIA STEAM NAVIGATION CO., LTD. *v.* A. M. JIWANJEE & CO. **30 S.L.R. 290=161 I.C. 524=8 R.S. 149=A.I.R. 1936 Sind 11.**

——O. 21, R. 50 (2)—*Enquiry under—Scope—If affects legal representatives of partner.*

The enquiry under O. 21, R. 50 (2), C. P. Code, is limited to the determination as to whether the persons who are sought to be made liable under the decree are partners or not. It is not intended to affect the legal representatives of the partner. (*D. N. Mitter and S. K. Ghose, JJ.*) PURNA CHANDRA SHAHA *v.* HOSSAIN KASIM DADA. **41 C.W.N. 566.**

C. P. CODE (1908), O. 21, R. 50.

——O. 21, R. 50 (2)—Ex parte *decree obtained against firm mentioning individuals constituting it—Application to set aside* ex parte *decree dismissed on footing that decree was against firm—Sale of personal properties of partners without leave of Court—Validity—Decree-holder, if can contend that decree was against individuals composing firm.*

A decree was obtained against a firm mentioning also the individuals that constituted the firm. Execution was taken and a certain property was brought to sale and purchased by the decree-holders. Upon this judgment-debtor No. 1 and the sons of judgment-debtor No. 2, who had died since the passing of the decree, objected that the property did not belong to the firm; that the decree-holders had not obtained any order under O. 21, R. 50, making the partners of the firm personally liable and that the sale was accordingly without jurisdiction. This objection was allowed by the lower appellate Court. On appeal against the appellate order, it was contended on behalf of the decree-holder appellant that the decree under execution was not a decree against the firm at all and that it was, therefore, unnecessary to obtain any order under O. 21, R. 50. It appeared that at a later stage judgment-debtors Nos. 1 and 2 applied under O. 9, R. 13 (as the decree had been passed *ex parte* against them) to have it set aside. This application was dismissed but only on the finding that though they had not been individually served with summonses the decree was quite valid in view of the service of summons on defendant No. 4 who had been stated by the plaintiffs to be the manager of the business of the firm. The Court which dealt with the application further held that it would be "open to defendants Nos. 1 and 2 to come under O. 21, R. 50, C. P. Code, in the execution stage to object to the attachment of their personal properties."

Held, that in view of what happened in the proceedings under O. 9, R. 13, it was no longer open to the decree-holders to contend that what they had was a decree against the individuals composing the firm and not merely a decree against the firm, and that, therefore, their appeal should fail. (*Courtney-Terrell, C.J. and Dhavle, J.*) RAMANAND GANPAT RAI *v.* RAKHAL MANDAL. **163 I.C. 34=8 R.P. 631=1936 P. W. N. 527=A.I.R. 1936 Pat. 496.**

——O. 21, R. 50 (2)—*Jurisdiction.*

Difference between an order under O. 21, R. 50 (2) and an order under S. 47 is that an order under S. 47 may be passed by the Court executing the decree whereas an order under O. 21, R. 50 (2) may be passed only by the Court which passed the decree. (*Davis, J.C., Lobo and Weston, JJ.*) SEOOMAL KHEMCHAND *v.* SH. LAHNIBAI. **I.L.R. (1939) Kar. 589=182 I.C. 470=12 R.S. 13=A.I.R. 1939 Sind 161 (F.B.).**

——O. 21, R. 50 (2)—*Jurisdiction—Application for leave under—Decree transferred for execution to another Court—Subsequent application to original Court for leave under O.* 21, *R.* 50 (2) *—Competency—Order granting leave—If* ultra vires.

The Court which passed the decree is competent and has jurisdiction to grant leave to the decree-holder under O. 21, R. 50 (2), C. P. Code, even

C. P. CODE (1908), O. 21, R. 50.

after the decree has been transferred for execution to another Court. Merely because the decree is transferred for execution by it to another Court, it does not cease to have jurisdiction to grant such leave. (*Sulaiman, C.J. and Yorke, J.*) KRISHNA CHANDRA AGARWAL *v.* MOHAN LAL BIKRAM DAS & Co. **I.L.R. (1937) All. 946=10 R.A. 433=1938 A.L.R. 41=172 I.C. 901=1937 A.W.R. 850=1937 A.L.J. 1165=A. I. R. 1937 All. 758.**

———O. 21, R. 50 (2)—*"Partner"—Legal representative of deceased partner—Question as to liability—If can be raised in execution.*

The term "partner" in O. 21, R. 50 (2), C. P. Code, includes his legal representative; and the question of the liability of the legal representative of a deceased partner of a firm can therefore be raised and decided in execution proceedings. (*Davis, J.C. and Mehta, A.J.C.*) PIARALAL NANAK CHAND *v.* THE BOMBAY CO. **30 S. L.R. 6=165 I.C. 826=9 R.S. 108=A.I.R. 1936 Sind 211.**

———O. 21, R. 50 (2)—*Person filing objection under protest under O. 30, R. 8—Enquiry into his liability—If excluded.*

A person who files an objection under protest under O. 30, R. 8, C. P. Code, denying that he is a partner, does not fall under the category of persons to whom O. 21, R. 50 (1) (*b*) applies, and an enquiry into his liability under O. 21, R. 52 (2) is, therefore, not excluded. (*D. N. Mitter and S. K. Ghose, JJ.*) PURNA CHANDRA SHAHA *v.* HOSSAIN KASIM DADA. **41 C.W.N. 566.**

———O. 21, R. 50 (2)—*Procedure—Application for leave under—Prior application for execution—If condition precedent.*

There is no warrant for holding that an application under O. 21, R. 50 (2), C. P. Code, for leave to execute a decree obtained against a firm as against some partner or partners cannot be made unless in the first instance a regular darkhast has been filed under O. 21, R. 11, C. P. Code. The logical course is to apply for leave first and then to execute the decree afterwards. (*Beaumont, C.J. and Kania, J.*) COOVERJI VARJANG *v.* COOVERBAI. **I.L.R. (1940) Bom. 562=42 Bom.L.R. 564.**

———O. 21, R. 50 (2)—Question of liability under—Jurisdiction to decide—Transferee Court—Competency of. *See* C. P. CODE, S. 42. **A.I.R. 1937 Pesh. 96.**

———O. 21, R. 50 (2)—*Scope—Arbitration—Award—Filing of—Application for—Objection that party is not partner of firm—Maintainability—Question—When to be raised.*

The question whether all or any of the persons served with notices of an award or of its filing in Court are partners in a firm can only be litigated when an application under O. 21, R. 50, C. P. Code, is made against persons alleged to be partners and permission is sought to enforce the award against them. Such a question cannot be gone into in proceedings for filing the award and the hearing of objections directed against it. (*Rupchand Bilaram, A.J.C.*) FLEMING SHAW & Co. *v.* BAHADUR & Co. **29 S.L.R. 292=164 I.C. 1015=9 R.S. 83=A.I.R. 1936 Sind 121.**

———O. 21, R. 50 (2)—*Scope—Grounds on which liability may be disputed.*

O. 21, R. 50 (2), C. P. Code, is sufficiently wide to permit a person desiring to dispute his liabi-

C. P. CODE (1908), O. 21, R. 52.

lity as a partner to do so not only on the ground that he is not a partner, but on other grounds as well. He can dispute his liability by establishing that a contract of sale was beyond the scope of the partnership. He can also contend that the individual partners had no authority on behalf of the partnership to refer disputes between the firm and persons with whom the firm had dealings, to arbitration. (*Panckridge, J.*) TOLARAM NATH MULL, *In re.* **I.L.R. (1939) 2 Cal. 312=185 I. C. 44=12 R.C. 427=43 C.W.N. 997=A. I. R. 1940 Cal. 28.**

———O. 21, R. 52—Applicability—Surplus sale proceeds in Court. *See* C. P. CODE, S. 60 (*m*). **A.I.R. 1937 Nag. 391.**

———O. 21, R. 52—*Attachment before judgment in force—Another decree-holder without giving notice to Court putting to sale property in execution of his decree and purchasing it—Property again sold in execution of decree, in which it was attached before judgment—Right of decree-holder previously purchasing property to damages.*

An attachment before judgment, is made in the interest of the decree-holder subsequently obtaining decree in the suit, in order to prevent the judgment-debtor from disposing of the property before the sale and does not operate against any other creditor of the judgment-debtor. Where however a creditor putting property to sale in execution of his decree and purchasing it, while an attachment before judgment is in force, omits to give notice according to O. 21, R. 52 to the Court attaching the property before judgment, and the property is again sold in execution of the decree in that suit, the decree-holder purchasing the property and omitting to give notice under O. 21, R. 52, is not entitled to get any damages from the other decree-holder, as the decree-holder by omitting to take action under O. 21, R. 52 prejudices the other decree-holder. (*M.C. Ghose, J.*) SASHI BHUSAN GHOSE *v.* BHUPENDRA NATH PAL. **167 I.C. 455=9 R.C. 693=A.I.R. 1936 Cal. 112.**

———O. 21, R. 52—*Scope—Dividend in Official Assignee's hand due to judgment-debtor—Attachability before declaration of dividend.*

O. 21, R. 52, C. P. Code, deals with the position where property is in the custody of the Court and says how it shall be attached. Where no dividend in the Official Assignee's hands to which judgment-debtor is entitled is declared until a particular date, the creditors of the judgment-debtor are entitled to nothing prior to that date since there is nothing in the Official Assignee's hands to which they can lay claim. (*Roberts, C. J. and Leach, J.*) RAMASWAMY CHETTYAR *v.* DAYABHOY & SONS. **175 I.C. 869=11 R.R. 13=A.I.R. 1937 Rang. 538.**

———O. 21, R. 52—*Suit by* A *for recovery of rent due from paddy lands—Appointment of receiver—*A *applying for attachment of amount collected by receiver—Other decree-holders,* C *and* D, *also applying for permission to attach the money—Permission granted—No order under O. 21, R. 52, issued—Right of* A *to the amount.*

A, a company, filed a suit against *B* for recovery of a sum of money being rent due from paddy lands. *A* also applied for an injunction

C. P. CODE (1908), O. 21, R. 52.

restraining *B* from dealing with the rental paddy for the current year. The application was treated as an application for appointment of a receiver of the rental paddy of the land from which rent was due and a receiver was appointed. The receiver filed his accounts and reported a certain sum as the balance in his hands available for distribution. *A* subsequently applied in execution of his decree by arrest of *B*, but on advice of the Court applied for attachment of the amount collected by the receiver. Meanwhile two other decree-holders *C* and *D* holding decrees against *B* filed applications praying for permission to attach the money in the hands of the receiver. The permission was granted but neither party took any further steps. No order was issued under O. 21, R. 52, requesting that the money should be held subject to further orders nor was there anything on the record showing that the decrees of *C* and *D* were transferred to the Court in which the application for execution was made. On application by *A* for payment of the amount deposited by the receiver, *C* and *D* filed objections. The Court holding that *C* and *D* had effected an attachment of the amount decided that they alone were entitled to utilise the amount towards the satisfaction of their decrees, and that they had a prior claim to *A* inasmuch as their attachments were prior. *A* appealed from the order.

Held, that the order of the lower Court was wrong. *C* and *D* had not effected a valid attachment of the amount in question. All that they did was to go to the Court holding the 'assets' and ask for permission to attach it. That was not sufficient. Their proper procedure was to apply to the Court executing their decrees for an order under O. 21, R. 52.

Held, further, that there was no provision of law under which the Court could have appointed the receiver. The appointment of receiver being made by agreement or consent of parties, only such amount could be attached by any other creditor of *B* which was in excess of the amount due to *A*. *C* and *D* had no claim whatever to the amount deposited by the receiver. *A* company was entitled to have the amount paid to them towards satisfaction of their decree. (*Ba U and Mackney, JJ.*) SYRIAM LAND CO., LTD. *v.* GURA BISWAL. **A.I.R. 1936 Rang. 83.**

———**O. 21, R. 52, Proviso**—Construction and scope—Right to money in deposit under attachment—Dispute between decree-holder and judgment-debtor—Jurisdiction to decide—Custody Court or executing Court. *See* C. P. CODE, S. 47. **19 N.L.J. 287.**

———**O. 21, R. 52, Proviso**—*Right of suit—If barred.*

Any decision in a proceeding under O. 21, R. 52, proviso, C. P. Code, between the decree-holder and a third person would not be a decision under S. 47, C. P. Code and therefore a regular suit would not be barred. (*Syed Nasim Ali and Sen, JJ.*) KANJI VALJI *v.* KALIDAS THAKURSAY. **182 I.C. 860=12 R.C. 104 (2)=69 C.L.J. 108=A.I.R. 1939 Cal. 413.**

———**O. 21, R. 53**—*Attachment before judgment of decree held by defendant—Decree passed in suit—Effect of—Rights of attaching decree-holder.*

C. P. CODE (1908), O. 21, R. 53.

Per *Nazim Ali, J.*—Where a plaintiff in a suit attaches before judgment a decree that the defendant had obtained in his favour against another, the attachment, after a decree is passed in the suit, operates as an assignment of the attached decree in favour of the plaintiff-decree-holder for the *pro tanto* satisfaction of his decree. Money realised in execution of the attached decree must be taken as lying in Court to his credit for *pro tanto* satisfaction of his decree, at any rate, after he applies for payment of the money to him.

Per *Mitter, J.*—When the plaintiff obtains a decree against the defendant and attaches the decree which the defendant had obtained against another, he becomes entitled to all the rights which are given to the attaching decree-holder under O. 21, R. 53, C. P. Code. Any payment by the judgment-debtor of the attached decree would go to satisfy not only that decree but also the decree of the attaching decree-holder. (*Nazim Ali and Mitter, JJ.*) UDAI RAM *v.* NATHMALL. **43 C. W.N. 1076.**

———**O. 21, R. 53**—*Decree attached in execution—Execution case subsequently dismissed for default—Right of decree-holder to execute attached decree.*

A decree-holder in execution of his decree attached another decree in favour of the judgment-debtor along with his other property. He proceeded only against the other property and later on with the object of executing the attached decree filed another execution case and got his name substituted as a decree-holder for that of the judgment-debtor. The Sub-Judge in seisin of the first execution case dismissed the same in default on the ground that no steps had been taken and the judgment-debtors of the attached decree applied under S. 47 objecting to the execution.

Held, that having obtained an order of attachment the decree-holder had automatically become authorized to put the attached decree into execution under O. 21, R. 53 in so far as the attached decree was concerned. Any subsequent dismissal for default of the previous execution case on account of any default of the decree-holder in connection with matters left outstanding in those execution proceedings after the attachment of the decree could not be regarded as an obstacle to prevent the decree-holder from executing that decree in a subsequent execution proceeding properly instituted for the purpose under O. 21, R. 53 of the Code. (*Edgley, J.*) SATISH CHANDRA *v.* BIRESWAR SUR. **A.I.R. 1939 Cal. 465.**

———**O. 21, Rr. 53, 60 and 47**—*Decree for arrears of rent under C. P. Tenancy Act—If attachable under Civil Procedure Code—Lambardar and attaching decree-holder forming the only co-sharers—Effect.*

A decree for arrears of rent against a tenant whose tenure is governed by the C. P. Tenancy Act is a simple money decree and in itself does not differ from any other decree of that character. There is nothing special or peculiar to it *qua* decree. It can therefore, so far as Civil Procedure Code is concerned, be executed in the same way as any other decree. Hence it is also attachable as any other decree under O. 21, R. 53. Where the decree is obtained by the lambardar who together with the attaching decree-holder

C. P. CODE (1908), O. 21, R. 53.

form the only two co-sharers of the village, O. 21, R. 60, C. P. Code, would not apply, for the words 'some other person' occurring in the rule, can only mean, when the context is considered some person other than the attaching decree-holder or judgment-debtor. Nor would R. 47 of O. 21 apply to the case. O. 21 deals separately with different kinds of property and lays down different modes of attachment in respect of each. In view of the special provisions, decrees cannot be dealt with as 'movable property' and are not so treated for the purpose of the special provisions which relate to attachment. Again, R. 47 which contemplates two or more 'co-owners' in the property sought to be attached can have no application inasmuch as according to the special rules obtaining in the C. P. Tenancy Act the lambardar alone is the decree-holder. (*Stone, C.J. and Bose, J.*) CHINTAMAN *v.* MAHADEO. **189 I.C. 807=1940 N.L.J. 56=A.I.R. 1940 Nag. 270.**

——**O. 21, R. 53**—*Decree for payment of money—Meaning of—Preliminary decree for accounts in suit for dissolution of partnership—Attachability.*

A preliminary decree for accounts in a suit for dissolution of partnership is not a decree for the payment of money within the meaning of O. 21, R. 53, C. P. Code and is therefore not attachable and saleable in execution. (*D. N. Mitter and S. K. Ghose, JJ.*) SAILENDRA KRISHNA CHOUDHURY *v.* HARENDRA KUMAR ROY. **167 I.C. 430=9 R.C. 686=40 C.W.N. 1393=A.I.R. 1937 Cal. 4.**

——**O. 21, Rr. 53 and 54**—*Decree for possession by partition—Mode of attachment.*

When a decree is for possession by partition of property, it is not even a preliminary decree for partition and hence if such a decree is to be attached, one has to proceed under O. 21, R. 53, and attachment under O. 21, R. 54 is invalid as it deals with attachment of immovable property. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SAYED AHMAD ALI *v.* RADHA KISHAN. **166 I.C. 867=9 R. Pesh. 77=A.I.R. 1937 Pesh. 13.**

——**O. 21, R. 53**—*Notice to judgment-debtor and decree-holder if necessary to make attachment effective.*

When a decree-holder seeks to execute his decree by attachment of another decree, in order that the attachment may be effective notices to the decree-holder and judgment-debtor of the attached decree are imperative and the mere order communicating the fact of attachment to the Court passing the decree is not enough. (*Vivian Bose, J.*) GOWARDHAN *v.* HARGOVIND. **180 I.C. 305=11 R.N. 353=1939 N.L.J. 73=A.I.R. 1939 Nag. 17.**

——**O. 21, R. 53**—*Preliminary decree for sale of property covered by security bond—Attachment of—Final decree passed in favour of transferee decree-holder*—Locus standi *of attaching creditor to execute final decree.*

A preliminary decree for sale of property covered by a security bond cannot be regarded as one for the payment of money, or for enforcement of a mortgage or charge nor is it capable of execution. An attaching creditor of such a decree has no *locus standi* as regards the execution of the final decree that is subsequently passed in favour of a transferee from the decree-

C. P. CODE (1908), O. 21, R. 53.

holder. (*Nanavutty and Smith, JJ.*) FAQIR BAKHSH *v.* MARIYAM. **13 Luck. 237=168 I.C. 154=9 R.O. 445=1937 O.L.R. 224=1937 O.W. N. 519=A.I.R. 1937 Oudh 365.**

——**O. 21, R. 53 (1) (b)**—*Notice not issued to Court which passed decree sought to be attached—Validity of attachment.*

The provisions of O. 21, R. 53 (1) (*b*), C. P. Code, are mandatory. The only manner in which a decree is to be attached is by issuing a notice by the Court which passed the decree sought to be executed to the Court, which passed the decree sought to be attached and further if the latter decree had been transferred for execution to another Court, by a further notice to that Court. If such notices are not issued, there is no legal attachment, and the holder of the decree sought to be executed does not become the representative of the holder of the decree sought to be attached and he cannot, therefore, execute the same. (*Mitter and Khundkar, JJ.*) ANIL KUMAR *v.* JUGAL KISHORE. **43 C.W.N. 374.**

——**O. 21, R. 53 (1) (b) (ii) (Lahore amendment) and R. 53 (3)**—*Decree-holder attaching in execution decree obtained by his judgment-debtor in another Court—Execution of attached decree by attaching decree-holder—Consent of attaching Court—If necessary—No consent is necessary for attaching decree-holder to execute attached decree.*

O. 21, R. 53 (1) (*b*) (*ii*), C. P. Code (Lahore amendment) and O. 21, R. 53 (3) are to be read together. Where a decree-holder attaches in execution a decree obtained by his judgment-debtor in another Court such decree-holder becomes the representative of his judgment-debtor under O. 21, R. 53 (3), with respect to the decree obtained by such judgment-debtor and he is entitled to execute the attached decree in any lawful manner. The consent in writing as required by R. 53 (1) (*b*) (*ii*) (Lahore), of the attaching decree-holder or of the attaching Court, is necessary when the judgment-debtor whose decree is attached seeks to execute it. Such consent is not necessary when the attaching decree-holder executes the attached decree. (*Jai Lal, J.*) WASDEV *v.* KIDAR NATH. **173 I.C. 300=10 R.L. 430=39 P.L.R. 583=A.I.R. 1937 Lah. 368.**

——**O. 21, R. 53 (2)**—Scope and effect—Attachment of same decree by several decree-holders—Right to rateable distribution—Decree-holder starting execution first—If entitled to benefit of entire deposit—C. P. Code, S. 73. *See* C. P. CODE, S. 73. **40 C.W.N. 1249.**

——**O. 21, R. 53 (3) and S. 146**—Attaching decree-holder—Position of—Right to adjust attached decree to his satisfaction. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT, S. 19 (3). **41 C.W.N. 880=A.I.R. 1937 Cal. 468.**

——**O. 21, R. 53 (3)**—*Construction—Attaching decree-holder—Power to certify satisfaction of attached decree under O. 21, R. 2.*

The mere use of the word "representative" in O. 21, R. 53 (3), C. P. Code, cannot be taken as justifying the conclusion that the attaching decree-holder is the representative of the holder of the attached decree for all purposes. The holder of the attaching decree can be treated as the representative of the holder of the attached decree only

C. P. CODE (1908), O. 21, R. 53.

for the purpose contemplated in O. 21, R. 53 (3), namely, for the purpose of execution, but he cannot exercise the power conferred under O. 21, R. 2 upon the decree-holder himself of certifying an adjustment made out of Court as a satisfaction of the decree. (*Wadsworth, J.*) AHAMAD IBRAHIM ROWTHER *v.* ALLAPICHAI ROWTHER. **51 L.W. 148=1940 M.W.N. 505=A.I.R. 1940 Mad. 534=(1940) 1 M.L.J. 292.**

———O. 21, R. 53 (4)—Applicability—Partnership—Decree for dissolution and accounts—Attachment—Mode of. *See* C. P. CODE, S. 60. **18 Pat. 688.**

———O. 21, R. 53 (4)—*Construction—"Court which passed the decree"—If includes Court to which decree is sent for execution—Decree—Transfer for execution to another Court—Jurisdiction of latter Court to attach and sell partition decree of judgment-debtor.*

The words "the Court which passed the decree" in O. 21, R. 53 (4), C. P. Code, include the Court to which the decree has been sent for execution and such Court, and not only the Court which actually passed the decree, has jurisdiction to attach a decree passed in favour of a judgment-debtor, in the manner laid down by O. 21, R. 53 (4). Having regard to the terms of S. 42, C. P. Code, the Court to which the decree has been sent for execution is empowered to execute it in any of the ways prescribed by S. 51, C. P. Code, that is applicable to the particular kind of decree, and in the case of a partition decree, the executing Court is empowered, by reason of S. 42, to effect attachment in the manner prescribed by O. 21, R. 53 (4).

Rowland, J.—The steps contemplated by O. 21, R. 53 (4), C. P. Code, are things to be done in executing the decree, and, therefore, in this matter the powers of the Court to which a decree has been sent are co-extensive with the powers of the Court which passed the decree even without the addition in the rule of words specifically permitting the Court to which the decree has been sent to do a particular thing. (*Agarwala and Rowland, JJ.*) PIRTHI RAJ GANESH DAS *v.* BAI MAKUND MARWARI. **188 I.C. 488=13 R.P. 1=6 B.R. 698=21 Pat.L.T. 427=A.I.R. 1940 Pat. 557.**

———O. 21, R. 53 (4) and (6)—*Sale of attached decree before receipt of notice of attachment—Right of purchaser to execute decree.*

A purchaser of an attached decree has no right to execute that decree for himself, although no notice of attachment was served upon his vendor previous to the sale by him of his decree. Sub-Cl. (6) of R. 53 of O. 21, C. P. Code, affords no help to the purchaser at all. Its purpose is to protect payments made by the judgment-debtor of the attached decree to his creditor before he receives notice of the attachment. Nor is sub-Cl. (4) of any avail to the purchaser. The mere fact that the decree was sold after the attachment would not prevent the attaching creditor from executing the decree himself. (*Henderson, J.*) SARAT CHANDRA DAS *v.* JATINDRA NATH CHAKRAVARTI. **175 I.C. 912=11 R.C. 18=66 C.L.J. 459=A.I.R. 1938 Cal. 401.**

———O. 21, R. 53 (6)—*Notice not issued to judgment-debtor—Adjustment between him and his decree-holder—Validity.*

C. P. CODE (1908), O. 21, R. 54.

If no notice under O. 21, R. 53 (6), C. P. Code, is issued on the judgment-debtor and bound by the attached decree, an adjustment between him and his decree-holder would be valid. (*Mitter and Khundkar, JJ.*) ANIL KUMAR *v.* JUGAL KISHORE. **43 C.W.N. 374.**

———O. 21, R. 54—Applicability—Attachment before judgment—Mode of effecting. *See* C. P. CODE, O. 38, R. 7. **A.I.R. 1939 Pat. 81.**

———O. 21, R. 54—*Attachment by non-official—Validity.*

An attachment under O. 21, R. 54, C. P. Code, cannot be made by a non-official who has no authority to effect any attachment at all. (*Tek Chand and Dalip Singh, JJ.*) PILADA RAM *v.* TULSI DAS ASA NAND. **186 I.C. 633=12 R.L. 407=41 P.L.R. 838=A.I.R. 1940 Lah. 30.**

———O. 21, R. 54—Attachment of property—Validity of—Part of such property vesting in judgment-debtor only after attachment. *See* C. P. CODE, S. 64. **42 Pat.L.R. 356.**

———O. 21, R. 54—*Compliance with—Attachment under—Essentials of.*

In order to effect an attachment of immovable property, it is necessary (1) to pass an order prohibiting the judgment-debtor from transferring or charging the property in any way, and (2) to have that order proclaimed by beat of tom-tom near the property and to have copies of the order affixed on a conspicuous part of the property, of the Court-house, and also in the office of the Collector of the district. The prohibitory order must be passed by the Court, and it is not enough for the Court to say "attach" and for the Amin to say "I have attached," to constitute a valid attachment. (*Burn, J.*) NOOR MAHOMED MOHIDEEN PILLAI *v.* PECHI AMMAL. **50 L.W. 656=1939 M.W.N. 783=A.I.R. 1939 Mad. 793=(1939) 2 M.L.J. 375.**

———O. 21, R. 54 and O. 38, R. 5—*Conditional order of attachment before judgment—No order absolute—Requirements of O. 21, R. 54 complied with—No process issued—Validity of attachment.*

Where there was a conditional order of attachment before judgment and no order absolute was later on made and where though no process was issued under O. 21, R. 54, all other requirements were observed.

Held, that the attachment was validly made and that the mere omission to record an order absolute does not make the attachment ineffectual. (*M. C. Ghose, J.*) AMODINI DASI *v.* RAGHUNATH MALLICK. **176 I.C. 166=11 R.C. 45=66 C.L.J. 222=A.I.R. 1938 Cal. 236.**

———O. 21, Rr. 54 and 90—*Failure to affix copy of proclamation at Court-house—Material irregularity.*

Failure to affix a copy of the sale proclamation at the Court-house of the execution Judge amounts to irregularity of a material character as described in O. 21, R. 90. (*Mir Ahmad, J.*) BUNDHELKHAND CYCLE AND MOTOR AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **181 I.C. 542=11 R. Pesh. 70=A.I.R. 1939 Pesh. 9.**

———O. 21, R. 54—*Issue of prohibitory order—If includes service of copy of order on judgment-debtor.*

Issue of a prohibitory order under Sub-R. (1) does not mean or include the service of a copy of the order on the judgment-debtor or defendant as

C. P. CODE (1908), O. 21, R. 54.

the case may be. All that is required under R. 54 is making of a prohibitory order by the Court after the procedure has been followed, and then the proclamation of that order in the manner laid down in Sub-R. (2). (*Mya Bu and Dunkley, JJ.*) NAYASHA KURSOON BEE BEE *v.* S.P.S.T.R.M. CHETTYAR FIRM. **164 I.C. 1044=9 R.R. 172=A.I.R. 1936 Rang. 403.**

——**O. 21, R. 54**—*Notice to Judgment-debtor living outside jurisdiction—Power of Court—Property to be attached lying within jurisdiction.*

There is nothing to prevent a Court issuing a notice to a judgment-debtor living outside its own jurisdiction on an application made for attachment of property situate within its jurisdiction. (*Baguley, J.*) U MAUNG MAUNG *v.* SAHUL HAMID. **186 I.C. 42=12 R.R. 243=1939 Rang. L.R. 587=A.I.R. 1939 Rang. 433.**

——**O. 21, R. 54**—Order of attachment—Compliance with formalities—Presumption, when process-server's report is available. *See* EVIDENCE ACT, S. 114, ILL. (*e*). **41 P.L.R. 149.**

——**O. 21, R. 54**—*Personal service of prohibitory order on Judgment-debtor—Necessity for.*

Under O. 21, R. 54, C. P. Code, personal service of the prohibitory order on the judgment-debtor is not necessary. (*Roberts, C.J., Mya Bu and Mosely, JJ.*) S. T. R. M. CHETTYAR FIRM *v.* ANDATHAL. **185 I.C. 386=12 R.R. 192=1939 Rang.L.R. 594=A.I.R. 1939 Rang. 434 (S.B.).**

——**O. 21, R. 54 (2)**—*Attachment of single parcel of land with buildings thereon—Copy of order of attachment affixed to one building—Validity of attachment.*

When a single parcel of land with the buildings thereon is to be attached, the attachment is validly made, within the terms of Sub-R. (2), R. 54, if a copy of the order of attachment is affixed on some one part of the property. This one part need not necessarily be a building at all, as long as it is a conspicuous part. If a copy of the order is affixed on one of the buildings, then that copy of the order will be sufficient to include in the attachment all the buildings standing upon the land attached. (*Mya Bu and Dunkley, JJ.*) NAYASHA KURSOON BEE BEE *v.* S. P. S. T. R. M. CHETTYAR FIRM. **164 I.C. 1044=9 R.R. 172=A.I.R. 1936 Rang. 403.**

——**O. 21, R. 54 (2)**—*Non-affixing of order on Court-house—Validity of attachment.*

There is no valid attachment if a copy of the order is not affixed on the Court-house as required by O. 21, R. 54, C. P. Code. (*Bhide, J.*) MAIDATT MANAK CHAND *v.* MST. LACHHO. **41 P.L.R. 149=A.I.R. 1939 Lah. 284.**

——**O. 21, R. 54 (2)**—*Omission to affix notice and make proclamation—Validity of attachment.*

No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Civil Procedure Code have been done. The omission to affix notice, etc., and make proclamation cannot be looked upon as a trivial irregularity as that is the only way in which the public is informed of the existence of an attachment. (*Bhide, J.*) DERAJAT BANK, LTD. *v.* SARDAR BIBI. **173 I.C. 527=10 R.L. 455=39 P.L.R. 887=A.I.R. 1937 Lah. 671.**

C. P. CODE (1908), O. 21, R. 54.

——**O. 21, R. 54 (2)**—*Order of attachment—Formality of affixing a copy on the Court house—Non-mention on the endorsement on the back of the warrant—Effect.*

Where it is not in dispute that an order of attachment was made and the order was proclaimed as required by O. 21, R. 54 (2) and a copy of the order was affixed in the office of the Collector, and the only thing that is disputed is the affixing of a copy of the order on a conspicuous part of the Court house, which fact is not specifically mentioned on the back of the warrant and there is no evidence that this formality was not observed.

Held, it must be presumed that this formality also has been complied with. It is enough if the bailiff stated that the order of the Court had been complied with. It is not necessary for him to have entered into minute details. (*Din Mahomed, J.*) LACHMAN SINGH *v.* DASAUNDHI RAM BABU RAM. **175 I.C. 400=10 R.L. 716=39 P. L.R. 870=A.I.R. 1938 Lah. 16.**

——**O. 21, R. 54 (2)**—*Scope—Non-compliance—Failure to affix order in Court house—Effect.*

Where an order for attachment is proclaimed by beat of drum and a copy of the same affixed on the property attached but no copy is affixed to the notice board of the Court as required by O. 21, R. 54 (2) the attachment cannot be regarded as complete. In such a case there cannot be any question that there is no attachment in fact. But that will not affect the right of the person obtaining the order of attachment to apply as an attaching creditor to set aside a sale of the property in execution of another decree held after his order of attachment and decree. (*R. C. Mitter, J.*) GOVINDA PRASAD DALAL *v.* BRINDABON CHANDRA NASIPURI. **167 I.C. 600=9 R.C. 703=63 C.L.J. 560=40 C.W.N. 1338=A.I.R. 1937 Cal. 7.**

——**O. 21, R. 54 (3) (Allahabad)**—*Construction—'Date', meaning of—Priority as between sale and attachment on the same day—Rules for determination—General Clauses Act, S. 5 (3), if can be applied.*

Sub-R. (3) added by Allahabad High Court to O. 21, R. 54, C. P. Code, speaks of the 'date' but makes no provision as to the 'time' from which the order shall take effect as against the person mentioned therein. The word 'date' in the rule, must be interpreted to mean 'time'. Therefore where the execution of the sale-deed and the attachment of the same property take place on the same date, there is no statutory provision for priority as between the two. As such, rules of justice, equity and good conscience must be followed. S. 5 (3) of the General Clauses Act cannot be applied to such a case. That deals with the Acts of the Governor-General in Council and lays down that unless the contrary is expressed such Acts shall be construed as coming into operation immediately on the expiration of the day preceding their commencement. That is a very different matter and can be of no assistance in the present case. (*Bennet and Verma, JJ.*) RAMESHWAR PRASAD *v.* GAYA PRASAD. **180 I.C. 83=11 R.A. 423=1939 A.L.J. 7=1938 A.W.R. (H.C.) 876=A.I.R. 1939 All. 154.**

——**O. 21, R. 54 (3) (Nagpur)**—*"Good faith"—What constitutes—Mortgage in favour of*

C. P. CODE (1908), O. 21, R. 54.

creditor—Mortgage effected after order of attachment—Mortgage complete before property actually attached—Validity—If void under S. 64, C. P. Code.

A creditor who takes a mortgage from his debtor to secure his debt cannot be deemed to be fraudulent in so doing, even though he knows that another creditor has obtained an order of attachment of the property mortgaged and even though the mortgage is for an amount higher than his pre-existing debt. He should not be presumed to be effecting the mortgage to defeat or delay the attachment, but rather to secure his debt. Such a mortgage cannot be held to be one not made in good faith—When such a mortgage is effected and completed before the attachment of the property is actually effected by affixing the order on the property in question, the mortgage is not void under S. 64, C. P. Code. (*Stone, C.J. and Niyogi, J.*) BEHARILAL *v.* ANAND MANGAL. **19 N.L.J. 94.**

———O. 21, R. 54 (3) (Nagpur)—*"Purchaser"—Meaning—If includes mortgagee.*

The word "purchaser" in sub-rule (3) to rule 54 of order 21, C. P. Code, is used in its technical English legal sense and includes a mortgagee. (*Stone, C.J. and Niyogi, J.*) BEHARI LAL *v.* ANANDA MANGAL. **19 N.L.J. 94.**

———O. 21, R. 55—*Attachment of money—How long subsists.*

The attachment of money must be deemed to continue so long as that money which is brought into Court by the attachment is not disposed of by the Court attaching that money. (*Thomas, C. J. and Srivastava, J.*) HARSHI KESH v. GULAM HAIDER KHAN. **189 I.C. 236=1940 A. W. R. (C.C.) 282=1940 O.L.R. 419=1940 O.W.N. 591 =1940 O.A. 516=A.I.R. 1940 Oudh 360.**

———O. 21, R. 55 and S. 64—*Attachment released on reversal of decree—Decree passed again after remand—Attachment, if revives—Alienation after the release of attachment and before second attachment—Validity.*

Where an attachment is released owing to the reversal of the decree, it should not be deemed to have revived on the passing of the decree once again after remand, and to relate back to the date of the original attachment. When the first attachment is removed, there is no bar left to any alienation until a second attachment takes place. (*Bhide, J.*) PARMANAND *v.* THARU LAL. **163 I.C. 892=9 R.L. 60=39 P.L.R. 306=A.I.R. 1937 Lah. 169.**

———O. 21, R. 55—Scope—If subject to S. 73—Money paid to satisfy particular decree debt—Liability to rateable distribution. *See* C. P. CODE, S. 73. **1939 P.W.N. 242.**

———O. 21, R. 55 (a)—*Construction—Duty to avoid conflict with S. 73—Attachment when to be deemed to be withdrawn.*

O. 21, R. 55 (*a*), C. P. Code, should be read in such a way that it does not conflict with S. 73, C. P. Code. Attachment shall be deemed to be withdrawn on payment under O. 21, R. 55 (*a*), only when the decree has been satisfied, and the decree can be satisfied only if the amount deposited is available to the decree-holder in full satisfaction of the decree. This result cannot ensue in cases falling under S. 73 which are imperative. The law intervenes in such a case and directs that although the full amount is intended to be paid to the particular decree-holder whose attachment is sought to be got rid of, it has to be diverted by reason of S. 73. (*Fazl Ali and Manohar Lall, JJ.*) SATNARAIN PRASAD CHOWDHURY *v.* MAHABIR PRASAD CHOWDHURY. **18 Pat. 404=183 I.C. 409=5 B.R. 914=12 R.P. 137= 20 P.L.T. 646=1939 P.W.N. 242=A.I.R. 1939 Pat. 392.**

———O. 21, R. 55 (2) (b) (as amended by Oudh Chief Court)—*Applicant for rateable distribution—When entitled to benefit of original attachment.*

O. 21, R. 55 (2) (*b*), C. P. Code, as amended by the Oudh Chief Court, undoubtedly means that unless along with the decree of the attaching creditor, the decree of an applicant for rateable distribution is also satisfied, the attachment shall not be deemed to be withdrawn. In other words, the meaning is that the original attachment shall enure for the benefit of the decree-holder who has applied for rateable distribution of assets under S. 73 of the Code. This, however, does not and cannot mean that the attachment will enure for the benefit even of those who may apply for execution by rateable distribution of assets in future. The words "notice of which *has been sent* to the sale officer under sub-R. (1)" clearly show that R. 55 (2) can be availed of only by those decree-holders who have applied for rateable distribution prior to the satisfaction of the decree. (*Srivastava, Ag. C. J. and Ziaul-Hasan, J.*) BISMOHAN SINGH *v.* JAGAT BAHADUR SINGH. **12 Luck. 365=164 I.C. 1031=9 R. O. 126=1936 O.W.N. 861.**

———O. 21, R. 57—*Applicability—"Attached in execution"—If covers attachment before judgment—Application for execution after attachment before judgment—Dismissal for default—If terminates attachment—Sale without further attachment—If void—C. P. Code, O. 38, R. 11.*

An attachment obtained before judgment was raised on the objection of the defendant on the ground that certain idol was involved whose shebait the defendant was. Plaintiff having instituted a regular suit under O. 21, R. 63, C. P. Code, got a decree in his favour with the result that the attachment before judgment was revived. After further execution and part satisfaction he applied for execution by the arrest of the defendant, but the application was dismissed for default. He then lodged another execution in pursuance of which the property attached before judgment was sold without further attachment.

Held, (1) that O. 21, R. 57, C. P. Code, did not apply so as to invalidate the sale in execution without a fresh attachment, as the attachment before judgment, which once failed and was revived by the decree in the suit under O. 21, R. 63, C. P. Code, did not come to an end on the dismissal of the previous execution for default; (2) that there was nothing in O. 38, R. 11, C. P. Code, to give colour to the view that for purposes of O. 21, R. 57, C. P. Code, the words "attached in execution" covered attachment before judgment, and that "the attachment" in R. 57 of O. 21, C. P. Code, meant only attachment in execution of the decree; and, therefore, (3) the sale without further attachment was not void. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) MOTI JHA *v.* JWALA PRASAD MARWARI. **18 Pat.L.T. 585=16**

C. P. CODE (1908), O. 21, R. 57.

Pat. 589=172 I.C. 193=10 R.P. 307=1937 P. W.N. 895=A.I.R. 1937 Pat. 626.

———O. 21, R. 57—*Applicability—Attachment before judgment—Determination of—Rule as to —Application. for sale of attached property—Disposal—Order for continuance of attachment with consent of parties—Effect of.*

Where a sale of property attached before judgment is prayed for in a darkhast and the darkast is disposed of, the attachment is determined so far as such property is concerned. This is a general rule applicable to the determination of an attachment before judgment after the disposal of the darkhast in which the property attached is sought to be sold; it does not, however, apply to a case where there is a specific order for continuance of the attachment made with the consent of the parties. (*Lokur, J.*) BALIRAM NARAYAN *v.* SAKHARAM RAMJI. **190 I.C. 21=42 Bom.L. R. 423=A.I.R. 1940 Bom. 250.**

———O. 21, R. 57—*Applicability—"Default of decree-holder"—Attachment — Subsequent insolvency of judgment-debtor—Order dismissing execution petition—If terminates attachment—Subsequent annulment of adjudication—Property if reverts free of attachment—Provincial Insolvency Act, Ss. 29 and 37.*

An adjudication of the judgment-debtor as an insolvent does not automatically raise an attachment effected on his properties prior to the adjudication, and it cannot be said that there will be no attachment if and when the adjudication is annulled. Where the executing Court on being informed of the insolvency erroneously passes an order dismissing the execution petition then pending, instead of staying the proceedings as it should under S. 29 of the Provincial Insolvency Act, it cannot be said that the order of dismissal is an order of dismissal for default of the decree-holder within the meaning of O. 21, R. 57, C. P. Code, so as to have the effect of automatically terminating the attachment. In such a case, where there has been an attachment at the time of the adjudication, and the insolvency is not prosecuted with the result that the adjudication is annulled, subject to the special contingencies contemplated by S. 37 of the Provincial Insolvency Act, the property goes back to the debtor with any burdens which existed upon it at the time of the adjudication. His interest in the property would still be bound by the attachment on the date of the annulment. (*Wadsworth, J.*) PARANDAMAYYA *v.* SURAYYA. **1939 M.W.N. 1111 =50 L.W. 716=A.I.R. 1940 Mad. 129=(1939) 2 M.L.J. 786.**

———O. 21, R. 57—*Applicability—Rejection of execution application under O. 21, R. 17—If dismissal terminating attachment.*

R. 57 of O. 21, C. P. Code, deals in terms with a case where on the petition which is ultimately dismissed an attachment has taken place. In such case the execution petition must *ex hypothesi* have been taken cognizance of and execution ordered and it is only at a later stage that it must be dismissed as contemplated by R. 57. The words of the rule must be applied with caution to cases in which an attachment has taken place before judgment or on a prior execution application. In these classes of cases, if an application execution is rejected under R. 17 of O. 21, *in limine* as not complying with the formal requirements of law, it does not amount to a "dismissal" within the meaning of O. 21, R. 57, C. P. Code. The legal position is that no execution application in accordance with law must be deemed to have been filed; and therefore an attachment effected before judgment and existing does not come to an end. (*Varadachariar and Abdur Rahman, JJ.*) SATHAPPA CHETTIAR *v.* CHOKKALINGAM CHETTIAR. **1940 M.W.N. 69=A.I.R. 1940 Mad. 615.**

———O. 21, R. 57 (as amended in Nagpur)—*Application "struck off" as infructuous but attachment kept pending—Effect of—If dismissed or merely adjourned—Subsequent receipt of assets by Court—Right to rateable distribution—C. P. Code, S. 73.*

Under R. 57 of O. 21, C. P. Code, as it now stands after its amendment in Nagpur in 1930, a Court has power to dismiss an execution application and to continue the attachment. Where a Court passes an order to the effect that "the case is struck off as wholly infructuous at the instance of the decree-holder; house shall remain under attachment for three months," it must be held that the Court dismisses the application and not merely adjourns it. The execution application in such a case cannot be held to be pending for the purpose of enabling the decree-holder to claim rateable distribution of assets received on a date subsequent to such dismissal. The expression "struck off" is ambiguous and unauthorized and should not be used. (*Pollock, J.*) GULABCHAND SHEOLAL *v.* DONGARMAL HARAK CHAND. **I.L.R. (1938) Nag. 346=168 I.C. 475=9 R.N. 257 (1) =A.I.R. 1936 Nag. 277.**

———O. 21, R. 57—*Construction—"Dismissal of such application"—Meaning of—Dismissal of interlocutory application in pending execution application—Effect on attachment—Obtaining of fresh attachment during continuance of prior attachment—If terminates prior subsisting attachment.*

It is clear from the language of R. 57 of O. 21, C. P. Code, that before a pending attachment shall cease, there must be a dismissal of the application for execution in which the attachment was effected. As long as that application for execution is pending and no final orders have been passed on it, any order of dismissal passed on an interlocutory application in the pending execution petition would not terminate the attachment. The fact that owing to a mistake or ignorance of legal rights the decree-holder obtains a fresh attachment would not terminate the previous attachment which is already subsisting. The fresh attachment is a superfluity. (*Venkataramana Rao, J.*) KARUPPAN CHETTIAR *v.* RAJANGAM. **1939 M.W.N. 1157=A.I.R. 1940 Mad. 172=(1939) 2 M.L.J. 916.**

———O. 21, R. 57—*'Default'—Decree-holder's inability to get property attached—If amounts to.*

On an application by a decree-holder, a warrant of attachment of certain movable property belonging to the judgment-debtor was issued. When the bailiff went to the spot accompanied by the decree-holder's representative, he was informed that the property was already sold. On a report being submitted by him to that effect, the execution Court made an order that the case be con-

signed to the record room inasmuch as the decree-holder's representative had failed to get the property attached.

Held, that the inability on the part of the decree holder to get the property attached did not amount to default contemplated by O. 21, R. 57 and the consignment of the execution case to the record room did not amount to a dismissal of the application so as to attract the penal provisions of O. 21, R. 57, and this being so a fresh application by the decree-holder for execution was not barred. A.I.R. 1938 Lah. 123=175 I.C. 801=11 R.L. 53=39 P.L.R. 967; Reversed. (*Addison and Din Mohammad, JJ.*) PEOPLES BANK OF NORTHERN INDIA, LAHORE *v.* DURGA DASS. **181 I.C. 900=11 R.L. 898=A.I.R. 1938 Lah. 728.**

———O. 21, R. 57—*"Default"—Meaning of—If covers non-prosecution.*

The term "default" in O. 21, R. 57, in so far as it applies to the decree-holder means default not merely in the sense of non-appearance or non-payment of process fees, etc., but also includes the case of non-prosecution. (*Divatia, J.*) BABA PUNJAJI *v.* KISAN NARAYAN. **172 I.C. 848=10 R.B. 296=39 Bom.L.R. 1105=A.I.R. 1938 Bom. 18.**

———O. 21, R. 57—*Execution application consigned to record room at request of decree-holder—Termination of attachment.*

Where at the request of the decree-holder, the executing Court consigned his application for execution to the record room but maintained the attachment,

Held, that the application for execution was dismissed by the executing Court, that the attachment terminated with the dismissal of the application and that it was not possible to revive that application. (*Abdul Rashid, J.*) NANU MAL *v.* AMAR NATH. **181 I.C. 14=11 R.L. 746=40 P. L.R. 473=A.I.R. 1938 Lah. 590.**

———O. 21, R. 57—*Order consigning case to record room—If tantamount to dismissal.*

The question whether a particular order is or is not to be taken as tantamount to dismissal has to be decided on facts of each case. A decree-holder who had attached property made a statement to the effect that the proceedings might be consigned to the record room for the time being, the attachment being kept intact and that certain documents on the record might be returned to him and that he would present an application again within two days. The Court accordingly passed an order consigning the proceedings to the record room and directing that the attachment would continue.

Held, that the order consigning the case to the record room could not be looked upon as one of dismissal. (*Bhide, J.*) DAULAT RAM *v.* PRITAM SINGH. **188 I.C. 335=12 R.L. 519=A.I.R. 1940 Lah. 78.**

———O. 21, R. 57—*Order consigning execution to record room—Effect on attachment.*

In execution proceedings the lower Court, finding that all the representatives of the deceased decree-holder were not included in the application for substitution, passed an order consigning the application to the record room, though the attachment in that execution was to remain in force.

Held, that the order of the lower Court was erroneous to the extent that instead of consigning the proceedings to the record room, it should have got the application for substitution amended. But the order was not tantamount to dismissal of the application for execution, nor did it have the effect of terminating the prior attachment. All that the order meant was that execution proceedings should stand adjourned *sine die*. 1922 All. 62 and 1926 All. 734, *Rel. on.* (*Tek Chand, J.*) MANGAL SINGH *v.* SAGAR. **169 I.C. 255=9 R.L. 729=A.I.R. 1936 Lah. 873.**

———O. 21, Rr. 57, 58 and 63—*Scope—Execution petition finally dismissed though not for default—Effect on attachment—Defeated claimant—If bound to sue under O. 21, R. 63—Fresh attachment—Claim—If barred by failure to file suit to set aside order on claim under prior attachment.*

R. 57 of O. 21, C. P. Code, is not exhaustive of all the ways in which an attachment can be raised. It must be held that when an execution petition has been in fact and intention dismissed finally, even though the dismissal might be due to causes which cannot be described as the default of the decree-holder, then the attachment made under that petition must automatically cease to operate. When an attachment ceases to operate there is no longer any occasion for a defeated claimant to file a suit under O. 21, R. 63. Nor can it be contended that when there is a subsequent attachment and a claim against such attachment, the claim must be related back to the prior attachment; the claim under the subsequent attachment is not barred by the claimant's failure to file a suit to set aside the dismissal of the claim under the earlier attachment which has come to an end owing to an order dismissing the execution petition. (*Wadsworth, J.*) UNNAMALAI AMMAL *v.* BAGHYATHAMMAL. **1940 M. W. N. 459=A.I.R. 1940 Mad. 763.**

———O. 21, R. 57—*Termination of attachment—Execution petition—Order to the effect "Adjourn Rejected"—If amounts to dismissal.*

In connection with execution petitions, the legal result of orders, such as "rejected," "struck off," "closed," "recorded" and "dismissed," is a matter to be ascertained with reference to the attendant circumstances and not merely from the form of the order. Under O. 21, R. 57, C. P. Code, the Court, where it is unable to proceed further with an execution application, even when it is by reason of the decree-holder's default, can either adjourn the matter or dismiss the petition. Where the order is "Adjourn-Rejected," the order does not amount to a dismissal, but is clearly one of adjournment only. The petition does not cease to be pending and the attachment does not terminate. (*Varadachariar and Mockett, JJ.*) SOMASUNDARAM CHETTIAR *v.* ALAMELU ACHI. **1937 M..W.N. 480.**

———O. 21, R. 58 and S. 47—*Appeal or revision—Creditor attaching money in receiver's hands—Attachment raised by Court's order.*

Where a creditor attaches the money of his debtor in the hands of the receiver and the attachment is raised by the order of the Court, the order falls within the provisions of O. 21, R. 58, C. P. Code, and not within S. 47 and therefore no appeal lies against the order. Neither can a revision against the order lie as the aggrieved party has a remedy by way of a suit. 1932 Cal. 302, Rel. on. (*Davis, J.C. and D.C. Mehta, A.J.C.*)

C. P. CODE (1908), O. 21, R. 58.

GHANSHAMDAS *v.* SHIVALDAS. **160 I.C. 383=30 S.L.R. 288=8 R.S. 126=A.I.R. 1936 Sind 2.**

———**O. 21, Rr. 58 to 63**—Applicability and scope—Attachment of debt—Garnishee denying any debt due—Order disallowing objection and directing him to pay—Finality—Subsequent suit by decree-holder as receiver for realising debt attached—Plea denying debt—If barred. *See* C. P. CODE, O. 21, R. 46. **70 M.L.J. 20.**

———**O. 21, Rr. 58, 63 and 100**—*Applicability—Attachment of mortgaged property—Claim by mortgagee—Dismissal—Failure to sue under O.* 21, *R.* 63*—Execution sale and purchase by decree-holder—Delivery of possession—Application by decree-holder under R.* 100*—If barred.*

The holder of a money decree can merely attach and sell the right, title and interest of the judgment-debtor in his property, and when the property is subject to mortgage, all that the decree-holder can do is to put up for sale the judgment-debtor's equity of redemption. The threatened sale cannot affect the rights of the mortgagee even if he be the mortgagee in possession. O. 21, R. 58, C. P. Code, has no application, and the mortgagee need not object under the rule. Even if he objects and fails, O. 21, R. 63 will not apply so as to make it incumbent on him to file a suit. In such a case there is no decision which can be made the subject of litigation under O. 21, R. 63. Consequently, if the decree-holder purchasing the property, *i.e.*, the equity of redemption at his execution sale obtains delivery of possession the mortgagee is entitled to apply to the executing Court under O. 21, R. 63, C. P. Code. The only remedy properly left to the mortgagee is to press his claim under O. 21, R. 100. The abortive proceedings under O. 21, R. 58, and the failure to file a suit under O. 21, R. 63 are no bar to the subsequent proceedings by the mortgagee under O. 21, R. 100. 1 Pat. 159 appr. (*Courtney Terrell, C.J., Fazl Ali and James, JJ.*) SUNDER PRASAD SINGH *v.* DEODHARI SINGH. **16 Pat. 54=166 I.C. 463=9 R.P. 299 (2)=3 B.R. 175=17 Pat.L.T. 812=1936 P.W.N. 847=A.I.R. 1937 Pat. 63 (F.B.).**

———**O. 21, R. 58**—Applicability—Claim by judgment-debtor as shebait—Objection that property attached is debutter—Order on—Appeal. *See* C. P. CODE, S. 47. **17 Pat.L.T. 810.**

———**O. 21, R. 58**—Applicability—Decree for rent against wrong person—Execution—Claim by third party—Maintainability. *See* BIHAR TENANCY ACT, S. 170. **15 Pat. 812.**

———**O. 21, R. 53**—Applicability—"Decree"—Suit for unpaid consideration due under mortgage deed—Preliminary decree—Attachment—Procedure. *See* C. P. CODE, S. 60. **1937 A.W.R. 649=A.I.R. 1937 All. 652.**

———**O. 21, R. 58**—Applicability—Execution of rent decree—Claim—If lies. *See* B. T. ACT, S. 170. **17 Pat.L.T. 385.**

———**O. 21, R. 58**—*Applicability—Mortgage decree for sale—Attachment wrongly effected—Claim under O.* 21, *R.* 58*—If competent.*

When an attachment of mortgaged property in a decree for its sale has actually been made although such an attachment was unnecessary, an objector is entitled to come into Court and make an objection under O. 21, R. 58, C. P. Code. 29 I.C. 941 (F.B.) and A.I.R. 1928 Mad. 525, Foll.; 33 I.C. 603, Dist.; A.I.R. 1918 Lah. 368; 18 Bom. 98; 19 All. 480; A.I.R. 1930 Mad. 712 and 18 I.C. 215, Not Foll. (*Almond, A.J.C.*) DIWAN CHAND *v.* RUPCHAND. **161 I.C.** 194=**8 R. Pesh. 165=A.I.R. 1936 Pesh. 53.**

———**O. 21, R. 58**—Applicability—Personal decree in mortgage suit—Execution—Claim to attached property by person party to mortgage suit but not impleaded as party to personal decree proceedings—Procedure applicable—S. 47. *See* C. P. CODE, S. 47. **(1940) 2 M.L.J. 305.**

———**O. 21, R. 58**—Applicability—Receiver of properties of judgment-debtor—Attachment of monies in his hands in execution of decree against judgment-debtor—Objection by receiver—Order allowing—Appeal—S. 47. *See* C. P. CODE, S. 47. **30 S.L.R. 288.**

———**O. 21, R. 58**—Applicability—Rent-decree—Sale of holding in execution—Claim by purchaser at sale in execution of prior rent decree—Maintainability. *See* BIHAR TENANCY ACT, S. 170. **A.I.R. 1937 Pat. 341.**

———**O. 21, Rr. 58 and 63**—*Applicability—Sale of mortgaged property in execution—Application by mortgagee under O.* 21, *R.* 58 *as against purchaser—Dismissal—Suit by mortgagee on mortgage beyond one year—Maintainability—Limitation.*

Where a mortgagee makes an application under O. 21, R. 58, C.P. Code, in respect of the mortgaged property as against the purchaser of that property in execution, and that application is dismissed, whether for default or not, the mortgagee must bring a suit on his mortgage within one year. A suit by him on the mortgage more than one year after the disposal of his application under O. 21, R. 58, is barred and must fail as against the purchaser on the ground of the effluxion of time. O. 21, R. 58 is not inapplicable to the case of relationship of mortgagee and the purchaser, either of the equity of redemption or of the security. It may be unnecessary for a purchaser or a mortgagee to make an application under O. 21, R. 58, but R. 62 of O. 21 contemplates the possibility of such an application being made. If an application is made and is unsuccessful, as regards those parties, O. 21, R. 63 would apply. (*Wort, A.C.J. and Manohar Lall, J.*) RAGHUBIR PRASAD *v.* RAMNATH SINGH. **177 I.C. 702=5 B.R. 9=11 R.P. 175=19 Pat.L.T. 746=1938 P.W.N. 752=A.I.R. 1939 Pat. 21.**

———**O. 21, R. 58**—Applicability—Suit for rent by landlord against occupancy tenant—Transfer of holding by tenant *pendente lite*—Non-joinder of transferee—Landlord having knowledge of transfer—Decree—Execution against holding—Claim by transferee—Maintainability. *See* B.T. ACT, CH. XIV. **40 C.W.N. 683=A.I.R. 1936 Cal. 279.**

———**O. 21, R. 58**—*Application under—If can be made after sale.*

Attachment must be deemed to continue until the sale is confirmed and so till then an objection to the attachment could be made under O. 21, R. 58 even though the execution sale is over. (*Gruer, J.*) BABA RAMCHANDRA KOMTI *v.* KONDOO JAGNA

C. P. CODE (1908), O. 21, R. 58.

WADHAI. **184 I.C. 797=1939 N.L.J. 496=12 R.N. 124=A.I.R. 1940 Nag. 7.**

——**O. 21, R. 58**—Burden of proof—Decree against Hindu Co-parcener—Execution against joint family property—Objection by other co-parceners—Onus of proof of binding character of decree. *See* HINDU LAW—JOINT FAMILY. **A.I.R. 1936 Pat. 319.**

——**O. 21, Rr. 58 and 63**—*Claim under R.* 58 *by a third party—Disallowance of claim—Suit under R.* 63 *by defeated claimant—Proof that attachment was invalid by reason of debtor's insolvency—If enough to decree the suit—Question of title to be gone into—Meaning of 'establish the right to' in R.* 63.

Where in execution of a decree, the decree-holder attached certain properties belonging to the judgment-debtor, and a claim was put in under O. 21, R. 58, by the judgment-debtor's wife that it was her property but which claim was disallowed.

Held, that in a suit under O. 21, R. 63, by the wife to set aside claim order, it is not enough to find that the attachment was invalid by reason of the fact that prior to the date of attachment, the judgment-debtor was adjudicated an insolvent and the execution was conducted without the leave of the Insolvency Court, but the Court must also find if the claimant was entitled to the property. The words 'to establish the right' in R. 63 clearly indicate that the plaintiff has to establish his *title* to the property in dispute before he can get the relief he wants, namely, the release of the property from attachment. (*Venkataramana Rao, J.*) BAVAMMA *v.* PAPANNA. **1936 M.W.N. 904=44 L.W. 728=165 I.C. 620=9 R.M. 271=A.I.R, 1936 Mad. 971=(1937) 1 M.L.J. 133.**

——**O. 21, R. 58**—*Deposit in connection with cash certificate attached—Application of Post Master General—Duty of Court to adjudicate.*

One *R* was the owner of cash certificates of certain value in the custody of the Post Master General. He subsequently died but his heirs did not take any steps to obtain a transfer to them of the cash certificates in accordance with the provisions of the Post Office Rules. Later on certain persons obtained a decree against the assets of *R* in hands of his heirs. The Court thereupon called upon the Post Master General to remit certain sum deposited in the Post Office in connection with cash certificates and allowed the attachment to stand. The Post Master General thereupon made a formal application to the Court under O. 21, R. 58 of C.P. Code. The Court dismissed the application as not maintainable.

Held, that the Post Master General was in possession of the cash certificates which stood in the name of *R* and he was empowered to deal with them in conformity with the provisions of the Post Office Cash Certificate Act. This being the case the Court ought to have adjudicated on the application under O. 21, R. 58.

Held, further, that having regard to the provisions of S. 214 of Succession Act, the Court should not have proceeded to execute the decree against the cash certificates in possession of Post Master General except on production by the decree-holders of one of the documents mentioned in the latter part of the section. (*Edgley, J.*)

C. P. CODE (1908), O. 21, R. 58.

SECRETARY OF STATE *v.* GIRINDRA NATH. **178 I.C. 152=11 R.C. 327=A.I.R. 1938 Cal. 445.**

——**O. 21, R. 58**—*Effect of order—Raising of attachment on claim by third party—Judgment-debtor, if bound by order.*

Where on a claim by a third party that he is the owner of a property attached in execution of a decree against another, the attachment is set aside on that ground, the decision, that the third party is the owner of the property is not binding as between the judgment-debtor and the claimant. No doubt, if the judgment-debtor had appeared and opposed the claim and the matter is decided, the decision may be binding on him. (*Allsop, J.*) MAHOMED UMAR *v.* ABDUL GHANI. **1939 A.W.R. (H.C.) 729=A.I.R. 1939 All. 728.**

——**O. 21, R. 58**—*Enquiry—Necessity—Scope and extent—Refusal to enquire—Revision.*

Where an applicant under O. 21, R. 58 claims that he has a share in, and is in joint possession with the judgment-debtor along with certain other members of the family, of the attached property, as provided by R. 58, the Court should proceed to investigate the claim. No doubt the extent of the investigation to be carried out would depend upon the circumstances of each case, but a refusal to moke any investigation at all is a failure to exercise jurisdiction vested in the Court and is open to revision. (*Weston*). BISMILLAH *v.* NASIRABAD URBAN CO-OPERATIVE BANK, LTD. **1938 A.M.L.J. 23.**

——**O. 21, Rr. 58-62**—*Enquiry under—Scope of—Claimant claiming under sale deed executed by judgment-debtor—Power of Court to consider validity of sale-deed—Refusal to do so—Revision.*

In some cases the decision of the question whether the person in possession of the attached property is in possession on his own account or on account of the judgment-debtor depends upon a consideration of the title to the property, and, therefore, in such cases it is necessary, even in a summary inquiry under Rr. 58 to 62, O. 21 of the Code of Civil Procedure, to decide what is the nature of the title, if any, of the person in possession. Where, therefore, a person applies under O. 21, R. 58 for removal of an attachment on certain property on the ground that it belongs to him and has been in his possession and bases his claim on a deed of sale executed by the judgment-debtor in his favour, but it appears on the facts appearing on the face of the sale-deed itself, that the sale is invalid in passing any title to the property. In such a case the investigating Court must, in order to decide whether the possession of the claimant is possession on his own account or possession in trust for the judgment-debtor, come to a decision as to the validity of the deed of sale whereby the property attached is purported to be conveyed from the judgment-debtor to the claimant, for if the deed of sale is not established the property still remains the property of the judgment-debtor and is in the possession of the claimant in trust for and on behalf of the judgment-debtor. Where the Court fails to consider the question of the validity or otherwise of the sale-deed and refuses to go into the question of title, it fails to exercise jurisdiction vested in it by law and its order

C. P. CODE (1908), O. 21, R. 58.

is open to revision. (*Dunkley, J.*) VEDNATH SINGH *v.* U BA DIN. **14 Rang. 516=164 I.C. 608=9 R.R. 116=A.I.R. 1936 Rang. 306.**

——O. 21, R. 58—*Enquiry under—Scope—Question of benami.*

In a proceeding under O. 21, R. 58, C.P. Code, the Court should not allow the parties to go into questions of *benami* to the practical rejection of the direct evidence of possession. The claimants are after all merely advancing claims and not bringing title suits. If a claim case is treated as a title suit, the claimant is taken by surprise, and if the claim case is dismissed, the onus on him in the suit that he may have to bring under O. 21, R. 63 would be rather heavier than in an ordinary title suit. Where although purporting to deal with the question of possession the Court has really been considering the question of *benami*, the High Court will interfere with its order in revision. (*Dhavle, J.*) JHUNABATI *v.* KAMESHWAR SINGH. **6 B.R. 696=188 I.C. 481=13 R.P. 3.**

——O. 21, Rr. 58 to 62—Inquiry—Scope of—Plea of benami—If open. *See* C.P. CODE, O. 21, R. 63. **19 Pat. 494.**

——O. 21, Rr. 58, 59 and 60—*Inquiry under—Scope—Question of possession—Title—If can be gone into—House purchased in name of Hindu wife—Wife in possession—Attachment in execution of decree against husband—Claim by wife—Onus—Proof of possession—Duty of Court—Allegation or suspicion of* benami *purchase—If ground for rejection of claim.*

In a claim matter the question for investigation is whether the claimant or the judgment-debtor (or his trustee) is in possession of the property attached. There is also a supplementary question of trust as to whether the judgment-debtor is or is not the beneficiary in possession. On the question of possession the onus of proof is obviously on the claimant or objector, and on the supplementary question, taken by itself, the onus of proof of beneficiary ownership is on the decree-holder. But taking the whole as a compound question, the question is one of possession which is the only question to be decided under Rr. 59 and 60 of O. 21, C.P. Code. Where a claim is made by a Hindu wife to a house purchased in her name, which is attached in execution of a decree ogainst her husband, if she is found to be in possession on the date of the attachment her claim should be allowed. It is not enough for the decree-holder to plead that she is only a *benamidar* for her husband, the judgment-debtor. Nor will the suspicion that it is a *benami* transaction be a ground for the Court disallowing the claim, when the claimant's possession has been made out. (*Ameer Ali, J.*) BUTTO KRISTO PAUL & Co., LTD. *v.* HARENDRA NATH GHOSE. **172 I.C. 151=10 R.C. 343=64 C.L.J. 399=A.I.R. 1937 Cal. 639.**

——O. 21, R. 58—Inquiry—Scope of—Question of title—Inquiry under S. 47—Difference. *See* C.P. CODE, S. 47 and O. 21, R. 58. **(1940) 2 M.L.J. 305.**

——O. 21, Rr. 58 and 63—*Jurisdiction—Claim petition—Power of Court to investigate after sale—Order dismissing petition for default after sale—Limitation Act, Art.* 11.

Where a sale has actually taken place the executing Court has no jurisdiction to investigate a claim or objection filed under O. 21, R. 58, C.P. Code, even though it was filed before the sale was actually held and the sale has not yet been confirmed. It follows, therefore, that an order of dismissal of the claim petition for default passed after the sale is without jurisdiction, and consequently limitation under Art. 11 of the Limitation Act for a suit for declaration of title and recovery of possession does not run from the date of the order of dismissal. (*S. K. Ghose and Patterson, JJ.*) SASHI CHARAN BISWAS BANIK *v.* GOPAL CHANDRA SHAHA. **172 I.C. 503=10 R.C. 380=65 C.L.J. 353=41 C.W.N. 845=A.I.R. 1937 Cal. 390.**

——O. 21, R. 58—*Jurisdiction—Sale held but not confirmed—Court's jurisdiction to hear claim petition—If lost.*

The fact that an execution sale of the attached property has already taken place does not deprive the Court of jurisdiction to hear the claim petition under O. 21, R. 58, C.P. Code, so long as the sale is not confirmed by the Court. The mere accident of the sale having taken place would not shut out a claimant for ever from getting his property released from attachment. (*Wort, J.*) DEOKI SINGH *v.* RAGHVINDRA BHAGWAN. **183 I.C. 371=5 B.R. 922=12 R.P. 135=1939 P.W.N. 229=A.I.R. 1939 Pat. 430.**

——O. 21, R. 58—Locus standi *to object—Attachment of share of member in Co-operative Society*—Locus standi *of Society.*

A Co-operative Society has an interest in the shares of a member as these shares form part of its capital. Hence where these shares are attached by a person in execution of a decree against the member, the Society has *locus standi* to object to the attachment of these shares. Apart from this when the Society is being made personally liable it has a right to show that the attachment order was *ultra vires* as the shares held by a member are not liable to attachment and sale under S. 20, Co-operative Sicieties Act. (*Bhide, J.*) HIRA LAL *v.* RAJO KHERI CO-OPERATIVE CREDIT SOCIETY. **42 P.L.R. 225=A.I.R. 1939 Lah. 305.**

——O. 21, R. 58—Locus standi *to object—Mortgagee in possession—His proper remedy.*

A mortgagee in possession is not entitled to object under O. 21, R. 58, C.P. Code, to the attachment of the property at the instance of a person who holds a decree against the mortgagor. His proper remedy is to wait and to take action under O. 21, Rr. 100 and 103, C.P. Code, at the proper time, provided always that he does not in the meantime bring a suit to have the property sold. (*Addison and Din Mohammad, JJ.*) SANT LAL *v.* FIRM UDHO RAM WALAIT RAM. **I.L.R. (1938) Lah. 593=177 I.C. 928=11 R.L. 378=40 P.L.R. 522=A.I.R. 1938 Lah. 568.**

——O. 21, Rr. 58 and 63—*Mortgage decree—Proceedings by way of attachment—Dismissal of objections—Objector's right to brug declaratory suit.*

C. P. CODE (1908), O. 21, R. 58.

While proceedings by way of attachment are not appropriate to mortgage decrees, claims and objections to the attachment can be made under O. 21, R. 58, C.P. Code, if the decree-holder applies for and obtains an order of attachment and the property is attached. On dismissal of his objection, the objector is entitled to bring a suit for declaration of his title under O. 21, R. 63. (*Coldstream and Bhide, JJ.*) RAHMAT-ULLAH *v.* ATTA MOHAMMAD KHAN. **173 I.C. 198=10 R.L. 409=39 P.L.R. 568=A.I.R. 1937 Lah. 360.**

——O. 21, Rr. 58, 63—*Objection accepted in default of decree-holder—Remedy of latter.*

Where an objection preferred in execution under O. 21, R. 58 has been accepted *ex parte* in the decree-holder's default, the order accepting the objector's claim is conclusive within the meaning of O. 21, R. 63 and the decree-holder's only remedy is by way of a separate suit. Such objection cannot be restored and re-heard on the decree-holder's application. It would not also be competent for the Court to restore such order by virtue of its own inherent powers under S. 151. (*Fraser, J.C. and Saad-Ud-Din, A.J.C.*) PIARA RAM *v.* SOMA RAM. **A.I.R. 1936 Pesh. 115.**

——O. 21, Rr. 58 and 63—Objection by legal representative of judgment-debtor in personal capacity—Dismissal of—Right of suit. *See* C.P. CODE, S. 47—BAR OF SUIT. **179 I.C. 538.**

——O. 21, Rr. 58 and 55—*Objections, if can be filed after sale.*

O. 21, R. 55, C.P. Code, is not exhaustive of the modes in which attachment ceases. An attachment ceases as soon as the sale of the property attached takes place. It is wrong to suppose that an attachment subsists until the confirmation of the sale, because in the event of a re-sale being ordered a fresh attachment is not necessary. In a case where a re-sale is ordered without a fresh order of attachment, the real reason is not that the original attachment continues, but the first sale and all subsequent proceedings are set aside, the *status quo* before the sale is restored and the attachment revived. Therefore an objection under O. 21, R. 58 must be brought before the sole takes place and the Court cannot pass orders on objections under R. 58 after the sale has taken place. (*Almond, J.C. and Mir Ahmad, A.J.C.*) KISHAN SINGH *v.* VAISHNO DAS. **171 I.C. 302=10 R. Pesh. 30=A.I.R. 1937 Pesh. 90.**

——O. 21, R. 58.—*Objection lodged after execution sale—Competency.*

An objection under O. 21, R. 58, C.P. Code, lodged after the execution sale which is subsequently confirmed is incompetent. (*Addison and Din Muhammed, JJ.*) SANT LAL *v.* UDHORAM WALIT RAM. **40 P.L.R. 522=177 I.C. 928=11 R.L. 378=I.L.R. (1938) Lah. 593=A.I.R. 1938 Lah. 568.**

——O. 21, Rr. 58 and 64—*Objection to sale by third person on ground of title acquired subsequent to attachment—Duty of executing Court.*

An objection to the sale of a property by a third person on the ground that subsequent to its attachment he has purchased it at an auction sale in execution of another decree against the same judgment-debtor is, no doubt, not maintainable under O. 21, R. 58, C.P. Code. Although the objection is wrongly put in under that rule, the executing Court will be justified in taking notice of it. For as the judgment-debtor has no longer any saleable interest in the property owing to the valid title acquired by the objector by a prior sale in execution in his favour, the property is not 'liable to sale' under O. 21, R. 64, C.P. Code, and therefore could not be sold again. The objection could at least be entertained in the exercise of inherent powers under S. 151, C.P. Code, and it would be desirable to do so to prevent unnecessary complications, which would otherwise result from a second sale. (*Bhide, J.*) PREM CHAND *v.* MULKH RAJ. **188 I.C. 529=12 R.L. 535=41 P.L.R. 305=A.I.R. 1939 Lah. 380.**

——O. 21, Rr. 58, 60 and 63 and S. 115—*Objection under O. 21, R. 51—Duty of Court dealing with—If can go into question of title—Breach of R. 60, if a material irregularity liable to be revised—Revision, if excluded by R. 63.*

When an objection is raised under O. 21, R. 58, C.P. Code, the Court dealing with it has to concentrate its attention only to the question of possession and to decide whether the judgment-debtor, is in possession of the property on his own behalf or on account of or in trust for some person. If the property is found to be in possession of somebody else, then it has to be decided whether it is in trust or on behalf of the judgment-debtor. The question of title to the property, is not the Court's concern, nor is it competent to consider and decide it. The order of the Court must be based entirely upon the finding on the question of possession. As the provisions of R. 60 are clearly mandatory and any breach of those provisions is at the very least a material irregularity. The powers of the High Court to interfere in revision with an order under O. 21, R. 58 is not precluded by the fact that a remedy by suit is available to the applicant under O. 21, R. 63. (*Mulla, J.*) BACHU LAL *v.* RAM DIN. **180 I.C. 349=11 R.A. 447=1938 A.L.J. 1118=1938 A.W.R. (H.C.) 816=A.I.R. 1939 All. 117.**

——O. 21, R. 58 and Sch. II—*Objection under O. 21, R. 58—Nature of—Sch. II, if applicable.*

An objection under O. 21, R. 58 creating as it does a dispute between the decree-holder and a person claiming property which the decree-holder seeks to put to sale as being the property of his judgment-debtor, is a matter relating to the execution, discharge or satisfaction of a deree, and is, therefore, a proceeding in execution. Sch. II of the Code does not apply of its own force to such a proceeding, nor is it rendered applicable under the provisions of S. 141. (*Collister and Bajpai, JJ.*) SARJU LAL BEHARI LAL *v.* SUKHDEO PRASAD. **58 All. 797=161 I.C. 107=8 R.A. 731=1936 A.W.R. 251=1936 All. L.R. 281=1936 A.L.J. 142=A.I.R. 1936 All. 378.**

C. P. CODE (1908), O. 21, R. 58.

———O. 21, R. 58—*Objection under—If can be made after sale.*

The attachment does not cease when the property is sold in execution; and a valid objection can be made even after sale to the attachment under O. 21, R. 58. (*Niyogi, J.*) RAMCHANDRA JAGANNATH *v.* KAYAM HUSSAIN ABDUL ALI. **I. L.R. (1940) Nag. 306=11 R.N. 225=178 I.C. 410=A.I.R. 1938 Nag. 475.**

———O. 21, Rr. 58 and 63—*Onus—Father making gift of property to daughters—Property attached in execution of decree against daughters—Claim by father dismissed—Suit by him under O. 21, R. 63—Burden of proof.*

A person made a gift of his property to his daughters. The property was attached in execution of a decree against the daughters. The father's claim under O. 21, R. 58 having been dismissed, he instituted a suit under O. 21, R. 63.

Held, that the burden was on him to show that he was entitled to resist the attachment of the property. (*James and Rowland, JJ.*) MT. NAUROZI *v.* NAJAF ALI SHAH. **184 I.C. 508=6 B. R. 53=12 R.P. 248=A.I.R. 1939 Pat. 321.**

———O. 21, R. 58—*Order under—Appeal.*

An order passed by the Court under O. 21, R. 58, is conclusive and can only be challenged in a suit brought under O. 21, R. 63. No appeal lies against such order. (*Aga Haidar, J.*) SAIN DAS *v.* TIKKA SANT SINGH. **165 I.C. 519=9 R.L. 254=A.I.R. 1936 Lah. 830.**

———O. 21, R. 58—*Release from attachment—Effect—Subsequent decreeing of suit under* O, 21, *R.* 63*—If renders sale in the interval void.*

The order for release from attachment in a case under O. 21, R. 58, C.P. Code, does not put an end to the attachment. If a suit is subsequently brought under **O. 21, R. 63** and decreed, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally made. Hence any alienation in the interim period is void by reason of S. 64, C.P. Code. (*Zia-ul-Hasan, J.*) ANANDEI *v.* LALA RAM. **14 Luck. 543=181 I.C. 362=1939 O. W.N. 408=11 R.O. 305=1939 O.L.R. 268 =1939 O.A. 388=A.I.R. 1939 Oudh 178.**

———O. 21, R. 58—Revision—Dismissal of objections—Interference by High Court. *See* C. P. CODE, S. 115—REVISION. **A.I.R. 1938 Rang. 319.**

———O. 21, Rr. 58, 61 and 63—*Revision—Order refusing to entertain objections.*

An order of the executing Court refusing to entertain objections under O. 21, R. 58, is not one under O. 21, R. 61, so as to give a right of suit under O. 21, R. 63 to the objectors and objectors are not precluded from going in revision against the order on the ground that another remedy, *i.e.*, one by way of suit under O. 21, R. 63, is open to them. The remedy by way of obection under O. 21, R. 58 is a summary remedy provided by legislature in lieu of a suit, and a refusal of that remedy can be legimately considened in revision. (*Middleton, J.C.*) MT. ZAMRUT *v.* PEOPLES BANK OF NORTHERN INDIA. **164 I.C. 1012=9 R. Pesh. 41=A.I.R. 1936 Pesh, 185.**

C. P. CODE (1908), O. 21, R. 60.

———O. 21, R. 58, proviso and S. 115—*Revision—Summary dismissal of objection—Objector not allowed opportunity—Revision.*

A Court cannot dismiss an objection filed under O. 21, R. 58, C.P. Code, summarily on the ground that there is an unnecessary delay without giving an opportunity to the objector or his Counsel to explain the delay. Where no such opportunity is allowed to the objector, the Court acts with material irregularity in dismissing the objection, and its order is, therefore, liable to be set aside in revision. (*Srivatsava, Ag. C.J. and Zia-ul-Hasan, J.*) BARATI MIAN *v.* RAM ADHIN. **13 Luck. 111=166 I.C. 337=9 R.O. 307=1937 O.W.N. 48=1937 O.L.R. 8=A.I.R. 1937 Oudh 268.**

———O. 21, R. 58 (2) (All.)—*Claim—If can be investigated and heard after sale.*

The addition by the Allahabad High Court to sub-cl. (2) of R. 58 of O. 21, C.P. Code, to the effect, that the Court may in its discretion make an order 'postponing the delivery of the property after the sale pending such investigation and that in no such case shall the sale become absolute until the claim or objection has been decided' obviously contemplates the decision of a claim after the sale. Sale can go on and confirmation can be stayed pending decision of claim or objections. (*Bajpai, J.*) TUNDI RAM SHEO SHANKER RAM *v.* GHURE LAL. **1939 A.W.R. (H.C.) 495=1939 A.L.J. 622=A.I.R. 1939 All. 598.**

———O. 21, R. 58 (2)—*Scope—Sale proclamation pending claim—Power of Court to issue.*

It is not competent to a Court to order the issue of a praclamation of sale while a claim petition is pending. (*Burn, J.*) GOVINDARAJULU CHETTY *v.* RAMASWAMY CHETTY. **1939 M.W.N. 776=50 L.W. 338 (1)=A.I.R. 1940 Mad. 6=(1939) 2 M.L.J. 505.**

———O. 21, R. 60—Applicaability—Decree for rent obtained by lambardar under C. P. Tenancy Act—Lambardar and attaching decree-holder forming the only co-sharers in the village. *See* C.P. CODE, O. 21, RR. 53, 60 AND 47. **1940 N.L. J. 56.**

———O. 21, R. 60—*Inquiry under—Scope of.*

All that a Court has to find under O. 21, R. 60, C.P. Code, is whether the properties in respect of which the claim is preferred were, on the date of the attachment, in the possession of the claimant on his own account or on account of the judgment-debtor or in trust for him. The question of title may be only relevant to determine this matter. (*Venkataramana Rao, J.*) 'VOIKARAN *v.* KOTHANDAPANI PILLAI. **1937 M.W.N. 320 (1).**

———O. 21, R. 60—*Release of property from attachment—Attachment of standing crops—Claim to—Allowance of and release of crops from attachment—Crops burnt and destroyed in the meanwhile—Right of owner to value of crops.*

Where property belonging to another person than the judgment-debtor is wrongly attached and the attachment is raised on a claim preferred by that person, the latter has the right to have the property restored to him in ***status quo ante*** the

C. P. CODE (1908), O. 21, R. 62.

attachment and that right can in no way be whittled down by the subsequent deterioration or loss of the properties attached. *A* in execution of his decree against *B* attached certain standing crops belonging to *C*. The crops were put in the custody of a supratdar and subsequently reaped, and after they had been reaped, they were accidentally burnt. *C* objected to the attachment of the crops on the ground that he had grown them and his objection was allowed shortly after the crops had been burt.

Held, that *C* was entitled to recover the value of the crops that had been accidentally burt. (*Pollock, J.*) MOTIRAM TUKARAM *v.* NILIKANTH RAO. **I.L.R. (1937) Nag. 19=168 I.C. 463=9 R. N. 254=A.I.R. 1936 Nag. 257.**

——**O. 21, R. 62**—*Applicability—Petition informing incumbrance and praying notification—Order of dismissal holding mortgage discharged—If should be set aside within a year.*

The question whether an order by the executing Court with reference to an attached property is conclusive unless set aside within a year or not depends upon the nature of the petition on which the order is made. If a mortgagee files a *petition of objection or claim then* an order adverse to the mortgagee is conclusive unless set aside within a year. But where the mortgagee apart from informing the Court about his encumrance and praying that it may be notified in the auction notification does nothing more, but the Court on the allegation of the judgment-debtor goes into the question of the satisfaction of the mortgage and finds that it is discharged and dismisses the mortgagee's petition, the order is not one passed under O. 21, R. 62, C.P. Code, and hence the mortgagee is not bound to bring a suit to set it aside within a year. (*Bajpai, J.*) BHUDEO PRASAD *v.* SRI NATH. **185 I.C. 660=12 R.A. 343=1939 A.W.R. (H.C.) 644=A.I.R. 1939 All. 657.**

——**O. 21, Rr. 62 and 63**—*Application by mortgagee for continuance of attachment subject to mortgage—Dimissal of—Effect.*

If on an application by the mortgagee under O. 21, R. 62, C.P. Code, the Court passes an order directing the continuance of attachment subject to his mortgage, the summary order becomes conclusive, and the decree-holder or the purchaser cannot dispute the mortgage unless he brings a suit to set aside the order under O. 21, R. 63, C.P Code. The same principle applies even if the mortgagee's application is dismissed or refused. (*Mukherjea and Latifur Rahman, JJ.*) AMBICA PROSAD SANYAL *v.* SOORAJMAL. **I.L.R. (1939) 2 Cal. 291=185 I.C. 523=12 R.C. 378 =43 C.W.N. 999=A.I.R. 1939 Cal. 620.**

——**O. 21, Rr. 62 and 66**—*Application by mortgagee that attached property might be notified for sale subject to mortgage—Nature of.*

An application made by a mortgagee after attachment heading it to be one under O. 21, R. 62, C.P. Code, and praying that the fact of the property attached being subject to a mortgage might be notified and proclaimed at the time when the sale takes place, is really a claim petition made under O. 21, R. 62, C.P. Code. It is not a mere application for insertion of an incumbrance

C. P. CODE (1908), O. 21, R. 63.

in the sale proclamation under O. 21, R. 66, C. P. Code. If, therefore it is dismissed, the order is conclusive unless it is set aside by a suit under O. 21, R. 63, C.P. Code. (*Mukherjea and Latifur Rahman, JJ.*) AMBICA PROSAD SANYAL *v.* SOORAJMULL. **I.L.R. (1939) 2 Cal. 291=43 C. W.N. 999=185 I.C. 523=12 R.C. 378=A. I.R. 1939 Cal. 620.**

——**O. 21, R. 62**—*Claim on ground that property is subject to mortgage—Refusal by Court to investigate—Order that sale would be held with notice of mortgage—Legality.*

If a person prefers a claim on the ground that the properties attached in execution of a rent decree are subject to a mortgage in his favour, the Court must proceed to investigate the claim and cannot order simply without investigation that the sale would be held with notice of the mortgage. Such an order is not one contemplated by O. 21, R. 62, C.P. Code, and cannot be sustained. (*Bartley and Nasim Ali, JJ.*) KHAGENDRA NATH *v.* JORAD KUMARI DASI. **67 C.L.J. 79.**

——**O. 21, Rr. 62 and 66**—*Construction—'Subject to such mortgage', meaning of—Distinction between such a sale and one where notice of encumbrance is given in the proclamation—Right of auction-purchaser to question mortgage.*

The expression 'subject to such mortgage' occurring in O. 21, R. 62, C.P. Code, means that what is sold is the equity of redemption. There is a distinction between an express order directing the property to be sold 'subject to a mortgage' and cases where notice of an alleged mortgage is given in the sale proclamation. While in the former case the would-be purchaser is made aware of what exactly he is purchasing in the latter case he merely takes a chance of the mortgage being either not in force or enforceable. The price would vary considerably according as to whether a sale is 'subject to a mortgage' or whether a mortgage is merely notified in the sale proclamation. An auction-purchaser who is the decree-holder cannot challenge the finding that a mortgage subsists when the sale is 'subject to a mortgage' (*Grille, J.*) SETH MISHRILAL OSWAL *v.* BARIK JURSI KIRAR. **I.L.R. (1939) Nag. 665 =1939 N.L.J. 487=185 I.C. 727=12 R.N. 169=A.I.R. 1939 Nag. 305.**

——**O. 21, R. 63**—*Applicability—Absence of valid attachment—Order dismissing objections and suit because relief was cognizable under S. 47—Finality of.*

Where no valid attachment was subsisting, a declaratory suit praying that property was not liable to be attached was redundant and an order dismissing such suit cannot operate as conclusive under O. 21, R. 63. Moreover when such suit was dismissed not on merits but because Court thought that the relief was cognizable under S. 47, C.P. Code, the decision cannot operate as *res judicata* under S. 11, C.P. Code. Nor can the dismissal of a claim petition when there is no attachment subsisting attract the operation of O. 21, R. 63, and make the order of dismissal conclusive. (*Mir Ahmad, A.J.C.*) GHULAM RAZA *v.* MT. IKBAL SULTAN. **160 I.C. 835= 8 R. Pesh. 132=A.I.R. 1936 Pesh. 41.**

C. P. CODE (1908), O. 21, R. 63.

———O. 21, R. 63—*Applicability—Attachment of pro-note—Objection by executant that debt discharged—Order for sale without investigation—If against claimant—Subsequent suit on pro-note by purchaser in execution—Plea of discharge—If barred.*

A executed a pro-note in favour of *B*. In an execution against *B* the pro-note was ordered to be sold. *A* objected to the sale contending that the pro-note had been satisfied by him. The Court refusing to go into the question ordered the sale. The pro-note was accordingly sold to *C*. *C* brought a suit on the pro-note against *A* and *B*. *A* claimed satisfaction of the pro-note. *C* contended that as this defence was raised by *A* in the previous execution proceedings it was not open for him to raise the same objection again.

Held, that in the execution proceedings there was no order under R. 61, and therefore R. 63 did not apply. Therefore it was open to *A* to take the same objection again. (*Pollock, J.*) SITA-RAM SHAMRAO *v.* GANPATI MAROTI. **171 I.C. 759=10 R.N. 133=A.I.R. 1937 Nag. 149.**

———O. 21, R. 63—*Applicability—Claim—Rejection on the ground that execution has already been transferred to Collector—Order—If "against" claimant—Suit after 1 year—If barred.*

Where a claim petition is summarily rejected on the ground that "the execution has already been transferred to the Collector," the order is an ambigous order which must be construed in favour of the claimant against whom it is made. It is not therefore an order "against" the claimant within the meaning of O. 21, R. 63, and Art. 11 of the Limitation Act cannot apply. A suit filed by the claimant more than one year is not therefore barred. (*Bose, J.*) CHAITANLAL *v.* GHANSYAMSINGH. **19 N.L.J. 308.**

———O. 21, R. 63—Applicability—Dismissal of claim by mortgagee—Failure to sue within one year—Execution sale and purchase by decree-holder—Delivery of possession—Application by mortgagee under R. 100—If barred. *See* C.P. CODE, O 21, RR. 58, 62 AND 100. **17 Pat.L.T. 812 (F.B.).**

———O. 21, R. 63—Applicability—Order against—Order directing notification of mortgage and of decree-holder's allegation of collusive character at time of sale—If against mortgagee—Suit on mortgage after one year—If barred. *See* LIMITATIN ACT, ART. 11. **52 L.W. 354=(1940) 2 M.L.J. 402.**

———O. 21, R. 63—Applicability—Proceedings under Oudh Rent Act. *See* OUDH RENT—S. 116. **1937 O.W.N. 1164.**

———O. 21, R. 63—*Burden of proof.*

Where the facts are fully established and the inference from them is clear, the question of *onus* is not material. (*Sir George Lowndes.*) MD. ISMAIL *v.* HANUMAN PARSHAD. **I. L. R. (1939) Kar. 31=11 R. P. C. 106=1939 O.A. 98=1939 M.W.N. 24=1939 P.W.N. 1=5 B.R. 168=20 P.L.T. 81=1939 A.L.J. 296=1938 A. L.R. 910=178 I.C. 476=1938 A.W.R. (P.C.) 209=1938 O.W.N. 1248=1938 O.L.R. 510= A.I.R. 1938 P.C. 290 (P.C.).**

C. P. CODE (1908), O. 21, R. 63.

———O. 21, R. 63—Burden of proof. *See infra* UNDER O. 21, R. 63—SUIT UNDER. **A.I.R. 1937 Rang. 362.**

———O. 21, R. 63—*Burden of proof.*

In a suit under O. 21, R. 63, C. P. Code, the burden is upon the plaintiff, who was unsuccessful in the execution proceedings, to establish his case. If his suit is dismissed, a double burden lies upon him in appeal. (*Addison and Ram Lall, JJ.*) AHMAD DIN ALLAH DITTA *v.* PARTAP SINGH. **41 P.L.R. 373=A.I.R. 1939 Lah. 438.**

———O. 21, R. 63—*Burden of proof—Burden on plaintiff to show title.*

Where an application under O. 21, R. 58, C P. Code, has been dismissed and a suit is filed under O. 21, R. 63, the onus is on the plaintiff to show affirmatively that not only the ostensible but the real title is in him. The presumption as to the correctness of the order is ordinarily sufficient to rebut or at least to considerably weaken the presumption that ostensible owner is the real purchaser. A.I.R. 1916 Cal. 666 and 30 All. 321, Rel. on. (*Mosely, J.*) M. S. M. CHETTYAR FIRM *v.* MRS. A. MURRAY. **172 I.C. 52=10 R. R. 206=A.I.R. 1937 Rang. 252.**

———O. 21, R. 63—*Burden of proof—Claim based on registered sale-deed of attached property—Dismissal—Suit to set aside claim order—Onus of proving consideration and validity.*

Where an order has been made rejecting a claim to attached property, based on a registered sale-deed obtained by the claimant, it is not enough for the defeated claimant suing to set aside the claim order, to produce and prove a duly registered deed executed by the owner of the property. He must show, in order to succeed in the suit, that the sale in his favour was a genuine transaction and that he had purchased the property for valuable consideration. That is a fact specially within the plaintiff's knowledge and the burden of proving it must obviously lie on him. The recital as to the passing of consideration in the sale-deed cannot be of any evidentiary value by itself against a person who was not a party to the deed. (*Venkataramana Rao and Abdur Rahman, JJ.*) MAHOMED KASSIM SAHIB *v.* SUBRAMANIAN CHETTIAR. **51 L.W. 34=1940 M.W.N. 557=A.I.R. 1940 Mad. 444.**

———O. 21, R. 63—*Burden of proof—Plaintiff relying on gift made to him by judgment-debtor after decree.*

In a suit under O. 21, R. 63, C. P. Code, instituted by an unsuccessful objector in execution proceedings, the onus lies heavily on the plaintiff to prove not only the factum of the gift of the property in dispute alleged to have been made in his favour by the judgment-debtor after the passing of the decree, but also to establish its *bona fides* and show that it was not intended to defeat and delay the creditors of the donor. (*Tek Chand, J.*) MELA RAM *v.* INAYAT BEGAM. **169 I.C. 123 =9 R.L. 706=40 P.L.R. 462=A.I.R. 1937 Lah. 847.**

———O. 21, R. 63—*Burden of proof—Suit against successful claimant and parties—Judgment-debtors—If necessary parties—Proof of title—Onus.*

C. P. CODE (1908), O. 21, R. 63.

In a suit under O. 21, R. 63, against the successful claimant, the judgment-debtors, his vendors, through whom he holds, are not necessary parties. They having parted with their interest in the property, it matters not to them if the defendant or the plaintiff has it, but the rules of evidence which require a plaintiff to prove his claim are not abrogated in his favour because he brings a suit against a successful claimant. The plaintiff must therefore succeed on the strength of his own title and must prove his case by legally admissible evidence and by the best evidence available. (*Davis, J.C. and Weston, J.*) HARCHANDRAI *v.* GOPALDAS. **I.L.R. (1939) Kar. 539=183 I.C. 797=12 R.S. 81=A.I.R. 1939 Sind 177.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant.*

If a creditor has attached in execution the property of the judgment-debtor, and the objection by third person that property is his because of a sale made in his favour by the judgment-debtor, is lost, the fraudulent nature of the sale is presumed, and in an ensuing suit by the objector, the burden to prove that the sale was for consideration and in good faith is upon the objector and in such suit if he once establishes the consideration, good faith follows, as a matter of course, except in cases of exceptional nature. (*Bose, J.*) GOPAL SINGH *v.* SHEOKUMAR SINGH. **169 I.C. 954=10 R.N. 33=A.I.R. 1937 Nag. 85.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Onus—Proof that attachment is invalid—If sufficient—Proof of claimant's title—Necessity for.*

Where a claim to attached property is disallowed on the ground that the sale-deed under which the claimant lays claim to the property is *benami* and not *bona fide*, the burden of proof, in a suit instituted by the claimant to establish the claimant's right to the property, is on the claimant; and the latter must prove that he has title to the property in dispute. (*Venkataramana Rao, J.*) BAVAMMA *v.* PAPANNA. **165 I.C. 620=9 R. M. 271=1936 M.W.N. 904=44 L.W. 728=A.I. R. 1936 Mad. 971=(1937) 1 M.L.J. 133.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Onus.*

Where in proceedings under O. 21, R. 58 evidence is called and a person's claim to the attached property is rejected upon the merits, the *onus* in a suit by him under O. 21, R. 63 is upon him to show that he is the owner of the property. (*Harries, C.J. and Chatterji, J.*) SAHDEO KARAN SINGH *v.* USMAN ALI KHAN. **184 I.C. 113=6 B.R. 14=12 R.P. 225=20 P.L.T. 787=A.I.R. 1939 Pat. 462.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Onus.*

Where an objection by an alienee of certain property to attachment in execution is dismissed and he files a suit for a declaration, the burden of proof is upon him to show that the alienation is not a fraudulent alienation, and that it was made *bona fide* and for consideration. (*Stone, C.J. and Niyagi, J.*) KASTURCHAND *v.* MT. WAZIR BEGAM. **167 I.C. 48=9 R.N. 160=I.L.R. (1937) Nag. 291=A.I.R. 1937 Nag. 1.**

C. P. CODE (1908), O. 21, R. 63.

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Claimant producing registered sale-deed and proving execution and valuable consideration and possession also—Effect.*

Where in a suit by the vendee for the establishment of a right to the attached property, he proves the execution and registration of the sale-deed and valuable consideration therefor and further proves that he is in possession of the property under the sale-deed, and that he is not a party to and has no knowledge of the vendor's fraud, if any, the burden of proving that the sale is bogus, fraudulent and collusive shifts on to the attaching creditor. (*Stone, C.J.*) CHAMPAT RAO *v.* MAHADEO BAJIRAO. **174 I.C. 321=10 R. N. 370=A.I.R. 1937 Nag. 143.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Onus.*

In a suit for a declaration by a defeated claimant, the onus is on the plaintiff to prove that he has the right which he claims. (*Courtney-Terrell, C.J. and James, J.*) RADHA KISHUN *v.* KEOLA PRASAD. **167 I.C. 118=9 R.P. 377=3 B.R. 264=1936 P.W.N. 812=17 Pat.L.T. 785=A.I.R. 1937 Pat. 76.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Purchase by duly registered sale-deed reciting passing of consideration—Effect—Onus—If shifted.*

Where a claim to attached property made by a purchaser of such property is dismissed and the purchaser files a regular suit, the initial onus is on the plaintiff. But if he proves his purchase by producing a duly registered sale-deed which contains recitals of consideration, the onus is shifted on to the defendant who has to prove that the consideration is utterly inadequate and the sale is fraudulent. (*Stone, C.J.*) JAGOBA KASHIBA KASAR *v.* ANANDRAO. **169 I.C. 449=9 R.N. 6=A.I.R. 1937 Nag. 9.**

———O. 21, R. 63—*Effect of order—Claim by person in adverse possession—Dismissal—If interrupts adverse possession—Attachment subsequently raised after a year—Effect.*

Where a person has been actually in possession of certain properties adversely to the owner thereof the dismissal of a claim petition preferred by him under O. 21, R. 63, C. P. Code, does not operate as an interruption of that adverse possession by operation of law, especially when the attachment is raised subsequently. The fact that the attachment is raised only beyond a year of the dismissal of the claim does not make any difference, because once it is raised, it ceases to be effective even from the date of the attachment itself. An attachment, further, does not operate as a disturbance of the possession. (*Harwill, J.*) DHARAPURAM JANOPAKARA NIDHI LTD. *v.* LAKSHMINARAYANA CHETTIAR. **166 I.C. 308 (2)=9 R.M. 358=1936 M.W.N. 1113=44 L.W. 617=A.I.R. 1937 Mad. 44=(1937) 1 M.L.J. 642.**

———O. 21, R. 63—*Frame of suit—Mere declaration—If sufficient—Prayer for consequential relief—Necessity—Specific Relief Act, S. 42, Proviso.*

C. P. CODE (1908), O. 21, R. 63.

A plaintiff suing under O. 21, R. 63, C. P. Code, is only required to obtain a declaration of his rights or title in so far as it is affected by the order which he seeks to impeach. He is not bound to ask for a consequential relief. The proviso to S. 42 of the Specific Relief Act does not operate to take away from a party against whom an adverse order is made on a claim petition the special right conferred by O. 21, R. 63 to sue for a declaration. (*Leach, C.J. and Lakshmana Rao, J.*) NARAYANA SINGH *v.* BATCHA SAHEB. **181 I.C. 887=11 R. M. 873=47 L.W. 724=1938 M.W.N. 514=A.I. R. 1938 Mad. 741=(1938) 1 M.L.J. 803.**

———O. 21, R. 63—*Limitation—Order under O. 21, R. 58—Finality—Conditions—Disallowance of claim—Subsequent setting aside of sale in execution—Suit within one year—If necessary.*

The conclusiveness of an order on a claim petition is conditional on the continuance of the execution proceedings and of the attachment issuing therefrom. Where after the disallowance of a claim, the execution proceedings come to an end by reason of the execution-sale being set aside, the attachment goes and with it the order disallowing the claim also goes and becomes useless and inoperative. A suit brought by the defeated claimant for declaration of his title to the property in question beyond one year is not therefore barred under Art. 11 of the Limitation Act, as the order on the claim is no longer a bar. Art. 11, Limitation Act, will have no application whether the execution proceedings terminate as a result of the setting aside of the sale, within or beyond one year after the adverse claim order. (*Nasim Ali and Henderson, JJ.*) BAMAPADA BANDOPADHYA *v.* RAMANATH MANDAL. **165 I.C. 84=9 R.C. 340=40 C.W.N. 146.**

———O. 21, R. 63—*Limitation—Summary rejection of claim—If final—Suit within one year—If necessary.*

The ordinary rule of law is that a party who is aggrieved by the attachment and sale of his property has a longer period of limitation within which to sue than that prescribed under Art. 11, Limitation Act, which is an exception to the general law and curtails the plaintiff's rights very considerably. Consequently, if an order under O. 21, R. 63, C. P. Code, is intended to operate to the prejudice of any person, it should be couched in clear and unambiguous terms, so that there can be no misapprehension as to exactly what is meant. When an order is passed by the Court in an ambiguous way it should be construed in favour of the party against whom it is made. An objection to attachment of certain property in execution of a decree was filed but the Court passed an order in the following terms: "The application is summarily rejected as the execution has been transferred to the Collector. Applicant's cost Re. 1. Non-applicant's costs nil". The objector filed a suit for a declaration that the property attached belonged to him and could not therefore be proceeded against in execution. It was contended by the defendant decree-holder that the suit was barred by time as having been brought more than a year from the order rejecting the plaintiff's application.

Held, that the order being ambiguous should be construed in favour of the plaintiff and the application was not dismissed by the Court but rejected as it had no jurisdiction to entertain it, the case being transferred to the Collector. The plaintiff, therefore, could bring a suit within the longer period of limitation allowed under the general law and his suit though brought more than a year from the order rejecting his application was not barred. (*Bose, J.*) CHETAN LAL *v.* LALJI. **I.L.R. (1938) Nag. 276=19 N.L.J. 308 =168 I.C. 601=9 R.N. 261 (2)=A.I.R. 1937 Nag. 170.**

———O. 21, R. 63—*Objection filed by mortgagee to attachment dismissed—Suit by him for possession—Nature of—Onus of proof in such suit.*

O. 21, R. 63, C. P. Code, is clearly intended to apply only to claims and objections which can properly be preferred under R. 58. A mortgagee cannot come to Court under R. 58 and argue that the mortgaged property is not liable to attachment. If a mortgagee who is not in possession of the property files a suit for possession after the dismissal of the objection preferred by him under R. 58, the suit cannot properly be described as one under O. 21, R. 63, but it is simply one for possession on the footing of the alleged mortgage. To such a suit, the rule that the onus of proving title lies on the plaintiff who had raised an unsuccessful objection before the executing Court has no application. (*Beckett, J.*) HARCHAND *v.* HIRA LAL. **180 I.C. 138=11 R.L. 663=40 P.L. R. 682=A.I.R. 1938 Lah. 760.**

———O. 21, R. 63—*Occupancy rights of judgment-debtor attached in execution of decree—Declaratory suit by landlord—Maintainability.*

Where the occupancy rights held by a judgment-debtor are attached in execution of a decree against him, the landlord of the land in which the occupancy rights are held, is entitled to bring a suit under O. 21, R. 63 for a declaration that the occupancy rights cannot be attached and sold in execution of the decree. (*Addison and Din Mohammad, JJ.*) KARAM CHAND *v.* AMAR KAUR. **179 I.C. 58=11 R.L. 518=40 P.L.R. 946=A.I. R. 1938 Lah. 677.**

———O. 21, R. 63—*Order dismissing claim for non-prosecution—Finality.*

In order to bring a case within the purview of O. 21, R. 63, C. P. Code, the question as to whether the claim was investigated or not is immaterial. Even if a claim is dismissed for non-prosecution, the claimant is bound to institute a suit under O. 21, R. 63, failing which the order becomes conclusive and final. (*Mukherjea and Latifur Rahman, JJ.*) AMBICA PROSAD SANYAL *v.* SOORAJMULL NAGARMULL. **185 I.C. 523=12 R.C. 378=I.L.R. (1939) 2 Cal. 291=43 C.W.N. 999=A.I.R. 1939 Cal. 620.**

———O. 21, R. 63—*Parties—Suit by defeated claimant—Execution sale pending suit—Purchaser—If necessary party.*

A decree-holder put his decree into execution attaching the prrperty which had been mortgaged under O. 21, R. 54. A person preferred a claim under O. 21, R. 58, which was dismissed. He then instituted the suit under O. 21, R. 63 making the decree-holder and the judgment-debtors defendants. During the pendency of the suit, the property was brought to sale in the execution proceedings and was purchased by a stranger who was not a party to the suit.

C. P. CODE (1908), O. 21, R. 63.

Held, that the claimant was entitled to institute a suit under O. 21, R. 63 against the persons who had been parties to the case under O. 21, R. 58 and he was not obliged subsequently to implead the auction-purchaser. (*James and Rowland, JJ.*) MT. NAUROZI *v.* NAJAF ALI SHAH. **184 I.C. 508=6 B.R. 53=12 R.P. 248=A.I.R. 1939 Pat. 321.**

——**O. 21, R. 63**—*Right of suit—Attachment of share of debtor in property inherited from mother—Claim by daughter as mortgagee from mother allowed—Suit on mortgage—Suit by creditor under O. 21, R. 63 alleging mortgage to be collusive*—Locus standi.

A creditor having attached and brought to sale the one-third share of the judgment-debtor which he had inherited from his mother, the latter's daughter objected under O. 21, R. 58 on the ground that she was a mortgagee of the whole property from the mother. Her objection was upheld and the share was sold subject to her mortgage. She filed a suit on her mortgage whereupon the creditor objected to the mortgage and also brought a suit under O. 21, R. 63, for a declaration that the mortgage was collusive and without consideration. It was contended that the creditor firm had no *locus standi* and could not be allowed to challenge the mortgage as being without consideration.

Held, that the firm by purchasing land at the Court-auction succeeded to the rights of the judgment-debtor in his mother's property and he, being the representative of his mother, the firm was also a representative of the mother and therefore had a right to challenge the mortgage and to assert that it was a sham and collusive transaction and without consideration. (*Dunkley, J.*) A. K. R. M. S. CHETTYAR FIRM *v.* DAW PWA THET. **161 I.C. 342=8 R.R. 467=A.I.R. 1936 Rang. 2.**

——**O. 21, R. 63**—*Right of suit—Decree-holder consenting to claim being allowed—Subsequent suit to declare property liable to attachment as belonging to judgment-debtor being held benami by claimant—Maintainability.*

An executing Court cannot go into the question as to whether a transaction is benami or not in summary proceedings under O. 21, R. 58, C. P. Code. The fact that the decree-holder does not contest a claim to attached property preferred by the person in whose name the attached property stands and agrees to the claim being allowed does not debar him from bringing a suit for a declaration under O. 21, R. 63, C. P. Code, that the property really belongs to the judgment-debtor and liable to attachment and the purchase in the name of the claimant is only benami and a fraudulent and colourable transaction. Where a decree-holder cannot successfully hope to resist a claim under O. 21, R. 58, C. P. Code, because the question cannot be gone into and decided by the executing Court he may well ask the Court to allow the claim in order to enable him to bring proceedings under O. 21, R. 63 without delay. Where he does not give up his right to contest the matter by means of a suit, his admission in the claim must be confined to the claim only and he does not lose his right of suit under O. 21, R. 63. A party who realises the hopelessness of resisting a claim in summary proceedings and consents to the claim being allowed is nevertheless a party against whom an order is made and consequently he can bring a suit under O. 21, R. 63; unless a party has clearly contracted himself out of his statutory rights given to him by O. 21, R. 63, he cannot be debarred from instituting a suit under the rule to obtain the appropriate relief. (*Harries, C.J. and Manohar Lal, J.*) RAMRUP RAI *v.* MAHADEO LAL NATHMAL. **19 Pat. 494.**

——**O. 21, R. 63 and T. P. Act, S. 53**—*Right of suit—Defeated attaching creditor, claimant—Avoidance of transfer necessary—Suit, if to be in representative character.*

It is very doubtful as to whether the fact that a plaintiff has instituted his suit under O. 21, R. 63, C. P. Code, to declare his right to attach and sell certain property after setting aside a transfer as having been made with a view to defeat creditors, is sufficient in itself to exclude the operation of the provisions of S. 53 (1) of the T. P. Act. (*Smith and Madeley, JJ.*) GIRRAJ *v.* SANKTA PRASAD. **171 I.C. 927=1937 O.L.R. 582=1937 O.W.N. 1169=10 R.O. 148=A.I.R. 1938 Oudh 33.**

——**O. 21, R. 63**—*Right of suit—Property in possession of auction-purchaser of a Hindu widow's limited interest—Attachment by creditor of estate, after widow's death—Release on objection by auction-purchaser—Attaching creditor, if can sue under O. 21, R. 63.*

A sale in execution of a decree in a suit based on the personal debt of a Hindu widow, can only convey her life-interest in the property. On her death, the interest of an auction-purchaser of such property, will terminate. If he remains in possession, he does so without any right or title, and his sale need not be set aside. A creditor of the estate whose attachment of such property has been released on objection by the auction-purchaser, can sue for a declaration under O. 21, R. 63. (*Smith and Madeley, JJ.*) RAMESHAR BUX SINGH *v.* PATRAJ KUER. **172 I.C. 94=10 R.O. 155=1937 O.L.R. 595=1937 O.W.N. 1181=A.I.R. 1938 Oudh 35.**

——**O. 21, R. 63**—*Scope of.*

(Per *Braund, J.*)—O. 21, R. 63, C. P. Code, does not itself confer a right but only gives the creditor the opportunity of enforcing whatever rights he has by a civil suit. (*Collister and Braund, JJ.*) PARBHU NATH PRASAD *v.* SARJU PRASAD. **1940 A.W.R. (H.C.) 422=1940 A.L.J. 470=A.I.R. 1940 All. 407.**

——**O. 21, R. 63**—Scope and effect—Attachment—Claim — Rejection — Attachment ceasing owing to dismissal of execution petition—Failure to institute suit to set aside claim order—Subsequent attachment—Fresh claim—If barred by order on prior claim. *See* C. P. CODE, O. 21, RR. 57, 58 AND 63. **1940 M.W.N. 459.**

——**O. 21, R. 63**—*Scope—Order allowing claim to attached property—Suit by decree-holder—Frame of—If to be representative suit on behalf of all creditors of judgment-debtor—Right of decree-holder—If subject to S. 53, T. P. Act.*

A judgment-creditor who is defeated at the instance of an intervener in proceedings taken in execution of his decree is not bound necessarily to file a suit under S. 53 of the T. P. Act. He is entitled under O. 21, R. 63, C. P. Code, to bring a suit for a declaration that the intervener-claim-

ant has no title and that he (the decree-holder) has the right to attach the property and bring it to sale in execution of his decree. O. 21, R. 63, C. P. Code, does not say that the suit by the defeated decree-holder must be a representative suit brought by the judgment-creditor for and on behalf of the general body of creditors of the judgment-debtor. The rule is not subject to S. 53 of the T. P. Act. All that the last paragraph of S. 53 (1), T. P. Act, says is that if a creditor (which term includes a decree-holder) wants to avoid a transfer on the ground that it has been made with intent to defeat or delay the *creditors* of the transferor, then he must sue on behalf and for the benefit of all the creditors. But it does not say that a creditor who wants to enforce his own right to property as against another creditor or a transferee must bring a representative suit. A suit to establish the decree-holder's priority need not be a representative suit. S. 53 does not cover the case of a transfer in which the intention is only to prefer one creditor to another; the section does not refer to the question of priority or preference among the creditors of the transferor or the debtor under the section the intention must be to defeat or delay the creditors generally. Though a suit under S. 53 (1), last paragraph, has to be brought by the plaintiff on behalf of himself and all other creditors of the debtor, a suit under O. 21, R. 63, C. P. Code, need not necessarily be on behalf of the defeated decree-holder and all other creditors. S. 53, T. P. Act, merely confers a privilege upon a creditor (or decree-holder) to impeach a transaction of his debtor in the interest of other creditors; but there is nothing in it which compels a decree-holder who wants to entablish his own rights as against a transferee from the judgment-debtor in order to realize the fruits of his decree to bring a representative suit under S. 53, T. P. Act. (*Rangnekar, J.*) SHRIMAL *v.* HIRALAL. **I.L.R. (1938) Bom. 445=175 I.C. 843=11 R.B. 7=40 Bom. L.R. 371=A.I.R. 1938 Bom. 289.**

———O. 21, R. 63—*Scope—Order—allowing claim—Suit by decree-holder more than* 12 *years after attachment—Maintainability—Discretion of Court to grant declaration of right to attach.*

A suit under O. 21, R. 63, C. P. Code, is in form and substance a declaratory suit, and it would be an unreasonable exercise of discretion by the Court to make a declaration of the decree-holder's right to attach if the period of limitation of 12 years has expired between the date of attachment and the date of the suit unless the property in question has already been sold in time. The suit is often but a step to enable the decree-holder to bring the property to sale; if by reason of the extinction of the title of the judgment-debtor before the sale, there would be nothing to be sold, as declaration in the decree-holder's favour in a suit under O. 21, R. 63, C. P. Code, would not only be futile but sometimes even be mischievous, as it may lead an unwary purchaser into thinking that he is buying a subsisting interest. (*Varadachariar, Lakshmana Rao and Gentle, JJ.*) DHARAPURAM JANOPAKARA NIDHI, LTD. *v.* LAKSHMINARAYANA CHETTIAR. **I.L.R. (1939) Mad. 803 =182 I.C. 999=12 R.M. 239=49 L.W. 671= 1939 M.W.N. 488=A.I.R. 1939 Mad. 456= (1939) 1 M.L.J. 802 (F.B.).**

———O. 21, R. 63—*Scope—Order allowing claim by transferee from judgment-debtor—Suit by decree-holder—Allegation of fraudulent transfer—Suit—If falls under S.* 53, *T. P. Act.*

There is no absolute distinction between a suit brought under O. 21, R. 63, C. P. Code, and one brought under S. 53, T. P. Act. A suit by a defeated decree-holder under O. 21, R. 63, alleging that the claimant's title is based on a transfer which is voidable as having been made fraudulently to defeat and delay his claim, must be treated as coming under S. 53, T. P. Act also, though the plaint may not specifically refer to S. 53. The fact that the suit is by the decree-holder alone and not by all the creditors or on behalf of all the creditors does not make the suit non-maintainable. (*Norman, I.C.S.*) AMOLAK CHAND *v.* RAM NATH RAM NARAIN. **1936 A. M.L.J. 104.**

———O. 21, R. 63—Scope—Order dismissing claim by person in adverse possession—Omission to file suit—Sale in execution subsequently set aside—Decree satisfied otherwise—Effect—Order of dismissal—If breaks adverse possession or estops claimant from pleading it. *See* ADVERSE POSSESSION—INTERRUPTION. **(1939) 1 M.L.J. 802 (F.B.).**

———O. 21, R. 63—*Scope—Order filing objection, without adjudication—If "against" objector —Suit within one year—If obligatory.*

The suit property was mortgaged first to *R* and subsequently to *M*. *R* obtained a mortgage decree and took out execution of his decree. The property was attached and *M* presented an objection to the executing Court in which he asked for the raising of *R's* attachment or in alternative for the sale of property subject to his mortgage. In the meantime a declaratory suit was filed by a stranger and execution was stayed. The executing Court filed the application for execution with the direction that attachment should subsist. The same Judge filed *M's* objection on the ground that the connected petition for execution had been stayed. On dismissal of the declaratory suit the sale of the property took place in execution of *R's* decree and was knocked down in favour of *J*. *M* asking himself to be paid out of sale proceeds gave a petition to executing Court which was dismissed for default and sale was confirmed. *M* then brought a suit under O. 34, C. P. Code, for a mortgage decree to be granted to him. *J* contested the suit urging that *R* had a prior mortgage and that his mortgage money must be paid before *M* could obtain the relief asked for and that O. 21, R. 63 was a bar to the suit.

Held, that *M's* objection which was filed because injunction had been received to stay the connected application was not adjudicated upon. It could not be said therefore that the order filing the objection amounted to either a dismissal or acceptance of the request contained in that petition. It is necessary under O. 21, Rr. 58 to 63, C. P. Code, that the Court should investigate the claim and give its decision on the merits. Hence the order filing the objection was not one which should have been set aside by a declaratory suit under O. 21, R. 63 and therefore O. 21, R. 63 was no bar to the present suit.

Held also, that the dismissal of *M's* application after the sale for default was not such a final

C. P. CODE (1908), O. 21, R. 63.

order as to make a suit under O. 21, R. 63 necessary as the attachment had ceased to exist directly the property was auctioned and no application under O. 21, R. 58 was necessary. (*Almond, J. C. and Mir Ahmad, A.J.C.*) MOTI RAM NIHAL CHAND *v.* BASHESHAR NATH. **171 I.C. 810=10 R. Pesh. 36=A.I.R. 1937 Pesh. 97.**

———**O. 21, R. 63**—*Scope—Suit under—Decree under execution whether justifiable—If relevant question for decision.*

In a suit by a defeated decree-holder under O. 21, R. 63, C. P. Code, the plaintiff should not be forced to try out the suit in which he has already obtained a decree. It may be that the decree which is the basis of the execution is not a justifiable decree; but that is not the question for decision in the suit under O. 21, R. 63, C. P. Code. (*Wort, J.*) DEOKI SINGH *v.* RAGHVINDRA BHAGWAN. **183 I.C. 371=5 B.R. 922=12 R.P. 135=1939 P.W.N. 229=A.I.R. 1939 Pat. 430.**

———**O. 21, R. 63**—*Scope and effect of—Attachment of mortgaged property—Claim by mortgagee—Mortgage upheld by Court—Order not impeached—Effect—Sale in execution—Purchaser in execution and purchaser from him—Right to impeach mortgage.*

Where a mortgagee prefers a claim to the mortgaged property attached in execution of a money decree, and the Court upholds the claim based on the mortgage, and no steps are taken to impeach the order within the time limited, the order becomes conclusive between the parties; and when the equity of redemption only in the property is sold in court auction (sale being subject to the mortgage), neither the decree-holder nor the auction-purchaser nor a purchaser from him can go behind the order in the claim proceedings. (*Varadachariar and Abdur Rahman, JJ.*) MAHALAKSHMI *v.* SOMARAJU. **I.L.R. (1939) Mad. 600=189 I.C. 17=1939 M.W.N. 159=49 L.W. 280=A.I.R. 1939 Mad. 393=(1939) 2 M. L.J. 72.**

———**O. 21, R. 63**—*"Suit"—If includes application under Provincial Insolvency Act, S. 4.*

The suit contemplated by O. 21, R. 63, is a suit under the Civil Procedure Code, which commences by the filing of a plaint. An application under S. 4 of the Provincial Insolvency Act is not a suit for purposes of O. 21, R. 63. (*Venkataramana Rao, J.*) SANGA PILLAI MUTHIRIAN *v.* OFFICIAL RECEIVER, TRICHINOPOLY. **1937 M.W.N. 1046.**

———**O. 21, R. 63**—*Suit by unsuccessful decree-holder—Frame of—If to be in representative capacity on behalf of all creditors—T. P. Act, S. 53.*

A suit by a decree-holder to set aside an order allowing a claim to attached property is one which can be brought by the decree-holder alone on his own behalf. It is not necessary that he should sue in a representative capacity on behalf of all the creditors of the judgment-debtor. S. 53, T. P. Act does not apply to such a suit under O. 21, R. 63. (*Fazl Ali and Agarwala, JJ.*) MT. BAS KUER *v.* GAYA MUNICIPALITY. **17 Pat. 588=180 I.C. 983=11 R.P. 563=5 B.R. 514=20 P. L.T. 76=A.I.R. 1939 Pat. 138.**

———**O. 21, R. 63**—*Suit under—Attached property in possession of judgment-debtor—Decree-holder if can rely on presumption drawn from possession.*

C. P. CODE (1908), O. 21, R. 63.

Where a decree-holder, who has attached property in possession of his judgment-debtor, is unsuccessful in the claim proceedings under O. 21, R. 58 of C. P. Code, and therefore brings a declaratory suit under O. 21, R. 63, in such suit he can rest himself on the presumption drawn from possession, that property attached belonged to the judgment-debtor on his behalf and the burden to prove that this was not so is on the defendant. (*Mosely, J.*) RAMJI DAS *v.* MAUNG THAN MAUNG. **172 I.C. 572=10 R.R. 261=A.I.R. 1937 Rang. 362.**

———**O. 21, R. 63**—*Suit under—Burden of proof.*

In a declaratory suit under O. 21, R. 63, C. P. Code, the burden of proving good faith in the first instance is on the plaintiff when objections filed by him in execution proceedings have been dismissed on a summary finding of fraud. The position is not altered when objections are dismissed for reasons not affecting the merits of the case. (*Beckett, J.*) KRISHAN CHAND *v.* KANSHI RAM. **40 P.L.R. 705.**

———**O. 21, R. 63**—*Suit under—Court-fee.*

If an objection made in the executing Court under O. 21, R. 58, C. P. Code, is dismissed, the sole remedy of the objector is a suit under O. 21, R. 63, and such a suit falls within Art. 17 of Sch. II of the Court-Fees Act. (*Niyogi and Pollock, JJ.*) KISAN *v.* TOTARAM. **I.L.R. (1937) Nag. 342=169 I.C. 590 (1)=10 R.N. 13=A.I.R. 1937 Nag. 253.**

———**O. 21, R. 63**—*Suit under, by alienee of judgment-debtor—Burden of proof.*

In a suit under O. 21, R. 63, C. P. Code, by the alienees from a judgment-debtor, whose properties have been attached by the decree-holder as properties belonging to the judgment-debtor it is not sufficient for the alienees to prove the deed of transfer. The burden of proving that the transfer was for consideration and was in good faith also lies on them. A.I.R. 1932 Lah. 174 and A.I.R. 1930 P.C. 255, Rel. on. (*Jai Lal and Coldstream, JJ.*) HANUMAN PRASAD *v.* MAHOMED ISMAIL. **162 I.C. 495=8 R.L. 909=38 P.L.R. 263=A.I.R. 1936 Lah. 72.**

———**O. 21, R. 63**—*Suit under by defeated decree-holder—Frame of—If to be representative—Objection to frame of—When to be taken.*

Where a suit is brought under O. 21, R. 63 by an attaching creditor to establish his right to attach and bring to sale certain property by avoiding a transfer of the property, on the ground that it has been made with intent to defeat or delay the creditors of the transferor, it is the duty of the trial Court to see that the suit is brought in a representative capacity and it can if such a suit is brought by one creditor in his individual capacity, direct the plaintiff to take proper steps to put matters right. Where, however, such a suit is not brought in a representative capacity and no objection is taken as to the form of the suit in the trial Court but is only raised for the first time in appeal the objection cannot be allowed in the appellate Court. The Court has inherent jurisdiction in a case of this nature although its jurisdiction is irregularly invoked and the defendant by his conduct is precluded from maintaining in appeal that the suit was not maintainable as framed. Second Appeal No. 244 of 1932; A.I.R.

1935 Rang. 489 and A.I.R. 1933 Rang. 52, Foll.; A.I.R. 1934 Rang. 303, Ref.; A.I.R. 1934 Rang. 334, Not Foll. (*Mya Bu and Baguley, JJ.*) ASGAR ALI *v.* C. V. R. M. FIRM. **14 Rang. 81=161 I.C. 887=8 R.R. 522=A.I.R. 1936 Rang. 117.**

———**O. 21, R. 63**—Suit under by defeated decree-holder—If one under S. 53, T. P. Act. *See* T. P. ACT, S. 53. **62 C.L.J. 548.**

———**O. 21, R. 63**—*Suit under—Failure to institute—Order dismissing objection—Subsequent release of attachment—Finality of order.*

A summary order of dismissal of objections under O. 21, R. 58, C. P. Code, is vacated if the attachment itself is subsequently released owing to the reversal of the decree, and the property in question is not sold. Such an order does not, therefore, become final by reason of failure to institute a suit under O. 21, R. 63. (*Bhide, J.*) PARMA NAND *v.* THARU LAL. **163 I.C. 892=9 R.L. 60=39 P.L.R. 306=A.I.R. 1937 Lah. 169.**

———**O. 21, R. 63**—*Suit under—Frame of—If should be a representative suit under S.* 53, *T. P. Act.*

A suit by the judgment-creditor under O. 21, R. 63, C. P. Code, praying for a declaration that a sale-deed, on which the successful claimant based his claim, is void, and that the property covered by it is liable to attachment and sale in execution of his decree, need not necessarily be one on behalf of himself and all other creditors of the judgment-debtor, as falling under S. 53, T. P. Act. The creditor should not be compelled to prove that the sale-deed was made with intent to defeat and delay creditors generally, when he only wants a declaration in a limited form that the transfer is void as against him. (*Beaumont, C. J.*) GULJARKHAN *v.* HUSENKHAN. **172 I.C. 165=10 R.B. 253 (1)=39 Bom.L.R. 917=A.I.R. 1937 Bom. 476.**

———**O. 21, R. 63**—Suit under—Frame of—If to be on behalf of all creditors. *See* TRANSFER OF PROPERTY ACT (AS AMENDED IN 1929), S. 53. **51 L.W. 608=(1940) 1 M.L.J. 872.**

———**O. 21, R. 63**—*Suit under—Frame of—Prayer for declaration of right as against decree-holder—Necessity for—Suit merely for possession as against persons in possession—If proper—Decree-holder—If necessary party.*

In a suit by a defeated claimant, it is incumbent on the plaintiff to seek a declaration against the decree-holder who attached the property in execution of his decree, to establish his right to the property attached. If he merely claims possession of the property from the persons in possession, and merely makes the decree-holder a party without claiming any relief against him, that would not amount to compliance with O. 21, R. 63, C. P. Code. To such a suit for possession alone, the decree-holder is not a necessary party. (*Pollock, J.*) JANGLUDEO *v.* RAGHUDEO. **20 N.L.J. 199.**

———**O. 21, R. 63**—*Suit under—If one in continuation of claim proceedings—Order allowing claim—Subsequent transferee from claimant—If alienee* pendente lite—*Transfer if void under S. 64—Joinder of transferee as party to suit after one year—Effect—Suit—If barred.*

A suit brought under O. 21, R. 63, C. P. Code, to set aside an order allowing a claim to attached property is a mere continuation of the proceedings in the claim petition. A purchaser of the attached property from the successful claimant after the order and before a suit under O. 21, R. 63, is an alienee *pendente lite.* Such an alienee is not a necessary party to the suit under O. 21, R. 63; the transfer in favour of such alienee is also void under S. 64, C. P. Code. In that view also, the transferee is not a necessary party. If the transfer is not also a real one, the transferee would then too be not a necessary party to the suit. S. 22 (1) of the Limitation Act has no application to the addition of such a party after the period of limitation for the suit. (*Fazl Ali and Agarwala, JJ.*) MT. BAS KUER *v.* GAYA MUNICIPALITY. **17 Pat. 588=180 I.C. 983=11 R.P. 563=5 B.R. 514=20 Pat.L.T. 76=A.I.R. 1939 Pat. 138.**

———**O. 21, R. 63**—*Suit under—Nature of—Decree in—Effect on prior summary order—Dismissal of claim under O.* 21, *R.* 58 *with costs—Suit under O.* 21, *R.* 63 *decreed—Both sides to bear their own costs—Costs awarded by summary order—If executable.*

Where a claim is preferred under O. 21, R. 58, C. P. Code, and is rejected with costs and the defeated claimant files a suit under O. 21, R. 63, it is substantially one to set aside the summary order and where the suit is decreed, each party being directed to bear its own costs it amounts to a setting aside of the summary order, and superseding of the prior order as to costs and hence the prior order as to costs is unexecutable. The prior summary order must be deemed to have been set aside wholly and not in part. (*Niyogi, J.*) CHINTAMAN RAMJIPANT *v.* GOVIND VITHAL. **175 I.C. 753=11 R.N. 12=A.I.R. 1938 Nag. 376.**

———**O. 21, Rr. 63 and 58 and O. 2, R. 2**—*Suit under—Nature of—Property sold at Court-auction—Suit for bare declaration without consequential relief—If lies.*

Where there has been a claim under O. 21, R. 58, a suit for a bare declaration will always lie under O. 21, R. 63 and even where the goods have been sold before the suit is filed, the plaintiff is not bound in either law or practice to claim any consequential relief, for once he has obtained his declaration, he is not barred by the provisions of O. 2, R. 2 from filing a subsequent suit for recovery of the value of the property or the auction price or whatever it may be he sues for. (*Mosely, J.*) **KAKAYAN *v.* LEE LIKE. 169 I.C. 258=9 R. R. 393 (1)=A.I.R. 1937 Rang. 133.**

[Followed in (*Mosely, J.*) MAUNG KHIN GYI *v.* RAHIM ULLA KHAN. **10 R.R. 140=171 I.C. 14=A.I.R. 1937 Rang. 249.**]

———**O. 21, R. 63**—*Suit under—Objections not raised earlier but raised later in execution—Maintainability.*

Suit under O. 21, R. 63 is in essence a continuation of the execution proceedings. Such a suit is for decision of a question of title and there is no reason for holding that a plaintiff may not rely upon points which he had not raised in the summary objection proceedings to begin with but which he urged during these proceedings later on. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SAYED AHMAD ALI *v.* RADHA KISHAN. **166 I.C. 869=9 R. Pesh. 77=A.I.R. 1937 Pesh. 13.**

———O. 21, R. 63—*Suit under—Onus.*

An adverse order against the claimant in the claim proceeding under O. 21, R. 58 is conclusive unless it is displaced by a declaratory suit brought under the provisions of O. 21, R. 63 and the *onus* is certainly upon the claimant to show that he has a right which was denied by the order. The burden cannot be discharged merely by pointing to the innocent appearance of the instruments under which the plaintiff claims. He must prove that they are as good as they look and it is not for the defendant to make out that they are collusive. (*Mukherjea and Latifur Rahman, JJ.*) DHIRENDRA NATH DAS *v.* INDRA CHANDRA KISRIWALA. **185 I.C. 871=12 R.C. 418=A.I.R. 1939 Cal. 578.**

———O. 21, R. 63 and Transfer of Property Act, S. 53—*Suit under O. 21, R. 63 by creditor—If should be on behalf of the body of creditors—Absence of other creditors, when can be presumed.*

A creditor proceeding under O. 21, R. 63, C. P. Code, who does not know of the existence of other creditors is not bound to bring a representative suit to represent persons of which existence he is not aware. It is for the defendant who as debtor knows whether he has other creditors to object that there are other creditors and that a representative suit should be filed. If no such objection is raised by him, the Court is entitled to hold that there are no other creditors and that the plaintiff can sue for himself alone. (*Hamilton, J.*) SURAJ BAKHSH SINGH *v.* THAKUR DAS. **15 Luck. 503=12 R.O. 355=187 I. C. 90=1940 O.A. 260=1940 O.L.R. 167=1940 O.W.N. 285=1940 A.W.R. (C.C.) 148=A.I.R. 1940 Oudh 200.**

———O. 21, R. 63—*Suit under—Parties—Decree-holder, if necessary party.*

Where the plaintiff, whose property is attached and sold in execution of a decree, brings a suit under O. 21, R. 63, for a declaration that suit property belongs to him and is not liable to attachment, the cause of action in such a suit is the attachment. If a declaration be granted in favour of the plaintiff, without making decree-holder a party to the proceedings, against the auction-purchaser, the latter will be immediately entitled to sue the decree-holder for the return of the auction-money. The decree-holder not being a party there will be no question of *res judicata* in the subsequent suit, but the decree-holder will be obliged to resist the conclusions arrived at in the present suit, to which he is not a party, and the Court in which the suit is brought cannot grant relief without traversing the orders given in the present suit. Therefore, the decree-holder is a necessary party in the present suit to enable the adjudication of the main question involved in the suit. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SANT LALL *v.* MIAN FEROZ SHAH. **165 I.C. 252 =9 R. Pesh. 42=A.I.R. 1936 Pesh. 189.**

———O. 21, R. 63—*Suit under—Parties—Judgment-debtor—If proper party.*

Plaintiff obtained a decree against respondents 3 and 4 and in execution of the decree attached certain property. Respondents 1 and 2 objected to the attachment and their objection was upheld and the attachment removed. Plaintiff filed a declaratory suit under O. 21, R. 63, against the objectors and in the same suit joint respondents 3 and 4 as defendants. Respondents 1 and 2 objected to the joining of respondents 3 and 4 as parties, as the declaratory suit was based on the removal of attachment and respondents 3 and 4 had no connection with the proceedings for removal of attachment.

Held, that the respondents 3 and 4 were possible and proper parties to this suit though not necessary parties. 28 All. 41 and 35 Cal. 202 (P.C.), Dist. (*Mya Bu and Baguley, JJ.*) S. N. V. R. CHETTYAR FIRM *v.* MA LAY. **161 I.C. 950= 8 R.R. 518=A.I.R. 1936 Rang. 56.**

———O. 21, R. 63—*Suit under—Parties—Legal representatives of judgment-debtor.*

For a suit under O. 21, R. 63, C. P. Code, the judgment-debtor's legal representatives are necessary parties. 28 All. 41, Rel. on. (*Mosely, J.*) MAUNG KHIN GYI *v.* RAHIM ULLA KHAN. **171 I.C. 14=10 R.R. 140=A.I.R. 1937 Rang. 249.**

———O. 21, R. 63—*Suit under—Parties—Non-joinder of judgment-debtor—Effect.*

The absence of judgment-debtor from the suit for declaration gives rise to prolonged litigation unless the judgment-debtor is brought on the record in the suit for declaration. The mere fact that he was impliedly a party to the removal of attachment proceedings will not make the decree in the declaratory suit binding upon him. 11 Bom. 114; 15 Cal. 674; 30 Mad. 335 and A.I.R. 1924 All. 274, Foll. (*Mya Bu and Baguley, JJ.*) S. N. V. R. CHETTYAR FIRM *v.* MA LAY. **161 I.C. 950=8 R.R. 518=A.I.R. 1936 Rang. 56.**

———O. 21, R. 63—*Suit under—Plaintiff, if bound to prove his title to the property.*

R. 63 lays down that where a claim or an objection is preferred under the preceding rules of O. 21 the party against whom an order is made may institute a suit to establish "the right which he claims to the property in dispute." Obviously these words do not mean that the plaintiff has to establish his ownership of the property in dispute. All that he is required to do is to establish "the right which he claims to the property in dispute." If the suit has been instituted by the decree-holder, against whom an order has been passed under R. 60 releasing the property from attachment, the right which he claims in the suit is the right to have the property attached in execution of the decree against his judgment-debtor. If, on the other hand, the plaintiff is the objector, who has been unsuccessful in the objection proceedings before the executing Court, the right which he claims in the suit is the right to have the property in dispute released from attachment, it not being the property of the judgment-debtor. It will be seen, that in either case it is not necessary for the plaintiff to establish his own "title" in the property in question, but what he has to establish is, in the first case, the claim to have the property attached, and in the other to have it released from attachment. (*Tek Chand, J.*) JAWAHAR MAL *v.* PUNJAB NATIONAL BANK, LTD. **17 Lah. 668=166 I.C. 521=9 R.L. 397= 39 P.L.R. 68=A.I.R. 1936 Lah. 524.**

———O. 21, R. 63—*Suit under—Plaintiff, if must press whole of claim raised in objection under R. 58.*

It is not obligatory on a plaintiff in a suit under O. 21, R. 63 to press the whole of the claim raised

by him in the objection under O. 21, R. 58. If he realises that part of his claim in objection cannot be sustained, he is entitled to omit it when bringing a suit under O. 21, R. 63. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MAHOMED ASLAM *v.* MOTI RAM. **166 I.C. 372=9 R. Pesh. 66=A.I.R. 1936 Pesh. 206.**

———**O. 21, R. 63**—*Suit under—Plea that sale colourable and without consideration—Onus of proof.*

Where the judgment-debtor has sold his property to another person, the fact that he was seriously embarrassed at that time by pressing creditors and had motive for disposing of the property to persons out of their reach does not prevent the burden from still lying on decree-holder to show that the transaction of sale was not a real transfer. (*Rowland and Chatterji, JJ.*) SADHU PRASAD SAH *v.* SATNARAIN SAH. **182 I.C. 748=5 B.R. 820=12 R.P. 62=A.I.R. 1939 Pat. 81.**

———**O. 21, R. 63**—*Suit under—Prayer for declaration that a sale-deed was void and property attachable and saleable—Proper frame of suit—Suit, if should be under S. 53, Transfer of Property Act.*

Where a person sues to get it declared that certain property was attachable and saleable in execution of a decree obtained by him against another and also prays for a declaration that certain sale-deeds executed by his judgment-debtor were void, it is not necessary that such a suit should be under S. 53 of Transfer of Property Act on behalf of all the creditors. He can institute the suit on behalf of himself only under O. 21, R. 63, C. P. Code. (*Ismail, J.*) ASGHAR ALI *v.* ISHAQ ALI. **I.L.R. (1940) All. 31=187 I.C. 383=12 R.A. 531=1939 A.W.R. (H. C.) 798=1939 A.L.J. 1020=A.I.R. 1940 All. 72.**

———**O. 21, R. 63**—Suit under—Proper relief—Execution sale held pending suit by defeated claimant—Sale set aside at his instance under O. 21, R. 89—Amendment of plaint to add relief of injunction to restrain decree-holder from withdrawing amount deposited in Court—If allowable. *See* C. P. CODE, O. 21, R. 89 (2). **20 Pat.L.T. 640.**

———**O. 21, R. 63**—*Suit under—Rights of parties—Determination—Crucial date—Date of suit or date of claim order or attachment—Adverse possession not complete on date of claim order but complete on date of suit on claim order—If can be taken into account.*

In a suit to set aside a claim order, the rights of the parties on the date of the attachment or on the date of the order on the claim petition are the rights which have to be taken into consideration. Where an unsuccessful claimant has not been in possession of the property in dispute which he claims to have purchased, for 12 years on the date of the attachment or on the date of the order dismissing his claim, and has not perfected his title by prescription on either of those dates, he cannot by waiting for some months and then bringing his suit, be permitted to say that on the date of the suit he has completed twelve years and thereby got a title by prescription. It is not possible for the plaintiff to clothe himself with additional rights by waiting for some months and then compel the rightful owner (the judgment-debtor) to lose his right to the property. (*Burn and Stodart, JJ.*) VENKATA RANGACHARYULU *v.* TURANGA RAO. **182 I.C. 858=12 R.M. 151=48 L.W. 375=1938 M. W.N. 918=A.I.R. 1938 Mad. 857=(1938) 2 M.L.J. 430.**

———**O. 21, R. 63**—*Suit under—Right to transferred decree—Plea in defence open.*

Where a transferee of a decree sues under O. 21, R. 63 to establish his right thereto, it is open to those impugning the transfer to allege either that the transfer was a sham transaction executed without consideration and not intended to take effect or that it was a transaction executed for a consideration and intended to take effect, but made with a view to defraud the creditors of the transferor by removing the property out of their reach. (*Pollock, J.*) MOTILAL *v.* KASHIBAI. **I.L.R. (1940) Nag. 316=174 I.C. 398=10 R.N. 384=A.I.R. 1938 Nag. 249.**

———**O. 21, R. 63**—*Suit under—Scope—Question under S. 52—If can be gone into—Proper revenue—Executing Court.*

A suit under O. 21, R. 63, C. P. Code, has nothing to do with S. 52 and question under S. 52 must be decided by the Court executing the decree and not by a separate suit. (*Spargo, J.*) A. R. M. N. A. CHETTYAR FIRM *v.* R. M. V. S. CHETTYAR FIRM. **173 I.C. 873=10 R.R. 376=A.I.R. 1937 Rang. 531.**

———**O. 21, R. 63**—Suit under—Title to be gone into—Proof that attachment was invalid—If sufficient—'Establish the right to'—Meaning of. *See* C. P. CODE, O. 21, RR. 58 AND 63. **A.I.R. 1936 Mad. 971=(1937) 1 M.L.J. 133.**

———**O. 21, R. 63**—*Suit under—Valuation for jurisdiction—Property already sold in execution.*

The value of a suit under O. 21, R. 63, C. P. Code, for purposes of jurisdiction, is its value to the plaintiff. If the value of the property is less than the value of the decree, the value of the action to the plaintiff would be not the decretal amount but the market-value of the property. If, however, the value of the decree is less than the value of the property, then the value of the decree affects the value of the suit. If the property has already been sold in execution of the decree before the suit, the value of the suit to the plaintiff is the value of the property which he has lost by reason of the execution proceedings. (*Mitter and Khundkar, JJ.*) BANJOR DORABJI *v.* THE CALCUTTA CHEMICAL CO., LTD. **43 C.W.N. 609.**

———**O. 21, Rr. 63 and 66**—*Summary order on an objection to sale proclamation—Effect—If conclusive under R. 63.*

The mere question of whether there was a prior charge would not be an objection to the attachment. It is only when an inquiry is held and an order is passed under one of the Rr. 60 or 61 of O. 21, that there is an order which is conclusive under R. 63; and without an inquiry there can be no such conclusive order. Hence a summary order passed on an objection to the sale proclamation does not have any of the effects of an order under R. 63. (*Bennet, Ag.C.J. and Verma, J.*) KANHAIYA LAL *v.* BANKE BEHARI. **1938 A.W.R. (H.C.) 596=1938 A.L.J. 940=1938 A.L.R. 808=178 I.C. 66=11 R.A. 249=A.I.R. 1938 All. 542.**

C. P. CODE (1908), O. 21, R. 63.

——O. 21, R. 63 (A) (Lahore)—*Application under, by decree-holder—Court-fee payable.*

On an application by the decree-holder under O. 21, R. 63 (A) to secure adjudication as to the indebtedness of other persons to his judgment-debtor, a court-fee stamp of only one rupee is payable, and the decree-holder cannot be required to pay an *ad valorem* court-fee on such an application. (*Jai Lal, J.*) CHANDGI RAM *v.* JANKI DAS. **17 Lah. 467=38 P.L.R. 199.**

——O. 21, R. 63-A (Lahore)—*Attachment of debt due to judgment-debtor—Judgment-debtor's claim against garnishee becoming barred during investigation by Court—Final order against garnishee after expiry of limitation—If can be passed.*

In execution a decree-holder attached on 19th February, 1933, a debt due to *A*, judgment-debtor from *B*, the garnishee before the right of *A* to sue for his debt from *B* had become barred. The Court proceeded to investigate the claim of *A* against *B* in September or October, 1933, under O. 21, R. 63 (A) when also the debt due to *A* was not barred. The investigation proceedings continued till 1936 and a final order was passed in March, 1936, when the right of *A* for debt against *B* had become barred on 4th July, 1934, apart from proceedings under O. 21, R. 63-(A). The executing Court refused to order the garnishee *B* to pay the amount in March, 1936.

Held, that the crucial date in such cases was either the date of attachment, which gave a right to the attaching decree-holder to claim an order against the garnishee *B* for payment, or in any case the date when the Court decided to investigate the claim of the judgment-debtor *A* against *B*. Any order, which might subsequently be passed must relate back to the date of attachment or to the date when the Court decided to investigate the claim. Prolongation of proceedings was not material for purposes of limitation. Attachment having taken place on 19th February, 1933, before the debt had become barred and the Court having started investigation under O. 21, R. 63 (A) in September or October, 1933, proceedings about order of payment of debt were instituted at the latest in September or October and hence it was competent to the Court to order the garnishee to pay the amount in spite of the expiry of limitation after attachment or at any rate during investigation under O. 21, R. 63 (A). (*Jai Lal, J.*) HEM RAJ *v.* ASA RAM. **174 I.C. 314=10 R.L. 548=A.I.R. 1937 Lah. 255.**

——O. 21, R. 63-A (Lahore)—*Enquiry by Court—When contemplated.*

O. 21, R. 63-A contemplates an inquiry only where the judgment-debtor claims a debt from a garnishee. Where money due to a member from Co-operative Society is attached and prohibition order is issued to the Society but the member does not claim any debt from the Co-operative Society but claims to be a shareholder of the Society at the time when the prohibitory order was issued there is no dispute as regards any debt between the judgment-debtor and the alleged garnishee, which can be inquired into under O. 21, R. 63 (A). It follows therefore that the finding given in the proceedings relating to the objection raised by the judgment-debtor in connexion with the attachment of his shares cannot bind the Society. (*Bhide, J.*) HIRA LAL *v.* RAJO KHERI CO-OPERATIVE CREDIT SOCIETY. **42 P.L.R. 225=A.I.R. 1939 Lah. 305.**

C. P. CODE (1908), O. 21, R. 66.

——O. 21, R. 63 (c) (1) (Rangoon)—*Execution against garnishee—When permissible.*

Until there is a definite order against the garnishee to pay under O. 21, R. 63 (*c*) (1), C. P. Code, there is nothing executable directly against the garnishee as a decree. (*Baguley, J.*) SHEERAZEE *v.* REDDY. **1939 Rang.L.R. 694=187 I.C. 105=12 R.R. 305=A.I.R. 1940 Rang. 34.**

——O. 21, R. 64—Applicability—Property—Preliminary decree in suit for unpaid mortgage money—Saleability in execution—Procedure after attachment—O. 21, R. 53—Applicability. *See* C. P. CODE, S. 60. **1937 A.W.R. 649=A.I.R. 1937 All. 652.**

——O. 21, Rr. 64 and 58—Objection to sale by third person on ground of title acquired subsequent to attachment—Duty of executing Court. *See* C. P. CODE, O. 21, RR. 58 AND 64. **41 P.L.R. 305.**

——O. 21, R. 65—*Sale, when complete.*

When the officer of the Court or such other person as the Court may appoint to conduct a sale as provided in O. 21, R. 65 knocks down the property to the highest bidder, such person must be deemed to have been declared to be the purchaser of such property. The sale is complete when the property is knocked down to the highest bidder and it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for higher amount. 1931 Lah. 78 and 1933 Nag. 123, Foll. (*Addison and Abdul Rashid, JJ.*) HOSHNAK RAM *v.* PUNJAB NATIONAL BANK, LTD. **166 I.C. 603=9 R. L. 393 (2)=A.I.R. 1936 Lah. 555.**

——O. 21, R. 66—*Duty of Court under—Settlement of sale proclamation—Procedure.*

The obligation of settling a sale proclamation really rests on the Court. It is incumbent on the Court to see that all the particulars required under O. 21, R. 66 are given properly so as to enable intending bidders to know exactly what they are going for. It is very undesirable that properties should be sold in large lots. The Court would do well to group the lands into small and convenient lots after notice to the parties and settle the sale proclamation with proper upset prices and have the properties sold. (*Venkataramana Rao and Stodart, JJ.*) RANGASWAMI AYYANGAR *v.* MARUDANAYAGAM PILLAI. **11 R.M. 371=177 I. C. 717=47 L.W. 773=1938 M.W.N. 524=A.I. R. 1938 Mad. 720.**

——O. 21, R. 66—*Duty of decree-holder—Sale statement—Property brought to sale, in possession of third person—No mention of claim of third person in sale statement—Effect.*

A property was sold in execution of a decree. The property was in possession of a third person having a good title thereto. The decree-holder already knew about the claim of such person over such property as he had appeared as a witness in a successful suit by such person for declaration of his title thereto. The decree-holder did not make any mention of the claim of such person in the sale statement.

C. P. CODE (1908), O. 21, R. 66.

Held (*obiter*), that failure on the part of the decree-holder to make mention of such person's claim to property brought to sale amounted to neglect of the statutory duty imposed on him. (*Gruer, J.*) SANGIDAS RAMPRATAP *v.* CHAHADU. **20 N.L.J. 111=168 I.C. 970=9 R.N. 288=A.I.R. 1937 Nag. 140.**

———O. 21, R. 66—*Construction—Sale proclamation—Court, if bound to value property and to state value in proclamation of sale.*

It is not necessary for the Court in cases of sales in execution to value the property and state the value in the proclamation of sale. To so hold would involve adding a clause to O. 21, R. 66, C. P. Code. If in any case the Court thinks it desirable to value the property and state the value in the proclamation, it ought to state it under O. 21, R. 66 (*v*). (*Beaumont, C.J. and Lokur, J.*) CHARANDAS VASANJI *v.* DOSSABHOY MAGANLAL. **I.L.R. (1939) Bom. 389=182 I.C. 409=12 R. B. 12=41 Bom.L.R. 328=A.I.R. 1939 Bom. 182.**

———O. 21, Rr. 66 and 90, O. 30, R. 3—*Judgment-debtors sued not as partners but as individuals—Failure to serve notice on any of them—Material irregularity.*

Where several judgment-debtors are sued not as partners in the name of their firm but as individuals and the decree directs all of them to pay the decretal amount, notices in execution under O. 21, R. 66 must be served on all judgment-debtors. Failure to serve such notice on any of them amounts to an obvious breach of O. 21, R. 66 which cannot be cured under O. 30, R. 3 and which therefore amounts to a material irregularity within the meaning of O. 21, R. 90. (*Mir Ahmad, J.*) BUNDHELKHAND CYCLE & MOTOR AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **181 I.C. 542=11 R. Pesh. 70=A.I.R. 1939 Pesh. 9.**

———O. 21, R. 66—*Mortgage noted in sale proclamation—Property, if sold subject to mortgage.*

The mere fact that a mortgage is noted in a sale proclamation does not establish that the property is sold subject to that mortgage, and the auction-purchaser is not, therefore, estopped from raising the question of the validity of the mortgage. (*Thomas and Zia-ul-Hasan, JJ.*) PARSHOTAM DAS *v.* ALI HAIDAR. **13 Luck. 484=171 I.C. 233=10 R.O. 98=1937 O.L.R. 530=1937 O.W.N. 944=A.I.R. 1937 Oudh 493.**

———O. 21, R. 66—*Objection to sale by judgment-debtor on ground of defect in proclamation—Objection dismissed on ground that remedy under O. 21, R. 90 is open—Such remedy not found available—Judgment-debtor's right to claim adjudication upon earlier objection.*

Where the judgment-debtor objects to the order of sale on the ground of material defect in the sale proclamation at a time when he was not prevented under law from raising such objection, but the application is dismissed solely on the ground that the remedy under O. 21, R. 90 is open to him and if it is eventually found that that remedy is not available to him under the law, the judgment-debtor is entitled to claim an adjudication upon the objections taken by him at an earlier stage. (*Addison and Din Mohammad, JJ.*) BARKAT RAM *v.* BHAGWAN SINGH. **177 I. C. 116=11 R.L. 269=A.I.R. 1938 Lah. 65.**

C. P. CODE (1908), O. 21, R. 66.

———O. 21, R. 66—*Order of sale proclamation—Appealability—Valuation set out without enquiry—Remedy.*

Setting out in the proclamation of sale the valuation of the properties as given by the decree-holder without a previous enquiry as to the valuation would be a material irregularity in the publication of the sale, which can be a ground of application for the setting aside of the sale under O. 21, R. 90. Such application can be made only after the sale has taken place, and whether it will succeed or not will depend on whether the under-valuation set out in the proclamation is gross and whether substantial injury has resulted to the applicant on account of such under-valuation. The order approving sale proclamation cannot, however, give the dissatisfied party a right of appealing against the order for issue of the proclamation before the sale takes place. (*Mya Bu and Mackney, JJ.*) L. A. R. LUTCHUMANAN CHETTYAR *v.* HAJI ISMAIL NOOR MOHAMMAD. **171 I.C. 636=10 R.R. 169=A.I.R. 1937 Rang. 157.**

———O. 21, R. 66—*Order under—Nature of—Appeal.*

Per *Sulaiman, J.*—An order under O. 21, R. 66 is not a judicial adjudication of any question arising between the parties to the execution, but merely the issuing of directions as to the mode of proclamation of sale. The approximate estimation of the value of the property cannot ever be regarded as a determination of any question arising between the decree-holder and the judgment-debtor within the meaning of S. 47, C. P. Code, and such an order is not appealable as a decree. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SHYAMAKANT LAL *v.* RAMBHAJAN SINGH. **(1939) F.C.R. 193=12 R.F.C. 1=2 Fed.L.J. 183=43 C.W.N. (F.C.R.) 68=182 I.C. 161=1939 O.L. R. 399=5 B.R. 756=1939 M.W.N. 674=1939 P.W.N. 533=20 Pat.L.T. 473=71 C.L.J. 369= A.I.R. 1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.**

———O. 21, R. 66—*Procedure—Duty of Court—Mahal constituted by collectorate—Partition out of number of village in estate—Execution sale under final mortgage decree—Proclamation for sale in one lot at one single price—Propriety—Judgment-debtor giving separate valuation for each village and praying for sale in different lots—Duty of Court to accept.*

Under O. 21, R. 66, C. P. Code, the executing Court has to insert in the sale proclamation the valuation given by the judgment-debtor, and that valuation has to be inserted as given by the judgment-debtor and must not be altered or corrected by the decree-holder before insertion. Where in execution of a final decree on a mortgage, a number of villages in an estate constituted into a separate *mahal* by collectorate partition are proclaimed for sale as a single block with a single upset price, and the judgment-debtor puts in a separate valuation of each village and prays that the sale should be held village by village, the Court must accept the same and order a sale village by village, and the *mahal* should, for purposes of sale, be broken up into lots, although the sale is the sale of a single *mahal*. It is not, however, necessary that the proclamation should be separately published in every village affected,

C. P. CODE (1908), O. 21, R. 66.

but the sale should be directed on the valuation as given by the judgment-debtor for each village, and village by village. (*James and Rowland, JJ.*) SRI KANT LAL *v.* RAM BHAJAN SINGH. **189 I.C. 355=13 R.P. 79=6 B.R. 791=21 Pat.L.T. 108 =A.I.R. 1940 Pat. 422.**

——**O. 21, R. 66**—*Proclamation—Insertion of judgment-debtor's disputed claim—Legality.*

An order inserting the judgment-debtor's claim in the proclamation for sale is contrary to law if the claim is disputed. (*Mosely and Sharpe, JJ.*) T. R. M. RAMASWAMY CHETTIAR *v.* M. M. K. KUTTAIN CHETTIYAR. **189 I.C. 446=13 R.R. 39 =A.I.R. 1940 Rang. 153.**

——**O. 21, R. 66**—Sale proclamation—If conclusive of title of purchaser—Statement of existence of mortgage on property sold—How far effective as against purchaser. *See* LIMITATION ACT, S. 19. **A.I.R. 1936 Mad. 70.**

——**O. 21, R. 66 (Lahore)**—*Sale proclamation—Value of property given by party—Duty of Court to include.*

Under O. 21, R. 66, C. P. Code, as amended by the Lahore High Court, it is incumbent upon the Court issuing the proclamation to include the estimate of the value of the property, if any, given by either or both the parties. (*Din Mohammad, J.*) BARKAT RAM *v.* BHAGWAN SINGH. **42 P.L. R. 404=A.I.R. 1940 Lah. 394.**

——**O. 21, R. 66 (Patna)**—*Sale proclamation—Entry in, of valuations placed on property by decree-holder and by High Court in earlier proceeding—Such entry made with consent of both parties—Judgment-debtor, if can complain of irregularity.*

Where the valuations placed on the property by the decree-holder and by the High Court in an earlier proceeding are entered in the sale proclamation by agreement of both parties, it is not open to the judgment-debtor to contend subsequently that the entries regarding valuation in the sale proclamation constitute a substantial irregularity in the proceedings for sale. (*Rowland and Chatterji, JJ.*) BAZIA BEGUM *v.* KRISHUNDEO NARAIN MAHTHA. **6 B.R. 177=185 I.C. 404=12 R.P. 367=21 Pat.L.T. 541=A.I.R. 1940 Pat. 286.**

——**O. 21, R. 66 (Patna), Proviso**—Scope—If repealed by Bihar Money Lenders' Act, S. 16—Repugnancy—Latter section—If void on ground of repugnancy to O. 21, R. 66. *See* BIHAR MONEY-LENDERS' ACT, S. 16. **19 Pat.L.T. 760.**

——**O. 21, R. 66 (2)**—*Scope—Mortgage decree—Sale proclamation—Notice to judgment-debtor—Omission to raise objection—Subsequent objection that properties not comprised in mortgage are included—Sustainability.*

Where the sale proclamation in respect of proceedings in execution of a mortgage decree are settled in the presence of and after notice to the judgment-debtor who and his attorney are fully cognisant of all that is taking place, and who allow the sale to proceed as proclaimed without raising any objection, the judgment-debtor is precluded from afterwards impeaching the sale on the ground that the mortgagee has caused to be sold in execution properties, which were not comprised in the mortgage and which could not therefore be lawfully sold. (*Derbyshire, C.J. and Costello, J.*) SARADA CHURN *v.* PRATIVA SUNDARI. **40 C.W.N. 428.**

C. P. CODE (1908), O. 21, R. 66.

——**O. 21, R. 66 (2)**—*Scope—Non-compliance with—Effect—Material irregularity—Failure of judgment-debtor to appear on previous occasions—If ground for non-issue of notice.*

The fact that the judgment-debtor has not appeared at any previous stage of the proceedings does not absolve the Court from complying with O. 21, R. 66 (2), which requires a notice to be sent to the judgment-debtor. Omission to give such notice is a material irregularity. (*Greenfield, F.C.*) KHAJA ABDUL GAFUR KHAN *v.* CHOTEKHAN. **20 N.L.J. 283.**

——**O. 21, R. 66 (2)**—*Specification of particulars—Sale of mining rights.*

At an execution sale, the mining rights which the judgment-debtor had under a certain document of lease were sold. In the sale proclamation, the boundaries of the area covered by the document were indicated but not its extent. Further no indication was given of the nature of the coal deposits. There was also no extract of the document of lease. As regards valuation of the property, there were contradictory statements.

Held, that the sale proclamation did not comply with the terms of O. 21, R. 66 (2), C. P. Code. (*Derbyshire, C.J. and Mukherjea, J.*) KANGAL CHANDRA MONDAL *v.* BEJOY CHAND MAHTAB. **42 C.W.N. 661.**

——**O. 21, R. 66 (2)**—*"Time of sale"—Meaning of—Bidding—When to commence.*

The time of sale which is required to be set out under O. 21, R. 66 (2), C. P. Code, means the time at which the sale would begin. Bidding ought not therefore to start until the advertised time arrives. (*Norman.*) GAJJI DAS *v.* SURAJMAL. **1936 A.M.L.J. 13.**

——**O. 21, R. 66 (2), Proviso (N.W.F.P.) and R. 90**—*Decree-holder and judgment-debtor giving separate estimate of value of property—Failure to give both estimates in proclamation—Material irregularity.*

Proviso to O. 21, R. 66 (2) does not condone the failure of the execution Judge to mention the correct estimate of the value of property proposed to be auctioned. When the decree-holder and judgment-debtor give their respective estimates of the value at two different figures, failure to give both the estimates in the proclamation is serious omission likely to influence the minds of those who propose to buy the property and therefore amounts to material irregularity referred in O. 21, R. 90. (*Mir Ahmad, J.*) BUNDHELKHAND CYCLE & MOTOR AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **181 I.C. 542=11 R. Pesh. 70=A.I.R. 1939 Pesh. 9.**

——**O. 21, R. 66 (2) (c)**—*Sale proclamation—Arrears of property tax—If to be mentioned—Sale by Sheriff on High Court Original Side—Practice—Arrears of municipal rate—If to be deducted out of sale-proceeds.*

Arrears of rates are, under the Calcutta Municipal Act, a statutory charge on the property. It is, therefore, the duty of the party having the carriage of execution proceedings to find out any arrears and to mention them in the sale proclamation under O. 21, R. 66 (2) (*c*), C. P. Code. In sales by the Sheriff on the Original Side of the High Court, the arrears of taxes due to the

Municipality should be set out in the proclamation and deducted by the Sheriff out of the sale proceeds realised in execution. (*McNair, J.*) SHUSHAMABALA DASEE *v.* POORNA CHANDRA DE. **63 Cal. 621.**

———**O. 21, Rr. 66 (3) and 90**—*Failure to present application—Material irregularity.*

Order 21, R. 66 (3) makes it mandatory that an application by the decree-holder under R. 66 should be given, as it gives advantage to the Court of enabling it to obtain all necessary information required for drawing up a proclamation of sale. Therefore failure of the decree-holder to present an application under O. 21, R. 66 (3) is a material irregularity contemplated by O. 21, R. 90. (*Mir Ahmad, J.*) BUNDHELKHAND CYCLE & MOTOR AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **181 I.C. 542=11 R. Pesh. 70=A.I.R. 1939 Pesh. 9.**

———**O. 21, R. 69**—*Adjournment of sale—Non-intimation of date or hour of adjourned sale—Effect on sale—Liability to be set aside.*

Where a sale is adjourned without stating in the order of adjournment the hour of the adjourned sale, there is no proper adjournment of the sale as contemplated by law, *i.e.*, as provided by O. 21, R. 69, C. P. Code. The omission to state the hour is a serious irregularity and when it results in loss to the judgment-debtor, the sale should be set aside and a fresh sale held. (*Ragavendra Rao, H. M.*) DHARYADHAR *v.* YESHWANT. **19 N.L.J. 103.**

———**O. 21, R. 69**—*Adjournment of sale—Specification of hour and date—Failure—Material irregularity.*

The omission to specify the hour as well as the date to which the sale is adjourned while being undoubtedly an irregularity, may sometimes not be and sometimes be a material irregularity.

Held, on the facts that the failure to mention the hour was a material irregularity. (*Burn and Lakshmana Rao, JJ.*) TIRUGNANAVALLI AMMAL *v.* VENUGOPALA PILLAI. **1937 M.W.N. 1223 (1).**

———**O. 21, R. 69**—*Non-compliance with—Sale, if nullity.*

The failure to comply with the provisions of O. 21, R. 69, C. P. Code, would not alone render a Court sale a nullity, but it would be necessary for a person who is aggrieved to treat such non-compliance as a material irregularity which he must urge in a properly constituted application under O. 21, R. 90, C. P. Code. If, therefore, the judgment-debtors themselves take no steps to have the sale set aside on the ground of non-compliance with O. 21, R. 69, it is not open to the Court to treat the sale as a mere nullity. (*Edgley, J.*) JOGENDRA NATH BHATTACHARYA *v.* SHEIK NABI NEWAJ. **178 I.C. 842=11 R.C. 417 =67 C.L.J. 96=A.I.R. 1938 Cal. 699.**

———**O. 21, R. 69**—*Order of Court directing property to be sold at monthly sale commencing from 5th August—Sale held by Nazir on 12th after postponing it from day to day—Validity.*

The executing Court ordered the sale of a certain property to be held in the course of the monthly sales to commence on the 5th August at 12 noon and issued the sale proclamation on that basis. The Nazir postponed the sale on the 5th and 6th August on the ground of absence of the presiding officer, and from 7th to 10th for want

of time. 11th was a Sunday and the property was sold on the 12th.

Held, that, assuming that the postponement of the sale on the 5th and 6th August by the Nazir was in excess of his powers, the sale was not taken out of the monthly sales by his act; that the sale held on the 12th must be taken to be a sale in the course of the monthly sales and was, therefore, valid. (*Mitter and Khundkar, JJ.*) RANGPUR LOAN OFFICE, LTD. *v.* TARIT BHUSAN ROY. **I.L.R. (1939) 1 Cal. 530=70 C.L.J. 97= 186 I.C. 174=12 R.C. 447=43 C.W.N. 539= A.I.R. 1939 Cal. 369.**

———**O. 21, R. 69**—*Scope—Sale advertised for particular day and included in sale list for the day—Sale not finished that day and continued next day—If liable to be set aside—"Adjournment"—Meaning of.*

A sale in execution of a decree was fixed for 4—1—1935, and was included in the sale list for that day. As the sales could not be finished that day, the Nazir in charge continued them on the following day in accordance with the procedure prescribed by the General Rules and Circular orders of the Patna High Court. The sale was actually finished the next day. The judgment-debtor applied to have the sale set aside on the ground that it was in contravention of O. 21, R. 69, C. P. Code, having been held on a date not advertised in the sale proclamation and without an express order of the Court adjourning the sale.

Held, (1) that as the sale commenced on the appointed day; though continued on the following day, there was no adjournment within the meaning of O. 21, R. 69, C. P. Code, (2) that O. 21, R. 69 did not refer to a case where sales on the same sale list held in accordance with the rules of the Court continued beyond the first day, and (3) the sale could not, therefore, be set aside. (*Agarwala and Madan, JJ.*) RAJENDRA NARAIN BHUNJ DEO *v.* DEBI CHOUDHURY. **18 Pat.L.T. 326=1937 P.W.N. 337=16 Pat. 408= 169 I.C. 877=3 B.R. 637=10 R.P. 54=A.I.R. 1937 Pat. 386.**

———**O. 21, R. 69 (2) (as amended in Nagpur)**—*Collector's sale—Collector accepting bid at sale held by Tahsildar beyond seven days—Legality.*

In a Collector's sale, it is the Collector who has to accept the bid though it may be the Tahsildar who holds the sale. The period of seven days in O. 21, R. 69 (2), C. P. Code, has been extended to 15 days in Nagpur, and the fact that the Collector accepts the bid beyond 7 days of the sale does not make such acceptance illegal as beyond time and does not render a fresh proclamation of sale necessary. An order of acceptance within 15 days is in time. (*Greenfield, F.C.*) RAMCHANDRA *v.* ARJUN. **1938 N.L.J. 10.**

———**O. 21, R. 69 (2)**—*Scope and effect—If subject to R. 10 of the Central Provinces Revenue Book Circular—Collector's sale—Sale when complete—Acceptance of bid by Collector—If essential.*

The provisions of O. 21, R. 69 (2) of the C. P. Code are modified in the Central Provinces by R. 10 of the rules in the Revenue Book Circular, Vol. 2-III, framed by the Local Government; R. 10 (2) of the said rules makes it clear that the final bid is not accepted and the purchaser is therefore not declared until the proceedings are ad-

journed to, and the bid approved by the Collector. Till the Collector accepts the bid, it is only an offer. (*G. P. Burton, R.M.*) VINAYAK RAO *v.* PANNALAL. **20 N.L.J. 80.**

———O. 21, R. 69 (2)—*Waiver of necessity of fresh proclamation—Effect of—Objections to attachment—If waived.*

The waiver of the necessity for a fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation. But the waiver of any necessity for a fresh sale proclamation would not imply a waiver of the right to object to any irregularities in the attachment. (*Lord Thankerton.*) SHYAM SUNDER SINGH *v.* KALURAM AGARWALA. **32 S.L. R. 879=5 C.L.T. 1=176 I.C. 2=42 C.W.N. 1041 =19 Pat.L.T. 561=48 L.W. 199=1938 M.W.N. 814=1938 O.L.R. 344=1938 A.W.R. (P.C.) 186 =68 C.L.J. 145=1938 O.W.N. 883=11 R.P.C. 58=1938 A.L.R. 672=4 B.R. 815=1938 O.A. 780=1938 P.W.N. 612=A.I.R. 1938 P.C. 230= (1939) 1 M.L.J. 147 (P.C.).**

———O. 21, Rr. 71 and 84—*Applicability—"Re-sale"—Failure of decree-holder purchaser to pay 25 per cent.—Fresh sale after fresh proclamation—Deficiency in price—Liability of decree-holder to make good.*

The liability of a defaulting purchaser under O. 21, R. 71, C. P. Code, is not dependent upon re-sale of the property strictly according to R. 84. There is nothing in R. 71 itself which makes it a condition precedent that the re-sale should take place forthwith. The fact that the re-sale takes place not forthwith but after a fresh proclamation does not relieve the purchaser of his liability under R. 71. Where, therefore, a decree-holder purchases the property and fails to pay the 25 per cent. of the sale price, and a fresh sale is held after the issue of a fresh proclamation, the second sale is a "re-sale" within the meaning of R. 84 of O. 21, C. P. Code, and if it results in any deficiency, the decree-holder is liable under R. 71 to make good that deficiency. (*Niamatullah, J.*) PRAG DAS *v.* BENI PRASAD. **1937 A.W.R. 426= 1937 A.L.J. 495=171 I.C. 75=1937 A.L.R. 797 =10 R.A. 225=A.I.R. 1937 All. 556.**

———O. 21, R. 71—*'Decree-holder'—Meaning of.*

The decree-holder who can recover the deficiency in price resulting on re-sale by reason of the purchaser's default under O. 21, R. 71 is not any decree-holder of the judgment-debtor or any decree-holder who is entitled to share rateably under S. 73, but the decree-holder who brings the property to sale. 49 M. 570, Foll. (*King, C.J. and Nanavutty, J.*) MAHOMED SALAMATULLAH *v.* MURLIDHAR. **163 I.C. 175 (2)=8 R.O. 416=1936 O.W.N. 559=A.I.R. 1936 Oudh 277.**

———O. 21, Rr. 71 and 84—*Deficiency—Re-sale held not forthwith but after long time—Defaulting purchaser is not liable for deficiency on re-sale.*

The defaulting purchaser is answerable for the loss on the re-sale, only if the re-sale takes place forthwith. The first sale had taken place on certain date when the auction-purchaser defaulted. The decree-holder instead of having the re-sale conducted properly and openly the same day, or on the following day, or as soon thereafter as was reasonably possible, caused a farcical re-sale

to be held in collusion with the auctioneer and purchased the property himself for a ridiculously small sum. The inquiry into the propriety of this sale continued for 17 months, and eventually the sale in favour of the decree-holder was set aside.

Held, that the subsequent sale conducted after long delay could not be said to be a sale held 'forthwith' within the meaning of R. 84 of O. 21, C. P. Code, and therefore the defaulting purchaser was not liable to make good the deficiency. (*Tek Chand, J.*) RAM SARAN DAS *v.* KESHO NATH. **176 I.C. 302=11 R.L. 195=A.I.R. 1937 Lah. 924.**

———O. 21, Rr. 71, 86 and 87—*Scope—Default of purchaser in paying balance of sale price—Re-sale—Application for—When to be made—Delay caused in re-sale—Deficit sale price—Liability of purchase—If affected—Right of decree-holder to order against defaulting purchaser—Limitation Act, Art.* 181.

Where there has to be a re-sale as the result of the default of the decree-holder under O. 21, R. 86, C. P. Code, the decree-holder has to apply for a re-sale, which under O. 21, R. 87, C. P. Code, has to be made after the issue of a fresh proclamation. The Code contains no provision as to when the application for a re-sale shall be made; the decree-holder is therefore entitled to make the application at any time within three years as Art. 181 of the Limitation Act applies to such an application. If there is a deficiency in the re-sale, the auction purchaser is responsible for the deficit under R. 71 of O. 21. Under O. 21, R. 71, the liability of the defaulting pruchaser is unqualified and hence it cannot be said that the decree-holder is bound to apply for re-sale within a re-assurable time of the default in payment of the balance of price under R. 85. In any case, where a decree-holder takes prompt steps for the securing of an order of re-sale, but the re-sale does not take place early because of erroneous orders passed by the Court, not in a judicial capacity, but in pursuance of a wrong administrative practice, *e.g.*, striking off an application for statistical reasons, the decree-holder cannot be held responsible for the delay in re-sale, so as to disentitle him to an order calling upon the defaulting purchaser to pay the deficit. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) SIVASUBRAMANIAN CHETTIAR *v.* MURUGESA MUDALIAR. **1940 M.W. N. 345=51 L.W. 739=A.I.R. 1940 Mad. 566= (1940) 1 M.L.J. 537.**

———O. 21, Rr. 72 and 84—*Decree-holder auction-purchaser—Right to set-off decretal amount.*

A decree-holder auction-purchaser should be allowed to set-off the decretal amount against the purchase-money. (*Bhide, J.*) MOHAMMAD AMIR MOHAMMAD SHAFI *v.* RABIB-UD-DIN. **40 P.L. R. 544 (1).**

———O. 21, R. 72—Execution transferred to Collector—Leave to bid—Jurisdiction to grant—Court or Collector. *See* C. P. CODE, Ss. 68, 70 AND O. 21, R. 72. **38 Bom.L.R. 276.**

———O. 21, R. 72—Interest—Decree awarding interest until date of realisation—Decree-holder granted permission to bid and set-off—"Date of realisation"—Meaning of—Right to interest after date of sale. *See* DECREE—CONSTRUCTION. **(1939) 1 M.L.J. 466.**

C. P. CODE (1908), O. 21, R. 72.

———**O. 21, Rr. 72, 84 (2) and 92**—*Permission granted to decree-holder to bid and set-off—If dispenses with deposit of 25 per cent.—Order setting aside sale—Appeal.*

In execution of a decree the equity of redemption of the property was ordered to be sold. The decree-holder presented an application in the executing Court under O. 21, R. 72 asking for permission to bid at the auction. In this application, it was stated by the decree-holder that, if he was allowed to bid, the purchase price would be set-off against the amount due under the decree. This application was granted. The equity of redemption was purchased by the decree-holder but as he failed to deposit 25 per cent. of the purchase price, the Court ordered that a fresh auction of the equity of redemption should take place.

Held, that in setting aside the sale, the executing Court had acted under O. 21, R. 92. An appeal lay against such an order under O. 43, R. 1 (*j*). The decree-holder even though he purchased the equity of redemption of the property in dispute, must also be regarded as a party to the proceedings under S. 47, C. P. Code, and the order was consequently subject to appeal.

Held, further, that when permission was accorded under O. 21, R. 72, to decree-holder to bid for and set-off the purchase price, such permission impliedly dispensed with the deposit of the requisite 25 per cent. Hence the Court was not justified in setting aside the sale. (*Abdul Rashid, J.*) KANSHI GOPAL *v.* MRS. J. PELITI. **41 P.L. R. 286=A.I.R. 1939 Lah. 46.**

Reversed in **A.I.R. 1939 Lah. 210.**

———**O. 21, R. 72**—Right of set-off—When to be allowed—Attachment of same property under decree of another Court effected prior to attachment under decree under execution—When a bar. *See* C.P. CODE, SS. 63, 73 AND O. 21, R. 72. **A.I.R. 1937 Cal. 55.**

———**O. 21, Rr. 72 and 90**—*Scope—Attachment in execution of one decree—Subsequent decree against same judgment-debtor and attachment of same property—Sale under later decree—Decree-holder allowed to set-off—Effect—Material irregularity.*

When a property has been attached in execution of a decree and subsequently it is attached and sold in execution of a later decree against the same judgment-debtor, the later decree-holder should not be allowed to set-off his purchase money against the decree debt due to him, because there is another decree-holder who, by reason of his having attached the property is entitled to rateable distribution. The executing Court in such a case should order the purchasing decree-holder to pay the purchase price into Court and distribute it rateably among the decree-holders. If it allows a set-off, it amounts to material irregularity and the sale is liable to be set aside under O. 21, R. 90, C.P. Code. (*Varma and Rowland, JJ.*) DURGA PRASAD SHRAFF *v.* MAHADEB LAL SINGHANIA. **166 I.C. 873=9 R.P. 348 =1936 P.W.N. 785=3 B.R. 229=17 Pat. L.T. 847=A.I.R. 1937 Pat. 50.**

———**O. 21, R. 72 (1)**—*Conditions as to leave to bid—Violation of—Effect.*

Where a decree-holder was given leave to bid on condition that he does not bid for any amount less than the upset price, actually as a matter of fact bids for a much smaller amount and the bid is accepted, the sale cannot be allowed to stand. To do so would be to deprive R. 72 (1) of its value. The conditions cannot be disregarded. (*Roughton, F.C.*) MST. SAWANABAI *v.* KRISHNAJI. **1938 N.L.J. 180.**

C. P. CODE (1908), O. 21, R. 84.

———**O. 21, R. 72 (2)**—Decree-holder purchasing—Rights of other decree-holders for rateable distribution. *See* C.P. CODE, S. 73. **A.I.R. 1937 Nag. 383.**

———**O. 21, Rr. 82-92**—*Execution sale—Setting aside of—Power of Court.*

A sale in execution can only be set aside if the ground mentioned in R. 89, 90 or R. 91 of O. 21, C.P. Code, be established as the case may be. If no such application is made, the Court has no option but to confirm the sale. If any such application is made and the ground mentioned in those rules be not established, the onus being on him who applies for reversal of the sale, the Court has no option but to confirm the sale under O. 21, R. 92. (*R.C. Mitter and Sen, JJ.*) NERODE CHANDRA *v.* OFFICIAL TRUSTEE OF BENGAL. **179 I.C. 226=11 R.C. 505=A.I.R. 1938 Cal. 798.**

———**O. 21, R. 83**—*Order refusing postponement of sale—Appeal.*

No appeal lies from a decision under O. 21, R. 83, C.P. Code, refusing to postpone the sale of the property. (*Almond, A.J.C.*) ATTAR SINGH *v.* MOHAMMAD AKBAR KHAN. **169 I.C. 315= 10 R. Pesh. 1=A.I.R. 1937 Pesh. 64.**

———**O. 21, R. 84**—*Bid on behalf of temple—Failure to deposit 25 per cent.—Deficit on resale—Nature of liability.*

Where a bid is made on behalf of a temple, which not being a juristic person cannot either sue or be sued, and a default is made in the payment of the 25 per cent. and a resale is held, the liability in respect of the deficit is not that of the bidder personally, but only as a representative of the temple and hence is recoverable out of the temple funds. (*Stone, C.J. and Bose, J.*) LOKMAN CHHABILAL JAIN *v.* MOTILAL TULSIRAM. **186 I.C. 872=12 R.N. 261=1939 N.L.J. 504 =A.I.R. 1939 Nag. 269.**

———**O. 21, R. 84**—*Failure to deposit—Irregularity.*

The omission to pay 25 per cent. of the sale money amounts only to an irregularity and a sale can be set aside on this ground only if it is proved that substantial injury has been caused by it. (*Almond, J.C. and Mir Ahmad, J.*) BOOTA MAL CHARANDAS *v.* NAND RAM SANTO MAL. **176 I.C. 609=11 R. Pesh. 15=A.I.R. 1938 Pesh. 36.**

———**O. 21, R. 84 and S. 47**—*Order setting aside sale—Appeal.*

Where on account of the failure of the auction-purchaser in execution to deposit 25 per cent. of the purchase-money, the Court orders a fresh auction to be held under O. 21, R. 84, no appeal lies from such order. It makes no difference whether the auction-purchaser is an outsider or the decree-holder himself, because the fact that the decree-holder himself is the auction-purchaser does not bring the case within the purview of S. 47 as the auction-purchaser is not a party to

the suit nor can it be said that the order setting aside the sale and ordering re-sale is one which relates to execution, discharge or satisfaction of the decree. A.I.R. 1939 Lah. 46, Reserved. (*Addison and Ram Lall, JJ.*) MRS. J. PELITI *v.* KANSHI GOPAL. **186 I.C. 152=12 R. L. 369=41 P. L.R. 568=A.I.R. 1939 Lah. 210.**

———O. 21, Rr. 84 and 72—*Re-sale—Duty of decree-holder purchaser to deposit 25 per cent.—Omission by him to deposit—Sale, if complete.*

In N.-W.F. Province, no permission is, of course necessary for the decree-holder to bid at an auction in view of O. 21, R. 72, C.P. Code, as applicable to that province. It cannot be inferred, however, from this that the Court has under R. 84 (2) impliedly dispensed with the requirement of that rule which requires a deposit of 25 per cent. of the bid which is accepted. The sale in his favour is not completed until such deposit is made, for if such a deposit is not made, it is the duty of the officer conducting the sale to put the property up to auction again immediately. His action in doing so is not really a re-sale of the property but a continuation of the previous auction. (*Almond, A.J.C.*) TAJ MOHAMMAD KHAN *v.* KARAM CHAND. **165 I.C. 554=9 R. Pesh. 49.**

———O. 21, R. 84—"Re-sale"—Meaning of Decree-holder purchaser—Failure to deposit 25 per cent.—Fresh sale after fresh proclamation—If "re-sale". *See* C.P. CODE, O. 21, R. 71 AND 84. **1937 A.W.R. 426.**

———O. 21, Rr. 84 and 71—*Sale when complete—Deposit when to be made—'Forthwith,' meaning of—Re-sale if can be held on same day.*

An auction sale is complete when the final bid is accepted by the Sale Amin who conducts it, and to make it binding on the parties, it is not necessary to obtain the permission of the Court ordering the sale. The deposit of 25 per cent. has to be paid to the person conducting the sale, 'immediately' after a person is declared to be the purchaser. If it is not so paid the property shall 'forthwith' be re-sold. That word in R. 84 governs the time at which the re-sale is to be held and an officer is justified in holding a re-sale the same day and is not bound to wait for the payment of 25 per cent. If there is any deficiency by reason of the purchaser's default it can be recovered from him. (*Stone, C.J. and Bose, J.*) LOKMAN CHHABILAL JAIN *v.* MOTILAL TULSIRAM. **186 I.C. 872=12 R.N. 261=1939 N.L.J. 504 =A.I.R. 1939 Nag. 269.**

———O. 21, R. 85—*Applicability—Withdrawal of deposit on sale being set aside.*

O. 21, R. 85, C.P. Code, has no application to a case where the purchaser had duly deposited the price but had withdrawn it on the sale being set aside. (*Stone, C.J. and Bose, J.*) TARACHAND *v.* KALU. **1938 N.L.J. 207.**

———O. 21, Rr. 85 and 86—*Applicability—Collector's sale—Non-payment of balance within time—Effect.*

In Collector's sales, the non-payment of three-fourths of the sale price within the time limited by O. 21, R. 85, C.P. Code, is a mere irregularity and does not automatically involve the holding of a sale afresh. (*G.P. Burton, R.M.*) VINAYAK RAO *v.* PANNALAL. **20 N.L.J. 80.**

———O. 21, Rr. 85, 86 and 90—*Failure to deposit 75 per cent. of purchase-money within fortnight—Duty of Court.*

The 'publishing' of the sale has reference to all proceedings that take place till the sale is actually held. Any proceedings that take place after the deposit of 25 per cent. of the purchase-money has been made cannot be regarded as falling within the meaning of the words 'publishing' or 'conducting the sale'. The failure to deposit 75 per cent. of the sale price within a fortnight as required by O. 21, R. 85, C.P. Code, does not therefore amount to a material irregularity in publishing or conducting a sale within the meaning of O. 21, R. 90. When default is made by the auction-purchaser in paying into Court full amount of the purchase-money within the time allowed by O. 21, R. 85 the Court has no jurisdiction to extend the time but must order a re-sale under R. 86. The only discretion given by R. 86 is in the matter of forfeiture of the deposit of 25 per cent. made by the auction-purchaser, and not in the matter of re-sale. (*Tek Chand and Abdul Rashid, JJ.*) A. R. DAVAR *v.* JHINDA RAM. **I.L.R. (1938) Lah. 97=40 P.L. R. 509 and 1004=181 I.C. 124=11 R.L. 769= A.I.R. 1938 Lah. 198.**

———O. 21 (Mad. H.C.), Rr. 85 and 86—*Failure to deposit stamp for sale certificate—Forfeiture of whole deposit—If justified.*

Where default is committed in respect of the cost of the general stamp to be affixed to the sale certificate only the initial deposit of 25 per cent. can in any case be forfeited. The whole amount cannot be forfeited. (*Stodart, J.*) PONNAMBALA MUDALI, *In re*. **48 L.W. 416=178 I.C. 96=1938 M.W.N. 864=11 R.M. 403 (2)=A.I.R. 1938 Mad. 905=(1938) 2 M.L. J. 529.**

———O. 21, R. 86—*Applicability—Decree-holder purchaser—Leave obtained for bidding but not for set-off—Deposit of balance beyond time—Effect—Order forfeiting whole amount—Propriety—Proper order.*

In execution of a decree certain property of the judgment-debtor was sold. Before such sale the decree-holder had applied for leave to bid at the auction sale and the leave was granted. He however had omitted to apply under O. 21, R. 72, C.P. Code, to set off. The property was purchased by the decree-holder who deposited 25 per cent. of the purchase money but the balance was paid by him one day late. The Court without considering the question that the delay might be due to the *bona fide* mistake about the date of the payment or the question of possible prejudice which could have been caused to the judgment-debtor by the delay of one day, ordered that the whole amount deposited be forfeited and property re-sold.

Held, that the order forfeiting the whole amount was without jurisdiction and even though the Court had jurisdiction to forfeit 25 per cent. deposit, under the circumstances it was a sufficient punishment to the purchaser decree-holder for his mistake to hold him liable only for the costs of the re-sale of the property under O. 21, R. 86, C.P. Code. (*Rupchand Bilaram, J.C. and Lobo, A.J.C.*) LAHRUMAL SABANMAL *v.*

C. P. CODE (1908), O. 21, R. 86.

TAROMAL SIROOMAL. **172 I.C. 575=10 R.S. 169 =A.I.R. 1937 Sind 311.**

———O. 21, Rr. 86 and 87—Re-sale under—Application for—Limitation—Duty of decree-holder—Limitation Act, Art. 181. *See* C.P. CODE, O. 21, RR. 71, 86 AND 87. **(1940) 1 M.L. J. 537.**

———O. 21, R. 86—*Scope—Re-sale—Default in payment of balance of sale price—Duty of Court.*

O. 21, R. 86, C.P. Code, makes it obligatory on the Court to re-sell the property in case default is made in payment of the balance of the purchase money as required by O. 21, R. 85. The discretion vested in the Court is only as regards the forfeiture of the deposit. (*Venkataramana Rao, J.*) MONNI AIDRUZ *v.* SAFFANI MIRA MOHIDEEN. **179 I.C. 320 (1)=11 R.M. 574= 1938 M.W.N. 1031=48 L.W. 659=A.I.R. 1939 Mad. 57=(1938) 2 M.L.J. 833.**

———O. 21, R. 88—*Object of—Powers of executing Court acting under.*

O. 21, R. 88 is intended to safeguard the rights of the co-sharers in undivided immovable property. The executing Court is to act judicially and not arbitrarily and particularly when the law gives a co-sharer a right of pre-emption, it is necessary for the Court to interpret the rule in such a manner as will protect that right and not in a manner as will have the effect of depriving co-sharers of their right. (*Puranik, J.*) MUNNALAL *v.* GOPILAL. **1940 N.L.J. 453=A.I.R. 1940 Nag. 337.**

———O. 21, R. 89—*Applicability—Agreement between decree-holder purchasers and juagment-debtor on date of sale—Part payment of decree amount—Time fixed for payment of balance—Joint application to Court praying that on payment by fixed date sale to be set aside and in default sale be confirmed—Effect—Time—If of essence of contract—Non-payment on fixed date—Effect—Order confirming sale—Appeal—Revision—O.* 43, *R.* 1 (j)—*S.* 115—*Contract Act, S.* 55.

A property was sold in execution of a decree on 13—9—1935 and was purchased by the decree-holder himself. On the same day both the parties filed a petition in Court to the effect that the judgment-debtor had paid Rs. 500 to the decree-holder purchaser towards satisfaction of the decree, and that it was agreed between them on payment of the balance of the decretal amount with interest, etc., by 10—11—1935, the sale would be set aside, the decree-holder auction-purchaser foregoing his 5 per cent. compensation, but that in default of such payment by the date fixed, the sale would be confirmed. The Court was closed on 10—11—1935, and re-opened on 13—11—1935, but it was not until 20—11—1935, that the requisite amount was actually deposited in Court, though the chalan was applied for on 14—11—1935 and was issued on the 15th. The decree-holder applied on 20—11—1935 for confirmation of the sale, ignoring the deposit, and the Court confirmed the sale. The judgment-debtor appealed against the order.

Held, (1) that though the parties agreed to substitute an agreed procedure for the procedure prescribed by law, it was nevertheless in essence, though not in form, one falling under O. 21, and that the application filed by the parties on the date of sale might be treated as an application under R. 89 of O. 21, C.P. Code, and the order confirming the sale was therefore appealable under O. 43, R. 1 (*j*); even if there be no appeal, the High Court could interfere in revision if the order were shown to be wrong, as a question of jurisdiction was involved; (2) that the contract between the parties clearly showed that time was of the essence of the contract, and that on the expiry of 10—11—1935, the sale automatically became confirmed, no order of the Court being necessary for the purpose and there was nothing left which could be set aside after that date. (*Courtney-Terrel, C.J., Khaja Mahommad Noor, James Dhavle and Varma, JJ.*) BHATWAT NARAIN SINGH *v.* SRINIVAS. **16 Pat. 202=1937 P.W.N. 13= 169 I.C. 483=10 R.P. 16=3 B.R. 579=17 Pat.L.T. 940=A.I.R. 1937 Pat. 113 (F.B.).**

C. P. CODE (1908), O. 21, R. 89.

———O. 21, R. 89—*Applicability—Execution sale under Revenue Court decree.*

O. 21, R. 89, C.P. Code, does apply to executions of Revenue Court decrees. (*Marsh, S.M.*) PANCHI DEVI *v.* ZALIM SINGH. **1939 R.D. 204 (1)=1939 A.W.R. (B.R.) 202.**

———O. 21, R. 89—*Applicability—Sales by Registrar on original side of High Coourt.*

Whether or not the provisions of O. 21, R. 89, C.P. Code, do in terms apply to sales by the Registrar on the original side of the High Court, the principles laid down in that rule have always been observed in dealing with applications to set aside such sales. (*McNair, J.*) NATIONAL INSURANCE CO., LTD. *v.* EZEKIEL AARON DAVID. **I.L.R. (1937) 2 Cal. 606=41 C.W.N. 998.**

———O. 21, R. 89—*Application under—Cash deposit in Court for payment to decree-holder—If necessary—Arrangement between decree-holder and judgment-debtor for adjustment of claim—Sufficiency.*

It is unnecessary, in an application under O. 21, R. 89, C.P. Code, to insist on a cash deposit in Court of the amount specified in the sale proclamation for payment to the decree-holder. If an arrangement is entered into between the decree-holder and the judgment-debtor for adjustment of the claim, the provisions of the rule are substantially complied with, and the sale will be set aside. (*McNair, J.*) NATIONAL INSURANCE CO., LTD. *v.* EZEKIEL AARON DAVID. **I.L.R. (1937) 2 Cal. 606=41 C.W.N. 998.**

———O. 21, R. 89—Application under—Limitation—Starting point—Sale by Qurq Amin—Acceptance by Court on later date. *See* LIMITATION ACT, ART. 166—'DATE OF SALE'. **1940 O. W.N. 381.**

———O. 21, R. 89—*Application to set aside sale—Form of—Form of tender for deposit of sale price and* 5 *per cent. extra—Signing by Judge—Specific prayer for setting aside sale, if necessary.*

Where a person comes to Court with a tender form, for the deposit of the sale price plus a penalty of 5 per cent. on it and the Judge signs the tender and the money is deposited, the tender must be deemed to be an application not only to deposit but also to have the sale set aside.

C. P. CODE (1908), O. 21, R. 89.

Though the form does not use those actual words, it is clearly the intention of the person tendering the form to a Court for signature, that the deposit is being made for that purpose. (*Bennet and Verma, JJ.*) MAHBOOB KHAN *v.* MAJID HUSSAIN. **I.L.R. (1939) All. 403=181 I.C. 908=11 R.A. 622=1939 A.W.R. (H.C.) 145=1939 A.L.J. 97=A.I.R. 1939 All. 241.**

———O. 21, R. 89—*Compliance—Deposit of decree amount and compensation within 30 days—Sufficiency—Application to set aside sale not presented—Effect—Sale—If can be set aside—Order refusing to set aside sale—Revision.*

A sale cannot be set aside under O. 21, R. 89, C.P. Code, in the absence of an application praying to set aside the sale, although the full decretal amount has been deposited. The deposit of the decretal amount and compensation does not amount to an application within the meaning of O. 21, R. 89, nor can an application be implied from the fact of the deposit. Where within 30 days of the sale the decree amount together with the compensation was deposited, but the deposit was not accompanied by an application praying the Court to set aside the sale and the executing Court confirmed the sale holding that it could not be set aside in the absence of an application therefor, and an application by the judgment-debtor made after 30 days under S. 151 and O. 21, R. 89, C.P. Code, for review of the prior order was dismissed.

Held, that the sale could not be set aside as there was no application to set aside the sale, and that the High Court had no power to interfere in such a case under S. 115, C.P. Code. (*Harries, C.J. and Rowland, J.*) BHARI JENA *v.* GAURANGA CHARAN SAHU. **186 I.C. 143=6 B.R. 290=12 R.P. 453=5 C.L.T. 27=18 Pat. 210=A.I.R. 1940 Pat. 87.**

———O. 21, R. 89—*Conditional deposit—Validity—Alternative applications under Rr. 89 and 90—Maintainability.*

Neither the judgment-debtor nor a person interested in the property sold can attach any condition to his deposit under O. 21, R. 89 and the Court cannot accept the deposit subject to any condition or protest. A judgment-debtor made applications under Rr. 90 and 89. The prayer under R. 89 was in the first place "in the alternative". It was to be taken into consideration only if the first prayer in the application which was the main prayer was not granted, namely, if the sale was not set aside under R. 90. Further, even this alternative prayer was hedged round with conditions. The deposit made was to be retained only if the sale was set aside. If the sale was confirmed it was to be refunded. The main prayer under R. 90 was dropped by the judgment-debtor subsequently.

Held, that the application was conditional and hence not maintainable and the date on which the application under R. 90 was dropped must be taken to be the date on which the application under R. 89 was filed. The application if more than thirty days after the date of the sale was accordingly time barred. (*Lobo, J.*) HARIRAM DIPCHAND *v.* RAGHUNATH JETHABHAI. **177 I.C. 952=11 R.S. 74=A.I.R. 1938 Sind 177.**

C. P. CODE (1908), O. 21, R. 89.

———O. 21, R. 89—*Construction—Deposit not accepted by decree-holder—If amount received by decree-holder.*

R. 89 has to be strictly construed and even a mistake cannot be availed of as justifying a departure from the requirements of the rule. The judgment-debtor cannot be allowed to take credit for any amount which he might have deposited in Court behind the back and without the consent of the judgment-creditor and which the judgment-creditor has refused to accept. The only deduction allowed by the rule is the amount which since the date of the proclamation of sale has been actually received by the decree-holder. (*Lobo, J.*) HARIRAM DIPCHAND *v.* RAGHUNATH JETHABAI. **177 I.C. 952=11 R.S. 74=A.I.R. 1938 Sind 177.**

———O. 21, R. 89—*Construction—Payment under—If to be in cash—Adjustment between judgment-debtor and decree-holder out of Court—Effect of—Court closed on 30th day or after—Deposit on reopening day—Sufficiency.*

Any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of R. 89, O. 21, C.P. Code. Where the decree-holder is paid most of the amount due to him by the judgment-debtor assigning a mortgage in his favour out of Court, and a small balance due to him is deposited by the judgment-debtor into Court at the time he makes the application to Court for setting aside the sale, that would be sufficient compliance with O. 21, R. 89, C.P. Code. The fact that the deposit is not made within 30 days of the sale makes no difference, where the deposit cannot be so made on account of the Court being closed. Where it is made on the reopening day, it is in time by virtue of S. 10 of the General Clauses Act.

Krishnaswami Aiyangar, J.—O. 21, R. 89 cannot be construed as contemplating payment in cash and in cash only. What is done by consent of parties as a substitute for the deposit is to be regarded as its equivalent in every respect and judged by the same principles as those applicable to a deposit. By such consent what is not in fact a payment in cash is turned into a deposit within the meaning of the rule to be acted upon by the Court in all respects as if it were a payment in cash. (*Leach, C.J., King and Krishnaswami Aiyangar, JJ.*) MUTHUVENKATAPATHY REDDI *v.* KUPPU REDDI. **188 I.C. 557=13 R.M. 24=51 L.W. 527=1940 M.W.N. 379=A.I.R. 1940 Mad. 427=(1940) 1 M.L.J. 629 (F.B.).**

———O. 21, R. 89—*Deposit—Sufficiency—Decree-holder purchasing one of properties.*

Under O. 21, R. 89, C.P. Code, the person who seeks to set aside a sale must deposit the amount of the decree unless the decree-holder may have received any sum. The decree-holder cannot be said to have notionally received a sum equal to the amount for which he (the decree-holder) purchased one of the properties, and a deposit of a sum less that amount would not, therefore, be sufficient. (*Wort, J.*) ADO DAS v. BANSI DAS. **6 B.R. 692=188 I.C. 467=13 R.P. 8.**

———O. 21, R. 89—*Deposit under—Sufficiency—Test—Amount mentioned in proclamation of sale.*

C. P. CODE (1908), O. 21, R. 89.

Where in execution of a mortgage decree, the properties were sold and an application was made by the mortgagee decree-holder to set aside the sale, with a deposit of 5 per cent. of the purchase price together with an amount enough to satisfy one of three creditors, who had attached the mortgage decree, but which was less than the amount mentioned in the proclamation of sale.

Held, that assuming that he had a *locus standi* to maintain such an application, it was bad in law as the amount mentioned in the proclamation of sale, had not been deposited as required by O. 21, R. 89. (*Leach, C.J. and Burn, J.*) SUBRAMANIA IYER *v.* VISWANATHA PILLAI. **46 L.W. 922= 1938 M.W.N. 15.**

———O. 21, R. 89—*Deposit under—When to be made—Application without deposit—If can be entertained.*

Where an application under O. 21, R. 89, C.P. Code, for setting aside the sale is made and the circumstances of the case show that the applicant is ready to deposit the sum required, the Court can entertain the application always provided that the applicant has an interest by virtue of title. But the application and the deposit have both to be made within 30 days. (*Wort, J.*) NASIRUDDIN HAIDER *v.* HAKIM MUHAMMAD TAHIR. **161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.**

———O. 21, R. 89 and O. 32, R. 3 (5) (Oudh)—*Execution sale of minor's property—Mother, guardian for suit—Deposit of decretal amount by father—Sale set aside—Board if bound to interfere.*

Where in a suit the mother has acted as guardian for a minor party and subsequently the minor's property is sold in execution of a decree against the minor and the father of the minor deposits the decretal amount which is accepted by the Court and the sale is set aside, nothing flagrant has happened as to call for the revisional interference of the Board in the matter. The tender by the father is not such a deviation from the routine as would raise a suspicion in the mind of the Court that the tenderer was not doing it in the interests of the minor. (*Mehta, S.M. and Harper, J.M.*) RAM NARESH SINGH *v.* RAM LOCHAN SINGH. **1940 A.W.R. (B.R.) 17=1940 A.L.J. 12 (B.R.)=1940 R.D. 19.**

———O. 21, R. 89 and Contract Act, S. 72—*Failure to certify after receiving satisfaction—Sale in execution of such satisfied decree—Deposit under O. 21, R. 89 by owner and setting aside of sale—Right of owner to recover it from the decree-holder.*

Where a decree-holder whose decree is fully satisfied fails to enter up satisfaction of the decree and proceeds to execute his decree fraudulently and the property is sold in Court auction and where the owner deposits the amount due under O. 21, R. 89, C.P. Code; and gets the sale set aside, on a question whether such an owner can recover the money from such a decree-holder.

Held, that the owner's right to recover back the money paid under compulsion of execution which amounts to 'coercion' within the meaning of S. 72 of the Contract Act, is a statutory right. The liability is one tort and the owner could recover back the money so paid.

C. P. CODE (1908), O. 21, R. 89.

Held, further, that the fact that the payment was made under O. 21, R. 89 of the C.P. Code could not affect the question, for the law as to unconditional payment would not apply to this case where there is no subsisting decree. (*Venkatasubba Rao and Abdur Rahman, JJ.*) PAPPU REDDIAR *v.* PICHU AYYAR. **179 I.C. 717=11 R.M. 620=(1938) M.W.N. 164=47 L.W. 188= A.I.R. 1938 Mad. 493=(1938) 1 M.L.J. 829.**

———O. 21, R. 89—*Interpretation—If refers to withdrawal by decree-holder of sale proceeds deposited.*

The words "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder" in O. 21, R. 89, refer to a payment made to the decree-holder out of Court and not to the withdrawal by the decree-holder of the sale proceeds deposited in Court by the auction-purchaser. (*Puranik, J.*) RAMCHANDRA MAHOTRAO *v.* RAMCHANDRA GUJABA. **I.L.R. (1938) Nag. 456=173 I.C. 296=10 R.N. 295=A.I.R. 1938 Nag. 54.**

———O. 21, R. 89—*Judgment-debtor depositing five per cent. for payment to auction-purchaser—Allegation that decree satisfied out of Court—Sale, if can be set aside.*

A judgment-debtor can deposit five per cent. of the purchase-money in Court to be paid to the auction-purchaser and get the sale set aside without depositing the decretal amount and contending that the decree is satisfied out of Court. The auction-purchaser has no right to restore the sale on the ground that the alleged satisfaction of the decree was untrue because such application could only be made by the decree-holder. (*Henderson, J.*) MAHENDRA CHANDRA DAS *v.* PARASHMANI DASYA. **177 I.C. 336=11 R.C. 232=68 C.L.J. 264=A.I.R. 1938 Cal. 252.**

———O. 21, R. 89—Jurisdiction—Sale by Collector in execution transferred by Court—Application to Court to set aside sale—If incompetent. *See* LIMITATION ACT. S. 4. **40 Bom.L.R. 152.**

———O. 21, R. 89—*Poundage fee—Duty of judgment-debtor to pay.*

There is nothing in O. 21, R. 89 which makes it necessary for the judgment-debtor to pay in the poundage fee as a condition precedent to the sale being set aside. After the sale is set aside the judgment-debtor can be made to reimburse the auction-purchaser for any costs and the poundage fee he has properly paid in connexion with the sale. (*Derbyshire, C.J. and Mukherjea, J.*) GOPAL CHANDRA *v.* GOBARDHAN CHANDRA. **176 I.C. 749=11 R.C. 168=68 C.L.J. 27=A.I.R. 1938 Cal. 523.**

———O. 21, R. 89—*Right to apply—"Interest" —Sale by judgment-debtor after Court sale—Application to set aside sale by judgment-debtor and purchaser—Competency.*

A judgment-debtor who, after the Court sale, transfers his interest in the property sold in execution of a decree, retains sufficient "interest" within the meaning of O. 21, R. 89 to allow him to apply under the rule. But the purchaser of such properties after Court sale is precluded from applying under the rule. (*Lobo, J.*) HARIRAM DIPCHAND *v.* RAGHUNATH JEETHABHAI. **177 I.C. 952=11 R.S. 74=A.I.R. 1938 Sind 177.**

C. P. CODE (1908), O. 21, R. 89.

———O. 21, R. 89 (as amended by Lahore High Court)—*Right to apply—Person taking mortgage of property under attachment*—Locus standi.

A person who has obtained a mortgage of the property after attachment can come forward under O. 21, R. 89, as amended by the Lahore High Court, and by making the necessary payments save the property and prevent its sale from taking place. A.I.R. 1935 Lah. 51, Rel. on. (*Agha Haider, J.*) JAMNA DAS *v.* JALAL-UD-DIN. **168 I.C. 819=9 R.L. 676=A.I.R. 1936 Lah. 561.**

———O. 21, R. 89—*Right to apply—Purchaser from judgment-debtor subsequent to sale—Application by—Competency.*

A purchaser of the property from the judgment-debtor subsequent to the auction sale cannot maintain an application under O. 21, R. 89, C.P. Code, while the rule may be so construed as to recognise in the judgment-debtor, who has sold his property subsequent to the auction-sale, a sufficient interest to allow him to apply under the rule, it does not follow that the rule can be so construed as to permit the subsequent purchaser himself to apply to the Court to set aside the sale. (*Davis, J.C. and Weston, J.*) RAGHNATH *v.* HARIRAM. **I.L.R. (1940) Kar. 360=A.I.R. 1940 Sind 181.**

———O. 21, R. 89—*Right to apply—Setting aside sale*—Locus standi *of mortgagee.*

The words "immovable property" in R. 89 should be interpreted to mean tangible immovable property, whether or not persons other than the judgment-debtor had any interest in it, and it does not mean merely the right, title, and interest of the judgment-debtor alone. A mortgagee of the property sold is, therefore, entitled under R. 89 to apply to have the sale set aside. 51 Mad. 770, Rel. on. (*King, C.J. and Nanavutty, J.*) NARAIN DAS *v.* BULAQI. **11 Luck. 708=159 I.C. 1044 (2)=8 R.O. 233=1936 O.W.N. 48=A.I.R. 1936 Oudh 128.**

———O. 21, R. 89—*Right to apply—Tender by person acquiring interest in property subsequent to auction-sale—Validity.*

A person who acquires an interest in the immovable property after its auction-sale would not, *prima facie*, be entitled to have the sale set aside on his depositing 5 per cent. of the purchase-money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. Where on an application by the judgment-debtor under O. 21, R. 89 the deposit money is tendered by such a person, the tender is invalid and the sale cannot be set aside. A tender by a person who is neither an attorney, general or special, nor a Vakil or Mukhtar, for the owner of the immovable property sold does not comply with the provisions of O. 21, R. 89 and is consequently invalid. 9 A.L.J. 12, Foll. (*Nanavutty, J.*) SHANKAR PERSHAD *v.* MOHAMMAD TAQI. **8 R.O. 330=1936 O.W.N. 344=161 I.C. 424=A.I.R. 1937 Oudh 108.**

———O. 21, R. 89—*Right to apply under—Decree for specific performance of contract for sale—Property sold under another execution—Application by holder of former decree—If lies.*

A person, who had obtained a decree for specific performance of a contract of sale against one of the tenants of the property sold in execution

C. P. CODE (1908), O. 21, R. 89.

of another decree, made an application to set aside the sale under O. 21, R. 89, C.P. Code. The applicant had not executed his decree for specific performance when he made the deposit required under O. 21, R. 89.

Held, that so long as the applicant did not execute his decree for specific performance he could have no title in the property sold. (*Wort, J.*) NASIRUDDIN HAIDER *v.* HAKIM MUHAMMAD TAHIR. **161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.**

———O. 21, R. 89—*Right to apply under*—Interim *receiver appointed under S. 20, Provincial Insolvency Act—Application to set aside execution sale—Competency—Order of appointment expressly authorising application—Effect of.*

An *interim* receiver of the debtor's property appointed under S. 20 of the Provincial Insolvency Act is entitled to apply under O. 21, R. 89, C.P. Code, to set aside a sale of immovable property in execution of a decree against the debtor, and when the order appointing the interim receiver expressly empowers him to act under O. 21, R. 89, C.P. Code, to set aside the sale; the appointment divests the debtor of all control over the property and the interim receiver becomes, as it were, his statutory agent to do all acts which he would be entitled to do if he were not so disabled. (*Venkataramana Rao, J.*) ANKAYYA *v.* OFFICIAL RECEIVER, KISTNA. **1937 M.W.N. 262=45 L.W. 771=171 I.C. 220=10 R.M. 293=A.I.R. 1937 Mad. 589.**

———O. 21, R. 89—*Right to make deposit under.*

Although O. 21, R. 89 speaks of any person, either owning such property or holding an interest therein by virtue of a title acquired by such sale, it does not confer the right to make a deposit on a person who had purchased the property so far back from the date of the sale and the execution proceedings that his interest was not affected by the sale. (*Dhavle, J.*) RAMANAND LAL *v.* BARHAMDUTT MISSER. **175 I.C. 566=4 B.R. 615=11 R.P. 2=A.I.R. 1938 Pat. 233.**

———O. 21, R. 89—Scope—Application for challan for depositing amounts for setting aside sale—Memorandum accompanying deposit receipt—Absence of formal payer for setting aside sale—Application and memorandum—If applications under rule. *See* C.P. CODE, S. 153. **(1937) 1 M.L.J. 658.**

———O. 21, R. 89—*Scope—Compliance—Execution sale—Subsequent private sale by judgment-debtor to purchasers in execution of items purchased by them—Purchasers willing to allow judgment-debtor to use moneys deposited by them as his—Amount sufficient to cover decree debt and poundage—Sale—If can be set aside—Conditions of R. 89—If complied with.*

Where after a Court sale in execution of a decree the judgment-debtor privately sells some of the items to the persons who have purchased them in the Court-auction, and applies to the Court to set aside the sale under O. 21, R. 89, praying that the moneys deposited by the purchasers may be appropriated towards the satisfaction of the decree and the poundage due, the sale cannot be set aside, although the purchasers support the judgment-debtor and express their willingness to al-

C. P. CODE (1908), O. 21, R. 89.

low the judgment-debtor to use the moneys deposited by them in Court, they having purchased the items privately, and although the moneys so deposited by the purchasers are sufficient to cover the amounts mentioned in Cls. (*a*) and (*b*) of R. 89 of O. 21, C.P. Code. Since the moneys deposited by them are in the custody of the Court till final orders are passed by the Court with respect to the sale, they cannot operate upon it to enable the judgment-debtor to use the same for the purpose of setting aside the sale under O. 21, R. 89. The rule cannot be said to be complied with and the sale cannot therefore be set aside. (*Madhavan Nair, J.*) MARUDAMUTHU KADURAR *v.* ARUMUGASWAMI KADURAR. **I.L.R. (1937) Mad. 828=1937 M.W.N. 377=45 L.W. 88 =169 I.C. 532=10 R.M. 69=A.I.R. 1937 Mad. 270=(1937) 1 M.L.J. 264.**

———O. 21, Rr. 89, 90 and 91—*Scope of exhaustive—Application for execution barred by time under S. 48—Matter brought to notice of Court after sale and before confirmation thereof —Power of Court to refuse to confirm sale.*

It cannot be said that in no circumstances can a Court to refuse to confirm a sale upon grounds other than those mentioned in Rr. 89, 90 and 91 of O. 21, C.P. Code. If it is brought to the notice of the Court that the execution application on which the sale is held was obviously barred by limitation under S. 48, C.P. Code, the Court is entitled to refuse to confirm the sale on being satisfied that the application is barred. It is the duty of the Court to see that the application is within time, and when the matter is brought to its notice before it finally disposed of the proceedings, the Court must take notice of it and is justified in giving effect to it. (*Niamatullah, Ag. C.J. and Allsop, J.*) COLLECTOR OF BENARES *v.* JAI NARAIN RAI. **172 I.C. 428=10 R.A. 480 =1938 A.L.R. 142=1937 A.W.R. 1222=1937 A.L.J. 1349=A.I.R. 1938 All. 89.**

———O. 21, R. 89—*Setting aside sale—Formal application, if necessary—Challan by which judgment-debtor deposits amount required—If sufficient.*

O. 21, R. 89, C.P. Code, evidently contemplates an application for setting aside a sale. But where the money required to be deposited under R. 89 is deposited by the judgment-debtor in Court within the time prescribed by law, the challan which sets out the purpose of the deposit might be regarded as a sufficient application, and an order could be made in favour of the judgment-debtor although there is no formal application by him for setting aside the sale. (*Nasim Ali, J.*) JYOTISH CHANDRA SIKDAR *v.* SURENDRA NATH DAS. **181 I.C. 79 (1)=11 R.C. 771=43 C.W.N. 252=A.I.R. 1939 Cal. 153.**

———O. 21, R. 89 (2) (as amended in Nagpur)—*Applicability and scope—Application by judgment-debtor under R. 90—Subsequent private sale—Application by vendee under R. 89—Competency—Withdrawal of prior application—If condition precedent.*

A judgment-debtor *A*, whose property was attached and sold in execution of a decree, applied for setting aside the sale under O. 21, R. 90, C. P. Code, and subsequently sold the same property privately to a third person *B* who applied to set aside the sale under O. 21, R. 89.

Held, that the rights of the judgment-debtor *A* to continue the application under O. 21, R. 90 devolved upon *B* and, for purposes of R. 90, *A* and *B* became identical and hence *B* was the only person contemplated in R. 89 (2) and thus could not be allowed by virtue of R. 89 (2) to make an application to set aside the sale under O. 21, R. 89 unless the application under R. 90 by the vendor *A* was withdrawn. The words in R. 89 (2) being express, Court need not have put *B* to his election of choosing between his two applications under O. 21, Rr. 90 and 89. It was for *B* to withdraw the application under R. 90 and not for the Court to ask *B* to choose and elect. (*Bose, J.*) SETH JUHARMAL *v.* RAMDAS-BALDEO DAS. **168 I.C. 1003=9 R.N. 292=A.I.R. 1937 Nag. 161.**

———O. 21, R. 89 (2)—*Construction—Application under Rr. 89 and 90—Competency—Subsequent withdrawal of prayer for relief under R. 90 —Effect—Application under R. 89—When deemed to be made—Limitation.*

While R. 89 of O. 21, C. P. Code, does indeed provide for a last minute indulgence to the judgment-debtor, that rule must be strictly complied with. Sub-R. (2) for instance has to be strictly complied with and the judgment-debtor cannot prosecute two remedies at one and the same time. Two simultaneous applications under Rr. 89 and 90 cannot be made or prosecuted. R. 89 prohibits not only the making or prosecution of an application under it unless a previous application under R. 90 has been withdrawn, but it also excludes an application already made. Where an application is made under Rr. 89 and 90, and subsequently the prayer for relief under R. 90 is abandoned, the application under R. 89 can be deemed to have been made only on the date on which the prayer for relief under R. 90 is abandoned. And if that date is beyond 30 days of the date of sale, it must be held to be barred by limitation. (*Davis, J.C. and Weston, J.*) RUGHNATH *v.* HARIRAM. **I.L.R. (1940) Kar. 360=A.I.R. 1940 Sind 181.**

———O. 21, R. 89 (2) (as amended in Nagpur)—*Construction—Devolution of interest—General rule.*

Provisions of the nature of O. 21, R. 89 (2), C. P. Code, must be construed with reference to the usual rules that the singular includes the plural, the male, the female, and in all cases where the law allows devolution, the assignee or other person on whom the rights in question have devolved has to be substituted, as far as may be, for the original owner of the interest, subject of course to any express or implied prohibition to the contrary. Although this rule finds no place in the General Clauses Act, yet it is a principle of general application nevertheless. The difficulty usually lies in determining when the law permits of devolution, and not in applying this principle once that is ascertained. (*Bose, J.*) SETH JUHARMAL *v.* RAMDAS-BALD. DAS. **168 I.C. 1003 =9 R.N. 292=A.I.R. 1937 Nag. 161.**

———O. 21, R. 89 (2)—*Execution sale of property pending suit under O. 21, R. 63, by defeated claimant—Plaintiff getting sale set aside by deposit of decree amount—Application to amend plaint*

C. P. CODE (1908), O. 21, R. 89.

by adding prayer to restrain decree-holder from withdrawing amount deposited in Court—Competency.

Where an execution sale held pending a suit by the defeated claimant under O. 21, R. 63, C. P. Code, is set aside at the latter's instance under O. 21, R. 89, C.P.Code, it is not competent for such a plaintiff to seek to amend his plaint by adding a prayer for restraining the decree-holder from withdrawing the amount deposited by the plaintiff under O. 21, R. 89, C. P. Code. Apart from the language of O. 21, R. 89 (2), such a relief is not available to him. (*Agarwala, J.*) JITAN PRASAD *v.* NAULAKHO KUER. **20 Pat.L.T. 640.**

——**O. 21, R. 89**—*Scope and intention—Deposit by judgment-debtor—Conditions of validity.*

The intention of R. 89 of O. 21, C. P. Code, is to provide a simple procedure where at the last moment a judgment-debtor may come and deposit without condition the full decretal sum and five per cent. penalty and save his property. There is to be no room for argument or doubt or question or enquiry. It is not for the Court to enter where the judgment-debtor got the money. He may get it from a purchaser of his property after the sale, it matters not; the Court will not require, but the judgment-debtor must not deposit the money under protest, he cannot impose conditions. (*Davis, J.C. and Weston, J.*) RUGHNATH *v.* HARIRAM. **I.L.R. (1940) Kar. 360=A.I.R. 1940 Sind 181.**

——**O. 21, Rr. 90 and 92**—*Appeal—Application to set aside sale dismissed—Order confirming sale—Auction-purchaser, if necessary party to appeal.*

In an execution of a decree certain property was put up for sale. An application to set aside the sale was made under O. 21, R. 90 but that was refused and sale was confirmed. An appeal was preferred against this order but the auction-purchaser was not made a respondent. Afterwards he was sought to be impleaded as a respondent but the time fixed for filing the appeal had expired.

Held, that as the auction-purchaser was a necessary party and was not impleaded within time, the appeal should be dismissed. (*Young, C.J. and Monroe, J.*) RAM LAL *v.* KIDAR NATH. **163 I.C. 698=9 R.L. 35=A.I.R. 1936 Lah. 478.**

——**O. 21, R. 90**—*Applicability—Objection as to saleability of property.*

O. 21, R. 90, C. P. Code, applies only to irregularities or fraud in publishing or conducting a sale and not to questions of saleability of the property concerned. (*Gruer, J.*) MAROTI *v.* KISANLAL. **1938 N.L.J. 389=180 I.C. 553=11 R.N. 367=A.I.R. 1938 Nag. 558.**

——**O. 21, R. 90**—Applicability—Sale in execution of revenue decree under Madras Estates Land Act—Material irregularity—Application to set aside sale—If lies. *See* MADRAS ESTATES LAND ACT, S. 192. **49 L.W. 649.**

——**O. 21, R. 90**—Applicability—Sale of a decree by liquidators of a company during the winding up to the highest bidder—Decree assigned in his favour—Sanction of Court got—Irregularity in contract of sale alleged. *See* COMPANIES ACT, S. 183. **(1937) 2 M.L.J. 926.**

C. P. CODE (1908), O. 21, R. 90.

——**O. 21, R. 90 (as amended in C. P.)**—*Applicability—Collector's sale—Material irregularity—Objection to proclamation not taken before sale—Substantial injury—Proof—Absence of—Sale—If can be set aside—Revenue Book Circular, III-8.*

When an application is made to set aside a sale held by a Collector under the C. P. Revenue Book Circular, the Revenue Court in considering objections to the publication of the sale proclamation should not disregard the provisions of O. 21, R. 90, C. P. Code, as amended in the Central Provinces. When no objection to the proclamation is taken before the sale, and when there is no proof that the price fetched is inadequate or that substantial injury has resulted to the judgment-debtor by reason of the irregularity in the publication of the proclamation, the sale cannot be set aside. (*Burton, R.M.*) DHUNDIRAJ *v.* MAHADEO. **19 N.L.J. 318.**

——**O. 21, R. 90 (as amended in C. P.)**—*Applicability to Collector's cases—C. P. Revenue Book Circular, III-8—Scope—Duty of Collector under.*

The amendment made in the Central Provinces to O. 21, R. 90, C. P. Code, govern all the proceedings in Collector's cases in those Provinces. The Collector under the rules contained in the Revenue Book Circular is merely undertaking the execution of the decrees of the Civil Courts as the agent of the Civil Courts and has to observe the provisions of O. 21, C. P. Code, including R. 90. (*Burton, R.M.*) DHABA *v.* DWARKAPRASAD. **19 N.L.J. 282.**

——**O. 21, R. 90**—*Application by some of judgment-debtors dismissed—Subsequent order setting aside sale on application by another judgment-debtor—Effect of order.*

Where after dismissing the applications under O. 21, R. 90, C. P. Code, made by some of the judgment-debtors, the Court passes an order setting aside the sale on an application by another judgment-debtor under the same rule, the order will take effect only so far as the share and interest of that judgment-debtor are concerned, and the sale will stand confirmed so far as the share and interest of the other judgment-debtors are concerned. (*Guha and Bartley, JJ.*) AMULYA KRISHNA BANDOPADHYA *v.* DALIP KUMAR ROY CHOWDHURY. **41 C.W.N. 224.**

——**O. 21, R. 90**—*Application under—Power of Court to dismiss for default.*

Where the applicant fails to appear in support of his application under O. 21, R. 90, C. P. Code, it is open to the Court acting under its inherent powers to dismiss the application for default. (*Burn and Mockett, JJ.*) VALIA MANNADIAR, *In re.* **176 I.C. 320=1938 M.W.N. 416=47 L.W. 258=11 R.M. 60=A.I.R. 1938 Mad. 495=(1938) 1 M.L.J. 255.**

——**O. 21, R. 90**—*Auction-purchaser—Right to apply.*

The auction-purchaser can apply under O. 21, R. 90, to set aside the sale. (*Gruer, J.*) SANGIDAS RAMPRATAP *v.* CHAHADU. **20 N.L.J. 111=168 I.C. 970=9 R.N. 288=A.I.R. 1937 Nag. 140.**

——**O. 21, R. 90**—*Cause and effect—Material irregularity alleged—Inadequacy of price—Causal*

connection between both, if to be proved—Circumstances necessary to set aside the sale.

It is no longer necessary to prove the causal connection between the inadequacy of price fetched at the sale of a property and the material irregularity in the conduct of the sale of the same by means of direct evidence; but a sale can be set aside if the Court is satisfied upon the facts proved in the case that there are circumstances from which a reasonable inference may be drawn that the inadequacy in price is the result of the material irregularity, although mere inadequacy of price, without either direct evidence or proof of such circumstances as mentioned above, will not be sufficient to set aside the sale. 20 Mad. 159, 30 Cal. 1 and 31 Cal. 815 Ref. (*Abdur Rahman, J.*) ANNAMALAI CHETTIAR *v.* CHELLAMMAI ACHI. **175 I.C. 493=10 R.M. 786 =47 L.W. 434=1937 M.W.N. 1201=A. I. R. 1938 Mad. 174=(1937) 2 M.L.J. 936.**

———O. 21, R. 90 (Madras amendment), first proviso—*Construction — Security — Power of Court to order after admission of application—Right of decree-holder to apply for order of security.*

Under the first proviso to R. 90 of O. 21, C. P. Code, as amended in Madras, the power of the Court to call upon the applicant to furnish security is confined to a time anterior to admitting the application to set aside. The Court has no power to do so after the admission, *i.e.,* after notice is given to the opposite side. The proviso specifically excludes the right of a decree-holder to apply to the Court for an order calling for security, although such order may be for the protection of the decree-holder. (*Mockett, J.*) NARASIMHA PATTAMAHADEVI *v.* ANNAN NAIDU. **1940 M.W. N. 121=51 L.W. 256=A.I.R. 1940 Mad. 624= (1940) 1 M.L.J. 350.**

———O. 21, R. 90 and S. 47—*Decree-holder's application to set aside sale—Omission to implead auction-purchaser—Application, if can be treated as one under S. 47.*

When there is a specific provision in O. 21, R. 90, C. P. Code, enabling a decree-holder to apply to set aside a sale, his application can only be under R. 90 of O. 21, and S. 47, C. P. Code, could not possibly apply to it. The fact that the auction-purchaser was not made a party to that application could not in any way affect the question as it could not have the effect of converting the application into one under S. 47. (*Stone, C.J. and Bose, J.*) SHEIKH RAHMAN *v.* SETH SHEODAS. **184 I.C. 635=12 R.N. 119=1939 N.L.J. 344= A.I.R. 1939 Nag. 241.**

———O. 21, R. 90—*Fraud or irregularity prior to publication of sale proclamation—If covered by.*

Order 21, R. 90 does not refer only to an irregularity or fraud in publishing or conducting the auction-sale. The decree-holder is also responsible for any irregularity or fraud occurring in the sale proclamation which is itself prepared from the sale statement for which the decree-holder himself is responsible. (*Gruer, J.*) SANGIDAS RAMPRATAP *v.* CHAHADU. **168 I.C. 970= 9 R.N. 288=20 N.L.J. 111=A.I.R. 1937 Nag. 140.**

———O. 21, R. 90—*Illegality vitiating sale—Setting aside of sale—Proof of prejudice to judgment-debtor resulting from sale—Necessity—Sale held on day not advertised—If null and void.*

A sale which is held on a day on which it has been expressly proclaimed that it shall not take place is not a valid sale at all. Where an execution sale is held on a day which was not a day on which it had been advertised to take place or a day to which it had been adjourned, the sale is vitiated by illegality and is altogether null and void. In such a case, in order to set aside the sale on the ground of illegality, it is not necessary for the Court to hold that the judgment-debtor has been materially prejudiced by the sale. An execution sale which was adjourned from time to time to 26—7—1935, was, on that day, ordered to be held continuously from 26—7—1935 to 5—8—1935 and to be closed on 5—8—1935. Notices were published and circulated to that effect. There was, however no sale on the 5th August, nor was it closed on that date. The property was put up for auction on 6—8—1935 and successive days and eventually knocked down on 12—8—1935.

Held, that the Court's action in not selling the property on the 5th August or concluding the sale on that day was highly irregular, and its action in selling the property on a date subsequent to that date was positively illegal, and the sale being vitiated by illegality, was a nullity must be set aside. (*Burn and Stodart, JJ.*) NATESA PILLAI *v.* VENKATARAMA AYYAR. **188 I.C. 472=13 R. M. 19=1940 M.W.N. 294=50 L.W. 867=A.I.R. 1940 Mad. 206=(1940) 1 M.L.J. 568.**

———O. 21, R. 90—*'Interests'—Meaning of.*

The use of the plural 'interests' in O. 21, R. 90 obviously means more than one interest which may be of the same kind or different kinds, which may be held by one or more persons. The 'interests' may be interests in the property as that of a mortgagee or lessee, or it may be pecuniary interest in respect of property as that of the decree-holder. (*Stone, C.J. and Niyogi, J.*) ALL INDIA RAILWAYMEN'S BENEFITS FUND, LTD. *v.* RAMCHAND HEMRAJ. **I.L.R. (1939) Nag. 357= 186 I.C. 244=12 R.N. 194=1939 N.L.J. 238= A.I.R. 1939 Nag. 179.**

———O. 21, R. 90—*'Interests'—Meaning of—Purchaser after execution sale*—Locus standi *to apply to set aside sale.*

It is now settled that the word "interests" as used in O. 21, R. 90, C. P. Code, are not limited to proprietary or possessory interests in the property itself but extends to other kinds of interest pecuniary or otherwise which is in any way affected by the sale. But whatever the nature of the interest might be, it must be in existence at the time when the sale takes place and must be prejudicially affected by it and if it is created after the sale, it is inconceivable how it can be affected by the sale, and give the person a right to set it aside. Consequently a person who purchases the property from the judgment-debtor after the execution sale has no *locus standi* to make an application under O. 21, R. 90. (*Mukerjea, J.*) KIRAN BALA SAHA *v.* SUNITI PROVA SAHA. **I.L.R. (1939) 1 Cal. 273=179 I.C. 693 =11 R.C. 595=43 C.W.N. 189=68 C.L.J. 516 =A.I.R. 1939 Cal. 146.**

———O. 21, R. 90—*Irregularity—Absence of attachment.*

C. P. CODE (1908), O. 21, R. 90.

The absence of attachment prior to the sale of immovable property in execution of a decree amounts to no more than an irregularity and is not sufficient to vitiate the sale in the absence of any substantial loss resulting from such want of attachment. A.I.R. 1930 Lah. 685, Foll. (*Addison and Din Mohammad, JJ.*) TIRKA RAM CHUNI LAL *v.* FAKHIR AHMED. I.L.R. (1938) Lah. 582=179 I.C. 889=11 R.L. 647=41 P.L.R. 199=A I.R. 1939 Lah. 36.

——O. 21, R. 90—*Irregularity—Non-compliance with O. 21, R. 66—Validity of sale.*

Where a sale is effected in contravention of the mandatory provisions of O. 21, R. 66, C. P. Code, and the price offered by the decree-holder purchaser is not adequate and substantial injury has been done to the judgment-debtor by the irregular manner in which proceedings have taken place, the sale is liable to be set aside. (*Abdul Qayoom, C.J. and Kichlu, J.*) GANGA RAM *v.* CHANDAR PRAKASH 39 P.L.R J. & K. 127.

——O. 21 R. 90—Irregularity—Notice under O. 21, R. 22 issued to major defendant as minor represented by guardian—Effect of—Sale—If to be set aside. *See* C. P. CODE, O. 21, R. 22. 48 L. W. 586.

——O. 21, R. 90—*Irregularity — Judgment-debtor permitting Court to sell property without fresh proclamation if he fails to pay decretal amount within given period—Waiver of irregularity in the proclamation.*

Where a judgment-debtor applies to Court to grant him time to raise the decretal amount and agrees that if he is unable to do so within the time allowed, the property may be sold without fresh proclamation, it is not open to him to object to the sale on the ground of any irregularity in the original proclamation of sale, which had been issued but stayed owing to his application, the contents of which were known to him already. (*Jai Lal, J.*) MAHOMED ALI *v.* RAM DAS 171 I.C. 932=10 R.L. 251=A.I.R. 1937 Lah. 113.

——O. 21, R. 90—*Irregularity—Purchaser depositing 25 per cent. of purchase money three days after sale—Sale, if vitiated.*

Where the deposit of 25 per cent. of the purchase-money is not made by auction-purchaser at the time of sale but three days after it, and it is accepted by the Court it is a mere irregularity and cannot vitiate the sale. (*Jai Lal, J.*) MAHOMED ALI *v.* L. RAM DAS. 171 I.C. 932=10 R.L. 251=A.I.R. 1937 Lah. 113.

——O 21, R. 90—*Irregularity—Raising of attachment due to judgment-debtor's insolvency —Subsequent annulment of adjudication—Sale without fresh attachment—Validity—Sale—If to be set aside.*

Subsequent to the attachment of a property in execution, the judgment-debtor became insolvent and the attachment was raised on the application of the Official Assignee. The adjudication order was, however, subsequently annulled, and thereupon the executing Court ordered a sale of the property without a fresh attachment.

Held, that the omission to re-attach the property did not invalidate the sale, and that it amounted to no more than a mere irregularity, and would not be a ground for setting aside the sale, when no damage is thereby caused to the judgment-debtor. (*Broomfield and Tyabji, JJ.*)

C. P. CODE (1908), O. 21, R. 90.

SAKHARLAL *v.* PIROJSHA. 165 I.C. 86=9 R.B. 119=38 Bom.L.R. 719=A.I.R. 1936 Bom. 315.

——O. 21, R. 90—*Irregularity—Sale by Collector—Sale order and sale proclamation not mentioning mortgage—Collector directing sale subject to mortgage on application by alleged mortgagee without inquiry—Propriety—Sale—If to be set aside.*

It is of the essence of a Court-sale that there shall be no doubt in the minds of those concerned about what is to be sold. Where the Collector's sale order and the sale proclamation make no mention of any encumbrances on the property to be sold, it is not proper for the Collector to direct the property to be sold subject to a mortgage on the mere application of the alleged mortgagee without verifying and inquiring into the matter and issuing a correct proclamation for a fresh sale. A sale held with ambiguity under the original proclamation of sale is not a valid sale and should not be confirmed, the proclamation being radically incorrect. (*Burton, R. M.*) BRIJLAL *v.* NARAYAN. 20 N.L.J. 181.

——O. 21, R. 90—*Irregularity—Sale conducted two hours after appointed time.*

Where according to the sale proclamation the sale was to commence at 10 o'clock and the officer who was to conduct the sale reaches the spot at 12 o'clock with the result that the intending bidders depart after waiting, the sale cannot be said to have been properly and regularly conducted. When the intending bidders depart, it follows that there was no proper competition in bidding and the property would naturally be sold at an inadequate price. (*Agha Haidar, J.*) DATA RAM *v.* THE PUNJAB NATIONAL BANK, LTD., MULTAN. 38 P.L.R. 515.

——O. 21, R. 90—*Irregularity—Sale of properties by Nazir in different order than that indicated in District Judge's list—Culcutta High Court Civil Rules and Circular Orders, Rr. 233 and 234.*

If the Nazir sells properties in a different order than that indicated in the list prepared by the District Judge under R. 233 of the Civil Rules and Circular Orders issued by the Calcutta High Court, there is only an irregularity in conducting the sale, and the sale is not void but voidable if that irregularity has resulted in loss to the judgment-debtor or the decree-holder. (*Mitter and Khundkar, JJ.*) RANGPUR LOAN OFFICE, LTD. *v.* TARIT BHUSAN ROY. I L.R. (1939) 1 Cal. 530=186 I.C. 174=12 R C. 447=43 C.W.N. 539=70 C.L.J. 97=A.I.R. 1939 Cal. 369.

——O. 21, R. 90—*Irregularity—Sale under hammer on 18th but actually sold on 20th—Validity.*

Where a sale was under hammer on the 18th but in fact was held on the 20th, a day which was not fixed for the sale, it is not illegality but only an irregularity. (*Wort, A.C.J. and Manohar Lal, J.*) VASISTHA NARAIN SINGH *v.* KANDHAI LAL DURGA PRASAD. 11 R.P. 129=177 I.C. 138=4 B.R 793.

——O. 21, R. 90—*Irregularity—Under valuation in sale proclamation—Omission to object before sale—Effect—Right to urge as ground for setting aside sale.*

Although the judgment-debtor who, being served with notice under O. 21, R. 66, C. P. Code,

fails to appear, is no longer entitled to object to the under-valuation as an irregularity in the procedure, yet it is still open to him to plead that as a result of the under-valuation the property had been sold for an inadequate price and he has thereby suffered material injury. (*Fazl Ali and Madan, JJ.*) TARNI PRASAD SINGH *v.* CHANDRESHWAR PRASAD. 171 I.C. 73=10 R.P. 100=3 B. R. 792=1937 P.W.N. 205=A.I.R. 1937 Pat. 493.

——O. 21, R. 90—*Material irregularity—Absence of notice under O. 21, R. 22—Effect on sale.*

In an application under O. 21, R. 90 no objection as to notice under O. 21, R. 22 was taken in the first Court. The applicant had notice of the execution proceedings by reason of the notice under O. 21, R. 66. The objection was taken for the first time in the course of argument in the Appellate Court.

Held, that the absence of notice was not fatal and did not invalidate the sale. (*Wort, J.*) SUNDER RAM *v.* HARANGI RAM. 175 I.C. 919=11 R. P. 33=4 B.R. 652=A.I.R. 1938 Pat. 289.

——O. 21, R. 90—*Material irregularity—Absence of sale proclamation—If amount to.*

The omission to issue a sale proclamation and to specify the time and place of sale by means of the poclamation as prescribed by O. 21, R. 65, C. P. Code, is a material irregularity within the meaning of O. 21. R. 90, C. P. Code. (*Iqbal Ahmad and Bajpai, JJ.*) HARINDRA NATH *v.* BHOLA NATH. 1937 A.W.R. 262=1937 A.L.J. 288=170 I.C. 559=10 R.A. 167=1937 A.L.R. 724=A.I. R. 1937 All. 407.

——O. 21, R. 90—*Material irregularity—Adjournment of sale—Adjournment announced only to decree-holder—Failure to specify hour of adjourned sale.*

Where the Naib Tahsildar holding a sale adjourns it to another date, but informs no one but the decree-holder about the adjournment and does not specify the hour to which the sale is adjourned, that amounts to a material irregularity. The order of adjournment must be announced to all persons who have attended the sale and not merely to the decree-holder. (*Greenfield, F. C.*) KHAJA ABDUL GAFUR KHAN *v.* CHOTEKHAN. 20 N.L.J. 283.

——O. 21, Rr. 90 and 69—*Material irregularity Adjournment of sale—Failure to record reasons.*

O. 21, R. 69, C. P. Code, no doubt directs the sale officer to record his reasons for the adjournment of the sale. But his failure to record his reasons would not amount to a material irregularity, for it cannot be said to go to the root of the matter. (*Bose and Puranik, JJ.*) ANANDI PRASAD *v.* GOVINDA BAPU. I.L.R. (1938) Nag. 436=10 R.N. 210=172 I.C. 465=A.I.R. 1938 Nag. 107.

——O. 21, Rr. 90 and 69—*Material irregularity—Adjournment of sale by sale officer—Omission to specify hour.*

The failure of the sale officer to specify the exact hour to which the sale is adjourned would amount to a material irregularity. When the Code directs a specific hour to be named, it is not fulfilling its directions to say in a vague way that the sale will be "resumed in an hour or so". But this is not enough to justify setting aside the sale unless the applicant has sustained substantial injury by reason of such irregularity. (*Bose and Puranik, JJ.*) ANANDI PRASAD *v.* GOVINDA BAPU. I.L.R. (1938) Nag. 436=172 I.C. 465=10 R.N. 210=A.I.R. 1938 Nag. 107.

——O. 21, R. 90—*Material irregularity—Auctioneer arbitrarily closing auction at 4 o'clock although another bidder is willing ta purchase property for larger sum.*

Where the auctioneer conducting an execution sale, arbitrarily closes the auction either before or as soon as it is 4 O'clock although a bidder is willing to purchase the property for a much larger sum than the price realized, and although, the bid for the larger sum even if made after 4 O'cloek is made immediately after the bid for which the property is knocked down, it amounts to a material irregularity in conducting the sale. Where however the property has not been sold at an inadequate price and the applicant has not sustained any substantial injury by reason of the irregularity in conducting the sale, the sale will not be set aside. (*Addison and Abdul Rashid, JJ.*) HOSHNAR RAM *v.* PUNJAB NATIONAL BANK, LTD. 166 I.C. 603=9 R.L. 393 (2)=A.I.R. 1936 Lah. 555.

——O. 21, R. 90—*Material irregularity—Gross under-valuation in sale proclamation—Effect of.*

Where the upset prices shown in the sale proclamation are grossly low, and the prices fetched at the sale for the lots are far below their actual market-value and the judgment-debtor suffers substantial injury by reason of such gross undervaluation, the sale can properly be set aside. (*Venkataramana Rao and Stodart, JJ.*) RANGASWAMI AYYANGAR *v.* MARUDANAYAGAM PILLAI. 177 I.C. 717=47 L.W. 773=11 R.M. 371=(1938) M.W.N. 524=A.I.R. 1938 Mad. 720.

——O. 21, R. 90—*Material irregularity—Holding of sale on Friday during suspension of Court's sitting—Civil Rules and Orders, Chap. 1, R. 1 (4).*

The holding of the sale between 12-30 and 2 P. M. on a Friday when the sitting of Court is suspended under sub-R. (4) of R. 1 of Chap. 1 of the civil rules and orders issued by the Calcutta High Court, does not amount to material irregularity in the conduct of the sale. (*Mitter and Akram, JJ.*) FATEH CHAND *v.* AKIMUDDIN. I.L. R. (1940) 1Cal. 1=188 I.C. 151=12 R.C. 654= 44 C.W.N. 109=A.I.R.1940 Cal. 265.

——O. 21, R. 90—*Materia! irregularity—Noncompliance with O. 21, R. 66—Effect—Objection when to be urged—Necessity to prove substantial loss.*

Objections based on the ground of non-compliance with O. 21, R. 66, C. P. Code, such as defects in mentioning the value of the property, the encumbrances on the property and the description of the property proclaimed for sale, must be raised before the sale is held; when they have not been so raised or even mentioned in the lower Court, they cannot be considered as grounds for setting aside the sale in appeal. Further it must be proved that the defects alleged clearly resulted in loss; when they are not shown to have had any effect on the price obtained at the sale, the sale is not liable to be set aside. (*Burton, R. M.*) DHABA *v.* DWARKAPRASAD. 19 N L.J. 282.

——O. 21, R. 90—Material irregularity—Noncompliance with O. 21. R. 66 (2). *See* C. P. CODE, O. 21, R. 66 (2). 20 N.L.J. 283.

——O. 21, R. 90—*Material irregularity—Permission to bid given to decree-holder—Condition*

C. P. CODE (1908), O. 21, R. 90.

subsequently added that decree-holder must pay in cash half of purchase money — Decree-holder abstaining from offering bid— Property sold at inadequate price.

The decree-holder was given an unconditional permission to bid at the execution sale. Subsequently an application for rateable distribution was received by the Court which attached a further condition to this permission that if the decree-holder wanted to bid he must pay in cash half the amount. Thereupon the decree-holder abstained from offering any bid at the sale with the result that the property was sold at an inadequate price.

Held, that there was material irregularity in conducting the sale resulting in substantial loss to the judgment-debtor and that, therefore, the sale should be set aside. (*Derbyshire, C. J. and Nasim Ali, J.*) KARTICK CHANDRA MUKHEJEE *v.* BATAKRISTO ROY. **43 C.W.N. 245.**

——O. 21. R. 90—Material irregularity—Sale advertised for particular day but not finished that day—Continuance on next day by Nazir without express order of Court—If liable to be set aside, *See* C. P. CODE, O. 21, R. 69. **18 Pat L.T. 326.**

——O. 21, R. 90—*Material irregularity—Sale before the hour fixed—Validity—Illegal sale—Court, if can set aside* suo motu.

The holding of a sale before the time fixed is not merely an irregularity but an illegality which in itself renders the sale void. An irregularity which renders impossible the publicity which affords one main security for the fairness of public sales must be deemed to be an illegality. Holding the sale at a time earlier than that adverrised would result in the intending bidders arriving too late. Such a sale can be set under O. 21, R. 90, C. P. Code, by the Court itself, even if the objection is not raised by the applicant himself. (*Gruer, J.*) PANNALAL *v.* HASAN DADA. **187 I.C. 584=12 R.N. 290=1939 N.L.J. 319=A.I.R. 1939 Nag. 258.**

——O. 21, R. 90—*Material irregularity—Sale fixed for one date—Holding of sale next day in due order for want of time on prior day—If void.*

The holding of an execution sale fixed for a particular date in the following date because it could not be held earlier, when the sales are held in due order, is not illegal and void. It is not even a material irregularity. (*Saunders, J.*) NAND KISHORE SINGH *v.* NAGENDRA BALA DEBI. **166 I.C. 503=9 R.P 305 (1)=3 B.R. 180=17 Pat.L.T. 712=A.I.R. 1937 Pat. 20.**

——O. 21, R. 90—Material irregularity—Sale in execution of later decree—Attachment on property effected previously in execution of prior decree—Omission to notify—If renders sale liable to be set aside. *See* C. P. CODE, S. 64. **17 Pat.L.T. 847.**

——O. 21, R. 90—Material irregularity—Sale in execution of later decree of property attached in execution of prior decree—Court allowing decree-holder to set off sale price—Propriety—If sale liable to be set aside at the instance of prior attaching decree-holder. *See* C. P. CODE, O. 21, RR. 72 AND 90. **17 Pat.L.T. 847.**

——O. 21, R. 90—*Material irregularity—Sale held not on advertised date but two days later—If illegal or a nullity.*

Where a sale notified and advertised for a particular date is not held on that day but is held on the next day or the following day owing to the large number of sales to be held, it does not amount to a material irregularity, so as to render the sale illegal or a nullity. (*Varma, J.*) DEONANDAN THAKUR *v.* MST. HANSO KUER. **167 I.C. 63=9 R.P. 375=3 B.R. 261=1936 P.W.N. 825=17 Pat.L.T. 852=A.I.R. 1937 Pat. 104.**

——O. 21, R. 90—*Material irregularity—Sale of only a portion while proclamation was for the sale of whole house—Substantial injury—Absence of any general rule.*

There is no doubt that where the sale proclamation stated that the entire house would be sold but in fact only a portion of it was sold, it does constitute an irregularity and perhaps even a material irregularity; but whether substantial injury would flow from that, is another matter. The tracing of the injury to the irregularity must depend on the facts of each case. (*Stone, C. J. and Bose, J.*) SHEIKH RAHMAN *v.* SETH SHEODAS. **184 I.C. 635=12 R N. 119=1939 N. L.J. 344=A.I.R. 1939 Nag. 241.**

——O. 21, R. 90—*Material irregularity—Sale proclamation — Direction for sale of lots in particular order—Departure from — Effect on sale.*

The practice in the Madras Presidency in execution sales is to sell the lots in the order in which they appear in the sale proclamation. A departure from that order may amount to a material irregularity, and if substantial injury is occasioned by such irregularity, the sale is liable to be set aside. (*Burn and Stodart, JJ.*) JALAMENNA *v* RAMARAO. **I.L.R. (1939) Mad. 216=183 I C. 508=12 R.M. 297=49 L.W. 502=1939 M.W.N. 433=A.I.R. 1939 Mad. 303=(1939) 1 M.L.J. 38.**

——O 21, R. 90—*Material irregularity in publishing and conducting sale—Auction price grossly inadequate — Substantial loss if may be presumed.*

Where there has been material irregularity in publishing and conducting a sale, and the price fetched by the auction is proved to be grossly inadequate, the Court may presume that substantial loss has been suffered by reason of the irregularity. 40 Cal. 635 (P.C.), Rel. on. (*Coldstream and Din Mohammad, JJ.*) INDAR RAM *v.* LILA DHAR. **178 I.C. 93=11 R.L. 402=A.I.R. 1938 Lah. 152.**

——O. 21, R. 90 — *Material irregularity—Value not given and non-existing mortgage shown.*

Where the value of the property was neither entered in the proclamation of sale, nor was any valuation made at all, and where a non-existing mortgage was shown as subsisting, the irregularities are so great that the sale should be set aside. (*Greenfield, F.C.*) SITARAM *v.* KATANLAL. **1938 N.L.J. 262.**

——O. 21, R. 90 (Lahore)—*Objection under S. 60 (1) (c) after sale but before Confirmation—If entertainable.*

Where an objection to a sale of immovable property is taken under S. 60 (1) (*c*) after sale, but before sale is confirmed, objection falls under O 21, R. 90, as amended by the Lahore High Court and is not entertainable. (*Skemp, J.*) ALAM KHAN *v.* ANJUMAN IMDAD BAHMI QARZA. **174 I.C. 261=10 R.L. 537 (1)=A.I.R. 1937 Lah. 309.**

C. P. CODE (1908), O. 21, R. 90.

——O. 21, R. 90—*Parties—Auction purchaser—Appeal against order setting aside sale—Necessity to implead.*

In an appeal against an order setting aside a sale made on an application for that purpose, the auction purchaser who had on notice being given to him failed to express his interest one way or another need not be added as a party and his absence is not fatal to the appeal. (*Stone, C.J. and Bose, J.*) BIRDICHAND *v.* GANPATRAO. I.L.R. 1940 Nag. 302=179 I.C. 256=11 R.N. 281=1938 N.L.J. 303=A.I.R. 1938 Nag. 525.

——O. 21, R. 90—*Person interested—Construction—"Whose interests are affected by the sale"—If includes auction-purchaser — Mortgage on property not disclosed in sale proclamation—Purchase in execution in ignorance of—Application by purchaser to set aside sale—Maintainability.*

O, 21, R. 90, C. P. Code, does not apply to an auction-purchaser. He is not a person "whose interests are affected by the sale", as used in the rule. The expression "affected by the sale" means affected by reason of the property being sold, that is, by reason of the fact that a person has interest in the property which would be affected if it is sold. An auction-purchaser is consequently not competent to apply to set aside the sale under O 21, R. 90, C. P. Code, on the ground that an encumbrances existing on the property was not disclosed in the proclamation of sale and that he was unaware of it. (*Divatia, J.*) BALKRISHNA VAMAN *v.* SAKHARAM HABAJI. 60 Bom. 750=164 I.C. 644=9 R.B. 101=38 Bom. L.R. 589=A.I.R. 1936 Bom. 311.

——O. 21, R. 90—"*Person whose interests are affected by the sale*"—*Meaning of—Creditor attaching property after sale in execution of another decree pending confirmation* — Locus standi *to apply to set aside sale.*

A decree-holder who attaches the property after it has been sold in execution of another decree and pending confirmation of sale is not a person whose interests are affected by the sale so as to give him a right to apply under O 21, R. 90, C.P. Code, to set aside the sale. In order to entitle a person to apply under O. 21, R. 90, he must be damnified by the actual sale, and nothing that the applicant himself does after the sale can give him a higher right than he had at the time of the sale. If at the time of the sale he has no *locus standi* to apply to have the sale set aside, he cannot, by attaching the property after the Court sale, acquire any right to apply. (*Stodart, J.*) GOVINDASAMI CHETTI, *In re.* 184 I C. 166=12 R.M. 418=1939 M.W.N. 297=49 L W. 458=A.I.R. 1939 Mad. 501=(1939) 1 M.L.J. 608.

——O, 21, R. 90—"*Person whose interests are affected by the sale*"—*Meaning of—Person obtaining attachment before judgment—Right to apply to set aside sale held in execution of another decree.*

A person who has obtained an attachment before judgment is, by virtue of the attachment itself, a "person whose interests are affected by the sale" within the meaning of O. 21, R. 90, C.P. Code, where the property attached by him is later sold in execution of a decree obtained by another person. The fact that he has not obtained a decree in his suit at the date of the application does not make any difference. The words "person whose interests are affected by the sale" are

C. P. CODE (1908), O. 21, R. 90.

not restricted to persons having a proprietary or possessory title in the property, but are intended to apply also to persons whose pecuniary interests are affected by the sale. Where a person, therefore, obtains an order for attachment before judgment and in due course obtains a decree, but before the date of such decree the attached properties are sold in execution of a decree obtained by another creditor, the former attaching creditor is a person entitled to apply under O. 21, R. 90, C. P. Code, though the decree in his suit is obtained after the sale. (*Leach. C.J., Wadsworth and Krishnaswami Aiyangar, JJ.*) AYYAPPA NAICKER *v.* KASI PERUMAL NAYAKAR. I.L.R. (1939) Mad. 374=180 I.C. 267=11 R.M. 684=49 L.W. 110=1939 M.W.N. 131=A.I.R. 1939 Mad. 250=(1939) 1 M.L.J. 163 (F.B.).

——O. 21, R. 90—*Right to apply—Attaching creditor—Person obtaining order for attachment before judgment and subsequently getting decree*—Locus standi *to apply to set aside sale in execution of another decree — Order of attachment not affixed in Court house—Effect—If affects right to apply—Rejection of application—Revision—C. P. Code, S.* 115.

A person who obtains an order for attachment before judgment, and subsequently obtains a decree in his suit prior to an execution sale of the property of the judgment-debtor at the instance of another decree holder, has *locus standi* to maintain an application under O. 21, R. 90, to set aside the sale. The fact that the order of attachment has only been proclaimed by tom tom and affixed on the property but not affixed in the notice board of the Court as required by O. 21, R. 54 (2) does not affect his right to apply to set aside the sale. The fact that there was in fact no attachment does not affect his position as an attaching creditor, having regard to the fact that an order for attachment is made and a decree is subsequently passed prior to the challenged sale and to the fact that part of the provisions of O. 21, R, 54 have been complied with. Where an application by such a person is rejected on the ground that he has no *locus standi* to apply under O. 21, R. 90, as an attaching creditor, that amounts to a failure to exercise a jurisdiction vested in the Court by law, and the High Court will interfere in revision under S, 115, C.P. Code. (*R. C. Mitter, J.*) GOVINDA PRASAD DALAL *v.* BRINDABON CHANDRA NASIPURI. 167 I.C. 600=9 R.C. 703=40 C.W.N. 1338=63 C.L.J. 560=A.I.R. 1937 Cal. 7.

——O. 21, R. 90—*Right to apply—Auction-purchaser.*

An auction-purchaser is entitled to apply for setting aside sale under O. 21, R. 90. C. P. Code, as a person whose interests are affected by the sale. (*Stone, C.J, and Niyogi, J.*) ALL INDIA RAILWAYMEN'S BENEFITS FUND, LTD *v.* RAMCHAND HEMRAJ. I.L.R. (1939) Nag. 357=186 I.C. 244=12 R.N. 194=1939 N.L.J. 238=A.I.R. 1939 Nag. 179.

——O. 21, R. 90—*Right to apply—Receiver appointed in respect of mortgaged properties—Application by mortgagor—Maintainability,*

A mortgagor judgment-debtor is entitled to maintain an application under O. 21, R. 90, C, P. Code, for setting aside the sale in execution of the mortgage-decree, although a receiver has been appointed by Court in respect of the mortgaged

C. P. CODE (1908), O. 21, R. 90.

properties. (*Costello, A.C.J. and Edgley, J.*) GOPAL HARI *v.* JESSORE LOAN CO. LTD. 41 C.W. N. 1246.

——O. 21, R. 90 (as amended in C.P.)—Sale by Collector — Sale proclamation — Omission of details in— Omission to publish in Collector's office and Tahsil—If ground for setting aside sale. *See* C.P. REVENUE BOOK CIRCULAR, III-8. 19 N.L.J. 312.

——O. 21, R. 90—*Scope—Objections retating to preliminary deposit and acceptance of improper bid.*

Objections relating to the failure to deposit 25 per cent. of the purchase money in the first instance and the balance of the purchase money later and the acceptance of an improper bid, come within the purview of O. 21, R. 90, C. P. Code. These questions do relate to the conduct of sale, in as much as the failure to make the preliminary deposit as well as the acceptance of the improper bid take place before the sale is complete and is, therefore, connected with the sale proceedings and being prior to the completion of the sale would naturally relate to the conduct of the sale. (*Din Mahomed, J.*) MEHR BANO *v.* SHER MAHOMED. 9 R.L 48=38 P.L.R. 839=163 I.C. 765=A.I.R. 1936 Lah. 969

——O. 21, R. 90—*Scope—Sale of entire joint family property found to be without title in respect of shares of minor members—Sale not confirmed—Objection by minors—Sale—If be set aside entirely or in part.*

A sale of entire joint family property was found to be without title as against the share of minor members. The sale was not confirmed by the time when the minors objected that the sale did not affect their interest. There was no mutual understanding between the Court and the bidders as to what was being put to sale.

Held, that the sale should be set aside in its entirety and not only as against share of the minors. (*Rowland and Chatterji, JJ.*) BACHOO PRASAD *v.*, GOBARDHAN DAS. 187 I.C. 492=12 R.P. 599=6 B.R. 478=A.I.R. 1940 Pat. 62.

——O. 21, R. 90—*Second appeal—Order passed in appeal.*

Section 47, C.P.Code is general in its terms and O. 21, R. 90 is specific in its character and, therefore,if a sale is attacked on the ground of material irregularity in the conduct or publication of the sale, this provision of law would come into operation and in case an appellate order is passed against the order of the executing Court, no second appeal will be competent. Otherwise, the prohibition laid down in S. 104 (2) would be rendered nugatory so far as it relates to O. 43, R. 1 (*j*) read with O. 21, R. 90. (*Din Mahomed, J.*) MEHR BANO *v.* SHER MAHOMED. 163 I.C. 765=9 R.L. 48=38 P.L.R. 839=A.I.R. 1936 Lah. 969.

——O. 21, R. 90—*Second appeal—Order passed in appeal—Purchaser being decree-holder himself.*

No second appeal lies in view of the provisions of S. 104 (2), C. P. Code, from an order passed in appeal dismissing the application of the judgment-debtor under O. 21, R. 90, even where the purchaser is the decree-holder himself. (*Sulaiman, C.J. and Bennet, J.*) DEBI CHARAN LAL *v.* KHUSHAL RAI RATAN LAL. 165 I.C. 654 =9 R.A. 292=1936 A.L.J. 959=1936 A.L.R. 934 =1936 A.W.R. 869=A.I.R. 1936 All. 763.

C. P. CODE (1908), O. 21, R 90.

——O. 21, R. 90—*Second appeal—Order passed on appeal.*

A second appeal against an order passed on appeal dismissing an appeal from an order under O. 21, R. 90, C. P. Code, is incompetent, as no second appeal lies in such a case. (*Saunders, J.*) NAND KISHORE SINGH *v.* NAGENDRABALA DEBI. 166 I.C. 503=9 R P. 305 (1)=3 B.R. 180=17 Pat.L.T. 712=A.I.R. 1937 Pat. 20.

——O. 21, R. 90—Setting aside sale—Circumstances necessary for—Mere inadequacy of price fetched at the sale not sufficient—*See* C. P. CODE, O. 21. R. 90, CAUSE AND EFFECT. (1937) 2 M.L.J. 936.

——O. 21, R. 90—*Setting aside sale—False representation leading to purchase.*

Where a person is not aware of the sale proclamation and false representations are made to him by the bailiff as to the nature and interest put to sale and he purchases the property relying on those representations, the sale must be set aside. 5 L.B.R. 25, Ref. (*Page, C.J. and Ba U, J.*) MA MA GALE *v.* MAUNG BA. 164 I.C. 202=9 R. R. 68=A I.R 1936 Rang. 327.

——O. 21, R. 90—*Setting aside sale—Single item of property—One of the judgment-debtors alone applying—Entire, sale, if to be set aside.*

Where there is only one house which is sold and the irregularity in the conduct of the sale could not be apportioned and it is such an irregularity as to amount to an illegality, the sale cannot be set aside in part and it is immaterial in such a case whether both judgment-debtors objected or not. (*Gruer, J.*) PANNALAL *v.* HASAN DADA. 187 I.C. 584=12 R.N. 290=1939 N.L.J. 319=A. I.R. 1939 Nag. 258.

——O. 21, R 90—*Suit on mortgage—Decree—Sale in execution—Judgment-debtor's application to set aside sale—Later mortgages by judgment-debtor over some properties—If possibility of no surplus to judgment-debtor a ground to hold judgment-debtor is not affected by the sale—Reduction of upset price without notice—If irregularity.*

In a suit on a mortgage the decree-holders purchased properties in execution of the mortgage decree. The judgment-debtors applied under O. 21, R. 90 to set aside the execution sale. Their petitions were dismissed by the District Judge as not maintainable as he held that they could not come under Cls. 1 and 2, nor even under cl. 3 of O. 21, R. 90 because they were not persons "affected by the sale" inasmuch as the judgment-debtors had executed three other later mortgages for very large amounts and could not therefore get any surplus available to them even if a fresh sale should be held. He did not make any enquiry into the facts. Certain attaching decree-holders of the equity of redemption also applied to set aside the sales. These petitions were also dismissed.

Held, that the petltions by the judgment-debtor and the attaching decree-holder were maintainable as they are persons whose interests are *prima facie* affected by the sale and that the question whether the judgment-debtor or attaching decree-holders would get any surplus may be relevant only in an enquiry as to whether they sustained substantial injury.

Held, further, that reduction of upset price during the conduct of the sale without notice to

the judgment-debtor is not an irregularity which could possibly affect the sale.

Held, further, that a mere allegation in the pleadings that there has been no publication no proclamation and no means for bidders to become aware of the sale (almost as a matter of common form) without any more definite particulars of any specific omission on the part of the Court to carry out its duties is not sufficient *per se*, to sustain the petition. (*King and Stodart, JJ.*) RAJARAM RAJA SAHEB *v.* BHAWANI SHANKAR JOSHI. 181 I.C. 73=11 R.M. 769=1938 M.W.N. 1225=A.I.R. 1939 Mad. 193=(1938) 2 M.L.J. 940.

——O. 21, R. 90—"*Substantial injury*"—*Necessity for proof—Proof of material irregularity alone—If sufficient for setting aside sale.*

Although material irregularity is proved in the case of an execution sale, that will not by itself render the sale liable to be set aside. It must further be proved that substantial injury has resulted to the judgment-debtor by the sale. In the absence of such proof of substantial injury the sale cannot be set aside. (*Iqbal Ahmad and Bajpai, JJ.*) HARINDRA NATH *v.* BHOLA NATH. 1937 A.W.R 262=1937 A.L.J. 288=170 I.C. 559 =10 R.A. 167=1937 A.L.R. 724=A.I.R. 1937 All. 407.

——O. 21, R. 90—"*Whose interests are affected by the sale*"—*Meaning of—Insolvent judgment-debtor—Right of to apply to set aside sale.*

The expression "whose interests are affected by the sale" in O. 21, R. 90, C. P. Code, must be construed in their ordinary sense, and it is too much to say that merely because a person is adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication. (*Pandrang Row and Horwill JJ.*) MANTHIRI GOUNDAN *v.* ARUNACHALA GOUNDAN. 1940 M.W.N. 462=51 L.W. 600=A.I.R. 1940 Mad. 569=(1940) 1 M.L.J. 711.

——O. 21, R. 90, Proviso (Lahore)—*Setting aside sale—Omission to state value of property in sale proclamation—Effect of.*

Objections to a sale on the ground that the value or the rent of the houses which were to be sold was not given in the proclamation of sale and that the dimensions of the houses were not stated in the proclamation and the houses were not otherwise sufficiently described, ought to be raised before the sale and cannot be considered after the sale under the proviso to R. 90 of O. 21, C. P. Code, added by the Lahore High Court. Even according to the law as it stood before the amendment, a sale could not be set aside merely because of the omission to give the approximate value or rental of the properties. (*Tek Chand, J.*) KISHAN KAUR *v.* CHANNU MAL. 177 I.C. 558=11 R.L. 336=40 P.L.R. 201=A.I.R. 1938 Lah. 508.

——O. 21, R 90, Proviso—*Substantial injury—Sale in separate lots—Deficiency in price as to certain items caused by material irregularity—Whole sale—If liable to be set aside.*

Where it is found that there was material irregularity in the publication of the sale notice, and that in consequence thereof the price realised for some of the several lots was substantially less than what it would have been but for the irregularity, the sale, where it is held in separate lots, should be set aside only as regards such items or lots; the sale cannot be set aside in respect of the items which were sold for an adequate price. (*Burn and K.S. Menon, JJ.*) NARASIMHAMURTHI *v.* OFFICIAL RECEIVER, WEST GODAVARI, ELLORE. 59 Mad. 438=160 I.C. 645=8 R.M. 703=43 L.W. 32=1935 M.W.N. 1306=A.I.R. 1936 Mad. 121.

——O. 21, R. 90 (1) (as amended by Patna High Court in 1936)—*Applicability—Application made in 1935—Application dismissed but restored in appeal—Amendment coming in force after restoration—Court directing applicant to make deposit—Legality of.*

The proviso to R. 90, Cl. (1) is that 'no application to set aside a sale shall be admitted' unless certain conditions are fulfilled. That applies to every occasion on which admission of an application is sought after the date of coming into force of the rule. It cannot apply to applications which have been already admitted before the rule came into force. The rule, therefore, forbids a Court to admit an application but cannot have the effect of setting aside the previous admission of an application. The rule orders the applicant to deposit 'with his application' a certain amount. But where the application is made in 1935, it is physically impossible for him after 1st March, 1936, to deposit any amount with his application. The law is never deemed to order the impossible where such a construction can be avoided. Therefore, the applicant is not bound to fulfil the conditions in proviso (1) to R. 90 Cl. (1). (*Rowland, J.*) MOGAL JAN KHAN *v.* MEHDI BEGUM. 168 I.C. 627=9 R.P. 505 (1)=3 B.R. 453=A.I.R. 1937 Pat. 260.

——O. 21, R. 90 (Patna amendment), Proviso (i)—*Discretion of Court—Application for permission to give landed property as security instead of deposit—Court not applying mind to it and refusing—Dismissal of application to set aside sale for failure to make deposit—Appeal—Order refusing to accept security—Revision—Interference.*

Under O. 21, R. 90 (1), C. P. Code, as amended in Patna, the Court in an application to set aside an execution sale, has a discretion to accept landed property as security instead of a cash deposit in a proper case. If the Court refuses to dispense with cash deposit and to accept landed property as security and then dismisses the application for failure to make the deposit, the latter order is appealable under O 43, R. (1) (*j*), C. P. Code, though the order refusing to accept security is not appealable. But the order refusing to accept security can be set aside in revision, if it does not apply its mind to the facts of the case and does not judicially determine the application for permission to give landed property as security. If it does not fix the amount of the security, interference in revision on the simple ground that it does not exercise a jurisdiction vested in it by law. (*Mahomed Noor and Varma, JJ.*) BALMAKUND MARWARI *v.* PIRTHIRAJ GANESHDAS. 17 Pat 107=1938 P.W.N. 391=19 Pat L.T. 402 =175 I.C. 486=4 B.R. 590=10 R.P. 629=A.I.R. 1938 Pat. 240.

——O. 21, R. 90, Proviso 1 (b) (Patna High Court Amendment)—*Scope—If* ultra vires.

Proviso 1 (*b*) which has been added by the Patna High Court to O. 21, R. 90, C. P. Code, in

C. P. CODE (1908), O. 21, R. 90.

exercise of its rule-making powers under S 122, C. P. Code, is not *ultra vires*. The amended proviso added by the Patna High Court is only a rule of procedure and does not take away any substantive right. It is nothing more than putting the party on terms and is not an obstacle in the way of the applicant. (*Wort, Dhavle, Varma, Manohar Lall and Chatterji, JJ.*) UPENDRA NATH *v.* GULAB SIRKAR. 19 Pat. 531=188 I.C. 241=12 R.P 682=21 Pat.L.T. 294=6 B.R. 610=1940 P. W.N. 287=A.I.R. 1940 Pat. 264 (F.B.).

——O. 21, R. 90, Proviso (N.W F.P.)—*Execution against legal representative of judgment-debtor—Notice under O. 21, R. 66 served on agent of widow of judgment-debtor—Agent not appearing owing to illness—Objection by widow after sale—Maintainability.*

K, who had a decree against one *A*, took out execution after his death, against his legal representatives. The property was attached and the agent of *R*, one of the widows of the deceased judgment-debtor, was served with notice under O. 21, R. 66 on 15th June, 1936, for appearing in Court on 22nd June, 1936. He endorsed the notice to the effect that he was lying ill in hospital after an operation and was therefore unable to attend Court on the date fixed. The sale took place on 6th August, 1936, and *R* put in objection to the sale of the property alleging that it was part of the property given to her in lieu of dower and that the sale had been conducted fraudulently.

Held, *R's* interests were affected by the sale and she was entitled to prefer an objection under O. 21, R. 90. That the proviso to O. 21, R. 90 however applied to the case and the sale could not be set aside as the objection made by *R* could have been made before the sale was conducted and the the fact that an agent was lying ill was not sufficient ground for the objection not having been made before the sale. That as the objector did not appear nor was represented when the conditions of the sale were published, it could not be said that there had been any material irregularity in publishing and conducting the sale. (*Almond, J.C.*) KAHAN CHAND *v.* MT. ROSHAN JAN. 177 I.C. 496=11 R.Pesh. 27=A I.R 1938 Pesh. 52.

——O. 21, R. 90, Proviso (ii) (Calcutta High Court)—*Inapplicability—Defect in sale proclamation despite Court's direction to contrary.*

Per *Mukherjea, J.*—O 21, R. 90, Proviso (*ii*), C. P. Code, is inapplicable if the particular defect in the sale proclamation that is complained of is no part of the order of the Court in drawing up the sale proclamation and it finds a place in the sale proclamation that is actually issued despite the direction of the Court to the contrary. (*Derbyshire, C.J. and Mukherjea, J.*) KANGAL CHANDRA MONDAL *v.* BEJOY CHAND MAHTAB. 42 C.W.N. 661.

——O. 21, R. 90, Proviso (2) (Lahore)—*Applicability—Objection by judgment-debtor not served with notice regarding sale.*

Proviso 2 to O. 21, R. 90 only precludes objection to a sale being entertained at a later stage if it could have been put forward earlier, but if the judgment-debtors were never served with a notice as regards sale it is obvious that the objection could not have been preferred earlier and hence the Proviso does not apply. (*Bhide, J.*) SARWAN SINGH *v.* MAN SINGH. 41 P.L.R. 553=A.I.R. 1939 Lah. 222.

C. P. CODE (1908), O. 21, R. 90.

——O. 21, R. 90, proviso 2—*Scope—Objection under S. 60 after sale and before confirmation—Duty of Court.*

Proviso 2 to O. 21, R. 90 only relates to what lies within O. 21, R. 90, that is, to matters in connexion with publishing or conducting the sale. It has and can have no application to a question raised under S. 47. Where, therefore, an objection under S. 60 (1) (*c*) which falls under S. 47, is raised after the sale and before its confirmation, it is the duty of the Court to decide it and to see if it has jurisdiction to sell the property. If it has no jurisdiction, it is its duty to end the execution proceedings by refusing to confirm the sale which so far has not become absolute. (*Addison and Ram Lall, JJ.*) RAM CHANDAR *v.* SARUPA. I.L.R. (1939) Lah. 103=184 I C. 393=12 R.L. 218=41 P.L.R. 436=A.I.R. 1939 Lah. 113.

——O. 21, R. 90 (1) (as amended by Patna High Court), Proviso (i) (a) and (b)—*Construction and Scope—Application to set aside sale—Deposit not made till after expiry of 30 days from date of sale—Effect—Dismissal of application—If justified—Limitation Act, Art. 166.*

Proviso (1) (a) and (1) (b), substituted to O. 21, R. 90 (1), C. P. Code, by the Patna High Court only contemplates that after an application to set aside sale has been presented an inquiry must be made by the Court by admitting it, to see whether the requirements of the proviso has been satisfied. The proviso places conditions not upon the presentation of an application to set aside a sale, but upon its admission. The application cannot be admitted unless the provisions of Cls. (a) and (b) of proviso (1) are complied with. There is nothing in the rule to suggest that the admission of the application must take place within the period of limitation of thirty days prescribed by Art. 166 of the Limitation Act. All that the proviso requires is that before admission the necessary sum of money or security, unless dispensed with, must be deposited. The applicant can then be said to have deposited with his application such deposit or security within the meaning of the proviso. The date of admission is not governed by the Limitation Act. Where no deposit accompanies an application to set aside a sale, the Court has no power to reject such application forthwith. It must give the applicant an opportunity to urge that the deposit should be dispensed with or to deposit the full or lesser amount or other security before some date fixed for admission. If the orders of the Court are complied with the application must be admitted and heard on the merits provided that it complies with proviso (1) (a) as well.

Quaere: Whether the amendment made by the Patna High Court to O. 21, R. 90, C. P. Code, is *ultra vires* the rule making powers of the Court. (*Harries, C J., Wort, James. Agarwala and Manohar Lall, JJ.*) BRIJ BEHARI LAL *v.* SRINIVAS RAM KUMAR. 18 Pat 327=181 I.C. 579=5 B.R. 616=11 R.P. 607=1939 P.W N. 232=20 P.L.T. 275=A.I.R. 1939 Pat. 248 (F.B.).

——O. 21, R. 90, Proviso (b)—*Necessity for deposit in Rangoon.*

Schedule Notification No. 44 of 27th January, 1937, has removed the necessity of a deposit under O. 21, R. 90 C. P. Code. (*Mosely and Dunkley, JJ.*) S. T. R. M. FIRM *v.* ANDATHAL. 11 R. R. 199=178 I.C. 118=A.I.R. 1938 Rang. 292.

C. P. CODE (1908), O. 21, R. 90.

——O 21, R. 90, proviso (b) (Rangoon)—*If* ultra vires.

O. 21, R. 90, proviso (*b*), which has been cancelled by an order of the Rule Committee dated 27th January, 1937, is *ultra vires* the Rule making Committee of the High Court. The only valid rules which can be made by the High Courts under the provisions of S. 122, C. P. Code, which confer the rule-making power, must regulate the mode of proceeding to enforce a legal right and cannot stray beyond it. Proviso (*b*) to R. 90 does not regulate procedure but lays down an indispensable preliminary before any proceedings take place at all. It seeks to take away an existing right, namely, the right of being heard to impeach a sale in execution subsisting in a person whose interests are affected by it, unless he is able and willing to deposit with his application the amount mentioned in the sale warrant or an amount equal to that realized by the sale whichever is less. (*Roberts, C. J., Leach and Braund, JJ.*) O.N.R.M.M. CHETTYAR FIRM *v.* THE CENTRAL BANK OF INDIA, LTD. **1937 Rang.L.R. 268=172 I.C. 102=10 R.R. 217=A.I.R. 1937 Rang. 419 (F B.).**

——O. 21, R. 91—*Application under—Dismissal as barred by limitation—Subsequent application for revival of execution—Maintainability.*

Where a decree-holder purchases the property of the judgment-debtor in execution of his decree and then applies under O. 21, R. 91, C. P. Code, to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property, but fails in it on the ground of the application being barred by time, he cannot thereafter apply for revival of execution proceedings pleading that his decree is in fact unsatisfied. (*Courtney Terrell, C.J., Dhavle and Agarwala, JJ.*) SURANDRA KUMAR SINGH *v.* SRICHAND MAHATA. **15 Pat. 308=160 I.C. 1049=8 R.P. 405=1936 P.W.N. 36=16 Pat.L.T. 908=A.I.R. 1936 Pat. 97 (F.B.).**

——O. 21, Rr. 91 and 93—Auction-purchaser losing part of property under decree obtained by third party—Right to sue decree-holder for refund of purchase-money. *See* EXECUTION—SALE IN. **1937 O.W.N. 83.**

——O. 21, Rr. 91 and 92—*Auction sale—Property sold turning out to be not the property of the judgment-debtor—Purchaser if can sue to recover price paid, from decree-holder—Decree-holder purchaser if in a different position—Right to execute decree after confirmation of sale and satisfaction of decree.*

There is at present no right either in law or in equity for an auction purchaser to recover by suit, from the decree-holder, the purchase price paid, in case of the property sold turning out to be not the property of the judgment-debtor. As regards the decree-holder auction-purchaser his rights are limited to those granted by C. P. Code, O. 21, Rr. 91 and 92, and if the auction-sale is confirmed that becomes *res judicata* between him and the judgment-debtor and hence he cannot reopen the matter by an application for further execution or by any other means unless he can get the order confirming the sale set aside. (*Bennet, A.C.J., Harries, Collister, Ismail and Verma, JJ.*) AMAR NATH *v.* FIRM CHOTEY LAL DURGA PRASAD. **I.L.R. (1938) All. 922=178 I.C. 1=1938 A.L.R. 842=1938 A.L.J. 955=1938 A.W.R.**

C. P. CODE (1908), O. 21, R. 91.

(H C) 668=1938 O.W.N. 1021=A.I.R 1938 All. 593 (F B).

——O. 21, Rr. 91 and 92 (3)—*Bar to suit—Auction-purchaser—Suit for refund of purchase-money from decree-holder on failure to get possession of property purchased from person in possession—Maintainability—Purchaser already aware of possession of property by third person—Effect.*

Once the sale is confirmed it must be presumed conclusively that there is no defect in the sale either under R. 90 or under R. 91 and so there exists no basis for a suit on the ground of want of saleable interest of the judgment-debtor. If there is no warranty of title there is no cause of action in favour of the auction purchaser, and no question of equity and justice arises. A property was sold by auction-sale in execution of a decree and the sale was confirmed. The property was in possession of a third person having a good title thereto. The auction-purchaser was already aware of the possession of the property by such person. The decree-holder had filed with the sale statement parcha containing the entry of title of such person to the property. The purchaser being unable to get possession of the property from such a person, sued the decree-holder for the refund of the purchase money on the ground that the judgment-debtor had no saleable interest in the property.

Held, that the sale having been confirmed, the suit was barred under O. 21, R. 92 (3), and no suit could be brought on the ground that the judgment-debtor had no saleable interest in the property sold.

Held also, that the auction-purchaser being already aware of the possession by a third person of the property put to sale and not caring to make inquiry thereunto before sale, and he having allowed it to be confirmed, there was no warranty of title the breach of which would give him a cause of action to claim refund of the purchase-money from the decree-holder, and so his suit for refund could not lie. (*Gruer, J.*) SANGIDAS RAMPRATAP *v* CHAHADU. **20 N.L.J. 111=168 I.C. 970=9 R.N. 288=A.I.R. 1937 Nag 140.**

——O. 21, Rr. 91 to 93—*Judgment-debtor having no saleable interest—Refund of purchase-money—Remedy of purchaser—Right of suit.*

Whatever may have been the position under the Code of 1882, the law is now clear that a purchaser at a regular execution sale cannot obtain a refund of his purchase money on the ground that the judgment-debtor has no saleable interest unless the sale is set aside. The purchaser is restricted to his remedy by an application under O. 21, R. 91, C. P. Code, which must be made within thirty days from the date of the sale, followed by an application under R. 93. He cannot maintain a suit, nor an application under S. 151, C. P. Code, especially when the sale has been properly held in regular execution proceedings in connection with which no fraud on the part of the decree-holder or judgment-debtor has been established. (*Edgley, J.*) AMAL CHANDRA *v.* RAM SWARUP. **I.L.R. (1939) 1 Cal. 452=184 I.C. 453=12 R.C. 231=43 C.W.N. 383=69 C.L.J. 138=A.I.R. 1939 Cal. 310**

——O. 21, Rr. 91 to 93—*Scope—Auction-purchaser in execution unable to obtain possession owing to fraud and collusion of judgment-debtor*

C. P. CODE (1908), O. 21, R. 91.

and decree-holder—Suit for damages against decree-holder—Maintainability—Non-joinder of judgment-debtor—If fatal—Liability for damages—Nature of.

Where an auction purchaser at a Court sale has suffered loss through the fraud of the execution creditor of the breach of any duty which the latter owes to the auction-purchaser, he is entitled to compensation for the loss which he has thereby sustained. Where therefore, the auction-purchaser is unable to obtain possession of the property purchased by him owing to the fraud and collusion of the decree-holder and the judgment-debtor, he can maintain a suit for damages against the decree-holder on the ground of fraud; and such a suit is not barred by the provisions of Rr. 91 to 93 of O. 21, C. P. Code. The fact that the purchaser does not implead the judgment-debtor as a party defendant to the suit cannot defeat his suit. The judgment-debtor and the decree-holder, who have acted fraudulently and in collusion with each other are jointly and severally liable for damages; and a decree can therefore be passed for the entire damages against the decree-holder alone who has been impleaded. (*Fazl Ali and Agarwala, JJ.*) KAMESHWAR SINGH BAHADUR *v.* BANSIDHAR MARWARI. **16 Pat. 196=1937 P.W.N. 83=3 B.R. 212=166 I.C. 703=9 R.P. 339=18 Pat.L.T. 32=A I.R. 1937 Pat. 532.**

——**O. 21, Rr. 91 and 93**—*Scope—If exhaustive—Execution sale—Delivery of possession—Subsequent claim by dispossessed person under O. 21, R. 100—Order holding judgment-debtor had no saleable interest—Application by purchaser for refund of purchase money—Dismissal on the ground that the remedy was by way of suit—Suit by purchaser—Maintainability—Remedy of purchaser—Omission to sue to set aside order on claim—Effect.*

Appellant who was the auction-purchaser of certain properties sold in execution of decree lost some of them as a result of claim proceedings under O. 21, R. 100, C. P. Code, the Court holding that the judgment-nebtor had no title or saleable interest in them. His application to the execution Court for repayment of the purchase money of the properties he had lost thus was refused on the ground that his remedy was a regular suit. He thereupon brought a suit impleading the decree holder, but not the judgment-debtor. Both the Courts below dismissed the suit on the ground that he ought to have applied under O. 21, R. 91, C. P. Code.

Held, that the appellant (auction-purchaser) had only one remedy under the present Code, namely, by way of an application under O. 21, R. 91, C. P. Code; and after getting the sale set aside by such applicatio , to apply for repayment of his purchase money under O. 21, R. 93.

Fazl Ali, J.—The appellant not having brought a suit to challenge the order passed in proceedings under O. 21, R. 100, C P. Code, as it was open to him to do, was precluded from asking the Court to hold as a fact, merely on the basis of an order passed in a summary proceeding, that the judgment-debtor had no saleable interest in the property. (*Fazl Ali and Rowland, JJ.*) PALI RAM *v.* LAHERIA SARAI CENTRAL CO-OPERATIVE BANK. LTD. **175 I.C. 347=4 B R. 577=10 R.P. 615=19 Pat. L.T. 80=A.I.R. 1938 Pat. 150.**

C. P. CODE (1908), O. 21, R. 92.

——**O. 21, R. 91-A (Bom.)**—Scope and effect of—Application to set aside sale—If to be made to Collector—Jurisdiction of Court. *See* LIMITATION ACT, S. 4. **40 Bom.L.R. 152.**

——**O. 21, R. 92**—*Appeal—Order confirming sale—Judgment-debtor declared insolvent during sale proceedings*—Locus standi *to appeal.*

A judgment-debtor who was declared insolvent during the sale proceedings has no *locus standi* to appeal from an order confirming the sale. (*Bhide, J.*) MUNI LAL *v* THE BARI DOAB BANK, LTD., HOSHIARPUR. **162 I.C. 299=8 R.L. 870=38 P.L.R. 108=A.I.R. 1936 Lah. 368.**

——**O. 21, R. 92**—*Appeal—Order setting aside sale—Auctian-purchaser—Right of appeal.*

While the auction-purchaser is not a person affected within the meaning of R. 90 and cannot therefore move the Court under R. 90, when it comes to a question of setting aside the sale, he is a person affected within the meaning of the Proviso to sub-R. 2 of R. 92. Under the Proviso to sub-R. (2) of R. 92 he is entitled to notice, and if he is entitled to notice, then he is a party to the proceedings and can as such appeal from an order passed in such proceedings. (*Davies, J.C. and Tyabji, J.*) UTTAMCHAND *v.* DEVDITTARAM. **I.L.R. (1939) Kar. 417=180 I.C. 669=11 R.S. 189=A.I.R. 1939 Sind 62.**

——**O. 21, R. 92**—*Applicability—Absence of bidders—Offer by post—Acceptance and sale—If can be confirmed.*

O. 21, R. 92, applies to a sale that is, a sale held in accordance with the provisions of O. 21. But a 'sale' that consists merely of the receipt of an offer by post in the absence of any bidders and its acceptance, is not a sale at all. Such 'sale' proceedings could not be confirmed. (*Burton, F.C.*) SHYAMABAI *v.* THAKUR SAMPAT KUMAR SINGH. **1939 N L.J. 226.**

——**O. 21, R. 92**—*Application under—Notice to auction-purchaser—If mandatory.*

Before the objection application of the judgment-debtor under O. 21, R. 92 is adjudicated upon, it is mandatory on the execution Judge to send notice to the auction-purchaser and his omission to do so makes the order illegal. (*Mir Ahmad, J.*) GELA RAM *v.* MAKHAN SINGH. **174 I.C. 233=10 R Pesh. 60=A.I.R. 1938 Pesh. 14.**

——**O. 21, R. 92**—*Confirmation of sale—If automatic—Application—Necessity.*

A sale cannot be said to be automatically confirmed merely because no application had been made under R. 89, 90 or 91 of O. 21, C. P. Code, or such application had been made and disallowed. Something had to be done by the Court, namely, to make an order confirming the sale and unless it is done the sale cannot be said to be confirmed. (*Zia-ul-Hasan and Yorke, JJ.*) SHEO NATH *v.* MADAN MOHAN LAL. **14 Luck. 186=177 I.C. 543=11 R.O. 50=1938 O.W.N. 911=1938 R.D. 765=1938 A.W.R. (C.C) 119=1938 O.L.R. 422=1938 O.A. 684=A.I.R. 1938 Oudh 221.**

—— **O. 21, R. 92**—*Confirmation of sale—Specific order as to—Necessity.*

The expression 'shall make an order confirm-the sale' occurring in O. 21, R. 92, of the C. P. Code, shows that a sale cannot automatically be confirmed, but that something has to be done by the Court for confirmation of the sale namely, to make an order confirming the sale, and unless the

Court makes such an order, the sale cannot be said to have been confirmed. (*Zia-ul-Hasan, J.*) GIRDHARI LAL *v.* MAHOMED ISHRAT ALI. **158 I.C 913=36 Cr.L.J. 1467=1935 O.L.R. 624=1936 Cr C. 107=1935 O.W.N. 1153=A.I.R. 1936 Oudh 108.**

——**O. 21, R. 92**—*Confirmation—When could be made—Last day happening to be a holiday.*

It is not legal to pass an order confirming the sale under R. 92 of O. 21, C. P. Code, till 30 days have elapsed from the date of the sale, and if the 30th day is a holiday the confirmation could only be made at the end of the next day. (*Burton, F.C.*) AMBADAS *v.* MST. ALUKHABAI. **1939 N.L.J. 598.**

——**O. 21, R. 92**—Construction—Sale when becomes absolute—Order of confirmation—If necessary to be passed—Expiry of 30 days from sale—If automatically confirms sale. *See* LIMITATION ACT, ART. 166. **(1937) 1 M.L.J. 569.**

——**O. 21, R. 92**—*Execution sale—Refusal to confirm—Jurisdiction.*

Once a sale has taken place the Court has no jurisdiction to refuse to confirm it unless the specified objections are taken and sustained. Sale in execution of a decree cannot be set aside merely on the ground that after the date of the sale in fact more than thirty days after the date of the sale but before its confirmation the judgment debtor was declared to be a member of an agricultural tribe whose land cannot be sold. A.I.R. 1931 P.C. 33 and A.I.R. 1933 Lah. 99, Rel. on. (*Jai Lal, J.*) ABDUL RAHIM *v.* ABDUL HAQ. **161 I.C. 752=8 R.L. 796 (2)=A.I.R. 1936 Lah. 191.**

——**O. 21, Rr. 92 and 2**—*Execution Sale—Setting aside of—Adjustment made before sale—Application to record after sale.*

Where an adjustment is alleged to have taken place before the sale, the mere fact that it was applied to be recorded after the sale does not make the adjustment invalid for the purpose of setting aside the sale. The proper order to pass is to stay confirmation of the sale and decide the question of fact as to whether there had been an adjustment or not. If it is found that there had been such an adjustment, the sale should be set aside on this ground. (*Dalip Singh, J.*) RAJA LAL *v.* MAKHAN LAL. **41 P.L.R. 220=A.I.R. 1939 Lah. 326.**

——**O. 21, R. 92**—*Fraud in conduct of sale—Suit to set aside sale—Maintainability.*

A suit to set aside a sale on the ground of fraud and irregularity in the matter of publishing and conducting the sale is barred by the provisions of O. 21, R. 92, C. P. Code. The proper remedy is to institute a proceeding under O. 21, R. 90, C. P. Code. (*Mukherjea, J.*) SATISH CHANDRA PODDAR *v.* MAKBELALI TALUKDAR. **68 C.L.J. 431.**

——**O. 21, R. 92**—*Jurisdiction—Collector's sale—Application beyond 30 days of acceptance of bid by Collector for time for payment of decree amount—Failure to offer payment of decree amount and 5%—Absence of allegation of irregularity—Order setting aside sale on ground of inadequacy of price—Legality.*

In the absence of any application under R. 89, 90 or 91, C. P. Code, an execution sale has to be confirmed under R 92, and the Court has no jurisdiction to set aside the sale. Where in a Collector's sale, the Collector has accepted the bid, the judgment-debtor applies, beyond 30 days of such acceptance, an application praying for time for payment of the decretal amount, but without offering to pay the amounts mentioned in R. 89, of O. 21, or alleging any irregularity under R. 90, that cannot be regarded as an application under either R. 89 or R. 90, and the Collector has no jurisdiction to set aside the sale on the ground that the price fetched was inadequate. (*Greenfield, F.C.*) RAMCHANDRA *v.* ARJUN. **1938 N.L.J. 10.**

——**O. 21, R. 92**—*Order dismissing objections of judgment-debtor—Appeal—Auction-purchaser, if necessary party—Omission to implead him in time—Effect.*

In an appeal against an order dismissing the objections of a judgment-debtor under O. 21, R. 92, C. P. Code, the auction-purchaser is a necessary party, and if he is not made a party, the appeal is liable to dismissal on that ground. The amendment of pleadings or of the memorandum of appeal at a late stage, when valuable rights have already accrued to the auction-purchaser, would result in very serious hardship to him and should not, therefore, be allowed. (*Agha Haidar, J.*) MAHOMED HAMDAN *v.* MUHAMMAD RAMZAN. **167 I.C. 166=9 R.L. 462.**

—— **O. 21, R. 92**—*Order refusing to set aside sale—Second appeal.*

No second appeal lies from an order refusing to set aside a sale. (*Bose and Puranik, JJ.*) ANANDI PRASAD *v.* GOVINDA BAPU. **I.L.R. (1938) Nag. 436 10 R.N. 210=172 I.C. 465=A.I.R. 1938 Nag. 107.**

——**O. 21, R. 92**—Scope—Confirmation of sale—Right of purchaser—Issue of certificate by Debt Conciliation Board after sale—If ground for refusal of confirmation. *See* C. P. DEBT CONCILIATION ACT, SS. 15 (1) AND 21, PROVISO. **19 N.L.J. 296.**

——**O. 21, R. 92**—*Scope—Duty of Court under—No application made to set aside sale—Effect on sale.*

Under O. 21, R. 91, C. P. Code, an execution sale must be confirmed if no application has been made under Rr. 89, 90 or 91; and a sale thus confirmed becomes absolute (*Greenfield, F.C.*) SHRIRAM *v.* MAROTI. **20 N.L.J. 222.**

——**O. 21, R. 92**—Scope—If controlled by C. P. Debt Conciliation Act, S. 21. *See* C. P. DEBT CONCILIATION ACT, S. 21. **1938 N.L.J. 60.**

——**O. 21, R. 92**—Scope—If controlled or overridden by S. 11, C. P. Money-Lenders' Act. *See* C. P. MONEY-LENDERS' ACT, S. 11. **1938 N.L.J. 15.**

——**O. 21, R. 92**—*Second appeal—Order passed in appeal.*

No second appeal lies against an appellate order upholding an order rejecting an application to set aside sale under O. 21, R. 92, C. P. Code. (*King, C.J. and Zia-ul-Hasan, J.*) BHOONA *v.* BADRI PRASAD. **160 I.C. 468=8 R.O. 262=1936 O.L.R. 79=1936 O.W.N. 137=A.I.R. 1936 Oudh 172.**

——**O. 21, R. 92**—Second appeal—Order setting aside sale. *See* C. P. CODE, S. 100. **A.I.R. 1936 Pat. 119.**

——**O. 21, Rr. 92 and 93**—*Withdrawal of deposit on sale being set aside—Subsequent confirmation of sale—Right to ask for re-sale—Point of time—Forum.*

C. P. CODE (1908), O. 21, R. 92.

Where a purchaser had withdrawn the price on the sale being set aside, but the sale was confirmed by the appellate Court, and where the judgment-debtor's application for re-sale on the ground of the absence of the deposit under O. 21, R. 85 was negatived, he cannot in appeal from that order agitate the question as to the absence of a deposit, for it is a matter which ought to have been raised and fought out before the Court which confirmed the sale. (*Stone, C.J. and Bose, J.*) TARACHAND *v.* KALU. **1938 N.L.J. 207.**

——O. 21, R. 92 (1) and (2)—*Confirmation of sale—Power of Court to refuse—Sale under final decree, pending appeal from the preliminary decree—Variation of prelimary decree—Sale in favour of third party, if can be set aside.*

Where a final mortgage decree was passed pending an appeal from a preliminary decree and a sale is held, the fact that in the appeal the preliminary decree was varied cannot be a ground for setting aside a sale to a third party. Further under O. 21, R. 92 (1) the Court is bound to confirm a sale unless there is a successful or effective application under R. 89, 90 or 91 of O. 21. It is quite clear that the proviso to R. 92 (2) does not relate to R. 92 (1). (*Stone, C.J. and Bose, J.*) BIRDI CHAND *v.* GANPATRAO. **I.L.R. (1940) Nag. 302=179 I.C. 256=11 R.N. 281=1938 N.L.J. 303=A.I.R. 1938 Nag. 525.**

——O. 21, R. 92 (1) and (2)—*Scope of—Auction-purchaser, if can apply for confirmation of sale.*

There is no provision in the Code of Civil Procedure for an application by the auction-purchaser for confirmation of the sale; confirmation follows automatically under R. 92 (1) and the setting aside follows automatically under R. 92 (2) of O. 21. (*Burn and Lakshmana Rao, JJ.*) SATYANANDAM *v.* NAMMAYYA. **183 I.C 33=12 R.M 216=1938 M.W.N. 656=47 L.W. 51=A.I.R. 1938 Mad. 307.**

——O. 21, R, 93—Appeal—Order for refund of purchase money—Appealability. *See* C. P. CODE, S. 2 (2). **42 Bom.L R. 367.**

——O. 21, R. 93—*Execution sale confirmed and application by auction purchaser to be put in possession—Possession not given on account of decree passed in favour of another in regular suit claiming property as his own—Right of auction-purchaser to refund of purchase money.*

An execution sale was confirmed. Subsequent to this a person brought a regular suit claiming the property as his own and obtained a decree. In the meantime the auction purchaser applied to be put in possession of the property and the decree-holder in the regular suit put in an application objecting to possession being given to the auction purchaser. It was held that the auction-purchaser could not be given possession in view of the decree in the regular suit and it was remarked that the auction purchaser could apply for refund of purchase money. Accordingly he applied for it.

Held, that the application for refund could not be made under R. 93 as the sale was not set aside under O. 21, R. 92 and that the auction-purchaser was not entitled as of right to get any refund in execution proceedings. (*Almond, J.C. and Mir Ahmad, J.*) MAHOMED RAMZAN *v* CIVIL EMPLOYEES CO-OPERATIVE SOCIETY LTD. **11 R. Pesh. 43=177 I.C. 906=A.I.R. 1938 Pesh. 66.**

C. P. CODE (1908), O. 21, R. 93.

——O. 21, R. 93—*Interpretation—If implies that decree-holder can withdraw purchase money before confirmation of sale.*

O. 21, R. 93 is intended to arm the Court with power to order the return of the money to the purchaser in case the same has been paid to any person in the meantime. It should not be read as containing an implication that the decree holder is entitled to withdraw the purchase money before confirmation of sale, during the execution proceedings in the executing Court. (*Puranik, J.*) RAMCHANDRA MAHOTRAO *v.* RAMCHANDRA GUJABA. **I.L R (1938) Nag. 456=173 I.C. 296=10 R N. 295=A.I.R. 1938 Nag. 54.**

——O 21, R. 93—*Judgment-debtor having no saleable interest in property sold—Right of purchaser to sue for refund of purchase money.*

Per *B. K. Mukerjea, J.*—A suit for refund of purchase money on the ground that there is no saleable interest of the judgment-debtor in the property sold, does not lie at the instance of the auction-purchaser. The auction-purchaser has now got under the C. P. Code to set aside the sale under O. 21, R 91, by an application made within 30 days from the date of sale, before he can apply for refund under O. 21, R. 93. Where however the invalidity of the proceeding is due to fraud, carelessness, or neglect of duty on the part of the decree holder, the auction-purchaser can sue to recover the purchase money on the ground of failure of consideration and such right is unaffected by any provision of the C. P. Code. (*Nasim Ali and B. K. Mukherjea, JJ.*) CHAITANYA DAS BANERJEE *v.* RANJIT PAL CHOWDHURY. **I.L. R. (1938) 1 Cal. 512=182 I.C. 244=12 R.C. 24=67 C.L.J. 16=A.I.R. 1938 Cal. 263.**

——O. 21, R. 93—*Limitation—Application for refund of purchase-money—Limitation—Starting point—Date of order of original Court or of appellate Court.*

An application under O. 21, R. 93, C. P. Code, is governed for purposes of limitation by Art. 181 of the Limitation Act; and time begins to run from the date of the passing of the original order setting aside the sale, and not from the order of the final Court of appeal, confirming the order setting aside the sale. The right to make the application accrues immediately the order setting aside the sale is made. Art. 182 has no application to an application under O. 21, R. 93, C.P Code. (*Horwill, J.*) RAMASWAMI CHETTIAR MEYYAPPAN SERVAI. **172 I.C. 468=10 R.M. 460=46 L W. 280=1937 M.W.N. 749=A.I.R. 1937 Mad. 779.**

——O. 21, R. 93—*Right to refund against decree-holder.*

A right to claim refund in restitution is recognized against the decree-holder in O. 21, R. 93. In principle there is no difference in this liability of the decree-holder whether the sale is set aside under O. 21, R. 92 or under S. 47. (*Jai Lal, J.*) RANBIR SEN *v.* MOHAMMAD DIN. **166 I.C. 381=9 R.L. 362=A.I R 1936 Lah. 497.**

——O. 21, R. 93—Sale of right, title and interest of judgment-debtor in movable property—Such property subsequently recovered by true owner from purchaser—Purchaser's right to recover back purchase price from decree-holder. *See* EXECUTION—SALE IN—PURCHASER'S RIGHTS. **1939 Rang.L.R. 649 (F.B.).**

Court makes such an order, the sale cannot be said to have been confirmed. (*Zia-ul-Hasan, J.*) GIRDHARI LAL *v.* MAHOMED ISHRAT ALI. **158 I.C 913=36 Cr.L.J. 1467=1935 O.L.R. 624=1936 Cr C. 107=1935 O.W.N. 1153=A.I.R. 1936 Oudh 108.**

——**O. 21, R. 92**—*Confirmation—When could be made—Last day happening to be a holiday.*

It is not legal to pass an order confirming the sale under R. 92 of O. 21, C. P. Code, till 30 days have elapsed from the date of the sale, and if the 30th day is a holiday the confirmation could only be made at the end of the next day. (*Burton, F.C.*) AMBADAS *v.* MST. ALUKHABAI. **1939 N.L.J. 598.**

——**O. 21, R. 92**—Construction—Sale when becomes absolute—Order of confirmation—If necessary to be passed—Expiry of 30 days from sale—If automatically confirms sale. *See* LIMITATION ACT, ART. 166. **(1937) 1 M.L.J. 569.**

——**O. 21, R. 92**—*Execution sale—Refusal to confirm—Jurisdiction.*

Once a sale has taken place the Court has no jurisdiction to refuse to confirm it unless the specified objections are taken and sustained. Sale in execution of a decree cannot be set aside merely on the ground that after the date of the sale in fact more than thirty days after the date of the sale but before its confirmation the judgment debtor was declared to be a member of an agricultural tribe whose land cannot be sold. A.I.R. 1931 P.C. 33 and A.I.R. 1933 Lah. 99, Rel. on. (*Jai Lal, J.*) ABDUL RAHIM *v.* ABDUL HAQ. **161 I.C. 752=8 R.L. 796 (2)=A.I.R. 1936 Lah. 191.**

——**O. 21, Rr. 92 and 2**—*Execution Sale—Setting aside of—Adjustment made before sale—Application to record after sale.*

Where an adjustment is alleged to have taken place before the sale, the mere fact that it was applied to be recorded after the sale does not make the adjustment invalid for the purpose of setting aside the sale. The proper order to pass is to stay confirmation of the sale and decide the question of fact as to whether there had been an adjustment or not. If it is found that there had been such an adjustment, the sale should be set aside on this ground. (*Dalip Singh, J.*) RAJA LAL *v.* MAKHAN LAL. **41 P.L.R. 220=A.I.R. 1939 Lah. 326.**

——**O. 21, R. 92**—*Fraud in conduct of sale—Suit to set aside sale—Maintainability.*

A suit to set aside a sale on the ground of fraud and irregularity in the matter of publishing and conducting the sale is barred by the provisions of O. 21, R. 92, C. P. Code. The proper remedy is to institute a proceeding under O. 21, R. 90, C. P. Code. (*Mukherjea, J.*) SATISH CHANDRA PODDAR *v.* MAKBELALI TALUKDAR. **68 C.L.J. 431.**

——**O. 21, R. 92**—*Jurisdiction—Collector's sale—Application beyond 30 days of acceptance of bid by Collector for time for payment of decree amount—Failure to offer payment of decree amount and 5%—Absence of allegation of irregularity—Order setting aside sale on ground of inadequacy of price—Legality.*

In the absence of any application under R. 89, 90 or 91, C. P. Code, an execution sale has to be confirmed under R 92, and the Court has no jurisdiction to set aside the sale. Where in a Collector's sale, the Collector has accepted the bid, the judgment-debtor applies, beyond 30 days of such acceptance, an application praying for time for payment of the decretal amount, but without offering to pay the amounts mentioned in R. 89, of O. 21, or alleging any irregularity under R. 90, that cannot be regarded as an application under either R. 89 or R. 90, and the Collector has no jurisdiction to set aside the sale on the ground that the price fetched was inadequate. (*Greenfield, F.C.*) RAMCHANDRA *v.* ARJUN. **1938 N.L.J. 10.**

——**O. 21, R. 92**—*Order dismissing objections of judgment-debtor—Appeal—Auction-purchaser, if necessary party—Omission to implead him in time—Effect.*

In an appeal against an order dismissing the objections of a judgment-debtor under O. 21, R. 92, C. P. Code, the auction-purchaser is a necessary party, and if he is not made a party, the appeal is liable to dismissal on that ground. The amendment of pleadings or of the memorandum of appeal at a late stage, when valuable rights have already accrued to the auction-purchaser, would result in very serious hardship to him and should not, therefore, be allowed. (*Agha Haidar, J.*) MAHOMED HAMDAN *v.* MUHAMMAD RAMZAN. **167 I.C. 166=9 R.L. 462.**

—— **O. 21, R. 92**—*Order refusing to set aside sale—Second appeal.*

No second appeal lies from an order refusing to set aside a sale. (*Bose and Puranik, JJ.*) ANANDI PRASAD *v.* GOVINDA BAPU. **I.L.R. (1938) Nag. 436 10 R.N. 210=172 I.C. 465=A.I.R. 1938 Nag. 107.**

——**O. 21, R. 92**—Scope—Confirmation of sale—Right of purchaser—Issue of certificate by Debt Conciliation Board after sale—If ground for refusal of confirmation. *See* C. P. DEBT CONCILIATION ACT, SS. 15 (1) AND 21, PROVISO. **19 N.L.J. 296.**

——**O. 21, R. 92**—*Scope—Duty of Court under—No application made to set aside sale—Effect on sale.*

Under O. 21, R. 91, C. P. Code, an execution sale must be confirmed if no application has been made under Rr. 89, 90 or 91; and a sale thus confirmed becomes absolute (*Greenfield, F.C.*) SHRIRAM *v.* MAROTI. **20 N.L.J. 222.**

——**O. 21, R. 92**—Scope—If controlled by C. P. Debt Conciliation Act, S. 21. *See* C. P. DEBT CONCILIATION ACT, S. 21. **1938 N.L.J. 60.**

——**O. 21, R. 92**—Scope—If controlled or overridden by S 11, C. P. Money-Lenders' Act. *See* C. P. MONEY-LENDERS' ACT, S. 11. **1938 N.L.J. 15.**

——**O. 21, R. 92**—*Second appeal—Order passed in appeal.*

No second appeal lies against an appellate order upholding an order rejecting an application to set aside sale under O. 21, R. 92, C. P. Code. (*King, C.J. and Zia-ul-Hasan, J.*) BHOONA *v.* BADRI PRASAD. **160 I.C. 468=8 R.O. 262=1936 O.L.R. 79=1936 O.W.N. 137=A.I.R. 1936 Oudh 172.**

——**O. 21, R. 92**—Second appeal—Order setting aside sale. *See* C. P. CODE, S. 100. **A.I.R. 1936 Pat. 119.**

——**O. 21, Rr. 92 and 93**—*Withdrawal of deposit on sale being set aside—Subsequent confirmation of sale—Right to ask for re-sale—Point of time—Forum.*

C. P. CODE (1908), O. 21, R. 95.

O. 21, Rr. 95 and 97, C. P. Code, obtain possession as against the beneficiaries under the will, that is to say, the beneficiaries entitled to the estate which is represented by the executors. The reason for this is that the beneficiaries are not affected by Rr. 97, 95 or 35. Beneficiaries do not claim under executors, and they are not "judgment-debtors" or some persons on their behalf under R. 95 or any person bound by a decree under R. 35. (*Ameer Ali, J.*) PRABHAS CHUNDER MULLICK *v.* DHIRENDRANATH KER. **169 I.C. 454=10 R.C. 1=A.I.R 1937 Cal. 301.**

——**O. 21, Rr. 95 and 97**—Property in Karachi Court's jurisdiction sold in execution by Bombay High Court—Decree-holder auction-purchaser obstructed from obtaining possession—Decree sent for execution to Karachi Court—Power of Karachi Court to remove obstruction. *See* C. P. CODE, S. 42. **A.I.R. 1936 Sind 11.**

——**O. 21, Rr. 95 to 99 and S. 47**—*Relative scope.*

O. 21, R. 95 and the subsequent rules in O. 21, relating to delivery of possession to the decree-holder or auction-purchaser fall under an order relating to the execution of decrees and orders. When a question arises as to the kind of possession to be delivered, it is a question relating to the execution of the decree. (*Stone, C.J. and Puranik, J.*) MST. SEMABI *v.* GANPATRAO YADORAO. **I.L.R. (1938) Nag 583=177 I,C. 643=11 R.N. 155=A.I.R. 1938 Nag. 212.**

——**O. 21, R. 95**—*Second application by auction-purchaser—If lies—Limitation—Starting point—Limitation Act, Art.* 167.

A second application for delivery of possession under O. 21, R. 95, C. P. Code, can be made by the auction-purchaser, if it is otherwise within time. The period of 30 days under Art 167 of the Limitation Act is to be counted from the date of the resistance or obstruction of which complaint is made and not from the date of the first resistance in respect of which an application for delivery of possession was made and dismissed for default. (*M.C. Ghose, J.*) SURAMA SUNDARI DEVI *v.* KIRAN SASHI CHOWDHURANI. **176 I.C. 816=11 R.C. 185=42 C.W.N. 478=A.I.R. 1938 Cal. 352.**

——**O. 21, R. 97**—*Applicability—Person entitled to order for possession.*

R. 97, O. 21, would apply equally to a person who was entitled to an order for possession in the same way as it, in terms, applies to the holder of a decree for possession. An order which has been made for a receiver to obtain possession is in effect, and for the purpose of execution, the same as a decree for possession, and application under O. 21, R. 97, though not made by the receiver in person is proper if it has been made on behalf of the receiver. (*McNair, J.*) KEDAR NATH *v.* BAIJNATH. **A.I.R. 1939 Cal. 494.**

——**O. 21, R. 98**—Bona fide *objections—Dispute between Agraharamdars and tenants regarding occupancy rights—Claim for delivery against Agraharamdar—Tenants objecting to actual possession—Procedure.*

Where litigation regarding occupancy tenant's rights was going on between the Agraharamdars and tenants of the village, and other tenants also claimed occupancy rights, and seeing that the matter was *sub judice*, asserted the right to actual possession on the basis of that right against the person claiming delivery from Agraharamdars.

Held, that the objection by such tenants was certainaly a *bona fide* one and not at the instigation of the judgment-debtors within the meaning of O. 21, R. 98, so that the only result of an application under R. 99 would be a dismissal followed by a suit. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO. **169 I.C. 456=10 R.M. 43=A.I.R. 1936 Mad. 733.**

C. P. CODE (1908), O. 21, R. 100.

——**O. 21, R. 98**—*Exercise of power under—Condition precedent—"Judgment-debtor" meaning of.*

The condition precedent to the Court putting the decree-holder into possession in the exercise of its power under O. 21, R. 98, C. P. Code, is that the resistance or obstruction should have been occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf. The word "judgment-debtor" in R. 98 must be interpreted in the light of the definition of the term as given in S. 2 (10), C. P. Code. (*Mulla, J.*) KULSOOMUNNISA *v.* RAGHUBAR DAYAL. **I.L.R. (1940) All. 87=1939 A.W.R. (H.C.) 817=1939 A.L.J. 1160.**

——**O. 21, R. 98**—*"Person other than the judgment-debtor"—Suit on mortgage against legitimate son of mortgagor—Plaintiff not aware of existence of illegitimate son and not impleading him as defendant—Effect—Illegitimate son—If person other than the judgment-debtor.*

Where a mortgagee institutes a suit on his mortgage impleading as defendant to the suit the legitimate son of the deceased mortgagor *bona fide* believing that he is the only legal representative, and such legal representative is in possession of the properties on the date of the suit and the date of the decree, and there is no fraud or collusion between the plaintiff and legitimate son, an illegitimate son of the mortgagor, of whose existence the mortgagee is not aware at the time and whom he does not consequently implead as a defendant to his suit, would be bound by the decree in the suit. He cannot be regarded as a person other than the judgment-debtor within the meaning of O. 21, R. 98, C P. Code. (*Abdur Rahman, J.*) VYTHILINGAM PILLAI *v.* SESHAN. **185 I.C. 850=12 R M. 580=49 L.W. 103=1939 M.W.N. 295=A.I.R. 1939 Mad. 477=(1939) 1 M.L.J. 416.**

——**O. 21, R. 99**—"Person other than the judgment-debtor"—Meaning of—Decree on mortgage by Hindu father—Suit by sons for partition—Decision that mortgage decree thereon binding on sons—Effect of—Sons, if persons "other than the judgment-debtor"—Remedy of purchaser for possession—Application under R. 95—If lies—Suit—If necessary. *See* O. 21, R. 95. **45 L.W. 568=(1937) 1 M.L.J. 667.**

——**O. 21, R. 100**—*Applicability—Execution of rent decree against recorded tenant of non-transferable holding—Private purchaser from recorded tenant—Application under O. 21, R. 100—Competency—Purchase not recognised by landlord—Effect.*

An application under O. 21, R. 100, C. P. Code, by a private purchaser from the recorded tenant of a non-transferable holding, in the course of execution of a rent decree obtained by the landlord against the recorded tenant, is incompetent when such purchase has not been recognized by the land-

C. P. CODE (1908), O. 21, R. 94.

——**O. 21, R. 94**—*Sale certificate—Date of.*

Under the Code a sale certificate should bear the date of confirmation of sale. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO **169 I.C. 456=10 R.M. 43=A.I.R. 1936 Mad. 733.**

——**O. 21, R. 94**—*Sale certificate—Effect of—Property not proclaimed or put up for sale but included in sale certificate—Purchaser's title to.*

A sale certificate is only a formal document confirming what was purchased in the Court auction and cannot confer title on the purchaser to property which was never included in the proclamation of sale or put up for sale, though included in the sale certificate. The purchaser can only base his title to the property by virtue of his purchases and not on the certificate of sale. (*Venkataramana Rao, J.*) CHIDAMBARAM CHETTIAR *v.* RANGASWAMI DEVAR. **175 I.C. 208=10 R.M. 758=1937 M.W.N. 1267=A.I.R. 1938 Mad. 232.**

——**O. 21, R. 94**—*Sale certificate—Value.*

The sale certificate is the document of title in cases of sales in execution, and as such it cannot be lightly ignored by reference back to other documents and it cannot be argued that the property could not have been sold and so must be taken not to have been sold. (*Bennet and Verma, JJ.*) KUNJLAS KUNWAR *v.* KRISHNA DEO SINGH. **187 I.C. 185=12 R.A. 487=1939 A.L.J. 1079=1939 A.W.R. (H.C.) 920=A.I.R. 1940 All. 121.**

——**O 21, R. 94**—*Sale certificate—Value of—Issuing in the name of third party—Competency.*

The law recognizes only the method under which a man can sell his property to another and that is by a registered sale deed. There is, however, one exception and that is about transfers created by operation of law. In case where property is purchased by a person at a Court sale, no sale deed is necessary. The sale certificate which the Court will issue will show that the purchaser got a title and the property vested in him from the date of the sale. The sale certificate will not be a title deed but would be statutory evidence of transfer in place of the mode of transfer by a registered sale deed. Having regard to the provisions of R. 94 of O. 21, the Court will issue the sale certificate only in the name of auction-purchaser or if he dies in the name of his legal representative. But the Court is incompetent to recognize any transfer or arrangements made by the auction-purchaser with a third person. (*Rachhpal Singh, J.*) MAKHAN LAL *v.* BALDEO PRASAD. **176 I.C. 774=11 R.A. 147=1938 A.W.R. (H.C.) 530=1938 A.L.R. 681=1938 A.L.J. 625=A.I.R. 1938 All. 471.**

——**O. 21, R. 94**—*Sale certificate—Whether can be granted to assignee of auction purchaser.*

There is nothing whatever in O. 21, R. 94, C. P. Code to prevent an assignee from the auction-purchaser applying for the sale certificate, nor to prevent the Court granting it to him. (*Broomfield, J.*) GANAPATI MANJIA *v.* SUBRAYA RAYAPPA. **161 I.C. 740=8 R.B. 363=38 Bom. L.R. 104=A.I.R. 1936 Bom. 137.**

——**O. 21, R. 95**—*Applicability—Claim by person independently of the judgment-debtor.*

O. 21, R. 95, C. P. Code, has no application to a case in which the property sold in execution is claimed by a person in his own right and independently of the judgment-debtor. (*Cornish, J.*)

C. P. CODE (1908), O. 21, R. 95.

PEER BATHUMMAL BEEVI *v.* MEERAMMAL BEEVI. **167 I.C. 113=9 R.M. 424=1936 M.W.N. 1369=44 L.W. 698=A.I.R. 1937 Mad. 108=71 M.L.J. 725.**

——**O. 21, R. 95**—*Applicability — Decree on mortgage executed by Hindu father—Partition suit by sons impeaching mortgage—Decree holding mortgage valid and binding on sons—If makes sons parties to mortgage decree—Application by decree-holder for possession under R. 95—Competency—Suit—Necessity—O. 21, R. 99.*

Where it is decided in a suit for partition by Hindu sons against their father, that a mortgage executed by the father on the footing of which the mortgagee has obtained a decree, was executed for legal necessity and for purposes binding on the family and that the father fully represented the family in the said transaction and that the sons are bound by the decree passed thereon, it must be taken that the sons as members of the family were also parties to the mortgage decree, and not "persons other than the judgment-debtor" within the meaning of O. 21, R. 99, C. P. Code. The decree-holder may in such a case apply for possession under O. 21, R. 95 and need not file a suit for possession. (*Venkataramana Rao, J.*) PALANIAPPA CHETTIAR *v.* RAMASWAMI SERVAI. **1937 M.W.N. 258=169 I.C. 673=10 R.M. 100=A.I.R. 1937 Mad. 582=45 L.W. 568=(1937) 1 M.L.J. 667.**

——**O. 21, Rr. 95, 96**—*Applicability—Delivery—Obstruction by tenant.*

Where delivery that is originally attempted is under O. 21, R. 95, *i.e.*, actual vacant possession, and the result of objections raised is that the outstanding dispute that remains is only the rights of tenants, the commonsense and reasonable view is that delivery, so far as landlord's right is concerned under O. 21, R. 95, is effected, and what is not completed is the right to actual possession asserted by tenants. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO. **169 I.C. 456=10 R.M. 43=A.I.R. 1936 Mad. 733.**

——**O. 21, Rr. 95 and 97**—*Application by decree-holder auction-purchaser—If one in execution.*

Auction-purchasers who are decree-holders do not cease to be parties to a suit, and even if they ask relief as auction-purchasers they are still decree-holders coming under the provisions of S. 47. Therefore an application under O. 21, Rr. 95 and 97 by decree-holder auction-purchaser is an application in execution of a decree and the removal of obstruction to the decree-holder auction-purchaser is in execution of the decree even though the decree be only for sale. (*Davis, J.C. and Mehta, A.J.C.*) BRITISH INDIA STEAM NAVIGATION CO., LTD *v.* JIWANJEE & CO. **30 S.L.R. 290=161 I.C. 524=8 R.S. 149=A.I.R. 1936 Sind 11.**

——**O. 21, R. 95**—Delivery under—Effect—Right of purchasee to cut crops on land. *See* PENAL CODE, S. 427. **A.I.R. 1936 Cal. 157.**

——**O. 21, Rr. 95 and 97**—*Mortgage decree against executors—Sale of property—Purchaser, if can proceed against beneficiaries to obtain possession.*

Where a mortgage decree has been obtained against executors in their representative capacity and there has been a decree for sale and a sale is held, the purchaser cannot by proceeding under

material in an application under O. 21, R. 100 whether or not his possession was subject to the mortgage right of the decree-holder. (*Dhavle, J.*) RAMCHANDRA JHA *v.* PRASAD THAKUR. 174 I.C. 382 (1)=4 B.R. 432=10 R.P. 505=1937 P. W.N. 953=A.I.R. 1938 Pat. 90.

——O. 21, R. 102—*Applicability—Involuntary alienations* pendente lite.

The rule of *lis pendens* is expressly recognised in O. 21, R. 102, C. P. Code, as regards transfers in the course of execution proceedings. The language of the rule is sufficiently wide to cover both voluntary alienations on the part of judgment-debtor and transfers by a Court sale or a sale under the Public Demands Recovery Act. (*Edgley, J.*) BEPIN CHANDRA GORAIN *v* HEM CHANDRA MUKHERJI. I.L.R. (1939) 2 Cal. 63=43 C.W.N. 692=185 I.C. 424=12 R.C. 368=A. I.R. 1939 Cal. 709.

——O. 21, R. 103—*Applicability—Sale of mortgaged property in execution of money decree pending suit on mortgage—Subsequent sale in execution of mortgage decree—Purchaser under mortgage decree obtaining delivery in dispossession of purchaser under money decree—Application by latter—Dismissal—Suit for possession on redemption—Limitation.*

A money decree-holder purchased his judgment debtor's property which was subject to a mortgage in execution of his decree pending a suit on the mortgage against the judgment-debtor mortgagor and obtained possession. After the sale but before delivery of possession, a decree was passed in the mortgage suit, and in execution of the mortgage decree the property was sold and purchased by the mortgagee who duly obtained delivery of possession. The prior purchaser under the money decree applied under O. 21, R. 100, C. P. Code, complaining of dispossession; that application was dismissed eventually on 4th August, 1927. On 30th July, 1930, the money decree purchaser brought a suit claiming, *inter alia*, possession of the property upon redemption of the mortgages on the ground that they had a right to redeem the property.

Held, that the suit was not really a suit for redemption, but a suit for establishment of the right to the present possession of the property and fell under O. 21, R. 103, C. P. Code, and, not having been brought within one year as required by Art. 11-A of the Limitation Act, was barred by time. (*Khaja Mohammad Noor and S.C. Chatterjee, JJ.*) BAIJU LAL MARWARI *v.* THAKUR PRASAD MARWARI. 18 Pat. 155=180 I.C. 974=11 R.P. 552=5 B R. 508=1938 P.W.N. 836=19 Pat.L.T. 781=A.I.R. 1939 Pat. 7.

——O. 21, R. 103—*Application under R.* 100 *by manager of joint family dismissed—No suit brought within limitation—Effect—Suit by member of family for partition of his share in property—If barred.*

Where an application under O. 21. R. 100, C. P. Code, made by a manager of a joint Hindu family on behalf of the family was dismissed and no suit was brought within limitation to establish the right of the joint family to the possession of the property, the order dismissing the application becomes conclusive under O. 21, R. 103, C. P. Code. The result of this is the joint family has lost the right to possession of the property. When the right of the family as a whole to

recover possession of the property has become barred by reason of the provisions of O. 21, R. 103, it follows that the right of every individual member constituting the joint family for possession of such share in the property as he might be entitled to on partition must be equally barred. (*Srivastava, C.J. and Zia-ul-Hasan, J.*) NIHAL CHAND *v.* KUSHAI. CHAND. 13 Luck. 389=168 I. C. 925=9 R.O 510=1937 O.L.R. 331=1937 O. W.N. 822=A.I.R. 1937 Oudh 401.

——O. 21, R. 103—*Attaching decree-holder purchasing mortgaged property and obtaining possession—Not party in mortgage suit—Dispossessed by purchaser of same property at mortgage sale—Application under O.* 21, *R.* 100 *dismissed—Suit for redemption fell under O.* 21, *R.* 103.

A decree-holder who had attached judgment-debtor's mortgaged property in execution of his money decree, purchased the same and obtained possession but was subsequently dispossessed by the purchaser of the same property in execution of the mortgage decree. The attaching decree-holder applied under O. 21, R. 100 complaining of the dispossession, but his application was dismissed. Subsequently he filed a suit for redemption and based his claim on the fact that he was not made a party to the mortgage suit, the mortgage decree and sale were not binding on him and therefore as auction-purchaser being in rightful possession of the disputed property could not be dispossessed therefrom.

Held, that the suit fell under O. 21, R. 103 and the mere fact that in the suit the decree-holder sought to recover possession on redemption could not be a ground for holding that he did not claim a right to the present possession of the property. (*Mahomed Noor and Chatterji, JJ.*) BAIJU LAL MARWARI *v.* THAKUR PRASAD. 18 Pat. 155=180 I.C. 974=11 R.P. 552=1938 P.W.N. 836=19 Pat.L.T. 781=5 B.R. 508=A.I.R. 1939 Pat. 7.

——O. 21, R. 103—*Construction and scope—Adverse order—Subsequent declaration of title of defeated party within one year in suit instituted against him prior to order—Effect of—If supersedes order—Fresh suit within a year by a party adversely affected by order—If obligatory.*

The object of O. 21, R. 103, C. P. Code is to have a speedy settlement of questions of title raised in execution sales. But the institution of a suit by the unsuccessful party is not the only remedy for getting the adverse order superseded. What is contemplated as necessary to supersede the order is the establishment of a right to the property. Consequently if the unsuccessful party is able to get his right declared or established within a year, though in a suit instituted not by him but against him, the order under R. 103 must be held to have been superseded by the later adjudication. What makes the order conclusive is not the failure to institute a suit but the failure to have the right established. If therefore the unsuccessful party's title is declared or established within a year of the adverse order in a suit wherein he is a defendant, it is not obligatory on him to institute a suit within a year to establish his title to the property. (*Venkataramana Rao, J.*) PALANIAPPA CHETTIAR *v.* RAMASWAMI SERVAI. 1937 M.W.N. 258=169 I.C. 673=10 R.M. 100=45 L.W. 568=A.I.R. 1937 Mad. 582=(1937) 1 M.L.J. 667.

C. P. CODE (1908), O. 21, R. 103.

——O. 21, R. 103—*Court-fees—Suit under*—Ad valorem *fee—If payable.*

Obiter.—The view that in a suit under O. 21, R. 103, C. P. Code the plaintiffs would have to pay court-fees on that part of the claim which amounts to a prayer for recovery of possession is erroneous. (*Courtney Terrell, C.J. and James, J.*) GAJANAND MARWARI *v* NONIDH LAL. 174 I. C. 630=4 B.R 470=10 R.P. 538=1938 P.W.N. 307=19 Pat.L.T. 250=A.I.R. 1938 Pat. 321.

——O. 21, R. 103—Scope—Claim under O. 21, R. 100 by dispossessed person—Order allowing and holding that judgment-debtor had no title to property sold—Remedy of purchaser—Application for refund of purchase money—Dismissal—Subsequent suit for refund — Maintainability. *See* C. P. CODE, O. 21, RR. 91 AND 93. 19 Pat L. T. 80.

——O. 21, R. 103—*Scope—Obstruction to delivery by manager of joint Hindu family—Order removing obstruction and failure to sue within one year—If final and conclusive as against other members.*

Where the manager of a joint Hindu family obstructs delivery of property to a purchaser, and the obstruction is ordered to be removed, the Court holding that the manager was not in possession it must be taken that the manager is acting on behalf of the entire family. If no suit is filed to set aside that order within one year, it becomes final and conclusive not only as against the manager but against all the members of the family. (*Wadsworth, J.*) PARAMASIVAN PILLAI *v.* THIRUVUDAYA PILLAI. 1940 M.W.N. 144=51 L.W. 386=A.I.R. 1940 Mad. 636.

——O. 21, R. 103—Scope—Order on application under R. 100—Revision—Competency—Grounds for interference. *See* C. P. CODE, S. 115. 44 L. W. 703.

——O. 21, R. 103—*Scope—Order on obstruction to delivery—Appeal—Wrong entertainment of appeal—Revision—Interference.*

In cases where delivery of possession is obstructed by a third party the order passed by the executing court is final under O. 21, R. 103 and not open to appeal. If an appeal is entertained against such an order, the appellate Court acts without jurisdiction and the case is clearly one for revision by the High Court, which has power to interfere either under the appellate jurisdiction or revisional jurisdiction. Even if a second appeal is not competent, the High Court will interfere in revision. (*Mohammad Noor and Madan, JJ.*) MST. CHAMPA DEBI *v.* RAMCHANDRA MARWARI. 165 I.C. 986=9 R.P 248=17 Pat.L. T. 815=3 B.R 114 (1)=A.I.R. 1937 Pat. 136.

——O. 21, R. 103—*Scope—Purchaser of property in execution of money-decree pending suit for possession of same property—Objection by to delivery of possession in execution of decree for possession in former suit—Claim of* bona fide *possession in own right—Refusal of delivery by executing Court—Remedy of holder of decree for possession—Separate suit—Revision.*

Pending a suit by the petitioner for recovery of possession of an estate the respondent's predecessor-in-interest sued the person then in possession of that estate for recovery of money for goods sold and delivered and obtained a decree in execution of which he put up some part of the estate fo sale and purchased it himself at the sale. The petitioner ultimately obtained a decree for possession of the estate, but when he attempted to take delivery of possession he found the respondent in possession of a village which he had purchased in execution of his money-decree. The respondent pleaded that the petitioner himself was a party to the proceedings in execution of his decree and that he was therefore bound by the execution sale. Petitioner then applied under O. 21, R. 35 to have the respondent ousted from possession the respondent objected to the same on the ground that he was *bona fide* in possession on his own account. The executing Court dismissed the application.

Held, in revision, that the petitioner's proper course was to bring a suit for possession of the property, in which the question of title and the question of priority of his decree as well as the respondent's title by reason of his purchase in execution might be properly adjudicated upon, as the executing Court could only deal with the question of *bona fide* possession and not with the legal merits of title; and the order refusing delivery was right and could not be interfered with in revision. (*Courtney Terrell, C.J. and Manohar Lall, J.*) GOPAL BUX RAI *v.* MANKALI DEVI. 172 I.C. 4=10 R.P. 303 (1)=18 Pat.L.T. 833=A.I. R. 1937 Pat. 615

——O. 21, R. 103—*Scope—Suit under—Decree-holder-purchaser—Application for delivery of possession—Dismissal on objection by person claiming under judgment-debtor—Suit by decree-holder—Plea that decree on which suit based was without jurisdiction—Sustainability.*

It is not open to the defendant in a suit under O. 21, R. 103, C. P. Code, instituted by the decree-holder-purchaser whose application under O. 21, R. 95 has been dismissed, to contend that the decree in execution of which the plaintiff became purchaser of the disputed property was passed without jurisdiction. It is for the Court which tries a suit to determine whether it has jurisdiction or not to entertain a suit or proceeding, and if there is a judicial determination of the question, the judicial determination assuming jurisdiction cannot be collaterally attacked. That determination must be held binding on the other party, and a person who, claiming through the judgment-debtor, resists the decree-holder purchaser in taking possession cannot be heard to say that the decree on which the suit under O 21, R. 103 is based was without jurisdiction. (*Mitter and Patterson, JJ.*) BIRAJ MOHINI DASSI *v.* SARALA DEVI CHOWDHRANI. 64 C.L.J. 115=41 C.W.N. 396=169 I.C. 913=10 R.C. 59=A.I.R. 1937 Cal. 88.

——O. 21, R. 103—*Scope—Suit under—Enquiry—If limited to possession on date of adverse order—Duty of plaintiff.*

It is not correct to hold that in a suit under O. 21, R. 103, C. P. Code, the Court has merely to ascertain whether the plaintiff was in possession at the date of the order against him, which has given rise to the suit. The rule requires the plaintiff to establish the rights which he claims to the present possession of the property. (*Wort and Rowland, JJ.*) SYED ABDUL HAKIM *v.* MANGAL CHAND. 17 Pat 164=177 I.C. 806=5 B.R. 22=11 R.P. 184=A.I.R 1938 Pat. 433.

——O. 21, R. 103—*Scope and effect of—Execution purchaser—Obstruction to delivery order—*

C. P. CODE (1908), O. 21, R. 103.

Subsequent suit by purchaser for partition and separate possession—Issues raised in prior obstruction proceedings—If can be re-agitated.

An order under R. 98 of O. 21, C. P. Code, can be passed only after notice to the person resisting or obstructing delivery to the execution purchaser, and an investigation of the case as contemplated in R. 97 (2). O. 21, R. 103 clearly covers an order under R. 98. In a suit by the execution purchaser for partition and separate possession of the property purchased by him the defendant-resister is precluded from re-agitating the questions which he has put forward and which have been adjudicated upon in the obstruction proceedings. So far as the conclusiveness enacted in the final part of R. 103 is concerned, it makes no difference whether the questions are sought to be re-agitated by a person as plaintiff or as defendant. But it will be going too far if it were held that every issue sought to be raised must be taken to be precluded by O. 21, R. 103. Issues which could not be raised in the obstruction proceedings such as one which attacks the validity of the decree in execution of which the proceedings arose, can be raised in the suit and are not precluded by R. 103. (*Varadachariar, J.*) METHAR ROWTHER *v.* SAHU MOIDEEN ROWTHER. **167 I.C 199=9 R.M. 436=45 L.W. 91=1937 M.W.N. 27 =A.I.R. 1937 Mad. 366=(1937) 1 M.L.J. 122.**

——**O. 21 R. 103**—Suit by a vendee under—Nature of—Plaintiff, if can claim rights under S. 53-A, Transfer of Property Act.' *See* TRANSFER OF PROPERTY ACT, S. 53-A AND C. P. CODE, O. 21, R. 103. **1939 O.W.N. 876.**

——**O. 21, R. 103**—*Suit under—Court-fees—Nature of suit—Determination.*

O. 21, R. 103 enables a suit to be filed on a Court-fee of Rs. 20 for possession, by a person who has been dispossessed in execution of a decree to which he is not a party, and whose application under O. 21, R. 100 has been disallowed. Though the plaint does not purport to be filed under O. 21, R. 103, when the plaint contains the necessary allegations the suit can be held to be one under the rule. It is the substance rather than the form of the suit which should be considered in determining the nature of the suit. (*Weston.*) ABDUL GHAFFAR *v.* MOHAMED SHAFI. **1935 A M.L J. 107.**

——**O. 21, R. 103**—Suit under—If continuation of claim under O. 21, R. 11—Special oath in claim—If conclusive in suit under R. 103. *See* OATHS ACT, S. 11. **51 L.W. 449.**

——**O. 21, R. 103**—*Suit under—Loss of possession pending suit—Ultimate decree—Restoration of possession—If can be ordered.*

Where during the pendency of a suit under O. 21, R. 103, C. P. Code, the plaintiff loses possession of the property, an order for restoration of possession would be justified, if the suit is ultimately decreed. (*Bennet, J.*) FIRDOS JAHAN *v.* MAHOMED YUNUS. **15 Luck. 43=184 I C. 401= 12 R O. 109=1939 O.W.N. 876=1939 O.L R.614 =1939 A W R. (C.C.) 193=A.I.R. 1940 Oudh 1.**

——**O. 21, R. 103**—Suit under for mere declaration—Maintainability without claim for possession. *See* SPECIFIC RELIEF ACT, S. 42, PROVISO. **1938 P.W N. 455.**

——**O. 21, R. 103**—Suit under—Prayer for possession—Court fee payable. *See* COURT-FEES ACT, SCH. II, ART. 17. **1938 N.L.J. 107.**

C. P. CODE (1908), O. 21, R. 139.

——**O. 21, R. 103**—*Suit under—Proper parties.*

As it is essential for the plaintiffs in a suit under O. 21, R. 103, C. P. Code, to establish their right not only against the decree-holder, but also against the judgment-debtor in such cases the judgment-debtor would be a proper if not a necessary party. (*Niyogi, J.*) DINKARRAO *v.* RATANSI ASARAM. **I.L R. (1939) Nag 422=179 I.C. 837=11 R.N. 321=1938 N.L.J. 107=A.I.R. 1938 Nag. 300.**

——**O. 21, R. 104 (Oudh C. C. rules)**—*'Debt', if confined to ascertained amounts—Proceedings under the rule—If involves question of attachment.*

It cannot be contended that until a debt is ascertained, it cannot be called a 'debt' within the meaning of R 104 of O. 21. This rule does not involve any question of attachment. (*Yorke, J.*) LINCOLN *v.* ANDERSON **179 I.C. 601=11 R.O 187 =1939 O L.R. 61=1939 O.A. 196=1939 O.W.N. 82=A.I.R. 1939 Oudh 86.**

——**O. 21, Rr. 107 and 112 (Oudh)**—*Order under R. 107—Second appeal.*

An appeal is allowed under O. 21, R. 112 against an order of Civil Court proceeding under O. 21, R. 107. No right of second appeal is allowed under the Code. (*King, C.J. and Nanavutty, J.*) LACHHMAN PRASAD *v.* MUHAMMAD YUNUS. **160 I.C 42=8 R O. 245=1936 O.W.N. 114=1936 O. L.R 38=A.I.R 1936 Oudh 167.**

——O. **21, R. 124 (as amended in Allahabad).**—*Fees of custodian under—Jurisdiction to settle—Order calling upon decree-holder to pay fees to custodian—If without jurisdiction.*

An order by the executing Court calling upon the decree-holder to pay a certain sum of money to a custodian or *Supurddar* by way of fees payable under O. 21, R. 124, C. P. Code, as amended by the Allahabad High Court, is not without jurisdiction. It is the execution Court only which can settle the fee which is to be paid to the custodian under the rule; and it is the only decree-holder, as the person who has got the property attached, that can be called upon to pay the fee. (*Sulaiman, C.J. and Bennet, J.*) GOVIND PRASAD *v.* YAD RAM. **1937 A.W.R. 141=1937 A.L.J. 160 =169 I.C. 634=10 R.A. 44 (1)=1937 A.L.R. 566.**

——**O. 21, R. 131**—*Construction—'Charge', if confined to charge created by act of parties.*

There is nothing in the words of R. 131 of O. 21, C. P. Code, or anything in the principle underlying the garnishee orders which would justify a construction restricting the word 'charge' in R. 131 to a charge created by act of parties only. A charge created by operation of law is equally within the purview of R. 131. (*Collister and Bajpai, JJ.*) RAMCHANDRA *v.* RAM LAL. **1940 A.W.R. (H.C.) 470.**

——**O. 21, R. 139 (1) and (2) All.**—*Scope and distinction between—Court-fee to be paid on garnishee's appeal.*

Sub-R. (2) of R. 139 of O. 21, C. P. Code, is intended to cover the case where the decision is that the application should be dismissed and sub-R. (1) is intended to cover the case where the application is allowed. The object of the distinction may be to exempt a decree-holder who has already paid court-fee on his plaint from a further *ad valorem* payment, where he has to appeal from a dismissal of a garnishee applica-

tion. But where the appeal has to be brought by a garnishee when his liability is held to exist, the garnishee may have been intended to pay *ad valorem* court-fee, as he has not paid any court-fee in the lower Court. Where the liability of a garnishee has been held to exist and an appeal is preferred, it is on account of the special provision in O. 21, R. 139 (1). The words refer to those conditions of an appeal as if it were a decree—and one of such conditions of an appeal from a decree for money is the payment of *ad valorem* court-fees. (*Bennet, A.C.J.*) RAM CHANDRA *v.* RAM LAL. **175 I.C. 310=10 R.A. 679=1938 A.L.R. 410=1938 A.W.R. (H.C.) 158 =1938 A.L.J. 232=A.I.R. 1938 All. 254.**

——O. 22—*Abatement—Applicability to revisions.*

A Court hearing a revision application is not necessarily bound by the rules relating to abatement of appeals contained in O. 22, C. P. Code. But a Court is not bound to substitute names of heirs even after the lapse of the period of limitation prescribed. The option of adding or refusing to add is at the discretion of Court which would not be exercised to add a person after the period of limitation except in special circumstances. (*Sathe, J.M.*) GULAB *v.* GIRDHARI. **1940 A.W.R. (B.R.) 126=1940 O.A. 775=1940 R.D. 367.**

——O. 22—*Applicability—Death of plaintiff after dismissal of suit—Right of legal representatives to file appeal.*

The provisions of O. 22, C. P. Code, do not apply where a party dies after a final decree has been passed. If a plaintiff sues and dies after his suit has been dismissed, his legal representatives may appeal from the decree without making any application to be brought on the record in his place. (*Becket, J.*) RISAL SINGH *v.* CHANDGI. **179 I.C. 760=11 R.L. 630=40 P.L.R. 767=A.I.R. 1939 Lah. 34.**

——O. 22—*Applicability — Municipality—Suit by Municipality represented by Special Officer—Decree—Appeal by defendant—Administration vested in commissioners pending appeal—Latter not impleaded in place of Special Officer—Effect—Abatement.*

A Municipality is a Corporation and continues to be a Corporation even when it is administered by the Special Officer appointed by the Government. The only difference is that by statutory provision the powers of the Commissioners are vested in an individual. But the corporate existence of the Municipality remains the same as a Corporation never dies. A Municipality brought a suit for the recovery of certain amount, through its Special Officer appointed by the Government. On a decree being passed in favour of the Municipality, the defendant filed an appeal against the Municipality making the Special Officer as representing the Municipality, a respondent. Before such appeal the administration of the Municipality was restored back to the Commissioners. It was contended by the respondent municipality that the appeal abated as the Commissioners were not substituted in place of the Special Officer as respondents.

Held, that the Municipality was a corporate body and it never died. The Commissioners who had taken charge of the Municipality could not be said to be representatives of the Special Officer, who was made a respondent. No substitution was therefore necessary in such a case and the appeal therefore did not abate. (*Mohammad Noor, J.*) RAM CHANDRA PRASAD *v.* PATNA CITY MUNICIPALITY. **4 B.R. 63=10 R.P. 234=171 I.C. 691=A.I.R. 1937 Pat. 588.**

——O. 22—*Applicability—Representative suit—Suit under S. 92 or O. 1, R. 8—Appeal—Death of some respondents — Legal representatives not impleaded—Effect—Abatement.*

The death of one or more of several plaintiffs or defendants or several appellants or respondents in a suit or appeal, who are suing or being sued in a representative character does not lead to the abatement of the suit or appeal on failure to bring on record the legal representatives of the deceased party or parties within the time limited by law. O. 22, C. P. Code, cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons not on record under O. 1, R. 8, C. P. Code, or to suit instituted under S. 92, C. P. Code. (*Khaja Mohammad Noor, J.*) JAGDAM RAM *v.* ASARFI RAM. **168 I.C. 113=3 B.R. 386=9 R.P. 464=1936 P.W.N. 867=17 Pat.L.T. 926=A.I.R. 1937 Pat. 149**

——O. 22—*Applicability — Revisions before High Court.*

The provisions of O. 22, C. P. Code, do not apply to revision applications and hence no rule of limitation governs the application for substitution of parties in a revision application. (*Radha Krishna Srivastava, J.*) KARIM HUSSAIN *v.* PEAREY LAL. **15 Luck 26=1939 O.W.N. 819 =184 I.C. 81=12 R.O. 81=1939 O.A. 686=1939 O.L.R. 582=1939 A.W.R. (C.C.) 149=A.I.R. 1939 Oudh 277.**

——O. 22—Applicability to proceedings under U. P. Encumbered Estates Act. *See* U. P. ENCUMBERED ESTATES ACT, RULES, R. 6 AND C. P. CODE, O. 22 **1939 A.W.R. (H.C.) 713.**

——O. 22—If inconsistent with S. 50 of U. P. Encumbered Estates Act. *See* U. P. ENCUMBERED ESTATES ACT, S. 50 AND C. P. CODE, O. 22. **1940 O.A. 518.**

——O. 22, R. 1—*Plaintiff transferring all his rights—Transferees parties—Decree in ignorance of death of transferor—If a nullity.*

Where a plaintiff after the institution of a suit transfers his entire rights but continues as co-plaintiff with his transferees and dies during the pendency of the suit and a decree is passed in ignorance of such death, the decree does not become a nullity because of that plaintiff's death, for the reason that after his transfer he was not a necessary party to the suit. (*Thomas, C.J. and Yorke, J.*) PARMA SAH *v.* UNITED PROVINCES. **181 I.C. 662=1939 O.L.R. 345=11 R.O. 310=1939 O.W.N. 500=1939 O.A. 464=A.I.R. 1939 Oudh 196.**

——O. 22, R. 1—*Right to sue—Survival of—Suit for damages for malicious prosecution—Dismissal of suit in first Court or in Court of appeal—Appeal—Nature of claim—Death of respondent—Effect—Abatement.*

In a personal action like a suit for damages for malicious prosecution, if, in the first Court, the result was a dismissal of the suit, the plaintiff, in appealing against it, is only seeking to enforce the very claim which he unsuccessfully sought to enforce in the suit. The appeal, therefore, partakes of the character of the suit and the

C. P. CODE (1908), O. 22, R. 1.

"right to sue" will not survive on the death of either party. The appeal cannot be continued even in respect of costs or other reliefs which are merely incidental to the main relief. The same principle applies to the dismissal of the suit in appeal and the second appeal would abate on the death of either party. (*Gruer, J.*) MANIRAMLALA BALIRAMLALA *v.* MT. CHATTIBAI. I.L.R. (1938) Nag. 280=170 I.C. 159=10 R.N. 48=A.I.R. 1937 Nag. 216.

——O. 22, R. 1—*Suit for damages for malicious prosecution—Death of plaintiff after decree—Execution by Legal representative—Permissibility.*

It is no doubt true that the right to get compensation for malicious prosecution is personal to the person wronged. and to such a right the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) fully applies. If, therefore, such person dies before suing the wrong-doer, his heirs, executors, or administrators cannot, after his death, maintain an action for the same relief against the wrong-doer. In such a case, clearly, there is a "discharge of the tort" by the death of the person wronged, and the wrong-doer is released from all liability for his tortious act. It is equally clear that if the injured person had brought a suit in his life-time, but had died before a decree had been passed in his favour, the suit would have abated and his legal representatives could not have continued the suit after his death, for the "right to sue" in such a case being personal to the deceased did not survive. The position, however, is different when the suit had been decided in the plaintiff's time and a decree passed in his favour granting him compensation. On the passing of the decree, there is no longer an *actio personalis* in existence; it has passed into a judgment and become a matter of record (*transit in rem judicatum*). The original personal claim has merged in the decree of the Court and as such its character has entirely changed. The *quondam* plaintiff, as the decree-holder, has acquired the right to realise the amount decreed from the judgment-debtor, and this is a right of an entirely different character. He may enforce it himself by process of law, or (unlike the original claim) he may assign it to a third party, who can execute the decree. Further, the decree itself (also unlike the original claim) is liable to attachment by a creditor of the decree-holder. It has to all intents and purposes, become a part of the "property" of the decree-holder and, on his death, it devolves, as a part of his estate, on his heirs, executors or administrators, and they can execute it in the same manner as he would have done, if alive. (*Tek Chand and Ram Lall, JJ.*) SALIG RAM *v.* CHARAN DASS. 185 I.C. 877=12 R.L. 329=41 P.L.R. 610=A.I.R. 1939 Lah. 492.

——O. 22, Rr. 2, 3 and 4—*Applicability—Death of one of the appellants and one of the respondents—Heirs already on record—Application for substitution—Necessity—Abatement.*

When in an appeal against a decree dismissing a suit, one of the appellants and one of the respondents die pending the appeal, and all the heirs of the deceased appellant and respondent are already on the record, the case is governed by R. 2 of O. 22, C. P. Code, and not by Rr. 3 and 4; no application for substitution is therefore necessary in such a case. The appeal cannot therefore abate by reason of the omission to apply for substitution. Even if it be that there are other heirs of the deceased appellant besides those on the record, there cannot be a total abatement of the appeal, when the shares or interests of the several appellants are separate. The surviving appellants. if successful, will get a decree to the extent of their shares. (*Macpherson and Khaja Mohamad Noor, JJ.*) SANKRU MAHTO *v.* BHOJU MAHATO. 15 Pat. 326=165 I.C. 612=9 R.P. 198=17 Pat.L.T. 584=3 B.R. 64=A I.R. 1936 Pat. 548.

C. P. CODE (1908), O. 22, R. 2.

——O. 22, R. 2—*One of five Jat brothers owning property transferring it—Suit for possession against transferee by all brothers—One brother dying during pendency of suit—His legal representatives not brought on record—Suit, if abates as a whole.*

The rule of joint ownership and survivorship as understood by the Benares School of Hindu Law does not apply to Jat agriculturists. They enjoy the family property as tenants in common and share of each is capable of separation and division. Where therefore one of five Jat brothers, owning certain property, transfers it and the brothers institute a suit for its possession and during the pendency of the suit one of the brothers dies but his legal representative is not brought on record, the suit abates only as regards the share of the deceased brother and does not abate as a whole. (*Agha Haidar, J.*) KEHR SINGH *v.* CHANDA SINGH. 164 I.C. 971=9 R.L. 184=A.I.R. 1936 Lah. 578.

——O. 22, R. 2 and O. 23, R. 1(3)—*Scope—Death of one of several plaintiffs—Heir refusing to join as plaintiff added as* pro forma *defendant—Suit then proceeded with—Abatement—Refusal to join as plaintiff—If withdrawal or abandonment of suit—Subsequent suit by such heir—If barred.*

Where the legal representative of a deceased plaintiff is added as a *pro forma* defendant, on his refusal to join as a plaintiff, and the suit proceeds as between the remaining plaintiff and the defendant and the newly added defendant, there is sufficient compliance with the requirements of the law, and there is no abatement in such a case. The fact that the legal representative does not become a plaintiff does not amount to a withdrawal of the suit by him so as to make O. 23. R. 1 (3), C. P. Code, applicable to the case. Where he merely refuses to join as a plaintiff and is impleaded as a defendant, and he does not make any formal application for withdrawing the suit or abandoning any part of his claim, O. 23, R. 1 (3), C. P. Code, will not apply, so as to bar a subsequent suit by him. (*Fazl Ali and Varma, JJ.*) MANKI KANAK RATAN *v.* SUNDAR MUNDA. 179 I.C. 834=11 R.P. 413=5 B.R. 298=1939 P.W.N. 41=20 P.L.T. 346=A.I.R. 1939 Pat 225.

——O. 22, R. 2—*Suit by reversioners as such—Death of one—Effect—Failure to implead legal representative—Abatement.*

Where two of the nearest reversioners file a suit to challenge an alienation by a widow and one of them dies during the pendency of an appeal filed by both of them and in ignorance of that and without the addition of his legal repre-

sentative the appeal is disposed of, on a contention that the appeal had abated, it was held, that the right sought to be enforced was an individual right in each of the plaintiffs and not a joint right and as such the failure to add the legal representative of the deceased reversioner could not affect the rights of the other reversioner to prosecute his appeal. (*Iqbal Ahmad, J.*) ANANT BAHADUR SINGH *v.* TIRATHRAJ. **184 I.C. 169=12 R A. 187=1939 A.W.R. (H.C.) 411=A.I.R. 1939 All. 526.**

——**O. 22, R. 3**—*Appeal by deity—Abatement against one of shebaits—Appeal, if competent.*

Per *Jack, J.*—An appeal by a deity is not incompetent merely by reason of its being allowed to abate as against the heirs of one of the shebaits who died pending the appeal. (*Jack and Khundkar, JJ.*) LAKSHMI NARAYAN JIE *v.* JAGADISH CH. SUR. **42 C.W.N. 837=177 I.C. 477=11 R C. 247=A.I.R. 1938 Cal 541.**

——**O 22, R 3**—Applicability—Application by several persons for leave to sue as pauper—Death of one—Right of heirs to be, impleaded and to continue. *See* C. P. CODE, O. 33, R. 1. **A.I.R. 1936 Pat. 591.**

——**O. 22, R. 3**—*Applicability—Application for substitution as lessee of deceased plaintiff.*

O. 22, R. 3, which deals with substitution after the death of a party, does not apply to a man who does not come in as a legal representative of a deceased party but as an assignee from him. Where the right which a person claims does not accrue to dim on the death of the plaintiff but on a lease obtained by him from her in her lifetime it is obvious that he cannot come in as a man entitled to have his name substituted in consequence of the death of the original plaintiff. (*Mahomed Noor and Saunders, JJ.*) GOBARDHAN MUKHERJI *v.* SALIGRAM MARWARI. **15 Pat. 82=8 R.P 308=159 I.C. 828=17 Pat.L.T. 73=A.I.R. 1936 Pat. 123.**

——**O. 22, Rr. 3 and 4**—*Applicability—Civil Revision petition under S. 115—Death of petitioner—Legal representative not coming on record within time—Effect—Order in revision petition more than 90 days after death of petitioner—Legality—If nullity.*

The provisions of O. 22, C. P. Code, apply to Civil revision-petitions under S. 115, C. P. Code, where the petitioner in a civil revision petition dies, and his legal representatives do not apply to be brought on the record and to continue the revision petition, within the period of 90 days prescribed there for the revision petition abates. After the said 90 days there is no revision petition pending in the High Court. If the High Court in ignorance of the death of the party disposes of and passes an order on that petition, after it has abated, that order is without jurisdiction and a nullity. (*Stodart, J.*) BASAVANJANEYULU *v.* RAMALINGAYYA. **176 I C. 344=11 R.M. 67=1937 M.W.N. 787=A.I.R. 1938 Mad. 115.**

——**O. 22, R. 3**—*Applicability—Decree passed before death of appellant—Limitation for appeal.*

O. 22, R. 3, C. P. Code, which relates to the abatement of a suit or an appeal [*vide* S. 107 (2)] during the progress or hearing of that suit (or appeal) has no application in cases where original or appellate decrees have been passed before the death in question. The limitation for appeal in such a case therefore is the usual period of 90 days, not from the death of the appellant, but from the date of the decree. (*Mosely, J.*) DAW SEIN TIN *v.* CHINESE KWAN TEIN. **169 I. . 398=9 R.R. 399=A.I.R 1937 Rang. 199.**

——**O. 22. Rr. 3, 4 and 8**—*Applicability—Execution proceedings.*

The provisions of Rr. 3, 4 and 8 of O. 22 do not apply to proceedings in execution of a decree. (*Jai Lal, J.*) BALMOKAND *v.* RAM SARAN DAS. **163 I C. 59=8 R.L. 990=38 P.L.R. 281=A I.R 1936 Lah. 519.**

——**O. 22, Rr. 3 and 4**—*Applicability—Mortgage suit—Death of plaintiff after preliminary decree and before final decree.*

The provisions of Rr. 3 and 4 of O. 22 of the Code have no applicability to a case where the plaintiff dies after securing a preliminary decree and before the passing of the final decree in a mortgage suit. (*Addison and Abdul Rashid, JJ.*) HARI CHAND *v.* DINA NATH. **17 Lah. 817=39 P. L R. 168=168 I.C. 868=9 R.L. 679=A.I.R. 1937 Lah. 164.**

——**O 22, Rr. 3 and 4**—*Applicability—Person appointed under O. 1, R. 8 to sue and defend.*

Where a person is appointed by the Court on an application under O. 1, R. 8 to be sued and defend the suit on behalf of a class, he is not a party to the suit in his personal capacity, but is impleaded as a representative of a class and derives authority to do so from the order of the Court. This right is personal to him, and on his death, it does not survive to his personal heirs who, without another order by the Court appointing them, or any of them, *eo nomine* have no authority to act as representatives of the class. In such a case the right to sue does not survive, and therefore the provisions of O. 22, Rr. 3 and 4 do not apply. Hence it is not necessary for the plaintiff under the law to bring his legal representatives on the record as defendants, as required by O. 22, R. 4 within the period of 90 days prescribed under Art. 177, Limitation Act. (*Tek Chand and Dalip Singh, JJ.*) FAZAL RAHIM KHAN *v.* HUSSAINA. **I.L.R. (1940) Lah. 199=188 I.C. 189=12 R.L. 507=A.I.R. 1939 Lah. 572.**

——**O. 22, R. 3**—*Applicability and scope—Suit by Hindu—Death of plaintiff leaving sons and widow—Sons alone brought on record as legal representatives—Death of widow subsequently—Widow supposed to be heir on account of Hindu Women's Rights to Property Act—Sons not described as heirs of widow as well—Effect—If causes abatement of suit.*

There is no justification for enlarging the words of O. 22 R. 3, C. P. Code, so as to cover a case where all that is required is formal amendment of the record, and not the addition of new parties. There is no justice in holding that a suit abates for want of parties when all parties interested are in fact before the Court. A person who is already a party cannot be made a party over again. If the proper parties are not before the Court, the suit cannot proceed; but if a party is on the record, he can appear either in person or by counsel and make any representation which seems good to him whether in one capacity or in more than one capacity and being on the record, it is competent to him to put in a plaint or written statement stating his attitude in the different capacities in which he is suing or is being sued.

C. P. CODE (1908), O. 22, R. 3.

On its being brought to the notice of the Court that the record that does not show that he is suing or is being sued in more than one capacity, it is the duty of the Court to have the record amended. An amendment of that sort can be made at any time. The fact that the interest of the party pleading has not been properly shown on the record does not justify an order striking out the pleading. A. K., a Hindu, brought a suit in 1935 for possession of certain property as reversioner to the estate of another. He died on 1—2—1938. On 21—3—1938 an application was made for substitution and his three sons were brought on record as his legal representatives. Besides the sons, the plaintiff also left a widow who was, however, not brought on the record. She died on 15th April, 1938. The Hindu Women's Rights to Property Act came into force on 14th April, 1937, and it was contended for the defendants, that the widow was an heir along with the three sons, that she was not brought on the record and that on her death, the sons should have been made parties as her legal representatives also, and that since the sons were not described as suing not only as heirs of the plaintiff but also as heirs of their deceased mother, the suit abated at least in respect of the widow's interest.

Held, that assuming that the widow was an heir of the deceased plaintiff and therefore should have been brought on the record, since her heirs were already on the record. the amendment describing them as her heirs also could be made at any time, and the suit therefore did not abate. (*Beaumont, C.J. and Sen, J.*) NARANLAL JETHALAL *v.* SHIVPRASAD ACHRATLAL **I.L.R. (1940) Bom. 487=42 Bom.L.R. 494=A.I.R. 1940 Bom. 259.**

——**O. 22, Rr. 3, 4 and 12**—Applicability to execution proceedings — Application to bring on record legal representatives of deceased decreeholder. *See* C. P. CODE, S. 47. **A I.R. 1939 Sind 234.**

——**O 22, Rr. 3 and 9**—*Death of appellant—One only of his legal representatives brought on record within time—Appeal, if abates.*

O. 22, R. 3 read with R. 9 deals with representation of deceased appellant. Upon the death of the appellant, if one of his legal representatives is properly brought on record, this would prevent the appeal from abating. Applications to place other legal representatives on record can be made and allowed even after the period of limitation has expired and such applications do not operate as an automatic abatement of the appeal. (*Young, C.J. and Ram Lall, J.*) UMRAO BEGUM *v.* RAHMAT ILAHI. **I.L.R. (1939) Lah. 433=41 P.L.R. 843 =186 I.C. 77=12 R.L 341=A.I.R. 1939 Lah. 439.**

——**O. 22, R. 3**—*Death of some plaintiffs thereafter—Preliminary decree for mesne profits—Legal representatives not added—Effect.*

Where a preliminary decree has been passed directing ascertainment of mesne profits and some of the plaintiffs die after it, the suit does not abate by reason of the non-substitution of the legal representatives of the deceased plaintiffs within the time limited by law (*Guha and Bartley, JJ.*) PRIYABALA DASSI *v.* SARAJUBALA CHOUDHURANI. **168 I.C. 289=9 R.C. 809=41 C.W.N. 177=A.I.R. 1936 Cal. 540.**

C. P. CODE (1908), O. 22, R. 3.

——**O 22, Rr. 3 and 11**—*Death of sole defendant appellant—Substitution of some only of his heirs—Abatement of appeal.*

Where a sole defendant in a suit against whom a decree is passed, dies pending the appeal filed by him, and some only of his heirs are substituted, within time as appellants, the appeal abates unless the existence of the other heirs are unknown. If any of them are unwilling to proceed with the appeal, they must be made respondents. (*Sen, J.*) HAFIJUL HOQUE *v.* ALTAP HOSSAIN. **43 C.W.N. 1088.**

——**O. 22, Rr. 3 and 10**—*Difference between.*

There is a difference between R. 3 and R. 10. In case there is a death of a party to a suit, the Court, on a proper application, is bound to substitute the legal representative of the deceased party under R. 3, while R. 10 refers to cases of assignment, creation or devolution of an interest during the pendency of a suit other than on death etc. In this case the Courts have a discretion to give leave for the suit to be continued by or against the person to or upon whom such interest has come or devolved. (*Mahomed Noor and Saunders. JJ.*) GOBARDHAN MUKHERJI *v.* SALIGRAM MARWARI. **15 Pat. 82=8 R.P. 308=159 I. C. 828=17 Pat.L.T 73=A.I.R. 1936 Pat. 123**

——**O 22, R. 3**—*Joint interest—Death of one of two decree-holders—Appeal against the other —Effect.*

Where there is a decree in favour of two persons and one of them dies and the judgment-debtor prefers an appeal against the other only, he takes the risk that whatever relief he might obtain in the appellate Court, it will bind that party only against whom the appeal is filed and will have no effect on the party left out, unless it can be shown that the appeal itself was incompetent in the absence of the legal representatives of the dead person as a party to the appeal along with the survivor. (*Marsh, S.M. and Mehta, J. M.*) BANSDEO SINGH *v.* KIRPA NARAIN SINGH. **1939 RD. 310=1939 A.W.R. B.R. 259.**

——**O. 22, Rr. 3, 4 and 11**—Order that cross-appeal has abated—If a decree and appealable. *See* C. P. CODE, S 2 (2) AND O. 22, RR. 3, 4 AND 11. **I L R. (1940) Nag. 324.**

——**O. 22 Rr. 3 and 11**—Scope—If overridden by O. 41, R. 4. *See* C. P. CODE, O 41, R. 4. **1940 P.W.N. 361=A.I.R. 1940 Pat. 346 (F.B.).**

——**O. 22, R. 3**—*Scope—Representative suit—Appeal by defendants—Death of one—Omission to implead legal representatives—Order abating whole appeal—If justified.*

A suit against Khadims in a representative capacity, was decreed, and all the defendants appealed. One of them died, but his legal representatives were not brought on record within the time limited. The Court passed an order that the appeal abated not only as against the deceased appellant but as a whole.

Held, treating a second appeal as a revision petition, (1) that an order that a suit or an appeal abated as a whole was not one falling under O. 22 R. 3, C. P. Code, but was of the nature of an order of dismissal of the appeal as incompetent for want of proper parties to proceed with it; (2) that having regard to the fact that the grounds of appeal were common to all the appellants, it was possible to proceed with the appeal even in the absence of the heirs of the deceased

appellant, and the appellate Court could have varied the decree under O. 41, R. 4, C. P. Code, in favour of the deceased, even if he had not appealed. Consequently the order abating the whole appeal was not justified and must be set aside. (*Weston.*) ABDUL AZIZ *v.* AMIR ALI. **1935 A.M.L.J. 102.**

——**O. 22, R. 3**—*Substitution of wrong heir—Absence of enquiry—Existing members not representing others—Abatement as a whole.*

D filed a suit against two brothers. The plaint did not show that the two brothers were impleaded as representing the joint family. After the filing of the appeal by *D*, he applied for substituting the widow of the younger brother as his heir as he had since died. The surviving brother respondent filed an affidavit on the date of hearing stating that the widow was not the heir but the deceased died joint with him and so he, his two minor sons, the minor sons of the deceased and his adult nephew were the real heirs. He further contended that as they were not substituted within time, appeal abated as a whole. *D* lived close by to the respondents and had dealings with their family.

Held, that under the circumstances even though *D* could not be said to have any motive for applying to substitute a wrong person as the heir of the deceased, still when he was in a position to know who the real heirs were on making inquiries which he failed to make, his application to substitute a wrong person as the heir of the deceased could not be of any use to him to avoid the abatement. The appeal therefore abated as a whole.

Held further, that as the suit was not against the brothers as representing the family and as no contention was raised that the surviving brother was the karta of the family, the surviving brother could not be said to be representing the entire family, in the presence of the adult nephew. Substitution was therefore necessary and it not being made, the appeal abated. (*Courtney-Terrell, C. J. and Madan, J.*) DEVJI NARAYANJI *v.* RATANSHI HIRJI BHOJRAJ. **172 I.C. 741=10 R. P. 342 (2)=A.I R 1937 Pat. 612.**

——**O. 22, Rr. 3 and 11**—*Suit by co-sharers to recover revenue paid—Presumption, if any, that each has paid a portion—Death of one of the plaintiffs, respondents in appeal—Legal Representative not added—Appeal if abates* in toto.

Though joint purchasers may have equal shares in the property they buy, and may as between themselves, each, be liable to pay a half of the revenue, each of them is so far as the Government is concerned liable to pay the whole. So when both of such persons sue as one entity to recover from the defendant the revenue which they had been wrongly compelled to pay, there is no presumption that each of them has paid one half of it. When such a suit is decreed and pending the appeal one of the plaintiffs respondents dies, the whole appeal abates as no presumption could be made about the payment made by the dead person. (*Hamilton and Bennett, JJ.*) HINGA LAL *v.* AHMAD ALI KHAN. **183 I.C. 479=1939 O A. 622=1939 R.D. 430=1939 A.W.R. (C.C.) 105=1939 O.L.R. 519=12 R O. 40=1939 O.W.N. 711=A.I.R. 1939 Oudh 241.**

——**O. 22, Rr. 3 and 8**—*Suit by daughter for possession of father's estate—Dismissal—Appeal by plaintiff—Death of appellant leaving insolvent son—Application by Official Receiver to be impleaded—Subsequent withdrawal — Subsequent application by insolvent son for permission to continue appeal in his own right as reversioner—Maintainability.*

K brought a suit for possession of certain properties as constituting the estate of her deceased father. The suit was dismissed and *K* appealed to the High Court. Pending the appeal she died, and her son, the petitioner applied to be allowed to continue the appeal as the actual reversioner of his mother's father in his own right and not as claiming through his mother. He was, however, an insolvent when he filed the application. Before his application, the Official Receiver had applied to be brought on the record, but later on withdrew the application as he was not placed in possession ot funds to meet the costs.

Held, that this was a case of an after-acquired property of the insolvent petitioner, and though the petitioner might maintain a suit to recover the after-acquired property in the hands of a stranger unless the receiver intervened, the Official Receiver having already intervened, he alone could maintain the appeal; since the rights of the petitioner, whatever they were, had devolved on the Official Receiver, the law did not permit the petitioner to maintain or continue the appeal. Once the property had vested in the receiver, the latter could not by withdrawing his intervention divest himself of the property and re-vest it in the insolvent.

Varadachariar, J.: *Quaere.*—Whether the same result would follow if the petitioner applied for leave to continue the appeal as a legal representative in the strict sense of the term, *i e.*, as claiming through his deceased mother? (*Leach, C. J., Varadachariar and Pandrang Row, JJ.*) SOBHANADRI SASTRULU *v.* NAGAYYA SASTRY. **I L.R. (1938) Mad. 420=175 I.C. 398=10 R M. 773=1938 M. W.N. 272=47 L.W. 363=A.I.R. 1938 Mad. 420=(1938) 1 M.L.J. 413 (F.B.).**

——**O. 22, R. 3 (1)**—*Scope—Absence of application under—Power of Court to order substitution—Proper course—O. 22, R. 9.*

The sole appellant in an appeal to the High Court from a decree in a partition suit having died pending the appeal, his advocate informed the Court that the deceased appellant had left him surviving two minor sons as his legal representatives and the Court thereupon made an order substituting the two minor sons in the place of the deceased appellant and appointing the Deputy Registrar of the Court as their guardian *ad litem*.

Held, that in the absence of an application by the legal representatives of the appellant under O. 22, R. 3 (*i*), C. P. Code, it was not open to the Court to substitute them and direct the appeal to be proceeded with in their name and that the appeal must therefore be regarded as having abated.

Held further, that the proper protection for the minors was an application on their behalf at such date as they may be advised under O. 22, R. 9 (2), under which they might ask for an order to set aside the abatement. (*Macpherson and Fazl Ali, JJ.*) HARIPADA GUPTA *v.* LAL MAHTO. **162 I.C. 592=8 R.P 561=17 Pat.L.T. 129=1936 P.W.N. 171=A.I.R. 1936 Pat. 266.**

C. P. CODE (1908), O. 22, R. 3.

——O. 22, R. 3 (1)—*Right to apply under—If confined to heirs of deceased plaintiff—Person claiming to be legal representative or claiming interest in continuance of suit—Right of.*

There is nothing in O. 22, R. 3 (1), C. P. Code, to suggest that an application under that rule can only be made by one who is legal representative. The right to make an application under the rule is not confined to the heirs of a deceased plaintiff. An application by a person who claims to be a legal representative, although he does not turn out to be one after full inquiry or by one who claims to have an interest in the continuance of the suit must be held to be such as would not allow the suit to abate. The only limitations are that the application must be a *bona fide* one and that the applicant must have claimed an interest in the suit in which application is made under the rule in good faith. (*Abdur Rahman, J.*) SUBBANAGALU NAIDU *v.* BALANAGAMAYYA CHETTIAR. **180 I.C. 340=11 R.M. 691=48 L.W. 932=1939 M W N. 95=A.I.R. 1939 Mad. 148.**

——O. 22, R. 4—*Abatement of appeal—Decree common to all defendants respondents—Abatement of appeal against one of them—Abatement in toto.*

Although the decree appealed against is common to all the defendants against whom the suit was dismissed, the abatement of appeal against one of the defendants-respondents does not have the effect of the abatement of the entire appeal if the interest of that defendant is quite distinct and separate from that of the other defendants. (*Thomas and Zia-ul-Hasan, JJ.*) RAM CHANDRA *v.* MAKHDOOM SINGH. **172 I C. 655=1938 O.L. R. 21=1938 O.A. 26=1938 O.W.N. 40=10 R.O 193=A.I.R. 1938 Oudh 62.**

——O. 22, R. 4—*Abatement of appeal—Legal representatives of* pro forma *respondent not brought on record.*

Where the legal representative of a *pro forma* respondent who is dead is not brought on record, the appeal does not abate *in toto* (*S.K. Ghose and Patterson, JJ.*) SABITRI BAI *v.* JUGAL KISHORE. **179 I C. 95=11 R.C. 468=43 C.W.N. 41=A.I.R. 1938 Cal. 639.**

——O. 22, R. 4—*Appeal by applicant under U. P. Encumbered Estates Act—Death of some creditor respondents—Legal representative not added—Appeal, if abates* in toto.

Where in an appeal by an applicant under the U. P. Encumbered Estates Act some of the creditor respondents died during its pendency and their legal representatives are not added as parties, the appeal must abate as a whole. (*Hamilton and Yorke, JJ.*) UDAI PRATAP SINGH *v.* DWARKA PRASAD. **189 I. C. 292=1940 O. A. 648 =13 R O. 56=1940 A.W R. (C.C.) 352=1940 O, L.R. 421=1940 O.W.N. 622=A.I.R. 1940 Oudh 365.**

——O 22, R. 4—*Appeal—Death of one of several respondents—Withdrawal of appeal as against him—Effect.*

Where, on the death of one of several respondents, the appellant withdraws his appeal as against him intead of bringing his legal representatives on record, the whole appeal will abate and become incompetent if it will result in two inconsistent decrees being made. (*Norman.*) MOHAMMAD BUX *v.* HAZARAT NOOR KHAN. **1936 A.M.L.J. 19.**

C. P. CODE (1908), O. 22, R, 4.

——O. 22, Rr. 4 and 11—*Appeal—Death of one of two respondents, decree-holders—Abatement only partial.*

There were two separate attachments of a bungalow by two decree-holders. On objection to the attachments being dismissed, a suit was filed under O. 21, R. 63, C. P. Code, which was also dismissed. The object or preferred an appeal impleading both the decree-holders as respondents. When the appeal came up for hearing, it was reported that one of the decree-holders had died more than three months previously and an order was passed that the appeal had abated against him.

Held, that the appeal did not abate in *toto* and that it could proceed against the surviving respondent. (*Jai Lal and Sale, JJ.*) DEWAN CHAND *v.* PUNJAB AND KHASHMIR BANK, LTD., RAWALPINDI. **170 I.C. 68=10 R.L. 75=38 P.L.R. 269 =A.I.R 1937 Lah. 220.**

——O. 22, R. 4—*Applicability—Abatement of counter-claim—Death of plaintiff in suit—Heirs of plaintiff coming on record and amending plaint—Duty to amend written statement—Liability of defendants counter-claiming—Abatement.*

A counter-claim stands in the same category as a cross-suit for the purposes of the C. P. Code, and counter-claim would abate by reason of the omission to bring the heirs of the deceased defendant to the counter-claim on record in the counter-claim. On the plaintiff's death his heirs can come on record and amend the plaint which is their pleading. But it is no part of their duty to amend the title of the written statement. If the defendant who counter-claims wants to amend the title of his counter-claim and his written statement, it is his duty to obtain an order for that purpose. (*Kania, J.*) HIRJI RAMJI *v.* DAULATRAM RATANJI & Co. **I.L.R (1940) Bom. 10=187 I C. 226=12 R B. 459=41 Bom. L.R. 1288=A I.R. 1940 Bom. 117.**

——O 22, Rr. 4 and 6—*Applicability—Death of mortgagor after preliminary decree—Final decree in ignorance of death—If a nullity—Procedure for challenging decree.*

A final decree in a mortgage suit is a "decree" within the meaning of S. 2 (2), C. P. Code, and as such, is subject to the general rule that a decree made against a dead defendant, *i.e.*, a defendant dead at the date it was made, is a nullity. The legal representative can properly raise the question of validity of the decree so made in an independent suit, and cannot be prejudiced by the fact that their interests were technically represented in the execution by an administrator appointed *pendente lite*. It is not necessary that they should take steps in the mortgage suit itself. (*Panckridge, J.*) ABDUL RAHIM *v.* EZEKIEL. **63 Cal. 472.**

——O. 22, Rr. 4 and 5—*Applicability—Defendant dying after passing of preliminary decree.*

O. 22, Rr. 4 and 5, C. P. Code, do not apply to a case where the defendant dies after the passing of a preliminary decree as the rights of the parties are already determined by the passing of the preliminary decree. (*Addison and Abdul Rashid, JJ.*) JANI *v.* ABDUL KARIM **174 I.C 898=10 R.L. 624=A.I.R 1937 Lah. 615.**

——O 22, R. 4—*Applicability—Mortgage suit—Preliminary decree—Subsequent death of mortgagor—Heirs not impleaded—Abatement—Rule—O. 22, R. 6.*

C. P. CODE (1908), O. 22, R. 4.

O. 22, R. 4, C. P. Code, does not apply to a case in which a preliminary decree has been passed. Where in a mortgage suit, the mortgagor dies after the preliminary decree, and his heirs are not brought on the record within the time limited, there is no abatement of the suit. The preliminary deeree is a good decree although the mortgagor dies on the same on which judgment is proved but the decree is passed only the next day. O. 34, R. 6 applies to the judgment based on arguments which have been concluded before the death and such judgment may be the judgment founding either a preliminary decree or a final decree (*Beaumont, C.J. and Sen, J.*) DAWARALI JAFARALI SAIYAD *v.* BAI JADI. **42 Bom.L.R. 663=A.I.R. 1940 Bom. 318.**

——**O. 22, R 4**—Applicability—One of the impleaded nonappealing plaintiffs and a *pro forma* defendant dying — Legal representatives not brought on record—Appeal if abates *See* C. P. CODE. O 41, R. 4—APPLICABILITY. **1938 A.W.R. (H.C) 138.**

——**O 22, R. 4**—*Applicability—Representative suit—Appeal from decree in—Death of some respondents—Omission to implead heirs—Effect—Abatement—Procedure—Duty of Court.*

O. 22, C. P. Code, cannot be applied to a suit or appeal instituted or defended by a few persons on behalf of numerous persons not on record under O 1, R. 8, C P, Code, where certain respondents to an appeai are allowed by the Court to defend the appeal on behalf of all the respondents who are a large number, the death of some of such respondents defending the appeal will not result in the abatement of the appeal by reason of the omission to implead or substitute their heir within the time limited. It is for the Court in such a case to decide whether it will permit the remaining respondents to continue to defend the appeal or whether it will insist on the original number of respondents being maintained by adding some of the respondents. (*Harries, C.J. and Manohar Lall, J.*) HARSAMUKHI DASI *v.* AGADHU MOHAPATRA **18 Pat 723=188 I C 838=21 P.L.T. 637 =13 R.P. 43=6 B.R. 746=A I.R. 1940 Pat. 180.**

——**O. 22, Rr. 4 and 9**—*Application meant to be under R. 4—If can be treated as under R. 9.*

O. 22, Rr. 4 and 9 contemplate two separate proceedings and in no case can an application which is meant to be under O. 22, R. 4 be treated as one under O. 22, *R.* 9. (*Almond, J.C. and Mir Ahmad, J.*) KHUSHAL ASAF KHAN *v.* HARI SINGH. **190 I.C. 30=A.I.R. 1940 Pesh. 39.**

——**O. 22, R. 4**—Death of defendant—Omission to implead all legal representatives—Effect—Subsequent order allowing withdrawal of the suit with liberty—Legality—O. 23, R. 1. *See* C. P. CODE, O 23, R, 1 AND O. 22, R. 4. **40 C.W.N. 1019.**

——**O. 22, R. 4**—*Death of defendant—Sons impleaded—Death of one—Continuation of suit in ignorance of—Proceedings if void.*

A decree obtained after the death of a defendant cannot bind his representatives unless they had been made parties to the suit. But there is a difference between cases in which the original party to the action dies and his legal representative is not brought on the record and cases in which only one of several representatives brought in as such during the pendency of an action dies, and the estate continues to be represented by the

remaining legal representatives; in the second group there is no lack of representation of the estate as the remaining representatives can as well represent the estate as the original group did. Hence where on the death of a defendant his two sons are brought on record as his representatives, but one of them dies and this is not known to the plaintiff who continues the suit and the subsequent proceedings *bona fide* with the two sons on record and the other son contests all proceedings, the subsequent proceedings taken are not null and void. A.I.R. 1927 Lah. 6, Rel. on. (*Beasley, C.J. and Stodart, J.*) MUTHURAMAN CHETTIAR *v.* ADAIKAPPA CHETTY. **59 Mad. 660= 162 I C. 214=1936 M.W.N. 125=8 R.M. 966= 43 L.W. 500=A.I.R. 1936 Mad 336.**

——**O, 22, R. 4**—*Failure to implead all Legal Representatives of deceased defendant—If abates suit against him.*

The failure to implead all the legal representatives of a deceased defendant does not cause the suit to abate as against him. There is no provision in O. 22 R. 4, allowing a suit to abate when an application has been made, merely because the application does not include all the legal representatives of the deceased. (*Almond, J.C. and Mir Ahmad, A.J.C*) SARDAR BAHADUR KHAN *v.* MAJID **40 P.L.R. 90=172 I.C 980=10 R. Pesh. 46=A.I.R. 1938 Pesh. 4.**

——**O. 22, R. 4**—*Impleading of some only of the legal representatives—Effect.*

When a party takes proper steps to substitute on the record the representatives of an adversary who had died *pendente lite*, he is not to be penalised because he has not brought on record the whole of the representatives. He can only act to the best of his knowledge. Case law, Ref. (*Beasley, C.J. and Stodart, J.*) MUTHURAMAN CHETTIAR *v.* ADAIKAPPA CHETTY. **59 Mad 660=162 I.C. 214=8 R.M. 966=1936 M.W.N. 125=43 L. W. 500=A.I.R. 1936 Mad. 336.**

——**O. 22, Rr. 4 and 11**—*Joint interest—Relief claimed not separate but joint as against all respondents—Death of one respondent—Failure to add his legal representatives—Appeal, if abates* in toto.

Where an appellant claims correction of the *khatauni* and wants his name to be entered as the exclusive holder of the *sir* and *khudkasht* situated in *patti* and for the expunction of the names of all the respondents, and one of the respondents dies pending appeal and his legal representatives are not brought on record, under O. 22, R. 4 read with R. 11, the appeal abates not only against the legal representatives of that respondent but also as against the remaining respondents inasmuch as the relief claimed against the various respondents is not separate but joint. (*Sathe, J.M.*) RAM SHANKER LAL *v.* RAM BAHADUR LAL. **1940 R D. 217=1940 A W R. (B.R.) 82.**

——**O 22, Rr. 4 and 11**—*Joint relief against respondents—Death of one of them—Failure to add heir within limitation—Appeal, if abates* in toto.

Where in an appeal the relief claimed against the respondents is joint, and one of the respondent dies but his legal representatives are not added within the time allowed by law, the whole appeal will abate under O. 22, R 4 read with R. 11, C.P. Code. (*Sathe, J.M.*) EKADASH SHUKUL *v.* JAMUNA PRASAD. **1940 A.W.R. (B.R.) 128= 1940 O.A 779.**

C. P. CODE (1908), O. 22, R. 4.

——O. 22, R. 4—*Joint and several decree—Death of one of the judgment-debtors—Legal Representative not added—Effect.*

Where a joint and several decree is passed against a number of defendants and one of them dies and his legal representative is not brought on record, the suit does not abate against all. The proceedings can still go on against the remaining judgment-debtors. (*Davies.*) BENI PRASAD *v.* BASHIRAM. 1939 A.M.L.J. 109.

——O. 22, R. 4—*Legal representative already on record—Application, if necessary—Procedure*

Where the Legal representative of a deceased defendant is already on the record, an application to bring his legal representative on record within three months is not necessary. It is enough if the fact is brought to the notice of the Court and is recorded. (*Thomas, C. J.*) BISHUNATH PRASAD *v.* LALA JAMUNA DAS. 11 R.O. 89 =177 I.C. 979=1938 O.A. 791=1938 O.L.R. 463 =1938 O.W.N. 1043=A.I.R. 1938 Oudh 259.

——O. 22, Rr. 4 and 12—*Legal representative of judgment-debtor not brought on record—Execution proceedings—If a nullity.*

The failure to bring the legal representative of the judgment-debtor on record does not necessarily make the proceedings a nullity. (*Pollock, J.*) MST. GOMTI *v.* SOCIETY GHAR PINDARAI. 178 I.C. 988=11 R.N. 263=1938 N.L.J. 166=A.I.R. 1938 Nag. 308.

——O. 22, R. 4—*Legal representatives of one of defendants not impleaded in appeal—Abatement of appeal* in toto—*Test.*

If a decree is made jointly in favour of all the defendants, and their interests *inter se* are neither separate nor separable, it may lead to two conflicting decrees, if an appeal is allowed in the absence of some of the defendants in whose favour the original decree stands. In cases like these therefore, the non-inclusion of some of the defendants as respondents must naturally result in the failure of the whole appeal. But where this is not the case and there is no danger of coming into conflict with any other recognized principle of law, there is no bar against an appeal proceeding in the absence of some of the defendants who are not impleaded as respondents. A suit was brought by the daughter's sons of the deceased against the reversioners for a declaration that the property in suit belonged to them and was in their possession. On the death of one of the defendants during the course of the suit his legal representatives were brought on record. The suit was dismissed. In appeal from such decree, instead of impleading these legal representatives as respondents, the name of the deceased defendant was mentioned. The appellant applied for making them respondents but at a time when the limitation for appeal against them had expired.

Held, that as succession had opened, every reversioner was interested in the estate only to the extent of his own share and no more and so each reversioner had a clearly defined interest in the suit. The suit as brought though declaratory in form, was possessory in effect. It was as if each one of the defendants ran the risk of being disturbed *qua* his own share of the property and relief was claimed against him to that limited extent only. The appeal, in these circumstances, could not abate as a whole merely by the omission to implead the legal representatives of the deceased defendant as respondents. The appeal therefore could proceed against those defendants that were impleaded as respondents. (*Addison and Din Mohammad, JJ.*) HAYAT *v.* MUTALLI. 18 Lah. 746=40 P.L.R. 273=175 I.C. 819=11 R. L. 67=A.I.R. 1938 Lah. 35.

C. P. CODE (1908), O. 22, R. 4.

——O. 22, Rr. 4 and 11—*Preliminary decree in partition suit—Appeal—Death of respondent-alienee—Non-joinder of legal representatives—Effect—Appeal—If abates.*

Where there has been a preliminary decree in a partition suit, the right of action has been determined, it is merged in the preliminary decree and the rights of the parties are fixed; and if thereafter and before the final decree one of the defendants dies, there is no abatement of the suit, because no right of action continues after the preliminary decree and all that remains to be done is to carry out the directions contained in the preliminary decree so that the final decree may be passed. But it is not possible to apply the same principle to an appeal from the preliminary decree. In such an appeal in which the preliminary decree is put in jeopardy it is necessary that all the parties interested should be joined; and if a respondent who was one of the alienees impleaded in the suit dies during the pendency of the appeal and if his legal representatives are not impleaded as parties within the time limited, the appeal must necessarily abate. (*Davis J.C. and Mehta, A.J.C.*) DASSUMAL *v.* MUHAMMAD BAKHSH. 30 S.L.R. 428=170 I.C. 609=10 R.S. 69=A.I.R. 1937 Sind 208.

——O. 22, R. 4—Scope—Hindu joint family firm—Suit against—Death of one member—Omission to implead legal representative—Effect—Suit—If abates as a whole. *See* C. P. CODE, O. 30, R. 4. I.L.R. 1937 Nag. 423.

——O. 22, R. 4—*Scope—Legal representative of deceased defendant already on record but not as such—Application for substitution—Necessity—Abatement.*

The fact that the legal representative as a deceased defendant is already on the record, but not as such (but in another capacity) does not prevent the abatement of the suit, and a plaintiff is not thereby relieved from the duty of applying within the time limited for the substitution of the legal representative of the deceased defendant under O. 22, R. 4, C. P. Code. (*Engineer, J.*) KHODADAD *v.* BAI JERBAI. I.L.R. 1938 Bom. 64= 172 I.C. 919=10 R.B. 301=39 Bom.L.R.1156= A.I.R. 1938 Bom. 6.

——O. 22, R. 4—*Scope—Suit on basis of hand-note—Interest* pendente lite *not granted—Appeal—One of respondents dying—Legal representative not brought on record—Whole appeal—If abates—Test.*

The proposition that where the liability of the defendant is joint and several, it is open to the plaintiff on the death of one of them, to proceed against the remaining defendants alone, is true so far as a suit is concerned but different considerations arise in an appeal. There may be cases in which a suit might not have abated but an appeal will abate. The test to be applied is whether in the event of appeal being allowed as against the remaining respondents there would or would not be contradictory decrees in the same litigation

with respect to the same subject-matter. Where therefore in a suit on a hand-note, the trial Court having either intentionally or through oversight omitted to grant interest *pendente lite*, the plaintiff appeals from the suit praying for grant of interest *pendente lite* and during the pendency of the appeal one of the respondent dies and the appellant fails to bring his legal representative on record within the prescribed period, the appeal abates as a whole, because if the appeal is allowed there would be two inconsistent decrees on the basis of the same hand-note. Against some of the defendants it will be a decree for principal and interest only up to the date of the suit and not for interest *pendente lite*, while against others there will be another for the amount as well as for the interest *pendente lite*. 11 Pat. 538, Rel. on. (*Mohammad Noor and Varma, JJ.*) APURBA KRISHNA MITRA *v.* RAM BAHADUR. **161 I.C. 862 =8 R.P. 489=1936 P.W.N. 155=A.I.R. 1936 Pat. 191.**

——**O. 22, R. 4**—*Suit against Hindu brothers—Family 'business'—Death of eldest brother—Son not impleaded—Effect—Whole suit—If abates.*

In a suit filed against a Hindu joint family business formed by brothers none of them was impleaded as the manager of the joint family. The eldest member died but his son was not brought on record.

Held, that none of the other defendants had any right to represent the son of the deceased brother and therefore he was unrepresented and that the suit had abated against him.

Held, further, that the ordinary test to see whether the suit abated against other defendants was that if the continuation of the suit would result in conflicting decrees, then the suit must abate against the other defendants as well, but if there would be no such contradiction, then it would not abate against all. Hence in the present case there was no reason why the plaintiff should not be allowed to sue the other defendants and the suit had not abated against them (*Pollock, J.*) RAMCHANDRA *v* NARAYANDAS. **168 I.C. 342 =9 R.N. 251=A.I.R. 1936 Nag 292.**

——**O. 22, R. 4**—*Suit instituted in wrong Court in* 1934—*Plaint returned and presented in proper Court on 26th February*, 1935—*Two of the defendants dead in meantime and their legal representatvies not brought on record—On 20th May*, 1935 *plaintiff making necessary application therefor—Abatement of suit.*

A suit was instituted in 1934 in a Court which had no pecuniary jurisdiction to try it. The plaint was returned and presented in the Court of competent jurisdiction on 26th February, 1935. In the meantime two out of the number of defendants had died and the plaintiff had not brought their legal representatives on the record. On 20th May, 1935 the plaintiff made the necessary application to represent all the defendants. On 18th May the plaintiff applied under O. 1, R. 8 to allow certain defendants, named to represent all in the suit. The contesting defendants objected that the whole suit had abated as the representatives of the deceased defendants had not been impleaded within time.

Held, that the time during which the plaintiff prosecuted his case in the wrong Court did not matter, as it had no jurisdiction to deal with the case and consequently the suit could not but be taken to have been instituted for the first time on 26th February, 1935. The position was that at time of proper institution of the suit the list contained the names of two dead persons and that on being apprised of the fact the plaintiff on 20th May, 1935 replaced them by their legal representatives. Accordingly no question of abatement arose in the case. At most it could be considered that the new defendants were added for the first time on 20th May, 1935. This was material for the limitation but obviously had nothing to do with the abatement. (*Addision and Din Mohammad, JJ.*) GHULAM QADIR KHAN *v* GHULAM HUSSAIN. **174 I C. 247=10 R.L. 529=40 P.L.R. 103 =A.I R 1937 Lah. 794.**

——**O. 22, R. 4**—*Suit under S.* 44, *Agra Tenancy Act, against several defendants—Dismissal by trial Court and on appeal—Second appeal—Death of two respondents—Legal representatives not brought on record—Whole appeal—If abates.*

A suit against several defendants under S. 44 of the Agra Tanancy Act for ejectment and damages was dismissed and the dismissal was confirmed on appeal. Pending a second appeal two of the respondents died, but their legal representatives were not brought on the record within the time limited.

Held, that since the interests of the various respondents were not distinguishable, the appeal must abate completely against all the respondents and not only against the deceased parties. (*Knox, J.M.*) BISHESHAR PRASAD PANDE *v.* JAGARNATH KAMKAR. **1936 R.D. 473.**

——**O. 22, Rr. 4 and 11**—*Tests of abatement.*

If in an appeal, the absence of the legal representatives of a deceased party from the record would result in the possibility of two inconsistent and contradictory decrees or will make it impossible effectively to execute a decree that may be passed in the appeal, the appeal must fail. Where a joint relief is being sought for by the plaintiff against all the defendants on whose joint act the cause of action for the suit is based, and one of the defendants dies during the pendency of the appeal against the dismissal of the suit, and where his legal representatives are not brought on record, the appeal is incompetent. In the absence of the legal representatives it is not possible to grant the relief prayed for by the plaintiff appellant, because it involves the taking, of action which cannot be completed without their joining in it. (*Thom, C.J. and Ganga Nath J.*) DHANDEI KUER *v.* FATMA ZUHRA. **I.L.R. 1939 All. 921=185 I C. 649=12 R.A. 342=1939 A W.R. (H.C.) 699=1939 A.L.J. 807=A.I.R. 1939 All. 698.**

——**O. 22, R. 4 (3)**—*Abatement—If automatic —Express order of abatement by Court—Necessity.*

There is no necessity of making an express order of abatement when a party to a suit or appeal dies and no application is made in time for substitution of heirs The abatement takes place automatically (*Wadia and Wassoodew. JJ.*) ALABHAI AJSURBHAI *v.* BHURA BHAYA. **I.L.R. (1937) Bom. 602=10 R B. 207=171 I.C. 536=39 Bom.L.R. 444=A.I.R. 1937 Bom. 401.**

——**O. 22, R. 4 (3)**—*Abatement—If automatic —Order of Court—If necessary.*

When no application to bring on record the legal representatives of the deceased defendant is filed

C. P. CODE (1908), O. 22, R. 4.

within limitation, the suit abates automatically without any order of Court to that effect. An application filed to set aside such abatement within 60 days from the date of abatement of suit is proper and not premature, even though it is made before the order of the Court that the suit had abated. (*Pollock, J.*) HARISA RATANSA *v.* JANU. 169 I.C. 853=10 R.N. 26=A.I.R. 1937 Nag. 88.

——O. 22, R. 4 (3)—*Appeal—Death of one respondent—Legal representative not brought on record—Effect.*

Where during the pendency of an appeal from a decree, one of the respondents dies and no attempt is made to bring his legal representative on record, the appeal abates as against him and his legal representative cannot be affected by any decision made in the appeal. (*Stone, C. J. and Bose, J.*) GHANARAM *v.* BALBHADRA SAI. I.L.R. (1938) Nag. 370=173 I.C. 44=10 R.N. 266=A.I.R. 1938 Nag 42.

——O. 22, R. 4 (3)—*Preliminary foreclosure decree in favour of three persons—Appeal against—One of plaintiff respondents dying—Legal representative not brought on record—Whole appeal—If abates.*

To decide whether a partial abatement leads to an abatement of the appeal in its entirety, one of the under-lying principles is: If a decree can be passed and given effect to in so far as the right of the parties actually before the Court are concerned without interfering with the interests of others, then the suit or the appeal can continue; if not, it abates as a whole. In a suit three persons obtained a preliminary decree for forclosure against some persons upon a mortgage executed by them. The defendants thereupon appealed. During the pendency of the appeal one of the plaintiff-respondents died and no attempt was made to bring his legal representatives on record.

Held, that because of the abatement with respect to the deceased respondent, the whole appeal abated. (*Stone, C.J. and Bose, J.*) GHANARAM *v.* BALABHADRA SAI. I.L.R. (1938) Nag. 370=173 I.C. 44=10 R.N. 266=A.I.R. 1938 Nag 42.

——O. 22, R. 4 (3)—*Suit for partition against brothers—Appeal against order passed in execution—Death of one brother pending appeal—Effect—If whole appeal abates.*

A suit for partition and proceeding in execution of such a suit must proceed against all the co-sharers and they or their legal representatives must be on the record. Where in a suit for partition against brothers an appeal is brought against an order passed in execution and during the pendency of the appeal one of the respondent brothers dies, the appeal abates as a whole if his legal representative is not brought on the record within limitation. The consequence following the abatement of an appeal cannot be avoided by the simple device of an affidavit in appeal that the party who has died gave up his interest in the property bebore the order in execution appealed against was passed. (*Davis, J.C. and Mehta, J.*) MT. AMAN KHATUN *v.* ABDUL KASOOL. I.L.R. (1939) Kar. 156=178 I.C. 890=11 R.S. 113=A.I.R. 1938 Sind 239.

——O. 22, R. 5—*Decision under—Finality—Limits.*

A decision under O. 22, R. 5, C. P. Code, as to whether a person is not a legal representative though not *res judicata*, is final so far as the suit

C. P. CODE (1908), O. 22, R. 5.

in which it is made is concerned, not on the ground of *res judicata*, but because of S. 47, C. P. Code. That question alone is not finally concluded by a decision under O. 22, R. 5, except in so far as it concerns the suit in which the decision is made. But no subsequent decision in a separate suit can be used to affect the rights of the parties so far as questions relating to the 'execution,' discharge or satisfaction of the decree in connection with which the order concerned was made. (*Stone, C. J and Bose, J.*) SHALIGRAM *v.* DHURPATI. I.L.R. (1939) Nag. 165=182 I.C. 285=12 R.N. 6=1939 N.L.J. 82=A.I.R. 1939 Nag. 147.

——O. 22, R. 5—*Duty of Court—"Legal representative"—Meaning of—Intermeddler—If to be preferred to true representative.*

Under R. 5 of O. 23, when more than one person claim to be legal representatives of a deceased's property the Court is required to decide which of the rival claimants is in fact the legal representative The definition in S. 2 merely means that a person who intermeddles with the estate may be treated as the legal representative. It does not mean that a person who intermeddling with the estate of the deceased is to be preferred to a person who is found to be the true legal representative of the deceased's property. (*Agarwala, J.*) SURAJ PRASAD *v.* LUKHER KUER. 180 I.C. 812=11 R.P. 540=1938 P.W.N. 803=5 B.R. 495=A.I.R. 1939 Pat. 117.

——O. 22, R 5—Duty of Court—Rival claimants—Intermeddler and true representative—Preference. *See* C. P. CODE, S. 2 (11). 1938 P.W.N. 803.

——O. 22, R. 5—*Duty of Court under—Order of substitution—Enquiry—If condition precedent.*

Under O.22, R. 5, C.P.Code, it is the duty of the Court to go into the matter as to who is the proper person to be substituted in place of a deceased party. It is not sufficient for the Court to merely substitute one petitioner (who applies for substitution) in preference to another. That is clearly wrong. The order of substitution can be made only after enquiry. (*Wort. J.*) RAM KISHAN OJHA *v.* RAM DULARI KUER. 4 B.R. 42=10 R.P. 222=171 I.C. 607=18 Pat.L.T. 763=1937 P.W.N. 756=A.I.R. 1937 Pat. 530.

——O. 22, R. 5—*Proceeding under—Decision that certain person is legal representative of deceased party—If* res judicata.

The determination of the question whether a certain person is, or is not the legal representative of a deceased party in a proceeding under O. 22, R. 5, C P. Code, does not operate as *res judicata* so as to preclude the same question from being re-agitated in a separate suit. 8 Luck. 477, Overr. (*Srivastava, Ag. C. J., Nanavutty and Zia-ul-Hasan, JJ.*) ZALIM *v.* TRILOCHAN PRASAD SINGH. 13 Luck. 20=166 I.C. 393=9 R.O. 308=1937 O.W.N. 17=1937 O.L.R. 16=A.I.R. 1937 Oudh 220 (F.B.).

[*See also* (*Thomas and Zia-ul-Hasan, JJ.*) SURAJ BALI SINGH *v.* PARBHURAJI. 169 I.C. 798=10 R.O. 1=1937 O.L.R. 390=1937 O.W.N. 782.]

——O. 22, R. 5—*Scope and effect—Death of appellant—Application for substitution by one heir—Notice to other heirs—Latter raising no objection—Order of substitution—Finality—If can be challenged.*

Where the appellant in an appeal dies and one of his heirs is, on his application, substituted as

the legal representative of the deceased appellant after notice to the other heirs and without any objection on their part, the question so far as the appeal is concerned, is final and cannot be reopened; and it must be held to have been constructively decided that the substituted heir is the legal representative of the deceased and competent to prosecute the appeal in that capacity.

Chatterji, J.—Under O. 22, R. 5, C. P. Code, the question as to who is the legal representative has to be decided, and the person substituted shall, for the purpose of the suit or appeal, be deemed to be his legal representative. An *ex parte* order is as much binding as a contested order, and the order of substitution cannot be challenged by the other heirs in the suit or appeal. (*Fazl Ali and Chatterji, JJ.*) JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON. **19 Pat. 433=A.I.R. 1940 Pat. 516.**

——**O. 22, R. 6**—Applicability—Mortgage suit—Death of mortgagor after arguments—Judgment pronounced on day of death—Decree passed later—If bad—Abatement. *See* C. P. CODE, O. 22, R. 4. **42 Bom L.R. 663.**

——**O. 22, R. 6**—*Conclusion of hearing—Court making local inspection during interval of last date of hearing and date of judgment—Hearing, if concluded on that date.*

Where during the interval between the last date of hearing of the suit and the date on which the judgment is pronounced, the Court makes local inspection of the site in suit and makes a reference to it in its judgment, the hearing of the suit cannot be said to have concluded on that date of hearing within the meaning of O. 22, R. 6. (*Agha Haidar, J.*) KEHR SINGH *v.* CHANDA SINGH. **164 I.C. 971=9 R.L. 184=A.I.R. 1936 Lah. 578.**

——**O. 22, R. 6**—Death of plaintiff before hearing—Decree for amount admitted by defendant—Validity. *See* DECREE—VALIDITY. **182 I.C. 208=5 B.R. 732**

——**O. 22, Rr. 8 and 10**—Scope—Suit for maintenance by Hindu widow against father-in-law—Insolvency of defendant—Official Receiver added as party—Decree against insolvent with charge on property—Appeal by insolvent—Competency. *See* PROVINCIAL INSOLVENCY ACT, S. 59 (D). **46 L.W. 550.**

——**O. 22, R. 9**—*Abatement—Rent cases—Technical points—Decree against dead person—No steps to remedy—Setting aside abatement after a year, if allowable.*

Though technical points should not be pressed too far in rent cases, yet when a plaintiff with knowledge of the death of the defendant before decree, refrains from taking steps to remedy his decree, which he has for a year known to be null and void, then the law as to abatement cannot be interpreted liberally in his favour. (*Darling, S. M. and Bomford, J. M.*) RAJ BAHADUR *v.* ADMINISTRATOR GENERAL OF THE ESTATE OF C. J. BARBAR. **1938 R.D. 431=1938 A.W.R. (B.R.) 305=1938 A.L.J. (Supp.) 128.**

——**O. 22. R. 9**—Appeal—Suit in High Court—Abatement—Order setting aside—Appealability—"Judgment." *See* LETTERS PATENT (BOM.), CL. 15. **40 Bom.L.R. 658.**

——**O. 22. R. 9**—*Applicability—Abatement of suit by reversioner to set aside alienation by widow—If bars fresh suit by another reversioner.*

It is true that a suit by a reversioner is a suit on behalf of the whole body of reversioners, but the abatement of a suit instituted by a reversioner to set aside an alienation by a widow does not bar a fresh suit for the same relief by another reversioner. The provisions of O. 22, R. 9 as to abatement do not apply to such a case. A.I.R. 1931 Lah. 79, Rel. on. (*Skemp, J.*) MOHAMMAD KHAN *v.* JAN MOHAMMAD. **186 I.C. 145=12 R.L. 367=A.I.R. 1939 Lah. 580.**

——**O. 22, R. 9**—*Application under—Competency—Suit not "declared" to have abated.*

It is wrong to say that an application under O. 22, R. 9 is competent only when it is made after the suit has been declared to have abated. (*Tek Chand and Dalip Singh, JJ.*) FAZAL KAHIM KHAN *v.* HUSSAINA. **I.L.R. (1940) Lah. 199=188 I.C. 189=12 R.L. 507=A.I.R. 1939 Lah. 572.**

——**O. 22, R. 9**—*Death of one of four brothers respondents—Legal representative not added—Others served and competent to attend to appeal—Appeal if abates.*

Where one of four brothers, respondents in an appeal dies and his legal representative is not brought on record, but the other three have been served and are quite competent to look after the appeal, the appeal need not necessarily abate. (*Mehta, S. M and Harper, J.M.*) DASRATH SINGH *v.* RAM LAKHAN PANDEY. **1940 O.A. 488=1940 A.W.R. (B.R.) 105.**

——**O. 22, R. 9 (2)**—Death of appellant—Court ordering substitution of minor heirs without application and appointing Court guardian—Competency—Appeal—If abates—Remedy of minor heirs. *See* C. P. CODE, O. 22, R. 3 (1). **17 Pat.L.T. 129.**

——**O. 22, R. 9**—Death of appellant—Impleading of widow and minor son—Subsequent death of widow—Failure to appoint fresh next friend—Effect—Procedure—Application of respondents for appointment of next friend. *See* ABATEMENT—APPEAL **17 Pat.L.T. 86.**

——**O. 22, R. 9 (2)**—*Delay in applying for substitution of legal representatives—Condonation.*

An appeal had abated, as the application to bring on record the representatives of the deceased respondents had been made beyond time. The number of parties to the case was very large and the appeal had remained pending for a long time. There was no negligence in making applications for substitution of legal representatives.

Held, that in the peculiar circumstances of the case the delay in making the application should be condoned and the abatement set aside. (*Tek Chand. J.*) MEHR SINGH *v.* SOHAN SINGH. **165 I.C. 521=9 R.L. 255=38 P.L.R. 915=A.I.R. 1936 Lah. 710.**

——**O. 22, Rr. 9 and 10**—*Scope—Decree in suit for possession of land—Appeal by defendant—Assignment by plaintiff pending appeal—Failure of assignee to get himself substituted or brought on record—Appeal decided against plaintiff—Second appeal by latter—Death of plaintiff pending second appeal—Application by assignee for substitution—Maintainability.*

D. P. sued for possession of a plot of land from defendant No. 2 and his transferees defendants 3 and 4. There was a compromise between plaintiff and defendant No. 4, and ultimately the suit was decreed *ex parte* against defendant No. 3 only. The latter appealed to the District Judge. Pending the appeal the plaintiff assigned

the property to the petitioner by a deed dated 4-1-1937. The appeal was decided on 7-12-1937 against the plaintiff. The petitioner, however, did not avail himself of the provision of O. 22, C. P. Code, and did not come on record in the appeal. A second appeal was filed in the High Court by the plaintiff against the decision in the appeal and it was admitted on 4-5-1938. The plaintiff, the sole appellant in the second appeal, died on 25-8-1938, pending appeal, but this was discovered and brought to the notice of the Court only in February, 1939. On 23-2-1939, the petitioner assignee filed an application praying that the abatement might be set aside, and he might be substituted in place of the deceased plaintiff-appellant, as the assignee of the plaintiff.

Held, that the devolution of interest having taken place during the pendency of the appeal before the District Court, and not while the second appeal was pending in the High Court, the High Court had no power to make any substitution under O. 22, C. P. Code. No right accrued to the petitioner afresh on the death of the plaintiff-appellant and therefore no substitution could be made. (*Manohar Lall, J.*) DIRGHAYU PANDE *v.* KISHORE KUER. **189 I.C. 751=13 R.P. 131=1939 P.W.N. 863=21 Pat.L.T. 81=6 B.R. 855=A.I.R. 1940 Pat 177.**

——O. 22, R. 9—*Scope—Benamidar—Suit by for possession—Death pending suit—Sons not impleaded as legal representatives—Abatement—Subsequent suit by sons of real owner—If barred.*

R, a benamidar for *C*, sued for possession of certain properties. He died pending suit. The sons of *R* did not come on the record, and no legal representatives having been brought on the record the suit abated. An application filed by the sons of *C*, to implead *R's* sons on the record was dismissed ultimately by the High Court. The sons of *C* then sued for possession as being the beneficial owners of the property.

Held, that the suit was barred by O. 22, R. 9, C. P. Code. (*K.S. Menon. J.*) CHIDAMBARAM CHETTIAR *v.* SWAMINATHAN. **1936 M.W.N. 1008 =168 I.C. 937=9 R.M 672=45 L W. 171=A.I. R. 1937 Mad. 101=(1937) 1 M.L.J. 33.**

——O. 22. Rr. 9 and 11—*Setting aside abatement of appeal—Sufficient cause—Mere ignorance of death of opposite party.*

An appellant, in the prosecution of his appeal, is under an obligation to keep himself informed as to the existence of the opponent. Mere ignorance of the death of the opposite party is never a sufficient ground for setting aside an order of abatement. (*Radha Krishna, J.*) BHAGWAN DIN *v.* MURU. **1940 O.W.N. 219=1940 A.W.R. (C. C.) 120=1940 O.A. 264**

——O. 22, R. 9 (2)—*Sufficient cause—Appeal—Ignorance of death of respondent—If ground for setting aside of abatement of appeal—Duty of appellant to be diligent.*

Ignorance on the part of an appellant of the death of the respondent to the appeal is a sufficient cause within the meaning of O. 22, R. 9 C. P. Code. The appellant is no doubt required to be diligent in prosecuting his appeal, but when he has succeeded in getting the notice ofappeal served on the respondent before his death, he must be taken to have done all that was expected of him in connection with the appeal. The appellant cannot reasonably be expected and is not required to

inquire from day to day as to the movements of the respondent or to the state of his health or as to whether he is dead or alive. (*Wort and Varma, JJ.*) WAJID ALI *v.* FAGOO MANDAL. **17 Pat. 84= 18 Pat. L.T. 1014=174 I.C. 40=4 B. R. 379=10 R.P. 471=A.I.R. 1938 Pat. 125.**

——O. 22, R 9—*"Sufficient cause"—Appellant living elsewhere than in village of respondents—Ignorance of death—Sufficiency.*

The question whether there is sufficient cause for setting aside the abatement of an appeal is a matter for decision on the facts of each case. No hard and fast rule can be laid down as to what constitutes sufficient cause. Where the appellant a zemindar, has left the conduct of the appeal in charge of a law agent, and there is nothing to suggest that he lived in the village or had any touch with the village where the deceased respondent lived, or that the appellant in the ordinary course of business could have known of the death, or that the law agent in charge of the appeal had been to the village near about the death of the respondent, it must be held that sufficient cause exists for setting the abatement aside. (*Rowland and Chatterjee, JJ.*) RAM RAN VIJAYA PRASAD SINGH *v.* MADHO TURHA. **1939 P.W.N. 680=20 Pat. L.T. 715=6 B.R. 187=185 I.C. 498=12 R.P. 375=A.I.R. 1939 Pat. 623.**

——O. 22, R. 9 (2)—*Sufficient cause—Doubtful construction of old Act and ignorance of new amendment.*

On 17th January, 1938, *X* a Hindu, who was a defendant in a suit, died leaving a son and a widow. On 24th January, 1938, on an application by the plaintiff, the son was substituted as the sole legal representative of *X*. On both these dates Act XVIII of 1937 was in force. Later on, an Amending Act (XI of 1938) was passed. This Act received the assent of the Governor General on 8th April, 1938 and was given retrospective effect as from 14th April, 1937. On 16th May, 1938, the plaintiff applied for addition of the widow as a party defendant and she was substituted under O. 22, R. 10, C P. Code. This order was, however, vacated on 30th June, 1938 on objection by the widow, and the suit was held to have abated as against her. On 20th July, 1938, the plaintiff applied under O. 22, R. 9, C. P. Code, for setting aside the abatement.

Held, that sufficient grounds had been made out for setting aside the abatement, having regard to the fact that S. 3 (1) of Act XVIII of 1937 might possibly be interpreted as not applying to the case and also to the fact that the plaintiff came to know of the Amending Act only on or about 2nd May, 1938 and then took steps to bring the widow on record. (*Mitter and Akram, JJ.*) KULADA GOBINDA *v.* SARAT KUMARI ROY. **43 C.W.N. 1143.**

——O. 22, R. 9 (2)—*"Sufficient cause"—"Ignorance of death of respondent"—If ground for setting aside abatement—Limitation Act. S. 5.*

There is no justification for holding that ignorance on the part of an appellant of the death of the respondent to the appeal, in the absence of any negligence or other act or omission for which the appellant can be held responsible, is not a sufficient cause within the meaning of O. 22, R. 9 (2), C. P Code, and S. 5 of the Limitation Act, affording a ground for setting aside the abatement. It is incumbent upon an appellant to make

periodical inquiries as to whether the respondent is alive. If the appellant therefore does not become aware of the death of the respondent for a long time after the death, and if there is no delay in filing the application under O. 22, R. 9(2) after the news of the death is received, the appellant is entitled to have the abatement set aside. (*Leach, C.J. and Madhavan Nair, J.*) SECRETARY OF STATE *v.* KISTNAMACHARYULU. **I.L.R. (1938) Mad. 275=174 I.C 951=10 R.M. 747 (1)=46 L.W. 898=1938 M.W.N. 14=A.I.R. 1938 Mad. 218=(1938) 1 M.L.J. 54.**

——**O. 22, R. 9**—*Sufficient cause—Mere ignorance of death.*

Mere ignorance of death of a respondent is not a sufficient cause within the meaning of O. 22, R. 9, which would entitle an appellant to ask for setting aside an abatement. (*Thomas, C.J. and Zia-ul-Hasan, J.*) JAGDISH BAHADUR *v.* MAHADEO PRASAD. **12 R.O. 375=187 I.C. 549=1940 O.A. 377=1940 O.L.R. 213=1940 O.W.N. 411=1940 A.W.R. (C.C.) 200.**

——**O. 22, R. 9 (2)**—*"Sufficient cause"—Meaning of—Death of defendant—Delay in applying to set aside abatement—Ignorance of legal representatives—Sufficiency.*

B. J. Wadia, J.—Under O. 22, R. 9 (2), C. P. Code, read with S. 5 of the Limitation Act the Court has a discretion to excuse delay. In exercising the discretion, which must be judicially exercised, the Court should construe the words "sufficient cause" liberally, having regard to the facts and circumstances of the case. Ignorance of the legal representatives of a deceased domiciled in a Native State or a foreign place may be a sufficient cause for excusing delay in seeking to set aside an abatement, unless there is clear negligence or carelessness or unnecessary delay. (*Beaumont, C.J. and Wadia. J.*) M. F. ALMEIDA *v.* RAMCHANDRA SANTURAM ASAVLE. **I.L.R. (1938) Bom. 704=177 I.C. 734=11 R.B. 119=40 Bom.L.R 658=A.I.R. 1938 Bom. 408.**

——**O. 22, R. 9 (2)**—Sufficient cause—Minor party represented by pardanashin lady as next friend—Mistake due to negligence or ignorance of pleader—Delay—If excusable. *See* LIMITATION ACT, S. 5. **19 N.L.J 273.**

——**O. 22, R. 9 (2)**—*Sufficient cause—Abatement—Ignorance of death on part of agent of plaintiff or appellant—Numerous parties involved in case—If sufficient cause for setting aside abatement.*

Where the failure to apply to bring on record the legal representatives of a deceased defendant or respondent is due to ignorance of the death on the part of the plaintiff's or appellant's agent, who, having regard to the numerous parties in the litigation, could not properly keep a more efficient watch on them, that is a perfectly excusable default and is sufficient cause for purposes of setting aside the abatement. (*Wadia and Wassoodew, JJ.*) ALABHAI VAJSURDHAI *v.* BHURA BHAYA. **I.L.R. (1937) Bom. 602=39 Bom.L.R. 444=171 I.C. 536=10 R.B. 207=A.I.R. 1937 Bom. 401.**

——**O. 22 R. 9 (2)**—*Sufficient cause—Application to bring legal representatives of deceased filed after limitation—If can be regarded as one to set aside abatement.*

In a suit to recover certain amount one of the two defendants died and the application by the

plaintiff to bring his legal representatives on record was filed after the statutory period. The deceased defendant had no fixed residence and the plaintiff did not know of his death immediately. There was sufficient cause for the delay in making the application.

Held, that O. 22, R. 2, C. P. Code, had no application, as the suit against the survivor defendant alone could not proceed, and under that rule proceedings abated. But the application to bring the legal representatives on record could be regarded as an application to set aside the abatement and as there was sufficient cause for the delay, plaintiff not being guilty of laches the abatement should be set aside. (*Tek Chand and Skemp, JJ.*) DIWAN CHAND NIRMAL SINGH *v.* BHAGWAN CHAND. **174 I.C. 700=10 R.L. 581=A.I.R 1937 Lah. 455.**

——**O. 22, R. 10**—Applicability—Death of defendant before suit—Joinder of representative—O. 1, R. 10. *See* C. P. CODE, O. 1, R. 10. **A.I.R. 1937 Sind 47.**

——**O. 22, R. 10**—*Applicability to execution proceedings.*

O. 22, R. 10 is applicable to execution proceedings. R. 12 of O. 22 does not exclude execution proceedings from the operation of R. 10. (*Agarwala and Rowland, JJ.*) AJODHYA LAL MAHASETH *v.* BRIJ KISHORE DASS. **186 I.C. 786=12 R.P. 529=6 B.R. 393.**

——**O. 22, R. 10**—*Applicability—Final decree passed in suit—Discretion of Court.*

Per *Costello, J.*—O, 22. R. 10, C. P. Code, can only apply before a final decree or order has been passed or made in the suit.

Per *Derbyshire, C. J.*—Under O, 22, R. 10, C. P. Code, the Court has a discretion in the matter of ordering substitution of a party. It has to look at the position and see what is contemplated and what is likely to happen. (*Derbyshire, C.J. and Costello, J.*) JITENDRA NATH *v.* HARINDRA NATH. **42 C.W.N. 1183.**

——**O. 22, R. 10**—*Applicability—'Interest'—Meaning of—Posthumous son born to deceased person during execution proceedings against his estate—Application to bring on record such son—If lies.*

The "interest' contemplated in O. 22. R. 10 is 'interest' in the subject-matter of the suit. Where during the execution of a decree against the estate of a deceased person, a posthumous son is born to him, there is no devolution of interest on him in the subject-matter of the suit, and O. 22, R. 10 does dot apply to an application made on his behalf that he should be brought on record in the execution proceedings pending before the Court. There is no provision in the Code under which in execution proceedings a posthumous son is to be brought on record as representing the estate of the deceased person when that estate is already fully represented. (*Davis, J.C. and Lobo, A.J.C.*) ESAK HAJI ABABAKAR *v.* JIMABAI. **30 S.L.R. 170=165 I.C. 305 (2)=9 R.S. 96=A.I.R. 1936 Sind 166.**

——**O. 22, R. 10**—Applicability and scope—Execution proceedings—Power of Court to add party not impleaded in suit. *See* C. P. CODE, S. 47. **71 M.L.J. 385.**

——**O. 22 Rr. 10 and 11**—*Applicability—Scope—Final decree for partition allotting suit property to a person during pendency of suit in res-*

C. P. CODE (1908), O. 22, R. 10.

pect of such property—Application by such party to come on record during pendency of appeal from decree in suit—Maintainability.

Under O. 22, Rr. 10 and 11, unless the assignment, creation or devolution referred to in R. 10, has occurred during the pendency of the appeal, the rules would not entitle a person to be impleaded as a party in the appeal; where such party has acquired the suit property as his separate aud absolute property by virtue of a partition decree in a suit, during the pendency of the suit and before the filing of the appeal, it cannot be said that he acquired any title during the pendency of the appeal as contemplated by O. 22, R. 10, read with R. 11. The accrual of exclusive title to the party in respect of the suit property under the partition decree can properly be regarded as the "creation" of an interest within the meaning of O. 22, R. 10, but if he has failed to make his application to be impleaded during the pendency of the suit (the devolution of interest having been pending the suit), he cannot be allowed to make his application during the pendency of the appeal from the decree in the suit. (*Patanjali Sastri, J.*) RATNASABAPATHI PILLAI *v.* GOPALA AIYAR. **1940 M.W.N. 876=52 L.W. 357=(1940) 2 M.L.J. 349.**

——O. 22 R. 10—*Application made after delay —Discretion of Court.*

The powers of Court to grant permission under O. 22, R. 10 are discretionary. Where such an application is made after great delay and the delay is not properly explained, the discretion should not be exercised. (*Tek Chand and Dalip Singh, JJ.*) RAMESHWAR *v.* GANPATI DEVI. **18 Lah. 525=166 I.C. 753=9 R.L. 421=39 P.L.R. 529=A.I.R. 1936 Lah. 652.**

——O. 22, R. 10—Application under O. 1, R. 10 —Disposal by Court under O. 22, R. 10—Order—Appeal. *See* C. P. CODE, O. 1, R. 10. **A.I.R. 1937 Mad. 200.**

——O. 22, R. 10—*"Assignment, creation or devolution of interest"—Deed of relinquishment—If amounts to.*

A deed of relinquishment does not amount to any assignment, creation or devolution of an interest within the meaning of R. 10 of O. 22, C. P. Code. (*Srivastava and Nanavutty, JJ.*) KEOLAPATI *v.* AMAR KRISHNA NARAIN SINGH. **160 I.C. 801=8 R.O. 275=1936 O.W.N. 183=1936 O.L.R. 98=A.I.R. 1936 Oudh 224.**

——O. 22, Rr. 10 and 11—*Assignment pending suit in trial—Court—Application by assignee for addition in appeal—Maintainability.*

An application by an assignee under O. 22. R. 10, C. P. Code for his substitution as a co-appellant in appeal is not maintainable where the assignment was made during the pendency of the suit in the trial Court and not during tbe pendency of the appeal. (*Srivastava and Nanavutty, JJ.*) KEOLAPATI *v.* AMAR KRISHNA NARAIN SINGH. **160 I.C. 801=8 R.O. 275=1936 O.L.R. 98=1936 O.W.N. 183=A.I.R. 1936 Oudh 224.**

——O. 22, Rr. 10 and 11—*Assignment* pendente lite—*Rights of assignee.*

No doubt it is true that parties who have assigned the whole of their interest *pendente lite* cannot ask for judgment in respect of an interest which is no longer theirs. But it does not follow that their assignees are thereby precluded from recovering. (*Lord Porter.*) MONGHIBAI *v.* COOVERJI UMERSEY. **66 I.A. 210=I.L.R. (1939) Bom. 503=I.L.R. 1939 Kar. (P.C.) 295=1940 P.W.N. 19 (P.C.)=11 R.P.C. 295=1939 O.W.N. 626=1939 A.W.R. (P.C.) 136=70 C.L.J. 261=41 Bom.L.R. 1127=50 L.W. 926=1939 A.L.J. 863=182 I.C. 1=43 C.W.N. 869=1939 O.L.R. 392=5 B.R. 750=A.I.R. 1939 P.C. 170=(1939) 2 M.L.J. 366 (P.C.).**

——O. 22, R. 10—Creation or devolution of interest—What amounts to—Financing of litigation—Litigant agreeing to let financer take one half of properties as compensation for his trouble and giving him right to join as party and conducting proceedings in Suits—Effect of. *See* DEED—CONSTRUCTION. **(1940) 2 M.L.J. 337.**

——O. 22, R. 10 and O. 43, R. 1 (1)—*Death of defendant after passing of preliminary decree—Plaintiff and others applying for being appointed as legal representatives—Plaintiff appointed as legal representative—Applications of other persons dismissed as time barred—Appeal by such persons—If competent.*

The plaintiff brought a suit for possession by partition of ¾ share in a house left by his deceased uncle. One of the defendants died after the passing of the preliminary decree; certain persons including the plaintiff applied for being appointed as legal representatives of the deceased. The application of the plaintiff was accepted while those of others were dismissed as time-barred. Those persons therefore filed an appeal against the dismissal of their applications.

Held, that the acceptance of the plaintiff as the legal representative of the deceased, resulted in the devolution of an interest in the property on the plaintiff during the pendency of the proceedings between the passing of the preliminary decree and the passing of the final decree. O. 22, R. 10, C. P. Code, was therefore applicable to the case and the order dismissing their application was appealable under O. 43, R. 1 (1). (*Addison and Abdul Rashid, JJ.*) JANI *v.* ABDUL KARIM. **174 I.C. 898=10 R.L. 624=A.I.R. 1937 Lah. 615.**

——O. 22, R. 10—*Discretion of Court—Suit under S. 92 for removing Mohant and framing scheme—Mohant abdicating and installing X as Mohant* pendente lite—*Substitution of X in place of Mohant—If may be allowed.*

A suit was filed by certain members of the Hindu public under S. 92, C. P. Code, with respect to a *math*. The main prayers of the plaintiffs were that the defendant should be removed from his office as Mohant, that a new Mohant should be appointed and a scheme framed. After the institution of the suit, the defendant abdicated and installed one *X* as the Mohant of the *math*. *X* applied under O. 22, R. 10, C.P. Code, to be substituted in the place of the Mohant.

Held, that in circumstances like these, it would not be a proper exercise of discretion by Court to direct substitution of *X* as a party.

Held, further, that the devolution of the Mohantship did not constitute such a devolution of an interest in the subject-matter of the suit as would justify action under O. 22, R. 10. (*Henderson and Sen, JJ.*) RATAN NARAYAN GIRI *v.* ASHUTOSH NUNDY. **189 I.C. 780=13 R.C. 115=44 C.W.N. 690=A.I.R. 1940 Cal. 383.**

C. P. CODE (1908), O. 22, R. 10.

——O. 22, O. 10—*Leave—Refusal—Discretion.*

No doubt O. 22, R. 10 gives the Court a discretion in allowing or refusing an application by the successors in interest to continue the litigation, but leave should not be unreasonably refused. (*Agarwala and Rowland, JJ.*) JOTI LAL SAH *v.* SHEODHAYAN PRASHAD. 15 Pat. 607=163 I.C. 908=9 R P. 50=1936 P.W.N. 447=17 Pat.L.T. 564=A I.R. 1936 Pat. 420.

——O. 22, R. 10—*Mortgage suit—Mortgagor adjudged insolvent after final decree—Official Assignee's right to be made party to mortgage suit.*

Where in a case an order of adjudication was made against the mortgagor after the final decree was passed in the mortgage suit and it was contended that the Official Assignee ought to have been made a party to the mortgage suit.

Held, that O. 22, R. 10, C. P. Code, did not give to the Official Assignee a right to be made a party on the ground that the property and the assets of the insolvent had devolved on him by virtue of the order of adjudication. (*Panckridge, J.*) UPENDRA NATH KAR, *In re.* 173 I.C. 906=10 R. C. 583=A.I.R. 1937 Cal. 336.

——O. 22, R 10 and O. 21, R. 16—*Mortgage suit—Person claiming under assignment made by plaintiff subsequent to final decree—Right to be substituted in suit—Proper remedy.*

After the passing of the final decree in a mortgage suit, the suit cannot be said to be any longer pending. A person claiming title under an assignment made by the plaintiff subsequent to the passing of the final decree has no right, therefore to be substituted in the suit as plaintiff under O. 22, R. 10, C. P. Code. He can only apply for execution of the decree as a transferee under O. 21, R. 16. (*Mc Nair, J.*) KAMESHWAR SINGH *v.* ANATH NATH BASU. I.L.R. (1937) 2 Cal 207=173 I.C. 809=10 R.C. 567=A.I.R. 1938 Cal. 169.

——O 22, R. 10—*Person putting forward adverse claim—If can come in.*

The language of O. 22, R. 10, C. P. Code, is wholly inapplicable to a case where some one is seeking to come into the proceedings in order to put forward a claim adverse to that of the original parties in the proceedings. (*Derbyshire, C. J. and Costello, J.*) JITENDRA NATH *v.* HARINDRA NATH. 42 C.W.N. 1183.

——O. 22, R. 10—*Right to continue suit after devolution of interest on another.*

A person who institutes a litigation may prosecute it to its conclusion notwithstanding a devolution of his interest in the property. The litigation will continue in his name for the benefit of his successor. (*Agarwala and Rowland, JJ.*) JOTI LAL SAH *v.* SHEODHAYAN PRASHAD. 15 Pat. 607=163 I.C. 908=9 R.P. 50=17 Pat.L.T. 564=A.I.R. 1936 Pat. 420.

——O. 22, Rr. 10 and 11—Scope—If control S. 146—Mortgagee pending suit—Decree—Appeal by mortgagee from decree against mortgagor—Competency. *See* SUCCESSION ACT, S. 6. (1940) 2 M.L.J. 376.

——O. 22, R. 10—*Scope—"Suit"—Second appeal—Compromise—Right of party acquiring interest of one of the parties to come on record and to continue or defend appeal.*

"Suit" in O. 22, R. 10, C. P. Code, means also an appeal and a second appeal, and a second

C. P. CODE (1908), O. 22, R. 10.

appeal may be continued by or against a person who has acquired the interest of one of the parties to the appeal in the subject-matter of the suit, though the original parties to the appeal have compromised the matter, when the party seeking to come on record has a substantial interest which is in danger of being injured by the proposed compromise. (*Stodart, J.*) ALAGAR RAJA *v.* NARAYANA RAJA. 11 R.M. 428=178 I.C. 205=47 L.W. 728=1938 M.W.N. 516=A.I.R. 1938 Mad. 757=(1938) 1 M.L.J. 882

——O. 22, R. 10—*Substitution or addition of party under—Grounds—Duty of Court.*

In order to implead a person as a party to a suit, the Court must see whether there has been an assignment, creation or devolution of interest within the meaning of O. 22, R. 10, C. P. Code. 'Interest' means interest in the subject-matter of the litigation. The words "has come or devolved" connote an interest *in praesenti.* It must be vested in the applicant on the date of the application to implead him a party to the suit and not merely contingent. (*Venkataramana Rao, J.*) MEYYAPPA CHETTIAR *v.* SEETHACHI ACHI. 171 I.C. 145=10 R.M. 280=A.I.R. 1937 Mad. 200=(1937) 2 M. L.J. 279.

——O. 22, R. 10—*Suit against Municipality—Municipality superseded by Government and administrator appointed before passing of decree—Administrator not brought on record—Decree passed against Municipality—If a nullity.*

A suit was brought against a Municipality to recover certain amount. Before the decree was passed the Municipality was superseded by the Government and an administrator was appointed. Neither the administrator nor any other legal representative of the Municipality was brought on record. A decree was subsequently passed and decree-holder tried to execute it against the property in the hands of the administrator. Administrator raised an objection.

Held, that the decree was a nullity as the legal representative of the Municipality was not brought on record and could not be executed against any property in the hands of the administrator. (*Bhide, J.*) ADMINISTRATOR, LAHORE MUNICIPALITY *v.* SIRAJ DIN. 177 I.C. 389=11 R. L. 306=A.I.R. 1938 Lah. 83.

——O. 22, R. 10—*Suit by presumptive reversioner challenging alienation by limited owner—Period of 12 years from date of alienation over before Act II of 1929—Death of reversioner—Sister of last male-holder—If can continue suit.*

The 'interest' referred to in R. 10 is the interest of a person who was a party to the suit. It is the transfer by assignment, creation or devolution *pendente lite* of the interest of such a person to the applicant, which entitles the latter to make an application to continue the suit or appeal, as the case may be, and not the creation of an independent right in him. A suit was filed by a presumptive reversioner challenging an alienation by the limited owner as not affecting his interest. The period of 12 years for such a suit elapsed before Act II of 1929 came into force. On death of the plaintiff reversioner, a sister of last male-holder sought to continue the suit on the ground that she had been included under O. 22, R. 10, C. P. Code in the line of heirs by Act II of 1929.

Held, that there was no transmission by assignment, creation or devolution of the interest of a

party to the litigation to her within the meaning of R. 10, and that she was not competent to apply for permission to continue the suit. (*Tek Chand and Dalip Singh, JJ.*) RAMESHWAR *v.* GANPATI DEVI. 18 Lah. 525=166 I.C. 753=9 R.L. 421=39 P.L.R. 529=A.I.R. 1936 Lah. 652.

——O. 22, R. 10—*Transferee of legal representative—Right to continue suit.*

R. 10 empowers the Court to give leave to a person who has taken an assignment from a party to continue the suit. The "party" there obviously refers to a party already on the record. Where the legal representative of a deceased plaintiff, instead of coming forward and himself taking up the responsibility of the suit, transfers his interest to another man, it will be defeating the object of the law to permit that man to continue the suit. (*Mahomed Noor and Saunders, JJ.*) GOBARDHAN MUKHERJI *v.* SALIGRAM MARWARI. 15 Pat. 82=17 Pat L.T. 73=8 R.P. 308=159 I.C. 828=A.I.R. 1936 Pat. 123.

——O. 22, R. 10 (1)—*Leave—Refusal—Discretion of Court—Unexplained and unnecessary delay of several years—Sufficient ground.*

Under O. 22, R. 10 (1), the Court, as indicated by the use of the word "may" is given full discretion to allow or disallow an application under the rule by an assignee from a plaintiff for leave to be brought on the record as a party plaintiff in the suit. Such discretion must of course be exercised judicially. When the application is made after long delay—there being interminable, unexplainable and unnecessary delay and dallying since the commencement of the suit for nearly 10 years—the Court will rightly exercise its discretion by refusing leave to the applicant. (*Beasley, C.J. and Gentle, J.*) RAGUNATH DASS HARAKCHAND *v* PURUSHOTHAM DASS. 164 I.C. 845=9 R.M. 172=1936 M.W.N. 771=44 L.W. 263=A.I.R. 1936 Mad 714=71 M L J. 307

——O. 22, R. 11—*Abatement of appeal—Order intended to operate during pendency of appeal—Effect on.*

After abatement of an appeal, the trial Court has no jurisdiction to go on with the proceedings taken in pursuance of an order of the appellate Court which was intended to operate only during the pendency of the appeal. (*Bhide, J.*) MAHOMED SADIQ *v.* MT. SAMI-UL-NISA. 161 I.C. 212=8 R.L. 690=A.I.R. 1936 Lah. 618.

——O. 22, Rr. 11 and 12—*Appeal from order in execution—Rules of abatement—If apply.*

The rules of abatement in O. 22, C. P. Code, apply to appeals against orders made in execution proceedings as to other appeals. The words "proceedings in execution" in O. 22, R. 12, mean proceedings provided for in Part II and O. 21 of the Code, that is, they are proceedings in the Court which passed the decree or in the Court to which the decree has been sent for execution. An appellate Court may have to consider the propriety of the orders passed by these Courts but the proceedings in the appellate Court cannot properly be described as proceedings in execution. They are separate proceedings, merely testing the validity of the order made by the executing Court. Further, Rr. 3, 4 and 8 apply in terms to suits while R. 11 makes these provisions applicable to all appeals. As no distinction is made in the Code between appeals from orders in execution and appeals generally, and as R. 11

is without qualification or exception, Rr. 3,4 and 8 apply to appeals in execution matters. (*Addison and Abdul Rashid, JJ.*) CHEDA LAL *v.* AIJAZ HUSSAIN. 18 Lah. 80=9 R L. 144=38 P.L.R. 946=164 I.C. 605=A.I.R. 1936 Lah. 1022.

——O. 22, Rr. 11 and 12—*Applicability—Appeal from order in execution.*

An appeal from an order in execution proceedings does not stand on a footing different from other classes of appeals, for, O. 41, C. P. Code, which provides the procedure relating to appeals does not make any such distinction. Hence R.11 of O. 22 should apply to appeals falling under S. 47; R. 12 of O. 22 cannot apply to such appeals, for an appeal which arises from execution proceedings cannot be regarded as a 'proceedings in execution'. R. 12 of O 22 must therefore be construed as referring only to the proceedings in the executing Court and not to those in the appellate Court which hears appeals arising from execution proceedings. (*Stone, C.J. and Niyogi, J.*) MADHORAO NARAYANRAO *v.* YADORAO. I.L.R. (1939) Nag. 119=178 I.C. 568=11 R.N. 237=1938 N.L J. 312=A.I.R. 1938 Nag. 502.

——O. 22, R. 11—Applicability—If has reference to O. 43, R. 1 (*k*). *See* C. P. CODE, O. 43, R. 1 (*k*). 18 Pat.L.T. 1014.

——O. 22, R. 11—Scope and applicability—If applies to appeals under S. 47, C. P. Code. *See* C. P. CODE, S. 50 AND O. 22, RR. 11 AND 12. 1938 N.L.J. 312.

——O. 22, R. 12—*Applicability—Appeals arising from execution proceedings.*

O. 22, R. 12, C P. Code, does not exempt pending appeals from the operation of R. 8 of that order, though the appeals arise out of execution proceedings. An appeal stands on a different footing, in this respect, from an application for execution. R. 12 does not contemplate that, if an appeal has been preferred from an order in execution then also Rr. 3, 4 and 8 would never apply. (*Thomas, C.J. and Zia-ul-Hasan, J.*) JAGDISH BAHADUR *v.* MAHADEO PRASAD. 187 I.C. 549=12 R.R. 375=1940 A.W.R. (C.C.) 200=1940 O.A. 377=1940 O L.R. 213=1940 O.W.N. 411.

——O. 22, R 12—*Applicability—Appeal from order in execution.*

Rule 12 of O. 22, C. P. Code, is not intended to apply to appeals against orders passed in execution. (*Davis, J.C. and Mehta, J.*) MT. AMAM KHATUN *v.* ABDUL RASOOL. I.L.R. (1939) Kar. 156=178 I.C. 890=11 R.S. 113=A.I.R. 1938 Sind 239.

——O. 22, R. 12—Applicability—Appeal from order in execution. *See* C. P. CODE, O. 22, RR. 11 AND 12—APPLICABILITY. I.L.R. (1939) Nag. 119.

——O. 22, R. 12—*Scope and effect—Execution proceedings, if abate—Procedure to be followed in case of decree-holder's death.*

Abatement does not apply to execution proceedings. The result of that is, however, that the heirs need not take steps for substitutions under O. 22, R. 3, but may apply to carry on the proceedings or may file a fresh application. (*Stone, C.J. and Bose, J.*) TEJRAJ *v.* MT. RAMPYARI. I.L.R. (1940) Nag. 198=178 I.C. 581=11 R.N. 239=1938 N. L. J. 99=A. I. R. 1938 Nag. 528.

——O. 23, R. 1—Abandonment of part of claim—If can be allowed after party is given time to

C. P. CODE (1908), O. 23, R. 1.

pay deficit Court-fees. *See* C. P. CODE, O. 6, R. 17. 65 C.L.J. 199.

——O. 23, R. 1—*Appeal against order of remand — Leave to withdraw suit — Power to grant.*

On an appeal against an order of remand, the Court can, at the plaintiffs' request, allow him to withdraw the suit with liberty to bring a fresh suit under O. 23, R. 1. (*Addison, Ag.C.J. and Din Mohammad, J.*) MOHAMMAD MURID SABAR *v.* MOHAMMAD BUTA RAHMAT ULLAH. 166 I.C. 290 (1)=9 R.L. 358 (1)=38 P.L.R. 319.

——O. 23, Rr. 1 and 3—Applicability—Adjustment with reference to preliminary decree for sale on mortgage *See* C. P. CODE, O. 21, R. 2—SCOPE OF. 1938 A.W.R. (H.C.) 859=1938 A.L.J. 1231.

——O. 23, R. 1—Applicability—Appeal withdrawn—Right of appellant—Power of Court to grant leave to withdraw. *See* C. P. CODE, S. 107 AND O. 23, R. 1. 40 Bom.L.R. 895.

——O. 23, R. 1—Applicability—Death of one of several plaintiffs—Legal representative refusing to join as plaintiff and added as defendant—Effect of—If withdrawal or abandonment of claim—Fresh suit—If barred. *See* C. P. CODE, O. 22, R. 2 AND O. 23, R. 1 (3). 1939 P.W.N. 41.

——O. 23, R. 1—*Applicability—Defence.*

O. 23, R. 1, C. P. Code, applies to suits and not to defences. A defendant in a previous suit who raises a claim for set-off but withdraws it without the leave of the Court, is not thereby precluded from raising it again in a subsequent suit against him. (*Zia-ul-Hasan, J.*) RADHEY SHIAM *v.* MOHAMMAD NASIR KHAN. 13 Luck. 323=168 I.C. 472=9 R.O 481=1937 O L.R. 285=1937 O. W.N. 831=A.I.R. 1937 Oudh 394.

——O. 23, R. 1—*Applicability—Previous suit for declaration that certain share in property was plaintiff's and not liable to execution withdrawn—Fresh suit for partition—If barred.*

Where a previous suit for declaration that certain share in property sold by decree-holder was plaintiff's and hence not liable to execution is withdrawn and subsequently a fresh suit for partition of that property is brought, O. 23, R. 1 is not applicable and the fresh suit is not barred. (*Blacker, J.*) MT. KHAIRAN *v.* ATA MOHAMMAD. 41 P.L.R. 594=A.I.R. 1939 Lah. 148.

——O. 23, R. 1—*Bar of fresh suit—Dismissal of suit for joint possession, as defendant found to be mortgagee—Suit for redemption—If lies.*

Where a suit for joint possession is dismissed on the ground that the defendants are mortgagees in possession, it will certainly be open to the plaintiff to file a suit for redemption of the mortgage and it will not be barred by the provisions of O. 23, R. 3. (*Ismail, J.*) RAM BHAROSE *v.* BARAMDIN. 184 I.C. 808=1939 R D. 422=1939 A.L.J. 892=12 R.A. 281=1939 A.W.R. (H.C.) 517=A I.R. 1939 All. 584.

——O 23, R. 1—*Conditional order—Condition not fulfilled—Right to bring fresh suit.*

What is important in each case is the terms in which the permission to institute fresh suit is granted. The permission in each case is conditional and the right under the permission cannot be said to have accrued to the plaintiff until the conditions are fulfilled. Hence, where permission is given to bring a fresh suit after payment of the case, the fresh suit is barred unless costs are paid.

C. P. CODE (1908), O. 23, R. 1.

(*Blacker, J.*) MT. KHAIRAN *v.* ATA MOHAMMAD. 41 P.L.R. 594=A.I.R. 1939 Lah. 148.

——O. 23, R. 1—*Leave to withdraw—Absence of specific permission to bring fresh suit—Inference.*

Where it is clear from the application that the suit was being withdrawn with permission to file a fresh suit but the Court fails to state that such permission has been given, it can be implied, for it need not be in express terms. (*Marsh, S. M. and Mehta, J.M.*) MAHANGOO *v.* RAM KISHUN DAS. 1939 A.W.R. (B.R.) 113=1939 R.D. 437=1939 A.L.J. (Supp.) 88.

——O. 23, R. 1—*Leave to withdraw—Duty of Court—Procedure.*

Where a person applies for permission to withdraw his suit and the application is referred to the other side and on the other side stating that they have no objection provided that they get their costs the Court allows the application, it cannot be said that the Court fails to exercise any jurisdiction invested in it. It would be called upon to go into the question whether a formal defect or other sufficient cause exists only if the opposite party denies that there is any such defect or sufficient cause. (*Allsop, J.*) RAGHO SEWAIK *v.* BHOLA SINGH. 177 I.C. 73=1938 A.L.R. 697=11 R.A. 163=1938 A.L.J. 652=1938 A.W.R. (H. C.) 414=A.I R 1938 All. 450.

——O. 23, R. 1—*Leave to withdraw—Removal of a defendant—Permission under O. 23, R. 1 not obtained—Re-impleading of same defendant—Effect—Suit as against him, if maintainable.*

Where in a suit against a number of defendants, one of them is removed but no permission under O. 23, R. 1 to file a fresh suit against him was obtained and where later on he is again re-impleaded, it is really a new suit as against him. In as much as there was no leave to file a fresh suit against him, the suit as against him is not maintainable and if the relief as against the others is such that it could not be given independently of that defendant, the whole suit would have to be dismissed. (*Hamilton, J.*) BALMAKUND *v.* PARAG NARAIN. 184 I C. 785=1939 O.L.R. 659 =12 R.O 150=1939 A.W.R. (C.C.) 260=1939 O.W.N. 990=1939 O.A. 797=A.I.R. 1940 Oudh 43.

——O. 23, R. 1—*Order as to costs—Appeal—Revision.*

An order as to costs under O. 23, R. 1, C. P. Code, is merely incidental to the permission to withdraw the suit and as the permission to withdraw the suit is not a decree, the incidental order of costs is also not a decree. No appeal, therefore lies on the question of costs. It is also doubtful whether a revision lies, as O. 23, R. 1 (3) appears to give absolute discretion to the Court on the question of costs. (*Dalip Singh, J.*) DAULAT RAM VIDYA PARKASH *v.* BANSI LAL. 184 I C. 855 =12 R L. 263 (1)=41 P.L.R. 486=A.I.R. 1939 Lah. 472.

——O 23, R. 1—*Order simply allowing suit to be withdrawn—Order allowing withdrawal and also dismissing suit—Distinction between.*

There is no distinction between the cases where a suit is simply allowed to be withdrawn and the cases where the Courts though allowing the suit to be withdrawn and that the suit is dismissed. (*Dalip Singh, J.*) DAULAT RAM VIDYA PARKASH *v.*

C. P. CODE (1908), O. 23, R. 1.

BANSI LAL. 184 I.C. 855=41 P.L.R. 486=12 R. L. 263 (1)=A.I.R. 1939 Lah. 472.

——O 23, R 1 and S 11—*Parties agreeing to dismissal of appeal—Court passing order dismissing appeal allowing plaintiff to file fresh suit—Fresh suit, if maintainable.*

Where on dismissal of the suit the plaintiff files an appeal and in appeal the appellate Court passes an order that the parties agree that the appeal may be dismissed and further states in the order that the plaintiff is permitted to bring a fresh suit and ultimately concludes the order by stating that the appeal is dismissed, it cannot be said under these circumstances that the suit is withdrawn under O. 23, R. 1 and not dismissed. On the dismissal of the appeal, the suit automatically is dismissed and the Court ceases to have any further jurisdiction in the matter and it ceases to have any power to grant permission to the plaintiff to institute a fresh suit on the same cause of action A subsequent suit brought by the plaintiff on the basis of such order is barred by principles of *res judicata.* (*Addison and Din Mohammad, JJ.*) SHAHU *v.* MT. RAHMON. 178 I.C. 319=11 R. L. 444=A.I.R. 1938 Lah 52.

——O. 23, R. 1—*Scope and applicability of—Absence of application.*

The rule clearly contemplates an application by plaintiffs and the decision in the presence of the parties. A mere remark in the judgment cannot be construed to be a permission of the Court. (*Madeley, J.*) KISHEN NARAIN *v.* NIZAMUDDIN. 1937 O.W.N. 1146.

——O. 23, R. 1 and O. 22, R. 4—*Scope—Death of defendant—Omission to bring on record all legal representatives—Abatement—Withdrawal of suit with liberty—Power of Court to order—Fresh suit—Maintainability.*

The sole defendant in a suit for possession died leaving three sons. One of them and two other persons were impleaded as the legal representatives, but not the other two sons. The son who was impleaded stated that the other two persons impleaded were not the sons of the defendant. Plaintiff thereupon applied for amendment of the record by putting in the names of the other two sons in the place of the persons wrongly impleaded. This being refused, plaintiff applied for permission for the withdrawal of the suit with liberty to institute a fresh suit. The Court granted the application.

Held, that at the time when the plaintiff made the application for the withdrawal of the suit, the suit had abated under O. 22, R. 4, C. P. Code, and the order granting permission to withdraw the suit under O. 23, R. 1 was without jurisdiction. A fresh suit instituted thereafter is not maintainable, and the order of the withdrawal made without jurisdiction in the prior suit could be attacked in the subsequent suit. (*R. C. Mitter, J.*) RAMESH CHANDRA MAJUMDAR *v.* DUD MEHAR BIBI. 40 C.W.N. 1019.

——O. 23, R. 1—*Scope—If subject to Sch. II, para. 3—Reference to arbitration pending—Power to permit withdrawal of suit.*

Once a suit has been referred to arbitration, so long as that reference stands, the Court which has made the reference has no power to pass any order which in any way would affect the subject-matter of the suit. The Court has consequently no jurisdiction after the suit has been referred to arbitration and as long as the reference subsists, to intervene and give the plaintiff permission to withdraw his suit under O. 23, R 1, C. P. Code. (*Thom, Ag.C.J.*) POORAN CHAND *v.* BABU RAM. I.L.R. (1938) All. 146=1937 A.W.R. 1083=1937 A.L.J. 1163=1938 A.L.R. 188=173 I.C. 895=10 R.A. 529=A.I.R. 1938 All. 56.

——O. 23, R. 1—Scope—Express application for leave and express order thereon giving leave —If necessary. *See* C. P. CODE, O. 2, R. 2 AND O. 23, R. 1. 1938 M.W.N. 785.

——O. 23, R. 1—Scope—Withdrawal of suit against some defendants—If can be cancelled—Procedure. *See* C. P, CODE, O. 9, R. 13 AND O. 23, R. 1. (1940) 1 M L.J. 811.

——O 23, R. 1—*'Sufficient ground'—Suit referred to arbitration—Leave of Court not obtained in respect of minor defendants—Permission to withdraw suit against them—If can be granted.*

Where a suit in which some of the defendants are minors is referred to arbitration without the leave of the Court and the arbitrators give an award, the Court has no jurisdiction to allow the suit to be withdrawn against the minor defendants with permission to bring a fresh suit against them. O. 23, R. 1, C. P. Code, is inapplicable in such circumstances. (*Tek Chand, J.*) SAMAND KHAN *v.* MOHD, RAMZAN. 181 I.C. 287 =11 R.L. 803=40 P.L.R. 498=A.I.R. 1938 Lah. 582.

——O. 23, R. 1—*Withdrawal of suit—Order for payment of costs as condition precedent—No time fixed for such payment—Costs paid subsequent to filing of fresh suit—Maintainability of suit.*

Where at the time of the application for withdrawal of the former suit with permission to file a fresh suit under O. 23, C. P. Code, the Court directed the payment of costs as a condition precedent but did not fix any date for such payment, the non-payment of costs does not render a fresh suit bad *ab initio* and the payment of costs subsequent to the institution of the suit would cure the irregularity (*Sen, J.*) SAGARESWAR CHATTARAJ *v.* BABULAL CHATTOPADHYAYA. 68 C.L.J. 75.

——O. 23, R. 1—*Withdrawal without leave to file fresh suit—Filing of fresh suit—Cause of action and relief, identical—Suit if barred by O.23, R. 1.*

Where a plaintiff after withdrawing a suit without obtaining leave to file a fresh suit, files a fresh suit, and where the cause of action and relief claimed are identical with those of the former suit, the later suit is barred not on the principle of *res judicata* but by the provisions of O. 23, R. 1, C. P. Code. (*Ismail, J.*) RAM BHAROSE *v.* BARAMDIN. 184 I.C. 808=1939 R.D. 422=1939 A.L.J. 892=12 R A. 281=1939 A.W. R. (H.C.) 517=A.I.R. 1939 All. 584.

——O. 23, R. 1 (2)—'Formal defect'—What is. *See* C. P. CODE, O. 7, RR. 14 AND 18. 1937 A.M. L.J. 75.

——O. 23, R. 1 (2)—*Leave to withdraw suit with liberty to file fresh one—Conditional order on payment of costs—Suit filed without payment of costs—Costs deposited with permission of Court, before hearing of the suit—Such suit if maintainable—C. P Code, S.* 148.

An order granting leave to withdraw a suit with liberty to file a fresh one was in the follow-

ing terms: "The plaintiffs be permitted to withdraw the suit with liberty to bring a fresh one unless barred as prayed for. Defendant will get costs which must be paid within one month as a condition precedent to a fresh suit." A fresh suit was filed The cost were neither paid within the time allowed, nor even prior to the filing of the fresh suit. The costs were paid with the permission of the Court, before the commencement of the hearing of the fresh suit on an objection as to maintainability of the fresh suit.

Held, that whether the condition as to payment of costs attaches to the permission to withdraw or to file a fresh suit, the Court extended the time under S. 148, C. P. Code, for payment of the costs. Even if the condition be taken as attaching to the permission to file the fresh suit, the conditional permission had become final on payment of the costs and hence the suit was maintainable. (*Nasim Ali and Remfry, JJ.*) ABDUL KHALEQUE *v.* SUSIL CHANDRA CHAUDHURI. **I.L.R. (1938) 1 Cal. 273=175 I C. 188=10 R.C. 760=66 C.L.J. 275=41 C.W.N. 1336=A.I.R. 1938 Cal. 13.**

——**O. 23, R. 1 (2) (a) and (b)**—*Construction and scope—"Formal debt" — "Sufficient grounds" —Meaning of—Withdrawal on ground of defect of substance —Permissibility—Order allowing withdrawal —Jurisdiction — Revision—C. P. Code, S. 115.*

The two clauses of sub-R (2) of R. 1 of O. 23, C. P. Code, must be read together. Cl. (*a*) of sub-R. (2) of R. 1 of O. 23, C.P. Code, is illustrative of the "grounds" referred to in Cl. (*b*), and although the "grounds" in Cl. (*b*), need not be *ejusdem generis* with the ground mentioned in Cl. (*a*), they must be at least analogous to it. The ground in Cl. (*a*) requires that the suit must fail by reason of some formal defect; whereas the grounds contemplated in Cl. (*b*) need not necessarily be fatal to the suit, but must be analogous to a formal defect. The expression "formal" defect must be given a wide and literal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect is fatal to a suit or not. Where the ground of withdrawal is a defect of substance as distinguished from a defect of form, the suit should not be allowed to be withdrawn. If a Court allows a suit to be withdrawn on the ground of defect of substance arising out of the plaintiff's inability to prove the title on which the claim is based, the Court acts without jurisdiction, and its order can be corrected in revision under S. 115, C. P. Code. (*Wadia, Divatia and Lokur, JJ.*) RAMA RAO BHAGWANTRAO *v.* BABU APPANA. **I L R. (1940) Bom. 299=187 I.C. 409=12 R.B. 443=42 Bom. L.R. 143=A.I.R. 1940 Bom. 121 (F.B.).**

——**O. 23, R. 1 (2) (a) and (b)**—*Scope of—Leave to withdraw—When could be granted.*

The two sub-Cls. (*a*) and (*b*) of sub-R. (2) of R. 1 of O. 23, C. P. Code, are worded in an entirely different manner and they are intended to cover different circumstances. Cl. (*b*) is not limited to cases in which the Court thinks that the suit must necessarily fail. There may be other sufficient grounds on which it is proper to allow the plaintiff to withdraw his suit. (*Mackmey, J.*) DAW DWE *v.* U SAN HLA. **1938 Rang.**

L.R. 270=178 I. C. 607=11 R.R. 251=A.I.R. 1938 Rang 389.

——**O 23. R. 1 (2) (b)**—*"Other sufficient grounds"—Interpretation.*

The "other sufficient grounds" in Cl. (*2*) (*b*) of R. 1 of O. 23, C. P. Code, must be *ejusdem generis* with the ground mentioned in Cl. (*2*) (*a*). (*Tek Chand, J.*) MT. FATIMA *v.* NURA. **175 I.C. 56=10 R.L. 674 (2)=39 P.L.R. 1010=A.I.R. 1938 Lah. 294.**

——**O. 23, R. 1 (2) (b)**—*"Sufficient grounds"—Meaning of.*

The "sufficient grounds" referred to in O. 23, R. 1 (*2*) (*b*), C. P. Code, must be *ejusdem generis* with the grounds specified in sub-R. 2 (*a*), *i.e.*, there must be some formal defect. They must, at any rate, be analogous to it. (*Horwill. J.*) JAGADAMBAL *v.* SUNDARAMMAL. **1940 M.WN. 806=(1940) 2 M.L.J. 398.**

——**O. 23, R. 1 (3)**—Applicability—Amendment of plaint—Direction to value property and to pay deficit Court-fee — Non-compliance—Prayer for leave to withdraw suit with liberty refused—Subsequent dismissal for default—If bars fresh suit. *See* C. P. CODE, O. 7. RR. 11 AND 13. **40 C.W N. 1390**

——**O. 23, R. 1 (3)**—*Applicability—"Subject-matter"—Meaning—Prior suit to eject mortgagee of tenant alleging latter's death—Withdrawal on tenant turning up—Subsequent suit on surrender by tenant—If barred.*

The bar in O. 23, R. 1 (3) is in respect of the subject-matter and not the cause of action; subject-matter means the series of acts and transactions alleged to exist giving rise to the relief claimed. A surrender by a tenant of his holding is clearly different from his death On 15 9-1928, plaintiff, a zamindar, sued to eject the defendant, a mortgagee of the tenant, as a trespasser on the ground that the tenant mortgagor was dead and hence the tenancy had terminated. The tenant, however, turned up alive in Court, and the suit was therefore withdrawn. Subsequently on 24—9—1935 the tenant surrendered his holding to the zamindar who again sued the defendant mortgagee as a trespasser.

Held, the suit based on the surrender by the tenant was not barred under O. 23, R 1 (3), C. P. Code, by reason of the withdrawal of the prior suit based on his alleged death. (*Darling, S. M. and Bomford, J. M.*) BALGOVIND *v.* SATNARAIN LAL. **1938 R.D. 174=1938 A.L.J. (Supp.) 2=1938 A.W.R. (B.R.) 93.**

——**O. 23, R. 1 (3)**—*Scope—Suit by partners of firm not registered under Partnership Act—Withdrawal—Fresh suit after registration—If barred.*

The withdrawal of a suit instituted by partners who have not been registered as a firm under the Partnership Act is no bar to a fresh suit filed by them on the same cause of action after they get themselves registered as a firm. The later suit is technically a suit by a different plaintiff. (*Stodart, J.*) ARUNAGIRI MUDALIAR, *In re.* **164 I C. 748=9 R.M. 169 (1)=1936 M.W.N. 888=44 L.W. 247 (1)=A.I.R. 1936 Mad. 697.**

——**O. 23, R. 1 (3)**—*Withdrawal of suit—Subsequent suit between same parties on same facts but on different basis—If barred.*

The plain meaning of O. 23, R. 1(3) is that if the subsequent suit is in respect of the same subject-matter as the previous suit the subsequent suit

must be dismissed. It matters not whether the defendant concurred with the plaintiff in the withdrawal of the suit. In a previous suit between *A* and *B*, the basis of the claim was alleged tenancy of *B* under *A*. It was alleged that *B* was holding over and it was prayed that he should be ejected. The suit was withdrawn by *A* without permission to bring a fresh suit as being compromised. *A* subsequently sued *B* for being in wrongful possession of the same property in his own right and not as tenant of *A*.

Held, that the subsequent suit of *A* was not barred by O. 23, R. 1 (3). (*Mackney, J.*) MA PAN BU *v.* MAUNG LU THANT. **177 I C. 211=11 R.R. 103=A.I.R. 1938 Rang. 210.**

——**O. 23, R. 2**—*Applicability—Suit in High Court—Plea by defendant of being agriculturists —Plaintiff withdrawing suit with liberty—Subsequent suit in muffasal Court—Right to deduct period of prior suit—Limitation Act, S.* 14—*Applicability.*

The C. P. Code and the Limitation Act are rules of procedure and must be interpreted strictly. A plaintiff who prays for an order for withdrawal of his suit with leave of the Court under O. 23, R. 1, C. P. Code, must face R. 2 of O. 23, and cannot have the benefit of S 14 of the Limitation Act. In a suit in the High Court the defendants pleaded that they were agriculturists The plaintiff applied for leave to withdraw the suit under O 23, R. 1 with liberty to file a fresh suit, and the Court granted the same. Subsequently the plaintiff filed a suit in a Subordinate Court in the moffussil and claimed the right to deduct the period during which he was prosecuting the first suit, under S. 14, Limitation Act.

Held, that the High Court in the prior suit had jurisdiction to decide the plea raised by the defendant as to their status, and that the case fell under O. 23, R. 2, C. P. Code, but not under S. 14 of the Limitation Act, and the plaintiff could not therefore avail himself of the benefit of S. 14, Limitation Act. (*Barlee and Norman, JJ.*) ACHUT DADAJI JOSHI *v.* PARSHRAM VASUDEV. **I.L.R. (1938) Bom. 327=40 Bom.L.R. 377 =175 I.C. 528=10 R. B. 565=A.I.R. 1938 Bom. 281.**

——**O. 23, R. 2**—*Applicability—Suit in time in proper Court—Amendment reducing rate of interest—Suit falling below jurisdiction of Court —Order returning plaint—If withdrawal or abandonment of claim—Limitation Act, S.* 14—*Applicability—Conflict between S.* 14 *and O.* 23, *R.* 2, *C. P. Code.*

There is really no conflict between S. 14 of the Limitation Act and R. 2 of O. 23, C. P. Code. S. 14 of the Limitation Act applies to a case where the Court by its own order has terminated a suit or proceeding on the ground that it has no jurisdiction to entertain it or that there some other cause of a like nature which makes it impossible for the Court to entertain it. O. 23, Rr. 1 and 2, C P. Code, apply to a case where the plaintiff on discovering that his suit must fail either by reason of some formal defect or because of some other sufficient grounds for withdrawal applies voluntarily for the withdrawal of the suit and asks for permission to file a fresh suit and the Court grants his prayer. Where a suit is filed in time in the proper Court, but the Court orders its return for presentation to the proper

Court, as, the plaintiffs having, by amendment, reduced their claim for interest, the Court ceases to have jurisdiction, there is neither withdrawal of the suit nor abandonment of part of the claim within the meaning of O. 23, R. 1 (2) and O. 23, R. 2 will not apply. S. 14 of the Limitation Act applies to a such case. (*Davis, J C. and Weston, J.*) KALIANDAS *v.* MAHOMED AKBAR **I.L.R. (1940) Kar. 225=A.I.R. 1940 Sind 125.**

——**O. 23, R. 2**—Fresh suit after withdrawal of previous suit—Limitation. *See* LIMITATION ACT, S. 14. **69 C.L.J. 540.**

——**O. 23, R. 2**—*Permission to bring fresh suit granted on condition of plaintiff paying costs before such suit—Second suit instituted without payment of costs—If void* ab initio.

Under R. 1 of O. 23, a plaintiff can withdraw a suit as a matter of right without the permission of the Court, but if he does it he is then precluded from filing a fresh suit on the same cause of action. If he wants to withdraw the suit and at the same time wants to file a fresh suit on the same cause of action, he must resort to R. 2. Under the said rule he must ask for permission to withdraw with liberty to file a fresh suit. The Court may grant the permission asked for on such terms as it thinks fit. The terms may be of any kind. They might be (1) that the plaintiff shall pay the costs before a certain date specified in the order, or (2) that the plaintiff shall pay the costs before the institution of the second suit, or (3) that the plaintiff shall pay the costs without specifying the time of the payment. If the terms imposed are as in Ill. (1) or Ill. (2), they then obviously refer not to the withdrawal of the suit but to the institution of a fresh suit. Once permission is granted to withdraw, the suit can no longer be regarded to be still existing. Where therefore leave to bring a fresh suit on the same cause of action is granted on payment of the costs on or before a specified date or before the institution of a fresh suit, such payment of costs is a condition precedent to the institution of a fresh suit. If no payment is made, the second suit is void *ab initio*. (*Ba U, J.*) MA SAN MYINT *v.* U TUN SEN. **187 I.C. 711=12 R.R. 335=1939 Rang.L.R. 749=A.I.R. 1939 Rang. 378.**

——**O. 23, R. 3**—*Adjustment—Agreement to abide by statement of plaintiff—Statement by plaintiff—Effect of.*

Where a defendant offers to bind himself by the statement of the plaintiff and the plaintiff makes the statement, it follows that the Court is entitled to decree the claim against the defendant, as the only condition laid down by him has been fulfilled. The statement of the plaintiff has to be accepted as an adjustment of the claim and a decree passed accordingly. (*Ismail, J.*) NARAIN DAS *v.* GHAZI RAM GOJAR MAL. **1938 A L.J. 449 =1938 A.W.R. (H C.) 294=176 I.C. 99=1938 A.L.R 543=11 R.A. 40=A.I.R. 1938 All. 353.**

——**O. 23, R. 3**—*Adjustment under—Agreement of parties requesting Court to decree suit if a certain thing happened—Binding nature—Appeal.*

When the parties to the suit request the Court to adopt a certain procedure and to decree the suit in case a certain event happened, and make an endorsement to that effect on the plaint, they cannot afterwards go behind it or appeal against

the decree passed in pursuance of that agreement.

Quaere.—Whether the agreement and endorsement of the plaint would amount to an adjustment of the suit under O. 23, R. 3, C. P. Code. (*Pandrang Row, J.*) MAKUDAM MAHOMED *v.* MAHOMED SHEIKH ABDUL KADIR. **164 I.C. 611=9 R.M. 148=44 L.W. 351=1936 M.W.N. 740=A.I.R. 1936 Mad. 856=71 M.L.J. 281.**

——**O. 23, R. 3 and O. 43, R. (1) (m)**—*Adjustment under—Award by private arbitrator without consent of Court—Court after deciding question of validity of award remarking that there is no adjustment of claim out of Court—Appeal.*

If in a pending suit the parties go to a private arbitrator without the consent of the Court and the arbitrator makes an award there is nothing to prevent the Court from giving effect to the award as if it were an adjustment by common consent and it amounts to an adjustment under O. 23, R. 3. Where therefore the Court after deciding the issues as to the validity of the award made by a private arbitrator remarks that "there is no adjustment of claim in suit out of Court as alleged", it amounts to an order refusing to record an adjustment under O. 23, R. 3, and the order is appealable under O. 43, R. 1 (*m*). (*Pollock, A. J. C.*) TATYARAO *v.* SHRIKRISHNA LAXMINARAYAN. **31 N.L.R. (Supp.) 72=160 I.C. 202=8 R.N. 160=A.I.R. 1936 Nag. 8.**

——**O. 23, R. 3**—*Applicability—Adjustment of suit—Parties to suit agreeing to abide by statement of third person—Effect of—Right to challenge statement—Estoppel.*

There is nothing in law to prevent the parties to a suit from agreeing, apart altogether from the Oaths Act, to abide by the statement a third person. The agreement of the parties to abide by such statement and the statement given in pursuance of the agreement amount in effect to an adjustment of dispute, within the meaning of O. 23, R. 3, C. P. Code, and each party is estopped from subsequently impugning the same and from challenging the statement of the referee. (*Collister and Bajpai, JJ.*) SURAJ NARAIN *v.* BENI MADHO **171 I.C. 697=1937 A.L.R. 875=1937 A.L.J. 1066=10 R.A. 302=1937 A.W.R. 801=A.I.R. 1937 All 701.**

——**O. 23, R. 3 and O. 32, R. 7**—*Applicability—"Subject-matter of the suit"—"Having reference to the suit"—Meaning of.*

Whether a particular matter is the subject-matter of or relates to a suit is primarily a question of fact depending upon the circumstances of each case. Although a matter is not strictly the subject-matter of a suit, it may relate to or have reference to the suit if it forms part of the consideration. In a suit by a plaintiff against defendants of whom one was a minor, a compromise was arrived at, whereby the plaintiff, in consideration of her giving up her right to an account of the whole property from the defendant who managed it, for which in fact she had sued, agreed in order to facilitate enjoyment, to take her share of the income from only some villages out of the whole property, and it was agreed between the parties that, in case no agreement could be arrived at on reference to the vakils, the parties had a right to obtain partition from the Court.

Held, that the arrangement arrived at to 'facilitate management' being in consideration of the plaintiff's giving up her right to an account, was one having reference to the suit within the meaning of O. 32, R. 7 and was therefore the subject matter of the suit within the meaning of O. 23, R. 3, C P. Code. (*Wort and Agarwala, JJ.*) MAHOMED YAHIA *v.* MT. BIBI SOGHRA. **169 I.C. 741=3 B.R. 611=10 R P. 39=1937 P.W.N. 51=A.I.R. 1937 Pat 232.**

——**O. 23, R. 3**—*Arbitration—Reference made in pending suit without Court's intervention—Award, if compromise.*

An award made in an arbitration without the intervention of the Court in a pending suit is not a compromise within the meaning of O. 23, R. 3, C. P. Code. All the rules relating to arbitration lie within the compass of the second schedule, subject to the proviso contained in S. 89 of the Code. If the parties to a dispute purport to go to arbitration but ignore these rules, there can be no award of which the Courts will take notice as such. Nor can there be any adjustment of the dispute by lawful agreement by reason of a submission alone, unless the third party to whom they have recourse brings them in fact to an adjustment by lawful agreement. If, however, subsequent to the making of the award, the parties agree to accept the award and thus by a lawful agreement arrive at an adjustment of their disputes, the Court would be enabled to record it as an adjustment upon that basis alone. (*Roberts, C. J., Mya Bu and Mosely, JJ.*) MAUNG HLAY *v.* U GE. **1939 Rang.L.R. 280=183 I.C. 343=12 R.R. 71=A.I.R. 1939 Rang. 300 (F.B.).**

——**O. 23, R. 3**—Award out of Court—If can be given effect to. *See* C. P. CODE, S. 89 AND O. 23, R. 3. **1939 N.L.J. 228.**

——**O. 23, R. 3**—*Complicated compromise—Drawing up terms in writing—Desirability.*

Although the requirements of O. 23, R. 3 say nothing about any particular form in which a compromise is to be made before the Court is to be satisfied of its existence, still the more complicated the compromise, the more desirable it is that its terms should be drawn up in writing, before they could strictly be proved. There must be in the nature of things, compromise about small matters, which may be capable of proof orally, but the Court must always look with some suspicion on cases of elaborate compromises which are sought to be proved purely by oral evidence, when one of the parties to the suit strenuously denies that he entered into any compromise at all. (*Roberts, C. J. and Mosely, J.*) HAMID ROWTHER *v.* AYAPPA MUDALIAR. **181 I.C. 54=10 R.R. 448=A.I.R. 1939 Rang. 149.**

——**O. 23, R. 3**—*Compromise—Recording of—Procedure—Notice of motion by defendant to record—Propriety—Bombay High Court Rules (O.S.) 1936, R. 150—Effect of.*

There is no specific provision in the C. P. Code or the High Court rules which prevents a defendant from taking out a notice of motion to record a compromise propounded by him. R. 150 of the Bombay High Court Rules (O.S.) enabling the defendant to put in a supplemental written statement, is not sufficient to take away the right which exists in the defendant otherwise to move the Court to record a compromise. (*Kania, J.*) LILADHAR *v.* SALEHBHAI. **173 I.C. 652=10 R.B. 363=39 Bom.L.R. 1179=A.I.R. 1938 Bom. 85.**

C. P. CODE (1908), O. 23, R. 3.

——O. 23, R. 3—*Compromise—Recording of—What amounts to—Decree directing effect to be given to compromise, without setting out the text of it.*

Where a decree though it did not set out the text of the compromise either in the body or in any schedule, directed that effect should be given to the whole compromise, it must be taken that the decree has recorded the compromise. A reference to the compromise in the decree is a sufficient compliance with S. 375 of the Code of 1882. (*Sir George Rankin.*) JAGAT SINGH *v.* SANGAT SINGH. 67 I. A. 179=I L R. (1940) Lah. 330=44 C.W.N. 569=187 I C. 440=1940 P.W.N. 385=1940 O.L.R. 242=6 B.R. 559=12 R P.C. 156=52 L.W. 17=I.L.R. (1940) Kar. (P.C.) 149 =1940 M.W.N. 672=42 Bom.L.R. 697=1940 A. W.R. (P.C.) 66=1940 O.A. 307=1940 O.W.N, 338=A.I.R. 1940 P.C. 70 (P.C)

——O. 23, R. 3—*Compromise—When embodied in the decree—Omission in the operative part of the decree—Relief in respect of the omitted portion—Execution or suit.*

Where a Court which passed a compromise decree orders the compromise to be made part of the decree, but in the operative part of it incorporates only so much of the compromise as related to the actual subject-matter of the suit, it cannot be said that the compromise has been embodied in the decree. Where a relief is required in such a case in respect of a matter omitted in the operative part of the decree, it would not be available by way of execution of the decree. (*Hamilton and Radhakrishna, JJ.*) SAT NARAIN *v.* CHANDRA MOHAN. 184 I.C. 850=1939 O.L.R. 671=12 R.O. 162=1939 O.W.N. 936=1939 A. W.R. (C.C.) 233=A.I.R. 1940 Oudh 27.

——O. 23, R. 3—*Compromise petition—Duty of Court to pass decree in accordance with its terms.*

Parties to a suit can compromise their differences on any terms they please and they can include in those terms any matters, whether the subject matter of the suit or not, and under the provisions of O 23, R. 3, the Court is compelled to pass a decree in accordance with the terms of the petition. It is not open to the Court to select some terms of the petition and pass a decree in accordance with those terms while neglecting the others. (*Dunkley, J.*) DAW PO *v.* U PO HMYIN. 1940 Rang L.R 237=187 I.C. 875=12 R.R. 345 =A.I.R. 1940 Rang 91.

——O. 23, R. 3—*Construction—"So far as it relates to the suit"—Meaning of—Matter relating to suit but not the subject-matter of suit—Compromise—Power of Court to pass decree in terms of compromise.*

Merely because what is agreed to be done is consideration for a compromise, it cannot be said that what is to be done is a matter that "relates to the suit" within the meaning of O. 23, R. 3, C. P. Code. The expression "so far as it relates to the suit" is somewhat wider than the words "so far as it relates to so much of the subject-matter of the suit as is dealt with by the compromise." There are matters which may not, strictly speaking, be the subject-matter of the suit itself as brought, and yet they may relate to the suit. So long as the compromise relates to the suit, the Court has full authority to pass a decree under O. 23, R. 3, in terms of the compromise even though it might not have, strictly speaking, formed the subject-matter of the suit. (*Davis, J.C. and Mehta, A.J.C.*) NICHUMAL CHANDUMAL *v.* RAMDAS DOWLATSING. 31 S.L.R. 153=171 I. C. 210=10 R.S. 95=A.I.R. 1937 Sind 190.

——O 23, R. 3—*Decree in terms of compromise--Recital as to an exchange having taken place—Effect—Suit as regards exchanged plots—Question of title—Compromise, if bars Court from going into.*

Where a decree in terms of a compromise is passed and the Court merely recited the fact stated in the compromise between the parties that there had been an exchange and transfer of possession between them, this recital of what had already taken place is not necessarily a part of the decree as it does not necessarily amount to any adjustment of the rights of the parties to be effected by the decree. Where subsequently a fresh suit is brought for enforcement of the contract so far as it relates to these plots it cannot be said that the embodiment in the decree of the statement that the exchange had taken place, is in any way a bar to the Court's investigating the question of the plaintiff's title to the plots in question. (*Bennet and Ganga Nath, JJ.*) BALESAR MISIR *v.* TEKESAR MISIR. I.L.R. (1939) All 435 =183 I C. 304=12 R.A 121=1939 A L.J. 260= 1939 A.W.R. (H C.) 270=A.I.R. 1939 All. 454.

——O. 23, R. 3—*Dismissal under—Effect of.*

A dismissal under O 23, R. 3, C. P. Code, does not amount to an adjudication but only precludes the institution of a second suit on the same cause of action. Hence where a suit on a debt praying for a decree against a Malabar tarwad is dismissed by a compromise being effected by the execution of a pro note by the then karnavan, and the plaintiff files a suit on the note, the suit on the note is on an independent cause of action and the binding character of the debt on the tarwad can be gone into. (*Varadachariar and Mockett, JJ.*) PAPPI AMMA *v.* RAMA IYER. 173 I.C. 147=10 R.M. 517=A.I.R. 1937 Mad. 438.

——O. 23, R. 3—*Duty of Court under—Enquiry—Scope—Fairness of compromise—If can be gone into.*

Under O. 23, R. 3, C. P. Code, the Court is bound, when it is proved to its satisfaction that a suit has been adjusted by any lawful agreement or compromise, to order such agreement, compromise or satisfaction to be recorded and to pass a decree in accordance therewith. The Court has no jurisdiction, except in the case of minors etc., to investigate the fairness or unfairness of a compromise which has been accepted by both the parties, (*Wadsworth, J.*) SURAPPARAJU *v.* VENKATARATHNAM. 161 I.C. 728=8 R.M. 859= 1936 M W N. 199=43 L W. 386=A I.R. 1936 Mad. 347=70 M.L J. 471.

——O. 23, R. 3—*Duty of Court under—Record of compromise—Procedure—If can be delayed.*

A Court to whom a petition of compromise is presented should not delay passing order for recording the compromise. Under O. 23, R. 3, C. P. Code, the Court is to pass an order directing the compromise to be recorded and this should be done at once. The Court is also to pass a decree in accordance with the compromise so far as it relates to the suit and the passing of the decree may, if necessary, be postponed till the hearing of the suit if there is a question as to how the interests of other parties to the suit,

who have not entered into the compromise, would be affected by it, but this is no reason to defer the actual recording of the agreement of compromise. (*Mohammad Noor and Rowland, JJ.*) THAKUR PRASAD SINGH *v.* BABUI HARPEARI KUAR. **15 Pat. 456=163 I.C. 675=9 R.P. 35=1936 P W.N. 653=A.I.R. 1936 Pat. 401.**

——**O. 23, R. 3**—Inquiry—Scope—Question of consideration—Relevancy of. *See* COMPROMISE—CONSENT DECREE. **6 B.R. 767=189 I.C. 232.**

—— **O. 23, R. 3**—*"Lawful agreement"—Meaning of—Duty of Court before recording compromise.*

In an application to record a compromise under O 23, R. 3, C. P. Code, the Court has to be satisfied on two points: first, that there was an agreement between the parties, and secondly, that it was "lawful". The term "lawful agreement" in the rule excludes not only unlawful agreements (the object or consideration for which is unlawful as defined in the Contract Act) but also all agreements which on the face of them are void and therefore will not be enforced by Courts. For this purpose no inquiry is necessary because the terms of the agreements themselves will show the defect. (*Kania, J.*) WESTERN ELECTRIC CO., LTD. *v.* KAILAS CHAND. **I.L.R. (1940) Bom. 13=187 I.C. 250=12 R.B. 420=41 Bom.L.R. 1290=A.I.R. 1940 Bom. 60.**

——**O. 23, R. 3**—*Lawful agreement or compromise—Executory contract—If can form subject of compromise of suit.*

It is not true that a contract cannot be a contract unless it is performed. If there is a lawful agreement between the parties to adjust the suit in a particular way, a party is entitled to have an enquiry whether there was such an agreement under O. 23, R. 3, C. P. Code. A promise by one party to execute a sale deed of half the mortgaged property is a good consideration for the other party's promise to have the suit decided in a particular way and as long as the former party is willing to perform its part of promise, namely to execute sale deed, that party can hold the other party bound to its promise. (*Mahomed Noor and Saunders, JJ.*) SUKHDEO MISSIR *v.* KAMESHWARI PRASAD SINGH. **166 I.C. 946=1936 P.W.N. 168=9 R.P. 359=3 B.R. 240=A.I R. 1937 Pat. 39.**

——**O. 23, R 3**—*Lawful compromise—Compromise affecting rights of third party.*

A compromise affecting the rights of a person who is not a party to it cannot be considered to be lawful, and a decree passed thereon is liable to be set aside. (*Bhide, J.*) CHANDA RAM *v.* HARI CHAND. **38 P.L.R. 283.**

——**O. 23, R. 3**—*Matter 'relating to suit'—Meaning of.*

Where a widow who was a party to a partition suit was held by mutual agreement entitled to maintenance from a date prior to the date of the suit, a provision in a compromise between the parties for payment of mesne profits from that date was a matter "relating to the suit" although no past mesne profits were claimed by the plaintiff in the suit, and could, therefore, be given effect to under O. 23, R. 3, C. P. Code. (*Zia-ul-Hasan and Hamilton, JJ.*) SRIKRISHEN *v.* JAMNA NARAIN. **173 I.C. 980=10 R.O 248=1938 O.L.R. 154=1938 O.W.N. 348=1938 O.A. 240=A.I.R. 1938 Oudh 103.**

——**O. 23, R. 3 and Sch. II, Para. 20**—*Power to adjust disputes by compromise—If affected by para. 20, Sch. II, C P. Code.*

The power given by Para. 20 of Sch. II, C. P. Code, cannot override the general power given to parties under O. 23, R. 3, C. P. Code, to adjust their disputes by a lawful compromise at any time after suit. The award is not entertained as an award but as an agreement between the parties disposing of their dispute and it is this agreement which the Court has power under O. 23, R. 3 to record and pass a decree in terms thereof. In principle there is no difference between an agreement of the parties and an award by arbitrators who are appointed by the parties themselves to settle their dispute, because in either case the parties are bound by their own agreement. An award therefore assumes the character of an agreement as soon as it is delivered whether the parties accept it or not. (*Niyogi J.*) RAMDHAR RAM *v.* SANTADAR. **178 I.C. 29=11 R. N. 208=A.I.R. 1938 Nag. 492.**

——**O. 23, R. 3 and Sch. II, Para. 15**—*One of parties praying for an award being set aside—Other party not objecting to that prayer—Power of Court to set aside award.*

O. 23, R. 3, C. P. Code, contemplates an agreement or compromise entered into by the parties out of Court which the parties ask the Court to give effect to and does not apply to a case in which a party prays for an award being set aside and the other party does not object to that prayer. To hold otherwise would be tantamount to holding that parties can by consent confer upon a Court jurisdiction which it does not possess, for the Court has no jurisdiction to set aside the award on any ground not included in those prescribed by para. 15 of Sch. II, C. P. Code. (*Thomas and Zia-ul-Hasan, JJ.*) BACHCHA LAL *v.* MUNNU LAL. **13 Luck. 609=171 I C. 172=1937 O.L.R. 524=10 R.O. 90=1937 O.W.N. 1002=A.I.R. 1937 Oudh 507.**

——**O. 23, R. 3**—Order recording compromise—If consent decree—Appeal—If barred by S. 96 (3). *See* C. P. CODE, S. 96 (3), O. 23, R. 3 AND O. 43, R. 1 (*m*). **A.I.R. 1936 Sind 59.**

——**O. 23, R. 3**—*Parties to suit referring dispute to arbitration without Court's intervention—Subsequent adoption of the award by them as basis of settlement—Adjustment of suit.*

It is open to the parties to a suit to adopt any method they please for the purpose of coming to an agreement in settlement of their disputes. If they choose to adopt the method of asking certain persons to decide what are fair and proper terms of settlement (without informing the Court of their action) and those persons decide on certain terms, and the parties themselves mutually agree to adopt and be bound by those terms as a basis of settlement, then the parties have concluded a lawful agreement in adjustment of the suit within the meaning of O. 23, R. 3, C. P. Code, just as much as if they had arrived at those terms after direct negotiation between themselves; it matters not whether the decision of the persons called in to settle the terms is valid in law as an award. (*Roberts, C.J. and Dunkley, J.*) ALAGAPPA CHETTYAR *v.* A. K. R. M. M K. CHETTYAR FIRM. **14 Rang. 766=170 I C. 434=10 R.R. 82=A.I.R. 1937 Rang. 287.**

C. P. CODE (1908), O. 23, R. 3.

——O. 23, R. 3—*Preliminary mortgage decree for sale—Subsequent adjustment out of Court—If lawful.*

A preliminary mortgage decree for sale is a formal adjudication of the rights of the parties with reference to the mortgage and the decree directs that the plaintiff's claim *shall* be satisfied by a payment in Court in a certain manner. Any adjustment out of Court would, therefore, be obviously contrary to the terms of the decree. In this aspect of the question, the adjustment out of Court made without its sanction may be looked upon as "unlawful" and therefore inadmissible under O. 23, R. 3, C. P. Code. (*Bhide, J.*) RAJA RAM *v.* ALLAHABAD BANK, LTD. **I.L.R. (1939) Lah. 313=185 I.C. 75=12 R.L. 263 (2)=41 P. L.R. 26=A.I.R. 1939 Lah. 79.**

——O. 23, R. 3—*Procedure under—Recording of compromise—Evidence—When to be recorded.*

The general rule, that evidence should be recorded before a decision is made and not after, should also be followed in cases in which the Court records compromises arrived at between the parties. (*Davis, J.C. and Dadiba C. Mehta, A. J. C.*) GHANSHAMDAS LOKUMAL *v.* NANIK-RAM KHUBCHAND. **29 S L.R 437=163 I.C. 240=9 R.S. 2=A I.R. 1936 Sind 59.**

——O. 23, R. 3—Scope—Non-compliance with—Effect on decree—If makes decree other than one on compromise—Registration—Necessity. *See* REGISTRATION ACT, S. 17 (2) (*vi*). **40 C.W. N. 1176.**

——O. 23, R. 3—*Scope—Scheme of arrangement sanctioned under S.* 153, *Companies Act—If can be recorded.*

O. 23, R. 3, C. P. Code, contemplates an adjustment by a lawful agreement or compromise, that is, an adjustment by act of parties and not an adjustment which has a statutory operation. The effect of the words in S. 153 (2), Companies Act, is to give the scheme of arrangement when sanctioned by the Court a statutory operation. Such a scheme of arrangement cannot therefore be said to be an adjustment by a lawful agreement or compromise within the meaning of O. 23, R. 3 and cannot be ordered to be recorded under that rule. (*Nasim Ali and R. C. Mitter, JJ.*) HOUSE OF LABOURERS, LTD. *v.* COMILLA BANKING CORPORATION, LTD. **173 I.C. 431=10 R.C. 515=A I.R. 1937 Cal. 381.**

——O. 24—*Applicability—Suit for infringement of design—Defendant admitting right of plaintiff and submitting to decree for injunction and also offering to pay profits and costs—Refusal by plaintiff to accept offer—Liability for costs—Rules.*

In a suit by the registered proprietors of certain designs for infringement of the designs, the defendants who were innocent infringers admitted the plaintiffs' rights in the designs and offered to submit to a decree for an injunction as prayed for by the plaintiffs and also to pay the plaintiffs the amount of profits they had made by the sale of the goods bearing the offending designs, and also to pay the plaintiff's taxed costs of the suit up to date with costs of the decree to be obtained by the plaintiffs in the terms suggested by the defendant. The plaintiffs, however, did not accept the offer which the defendants made and continued to prosecute the suit, and

C. P. CODE (1908), O 25, R. 1.

the suit finally ended in a decree in terms of the offer made by the defendants.

Held (on the question of costs), that the defendants should be liable only for the plaintiffs' taxed costs of the action up to the date of the offer made by them but that the plaintiff should be made liable for the taxed costs of the defendants from and after that date. There is no doubt that the provisions of O. 24, C. P. Code, do not apply to a case of an infringement of a patent or design. But there is no reason why the principles laid down in that order should not be applied to cases of that nature in which the defendants submit to a decree and admit the claim of the plaintiffs at an early stage of the suit. (*Somjee, J.*) CALICO PRINTERS ASSOCIATION, LTD. *v.* AHMED ABDUL KARIM BROS., LTD. **182 I.C 577=12 R.B. 20=41 Bom L.R. 290= A I.R 1939 Bom. 198.**

——O. 24, R. 2—*Conditional deposit—Interest, if ceases to run.*

Where conditional deposit is made and the decree-holder is under the necessity, if he desires to withdraw the amount, of furnishing security, interest does not cease to run even after the date of deposit. A I.R. 1927 Cal 72, Rel. on (*Coldstream and Din Mohammad, JJ.*) AMIN CHAND *v.* CHUNI LAL TULSI RAM. **175 I C. 814=11 R. L. 61=39 P.L.R. 858=A.I R. 1937 Lah. 733.**

——O. 24, R 3—*Deposit—Defendant responsible for its non-payment to plaintiff—Liability to interest.*

Where the defendant deposits the amount in Court but stipulates such conditions as will make it impossible for plaintiff to get payment and is thus himself responsible for non-payment to plaintiff, he cannot escape payment of interest from date of such deposit. And O. 24, R. 3 has no application to such a case. (*Tek Chand and Din Mahomed, JJ.*) PIARA MAL *v.* SHAM DAS. **A.I.R. 1936 Lah. 76.**

——O 25, R. 1—Applicability—Revision application—Security for costs—Power to make. *See* C. P. CODE, S 151. **40 Bom.L.R. 1025.**

——O. 25, R. 1—*Discretion of Court.*

The power given to the Court under O. 25, R. 1 C. P. Code, is discretionary, and in deciding whether to exercise that power, the Court must have regard to the circumstances of each case, and unless it be shown that an order for security is necessary for the protection of the defendant, it ought not to order security to be taken from the plaintiff. (*Lort Williams, J.*) CELLULAR CLOTHING CO., LTD. *v.* SEN ABDOOL & CO. **I L R. (1938) 1 Cal. 688=179 I.C. 731=11 R.C. 602=42 C.W.N. 270=A I.R. 1939 Cal. 154.**

——O. 25, R. 1—*Discretion of Court under—Scope of.*

The discretion allowed to the Court by R. 1 of O. 25, C. P. Code, is a discretion which is unfettered and unqualified. (*Cunliffe, J.*) CALICO PRINTERS ASSOCIATION, LTD. *v.* JEEVANRAM GANGARAM AND CO. **63 Cal. 897=164 I.C. 560=9 R.C. 297=40 C.W.N. 511.**

——O. 25, R. 1 (3)—*Applicability—Suit by male and female plaintiffs—If one "in which plaintiff is a woman"*

O. 25, R. 1 (3), C. P. Code, cannot apply to a suit where there are more plaintiffs than one, and only one of them is a woman. A suit in which there is also a male plaintiff cannot properly be

described as "a suit in which the plaintiff is a woman," within the meaning of the rule. (*Pankridge, J.*) VICTOR DAY *v.* NISSIM ASRON JUDAH **63 Cal 809=167 I.C. 192=9 R.C. 655=A.I.R. 1937 Cal. 58.**

——**O. 26**—*Appointment of Commissioners and fixing of remuneration—Nature of the acts done—Interference by High Court.*

A Court acts judicially and not administratively when it appoints a Commissioner and fixes his remuneration under O. 26, C. P. Code. If it has acted according to rules laid down, and the High Court is unable to interfere under S. 115, C.P. Code, the High Court could not interfere at all. (*Pollock, J.*) GHANASHYAM PRASAD *v.* VISHWANATH **1940 N L.J. 93.**

——**O. 26**—*Reference to Commissioner of issue as to whether account is mutual, open and current—Legality.*

It is not open to a Court to refer for decision to a Commissioner for accounts, an issue as to whether there was a mutual, open and current account between the parties. Such procedure is unauthorized by O. 26. All that can be referred to the Commissioner is an enquiry into the nature and course of dealings and the amount, if any, due. The further question whether the dealings constituted in law a mutual account is one of law and cannot be referred to a Commissioner. (*Mosely and Dunkley, JJ.*) BHIMBAI MORARJI AND Co. *v.* HARGOVIND MOHANLAL. **177 I.C. 442=11 R.R. 129=A I R. 1938 Rang. 270.**

——**O. 26, Rr. 1 and 4**—*Pardanashin lady living beyond jurisdiction—Commission to examine—Application requesting examination at residence—Order for examination at place of Court—Propriety—Revision.*

Where on an application filed by the defendant a pardanashin lady who was living beyond the jurisdiction of the Court, for her examination on commission at *K* (her place of residence), as she was ill, the Court insisting on her examination on commission at R (place of suit), rejected her applic tion; on revision against this order,

Held, in the case of a pardanashin lady a commission usually issues for her examination especially when she is residing beyond the jurisdiction of the Court. The whole object of the issue of commission fails if the witness has to go to the commissioner at a place where the Court is sitting and the commissioner does not go to the witness. Once the principle is recognized that a commission should issue for the examination of the lady, the power of the Court to issue commission is not limited to her examination at *R* only. The order therefore rejecting her application for her examination at *K* and insisting upon her examination at *R* was certainly an irregular exercise of jurisdiction and could be set aside in revision. (*Varma, J.*) MT. BIBI UMA SALAMA *v* SYED HASAN IMAM. **166 I.C. 729=9 R.P. 341=3 B.R. 218=A I.R. 1937 Pat. 21**

——**O. 26, R. 4**—*Applicability—Execution applications—Power to issue commission in.*

The provisions of O. 26, R. 4, C. P. Code, are not applicable to execution proceedings and have not been made so by S. 141, C. P Code O. 26, R. 4 empowers a Court to issue a commission only in any suit. An application in execution proceedings by the transferee of a decree to be brought on record as the transferee-decree-holder

is neither a proceeding in a suit nor an original proceeding within the meaning of S 141, C.P. Code. (*Gentle, J.*) VENKAYYA *v.* RATTAYYA. **184 I.C. 12=12 R.M. 402=1939 M W N. 403=49 L W. 549=A.I.R. 1939 Mad. 578=(1939) 1 M.L.J 724.**

——**O. 26, R. 4**—Discretion and duty of Court—Witness living and in public service more than 200 miles from Court house—Refusal of commission—Propriety of. *See* C. P. CODE, S. 115. **21 Pat L T. 197.**

——**O. 26, Rr. 4 and 5**—*Duty of Court—Witnesses resident in Bangalore in Mysore State—Application for commission to examine—Refusal—Propriety—Revision—Interference.*

An application for the issue of a commission to examine the applicant's witnesses residing in Bangalore in the native State of Mysore falls within the ambit of R. 5 of O. 26, C P. Code. O. 26, R. 4 has no application to such a case. If the Court thinks that the evidence of those witnesses is necessary, it has no further discretion in the matter, it must order the commission to issue as a matter of course. If the Court in such a case refuses to issue a commission, the High Court would, under S. 115, C. P. Code, interfere with the order in revision. (*Abdur Rahman, J.*) M. J SHETH & Co. *v.* RAMIZA BIBI. **1938 M.W N. 630=178 I.C. 290=11 R M. 440=47 L.W. 656=A.I R. 1938 Mad. 646=(1938) 1 M.L.J. 769.**

——**O. 26, R. 5**—*Defendant residing abroad—Whether should be examined on commission.*

Ordinarily a defendant residing abroad should be permitted to be examined on commission. The mere fact that he was within the jurisdiction of the Court about a month before the presentation of the application to examine him on commission, is not a sufficient reason for a departure from the ordinary rule. (*Horwill, J.*) MUHAMMAD IBRAHIM *v.* ALLAPICHAI ROWTHER. **1936 M W. N 1014=167 I.C. 583=9 R.M. 470=A.I.R. 1937 Mad. 24.**

——**O. 26, R. 5**—*Examination of witnesses in England—Rules of Lahore High Court.*

Proper procedure for examination of witnesses in England would appear to be the issue of a commission in accordance with the provisions of Statute 22 Vict, Ch. 20, as laid down in Para. 1, Part E, Ch. 10 of the Rules and Orders of the Lahore High Court, Vol. I (1930). Of course the issue of a commission for examination of a witness in a distant country is bound to cause delay and a Court will be fully justified in satisfying itself that the evidence is really relevant and necessary for the purposes of the case before issuing process. But a party cannot obviously be deprived of the opportunity of producing his evidence merely on the ground that it may involve some delay Such a procedure would be nothing short of denial of justice. (*Bhide and Din Mohammad, JJ.*) BASHESHAR NATH KHANNA & SONS *v.* GRINDLAY & Co, LTD. **39 P L R. 345=10 R.L. 220=171 I.C. 649=A.I. R. 1937 Lah. 73.**

——**O. 26, R. 8**—*Commission evidence—Admissibility—Conditions—Duty of Court—Discretion under Rule* 8 (b).

Before the evidence taken on commission can be looked at or used for any purpose whatsoever, the Court must first of all determine by a re-

C. P. CODE (1908), O. 26, R. 8.

ference to the provisions of R. 8 of O. 26, C. P. Code, whether or not the evidence taken on commission should be read as evidence in the suit. To look into such evidence in order to decide whether the witness should be ordered to attend in person is not a satisfactory way of dealing with the matter. Evidence taken on commission and tendered on behalf of a party in the suit, unless it is shown that the witness is beyond the jurisdiction of the Court, or is dead or unable from sikness or infirmity to attend to be personally examined can only be put in on behalf of the party provided the Court in its discretion dispenses with proof of any of those circumstances under sub-R. (*b*) of R. 8 of O. 26, C. P. Code. *(Derbyshire, C.J. and Costello, J.)* MAHI TOSH GHOSH *v.* MALIN BIHARI DATTA. **63 Cal. 914=170 I.C. 888=10 R.C. 220=A.I.R. 1937 Cal. 163.**

——**O. 26, R. 8**—*Construction—"Beyond the jurisdiction of the Court"—Meaning of—O. 16. R. 19.*

The expression "beyond the jurisdiction of the Court" in O. 26, R. 8, C. P. Code, has reference to the question whether or not the witness is in reach of the compelling or disciplinary powers of the Court in his capacity of a witness or potential witness; and the matter would therefore fall within the purview of O. 16, R. 19, C. P. Code, under which no witness is to be ordered to attend in person unless he is resident within a certain distance from the Court. *(Derbyshire, C. J. and Costello, J.)* MAHI TOSH GHOSH *v.* MALIN BIHARI DATTA. **63 Cal. 914=170 I C. 888=10 R. C. 220=A.I.R. 1937 Cal. 163.**

——**O. 26, R. 8**—*Scope and effect of—Absence of conditions mentioned in R. 1—Consent of parties, if can render such evidence admissible.*

In the case of consent of the parties, it would not be necessary that the conditions and limitations prescribed in R. 1 of O. 26 should exist. It will appear from R. 8 of O. 26, that with the consent of the parties, the evidence of a person in cases where the conditions and limitations laid down in R. 1 or Cls. (*a*) and (*b*) of R. 8, do not exist may be admissible in evidence. *(Bennet and Ganga Nath, JJ.)* GOPAL DAS *v.* JAGANNATH PRASAD. **I.L.R. (1938) All. 370=176 I.C. 118=11 R. A. 53=1938 A.L.R. 552=1938 A.L.J. 390=1938 A. W. R. (H.C.) 209=A.I.R. 1938 All. 266.**

——**O. 26, R. 8 (a)**—*Evidence on commission—Admissibility—Witness beyond the jurisdiction of Court—Consent of party, if necessary.*

Where the witness who is examined on commission, is beyond the jurisdiction of the Court, the consent of the party is not necessary to make it admissible. Even if a party objects, it is of no use. *(Bose, J.)* JAMSHED *v.* KUNJILAL. **181 I. C. 177=11 R. N. 444=1938 N.L.J. 392=A.I.R. 1938 Nag. 530.**

——**O. 26, R. 8 (a)**—*Sick witness—Evidence taken on commission—If inadmissible.*

Where a witness is examined on commission on the ground that he is ill, the case falls within the exception referred to in Cl (*a*) of R. 8 of O. 26, and the evidence so taken on commission can therefore be taken into account. *(Varma, J.)* SNEHALATA DEVI *v.* JANARDHAN PRASAD SINGH. **21 Pat. L.T. 340=A.I.R. 1940 Pat. 563.**

C. P. CODE (1908), O. 26, R. 10.

——**O. 26, Rr. 9 and 10**—*Commissioner's report—Principles to be adopted by Courts in dealing with.*

Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task is proved by his report and who has not blindly adopted the assertions of either party. *(Lord Romer.)* CHANDAN MULL INDRA KUMAR *v* CHIMAN LAL. **I.L.R. (1940) Kar. (P.C.) 15=42 Bom L.R 387=1939 A.W.R. (P. C.) 185=1939 O.W.N. 1086=1940 A.L.J. 70=185 I.C. 219=21 Pat.L.T. 1=44 C.W.N. 205=6 B.R. 189=1940 P.W.N. 97=42 P.L.R. 81=51 L.W. 135=12 R.P.C. 94=A.I.R. 1940 P.C. 3 (P.C.).**

——**O. 26, R 9 and S. 99**—*Issue of commission—Notice to parties—Failure to give—Effect.*

O. 26, R. 9 does not provide for the presence of the parties when a commission is issued and merely leaves it to the discretion of the Court. But natural justice requires that such acts should not be done without notice to one of the parties. S. 99, C. P. Code, provides a decree could not be varied or reversed because of an irregularity in the proceedings which does not affect either the merits of the case or the jurisdiction of the Court. If there has been no prejudice, the decree could not be attacked. *(Bose, J.)* JAMSHED *v.* KUNJILAL. **181 I.C 177=11 R N. 444=1938 N.L. J. 392=A.I.R. 1938 Nag. 530.**

——**O. 26, R. 10**—*Commissioner for local investigation—Evidence of possession recorded by—Admissibility.*

Evidence of possession recorded by a Commissioner who is appointed in a suit for possession of land, not for the purpose of examining witnesses, but for the purpose of relaying the settlement boundaries and to ascertain and determine whether the suit land was within a particular patta, is not admissible in evidence in the suit to prove the possession of the land. *(Jack, J.)* TARAK NATH BANERJI *v.* KARUNAMAY MUKERJI. **40 C.W.N. 582.**

——**O. 26, R. 10**—*Commissioner's report—Duty of Court to consider.*

Under O. 26, R. 10, C. P. Code, the Commissioner's report is evidence in the suit and shall form part of the record. A party to the suit is, therefore, entitled to have the report, for what it is worth, considered by the Court before it reaches its conclusion on any issue. *(Curgenven, J.)* VENKATRAMA IYER *v.* PONNUSWAMI PADAYACHI. **163 I.C. 36=8 R.M. 1100=1936 M.W.N. 935=A.I.R. 1935 Mad. 918.**

——**O. 26, R. 10**—*Commissioner's report rejected by appellate Court—Duty to issue another commission.*

An appellate Court rejecting a Commissioner's report, is not bound in law to issue another commission. In every case the superior Court is to see whether the subordinate Courts have exercised their discretion judiciously or capriciously. Where, therefore, in a suit for the removal of an encroachment, the plaintiff failed to apply for the issue of a commission for ascertaining by actual measurement if there had been really an en-

croachment, notwithstanding the suggestion of the Court when the trial began, but insisted upon a decision of his case on the materials placed before the Court which included a Commissioner's report in a prior criminal case relating to the same dispute, and the Courts of fact ultimately declined to act on those materials, the litigation cannot be allowed to be prolonged simply to give the plaintiff an opportunity to bring forth new evidence by the issue of a fresh commission. (*Manohar Lall, J.*) MT. BIBI FATIMA SOGRA *v.* HAIDER HUSSAIN. **5 B.R. 357=180 I.C. 134=11 R.P. 472=A.I.R. 1939 Pat. 270.**

——**O. 26, R. 10**—*Scope—Commissions—Power of Court to issue successive commissions—Previous Commissioner's report—If to be wiped out and treated as not evidence before sending out another commission.*

It is in the power of the trial Court, when it is dissatisfied with the report of the first Commissioner, to send out a second or even a third commission; and when all the materials are before the Court, it may, at the time of delivering judgment, attach very little or no weight to the first Commissioner's report; but it is not necessary that before issuing a second or third commission, the Court should wipe the previous Commissioner's report off the record, and treat it as not being evidence at all. There is nothing in O. 26, R. 10, C. P. Code, to justify such a contention. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) SHIB CHARAN SAHU *v.* SARDA PRASAD. **172 I.C. 751=4 B.R. 164=10 R.P. 341=18 Pat.L.T. 837 =1937 P.W.N. 862=A.I.R. 1937 Pat. 670.**

——**O. 26, R. 10 (3)**—*Commissioner's right to fee—Work done inaccurately—No finding of negligence, dishonesty or incompetence.*

A pleader who is appointed Commissioner for the purpose of relaying a large number of *dags* of a very old *chitta* having no bearings on the Field Book but giving only the lengths of the different *dags*, will not be disentitled to any fee, merely because the work done by him is found to be inaccurate, in the absence of any finding that he has done his work carelessly or negligently or that he was actuated by improper motives or that he was incompetent to do that kind of work. (*R. C. Mitter, J.*) DEBENDRA KUMAR SEN *v.* SUBAL CHANDRA CHOUDHURY. **40 C.W.N. 928.**

——**O. 26, R. 11**—*Commissioner appointed in partnership suit—Dispute as to which party was in possession of accounts—If can be left to Commissioner.*

Where in a suit for dissolution and setttement of accounts of a partnership business, a dispute arises as to which of the parties is in possession of the account books, the Court should not leave it to the Commissioner, who is appointed to examine accounts and to submit a scheme for the winding up, to decide that question, as it does not fall within his ordinary duties. It is the duty of the Court to record the evidence and to decide that question itself, and not to appoint a Commissioner for that purpose. (*Jai Lal and Sale, JJ.*) TARIF SINGH *v.* KANSHI RAM. **160 I.C. 642=8 R. L. 574=A.I.R. 1936 Lah. 458.**

——**O. 26, R. 11**—*Scope—Suit on pro-note—Defendant putting in no defence—Commissioner to examine accounts under O. 26, R. 11—Power to appoint.*

O. 26, R. 11 merely entitles the Court to appoint a Commissioner to examine accounts when it is necessary to examine the accounts, but it has first to be shown that it is necessary to examine them. When in a suit on a promissory note the defendant puts in no defence, it is impossible to say whether it is necessary to examine the accounts or not. (*Pollock, J.*) LAXMANRAO TRIMBAKRAO *v.* GAYADIN SHEOPRASAD. **I.L.R. (1937) Nag. 266=170 I.C. 48=10 R.N. 57=A.I.R. 1937 Nag. 136.**

——**O. 26, R. 15**—*Application by defendant for examination of his witnesses on commission—Objection by plaintiff—Order directing commission to issue only on payment of costs to plaintiff—Legality—Proper procedure.*

Where on an application by the defendant for the examination on commission of some of his witnesses who do not live within the jurisdiction of the Court, the Court directed him to file interrogatories and when this had been done, granted time for the plaintiff to file cross-interrogatories, and the plaintiff, instead of filing them, objected to the issue of the commission, and the Court then directed that the commission should issue only on condition that the defendant paid to the plaintiff Rs. 200 as costs of the plaintiff in attending the commission.

Held, that the order was within the competence of the Court but that the money should not be paid directly to the plaintiff but must be deposited in Court as security for such costs as may be payable to the opposite party in the matter of commission. (*Agarwala, J.*) GHANSHYAM DAS AGARWALA *v.* KASTURIBALA DEBI. **159 I.C. 179= 8 R.P. 253 (1)=A.I.R. 1936 Pat. 33.**

——**O. 26, R. 15**—*Commissioner—Fees for—Fixing.*

The parties to a suit had agreed to the appointment of a particular pleader of standing and experience as a Commissioner to investigate certain accounts. No mention however was made of the scale of remuneration in his order of appointment. The Commissioner charged a rate of Rs. 16 per day as his fees. Previous to his appointment the District Judge had directed not to allow a charge of more than Rs. 8 per day to the Commissioner in ordinary cases.

Held, that there was no implied contract on the part of the Commissioner to work on Rs. 8 per day and the rate claimed by him was not improper. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) TARAPADA GANGULY *v.* BABU JITINDRA NATH GHOSH. **172 I.C. 120=10 R.P. 282=A.I.R. 1937 Pat. 614.**

——**O. 26, R. 15**—*Commissioner's costs—Order for—If can be made part of decree.*

The commissioner is not a party to the suit, and an order directing one of the parties to pay a certain sum to the commissioner cannot be made a part of the decree. If at the end of an enquiry there is money due to the commissioner, then that is due to non-observance of the provisions of O. 26, R. 15 by the Court and the failure of the commissioner to look after his own interests, because a sum sufficient to cover the commissioner's expenses ought to be deposited in the Court before the commission is taken. (*Mosely and Dunkley, JJ.*) OON CHAN *v.* KHOO ZUN **177 I.C. 501=11 R.R. 134=A.I.R. 1938 Rang. 254.**

C. P. CODE (1908), O. 26, R. 15.

——**O. 26, R. 15**—*Commissioner's fees—Determination—Matters to be considered by Court—Commissioner doing work but dying without submitting report—Application by widow for fees—Order by Court calling on party to deposit amount—Propriety.*

Before directing a party under O. 26, R. 15 to pay into Court money for fees of a commissioner, the Court has to take into consideration not only the work done by the commissioner and the labour expended by him, but also the return which that party has got for his money. The Court has also to consider whether the work has been done efficiently and with due diligence in accordance with its directions. On the application of the petitioner, *A* was appointed commissioner for local investigation in a suit; he did not finish the work within the time fixed by the Court, and time was therefore extended to him on several occasions. Ultimately after taking further time, he died without submitting any report at all to the Court and the Court had to direct a fresh local investigation. *A's* widow having applied to the Court for payment to her of the balance of the fees due to *A* who had already drawn Rs. 700 out of Court during his life time, out of the amount deposited by the petitioner prior to the issue of the commission under O. 26, R. 15, the Court directed the petitioner to deposit into Court a sum of Rs. 2,050. The value of the property in suit was Rs. 7,800.

Held, in revision, that the Court, in view of the facts, was not justified in making the order summarily, calling on the petitioner to deposit the amount, and that therefore the order must be set aside without prejudice to the rights of the widow to take such steps as were open to her under the law to recover any excess amount which might justly be due to her husband *A*, in respect of the work done by him. (*Nasim Ali and Edgley, JJ.*) NADIA BASHI DEB CHAUDHURY *v* SUDHA BAKUL DE. **63 C.L.J. 563=40 C.W.N. 1216.**

——**O. 26, Rr. 16 and 17**—*Scope of—Examination of witnesses, secretly and in the absence of parties—If permissible.*

The provisions of O. 26, R. 16 are permissive in the sense that they vest a discretion in the Commissioner to examine or not to examine a witness. But when once the Commissioner has decided to examine a witness, then the mandatory provisions of R. 17 come into play which in their turn attract the provisions of O. 18 of the C. P. Code and of S. 138 of the Evidence Act. As such it is certainly not permissible for a Commissioner to record the statements of witnesses secretly and in the absence of parties. (*Iqbal Ahmad, J.*) NAND KISHORE *v.* SHIAM SUNDAR LAL. **1938 A.W.R. (H.C.) 120=1938 A.L.J. 131=1938 R.D. 298=174 I.C. 925=10 R.A. 639=1938 A.L.R. 357=A.I.R. 1938 All. 215.**

——**O. 27, R. 4 and Government of India (Adaptation of Indian Laws) Order 1937, Rr. 9 and 10**—*Agent for the Secretary of State in respect of cases concerning East India Railway—Absence of a Crown pleader.*

Where by a notification the Agent, East India Railway, has been appointed as the agent of the Secretary of State to receive processes in respect of cases concerning the East India Railway and where after the Government of India Act, 1935, no Crown pleader has been appointed, then by virtue of Rr. 9 and 10 of the Government of India (Adaptation of Indian Laws) Order, the Agent, East India Railway, continues to be the Agent of the Secretary of State and service of notice on him in cases concerning the East India Railway is proper service. (*Ganga Nath, JJ.*) SHRI BHAGWAN *v* SECRETARY OF STATE FOR INDIA IN COUNCIL. **I.L.R. (1939) All. 392=184 I.C. 948=11 R.A. 631=1939 A.W.R. (H.C.) 216=1939 A.L.J. 154=A.I.R. 1939 All. 277.**

C. P. CODE (1908), O. 29, R. 1.

——**O. 29, R. 1**—*Scope—If exclude operation of O. 6, Rr. 14 and 15.*

O. 29, R. 1, C. P. Code, is only a permissive rule and does not exclude the operation of O. 6, Rr. 14 and 15 of the Code. A plaint signed by the constituted agent of a party, who holds a power of attorney is properly signed. (*Wadia, J.*) PERFORMING RIGHT SOCIETY, LTD. *v.* INDIAN MORNING POST RESTAURANT. **I.L.R. (1939) Bom. 295=184 I.C. 673=12 R.B. 192=41 Bom.L.R. 530=A.I.R. 1939 Bom. 347.**

——**O. 29, R. 1**—*Scope—Requirements—Compliance with—Statement in plaint that verification is by principal officer able to depose to facts of the case—If necessary.*

R. 1 of O. 29 is clearly permissive and not imperative in its terms and it lays down mere procedure. The rule, however, does not exclude the operation of Rr. 14 and 15 of O. 6. In the case of a suit by a corporation all that the law requires is that the plaint should be verified by a principal officer and that he should be able to depose to the facts of the case. But it is not necessary for the plaintiff-corporation to state in the body of the plaint or by affidavit that the person verifying the plaint is a principal officer of the corporation able to depose to the facts of the case. There is nothing in the code which requires this. It is no doubt open to the defendant to object to the verification as insufficient and to show that the person who has verified the plaint is not a principal officer, or if he is such, that he is not able to depose to the facts of the case, either by cross-examination or otherwise. (*Rangnekar, J.*) BUNDI PORTLAND CEMENT, LTD. *v.* ABDUL HUSSEIN ESSAJI. **I.L.R. (1937) Bom. 85=166 I.C. 138=9 R.B. 209=38 Bom.L.R. 894=A.I.R. 1936 Bom. 418.**

——**O. 29, R. 1**—*Suit by company—Plaint signed and verified by secretary—Suit, if properly instituted.*

A suit on behalf of a company incorporated under the Companies Act is properly instituted, if the plaint in the suit is duly signed and verified by the secretary who has a letter from the chief officer of the company expressly authorizing him to conduct and defend suits on behalf of and against the company, when such officer is given by the Memorandum and Articles of Association extensive powers to manage and conduct the affairs and business of the company and also to appoint and employ for such purposes a secretary or secretaries with such powers and duties as he should think fit. (*Tek Chand, J.*) GENERAL RELIEF ASSOCIATION, LTD. *v.* GANPAT RAM HIRA LAL. **175 I.C. 894=11 R.L. 87=39 P.L.R. 173=A.I.R. 1937 Lah. 751.**

——**O. 29, R. 1**—*Suit by limited company—Secretary empowered by Articles of Association to verify pleadings—Plaint signed and verified by*

C. P. CODE (1908), O. 30.

Secretary—Sufficiency—Affidavit testifying fitness of Secretary to verify—Necessity.

The plaint in a suit by a limited company registered under the Companies Act was signed and verified by the Secretary of the company. The Articles of Association of the company empowered the Secretary to do all acts necessary for the conduct of suits and especially mentioned verification of pleadings as one of those acts. The plaint contained an averment to that effect.

Held, the requirements of O. 29, R. 1 were satisfied, and it was not necessary for the plaintiff to file an affidavit testifying to the fitness of the Secretary to verify the plaint. (*Khundkar, J.*) GOPALGANJ LAKSHMI BHANDAR, LTD. *v.* PURNA CHANDRA DUTTA BANK. **40 C W.N. 930.**

——**O. 30**—*Applicability—Joint Hindu family business.*

O. 30 does not apply to the business of a joint Hindu family. In the plaint in a suit the plaintiffs were described as "firm *K* through *B*".

Held, that this was nothing more than *B* bringing an action on behalf of *K*. In the circumstances it was not a case in which a joint Hindu family sued in the firm's name. (*Wort and Manohar Lall, JJ.*) LAKHAN SAO *v.* KANI RAM. **175 I.C. 655=4 B.R. 618=11 R.P. 17=19 Pat. L.T. 686=A.I.R. 1938 Pat. 270.**

——**O. 30**—*Applicability—Joint Hindu family business—"Partner"—"Firm"—Meaning of.*

The word "partner" in O. 30 applies to persons who are partners by contract and not by virtue of their personal law, and the word "firm" means a business carried on by persons who have contracted to do so and does not include a Hindu joint family business. (*Pollock, J.*) RAMCHANDRA *v.* NARAYANDAS. **I.L.R (1937) Nag. 423 =168 I.C. 342=9 R.N. 251=A.I.R. 1936 Nag. 292.**

——**O. 30**—*Applicability—Joint Hindu family firm.*

There is no rule of law which lays down that a suit brought in the name of a joint Hindu family business should be brought in the name of the firm. O. 30, C. P. Code, does not apply to a joint Hindu family firm as the rights and liabilities of such a firm are not exclusively regulated by the Contract Act. Such a firm must sue and be sued in the name of its members. (*Tek Chand, J.*) DEBI SAHAI *v.* GILLU MALL. **40 P.L.R. 456=11 R.L. 377 (2)=177 I.C. 918= A.I.R 1938 Lah. 563.**

——**O. 30**—*Applicability—Joint Hindu family business—Suit on behalf of—Right to institute.*

A Hindu joint family business is not a partnership and the members of the family cannot, in filing a suit, take advantage of O. 30, C. P. Code, which applies only to suits by partners. In the case of a joint Hindu family business either the manager of the family must sue on behalf of the joint family or all the members of the family must be joined. (*Norman.*) MISRI LAL *v.* CHANDAN MAL. **1937 A M.L.J. 41.**

——**O. 30**—*Applicability—Partnership—Firm owned by minors—Suit against in firm name—Permissibility—Partnership Act, Ss. 4 and 30.*

It is impossible to regard minors who are owners of a business as constituting a partnership firm. A minor who is incapable of contracting cannot be a partner. Nor can persons who are all minors agree with each other to form a

C. P. CODE (1908), O. 30, R. 1.

partnership. Under S. 30 of the Partnership Act, a minor can be admitted to the benefits of partnership, under that section the adult partners by a contract between themselves can agree to confer this benefit upon minors. But before a minor can be entitled to the benefits of partnerships there must be at least two adult partners who are capable of contracting. If a suit is brought under O. 30, C. P. Code, against a partnership firm where a minor has been admitted to some kind of benefit, the minor can in no sense be regarded as a party to the suit. When all the owners of the firm happen to be minors there is no partnership as contemplated by the Partnership Act, and the procedure prescribed by O. 30, C. P. Code, cannot apply, so as to make the minors liable under a decree passed in a suit in the firm name. (*Venkatasubba Rao and Venkataramana Rao, JJ.*) CHIDAMBARAM CHETTIAR *v.* THE NATIONAL CITY BANK OF NEW YORK. **I.L.R. (1937) Mad. 28=164 I.C. 806=9 R.M. 169= 1936 M.W.N. 669=44 L.W. 310=A.I.R. 1936 Mad. 707=71 M.L.J. 373.**

——**O. 30**—*Decree against firm—Appeal by one of the members—Competency.*

In the case of a decree against a firm where the decree-holder is entitled to recover money due under it, jointly and severally from the individuals composing the firm any member of the firm could appeal against the decree as against the firm (*Allsop, J.*) MAHADEO PRASAD *v.* KUNJI LAL VIDYA RAM. **186 I.C. 811=12 R.A. 452 =1939 A.W.R. (H.C.) 814=1939 A.L.J. 1016 =A.I.R 1940 All. 81.**

——**O. 30**—*Scope and object of.*

The policy underlying O. 30 is no more than to afford facilities in the joinder of parties who may be numerous. (*Niamatullah and Allsop, JJ.*) BRIJ KISHORE RAM SARUP *v.* SHEO CHARAN LAL. **I.L.R. (1938) All. 100=173 I.C 853=1938 A.L. R. 193=10 R A. 503=1937 A.L.J. 1328=1937 A.W.R 1142=A.I R. 1938 All. 69.**

——**O. 30, R. 1**—*Applicability—Joint Hindu family firm—Punjab.*

By virtue of the Explanation added by the Punjab Chief Court to R. 1 of O. 30, C. P. Code, that rule is made applicable to a "joint Hindu family trading partnership". In the Punjab, therefore, a joint Hindu family firm can sue and be sued in its "firm name", like any other contractual partnership. (*Tek Chand, J.*) NAND GOPAL OM PARKASH *v.* MEHNGA MAL KISHORI LAL. **42 P L.R. 418=A.I.R. 1940 Lah. 425.**

——**O. 30, R. 1**—*Applicability—Joint Hindu family trading firm—Punjab.*

By virtue of the Explanation added to R. 1 of O. 30, C. P. Code, the provisions of that rule apply, in the Punjab, to joint Hindu family trading firms on partnerships, and persons who are members of such a family trading business can sue, and be sued, in the name of the firm as provided in R. 1, and subject to the limitations laid down in other rules of O. 30. (*Tek Chand and Abdul Rashid, JJ.*) ATMA RAM *v.* MIAN UMAR ALI. **190 I.C. 78=42 P.L.R. 278=A.I.R. 1940 Lah. 256.**

——**O. 30, R. 1**—Firm—Insolvency of one firm —Effect of—Right of remaining partners to sue for money due to firm. *See* CONTRACT ACT, S. 254. **I.L.R. (1937) Nag. 28.**

——**O 30, R. 1**—*Judgment obtained against firm—Effect of.*

C. P. CODE (1908), O. 30, R. 1.

When a suit is brought against a firm and judgment obtained against it, the action is really against the persons who constitute the firm and the judgment is really a judgment against the individuals. (*Bartley and Nasim Ali, JJ.*) RADHA KANTA PAL *v.* PULIN KRISHNA PAL. **42 C.W.N. 310=177 I.C. 812=11 R.C. 277=A.I.R. 1938 Cal. 316.**

——**O. 30, R. 1**—*Nature of provision.*

O. 30, R. 1, C. P. Code, is only an enabling provision, and firms need not sue or be sued only in the form prescribed therein. A plaintiff bringing a suit against a firm may implead all the members of the firm as defendants in that suit. Conversely, such members could sue jointly in their individual names. (*Tek Chand and Abdul Rashid, JJ.*) ATMA RAM *v.* MIAN UMAR ALI. **190 I.C. 78=42 P.L.R. 278=A.I.R. 1940 Lah. 256.**

——**O. 30, R. 1**—*Partnership—Dissolution—Suit by some partners—Competency.*

The mere fact of dissolution does not prevent suits being instituted in the name of the firm with respect to transactions, which were entered into before the date of dissolution. The effect of dissolution is not to render the firm non-existent. It continues to exist for all purposes necessary for its winding up, one of these being the recovery of moneys due to it by suit or otherwise. Two or more of the partners therefore can institute the suit under O. 30, R. 1, C. P. Code. (*Vivian Bose, J.*) AGARWAL JORAWARMAL *v.* KASAM. **I.L.R. (1937) Nag. 28=174 I.C. 179=10 R.N. 350=A.I.R. 1937 Nag. 314.**

——**O. 30, R. 1**—*Scope—Plaintiff describing himself as "Firm X"—Plaint signed by* B *as proprietor—Suit if one in firm name.*

Obiter.—What is contemplated by O. 30, R. 1 is that two or more persons under a firm name may sue without mentioning the names of the individuals. That is not the case, where the plaint describes the plaintiff himself as the "firm *X*, situate in *Y*, etc., through *B*, proprietor of the said firm" and the plaint is signed by *B*, as the plaintiff cannot be deemed to be suing in the firm's name but in his own name, and the mere fact of the firm's name being mentioned, in no way affects the matter. (*Wort and Rowland, JJ.*) MOHAN LAL RAM GOPAL *v.* UDAI RAM SEWA RAM. **161 I.C. 516=8 R.P. 454 (2)=A.I.R. 1936 Pat. 140.**

——**O. 30, Rr. 1 and 10**—*Scope—Sole partner of firm—Right to sue in firm name.*

There is no provision of law which entitles a person carrying on business in a name other than his own to sue in that name. He may be sued, but unless there are two or more persons in the firm the plaintiff cannot sue in the firm name. (*Beaumont, C.J. and Rangnekar, J.*) SCOTT *v.* JITTA AMICHAND & CO. **38 Bom.L.R. 529.**

——**O. 30, R. 1**—*Suit against firm—Addition of names of partners—If obligatory.*

In cases of suits by or against firms properly represented, the addition of the names of individual partners is not obligatory and the suit can proceed even in the absence of partner's names. (*Din Mohammad, J.*) CHANDU LAL *v.* SARASWATI SUGAR SYNDICATE. **180 I.C. 911=11 R.L. 728=A.I.R. 1938 Lah. 823.**

——**O. 30, R. 1**—*Suit in firm name by one only of several partners—Maintainability when other partners refuse to join—Refusing partners—If necessary parties—Plaintiff described as firm through suing partners—Plaint—If defective.*

C. P. CODE (1908), O. 30, R. 3.

Under O. 30, R. 1, C. P. Code, it is competent for one partner alone to sue in the firm's name even though the other partners refuse to sue. Such a suit is a good suit; to such a suit the other partners who refuse to join are not necessary parties, although if these latter want an indemnity against costs from the suing partner, the Court can stay the suit till the indemnity is furnished. The fact that the plaintiff in the suit is described as the firm through the suing partner does not matter in the least and does not make the suit defective. (*M.C. Ghose and R.C. Mitter, JJ.*) BHADRESHWAR COAL SUPPLY CO. *v.* SATISH CHANDRA NANDY & CO. **165 I.C. 390=9 R.C. 388=40 C.W.N. 824=A.I.R. 1936 Cal. 353.**

——**O. 30, R. 2**—*Plaintiff furnishing only initials of partners—No objection by defendant—Suit, if bad for non-joinder of parties.*

Where a person suing as managing partners of a firm when requested to give the name of his partners under O. 30, R. 2 merely gave the initials of the persons or firms which were partners in the firm and their addresses and their respective shares, and the description was not questioned by the defendant in the lower Court but was accepted as sufficient.

Held, the duty of the trial Court at most was to stay the case until the names of the partners had been properly furnished and the case could not be dismissed for non-joinder of parties. (*Mosely, J.*) A.M.K.M. FIRM *v.* BAISHMAW. **171 I.C. 622=10 R.R. 167=A.I.R 1937 Rang. 137.**

——**O. 30, Rr. 3 and 6**—*Scope—Summary suit against firm—Partners served individually—Leave to defend granted to some—Decree against all—Legality.*

In a summary suit against a firm where several partners have been served individually and leave to defend is granted to some and not to others, a decree can be passed against those partners to whom leave is refused and also against the firm. (*Lobo, J.*) FATEHCHAND KHUBCHAND *v.* NATIONAL TILES CO. **187 I.C. 373=12 R.S. 229=A.I.R. 1940 Sind 19.**

——**O. 30, R. 3**—*Suit against firm and its partners—Decree against firm and partners—Power of Court to pass.*

Although O. 30, R. 3 provides that there must be individually the service of summons upon a person who was a partner of a dissolved partnership, it cannot be said that the decree cannot be both against the firm and the partner personally. The question is to be decided by the form of the plaint. If in the plaint the plaintiff sues not only the firm but also a partner personally, then there may be decree not only against the firm but against the partner individually in his personal capacity. O. 30 contemplates a suit against a firm as such, and even if the firm be dissolved before the institution of the suit, there may still be property of the firm against which execution may proceed, and merely because the partnership has been dissolved the whole form and nature of the suit is not altered. Where the partner appears not only on behalf of the firm but also in his personal capacity and puts in a personal defence, the Court is entitled to pass a decree not only against the firm but also against him. (*Davis,*

C. P. CODE (1908), O. 30, R. 3.

J.C. and Mehta, A.J.C.) TOPANMAL SOMAJIMAL *v.* ASSUDOMAL FATEHCHAND. **30 S.L.R. 296=165 I.C. 907=9 R.S. 111=A.I.R 1936 Sind 206.**

——**O. 30, Rr. 3 and 8**—Suit against firm—Parties—Joinder of—Person not served but claiming to be interested in firm though denying to be partner—Right to intervene and defend suit on merits—Court's power to add without plaintiff's consent—O. 1, R. 10. *See* C. P. CODE, O. 1, R. 10 AND O. 30, RR. 3 AND 8. **40 C.W.N. 677.**

——**O 30, R. 3, Proviso**—*Construction—If subject to O. 21, R. 50—Decree against dissolved firm—Partner not party to suit—Right to challenge decree.*

All that the proviso to O. 30, R. 3 requires is that the summons shall be served upon every person whom it is sought to make liable which means every person "whom it is sought to make personally liable." The proviso to O. 30, R. 3, C. P. Code, must be read along with and in the light of O. 21, R. 50, C. P. Code, and so far as the property of a dissolved firm is sought to be made liable, there is no need for serving each and every partner of that firm. Therefore, it is not open to a person to challenge the decree passed against his dissolved firm as a nullity on the ground that he was not personally served, or on the ground that the property of the firm was not liable for the decree. (*Rupchand Bilaram, A.J.C.*) EBRAHIMJEE MULLA *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. **161 I.C. 324=8 R.S. 137=A.I.R. 1936 Sind 34.**

——**O. 30, R. 3, Proviso**—*Suit against firm—Plaintiff having notice of dissolution—Decree obtained after service on one partner only—Validity and effect.*

A decree obtained against a firm after service of summons upon one of the partners only is a good decree against the firm, although the plaintiff had notice of the dissolution of the partnership and he had not served all the partners individually. The only effect would be that it could not be executed individually against the partner who had not been served, nor could the plaintiff get leave under O. 21, R. 50, C. P. Code, to have it executed against him personally. (*Ameer Ali, J.*) SATYA CHARAN *v.* CALCUTTA HARDWARE ENGINEERING CO. **42 C.W.N. 820.**

——**O. 30, R. 4**—*Applicability—Hindu joint family firm—Suit against—Death of one member—Omission to implead legal representative within time—Effect—Suit, if abates entirely—O. 22, R. 4.*

O. 30, R. 4, C. P. Code, does not apply to a joint Hindu family firm. "Partner" is one who is a partner by a contract and not by virtue of his personal law, and "firm" means a business carried on by persons who have contracted to do so and does not include a Hindu joint family business. If one of the defendants sued as a joint family firm dies his legal representatives must be brought or record, and if no application for substitution be made within the time limited, the suit must be held to abate as against him; and if the continuation of the suit would result in conflicting decrees, the suit abates against the other defendants as well. (*Pollock, J.*) RAMCHANDER RAMKISAN *v.* NARAYANDAS SUNDERLAL. **I.L.R. (1937) Nag. 423=168 I.C. 342=9 R.N. 251=A.I.R. 1936 Nag. 292.**

——**O. 30, R. 4**—*Scope—Surviving partner of firm—Suit by—Non-joinder of legal representatives of deceased partners—If fatal—Dismissal of suit—Propriety.*

The surviving partner of a firm is entitled to maintain a suit under O. 30, R. 4, C. P. Code, without joining as parties to the suit the legal representatives of the deceased partner or partners of the firm; and a suit by such a partner cannot be dismissed on the ground of non-joinder of the legal representatives of the deceased partner or partners. (*Beasley, C.J.*) NARAYANA IYER *v.* NARAYANA IYER. **1937 M.W.N. 1312.**

C. P. CODE (1908), O. 30, R. 9.

——**O. 30, R. 6**—*Suit against firm—Right of each partner to defend.*

In an ordinary suit against the firm, each partner has a right to come in and defend. He has an individual right to come in and defend although he defends on behalf of the firm. Each partner may file separate defences, one partner may defend, while another admits. Though not clearly stated this is involved in O. 30, R. 6, C. P. Code. (*Ameer Ali, J.*) SATYA CHARAN *v.* CALCUTTA HARDWARE ENGINEERING CO. **42 C.W.N. 820.**

——**O. 30, R. 6**—*Warrant of Attorney by one partner for appearance—Appearance if on behalf of firm.*

Under O. 30, R. 6, C. P. Code, after appearance all steps in the suit must be in the name of the firm. Though the appearance in such circumstances is individual by each partner, that appearance is an appearance on behalf of the firm. Hence where a warrant of attorney is given by one partner to enter appearance on his behalf, the warrant of attorney is and is intended to be on behalf of the firm. (*Lort Williams and Jack, JJ.*) GHISULAL GANESHILAL *v.* GUMBHIRMULL. **A.I.R. 1938 Cal. 377.**

——**O. 30, Rr. 7 and 8**—*Scope—Suit against firm and its partners—Person alleged to be partner appearing in protest—Finding in suit itself that he is partner—If illegal.*

In a suit against a firm and its partners, there is nothing in law to prevent the Court from arriving at a finding in the suit itself that a particular person is a partner in the firm, although such person appears in protest and although his protest is not struck off. (*Davis, J.C. and Mehta, A.J.C.*) TOPANMAL SOMJIMAL *v.* ASSUDOMAL FATEHCHAND. **30 S.L.R. 296=165 I.C. 907=9 R.S. 111=A.I.R. 1936 Sind 206.**

——**O. 30, R. 9**—*Scope—Firm having common partner—Suit between—If lies—Agreement of lease between firm and one member—Suit for specific performance—Maintainability.*

Where an individual happens to be a common partner in two houses of trade or firms, no action can be brought by one firm against the other upon any transaction between them while such individual is a common partner. This rule, however, is subject to an exception in equity in certain cases where it might be possible to ascertain the rights and liabilities of a member of a firm when all the parties are before the Court; and provided all interested parties are before the Court either as plaintiffs or as defendants, the Court would adjust and determine their rights. This equitable exception cannot be extended to a case which cannot be adequately dealt with merely by a declaration of a right to a credit in the partnership accounts. A suit for specific performance of an oral agreement for a lease entered

C. P. CODE (1908), O. 30, R. 9.

into between a firm and one of its partners is a suit to which the equitable principle cannot be applied. Nor does O. 30, R. 9 of the C. P. Code entitle the firm to institute such a suit on such an agreement. Such a suit is therefore not maintainable in law. (*Macklin, J.*) CHANDULAL *v.* KESHAVLAL. **163 I.C. 579=9 R.B. 34=38 Bom. L.R. 486=A.I.R 1936 Bom. 246.**

——**O. 30, R. 9**—*Scope—Partner of firm doing business with firm on his own behalf—Balance struck in favour of firm after settling accounts—Suit by firm for balance—Maintainability.*

Although the Civil Procedure Code, does not profess to lay down substantive law, O. 30, R. 9 implies that a suit by a firm against one of its partners or between firms having common partners is maintainable in certain circumstances. An action for balance of a settled account is not barred merely because there are other unsettled accounts between the partners. Where, therefore, a partner of a firm is doing business with the firm on his own behalf and has struck a balance in favour of the firm after settling his account, a suit by the firm for the balance is maintainable. The provisions of O. 30, R. 9 which provide that execution will not be taken without the leave of the Court and that the Court may order all accounts to be taken and give such directions as it considers just are sufficient to safeguard the interest of the defendant. (*Bhide, J.*) CHAUDHRI FAZL DIN *v.* GHULAM RASUL. **164 I.C. 832=9 R.L. 163=38 P.L.R. 857=A.I.R. 1936 Lah. 648.**

——**O. 30, R. 10**—*Applicability—Business conducted by guardian on behalf of minors in firm name—Decree against—Execution against minors—Permissibility.*

R. 10 of O. 30, C. P. Code, is applicable only to the case of a single individual carrying on a business under an assumed or trading name. Where a business is owned by four minors and conducted on their behalf by their mother as guardian, it cannot be said that there is a person carrying on business in a name or style other than his own within the meaning of the rule. A decree obtained *ex parte* in a suit instituted against the firm in the firm name is not a decree against the minors and cannot be executed against them or their property, because, the minors are not parties to the decree. (*Venkatasubba Rao and Venkataramana Rao, JJ.*) CHIDAMBARAM CHETTIYAR *v.* THE NATIONAL CITY BANK OF NEW YORK. **I.L.R. (1937) Mad. 28=164 I.C. 806=9 R.M. 169=1936 M.W.N. 669=44 L.W. 310=A.I.R. 1936 Mad. 707=71 M.L.J. 373.**

——**O. 30, R. 10**—*Death of partner—Minor son continuing business along with other partners in old name of firm—Suit against firm by the name of firm—If properly framed.*

Where on the death of partner his minor son carries on business along with the other partners in the old name of the firm, a suit against the members of the firm by the name of the firm is properly framed, and the minor need not be sued in his individual capacity. (*King, C.J. and Ziaul-Hasan, J.*) HAFIZ ABDUL RAZRAQ *v.* RAUF AHMAD. **160 I.C. 893=8 R.O. 283=1936 O.W.N. 221=A.I.R. 1936 Oudh 245.**

——**O. 30, R. 10**—*Firm of one person—Suit in firm's name—If lies.*

C. P. CODE (1908), O. 32, R. 2.

When a firm is only of one person a suit in the name of the firm is incompetent and will not lie under O. 30, R. 10. (*Davis, J.C. and Mehta, J.*) MANGHARAM RUPCHAND *v.* HAZI SORIK PUNHOO. **I.L.R. (1939) Kar. 275=182 I.C. 881=12 R.S. 39=A.I.R. 1939 Sind 172.**

——**O. 31, R. 2**—*Applicability—Suit against an idol.*

Where a suit is not one by or against trustees, executors or administrators, but a suit against the idol, it seems doubtful whether O. 31, R. 2 has any application, for it cannot be said that the property in such a case is vested in a trustee, executor or administrator. (*Thomas, C.J. and Yorke, J.*) DEBI DAYAL *v.* SRI RADHA KRISHNA. **14 Luck. 595=180 I.C. 888=11 R.O. 264=1939 O.L.R. 214=1939 O.W.N. 346=A.I.R. 1939 Oudh 145.**

——**O. 32**—*Applicability—Suit against minor who is a Ward of Court—Power of Civil Court to appoint and remove guardian* ad litem.

O. 32 has no application when the minor happens to be a Ward under the Court of Wards, and a Civil Court in which such a minor is sued has no power to appoint a guardian *ad litem* for him or to remove a guardian who has been acting for him. (*Khaja Mohamad Noor and Saunders, JJ.*) CHHOTI RANI SAHEBA *v.* KUMAR BRIJDEO NARAYAN SINGH **15 Pat. 667=167 I.C. 233=9 R.P. 399=3 B.R. 288=17 Pat.L.T. 899=A.I.R. 1937 Pat. 108.**

——**O. 32**—*Minor defendant—Attainment of majority—Effect—Power of guardian* ad litem *to represent.*

As soon as a minor defendant becomes a major, his guardian becomes *functus officio* and the ex-minor has an absolute right to defend the suit. Though it is open to the Court to refuse to set aside past proceedings it cannot allow the suit to proceed with the guardian on the record as representing the defendant who has become a major. (*Norman.*) BHANWAR LAL *v.* THAKUR HARISINGH. **1937 A.M.L.J. 37.**

——**O. 32, R. 1**—*Next friend or guardian* ad litem *—Position of*—De facto *guardian of Mahomedan minor—Power to give valid discharge or compromise or settle suit on behalf of the minor.*

There is no true analogy between the position of *de facto* guardian of a minor under the Mahomedan Law and the position of a next friend or guardian *ad litem* under O. 32, C. P. Code. The next friend or guardian *ad litem* under O. 32 is not a party to the suit in the true sense of the word. He is there to look after the interests of the minor. Though a *de facto* guardian as such cannot give a valid discharge, if he is the next friend or guardian *ad litem* in the suit, he can, with the leave of the Court give a valid discharge or settle or compromise on behalf of the minor. (*Davis, J.C. and Lobo, J.*) AZIZUL RAHMAN FATEHULLAH *v.* CHOITHRAM. **I.L.R. (1940) Kar. 200.**

——**O. 32, R. 1**—Suit on behalf of alleged minor—Plaintiff found to be major—Procedure to be followed. *See* C. P. CODE. S. 47 AND O. 32, R. 1. **1938 O.A. 612=1938 O.W.N. 779.**

——**O. 32, Rr 2 and 15**—*Applicability—Person on whose behalf suit is instituted becoming of unsound mind during pendency of suit—Power of Court to strike suit off file.*

C. P. CODE (1908), O. 32, R. 2.

Where a suit was instituted in the name of joint family firm consisting of *R* and his minor son by *N*, holding a power of attorney on behalf of *R*, and it was found during the pendency of the suit that *R* was of unsound mind but was not so at the time the suit was instituted.

Held, that in the absence of any finding that the suit had not been properly instituted, the Court had no power to order the plaint to be taken off the file.

Held, further, that the rules relating to suits on behalf of minor could not be strictly applied under O. 32, R. 15 to the circumstances of the case and that O. 32, R. 2 did not apply as the suit was properly instituted. (*Beckett, J.*) DEOKARAN DAS RAM BILAS *v.* DEBI SAHAI. **161 I C. 646=6 R L. 780=A I.R. 1936 Lah. 7.**

——**O 32, R. 2**—*Suit by minor—No objection by defendant—Plea of proceedings being a nullity if open to such a defendant.*

Where a suit is filed by a minor, it is open to the defendant to apply to have the plaint taken off the file under O. 32, R. 2, C. P. Code. But if he fails to avail himself of this, he cannot be heard afterwards to say that the proceedings were null and void because the plaintiff was a minor. (*Pollock, J.*) SULEMAN *v.* ABDUL SHAKOOR. **188 I.C. 292=12 R.N. 328=1939 N.L.J. 577=A.I.R. 1940 Nag. 99.**

——**O. 32, R. 3**—*Applicability—Execution proceedings*

Failure to appoint guardian for the minor does not vitiate execution proceedings since the provisions of O. 32 do not in terms apply to execution. (*Din Mohammad, J.*) RAM KISHEN *v.* CHANDRA BHAN. **A.I.R. 1940 Lah. 241.**

——**O. 32, R. 3**—*Appointment of guardian* ad litem—*Absence of formal order—Effect of.*

Where a person proposed as a guardian *ad litem* appeared and represented the minor in the proceedings against him, the absence of a formal order appointing him as guardian would not be much material. (*Mitter and Khundkar, JJ.*) PRIYA KANTA PAL *v.* SUDHIR CHANDRA ROY. **69 C.L.J. 288=43 C.W.N. 519=A.I.R. 1939 Cal. 471.**

——**O. 32, R. 3**—*Appointment of guardian* ad litem—*Effect—Allegations that minors were in fact majors—Onus.*

Where a suit is instituted against certain persons on the footing that they were minors, the Court, by appointing guardian *ad litem* under O. 32, R. 3 must be taken to have arrived at a finding of fact of their minority and the onus of proving that they were majors at the time of institution of the suit is on the persons alleging it to be so. (*Dunkley and Braund, JJ.*) R. M. A. R. M. CHETTYAR FIRM *v.* MG. SHWE HMUN. **180 I.C. 489=11 R.R 404=A.I.R. 1938 Rang. 468.**

——**O. 32, Rr. 3 and 4**—*Appointment of joint guardians for same minors—Interests of guardians adverse to those of minors—Appointment, if defective.*

There is nothing in the Code of Civil Procedure permitting the appointment of joint guardian *ad litem*. Where, in a suit on mortgage against two persons and their minor children, the Court, without issuing any notice to the minors or other persons who might be fitted to act as guardians of the minors and without taking any steps to comply with the provisions of O 32, Rr. 3 and 4, passes an *ex parte* order appointing the two persons as guardians *ad litem* jointly for the same minors and the interests of the guardians *ad litem* are adverse to those of the minors, the appointment of the guardians *ad litem* is defective. (*Dunkley, J.*) MARY ALVERAZ *v.* RATANAPON SOCIETY. **163 I.C. 499=9 R R. 25=A.I.R 1936 Rang. 237.**

C. P. CODE (1908), O. 32, R. 3.

——**O. 32, R. 3**—Award against minor—Filing of—Appointment of proper guardian—Necessity for. *See* ARBITRATION ACT, S. 11. **42 P L.R. 114.**

——**O. 32, Rr. 3, 5 and 7**—*Compromise on behalf of minor defendant—Right to enter into—Natural guardian of minor—Compromise by—Guardian* ad litem *not party to compromise—Minor—If bound.*

If a guardian *ad litem* has been appointed for a minor, then the karta of the family of the minor or the father of the minor cannot enter into a compromise on behalf of such minor so as to bind the minor unless the guardian *ad litem* is a party to it. It is clear from O. 32, Rr 3 and 5, that the guardian *ad litem* alone can represent the minor. Where a compromise is entered into by the natural guardian of a minor defendant, but the guardian *ad litem* appointed for the suit is not a party to it, such compromise is not binding on the minor, though the Court may have approved of it. (*Harries, C.J. and Dhavle, J.*) AWADHESH PRASAD MISSIR *v.* WIDOW OF TRIBENI PRASAD. **19 Pat. 343=1940 P.W.N. 514.**

——**O. 32, R. 3**—*Duty of Court—Minors served through mothers as guardians—No express order of appointment or consent of guardians—Proposed guardians not appearing in proceedings—Decree against minors—If null and void.*

Where the defendant in a suit is a minor that Court has to see not merely that a guardian is appointed, but also that the guardian has consented to act. Where notices are served on minor defendants through their mothers as guardians, but no appearance is made on their behalf, nor any order of Court passed appointing the mothers as guardians, or showing that the proposed guardians consented to act as such on behalf of the minor defendants, the decrees passed in the suits against the minors must be held to be mere nullities. (*Courtney-Terrell, C.J. and Madan, J.*) BARAIK RAM GOBIND SINGH *v.* CHOWRA URAON. **16 Pat. 632=1938 P.W.N. 78=173 I.C. 644=4 B.R 315=19 Pat.L T. 259=10 R.P. 430=A.I.R. 1938 Pat. 97.**

——**O. 32, R. 3**—*Guardian* ad litem—*Absence of formal order appointing—Validity of proceedings*

Where a person acts as the *de facto* guardian *ad litem* of a minor defendant, the mere absence of an order formally appointing him as guardian *ad litem* is not fatal to the validity of the proceedings. (*Tek Chand and Abdul Rashid, JJ.*) KARAM CHAND *v.* NARINJAN SINGH. **179 I C. 233 =11 R.L. 543=40 P.L.R. 403=A.I.R. 1938 Lah. 709.**

——**O. 32, R. 3**—*Guardian* ad litem *appointed in suit—Appointment of new guardian in execution —Practice in Calcutta High Court.*

According to the practice of the Calcutta High Court up to the year 1936; a guardian *ad litem* appointed in a suit ceased to be the guardian on

C. P. CODE (1908), O. 32, R. 3.

the passing of the decree and the decree-holder was bound to have a new guardian *ad litem* appointed at the execution stage. (*Mitter and Khundkar, JJ.*) PRIYA KANTA PAL *v.* SUDHIR CHANDRA ROY. **69 C.L.J. 288=43 C.W.N. 519=A.I.R. 1939 Cal. 471.**

——O. 32, R. 3—*Guardian of minor appointed in suit—If continues in execution proceeding.*

A guardian of a minor appointed in the suit continues to be the guardian of the minor in the execution proceeding until he dies or is removed. The decree-holder is, therefore, not bound to have a fresh guardian appointed in the execution proceeding. (*Nasim Ali and R.C Mitter, JJ.*) BROJENDRA KISHORE ROY CHAUDHURY *v.* SHAMSERALI **I.L.R (1937) 2 Cal. 127=171 I.C. 435=10 R.C. 268=41 C.W.N. 531=A.I.R. 1937 Cal. 259.**

——O. 32, R. 3—*Guardian* ad litem *not appointed—Decree against minor—If a nullity.*

The Court cannot dispense with the appointment of a guardian *ad litem* of a minor defendant and a decree passed against a minor who is not properly represented is a nullity. (*Leach, J.*) MA WE GYAN *v.* MAUNG THAN BYU. **1937 Rang. L.R. 164=169 I.C. 967=10 R.R. 48=A.I.R. 1937 Rang. 126.**

——O. 32, R. 3—If applies to proceedings under United Provinces Encumbered Estates Act. *See* UNITED PROVINCES ENCUMBERED ESTATES ACT AND R. 6 OF RULES UNDER THE ACT. **1939 A L.J. 411.**

——O. 32, R 3—*Minor—Restitution of conjugal rights—Decree against minor girl—If a nullity.*

A decree passed against a minor girl for restitution of conjugal rights is a nullity. 31 A. 572 (P.C.), Rel. on. (*Mosely, J.*) MA THEIN *v.* MAUNG PA CHAW. **10 R.R. 98=170 I.C. 532=A.I.R. 1937 Rang 226.**

——O. 32, Rr. 3 and 7—*No formal order appointing guardian—Compromise not sanctioned by Court—Effect.*

Where no formal order was made appointing a guardian *ad litem* as required by O. 32, R. 3, C. P. Code, and no sanction was sought, or granted by the Court to the compromise as required by O. 32, R. 7, C. P. Code, the irregularities are very serious, and the compromise is not binding upon the minor. The fact that the minor was near his majority, that he took an active part in the proceedings and that he was effectively represented by his grandmother although no order of appointment was made, will be of no avail. (*Shemp, J.*) NARANJAN SINGH *v.* KARAM CHAND. **170 I.C. 831=10 R.L. 145=39 P.L.R. 125.**

——O. 32, R. 3—*Powers and duration of guardianship—Appeal filed by third person—Order of dismissal—Effect of.*

Execution proceedings are only a continuation of the regular suit and a guardian *ad litem* appointed in the civil suit continues to be guardian *ad litem* in execution proceedings and for the purposes of appeal. After a decree was passed against a minor and the case had been transferred to another Court for execution the guardian *ad litem* did not wish to continue and so another guardian *ad litem* was appointed. The proceedings in execution were however conducted by a third person and during such proceedings he appeared on behalf of the minor. In an appeal filed by him,

C. P. CODE (1908), O. 32, R. 3.

Held, that where there was a properly constituted guardian *ad litem* no one else could represent the minor and hence the appeal must be dismissed.

Held, further, that such dismissal of appeal on the ground that the minor was not properly represented could not affect the minor's interest as he was not bound by it. (*Wright, J.*) SINGARAM *v.* SOMASUNDARAM. **185 I.C. 883=12 R.R. 241=A.I.R. 1939 Rang. 444.**

—— O. 32, R. 3—*Proper person—Duty of Court in appointing guardian* ad litem*—Considerations—Interest adverse to that of the minor—Likelihood of conflict in interest—Effect of.*

The Court, when appointing a guardian *ad litem* for a minor defendant must consider the question whether the interest of the proposed guardian is adverse to that of the minor; and if the Court is not apprised of all the circumstances of the case and is, for that reason, not in a position to say that the interest of the guardian is adverse to the minor whom he is called upon to represent in the suit, but in reality the facts are such that the defence reasonably open to the minor would necessarily raise questions likely to create a conflict between him and the proposed guardian, the appointment of such a person as guardian *ad litem* is highly improper. Where it is reasonably open to the minor to raise a defence which would involve the impugning of the act of the proposed guardian the latter's interests must be regarded as adverse to that of the minor and he is not therefore a proper guardian for the suit for such minor. (*Niamatullah, J.*) RADHEY SHYAM *v.* GOPAL RAI PHULCHAND. **1937 A.L.J. 340=169 I.C. 508=1937 A.L.R. 539=10 R.A. 25=1937 A.W.R. 271=A.I.R. 1937 All. 374.**

——O. 32, R. 3—*"Proper person"—Mortgage executed by Hindu father—Suit on against father and minor sons—Appointment of father as guardian.* ad litem *of minor defendants—If vitiates proceedings—Interests of father—If necessarily adverse to sons—Rule—Decree—When binds minor defendants.*

In a suit against a Hindu father and his sons on the basis of a mortgage executed by the father, it is undesirable that the father should be appointed guardian *ad litem* of the minor sons. The position is somewhat difficult and embarrassing. But the fact that the father executant is appointed, and acts as the guardian *ad litem* of his minor sons is no ground for holding that the trial of the suit is *ipso facto* vitiated and does not relieve the Court from the necessity of going into the question whether the mortgage was executed for legal necessity. It cannot be presumed as a matter of law that the interests of the father in such a case are adverse to the minor sons. Whether or not a guardian *ad litem* is a proper guardian depends on whether he has made a good defence to the suit—what has to be shown, in order to make the decree binding on the minor defendants, is that the guardian *ad litem* represented the interests of the minors to the best of his ability. (*Harries and Rachhpal Singh, JJ.*) SUNDER LAL *v.* HARIHAR SAHAI. **1937 A.W.R. 418=1937 A.L.J. 468=171 I.C. 36=1937 A.L.R. 793=10 R.A. 221=A.I.R. 1937 All. 552.**

——O. 32, R. 3 (4)—*Appointment of guardian—Application by a person to be appointed guardian—Failure to serve notices—Irregularity.*

C. P. CODE (1908), O. 32, R. 3.

The main object of O. 32, R. 3, C. P. Code, is to ensure that minor defendants are adequately represented in suits which may be instituted against them. It may well be that circumstances may arise in connection with a particular suit which would be sufficient to satisfy the Court that a person who had applied to be appointed as guardian of a minor defendant was really a proper person to be the minor's guardian for the suit within the meaning of O. 32, R. 3 (1) of the Code and, if it was clearly in the interest of the minor that such person should be appointed forthwith without issuing the notices upon the minor or upon the natural guardian, to which reference is made in O. 32, R. 3 (4) of the Code, it might be held that failure to serve such notices would merely amount to an irregularity. (*Edgley, J.*) BARADA PRASAD SHUKUL *v.* SAHAN LAL BOID **I.L.R. (1937) 1 Cal. 586=173 I.C. 341=10 R.C. 504 =A.I.R. 1937 Cal. 658.**

——**O. 32, R. 3 (5)**—*Scope and effect of—Suit against minor—Latter becoming major pending suit—Fact of majority not brought to notice of Court—Decree by Court as if defendant was still minor—If a nullity.*

Where a decree is passed by a competent Court against a defendant, who was a minor at the time of the institution of the suit and who attained majority during the pendency of the suit, but who was still shown in the records as a minor represented by a guardian, the decree is a perfectly good decree, and it cannot be said that such a decree is a nullity. (*Khaja Mohammad Noor and Rowland, JJ.*) RATAN PRASAD MARWARI *v.* BRIDHI CHAND SHOROFF. **18 Pat. 539=186 I.C. 298=6 B.R 326=12 R.P. 475=1939 P.W.N. 677=20 Pat L.T. 765=A.I.R. 1939 Pat. 601.**

——**O. 32, R. 4**—*Adverse interest—Mortgage by guardian on behalf of himself and minors—Joint debtors—Guardian, if can be appointed guardian* ad litem.

Where a mortgage is executed by a guardian on behalf of himself and minors in respect of property in which they were jointly interested and in a suit brought against them on the mortgage the guardian is appointed guardian *ad litem*, his interest is adverse to that of the minors as they are sued as joint-debtors, and every joint-debtor has an interest in seeing that his co-debtors do not escape from their joint liability. This being so, the decree obtained against minors is a nullity on the ground that they were not properly represented in the suit. (*Dunkley and Braund, JJ.*) R.M.A.R.M CHETTIAR FIRM *v.* MG. SHWE HMUN. **180 I.C. 489=11 R.R. 404=A.I.R. 1938 Rang. 468.**

——**O. 32, R. 4 (1)**—*Leave of Court—Inference from circumstances—Suit by next friend—Existence of certificated guardian, not known to Court —Effect.*

The leave of the Court as contemplated by sub-S. (1) of R. 4 of O. 32, C.P. Code, need not necessarily be in writing and an oral granting of leave may be inferred from the circumstances of particular cases. Where the existence of a certificated guardian for a minor is not brought to the notice of the Court in a suit by a next friend on behalf of such a minor, it cannot be held that such a next friend was acting as such with the leave of the Court as contemplated by O. 32, R. 4 (1). (*Collister, J.*) BHAGWATI PRASAD *v.* SECRETARY OF STATE.

C. P. CODE (1908), O. 32, R. 5.

188 I.C. 281=12 R.A. 591=1940 A.W.R. (H.C.) 48=1940 A.L.J. 85=A.I.R. 1940 All. 202.

——**O. 32, R. 4 (1)**—*Mortgage by Hindu father —Suit on impleading minor son—Father appointed guandian* ad litem *— Propriety — Father's interests—If adverse to those of minor son.*

It cannot be stated as a universal proposition of law that in a suit on a mortgage executed by a Hindu father impleading his minor son as a defendant the father's interests are necessarily adverse to those of the minor and the father cannot properly represent the minor son in the mortgage suit. That is a question of fact; if the father-guardian fails to raise the defences open to the minor son, it follows that the minor is not properly represented and the decree made in the suit would not bind him. (*Wort and Varma, JJ.*) CHITRADHAR NARAIN DAS *v.* KHIDAR THAKUR. **17 Pat. 236=177 I.C. 886=5 B.R. 37=11 R.P. 191 =A.I.R. 1938 Pat. 437.**

——**O. 32, R. 4 (3)**—*Appointment of non-consenting person—Effect—Proceedings null and void.*

The representation of a minor by a non-consenting guardian is no representation at all and all proceedings while the minor is under such guardianship are null and void against him. A.I.R. 1927 Cal. 488, Rel. on; A.I.R. 1921 Cal. 534; A.I.R. 1922 Pat. 448 and 31 All. 572, Cons. (*Middleton, J. C.*) DALIP CHAND *v.* GANGA RAM SAHIB RAM. **161 I.C. 200=8 R. Pesh. 164=A.I.R. 1936 Pesh. 40.**

——**O. 32, R 5**—*Decree based on award passed against minor—Minor not properly represented—Application by him to set aside decree—Maintainability.*

It is open to a minor against whom a decree has been passed on the basis of an award without the appointment of a guardian, to put in an application under O. 32, R. 5, C. P. Code, to have the decree declared a nullity. (*Abdul Rashid, J.*) ARURA *v.* PUNJAB ZAMINDARA BANK, LTD. **189 I.C. 254=13 R.L. 71=42 P.L.R. 114=A.I.R. 1940 Lah. 164.**

——**O. 32, R. 5**—*Representation of minor—Appointment of guardian* ad litem*—Mother, if can act thereafter.*

Where a guardian *ad litem* has once been appointed by the Court for a minor, it is only through him that any petition on the minor's behalf should be filed, and not through anybody else Where a mother of a minor files some objections in execution, without reference to the guardian *ad litem* it is not entertainable. (*Bennet and Verma, JJ.*) HEM RAJ *v.* KHEMCHAND. **I.L.R. (1938) All. 829=1938 A.L.R. 855=178 I.C. 449=1938 A.W.R. (H.C.) 657=11 R.A. 296= 1938 A.L.J. 919=A.I.R. 1938 All. 601.**

——**O. 32, R. 5**—*Scope—If mandatory—Order at instance of minor without next friend or guardian but beneficial to minor—Court—If bound to set aside.*

O. 32, R. 5, C.P. Code, was made for the benefit and protection of a minor and not for his prejudice.

Quaere.—Whether R. 5 of O. 32 compels the Court in every case to discharge an order made at the instance of a minor without a guardian or next friend even when such order is for the benefit of the minor? (*Davis, J. C. and Lobo, J.*) DHOLANDAS GIDUMAL *v.* SADHUMAL DOLUMAL. **32 S.L.R. 215.**

C. P. CODE (1908), O. 32, R. 5.

——**O. 32, R. 5 (2)**—*Scope—Application for execution by minor without guardian—Competency—Discretion of Court.*

Sub-R. (2) to R. 5 of O. 32 does not say that an order on any application made by a minor where no next friend or guardian is appointed 'shall' be discharged; it says 'may' be discharged. The sub-rule cannot be so construed as to deprive the Court of its discretion to allow proceedings, which are in the interests of the minor, to go on, or to permit them to be frustrated by mere accident or technicality. Hence, where a minor has made an application for execution of rent decrees and there is no guardian appointed, the Court may allow the receiver appointed in the proceedings to recover rent on behalf of minor. (*Davis, J. C. and Tyabji, J.*) LALUMAL DHOLUMAL *v.* HARUMAL LALSING. **185 I.C. 155=12 R.S. 153=A.I.R. 1939 Sind 332.**

——**O. 32, Rr. 5 and 7 (2)**—*Scope—Compromise by guardian without leave of Court—Decree based on—If nullity—Minor represented by guardian—Absence of formal order of appointment of guardian—Effect—Decree based on agreement by such guardian—If nullity—Executability against minor.*

Under O. 32, R. 7 (2), C. P. Code, a decree based on an agreement or compromise entered into by a guardian of a minor without the leave of the Court is not void, but only voidable at the instance of the minor concerned. Where a minor is properly represented in the suit by a guardian but there is no formal order of appointment of the guardian, as such, it is only a case of mere irregularity, and the decree cannot be said to be a nullity; and it cannot be held to be invalid as against the minor unless prejudice is shown. It must be held to be valid and binding until it is declared to be invalid in proper proceedings, and so long as it stands, the executing Court cannot refuse to execute it. (*Rowland and Chatterji, JJ.*) UMAR *v.* MAHABIR LAL SAHU. **18 Pat. 708 =183 I C. 799=5 B R. 996=12 R.P. 192=1939 P.W.N. 631=A.I.R. 1940 Pat. 59.**

——**O. 32, R. 6**—*Applicability—Award in favour of certain person for himself and as representing minor brothers—Part of amount payable to such person under award deposited in Court—Application to withdraw—Security—Necessity.*

An award can only be enforced as if it were a decree, and when enforced, all the provisions relating to enforcement of a decree apply. Where therefore an award is made in favour of a certain person on behalf of himself and as representing his minor brothers, the award is one made in favour of all such persons, and when out of the amount payable to such person under such award, some amount is deposited in Court for payment to him, and when such person applies for withdrawal of the said amount from Court, the security which he can be called upon to furnish under O. 32, R. 6, C. P. Code, is in respect of the amount payable to the minors according to their shares in the amount so deposited. (*Rupchand Bilaram, A J C.*) JERAMDAS DANOMAL *v.* MENGHRAJ & Co. **169 I.C. 943=10 R.S. 30=A.I R. 1937 Sind 173.**

——**O. 32, R. 6**—*Applicability—Execution proceedings—Guardian* ad litem *representing minor in mortgage suit—If competent to give valid discharge of decree without leave of Court.*

C. P. CODE (1908), O. 32, R. 6.

Even though the terms of O. 32, C. P. Code, do not apply to execution proceedings, the procedure laid down in that order and the principle which underlies the provisions contained in that order must be taken to apply not only to suits but to execution proceedings as well Accordingly a guardian *ad litem* who represents a minor in a mortgage suit and obtains a final decree for sale, is not in a position to give a legal and valid discharge of the decree without the leave of the Court obtained under O 32, R. 6, C. P. Code. (*Mukherji and S.K. Ghose, JJ.*) KANAILAL SAHA *v.* BAIJANATH KHETRI. **174 I.C. 887=10 R.C. 732 =65 C.L J. 381=A.I.R. 1937 Cal. 649.**

——**O. 32, R. 6**—*Bond under—Enforcement—Assignment of bond by Judge—Competency—Suit by assignee—Maintainability.*

A bond executed by a surety for a guardian under O. 32, R. 6, C. P. Code, to the Judge of the Court described by his title, *e.g.*, to the District Munsif, being one to a judicial person can be assigned by the District Munsif. The fact that his full name is not given makes no difference, he being a *persona designata* described by his title of District Munsif. The assignment by the Judge is valid and enables the assignee to maintain a suit on the bond toe nforce it against the surety. (*Cornish, J.*) SATYAM *v.* SATYANARAYANA **167 I C. 692 (2)=9 R M. 473=44 L.W. 621=1936 M.W. N. 1127=A.I.R. 1936 Mad. 953=71 M.L.J. 675.**

——**O. 32, Rr. 6 and 7** – *Natural guardian appointed as guardian* ad litem*—Powers—Limitations.*

It is well established that the *Karta* of a joint Hindu family or the natural guardian of a minor who has sued as his next friend or who has been appointed his guardian *ad litem*, comes under the control of the Court and his powers as *Karta* or as natural guardian are controlled by the provisions of law contained in O. 32, C. P. Code. He cannot in the capacity of *Karta* or natural guardian do anything on behalf of the minor which he is debarred from doing as next friend or guardian *ad litem* without leave of the Court. A payment to such a person by the judgment-debtor out of Court without its leave is accordingly invalid and cannot be given effect to. Such a payment would not discharge the judgment-debtor. (*Mitter and Rau, JJ.*) SAMARENDRA NATH MITTER *v.* ASHUTOSH ROY. **186 I.C. 72=12 R C. 437 =43 C.W.N. 962=70 C.L.J. 115=A.I.R. 1939 Cal. 588.**

——**O. 32, R. 6**—*Next friend accepting money on behalf of minor from judgment-debtor without obtaining leave of Court—Certification, if can be made*

Where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court. So, where on a decree obtained in favour of a minor, his next friend accepts money from the judgment-debtor on behalf of the minor and the judgment-debtor wants to get such repayment out of Court certified, the certification cannot be made as leave of Court was not taken in order to accept the payment on behalf of the minor. 36 Mad. 295 (P C.) and A.I.R. 1925 Mad. 230, Rel. on. (*Skemp, J.*) KANSHI RAM *v.* GOHRA SHAH HARI CHAND.

C. P. CODE (1908), O. 32, R. 6.

173 I.C. 379=10 R.L. 442=39 P.L.R. 714=A.I.R. 1937 Lah. 387.

——O. 32, R. 6—*Next friend receiving payment from judgment-debtor without leave of Court—Objection to certification newly raised in second appeal—Maintainability.*

One *K* who was the next friend of a minor in a suit was alleged to have received some amount in favour of the minor without obtaining leave of Court under O. 32, R. 6. Three Courts found that *K* had not received the amount but the finding of the first appellate Court was that he had received the amount. Then *K* brought an objection on behalf of the minor that as provisions of O. 32, R. 6 were not complied with there could be no certification.

Held, in the circumstances *K* was not precluded from taking the point, that the minors were not bound by the payment received by him on their behalf without the leave of the Court. (*Skemp, J.*) KANSHI RAM *v.* GOHRA SHAH HARICHAND. **173 I C. 379=10 R.L. 442=39 P.L.R. 714=A.I.R. 1937 Lah. 387.**

——O. 32, R. 6—*Scope—Compromise decree—Provisions for payment of money to next friend of minor—Payment out of Court to next friend—If permissible—Duty of Court to direct security before payment—Provision for payment direct to next friend—If unlawful—Promisor if can ignore the provision.*

Where a decree, even in the case of a compromise decree in favour of minors sanctioned by the Court as being beneficial to the minor parties, provides that a certain payment shall be made to the minor plaintiff's next friend, it must be understood as meaning that the payment shall be made under the provisions of the Civil Procedure Code, and that the next friend must apply to the Court to receive the money, and, if not a statutory guardian, must furnish the requisite security. O. 32, R. 6 is imperative on this point. The next friend at the time of payment of the money need not be the same person who was the next friend when the compromise decree was sanctioned. It is necessary therefore that the Court sanctioning the receipt of money on behalf of the minor should apply its mind to circumstances as they exist at the time of the receipt and not as they existed at the time when the decree was passed. Where a compromise includes acts which are unlawful, *e g.* in respect of payments of money to a minor's next friend or guardian direct, out of Court, the promisor is entitled to ignore such part of the contract by way of analogy to S. 56, Contract Act, as being unlawful and therefore void. (*Burn and Stodart, JJ.*) KASI CHETTI *v.* NAGAPPA CHETTI. **1939 M W.N. 854=50 L.W. 384=A.I.R. 1939 Mad. 814=(1939) 2 M.L.J. 262.**

——O 32, Rr 6 and 7—*Scope—Decree in favour of joint Hindu family—Minor coparcener represented by another person than manager—Power of latter to collect money and give valid discharge—Sanction of Court—Necessity.*

The provisions of Rr. 6 and 7 of O. 32 do not restrict in any way the powers of a father or manager of a joint Hindu family to receive the amount of a decree in favour of the family and to give a valid discharge so as to bind a minor member of his family also, who is a party to the suit, without obtaining the leave of the Court in cases where such father or managing member is not the next friend of the said minor, and those powers are not in any way affected by the mere fact that another person is the next friend of the minor. (*Burn and K.S. Menon, JJ.*) ADMINISTRATOR-GENERAL, MADRAS *v.* RADHAKRISHNAN CHETTIAR. **161 I C 969=8 R.M. 904=1936 M.W.N. 158=43 L.W. 390=A I.R. 1936 Mad. 434=70 M.L.J. 700.**

——O. 32, Rr.6 and 7—*Scope—Decree in favour of major and minor—Receipt of money by major brother and certification of satisfaction—Leave of Court not obtained—Right of minor to execute decree after becoming major.*

In a suit for partition by two brothers, one of whom was a minor, there was an award made by arbitrators which was made a decree of Court. The major plaintiff settled the claim under the decree with the defendants who applied to have satisfaction of the decree recorded in terms of the settlement. The Court entered satisfaction as prayed for with the full knowledge of the fact that the plaintiff had received from the defendants moneys in full satisfaction of the claim under the decree. The major plaintiff did not, however, obtain sanction of the Court for receiving money outside the Court on behalf of his minor brother. The minor plaintiff after becoming a major, applied to execute the decree.

Held, that the minor was not entitled to ignore the satisfaction recorded or to say, that the first plaintiff not having obtained the leave of the Court to receive money under the decree, he was entitled once more to get that from the defendant. The Court having made an order recording satisfaction knowing full well that the money had been received without its previous sanction, must be taken to have approved of the receipt by the major plaintiff of the money on behalf of the minor brother; the defendants were therefore entitled to the full benefit of that order and to claim full discharge by reason of the same. (*Beasley, C.J. and Stodart, J.*) RAMA RAO *v.* SREE RAMAMOORTHY. **164 I.C. 670=9 R M 162=44 L.W. 486=1936 M.W.N. 575=A.I.R. 1936 Mad. 861=71 M. L.J. 388.**

——O. 32, Rr. 6 (1) (b) and 7 (1)—*Decree in favour of minor—Assignment by guardian* ad litem *without leave of Court—Validity—Right of judgment-debtor to attack assignment.*

An assignment of a decree passed in favour of a minor to a third person by the guardian *ad litem* of the minor without the leave of the Court, though not covered by O. 32, R. 7 (1), falls within O. 32, R. 6 (1) (*b*), and is, therefore, invalid. The word 'agreement' in O. 32, R. 7 (1) means an agreement with a party to the suit and must be in reference to the proceedings in the suit. An agreement with a third party, as also an agreement outside the scope of the suit, does not come within the scope of the said rule. But in interpreting O. 32, R. 6 (1), the widest meaning of which the words are capable must be attributed to it. The word "receive" occurring there should be taken as "receive either directly or indirectly". The protection given to the minor would be reduced to a farce if the guardians, while restrained from receiving any money directly from the judgment-debtor, were free to assign the decree to a third party and receive money from the assignee, who would then recover it from the judgment-debtor. To permit any such assignment without leave of the Court would be to

defeat the plain purpose of the rule. It is open to the judgment-debtor to attack the assignment on the ground that it falls within O. 32, R. 6 (1) (*b*), and to contend that the assignee has no right to apply for execution or to substitute himself in pending execution. (*Mitter and Rau, JJ.*) SAMARENDRA NATH MITTER *v.* ASHUTOSH ROY. **186 I.C. 72=12 R C. 437=43 C.W.N. 962=70 C.L.J. 115 =A.I R. 1939 Cal. 588.**

——**O. 32, R. 7**—Agreement to refer suit to arbitration—Minor party—Omission to obtain leave of Court—Award, if void or voidable—Right of minor to assail award in suit itself. *See* C. P. CODE, SCH. II, PARA. 1 AND O. 32, R. 7. **1936 A.W.R. 1223=A.I.R. 1937 All. 65 (F.B.).**

——**O. 32, R. 7**—*Applicability—Adjustment of decree by compromise—One of the parties a minor—Leave of Court—Necessity.*

The provisions of O. 32, R. 7 are by virtue of S. 141 of the Code applicable to miscellaneous proceedings. Hence where a decree is adjusted before execution by means of a compromise and one of the parties to the litigation happens to be a minor, the consent of the Court is necessary, if the minor is to be bound thereby. (*Thom, C. J. and Ganga Nath, J.*) KASTORI SINGH *v.* PATI RAM. **I.L.R. (1940) All. 1=12 R.A. 374=1939 A.W R. (H.C) 797=1939 A.L.J. 1019=186 I.C. 68=A.I.R. 1940 All. 16.**

——**O. 32, R. 7**—*Applicability to agreements for reference to arbitration in pending suits.*

O. 32, R. 7 must be read as controlling paragraph (1) of Sch. II, C. P. Code, and must be held to apply to agreements to refer to arbitration in suits in Courts. Therefore sanction of the Court must be obtained by a guardian *ad litem* or next friend before making a reference to arbitration on behalf of a minor party. (*Davis, J.C. and Weston, J.*) LOUNG TAHIR *v* RAMSING TAKHATRAM. **I.L.R. (1940) Kar. 327=A.I R. 1940 Sind 178.**

——**O. 32, R. 7**—*Applicability—Execution proceedings.*

The powers of a next friend acting for a minor in the course of a suit are not wider after the decree than before it. O. 32, R. 7, or at any rate the principle embodied in it, is applicable to agreement in execution proceedings. (*Rowland and Varma, JJ.*) LAL BABU *v.* RANG BAHADUR SINGH. **165 I C. 857=9 R.P. 226=3 B R. 94= 17 Pat.L.T. 743=A.I.R. 1936 Pat 506.**

——**O. 32, R. 7**—*Applicability—Mortgage by Hindu fother—Suit on against father and minor sons represented by Court guardian—Mortgage* qua *mortgage held not binding on minor—Finding of consideration—Decree for sale against father's share and order postponing personal decree—Effect—Minor—If exonerated— Execution—Sale—Application to set aside sale—Execution by father for himself and minor son of mortgagee by conditional sale in discharge of decree—Validity as against minor—Absence of Court's sanction—Effect.*

In a suit against a Hindu and his minor son on a mortgage executed by the father, it was held that the mortgage was not binding on the share of the minor son *qua* mortgage as it was not executed to secure an antecedent debt but the Court found that it was supported by consideration and that the personal remedy was not barred. While passing a decree for sale of the share of the father, the Court postponed the application for a

personal decree to a later stage. After some of the properties were sold in execution of the decree in that suit, in which the minor was represented by a Court guardian, and at a time when an application to set aside the sale under O. 21, R. 90, C.P Code, was pending, the father executed a mortgage by conditional sale to the decree-holder for himself and as guardian of his minor son in discharge of the decree-debt on the prior mortgage. The transaction was not shown to be improper or prejudicial to the minor. On the execution of the mortgage the decree in the prior mortgage suit was treated as discharged. No sanction was however obtained by the father from the Court to execute the mortgage by conditional sale.

Held, (1) that the transaction did not contravene the provisions of O. 32, R. 7, and was not therefore invalid on the ground, because the disability imposed by that rule would apply only if the father was also the guardian *ad litem* for her minor son; in the present case, the minor having been represented by a Court guardian and not by the father, the validity of the mortgage was not affected by the omission to obtain the Court's sanction; (2) that there was no justification for extending the provisions of O. 32, R. 7, by analogy or on considerations of policy; (3) that the decree in the prior suit could not be held as exonerating the minor son; all that was held was that the mortgage *qua* mortgage was not binding on him, but the plea of absence of consideration having been overruled and there being no suggestion of the debt being illegal or immoral, a decree could be passed against the minor son to the extent of a money decree against his interest in the joint family property; consequently the minor son's interest in the family could be bound under the mortgage by conditional sale. (*Varadachariar, J.*) MARWADI VANNAJI *v.* RANGA RAO. **45 L.W. 722=1937 M.W.N. 528= 171 I.C. 777=11 R.M. 397=A.I.R. 1937 Mad. 446=(1937) 1 M.L.J. 384.**

——**O. 32, R. 7**—*Applicability—Natural or certificated guardian appointed guardian* ad litem—*Compromise of mutation proceedings—Sanction of Court—Necessity.*

Even if a natural or a certificated guardian appointed by the District Judge, is appointed guardian *ad litem*, he is bound by the provisions of O 32, R. 7. It is not all the rules of O. 32 that have been made applicable to proceedings under the Land Revenue Act and as such a compromise of mutation proceedings on behalf of a minor without the sanction or permission of the Court is not fatal to the validity of the compromise. (*Ismail, J.*) RAJ BAHADUR *v.* JAMNA KUER. **184 I C. 609 (2)=12 R.A. 262=1939 R. D. 446=1939 A.W.R. (H.C.) 587=1939 A.L.J. 624=A.I.R. 1939 All. 607.**

——**O. 32, R. 7**—Applicability—Proceeding under S. 26-F of Bengal Tenancy Act. *See* BENGAL TENANCY ACT, S. 26-F. **42 C.W.N. 154.**

——**O. 32, R. 7**—*Applicability—Proceedings under S. 36, U P. Land Revenue Act.*

The provisions of O. 32 R. 7 must presumably be held to apply to proceedings under S. 36 of the U. P. Land Revenue Act, in view of S. 264 of the Agra Tenancy Act. (*Bennet, J.*) SUCHIT CHAUBE *v.* BALDEO RAI. **1937 A.W.R. 1181=1937 A.L.J. 1284=1938 R.D. 47=173 I.C.**

C. P. CODE (1908), O. 32, R. 7.

425=1938 A.L.R. 137=10 R.A. 482=A.I.R. 1938 All. 74.

——**O. 32, R. 7**—*Applicability and construction —Leave of Court—When necessary—Arbitration out of Court when no suit pending—Award—Application to file award—Guardian appearing in Court and consenting—Decree—If invalid for want of leave of Court for consent of guardian.*

The leave of the Court under O. 32, R. 7 is necessary if an agreement is to be entered into or a compromise is to be effected on behalf of a minor in a pending suit or proceeding. A reference to arbitration out of Court at a time when no suit or proceeding is pending in Court, does not require the sanction of any Court. Where the guardian of a minor and a creditor of the estate refer their dispute regarding the debt to arbitration, and, the arbitrator having given his award, the creditor presents the award in Court and applied to have it filed, if the minor's guardian voluntarily appears in Court and consents to the award being filed, the decree made by the Court in terms of the award cannot afterwards be challenged as not binding on the minor on the ground that no leave of the Court was obtained in the case under O. 32, R. 7. It does not follow that the consent of the guardian to the filing of the award is given as a result of any agreement entered into by the guardian with the creditor after the latter files his application in Court for filing the award. It is only when an agreement is entered after the award is presented in Court that there would be a Court to sanction or not to sanction it. Till then there would be no Court whose sanction can be sought. Unless an agreement is found to have been entered into by the minor's guardian during the pendency of the suit, the question of the consent of the Court does not arise. It cannot be inferred from the mere fact that the guardian consents to the filing of the award that the guardian must have done so in pursuance of an agreement entered into with the creditor after the application for the filing of the award was presented in Court. No sanction of the Court is therefore necessary for the minor's guardian consenting to the filing of the award. From the guardian's failure to oppose the award it cannot be inferred that it must be due to any express or implied agreement between the parties. (*Lokur, J.*) NANA NAMDEO *v.* DALPAT SUPADU. **186 I.C. 578=12 R.B. 354=41 Bom. L.R. 1208=A.I.R. 1940 Bom. 33.**

—— **O. 32, R. 7**—*Applicability to agreement of reference to arbitration—Partition suit—Minor defendant—Omission to apply for and obtain leave of Court—If fatal—Award and decree—Right of minor to avoid—Decree set aside—Effect as regards other parties.*

The procedure to be followed when all parties to a suit agree to refer their differences to arbitration is governed by para. 1 of Sch. II, C. P. Code. This provision is subject to O. 32, R. 7, which deals with the procedure to be followed when a next friend or guardian of a minor enters into any agreement or compromise. An agreement to refer to arbitration is an agreement contemplated by O. 32, R. 7. If, therefore, no application is made by the guardian *ad litem* of a minor defendant in a partition suit for leave to enter into an agreement to refer the matter to arbitration, the failure to obtain leave of the Court for entering into the agreement of reference to arbitration would render all subsequent proceedings including the award and the decree based thereon invalid at the option of the minor. But it is the minor alone who can challenge the award and the decree based thereon and the other parties to the reference cannot. If the decree based thereon is subsequently set aside at the instance of the minor, the effect would be to reopen the whole suit in respect of all the parties from the point at which the matter was referred to arbitration. (*Harries, C.J. and Manohar Lall, J.*) KEDAR NATH SAHU *v.* BASANT LAL SAHU. **18 Pat. 271=183 I.C. 422=12 R.P. 153=5 B.R. 919=20 Pat L.T. 170=1939 P.W.N. 157=A.I.R. 1939 Pat. 278.**

C. P. CODE (1908), O. 32, R. 7.

——**O. 32, R. 7**—*Arbitration—Reference by guardian—Leave of Court—Necessity for.*

Every agreement by the guardian or next friend of a minor relating to a suit is subject to the leave of the Court. Agreement to refer to arbitration is an agreement within the meaning of this rule and therefore leave is necessary for referring the case of a minor to arbitration. (*Mir Ahmad, J.*) UMAR GUL *v.* ABDUL MANAN. **187 I.C. 860=12 R. Pesh. 35=A.I.R. 1940 Pesh. 12.**

——**O. 32, R. 7**—*Arbitration—Reference to—Leave of Court—If to be express.*

O. 32, R. 7 does not require any particular formula to be used by the Court in granting leave to a guardian of a minor to enter into an agreement to refer the suit to arbitration. So long as an application is made to the Court for leave and the Court exercises its judicial discretion to permit the guardian to enter into an agreement on behalf of the minor, the reference to arbitration is binding even though there is no record expressly granting the Court's leave. (*Agarwala, J.*) RAMNARAIN SINGH *v.* ATAL BEHARI SINGH. **5 B.R. 487=180 I.C. 733=11 R.P. 527=A.I.R. 1939 Pat. 387.**

——**O. 32, R. 7**—*Arbitration—Reference to—Minors parties to dispute—Application to Court for order directing arbitrator to file award—Sanction of Court—If necessary.*

Where a dispute to which minors are parties is referred to arbitration and a party makes an application for an order directing the arbitrators to file the award and for a decree in accordance therewith and the guardian *ad litem* of the minors makes a petition that they have no objection to the decree the provisions of O. 32, R. 7 are not attracted and the Court is under no necessity to sanction anything as a condition precedent to filing the award and passing a decree upon it. A.I.R. 1918 Bom. 123 and 22 Mad. 538, Rel. on. (*Lort Williams, J.*) RAJ KUMAR *v.* SHIVA PRASAD GUPTA. **184 I.C. 553=12 R.C. 241=A.I.R. 1939 Cal. 500.**

——**O. 32, R. 7 and S. 141**—*Arbitration—Reference to—Subject-matter of proceedings not same—Leave of Court—If necessary.*

Neither S. 141 nor O. 32, R. 7 applies to a reference to an arbitration when the subject-matter of the proceedings in Court cannot possibly be said to be the same as covered by the reference to arbitration, and the award is not, therefore, invalid for want of leave of the Court for the reference. (*Dalip Singh, J.*) SARASWATI

C. P. CODE (1908), O. 32, R. 7.

DEVI *v.* JAGANNATH. 41 P.L.R. 201=A.I.R. 1939 Lah. 308.

——O. 32, R. 7—*Arbitration—Reference without leave of Court—Validity.*

Where a suit in which some of the defendants are minors is referred to arbitration without the leave of the Court being expressly obtained and recorded, the arbitration proceedings are voidable at the option of the minors although the petition for making the reference is signed by the *mukhtar* of their guardian *ad litem*. If the minors exercise their option in avoiding the proceedings, the award made by the arbitrators is liable to be set aside, if it is not separable. (*Tek Chand, J.*) SAMAND KHAN *v.* MOHD. RAMZAN. 40 P.L.R. 498=181 I.C. 287=11 R.L. 803 =A.I.R. 1938 Lah. 582.

——O. 32, R. 7—*Compromise arrived at by guardian* ad litem *without leave of Court—Decree passed thereon—If void against minor—Minor, if can take the plea in defence.*

A compromise arrived at by guardian *ad litem* without obtaining the leave of the Court under O. 32, R. 7 is voidable against all parties who are majors and not void, but it does not bind the minor in any manner. As it is not binding on the minor, it is void against him and consequently the decree passed thereon is also void. In a suit to enforce the terms of the compromise, it is open to the minor to plead in defence the invalidity of the compromise. There is nothing in law to prevent him from taking such a plea in defence. (*Rachhpal Singh, J.*) MAHTAB SINGH *v.* DURGA NARAIN SINGH. 1936 A.L.J. 1366= 1937 A.L.R. 21=166 I.C. 354=9 R.A. 396 (2) =1936 A.W.R. 1017=A.I.R. 1936 All. 811.

——O. 32, R. 7—*Compromise decree against minor—R. 7 not complied with—Suit for declaration by minor—Form of decree.*

In a suit by the plaintiff on attaining majority for a declaration that a compromise decree passed against him is not binding on him on the ground that the provisions of O. 32, R. 7, had not been complied with, the granting of a declaration *simpliciter* is incomplete. It should further be ordered that the proceedings in the original suit be revived from the stage at which they were when the irregularity above mentioned was committed. (*Tek Chand and Abdul Rashid, JJ.*) KARAM CHAND *v.* NARINJAN SINGH. 179 I.C. 233=11 R.L. 543=40 P.L.R. 403=A.I.R. 1938 Lah. 709.

——O. 32, R. 7—*Compromise decree against minor—Sanction not expressly recorded—Compromise signed by minor—Decree, if binding.*

Where no application for sanction to enter into a compromise was filed by the guardian *ad litem* of a minor defendant and there was no order expressly recorded by the Court granting such sanction and there is nothing to indicate that when the terms of the compromise were placed before the Court and accepted by it, it applied its mind to the question that the compromise was for the benefit of the minor, the provisions of O. 32, R. 7 are not complied with and the compromise and the decree passed thereon are not binding on the minor. The fact that the minor himself has signed the statement embodying the terms of the compromise is of no avail. (*Tek Chand and Abdul Rashid, JJ.*) KARAM

C. P. CODE (1908), O. 32, R. 7.

CHAND *v.* NARINJAN SINGH. 179 I.C. 233=11 R. L. 543=40 P.L.R. 403=A.I.R. 1938 Lah. 709.

——O. 32, R. 7—*Compromise decree—Duty of Court—Benefit of minor.*

It is the duty of the Court to see that the interests of minors are adequately protected, and when a compromise is effected to which a minor is a party, it is of considerable importance that the conscience of the Court should be satisfied that the compromise is really in the interest of the minor. In ordinary circumstances, when the Court records an order to the effect that a compromise has been allowed, it may be assumed, unless there are clear indications to the contrary, that the Court has exercised its judicial discretion in dealing with the matter. In cases, however, in which the circumstances are peculiar or suspicious, it is clear that a heavy duty lies upon the Court to scrutinise with care the terms of the proposed compromise and the circumstances connected therewith. In the latter case, a mere order permitting the compromise is not sufficient to show that the Court applied its mind judicially to the question as to whether or not the compromise was really for the benefit of the minor. (*Edgley, J.*) BARADA PRASAD SHUKUL *v.* SAHAN LAL BOID. I.L.R. (1937) 1 Cal. 586=173 I.C. 341=10 R.C. 504=A.I.R. 1937 Cal. 658.

——O. 32, R. 7—*Compromise by next friend—Court omitting to record that it is for minor's benefit—Validity of compromise.*

The fact that the Court, when sanctioning a compromise entered into by the next friend of a minor, omitted to use the words that it was for the benefit of the minor, is not a sufficient ground to invalidate the compromise, when there is good reason for thinking that it applied its mind to the question. (*Madeley, J.*) BACHAI *v.* HAYAT MOHAMMAD. 171 I.C. 187=1937 O.L.R. 527= 10 R.O. 93=1937 O.W.N. 1012=A.I.R. 1937 Oudh 521.

——O. 32, R. 7—*Construction—Duty of Court—Leave of Court—Grant of before entering into compromise—If essential—Approval of terms of compromise already entered into—Sufficiency.*

A guardian *ad litem* of a minor defendant cannot enter into a compromise without the leave of the Court, and such leave must be expressly recorded by the Court. The terms of O. 32, R. 7 are not complied with by merely asking the Court to approve of a compromise which has been actually entered into under that rule, the Court must consider the proposed terms before they are agreed to by the parties and must grant leave to the guardian *ad litem* to enter into the compromise. Approving the terms of a compromise after it has been entered into is not sufficient compliance with O. 32, R. 7. (*Harries, C.J. and Dhavle, J.*) AWADHESH PRASAD MISSIR *v.* WIDOW OF TRIBENI PRASAD. 19 Pat. 343=1940 P.W.N. 514.

——O. 32, R. 7—"Having reference to the suit" —Meaning of. *See* C. P. CODE, O. 23, R. 3 AND O. 32, R. 7. A.I.R. 1937 Pat. 232.

——O. 32, R. 7 and O. 21, R. 2—*Managing member—Powers to act on behalf of minor—Limits—Certificate of satisfaction—Leave of Court—Necessity.*

A managing member of a joint Hindu family cannot without leave of the Court do any act which he is debarred from doing as guardian *ad*

C. P. CODE (1908), O. 32, R. 7.

litem. Where a manager and a minor for whom he was a next friend are joint decree-holders and an application is made by the manager for entering up satisfaction of the decree, O. 21, R. 2 does not empower a Collector executing the decree to certify payment as satisfying the decree as far as the minor was concerned, unless leave of the Court had been obtained according to O. 32, R. 7 and such leave cannot be implied but must be expressly recorded. (*Binney, F.C.*) PUKHRAJ *v.* JAWARIMAL. 1938 N.L.J. 363.

——O. 32, R. 7—*Next friend agreeing to relinquish claim on special oath by opposite party—Sanction if necessary.*

If the next friend of a minor expresses his willingness to relinquish the claim of the minor, should the opposite party take a certain oath, it is only a special method of proof adopted by the next friend and is not at all a compromise, and if the interests of the next friend are identical with the minor then sanction under O. 32, R. 7 is not necessary for adopting special oath as a form of proof. (*Agha Haidar, J.*) SULTAN MUHAMMAD *v.* MEHR KHAN. 162 I.C. 921=8 R.L. 969=38 P.L.R. 629=A.I.R. 1936 Lah. 235.

——O. 32, R. 7—*Scope—Arbitration—Agreement of reference by guardian* ad litem *without leave of Court—Validity—Option to resile—If available to parties other than minor—Guardian agreeing to reference—Right to impeach validity on behalf of minor.*

If a guardian *ad litem* of a minor defendant enters into an agreement of reference to arbitration on behalf of the minor without obtaining the leave of the Court as required by O. 32, R. 7, the proceedings and the award resulting therefrom would be voidable against all the parties at the option of the minor defendant. This option is not intended to be given to the very persons who may enter into an agreement in contravention of R. 7 of O. 32, with a next friend or guardian *ad litem* of a minor party. It is only the minor who alone is entitled to resile from the agreement, if he may choose to do so, either on attaining majority or even before that through a next friend or guardian.

Obiter.—The question of the legality of the reference and of the award can be raised on behalf of the minor by the same guardian or next friend who agreed to the reference resulting in the award. (*Abdul Rahman, J.*) RAMANATHAN CHETTIAR *v.* KUMARAPPA CHETTIAR. 1940 M.W.N. 191=A.I.R. 1940 Mad. 650.

——O. 32, R. 7—*Scope—Leave of Court—Express order of Court—Necessity.*

It is enough if the attention of the Court is directed specifically to the fact that there is a minor involved in the suit and the compromise entered by the guardian *ad litem* on behalf of the minor is brought to its notice; if thereafter a decree is ordered to be passed in terms of the compromise it must be assumed that the Court has complied with the requirements of the law. (*Manohar Lall and Chatterji, JJ.*) BADRI SINGH *v.* CHOTU SINGH. 175 I.C. 75=4 B.R. 517=10 R.P. 572=A.I.R. 1938 Pat. 202.

——O. 32, R. 7—*Scope—Non-compliance—Reference to arbitration—Leave of Court not obtained—Effect—Remedy of minor—Revision against order dismissing objections to validity of award—Competency.*

C. P. CODE (1908), O. 32, R. 7.

A minor or his next friend or guardian may repudiate an agreement including a reference to arbitration which has not been sanctioned by the Court as required by O. 32, R. 7. But a minor is not entitled to relief by way of revision of the order of the Court disallowing his objections based on the ground of non-compliance with R. 7 of O. 32. The order of reference is open to revision on this ground, but not the decision of the Court overruling the objections. The minor has in any case a remedy by way of suit. (*Broomfield, J.*) SHRIPAD BAJI *v.* DATTATRAYA VITHAL. 183 I.C. 753=12 R.B. 128=41 Bom.L.R. 485=A.I.R. 1939 Bom. 296.

——O. 32, R. 7—*Settlement of appeal affecting interests of minor—Leave of Court—If necessary.*

If the parties come to an agreement to settle an appeal on certain terms which puts an end to it, such a settlement, if it affects the interests of a minor, must under O. 32, R. 7, be subject to the leave of the Court. (*Wadsworth, J.*) KRISHNAMACHARY *v.* APPALACHARYULU. 161 I.C. 751=8 R.M. 865=1936 M.W.N. 123=43 L.W. 601=A.I.R. 1936 Mad. 494.

——O. 32, R 7 (1)—*Leave of Court—When to be given—Real meaning of R. 7.*

It would appear that the parties must in fact always enter into the compromise before any express leave can be obtained the Court need not always grant that leave but where it is clearly in the interest of the minor to do so, the Court will, short of alleged fraud, always exercise its discretion by granting that leave The real meaning of R. 7 of O. 32 is that the express leave of the Court must be obtained before the compromise entered into becomes a valid one for future eventualities. The result of this is that subsequent express leave of the Court granted will validate a compromise entered into on behalf of a minor. (*Davies.*) SUTINDAR SINGH *v.* BHAG CHAND. 1940 A.M.L.J. 25.

——O. 32, R. 7 (1) and Madras R. 7 (1-A)—*Scope and effect—Decree in favour of Hindu minor—Transfer by guardian—Sanction of Court—Necessity.*

Leave of the Court is not necessary under R. 7 of O. 32, C. P. Code, before a decree passed in favour of a Hindu minor plaintiff can be assigned or transferred by his guardian. O. 32, R. 7 does not affect the rights of a natural guardian or a legal guardian who also happens to be the next friend in the matter of dealing with a decree as part of the property belonging to the minor. The scope of R. 7 has not been extended by R. 7 (1-A) added by the Madras High Court. Though the minor may challenge the validity of the transfer made by the guardian, that cannot make the judgment-debtor who has paid to the assignee-decree-holder liable to pay the amount again. Payment made in accordance with the Court's order would protect him. (*Leach, C.J., Varadachariar and Lakshmana Rao, JJ.*) VENKATAKRISHNAYYA *v.* CHINA KANAKAYYA. I.L.R. (1938) Mad. 819=1938 M.W.N. 537=47 L.W. 696=175 I.C. 1002=11 R.M. 24=A.I.R. 1938 Mad. 539=(1938) 1 M.L.J. 775 (F.B.).

——O. 32, R. 7 (2)—*Applicability and scope.*

O. 32, R. 7 applies to proceedings under the U. P. Land Revenue Act. The absence of the Court's sanction to a compromise makes it only

C. P. CODE (1908), O. 32, R. 7.

voidable and not void as is clear from Cl. (2) of R. 7. (*Sathe, J.M.*) RAM UJAGIR *v.* RAM DULAR. 1940 A.W.R. (B.R.) 96.

——O. 32, R. 7 (2)—Scope—Compromise by guardian without leave—Decree—If void or voidable. *See* C. P. CODE, O. 32, RR. 5 AND 7 (2). 18 Pat. 708.

——O. 32, R. 7 (2)—*Scope and meaning of.*

O. 32, R. 7 (2) lays down that any compromise entered into without the express leave of Court shall be voidable against all parties other than the minor. The meaning of this final phrase is that the compromise is voidable but only at the instance of the minor. (*Davies.*) SUTINDAR SINGH *v.* BHAG CHAND SONI. 1940 A.M.L.J. 25.

——O. 32, R. 10—Scope—Appeal—Death of appellant—Substitution of widow and minor son—Death of widow—Absence of application to appoint new next friend—Procedure—Right of respondents to apply. *See* ABATEMENT—APPEAL. 17 Pat.L.T. 86.

——O. 32, R. 11—*Removal of guardian—Fresh guardian—Duty of Court as to.*

Where a Court removes a guardian *ad litem*, the party concerned should be given an opportunity to suggest another person. The Nazir should only be appointed as a last resort. (*Norman, I.C.S.*) GULAB KANWAR *v.* UDAI CHAND. 1939 A.M.L.J. 31.

——O. 32, R. 11—*Scope—Appeal—Death of guardian for minor respondents—Omission to appoint fresh guardian* ad litem—*Effect—Decree—Validity—Costs—Rule as to.*

Where during the pendency of the appeal, the guardian for the minor respondents dies and no effort is made by the Court, under O. 32, R. 11 to appoint a guardian *ad litem* for them, and a decree is passed that must be set aside as made during the absence of a guardian *ad litem* and the suit must be remanded to the same lower appellate Court. The appellants in the lower appellate Court who are respondents in the second appeal, not being under a duty to appoint guardian *ad litem* for the minor respondents in the lower Court, should not be made responsible for costs of the appellants in second appeal, (*James and Rowland, JJ.*) YAKUB CHRISTIAN *v.* PATRAS MUNDA. 165 I.C 581 (1)=9 R.P. 191 (1)=18 Pat.L.T. 123=A.I.R. 1936 Pat. 570.

——O. 32, Rr. 11 and 15—*Defendant of unsound mind represented by his brother defendant as guardian* ad litem—*Suit dismissed—Appeal—Both defendants impleaded as respondents but omission to describe one of them as guardian* ad litem—*Death of guardian* ad litem *pending appeal—No fresh guardian appointed—Decree, if a nullity.*

At the time of the institution of a suit the defendant was of unsound mind but was represented by the other defendant, his elder brother, as his guardian *ad litem*. The suit was dismissed and the memorandum of appeal impleaded both the defendants as respondents and by oversight omitted to describe one of them as guardian *ad litem*. During the pendency of the appeal the guardian *ad litem* died and no steps were taken to substitute another. A decree against the other defendant (of unsound mind) was passed without his being represented by another guardian *ad litem* after the case was argued by counsel appointed by the deceased respondent.

C. P. CODE (1908), O. 32, R. 12.

Held, that there was only a misdescription in the heading of the appeal and that the defendant was represented by the guardian *ad litem* but as the appeal had proceeded in the absence of a guardian *ad litem* after his death, the defendant was not represented and the decree passed in the appeal was a nullity and not binding on him. 38 P.L.R. 320=161 I.C. 987, Reversed. (*Tek Chand and Dalip Singh, JJ.*) WASANDA RAM *v.* RAM CHAND. 168 I.C. 292=9 R.L. 610=A.I.R. 1936 Lah. 861

——O. 32, R. 12—*Applicability—Suit by person on behalf of nephew alleged to be minor—Plaintiff really major on date of suit—Procedure—Duty of Court to dismiss suit—Opportunity to continue suit—If to be given.*

O. 22, R. 12 does not contemplate the giving of an opportunity to a person who is not on record to continue the suit. The rules apply to cases where a suit has been filed by a minor who becomes a major during the course of the trial. A suit was filed by an uncle in the name of his nephew for the purpose of making it appear that the nephew was a minor on the date of a decree of a Panchayat Court against the nephew which was sought to be set aside in the suit. It was found that the plaintiff's nephew was a major on the date of the decree as well as of the suit.

Held, that the plaintiff being a major at the time of the filing of the suit, no other person had a right to file the suit on his behalf, and the suit had therefore to be dismissed. (*Horwill, J.*) SAMI NAIDU *v.* KATHA GOUNDAN 51 L.W. 267=1940 M.W.N 500=A.I.R. 1940 Mad. 522=(1940) 1 M.L.J. 337.

——O. 32, Rr. 12 and 14—*Minor—Suit by next friend—Plaintiff attaining majority and electing not to proceed with suit—Liability for costs of defendant and next friend—Liability of next friend—When arises.*

If a minor plaintiff, on whose behalf a suit has been filed by his next friend, elects, on attaining majority, not to proceed with the suit, he can only do so on submitting to an order to pay the costs of the defendant and also the costs of the next friend. The defendant is placed in exactly the same position as he would be in if the plaintiff had never been a minor. It is only in a case of misconduct by the next friend, which falls within R. 14 of O. 32, that any order for payment of costs can be made against the next friend after the minor has attained majority. (*Beaumont, C.J. and Kania, J.*) RATANCHAND DHULAJI *v.* IASRAJ KASTURCHAND. I.L.R. (1940) Bom. 135=186 I.C. 597=12 R.B 349=41 Bom.L.R. 1296=A.I.R. 1940 Bom. 58.

——O 32, Rr. 12-14—*Scope—Next friend and guardian* ad litem—*Difference.*

Under O. 32, Rr. 12-14, C. P. Code, a plaintiff or applicant, on attaining majority, is given by the Statute an option to abandon the suit or to proceed with it, and there is no anomaly if some similar liberty to ratify or to repudiate the act of guardian on his behalf is not given to a minor defendant. The reason is that the plaintiff suing through a next friend is put in a different position from a defendant against whom a suit is brought through a guardian *ad litem*. The next friend of a minor plaintiff, unless he happens to be a certificated guardian under the Guardians and Wards Act or the Court of Wards Act, takes

C. P. CODE (1908), O. 32, R. 15.

upon himself the responsibility of instituting a suit in the name and for the benefit of the minor. But a guardian *ad litem* for a minor defendant is a person appointed to act as such by the Court. (*Rowland, J.*) RAMKHELAWAN SINGH *v.* GANGA PRASAD 172 I.C 513=10 R.P. 337=1937 P.W.N. 720=A.I.R. 1937 Pat 625.

——O. 32, R. 15—*Appeal and cross-appeal filed on behalf of and against lunatic—None acting as his next friend or guardian—Decrees in favour of lunatic—Validity—Suit to avoid the decrees—Duty of Court.*

Where an appeal and a cross-appeal were filed on behalf of, and against a lunatic with nobody acting as his next friend or guardian, and decrees were passed in his favour in both, the decrees are not null and void. In a suit subsequently brought to avoid the decrees, all that a Court has got to see is if any prejudice has been caused to any particular party and to see that that grievance is removed. If none of the parties suffered any prejudice by reason of the irregularity, the Court can rightly refuse to grant any relief. In any case, the former decrees could not be a nullity and the utmost that could be done is to revive those appeals and appoint a proper next friend or a proper guardian and to allow the appeal of the lunatic to be continued by a proper next friend and the other appeal to be continued after the appointment of a guardian for him. But it is not necessary to adopt this course, if no prejudice has been caused to the person suffering under a disability. (*Sulaiman, C.J. and Bajpai, J.*) KANHAIYA LAL *v.* THOMAS SKINNER. 165 I.C. 645=9 R.A. 294=1936 A.L.J. 964=1936 A.W.R. 832=A.I.R. 1936 All. 806.

——O. 32, R. 15—*Applicability — Person of unsound mind—Suit by next friend—Competency—Conditions.*

In order that a suit by a lunatic can be instituted in his name by his next friend, the lunatic must be a person who has been adjudged to be of unsound mind or a person who, though not so adjudged, is found by the Court on enquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting his interests when suing. Where there was no adjudication that a person was of unsound mind, nor was there any enquiry resulting in the finding of the Courts that he was by reason of unsoundness of mind or mental infirmity incapable of protecting his interest in the suit, a suit by a person posing himself as the next friend of the lunatic and on his behalf is not competent. (*Mya Bu, J.*) MAUNG KYA YAN *v.* MAUNG THA E. 161 I.C. 665=8 R. R. 503=A.I.R. 1936 Rang. 121.

——O. 32, R. 15—*Construction--Inquiry as to unsoundness of mind—If to precede suit or to be held after suit—Suit on behalf of alleged lunatic by wife—Objection by defendant—Inquiry—Finding that plaintiff not lunatic—Effect on plaint—Procedure—Amendment of plaint—Propriety—Suit—If may be regarded as authorised.*

A suit was filed on the last day of limitation on a promissory note by the wife of the payee as his next friend, representing him to be a lunatic. The defendant objected that the payee was not a lunatic and on enquiry the plaintiff-payee was found not to be of unsound mind. The Court allowed the plaint to be amended by having the proper corrections made and passed a decree on the merits.

Held, that, though under the circumstances no plaint could be held to have been virtually filed at all, and though the plaint should be re-presented by the alleged lunatic and must be deemed to have been filed only on such re-presentation for purposes of limitation, yet as the plaintiff, not being insane knew all about the filing of the plaint, it had to be assumed that the wife was authorised to file the plaint, and that she would not have filed it if she was not his agent; and consequently a Court of revision would not reverse the decree on the merits by assuming that the plaintiff now found to be sane did not authorise his wife to file the suit for him. The inquiry contemplated by O. 32, R. 15 should precede the filing of the plaint. (*Mockett, J.*) RAJAMMAL *v* MAHADEVA IYER. 1937 M.W.N. 398.

——O. 32, R. 15—*Decree against lunatic without appointment of guardian—Validity—Remedy of lunatic.*

Lunatics are under the peculiar protection of the Court and from the mere fact that by reason of the ignorance of the Court no enquiry was made, the decree passed against a lunatic without the appointment of a guardian cannot be said to be binding upon him. Such a decree is a nullity. The lunatic so aggrieved is not confined to the solitary remedy by way of review only; he can through his next friend institute a suit for a declaration that the decree is not binding on him. (*Collister and Bajpai, JJ.*) BHONDU MAL *v.* THOMAS SKINNER. 166 I.C. 903=9 R A. 466=1937 A.L.J. 17=1937 A.L.R. 106=1936 A.W.R. 1182=A.I.R. 1937 All. 29.

——O. 32, R. 15—*Person of unsound mind not represented by guardian at the time of hearing of appeal—Appeal decided against him—Decree, if a nullity.*

Where the guardian of a respondent died before the appeal was argued and the appeal was subsequently decided on the merits against him without a fresh guardian being appointed, in a suit to set aside the decree of the appellate Court it is necessary for the plaintiff-respondent not only to establish the fact of his being of unsound mind but also to establish that in the absence of the appointment of a fresh guardian for him he had been prejudiced by the decision of the appeal against him. (*Jai Lal, J.*) RAM CHAND *v.* WASANDA RAM. 161 I.C. 987=8 R.L. 833=38 P.L.R. 320.

——O. 32, R. 15—*Power-of-attorney granted by plaintiff—Plaintiff incapable of protecting his interests—Suit by next friend for the revocation of—Maintainability.*

Where the next friend files a suit alleging that a power-of-attorney granted by the plaintiff was on unsubstantial grounds and that it should be revoked in the interests of the plaintiff himself, and it is found that the plaintiff is mentally deficient and incapable of protecting his interests.

Held, that the next friend is entitled to institute the suit. (*Madhavan Nair, O.C.J. and Stodart, J.*) NARASIMHA BHATTACHARIAR, *In re.* 184 I.C. 211=12 R.M. 422=48 L.W 610=1938 M.W.N. 1075=A.I.R. 1939 Mad. 657=(1938) 2 M.L.J. 810.

——O 32, R. 15—*Scope—Duty of Court—Non-compliance—Effect—Defendant alleged to be of*

unsound mind in midst of hearing of suit—Issue as to unsoundness of mind not raised and tried—Finding on written statement subsequently filed and without taking evidence—Binding character of—Decree—Liability to be set aside.

Where an allegation is made before Court that the defendant in a suit is of unsound mind or weak intellect and incapable of managing his affairs, that allegation is one which by O. 32, R. 15 is placed on the some footing as an allegation of minority and requires similar treatment. The Court is not justified in rejecting it forthwith, but must try that issue like any material issue in the case by placing the defendant under a (provisional) guardian *ad litem* or curator; and the course to be followed subsequently would then depend on what is established at the inquiry into the mental condition of that defendant who is alleged to be of unsound mind or weak intellect. The fact that the question arises in the midst of the hearing of the case does not absolve the Court from holding the inquiry or to put away its doubts and come to a conclusion on no evidence. If the Court without any inquiry calls upon a defendant in this condition to prove his case after adopting a written statement filed subsequently on his behalf or some one else, no finding arrived at in such circumstances against that defendant can be held to be finding on him. Such a procedure is irregular and must necessarily affect the trial of the case on the merits. The decree passed in the case is therefore liable to be set aside on appeal. (*Dhavle and Agarwala, JJ.*) BAI JU LAL PATHAK *v.* SRIMATHI MAINA DAI. **180 I.C. 213=5 B.R. 365=11 R.P. 479=1938 P.W.N. 705=A.I.R. 1939 Pat. 25.**

——**O.** 33—Applicability — Applications for leave to appeal *in forma pauperis*. *See* C. P. CODE, S. 149 AND O. 44, R. 1. **A.I.R. 1936 Pesh. 69.**

——**O. 33**—*Applicability—Application for probate or letters of administration in* forma pauperis—*Competency—Power of Court to exempt from payment of fees under S. 19-I, Court-Fees Act—Procedure.*

An application for the grant of probate or letters of administration, which is clearly a proceeding in a Court of civil jurisdiction, is subject to the provisions of O.33, and the rules of that order are therefore applicable to such an application. The mandatory language of S. 19-I of the Court-Fees Act is subject to the provisions of O. 33. The Court has power to order letters of administration or probate to issue in *forma pauperis* making the fees payable to Government under S. 19-I, Court-Fees Act and any other court-fees payable as a first charge upon the subject-matter of the grant pursuant to O. 33, R. 10, C.P. Code. (*Gentle, J.*) PALANI GRAMANI *v.* MANICKAMMAL. **180 I.C. 308=11 R.M. 688=1938 M.W.N. 640 =47 L.W. 731=A.I.R. 1938 Mad. 486.**

——**O.** 33—Leave to sue *in forma pauperis*—When revisable. *See* C. P. CODE, S. 115—LEAVE TO SUE IN *forma pauperis*. **1940 O.W.N. 259= 1940 O.L.R. 118 (F.B.).**

——**O 33, R. 1**—*Applicability—Partition suit filed with court-fee—Court asking for additional court-fee—Continuation of suit as pauper—Permissibility.*

Especially in respect of partition suits it is common knowledge that there is considerable divergence of judicial opinions as to the court-

fee payable. If later on the Court considers an additional fee necessary, and if in truth and fact the plaintiffs are not possessed of means to pay the additional fee, there is nothing inconsistent with the scheme of the Code giving the plaintiffs the benefit of the provisions of O. 33. (*Varadachariar, J.*) NEELIKANDI MOIDIN *v.* KUNHAYISSA. **161 I.C. 359=8 R.M. 821=1936 M. W.N. 137=43 L.W. 380=A.I.R. 1936 Mad 158.**

——**O.** 33, R. 1—Applicability—Suit in ordinary form—Order for payment of additional court-fee—Non-payment—Application for leave to continue suit *in forma pauperis*—Maintainability. *See* C. P. CODE, O. 7, R. 11 (*e*). **40 C.W.N. 747=A.I.R. 1936 Cal. 221.**

——**O. 33, R. 1**—*Death of one of the applicants under—Legal representative—Right to continue.*

Where, one of the applicants applying for permission to sue as pauper dies during the pendency of the application, his legal representative is entitled to be brought on record in his place, and to continue the proceedings as a suit by substitution on payment of court-fees, or else by filing a fresh application for leave to sue as pauper. Court in not allowing the applicants time for substituting the heirs of deceased applicant, acts with material irregularity. (*Agarwala and Madan, JJ.*) MT. BIBI MARIM *v.* SURAJMAL. **15 Pat. 738=165 I.C. 927=9 R.P. 228=18 Pat.L.T. 39=3 B.R. 101=A.I.R. 1936 Pat. 591.**

——**O. 33, R. 1 and S. 115**—*Application for leave to sue as pauper—Proceedings thereon—Nature of—Final decision on—Revision.*

When an application is presented under O. 33, R. 1 for leave to sue *in forma pauperis*, all proceedings thereon are in the nature of proceedings prior to, or before the commencement of, a suit and hence are not interlocutory proceedings. They constitute a separate case. Any final decision in such proceedings would amount to a 'case decided' and would be open to revision under S. 115, C. P. Code. (*Hamilton and Yorke, JJ.*) DURGA PRASAD *v.* GUR DULAREY. **14 Luck. 116= 175 I.C. 63=1938 O.A. 487=1938 O.W.N. 561= 1938 O.L.R. 265=10 R.O. 301=A.I.R. 1938 Oudh 146.**

——**O. 33, R. 1**—Order on application under—Revision, if lies and when can succeed. *See* C. P. CODE, S. 115 AND O. 33, R. 1—LEAVE TO SUE AS PAUPER. **1940 O.A. 501=1940 O.W.N. 626.**

——**O. 33, Rr. 1 and 5 (d)**—Order granting leave to sue *in forma pauperis*—Revision—Grounds. *See* C.P. CODE, S. 115—LEAVE TO SUE IN *forma pauperis*. **1938 O.W.N. 561.**

——**O. 33, R. 1**—*"Sufficient means"—Test of—Occupancy holding held by applicant—If to be taken into account.*

In deciding whether an applicant for permission to sue *in forma pauperis* is possessed of sufficient means to enable him to pay the court-fee prescribed by law, the possession by the applicant of an occupancy holding must be taken into consideration. The Court will have to consider whether the applicant can convert the occupancy holding into cash so as to enable him to pay the Court-fee. (*Stone, C.J. and Puranik, J.*) MST. KARIMAN *v.* BAHORANSINGH. **I.L.R. (1938) Nag. 171=11 R.N. 234=178 I.C. 512=1938 N.L.J. 37 =A.I.R. 1938 Nag. 176.**

——**O. 33, R. 1**—Suit instituted in the ordinary way—Application for extension of time to pay

C. P. CODE (1908), O. 33, R. 1.

deficit Court-fee pending consideration—Application to continue the suit *in forma pauperis*—Maintainability. *See* C. P. CODE, O. 7, R. 11 (c) AND S. 148. **66 C.L.J. 78.**

——**O. 33, R. 1, Expl.**—*Applicability—"Person"—Meaning of—Official Receiver of insolvent estate—Right of to sue* in forma pauperis *in respect of such estate—Possession of sufficient funds in individual capacity—If bar to right.*

An Official Receiver in whom the estate of an insolvent has vested under S. 28 (2) of the Provincial Insolvency Act by virtue of an order of adjudication made by the Court, can institute a suit as a pauper for recovery of the said estate, provided he fulfils the conditions laid down in the explanation to O. 33, R. 1. The word "person" in the rule would include both natural and legal persons and would not exclude the Official Receiver. The test is not whether he is the legal owner, but whether as legal owner, as distinct from his personal capacity, he is a pauper or not. The fact that he is not a pauper in his individual capacity is immaterial. (*Beasley, C.J., Venkataramana Rao and Lakshmana Rao, JJ.*) SWAMINATHAN *v.* OFFICIAL RECEIVER OF RAMNAD. **I.L.R. (1937) Mad. 784=170 I.C. 37=10 R.M. 149=1937 M.W.N. 515=45 L.W. 733=A.I.R. 1937 Mad. 549=(1937) 1 M.L.J. 727 (F.B.).**

—— **O. 33, R. 1, Expl.**—*Construction—Plaintiff having saleable interest in some items of property involved in suit—Right to obtain leave to sue as pauper.*

The comma after the word "suit" in the explanation to O. 33, R. 1 separates the first part of the explanation from the second part; it would therefore follow that the words "other than his necessary wearing apparel and the subject-matter of the suit," qualify only the second part of the explanation and not the first. Where it is found or agreed that the plaintiff has a saleable interest in certain items of the property in suit it would be contrary to the spirit of O. 33, if the plaintiff could ignore that property on which money could be raised. (*Horwill, J.*) PAPPAMMAL *v.* SEETHAMMAL. **1940 M.W.N. 489=51 L.W. 633=A.I.R. 1940 Mad. 754=(1940) 1 M.L.J. 813.**

——**O. 33, R. 1, Expl.**—*Construction—Subject-matter of suit—If always to be excluded—"Possessed of sufficient means to enable him to pay the fee"—Meaning of.*

It cannot be laid down that the subject-matter in dispute in the suit can in no circumstances be taken into account in considering whether the plaintiff is possessed of sufficient means to enable him to pay the court-fee or not. The Explanation to O. 33, R. 1 consists of two distinct parts, and while under the second part the legislature has advisedly excluded the subject-matter of the suit, it has obviously reframed from excluding it in the first part. In cases coming under the first part, it is not possible to hold that the subject-matter of the suit must always and of necessity be excluded from consideration. Whether it should or should not be excluded is a matter for the consideration of the Court. The words "possessed of sufficient *means* to enable him to pay the fee" are not equivalent to "possessed of sufficient *property* to enable him to pay the fee". (*Sulaiman, C.J. and Hamilton, J.*) MITHAI LAL *v.* JAGAN. **I.L.R. (1937) All. 913=172 I.C. 17=10 R.A. 371=1937 All.L.R. 964=1937 A.L.J. 1171=1937 A.W.R. 836=A.I.R. 1937 All. 740.**

C. P. CODE (1908), O. 33, R. 2.

——**O. 33, R. 1, Expl.**—*Scope of.*

Where court-fee is prescribed for the plaint in the suit, the case falls within the first part of the Explanation appended to O. 33, R. 1 and the question which requires decision is whether the applicant for permission to sue in *forma pauperis* is possessed of sufficient property to enable him to pay the court-fee. Provision is made in the second part of the Explanation for a case in which no court-fee is prescribed. A finding of the Court that the assets of the applicant are worth more than Rs. 100 is, therefore, beside the point in a case covered by the first part of the Explanation. (*Srivastava and Nanavutty, JJ.*) SABIHA KHATUN *v.* ANWARUL HASAN. **1936 O.W.N. 237.**

——**O. 33, R. 1, Expl.**—*"Necessary wearing apparel"—Ornaments worn by woman on her person.*

Ornaments worn by a woman on her person cannot be classed as necessary wearing apparel, when she is applying for leave to sue as a pauper. (*James, J.*) WASI AHMAD *v.* JAMILA KHATOON MT. **5 B.R. 383=180 I.C. 363=11 R.P. 503 (1)=1938 P.W.N. 804=19 Pat L.T. 844=A.I.R. 1939 Pat. 95.**

——**O. 33, R. 1, Expl.**—*Subject-matter of suit in possession of applicant—Court's duty to take into consideration its value.*

Where an applicant for leave to appeal as a pauper is in possession of the subject-matter of the suit, the Court should take into consideration its value in determining whether or not he should be allowed to appeal as a pauper. (*Din Mohammad, J.*) MOHAMMAD DIN *v.* MST. SARDAR BEGUM. **42 P.L.R. 266=A.I.R. 1940 Lah. 310.**

——**O. 33, R. 2**—*Applicability—O. 44, R. 1.*

Quaere.—Whether the provision, that an application for permission to sue as a pauper, which is virtually a plaint and contains various allegations of fact, should be verified as a plaint, is applicable to an application for leave to appeal in *forma pauperis* inasmuch as a memorandum of appeal does not require to be verified and the application contains merely a bare statement in Form 10, App. C of the Code. (*Pollock, J.*) BISANLAL GUJRATHI *v.* KISAN VITHOBA GUJRATHI. **I.L.R. (1938) Nag. 245=169 I.C. 894=10 R.N. 32=A.I.R. 1937 Nag. 108.**

——**O. 33, R. 2**—Applicant omitting to state estimated value of property or to disclose all his movables—Omission not deliberate—Permission to amend the list of property—If can be allowed. *See* C. P. CODE, O. 33, RR. 15 AND 2. **39 P.L.R. 665.**

——**O. 33, R. 2 and S. 149**—*Application for leave to sue in* forma pauperis—*Time for payment of court-fee, before rejection—Payment within time—Plaint when treated as filed.*

Where prior to the rejection of an application for leave to sue as a pauper, the applicant is granted on his request time for payment of court-fee and the court-fee is paid within that time, the plaint is treated as having been filed on the date when the application for leave to sue in *forma pauperis* was filed and not on the date when the court-fee was actually paid. (*Zia-ul-Hasan and Hamilton, JJ.*) LALTA *v.* AVADH NARESH SINGH. **15 Luck. 68=184 I.C. 443=12 R.O. 121=1939**

O.W.N. 920=1939 O.L.R. 626=1939 A.W.R. (C.C.) 222=A.I.R. 1940 Oudh 59.

——O. 33, R. 2—Application under to sue as pauper—Order rejecting it also fixing the time for payment of full court-fee—Payment within such time—Effect of. *See* C. P. CODE, S 149 AND O. 33, R. 2. 171 I.C. 412.

——O. 33, R. 2 and S. 149—*Pauper petition—Subsequent application to pay court-fees—Effect of—Discretion of Court.*

Under O. 33, as amended by the Rangoon High Court, a pauper applicant is required to present a plaint together with his application to sue as a pauper. He may at any time apply to the Court under S. 149, C. P. Code, for leave to pay the court-fee payable on the plaint. By making such application his prior application to sue as a pauper must be taken to be abandoned and will accordingly stand rejected. It is then incumbent upon the Court to deal with the application under S. 149. The Court must exercise its discretion judicially and must consider all the circumstances of the case, including, of course, the fact that, if the application is granted, the plaintiff may by presenting and subsequently abandoning a petition for leave to sue as a pauper, have obtained a valuable extension of time and that the Court, by exercising its discretion in the plaintiff's favour, may in effect be extending the limitation of time imposed by statute. (*Sharpe, J.*) MATHURA PRASAD *v.* R. A. PHILIPS. 1938 Rang L.R. 629=179 I.C. 700=11 R.R. 340=A.I.R. 1939 Rang. 56.

——O. 33, R. 2—*Property which is subject-matter of suit—If should be included in schedule.*

The property which is the subject-matter of the suit is not exempted from the operation of R. 2. (*Almond, J.C.*) VAISHNODAS *v.* REHMAT KHAN. 177 I.C. 311=11 R. Pesh. 20=A.I.R. 1938 Pesh. 50.

——O. 33, Rr. 2 and 5—*Scope—Suit for partition—Objection to court-fee—Order calling on plaintiff to pay additional court-fee—Application for amendment and for leave to continue suit as pauper—Power of Court to allow—Application if defective and liable to be rejected—Rules of procedure—Object of.*

The petitioner instituted a suit for partition on 18—12—1937, paying a court-fee of Rs. 15 only on the plaint. On objection raised by the defendant (respondent), the Court by an order dated 8—1—1938, directed the petitioner to pay *ad valorem* court-fee giving him (5 days for making up the deficiency). On 22—1—1928, the petitioner filed two applications, one for amendment of the plaint, and another for leave to continue the suit as a pauper, but did not comply with the order for payment of deficient court-fee. In the second application for leave to continue the suit as a pauper, the petitioner prayed the Court to regard his original plaint, and his application for amendment as parts of his second application. He was allowed to continue the suit as pauper.

Held, in revision, (1) that the plaintiff could be allowed to continue the suit as a pauper, and his application should not be rejected on the ground that he had not complied with the order of the Court requiring him to pay court-fee within a certain time; (2) that if the original plaint and the amendment application were read as parts of the application for leave to continue the suit as a pauper, the requirements of O. 33, R. 2 would be substantially complied with and the mere fact that the Court did not pass an order on the amendment application at once would not necessarily make the present application defective; (3) that rules of procedure were not made for the purpose of hindering justice. (*Fazl Ali and Manohar Lall, JJ.*) CHAITAN RAY *v.* PADMA CHARAN RAY. 6 Cut. L.T. 39.

——O. 33, Rr. 2 and 5—*Suit in a representative capacity—Leave to sue* in forma pauperis—*Existence of personal property of the plaintiff—If a ground for refusing leave.*

Per Division Bench.—Where a plaintiff sues in a representative capacity, as manager or *sarburakar* of an institution, unless it is shown that he is in possession of property belonging to the institution sufficient to enable him to pay the court-fee prescribed by law for the suit, he may be allowed to sue *in forma pauperis*, even if it is shown that he has sufficient personal property of his own. His personal and representative capacities must be kept distinct. (*Thomas, C.J., Zia-ul-Hasan and Hamilton, JJ.*) SUNDAR BHARTHI *v.* TRUST MANDIR NAGESHAR NATH. 186 I.C. 381=12 R.O. 306=1940 A.W.R. (C.C.) 133=1940 O.A. 239=1940 O.L.R. 118=1940 O.W.N. 259=A.I.R. 1940 Oudh 148 (F.B.)

——O. 33, Rr. 3 and 4—*Court inquiring into pauperism after notice—Jurisdiction to consider if plaint discloses cause of action or suit barred.*

A Court issuing notice and hearing the case on the question of pauperism under O. 33, R. 4, C.P. Code, is not thereby deprived of its jurisdiction to consider under R. 3 (*b*) and (*c*) the questions as to whether the plaint discloses a cause of action or whether the suit is barred by limitation. But the Court should not allow itself to be influenced by any evidence which was taken at the equiry under R. 4 or by anything which has been brought to its notice by the opposite party, which are not to be found either on the face of the proposed plaint or in an admission by the applicant. (*Mya Bu and Mackney, JJ.*) KARIM *v.* LAIQ RAM. 1939 Rang L.R. 263=184 I.C. 796=12 R.R. 175=A.I.R. 1939 Rang 351.

——O. 33, R. 3 (as amended by Rangoon High Court)—*Petition not stating date of verification—Jurisdiction of Court to allow amendment.*

Where a petition for leave to sue *in forma pauperis*, although otherwise in proper form, does not state the date on which the verification was signed, the Court has jurisdiction under O. 33, R. 3, as amended by the Rangoon High Court in 1935, to allow an amendment of the petition to enable the plaintiff to put in the date upon which the petition was verified. (*Page, C. J. and Ba U, J.*) M. H. MASHIAH *v* BALTHAZAR & SON, LTD 14 Rang. 311=163 I.C. 842=9 R.R. 52=A.I.R. 1936 Rang. 279.

——O. 33 R. 4 (as amended by Rangoon High Court, 1935)—*Enquiry under—Power of Court to reject plaint on ground that it does not show cause of action.*

R. 4 of the new Rules under O. 33, as amended by Rangoon High Court in 1935, does not give any express authority to the Court to reject a plaint on the ground that it does not show a cause of action after enquiry held under the rule; but when on the face of the plaint itself it does not show a valid cause of action, it does not stand to

reason that the Court cannot act upon that finding at any stage of the proceedings provided it has not infringed the rule that it should not adduce matters extraneous to the plaint in determining whether it shows a valid cause of action or not. Since the reference to certain proceedings in the High Court cannot be deemed to be tantamount to adducing of matters extraneous to the plaint where those proceedings are themselves mentioned in the plaint and the applicant himself asks that those proceedings be read as part of the plaint, there is nothing which renders the order dismissing the application illegal. (*Mya Bu and Spargo, JJ.*) M. H. MASHIAH *v.* BALTHAZAR & SONS, LTD. **173 I.C. 273=10 R.R. 331=A.I.R. 1937 Rang. 365.**

——**O 33, R. 5**—*Applicant possessed of immovable property not including it in schedule—If fatal to application.*

Where it is apparent on the face of the application to sue *in forma pauperis* that the applicant is possessed of immovable property which he has not included in the schedule and on which he has placed no value, the application must be dismissed. (*Almond, J.C.*) VAISHNODAS *v.* REHMAT KHAN. **177 I.C. 311=11 R. Pesh. 20=A.I.R. 1938 Pesh. 50.**

——**O. 33, Rr. 5, 7 and S. 149**—*Application for permission to sue as pauper rejected—Power of Court to allow applicant to pay Court-fees—Separate and subsequent order—Legality.*

Where an application for permission to sue as a pauper is rejected under O. 33, R. 5, the Court, while rejecting the application can, under S. 149, allow the applicant to pay the requisite Court-fee and treat the application as a plaint. If however the Court has refused to allow the applicant to sue as a pauper under O. 33, R. 7 (3), then the Court while rejecting the application for permission to sue as pauper, cannot under S. 149, allow the applicant to pay the requisite Court-fee and treat the application as a plaint. Where the Court rejects an application for permission to sue as a pauper, it cannot, after rejecting the application, by a separate and subsequent order allow the applicant to pay the requisite Court-fee under S. 149 and treat the application as a plaint.

Per *Allsop, J.*—The Court, having once passed an order refusing to allow an applicant to sue as a pauper, may after the proceedings have been reopened exercise jurisdiction under S. 149. (*Sulaiman, C.J., Bennet and Allsop, JJ.*) CHUNNA MAL *v.* BHAGWANT KISHORE **I.L.R. (1937) All. 22=164 I.C. 305=9 R.A. 145=1936 A.L.J. 760=1936 A.W.R. 672=1936 All. L.R. 732=A.I.R. 1936 All. 584 (F.B.).**

——**O. 33, R. 5**—*Application to sue* in forma pauperis *accompanied by plaint—Rejection of application—If amounts to institution of suit.*

The rejection of an application to sue *in forma pauperis* does not amount to an institution of a suit, although the application was accompanied by the plaint in the suit which it was desired to institute, if no further action is taken by the applicant after its rejection. (*Strivastava, C. J. and Smith, J.*) RAN BAHADUR SINGH *v.* SHEO PRATAP SINGH. **170 I.C. 505=10 R.O. 24=1937 O.L.R. 438=1937 O.W.N. 766=A.I.R. 1937 Oudh 452.**

——**O. 33, Rr. 5, 7 and 15**—*Application to sue* in forma pauperis—*Rejection under R. 5 for non-compliance with formalities—Fresh application, if barred—Refusal contemplated by R. 15.*

The rejection of an application under O. 33, R. 5, on the ground that the application was not framed and presented in the manner prescribed by Rr. 2 and 3 does not bar a subsequent application. The refusal contemplated by R. 15, which would have the effect debarring a subsequent application, is the one that is provided for in R. 7. (*Bennet and Verma, JJ.*) MAHADEO DAS *v.* BISHWANATH DAS. **I.L.R. (1940) All. 253=189 I.C. 89=1940 A.L.J. 118=13 R.A. 80=1940 A.W.R. (H.C.) 153 (2)=A.I.R. 1940 All. 251**

——**O. 33, R. 5**—*"Cause of action"—Meaning.*

Cause of action means every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. *Read* v. *Brown*, (1888) 22 Q.B.D. 128, Ref. (*Mosely, and Ba U, JJ.*) MA PWA *v.* TASUDUT. **164 I.C. 556=9 R.R. 123=A.I.R. 1936 Rang. 388.**

—— **O. 33, R. 5**—Dismissal of pauper application as barred by S. 47, C. P. Code—If revisable. *See* C. P. CODE, S. 115—MATERIAL IRREGULARITY. **A.I.R. 1938 Rang. 453.**

——**O. 33, R. 5**—*Enquiry into merits—Power of Court.*

There is nothing in the provisions of C.P. Code which would entitle a Court to go into the merits of the case of the applicant for permission to be allowed to sue as a pauper. (*Wort, J.*) BALBAHADUR *v.* NARBADA PRASAD. **160 I.C. 351=8 R.P. 357 (2)=A.I.R. 1936 Pat. 2.**

——**O. 33, Rr. 5, 6 and 7**—*Notice issued under R. 6—Applicant's right to adduce evidence regarding matter specified in R. 5.*

Where notices have been issued under R. 6, the opposite party has a right to adduce evidence and to be heard in connexion with any matter specified in R. 5; and the High Court will interfere in revision under S. 115 (*c*) if the opposite party is prevented from defending himself on any of those grounds. (*Bose, J.*) KRISHNA KUMAR *v.* RADHELAL. **I.L.R. (1940) Nag 463=175 I.C. 107=10 R.N. 433=A.I.R. 1938 Nag. 210.**

——**O 33, Rr. 5 and 15**—*Rejection of application for leave to sue* in forma pauperis—*Power to grant time for payment of court-fee—Limits—C. P. Code, S. 149.*

A Court has, undoubtedly, power to permit during its pendency, an application for leave to sue *in forma pauperis*, to be converted into a plaint by payment of the necessary court-fees. This power can also be exercised at the time of rejecting the application, if in one single order the Court declines leave to sue as a pauper and also gives time for payment of court-fee. This will be within the discretion allowed by S. 149, C. P. Code. But when once an order finally disposing of the application for leave to sue as a pauper has been passed, it is no longer open to that Court to give any further time so as to revive the proceedings already completely disposed of and to permit them to be resumed. (*Fazl Ali and Rowland, JJ.*) LALA MISTRY *v.* GANESH MISTRY. **17 Pat. 281=19 Pat.L.T. 8=1938 P W.N. 7=174 I.C. 769=4 B.R. 483=10 R.P. 552=A.I.R. 1938 Pat. 120.**

——**O. 33, R. 5**—*Rejection under—Duty of Court to give time to pay court-fees.*

C. P. CODE (1908), O.33, R. 5.

Where an application for leave to sue as a pauper is dismissed, the Court should give the applicant time to pay the requisite court-fee stamp. (*Jai Lal, J.*) SULTAN SINGH *v.* KANSHI RAM. 38 P.L.R. 429.

——O. 33, R. 5—*Rejection under—Reasonable time to pay court-fees—Duty of Court to fix—Practice.*

It is a salutary rule of practice that when an application to sue *in forma pauperis* is rejected, the Court should fix a reasonable time within which the applicant should pay the requisite amount of court-fee. (*Agha Haider, J.*) DHARAM DAS *v.* MT. PARBATI. 38 P.L.R. 79.

——O. 33, Rr. 5, 6 and 7—*Scope—Court declining to reject application under R. 5 (a)—Notice under R. 6—Evidence and argument—Subsequent objection under R. 5 (a) based on admissions of applicant after notice—Maintainability.*

After notice is issued under R. 6, O. 33, the Court, it is true, is required under R. 7 (2) to hear arguments as to whether the applicant is or is not subject to any of the prohibitions specified in R. 5. But an objection which relates to R. 5 (*a*) cannot be made out by the evidence required under R. 6 and taken under R. 7 (1), which must be confined to proof of the pauperism and disproof thereof. Evidence and admissions obtained from the applicant, which go beyond the issue of pauperism cannot be regarded as available to the objector for asking the Court to reject the application under R. 5 (*a*), when he has not been able to establish on the materials before the Court before it issued notice under R. 6, that the Court should have rejected the application on the ground of non-compliance with Rr. 2 and 3. (*Dhavle and Varma, JJ.*) BIHARI SAHU *v.* SUDAMA KUER. 175 I.C. 505=4 B.R. 598=10 R. P. 632=19 Pat.L.T. 101=1938 P.W.N. 163=A. I.R. 1938 Pat. 209.

——O. 33, R. 5 (b) and (c)—*Opposition on grounds under—Burden of proof.*

Where opposite party opposes the application on any of the grounds under O. 33, R. 5 (*b*) or (*c*), the primary burden of proof is on the opposite party (defendant). (*Bose, J.*) KRISHNA KUMAR *v.* RADHELAL. I.L.R. (1940) Nag. 463= 175 I.C. 107=10 R.N. 433=A.I.R. 1938 Nag. 210.

——O. 33, R. 5 (d)—*Application by benamidar—If barred.*

In an application to sue *in forma pauperis* the Court is entitled to see whether the petitioner has any cause of action and if it is found that the petitioner is in fact acting for somebody else the Court is perfectly justified in holding that his application is barred by O. 33, R. 5, Cl. (*d*). If this were not the law, and such persons were allowed to proceed with their suits *in forma pauperis*, every one who can afford to pay the court-fee, would put up some pauper to sue as his transferee and avoid paying duty. A.I.R. 1919 Pat. 58, Foll. (*Mir Ahmad, J.*) MOHAMMAD NARI *v.* MUSHTAQ MAL. 188 I.C. 31=12 R. Pesh. 36=A.I.R. 1940 Pesh. 13.

——O. 33, R. 5 (d)—*Cause of action barred by limitation—Duty of Court to reject application.*

Under O. 33, R. 5 (*d*) the Court must reject an application to sue *in forma pauperis* if the allegations do not show a subsisting cause of action at the date of the petition. The cause of action cannot be said to be subsisting if the law of limitation has come into operation and barred the suit. (*Smith and Madeley, JJ.*) SUNDER BAHU *v.* MOHAN DEI. 13 Luck. 560=170 I.C. 956=10 R.O 61=1937 O.L.R. 494=1937 O.W.N. 971= A.I.R. 1937 Oudh 481.

——O. 33, R. 5 (d)—*Enquiry into question of limitation—Permissibility.*

Although it may be permissible for the Courts to enter into the question of limitation for the purpose of satisfying as to whether the application for leave to sue as a pauper does or does not disclose any existing cause of action, yet the enquiry must be limited to the facts of the case apparent on the face of the plaint and any complicated question of law upon which a difference of opinion is possible should be avoided at this stage. (*Mukherjea, J.*) PARAMESHWAR SINGH *v.* THE NEW THEATRES, LTD. 173 I.C. 305=10 R.C. 500=41 C.W.N. 1087=A.I.R. 1937 Cal. 516.

——O. 33, R. 5 (d)—*Scope—Mandatory character.*

The provisions of O. 33, R. 5 (*d*), are mandatory and a petition for permission to sue as pauper must be rejected if it does not show a cause of action. (*Rupchand Bilaram, A.J.C.*) YOUSIF ABID *v.* SECRETARY OF STATE. 30 S.L.R. 314=164 I.C. 571=9 R.S. 48=A.I.R. 1936 Sind 130.

——O. 33, R. 5 (d)—*Suit barred by* res judicata—*Application to be rejected.*

An application to sue *in forma pauperis* should be rejected if it is found that the suit is barred by the rule of *res judicata*. 19 Mad. 197, Foll. (*Mir Ahmad, A.J.C.*) AMIR SINGH *v.* ATTAR SINGH. 161 I.C. 47=8 R. Pesh. 153=A.I.R. 1936 Pesh. 39.

——O. 33, R. 5 (e)—*Agreement contemplated by.*

O. 33, R. 5 (*e*), C. P. Code, contemplates an agreement entered into after the cause of action for the suit has arisen and enforceable at the time when the application for leave to sue *in forma pauperis* is filed. (*Nasim Ali and Rau, JJ.*) BHANUPATI *v.* NEW ASIATIC LIFE INSURANCE CO. 44 C.W.N. 470.

——O. 33, R. 5 (e)—*Construction and scope—"Proposed"—Transfer of subject-matter pending suit—Appeal by transferor—Application for permission to appeal* in forma pauperis—*Maintainability.*

The appellant transferred the whole of his interest in the subject-matter of the litigation to a third party when the suit was pending. After the decree he sought to appeal against it *in forma pauperis* and applied for leave.

Held, the case fell precisely within the words of O. 33, R. 5 (*e*), because though there was no appeal in contemplation at the time of the agreement transferring his interest, an appeal was now "proposed" and the would-be appellant had entered into an agreement under which another person had obtained an interest in the subject-matter of the appeal. (*Burn, J.*) VISVANADHAM *v.* SATYANANDHAM. 162 I.C. 840=8 R.M. 1056=1936 M. W.N. 488=43 L.W. 717=A.I.R. 1936 Mad. 665.

——O. 33, R. 5 (e)—*Construction— "Agreement"—If must be champertous.*

There is no warrant for holding that the "agreement" contemplated by Cl. (*e*) of O. 33,

R. 5, must be of a champertous character. The principle underlying the provision is that a person ought not to be allowed to sue *in forma pauperis*, after transferring to a third party his interest in the property involved in the suit, no matter for what reason the transfer has been made. It is to prevent payment of Court-fee being evaded that this provision has been enacted, and it matters little with what purposes the agreement has been entered into. (*Venkatasubba Rao, J. and Venkataramana Rao, J.*) VISWANATHAM *v.* SATYANANDAM. I.L.R. (1937) Mad. 584 =1937 M.W.N. 74=44 L.W. 856=169 I.C. 174 =9 R.M. 688=A.I.R. 1937 Mad. 161=(1937) 1 M.L.J. 147.

——O. 33, R. 5 (e)—*Construction—"Interest" —Meaning—If to be vested and completed interest under T. P. Act and Registration Act.*

The word "interest" in O. 33, R. 5 (*e*) is used in its ordinary and general sense, and not in the technical sense of an interest of a transferee or mortgagee, co-owner or charge holder under the combined operation of the T. P. Act and Registration Act. The "interest" need not be a vested and completed interest. The provisions of O. 33 are intended to aid a pauper suing for his own benefit, but not to enable an ostensible pauper to figure as plaintiff, when in the fruits of the litigation a third party has been given an interest. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KAYAMBU PILLAI *v.* LAKSHMI AMMANI AMMAL. 11 R.M. 466=178 I.C. 514=1938 M.W.N. 322= 47 L.W. 405=A.I.R. 1938 Mad. 491=(1938) 2 M.L.J. 137.

——O. 33, R. 5 (e)—*Scope—"Agreement with reference to the subject-matter, etc."—Meaning of—Applicant for leave to appeal* in forma pauperis—*Assignment of interest in assets to third party to finance litigation—Right to grant of leave.*

The agreement referred to in Cl. (*e*) of R. 5 of O. 33, must not only be an agreement with reference to the subject-matter of the litigation, but it must also be an agreement under which any other person "has obtained" an interest in such subject-matter. In other words, the interest acquired must be subsisting and the agreement operative and not rescinded and the claim thereunder not renounced. If an applicant for leave to appeal *in forma pauperis* has by agreement assigned his interest or part thereof in the entire assets (the subject-matter of the litigation) to a third party to finance the litigation at any stage of the proceedings or even before the suit, his act comes within the ambit of O. 33, R. 5 (*e*), and he cannot claim exemption on the ground that he has reduced his claim to the unassigned share in the property. He cannot therefore be allowed to file the appeal *in forma pauperis*. (*Wassoodew and Indarnarayan, JJ.*) EBRAHIM SHERKHAN *v* HAJRATKHAN MOHIDDINKHAN. 186 I.C. 726=12 R.B. 368=41 Bom.L.R. 1305=A.I.R. 1940 Bom. 49.

———O. 33, R. 5 (e)—*Scope—Suit by chela of mahant claiming mahantship — Plaintiff merely tool in hands of backers who stand to derive substantial advantage—Leave to sue or appeal* in forma pauperis—*Grant of.*

The provisions of C. P. Code which provide the machinery of leave to sue or to appeal *in forma pauperis* are not intended for the purpose

of promoting the interest of champertors or for the benefit of such persons as are really working behind the applicant, but only for the purpose of protecting and giving assistance to people who are genuinely paupers and have no one to help them out of their difficulties. A chela of a deceased mahant in a math may be a pauper and may have no property, but if a suit by him claiming the right of mahantship of the math is really promoted by others who merely use him as a tool—it being also found that the plaintiff is only a nominal plaintiff, and that the backers with whom he has entered into an arrangement are to derive substantial advantages—he cannot be permitted to sue or appeal *in forma pauperis* R. 5 of O. 33, is by no means exhaustive; it merely states a series of circumstances any of which if proved compels the Court to reject the application. (*Courtney-Terrell, C.J. and Agarwala, J.*) JAIKISHUN DAS *v.* RAM NARAIN DAS. 183 I.C. 385 =12 R.P. 142=5 B.R. 901=20 Pat. L.T. 720= 1939 P.W.N. 261=A.I.R. 1939 Pat. 385.

——O. 33, Rr. 6 and 7—*Application for leave to sue as pauper—Report of Tahsildar that applicant is pauper forwarded by Collector performing functions of Government Pleader—Application opposed by Government Pleader appearing for defendant Secretary of State—Jurisdiction of Court to make further enquiry.*

A report of a Tahsildar to the effect that an applicant for permission to sue *in forma pauperis* is a pauper merely forwarded by the Collector of the district who has been appointed to perform the functions of the Government Pleader under O. 33, R. 6, is not in itself evidence in the case. It is for the Government Pleader who appears in the case for the defendant Secretary of State to decide whether to accept that report or to oppose the application. If he chooses the latter course, the Court has jurisdiction to enter upon a further enquiry in the matter and come to the conclusion that the applicant is not a pauper. (*Bhide, J.*) HASAN DIN *v.* SECRETARY OF STATE FOR INDIA. 12 R.L. 442=187 I.C. 134.

——O. 33, Rr. 6 and 7—*Decision as to pauperism—Court, if can go into merits of the case.*

It is not proper that a Court in deciding as to whether the plaintiff is entitled to sue as a pauper or not, should take into consideration the weakness of the merits of the plaintiff's case; the strength or weakness of the case on the merits must necessarily be left for decision on the merits when the application for pauperism is admitted. (*Puranik, J.*) KISAN SAKHARAM *v.* SAHAJAT SINGH. I.L.R. (1940) Nag. 549=1940 N.L.J. 314=A.I.R. 1940 Nag. 258.

——O. 33, Rr. 7, 8 and 15—*Application to sue* in forma pauperis *rejected — Court-fee subsequently paid—Date of institution of suit.*

The application to sue *in forma pauperis* is a potential plaint. If it is rejected under R. 5 or R. 7 of O. 33, it never ripens into a plaint. If the application ripens into a plaint, then the date of the institution of the suit shall relate back to the date of the filing of the application to sue *in forma pauperis*. If, on the other hand, such an application is rejected, it cannot be deemed to be a plaint, and the payment of the Court-fee after the application to sue *in forma pauperis* has been rejected cannot revive a potential plaint which ceased to exist when the application for leave to

C. P. CODE (1908), O. 33, R. 7.

sue *in forma pauperis* was rejected. In such a case, therefore, the suit must be considered for the purposes of limitation to have been instituted only after the payment of the Court-fee, and not at the date of presentation of the petition to sue as a pauper. (*Addison and Abdul Rashid, JJ.*) ALOPI PERSHAD *v.* MST. GAPPI. 17 Lah. 831= 169 I C. 368=10 R.L. 2=39 P.L.R. 158=A.I.R. 1937 Lah. 151.

——O. 33, Rr 7 and 15 and S. 149—*Dismissal of pauper application—Permission granted to pay court-fees—Date of institution of suit.*

Although a *bona fide* applicant to sue *in forma pauperis*, whose application has not been already refused, may be allowed to convert his application into a plaint which, after it has been so converted, should be deemed to have been filed on the date on which the original application was presented to the Court, the position would be different if the pauper application had been refused under O. 33, R. 7 or if the applicant had presented his application *mala fide* or with intent to defraud the revenue. Where an application for leave to sue *in forma pauperis* is rejected under O. 33, R. 7, there is no proceeding before the Court and the plaint filed along with the original application cannot be said to remain. In such a case an order granting the applicant permission to pay court-fees cannot be deemed to be one under S. 149 and the suit must be held to have been instituted on the day on which the court-fee is paid. 62 C. 711, Diss. from. (*Edgley, J.*) BISWANATH DAS *v.* KHEJERALI MOLLA. I.L.R. (1939) 2 Cal. 68=184 I C. 345=12 R.C. 224=69 C.L J. 420=43 C.W.N. 686=A.I.R. 1939 Cal. 394.

——O 33, R. 7—*Inquiry under—Scope of—Inquiry into complicated questions of fact or law—Jurisdiction to embark—Revision—Interference.*

At the stage of enquiry provided for by R. 7 of O. 33, the only evidence which a defendant is entitled to put before the Court is evidence touching the pauperism of the applicant and no other evidence. But notwithstanding the fact that the Court at an earlier stage may have satisfied or thought that there was a cause of action shown, it is open to the defendant by argument to show that the plaint does not disclose a cause of action. The defendant cannot, however, call or put in any evidence. A Court under O. 33, R. 7, ought not to go into complicated questions of fact or law such as questions of *res judicata*; but if the Court does embark upon such an inquiry as that the Court cannot be said to be acting beyond its jurisdiction so as to justify interference in revision under S. 115, C. P. Code. (*Beasley, C.J.*) SURBAYYAR *v.* VALLAPPAN AMBALAM. 1937 M. W.N. 415.

——O. 33, R. 7—*Leave to sue conditional on payment of costs to the other side—Propriety.*

An order granting leave to sue as pauper on payment of costs to the other side when the applicant could afford it, is an extraordinary order. (*Bennet and Verma, JJ.*) MAHADEO DAS *v.* BISHWANATH DAS I.L.R. (1940) All. 253= 13 O A. 80=189 I.C. 89=1940 A.L.J. 118=1940 A.W.R. (H. C.) 153 (2)=A.I.R. 1940 All. 251.

——O. 33, R 7—*Objection under R. 5—Power of Court to deal with.*

Court has under O. 33, R. 7 power to dismiss the application either because on the evidence produced it is not satisfied that the petitioner is a pauper or because the petition falls within some of the prohibitions specified in R. 5. Hence there is no objection to the Court in dealing with the technical objections mentioned in R. 5 before hearing the evidence as to whether the petitioner is actually a pauper or not. (*Almond, J. C.*) VAISHNODAS *v.* REHMAT KHAN. 177 I.C. 311= 10 R. Pesh. 20=A.I.R. 1938 Pesh. 50.

C. P. CODE (1908), O. 33, R. 9.

——O. 33, Rr. 7 and 15 and S. 149—Pauper application rejected—Power of Court to grant time to pay Court-fee—Date of institution of suit. *See* C. P. CODE, S. 149. A.I.R. 1937 Rang. 185.

——O. 33, R. 8—*Scope and effect of—Pauper suit—Date of filing—Date of application for leave to sue as pauper or date of grant of leave—Limitation Act, S. 3.*

Though by reason of O. 33, R. 8, C. P. Code, the suit of a pauper can be registered only after the application for permission to sue *in forma pauperis* is granted, it is the date of the filing of the application and not the date of the grant of leave that should be regarded as the date of filing of the suit. S. 3 of the Limitation Act makes this clear. (*Lokur, J.*) KESHAVLAL *v.* BAI DAHI. 12 R.B. 198=184 I.C. 804=41 Bom.L.R. 784= A.I.R. 1939 Bom. 418.

——O. 33, R. 8 and O. 44, R. 1—*Suit or appeal* in forma pauperis—*Application for review of judgment in—Liability to court-fee.*

An application for review of judgment passed in a suit or appeal *in forma pauperis* must, under the law, be considered to be one in continuation of the suit or appeal, as the case may be, which was *in forma pauperis*. Such an application must be held to be maintainable without payment of any Court-fee. (*Guha and Bartley, JJ.*) SERAJGANJ CO-OPERATIVE URBAN BANK, LTD *v.* BIMDUBASINI BASSYA. 170 I.C. 688=10 R.C. 177=40 C.W.N. 1407=A.I.R. 1936 Cal. 752.

——O 33, R. 9—*Addition of defendants—If a ground for fresh enquiry into pauperism.*

There is nothing in O. 33, which contemplates a fresh inquiry into pauperism merely from the fact that other defendants are subsequently added to the suit. Although an added defendant can apply under R. 9, for dispaupering the plaintiffs for one of the reasons given in R. 9 yet, in absence of such application, the Court has no jurisdiction to pass an order requiring evidence of pauperism to be produced again. (*Almond, A. J. C.*) HAR KISHAN LAL *v.* GURDAS LAL. 161 I.C. 51=8 R. Pesh. 158 (1)= A.I.R. 1936 Pesh. 51.

——O. 33, R. 9—*Procedure—Application to dispauper plaintiff—Time for disposal—Order dispaupering plaintiff after judgment in suit and along with disposal of suit—Propriety.*

The practice of disposing of an application to dispauper a pauper plaintiff along with the judgment itself and after delivery of judgment in the suit is one that ought to be condemned. An application of that sort ought to be dealt with and decided finally before further proceedings in the suit are taken. (*Pandrang Row and Abdur Rahman, JJ.*) ADINARAYANA CHETTY *v.* SRIRANGACHARIAR. 51 L.W. 666=1940 M.W.N. 404.

——O. 33, R. 9 (c)—*Applicability — Family settlement between parties pending suit—Agreement by plaintiff recognising right of another party's antecedent right to property—If ground for dispaupering.*

C. P. CODE (1908), O. 33, R. 9.

O. 33, R. 9 (*c*) contemplates an agreement in and by which an interest is transferred or created in the subject-matter of the suit in favour of a person who is not entitled to it, and does not cover a case where by virtue of a family settlement between the parties there is a recognition of an antecedent title in one of the parties to the suit. Where a suit is filed *in forma pauperis* by *C* on a mortgage executed in favour of *A* and *B* claiming that the same was executed in their favour benami for the plaintiff's father and that plaintiff was therefore entitled to the full amount, impleading as parties to the suit, among others, the mortgagors and *B's* son who pleads that it is not benami, and pending the suit the plaintiff and *B's* son file a joint memorandum in Court by which the plaintiff agrees that the son of *B* is entitled to half the amount of the mortgage, such a case is not affected by O. 33, R. 9 (*c*) and does not afford a ground for dispaupering the plaintiff. (*Venkataramana Rao, J.*) SWAMI NAIDU *v.* NATESA IYER. **1937 M.W.N. 220=45 L.W. 560=169 I.C. 957=10 R.M. 146=A.I.R. 1937 Mad. 576=(1937) 1 M.L.J. 616.**

——**O. 33, R. 9 (c)**—*Construction—Pauper plaintiff—Mortgage of properties by pending suit—If ground for dispaupering.*

O. 33, R. 9 (*c*), C. P. Code, must be construed as meaning that a person cannot sue as a pauper if at the time of the petition some other person has under an agreement an interest in the subject-matter of the suit. It must be a subsisting interest at the time of the suit. Where therefore a pauper plaintiff, after he has been given leave to sue as pauper, executes a mortgage over the properties affected by the suit, that is a good ground for dispaupering the plaintiff. (*Mockett, J.*) VEERARAGHAVA RAO *v.* SRIMIRJA NALLAPPA RAJU VENKATANARASIMHA RAJU. **59 Mad. 901=164 I.C. 831=9 R.M. 173=1936 M.W.N. 785=44 L.W. 31=A.I.R. 1936 Mad. 662=71 M.L.J. 355.**

——**O. 33, R. 9 (c)**—*Construction—"Plaintiff"—Meaning—If includes his representative in interest—Representative—If may be dispaupered for agreement by predecessor-in-interest.*

The word "plaintiff" in O. 33, R. 5 (*c*) means, in both places in which it occurs, "the plaintiff or his representative." The application of the clause is not confined to the party who has entered into the agreement. A legal representative of the original plaintiff or appellant can be dispaupered for an agreement of the nature mentioned in the clause entered into by his predecessor-in-interest. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KAYAMBU PILLAI *v.* LAKSHMI AMMANI AMMAL. **11 R.M. 466=178 I.C. 514=1938 M.W.N. 322=47 L.W. 405=A.I.R. 1938 Mad. 491=(1938) 2 M.L.J. 137.**

——**O. 33, R. 9 (c)**—*Scope—Pauper plaintiff—Agreement with stranger—Latter advancing funds for expenses already incurred and promising to advance more for future expenses of suit till disposal—Undertaking by plaintiff to re-pay with interest in fixed time—Further undertaking in default, to convey part of properties to which he might be held entitled—If ground for dispaupering.*

The provisions of O. 33, C. P. Code, are designed in aid of *bona fide* litigants and must be strictly confined to them. Where a pauper plaintiff enters into an agreement with a stranger under which the latter advances a sum of money to the plaintiff towards the expenses already incurred by him in conducting the suit till then, and also agrees to advance another like sum "for taking steps and for the expense that may be necessary hereafter till the disposal of the suit," and the plaintiff in consideration of the advances so made and promised to be made agrees to repay the amounts with interest within three months, and in default, to sell one-fourth of the properties to which he might be held entitled, the agreement falls within the language of O. 33, R. 9 (*c*), C. P. Code, and affords a ground for dispaupering the plaintiff. O. 33, R. 9 (*c*) is wide enough to cover such an interest as is created by the plaintiff under the agreement in favour of the stranger. (*Abdur Rahman, J.*) SIVARAMA AIYAR *v.* AHILAMBAL AMMAL. **175 I.C. 704=10 R.M. 805=1937 M.W.N. 1305=46 L.W. 649=A.I.R. 1938 Mad. 153=(1937) 2 M.L.J. 789.**

C. P. CODE (1908), O. 33, O. 10.

——**O. 33, Rr. 10 and 11**—*Court-fee—Apportionment of—Pauper suit—Claim decreed in part only—Court-fee—Liability for—Proper order as to.*

Where a pauper plaintiff succeeds only in part in the suit and the rest of the claim is dismissed, the proper mode of apportionment of Court-fee due to the Government is that the defendant must be ordered to pay the Court-fee on the portion of the claim decreed and the plaintiff must be made liable for the Court-fee on the portion of the claim which is dismissed. (*Iqbal Ahmad, J.*) SECRETARY OF STATE FOR INDIA *v.* BASTI BEGAM. **172 I.C. 695=10 R.A. 422=1938 A.L.R. 23=1937 A.L.J. 804=1937 A.W.R. 705.**

——**O 33, Rr. 10 and 12 and O. 44, R. 1**—*Order in terms of O. 33, R. 10 passed by trial Court—No such order made by appellate Court in appeal—Application by Government for such order—If competent.*

Where a pauper suit instituted under O. 33 is disposed of, the Court is at liberty, whether the Government is represented before it at the time or not, to make an order in favour of the Government for the payment of court-fees and in making such order the Court is entitled in the exercise of its discretion, which it has in the matter, to direct which of the parties shall be liable for the payment of such court-fees. Where therefore although an order in the terms of O. 33, R. 10 had been made by the trial Court when it passed the decree, no such order was made by the appellate Court on appeal the Government is entitled to obtain such an order by making an application under O. 33, R. 12. Such an application is competent and the Government's right to obtain an order for the recovery of the court-fees is not lost merely because there was no such order incorporated in the decree of the appellate Court. (*Biswas and Edgley, JJ.*) PROVINCE OF BENGAL *v.* NOOR AHMADE. **179 I.C. 4=11 R.C. 487=43 C.W.N. 164=A.I.R. 1938 Cal. 776.**

——**O. 33, Rr. 10 and 13**—Pauper suit—Portion of court-fee ordered to be paid by defendants—Sale of latter's property in execution of another decree—Right of Government to recover court-fee out of sale proceeds—Priority over decree-holder. *See* C. P. CODE, S. 73 (3), AND O. 33, RR. 10 AND 13. **70 M.L.J. 601.**

C. P. CODE (1908), O. 33, R. 10.

——O. 33, Rr. 10 and 12—*Payment of court-fees to Government—Power of Court to make order—Order not made in decree—Application by Government to obtain such order—If competent.*

The effect of the concluding portion of O. 33, R. 10, C. P. Code, is that it not merely declares the right of the Government to recover the court-fees but also authorises the Court to make an order as to the party or parties from whom the court-fees are to be recovered. It follows, therefore, that after the suit is disposed of, the Court is at liberty, whether the Government is represented or not before it at the time, to make an order in favour of Government for payment of court-fees; and in mak ng such an order, the Court will no doubt be entitled in the exercise of its discretion to direct which of the parties shall be liable for the payment of such court-fees. If no such order is incorporated in the decree of the Court, Government can seek to obtain such an order by an application made under R. 12. (*Biswas and Edgley, JJ.*) GOVERNMENT OF BENGAL *v.* T & J. BROCKLEBANK, LTD. **43 C.W.N. 164.**

——O. 33, Rr. 10, 11 and 14—*Scope of—Remedy of Provincial Government aggrieved by order as to payment of court-fee.*

The provisions of Rr. 10, 11 and 14 of O. 33, C. P. Code, are mandatory. Though orders under Rr. 10 and 11 usually must be passed *suo motu*, R. 12 gives the Provincial Government a right to apply, as a precautionary measure, for an order as to payment of court-fee under Rr. 10 and 11. The orders passed under Rr. 10, 11 and 12 are appealable in accordance with the provisions of S. 47, C. P. Code and R. 14 appears to have been enacted with a view to enable the Provincial Government to appeal against the order passed by the Court as to the calculation or the payment of court-fees in the event of being aggrieved by the same. Where the right of appeal is not however exercised by the Provincial Government within the time allowed by law, and the decree of the trial Court, had thereby become final, it cannot be allowed to be reopened by means of an application for amendment of the decree. (*Iqbal Ahmad and Bajpai, JJ.*) COLLECTOR OF GORAKHPUR *v.* BUDHU KALWAR. **182 I.C. 337=11 R.A. 654=1939 A.L.J. 125=1939 A.W.R (H.C.) 82=A.I.R. 1939 All. 327.**

——O. 33, R. 11—Pauper suit—Dismissal—Order directing defendant to pay court-fee due to Government—Justifiability — Suit involving difficult construction of settlement deed. *See* COSTS—DISCRETION. **70 M.L.J. 128.**

——O. 33, Rr. 11 and 12—*Scope—Pauper suit by minor plaintiff—Order directing next friend to pay costs of suit—Application by Government for order on plaintiff to pay Court-fee—Competency.*

The Court may, in disposing of a pauper suit, direct the next friend of a minor pauper plaintiff to pay the costs of the suit; but such an order cannot have the effect of depriving the Government of the right expressly given to the Government by Rr. 11 and 12 of O. 33, C. P. Code, to have an order that the plaintiff shall pay the Court-fee payable on the plaint to the Government. The Government may, therefore, apply for such an order in spite of the order of the Court directing the next friend to pay the costs of suit. (*Cornish, J.*) VENKATASWAMY NAICKEN *v.* SECRETARY OF STATE. **166 I.C. 949=9 R.M. 414=45 L.W. 234=1936 M.W.N. 1110=A.I.R. 1937 Mad. 145=(1937) 1 M.L.J. 151.**

C. P. CODE (1908), O. 33, R. 13.

——O. 33, R. 12—*Scope of.*

R. 12 of O. 33, C. P. Code, is confined in its operation to cases in which the Court has not already *suo motu* passed an order either under R. 10 or R. 11 of that order. (*Iqbal Ahmad and Bajpai, JJ.*) COLLECTOR OF GORAKHPUR *v.* BUDHU KALWAR. **182 I.C. 337=11 R.A. 654=1939 A.L.J. 125=1939 A.W.R. (H.C.) 82=A.I.R. 1939 All. 327.**

——O. 33, Rr. 12 and 13—*Scope—Pauper suit—Dismissal—Appeal by plaintiff paying Court-fee—Liability of plaintiff to pay Court-fee on plaint and other costs of Government in trial Court—Power of appellate Court to enforce—Order by appellate Court calling on plaintiff to pay such Court-fee and costs within a time—Default—Dismissal of appeal—Jurisdiction—Revision—Interference—Second appeal—If lies.*

It is not the function of a Court of appeal to give effect to the right of the Government conferred by O. 33, R. 12, C. P. Code, in respect of Court-fee and some other costs incurred by and due to the Government in the trial Court O. 33, R. 13 makes it clear that the Government should proceed in the trial Court for recovery of the Court-fee and other costs due to it to which its right has been declared by R. 12. Where a pauper plaintiff, whose suit has been dismissed and who has become liable to pay to Government the Court-fee due on the plaint and other costs incurred by the Government, prefers an appeal from the decree paying the necessary Court-fee on the appeal, the appellate Court which has registered the appeal cannot enforce the right of the Government in that matter of the Court-fee and other costs either by issuing a process or by directing the appellant to pay the said sums on pain of his appeal being dismissed. If after having so directed the appellant, it dismisses the appeal on default of compliance with the direction, the order of dismissal is wholly without jurisdiction subject to revision and interference by the High Court under S. 115, C. P. Code. The order of dismissal of the appeal under such circumstances is not a "rejection" and does not amount to a "decree" within the meaning of S. 2 (2), C. P. Code, so as to be open to second appeal. (*Niamatullah, J.*) AMBA SHANKAR *v.* MST. SHEOTI. **I.L.R. (1937) All. 484=1937 A.L.J. 171=168 I.C. 676=9 R.A. 666=1937 A.L.R. 389=1937 A.W.R. 113=A.I.R. 1937 All. 280.**

——O. 33, R. 13—*Applicability—Dismissal of pauper suit—Appeal* in forma pauperis *permitted—Application by Government for security for Court-fee due in the lower Court and in appeal—Maintainability—C. P. Code, O. 41, R. 10.*

O. 41, R. 10, C. P. Code, is a provision meant for the protection of the respondent in an appeal and is not intended to assist the Government in collecting Court-fee. Where a pauper plaintiff whose suit has been dismissed has been allowed to appeal *in forma pauperis*, there is no scope for the intervention of the Government in the matter of Court-fee, and an application by the Government for an order directing the appellant to furnish security for payment of Court-fee due to the Government in the lower Court and the appellate Court is unsustainable. The provisions of O. 41, R. 10, C. P. Code, should not be made

available or utilised for the benefit of the Government in order to enable it to collect the Court-fee due. Even if Court-fee is directed to be paid to the Government that does not convert the Court-fee into costs incurred by a party within the meaning of O. 41, R. 10. Nor can O. 33, R. 13, C. P. Code, be invoked to support such an application by the Government. (*Pandrang Row, J.*) SECRETARY OF STATE FOR INDIA *v.* THAYAMMAL. 1937 M.W.N. 244=10 R.M. 292=171 I.C. 202=45 L.W. 186=A.I.R. 1937 Mad. 267.

——O. 33, R. 15—*Applicability—Application for leave to sue* in forma pauperis *dismissed—Direction to pay requisite Court-fee "within two weeks, and the plaint will then be registered"—Payment of Court-fee within time—Payment of costs due to Government and opposite party—If condition precedent to suit—Dismissal of suit for non-payment—If justified.*

Where the Court 'dismisses' an application for leave to sue *in forma pauperis* but at the same time directs that "the Court-fee shall be paid within two weeks and the plaint will then be registered", the Court really intends that the application to sue *in forma pauperis* should itself be treated as a plaint on the requisite Court-fee being paid. O. 33, R. 15, C. P. Code, cannot apply to such a case, as there can be no question of the institution of a fresh "suit in ordinary manner" in such a case. The proviso in that rule as to payment of the costs of the Government and the opposite party cannot come into oparation at all in that case, and if the applicant pays the Court-fee due within the time fixed, the Court cannot dismiss the suit on the ground of non-payment of the costs. (*Iqbal Ahmad, J.*) BIR RAM *v.* LACHMI RAI. I.L.R. (1938) All. 11=172 I.C. 658=10 R. A. 419=1938 All.L.R. 16=1937 A.W.R. 858=1937 A.L.J. 1208=A.I.R. 1937 All. 781.

——O. 33, Rr. 15 and 2—*Applicant omitting to state estimated value of property or to disclose all his movables—Omission not deliberate—Order refusing leave to sue as pauper—Propriety.*

The Court should not refuse leave to an applicant to sue *in forma pauperis* on the ground that he has not stated in accordance with the provisions of O. 33, R. 2, C. P. Code, the estimated value of his property and that he has not disclosed all his movables, when it is not apparent that he has deliberately concealed his assets. In such circumstances, the Court should allow the applicant to amend his list of property. (*Coldstream, J.*) MUZAFFAR HUSSAIN *v.* RAM SINGH. 39 P.L.R. 665.

——O. 33, R. 15—Application to sue as pauper dismissed—Court-fee paid beyond limitation but within time granted by Court—Date of institution of suit. *See* C. P. CODE, S. 149 AND O. 33, R. 15. A.I.R. 1938 Cal. 730.

——O. 33, R. 15—*Construction—Bar to suit in ordinary manner—Applicability of—Application dismissed "with costs," but no formal order drawn up embodying such decision—Ordinary suit with Court-fee—Non-payment of costs—If a bar.*

The proviso in R. 15 of O. 33, C.P.Code, requiring the unsuccessful applicant for leave to sue *in forma pauperis* can only come into play when there is a formal order of the Court drawn up, stating the amount of costs payable by him to the Government and the opposite party. The provision, though mandatory, has to be strictly construed, inasmuch as it puts a fetter on the inherent right of an individual to resort to a Court of law for the redress of the wrong done to him. In the case of an application which is merely dismissed "with costs" where no order has been formally drawn up embodying the decision and specifying the amount of costs payable by the unsuccessful applicant to the government and the opposite party, the rule is no bar to the applicant instituting a suit in the ordinary manner on payment of the requisite Court-fee. (*Iqbal Ahmad, J.*) BIR RAM *v.* LACHMI RAI. I.L.R. (1938) All. 11=172 I.C. 658=10 R.A. 419=1938 All. L.R. 16=1937 A.W.R. 858=1937 A. L.J. 1208=A.I.R. 1937 All. 781.

——O. 33, R. 15—*Construction and scope—Condition as to payment of costs—Mandatory character of—Non-compliance—If affects jurisdiction of Court to entertain subsequent suit—Failure to take objection at initial stage—Effect—Waiver.*

The provisions of O. 33, R. 15, C. P. Code, are mandatory, and when failure to comply with the rule is brought to the notice of the Court, the suit must be dismissed, if the objection as to the non-compliance of the rule has not been waived. The failure to comply with the condition in O. 33, R. 15, as to prior payment of costs is an irregularity in the initial procedure which does not affect the inherent jurisdiction and competence of the Court to entertain the suit, and it may be waived. If the defendant in the subsequently instituted suit with court-fee does not raise the objection, that the condition in O. 33, R. 15, as to payment of costs has not been complied with, at the initial stage of the trial, he cannot subsequently dispute the Court's jurisdiction. (*Broomfield, Ag.C.J. and Sen, J.*) UMABAI SHANKAR *v.* SHANKAR HARI. I.L.R. (1940) Bom. 17=186 I.C. 749=12 R.B. 363=41 Bom.L.R. 1269=A. I.R. 1940 Bom. 44.

——O. 33, R. 15—Order of refusal contemplated by. *See* C. P. CODE, O. 33, RR. 5, 7 AND 15. 1940 A.L.J. 118.

——O. 33, R. 15—*Petition rejected* ex parte *under R. 5—Second application—If competent.*

If the Court rejects the petition *ex parte* on any of the grounds laid down in O. 33, R. 5, C. P. Code, a second application is competent; but if the Court proceeds to issue notice to the respondent and takes evidence and finally refuses to allow the petition on merits, no second application is competent. (*Mir Ahmad, A.J.C.*) MATHRA DAS HAKIM RAI *v.* SECRETARY OF STATE. 173 I.C. 647=10 R. Pesh. 51=A.I.R. 1937 Pesh. 85 (2).

——O. 33, R. 15—*"Right to sue"—Meaning of—Leave to sue* in forma pauperis *for specific performance of contract to sell—Refusal—Second application for leave to sue for refund of money paid under contract—If barred.*

The words "right to sue" in O. 33, R. 15 have substantially the same meaning as the words "cause of action." The cause of action in the suit for specific performance of a contract is not the same as in a suit for refund of the consideration. Hence where leave to sue *in forma pauperis* for specific performance of a contract to sell immovable property is refused, a subsequent application

for leave to sue for refund of money paid under the contract is not barred. (*Pollock, J.*) RAMCHANDRARAO *v.* MADHORAO. **I.L.R. (1937) Nag. 428=167 I.C. 122=9 R.N. 166=A.I.R. 1936 Nag. 280.**

———O. 33, R. 15—Scope—Imperative character—Payment of costs only long after filing of suit—Sufficiency. *See* C. P. CODE, S. 149. **1939 M.W.N. 178=A.I.R. 1939 Mad. 316.**

———O. 34—Puisne mortgagee's right in prior mortgagee's suit. *See* MORTGAGE—PUISNE AND PRIOR MORTGAGE. **A.I.R. 1937 Cal. 717.**

———O. 34, R. 1—*Attaching creditor—If necessary party.*

Per *Nasim Ali, J.*—An attaching creditor is a necessary party to a mortgage suit. (*S. K. Ghose and Nasim Ali, JJ.*) KARNANI INDUSTRIAL BANK, LTD. *v.* BARABANI COAL CONCERN, LTD. **178 I.C. 833=11 R.C. 411=42 C.W.N. 523=A.I.R. 1938 Cal. 471.**

———O. 34, R. 1—*Attaching creditor—If necessary party—Mortgaged property purchased by attaching creditor in execution of his money decree—Mortgage decree in the meanwhile—Rights of parties—Attaching creditor, purchaser, if a representative of the mortgagor.*

An attaching creditor is not a necessary party to a suit on a mortgage in respect of the property attached. But where an attaching creditor has purchased the mortgaged property in execution of his own money decree, and a decree on the mortgage also had in the meanwhile been obtained, the rights of the purchaser are subject to the mortgage decree. The purchaser or his assignee is a representative of the mortgagor and is a proper party to the execution proceedings in respect of the mortgage decree. (*Mulla, J.*) ALLIANCE BANK OF SIMLA *v.* F. B. POWELL. **179 I.C. 1007=11 R.A. 404=1938 A.W.R. (H.C.) 662=1938 A.L.J. 1024=A.I.R. 1938 All. 651.**

———O. 34, R. 1—*Attaching creditor—If necessary party—Non-joinder—Effect of—T. P. Act, S. 91.*

The amended S. 91 of the T. P. Act does not mention an attaching creditor as one of the persons entitled to redeem a mortgage and under the present law he can in no sense be said to be a necessary party to a mortgage suit. Assuming that he is a necessary party under that section before its amendment, the result of his non-joinder cannot be fatal to the rights of the mortgagee, but the obvious result would be that the rights of the attaching creditor would not in any way be affected either by the decree in the mortgage suit or even perhaps by the sale on the basis of the said decree. (*Baipai, J.*) GOPAL DEVI *v.* LACHMI SHANKAR. **163 I.C. 966=9 A. A. 105=1936 A.W.R. 595=1936 All.L.R. 688=1936 A.L.J. 708=A.I.R. 1936 All. 512.**

———O. 34, R. 1—*Attaching creditors—Proper but not necessary parties—Lower Court striking out their names—Attaching creditors bringing the property to sale and becoming purchasers subsequently—Effect—Application by them to the High Court in revision—Right to relief.*

In a suit brought by the plaintiff on his mortgage, he impleaded petitioners, who had obtained a money decree against the defendants prior to the date of the mortgage and attached the mortgaged properties. When the suit came for trial, the Court directed the names of the petitioners to be struck out as they were unnecessary parties and asserted a paramount claim and raised questions of priority. Subsequent to the date of the preliminary decree in the mortgage suit, the petitioners became the auction-purchasers of the property in execution of their money decree. The plaintiff also became the purchaser in execution of the mortgage decree. The petitioners complained against their removal from the record by filing a revision petition to the High Court, after they became purchasers.

Held, that the petitioners as attaching creditors are not necessary parties to the suit but they will be proper parties by virtue of the statutory right of redemption conferred on them under S. 91 (*f*) of the Transfer of Property Act (before amendment). It is not open to a Court to strike out their names as unnecessary parties if they were otherwise proper parties to the suit. Even apart from S. 91, the attaching creditors may intervene as proper parties to enable them to effect a more advantageous sale of the interest of the judgment-debtor and to correctly determine the rights of the latter. The petitioners would be entitled to relief if they applied to the High Court immediately after the passing of the order by the lower Court. They might have got it revised and the preliminary decree re-opened before proceeding to sell the property. When the attaching creditors proceeded to sell the property without having the right, title and interest of the judgment-debtors being defined, they sued in their character as such. It is immaterial they became the auction purchasers. The High Court, taking notice of the altered circumstances, declined to give to the petitioners that relief to which they by their own act in bringing the property to sale before filing revision petition to the High Court disentitled themselves. (*Pandrang Row and Venkataramana Rao, JJ.*) ANNAMALAI CHETTIAR *v.* SRINIVASARAGHAVA AIYANGAR. **178 I.C. 595=11 R.M. 476=1938 M.W.N. 73=A.I.R. 1938 Mad. 293.**

———O. 34, R. 1—*Attaching decree-holder—If necessary party to mortgage suit.*

An attaching decree-holder is not a "person having an interest" within the meaning of O. 34, R. 1, C. P. Code, and is not necessary party to a suit on a mortgage. An attachment merely prevents private alienation and does not create any title or legal charge upon the attached property; nor does it affect Court sales. It cannot therefore be said that a mortgage decree and sale in execution thereof are not binding on the attaching decree-holder who purchases the property in execution of his money decree, by reason of the fact that he is not impleaded as a party to the mortgage suit. (*Khaja Mohammad Noor and Chatterjee, JJ.*) BAIJU LAL MARWARI *v.* THAKUR PRASAD MARWARI. **18 Pat. 155=180 I.C. 974=11 R.P. 552=5 B.R. 508=19 Pat.L.T. 781=1938 P.W.N. 836=A.I.R. 1939 Pat. 7.**

———O. 34, R. 1—*Attaching decree-holder—If necessary party to suit on mortgage comprising land attached.*

Where a decree-holder attaches the property of the judgment-debtor which is already mortgaged, the attaching decree-holder does not

acquire any interest in or charge on the mortgaged property which he attaches having regard to S. 64, C. P. Code, and as such he is not a necessary party to a suit on the mortgage by the mortgagee. Although it is open to the attaching creditor to come into the mortgage suit and claim redemption before the Court sale put an end to his attachment and to his character of attaching creditor, he is not entitled to disturb the title acquired by any person under the mortgage decree on the ground that he has not been impleaded in the mortgage suit. (*Stone, C.J. and Niyogi, J.*) AMARDAS *v.* JAILALSAO. **I.L.R. 1936 Nag. 127=165 I.C. 939 (1)=9 R.N. 111 (1)= A.I.R. 1936 Nag. 209.**

———**O. 34, R. 1**—*Decree-holder purchaser of mortgaged property in Court sale held after mortgage suit is filed—If necessary party.*

A decree-holder who in execution of a money decree against the mortgagor purchases the mortgaged property in Court sale held after the mortgagee filed a suit on his mortgage, is not a necessary party to such a suit as on the day it is filed his position is that of an attaching creditor. (*Bhide, J.*) LALIT MOHAN *v.* HARDAT RAI. **41 P.L.R. 629=A.I.R. 1939 Lah. 146.**

———**O. 34, R. 1**—Equitable mortgagee not added as party—Addition after final decree—Power of Court. *See* C. P. CODE, O. 1, R. 10 (2), **40 C.W.N. 1173.**

———**O. 34, R. 1**—*Joinder of parties—Party not having any contract or privity of estate with plaintiff—Interest of such party, if can be sold.*

It is well known that people are often joined as parties to a mortgage suit to prevent further complications, but the mere fact that a person is joined as a party to the suit, possibly *pro forma,* does not necessarily give the plaintiff a right to sell his interest in the property, particularly when he has entered into no contract with the plaintiff and has no privity of estate with him. (*Mya Bu and Baguley, JJ.*) MAUNG PO HLA *v.* MA NGWE SINT. **167 I.C. 449=9 R.P. 315=A.I.R. 1937 Rang. 56.**

———**O. 34, R. 1**—*Lease—Rent made charge on property—Rent payable to lessors half to one party and half to another—Suit by one party joining other party as defendant—Decree for charge on whole property—If can be given.*

Where the terms of a lease contain a clear stipulation that the rent is a charge on the property and the lease further stipulates that half rent shall be paid to one party and half to the other, decree for charge attaching to whole property in respect of the demand of one party cannot be refused merely because the other party has not joined as plaintiffs and are impleaded as *pro forma* defendants. (*Mohammad Noor and Rowland, JJ.*) AMAL KRISHNA RAI *v.* KEDARNATH BANERJEE. **163 I.C. 175 (1)=8 R.P. 633 (1)=A.I.R. 1936 Pat. 306.**

———**O. 34, R. 1**—*'Mortgage security'—Meaning of.*

Mortgaged security does not mean the mere lands which the mortgagor professes to mortgage. The mortgaged security means not the physical object but the interest therein which the mortgagor is competent to transfer by way of mortgage at the date of the transaction: 1926 Rang. 208, Foll. (*Baguley and Mackney, JJ.*)

CHETTYAR FIRM OF S. M. A. M. *v.* U PO MAUNG. **162 I.C. 731=8 R.R. 582=A.I.R. 1936 Rang. 198.**

———**O. 34, R. 1**—Necessary party—Mortgage by Hindu father—Suit on—Son—Joinder of—If necessary—Application by son to be joined—Duty of Court to allow. *See* C. P. CODE, O. 1, R. 10. **A.I.R. 1937 Nag. 121.**

———**O. 34, R. 1**—*Non-compliance with—Effect.*

There is nothing in O. 34, R. 1, C. P. Code, to warrant a conclusion that if a mortgagee fails to join every person interested in the equity of redemption as a party to the suit on his mortgage, he loses his right against their interests in the mortgaged property. All that that rule provides is that persons interested in the equity of redempion shall be made parties to a mortgage suit. But the rule does not go further and lay down that if any of them is not made party to the suit he is discharged from his liability to pay the mortgage debt, nor does it lay down that the subsequent sale held in execution of a decree passed in such a suit does not affect the interest of a person who is not a party to it. (*Rupchand Bilaram and Dadiba C. Mehta, A.J.Cs.*) BHAGWANDAS *v.* RADHAKISHIN. **30 S.L.R. 42=164 I.C. 69=9 R.S. 37=A.I.R. 1936 Sind 87.**

———**O. 34, R. 1**—*Non-compliance with—Effect—Applicability of O. 1, R. 9 to mortgage suits.*

Non-compliance with the provisions of O. 34, R. 1, C. P. Code, is not necessarily fatal to a suit to enforcee a mortgage. That provision of law is subject to the other provisions of the Code and on such provision is O. 1, R. 9, which applies to mortgage suits also, declare that no suit shall be defeated by reason of misjoinder or non-joinder. (*Zia-ul-Hasan, J.*) LASA DIN *v.* MAHOMED ABDUL SHAKOOR. **15 Luck. 399=1940 O.W.N. 209=12 R.O. 314=186 I.C. 540=1940 O.A. 191=1940 O.L.R. 127=1940 A.W.R. (C. C.) 113=A.I.R. 1940 Oudh 235.**

———**O. 34, R. 1**—*Non-compliance with—If fatal.*

Failure to make a person interested in the equity of redemption a party to the mortgage suit is not fatal, as the Court may exercise its powers of joining parties under O. 1, R. 10, C. P. Code. (*Wort and Rowland, JJ.*) SATYADEVA NARAYAN SINHA v. TIRBENI PRASAD. **161 I.C. 579=8 R. P. 458=1936 P.W.N. 321=A.I.R. 1936 Pat. 153.**

———**O. 34, R. 1**—*Non-joinder of all interested parties—Effect of.*

A mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not upon the record, the suit must be dismissed in its entirety. (*Stone, C.J. and Bose, J.*) GIRDHAR *v.* MOTILAL CHAMPALAL FIRM. **1940 N.L.J. 151.**

———**O. 34, R. 1**—*Non-joinder—Death of one of the mortgagors before final decree—His legal representative not brought on record—Final decree passed against deceased mortgagor also—Validity—Right of other mortgagors to impeach sale.*

If in a mortgage suit, the equity of redemption is not entirely unrepresented but only some of the owners of the equity of redemption are left out without any negligence or fault on the part

C. P. CODE (1908), O. 34, R. 1.

of the mortgagee, and a decree is passed on his mortgage, such a decree is not a void decree. It is only the right of redemption of the persons so left out which is not affected or cut off by the final decree. Such a mortgagee is entitled to recover his whole dues from the shares of those persons, who were parties to the suit in the hypothecated properties. Where, therefore, before the passing of the final decree, one of the mortgagors defendants dies and his legal representative is not brought on record the mortgagee having been ignorant of his death, and the final decree is passed against the deceased mortgagor also, such a decree is a valid decree against the other mortgagors. They cannot impeach the sale in execution of that decree on the ground that the decree was not binding on the legal representative of the deceased mortgagor. Further it is doubtful whether they could raise the question in execution proceedings. (*Mitter and Khundkar, JJ.*) SAKTI NATH ROY CHOUDHURY *v.* REGISTERED JESSORE UNITED BANK, LTD. **I.L.R. (1939) 1 Cal. 493=184 I.C. 786=12 R.C. 306=70 C. L.J. 47=43 C.W.N. 453=A.I.R. 1939 Cal. 403.**

———**O. 34, R. 1**—*Non-joinder—Omission to implead purchaser of part of equity of redemption—Purchaser at execution sale—Rights of.*

If the ownership of the equity of redemption is completely represented in the mortgage suit, the purchaser at the mortgage sale acquires the entire equity of redemption together with the lien of the mortgagee which he may use, if necessary, for his protection. If however the equity of redemption is wholly unrepresented in the action, the purchaser at the mortgage sale acquires nothing. He does not get the equity of redemption which includes the right to possess the mortgaged property. The lien of the mortgagee also is not transferred to him. If mortgagee sells the property to satisfy his debt, he must be taken therefore to sell the mortgaged property discharged of his own lien. But if, in fact, he sells nothing and the sale is liable to be set aside, because the mortgagor had no property to sell, the mortgagor's lien cannot pass to the purchaser. In spite of the sale it remains in the mortgagee. But where however the mortgagee sells something, the sale, though it fails to be effectual in every other respect, operates as an assignment of the mortgage to the purchaser and he can use it for his own protection. But the purchaser cannot compel a purchaser of a part of the equity of redemption who has not been impleaded in the mortgage suit to redeem him, after the right to enforce the mortgage has become barred by limitation. (*S. K. Ghose and Nasim Ali, JJ.*) DHAPUBAI *v.* CHANDRA NATH CHAKRABARTY. **176 I.C. 745=11 R.C. 169=67 C.L.J. 429=42 C.W.N. 721=A.I.R. 1938 Cal. 524.**

———**O. 34, R. 1**—*Non-joinder—Suit for redemption of mortgage—Non-joinder of necessary party—Effect.*

If a person interested in the equity of redemption is known he ought to be made a party to a redemption suit in order to safeguard his right. But if he is not known or if it was not possible to have made him party, due provision may be made in the decree for safeguarding his rights. Where he is deliberately omitted, still relief can be given to the parties before Court. (*Venkataramana Rao, J.*) PERIAKARUPPA PILLAI *v.* SATYANARAYANAMOORTHY. **1936 M.W.N. 1005=168 I.C. 899=9 R.M. 656=A.I.R. 1937 Mad. 136.**

C. P. CODE (1908), O. 34, R. 1.

———**O. 34, R. 1**—*Non-joinder—Suit, if can be sent back to trial Court on Letters Patent appeal—Practice.*

Where in a mortgage suit the plaintiff had failed to bring all the parties concerned on the record and had also failed to bring before the Court materials sufficient to enable it to work out the account, the suit should not on a Letters Patent appeal, be sent back to the trial Court for the addition of the parties and for accounts to be taken on a proper basis, as that would mean a complete rehearing involving the leading of a considerable amount of new evidence. The suit, in such circumstances, can rightly be dismissed. 59 I.A. 106, Rel. on. (*Roberts, C.J. and Leach, J.*) S. N. V. R. CHETTYAR FIRM *v.* K. Y. A. CHETTYAR FIRM. **171 I.C. 168=10 R.R. 135= 1937 Rang.L.R. 13=A.I.R. 1937 Rang. 220.**

———**O. 34, R. 1**—*Non-joinder—Usufructuary mortgage—Suit for possession on basis of by one co-mortgagee alone—Non-joinder of other co-mortgagee—If fatal.*

A suit by one co-mortgagee for possession on the strength of a usufructuary mortgage is not one in which a decree under O. 34, C.P. Code, would have to be ultimately passed. A co-mortgagee may well be entitled to possession as against the mortgagor, but he is entitled to recover possession of the entire estate as he has an interest in every inch of the ground so long as the integrity of the mortgage is not broken, although it may be necessary in order to protect the interest of the mortgagee to implead him. Such a mortgagee can be impleaded even at a late stage of the appeal. The non-joinder of the co-mortgagee to a suit by one co-mortgagee is not a fatal defect under O. 34, R. 1, C. P. Code. (*Sulaiman, C.J. and Bennet, J.*) AMIR HUSAIN *v.* ABDUL SAMAD. **1937 A.L.J. 710 =I.L.R. (1937) All. 723=1937 A.L.R. 883=10 R.A. 309=171 I.C. 743=1937 A.W.R. 641=A. I.R. 1937 All. 646.**

———**O. 34, R. 1**—*Paramount title—Defendant in mortgage suit claiming title independently of mortgagor—Duty to set up his paramount title—S.* 11, *Expl.* 4.

Where the defendants to a mortgage suit claim under a title quite independent of the mortgagors that title cannot be properly brought in issue in a suit based upon a mortgage to which the only proper parties are the mortgagors and mortgagees and the purchasers of the equity of redemption. It makes no difference that it happens to be the same individual who claims personal title and who is joined as interested in the equity of redemption. The defendant is not bound to raise a paramount title which is not impugned and which he did not even get from the mortgagors nor is he bound under S. 11, Expl. 4, C.P. Code, to raise the question as it lies outside the scope and nature of the suit. (*Davis, J.C.*) MATOMAL JHANGIMAL *v.* BHANWARMAL BADOMAL. **I.L.R. (1940) Kar. 302=A.I.R. 1940 Sind. 103.**

———**O. 34, R. 1**—*'Person having an interest'—Holder of decree against the mortgagor getting receiver appointed—If necessary party—C. P. Code, O. 1 R. 10 (2)—T.P. Act, S.* 91.

C. P. CODE (1908), O. 34, R. 1.

The holder of a money decree against the mortgagor who has obtained an order for a receiver in execution of his decree is not a person having an interest in the mortgaged property or in the right of redemption so as to make him a necessary party to a suit on the mortgage under O.34, R. 1. Such a person is not a party whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon, and settle, questions involved in the suit. The Court has consequently no power to add him as a party under O. 1, R. 10 (2), C. P. Code. The fact that the decree in his favour is a consent decree which provides that the property comprised in the mortgage will remain charged for the decretal amount cannot give him the right to redeem the mortgage under S. 91 of the Transfer of Property Act, when that decree has not been registered. (*Panckridge, J.*) SIMBURAM BERIWALLA *v.* GULZARILAL THAKUR. **I.L.R. (1937) 1 Cal. 65 =164 I.C. 1009=9 R.C. 332=40 C.W.N. 974.**

———**O. 34, R. 1**—Person having an interest—Paramount title—Vendee from mortgagor prior to mortgage—If proper party to suit on mortgage. *See* C. P. CODE, S. 11, EXPL. IV. **1936 A.W.R. 157=A.I.R. 1937 All. 251.**

———**O. 34, R. 1**—*Prior mortgagee joined as party in suit on subsequent mortgage—Jurisdiction of Court to decide matters raised in suit.*

Although a prior mortgagee is not a necessary party to a suit on a subsequent mortgage yet the Court has jurisdiction to decide the matters raised in the suit on the contention of a prior mortgagee being joined as a party where a prior mortgagee, on being joined in a suit on a subsequent mortgage raises no objection to his being joined as a party, and, does not object to the issues framed by the Court as to the genuineness or otherwise of his mortgage, but on the contrary accepts the issues and offers evidence in support of his title as a mortgagee and each party has full opportunity of adducing evidence as it wishes and the merits of the case have not been affected by the introduction of the issues, the Court has jurisdiction to decide the matters raised in the suit on the contention of the prior mortgagee being joined as a party. Having assumed the role of being a proper and a necessary party to the suit, he cannot, after the issues have been decided against him, contend that he was not properly joined as a party in the suit. (*Mackney, J.*) LEDI PITAKA ASSOCIATION *v.* MAUNG PO THENE. **164 I.C. 445=9 R.R. 95 =A.I.R. 1936 Rang. 340.**

———**O. 34, R. 1**—*Proper and necessary party—Suit by a subsequent mortgagee—Prior mortgagee whose suit was dismissed as against him, if to be party in.*

A prior mortgagee whose suit on the mortgage was dismissed as against the subsequent mortgagee is not only a proper but a necessary party to the suit brought by the subsequent mortgagee on the basis of his mortgage. (*Srivastava, C.J. and Zia-ul-Hasan, J.*) SHEO PRASAD LAL *v.* PRAKASH RANI. **13 Luck. 625=10 R.O. 121=171 I.C. 434 =1937 O.L.R. 558=1937 O.W.N. 1118=A.I.R. 1938 Oudh. 10.**

———**O. 34, R. 1.**—*Proper parties—Mortgage suit against firm—Mortgagees claiming certain persons are not partners—Such persons, if proper parties.*

C. P. CODE (1908), O. 34, R. 1.

Where in a suit on mortgage against a firm, the mortgagees claim that certain persons are not partners and have no interest in the mortgage at all and where the persons concerned equally deny that they are partners and they have any interest in the mortgage, such persons may be struck out and the Court does not exercise its jurisdiction illegally or with material irregularity in refusing to examine the issue as to whether these persons are or are not partners. But the mortgagees are not precluded from obtaining a decree against the firm, provided they have served summons on the firm. Even if these persons claim as co-owners ignorant of the mortgage, they are claiming adversely to both the mortgagors and the mortgagees and they are not proper parties to the suit. (*Mya Bu and Mackney, JJ.*) R.M.P. CHETTYAR FIRM *v.* SINI MOHAMED. **172 I.C. 672 =10 R.R. 272=A.I.R. 1937 Rang. 351.**

———**O. 34, R. 1**—Scope and effect of—Suit on first mortgage—Failure to implead second mortgagee—Effect—If enlarges rights of latter or entitles him to ignore the existence of the first mortgage. *See* MORTGAGE—PRIOR AND SUBSEQUENT MORTGAGEES. **1940 M.W.N. 256.**

———**O. 34, R. 1**—Scope—If controls O. 1, R. 9—Mortgage—Suit for redemption—Omission to implead some proprietors interested in equity of redemption—If fatal. *See* C. P. CODE, O. 1, R. 9 AND O. 34, R. 1. **18 Pat.L.T. 289.**

———**O. 34, R. 1**—*Scope—Mortgage decree against Hindu manager not described as such—Effect of.*

In the absence of any express provision in O. 34, R. 1, C. P. Code, there is no reason why a mortgage decree passed against the manager of a joint Hindu family or the auction sale held in execution of a decree passed against him should not have the same effect whether he is sued as manager of the joint family or not. R. 1, is a rule of procedure and does not purport to deal with substantive rights of parties or the extinguishment of such right. (*Rupchand Bilaram and Mehta, A.J.Cs.*) BHAGWANDAS *v.* RADHAKISHAN. **30 S.L.R. 42=164 I.C. 69=9 R.S. 37 =A.I.R. 1936 Sind 87.**

———**O. 34, R. 1**—Scope—Mortgaged property attached and sold under S. 88, Cr. P. Code, after mortgage—What passes—Suit by mortgagee to enforce mortgage against purchaser at sale under S. 88, Cr. P. Code—Government—If necessary party. *See* CR. P. CODE, S. 88. **18 Pat.L.T. 814.**

———**O. 34, R. 1**—*Scope—Mortgage suit—Joinder of parties—Owner of equity of redemption—If to be always a defendant—Suit by such owner as plaintiff—If incompetent.*

O. 34, R. 1, C. P. Code does not require that in a suit on a mortgage, the owner of the equity of redemption must always fill in the role of a defendant. It is enough if all the interests in the property are represented in the suit. A suit by a purchaser of mortgaged property to enforce a mortgage which he has paid off is competent. (*King and K. S. Menon, JJ.*) ARUMUGA BATHAN *v.* SEMBA GOUNDAN. **59 Mad. 1042=163 I.C. 704=9 R.M. 43=1936 M.W.N. 408=43 L.W. 628=A.I.R. 1936 Mad. 814=70 M.L.J. 719.**

———**O. 34, R. 1**—*Scope—Mortgage suit—Omission to bring on record all persons having*

C. P. CODE (1908), O. 34, R. 1.

equity of redemption—Effect—Decree for amount If may be passed.

The general rule is that all persons having the equity of redemption ought to be brought on the record of a suit on the mortgage; the failure to bring any one of them on the record does not, however, necessitate the dismissal of the suit if the Court in his absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. The decree in the suit would not affect the interests of the parties not before the Court. But that does not mean that the Court can only pass a decree for something less than the amount due on the mortgage. The Court can pass a decree for the entire mortgage amount without any reduction in consequence of some of the parties not being on record. (*Rowland and Manohar, JJ.*) MUHAMMAD YUNUS *v.* CHAMPAMANI BIBI. **18 Pat. 141 =179 I.C. 549=5 B.R. 252=11 R.P. 382=1938 P.W.N. 885=19 Pat.L.T. 875=A.I.R. 1939 Pat. 49.**

——O. 34, R. 1—*Third party claiming interest in the property, not in the interest of mortgagor in property—Right of such party, if affected by mortgage decree.*

In a suit on a mortgage a third party claimed an interest in the fields, not in the mortgagor's interest. On their claim they had no right to redeem, so no decree should be passed against them. They can in no way be disadvantaged by the fact that their claim is not adjudicated on in the mortgage suit. (*Baguley and Mackney, JJ.*) CHETTIYAR FIRM OF S. M. A. M. *v.* U PO MAUNG. **162 I.C. 731=8 R.R. 582=A.I.R. 1936 Rang. 198.**

——O. 34, R. 1—*And U. P. Enc. Est. Act, R. 6—O. 34, R. 1, if applies to proceedings under Enc. Est. Act—Persons interested in mortgage, subject-matter of proceedings under the Enc. Est. Act—If can be made parties.*

It is doubtful whether it is contemplated by the Enc. Est. Act, that the provisions of R. 1 of O. 34, C. P. Code, should apply to proceedings under that Act. But in a case where a mortgage is the subject-matter of proceedings under the U. P. Enc. Est. Act, there would be no inconsistency with the provisions of the Act, in allowing the persons interested in the mortgage, to be made parties to the case. (*Thomas C.J. and Bennett, J.*) DWARKA NATH SINGH *v.* RAJ RANI. **190 I.C. 76=1940 O.L.R. 523=1940 O. W.N. 716=1940 O.A. 691=1940 R.D. 353.**

——O. 34, Rr. 2, 4 and 6—*Mortgage suit—Mortgagee claiming decree against property and person—Court granting decree payable in instalments and on mortgagor's default, entitling mortgagee to possession under R. 2—Legality of order —Mortgagee's right to decree under R. 4—Instalments, when may be fixed.*

In a suit on mortgage, the mortgagee claimed a decree for Rs. 32,000 against the mortgaged property and person of the mortgagor. The Court passed a decree, making the decretal amount payable in eight annual instalments and entitling the mortgagee to possession under O. 34, R. 2, C. P. Code, in case mortgagor failed to pay three instalments regularly. Mortgagee appealed from it claiming decree under O. 34, R. 4.

C. P. CODE (1908), O. 34, R. 3.

Held, that the order directing mortgagee to possession on default of three successive instalments was erroneous as O. 34, R. 2, applied to foreclosure and the mortgagee was entitled to decree under O. 34, R. 4. The stage at which the mortgagor should ask the Court for fixing instalments would be reached, when decree-holder applied under O. 34, R. 6, to the Court to proceed against the person of the mortgagor. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MAKHAN SINGH *v.* LAKHMI DAS. **167 I.C. 26=9 R. Pesh. 83= A.I.R. 1937 Pesh. 31.**

——O. 34, R. 3—*Final decree for foreclosure —No appeal filed against decree—Terms of decree, if can be altered or varied by Court.*

A final decree for foreclosure passed according to O. 34, R. 3, C. P. Code, which has become an absolute decree by reason of no appeal having been filed against it cannot be varied or altered. An order of Court the effect of which would be to interfere with its terms, is irregular and without jurisdiction. (*Abdul Qayoom, C.J.*) MAHASHA RAM LAL *v.* MT. ISHWARI. **39 P.L.R. J. & K. 138.**

——O. 34, R. 3 (4) (Rangoon High Court) —*Cause of action for personal remedy—When accrues—Suit on mortgage by deposit of title deeds filed more than three years after date of promissory note—Fresh note executed after three years—Mortgagee's right to personal decree— Limitation Act, S. 19—Contract Act, S. 25 (3).*

There is only one cause of action on a mortgage giving rise both to a relief by way of final decree for sale and also to an additional remedy by way of a personal decree for the balance. There is no separate cause of action for the personal remedy accruing after the mortgaged property is found on sale to be insufficient to satisfy the mortgage debt. Accordingly a decree under O. 34, R. 3 (4), C. P. Code, as amended by the Rangoon High Court, cannot be obtained when at the date of filing of the suit the personal remedy in the mortgage suit is barred. Where, therefore, a suit on a mortgage by deposit of title deeds is filed more than three years after the date of the promissory note given by the mortgagor for the amount of the mortgage debt, the personal remedy is barred by limitation. A fresh promissory note given by the mortgagor will be of no assistance to the mortgagee by way of an acknowledgment under S. 19 of the Limitation Act, if such note was executed more than three years after the date of the first promissory note. The fresh promissory note, no doubt, constitutes a new promise under S. 25 (3) of the Contract Act. but it cannot alter the pre-existing cause of action though it does give rise to a new one. The failure of the mortgagee to bring an action on the new promissory note would, therefore, be fatal to his cause of action for a personal remedy. (*Roberts, C.J. and Sharpe, J.*) SMITH *v.* HEPTONSTALL. **1938 Rang.L.R. 6=177 I.C. 63=11 R.R. 95= A.I.R. 1938 Rang. 134.**

——O. 34, R. 3 (4) (Rang.)—*Personal decree if can be passed without sale.*

Where the parties agree that the mortgaged property should be taken over by the plaintiff at a valuation in lieu of a Court sale, a personal decree can be passed without sale of the mortgaged property for the balance. (*Baguley and*

C. P. CODE (1908), O. 34, R. 4.

Mosely, JJ.) V. N. A. FIRM v. BANK OF CHETTINAD, LTD. **179 I.C. 875=11 R.R. 351=A.I.R. 1938 Rang. 353.**

———O. 34, Rr. 4 and 11 (as amended in 1929)—Applicability—Mortgage decree prior to 1929—Interest from date fixed for redemption to date of realisation—Award of—Power of Court before and after amendment. *See* C. P. CODE, S. 34, R. 11 (*b*) AS AMENDED IN 1926. **40 C.W.N. 328=A.I.R. 1936 P.C. 63=70 M.L.J. 355 (P.C.).**

———O. 34, Rr. 4, 6 and S. 48—*Compromise mortgage decree—Preliminary and final decree and later a personal decree, if could be passed—Limitation under S.* 48—*Starting point.*

Where a compromise mortgage decree itself makes provision for a preliminary and a final decree, there could be no objection to the passing of a preliminary decree under O. 34, R. 4 and to its being made absolute on the expiry of the time fixed in the compromise. Nor could there be an objection to a personal decree for the balance being subsequently awarded to the decree-holder. Time for purposes of S. 48, C.P. Code, would run from the date of the passing of the final decree. (*Zia-ul-Hasan and Bennett, JJ.*) BUNYAD HUSAIN *v.* BALLABH DAS. **15 Luck. 95 =1939 O.W.N. 927=184 I.C. 543=12 R.O. 134 =1939 O.L.R. 639=1939 A.W.R. (C.C.) 227= A.I.R. 1940 Oudh 90.**

———O. 34, R. 4—*Interest from suit till redemption—Rate of—Right of mortgagee.*

Mortgagee is entitled to claim interest from the date of suit till the date for redemption at the rate fixed in the mortgage deed as till the period for redemption has expired the matter remains in contract, and the interest has to be paid at the rate and with the rests, specified in the contract of morgage. (*Tek Chand and Abdul Rashid, JJ.*) GHULAM MOHAMMAD *v.* RAJESHWAR. **A. I.R. 1940 Lah. 333.**

———O. 34, R. 4—Mortgage by statutory agriculturist—Suit on—Form of decree...*See* PUNJAB ALIENATION OF LAND ACT, S. 16. **42 P.L.R. 110.**

———O. 34, R. 4—*Mortgage decree—Power of Court to fix the order in which the items are to be sold—Considerations.*

The Court has under O. 34, R. 4, C. P. Code, the power to direct the order in which the various items of the mortgaged properties are to be sold, provided the order laid down by the Court does not prejudice in any way the rights of the mortgagee decree-holder. (*Iqbal Ahmad and Verma, JJ.*) KARIMUL RAHMAN KHAN *v.* SARASWATI SUGAR SYNDICATE LAHORE. **I.L.R. (1939) All. 150=182 I.C. 493=12 R.A. 23=1939 A.W.R. (H.C.) 17=1939 A.L.J. 53=A.I.R. 1939 All. 314.**

———O. 34, R. 4—*Mortgagee allowed to remain in possession of mortgaged property for fixed period under deed—Mortgagee's right of sale.*

Where the words in a mortgage deed with regard to redemption after the period of three years has elapsed clearly indicate that the redemption was considered to be *de rigueur* at the end of the stipulated period and that it was not intended that the mortgagee should continue to occupy the land afterwards, it will be inequitable to refuse the relief to recover the mortgaged money by sale of the property as plaintiff is entitled to a decree for the sale, as contemplated by O. 34, C. P. Code.

C. P. CODE (1908), O. 34, R. 4.

(*Middleton, J.C. and Mir Ahmad, A.J.C.*) SAIFULLAH KHAN *v.* CHAMAN LAL. **160 I.C. 986 =8 R. Pesh. 140=A.I.R. 1936 Pesh. 43.**

———O. 34, R. 4—Order regulating sale of mortgaged property—If appealable. *See* C. P. CODE, S. 47 AND O. 34, R. 4—APPEAL. **I.L.R. (1939) All. 150=1939 A.W.R. (H.C.) 17=A.I. R. 1939 All. 314.**

———O. 34, R. 4—*Preliminary decree—Subsequent adjustment out of Court—If can be recognised.*

The terms of a preliminary decree passed according to the provisions of O. 34, R. 4, C. P. Code, as regards payment in Court, etc., are imperative. Any payment or adjustment out of Court is not intended to be recognised under O. 34. If, of course, both the parties appear in Court and agree to a certain adjustment and the Court sees no reason otherwise to disallow it as "unlawful", the position may be different. In such circumstances, the adjustment may be taken to have been made with the express or implied permission of the Court and consequently there will be no objection in principle to the variation of the terms of the decree. (*Bhide, J.*) RAJA RAM *v.* ALLAHABAD BANK, LTD. **I.L.R. (1939) Lah. 313 =41 P.L.R. 26=185 I.C. 75=12 R.L. 263 (2)= A.I.R. 1939 Lah. 79.**

———O. 34, Rr. 4 and 5—*Preliminary decree based on Compromise—Final decree passed after notice to judgment-debtor—Judgment-debtor not putting in appearance—If can plead in execution that final decree was unnecessary.*

Where the decree-holder applied for the preparation of the final decree and notice of that application was served on the judgment-debtor but he did not put in an appearance and the Court thereupon passed a final decree, the judgment-debtor cannot be heard to say that the final decree was passed unnecessarily in as much as the preliminary decree prepared in terms of the compromise was itself capable of execution. If, therefore, the decree-holder applies for execution of the final decree within three years of the date of the final decree but more than three years after the preliminary decree, the judgment-debtor cannot plead that the preliminary decree based on the compromise did not require to be made absolute and that as the application for execution had been brought beyond three years of that date, it was barred by time. (*Zia-ul-Hasan, J.*) SANKTHA PRASAD *v.* KASHI NATH. **170 I.C. 533 =10 R.O. 34=1937 O.L.R. 453=1937 O.W.N. 796=A.I.R. 1937 Oudh 453.**

———O. 34, Rr. 4 and 15—Scope and effect of—Suit to enforce charge—Form of decree—Duty of Court. *See* C. P. CODE, S. 152. **1937 M.W.N. 1013.**

———O. 34, R. 4—*Scope—Preliminary decree—Form of—If personal decree against defendant—Suit for possession by vendee—Unpaid purchase-money due to vendor—Charge in favour of the vendor declared—Time for payment fixed and vendor given right to recover amount by sale in default of payment—Sale of property to third party—Vendor's right to proceed against other property of vendee—Decree—If personal decree.*

A suit to enforce a charge is treated as one to enforce a mortgage and the decree passed in such suit is in the form of a preliminary decree as

prescribed by O. 34, R. 4, C. P. Code. There is no direction in the form prescribed against the defendant personally to pay the amount. The decree in a suit for possession by a vendee of immovable property declared a charge on the property in favour of the defendant who as unpaid vendor was entitled to such charge under S. 54 (4) (*b*), T. P. Act; it then provided that the plaintiff should pay the money (unpaid price) within six months from the date of the decree and then proceeded to direct that in the event of the amount not being paid, the defendant should pay the court-fee on the amount due to him and recover the amount by sale of the property in suit. After this decree, the property was sold to a third party in execution of a decree against the plaintiff. Thereupon without taking any further steps, the defendant applied for execution by attachment and sale of another property of the plaintiff. The latter objected on the ground that there was no personal decree against him for payment.

Held, that the decree in terms did not either order the plaintiff to pay the amount personally or give a right to the defendant to recover the amount otherwise than by a sale of the property in suit. To be able to do so, a further step under O. 34, R. 6 was necessary. The decree was not a personal decree and did not permit execution on the footing against other property of the plaintiff. (*Kania, J.*) GURUPADAPPA MALLAPPA *v.* BASAPPA SHIDDAPPA. **42 Bom.L.R. 592=A.I.R. 1940 Bom. 276.**

———**O. 34, Rr. 4 and 5**—Scope—Powers of Court as to marshalling apart from S. 56, T.P. Act. *See* T.P. ACT (AS AMENDED IN 1929), S. 56. **1940 M.W.N. 551=(1940) 2 M.L.J. 27.**

———**O. 34, R. 4 (1) (before amendment of 1929)**—*Construction — Subsequent interest—Meaning of.*

The 'subsequent interest" which R. 4 (1) of O. 34, C. P. Code, before its amendment in 1929, provided for payment out of the sale proceeds could only be the interest on the decretal amount awarded under S. 34, C.P. Code. (*Sir George Lowndes.*) KUSUM KUMARI *v.* DEBI PROSAD DHANDHANIA. **63 I.A. 114=15 Pat. 210=38 Bom.L.R. 349=1936 O.W.N. 283=1936 M.W.N. 308=40 C.W.N. 328=160 I.C. 285=8 R.P.C. 146=1936 A.L.J. 108=43 L.W. 268=1936 A.W.R. 204=17 Pat.L.T. 89=1936 O.L.R. 91=1936 All.L.R. 155=1936 P.W.N. 122=63 C.L.J. 154=A.I.R. 1936 P.C. 63=70 M.L.J. 355 (P.C.).**

———**O. 34, R. 4 (3)**—*Anomalous mortgage—Suit for foreclosure—Power to pass decree for sale—T. P. Act (as amended in 1929), S. 67.*

A Court has jurisdiction to order a sale in a foreclosure suit, under O. 34, R. 4 (3), C. P. Code, in the case of an anomalous mortgage. Under S. 67 of the T. P. Act as amended by the Amendment Act of 1929, two remedies can alternatively be given in the case of an anomalous mortgage which by its terms confers the right to foreclosure, namely, sale or foreclosure. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR. **I.L.R. 1938 Nag. 91=179 I.C. 129=11 R.N. 271=20 N.L.J. 285=A.I.R. 1938 Nag. 112.**

———**O. 34, R. 4 (3) and T. P. Act, S. 58 (g)**—'Lahangahan' *mortgage—Decree that could be passed—Scope and grounds for the exercise of discretion of Court.*

In the case of a *lahan gahan* mortgage, the Court can pass a decree either for foreclosure or for sale. Where the interest under the mortgage was excessive and where it was allowed to accumulate for a number of years, it was held that the circumstances warranted the exercise of the Court's discretion in ordering only sale. (*Stone, C.J. and Bose, J.*) SITARAM *v.* KRISHNA RAO. **1940 N.L.J. 179=A.I.R. 1940 Nag. 156.**

———**O. 34, R. 4 (4)**—*Subsequent mortgagees—Right to apply for sale—Duty of Court.*

Where in a suit on the first mortgage the rights of the subsequent mortgagees are adjudged, it is necessary to safeguard their interests including the right to obtain an order that the property be sold. The subsequent mortgagees cannot be deprived of the right of putting up the property to sale in all circumstances. Para. 7 of Form No. 9 of Appendix D must be interpreted as authorising the Court to pass suitable orders so as to safeguard the right of the subsequent mortgagees, if any, to obtain a final decree or to sell the property. (*King C.J. and Nanavutty, J.*) NAND LAL MANUCHA *v.* AJODHYA BANK, LTD., FYZABAD. **12 Luck. 72=160 I.C. 165=8 R.O. 247 (2)=1936 O.W.N. 139=1936 O.L.R. 42=A.I.R. 1936 Oudh 183.**

———**O. 34, R. 4 (4)**—*Suit on prior mortgage—Subsequent mortgagee impleaded as party—Rights and remedies of.*

Under O. 34, R. 4 (4), C. P. Code, a subsequent mortgagee who is impleaded as a party to a suit on a prior mortgage is entitled at least to redeem the plaintiff or to receive his own mortgage money out of the surplus sale proceeds remaining after satisfaction of the plaintiff's mortgage. If they pay off the plaintiff he becomes entitled to apply for a final decree for sale in the plaintiff's stead. (SIR GEORGE RANKIN.) HEM CHANDAR ROY *v.* SURADHANI DEBYA. **189 I.C. 509=52 L.W. 393=1940 O.W.N. 774=21 P.L.T. 655=1940 O.A. 788=1940 A.W.R. (P. C.) 140=42 Bom.L.R. 993=1940 M.W.N. 998=1940 O.L.R. 537=A.I.R. 1940 P.C. 134 (P.C.)=(1940) 2 M.L.J. 550.**

———**O. 34, R. 4 (4), Sch. 1, App. D, Forms 9 and 10**—*Suit by puisne mortgagee impleading as defendant prior mortgagee who is also a subsequent mortgagee—Plaintiff not offering to redeem prior mortgage—Form of decree—Properties covered by subsequent mortgage including property not included in plaintiff's mortgage—Defendant, if entitled to decree for sale in respect of such additional property—His right to personal decree.*

Form No. 10 of Appendix D applies to a case where a puisne mortgagee sues for redemption of the prior mortgage and foreclosure or sale on subsequent mortgage. Where the puisne mortgagee impleads in his suit as a defendant a person who, in respect of the plaintiff's mortgage, is in the position of a prior mortgagee with regard to certain properties, and subsequent mortgagee with regard to the remaining properties as also with regard to an additional property, and does not offer to redeem the prior mortgage but impleads the defendant merely to give him an opportunity to settle the order in which the pro-

C. P. CODE (1908), O. 34, R. 5.

perties should be sold, the latter is not entitled as of right to get a decree in Form No. 10 in respect of the properties covered by the prior mortgage. It is for the plaintiff to seek relief and a decree in favour of the prior mortgagee as such in accordance with Form No. 10 may result in hampering the relief which the plaintiff is entitled to get in his suit. In such circumstances, the Court would be acting properly in directing a decree to be drawn up in Form No. 9 with the necessary variations. With regard to the properties covered by the subsequent mortgage, the defendant is not entitled to get a mortgage decree for sale in respect of the additional property which is not included in the mortgage in favour of the plaintiff. Forms Nos. 9 to 11 mentioned in O. 34, R. 4 (4), C.P. Code, relate to the same property which is the subject-matter of the mortgage whether as between the mortgagor and the mortgagee or as amongst successive mortgagees. If the additional property is to be excluded from the decree for sale, it follows that the defendant is not entitled to get a personal decree. This view is consistent with para. (4), Cl. (*iv*) of Form No. 9. (*S. K. Ghose and McNair, JJ.*) AKHILBANDHU GUHA *v.* SURADHANI DEBYA CHOUDHURANI. **170 I.C. 926=10 R.C. 214=65 C.L.J. 1=A.I.R. 1937 Cal. 446.**

——**O. 34, R. 5**—*Appeal from preliminary decree pending—Jurisdiction to make final decree—Preliminary decree affirmed on appeal—Effect on final decree already made.*

The Court has jurisdiction to make a final decree during the pendency of an appeal against the preliminary decree. The final decree so made is not wiped off or destroyed by the affirmance of the preliminary decree by the Appellate Court. (*Derbyshire, C.J. and Nasim Ali, J.*) BHOLANATH SEN *v.* JOGENDRA MOHAN. **I.L.R. (1939) 1 Cal. 477=69 C.L.J. 355=186 I.C. 215=12 R.C. 455=43 C.W.N. 401=A.I.R. 1939 Cal. 601.**

——**O. 34, R. 5 (as amended in 1929)**—*Applicability—Sale taking place after amendment coming into force—Right to redeem till date of confirmation.*

It is well-settled that the law of procedure governs all pending cases from the time it comes into force, unless there is anything in the amending Aot to the contrary. The provisions of O. 34, R. 5, C.P. Code, as amended by Act XXI of 1929 which came into force on the 1st April, 1930 are, therefore, applicable to a sale which takes place thereafter, and the right to redeem is available to the judgment-debtor till the date of the confirmation of the sale. (*Addison and Abdul Rashid, JJ.*) SURAJ BHAN *v.* ALLAHABAD BANK, DELHI. **164 I.C. 53=9 R.L. 75=38 P.L.R. 259=A.I.R. 1936 Lah. 562.**

——**O. 34, R. 5**—*Application under—Notice to defendant—Power of Court to order and issue.*

On an application under O. 34, R. 5, notice should usually issue, as a matter of justice and prudence. The Court has jurisdiction to order notices to issue to the defendants. (*Davis, J.C.*) PAEMOMAL *v.* KHUDA BAKHSH. **31 S.L.R. 180=172 I.C. 520=10 R.S. 163=A.I.R. 1937 Sind 273.**

C. P. CODE (1908), O. 34, R. 5.

——**O. 34, R. 5 and O. 22, R. 4**—*Death of mortgagor after preliminary decree—Brother and his son added as legal representatives—Objection that property is joint family property—If can be raised at the time of passing of final decree.*

Where on the death of a mortgagor after the passing of a preliminary decree, his brother and nephew are brought on record as his legal representatives and an application is made for a final decree it is not open to the legal representatives to plead that the property covered by the decree is joint family property and that the mortgage was not binding on them as being without legal necessity and that a final decree could not be passed. These defences have reference only to the personal rights of the objectors and they could not be raised under O. 22, R. 4, C.P. Code. (*Thom, C.J. Allsop and Ganga Nath, JJ.*) RAM UGRAH OJHA *v.* GANESH SINGH. **I.L.R. (1940) All. 153=186 I.C. 542=12 R.A. 412=1940 A. L.J. 32=1940 A.W.R. (H.C.) 45=1940 O. L.R. 132=A.I.R. 1940 All. 99 (F.B.).**

——**O. 34, R. 5**—*Decree for sale—Application of sale proceeds—Costs and interests—If can have priority over mortgage debt.*

There is no doubt that a creditor to whom principal and interest are due, is entitled to appropriate against the interest any sum the debtor pays without stipulating that it is to be appropriated against the principal. But there is no reason why this principle should be imported into the execution of decrees which are provided for by the C.P. Code. In cases in which a decree has been passed in the usual form, prescribed under R. 5 of O. 34, costs and interest cannot have priority over the actual mortgage debt declared to be due in the preliminary decree and the rule laid down in O. 34, Rr. 10 and 13, relating to properties which are subject to prior mortgages cannot be inferentially applied to cases in which the property sold is not subject to any mortgage other than the one for the realization of which the property of the judgment-debtor was ordered to be sold. A.I.R. 1931 Rang. 153 Appr. (*Addison and Din Mohammad, JJ.*) CENTRAL BANK OF INDIA, LTD. *v.* ATTAR CHAND. **I.L.R. 1938 Lah. 403=178 I.C. 189=11 R.L. 415=40 P.L.R. 1045=A.I.R. 1938 Lah. 289.**

——**O. 34, R. 5**—*Decree for sale—Effect of—Subsequent payment of decree debt before sale—Effect of—Right to person paying—Subrogation.*

A decree for sale does not extinguish the equity of redemption until the sale is confirmed. Therefore if a person who is interested in the mortgaged property, pays into Court the decretal amount before the sale is held the mortgage is thereby redeemed, he is entitled to be subrogated to the rights of the mortgagee decree-holder so far as the sale of the mortgaged property is concerned. (*Pollock, J.*) RAGHUNATH NARAYAN *v.* KRISHNARAO SHANKARRAO. **171 I.C. 612=10 R.N. 122 A.I.R. 1937 Nag. 196.**

——**O. 34, R. 5**—*Decree not in proper form—Rights of decree-holder.*

Although the decree is not made out in the proper form in accordance with the provisions of O. 34, C.P. Code, the decree-holder is entitled to realize his decree from the mortgaged pro-

C. P. CODE (1908), O. 34, R. 5.

perty. (*Almond, J.C. and Soofi, J.*) MOTIRAM *v.* BASHESHAR NATH. **183 I.C. 833=12 R. Pesh. 18=A.I.R. 1939 Pesh. 34.**

———**O. 34, R. 5**—*Duty of Court under—Application for final decree—Objection by legal representative of mortgagor defendant—Plea that mortgage property is inalienable service inam—Competency—Power of Court to entertain—Objection—If one relating to execution—Rule as to powers of executing Court—Applicability.*

It is perfectly open to a party who is impleaded as the legal representative of a deceased mortgagor-defendant to resist the passing of a final decree under O. 34, R. 5, C.P. Code, on the ground that the mortgaged property, being an Acharyapurusha service inam, is inalienable and that the sale of such property would be illegal on grounds of public policy. The fact that O. 34, R. 5, C.P. Code, says that the Court (shall) pass a final decree does not mean that the Court is bound to pass it in every case. It is only in cases where there is no prohibition imposed by statute law that the Court can direct a sale. Once the prohibition on grounds of public policy is brought to the notice of the Court, it is incumbent on the Court to give effect to the prohibition and decline to pass an order for sale. Such an objection can be taken even by the original mortgagor, because no estoppel can be relied upon to defeat the prohibition of law on the ground of public policy, and the legal representative is, therefore, equally competent to raise the objection. The doctrine that a an executing Court cannot go behind the decree cannot be invoked in such a case, because the objection is taken at the stage of passing the final decree; in a mortgage suit, the suit is pending until the final decree is passed and until that is passed there is no executable decree. An objection to the passing of a final decree is not one relating to execution, discharge or satisfaction of the decree, (*Venkataramana Rao, J.*) ADINARAYANA CHETTY *v.* CHENGIAH CHETTY. **173 I.C. 659=10 R.M. 619=1937 M.W.N. 891=46 L. W. 544=A.I.R. 1937 Mad. 918.**

———**O. 34, R. 5**—*Duty of Court—Final decree at variance with preliminary decree—Effect—Which to prevail—Execution—Duty of executing Court—Construction of final decree—Omission to object to final decree—Effect—Sale in execution of final decree—Binding character of.*

Under O. 34, R. 5, the Court in passing a final decree has to follow the terms of the preliminary decree already passed in the suit. If however, the final decree passed is at variance with the terms of the preliminary decree, the Court executing the decree would take the final decree as it stands. It is of course open to the executing Court to interpret the final decree in the light of the preliminary decree. But when no objection was taken to the passing of the final decree in variance with the terms of the preliminary decree or to the execution of such final decree, and the mortgaged property has been sold in execution and the sale confirmed, the judgment-debtor cannot be heard to say afterwards that the final decree and the sale in execution thereof is not binding on him or does not affect his rights under the preliminary decree. (*Fazl Ali and Chatterji, JJ.*) PARMESHWAR DAYAL *v.*

C. P. CODE (1908), O. 34, R. 5.

RAMBRICH SINGH. **5 B.R. 446=180 I.C. 474=11 R.P. 515 (2)=1938 P.W.N. 776=A.I.R. 1939 Pat. 113.**

———**O. 34, R. 5**—Mortgage suit for sale in High Court—Application for final decree—Limitation. *See* LIMITATION ACT, ARTS. 181 AND 183. **40 Bom.L.R. 507.**

———**O. 34, Rr. 5 and 6**—*Parties entering into arrangement to discharge final decree for sale—P, a third person, paying off decree-holder and obtaining assignment of decree—P also advancing loan to judgment-debtor on his executing mortgage—Mortgage comprising of properties originally mortgaged and also additional properties—Clause in mortgage empowering P to include additional properties within order for sale made in pursuance of final decree—Enforceability—P's right to bring suit on his mortgage.*

After a final mortgage decree for sale was passed, an arrangement was arrived at between the parties for the satisfaction of the claim of the decree-holders. One *P*, a third person, paid the sum due to the decree-holders and obtained from them an assignment of the decree. *P* also advanced an additional amount as a loan to the judgment-debtors who executed a mortgage deed in his favour for that amount and also for the amount paid by him to satisfy the decree. The re-payment of the mortgage money was secured, not only by the property specified in the first deed of mortgage executed in favour of decree-holders, but also by certain other properties conveyed by the second deed. In the event of the mortgagor's failure to redeem the properties within the stipulated period, a clause in the mortgage deed empowered the mortgagee to include the newly mortgaged properties "within the order for sale" made in pursuance of the final decree as if they had been "comprised and included" in the first deed of mortgage, without having to institute a fresh suit on the footing of the second deed, and to treat the money due to him on the second mortgage as if it was included in the first mortgage and in the aforesaid decree for sale. *P*, the new mortgagee, was substituted for the decree-holders in the final decree for sale obtained by them on their mortgage and the properties included in that mortgage were sold, and the price realised by the sale was paid to him. The properties conveyed by the deed in his favour were sold privately without invoking the clause mentioned above. After giving credit for the amounts realised by the judicial and private sales, the mortgagee was still entitled to a large sum of money for the recovery of which he made an application under O. 34, R. 6, C.P. Code. He based his claim on the clause in his deed allowing him to treat the money due to him on that instrument "as having been included" in the first mortgage and in the aforesaid decree for sale. The application was dismissed as barred by limitation and *P*, thereupon, instituted a suit for the recovery of the money on the personal covenant contained in his deed.

Held, (*i*) that the remedy by an application for a personal decree was not legally available to the plaintiff, as any attempt to enforce the claim in the manner prescribed by the clause in the deed was bound to fail inasmuch as the parties had no authority to add to the decree something which

was not included in the claim upon which it was founded, or to confer upon the Court jurisdiction to enforce a claim which had not been embodied in a decree or an order having the force of a decree, (*ii*) assuming, however, that the remedy mentioned in the clause could be legally enforced, the plaintiff was not thereby debarred from availing himself of his undoubted right to bring a suit on the footing of the second mortgage; and the circumstance that he made an infructuous application to obtain a personal decree under O. 34, R. 6 did not take away that right, (*iii*) that neither the rule of *res judicata* nor the rule of estoppel operated as a bar to the suit. (*Sir Shadi Lal.*) PRADYUMNA KUMAR MULLICK *v.* KUMAR DINENDRA MULLICK. **64 I.A. 302=I.L.R. (1938) 1 Cal. 66=31 S.L.R. 637=169 I.C. 547=41 C.W.N. 1093=46 L.W. 209=1937 O.L.R. 394=1937 A.L.R. 609=1937 P.W.N. 631=10 R.P.C. 32=3 B.R. 681=39 Bom.L.R. 1041=66 C.L.J. 3=1937 O.W.N. 996=18 Pat.L.T. 873=A.I.R. 1937 P.C. 256=(1938) 1 M.L.J. 743 (P.C.).**

———O. 34, R. 5—*Passing of final decree by consent without preliminary decree—Right of decree-holder to execute decree.*

It is settled law that on a mortgage suit a "final" decree may be passed by a Court by consent of parties without a preliminary decree being formally passed as required by R. 4 of O. 34, C.P. Code. In such a case a final decree may be passed straight off either authorising the sale of the property forthwith or deferring the sale for a specified time during which the judgment-debtor undertakes to pay the amount. If the judgment-debtor fails to pay the amount within the stipulated period, the decree-holder is entitled to execute the final decree. If the decree is not appealed against, even if any irregularity in procedure has been committed in passing it, the executing Court cannot question its validity. (*Tek Chand, J.*) CHAMAN LAL *v.* ALI MAHOMED. **170 I.C. 821=10 R.L. 146=A.I.R. 1937 Lah. 874.**

———O. 34, R. 5—*Payment made out of Court—Court if can take into consideration.*

A payment which is made out of Court, whether or not it be certified under O. 21, R. 2, C.P. Code, cannot be taken into consideration by the Court at the time of passing final decree in a mortgage suit. (*Almond, J.C. and Mir Ahmad, J.*) HAJI HABIB GUL *v.* GOPI CHAND SINGH. **174 I.C. 295=10 R. Pesh. 61=A.I.R. 1938 Pesh. 12.**

———O. 34, R. 5—*Preliminary decree based on compromise—Decree contemplating passing of final decree—Claim for final decree—Maintainability.*

Where a preliminary decree for sale based on a compromise is not only headed and described as a preliminary decree but expressly contemplates and provides for the passing of a final decree in certain eventualities, an application for a final decree should not be rejected on the ground that the decree being one based on a compromise, no final decree is required and that the decree passed in terms of the compromise is itself executable. (*Srivastava and Nanavutty, JJ.*) BRIJ MOHAN NARAIN MAUL *v.* MUJIB FATIMA. **160 I.C.**

174=8 R.O. 252=1936 O.W.N. 59=1936 O. L.R. 47=A.I.R. 1936 Oudh 173.

———O. 34, R. 5—*Proceeding under—Appeal—Auction-purchaser—If necessary party.*

In proceedings under O. 34, R. 5, C.P. Code, the auction-purchaser is not a necessary party. When an appeal is preferred from a decision of a Court dismissing an application under that rule, it is not necessary to make the auction-purchaser a respondent. (*Addison and Abdul Rashid, JJ.*) SURAJ BHAN *v.* ALLAHABAD BANK, DELHI. **164 I.C. 53=9 R.L. 75=38 P.L.R. 259=A.I.R. 1936 Lah. 562.**

———O. 34, R. 5—*Property not included in mortgage decree fraudulently inserted in sale certificate—Purchaser's rights.*

It is clear from the provisions of O. 34, R. 5 that the property which can be sold in execution of mortgage decree is the mortgaged property only, and no other property, and therefore where property sold in execution of a mortgage-decree and bought by the mortgagee purchaser was not included in the mortgage suit or decree, but was fraudulently inserted in the sale certificate, the purchaser can get no more property than that which was really included in the mortgage decree. 27 Bom. 334 and 10 Mad. 241, Foll. (*Dunkley, J.*) S. R. M. M. C. T. M. FIRM *v.* KO PO SIN. **162 I.C. 383=8 R.R. 566=A I.R. 1936 Rang. 127.**

———O. 34, R. 5—Scope—If overrides Art. 166, Limitation Act—Sale in execution of mortgage decree—Application to set aside beyond 30 days of sale but before confirmation—If barred. *See* LIMITATION ACT, ART. 166. **(1937) 1 M.L. J. 569.**

———O. 34, R. 5—Scope—Mode of payment under—Mortgagee purchasing mortgaged property by private sale from mortgagor after preliminary decree—If operates as satisfaction of or payment under decree. *See* LIMITATION ACT, S. 20 (2). **(1940) 1 M.L.J. 134.**

———O. 34, R. 5 (2)—*Preliminary decree attached in execution*—Locus standi *of attaching decree-holder to apply for final decree.*

A decree-holder who attaches in execution of his decree a preliminary mortgage decree obtained by his judgment-debtor in a certain suit, has no *locus standi* to apply under O. 34, R. 5 (2), C.P. Code, for the preparation of a final decree. (*Bennet and Ganga Nath, JJ.*) RAM KUMAR RAMESHWAR LAL *v.* PREM SUKH DAS. **166 I.C. 231=9 R.A. 377 (1)=1937 All.L.R. 3=1936 A.L.J. 1154=1936 A.W.R. 986=A.I.R. 1936 All. 857.**

———O. 34, R. 5 (3)—*Execution of decree—Decree-holder's right to proceed against some of mortgaged properties.*

A mortgagee decree-holder is entitled at his option to execute his decree against some of the mortgaged properties which are covered by his decree. This view finds support in the language of O. 34, R. 5 (3), C.P. Code. The intention of the Legislature by this provision of the law is to confer a right upon the mortgagee ordinarily to realise his security by bringing only a part of the mortgaged property to sale, provided he is satisfied that the sale of a portion of such property will be sufficient for the purpose of enab-

ling him to realise his dues. This right, however, is subject to certain exceptions in the case of a *bona fide* purchaser of the mortgaged properties. (*Edgley, J.*) MURARI RAM DAS *v.* RASIK LAL BHADRA. **I.L.R. (1939) 2 Cal. 455=186 I.C. 857=12 R.C. 533=A.I.R. 1940 Cal. 159.**

———O. 34, R. 6—*Applicability—Mortgage decree for sale and providing for personal remedy in case of insufficiency of sale proceeds to satisfy decree—Mortgaged property ceasing to be available for sale under decree—Right to apply for personal decree without sale.*

A compromise decree in a mortgage suit praying for a decree for sale and for a personal decree, provided that in the event of the decretal dues not being satisfied by sale of the mortgaged properties the decree-holder should be entitled to recover the balance from the person and other properties of the mortgagor. Before this decree could be executed, the mortgagor's coparceners sued for a declaration that the mortgage was invalid for want of legal necessity and got an *ex parte* decree in their favour; the mortgagee decree-holder was also restrained from executing his decree. He thereupon applied under O. 34, R. 6, C.P. Code, for a personal decree against the mortgagor.

Held, that inasmuch as the mortgaged property directed to be sold by the decree had ceased to be available for sale owing to no fault of the mortgagee, the latter was entitled to a personal decree, the right to which had merely been suspended owing to the fact that the remedy against the mortgaged property was not till then shown to have been exhausted or to be otherwise available. (*Agarwala, J.*) GANESWAR PARIDA *v.* HARISH CHANDRA DUTTA. **6 Cut.L.T. 37.**

———O. 34, R. 6—*Application under—Limitation—Starting point—Sale confirmed—Appeal by judgment-debtor—Application for personal decree within three years of decision of appellate Court but beyond three years of order of confirmation by first Court—If barred.*

An application under O. 34, R. 6 for a personal decree is not an application for execution of a decree, and is therefore governed by Art. 181 of the Limitation Act. When there is an appeal from the order confirming the sale of the mortgaged property, it is only when the appellate Court finally decides the matter by holding that the sale should be confirmed that the right to apply accrues, because until then it should not be held that it has been definitely ascertained that the amount realised is insufficient to pay the decretal amount. An application made within three years of such date is therefore in time though beyond three years of the date of confirmation by the first Court. (*Sulaiman, C.J. and Bennet, J.*) JAGRUP SINGH *v.* RAM GATI. **I.L.R. (1937) All. 481=168 I.C. 673=9 R.A. 664=1937 A.L.R. 388=1937 A.L.J. 135=1937 A.W.R. 103=A.I.R. 1937 All. 285.**

———O. 34, R. 6—*Application under preliminary and final decree passed without jurisdiction—Application for personal decree—Maintainability.*

A mortgage suit was filed on the original side of the Rangoon High Court in respect of property

situated outside the original jurisdiction of that Court. A preliminary consent decree was passed. The decretal amount not having been paid, final decree was passed and the property sold and money realized. As the amount so realized fell short, the decree-holder filed an application for a personal decree to which the judgment-debtor objected contending that in view of Cl. 10, Letters Patent, the preliminary and final decrees were nullities and hence the application for personal decree was not maintainable.

Held, that until the preliminary or the final decree was not set aside by way of appeal, revision or review, etc., they would stand irrespective of the fact that they might have been passed with or without jurisdiction, and hence the application for personal decree was maintainable. (*Mya Bu and Baguly, JJ.*) BANK OF CHETTINAD, LTD. *v.* N. K. N. R. M. CHETTYAR FIRM **167 I.C. 80=9 R.R. 289=A.I.R. 1937 Rang. 12.**

———O. 34, R. 6—*Claim for personal decree rejected in original suit—Subsequent application for personal decree*—Res judicata.

Where the mortgagee made a claim for a personal decree in the original suit and the claim was rejected upon its merits and no appeal was lodged against that decree, the doctrine of *res judicata* applies, and a subsequent application for a personal decree under O. 34, R. 6, C.P. Code, is not maintainable. (*Harries and Ganga Nath, JJ.*) MOHAMMAD HUZABBAR ALI KHAN *v.* ABDUL FATEH KHAN. **166 I.C. 884=9 R.A. 457=1937 A.L.R. 99=1936 A.L.J. 1228=1936 A.W.R. 1033=A.I.R. 1937 All. 54.**

———O. 34, R. 6—*Costs—Order imposing personal liability for—Legality—Personal remedy for mortgage debt barred.*

Ordinarily costs awarded to a mortgagee decree-holder in a mortgage suit or appeal in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. But where the trying Court imposes personal liability for costs on the mortgagor in express terms, the order is *intra vires* although his personal liability for the mortgage debt is time barred, and can be executed against the person of the mortgagor apart from the sale of the mortgaged property. (*Coldstream and Din Mohammad, JJ.*) KRISHAN LAL *v.* SIRI JAIN MANDIR PANCHAITI. **I.L.R. (1938) Lah. 148=181 I.C. 487=11 R.L. 847=40 P.L.R. 640=A.I.R. 1938 Lah. 188.**

———O. 34, R. 6—Decree under—Executability—Judgment-debtor insolvent. *See* PROVINCIAL INSOLVENCY ACT, Ss. 28 AND 44. **1939 A.W.R. (H.C.) 265.**

———O. 34, R. 6—*Decree under—When to be made—Decree for sale—If implies also decree under Rule* 6.

There can be no presumption that when a decree for sale is made under R. 5, O. 34, a decree for the balance under R. 6 is passed at the same time. In fact the presumption is to the contrary, namely, that a decree under R. 6 would not be passed until the property has been sold under R. 5. Before the person and other property of the judgment-debtor can be proceeded against, the

C. P. CODE (1908), O. 34, R. 6.

decree-holder must obtain a decree under R. 6. A.I.R. 1932 Cal. 775, Ref. (*Almond, A.J.C.*) DHIAN SINGH *v.* SHIV DAS. **161 I.C. 633=8 R. Pesh. 179=A.I.R. 1936 Pesh. 71.**

——**O. 34, R. 6**—*Liberty reserved to apply for personal decree—Application when to be made.*

Where a decree is drawn up containing a provision that if the proceeds of sale were found insufficient, plaintiff would be at liberty to apply for a personal decree.

Held, that an application for a personal decree in such a case, is not an application for execution. It is an application for a decree and as such not governed by the twelve years rule contained in S. 48, C. P. Code. (*Weston.*) RAM DUTTA *v.* CHATUR BHUJ. **1937 A.M.L.J. 99.**

——**O. 34, R. 6**—*Limitation—Right to personal decree—Surety for mortgage debt undertaking to be liable for loss arising from defect in mortgagor's title—Suit for personal decree against surety on basis of—Limitation—Starting point.*

Where a person stands surety for a mortgage debt, giving a guarantee of the mortgagor's title to the mortgaged property and undertaking to compensate the mortgagee for any loss caused to him in consequence of proof of the mortgagor's title being defective, a suit against the surety on the contract of guarantee for a personal decree against the surety is governed by Art. 116 of the Limitation Act and must be filed within 6 years from the date on which the mortgage debt becomes payable. O. 34, R. 6, C. P. Code, does not permit of a personal decree being passed against the mortgagor or his surety unless on the date of the suit founded on the mortgage the balance is legally recoverable. (*Niyogi, J.*) BHIKARILAL *v.* SITARAM. **20 N.L.J. 42.**

——**O. 34, R. 6**—*Mortgage decree in terms of compromise—Right of decree-holder to personal decree.*

Where a mortgage decree passed on a compromise expressly authorized the decree-holder to apply for a personal decree, and this was not contrary to the terms of the compromise but was in accordance with the intention of the parties, the decree-holder is entitled to a personal decree for the balance remaining due after the sale of the mortgaged property. (*King, C.J. and Zia-ul-Hasan, J.*) DRIGPAL SINGH *v.* KALKA SINGH. **12 Luck. 207=162 I.C. 536=8 R.O. 394=1936 O. W.N. 476=1936 O.L.R. 278=A.I.R. 1936 Oudh 259.**

——**O. 34, R. 6 and O. 38, R. 5**—*Mortgagee decree-holder selling portion of mortgaged property and realising substantial amount—Remainder not sold—Application by him to attach non-mortgaged properties—Maintainability.*

A mortgagee decree-holder put up for sale certain portions of the property mortgaged and recovered a substantial part of the sum due. It would appear that the amount that he was likely to obtain upon the sale of the remaining property was insufficient to satisfy the whole of the debt due to him. Before proceeding with the sale of the remainder of the mortgaged property and before obtaining a personal decree, he made an application to the Court for attachment of certain non-mortgaged properties of the judgment-debtor under O. 38, R. 5, C. P. Code.

C. P. CODE (1908), O. 34, R. 6.

Held, that the Court had jurisdiction to entertain the application. (*Harries and Bajpai, JJ.*) SHYAM LAL *v.* SAHU BAHAL RAI. **58 All. 884=163 I.C. 236=8 R.A. 946=1936 A.L.J. 314=1936 A.W.R. 362=1936 All.L.R. 529=A.I.R. 1936 All. 408.**

——**O. 34, R. 6**—*Part of mortgaged property sold—Remaining part released by mortgagee in favour of one of heirs of mortgagor—Mortgagee's right to personal decree.*

A mortgagee is not entitled to a personal decree under O. 34, R. 6, C. P. Code, where only a portion of the mortgaged property has been sold and the other portion is no longer available for sale owing to the act of the mortgagee himself in releasing it in favour of one of the heirs of the mortgagor on receipt of a certain sum of money from him. (*Srivastava, Ag. C. J. and Smith, J.*) ULFAT HUSAIN KHAN *v.* GIRDHARI LAL. **13 Luck. 129=166 I.C. 673=9 R.O. 326=1937 O. W.N. 100=1937 O.L.R. 35=A.I.R. 1937 Oudh 252.**

——**O. 34, R. 6**—*Personal decree—Right of second mortgagee to apply—Entire property sold under prior mortgagee's decree.*

Where there are two mortgage decrees in favour of different mortgagees, and the property had been sold and the entire equity of redemption in the mortgaged property had passed to the first mortgagee under the first sale, the second mortgagee would be at liberty to start a proceeding under O. 34, R. 6, and obtain a personal decree, even though the property was not sold in execution of his own decree. (*Mukherjea, J.*) JAYARAM DAS *v.* TOKENDRA NATH. **42 C.W.N. 47.**

——**O. 34, R. 6**—*Personal liability for principal amount barred—Claim to recover interest—If also barred.*

Interest cannot be held to accrue to a principal amount which is not legally recoverable, interest itself being essentially not an inherent right but a right which is given by law. Where, therefore, the claim for personal liability for the principal amount is barred by time the claim to recover interest for six years immediately preceding the institution of the suit is also barred. (*Tek Chand and Dalip Singh, JJ.*) DOST MAHOMED *v.* MIRAJ DIN. **163 I.C. 100=8 R.L. 1005=38 P.L.R. 74 =A.I.R. 1936 Lah. 387.**

——**O. 34, R. 6**—*Personal remedy barred by limitation—Bar, if applies to personal decree for costs.*

Costs in a mortgage suit ordinarily form part of the mortgage debt. Rule 3 of O. 34, as amended by the Rangoon High Court, does not direct that there shall be a decree for costs apart from the preliminary mortgage decree, which includes the amount due for costs. Where, therefore, the personal remedy of the mortgagee against the mortgagor is barred by the law of limitation, this bar applies to a personal decree for costs, when there is nothing in the preliminary decree which says that the mortgagee shall be at liberty to apply for a personal decree in respect of the costs alone, or enforce payment independently of the amount which is otherwise due on the mortgage. (*Leach, J.*) BALTHAZAR & SONS, LTD. *v.* AGA ALI RAMZAN VEZDI. **14 Rang. 538=167 I.C. 805=9 R.R. 332=A.I.R. 1937 Rang. 71.**

C. P. CODE (1908), O. 34, R. 6.

———O. 34, R. 6—*Personal remedy for principal and interest time-barred—Personal decree for costs—Whether can be granted.*

There can be a personal decree against the mortgagor for the amount of costs incurred in the mortgage suit, even though his personal liability for the principal amount and interest is barred by time. (*Tek Chand and Dalip Singh, JJ.*) DOST MAHOMED *v.* MIRAJ DIN. **163 I.C. 100=8 R.L. 1005=38 P.L.R. 74=A.I.R. 1936 Lah. 387.**

———O. 34, R. 6—*Preliminary decree specifying judgment-debtor's personal liability—Sale proceeds insufficient—Decree-holder obtaining order under O. 34, R. 6—Preliminary decree set aside on appeal—Effect on order under O. 34, R. 6.*

A decree for sale of mortgaged property can validly provide that if the proceeds of sale are not sufficient to pay the mortgage debt, the mortgagor should pay the balance personally, though the personal decree would not be executed until after the property was sold and the net sale proceeds were found to be insufficient to satisfy the debt. This being so if in a suit for the sale of mortgaged property the preliminary decree incorporates the personal liability of the judgment-debtor to pay, and the sale proceeds being insufficient the decree-holder also applies under O. 34, R. 6, any order passed on the application under O. 34, R. 6 flows from the preliminary decree and therefore if an appeal against that preliminary decree succeeds, the order or decree under O. 34, R. 6 would *ipso facto* fall to the ground and cannot operate as *res judicata.* (*Tek Chand and Dalip Singh, JJ.*) SHEO RAM *v.* LUTA RAM. **39 P.L.R. 165=169 I.C. 876=10 R.L. 54 =A.I.R. 1937 Lah. 6.**

———O. 34, R. 6—*Right to apply under—Preliminary decree not providing for personal decree —Application for personal decree after sale—If barred*—Res judicata.

The omission to provide for a personal decree in the preliminary decree in a mortgage suit does not operate as *res judicata,* and the omission therefore to reserve personal liability of the defendants in the preliminary decree does not preclude the plaintiff mortgagor from applying for relief under O. 34, R. 6, C. P. Code, if the sale proceeds are not sufficient to satisfy the decree amount. (*Varadachariar and Pandrang Row, JJ.*) NILAKANTA PRABHU *v.* APPU NAICKA. **I.L.R. (1939) Mad. 223=180 I.C. 236=11 R.M. 679=1938 M.W.N. 1185=48 L.W. 758=A.I.R. 1939 Mad. 162=(1938) 2 M.L.J. 999.**

———O. 34, R. 6—*Right to composite decree.*

Under O. 34, R. 6, the mortgagee is not entitled to apply for a personal decree until the mortgaged property has been actually sold and the sale proceeds found insufficient to meet the mortgagee's claim. The original decree should, therefore, merely reserve the right to apply for a personal decree. (*Grille, J.C. and Pollock, A.J.C.*) JINWARSA GANGASA *v.* GUNWANT RAO. **31 N.L. R. (Supp.) 124=160 I.C. 196=8 R.N. 157= A.I.R. 1936 Nag. 34.**

———O. 34, R. 6—*Right to personal decree—Conditions—Properties directed to be sold ceasing to be available—Application for final decree without sale of properties—Competency.*

C. P. CODE (1908), O. 34, R. 6.

Upon a true reading of R. 6 of O. 34, C.P. Code, the conditions under which a personal decree against the mortgagor may be asked are equally satisfied if the properties directed by the mortgage decree to be sold are no longer available. It is not incumbent on the plaintiff to go through the farce of selling those properties when they have ceased to be available to him, before he can apply for and get a personal decree. (*James and Chatterjee, JJ.*) MAKHAN SAHU *v.* KUMARUNNISSA. **17 Pat. 538=179 I.C. 109= 11 R.P. 325=5 B.R. 196=(1938) P.W.N. 423= A.I.R. 1938 Pat. 525.**

———O. 34, R. 6—*Right to personal decree—Personal covenant—Mortgagors promising to pay loan by certain date and in case of non-payment agreeing to put creditors in possession until payment—Deed also providing for personal liability of mortgagors in case of their failure to give possession—Nature of mortgage.*

In a dakhali-rehan deed, the mortgagors stated that they had taken a loan which they expressly promised to pay by a certain date. It was next stipulated that in the event of non-payment, the creditors would be put in possession of certain property as dakhali-rehandars until payment. There was a further stipulation that if the creditors, through any act done by the mortgagor or in any manner, failed to get possession over the property, they should be at liberty to realize the principal with interest from the person and properties of the mortgagors or from the rehan property in any manner they liked.

Held, that the mortgage was of an anomalous kind and the rights and the liabilities of the parties to it were to be determined by their contract, as evidenced in the deed. As the deed created a personal liability, the assignee of the mortgagee was entitled to get a decree under O. 34, R. 6, C. P. Code, against the mortgagor personally. (*Dhavle and Varma, JJ.*) BENI MADHO LAL *v.* JANKI PANDEY. **1937 P.W.N. 60 =169 I.C. 75=3 B.R. 532=9 R.P. 545=A.I.R. 1937 Pat. 261.**

———O. 34, R. 6—*Right to relief apart from—Mortgage decree becoming useless—Equitable relief by way of simple money-decree—Legality.*

A simple money decree cannot be passed unless the contingency contemplated by O. 34, R. 6 has occurred; there is no other rule of law under which a simple money decree could be passed in a suit which has been concluded by a final decree. So a Court cannot pass a decree on equitable grounds, when a mortgage decree becomes useless. (*Niamatullah and Ismail, JJ.*) RAM SARAN DAS *v.* BANWARI LALL. **I.L.R. (1938) All. 148=173 I.C. 729=10 R.A. 499=1938 All.L.R. 171=1937 A.L.J. 1181=1937 A.W.R. 1116=A.I.R. 1938 All. 98.**

———O. 34, R. 6—*Scope—Compromise providing for personal remedy in case of deficiency in sale-proceeds—Preliminary decree based on—Final decree and sale—Sale-proceeds insufficient—Right of decree-holder to proceed against person and other properties—Application under R. 6—If essential.*

There is nothing in O. 34, C. P. Code, which debars a Court from determining the personal liability of the mortgagor defendant at the time of passing the preliminary decree. R. 6, of O. 36,

C. P. CODE (1908), O. 34, R. 6.

which gives the plaintiff a right to apply for a personal decree after the sale of the mortgaged property does not lay down that such an application is necessary where a personal decree has already been passed at the time of the preliminary mortgage decree. Where therefore the preliminary decree in mortgage suit is passed on a compromise between the parties which clearly provides for the sale of other properties of the mortgagor in case the sale-proceeds of the mortgaged properties be found insufficient though the decree itself makes no mention of the personal remedy, the decree-holder can proceed in execution against the person and other properties of the judgment-debtor, without applying for and getting a decree under O. 34, R. 6. (*Macpherson and Khaja Mohamad Noor, JJ.*) SHEO BALAK PRASAD AWASTHI *v.* JUGAL KISHORE NARAIN. **15 Pat. 345=165 I.C. 561=9 R.P. 185=17 Pat.L.T. 540 =3 B.R. 48=A.I.R. 1936 Pat. 568.**

——**O. 34, R. 6**—*Suit for sale of mortgaged property—Mortgagee compromising suit with subsequent purchaser of equity of redemption—Mortgagee accepting a certain amount from him and releasing mortgaged property from liability—Right to personal decree for balance against sons of deceased mortgagor.*

In a suit for sale of the mortgaged property under S. 67 of the T. P. Act, no personal decree can be passed until the mortgaged property has been put to sale and has failed to realise the entire amount due on the mortgage. Where in such a suit against the sons of the deceased mortgagor and a subsequent purchaser of the equity of redemption, the mortgagee enters into a compromise with the subsequent purchaser by which he accepts a certain amount from him and releases the mortgaged property from all liability under the deed of mortgage, there is no provision of law which would enable the mortgagee in the suit under S. 67 of the T. P. Act to recover the balance of the money due under the deed from the sons of the mortgagor. (*Nanavutty and Smith, JJ.*) BOOTA *v.* GUR PRASAD. **12 Luck. 313=164 I.C. 817=9 R.O. 101=1936 O.W.N. 732=1936 O.L.R. 501=A.I.R. 1937 Oudh 20.**

——**O. 34, R. 9**—Applicability—Suit for sale by some heirs of mortgagee—Other heirs joined as co-defendants along with mortgagors—Decree for surplus amount in favour of mortgagors against co-defendants—Whether can be passed. *See* MORTGAGE—MORTGAGE SUIT—ACCOUNTS. **1936 O.W.N. 306.**

——**O. 34, R. 8**—Absence of seal on warrant—Effect on validity. *See* PENAL CODE, S. 225 (*b*). **1939 Rang.L.R. 445.**

——**O. 34, R. 10**—*Scope—Mortgage—Suit for redemption—Costs of suit—Liability for—Mortgagee—Right of to be awarded costs—Mortgagee raising unfounded and frivolous pleas—Effect of —C. P. Code, S. 35—Order for costs—Appeal.*

In a suit under O. 34, C. P. Code, the Court is bound to add the costs of the suit to the mortgage money when adjusting the amount to be paid to the mortgagee unless his conduct has been such as to disentitle him from recovering them. The provisions of S. 35, C. P. Code, are inapplicable to mortgage suits to which those stated specifically in O. 34, R. 10, C. P. Code, apply. A mortgagee who has been deprived of his costs in a

C. P. CODE (1908), O. 34, R. 11.

suit under O. 34, C. P. Code, is therefore entitled as of right to prefer an appeal as to costs to a higher tribunal. A mortgagee who frivolously resists an application under S. 83, T. P. Act, made by a mortgagor, and contests a suit for redemption without any justification, raising false and frivolous and unfounded pleas, would not only be disentitled to costs, but would also be liable to pay the costs of the mortgagor. (*Abdur Rahman, J.*) CHIDAMBARAM CHETTIAR *v.* RAMASWAMI CHETTIAR. **184 I.C. 83=12 R.M. 406= 1939 M.W.N. 288=49 L.W. 525=A.I.R. 1939 Mad. 654=(1939) 1 M.L.J. 687.**

——**O. 34, R. 10**—*Scope—Retrospective operation—Rights apart from preliminary decree—If affected.*

O. 34, R. 10, which was added to the C. P. Code in 1930, has no application to a decree for sale passed long prior to it, namely, in 1924. Nor can it affect rights which exist independently of the rights conferred by the preliminary decree. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) DURAISWAMI PILLAI *v.* VENKATA REDDY. **50 L. W. 889=A.I.R. 1940 Mad. 233.**

——**O. 34, R. 11**—*Discretion under—Principles governing exercise of.*

The discretion under O. 34, R. 11 is to be exercised judicially and the principles of S. 74 of the Contract Act must be taken to be the principle which would govern the exercise of such a discretion. (*Weston.*) BENI PRASAD *v.* SARFRAZ ALI SAYED. **1937 A.M.L.J. 97.**

——**O. 34, R. 11**—*Interest* pendente lite—*Discretion of Court to reduce contract rate.*

Rule 11 of O. 34, C. P. Code (which was inserted by Act XXI of 1929), gives a certain amount of discretion to the Court so far as interest *pendente lite* and subsequent interest are concerned and it is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances if there is no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. Whether Court would or would not give relief in respect of interest in excess of 9 per cent. per annum and if so to what extent, will depend on the special circumstances of each case. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) JAI GOVIND SINGH *v.* LACHMI NARAIN RAM. **3 F.L.J. 46=I.L.R. (1940) Kar. (F.C.) 33=187 I.C. 796 =12 R.F.C. 39=1940 O.L.R. 343=6 B.R. 589= 1940 P.W.N. 614=44 C.W.N. (F.R.) 21=A.I.R. 1940 F.C. 20=(1940) 1 M.L.J. (Supp.) 14.**

——**O. 34, R. 11**—*Suit for sale—Interest on decretal amount from date of sale to date of its confirmation—Decree-holder, if entitled.*

A decree-holder in a mortgage suit for sale is entitled to interest on the decretal amount from the date of the sale of the mortgaged property to the date of the confirmation of the sale. There is no reason why just because a sum of money which was lying in Court was taken away by a decree-holder, the decree-holder must be deemed to have taken it away upon the footing of full satisfaction of the decree or of the amount legitimately due to him. He can claim interest due to him on his claim even when his original claim is satisfied from the deposit in Court. (*Mya Bu and Mackney, JJ.*) A. S. N. CHETTYAR

C. P. CODE (1908), O. 34, R. 11.

FIRM *v.* IMPERIAL BANK OF INDIA, BASSEIN. **169 I.C. 432=10 R.R. 3=A.I.R. 1937 Rang. 193.**

———O. 34, R. 11 (a) (i)—*Construction—"Principal amount found or declared due"—Meaning—If restricted to principal amount secured by mortgage deed—Interest added to principal by calculation of rests under terms of mortgage deed—If principal amount—Right to interest on such added amount.*

The words "principal amount found or declared due on the mortgage" in O. 34, R. 11 (*a*) (*i*) ought not to be interpreted as meaning only the principal sum secured by the mortgage deed, but also the amount due on account of interest which, under the terms of the deed, has become part of the principal on the date of the preparation of the preliminary decree, *e.g.*, by the calculation of rests provided for in the deed. A mortgagee is entitled to interest at the rate and with the rests stipulated in the mortgage deed down to the date fixed for redemption by the decree. O. 34, R. 11 has not made any change in the law on the subject, and the words of R. 11 (*i*) cannot be construed as depriving the mortgagee of his right to interest calculated in the manner stipulated in the deed of mortgage. (*Harries and Rachhpal Singh, JJ.*) JAFAR HUSAIN *v.* BISHAMBAR NATH. **I.L.R. (1937) All. 584=1937 A.L.J. 324=(1937) A.W. R. 305=169 I.C. 795=10 R.A. 80=1937 A.L.R. 606=A.I.R. 1937 All. 442.**

———O. 34, R. 11 (b)—*Interest after date fixed by decree for payment—Discretion of Court—Successor of Judge—If can exercise.*

Although the mortgage contract expressly provides for interest up to date of realization, the rate of interest after the date fixed by the decree for payment is a matter for the discretion of the Court, but this discretion cannot be exercised by the successor of the Judge who passed the decree. (*Coldstream, J.*) MT. SANTI *v.* MULKH RAJ. **175 I.C. 634=10 R.L. 28=39 P.L.R. 769=A.I.R. 1937 Lah. 894.**

———O. 34, R. 11 (b) (as amended in 1929)—*Scope and effect of.*

O. 34, R. 11 (*b*) which specifically allows "subsequent interest up to "date of realisation," only gives effect to the previous judicial decisions. (*Sir George Lowndes.*) KUSUM KUMARI *v.* DEBI PROSAD DHANDHANIA. **63 I.A. 114=15 Pat. 210=38 Bom.L.R. 349=1936 O.W.N. 283=1936 M.W.N. 308=40 C.W.N. 328=160 I.C. 285=63 C.L.J. 154=8 R.P.C. 146=1936 A.L.J. 108=43 L.W. 268=1936 A.W.R. 204=17 Pat.L.T. 89=1936 O.L.R. 91=1936 All.L.R. 155=1936 P.W. N. 122=A.I.R. 1936 P.C. 63=70 M.L.J. 355 (P.C.).**

———O. 34, R. 12—Appeal—Order under—If "decree". *See* C. P. CODE, S. 2 (2). **45 L.W. 646=A.I.R. 1937 Mad. 554.**

———O. 34, R. 12—*Scope—Application by person claiming to be prior mortgagee for sale free of mortgage—Applicant not party to suit—Power of executing Court to enquire into claim and to pass order in favour of applicant.*

O. 34, R. 12, C. P. Code, does not contemplate an enquiry in execution as to whether a person who is a stranger to the suit is a prior mortgagee or not. R. 12 does contemplate the admitted existence of a prior mortgage and lays down the procedure for bringing mortgaged property to sale, the prior mortgagee being given the option of having the property sold subject to his mortgage or free of it. In the latter case, he is entitled to have his mortgage discharged out of the proceeds of the sale. R. 12 does not in any case empower the executing Court, whose primary duty is to execute, to go into a full enquiry into the claims of a person who is not a party to the suit, but who claims to be a prior mortgagee and applies under R. 12 for sale of the property free of his mortgage, in order that an order may be passed under the rule in his favour. (*Horwill, J.*) THALUPULAMMA *v.* MANGAMMA. **170 I.C. 932=10 R.M. 248=1937 M.W.N. 353=45 L.W. 646=A.I.R. 1937 Mad. 554.**

C. P. CODE (1908), O. 34, R. 14.

———O. 34, R. 14—*Applicability—Money decree providing for payment in instalments on judgment-debtor executing security bond hypothecating property—Default—Sale of hypotheca—Fresh suit—Necessity.*

Where a money decree is ordered to be paid in instalments on the judgment-debtor executing a security bond hypothecating immovable property for the satisfaction of the decree and default is committed in the payment of instalments, the hypothecated property can be sold in execution of the decree and a fresh suit is not necessary. Case-law discussed. (*Mohammad Noor and Varma, JJ.*) NAROTTAM DAS *v.* KRISHNA PRASAD. **15 Pat. 545=162 I.C. 830=8 R.P. 580=17 Pat. L.T. 434=A.I.R. 1936 Pat. 289.**

———O. 34, R. 14—*Applicability—'Mortgagee'—If means holder of subsisting mortgage—Mortgagee claiming only personal decree against mortgagor—If can attach and sell mortgaged property in execution.*

The word 'mortgagee' in R. 14 of O. 34 of the C. P. Code is intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against the purchaser or would be purchaser of the mortgaged property. Hence where in a suit on a mortgage executed by the father of joint Hindu family, the sons impugn the validity of it, and the mortgagee abandons his claim on the mortgage and rests content with a simple money decree against the mortgagor, there is no subsisting mortgage after the decree and it is not open to the mortgagee to bring a separate suit for the enforcement of such a mortgage as provided by O. 34, R. 14. He is clearly entitled to attach the interest of the mortgagor and put it up for sale and O. 34, R. 14 is no bar to his so doing, for it has no application to the facts of this particular case. (*Thomas, C.J. and Yorke, J.*) SHYAM SUNDAR *v.* CHANDAN DEVI. **180 I.C. 136=1939 O.A. 255=1939 O.L. R. 121=1939 O.W.N. 227=12 R.O. 233=A.I.R. 1939 Oudh 126.**

———O. 34, R. 14—Applicability—Mortgage by conditional sale for term and lease back to mortgagor for same term—Mortgagor holding over—Suit for rent by mortgagee—If barred—"Claim arising under the mortgage"—Question as to—When arises. *See* MORTGAGE—LEASE BACK. **40 C. W.N. 343.**

———O. 34, R. 14—*Applicability—Mortgage executed in favour of Hindu father—Promissory note in favour of son for interest due on mortgage money—Suit by son on promissory note—Decree—Execution by attachment and sale of mortgaged properties—If barred.*

C. P. CODE (1908), O. 34, R. 14.

O. 34, R. 14, C. P. Code, can come into play obviously only if the mortgagee and the decree-holder can be identified as the same person or the same legal entity. Where a mortgage is executed in favour of a Hindu father, and afterwards a promissory note is executed by the mortgagor in favour of the son of the mortgagee for the amount of interest due under the mortgage, a decree obtained by the son on the promissory note can be executed by attachment and sale of the mortgaged properties. O. 34, R. 14 does not apply to such a case so as to bar the attachment and sale of the mortgaged properties in execution of the decree on the promissory note. The mortgagee (father) and the decree-holder (son) are two different persons, although both the mortgage money and the interest are due to the joint family of which the father and son are members. (*King, J.*) VARADARAJAM PILLAI *v.* KRISHNAMURTI PILLAI. **189 I.C. 390=13 R.M. 273=1939 M.W.N. 302=49 L.W. 411=A.I.R. 1939 Mad. 436=(1939) 1 M.L.J. 680.**

———O. 34, R. 14—*Applicability—Sale of property under security bond—Separate suit, if necessary.*

Where a security bond is executed to get a stay of execution of a simple money decree, and the amount is not paid as agreed, the property can be sold without having recourse to a separate suit. O. 34, R. 14 does not apply to such a case, as there is no decree for payment of money in satisfaction of any claim on any mortgage. (*Iqbal Ahmad and Bajpai, JJ.*) KANJESWAR NATH *v.* BENARES BANK, LTD. **187 I.C. 741=12 R.A. 567=1940 A.W.R. (H.C.) 128=1940 A. L.J. 164=A.I.R. 1940 All. 196.**

———O. 34, R. 14—*Applicability—Usufructuary mortgage providing for redemption at end of one year or on fixed date in any succeeding year—Lease by mortgagee to mortgagor for one year only executed next day—Payment of Kattakanom by lessee to lessor—If one and same transaction—Suit for rent under lease—Sale of equity of redemption—Bar of.*

Where a lease back by a mortgagee is part of the same transaction of a usufructuary mortgage and is merely a piece of machinery for realising the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realise the interest on the mortgage, and under the decree in such a suit the equity of redemption cannot be brought to sale unless the suit was actually framed as a suit on the mortgage. The fact that mortgage was executed on one day and the lease was on the next day has very little bearing on the question whether the two form part of the same transaction. Nor would the fact that an advance by way of security for rent, or kattakanom, was paid by the mortgagor lessee to the mortgagee lessor, necessarily make the lease something separable from the mortgage. Again the fact that the lease is for one year only whereas the mortgage is redeemable at the end of the same period or at subsequent dates, would not also make them distinct or separate transactions. On the other hand the fact that the lease is expressed as ending on the same date as the date on which the right of redemption begins is a clear indication that the two deeds form part of one and the same transaction. Even if the decree

C. P. CODE (1908), O. 34, R. 14.

for arrears of rent is for a period subsequent to the expiry of the lease during which the tenant was holding over, it would make no difference to the applicability of O. 34, R. 14, because the relation between the parties would be still governed by the lease, and the rent claimed would still be in its essence a sum of money due under the mortgage. (*Wadsworth, J.*) CHINNAPPAYAN *v.* NARAYANA PATTAR. **187 I.C. 852=12 R.M. 761=50 L.W. 677=1939 M.W.N. 1145=A.I.R. 1940 Mad. 59=(1940) 1 M.L.J. 143.**

———O. 34, R. 14—Applicability and scope of. *See* T. P. ACT, SS. 67 AND 100 AND C. P. CODE, O. 34, R. 14. **1939 A.L.J. 542.**

———O. 34, R. 14—*Creditor obtaining money decree in satisfaction of claim under mortgage—Right to put mortgaged property to sale in execution.*

It is not open to a creditor who has obtained a simple money decree in satisfaction of a claim arising under the mortgage to put the mortgaged property itself to sale in execution of his decree as long as the mortgage subsists. (*Harries and Bajpai, JJ.*) SHAUKAT ALI *v.* SHEO GHULAM. **165 I.C. 124=9 R.A. 224=1936 A.L.J. 692=1936 A.W.R. 510=1936 All.L.R. 851=AI.R. 1936 All. 663.**

———O. 34, Rr. 14 and 15—*Money decree obtained by chargee—Subsequent suit to bring charged property to sale—If barred.*

By reason of the provisions of O. 34, R. 14 read with R. 15, C.P. Code, a chargee may bring a suit to recover the money charged on immovable property and may subsequently bring a suit to bring that immovable property to sale in satisfaction of his decree. A chargee cannot, on obtaining a money decree, execute that decree against the charged property. He must by a subsequent suit bring the charged property to sale. O. 34, Rr. 14 and 15 are an exception to the general rule laid down in O. 2, R. 2, C. P. Code. (*Harries, C.J. and Dhavle, J.*) BANK OF BIHAR, LTD. *v.* OMITANE CHATTERJI. **6 B.R. 304 =186 I.C. 221=12 R.P. 458=21 Pat.L.T. 262= A.I.R. 1940 Pat. 283.**

———O. 34, R. 14—*Mortgage—Lease back to mortgagor—Mortgagee obtaining decree for arrears of rent—Right to sell equity of redemption in execution.*

Where the whole of the property mortgaged was leased to the mortgagor by the mortgagee, the mortgagee who has obtained a decree for arrears of rent cannot proceed to sell the equity of redemption in execution of such decree. The arrears of rent in respect of which the decree is passed represent in substance the usufruct of the mortgaged property and the decree is a decree which the mortgagee has obtained for the payment of money in satisfaction of a claim arising under the mortgage. That being so, he could not by reason of the provisions of O. 34, R. 14 attach the property and put the same up for sale. (*Harries, J.*) PIYARE LAL *v.* HASAN AHMAD. **162 I.C. 402=9 R.A. 267=1936 R.D. 300 (2)= 1936 A.W.R. 713=1936 A.L.J. 1218=1936 All. L.R. 895=A.I.R. 1936 All. 708.**

———O. 34, R. 14—*Protection given by rule—Waiver by mortgagor—If binds his attaching creditor.*

C. P. CODE (1908), O. 34, R. 14.

The protection which is given by O. 34, R. 14, C. P. Code, can always be waived by the mortgagor. If the mortgagor waives his rights under the rule, although such waiver might not affect the position of persons deriving title from him, a creditor of the mortgagor who has attached the mortgaged property is not in a position to insist upon the provisions of the rule in spite of the waiver by the mortgagor. (*Panckridge, J.*) MANNALAL SRIMAL *v.* NEHALCHAND SAMSUKHA. **41 C.W.N. 1133.**

——**O. 34, R. 14**—Scope—Mortgage—Suit on —Claim for money decree only—If bar to subsequent suit for sale. *See* CONTRACT ACT, S. 141. **(1937) 1 M.L.J. 469.**

——**O. 34, R. 14**—Scope—Payment by mortgagee of revenue and land tax—Money decree in respect of—Sale of mortgaged property—If barred. *See* T. P. ACT, S. 72. **A.I.R. 1936 Rang. 47.**

——**O. 34, R. 14, Sub-R. (1)**—*Applicability—Exemption of certain item of security from mortgage suit and sale thereon—Decree under O.* 34, *R.* 6 *for balance—O.* 34, *R.* 14, *if bars execution against exempted item.*

Where a mortgagee exempts a certain item of security from the mortgage suit and brings the remaining property to sale and on its being insufficient obtains a decree under O. 34, R. 6, it could be executed against the exempted item, as by the operation of O. 2, R. 2 the mortgage security no longer exists; O. 34, R. 14 (1) is not a bar to the sale of such property, for the sub-rule cannot apply to a simple money decree under O. 34, R. 6. (*Bennet, A.C.J. and Verma, J.*) DIRGPAL SINGH *v.* GULZARI LAL. **I.L.R. (1938) All. 466=175 I.C. 938=11 R.A. 22=1938 A.L. R. 523=1938 A.L.J. 379=1938 A.W.R. (H.C.) 245=A.I.R. 1938 All. 341.**

——**O. 34, R. 15**—*Property subject to recurring charge—Sale of, in execution of decree for arrears payable in respect of sum charged—Liability in respect of future payments—If extinguished.*

A charge is not exactly identical with a mortgage, and although a similar remedy is available, a suit for the enforcement of a charge is not necessarily the same as a suit for sale on the basis of a mortgage deed. The general principle that, at a mortgage sale, the auction-purchaser takes the security free of the mortgage may apply in the case of a single charge because, by reason of the sale, all dues on the charge would usually be liquidated either by the sale proceeds or by means of a personal decree under O. 34, R. 6, C. P. Code. In the case of a recurring charge however, even although the charged property might be sold in execution of a decree for arrears payable in respect of the sum charged, the liability in respect of future payments would ordinarily remain after the sale and would not be extinguished by the sale of the charged property in satisfaction of a decree for arrears which might have already accrued. In such a case the charge will not be extinguished by the sale and, as a charge is attached to the property charged, the auction-purchaser would ordinarily get the purchased property subject to the charge. A.I.R. 1933 All. 934, Rel. on. (*Edgley, J.*) JNANENDRA NATH *v.* SASHI MUKHI. **186 I.C. 833=12 R.C. 528=44 C.W.N. 240=A.I.R. 1940 Cal. 60.**

C. P. CODE (1908), O. 35, R. 5.

——**O. 34, R. 15**—*Sale of charged property without preliminary decree for sale—Irregularity.*

Where in execution of decree in a suit to enforce a charge the charged property is sold without there being any preliminary decree for sale as in ordinary mortgage suit, this can be regarded only as an irregularity. (*Edgley, J.*) JNANENDRA NATH *v.* SASHI MUKHI. **186 I.C. 833=12 R.C. 528=44 C.W.N. 240=A.I.R. 1940 Cal. 60.**

——**O. 34, R. 15**—*Scope and effect of—Charge decree in respect of royalties due from property—Purchaser of property at sale in execution of another decree—Charge decree-holder in possession wrongfully—Suit for possession by purchaser—Right of charge-holder to insist on payment of dues before parting with possession.*

The effect of a decree on a charge is the same as that of a decree on a mortgage in view of the provisions of O. 34, R. 15, C. P. Code. But a person who has obtained a charge decree in respect of a property for royalties due to him from that property, has no right to insist on retaining possession of the property as against an auction-purchaser in execution of his money-decree, till his dues are paid, when the possession held by him is not attributable to the mortgage or charge. He can insist on his dues being paid if he has been let into possession by the mortgagor or the person against whom the charge was held. But when his possession is not so attributable, but wrongful, as having been wrested from the execution purchaser, he cannot insist on possession being retained till his dues, *i.e.*, the amounts due under the charge decree are paid. (*Mitter and Patterson, JJ.*) CREET *v.* GANGARAJ GULRAJ FIRM. **I.L.R. (1937) 1 Cal. 203=170 I.C. 214 =10 R.C. 111=64 C.L.J. 280=A.I.R. 1937 Cal. 129.**

——**O. 35, R. 4**—*Application by plaintiff to be dismissed from suit—When maintainable—'First hearing'—Meaning of.*

A plaintiff in an interpleader suit is entitled to apply to the Court as soon as the pleadings have been completed, for an order that those persons who have adverse claims to the property in dispute should continue their contest without having the plaintiff retained on the record. This will save costs not only for the plaintiff but also for the defendants themselves. The expression "first hearing" in O. 35, R. 4, C. P. Code, means the date on which the Court goes into the pleadings in order to understand the contentions of the parties. (*McNair, J.*) NATIONAL INSURANCE CO., LTD. *v.* DHIRENDRA NATH BANERJI. **I.L.R. (1938) 1 Cal. 53=175 I.C. 284=10 R.C. 786= 41 C.W.N. 1229=A.I.R. 1938 Cal. 287.**

——**O. 35, R. 5**—*Scope and object—Landlord and tenant—Person claiming title under sale-deed by landlord executed prior to lease—Demand of rent—Interpleader suit by tenant—Maintainability.*

The object of O. 35, R. 5, C. P. Code, is to prevent a tenant from compelling his landlord to have his title determined as against a stranger, and an interpleader suit is maintainable if the landlord, subsequent to the letting, does anything whereby his right to recover the rent is entangled. Plaintiff had taken an oral lease of the suit

perty from the second defendant, the owner, on a monthly rent and was paying rent to the 2nd defendant all along. Subsequently he was served with a notice by the 1st defendant that he should pay the rent to him. The second defendant also served the plaintiff with a notice asking him not to pay rent to the 1st defendant, if demanded by him. Plaintiff thereupon filed a suit to have it decided as to who was entitled to the rent and the property. The first defendant claimed title under a sale deed passed by the 2nd defendant before the date of letting to the plaintiff and he challenged the latter's right to let out the land to the plaintiff.

Held, that the 1st defendant cannot be regarded as claiming the property through the 2nd defendant, and the interpleader suit by the plaintiff was therefore not maintainable. (*Lokur, J.*) SADASHIV GOVIND *v.* YESHVANT. **I.L.R. (1939) Bom. 383=182 I.C. 991=12 R.B. 53=41 Bom. L.R. 460=A.I.R. 1939 Bom. 249.**

———**O. 37, Rr. 2 and 3**—*Suit under—Plea of payment—Leave to defend—If to be conditional.*

In a suit on a promissory note the plaintiff referred to the pledges in respect of the jewellery for payment of money due in respect of the promissory note but asked leave under O. 2, R. 2 to reserve his right as such pledgee. The defendant applied for leave to defend on the ground that since the execution of the promissory note various amounts had been paid in satisfaction and that upon proper account being taken it would be found that the amount claimed was in excess of the amount due.

Held, that leave to defend should be granted on the defendant giving security for costs only. (*McNair, J.*) SURPUT SING *v.* MAHARAJ BAHADUR SING. **166 I.C. 827=9 R.C. 585=A.I.R. 1936 Cal. 476.**

———**O. 37, R. 3**—*Conditional grant of leave to defend—Power of Court.*

Where in a suit on a promissory note instituted under O. 37, C.P. Code, the defendant applies for leave to appear and defend, but Court is not satisfied with the *bona fides* of the defendant, and vague and indefinite assertions have been made by him to gain time, it is open to the Court to grant leave to defend only conditionally, *i.e.*, on the defendant paying into Court the amount claimed. A.I.R. 1920 Mad. 969, Foll. (*Addison and Abdul Rashid, JJ.*) SHIB KARAN DAS *v.* MOHAMMAD SADIQ. **165 I.C. 166=9 R. L. 226=A.I.R. 1936 Lah. 584.**

———**O. 37, R. 3 (2)**—*Conditional grant of leave to defend—Powers—Discretion—Interference by High Court.*

In suits under O. 37, C.P. Code, the Court has jurisdiction to impose conditions when granting leave to defend; and it is not a reasonable interpretation of O. 37, R. 3 (2) to hold that it contemplates only two courses; either to grant leave unconditionally or to refuse leave. If the Court thinks that there is something to be said in defence (even a plausible defence) it may be inclined to grant leave, but only on condition of security. It will not be right to crystallise into rules of law the circumstance under which the Court, in the exercise of the discretion vested in it by O. 37, R. 3 (2), can demand security. If

in a particular case the High Court is satisfied that the discretion has been arbitrarily or perversely exercised, it will not hesitate to interfere in revision. (*Varadachariar, J.*) GOPALA RAO *v.* SUBBA RAO. **161 I.C. 182=8 R.M. 792 =1936 M.W.N. 175 (2)=43 L.W. 298=A.I.R. 1936 Mad. 246=70 M.L.J. 241.**

———**O. 37, R. 4**—*Decree against firm—One of partners deprived of opportunity for applying for leave to defend suit—Duty of Court to set aside decree.*

Each partner has a right to apply for leave to defend where a suit is brought against a firm under O. 37. There is, of course, a period of limitation for such application, but in a case where it is shown that a partner was deprived of an opportunity for applying for leave to defend, the Court ought to exercise its power under O. 37, R. 4 by setting aside the decree, restoring the suit and allowing leave to defend. (*Ameer Ali, J.*) SATYA CHARAN *v.* CALCUTTA HARDWARE ENGINEERING CO. **42 C.W.N. 820.**

———**O. 37, R. 4**—*Order rejecting application—Appeal.*

An order rejecting an application under O. 37, R. 4, C.P. Code, is not appealable. An appeal is competent from the decree passed under O. 37 and the rejection of an application under O. 37, R. 4 could also form a ground of appeal preferred against the decree passed. (*Abdul Qayoom, C.J. and Janki Nath Wazir, J.*) HARI SINGH *v.* KANSHI RAM DEVI DAS. **39 P.L.R.J. & K. 11.**

———**O. 38, R. 2**—*Surety under for appearance of defendant—Return of plaint for presentation to proper Court for want of jurisdiction in Court—If discharges surety—Re-presentation of plaint in proper Court—Surety's liability—If extends to that suit.*

The return of a plaint in suit on the ground that the Court has no jurisdiction terminates the litigation and the re-presentation of the plaint in a different Court in effect starts a fresh litigation on the same cause of action. Where a surety executes a bond undertaking to be responsible for the appearance of the defendant in an application for arrest of the defendant before judgment in a suit, and the plaint is subsequently returned for presentation to another Court having jurisdiction, the bond cannot be taken to cover the subsequent suit started by the re-presentation of the plaint to the Court having jurisdiction. It makes no difference that the plaint returned by the small cause side of a Court is re-presented to the original side of the same Court. Since there has been a change in proceedings, that change on the principle of S. 133 of the Contract Act, discharges the surety. (*Wadsworth, J.*) MOHOMED SHERIFF SAHIB *v.* HUSSAIN GHOUSE. **50 L.W. 426=188 I.C. 416=13 R.M. 18=1939 M.W. N. 950=A.I.R. 1939 Mad. 933=(1939) 2 M. L.J. 816.**

———**O. 38, R. 5**—*Applicability—Attachment before judgment—Order for—Conditions—Duty of plaintiff to adduce evidence—Intention of defendant—Reference to previous transactions—If justified.*

Before the power under O. 38, R. 5, C.P. Code, is exercised, the Court must be satisfied

that transfers are going to be made by the defendant after the suit has been filed and that such transfers are made with the object of frustrating the plaintiff, if he wins the suit, in executing the decree. Mere allegations to that effect are of no avail, the facts have to be positively proved by satisfactory evidence. Though for the purpose of finding out the intention with which transfers are going to be effected by the defendant, previous transactions may be referred to, they must be transactions subsequent to the filing of the suit. The applicant for attachment must adduce evidence to show what properties are going to be transferred, to whom they are going to be transferred, and under what circumstances. (*Wort and Varma, JJ.*) BODANAND RAI *v.* NABU KUMAR SINGH. **17 Pat. 89=173 I.C. 928=10 R.P. 464 (2)=1938 P.W.N. 304=4 B.R. 363 =19 Pat.L.T. 392=A.I.R. 1938 Pat. 161.**

———O. 38, R. 5 and S. 64—*Attachment before judgment made without complying with procedure—Effect of—Third party, if can enforce mortgage against claims under attachment.*

Though the order of attachment before judgment should comply with provisions of O. 38, R. 5, that is, the order should be a conditional order accompanied by a notice to the defendant, yet non-compliance with this procedure and failure to give the defendant an opportunity to furnish security does not make the *ex parte* order of attachment a nullity but simply renders it irregular, liable to be set aside only at the instance of the defendant. But a third party cannot ignore the attachment and enforce his mortgage against decree-holder's claims under attachment. (*Coldstream and Abdul Rashid, JJ.*) DWARKA DAS BADRI DAS *v.* SHRI RAM. **18 Lah. 756=175 I.C. 828=11 R.L. 64=40 P.L.R. 280=A.I.R. 1938 Lah. 49.**

———O. 38, R. 5—*Attachment of immovable property under—Mode of—O. 21, R. 54—Applicability.*

There cannot be valid or effective attachment before judgment of immovable property unless the requirements of O. 21, R. 54, C.P. Code, are satisfied. Although Form No. 5, Appendix F, is the form in which the order under O. 38, R. 5 is to be served, yet the actual attachment where the property is immovable, is to be effected in the manner provided in O. 21, R. 54, for which the proper form is prescribed in Appendix E, Form No. 24. An attachment before judgment of immovable property although issued in the form prescribed in Appendix F, Form No. 5, is not an effective attachment within the meaning of O. 21, R. 54. (*Rowland and Chatterji, JJ.*) SADHU PRASAD SAH *v.* SATNARAIN SAH. **182 I.C. 748=12 R.P. 62=5 B.R. 820=A.I.R. 1939 Pat. 81.**

———O. 38, R. 5—*Attachment of property—Duty of Court to call upon defendant to furnish ecurity.*

Under O. 38, R. 5, C.P. Code, the Court cannot attach the property of the defendant until it calls upon him to furnish security, or to produce and place at the disposal of the Court the property or to show cause why he should not furnish ecurity. Where this requirement has not been omplied with, the order attaching the property annot stand and is liable to be set aside. (*Harries and Bajpai, JJ.*) SHYAM LAL *v.* SAHU BAHAL

RAI. **58 All. 884=163 I.C. 236=8 R.A. 946 =1936 A.L.J. 314=1936 A.W.R. 362=1936 All. L.R. 529=A.I.R. 1936 All. 408.**

———O. 38, R. 5—Attachment under—Effect of—Attachment followed by decree on admission—Court calling for amount from custody Court—Effect of—Subsequent attachment before judgment by another creditor followed by decree—Right to payment of amount requestioned. *See* C.P. CODE, S. 73. **1937 A.W.R. 284=A.I.R. 1937 All. 424.**

———O. 38, R. 5—Conditional order of attachment before judgment—No order absolute—Validity of attachment. *See* C.P. CODE, O. 21, R. 54 AND O. 38, R. 5. **66 C.L.J. 222.**

———O. 38, Rr. 5 and 6—*Duty of Court—Need for proper affidavit.*

The provisions of O. 38, Rr. 5 and 6 are very drastic as the plaintiff can secure a very great advantage over his opponent in the earlier stages of the litigation long before the merits of the controversy are tried out. The Court should therefore be fully satisfied on a proper affidavit or other materials before it can take any action under O. 38, Rr. 5 and 6. It should not paralyse the defendant against whom the suit is brought by lightly making an order of attachment before judgment. Where the affidavit filed by the applicant is wholly inadequate and is not in law an affidavit at all, the Court should not take action under O. 38, Rr. 5 and 6. (*Aga Haider, J.*) MADAN THEATRES, LTD. *v.* HARI DAS. **38 P.L.R. 772 =A.I.R. 1936 Lah. 33.**

———O. 38, R. 5—Mortgagee decree-holder selling portion of mortgaged property and realising substantial amount—Remainder not sold—Application by him to attach non-mortgaged properties—Maintainability. *See* **C.P. CODE, O. 34,** R. 6. **1936 A.L.J. 314=1936 A.W.R. 362= A.I.R. 1936 All. 408.**

———O. 38, Rr. 5 and 6—*Order for attachment before judgment without notice to defendant—Appeal—Revision.*

An order granting an application for attachment before judgment without issuing notice to defendant under O. 38, R. 5 (1) can be deemed to have been one under O. 38, R. 6 and is therefore appealable under O. 43, R. 1 (*q*). Even if there is no appeal against the order, the Court may treat the memorandum of appeal as an application for revision, and can interfere on the ground that the order of the Court below is unjust and unfair and was passed in defiance of the legal procedure prescribed by the Code. (*Agha Haider, J.*) MADAN THEATRES, LTD. *v.* HARI DAS. **38 P.L.R. 772=A.I.R. 1936 Lah. 33.**

———O. 38, Rr. 5 and 7—*Order of attachment in Form No. 5 of Appendix F—Attachment not published in Form No. 24 of Appendix E—Validity of attachment.*

A proclamation by beat of drum and affixing on the property a copy of the order in Form No. 5 of Appendix F under O. 38, R. 5, C.P. Code, does not constitute an attachment under the Code. If there is no publication of attachment in the form laid down under O. 21, R. 54, namely, in Form 24 of Appendix E, there is no valid attachment. (*Jack, J.*) SITA NATH PATI *v.* SARADA PRASANNA DAS. **173 I.C. 711=10 R. C. 562=65 C.L.J. 329=A.I.R. 1937 Cal. 375.**

C. P. CODE (1908), O. 38, R. 5.

———O. 38, R. 5—*Salary of public servant—Attachment of, before its accrual—Legality.*

The word 'property' in O. 38, R. 5, C. P. Code, means property already in existence, belonging to and at the disposal of the defendant. A salary which has not yet been earned or paid, cannot be 'disposed' of until it has at least become payable. It is, therefore, clearly illegal to attach before judgment a moiety of the salary of a public servant or of any employee until it has accrued. (*Mosely, J.*) MACLEOD *v.* THE BOMBAY FURNITURE MART. **170 I.C. 240=10 R.R. 69=1937 Rang.L.R. 108=A.I.R. 1937 Rang. 292.**

———O. 38, R. 5—*Security given for removal of attachment before judgment—Decree by trial Court—Liability of surety—Subsequent appeal or appeals—Effect of.*

Where security is given to obtain removal of attachment before judgment under O. 38, the liability of the surety is fully incurred as soon as the decree of the Court of first instance is made and subsequent appeal or appeals from the decree do not destroy the liability, although they may have the effect of reducing the quantum of the liability which may even be found to be nothing. If the decree of the Court of the first instance is finally restored, the liability incurred when it was first passed is also restored. The decreeing of the suit by the Court of first instance has a different effect upon the attachment before judgment from the dismissal of the suit by that Court. (*Mya Bu, J.*) SOON THIN *v.* K. S. A. V. CHETTIAR FIRM. **14 Rang. 361=164 I. C. 455=9 R.R. 105=A.I.R. 1936 Rang. 342.**

———O. 38, R. 5—Surety under—Bond—Amount of—Bond providing for liability of surety for decretal amount and not value of property to be attached—If illegal. *See* C. P. CODE, S. 145 AND O. 38, R. 5. **A.I.R. 1936 Cal. 143.**

———O. 38, R. 5 (3)—*Judge issuing notice to defendant to show cause and at same time ordering interim attachment—Defendant objecting to attachment but voluntarily furnishing security—Appellate Court, if can cancel security.*

Where the trial Judge issues a notice to the defendant to show cause why the application of the plaintiff for attachment before judgment of the property of the defendant be not granted and at the same time orders attachment of the same and the defendant objects to the attachment but voluntarily offers security pending disposal of the plaintiff's application for attachment before judgment, the appellate Court cannot cancel security merely because it thinks that the attachment is illegal. (*Jai Lal, J.*) ASA RAM-RAM PAT *v.* J. D. PICTON CLARK. **175 I.C. 44=10 R.L. 665=40 P.L.R. 666=A.I.R. 1937 Lah. 780.**

———O. 38, R. 5 (3)—*Order under—Issue of notice to defendant—Necessity for.*

Issue of notice to defendant under O. 38, R. 5 (1) is absolutely necessary before an order under O. 38, R. 5 (3), is passed. Where no notice is issued, no foundation is laid for an action under O. 38, R. 5 (3). Before passing the order of attachment before judgment, the Court must faithfully and strictly carry out the stringent procedure as laid down in O. 38, R. 5 and no short cuts are permissible. (*Agha Haidar, J.*) MADAN THEATRES, LTD. *v.* HARI DAS. **38 P.L.R. 772=A.I.R. 1936 Lah. 33.**

C. P. CODE (1908), O. 38, R. 9.

———O. 38, R. 6—*Applicability.*

Order 38, R. 6 might apply to an objection by the defendant but not to an objection by a third person. (*Pollock, J.*) MT. RAHIBHAI *v.* RATANLAL HIRALAL. **176 I.C. 79=11 R.N. 34=A.I.R. 1938 Nag. 321.**

———O. 38, R. 7—*Property not mentioned in writ of attachment—If under attachment.*

The question whether a particular property has been attached has to be determined with reference to the writ of attachment. Even if the property is mentioned in the application for attachment before judgment and the order for attachment is made in terms of that application, but if the writ of attachment served by the Civil Court peon does not mention the property, the property cannot be said to be under attachment and the judgment-debtor is not prohibited from transferring it. (*Rowland and Chatterji, JJ.*) SADHU PRASAD SAH *v.* SATNARAIN SAH. **182 I. C. 748=12 R.P. 62=5 B.R. 820=A.I.R. 1939 Pat. 81.**

———O. 38, R. 8—*Procedure—Attachment before judgment—Objection to—When to be made—If can be entertained even in execution proceedings.*

An objection under O. 38, R. 8 to attachment of property attached before judgment need not be made before judgment as there is nothing in the rule to show that the claim must be preferred before judgment. Such objection even though preferred under O. 21, R. 58, in proceedings in execution of the decree can be entertained by the Court, the procedure to be followed in objection under O. 38, R. 8 or in objection under O. 21, R. 58, in respect of claim to property attached in execution being the same. (*Fazl Ali and Rowland, JJ.*) BENI MAHTO *v.* CHATURGUN SAO. **168 I.C. 364=3 B.R. 425=9 R.P. 484=18 Pat.L.T. 626=A.I.R. 1937 Pat. 245.**

———O. 38, R. 8—Scope and operation of—Objection to attachment before judgment by defendant—Order on—Remedy—Separate suit if barred—C. P. Code, S. 47. *See* C. P. CODE, S. 47. **1937 A.W.R. 587.**

———O. 38, R. 9—*Scope—Surety—Bond undertaking liability until defendant satisfies decree that might be passed—Dismissal of suit—If discharges surety—Decree passed in appeal—Liability of surety.*

A surety who binds himself as such to be liable until the defendant fully satisfies the decree that might be passed against him is not discharged from liability on the dismissal of the suit by the trial Court, O. 38, R. 9, C. P. Code, does not say that the surety shall be relieved from his liability on the dismissal of the suit. If an appeal is preferred against the dismissal of the suit and a decree is passed in appeal, the surety is bound by the appellate decree and remains liable for the decree amount. (*Davis, J.C. and Mehta, A.J.C.*) AILDAS *v.* DAYALOMAL. **171 I.C. 606=31 S.L.R. 165=10 R.S. 114 (1)=A.I.R. 1937 Sind 272.**

———O. 38, R. 9—*Suit dismissed but subsequently restored to file—Attachment if revived—Alienation of property in the meanwhile—Effect.*

There is no authority for the contention that an attachment before judgment which has come to an end with the dismissal of the suit, is restored when the suit is restored to file, in spite of an

C. P. CODE (1908), O. 38, R. 10.

alienation of the property in the meanwhile. (*Burn, J.*) BASAPPA *v.* RUDRAPPA. **180 I.C. 126 (2)=11 R.M. 659 (2)=1939 M.W.N. 639=48 L.W. 763=A.I.R. 1939 Mad. 167=(1938) 2 M. L.J. 1053.**

——**O. 38, R. 10**—*Attachment before judgment and subsequent decree—Attachment in interval of same property by another decree-holder—Earlier attachment, if entitled to priority.*

Where between the dates of attachment before judgment and the decree in a suit, another decree-holder against the same judgment-debtor attaches in the interval the same property of the judgment-debtor, the attachment before judgment though earlier in point of time does not confer any priority over the later attachment. (*Hamilton, J.*) DURGA PRASAD *v.* SEETLA PRASAD TEWARI. **15 Luck. 287=185 I.C. 301=12 R.O. 209 (1)=1939 A.W.R. (C.C.) 320=1939 O.W.N. 1107=A.I.R. 1940 Oudh 80.**

——**O. 38, R. 10**—Construction—"Rights"—Meaning—Contract of sale—Attachment—Subsequent sale in pursuance of contract—If void. *See* C. P. CODE, S. 64. **A.I.R. 1936 Nag. 163.**

——**O. 38, R. 10**—Scope—If controls S. 64—Contract for sale of property—Attachment of property before judgment—Conveyance executed subsequently—If void. *See* C. P. CODE, S. 64. **41 Bom.L.R. 943.**

——**O. 38, R. 10**—Scope and effect of—Sale-deed—Execution—Subsequent attachment of property sold—Deed registered subsequently—Effect—Sale, if affected. *See* REGISTRATION ACT, S. 47. **A.I.R. 1937 Nag. 143.**

——**O. 38, R. 11**—*Attachment actually effected after decree in pursuance of order made before judgment—Nature of.*

Attachment actually made after judgment cannot be deemed in law to be made before judgment, simply because it happens that the application for such attachment was made before the judgment was actually passed. The legal effect of the attachment comes into being only when the attachment is actually made, and its nature is defined also by the time when it is made and not when it is ordered. (*Pandrang Row and Menon, JJ.*) RAMANADHAN CHETTIAR *v.* VEERAPPA CHETTIAR. **173 I.C. 468=10 R.M. 591=A.I.R. 1937 Mad. 84.**

——**O. 38, R. 11**—*Attachment before judgment—When becomes attachment in execution—Application by decree-holder—If necessary.*

There must be some unmistakable declaration of the decree-holder's intention to execute the decree, before the attachment before judgment can become an attachment in execution of the decree. In ordinary cases such an election or declaration of intention would be made by presenting an execution application, but in every case it is not necessary that it should be done in this manner and in no other. If intention to execute can be inferred by other circumstances it is sufficient. (*Pandrang Row and Menon, JJ.*) RAMANADHAN CHETTIAR *v.* VEERAPPA CHETTIAR. **173 I.C. 468=10 R.M. 591=A.I.R. 1937 Mad. 84.**

——**O. 38, R. 11**—Scope—If excuses an application for execution. *See* C. P. CODE, S. 73 AND O. 38, R. 11. **1938 Rang.L.R. 565.**

——**O. 38, R. 11**—Scope and effect of—Attachment before judgment—Application for execution

C. P. CODE (1908), O. 39, R. 1.

—Dismissal for default—If terminates attachment. *See* C. P. CODE, O. 21, R. 57. **18 Pat. L.T. 585.**

——**O. 38, R. 12**—*"Agriculturist"—Who is—If means same as in S. 60.*

The word "agriculturist" in O. 38, R. 12, C. P. Code, must be interpreted in the same sense as in Ss. 60 and 61, C. P. Code, and not differently. An "agriculturist" is a tiller of the soil who is unable to maintain himself otherwise. (*Pandrang Row, J.*) VENKATASUBBAMMA *v.* NARAYANA REDDI. **178 I.C. 679=11 R.M. 488=48 L.W. 380=1938 M.W.N. 1139 (2)=A.I.R. 1938 Mad. 922=(1938) 2 M.L.J. 487.**

——**O. 39 and S. 94**—*Order 39, if exhaustive.*

It has sometimes been held that O. 39, Rr. 1 and 2 are not exhaustive of the Court's power to grant a temporary injunction. But they do not seem to have given due weight to the words "if it is so prescribed" occurring in the opening para. of S. 94 of C. P. Code—"Prescribed" in that section clearly means prescribed by the rules. (*Varadachariar, J.*) MURUGESA MUDALI *v.* ANGAMUTHU MUDALI. **176 I.C. 688=11 R.M. 149=46 L.W. 956=1937 M.W.N. 1229=A.I.R. 1938 Mad. 190=(1937) 2 M.L.J. 888.**

——**O. 39 and S. 151**—*Powers of Court apart from* O. 39—In forma pauperis *applicant praying for injunction before question of pauperism is decided—Jurisdiction of Court to grant prayer.*

Apart altogether from O. 39, C. P. Code, the Court has ample jurisdiction to pass an order providing for the protection and security of the property which is the subject-matter of the litigation. Where an applicant for leave to sue *in forma pauperis* also applied for an injunction to restrain the opposite party from dealing with the subject-matter of the litigation, it was held that the Court had jurisdiction to grant the necessary relief, though the question of pauperism had not been decided and the proceedings had not been numbered as suit. (*Bennet and Verma, JJ.*) DHANESHWAR NATH TEWARI *v.* GHANSHYAM DHAR. **I.L.R. (1940) All. 201=187 I.C. 813=12 R.A. 570=1940 A.W.R. (H.C.) 74=1940 A. L.J. 81=A.I.R. 1940 All. 185.**

——**O. 39**—Powers exercisable under and powers exercisable under Ss. 12 and 43, Guardian and Wards Act—Distinction. *See* GUARDIAN AND WARDS ACT, Ss. 12 AND 43 AND C. P. CODE, O. 39. **1940 N.L.J. 157.**

——**O. 39**—Scope—Court's powers under—Application for attachment before judgment—Undertaking by defendant—Acceptance by Court and dismissal of application—Defendant subsequently acting in breach of undertaking—Jurisdiction to punish. *See* C. P. CODE, S. 94 (*c*) AND O. 39. **44 L.W. 714.**

——**O. 39, Rr. 1 and 2**—Applicability—Administration suit—Decree—Order restraining execution of decree by creditor—Power of Court to pass. *See* C. P. CODE, O. 20, R. 13. **1938 M. W.N. 1127.**

——**O. 39, R. 1**—*Applicability—"Wrongfully sold in execution of a decree"—Sale of property under mortgage decree—Injunction to restrain at instance of unsuccessful claimant—If can be granted.*

Where in execution of a good and valid mortgage decree, the decree-holder proceeds to sell

C. P. CODE (1908), O. 39, R. 1.

the property mortgaged as the property of his judgment-debtor, and another person having been defeated in a claim case institutes a suit to declare that the property is his. O. 39, R. 1, C. P. Code, cannot be applied to the case so as to entitle the latter to apply for a temporary injunction to prevent the sale. The property cannot, at the moment of his application to the Court, be said to be in danger of being wrongfully sold in execution of a decree. Neither on the ground of balance of convenience nor in law can an injunction be granted in such a case.

Manohar Lal, J. (*Obiter.*)—It may be that the Court will invoke its inherent powers to stay the execution of the decree if the circumstances are coercive that the balance of convenience is in favour of the applicant or that the stay is necessary to prevent an abuse of the process of the Court. (*Wort and Manohar Lal, JJ.*) DALIP NARAYAN SINGH *v.* AMARBAS KUER. **16 Pat. 738=1938 P.W.N. 232=175 I.C. 629=4 B.R. 617=11 R.P. 3=19 Pat.L.T. 256=A.I.R. 1938 Pat. 228.**

———**O. 39, R. 1**—*Application under—Maintainability—Proceeding for grant of letters of administration—Inherent jurisdiction of High Courts.*

Before an application for injunction can be granted under O. 39, R. 1, the applicant must show that the property with respect to which an injunction is prayed for is property in dispute in a suit. In a proceeding for the grant of letters of administration, it cannot be said that there is any property in dispute. No question regarding title to property can be decided in an application for probate or letters of administration. Hence, an application in such proceeding for an order restraining certain authorities from making payments of money lying with them which are alleged to appertain to the estate of deceased and restraining certain person from withdrawing or receiving payments of the aforesaid money is not one which can be brought within the scope of O. 39, R. 1. Although the application cannot be brought within the scope of O. 39, R. 1, a chartered High Court is not powerless to grant an injunction otherwise than in accordance with the provisions of O. 39, R. 1 if a proper case is made out. It has an inherent jurisdiction to grant injunctions operating *in personam* under circumstances and conditions other than those set out in the Code of Civil Procedure where the ends of justice so require. (*Sen, J.*) *In the goods of* STANLEY AUSTIN CARDIGAN MARTIN. **187 I.C. 886=12 R.C. 629=A.I.R. 1939 Cal. 642.**

———**O. 39, R. 1**—*Court refusing injunction on previous application—If can go behind its order.*

Although a Court has refused to issue a temporary injunction on a previous application, it can, if new circumstances arise, go behind that order and make another order which the exigencies of the case require. (*Din Mahomed, J.*) ISHAR DAS *v.* FIRM OF BHAION KI DOKAN. **187 I. C. 304=12 R.L. 450=41 P.L.R. 823=A.I.R. 1940 Lah. 39.**

———**O. 39, R. 1**—*Defendant firm adopting name similar to that of plaintiff firm—Temporary injunction—If justified.*

Where the defendant firm has adopted a name so similar to that of the plaintiff firm as is likely to cause confusion in the mind of the intending purchasers, the harm thus caused to the plaintiff firm is *prima facie* such as no compensation would be enough to counter-balance it, and the Court would, therefore, be justified in granting a temporary injunction. (*Din Mahomed, J.*) ISHAR DAS *v.* FIRM OF BHAION KI DOKAN. **187 I. C. 304=12 R.L. 450=41 P.L.R. 823=A.I.R. 1940 Lah. 39.**

———**O. 39, R. 1**—*Discretion of Court—Interference in appeal.*

The appellate Court should be very reluctant in interfering with the discretion exercised by the lower Court in granting temporary injunction. (*Mir Ahmad, A.J.C.*) STANDARD OF INDIA INSURANCE CO., LTD., PESHAWAR *v.* STANDARD LIFE ASSURANCE CO., CALCUTTA. **160 I.C. 569=8 R. Pesh. 120=A.I.R. 1936 Pesh. 11.**

———**O. 39, R. 1 (Rangoon Amendment)**—*Effect of amendment—Suit under O. 21, R. 63 or appeal from such suit—Power of Court to grant temporary injunction to prevent sale of property under attachment.*

The result of the amendment of O. 39, R. 1, *prima facie*, is that the Court in which a suit under O. 21, R. 63 is pending or the Court in which an appeal from such a suit is pending does not enjoy the power of granting a temporary injunction to prevent the sale of the property under attachment in the execution case which led to the suit and then to the appeal. The reason for the present Rule is this. The claimant in a proceeding under O. 21, R. 58 who files a suit under O. 21, R. 63 is not the judgment-debtor against whom execution is taken; and by sale of the property attached in the execution case his right, title or interest in the property cannot be impaired, for it is only the right, title and interest of the judgment-debtor which is conveyed to the purchaser at the sale. If his suit or his appeal succeeds, then the interests which are declared in his favour are to be deemed not to have been disposed of by the sale. There is obviously no good ground for thinking that a sale made in the execution case during the pendency of a suit under O. 21, R. 63, or an appeal from such a suit will be injurious to the right, title and interest, if any, of the claimant in the property sold. Hence an application for stay of the sale and also of other steps taken or in contemplation in aid of execution, cannot be granted; nor can it be granted under S. 151, C. P. Code, as the order sought for is not necessary for the ends of justice or to prevent abuse of the process of the Court. (*Mya Bu and Mackney, JJ.*) MOHAMMAD HAJEF *v.* VEDNATH SINGH. **174 I.C. 503=10 R.R. 411=A.I.R. 1938 Rang. 21.**

———**O. 39, R. 1**—*Injunction apart from—Power of Court to grant—Agreement as to forum for decision of disputes—Suit in another Court—Injunction restraining its prosecution—If can be issued.*

Courts have an inherent jurisdiction to issue an injunction in a proper case to prevent an abuse of the process of Court. Where the circumstances require it, the Courts have power to act *ex debito justitiae* in order to do real and substantial justice. Where the parties agreed that disputes between them should be agitated in a particular Court, and one of them in flagrant violation of the agree-

ment filed a suit in another Court, it was held that an injunction could issue to prevent its prosecution in that Court. (*Bennet and Verma, JJ.*) BECHHARAM BABURAM *v.* BALDEO SAHAI SURAJMAL. **I.L.R. (1940) All. 232=189 I.C. 268=1940 A.L.J. 188=13 R.A. 86=1940 A.W.R. (H.C.) 178=A.I.R. 1940 All. 241.**

——O. 39, R. 1—*Injunction to restrain sale in execution—If can be granted—Mortgage decree—Injunction to restrain execution—Pendency of appeal in another suit—If a ground.*

An injunction can only be granted under O. 39, R. 1, C. P. Code, on certain grounds specified therein. A property cannot be said to be in danger of being wrongfully sold in execution of a decree, when the property is the property of a party to the decree, who is also a party to the suit or proceeding in which the injunction is applied for. A decree in a mortgage suit is a good decree until it is shown in appeal to be a wrong decree, and the decree-holder can therefore take all steps which he is entitled to take under the law. The fact that an appeal is pending against the decision in another suit does not affect the matter or justify the grant of an injunction. When a decree has been passed against a party who is himself seeking the injunction, the Court has no jurisdiction whatever to grant the injunction, merely because an appeal is pending in another suit, on the ground that the property is in danger of being wrongfully sold in execution. (*Beasley, C.J. and Stodart, J.*) SANKARA AIYAR *v.* MAHOMED GANI ROWTHER. **59 Mad. 744=161 I.C. 721=8 R.M. 854=43 L.W. 383=1936 M. W.N. 51=A.I.R. 1936 Mad. 276=70 M.L.J. 257.**

——O. 39, R. 1—*Interim injunction—Granting of—Conditions—Discretion—Applicant failing to make out even* prima facie *case.*

An *interim* injunction should not be granted merely because the defendant against whom it is asked for would be no worse off for it. To grant an injunction merely on that ground is not a proper exercise of judicial discretion. Where the applicant fails to make out even a *prima facie* case of loss, the grant of an *interim* injunction is entirely unwarranted. (*Dhavle and Agarwala, JJ.*) GOPALJI JHA *v.* GAJENDRA NARAYAN SINGH. **15 Pat. 404=162 I.C. 210=8 R.P. 513=1936 P. W.N. 109=17 Pat.L.T. 109=A.I.R. 1936 Pat. 226.**

——O. 39, R. 1—*Interlocutory injunctions—*Ex parte *order—Willingness to give undertaking to indemnify.*

Interlocutory injunctions can be very readily granted on the side that is asking for them undertaking to pay the person damnified by the granting of the injunction any damage that that person may sustain. Where no such undertaking is forthcoming, injunction should not be granted *ex parte* except in very rare circumstances. (*Stone, C.J. and Bose, J.*) MADHO RAO NARAYANARAO *v.* YADO RAO TUKARAM. **184 I.C. 570=12 R.N. 117=1939 N.L.J. 483=A.I.R. 1940 Nag. 45.**

——O. 39, Rr. 1 and 2—*Lawful exercise of right—If can be restrained—Mortgagor seeking relief under Agriculturists' Relief Act—Mortgagee suing to enforce mortgage—Latter, if can be restrained from proceeding with his legal remedy.*

The lawful exercise of a right vested in a person cannot be legally restrained by the Court under O. 39, R. 1, C. P. Code. Where a mortgage comprised of properties in United Provinces and Bombay and the mortgagor files a suit under S. 33 of the United Provinces Agriculturists' Relief Act and thereafter the mortgagee files a suit on the mortgage to enforce his rights, in the Bombay province, the action of the mortgagee could not be considered to be anything illegal or even improper and his enforcement of the mortgage could never be characterised as an attempt to waste or damage any property. In such a case the Court in United Provinces would not be justified in issuing an injunction under O. 39, R. 1 or R. 2 restraining the mortgagee from enforcing his legal remedy. (*Ismail, J.*) PRABHU DAYAL *v.* LAL DASS MAUGAN LAL. **I.L.R. (1939) All. 825=1940 O.L.R. 194=187 I.C. 305=12 R.A. 512=1939 A.W.R. (H.C.) 561=1939 A.L.J. 688=A. I.R. 1939 All. 643.**

——O. 39, R. 1—Scope—Suit by Hindu reversioners to declare invalid alienation by widow—Application for *interim* injunction to restrain widow from making further alienations—Maintainability—*Interim* injunction—If can be granted. *See* COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA), S. 7 (*iv*) (*c*) AND SCH. (*c*), ART. 17. **20 Pat.L.T. 855.**

——O. 39, R. 1—*Suit by unsuccessful claimant under O.* 21, *R.* 63—*Temporary injunction restraining execution sale—Power of Court to grant.*

In a suit filed by an unsuccessful claimant under O. 21, R. 63, C. P. Code, the Court has power to grant a temporary injunction under O. 39, R. 1, C. P. Code, restraining the decree-holder from selling the property, which is the subject-matter of the suit, in execution of his decree. The principle underlying O. 39, R. 1 is to prevent multiplicity of judicial proceedings, and in each case the Court will have to consider whether there is a danger of the property being wrongfully sold in execution of the decree. The mere fact that the plaintiff lost the claim case is not enough to indicate that the suit is a frivolous one or that it is an abuse of the process of the Court. (*Bartley and Nasim Ali, JJ.*) JODHANPRASAD BHAKAT *v.* HEERALAL AGARWALLA & Co. **42 C. W.N. 409=A.I.R. 1938 Cal. 371.**

——O. 39, R. 1—*Temporary injunction—Grant of—Grounds for—Inconvenience—Sufficiency—"Irreparable injury"—Owner selling building plots approved by Municipal Committee—Committee issuing notice to owner to construct certain roads and if he failed to do so, committee would construct them and recover damages from owner—Injunction restraining committee—Right to.*

The basic principle on which injunctions should be issued is that the plaintiff must show that an injunction is necessary to protect him from irreparable injury and that mere inconvenience is not enough; by the term "irreparable injury" is meant injury which is substantial and could never be remedied or adequately remedied or atoned for by damages. Plaintiff as owner sold certain land, divided into building plots. The lay-out was approved by the Municipality. The Municipal Committee gave notice calling upon him to construct certain external and internal roads and informed that if he failed to do so, the committee

C. P. CODE (1908), O. 39, R. 1.

would construct the roads and recover the cost of doing so from the plaintiff. The latter brought a suit and applied for a temporary injunction to restrain the committee from acting in that way.

Held, that the inconvenience caused to the plaintiff by refusing to issue an injunction would not be irreparable and could be obviously remedied by damages. Therefore he was not entitled to the injunction claimed by him. (*Pollock, J.*) SECRETARY, CIVIL STATION SUB-COMMITTEE, NAGPUR *v.* GOVINDRAO. **I.L.R. (1937) Nag. 313 =170 I.C. 239=10 R.N. 58=A.I.R. 1937 Nag. 137.**

———**O. 39, R. 1**—*Temporary injunction—Grant of—Necessity to show* prima facie *case—Interference with grant of injunction in revision.*

An applicant for a temporary injunction must show that he has a *prima facie* case. Where the Court grants such an injunction in the absence of a *prima facie* case, its order is vitiated by material irregularity justifying interference by the High Court in revision. (*Burn, J.*) MEYYAPPA CHETTIAR *v.* GOPALAKRISHNA IYER. **1939 M.W.N. 621=A.I.R. 1939 Mad. 750.**

———**O. 39, Rr. 1 and 2**—Temporary injunction —Granting of—Duty of Court—Suit to declare that a certain article of a temple is sacred and for injunction to restrain sale thereof. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 73. **70 M.L.J. 315.**

———**O. 39, R. 1**—*Temporary injunction—Granting of—Principles governing.*

The principles governing the issue of temporary injunctions are as follows: The applicant must show a fair *prima facie* case in support of the right claimed and an actual or threatened violation of that right, productive of irreparable or at least serious damage; his conduct must be such as not to disentitle him to assistance; it should be fair and honest, and in particular there must be no acquiescence or delay. There must be a greater convenience in granting than refusing the injunction; and equally efficacious relief must not be obtainable by any other usual mode of proceedings, except in case of breach of trust. (*Mir Ahmad, A.J.C.*) STANDARD OF INDIA INSURANCE CO., LTD. *v.* STANDARD LIFE ASSURANCE CO., CALCUTTA. **160 I.C. 569=8 R. Pesh. 120= A.I.R. 1936 Pesh. 11.**

———**O. 39, R. 1**—*Temporary injunction—Sale in contravention of—If a nullity.*

A temporary injunction under the provisions of Rule 1, O. 39 is not a stay order issued by a Court competent to stay execution proceedings under any provision of the Code authorizing such an order. The effect of non-compliance with an injunction issued under O. 39, R. 1 is to make the offender liable to the punishment prescribed in O. 39, R. 2 (3) and a completed sale in contravention of an injunction under O. 39, R. 1 is not a nullity as being without jurisdiction. A temporary injunction under O. 39 is not a mandatory direction to a Court, as is a stay order of the kind provided for by the Procedure Code, but is an order directed against a particular person which can be issued only in the circumstances described in R. 1. (*Coldstream, J.*) LAL CHAND *v.* SOHAN LAL. **179 I.C. 123=11 R.L. 530=40 P.L.R. 518=A.I.R. 1938 Lah. 220.**

C. P. CODE (1908) O. 39, R. 2.

———**O. 39, R. 1**—*Temporary injunction—Taking formal delivery in execution of decree—If an act of disobedience of injunction.*

The taking of delivery implied in the passing of the delivery receipt, is not punishable as an act of disobedience of an order of injunction under O. 39, R. 1. The terms of O. 39, R. 1 would not include the mere act of taking possession in execution of a decree. (*Varadachariar, J.*) MURUGESA MUDALI *v.* ANGAMUTHU MUDALI. **176 I.C. 688=11 R.M. 149=46 L.W. 956=1937 M.W.N. 1229=A.I.R. 1938 Mad. 190=(1937) 2 M.L.J. 888.**

———**O. 39, R. 1**—*Temporary injunction—When may be granted.*

The power of a Court is very wide with respect to the issue of a temporary injunction and the injunction can be issued in any suit if it is proved to the satisfaction of the Court that the property in dispute in the suit is being wrongfully sold in the execution of a decree. There is no restriction in O. 39, R. 1 that the suit should be for the issue of a perpetual injunction if a temporary injunction is to be granted. (*Mir Ahmad, J.*) MT. TAJBARO *v.* GOPICHAND SINGH. **177 I.C. 917 =11 R. Pesh. 42=A.I.R. 1938 Pesh. 67.**

———**O. 39, R. 1**—*"Wrongfully sold in execution"—Meaning of—Sale in execution of decree by person entitled to execute same—Injunction to restrain—If can issue.*

It is impossible to contend that a person who has got a decree, and is entitled to execute it, can be said to be wrongfully selling in execution because some other person has brought an action through which he hopes to succeed in getting possession of the property which is being sold; an injunction to restrain such a sale cannot be granted. (*Wort, J.*) RAMKESHWAR DAS *v.* BALDEO SINGH. **179 I.C. 112=11 R.P. 335=5 B.R. 197=1938 P.W.N. 220=A.I.R. 1938 Pat. 606.**

———**O. 39, R. 1 (a)**—*Applicability and scope—Application by defendant—Competency.*

An application under O. 39, R. 1 (*a*), C.P. Code, can be made on behalf of a defendant who is entitled to come to the Court if any such act as is referred to in the rule is committed by the plaintiff. (*Abdur Rahman, J.*) SIVAKAMI ACHI *v.* NARAYANA CHETTIAR. **1939 M.W.N. 402=49 L.W. 441=A.I.R. 1939 Mad. 495=(1939) 1 M.L.J. 519.**

———**O. 39, R. 1 (as amended in 1937), Proviso**—Scope and effect—If adds to the law under Specific Relief Act. *See* SPECIFIC RELIEF ACT, S. 56 (*b*). **1938 P.W.N. 220.**

———**O. 39, R. 2**—*Suit for injunction and declaration—Application for injunction almost identical with the relief claimed in Court—If can be granted—Practice—Rule of Court.*

Where the relief asked for by way of an injunction on an interlocutary application is in effect the whole relief that is asked for in the plaint in the suit, the effect of granting the injunction will be to decide the whole suit. It is not a rule, and it is not the usual practice of the Court to grant such an injunction on motion, especially when there is no statement of pleading as to the injury likely to be caused by not getting the injunction or as to the urgency of the matter. (*McNair, J.*) RAMESWAR NATH *v.* THE CALCUTTA WHEAT AND SEEDS ASSOCIATION. **40 C.W.N. 1201.**

C. P. CODE (1908) O. 39, R. 2.

———**O. 39, R. 2**—*Suit for declaration and injunction—Temporary injunction—Grant of—Considerations.*

Where in a suit for a declaration and injunction it is alleged that the defendant accompanied by some person armed with lathis is trespassing on the plaintiff's land and staging demonstration thereon which are calculated to overawe and intimidate the plaintiff and his workmen, temporary injunction under O. 39, R. 2 if prayed for, will be granted, if plaintiff has made out a *prima facie* case and the balance of convenience is on his side. (*Lobo, J.*) DALMIA CEMENT, LTD. *v.* NARAINDAS. **185 I.C. 57=A.I.R. 1939 Sind 256.**

———**O. 39, R. 2**—*Interim injunction made absolute at final hearing—Breach of—Contempt—Persons not parties to suit—If can be proceeded against.*

Where the Government were restrained by an injunction from disturbing the possession of the persons who were in possession of the quarries under their lease, but some persons continued working in the quarry with the permission of Government and though they were not parties to the suit in which injunction was granted, they had thorough knowledge that their presence on the quarry was in breach of the injunction.

Held, that their presence upon the quarry with the permission of the Government was a setting at naught of the order of the Court, and the conduct of those persons was a contempt of the authority of the Court whether or not they were themselves bound by the injunction. (*Courtney Terrell, C.J., Mohammad Noor and Varma, JJ.*) KUCHWAR LIME AND STONE CO. *v.* SECRETARY OF STATE. **16 Pat. 159=166 I.C. 966=9 R.P. 361 =1937 P.W.N. 102=3 B.R. 248 (2)=18 Pat. L.T. 95=A.I.R. 1937 Pat. 65 (S.B.).**

———**O. 39, R. 2**—*Temporary injunction—Grant of—Principles governing.*

In a suit for a perpetual injunction a temporary injunction is to be granted or refused on a consideration of the following points: (1) Has the plaintiff made out a good *prima facie* case? (2) On which side lies the balance of convenience? A person's title to a plot was based on a deed of conveyance. That deed of conveyance gave him a right of passage to certain road. The nature and dimensions of that passage were not mentioned in the deed of conveyance. *Prima facie* therefore he was entitled to the passage as it existed on the date of conveyance; on the date of the conveyance that passage was a passage which connected his property with the road and ran between two compound walls. That passage was 20 feet wide. The defendant started building operations by which he was encroaching upon this passage to the extent of five feet.

Held, that the owner of the plot had every right to say that having made out a *prima facie* case he was entitled to a temporary injunction. (*Lobo, J.*) BRIJLAL JAGANNATH *v.* J. R. SUKIA. **179 I.C. 626=11 R.S. 143=A.I.R. 1939 Sind 17.**

———**O. 39, R. 2**—*Temporary injunction—Grant of—Principles—Plaintiff, if need have pecuniary interest.*

Relief by way of temporary injunction is in the discretion of the Court, but that discretion is not unfettered and it must be exercised in accordance with the principles generally recognised. One of these principles is that the Court will not grant an interlocutory injunction, except in cases where there is some pecuniary or proprietary right of the plaintiff which requires protection. (*Panckridge, J.*) SIDDESHWAR DATTA *v.* MANMATHA NATH RAY CHAUDHURI. **I.L.R. (1937) 1 Cal. 382=41 C.W.N. 755=172 I.C. 800=10 R.C. 427.**

C. P. CODE (1908), O. 40, R. 1.

———**O. 39, R. 2 (3)**—*Applicability—Injunction issued under R.* 1.

The penalty prescribed in O. 39, R. 2 (3), C. P. Code, by way of detention in civil prison of the person committing a breach of an injunction applies to cases of injunctions issued under O. 39, R. 1, also though there is no specific provision to that effect in that rule. (*Macpherson and Mahomed Noor, JJ.*) JANG BAHADUR SINGH *v.* CHHABILA KOIRI. **15 Pat. 320=160 I.C. 347= 8 R.P. 355=17 Pat.L.T. 61=A.I.R. 1936 Pat. 23.**

———**O. 39, R. 4**—*Order on application to set aside* ex parte *injunction—Appealability—Test.*

Where an order for an injunction has been passed and an application for its discharge is made, the order if it allows the application is clearly appealable because it results in an order being discharged. Also if the application is dismissed still the order is made under O. 39, R. 4 which attracts O. 43, R. 1 (*r*) which makes the order appealable. (*Stone, C.J. and Bose, J.*) MADHO RAO NARAYANRAO *v.* YADO RAO TUKARAM. **184 I.C. 570=12 R.N. 117=1939 N.L.J. 483= A.I.R. 1940 Nag. 45.**

———**O. 39, R. 6**—Application under—If one for execution. *See* C. P. CODE, O. 21, R. 11. **40 C.W.N. 1317.**

———**O. 39, R. 7**—*Applicability—Application for leave to sue as pauper—If "suit"—Application for appointment of commissioner to take inventory—Maintainability.*

An application for leave to institute a suit in *forma pauperis* is a suit for purposes of O. 39, R. 7, C. P. Code, and the parties in a contemplated pauper suit who have petitioned to have their suit admitted under O. 33, C. P. Code, are therefore entitled to the relief of appointment of a commissioner or receiver for the purpose of taking an inventory of properties. (*Gentle, J.*) CHIDAMBARAM *v.* NATARAJA MUDALIAR. **179 I.C. 802=11 R.M. 628=48 L.W. 688=1938 M.W.N. 1254=A.I.R. 1939 Mad. 80=(1939) 1 M.L.J. 96.**

———**O. 39, R. 7**—*Scope—Order that situation should not be altered pending suit—Legality.*

An order by a Court, in reference to certain constructions over a site which is in dispute directing that the situation then existing should not be altered pending disposal of a suit is an order which the Court is competent to pass under O. 39, R. 7. (*Weston.*) BISHEN LAL *v.* SRI NARAIN. **1935 A.M.L.J. 117.**

———**O. 39, R. 9**—Possession given under—Nature and effect of—If conclusive in proceedings in Criminal Court. *See* CR. P. CODE, Ss. 107 AND 145. **1938 P.W.N. 526.**

———**O. 40, R. 1**—Appeal—Appointed receiver refusing to act—Appeal against appointment—If lies. *See* C. P. CODE, O. 43, R. 1, CL. (*s*). **A.I.R. 1938 Lah. 10.**

———**O. 40, R. 1 and O. 43, R. 1 (S)**—*Appeal—Application for appointment—Prayer—Form—Proper order to pass—Order when appealable.*

C. P. CODE (1908), O. 40, R. 1.

(Per *Stone, C.J.*) An application for the appointment of a receiver should not merely ask for the appointment of a receiver but should name out the person whom the applicant wants to be appointed as a receiver. If the application does not name out a receiver the Court should adjourn the matter for the naming of a receiver and not make an order granting the application and still leaving the matter at large as to who the receiver ought to be. There should not be two distinct orders, one stating that it is just and convenient to appoint a receiver and then a later order appointing a particular person as a receiver.

(Per *Niyogi, J.*) An order stating that it is just and convenient to appoint a receiver merely expresses the opinion of the Judge as to the expediency of the appointment of a receiver. Such an order is not appealable. The only order which is appealable is the order appointing a receiver by name and that alone would give the aggrieved party a right of appeal under O. 43, R. 1 (*s*), C. P. Code. (*Stone, C.J. and Niyoga, J.*) GOPALRAO *v.* DEVIDAS. **I.L.R. (1938) Nag. 174=174 I.C. 148=10 R.N. 346=A.I.R. 1938 Nag. 540.**

———**O. 40, R. 1**—*Appeal—Interference with discretion—Order appointing receiver.*

When discretion is exercised by a Court in the matter of appointment of a receiver after considering the facts of the case, the discretion will not be interfered with in appeal, unless it is shown that it was improperly exercised or that the appointment contravenes any principles of law. (*Tek Chand and Bhide, JJ.*) PAHLAD DASS BHAGWAN DASS *v.* SETH SHANTI SAGAR. **42 P. L.R. 421=A.I.R. 1940 Lah. 325.**

———**O. 40, R. 1 and O. 43, R. 1 (*s*)**—*Appeal—Order dismissing application for removal of receiver—If appealable.*

In view of S. 16 of the Burma General Clauses Act, O. 40, R. 1, must be regarded as giving authority to the Court to remove the receiver; and if an application is made to remove the receiver then the dismissal of that application must be regarded as an order passed under O. 40, R. 1 and a right of appeal is given by O. 43, R. 1 (*s*) generally to all orders passed under O. 40, R. 1. (*Baguley and Mosely, JJ.*) ABDUL KADER *v.* R. M. P. CHETTYAR FIRM. **1938 Rang. L.R. 586=178 I.C. 924=11 R.R. 289=A.I.R. 1938 Rang. 387.**

———**O. 40, Rr. 1 and 4**—*Applicability—Accounts by third party during receiver's administration.*

Neither R. 1 nor R. 4 of O. 40 has any application to accounts from a third party relating to the period of a receiver's administration and the non-rendition of accounts by third party during that period is not appealable under any of these provisions of law. (*Addison and Din Mohammad, JJ.*) SHANKAR DAS *v.* OFFICIAL RECEIVER. **179 I.C. 637=11 R.L. 601=A.I.R. 1938 Lah. 328.**

———**O. 40, R. 1**—*Applicability—Decree against tenant—Execution—Receiver to realise income of occupancy and exproprietary tenancies of judgment-debtor—Power of Court to appoint.*

Though O. 40, C. P. Code, governs the appointment of receivers in execution, R. 1 (2) of O. 40 bars the appointment of a receiver to take possession of, and to realise the income from, the occupancy and exproprietary tenancies of a judgment-debtor. To so appoint is contrary to the Tenancy Act and is tentamount to an ejectment of the tenant. (*Sulaiman, C.J. and Bennet, J.*) AMIRUDDIN *v.* PANCHAITI AKHARA. **I.L.R. (1937) All. 542=1937 A.L.J. 267=1937 A.W.R. 197=1937 R.D. 210=169 I.C. 181=1937 A.L.R. 474=9 R.A. 718=A.I.R. 1937 All. 389.**

———**O. 40, R. 1**—Applicability—Special judge acting under U. P. Encumbered Estates Act. *See* U. P. ENCUMBERED ESTATES ACT. **1937 A.W.R. 1125.**

———**O. 40, R. 1**—*Applicability—Suit under S. 9, Specific Relief Act—Receiver to collect rents—Power of Court to appoint—Order of appointment—Appeal—If lies.*

In a suit for possession under S. 9 of the Specific Relief Act, which is a suit of a limited character and in which no mesne profits pending suit can be ordered, it is not competent to the Court to appoint a receiver to collect the rents of the property in dispute. If an order appointing a receiver is passed in such a suit, it is illegal and without jurisdiction, and an appeal lies against such order under O. 43, R. 1 (*s*). The bar under the last paragraph of S. 9 of the Specific Relief Act does not apply, as the order is without jurisdiction. (*Davis, J.C. and Mehta, A.J.C.*) FOUJMAL *v.* BIKHIBAI. **31 S.L.R. 28=10 R.S. 54=170 I.C. 12=A.I.R. 1937 Sind 161.**

———**O. 40, R. 1**—*Application under by plaintiff—Duty to prove that defendant had no* prima facie *title.*

On an application under O. 40, R. 1 filed by the plaintiff for appointment of a receiver, the plaintiff, in order to succeed, must show that *prima facie* the defendant has no title to the property and that he (the plaintiff) has the title. (*Thomas, J.*) ALI RAZA KHAN *v.* NAWAZISH ALI KHAN. **161 I.C. 838=8 R.O. 351=1936 O. L.R. 213=1936 O.W.N. 466.**

———**O. 40, R. 1**—*Appointment of receiver—Application for—Burden of proof.*

In an application praying for the appointment of a receiver, the burden of proof is on the applicant to show that it is just and convenient that a receiver should be appointed, and it is not for the opposite party to show cause why no receiver should be appointed. (*Nanavutty and Zia-Ul-Hasan, JJ.*) MANRAJ KUNWAR *v.* S. P. SHUKLA. **167 I.C. 302=9 R.O. 381=1937 O.W.N. 243=1937 O.L.R. 105=A.I.R. 1937 Oudh 232.**

———**O. 40, R. 1**—*Appointment of receiver—Discretion of trial Court—Interference in appeal.*

The appointment of a receiver is a matter entirely within the discretion of the trial Judge and unless it can be shown by the appellant that the trial Judge has not exercised a judicial discretion in the matter, he cannot succeed in his appeal against an order rejecting his application for the appointment of a receiver. (*Nanavutty and Zia-ul-Hasan, JJ.*) ALI RAZA KHAN *v.* NAWAZISH ALI KHAN. **166 I.C. 983=9 R.O. 356=1937 O.L.R. 83=1937 O.W.N. 197=A.I.R. 1937 Oudh 280.**

———**O. 40, R. 1**—Appointment of Receiver—Effect of—If involves transference of ownership—Duty to report to Collector under U.P. Land

C. P. CODE (1908), O. 40, R. 1.

Revenue Act. *See* U.P. LAND REVENUE ACT, Ss. 33 (2), 34 AND 38. **1936 R.D. 238.**

———**O. 40, R. 1**—*Appointment of Receiver—Effect of—Rights of attaching creditor—Debt attached by creditor after Receiver is appointed but before he takes possession—Creditor's right, if postponed to that of Receiver.*

The appointment of a Receiver, unless perfected by his taking possession of the property has no effect on the right of an attaching creditor. Accordingly an attachment of property made after the appointment of a Receiver but before he takes possession of the property would be a valid attachment which would have priority over the claims of the Receiver. This would be so not only when the property is immovable property but also when it is a debt. (*McNair, J.*) LAKSHMINARAIN *v.* AMAR NATH. **I.L.R. (1937) 2 Cal. 440=41 C.W.N. 1074.**

———**O. 40, R. 1**—*Appointment of Receiver—Effect—Property in possession of Receiver—Suit for possession of—Sanction of Court—Necessity.*

Where an estate is in the possession of a receiver appointed by Court, a suit for possession of the estate from that receiver can only be brought with the leave of Court. It is necessary for the plaintiff to apply to the Court which has appointed the receiver for sanction for the purpose of bringing the action for possession of the estate. Where property is in possession of an officer of the Court, if there are legal or equitable rights in that property which are not vested in the parties to the action or the persons before the Court, and which are not the subject of the administration then going, then the person who claims to enforce those rights must apply for leave to enforce them. Whether such right be a right to take possession, or a right to bring an action, or a right to do various other things, the Court requires an application to be made to it for leave to enforce the same. If no such sanction is obtained, the action commenced without the sanction must fail. (*Wort and Manohar Lall, JJ.*) NRISHINGHA CHARAN NANDY CHOUDHURY *v.* ASHUTOSH DEO GHATWAL. **178 I.C. 762=5 B.R. 129=11 R.P. 257=19 Pat.L.T. 35=A.I.R. 1938 Pat. 487.**

———**O. 40, R. 1**—Appointment of receiver—Equitable execution—Considerations. *See* C.P. CODE, S. 51 AND O. 21, R. 11 AND O. 40, R. 1. **1939 O.W.N. 206.**

———**O. 40, R. 1 and S. 60 (1) (n)**—*Appointment of receiver—Equitable execution—Principles—House in which judgment-debtor has right of residence—If can be attached.*

A person seeking 'equitable execution' by appointment of receiver must show that he was met by difficulties arising from the nature of the property, which prevented his obtaining relief at law. One principle to be applied is to see whether in lieu of the assets the amount due under the decree is likely to be realized within a reasonable time from the profits of the attached property. Another principle is that such an appointment should appear in the circumstances to be the best course both for the creditor and the debtor. Owing to a dispute between the father and the son, along with other property for his maintenance, the son was given the right of residence in a certain house, with no power to transfer the same. In execution of a decree against him the house was attached. It was contended by him that it was not liable to attachment and sale under S. 60 (1) (*n*), C.P. Code. The son did not reside in the house but it was let out to tenants.

Held, that though the son's right to residence in the house was not liable to attachment and sale under S. 60 (1) (*n*), still as he did not reside in the house and the house was let out, there was no likelihood of any inconvenience being caused to him if a receiver was appointed for the same. It being just and convenient, a receiver could be appointed to realize the rent of the house with a direction to the receiver that the surplus remaining after defraying the incidental expenses and his own remuneration should go towards the satisfaction of the decretal amount. (*Addison and Din Mohammad, JJ.*) SANT SINGH *v.* SAIN DAS. **18 Lah. 486=175 I.C. 447=10 R.L. 739=39 P.L.R. 839=A.I.R. 1937 Lah. 433.**

———**O. 40, R. 1**—*Appointment of receiver—Equitable mortgage—Proof of existence of mortgage and interest in arrears—Necessity.*

The possession of deeds under circumstances consistent with a deposit by way of security raises a *prima facie* case for the appointment of a receiver on an interlocutory application; and in addition to proving that there is a *prima facie* mortgage it is incumbent upon the plaintiff to prove that, interest is in fact in arrear. (*Roberts, C.J. and Leach, J.*) V. M. R. P. FIRM *v.* NAGOOR GANNY. **173 I.C. 452 (1)=10 R.R. 347 (1)=A.I.R. 1937 Rang. 399.**

———**O. 40, R. 1**—*Appointment of receiver—Execution proceedings to be transferred to Collector.*

The appointment of a receiver to take charge of the judgment-debtor's property is an exceptional remedy and when there is admittedly ample property of the judgment-debtor available for satisfaction of the decree, there is no good reason to apppint a receiver. Besides, when the execution proceedings are to be transferred to the Collector a receiver cannot be appointed. (*Bhide, J.*) NARAIN DASS GULAB SINGH *v.* PATIALA DURBAR. **A.I.R. 1940 Lah. 345.**

———**O. 40, R. 1**—*Appointment of receiver—Ground for—Apprehension that defendant would wrongfully dispose of property—If enough.*

Mere existence of apprehension in the mind of the plaintiff that the defendant would wrongfully dispose of his property is not alone sufficient to justify an order for receivership without further inquiry as to the basis of these apprehensions and existence of such apprehensions cannot render the appointments of a receiver, just and convenient. (*Hilton, J.*) HARIKISHAN LAL & SONS *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **A.I.R. 1936 Lah. 102.**

———**O. 40, R. 1**—*Appointment of receiver—Grounds for—Courts of concurrent jurisdiction—Separate appointments by—Undesirability.*

It is obviously undesirable that receiver should be appointed by two Courts of concurrent jurisdiction, so that orders may be given possibly by one Court which may conflict with the orders that are given in the other Court. Where there

C. P. CODE (1908), O. 40, R. 1.

is a receiver already appointed, the proper procedure for protection of one's interest is not to apply to another Court of concurrent jurisdiction for the appointment of another receiver, but to apply to the Court which has already appointed a receiver for adequate protection. (*McNair, J.*) ANANDINATH MUKHERJEE *v.* SHIBCHARAN TRIGUNAIT. **42 C.W.N. 33.**

——**O. 40, R. 1**—*Appointment of receiver—Ground for—Non-payment of arrears of rent.*

In a suit for cancellation of a lease on the ground that it was obtained by the defendant fraudulently, for recovery of *khas* possession, and for mesne profits on that footing, the fact that the defendant had not been paying the stipulated rent to the plaintiff is not a ground by itself for the appointment of a Receiver. (*Nasim Ali and Mitter, JJ.*) JAMADAR SINGH *v.* KANAI DAS BABAJI MOHUNT GARU. **41 C.W.N. 951.**

——**O. 40, R. 1**—*Appointment of receiver—Ground for—Executant of trust deed taking possession of trust property in contravention of its terms.*

Where a person takes possession of the trust property in direct contravention of the terms of the trust deed which he himself executed and thus deprives the co-trustees of possession of the trust property, his act is entirely illegal. In a suit by him for the removal of the other trustees, it is certainly just and convenient that a receiver should be appointed. It is not necessary for the appointment of a receiver that proof should be forthcoming of any embezzlement or mismanagement on his part. (*King, C.J. and Nanavutty, J.*) BISHWA NATH *v.* BISHAMBAR NATH. **163 I.C. 204=8 R.O. 423=1936 O.W.N. 1134=1936 O.L.R. 339=A.I.R. 1936 Oudh 337.**

——**O. 40, R. 1**—*Appointment of receiver——Merely to receive daily earnings of judgment-debtor's theatre—Order, if* ultra vires.

S. 51, C.P. Code, prescribes the procedure in execution and lays down that the Court may on the application of the decree-holder order execution of the decree by appointing a receiver. No further restrictions have been placed on the power of the Court in this section, nor has the nature of the property been defined of which a receiver can be appointed. This section will therefore evidently be governed by the provisions of O. 40, R. 1. Hence where the judgment-debtor has a theatre and a receiver is appointed in execution of a decree against the judgment-debtor to receive the earnings collected and keep accounts but not to receive money at the doors, the money so earned is property within the meaning of O. 40, R. 1 and as such the order is not *ultra vires*, but is just and convenient. (*Din Mohammad, J.*) BALKISHEN *v.* NARAIN DAS CHELA RAM. **162 I.C. 861=8 R.L. 961=A.I.R. 1936 Lah. 239.**

——**O. 40, R. 1**—Appointment of receiver—Person not entitled to possession—If can ask for. *See* U.P. ENCUMBERED ESTATES ACT (1934)—RECEIVER. **1937 A.W.R. 1125.**

——**O. 40, R. 1**—*Appointment of receiver—Power of Court—Basis of—Pendency of proceedings—If condition precedent—Appeal pending against preliminary decree—Final decree proceedings stayed—Power of original Court to appoint receiver.*

The Court's power to appoint a receiver is limited to the case where the proceedings are still pending before it. Either the suit must be pending, and it will be pending after a preliminary decree but before final decree, or the proceedings in execution of a final decree must be pending. In either event the Court in which the suit or proceedings are pending will have seisin of the suit or of the property subject to execution and this will be the basis of Court's power to appoint a receiver of it. This principle applies equally well where a decree is partly preliminary and partly final. An appeal was pending before High Court against a decree and the High Court, while upholding the appointment of the special receiver appointed in that suit, had stayed the passing of a final decree as regards that in which a preliminary decree only had been made by the first Court. A party applied to the original Court for appointment of a general receiver.

Held, that the original Court had no power to appoint a general receiver as the appellate Court had become seized of the whole case, there being no control of original Court over it. (*Cornish, J.*) CHIDAMBARAM CHETTIAR *v.* PETHAPERUMAL CHETTIAR. **168 I.C. 80=45 L.W. 519=9 R.M. 521=1936 M.W.N. 1125=A.I.R. 1937 Mad. 163=(1937) 1 M.L.J. 605.**

——**O. 40, R. 1**—*Appointment of receiver—Practice—Creditor having right against specific fund or estate.*

There is a distinction between the practice of appointing a receiver in the case of a general creditor and in the case of a creditor who has a right against a specific fund or estate. The latter class of creditors is entitled to a receiver on the ground that they have a special or equitable charge or lien upon the debtor's property, unless other circumstances exist which make the appointment unjust or inconvenient. A.I.R. 1922 Pat. 318, Rel. on. (*Hilton, J.*) HARIKISHEN LAL & SONS *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **A.I.R. 1936 Lah. 102.**

——**O. 40, R. 1**—*Appointment of receiver—Principles—Suit wrongly valued but not wrongly framed.*

Where the plaint itself shows that the suit is not likely to succeed or even the plaintiff has not excellent chance to succeed, it is a circumstance which would render it unjust and inconvenient to appoint a receiver. It is however one thing to argue that a suit is wrongly framed and quite another to say that it is wrongly valued. A wrong valuation is not so vital that it can never be remedied. Where therefore the suit is not so patently framed in a wrong manner as to make its success so problematical as to justify refusing a receivership order to a creditor whose case is that he is a secured one, the Court should not refuse to pass such an order. (*Hilton, J.*) HARIKISHAN LAL & SONS *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **A.I.R. 1936 Lah. 102.**

——**O. 40, R. 1**—*Appointment of receiver—Propriety — Defendant put in possession by Revenue Court.*

C. P. CODE (1908), O. 40, R. 1.

Where the defendant has been put in possession of the properties in dispute by the Revenue Courts after contest on the ground of his having a *prima facie* title to them, it would not be just and convenient for the Court to deprive him of that possession and to appoint a receiver in his place to manage the properties. (*Nanavutty and Zia-ul-Hasan, JJ.*) ALI RAZA KHAN *v.* NAWAZISH ALI KHAN. **166 I.C. 983=9 R.O. 356=1937 O.L.R. 83=1937 O.W.N. 197=A.I.R. 1937 Oudh 280.**

———**O. 40, R. 1**—*Appointment of receiver—Suit on mortgage executed by Buddhist Burmese—Wife impleaded as defendant—No reasonable probability of plaintiff getting decree covering wife's interest also.*

Where in a suit on a mortgage executed by a Buddhist Burmese, his wife is joined as a defendant, but there is no allegation that the mortgage was entered into with her knowledge or consent, and the plaint merely states that it was entered into for her benefit, there is no reasonable probability of the plaintiff getting a decree covering the wife's as well as husband's interest. But if it is practically certain that if the receiver already appointed is entirely discharged and the wife gets into possession of the property, the rents and profits of the property would not find a way towards the satisfaction of the decree against the husband's estate, the wife not being under the control of the Court, the most just and convenient order to be passed, under the circumstances of the case, is that the receiver should be confirmed in his appointment and that each year when his accounts are settled he should pay half of his net receipts to the wife. (*Baguley and Mosely, JJ.*) DAW MAY *v.* MAUNG AUNG KYAW. **163 I.C. 166 =8 R.R. 612=A.I.R. 1936 Rang. 246.**

———**O. 40, R. 1**—*Construction—Just and convenient.*

The words 'just and convenient' in O. 40, R. 1 construed according to the ordinary rules do not limit the appointment of a receiver to property over which the plaintiff has a lien. Receiver can be appointed if the appointment is in fact just and convenient. (*Skemp, J.*) HARI RAM *v.* FIRM MADDU MAL. **177 I.C. 612=11 R. L. 338 =A.I.R. 1938 Lah. 12.**

———**O. 40, R. 1**—*English mortgage—Receiver if can be appointed in execution.*

In the case of English mortgages, a receiver can be appointed of the mortgaged property in execution in cases where sub-R. (2) of O. 40, R. 1, C.P. Code, would operate to prevent such an appointment. (*Panckridge, J.*) SM. RENULA BOSE, *In re*. **175 I.C. 908=11 R.C. 11=42 C.W.N. 266=A.I.R. 1938 Cal. 93.**

———**O. 40, R. 1**—Execution of decree—Properties outside jurisdiction—Receiver—Power of Court to appoint. *See* C. P. CODE, S. 51 (*d*) AND O. 40, R. 1. **40 C.W.N. 1056.**

———**O. 40, R. 1**—*Execution of money decree—Appointment of receiver—When justified.*

A Court has jurisdiction to appoint a receiver even in execution of a money decree. To justify such an appointment, it is not necessary that there should be difficulties arising from the nature of the property against which execution is sought and which prevent the decree-holder from obtaining relief in the ordinary manner, *i.e.*, by attachment and sale of the judgment-debtor's property. Where the decree-holder wants to get the property sold as soon as possible but the judgment-debtor is putting obstacles in his way by raising all sorts of objections and thus delaying the proceedings and the judgment-debtor is in the meantime appropriating the rents and profits paying little or nothing to the decree-holder, an order for the appointment of a receiver only till the property is sold in execution would be "just and convenient" under O. 40, R. 1, C.P. Code. (*Tek Chand and Bhide, JJ.*) PAHLAD DAS BHAGWAN DAS *v.* SETH SHANTI SAGAR. **42 P.L.R. 421=A.I.R. 1940 Lah. 325.**

———**O. 40, R. 1**—*Grounds of appointment—Appeal against order on application under O. 40, R. 1—Duty of appellate Court.*

The apposite words in O. 40, R. 1 are 'where it appears to the Court to be just and convenient.' Where it was found that there was no danger of loss or injury to the property in suit and that the person in possession was a fit and proper person to manage the property, it was held that it was not a fit case for the appointment of a receiver. In an appeal against an order on an application under O. 40, R. 1, it is dangerous for the appellate Court to express any opinion at all as to the merits of the suit or to indicate even briefly whether there appear grounds for supposing that one side or the other has a stronger *prima facie* case. (*Davies.*) MUKANKANWAR *v.* UMRAO MAL. **1940 A.M.L.J. 34.**

———**O. 40, R. 1**—*Grounds for appointment of receiver*—Prima facie *case—Defendants in possession—Absence of even allegation as to waste.*

The power conferred by O. 40, R. 1, C.P. Code, should be exercised cautiously and only in cases where the applicant for the appointment of a receiver has made out a *prima facie* title to the property. Where the defendant has been in possession for about fifteen years, without any objection from any body, and the plaintiff seeking to oust him from possession does not even allege that the property is in danger of being wasted by the defendant, no case is made out for the appointment of a receiver to take possession of the property. (*Thomas, C.J. and Zia-ul-Hasan, J.*) BIDURRAMJI *v.* KESHO RAMJI. **178 I.C. 725= 11 R.O. 123=1938 A.W.R. (C.C.) 127=1938 O. W.N. 1153=1938 O.A. 938=1938 O.L.R. 513= A.I.R. 1939 Oudh 61.**

———**O. 40, R. 1**—*Interim receiver—Appointment of—Legality under will of deceased whose property is in dispute—If fit and proper person.*

Where the right to succeed to the estate of a deceased person is in dispute, a person to whom the deceased had bequeathed by her will the bulk of her property and who has been granted letters of administration may be appointed interim receiver on his furnishing sufficient security to safeguard the interests of whoever is ultimately found to be the rightful heir to the estate. (*Tek Chand and Dalip Singh, JJ.*) GANGA RAM *v.* PANNA LAL. **42 P.L.R. 475.**

———**O. 40, R. 1**—*"Just and convenient"*—Wakf *property—Receiver in execution—Power of Court to appoint—C. P. Code, S.* 51.

C. P. CODE (1908), O. 40, R. 1.

The Court under O. 40, R. 1, C. P. Code, has a discretion to appoint a receiver where it appears to it just and convenient. The rule is not mandatory. Where the property in question is dedicated property, being *wakf* property, which under the terms of the *wakf* deed has to be managed by a trustee enjoined to perform certain religious duties as trustee, it would not be just and convenient to appoint a receiver of such property. No receiver of such property can therefore be appointed in execution of a simple money decree, as the property is not liable to attachment and sale and as the judgment-debtor has no proprietary interest in the same. S. 51, C. P. Code, must be read subject to O. 40, R. 1. (*Sulaiman, C.J. and Harries, J.*) ABDUL LATIF KHAN *v.* SIKHANDAR BEGUM. **I.L.R. (1938) All. 35=173 I.C. 127 =10 R.A. 457=1938 A.L.R. 82=1937 A.W.R. 903=1937 A.L.J. 1103=A.I.R. 1938 All. 3.**

———**O. 40, R. 1**—*Leave to sue receiver—Grant of—Duty of Court.*

Where the applicant establishes a *bona fide* claim either against the former receiver or against the estate as represented by his successor or against both, permission to sue the receiver should be granted and refusal amounts to illegal exercise of jurisdiction. The Court has no jurisdiction to consider the issues of law between the applicant and the receiver on the petition for leave to sue and should leave them to be decided in the regular suit. (*Dunkley and Wright, JJ.*) MOOLJEE MARACAN & Co. *v.* M. B. MEHTA. **186 I.C. 854=12 R.R. 292=A.I.R. 1940 Rang. 59.**

———**O. 40, R. 1**—*Malabar tarwad—Manager appointed under karar—Suit for removal—Appointment of receiver—Power of Court—Considerations.*

It is open to the Court in a suit for removal of the manager of a Malabar tarwad appointed by akarar, to appoint an *interim* receiver when the circumstances require it; but the power of appointing a receiver should be exercised only when the circumstances of the case clearly not only justify, but also require it, as being the only means of protecting the rights of the junior members of the tarwad. Mere charges of mismanagement and fraud would not be sufficient. They must be established *prima facie* before the appointment of an *interim* receiver is made. (*Pandrang Rao, J.*) MANAVEDAN *v.* MANAVEDAN. **164 I.C. 857=9 R.M. 176=1936 M.W.N. 786= 44 L.W. 498=A.I.R. 1936 Mad. 817.**

[Reversed on L. P. Appeal. *See* **71 M.L.J. 629.**]

———**O. 40, R. 1**—*Malabar tarwad—Suit for removal of karnavan*—Interim *receiver can be appointed provided the petitioner makes out a case —Opportunity should be given to petitioner to adduce evidence.*

In suits for removal of a karnavan or manager appointed under a family karar, a receiver, can be appointed during the pendency of the suit if a proper case is made out. If the plaintiff is able to show sufficient cause for the appointment of a receiver by adducing such evidence, it would certainly be competent for the Court to appoint a receiver. For such evidence he must be given an opportunity and without it, it would not be proper to dispose of a petition on the materials on record. (*Burn and K. S. Menon, JJ.*) MANAVEDAN *v.* MANAVEDAN. **166 I.C. 112=9 R.M. 336=44 L.W. 606=A.I.R. 1936 Mad. 966=71 M.L.J. 629.**

C. P. CODE (1908), O. 40, R. 1.

———**O. 40, R. 1**—*Mortgage decree—Appointment of receiver in execution—Considerations.*

The Court will not appoint a receiver in execution of mortgage decree unless the circumstances are such as to make the sale and of the properties a matter of serious difficulty. Once a receiver in execution is appointed, the mortgagee will, as a rule, have little inducement to bring the properties to sale which will tend to let matters drag on indefinitely. If the properties are producing a good income, it is probable that the mortgagee will have a more profitable investment than he will be able to obtain for the sale proceeds if the properties are brought to sale. This does not however mean that if there are substantial difficulties in the way of the sale the Court will not help the mortgagee by appointing a receiver. The Court in considering this question should also take into consideration the diligence of the mortgagee. The person who applies for appointment of receiver in execution of mortgage decree should be able to point to some actual difficulty in carrying out the sale, and not merely to a delay which he foresees on general grounds. It cannot be supposed that when a substantial portion of the mortgage securities is outside the local limits of the jurisdiction of the Original Side, the mortgagee can almost as of right obtain the appointment of a receiver in execution which is a form of relief which the Courts are slow to encourage. (*Panckridge, J.*) SM RENULA BOSE, *In re*. **175 I.C. 908 =11 R.C. 11=42 C.W.N. 266=A.I.R. 1938 Cal. 93.**

———**O. 40, R. 1**—*Mortgage decree—Subsequent appointment of receiver—If justified.*

Under O. 40, R. 1 a receiver may be appointed before as well as after the passing of a decree. A mortgage decree was passed after compromise and the judgment-debtor placed various obstacles in the way of sale; the Court appointed receiver to take charge of the mortgaged properties.

Held, that considering all the circumstances of the case, the appointment of receiver was amply justified and that the contention, that proper course for decree-holder was to proceed to get the mortgaged property sold, had no force. (*Bhide, J.*) MAHMUDI BEGUM *v.* SULTAN AHMAD. **189 I.C. 729=13 R.L. 103=A.I.R. 1940 Lah. 125.**

———**O. 40, R. 1**—*Mortgage suit—Appointment of receiver—Interest in arrear—Property more than sufficient to cover mortgage debt.*

The Court will appoint a receiver in a mortgage suit, as in a suit of any other nature, when it is just and convenient to do so. Normally, when the interest is in arrear a receiver will be appointed as of course at the instance of the mortgagee. No doubt there may be special reasons, even in such a case, that will make it not 'just and convenient' that a receiver should be appointed, *e.g.*, when the interest has been in arrear for a very short period, or when the interest has been tendered but acceptance of it has been refused; but the fact that the property is more than sufficient to cover the mortgage debt is not a ground upon which the Court ought to refuse to appoint a receiver in such a suit. (*Page, C.J.*,

C. P. CODE (1908), O. 40, R. 1.

Ba U and Leach, JJ.) VENKANNA *v.* MANGAMMAL. **14 Rang. 308=163 I.C. 856=9 R.R. 53 =A.I.R. 1936 Rang. 296 (S.B.).**

———**O. 40, R. 1**—*Mortgage suit—Appointment of Receiver—Justifiability after insolvency of mortgagor and after appointment of receiver in insolvency.*

The considerations which apply in a suit between the mortgagee and mortgagor as regards the appointment of a receiver differ considerably from the considerations which arise where the interests affected are not of the mortgagor only, but also of the mortgagor's creditors. The appointment of a receiver in the mortgagee's suit will have the effect of depriving the creditors in the insolvency proceedings of the benefit of the usufruct of mortgaged property although the mortgagee has not yet obtained a final decree in the mortgage suit. Hence the appointment of a receiver in a mortgage suit subsequent to the appointment of receiver in insolvency was set aside. (*Agarwala and Rowland, JJ.*) GOCHURAN SINGH *v.* RAMBALLABH. **163 I.C. 811=8 R.P. 42=1936 P.W.N. 306=17 Pat.L.T. 671=A.I.R. 1936 Pat. 357.**

———**O. 40, R. 1**—*Mortgage suit—Appointment of Receiver—Mortgage by deposit of title-deeds—Right to rents and profits in hands of receiver.*

The Court is entitled to appoint a receiver under O. 41, R. 1 whenever it is deemed just and convenient to do so; for example, in a mortgage suit when interest is in arrear, the Court will normally appoint a receiver at the instance of the mortgagee as of course, whether or not the property appears to be of sufficient value to cover the mortgage debt and interest, and whether or not the right of the mortgagee to obtain a personal decree against the mortgagor subsists or has been lost. For more than a century it has never been doubted in England that when a receiver is so appointed the mortgagee if successful in the suit will be given the accruing rents and profits in the hands of the receiver. This equitable doctrine which is applied in England forms part of the law in India as being in accordance with equity, justice and good conscience. It is consonant alike with reason and equity, if a mortgagee is diligent and applies that a receiver should be appointed and in the event he succeeds in the suit, that the rents and profits in the hands of the receiver should be allocated to the mortgagee who during the period between the time when he filed the suit to enforce his security and the date of the sale has been deprived of the interest and profits which otherwise might have accrued to him if he had been in possession of the proceeds of the sale during that period. It is upon this ground and not upon the footing that a mortgagee by deposit of title deeds possesses a substantive right to the rents and profits of the property subject to the mortgage that the Court allocates to such mortgagee the rents in the hands of the receiver that have accrued after the order appointing the receiver was made. (*Page, C.J. and Ba U, J.*) AGA G. ALLY RAMZAN YEZDI *v.* BALTHAZAR & SON, LTD. **14 Rang. 292=163 I.C. 850=9 R.R. 49=A.I.R. 1936 Rang. 290.**

C. P. CODE (1908), O. 40, R. 1.

———**O. 40, R. 1**—*Mortgage suit—Simple mortgage—Appointment of Receiver.*

It is settled law that in the case of a simple mortgage without possession the intention of the parties is that the mortgagor shall ordinarily remain in possession of the mortgaged property till it is brought to sale in execution proceedings for the payment of the mortgage debt. Consequently a receiver will be appointed pending a suit on the basis of a simple mortgage only if there exist special circumstances in the case. (*Ram Lall, J.*) LADLI PARSHAD *v.* BANARSI DASS. **40 P.L.R. 541.**

———**O. 40, R. 1**—*Mortgage suit—Simple mortgage—Appointment of receiver—Powers of Court.*

The Court undoubtedly has jurisdiction to appoint a receiver in a simple mortgage suit but whether it will do so must depend upon what is just and convenient in each particular case having regard to the reason for which he is appointed, to the precise nature of the security in the particular contract whereby a simple mortgage has been created and bearing in mind the limitations imposed by sub-rule (2) of O. 40, R. 1, C.P. Code. The fact that interest on the mortgage debt is in arrear, or substantially in arrear, can only be a factor in deciding whether a receiver should be appointed: the fact that the security is likely for any reason to become insufficient may be another factor; but the governing words of the rule are whether it is just and convenient and in deciding this matter due weight must be given to all relevant considerations including those mentioned in sub-rule (2) of O. 40, R. 1. It can never be just and convenient to appoint a receiver for the sole purpose of taking possession of rents and profits unless they have been expressly made part of the security for the debt by the instrument creating the mortgage, even if, having done so, the Court could put the receiver into possession.

Ba U, J.—A receiver can be appointed in a simple mortgage suit even though the rents and profits are not part of the mortgage security. (*Roberts, C.J., Mya Bu, Baguley, Ba U and Braund, JJ.*) MA HNIN YEIK *v.* K. A. R. K. CHETTYAR FIRM. **1939 Rang.L.R. 403=183 I.C. 728=12 R.R. 101=A.I.R. 1939 Rang. 321 (F.B.).**

———**O. 40, R. 1**—*Mortgage suit—Simple mortgage—Receiver—Interest, rates and taxes in arrears—If sufficient ground for appointment of receiver.*

The Court in a suit on a simple mortgage has jurisdiction to appoint a receiver of the mortgaged property whether before or after the preliminary decree whether or not the fact that the interest is in arrear would by itself be sufficient ground for appointment of a receiver; where the rates and taxes as well as interest are in arrear, the property is in jeopardy, and in such a case it is just and equitable to appoint a receiver. (*Beaumont, C.J. and Sen, J.*) DAMODAR *v.* RADHABAI. **I.L.R. (1939) Bom. 82=179 I.C. 821=11 R.B. 265=40 Bom.L.R. 1226=A.I.R. 1939 Bom. 54.**

———**O. 40, R. 1**—*Mortgage suit—Simple mortgage—Suit for sale—Receiver, if can be appointed.*

C. P. CODE (1908), O. 40, R. 1.

Under O. 40, R. 1 a receiver cannot be appointed in a suit for sale on a simple mortgage before a preliminary decree has been passed. (*W'eston.*) NANDA *v.* KANHAIYA LAL. **1938 A.M.L.J. 90.**

———O. 40, Rr. 1 and 2 and S. 11—*Mortgage suit—Simple mortgage—Whether receiver could be appointed—Original order of Court allowing mortgagor to be in a portion of the house—Subsequent order to vacate—No constructive* res judicata*—Power of Receiver to get order from Court to enable him to collect rent.*

Where in a suit on a mortgage the mortgagee obtained a decree and a receiver was appointed to collect rents from the mortgagor in possession of a portion of the suit property but because the receiver was unable to realise the rent an order was passed against the mortgagor to vacate the portion he was occupying, on the contention that the appointment of a receiver in a simple mortgage suit was wrong.

Held, that a receiver could be appointed in this case according to the law in this Presidency and if it was the law, it was a necessary concomitant of his office that he should be able to lease the property and that if he was obstructed by the mortgagor he could seek the aid of the Court to remove him. 65 M.L.J. 222: 56 Mad. 915 (F.B.) Foll.

Held further, that the Courts allowing by its original order the mortgagor to be in possession of the property could not be barring the later order to vacate by any principle of constructive *res judicata*. The Court certainly did not decide any question against the mortgagee either expressly or by implication which would amount to a decision on some point which would prevent that point being raised in a subsequent stage of the suit. (*Horwill, J.*) SUBRAMANIAM CHETTIYAR *v.* ETHIRAJULU CHETTIAR. **1938 M.W.N. 1140=182=I.C. 87=11 R.M. 918=A.I.R. 1938 Mad. 325=(1938) 1 M.L.J. 249.**

———O. 40, R. 1—*Order* suo motu—*Appeal, if lies.*

The Court can under O. 40, R. 1, C.P. Code, appoint a receiver whenever it appears to the Court to be just and convenient. It is not necessary for the Court to act upon an application made for the appointment of a receiver. Accordingly, an order appointing a receiver under O. 40, R. 1 (*a*) without any application having been made is appealable under O. 43, R. 1 (*s*). (*King, C. J. and Nanavutty, J.*) BISHWA NATH *v.* BISHAMBAR NATH. **163 I.C. 204=8 R.O. 423=1936 O.L.R. 339=1936 O.W.N. 1134=A.I.R. 1936 Oudh 337.**

———O. 40, R. 1—Order under—Effect of—Agent of owner appointed Receiver—If terminates agency. *See* CONTRACT ACT, S. 201. **A.I.R. 1936 Mad. 980.**

———O. 40, R. 1—*Partition suit—Propriety of appointment of receiver.*

Where in a suit for partition of the movable and immovable property, it is likely that debts may be realized by the defendants without the plaintiff's knowledge or settlement of these debts may be arrived at by the defendants in a manner prejudicial to the plaintiff, it is just and convenient to appoint a receiver during such suit. (*Skemp, J.*) MANOHAR LAL *v.* KISHAN LAL. **176 I.C. 919=11 R.L. 249=A.I.R. 1938 Lah. 10.**

———O. 40, R. 1—*Partition suit—Receiver—Appointment of—Justification.*

In a suit by a minor for partition of the family properties, it was found that he was entitled to a half-share in the properties, that the quarrels in the family and the conduct of the defendant made it impossible for the plaintiff to get his fair share of the harvest and it also appeared that so long as the properties remained with the defendant the plaintiff would not be able to secure his fair share of the income. The lower Court appointed a receiver to harvest the crops.

Held, that the circumstances of the case justified the appointment of a receiver. (*Horwill, J.*) SARAVANA MUDALIAR *v.* SINGARAVELU MUDALIAR. **178 I.C. 519=1938 M.W.N. 515=11 R.M. 467=A.I.R. 1938 Mad. 730=(1938) 1 M.L.J. 863.**

———O. 40, R. 1—*Power of Court—Suit for declaration—Receiver — Appointment of—Conditions.*

If there is property in dispute between parties, and the Court thinks it expedient that the property should be protected for the benefit of the party ultimately entitled to it pending the suit, the Court can properly appoint a receiver of it under O. 40, R. 1 even in a suit which prays for no other relief than the declaration of some particular right or title. (*Cornish, J.*) CHIDAMBARAM CHETTIAR *v.* PETHAPERUMAL CHETTIAR, **168 I.C. 80=45 L.W. 519=9 R.M. 521=1936 M.W.N. 1125=A.I.R. 1937 Mad. 163=(1937) 1 M.L.J. 605.**

———O. 40, R. 1—*Powers of Receiver—Lease of estate—Contract by Receiver—Breach—Remedy of lessee.*

A Receiver appointed by Court under O. 40, R. 1, C.P. Code, has no power to bind the estate by a lease. The proper remedy of the lessee for breach of contract of lease entered into by the Receiver is only against the Receiver personally and the lessee has no right of suit against the owner of the estate. The receiver can claim to be indemnified from the estate if it is found that his action in leasing the property was correct. (*Mackney, J.*) REV. BROTHER PATRICK *v.* LYAN HONG & Co. **1938 Rang.L.R. 611=180 I.C. 819=11 R.R. 433=A.I.R. 1939 Rang. 12.**

———O. 40, R. 1—Receiver—Appointment in suit on simple mortgage—Effect of—If creates charge in favour of mortgagee over rents and profits—Money due by mortgagor to Government in respect of Kudimaramath—Liability of receiver to pay as incident of management. *See* MORTGAGE—MORTGAGE SUIT. **(1940) 1 M.L.J. 429.**

———O. 40, R. 1—*Receiver—Legal position.*

A receiver appointed by the Court under O. 40, R. 1 has a legal position different from that of the Official Trustee or the Administrator-General. Unlike the receiver these officers have an estate in the properties which they hold by virtue of their office and consequently a suit in respect of the properties they hold would be a suit against them in the legal sense. The same reasoning does not apply to a receiver. (*Mukherjea and Roxburgh, JJ.*) BHUBAN MOHINI *v.* BIRAJ MOHAN. **186 I.C. 584=12 R.C. 495=44 C.W.N. 74=A.I.R. 1940 Cal. 1.**

C. P. CODE (1908), O. 40, R. 1.

———O. 40, R. 1—*Receiver—Position of—If legal representative of party—Estate including decree to be executed—Execution—Procedure for execution of decree by receiver.*

Receivers appointed by the Court are officers of the Court, and are not the legal representatives or assigns of the parties to the suit; nor is it the practice of the Court to bring receivers on the record in a suit and subject them to liability as to costs. Where an estate of which a receiver has been appointed includes a decree to be executed, the proper procedure is for the receiver to apply in the suit in which he was appointed (unless it already has the power) for liberty either to file a fresh darkhast in his own name for execution or to continue the existing darkhast (when one has been filed and is pending) in the name of the darkhastdar on giving him a proper indemnity as to costs. (*Beaumont, C.J. and Wassoodew, J.*) HANMANT *v.* JAINAPUR. **178 I.C. 395=40 Bom.L.R. 932=11 R.B. 159=A.I.R. 1938 Bom. 458.**

———O. 40, R. 1—*Receiver—Secret agreement with judgment-debtor—Fraud on Court—Enforceability.*

No secret agreement can be enforceable which puts the receiver in a position which might affect his advice to the Court, and consequently the Court's decision as to whether time should be granted. A decree passed against the judgment-debtor declared a charge on certain properties and lien on some insurance policies but did not provide interest on the decretal amount. Decree-holder was appointed as receiver to take charge of the properties and to collect insurance money. In course of those proceedings, the Insurance Companies made an offer of a certain amount. But the judgment-debtor who expected a still better offer requested the receiver by letter to wait for some more time and in consideration agreed to pay the decretal amount with interest at a certain rate. The receiver accepted the agreement but did not communicate it to the Court. After the money was realized and paid into Court the decree-holder receiver asked to be allowed to deduct interests as per agreement. This being disallowed he filed a suit to recover the amount of interest on the basis of the agreement.

Held, that as under the agreement, the receiver undoubtedly got something more by way of interest to which he was not entitled under the decree it was his duty to report the agreement to the Court and get it ratified. As the agreement was kept from the knowledge of Court it amounted to fraud on Court. The agreement thus being not enforceable at law, claim for interest could not be sustained. (*Mosely, J.*) A. U. U. R. M. CHETTIAR FIRM *v.* SAW EU HOKE. **1940 Rang.L.R. 129=183 I.C. 868=12 R.R. 117=A.I.R. 1939 Rang. 217.**

———O. 40, R. 1—Receiver officer of Court—Security—Necessity. *See* LUNACY ACT—RECEIVER. **A.I.R. 1937 Cal. 735.**

———O. 40, R. 1—*Receiver—Powers to bring suit—Receiver of joint family property—Right to sue for recovery of possession of family property in his own name.*

The words of R. 1 of O. 40, C.P. Code, are wide enough to empower the Court to authorise a receiver appointed by it to bring any suit in his own name, the object of which is to preserve, collect or realize the property in suit, and where the Receiver is authorized in this behalf, he may sue in his own name. The grounds upon which the suit is based are immaterial. If the owner of the property in suit can bring a suit to recover his property and has a cause of action to do so, it follows that the receiver who has the same powers as the owner has to bring a suit and who is authorized by the Court in that behalf can also bring such a suit. A receiver is appointed for the benefit of all the parties concerned in the litigation and is the representative of the Court, and the parties interested in the litigation. If a joint Hindu family can sue to recover possession of family property, there is no reason why a receiver of the joint family estate cannot likewise sue. (*Rangnekar, Ag. C.J. and Tyabji, J.*) ACHUT SITARAM *v.* SHIVAJI RAO. **39 Bom.L.R. 224=170 I.C. 172=10 R.B. 64=A.I.R. 1937 Bom. 244.**

———O. 40, R. 1—*Removal of receiver—Failure to file accounts.*

The Court may remove a receiver who has failed to file his accounts in spite of its order and who considers his own personal interests to the exclusion of the interests of the parties. (*McNair, J.*) SARBA SUNDARI DASI *v.* NANDA RANI DASI. **I.L.R. (1940) 2 Cal. 102.**

———O. 40, R. 1—*Rights of parties decided by trial Court—Property if* in medio—*Receiver if can be appointed pending appeal.*

Where during the course of trial a receiver was appointed and a decision is given by that Court as to the rights of parties, the property can no longer be said to be *in medio* and as such there is no justification for the appointment of a receiver pending appeal. (*Zia-ul-Hasan and Yorke, JJ*). BISHESHAR SINGH *v.* JADUNATH SINGH. **179 I.C. 245=11 R.O. 154=1939 A.W.R. (C.C.) 21=1939 O.W.N. 59=1939 O.A. 113=1939 O.L.R. 6=A.I.R. 1939 Oudh 94.**

———O. 40, R. 1—*Rights of parties decided by trial Court—Receiver if can be appointed in pending appeal.*

When there has been a decision on the merits deciding the rights of the parties in the respective properties concerned, the property cannot be said to be any longer *'in medio.'* A receiver cannot be appointed where it would have the result of depriving the possession of the defendant who had possession up to the decision of the suit by the lower Court and who has continued to be in possession since, after a recognition of his title by one Court. (*Hamilton and Bennet, JJ.*) ALI RAZA KHAN *v.* NEWAZISH ALI KHAN. **14 Luck. 666=1939 O.W.N. 615=183 I.C. 16=12 R.O. 16=1939 O.A. 544=1939 O.L.R. 464=1939 A.W.R. (C.C.) 88=A.I.R. 1939 Oudh 229.**

———O. 40, R. 1—Scope—Scheme decree—Power given to District Judge to remove trustees—General control conferred over trustees and their management of the trust—Power to appoint Receiver pending enquiry into conduct of trustees after suspension of trustees. *See* C.P. CODE, S. 92. **38 Bom.L.R. 1137.**

———O. 40, R. 1—Suit by reversioners to restrain waste by Hindu widow—Receiver—Appoint-

C. P. CODE (1908), O. 40, R. 1.

ment—Power of Court. *See* HINDU LAW—REVERSIONERS. **I.L.R. (1940) Kar. 208.**

——**O. 40, R. 1 (2)**—*'Any person'—Whether restricted to non-parties—Suit for sale on simple mortgage—Receiver, if can be appointed pending appeal against mortgage decree.*

The general power under sub- R. (1) of O. 40, R. 1 has been curtailed by sub-R. (2). It necessarily follows that there is no authority in the Court whatsoever to remove from the possession or custody of property *any person* whom any party to the suit *has not a present right so to remove*. The plain words in sub-R. (2) are "any person". They are general, and have been used in a wide sense, and are fully comprehensive to include both persons who are parties and persons who ore non-parties and cannot be restricted to non-parties only. A mortgagor, where the mortgage is a simple mortgage, is entitled to remain in possession of the mortgaged property until such time as that property has been brought to sale in due course of law. It follows, therefore, that in a suit for sale on the basis of a simple mortgage, the Court is not competent to appoint a receiver of the property mortgaged pending the decision of an appeal against the mortgage decree. 1933 A.L.J. 51, Over. (*Sulaiman, C.J. Thom and Rachhpal Singh, JJ.*) RAM SWARUP *v.* ANANDI LAL. **58 A. 949=163 I.C. 481=9 R. A. 22=1936 A.W.R. 565=1936 A.L.J. 605=A.I.R. 1936 All. 495 (F.B.).**

——**O. 40, R. 1 (2)**—*Construction—"Whom any party to the suit has not a present right so to remove"—Meaning and effect of.*

O. 40, R. 1 (2) is an enactment for the benefit of third parties and means that the wide words of sub-rule (1) of O. 40, R. 1 are not to be construed to justify the Court in removing from possession or custody of property a third party who has got a good title to such possession or custody as against the parties to the suit. The words "whom any party to the suit has not a present right so to remove" merely mean whom no party to the suit has a right so to remove. The provision is *ex abundanti cautela*. (*Beaumont, C. J. and Sen, J.*) DAMODAR *v.* RADHABHAI. **I.L.R. (1939) Bom. 82=179 I.C. 821=11 R.B. 265=40 Bom.L.R. 1266=A.I.R. 1939 Bom. 54.**

——**O. 40, R. 1 (2)**—*Removal of receiver—Defendants in possession of property struck off—If entitled to discharge of receiver.*

Where two sets of defendants are joined in a suit on a mortgage and the mortgagee gets a receiver appointed to take charge of certain land covered by the mortgage, but subsequently one set of defendants are struck off the record as being not necessary parties to the suit, and the defendants so discharged apply that the receiver should be discharged and that the land under his possession should be released to them, they are entitled to the order prayed for, if it is found that they were in possession of the land at the time the receiver was appointed and if none of the other parties had the right to remove them from possession. (*Baguley and Mosely, JJ.*) ABDUL KADER *v.* R.M.P. CHETTIYAR FIRM. **1938 Rang.L.R. 586=178 I.C. 924=11 R.R. 289=A.I.R. 1938 Rang. 387.**

C. P. CODE (1908), O. 41, R. 1.

——**O. 40, R. 1 (2)**—*Stay of execution of decree—Judgment-debtor in possession of property on furnishing security—Appointment of receiver over part of property to realize costs—Permissibility.*

Where the judgment-debtors are in possession of the property by virtue of their having furnished the security demanded from them by the Court as a condition of execution being stayed, the decree-holder has not a present right to remove them from possession. The appointment of a receiver over part of that property with a view to the realization of costs awarded to the decree-holder would be tantamount to the removal of the judgment-debtors from the property, and O. 40, R. 1 (2), C.P. Code, is a bar to such appointment. (*Nanavutty and Smith, JJ.*) SURAJ MOHAN DAYAL *v.* SARUP NARAIN. **164 I.C. 159=9 R.O. 59=1936 O.L.R. 437=1936 O.W.N. 595=A.I.R. 1936 Oudh 370.**

——**O. 40, R. 2**—*Rangoon High Court, Rr. 204 and 205—Receiver's fees—Powers of Court.*

Official Receiver, in making his lists, should consider under what head the fees are to be charged and charged at the rate specified in the sub-section, The Court may then, in the circumstances of any particular case, review such remuneration, and, whilst not exceeding the maximum laid down, may direct such remuneration at any less rate as may be thought fit. (*Roberts, C.J. and Dunkley, J.*) DAW OO *v.* U BA THAUNG. **178 I.C. 30=11 R.R. 214=A.I.R. 1938 Rang. 357.**

——**O. 40, R. 4**—*Scope—Application for passing of receiver's accounts—Enquiry—Duty of Court—Allegations against receiver—Procedure for dealing with—Practice.*

Under O. 40, R. 4 of the C.P. Code, the Court is ordinarily bound to deal with all matters relating to the receiver in the proceeding itself in which he was appointed. The proper occasion for making allegations against the receiver is when his accounts are passed, and the Court ought to protect its officers and not to allow parties to pester the receiver with actions. Although under R. 4 of O. 40, C.P. Code, as amended, the Court may at its option refer the parties to a separate proceeding, it is bound, when it makes such an order, to record its reasons therefor. All such questions as bear on the receiver's discharge and relate to matters between him and his estate should be decided in the very proceeding for the passing of accounts prior to his discharge. (*Venkatasubba Rao, J.*) CHIDAMBARA NADAR *v.* MAHALINGA NADAR. **163 I.C. 968=9 R.M. 82=1936 M.W.N. 131=43 L.W. 460=A.I.R. 1936 Mad. 321=70 M.L.J. 282.**

——**O. 41, R. 1**—*Appeal filed with copy of judgment only—Copy of decree filed within limitation—Effect of.*

Where the memorandum of appeal was accompanied only by the copy of the judgment, and not by the copy of the decree, and this defect was removed by filing the copy of the decree before the expiration of the period of limitation, an objection based on O. 41, R. 1, C. P. Code, must fail. (*Srivastava, Ag. C.J. and Smith, J.*) LALLU RAM *v.* THE DEPUTY COMMISSIONER, KHERI. **165 I.C. 578 (2)=9 R.O. 230=1936**

C. P. CODE (1908), O. 41, R. 1.

O.W.N. 1008=1936 O.L.R. 665=12 Luck. 472 =A.I.R. 1937 Oudh 65.

———O. 41, R. 1—*Appeal filed with copy of original decree after it is amended—If liable to dismissal.*

Where an application for review of judgment is granted, no appeal is competent against the original decree as that decree must be deemed to have been superseded and therefore non-existent. But it is doubtful whether an amendment in the decree, apart from the review of the judgment, to however slight an extent, and even a correction of a mistake under S. 152, C. P. Code, in the decree, have the effect of superseding the original decree so as to necessitate the dismissal of an appeal, which is presented with a copy of the original decree. (*Coldstream and Jai Lal, JJ.*) Local Committee, Gurdwaras *v.* Sardul Singh. **178 I.C. 886=11 R.L. 504=A.I.R. 1938 Lah. 76.**

———O. 41, R. 1—*Appeal improperly presented admitted by Court—Power to dismiss it at later stage.*

Per *Sharpe, J.*—If a memorandum of appeal had been improperly presented by one advocate for another and the Judge accepted the document and admitted the appeal, he can hold that there was no proper appeal and can dismiss the appeal at a later stage, when his attention is drawn to the true legal position, for he was originally acting *ex parte* and accepted the document and admitted the appeal *per incuriam*. (*Roberts, C.J. and Dunkley, J.*) Sawarmal *v.* Kunjilal. **1939 Rang.L.R. 108=180 I.C. 565=11 R.R. 418= A.I.R. 1939 Rang. 1.**

———O. 41, R. 1—*Appeal—Presentation—Validity—Apprentice practitioner presenting memorandum without signature and permission of senior counsel.*

Where the memorandum of appeal was signed only by a newly enrolled practitioner who was working as an apprentice with the senior counsel engaged by the appellant and the memorandum was presented by the apprentice without the signature and permission of the senior counsel.

Held, that there was no proper presentation of the memorandum of appeal. (*Bhide, J.*) Tulsi Ram *v.* Gobind Ram. **179 I.C. 895=11 R.L. 646=41 P.L.R. 327=A.I.R. 1939 Lah. 41.**

———O. 41, R. 1—Appellant executing power of attorney in favour of certain advocate—Presentation of appeal by another advocate on behalf of latter—Whether proper. *See* C. P. Code, O. 3, R. 4. **38 P.L.R. 258.**

———O. 41, R. 1 and S. 104—*Applicability—Order in contentious proceedings under S.* 295, *Succession Act—Appeal—Production decree—Necessity—Form of decree.*

An appeal filed against an order passed in a contentious proceedings is an appeal filed under O. 41, R. 1, and not under S. 104 of the Code. Hence an appeal against an order in a contentious proceeding granting probate or letters of administration with the will annexed is incompetent without the production of a copy of a formal decree prepared in terms of such order. Such contentious proceeding should be registered as a suit and the form in which a decree should be prepared in such a proceeding should be that adopted by the Calcutta High Court. (*Rupchand Bilaram, Ag. J.C., Mehta and Lobo, A.J.Cs.*) Gangabai *v.* Jaikishindas. **173 I.C. 284=10 R.S. 200= A.I.R. 1938 Sind 36 (F.B.).**

C. P. CODE (1908), O. 41, R. 1.

———O. 41, R. 1—*Applicability to O.* 44, *R.* 1 —*Application for leave to appeal* in forma pauperis *filed without copy of decree and judgment —Effect.*

The proviso to O. 44, R. 1, C. P. Code, makes it incumbent on the applicant, when he applies for leave to appeal as a pauper, to show to the Court that *prima facie* the decree appealed from was contrary to law, which can only be done by a reference to the decree and judgment on which it is founded. Though R. 1, O. 44, C. P. Code, does not make its provisions subject to O. 41, R. 1, where the copies of decree and judgment appealed from are not filed along with the application for leave to appeal as a pauper, there will be no valid application for leave to appeal before the Court. Therefore it is necessary that the provisions of O. 41, R. 1 should be complied with while appealing as a pauper. (*Cornish, J.*) Rajammal *v.* Parthasarathi Iyengar. **165 I.C. 471=9 R.M. 255=1936 M.W.N. 804=44 L.W. 152=A.I.R. 1936 Mad. 600.**

———O. 41, R. 1—*Construction—Copy of decree accompanying memorandum of appeal—If to be entire decree—Partition decree—Appeal from in respect of right of maintenance—Whole decree if necessary—Power of Court to dispense with production of unnecessary portions—C. P. Code, S.* 151.

The provision in O. 41, R. 1, C. P. Code, requiring that the memorandum of appeal shall be accompanied by a copy of the decree appealed from must be read to mean that the memorandum shall be accompanied by a copy of that part of the decree which is appealed from and against which the grounds of appeal are all directed. The Court under its inherent powers under S. 151, C. P. Code, can dispense with the production of portions of the decree which are unnecessary for purposes of the appeal before the Court. Therefore in an appeal against a final decree for partition, the grounds of which relate to and are limited to an omission in the decree to provide for the maintenance which the appellant claims, it is not necessary for the appellant to file a certified copy of the whole decree including the commissioner's report and the maps, when the appellant does not object to the allotment of properties made by the Commissioner. The appeal being confined to the portion of the decree which does not direct or make any provision for the appellant's maintenance, the appeal accompanied by a copy of that part of the decree alone is in order and in conformity with O. 41, R. 1. (*D. N. Mitter and S. K. Ghose, JJ.*) Annabati Dassi *v.* Parameswar Mallik. **I.L.R. (1937) 1 Cal. 573 =170 I.C. 685=10 R.C. 169=40 C.W.N. 1298 =A.I.R. 1936 Cal. 751.**

———O. 41, R. 1—*Copies of judgment and decree accompanying memo. of appeal not properly stamped before limitation—Appeal, if time barred.*

Where the copies of judgment and decree accompanying the memo. of appeal were not properly stamped till after the period of limitation had expired, the appeal is time barred. (*Bhide, J.*) Har Narain *v.* Jai Gopal. **39 P.L.R. 502.**

C. P. CODE (1908), O. 41, R. 1.

———**O. 41, R. 1**—*Dispensing with copy of judgment appealed against—Written order—If necessary.*

Under O. 41, R. 1, C. P. Code, the Appellate Court may, in a fit case dispense with the filing of the judgment appealed against. The rule does not say that the Court must record an order dispensing with the judgment. The absence of a recorded order does not therefore necessarily show that no order was passed. It may be presumed from the circumstances of a case that the dispensation had been granted. (*Sen, J.*) SARAT CHANDRA NAG *v.* RATI KANTA POLLEY. **186 I.C. 58=12 R.C. 434=43 C.W.N. 1139=A.I.R. 1939 Cal. 711.**

———**O. 41, R. 1**—*Estate under Court of Wards—Plaintiff obtaining decree affecting ward both with regard to her estate and individual status—Right of ward to appeal—Separate appeals, if necessary.*

Three brothers, *X*, *Y* and *Z*, who owned an estate died childless, leaving behind them only widows, and the Court of Wards assumed charge of the entire estate. The plaintiff obtained a decree declaring that he was *Y* who was supposed to be dead and that he be put in possession of an undivided one-third share in the properties in suit—the share in enjoyment of the first defendant who was his wife, jointly with the other defendants' possession over the rest. An appeal was filed against this decree and a question was raised whether the first defendant could appeal both as represented by the Court of Wards and also in her individual capacity.

Held, that as the decree affected the first defendant both ways, that is to say, both with regard to her estate and also individually, inasmuch as there was a declaration to the effect that the plaintiff was her husband, she was entitled to file appeal and that there was no reason to ask her to file a separate appeal and pay separate Court-fees. (*S. K. Ghose and McNair, JJ.*) BIBHABATI DEBI *v.* RAMENDRA NARAYAN ROY. **41 C. W.N. 374=65 C.L.J. 127.**

———**O. 41, R. 1**—*Memo. of appeal accompanied by translations of judgment and decree—Validity of presentation.*

Where the papers which accompanied the memorandum of appeal were Urdu translations of the judgment and decree of the lower Court, there is no proper appeal before the Court. (*Agha Haidar, J.*) SURJAN SINGH *v.* CHAMEL SINGH. **38 P.L.R. 288.**

———**O. 41, R. 1**—*Memo. of appeal not accompanied by copy of decree—Validity.*

The provision of O. 41, R. 1, C. P. Code, is imperative and states that a memorandum of appeal shall be accompanied by a copy of the decree appealed against. It is a condition precedent to there being a valid memorandum of appeal that it should be accompanied by a copy of the decree appealed from. (*Thomas and Zia-ul-Hasan, JJ.*) BRIJ MOHAN LAL *v.* SARABJIT SINGH. **13 Luck. 597=171 I.C. 286=10 R.O. 103=1937 O.L.R. 537=1937 O.W.N. 978=A.I.R. 1937 Oudh 513.**

———**O. 41, R. 1**—*Order rejecting plaint—Appeal filed without decree sheet—If proper presentation.*

The definition of decree given in S. 2, C. P. Code, wherein it is noted that "a decree shall be

C. P. CODE (1908), O. 41, R. 1.

deemed to include the rejection of a plaint" renders an order rejecting a plaint itself equivalent to a decree and hence eliminates the necessity for preparing a separate decree sheet. Hence an appeal filed from such order without any decree sheet is correctly presented. (*Middleton, J. C. and Mir Ahmad, A.J.C.*) FEROZ SHAH *v.* KALU RAM. **164 I.C. 181=9 R. Pesh. 15=A. I. R. 1936 Pesh. 155.**

———**O. 41, R. 1**—*Order under S. 47—Appeal filed without copy of formal order—If competent.*

Under O. 41, R. 1, C. P. Code, it is imperative that a copy of the decree should accompany the memorandum of appeal. An order under S. 47, C. P. Code, is by S. 2 (2) included in the definition of a decree, and an appeal against such an order not accompanied by a copy of the formal order which is filed beyond limitation, is incompetent. (*Zia-ul-Hasan and Yorke, JJ.*) MANGREY *v.* SUNDAR. **188 I.C. 226=12 R.O. 430=1940 O.W.N. 528=1940 O.A. 504=1940 O.L.R. 359 =1940 A.W.R. (C.C.) 261=A.I.R. 1940 Oudh 351.**

———**O. 41, R. 1**—*Presentation of appeal—Mistake in description of respondents—If entails dismissal.*

The fact that there is a mistake in the description of the respondents does not entail the dismissal of the appeal, when the defect is a formal one. The appellate Court should allow it to be corrected when brought to its notice. (*Jai Lal, J.*) JHUTHA RAM *v.* RAM SARUP. **169 I.C. 647 =10 R.L. 32=39 P.L.R. 188=A.I.R. 1937 Lah. 60.**

———**O. 41, R. 1**—*Presentation of appeal—Person presenting must be duly authorised.*

The presenting or the filing of the appeal amounts to acting on behalf of the appellant, and on the day that the appeal is presented the person presenting the appeal must be duly authorised to act on behalf of the appellant. Where the appeal was not presented by *J's* clerk but by *T* who had duly signed the memorandum of appeal, it could not be held that *T* was merely an agent of *J*. By signing the memorandum of appeal he acted independently of *J* and presentation of the appeal by him could not be held to be a presentation by an agent or clerk of *J*. (*Abdul Rashid, J.*) NAWAB *v.* CHARAGH. **167 I.C. 467=9 R.L. 488= A.I.R. 1936 Lah. 195.**

———**O. 41, R. 1**—*Presentation of appeal—Practice of putting appeals in petition box—Appeal by whom presented.*

Strictly speaking the memorandum of appeal should be presented to the Court or some officer appointed by it in this behalf. But if the Court has adopted the practice of presentation of appeals by putting them in a petition box, the person who puts the memorandum in the box would be the person presenting the appeal, and not his junior who subsequently appears in Court for taking a date. The appeal should, therefore, be deemed to have been properly presented even though the former alone held a power-of-attorney and not the latter. (*Bhide, J.*) KARIM BAKHSH *v.* MOHAMMADA. **173 I.C. 796=10 R.L. 492= 39 P.L.R. 456.**

———**O. 41, R. 1**—*Requirement of copy of decree—If an inflexible rule.*

C. P. CODE (1908), O. 41, R. 1.

A memo. of appeal shall be accompanied by a copy of the decree appealed against. Else it is not duly presented as required under O. 41, R. 1. Its production cannot be dispensed with. (*Mehta, S.M. and Harper, J.M.*) JAFAR *v.* RAM PAL SINGH. **1940 A.W.R. (B.R.) 39=1940 R.D. 97.**

———**O. 41, R. 1**—*Scope—Order under S. 47, C. P. Code—Appeals by same party and against same respondent—Copy of order filed in one appeal only—Sufficiency.*

O. 41, R. 1, C. P. Code, does not expressly require that a copy of an order which has the force of a decree but which is not a decree shall be filed with the memorandum of appeal. Where in one of two analogous appeals between the same parties arising out of one and the same judgment under S. 47, C. P. Code, the appellant files a copy of the judgment and prays that the copy of the judgment in the other appeal may be dispensed with, his prayer should be granted. There is no reason why the appellant should be obliged to file a copy of the judgment which is already on the record in the analogous appeal and which is available for use in both the appeals. (*Agarwala, J.*) BODH NARAIN MAHTON *v.* JAIHORI MAHTON. **20 Pat. L.T. 801=A.I.R. 1940 Pat. 176.**

———**O. 41, R. 1**—*Scope—Provisions, if mandatory—Copy of decree not attached—Effect—Attaching of judgment, if optional.*

The provisions of O. 41, R. 1 are mandatory and an omission to attach a copy of decree is fatal to the appeal. As regards judgment it is for the Court to decide whether a copy of judgment may be dispensed with or not and the matter is not optional with the litigant and if the Court does not dispense with it and if a copy of judgment is not filed, the appeal is incompetent. (*Vivian Bose, J.*) CHETANLAL PURSHOTTAM *v.* G. S. GUPTA. **175 I.C. 33=11 R.N. 22=A.I.R. 1938 Nag. 233.**

———**O. 41, R. 1**—*Second appeal—Proper presentation—Claim decreed only in part—Both parties appealing—Lower appellate Court dismissing appeal by plaintiff while allowing appeal by defendant—Plaintiff appealing against dismissal of his appeal but filing copy of decree of defendant's appeal in lower Court.*

A person filed a suit against another for recovery of certain money advanced and for recovery of damages for breach of a contract. His suit was decreed only for recovery of advance while claim for damages was dismissed. He appealed against this dismissal of his claim for damages. The defendant appealed against the decree against him for recovery. Both appeals were separately numbered and the lower appellate Court dismissed the plaintiff's appeal and allowed the defendant's appeal thus dismissing the plaintiff's claim entirely. The plaintiff came in second appeal and along with his memorandum of appeal he filed a copy of the decree of the lower appellate Court where the defendant was an appellant and not the decree in appeal by him which was really appealed from.

Held, that there was no proper presentation of second appeal inasmuch as the plaintiff should have appealed against a decree dismissing his appeal under O. 41, R. 1, C. P. Code, to the lower Court and should have filed a decree of that appeal. (*Agha Haidar, J.*) GIRDHARI LAL *v.* RATTAN CHAND. **165 I.C. 137=9 R.L. 213 (2)=A.I.R. 1936 Lah. 293.**

C. P. CODE (1908), O. 41, R. 4.

———**O. 41, R. 2**—*Scope—Plea not raised in written statement or memorandum of appeal—Appellate Court—Power of to base judgment on such defences.*

An appellant should not be allowed to raise and succeed on defences not raised in the written statement or in the memorandum of appeal. It is true that the Appellate Court under O. 41, R. 2, C. P. Code, in deciding the appeal is not confined to the grounds of objection in the memorandum, but it is not permitted to rest its decision on any other ground unless the party affected thereby has had a sufficient opportunity of contesting the case on that ground. When an appellant seeks to raise a point not taken in the Courts below or in the memorandum of appeal, the propriety of allowing him to do so and of basing the appellate decision on such a ground is a matter which the Appellate Court ought to decide. (*Rowland, J.*) BHAGWAN SINGH *v.* UJAGIR SINGH. **A.I.R. 1940 Pat. 33.**

———**O. 41, R. 2 (Peshawar Amendment)**—*Appeal filed within limitation but without copy of the judgment of trial Court—Appeal returned—Appeal again filed with said copy after expiry of limitation for appeal—Appeal, if time barred.*

Where an appeal was filed within limitation but without a copy of the judgment of the trial Court as required by the amendment to O. 41, R. 2, C. P. Code, made by the Judicial Commissioner's Court, Peshawar, and it was returned with the directions that the copy of the trial Court's judgment be produced and the appeal was afterwards presented again with the copy when the period for filing the appeal had expired.

Held, that the appeal was time barred. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) ABDUL QAYAM *v.* MAULVI HAJI MOMAMMAD SAEED MOHAMMAD AMIN. **168 I.C. 878=9 R. Pesh. 137 (2)=A.I.R. 1937 Pesh. 50.**

———**O. 41, R. 2, proviso**—*Power of Court under—Decision of case on point raised by Court* suo motu—*If justified.*

It is no doubt open to a Court of appeal to decide a case on any rule of law which it considers applies, but it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an opportunity of meeting it. (*Leach, C.J., Varadachariar and Mockett, JJ.*) RAMACHANDRA NAIDU *v.* VENGAMA NAIDU. **I.L. R. (1938) Mad. 829=174 I.C. 493=10 R.M. 717 =48 L.W. 76=1938 M.W.N. 269=A.I.R. 1938 Mad. 357 (F.B.).**

———**O. 41, R. 4**—*Appeal filed by two defendants having common interest—Appeal by one of them found incompetent on technical ground—Whole appeal, if incompetent.*

Where an appeal was filed on behalf of two defendants having a common interest and a common case and the appeal filed by one of them who was a minor was found to be incompetent having been filed under the guardianship of a person other than the one who was appointed guardian by the trial Court, the appeal on behalf of the other defendant does not become incompetent. It was open to him alone to file an appeal against the whole decree and in such a case the appellate Court could reverse or vary the decree not only

in his favour but also in favour of the minor defendant under O. 41, R. 4, C. P. Code, and there is no valid ground for putting him in a worse position than he would have been if the minor defendant's name had not been joined as an appellant when the appeal was filed. (*Srivastava, C.J.*) DULLI *v.* BADRI PRASAD. **170 I.C. 636=10 R.O. 50=1937 O.L.R. 469=1937 O.W.N. 768=A.I.R. 1937 Oudh 448.**

———O. 41, R. 4—*Applicability—Death of one of several appellants—Abatement—Effect.*

The provisions of O. 41, R. 4 apply to the case of an appellant whose appeal has abated by his death, because the effect of the abatement is that to all intents and purposes there is no appeal on behalf of the appellant whose appeal has abated. A person brought a suit for malicious prosecution on the ground that defendants had conspired to implicate him in a false charge of dacoity. A decree was passed and the defendants appealed. During the pendency of the appeal one of the appellants died and his heirs were not brought on record.

Held, that as no decree could have been passed against the defendants unless the charge of conspiracy was proved, the decree appealed from proceeded on ground common to all defendants and hence O. 41, R. 4 applied. (*Fazl Ali, J.*) NARAIN PANDE *v.* GAYA RAI. **174 I.C. 388=4 B. R. 429=10 R.P. 510=19 Pat.L.T. 398=A.I.R. 1938 Pat. 147.**

———O. 41, R. 4—*Applicability—Some only of the plaintiffs appealing—Others impleaded—Common interest—One of the non-appealing plaintiffs and a* pro forma *defendant dying—Legal representatives not brought on record—Appeal, if can continue as against the rest—O. 22, R. 4.*

When a question arises as to the applicability of O. 41, R. 4 there is no essential difference between (1) a case where some only of the plaintiffs or defendants, as the case may be, have appealed without impleading others; (2) a case where all the plaintiffs or defendants have appealed and one of them dies and his heirs are not substituted; and (3) a case where some only of the plaintiffs have appealed and have impleaded the other non-appealing plaintiffs and the *pro forma* defendants having the same interest as the plaintiffs and one of the non-appealing plaintiffs or *pro forma* defendants dies and the heirs are not brought on record. Where some only of the plaintiffs appealed impleading a non-appealing plaintiff and a *pro forma* defendant having the same interest as the plaintiff, and a non-appealing plaintiff and a *pro forma* defendant die and their legal representatives are not brought on record, the appeal is not rendered incompetent on that account. (*Collister and Bajpai, JJ.*) ABDUL REHMAN *v.* GIRJESH BAHADUR PAL. **I.L.R. (1938) All. 350=176 I.C. 91=1938 A.L.R. 530=11 R.A. 32=1938 A.L.J. 159=1938 R.D. 312=1938 A.W.R. (H.C.) 138=A.I.R. 1938 All. 235.**

———O. 41, R. 4—*Decree against several defendants on common ground—Appeal by one alone without impleading others—Competency.*

Where a suit against several defendants is resisted by all the defendants by raising a common ground of defence, and a decree is passed against all of them upon a common ground, any one of the defendants is entitled by himself to prefer an

appeal against the decree and proceed with it without making the other defendants parties to the appeal. (*Guha and Bartley, JJ.*) GOPESH CHANDRA ADITYA *v.* BENODE LAL DAS. **165 I.C. 606 (2)=9 R.C. 425=40 C.W.N. 553=A.I.R. 1936 Cal. 424.**

———O. 41, R. 4—*Defendants-appellants resisting suit for possession on footing that they are tenants—Death of one of them pending appeal—Decree, if may be passed in favour of rest.*

Where the defendants-appellants claim to be tenants and are resisting the plaintiff's suit for possession on the footing that they are tenants, the fact that one of them has died pending the appeal and his heirs have not been brought on the record does not affect the maintainability of the appeal by the rest. If any one of them succeeds in establishing that he is a tenant, the plaintiff's suit for *khas* possession must necessarily fail and there would be no difficulty in passing a decree in favour of the appellants who are before the Court. (*Sen, J.*) NIBARAN CHANDRA GHOSE *v.* PRATAP CHANDRA. **44 C.W.N. 141.**

———O. 41, R. 4—*Powers of appellate Court—Appeal by all plaintiffs or defendants—Appeal proceeding on common ground—Death of one appellant and consequent abatement—Application to set aside abatement refused—Power of Court to hear appeal and to reverse or vary decree in favour of all appellants—O. 22, Rr. 3 and 11—If overridden by O. 41, R. 4.*

The appellate Court has no power to proceed with the hearing of an appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under O. 41, R. 4, C. P. Code, if all the plaintiffs or defendants appeal from the decree and one of them dies and no substitution is effected within time and an application for setting aside the abatement so far as the deceased appellant is concerned has been refused always assuming that the decree appealed from proceeded on a ground common to all the plaintiffs or defendants. There is nothing in R. 4 of O. 41, C. P. Code, which permits the Court to disturb the finality of the decree as against the deceased appellant. Before a Court can vary a decree in favour of the representative of the deceased appellant, such representative must be brought on the record. The Court can, of course, do so if a rule expressly empowers it; but O. 41, R. 4 does not give such a power. That rule is based on the assumption that all the plaintiffs or defendants in the suit are alive at the date of the passing of the appellate decree, and it cannot override or create an exception to O. 22, Rr. 4 and 11; in the case of one or more appellants dying even where a decree proceeds upon a ground common to all, the matter must be governed solely by Rr. 4 and 11 of O. 22, C. P. Code. To hold otherwise is to hold that O. 41, R. 4, C. P. Code, gives the Court power to set aside an abatement and to reverse or vary a decree which has become final against a deceased appellant. (*Harries, C.J., Wort and Manohar Lall, JJ.*) RAMPHAL SAHU *v.* SATDEO JHA. **188 I.C. 745=6 B. R. 737=21 Pat.L.T. 597=1940 P.W.N. 361=13 R.P. 33=A.I.R. 1940 Pat. 346 (F.B.).**

———O. 41, R. 4—*Power of Court—Abatement of appeal—Court's power to vary decree.*

C. P. CODE (1908), O. 41, R. 4.

Provisions of O. 41, R. 4 enable the Court to vary the decree as a whole even though the appeal of one of the appellants might have abated by reason of death. (*Burn, J.*) SAKKARAI CHETTIAR *v.* CHELLAPPA CHETTIAR. **179 I.C. 125 =11 R.M. 529=A.I.R. 1938 Mad. 374.**

———**O. 41, R. 4**—*Powers of Court—Dismissal of suit by two plaintiffs—Appeal by one only—Other impleaded as party but no appeal by latter—Decree in favour of latter also—Power to pass.*

Where a suit filed by two plaintiffs as reversioners to an estate is dismissed on the ground that they are not the reversioners, and one of them prefers an appeal in respect of the whole claim impleading the other also as a party respondent, the appellate Court has power to pass a decree in appeal in favour of not only the appellant plaintiff, but also in favour of the other plaintiff, though he has not himself appealed against the dismissal, in virtue of the powers conferred on the appellate Court under O. 41, R. 4, C. P. Code. The appeal being from the whole decree, which proceeded on grounds common to both the plaintiffs, O. 41, R. 4 applies to the case with full force and the appellate Court is fully entitled to pass a decree in favour of both the plaintiffs. O. 41, R. 4 is based on two considerations, firstly to give the appellate Court full power to do justice to all parties whether before it or not, and, secondly, to prevent contradictory decisions in the matter in the same suit. (*Ganga Nath, J.*) JAGDEI *v.* SAMPAT DUBE. **172 I. C. 635=1938 A.L.R. 8=10 R.A. 414=1937 A.W. R. 916=1937 R.D. 548=1937 A.L.J. 1111=A. I.R. 1937 All. 796.**

———**O. 41, R. 4**—*Pre-emption suit—Pleas raised by vendees-defendants common to all—Appeal by one of them—Others impleaded as respondents—Competency.*

Where in a suit for pre-emption, the pleas raised by the vendees-defendants are common to them all and only one of them appeals from the decree in the suit, but the memorandum of appeal clearly mentions O. 41, R. 4 according to which the appeal is filed in the name of only one of the vendees, and the other vendees-defendants are advisedly impleaded as respondents, it is competent for one of the vendee-defendants to appeal in his own name even though the interests of the other vendees-defendants are not inseparable from the interest of the appellant and the success of the appeal enures for the benefit of the appellant as well as his co-vendees-respondents. (*Agha Haidar, J.*) DHALA BAHLAK *v.* DHALA LAKHAN. **165 I.C. 66=9 R.L. 202=A.I.R. 1936 Lah. 612.**

———**O. 41, Rr. 4 and 33**—*Relief to persons not before Court—Exercise of discretion—Principles.*

Ordinarily when a person submits to a decree it is no part of the Court's duty to interfere and give that person gratuitously a relief which he has not prayed for and which possibly he may not want. The general principle of law is that when there is no appeal or motion the decree will stand. This principle should be adhered to unless it is found that such adherence will hamper the Court in doing complete justice. To meet this contingency O. 41, Rr. 4 and 33, C. P. Code, have been enacted. These provisions give the Court

C. P. CODE (1908), O. 41, R. 4.

a wide discretion to grant relief to persons who are not before the Court either as appellants or respondents. These discretionary powers, however, should be cautiously used and the exercise of these powers, when it is not necessary, would constitute an error of law and procedure justifying an interference by the High Court. (*Sen, J.*) FAZAL RAHMAN *v.* ABDUL RASHID. **43 C.W.N. 15.**

———**O. 41, R. 4**—*Scope of—Appeal by some only of the plaintiffs—Others necessary parties.*

The provisions of O. 41, R. 4 simply lay down that one or more plaintiffs *may* prefer an appeal where a decree proceeds on a ground common to all, but it does not lay down that the others are not necessary parties. Where the suit is one for declaration in respect of the partition of joint property, all plaintiffs' co-sharers are necessary parties to an appeal against the dismissal of such a suit. When only some of them alone appeal, the appeal is liable to be dismissed owing to absence of necessary parties. (*Bhide, J.*) KARTAR SINGH *v.* WARYAM SINGH. **40 P.L.R. 6.**

———**O. 41, R. 4**—*Scope—Appeal by some parties only—Decree based on ground common to all—Competency.*

O. 41, R. 4, C. P. Code, allows a Court of appeal to decide the whole case, although it may have been preferred by some of the parties concerned, provided the decree appealed against proceeds on a ground common to all parties. The provisions of O. 41, R. 33 give further powers to the appellate Court to pass such orders as the case may require in spite of the fact that the parties affected may not file any appeal or objections. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) CHATTAR SINGH *v.* MAKHAN SINGH. **160 I.C. 1005=8 R. Pesh. 143=A.I.R. 1936 Pesh. 20.**

———**O. 41, R. 4**—Scope—Powers of Court under—Appeal by all defendants having common defence—Suit in representative character—Death of one appellant—If operates as abatement of whole appeal—Power of Court to proceed with appeal. *See* C. P. CODE, O. 22, R. 3. **1935 A. M.L.J. 102.**

———**O. 40, R. 4**—*Scope—Receiver—Liability to make good loss to estate—Procedure for enforcing—Order in passing accounts—Competency—Separate suit—Necessity.*

It is perfectly competent to the Court in the course of passing the accounts of a receiver, under O. 40, R. 4, C. P. Code, to make an order, after holding him liable, to make good the loss caused to the estate through his wilful negligence. A separate suit against the receiver is not necessary for the purpose of establishing his liability or for enforcing it. (*Jack and Henderson, JJ.*) SURESH CHANDRA BANERJI *v.* ENAMEL HUQ. **40 C.W.N. 479.**

———**O. 41, R. 4**—*Scope and effect—Partition suit—Appeal from decree—Death of some defendants—If operates as abatement of whole appeal—Right of surviving defendants to continue.*

No effective decree for partition can be passed in a partition action unless all the co-sharers are before the Court. But it does not follow that a suit for partition cannot be dismissed against an absent defendant. In an appeal from a partition decree which proceeds on grounds common to all the appellants, if there is a partial abatement

C. P. CODE (1908), O. 41, R. 5.

owing to the death of some of them, the surviving appellant may continue the whole appeal having regard to the provisions of O. 41, R. 4, C. P. Code. Where the decree appealed from is of such a nature that the hearing of the appeal after partial abatement may result in the passing of two inconsistent decrees, the whole appeal must fail. (*Rowland and Chatterji, JJ.*) PRAHLAD CHANDRA SINGH *v.* BHIM MAHATO. **19 Pat. 172 =185 I.C. 685=6 B.R. 236=12 R.P. 411=1940 P.W.N. 317=21 Pat.L.T. 577=A.I.R. 1940 Pat. 341.**

———O. 41, R. 5—*Appeal filed but not registered owing to Stamp Reporter's report—Application for stay—If maintainable.*

Where an appeal is properly filed in accordance with O. 41, R. 1, C. P. Code, an application for stay of execution under O. 41, R. 5 is maintainable, even though the appeal is not registered owing to an adverse report of the Stamp Reporter. (*S. K. Ghose and McNair, JJ.*) BIBHABATI DEBI *v.* RAMENDRA NARAYAN ROY. **41 C.W.N. 374 =65 C.L.J. 127.**

———O. 41, R. 5—*Decree in respect of estate under Court of Wards—Undertaking by latter not to pay income to ward—Validity.*

An undertaking by the Court of Wards to hold the income of the estate under its management as a condition for stay of execution of the decree passed in respect of such estate, cannot be enforced as a personal security under S. 145, C. P. Code, and its legal validity is also not free from doubt. (*S. K. Ghose and McNair, JJ.*) BIBHABATI DEBI *v.* RAMENDRA NARAYAN ROY. **41 C. W.N. 374=65 C.L.J. 127.**

———O. 41, R. 5—Order under refusing to stay execution pending appeal—Appealability. *See* C. P. CODE, S. 2 (2). **40 Bom.L.R. 1198.**

———O. 41, Rr. 5 and 6—*Security bonds under —Form of.*

A security bond under O. 41, Rr. 5 and 6, C. P. Code, must be in the form of a bond to some one and not a mere undertaking to the Court. The bond must be addressed to some officer of the Court. The Court is not a juridical person and a bond in favour of the Court, is not one in proper form. (*D. N. Mitter and R.C. Mitter, JJ.*) AKSHAY ZEMINDARY, LTD. *v.* RAMANATH BURMAN. **I.L.R. (1937) 1 Cal. 375=64 C.L.J. 439=40 C.W.N. 1281.**

———O. 41, Rr. 5 and 6—Security bond under, in moffusil—Court-fee and stamp duty. *See* COURT-FEES ACT, SCH. II, ART. 6. **A.I.R. 1936 Sind 41.**

———O. 41, R. 5—*Stay of execution—Grant of —Conditions.*

On an application under O. 41, R. 5, C. P. Code, the Court has the power to make an order staying execution if there is sufficient cause. But this expression in sub-R. (1) must be read along with the conditions in sub-R. (3) and each of the three conditions mentioned therein must be taken to be a necessary ingredient before stay of execution may be granted. (*S. K. Ghose and McNiar, JJ.*) BIBHABATI DEBI *v.* RAMENDRA NARAYAN ROY. **41 C.W.N. 374=65 C.L.J. 127.**

———O. 41, R. 5—*Stay order—When comes to an end.*

A stay order is automatically vacated the moment the appeal is dismissed and therefore it ceases to have effect from that date. (*Bose, J.*) KESHAV YESHWANT KOLI *v.* KRISHNA BALAJI MAHAR. **181 I.C. 616=11 R.N. 480=1939 N.L. J. 13=A.I.R. 1939 Nag. 107.**

———O. 41, Rr. 5 and 6—Surety bond under—Hypothecation of properties—Stamp duty—Mortgage deed or security bond. *See* STAMP ACT, SCH. I, ARTS. 49 AND 57. **40 C.W.N. 1281.**

———O. 41, R. 5 (1)—*"Stay of proceedings" —Order of temporary injunction in suit for injunction—Appeal—Stay of operation of injunction pending appeal—Power of appellate Court to direct.*

In an appeal under O. 43, R. 1 (*r*) against an order of temporary injunction granted under O. 39, R. 2, C. P. Code, the appellate Court is competent under O. 41, R. 5 (1), C. P. Code, to direct a stay of operation of the interim injunction pending appeal. The words "stay of proceedings" in O. 41, R. 5 (1) do not mean stay of proceedings in the Court itself, so as to preclude the appellate Court from interfering with the operation of the injunction already issued. (*Sulaiman, C. J. and Bennet, J.*) RAM NARAIN *v.* IMPROVEMENT TRUST, CAWNPORE. **168 I.C. 32=9 R.A. 626= 1937 A.W.R. 381=1937 A.L.J. 377=1937 A.L. R. 304=A.I.R. 1937 All. 528.**

———O. 41, R. 6—*Applicability.*

O. 41, R. 6, C. P. Code, is inapplicable if no application for stay of sale is made to the executing Court. (*Bhide, J.*) SURAJ MAL *v.* BABU RAM. **172 I.C. 578=10 R.L. 350 (2)=39 P.L. R. 601=A.I.R. 1937 Lah. 841.**

———O. 41, R. 6—*Scope—Appellate Court directing subordinate Court to take security— Discretion and duty of subordinate Court—Interference by appellate Court.*

The Court which directs security to be furnished is directly interested in seeing whether its orders have been complied with or not, and though it may have delegated the function of enquiring into the sufficiency of security to a subordinate Court and left it entirely to that Court to decide the sufficiency or otherwise of the security, it can always intervene if the subordinate Court misdirects itself in conducting the enquiry. At the same time if certain matters have been left to the discretion of the subordinate Court, the appellate Court will interfere only when the Court below has acted perversely or either misconstrued or misdirected itself on any principle of law and justice. It is the duty of the subordinate Court to examine the titles of the sureties carefully and be reasonably satisfied as to the validity and the sufficiency of the bonds so that no difficulty may arise in their enforcement if it becomes necessary to enforce them in future. (*Fazl Ali and Madan, JJ.*) ANAND DAS *v.* RAM BHUSAN DAS. **1937 P.W.N. 216=3 B.R. 663 =18 Pat.L.T. 621=170 I.C. 139=10 R.P. 86 =A.I.R. 1937 Pat. 380.**

———O. 41, R. 6—*Security—Bond by member of joint Mitakshara family—If to be accepted.*

Security bond executed by a member of a joint Mitakshara family when it consists of other members including minors should not be accepted by the Court. (*Fazl Ali and Madan, JJ.*) ANAND DAS *v.* RAM BHUSAN DAS. **1937 P.W.N. 216= 3 B.R. 663=18 Pat.L.T. 621=170 I.C. 139=10 R.P. 86=A.I.R. 1937 Pat. 380.**

C. P. CODE (1908), O. 41, R. 6.

———O. 41, R. 6 (1)—*Order directing execution to proceed on furnishing of security—Security to the 'satisfaction of the Registrar'—Report by Registrar—Objection thereto—Appeal to Court, if lies.*

Where in an appeal, an application for stay of execution of the decree was dismissed, but the decree-holder was permitted to execute the decree on condition of his furnishing security to 'the satisfaction of the Registrar of the appellate side', and where by a subsequent order the time fixed was extended and the whole was directed to be disposed of by the Registrar in insolvency, and a 'report' is made by the Registrar accepting the security offered.

Held, that the party objecting to the acceptance of the security cannot come up to the Court again, as it would be in the nature of an appeal, which does not lie. But there is no doubt the Court can review its own order on proper grounds. (*S. K. Ghose and Patterson, JJ.*) BIBHABATI DEBI *v.* RAMENDRA NARAIN ROY. **66 C.L.J. 169=42 C.W.N. 188.**

———O. 41, R. 6 (2)—*Appellate Court refusing to stay execution under R.* 5 (1)—*Power of decretal Court to stay sale.*

An order of the appellate Court refusing to stay execution of the decree under R. 5 (1) of O. 41, C. P. Code, does not fetter the power of the Court which passed the decree to stay under O. 41, R. 6 (2) the sale ordered in execution of the decree. In fact such Court has no option but to stay a sale on such terms as it thinks fit if a proper application to that effect is made. (*Edgley, J.*) JITENDRA NATH *v.* BHOLANATH. **44 C. W. N. 701.**

———O. 41, R. 6 (2)—*Application by judgment-debtor for stay—Summary dismissal—Legality.*

On an application by the judgment-debtor under O. 41, R. 6, C. P. Code, for stay of sale of immovable property in execution of a decree pending the disposal of appeal, the execution Court can impose terms and even require the judgment-debtor to deposit the whole amount of the decree; but it cannot dismiss the application summarily. (*Saunders, J.*) BENI SINGH *v.* RAM SARAN SINGH. **161 I.C. 936=8 R.P. 494=1936 P.W.N. 264=A.I.R. 1936 Pat. 443.**

———O. 41, R. 6 (2) and S. 115—*Order under—Revision.*

The High Court may interfere in revision in respect of an incorrect order under O. 41, R. 6 (2), C. P. Code. (*Edgley, J.*) JITENDRA NATH *v.* BHOLANATH. **44 C.W.N. 701.**

———O. 41, R. 6 (2)—*Scope—Duty of Court to stay sale—Discretion to refuse stay.*

On the wording of O. 41, R. 6 (2), C. P. Code, the Court has no option but to grant stay of sale on such terms as to giving security. There is no limit to the discretion of the Court in imposing terms, but it has no discretion to refuse to stay the sale. (*Burn and Stodart, JJ.*) RUKMANI AMMAL *v.* SUBRAMANIA SASTRIGAL. **I. L. R. (1940) Mad. 420=190 I.C. 19=1939 M.W.N. 1154=50 L.W. 645=A.I.R. 1940 Mad. 82=(1940) 1 M.L.J. 460.**

———O. 41, R. 10—*Applicability—Original side appeals in High Court—Security for costs of original suit—Power to order—"Suit"—Meaning of.*

C. P. CODE (1908), O. 41, R. 10.

O. 41, R. 10, C. P. Code, is applicable to appeals from decrees or orders made on the original side of the High Court, whether the judgment appealed against is one made in a suit or in a petition. The expression "original suit" in O. 41, R. 10 is not used in the technical sense of a proceeding commenced by a plaint, but is used to cover also an original application on which the judgment appealed from was given, whatever its nature. (*Beaumont, C.J. and Wassoodew, J.*) PRATAPGIR NARSINGIRJI *v.* OFFICIAL LIQUIDATOR, PRAHLAD MILLS, LTD. **I.L.R. (1938) Bom. 399=176 I. C. 756=11 R. B. 49=40 Bom. L. R. 470=A.I.R. 1938 Bom. 351.**

———O. 41, R. 10—Applicability—Revision application—Security for costs—Powers of High Court to order. *See* C. P. CODE, S. 151. **40 Bom.L.R. 1025.**

———O. 41, R. 10—"Costs of the appeal or of the original suit"—Meaning of—Court-fee due to Government by pauper plaintiff or pauper appellant—Application by Government for security for—Maintainability. *See* C. P. CODE, O. 33, R. 13. **45 L.W. 186=A.I.R. 1937 Mad. 267.**

———O. 41, R. 10—*Order for security—Grounds for—Poverty, if a decisive factor—Vexatious suit*—Mala fide *conduct of appellant—Delay, when legitimate.*

An appellant's poverty would not by itself be sufficient to warrant his being required to furnish security for costs. But that does not mean that the appellant can rely upon his own poverty, as being an important or decisive factor, and resist an application for security, on that ground, particularly where it is found that appellant's claim was of a vexatious character and his conduct has been *mala fide* throughout. Though a respondent should be prompt in applying for security for costs, yet where the delay was due to the steps taken for recovering costs incurred in the lower Court, and where the very occasion for the application for security is the non-recovery of such costs, such a delay cannot deprive an applicant of his remedy under O. 41, R. 10. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AMBALATHILAKATH KUTTOOSSA *v.* KUNHAMMA AMMA. **178 I.C. 899=11 R.M. 520=47 L.W. 133=(1938) M.W.N. 87=A.I.R. 1938 Mad. 380=(1938) 1 M.L.J. 142.**

———O. 41, R. 10—*Order under—Discretion of Court—Mere poverty of appellant—If a ground.*

O. 41, R. 10, C. P. Code, gives an absolute discretion to the appellate Court to decide in what classes of cases security is to be demanded. Though as a general rule a Court is loath to prevent an appellant from pursuing the remedy by way of appeal allowed to him by the law merely on the ground of poverty, each case must stand on its own facts. There might be cases in which an appellant, because he is poor, should be directed to give security at any rate for the costs of the appeal, before he is allowed to proceed further. (*Fazl Ali and Rowland, JJ.*) NARAIN PASI *v.* NANHU MISTRI. **164 I.C. 93=9 R.P. 83=17 Pat.L.T. 187=1936 P.W.N. 296=A.I.R. 1936 Pat. 433.**

———O. 41, R. 10—*Order under—Discretion of Court—Mere poverty if a ground.*

There can be no rule of practice which would have the effect of fettering the discretion of the

C. P. CODE (1908), O. 41, R. 10.

Court in respect of applications for security for costs under O. 41, R. 10, C. P. Code. A respondent is not entitled as of course to an order for security for costs merely because the appellant may through poverty be unable to pay the respondent's costs if the appeal fails. Each case turns on its own facts and it would not be right or expedient to lay down any rule that would have the effect of regulating the discretion of the Court as to the circumstances under which it should make an order for security. (*Page, C.J. and Mya Bu, J.*) MIRZA SAGHIRUL *v.* THE RANGOON ELECTRIC TRAMWAYS & SUPPLY CO., LTD. **14 Rang. 289=163 I.C. 973=9 R.R. 56=A. I. R. 1936 Rang. 294.**

———**O. 41, R. 10**—*Scope and object of—Order for security—When to be made—Matters to be considered—Poverty of appellant—Relevancy of —Appeal* bona fide—*Application for security belated and not* bona fide—*If to be allowed.*

The object of R. 10 of O. 41, C. P. Code, is to secure the respondent from the risk of having to incur further costs which he might never recover from the applicant, and an application under the rule must therefore be made promptly. The Court must be careful to see that a poor appellant is not deprived in effect of his right of appeal. Poverty is always a handicap in litigation and there is no justification for the Court to add to this handicap by requiring impossible things to be done. Different considerations would arise if the appeal were not *bona fide* or if the appellant were only a puppet in the hands of others. But when there is nothing to show that the appellant has no real or substantial interest in the subject-matter of the litigation or that he is a mere name lender for another, and when on the other hand the application of the respondent for calling on the appellant to furnish security is not only belated, but also not *bona fide*, the Court should not allow the application, especially when even otherwise it is not desirable in the interests of justice that an order should be made for furnishing security which might very likely stifle the appeal itself. (*Pandrang Row, J.*) AMBALATHILAKATH KUTTOOSSA *v.* HUNHAMMA AMMA. **1937 M.W.N. 41=45 L.W. 232=168 I.C. 924=9 R. M. 669=A.I.R. 1937 Mad. 285.**

———**O. 41, R. 10**—*Security for costs—Appellant being a minor and a pauper—If can resist application for security for costs—Minor being a creature in the hands of others—Order for security—If proper.*

Where a minor pauper is an appellant and is a mere creature in the hands of persons well able to find security he can be called on to furnish security for costs. The fact that the appellant is both a minor and a pauper does not by itself entitle him to resist the application for security for costs. (*Venkatasubba Rao and Abdur Rahman, JJ.*) RARICHAN *v.* ANANTANARAYANA IYER. **174 I.C. 276=10 R.M. 696=1938 M.W.N. 72=47 L.W. 153=A.I.R. 1938 Mad. 313=(1938) 1 M. L.J. 235.**

———**O. 41, R. 10**—*Security for costs—Mere fact of appeal being in* forma pauperis—*If a sufficient ground.*

It is an established rule of law that poverty is no ground for demanding security from an appellant, so that the fact that the appellant has filed his appeal in *forma pauperis* should not be taken into consideration in this connection. (*Ziaul-Hasan and Hamilton, JJ.*) SUBEHA KHATOON *v.* ANWARUL HASAN. **1939 O.W.N. 152=1939 O.A. 293.**

C. P. CODE (1908), O. 41, R. 11.

———**O. 41, R. 10 (2)**—*Order under—Appeal —Revision.*

There can be no appeal against an order rejecting an appeal under O. 41, R. 10 on failure to furnish security, because the only orders under O. 41 that are appealable under O. 43, R. 1 are orders under Rr. 19, 21 and 23. Nor can such appeal be treated as an application for revision. The discretion of a Court to ask for security is absolute, and when a Court has absolute discretion to pass an order given it by the Code, it cannot be said that the order which it makes in this way is without jurisdiction. A.I.R. 1923 Bom. 264, Rel. on. (*Baguley, J.*) A.V.R.R.M. CHETTYAR FIRM *v.* S.P.S.P.L.N. CHETTYAR FIRM. **161 I.C. 233=8 R.R. 459=A.I.R. 1936 Rang. 109.**

———**O. 41, R. 10 (2) and R. 17**—*Applicability —Appellant not appearing on day fixed to decide sufficiency of security—Dismissal of appeal.*

Where owing to a dispute as to the sufficiency of the security furnished by an appellant under O. 41, R. 10, C. P. Code, a date is fixed for its decision and the appellant does not appear on such date and the appeal is dismissed, the rejection of the appeal is under O. 41, R. 10 (2), C. P. Code and not under R. 17. Hence a refusal to restore it would not come under R. 19 of O. 41 and so it would not be appealable. (*Ismail, J.*) KUTIKA KUER *v.* SRIDHAR MISIR. **I.L.R. (1940) All. 19=187 I.C. 31=12 R.A. 519=1939 A. W. R. (H.C.) 739=1939 A.L.J. 998=A.I.R. 1939 All. 733.**

———**O. 41, R. 10 (2)**—*Rejection of appeal under—If appealable.*

An order rejecting an appeal under O. 41, R. 10 (2), C. P. Code, for failure to furnish security for the costs of the respondent is not a decree within the meaning of S. 2 (2), C. P. Code and is hence not appealable as such. Nor is it one of the orders mentioned in O. 43, R. 1 and so is neither appealable as an order. (*Ismail, J.*) KUTIKA KUER *v.* SRIDHAR MISIR. **I.L.R. (1940) All. 19=187 I.C. 31=12 R.A. 519=1939 A.W.R. (H.C.) 739=1939 A.L.J. 998=A.I.R. 1939 All. 733.**

———**O. 41, Rr. 11 and 12 (1)**—*Construction and scope—Appeal—Admission in part only—Power of Court.*

A Court in dealing with an appeal under O. 41, R. 11, C. P. Code, cannot direct that it be admitted in part only. By virtue of R. 11 of O. 41, the appellate Court may dismiss the appeal without serving notice on the respondent, but if it does not dismiss the appeal summarily, it must, by virtue of R. 12 (1) of O. 41, fix a day for hearing "the appeal." There is nothing in either rule to suggest that the Court may admit the appeal in part only. There are only two courses open to the Court, namely, to dismiss or admit the appeal as a whole. (*Leach, C.J., Mockett and Krishnaswami Ayyangar, JJ.*) ESWARIAH *v.* RAMESWARAYYA. **189 I.C. 253=13 R.M. 218=**

C. P. CODE (1908), O. 41, R. 11.

51 L.W. 694=1940 M.W.N. 514=A.I.R. 1940 Mad. 483=(1940) 1 M.L.J. 857 (F.B.).

———O. 41, R. 11—*Court hearing appeal under —Courses open to.*

When an appeal is heard under O. 41, R. 11, the Court may either act under sub-R. (1) or sub-R. (2). Under sub-R. (1) the dismissal may be on the merits and this may be after hearing the pleader, if he appears, but the words indicate that a dismissal on the merits may also be ordered if the pleader does not appear. Under sub-R. (2) if the appellant does not appear the Court may dismiss for default. But this does not prevent a dismissal on the merits where there is no appearance under sub-R. (1). The power of the appellate Court to take these two courses under R. 11 is not taken away when a notice is issued to the respondent and the respondent appear in accordance with that notice. (*Bennet, A.C.J. and Varma, J.*) CHIMMAN LAL *v.* ZAHURUDDIN. **I.L.R. 1938 All.. 814=178 I.C. 89=1938 A.L.R. 812=1938 A.W.R. (H.C.) 561=11 R.A. 255=1938 A.L.J. 901=A.I.R. 1938 All. 548.**

———O. 41, R. 11—*Dismissal of appeal—Formal judgment—Necessity.*

In dismissing an appeal under O. 41, R. 11, C. P. Code, it is not obligatory upon the lower appellate Court to write a regular formal judgment giving reasons for the decision as required by R. 31 of the said Order, because R. 31 applies only to a judgment under R. 30. (*Mehta and Lobo, A.J.Cs.*) KRISHINCHAND *v.* RAMCHAND. **171 I. C. 625=10 R.S. 113=A.I.R. 1937 Sind 247.**

———O. 41, R. 11—Dismissal under—Lower Court's decree, if superseded. *See* C. P. CODE, O. 9, R. 13. **A.I.R. 1937 Nag. 381.**

———O. 41, R. 11—*Disposal of Appeal under —Elaborate questions of fact and also questions of law falling to be decided.*

Some elaborate questions of fact and also a question of law as to whether the Mahant had power to make certain grants fell to be decided and the appellate Court dismissed the appeal summarily under O. 41, R. 11.

Held, that in these circumstances the case was one where appellate Judgment was called for and therefore the appellate Court was wrong in dismissing it summarily under O. 41, R. 11. A.I.R. 1934 Pat. 341, Dist. (*Wort, Ag. C. J. and Dhavle, J.*) MAHABIR DAS *v.* SADHO CHOUDHURI. **163 I.C. 142=8 R.P. 620=17 Pat.L.T. 607=A.I.R. 1936 Pat. 505.**

———O. 41, R. 11—*Jurisdiction—Summary dismissal of appeal—Power of appellate Court—Revision—Interference.*

An appellate Court has jurisdiction to dismiss an appeal summarily under O. 41, R. 11, C. P. Code, although when difficult questions arise for consideration it would not be doing justice to the parties to dismiss the appeal under O. 41, R. 11. Since the dismissal under O. 41, R. 11 is not without jurisdiction, the High Court will not interfere in revision. (*Wort and Manohar Lall, JJ.*) BADRIA NARAYAN SINGH *v.* HARI LAL SINGH. **172 I.C. 202=1937 P.W.N. 843=10 R. P. 314=18 Pat.L.T. 812=A.I.R. 1937 Pat. 639.**

———O. 41, R. 11—*Powers of Court—Summary dismissal of appeal—When justified.*

An appellate Court should not dismiss an appeal summarily without any due regard to the nature of the questions of fact and of law that arise for consideration in the appeal. The powers of summary dismissal ought not to be lightly used especially in cases where the questions at issue between the parties are not simple but complicated and require careful examination and investigation by Courts of fact. (*Manohar Lall and S. C. Chatterji, JJ.*) RAJA MANDAR *v.* REWAT MAHTO. **174 I.C. 159=4 B.R. 389=10 R. P. 484=19 Pat.L.T. 305=A.I.R. 1938 Pat. 330.**

C. P. CODE (1908), O. 41, R. 17.

———O. 41, R. 11—*Procedure—Case involving elaborate questions of law and fact—Summary dismissal—Propriety.*

In a case where elaborate questions of fact and of law have to be decided, an appellate Court is not justified in dismissing the appeal summarily under O. 41, R. 11, C. P. Code. The appellate Court in such a case should admit the appeal, hear arguments on both sides, apply its mind to the oral and documentary evidence in the case and then come to a decision, which in many cases would be final between the parties. (*Manohar Lall, J.*) CHOTOO LAL *v.* MST. BIBI SEKINA. **179 I.C. 292=5 B.R. 208=11 R.P. 339=19 Pat.L. T. 210=A.I.R. 1938 Pat. 608.**

———O. 41, R. 11 (1) and (2)—Applicability and scope—Dismissal under R. 11 (1) and (2)—Dismissal—Second appeal—"Decree". *See* C. P. CODE, S. 2 (2) AND (14). **18 Pat.L.T. 321=A.I.R. 1937 Pat. 349.**

———O. 41, Rr. 11 (2) and 19—Collector's case —Appeal—Dismissal for default—Refusal to restore—Revision to Governor-in-Council from order of Deputy Commissioner—If open. *See* C. P. REVENUE BOOK CIRCULAR III, RR. 14 AND 15. **19 N.L.J. 314.**

———O. 41, Rr. 17 and 19—*Appellant's counsel leaving Court to attend another case after waiting for considerable time on date of hearing —Appeal called in his absence and dismissed summarily—Propriety of order.*

Where on the date fixed for hearing of the appeal, the appellant's counsel waited in Court from 10 A.M. to 3-20 P.M. and then left to attend a case in another Court, and the Court after finishing the hearing of a previous appeal at 3-50, called the appeal in the absence of the counsel and dismissed it summarily.

Held, that in the circumstances, the Court did not exercise a sound judicial discretion in proceeding so quickly to judgment and that it should restore the appeal for re-hearing on the merits on the application of the appellant. (*Skemp, J.*) UJAGAR MAL MAKHAN LAL *v.* HUKAM CHAND MILLS, LTD., INDORE. **40 P.L.R. 76.**

———O. 41, R. 17—*Appellant not giving correct address or change of address to Court—Notice sent to specified address returned unserved —Appellant absent on hearing date—Procedure—Liability of appeal to dismissal—Adjournment—Right to—Duty of appellant.*

It is the duty of an appellant to see that the Court is provided with the correct address or change of address so that notice can be served on him. If the appellant fails to intimate any change of address, and a notice sent to him by the Court to the address specified in the memorandum of appeal is returned unserved on the ground that he has left the place and taken up residence elsewhere, the Court will not postpone the hear-

C. P. CODE (1908), O. 41, R. 17.

ing of the appeal for the benefit of the appellant; and if the appellant is absent at the hearing the appeal is liable to be dismissed. (*Drake Brockman, S. M.*) PYARE LAL *v.* SRI THAKUR RANGI MAHARAJ. **1936 R.D. 448 (1).**

———**O. 41, R. 17**—*Appellant present but not his Counsel—Duty of Court to decide appeal on merits.*

Where the appellant was present at the hearing of the appeal but not his counsel, it is the duty of the appellate Court to decide the appeal on the merits. (*Jai Lal, J.*) BARKAT ALI *v.* THE MUNICIPAL COMMITTEE, GUJRAT. **39 P.L.R. 34 =171 I.C. 812=10 R.L. 235=A.I.R. 1937 Lah. 691.**

———**O. 41, R. 17**—*Applicability.*

O. 41, R. 17, C. P. Code, only applies when the appeal is called on for hearing, and not when it is called on merely in order to be postponed. (*Skemp, J.*) UMED BARKAT *v.* BHURJEE. **42 P. L.R. 271.**

———**O. 41, R. 17**—*Dismissal of appeal—If for default—Test—Appearance, meaning of.*

Where an appeal is adjourned for a short while to enable a party to engage a fresh counsel to argue his appeal but the new counsel files his appearance and asks for an adjournment and the Court thereupon orders 'No body appears to argue this appeal, I therefore dismiss it with costs', it is clearly an order dismissing the appeal for default. Appearance in the legal sense means that a party or somebody on his behalf either expressly in words or by his conduct demands an adjudication from the Court. (*Allsop, J.*) ALLAH BUX *v.* BUDHA. **183 I.C. 453=12 R.A. 141=1939 A.W.R. (H.C.) 366=1939 A.L. J. 355=A.I.R. 1939 All. 451.**

———**O. 41, Rr. 17, 30 and 31**—*Dismissal under R. 17 of O. 41, when justified—Court, when bound to proceed under Rr. 30 and 31.*

Where on the day fixed for the hearing of an appeal, the appellant does not appear when his appeal is called on for hearing, the Court is entitled under O. 41, R. 17 to make an order that the appeal be dismissed. In such a case the Court is not bound to proceed in the manner laid down by Rr. 30 and 31, for this reason that, that procedure has to be adopted only 'after hearing the parties or their pleaders'. To say that it should be followed even when a party does not appear, is to require the Court to do something which the law does not require it to do. (*Bennet and Verma, JJ.*) O. M. CHIENE *v.* SITA RAM. **1940 A.L.J. 121=1940 A.W.R. (H.C.) 156=A.I.R. 1940 All. 310.**

———**O. 41, R. 19**—Applicability—Appeal—Dismissal for failure to file appellant's list—Application for restoration—Competency—Power of Court. *See* C. P. CODE, S. 151. **1939 P.W.N. 832=A.I.R. 1939 Pat. 678 (F.B.).**

———**O. 41, R. 19**—Applicability—Appellant unable to argue case and applying for adjournment —Refusal of adjournment and dismissal for want of prosecution—If one for default—Remedy of appellant—Application for restoration or second appeal—"Decree". *See* C. P. CODE, S. 100. **1937 A.W.R. 122=A.I.R. 1937 All. 284.**

———**O. 41, R. 19**—Applicability—Application for restoration of appeal dismissed for non-payment of printing cost. *See* COURT-FEES ACT, SCH. I, ARTS. 4 AND 5 AND SCH. II, ART. 1 (*d*). **A.I.R. 1938 Pat. 111=19 P.L.T. 17.**

C. P. CODE (1908), O. 41, R. 19.

———**O. 41, R. 19**—*Application under—Parties —Non-mention of name of party—If fatal.*

In an application under O. 41, R. 19, C. P. Code, for the restoration of an appeal which has been dismissed for default, it is not necessary that any particular party should be expressly impleaded. There is nothing in the Code, which requires it. All that is required is that an application should be made for the restoration of the dismissed appeal. It is no doubt ordinarily advisable to mention in the application the names of all the parties on whom notice of the application should be served. But omission to mention the name of a party respondent does not entail the dismissal of the application on that ground, if the record enables the Court to ascertain the names of the persons to whom notice of the application should be, and is in fact, given. (*Niamatullah, J.*) KALAWATI *v.* DAYANAND. **1937 A.L.J. 407=1937 A. W.R. 338=169 I.C. 246=1937 A.L.R. 489=10 R.A. 7=A.I.R. 1937 All. 362.**

———**O. 41, R. 19 and S. 151**—*Dismissal for default—Delay in filing application for restoration—Condonation—Powers of Court.*

Where an appeal has been dismissed for default, an application for its restoration should be made within 30 days and failure to file such an application within the 30 days can only be condoned by the Court by resorting to the provisions of S. 151, C. P. Code. (*Davies, I.C.S.*) MUNSHI RAM *v.* RAJ KUMAR. **1938 A.M.L.J. 124.**

———**O. 41, R. 19**—*Dismissal of appeal for default—Application to restore—Mode of disposal.*

Courts exist not for the purpose of imposing discipline on practitioners or parties but for the purpose of administering justice. Where an appeal was summarily dismissed and an application for restoration was rejected on the ground of 'Court discipline'.

Held, that the order should have stated the reason for rejecting the petition and its merits should have been investigated by the Court. Even if the order gave reason, it was not sufficient and the order must be set aside. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) CHAMROO SINGH *v.* RAGHO SINGH. **172 I.C. 155=10 R.P. 288= A.I.R. 1937 Pat. 624.**

———**O. 41, R. 19**—*Restoration or re-hearing—When possible.*

Unless the dismissal of an appeal falls under either R. 11 (2) or R. 17 or R. 18 of O. 41, there can be no restoration or re-hearing under R. 19. (*Bennet and Verma, JJ.*) MATHURA DAS *v.* NARAIN DAS. **I.L.R. (1940) All. 220=13 R.A. 81=189 I.C. 163=1940 A.W.R. (H.C.) 157= 1940 A.L.J. 126=A.I.R. 1940 All. 248.**

———**O. 41, R. 19**—*Right to apply under—Appeal dismissed for default of appellant—Assignee from appellant pending appeal*—Locus standi *to apply for restoration.*

O. 41, R. 19, C. P. Code, contemplates that the applicant seeking to have an appeal restored to file has to prove that the appeal was his, and also that he was prevented by sufficient cause from appearing when his appeal was called on for hearing. A person who has got an assignment of the property in dispute from the appellant after the filing of the appeal has no *locus standi* to apply

under O. 41, R. 19 to restore to file the appeal which has been dismissed for default of the assignor appellant. (*Wort, A.C.J. and Manohar Lall, J.*) NARAIN CHANDRA KHAN *v.* JAGANNATH ACHARYA. **177 I.C. 152=4 B.R. 798=11 R.P. 134=1938 P.W.N. 601=A.I.R. 1938 Pat. 574.**

——O. 41, R. 19—*"Sufficient cause"—Appeal—Dismissal for default—Party engaging pleader and ensuring his attendance—Pleader failing to appear—Restoration.*

Unless expressly directed a party is not bound to attend in person even in the original much less in the appellate Court. The absence of the party is therefore immaterial. As to the absence of the pleader, the Court should address itself to the issue whether he was fully instructed by the party or not. In the absence of any evidence to the contrary, it must be presumed that he was fully instructed to argue the appeal on behalf of his client. If the party does all he is required to do under the law to retain a pleader, and he is failed or betrayed by the pleader, it is manifestly unjust to visit the party with penalty. All that the law requires is the assignment of a sufficient cause for non-appearance. The fact that the party has engaged a pleader is itself a sufficient cause for his non-appearance unless of course it is proved that he was in default in the matter of ensuring the performance of duty by the pleader. (*Niyogi, A.J.C.*) PANDU *v.* HIRA. **A.I.R. 1936 Nag. 85.**

——O. 41, R. 19—*Sufficient cause—Restoration of appeal.*

Where an appeal which was fixed for hearing on a certain date as last on the cause list was called in the earlier part of the day and dismissed for default, and within a few minutes of the dismissal, an application for restoration was made, supported by an affidavit, in which it was stated that the appellant could not be present as he was attending another case in another Court at the time, and that his pleader had gone to the Court room in the earlier part of the day and finding that the case was last on the list, went away to the Bar room expecting that the case would not be taken up for some time.

Held, that the absence of the appellant or his pleader was not intentional, and that there was sufficient ground for restoration on payment of costs. (*Tek Chand, J.*) ANJUMAN IMDAD QARZA *v.* AHMAD HUSSAIN. **41 P.L.R. 97=A.I.R. 1939 Lah. 267.**

——O. 41, R. 19—*"Sufficient cause"—Test to decide—Considerations—Counsel for appellant absent, when appeal called, being engaged in another Court—Dismissal for default—Restoration—Rule as to.*

In dealing with an application under O. 41, R. 19, C.P. Code, to restore an appeal which has been dismissed for default, the appellant's Counsel being engaged before another Court, the Court has to consider the position of the party concerned rather than the conduct of the members the bar, though it may sometimes be difficult to dissociate the one from the other. A litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs.

where the non-appearance is due to default of counsel engaged in the case a similar consideration will *mutatis mutandis* be applicabe, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his Counsel. This consideration is all the more weighty when dealing with cases of default in the High Court where in some cases the party is not present at all having entrusted his case to counsel. It will be unmerited hardship if the party's interests should be irreparably prejudiced by reason of every default on the part of Counsel. (*Varadachariar and Horwill, JJ.*) VENKATARAJU GARU *v.* MAHARAJA OF PITHAPURAM. **I.L.R. (1937) Mad. 607=45 L.W. 717=10 R.M. 357=171 I.C. 533=1937 M.W.N. 195=A.I.R. 1937 Mad. 503=(1937) 1 M.L.J. 632.**

——O. 41, R. 20—*Addition of parties in appeal—Powers of Court—Limitation.*

An appellate Court has power under O. 41, R. 20, C.P. Code, to add as respondents to the appeal persons who were parties to the suit in the original Court but who are not parties to the appeal, although the time in which the appeal may have been preferred as against them has expired. No question of limitation arises under O. 41, R. 20. (*Varma and Rowland, JJ.*) SURAJ PRAKASH PURI *v.* SANT LAL SINGH. **18 Pat. 768=186 I.C. 865=12 R.P. 549=6 B.R. 407=1940 P.W.N. 168=21 P.L.T. 420=A.I.R. 1940 Pat. 137.**

——O. 41, R. 20—*Appeal—Competency—Party having decree in his favour sought to be added as respondent after limitation.*

G sued *H* and *S* for the cancellation of a mortgage deed executed by *H* in favour of *S*, on the ground that the land mortgaged belonged to *G* and *H* jointly. The trial Court granted a decree cancelling the mortgage as to *G's* one-half interest in the land. In appeal by *H* against the decree making only *G* a party, *G's* suit was dismissed. *G* appealed from the appellate decree and joined only *H* as respondent and subsequently sought to join *S* as respondents but obviously after the appeal against *S* was time-barred.

Held, that the appeal was incompetent because the prayer of *G* in the second appeal being the restoration of the trial Court's decree he could not succeed in the appeal unless *S* was made a party to it and since the appeal against *S* was time-barred he could not afterwards be made a party to the appeal. A.I.R. 1927 P.C. 252 and A.I.R. 1932 Rang. 16, Rel. on. (*Mackney, J.*) MAUNG THAN GYAUNG *v.* MAUNG THAN HMO. **182 I.C. 1005=12 R.R. 43=A.I.R. 1939 Rang. 213.**

——O. 41, R. 20—Applicability. *See* C.P. CODE, O. 1, R. 10. **31 S.L.R. 486.**

——O. 41, R. 20—*Applicability—Omission to implead owing to no fault of party—Power of appellate Court to add after expiry of period of limitation.*

Where omission to add a party was not deliberate, but the error was due to the Collector's office in not including the party's name in the decree the power given under O. 41, R. 20 should be used and the party allowed to be added though beyond the period of limitation. (*Darling, S. M. and Bomford, J. M.*) MATHURA *v.* RAMDITTA. **1938 A.W.R. (B.R.) 140=1938 R.D. 270.**

C. P. CODE (1908), O. 41, R. 20.

———**O. 41, R. 20**—*Applicability—Person not a party to first appeal—If can be added in second appeal.*

A person not a party to a first appeal, can be joined in second appeal under R. 20 of O. 41, C.P. Code. (*Weston.*) KISHAN LAL *v.* KANHAIYA LAL. **1938 A.M.L.J. 91.**

———**O. 41, Rr. 20 and 22**—*Applicability—Respondent applying to be added under R. 20—Proviso to R. 22 is not applicable to such case—Whether period of limitation for filing cross-objections does not begin to run or whether it runs from date of notice of hearing of appeal* (Quaere.)

Quaere—When a respondent is added under R. 20 the proviso to R. 22 not being applicable to such a case, whether the period of limitation for filing cross-objection does not begin to run at all on notice being served on him and the right to file cross-objections continues indefinitely, or whether limitation for filing cross-objections runs from the date when he has notice of the hearing of appeal. (*Pollock, J.*) DASRULAL *v.* NARAYAN. **I.L.R. (1937) Nag. 401=170 I.C. 93=10 R. N. 43=A.I.R. 1937 Nag. 105.**

———**O. 41, R. 20**—*Application of.*

The appellate Court informed the appellant that a wrong respondent had been impleaded and that he was given 15 days' time to implead the right person who was specially made a party in the trial Court to the knowledge of the appellant. The appellant failed to bring the right person on record within the stated time.

Held, that it was neither a case for the application of O. 41, R. 20, C.P. Code, nor was there a sufficient cause within S. 5, Limitation Act, and the appeal was time-barred. (*Addison and Abdul-Rashid, JJ.*) ATMA RAM *v.* HARNAM SINGH. **164 I.C. 154 (1)=9 R.L. 225 (2)=A.I.R. 1936 Lah. 793.**

———**O. 41, R. 20**—*Contesting respondent added in time—Party supporting appellant—If can be added after limitation.*

Where the real contesting respondents in the case is duly impleaded in time, another party who is throughout supporting the appellant and is interested in the result of the appeal can be added as a proper party under O. 41, R. 20 even after the period of limitation has expired. (*Bhide, J.*) RAM RATTAN *v.* FAZAL HAQ. **I.L.R. (1940) Lah. 40=187 I.C. 839=12 R.L. 495=41 P.L.R. 816=A.I.R. 1939 Lah. 346.**

———**O. 41, R. 20**—*Defendant dying during pendency of suit—Legal representatives brought on record—In appeal, legal representatives not impleaded until right of appeal barred against them—Court, if can implead them.*

Where during the pendency of a suit a defendant dies and his legal representatives are brought on record, but in appeal they are not impleaded until the limitation for appeal against them has expired, they cannot be joined as respondent under O. 41, R. 20, C.P. Code, as such persons cannot be deemed to be persons interested in the result of the appeal filed against other defendants tation Act, cannot apply to such a case even if some of the appellants are minors. (*Addison and Din Mohammad, JJ.*) HAYAT *v.* MUTALLI. **18 Lah. 746=175 I.C. 819=11 R.L. 67=40 P. L.R. 273=A.I.R. 1938 Lah. 35.**

C. P. CODE (1908), O. 41, R. 20.

———**O. 41, R. 20**—*Discretion under—Appellant omitting to implead proper and necessary parties due to gross carelessness—Subsequent application to implead—If to be allowed.*

One *H* and some other zamindars sued for a declaration that *N* was the sole statutory tenant, under S. 123 of the Agra Tenancy Act. The suit was dismissed. Both *H* and *N* appealed to the Commissioner. *H* failed in his appeal but *N* got a decree that he was sole occupancy tenant. From this decree the other claimants appealed to the Board of Revenue, but impleaded only *H* and *N* as respondents and omitted the other zamindars. At the hearing of the second appeal the appellants applied under O. 41, R. 20, C.P. Code, to add the names of the other zamindars.

Held, that the omission of the appellants to implead the other zamindars was not due to any natural mistake, but a piece of gross carelessness, and since they had not taken reasonable care in preparing the second appeal, there was no reason why the Board should exercise its discretion given by O. 41, R. 20; the second appeal being incomplete, should be dismissed. (*Knox, J.M.*) MOHIT LONIA *v.* NATHE LONIA. **1936 R.D. 450 (2).**

———**O. 41, R. 20**—*Discretion under—Exercise of—Principles.*

Where the appellants were not able to show any good reason why the omitted parties were not impleaded though they were obviously necessary parties, the Court would refuse to permit them to be impleaded in appeal, in the exercise of its powers under O. 41, R. 20. (*Bhide, J.*) KARTAR SINGH *v.* WARYAM SINGH. **40 P.L.R. 6.**

———**O. 41, Rr. 20 and 22**—*Interpretation—"Within one month"—Meaning of—Right to file cross-objection—Service on him of notice of appeal—If condition precedent.*

The words "within one month" in O. 41, R. 22, of the Code, mean not beyond one month. The respondent has a right to file cross-objections at any time up to one month after the date of service of the notice of the appeal. The early filing of cross-objections is not prohibited by the Code. The respondent's right to file cross-objections is in no way dependent on the service of notice on him of the appeal. (*Pollock, J.*) DASRULAL *v.* NARAYAN. **I.L.R. (1937) Nag. 401=170 I.C. 93=10 R.N. 43=A.I.R. 1937 Nag. 105.**

———**O. 41, R. 20**—*"Interested in the result of the appeal"—Meaning of.*

A party to the suit against whom the right of appeal has been barred by limitation so far as he is concerned is not a person "interested in the result of the appeal" within the meaning of O. 41, R. 20, C.P. Code. (*Davis, J. C. and Lobo, A. J.C.*) BIBI THADHI AHMEDALI *v.* MIR ABDUL HUSAIN. **171 I.C. 315=10 R.S. 100=A.I.R. 1937 Sind 236.**

———**O. 41, R. 20**—*"Interested in the result of the appeal"—Meaning of.*

It is impossible to regard a defendant against whom a right of appeal has become barred as a person "interested in the result of the appeal" within the meaning of O. 41, R. 20, C.P. Code. 6 R. 29 (P.C.), Foll. (*Cornish, J.*) RAKKA KUDUMBAN *v.* ARULAYI. **1936 M.W.N. 789=169 I.C. 318=10 R.M. 2=A.I.R. 1937 Mad. 228.**

———O. 41, R. 20—*"Interested in the result of the appeal"—Meaning of.*

A co-defendant against whom the claim in the trial Court has been dismissed and appeal has been barred, is not a 'person interested in the result of the appeal' filed by the other defendant, within the meaning of O. 41, R. 20, C.P. Code. (*Dadiba C. Mehta and Lobo, A.J.Cs.*) CHATOMAL *v.* ABDUL HAMID KHAN. **173 I.C. 862=10 R. S. 231=A.I.R. 1937 Sind 312.**

———O. 41, R. 20—*"Interested in the result of the appeal"—Meaning of—Party to suit not impleaded to appeal—Right of appeal against him barred—Power of Court to add as party to appeal—Considerations.*

It cannot be laid down as an inflexible rule of interpretation that a party against whom a suit has been dismissed and as against whom the right of appeal has become barred is "interested in the result of the appeal" filed by the plaintiff within the meaning of O. 41, R. 20, C.P. Code. Nor can it be held that no person who is a party to the proceedings in the original Court can be added as a respondent to the appeal if the time to appeal against him has expired. The determination of the question as to whether the respondent proposed to be added is interested in the appeal must depend on the nature of the litigation, the decree passed, the subject-matter of the appeal and the effect of the decision in appeal in his absence. (*Wadia and Wassoodew, JJ.*) ALABHAI VASURBHAI *v.* BHURA BHAYA. **I.L.R. (1937) Bom. 602=39 Bom.L.R. 444=10 R.B. 207 =171 I.C. 536=A.I.R. 1937 Bom. 401.**

———O. 41, R. 20—*"Interested in the result of the appeal"—Party not impleaded in appeal against whom appeal is barred.*

Where a suit is dismissed against defendant 1 only and defendant 2 prefers an appeal, defendant 1 cannot be deemed to be interested in the result of the appeal at the time when the period of limitation for an appeal against him has expired and therefore his joinder as a respondent to the appeal by the appellate Court is not permitted by law. (*Mya Bu, J.*) LAKHAJEE *v.* SEIN DASS. **188 I.C. 120=12 R.R. 359=A.I.R. 1940 Rang. 97.**

———O. 41, R. 20—*"Interested in the result of the appeal"—Party not impleaded in appeal and against whom appeal had become barred—If can be added.*

Where an appeal is preferred against the dismissal of an application under S. 53 of the Provincial Insolvency Act and the transferee is not impleaded, and as against whom the appeal had become barred by time, cannot be added as a respondent under O. 41, R. 20, as he is not a person 'interested in the result of the appeal'. (*Srivastava, C.J. and Madeley, J.*) HARI SHANKAR *v.* MENDI LAL. **13 Luck. 659=171 I.C. 896=10 R.O. 144=1937 O.L.R. 578=1937 O.W.N. 1179.**

———O. 41, R. 20—*"Interested in result of appeal"—Person against whom appeal is barred by time.*

Where an appeal against a person has become barred by time he ceases to be "a person who is interested in the result of the appeal" within the meaning of O. 41, R. 20 and his name cannot be

subsequently added as a respondent under O. 41, R. 20. (*Young, C.J. and Monroe, J.*) RAMESHWAR DAS *v.* OFFICIAL RECEIVER, DELHI. **I.L.R. (1938) Lah. 398=180 I.C. 698=11 R.L. 707 =40 P.L.R. 1060=A.I.R. 1938 Lah. 325.**

———O. 41, R. 20—*Omission of a party's name from decree—Not noticed in appeal—If can be added in second appeal.*

Where the Zamindars were left out from the decree that was based on the order passed in suit for declaration under Ss. 121|123 of the Agra Tenancy Act and this was not noticed at the time of the appeal, he may be impleaded under O. 41, R. 20 in second appeal. (*Mehta, J. M.*) SHUKURULLAH *v.* ABDUL RAHMAN. **1939 A.W.R. (B.R.) 73=1939 R.D. 270.**

———O. 41, Rr. 20 and 33—Powers of appellate Court under—Suit dismissed as against particular defendant—Latter not impleaded in appeal—Power to pass decree against him. *See* C.P. CODE, S. 151. **15 Pat. 219.**

———O. 41, R. 20—*Power of Court—Impleading respondent after limitation.*

Under O. 41, R. 20, C.P. Code, the Court is not competent to allow the appellant to implead a respondent for the first time after the limitation for the appeal has expired. (*Din Mohammad, J.*) SHANGARA SINGH *v.* IMAM DIN. **42 P.L.R. 355=A.I.R. 1940 Lah. 314.**

———O. 41, R. 20—*Scope—Power of Court to add respondent in appeal—Suit for partition of joint Hindu family—Sons of members impleaded in suit—Decree dealing with groups or branches but not recognising sons separately or individually—Appeal—Sons not impleaded—If fatal—Application for addition—Competency—Discretion of Court.*

It cannot be laid down that no person against whom the right of appeal has become barred can ever be added as a respondent under O. 41, R. 20, C.P. Code. The power given to the Court under the rule to add a party respondent is discretionary. In a suit for partition of a Hindu joint family the family was originally divided into three branches and the preliminary decree allotted a distinct share to a branch, without otherwise disturbing the integrity of that branch. The appellate Court in appeal by its decree effected a further sub-division of shares between the 3rd defendant and the 4th defendant who with their sons formed that branch. The 3rd and 4th defendants, however, became insolvents pending the appeal and were adjudicated as such. The case having gone back to the trial Court, a final decree was passed against which one of the defendants appealed. To this appeal, the 3rd and 4th defendants, represented by the Official Receiver, were impleaded as respondents, but not their sons, though the latter were parties to the original suit. But the sons, though formally on the record in the trial Court, had no separate entity; nor did the decree of that Court recognise their existence.

Held, that though the sons were *proper* parties to the appeal, they were not necessary parties to the appeal and their non-joinder was therefore not fatal to the appeal. Granting, however, that they were not merely proper but the necessary parties the Court, in view of the circumstances

C. P. CODE (1908), O. 41, R. 20.

of the case, would exercise its discretion under O. 41, R. 20, C.P. Code, in favour of the appellant and add them as respondents. (*Venkatasubba Rao and Cornish, JJ.*) SWAMINATHA ODAYAR *v.* GOPALASWAMI ODAYAR. **I.L.R. (1938) Mad. 52=172 I.C. 776=10 R.M. 491=46 L. W. 916=1937 M.W.N. 506=A.I.R. 1937 Mad. 741=(1937) 2 M.L.J. 100.**

———O. 41, R. 20—*Power of Court to implead —Joint decree for possession in favour of plaintiffs and defendant No. 2—Appeal by other defendant against plaintiffs only—Power of appellate Court to implead defendant No. 2 after limitation.*

Where in a suit for recovery of possession, the plaintiffs claimed that they and defendant No. 2 were owners of the land in dispute and the Court passed a joint decree in favour of both, and the other defendant preferred an appeal against the plaintiffs only without impleading defendant No. 2, the appellate Court has no jurisdiction at all to implead defendant No. 2 after the limitation has expired. O. 41, R. 20, C.P. Code, is not applicable to such case. (*Sulaiman, C.J.*) ATTAR SINGH *v.* DEBI SAHAI. **1937 A.W.R. 27 =169 I.C. 186=1937 A.L.R. 481=9 R.A. 716 =1937 A.L.J. 436=A.I.R. 1937 All. 243.**

———O. 41, R. 20—*Power of Court to implead respondent after limitation.*

The power conferred on the Court of appeal by O. 41, R. 20 can be used in favour of that person alone who is interested in the result of the appeal and the defendant against whom a suit has been dismissed and as against whom the right of appeal has become barred is not a person interested in the result of the appeal filed by a plaintiff against the other defendants. In view of the above principle in a case where a declaration has been made jointly in favour of some persons who had claimed the right, title and interest in dispute and one of them was not impleaded in appeal until after the limitation for the appeal had expired, the appeal could not proceed against the other respondents inasmuch as the declaratory decree had become final in favour of the person omitted. (*Addison and Din Mohammad, JJ.*) TEJA SINGH *v.* KARTAR KAUR. **18 Lah. 136=172 I.C. 266 =10 R.L. 290=39 P.L.R. 301=A.I.R. 1937 Lah. 180.**

———O. 41, Rr. 20 and 33—*Power to implead after limitation—Suit against defendant* 1*—Defendants 2 to 7 impleaded as* pro forma *defendants—Decree in favour of plaintiff against defendant* 1*—Appeal by latter without impleading defendants 2 to 7—Court adding them as respondents after limitation for appeal—If justified.*

The plaintiffs sued for a declaration that they and defendants 2 to 7 were the owners of certain plots and of the cattle market held thereon, and that the first defendant had no right to any part of the profits accruing from that market. The suit was contested by defendant No. 1 only, and defendants 2 to 7 who were described in the plaint as *pro forma* defendants were absent throughout. The trial Court passed a decree in favour of the plaintiffs in terms of the relief prayed for by them. The defendant No. 1 filed an appeal against the plaintiffs only, without impleading the defendants 2 to 7. On objection being taken on behalf of the plaintiffs, the Court added them as

C. P. CODE (1908), O. 41, R. 22.

respondents at a time when the period of limitation for appeal had expired. The appeal was then heard on its merits, the decree of the trial Court was set aside and the plaintiffs' suit dismissed. In second appeal, the question arose whether the order impleading the defendants 2 to 7 passed by the lower appellate Court was justified.

Held (Per *Sulaiman, C.J. and Niamatullah, J, Smith J,* contra.), that in the special circumstances of the case, there being in strictness no decree in favour of defendants 2 to 7, the appellate Court had jurisdiction to implead them as respondents, so that they might be bound by the final order. (*Sulaiman, C.J., on difference between Niamatullah and Smith, JJ.*) ABRAR HUSAIN *v.* AHMAD RAZA. **167 I.C. 405=9 R.A. 532=1937 A.L.J. 424=1936 A.W.R. 1099= 1937 A.L.R. 178=A.I.R. 1937 All. 82 (S.B.).**

———O. 41, R. 21 and O. 9, R. 13—*Absence at hearing of appeal—Grounds for setting aside* ex parte *decision against him.*

An applicant under O. 41, R. 21, C.P. Code, who admits receipt of notice is obliged like an applicant under O. 9, R. 13 to show that he was 'prevented by sufficient cause from appearing'. (*Burn, J.*) NATESA IYER *v.* VENKATALAKSHMI AMMAL. **50 L.W. 515=1939 M.W.N. 947=A.I.R. 1940 Mad. 53=(1939) 2 M.L.J. 568.**

———O. 41, R. 21—*Ground for re-hearing of appeal—Laches of party's agent.*

Laches on the part of an agent of a party to an appeal, is not a ground for re-hearing of the appeal under O. 41, R. 21, C.P. Code. (*Varma, J.*) RAGHUBIR MAHTO *v.* GANESHDUTT OJHA. **159 I.C. 260=1936 P.W.N. 307=8 R.P. 273 (1) =17 Pat.L.T. 261=A.I.R. 1936 Pat. 128.**

———O. 41, R. 21—*Re-hearing of appeal—When may be ordered.*

An appeal was fixed for hearing before a District Judge on the 10th August, 1938. On that day the District Judge was hearing a Session case and the appeal was adjourned to 2nd December, 1938. The order signed by the Judge showed that the appellant's counsel was present but that the respondents were absent and unrepresented in spite of personal service. On 30th November, the Court issued notice to the appellants' counsel that the appeal will be heard on the 1st December. It was accordingly so heard. The respondent and his counsel appeared on the 2nd and sought the *ex parte* order should be set aside and the appeal re-heard.

Held, that the appeal ought to be restored and re-heard. (*Skemp, J.*) UMED BARKAT *v.* BHURJEE. **42 P.L.R. 271.**

———O. 41, R. 22—*Appeal by plaintiff against decree dismissing suit—Defendant not filing cross-objections—If can support decree on grounds of limitation and title found against him by trial Court.*

In an appeal by the plaintiff against the decree dismissing his suit, the defendant is at liberty to support the decree of dismissal on grounds of limitation and title which the trial Court had found against him and in favour of the plaintiff, although no cross-objections had been filed by him. (*Edgley, J.*) MUNSHI CHANDRA DUTTA *v.* AJIT SANKAR DE. **166 I.C. 1007=9 R.C. 644.**

C. P. CODE (1908), O. 41, R. 22.

———O. 41, R. 22—*Appeal by plaintiff against part of decree—Respondent not filing objection against part of claim decreed—Right to support decree.*

A respondent can support the decree appealed from not only on any of the grounds decided in his favour but also on grounds decided against him. Consequently where on a particular construction put on a contract or document against the respondent, the lower Court decrees part of the claim and dismisses part of it and against the part dismissed, the plaintiff prefers an appeal, merely because the defendant does not file an appeal or cross-objection against part of the claim decreed, he is not barred from supporting the part of the decree appealed from on the question of construction decided against him, merely because in such circumstances the defendant or respondent did not prefer appeal or cross-objection, the appellate Court is not precluded from constructing the document or contract for itself. (*Bennet and Smith, JJ.*) KESLA MAL NAND KISHORE *v.* COOPER ALLEN &CO., CAWNPORE. **165 I.C. 473=1936 A.L.R. 910=9 R.A. 282=1936 A.W.R. 1216 =A.I.R. 1936 All. 717.**

———O. 41, R. 22—*Appeal by plaintiff whose suit dismissed in entirety—Objections by* pro forma *defendant who did not contest suit—Permissibility.*

Where the plaintiff whose suit has been dismissed in its entirety prefers an appeal and the *pro forma* defendant who did not contest the suit at all files objections that the decision appealed from is wrong in its entirety, the petition of objection is not a petition of cross-objections within the meaning of O. 41, R. 22. A.I.R. 1922 Pat. 483, Rel. on. (*Lort Williams, J.*) LAKSHMI DEBI *v.* HANSRAJ GUPTA. **A.I.R. 1940 Cal. 377.**

———O. 41, R. 22—*Appeal held incompetent—Cross-objections—If can be entertained.*

A Court holding that the appeal preferred by the appellant does not lie, has no jurisdiction to entertain the cross-objections of the respondent. (*Abdul Rashid, J.*) MAM CHAND *v.* MATU RAM. **41 P.L.R. 153.**

———O. 41, R. 22—*Applicability—Appeals under Provincial Insolvency Act.*

On a reading of S. 5 (2) of the Provincial Insolvency Act, it would appear that that the procedure relating to cross-objections contained in O. 41, R. 22, C.P. Code, would apply to appeals under the Provincial Insolvency Act. (*Pollock, J.*) JAIKRISHNA *v.* SAWATRAM. **1940 N.L.J. 385 =A.I.R. 1940 Nag. 292.**

———O. 41, R. 22—*Applicability—Revision petition—Memorandum of cross-objections—If permissible.*

Quaere—Whether it is open to a respondent in a civil revision petition to prefer cross objections under O. 41, R. 22, C.P. Code? (*Davis, J.C. and Mehta, A.J.C.*) HARBHAGWANDAS *v.* SAHJOOMAL CHANGOMAL. **31 S.L.R. 1=172 I.C. 506 =10 R.S. 159.**

———O. 41, Rr. 22 and 33—*Co-sharer guilty of fraud in respect of revenue sale—Trial Court granting decree to co-sharers directing co-sharer guilty of fraud to convey to them their former share—Right of decree-holder respondent to claim, without filing cross-objections, that revenue sale should be set aside for want of jurisdiction.*

In a suit brought by them the co-sharers alleged that in respect of the revenue sale their co-sharer had been guilty of fraud or improper conduct to the prejudice of his co-owners in the estate, and contended that, by reason thereof the purchase was one in which they could claim to share by recovering their former interest upon payment of a proportion of the purchase money. The trial Judge accepted this contention and gave the plaintiffs a decree directing the co-sharer to convey to them their former share on receipt of a proportionate part of purchase price. On appeal the decree-holders respondents without filing any cross-objections to the decree of the trial Court claimed that the revenue sale should be set aside for want of jurisdiction or irregularity.

Held, that the claim to relief was founded upon different grounds from those upon which the trial Court's decree proceeded, and upon principles different from those which underlay the relief given by the decree. The case came clearly within the condition imposed by the concluding words of sub-rule (1) of R. 22, "provided he has filed such objections in the Appellate Court, etc., etc.," and R. 33 could not rightly be used in such a case so as to abrogate the important condition which prevents an independent appeal from being in effect brought without any notice of the grounds of appeal being given to the parties who succeeded in the Court below. (*Sir George Rankin.*) ANATH NATH BISWAS *v.* DWARKA NATH CHAKRAVARTI. **I.L.R. (1939) Kar. 149=181 I.C. 380=1939 O.L.R. 340=5 B.R. 654=69 C.L.J. 505=11 R.P.C. 262=43 C.W.N. 529=20 Pat.L.T. 359=A.I.R. 1939 P.C. 86 (P.C.).**

———O. 41, R. 22—*Cross-objections—Application for extension of time to file—Order allowing subject to objections at time of hearing—Propriety—Proper procedure.*

Where a memorandum of cross-objections is preferred out of time and an application is made to the Court to extend the time for preferring the cross-objection, it is not the proper procedure to allow the application subject to any just objection being taken at the time of the hearing. Applications of this kind should be dealt with at the time when they are made and should not be left over for determination till the hearing of the appeal. (*D. N. Mitter and Patterson, JJ.*) HAREY HAREY SIMHA CHOUDHURY *v.* HARI CHAITANYA SINHA CHOUDHURY. **40 C.W.N. 1237.**

———O. 41, R. 22—*Cross-objections—If can be entertained against a party to the suit, not impleaded as a party to the appeal—Cross-objections filed against such party—Effect.*

Where the plaintiff claimed relief against both defendant 1 and defendant 2 and the first defendant raised the plea that he was an unnecessary party to the suit but the Court found that there were no merits in his objection, but the first appellate Court held that the first defendant was an unnecessary party, and the second defendant filed a second appeal impleading only the plaintiff as a respondent.

Held, the plaintiff-respondent is entitled to file cross-objections against the first defendant, although he was not made a party to the second

C.P. CODE (1908), O. 41, R. 22.

appeal. By putting in the cross-objections the first defendant has been impleaded in the appeal. A respondent is entitled to file cross-objections, which could be raised by him in an appeal, against a party to the suit, who is not impleaded in the appeal as a party, at the instance of the appellant. (*Abdur Rahman, J.*) DEVENDRA AYYAR *v.* MUTHU CHETTIAR. **178 I.C. 191=47 L.W. 760=11 R. M. 416=1938 M.W.N. 75=A.I.R. 1938 Mad. 329.**

——**O. 41, R. 22**—*Cross-objections—If can be filed against one not a party to the appeal.*

The C.P. Code does not contemplate filing of cross-objections against a person not a party to the appeal. (*Ismail, J.*) PARTAP CHAND *v.* CHUNNI LAL. **188 I.C. 396=12 R.A. 15=1940 A.L.J. 161=1940 A.W.R. (H.C.) 169=A.I.R. 1940 All. 225.**

——**O. 41, R. 22**—*Cross-objections—Objector presenting appeal on one point—Cross-objection on other points, if can be taken.*

Where the objector has not appealed, he can put in any objection which he could have made in appeal although the period of limitation for appeal has expired, but where the objector did present an appeal and raised a certain objection he is debarred from putting other objections which he could have taken in appeal but which he did not. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SURJAN SINGH *v.* RAM SINGH. **166 I.C. 222=9 R. Pesh. 61=A.I.R. 1936 Pesh. 214.**

——**O. 41, R. 22**—*Cross-objection by one respondent against another for costs—Maintainability.*

Dhavle, J.—A cross-objection by one respondent seeking costs of the lower Court from another respondent does not lie under O. 41, R. 22; C.P. Code. (*Courtney-Terrell, C.J. and Dhavle, J.*) SECRETARY OF STATE FOR INDIA *v.* LODNA COLLIERY COMPANY. **15 Pat. 510=164 I.C. 860=99 R.P. 122=1936 P.W.N. 59=17 Pat.L.T. 279=A.I.R. 1936 Pat. 513.**

——**O. 41, R. 22**—*Cross-objection filed before notice of hearing of appeal—Nature of.*

O. 41, R. 22, lays down that a respondent may cross-object provided he does so within one month from the date when he receives notice of the hearing of the appeal. The use of the word "within" would fix two limits; an anterior limit starting from the date of receipt of the notice and a posterior limit of one month after that date. The cross-objections filed before that date (the date of receipt of notice) would not be cross-objections at all in the strict legal sense of the word. (*Tek Chand and Dalip Singh, JJ.*) MT. KOSHALIA *v.* RIAZ-UD-DIN. **162 I.C. 336=8 R.L. 882=A.I.R. 1936 Lah. 362.**

——**O. 41, R. 22**—*Cross-objections filed by deceased respondent—His Legal Representatives brought on record by appellant—If can maintain cross-objections.*

The cross-objections filed by a deceased-respondent can be maintained by his heirs and legal representatives, although they were brought on record by the appellant and no steps were taken by them in the matter of prosecution of the cross-objections. (*Guha and Mitter, JJ.*) PRODYOI KUMAR *v.* RADHAKISHEN. **42 C.W.N. 304.**

C. P. CODE (1908), O. 41, R. 22.

——**O. 41, R. 22**—*Decree for mesne profits by trial Court for certain amount—Appellate Court reducing certain items—Rights of respondent, without memorandum of cross-objections, to support decree of trial Court by showing that other items of profits may be assessed at higher figure.*

When an item in an account appearing in the decree of the lower Court is reduced by the appeal succeeding, the respondent without filing any memorandum of cross-objection can support the said decree by showing that the lower Court had wrongly decided against him on other items, but it is not open to the respondent to have adjudicated by the appellate Court rights or causes of action which have been decided against him in the lower Court without filing an appeal or memorandum of cross-objections. As interest is an integral part of mesne profits, the plaintiff respondent is entitled on the said principle to maintain the amount of mesne profits decreed to him by the lower Court by a relative variation of the constituent elements without filing memoranda of cross-objections. He is enitled to urge that if interest be reduced by the appellate Court, the profits may be assessed at a higher figure, if the evidence supports it, provided that the total does not exceed the amount decreed as mesne profits by the lower Court and *vice versa*. (*R. C. Mitter and Biswas, JJ.*) RAJENDRA NARAYAN RAY *v.* BHAIRABENDRA NARAYAN RAY. **179 I.C. 298=11 R.C. 522=62 C.L.J. 152=A.I.R. 1938 Cal. 563.**

——**O. 41, R. 22**—*Filing of cross-objections—Extension of time—Discretion of Court—Interference.*

It is entirely discretionary with the Court of appeal to extend the time for filing cross-objections and in refusing to extend time it cannot be said that it commits an error of law which can be interfered with in second appeal. (*S. K. Ghose and Mukherjea, JJ.*) AMULYA KRISHNA BANERJEE *v.* RARULI PIONEER CO-OPERATIVE BANK, LTD. **187 I.C. 416=12 R.C. 578=70 C.L.J. 397=A.I.R. 1940 Cal. 150.**

——**O. 41, R. 22**—*Letters Patent appeal from first appeal—Cross-objections—If can be filed.*

Cross-objections can be taken by a respondent in a Letters Patent appeal filed from the decision of a single Judge in a first appeal. (*Tek Chand and Dalip Singh, JJ.*) KHAZANCHI SHAH *v.* NIAZ ALI. **42 P.L.R. 499=A.I.R. 1940 Lah. 438.**

——**O. 41, R. 22**—*Limitation—Notice of filing of appeal—Subsequent notice fixing date of hearing—Time for filing of cross-objections—Starting point.*

Where a notice was issued to the respondents merely informing them that an appeal had been preferred in the case by the other side, so that they might appear to take necessary steps, it is not a notice about the hearing of the appeal as contemplated by O. 41, R. 22, C.P. Code; and hence the filing of cross-objections within a month of the notice fixing the date of hearing is within the time though it may happen to be more than a month after a first notice giving mere information of the filing of the appeal. (*Zia-ul-Hasan and Hamilton, JJ.*) LALTA BAKSH SINGH

v. POOL CHAND. **1939 O.W.N. 530=1939 O.A. 521.**

———O. 41, R. 22—*Limitation of one month—Starting point—Date of service of notice or date on which respondent come to know that an appeal has been filed—Date of service of notice—Proof—B diary—If evidence of service on particular date.*

Under O. 41, R. 22, the memorandum of cross-objections must be filed within one month from the date of service on the respondent or his pleader of the notice of the day fixed for the hearing of the appeal. The serving of a notice of the date fixed for hearing the appeal is not necessarily the date on which it comes to the notice of the respondent that an appeal has been filed. Nor is the B diary sufficient evidence of that fact that the notice of the date fixed for hearing the appeal is served on the respondent on a particular day. (*Horwill, J.*) SIRAVIL KUTTI AMBALAM *v.* CHINNIAH AMBALAM. **1937 M.W.N. 39.**

———O. 41, R. 22—*Plaintiff's suit wholly dismissed—Cross-objection by defendant-respondent—If necessary to attack certain findings.*

Where the plaintiff's suit has been wholly dismissed by the trial Court, the filing of cross-objections by the defendant-respondent to attack certain findings is superfluous, as he is entitled to challenge them without filing any cross-objections. (*Srivastava, Ag. C.J., and Smith, J.*) KANIZ ABID TALUQDARIA *v.* MURTAZA HUSAIN KHAN. 12 Luck. 540=165 I.C. 373=9 R.O. 207=1936 **O.L.R. 632=1936 O.W.N. 1069 =A.I.R. 1937 Oudh 159.**

———O. 41, R. 22—*Scope—Dismissal of suit—Specific declaration embodied in decree by Court adverse to the defendant—Appeal by plaintiff—Defendant not preferring memorandum of cross-objections—Right to challenge correctness of declaration.*

If a defendant has a grievance against the embodiment of a positive declaration adverse to him in the decree dismissing the suit, he could take objection to it in a formal way, and if such objection is taken to it, the declaration is conclusive, Where the dismissal of suit cannot be supported without traversing the grounds upon which the defendants has failed to convince the trial Court, and the specific declaration inserted in the decree is not one prayed for by the plaintiff, but has been added by the Court expressly in order to safeguard the interests of an institution which is the subject-matter of the suit, the defendant in an appeal by the plaintiff against the dismissal, is not entitled to canvass the correctness of the declaration embodied in the decree of the trial Court, in the absence of a memorandum of cross-objections under O. 41, R. 22, C.P. Code. (*Wadsworth, J.*) SUBRAMANIA GURUKKAL *v.* SRINIVASA RAO. **1940 M.M.N. 71=A.I.R. 1940 Mad. 617.**

———O. 41, Rr. 22 and 33—*Scope—Old appeal in the guise of cross-objection—Cross-objector having no community of interest with appellant—Cross-objection—Maintainability.*

A cross-objection under O. 41, R. 22 is not maintainable where the objector-respondent has no community of interest with the appellant and where the cross-objection is nothing more than

an old appeal which was dismissed as being out of time. O. 41, R. 33 does not allow an objection of this kind to be made, but merely places the Court in a position of doing justice between the parties. (*Wort and Agarwala, JJ.*) DEO NARAIN SAHU *v.* GANESH RAM. **165 I.C. 936=9 R. P. 233=3 B.R. 100=A.I.R. 1936 Pat. 604.**

———O. 41, R. 22 (4)—*Scope of—Abatement of appeal—Cross-objection—Effect on.*

Cross-objection is part of an appeal and when an appeal goes out for any extraneous reasons as abatement, it follows that the cross-objection should ordinarily go out with it. The only exceptions are those mentioned in O. 41, R. 22 (4), C.P. Code. (*Stone, C.J. and Clarke, J.*) PURUSHOTTAMDAS *v.* DEOKARAN. **I.L.R. (1940) Nag. 324=181 I.C. 411=11 R.N. 459=1938 N.L.J. 339=A.I.R. 1939 Nag. 39.**

———O. 41, R. 22 (4)—Scope—Appeal—Cross-objection by respondent—If bar to withdrawal of appeal. *See* C.P. CODE, S. 107 AND O. 23, R. 1. **40 Bom.L.R. 895.**

———O. 41, R. 22 (5)—*Leave to appeal in* forma pauperis *refused—Appeal by other party—Leave to file cross-objection in* forma pauperis *on different grounds—If can be granted.*

Leave can be granted to file a cross-objection in *forma pauperis* on grounds which are not entirely the same as those which it is necessary to put forward in seeking leave to appeal in *forma pauperis* which is refused. It is true that the provisions of O. 41, R. 22 (5), say that the provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule; but when an appeal has already been lodged, it is the duty of the Court to look carefully at the circumstances and see the judgment having been impugned, by one party, whether the other party would not also be in a position to attack it from another angle. (*Roberts, C.J. and Dunckley, J.*) SECRETARY OF STATE *v.* MAURICE. **9 R.R. 357=168 I.C. 407=A.I.R. 1937 Rang. 81.**

———O. 41, R. 22 (5)—*Leave to file cross-objections in* forma pauperis—*When can be granted.*

According to O. 41, R. 22, C.P. Code, the provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under that rule. Consequently leave cannot be granted to file cross-objections in *forma pauperis* on grounds which may not be entirely the same as those which it is necessary to put forward in seeking leave to appeal in *forma pauperis* which has been refused. So where the decree of the lower Court is not contrary to law or otherwise unjust or erroneous, leave to file cross objection in *forma pauperis* cannot be granted. (*Ranjitmad and Sukhdeonarain, JJ.*) BALAKRISHNAN *v.* MST. JAWRI. **1939 M.L.R. 244 (Civ).**

———O. 41, R. 23 and O. 43, R. 1 (u) (Oudh)—*Appeal—Appellate Court remanding appeal against order refusing to file an award—Remand if under O. 41, R. 23.*

Where in an appeal under **S. 104 (1) (f), C.P.** Code, against the dismissal of an application to have the award filed, the appellate Court remands the case to the lower Court, the remand order, since it does not arise out of a decree is not an

order of remand under the terms of O. 41, R. 23 and as such it can be nothing other than a remand made in the exercise of the inherent powers of the Court. An order of remand made in the exercise of inherent powers is not appealable. (*Hamilton and Yorke, JJ.*) BALRAJ KISHORE *v.* MAHARAJ KISHORE. **179 I.C. 799=11 R.O. 204 =1939 O.A. 183=1939 O.L.R. 88=1939 O. W.N. 128=A.I.R. 1939 Oudh 104.**

——**O. 41, R. 23**—Appeal—When lies. *See* C.P. CODE, O. 43, R. 1 (*v*). **1940 N.L.J. 350.**

——**O. 41, Rr. 23 and 26**—*Applicability.*

R. 23, O. 41, contemplates a position in which the appellate Court does not retain seizin of the case. The remand under it is for a 'determination of the suit', and after remand the appellate Court has nothing more to do with the matter unless it comes back to it by way of a fresh appeal. But when the appellate Court retains seizin of the case when remanding for a finding on issue, R. 26 or 27 is more nearly applicable. (*Vivian Bose, J.*) BALAJI SADASHIV *v.* VISHNU. **I.L.R. 1936 Nag 188=170 I.C. 527=10 R.N. 63 =A.I.R. 1936 Nag 140.**

——**O. 41, R. 23**—*Applicability—Conditions for remand—"Preliminary point"—Meaning of.*

The only meaning hat can properly be given to the word "preliminary point" in O 41, R. 23, C. P. Code, is any point the decision of which avoids the necessity for the full hearing of the suit. Where a suit is decided only on the strength of a finding on a point of law, and the questions of fact have not been tried or decided by reason of that finding, the suit must be deemed to have been decided on a preliminary point, and if that finding is set aside on appeal, it is open to the appellate Court to remand the suit under O. 41, R. 23. (*Lokur, J.*) SURAJMAL DEORAM *v.* MOTIRAM KALU. **I.L.R. (1939) Bom. 658=186 I.C 695=12 R B. 370=41 Bom.L.R. 1177=A.I.R 1940 Bom. 22.**

——**O. 41, R. 23**—Applicability—Order of remand for *de novo* trial of suit—If falls under—Appeal. *See* C. P. CODE, S. 151. **A.I.R. 1936 Pat. 491.**

——**O. 41, R. 23 (as amended in Oudh)**—*Construction—'Have not been decided.'*

The words 'have not been decided' in O. 41, R. 23 as amended by the Oudh Court, clearly refers to a decision of all the questions arising in the case by the trial Court and not to their decision by the appellate Court itself. (*Zia-ul-Hasan and Yorke, JJ.*) LACHMIN *v.* BHAIRON BAKSH SINGH. **188 I.C. 893=13 R.O. 14=1940 O.L.R. 393= 1940 A.W.R (C.C.) 248=1940 O.W.N. 500= 1940 O.A. 465=A.I R 1940 Oudh 367.**

——**O. 41, R. 23**—*District Judge remanding suit —Suit ultimately dismissed by trial Court—Appeal —Discretion of successor of District Judge to go behind the finding of his predecessor.*

Where a District Judge remands a suit to the trial Court and the suit is ultimately dismissed by the trial Judge and an appeal is preferred again to the successor of the District Judge who had remanded the case, it is competent for him to go behind the finding of his predecessor. This, however, is a matter entirely at his discretion and cannot be raised on second appeal. (*Jai Lal, J.*) NUR MAHOMED *v* AMIR. **161 I.C. 3=8 R.L. 660= 38 P.L.R. 567=A.I.R. 1936 Lah. 708.**

——**O. 41, R 23 and S. 151**—*Inherent power of remand—If exists—When could be resorted to.*

There is no doubt that there is an inherent power of remand. That is obvious when the changes between S. 562 of the old Code and O. 41, R. 23 are considered. The power so conferred must not only be sparingly used by Courts but also the Courts have no power whatever to resort to S. 151, C. P. Code, when the matter is expressly dealt with in the Code. If they do so they act without jurisdiction and their orders are revisable. (*Stone, C.J and Bose, J.*) SHEOLAL *v.* JUGAL KISHORE. **I.L R. (1940) Nag. 538=1940 N.L.J. 350=A.I.R 1940 Nag. 349.**

——**O. 41, R. 23**—*Order of remand—Appealability—Test.*

For the purpose of the competency of an appeal, the Court has to see what the lower Court purported to do and actually did and not what it should have done. Where, therefore, the lower Court remanded a case under O. 41, R. 23, C. P. Code, its order is appealable under O. 43, R. 1 (*u*), C. P. Code, though it was wrong in remanding the case under that rule. (*Abdul Kashid, J.*) RADHA LAL *v.* FATEH MOHAMMAD. **170 I.C. 422=10 R. L. 110=38 P.L.R 1154=A.I R. 1937 Lah. 454.**

——**O 41, Rr 23 and 25**—*Order of remand—Effect of—Matters disposed of by order—If can be reopened in appeal against decision after remand.*

If a Bench remands a case to the lower Court either under O. 41, R. 23 or under O. 41, R. 25 or under the inherent powers of the Court, the matters finally disposed of by the order of remand cannot any of them be reopened when the case comes back, from the lower Court to a Court of co-ordinate jurisdiction in appeal against the decision after remand. But if at the time of remand no final decision is given on a point though some observations only are made in respect of it, it is open to another Bench when finally determining the case to come to its own conclusions on it. (*Mohamed Noor and Dhavle, JJ.*) BARABONI COAL CONCERN, LTD *v.* RAM CHANDRA MARWARI. **5 B. R. 664=181 I C. 721=11 B.P. 626=20 Pat.L.T. 685=A.I.R. 1939 Pat. 580.**

——**O. 41, R. 23**—*Order of remand—When not justified.*

A case can be remanded under O. 41, R. 23, C.P. Code, only when the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point. Where the trial Court has considered and determined all the issues necessary for the disposal of the case and disposed of the case on merits, and further there is sufficient material existing on the file on which the appellate Court can itself dispose of the appeal filed before it, an order of remand is not justified. (*Abdul Qayoom, C. J. and Kichlu, J.*) SOLA SHEIKH *v.* SWAMI RESHA KOUL. **41 P.L.R J. & K. 43**

——**O. 41, R. 23**—*Power of Court to remand.*

Except under O. 41, R. 23, no case should be remanded for second decision by the trial Court which can be finally disposed of by the first appellate Court. It is only where owing to a failure to implead a necessary party or the like, a trial is radically bad, so that the correction of its omissions and defects in the appellate Court is not reasonably practicable that remand for re-trial is permissible. **12 N.L.R. 126, Foll.** (*Pollock, A.J.*

C. P. CODE (1908), O. 41, R. 23.

C.) TATYARAO *v.* SHRIKRISHNA LAXMINARAYAN. 31 N.L.R. (Suppl.) 72=160 I.C. 202=8 R.N. 160 =A.I.R. 1936 Nag. 8.

——O. 41, R. 23—*Remand—Construction of order.*

The operative position of an order of an appellate Court was to the following effect:—"I set aside the judgment and decree of the lower Court and allow the appeal of plaintiff No 3 with costs. The case will be sent back and re-tried according to law from the stage where it has been left by the learned Munsif".

Held, that the order was an order of remand contemplated by O. 41, R. 23, C. P. Code, and as such was appealable under O. 43, R. 1 (4), C. P. Code. (*Radhakrishna, J.*) MATHURA PRASAD *v.* SITA RAM. 1940 O.W.N. 662=1940 O.L.R 287 =187 I C. 889=12 R.O 411=1940 O.A. 611= 1940 A.W.R. (C. C.) 316=A.I.R. 1940 Oudh 314.

——O. 41, R. 23—*Remand—Construction of order—Appeal.*

It is doubtful whether it can be assumed that the Court purports to act under O. 41, R. 23, merely because the form used for the order of remand is the form designed for an order of remand under O. 41, R. 23, and because a certificate is issued for the refund of Court-fees. When it is perfectly clear that O. 41, R. 23, has no application it should not be assumed that the Court thought it was acting under O. 41, R. 23, unless it is quite clear that it did in fact so act. Still, if a Court purports to pass an order of remand under O. 41, R. 23, even if the order is wrongly passed under that rule, an appeal lies from the order. (*Pollock, A.J.C.*) TATYARAO *v.* SHRIKRISHNA LAXMINARAYAN. 31 N.L.R (Suppl.) 72=160 I.C. 202=8 R.N. 160=A.I R 1936 Nag.8.

——O 41, R. 23—*Remand—Duty of appellate Court not to make remarks on merits of case.*

Where the Judge of an appellate Court allows an appeal on a preliminary point of law which necessitates the remand of the suit for further trial or retrial of the suit he should refrain from making any remarks in his judgment concerning the merits of the claim, as by so doing, he must necessarily prejudice the further trial or new trial on remand. (*Dunkley, J.*) ANNAMALAI CHETTYAR *v.* DAW HNIN U. 163 I.C. 397 (2)=9 R.R. 9 =A.I.R. 1936 Rang 251.

——O. 41, R. 23—*Remand—Grounds—Trial Court adopting unjustifiable and unsatisfactory procedure—Shutting out material evidence.*

Where the procedure adopted by the lower Court in disallowing question in cross-examination was wholly unjustifiable regard being had to the nature of the issues raised in the suit, and the Judge's manner of dealing the points arising for consideration in the case on the pleadings of the parties and on the issues raised for determination in the suit was wholly unsatisfactory, the High Court, on appeal remanded the case for retrial in accordance with law. (*Guha and Bartley, JJ.*) CHITTAGONG COTTON MILLS *v.* AMAR KRISHNA CHOUDHURY. 162 I.C. 697=8 R.C. 647 (2 =A. I.R. 1936 Cal. 195.

——O. 41, R. 23—Remand—Inherent powers—Suit disposed of on merits and on preliminary point. *See* C. P. CODE, S. 151. A I.R. 1936 Pat. 491.

——O. 41, R. 23 (Oudh)—*Scope of—Order under—Appeal—Test.*

C. P. CODE (1908), O. 41, R. 25.

O. 41, R. 23 as amended is wider than the rule before its amendment, for under this rule the Court's power of remand is not confined to a case which has been disposed of upon a preliminary point and all that is required is that all questions should not have been decided. The words in the rule as amended make it, in our opinion, quite clear that for a remand to be under this rule there must have been a decree and there must have been something left undecided by the original Court. Where a remand is on the ground that one or both parties had been prejudiced and that though every thing had been decided it had been decided improperly, it is not a remand under O. 41, R. 23 and hence no appeal lies against such an order. (*Hamilton and Yorke, JJ.*) UMRAI *v.* RAHIMBUX. 180 I.C. 321=1939 O.A. 273=1939 O.L.R. 128=1939 O.W.N. 246=11 R.O. 244= A.I R. 1939 Oudh 157.

——O. 41, Rr. 23 and 25—*Scope—Remand on ground that evidence on record is insufficient to decide point in issue—Propriety.*

Though it cannot be laid down that an appellate Court has no power to remand a case to the trial Court unless the case falls strictly within the purview of R. 23 or R. 25 of O. 41, C. P. Code, an order of remand on the ground that the evidence on record is insufficient to come to a definite finding on the point in issue is not a proper order, where there is no reason to think that the parties did not get an opportunity of producing all the evidence that they desired to produce before the trial Court. (*Thomas and Zia-ul-Hasan, JJ.*) HIRA LAL BAJBAI *v.* SRI RAM JANKI. 13 Luck. 209=167 I.C. 922=9 R.O. 416=1937 O.L.R. 179 =1937 O.W.N. 377=A I.R. 1937 Oudh 338.

——O. 41, R. 23-A (Lahore)—*Order of remand—Appeal.*

Where an order reversing the decree and remanding the case to be retried has been passed by the appellate Court an appeal from the order is competent under O. 41, R. 23-A framed by Lahore High Court, although the remand is not covered by O. 41, R. 23, C. P. Code. (*Bhide, J.*) NAZIR AHMAD *v.* TAJ MAHAL BEGUM. 186 I.C. 828=12 R L. 425=A.I R 1940 Lah. 63.

——O. 41, R. 25—*Issue sent down to trial Court—Duty of latter Court—Issue not material—If ground for not returning finding.*

Where an issue is sent down by the appellate Court, it is the duty of the trial Court to return a finding on it, whether it considers the issue material or not. (*Norman, I.C.S.*) GIRDHARI *v.* DURGAH KHAWAJA SAHIB. 1936 A.M L J. 128.

——O. 41, R. 25—*Power of Court—Issue on point not pleaded—If can be remitted—Right of party to allege or prove facts not in accordance with real facts.*

An appellate Court cannot remit an issue at the instance of a party upon a point which was not pleaded by him; a party cannot be allowed in effect to say that he is prepared to allege or prove anything which is necessary, even if the allegations are not in accordance with the real facts. (*Niamatullah, Ag. C.J. and Allsop, J.*) GAYA DEEN MISIR *v.* TIRBHUWAN SINGH. 1937 A.W.R. 1183=1937 A L.J 1252.

——O. 41, R. 25—*Remand—Finding of fact—Power of second appellate Court.*

When a case is remanded under O. 41, R. 25, it is not open to a Court of second appeal to exa-

C. P. CODE (1908), O. 41, R. 25

mine the facts, except in so far as it is empowered to do so under S. 103, and it is immaterial whether the first Court takes the evidence or the lower appellate Court. (*Vivian Bose, J.*) BALAJI SADASHIV *v.* VISHNU. I.L.R. 1936 Nag. 188=170 I. C. 527=10 R.N. 63=A.I.R. 1936 Nag. 140.

——O. 41, R. 25—*Remand of an issue to District Judge—Latter sending case with consent of parties to trial Judge for record of evidence—Report of District Judge based on such evidence—Validity.*

Where the High Court remanded an issue to the District Judge and the latter sent the case with consent of parties to the trial Judge for record of evidence, it is not open to the respondent to contend that the report of the District Judge based on the evidence so recorded is invalid on the ground that the order of remand did not permit him to send the case to the trial Judge to record evidence. (*Jai Lal, J.*) BHAGAT RAM *v.* MALKIAT SINGH. 173 I.C. 214=10 R.L. 417=39 P.L.R. 14=A.I.R. 1937 Lah. 639.

——O. 41, R. 25—Scope of. *See* C. P. CODE, S. 104 AND O. 41, R. 25. A.I.R. 1939 Nag. 173.

——O. 41, R. 26—Memo of objection filed under—Court-fee. *See* COURT-FEES ACT, SCH. II, ART. 1, CL. (D). 160 I.C. 38 (1)=1936 O.W.N. 113.

——O. 41, R. 27—*Additional evidence—Admissibility—Condition.*

Under O. 41, R. 27, C. P. Code, production of additional evidence in the appellate Court is dependent upon whether the appellate Court requires that evidence to enable it to pronounce judgment. (*S. K. Ghose and Patterson, JJ.*) SONESH CHANDRA DEUTY *v.* RAJKUMAR DEUTY. 67 C.L.J. 223.

——O. 41, R. 27—*Additional evidence—Admissibility in appeal—Grounds.*

The grounds upon which additional evidence may be admitted in appeal are confined to those laid down in O. 41, R. 27, C. P. Code; where the lower Court has not refused to admit evidence which is tendered in appeal and when the appellate Court is not unable to pronounce judgment in the absence of the additional evidence, there is no reason which would justify the appellant Court in admitting evidence in appeal. (*Wadsworth, J.*) RAMANARAYANA RAO *v.* RAMAKRISHNA RAO. 163 I.C. 161=8 R.M. 1097=1936 M.W.N. 86=43 L.W. 722=A.I.R. 1936 Mad. 385=70 M.L.J. 400.

——O. 41, R. 27—*Additional evidence—Admissibility in second appeal—Judgment pending appeal in suit between parties or representatives—Admissibility.*

In an ejectment suit, the tenant pleaded the right of a third person to the leased property as against that of the plaintiff landlord. Pending the second appeal from the decision in the ejectment suit, in a suit between such third person and the landlord, judgment was delivered whereby the plaintiff was declared entitled to the property leased. The plaintiff applied for receiving this judgment in evidence in second appeal.

Held, that the judgment determining the right of plaintiff to the leased property, as against the person whose title the tenant was setting up, was admissible in evidence even at the stage of second appeal from the decision in the ejectment suit.

C. P. CODE (1908), O. 41, R. 27.

(*Venkataramana Rao, J.*) KRISHNAN NAIR *v.* KAMBI. 172 I.C. 268=10 R.M. 443=1937 M.W.N. 299=A.I.R. 1937 Mad. 544.

——O 41, Rr. 27 and 29—*Additional evidence—Admission of—Procedure to be followed—Irregularity in procedure—Effect.*

Where in an appeal to the District Judge against the judgment of the Subordinate Judge, the appellants filed an application under O. 41, R. 27, C. P. Code, for admitting certain documents as additional evidence, a review application on the basis of these documents was dismissed by the Subordinate Judge, the District Judge admitted the additional evidence at the end of the hearing of the appeal, he found that it was not necessary for the determination of the appeal or any other sufficient cause, he did not base the finding on the additional evidence and did not specify the points to which the additional evidence is to be confined and did not record on the proceedings the points so specified, he gave no definite reason for admitting the evidence except the formula 'in the interests of justice', and no opportunity, was given to the opposite side to adduce rebutting evidence.

Held, that the procedure adopted by the District Judge is irregular and must obviously have prejudiced the other party and his order in the appeal should be set aside. The formula 'in the interests of justice' may mean everything or may mean very little. The word 'requires' in O. 41, R. 27 (1) (*b*) means 'finds it needful'. (*Pandrang Row, J.*) SRINIVASAM PILLAI *v.* ALAGAPPA CHETTIAR. 182 I.C. 868=12 R.M. 162=1938 M.W.N 1147=48 L.W. 797=A.I.R. 1938 Mad. 372 =(1938) 1 M.L.J. 50.

——O. 41, R. 27—*Additional evidence—Admission in appeal—Conditions to be satisfied—Admission of additional evidence before hearing of appeal—Validity.*

The powers of the appellate Court in the matter of admission of additional evidence are subject to limitations which are clearly laid down in O. 41, R. 27 of the C. P. Code. The legitimate occasion for the exercise of the discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent. It may well be that the defect may be pointed out by a party or that a party may move the Court to supply the defect but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. Consequently it is not open to the appellate Court to admit additional evidence in appeal even before the appeal is heard. 61 M.L.J. 489 (P.C.), Rel. on. (*Pandrang Row, J.*) BALAGURUMURTHY CHETTIAR *v.* KALINGAM AMBALAGARAM 181 I C 263=11 R.M. 786 =48 L.W. 655=1938 M.W N. 1012=A.I.R. 1938 Mad. 957=(1938) 2 M.L.J. 648.

——O. 41, R. 27—*Additional evidence—Power of appellate Court to admit.*

The power of an appellate Court to admit additional evidence is limited by O. 41, R. 27, C. P. Code, and the conditions prescribed by the rule must be satisfied. (*Harries, C.J. and Fazl Ali, J.*) MANGTU LAL BAGARIA *v.* SECRETARY OF STATE. 18 Pat. 854=187 I.C. 727=12 R.P. 647=6 B.R. 549=1940 P.W.N. 45=A.I.R. 1940 Pat. 161.

C. P. CODE (1908), O. 41, R. 27.

——**O. 41, R. 27 and S. 100**—*Additional evidence—Admission of, without giving reasons—Decision on merits, not affected—Interference in second appeal.*

Where an order for the reception of additional evidence in appeal is made by the appellate Court without giving any reasons therefor, as required by O. 41, R. 27, there is no doubt a substantial error or defect in procedure but where it has not interfered with the decision on the merits the decision cannot be interfered with in second appeal. (*Bajpai, J.*) RAM CHANDER *v.* KUNJI LAL **12 R A 279=184 I C. 811=1939 A L.J. 903=1939 A.W.R. (H.C.) 491=A.I.R. 1939 All. 663.**

——**O. 41, Rr. 27 and 29**—*Additional evidence—Admission of—Procedure—Recording of reasons for admission and points on which to be admitted—Necessity for*

When additional evidence is to be admitted in appeal for the first time, reasons should be given and also the points on which the evidence is to be recorded should also be specified as required by Rr. 27 and 29 of O. 41, C P. Code. These should be recorded in a separate order before the evidence is let in so that the other side would know on what points the additional evidence is going to be led and whether any evidence in rebuttal should be adduced. Omission to follow the procedure laid down by Rr. 27 and 29 of O. 41 is a gross irregularity. (*Lokur, J.*) PARAWA SANGAPPA *v* RAYANGOUDA. **41 Bom.L.R. 841=A.I.R. 1939 Bom 401.**

——**O. 41, R. 27**—*Additional evidence—Admission—Recording of reasons—If imperative—Omission to record reasons—Effect.*

The second paragraph of R. 27, of O. 41, C. P. Code, which requires the appellate Court to record reasons for admitting additional evidence is only directory and not imperative. The omission to record the reasons for admitting the evidence should not, when the reasons for such admission are apparent on the record, result in the additional evidence being excluded (*Agarwala, J.*) BHAGABAT DEBA *v.* NABIN MANSINGH. **5 C. L.T. 32.**

——**O. 41, R. 27**—*Additional evidence—Appellate Court's power to admit—Admission in appeal of secondary evidence—Copies not compared with original—Non-objection to admission—Objection in second appeal—Competency.*

The appellate Court has ample power to admit additional documentary evidence under O. 41, R. 27, C. P. Code, if it finds that it is necessary to so admit for the purpose of arriving at a proper decision of the case. And when a party does not object to such admission on the ground that the documents are irrelevant or that, in the case of secondary evidence, the documents admitted do not contain a true and accurate statement of the contents of the originals, it is too late for him to contend in second appeal that there is no evidence of the formality of comparing the copies with the originals. (*Agarwala and Madan, JJ.*) CHHATRA KUMARI DEBI *v.* PARBAI KUER. **166 I. C. 262=9 R.P 278=3 B R. 147=17 Pat.L.T. 709=A.I.R. 1936 Pat. 600.**

——**O. 41, R. 27**—*Additional evidence—Documents in possession of Court—Party seeking help of trial Court in vain—Duty of appellate Court.*

C. P. CODE (1908), O. 41, R. 27.

Where the question is as to whether certain documents should or should not be taken in evidence by the appellate Court, one has to distinguish between two things: one, a request to the appellate Court to take in evidence documents rejected by the trial Court, and the other, a complaint that a party has not had a sufficient opportunity before the trial Court to produce all the evidence. In deciding such questions the only thing to be seen is whether the parties have had a fair chance of placing their cases before the Court or not. Where the documents sought to be adduced in evidence were not in the possession of the party but were in the possession of a Court and the party had to take the help of the trial Court in order to have those documents before the Court, but under such circumstances the trial Court refused to admit those documents.

Held, that the party wanting to produce them did not have a fair chance to put up his case, and so the appellate Court should remand the case to get those documents filed. (*Verma, J.*) SHEOGOBIND RAI *v.* DEONARAYAN AHIR. **166 I.C. 216=9 R.P. 268=3 B.R. 140=A.I.R. 1936 Pat. 631.**

——**O. 41, R. 27**—*Additional evidence—Opportunity to rebut.*

The Court admitting additional evidence in appeal should give an opportunity to the opposite party to meet the new situation arising out of the admission of such new evidence. (*Manohar Lall, J.*) MAUJI SHAH *v.* SAKALDIP SINGH. **173 I.C. 137=4 B.R. 221=10 R.P. 382=A.I.R. 1938 Pat. 11.**

——**O. 41, R 27**—*Additional evidence introducing new and inconsistent claim—Permissibility.*

Where an application under O 41, R. 27, C P. Code, is made to introduce new evidence in appeal without giving adequate reason for its non-production at the proper time, and the evidence sought to be introduced has no real bearing on the questions involved in the appeal, such application should not be granted as admission of evidence at this stage will mean introducing new and inconsistent claim in appeal, which the other party will have no opportunity of meeting. (*Tek Chand and Dalip Singh, JJ.*) HAFIZ MAHOMED SULEMAN *v.* HARI RAM. **176 I.C. 65=11 R.L. 151=39 P.L.R. 602=A.I.R. 1937 Lah. 370.**

——**O. 41, R. 27**—*Additional evidence—Report mentioned in order sheet exhibited in trial Court but not itself put in trial Court—Admission in evidence by appellate Court—Legality.*

Where a document proving the final publication of a record of rights is admitted in evidence by the appellate Court without any objection, the document being simply a report mentioned in an order sheet of a Revenue Officer exhibited in the trial Court—the report not having been put in before the trial Court—and the appellate Court takes the report as additional evidence in order to enable it to pronounce the judgment in the case, the reception of the additional evidence is not illegal or unwarranted under O. 41, R. 27, C. P. Code. Nor can a finding by the lower appellate Court based on such evidence to the effect that the record-of-rights was finally published as required by law be challenged as bad as being based on inadmissible evidence. (*Nasim Ali and Edgley, JJ.*) CHATTERJEE ESTATES LTD. *v.* DHIRENDRA NATH ROY. **40 C.W.N. 821.**

C. P. CODE (1908), O. 41, R. 27.

——O. 41, R. 27—*Additional evidence—When may be allowed.*

Legitimate occasion for the exercise of the discretion to allow additional evidence is not whenever, before the appeal is heard, a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. The provisions of S. 107, C. P. Code, as elucidated by O. 41, R. 27 are clearly not intended to allow a litigant who has been successful in the lower Court, to patch up the weak parts of his case and fill up omissions in the Court of appeal. (*Addison and Din Mohammad, JJ.*) BAGA SINGH *v.* IMAM DIN. 174 I.C 543=10 R L. 569=A.I.R. 1937 Lah. 285.

——O. 41, R. 27—*Additional evidence in appeal—When to be admitted.*

The legitimate occasion for the exercise of the discretion to allow additional evidence is not whenever, before the appeal is heard, a party applies to adduce fresh evidence but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent. (58 I.A. 254, Foll.) (*Bhide, J.*) RAM SARUP *v.* SARNU MAL. 177 I.C. 305=11 R.L. 294=40 P.L.R. 198=A.I.R. 1938 Lah. 114.

——O. 41, Rr 27 and 29—*Additional evidence allowed without examining evidence on record—Requirements of Rr. 27 (2) and 29 not complied with—Effect of.*

Under the law, the legitimate occasion for the exercise of discretion in allowing additional evidence to be produced is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence, as it stands, some inherent lacuna or defect becomes apparent. Where, therefore, the appellate Court summons additional evidence of its own motion, not after examining the record of the case at the hearing and in the presence of the pleader for the parties, but after reading the judgment of the trial Court in the privacy of its chamber, and further does not record any reasons whatsoever for admitting fresh evidence as required by O. 41, R. 27 (2) or fulfil the requirements of O 41, R. 29, the additional evidence is admitted contrary to law and must be discarded. (*Agha Haidar, J.*) SHADI RAM *v* MST. ATRI. 8 R.L. 852=38 P.L.R. 511=162 I.C. 152=A.I.R. 1936 Lah. 933.

——O. 41, R. 27—*Admission of fresh evidence—Ground for—Sufficient ground for non-production in trial Court.*

The legitimate occasion for admitting new evidence in appeal is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent, not where a discovery is made outside the Court of fresh evidence and the application is made to import it. The scope and requirement of O. 41, R. 27, C. P. Code, are different from those of O. 13, R. 2. O. 13, R. 2 refers to production of documents only, and that in the trial Court, while O. 41, R. 27 deals with the taking of additional evidence, oral as well as documentary, in the appellate Court. In the one case, the question is one of condoning delay in the production of documents on which a party relies; in the other of admitting evidence which the Court requires, either of its own motion or at the instance of a party, for the disposal of the case. It is not to be supposed that an appellate Court should admit additional evidence merely

C. P. CODE (1908), O. 41, R. 27.

because it is satisfied that there was sufficient ground for its non-production at the initial stage in the trial Court. (*Henderson and Biswas, JJ.*) NARENDRA NARAIN *v.* JNANADA DASSI I.L.R. (1937) 2 Cal 661 =176 I C. 429=11 R.C. 106= 67 C.L.J. 488=A.I.R 1937 Cal. 537.

——O. 41, R. 27—*Admission of fresh evidence—Ground for—Unimpeachable authenticity of document.*

The fact of a document being of unimpeachable authenticity is no doubt very material in considering whether the Court should or should not exercise its discretion in favour of a party under O. 13, R. 2, C. P. Code, but in determining whether or not an order should be made under O. 41, R. 27, considerations of a materially different character arise. (*Henderson and Biswas, JJ.*) NARENDRA NARAIN *v.* JNANADA DASSI. I L R. (1937) 2 Cal 661=176 I.C. 429=11 R.C. 106= 67 C.L.J. 488=A I R. 1937 Cal. 537.

——O 41, R. 27—*Admission of fresh evidence—Reasons not recorded—Omission to object at the time of hearing—Effect of.*

Additional evidence is only to be admitted under O 41, R. 27 of the Code where the appellate Court requires it. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but, "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent." Whenever the Court adopts this procedure and allows such evidence to be produced, the Court should record its reason for so doing. Where the Court has not done so, a party's criticism of the procedure followed is weakened, if he did not object to the reception of the additional evidence at the time of the hearing of the appeal and also if the papers admitted were public documents. (*Rowland, J.*) RAMGOLAM SINGH *v.* CHARAN MAHTON. 159 I.C. 460=8 R.P. 282 (2)=A.I.R. 1936 Pat. 57.

——O. 41, R. 27—*Admission of new document—Power of appellate Court—Limits.*

An appellate Court should not, in the absence of sufficient explanation, admit a document as a matter of course in appeal, when no attempt was made to produce it in the trial Court. (*Srivastava, Ag. C J.*) ARJUN *v.* THAKUR PRASAD. 1936 O.W.N. 722.

——O. 41, R. 27—*Applicability—Issue of commission by appellate Court without deciding admissibility of fresh evidence—Propriety—Report of Commissioner—If admissible—Court, if bound to accept as evidence.*

O. 41, R. 27, C. P. Code, is intended to enable an appellate Court to admit or exclude additional evidence of any nature, and if a Commissioner's report deals with matters not already in evidence, it must be fresh evidence the admission or rejection of which must be governed by the principles laid down in the rule. The distinction in R. 27 (*b*) between documentary and oral evidence is only one of classification. The Legislature could not have contemplated a third kind of evidence, neither documentary nor oral, the admission or rejection of which is governed by no rules at all. The fact that an appellate Court thinks fit to issue a commission to make a local investigation at the instance of one of parties does not make the report of the Commissioner *ipso facto* admis-

sible in evidence in the appeal. The appellate Court is not bound to accept the report as evidence merely because that Court has issued a commission. Where the Court, at the time of issuing the Commission, does not go into the question of the desirability of admitting additional evidence in appeal in the form of a Commissioner's report and leaves open the question whether that report should be admitted as evidence, it cannot be said that the Court must be deemed to have decided that question which it never considered. Nor is there anything wrong in such a procedure. (*Horwill, J.*) SIRAVILIKUTTI AMBALAM *v.* CHINNIAH AMBALAM. 1937 M.W. N. 39.

——O. 41, R. 27—Applicability — Order by Civil Court refusing to make complaint under S. 476, Cr. P. Code—Appeal under S. 476-B, Cr. P. Code—Procedure. *See* CR. P. CODE, S. 476-B. A.I.R 1937 Nag. 91.

——O. 41, R. 27—*Discretion of appellate Court to call witness not called by parties—Interference in second appeal.*

Where the lower appellate Court calls, of its own motion, a witness not called by the parties, in order to elucidate a point involved in the appeal, and gives good reasons for the calling of the witness, there is nothing illegal in the exercise of its discretion by the lower appellate Court and it is not open to the Court in second appeal to decide whether the discretion had not been rightly exercised. (*Jai Lal, J.*) ROSHAN LAL *v.* CHARAN DAS 168 I.C. 466=38 P.L.R. 449=9 R L. 637=A I R. 1937 Lah. 115.

——O. 41, R. 27—*Discretion of appellate Court —Interference.*

Where lower appellate Court rejected certain documents produced at the stage of appeal and gave reasons for doing so.

Held, that the High Court would not interfere with the discretion exercised by the lower appellate Court in the absence of sufficient reason to do so. (*Bhide, J.*) FATU *v.* MT PALI. 173 I.C. 887=10 R L. 500=39 P.L R. 663 (1)=A.I.R. 1937 Lah. 409.

——O. 41, R. 27—*Discretion of Court.*

An appellate Court has not unfettered discretion in the matter of admitting fresh evidence under O. 41, R. 27, C. P. Code, and a litigant who has been unsuccessful in the lower Court should not be allowed to patch up the weak parts of his case and fill up omissions in the Court of appeal. (*Din Mahomed, J.*) BANARSI DAS *v.* RULIA. 42 P.L.R. 261.

——O. 41, R. 27—*Document held inadmissible for want of proper registration—Re-registration after decision of appeal—Admissibility in second appeal.*

Where a registered document which was held to be inadmissible in evidence on the ground that it had not been properly presented for registration is after the decision of the appeal re-registered under the provisions of S. 23-A of the Registration Act, and the defect on the basis of which it had been held to be inadmissible was removed, the re-registered document can be admitted in evidence on second appeal. (*Din Mohammad, J.*) ISHAR SINGH *v.* HARNAM SINGH. 40 P.L.R. 432.

——O. 41, R. 27—*Duty of Court.*

The admission of additional evidence in appeal

is permissible only under exceptional circumstances and this course cannot be adopted by a Court, unless the Judge has applied his mind to the requirements of O. 41, R. 27, C. P. Code, and found justification for admitting additional evidence under this rule. (*Bhide, J.*) CHHAJJU *v.* GHULAMI. 41 P.L.R. 390=A.I.R. 1939 Lah. 459.

——O 41, R. 27—*Further evidence—When should be allowed.*

Further evidence is not intended to be ordered on special and preliminary application before the appeal on the merits has been heard and the evidence as it stood examined by the Court. It is no part of the duty of the Court nor is it necessary for the Court to act the part of counsel for either of the parties, and on realizing that further evidence on a point on which evidence has already been introduced is available, to require that evidence to be adduced. Such evidence is not necessary for the Court to pronounce a decision because the Court must pronounce its decision on the evidence before it. R. 27 of O. 41 is to be applied where the Court, after considering the case finds that the parties have failed to grasp the significance of some point which is necessary for decision of the case, but on which no evidence has been brought or which has been dealt with in a way which shows that its true significance has not been understood. In such a case the Court may well feel that it is necessary that further evidence should be adduced to elucidate the point. (*Mackney, J.*) MAUNG PO NYEIN *v.* MAUNG THA SAING. 181 I.C. 527=11 R.R. 471=A.I.R. 1939 Rang. 92

——O. 41, R. 27—*Non-examination of witness by trial Court on ground of his being counsel in case—Appellate Court recording his evidence—Propriety.*

Where a Barrister who was an important witness to the proceedings at the time of registration of the adoption deed, was tendered as a witness at the trial but refused by the trial judge on the ground that he was engaged as counsel in the case, the appellate Court would be acting rightly in recording his evidence under O. 41, R. 27, C P. Code. There might have been good reason why the witness should return his brief and cease to act as counsel in the case, but to deprive a party of the evidence of a witness is a very different matter. (*Sir George Rankin.*) BIRADH MAL *v.* PRABHABHATI KUNWAR. I.L.R. (1939) Kar. 258 =5 B.R 631=1939 O.L.R. 318=43 C W N. 842 =1939 O.W.N. 562=11 R.P.C. 249=41 Bom.L. R. 1061=70 C.L.J. 377=1939 P.W.N. 891=181 I.C. 311=A.I.R. 1939 P.C. 152 (P.C).

——O. 41, R. 27—*Non-production in lower Court—Additional evidence—Admissibility.*

Additional evidence will not be admitted under O. 41, R. 27, C. P. Code, if the party had ample opportunity of producing it in the trial Court. (*Bhide, J.*) JIWAN *v.* KESHO DASS. 187 .C. 848 =12 R.L. 498=41 P.L.R. 377 (2)=A.I R. 1939 Lah. 273.

——O. 41, R. 27—*Non-production in lower Court—Additional evidence—Admissibility.*

Where the additional evidence which a party wishes to produce was in his possession at the time when he gave evidence in the trial Court and no reason has been assigned as to why this evidence was not produced then, he cannot be allowed to produce it in the appellate Court. (*Tek*

C. P. CODE (1908), O. 41, R. 27.

Chand, J.) PURAN CHAND *v.* MAULA BAKSH. **184 I.C. 164=12 R.L 173=41 P.L.R. 388=A.I. R. 1939 Lah. 265.**

——O. 41, R 27—*Power of Court—Additional evidence—When to be admitted—Party failing to produce necessary evidence in trial Court—Additional evidence in appeal to fill up gaps—Admissibility.*

The failure a of party to examine a material witness when that witness is available and the consequent existence of a gap in his case is not ordinarily a sufficient reason for examining that witness in appeal, though in a case where the whole case is in such a muddle that the Judge in appeal is unable to pronounce a satisfactory judgment without further materials, such a procedure would be justified. A party should not be allowed to abstain from producing evidence which is obviously necessary in the hope that if an adverse comment is made upon the absence of this evidence the deficiency can be supplied in appeal. *(Wadsworth, J.)* ASSYA UMMA *v.* MOOSA. **1940 M.W.N 511=A.I.R. 1940 Mad. 707.**

——O. 41, R. 27—*Powers of Court—Appointment of Commissioner—Plaintiff not requiring it—Dismissal of suit—Appointment of Commissioner by appellate Court—Taking of additional evidence—Propriety.*

Where a plaintiff refused to comply with the order for the execution of a commission to prepare a map and locate a spot and the suit was dismissed for want of evidence, on appeal the appellate Court has no jurisdiction to appoint a Commissioner to prepare a plan and receive additional evidence, merely to supply the lacuna in the evidence on behalf of the plaintiff. The powers under O. 41, R. 27 ought to be very sparingly used. *(Zia-ul-Hasan, J.)* HIRDAY NARAIN *v.* MADAN GOPAL. **174 I.C 394=10 R O 257=1938 O L.R. 178=1938 O.W.N. 429=1938 O.A. 330=A.I.R. 1938 Oudh 135.**

——O. 41, R. 27—*Power of Court—Patta produced in appeal—No satisfactory explanation as to non-production earlier—Admissibility.*

Where a defendant fails to produce an unregistered patta in the lower Court apparently on the impression that it would be inadmissible in evidence and is unable to give a satisfactory explanation for his failure, cannot be permitted to produce it in the appellate Court, on the ground that its admission is necessary in order to do justice between the parties. Additional evidence can only be admitted on the grounds mentioned by their Lordships of the Privy Council in 10 Pat. 654. *(Pollock, J.)* GUJABA *v.* RAGHO. **186 I.C 89=12 R N. 182=1939 N.L.J 594=A.I.R. 1940 Nag. 80.**

——O. 41, R. 27—*Scope—New evidence admitted and relied in contravention of—Effect.*

Where an appellate Court bases its judgment on an entirely new case, raised for the first time in the appeal, and in support of the case admits and relies on evidence, which is improperly admitted, inasmuch as it does not come under O. 41, R 27, C. P. Code, its judgment cannot be upheld in second appeal and the Court sitting in second appeal will not take into consideration the new case. *(Davis, J.C and Mehta, J.)* ARAB JHANGLU *v.* PANJALSHAH. **I.L.R. (1939) Kar. 111=178 I.C. 690=11 R.S. 104=A.I.R. 1938 Sind 198.**

C. P. CODE (1908), O. 41, R. 27.

——O 41, R. 27—*Scope—Party having ample opportunity to produce documents in trial Court—Inability to explain nature or relevancy of documents—Rejection by appellate Court—Propriety.*

Where a party has had ample oppor tunity to put in all his documents at the trial itself, and is seeking to put in those documents in appeal, the appellate Court does not act wrongly in rejecting those documents, if he is unable to tell the Court what the documents are or what their relevancy is *(Agarwala and Madan, JJ.)* CHHATRA KUMARI DEBI *v.* PARBAI KUER. **166 I. C. 262=9 R.P. 278=3 B.R. 147=17 Pat. L T. 709=A I R. 1936 Pat. 600**

——O. 41, R. 27—*Additional evidence—Admission of—When permissible.*

Under O. 41, R. 27 (1) (*b*), it is only where the appellate Court requires it (*i.e.*, finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. The legitimate occasion for the exercise of this discretion is not, whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examination of evidence as it stands, some inherent lacuna or defect becomes apparent. It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. 10 P. 654 (P.C.), Foll. *(Addison A. C. J. and Din Mahomed, J.)* GHULAM MAHOMED KHAN *v.* SAMUNDAR KHAN. **165 I C. 626=9 R.L. 267 (2)=38 P.L R. 748=A.I R. 1936 Lah 37.**

——O. 41, R 27 (1) and S. 100 (1) (c)—*Documents referred to during trial but not produced—Admission in second appeal.*

O. 41, R. 27 (1) does not forbid the production of additional evidence but states that the parties are not entitled to produce it, although the Court may in its discretion in certain circumstances allow it to be admitted. Certain documents filed in a former case between one of the parties to the suit in question and some third parties were all along referred to during the trial by the parties as well as by the Court, in the absence of the documents themselves or their copies on record. The Court allowed them to be produced even at the close of the arguments but still they were not filed. After the close of the case for judgment they were produced but the Court refused to accept them then and dismissed the suit. The appellate Court refused to admit the documents as being additional evidence, under O. 41, R. 27 (1). In second appeal the plaintiff prayed for being allowed to produce the evidence.

Held, that the reference made by the Court and the parties to the documents in the absence of their copies on record was certainly irregular. The documents were all along before the Court and used by it, and if it could be properly said, they were evidence *de facto* in the trial, though not evidence *de jure*. The documents that were so dealt with could therefore hardly be said to be "new evidence". The irregular reference to them in the trial caused substantial error or defect in the procedure of the Court which might have caused error in the decision of the trial Court.

C. P. CODE (1908), O. 41, R 27.

The point as to irregular procedure resulting in such error could therefore be raised in the second appeal under S. 100 (1) (*c*) and the documents could therefore be allowed to be produced in second appeal, as the refusal to allow them to be filed would simply perpetuate the substantial error or defect. (*Baguley, J.*) MA THET SU *v.* MA KYI DAN. 177 I.C. 542=11 R.R. 138=A.I.R. 1938 Rang. 170.

——O. 41, R. 27 (1) (b)—*Additional evidence—Admission by the Court with the consent of parties—Record of reasons by Court not adequate—Effect of order—Duty of Court—Estoppel of party consenting to admission of evidence.*

Where by consent of parties the appellate Court admitted additional evidence, and the reasons given by it did not strictly comply with the terms of O. 41, R. 27 of the C. P. Code.

Held, that the consent of the parties may be treated as an admission by both parties that the grounds for admitting additional evidence existed. Still the Judge is not absolved from the requirement of satisfying himself as to the necessity for this evidence but the consent may to a large extent cover the defects in the record of the reasons for the order. 17 M.L.J. 34=34 I.A. 115=31 Bom. 381 (P.C.), dist.; 19 M.L.J. 435=36 I.A. 221=36 Cal. 833 (P.C.), Rel. on. Even if the reasons recorded by the Court are deemed inadequate, the consent of the party to the admission of further evidence precludes him from questioning the admissibility of that evidence in subsequent proceedings. 55 I.C. 226, not foll. (*Wadsworth, J.*) KANDASAMI GOUNDAN *v.* RAMAI GOUNDAN. 48 L.W. 546=179 I.C 695=11 R.M. 617=1938 M.W.N. 1080=A.I.R. 1939 Mad. 54=(1938) 2 M.L.J. 740.

——O. 41, R. 27 (1) (b)—*Admission of fresh evidence—Test.*

The test laid down in Cl. (*b*) of O. 41, R. 27, *viz.*, 'if the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment' is one relating to the state of mind of the appellate Court and not an external standard. In other words, the test is not, whether any tribunal would be unable to pronounce any judgment without the production of the additional evidence in question, but, whether the mind of the appellate Judge is in such a condition on the evidence on record that he requires any document to be produced or any witness to be examined to enable him to pronounce judgment. The object is to enable the appellate Judge to satisfy his own mind, when he entertains a doubt; the test proposed is therefore not an external one, *viz.*, whether some other mind or an average mind would require additional evidence to be produced in order to pronounce some judgment or other. 38 Mad. 414 and 36 Mad. 477, rel. on. (*Skemp, J.*) BUR SINGH *v.* SANTA SINGH. 179 I C. 350=11 R.L. 553=40 P.L.R. 646=A.I.R. 1938 Lah. 161.

——O. 41, R. 27 (b)—*Powers of Court—Additional evidence—When to be admitted.*

Where the appellate Court thinks that additional evidence is necessary to establish a fact necessary for the decision of the appeal, it is justified in taking snch additional evidence as it considers fit. *Ismail, J.*) NARAIN DAS *v* GHAZI RAM GOJAR MAL. 176 I.C. 99=1938 A.L.R. 543=11 R.A. 40=1938 A.L.J. 449=1938 A.W.R. (H.C.) 294=A.I.R. 1938 All 353.

C. P. CODE (1908), O. 41, R. 27.

——O. 41, R 27 (b)—*Construction—"Requires"—Meaning of—Additional evidence—Admissibility—Grounds—Discretion of appellate Court—Additional evidence admitted erroneously—Duty of Court to consider on merits.*

The word "requires" in O. 41, R. 27 (*b*) means that it is necessary O. 41, R. 27 (*b*) does not mean that additional evidence should not be admitted except on the definite pronouncement of the Court itself or that if the new and additional evidence is produced by one of the parties it should be ignored. The wording of R. 27 (*b*) is quite against such an interpretation. Additional evidence may be necessary for the purpose of enabling the Court to pronounce judgment, that is to say, the Court may find that unless such evidence is produced it has not sufficient material before it to decide the case or there may be some other good and substantial cause. The most common and frequent ground is that the evidence was not available in the trial Court because the party was not aware of it at the time of the trial and it has since been brought to the notice of the party. The Court has a discretion. If the additional evidence has been admitted, and is admissible as relevant, it must be heard upon its merits even if the discretion to admit it may have been exercised on erroneous grounds.

Per *James, J.*—If the appellant in an appeal makes out such grounds as would justify the admission of an application for review if no appeal had been preferred, they are sufficient grounds which justify the admission of additional evidence under O. 41, R. 27. (*Courtney-Terrel, C.J. and James, J.*) DURGA TEWARY *v.* RAMRATI KUER. 16 Pat. 371=18 Pat.L.T. 618=10 R P. 245=1937 P.W.N. 592=171 I.C. 728=A.I.R. 1937 Pat. 584.

——O 41, R. 27 (1) (b)—*Scope of power under—Remand for insufficiency of evidence to prove the case—If justified.*

O. 41, R. 27 (1) (*b*), C. P. Code, confers a limited power on an appellate Court to be used where certain definite evidence is required and it does not entitle a Court to allow a plaintiff to add to his case, evidence which he should have added in the first instance. There cannot be a remand, to allow a plaintiff to produce any additional evidence he wants, on the ground that the evidence on record is not sufficient to prove his case. (*Bennet, A.C.J.*) KALIKA PANDE *v.* RAM AUTAR PANDE. I L.R (1938) All. 952=11 R.A. 287=178 I.C. 309=1938 A.W.R. (H.C.) 617=1938 A L.J. 930=A.I.R. 1938 All. 621.

——O. 41, R. 27 (2)—*Additional evidence—Admissibility in appeal—Grounds of—Admission of fresh evidence for corroborating oral evidence disbelieved by trial Court—If justified.*

An appellate Court cannot admit fresh evidence in appeal where such admission is not for the purpose of remedying some inherent lacuna or defect, but for the purpose of providing corroboration for oral testimony which had been disbelieved by the trial Judge. Where the oral evidence is complete, and would, if believed, substantiate the case of a party, there is no question of any lacuna or inherent defect. If the additional evidence is not necessary for the Court to appreciate a party's case or to pronounce

C. P. CODE (1908), O. 41, R. 27.

judgment on it, it should not be admitted. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) NARASIMHAMURTI *v.* HAYAT KHAN. **1940 M.W.N. 863=52 L.W. 326=(1940) 2 M.L.J. 287.**

——**O. 41 Rr. 27 (2) and 29**—*Duty of Court—Recording of reasons—Specification of points.*

An appellate Court admitting fresh evidence is bound by R. 27 (2) of O. 41, C. P. Code, to record its reasons for so doing, and under R. 29 must specify the points in which the evidence is to be confined and record on its proceedings the points so specified. (*Din Mahomed, J.*) BANARSI DAS *v.* RULIA. **42 P.L.R. 261.**

——**O. 41, R. 27 (2)**—*Scope—Omission to record reasons for admission of additional evidence—When ground for reversal—Absence of objection to admission of evidence—Effect.*

It is established that when both parties agree that further evidence is necessary and admission of that evidence is made by consent, any failure on the part of the Judge to record in due form the reasons for the admission of that evidence is not a matter which would justify the reversal of the judgment or the rejection of the additional evidence. But it cannot be said that mere absence of objection to the admission of additional evidence in appeal is a bar to the raising of objections to the correctness of the admission or to make it a ground of reversal of the judgment based on that evidence in second appeal. The absence of objection becomes important only when it appears to have been equivalent to a consent. (*Wadsworth, J.*) ASSYA UMMA *v.* MOOSA. **1940 M.W.N. 511=A.I.R. 1940 Mad 707.**

——**O. 41, R. 29**—*Object.*

The rule in O. 41, R. 29 serves a very useful purpose namely that it ensures that the appellate Court will consider exactly on what points there is a lacuna which requires to be rectified and also that an opportunity will be given to both sides to adduce additional evidence on particular points on which additional evidence is allowed to be taken in appeal. (*Pandrang Row, J.*) SRINIVASAN PILLAI *v.* ALAGAPPA CHETTIAR. **182 I.C. 868=12 R.M. 162=1938 M.W.N. 1147=48 L.W. 797=A.I.R. 1938 Mad. 372=(1938) 1 M.L.J. 50.**

——**O. 41, R. 30**—*Order announced in two parts—Legality.*

There is nothing in O. 41, R. 30, C. P. Code, to prevent a Court from deciding a preliminary issue before passing its final judgment, and an order announced in two parts is, therefore, not illegal. (*Garbett, F.C.*) KHUSHI RAM *v.* ATMA RAM. **19 Lah.L.T. 31.**

——**O. 41, Rr. 30 and 31**—*Duty of appellate Court under—Appellant's pleader unable to argue appeal and applying for time—Refusal of adjournment and dismissal of appeal for want of prosecution—If justified—Proper course for appellate Court.*

An appellate Court is not entitled to dismiss an appeal for want of prosecution merely because the appellant or his pleader is for any reason, unable to argue the appeal. The Court, if it thinks fit to refuse an adjournment applied for by the appellant or his pleader on the ground of inability to argue the case, must, after such refusal, proceed in the manner laid down by Rr. 30 and 31 of O. 41, C. P. Code. It is bound to

C. P. CODE (1908), O 41, R. 31.

decide the appeal before it, to pronounce judgment in open Court containing the points for determination, its decision thereon and the reasons for that decision. A Court is justified in dismissing the appeal for want of prosecution only where a party is bound to do something and has failed to do it. The law gives an absolute right to the appellant to be heard; this right cannot be converted into a duty. The appellant may or may not avail himself of this right; and merely because he does not avail himself of his right to argue his appeal, he cannot be said to be guilty of "want of prosecution" of his appeal. The dismissal of the appeal in such a case for want of prosecution is not justified and is liable to be set aside. (*Niamatullah, J.*) MOHAMMADI HUSAIN *v.* CHANDRO. **1937 A.L.J. 174=1937 A.W.R. 122=168 I.C. 1001=9 R.A. 697=1937 A.L.R. 439=A.I.R. 1937 All. 284.**

——**O. 41, Rr. 30 and 17**—*Party appearing in person—No appearance by counsel and no arguments—Manner in which the appeal could be disposed by Court.*

Where an appellant appears personally, but is not prepared to argue the appeal, the appellate Court can dispose of the appeal under R. 30 and not R. 17 of O. 41. But in such a case it is not necessary for the Court to give a decision on any point or the reasons for the decision, inasmuch as there was in fact no point for determination raised before the Court. It is sufficient for the Court to pass an order of dismissal for default which does not necessarily mean default of appearance but rather means dismissal for default of proof. (*Bennet and Verma, JJ.*) MATHURA DAS *v.* NARAIN DAS. **I.L.R. 1940 A. 220=13 R.A. 81=189 I.C. 163=1940 A.L.J. 126=1940 A.W.R (H.C.) 157=A.I.R. 1940 A. 248.**

——**O. 41, Rr. 30 and 31**—Procedure as laid down in—Court when bound to follow. *See* C. P. CODE, O. 41, RR. 17, 30 AND 31. **1940 A.L.J. 121.**

——**O. 41, R. 31**—*Appellate judgment—Contents—Finding of fact—Reference to evidence—Necessity for.*

There is no authority which lays down that the appellate Court before recording a finding of fact should refer to each and every document or piece of evidence on the record while recording its finding. It should be assumed that all the relevant evidence was brought to the notice of the Judge and he had it in his mind when he delivered his judgment. (*Agha Haidar, J.*) MT. AKHTARI BEGAM *v.* ALLAH JAWAYA. **164 I.C. 252=9 R.L. 94=A.I.R. 1936 Lah. 543.**

——**O. 41, R. 31**—Applicability — Dismissal under R. 11—Formal judgment—Necessity. *See* C. P. CODE, O. 41. R. 11. **A.I.R. 1937 Sind 247.**

——**O. 41. R. 31**—*Applicability—Judgment under O. 41, R. 11—Form of.*

It is not necessary that judgment in the form prescribed in O. 41, R. 31, C. P. Code, should be given when the appeal is dealt with under O. 41, R. 11. The provisions of R. 31, O. 41 relate only to a judgment pronounced in accordance with the provisions of O. 41, R. 30. (*Davis, J.C. and Mehta, A. J. C.*) NEWANDRAI SITALDAS *v* SIRUMAL ATISING. **31 S.L.R. 167=171 I.C. 132=10 R.S. 92=A.I.R. 1937 Sind 206.**

——**O. 41, R. 31**—*Contents of appellate judgment.*

C. P. CODE (1908), O. 41, R. 31.

The judgment of the Court of first appeal should always be self-contained and should deal with material points in issue in such a way that the Court of second appeal might be in a position to know whether the first Court of appeal has properly applied its mind to the facts of the case or not. Besides the Court should not indulge in generalization but should confine itself to particular matters before it. (*Abdul Qayoom, C. J. and Kichlu J.*) SULEMAN *v.* ABDUL GHANI. **32 P.L.R. J & K. 52.**

——**O. 41, R. 31**—*Four appeals disposed of in one judgment—Question in each appeal distinct from that raised in others—Parties not same—If a proper Judgment.*

Where a Judge disposes of in a single judgment four appeals, each of which raises a question quite distinct from that raised in the other three and the parties are also not the same, and the Judge has not given proper consideration to the points for decision in the appeals, in none of the four appeals can the so-called judgment be regarded as a judgment within the meaning of O. 41, R. 31. (*Dunkley, J.*) S. P. L. A. CHETTYAR FIRM *v.* MA PU. **14 Rang. 697=163 I.C. 604=9 R R. 33=A.I.R. 1936 Rang. 262.**

——**O. 41, R. 31, Ss. 99 and 108**—*Judge after giving judgment going on leave without signing it —Irregularity—If curable.*

Rule 31 of O. 41 does not say that if its requirements are not complied with, the judgment shall be a nullity So startling a result would need clear and precise words. Indeed, the rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply, as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing judgment may call for more comment, but even so the convenience of the Court and the interest of the litigants must prevail. The defect is merely an irregularity not affecting the merits of the case or the jurisdiction of the Court and is no ground for setting aside the decree. (*Lord Wright.*) GOKAL CHAND *v.* NAND RAM. **66 I. A. 12=I.L.R. (1939) Lah. 56=I.L.R. 1939 Kar. 35 (P.C.)=68 C.L.J. 497=1939 A C. 106=1939 M W.N. 1=5 B.R. 154=1939 O A 456=20 Pat. L.T 61=41 Bom.L R. 128=49 L W. 248=1939 O.W.N. 272=41 P.L.R. 310=43 C W.N. 87=178 I.C. 425=1938 A.W.R. P.C. 212= 1938 O.L.R. 501=A.I.R. 1938 P.C. 292=(1939) 1 M.L.J. 56 (P.C.).**

——**O. 41, R 31**—*Judgment of appellate Court —Contents.*

The judgment of the Court of appeal should be self-contained in every respect and the material points in issue should be properly discussed with reference to the evidence led by the parties (*Abdul Qayoom, C. J. and Wazir. J.*) GHULAM HAIDAR KHAN *v.* GHULAB BIBI. **42 P.L.R.J. & K. 42.**

C. P. CODE (1908), O. 41, R. 33.

——**O. 41, R. 31 and O. 20, R. 4 (2)**—*Judgment of the appellate Court—Contents.*

It is not a sufficient judgment within the C. P. Code to state that the Judge is in agreement with the finding of the Court below. He is bound to express his reasons for the finding at which he arrives, and, although he need not, so far as the questions of fact are concerned, deal in detail with the evidence, a definite finding must be arrived at by him in order to comply with the provisions of the Code. (*Wort and Manohar Lall, JJ.*) GYAN PRAKASH DAS *v.* MT. DUKHAN KUAR **173 I.C. 479=4 B R. 293=10 R.P. 415=1937 P.W. N. 821=19 Pat L T 362=A.I.R. 1938 Pat. 69.**

——**O. 41, Rr. 32 and 33**—Scope—Deficiency in court-fee on plaint—Order for payment by trial Court within fixed time — Appeal—Power of appellate Court to extend such time. *See* C. P. CODE, Ss. 2 (2) AND 148. **1937 A.L.J. 1346=1938 A.W.R. 13 (H.C.).**

—— **O. 41, R. 33**—*Alteration of decree in favour of non-appealing respondent—Power of appellate Court.*

Under O. 41, R. 33, C. P. Code, the appellate Court has power to alter a decree in favour of a respondent who has not filed an appeal or objection, although the alteration is to the detriment of the other respondents. (*Agarwala, J.*) HARI MOHAN OJHA *v.* BANSDHAJ PATHAK. **184 I.C. 137=12 R P. 220=6 B.R. 23=A.I.R. 1940 Pat. 47.**

——**O 41, R. 33**—*Applicability—Decree against one set of defendants exonerating another set of defendants—Appeal by former against decree seeking to make latter also liable—Competency—Absence of appeal by plaintiff—Effect.*

In a suit on a mortgage against eight defendants, the plaintiff got a decree against defendants 1 to 4, and the remaining defendants were exonerated. Plaintiff did not appeal, but the defendants 1 and 4 appealed against the decree and sought in the appeal to make defendants 5 to 8 also liable to the plaintiff for the decree amount.

Held, that O. 41, R. 33, C. P. Code, would apply and that the appeal by defendants 1 to 4, involving as it would, if the appellants succeeded, defendants 5 to 9 was competent. (*Wort and Chatterji, JJ.*) RANESHWAR PRASAD SINGH *v.* AMPRATAP THAKUR. **187 I.C. 634=12 R.P. 621=6 B.R. 519.**

——**O 41, R. 33**—*Applicability—Decree against party not impleaded in appeal.*

What is contemplated by O. 41, R. 33 is that an order may be passed in favour of a person who has not appealed but not that an order can be passed against a person who is not a party to the appeal and who is not on the record. (*Davis, J.C. and Lobo, A J.C.*) THADHI *v.* ABDUL HUSSAIN. **31 S L.R 486=171 I.C. 315=10 R.S. 100=A.I. R. 1937 Sind 236.**

——**O. 41, R 33**—*Applicability—If confined to case of single cause of action or ground of liability—Suit for contribution—Decree against some defendants exonerating others—Appeal by former —No appeal by plaintiff—Question of liability of exonerated defendants—If can be raised and dealt with.*

There is nothing in O. 41, R 33, C. P. Code, or in the illustration to it to confine its application to cases, where there is but one cause of action or ground of liability against the defendants. In a

C. P. CODE (1908), O 41, R. 33.

suit for contribution under S. 82. T. P. Act, the plaintiff got a decree against some defendants only, but the others were exonerated. Some of the defendants against whom the claim was decreed appealed against the decree and urged that the exonerated defendants should also be made liable. The plaintiff, however, did not appeal on that point, but was content with the decree which he got.

Held, that under O. 41, R. 33, the appellants were entitled to raise the question of the liability of the exonerated defendants and that the Court had power under the rule to deal with the same. (*Wort, Ag.C.J. and Dhavle, J.*) ISRI PRASAD SINGH *v.* JAGAT PRASAD SINGH. **16 Pat. 557=18 Pat.L.T. 787=172 I.C 187=10 R.P. 308=1937 P.W.N. 919=A.I.R. 1937 Pat. 628.**

——**O. 41, R. 33**—*Applicability—Powers of Court—Distinct and separate decree against parties not choosing to appeal—Decision in favour of such parties—Power of Court to pass.*

The provisions of O. 41, R. 33, C. P. Code, which enable the appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering if necessary, even with the rights and liabilities of those who are not in fact appealing from that decision of the trial Court, ought not to be applied to cases where there has been a distinct and separate decree against those parties who have not chosen to appeal. In such a case, if such parties do not choose to come in record, no order should be passed in their favour in that state of the record, although the Court can bring them on the record under O. 41, R. 20, and after proper steps, may pass such order. (*Varma and Rowland, JJ.*) SURAJ PRAKASH PURI *v.* SANT LAL SINGH. **18 Pat. 768 =186 I C. 865=12 R.P 549=6 B.R. 407=1940 P.W.N. 168=21 Pat.L.T. 420=A.I.R. 1940 Pat. 137.**

——**O. 41, R. 33**—Applicability to second appeals—If controls S. 100. *See* C. P. CODE, S. 100. **185 I.C. 638=6 B.R. 229.**

——**O 41, R 33**—Powers of appellate Court. *See* C. P. CODE, O. 41, R. 4. **A.I.R. 1936 Pesh. 20**

——**O. 41, R. 33**—*Power of appellate Court—Interference in favour of a party not appealing—Conditions.*

O 41, R. 33 has been enacted to empower the appellate Court to do complete justice between the parties. The appellate Court has power under this rule to vary the decree of the lower Court although the variation may benefit a party who has not appealed, for example, where such party has not been able to find the money for preferring an appeal and the lower Court's judgment is undoubtedly wrong. (*Venkatasubba Rao and Abdur Rahman, JJ.*) PONNARI RAO *v.* LAKSHMI NARASAMMA. **177 I.C. 693=47 L.W. 751=11 R.M. 370=1938 M.W.N. 67=A.I.R. 1938 Mad. 322=(1938) 1 M.L.J. 154.**

——**O. 41. R. 33**—Powers of appellate Court—Old appeal in the guise of cross objection by party having no community of interest with appellant—Maintainability. *See* C. P. CODE, O. 41, RR. 22 AND 33. **A.I.R. 1936 Pat. 604.**

——**O. 41, R. 33**—*Powers of appellate Court—Perpetual injunction—Refusal by trial Court—Power of appellate Court to grant.*

C. P. CODE (1908), O. 41, R. 33.

It is open to an appellate Court to grant to a party relief by way of a perpetual injunction, which has been refused by the trial Court although there is no appeal or cross-objection by that party on the point. The wide language of O. 41, R. 33, C. P. Code, would warrant the appellate Court in granting such an injunction, so long as the party has prayed for it in his pleadings and that prayer has not been abandoned. (*Mukherji and S.K. Ghose, JJ.*) LANKAPARA TEA CO., LTD. *v.* GOPALPUR TEA CO., LTD. **63 Cal. 1008= 63 C.L.J. 210=40 C W.N. 916.**

——**O. 41, R. 33**—*Power of appellate Court—Respondent not appealing or preferring cross-objections—Relief to—If can be granted.*

The words of O. 41, R. 33, C. P. Code, are very wide, and the object of the rule is to do complete justice between the parties to the appeal. Where in order to grant relief to an appellant it is essential that some relief should at the same time be granted to the respondent also, the Court has power to grant such relief to the respondent, although the respondent has preferred neither an appeal nor a memorandum of cross-objections against the decree under appeal. (*Iqbal Ahmad, J.*) SECRETARY OF STATE FOR INDIA *v.* BASTI BEGAM. **1937 A.L.J. 804=1937 A.W.R. 705= 172 I.C. 695=10 R.A. 422=1938 A.L.R. 23.**

——**O. 41, R. 33**—*Powers of appellate Court—Single suit and decree—Two distinct transactions of two separate defendants—Appeal by one only—No appeal by other—Power to interfere with part of decree not appealed against.*

Obiter.—A Court of appeal has, under certain circumstances power to interfere with the portion of the decree against which there is no appeal. That power is certainly wide; but the power can only be exercised in cases in which the portion of the decree appealed against is so inseparably connected with the portion not appealed against that justice cannot be done unless the part not appealed against is also interfered with. Where the decree though in form one single decree, really amounts in effect to two distinct decrees against two different persons on two separate causes of action or transactions, the Court of appeal is not justified in interfering with that portion of the decree not appealed against although the questions of fact and law involved in both of them are to some extent the same. (*Khaja Mohammad Noor and Madan, JJ.*) DAROGI RAI *v.* BASDEO MAHTO. **16 Pat. 45 =166 I.C. 555=9 R.P. 316=3 B.R. 183=1936 P. W.N. 800=17 Pat.L.T. 780=A.I.R. 1937 Pat. 40.**

——**O. 41, R. 33**—*Powers of appellate Court—Suit for arrears of annuity charged on land—Decree disallowing charge but directing recovery of arrears against assets of grantor in the hands of defendant—Appeal by defendant alone—Decree exonerating defendant from personal liability—Decree declaring charge—Propriety.*

In a suit for arrears of annuity due under a deed executed by the predecessor in title of the defendant, claiming a charge on certain properties, the trial Court holding that the plaintiffs were not entitled to a charge as the deed was not properly attested,—no attesting witness having been examined—gave a decree against the assets of the executant of the deed in the hands of the defendant. The defendant appealed but the

plaintiffs did not appeal or prefer any cross-objections. The appellate Court held that the defendant was not personally liable, but held that the plaintiffs were entitled to a charge and granted a decree to that effect. It was found that the deeds being 30 years old and being in proper custody, there was no need to examine the attesting witness.

Held, that it was competent to the appellate Court to grant as decree declaring a charge under O. 41, R. 33, C. P. Code, although the plaintiff had not preferred an appeal or cross-objections against the disallowance of the charge. (*Jack and Edgley, JJ.*) RADHIKA MOHAN MEMSHI *v.* SUDHIR CHANDRA SAMJAL. **168 I.C. 646=9 R.C. 847=40 C.W.N. 1397=A.I.R. 1937 Cal. 10.**

——**O. 41, R. 33**—*Powers of appellate Court—Suit dismissed against two co-defendants—Appeal by plaintiff impleading only one defendant—Power of Court to decree suit against defendant not impleaded.*

No Court has jurisdiction to pass a decree against any person who is not a party to the proceeding before it, and an appellate Court has no power under O. 41, R. 33 to pass a decree against a person who is not a party to the record. If a plaintiff whose suit has been dismissed chooses to implead in his appeal only one of two co-defendants against whom an alternative claim was made, he has only himself to blame, if the respondent succeeds in the appeal in shifting the liability on to the defendant who has not been impleaded in the appeal. (*Wadsworth, J.*) VIRUPAKSHAYYA *v.* SUBBARAYUDU. **1940 M W N. 422 =51 L.W. 615=A.I R. 1940 Mad. 609.**

——**O. 41, R. 33**—*Powers of Court—Dismissal of suit against particular defendant—No appeal as against him—Latter not party to appeal—Order against such person—Power to pass.*

What is contemplated by O 41, R. 33, C. P. Code, is that an order may be passed in favour of a person who has not appealed, but not that an order can be passed against a person who is not a party to the appeal and who is not on the record. No order can be passed to the detriment or prejudice of a person against whom the suit has been dismissed by the trial Court and against whom no appeal had been preferred before the lower appellate Court. (*Dadiba, C. Mehta and Lobo, A.J Cs.*) CHATOMAL *v.* ABDUL HAMID KHAN. **173 I.C. 862=10 R.S. 231=A.I.R. 1937 Sind 312.**

——**O. 41, R. 33**—*Powers of Court—Power to deal with case of non-appealing party.*

It is within the power of an appellate Court to deal with so much of the decree under appeal as affects a defendant who has not appealed against the decrce by application of the provisions of O. 41, R. 33, C. P. Code. (*Courtney Terrell, C.J. and James, J.*) SARAT CHANDRA *v.* BAIDYANATH. **181 I.C 840=11 R.P. 646=5 B.R. 682=1938 P W N. 523=A.I R. 1939 Pat. 162**

——**O 41, R 33**—*Power to amend decree—Judgment imopsing personal liability for costs on mortgagor—Decree drawn up in usual form and making no mention of such liability.*

Where the judgment imposes personal liability for costs on the defendant mortgagor in express terms, but the decree is drawn up in the usual form and nowhere imposes any personal liability

on the mortgagor for costs, what is executed is the decree and not the judgment, and unless the decree is brought into conformity with the judgment, it will not be permissible to the decree-holder to realize the costs in suit personally from the mortgagor. O. 41, R. 33, invests an appellate Court with plenary powers and authorizes the Court to pass any decree or order as the case may require and even in favour of any respondent who may not have appealed. Even otherwise under S. 151, C P. Code, the inherent powers of the Court to make such orders as may be necessary for the ends of justice are unlimited. The appellate Court can order the decree to be amended and brought in conformity with the judgment (*Coldstream and Din Mohammad, JJ.*) KRISHAN LAL *v.* SIRI JAIN MANDIR PANCHAITI. **I.L R. 1938 Lah. 148=181 I.C. 487= 11 R.L. 847=40 P.L.R. 640=A.I.R. 1938 Lah. 188.**

——**O. 41, R. 33**—*Powers under—Defendant exonerated by trial Court—No appeal by plaintiff as against him—Power of appellate Court to grant relief as against such defendant.*

The powers of an appellate Court under O. 41, R. 33, C. P. Code, are sufficiently wide to enable it to grant a relief to a plaintiff against a defendant though as against him the plaintiff has not appealed. (*Wort and Varma, JJ.*) KESHWAR SAO *v.* GUNI SINGH. **17 Pat. 338=176 I.C. 269=4 B.R. 694=11 R.P. 75=19 Pat.L.T. 198=1938 P. W.N. 211=A.I R. 1938 Pat. 275.**

——**.O 41, R. 33**—*Powers under—When exercised.*

The exercise of the powers under O 41, R. 33, C. P. Code, is discretionary and is normally exercised only in cases in which the failure to exercise them would lead to impossible, contradictory and unworkable orders. (*Almond, A.J.C.*) SHER MOHAMMAD NAWAB KHAN *v.* MST. AMINA BIBI. **170 I.C. 195=10 R. Pesh. 21=A.I.R. 1937 Pesh. 69.**

——**O. 41. Rr. 33 and 4**—Relief to persons not before Court—Exercise of discretion—Principles *See* C. P. CODE, O. 41, RR. 4 AND 33. **43 C. W.N. 15.**

——**O 41, R. 33**—*Scope—Decision against party to suit not impleaded in appeal—If can be passed.*

According to O. 41, R. 33, C P. Code, in an appeal relief can be given in favour of a party who has not been impleaded either as appellant or respondent, but no decision can be given against the interests of a party impleaded in the trial Court but not impleaded in appeal. If any such order is passed it cannot operate as *res judicata*. (*Mehta, S.M. and Harper, J. M.*) MAHABIR SINGH *v.* BAIJ NATH SINGH. **1939 A. W.R. (B R.) 102=1939 R D. 8.**

——**O. 41, R. 33**—*Scope of—Decree in favour of non-appealing plaintiff and against non-appearing defendant—Powers of Court*

Where in an appeal by certain defendants, the plaintiff and one of the defendants were made respondents and the defendant respondent did not appear, the appellate Court passed a decree in favour of the respondent plaintiff and against the respondent defendant, it was held that under O 41, R. 33 the Court had ample powers to pass such orders. (*Verma, J.*) ETWARI MAHTO *v.*

C.P. CODE (1908), O. 41, R 33.

GANGA MAHTO. 174 I.C. 452=4 B.R. 449=10 R. P. 520=A.I.R. 1938 Pat. 323.

——O. 41, R. 33—*Scope—If subject to Court-Fees Act.*

Although the wording of O. 41, R. 33, C. P. Code, gives wide powers to the appellate Court, those powers should not be exercised in such a way as to interfere with the provisions of other enactments, *e.g.*, the Court-fees Act. (*Varma and Rowland, JJ.*) SURAJ PRAKASH PURI *v.* SANT LAL SINGH. 18 Pat 768=186 I.C. 865=12 R.P. 549=6 B.R. 407=1940 P.W.N. 168=21 P. L.T. 420=A.I.R. 1940 Pat. 137.

——O. 41, R. 33—*Scope -Party to suit not joined in appeal found not to be necessary party to appeal—Power of appellate Court to pass decree in his favour.*

R. 33 of O. 41 should not be exercised so as to deprive a party of a valuable right which he might have acquired in consequence of the opposite party's failure to appeal against decree so far as it affected him. There is nothing in the wording of the rule to show that the power can be exercised only in the case of a person who is interested in the appeal. If therefore once it is found that a certain party to the suit who is not joined in the appeal is not a necessary party to the appeal and to pass a decree in his favour in appeal would do him no prejudice but on the contrary would be a benefit to him, whereas it can in no way prejudice the opposite party then the appellate Court has power to pass a decree in his favour. (*Mackney, J.*) MAUNG THAN GYAUNG *v.* MAUNG THAN HMO. 182 I.C. 1005=12 R.R. 43=A I.R. 1939 Rang. 213.

——O. 41, R. 33—*Scope—Person not party to appeal—Order against—If can be passed.*

What is contemplated by R. 33 of O. 41, C. P. Code, is that an order may be passed in favour of a person who has not appealed, but not that an order can be passed against a person who is not a party to the appeal and who is not on the record. (*Davis, J.C. and Lobo, A.J.C.*) BIBI THADHI AHMEDALI *v.* MIR ABDUL HUSSAIN. 31 S L R. 486=171 I.C. 315=10 R.S. 100=A.I.R. 1937 Sind 236.

——O. 41, R. 33—*Scope of power under.*

There is no doubt that under O. 41, R. 33, the appellate Court has been given very wide powers to do complete justice between the parties. Under the rule the appellate Court enjoys a discretionary power to pass such decree as ought to have been passed by the trial Court. This power however can be exercised only in favour of a party to the suit who was not impleaded in the appeal. It is not permissible under this rule to pass any decree against a party who has not been impleaded as a respondent in the appeal. (*Ismail, J.*) PARTAP CHAND *v* CHUNNI LAL. 188 I.C. 396=12 R.A. 15=1940 A.L J. 161=1940 A.W. R. (H.C.) 169 =A.I.R. 1940 All 225.

——O. 41, R. 33—*Scope — Respondent not filing cross-objections—Right to attack findings.*

O. 41, R 33, C. P. Code, contemplates modification of the decree by the appellate Court at the instance of the appellant. It has no scope where the respondents in effect want to maintain the decree of th3 lower Court or when the decree under appeal is not modified in appeal. It is not open to a respondent, who has not preferred any memorandum of cross-objections or any appeal,

C. P. CODE (1908), O. 43, R. 1.

to attack a finding which if reversed would totally or in part destroy the decree made in favour of the appellants. (*R.C. Mitter and Khundkar, JJ.*) SAHEB MEAH *v*, LALIT MOHAN CHOUDHURY. 185 I.C. 94=12 R.C. 329=69 C.L.J. 385=A.I.R. 1939 Cal 582.

——O. 41, R 33—*Scope—Suit dismissed—Appeal by one defendant—Cross-objection by non-appealing plaintiff—Maintainability.*

Where an action by a person is dismissed, the appellate Court has under O 41, R. 33 power to grant him relief even if he has not appealed but has filed cross-objection. Hence an objection regarding competency of cross-objection by him has no substance. (*Harries, C.J. and Wort, J.*) HALIMAN BIBI *v* MD. TAJAMUL HUSSAIN. 6 B. R. 141=185 I.C. 250=12 R.P. 332=A.I R. 1939 Pat. 504.

——O. 41, R. 33—*Scope—Suit dismissed against one defendant—No appeal or cross-objection filed against this decision—Relief against such defendant in second appeal—If can be granted.*

Where the plaintiff's suit against several defendants is dismissed as against one of them and the plaintiff does not prefer any appeal or cross-objection in the lower appellate Court against the trial Court's decision nor is the point taken as a ground of second appeal to the High Court, it is not proper to give the plaintiff any relief under O. 41, R. 33 against such defendant against whom the suit was dismissed. (*Mukherjea and Roxburgh, JJ.*) SURENDRA NATH GHOSH *v.* SURENDRA NATH JORDAR. A.I.R. 1939 Cal. 593.

——O. 41, R. 33—*Scope—Technical mistake in judgment of lower Court—Power of appellate Court to rectify—Absence of appeal by respondent—If a bar.*

An appellate Court has ample powers under O. 41, R 33 to correct a purely technical mistake in the judgment of the lower Court, even though the respondent has not appealed against the decree to correct such mistake. (*Harries and Rachhpal Singh JJ.*) CHANDRA SARUP *v.* KANHAIYA LAL. I L.R. (1937) All. 489=1937 A L. J. 280=1937 A.W.R. 245=169 I.C. 570=10 R. A. 48=1937 A.L R. 569=A.I R. 1937 All. 401.

——O. 42, R. 1 (All.)—If affects second appeals under Agra Tenancy Act. *See* AGRA TENANCY ACT, S. 264 AND SCH. II—LIST 2, SERIAL 14 AND C. P. CODE, O. 42, R. 1 (All.). 1939 A.L.J. 592.

——O. 42, R. 1—*Memorandum of appeal under —Filing copy of trial Court's judgment—If necessary.*

An appeal is properly presented when the memorandum of appeal is filed in Court accompanied by a copy of the judgment and decree appealed from. It is not necessary to file with the appeal a copy of the judgment of the trial Court. (*Almond, J.C.*) AMIR SINGH NAND LAL SINGH *v.* MOHAMMAD AKBAR KHAN. 161 I.C. 708=8 R. Pesh. 181=A.I R 1936 Pesh. 77.

——O. 43, R. 1—Order by Court which passed decree refusing to amend decree under S. 151—Appeal. *See* C. P. CODE, S. 47. 41 Bom. L.R. 1170.

——O. 43, R. 1—Order rejecting appeal for failure to furnish security for costs—Appeal. *See* C. P. CODE, O. 41, R. 10 (2). A.I.R. 1936 Rang. 109.

C. P. CODE (1908), O. 43, R. 1.

——O. 43, R. 1—Order rejecting memorandum of appeal for non-compliance with O. 41, R. 1—Appealability. *See* C.P. CODE, S. 2 (2). 17 Pat 245.

——O. 43, R. 1 and S. 115—*Order returning appeal for presentation in proper Court—Appeal—Revision.*

No appeal lies from an order of an appellate Court returning the appeal for presentation in the proper Court. But if the order is wrong, the Court refuses to exercise a jurisdiction vested in it by law and therefore, a revision lies (*Skemp, J.*) SHAM LAL *v.* SHAHBAZ KHAN. 42 P.L.R. 364.

——O. 43, R. 1—Scope—Order rejecting memorandum of appeal for insufficient Court-fee—Appeal. *See* C.P. CODE. S. 2 (2). (1938) N.L.J. 1 (F.B.).

——O. 43, R. 1—Scope—Order returning plaint on ground of pecuniary jurisdiction—Appeal. *See* A.I.R. 1938 Sind 124.

——O. 43, R. 1 (a)—*Plaint filed in Court to which directed—Right to appeal—If lost.*

A plaintiff is not precluded from prosecuting his appeal against the order returning his plaint for presentation to proper Court; if in compliance with that order he presents the plaint to another Court in order to save limitation in case his appeal is dismissed. (*Bhide, J.*) NANU MAL *v.* SHIBBA MAL NAND KISHORE. 181 I.C. 396=11 R.L. 823=40 P.L.R. 975=A.I.R. 1939 Lah. 18.

——O. 43, R. 1 (c)—*Application for restoration of a dismissed application for restoration under O. 9, R. 9—Order on—Appeal.*

When an application for the restoration of a dismised application for restoration under O. 9, R. 9, C. P. Code, has been entertained and decided an appeal lies from that decision by virtue of S. 141, C.P. Code. (*Nanavutty and Smith, JJ.*) RAMESHAR DUTT SINGH *v* HARIHAR. 13 Luck. 246=168 I.C. 47=1937 O.L.R. 186=1937 O.W.N. 372=9 R.O. 441=A.I.R. 1937 Oudh 344.

——O. 43, R. 1 (c)—Application for restoration of suit—Order of dismissal for non-prosecution—Appeal. *See* C.P. CODE, O. 9, R. 9. 1936 A.L.J. 305.

——O. 43 R. 1 (c)—Order dismissing application to restore earlier application under O. 9, R. 13, for failure to comply with condition—Appeal—Maintainability. *See* C, P. CODE, O. 9, R. 9. (1940) 2 M.L.J. 374.

——O. 43 R. 1 (d)—*Construction—"In a case open to appeal"—Meaning of—Rent suit*—Ex parte *decree—Order rejecting application to set aside—Appeal—B. T. Act, S.* 153.

There can be no doubt that the right of appeal is a creature of statute, and when no such right is expressly conferred by the statute, there is no right of appeal. The right of appeal against decrees and orders in rent suits for agricultural land has been conferred by the provision of the C. P. Code, and S. 153 of the Bengal Tenancy Act restricts that right so conferred by the C. P. Code in certain cases. The words of O. 43, R. 1 (*d*) are perfectly general. The words "in a case open to appeal" have no reference to the appeal against the decree actually passed. If there could be no appeal against a decree that could be passed in the suit or proceeding under any circumstances, there would be no appeal against an order refusing to set aside an *ex parte* decree passed in such a suit or proceeding. A case is not open to appeal within the meaning of O. 43, R. 1 (*d*) when no appeal would lie against a decree under any circumstance. An appeal against a decree in a simple rent suit (when the proviso to S. 153, B. T. Act, does not come into play) valued at Rs. 50 or less would be incompetent only under one circumstance, namely, when the Munsif trying the suit has been vested with final jurisdiction, and would lie under all other circumstances. (*R.C. Mitter, J.*) MAHENDRA CHANDRA DUTTA ROY *v.* BASIRUDDIN. I.L.R. (1937) 1 Cal. 135=166 I.C. 103=9 R.C. 471=63 C.L.J. 277=40 C.W.N. 992=A.I.R. 1936 Cal. 485.

——O. 43, R. 1 (e)—*Application to add party—Order on—Appeal.*

O. 22, R. 10, C. P. Code, does not apply to an application to add a certain person as party. Consequently an order on such an application is not appealable, though the application purports to be made under that rule. (*Derbyshire, C.J. and Costello, J.*) JITENDRA NATH *v.* HARINDRA NATH. 42 C.W.N. 1183.

——O. 43, R. 1 (j)—*Appeal under—Scope of.*

Under O, 43. R. 1 (*j*), C. P. Code, there is no power in an appellate Court to entertain an appeal in any matter other than a refusal to confirm a sale or an order confirming a sale. (*Courtney Terrell, C.J. and Manohar Lall, J.*) NAKCHEDI SAHU *v.* BISHUN LAL SINGH. 172 I.C. 27=10 R. P. 328=18 Pat.L.T. 799=A.I.R. 1937 Pat 672.

——O. 43, R. 1 (j)—*Construction and scope—"Refusing to set aside sale"—Meaning of—Court declining to accept bond offering immovable property as security instead of cash deposit—Rejection of application to set aside sale—Appealability.*

So far as applications under O. 21, R. 90, C.P. Code, are concerned, there is no distinction between an order on the application and an order declining to entertain the application. A rejection of the application to have a sale set aside is not any the less a refusal to set aside the sale within the meaning of O. 43, R. 1 (*j*), C. P. Code, although the order may have been passed even before the petition is admitted. An order rejecting the petition on the ground that the petitioner tenders a draft bond offering immovable property as security instead of depositing the sale amount in cash as ordered by the Court is an order refusing to set aside the sale and is therefore appealable. (*Varadachariar, J.*) MARUDAMUTHU MUDALIAR *v.* VENKATARAMA AYYAR. I.L.R. (1939) Mad 349=184 I.C. 60=12 R.M. 400=1939 M.W.N. 154=49 L.W. 158=A.I.R. 1939 Mad. 482=(1939) 2 M.L.J. 132.

——O. 43, R. 1 (j)—Decree-holder purchaser failing to deposit 25 per cent. of purchase price—Order setting aside sale—Appeal *See* C P. CODE, O. 21, RR. 72, 84 (2) AND 92. A I.R. 1939 Lah. 46.

——O. 43, R. 1 (j)—*Order dismissing application under O. 21, R. 90—Appeal—Limitation—Starting point.*

An order dismissing an application to set aside a sale under O. 21, R. 90, C. P. Code, being itself an order refusing to set aside the sale, an appeal under O. 43, R. 1 (*j*) would lie against it and not against the order of confirmation of the sale passed later on. Therefore, limitation for the appeal would run from the date of the order dismissing the application and not from the date confirming the sale. (*Mukherjea, J.*) GURU

CHARAN NAMASUDRA *v.* MAHENDRA CHANDRA PAL. **43 C.W.N 352.**

——**O. 43, R 1 (j)**—Order setting aside sale under S. 227—Orissa Tenancy Act—Appeal. *See* ORISSA TENANCY ACT, S. 204 (1) AND (4). **15 Pat. 375.**

——**O. 43, R. 1 (j)**—Scope—Application to set aside sale under O. 21, R. 80—Refusal to accept security instead of deposit—Propriety—Dismissal of aprlication to set aside sale—Appeal from both orders—Competency. *See* C. P. CODE, O. 21, R. 90 (1) (PATNA AMENDMENT), PROVISO (1) (*b*). **17 Pat. 107.**

——**O. 43, R. 1 (j)**—Scope—Joint application between-judgment-debtor and decree-holder purchaser for setting aside sale on payment by particular date and for confirmation on default—Order on—Appeal *See* C. P. CODE, O. 21, R. 89. **17 Pat.L T. 940 (S.B.).**

——**O. 43, R. 1 (j)**—*Second appeal—Order setting aside execution sale—Reversal on appeal—Second appeal—Competency.*

Where an order passed under O. 21, R. 92 setting aside sale is set aside in appeal, a second appeal will not lie against the order in appeal made by a Judge under O. 43. R. 1 (*j*). (*Davis, J.C. and Tyabji. J.*) UTTAMCHAND *v.* DEVDITTARAM. **I L R (1939) Kar. 417=180 I.C. 669=11 R.S. 189=A.I R. 1939 Sind 62.**

——**O. 43, R. 1 (k)**—*Applicability—Appeal—Abatement—Order refusing to set aside—Appealability.*

O. 43 R. 1 (*k*), C. P. Code, applies not only to suit but also to appeals. Having regard to the provisions ot O. 22, R. 11, C. P. Code, a suit, so far as abatement is concerned, includes an appeal, and consequently an appeal lies against an order refusing to set aside an abatement of an appeal. (*Rowland and Chatterjee, JJ.*) RAM RAN VIJAYA PRASAD SINGH *v.* MADHO TURHA. **20 Pat.L T. 715=1939 P.W N. 680=6 B.R. 187=185 I.C. 498=12 R.P. 375=A.I.R. 1939 Pat 623.**

——**O. 43, R. 1 (k)**—*Scope—"Suit"—If includes appeal—Order refusing to set aside abatement of appeal—Appealability—O. 22, R. 11—Application of.*

An order refusing to set aside an abatement of an appeal is appealable under O. 43, R. 1 (*k*) C.P. Code; the word "suit," in the rule also covers an appeal O 43, R 1 (*k*) has to be read with reference to O. 22, R. 11, which applies to R. 9 of O. 22. (*Wort and Varma, JJ.*) WAJID ALI *v* FAGOO MANDAL. **17 Pat. 84=174 I.C. 40=4 B.R. 379=10 R.P. 471=18 Pat.L.T. 1014=A.I.R. 1938 Pat 125**

——**O. 43, R. 1 (l)**—Death of defendant after passing of preliminary decree—Plaintiff and others applying for being appointed as legal representative—Plaintiff appointed as legal representative—Application of other persons dismissed as time-barred—Appeal by such persons—If competent *See* C P. CODE, O 22, R. 10 AND O. 43, R. 1(L). **A I.R. 1937 Lah. 615.**

——**O 43, Rr. 1 (m) and 2**—*Consolidated order recording compromise and granting decree—Appeal—Filing of copy of such order—Sufficiency*

Where a Court passes one consolidated order recording a compromise and granting a decree in terms thereof, an appeal lies from the order recording the compromise under the provisions of O. 43. R. 1 (*m*). C. P. Code. If a copy of the consolidated order is filed by the appellant with the memorandum of appeal, the requirements of O. 41, R. 1 read with O. 43, R. 2 are fully complied with. (*Tek Chand, J.*) MST. CHAWALI *v.* KIDAR NATH. **177 I C. 680=11 R.L. 355=40 P L.R. 138=A.I.R. 1938 Lah. 350.**

——**O. 43, R. 1 (m) and S. 115**—*No separate order recording compromise—Appeal from decree—Plea of no compromise—No finding given by appellate Court—Revision.*

Where the trial Court holds that a compromise has been arrived at between the parties, the proper procedure is to record a separate order recording the compromise and then to pass a decree in accordance with it. In such a case no appeal would lie against the decree but an appeal should lie against the order recording the compromise and a petition for revision would lie to the High Court against the appellate order. If the appellate Court holds that there was no compromise the decree of the trial Court would automatically be set aside. Where, however, no separate order recording the compromise is passed by the trial Court and an appeal purporting to be from the decree is preferred (full Court-fees on the value of the suit being paid) but the first ground of appeal raised is that there had been no compromise and the appellate Court dismisses the appeal holding the decree to be consent decree without giving any finding as to whether there had been a compromise or not, the appeal must be assumed to be one under O. 43, R. 1 (*m*) and as no second appeal lies from the appellate order, it is open to revision. The petitioner is entitled to an adjudication from the lower appellate Court whether there had been a compromise or whether the terms of the compromise were as incorporated in the decree of the trial Court. (*Jai Lal and Abdul Rashid, JJ.*) FATEH DIN *v.* BAL MUKAND. **168 I.C. 328=9 R.L. 613=A.I.R. 1936 Lah. 963.**

——**O. 43, R. 1 (m)**—*Order dismissing petition of compromise for default—Appeal.*

It is doubtful whether an appeal lies under O. 43, R. 1 (*m*), C. P. Code, from an order dismissing a petition for recording a compromise presented in a suit owing to the absence of the petitioner on the date of hearing. It is not a refusal to record an agreement but a refusal to consider it on that day because the petitioner was not there. (*Derbyshire, C. J. and Nasim Ali, J.*) SURAJMALL KESHAN *v.* R. A. WOOD. **43 C.W.N. 1113.**

——**O 43, R. 1 (m)**—*Order recording compromise—Appeal—If competent after decree.*

An appeal from an order recording a compromise is not incompetent merely because it was preferred after a decree had been made. It is not necessary to prefer an appeal both from the order and decree passed in pursuance of the order. 141 I.C. 732, Rel on. (*Din Mahomed. J.*) JARNAIL SINGH *v.* NARAIN KAUR. **178 I.C. 829=11 R L. 492=40 P.L.R. 664=A.I.R. 1938 Lah. 766.**

——**O. 43, R. 1 (m)**—*Order refusing to record compromise on finding of no compromise—Appeal.*

An appeal lies against an order of a Court refusing to record a compromise on the ground that there was no compromise. (*Varma and Manohar Lall, JJ.*) PEOPLES CO-OPERATIVE BANK, LTD. PATNA *v* SHYAM NARAIN. **6 B.R. 767=189 I.C. 232=13 R.P. 62.**

C. P. CODE (1908), O. 43, R. 1.

——**O. 43, R. 1 (m)**—Scope—Order recording compromise—Appeal, if barred by S. 96 (3). *See* C. P. CODE, S. 96 (3), O. 23, R. 3 AND O. 43, R. 1 (*m*). **A.I.R. 1936 Sind 59.**

——**O. 43, R. 1 (m)**—*Scope—Order recording compromise—Appeal when factum of compromise not disputed.*

O. 43, R. 1 (*m*) C. P Code, provides specifically for an appeal against an order recording a compromise without any restriction. Such an appeal will lie, therefore, even though, when there has been no dispute as to the factum of the compromise, the dismissal of the appeal would normally follow as a matter of course, there being no materials upon which the appellate Court can interfere. (*Wadsworth, J.*) SURAPARAJU *v.* VENKATARATHNAM. **161 I C. 728=8 R.M. 859=43 L.W. 386=1936 M W.N. 199=A.I.R. 1936 Mad. 347=70 M.L.J. 471.**

——**O. 43, R. 1 (m)**—*Scope—Order recording compromise—No contest at the time of recording—Decree on compromise not appealed from—Appeal, if lies.*

An appeal does lie under O. 43, R. 1 (*m*), C. P. Code, against an order recording a compromise, though at the time when the compromise was recorded there was no contest before the Court, and though the order recording the compromise has ripened into a decree and no appeal has been preferred against the decree itself. (*Wadsworth, J.*) RAMANARAYANA RAO *v* RAMA KRISHNA RAO. **163 I.C. 161=8 R.M. 1097=1936 M.W.N. 86=43 L. W. 722=A.I.R. 1936 Mad. 385=70 M.L J. 400.**

——**O. 43, R. 1 (m)**—*Scope—Refusal to record compromise—Appeal.*

Cl. (*m*) of O. 43 provides for an appeal in a case in which the trial Court finds that no compromise has been made and refuses to record it on that ground. (*Allsop and Ganga Nath, JJ.*) GANGARAM SAHU *v.* RAM SHANKAR TIWARI. **163 I.C. 929=9 R.A. 100=1936 A.L.J. 336=1936 A.W. R. 408=1936 A.L.R. 672=A.I.R. 1936 All. 433.**

——**O. 43, R. 1 (m)**—*Time for appeal—Compromise—Minor party—Court refusing consent—Appeal, if to be preferred at once.*

Where there has been a compromise in which a minor is concerned, if the Court refuses its consent to such a compromise, it should be appealed against at once without waiting for final orders, as by that time the remedy under O. 43, R. 1 (*m*) would become time-barred. (*Darling, S. M. and Bomford, J. M.*) JAGDEO *v.* KHEDU SINGH. **1938 A W.R. (B R.) 288=1938 R.D. 477.**

——**O. 43, R. 1 (r)**—*Order refusing temporary injunction—Appeal.*

Under O. 39, R. 2 the Court can either grant or refuse an application for temporary injunction. An order therefore refusing to grant a temporary injunction is an order passed under O. 39, R. 2. An appeal lies from such an order under O. 43, R. 1 of the Code. (*Leach, J.*) KAMAL TOBACCO Co. *v.* A. G. HAJEE A. RAHIM. **169 I.C. 413=10 R.R. 2=A.I.R 1937 Rang 150.**

——**O. 43, R. 1 (s)**—Applicability—Order dismissing application for removal of receiver. *See* C. P. CODE, O. 40, R. 1 AND O. 43, R. 1 (s). **A.I.R. 1938 Rang. 387.**

——**O. 43, R. 1 (s)**—Nature of order appealable under. *See* C. P CODE, O. 40, R. 1, AND O. 43, R. 1 (s). **A.I.R. 1938 Nag. 540.**

C. P. CODE (1908), O. 43, R. 1.

——**O. 43, R. 1 (s)**—*Order appointing receiver ad interim—Appeal.*

The mere fact that an appointment of a receiver is made *ad interim* does not mean that the order is not an order under O. 40, R. 1, C. P. Code and an appeal lies from it under O. 43, R. 1 (*s*) in the same manner as if the appointment has not been *ad interim* but final. (*Hilton, J.*) HARIKISHAN LAL & SONS *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **A.I.R. 1936 Lah. 102.**

——**O. 43, R. 1 (s)**—Order appointing receiver, when appealable. *See* C. P. CODE, O. 40, R. 1 AND O. 43, R. 1 (s). **174 I.C. 148.**

——**O. 43, R. 1 (s)**—*Order that receiver should be appointed—Appeal, if allowed.*

There can be no question that the order from which an appeal is allowed by the law is not one by which it is ordered that a receiver should be appointed but the order by which some person or persons are appointed receiver. (*M. N. Mukerji and S. K. Ghose, JJ.*) PHANI BHUSHAN PAL *v.* SM. NALINIBALA DASI. **67 C.L J. 107.**

——**O. 43, R. 1 (s)**—*Refusal of appointed receiver to act—Appeal against appointment of receiver—If lies.*

Where a receiver is appointed but he refuses to act, an appeal on the point whether a receiver should or should not be appointed can be entertained. (*Skemp, J.*) MANOHAR LAL *v.* KISHAN LAL. **176 I.C. 919=11 R.L. 249=A.I.R 1938 Lah. 10.**

——**O. 43, R. 1 (s)**—Scope—Suit under S. 9. Specific Relief Act—Order appointing receiver—Appealability. *See* C. P. CODE, O. 40, R. 1. **31 S. L.R 28.**

——**O. 43, R. 1 (u)**—*Applicability—Order under O. 41, R. 27 directing lower Court to take further evidence if one of remand—Appeal.*

An order under O. 41, R. 27, C. P. Code, is not an order of remand and therefore not appealable. The mere use of the word 'remand' does not give the order the character that it does not possess. (*Mehta and Lobo A. J. Cs.*) BHAGWANDAS *v.* THADOMAL. **171 I.C. 258=10 R.S. 99=A.I.R. 1937 Sind. 233.**

——**O. 43, R. 1 (u)**—*Applicability—Remand under inherent powers.*

An order of remand made in the exercise of the inherent powers of the Court is not appealable under the provisions of O. 43, R. 1. (*Thomas, C. J. and Yorke, J.*) BRIJ MANOHAR *v.* RAMANAND. **14 Luck. 447=179 I.C. 1004=11 R.O. 223 =1939 O.A. 228=1939 O L.R. 105=1939 O.W. N. 181=A.I.R. 1939 Oudh 102.**

——**O. 43, R. 1 (u)**—*Order of appellate Court setting aside order of trial Court rejecting plaint under O. 7, R. 11—Appealability.*

An appeal does not lie against the order of appellate Court setting aside an order of Court of first instance rejecting a plaint under O 7, R. 11, C. P. Code, and directing the trial Court to proceed with the trial of the suit. Such order is not an order under O. 41, R. 23 and is not appealable under O. 43, R. 1 (*u*). Where in a suit by the sons of a deceased insolvent against the Official Receiver for partition of their share in the property no notice under S. 80, C. P. Code, was given to the Official Receiver, and the trial Court rejected the plaint under O. 7, R. 11 and the appellate Court set aside the order and directed

C. P. CODE (1908), O. 43, R. 1.

the trial Court to proceed with the trial of the suit.

Held, the order of the appellate Court was not appealable. (*Coldstream, J.*) BASHESHAR NATH GOELA *v.* BIDHI CHAND 173 I.C 365=10 R.L. 438=39 P.L.R. 720=A I R. 1937 Lah. 380.

——O. 43, R. 1 (u)—*Order of remand in appeal under S* 104—*Appeal.*

No appeal lies from an order of remand passed in an appeal submitted under S. 104, read with O. 43. (*Din Mohammad, J.*) TARA CHAND *v* MANKU LAL RAM CHAND. 182 I.C. 896=12 R.L. 91= A.I.R. 1939 Lah. 65.

——O. 43, R. 1 (u)—*Order of remand—Order under O.* 41, *R.* 25, *remitting issues for findings—Appealability.*

An order by appellate Court remitting issues to the trial Court for findings on those issues under O. 41, R. 25, C. P. Code, the appellate Court retaining seisin of the appeal, is not an order of remand such as is contemplated by O. 43, R. 1 (*u*), C. P. Code. and is not appealable. (*Niamatullah, J.*) CHANDAN *v.* GHISSA. 1937 A.L.J. 797=1937 A.W.R. 674 (2)=171 I.C 224 =1937 A.L.R. 814=10 R.A. 242=A.I.R. 1937 All 580.

——O. 43, R. 1 (u)—*Remand order—When appealable.*

In the case of remands an appeal lies only when the remand is under O. 41, R. 23, C. P. Code. It follows that there can be no appeal from an order of remand unless it falls under O. 41, R. 23, or unless it can be said to amount to a decree within the meaning of S. 2 (2), C. P. Code. An order of remand which does not and cannot fall within the purview of O. 41, R. 23, cannot be deemed to be one under it simply because the Judge purported to act in accordance with its provisions. (*Stone, C.J. and Bose, J.*) SHEOLAL *v.* JUGAL KISHORE I.L.R. (1940) Nag. 538=1940 N.L.J. 350=A I.R. 1940 Nag 349.

——O. 43, R. 1 (v)—*Scope—Order under O.* 45, *R. 3 by Disirict Judge granting leave to appeal to High Court against decision in appeal from Subordinate Judge under S.* 75, *Provincial Insolvency Act—Appeal to High Court—Competency.*

S. 75 of the Provincial Insolvency Act does not govern or regulate appeals to the Privy Council. Where a District Judge grants a certificate of leave to appeal to the Privy Council against his decision in an appeal from a Subordinate Judge under S. 75, Provincial Insolvency Act, no appeal lies to the High Court against the grant of the certificate. O. 43, R. 1 (*v*) only provides for an appeal against an order under O. 45, R. 6, but no appeal is provided for against an order under O. 45, R. 3. (*Mockett and Horwill, JJ.*) OFFICIAL RECEIVER OF MADURA *v.* KUPPUSWAMI CHETTIAR. 177 I C. 177=11 R.M. 269=46 L.W. 416=1937 M.W.N. 762=A.I R. 1937 Mad. 930.

——O. 43, R. 1 (w)—*Order granting review—Appeal—Grounds.*

An appeal lies from an order admitting an application for review, but it is a limited right of appeal on one or other of the three grounds set out in O. 47, Rule 7 (1) of the Code, O. 43, R. 1 (*w*) which allows the appeal, must be read with the provisions of O. 47, R. 7 (1). Where a Court bearing in mind the provisions of O. 47, R. 1 grants an application for review, it cannot be said to contravene the provisions of O. 47, R. 4 merely because it may have taken a wrong view

P. C. CODE (1908), O. 43, R. 1.

as to the meaning of R 1. An appellate Court would be acting without jurisdiction if on this ground alone, it sets aside an order of the lower Court granting a review. 7 Rang. 187, Foll. (*Mya Bu and Sharpe, JJ.*) MA LON *v.* MA MYA MAY. 179 .C. 946=11 R.R. 363=A.I.R. 1939 Rang. 59.

——O. 43, R. 1 (w)—*Order granting review—Question relating to execution of decree determined thereby—Scope of appeal.*

If the net result of an order granting review is the determination of a question relating to the execution of a decree, the order itself is a "decree" within the meaning of S. 2 (2), C. P. Code. Therefore an appeal lies from it as from a decree and consequently it can be attacked upon any ground which the appellant chooses to take, and not merely on the limited grounds mentioned in O. 47, R. 7, C. P. Code. (*Mitter and Rau, JJ.*) G P. STEWART *v.* BROJENDRA KISHORE ROY. 184 I.C. 689=12 R C 271=2 Fed L J. 112 =69 C L.J. 573=43 C.W.N 913=A.I.R. 1939 Cal. 628.

——O. 43, R. 1 (w)—*Order granting review—Right of appeal—Extent of.*

The general right of appeal given in O. 43, R. 1 (*w*), C. P. Code, against an order granting an application for review, must be held to be subject to the specific provisions of O. 47. R. 7, as regards the grounds on which an appeal can lie. (*Thomas and Zia-ul-Hasan, JJ.*) BRIJ MOHAN LAL *v.* SARABJIT SINGH. 13 Luck. 597=171 I.C. 286=1937 O.L R. 537=10 R.O. 103=1937 O.W. N. 978=A.I.R. 1937 Oudh 513.

——O. 43, R. 1 (w)—*Review of order under S.* 111 (1) (c), *U. P. Land Revenue Act—Appeal—Grounds.*

The provisions of O. 43, R. 1 (*w*) must be read with the provisions of O. 47, R. 7, C P. Code, with the result that no appeal can be entertained against an order granting an application for review except on one of the grounds mentioned in O, 47. R. 7 (1). Accordingly where an order of the Assistant Collector reviewing an order passed by him under S. 111 (1) (*c*) of the U. P. Land Revenue Act is appealed against, the appeal must fail if it is not based on any of the grounds mentioned in O. 47, R. 7 (1), C. P. Code. (*Srivastava, Ag.C J. and Smith, J.*) GAJRAJ KUER *v.* CHABRAJ KUER. 12 Luck. 362=165 I.C. 19=9 R.O. 165=1936 R.D. 454=1936 O.W.N. 836= A.I.R. 1936 Oudh 409.

——O. 43, R. 1 (w)—*Scope—If subject to O.* 47, *R.* 1.

O. 43, R. 1 (*w*), C. P. Code, must be read subject to O. 47, R. 7. (*Bose and Puranik, JJ.*) KARNIDAN HANSRAJ *v.* ASKARAN JHABAK. I.L R. (1938) Nag. 395=172 I.C. 433=10 R.N. 208= A I.R. 1937 Nag 385.

——O 43, R. 1 (w)—*Scope—If subject to O.* 47, *R.* 7—*Order granting review for sufficient ground—Appealability.*

An appeal under O. 43, R. 1 (*w*) C. P. Code, is restricted by and is subject to the provisions of O. 47, R 7, C P. Code, and an order granting an application for review can be objected to only on the three grounds specified in O. 47, R. 7 and no other. An order granting a review merely for sufficient ground is not appealable. (*Rowland and Chatterji, JJ.*) HARBALLABH PRASAD *v.* JAGBALAV PRASAD. 18 Pat. 777=185 I.C. 769=12

C. P. CODE (1908), O. 44, R. 1.

R.P. 416=20 Pat.L T. 859=1939 P.W.N. 719=6 B.R 248=A.I.R. 1940 Pat. 7.

——O. 44, R. 1 and O. 33, R. 1—*Appeal from decision of Special Judge under U P. Encumbered Estates Act—Appellant applicant under the Act, if a pauper.*

An applicant under the U. P. Encumbered Estates Act, who has considerable properties is not a pauper because of the prohibition under S. 7 of the Act against dealing with such property. An applicant, if he desires to appeal against a decision of Special Judge, cannot claim that he is a pauper because he has not been able to find a buyer. He has to seek the means to get over the difficulty arising out of S. 7 and not claim benefit as a pauper. (*Yorke and Radha Krishna, JJ.*) PREM KUMAR *v.* GIRDHARI LAL. 15 Luck. 397=186 I.C. 789=12 R.O. 343=1940 R.D. 111=1940 A W.R. (C C.) 140=1940 O.A. 245=1940 O L.R. 149=1940 O W N. 258=A.I.R. 1940 Oudh 208

——O. 44, R. 1—*Applicability to appeals to Privy Council.*

O. 44, R. 1, does not apply to appeals to Privy Council and the High Courts have no power to grant leave to appeal to Privy Council *in forma pauperis*. 18 I.C. 129; 3 P.L.J 179 and 42 M. 32, Appr. (*Middleton, J.C. and Almond, A.J.C.*) MATHRA DAS *v.* MOKHAN SINGH. 161 I C. 192 (1)=8 R.Pesh. 162=A.I.R 1936 Pesh. 36.

——O. 44, R. 1—*Application for leave to appeal as pauper—Issue of notice to respondent—Practice—Order issuing notice—Implication of.*

On an application for leave to appeal as a pauper under O. 44, R. 1, notice should not go as a matter of routine to the respondent. The practice of the Madras High Court is that when such an application is presented, as a condition precedent to the issue of notice the Court has to have reason to think that the decree is contrary to law, etc. If the Court, after a perusal of the judgment, has not got reason to think so, then the Court is bound to reject the application; and it is only when that condition is satisfied that any notice goes at all to the respondent, and that is the notice on the question of pauperism and upon nothing else. Unless the order directing notice to go is qualified by some observations showing that the respondent is to be heard on the question of law, the ordinary rule is that the issue of notice means nothing more than that the question of pauperism is to be gone into, the Court being satisfied that on the face of the record it does satisfy the requirements of the proviso to O. 44, R. 1. (*Beasley, C.J.*) BALARAM CHOUDHARI *v.* HARIKRISHNA CHOUDHARY 163 I. C. 755=9 R.M. 60=A I.R 1936 Mad. 661.

——O. 44, Rr. 1 and 2—Application for leave to appeal *in forma pauperis*—Order rejecting it on Munsif's report without hearing applicant—Revision. *See* C. P CODE, S. 115—MATERIAL IRREGULARITY. 186 I.C. 170.

——O. 44, R. 1—Application under—Court ordering Court-fees to be paid by certain date and rejecting appeal on default—If *ultra vires*. *See* C. P. CODE, S. 149 AND O. 44, R. 1. A.I.R. 1936 Pesh. 69.

——O. 44, R. 1—Application under—If governed by O. 41, R. 1. *See* C. P. CODE, O. 41, R. 1. A I.R. 1936 Mad. 600.

——O. 44, R. 1—Application under—If to be verified as a plaint. *See* C. P. CODE, O. 33, R. 2. A.I.R. 1937 Nag. 108.

C. P. CODE (1908), O. 44, R. 1.

——O. 44, R. 1—*Application under—Respondent's right to be heard—Jurisdiction of Court to hear respondent.*

It is quite true that the respondent has no right to be heard on application for leave to appeal *in forma pauperis* under O. 44, R. 1. But the Court is always justified in hearing the respondent or his pleader and there is nothing wrong in the Court hearing the respondent. (*Horwill, J.*) SURYANARAYANAMURTHY *v.* NAGACHANDRAMOWLI. 165 I C. 741=9 R.M. 296=1936 M.W.N. 1027=44 L.W. 425=A.I.R. 1936 Mad. 842=71 M.L.J. 497.

——O. 44, R. 1—*Order allowing leave to appeal* in forma pauperis—*Right of respondent to object to finding as to pauperism subsequently.*

An order passed behind the back of a party should not operate to the prejudice of that party. Where therefore an appellant applied for leave to appeal *in forma pauperis* without having sued *in forma pauperis*, and the appellate Court on report received on inquiry into his paupersim admitted the pauper appeal saying that the decree was erroneous and the respondent on notice of appeal took preliminary objections first as to appellant's pauperism and secondly as to the decree not being unjust or erroneous.

Held, that it was open to the respondent to take the objections to the preliminary finding of the appellate Court as these findings were given behind his back. (*Pollock, J*) BHAIRANLAL HARAKCHAND *v.* AMBIKAPRASAD RAMRATAN. I L.R. (1937) Nag. 463=9 R.N. 315=169 I.C. 260=A.I.R. 1937 Nag. 150.

——O 44, R. 1—*Order rejecting application to appeal as pauper—Revision—Dismissal—Expiry of time fixed for paying Court-fees—Power of revision Court to extend time.*

The High Court can, after rejecting a petition for revision against an order of the District Judge rejecting an application to appeal as a pauper, extend the time fixed by the District Judge for paying the requisite Court-fees, even though such time had already expired and the appeal had been dismissed. (*Jai Lal, J.*) MT. RAM RAKHI *v.* BAWA ISHAR DAS 166 I.C. 83(1) =9 R.L. 336 (2)=38 P.L.R. 374=A.I.R. 1936 Lah. 909.

——O. 44, R. 1—*Pauper appeal—Maintainability—Order not amounting to decree.*

A person can file a petition to appeal *in forma pauperis* only against a decree as a whole, and not against any order which is not a decree and which does not dispose of a case finally. (*Addison and Abdul Rashid, JJ.*) PRAPHULL DEV *v.* SHAM LAL. 163 I.C 366=9 R.L. 6 (1)=38 P.L.R. 1119=A.I.R 1936 Lah. 406.

——O. 44, R. 1 and O. 33, R. 1—*'Person'—If includes limited company.*

The word 'person' in O. 33, R. 1 and so the word 'person' in O. 44 R. 1, does not include a limited company incorporated under the Indian Companies Act. Consequently, an application by a limited company for leave to appeal *in forma pauperis* under the provisions of O. 44, R. 1, is not competent.

Per *Costello, J.*—It is doubtful whether it is even right to say that the word 'person' includes a liquidator of a limited company in liquidation. (*Costello and Biswas, JJ.*) BHARAT ABHYUDHOY

C. P. CODE (1908), O. 44, R. 1.

COTTON MILLS, LTD. *v.* KAMESHWAR SINGH. **I.L. R. (1939) 1 Cal. 81=178 I.C. 977=11 R.C. 446= 42 C.W.N. 1164=A.I.R 1938 Cal. 745.**

——**O. 44, R. 1**—*Procedure under—Notice to respondent without considering merits of application—Propriety—Power of Judge to subsequently rescind order issuing notice.*

An appeal under O. 44, R. 1, should not be admitted until the Judge is satisfied that the decree of the Court appealed against is contrary to law or as otherwise erroneous or unjust. When a Judge without considering this question issues notice to the respondent to show cause why the appellant should not be allowed to appeal *in forma pauperis*, he is entitled to correct the error and rescind his previous order issuing the notice and then consider whether there is any substance in the appeal. (*Horwill, J.*) SURYANARAYANAMURTHY *v.* NAGACHANDRAMOWLI. **165 I.C. 741=9 R. M. 296=1936 M.W N. 1027=44 L.W. 425=A.I. R. 1936 Mad. 842=71 M.L J. 497.**

——**O. 44,R. 1 (Allahabad)**—*Proceedings under —Respondent if entitled to be heard on the merits of the appeal.*

A respondent has no right whatever to be heard on the merits of the appeal at any stage of the proceedings under O. 44, R. 1. He can only be heard as to the pauperism of the appellant. (*Bennet and Verma, JJ.*) RAM KAILASH KUNWARI *v.* ISHWAR SARAN. **I.L.R. (1939) All 917=185 I.C. 406=12 R.A. 321=1939 A.W R. (H.C.) 653 =1939 A.L.J. 996=A.I.R. 1939 All. 715.**

——**O. 44, R. 1, Proviso**—*Issue of notice to Government Advocate and respondent—Subsequent rejection of application under proviso—Propriety.*

It is not open to theCourt to reject an application to appeal "*in forma pauperis*" under the proviso to O. 44, R. 1, after notices were issued to the Government Advocate and the respondents. A.I. R. 1933 All. 11; 6 Pat. 687 and 7 Pat. 825, Foll. (*Zia-ul-Hasan and Smith, JJ.*) ASA RAM *v.* PUTTOO LAL. **165 I.C. 276 (1)=9 R.O. 189=1936 O.W.N. 875=1936 O.L.R. 624=A.I.R. 1937 Oudh 2.**

——**O. 44, R. 1, Proviso**—*Notice issued to opposite party and Government Advocate—Power of Court to reject application under proviso.*

When notice has been issued upon an application under O. 44, R. 1, to the opposite party and the Government Advocate, it is still open to the Court under the proviso to that rule to reject the application unless, upon a perusal thereof, and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. (*Srivastava, Ag. C. J., Nanavutty and Zia-ul-Hasan, JJ.*) HUBSHI MIAN ILMAS KHWAJA SARA *v.* MEHDI HASAN KHAN. **166 I.C 284=9 R.O. 298=1937 O.W.N 14=1937 O.L.R. 1=A.I.R. 1937 Oudh 222 (F.B.).**

——**O. 44, R. 1 Proviso**—*Rejection of application—Court if bound to hear arguments prior to.*

All that an appellate Court is required to do under O. 44, R. 1 Proviso is that it should peruse the application for leave to appeal as a pauper and the judgment and decree appealed from. It cannot be held that an appellate Court must hear arguments in support of an application for leave

C. P. CODE (1908), O. 45, R. 4.

to appeal *in forma pauperis*, for to hold so would be to add something to the law on the subject and not to interpret it. (*Zia-ul-Hasan and Yorke, JJ.*) RAM LAL *v.* KALI CHARAN. **1938 O.W.N. 1246**

——**O. 44, Rr 1 and 2**—*Application to appeal as pauper—Duty of Court—Procedure*—Ex parte *order admitting application—Respondent's right to question its propriety.*

The correct procedure on the presentation of an application for leave to appeal as a pauper is, if the Court does not see fit to reject the application on hearing the applicant only, to issue notices (without calling for the records), in Form No. 11 of Appendix, G., C.P. Code, to the respondent and the Government Pleader, and then to hear all parties in regard to the question raised by the proviso to R. 1 of O. 44 and come to a decision thereon, and also to decide the question of pauperism if that falls to be decided under R. 2. If an application for leave to appeal *in forma pauperis* is admitted in the absence of the respondent, and without notice to him it is open to him at the final hearing of the Rule to show that the case does not satisfy the proviso to R. 1 of O. 44. (*Dunkley, J.*) MAUNG NYEIN *v.* THE BURMA ELECTRIC SUPPLY CO., LTD., MANDALAY. **1938 Rang. L.R. 651=180 I.C 374=11 R.R. 390=A.I. R. 1939 Rang. 25**

——**[as amended by the Government of India (Adaptation of Indian Laws) Order 1937], O. 45, Rr. 2 and 17**—Procedure—Dismissal of civil revision petition by single Judge of High Court—Certificate as to substantial question of interpretation of Government of India Act granted—Application for leave to appeal to Federal Court—Certificate—If to be applied for or granted—Court—If bound to consider whether substantial question of interpretation arises. *See* GOVERNMENT OF INDIA ACT (1935), S. 205 (1). **(1940) 2 M.L J. 170.**

——**O. 45, R. 3**—*Scope—Omission to state explicitly grounds—Effect—Summary dismissal.*

Where the applicant for leave to appeal to His Majesty in Council, knowing full well that the requirements of S 110, C. P. Code, are not fulfilled, omits to say and is unwilling to say explicitly how his case is a fit one for appeal to His Majesty in Council, the petition deserves to be summarily dismissed on that sole ground. (*Drake Brockman, S.M. and Knox, J.M.*) JAGDAMBA PRASAD *v.* RAM GOPAL SINGH. **1936 R.D. 120.**

——**O. 45, R. 4**—*Applicablity—Conditions—Two different suits having but one common question between them but having other different questions also—Joint trial—Separate judgments—Appeals—Joint hearing and single judgment—Consolidation for purposes of appeal to Privy Council—Permissibility—Discretion of Court.*

O. 45, R. 4, requires that the questions for determination in the several suits sought to be consolidated shall substantially be the same. The fact that there is one common question does not entitle an applicant to an order for consolidation when there are other questions which are not common. The basis of an order for consolidation must be that the several suits involve substantially the same questions. Two different suits which had among others one question in common were tried together in the trial Court, but there were separate judgments. The appeals from

C. P. CODE (1908), O. 45, R. 4.

those judgments were heard together and dealt with in one and the same judgment. Applications were made for leave to appeal to His Majesty in Council and also for an order consolidating the two appeals. Totalling the values placed on the respective claims, the suit, if consolidated, would comply with the condition with regard to value.

Held, that the case did not come within O. 45, R. 4, and there could therefore be no order for consolidation.

Held, further, that the Court under the rule had a discretion to consolidate or not and was not bound to grant an order of consolidation as of course. (*Leach, C.J. and Somayya, J.*) BALANAGAYYA CHETTI *v.* VARADARJULU CHETTI. I.L.R. (1939) Mad. 593=1939 M.W.N. 353=184 I.C. 832=12 R M. 498=49 L.W 470=A.I.R. 1939 Mad. 734=(1939) 1 M.L J 610.

——O. 45, R. 4 — *Consolidation — Inherent power of High Court.*

In a case to which O. 45, R. 4, does not in terms apply as when the appeals arise out of one and the same suit and not out of two separate suits, the High Court has no inherent power for consolidating appeals to the Privy Council for the purpose of security for costs. Ordinarily inherent powers exist as regards matters relating exclusively to the proceedings in the Court which exercises such powers. There is no authority for holding that the High Court has inherent power to make orders relating to appeals pending before the Privy Council when there is no specific provision in the rule and when the relevant rule is confined to particular cases. (*Sulaiman, C.J. and Bennet J.*) MUKANDI LAL *v.* HASHMAT-UN-NISSA. I.L.R. 1937 All 105=166 I.C. 283=9 R.A. 394=1937 All. L.R. 18=1936 A.W.R. 883=1936 A.L.J. 1025=A.I.R. 1936 All. 832.

——O. 45, R. 4—*Consolidation of appeals—Power of High Court—R. 7 of Schedule to Rules of Indian Order in Council.*

R. 7 of the Schedule to the Rules of the Indian Order in Council (9th February, 1920), regarding appeals to the Privy Council invests the High Court with power to allow consolidation of appeals for the purpose of giving security in cases not falling directly within the scope of O 45, R. 4. (*Coldstream and Bhide, JJ.*) CHANDAR BHAN *v.* FATEH SHER. 179 I.C. 53=11 R.L. 519=40 P.L.R. 658=A.I.R. 1938 Lah. 207.

——O. 45, R. 4—*Consolidation of suits—When allowed.*

Two separate suits were filed for possession of two separate plots of land, the valuation being Rs. 7,800 and Rs. 6,500 respectively. The basis of the alleged title in the two suits was totally different. Both were tried in the same Court and were between the same parties and with the consent of the parties both cases were consolidated. The suits came up for hearing on same days, the evidence was recorded on same days and arguments were heard on the same day. Though the evidence was recorded on the same day, there was no production of the evidence on points common to both the cases or consideration of common arguments affecting them. They were disposed of by one single judgment, but separate issues were mentioned and the two cases were dealt with separately; the decrees granted were

C. P. CODE (1908), O. 45, R. 7.

also entirely separate. The Court in which the suits were filed and said to be consolidated had unlimited pecuniary jurisdiction and no question of pecuniary valuation arose then:

Held, that there had never been consolidation of the two suits for the purpose of pecuniary valuation and they could not be consolidated for the purposes of appeal to His Majesty in Privy Council and that the applicant could press his petition for leave to appeal only in respect of one of the two suits. (*Middleton, J.C., and Mir Ahmad, A.J.C.*) SECRETARY OF STATE *v.* RADHA DEVI. 169 I.C. 926=10 R. Pesh. 11=A.I.R. 1937 Pesh. 61.

——O. 45, R 7—*Compliance—Security for costs under—Time for—Security bond executed and filed in Court by surety within time—Subsequent withdrawal by surety from undertaking—Deposit of cash —Sufficiency —Security—If furnished within time.*

An applicant for leave to appeal to the Privy Council was allowed at the time of grant of leave to furnish security of another kind than in cash or Government securities. One *S. N.* executed a hypothecation bond, becoming surety for payment of the respondent's costs in the Privy Council appeal and hypothecating immovable property which was declared sufficient. The bond was duly registered and filed in Court within the time limited by O. 45, R. 7, but when the bond was sent for verification, *S. N.* stated that he was not willing to stand surety any longer. The applicant then deposited the requisite amount in cash in Court. The respondent objected that the security was not deposited in time as required by O. 45, R. 7.

Held, that the security should under the circumstances be deemed to have been furnished on the date on which the hypothecation bond was filed in Court and not on the date on which the amount was deposited, and that for all technical requirements of O. 45, R. 7, the security must be held to have been furnished within time. (*Niamatullah and Verma, JJ.*) BISHAN SINGH *v.* SHIAM LAL. 174 I.C. 249=10 R.A. 550=1938 A.L.R. 251=1937 A.L.J. 1362=1938 A.W.R. 9 (H.C.)=A.I.R. 1938 All 131.

——O 45, R. 7 and P. C. Rules, R. 9—*Deficit in the security—Extension of time fixed—Powers of Court.*

Under R. 9 of the Privy Council Rules the High Court has full discretion to extend the time for filing the security or to extend the time to make good any deficiency in the security furnished. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RAJA MOHAN MANUCHA *v.* MANZUR AHMAD KHAN. 14 Luck. 335=11 R. O. 112=178 I.C. 389=1938 O.W.N. 1121=1938 O.L.R 485=1938 A W R. (C.C.) 113=A.I.R. 1939 Oudh 42.

——O. 45, R 7—*Extension of time for furnishing security—Jurisdiction of High Court.*

The High Court has no jurisdiction to extend the time for furnishing security by an appellant to the Privy Council beyond the period prescribed by O. 45, R. 7. (*Derbyshire, C. J. and Mukherjea, J.*) AKIMUDDIN *v.* FATEH CHAND. 44 C.W.N. 920.

——O. 45, R 7—*Extension of time for furnishing security—Power of High Court—Privy Council Rules, R. 9—C. P. Code, O. 52, R. 66 (Rangoon).*

C. P. CODE (1908), O. 45, R. 7.

The High Court has power for cogent reasons to extend the time for furnishing security beyond that which would be allowed by O. 45, R. 7, if it were read alone. (*Roberts, C.J. Baguley and Sharpe, JJ.*) ISMAIL PIPERDI *v.* MOMIN BI BI. 1939 Rang.L.R. 668=185 I.C. 819=12 R.R. 234 =A.I.R. 1940 Rang. 12 (F.B.).

——O. 45, R 7—*Extension of time for giving security—Power of Court.*

Court cannot extend time for giving security beyond the period prescribed by O. 45 R. 7. (*Coldstream and Bhide, JJ.*) CHANDRA BHAN *v.* FATEH SHER. 179 I.C. 53=11 R.L. 519=40 P.L.R. 658=A.I.R. 1938 Lah. 207.

——O. 45, R. 7—*Extension of time—Powers of Court.*

The provision relating to the time within which security is to be given embodied in O. 45, R. 7, is directory only and the Court from which the appeal is preferred has power to extend the time if cogent reasons are forthcoming. (*Addison, Ag C.J, and Din Mahomed, J.*) PREMILA DEVI *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. 180 I.C. 393=11 R L. 683=40 P.L.R. 712=A.I.R. 1938 Lah. 725.

——O. 45, R. 7—*Furnishing of security—Time expiring during vacation—Security, if can be furnished on reopening day.*

If the time for the furnishing of the security under O. 45, R. 7, expires on a day when the Court is closed for the vacation, compliance with the order of security can be deferred until the day when the Court reopens. (*Addison, Ag.C.J. and Din Mahomed, J.*) PREMILA DEVI *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. 180 I.C. 393= 11 R.L. 683=40 P.L.R. 712=A.I.R. 1938 Lah. 725.

——O. 45, Rr. 7 and 17—*Order refusing to extend time for deposit of printing cost—Appeal to Federal Court—If lies.*

Gwyer, C. J.—The Federal Court has no power to entertain any appeal from an order of the High Court refusing to extend the time for receiving the deposit of printing cost in respect of an appeal to the Federal Court, and even if it has, it should be slow to interfere with the exercise of the High Court of its discretion in a matter of this kind.

Sulaiman, J.—There is no revisional power for interference with the order. And even if there is an appeal the Federal Court should not interfere with the non-exercise of a mere discretion by the High Court, unless some questions of principle are involved. (*Gwyer, C. J., Sulaiman and Varadachariar, JJ.*) LACHMESHWAR PRASAD SHUKUL *v.* GIRDHARI LAL CHAUDHURI. I.L.R (1940) Kar. (F.C) 1=187 I.C. 670=12 R.F.C. 33=1940 O.L R. 300=1940 P.W.N. 260= 3 F.L.J. 15=21 Pat.L.T. 309=1940 M W.N. 464=42 P.L.R. 312=6 B.R 543=71 C.L.J. 327= A.I.R. 1940 F.C. 26.

——O. 45, R. 7—Scope—Powers of Court—Application by solicitor of successful respondent for payment of deposit towards fees due from respondent—Powers of High Court to order. *See* SOLICITOR AND CLIENT—AGREEMENT FOR REDUCED FEE. 41 Bom L.R. 410.

——O. 45, R. 7—*Scope—Privy Council Rules, R. 9—Extension of time for security—Discretion of Court—Limits to power of Court.*

C. P. CODE (1908), O. 45, R. 7.

The discretion given to the Court under R. 9 of the Privy Council Rules is a general one, which does, if the justice of the case requires it, enable the Court to extend the time for lodging security to any extent; but in exercising that discretion, the Court must have regard to the fact that under O. 45, R. 7, the extension of time is strictly limited, and it would require a strong case to induce the Court to hold that justice requires an extension of time beyond the limit specified in that rule. (*Beaumont, C. J. and Wadia, J.*) SHANKAR *v.* PUTTABAI. I L.R. (1939) Bom. 556=41 Bom.L R. 947=185 I.C. 410=12 R.B. 237=A.I.R. 1939 Bom. 483.

——O. 45, R. 7 and P. C. Rules, R. 9—*Time for furnishing security—Power of High Court to extend.*

The High Court has power under R. 9 of the Rules to extend the period allowed for furnishing the security and making the deposit required by O. 45, R. 7, beyond the periods mentioned therein. The provisions of R. 9 are wide and general in their terms. The discretion conferred should be exercised only in exceptional circumstances and where an extension is clearly supported by considerations of justice and equity. (*Thom, C. J., Rachhpal Singh, Collister, Allsop and Ganga Nath, JJ.*) BISHNATH SINGH *v.* COLLECTOR OF BENARES. I L.R. (1939) All. 549=1939 O.L.R. 291=181 I.C 378=11 R A 560=1939 A L.J. 278=1939 A W.R. (H.C.) 322=1939 O.W.N. 366=A I R. 1939 All. 299 (F.B).

——O. 45, R. 7—*Time for furnishing security and making deposit—Power of Court to extend—Privy Council Rules, R. 9.*

In an appeal to His Majesty-in-Council the High Court has power under R. 9 of the P.C. Rules to extend the period allowed for furnishing the security and the making of the deposit required by O. 45, R. 7, C. P. Code, beyond the period mentioned therein, but the power should not be exercised without cogent reason. (*Leach, C. J., Madhavan Nair and Varadachariar, JJ.*) RAMAYYA *v* LAKSHMAYYA. I.L.R. (1938) Mad. 1007= 177 I.C. 188=11 R.M. 276=1938 M.W.N 678= 48 L.W. 35=A.I.R. 1938 Mad. 796=(1938) 2 M.L.J. 128 (F.B.).

——O. 45, R. 7 (1)—*As applied to Federal Court appeals—"Date of the decree"—Meaning of.*

The phrase "date of the decree" in O. 45, R. 7 (1), as applicable to Federal Court appeals, means the date which the decree bears or the date upon which the judgment was pronounced. The starting point of time in the rule is undoubtedly the date which the decree bears and not the date when the decree was actually signed. (*Harries, C.J., Fazl Ali and Agarwala, JJ.*) LACHHMESHWAR PRASAD SUKUL *v.* GIRDHARI LAL. 19 Pat. 123=1939 P.W.N 807=20 Pat.L.T. 905=6 B.R. 159=185 I.C. 353=3 Fed.L J. (p. II) 1=12 R.P. 353=A.I R. 1939 Pat. 667 (F.B.).

——(as amended in 1920), O. 45, R 7 (1)—*As applied to Federal Court appeals—Time for deposit of printing charges—Powers of High Court—Sufficient grounds for extension—Order in Council of* 1920, *R. 9—Applicability to Federal Court appeals.*

Harries, C.J. and Fazl Ali, J.—Under O. 45, R. 7 (1), C. P. Code, as amended by Act XXIV of 1920, the printing costs have normally to be

C. P. CODE (1908), O. 45, R. 7.

deposited within ninety days. An extension of time may be granted for deposit of printing charges after the expiry of 90 days upon cause being shown, but such extension of time cannot exceed 60 days, and if this further period of 60 days has elapsed, the Court has no power under the rule as it stands to grant further time. The words are mandatory and limit the discretion of the Court. So far as appeals to His Majesty in Council are concerned in view of the language of R. 9 of the Order in Council of 9th February, 1920, the High Court has power in proper cases to extend time for making deposits of printing costs beyond the limits fixed by O. 45, R. 7. The word "Code" in O. 9, R. 1 of the Federal Court Rules means the Code as amended or modified by any Order in Council and in particular as modified and adapted by the Government of India (Adaptation of Indian Laws) Order, 1937. Since O. 45, R. 7, has been modified by Order in Council of 9th February, 1920, power is also given to the Court in relation to Federal Court appeals to extend time to make a deposit by reason of O. 9, R. 1 of the Federal Court Rules. But such power should be exercised with great caution and only where there are cogent reasons. In other words, it is only when the justice of the case demands that Courts should extend time, or that such extension should be given. The circumstance that the appellant had a serious illness which incapacitated him from attending to any work would amount to cogent reasons for extension of time. So also, where there is misunderstanding as to what business would be transacted in the office of the Court during the vacation, and where the appellant is under the impression that it would be enough if the money is deposited on the reopening day although the period expires during the vacation, it must be held that there are cogent reasons for extending time. It may be true that the Court is not closed during the vacation, and money can be deposited, and if tendered, will be accepted. But when there is considerable confusion as a result of no orders having been issued as to what the Court will or will not do during the vacation, a litigant cannot be blamed if he honestly believes that he could deposit the money on the re-opening day of Court.

Agarwala, J.—Neither R. 9, nor any other rule of the Order in Council of 1920, applies to appeals to the Federal Court, and consequently, the High Court has no power to extend the time prescribed by O. 45, R. 7 (1), C. P. Code, in the case of appeals to the Federal Court. The Court is closed for ordinary business during the vacation. The fact that the office of the Court is open while the Court itself is closed for judicial business will not deprive a litigant of the extended period for doing an act to which S. 10 of the General Clauses Act applies. (*Harries, C.J., Fazl Ali and Agarwala, JJ.*) LACHMESHWAR PRASAD SUKUL *v* GIRDHARI LAL. **19 Pat. 123=1939 P. W.N 807=20 Pat.L.T. 905=6 B.R. 159=185 I C. 353=3 Fed.L.J. (p. II) 1=12 R.P. 353.=A.I. R. 1939 Pat 667 (F.B.)**

——O. 45, R. 7 proviso—*Application for permission to furnish security otherwise than in cash or Government securities—Time for making.*

Under O. 45, R. 7, an application for permission to furnish security otherwise than in cash or

C. P. CODE (1908), O. 45, R. 15.

in Government securities must be made at the time of the grant of the certificate. The proviso to the rule precludes the Court from granting an application of this nature at a later stage. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) SREERAMAMURTHY *v* MANNALURI RAMA RAO. **1939 M.W. N. 487=49 L W. 716=(1939) 2 M.L.J 521.**

——O. 45, Rr. 8 and 17—*Appeal to Federal Court not admitted by High Court after grant of certificate—Prosecution of appeal before Federal Court—If barred—Government of India Act, S. 205 (1).*

Per *Gwyer, C.J.*—The absence of any admission by the High Court of an appeal to the Federal Court is not a statutory bar to the prosecution of the appeal before the Federal Court. The provisions of O. 45, are procedural provisions only, and the noncompliance with R. 7 of that order relating to the deposit of printing costs does not necessarily oust the jurisdiction of the Federal Court, if a certificate under S. 205 (1) of the Constitution Act has once been given. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) LACHMESHWAR PRASAD SHUKUL *v.* GIRDHARI LAL CHAUDHURI. **I.L.R. (1940) Kar. (F.C.) 1=187 I.C. 670=12 R.F.C. 33=1940 O.L.R. 300=1940 P.W.N. 260=3 F.L.J. 15=21 Pat.L.T. 309=1940 M.W.N. 464=42 P.L.R. 312=6 B.R. 543=71 C. L.J. 327=A.I.R. 1940 F.C. 26.**

——O. 45, R. 9—*Acceptance of security—When may be revoked.*

Under O. 45, R. 9, the Court has power to revoke the acceptance of the security furnished under R. 7 only before the admission of the appeal under R. 8 and not at any subsequent stage. (*Addison, Ag.C.J. and Din Mohamed, J.*) PREMILA DEVI *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **180 I.C. 393=11 R.L. 683=40 P.L.R. 712 =A.I.R. 1938 Lah. 725.**

——O. 45, R. 13 (2) (d)—*Mortgage suit—Preliminary decree against sons of the mortgagor and his step-brother—Appeal to Privy Council by his step-brother—Final decree in the meanwhile —Execution—Application for stay of—Whether maintainable.*

O. 45, R. 13 (2) (*d*) enables the High Court in a proper case, even though no appeal has been filed against the final decree and the appeal pending before the Privy Council, as in this case, is only with respect to the preliminary decree, to pass necessary orders in order to safe-guard the rights of an applicant when he asks for stay of execution of the final decree. (*Madhvan Nair, O.C.J. and Krishnaswami Ayyangar, J.*) RAMANATHAN CHETTIAR *v.* VISWANATHAN CHETTIAR. **I.L.R. (1939) Mad. 135=180 I.C. 85=11 R.M. 656=1938 M.W.N. 1070=48 L.W. 689=A.I.R. 1939 Mad. 50=(1938) 2 M.L.J. 764.**

——O. 45, R. 15—*Applicability—Restitution application—Successful appellant if bound to apply first to High Court—High Court directing application for restitution to be presented to particular Court—If final—Plea of want of jurisdiction—If can be raised.*

O. 45, R. 15, C. P. Code is not applicable to an application for restitution under S. 144, such an application is not one in execution. When a successful appellant before His Majesty in Council applies for restitution, it is not necessary for him to apply under O. 45, R. 15. He has a right to approach the Court which passed the

C. P. CODE (1908), O. 45, R. 15.

decree and claim restitution, and the Court of first instance has an inherent power to order restitution. There is no law compelling such person to apply first to the High Court under R. 15 of O. 45. Nor has the High Court any power to decide on an application under O. 45, R. 15, to which Court an application for restitution has to be made. If the High Court decides that and directs the application to be presented in a particular Court, that is not final or conclusive; and the respondent to an application for restitution can raise the plea that the Court in which it is made pursuant to the direction of the High Court has no jurisdiction to decide the restitution application. (*Harries and Rachhpal Singh, JJ.*) SKINNER *v.* SKINNER. **I L.R. (1937) All. 670=1937 A.W.R. 510=1937 A.L.J. 588=1937 A.L.R. 713=170 I.C. 706=10 R.A. 157=A.I.R. 1937 All. 515.**

——**O. 45, R. 15**—*Application under—Form—Specific prayer for transmission to Court concerned, if necessary—Procedure adopted by Chief Court, Oudh with reference to such applications.*

When an application under O. 45, R. 15, prays that the memo of costs be prepared, it includes also a prayer for transmission of the order to the Court concerned. The usual practice adopted by the Chief Court of Oudh with reference to such applications is to send them to the office for necessary action. It is the office that then prepares the memo of costs and transmits it to the Court concerned without any further directions or orders of the Court. (*Thomas, C.J and Yorke, J.*) SURAJ KUER *v.* DEO SINGH. **14 Luck. 243=11 R. O. 101=178 I.C. 242=1938 O L. R. 476=1938 O.W.N. 1045=A.I.R. 1938 Oudh 250.**

——**O. 45, R. 15**—*Mandatory provision—Order by trial Court by way of restitution before transmission of order of His Majesty in Council—Legality.*

The provisions of O. 45, R. 15, are mandatory. Where a decree for pre-emption passed by the Chief Court on appeal was reversed by the Privy Council, and the trial Court passed, at the request of the pre-emptor, an order by way of restitution directing payment to his creditors out of the pre-emption money deposited by him, before the order of His Majesty in Council had been transmitted to it from the Chief Court under O. 45, R. 15, the order of the trial Court made in violation of its provisions is quite irregular if not altogether without jurisdiction. The fact that the other party himself obtained possession of the villages for which a decree for pre emption had been passed by the Chief Court and also took a rateable share out of a portion of the pre-emption money before any proceedings were taken by him under O. 45, R. 15, could not invest the Court with jurisdiction which it did not possess nor regularise its action in making the order for payment in question, if otherwise irregular. (*Srivastava and Nanavutty, JJ.*) BIRENDRA BIKRAM SINGH *v.* BASDEO. **12 Luck 52=160 I.C. 814=8 R O. 281=1936 O W.N. 262=1936 O.L. R. 109=A.I.R. 1936 Oudh 185.**

——**O. 45, R. 15 (2)**—*Order for costs—Execution—Costs—What it includes.*

Where their Lordships of the Privy Council direct that the costs incurred by the successful appellant, in the Judicial Commissioner's Court should be paid by the respondent, such costs include the printing charges and other expenses incurred by the appellant in the Judicial Commissioner's Court for presentation of the appeal to the Privy Council, and the appellant is also entitled to the costs of the execution. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) KALA RAM *v.* PUNJAB NATIONAL BANK, LTD. **167 I.C. 879=9 R. Pesh. 101=A.I.R. 1937 Pesh. 3.**

C. P. CODE (1908), O. 46, R. 1.

——**O. 45, R. 15 (2)**—*Transmission for execution of the order in council—Directions, if necessary.*

When an order of His Majesty in Council is transmitted for execution under O. 45, R. 15 (2) it is not necessary to give any further directions and particularly so, when they are not asked for. (*Thomas, C.J. and Yorke, J.*) SURAJ KUER *v.* DEO SINGH. **14 Luck. 243=11 R. O. 101=178 I. C. 242=1938 O L.R. 476=1938 O.W.N. 1045=A.I.R. 1938 Oudh 250.**

——**O. 45, R. 17**—*Application to High Court before granting of certificate—Irregularity.*

Rule 17 which has been added to O. 45, by the Government of India (Adaptation of Indian Laws) Order, 1937, assumes that a certificate under S. 205 of the Constitution Act has already been given and an application to the High Court under O. 45 is, therefore, irregular where no such certificate has been granted. (*Gwyer, C.J, Sulaiman and Varadachariar, JJ.*) RAJA PRITHWI CHAND LALL CHOUDHURY *v.* SUKHRAJ RAI. **I.L. R. (1940) Kar. (F.C.)52=187 I. C. 453=12 R.F. C. 22=3 Fed.L.J. 64=21 Pat.L.T. 405=6 B.R. 498=1940 O.L.R. 263=52 L.W. 122=1940 M. W. N. 685=1940 P.W.N. 700=44 C W. N. (F.R.) 29=A.I.R. 1940 F.C. 25=(1940) 1 M.L. J. (Supp.) 28.**

——**O. 46, R. 1**—*Applicability—Application for execution of award under Bombay Co-operative Societies Act, 1925—Reference—Competency.*

The condition precedent to a reference under O. 46, R. 1 is that the Court which refers is either hearing a suit or an appeal in which the decree is not subject to an appeal, or is hearing proceedings in execution of any such decree. An application to execute an award made under the provisions of the Bombay Co-operative Societies Act, 1925, is not a suit or the execution of a decree in a suit; so that, O. 46, R. 1 can have no application (*Davis, J.C. and Lobo, J.*) KARACHI URBAN CO-OPERATIVE BANK, LTD. *v.* SAHIBDIN. **I L.R. (1940) Kar. 411=188 I.C. 609=13 R.S.6=A.I.R. 1940 Sind 111.**

——**O. 46, R. 1**—*Question of law arising during execution—Jurisdiction of Court to make reference—Conditions.*

In order that a Court shall have jurisdiction to make a Reference under O. 46, R. 1, C. P. Code, in connection with a question of law arising during the execution of a decree, it must be shown that the decree itself was not subject to appeal. A second condition necessary to give a Court jurisdiction to make such a reference is that the Court itself shall entertain reasonable doubt on the question to be referred. If it has come to a definite decision on the question, it has no jurisdiction to make a reference. (*Khundkar and Lodge, JJ.*) MANINDRA NATH GHOSE *v.* MANDAR BISWAS. **44 C.W.N. 1067.**

——**O. 46, R. 1**—*Scope—Reference by Court after giving its decision—Competency—Government letter expressing contrary view brought to*

C. P. CODE (1908), O. 47.

its notice after its decision—If sufficient ground for reference.

O. 46, R. 1, C. P. Code, contemplates a pending proceeding. If a Court gives its decision in a matter, it becomes *functus officio* and is not competent to refer the matter thereafter under the rule. Where after the Court gives its decision on a certain point a Government letter expressing a view contrary to that held by the Court is brought to its notice, and the Court refuses to act upon that view, even assuming the Court is not *functus officio*, the fact that the Government letter expresses a contrary view is not sufficient for the Court to say that it entertains a "reasonable doubt" on the point, and a reference by it in such circumstances is, therefore, incompetent. (*Derbyshire, C.J. and Nasim Ali, J.*) HARDAYAL DAS *v* AKASH MAHOMED. **44 C.W N. 446**

——**O. 47**—Applicability—Insolvency proceedings—Power to review order of vesting made on annulment of adjudication. *See* PROVINCIAL INSOLVENCY ACT, S. 37. **1940 M.W.N. 420.**

——**O 47**—Applicability—Non-service of notice of proceedings—Remedy of aggrieved party—Appeal or review. *See* PRACTICE—APPEAL. **1936 R.D. 449.**

——**O 47**—Applicability--Review under S. 250, Agra Tenancy Act. *See* AGRA TENANCY ACT, S. 250. **1940 R.D. 193.**

——**O. 47**—Construction—Power of succeeding Judge to review order of predecessor—Limits—S. 151—Scope. *See* C. P. CODE, S. 151. **I.L.R. (1939) Kar 330.**

——**O. 47, R. 1**—*"Any other sufficient reason"—Misapprehension of counsel leading to omission to argue certain points in appeal—Erroneous impression in Judge's mind—If ground for review of judgment.*

If owing to a misapprehension the counsel for the respondent to an appeal does not urge all his arguments in support of the finding of the trial Court in favour of his client, and an erroneous impression is created in the mind of the judge that counsel had no arguments to urge to meet all the points raised by the appellant's counsel, that would be analogous enough to an error apparent on the face of the record to be a sufficient reason for review under O. 47, R. 1. C. P. Code. There is a power of review in cases of mistake of counsel or mistake of the Judge leading to errors in the judgment though not apparent on the face of the record. (*Patanjali Sastri, J.*) GOVINDA CHETTIAR *v.* VARADAPPA CHETTIAR. **188 I.C. 263=12 R.M 831=50 L.W. 568=1939 M. W.N. 1080=A.I.R. 1940 Mad. 17=(1939) 2 M. L.J. 809.**

——**O. 47, R. 1**—*"Any other sufficient reason"—What amounts to.*

The mere fact that the party seeking a review desires to have a fresh sifting of the evidence is clearly not a sufficient reason for review. (*Burton, R.M. and Roughton, H.M.*) MADHORAO *v.* VYANKATRAO. **19 N.L.J. 276.**

——**O. 47, R. 1**—Applicability—Appeal—Dismissal for non-payment of printing charges—Application to restore—If one for review. *See* COURT FEES ACT, SCH. I, ARTS. 4 AND 5. **A.I.R. 1938 Pat 111.**

——**O. 47, R. 1**—Applicability—New and important matter or evidence—Error or mistake apparent on face of the record—Meaning of—

C. P. CODE (1908), O. 47, R 1.

Appeal—Dismissal for failure to file appellant's list—Application for restoration—If one for review—Power of Court. *See* C. P. CODE, S. 151. **1939 P.W.N. 832=A.I.R 1939 Pat. 678 (F.B.).**

——**O. 47, R. 1**—Applicability—Proceedings under U. P. Encumbered Estates Act. *See* U. P. ENCUMBERED ESTATES ACT, S. 6. **1937 A.W.R. 268=1937 R.D. 103.**

——**O 47, R. 1**—Applicability—Second appeal—Review of judgment—Application for on ground of discovery of material evidence—Competency. *See* C. P. CODE, S. 114 AND O. 47, R. 1. **1939 P.W.N. 909.**

——**O 47, R 1**—*Application—Suit dismissed for default under O 9, R. 8 or under O. 17, R. 3—Remedy of plaintiff.*

Where a suit has been dismissed for default or under O. 17, R. 3 there is no ground for any application in review. The remedy of the plaintiff lies either in an appeal if the order of dismissal is passed under O. 17, R. 3, C. P. Code, or is an application under O 9, R. 9, if the suit is dismissed for default. (*Darling, S.M. and Bomford, J.M.*) BALWANTI *v.* BADAL. **1938 A.W.R. (B. R.) 115=1938 R.D. 184.**

——**O. 47, R. 1**—Application under—Subsequent presentation of appeal—Competency—Grant of review—Effect. *See* APPEAL—COMPETENCY. **43 L.W 542.**

——**O. 47, R. 1**—*Bench of Judges—Mistake apparent in judgment of one Judge—Grant of review.*

When two Judges sit on a Bench and dictate two separate judgments, judgment of any one of them by itself cannot be a basis of a decree. The judgment of one must be accompanied by an expression of concurrence by the other or there should be one conjoint judgment, to be a judgment of the Court. It is in this sense that the term "judgment" is used in S. 114 or O. 47, R. 1. Under these provisions, any person considering himself aggrieved by a decree or order on account of some mistake or error apparent on the face of the record, may apply for "a review of judgment" to the Court which passed the decree or made the order. Where two judgments constitute the "judgment" of one single Court, if one is vitiated by mistake or error apparent on the face of the record, that one cannot be a valid material on which a decree can be founded. The necessary consequence of the situation is that the other judgment, though not vitiated by such mistake or error, cannot by itself constitute the proper basis of the decree of the Court, for either one conjoint judgment or two concurring judgments are needed as the basis of the decree of the Court and hence application for review should be granted. (*Mya Bu and Baguley, JJ.*) MAUNG PO HLA *v.* MA NGWE SINT. **167 I.C. 449=9 R R. 315=A.I.R. 1937 Rang. 56.**

——**O. 47, R. 1**—*Competency of review—Order of Court cancelling arbitration and fixing case for evidence.*

A review of an order of Court cancelling a reference to arbitration and fixing the case for evidence is competent, and it depends upon circumstances whether the order passed in review is correct or not. (*Dalip Singh, J.*) RAMZANI *v.* NUR AHMADI. **189 I.C 466=13 R.L. 77=42 P. L.R. 124=A. I.R. 1940 Lah. 276.**

C. P. CODE (1908), O. 47, R. 1.

——**O. 47, R. 1**—*Consent decree—Review on ground of fraud or mistake—Permissibility.*

A review of a consent decree on the ground that it was obtained by fraud, or by mistake, cannot be had, and the consent decree can be set aside only by means of a separate suit. A.I.R. 1922 P C. 112, Foll.; A.I.R. 1929 Cal. 470, Rel. on. (*Dunkley, J.*) U Po Htu *v.* Ma Than Yin. **164 I.C. 785 (2)=9 R.R. 143=A.I.R. 1936 Rang. 389.**

——**O. 47, R. 1**—*Error apparent on the face of the record—Meaning.*

A clerical error not affecting the decision of the case is not an error apparent on the face of the record which will justify a review; nor can there be an error apparent on the face of the record when considerable research would be necessary to establish them if at all. (*Burton, R M. and Roughton, H.M.*) Madhorao *v.* Vyankatrao. **19 N.L.J. 276.**

——**O 47, R. 1**—*Error apparent on face of record—Meaning of.*

A mistake of law is not sufficient in itself to grant a review. The error must be patently gross and manifest. A question so debatable as one, whether the liability to perform a contract or to pay damages in breach, is included within the terms "debts and liabilities" of a special enactment, cannot be said to be an error apparent on the face of record within the meaning of O. 47, R. 1. It is a difficult question of law. (*Davis, J. C. and Weston, J.*) Mir Haji Ghulam Shah *v.* Khanchand. **I.L.R. (1939) Kar. 330=182 I. C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

——**O. 47, R. 1**—"Error apparent on the face of the record"—Meaning of—Award compulsorily registrable not registered—Decree passed on award without attention of Court being drawn—Review—Power of Court. *See* Registration Act, Ss. 17 (1) (*b*) and 49. **40 Bom. L.R. 952.**

——**O. 47, R. 1**—*Error apparent on face of record—Omission to mention and discuss a certain decision in judgment.*

The omission to mention and discuss a certain decision in the judgment is not an error apparent on the face of the record within the meaning of O. 47, R. 1. (*Nanavutty, J.*) Shankar Prasad *v.* Mohammad Taqi. **1937 O.W.N. 342.**

——**O. 47, R. 1**—*Grounds for review—Advocate abandoning contention owing to misconception.*

Where it is alleged that the defendant's advocate thought that the Court had formed a certain opinion of the plaintiff's evidence and because of this belief he abandoned a certain contention which was one of the contentions to be put before the Court, this is not sufficient reason for allowing review. (*Spargo, J.*) Eshar Dutt Singh *v*, Jamuna Singh. **189 I.C. 570=13 R.R. 44=A I. R. 1940 Rang. 144.**

——**O. 47, R. 1**—*Ground for review—Appeal dismissed as barred by limitation—Counsel for appellant subsequently discovering that rules of Financial Commissioner requiring payment of copying fees along with application, were not being enforced—Appellant, according to practice prevailing, found entitled to more time as being time requisite for obtaining copies which brought appeal within limitation.*

Counsel for appellant whose appeal was dismissed on the preliminary ground, that it was barred by limitation and who was taken by surprise discovered subsequently that the rules of the Financial Commissioner requiring the payment of copying fees on the day when the application was presented, were not being observed and that according to the existing practice the copying fees were to be paid only when the probable cost of the copying was ascertained. It was found that according to the practice which prevailed, the appellant had paid the copying fees when demanded and that the appellant was entitled to some more days as being time requisite for obtaining copies, which brought the appeal within limitation.

Held, that there was sufficient ground for allowing review of the judgment-dismissing the appeal as the counsel for appellant had discovered new important evidence which was not within his knowledge and could not be produced by him after the exercise of due diligence at the time when the judgment was delivered. (*Young, C.J. and Abdul Rashid, J.*) Sheo Ram *v.* Luta Ram. **166 I.C. 716=9 R.L. 411=A.I.R. 1936 Lah. 650.**

——**O. 47, R. 1**—*Ground for review—Decision wrong on merits.*

The words "any other sufficient cause" in R. 1 of O. 47 mean a reason sufficient on grounds at least analogous to those specified immediately previously; and a Court hearing an application for a review has, therefore, no power to order a review upon the ground that the decision was wrong on the merits. (*Tek Chand, J.*) Ram Rattan *v.* Dina Nath **186 I C. 22=12 R.L. 333=41 P.L.R. 884=A.I.R 1939 Lah. 460.**

——**O. 47, R. 1**—*Ground for review—Different views on question of law possible.*

Where the utmost that could be said is that a different view on certain questions of law is possible, and where the so-called error of law is not apparent on the face of the record, there is hardly any ground for review. (*Collister and Bajpai, JJ.*) Ranbir Prasad *v.* Sheobaran Singh. **186 I.C. 885=1940 O.L R. 184=12 R A. 469=1939 A.L.J. 555=1939 A.W.R (H C.) 581=1939 R. D. 440=A.I.R. 1939 All. 619.**

——**O. 47, R. 1**—*Ground for review—Document newly produced within knowledge of applicant at time of decree.*

Where it cannot be said that the document which is newly produced at the time of application for review was not within the knowledge of the applicant when the decree of the Court was passed, the mere production of the document is no ground for review. (*Abdul Qayoom, C.J. and Kichlu, J.*) Mani Ram *v.* Jew Nath. **39 P.L.R. J. and K. 145.**

——**O. 47, R. 1**—*Ground for review—Erroneous admission of fact by Counsel.*

It is doubtful whether an erroneous admission of fact made by Counsel can be considered to be a good ground for review. (*Bhide, J.*) Fateh Mahomed *v.* Sardar Ali Shah. **161 I.C. 444=8 R.L. 752=A.I.R. 1936 Lah. 48.**

——**O. 47, R. 1**—*Ground for review—Erroneous view of law—Refusal to consider finding of fact.*

Where a Judge erroneously came to a conclusion that he was bound by the finding of facts lower Court and which was tantamount to a refusal to consider the question of fact.

C. P. CODE (1908), O. 47, R. 1.

Held, that there was sufficient cause for a review. (*Mya Bu and Sharpe, JJ.*) MA LON *v.* MA MYA MAY. 179 I.C. 946=11 R R. 363=A.I.R. 1939 Rang 59.

——O. 47, R. 1—*Grounds for review—Error of law apparent on face of judgment.*

It is settled law that it is possible for an error of law to be apparent on the face of the judgment; but the error has got to be patent and an ordinary error of law, mere failure to interpret the law correctly when the point of law is complicated, is not necessarily an error of law apparent on the face of the judgment. (*Mya Bu and Baguley, JJ.*) MAUNG PO HLA *v.* MA NGWE SINT 167 I.C. 449=9 R.R. 315=A.I.R. 1937 Rang 56.

——O. 47, R. 1—*Ground for review—Failure of Counsel to lay apposite law.*

The mere failure of a Counsel to lay apposite law before the Court is by itself no ground for a review under O. 47, R. 1. (*Abdul Qayoom, C.J. and Wazir, J.*) BHAGAT RADHA KISHAN *v.* LLOYDS BANK, SRINAGAR. 41 P.L.R.J. and K. 89.

——O. 47, R. 1—*Ground for review—Judgment based on misapprehension of nature of attachment.*

Where the decision of the Judge, which is sought to be reviewed, is based on an obvious misapprehension of the nature of attachment it is sufficient reason for review (*Jai Lal, J.*) GURDIAL SINGH *v.* KHAZAN CHAND. 163 I.C. 374=9 R.L. 13=A.I R. 1936 Lah. 486.

——O. 47, R. 1—*Ground for review—Mistake of law patent on face of record.*

Where the sole ground upon which the judgment proceeded is found to be untenable in view of certain provisions of law to which the attention of the Court was not drawn the Court is empowered under O. 47, R. 1 (1), to review its judgment and to correct the error which is apparent on the face of the record. (*Nanavutty and Zia-ul-Hasan, JJ.*) KAPURTHALA ESTATE *v.* SHRI RAM NARAIN. 1937 R.D. 209=1937 O.W.N. 496.

——O. 47, R. 1—*Ground for review—Mistaken view of law.*

It may be possible to argue that a review lies if a positive rule of law is ignored but to say that a review lies because the apposite law is not applied is to state the proposition very widely. The mere fact that the Judge in deciding a case has taken a mistaken view of law is not sufficient to enable a party to come up with an application for review under O. 47, R. 1. (*Stone, C.J. and Puranik, J.*) JAGARAO ANNAJI *v.* BALWANT TUKARAM. 175 I.C. 649=11 R.N. 4=A.I.R. 1938 Nag. 221.

——O. 47, R. 1—*Grounds for review—Mistake of procedure or law—If a ground—Inadequacy of service and ignorance of proceedings owing to faulty service—Distinction.*

A mistake as regards procedure or law is not a sufficient ground for allowing a review. Though a plea of inadequate service of notice may not be a good ground for review of certain *exparte* execution proceedings, ignorance of such proceedings though due to faulty service, would be a good ground to justify review of the *ex parte* proceedings. (*Harper, S.M. and Sathe, J.M.*) KHALIL UDDIN *v.* ABDUL ALI. 1940 R.D. 332.

C. P. CODE (1908), O. 47, R. 1.

——O. 47, R. 1—*Grounds for review—Omission to raise point of law—Sufficiency.*

Omission to raise a point of law is not a sufficient ground for a review. (*Grille, J.*) DAYANAND *v.* LAXMIDAS. I L.R. (1937) Nag 392=A.I.R. 1938 Nag. 41

——O. 47, R. 1—*Grounds for review—Order rejecting plaint—Plaint filed without requisite court-fee—Time granted for payment of court-fee again and again—Failure to pay—Rejection of plaint—If can be reviewed.*

Where the Court rejects a plaint which is not stamped with the requisite court-fee, for failure to pay the necessary court-fee after the plaintiff was granted time therefor again and again the order cannot be reviewed by the Court. The reasons for the failure to produce the necessary court-fee in time are not facts which could not have been placed before the Court at the time of rejection of the plaint. Nor do they constitute new matters since discovered. Nor again can it be said that there was any mistake or error apparent on the face of the record. (*Stone and Pandrang Row, JJ.*) VARADHANAMMA *v.* MUNUSWAMI REDDI. 59 Mad. 975=163 I C 96=8 R.M. 1089=1936 M.W.N. 538=43 L.W. 494=A.I.R. 1936 Mad. 503=70 M.L.J. 491.

——O. 47, R. 1—*Grounds for review—Predecessor failing to decide the only point of importance—If amounts to 'other sufficient reason'.*

Where in an Execution Application, an objection was raised that the decree was not executable for want of engrossment on a non-judicial stamp, and the judge who heard the application did not say a word about it in his order, such an omission would clearly amount to 'other sufficient reason' under R. 1 of O. 47, even if it did not constitute a 'mistake or error apparent on the face of the record,' entitling a succeeding Judge to review the order of his predecessor. (*Burn and Lakshmana Row, JJ.*) SATYANANDAM *v.* NAMMAYYA. 183 I.C 33=12 R.M. 216=47 L.W. 51=1938 M.W.N. 656=A.I.R. 1938 Mad. 307.

——O. 47, R 1—*Ground for review—Recital in document found false—Judgment based on finding—Document being genuine not a good ground.*

Where the recital in a document was found to be false and collusive and the Court gave its judgment based on this finding.

Held, that even if the document was genuine the judgment could not be reviewed on that ground. (*Rupchand Bilaram and D.C. Mehta, A.J.Cs.*) ABDUL RAHIM *v.* GHULAM MAHAYADI. 161 I C. 501=8 R S. 116=A I.R. 1936 Sind 7.

——O. 47, R. 1—*Ground for review—Subsequent reversal of view of law.*

There is a clear general principle that decided cases cannot be re-opened merely because the view that was taken on a question of law in that case is subsequently upset. (*Rupchand Bilaram, A.J.C.*) EBRAHIMJEE MULLA *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. 161 I.C. 324=8 R. S. 137=A.I.R. 1936 Sind 34.

——O. 47, R. 1—*Grounds for review—Sufficient reason—What amounts to.*

A review is permissible under O. 47, R. 1, if there is an error apparent on the face of the record or something analogous to it. (*Rowland and Chatterji, JJ.*) HARBALLABH PRASAD *v.* JAGBALLAV PRASAD. 18 Pat. 777=20 Pat.L.T.

C. P. CODE (1908), O. 47, R. 1.

859=12 R.P. 416=185 I C. 769=6 B.R. 248=1939 P.W N. 719=A.I.R. 1940 Pat. 7.

——O 47, R 1—*Grounds for review—'Sufficient reason'—What is.*

It would certainly not be sufficient reason for granting review that if another opportunity is given to the applicant he could show that a different view could be taken of the case. (*Abdul Qayoom, C J. and Kichlu, J.*) SHARDA NAND KOUL *v.* PANDIT KRISHNAN KOUL. 41 P.L.R.J. & K. 51.

——O 47, R. 1—*Grounds for review—'Sufficient reason'.*

The expression "any other sufficient reason" in O. 47, R. 1, means any other sufficient reason analogous to those specified immediately previously, that is to say, to excusable failure to bring to the notice of the Court new and important matter. A Court can, therefore, entertain an application for review of its order on the ground that it was passed under a statute which was void under S. 107 (1) of the Government of India Act, not having received the assent of the Governor-General (*Mitter and Rau, JJ.*) G. P STEWART *v.* BROJENDRA KISHORE. 184 I.C. 689=12 R.C 271=2 Fed.L.J. 112=69 C.L.J. 573=43 C.W.N. 913=A.I.R. 1939 Cal 628.

——O. 47, R. 1—*Ground for review—Wrong interpretation of certain ruling by predecessor.*

A wrong interpretation of certain ruling by the predecessor cannot be considered an error of law apparent on the face of the record, so as to justify a review. (*Bhide, J.*) RATTAN CHAND *v.* MT. RAM PIARI. 175 I C 15 (2)=10 R. L. 674 (1)=A.I.R. 1937 Lah. 791.

——O 47, R. 1—If controls O. 43, R. 1 (*w*). *See* C. P. CODE, O. 43, R. 1 (*w.*) A.I.R. 1937 Nag. 385.

——O. 47, R. 1—*Mistake—Name of necessary party wrongly given.*

In a case where the Zamindar was a necessary party if his name has not been correctly given either in the appeal to the Board or the Commissioner, it is a ground on which any judgment that has been passed, can be reviewed. (*Marsh, S M. and Mehta, J M.*) HUKAM SINGH *v.* KESARI LAL. 1939 R.D. 227 (2)=1939 A.W.R. (B.R.) 210.

——O. 47, R. 1—*"Mistake or error apparent on the face of the record"—Meaning of.*

Rule 1 of O. 47, is definitive of the limits within which review is permitted. A mistake of law is not in itself a sufficient mistake or error apparent on the face of the record to warrant a review. The fact that a judgment proceeds upon an incorrect exposition of the law is not sufficient to found a review. It makes no difference whether that mistake is due to inadvertence, forgetfulness, ignorance, or other error, unless that mistake or error is apparent on the face of the record, that is to say, unless it amounts to an error which can be disclosed without referring to anything beyond the record. There is no difference between a real blunder and a debatable point. An error *dehors* the record is not analogous to an error apparent on the face of the record. Nor would an omission to raise a point of law amount to a mistake or error on the face of the record. (*Stone, C.J. and Puranik, J.*) LAXMAN *v.* RAMCHANDRA. I.L.R 1938 Nag. 151=182 I.C. 232=11 R.N. 511=1938 N.L.J. 48=A.I.R. 1938 Nag. 145.

C. P. CODE (1908), O. 47, R. 1.

——O. 47, R 1—*Mistake or error on the face of the record—Debatable point of law—Erroneous view on—If a ground for review.*

An erroneous view of the law on a debatable point or a wrong exposition of the law or a wrong application of the law cannot be considered a mistake or error on the face of the record, and as such cannot be a ground for review. (*Ismail, J.*) KISHAN CHAND SINGH *v* MUKAND SAWARUP. 175 I C 586=1938 R D 495=10 R. A. 703=1938 A.L.R. 448=1938 A.L.J. 347=1938 A.W R. (H.C.) 196=A.I.R. 1938 All. 308.

——O. 47, R. 1—*New and important matter or evidence—Absence of due diligence—Review—If can be granted.*

When the new and important matter or evidence is such that by the exercise of due diligence it could have been undoubtedly made available at an earlier stage, it cannot be accepted as a ground for review, when the party has not exercised due diligence. (*Burton, R.M. and Roughton, H M.*) MADHORAO *v.* VYANKATRAO. 19 N.L.J, 276.

——O. 47, R. 1—*New and important evidence—Onus of proof—Duty to mention dates and to prove that new evidence came to light only after decision sought to be reviewed.*

An application for review on the ground that the applicant has discovered new and important evidence, which he was unable to discover before and which will prove his case, cannot be allowed and must be rejected, when the applicant has not held an affidavit or mentioned any relevant dates to support his theory that the new piece of evidence only came to his notice after the decision sought to be reviewed, especially when he is not even ready with any proof. (*Knox, J. M.*) CHHEDI *v.* TULSHA DEVI. 1936 R.D 486 (1).

——O, 47, R. 1—*New evidence—Proof required.*

An applicant for review on the ground of discovery of new evidence should show that (*i*) such evidence was available, and of undoubted character; (*ii*) that the evidence was so material that its absence might cause a miscarriage of justice; (*iii*) that it could not with reasonable care and diligence have been brought forward at the time of the decree. (*Costello and Lort Williams, JJ.*) KUNJA BEHARY CHAKRABARTI *v.* KRISTO DHONE MAJUMDAR. I.L.R. (1938) 2 Cal. 361=179 I C. 977=11 R.C. 640=A.I.R. 1939 Cal. 42.

——O 47, R 1—*Notice—Order rejecting plaint for insufficient Court-fee—Review—Notice to opposite party—Necessity.*

Assuming that an order rejecting a plaint can be reviewed without notice to the defendant, where a plaint has been rejected for want of the requisite court-fee after ample time had been given again and again to the plaintiff for finding the requsite court-fee and for instructing counsel to urge the relevant facts as an excuse for the delay, it is necessary to give the defendant an opportunity at the earliest possible moment of contesting the propriety of the review. (*Stone and Pandrang Rao, JJ.*) VARADHANAMMA *v.* MUNISWAMI REDDI. 59 Mad. 975=163 I C 96=8 R M. 1089=1936 M.W.N. 538=43 L.W. 944=A.I.R. 1936 Mad. 503=70 M.L.J. 491.

C. P. CODE (1908), O. 47, R. 1.

—— O. 47, R. 1—*Order rejecting appeal—Application for review of order—Appellant guilty of lack of diligence.*

In an appeal before the Board of Revenue in a sales case, the judgment-debtor pleaded that the sale should have been postponed pending the order of the Civil Court on his application that he should be granted instalments under the Agriculturists' Relief Act. The sale took place after time had twice been given to the judgment-debtor to bring a stay order from the Civil Court and the Board took the view that the sale officer could not be expected to stay proceedings indefinitely and rejected the appeal. The judgment-debtor filed an application for review of the appellate order stating that an order for stay was actually issued by the Civil Court on the day previous to the sale. This fact he did not bring to the notice of the Board when it heard the appeal.

Held, that the judgment-debtor was himself ignorant for months of the order of the Civil Court which suggested that he was not pursuing his case with any zeal and that had he used due diligence he could have produced this piece of evidence in the appeal to the Board and that, therefore, no justification could be found in O. 47 R. 1, for allowing his application for review. (*Darling, S.M. and Bomford, J.M.*) SITA RAM RAI *v.* RAJDEO RAI. **1937 R.D. 264.**

——O. 47, R. 1—*Power of Judge to review order—Company law.*

Obiter.—The Company law does not affect the power of review which is otherwise vested in the Judge especially when by S. 141, C. P. Code, the provisions of the Code are to be followed in all proceedings in any Court of civil jurisdiction. (*Din Muhammad, J.*) PEOPLE'S BANK OF NORTHERN INDIA, LTD., *In the matter of.* **171 I.C. 549 =10 R L. 211=A.I.R 1937 Lah. 82.**

——O. 47, R. 1—*Rejection of plaint for non-compliance with order for payment of Court fee—Review.*

Where a plaint is rejected for non-compliance with the order for payment of Court-fee a review of that order is permissible and the Court has discretion to restore the suit (*Mohamed Noor and Varma, JJ.*) JADUNANDAN SINGH *v.* SHANKAR SAHU. **162 I.C. 992=8 R P. 602=17 Pat L.T. 766=1936 P.W N. 240=A.I.R. 1936 Pat. 310.**

——O. 47, R. 1—*Revenue Courts—Grounds of review.*

Though a petition for review of the Board's order may be admitted to hearing on the ground that there is an order from another appellate Court which is not in harmony with the decision of the Board, yet there is no case for review, where the appellate order in question was passed some months before the Board's order and where the very basis of that appellate order had been negatived by the Board in the order sought to be reviewed. (*Darling, S. M. and Marsh, J M.*) ANGAD *v.* RAM SARUP. **1931 A.W.R. (B.R.) 256 =1938 R.D. 560.**

——O. 47, R. 1—*Review—Competency*—Ex parte *decree.*

Application for review is one of the three remedies open to a person against whom an *ex parte* decree has been passed and hence there is nothing inherently wrong in such an application being presented. (*Mehta, J.M.*) RAM CHANDRA PRASAD *v.* RAMA KANT. **1939 A.W.R. (B.R.) 42 (2)=1940 R.D. 72 (2).**

C. P. CODE (1908), O. 47, R. 1.

——O 47, R. 1—*Review—Error of law—Lack of jurisdiction obvious on the face af the record—Fit case for review.*

Where there is an error of law, which obviously and without research into the rulings involves a lack of jurisdiction to pass the order of which review is sought, is eminently a case in which the error, though technically an error of law, is apparent on the face of the record and should be corrected at the earliest possible time without driving the parties to the expense of an appeal or revision petition to which there would be no answer. 45 M.L.J. 309; 46 Mad. 955 and A. I.R. 1935 Cal. 153, Foll. (*Wadsworth, J.*) VENKATARAYULU NAIDU *v.* VENKATA RATTAMMA. **189 I C. 320=49 L.W. 147=1939 M.W.N. 443=A.I. R 1939 Mad. 293=(1939) 1 M L.J. 120.**

——O. 47, R. 1—*Review—Evidence as to service untrustworthy—Power to restore.*

Where the evidence of the peon who effected the service is found to be untrustworthy, the case should be restored and retried on the merits. (*Marsh, S.M. and Mehta, J M.*) MAHOMED NURUL ABEDIN *v.* SHAHZADI. **1939 A.W.R. (B R.) 68= 1940 R D. 48 (2).**

——O. 47, R. 1—*Review—'For any other sufficient reason'—Mistake or error on the face of the record—Meaning of.*

The words "for any other sufficient reason" in O. 47, R. 1 have been interpreted as meaning reason sufficient on grounds at least analogous to those specified immediately previously. In all applications for review based on mistake or error or any sufficient reason the applicant has to show a mistake or error apparent on the face of the record or a mistake or error analogous thereto. Where a Court applies a particular statute to a given set of events whereas on the said date it is obvious from the record that a wholly different statute applies, it may be a mistake apparent on the face of the record. (*Stone, C.J. and Puranik, J.*) JAGARAO ANNAJI *v.* BALWANT TUKARAM. **175 I.C. 649=11 R.N. 4=A.I.R. 1938 Nag. 221.**

——O. 47, R. 1—Scope—Inherent power of review. *See* C. P. CODE, S. 47. **A.I.R. 1936 Pat. 506.**

——O. 47, R. 1—*"Sufficient reason"—Abandonment of question involved in specific issue raised at applicant's instance as the result of erroneous view of pleader—Review—If can be granted.*

There will be no finality to the decision of a Court if, after judgment is pronounced, the parties or advocates are allowed to come forward and say that a certain argument was addressed or given up in the course of the trial as the result of their not remembering certain material facts. It will not be correct to allow an application for review in such cases. Where there has been an abandonment of a specific question involved in an issue which was raised at the instance of the plaintiff in the suit, he is not entitled to apply for review of judgment on the ground that the abandonment of the question involved was the result of an erroneous view taken by the plaintiff's pleader. That would not constitute "sufficient reason" for a review under O. 47, R. 1. (*Kunhi Raman, J.*) VENKAYYA *v.* SURYANARAYANA. **50 L.W. 903=A.I.R. 1940 Mad. 203.**

C. P. CODE (1908), O. 47, R. 1.

——**O. 47, R. 1**—*"Sufficient reason"—Onus of proof—New and important evidence—Meaning of —Notice of ejectment under S.* 81, *Agra Tenancy Act—Tenant failing to pay arrears and to contest notice—Order of ejectment—Application for review—Competency—Failure to explain non-compliance with law—Effect.*

A litigant who fails to fulfil the requirements of the law and applies to the Court for review of an order passed against him must clearly show "sufficient reason" for the review. When a tenant who is served with a notice under S. 81 of the Agra Tenancy Act does not pay up the arrears or contest the claim for ejectment within the period allowed by law, and allows an order of ejectment to be passed against him, it is for him to explain, if he seeks a review of that order, why he did not exercise the option given to him by the law within the period allowed by the law; when he never even attempts to so explain, there is no question of any "new and important evidence" or anything else. His application therefore deserves to be rejected summarily. (*Drake Brockman, S. M. and Knox, J.M.*) AJODHIA PRASAD *v.* SURJI. **1936 R.D. 466.**

——**O. 47. R. 1 (1) (a)**—*Appealable decree—Application for review—Subsequent appeal from decree—Pendency of appeal—If bar to review application being dealt with—Review application—When made—High Court (Original Side) Rules, Ch. 32, Rr. 2, 3 and 34.*

If an application for review of judgment is presented on the original side of the High Court before an appeal is preferred, the Court is not deprived of its jurisdiction to entertain the application for review, on the ground that, when the application comes on to be dealt with, an appeal is pending under rules 2, 3 and 34 of the Rules and Orders of the High Court, Original Side, Chapter 32, the application for review must be held to be presented when the memorandum of review is filed and not when it is urged in Court. The person who files a memorandum of review takes a step which initiates proceedings for review, and by so doing applies for review of judgment within the meaning of O. 47, R. 1. (*Panckridge, J.*) RAYFIELD *v.* RAJ NARAIN. **170 I.C. 653=10 R.C. 174=41 C.W.N. 129.**

——**O 47, R. 1 (1) (a)**—*Applicability—Appeal preferred but withdrawn—Review—If lies.*

An appeal which has been withdrawn must be treated as if it had never been preferred within the meaning of O. 47, R. 1, C. P. Code. An application for review filed after the appeal is withdrawn is competent. (*Agarwala, J.*) THAKUR SINGH *v.* DINANATH SAH **171 I C. 700=10 R. P. 236=4 B.R. 54=A.I.R. 1937 Pat. 528.**

——**O. 47, R. 1 (c)**—*Discovery of new and important matter — Plaintiff failing to produce papers called for by defendant on false pretext—Subsequent tracing of papers by defendant after decree—Right to apply for review.*

Where in a suit for *bhaoli* rent, the defendant pleaded payment by division of crop and called for the papers of the landlord to prove his contention, but the landlord failed to produce the papers by putting forward a false excuse, and the defendant after the disposal of the suit by the High Court in second appeal, traced the papers and applied for a review of the judgment of the High Court in second appeal.

C. P. CODE (1908), O. 47, R. 3.

Held, that the papers constituted new and important matter which entitled the defendant to a review of judgment. (*Macpherson and James, JJ.*) BRINDABAN PRASAD *v.* BANKU BIHARI MITRA. **15 Pat. 295=166 I.C 317=9 R.P. 282=3 B.R. 153=1936 P.W.N. 598=17 Pat.L.T. 575 =A.I.R. 1936 Pat. 595.**

——**O. 47, R. 2**—*Applicability—Revenue Courts —Power of successor-in-office to review order of predecessor.*

Rule 2 of O. 47, C. P. Code, quite clearly applies as much to the Revenue Courts as to Civil Courts; and therefore, subject to the exceptions mentioned in the rule, it is not open to a successor to entertain an application for review of an order of his predecessor in office. (*Drake Brockman, S.M. and Knox, J.M.*) TRIBENI PRASAD TEWARI *v.* JAGMOHAN. **1936 R.D. 320.**

——**O. 47, R. 2**—*Application for review on ground of mistake of law—If can be entertained by successor of Judge.*

An application for review on the ground that there is a mistake of law on the face of the record could not be entertained by the successor of the Judge who made the order. (*Nasim Ali and R.C. Mitter, JJ.*) ABDUL JABBAR PALWAN *v.* AZIZAR RAHMAM MEA. **172 I.C. 682=10 R.C. 406=67 C.L.J. 129=41 C.W.N. 893=A.I.R. 1937 Cal. 425.**

——**O. 47, R. 2**—*Error apparent on face of record—Successor of Judge—Power of review.*

An application for review based on an error apparent on the face of the decree can be presented to the successor of the Judge who passed the decree, but one based on an error apparent on the face of the record but not on the face of the decree, can only be made to the Judge who passed the decree. An error on the part of the Judge in allowing interest on a certain sum without its being claimed by the party, is not an error apparent on the face of the decree, and an application for review presented to the successor of the Judge who passed the decree is, therefore, incompetent. (*Srivastava, Ag.C.J. and Zia-ul-Hasan, J.*) BRIJ KISHORE *v.* LACHMI NATH. **13 Luck. 112=166 I.C. 459 (2)=9 R.O. 323=1937 O.L.R. 31=1937 O.W.N. 80=A.I.R. 1937 Oudh 267.**

——**O 47, R. 3**—*Application for review—Copy of order sought to be reviewed—If should be filed —Affidavit—If necessary.*

Under O. 47, R. 3, it is not necessary to require a petitioner for review to file a copy of the order sought to be reviewed, as the application is made in the same Court and the previous order is on its own records. Nor does the law require that an application for review should invariably be accompanied by an affidavit. (*Tek Chand, J.*) JOWAND SINGH *v.* ALA SINGH. **175 I.C 42=10 R. L. 662=39 P.L.R. 1046=A.I.R. 1938 Lah. 295.**

——**O. 47, R. 3**—*Revi w—Application not accompanied by copy of order sought to be reviewed —If bad for material irregularity—Omission—If fatal—Procedure.*

An application for review cannot be said to be bad for material irregularity on the ground that no copy of the order sought to be reviewed is filed along with the application. The omission to file a copy of the order is not fatal and when the Court accepts the application without a copy of its order, it may be taken as dispensing with the same. (*Darling, S.M. and Bomford, J.M.*) BAL-

C. P. CODE (1908), O. 47, R. 4.

WANTI *v.* BADAL. 1938 AW.R. (B.R) 115=1938 R.D. 184.

——O. 47, R. 4—Ex parte *order allowing review—Application to set aside—Applicant found avoiding service of notice—Application, if can be granted.*

An application for setting aside an *ex parte* order allowing a review application, cannot be granted when the applicant is found to have deliberately avoided service of the notice served upon him in respect of the hearing of the application for review. (*Nanavutty and Zia-ul-Hasan, JJ.*) SRI MAN NARAIN SINGH *v.* KAPURTHALA ESTATE. 1937 O.W N. 497.

——O. 47, R. 4—*Scope of—Powers of Court under.*

O. 47, R. 4 describes what the Court should do when it is satisfied that there either is or is not sufficient ground for a review. If it is of opinion that there is not sufficient ground it will reject the application under R. 4 (1); if it is of opinion that there is sufficient ground then it will grant it under certain provisos. The fact that the Judge issued notices to the other side does not preclude him from rejecting the application under R 4 (1). (*Spargo, J.*) ESHAC DUTT SINGH *v* JAMUNA SINGH. 189 I.C. 570=13 R.R. 44=A.I.R. 1940 Rang. 144.

——O. 47, R. 4 (2) (a)—'*Opposite party*'—Pro forma *defendant—Proceedings* ex parte *against him throughout—Notice of review to him—If necessary.*

In a suit by some reversioners for setting aside an alienation, a certain reversioner was made a *pro forma* defendant in the suit He however took no interest in the litigation and all the proceedings were *ex parte* against him from the very beginning. His interest was sufficiently guarded by one of the plaintiffs reversioners. The suit was decreed but on the application for review of the judgment, the suit was dismissed. On appeal by the plaintiff against the order granting review, in which the *pro forma* defendant joined as appellant, it was contended by the *pro forma* defendant that notice to him was necessary before the review was granted.

Held, that the *pro forma* defendant could not under such circumstances come within the meaning of 'opposite party' in O. 47, R. 4 (2) (*a*), and therefore notice to him before the granting of the review application was not necessary. (*Jai Lal, J.*) GANDU *v.* MT. NASIBO. 177 I.C. 732=11 R.L. 377 (1)=A I.R 1938 Lah. 22.

——O. 47, R. 4 (2) (b)—"*Strict proof*"—*Meaning of.*

The phrase "strict proof" does not refer to the sufficiency of proof, but only to the fact that formal proof is required, derived from anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. (*King, J.*) MUTHUSWAMI NAICKER *v.* CHIDAMBARAM CHETTIAR 49 L W. 430=1939 M.W.N. 406=A.I.R. 1939 Mad 289.

——O 47, R. 7—*Appeal—Order granting review on ground of error apparent on face of record—Appealability.*

An order granting an application for review on the ground that there was an error in the judgment apparent on the face of the record cannot be successfully attacked in appeal, because the scope of the appeal is a limited one. Such an order does not fall under any of the grounds mentioned in O. 47, R. 7. (*Fazl Ali and James, JJ.*) KESHAB PRASAD MANDAL *v* JANESHWAR PRASAD MANDAL. 5 B.R. 580=11 R.P 588=181 I.C. 455.

C. P. CODE (1908), Sch. II.

——O 47, R 7—*Order allowing review—Non-compliance with O. 47, R. 3—If a ground of appeal.*

An order allowing an application for review is not appealable on the ground that the application was not in compliance with R. 3 of O 47. An appeal can lie only on the grounds mentioned in R. 7. (*Darling, S.M and Bomford, J.M.*) BALWANTI *v* BADAL 1938 R.D. 184=1938 A.W.R. (B.R.) 115.

——O. 47, R. 7—*Order granting review—Appeal when competent.*

When a review is granted an appeal is permissible only on the specified grounds and they are if the order contravenes the provision of R. 2 or R. 4 of O. 47 or if the application for review is barred by limitation. (*Mohamed Noor and Varma, JJ.*) JADUNANDAN SINGH *v.* SHANKAR SAHU. 162 I.C. 992=8 R.P. 602=17 Pat L T. 766=1936 P.W N. 240=A.I.R 1936 Pat. 310.

——O. 47, R 7—Scope—If controls S. 247, Agra Tenancy Act—Orders on review by Assistant Collector, Second class—Appeal—If subject to restrictions in O. 47. R. 7. *See* AGRA TENANCY ACT, S. 247 1935 R.D. 257.

——O 47, R. 7—Scope—If restricts right of appeal under O. 43, R. 1 (*w*)—Order granting review for sufficient ground—Appeal. *See* C. P. CODE, O. 43, R. 1 (*w*). 1939 P.W N. 719.

——O. 52, R. 66 (Rangoon)—Extension of time for furnishing security—Power of High Court. *See* C. P. CODE, O 45, R. 7. 1939 Rang.L.R. 668 (F.B.)

——Sch II—Applicability to execution proceedings. *See* C. P. CODE, O. 21, R. 2. 42 Bom. L.R. 867.

——Sch. II—*Applicability—Execution proceedings—Reference to arbitration and award—Competency—Decision by Court—Appeal.*

The provisions of Sch II, are not applicable to applications for execution of decrees. A Court executing a decree has therefore no jurisdiction to accept a reference to arbitration or to make an order on it; and an award, if any, made on such reference either by the arbitrators or by the Court as umpire on difference between the arbitrators is illegal and without jurisdiction. The decision of the Court cannot be regarded as one by an umpire so as to be non-appealable; but it must be held to be a decision of the executing Court appealable under S. 47, C. P. Code (*Rangnekar, J.*) NARAYAN RAMCHANDRA *v.* DHONDIBA TUKARAM. I.L. R. 1937 Bom. 144=167 I.C 750=9 R.B. 338=38 Bom L.R. 1303=A.I.R. 1937 Bom. 111.

——Sch II—Applicability— Objection under O. 21, R. 58. *See* C. P. CODE, O. 21, R. 58. 1936 A.W R 251=1936 A.L.J. 142.

——Sch. II—Applicability—Presiding officer of a Court appointed as an arbitrator *See* ARBITRATION—REFERENCE. 1937 O.W.N. 223=A.I R. 1937 Oudh 224

——Sch. II—*Reference to arbitration—Death of a party to—Effect of—English law, applicability—Adding representatives when necessary—Award without such addition—Legality.*

The rule of English Common Law that a submission to arbitration stands revoked by the

death of a party is not applicable to India. In every case it is a question of the intention of the parties, as to whether it is intended that they alone or their representatives also are to be bound by the decision. Though if a party dies before the completion of the hearing, it would be necessary to make the representatives, parties to the submission, where the death occurs after the termination of the hearing and just before the delivery of the award, the delivery of the award without the addition of the representatives, is none the less binding on the representatives and is quite valid. (*Thomas, C. J. and Zia-ul-Hasan, J.*) BENI DATT *v.* BAIJ NATH. **174 I.C. 369=1938 O.W.N. 480=1938 O.L.R. 186=10 R.O. 255=1938 O.A. 341=A.I.R. 1938 Oudh 125.**

——**Sch. II, Para. 1 and O. 32, R. 7**—*Agreement to refer suit to arbitration—Minor party—Omission to obtain leave of Court—Award, if void or voidable—Right of minor to assail award in suit itself.*

Para. 1 of Sch. II, C. P. Code, is subject to the provisions of O. 32, R. 7. Where one of the parties to the suit is a minor, the leave of the Court for the agreement to refer the suit to arbitration should be obtained before an application for an order of reference is made. Such leave cannot be granted by the Court after the award has been delivered. The omission of the next friend or the guardian *ad litem* of the minor to obtain leave of the Court does not render the order of reference and the award void, but only voidable at the option of the minor as against all the parties. Such an order of reference and the award can be assailed by the minor either in the suit itself or by a separate suit. (*Sulaiman, C.J., Iqbal Ahmad and Harries, JJ.*) MARIAM *v.* AMINA. **I.L.R. (1937) All. 317=167 I.C. 99=9 R.A. 479=1936 A.L.J. 1333=1937 A.L.R 130=1936 A.W.R. 1223=A.I.R. 1937 All. 65 (F.B.).**

——**Sch. II, Para. 1**—*Applicability—Execution proceedings.*

Sch. II does not apply to execution proceedings. (*Mir Ahmad, J.*) JINAHUDDIN *v.* SARFRAZ KHAN. **178 I.C. 255=11 R. Pesh. 52=A.I.R. 1938 Pesh. 80.**

——**Sch. II, Para. 1**—*Arbitration—Award—Validity*—Ex parte *defendant not signing reference*

Where one of the defendants who remained *ex parte* did not sign the reference to arbitration, the very foundation of a reference to arbitration is absent and hence there is no valid submission. An award on such a reference is equally invalid. (*Hamilton and Yorke, JJ.*) GHAFOORAN *v.* ABDUL HAMID. **174 I.C. 766=1938 O.W.N. 475=1938 O.L.R 215=10 R.C. 275=1938 O.A. 367=A.I.R. 1938 Oudh 154.**

——**Sch. II, Para. 1**—*Minor party—Reference by guardian—Leave of Court—Whether necessary.*

O. 32, R. 7, C. P. Code, does not control Art. 1 of the Second Schedule. It is not therefore necessary for the guardian of a minor party to obtain the express leave of the Court before agreeing to a reference to arbitration being made by the Court. 36 All. 69 (F.B.), Foll. (*Allsop and Ganga Nath, JJ.*) HANUMAN SINGH *v.* RAM LAKHAN SINGH **160 I.C. 868=8 R A 662=1936 A.W.R. 150=1936 A.L.J. 53=1936 All.L.R. 179 =A.I.R. 1936 All. 740.**

——**Sch. II, Para. 1**—*Parties interested—Consent of all not given—Validity of reference.*

Where the agreement to refer the matter to arbitration, which is embodied in the statement made by the parties counsel, was not supported by the consent of several parties who were interested, the reference is invalid and could not give the Court jurisdiction to refer the matter to arbitration. (*Mulla, J.*) ABDUL WAHEED KHAN *v.* RAM BUX. **179 I.C. 825=11 R A. 391=1938 A W.R. (H.C.) 691=1938 A.L.J. 1044=A.I.R. 1939 All. 49.**

——**Sch. II, Para. 1**—*Parties interested*—Ex parte *defendant—Reference without joinder of—Validity—Award and decree—If void.*

A defendant in a suit against whom an *ex parte* order has been passed is none the less a party "interested" within the meaning of para. 1, Schedule II, C. P. Code. An order of reference to arbitration to which such *ex parte* defendant has not agreed is illegal and without jurisdiction. The award made on such a reference is absolutely void and not merely voidable; the decree made upon such award is also equally void, and a nullity. (*Weston.*) DEO KARAN *v.* SUGAN CHAND. **1935 A.M.L.J. 89.**

——**Sch. II, Para. 1**—*"Parties interested"*—Pro forma *party.*

Where a person is merely a *pro forma* party to the suit and has no dispute either with the plaintiff or defendant he is not a party interested in suit within the meaning of Sch. II, Para. 1 and hence his agreement to reference is not necessary. (*Young, C.J. and Tek Chand, J.*) RAMINDER SINGH *v.* MONINDER SINGH. **A I.R. 1940 Lah. 186.**

——**Sch. II, Para. 1**—Private reference in pending suit—Award, if compromise. *See* C. P. CODE, O. 23, R. 3. **1939 Rang.L.R. 280 (F.B.).**

——**Sch. II, Para. 1**—Private reference to arbitration in pending suit—Suit dismissed—Award of arbitrator—Validity—Suit on award—Maintainability. *See* ARBITRATION—AWARD. **1937 Rang.L.R. 225.**

——**Sch. II, Para. 1**—*Reference—One of defendants not joining in—Validity.*

A dispute was referred to arbitration; but one of the defendants did not join in the reference. An award was passed making the person joining the reference liable for the amount in dispute. He contended that the reference was *ab initio* void as the other person had not joined the reference.

Held, that the reference was not invalid by the other defendant not joining the reference and that the award was binding on the person party to the reference and could not be interfered with in revision. (*Almond, J. C.*) MIAN RAHMATULLAH *v.* SAYED ALAM SHAH. **177 I.C. 285=11 R. Pesh. 19=A.I.R. 1938 Pesh. 47.**

——**Sch. II, Paras. 1 and 3**—*Reference to arbitration by appellate Court—Award for amount in excess of its pecuniary jurisdiction—Validity of arbitration proceedings.*

Where an appellate Judge properly seised of the appeal and competent to make the reference to arbitration has made reference to arbitration, the mere fact that the award directed that the sum payable by one party to the other was more than the pecuniary jurisdiction of appellate Court would not retrospectively, render all previous proceedings invalid. (*Young, C.J. and Tek Chand*

C. P. CODE (1908), Sch. II, Para. 1.

J.) RAMINDER SINGH *v.* MOHINDER SINGH. **A.I R. 1940 Lah. 186.**

——**Sch. II, Para. 1**—Scope—If controlled by O. 32, R. 7. *See* C. P. CODE, O. 32, R. 7. **I.L.R. (1940) Kar. 327.**

——**Sch. II, Para. 1**—Scope—If subject to O. 32, R. 7—Suit for partition—Reference to arbitration—Minor defendant— Omission to obtain leave of Court to enter into agreement of reference—Effect on award and decree based on award. *See* C. P. CODE, O. 32, R. 7. **20 Pat.L.T. 170.**

——**Sch. II, Para. 1**—Scope—Suit under S. 92—Reference to arbitration—Legality of—Suit regarding private rights to property—Issue raised as to public rights—Arbitration—Reference to—Jurisdiction of arbitrators—Declaration in award that property is trust property—If illegal—Scheme for administration—Jurisdiction to frame. *See* C. P. CODE, S. 92. **30 S L.R. 478.**

——**Sch. II, Para. 3 and O. 9, R. 8**—*Power of Court after reference—Matter referred to arbitration—Day fixed for umpire's report—Plaintiff absent on that date—Suit if can be dismissed for default.*

Where a matter is referred to arbitration, the Court has only to proceed according to the provisions of Sch. 2, or, in the alternative; to supersede the arbitration and then call on the parties and act under the sections and rules embodied in the C.P. Code. The matter in suit was referred to arbitrators, and upon difference of opinion between the arbitrators, the parties agreed to abide by the opinion of an umpire. A day was fixed for the umpire's report but on that day the plaintiff was absent and so the suit was dismissed for default.

Held the Court could not dismiss the suit for default under O. 9, R. 8 on a day when the umpire was expected to file his report. (*Mir Ahmad, A.J.C.*) MATHRA DAS *v.* KANSHI RAM. **168 I.C. 866=9 R. Pesh. 136=A.I.R. 1937 Pesh. 49.**

——**Sch. II, Para. 3**—Scope—If controls O. 23, R. 1—Reference to arbitration pending—Permission to withdraw suit—Jurisdiction to grant. *See* C.P. CODE, O. 23, R. 1. **1937 A. W.R. 1083=1937 A.L.J. 1163.**

——**Sch. II, Para. 3 (2)**—*Reference to arbitration—Jurisdiction of Court to try suit.*

After a matter is referred to arbitration, the Court has no jurisdiction left to try the suit without superseding the arbitration or without setting aside the award on any of the grounds set forth in para. 15 (1) of Sch. II, C.P. Code. An order of Court setting aside an award and taking cognizance of the suit without coming to a finding whether or not any of the grounds specified in para. 15 (1) existed but merely on the ground that one of the parties applied to have the award set aside and the other did not object to it, offends both against that para. and para. 3 (2) of Sch. II and is consequently illegal. (*Thomas and Zia-ul-Hassan, JJ.*) BACHCHA LAL *v.* MUNNU LAL. **13 Luck. 609=171 I.C. 172=1937 O.L.R. 524=10 R.O. 90=1937 O.W.N. 1002=A.I.R. 1937 Oudh 507.**

——**Sch. II, Para. 4**—*Difference of opinion between arbitrators—Power of Court to appoint umpire—Deed of reference filed by parties not providing for such contingency.*

The Court has no jurisdiction to appoint somebody as an umpire if the arbitrators differ, when the deed of reference to arbitration filed by the parties makes no provision for this contingency but expressly states that the Court should then decide the matter. (*Dalip Singh, J.*) RAMZANI *v.* NUR AHMADI. **189 I.C. 466=42 P.L.R. 124=13 R.L. 77=A.I.R. 1940 Lah. 276.**

C. P. CODE (1908), Sch. II, Para. 5.

——**Sch. II, Para. 5**—*Applicability—Statement by a referee—Agreement to abide by statement of specified person.*

The provisions of Sch. II, para. 5, C.P. Code, have no application to a case where parties agree to abide by the statement of a specified person and he makes such a statement in Court. Para. 5 applies solely to the procedure of arbitration under Sch. II, S. 20 of the Evidence Act would apply to such a reference and as such the statement made would be binding on the parties as an admission. (*Bennet and Varma, JJ.*) UMRAI ALI KHAN *v.* INTIZAMI BEGAM. **180 I.C. 364=11 R.A. 456=1939 A.W.R. (H.C.) 7=1939 A. L.J. 1=A.I.R. 1939 All. 176.**

——**Sch. II, Para. 5**—*Power of Court—Parties to suit agreeing to refer dispute to two arbitrators—In case of difference between arbitrators, award of umpire agreeing with that of any one of arbitrators to be final—One arbitrator refusing to act—Court ordering arbitrator and umpire to proceed with matter—Jurisdiction—Award by arbitrator and umpire—Court accepting award and passing decree—Legality.*

The parties to a suit agreed to refer their dispute to two arbitrators. It was also agreed that in case of difference between the arbitrators, the award of an umpire, agreeing with that made by any of the arbitrators should be final. One of the arbitrators refused to act as an arbitrator. The defendant applied to the Court to order the umpire to proceed with the matter, and the Court passed an order to that effect although objected to by the plaintiff. In pursuance of that order the other arbitrator and the umpire proceeded with the inquiry and then the other arbitrator passed an award against the plaintiff and at the foot of that award the umpire made a note that he agreed with the award. This award was accepted by the Court and a decree followed.

Held, that it was not open to the Court to refer the dispute to the other arbitrator and the umpire when one of the arbitrators had refused to act. It was open to the Court to substitute another arbitrator in place of the one who refused to act. The umpire could only be called in to act as an umpire when the two arbitrators made differing awards and not before.

Held also that it was not necessary for the plaintiff to raise again the objection to award as he had done so before the order referring that matter to another arbitrator and the umpire was passed. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) KISHNOMAL HUNDOMAL *v.* WAPARIAMAL JETHOMAL. **170 I.C. 487=10 R.S. 62=A.I.R. 1937 Sind 171.**

——**Sch. II, Paras. 5 (1) (b) and 19**—*Parties agreeing to get dispute decided by certain named persons—One of arbitrators unwilling to*

C. P. CODE (1908), Sch. II, Para. 5.

act—Court if competent to replace him by appointing another.

An agreement to have a dispute settled by one or more individuals is one thing; an agreement to go to arbitration rather than to litigate in the Courts is quite another. Where it is at all possible, if parties desire arbitration, they should be as free as possible under the guidance of the Court to have their disputes settled by arbitrators they chose themselves. So it is primarily the original intention of the parties which should be cherished by the Court. Hence where in a dispute regarding certain land, the parties agree that the dispute should be decided by certain named persons, the Court is not entitled to appoint another in the event of one of arbitrators being unable or unwilling to act. (*Cunliffe and Henderson, JJ.*) RAJANI KANTA KARATI *v.* PANCHANAN KARATI. **I.L.R. (1937) 2 Cal. 434=41 C.W.N. 981=172 I.C. 243=10 R.C. 354=A.I.R. 1937 Cal. 388.**

———**Sch. II, Para. 5 (1) (b) (ii)**—*Refusal to act—What amounts to—Arbitrator returning papers to Court on ground that one of the defendants did not wish him to act and on account of want of leisure in future to act—If "refuses to act".*

The mere fact that an arbitrator returns the papers to the Court intimating that he was doing so as one of the parties did not wish him to act and also because he had no leisure in future to carry out the task, does not amount to flat refusal by him to act, especially when subsequently he agrees to carry on the arbitration on a requisition from the Court. The arbitrator in such a case cannot be considered to have divested himself of his character as an arbitrator, and an award subsequently made by him cannot be attacked on that ground. (*Harries, J.*) KANCHEDDMAL *v.* GANGA PRASAD. **1937 A.L.J. 651=1937 A.W.R. 589=10 R.A. 271=171 I.C. 398=1937 A.L.R. 837=A.I.R. 1937 All. 582.**

———**Sch. II, Para. 8**—*Extension of time for making award—Inference from conduct of parties.*

An arbitrator is a domestic tribunal and the parties who refer their disputes to him for decision can by mutual consent, which can be inferred from their conduct, acquiesce in the proceedings of the arbitrator who may submit his award beyond the date fixed by the Court for returning the same. Such a consent would be inferred from the fact that the parties conducted the case and took a willing part in the proceedings before the arbitrator, though the date fixed for the filing of the award had expired. 50 I.C. 52 Foll. (*Agha Haider, J.*) ASA *v.* MT. BHURAN. **163 I.C. 380=9 R.L. 10=38 P.L.R. 725=A.I.R. 1936 Lah. 466.**

———**Sch. II, Para. 8**—*Filing of award—Power of Court to extend time after award had been made.*

Under Para. 8 of Sch. II, C.P. Code, the Court has power to extend time for the filing of the award even after the award had actually been made. (*Costello and Panckridge, JJ.*) JETHALAL LAXMICHAND SHAH *v.* AMRITLAL OJHA. **I.L.R. (1938) 2 Cal. 482=180 I.C. 346=11 R.**

C. P. CODE (1908), Sch. II, Para. 8.

C. 673=42 C.W.N. 883=A.I.R. 1939 Cal. 260.

———**Sch. II, Para. 8**—*Power of Court—Award—Application for execution of time—Order extending time made after award—Validity.*

Para. 8, Sch. II, C.P. Code, is wide enough to cover extension of time after the making of the award; and an application for extension of time put in even after the award is made can be granted.

The award in an arbitration was not made on the prescribed date, and extensions of time were granted by the Court. The award was actually written on 26—8—1936, but the order of Court allowing the last extension of time was made only on 27—8—1936 though the application for extension of time was put in before the award was made.

Held, that the Court was competent to pass the order for extension of time, and the order related back to the date on which the application for the extension of time was made. (*Horwill, J.*) CHOKKAPPA CHETTIAR *v.* SANTHABANA ROWTHER. **1940 M.W.N. 988=52 L.W. 537=(1940) 2 M.L.J. 481.**

———**Sch. II, Para. 8**—*Scope—Arbitration in pending suit—Reference—Order providing for supersession in anticipation in case award not filed within fixed time—Legality—Award not made in time—Disposal of suit—Legality—Setting aside ex parte decree—Procedure.*

R. 8 of the second Schedule to the Civil Procedure Code, contemplates that the Court must be in a position as and when occasion arises for sufficient cause to allow further time for the making of the award. The Court has no power to deprive itself once for all of the power to exercise this discretion by an order made at the time of reference. An order of supersession should be made only at the expiry of the time fixed for the filing of the award and not at the stage of the reference itself. An order passed by the Court in the middle of the hearing of a suit making a reference, and providing in anticipation that if the award is not filed by a particular date, the trial must go on that day, is not one in accordance with law. When therefore, for any reason, the award is not made or filed on the specified date, the Court acts illegally and without jurisdiction in disposing of the suit *ex parte*, for default of appearance on the part of the defendant. The remedy of the defendant in such a case is strictly an application under S. 151, C.P. Code, bringing it to the notice of the Court that its procedure was unauthorised and not by way of an application under O. 9, R. 13, C.P. Code. But the fact that an erroneous procedure is adopted should not stand in the way of the matter being set right; and when the lower Courts refuse to set aside the *ex parte* decree the High Court will interfere in revision and set the matter right on the ground of illegality and want of jurisdiction, (*Varadachariar, J.*) NARAYANA KANAKAPILLE *v.* SAVITRI AMMA. **166 I.C. 66=9 R.M. 335=1936 M.W.N. 1152=44 L.W. 608=A.I.R. 1937 Mad. 9=71 M.L.J. 648.**

———**Sch. II, Para. 8**—*Time not fixed—Legality.*

Where the Court leaves it to the discretion of the arbitrator to complete the award within a

reasonable time and he does so, it cannot be said that there has been substantial miscarriage of justice merely because the Court did not fix any time within which the award was to be submitted. (*Baguley and Mosley, JJ.*) MA NGWE *v.* U MIN SIN. **163 I.C. 590=9 R.R. 29=A.I.R. 1936 Rang. 240.**

———Sch. II, Para. 10—*If mandatory.*

Para. 10 of Sch. II, C.P. Code, is mandatory; and if notice of the filing of the award is not given to the parties, no decree could be passed by the Court on the basis of the award. (*Ghose and Mukherjea, JJ.*) MAIRAMJAN BIBI *v.* ASARADDI. **43 C.W.N. 924.**

———Sch. II, Para. 10—*Parties accepting award—Refusal to file by Court—Propriety.*

When parties accept an award and apply to the Court for filing it, the Court should not refuse to file it basing its view on some correspondence between the Registrar of the High Court and the District Judge, which it is not entitled to look at. (*Monroe, J.*) KANSHI RAM *v.* SAMPURAN SINGH, **166 I.C. 623 (1)=9 R.L. 403 (1)=38 P.L. R. 318.**

———Sch. II, Para. 12—*Jurisdiction of arbitrators—Property not referred to in plaint but mentioned in written statement—If subject-matter of suit—Judge raising issues as to—Effect—Jurisdiction of arbitrators to decide questions as to such property.*

The jurisdiction of arbitrators to make an award on a reference must be limited to the subject-matter in dispute between the parties, and the subject-mater in dispute, so far as property in suit is concerned, must be property mentioned in the plaint in respect of which relief is claimed. The fact that the defendant in his written statement raises issues as to other properties and the fact that the Court apparently raises issues covering not only the property mentioned in the plaint but also property referred to in the written statement will not give the arbitrators jurisdiction to decide as to that property which is not the subject-matter of the suit at all. The decision of the arbitrators must relate only to the property specifically mentioned in the plaint. (*Davies, J.C. and Mehta, A.J.C.*) GANGARAM *v.* KESHAVDAS. **30 S.L.R. 478=170 I.C. 102=10 R.S. 32=A.I.R. 1937 Sind 174.**

———Sch. II, Para. 13—*Scope—Power of Court—Fees of arbitrator—If can be awarded as costs—C.P. Code, S. 35—C.P. Code, S. 115—"Case decided"—Order awarding fees to arbitrator—Revision—Interference.*

The words of Para. 13 of Sch. II, C.P. Code, are very wide, and allow the Court to make such order as it thinks fit respecting the costs of arbitration if any question arises respecting such costs. A provision relating to arbitrator's fees is most often made in the award itself and the fees so provided would be deemed part of the costs of arbitration. But even if the award contains no sufficient provision respecting such fees, and though the award may be set aside, the Court has power to award the arbitrator's fees as part of the costs of the arbitration and as costs of the proceedings incidental to the suit under S. 35, C.P. Code. An order awarding a sum of money as fees to an arbitrator in arbitration proceedings arising out of a reference made through Court is a case decided within S. 115, C.P. Code, and a revision would lie to the High Court, though the latter would not interfere unless it involves any question of any irregularity in jurisdiction, *e.g.*, when the amount awarded is very excessive. (*Davis, J.C. and Tyabji, J.*) TAKHITRAM *v.* KISHINCHAND. **I.L.R. (1940) Kar. 34=A.I.R. 1940 Sind 190.**

———Sch. II, Paras. 14 and 15—*Error in law—Interference.*

Where the parties considering that arbitrators' knowledge of law is sound have chosen their tribunal to decide their disputes outside the Courts, the Courts are very reluctant to interfere with the decision of the tribunal and will only do so in cases mentioned in Sch. II, paras. 14, 15 and 16, C.P. Code. The mere fact that the tribunal has erred in law is no ground for interference. (*Derbyshire, C.J. and Nazim Ali, J.*) RAGHUPATHI DUTT *v.* RAM GOPAL DUTT. **187 I.C. 80 =12 R.C. 545=A.I.R. 1939 Cal. 557.**

———Sch. II, Para. 14—*Validity of award—Omission of direction by arbitrator regarding costs.*

Costs are a matter for decision by the Court and the omission of a direction by the arbitrator regarding costs does not vitiate the award. (*Young, C.J. and Tekchand, J.*) RAMINDER SINGH *v.* MOHINDER SINGH. **A.I.R. 1940 Lah. 186.**

———Sch. II, Para. 14—*Validity of award—Relief given different from what either party claimed.*

Where an award has clearly dealt with the subject-matter of the suit referred, the mere fact that the relief given by the award is different from what either party claimed does not make the award invalid on the ground that it went beyond the scope of the suit. (*Young, C.J. and Tek Chand, J.*) RAMINDER SINGH *v.* MOHINDER SINGH. **A. I.R. 1940 Lah. 186.**

———Sch. II, Para. 14 (a)—*Applicability—Matter not referred separable—Power of Court to remit award.*

Para. 14 (*a*) of Sch. II, C.P. Code, is only applicable when the matter not referred to arbitration but determined by the Arbitrator cannot be separated without affecting the determination of the matters referred. When such matter can be separated, the Court has no power to remit the award for re-consideration. (*Norman, I.C. S.*) OULAD HUSSAIN *v.* ASNAD KHAN. **1936 A. M.L.J. 55.**

———Sch. II, Para. 14 (c)—*Award not signed by arbitrators on same date—Validity.*

The mere fact that one of the arbitrators signed one day later cannot make the award illegal, when the decision of the arbitrators was arrived at after joint deliberation and the award was prepared in accordance with the said decision. (*Derbyshire, C.J. and Nasim Ali, J.*) MUKUNDALAL PAKRASHI *v.* PROKASH CHANDRA PAKRASHI. **70 C.L.J. 43=A.I.R. 1939 Cal. 739.**

———Sch. II, Para. 14 (c)—*Scope—Objection to legality of award apparent upon face—What amounts to—Award in arbitration in favour of unregistered firm—Application to file—Maintainability—Partnership Act, S. 69 (1).*

C. P. CODE (1908), Sch. II, Para. 14.

Sch. II, C.P. Code, is exhaustive, and no Court has jurisdiction to go beyond the provisions of this schedule in order to determine whether an award made in an arbitration on reference in accordance with the provisions of the schedule can be filed or not. An award made in favour of an unregistered company can be filed on the application of that company, and such an application is not barred under S. 69 (1) of the Partnership Act. The fact that it is in favour of an unregistered company does not make the award illegal on the face of it within the meaning of para. 14 (*c*) of Sch. II, C.P. Code. (*Wort and Manohar Lal, JJ.*) SATISH CHANDRA CHAKRAVARTY *v.* P. N. DAS & Co. **16 Pat. 712=1938 P.W.N. 228=175 I.C. 468=4 B.R. 587=10 R.P. 624 =19 Pat.L.T. 549=A.I.R. 1938 Pat. 231.**

———**Sch. II, Para. 14 (c)**—*Supplemental award—Validity.*

A second or supplemental award given by the arbitrators in pursuance of a reservation made in the first award is not illegal, and it cannot be said to have been passed by the arbitrators at a time when they were *functus officio*. (*Derbyshire, C.J. and Nasim Ali, J.*) MUKUNDALAL PAKRASHI *v.* PROKASH CHANDRA PAKRASHI. **70 C.L.J. 43=A.I.R. 1939 Cal. 739.**

———**Sch. II, Para. 14 (c)**—*Taking of an erroneous view of law by arbitrator—When renders an award liable to be set aside.*

An award of an arbitrator cannot be set aside merely because he has taken an erroneous view of the law. What he must not do is to lay down an erroneous proposition of law as being the true proposition of law and proceed to decide the rights of the parties on the foundation of this erroneous proposition of law. Where the parties in a case entrust the decision of the dispute between them to an arbitrator giving the fullest rights to the arbitrator, the arbitrator is entitled to decide the dispute between the parties on his own views of right and wrong and he need not follow the ordinary accepted views of law on the subject. (*Zia-ul-Hasan and Yorke, JJ.*) PHOOLCHAND *v.* MOOLCHAND. **189 I.C. 344=1940 O.L.R. 446=13 R.S. 58=1940 A.W.R. (C.C.) 327= 1940 O.A. 629=1940 O.W.N. 670.**

———**Sch. II, Para. 15**—*Award—Legality—Reference to arbitration pending criminal proceedings—Prosecution withdrawn by District Magistrate on application of parties before award—Reference and award—If illegal.*

A reference was made to arbitration in certain disputes between parties, but criminal proceedings were pending at the time of reference between some of the parties for non-compoundable offences and on application by a party, the District Magistrate withdrew the prosecution before an award was made. On an objection by a party that the award was illegal, one of the considerations being stifling of prosecution.

Held, that as an independent and responsible authority, such as a District Magistrate, had intervened and discharged the duty imposed upon him by law, it could not be said that the fact that he acted on the request of one of the parties to a reference made that reference or the award upon it unlawful on the ground that the consideration

C. P. CODE (1908), Sch. II, Para. 15.

was immoral or against public policy. (*Davies, J.C. and Mehta, A.J.C.*) KESSOMAL *v.* GIANCHAND. 31 S.L.R. 8=**169 I.C. 479=10** R.S. 5= **A.I.R.** 1937 Sind 156.

———**Sch. II, Para. 15**—Award—Order setting aside—Revision, if lies. *See* C. P. CODE, S. 115 AND SCH. II, PARA. 15—AWARD. **1939 O.W.N. 751.**

———**Sch. II, Para. 15**—Award, setting aside of and arbitration superseded—Revision, if lies. *See* C. P. CODE, S. 115 AND SCH. II, PARA. 15. **1939 O.W.N. 716.**

———**Sch. II, Paras. 15 and 16**—*Construction—Decree based on award—Appeal on ground that decree is invalid—Maintainability.*

The words of para. 16 of Sch. II, to C. P. Code, are perfectly clear and it would be doing violence to the plain language and the obvious intention of the Code if it were held that an appeal lies from a decree passed upon a judgment pronounced according to an award except in so far as the decree may be in excess of or not in accordance with the award. Paras. 14 and 15 of Sch. II, C. P. Code, enable the Court to which an award is submitted to refuse to give effect to the award if in its opinion it is either void, or invalid or illegal. If, however, the award is accepted, it means that in the opinion of the Court it is neither void nor invalid, and the opinion of the Court cannot be challenged in appeal. Para. 16 merely gives effect to the principle of finality of awards, and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one Court only namely, the Court through whom reference is made to arbitration, and not that Court and an appellate Court. No appeal can therefore be maintained from the decree based on an award on the ground that the award upon which the decree is based is invalid. (*Fazl Ali and Varma, JJ.*) RADHEY LAL *v.* KANHAI LAL. **18 Pat. 193=1939 P.W.N. 591=6 B.R. 88=185 I.C. 52=12 R.P. 287=A.I.R. 1939 Pat. 526.**

———**Sch. II, Para. 15**—*Construction—"Or being otherwise invalid"—Meaning of—Scope of enquiry—Objections to validity of reference—If competent.*

There is nothing in the words "or being otherwise invalid" themselves or in their context to limit their operations to cases where an award is invalid only on the ground of something done after the reference and not before or in the reference itself. The words "or being otherwise invalid" include within their meaning questions relating to the validity of a reference. Hence it is open to the trial Court in considering objections to an award under para. 15 of Sch. II to consider and decide objections raised to the validity of the reference. It makes no difference if thereby a Judge may find that his own order of reference is invalid or find that he must thereby reconsider any previous order he has passed on this question. It also makes no difference if thereby the Judge must decide questions which affect his own jurisdiction because his decision on questions of jurisdiction will be subject to revision or appeal on the principle that a Court cannot be the final Judge on the question of its own jurisdiction. (*Davis, J.C., Lobo and Weston, JJ.*) KISHINCHAND *v.* TAKHITRAM. **I.L.R. (1940) Kar. 22=183 I.C. 724=12 R.S. 75=A.I.R. 1939 Sind 241 (F.B.).**

C. P. CODE (1908), Sch. II, Para. 15.

———Sch. II, Para. 15—*Construction—"Otherwise invalid"—Arbitrator exceeding his powers.*

The words "or otherwise invalid" occurring in para. 15 are comprehensive enough to include all kinds of objections. Where the objection that the arbitrator exceeded his powers in drawing an award, is not taken before the Court passing the decree upon the award under para. 15 of Sch. II, a separate suit will not lie to set aside the decree on that ground. (*Bhide, J.*) MADHO RAM *v.* SITA RAM. **183 I.C. 79=12 R.L. 98 (1)=41 P. L.R. 380=A.I.R. 1939 Lah. 69.**

———Sch. II, Paras. 15 and 16—*Decree on award overruling objection to validity of reference—Appeal—Revision.*

The decision of the Court that made the reference to arbitration overruling the objection and passing a decree in accordance with the award cannot be challenged by an appeal or by an application in revision, for, at most that amounts to an error of law. But the order made by the Court, where it has acted illegally or with material irregularity in the exercise of its jurisdiction, can be challenged by way of revision, though not by way of appeal, whether the illegality or irregularity was committed before the reference to arbitration or after the receipt of the award. (*Sulaiman, C.J., Iqbal Ahmad and Harries, JJ.*) MARIAM *v.* AMINA. **I.L.R. (1937) All. 317=167 I.C. 99=9 R.A. 479=1936 A.L.J. 1333=1936 A.W.R. 1223=1937 A.L.R. 130=A.I.R. 1937 All. 65 (F.B.).**

———Sch. II, Para. 15—*Delay in pronouncing awards—Rights of parties.*

What is necessary in the case of arbitration is that once an arbitrator is appointed, the parties to the arbitration are entitled to insist that the arbitration should be proceeded with reasonable speed and if there is any unexplained unreasonable delay, the parties will be justified in revoking the reference, and if the award is given after long delay, they will be entitled to ask the Court not to file the award. Unreasonable delay on the part of the arbitrator amounts to legal misconduct. (*Puranik, J.*) KESHOLAL *v.* LAXMAN RAO. **1940 N.L.J. 393.**

———Sch. II, Para. 15—*Misconduct—Arbitrator hearing parties independently of each other with their consent—Award—If liable to be set aside.*

Where with the consent of the parties the arbitrator heard them independently of each other and in the absence of their respective solicitors, the arbitrator is not guilty of misconduct and irregularity and his award is not liable to be set aside. (*Costello and Lort Williams, JJ.*) BAIJ NATH *v.* BAJRANG LAL KAMALIA. **I.L.R. (1937) 2 Cal. 465=173 I.C. 816=10 R.C. 568=A.I.R. 1938 Cal. 166.**

———Sch. II, Para. 15—*'Misconduct'—Arbitrator not taking all the evidence produced by parties.*

An arbitrator who does not give any clear notice to the parties to produce their evidence before him and who does not take all the evidence that the parties want to produce, is clearly guilty of misconduct. (*Bhide, J.*) KANHAYA *v.* SHEO KARAN. **39 P.L.R. 582.**

———Sch. II, Para. 15—*Power of Court.*

C. P. CODE (1908), Sch. II, Para. 15.

Para. 15 of Sch. II of C. P. Code, does not provide for the Court setting aside an award in part only. The fact that the consequence of setting aside the award is an order superseding the arbitration is a strong indication that the whole award must be set aside. (*Norman, I.C.S.*) MAHOMED YUSUF *v.* AZIM ULLAH. **1939 A.M. L.J. 15.**

———Sch. II, Para. 15—*Reference to arbitration—Arbitrator, discovered to be indebted to one of parties—Reference, if can be superseded.*

A Court does not act without jurisdiction in passing an order superseding a reference to arbitration made by it on the ground that some of the arbitrators have since been discovered to be indebted to one of the parties, and proceeding with the trial of the suit, especially when its order is made without any protest from the parties. (*Dhavle, J.*) NANHA PRASAD SINGH *v.* JAGDAMBI SINGH. **179 I.C. 161=11 R.P. 330=5 B.R. 198 =A.I.R. 1939 Pat. 170.**

———Sch. II, Para. 15—*Scope—Award—Finding of misconduct—Procedure—Disallowing part of award and dismissal of suit—Propriety.*

If the Court finds that the award of the arbitrator has been arrived at by action which amounts to misconduct, the only course open to the Court is to set aside the award altogether. The Court is not empowered to sit in appeal on an arbitrator. It cannot disallow or set aside a part of it and pass an order dismissing the suit, it must supersede the arbitration and dispose of the suit on the merits. (*Norman, I.C.S.*) DAULA NATH *v.* GANESH MAL. **1936 A.M.L.J. 54.**

———Sch. II, Para. 15—*Scope—If exhaustive of grounds for setting aside an award.*

An arbitration award cannot be upset except on the specific grounds given in para. 15 of Sch. II, C. P. Code. If this is not done, it could not be avoided by raising a plea that it had become infructuous. (*Mehta, J. M.*). PARTAP *v.* BECHAN. **1940 R.D. 20=1940 A.W.R. (B.R.) 16.**

———Sch. II, Para. 15—*Scope—Objection to validity of reference.*

(Per *Sulaiman, C.J. and Harries, J. Iqbal Ahmad, J.* contra) :—An objection to the validity of reference to arbitration comes within the purview of para. 15 of Sch. II, C. P. Code. (*Sulaiman, C.J., Iqbal Ahmad and Harries, JJ.*) MARIAM *v.* AMINA. **I.L.R. (1937) All. 317=167 I.C. 99=9 R.A. 479=1936 A.W.R. 1223=1936 A.L.J. 1333=1937 A.L.R. 130=A.I.R. 1937 All. 65 (F.B.).**

———Sch. II, Para. 15—*Scope—Award—Validity—Suit challenging—Maintainability—Validity of reference impugned.*

When the question raised relates to the validity of the reference itself, the validity of an award following upon the reference can be challenged by a suit. The party so objecting is not bound to take proceedings under Para. 15 of Sch. II, C. P. Code. A mortgagee with possession from a party who has not joined in the reference is entitled to bring a suit to declare that the award and decree passed thereon are illegal and void as against him. (*Weston.*) DEO KARAN *v.* SUGAN CHAND. **1935 A.M.L.J. 89.**

———Sch. II, Para. 15 (1)—*Setting aside award—Jurisdiction of Court—One of parties applying to have award set aside—No objection*

C. P. CODE (1908), Sch. II, Para. 15.

raised by other party—Court, if can set aside award.

Para. 15 (1) of Sch. II, C. P. Code, is imperative and takes away the jurisdiction of the Court to set aside an award on any ground other than those specified therein. Therefore an order of Court setting aside an award merely on the ground that one of the parties applied to have the award set aside and the other did not object to it, offends against Para. 15 (1) and is consequently illegal. (*Thomas and Zia-ul-Hassan, JJ.*) BACHCHA LAL *v.* MUNNU LAL. **13 Luck. 609=171 I.C. 172=1937 O.L.R. 524=10 R.O. 90=1937 O.W.N. 1002=A.I.R. 1937 Oudh 507.**

———Sch. II, Para. 15 (1) (a)—*Misconduct—Absence of enquiry—Point not raised before arbitrators.*

On a petition filing an award in Court, an objection was raised that certain vouchers taken into consideration by the arbitrator were signed by minors, and as the arbitrator made no enquiry regarding the legality of those vouchers, the award was vitiated. This objection however was not raised before the arbitrators. It was also contended that absence of enquiry amounts to judicial misconduct on the part of the arbitrators.

Held, that the arbitrators, under the circumstances, were not bound to anticipate or guess any possible objections that might be made by the respondents and then to investigate such objections. Even assuming that the person who signed the vouchers was a minor, the arbitrators were not bound to hold that legally the objectors were not bound to pay the amount due on such vouchers. The decision of this question is entirely within the authority of the arbitrators and the absence of an enquiry does not amount to judicial misconduct on their part. (*Jai Lal, J.*) RAM DHAN DAS *v.* SHANKAR DAS DEVI DAYAL. **164 I.C. 296=9 R.L. 100=A.I.R. 1936 Lah. 492.**

———Sch. II, Para. 15 (1) (a)—*Misconduct—Arbitrator—Enquiry in absence of party.*

If arbitrator makes enquiries behind the back of the parties, that is misconduct. (*Pollock, J.*) BADRILAL *v.* LAKSHYA. **I.L.R. (1937) Nag. 35=168 I.C. 100=9 R.N. 237 (1)=A.I.R. 1936 Nag. 291.**

———Sch. II, Para. 15 (1) (a)—*"Misconduct"—Arbitrator making private inquiries.*

If an arbitrator makes references and inquiries privately he is guilty of misconduct. (*Norman, I.C.S.*) OULAD HUSSAIN *v.* ASNAD KHAN. **1936 A.M.L.J. 55.**

———Sch. II, Para. 15 (1) (a)—*Misconduct—Failure of arbitrator to hear parties and witnesses.*

An arbitrator, though not bound by the technical web of judicial procedure and rules of evidence, must hear the parties and, if requested, their witnesses, unless he is absolved therefrom by the terms of submission and must apply his mind to the points in dispute and decide it according to ordinary rules of justice, equity and good conscience. The failure to hear the parties and, if necessary, their witnesses, unless absolved therefrom by the terms of submission amounts to misconduct on the part of the arbitrator within the meaning of Para. 15, Sch. II, C. P. Code. (*Mosely and Ba U, JJ.*) MA HNINE LE *v.* MA NYEIN BWIN. **162 I.C. 772=8 R.R. 591=A.I.R. 1936 Rang. 191.**

C. P. CODE (1908), Sch. II, Para. 15.

———Sch. II, Para. 15 (1) (a)—*Misconduct—Reference to—Enquiry and award by two only—Effect of.*

Where the parties agreed that the case should be decided by three arbitrators, but the enquiry was made and the award given by two arbitrators alone, and where the parties never agreed to accept the decision of two arbitrators alone, the action of the two arbitrators in proceeding alone in such way was undoubtedly misconduct. (*Pollock, J.*) BADRILAL *v.* LAKSHYA. **I.L.R. (1937) Nag. 35=168 I.C. 100=9 R.N. 237 (1)=A.I.R. 1936 Nag. 291.**

———Sch. II, Paras. 15 (1) (c) and 16 (2)—*Decree in terms of award—Appeal questioning validity of reference—Competency—Revision, if lies.*

Para. 15 (1) (*c*) shows that all objections against the validity of an award can be brought in the Court making the reference, the words "or being otherwise invalid" being wide enough to cover all kinds of objections to an award. When once a decree is passed in terms of an award an appeal is not competent against the decree on the ground that the reference to arbitration was invalid as all the interested parties did not join in making the reference, and revision will be more objectionable than an appeal. (*Srivastava and Zia-ul-Hasan, JJ.*) RADHEY LAL *v.* SUNDER DEI. **159 I.C. 1041=8 R.O. 230=1936 O.W.N. 16.**

———Sch. II, Paras. 15 (1) (c) and 16—*Decree on award after disposing objections as to its validity—Revision.*

It is only one Court, namely the Court which refers the case to arbitration, that should finally decide the question whether the award is invalid, not only for the reason specifically mentioned in Cl. (*c*), but on other grounds also. This being so, the decree passed by a Court in terms of an award, after it has disposed of the objections under para. 15, Sch. II, C. P. Code, is final and not open to appeal. And to allow a revision would be more objectionable than an appeal in such case. 29 Cal. 167 (P.C.), Foll. (*Agha Haider, J.*) ASA *v.* MT. BHURAN. **163 I.C. 380=9 R.L. 10=38 P.L.R. 725=A.I.R. 1936 Lah. 466.**

———Sch. II, Paras. 15 (c) and 20—*Objection that applicant was partner of opposite party and so could not claim specific amount—Point decided against opposite party by trial Court but no decision of High Court obtained on that point—No such objection raised before arbitrator—Separate suit for dissolution of partnership against applicant by opposite party—Decision in question whether parties were partners—If* res judicata.

The grounds of invalidity of an award contemplated in Para. 15 (*c*) refer to those matters which apparently go to the root of the award and matters which merely pertain to procedure and have not been agitated before the arbitrator are not covered by it. In proceedings on an application under Sch. II, Para. 20 an objection was raised on the ground that the party applying was a partner of the opposite party and consequently could not make a demand for a specific sum of money. No such objection was raised before the arbitrator. The opposite party did not persist in obtaining a decision on this point from the High Court, after it had been decided against him by the trial Court. The opposite party brought a separate suit

for dissolution of partnership and rendition of accounts against the applicant. The defence was that the decision on the question whether the opposite party was a partner of the applicant operated as *res judicata*.

Held, that it was open to the opposite party to agree to the reference, although it was being sought by a partner, and to have the mutual adjustment of account made in a separate proceeding. Not having raised any objection before the arbitrator on the score of partnership to the claim put forward by the applicant, he could not afterwards challenge the award on the ground that it had been obtained by one partner against another for a specific sum.

Held also, that the objection in Sch. II, Para. 20, C. P. Code, was not covered by Sch. II, Para. 15 (*c*) and so the mere fact that opposite party did not persist in its objection did not debar it from contesting the question in the suit for dissolution of partnership. There the question was directly and substantially in issue and on it hinged the decision of the whole case. (*Addison and Din Mahomed, JJ.*) SARDAR SINGH *v.* NAWAL KISHORE KHARAITI LAL. **181 I.C. 195=11 R.L. 780=40 P.L.R. 972=A.I.R. 1938 Lah. 604.**

———**Sch. II, Para. 16**—*Arbitrator—Position of—If same as that of commissioner—Distinction.*

The contention that the position of an arbitrator is like that of a commissioner appointed by Court is obviously untenable. The essential difference between a commissioner and an arbitrator is that the former is an officer selected and appointed by the Court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the commissioner who is appointed by the Court and whose decision the parties may challenge before the Court passing a final decree. In the latter case they have expressed such consent, and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in Sch. II to the Code of Civil Procedure. (*Fazl Ali and Varma, JJ.*) RADHEY LAL *v.* KANHAI LAL. **18 Pat. 193=185 I.C. 52=12 R.P. 287=1939 P.W. N.591=6 B.R. 88=A.I.R. 1939 Pat. 526.**

———**Sch. II, Para. 16 (2)**—*Appeal—Award on invalid reference.*

Where there is no valid submission, there could be no award on which a decree could be made by the Court and if it is so made it is passed on something which is not an award and is therefore appealable. (*Hamilton and Yorke, JJ.*) GHAFOORAN *v.* ABDUL HAMID. **174 I.C. 766 =1938 O.W.N. 475=1938 O.L.R. 215=10 R.O. 275=1938 O.A. 367=A.I.R. 1938 Oudh 154.**

———**Sch. II, Para. 16 (2)**—*Decree based on award—Appeal on ground that award was invalid—If lies.*

When a decree is passed on the basis of an award, no appeal lies against the decree itself on the ground that the award was not a valid one. A.I.R. 1935 Rang. 94, Rel. on. (*Baguley and Mosley, JJ.*) MA NGWE *v.* U MIN SIN. **163 I.C. 590=9 R.R. 29=A.I.R. 1936 Rang. 240.**

———**Sch. II, Para. 16**—*Decree on award—Appeal—Revision.*

An appeal against a decree on an award is incompetent under the clear provisions of Sch. II, Cl. 16 of the Code, if the decree is not in excess of or contrary to the award. A revision is, however, competent. (*Tek Chand and Dalip Singh, JJ.*) LORIND CHAND KIRPA RAM *v.* GURDAS MAL. **39 P.L.R. 51.**

———**Sch. II, Para. 16**—*Objection taken to referring Court's jurisdiction to entertain suit but no objection raised to award—Court passing decree in terms of award—Award, if can then be challenged.*

When an objection was taken to referring Court's jurisdiction to entertain suit but no objections to award were filed by either of the parties, the Court has no option but to give a decree in accordance with the award, and it is not open to either party to object to the validity of the award on any ground by appeal or by revision. (*Jai Lal, J.*) MOHAMMAD KHAN *v.* CO-OPERATIVE SOCIETY, KHAWASPUR. **174 I.C. 310=10 R.L. 546=A.I.R. 1937 Lah. 268.**

———**Sch. II, Para. 17**—*Agreement providing for reference to arbitration—Right of parties to file in Court.*

Where an agreement between the parties stipulates that in the event of any dispute arising between them in respect of any term or condition of the agreement the said dispute should be referred to arbitration, and disputes arise between the parties in regard to the terms of the agreement, the parties to the agreement or any of them may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in the Court. (*Abdul Qayoom, C.J.*) STATE *v.* BHAGAT SUKHDYAL. **39 P.L.R.J. & K. 83.**

———**Sch. II, Paras. 17 and 19**—*Agreement to refer dispute to arbitrators nominated by each party—One of nominated arbitrators refusing to act—Power of Court to replace him by appointing another.*

If parties to an agreement to refer a dispute to arbitration leave a contingency unprovided for, the Court will not be proceeding consistently with the agreement if it makes a provision for such contingency. The lacuna, if any, is to be filled by parties themselves, and not by the Court. Where therefore parties agree to refer their dispute to arbitrators nominated by each party but the agreement does not make any provision for the nomination of an arbitrator in case any arbitrator already nominated refuses to act, and one of the nominated arbitrators refuses to act, the Court has no power to make the necessary appointment so as to make the agreement operative and effectual. (*Addison, Ag. C. J. and Din Mohammad, J.*) SALIG RAM BHAGAT RAM *v.* KISHEN SINGH. **I.L.R. (1939) Lah. 23=179 I. C. 584=11 R.L. 599=41 P.L.R. 464=A.I.R. 1938 Lah. 859.**

———**Sch. II, Para. 17**—*Agreement to refer dispute relating to division of estate to arbitration—Application for filing agreement in Court—If maintainable during pendency of proceedings for letters of administration.*

On the death of one *X*, his three sons, *A*, *B* and *C*, entered into an agreement to refer their

dispute relating to the division of the estate left by him to arbitration. Subsequently, however, *A* applied for Letters of Administration with respect to a will left by *X*. Two days later, *B* and *C* presented an application under Sch. II, Para. 17, C. P. Code, for filing the agreement regarding reference to arbitration. One of the contentions raised by *A* was to the effect that the application could not be entertained as the proceedings on the application for Letters of Administration had already commenced and were pending. Overruling that contention,

Held, that the application under Sch. II, C. P. Code, was maintainable and that there was no conflict of jurisdiction as between the arbitrator and the Court in this case although *A* questioned the validity of the agreement of reference to arbitration, and that the proper course for the Court dealing with the application for Letters of Administration in the circumstances would be to stay its proceedings until the question of the validity of that agreement was decided in the proceedings under Sch. II, C. P. Code. (*Bhide, J.*) RAM LABHAYA *v.* PANNA LAL. **18 Lah. 433=39 P.L.R. 852=172 I.C. 460=10 R.L. 328=A.I.R. 1937 Lah. 843.**

———**Sch. II, Para. 17**—*Agreement to refer to arbitration—Some of the matters within jurisdiction of Revenue Court—Agreement, if can be filed.*

An agreement for reference to arbitration cannot be filed in a Civil Court under para. 17, Sch. II, C.P. Code, if some of the matters included therein are within the jurisdiction of the Revenue Court only and there are actually suits pending in such Court with respect to some of them. (*Addison, Ag. C.J. and Din Mohammad, J.*) LACHMANDAS *v.* CHANAN MALL. **40 P.L.R. 966.**

———**Sch. II, Para. 17**—*Applicability—Contract of insurance accepted in Presidency Town——Contract containing arbitration clause—Arbitration Act, Ss. 2 and 3.*

Where a contract of insurance between the parties is finally accepted in a Presidency town and a clause in the contract provides for a reference to arbitration in case of a dispute arising as to any right or liability of either party, the provisions of the Indian Arbitration Act would be applicable and not of Sch. II, C.P. Code. (*Sulaiman, C.J. and Bajpai, J.*) GUARDIAN ASSURANCE CO., LTD. *v.* SHIVA MANGAL SINGH. **I.L.R. (1937) All. 234=167 I.C. 897=9 R.A. 585=1937 A.L.J. 98=1937 A.W.R. 52=1937 A.L.R. 265=A.I.R. 1937 All. 208.**

———**Sch. II, Paras. 17 and 19**—*Decree on award arrived at under para. 17—Appeal.*

No appeal lies from a decree passed on an award arrived at under para. 17 of Sch. II, C.P. Code, except in so far as it is at variance with the award. (*Tek Chand and Dalip Singh, JJ.*) LAL CHAND *v.* MEGHA RAM. **160 I.C. 1075=8 R.L. 659 (2)=A.I.R. 1936 Lah. 617.**

———**Sch. II, Para. 17**—*Order of reference not communicated to arbitrator—Arbitration, if vitiated.*

Where the arbitrator fully aware of the terms of the order of reference, accepts the office of the arbitrator and actually decides the controversy

between the parties by giving an award, the mere fact that the order of reference was not formally communicated to him is a mere trifling irregularity, and would not vitiate the arbitration. (*Niamatullah, Harries and Collister, JJ.*) MANNI LAL *v.* PAHLAD DAS. **167 I.C. 171=9 R.A. 512=1937 A.L.J. 29=1937 A.W.R. 30=1937 A.L.R. 157=A.I.R. 1937 All. 141 (F.B.).**

———**Sch. II, Para. 17**—*Order of reference not fixing time for filing award—Court subsequently intimating time to arbitrator—Validity of award,*

Where the order of reference itself does not fix the time within which the award should be filed, but the Court subsequently fixes a time limit and calls upon the arbitrator to file an award within that time and the award is filed, the irregularity, if any, would not affect the validity of the award. (*Niamatulla, Harries and Collister, JJ.*) MANNI LAL *v.* PAHLAD DAS. **167 I.C. 171=9 R.A. 512=1937 A.L.J. 29=1937 A.L.R. 157=1937 A.W.R. 30=A.I.R. 1937 All. 141 (F.B.).**

———**Sch. II, Para. 17**—*Reference to arbitration—Power of guardian mother of minor.*

The guardian mother of minor has authority to agree to refer the disputes that have arisen inside the family to the decision of arbitrators under para. 17 (1) if she finds that it is for the benefit of the minor. (*Derbyshire, C.J. and Nazim Ali, J.*) RAGHUPATI DUTT *v.* RAM GOPAL DUTT. **187 I.C. 80=12 R.C. 545=A.I.R. 1939 Cal. 557.**

———**Sch. II, Para. 17**—*Refusal to act after agreement to refer—Reference if could be made.*

Though the arbitrators might have refused to act before the application for a reference under para. 17 of Sch. II, C.P. Code, yet the Court has power under para. 17 to make an order of reference. (*Bennet and Verma, JJ.*) DATTA MAL *v.* AMAR NATH. **176 I.C. 404=11 R.A. 102=1938 A.L.J. 544=1938 A.W.R. (H.C.) 431=1938 A.L.R. 615=A.I.R. 1938 All. 414.**

———**Sch. II, Paras. 17 and 20**—*Relative applicability—Contract—Arbitration clause—Reference under—Award—Application to file—Maintainability—Proper procedure.*

Where an award is made by arbitrators under the Arbitration Act, under an agreement contained in a contract between the parties, an application to file such an award cannot be made under Sch. II, para. 20, C.P. Code. An agreement of that kind falls under para. 17, and the proper procedure is to apply to the Court for enforcing that agreement, and the Court is then to make an order of reference. Para. 20 refers to a reference by the parties to arbitration about any dispute that might have arisen between them, while para. 17 applies to future disputes. (*Divatia, J.*) LOUIS DREYFUS & Co. *v.* BASAPPA LINGAPPA. **166 I.C. 35=9 R.B. 207=38 Bom.L.R. 607=A.I.R. 1936 Bom. 401.**

———**Sch. II, Para. 17 (4)**—*"Sufficient cause"—Meaning—Circumstances showing that arbitrators cannot command defendant's confidence—Court, if can refuse to order agreement to be filed.*

The words "sufficient cause" occurring in para. 17 (4) of Sch. II, C.P. Code, cover all the grounds of justice, equity and good conscience on

which a Court thinks an agreement should not be ordered to be filed. If the circumstances show that even if the arbitrators be not partial to the plaintiff, they cannot command the confidence of the defendant, it would be wholly inequitable to compel the defendant to submit himself to their arbitration, and there is, therefore, sufficient cause for the Court to refuse to order the agreement to refer to arbitration to be filed. (*Zia-ul-Hasan and Smith, JJ.*) GIRDHARI LALL *v.* GOBHARDHAN DASS. **13 Luck. 428=170 I.C. 490=10 R.O. 16=1937 O.L.R. 436=1937 O.W.N. 792=A.I.R. 1937 Oudh 437.**

——Sch. II, Para. 18—*Application for stay—When to be made.*

The provisions of para. 18, Sch. II of C.P. Code, are mandatory and an application under that section for stay should be made at the earliest possible opportunity. Where a suit was filed in August, 1933, and the issues were framed in December of that year, but an application to stay the suit was put in only in 1936 and that at the instance of the Court.

Held, that it cannot be said that the provisions of para. 18 of Sch. II of the C.P. Code have been complied with. (*Horwill, J.*) MAHOMED MOHIDEEN NACHIAR *v.* MAHOMED NAINA MARACAIR. **177 I.C. 440=1938 M.W.N. 1124 (2)=11 R.M. 325=A.I.R. 1938 Mad. 205=(1938) 1 M.L.J. 38.**

——Sch. II, Para. 18—*Application under—Statement in written statement setting up an agreement to refer to arbitration—If amounts to an application for stay.*

The fact that a defence was raised in the written statement that under the agreement between the parties, the parties are bound to appoint arbitrators is not tantamount to an application for stay under para. 18, but is only a defence to the suit. (*Horwill, J.*) MAHOMED MOHIDEEN NACHIAR *v.* MAHOMED NAINA MARACAIR. **177 I.C. 440=1938 M.W.N. 1124 (2)=11 R.M. 325=A.I.R. 1938 Mad. 205=(1938) 1 M.L.J. 38.**

——Sch. II, Para. 18—*Order adjourning suit* sine die—*Propriety—Proper order.*

Where the Court refers the suit to arbitration in accordance with the agreement between parties to refer to arbitration under para. 18 of Sch. II, C. P. Code, an order adjourning the suit *sine die* is not proper and the proper order is to adjourn the suit for a definite period. (*Horwill, J.*) MAHOMED MOHIDEEN NACHIAR *v.* MAHOMED NAINA MARACAIR. **177 I.C. 440=1938 M.W.N. 1124 (2)=11 R.M. 325=A.I.R. 1938 Mad. 205=(1938) 1 M.L.J. 38.**

——Sch, II, Para. 18—*Scope—Plea of arbitration clause in defence to suit—When to be taken—Contract—Arbitration clause—Breach—Suit for damages—Omission to apply for stay of suit—Decree—Objection in appeal to maintainability of suit—Competency—Jurisdiction of Court—If ousted.*

There is a complete machinery under the C.P. Code for enforcing the agreement of parties to refer a matter in dispute between them to arbitration, and once the machinery is provided the choice to have the dispute so settled by arbitrators is left to the parties. If any party who has contracted to settle a dispute by arbitration backs out of it and institutes a suit in disregard of that contract, the Court is given the discretion to stay the suit at the instance of the other party. But if neither party wishes to resort to arbitration, the ordinary Courts of law have jurisdiction to decide the matters in dispute between them. It cannot therefore be said that a suit is not maintainable at all. If one party institutes a suit it is open to the other party, if he wants to bind the plaintiff to his contract for having the matter settled by arbitration, to apply to the Court for stay before the settlement of issues. When he does not do that, he cannot in appeal object to the decree passed against him on the ground that the suit is not maintainable as being in violation of the arbitration clause in the contract. (*Courtney Terrell, C.J. and Noor, J.*) SECRETARY OF STATE *v.* SURENDRA MOHAN LAHIRI. **17 Pat. 293=180 I.C. 122=11 R.P. 457=5 B.R. 352=1938 P.W.N. 138=A.I.R. 1939 Pat. 118.**

——Sch. II, Para. 18—*Stay of suit—Discretion of Court—Interference in appeal.*

Although a Court has a discretion to stay or to refuse to stay a suit under para. 18, Sch. 2, C. P. Code, it is its duty to act upon the agreement to refer to arbitration unless it sees sufficient reason why the dispute should not be referred. Where the lower Court held that there was no valid submission and that there was no contract regarding arbitration between the parties and in its discretionary power did not stay the suit.

Held, that it could not be said that the lower Court exercised its discretion in an unjudicial manner or capriciously. (*Coldstream, J.*) REGAL THEATRES, LTD. *v.* GURCHARAN SINGH. **172 I.C. 432=10 R.L. 323=30 P.L.R. 423=A.I.R. 1937 Lah. 206.**

——Sch. II, Para. 18—*Stay of suit—Discretion of Court—No difference arising before suit—Defence that contract is induced by fraud.*

The stay of a suit under para. 18 of Sch. II, C.P. Code, as also under S. 19 of the Arbitration Act is made by the Court only with a view that the parties may go to arbitration in accordance with their agreement. The stay of a suit will have, therefore, to be refused if there could not be an arbitration at all. An arbitration presupposes a dispute or difference between the parties and if no dispute or difference arises before the institution of the suit, there is no occasion for an arbitration, and a pending suit between the parties ought not to be stayed in such a case. If the plaintiff is not aware before the institution of the suit, that there is a difference between him and the defendant or of the nature of the difference, he cannot be said to have gone back upon his agreement to refer to arbitration or is attempting to go back upon it by rushing to Court. Further, if the basis of the main defence in the suit is that the contract was induced by either fraud or misrepresentation of the plaintiff, and this question does not come within the scope of the arbitration clause, the rights of the parties involved in the suit should be tried by the Court and the prayer for stay should be refused. (*Mitter and Latifur Rahman, JJ.*) LADHA SINGH *v.* JYOTI PRASAD SINGHA DEO. **I.L.R. (1939) 2 Cal. 181=186 I.**

C. P. CODE (1908), Sch. II, Para. 18.

C. 617=12 R.C. 490=70 C.L.J. 148=43 C. W.N. 879=A.I.R. 1940 Cal. 105.

———Sch. II, Para. 18—*Stay of suit—Duty of Court to cancel before reviving suit—Express order—Necessity.*

Where a Court has stayed a suit before it under para. 18 of Sch. 2, C.P. Code, before the Court revives the suit, it should first remove the stay and then decide the suit on its merits. If, however, a Court does not write a separate order vacating its original order of stay, and proceeds to hear the suit, the order of stay must be deemed to have been vacated by implication. (*Mehta and Lobo, A.J.Cs.*) KISHINCHAND *v.* RAMCHAND. **171 I.C. 625=10 R.S. 113=A.I.R. 1937 Sind 247.**

———Sch. II, Paras. 19 and 5—Parties agreeing to get dispute decided by certain named persons—One of arbitrators unwilling to act—Court, if competent to replace him by appointing another. *See* C.P. CODE, SCH. II, PARAS. 5 AND 19. **41 C.W.N. 981=A.I.R. 1937 Cal. 388.**

———Sch. II, Para. 20—*Application to file award—Objections filed—Objector absent on second adjourned date—Order to proceed* ex parte *passed—Objector appearing before final order - Right to get* ex parte *proceedings set aside.*

Where in an application to file an award objections to the award were filed but the application was adjourned twice, the Court being busy with other work, and on the second adjourned date the objector was absent and *ex parte* proceedings were taken against him and the case was postponed to another date, and no replication was filed by the applicant up to that date, and the objector appeared on that date and asked for the setting aside of the *ex parte* proceedings.

Held, that the objector having appeared before any final order was passed against him, except an order to proceed *ex parte* against him, he was entitled to the proceedings being set aside on an application to that effect being made. (*Jai Lal, J.*) JIWAN RAM *v.* MOTOR AND GENERAL FINANCE, LTD., DELHI. **178 I.C. 601=11 R.L. 485=40 P.L.R. 233=A.I.R. 1938 Lah. 486.**

———Sch. II, Para. 20—*Application to file award—Objection to portion of award—Application, if competent—Procedure.*

There is no law preventing an applicant to file an award made without the intervention of the Court, from objecting to a portion of the award. At the same time there is no provision entitling an applicant to ask the Court to file a part of the award. Where in an application to file an award, a prayer is added that a portion of the award is invalid and therefore in the final decree that may be passed on the award that portion should not be included, the application is competent as the main prayer to file the award is in accordance with law, and the Court could either ignore the subsequent illegal prayer or allow the applicant to amend his application by deleting such prayer. (*Jai Lal, J.*) SANGAT RAI *v.* SITAL PRASAD. **164 I.C. 543=9 R.L. 136=38 P.L.R. 86=A.I.R. 1936 Lah. 682.**

———Sch. II, Para. 20—*Application under—Powers of Court—Award dealing in part with property outside jurisdiction—Procedure—Refusal to file—Legality—Part separable from rest—Duty of Court to separate that part and file rest of the award.*

C. P. CODE (1908), Sch. II, Para. 20.

Where a part of an award made in an arbitration without the intervention of Court deals with property outside the jurisdiction of the Court which is requested to file it, if that part is separable without disturbing the basis and equilibrium of the award as a whole, the Court may delete that part of it and order the rest to be filed. Merely because the award deals with some matters which are not within the jurisdiction, it does not follow that the award cannot be filed. (*Broomfield and Sen, JJ.*) GANGHADAR LAXMAN *v.* DATTATRAYA LAXMAN. **I.L.R. (1937) Bom. 338=169 I.C. 301=10 R.B. 8=39 Bom.L.R. 159=A.I.R. 1937 Bom. 211.**

———Sch. II, Para. 20—*Application under—Valuation fixed for jurisdiction—If can be questioned in execution.*

Where in an application under para. 20, Sch. II, C.P. Code, the value for the purpose of jurisdiction is fixed. The valuation cannot be questioned in execution proceedings when the objection is not taken in the proceedings under para. 20, Sch. II or in any appeal arising therefrom. (*Bhide, J.*) BASANTI DEVI *v.* AMIN CHAND. **A.I.R. 1936 Lah. 63.**

———Sch. II, Para. 20—*Award covering properties beyond Court's jurisdiction—Power of Court to file such award—Limits.*

The words 'Court having jurisdiction over the subject-matter of the award' occurring in para. 20 of the second schedule to the C.P. Code, do not mean that the Court must have jurisdiction over the whole of the subject-matter of the award. The question of the existence or absence of jurisdiction should be decided in accordance with the general provisions in the body of the C.P. Code. The result would be, that if a suit to enforce the award would lie then an application for the award to be filed will also lie. A liberal construction could be given to the provisions in the second schedule of the Code for filing an award. Where the award referred to properties both within and without British India, it was held that the Court, to the extent to which it would in virtue of S. 17, C.P. Code, have jurisdiction, had power to file the award and to give judgment accordingly, (*Pollock and Digby, JJ.*) YESHWANT RAO *v.* DATTATRAYA RAMCHANDRA. **I.L.R. (1940) Nag. 225 =3 R.N. 57=189 I.C. 550=1940 N.L.J. 71 =A.I.R. 1940 Nag. 191.**

———Sch. II, Para. 20—*Award declaratory in some respects—If invalid for indefiniteness—Refusal to file—Propriety.*

An award passed in an arbitration without the intervention of Court, after dealing with certain ornaments which were ordered to be distributed among the parties stated: "or if any one desires to purchase them the market price of all these ornaments should be assessed and deducting the amount of his own share distribute the balance equally among the other sharers." So also in respect of a house it was provided that it should be sold to two of the sharers, and those sharers should pay the third sharer a certain amount as the price of his third share.

Held, that the provisions in the award could not be held to be bad for indefiniteness and that the

C. P. CODE (1908), Sch. II, Para. 20.

award was not invalid on that account. The most that could be said was the award was only declaratory in that respect, but that was no reason for refusing to file it. (*Broomfield and Sen, JJ.*) GANGADHAR LAXMAN *v.* DATTATRAYA LAXMAN. **I.L.R. (1937) Bom. 338=39 Bom.L.R. 159 =169 I.C. 301=10 R.B. 8=A.I.R. 1937 Bom. 211.**

——**Sch. II, Para. 20**—*Award inadmissible in evidence for want of proper stamp and registration—Decree based on the award—Admissibility—Decree not reproducing terms of award—Copy of award—If admissible to understand decree.*

Although an award is not admissible in evidence for want of proper stamp and registration, a decree based on the award is admissible in evidence. If the decree does not reproduce the terms of the award but only makes a reference to the award, a copy of the award is admissible in evidence to understand the terms of the decree. (*Bhide, J.*) HANS RAJ *v.* AMAR CHAND. **42 P.L.R. 77 =A.I.R. 1940 Lah. 107.**

——**Sch. II, Paras. 20 and 21**—*Award in arbitration outside Court—Registration—Necessity—Registration Act, S.* 17 (1) (*b*).

Paras. 20 and 21 of Sch. II, C.P. Code, which provide for the enforcement of awards in arbitrations made outside Court do not require that the awards should be registered before they can be filed or enforced, even though the awards might affect immovable property of the value of Rs. 100 or upwards. Registration is therefore not necessary in the case of such an award. S. 17 of the Registration Act does not affect the matter. The proceedings of arbitrators are judicial in their nature and there is no reason to suppose that the award of arbitrators is a document falling under S. 17 (1) (*b*) of the Registration Act. (*Bennet, J.*) SHEO RAM *v.* RAM DATT. **175 I.C. 397=10 R.A. 681=1938 R.D. 31=1938 A.L.R. 434=1937 A.L.J. 1303=1937 A.W.R. 1218 =A.I.R. 1938 All. 88.**

——**Sch. II, Para. 20**—*Award out of Court—If effective from date of making or only after being filed.*

An award made out of Court becomes effective from the date when it is made and not from the date when Court orders it to be filed in Court. (*Davies, J.C. and Mehta, A.J.C.*) KARMUSING NANU SINGH *v.* GAMBI BAI. **30 S.L.R. 337= 166 I.C. 947=9 R.S. 160=A.I.R. 1937 Sind 7.**

——**Sch. II, Para. 20**—*Award partitioning joint family property—Reference by only some members of family—Validity.*

An award partitioning joint family property, made on reference by only some members of the joint family is a valid award which can be filed under para. 20, Sch. II, C.P. Code, and is binding on those members who actually join the reference and can be enforced against them. The mere fact that some members of the joint family do not join, does not make the award invalid. The award may or may not be set aside at the instance of a third person but that is not a matter which enters into consideration in proceedings under para. 20 or 21. (*Fraser, J.C. and Saad-ud-din Khan, A.J.C.*) DIALA RAM *v.* MT. NIHALI BAI. **A.I.R. 1936 Pesh. 96.**

C. P. CODE (1908), Sch. II, Para. 20.

——**Sch. II, Paras. 20 and 21**—*Award partly invalid—If can be filed in Court.*

An award made without the intervention of the Court, which is partly invalid, can be made a rule of the Court if the invalid portion is separable from the valid portion. If it is so separable, then there is no objection to making the award a rule of the Court. If it is not so separable, then as the Court has no power to remit the award to arbitrators appointed without its intervention or to correct the award itself, the award cannot be made a rule of the Court. Where by the terms of the reference the arbitrators are empowered to decide what is the property belonging to the parties jointly, the mere fact that they have wrongly decided that certain property is not joint and in addition have gone further and held it to belong to a third party does not make the award invalid, for the portion which assigns title in the property to a third party can easily be separated from the rest of the award, which divides the property after finding what is the joint property of the parties. (*Dalip Singh, J.*) MOHAMMAD MUSTAFA *v.* MOHAMMAD YAR. **188 I.C. 477=12 R.L. 529 =A.I.R. 1940 Lah. 24.**

——**Sch. II, Paras. 20 and 21**—*Award partly invalid—Valid part, if can be filed.*

Where an application to file an award made without the intervention of Court is filed and the invalid portion in the award is separable from the valid portion, the Court can direct the filing of the valid part. (*Jai Lal, J.*) RATAN KAUR *v.* SOBHA RAM. **168 I.C. 213=9 R.L. 604=A.I.R. 1936 Lah. 794.**

——**Sch. II, Para. 20**—*Award—Reference to Court—If compulsory or only optional.*

Where an award has been made, it is not compulsory under para. 20 of Sch. II, C.P. Code, to refer it to a Court for making it a rule of the Court: it is optional to do so. It can be used as an instrument of title. (*Mehta, J.M.*) PARTAP *v.* BECHAN. **1940 R.D. 20=1940 A.W.R. (B. R.) 16.**

——**Sch. II, Para. 20**—*Construction and scope—Parties to suit pending in Revenue Court—Agreement of reference to arbitration without intervention of Court—Award—Application to Civil Court to file award—Jurisdiction of Civil Court to file award and pass decree.*

The right to agree to refer to an arbitration and to file an award under para. 20 of Sch. II, C.P. Code, is not confined to persons who are not parties to any litigation. Where persons who are parties to a suit pending in a Revenue Court go to arbitration without the intervention of any Court, one of the terms of the agreement of reference being that the award would be effective whatever might be the decision of the Revenue Court in the suit before it, the award may be filed in a Civil Court under para. 20 of Sch. II. Such Civil Court has jurisdiction to deal with the application and pass a decree in accordance with it. (*Niamatullah and Allsop, JJ.*) GANGA PRASAD SINGH *v.* BINDESHWAR SINGH. **172 I.C. 967= 1938 A.L.R. 59=10 R.A. 451=1937 A.L.J. 1133=1937 A.W.R. 1080=A.I.R. 1938 All. 46.**

——**Sch. II, Para. 20**—*Decree on award—*Res judicata.

C. P. COE (1908), Sch. II, Para. 20.

The contention that a decree passed not in a suit but in proceedings under Sch. II, C.P. Code, does not operate as *res judicata*, has no force. The decree gives effect to the award and must be held to be as binding on the parties as any other decree passed in a suit whether with or without consent. (*Bhide, J.*) HANS RAJ *v.* AMAR CHAND. **42 P.L.R. 77=A.I.R. 1940 Lah. 107.**

———**Sch. II, Para. 20**—*Decree passed on unregistered private award—If nullity—Executing Court—If can question its validity—Registration Act, S.* 17.

A decree passed under para. 20 of Sch. II, C. P. Code, on an unregistered award given on a reference to arbitration made out of Court is not a nullity, although such award requires to be registered under S. 17 of the Registration Act. After the decree has been passed the award has no separate existence. It is merged in the decree itself. The proper stay for raising the question of registration is after the application under para. 20 of Sch. II, C.P. Code, has been filed and before the decree is passed. There is no absence of jurisdiction in the Court which passes the decree on the award and the Executing Court is not, therefore, entitled to entertain an objection based on the absence of registration of the award. (*Mitter and Khundkar, JJ.*) LAL BEHARI CHATTERJEE *v.* JAGAT JIBAN. **43 C.W.N. 602.**

———**Sch. II, Paras. 20 and 21**—*Jurisdiction of Court under—Award allotting business to one partner and directing others to pay dues and execute release deeds to the former in fixed time—Provision for payment of fixed amount of damages on default—Legality—Enforceability of award—Power of Court to modify.*

An arbitration arose out of a dispute between partners of a firm and they agreed by the reference to abide wholeheartedly by the award which the arbitrators may pass directing the delivery of the firm to one of the partners and also the rules and regulations they may frame in connection therewith.

The award passed by the arbitrators directed that the business should be handed over to one of the partners and that the other partners should not only pay what was due by them but should execute release deeds in favour of the partner who was to have control of the business. In default of so doing within a stipulated time each of the partners who were in default was to pay to the partner taking the business Rs. 1,000.

Held, (1) that the Court had no jurisdiction under paras. 20 and 21 of Sch. II, C.P. Code, to go into what is the proper amount of damages and could not interfere with the figure embodied in the award unless it was illegal or went beyond the scope of the reference; (2) that the award was not one which could be challenged on any ground and should therefore be enforced *in toto*. (*Wadsworth, J.*) THIRUMALAI CHETTIAR *v.* NANJAYYA GOWDAR. **1940 M.W.N. 879.**

———**Sch. II, Paras. 20 and 21**—*Jurisdiction—Immovable property dealt with by award and parties to it within jurisdiction of Court—Business, subject-matter of award carried on by parties outside Court's jurisdiction—If ousts jurisdiction of Court.*

Where all the immovable property dealt with by the award is within the jurisdiction of the Court and so also the parties to the award, the mere fact that the business which is one of the subject-matters of the award is carried on by the parties at a place not within the jurisdiction of the Court is not sufficient to oust the jurisdiction of the Court, and the Court has jurisdiction to entertain an application under Para. 20 of Sch. II and to order the award to be filed under Para. 21. (*Rupchand Bilaram, Ag.J.C. and Lobo, A.J.C.*) VISHINDAS KHUSHALDAS *v.* TEJUMAL KHUSHALDAS. **174 I.C. 334=10 R.S. 250=A.I.R. 1938 Sind 59.**

C. P. CODE (1908), Sch. II, Para. 21.

———**Sch. II, Paras. 20 and 21**—*Oral award—Validity—Award subsequently reduced to writing—Refusal by one arbitrator to sign—If invalidates award.*

Where on a reference to arbitration without the intervention of the Court the arbitrators deliver a unanimous oral award, but on its being reduced to writing subsequently, one of the arbitrators resiles and refuses to sign the award, it is nevertheless competent to the Court to give effect to the award. The oral award is complete without the writing and the refusal on the part of one of the arbitrators to sign it when reduced to writing does not make it invalid. (*Venkatasubba Rao, J.*) UNNI MUHAMMAD *v.* MARAKKARUTTI. **164 I.C. 855=9 R.M. 174=1936 M. W.N. 768=44 L.W. 32=A.I.R. 1936 Mad. 713 =71 M.L.J. 342.**

———**Sch. II, Paras. 20 and 21**—Reference to arbitration by company—Award, where to be filed. *See* COMPANIES ACT, S. 152 (3). **44 C. W.N. 285.**

———**Sch. II, Para. 20**—*Scope—Powers of Court—Award—Power of Court to separate part and pass a decree as to part.*

Quaere, whether it is open to a Court to separate a portion of the award from the rest of it and proceed to pass a decree only in respect of a part? (*Khaja Mohammad Noor and Madan, JJ.*) HET LAL *v.* UPENDRA NATH BASU. **16 Pat. 34=166 I.C. 22=9 R.P. 274=1936 P.W. N. 858=3 B.R. 142=17 Pat.L.T. 835=A.I.R. 1937 Pat. 214.**

———**Sch. II, Para. 21**—*Award—Filing of—Powers of Court—Error in award—Power to set aside or refuse to file—Limits.*

A Court to which an application is made to file an award made by arbitrators should not arrogate to itself the functions of a Court of appeal from the arbitrators. Before it can interfere with the award, a great deal more than mere error on the part of the abitrators has to be shown. The arbitrators are judges of law as well as judges of fact, and an error in law or error in fact or in arithmetic cannot vitiate an award, unless the error or mistake is so palpable and gross as would afford strong evidence of misconduct. (*Pollock, J.*) TULSIRAM *v.* JHANAKLAL. **I.L.R. (1936) Nag. 44=165 I.C. 556=9 R.N. 88=19 N.L.J. 151=A.I.R. 1936 Nag. 197.**

———**Sch. II, Para. 21**—*Award leaving undetermined part of the matters referred—If can be filed.*

An award which has admittedly left undetermined part of the matters referred to arbitration could not be filed under Para. 21 of Sch. II, C. P. Code. (*Agarwala, J.*) BIJADHAR RAM *v.* RAJKARAN SINGH. **174 I.C. 592=4 B.R. 462**

C. P. CODE (1908), Sch. II, Para. 21.

=10 R.P. 524=19 Pat.L.T. 16=A.I.R. 1938 Pat. 129.

———Sch. II, Para. 21—*Decree in accordance with award—Appeal on ground that reference to arbitration is invalid—If lies.*

Where a decree has been passed in accordance with the award, the objection that the reference to arbitration was invalid could only be decided by the trial Court and no appeal would be maintainable on that ground. (*Bhide, J.*) FAZL RAHMAN *v.* ZAINAB BIBI. **A.I.R. 1940 Lah. 123.**

———Sch. II, Para. 21—*Form of order under—Order filing award and judgment combined into one—Legality.*

Paragraph 21, Sch. II, C. P. Code, does not lay down any particular form of order. All it states is that the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. All that is necessary is that the mandatory direction which constitutes the order must be present somewhere. Where the Judge, instead of passing a separate order with respect to the filing of the award, and then a judgment in terms of the award followed by a decree, combined the order for filing the award and judgment into one.

Held, that the procedure was not irregular. At any rate, even if it was an irregularity, it did not mislead either of the parties and hence would be curable under S. 99, C. P. Code. (*Vivian Bose, J.*) GANGAPRASAD *v.* MT. BANASPATI. **I.L.R. (1937) Nag. 6=167 I.C. 260=9 R.N. 175=A.I.R. 1936 Nag. 246.**

———Sch. II, Para. 21—*Parties signing award—If can pick holes in it.*

Parties signing the award should not be allowed to pick holes in it. (*Din Mahomed, J.*) KANSHI RAM *v.* HARNAM DAS. **188 I.C. 493=12 R.L. 531=A.I.R. 1940 Lah. 73.**

———Sch. II, Para. 21—*Proceedings under—Decree in terms of a compromise—Whether can be passed.*

The parties to an arbitration filed the award in Court for a decree to be passed on it. One of the parties filed a solenama in the Court and prayed that a compromise decree should be passed. By the solenamah one party had given up his rights under the award and had made amicable arrangements of all disputes. The Court refused to pass a compromise decree.

Held, that the Court rightly refused to pass such a compromise decree in proceedings under the Second Schedule of the Code of Civil Procedure. On an application for the filing of an award the only form which such a decree should take was an order that an award should be filed, and as the parties did not unite in praying that the application should be dismissed it was the duty of the Judge to proceed to consider whether the award which had been submitted should be filed. The Court therefore in its order refusing to pass a decree in terms of the compromise and in the subsequent order for filing the award did not act without jurisdiction, nor did it act irregularly in he exercise of its jurisdiction. (*Jack and Patterson, JJ.*) BRINDABAN CHANDRA *v.* KASHI CHANDRA. **171 I.C. 507=10 R.C. 272=A.I.R. 1937 Cal. 201.**

C. P. CODE (1908), Sch. III.

———Sch. II, Para. 21—*Unregistered award affecting immovable property—If can be filed and proceeded with.*

The filing of an award under para. 21 of Sch. II, C. P. Code, with its necessary concomitant of judgment and decree, does affect the property comprised in it just as much as the filing of a sale deed in a suit for specific performance or for possession and as such, if the award happens to be unregistered it could not be filed under para. 21. (*Stone, C.J., Grille and Bose, JJ.*) MOHAMMAD AZIZULLAH KHAN *v.* NOORULLAH KHAN. **I.L.R. (1939) Nag. 607=183 I.C. 845=12 R.N. 81=1939 N.L.J. 375=A.I.R. 1939 Nag. 233 (F.B.).**

———Sch. II, Para. 21—*Unregistered private award filed in Court—Court passing decree on award—Legality—Registration Act, Ss. 17 and 49.*

In order to decide whether an award is to be filed, the Court under para. 21, Sch. 2, C. P. Code, has to consider the terms of the award with reference to the matters referred to in Para. 14, Sch. 2, and for that purpose it is being admitted as evidence of a transaction purporting to affect rights in immovable property, for a private award operates to affect such rights apart from the passing of a decree based on the award. Where therefore an unregistered private award was filed in the Court and a decree was passed on its basis.

Held, that it was not admissible in evidence and that the Court transgressed the provisions of S. 49, Registration Act. (*Jack and Patterson, JJ.*) BRINDABAN CHANDRA *v.* KASHI CHANDRA. **10 R.C. 272=171 I.C. 507=A.I.R. 1937 Cal. 201.**

———Sch. II, Para. 21 (2)—*Appeal—Competency—Test.*

Where it is not alleged that the decree of the Court was in excess of or not in accordance with the award, an appeal attacking the validity of the award itself on the ground that one of the parties to the reference was acting not for himself but merely on behalf of a minor and that the award had gone beyond the terms of reference, is incompetent. (*Mackney, J.*) MA E CHO *v.* U PO MYA. **A.I.R. 1940 Rang. 238.**

———Sch. III—*Powers of Collector under—Lease by Collector—Order by Governor-in-Council disallowing alteration of terms of lease—Subsequent default and consequent sale—Legality.*

A decree was satisfied by a lease of the judgment-debtor's properties by the Collector. Attempts were made to alter the terms of the lease but the Governor-in-Council disallowed such alteration and directed certain proceedings in respect of defaulting lessees. The lessees having defaulted in paying the lease money the Collector cancelled the lease and sold the property which was purchased by the decree-holder. The order of the Collector confirming the sale was affirmed by the Deputy Commissioner.

Held, in revision by the Governor-in-Council, that the order cancelling the lease and confirming the sale were illegal and without jurisdiction, as being in contravention of the prior order of the Governor-in-Council and that the sale must therefore be set aside. (*Raghavendra Rao, H.M.*) NAMDEO TUKARAM *v.* KEDARMAL BANSIDHAR. **1936 N.L.J. 22.**

C. P. CODE (1908), Sch. III, Para. 1.

———Sch. III, Para. 1—*Collector's powers to execute—Adjustment of decree—If terminates Collector's powers.*

The power of the Collector to exercise his powers or perform his duties under Sch. III, C. P. Code, terminates on the decree being adjusted between the parties, and thereafter he has no powers to exercise or duties to perform. He becomes *functus officio*. (*Stone, C.J. and Niyogi, J.*) RAGHOJI *v.* VITHOBA. **169 I.C. 110 =9 R.N. 302=19 N.L.J. 175=A.I.R. 1937 Nag. 217.**

———Sch. III, Para. 1—*Order for sale and transfer of execution to Collector—Powers of Collector and Court.*

Where in execution proceedings the Court orders the sale of certain lands and transfers the execution of the decree to the Collector under S. 68, C. P. Code, it is not open to the Collector to allow the validity of the order for sale to be questioned. In that respect, he can be in no better position than a Court executing a decree transferred to it—he cannot go behind the decree. Conversely, as it is not within the Collector's competence to consider this question, it must be open to the Court to consider it, on a proper application and assuming that there is no bar of *res judicata*. The mere fact that the carrying out of the Court's order has been delegated to the Collector cannot deprive the Court of jurisdiction to consider the validity of the order. (*Broomfield and Macklin, JJ.*) SATTAPPA *v.* MAHOMEDSAHEB. **60 Bom. 516=163 I.C. 305=9 R.B. 4=38 Bom.L.R. 221=A.I.R. 1936 Bom. 227.**

———Sch. III, Para. 7 (1) (b)—*Decree directing sale—Powers of Collector to resort to other modes of satisfying decree.*

Though the judgment-debtor makes no real attempt to pay off the decree amount for a long time after the passing of the decree, when he pays a portion and undertakes to make further payments by a certain date, it is not advisable to order the sale of the property, especially when there is no definite valuation of the property or order to be sold by the Court. The Collector is competent to have recourse to sale or lease or other methods to recover the decretal amount. (*Gordon, R.M.*) ABDUL KHAN *v.* MT. KESARBAI. **19 N.L.J. 27.**

———Sch. III, Para. 11—*Collector carrying on proceedings—Relinquishment of interest in property—Validity.*

Para. 11 of Sch. III, C. P. Code, is a bar to the relinquishment by a person of his interest in immovable property in respect of which the Collector is carrying on proceedings under Sch. III, and such a relinquishment is invalid. (*Sulaiman, C.J. and Bennet, J.*) SHOK HARAN PRASAD SINGH *v.* FAKIR CHAND SARJU PRASAD. **163 I.C. 672=9 R.A. 58=1936 A.W.R. 502 (2)= 1936 A.L.J. 680=1936 A.L.R. 631=A.I.R. 1936 All. 452.**

———Sch. III, Para. 11—*Mortgage void under —Personal covenant in such mortgage—Enforceability.*

Although a mortgage deed executed in contravention of para. 11 of Sch. III, C. P. Code, is void and unenforceable, the agreement in respect of the personal covenant embodied in such deed

C. P. CODE (1908), Sch. III, Para. 11.

must not be deemed to be invalid in law. The deed of mortgage, though not legally enforceable as a mortgage, is a transaction which is not forbidden by law or opposed to public policy. All that para. 11 of Sch. III, C. P. Code, does is to impose a partial disability on the judgment-debtor in respect of whose immovable property the Collector can exercise the powers conferred upon him or perform the duties enjoined upon him by paras. 1 to 10 of the said Schedule. This partial disability to execute a mortgage will not effect the personal liability undertaken by him to repay the loan for which the deed was executed. (*Smith and Nanavutty, JJ.*) RAJA MOHAN MANUCHA *v.* NISAR AHMAD KHAN. **12 Luck. 435=1936 O.L.R. 526=164 I.C. 945=9 R.O. 108=1936 O.W.N. 1033=A.I.R. 1937 Oudh 87.**

———Sch. III, Para. 11—*Object and requirements of—Formal permission, if necessary.*

The object of Para. 11, Sch. III, C. P. Code, is that there shall be a fully substantiated and certain permission on the part of the Collector, which is to be given in such a manner that the fact of its having been given is indisputable. The essence of the paragraph is that there shall be a written permission as opposed to an oral permission, which would be susceptible of evidence of varying degrees of credibility in order to establish the necessary proof. What is required is certainty, and where there is a written record of facts which cannot be disputed, an unmistakable inference drawn from this written record that permission was given, fulfils the requirements of the paragraph and a formal permission is then unnecessary. (*Grille, J.*) POONAMCHAND SHEORATAN *v.* MT. FULABAI. **I.L.R. (1938) Nag. 573=177 I.C. 971=11 R.N. 194=A.I.R. 1938 Nag. 309.**

———Sch. III, Para. 11—*Portion of property under control of Deputy Commissioner—Mortgage by the judgment-debtor of the portion of property released from attachment—Permission of Deputy Commissioner—If necessary.*

So long as any part of the judgment-debtor's property is under the control of the Deputy Commissioner, the judgment-debtor could not execute a mortgage of even the portion of the property which had been released from attachment without the permission of the Deputy Commissioner. If no such permission is obtained, the mortgage is void because of the violation of the imperative provisions of para. 11 of Sch. III, C. P. Code. (*Smith and Nanavutty, JJ.*) RAJA MOHAN MANUCHA *v.* NISAR AHMAD KHAN. **12 Luck. 435=1936 O.L.R. 526=164 I.C. 945=9 R.O. 108 =1936 O.W.N. 1033=A.I.R. 1937 Oudh 87.**

———Sch. III, Para. 11—*Scope—Mortgage with sanction of Collector—Omission to inform Collector about attempt of decree-holder to attach property—Validity of mortgage if affected.*

Where a judgment-debtor executes a mortgage after obtaining the Collector's authority in writing therefor the fact that the authority is obtained without disclosing to the Collector that a decree-holder is about to attach the property in execution of a decree does not make the mortgage illegal or invalid. A judgment-debtor is not bound to inform the Collector of all the steps that his creditors are taking against him. (*Stone, C.J. and Niyogi, J.*) BEHARILAL *v.* ANAND MANGAL. **19 N.L.J. 94.**

C. P. CODE (1908), Sch. III, Para. 11.

———Sch. III, Para. 11—*Scope—Sale in contravention of—Validity—Right of vendor to refund of purchase money—Contract Act, Ss.* 65 *and* 70—*Applicability.*

A judgment-debtor is incompetent to sell or transfer his property under para. 11 of Sch. III, C. P. Code, if at the time of the sale the Collector has jurisdiction to execute the decree; and a transfer made in contravention of Sch. III, para. 11, is void and of no legal effect whatsoever. A person who is incompetent to transfer property by reason of Sch. III, para. 11, is on the same footing as a minor or lunatic, who is incompetent to contract. S. 65, Contract Act, cannot be applied to such a case or invoked by the vendor in order to entitle him to a refund of the purchase money paid by him in consideration of the transfer which is void. Nor does S. 70 of the Contract Act apply to the case, because the law will not presume or imply a contract where there could not have been a contract. (*Pollock, J.*) NATHIBHAI *v.* WAILAJI. **I.L.R. (1937) Nag. 111=169 I.C. 675=10 R.N. 16=A.I.R. 1937 Nag. 330.**

———Sch. III, Para. 11—*Transfer of execution to Collector—Sale officer returning file to Civil Court to find out extent of property—Order of Civil Court thereon—Mortgage during interval—Validity.*

Where after the transfer of the execution proceedings to the Collector, the Sale Officer returns the file to the Civil Court in order to find out the correct extent and description of the property to be sold, the Collector does not lose seizin of the case. Even if it were to be assumed that he does so, the Collector must be held to have become seized of the case again on the date of the order of the Civil Court answering the inquiry of the Sale Officer and directing the return of the file to him, and not on the date such order reaches him. A mortgage of the property under execution executed during the intervening period is, therefore, incompetent and void under Para. 11 of Sch. III, C. P. Code. (*Srivastava and Nanavutty, JJ.*) BHOLA NATH *v.* MAHRANI KUAR. **12 Luck. 185=1936 O.L.R. 242=162 I.C. 362=8 R.O. 364=1936 O.W.N. 489=A.I.R. 1936 Oudh 280.**

———Sch. III, Para. 11 (1) and S. 68—*Decree satisfied by sale of some of the villages under Collector's control—Sale officer exempting remaining villages from sale—Mortgage of exempted villages without Collector's permission—Validity.*

Certain villages were under the control of the Collector under S. 68, C. P. Code, in execution of a decree. The Collector directed sale of certain villages by separate lot and to stop further sale when the decretal amount was satisfied. The sale officer therefore sold only two villages and on fetching the required amount exempted the other villages from sale. The judgment-debtor thereupon mortgaged one of the exempted villages without the permission of the Collector.

Held, that the proceedings in execution before the Collector not having come to an end, the exemption from sale could not divest the Collector from exercising powers under Paras. 1 to 10, Sch. III, C. P. Code, over such exempted villages. The villages being still under the control of the Collector under Para. 11 (1) at the time of the mortgage, the mortgage was invalid. (*Thomas and Zia-ul-Hasan, JJ.*) RAJA MOHAN MANUCHA *v.* MANZOOR AHMAD KHAN. **13 Luck. 531=169 I.C. 785=10 R.O. 5=1937 O.W.N. 784=1937 O.L.R. 386=A.I.R. 1937 Oudh 410.**

C. S. (CLASSN., CON. & AP.) RULES, R. 55.

———Appendix—Forms in—Adherence to—Necessity. *See* PARTNERSHIP—SUIT FOR DISSOLUTION. **A.I.R. 1938 Rang. 478.**

———Appendix D, Form No. 21—*Applicability—Suit for accounts—Dissolution of partnership already taken place—Form of preliminary decree.*

Although the heading of Form No. 21 in Appendix D, C. P. Code, describes it as a form for a preliminary decree in a suit for dissolution of partnership and the taking of partnership accounts, it is just as much applicable when the Court is asked to declare that a dissolution has taken place and an account is still required, (*Beckett, J.*) RAM SUKH MAL *v.* HAR SAHAI MAL. **I.L.R. (1939) Lah. 178=180 I.C. 638=11 R.L. 701=40 P.L.R. 753=A.I.R. 1938 Lah. 758.**

———(SECOND AMENDMENT) (ACT IX OF 1937), S. 3—*Applicability to proceedings other than those arising from suits.*

Section 3 of Act IX of 1937, which amends S. 60, C. P. Code, has application to proceedings other than those arising from suits. (*Weston, J.*) PLEBIAN CO-OPERATIVE CREDIT SOCIETY *v.* ZAHOORBEG. **A.I.R. 1940 Sind 160.**

———S. 3—*Scope—Application for execution of award under Bombay Co-operative Societies Act—If "proceeding arising out of suit."*

An application to execute an award made under the provisions of the Bombay Co-operative Societies Act, 1925, is not a "proceeding arising out of a suit" within the meaning of S. 3 of Act IX of 1937. (*Tyabji, J.*) KARACHI URBAN CO-OPERATIVE BANK *v.* SAHIBDIN ALANDIN. **A.I.R. 1940 Sind 147.**

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, R. 14—*Scope—Non-compliance with—Dismissal of Government servant—Absence of proper enquiry—Right of suit in Civil Court.*

A Civil Court is not competent to give redress to a dismissed servant of the Crown on the ground that no proper enquiry was held prior to such dismissal as required by R. 14 of the Civil Service Classification Rules. Failure to observe the rules will not furnish a cause of action for a civil suit, although a solemn duty is laid on the Government to observe these rules. (*Varadachariar and Pandrang Row, JJ.*) NILAMEGAM PILLAI *v.* SECRETARY OF STATE. **172 I.C. 244=10 R.M. 439=46 L.W. 242=A.I.R. 1937 Mad. 777.**

———R. 55—*Construction—"Heard in person"—Right of Government servant to be represented by Counsel at inquiry—Bar Councils Act, S.* 14 (1) (*b*).

The Government servant in an inquiry under R. 55 is not entitled as of right to appear by Counsel. There is in British India no common law right in a party to a proceeding to be represented by Counsel. The right wherever it exists, is given by enactment. R. 55 limits the Government servant's right to be heard "in

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person"; and such right is restricted to the person of the Government servant. Nor can S. 14 (1) (*b*) of the Bar Councils Act be invoked to enable the Government to claim the right to be represented by Counsel. The question has to be determined not by Counsel's right of audience in inferior Courts, but by the right of the client to be represented by him. (*Beasley, C.J. and Cornish, J.*) RAJAGOPALA AIYANGAR *v.* COLLECTOR OF SALT REVENUE, MADRAS. **I.L.R. (1938) Mad. 127=173 I.C. 251=10 R.M. 536=1937 M.W.N. 821=46 L.W. 531=A.I.R. 1937 Mad. 735=(1937) 2 M.L.J. 189.**

———R. 55—Inquiry under—Power to hold—Authority competent to impose penalty—If bound to hold inquiry itself—Power to delegate to subordinate officer. *See* GOVERNMENT OF INDIA ACT (1919), S. 96-B. **(1937) 2 M.L.J. 189.**

CLUB—Expulsion of member—Power of Court to review—Resolution expelling member passed at meeting without discussion of reasons—Rule authorizing expulsion without assigning reasons—Effect of—Jurisdiction of Court to interfere—Principles of natural justice. *See* JURISDICTION—CIVIL COURT. **40 Bom.L.R. 1213.**

COLONIAL COURTS ACT, S. 3—*Accused charged under Admiralty Jurisdiction—Punishment and procedure.*

In charges under Admiralty Jurisdiction the offence with which an accused is chargeable is the offence under English law. Where therefore a person is charged under Ss. 4 and 304, Penal Code, he should be charged with manslaughter or a lesser offence of grievous hurt or simple hurt. The punishment which may be imposed will be the punishment which may be imposed for a like offence under the Penal Code as provided by S. 3, Colonial Courts Act (37 & 38 Vict., Chap. 27). The procedure which would govern the trial, question of jurisdiction apart, would be the procedure in the Cr. P. Code. (*Davis, J.C. and Rupchand Bilaram, A.J.C.*) FRANCIS XAVIER FERNANDEZ *v.* EMPEROR. **29 S.L.R. 281=160 I.C. 375=8 R.S. 122=37 Cr.L.J. 314=1936 Cr.C. 50=A.I.R. 1936 Sind 3.**

COLOURABLE IMITATION. *See* TRADE-MARK.

COMMISSION TO EXAMINE WITNESSES—COMMISSIONER. *See* C. P. CODE, O. 26.

COMMISSION—Application by defendant for examination of his witnesses on commission—Court directing him to file interrogatories—Plaintiff granted time to file cross-interrogatories—Objection by plaintiff to issue of commission—Order directing commission to issue only on payment of costs to plaintiff—Legality. *See* C. P. CODE, O. 26, R. 15. **159 I.C. 179=A.I.R. 1936 Pat. 33.**

COMPANIES ACT (VII OF 1913)—Rules of the Original Side of the Madras High Court Rr. 27 and 101—Construction. *See* COMPANIES ACT, S. 162. **46 L.W. 768=(1937) 2 M.L.J. 825.**

———S. 2 (11)—Broker—If an 'officer' of the company. *See* COMPANIES ACT, S. 235. **(1937) 2 M.L.J. 820.**

———S. 3—*Contravention of provisions of Act—Jurisdiction of High Court—Nature of.*

The jurisdiction of the High Court referred to in S. 3 of the Companies Act is obviously the

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jurisdiction exercised by virtue of the specific provisions of the Act and not a jurisdiction which may be invoked where merely a criminal offence is declared. The High Court cannot, as a Court of first instance, try persons who have been guilty of an offence committed on account of breaches of the provisions of the sections of the Act. If the case is committed to the High Court under S. 194 (1), Cr.P. Code, or proceedings are started on an application of the Advocate-General under S. 194 (2) or are transferred to it under S. 526, Cr.P. Code, then the High Court has jurisdiction to try such persons. (*Sulaiman, C.J., Thom and Rachhpal Singh, JJ.*) HARISH CHANDRA *v.* KAVINDRA NARAIN SINHA. **I.L.R. (1937) All. 220=166 I.C. 53=9 R.A. 349=38 Cr.L.J. 111=1936 All.L.R. 990=1936 A.L.J. 1105=1936 A.W.R. 964=A.I.R. 1936 All. 830 (F.B.).**

———S. 3—*Scope—Jurisdiction—High Court—Application for rectification of Registrar of Joint Stock Companies—Maintainability.*

The jurisdiction conferred on the High Court by S. 3 of the Companies Act is the jurisdiction to deal with matters provided for by the Act. There is no section in the Act which entitles the High Court to direct the Registrar of joint stock companies to rectify his register. It is very doubtful whether an application to rectify the register kept by the Registrar can be properly brought up before or dealt with by the Judge dealing with company matters. (*McNair, J.*) ARYA INSURANCE CO., LTD., *In re.* **63 Cal. 773=167 I.C. 689=9 R.C. 716=A.I.R. 1937 Cal. 81.**

———Ss. 3 and 235—*Payment by directors of company after winding up—Application by Official Liquidator for enquiry into conduct of directors—Three directors living in England and another beyond jurisdiction of Court and outside the province—Process against the directors—If can issue—Jurisdiction.*

The directors of a company which had its registered office in the province of Bihar within the jurisdiction of the Patna High Court having made certain payments after winding up the Official Liquidator applied under S. 235 of the Companies Act for an enquiry into the conduct of the directors in respect of the misapplication of the assets of the Company. All the directors were outside the jurisdiction of the Court. Three of them were in England and therefore beyond the jurisdiction of Courts in British India and the fourth was in Bombay, outside the jurisdiction of the Patna High Court.

Held, (1) that it was a principle of international law that a Court shall not serve its processes on persons outside its own jurisdiction and upon persons against whom, if an order was made, the order cannot be enforced; (2) that so far as the directors living in England were concerned, the Court could not issue summons or process upon them; (3) that as regards the director living in Bombay, it was difficult to hold that the Court had no jurisdiction, as he was a person resident in British India and the matter related to the assets of the company over which the Court had admittedly jurisdiction under S. 3 of the Act, and therefore process could issue against him. (*Wort, A.C.J.*) BISHADENDU GUPTA *v.* H. LANGHAN REED. **15 Pat. 630=168 I.C. 509=9 R.P. 485=3 B.R. 436=1936 P.W.N. 904=17 Pat.L.T. 892=A.I.R. 1937 Pat. 196.**

COMPANIES ACT (1913), S. 4.

———S. 4—*Association consisting of less than maximum number at formation—Number exceeding maximum later on—Need for registration.*

S. 4 of the Companies Act on its true construction governs not only the first formation of the company, association or partnership, but rules its continuance. An association formed for trading may be perfectly legal at its formation, if the original members be not more than ten in number, in the case of a banking business and twenty in other businesses, but if the number increases later on and exceeds the maximum allowable, the association becomes an illegal one, if no registration is effected. (*Mitter and Biswas, JJ.*) NIBARAN CHANDRA SHAHA *v.* LALIT MOHAN BRINDABAN SHAHA. I.L.R. (1938) 2 Cal. 368=181 I.C. 717=11 R.C. 834=69 C.L.J. 151=A.I.R. 1939 Cal. 187.

———S. 4—*Company—Members—Sub-partner—If member for purpose of calculation of members.*

Sub-partners are not members of a firm or a company, and the existence of sub-partners would not affect the number of members of a firm for purposes of S. 4 of the Companies Act. (*Macklin, J.*) CHANDULAL *v.* KESHAVLAL. 163 I.C. 579=9 R. B. 34=38 Bom.L.R. 486=A.I.R. 1936 Bom. 246.

———S. 4—*Applicability—Joint family business concern.*

A trading association to be within S. 4 of the Companies Act must be one formed on the basis of contract between its members. A joint family business concern, however, which by its nature descends from father to son, in which interests are acquired by the succeeding generations not by an act of party but by the law of inheritance, is not an association of persons in this sense, and does not, therefore, come within the scope of that section. (*Mitter and Biswas, JJ.*) NIBARAN CHANDRA SHAHA *v.* LALIT MOHAN BRINDABAN SHAHA. I.L.R. (1938) 2 Cal. 368=181 I.C. 717=11 R.C. 834=69 C.L.J. 151=A.I.R. 1939 Cal. 187.

———S. 4—*Partnership—Essential—Mere provision for sharing profits—Effect of.*

There can be no partnership where there is no common business, common to all the members of an association or a so-called partnership. In the absence of community of business, a mere provision for sharing profits would not constitute a partnership. (*Rangnekar, J.*) THE NEW MOFUSSIL COMPANY, LTD. *v.* RUSTOMJI DHANJISHA. 60 Bom. 800=38 Bom.L.R. 408.

———S. 4—*Scope—Association or partnership—Provision for sharing profits—If* per se *implies partnership—Pool agreement between more than 20 factory owners for stifling competition and for distributing earnings in a particular manner—If illegal when unregistered.*

A pool arrangement formed between the owners of ginning factories of a particular place under which they agree that each one of them should contribute his earning to the common pool for the purpose of stifling competition and distribute the same in certain shares among them, each member of the pool being allowed to carry on his business in an unrestricted manner and being responsible to the pool whether his constituent paid or not, is not an association formed for the purpose of carrying any business as contemplated by S. 4 of the Companies Act. Such an arrangement is a mere scheme for collecting the earnings of all the members for the purpose of distribution among them. It is not an agreement of partnership, and even if it were held to be an association, does not fall within the prohibition of S. 4, even when the members of the pool number more than twenty. An association as is contemplated in S. 4 carries on and can only carry on business either by a trustee or by an agent or officers or directors. Where the business is carried by each of the members of a pool entirely in an independent manner, there is neither an association nor a partnership, notwithstanding that there is a provision for sharing the profits. Such an arrangement cannot be rendered illegal on the ground that it is not registered under the Companies Act. The members of the pool might constitute a trade association, formed no doubt, with the ultimate object of gain to the members; but it cannot be said to be an association formed for the purpose of carrying on business. (*Rangnekar, J.*) THE NEW MOFFUSSIL COMPANY, LTD. *v.* RUSTOMJI DHANJISHA. 60 Bom. 800=38 Bom.L.R. 408.

———S. 4—*Suit by unregistered association—Maintainability.*

A suit by an association which is an illegal one by reason of the fact of non-registration, is not maintainable. (*Mitter and Biswas, JJ.*) NIBARAN CHANDRA SHAHA *v.* LALIT MOHAN BRINDABAN SHAHA. I.L.R. (1938) 2 Cal. 368=181 I.C. 717=11 R.C. 834=69 C.L.J. 151=A.I.R. 1939 Cal. 187.

———S. 4—*Unregistered association—Beneficial interest of members.*

The members of a partnership or company or association hit by S. 4 of the Companies Act can have beneficial interest in property. (*Mitter and Biswas, JJ.*) NIBARAN CHANDRA SHAHA *v.* LALIT MOHAN BRINDABAN SHAHA. I.L.R. (1938) 2 Cal. 368=181 I.C. 717=11 R.C. 834=69 C.L.J. 151=A.I.R. 1939 Cal. 187.

———S. 4 (2)—*Applicability—Existence of legal relation between shareholders—If necessary.*

In order to constitute an association within the meaning of S. 4, the existence of the legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary. 29 Mad. 477, Rel. on. But where the object is to form a company it does not and there is no need to show the existence of a legal relation between the persons forming the company. Where a person starting an unregistered company for carrying on business having acquisition of gain as its object collects money from its subscribers who number more than twenty then the moment money is collected the bargain is clinched and turned into an actual contract by acceptance and the subscribers become shareholders as such because they must be deemed to have paid the money for the very object of the company and the mere fact that share certificates are not issued does not make them any less shareholders and hence the case comes under sub-S. (2) of S. 4. (*Spargo, J.*) DAWSON *v.* KING. 183 I.C. 497=12 R.R. 79=40 Cr.L.J. 799=1939 Comp. C. 254=A.I.R. 1939 Rang. 273.

———S. 4 (2)—*Applicability—Conditions.*

In order that S. 4 (2) of the Companies Act might apply it is necessary that, in the first place, there should be either a company, association or

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partnership consisting of more than twenty persons. Secondly, such company, association or partnership must be formed for the purpose of carrying on business other than the business of banking. Thirdly that business must have for its object the acquisition of gain either to the company, association or partnership, or to the individual members thereof. (*Rangnekar, J.*) THE NEW MOFFUSSIL COMPANY, LTD. *v.* RUSTOMJI DHANJISHA. 60 Bom. 800=38 Bom.L.R. 408.

———S. 4 (2)—*Construction—"Any other business"—Meaning of.*

The word "business" in S. 4 (2) must be construed in a reasonable manner so as to effectuate the intention of the legislature. The words "any other business" show that what the legislature contemplated is something which must be business in the same sense in which banking is, although impliedly described as business. (*Rangnekar, J.*) THE NEW MOFFUSSIL COMPANY, LTD. *v.* RUSTOMJI DHANJISHA. 60 Bom. 800=38 Bom.L.R. 408.

———S. 4 (2)—*Construction—"Business"—Test of carrying on business.*

The word "business" is undoubtedly a word of very large import, and the test of business is continuity and repetition of acts. But whether a repetition of acts amounts to business or not must depend upon the nature of the acts, and the act itself, if done singly, must be such as to be called business. If the act when done singly cannot amount to business, then merely because twenty persons or more than twenty persons are repeating the same act, it can hardly be said that they are carrying on business. (*Rangnekar, J.*) NEW MOFFUSSIL COMPANY, LTD. *v.* RUSTOMJI DHANJISHA. 60 Bom. 800=38 Bom.L.R. 408.

———S. 4 (2)—*Scope—Partnership of less than twenty—Subsequent increase of members to over twenty and conversion into joint-stock company—Member of original firm not aware of increase of members or change and not allotted any share in new firm—New firm not registered—Suit by member for declaration of dissolution of firm and for accounts—If barred.*

Where a firm consisting of less than twenty partners is subsequently converted into a joint-stock company with additional partners so as to consist of more than twenty partners, it must be registered under the Companies Act; if it is not so registered, no suit can be maintained in respect of that partnership. But when a person who was a partner in the firm and was, as such, entitled to a share of the profits when the membership of the firm was below twenty, is not allotted any share in the newly formed company, he being totally unaware of the increase in the members and of the conversion, he cannot be made to lose his right to a share of the profits because the number of partners had increased beyond twenty without his knowledge. A suit by him for a declaration that there has been a dissolution of the partnership, and for accounts cannot be dismissed on the ground of non-registration under S. 4 (2) of the Companies Act. (*Horwill, J.*) PARASURAMA IYER *v.* SUBBURAMACHARI. 1937 M.W.N. 1189=175 I.C. 290=10 R.M. 764=A.I.R. 1938 Mad. 151.

———Ss. 4 (5) and 283—*Offences under—Case sent up by Police after investigation—Jurisdiction of Magistrate.*

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It is true that offences under S. 4 (5) and S. 283 are non-cognizable and cannot be investigated by the police under Ch. 14, Cr.P. Code. But the mere fact that the offences were wrongly investigated and sent up by the police is not an obstacle to their being tried by a Magistrate. (*Spargo, J.*) DAWSON *v.* KING. 183 I.C. 597=12 R.R. 79=40 Cr.L.J. 799=1939 Comp. C. 254=A.I.R. 1939 Rang. 273.

———Ss. 6, 10 and 12—*Scope—Place of registered office inserted in memorandum of association—If unalterable—Power of company to change.*

The insertion of the name of the place of the Registered office of a company in the memorandum of association of the company is not a condition within the meaning of S. 10 of the Companies Act. Such insertion does not make it an unalterable condition of the Company's constitution. It is merely a provision with regard to the management and administration of the company. The company has power by resolution to alter or change the place of the Registered Office; and provided the alteration is made in the manner provided by the Act, it is valid and binding on the company. (*McNair, J.*) ARYYA INSURANCE CO., LTD., *In re.* 63 Cal. 773=167 I.C. 689=9 R.C. 716=A.I.R. 1937 Cal. 81.

———Ss. 12 and 26—*Company registered under S. 26—Memorandum — Alteration — Procedure—Confirmation of alteration—Invalid order by Court—Power to recall.*

A company registered under S. 26 of the Companies Act desiring to alter its memorandum of association must apply in the first instance to the Local Government for the approval of the proposed alterations and then apply to the Court for the confirmation of the same. An order of Court confirming the proposed alterations before the approval of the Local Government is obtained, is erroneous and the Court has jurisdiction to recall and cancel its invalid order. (*Iqbal Ahmad, J.*) UGAR SEN PARSOTAM DAS *v.* CHAMBER OF COMMERCE, HAPUR. I.L.R. (1937) All. 202=169 I.C. 500=10 R.A. 22=1937 All.L.R. 534=1936 A.L.J. 1129=1936 A.W.R. 1054=A.I.R. 1937 All. 432.

———Ss. 20 and 81—*Amendment of articles of association—Failure to mention question of amendment in notice under S. 81—If fatal.*

Where a company amends the articles of association under S. 20 by a special resolution without mentioning in the notice under S. 81 that the question of amendment of articles was to come up for decision in the meeting, the irregularity is fatal to the proceedings and makes the amendment invalid and *ultra vires*. (*Bhide, J.*) GULAB SINGH *v.* PUNJAB ZAMINDARA BANK, LTD. A.I.R. 1940 Lah. 243.

———S. 20—*Number of directors specified in article of association—If can be altered by general meeting.*

An article of association of a company provided that until otherwise determined by a general meeting the number of directors should be not less than three or more than seven.

Held, that a resolution at a general meeting that the number of directors should be increased to more than seven was valid and no special resolution was necessary. (*Weston, J.*) TOPANDAS *v.*

COMPANIES ACT (1913), S. 21.

YEOTMAL ELECTRIC SUPPLY CO. **1940 Comp. C. 133=A.I.R. 1940 Sind. 87.**

———**S. 21**—*Articles—If constitute contracts.*

According to S. 21, the articles of association are binding on the company as well as on the members thereof. The articles constitute a contract *inter se* amongst the shareholders and where the articles have been acted upon by the company and the members, the articles constitute an implied contract between the members and the company. Therefore, where in pursuance of certain articles acted upon by the company, a member was appointed Managing Director of the Bank and acted for eleven years in that capacity, the articles constitute an implied contract between the member and the company, a suit for performance of which lies in a Civil Court. (*Bhide, J.*) GULAB SINGH *v.* PUNJAB ZAMINDARA BANK, LTD. **A.I.R. 1940 Lah. 243.**

———**S. 21 (2)**—*Undertaking to purchases shares by signatories to articles of association—If money becomes due from them.*

Though money becomes a debt when it is due under the articles of association and memorandum, it does not become due simply because the signatories to the articles and memorandum of association have undertaken to purchase certain number of shares and pay for them. It is only money which is presently due that can be described as a debt. (*Allsop, J.*) VISHWANATH PRASAD JALLAN *v.* HOLYLAND CINETONE, LTD., BENARES. **185 I.C. 501=12 R.A. 330=1939 A.W.R. (H.C.) 746=1939 A.L.J. 950=1939 Comp. C. 324=A.I.R. 1939 All. 739.**

———**Ss. 28 and 30 (1)**—*"Allotment of shares"—Proof—Subscriber for shares in memorandum of association—Liability of—Absence of resolution allotting shares—Effect of.*

A person who subscribes for shares in the memorandum of association of a company must, by S. 30 (1) of the Companies Act, be deemed to have agreed to become a member of the company, and on registration his name must be entered as a member in the register of members. But an express *allotment* of shares is necessary in order to give rise to a liability to pay up the value of the sahres. The fact that the prospectus published and issued contains a statement that a certain number of shares of certain value have been subscribed for by the signatories to the memorandum is not sufficient to show that there was any *"allotment"* of shares, where there is no record in the Minutes Book of the Board of Directors of any resolution allotting shares. (*Burn, J.*) SYNEMODELUX, LTD. *v.* VANNAMUTHU PILLAI. **185 I.C. 712=12 R.M. 574=1939 M.W. N. 324=49 L.W. 537=1939 Comp. C. 126=A.I.R. 1939 Mad. 498=(1939) 1 M.L.J. 534.**

———**S. 30 (2)**—*Scope—Non-compliance—Effect of.*

Per Trial Judge, *Rupchand A.J.C.*—S. 30 (2) of the Companies Act merely lays down a rule of procedure and does not purport to declare that a failure to comply with its provisions shall relieve a signatory to the memorandum of association of his liability to pay for his shares, which according to S. 30 (1) he is deemed to have agreed to have purchased and to pay for. A director is bound to see if the allotment of shares is made. He cannot avoid his liability to pay for the shares by pleading his own default or negligence in making the allotment of shares to himself. (*Mehta and Lobo, JJ.*) VAZIRMAL KEWALRAM *v.* MAKRAN COAST STEAM NAVIGATION CO., LTD. **32 S.L.R. 167=177 I.C. 577=11 R.S. 65=A.I.R. 1938 Sind 187.**

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———**S. 30 (2)**—*Shares transferred to person as qualification for directorship—Such person holding out that he is shareholder and member of company—Liquidation of company—Estoppel.*

Where a person has been given shares or shares have been transferred to him, as qualification for a directorship, such a transfer makes the transferee a member of the company within the meaning of S. 30, Cl. (2), Companies Act. And if such person holds out that he is a shareholder and member of the company, he is estopped from denying that he is a member or a shareholder where the company goes into liquidation on the ground that the transfer was a mere colourable transaction, and cannot object to his name being included in the list of contributories. (*Young, C.J.*) MULK RAJ BHALLA *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **17 Lah. 576=163 I.C. 670=9 R.L. 29=38 P.L.R. 816=A.I.R. 1936 Lah. 480.**

———**Ss. 30 and 184**—*Signatories to memorandum of association—Liability to be included in list of contributories—Actual entry in register of shares or actual allotment of shares—If condition precedent.*

It is well-settled that the signatories to the memorandum of association of a company become the first members of the company as from the date of incorporation mentioned in the Registrar's certificate. They are deemed to have become members of the company, and, on its registration, to be entered as members on its register of members. But neither this entry in the register nor the allotment of shares is a condition precedent. Each subscriber at once by subscribing irrevocably agrees to take from the company the number of shares placed opposite his signature unless all its share capital has already been allotted to other persons. The fact that no shares are allotted to him and that he has ceased to be treated as a member for a considerable time would not relieve him from liability as a member and to be included in the list of contributories settled under S. 184 of the Companies Act. (*Mehta and Lobo, JJ.*) VAZIRMAL KEWALRAM *v.* MAKRAN COAST STEAM NAVIGATION CO., LTD. **32 S.L.R. 167=177 I.C. 577=11 R.S. 65=A.I.R. 1938 Sind 187.**

———**S. 36**—*Copy of register—Power of Court to direct its delivery by company to a shareholder.*

The Court has inherent jurisdiction to direct a company to deliver a copy of the register of the members of the company to a shareholder of the company. (*Iqbal Ahmad and Harries, JJ.*) BRITISH INDIA CORPORATION, LTD. *v.* ROBERT MENZIES. **58 All. 988=164 I.C. 387=9 R.A. 153=1936 A.W.R. 465=1936 A.L.J. 748=1936 All.L.R. 742=A.I.R. 1936 All. 568.**

———**S. 38**—*Award of costs—Discretion of Court.*

Section gives a wide discretion to the Court in the awarding of costs. (*Wort, J.*) MOHADEVI *v.* MOTIRAM ROSHAN LAL COAL CO. **5 B.R. 659=181 I.C. 734=11 R.P. 639=20 Pat.L.T. 703=A.I.R. 1939 Pat. 603.**

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———**S. 38**—*Delay in making application—Effect of.*

A mere delay in making an application for rectification of the register is no ground in itself why the Court should not exercise its jurisdiction under the section. (*Wort, J.*) MOHADEVI *v.* MOTIRAM ROSHAN LAL COAL CO. 5 B.R. 659=181 I.C. 734=11 R.P. 639=20 Pat.L.T. 703=A.I.R.1939 Pat. 603.

———**S. 38 (1) (a)**—*Articles of Association—Binding nature of—Company acting to letter of article—If acts without sufficient cause—Power of Court to decide whether action reasonable or desirable.*

It needs no authority to establish or support the proposition that a member of the company and those claiming through him are bound by the Company's Articles of Association. It forms a contract between them and in any case in which the company and its directors literally and *bona fide* carry out the provisions of the Company's Articles of Association, it or they can never be said to be acting without sufficient cause. It is a misreading of those words in S. 38 to suppose that they confer upon the Court jurisdiction to make a roving inquiry as to whether what has happened is desirable or even reasonable. Under the articles of a company, it had a right and a duty to recognise only the executors or administrators of the deceased member. A member died leaving behind him his heir who under Hindu Law claimed to represent the deceased by right of survivorship:

Held, the company could rightly ask such claimant to produce a probate or a succession certificate. (*Braund, J.*) KASIVISWANATHAN CHETTIYAR *v.* INDO BURMA PETROLEUM CO., LTD. 162 I.C. 127=8 R.R. 538=A.I.R. 1936 Rang. 52.

———**Ss. 38, 40 and 55**—*Application for reduction of capital—Shareholder alleging that persons voting for resolution for reduction were not duly qualified to vote—Burden of proof.*

According to S. 40, the register of members is *prima facie* evidence of any matters directed or authorised by the Act to be inserted therein. Where the names of certain persons are entered in the register as shareholders it can be taken for granted that such persons are qualified shareholders. Where an application by a company for reduction of its capital is opposed by a shareholder on the ground that certain persons who have voted for the resolution for the reduction of the capital of the company were not duly qualified as shareholders so to vote, or to vote at all, by reason of their names not having been properly entered in the register or by reason of their names not having been on the register for a length of time sufficient to entitle them to vote, but no steps have been taken by the shareholder to have the register altered or rectified under S. 38, the burden is on the shareholder opposing the petition to substantiate his allegations, and where he fails to do so the application should be allowed. (*Costello and Panckridge, JJ.*) MARWARI STORES, LTD. *v.* GOURI SHANKER. 63 Cal. 703=165 I.C. 408=9 R.C. 390=40 C.W.N. 661=A.I.R. 1936 Cal. 327.

———**S. 55**—*Petition for reduction of capital—Proof of loss of capital—Necessity—Considerations.*

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It is not always essential or necessary for the Court on a petition for reduction of capital to satisfy itself that there has been a loss of the capital. The only serious question with which the Court is concerned is whether or not the company had duly passed its special resolution to the effect that the capital be reduced. Where, however, the reduction of the capital is based on the ground that capital has been lost or unrepresented by available assets, it is always prudent to proceed on some evidence. That is a sound procedure and one which ordinarily should be acted upon. Where the person opposing the petition accepts the statement of the company that there has been a loss of capital, the Court should act upon the assumption that there is evidence of loss of capital. (*Costello and Panckridge, JJ.*) MARWARI STORES, LTD. *v.* GOURI SHANKER. 63 Cal. 703=165 I.C. 408=9 R.C. 390=40 C.W.N. 661=A.I.R. 1936 Cal. 327.

———**S. 55**—*Sanction to proposal relating to reduction of share capital—Principles applicable.*

Where an application under S. 55 is presented to the Court by a company for its sanction to a proposal relating to a reduction of the share capital of the company, the following principles are the principles applicable: (1) That a company has the power to reduce its capital much more so if the power is conferred by the Articles of Association. (2) Subject to confirmation by the Court which is the safeguard of the minority, the question of reducing capital is a domestic one for the decision of the majority. (3) The company is to determine the extent, the mode and incidence of the reduction. (4) The company may reduce the share capital of all its shareholders *pro rata* or may reduce the shares of any individual shareholder or any class of shareholders wholly or in part. (5) That the Court has to see that interests of the minority have been protected and no unfairness has been shown to it. (6) That in doing so the Court should keep in view the consideration that the decision has been arrived at by businessmen who are fully cognizant of their necessities and are the best custodians of their interests and should therefore be slow to interfere. (*Mir Ahmad, J.*) KHATTAR ELECTRICAL ENGINEERING AND GENERAL SUPPLY CO., *In re.* 177 I.C. 368=11 R. Pesh. 21=A.I.R. 1938 Pesh. 41.

———**S. 56**—*Jurisdiction of Court under—Reduction of share capital—Application to Court—Scope of enquiry—Considerations for Court—Validity of resolution—If can be gone into.*

In an application under S. 56 of the Companies Act, the Court is only concerned to confirm the proposed reduction and not the resolutions passed by the company. It is the duty of the Court to confirm the reduction if it is satisfied as to its fairness. The Court has only to be satisfied that the reduction is fair and equitable to all concerned, as between different classes of shareholders. It is an elementary principal of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers and in fact it has no jurisdiction to do so. It is for the company, and the company alone, to judge the prudence of the course proposed. The only question to be considered by the Court are (1) whether the Court ought to refuse its sanction to the reduction out of regard to the interests of those

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members of the public who may be induced to take shares in the company and (2) whether the reduction is fair and equitable as between the different classes of shareholders. Where the creditors are not concerned at all and the reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, and no differences are made among the only class of shareholders existing, there can be no valid objection to confirming the reduction of share capital. If, on considering the reduction of the capital from the point of view as to whether it was necessary because of capital being lost or not represented by available assets, it is clear to the Court that the reduction has been shown to be proper and not unfair to the whole body of shareholders, the reduction would be confirmed. (*Shaw, J.*) BENGAL BURMA STEAM NAVIGATION COMPANY, LTD., *In re.* **1940 Comp. C. 1.**

———**S. 56**—*Reduction of share capital—Confirmation—Considerations for Court.*

It is an elementary principle of law relating to joint stock company that the Court will not interfere with the internal management of a company acting within its own rights and in fact has no jurisdiction to do so. In an application under S. 56 the Court is only concerned to confirm the proposed reduction and not the resolution passed by the company. The validity of the resolution cannot therefore be questioned in such application. The only questions to be considered by the Court are: (1) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? (2) Is the reduction fair and equitable as between different classes of shareholders? Where the reduction is shared by all and is designed to work justly and equitably and where it does not involve diminution of any liability in respect of the unpaid capital or payment to any shareholder of any paid up capital and there is evidence regarding the loss of capital and non-representation of available assets, there is nothing to prevent the Court from confirming such reduction. (*Shaw, J.*) BURMA COMPANIES ACT AND BENGAL BURMA STEAM NAVIGATION CO., LTD., *In re.* **186 I.C. 431=12 R.R. 266=A.I.R. 1939 Rang. 417.**

———**S. 76 (1)**—*Construction—Meeting called for particular date in one year but adjourned to next year—If separate meetings for two years—Requirements of section—If complied with.*

S. 76 (1) demands that there shall be a general meeting held once at least in every year, *i.e.*, one separate and distinct meeting every year. It does not mean that the same meeting can go on for several years being held once in each year. Where a meeting called and held on a day in one year is adjourned to a date in the next year and held on that date, the meeting held on the latter date, is not a different meeting from that which began on the former date; it is the same meeting and does not satisfy the requirements of S. 76. (*Burn, J.*) SREE MEENAKSHI MILLS CO., LTD. *v.* ASST. REGISTRAR OF JOINT STOCK COMPANIES, MADURA. **1938 M.W.N. 608=11 R.M. 358 (1)=177 I.C. 600=39 Cr.L.J. 907 (1)= 1938 M.Cr.C. 219=47 L.W. 635=A.I.R. 1938 Mad. 640=(1938) 1 M.L.J. 856.**

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———**S. 78**—*Notice of meeting—Contents of.*

It is true that a shareholder is entitled to be given adequate information as to the business to be transacted, as S. 78 in fact requires; but it cannot be held that unless the notice of the meeting recites all facts necessary to meet every technical objection which may be raised to its validity, the meeting held in pursuance of such notice must be invalid. (*Weston, J.*) TOPANDAS *v.* YEOTMAL ELECTRIC SUPPLY CO. **1940 Comp. C. 133—A.I.R. 1940 Sind 87.**

———**Ss. 81 and 20**—Amendment of articles of association—Failure to mention question of amendment in notice under **S. 81—If fatal.** *See* COMPANIES ACT, Ss. 20 AND 81. **A.I.R. 1940** Lah. 243.

———**S. 81**—*Resolution relating to question of reduction of capital—Validity—Amendment of section after adjournment of meeting—Effect on procedure.*

A notice was issued on 21st December, 1936, for the purpose of calling an ordinary general meeting of the shareholders of a private limited liability company on 30th December, 1936, for deciding the question of reducing the capital and assets of the company. At the meeting held on 30th December, 1936, eight out of the nine shareholders of the company were present. The ninth shareholder had died before the notice was issued and his legal representatives had not obtained succession certificate to entitle them to take part in the proceedings. An objection having been raised as to circulation of the balance-sheet, the meeting was adjourned to 21st February, 1937. Another notice was issued on 6th February, 1937, to convene the adjourned meeting on 21st February, 1937. In this notice the meeting was designated as an extraordinary general meeting of the shareholders of the company. The same eight shareholders were present at the meeting. One of the shareholders left the meeting under protest and the remaining passed the proposal relating to the reduction of the share capital of the company and certain other proposals. Another meeting of shareholders held on 10th March, 1937, confirmed the reduction of the capital agreed upon by the meeting of 21st February, 1937, and in pursuance of the proceedings an application under S. 55 was presented to the Judicial Commissioner's Court for sanction to be awarded to the proposals. It was contended that full 21 days' notice as required by S. 81 (as amended) not having been given the meeting of 21st February was not validly held and the resolutions were *ultra vires.*

Held, that the company was well within its rights in resolving to reduce its capital. The meeting of 30th December, 1936, was regularly called because seven days' notice was given for it and this was all that was required to be done by the law then in force (S. 81 of the old Act read with Art. 63 of the Articles of Association of the company). The meeting of 21st February, 1937, was clearly a continuation of the meeting of 30th December, 1936, because the latter meeting had been validly adjourned to the former date under Art. 67 of the Articles of Association of the company. The fact that S. 81 was amended in the meantime had no effect on the

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meeting of 21st February, 1937, so far as the procedure for convening it was concerned. The resolutions passed at the meeting of 21st February, 1937, were therefore in order. The omission to name the meeting of 30th December, 1936, as an extraordinary meeting in the notice dated 21st December, 1936, had no importance and did not vitiate the proceedings. As the old Act was no longer law when the meeting of 21st February, 1937, was held, the confirmatory meeting of 10th March, 1937, was unnecessary and the decision of the meeting of 21st February, 1937, became final on that very day. (*Mir Ahmad, J.*) KHATTAR ELECTRICAL ENGINEERING AND GENERAL SUPPLY CO., *In re.* **177 I.C. 368=11 R. Pesh. 21=A.I.R. 1938 Pesh. 41.**

———**S. 81 (3)**—*Declaration of chairman—When conclusive.*

The conclusiveness of the declaration of the Chairman contemplated by cl. (3) of S. 81 of the Companies Act attaches to the declaration where the chairman does not find by his declaration the figures for and against the resolution. But where the chairman by his declaration finds the figures and erroneously in point of law holds that the resolution has been duly passed, the resolution cannot be said to have been passed according to law. (*Nasim Ali and Remfry, JJ.*) DHAKESWARI COTTON MILLS, LTD. *v.* NIL KAMAL CHAKRAVARTI. **I. L. R. (1938) 1 Cal. 90=173 I.C. 622=10 R.C. 555 =41 C.W.N. 1137=A.I.R. 1937 Cal. 645.**

———**S. 83-B**—*Power of company in general meeting to appoint additional directors—When excluded.*

One of the articles of association of a company provided as follows: "The directors shall have power, at any time, and from time to time, to appoint any other qualified person to be a director, either to fill a vacancy or as an addition to the Board, but so that the total number of directors shall not at any time exceed the maximum number fixed by Art. 98, and any person so appointed shall retain his office only until the next following ordinary meeting, and shall then be eligible for re-election".

Held, that the ordinary power of the company in general meeting to appoint additional directors had not been excluded by the articles of association. (*Weston, J.*) TOPANDAS *v.* YEOTMAL ELECTRIC SUPPLY CO. **1940 Comp. C. 133=A.I.R. 1940 Sind 87.**

———**S. 85**—*Contravention of the provisions of—'If offence'—Jurisdiction of High Court.*

There can be no doubt that a contravention of the provisions of S. 85 is an offence which is punishable with fine. But the High Court has no jurisdiction as a Court of first instance to take cognizance of and try such offences and to impose the fine prescribed by the provisions of the Act. If the case is committed to the High Court under S. 194 (1), Cr. P. Code, or proceedings are started on an application of the Advocate-General under S. 194 (2) or are transferred to it under S. 526, Cr. P. Code, then the High Court has jurisdiction to try the accused, but it has no jurisdiction to try the accused merely on an application made under S. 85. (*Sulaiman, C. J., Thom and Rachhpal Singh, JJ.*) HARISH CHANDRA *v.* KAVINDRA NARAIN SINHA. **I.L.R. (1937) All. 220=166 I.C. 53=9 R.A. 349=38 Cr.L.J. 111=1936 All.L.R. 990=1936 A. W.R. 964=1936 A.L.J. 1105=A.I.R. 1936 All. 830 (F.B.).**

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———**S. 87**—*List of directors filed with Registrar —If amounts to notice to persons dealing with the Company of the names of directors.*

It cannot be held that persons dealing with a company have notice of the contents of all the documents on the file of the particular company; and merely because a list of directors has to be filed with the Registrar under S. 87 of the Act, it cannot be said that persons dealing with the company have notice of who the directors of the company are. (*Beaumont, C.J. and Wadia, J.*) T. R. PRATT (BOMBAY), LTD. *v.* E. D. SASSOON & CO., LTD. **60 Bom. 326=37 Bom. L.R. 978=161 I.C. 126=8 R.B. 317=A.I.R. 1936 Bom. 62.**

———**S. 88**—*Chairman as principal officer of corporation—Implied authority to enter into contract on behalf of corporation.*

The Chairman of a corporation as principal officer while carrying on business of the corporation executed a declaration creating a lien on property of the corporation in respect of a loan sanctioned by the Board of Directors, but the Articles of Association were silent as to the authority of the person entering into agreement on behalf of the corporation.

Held, that the Chairman had implied authority to execute the declaration. (*Lobo, J.*) INDUS FILM CORPORATION, *In re.* **181 I.C. 681=11 R.S. 234=A.I.R. 1939 Sind 100.**

———**S. 91-A (1)**—*Applicability—Contract not made at meeting of directors.*

S. 91-A (1) is not limited to contracts entered into at a meeting of the directors but applies also to cases in which contracts were not made at such a meeting. (*Jack and Patterson, JJ.*) RABINDRANATH MITRA *v.* EMPEROR. **42 C.W.N. 533=176 I.C. 108=11 R.C. 39=39 Cr. L.J. 687 (2)=A.I.R. 1938 Cal. 440.**

———**S. 91-A (1)**—*Disclosure of interest—Proof —Letter by purchasing director to chairman—Sufficiency.*

A letter written by the purchasing director to the chairman of the Board of Directors who merely signed it as noted, does not prove that the disclosure of the director's interest was made at any meeting of the directors as required by S. 91-A (1), when it is not referred to in the minutes of any of the meetings. (*Jack and Patterson, JJ.*) RABINDRA NATH MITRA *v.* EMPEROR. **42 C.W.N. 533=176 I.C. 108=11 R.C. 39=39 Cr.L.J. 687 (2)=A.I.R. 1938 Cal. 440.**

———**S. 91-A (1), Proviso**—*Petty purchases by director—Disclosure of interest—If necessary.*

Petty purchases by a director of a company from a firm in which he has an interest, are covered by the proviso to S. 91-A (1) and the director's interest should be disclosed in the manner provided for therein. (*Jack and Patterson, JJ.*) RABINDRA NATH MITRA *v.* EMPEROR. **42 C.W.N. 533=176 I.C. 108=11 R.C. 39=39 Cr. L.J. 687 (2)=A.I.R. 1938 Cal. 440.**

———**Ss. 91-A and 91-B and Sch. I, Table A, Art. 73**—*Scope—Directors—Resolutions authorising mortgage—Conflict of interests—Effect on mortgage—Notice of disability and conflict—Notice to managing director—If notice to com-*

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pany — Contract — Consideration — Deed—Construction—Mortgage or suretyship.

A joint-stock company known as *Pratts* was incorporated in 1919 with a capital of 5 lacks, divided into preference and ordinary shares. The memorandum of Association contained power to borrow and to give security for money borrowed, but contained no power to give security for a debt of third parties. Articles of Association prepared originally were not registered; hence the company was regulated by Table A of Schedule I of the Companies Act, and under Art. 73 thereof the director's power of borrowing is limited to the amount of the capital, five lacs.

In 1920, another joint-stock company, known as *M.T.'s* was incorporated. It was found by the managing agents of *Pratts* and persons interested in another private limited company, called the *Sassoons,* the managing director of which was also a director of both *Pratts* and *M. T.'s,* and had delegated to him all the powers of directors of *Sassoons.* The principal object of the company *M. T.'s* was to finance *Pratts* and *M. T.'s* acquired practically the whole of the ordinary share capital of *Pratts,* but the preference shares were held by outside parties. On 22—6—1932, the date of liquidation of *Pratts,* there was a sum of about Rs. 4,92,000 due by the latter to *M. T.'s.* In the years 1926 to 1928 *Sassoons* financed *M. T.'s,* and a sum of about 9 lacs of rupees was due by *M. T.'s* to *Sassoons* during those years. The advances by *M. T.'s* to *Pratts* in previous years did go beyond five lacs and reached 13 lacs, though in 1932 the amount due was only about Rs. 4,92,000. In 1926, *Sassoons* began to press *M. T.'s* for security and wanted to get a mortgage of the properties of both *M. T.'s* and *Pratts* as security, namely, two immovable properties of *Pratts* and a building owned by *M.T.'s,* which was part of the building in which *Pratts* carried on business. It was originally proposed that there should be two deeds, one by *Pratts* to *M. T.'s,* and another by *M. T.'s* to *Sassoons*; but finally it was arranged to have only one deed by both *Pratts* and *M. T.'s* to *Sassoons* in order to avoid expense. On 23—2—1928, resolutions were passed by the Boards of both *Pratts* and of *M. T.'s* for the execution of a deed in favour of *Sassoons* by both the *Pratts* and *M. T.'s.* The deed was made and executed on 28—2—28, and was between *M. T.'s* as mortgagor, *Pratts,* the surety and *Sassoons,* the mortgagee and it recited, *inter alia,* that the *Sassoons* had already paid to *M. T.'s* rupees 9 lacs, out of which the latter had paid to *Pratts* rupees 4½ lacs, that the title deeds of the immovable properties both of *M. T.'s* and *Pratts* were deposited with *Sassoons,* and the witnessing part of the deed stated that *Pratts* had already deposited with *Sassoons,* the title-deeds with intent that the properties covered thereby might be equitably charged with the repayment to *Sassoons* of the sum of rupees 4 1/2 lacs out of the sum of 9 lacs of rupees advanced by *Sassoons* to *M. T.'s* with interest. Then *M. T.'s* and *Pratts* jointly and severally covenanted with *Sassoons* to pay the sum of rupees 4 1/2 lacs with interest on 31—10—31. In the liquidation proceedings of *Pratts* which followed in 1932, *Sassoons* claimed to be secured creditors for Rs. 4,92,000 and *M. T.'s* also claimed alternatively to be secured creditors for the same amount.

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Held, (i) that the deed was not a document of suretyship by *Pratts* at all having regard to the fact that *Pratts* was primarily liable to pay at least rupees 4 1/2 lacs to *Sassoons,* and that to hold that an arrangement which could have been carried out by two documents could not be carried out validly by one document to which all the parties interested were parties would be to sacrifice substance to form, and that it was binding on *Pratts* on proof of valid execution; (2) that though the document expressed no consideration in favour of *Pratts,* there was a novation or a substitution of the liability of *Pratts* to *Sassoons* for the liability of *Pratts* to *M. T.'s* and *M. T.'s* to *Sussoons,* and that there was an implied obligation on *M. T.'s* part not to sue for the amount of 4 1/2 lacs of rupees for which *Pratts* had given security to *Sassoons,* and that coupled with the giving of time constituted sufficient consideration in favour of *Pratts*; (3) that since, all the directors of *Pratts* were not only directors but also shareholders of *M. T.'s* the Board of *Pratts* was not independent of *M. T.'s* in the matter of the transaction, and that there was consequently a conflict of interests in the matter of the mortgage between *M. T.'s* and *Pratts,* which offended against S. 91-A of the Companies Act, and therefore by virtue of S. 91-B, none of the directors of *Pratts* was competent to vote for the resolution authorising the mortgage to *Sassoons*; (4) that since the managing director of *Sassoons* was also a director of both *Pratts* and *M. T.'s,* his knowledge of the invalidating circumstances under Ss. 91-A and 91-B, constituted notice to the *Sassoons*; (5) that further, as the attestation clause to the deed of mortgage showed that the common seals of both *Pratts* and *M. T.'s* had been used *Sassoons* were bound to see that the resolutions passed were in order, and *Sassoons* must therefore be held to have had notice of the invalidating circumstances under S. 91-A and S. 91-B; (6) that the resolutions and the mortgage executed in pursuance thereof to *Sassoons* were void, and that as there was no debt apart from the mortgage-deed, *Sassoons* had no equity to retain the document of title of *Pratts* deposited with them; (7) that since the amount due to *M.T.'s* by *Pratts* was below five lacs it was valid and sustainable, as the prohibition under Art. 73, of Table A of Sch. I of the Act did not apply. (*Beaumont, C. J. and Wadia, J.*) T. R. PRATT (BOMBAY), LTD. *v.* E. D. SASSOON AND CO., LTD. **60 Bom. 326=37 Bom.L.R 978=161 I.C. 126=8 R.B. 317=A.I.R. 1936 Bom. 62.**

———**S. 91-B**—*Scope and object of—Contract resolved upon by directors—Directors under disability—Third party dealing with company—If affected—Notice.*

The object of S. 91-B, Companies Act, is clearly to ensure that a company shall have the benefit of the judgment of an entirely interdependent Board. It is very well settled law in the case of English joint-stock companies that people dealing with such a company are fixed with notice of any limitations on the power of the company contained in the statute

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under which it is incorporated or in the memorandum or articles of association, but that if it is shown that a particular act was ostensibly authorised by the statute and the memorandum or articles of association, persons dealing with the company are not concerned to see that the company has put itself into a position to exercise its power properly. That is to say, outside parties are not concerned with the internal management of the company; and if the disability of a director to vote upon a contract in which he is personally interested were imposed by the articles of association, the question whether he is personally interested in, and entitled to vote upon, a particular contract would be regarded as a matter of internal management, with which outside persons dealing with the company would not be concerned. The principle of English Law ought to be applied to a case of disability of directors arising under S. 91-B of the Companies Act. But when a person has notice of the terms of the contract to which he is a party, he necessarily has notice of the circumstances under which the contract was passed or resolved upon by the directors. (*Beaumont, C. J. and Wadia, J.*) T.R.PRATT (BOMBAY) LTD. *v.* E.D.SASOON AND CO., LTD. **60 Bom. 326=37 Bom.L.R. 978=161 I.C.126 =8 R.B.317=A.I.R. 1936 Bom. 62.**

——**91-B**—*Transaction entered into by interested director—Voidability.*

Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company, which is proposing to enter into a transaction with the company of which he is the director, he comes within the rule laid down in S. 91-B and the transaction is voidable at the instance of the company with whom it is entered into. He has a personal interest in the matter and owes a duty which conflicts with his duty to the company of which he is the director. It is immaterial whether the conflicting interest belongs to him beneficially or as a trustee for others. S. 91-B would not however deprive of the benefit of his contract with the company a third party who had no notice of the defect in the director's authority. Such a person would be entitled to assume that the internal management of the company is properly conducted. But if the third party is shown to have knowledge of the real state of affairs, the transaction is voidable as against him. *S* company which had been financing *P* company through one *M T* company for seven years decided to have the property of *P* company as security for debt owed really by *M T* company and obtained an equitable mortgage over *P's* property by two indentures. The *M T* company which was putting up *P's* property as security, held almost all the shares in *P* company and the directors of *P* company had for years been directors of *M T* company and these facts were known to directors of the *S* company in course of their business. Winding up proceedings having been started in respect of *P* company, *S* company claimed to be a secured creditor of *P*, by virtue of the equitable mortgage executed in its favour. The Official Liquidator disputed the claim:

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Held, that the Official Liquidator was entitled to avoid the equitable mortgage on which *S* company based its claim. (1914) 2 Ch. 488, Rel. on. (*Sir George Rankin.*) T. R. PRATT (BOM.) LTD. M.T.LTD. **I.L.R.(1938) Bom. 421=42 C.W.N. 733=174 I.C. 545=1938 O.L.R. 223=4 B.R. 540=10 R.P.C. 267=67 C.L.J. 338=1938 A.L.R. 359=32 S.L.R. 517=1938 O.W.N. 859=40 Bom.L.R. 1109=A.I.R. 1938 P.C. 159 (P.C.).**

——**Ss. 92 (5) and 93**—*Prospectus filed in English before Registrar—Subsequent prospectus issued in Bengali—Latter not containing particulars required by S. 93—Complaint by Registrar under S. 92 (5)—Acquittal by Magistrate—Interference on appeal.*

R filed a prospectus fulfilling all requirements of law in the office of the Registrar, Joint-Stock Companies, and subsequently issued a prospectus in Bengali. It was found that the propectus in Bengali did not contain certain particulars required by S.93, Companies Act, and was not a verbatim translation of the English prospectus. The Registrar filed a complaint under S. 92 (5) on the ground that the Bengali prospectus had been issued without having been filed before him. The Magistrate holding the offence to be purely technical and omission not culpable acquitted *R*.

Held, that *R* was liable to be convicted under S. 92 (5) Companies Act. That the proceedings were initiated by the Registrar and not a private person and as the question involved was one of great importance in view of the scope of the Act and of necessity in the interest of the community of the strictest observance of its provision, the High Court could not refuse to interfere with the order of acquittal. (*Guha and Bartley JJ.*) EMPEROR *v.* BENGAL SALT CO., LTD. **160 I.C. 829=37 Cr. L.J. 379=8 R.C. 453= 63 C.L.J. 188=40 C.W.N.320=A.I.R. 1936 Cal. 33.**

——**Ss. 93 and 183 (5)**—*False and misleading prospectus—Right to avoid agreement to purchase shares—When to be exercised—Application under S.* 183 (5) *for removal from list of contributories—If can be allowed.*

Where the prospectus issued by a company is a false and misleading document and contained untrue statements and representations, a person who has agreed to take shares in such a company has a right to repudiate or avoid the contract, provided he does so within a reasonable time and before the commencement of proceedings for the winding of the company. But an application under S. 183 (5) after the list of contributories had been settled, and nearly eleven years after the agreement to take the shares, is too belated an application to be allowed. (*Iqbal Ahmad, J.*) JAGANNATH PRASAD *v.* OFFICIAL LIQUIDATORS. **I.L.R.(1938) All. 301 =1938 A.W.R.(H.C.)84=1938 A.L.J. 94= 174 I.C. 886=10 R.A.631=1938 A.L.R. 350 =A.I.R. 1938 All. 193.**

——**S. 101**—*Application money not paid—Allotment of shares—Power of directors.*

S. 101 does not forbid the directors to allot shares to applicants who neglect to pay the application money in terms of the prospectus once the first allotment has been regularly made, although it may be that a provision in a pros-

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pectus empowering them to do this would be an infringement of the Act. (*Panckridge, J.*) HAPPY INDIA INSURANCE CO., LTD., *In re.* **I.L.R.(1939) 2 Cal. 512=188 I.C. 468=12 R. C. 683=A.I.R. 1940 Cal. 164.**

———**S. 101 (3)**—*Scope of—Allotment without compliance with requirement of S.* 101 (3)—*Legality—Company, if can demand share money.*

Sub-S. (3) to S. 101 of the Companies Act lays down a mandatory requirement. The applicant for a share is under a statutory obligation to pay 5 per cent. of the nominal amount of the share along with his application, and the company is also under the obligation to see that he does so, and it is against public policy that any allotment should be made without compliance with this requirement. That being so a company should not be allowed to take advantage of its own wrongdoing and neglect of the provisions of the Act by demanding the share money subsequently. (*Gruer, J.*) RAMALALSAO *v.* K.B.M. E. R. MALAK. **1939 N.L.J. 305=183 I.C. 748=12 R.N. 80=A.I.R. 1939 Nag. 225.**

———**S. 101 (3)**—*Applicability—Allotment of shares subsequent to floating of company.*

Sub-S. (3) of S. 101, Companies Act, is applicable to all allotments of shares whether at the time of the floating of the company or any subsequent period. Any allotment which is made without payment of at least 5 per cent. of the nominal value of the shares by the applicant is, therefore, invalid. (*Addision and Abdul Rashid, JJ.*) MUTUAL BANK OF INDIA, LTD. *v.* SOHAN SINGH. **161 I.C. 952=8 R.L. 823=A.I.R. 1936 Lah. 790.**

———**S. 103**—*Failure to pay for shares by directors—If renders shares liable to forfeiture.*

Where the directors who have signed the articles of association and memorandum undertaking to take a certain number of shares and pay for them, fail to pay for them, it does not necessarily follow that they are liable to forfeiture of their shares. (*Allsop, J.*) VISHWANATH PRASAD JALLAN *v.* HOLYLAND CINETONE, LTD., BENARES. **185 I.C. 501=12 R.A. 330=1939 A.W.R.(H.C.) 746=1939 A.L.J. 950=1939 Comp. C. 324=A.I.R. 1939 All. 739.**

———**S. 104**—Contract relating to allotment of shares—Statement in form VII filed before Registrar—Nature—If conveyance. *See* STAMP ACT, S. 2 (10). **(1937) 1 M.L.J. 108.**

———**S. 109**—*Applicability—Scope — Unregistered mortgage—Decree on, before winding up —Validity—Application for leave to execute—Maintainability—S.* 171.

An unregistered mortgage or charge is void under S. 109 of the Companies Act against all creditors irrespective of the date on which the debts accrued. The fact that the charge has been merged in a decree obtained by the mortgagee or charge-holder prior to the application for winding up proceedings cannot make S. 109 of the Act inapplicable; and the decree-holder cannot, on that ground, claim to stand outside the winding up and realise his security. An application by such a decree-holder under S. 171 of the Act for leave to execute his mortgage-decree should not be allowed. (*Panckridge, J.*)

COMPANIES ACT (1913), S. 120.

SATHGRAM COAL CO., LTD., *In the matter of.* **40 C.W.N.1171.**

———**S. 109**—*Instrument creating charge—Non-registration—Effect.*

An instrument creating charge on the property of a corporation, if not registered with the Registrar as provided by S. 109, is void as against the Official Receiver. (*Lobo, J.*) INDUS FILM CORPORATION LTD., *In re.* **181 I.C. 681=11 R.S.234=A.I.R.1939 Sind 100.**

———**S. 109 (1) (e)**—*Floating charge—Test.*

The principal tests as to whether a charge is a floating one are: (1) Is it a charge upon all or a certain class of assets, present or future? (2) Would the assets charged in the ordinary course of business be changed from time to time? (3) Has the company power until such step is taken by the charges to carry on the business of the company in the ordinary way? Where a clause in an agreement was 'that the amount of security money will be the second charge on the machinery and other goods of the company', on a construction with reference to the tests laid down it was held that it amounted to a floating charge and that if not registered is void. (*Harris, J.*) INDIAN COMPANIES LAW AND INDRA SUGAR WORKS, LTD. *v.* OFFICIAL LIQUIDATORS, INDRA SUGAR WORKS, LTD. **I. L. R. (1938) All. 896=178 I.C. 585=11 R. A. 305=1938 A.W.R. (H. C.) 553=1938 A.L. J. 820=1938 A.L.R. 867=A.I.R. 1938 All. 574.**

———**S. 109 (1), Cl. (f)**—*Floating charge—Meaning of.*

Where the assets of a corporation are of a fluctuating nature and must change from time to time in the ordinary course of business, and while taking loan creating charge on their assets, no restraint of any kind whatever is placed on the conduct of the business of the corporation and the charge does not crystallize into a fixed security, the charge so created is a floating charge. (*Lobo, J.*) INDUS FILM CORPORATION, LTD., *In re.* **181 I.C. 681=11 R.S. 234=A.I.R. 1939 Sind 100.**

———**S. 120**—*Company in liquidation—Extension of time for registration of mortgage—Whether can be granted.*

The effect of an order under S.120 of the Companies Act extending the time for registration of mortgage in a case where an order for the winding up of the Company has been passed would obviously be to reduce the property available to the creditors. No extension of time can, therefore, be granted after the company has gone into liquidation. (*Srivastava, Ag.C.J.*) *In the matter of* DINSHAW & CO. BANKERS LTD., LUCKNOW. **165 I.C. 254=9 R.O. 179=1936 O.W.N.923=1936 O.L.R. 614=A. I. R. 1937 Oudh 62.**

———**S. 120**—*Order under, extending time for registration—Power of Court to review— C. P. Code, S.* 141.

An order passed by the District Judge under S. 120 of the Companies Act extending the time for registration of a mortgage, is in the exercise of his powers as a Court of Civil jurisdiction, and is as such subject to the provisions of C. P. Code by virtue of S. 141, C.P. Code. The

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District Judge is, therefore, competent to review his order passed under S. 120. (*Srivastava, Ag.C.J.*) *In the matter of* DINSHAW & Co., BANKERS, LTD., LUCKNOW **165 I.C. 254=9 R.O. 179=1936 O.W.N. 923=1936 O.L.R. 614=A.I.R. 1937 Oudh 62.**

——**S. 131**—*Applicability—Default under S. 131 committed before accused became a director or officer or even shareholder—Conviction—Sustainability.*

A person cannot be held liable under S. 131 of the Companies Act in respect of default in preparing a balance-sheet or placing it before a general meeting of the company committed long before he ever became a director or officer of the company and indeed before he was even a shareholder, and the conviction of such a person is unsustainable. (*Pandrang Row, J.*) NARASIMHA RAO, *In re.* **1937 M.W.N. 90=45 L.W. 242=169 I.C. 100=9 R.M. 681=38 Cr.L.J. 696=1937 M.Cr.C. 100=A.I.R. 1937 Mad. 341.**

——**Ss. 131 and 134**—*Scope—If mutually exclusive—conviction under S. 131—If bar to conviction of same person in same year under S. 134.*

S. 131 of the Companies Act relates to the auditing of the balance sheet of the accounts of a company and placing the same before the general meeting of the company, while S. 134, relates to the non-sending of a copy of the balance sheet after it had been laid before a general meeting of the company. In respect of the same year, the same persons cannot be charged with offences punishable under both Ss. 131 and 134, because S. 134 clearly contemplates the sending of a copy of the balance sheet only after it has been placed or laid before the company at a general meeting; and where there has been a prosecution and conviction under S. 131, the offence under S. 134 cannot possibly have been committed, as the prosecution under S. 131 makes it clear that there was no placing of a balance sheet before the company at a general meeting (*Pandrang Row, J.*) NARASIMHA RAO, *In re.* **1937 M.W.N. 90=9 R.M.681=38 Cr.L.J. 695=169 I.C.100=1937 M.Cr.C. 100=45 L.W. 242=A.I.R. 1937 Mad. 341.**

——**S. 132**—*Balance-sheet—Nature and contents of.*

Per *Cunliffe, J.*—A balance-sheet, in fact, must not be a mere inventory. It is supposed to be a pictorial representation of the trading position of the company, easily appreciated not by ignorant people but by persons who are reasonably able to understand commercial expressions and commercial conditions. (*Cunliffe and Henderson, JJ.*) SUPPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* AKHIL BANDHU GUHA. **166 I.C. 163=9 R.C. 478=38 Cr.L.J. 151=40 C.W.N.1341=A.I.R. 1936 Cal. 680.**

——**S. 134**—Applicability—Person convicted under S. 131—Conviction of in same year under S. 134 also—Legality. *See* **Ss. 131 and 134.**

——**S. 140 (3)**—*Applicability—Refusal by managing agent to produce books before Inspector—Inspector not validly appointed—Offence—Conviction of managing agent—Sustainability—India and Burma (Transitory Provisions) Order, 1937, para. 8 (2).*

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The refusal on the part of the managing agent and director of a company to produce the book and accounts of the company before the Inspector appointed under S. 138 of the Companies Act will not render him liable to conviction under S. 140 (3) of the Companies Act, if it is found that the Inspector has not been validly appointed. An Inspector appointed by a Provincial Government subsequent to the transfer of the functions of that Government under S. 138 to the Central Government and before the entrustment of these functions to the Provincial Government by Governor-General cannot be held to be validly appointed, because under para. 8 (2) of the India and Burma (Transitory Provisions) Order, 1937, it is the Governor and not the Provincial Government who can discharge these functions in the interval. (*Lakshmana Rao, J.*) SRI MEENAKSHI MILLS, LTD., MADURA, *In re.* **49 L.W.651=183 I.C. 762=12 R.M.371 (1)=1939 M.W.N. 743=40 Cr.L.J. 835=1939 Comp. C. 252=1939 M.Cr.C. 193=A.I.R. 1939 Mad. 589=(1939) 2 M.L.J. 97.**

——**Ss. 141-A and 137**—*Private prosecutions—If barred.*

There is nothing in the actual terms of S. 141-A or of S. 137 of the Companies Act to justify the inference that the intention of the Legislature was that prosecutions by private individuals under the Act should not be allowed. (*Henderson and Akram, JJ.*) SURENDRANATH SARKAR *v.* KALIPADA DAS. **I.L.R. (1940) 1 Cal. 575=188 I.C. 537=13 R.C. 14=1940 Comp. C. 141=41 Cr.L.J. 625=44 C.W.N. 454=A.I.R. 1940 Cal. 232.**

——**S. 152**—*One of parties to agreement, a company—No specific reference to Arbitration Act—Latter, if applies.*

A company under the Companies Act stands in the Punjab on no different footing than a private individual governed by Punjab Act I of 1911. Therefore if an agreement between the parties of which one is a company makes no specific reference to the Arbitration Act, the Arbitration Act will not apply to the arbitration agreement between the parties. (*Bhide, J.*) CHANDU LAL *v.* GRAHAMS TRADING Co. **179 I.C.706=11 R.L. 611=A.I.R. 1938 Lah. 827.**

——**S. 152**—*Reference to arbitration under Arbitration Act—If obligatory.*

It is not obligatory that any reference to arbitration to which a limited company is a party should be made under the Arbitration ACT. (*Bhide, J.*) LYALLPUR BANK, LTD. *v.* JAI GOPAL. **A.I.R. 1940 Lah. 97.**

——**S. 152**—*References to arbitration by limited liability companies—Arbitration Act alone—If applies.*

The word 'may' after the words 'a company' in the beginning of S. 152 does not go with the sentence 'in accordance with the Indian Arbitration Act, 1899', but with the words 'refer to arbitration'. Again the existence of the words 'in accordance with the Indian Arbitration Act, 1899' in Cl. (1) of S. 152 is an indication that the Legislature considered it to be

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de rigueur that every reference by a limited liability company to arbitration should be in accordance with the Arbitration Act. Cl. (3) is conclusive on the point that the provisions of the Arbitration Act only apply to arbitrations to which a limited liability company is a party. Limited liability companies cannot refer to arbitration independently of this provision of the law and Sch. II, C.P.Code, has no application. The Arbitration Act alone applies to all references to arbitration made by limited liability companies and hence the award is executable by the District Judge only and not by the Sub-Judge. A. I. R. 1934 Pesh. 107, Foll. (*Almond, J.C.* and *Mir Ahmad, J.*) PEOPLES BANK OF NORTHERN INDIA LTD. *v.* PADAM LAL. **177 I.C.659=11 R. Pesh. 30=A.I.R. 1938 Pesh. 54.**

———**S. 152**—*Scope—Arbitration with intervention of Court—Arbitration Act—If applies.*

The scope of S. 152 of the Companies Act is that the provisions of Ss. 3 to 22 of the Indian Arbitration Act would apply, where one or both the parties to arbitration are companies registered under the Companies Act, by force and effect of the Companies Act itself, irrespective of the provisions of S. 2 of the Arbitration Act; that is to say, the said Act would apply in a case falling within the scope of the Act even when the *locus* of the subject-matter was outside a Presidency town, provided one of the parties or both of them were companies registered under the Companies Act. As the Indian Arbitration Act has no application to arbitration with the intervention of Court, S. 152 of the Companies Act does not require the procedure laid down in the said Act to be followed in the case of such arbitration even if a company is a party to it. (*Mitter, J.*) EAST BENGAL BANK, LTD. *v.* JOGESH CHANDRA BANERJEE. **44 C.W.N.828.**

———**S. 152**—*Scope—Dispute between share-holder and company arising out of affairs of company—Arbitration—Power of share-holder to compel submission apart from Articles of Association.*

S. 152 of the Companies Act only empowers a company to refer to arbitration an existing difference between itself and any other company or person. But a share-holder of a company has no such right against the company. Apart from the Articles of Association of the company a shareholder has no power to compel a submission to arbitration of a dispute arising out of the affairs of the company. (*Cornish, J.*) MADURA MILLS CO., LTD. *v.* KRISHNA AIYAR. **1937 M.W.N.518=171 I.C.690=10 R.M.390 =45 L.W.405=A.I.R.1937 Mad. 405.**

———**S. 152**—*Scope—Reference by company made outside Arbitration Act—Permissibility.*

S. 152 is an enabling section, and it merely confers power on companies to refer disputes to arbitration under the Arbitration Act by an agreement in writing, when this course is preferred. It is not obligatory on a company governed by the Arbitration Act, to make a reference to arbitration out of Court in the province of Punjab, only in pursuance of the provisions of the Arbitration Act and to file an award made on such reference in the Court of the District Judge as required by the Arbitration Act. It is permissible for the company, although governed by the Arbitration Act, to make a reference outside the Arbitration Act, and although the award on such reference is filed in the Court of the Senior Subordinate Judge, the decree passed on basis of it is perfectly legal. (*Coldstream Monroe and Bhide, JJ.*) BALMUKAND *v.* PUNJAB NATIONAL BANK, LTD. **17 Lah. 722=164 I.C.393=9 R.L.117 (2)= 39 P.L.R. 35=A.I.R. 1936 Lah. 721 (F.B.).**

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———**S. 152 (3)**—*Applicability.*

S. 152, applies to those cases only in which a Joint Stock Company by written agreement refers to arbitration in accordance with the provisions of the Arbitration Act, any dispute beween itself and any other company or person. In a case where the reference to arbitration is not by written agreement of the parties, but is made by the Court in a pending suit, the arbitrator has to submit his report to the Court which has to pass a decree in the suit in accordance with the terms of the award or pass such other order in accordance with law as it thought fit. A decree on such award is open to appeal in the ordinary course. Such a case does not come under S. 152. (*Tekchand and Dalip Singh, JJ.*) PUNJAB AND KASHMIR BANK, LTD. *v.* MT. DAMODRI. **163 I.C. 339= 9 R.L.4=A.I.R.1936 Lah. 257.**

———**S. 152 (3)**—*Interpretation—Reference to arbitration by company—Award, where to be filed—Arbitration Act, Ss.* 3, 4 (a) *and* 11 (2), *C. P. Code, Sch. II, paras.* 20 *and* 21.

The concluding words of S. 152 (3) of the Companies Act "in pursuance of *this* Act" mean that the provisions of the Arbitration Act, except S. 2 thereof, would apply to all arbitrations in which one or both the parties are companies irrespective of the *locus* of the subject-matter *by the force and effect of the Companies Act*, and the procedure provided for in the Arbitration Act for extending its field of operation would not have to be followed in such cases. On this interpretation of S. 152 (3), Ss. 3 and 4 (*a*) of the Arbitration Act would apply to *all* arbitration in which a company is a party. Paras 20 and 21 of Sch. II, C.P. Code, are accordingly excluded and the Court in which the award will have to be filed under S. 11 (2) of the Arbitration Act, must be either the High Court or the Court of the District Judge, as the case may be. (*Mitter and Lodge, JJ.*) JHIRIGHT NATIVE TEA CO., LTD. *v.* B. GUPTA. **I.L.R.(1940) 1 Cal. 358= 188 I.C.143=12 R.C.651=1940 Comp. C. 56 =71 C.L.J. 62=44 C.W.N.285=A.I.R.1940 Cal. 220.**

———**S. 153.**

Applicability.
"Class of creditors".
Duty of Court.
Jurisdiction of Court.
Notice of meeting.
Scheme—Alteration of.
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Applicability.

———**S. 153**—*Applicability—Foreign Company —Bank incorporated and having registered office outside British India but having central office in British India—Application under S. 153—Jurisdiction of British Indian High Court—'Court', meaning of.*

The High Court has jurisdiction to entertain an application under S. 153 at the instance of a creditor or a member of a foreign company. A Bank incorporated outside British India and having its registered office outside British India is a foreign company, but it would be an unregistered company within the meaning of Ss. 270 and 271 of the Act and therefore liable to be wound up under the Act. The expression "Court" in the case of an unregistered company including a foreign company would mean "the Court in which the said company is liable to be wound up," and under S. 271, the High Court is the Court in which a foreign company is liable to be wound up. A Bank which has its central office in British India, which is the centre of administrative control, is subject to the jurisdiction of the High Court in that part of British India, though its registered office and place of incorporation may be outside British India. (*Venkataramana Rao, J.*) TRAVANCORE NATIONAL AND QUILON BANK LTD., *In re.* **183 I.C. 353=12 R.M. 272=1939 Comp. C. 14 =1938 M.W.N. 1313=A.I.R. 1939 Mad. 318.**

———**S. 153**—*Applicability—If confined to company which is in the course of being wound up.*

The plain language of S. 153 of the Companies Act is applicable both to a going company and to the case of company in liquidation; a compromise or arrangement, can therefore be availed of both in the case of a company which is a going concern and also in the case of a company which is in the course of being wound up. It cannot therefore be contended that an application under the section cannot be made before an order for winding up is made. (*Venkataramana Rao, J.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., In re. **183 I.C.353=12 R.M.272=1939 Comp. C.14=1938 M.W.N. 1313=A.I.R. 1939 Mad. 318.**

———**S. 153**—*Application under—Right to make —If confined to liquidator—Company being wound up—Application by creditor for considering scheme—Maintainability.*

Even after an order for winding up a company has been made, a creditor or a member of the company can move the Court under S. 153 of the Companies Act. The liquidator has also the right to make an application under S. 153 but he has not got the exclusive right to do so. It was not the intention of the Legislature to deprive the creditors or members of the right once an order for winding up is made and place them at the mercy of the liquidator who may or may not choose to move in the matter. (*Venkataramana Rao, J.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., *In re.* **183 I.C. 353=12 R.M. 272=1939 Comp. C. 14 =1938 M.W.N. 1313=A.I.R. 1939 Mad. 318.**

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"Class of creditors".

———**S. 153**—*Class of Creditors—Depositors who have obtained decrees and depositors who have not—If belong to the same class.*

A depositor in a company who has obtained a decree against a company in respect of the amount of his deposit belongs to a different class from depositors who have not obtained decrees, for the purpose of S. 153 of the Companies Act, and a scheme agreed to by depositors who have not obtained decrees and sanctioned by the Court will not bind a depositor who has obtained a decree, notwithstanding that a notice is sent to him directing him to attend a meeting of depositors for considering a scheme. A clause in the schedule to the scheme of arrangement providing that those who have filed suits or obtained decrees against the companies would also come under the category of the expression "depositors" cannot alter the position in any way and will not affect a depositor who has become a decree-holder as he is essentially a person coming under a different category. Consequently he is not bound by the decision come to at the meeting of the depositors. It is therefore open to the Court which has sanctioned the scheme of arrangement to modify the scheme by deleting therefrom such part of it as prevents a decree-holder depositor from executing his decree. (*Derbyshire, C. J. and Costello, J.*) RAJSHAHI BANKING CORPORATION v. SURABALA DEBI. **40 C.W.N. 1104.**

———**S. 153**—*"Class" of creditors—Meaning of—Agreement by one class of creditors—If binds creditor of another class not party.*

S. 153, Companies Act, itself contemplates an agreement with any class of creditors or an agreement with all creditors; but, different classes affected by any scheme must hold separate meetings. The term "class" must be confined to those persons whose rights are not so dissimilar as to make it possible for them to consult together with a view to their common interest. An agreement arrived at by one class of creditors will not bind another class which has not been a party to it. And a depositor who has obtained a decree against a Banking Company before any scheme has been embarked on by the latter, ceases to be a depositor and becomes a decree-holder. Hence where the scheme was sanctioned by one class of creditors, the depositors, a decree-holder, an entirely different class of creditors, will not be bound by it. The position is not altered by the consideration that the depositors in the meeting purported to treat decree-holders as "creditors". A.I.R. 1935 Cal. 117, Rel. on. (*Guha and Bartley, JJ.*) MANIKGANG TRADING AND BANKING CO., LTD. *v.* MADHABENDRA KUMAR SHAHA. **166 I.C.957=9 R.C.629=40 C.W.N.580=A. I.R.1936 Cal. 162.**

———**S. 153**—*Depositor who has obtained decree and depositor who has not—If belong to same class.*

A depositor who has obtained a decree against the company in respect of the amount of his deposit is in a different position from those persons who have not. He is entitled to be considered as belonging to a different class when the provisions of S. 153 of the Companies Act are sought to be enforced. **40 C.W.N. 1104,**

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Ref. to (*Derbyshire, C.J. and Mukherjea, J.*) RAJSHAHI BANKING AND TRADING CORPORATION, LTD. *v.* PULIN BEHARI MUKHERJEE. **42 C.W.N. 610.**

———**S. 153**—For the purpose of S. 153, a depositor who has already obtained a decree for realisation of deposit belongs to a distinct class from other depositors who have not obtained such decree. 40 C.W.N. 1104, Foll.; 39 C. W. N. 1199; 39 C. W. N. 1198 and 39 C.W.N. 875, Appr. but Not Foll. (*Lort Williams, J.*) NATORE KAMALA BANK, LTD., *In re.* **I.L.R.(1937) 1 Cal. 368=172 I.C.349=10 R.C. 368=A.I.R. 1937 Cal. 124.**

———**S. 153**—Per *B. K. Mukherjea, J.*—Depositors with a loan company who have already obtained decrees for their amounts against the company form a separate class from the ordinary depositors and it is necessary that there should be a separate meeting of such creditors before a scheme binding on them should be sanctioned by the Court. If the absence of any such separate meeting is brought to the notice of the Court which is invited to sanction the scheme binding on all the creditors, it should refuse to sanction it, or the parties affected might apply for a modification of the scheme by expunging the clause which made the scheme binding on that class of creditors who had no opportunity of having a meeting of their own. (*Derbyshire, C.J. and B. K. Mukherjea, J.*) KRISHNA NATH SEN *v.* DINAJPUR LOAN OFFICE, LTD. **I.L.R. (1938) 2 Cal. 30=179 I.C. 405=11 R.C. 537=A.I.R.1938 Cal. 337.**

———**S. 153 (before amendment in 1936)**—*Depositor obtaining decree—Sanction of scheme by Court—Retrospective effect—Suit filed by depositor before passing of scheme by creditors—Decree obtained by him subsequently but before sanction of scheme—Position of such depositor—Resistance to execution of decree by company—Estoppel.*

Under the law as it was prior to the Companies Amendment Act, 1936, a depositor who has obtained a decree and one who has not obtained a decree cannot be regarded as belonging to the same class of creditors for the purpose of S. 153 and accordingly a notice sent to such a decree-holder directing him to attend a meeting of the depositors for the purpose of considering a scheme, is not binding on him, as equally as he is not bound by anything which is decided at such meeting. But a depositor who has merely filed a suit and has not obtained a decree on the date of the meeting of the creditors at which a scheme is agreed to by them, is in the same class of creditors as all the rest of the depositors who have not filed suits, although he obtains a decree before the date on which the Court sanctions the scheme. Such a depositor is entitled to receive notice of the meeting of the creditors and to attend it, and if he does not choose to attend, he is bound by the scheme passed by the majority of his fellow depositors. The sanction of the scheme by Court has a retrospective effect, and the scheme, therefore, operates not from the date on which the sanction is given but from the date on which it is agreed to by the creditors, namely, the date of the meeting. **The fact that in the suit filed by the depositor, the company filed a written statement subsequent to the passing of the scheme by the creditors admitting their liability and asking for time within which to pay does not preclude them from resisting execution of the decree.** (*Costello, Ag. C. J. and Edgley, J.*) BADARGANJ LOAN OFFICE, LTD. *v.* SHAHABUDDIN SHAH. **I.L.R. (1938) 1 Cal. 121=41 C.W.N. 1272=65 C.L.J.503.**

———**S. 153**—*"Meeting of creditors or class of creditors"—Meaning of—Meeting of foreign creditors—Power to call.*

The expression "meeting of creditors or class of creditors" in S. 153 (1) of the Companies Act should be interpreted as comprising all creditors of the company whether in British India or outside. There is nothing to preclude the Courts from directing a meeting of all such creditors. The question of principal liquidation or ancillary liquidation does not matter. (*Venkataramana Rao, J.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., *In re.* **183 I. C. 353=12 R.M.272=1939 Comp. C. 14=1938 M.W.N. 1313=A.I.R. 1939 Mad. 318.**

———**S. 153**—*Scheme of composition—If binds judgment-creditors.*

The unsecured creditors of a company who have obtained decrees and the unsecured creditors who have not obtained decrees do not constitute different classes of creditors, and a scheme of composition passed and sanctioned under the provisions of the Companies Act binds all the creditors of the Company including judgment-creditors. (*Addison and Din Mohammad, JJ.*) BHAGAT RAM KOHLI *v.* THE ANGELS INSURANCE CO., LTD. **172 I. C. 313=10 R.L. 299=39 P.L.R. 230=A.I.R. 1937 Lah. 442.**

Duty of Court.

———**S. 153**—*Composition scheme—Sanction of Court—Principles in according—Company's assets consisting of moneys lent on bonds, promissory note, etc., but having no cash.*

A Court will not give sanction to a scheme which will have the effect of enabling a bank or other company, which is to all intents and purposes, insolvent, to continue carrying on business and attract deposits which in all probability go the way of the former deposits. These principles are to be adhered to in dealing with applications to sanction schemes of composition and arrangement intended to keep sinking banking companies afloat, whose assets consist principally of monies lent out on mortgages, simple bonds, promissory notes, decrees of Court and immovable property, but no cash. (*Panckridge, J.*) *In re* NILPHAMARI LUXMI BANK, LTD. **63 Cal. 99.**

———**S. 153**—*Meeting of creditors to consider scheme—Considerations for Court in ordering.*

The Court has to exercise its discretion in making an order under S. 153 of the Companies Act. There is a distinction between making an order under S.153 (1) and an order under S. 153 (2) when the scheme comes before the Court for sanction after the approval of the majority of the Court. It is very essential that any scheme put forward before the general body of creditors must as far as possible be based upon correct information; and any scheme which is approved must *prima facie* appear to

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be based on correct information and date. But that does not mean that an application under S. 153 to call a meeting of the creditors to consider a proposed scheme should be rejected merely because the same is not based on correct information as to the affairs of the company. The Court can call for a report giving a fair idea of the affairs of the company and on that information the scheme as adumbrated or with the necessary amendments can be circulated along with the report. A Court ought not to decline to order a meeting of the creditors unless the proposals are illegal as being in contravention of the Companies Act or incapable of modification in view of ascertained facts. (*Venkataramana Rao, J.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., *In re.* **183 I.C.353=12 R.M.272=1939 Comp. C.14 =1938 M.W.N. 1313=A.I.R. 1939 Mad. 318.**

———**S. 153**—*Scheme—Sanctioning of—Considerations.*

What the Court has to do on an application for sanctioning a scheme is to see first of all that the provisions of the Act have been complied with; and, secondly that the majority have been acting *bona fide*. It must also see whether the scheme is a reasonable one or whether there is any reasonable objection to it. (*Rangnekar, J.*) KATNI CEMENT AND INDUSTRIAL CO. LTD., *In re.* **39 Bom. L. R. 675= 171 I.C.769=10 R.B.225=A.I.R.1937 Bom. 423.**

———**S. 153**—*Scheme approved by shareholders and creditors—If to be accepted by Court as a matter of course—Principles to be observed.*

The fact that the shareholders and creditors of a company have approved of a scheme of compromise or arrangement as contemplated by S. 153 of the Indian Companies Act does not mean that the Court is bound to accept the scheme. It is the duty of the Court to examine the proposals and decide whether they are fair and reasonable. That the shareholders and creditors have approved of a scheme will of course carry weight, but there may be more important considerations. Where the resolution approving of a scheme is shown to have been passed as a result of misleading statements contained in a letter written by one of the creditors of the company who was also a director thereof, and circulated to all the shareholders and creditors before the meeting, where the company is hopelessly insolvent and the scheme confers no apparent benefit on any one and in fact ignores creditors who are not depositors, and the scheme is itself not a feasible one, and where besides there are also allegations of unlawful and unauthorised acts on the part of the company's officials, justice demands that the resolutions approving of the scheme passed at the meeting of the shareholders and creditors should be disregarded. (*Leach, C.J. and Krishnaswami Iyengar, J.*) CALICUT BANK, LTD. *v.* DEVANI AMMAL. **1940 M.W.N. 252=51 L.W. 639=A.I.R.1940 Mad. 621.**

Jurisdiction of Court.

———**S. 153**—*Jurisdiction of Court under—To consider scheme—Considerations.*

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S. 153 confers jurisdiction on the High Court to deal with a scheme, but how the scheme when sanctioned can be rendered effective and operative on the company in question as a whole does not affect the jurisdiction of the Court to deal with it. (*Venkataramana Rao, J.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., *In re.* **183 I.C.353=12 R.M.272=1939 Comp.C.14= 1938 M.W.N.1313=A.I.R.1939 Mad. 318.**

———**S. 153**—*Foreign company—Order for winding up made by foreign Court—Application in British Indian Court under S. 153—Competency.*

There is no warrant for holding that because an order for winding up a foreign company has been made by the Court of the place which is the registered office of the company a British Indian Court has no jurisdiction to entertain an application under S.153. S.271 of the Act, on the other hand, negatives such a theory. Under S. 271, it is left to the discretion of the Court whether it would wind up the company in spite of a similar order having been passed in some other Courts. There is nothing to oblige the Court to pass an order of winding up. The desire to assist in the main liquidation—the desire to act as ancillary to the Court where the main liquidation is going on—will not ever make the Court give up the forensic rules which govern the conduct of its own liquidation. The underlying principle is one of co-operation based on the essential principles of justice and equity. (*Venkataramana Rao, J.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., *In re.* **183 I.C. 353=12 R.M. 272=1939 Comp. C. 14 =1938 M.W.N. 1313=A.I.R. 1939 Mad. 318.**

Notice of meeting.

———**S. 153**—*Service of notice on every creditor —If obligatory.*

S.153 does not make it obligatory either upon the Court or the company to serve a notice of the creditors meeting on each and every creditor of the company and a decision arrived at by the creditors and the company in the absence of any individual creditor is not, therefore, invalid. (*Addison and Din Mohammad, JJ.*) BHAGAT RAM KOHLI *v.* THE ANGELS INSURANCE CO., LTD. **172 I.C. 313=10 R.L. 299=39 P.L.R 230 = A.I.R.1937 Lah. 442.**

———**S. 153**—*To unsecured creditors—Decree-holder who is also unsecured creditor—If bound by such notice.*

As between a decree-holder and an unsecured creditor, their interests are not so dissimilar as to make it necessary to place them in different classes. Where a notice of a meeting to approve a scheme of arrangement between the company and its unsecured creditors is issued to its unsecured creditors the decree-holder who is also an unsecured creditor of the company is *prima facie* bound by such notice. (*Lort Williams, J.*) JALPAIGIRI BANKING AND TRADING CORPORTION, LTD., *In re.* **172 I.C. 717= 10=R.C. 408=A.I.R. 1937 Cal. 401.**

———**S. 153**—*Notice served on creditor—Latter assigning his interest to debtor of company before date of meeting—Assignee, if bound by scheme.*

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Where after the issue of a notice of a meeting to frame a scheme under S. 153 of the Companies Act on the general body of creditors of a company, one of them assigns his interest to a debtor of the company after the receipt of the notice and before the date of the meeting, the assignee is bound by the scheme adopted at the meeting and sanctioned by the Court. He cannot contend that he belongs to a class of "debtor creditor" and is therefore different from the class of creditors who formed the meeting and agreed to the scheme. (*Mukherjea and Roxburgh, JJ.*) ANUKUL CHANDRA SEN GUPTA *v.* SERAJGANJ LOAN OFFICE CO., LTD., **43 C.W.N.1181=1939 Comp. C. 247.**

Scheme—Alteration of.

——**S. 153**—*Powers of creditors and shareholders.*

Upon confirmation by the Court of a scheme of arrangement, that scheme becomes by virtue of S. 153 binding upon the creditors, the shareholders and the company. Its terms can thereafter only be varied by order of the Court after the variation had been approved at meetings of the creditors and shareholders and it is not possible for the company or its directors or shareholder whether by resolution or ratification or otherwise to alter the scheme. Nor is it possible for the company or its directors to vary the scheme under the guise of a compromise with a shareholder, as no variation or departure from that scheme can be validated by mere acquiescence of the shareholders or the creditors. (*Lord Romer*). PREMILA DEVI *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **I. L. R. (1939) Lah. 1=I. L.R.(1939) Kar. 16 (P.C.)=178 I.C.659=11 R.P.C.117=43 C.W.N.205=68 C.L.J.567=5 B.R.178=1939 Comp. C. 1=1939 M.W.N. 78=41 B.L.R.147=1939 O.W.N.249=41 P. L.R. 177=49 L.W. 444=1938 A.W.R. 222=1938 O.L.R. 521=1938 A.L.R. 922=A.I.R. 1938 P.C.284=(1939) 1 M.L.J. 98 (P.C.).**

——**S. 153**—*Powers of Court.*

Powers of the Court under S.153 are strictly limited. The Court may either sanction or refuse to sanction a scheme approved by the company and its creditors or members. The Court has no power upon an application to alter the scheme which has been sanctioned by the Court and agreed to at a meeting under S.153 without giving parties to the agreement an opportunity of considering the scheme in the way the Court proposes. (*Lort Williams, J.*) NATORE KAMALA BANK, LTD., *In re.* **I.L.R.(1937) 1 Cal. 368=172 I.C.349=10 R.C.368=A.I.R. 1937 Cal. 124.**

——**S. 153**—*Scheme passed by meeting properly called—If can be altered by Court at time of sanction or thereafter.*

Where a scheme is passed by a meeting properly called and competent to approve it, the Court cannot either at the time of sanction or at any time thereafter, alter the terms of the scheme without consulting those who agreed to it and without their sanction. Therefore the Court has no power, either at the time of sanction or at any time thereafter, to expunge any part of the scheme or to modify it in any way without consulting those who passed it originally and without obtaining their consent. All that the Court can do is to refuse to sanction the scheme or possibly to withdraw the sanction which has already been given. (*Lort Williams, J.*) JALPAIGIRI BANKING AND TRADING CORPOTION, LTD., *In re* **172 I.C. 717=10 R.C. 408=A.I.R.1937 Cal. 401.**

——**S. 153**—*Scheme sanctioned by Court—Subsequent modification—Power of Court.*

Under S. 153 of the Companies Act, the Court may order a meeting to be held to consider a scheme of arrangement and may grant or withhold sanction of such scheme. If a scheme has been sanctioned by the Court, it has no power to subsequently modify or alter or expunge any part of it without the consent of those who have agreed to it. (*Lort Williams, J.*) MYMENSINGH LOAN OFFICE LTD., *In re.* **175 I.C.892=11 R.C.10=41 C.W.N 599=A. I.R.1937 Cal. 667.**

——**S. 153**—*Scheme sanctioned by one Judge—Another Judge having equal jurisdiction—If can declare such scheme to be a nullity so far as it affects particular person.*

Where one Judge has sanctioned a scheme it is not within the power of another Judge exercising equal jurisdiction to declare in effect that the order sanctioning the scheme is to the extent that it affects a particular person, a nullity. (*Lort Williams, J.*) JALPAIGIRI BANKING AND TRADING CORPORATION, LTD., *In re.* **172 I.C.717=10 R.C.408=A.I.R.1937 Cal. 401.**

——**S. 153**—Scheme of arrangement sanctioned under—If can be recorded as agreement or compromise under O. 23, r. 3, C.P. Code. *See* C.P. CODE, O.23, R. 3—SCOPE. **A.I.R. 1937 Cal. 381.**

Scheme—Effect of.

——**S. 153**—*Order sanctioning scheme—Debtor company pleading scheme in bar to execution by judgment-creditor—Questions to be considered by executing Court.*

If the question whether a judgment-creditor of a company is precluded from executing his decree by reason of a scheme sanctioned by the Court usder S. 153 of the Companies Act comes up before an executing Court, on an objection by the debtor company under S. 47, C.P. Code, the executing Court has to consider only two questions, namely: (1) whether the execution is affected by the terms of the scheme as sanctioned by the Court exercising jurisdiction under the Companies Act, and (2) whether the order sanctioning the scheme was passed with jurisdiction, and subject to this it cannot go behind the sanctioned scheme and consider the question as to whether it ought to have been sanctioned in that form. The fact that notice of the meeting held in pursuance of the order of the Court under S. 153 had not been served upon the judgment-creditor and that separate meetings of depositors, who had not obtained decrees and those who had, had not been convened, does not affect the jurisdiction of the Court that sanctioned the scheme, but are at most irregularities in the exercise of its jurisdiction. These defacts ought to have been pointed out to that Court at the time when the

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matter of sanction came up or thereafter, and could not be pleaded before the executing Court. (*S. K. Ghose and R. C. Mitter, JJ.*) MAHIGANJ LOAN OFFICE, LTD. v. BEHARI LAL CHAKI. **176 I.C.474=11 R.C.110=41 C.W.N. 952=65 C.L.J. 367=A.I.R. 1937 Cal. 507.**

——**S. 153**—*Scheme including depositors who had obtained decrees—Scheme sanctioned by Court—If can be challenged in execution proceeding.*

The executing Court cannot modify, alter or amend the scheme which definitely includes the depositors who had obtained decrees, and which has been sanctioned under S.153 of the Companies Act. If there are circumstances to justify any modification or alteration or amendment of the scheme by excluding the depositors who had obtained decrees, the remedy is to go to the Court which sanctioned the scheme. An order sanctioning the scheme cannot be challenged collaterally in the executing Court as being without jurisdiction either on the ground that no notice of the meeting was served upon the depositor who had obtained a decree in the proceeding under S. 153 of the Act, or on the ground that in the said proceeding the Court did not order that the meetings of the different classes of depositors should be held separately. Such objections to the order do not touch the question of the existence of the jurisdiction but relate only to the illegal or irregular exercise of the jurisdiction. So long as the order stands, it continues to be binding upon the party whom it purports to bind. (*Nasim Ali and R.C.Mitter, JJ.*) MAHIGANJ LOAN OFFICE, LTD. *v.* BEHARI LAL CHAKI. **I.L.R.(1937) 1 Cal. 781=171 I. C. 198=10 R.C.239=65 C.L.J.361=41 C.W.N. 406=A.I.R.1937 Cal. 211.**

——**S. 153**—*Scheme sanctioned after depositor obtaining decree against Bank Scheme, if binds decree-holder depositor—Construction of Scheme.*

A depositor sued the Bank for the money due. The Bank in the meantime applied under S. 153, Companies Act, for calling a meeting to sanction a scheme which provided that the depositors would not be entitled to demand payment of their deposit money at once and would be paid only in terms of the scheme. The suit instituted by the depositor was decreed and a consent decree was passed ordering instalments to be paid by the Bank to the depositor. The scheme of the Bank was sanctioned by the Court after passing of the said decree. There was no proof that the notice of the meeting which sanctioned the scheme was served on the decree-holder depositor. The Bank in contravention of the scheme paid two instalments but made default afterwards. The decree-holder applied for execution of the decree.

Held, that not asking the Court to stay the suit till the sanction of the scheme by High Court and payment of instalments in contravention of the scheme clearly indicated that the Bank knew that the scheme was not intended to be binding on the decree-holder depositor. The scheme being passed and sanctioned after the decree was passed, the decree-holder depositor was not included in the word 'depositors' in the scheme. (*Nasim Ali and R. C. Mitter, JJ.*) SUDHANYA KUMAR RAHUT *v.* FARID-

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PUR LOAN OFFICE, LTD. **171 I.C. 492=10 R. C. 274=A.I.R. 1937 Cal. 169.**

——**S. 153**—*Scheme sanctioned by Court—Executing Court, if can go behind.*

A scheme of arrangement which is sanctioned by the Court under S.153 has the force of a judicial pronouncement. Where an execution of a decree obtained against a loan company by one of its depositors, the sanctioned scheme is set up as a bar by the company, the executing Court cannot go behind the sanction unless it is shown that the order giving the sanction was without jurisdiction. When the matter comes before the executing Court, it is not open to the decree-holder to urge against the sanctioned scheme that there was any defect in the procedure or that there was no meeting of the particular class of creditors to which he belongs. Such defects, if any, do not take away the foundation of the authority of the Court in granting sanction under S. 153 and they are at the most irregularities and do not render the sanctioned scheme a nullity in the eye of the law. The order of the High Court unless set aside or modified is binding on the decree-holder and on person who seeks to execute his decree and is one which the executing Court has to obey. (*Derbyshire, C.J. and B.K.Mukherjea, J.*) KRISHNA NATH SEN *v.* DINAJPUR LOAN OFFICE, LTD. **I.L.R. (1938) 2 Cal. 30=179 I.C.405=11 R.C.537=A.I.R.1938 Cal. 337.**

——**S. 153**—*Scheme sanctioned by Court—Creditor obtaining decree prior to—If bound by.*

The depositors of a company held a meeting in which they passed a scheme. The Court also sanctioned it, which gave effect to the resolution carried at the meeting of the depositors held after a depositor-creditor of the company had obtained a decree. The scheme related to distribution of teh available funds among the depositors who were to be deemed as creditors *pro rata*. The creditor-decree-holder took out execution.

Held, that the scheme could not possibly be held to apply to the depositor creditor who had already obtained a decree before the scheme as he had ceased to be a depositor and as such he was entitled to execute his decree. (*Guha and Bartley, JJ.*) NAOKHILA LOAN CO., LTD. *v.* HEMENDRA NARAYAN ROY. **166 I.C. 815=9 R.C.588=A.I.R. 1936 Cal. 402.**

——**S. 153**—*When takes effect—Depositor obtaining decree after order of Court to prepare scheme but before its preparation—If bound by scheme.*

A scheme becomes binding from the date when it is arrived at, subject to subsequent sanction by the Court. A depositor who obtains a decree after an order of Court for the preparation of a scheme but before it is actually prepared is not bound by the scheme and is not prevented from putting the decree into execution. (*Derbyshire, C.J. and Mukherjea, J.*) RAJSHAHI BANKING AND TRADING CORPORATION, LTD. *v.* PULIN BEHARI MUKHERJEE. **42 C.W.N.610.**

——**S. 153**—*Composition scheme sanctioned by High Court—Decision that scheme binds decree-holder—Execution by latter started in mofussal Court—Injunction to restrain—Power of High Court to issue.*

COMPANIES ACT (1913), S. 153.

A compromise or composition scheme which has been sanctioned by the Court binds all the creditors of the company. Where after a scheme of composition has been passed by the creditors at a meeting, the holder of a decree against the company applies to the High Court contending that the scheme is not binding on him, but the High Court decides that he is bound by the scheme, the decree-holder cannot be permitted to nullify that decision by getting his decree transferred to a mofussil Court and attempting to execute it against the assets of the company. If the decree-holder attempts to start execution the High Court has power to stop the execution proceedings and will issue an injunction to restrain him from further proceeding with the execution of the decree, so long as the scheme is in operation. (*McNair, J.*) JALPAIGURI BANKING AND TRADING CORPORATION, LTD. *In re.* 165 I.C. 655=9 R.C. 443=40 C.W.N.551=A.I.R.1936 Cal. 662.

Scheme—Scope of.

———S. 153, *Scope of—Scheme—Sanction of Court—Grant of—Conditions—Jurisdiction of Court—Scheme of merger involving transfer of undertaking to amalgamated company—Alteration of rights conferred by memorandum of association and re-organization of rights of share-holders—Provision for distribution of assets in case of winding up—Application for sanction—Competency—Discretion of Court—Conditions in favour of dissentients—If to be imposed.*

A scheme of merger of several companies under which a company should transfer its business and undertaking to the new combined or merger company, which involves a re-organization of capital altering rights conferred by the memorandum of association and re-organising the rights of different classes of shareholders and which provides for a distribution of the assets of the company among different classes of share-holders should the company be wound up after the merger, is one which may be sanctioned by the Court under S. 153 of the Companies Act. An application for sanction of such a scheme is maintainable and the Court has jurisdiction to consider it, and see if it is fair and reasonable, even though the scheme may involve winding up. But the Court may, in the exercise of its discretion, impose certain conditions upon the company before sanctioning it, *i.e.*, it may ask the company to make some provision for the dissentients. Such a provision, is not, however, a *sine qua non* to sanctioning a scheme if it is reasonable and fair. (*Rangnekar, J.*) KATNI CEMENT AND INDUSTRIAL CO., LTD., *In re.* 39 Bom.L.R. 675=10 R.B.225=171 I.C.769=A.I.R.937 Bom. 423.

Miscellaneous.

———S. 153—*Petition under—Winding up petition filed—Hearing of—If barred—Scheme not placed before shareholders and creditors.*

A petition was presented by the Directors of a Bank under S. 153 of the Companies Act asking the Court to refer a scheme, which they had prepared, to the shareholders and creditors for their consideration, but a winding up petition was filed subsequently by some of the creditors.

COMPANIES ACT (1913); S. 156.

Held, there was no bar to the hearing of the winding up petition, though the scheme was not placed before the shareholders and the creditors by the Court as prayed for. (*Leach, C.J. and Abdur Rahman, J.*) CALICUT BANK, LTD., *In re.* 180 I.C. 238=11 R.M.678=48 L.W.648=1938 M.W.N.1082=A.I.R.1939 Mad. 58=(1938) 2 M.L.J. 812.

———Ss. 153 and 213—*Applicability and relative scope.*

The plain language of S. 153, Companies Act, clearly shows that the machinery provided by the section is available where there is and where there is not a winding in progress, and the section would apply to a going concern as well as in a winding up. S. 213, on the other hand, is applicable only in view of a winding up or in the course of a winding up. (*Rangnekar, J.*) KATNI CEMENT & INDUSTRIAL CO., LTD., *In re.* 39 Bom.L.R. 675=171 I.C. 769=10 R.B. 225=A.I.R. 1937 Bom. 423.

———S. 156—*Award of interest—Power of Court.*

The liability created by S. 156 is a new liability and no provision is made for interest therein. It may be that when a Court makes a payment order under that section it could direct future interest on the amount fixed in the payment order until realization but it cannot include interest prior to that time. (*Addision and Abdul Rashid, JJ.*) PARS RAM BRIJKISHORE *v.* JAGROAN TRADING SYNDICATE, LTD. 166 I.C. 745=9 R.L. 419=A.I.R.1936 Lah. 739.

———S. 156—*Liability of shareholders to contribute—Unpaid calls barred by limitation.*

S. 156 of the Companies Act creates a new liability as regards shareholders to contribute to the assets of the company, and this new liability arises for the first time upon the winding up and is unaffected by the fact that previous calls have been made by the company and have become barred by limitation. (*Lort Williams, J.*) EAST BENGAL SUGAR MILLS, LTD., *In re.* I.L.R.(1940) 2 Cal. 175.

———S. 156—*Liability under—Shareholder forfeiting share for non-payment of call—Claim barred by limitation.*

Where calls made by a company are not paid and their recovery by the company is time-barred, the liquidator can have no higher rights than the company and as such he also cannot recover them. But if the claim of the liquidator is not on foot of the debt, but is for contribution under S. 156 of the Companies Act, which creates a new liability, the shareholder is liable for unpaid calls and his liability is limited to the amount unpaid on the shares but not to interest. The fact that he has ceased to be a member by reason of the forfeiture of his shares by non-payment of call, would not help him. (*Monroe, J.*) PARSRAM BRIJKISHORE *v.* JAGROAN TRADING SYNDICATE, LTD. 163 I.C. 126=8 R.L.1011=38 P.L.R.693=A.I.R.1936 Lah. 226.

———S. 156 (1) (i)—*Past member—Director of company ceasing to be director—If ceases to be member also.*

A director of a company who ceases to be a director does not thereby cease to be a member of the company. He cannot be held to be a

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"past member" of the company within the meaning of S. 156 (1) (i) of the Companies Act. (*Mehta and Lobo, JJ.*) VAZIRMAL KEWALRAM *v.* MAKRAN COAST STEAM NAVIGATION CO., LTD. 32 S.L.R. 167=177 I.C. 577=11 R.S. 65=A.I.R.1938 Sind 187.

———S. 156 (1) (iii)—*Winding up—Existing members not called upon to contribute unpaid amounts of their share money—Liability of past members to contribute.*

In the case of winding up of a Company where existing members on list A are not called upon to contribute to the full extent of the unpaid amounts of their share money, a past member on list B cannot be liable to contribute till list A is exhausted. A.I.R. 1936 Lah. 226; 163 I.C. 126, Reversed. (*Addison and Abdul Rashid, JJ.*) PARS RAM BRIJKISHORE *v.* JAGROAN TRADING SYNDICATE, LTD. 166 I.C. 745=9 R.L. 419=A.I.R.1936 Lah. 739.

———S. 158—*'Contributory'—Holder of fully paid up shares—If included.*

The term 'contributory' as defined in S. 158 of the Companies Act includes a shareholder who holds fully paid up shares only. (*Harries, J.*) PARSHOTTAM DAS *v.* OFFICIAL LIQUIDATOR OF THE GORAKHPUR ELECTRIC SUPPLY CO., LTD. I.L.R. (1938) All. 957=1938 A.W.R.(H.C.) 621=1938 A.L.J. 925=1938 A.L.R. 860=178 I.C. 458=11 R.A.300=A.I.R.1938 All.613.

———S. 160—Scope—Application for order for balance of contributions from member—Death of respondent—Effect—Liability of legal representatives—Omission to implead latter within 90 days—If fatal—Limitation Act—Applicability. *See* LIMITATION ACT, ART. 177. 19 Pat.L.T. 214.

———S. 162—*Application for compulsory winding up of Company—Need for strict observance of rules—Application for appointment of Official Liquidator—Whether can be treated as one for compulsory winding up.*

An application for the appointment of an Official Liquidator cannot be treated as one for compulsorily winding up the Company, when on the face of it the rules to be strictly observed have not been observed. The Court is not concerned merely with the litigants or the parties before it in the jurisdiction conferred upon it under the Companies Act, but is concerned with the creditors or contributories and the public generally, and indeed it has no power to waive any irregularity as regards the strict compliance with the law laid down in the Act and the rules made thereunder. (*Wort, J.*) KAMESHWAR SINGH BAHADUR *v.* AMBLER SLATE AND STONE CO., LTD. 8 R.P.517=162 I.C.218=A.I.R.1936 Pat. 468.

———S. 162—*Compulsory winding up of company—Order, when may be passed.*

No doubt the mere misconduct of directors or of managing agents or the fact that the business of the company has not resulted in profit is not *per se* a ground for winding up. But where the cumulative effect of these facts does demonstrate that the company is insolvent, that its affairs have been mismanaged from the very outset, that debts have been recklessly incurred and never paid, that the provisions of the Companies Act as regards the maintenance and publication of true balance-sheets have been deliberately contravened, and the information necessary to keep the share-holders cognizant of the true state of affairs has been studiously concealed from them all through, the company ought to be compulsorily wound up. (*Iqbal Ahmad, J.*) HENLEY'S TELEGRAPH WORKS CO., LTD. *v.* THE GORAKHPUR ELECTRIC SUPPLY CO., LTD. 166 I.C.238=9 R.A. 383=1936 A.W.R.1113=I.L.R. (1937) All. 210=1937 A.L.R.4=A.I.R.1936 All. 840.

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———S. 162—*Petition by creditor for winding-up—Opposition by debenture-holders—When sustainable.*

The debenture-holders who oppose a petition by a creditor for the winding up of the company, must show that there is no possibility of any benefit accruing to the unsecured creditors from an order for the winding-up. Otherwise their opposition to the petition is without substance. The unsecured creditors are entitled to ask the Court to pass a winding-up order so that the question whether the debentures were *bona fide* issued for value may be enquired into and they may, before it is too late, be able to realize, if not the whole, at least a portion of their unsecured debts. (*Iqbal Ahmad, J.*) HENLEY'S TELEGRAPH WORKS CO., LTD. *v.* THE GORAKHPUR ELECTRIC SUPPLY CO., LTD. I.L.R. (1937) All. 210=166 I.C. 238=9 R.A. 383=1936 A.W.R. 1113=1937 A.L.R. 4=A.I.R. 1936 All. 840.

———S. 162—*Winding-up petition—Supporting creditors—Right to costs, as against petitioner—Construction of Rr. 27 and 101 of Companies Act Rules of the Original Side of the Madras High Court.*

Where on the presentation of a winding-up petition, some of the creditors appeared to support it, in answer to a notice issued under R. 27 of the Companies Act rules of the Original Side of the Madras High Court and where neither the petitioning creditor nor any of the supporting creditors was willing to continue the petition, the petition was dismissed.

Held, that the supporting creditors are not entitled to costs as against the petitioning creditor. (*Leach, C.J. and Varadachariar, J.*) MOHAMED HASAN KHALEELI *v.* VARADARAJALU NAIDU. I.L.R. (1938) Mad. 284=175 I.C.851=11 R.M.12=1937 M.W.N.1106=46 L.W.768=A. I. R. 1938 Mad. 96=(1937) 2 M.L.J.825.

———S. 162 (vi)—*Compulsory winding-up—Ground for—Auditor's report showing defalcation by company's officers.*

Where the report of the auditors shows that there had been defalcation of certain funds of the company and that attempts were made to cover up the defalcation by various devices, and the contributories level charges of dishonesty and mismanagement against each other, the case in one in which the conduct of some officers of the company would require investigation which can only be obtained in winding-up by the Court. In such circumstances, considerations of justice and equity are more in favour of a compulsory winding-up than voluntary liquidation. (*Srivastava, C.J.*) MURRAY & CO., LTD., *In the matter of* 168 I.C.185=9 R.O.449=1937 O.L.R. 234=1937 O.W.N.627=A.I.R.1937 Oudh 377.

———S. 163 (i)—*Applicability—Judgment-debt.*

It does not follow from the fact that all the three clauses of S. 163 are mutually exclusive of

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each other, that Cl. (*i*) of the section does not apply to a judgment-debt. Cl. (*i*) is general in its terms and has application to all sorts of debts, be it a simple money debt, a mortgage-debt or a judgment-debt. In the case of a judgment-debt, if execution for the recovery of that debt has been taken and has remained unsatisfied, the Court is, in accordance with Cl. (*ii*) of S. 163, bound to presume that the company is unable to pay its debts. Nevertheless, the decree-holder is not barred from making a demand for the payment of the judgment-debt by a notice in accordance with Cl. (*i*) without having recourse to execution proceedings. In such a case, if the demand remains unsatisfied for three weeks, the presumption enjoined by S. 163 necessarily follows. (*Iqbal Ahmad, J.*) HENLEY'S TELEGRAPH WORKS Co., LTD. *v.* GORAKHPUR ELECTRIC SUPPLY Co., LTD. **I.L.R. (1937) All. 210 =166 I.C. 238=9 R.A. 383=1936 A.W.R. 1113= 1937 A.L.R. 4=A.I.R. 1936 All. 840.**

———**S. 163 (i)**—*Creditor's demand under—Need for strict compliance with its provisions—Demand by limited liability company through its manager—If demand under its hand.*

The provisions in Cl. (*i*) of S. 163 of the Companies Act that the notice by the creditor must be a "demand under his hand" asking for the payment of the debt must be strictly complied with otherwise, the demand, though followed by neglect of the company to pay the debt demanded, cannot be made the basis of presumption that the company is unable to pay its debts. Cl. (*i*) of S. 163 imposes a penal obligation upon the company, and has, therefore, to be strictly construed. A demand by a limited liability company under the hand of its manager must be deemed to be a demand by the company under its hand. (*Iqbal Ahmad, J.*) HENLEY'S TELEGRAPH WORKS Co., LTD. *v.* THE GORAKHPUR ELECTRIC SUPPLY Co., LTD. **I.L.R. (1937) All. 210 =166 I.C. 238=9 R.A. 383=1936 A.W.R. 1113= 1937 A.L.R. 4=A.I.R. 1936 All. 840.**

———**S. 163 (i)**—*Service of notice under—Company disputing its liability—Effect.*

No doubt the mere service of a notice by a creditor on a solvent company does not entitle the creditor to a winding-up order if the company *bona fide* disputes the existence of the debt. But this principle has no application where the denial by the Company of its liability is *mala fide* and dishonest. (*Iqbal Ahmad, J.*) HENLEY'S TELEGRAPH WORKS Co., LTD. *v.* THE GORAKHPUR ELECTRIC SUPPLY Co., LTD. **I.L.R. (1937) All. 210 =166 I.C. 238=9 R.A. 383=1936 A.W.R. 1113= 1937 A.L.R. 4=A.I.R. 1936 All. 840.**

———**S. 166**—*Person holding power-of-attorney from executors under will of deceased contributory—Such person also obtaining letters of administration and getting himself registered as member—Right to maintain application for winding-up as contributory.*

A person who holds a power-of-attorney from the executors under the will of a deceased contributory and who has also obtained letters of administration with the will annexed and has got himself registered as a member represents the legal estate in the shares forming part of the assets of the deceased and as such must be regarded as a contributory who is entitled to

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maintain an application for winding-up of the company. (*Srivastava, C.J.*) MURRAY & Co., LTD., *In the matter of.* **168 I.C. 185=9 R.O. 449=1937 O.L.R.234=1937 O.W.N. 627= A.I.R. 1937 Oudh 377.**

———**S. 166 and S. 287**—*Applicability—Life Assurance Company—Policy holder—Right to apply to wind up as contributory or creditor—Life Assurance Companies Act, S. 22.*

The effect of S. 287 of the Companies Act and S. 22 of the Life Assurance Companies Act is to incorporate into the Life Assurance Companies Act the relevant provisions about winding-up contained in the Companies Act including S. 166 of the Companies Act. The right to wind up a company is, however, a statutory right and unless petitioner can bring his case within the terms of S. 166, he is not entitled to maintain the petition. A policy holder in a Life Assurance Company Limited by guarantee which has no share capital is not entitled to apply for winding up of that company either as contributory or as a creditor. (*Engineer, J.*) ARYAN LIFE ASSURANCE SOCIETY, LTD., *In re.* **40 Bom.L.R. 52=174 I.C.593=10 R.B. 465=A.I.R. 1938 Bom. 182.**

———**S. 171**—*Company in liquidation itself starting execution proceedings—Objections under O. 21, R. 58, C. P. Code, filed without leave of Court—Maintainability.*

Where a company in liquidation itself starts certain execution proceedings, it is not entitled to rely on S. 171, Companies Act, to debar persons from defending their property in the execution proceedings. Objections under O. 21, R. 58 can be raised during such proceedings and the Court refusing to entertain the objections on the ground that the objectors have not obtained leave of the liquidation Court, fails to exercise jurisdiction vested in it by law and its order is open to revision. (*Middleton, J.C.*) MT. ZAMRUT *v.* PEOPLES BANK OF NORTHERN INDIA. **164 I.C.1012=9 R.Pesh. 41=A.I.R.1936 Pesh. 185.**

———**S. 171**—*Appeal or application for revision arising out of action by company—Leave of Liquidation Court—If necessary.*

An appeal or an application for revision arising out of an action brought by a company does not come within the purview of S. 171 and such appeal or application can be instituted, or proceeded with, without the leave of the Liquidation Court. (*Tek Chand, J.*) SIMLA BANKING AND INDUSTRIAL Co., LTD. *v.* INDO SWISS TRADING Co., LTD. **179 I.C.376=11 R.L.556=41 P.L.R.91=A. I.R.1938 Lah.754.**

———**S. 171**—*Company in liquidation successful in action instituted by itself—Defendants wanting to take defensive proceeding—Leave is not necessary.*

When once an action by the company in liquidation itself has been proceeded with, and is successful, there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their behalf, as the defendants cannot be said to proceed with or commence any legal proceedings against the company. (*Addison and Din Mohammad, JJ.*) JIWAN DAS *v.* PEOPLE'S BANK OF NORTHERN INDIA. **176 I.C. 206=11 R.L.173=A.I.R.1937 Lah. 926.**

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———S. 171—*Continuation of insolvency proceedings against company—Leave of Court, if necessary.*

The provisions of S. 171 of the Companies Act are very wide and though an application for discharge may not start independent proceedings, the section would seem to require leave of the High Court even for the continuation of the insolvency proceedings already taken. (*Bhide, J.*) BANWARI LAL *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **169 I. C. 625=10 R. L. 40=39 P.L.R.717.**

———S. 171—*Construction—"Or commenced".*

It is impossible to hold that the words "or commenced" in S. 171, Companies Act, are otiose. They were put in to show that no suit could be instituted or other legal proceeding commenced without the leave of Court after the company had gone into liquidation. The words immediately preceding them, namely "shall be proceeded with," were put in merely in order to meet the case of those suits or legal proceedings which were pending at the time the liquidation started. The word "commenced" has been used because a proceeding is usually said to be commenced just as a suit is usually said to be instituted, but the meaning of the two words is the same. S. 171 means that after liquidation has started, a suit cannot be instituted and other legal proceedings cannot be commenced until the leave of the Court is given. (*Addison and Abdul Rashid, JJ.*) PEOPLES BANK OF NORTHERN INDIA, LTD., LAHORE *v.* FATESH CHAND & CO. **164 I.C.136=9 R.L.88=38 P.L.R.1104=A. I.R.1936 Lah. 401.**

———S. 171—*Leave to sue under—When to be obtained—Leave after institution of suit—If can be granted.*

Under S. 171, Companies Act, leave to proceed with a pending legal proceeding can only be granted where that proceeding has been initiated prior to the winding-up order. A Court has no jurisdiction to give a plaintiff leave to continue a suit instituted without leave subsequent to the winding-up order. (*Panckridge, J.*) *Re* STEEL CONSTRUCTION CO., LTD. **40 C.W.N. 312.**

———S. 171—If after an order for the winding up of a company is passed, a suit is instituted against the company without obtaining leave to sue under S. 171 of the Companies Act, the Court has inherent jurisdiction to dismiss the suit as incompetent on an interlocutory application under S. 171, the winding-up Court has no jurisdiction to give the plaintiff leave to continue a suit instituted without leave subsequent to the winding-up order. (*Panckridge, J.*) HAR NARAIN MISRA *v.* KANHAIYA LAL LOHAWALLA. **I.L.R. (1939) 2 Cal. 425=187 I.C.880=12 R.C.627=1940 Comp. C.146=A.I.R.1940 Cal. 166.**

———S. 171—Leave under—Unregistered mortgagee—Decree on—Subsequent liquidation proceedings— Leave to execute decree—If to be granted. *See* COMPANIES ACT, S. 109. **40 C.W.N. 1171.**

———S. 171—*Original proceedings begun by company—Subsequent appeals and revision—If require permission of liquidating Court.*

Where the original proceedings have been begun by a company, as the plaintiff and decree-holder, no permission of the liquidating Court as required by S. 171 of the Act is necessary for appeals or revisions which may be presented by the unsuccessful defendants or judgment-debtors against orders passed in the proceedings. 62 P. R. 1918 (F.B.), Foll. (*Mir Ahmad, A.J.C.*) BUNDHELKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLES BANK OF NORTHERN INDIA, LTD., LAHORE. **162 I.C.416=8 R.Pesh. 197=A.I.R.1936 Pesh. 97.**

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———S. 171—*Suit instituted by company under liquidation without leave of Court—Leave obtained within period of limitation—Dismissal of suit—Propriety.*

If a suit by a company in liquidation has been instituted without leave of Court under S. 171, Companies Act, but such leave has been obtained within the period of limitation it would obviously be useless to dismiss the suit and to compel the plaintiff to bring another suit after obtaining the leave. (*Addison and Abdul Rashid, JJ.*) PEOPLES BANK OF NORTHERN INDIA, LTD., LAHORE *v.* FATEH CHAND & CO. **164 I.C. 136=9 R.L. 88 =38 P.L.R.1104=A.I.R. 1936 Lah 401.**

———S. 176 (1)—*"Due cause"—Meaning of—Test—Liquidator negligent in carrying out specific orders of Court—If ground for removal.*

"Due cause" for removal of a liquidator under S. 176 (1) of the Companies Act is to be measured by reference to the real, substantial, and honest interest of the liquidation and to the purpose for which the liquidator is appointed. Fair play to the liquidator himself is not to be left out of sight. Although the liquidator has been found to be negligent in carrying out the specific orders of the Court and the specific rules laid down in the Rules of Court, the Court will not remove the Liquidator, if it appears that it is not in the "real, substantial, honest interest of the liquidation" that he should be removed from his post. (*McNair, J.*) PABNA DHONABHANDAR CO., LTD., *In re.* **165 I.C. 108=9 R.C. 337=40 C.W.N. 857.**

———S. 179—*Liquidator—Power of attorney agent of—Authority to endorse promissory notes —Ratification by liquidator—Permissibility.*

The power given to the liquidator under S. 179 (*f*) of the Companies Act to indorse a promissory note is a statutory power and it cannot be delegated in the absence of a statutory provision permitting such delegation.

Held, that the indorsements of certain promissory notes by the agents appointed by the liquidators conveyed no title in law to the assignees.

Held, further, that no subsequent ratification of such indorsements by the liquidator could make them valid as they were void *ab initio*. (*Pandrang Rao, J.*) SANKAMMA HENGU *v.* ANANTHA KAMATH. **1940 M.W.N.796=52 L.W.342=(1940) 2 M. L.J.309.**

———Ss. 179 and 183 (5)—*Construction and scope — Company — Winding-up — Permission to liquidator to sell property for price not less than a fixed sum—Contract of sale by liquidator for sum in excess of stipulated price—Sanction by Court—Sanction acted upon—Subsequent revocation of sanction—Power of Court—Inherent power to revoke sanction.*

Any sales or contracts of sale effected by the official liquidator of a company which has gone into liquidation in pursuance of the Court's sanction previously obtained are not mere conditional agreements subject to subsequent confirmation by the Court. Once the Court has sanctioned the

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sale of the company's sale of the property and has fixed a reserve price, the matter is closed so far the Court is concerned, and the liquidator is free to dispose of the property provided he observes the conditions previously imposed by the Court. Under S. 179 of the Companies Act, the liquidator can finally dispose of the property once he has got the sanction of the Court. It is not as if he has power merely to invite offers and to submit them to the Court for approval. Where the Court has given the official liquidator a general permission to sell the property of the company (provided that a certain price was obtained) and has expressly sanctioned a contract of sale entered into by him for a sum considerably in excess of the stipulated price, the Court cannot, by passing an order purporting to revoke its own sanction, nullify the contract of sale. Neither S. 179 nor any other provision in the Companies Act gives any authority to the Court to revoke the sanction granted by it. S. 183 (5) of the Act is also of no avail, because S. 183 (5) clearly cannot apply to a case in which the act or decision of the official liquidator has been performed or made in pursuance of the Court's express sanction. Nor has the Court any inherent power to revoke its own sanction after the sanction has been acted upon. (*Burn and Stodard, JJ.*) ROWTHMALL NEO PANI *v.* NAGARMALL MADAN GOPAL. **50 L.W. 879=1940 M.W.N. 584 =1939 Comp. C. 335=A.I.R. 1940 Mad. 179= (1940) 1 M.L.J. 107.**

——**S. 183**—*Winding up of a company by order of Court—Liquidators selling a decree to the highest bidder and assigning it to him—Sanction of Court—Irregularity in conduct of sale alleged—O. 21, R. 90 of C. P. Code—Applicability of.*

Where a company was compulsorily wound up by order of Court and the liquidators felt a certain asset in the shape of a decree in favour of the directors of the company should be sold by auction and accordingly applied to the District Judge for directions under S. 183 of the Companies Act and having obtained sanction sold the decree to the highest bidder and executed a deed assigning the decree to him, but the sale was later attacked by one of the liquidators on the ground of some irregularity in the conduct of the sale and the District Judge set aside the sale.

Held, that in the absence of fraud the District Judge had no power to set aside the sale, as the official liquidators with the sanction of the Court assigned the decree to the person who became the purchaser. The principles of O. 21, R. 90 of the C. P. Code do not apply, but even if they do, there would be no ground for setting aside the sale. (*Leach, C.J. and Burn, J.*) RAMANUJA MUDALIAR *v.* SUNDARA VARADACHARIAR. **175 I.C.22=10 R.M.752=1938 M.W.N. 24 (1)= 46 L.W.925=A.I.R.1938 Mad. 176=(1937) 2 M.L.J.926.**

——**S. 183 (5)**—Applicability—Act or decision of liquidator in pursuance of express sanction of Court—If can be cancelled. *See* COMPANIES ACT, Ss. 179 AND 183 (5). **50 L.W. 879.**

——**S. 184**—List of contributories—Persons signing memorandum of association—Liability to be included in list—Actual entry in register or allotment of shares—If condition precedent *See* COMPANIES ACT, Ss. 30 AND 184. **32 S.L.R. 167.**

COMPANIES ACT (1913), S. 185.

——**S. 184**—*Father applying for shares for minor sons—Liability as contributory.*

Where a father applied for shares in a company for his minor sons, signed the application form on their behalf, paid the purchase-money by his own cheque out os the Bank accounts opened by him in their names, and dividends were credited to those accounts and the balance in those accounts was drawn out by the minors when they became of age.

Held, that the father, when he signed the applications on behalf of his minor sons, must be taken to know that the sons were incapable of contracting being minors, that therefore, he must be treated as the owner of the shares and that consequently he, and not his sons, was liable to be put upon the list of contributories. (*Young, C.J. and Monroe, J.*) MUSLIM BANK OF INDIA, LTD. (IN LIQUIDATION), LAHORE, *In the matter of*. **I.L.R. (1939) Lah. 299=185 I.C. 176=12 R.L. 271=41 P.L.R. 739=1939 Comp.C. 309=A.I.R. 1939 Lah. 515.**

——**S. 185**—*Applicability—Conditions.*

S. 185 only applies where it can be shown that the money or property covered by the order is, at the time of the order, in the hands of the party ordered to deliver them up. (*Lort Williams, J.*) EASTERN TAVOY MINERALS CORPORATION, LTD., *In re*. **41 C.W.N. 975.**

——**S. 185**—Chairman of Bank taking money from Bank by illegal and unauthorised way—Money converted to personal use by purchase of property—Power of Court to give possession of the property to liquidator. *See* TRUSTS ACT, S. 63. **A.I.R 1936 Lah. 408.**

——**S. 185**—*Scope—Enquiry under—Nature of —Ex-managing agent of company—Application by Official Liquidator for money overdrawn by ex-agent—Counter claim by latter for money due from company—Procedure—Duty of Court—Direction for accounts—Desirability of.*

S. 185 does not of course contemplate an elaborate enquiry, but the Court has a discretion to decide whether any particular claim made can or cannot be conveniently dealt with under the section. An application by the Official Liquidator under the section against an ex-managing agent of the company for payment of sums overdrawn by him while he was managing agent is maintainable and not excluded by the mere fact that he had ceased to be an agent before the commencement of liquidation proceedings. If in such application, the agent claims that he is entitled to credit as against the company in respect of arrears of salary due to him and in respect of expenses of suits against him as agent it will not be proper to disallow the claims and to drive him to a separate suit. It is only fair that his claims against the company must be considered in the application itself. Nor will the Court be justified in treating an application under the section as if it were an ejectment suit and seeking to ascertain the rights of the parties only as on the date of the initation of the proceedings. The proper course would be to take an account in respect of such of the items as the agent would be entitled to retain either under S. 217 of the Contract Act or under the terms of the agreement between the parties and of the Articles of the Association of the company; and the balance of the amount claimed by the liquidator would be the amount *prima facie* payable by the agent to the liquidator. (*Varada-*

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chariar and Horwill, JJ.) VENKATARAMA AIYAR *v.* SARVOTHAMA RAO. **1937 M.W.N. 24=45 L.W. 119=168 I.C. 555=9 R.M. 602=A.I.R. 1937 Mad. 401=(1937) 1 M.L.J. 219.**

——**S. 186**—Order under—If a decree within the meaning of that word in S. 73, C. P. Code. *See* C.P. CODE, S. 73 AND COMPANIES ACT, S. 186. **1940 O.A. 132=1940 O.W.N. 132.**

——**S. 186**—*Proceeding under—Company appointed and acting as liquidator—Legality of appointment—If can be questioned.*

Where the Memorandum of Association shows that one of the objects of the company is to manage estates, it entitles the company to act as a liquidator of another company and once the company having been appointed a liquidator and having accepted the position the legality of the appointment cannot be questioned in proceedings for a payment order under the section. (*Jai Lal, J.*) SHANTI LAL *v.* LYALLPUR BANK, LTD. **162 I.C. 306=8 R.L. 875=A.I.R. 1936 Lah. 276.**

——**S. 186 (2)**—*Contributory of limited company, if entitled to set off.*

Sub-S. (2) to S. 186 permits a limited right of set-off to a contributory when the company is unlimited and as no mention whatsoever is made as to his rights where the company is limited, it follows, that he has no such right of set-off, if the company be limited. (*Harries, J.*) PARSHOTTAM DAS *v.* OFFICIAL LIQUIDATOR OF THE GORKHPUR ELECTRIC SUPPLY CO., LTD. **I.L.R. (1938) All. 957 =11 R.A. 300=1938 A.W.R. (H.C.) 621=1938 A.L.J. 925=1938 A.L.R. 860=178 I.C. 458=A.I.R. 1938 All. 613.**

——**S. 188**—*Interpretation—Order against person who has entered into contract with liquidator to deposit money in Bank—Jurisdiction of Judge.*

The Company Judge has no jurisdiction to pass an order against a person who has entered into a contract with the liquidator during the course of the liquidation for payment of the money due from him in a Bank and to direct the execution of the order as a simple money decree. S. 188 of the Companies Act does not give jurisdiction to a Judge to enforce an order against persons other than contributories, or persons mentioned in S. 185. The word 'purchaser' in S. 188 means the purchaser of the interest of a contributory. The words "or other persons from whom money is due," have a reference to a person from whom money is due under S. 185 so far as it is intended that an order enforcing payment should be made. (*Sulaiman, C.J. and Bennet, J.*) JOHN BROTHERS *v.* AGRA SPINNING AND WEAVING MILLS CO., LTD. **58 All. 925=165 I.C. 790=9 R.A. 332=1936 A.L.J. 741=1936 A.W.R. 537=1936 All.L.R. 979=A.I.R. 1936 All. 808.**

——**S. 202**—*Order sanctioning scheme—Appeal.*

A creditor who is aggrieved by an order sanctioning a scheme could apply to the Court for leave to appeal against the order. (*Lort Williams, J.*) MYMENSINGH LOAN OFFICE, LTD., *In re.* **175 I.C. 892=11 R.C. 10=41 C.W.N. 599=A.I.R. 1937 Cal. 667.**

——**S. 195**—*Copies of depositions—Right of deponent.*

A suit was filed by the Liquidator on behalf of a company for setting aside the purchase of the stock-in-trade and assets of the company by one of the defendants. In that suit, the Liquidator applied for the appointment of a receiver of the assets of the company and in the petition in support of his application, while referring to the examination under S. 195 of the Companies Act, stated that the facts elicited by such examination clearly indicated a well-designed conspiracy to defraud the creditors of the company. Thereupon, the defendants who were examined under S. 195 of the Act at the instance of the Liquidator, applied for obtaining copies of their depositions.

Held, that in the above circumstances, each of the defendants was entitled to have a copy of his own deposition upon his counsel undertaking on his behalf to prevent communication of his deposition to his co-defendants or their solicitors or counsel. (*Lort Williams, J.*) KAMAL BROTHERS (1937), LTD. *v.* SUNIL KUMAR CHATTERJI. **I.L.R. (1940) 1 Cal. 28=44 C.W.N. 512=A.I.R. 1940 Cal. 488.**

COMPANIES ACT (1913), S. 209.

——**S. 195**—*Depositions under—Nature of—Liquidator's right to refer to them in other proceedings.*

The depositions made under the provisions of S. 195 of the Companies Act and obtained by the Liquidator under R. 174 of the Ch. XXXI of the Original Side Rules made under the Companies Act, are to be regarded as private documents. The Liquidator is, therefore, not entitled to refer to them in any other proceedings. (*Lort Williams, J.*) KAMAL BROTHERS (1937), LTD. *v.* SUNIL KUMAR CHETTERJI. **I.L.R. (1940) 1 Cal. 28=44 C.W.N. 512=A.I.R. 1940 Cal. 488.**

——**Ss. 202 and 235**—*Petition under S. 235 presented to High Court against certain persons—High Court holding petition maintainable—Order of High Court—Appealability.*

S. 202 is very wide in its terms and covers appeals against any order in the matter of the winding up of a company, provided such order finally decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal and interlocutory order. The last part of S. 202 which lays down that appeal will be heard in the same manner, etc., merely regulates the procedure to be followed in the presentation and hearing of such appeals. Where a petition under S. 235 is presented to the High Court against certain persons and the High Court passes an order holding the application to be maintainable, its order is not of a merely formal or ministerial character, but finally decides points between the parties relating to substantial and important rights. Such an order is appealable under S. 202 and a party aggrieved by the order is entitled to a Division Bench of the High Court under Cl. 10 of the Letters Patent. (*Young, C.J. and Tekchand, J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK. **180 I.C. 254=11 R.L. 667=A.I.R. 1938 Lah. 658.**

——**S. 209 (1) and (2)**—*Application for removal of liquidator—Condition precedent.*

The condition precedent to moving the Court for the removal of the liquidator is a meeting of the creditors held in pursuance of sub-S. (1) of S. 209 in which the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the Company. (*Wort, J.*) KAMESHWAR SINGH BAHADUR *v.* AMBLER SLATE AND STONE CO., LTD. **8 R.P. 517=162 I.C. 218=A.I.R. 1936 Pat. 468.**

COMPANIES ACT (1913), S. 215.

——S. 215—*Powers of Court under—Scope—Creditor applying for declaration that the winding up is void*—Locus standi.

There is no power under the Companies Act for a creditor to come and say that the winding up resolution is bad, and he has no *locus standi* under S. 215 to ask for a declaration that the winding up is void. The powers of a Court under that section are strictly limited and the Court is empowered, on the petition of persons named in the first sub-section, to exercise certain powers for the "assistance" of the winding up, for it speaks of determining any question arising in the winding up. Further the exercise of such powers must be, under the second sub-section, in cases which are just and beneficial, not only just and beneficial to the petitioner but just and beneficial to all parties. (*Wort, J.*) KAMESHWAR SINGH BAHADUR *v.* AMBLER SLATE AND STONE CO., LTD. 8 R.P. 517=162 I.C. 218=A.I.R. 1936 Pat. 468.

——S. 217—*Sale by liquidator with the consent of the mortgagee—No waiver of security—Liquidation expenses—Priority.*

Where a mortgagee of the machinery of a company agreed to the liquidator selling the machinery, but there was no waiver of the security, on a question as to whether the landlord of the premises in which the machinery was kept pending sale negotiations was entitled to a priority of payment in respect of the rent due as against the mortgagee, it was held that it was no doubt true that the Companies Act provided that expenses incurred in winding up shall be payable out of the assets in priority to all other claims subject to the rights of secured creditors if any and that if the mortgagee had chosen to enforce his security personally, he would have been entitled to satisfaction before any expenses of liquidation were paid; but as he had invoked the assistance of the liquidator he must bear the expenses incidental to the assistance he had received and that rent was one of such expenses. (*Weston, I. C. S.*) BIJAI SINGHJI *v.* BALLABH DAS. 1938 A.M.L.J. 100.

——S. 218—*Scope—Creditor's right to ask for compulsory winding up where company is in voluntary liquidation—Voluntary liquidator, if can ask for it*

The present S. 218 means that any creditor who would otherwise be entitled to a compulsory order for winding up may apply to the Court for such an order though the company is at the date of such application in the process of being wound up voluntarily. There is no section in the Act which enables a voluntary liquidator to ask for an order to compulsorily wind up the company. (*Harries, J.*) SHRI GOPAL CHANDRA *v.* NARAIN DAS. I.L.R. (1938) All. 945=178 I.C. 704=11 R.A. 323=1938 All.L.R. 889=1938 A.W.R. (H.C.) 576=1938 A.L.J. 898=A.I.R. 1938 All. 623.

——S. 221—*Order for supervision—When can be made.*

An order for supervision of the Court can be made only where there is a valid winding up of the Company. Where the whole case of the petitioner is that the whole winding up proceedings are *ultra vires* and void, his petition cannot be treated as one for an order for supervision. (*Wort, J.*) KAMESHWAR SINGH BAHADUR *v.* AMBLER SLATE AND STONE CO., LTD. 8 R.P. 517=162 I.C. 218=A.I.R. 1936 Pat. 468.

COMPANIES ACT (1913), S. 227.

——S. 227—*Scope and effect of—S. 57, Presidency Towns Insolvency Act—Distinction—Notice—Relevancy.*

The difference between S. 57, Presidency Towns Insolvency Act, and S. 227, Companies Act, is that while *bona fide* payments to creditors by an insolvent, subject to the very important foregoing sections in the Insolvency Act are permissible and valid, and may generally be quite proper, payments to creditors, of debts previously incurred by a company from the moment of the presentation of a winding up petition become improper alienations and void. It necessarily follows from this, that while such payments by an insolvent made *bona fide* to his creditors may be regarded as payments made in the ordinary course of business, payments by a company of debts existing at the time of the presentation of a petition for winding up, made after the presentation of the petition, cannot be so regarded. Transactions which the law regards as improper and declares void, and which a company conducted with due care and attention ought to avoid cannot be regarded as transactions in the ordinary course of business. Secondly, for the purposes of S. 227, it is wholly immaterial whether the person making or receiving the payment had or did not have notice of the presentation of the petition for winding up, and the operation of that section is not in any way made to depend upon such notice, whereas it would be essential under S. 57, Presidency Towns Insolvency Act, for a person claiming the protection of that section to show that the transaction claimed to be valid was without notice of the presentation of any petition. (*Tyabji, J.*) ALL-INDIA HOME RELIEF INSURANCE CO., *In re.* I.L.R (1939) Kar. 460=184 I.C. 428=12 R.S. 103=A.I.R. 1939 Sind 196.

——S. 227 (2)—*Applicability—Payments by insurance company after commencement of winding up—If void.*

Where an insurance company makes payments between the commencement of the winding up and the date of the winding up order, to some of its policy-holders in respect of their policies, the amount of which had become due, such payments being payments of debts by company to its creditors clearly amount to dispositions of property within the meaning of S. 227 (2) and are not only void but cannot be validated. (*Tyabji, J.*) ALL INDIA HOME RELIEF INSURANCE CO., *In re.* I.L.R. (1939) Kar. 460=184 I.C. 428=12 R.S. 103=A.I.R. 1939 Sind 196.

——S. 227 (2)—*Scope of.*

Transactions made after the commencement of a winding up which a Court would validate under S. 227 (2), are transactions *bona fide* entered into by a company for the benefit of the company and those interested in the assets of the company for preserving the business of the company as a going concern and not to the detriment of other creditors. (*Tyabji, J.*) ALL INDIA HOME RELIEF INSURANCE CO., *In re.* I.L.R. (1939) Kar. 460=184 I.C. 428=12 R.S. 103=A.I.R. 1939 Sind 196.

——S. 227 (2) (as amended in 1936), Ss. 229 and 230 (1) (e)—*Scope and operation—Foreign company—Winding up—Employees' provident fund—If part of assets of company—Right of*

COMPANIES ACT (1913), S. 228.

employees to preferential payment—Trust—Presidency Towns Insolvency Act, S 52.

Where a foreign company is wound up in more jurisdictions than one, the law is that the Court of each jurisdiction will be governed by the forensic rules which govern the conduct of its own liquidation. S. 230 (1) (*e*) as amended in 1936 is a forensic rule in this sense and ought to be applied in the matter of winding up of a foreign company which is an unregistered company under the Act and that provision would therefore apply to the case of a sum due to any employee from the provident fund account maintained by the company. Where a provident fund is established for the benefit of the employees of a company, called the employees provident fund subscription to which is compulsory, and it is clear from the rules of the fund that the fund is held for a specific purpose, *i.e.*, for payment to the employees or their legal representatives on the termination of their service, that fund is a trust fund and the relationship between the bank and the employee is that of a trustee and *cestui que trust* and not that of a debtor and creditor. The fact that in certain contingencies the employee may not be paid the amount or the company may have a beneficial interest in the said moneys does not make the fund any the less a trust fund. The company holds the money standing to the credit of an employee as trust money in a fiduciary capacity, and by the combined operation of S. 229 of the Companies Act and S. 52 of the Presidency Towns Insolvency Act, the said fund does not form part of the assets of the company; the employees are therefore entitled in the winding up of the company, to be paid in full the amounts standing to their credit in the provident fund account irrespective of S. 230 (1) (*e*) of the Companies Act in priority to all other debts of the company. (*Venkataramana Rao, J.*) VENKATARANGAM *v.* OFFICIAL LIQUIDATORS, T. N. & Q. BANK, LTD. **183 I.C. 889=12 R.M. 389=1939 Comp. C. 50=1938 M.W.N. 1332=A.I.R. 1939 Mad. 352.**

——**Ss 228 and 229**—*Construction—"Law of Insolvency" — Meaning of — Provisions of Provincial Insolvency Act—Extent of applicability.*

The expression "rules . . . . under the law of insolvency" in S. 229 should not be widened so as to include the whole "law of insolvency" but the expression "the law of insolvency" in S. 228 should be narrowed so as to include only "rules" as given in S. 229. S. 229 of the Act does not import all the provisions of the Provincial Insolvency Act into company law, and in particular S. 28 (2) of the latter Act is not so imported. 1929 All. 353, Dissent. (*Middleton, J.C. and Almond, A.J.C.*) ALLIANCE BANK OF SIMLA, LTD. *v.* FEROZE SHAH. **160 I.C. 908=8 R.Pesh. 135=A.I.R. 1936 Pesh. 57.**

——**S. 229**—*Company—Winding up—Money due to bank from customer—Money due by bank on account in name of that customer and another jointly—Money in joint account solely belonging to customer—Right of set-off.*

It is no doubt true that where there is an amount due to a bank payable by *A* in his individual account, and an amount due by the bank payable to *A* and *B* in their joint account, the two accounts cannot be set-off; but if it could be shown that though the account is in the name of *A* and *B*, *A* is solely entitled to the amount, a set-off has always been allowed. The question is whether it can be said that the money so absolutely belongs to that one of the two persons in whose names the account stands, who has another account of his own, that the Court must treat it as his sole property and require the balance to be struck between the two accounts. Whether the property belongs solely to *A* can be found on evidence. Once it is found that the person having the sole account is solely interested in the balance of the joint account, so that equity would have compelled the other person, without imposing any terms or directing any inquiry, to transfer the account into his name alone, upon the bankruptcy of the bank a set-off must be allowed. (*Venkataramana Rao, J.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., *In the matter of.* **1940 Comp. C. 52=51 L.W. 680=1940 M.W.N. 608=A.I.R. 1940 Mad. 436=(1940) 1 M.L.J. 115.**

COMPANIES ACT (1913), S. 229.

——**S. 229**—*Company — Winding up—Debtor of company having cross-claim against company —Surety for debtor also having claim against company—Right of debtor and surety to set-off—Mutual dealings.*

A debtor of an insolvent company in respect of whose debt there is a surety is entitled to set-off against the money owing by the debtor to the company moneys due to the debtor from the company, and a surety is entitled to set-off in respect of his obligation to the company moneys owing to him from the company. A debtor having a cross-claim which can be set-off against the company does not lose that right because the company has obtained a safeguard by a surety. The moneys due to the surety on the one hand and from him to the company on the other in respect of the debt of another for which he is surety, are mutual dealings, and he has the right to set-off against his indebtedness to the company the moneys due to him when the obligation to the company by the debtor and surety is one which is joint and several. Both the debtor and the surety who are under an obligation to pay moneys to the company but who themselves are creditors of the company may therefore set-off one debt against the other. (*Gentle, J.*) SUNDARAVARADAN *v.* OFFICIAL LIQUIDATOR, T.N.B SUBSIDIARY CO. **1939 M.W.N. 1231=A.I.R. 1940 Mad. 266.**

——**S. 229**—*Deposits by employees by way of security—Nature of—Trust, if created—Liquidation—Preferential right of such depositors—Tracing.*

Where deposits were made to a bank by the employees or on their behalf as security for their faithful and honest service and interest was also payable on such deposits, on a question whether such depositors were entitled on a liquidation of the bank to a preferential payment,

Held, that the deposits formed part and parcel of the engagement transaction and the moneys should have been held by the bank in trust, since expressly they were paid as security for good behaviour. The deposits were trust moneys and an agreement to pay interest on such deposits, could not destroy the character as such of those moneys which still remained trust moneys so long as they were in the hands of the bank. Trust moneys could be followed so as to reach the assets of the bank from whatever source they might

come, the tracing of the assets in that way is the proper principle of law to apply in regard to those matters. The assets of the bank coming into the hands of the Liquidator would have to be earmarked first of all to the discharge of the claim by the depositors. (*Gentle, J.*) HINDUSTAN COMMERCIAL BANK, LTD., *In the matter of.* **1938 M.W.N. 7=47 L.W. 153=11 R.M. 453=178 I.C. 428=A.I.R. 1938 Mad. 651.**

——Ss 229 and 230—*Scope—Crown debts—Priority—If extends to trade debts—Presidency Towns Insolvency Act, S. 49.*

The provisions of S. 49 of the Presidency Towns Insolvency Act are not incorporated by S. 229 of the Companies Act and the priority of Crown debts in winding-up proceedings is limited to those specifically mentioned in S. 230 of that Act. Accordingly the priority regarding Crown debts is restricted to such matters as revenue and taxation and does not extend to trade debts payable to the Crown. Apart from the exceptions contained in S. 230, the assets of a company must be applied in satisfaction of its liabilities *pari passu* in accordance with the provisions of S. 207. (*Lort Williams, J.*) THE NORTHERN BENGAL CO., LTD., *In the matter of.* **I.L.R. (1937) 1 Cal. 684=41 C.W.N. 458=169 I.C. 506=10 R. C. 9.**

——S. 230—*Creditor's right to preferential treatment in respect of money deposited as security—Trust, if created.*

Where as part of the agreement of the appointment of certain persons as selling agents they deposited with a company certain amount, which was to carry interest and which was to be re-paid on the termination of the period for which those persons acted as selling agents, and such persons applied for the return as per their agreement and not succeeding in getting it applied for the winding up of the company with which they had contracted and contended that they are entitled to preferential payment, it was held that the agreement between parties did not create a trust or any other fiduciary relationship and as such the selling agents were not entitled to any preferential payment. (*Harries, J.*) INDIAN COMPANIES LAW AND INDRA SUGAR WORKS, LTD. *v.* OFFICIAL LIQUIDATORS, INDRA SUGAR WORKS, LTD. **I L.R. (1938) All. 896=178 I.C. 585=11 R.A. 305=1938 A.W.R. (H.C.) 553=1938 A.L.J. 820=1938 A.L. R. 867=A.I.R. 1938 All. 574.**

——S. 230 (1) (c) and (2)—*Workmen's wages—Rule of priority as to—Extent.*

Under the provisions of S. 230 (1) (*c*) and (2) the wages of workmen have a priority of claim over the claims of debenture-holders under any floating charge created by the company. (*Bennet, A C J. and Varma, J.*) A. V. JOHN *v.* SURAJ BHAN. **I.L R. (1938) All. 869=1938 A.W.R (H.C.) 591=1938 A.L.R 852=178 I.C. 441=11 R.A. 293=A.I R. 1938 All. 609.**

——S. 230 (1) (e)—*Applicability—Conditions—Employees in service before* 15—1—1937, *and those entering service afterwards—Distinction, if any.*

The condition precedent to the applicability of S. 230 (1) (*e*) which was enacted by the Act II of 1936 and came into force on 15—1—1937, is that the employee must be an employee of the company on the date of the winding up of the company. It is immaterial when he entered service.

There is no distinction between employees entering service before 15—1—1937, and those entering service after that date. (*Venkataramana Rao, J.*) VENKATARANGAM *v.* OFFICIAL LIQUIDATORS, T. N. & Q. BANK, LTD. **183 I.C. 889=12 R. M. 389=1939 Comp. C. 50=1938 M.W.N. 1332 =A.I.R. 1939 Mad. 352.**

——S. 234—*Compromise of debt—Power of Court to compel liquidator.*

A liquidator may, with the sanction of the Court, compromise a debt due to the company in liquidation. But the Court has no jurisdiction to compel an unwilling liquidator to compromise such debt. (*Young, C. J.*) CHIRAGH DIN *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK OF NORTHERN INDIA, LTD. (IN LIQUIDATION), LAHORE. **I.L.R. (1939) Lah. 324=185 I.C. 314=12 R.L. 274=41 P.L.R. 737=1939 Comp. C. 307=A.I.R. 1939 Lah. 497.**

——Ss. 234 and 230—*Payment in full to any class of creditors—Discretion of Court—Interference by High Court.*

The creditors referred to in S. 230 of the Companies Act are persons entitled to priority under the statute and as of right, but the Court has under S. 234 been allowed a discretion to order payment in full to any class of creditors other than those referred to in S. 230. If the discretion used by the Court under S. 234 of the Act is not capricious or in disregard of any legal principle, the High Court should be very slow to interfere. (*King, C. J. and Thomas, J.*) PEOPLE'S BANK OF NORTHERN INDIA, LTD. *v.* LUCKNOW SUGAR WORKS, LTD. **12 Luck. 283=163 I.C. 194=8 R.O. 418=1936 O.W.N. 539=1936 O.L.R. 343=A.I.R. 1936 Oudh 338.**

——S. 235—*Applicability—Winding-up—Directors entering into contract and making payments during winding up—Liability of—Absence of dishonesty—If ground for exemption—S. 281—Benefit of.*

If the directors enter into a contract and make a payment on it during the winding-up proceedings, they do so at their peril, and excepting those cases in which it would be held that the payment was necessary for the winding up or for the carrying on of the business of the company pending the hearing of the winding up petition, the directors must be aware that there is always a risk of such payments being void under this section. It is impossible to excuse the directors on account of lack of knowledge. They, above all, must be knowing what were necessary payments, and they also must be assumed to have known that having entered into a contract which had not been completed before the winding up, the persons with whom they were contracting were entitled only to prove in the winding up for damages. In the sense therefore that the directors were aware that they were making an unauthorized pnyment, they were disposing of the property of the company wrongfully and therefore guilty of a breach of trust and the absence of dishonesty or fraud is immaterial. The directors, therefore, are not entitled to relief under S. 281, Companies Act. (*Wort, J.*) PENINSULAR LOCOMOTIVE CO. *v.* LANGHAM REED. **168 I.C. 786=9 R.P. 509=3 B.R. 477=A.I.R. 1937 Pat. 293.**

——S. 235—*Application under—Contents.*

COMPANIES ACT (1913), S. 235.

It is not necessary in a petition presented to the High Court under S. 235 to fully and adequately set out the particulars on which the claim is based. Neither S. 235 nor the rules framed thereunder require that the sum claimed by the liquidator from a director or officer of the company should be specifically stated in the petition. So also the rules framed under S 235 do not require that an affidavit supporting the facts mentioned in the petition should be filed along with the petition or that if it is not filed, it cannot be received at a later stage. Where therefore a petition under S. 235 does not state the sum sought to be recovered from the persons against whom the petition is presented and is not supported by affidavit, the absence of these do not render the proceedings defective. (*Young, C. J. and Tekchand, J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK. **180 I.C. 254=11 R.L. 667=A.I.R. 1938 Lah. 658.**

——**S. 235**—*Application under—Names of certain persons added subsequently but documents relating to them filed later on—Date of application against these persons.*

Per *Monroe, J.*—Where in a petition under S. 235 to the High Court, the names of certain persons are added subsequently but documents relating to them which taken together fulfil the requirements of the rule framed under S. 235 are not filed at that time but later, the date of the application against the added defendants is the date on which the documents are filed. (*Young, C. J. and Tekchand, J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK. **180 I.C. 254=11 R.L. 667=A.I.R. 1938 Lah. 658.**

——**S. 235**—*Application under—Provisions of Civil Procedure Code—If applicable.*

Per *Monroe, J.*—An application under S. 235 is in the nature of a plaint and the proceedings under S. 235 are judicial proceeding; but the provisions of the Code of Civil Procedure are inapplicable to a petition under S. 235, because express provisions for its contents and the formalities connected with it are provided for by the Companies Act and the rules made thereunder. (*Young, C. J. and Tekchand, J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR PEOPLES BANK. **180 I.C. 254=11 R.L. 667=A.I.R. 1938 Lah. 658.**

——**S. 235** —Application under —Limitation. *See* LIMITATION ACT, ARTS. 115, 116 AND 120. **A.I.R 1937 Pat. 293.**

——**S. 235**—*Broker—If an 'officer' of the company.*

A broker has nothing to do with the management of the company and may have no knowledge of what is being done inside the company's office. Therefore to classify him as an 'officer' of the company would be putting too great a strain on the wording of the section. (*Leach, C. J. and Madhavan Nair, J.*) THIRUVENKATACHARIAR *v.* VELU MUDALIAR. **I.L.R. (1938) Mad. 192=176 I.C. 635=11 R.M. 137=1937 M.W.N. 1337=46 L.W. 887=A I.R. 1938 Mad. 154=(1937) 2 M.L.J. 820.**

——**S. 235**—*Duties and liabilities of directors—Misappropriation by chairman or advisory directors of security deposited by employees—Appointment of staff vested in chairman—No reason for suspecting chairman's or advisory director's integrity—Liability of directors for loss—Wilful neglect or default.*

COMPANIES ACT (1913), S. 235.

In order to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances and is not inconsistent with any express provisions of the articles. In discharging his duties, a director must not only act honestly but must also exercise some degree of both skill and diligence. But a director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; nor is he bound to give continuous attention to the affairs of the company, his duties being of an intermittent nature to be performed at periodical meetings; and in respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. Where the articles of association contain an indemnity clause which protects the directors, protectors, etc., except where loss has been incurred as the result of wilful neglect or wilful neglect on their part, a director cannot be made liable unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty. Any act, or omission to do an act, his wilful where the person concerned knows what he is doing and intends to do what he is doing. A director is entitled to rely on the judgment, information, and advice of the chairman or general manager or advisory director, as to whose integrity, skill and competence, he has no reason for suspicion. Where the matter of appointment of the staff of the company is in the hands of the chairman, and the directors have no reason to suspect the integrity of the chairman or advisory director, there being an entire absence of anything, which would point the finger of suspicion to either the chairman or the advisory director in the matter of the appointments, the directors cannot be made liable for the amounts misappropriated by the chairman or advisory director amounts paid by the staff as security for their employment since the directors are justified in trusting the chairman and advisory director to deal properly with the employees and it cannot be said that they are guilty of wilful negligence, and they cannot be called upon to pay the amount of the security ulilised by the chairman or advisory director for their own purposes. (*Leach, C. J. and Varadachariar, J.*) DOSS *v.* CONNELL AND LOBO. **I.L.R. (1938) Mad. 292=176 I.C. 592=11 R.M. 123=1937 M W.N. 1099=46 L.W. 869=A.I.R. 1938 Mad. 124=(1937) 2 M.L.J 848.**

——**S. 235**—*Liquidation — Brokers—Whether liable to repay amount received as commission to official liquidator.*

Where the official liquidator sought to make the respondent liable to repay a certain amount received by them in the shape of commission as share brokers of the company, on the ground

that the agreement under which they were to act as brokers of the company was *ultra vires.*

Held, that if moneys had been wrongly paid to the brokers, the official liquidator had, subject to the law of limitation, other means of recovering them; but he is not entitled to use S. 235 for the purpose. Hence he could not proceed against the brokers as promoters of the company. (*Leach, C.J. and Madhavan Nair, J.*) THIRUVENKATACHARIAR *v* VELU MUDALIAR. I.L.R. (1938) Mad. 192=176 I.C. 635=11 R.M. 137=1937 M.W.N. 1337=46 L.W. 887=A.I.R. 1938 Mad. 154=(1937) 2 M.L.J. 820.

——S. 235—*Misfeasance—Non-compliance with S. 103—Pronote making false declaration and obtaining certificate permitting commencement of business—Directors allowing same with knowledge of non-compliance of law and of false declaration—Liability to make good loss suffered by company.*

If the directors of a company such as a banking corporation, allow the company to open its doors and keep them open for months knowing full well that S. 103 has not been complied with that the company had no capital with which to carry on business, and that deposits made by customers in current or other accounts are being utilised by the management for the payment of wages and current expenses without any likelihood of the company being able to pay back such moneys, and knowing that the bank was utilising its customers' moneys dishonestly the directors are clearly guilty of misfeasance under S. 235 of the Act. It is immaterial whether they had knowledge of the law or not. They are bound to know what the law is and the only question is whether the directors knew the facts which made the act complained of a contravention of the statute. If the company obtains a certificate allowing it to carry on business by means of a false declaration made by the promoter and the directors wilfully permit the company to carry on business on the strength of the certificate obtained by a false declaration, they are guilty of misfeasance and wilful negligence and liable to make good, under S. 235, the loss suffered by the company by such carrying on of business. (*Leach, C. J. and Varadachariar, J.*) Doss *v.* CONNELL AND LOBO. I.L.R. (1938) Mad. 292=176 I.C. 592=11 R.M 123=1937 M W.N. 1099=46 L. W 869=A.I.R. 1938 Mad. 124=(1937) 2 M.L.J. 848

——S. 235—*Proceedings under—If can be continued against heirs representing the estate.*

The phraseology of S. 235 makes it clear that proceedings contemplated therein were intended to apply only to the director and not to his representatives and hence proceedings brought against a director during his lifetime cannot be continued against his sons and wife as heirs representing his estate. (*Harries, J.*) OFFICIAL LIQUIDATORS *v.* JUGAL KISHORE. I L.R. (1939) All. 6=180 I.C. 439=11 R.A. 461=1938 A.L.J. 1002=1938 A. W.R. (H C) 741=A.I.R. 1939 All. 1.

—— S. 235—*Proceedings against director's for misfeasance—Subsequent suit against them for compensation for misfeasance and fraud—If competent*

If the company is being wound up the remedy against a delinquent director whether for negligence, fraud or misfeasance is under S. 235, Companies Act. Where such proceedings have been taken against a director, subsequent suit against him for compensation for fraud or misfeasance is incompetent on the principle of *res judicata.* (*Addison and Din Mahomed, JJ.*) NANAK CHAND *v.* SARDAR SINGH. 40 P.L.R 883=11 R.L. 463=178 I.C. 504=A.I.R. 1938 Lah. 577.

——S. 235—*Proceedings under—Matter alleged against some entirely different from those alleged against others—Joint trial of claims against all—Permissibility.*

Where in the proceedings under S. 235, Companies Act, instituted in the High Court against certain persons, the matters alleged against some of such persons are entirely different from those which are subject-matter of the investigation against others, the claims against all cannot be tried jointly on principles underlying O. 2, R. 6, C. P. Code, there being no real common unity between them. (*Young, C.J. and Tekchand, J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK. 180 I.C. 254=11 R.L. 667=A.I.R. 1938 Lah. 658.

——S. 235—*Promoter—Person signing memorandum of association and taking shares—Agreement to act as broker of the company entered into by—No part taken in formation of the company—If becomes a promoter—Money paid by him utilized in the formation of the company—Effect.*

Where a person only signed the memorandum of association and paid for a certain number of shares and did not take any steps to bring the company into being and had nothing to do with the selection of the directors, the drawing up of memorandum and articles of association or the settlement of any contract except the contract under which his firm was to act as brokers of the company.

Held, that he should not be deemed to have taken part in the formation of the company and to be a promoter. The fact that the money paid by him for his shares was utilised in defraying the expenses of formation of the company cannot make him a promoter. (*Leach, C.J. and Madhavan Nair, J.*) THIRUVENKATACHARIAR *v.* VELU MUDALIAR. I L.R. (1938) Mad. 192=176 I.C. 635=11 R M. 137=1937 M.W.N. 1337=46 L. W. 887=A.I.R. 1938 Mad. 154=(1937) 2 M.L. J. 820.

——S. 236—*Scope—If exhaustive—Prosecution under Penal Code—If barred.*

It is not correct to hold that charges of falsification of accounts or forgery against the promoters of a company can only be tried under S. 236 of the Companies Act. A penal enactment in a special Act is no bar to a prosecution under the Penal Code. A prosecution of the promoters of a company under the Penal Code on such charges is therefore perfectly legal. (*Collister and Bajpai, JJ.*) EMPEROR *v.* BISHAN SAHAI. I.L. R. (1937) All. 779=1937 A.W.R. 748=1937 A.L. J. 1073=171 I C. 994=10 R.A. 350=1937 All. L. R. 935=39 Cr.L.J. 38=1937 A.Cr.C. 119=A.I. R. 1937 All. 714.

——S. 237—*Scope—Company directors—Prosecution by police for criminal breach of trust—Sanction—Necessity.*

S. 237, Companies Act, affords no protection to company promoters and directors against prosecu-

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tions for breaches of trust. That section is intended to safeguard the interests of the shareholders of a company which has failed to prevent what remains of their money from being wasted by the liquidator on unprofitable criminal prosecutions. But there is nothing which restricts the powers of the police or of any private person to file a complaint of criminal breach of trust against a company director or any other person, and the police do not require sanction to prosecute for criminal breach of trust. (*Newsam, J.*) MEHTA *v.* EMPEROR. 1937 M.W.N. 1122 (2).

——S. 237—*Scope—Compliance with—Prosecution of promoters of company – Procedure—Direction by Company Judges of High Court—If condition precedent.*

The Official Liquidator of a company who was appointed by the High Court during the winding up of the company wrote to the High Court stating that on going through the account books and the records of the company he found that the promoters of the company had committed various acts of dishonesty amounting to criminal breach of trust and manipulation of accounts and instances of false affidavits and wrong returns and that it was advisable that they should be prosecuted. The Company Judges of the High Court were of opinion that there was a *prima facie* case against the promoters and desired that the matter be investigated and, if the evidence were found sufficient, that the promoters be put on their trial. The Registrar of the High Court forwarded the Official Liquidator's letter to the Police under cover of a letter which stated that the Court considered it a fit case for inquiry by the Police. The promoters who were prosecuted and put on their trial pleaded that the prosecution was illegal for the reason that the procedure laid down by S. 237, Companies Act, was not followed.

Held, that the provisions of S. 237 had been substantially complied with, and even assuming that it was not so, the Act nowhere laid down that there could be no prosecution on a criminal charge otherwise than upon a direction by the Company Judge or Judges of the High Court, and the trial was consequently not at all illegal. (*Collister and Bajpai, JJ.*) EMPEROR *v.* BISHAN SAHAI VIDYARTHI. I.L.R. (1937) All. 779=1937 A.W.R. 748=1937 A.Cr.C. 119=1937 A.L.J. 1073=171 I.C. 994=10 R A. 350=1937 All.L.R. 935=39 Cr.L.J. 38=A.I.R. 1937 All. 714.

——S. 240—*Entries in books of company—Presumption — Contributory denying transaction — Burden of proof.*

Entries in the books of a company are *prima facie* evidence of the transaction to which they relate and it is for the contributory denying the transaction to rebut that evidence and disprove the entries recorded in books of the company and rebut the presumption arising against him. The proof of the entries by the manager and the accountant of the company is sufficient to shift the onus to the contributory to disprove the transaction, and the mere fact that the contributory states on solemn affirmation that he did not enter into the transaction and has repudiated the transaction will not save him from his liability. (*Din Mahomed, J.*) KESAR SINGH *v.* JOINT OFFICIAL LIQUIDATORS. 169 I.C. 643=10 R.L. 28=39 P. L.R. 136=A.I.R. 1937 Lah. 61.

COMPANIES ACT (1913), S. 270.

——S. 241—*Inspection of documents—Order of—Discretion of Court.*

S 241 places the matter of ordering inspection of documents in the discretion of the Court and when once this discretion has been exercised in favour of contributory or creditor, it will not be interfered with by the Court, merely on the ground that he is likely to use the information obtained on inspection, in the interest of directors yet to be examined. (*Din Mahomed, J.*) PEOPLE'S BANK OF NOTHERN INDIA, LTD., *In the matter of.* 171 I.C. 549=10 R.L. 211=A.I.R. 1937 Lah. 82.

——S. 243—*Resolution for voluntary winding up—Declaration by Court that it was void—Effect on proceedings taken between resolution and declaration—Rule in* Morris *v.* Harris—*Applicability—Resolution tainted by fraud.*

The rule in *Morris* v. *Harris*, (1927) A.C. 252, that the effect of a subsequent declaration of the Court that a resolution for voluntary winding up was void is not to invalidate any proceedings which have been taken at a time when the resolution was not declared to be invalid does not apply to a case where the transaction, that is, the resolution is tainted by fraud. (*Mitter and Patterson, JJ.*) CREET *v.* GANGARAJ GULRAJ FIRM. I L.R. (1937) 1 Cal. 203=170 I.C. 214=10 R.C. 111=64 C.L.J. 280=A.I.R. 1937 Cal 129.

——S. 270 — *Construction — If exhaustive—"Shall include."*

As a matter of construction, S. 270 of the Companies Act, is clearly not exhaustive. The words "shall include" do not amount to "shall mean and include." (*Rangnekar, J.*) *In re* STRAUSS & Co., LTD. 167 I.C. 85=9 R.B. 276=38 Bom.L.R. 1080=A I.R. 1937 Bom. 15.

——S. 270—*"Unregistered company"—Foreign company not consisting of more than seven members.*

A foreign company, whatever the number of its members may be, which is not registered in British India, will come within the second part of S. 270 of the Companies Act, and will be an "unregistered company" for the purposes of part IX of the Act. (*Rangnekar, J.*) *In re* STRAUSS & Co., LTD. 167 I C. 85=9 R.B. 276=38 Bom.L.R. 1080=A.I.R. 1937 Bom. 15.

——Ss. 270 and 271—*Scope—Foreign unregistered company not consisting of more than seven members—Jurisdiction of British Indian Court to wind up—Winding up order by foreign Court if a bar—Procedure.*

A Court in British India has jurisdiction under Ss. 270 and 271 of the Companies Act to wind up as an unregistered company, a foreign company, whatever the number of its members, whether or not consisting of more than seven members, if it has an office and assets within its jurisdiction; and the mere fact that an order for winding up of the company has been made by a competent Court of the place of the Company's incorporation cannot make any difference to the jurisdiction of the Court in British India. In such a case the order will sometimes be restricted, and the sanction of the Court will be required if further proceedings are taken, and the liquidation in India will be ancillary to the Court where the company is incorporated. But in spite of its

desire to assist the foreign Court, the Court in British India will not give up the forensic rules governing the conduct of its own liquidation. (*Rangnekar, J.*) *In re* STRAUSS & Co, LTD. 167 I.C. 85=9 R.B. 276=38 Bom.L.R. 1080=A.I.R. 1937 Bom. 15.

——S. 277-L—*Ingredients of offence.*

Where the evidence does not warrant the conclusion that an ordinary director of a company was knowingly and wilfully a party to the default to maintain the requisite cash reserve, he cannot be convicted under S. 277-L of the Companies Act. (*Lakshmana Rao, J.*) NEELAKANTAN NAMBISAN, *In re.* 51 L.W. 434 (1)=1940 M.W.N. 537=(1940) 1 M.L.J. 478 (1).

——S. 277-N—*Scope and object of—Court not satisfied as to solvency—Order for stay, if can be passed.*

It was never the intention of the Legislature in enacting S. 277-N of the Companies Act that a company in an insolvent position should be allowed to continue its operations under the protection of the Court and that those who had dealings with the company should be prevented from seeking legal remedies to which they would otherwise have been entitled. The Court could only undertake the responsibility of barring these legal remedies to which the people would ordinarily be entitled if it was certain within reasonable limits that they would not suffer any real loss by being deprived of these remedies. Where the Court is not satisfied that the company is in a solvent condition essen ially an order under S. 277-N cannot be passed. (*Allsop, J.*) BENARES BANK, LTD., BENARES, *In re.* I.L.R. (1939) All. 938=185 I.C. 388=12 R.A. 317 (2)=1939 A.W.R. (H.C.) 707=1939 A.L.J. 1009=1939 Comp. C. 321=A. I.R. 1939 All. 726.

——S. 277—*Scope—Foreign company—Non-registration in British India—Effect on right to sue in British India.*

A foreign company registered in the foreign state is entitled to file suits and maintain actions in British India, and it is not necessary that it must register itself in British India for that purpose. The default on the part of the foreign company in fulfilling the requirements of S. 277 of the Companies Act does not disable it from maintaining a suit in British India. (*Divatia, J.*) SHAMRAO KRISHNAJI *v.* THE UNITED HOUSE BUILDING AND ENGINEERING SOCIETY, INDIA, LTD., OF BANGALORE. 166 I.C. 294=9 R.B. 235=38 Bom.L.R. 1092=A I.R. 1937 Bom. 24.

——S. 281—Applicability—Company—Winding up—Directors entering into contract and making payments during—Liability of—Right to benefit of S. 281. *See* COMPANIES ACT, S. 235. A.I.R. 1937 Pat. 293.

——S. 281—*Scope—Power of Court under—Grant of relief to director from liability for negligence—Conditions.*

The power to relieve a director from the consequences of his wilful negligence is placed in the hands of the Court under S. 281 of the Companies Act when the Court is convinced that the director has acted honestly and reasonably. Where it cannot be said that he has acted reasonably, though he may be said to have acted honestly, the Court has no power to grant any relief

under the section. (*Leach, C.J. and Varadachariar, J.*) DOSS *v.* CONNELL AND LOBO I.L.R. (1938) Mad. 292=176 I.C 592=11 R.M. 123=1937 M.W.N. 1099=46 L.W. 869=A.I.R. 1938 Mad. 124=(1937) 2 M.L.J. 848.

——S 282—*Applicability—False balance sheet—Item shown as "Deposits by others" not the total of deposits but net amount after deducting loan to firm—Loan not separately shown—Managing directors interested in debtor firm—Offence—Breach of S. 282—Tests.*

The Managing Directors of a Cotton Mill which did not carry on banking business, but received deposits in cash from its customers with the object of merely assisting its working capital issued a balance-sheet showing a certain amount as "Deposits by others." The amount, however, represented not the total figure of accumulated deposits but an incorporated net figure, being the net balance of a deposit account after deducting a loan and interest thereon, advanced by the Managing Directors to another Mill in which the Managing Directors were interested. The loan to the latter Mill was not shown separately on the loan side or anywhere in the balance-sheet.

Held, that a loan and a deposit being obviously items differing completely in principle from the balance-sheet point of view, ought to appear on different sides, one as an asset and the other as a liability and that the act of consolidating the two and presenting them as one item in the balancs-eheet was a striking case of non-disclosure, amounting to suppression of the truth; and there being a statement false in material particulars, the Managing Directors were guilty of an offence under S. 282 of the Companies Act and liable to conviction thereunder.

Per *Cunliffe, J.*—Balance-sheets and prospectuses are governed by the same principles of law with regard to the making of false statements; it is the effect upon the ordinary investor, reading the statements in ordinarily careful manner in which an investor would do which has to be considered when the Court has to find whether a breach of S 282 has been commited.

Per *Henderson, J.*—A balance-sheet which does not disclose the true state of affairs of a company is not a properly drawn up balance-sheet; and the opinion of an auditor that it has been properly drawn up is of no value whatsoever. (*Cunliffe and Henderson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* AKHIL BANDHU GUHA. 166 I.C. 163=9 R.C. 478 =38 Cr.L.J. 151=40 C.W.N. 1341=A.I.R. 1936 Cal. 680.

——S. 282—*Balance-sheet—Suppression of advance by bank and showing only net amount of deposits after deducting advance—Plea of overdraft—Sustainability.*

Per *Cunliffe, J.*—There can never be an overdraft based on a deposit account. Overdrafts are the usual accompaniments of current accounts.

Per *Henderson, J.*—A banker, in drawing up a balance-sheet, must disclose both loans and overdrafts; and it does not make the slightest difference whether a particular advance made by him is a loan or an overdraft, when the question is as

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to the suppression of an advance from the balance-sheet. (*Cunliffe and Henderson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* AKHIL BANDHU GUHA. **166 I.C. 163=9 R.C. 478=38 Cr.L.J. 151=40 C.W.N. 1341=A.I.R. 1936 Cal. 680.**

——**S. 282**—*"Wilfully"—Meaning of.*

Per *Cunliffe, J.*—The term "wilfully" in S. 282 of the Companies Act does not embody the idea of a criminal mentality. The word means nothing more nor less than the spontaneous action of a person who is a free agent. It is not a term of art, but a legal expression to be fitted to the circumstances being considered by the Court and to be interpreted according to the facts of each case. (*Cunliffe and Henderson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* AKHIL BANDHU GUHA. **166 I.C. 163=9 R.C. 478=38 Cr.L.J. 151=40 C.W.N. 1341=A.I.R. 1936 Cal. 680.**

——**S. 282-B (1) (as amended in 1936)**—Company—Security deposited by employee—If trust money—Right to priority. *See* COMPANY—WINDING UP. **1938 M.W.N. 1337.**

——**S. 282-B**—Employees' cash security fund—Company depositing same in Scheduled Bank—Latter—If becomes trustee. *See* BANKER AND CUSTOMER—RELATIONSHIP. **1939 M.W.N. 1066.**

——**S. 282-B**—*Scope and effect of—Company—Employees' Provident Fund deposited in Bank—Liability of Bank as trustee—Extent of.*

The fact that a Bank is given notice that money deposited is trust money does not make the Bank a trustee thereof. The legal consequence of such notice is only that the Bank should not participate in a breach of trust by the trustee. S. 282-B of the Companies Act imposes on a company a duty to invest all provident fund moneys in securities mentioned in S. 20 of the Trust Act, and all such moneys belonging to the Fund at the commencement of the Companies Act which are not so invested shall be invested in such securities by annual instalments not exceeding ten in number and not less in amount than one-tenth of the whole amount of such moneys. On the coming into force of S. 282-B, if the said moneys are not invested in any such securities as are mentioned in S. 20 of the Trusts Act, the obligation of a company is to invest a tenth of the said moneys in that year and in every succeeding year in the authorised securities, and the balance of the moneys can be invested in any authorised Bank or Banks according to the rules of the institution. In so far as a company has not invested the said sum in any authorized security the company is guilty of a breach of trust, and a Bank holding the moneys in deposit must be held to participate in that breach of trust, and the Bank can therefore be compelled to restore such trust fund, *i.e.*, in respect of so much of the provident fund as it is obligatory on the company to invest in authorised securities. (*Venkataramana Rao, J.*) EAST TANJORE E. S. C. EMPLOYEES' PROVIDENT FUND *v.* OFFICIAL LIQUIDATOR, T. N. AND Q. BANK, LTD. **1939 Comp.C. 275=1939 M.W.N. 1068=A.I.R. 1940 Mad. 184.**

——**S. 282-B**—*Scope and effect of—Company—Employees' security amount and provident fund—Deposit in Bank prior to coming into force of section—Renewal after coming into force—Effect—Breach of trust by Bank—Extent of liability.*

Where a company has deposited its employees' security fund and Provident Fund in a Bank prior to the coming into the operation of S. 282-B of the Companies Act, as amended in 1936, and the deposits is renewed after that section came into force it cannot be said that the renewal constitutes a breach of trust on the ground that the moneys are not invested in approved securities mentioned in S. 20 of the Trusts Act as required by S. 282-B of the Companies Act. So far as the amount of the security deposit is concerned, there can be no breach of trust, because the Bank is not a trustee in respect of the same, although the company may be a trustee and the money may be trust money in its hands. In regard to the provident fund deposit, there can be a breach of trust only in respect of so much of it as is required to be invested in authorised securities, namely, the annual instalments for the year or years in question, and there can be no breach of trust in respect of the balance. (*Venkataramana Rao, J.*) TRICHINOPOLY-TENNURE HINDU PERMANENT FUND, LTD. *v.* OFFICIAL LIQUIDATOR, T. N. AND Q. BANK, LTD. **1939 M.W.N. 1069=1939 Comp.C. 281.**

COMPANIES ACT (1913), Sch. I, Table A, Art. 73.

——**Table A, Cls. 21 and 22**—*Applicability in India.*

Obiter.—Clauses 21 and 22, Table A, while appropriate to system such as that prevailing in England under which a legal title from a deceased person can only be traced either through probate or through letters of administration, are hardly so appropriate to a system under which a legal title by devolution may be obtained, apart altogether from and without either probate or letters of administration. (*Braund, J.*) KASI VISWANATHAN CHETTIAR *v.* INDO BURMA PETROLEUM CO., LTD. **162 I.C 127=8 R R. 538=A.I.R. 1936 Rang 52.**

——**Sch 1, Table A, Art. 73**—*Construction.*

Art. 73 limits the directors' authority to borrow. The requirement of the article is that the directors shall so restrict their borrowing that the amount for the time being remaining undischarged shall not exceed the limit specified. The intention of the article is not satisfied by treating it as a direction that beyond the specified limit further borrowings, though not prohibited, are to be expended in reduction of existing loans. Where however the loans, although in excess of the authority of the directors, are not *ultra vires*, the money having been received by the company and applied for its purposes, the Official Liquidator of the company cannot, during the winding up proceedings, reduce the balance outstanding at the date of liquidation by disputing the liability of the company to pay the whole sums advanced. (*Sir George Rankin.*) T. R. PRATT (BOM.), LTD. *v.* M. T., LTD. **I.L.R. (1938) Bom. 421=42 C.W.N. 733=174 I.C. 545=1938 O.L.R. 223=4 B.R. 540=10 R.P.C. 267=67 C.L.J. 338=1938 A.L.R. 359=32 S.L.R. 517=1938 O.W.N. 859=40 Bom. L.R. 1109=A.I.R. 1938 P.C. 159 (P.C.).**

——**Sch. I, Table A, Art. 73**—*Construction and scope—Borrowing by directors in excess of limit—Effect—Claim by creditor for amount not in excess of limit—Maintainability—Rule in Clayton's case—Applicability.*

COMPANY.

Though the borrowings by the directors of a company may have at times exceeded the limits fixed by Art. 73 where the claim made by a creditor lending money is not in excess of the amount limited, the claim cannot be challenged on the ground that the incurring of the debt was *ultra uires*. The rule in Clayton's case has no application where the question is between moneys borrowed *intra vires* and moneys borrowed *ultra vires*. As soon as the amount due comes below the limit, the borrowing is authorised under Art. 73, and the presumption would be that the moneys already repaid represented the moneys borrowed *ultra vires* which never became the property of the company, but remained the property of the lender. In a case where the borrowing is *ultra vires* the directors, and not *ultra vires* the company, the money can be recovered in an action for money had and received. (*Beaumont, C.J. and Wadia, J.*) T. R. PRATT (BOMBAY), LTD. *v.* E D. SASSON AND CO., LTD. **60 Bom. 326=37 Bom L R. 978=161 I.C. 126=8 R.B. 317=A.I. R. 1936 Bom. 62.**

COMPANY.
Articles of Association.
Directors.
Meeting.
Shares.
Winding up.

Articles of Association.

——*Articles of Association—Alteration of special contract in—Powers of company.*

There is a very clear distinction between the relation of a shareholder to a company in regard to his shares and his rights against the company in regard to other contracts. Although the regulations contained in a company's Articles of Association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the Articles, and a company cannot break its contracts by altering its Articles. When dealing with contracts referring to revocable Articles, and especially with contracts between a member of the company and the company respecting his share, care must be taken not to assume that the contract involves as one of its terms an Article which is not to be altered. If the Court sees that a contract involves as one of its terms that an Article is not to be altered, then the company is not at liberty to alter that Article so as to break that contract. (*Reilly, C.J. and Abdul Ghani, J.*) BASAPPA *v.* ASIATIC GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. **43 Mys.H.C.R. 396=16 Mys L.J. 448.**

——*Articles of Association—Borrowings of managing agent specifically excluded.*

Where the articles of association specifically excluded from the managing agent's powers, that of borrowing, but nevertheless such a managing agent borrows money and spends it, the company is not liable for the debts when the borrowings were neither *bona fide* nor necessary for the business of the company. (*Hamilton and Radha Krishna, JJ.*) THE EQUITY INSURANCE CO., LTD *v.* MESSRS. DINSHAW & CO., LTD. (BANKERS). **15 Luck. 515=186 I C. 813=12 R.O. 345=1940 Comp.C. 93=1940 A.W.R. (C.C.) 141=1940 O. L.R. 161=1940 O.A. 255=1940 O.W.N. 274=A. I.R. 1940 Oudh 202.**

COMPANY.

——*Articles of Association—Construction—Forfeiture clause—Enforceability of.*

There is a distinction which must be recognized between a clause in the Articles of Association of a company providing for forfeiture of shares held by a shareholder on the happening of certain events, and a clause providing for a lien. The Articles are a contract between the company and its members and a provision therein authorising forfeiture is enforceable and cannot be regarded as constituting a penalty. Where there is a provision for forfeiture on the happening of certain events, it operates as an extinction of all interest incidental to the shares, if the events happen. (*Panckridge, J.*) SURAJMALL MOHTA *v.* BALLABHDAS MOHTA. **63 Cal. 531.**

——Articles of Association—Preference shares not free from income-tax—Dividend at seven and half per cent. subject to tax—Right of company to deduct tax when no tax payable by company. *See* INCOME-TAX ACT, SS. 10 (2) (*vi*), 14, 19 AND 20. **42 Bom.L.R. 57 (F.B.).**

——Articles of Association—Provision for automatic re-election of directors—Construction—Applicability to co-opted directors. *See* **I.L.R. (1940) 1 Cal. 560.**

——*Articles of Association—Provision in for varying sets of circumstances—Validity.*

There is nothing in the Companies Act which requires that articles of association must be rigid and may not in themselves provide for varying sets of circumstances. (*Weston, J.*) TOPANDAS *v.* YEOTMAL ELECTRIC SUPPLY CO. **1940 Comp.C. 133=A.I.R. 1940 Sind 87.**

——*Articles of Association—Requirement as to number of managing directors—Appointment of a lesser number—Effect—Legality of their acts.*

Where the articles of association required that the Board of managing directors should consist of a certain number, but as a matter of fact a lesser number only is appointed, they are not entitled to exercise the functions of the Board of managing directors and any resolutions passed by them are not valid. (*Allsop, J.*) VISHWANATH PRASAD JALLAN *v.* HOLYLAND CINETONE, LTD., BENARES. **185 I.C. 501=12 R.A. 330=1939 A. W.R. (H.C.) 746=1939 A.L.J. 950=1939 Comp. C. 324=A.I.R. 1939 All. 739.**

——*Articles of Association—Right of inspection of records given to members under—If can be limited by rules.*

A power to regulate a right cannot be used to abrogate it. If a member has under the Articles of Association a contractual right of inspection of the minutes of the committee of the association, the right cannot be reduced by the power given under the Articles to the committee to make rules, into a mere right to claim inspection subject to the committee's approval. No matter how limited the grounds for refusing inspection might be, making the right of inspection a matter of discretion of the committee, fundamentally alters the Articles for, a contractual right of inspection, just as a statutory right of inspection, can be exercised whatever the motive or interest of the member may be. (*Remfry, J.*) RAMESWAR LAL *v.* CALCUTTA WHEAT AND SEED ASSOCIATION, LTD. **178 I.C. 861=11 R.C. 420=42 C.W.N. 161=A.I.R. 1938 Cal. 89.**

COMPANY.

———*Articles of Association—Right of inspection of records given to members under—If implies right to take copies—Common law right of members.*

A contractual right of inspection does not of itself imply a right to take copies, any more than a statutory right would do. In the case of a statutory right of inspection the Court will not imply a right to take copies unless the statutory right would otherwise be of no avail, or practically useless. The Court is bound by a stricter rule when a question of implying a term in a contract arises than in the case of a statute. S. 21 of the Companies Act merely converts the Articles of Association into a contract between the company and its members. If the Articles give to its members a right to inspect the minutes and there is nothing to show that the intention was to give a right to take copies of the minutes, the Articles must be construed to mean that the members, though given a right to inspect the minutes, could only take copies of them if that were permissible under their common law rights. If the interests of members are sufficiently protected by the common law, there is no necessity for implying any greater rights in their contract. The members are not entitled under their common law right to take copies of the minutes if their interest is not different from that of their fellow members, and if they have no special object of their own. (*Remfry, J.*) RAMESWAR LAL *v.* CALCUTTA WHEAT AND SEED ASSOCIATION, LTD. **178 I.C. 861 =11 R.C. 420=42 C.W.N. 161=A.I.R. 1938 Cal. 89.**

———Defamation statement that company will not survive for twelve years or long enough to fulfil its obligations—Suit by—Burden of proof. *See* TORT—DEFAMATION. **37 Bom.L.R. 1033= A.I.R. 1936 Bom. 114.**

Directors

———*Directors—Act of directors* ultra vires—*Ratification by shareholders—Validity.*

To render valid an act of the directors of a company which is *ultra vires* the acquiescence of shareholders must be of the same extent as the consent which would have given validity from the first, *viz.*, the acquiescence of each and every member of the company. Of course, this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders. By knowledge of the transaction is clearly meant knowledge of the invalidity of the transaction. There can be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. (1869) 3 H. L. 171, Foll.; (1877) 2 A.C. 366, Rel. on. (*Lord Romer.*) PREMILA DEVI *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **I.L.R. (1939) Lah. 1=I. L.R (1939) Kar. 16 (P.C)=178 I C. 659=11 R. P.C. 117=43 C.W.N. 205=68 C.L.J. 567=5 B. R. 178=1939 Comp.C. 1=1939 M.W.N. 78=41 Bom.L.R. 147=1939 O.W.N. 249=41 P.L.R. 177=49 L.W 444=1938 A W.R. 222=1938 O. L.R. 521=1938 All.L.R. 922=A.I.R. 1938 P.C. 284=(1939) 1 M.L.J 98 (P.C.).**

———*Directors—Application of assets to other than defined objects—Liability.*

COMPANY.

The assets of the company are entrusted to the directors to be applied to certain defined objects and they are responsible as for a breach of trust if they apply them to other objects. (*Wort, J.*) PENINSULAR LOCOMOTIVE CO. *v.* LANGHAM REED. **168 I.C. 786=9 R P. 509=3 B.R. 477=A.I.R. 1937 Pat. 293.**

———Directors—Borrowings *ultra vires*—Creditor's right of action—Rule in *Clayton's* case. *See* COMPANIES ACT, SCH. I. TABLE A ART. 73. **37 Bom.L.R 978=A.I.R. 1936 Bom. 62.**

———*Directors—Fees due to—Lien on for amounts due to Company.*

A company has usually a lien on shares or dividends due on them for realisation of money due on them, but there is no authority for holding that it has any lien on fees due to a director. The Company cannot, without the consent of the director, adjust the fees due to him towards interest due from him on calls on shares which had not been paid in time. (*Bhide, J.*) PUNJAB ELECTRIC POWER CO., LTD. *v.* SURAJ KISHAN. **164 I.C. 586=9 R.L. 137=38 P.L.R. 941=A.I.R. 1937 Lah. 62.**

———*Director—Fraudulent preference in his favour as creditor—If liable to be set aside.*

A director of a company is a trustee for the benefit of the company and is a trustee for the creditors of the company to this extent that he is bound to apply all the assests for the benefit of all the creditors so far as they will extend If a director who is also a creditor of the company knows that the company is in a state of insolvency, that it cannot avoid being wound up, and with such knowledge obtains a hypothecation of the stock in-trade and outstandings of the company and thereby obtains undue preference to other creditors, his transaction is tainted with fraud, and the same is liable to be set aside on the ground of fraud. (*Nasim Ali and Edgley, JJ.*) A. H. MAHOMED ISMAIL & CO. *v.* SACHIDANANDA BHATTACHARJEE. **40 C.W.N. 769.**

———*Directors—Misuse of powers to their own advantage—Effect.*

If directors misuse their powers as directors for their own advantage, the transaction as against the company is of no effect, and the Court will not inquire whether the company derived any benefit from the transaction. (*Lord Russell of Killowen.*) E. B. M. COMPANY, LTD. *v.* DOMINION BANK. **170 I.C. 545=10 R.P.C. 74=A.I.R 1937 P.C. 279 (P.C.).**

———Director—Mortgage in favour of to discharge part of mortgage-debt due to Government —Subsequent liquidation of company—Sale at the instance of Government—Suit by director to enforce mortgage—Right to priority over purchaser in Government sale. *See* BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (1934). **15 Pat. 762=A I.R 1937 Pat. 151.**

———*Directors—Position and liability of.*

Although the position of directors differs from that of trustees in some respects, yet to the extent of their being entrusted with the moneys of the company, they are trustees and are jointly and severally liable for breach of trust. (*Wort, J.*) PENINSULAR LOCOMOTIVE CO. *v* LANGHAM REED. **168 I.C. 786=9 R.P. 509=3 B R. 477=A.I.R. 1937 Pat. 293.**

COMPANY.

——*Directors—Powers of—Sale of assets.*

The assets of a company cannot be disposed of by a resolution of the Directors only. They can only be disposed of after the resolution of the shareholders passed at a special meeting called for the purpose of winding up the company and disposing of its assets. A resolution passed by the Board of Directors of a company, authorizing one of their members to sell the assets of the company for satisfaction of its debts, is *ultra vires* and a transfer of property effected in pursuance of such resolution is ineffectual to pass any title to the transferee so as to entitle him to bring a suit under O. 21, R. 63, C. P. Code, more so when the formalities in respect of the deed of transfer provided by the Articles of Association of the company have not been observed and the transfer has been effected not by the Director so authorized but by his agent whose authority to act for the company is not proved. (*Mosely and Dunkley, JJ.*) U BA DIN *v.* JANKI DEVI **178 I. C. 583=11 R R. 249=A.I R. 1938 Rang. 447.**

——*Forfeiture of shares—Mode of effecting—Conditions—Articles of association—Construction—Notice informing shareholder that if he did not pay call money by fixed date his shares would be forfeited without further notice—Non-payment—If effects forfeiture automatically.*

One of the articles of association of a company provided that if any member failed to pay any call or instalment on the day appointed, the directors might serve a notice requiring him to pay. Another article provided that the notice shall name a day and place of payment and shall state in the event of non-payment the shares would be liable to be forfeited. A third article provided that if there was non-compliance with the notice, then by a resolution of the directors a forfeiture shall be effected of the shares in respect of which non-payment is made. A fourth article directed that notice of forfeiture should be sent. Two shareholders of the company received a notice from the company dated 23—11—38 to the effect that in pursuance of the resolution of the Board, notice was given that if there was failure to pay by 23—12—1938, the call in respect of the allotment money at the registered office of the company, the shares allotted to the shareholders would be forfeited without further notice as per the articles of association of the company. The two shareholders did not pay the amount. In January, 1939, at a meeting of the Board of Directors, a resolution was passed forfeiting the shares of a number of shareholders, but the names of these two shareholders were not included in the resolution.

Held, that the company continued to treat these two persons as shareholders, and construing the notices sent to them, it must be held that unless payment was made by 23—12—1938 of the amount due to the company, it was the intention of the directors to proceed to forfeiture without giving any further notice of such intention. The notices contained reference to articles under which forfeiture was made and the machinery to be followed, and the notices were not notices in which on failure of the shareholders to comply with the payment required, automatically the forfeiture of the shares would follow. The shareholders therefore were liable to be included in the list of contributories in winding up proceedings. (*Gentle, J.*) GURUSWAMY *v.* OFFICIAL LIQUIDATORS, THE INDO CARNATIC BANK, LTD. **1940 M.W.N. 553.**

——*Management — Board of management—Power to frame by-laws delegated to Board—Gratuity to ex-employee in cases not covered by by-laws—Power of General Body to sanction award of.*

The Board of management of a company granted a gratuity to an ex-secretary, although the Gratuity Rules of the company did not permit such a grant. The Board of Management, on exception being taken to the grant by the Deputy Registrar of Co-operative Societies, amended the by-laws so as to permit the grant, and they placed the matter before the General Body. The latter passed a resolution at a meeting sanctioning the payment of gratuity.

Held, that the matter only related to the administration and internal management of the affairs of the company and so long as the General body acted within the ambit of the Articles of Association, any act done by them in regard to the management of the company should be *intra vires* and not *ultra vires*; (2) that though the Board of managements was delegated the power to frame by-laws, that did not take away the power of the General Body to sanction and payment of gratuity in exceptional cases not provided for by the by-laws as framed by the Board of management. This power always vested in the General Body and could not be taken away by the mere fact of delegation. (*Venkataramana Rao, J.*) VENKATESA RAO *v.* TRICHINOPOLY DISTRICT CO-OPERATIVE CENTRAL BANK, LTD. **1940 M.W.N. 1004=52 L.W. 417=(1940) 2 M.L.J. 488.**

Meeting.

——*Meeting—Meeting valid under substantive law whether can be invalidated by article of association.*

Quaere.—It is very doubtful if a meeting valid under the substantive law could be invalidated by an article of association. (*Weston, J.*) TOPANDAS *v.* YEOTMAL ELECTRIC SUPPLY CO. **1940 Comp. C. 133=A.I.R. 1940 Sind 87.**

——*Meeting—Notice of—Contents.*

Notice of an extraordinary general meeting of the shareholders of a company must disclose all facts necessary to enable the shareholders to determine in his own interest whether or not he ought to attend the meeting. The pecuniary interest of a director in the matter of a special resolution to be proposed at the meeting is a material fact for this purpose. (*Reilly, C.J. and Abdul Ghani, J.*) BASAPPA *v.* ASIATIC GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. **43 Mys.H.C.R. 396=16 Mys L.J. 448.**

——*Meeting on requisition—Date of requisition—If date of receipt of same—Presumption.*

In case of calling of a meeting on requisition, there is no presumption in law that the requisition is received on the date it bears. (*Weston, J.*) TOPANDAS *v.* YEOTMAL ELECTRIC SUPPLY CO. **1940 Comp. C. 133=A.I.R 1940 Sind 87.**

——Promoter—Brokers of company, signing memorandum of association of taking shares—If promoter. *See* COMPANIES ACT, S. 235. **(1937) 2 M.L.J. 820.**

COMPANY.

Shares.

——*Shares—Allotment—Allotment not made within reasonable time—Validity.*

R applied for shares on 10th August, 1930, and a sum of Rs. 250 was paid along with the application. The allotment was said to have been made on 17th October, 1931. A letter was also issued to *R* on 2nd March, 1932, asking him to pay allotment money as well as the call money and the company resolved to go into liquidation on 3rd March, 1932.

Held, that *R* was not the purchaser of the shares of the company since shares were not allotted to him till 17th October, 1931, and also because no notice of allotment was ever sent to *R*. (*Bhide, J.*) RADHE SHAM BEOPAR CO., LTD. *v.* PRABH DAYAL RAM DHAN. **161 I.C. 294=8 R.L. 707 (1)=38 P.L.R. 788=A.I.R. 1936 Lah. 16.**

——*Shares—Allotment—Misrepresentations by Secretary—Whether bind company.*

If a Secretary of a company makes fraudulent misrepresentations to induce persons to take shares in the company, the comp ny would not be bound by them. The Secretary could not validly agree to any terms which were not contemplated by the Articles of Association or ran counter to them. (*Young, C.J. and Din Mohammad, J.*) DIWAN CHAND *v.* THE GUJRANWALA SUGAR MILLS CO., LTD. **173 I C. 165=10 R.L. 394=39 P.L.R. 293=A I.R. 1937 Lah. 644.**

——*Shares—Conditional purchase—Conditions carried out—Subsequent breach of condition—Remedy.*

Where a person purchases some shares on condition that he would be appointed Chairman of the Local Board and he is allotted shares and appointed Chairman, but subsequently there is breach of the condition by his dismissal, his remedy is by an action for damages and not for getting his name removed from the register of shareholders. (*Young, C.J. and Monroe, J.*) PEOPLES BANK OF NORTHERN INDIA, LTD., *In re.* **17 Lah. 793=166 I.C. 406=9 R.L. 375=38 P.L.R. 931=A.I.R. 1936 Lah. 700.**

——*Shares—Forfeiture of—Strict fulfilment of conditions—Necessity for.*

In the matter of the forfeiture of shares, technicalities must be strictly observed. And it is not, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture. For, the forfeiture of shares may result in a permanent reduction of the capital of a company. The creditors are therefore entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit shares has arisen, the Articles of Association usually contain provisions as to the sending of notices and the like that may be regarded as being inserted merely for the protection of the shareholder affected. Such provisions may properly be regarded as being directory only and capable of being waived by the individual shareholder. But no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess, as for example, a power to forfeit shares for non-payment of calls that are not yet due. (*Lord Romer.*) PREMILA DEVI *v.* PEOPLES BANK OF NORTHERN INDIA, LTD. **I.L.R.**

COMPANY.

(1939) Lah 1=I.L.R. (1939) Kar. 16 (P.C.)=178 I C. 659=11 R.P.C. 117=43 C.W N. 205=68 C.L.J. 567=5 B.R. 178=1939 Comp. C. 1=1939 M.W.N. 78=41 Bom.L.R. 147=1939 O. W.N 249=41 P.L R 177=49 L.W. 444=1938 A.W.R. 222=1938 O.L.R. 521=1938 All L.R. 922=A.I.R 1938 P.C 284=(1939) 1 M.L.J. 98 (P.C.).

——*Shares—Joint Hindu family—Certificates standing in name of one member—If negotiable.*

Share certificates are not negotiable instruments, so as to make the person in whose name they stand the sole owner of the shares; when the shares are held by a join Hindu family, it cannot be said that the members other than the member in whose name they stand have no right or interest in them. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) AKKITHIMMIAH *v.* RANGAPPA. **16 Mys.L.J. 115=43 Mys.H.C.R. 58.**

——*Shares—Liability for, of subscribers of memorandum of association—Right to rescission of contract to take shares.*

A person who has signed the Memorandum of Association of a limited company at the time of its formation and has agreed to take up a certain number of shares, is liable for call money in respect of those shares. He cannot plead that before the registration of the company he had repudiated liability for the shares as he had been induced to take them by untrue representations made by the promoters. He is not entitled to rescission of his contract to take shares on the ground of misrepresentation by the promoters. Before the registration of the company, the promoters were not the agents of the company, because the company did not exist and therefore he could not have been induced to sign for the shares by the misrepresentation of the company or its agents. (*Skemp, J.*) BANWARI LAL *v.* KUNDAN CLOTH MILLS. LTD. **18 Lah. 294=39 P.L.R. 760=172 I.C. 11=10 R L. 280=A.I.R. 1937 Lah. 527.**

——*Shares—Surrender of — Validity—Conditions for.*

Per Trial Judge, *Rupchand, A.J.C.*—There can be no valid surrender of shares in a limited company, which are not fully paid up, so as to exonerate a subscriber from his liability to pay for the shares agreed to be purchased by him in accordance with the memorandum, except where shares are forfeited as it involves a reduction of capital; before this can be done the sanction of the Court must be obtained. A surrender which has the effect of releasing a shareholder from further liability in respect of his shares is equivalent to a purchase of the shares of the company and is illegal, and null and void. Such a surrender can only be supported under circumstances which would justify a forfeiture of the shares. (*Mehta and Lobo, JJ.*) VAZIRMAL KEWALRAM *v.* MAKRAN COAST STEAM NAVIGATION CO., LTD. **32 S L.R. 167=177 I.C. 577=11 R.S. 65=A.I.R. 1938 Sind 187.**

——*Shares—Transfer and allotment of—Distinction between.*

An allotment of shares is an act of the Company by which the applicant for shares becomes the holder of unappropriated shares: while shares standing in the name of *A* cannot be allotted to *B* by the Company even with *A's* consent, such shares may be transferred by *A* to *B*, the

Company's powers of interference in respect of such transfer being determined by its Articles of Association. (*Young C.J. and Monroe, J.*) MUMTAZ BANK, LTD. *v* SAYED MASUD ALI CHISHTI. **175 I.C. 17=10 R.L. 656=40 P.L.R. 52=A.I.R. 1937 Lah. 812.**

——*Shares—Transfer of—Delay in according sanction—Payment of dividend to transferor—Liability of company for damages to transferee.*

A slight delay in according sanction to a transfer of shares would not justify a payment of dividends to a person not yet entered as a member on the books of the company. Such a delay would not make the company liable to an action for damages for payment of the dividend to the transferor whose name appears on the books of the company at the time. (*Beckett, J.*) SONAWALA *v.* LAHORE ELECTRIC SUPPLY CO. LTD, LAHORE. **159 I.C. 766=8 R.L. 427=38 P.L.R. 742=A I.R. 1936 Lah. 207.**

——*Share-holders—Right to sue—Right of minority to sue majority of share-holders.*

An individual share-holder or a minority of share-holders in a company can sue the majority of the share-holders, where the acts complained of are of a fraudulent character or beyond the powers of the company. The suit cannot be thrown out on the ground that the plaintiff or the plaintiffs did not give the company an opportunity of expressing its views whether litigation should be undertaken. The rule that it is the company which must decide whether or not litigation should be undertaken applies only to cases where the act complained of is ratifiable. It is inapplicable where the act complained of is fraudulent or *ultra vires* of the company, as it could not be ratified by any majority. (*Nasim Ali and Remfrey, JJ.*) DHAKESWARI COTTON MILLS, LTD. *v.* NIL KAMAL CHAKRAVARTY. **I.L.R. (1938) 1 Cal. 90=173 I.C. 622=10 R.C. 555=41 C.W.N. 1137=A.I.R. 1937 Cal. 645.**

Winding up.

——*Winding up—Call order—Defendant holding share in company registered in Indian State and residing in British India—Call order made against him by State Liquidation Court—Enforcibility.*

In a personal action, a decree pronounced by a Court of a foreign state *in absentem*, the defendant not having submitted to its authority, is by international law a nullity. Where the defendant who is a shareholder in a company registered in an Indian State and is a resident of British India, does not appear before the State Liquidation Court, before which the liquidation proceedings in respect of the company are started, and does not submit to the jurisdiction of the Liquidation Court, a call order made against him by the Liquidation Court, in absence of an express agreement in the Articles of Association that the disputes with the share-holders should be settled by the State Court, is without jurisdiction and cannot be enforced as such in British India. It is necessary that the liquidator suing the defendant in British India should prove all necessary facts to establish his liability. It is also necessary, in order to allow the plaintiff to succeed, that the call order for the particular amount was necessary and just. The mere fact that the call order was made does not amount to such proof. (*Addison and Din Mahomed, JJ.*) MODERN CHEMICAL WORKS, LTD., BARODA *v.* MAN MOHAN NATH DAR. **181 I.C. 392=11 R.L. 820=40 P.L.R. 819=A.I.R. 1938 Lah. 559.**

——*Winding up—Company having debenture account with Bank on security of block and machinery—Money realized by liquidator from lease of mills—Bank, if entitled to the money.*

A company which went into liquidation had dealings with a Bank under the head of debenture account on the security of block and machinery. Under the direction of the Court, the liquidator leased out the mills and realized some money. The contention of the Bank with regard to the debenture account was that the Bank was a secured creditor and, therefore, all the money should be paid to it, that the income must form part of the security and that as soon as the order of liquidation was made, the securities were crystallized and it must enure for the benefit of the creditor.

Held, that the security of the Bank as debenture holder was limited to block and machinery, and whether it was a floating security or fixed security, it created no new rights in the debenture holders, that the old security which is block and machinery remained and because the security had crystallized it did not mean that the Bank was entitled to the usufruct of the property and that its security as debenture-holder could not extend to the money realized from the leases. (*King, C. J. and Thomas, J.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* LUCKNOW SUGAR WORKS, LTD. **12 Luck. 283=163 I.C. 194=8 R.O. 418=1936 O. W.N. 539=1936 O.L.R. 343=A.I.R. 1936 Oudh 338.**

——*Winding up—Debt due by company not payable* in presenti*—Set-off against debt due to company—Debtor of company taking assignment of debt due by it—Claim to set off against debt due by him in liquidation proceedings—Sustainability—If fraudulent preference.*

Though a debt due by a company is not presently payable, it can be set off against moneys owing to the company in liquidation. If a debtor of a company takes an assignment of a debt due by the company, before it goes into liquidation, a set off of the one against the other can be allowed in liquidation proceedings, and it would not amount to a fraudulent preference. (*Gentle, J.*) ANANTARAMAN *v.* OFFICIAL LIQUIDATOR, T. N. & Q. BANK **187 I.C. 531=12 R.M. 730=50 L.W. 759=1939 M.W.N. 1096=1939 Comp. C. 285=A.I.R. 1940 Mad. 157.**

——*Winding up—Duty of Court.*

A Judge in winding up is the custodian of the interests of every class affected by the liquidation. It is his duty, even if it be in a voluntary liquidation, that opportunity offers, to see to it that all assets of the company are brought into the winding up. In authorising the proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success, where they invove no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive. (*Lord Blanesburgh.*) VERNON LLOYD

COMPANY.

OWEN *v.* ALFRED E. BULL. **9 R.P.C. 129=165 I. C. 695=44 L.W. 770=A.I.R. 1936 P.C. 322 (P. C.)**

——*Winding up—Employee's security for good conduct—Deposit of security money earning interest—Whether trust money—Employee's right to claim priority—Companies Act, S. 282 B* (1).

Where an employee of a Bank in liquidation applied to Court to be paid back a sum of money furnished by him as security for his post, in full, and in priority to the claim of any creditor, and on the facts of the case the question arose whether the nature of the relationship between the Bank and the employee in respect of the amount which was furnished by the employee as cash security in obedience to the rules of the Bank was one of trustee and *cestui que trust* or one of debtor and creditor.

Held, that the amounts received by the Bank as security from the employees were held by the Bank in trust for the employees and they did not form part of the assets of the Bank divisible among its creditors. The principle of the general law of trusts is that when a sum of money is handed to another person who accepts it for a purpose declared at the time, a binding trust is constituted in respect thereof The fact that the person to whom the money is handed over happens to be a Bank does not affect the principle. Where a trust is complete, provision for payment of interest by the trustee would not make the trustee a debtor and from the fact of payment of interest alone the relationship of trustee and *cestui que trust* should not be negatived. If the matter was governed by the provisions of the Indian Companies Act, S. 282-B (1), as amended by Act XXII of 1936, there can be no doubt that the answer will be that the relation between the Bank and the employee is one of trustee and *cestui que trust* (*Venkataramana Rao, J.*) GOPALAKRISHNAN *v.* THE OFFICIAL LIQUIDATORS, T. N. AND QUILON BANK, LTD. **183 I.C. 203=12 R.M 254 (2)=1938 M.W.N. 1337=49 L.W. 181 =1939 Comp. C. 60=A.I.R. 1939 Mad. 337= (1939) 1 M.L.J. 209.**

——*Winding up—Execution against assets—Stay—Practice.*

Where there is a voluntary liquidation of a company, the general practice is to grant an order staying execution against the assets of the company, and it is only in very special circumstances that the Court would depart from that general practice. (*Lort Williams, J.*) RAJBARI ICE FACTORY, LTD., *In re*. **41 CW.N. 597=I.L.R. (1937) 1 Cal. 632.**

——*Winding up—Just and equitable grounds—Position of Court—Consideration.*

The position of the Court in determining whether it is just and equitable to wind up the company requires a fair consideration of all the circumstances connected with the formation and the carrying on of the company; and the common misfortune which had befallen some shareholders in the company does not involve the consequence that the ultimate desires and hopes of the ordinary shareholders should be disregarded merely because there is a strong interest in favour of liquidation naturally felt by the holders of the preference shares. (*Lord Maugham.*) DAVIS & CO. *v.* BRUNSWICK (AUSTRALIA), LTD.

COMPANY.

161 I.C. 539=8 R.P.C 202=A.I.R. 1936 P.C. 114 (P C.).

——*Winding up—Just and equitable grounds—Test.*

No general rule can be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase 'just and equitable' for purposes of winding up. The decisive question must be the question whether at the date of the presentation of the winding up petition there is any reasonable hope that the object of trading at a profit, with a view to which the company is formed, can be attained. In considering that question, the guarantee of the preference shares should be left out of sight, except in so far as it may have biassed the evidence on either side. Where there was no question of a dead-lock, nor was there any question of shareholders who have the voting power using that power for their own commercial interests outside the company in disregard of the interests of a minority, nor again, was there any question involved of an improper management of the company by the directors who were in control and the problem involved was of the nature of a business problem.

Held, that if there was at the relevant time a reasonable hope of tiding over the period of deep depression and of emerging into a region in which the company might reasonably expect to carry on at a profit, there would seem to be no sufficient reason why the Court should wind up the company under the just and equitable clause. (*Lord Maugham.*) DAVIS & CO. *v.* BRUNSWICK (AUSTRALIA) LTD. **161 I C. 539=8 R.P.C. 202=A.I R. 1936 P.C. 114 (P.C.).**

——*Winding up—Official Liquidator—Position of.*

The Official Liquidator representing a company is in no different position from any one else against whom a stranger or a third party makes a claim. His only duty is to consider and if he thinks it is an admissible claim to admit, and if he thinks it an inadmissible claim to reject it; and accordingly he is not bound to call on the claimant to appear before him and make enquiry. (*Roberts, C. J. and Braund, J.*) JOHNSTON *v.* OFFICIAL LIQUIDATOR. **180 I.C. 69=11 R.R. 379= A.I.R. 1939 Rang. 46.**

——*Winding up—Petition for—Future prospects of company—Duty of Court.*

There is obviously a great difference between a question of positive fact, such as the pecuniary position of a trading company at a particular date, and a question of the prospects of such a company in the future, a matter which must depend on all sorts of views as to the state of world trade, the confidence of the public, the price at which articles can be sold, a matter which depends very largely upon the number of such sales and an infinity of other considerations very difficult either to summarise or to define. It is not the function of a Court to determine such a matter on its own views as to probable success or failure, but to form the best opinion it can upon the evidence given by persons with a practical knowledge of the trade in question and the local conditions where these affect the matter. (*Lord Maugham.*) DAVIS & CO. *v.* BRUNSWICK (AUS-

COMPANY.

TRALIA), LTD. **161 I.C. 539=8 R.P.C. 202=A.I R. 1936 P.C. 114** (P.C.).

——*Winding up—Prior attachment of assets—If prevails over interests of other creditors.*

An attachment of the assets of a company which is subsequently wound up, ought not to be allowed to prevail over the interests of other creditors. if such attachment had not been completed by sale before the commencement of the winding up. (*Lort Williams, J.*) RAJBARI ICE FACTORY, LTD., *In re.* **I.L.R. (1937) 1 Cal. 632=41 C.W.N. 597.**

——*Winding up—Prize-winner in chit fund of company—Sureties for—Security furnished by in respect of future subscriptions due by prize winner—Liquidator of compny—Effect of—Prize winner—If relieved from liability to pay subscriptions by reason of securities due to sureties—Rule.*

The principle of equity, that a creditor is not entitled to recover the amount of his debt for which security has been given when he is not in a position to return the security applies when the debtor and the person giving the security are the same person. Where a company conducting a chit fund has taken security from two other persons in respect of the amount of future subscriptions payable by a prize winner in the chit, to whom the company is entitled to look for payment if default were made by the prize-winner, if the company goes into liquidation, the official liquidator of the company cannot be held to be disentitled to recover from the prize-winner any moneys due from him for future subscriptions on the ground that the company, by going into liquidation, has reached a position in which the securities which had been taken from the sureties cannot be returned. So long as the securities are still in existence and have not been wrongfully dealt with by the company, the sureties would be entitled to a division from the assets realized, whatever the dividends eventually may be. The debtor therefore cannot claim immunity from liability to pay the amounts due by him. (*Gentle, J.*) MANI IYER *v.* OFFICIAL LIQUIDATOR, T. N. BANK SUBSIDIARY COMPANY, LTD. **186 I C. 297=12 R M. 615=1939 M W.N. 1193=50 L.W 306=A.I.R 1939 Mad. 915=(1939) 2 M.L.J. 325.**

——Winding up—Provident fund started for benefit of employees—If trust fund—Members of fund—Right to rank as preferential creditors. *See* TRUST—TRUST FUND. **38 Bom.L.R. 541.**

——Winding up—Set off—Joint and separate debt—Principle—Individual over draft account and joint fixed deposit account—Claims in respect of, when can be set-off. *See* BANKER AND CUSTOMER. **1940 Comp. Cas. 52.**

——*Winding up—Surplus assets—Preference shareholders—Rights of—Arrears of preferential dividends—Payment of.*

It was provided by the Memorandum of Association of a company that the preference shares should rank both as regards dividend and capital in priority to the ordinary shares. The articles of association provided that preference shareholders should receive out of the profits of the company, if any, as a first charge thereon, a cumulative preferential dividend of 7 per cent. per annum on the paid up amount of the preference shares held by them, and subject to the rights of the preference shareholder, the surplus profits should be divided among the holders of the ordinary shares. There was also a further provision that if the company should be wound up, the surplus assets should be applied in the first place, in repaying to the holders of preference shares the amount paid up thereon, and the residue should belong to the holders of ordinary shares. The company was would up voluntarily, and no dividend on preference shares had been declared or paid for several years prior to the winding up.

Held, (*i*) that the surplus assets must be applied in the first place in repaying to the holders of preference shares the amount paid up thereon and the residue belonged to the holders of the ordinary shares; (*ii*) that the arrears of preferential dividends could not be treated as "debts" and therefore to be paid out of the assets of the company before the "surplus assets" were ascertained. (*Lort Williams, J.*) NEW RING MILLS CO., LTD. (IN LIQUIDATION), *In re.* **I.L.R (1938) 2 Cal. 533=179 I.C. 733=11 R.C. 609=1939 Comp.C. 128=A.I.R. 1939 Cal. 126.**

——Winding up—Trust for objects mentioned in Memorandum of association—Percentage of subscriptions from certificate holders to be allotted towards trust for specific purposes—Condition incorporated in certificate—Subscribers accepting certificates and remitting moneys—Moneys collected not allocated but kept in suspense account—Power of Official liquidator to allocate percentage towards trust. *See* TRUST—CREATION. **(1937) 1 M.L.J. 10.**

——Winding up—Life Insurance Companies—Policy holder—Right to apply for winding up. *See* LIFE INSURANCE COMPANIES ACT, S. 22 (*a*). **40 Bom.L.R. 52.**

COMPARTMENT. *See* RAILWAYS ACT.

COMPENSATION.

See (1) CR. P. CODE, S. 250.
(2) LAND ACQUISITION ACT.
(3) T. P. ACT, S. 51.

COMPETENT COURT.

See (1) CIVIL PROCEDURE CODE.
(2) PRACTICE—JURISDICTION.

COMPETENT PERSONS TO DEPOSE AS WITNESSES. *See* EVIDENCE ACT, S. 118.

COMPLAINT. *See* CR. P. CODE, SS. 4 AND 199 TO 203.

COMPOSITION.

See (1) DEBTOR AND CREDITOR.
(2) T. P. ACT, S. 53.

COMPOUNDING OFFENCE.

See CR. P. CODE, S. 345.

COMPOUND INTEREST. *See* INTEREST.

COMPROMISE. *See also* C. P. CODE, O. 23, R. 3.

——Consent decree. *See* CONSENT DECREE.

——Construction—Clause entitling party to all rents and profits accruing as from date of compromise—Rent collected in advance by opposite party before such date—Kist falling after date of compromise—Suit for recovery of rents collected—Maintainability—Rent, when accrues. *See* BIHAR TENANCY ACT, S. 53. **16 Pat. 184=18 Pat. L.T. 162.**

———*Construction—Compromise on payment of the money due and full satisfaction recorded.*

Where as a matter of fact there was only one holding and not two and when the proceeding taken as regards the subsequent ejectment decree about the same holding was compromised on the payment of the money due and full satisfaction recorded, the full satisfaction can only be of the full outstanding claim. (*Marsh, S.M. and Mehta, J.M.*) JWALA PRASAD *v.* MOHAN SINGH. **1939 A.W.R. (B.R) 164=1939 R.D. 166.**

———*Construction—Condition restricting alienation of property—Alienation even for necessary purpose—If prohibited.*

One *J*, a Jat of Rohtak District made a gift of one half of his ancestral land to one *S*. A collateral of *J* instituted a suit to contest the gift and *J* entered into a compromise with him whereby his collateral agreed to withdraw his suit and *J* undertook not to effect a mortgage sale or gift of the remaining half to any one else.

Held, that the effect of the condition in the compromise was not to restrict absolutely the power of alienating the other half even if necessity existed and that an alienation by *J* of the remaining half of the ancestral land was valid to the extent to which it could be established to have been effected for valid necessity. (*Tek Chand, J.*) SHIB LAL *v.* INDRAJ. **172 I.C. 743=10 R.L. 365=39 P.L.R. 496=A.I.R. 1937 Lah. 708.**

———*Construction—Conflicting claims to property of deceased Hindu—Claim by brother by survivorship—Claim by daughters as heirs—Compromise—Division of properties—Allotment of shares to brother and daughters—Latter to take jointly and enjoy as of right—Estate taken—Limited estate or absolute estate.*

V and *B* were brothers, members of a Hindu family. *B* died leaving two daughters. *V* filed a suit against these two alleging that he and *B* were undivided that he was entitled to all the properties by survivorship and that the deceased's daughters were obstructing him in the enjoyment of the properties. The defendants claimed to succeed as heirs of their father to his share of the property, but before any written statement was put in, there was a compromise By that compromise which was drafted as a partition, the properties were divided between the plaintiff on the one hand and the defendants jointly on the other. The daughters were to have a share in a family house jointly and to get a share of the other properties to be enjoyed by them as of right.

Held, that the arrangement being only a compromise of conflicting claims, *V* claiming by survivorship and the daughters claiming by heirship, and not a gift by *V* to his nieces, the shares taken by each party must be held to have been taken in the capacity in which it was claimed; that the daughters therefore took only a limited estate of a daughter under the Hindu Law and not an absolute estate. (*Wadsworth, J.*) NAGABHUSHANAM *v.* ANANDAYYA. **183 I C. 503=12 R.M. 298=48 L.W. 939=1939 M.W.N. 70=A.I.R. 1939 Mad. 179=(1939) 1 M L.J. 170.**

———*Construction—Failure to pay 'three consecutive instalments'—What amounts to.*

Where a compromise among other things provided that if the judgment-debtor does not pay three consecutive instalments, the decree-holder shall have power to take out execution in respect of remaining entire amount due, and the judgment-debtor relied upon the fact that after the date of the compromise he had never come within the terms that he had not paid three consecutive instalments, because in respect of every series of three instalments he had paid the third instalment of the three, that is, if instalments were due in January, February and March he had actually paid the March instalment and that for the next quarter he had paid the June instalment and so on, it was held that when the instalment was paid in March, it was in fact and in law a payment of the January instalment, and that it followed from that, that when April came and no payment was made, there were three consecutive instalments unpaid and that hence the entire amount became payable. (*Lord Wright.*) OUDH COMMERCIAL BANK, LTD., FYZABAD *v.* BISHAMBHAR NATH BAJPAI. **32 S.L.R. 913=176 I.C. 890=1938 O.W.N. 816=48 L.W. 368=1938 A.W.R. (P.C.) 178=1938 M.W.N. 934=1938 O.L.R. 388=19 Pat.L.T. 709=1938 O.A. 743=11 R P C. 87=1938 A.L R 750=5 B.R. 24=A.I.R. 1938 P.C. 250 (P.C.).**

———*Construction—Grant of patni by K—K subsequently giving portion of his lands to S under compromise deed—Land comprised in patni allotted to purchaser from S at revenue partition—Latter, if bound by patni.*

One *K* granted a patni in respect of certain lands belonging to him. Subsequently a suit was threatened against *K* by one *S* who challenged the validity of the adoption of the former and claimed the entire estate as legal heir. To purchase peace the parties entered into a compromise and by an ekrarnama it was agreed between them that *S* would get 5/16ths share of the lands belonging to *K* and the remaining 11/16ths share would remain vested in the latter. Some time after this, the lands comprised in the patni were allotted to a purchaser from *S* in a proceeding under the Estates Partition Act.

Held, that the ekrarnama amounted really to a transfer of 5/16ths share in the Hissya by *K* to *S*. and *S* took that interest in the estate as it existed at that time, and that therefore the patni was binding on *S* and the purchaser from him. (*Mukherjea, J.*) KALIMUDDIN MIA *v.* EAKUTENNESA BIBI. **71 C.L.J. 232=A.I.R 1940 Cal. 347.**

———Construction Hindu widow—Compromise allotting properties to widow in absolute right—Claim by widow only as heir of husband—Estate taken by widow—Presumption. *See* HINDU LAW—WIDOW. **50 L.W. 166=(1939) 2 M.L.J. 236.**

———*Construction —Language used —If controlled by antecedent claims of parties to suit—"Heirs" and "own heirs"—Meaning and distinction—Clause giving properties to widow and her heirs with powers of alienation by way of gift in exchange, sale, etc.—Effect of.*

One the death of a Zamindar in 1888 disputes arose as to the succession to the Zamindari. The Zamindar's widow alleged that her husband was a divided member and set up her title both as heir to her husband and as the legatee under a will alleged to have been left by him on the footing that her husband had become divided. A son of one of the uncles of the deceased claimed

as the survivor by rule of lineal primogeniture alleging that the deceased Zamindar was undivided, and in 1889 he instituted a suit claiming the Zamindari. The parties however, settled their disputes by a compromise dated 8—5—1890. The razinama contained three sets of provisions relating to three sets of properties. Cls. 1 to 4 of the compromise related to the Zamindari proper and its appurtenances; as regards these the arrangement was that the widow should enjoy the same during her lifetime and the plaintiff and his heirs should enjoy the same after her death. Cl. 6 of the razinama dealt with certain properties which belonged to or were in the possession of the deceased Zamindar excluding the Zamindari, etc., dealt with by Cls. 1 to 4; and Cl. 6 provided that the widow and *her heirs* were to enjoy those properties with absolute rights, with powers of alienation by way of gift, exchange, sale, etc., and that the plaintiff and his heirs shall have no subsequent claim thereto. Cl. 7 of the compromise dealt with the third set of properties, namely, acquisitions that might be made by the widow out of the income of the estate in her hands or by other means, and it was provided by Cl. 7, that these properties should not merely belong to the widow exclusively, with powers of alienation, etc., but that after her death they should belong to the widow's *own heirs* and that the plaintiff and his heirs should have no right or claim in respect thereof.

Held, on a construction of the compromise, (1) that what was given to the widow under Cls. 1 to 4, in respect of the Zamindari was a strict life-estate and not an ordinary widow's estate, and that the plaintiff took a vested remainder as regards the same; (2) that Cl. 6 of the compromise give the properties dealt with by it absolutely to the widow, and the clause could not be read as giving her only a widow's estate; (3) that the said Cl. 6 expressly mentioned the widow and her heirs as absolute owners with powers of alienations by way of gift, etc., and it was not reasonable to say that the words did not connote what their natural meaning undoubtedly conveyed; (4) that it was not fair to allow the antecedent claims of the parties in the suit to control the construction of the clear words employed in Cl. 6; (5) that the words "her heirs" in Cl. 6 could not read as meaning her husband's heirs, and by the mere use of the word "her own heirs" in Cl. 7, it was not intended to draw any antithesis between her heirs and her husband's heirs; nor would the fact that a reference to her husband occurred in some distant part of the clause after the words "heirs" connote that her husband's heirs were meant. (*Varadachariar and Abdur Rahman, JJ.*) RAMASWAMI KAMAYA NAICKER *v.* KAMARAJA PANDIYA NAICKER. **1938 M.W.N. 459=(1938) 1 M.L.J. 563.**

———*Decree in terms—Dispute as to identity of property specified in decree—If Court can decide at the instance of parties.*

Where in a suit on a mortgage the parties come to terms and present a petition of compromise stating that the claim of the defendants is settled at a certain amount for which those defendants are to convey the mortgaged properties to the plaintiff, the Court should pass a decree in terms of the compromise. The question whether a particular property is included in the mortgaged property is not one which has to be decided in those proceedings and the Court has no jurisdiction to incorporate its decision on that matter in the decree in the suit; although the parties invite the Court to hold a local inspection and decide that question and the Court accordingly holds a local enquiry and decides that matter, such decision cannot be incorporated in the decree in the suit based on the compromise. (*Manohar Lall and Chatterjee, JJ.*) CENTRAL INDIA SPINNING, WEAVING AND MANUFACTURING CO. *v.* KHEMRAJ. **18 P. 261=181 I.C. 42=11 R.P. 565=5 B.R. 524=1939 P.W.N. 151=A.I.R. 1939 Pat. 514.**

———Decree in terms of—If can be passed—Proceedings under the Second Schedule of the C.P. Code. *See* C. P. CODE, SCH, II, PARA. 21. **A.I.R. 1937 Cal. 201.**

———*Enforceability by separate suit—Compromise of suit—Decree—Compromise not incorporated—Separate suit on compromise, if lies.*

Where parties to a suit entered into a compromise and reduced it to writing, and got a decree passed without incorporating the compromise in the decree, a separate suit could be founded on compromise as it had not become merged in the decree passed. (*Spargo, J.*) U LAT *v.* U PON GAUNG. **177 I.C. 601=11 R.R. 148=A.I.R. 1938 Rang. 145.**

———*Legal practitioner—Authority.*

In the absence of a power of attorney a pleader is not competent to effect a compromise so as to bind his client. (*Din Mahomed, J.*) TARNAIL SINGH *v.* NARAIN KAUR. **178 I.C. 829=11 R.L. 492=40 P.L.R. 664=A.I.R. 1938 Lah. 766.**

———*Pleader acting without authority—If binds parties.*

Before so important a matter as a compromise of a suit, can be recorded by the Court, when the parties themselves do not notify it to the Court or give their written consent, then if the pleaders are to act as agents for the parties to compromise, their authority must be clear and unequivocal. The vakalatnamas must authorise them to compromise. Where the vakalatnamas filed by pleaders for the parties, were ordinary vakalatnamas which did not give them power to compromise either generally or specially nor was there any special authorization contained in the vakalatnamas or any written authority to the pleaders to act specially in the matter, and all that was on record regarding their power to compromise was their written statement to the effect that they had such special power.

Held, that, under the circumstances, the written statement was not sufficient authority to enable the pleaders to compromise the suit on behalf of the parties and the compromise so effected did not bind the parties. (*Davis, J.C. and Mehta, A. J.C.*) GHANSHAMDAS LOKUMAL *v.* NANIKRAM KHUBCHAND. **29 S.L.R. 437=163 I.C. 240=9 R. S. 2=A.I.R. 1936 Sind 59.**

———*Suit by minor to declare it void and not binding on him—Pleader authorised to file compromise—Compromise arrived at after discussion in open Court—Permission, inference—Compromise not being beneficial to minor, if can be gone into in later suit—Interpretation, of words* 'Sulahnama dakhil karen', *in the vakalat.*

COMPROMISE DECREE.

In a suit by a minor to declare that a compromise decree in a prior suit, in which he was represented by his mother as next friend, was void and not binding on him, when it is found that the vakalat to the pleader authorised him to file a compromise, the actual words used being '*Sulahnama dakhil karen*', and it is also found that the compromise was arrived at in open Court after mutual discussion between the parties, it could not under those circumstances be said that the permission of the Court to enter into the compromise on behalf of the minor was not given. If the compromise was otherwise valid and binding, the question whether or not it was for the benefit of the minor plaintiff could not be debated and discussed in this later suit. That was a question to be determined by the judge who granted the permission for the compromise. The words in the vakalat are of general import and being uncontrolled by any condition, the only reasonable interpretation that can be put on those words is that the pleader was given authority to enter into a compromise on behalf of the minor. (*Iqbal Ahmed and Bajpai, JJ.*) SAT DEO PRASAD *v.* DEBI BADAL. I.L.R. (1940) All. 132=187 I.C. 299=12 R.A. 510=1940 A.L.J 18=1940 A W.R. (H.C.) 9=A.I R. 1940 All. 143.

COMPROMISE DECREE.
See (1) C. P. CODE, O. 23, R. 3.
(2) CONSENT DECREE.

COMPROMISE PETITION.
See (1) C. P. CODE, O. 23.
(2) COMPROMISE.

COMPULSION.
See (1) CONTRACT ACT, S. 16.
(2) PARDANASHIN LADY.

COMPULSORY DEPOSIT. *See* C. P. CODE, O. 21, R. 84.

COMPUTATION OF TIME. *See* LIMITATION ACT, S. 12.

CONCEALMENT OF BIRTH. *See* PENAL CODE, S. 318

CONCILIATION.
See (1) ARBITRATION.
(2) AWARD.
(3) C. P. CODE, SCH. II.
(4) DEKKHAN AGRICULTURISTS RELIEF ACT.

CONCUBINE. *See* HINDU LAW—MAINTENANCE.

CONCURRENT FINDINGS.
See (1) PRACTICE.
(2) PRIVY COUNCIL.

CONDITION.
See (1) DEED—CONDITION.
(2) EVIDENCE ACT, S. 92.
(3) SUCCESSION ACT, Ss. 99-124.
(4) T. P. ACT, Ss. 10-20.
(5) WILL—CONSTRUCTION.

CONDITIONAL GIFT.
See (1) SUCCESSION ACT, Ss. 113-124.
(2) T. P. ACT, Ss. 25-29.

CONDITIONAL SALE.
See (1) MORTGAGE.
(2) T. P. ACT, S. 58.

CONFLICT OF LAWS.

CONDUCT. *See* EVIDENCE ACT, S. 115.

CONFESSION.
See (1) CR. P. CODE, SS. 164 AND 364.
(2) CRIMINAL TRIAL—EVIDENCE.
(3) EVIDENCE—CONFESSION.
(4) EVIDENCE ACT, SS. 17 AND 24-30.

CONFIDENCE. *See* EVIDENCE ACT, SS. 126-129.

CONFIDENTIAL COMMUNICATION. *See* EVIDENCE ACT, SS 22 AND 126-129

CONFIDENTIAL RELATION.
See (1) CONTRACT ACT S. 16.
(2) EVIDENCE ACT, S. 111.
(3) TRUST.
(4) TRUSTS ACT.

CONFIRMATION OF AUCTION SALE. *See* C. P. CODE, O. 21, RR. 90-92.

CONFISCATION.
See (1) ACT OF STATE.
(2) CROWN.
(3) GRANT.
(4) HINDU LAW—JOINT FAMILY.
(5) PENAL CODE, SS. 121, 122 AND 124-A.

CONFLICT—Of decision. *See* C. P. CODE. S. 11.
——Of equity. *See* PRACTICE.
——Of evidence. *See* PRACTICE.

CONFLICT OF LAWS.
See also (1) INTERNATIONAL LAW.
(2) INTERPRETATION OF STATUTES.
(3) NEGOTIABLE INSTRUMENTS ACT, Ss. 134-137.
(4) PRACTICE.

——Of Rulings. *See* PRACTICE—PRECEDENT.
——Lex loci *and personal law—Mahomedan parties—Custom of adoption—Property both in British India and Native State—Adoption declared valid in Court in Native State—Dispute in respect of property in British India—Law applicable—English rule of* lex loci—*Applicability—Bombay Regulation IV of* 1827.

A Mahomedan lady died leaving properties both in British India and in a Native State. A custom of adoption set up by the adopted son was declared to be valid by the Court in the Native State, and his claim with reference to the property in the Native State, was decreed. In a dispute with reference to the right to the property in British India, the validity of the adoption was challenged. On the question whether the validity of the adoption is to be decided according to the personal law of the parties or the laws of British India, where the property in dispute is situate.

Held, that the rule of adopting the *lex loci* for the discovery of the right heir to land is not confined to England. It seems to be the law of British India also or rather of Bombay Presidency; for it is enacted in Bombay Regulation IV of 1827, that the law to be observed in the trial of suits shall be Acts of Parliament, etc., and in the absence of such Acts and Regulations, the usage of the country in which the suit has arisen. It follows that the personal law of the adopted son can only be taken into consideration in the absence of an usage of the country in which the suit has arisen (*i.e.*) British India. (*Barlee and Macklin, JJ.*) AYUBSHA *v.* BABALAL. I.L.R.

CONFLICT OF LAWS.

(1938) Bom. 150=39 Bom.L.R. 1324=173 I.C. 801=10 R.B. 384=A.I.R. 1938 Bom. 111.

———Parsi resident in Baroda, dying having immovable properties in British India—Succession to such property—Law applicable. *See* SUCCESSION ACT (XXXIX OF 1925), S. 5.

———Suit on foreign judgment in time according to British Indian Law—Execution of decree barred under foreign Law—Effect. *See* LIMITATION ACT, ART 117 41 Bom.L.R. 1084.

CONJUGAL RIGHTS.

See (1) HUSBAND AND WIFE.
(2) RESTITUTION OF CONJUGAL RIGHTS.

CONNIVANCE.

See (1) ABETMENT.
(2) ACQUIESCENCE.

CONSENT.

See (1) ACQUIESCENCE.
(2) ESTOPPEL.

———Decree.

See (1) C. P. CODE, S. 96 AND O. 23, R. 3.
(2) COMPROMISE.

———Order. *See* C P. CODE, S. 96 AND O. 23, R. 3.

CONSENT DECREE.

Appeal.
Binding nature.
Breach.
Consideration.
Construction
Default clause.
Power of Court.
Setting aside.
Validity.

Appeal.

———*Appeal.*

Where as the result of an agreement between the parties which is intimated to the Court and recorded by it, the Court is invited to proceed outside its ordinary jurisdiction and as result passes a decree, there is no appeal from the decision. It is in essence a consent decree based upon an agreement amounting to a compromise and hence no appeal lies. (*Bennet and Verma, JJ.*) BANWARI LAL *v.* RAM GOPAL. I.L.R (1940) All. 185=188 I C. 114=12 R.A. 585=1940 A L. J. 38=1940 A.W.R. (H.C.) 50=A.I.R. 1940 All. 190.

Binding character.

———*Compromise giving effect to illegal act—Validity.*

A compromise decree must be treated as good and binds the parties to it and their representatives unless and until it is set aside. Even if the decree is based on an agreement which is bad in law, in the sense that it gives effect to and sanctions what is illegal or prohibited by statute, it is binding until set aside in proper proceedings. (*Broomfield and Wadia, JJ.*) BASANGOUDA *v.* BASALINGAPPA. 164 I.C. 703 (2)=9 R B. 92=38 Bom L R 593=A.I.R. 1936 Bom. 301.

———*Grounds for setting aside—Penal clause—Relief against—Power of executing Court.*

Although a consent decree has all the force of a decree *in invitem*, so far as its binding character is concerned, it does not stand on a footing higher than a contract so far as its legal character is concerned. It is binding on the parties as a decree only when it is in accordance with law and valid. The Court has jurisdiction to set aside the consent decree on any ground which would invalidate an agreement between the parties. S. 74, Contract Act, applies to the case of a compromise decree and it is open to a Court executing such decree to interfere with a stipulation by way of penalty contained in the compromise. (*Niyogi, J.*) HIRALAL HARIRAM *v.* DURGA BAI MURLIDHAR. 173 I C. 257=10 R.N. 292=A.I.R. 1937 Nag. 413

———*Binding force—Party giving up right—If bound when subsequently it transpires that he had right.*

A compromise by which a party gives up for consideration a right, which it subsequently transpires that he had, is valid and binding, and the right cannot prevail against the agreement of parties. The compromise of a doubtful right is a sufficient foundation of an agreement. (*Agarwala and Rowland, JJ.*) CENTRAL CO-OPERATIVE BANK, LTD. *v.* DASRATH PANDY 189 I C. 739=13 R P. 128=6 B.R. 849=21 Pat.L.T. 246=A.I.R. 1940 Pat. 406.

———*Relief against penalty—Rules governing.*

It is settled law that where a decree is passed as a result of an agreement between the parties, it does not stand on a higher footing than the agreement which preceded it and therefore the Court has the power to relieve the defaulting party from the consequences of the default; but the Court does not possess unrestricted power in the matter, inasmuch as it cannot interfere with the effect of the default, if as a result thereof the decree-holder seeks merely to take away the concession which had been given to the judgment-debtor. If, on the other hand, as a result of the default the decree-holder attempts to realise more than was originally due to him, in other words if he is enforcing a penalty, then the Court is entitled to step in and to give relief to the judgment debtor against the forfeiture. There was an agreement between *A* and *B* whereby *B* was to take possession of *A's* land and repair the old well or to sink a new one and make the land culturable within ten years and after fulfilling these conditions *B* was to be the owner of half the land. *B* remained in possession for 20 years but did not fulfil the conditions. *A* brought a suit for possession which was compromised and according to the terms of compromise decree two years more were allowed to *B* to fulfil the conditions and on non-fulfilment *A* had a right to eject *B* by taking execution proceedings. *B* having failed to fulfil the terms, *A* applied for execution. The lower Court held that the condition in compromise decree was penal.

Held, that the condition embodied in the compromise decree was not penal. *A* was merely withdrawing the concession given to *B* and was enforcing his original right and in doing so it could not be said that he was attempting to get more than what he was entitled to at the institution of suit. (*Tek Chand, J.*) MITHA *v.* REMAL DASS. 175 I.C. 751=40 P.L.R. 458=11 R.L. 15 =A.I.R. 1937 Lah. 828.

———*Res judicata.* *See* C. P. CODE, S. 11. 63 Cal. 550.

———*Decree offending against law of perpetuities—Effect—Remedy of parties.*

Where a compromise decree subsists between the parties declaring the suit property inalienable, the defendant is estopped from contending in a

subsequent proceeding that the property in dispute is alienable, whether the subsisting decree offends against the law against perpetuities or not. The latter point can be decided in a suit to set aside the decree. But so long as the decree is in force the defendant cannot escape its provisions. (*Davis, J.C. and Mehta, A.J.C.*) MULCHAND HAZARIMAL *v.* HASSOMAL BACHOMAL. **31 S.L.R 197=171 I.C. 127=10 R.S. 90=A.I.R. 1937 Sind 177.**

Breach.

——*Breach—Remedy—Separate suit—Relief in execution—Power of executing Court.*

If a term of compromise is broken by one of the parties thereto, that is a matter which can only be remedied by a suit on the part of the injured party. An executing Court cannot do anything more than what it is bound to do under the compromise agreement. (*Courtney Terrell, C.J. and Manohar Lall, J.*) NAKCHEDI SAHU *v.* BISHUN LAL SINGH. **172 I.C. 27=10 R.P. 328=18 Pat.L.T. 799=A.I.R 1937 Pat. 672.**

Consideration.

——*Consideration—Relevancy—Refusal to record compromise on ground of want of consideration—If justified.*

The fact that there was no consideration for a compromise is not a sufficient ground for the Court refusing to record the compromise. The question of consideration has not much bearing because the results of litigation are uncertain, and parties enter into compromises with the object of escaping from the anxieties and worries of continuing a litigation. (*Varma and Manohar Lall, JJ.*) PEOPLES CO-OPERATIVE BANK, LTD., PATNA *v.* SHYAM NARAIN. **6 B.R. 767=189 I.C. 232=13 R.P. 62.**

Construction.

——*Construction—Decree awarding maintenance to Hindu widow—Option given to proceed against charged properties or other immovable properties of joint family—Right to proceed against movable properties of family.*

Where a compromise decree awarding maintenance to a Hindu widow against her husband's coparceners gives her an option to recover the amount due either by sale of properties specifically charged by the decree or out of other immovable properties of the joint family, it is not open to her to execute the decree for recovery of her dues by sale of movable properties of the family. It is not open to her to seek a remedy which is not given to her by the decree. Though the fact that a charge is given on specific property would not of itself curtail the widow's right to recover the decretal amount out of the assets of the joint family, the parties by reason of the compromise must be taken to have agreed that the amounts due under the decree should be recovered only out of the immovable properties mentioned in the decree, some of which are charged specifically. (*Lokur, J.*) LAKSHMIBAI *v* SHANTARAM. **182 I.C 851=12 R.B. 43=41 Bom.L.R. 420=A.I.R 1939 Bom. 206.**

Default clause.

——Default clause — Agreement to receive smaller sum if paid on fixed date and to give up balance—Stipulation that on default of such payment whole suit amount to be paid—If penal—Power of Court to relieve against. *See* CONTRACT ACT, S. 74. **44 L.W. 832.**

——Default clause—Penalty. *See* CONTRACT ACT, S 74. **A.I.R. 1937 Mad. 234.**

——*Default clause—Penalty.*

Where as a result or compromise the decretal amount is reduced and is allowed by the decree-holder to be paid in instalments a default clause that if the instalments were not duly paid the decree-holder would be entitled to execute the whole decree as it then stood cannot be treated as penal. The reduction of the decretal amount is in the nature of a concession which can be withdrawn on the default of the judgment-debtor. (*Din Mohammad, J.*) RAM KISHEN *v.* CHANDRA BHAN. **A.I.R. 1940 Lah. 241**

——*Judgment-debtor giving security of property to decree-holder—Right of latter to proceed against person of judgment-debtor.*

Even though under a compromise the judgment-debtor gives as security certain properties for the recovery of the decretal amount, the decree-holder can proceed against the person and other properties of the judgment-debtor without first proceeding against those properties, where the compromise shows that there is a personal covenant on the part of the judgment-debtor to pay the amount. (*Thomas and Zia-ul-Hasan, JJ.*) GWALA PRASAD KHANNA *v.* MATHURA PRASAD. **13 Luck 340=168 I.C. 625=9 R.O. 492=1937 O.L.R 295=1937 O.W.N. 686=A.I.R. 1937 Oudh 379.**

——*Money payable on holiday—Payment into Court on reopening day—Sufficiency.*

Where money becomes payable under a compromise decree on a day when the Court is closed it is not breach of the compromise to pay the money into Court on the first day when the Court reopens. (*Burn and Stodart, JJ.*) KASI CHETTI *v.* NAGAPPA CHETTI. **1939 M.W.N 854=50 L W. 384=A.I.R. 1939 Mad. 814=(1939) 2 M.L.J 262.**

——*Time—If of the essence of contract—Provision for payment within fixed time—Delay—Power of Court to excuse and extend time.*

Where a compromise decree provides that a defendant should deposit a certain amount into Court within a specified period and that if it is not so paid within that period the suit would stand decreed without any further interference by the Court, the only inference that can be drawn from such a provision is that the parties intend the time to be of the very essence of the contract; and such time cannot be extended by the Court even if refusal to extend the time involves a forfeiture or something of that nature. If the Court extends time in such a case, its act would be without jurisdiction. A Court can only extend time when it is satisfied that time is not of the essence of the contract. (*Harries, C.J.*) BISWAMBHER SAHU *v.* HARI NAIK. **5 Cut.L.T. 29.**

——Meaning of — Execution petition— Dismissal at request of decree-holder owing to arrangement with judgment-debtor out of Court—If compromise decree—Right of decree-holder to apply for execution again on ground of mistake, misrepresentation, fraud, etc.—Remedy. *See* LIMITATION ACT, ARTS. 181 AND 182. **1937 A.W.R. 394.**

——Post diem *interest—Rule as to—Absence of provision in decree—Effect.*

Where the terms of a compromise are reduced to writing and placed before the Court and the

Court simply adopts it, the rule that a compromise partakes of the nature of a contract applies. A compromise decree, which merely embodied the terms of a compromise, provided that a specified sum of money with interest at 6 per cent. from the date of the plaint to the date of the compromise should be paid within 6 months from the date of the decree and that in default execution was to be taken out. There was no provision that after the expiry of six months the amount shall carry interest.

Held, that there was no reason to suppose that the parties intended that the defaulting party should benefit by his own default, and that *post diem* interest could be claimed at 6 per cent., as it made no difference that no provision was made for interest between the date of the decree and the date when the amount was payable. (*Somayya, J.*) MUTHUKRISHNA RAJA *v.* VISWALINGA KADAVARAYAR. **1940 M.W.N. 547.**

Power of Court

——*Amount payable in instalments—Default clause—Executing Court, if will grant relief.*

Where by a consent decree the decree-holder has agreed to accept by way of certain instalments an amount less than that which is actually due to him and there is a default clause in the decree, time will be ordinarily deemed to be the essence of the contract and in case of default of any of the instalments the executing Court will not give any relief against forfeiture. The decree-holder would be entitled to claim the whole amount. (*Bhide, J.*) RANJIT RAM *v.* KARIM BAKSH. **189 I.C. 679=13 R.L. 97=A.I.R. 1940 Lah. 46.**

——*Money due under final mortgage decree agreed to be paid in instalments—Mortgagor agreeing to furnish additional security within specified time—Power of Court to extend such time.*

The parties to a final mortgage decree came to a compromise and filed a joint application by which the mortgagor agreed to pay balance due under the decree in certain instalments and also agreed to furnish additional security bond within certain specified time. It was agreed that time would be of the essence of contract and on failure of mortgagor to pay instalments or furnish security within specified time the decree-holder would be at liberty to proceed with the sale of the property covered by the mortgage decree. The mortgagor failed to furnish additional security within the specified time and thereupon the decree-holder applied for the sale of the property.

Held (granting the application), that Court could not enlarge the time specified in the compromise petition for furnishing security. (*Mosely and Sharp, JJ.*) O.R.M.M.S.P.S.V. CHETTYAR FIRM *v.* O.V.R.A.T FIRM. **187 I.C. 223=12 R. R. 322=A.I.R. 1940 Rang. 62.**

——Variation—Time fixed for payment—If can be extended—Consent of both parties—Necessity. *See* C. P. CODE, S. 148. **1940 M.W.N. 720.**

Setting aside.

——*Allegation of fraud—Procedure—Appeal—Maintainability.*

When a party alleges that owing to the fraudulent action of his vakil or others he was committed to a compromise to which he did not wish to consent, his remedy is not by appeal and by dducing evidence of fraud in appeal before the

appellate Court, but by taking proper action to get the decree set aside as having been obtained by fraud. (*Wadsworth, J.*) RAMANARAYANA RAO *v.* RAMAKRISHNA RAO. **163 I.C. 161=8 R.M. 1097=1936 M.W.N. 86=43 L.W. 722=A.I.R. 1936 Mad. 385=70 M.L.J. 400.**

——Compromise decree against minor—Gross neglect of guardian *ad litem*—Opposite party withholding material documents in his possession from Court and urging false and unfounded plea knowing same to be such—Effect—Right of minor to set aside. *See* MINOR—DECREE AGAINST. **46 L.W. 620.**

——Compromise by shebaits on behalf of endowment—Suit by sons of shebaits to avoid at the instance of shebaits — Maintainability. *See* HINDU LAW — RELIGIOUS ENDOWMENT. **A.I.R. 1936 Cal 215.**

——*Fraud.*

A compromise decree is liable to be set aside where the compromise on which the decree is based is secured through fraud (*Abdul Qayoom, C.J. and Janki Nath Wazir, J.*) NAWAB BIBI *v.* RAHMOON. **39 P.L.R. J. & K. 89.**

——*Ground of fraud, misrepresentation or mistake — Procedure — Separate suit — Application under S. 151, C. P. Code—Competency.*

Where a compromise decree which, on the face of the record, is proper, is impeached on the ground of fraud, misrepresentation or mistake, the Court which passed that decree cannot set it aside in an application under S 151, C. P Code. The remedy of the aggrieved party is by way of a separate suit and not an application to have the consent decree set aside. (*Lokur, J.*) KESHAV *v.* SUBBA MANGA. **185 I.C 669=12 R.B. 263=41 Bom.L R. 994=A.I.R. 1939 Bom. 490.**

——*Grounds—Separate suit—Maintainability—Absence of jurisdiction—Effect of—Ignorance of law—If ground for avoiding compromise.*

A judgment given or order made by consent may, in a fresh action brought for the purpose, be set aside on any ground which would invalidate an agreement, not contained in a judgment or order, such as that the consent is the result of a mistake or that it was *ultra vires* on the part of one of the consenting parties The contract of parties is not the less a contract and subject to the incidents of a contract because there is superadded the command of the Judge. Nor can consent or waiver give jurisdiction where none exists. But where in a cause, which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction on the ground of there being irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.

Per *Rupchand, A.J.C.*—A compromise made by a party cannot be set aside on the ground that he made it in ignorance of the law in force in British India. (*Davis, J.C. and Rupchand, A.J.C.*) ALLAHBUX *v.* NUSSERWANJI AND CO. **29 S. L.R. 455=164 I.C. 43=9 R.S. 30=A.I.R. 1936 Sind 99.**

——*Principles applicable—Limitation.*

Though a decree can be set aside like other contracts on the ground of fraud, yet, in its nature, it differs from a contract between two parties, which has not been impressed with the seal of the

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Court. So impressed, it becomes a sovereign order and cannot be ignored. Hence where a compromise decree has been entered into by a mother on behalf of minors, and the minors have not sued to set it aside within the time allowed after their minority, they cannot question its validity and binding force. (*Davis, J.C. and Weston, J.*) PREMGIR *v.* WAWA COMMUNITY, KARACHI. **I L.R. (1939) Kar. 580=184 I.C. 643=12 R.S. 125=A I.R. 1939 Sind 251.**

Validity.

——Compromise going beyond scope of suit—Enforceability. *See* B. T. ACT, S. 29. **40 C.W.N. 689.**

CONSEQUENTIAL RELIEF. *See* SPECIFIC RELIEF ACT, S 42.

CONSIDERATION.

See (1) CONTRACT.
(2) CONTRACT ACT, SS. 2 (*d*) AND 25.
(3) EVIDENCE ACT, SS. 102 AND 103.
(4) FAMILY ARRANGEMENT.

CONSIGNMENT. *See* RAILWAYS ACT, S. 72.

CONSIGNOR AND CONSIGNEE. *See* RAILWAYS ACT, S. 72.

CONSOLID ATION.

See (1) MORTGAGES
(2) T. P. ACT, SS. 60 AND 61.

——Of appeals. *See* C. P. CODE, S. 151.

——Of suits. *See* (1) C. P. CODE, S. 151.
(2) PRACTICE.

CONSPIRACY.

See (1) PENAL CODE, S. 120-A.
(2) TORT

CONSTITUTIONAL LAW—*British North America Act* (1867)—*Provincial Legislature—Power to delegate legislative power.*

Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament. It is within the powers of the Provincial Legislature to delegate legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation. Hence the Natural Products Marketing (British Columbia) Act cannot be attacked as *ultra vires* on the ground that it delegates legislative power to Lieutenant-Governor in Council. (*Lord Atkin.*) GEORGE WALKEM SHANNON *v* LOWER MAINLAND DAIRY PRODUCTS BOARD. **180 I.C 538=11 R P C 182 =2 Fed.L.J. 147=A.I.R. 1939 P C. 36 (P.C.).**

——*British North America Act, S.* 91 (2)—*Regulation of trades within province—Power of Dominion—Natural Products Marketing (British Columbia) Act* (1936)—*If* ultra vires.

It is now well settled that the enumeration in S. 91 of "the regulation of trade and commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate provincial purposes particular trades or business so far as the trade or business is confined to the province. It follows that to the extent that the Dominion is forbidden to regulate within the province, the province itself has the right under its legislative powers over property and civil rights within the province. 'Natural products' as defined in the Natural Products Marketing (British Columbia) Act are not confined to natural products produced in British Columbia. But the Act is clearly confined to dealings with such products as are

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situate within the province. "Transportation" is confined to the passage of goods whose transport begins within the province to a destination also within the province. The pith and substance of this Act is that it is an Act to regulate particular businesses entirely within the province and it is therefore *intra vires* of the province (*Lord Atkin.*) GEORGE WALKEM SHANNON *v.* LOWER MAINLAND DAIRY PRODUCTS BOARD. **180 I.C. 538 =11 R.P C 182=2 Fed L.J. 147=A.I.R. 1939 P.C. 36 (P.C.).**

——*British North America Act, Ss.* 91 (3) *and* 92 (13) *and* (16)—*Imposition of licence fees—Provisions in Natural Products Marketing (British Columbia) Act—Validity.*

If regulation of trade within the province has to be held valid, the ordinary method of regulating trade, *i e.*, by a system of licences, must also be admissible. A licen e itself merely involves a permission to trade subject to compliance with specified conditions. A licence-fee, though usual, does not appear to be essential. But if licences are granted it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the province or for both purposes. The object would appear to be in such a case to raise a revenue for either local or provincial purposes. It cannot be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. The provisions in Natural Products Marketing (British Columbia) Act regarding power to impose licence fees which may be vested in provincial boards by the Lieutenant-Governor in Council can also be supported on the ground that they are fees for services rendered by the province or by its authorized instrumentalities under the power given by S. 92 (13) and (16). (*Lord Atkin*) GEORGE WALKEM SHANNON *v.* LOWER MAINLAND DAIRY PRODUCTS BOARD. **180 I C. 538=11 R.P.C. 182=2 Fed.L.J. 147=A.I.R. 1939 P.C. 36 (P.C).**

——*Canada—Legislative powers of Dominion Parliament—Employment and Social Insurance Act*, 1935—*If* ultra vires.

The Dominion Legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the province or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be colourable device or a pretence If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain. The substance of the Employment and Social Insurance Act. 1935, is contained in the sections constituting Part 3 They set up a now familiar system of unemployment insurance under which persons engaged in employment as defined in the Act are insured against unemployment. The funds required for making the necessary payments are to be provided partly from money provided by Parliament, partly from contributions by employed persons and partly from con-

tributions by the employers of those persons. The two sets of contributions are to be paid by revenue stamps. Every employed person and every employer is to be liable to pay contributions in accordan e with the provisions of Sch. 2, the employer being liable to pay both contributions in the first instance, recovering the employed person's share by deduction from his wages, or if necessary in certain cases by action

Held, there could be no doubt that *prima facie* provisions as to instances of this kind, especially where they affected the contract of employment, fell within the class of property and civil rights in the province, and would be within the exclusive competence of the Provincial Legislature. As in pith and substance this Act was an Insurance Act affecting the civil rights of employers and employed in each province, it was invalid. (*Lord Atkin.*) ATTORNEY-GENERAL OF CANADA *v.* ATTORNEY-GENERAL OF ONTARIO. **168 I.C. 316=9 R.P.C. 272=A.I.R. 1937 P.C. 89 (P.C.).**

——*Canada—Power of Dominion to amend criminal law—Criminal Code, S. 498-A—If* ultra vires.

The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in S. 92 of B. N. America Act. It is no objection that it does in fact affect them. If it is a genuine attempt to amend the Criminal law, it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which apart from the amendment he could lawfully do. No doubt the plenary power given by S. 91 (2) does not deprive the Provinces of their right under S. 92 (15) of affixing penal sanctions to their own competent legislation. On the other hand there seems to be nothing to prevent the Dominion, if it thinks fit in the public interests from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments. S 498-A of the Criminal Code introduced by S. 9 of 25 & 26 Geo. V, c. 56 is not therefore *ultra vires* of the Parliament of Canada as there is no reason for supposing that the Dominion are using the criminal law as a pretence or pretext or that the legislature is in pith and substance only interfering with civil rights in the Province. (*Lord Atkin.*) ATTORNEY-GENERAL OF BRITISH COLUMBIA *v* ATTORNEY-GENERAL OF CANADA **168 I.C. 56=9 R. P.C. 224=A.I.R 1937 P.C. 91 (P.C.).**

——*Canada—Power of legislation of Dominion Parliament—Dominion Trade and Industry Commission Act*, 1935, *Ss.* 18 *and* 29 *and Ss.* 23 *to* 26—*If* ultra vires.

If the Dominion has power to create trade mark rights for individual traders, it is difficult to see why the power should not extend to that which is now a usual feature of national and international commerce a national mark. It is perfectly true that the method adopted in S. 18 of the Dominion Trade and Industry Commission Act, is to create a civil right of a novel character. Ordinarily a trade mark gives rights only when used in connection with goods manufactured or sold by the person who has the right to use the mark. A trade-mark "in gross" would be an anomaly. And it obviously is not contemplated that the Crown should have any proprietary interest in the goods to which the mark vested in the Crown is to be applied. But there seems no reason why the legislative competence of the Dominion Parliament should not extend to the creation of juristic rights in novel fields, if they can be brought fairly within the classes of subjects confided to Parliament by the constitution. The substance of the legislation in question is to define a national mark, to give the exclusive use of it to the Dominion so as to provide a logical basis for a system of statutory licences to producers, manufacturers and merchants. To vest the "exclusive property" in the mark in His Majesty is probably no more than to vest "the use of" the mark in His Majesty. Ss. 23 to 26 appear to define the power of the commission, and to give them no rights of interfering with rights or property in the Province, except possibly powers under S. 26 which are of like validity with the powers given by the valid Dominion Acts there referred to. For the reasons above given the legislation is within the competence of the Dominion Parliament and Ss. 18 and 19 and Ss. 23 to 26, both inclusive, are not *ultra vires*. (*Lord Atkin.*) ATTORNEY-GENERAL OF ONTARIO *v.* ATTORNEY-GENERAL OF CANADA. **168 I.C 128=9 R.P.C. 245=A.I.R. 1937 P.C. 99 (P.C.).**

——*Canada—Powers of legislation of Parliament of Canada—Natural Products Marketing Act*, 1934, *and its Amending Act*, 1935—*If* ultra vires.

The provisions of the Natural Products Marketing Act of 1934, and its amendment in 1935, cover transactions in any natural product which are completed within the province, and have no connection with inter-provincial or export trade. The enactments, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and inter-provincial trade and committing the regulation of external and inter-provincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority. The whole Act is therefore *ultra vires*. *King* v. *Eastern Terminal Elevators*, (1925) S. C. R. 434, Approved. (*Lord Atkin.*) ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* ATTORNEY-GENERAL OF CANADA. **9 R P.C. 247=168 I.C. 10=A.I.R. 1937 P.C. 93 (P.C.).**

——*Canada—Power of Parliament—Legislation as to insolvency—Farmers' Creditors Arrangement Act*, 1934, *as amended by Amendment Act*, 1935—*If* ultra vires.

The statutory conditions of insolvency which enable a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws apply, are not intended to be stereotyped under head 21 of S. 91, British North America Act, so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters.

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The legislative provisions as to compositions enacted by the Farmers' Creditors Arrangement Act, 1934, as amended by Amendment Act, 1935, by which bankruptcy is avoided, but which assumes insolvency is properly within the sphere of bankruptcy legislation. The Act is, therefore, a genuine legislation relating to bankruptcy and insolvency and falls within head 21 of S. 91, British North America Act. (*Lord Thankerton.*) ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* ATTORNEY-GENERAL OF CANADA **168 I C. 64=9 R.P.C. 220=A.I.R 1937 P.C. 95 (P C.).**

——*Ceded territories—'Cession'—If includes voluntary cession by consent of people.*

The word "cession" is not restricted to cases where the possession was acquired either by conquest or by cession, but it includes cases of voluntary cession by the general consent of people. Hence, the division of ceded territories into two classes, those acquired by an act of cession from sovereign power and those ceded by the general consent or desire of the inhabitants, is not correct (*Lord Maugham.*) EDGAR SAMMUT *v.* STRICKLAND. **180 I.C. 424=11 R P C. 159 =48 L W. 551=A.I.R. 1939 P.C. 39 (P.C).**

——Interpretation of Constitution Act—British North America Act, Ss. 91 and 92—Dominion Law and Provincial Law—Conflict between—Effect of—Provincial Law—*Ultra vires* or *intra vires*—Tests—Considerations for Courts. *See* INTERPRETATION OF STATUTES—CONSTITUTION ACT. **1939 M.W.N. 142 (P.C.).**

——*Possession—Ceded territories—Voluntary cession—Power of Crown to legislate.*

Even in the case of possessions acquired by voluntary cession, like Malta, the Crown is by virtue of Royal Prerogative *prima facie* entitled to legislate and the principle which excludes cases of settlement from the Royal Prerogative has no application to such a case. (*Lord Maugham.*) EDGAR SAMMUT *v.* STRICKLAND. **180 I C. 424=11 R.P.C. 159=48 L.W. 551=A.I.R. 1939 P.C. 39 (P.C.).**

——*Possession—Responsible Government granted by Crown—Revocation of by virtue of express power to do so—Power of Crown to make laws for such possession.*

As a general rule a grant of representative institutions made without the reservations of a power of concurrent legislation precludes the exercise of a prerogative while the legislative institutions continue to exist and a power of revoking the grant must be reserved or it will not exist. But it cannot be said that once such a grant is made, the Crown is immediately and irrevocably deprived of its right to legislate by Letters Patent or Ordinance, unless there is an express reservation to that effect. Hence, where the grant of the responsible Government is revoked by virtue of an express power contained in the grant, the Crown has by Royal Prerogative power to legislate for such possession by Letters Patent or Ordinance even in the absence of express reservation in the grant. (*Lord Maugham*) EDGAR SAMMUT *v.* STRICKLAND. **180 I C. 424=11 R.P.C. 159=48 L.W. 551=A.I.R. 1939 P.C. 39 (P.C.).**

——*Treatise and performance of obligations thereunder—Powers of Executive and Legislature—Draft conventions of International Labour Organisation of League—Canada ratifying draft conventions as to Hours of Work, Minimum Wages and Weekly Rest in industrial undertakings—Legislation by Dominion Parliament—If* ultra vires*—British North America Act, Ss, 91, 92 and 132.*

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries the stipulations of a treaty duly ratified do not, within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification, seek to obtain from Parliament an expression of approval. But it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament has a constitutional control over the executive; the creation of the obligations undertaken in treaties and the assent to their form and quality are the functions of the executive alone. Once they are created, while they bind the State as against the other contracting parties. Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not possess absolute authority in a federal State where Legislative authority is limited by a constitutional document or is divided up between different Legislatures in accordance with the class of the subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed and that depends upon the authority of the competent legislature or legislatures. The Treaty of Versailles was made between the Allied and Associated Powers of the one part and Germany of the other part The British Empire was represented by the English Ministers as representing His Majesty the King, and Canada and other Dominions by their respective Ministers. By the contracting parties agreeing to the covenant of the League, the signatories were to be the original members of the League of Nations. The Dominion of Canada was one of the signatories and thus became the original member of the League. Part 13 deals with 'Labour' and states therein that the object of the League is to

improve the conditions of labour throughout the world. It also states that the contracting parties agree to the establishment of a permanent organization for the promotion of the desired objects and that the members of the League shall be the members of the organization. In accordance with Part 13 draft conventions with respect to Limitation of Hours of Work in industrial undertakings, the Weekly Rest and Minimum Wages in industrial undertakings were adopted by general conference of the International Labour Organization. These three conventions were ratified by the Dominion of Canada in 1935 by the resolutions of the Senate and House of Canada approving therein. Each of the draft conventions contained stipulations binding on the members of the League who ratified them. The ratification was approved by the Governor-General in Council and the ratification was communicated to the Secretary-General of the League of Nations. The statutes which in effect give effect to the draft conventions were passed by the Parliament of Canada and received the Royal assent and became laws. It was contended by the Provincial Governments that the statutes affected property and civil rights of the subjects in each Province and that they were *ultra vires* of the Dominion Parliament and that neither S. 132 nor S 91, British North America Act, could apply to them.

Held, that the obligations were not obligations of Canada as part of the British Empire, but of Canada by virtue of her new status as an international person, and did not arise under a treaty between the British Empire and foreign countries. No obligation to legislature arose until the Canadian executive, left with an unfettered discretion of their own volition, acceded to the conventions under the Treaty of Versailles *a novus actus* not determined by the Treaty. For the purposes of these statutes, the obligation arose under the conventions alone. The legislation made by the Canadian Parliament by enacting the statutes, obligation to make which arose under the conventions under the Treaty, which the Canadian executive had no power to enter into, was *ultra vires* of the Dominion Parliament and was not sanctioned by S. 132 of the Act The legislation as to these classes of subjects, *viz.*, as to the property and civil rights in the province having been assigned exclusively to the Provincial Legislatures by S. 92 of the Act, the Dominion Parliament could not legislate on the said subjects. There being no such thing as treaty legislation but only a distribution of legislative powers between the Dominion and the Provinces, the distribution being based on classes of subjects and it being one of the essential conditions in the Inter-Provincial compact to which the B. N A. Act gives effect. the Dominion Parliament could not be said to have power to legislate for obligation arising out of treaty and make the same binding on the Provinces in face of Ss. 91 and 92 of the Act. The legislation also could not be deemed to be valid under S. 91 by saying that it concerned with matters of such general importance as to have "attained such dimensions as affect the body politic" and to have "ceased to be merely local or personal and to have become matters of national concern". Each of the said Acts was *ultra vires* of the Parliament of Canada.

CONTEMPT.

(*Lord Atkin.*) ATTORNEY-GENERAL OF CANADA *v.* ATTORNEY-GENERAL OF ONTARIO. **168 I.C. 117=9 R.P C. 239=A.I.R 1937 P.C. 82 (P.C.).**

CONSTRUCTION

See (1) CONTRACT—CONSTRUCTION.
(2) DEED—CONSTRUCTION.
(3) HINDU LAW—WILL.
(4) LEASE—CONSTRUCTION.
(5) MORTGAGE—CONSTRUCTION.
(6) WILL—CONSTRUCTION.

CONSTRUCTION OF STATUTES. *See* INTERPRETATION OF STATUTES.

CONSTRUCTIVE ESTOPPEL.

See (1) C. P CODE, S. 11
(2) EVIDENCE ACT, S. 115.

CONSTRUCTIVE NOTICE. *See* T. P. ACT, S 3.

CONSTRUCTIVE TRUST.

See TRUST.
TRUSTS ACT, Ss. 80-94.

CONSUMMATION OF MARRIAGE.

See MAHOMEDAN LAW—MARRIAGE.

CONTEMPORANEOUS AGREEMENT.

See (1) DEED—CONSTRUCTION.
(2) EVIDENCE ACT, S. 92.

CONTEMPT—*Apology—Nature and contents of.*

An apology is not a weapon of defence forged to purge the guilty of their offences. Nor is it intended to operate as a universal panacea. It is intended to be evidence of real contriteness. Only then is it of any avail in a Court of Justice. It must be tendered at the earliest opportunity unreservedly and unconditionally. Everything depends on the circumstances as well as upon the nature of the apology and the manner in which it is tendered (*Bose, J.*) SUBORDINATE JUDGE *v.* JAWAHARLAL **1940 N.L.J. 425.**

——*Interference with receivers.*

It is well settled that when receivers are appointed by a Court interference with them and obstruction to them will amount to contempt of Court, and that the forcible taking of the rents and profits for which the receiver has been appointed or of chattels in his possession as receiver will amount to such interference and obstruction. (*Henderson and Khundkar, JJ.*) TRIDIBESH BASU *v.* JITENDRA KUMAR BASU. **71 C.L.J 409=44 C. W.N 925=A I.R 1940 Cal. 487.**

——*Letter by party to Judge seised of the case—Imputation against Judge's impartiality—Duty of Court.*

Where a party to a pending case wrote a letter to the Judge seised of the case containing the following statement 'you have on your responsibility caused all the e proceedings against law to be taken with a view to cause loss to me. In case I succeed in appeal, you yourself shall be responsible for the property as the value thereof due to the above mentioned unlawful acts', it was held that it amounted to contempt of a serious nature and that it contained a threat and an imputation against the Judge's impartiality and that it was a serious matter which could not be treated lightly. (*Bose, J.*) SUBORDINATE JUDGE *v.* JAWAHARLAL. **1940 N.L.J 425.**

——*Pending proceedings—Speech at meeting.*

The question in all cases of comment on pending proceedings is not whether the publication

does interfere, but whether it tends to interfere with the due course of justice, and on the same principle it is a contempt of Court to make a speech tending to influence the result of a pending trial whether civil or criminal, or to deliver a speech at a meeting. (*Thomas, C.J. and Radha Krishna, J.*) RADHA KRISHNA *v.* RAJA RAM. 188 I.C. 408=12 R.O. 431=1940 O.A. 456=1940 O.L.R. 355=41 Cr.L.J. 584=1940 A.Cr.C. 101=1940 A.W.R. (C.C.) 238=1940 O.W.N. 491.

CONTEMPT OF COURT.

Abuse of process.
Attack against parties to pending litigation.
Attack against witnesses.
Communication to Judges.
Disobedience of order.
Jurisdiction.
Newspaper article.
Pending case.
Power of Court to commit.
Procedure.
Proof.
Scandalising Court.
What amounts to.

Abuse of process

——*Abuse of process of obtaining warrant against another in order to blackmail.*

The misuse of the process of the Court for obtaining a warrant against a person against whomthe complainant has no intention of proceeding, merely to use it as a lever for blackmailing him, amounts to contempt of Court. (*Monroe and Blacker, JJ.*) ABDUL HAMID *v.* IQBAL HUSSAIN. 181 I.C. 861=11 R.L. 893=40 Cr.L.J. 571=41 P.L.R. 130=A.I.R. 1939 Lah. 143.

Attack against parties to pending litigation.

——*Abuse in relation to the subject-matter of the suit—If constitutes contempt—Test—Intention of writer—If material—Tendency to prejudice fair trial—If sufficient to justify proceedings for contempt.*

Abuse of parties concerned in a litigation constitutes contempt of Court, and anything which tends to excite prejudice against the parties in litigation while it is pending is contempt of Court. In considering whether the writer of an article in a newspaper has been guilty of abusing and vilifying the parties to a pending suit in relation to their defence, and thereby prejudicing a fair trial for them at the hearing, the test is not whether the article has in fact obstructed or interfered with the administration of justice, or will so obstruct or interfere, but whether it is calculated to do so or whether it is likely that it will have that effect. The intention of the writer may be of secondary importance, the question is what is the effect of the article? Has it a tendency to obstruct and interfere with the due and proper course of administration of justice? A libel on the parties to a suit which does not amount to an interference with the course of administration of justice is not a matter in respect of which contempt proceedings can be taken. The aggrieved party has his remedies elsewhere, namely, he can either prosecute the offender in a Criminal Court or sue him for defamation in a Civil Court. All proceedings in suits pending in a Court of justice are privileged, and any comment on the subject-matter of the suits and any abuse of the parties or holding them up to ridicule and contempt in the eyes of the public, whilst the suit is pending are not allowed. The object of proceedings in contempt in such cases is not so much to vindicate the dignity of the Court or of the person of the Judge, as to ensure that every litigant in a Court of justice has a fair and unprejudiced hearing at the trial on the merits of his case. Whether an article in a newspaper will in fact prejudice a party or not, or scare away his witnesses, or lead him to compromise the suit, is not the real and proper test in such a case. The Court has to read the article and see whether the article may have that effect, and thereby tend to interfere with the proper course of justice. If it has that tendency, it constitutes contempt of Court justifying the Court in taking action. (*Wadia, J.*) DEMIBAI *v.* RAWJI SOJPAL. 39 Bom.L.R. 471=170 I.C. 631=38 Cr.L.J. 942=10 R.B. 108=A.I.R. 1937 Bom. 305.

——*Assumption of truth of facts awaiting decision—Prediction that certain party will win and justice will thereby be defeated.*

A pamphlet which assumes the truth of certain facts which are connected directly or indirectly with the matters under consideration and awaiting decision in a pending litigation, amounts to contempt of Court. So also a document containing reflections of the gravest possible nature upon the conduct and the character of certain of the persons concerned in a pending proceeding and predicting that a certain party will win and thereby justice will be defeated. (*Costello, Biswas and Lodge, JJ.*) NAGENDRA NATH DAS, *In the matter of.* I.L.R. (1939) 1 Cal. 399=43 C.W.N. 333=185 I.C. 286=12 R.C. 354=41 Cr.L.J. 148=A.I.R. 1939 Cal. 672.

Attack against witness.

——*Complaint of defamation by accused against witnesses—Contempt—Test.*

Where a person accused of an offence under Ss. 420 and 406, I. P. Code, files a complaint for defamation against a witness in that case and during its pendency, in respect of certain statements made by that witness it was held that inasmuch as the complaint was made more than 6 months after the examination of all the witnesses and not straightaway as soon as the particular witness was examined, it was a *bona fide* act intended for the protection of the complainant's own good name and not an act aimed at putting pressure to bear on witnesses and as such there was not even a technical offence of contempt committed. (*Zia-ul Hasan and Yorke, JJ.*) MOHAMMAD YUSUF *v.* IMTIYAZ AHMAD KHAN. 181 I.C. 575=11 R.O. 308=40 Cr.L.J. 569=1939 A. Cr. C. 84=1939 O.L.R. 336=1939 O.W.N. 467=1939 O.A. 443=1939 A.W.R. (C.C.) 79=A.I.R. 1939 Oudh 225.

Communication to Judges.

Where after a magistrate has started proceedings in a case under S. 107, Cr. P. Code and has issued notices under S. 112, the writing of letters to that magistrate in respect of the proceedings pending before him grossly offends against the law of contempt of Court. It is in the clearest terms an attempt to prejudice the mind of the magistrate in regard to the trial of the case before him. (*Zia-ul-Hasan and Yorke, JJ.*) MAHA-

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BIR PRASAD *v.* C. B. GUPTA. 14 Luck. 653=181 I.C. 714=1939 O.W.N. 525=1939 O.A. 487=1939 A.Cr.C. 89=1939 O.L.R. 363=11 R.O. 323 (2)=1939 A.W.R. (C.C.) 84=A.I.R. 1939 Oudh 180.

——*Letter to Magistrate relating to proceedings under S.* 107, *Cr. P. Code, pending before him.*

Where a member of the Legislative Assembly wrote a letter to a Magistrate making certain suggestions with reference to proceedings under S. 107, Cr. P. Code, pending before him, it was held that it grossly offended against the law of contempt of Court and that no member of the Legislative Assembly had any right to interfere in such a manner in the course of administration of criminal justice. (*Thomas, C. J. and Radhakrishna, J.*) DT. MAGISTRATE, SULTANPUR *v.* RAMJAS YADAVA. 185 I.C. 754=12 R.O. 280=41 Cr.L.J. 233=1940 O.A. 651=1940 A.W.R. (C.C.) 372=1940 O.L.R. 40=A.I.R. 1940 Oudh 178.

Where a member of the Legislative Assembly writes letters to a District Magistrate about certain pending criminal cases, he is attempting to interfere with the administration of criminal justice which nobody is entitled to. (*Bennet and Verma, JJ.*) EMPEROR *v.* GAJADHAR PRASAD. 181 I.C. 558=11 R.A. 575=1939 A Cr.C. 35=1939 A.W.R. (H.C.) 128=1939 A.L.J. 99=A.I.R. 1939 All. 247.

——*When amounts to.*

Every private communication to a Judge for the purpose of influencing his decision upon a pending matter, is contempt of Court, as tending to interfere with the course of justice. On the facts of the case it was held that a letter addressed to a Magistrate at a time when no proceedings were pending before him did not amount to contempt, as it was not the intention of the writer to influence the Magistrate by means of that letter. (*Zia-ul-Hasan and Yorke, JJ.*) RAM SHANKAR. *v.* SHUKLA. 14 Luck. 649=181 I.C. 466=11 R.O. 307=1939 O.A. 447=1939 O.W.N. 522=1939 A.W.R. (C.C.) 82=1939 A. Cr C. 87=1939 O L.R. 315=40 Cr.L.J. 566 (2)=A.I.R. 1939 Oudh 182.

Disobedience of order.

——Breach of injunction issued by Court—Persons not parties to suit—Proceedings against—Competency. *See* C. P. CODE, O. 39, R. 2. A.I.R. 1937 Pat. 65 (S.B.).

——*Injunction against Government not to interfere with possession of* A—B *interfering with* A's *possession*—B *deriving his interest through Government—Government, if guilty of contempt.*

The Government granted certain lease of quarrying rights to *A*. *A* took possession of the quarries. In a dispute concerning lease the Government and its servants were restrained by an injunction from disturbing possession of *A*. *B*, who was not a party to the injunction proceedings, but who derived his supposed interest from the Government, continued to work the quarries. *A* brought an action for contempt proceedings against the Government for disobedience of the injunction, and against *B*, for aiding and abetting the disobedience.

Held, that Government could not be said to have disobeyed the injunction. It was for *A*, who had the immediate right to possession or

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was in possession under the order of the Court and not for the Government, who was not in actual possession to eject *B*. The duty of the Government was to leave those who claimed entitled to the possession of the soil to take the appropriate measures.

Held, further, as Government was not liable, *B*, who derived his interest through it, could also not be held liable for disobedience. 16 Pat. 159=A.I.R. 1937 Pat. 65=166 I.C. 966 (S. B.), reversed. (*Lord Porter.*) BANERJEE *v.* KUCHWAR LIME AND STONE CO., LTD. 17 Pat. 770=1938 P.W.N. 895=19 Pat.L.T. 867=178 I.C. 490=11 R P.C 111=1938 O.W.N. 1256=1938 O.L.R. 514=5 B.R. 171=68 C.L.J. 488=43 C.W.N. 197=1939 M.W.N. 18=49 L W. 10=41 Bom L.R. 136=41 P.L.R 168=1938 All.L.R. 914=1938 A.W.R. 216=A.I.R. 1938 P.C. 295=(1939) 1 M.L J. 715 (P.C.).

——*Consent prohibitory order—Party having knowledge of such order—Failure to serve him with injunction—If fatal.*

Where in the case of a consent prohibitory order the party whom it is sought to commit has knowledge of the order, the failure to serve that party with the injunction is not necessarily fatal, even although there has been ample time to have the order drawn up and a copy served. (*Panckridge, J.*) KHANTOBALA DEBI *v.* MAHARANI MANDALEESA KUMARI. 41 C.W.N. 821.

——*Judicial order restraining party from proceeding with certain action—Party so ordered, if can disobey it merely because he is advised that order is wrong.*

Where a person is restrained by a judicial order from proceeding with certain action, the person so ordered is not justified in disobeying the order merely because he is advised or thinks that the order is wrong in law. (*Ameer Ali, J.*) ALL INDIA SUGAR MILLS, LTD. *v.* SUNDER SINGH. 175 I.C. 872=11 R.C. 7=39 Cr.L J. 654=A.I.R. 1937 Cal. 601.

——*Terms of settlement between parties embodied in decree—Undertaking given by defendant not to dispose of property—Breach of undertaking—If amounts to contempt.*

Where a suit was concluded by a decree of Court embodying the terms of settlement between the parties one of which was an undertaking given by the defendant not to dispose of his properties until the decree was fully satisfied, and the defendant mortgaged the properties before the satisfaction of the decree,

Held, that the breach of the undertaking given to the Court amounted to contempt of Court and that the breach was not so trivial a matter as to be beneath the dignity of the Court to notice or punish it. (*Panckridge, J.*) HARI CHARAN DEY *v.* RANJIT KUMAR. 42 C.W.N. 203.

——*Evasion of warrant of arrest by convicted persons—Misrepresentation in revision petition to High Court.*

Where the accused were convicted by the trial Court, but were released on bail the same day by the Sessions Court which later on confirmed the conviction and issued warrants of arrest against them and the accused evaded those warrants of arrest and applied to the High Court in revision, making it appear to the High Court that they were in Jail, while in fact they were at no time in Jail, it was held that both their evasion and mis-

representation amounted to contempt of Court. (*Bennet and Iqbal Ahmad, JJ.*) MUMTAZ *v.* CHHUTWA. 189 I.C. 468=41 Cr.L J 741=1940 A.Cr.C. 89= 1940 A W.R (H C.) 334=1940 A. L.J. 309=A I.R. 1940 All. 386.

——*Guardianship proceedings — Application under S 476, Cr P. Code and a complaint under S. 500, I. P Code, by one against the other party— If can amount to contempt.*

Where during the course of guardianship proceedings, one of the parties files an affidavit containing aspersions on the other party and he thereupon files an application under S. 476, Cr. P. Code, for enquiry into the falsity of the allegations in the affidavit and for necessary action and also files a complaint against the other under S. 500, I. P. Code, neither the application under S. 476, Cr. P. Code, nor the complaint under S. 500, I. P. Code, constitutes contempt of Court. (*Collister and Bajpai, JJ.*) HRISHI KESH SANYAL *v.* A. P. BAGCHI. 1940 A.L.J. 579.

Jurisdiction.

——*Calcutta High Court- Power to commit.*

The power to commit for contempt was conferred on the Calcutta High Court by its charter and has been retained in the Court by subsequent legislation, namely, the High Courts Act of 1861, the Letters Patent of 1865, and the Government of India Act of 1919. (*McNair, J.*) CHANDANMULL KARNANI *v* SARDARILAL THAPAR. I.L.R. (1937) 1 Cal. 345=40 C.W.N. 1285.

——Chief Court of Oudh—Contempt of subordinate Courts. *See* CONTEMPTS OF COURTS ACT (1926), S. 2 (2) AND (3). 1939 O.W.N. 296 =A.I.R. 1939 Oudh 131 (F.B.).

——*Extent to, of power—Limits--Power to arrest person outside the Presidency.*

In a case of contempt, the High Court acting under its inherent powers may send a special bailiff to arrest a person at any place within its general jurisdiction, within the confines of the Bengal Presidency. But it has no power to order the arrest of a person outside the boundaries of the Presidency. The power, however, to send a special bailiff to arrest a person within its general jurisdiction should be jealously and carefully watched and exercised. Such an order ought only to be made in the rarest of cases (*McNair, J.*) CHANDANMULL KARNANI *v.* SARDARILAL THAPAR. I.L.R. (1937) 1 Cal. 345=40 C.W.N. 1285.

——*High Court—Inherent powers of, to punish —If affected by C. P. Code or Cr. P. Code.*

The High Court, as a superior Court of Record has an inherent power to punish for contempt, and that power is in no way affected, curtailed, diminished or restricted by the Codes of Civil or Criminal Procedure. (*McNair, J.*) CHANDANMULL KARNANI *v.* SARDARILAL THAPAR. I.L.R. (1937) 1 Cal. 345=40 C.W.N. 1285.

——*High Court—Jurisdiction to punish—Party failing to obey orders of High Court—Party giving undertaking in Court and removing himself from jurisdiction—Arrest — Powers of High Court—Procedure.*

Where a party fails to carry out the orders of the High Court, when he in *facie curiae* gives an undertaking to carry out those orders and then removes himself from the territorial jurisdiction of the High Court and fails to carry out that undertaking or to give any explanation for his failure, when further he treats with scant courtesy the persons sent to his place under the orders of the Court and in terms of a decree to which he has been a consenting party, it is the duty of the Court to exercise the powers with which it has been invested for the enforcement of its orders. It is not necessary for the Court in such a case to send a special bailiff to arrest him at his place beyond the general limits of the Court's jurisdiction, assuming the Court has such power. The spirit of co-operation existing between the Courts in India will be sufficient alone to make such orders effectual, and the Court in the province where the party guilty of contempt resides will assist in making the order effectual. (*McNair, J.*) CHANPANMULL KARNANI *v.* SARDARILAL THAPAR. I.L.R. (1937) 1 Cal. 345=40 C.W.N. 1285.

——*Judicial order of one High Court—Breach of order committed in other High Court's jurisdiction—Former High Court, if can commit such person for contempt.*

Where a person is restrained by a judicial order of one High Court from proceeding with certain action and the person commits contempt of that High Court by defying the order in the jurisdiction of other High Court, the former High Court has jurisdiction to commit the person for contempt. I.L.R. (1937) 1 Cal. 345, Foll. (*Ameer Ali, J.*) ALL-INDIA SUGAR MILLS *v.* SUNDER SINGH. 175 I.C. 872=11 R.C. 7=39 Cr. L.J. 654=A.I.R. 1937 Cal. 601.

——*Non-Presidency High Court — Inherent power to punish for contempt of itself—Indefinite sentence—Legality—Contempt of Courts Act, S. 3.*

The jurisdiction to punish for contempt of itself is inherently vested in every High Court in India including the non-Presidency High Court, which is also a superior Court of Record. This inherent power of the High Courts has not been taken away or in any wise limited by Act XII of 1926. Consequently the High Courts in India continue to have power to deal with contempt of themselves in the same manner as a Court of Record has under the common law of England. There is no limitation imposed on the High Courts in the matter of punishment of offenders for contempt. A sentence passed on an offender committing him to custody in jail until such time as he apologised to the Court and further purged his contempt by paying into the Court the sums of money received in defiance of the Court's injunction, is in accordance with law. (*Young, C.J., Monroe and Din Mahomed, JJ.*) HARKISHEN LAL *v.* EMPEROR. 18 Lah. 69=39 P.L.R. 733=170 I.C. 375=38 Cr.L.J. 883=10 R.L. 103 (2)=A.I.R. 1937 Lah. 497 (S.B.).

——*When amounts to contempt of Court—Privilege of the press—Fallacy as to.*

The special privilege of the press is a time worn fallacy, and the sooner the misconception that the press is not accountable to the law is removed the better it will be. No editor has a right to assume the role of investigator or try to prejudice the Court against any person. Writing and publishing an article in a newspaper likely to prejudice the course of justice relating to a pending case amounts to a contempt of Court. (*Thomas, C.J and Radha Krishna, J.*) DISTRICT MAGISTRATE, KHERI *v.* HAMID ALI GARDISH. 15

Luck. 268=185 I.C. 342=12 R.O. 242=41 Cr. L.J. 169=1940 A.W.R. (C.C.) 21=1939 O.W.N. 1132=A.I.R. 1940 Oudh 137.

Newspaper article.

———*Newspaper articles—Comments on Magistrate's finding in inquest held under S. 176, Cr. P. Code—Punishment—Principle of.*

The principle underlying the case in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders is not the protecting of either the Court as a whole or the individual Judges of the Court from a repetition of them, but the protecting of the public and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired. An article in newspaper containing comments on the finding of the Magistrate in an inquest under S. 176, Cr. P. Code, into the death of certain person amounts to contempt of Court if the comments impute deliberate perversity incapability and partiality to the police on the part of Magistrate in question. For the publication of this article the publisher and editor are liable to be dealt with for contempt of Court and they cannot be allowed to go unpunished merely because they have tendered an apology. (*Mya Bu and Mosely, JJ.*) ADVOCATE-GENERAL, BURMA *v.* MAUNG CHIT MAUNG. 187 I.C. 308=12 R.R. 330=41 Cr.L.J. 445=A.I.R. 1940 Rang. 70.

Pending case.

———*Pending case—Newspaper article—Allegation of evidence in contemplated prosecution being unreliable and obtained by unfair means—Suggestion of improper means to obtain admissions from accused—Effect of—If amounts to contempt of Court.*

It is well settled that any act done or writing published which is calculated to interfere with or obstruct the due course of justice or the legal process of the Court is contempt of Court, although the Court will not take action for contempt unless it thinks that the conduct of the party in question is calculated seriously to interfere with the course of justice. Proceedings in contempt are not taken merely in respect of technical offences. To suggest in a newspaper article that evidence intended to be used in a prosecution which is either proceeding or is plainly contemplated, has been obtained by improper means and is unreliable or to suggest that admissions by the accused have been improperly obtained is such as is calculated to interfere with the due course of justice, and amounts to contempt of Court, as such allegations introduce at once into the trial an element of prejudice against the prosecution evidence. (*Beaumont, C.J. and Wassoodew, J.*) GOVERNMENT PLEADER, BOMBAY *v.* SHANKAR DATTATRAYA JAVADEKAR. I.L.R. (1938) Bom. 176=174 I.C. 520=10 R.B. 476=39 Cr.L.J. 424=40 Bom.L.R. 73=A.I.R. 1938 Bom. 198.

———*Newspaper article—Attack on and accusations against party—When amount to contempt.*

Any publication which tends to excite prejudice against the parties to a pending litigation or their litigation while it is pending constitutes contempt of Court. Attacks on or abuse of a party, his witnesses or solicitor constitute contempt, but a mere libel on a party, not amounting to an interference with the course of justice, does not, the party being left to his remedy by action. To publish injurious misrepresentations directed against a party to the action, especially when they are holding that party to hatred or contempt, is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to, for a like reason. The fact that the trial Judge would not be affected by the article has no bearing on the matter. An article published in a newspaper stated the defendant's case and inferred that it was true. It then accused the plaintiff of having ruined the defendants and of having concocted false criminal cases against them; and it further accused the plaintiff of using his influence maliciously and to the detriment of the defendants. The article was published pending a suit instituted by the plaintiff against the defendants.

Held, that the article constituted grave contempt, and that the fact that the article closed with an appeal for assistance for the defendants did not help the author or publisher of the article, as the appeal for help could well have been made without the accusations which preceded it. (*Leach, C.J. and Madhavan Nair, J.*) RAJA OF VENKATAGIRI *v.* RAMA NAIDU. I L.R. (1938) Mad. 545=1937 M.W.N. 1193=173 I.C. 455=10 R.M. 589=39 Cr.L.J. 328=1937 M.Cr.C. 392=48 L.W. 444 (2)=A.I.R. 1938 Mad. 248=(1938) 2 M.L.J. 81.

———*Newspaper headlines—Publication of complaint with comments.*

Where a newspaper published with scare headlines portions of a complaint against the respondent in which gross allegations were made against him four months after the complaint had been filed, while proceedings were actually pending in the trial Court and also in the High Court for quashing the complaint, and further the paper published above the complaint its own comments.

Held, that nothing could be more in the nature of contempt than action of that character. (*Young, C.J and Monroe, J.*) VIDYA SAGAR KAPUR, *In the matter of.* 178 I.C. 990=11 R.L. 512=40 Cr.L.J. 156=40 P.L.R. 791=A.I.R. 1938 Lah. 815.

———*Resolution at public meeting making accusations against party—If amounts to contempt.*

Where during the pendency of a suit instituted for a declaration that certain land claimed by the defendant is a public pathway, a resolution is passed at a public meeting protesting against the attempts of the defendant to close the land in question which is being used by the general public from time immemorial, the effect and tendency of the resolution is to embarrass, if indeed not to imperil the defendant's cause and that being so, the passing of that resolution amounts to contempt. To the resolution itself, there is not so much objection in so far as it is, or purports to be merely a resolution of the residents of the locality to support the cause of establishing the right of the public over the land in suit. But it is objectionable to put forward in the resolution of a public meeting a positive assertion of a public right of way, as it would predispose people to a belief right or wrong, that the defendant is an invader of the public right. It undoubtedly conveys

the impression of a public denunciation of the defendant's conduct which might well deter inhabitants of the locality from bearing testimony in support of his case. (*Jack and Khundkar, JJ.*) SURESH CHANDRA MUKERJEE *v.* BISWA NATH CHUCKERBUTTY. I.L.R. (1938) 2 Cal. 447=178 I.C. 744=11 R C. 405=42 C.W.N. 952=A.I.R. 1938 Cal. 772.

——*Statements published — Grave offence — Punishable even if apology were tendered.*

(1) Where the contempt of Court is of a very grave nature, the party in contempt may be punished in spite of apology tendered. (2) There is nothing more incumbent upon Courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. In re *Read* and *Huggenson*, (1742) 2 Atk. 469: 26 E.R. 683, foll. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) BAPAYYA NAIDU *v.* BAPAYYA. 179 I.C. 91=11 R M. 521=40 Cr.L.J. 169=1938 M. Cr. C 269=1938 M. W.N. 1008=A.I.R. 1938 Mad. 975=(1938) 2 M.L.J. 520.

——*What constitutes.*

A pamphlet published during the pendency of proceeding comes within the definition of "contempt of Court" if (1) it assumes the truth of certain facts which are connected directly or indirectly with the matters under consideration and awaiting decision in the proceeding itself; (2) if the document contains reflections of the gravest possible nature upon the conduct and the character of certain of the persons in the proceeding; and (3) if the pamphlet purports to predict that certain party will be or is likely to be successful in the proceeding and adds the comment in effect that if he is successful, law and justice will be defeated. (*Costello, Biswas and Lodge, JJ.*) BIBHABATI DEVI *v.* RAMENDRA NARAYAN ROY. I.L.R. (1939) 1 Cal. 399=185 I.C. 286=12 R.C. 354=41 Cr.L.J. 148=43 C.W.N. 333=A.I.R. 1939 Cal. 672.

Power of Court to commit.

——*Power of Court to commit—Exercise of—Rules.*

The power to commit for contempt is not to be lightly used and should be reserved for cases where the contempt is deliberate and of such a nature that committal is called for. (*Leach, C.J., Madhavan Nair and Gentle, JJ.*) TULJARAM RAO *v.* SIR JAMES TAYLOR. I.L.R. (1939) Mad. 466=181 I.C. 451=11 R M. 813=1939 M.W.N. 113=40 Cr.L.J. 533=1939 M Cr C. 83=49 L.W. 29=A.I.R. 1939 Mad. 257=(1939) 2 M.L.J. 843 (F B.).

Persons who are not parties to the proceedings can be proceeded against in contempt if they at the investigation of the insolvent refuse to vacate possession of the properties of the insolvent as ordered by the Court. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* SURYAKANTHAMMAL. I.L.R. (1939) Mad. 19=181 I C 288=11 R.M. 787=1938 M. W.N 920=48 L.W. 462=A.I.R. 1938 Mad. 927=(1938) 2 M.L J. 609.

[Reversing 46 L.W. 900=1937 M.W.N. 125.]

——High Court— Insolvency jurisdiction — Powers to commit persons not parties but aiding insolvent in defying orders passed in insolvency. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 58. 48 L.W. 462=(1938) 2 M.L.J. 609.

Procedure.

——*Procedure—Injunction against* B—A *abetting* B *in disobeying it—Petition against* A—*Form of.*

Where *A* aids and abets *B* in his disobedience of an injunction, it is a wrong remedy to petition the Court to issue notice upon *A* to show cause why he should not be committed for contempt for disobedience of the injunction. The petition should ask the Court that *A* be committed for aiding and abetting *B* in his disobedience. In the first case the Court might dismiss the application and ask the petitioner to apply again in proper form. (*Lord Porter.*) BANNERJEE *v.* KUCHWAR LIME AND STONE CO., LTD. 17 Pat. 770=11 R.P. C. 111=1938 O.W.N. 1256=5 B.R. 171=1938 O L.R. 514=68 C.L J. 488=43 C.W.N. 197=1939 M.W.N. 18=49 L.W. 10=41 Bom.L.R. 136=41 P L.R. 168=1938 A.L.R. 914=1938 A.W. R. 216=1938 P.W.N. 895=19 Pat.L.T. 867=178 I.C. 490=A.I.R. 1938 P.C. 295=(1939) 1 M L.J. 715 (P.C.).

——*Obstruction to members of Official Receiver's staff—Initiation of either criminal proceedings or contempt proceedings—Discretion of Official Receiver.*

If the Official Receiver considers that members of his staff have been obstructed to an extent which amounts to a contempt of Court, it is entirely within his discretion either to take proceedings for contempt or to initiate criminal proceedings. It is, however, a salutory principle that where the contempt is some form of physical violence or obstruction and is as such punishable by a Criminal Court, it should be dealt with there. (*Panckridge, J.*) NIRMAL CH CHATTERJEE *v.* MAHENDRA LAL SARKAR. 41 C.W.N. 1325.

Proof.

——*Proof—Charge of deliberate withholding of documents called for—Mere suspicion—If sufficient.*

To establish a charge of contempt of Court, it is essential to prove that there are in the case other documents which have been deliberately withheld by the person charged. Mere suspicion, although very deep is not sufficient to establish a charge of contempt of Court. (*McNair, J.*) SITARAMA KHEMKA *v.* ARTHUR CHARSLEY THOMAS. 161 I.C. 738=8 R.C. 544=A.I.R. 1936 Cal. 132.

Scandalising the Court.

——*Scandalising the Court—What amounts to—Generol attack hostile to utility of Courts of justice—Process for contempt—If justified.*

Any act done or writing published which is calculated to bring a Court or a Judge into contempt or to lower his authority is contempt of Court. It is a class of contempt usually known as "scandalising the Court"; the principle on which the Court proceeds in taking notice of this class of contempt is based on the interest of the public and not on the interest of the particular Court or Judge who is attacked. Where attacks are made on the personal character of a Judge, or where base or improper motives in the decision of a case are attributed to a Judge, the process of the Court should be used; but the process of

contempt for scandalising the Court is one which should be sparingly used. A general expression of opinion hostile to the utility of Courts of Justice, without any attack on any particular Judge or comment on any particular case, is not likely to affect the public and need not disturb the equanimity of Judges, and does not amount to such a contempt of Court as should be dealt with by the process of contempt. (*Beaumont, C.J. and Wassoodew, J.*) GOVERNMENT PLEADER, BOMBAY *v.* TULSIDAS SUBHANRAO JADHAV. I.L.R. (1938) Bom. 179=40 Bom.L.R. 75=10 R.B. 457 =174 I.C. 492=39 Cr.L.J. 440=A.I.R. 1938 Bom. 197.

What amounts to.

———*What amounts to.*

Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which is characterised as 'scandalising a Court or a Judge.' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. In applying the law the Courts should not lose sight of local conditions. But whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Where the writer had written an article on the inequality of sentence under text, "The Human Element".

Held, that he was perfectly justified in pointing out what is obvious, that sentences do vary in apparently similar circumstances with the habit of mind of the particular Judge. It is quite inevitable. Some very conscientious Judges have thought it their duty to visit particular crimes with exemplary sentences; others equally conscientious have thought it their duty to view the same crimes with leniency. Hence, to say that the human element enters into the awarding of punishment is not contempt of Court. (*Lord Atkin.*) ANDRE PAUL *v.* THE ATTORNEY-GENERAL OF TRINIDAD. 162 I C. 92=8 R.P.C. 229=1936 A.L.J. 671=38 P.L.R. 541=44 L W. 15=40 C. W.N. 801=1936 A.W.R. 600=38 Bom.L.R. 681 =1936 P.W.N. 439=1936 M.W.N. 619=64 C.L. J. 36=A.I.R. 1936 P.C. 141=71 M.L.J. 665 (P. C.).

———*Intentional disobedience of Court's order.*

A Guzerati person applied for restoration of his minor boy from an Anglo Indian lady who looked after him for a long time with the father's concurrence In a previous proceeding, the father was appointed as the guardian of the boy and the father was ordered to have the custody of his boy and was to arrange to take the child for a change. The father made the arrangement but the lady refused to deliver the child to its father in spite of many requests. The lady had acted in such a manner as to indicate clearly that she wanted to have an absolute control over the child in derogation of the rights of the father. Any amicable settlement suggested by the father was refused by her.

Held, that the lady was guilty of contempt. (*McNair, J.*) RANJANI KANTA PADIA, *In re.* 174 I.C. 785=39 Cr.L.J. 466=10 R.C. 717=A.I. R. 1938 Cal. 38.

———*Plaint reflecting severally on defendant's conduct—Its publication, if contempt.*

Where the publication of a plaint is the publication of a document reflecting severely on the conduct of the defendant, a contempt of scandalous and serious nature is committed. (*Monroe and Din Mohammad, JJ.*) BENNETT COLEMAN & CO., LTD. *v.* G. S. MONGA. 18 Lah. 34=165 I.C. 813=9 R.L. 305=38 P.L.R. 1166=1936 Cr.C. 1005=38 Cr.L.J. 73=A.I.R. 1936 Lah. 917.

———*Matters pending before Court or about to come before Court—Comment on—Discussion of rights and wrongs—Propriety of—Good intention and* bona fides *of person commenting—Relevancy.*

To com nent on a case which is *sub-judice* or to suggest that the Court should take a certain course in respect of a matter before it undoubtedly constitutes contempt and honesty of motive cannot remove it from this category. If this were to be allowed persons in a position to assist the Court by their evidence might be prevented from coming forward, and persons appearing as witnesses might be influenced in their testimony. The criterion is not whether the Court will be influenced, but whether the action complained of is calculated to prejudice the course of justice. Good intention is not the deciding factor in a matter of contempt, though the intention and *bona fide* nature of the action constituting contempt have an important bearing on the question whether the Court should take action. To comment on a case which is about to come before the Court with knowledge of that fact is just as much contempt as comment on a case actually launched. A discussion in a newspaper of the rights and wrongs of a case when pending before a Court is improper and constitutes contempt of Court. This does not mean that reference cannot be made to pending cases or that items of news which are concerned with pending cases should not be published. What cannot be permitted is a discussion of the attitude which the Court should adopt when considering the case. (*Leach, C.J., Madhavan Nair and Gentle, JJ.*) TULJARAM RAO *v.* SIR JAMES TAYLOR. I.L.R. (1939) Mad 466=181 I. C. 451=11 R M. 813=1939 M.W.N. 113=40 Cr. L.J. 533=1939 M Cr.C. 83=49 L W. 29=A.I.R. 1939 Mad. 257=(1939) 2 M.L.J. 843 (F.B.).

———*Notice demanding withdrawal of abusive epithet in written statement—Threat of suit for defamation—If constitutes contempt of Court.*

CONTEMPT OF COURT.

Where a person not a party to the suit sends a registered notice to the defendant, demanding the withdrawal of an abusive epithet used in the written statement with reference to him, and threatening to file a suit for damages, if it was not withdrawn, it is merely the formal preliminary notice for a suit for damages for libel and does not constitute contempt of Court. This is quite different from putting pressure on a party to withdraw a plea in a civil suit, which may amount to contempt of Court. (*Bennet and Verma, JJ.*) BALDEO SAHAI *v.* SHIVA DATT SHARMA. **187 I.C. 65=12 R.A. 486=1939 A.W.R (H.C.) 887=1939 A.L.J 1157=1940 A.Cr.C. 14=41 Cr.L.J. 390=A.I.R. 1940 All. 114.**

———*Prohibitory order—Disobedience by party and stranger, difference—Marriage in spite of prohibition.*

Contempt of Court is either (1) criminal contempt consisting of words or acts obstructing or intending to obstruct the administration of justice or (2) contempt in procedure, consisting of disobedience to the judgments, orders or other process of the Court and involving private injury. Ordinarily a party to an action who disobeys a prohibitory order, such disobedience though wilful is contempt in procedure, whereas persons who aid and abet such disobedience and are not parties to the action are guilty of criminal contempt. Where in spite of an order of prohibition a father performs the marriage of his minor daughter he is guilty of contempt along with the person who married the girl knowing of the prohibition. (*Niyogi, J.*) DISTRICT JUDGE, CHHINDWARA *v.* BASORI LAL. **189 I.C. 813=1940 N.L.J. 157=A.I.R. 1940 Nag. 203.**

———*Threatening letters to opposite side counsel demanding withdrawal of allegations in pleadings —If amounts to.*

It is indeed difficult and well nigh impossible to frame a comprehensive and complete definition of 'contempt of Court.' Anything that tends to curtail or impair the freedom of the limits of the judicial proceeding must of necessity result in hampering the due administration of law and in interfering with the course of justice. It must therefore be held to constitute contempt of Court. Where a party sends threatening letters to the opposite party and his advocate demanding the withdrawal of certain allegations in the pleadings it is calculated to interfere with and obstruct or divert the course of justice and hence the party sending such communications is therefore clearly guilty of a contempt of Court. (*Niyogi, J.*) TELHARA COTTON GINNING CO. *v.* KASHINATH GANGADHAR NAMJOSHI. **I.L.R. (1940) Nag. 69=1939 N.L.J. 461=189 I.C. 58=41 Cr.L.J. 709=A.I.R 1940 Nag. 110.**

CONTEMPT OF COURTS ACT (XII OF 1926)—*Scope of.*

Per *Yorke, J.*—Far from the enactment implying a recognition that no such power had in fact previously existed, the Contempt of Courts Act is an Act which creates no fresh powers at all but merely recognises the fact that such powers already do exist but seeks to define and limit them. (*Thomas, C.J., Zia-ul-Hasan and Yorke, JJ.*) MAHOMED YUSUF *v.* IMTIAZ AHMAD KHAN. **14 Luck. 492=11 R.O. 248=40 Cr.L.J. 421=180 I C. 745=1939 O.A. 326=1939 A.W.R. (C.C.) 59=1939 O.L.R. 194=1939 O.W.N. 296=1939 A.Cr.C. 57=A.I.R. 1939 Oudh 131 (F.B.).**

CONTEMPT OF COURTS ACT (1926), S. 1.

———Scope—Non-Presidency High Court—Inherent power to punish for contempt—If limited by the Act. *See* CONTEMPT OF COURT. **18 Lah. 69 (S.B.).**

———**Ss. 1 and 2**—*"Contempt"—What constitutes —Letter by manager of estate to Collector referring to decision of latter as District Magistrate dismissing a complaint and stating that opposite party had been emboldened by the view taken by the District Magistrate—If contempt of Court.*

Between two big estates called *D* and *B* there ran a depression which in normal times was a river. There was an embankment on the edge of each of the estates facing each other across the river. There had been considerable litigation between the proprietors of the two estates arising out of the flooding of the country on the one side or the other, each party attributing the flooding to the conduct of the other. Ultimately owing to the intervention of the Government both sides gave an undertaking to the Governor that they would not add to the embankments or alter them in any way without going to the Collector and getting the permission of the Government. A breach having thereafter occurred in the embankment in estate *B*, some tenants of that estate repaired the breach on their own account. The proprietor of estate *D*, then petitioned the District Magistrate who was also the Collector, complaining of this action of the people of estate *B*. The District Magistrate held that there was no complaint which could properly be investigated and therefore no action could be taken. The people of *D* estate then filed a regular complaint. Pending this complaint, the manager of *B* estate wrote to the Collector a letter, a copy of which was also sent to the manager of *D* estate, referring to the undertaking given by the parties to the then Governor, pointing out that there had been great delay by the Government in passing orders on embankment matters, and stating, *inter alia*, that the time was rapidly approaching when he must withdraw from the undertaking in justice to the tenants of his estate whose land was being destroyed by continuous flooding. The manager of the *D* estate on receipt of a copy this letter wrote to the Collector, sending a copy of the letter to the manager of *B* estate, complaining that the repair of the breach by the people of *B* estate was a breach of the undertaking given to the Governor, referring to the proceedings taken by the *D* estate people which had been dismissed by the Collector—District Magistrate, and observing that the *B* estate people had been evidently emboldened by the view taken by the District Magistrate in the case and the orders that were passed by him. The Collector took this as a contempt of his authority as District Magistrate and referred the matter to the High Court under the Contempt of Courts Act.

Held, that the letter in question was one addressed to the Collector who was the proper person to deal with any alleged breach of an undertaking given to the Governor and the decision by the Collector as District Magistrate in the proceedings referred to was a relevant point to mention in dealing with a supposed threat of a breach

of the undertaking. There was nothing in the observation which would tend to lessen the authority of the Court or to bring the authority of the District Magistrate into contempt. The observation, moreover, referred to a decision by the Magistrate in which he had refused to take any action at all, that is to say, he having refused to act on a complaint before him and refused to summon the accused, there was no judicial matter before the District Magistrate at all, the action of the latter having been a mere rejection of the complaint.

Held, further, that there was nothing in the nature of a criticism of a judicial decision, and that even if there had been such a criticism there was nothing of a kind to bring the Magistrate's Court into contempt or to diminish its authority; and that the action on the part of the manager of *D* estate did not therefore constitute a contempt in any way. (*Courtney-Terrell, C.J. and James, J.*) EMPEROR *v.* GIRINDRA MOHAN MISRA. **167 I. C. 646=9 R.P. 413=38 Cr.L.J. 412=3 B.R. 305 =1937 P.W.N. 137=18 Pat.L.T. 113=A.I.R. 1937 Pat. 124.**

——**S. 2**—*"Subordinate Court"—Sub-Divisional Magistrate holding inquiry under S. 176, Cr. P. Code.*

The words "Subordinate Court" in the Contempt of Courts Act are used in a wide sense as including any Court over which the High Court has superintendence for the purposes of S. 85, Government of Burma Act, 1935, that it is to say, all Courts subject for the time being to its appellate jurisdiction. Sub-Divisional Magistrate when holding an inquiry under S. 176, Cr. P. Code, is acting as a Court subordinate to High Court for the purposes of the Contempt of Courts Act. (*Mya Bu and Mosely, JJ.*) ADVOCATE-GENERAL *v.* MAUNG CHIT MAUNG. **1940 Rang.L. R. 188=187 I.C. 573=12 R.R. 337=41 Cr.L.J. 470=A.I.R. 1940 Rang. 68.**

——**Ss. 2 (2) and (3)**—*Chief Court of Oudh—Position and powers of—Jurisdiction as regards contempt of subordinate Courts.*

The chief Court of Oudh is by virtue of the Oudh Courts Act and Ss. 219 and 220 of the Government of India Act, the High Court of Oudh and the one and only Court of Record and by virtue of its position akin to that of the Court of King's Bench. It has its power of superintendence over all inferior civil and criminal Courts and it has power to protect its subordinate Courts from improper interference in the administration of justice. It would be absurd to think that such a Court, which is the custodian and protector of public justice throughout the province of Oudh, has no power to deal with the contempt of Courts subordinate to it. Its powers in that respect are defined and limited by the Contempt of Courts Act of 1926. The Act is silent as to the powers of the Chief Court to deal with contempts of Court subordinate to it, but such power cannot be negatived by silence and is to be inferred from the wording of sub-Cl. (2) of S. 2 in which the words "subject to the provisions of sub-Cl. 3" would be otherwise meaningless and in fact unnecessary. (*Thomas, C. J., Zia-ul-Hasan and Yorke, JJ.*) MAHOMED YUSUF *v.* IMTIAZ AHMAD KHAN. **14 Luck. 492=11 R.O. 248=40 Cr.L.J. 421=180 I.C. 745=1939 O.A. 326=1939 A.W.R. (C.C.) 59=1939 O.L.R. 194=1939 A.Cr.C. 57=**

1939 O.W.N. 296=A.I.R. 1939 Oudh 131 (F.B.).

——**S. 2, sub-S. (3)**—*Interpretation.*

Sub-S. (3), S. 2 means that the contempt must be punishable as a contempt under the Penal Code and not punishable only because it otherwise is an offence. (*Monroe and Din Mohammad, JJ.*) BENNET COLMAN & CO., LTD. *v.* G. S. MONCA. **18 Lah. 34=165 I.C. 813=9 R.L. 305=38 P.L.R. 1166=1936 Cr.C. 1005=38 Cr.L.J. 73=A.I.R. 1936 Lah. 917.**

——**S 2 (3)**—*Scope and effect of—Act being punishable both under this Act and Penal Code—Procedure.*

The true interpretation of Cl. (3) to S. 2 of the Contempt of Courts Act is that where there is already a provision in the Penal Code for punishing a contempt of Court as such the Contempt of Courts Act itself shall have no application. But where an act amounts to an offence under the Penal Code and also under the Contempt of Courts Act, it will be punishable under both Acts. (*Iqbal Ahmad and Harries, JJ.*) EMPEROR *v.* JAGANNATH PRASAD. **I.L.R. (1938) All. 548= 1938 A.L.J. 430=1938 A.W.R. (H.C.) 275=176 I.C. 110=1938 A.Cr.C. 35=1938 A.L.R. 547= 11 R.A. 46=39 Cr.L.J. 677=A.I.R. 1938 All. 358.**

——**S. 2 (3)**—*Scope of prohibition contained in.*

The prohibition contained in S. 2 (3) of the Contempt of Courts Act, refers to offences punishable as contempt of Court by the Indian Penal Code and not to offences punishable there otherwise than as contempt. (*Bose, J.*) SUBORDINATE JUDGE *v.* JAWAHARLAL. **1940 N.L.J. 425.**

CONTEMPT OF LAWFUL AUTHORITY. *See* PENAL CODE, S. 185.

CONTENTIOUS SUIT. *See* T. P. ACT, S. 52.

CONTINGENT BEQUEST.

See (1) SUCCESSION ACT, S. 111.
(2) T. P. ACT, Ss. 21-26.
(3) WILL—CONSTRUCTION.

CONTINUING GUARANTEE. *See* CONTRACT ACT, S. 130.

CONTINUING OFFENCE. *See* PENAL CODE, S. 363.

CONTRACT.

Agreement.
Basis of suit.
Breach.
Building contract.
Cancellation.
Champertous agreement.
C. I. F.
Concluded agreement.
Consideration.
Construction.
Enforceability.
English principles.
Executory agreement.
Formation.
Hire agreement.
Hire purchase.
Hypothecation.
Indemnity.
Insurance contract.
Implied obligation.
Joint contractors.

Liability under.
Maintenance Agreement.
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Novation.
Pakki adat.
Part performance.
Penalty.
Performance.
Privity.
Prohibition by statute.
Ratification
Restitution.
Sale.
Shipping.
Specific performance.
Substitution.
Third party—Right to sue.
Validity.
Variation.
Void contract.
Wagering contract and Speculation.
Miscellaneous.

Agreement.

——*Agreement—Confimation by Act of Legislature—Effect of.*

Where an agreement is approved, ratified, confirmed and declared to be valid and binding on the parties thereto by an Act of the Legislature, the effect of this statutory confirmation is to render every provision and stipulation of the agreement as obligatory and binding on the parties as if these provisions had been repeated in the form of statutory sections. (*Lord Macmillan.*) INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION. **169 I C. 562=10 R.P.C. 17 =A.I.R 1937 P.C. 214. (P.C.).**

——Agreement in an absolute sale to pay annual rent to the vendor—If legal. *See* TRANSFER OF PROPERTY ACT, S. 11. **171 I.C. 504=1937 O.W.N. 1138.**

——Bailment—Essentials of. *See* MYSORE CITY MUNICIPALITIES ACT, S. 41 (7) **16 Mys.L.J. 368.**

——Bailment—Liability of hirer for loss—Express covenant that hirer to make good loss by fire. *See* CONTRACT—HIRE-PURCHASE **A.I.R. 1937 Sind 207.**

Basis of suit.

——*Basis of suit—Deed not properly stamped—Falling back upon prior oral negotiations—Permissibility.*

Where the deed forming the contract between the parties is not properly stamped, it cannot form the basis of a suit, nor is it permissible to fall back upon the previous oral negotiations. (*Addison and Ram Lall, JJ.*) RAMESHWAR DASS *v.* PIRTHI. **183 I.C. 93=12 R.L. 97=41 P.L.R. 98=A.I.R. 1939 Lah. 266.**

Breach.

——*Agreement that suit should be braught only in one of the two Courts having jurisdiction—Trial of suit on merits by the other Court—Interference in revision.*

There can be no doubt that where there are two Courts, both of which would normally have jurisdiction to try the suit, the parties may be allowed to agree among themselves that the suit should be brought in any of those Courts and not in the other. The object of such a contract is to afford facjlity or convenience either to both the parties or to one of them, and it is unfair that any one of the parties should resile from the contract entailing hardship and inconvenience to the other party. But where the suit is brought in the other Court, *i.e*, the Court different from the one for which the parties had contracted, and that Court, holding that it has jurisdiction, has tried the merits of the case between the parties, it would not be proper for the revisional Court to interfere and to entail fresh hardship on both parties. (*Bajpai, J.*) GOPAL DAS AGARWALA *v.* HARI KISHAN DAS. **163 I.C. 919=9 R.A. 96= 1936 All.L.R. 667=1936 A.W R. 591=1936 A. L.J. 704=A.I.R. 1936 All. 514.**

——*Contract for delivery of goods—Measure of damages.*

When a contract to deliver goods is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser having the money in his hands may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them. It is therefore necessary to prove difference between contract price and market price. If that is not done, nominal damages; if that is done, that is the measure of damages *prima facie*. (*Stone, C.J. and Niyogi, J.*) ARJUNSA *v.* MOHANLAL. **I. L.R. (1938) Nag. 308=172 I.C. 812=10 R.N. 246=A I.R. 1937 Nag 345.**

——*Contract of sale—Suit for damages by seller for failure to take delivery by buyer—Facts to be proved.*

In a contract for sale, the due date for delivery of which having passed, if the seller has called upon his buyer to come and take delivery in a specified way, and he is suing the buyer not for the price but for damages for failure to take delivery, the seller has first to prove tender. But he need not prove tender if he establishes that his opponent has failed to accept the delivery. He is however required to show readiness and willingness to tender which can be proved by establishing that the contract remained uncompleted not because of his fault, but, because of the fault of his opponent. (*Stone, C.J. and Niyogi, J.*) ARJUNSA *v.* MOHANLAL. **I L.R. (1938) Nag 308=172 I.C. 812=10 R.N. 246=A.I.R. 1937 Nag. 345.**

——*Contract with Bank taking form of purchases of yen to be delivered during specified period at fixed rate—Bank covering itself by yen purchased against yens sold—Failure to purchase yen during period specified—Measure of damages.*

Where a merchant in Rangoon buying goods in Japan and desirous of paying for them in rupees and not in yen, enters into several contracts with a Bank in the form of purchases of yen to be delivered during a specified period at a fixed rate and the Bank covers itself by yen purchased against the yen that have been sold, the transaction between the parties is genuine contract and cannot be said to have been entered into by way of gambling or wagering. It is obligatory, under the contracts, on the importer to pay the bills by purchase of yen at the rate prescribed during the period to which each of the contracts relates and in case of failure to do so he commits a breach of contract. The measure of damages to which the

Bank is entitled is the difference between the contract rate and the buying rate at which the Bank would have to purchase yen against the yen sold to importer under the contract (*Page, C.J. and Ba U, J.*) ARDUL LATIFF JAMAL AND CO. *v.* YOKOHAMA SPECIE BANK, LTD **163 I.C. 516=9 R.R. 27=A.I R. 1936 Rang 269.**

———*Damages—Buyer refusing to take delivery of goods—Proper measure of damages.*

Where the buyer fails to take delivery of goods contracted to be purchased, the proper measure of damages is the difference between the market rate and the contract rate on the date of the final refusal to take delivery and not on the date of the notice of the seller's intention to resell the goods. (*Raguley, J.*) E. HOE CHAND CO. *v.* BABOO CHOTALAL. **1939 Rang.L R. 622=181 I.C. 846=11 R.R. 501=A.I.R. 1939 Rang. 139.**

———*Damages—Doctrine of frustration—Applicability of.*

The doctrine of frustration of contract only applies if the disturbing cause goes to the extent of substantially preventing the performance of the whole contract: "interference leaving a considerable part capable of performance will not be an excuse." Impossibility arising from the promisor's own act or default is not in any case an excuse for non-performance of his contract. (*Dhavle, J., on difference of opinion between Mahomed Noor and Manohar Lall, JJ.*) BANWARI LAL *v.* SHAIKH SHUKRULLAH. **19 Pat. 1=188 I C 337=12 R.P. 697=6 B.R. 653=A.I.R. 1940 Pat. 204.**

———*Damages—Interest—Right to—Money due by assignee of decree to assignor under deed of assignment.*

In a suit for an amount of money left with the assignee of a mortgage decree, by the assignor, which is a suit for compensation for breach of contract, the plaintiff is entitled to such an amount as would compensate him for the loss which he has suffered by reason of the defendant's breach. The correct measure of damages is the loss sustained by the plaintiff, and that loss is properly estimated as the amount stated as payable under the assignment deed plus a reasonable rate of interest. The Court therefore is justified in awarding interest on that amount although there is no provision for interest in the deed of assignment. (*Harries, C J. and Fazl Ali, J.*) SHEONARAIN PRASAD SINGH *v.* GANGA PRASAD SINGH. **1939 P.W.N. 769=A.I R 1940 Pat. 155.**

———*Damages—Liability—Doctrine of laches—Applicability of—Partnership—Damages caused by wilful default of partner—Claim to damages by another partner.*

The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it; and a Court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in the case of loss, but of being able to claim a share of gain in case of ultimate success. But this doctrine applies to cases where the plaintiff has by his conduct induced the defendant to suppose that the plaintiff had abandoned the common undertaking, usually in cases of a highly speculative character. If a partner has been set at defiance by his coparceners, and if the latter have denied that he has any right to interfere in the partnership, they can derive no advantage from the circumstances that he has not performed his duty to them. (*Dhavle, J., on difference of opinion between Mahomed Noor and Manohar Lal, JJ.*) BANWARI LAL *v* SHAIK SHUKRULLAH. **19 Pat. 1=188 I C. 337=12 R.P. 697=6 B.R. 653=A.I.R. 1940 Pat. 204.**

———Damages—Rule as to mitigation of damages—Applicability to contract of service. *See* PRINCIPAL AND AGENT—AGENT'S RIGHT TO SALARY. **(1938) 1 M.L.J. 857.**

———Measure of damages—Building contracts. *See* CONTRACT—BUILDING CONTRACTS. **1940 N. L.J. 486.**

———*Money left with mortgagee to discharge earlier mortgage—Default by mortgagee—Damages—Cause of action.*

Where money has been left with a vendee or mortgagee in order to discharge some earlier mortgage and such vendee or mortgagee fails to discharge the liability, a cause of action for damages arises immediately and the vendor or mortgagor need not wait until the property is actually sold or until he is sued or a decree is passed against him before bringing a suit for damages. 34 All. 429; A.I.R. 1931 All. 754 and A. I R. 1934 All. 406, Rel. on. (*Harries and Rachhpal Singh, JJ.*) ABDUL MAJEED *v.* ABDUL RASHID. **164 I.C. 665=9 R.A. 1914=1936 A W.R. 773=1936 All L.R. 810=1936 A.L.J. 940=A.I.R. 1936 All. 598.**

———*Sale of goods—Breach by purchaser—Right to refund of sale price—Claim by defendant to set-off damages—Sustainability — Burden of proof.*

Where a contract for the sale of goods falls through the default of the purchaser, the latter is entitled to recover the purchase-money paid by him (excluding the earnest or deposit), and the seller can only resist the claim by seeking to set-off against the said sum any damages which he might have incurred by reason of the purchaser's non-performance of the contract. But before the seller can substantiate his claim to set-off, he should prove his readiness and willingness to perform his part of the contract and that he was in a position to perform the contract on the date fixed for the performance of the contract. (*Venkataramana Rao, J.*) NARAYANAMURTI *v.* NAGESWARA RAO. **1940 M.W.N. 756=52 L.W. 251.**

———*Sale of goods—Buyer becoming aware of breach of condition by seller—Buyer's right to reject goods within reasonable time.*

When a buyer of goods becomes aware of a breach of a condition of the contract by the seller, he is entitled to a reasonable time to consider what he will do and his failure to reject the goods at once does not prejudice his right to reject them within a reasonable time. What is a reasonable time must always be a question of fact, having regard to the particular circumstances of each case (*McNair, J.*) KHIRENDRA NATH *v.* SECRETARY OF STATE. **44 C.W N. 1069**

———*Sale of goods—Default by purchaser—Deposit or earnest—Forfeiture—Right of vendor—Vendor equally in default—Effect.*

In the case of mercantile contract, even in respect of sale of goods, it has been customary in India to receive sums of money by way of deposit or earnest and such sums can be forfeited by the

entered into a forward contract of April-May delivery at the current market rate, and the next day he wired back to the agent that the order had been placed at Rs. 208-12-0 per candy at a (mandi) premium of Rs. 7-8-0. Three days later, the agent communicated this to *A* who failed to pay the amount of the 'mandi' as agreed upon, in spite of demand by *B*. The rate varied to the disadvantage of *A* and he repudiated the contract, whereupon *B* sold the transaction to another party at a loss.

Held, that there was no question of an "offer" by *A* and its "acceptance" by *B*. There was a eompleted contract between the parties and *A* was liable to pay the amount of the 'mandi' and he was also liable to pay *B* the loss which the latter had suffered in the transaction, together with brokerage at the stipulated rate. (*Tek Chand, J.*) LAKSHMI NARAIN *v.* BALA PARSHAD. **182 I C. 335=12 R.L. 9=A.I.R. 1938 Lah. 825.**

Consideration.

——*Executory promise—Sufficiency—Performance of such promise—Effect.*

Where a promise by *A* is consideration for a promise by *B*, the former, so long as it rem ins executory, will not amount to consideration in the eye of the law unless it involves a legal obligation which *A* may be compelled to perform. But even where the promise on the side of *A* does not involve a legal obligation, its performance will constitute sufficient consideration, that is, as an executed consideration for the promise on the other side. When once the executed promise becomes the consideration it is not for the Court to examine the quantum or adequacy of the consideration except where the language of the document is ambiguous. (*Varadachariar and Mockett, JJ.*) TALUK BOARD, KOILPATTI *v.* PANDIA CHINNATHAMBIAR. **164 I.C. 697=9 R.M. 154=44 L.W. 353=1936 M W N. 569=A.I.R. 1936 Mad. 709=(1937) 1 M.L.J. 50.**

——*Parties not managing their estates in severalty but agreeing for common management—Validity.*

Where the parties, though entitled, do not manage their estate or their respective interests in severalty but give up that right and agree to a common management, such giving of rights is sufficient consideration. (*Wort, Ag.C.J.*) KIRTYANAND SINHA *v.* RAMANAND SINH . **164 I.C. 220 =9 R.P. 95=17 Pat.L.T. 865=1936 P.W.N. 568 =A.I.R. 1936 Pat. 456.**

Construction.

——*Adjustment of decree—Agreement to accept less than amount of decree—Portion to be paid immediately and balance within time fixed—Default—Entire amount of original decree, if can be realised.*

With respect to the execution of a certain decree, it was agreed that the decree would be satisfied on payment of a certain sum which was less than the amount of the decree, and that the judgment-debtor should pay a portion of it immediately and the balance within a certain date and that if the amount was not so paid, the decree could be realised by execution. The judgment-debtor committed default in payment and the decree-holder sought to realise the entire amount he original decree by execution.

Held, that the entire amount of the original decree could not be realised as it was not expressly stipulated that in case of non-payment the amount remitted would not be allowed. (*S. K. Ghose, J.*) GRISH CHANDRA SEN *v.* BENARSI LAL MARWARI. **65 C L.J. 210.**

——*Agreement by zemindar to contribute annually for maintenance of hospital to be established in zamindari—Absence of intention on zamindar's part to create charge—Contract—If can be enforced against successors in title.*

Where a zemindar by a registered document bound himself and his successors-in-title to pay to the Taluk Board an annual contribution in consideration of the establishment and maintenance of a dispensary by the Taluk Board, but the language of the document and the surrounding circumstances did not indicate any intention on zemindar's part to create a charge.

Held, that there being no charge and the obligation resting solely on a covenant could not be enforced against the zemindari in the hands of the successors in title. (*Varadachariar and Mockett, JJ.*) TALUK BOARD, KOILPATTI *v.* PANDIA CHINNATHAMBIAR. **164 I.C. 697=9 R.M. 154=44 L. W. 353=1936 M W N. 569=A.I.R. 1936 Mad. 709=(1937) 1 M.L.J. 50.**

——*Arbitration clause—Clause providing for reference to arbitration and making such reference a condition precedent to cause of action—Validity.*

A clause in a contract to the effect that no cause of action can accrue until a third person has decided on any difference that may arise between the contracting parties is perfectly legal both under the English law and also under the Indian Contract Act. This principle holds good when the referee has power to determine liability, and his decision is not limited to *quantum*. (*Panckridge, J.*) M. D'CRUZ *v* SECRETARY OF STATE FOR INDIA IN COUNCIL. **40 C.W.N. 865.**

——*Arbitration clause—Deposit in Bank by manager of joint family business—Subsequent differences between members resulting in agreement to divide—Areement providing for resort to arbitration—Construction—Direction to Bank regarding the deposit by manager pending arbitration—Bank, if bound by such direction.*

A joint undivided Hindu family possessed *inter alia* a joint family business. One *X* who represented one branch of the joint family was the manager of the firm and the *malik* of the joint family. He, as such manager and in the name of the firm, deposited with a Bank a lakh of rupees. Before the date of the maturity of the deposit, differences arose between *X* and his nephew *Y*, who represented another branch of the joint family and an agreement was entered into between them. After reciting that owing to the differences the parties were desirous of having partition effected of the business and movable and immovable property of the joint family and that resort to arbitration was necessary to settle differences, the appointment was agreed of a certain named person as sole arbitrator with a direction to have due regard to certain points on which agreement had been reached. Cl. 4 of the agreement effectually precluded either *X* or *Y*, pending the final award, from claiming or taking possession of the entirety of any of the joint family property. Cl. 7 was as follows:—"It has been

settled between the parties that up to the decision and partition the business and dealings of the family of whatever nature they may be would continue in the present condition. But till the completion of the partition the arbitrator shall be authorized to make suitable arrangements temporarily in the business if it requires alterations or pass an order which he deems proper.

Held, that it could not be concluded from the vague words of Cl. 7 of the agreement especially in their connection with the final reference to the arbitrator that *X*, pending the result of the arbitration, was left in management of the firm as before and that the Bank was bound by his direction to deal with any deposit with it on the firm's account. (*Lord Blanesburgh.*)) NANNHEMAL JANKI DAS *v.* PUNJAB NATIONAL BANK, LTD. **162 I.C. 440=8 R.P.C. 281=63 C.L.J. 346 (P.C).**

——Arbitration clause—Fire insurance policy—Provision for reference to arbitration in case of difference on loss by fire—Provision that action to be commenced within specified period in case claim be fraudulent or rejected by company—Difference on loss—Refusal of claim by company—Subsequent arbitration and award at instance of assured—Suit within specified period after award—If in time. *See* INSURANCE—FIRE INSURANCE. **A.I.R. 1936 Cal. 550.**

——*Arbitration clause—Provision for settlement of disputes by reference to arbitration of "Manager or Assistant of European firm in Karachi"—Meaning of—Reference to commission agent of foreign firm—If legal.*

An arbitration clause in an indent provided *inter alia*: "Any dispute arising out of this agreement . . . shall be referred to the arbitration of . . . Managers or Assistants in European Firms in Karachi, etc."

Held, the expression Manager or Assistant in European Firm used in the clause meant Manager or Assistant in a firm carrying on business in Karachi through an agent properly and strictly so called and under their effective control. A person who is a mere post office for an English firm, who secures contracts for them, and looks after their contracts and gets a commission for doing the same is not such an agent, or Manager or Assistant of a European firm, and a reference to him is therefore no valid reference at all. (*Rupchand Bilaram, A.J.C.*) FLEMING SHAW & CO. *v.* BAHADUR & CO. **164 I.C. 1015=9 R S. 83=29 S. L.R 292=A.I.R. 1936 Sind 121.**

——*Arbitration clause—Reference to "Arbitration Act"—If includes arbitration under Sch. II, C. P. Code.*

If an arbitration clause in a contract does not speak of arbitration under the *Indian* Arbitration Act of 1897 but the words used are simply "Arbitration Act," and the overriding intention of the parties as can be gathered from the contract is that in the matters specified therein their differences should be settled by arbitration, that general intention is to be given effect by taking the words "Arbitration Act" to mean "statutory provisions relating to arbitration" in a case to which the Indian Arbitration Act has no application. This construction will include arbitration under Sch. II, C. P. Code. (*Mitter and Latifur Rahman JJ.*) RADHA SINGH *v.* JYOTI PRASAD. **I. L.R. (1939) 2 Cal. 181=186 I.C. 617=12 R.C.**

490=70 C.L.J, 148=43 C.W.N. 879=A.I.R. 1940 Cal. 105.

——*Arbitration clause—Words "with regard to this indent or to relative goods"—If cover case of non-delivery.*

An arbitration clause in a contract for sale of goods ran thus:—If any dispute arises with regard to this indent or to relative goods, it shall be optional to you (seller) to release me from the contract and take the goods back or to refer the dispute in respect of Japanese goods to the arbitration of Japanese Commercial Museum and in respect of other goods to the arbitration of the Bengal Chamber of Commerce or to two merchants, one to be nominated by each party, and I agree to accept the decision of the arbitration as final."

Held, that the words, "with regard to this indent or to relative goods" occurring in the arbitration clause were sufficiently comprehensive to cover a case of non-delivery of goods. (*R. C. Mitter J.*) BRINDABAN CHANDRA DATTA & CO. *v.* BISHWESHWAR LAL. **I.L.R. (1937) 1 Cal. 606=174 I.C. 58=10 R.C. 610=A.I.R. 1938 Cal. 10.**

——*Arrangement to pay "as soon as final bill is ready"—Suit filed before settlement of the bill—If premature.*

Plaintiff sued the defendants for accounts and his share of profits. His case was that the defendants, who took a contract for the construction of a railway line, availed themselves of his services in connection with that work and agreed to pay him $\frac{1}{3}$ of the profits "as soon as the final bill is ready after deducting all the expenses". The final bill was prepared by the Railway Company in 1927 but it was not passed as such, as disputes arose between the defendants and the company. A suit was instituted by the defendants against the company in 1929 and the appeal was decided in 1934. It was contended that as the amount out of which the plaintiff could get a $\frac{2}{3}$ share could be definitely ascertained only after the disputes between the defendants and the company as regards the bill had been finally settled, the suit which was instituted in 1928 must be held to be premature. Overruling that contention,

Held, that once it was found that under the contract between the parties the plaintiff, was entitled to a share of the profits that was the cause of action for him, if only he had fulfilled his part under the contract, and that the settlement of accounts between the defendants and the Railway Company was no part of his cause of action, though till those accounts were settled, the exact amount payable to him might not be ascertained. (*Varadachariar and Stodart, JJ.*) MUNISWAMI NAIDU *v.* THANDAVARAYA MUDALIAR. **43 L.W. 218 =1935 M.W.N. 1084 (2)=159 I.C. 1005=8 R.M. 588=A.I.R. 1936 Mad. 5.**

——*Building contract—Contractor to build and engineer to supervise—Building as built not according to plan, unsightly and not fit for use—Owner's remedy—Joint decree against contractor and engineer, if could be passed—Measure of damages.*

Where an owner engages contractor to put up a building according to a plan and at certain rates and also an engineer to supervise the construction, and contractor builds a house which wa

neither according to plan nor fit for use and besides unsightly, and the owner alleges negligence and collusion between the contractor and engineer, he can sue both of them together and obtain damages. A joint decree against two such persons is possible even though the connection between the plaintiff and the one is a direct one while that between the plaintiff and the other is indirect. The purpose of money damages is to put the injured party in as good a position as that in which full performance would have put him; but this does not mean that he is to be put in the same physical position. Satisfaction for his harm is made either by giving him a sum of money sufficient to produce the physical product contracted for or by giving him the exchange value that that produce would have had if it had been contracted. Sometimes defects in a completed structure cannot be physically remedied without tearing down and rebuilding at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste. (*Stone, C.J. and Bose, J.*) RAJARAM *v.* MADHAORAO CHITNAVIS. **1940 N.L.J. 486.**

———*Building contract—Lump sum or rate contract.*

A bu ding contract consisted of two parts, the first part dealt with the terms and conditions under which the work was to be done and the second part consisted of a document which was headed as an "estimate". The estimate did not give merely the rates to be charged for the different items of work or materials but also mentioned the amount of work to be done and materials to be supplied. All the items were totalled together and a certain sum was given as the total of the cost of the various items. There was only one clause in the contract in which mention was made of how the remuneration of the contractor was to be calculated. It ran as follows:—"The owner shall pay to the contractor for the work actually done according to the rates provided for various items in the schedule of rates hereto annexed and in case of items of work for which no provision has been made in the said schedule, the contractor should be entitled to be paid market rates of the actual cost with an establishment charge of five per cent. and a profit of ten per cent."

Held, that the estimate was nothing but a schedule of rates and it amounted only to this that the contractor intimated to the owner that he would charge at the rates mentioned in the estimate for a building of the dimensions given in the estimate and nothing more, and that, therefore the contract was a contract according to the schedule rates and not a contract for a lump sum. (*Sen, J.*) PANCHANAN GANGULY *v.* KALIPADA BANERJEE. **71 C.L.J. 309.**

———*Cancellation of contract in case of "bankruptcy or any other reason"—Interpretation.*

A supplying agent in anticipation of his appointment as such, and of acceptance of his terms as to commission and price by the manufacturing firm accepted indents which provided a clause as follows: "In the event of fire, strike among workmen or any unforeseen event, or the failure of your supplier to deliver either through bankruptcy or any other reason, you or your agents are to have the option of concelling the order,"

His terms as to price and commission not being accepted by the manufacturing firm, the goods were not supplied. The contract was between the parties as principal to principal. Purchaser sued for damages.

Held, that the failure of the supplier through "bankruptcy or any other reason" must be based on something reasonable and the circumstance that the supplier would not pay the price demanded by the manufacturer who also refused to pay him the commission could not be one of the reasons contemplated by the indent. Hence the supplier was not entitled to cancel the order and liable to pay damages. (*Addison and Ram Lal, JJ.*) HOSIERY KNITTING MILLS LTD., DELHI *v.* S, WAHID-UD-DIN. **183 I.C. 838=12 R.L. 142=41 P.L.R. 709=A.I.R. 1939 Lah. 166.**

——— Contract of sale—Contract to sell certain lands acceptable to vendee out of larger area belonging to vendor—Lands chosen by vendee found encumbered—Duty of vendor to discharge the encumbrances before conveyance. *See* T. P. ACT, S. 55 (1) (G). **14 Rang 766.**

———*Charter party—Owner letting vessel to charterer for towing flats and barges—Collision between vessel and country barge—Suit by owner of barge—Liability of charterer of vessel for negligence of master and crew.*

The relevant provisions of a charter party were that "the owner will let and the charterer will take, for the purpose of towing flats and barges.....the steam launch "Sri Krishna" .....for a period of six months certain..... provided that the charterer shall not ply the vessel.....in salt water, nor use the same for any other pursoses than towing flats and barges without the consent in writing of the owner." A collision recurred between the steam launch and a country barge of the plaintiff. The latter sued the charterer of the launch on the ground that the collision was caused by the negligence of the master and crew of the launch.

Held, that the language used was appropriate to a lease and that the charter party was a demise; and hence if the plaintiff succeeded in establishing negligence on the part of those in charge of the vessel, the defendant (charterer) would be liable. (*Panckridge, J.*) VARAJA LAL & Co. *v.* RANADAPRASAD SHAHA. **63 Cal. 53.**

———*Contract between mining company and power company for supply of electric power—Agreement to extend for mining life of properties operated, owned or controlled by consumer—Latter ceasing to occupy, own or control the property—Mining life of property continued—Effect on agreement.*

A mining company entered into a contract with the power company for the supply of electrical power. The contract, amongst other things, provided that during the continuance of the contract no system of electricity other than that furnished by the power company should be used in "said premises." The agreement was to extend for the mining life of the properties operated, owned or controlled by the consumer (the mining company). After the supply continued for some years, the mining company informed the power company that they no longer had the ownership of the property, and hence were no longer bound by the contract. If the power was supplied, the new company, working

the mines then would be liable. Ultimately, the mining company went into voluntary liquidation. In response to the usual notice of claims, the power company sent in a claim for damages for breach of contract. The contention of the power company was that so long as there was mining life in the property, the mining company was liable. It was not disputed that the mining life of the property continued.

Held, that the mining life contemplated by the agreement in the events which have happened was the mining life while the property was being operated, owned or controlled personally by the mining company. But as the latter had ceased to occupy, own or control the property, the contract necessarily came to an end. Hence the mining company was not liable to pay any damages. (*Lord Russell of Killowen.*) NORTHERN ONTARIO POWER CO. LTD, *v.* LA ROCHE MINES LTD. **181 C. 444=11 R.P.C. 242=A.I R 1939 (P.C.) 59 (P.C.).**

——*Contract of guarantee—Letter requesting supply of goods to third person and undertaking liability to the extent of Rs.* 250—*Guarantee to enure for one year—Value of goods supplied in year exceeding limit—Effect of—If variation of contract—Surety—If discharged—Liability for interest.*

Second defendant stood surety for the 1st defendant and gave a letter of guarantee to the plaintiff in the following terms: "Please supply goods to the bearer of this letter (1st defendant) in current account up to the extent of Rs. 250 and have debit and credit transactions in his name. For this said sum I shall be surety for a period of one year. Thereafter I shall not be surety." In the period of one year for which the guarantee was to subsist, the first defendant was supplied with goods of the total value exceeding Rs. 250. Plaintiff sought to make the 2nd defendant liable and the latter pleaded discharge from liability on the ground of a variation of the terms of the contract of guarantee by reason of the fact that the plaintiff by supplying goods for over Rs. 250 had exceeded the limit indicated by him.

Held, (1) that, on a construction of the letter of guarantee the reasonable intention of the parties was to define the duration and limit of the surety and not to impose a limit on the supply of the goods; "the words up to the extent of Rs. 250" did not mean that once the goods of the said sum had been supplied no further goods should be supplied, and consequently there was no variation of the contract so as to discharge the surety (guarantor) from liability to the extent undertaken hy him; (2) that the surety was not, however, bound to pay interest as there was no stipulation in the letter to pay any interest, in the absence of proof that the dealings carried on were intended to carry interest. (*Venkataramana Rao, J.*) HAJEE MOOSA SAIT AND BROS. *v.* ABDUL KARIM. **167 I C. 1006=1937 M.W.N. 46=45 L.W. 605=9 R.M. 517=A.I.R. 1937 Mad. 360=(1937) 1 M L J. 143.**

——*Contract of mother and minor daughter with company—Minor to do certain services—Mother to compensate if minor defaulted—Respective liabilities—Measure of damages.*

A mother and her minor daughter entered into a contract with a company whereby the mother agreed that the minor daughter should do certain service for the company and if the daughter failed to follow the terms of the contract the mother and the daughter would compensate the company for the loss sustained by it. The mother was herself receiving money under the earlier contracts and she was promising to stand in the role of one who should use her influence with her daughter to enable the company's expectations in respect of the daughter to be realized. The company advanced money to be adjusted against her future earnings. The daughter failed to earry out the contract:

Held, (1) that the minor daughter was not liable under the contract but her mother was liable on her covenant to pay the company any loss which it suffered; (2) that the contract was not one of indemnity; (3) that her failure to earn sums paid caused a loss to the company of the moneys advanced and this was the measure of damages. (*Roberts, C. J. and Dunkley, J.*) DAW NYUN *v* MAUNG NYI PU. **178 I.C. 680=11 R.R. 258=A.I R. 1938 Rang. 359.**

——*Contract of service between Insurance Company and employee—Provision for monthly salary—Employee expected to complete certain business—Contract if one of guarantee.*

A contract between an Insurance Company and an employee provided as follows:—(1) That the employee should get Rs. 125 per mensem as salary. Subsequent increment should be proportionate to the increase of business the basis of calculation being one and half lacs. (2) That the employee was expected to complete a business of Rupees one and half lacs during the first year which was to increase year by year with the expansion of organization.

Held, that the contract could not be construed as one of guarantee that the expectation of the employer that the employee would secure business was not an essential part of the contract but was merely a hope, and that, therefore, the securing of business was not a condition precedent to the payment of the salary. (*Ram Lall, J.*) PREM PARKASH SHARMA *v* FEDERAL INDIA ASSURANCE CO. LTD. **185 I.C. 122=12 R.L. 269=41 P.L.R. 569=A.I R. 1939 Lah. 509.**

——*Contract of service entered into in London—Employment in New Zealand on remuneration of seven hundred pounds sterling per year—Payment, if to be made according to English or New Zealand currency.*

An agreement was entered into between the respondents and the appellant in London, under which the appellant was to proceed to New Zealand, there to be employed by the respondents as a tailor cutter at a remuneration of seven hundred pounds sterling a year. A question arose as to whether the appellant was entitled under that agreement to be paid according to the English or the New Zealand value of the pound.

Held, that the question was purely one of construction of the particular contract. The word 'sterling' was to be construed as signifying English currency, in contrast with the currencies of other countries, and in particular with that of Australia or New Zealand. The word was an express term intended to exclude and in fact excluding, *prima facie* rule, according to which the New Zealand pound would be meant as being currency of the place of payment. The insertion of the word 'sterling' was not a common form in

a service agreement like the one under consideration. If it was used in a business document in London it naturally meant 'British sterling' and nothing else. (*Lord Wright.*) C. F. MARTIN *v* BALLANTYNE & Co. **1938 M.W.N. 637=174 I.C. 47=47 L.W. 596=10 R.P.C. 241=A.I.R. 1938 P.C. 136 (P.C.).**

——*Contract of service—Insurance company and canvasser—Right of canvasser to renewal commissions after termination of service.*

The contract of service between a Life Assurance Company and a canvasser stipulated that the company would pay commission on proposals of Life Assurance introduced by the canvasser and accepted by the company according to certain rates for the first year's premium and certain other rates for subsequent years' premium or instalments paid to and received by the company. The company was at liberty to terminate the arrangement with the agent at any time. It was also found that even after the introduction of clients the canvasser had still to do something from time to time. The company terminated his services and refused to pay him renewal commission fees on policies effected through him during the period of his service. In suit by the canvasser for such commissions.

Held, that the company was entitled to terminate the whole arrangement with the canvasser including the payment of renewal commissions; that the duties of the canvasser did not end with the first introduction of the customer to the company, and that the canvasser could not therefore claim renewal commission fees after he had ceased to represent the company on policies effected through him during his period of service even though the contract of service did not contain a clause to the effect that the commission would be allowed only so long as the canvasser continued to represent the company. (*S K. Ghose and Edgley, JJ.*) PROVAT KAMAL BASU *v.* PHOENIX ASSURANCE CO., LTD. **162 I.C. 525=8 R.C. 611=40 C.W.N. 694=A.I.R. 1936 Cal. 246.**

——*Contract to construct a dam merely providing excavation of earth—Earth, if includes boulder clay.*

In a contract to construct certain dam the schedule attached to the agreement merely provided excavation of the earth. In the construction boulder clay was found. From other terms of the contract it could be gathered that such a thing was in the contemplation of the parties. The excavation of the material was done before the contract was actually signed.

Held, that there was no *casus omissus* in the contract and the material was earth within the meaning of the contract. Hence the contractor was not entitled to any damages. (*Lord Roche.*) WILLIAM I. BISHOP. LTD. *v.* JAMES MACLAREN CO., LTD. **169 I.C. 137=9 R.P.C. 321=A.IR. 1937 P. C. 193 (P.C).**

——Contract to ship dogs from England to India at owner's risk—Party undertaking to ship dogs shipping them on board the steamer of steamship company—Loss of dog owing to slipping of collar—Liability for—Absence of negligence—Liability of owner for charges for shipping, feeding, etc. of lost dog. *See* TORT—NEGLIGENCE. **71 M.L.J. 425.**

——*Copyright—Author agreeing to grant to publishers sole and exclusive license to print, publish and sell his work—Agreement, if amounts to assignment of copyright.*

The author agreed to grant the publishers the sole and exclusive license to print, publish and sell his works in book form in the English language in certain parts of the world but reserved the entire copyright of the volume as his property and also reserved to himself all other rights except those mentioned in the agreement.

Held, that the agreement merely amounted to a publishing agreement and could not be regarded as an assignment of copyright. (*Tek Chand and Abdul Rashid, JJ.*) YEATES *v.* ERIC DICKINSON. **I.L.R. (1938) Lah. 84=40 P L.R. 622=177 I.C. 341=11 R.L. 300=A.I.R. 1938 Lah 173.**

——*Currency in particular country—How determined.*

The currency in any particular country must be determined by the law of that country and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. (*Lord Wright.*) OTTOMAN BANK OF NICOSIA *v.* OHANES CHAKARIAN. **172 I. C. 786=10 R.P.C. 141=A.I.R. 1938 P.C. 26 (P. C.).**

——*'Deposit'—For feiture—If implied.*

The use of the word 'deposit' in contract implies an agreement that the sum deposited may be forfeited in case of breach by the depositor. (*Monroe, J.*) TIKAM CHAND BHAG CHAND *v.* KAKHAN LAT-DIN-DAYAL. **175 I.C. 90=10 R.L. 676=40 P.L.R. 55=A.I.R. 1937 Lah. 842**

——*Forum of suit—Contract to be carried out in Calcutta—Casual variations—Effect of.*

Where a contract is entered into at Calcutta, and the plaintiff by his own witnesses proves that the contract is to be completely carried out in Calcutta, casual variations from the rule that payment is to be made by *Hundi* which is to be cashed in Calcutta cannot be taken as implying that the original contract is something more than the plaintiff himself makes out, and a suit based on the contract should be instituted at Calcutta. (*James. J.*) KANI RAM HAZARI MAL *v.* SITARAM AGARWALA. **5 B.R. 199=11 R.P. 336=179 I.C. 128=A.I R. 1939 Pat. 140.**

——*Government kabuliat in respect of toll on public road—Clause prohibiting sub-letting or assignment without permission of Collector—Effect — Assignment without permission — If void.*

A term in a Government kabuliyat dealing with the assignment by the lessee of tolls was to the effect that the "contractor, his heirs, executors, administrators and assigns shall not sub-let, assign, transfer or mortgage the whole or any portion of the rights or property the subject of these presents without the written permission of the said Collector previously obtained". It was also provided that for breach of the conditions, the Collector could impose a fine.

Held, that sub letting or assignment was not absolutely prohibited and is not opposed to any provisions of law and since redress was provided

by the imposition of a penalty under the kabuliyat, the clause against sub-letting or assignment except in a particular manner would not render an assignment void. (*Macklin and Wassoodew, JJ.*) BHAGWANT GENUJI *v.* GANGABISAN RAMGOPAL. **42 Bom.L.R. 750.**

———Intention of parties—Ascertainment of—Surrounding circumstances—If can be looked to—Written contract for sale and purchase—Oral evidence of intention to pay differences only as wager—Admissibility. *See* CONTRACT ACT, S. 30, **39 Bom.L.R. 1083.**

———*Intention of parties—Several contracts for supply of goods—If separate contracts or part of a series.*

The plaintiff and defendant entered into three contracts under which the plaintiff undertook to supply the defendant certain quantities of flour at certain rates. Although the defendant demanded the flour agreed to be supplied, the plaintiff sent only the goods under the last contract, of which the efendant refused to accept delivery. In a suit by the plaintiff for damages for breach of contract,

Held, that the intention of the parties in entering into the third and last contract, at a time when the two prior contracts had not been fulfilled was that the goods under that contract should be supplied in addition to the goods under the former two, and that the third contract should not be treated separately from the other two. The plaintiff could not, therefore, treat the one as an isolated one and to sue for damages for breach thereof. (*Bennet, J.*) HARI KISHEN DAS *v.* BENI PRASAD SHEO PRASAD BHAGAT. **1937 A.L.J. 1250.**

———Lex situs—*Contract relating to land—Form of—Law governing.*

A contract has to be interpreted according to the *lex situs*: and the form of an instrument embodying a contract with regard to land is admittedly determined by the law of the country where the land is situate (*Horwill, J.*) RAMASWAMI CHETTIAR *v.* MUTHIAH CHETTIAR. **168 I.C. 528=9 R.M. 600=44 L.W. 569=A.I.R. 1937 Mad. 22=71 M.L.J. 641.**

———*Oral and documentary contract—Distinction—Written offer and written acceptance—If constitute written contract.*

An offer may be oral and the acceptance may be oral, and yet the terms may be embodied in a document. In such a case the contract is in writing, and not oral, inspite of the oral offer and acceprance. Equally the offer and acceptance may be in writing and yet the terms may be oral, and the contract is an oral one, not a written one, for it is the terms of the contract which must be embodied in a written instrument before the contract can be considered a written one, and not merely the offer and the acceptance. So also the contract may actually be contained in several documents which, when read together, constitute the entire contract, and they are then regarded as one instrument in the eye of the law, even as they form but one contract. There was a written offer and a written acceptance of a contract but the contract was not wholly reduced to writing and the terms of the contract were not found to be in writing A formal written agreement had yet to be executed. But before that, the parties began to act upon the contract.

Held, that the contract was an oral one and that the intention of the parties as indicated by their conduct was to regard the oral contract as binding until it was superseded by a written instrument. (*Vivian Bose, J.*) IMAMALI *v.* RANI PRIYAWATI DEVI. **I.L.R. (1938) Nag. 31=10 R.N. 115=171 I.C. 553=A.I.R. 1937 Nag. 289.**

———*Privity—Sale of grainpits by means of slips—Condition in slips that filler of pits would deliver grain to party bringing slips—Successive sales—Privity of contract between ultimate purchaser and filler of pit—Liability of intermediate purchasers.*

Defendant No. 3 filled two grainpits and sold the same by means of two slips. These slips passed through the hands of various successive purchasers and ultimately defendants 1 and 2 became the purchasers of the same. These defendants sold the two slips to the plaintiff. The plaintiff, however, could not get delivery of the pits and, therefore, brought a suit for recovery of the earnest money paid by him to defendants 1 and 2. The very first condition entered in the slips drawn by the filler of pits was as follows:—"The goods entered in the *parcha* of this grainpit shall be delivered by us to the party who—after sale and resale from one party to another—brings this *parcha* to us after receiving from him the remaining amount and interest less the amount of margin money".

Held, that the condition noted above absolved the intermediate purchasers from responsibility to each successive purchaser and that the contractual liability existed only between the filler of the pit and the ultimate holder of the slip and plaintiff was, therefore entitled to a decree not against defendants 1 and 2 but only against defendant No. 3. (*Thom and Iqbal Ahmad, JJ.*) SHIKAR CHAND *v.* SHANKAR LAL. **165 I.C. 231=9 R.A. 255=1936 A.L.J. 1012=1936 All.L.R. 887=1936 A.W.R. 834=A.I.R. 1936 All. 700.**

———*Sale of goods—Implied negative covenant Breach—Interlocutory injunction—Specific Relief Act, S. 57—Sale of Goods Act, S. 58.*

The defendants entered into an agreement to purchase their entire future requirements of limestone and dolomite from the plaintiff at certain specified rates. After some years the defendants discontinued the use of dolomite but continued to take supplies of limestone Some time later they wrote to the plaintiff that they would not take any supply of limestone from him after a certain date. The defendants were arranging to obtain limestone for their works from other suppliers.

Held, that the agreement contained by implication a negative covenant by the defendants not to take limestone or dolomite from other suppliers and that the breach of such covenant could be restrained by an interlocutory injunction, although it was contained in a contract for the sale of goods. (*Panckridge, J.*) JAIRAM VALJEE *v.* INDIAN IRON AND STEEL CO., LTD. **I.L.R. (1940) 2 Cal. 53=A.I.R. 1940 Cal. 466.**

———*Sale of goods—Payment to be made in cash in exchange for delivery order on seller for Mate's receipts—Stipulation for delivery alongside export vessel in port—Goods delivered to ship and Mate's receipt taken by seller in buyer's*

name—Bills of lading, issued to buyer without Mate's receipt but on letter of guarantee by buyer —Non-payment of price—Buyer endorsing bills of lading—Delivery to endorsee—Claim by seller to damages against shipping company—Maintainability—Property—When passes.

On 4—5—1926, the respondents, who were brokers and merchants at Calcutta, entered into three contracts with three mills, respectively, for the purchase of a total quantity of250 bales jute gunny bags. On the same day they sold the same quantity of 250 bales to a company carrying on business in Calcutta known as the Export Company. The contracts were in a form which contained, *inter alia*, the following material terms: (1) "Payments to be made in cash in exchange for delivery order on sellers or for Railway receipts or for Dock receipts or Mate's receipts (which Dock receipts or Mate's receipts are to be handed by a Dock or ship s officer to the seller's representatives). (2) The buyers hereby acknowledge that so long as such Railway receipts or Mate's receipts (whether in sellers' or buyers' name) are in possession of the sellers, the lien of sellers as unpaid vendors subsists both on such Railway receipts or Dock or Mate's receipts and the goods they represent until payment in full." The contracts stipulated for delivery free alongside export vessel in the Port of Calcutta. The Export Company had in due course engaged freight from the appellants, a Japanese ship owning company, and the shipping order stipulated that the goods should be sent alongside on notice, that freight was payable in Calcutta and that receipt of cargo issued by the ship (the Mate's receipt) must be exchanged for bill of lading. On 4—5—1926, the Export Company shipping instructions to the respondents which they passed on in the same terms to the mills concerned; and on 17—5—1926 and 18—5—1926, two of the mills sent alongside certain parcels to a vessel, and the remaining quantities were sent to another vessel, both of which were owned by the appellants, who received the goods and issued Mate's receipts as presented to them for signature by the mills. The receipts recited that the goods mentioned therein were received for conveyance to Kobe from the Export Company. The receipts were handed over to the mills' sircars who requested that the Mate's receipts might be handed to them. The appellants issued the bills of lading describing the goods as shipped by the Export Company and deliverable to order at Kobe, without the Mate's receipts being given in exchange, but taking a letter of guarantee from the Export Company. The respondents obtained the Mate's receipts from the mills a fews days later against payment and tendered them to the Export Company who defaulted in payment. Thereupon on 27—5—1936, they gave notice to the appellants that bills of lading should not be issued to the Export Company until Mate's receipts were surrendered. But by that time the Export Company having the bills of lading with them had re-sold the goods to purchasers in Japan and had endorsed over the bills of lading as security for bills of exchange drawn for the price of goods and discounted by them. The appellants told the respondents that they had passed bills of exchange to the shippers on their letter of guarantee and referred them to the shippers. The goods arrived

in Kobe and were delivered on presentation of the bills of lading. The respondents sued to recover the price of the goods from the Export Company and damages from the appellants.

Held, (1) that the property in the goods sold passed when the goods were appropriated by delivery alongside in implement of the contracts; (2) that the sellers had parted with property and possession after delivery alongside, and had nothing left except the equitable charge which could be enforced only against the buyer or persons taking with notice of the equity; (3) that there was nothing left in the sellers-respondents in the nature of a common law or possessory lien which would support an action in conversion or trespass; (4) that the appellants in issuing bills of lading without Mate's receipts did not commit any wrong as against the respondents and were not guilty of any breach of duty; (5) that the appellants did not, by delivery of the goods to the holder of the bills of lading, convert the respondents' goods, as the respondents had no special property in the goods which could be said to have been violated by the delivery at Kobe to the bill of lading holders and which could give the respondents any right to damages in trespass or conversion; and (6) that the equitable lien or personal license which was all that remained with the respondents under the contract when the goods were delivered to the ship, did not affect the transferee of the bills of lading so as to found a claim for conversion, though it might found a claim for breach of contract against the Export Company. (*Lord Wright.*) NIPPON YUSEN KAISHA *v* RAMJIBAN SEROWGEE. **65 I.A. 263=I L.R. (1938) 2 Cal. 381=10 R P.C 273=1938 O.L.R. 235=4 B R. 549=67 C.L.J 299=1938 A.L.R. 367=32 S.L R. 502=40 Bom.L.R 799=174 I.C. 564=42 C.W.N. 677=1938 M.W N. 487=A.I.R. 1938 P.C. 152=(1938) 1 M.L.J. 834 (P,C.).**

———*Surrounding circumstances, if can be considered.*

In looking at the contracts to find their true meaning, the surrounding circumstances must, of course, be considered. (*Roberts, C. J. and Mya Bu, J.*) MAHOMED VALLI PATEL *v.* EAST ASIATIC CO., LTD. **14 Rang. 347=164 I.C. 654=9 R R. 118=A.I R. 1936 Rang. 319.**

———*Time—When of essence of contract—Test —P. W. D. contracts.*

The question whether or not time is of the essence of a contract is a question of the intention of the parties to be gathered from the terms of the contract. Where there is an express provision that time is of the essence of the contract and at the same time provision for extension of time in certain contingencies, and for the payment of a fine or penalty for every day or week the work undertaken under the contract remains unfinished on the expiry of the time provided in the contract, such provision is inconsistent with time being of the essence of a contract, and would be calculated to render ineffective an express provision in a contract to that effect. In such a case it cannot be said that it was intended that time should be of the essence of the contract. This principle applies to P W. D. contracts. (*Lobo, J. C. and O'Sullivan, J.*) SHAMBHULAL *v.* SECRETARY OF STATE. **189 I.C. 785=13 R.S. 36=A.I.R. 1940 Sind 1.**

CONTRACT.

Enforceability.

——*Legal and illegal objects—Duty of Courts.*

Per *Vivian Bose, J.*—Where a transaction consists of two separate considerations for two severable objects consisting of legal and illegal parts in which the lawful is separable from unlawful, it is always possible to give effect to the lawful and reject the unlawful; in fact that is what the Courts are bound to do unless the whole transaction is prohibited by statute or unless it involves serious moral turpitude or is otherwise against public policy. (*Stone, C. J., Bose and Digby, JJ.*) ASARAM *v.* LUDHESHWAR. **I.L.R. (1939) Nag 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B.).**

English principles.

——*If may be applied*

Per *Leach, J.*—In deciding cases relating to contracts in India, the Court is governed by the provisions of the Contract Act and it is not entitled to go outside the four corners of the Act, unless the Act is not clear. If the Act is silent or there is ambiguity it may be necessary to apply English principles but not otherwise. (*Roberts, C. J. and Leach, J.*) U BA YI *v.* MAHANT SINGH **171 I.C. 291=10 R.R. 142=A.I.R. 1937 Rang 302.**

——Executed and executory—Contract with corporation—Omission to comply with statutory requirements—Effect on validity and enforceability. *See* BOMBAY DISTRICT LOCAL BOARDS ACT, S. 42 (2). **I.L.R. (1940) Kar. 347.**

Executory agreement.

——*Such agreement to be carried out by subsequent deed—Contract, if merged in deed.*

It is well settled that where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed. The most common instance perhaps of this merger is a contract for the sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should be performed by the conveyance are merged in the conveyance, and all the rights of the purchaser in relation thereto are thereby satisfied There may, no doubt, be provisions of the contract which from their nature or from the terms of the contract, survive after completion. (*Lord Russell*) THE KNIGHT SUGAR CO., LTD *v* ALBERTA RAILWAY AND IRRIGATION CO. **10 R.P.C. 192=173 I.C. 88 (P.C.).**

Formation.

——Offer and acceptance—Despatch of offer by telegram—If part of the cause of action. *See* LETTERS PATENT (MADRAS), CL. 12—JURISDICTION. **50 L.W. 597.**

——*Offer and acceptance— Counter-offer— If amounts to rejection of offer.*

Where an offer containing certain conditions has been made to a party and that party by adding to the conditions makes a counter-offer, the counter-offer amounts to rejection of the offer made to him. (*Addison and Din Mohammad, JJ.*) RAO GIRDHARI LAL *v* SOCIETE BELGE DE BANQUE. **178 I.C. 23=11 R.L. 411=A.I.R. 1938 Lah. 341.**

——*Offer and acceptance—Letter to member offering new shares to him and on his renunciation to his nominee—Renunciation by member and acceptance by nominee—Contract if concluded.*

A letter addressed to a member of a company offered him new shares and in the event of his renouncing, to his nominee. The member renounced and his nominee accepted them.

Held, the contract with the nominee was completed even though the offer was made in the letter to the member. (*Panckridge, J.*) EZEKIEL *v.* CAREW & CO., LTD. **I.L.R. (1938) 2 Cal. 190=180 I.C. 86=11 R.C. 646=A.I.R. 1938 Cal. 423.**

——*Offer and acceptance—Plaintiff accepting defendant's offer to sell but adding a further term—Defendant refusing to consider term, but repeating his previous offer—Acceptance by plaintiff—If completes contract of sale.*

Where the plaintiff accepts the offer of the defendant to sell but seeks to add a further term, which the defendant refused to consider at the same time repeating the offer which he had previously made, and the plaintiff accepts the offer, the transaction of contract of sale is complete and binding on the defendant. (*Lort Williams, J.*) PACIFIC MINERALS, LTD. *v.* SINGBHUM MINING SYNDICATE. **177 I.C. 524=11 R.C. 258=A.I.R. 1938 Cal. 343.**

Hire agreement.

——*Fitness of article for purpose required—Implied warranty.*

As a general rule, if a person contracts for the hire and use of a specific article, there is no implied warranty by the owner that it is fit for the purpose for which it is required. He undertakes to deliver it in the state agreed for, but the hirer obtaining the thing agreed for, takes the risk of its fitness and efficiency for his purpose. (*Lort Williams, J.*) BHARAT BIKASH HALDER *v.* BHARAT LUXMI PICTURES. **177 I.C. 540=11 R.C. 262=A.I.R. 1938 Cal. 248.**

Hire purchase.

See also CONTRACT ACT, S. 78.

——*Construction—Purchase of motor car—Provision for payment in instalments—Default clause—Whole amount to become due on default and seller having power to seize car—Absence of provision permitting buyer to return car to escape further liability—Nature of contract—Contract or hire.*

Where under an agreement described as a hire purchase agreement, the purchaser of a motor car binds himself to pay a certain amount for the car in instalments, with the usual default clause giving the seller power to seize the car on default, but there is no term in the contract enabling the purchaser to return the car at any stage and thereby relieve himself from any further obligation for the remaining instalments, the contract is one of sale and not of hire. (*Pollock, J.*) MAHOMED ISMAIL *v.* PROVINCIAL AUTOMOBILE CO. **20 N.L.J. 108=171 I.C. 781=10 R.N. 20 A.I.R. 1937 Nag. 198.**

——*Express covenant that hirer shall take good care of car—Duty to take care—Extent—Express covenant that hirer to make good loss by fire—Validity—Liability for loss by fire in absence of express covenant.*

It is no doubt true that in the absence of an express covenant either limiting or extending the liability of a bailee, he is not liable for loss occasioned by an accident which is in no way occasioned or contributed to by his negligence But that does not mean that a bailee may not expressly covenant to make good such loss or that in

the event of his so agreeing, it is open to him to avoid his contractual liability. Where there is an express covenant contained in the hire-purchase agreement that the hirer shall be responsible to make good the damage done by fire to the subject-matter of the agreement, it is open to the hirer to protect himself against loss by fire by effecting an insurance on the chattel bailed to him, and there is no great hardship upon him if he is made to pay compensation to the owner in the event of loss by fire. The stipulation cannot be avoided under S. 56, Contract Act. Moreover the hirer being a bailee for the article given on hire to him is liable under Ss. 151 and 152, Contract Act, for loss occasioned to the owner of the article by fire, by virtue of the special contract of liability of the hirer for such kind of loss. (*Davis, J.C. and Rupchand Bilaram, A.J.C.*) F. O. HASSANAND RAMDAS *v.* ABDUL RAHMAN ARZ MAHOMED. **171 I.C. 512=10 R.S. 109=A.I.R. 1937 Sind 207.**

———*Nature of—Construction—Principles.*

The hire purchase agreements are, on account of their complexity, not easy to construe. The terms used by the parties are frequently so obscure and equivocal that they are calculated to elude an attempt to gather their intention from them. A hire purchase agreement is ordinarily so complex that it may be described as a compound of agreement of hiring and agreement to sell tinged with an agreement of hypothecation. With all these, it at bottom may well be a contract of sale on credit. The main point in regard to the hire-purchase agreement is to ascertain the precise time when property in the subject-matter of the agreement passes to the hirer, for, on that point turns the nature of the rights and obligations of the parties which have to be ascertained for the purpose of giving appropriate relief. The question whether or not the agreement which wears the garb of hire purchase agreement transfers by its own force the ownership from one party to the other is one of great moment for the purposes of determining the nature and extent of the remedy that is available to the aggrieved party. If it is found that the agreement is a contract of sale with the condition of retarded payment of the price by instalments, the property in the chattel would pass to the ostensible hirer. If on the other hand the agreement is one of hiring, albeit coupled with an option to purchase, the property will not pass to the hirer as he will be treated only as a bailee until he exercises his option after having fulfilled the required conditions. In the former case the owner who has parted with his ownership is entitled to sue the purchaser for the balance of the price as a debt owed to him. In the latter case he may seize the chattel or sue for recovering the arrears of hire money or for damages as a consequence of the breach of the contract. To construe a hire-purchase agreement, one must look into the language used by the parties to it for indications of the various stages in the development of the contract in relation to the rights and obligations that the parties contemplated to create, alter or extinguish. Every part of the agreement must therefore be explored to seek out the clue to the real intention of the parties as to the time of the transaction of the property in the subject-matter of the agreement. If the agreement embodies a

stipulation which entitles the hirer to terminate the contract at any time he pleases, that stipulation will qualify the contract as a whole and would also serve to shed light on the intention of the parties as to the time of the transfer of ownership from one party to the other. (*Niyogi, J.*) MANICKCHAND *v.* BERAR MOTOR SUPPLY CO. **I.L.R. 1940 Nag. 208=175 I.C. 337=10 R.N. 441=A.I.R. 1938 Nag. 18.**

———*Owner's right to rent—If lost by exercising right to re-take possession.*

The general rule is that in a hire purchase agreement the right of the owner to recover rent is not lost by the exercise of the right to re-take possession, even in the absence of an express stipulation to that effect. (*Tek Chand, J.*) MODERN FINANCE LTD., DELHI *v.* OM PARKASH. **184 I.C. 100=12 R.L. 165=41 P.L.R. 365=A.I.R. 1939 Lah. 324.**

Hypothecation.

———*Proof—Deposit of Government promissory note.*

One *D* at Calcutta held on deposit on *P's* account certain cash certificates and fixed deposit receipts, and a considerable sum in cash. *P* at that period was contemplating a visit to Kathiawar where his home was and he requested *D* to purchase on his account, out of the money that was lying with *D*, two Government promissory notes. The notes were purchased through a broker by *D*. The interest had not been drawn by the sellers of the note when they were purchased by *D* on *P's* account. Subsequently when *P* was about to leave for Kathiawar he obtained from *D* all the postal securities and fixed deposit receipts held by *D* and also one of the Government promissory notes which had been purchased. The other note remained with *D*. *P* at that time was indebted to *D* for certain amount Subsequently *P* wrote a letter to *D* asking him to send the promissory note remaining with him and promised in return to send another note to *D*.

Held, that the suggestion that the purpose for which the note was retained by *D* was the collection of interest was unsatisfactory, because it was possible to collect the interest due on such notes at other places as well as in Calcutta and also because the other Government promissory note on which interest was due, was taken away by *P* along with his other documents. The promise to send another paper in return could only be interpreted as an admission that *D* was entitled to the protection afforded by the hypothecation and possession of a Government promissory note of a similar issue and denomination as the one which *P* was asking for. In these circumstances the terms on which *D* retained the Government promissory note were not that *D* should keep it for safe custody and collection of interest but that he should hold it as security for dues from *P*. (*Panckridge, J.*) RAMNATH *v.* CHANDULAL. **A.I.R 1938 Cal. 649.**

Implied obligation.

———*Plaintiff's money forfeited for defendants' dues—Right to recover.*

Where a portion of the amount deposited by the plaintiff was appropriated by Government for the satisfaction of a debt due from the defendants, it is not a case of any voluntary payment by the plaintiff, but of one of appropriation with-

out his consent. As the defendants obtained the benefit of the appropriation, an implied obligation on their part to repay the plaintiff arose, on which he can sue to recover the amount. (*Iqbal Ahmad, J.*) PHEKU RAM *v.* GANGA PRASAD. **1938 A.W.R. (H C.) 123=1938 A.L.J. 223=174 I.C 900=1938 R.D 494=1938 A.L.R. 349=10 R.A. 635=A.I.R. 1938 All. 206.**

Indemnity.

——*Contract of—Requisites of—If can be implied—Writing—If necessary.*

Contract of guarantee or indemnity can be created either by parol or by written instrument. It need not necessarily be in writing. It may be express or it may be implied and may be inferred from the course of conduct of the parties concerned. When *N*, a member of a firm *A* wrote a letter to the firm *B* asking them to buy piece-goods to the extent of certain amount and also stating in the letter that *V* was *N's* man and that *B* should not worry about payment and should debit the amount to *V's* account:

Held, that the circumstances under which the letter was sent clearly showed that *N* represented to the firm *B* that his firm would be liable to them to the extent of certain amount for purchases made by *V* and credit might be given to him to that extent on the security of *N's* firm But if *N* be not proved to have authority to send that letter making his firm liable, he alone was held liable to pay the amount not yet paid by *V*. (*Rupchand Bilaram and Havcliwala, A.J.Cs.*) NANDLAL CHANANDAS *v.* KISHINCHAND BUTAMAL. **9 R.S. 231=168 I.C. 222=A.I.R. 1937 Sind 50**

——Contract of—What amounts to—Sale-deed—Vendee retaining part consideration to pay-off vendor's debts on condition of suit ending unfavourably—If contract of indemnity—Vendor's right to such amount when vendee does not have to pay the same, *See* DEED—CONSTRUCTION. **A.I.R. 1936 Mad. 528.**

Insurance contract.

——*Fraud—Effect of—Wilful suppression of material facts by assured—Right of insurer to avoid contract.*

In a proposal for insurance the utmost degree of good faith is required. Where the insured in reply to the questions of the insurance company during the course of inquiry into his proposal withholds the fact that his proposal has been accepted by another company on special conditions and that he has got himself insured for Rupees 15,000 in another company, and deliberately gives false replies, such withholding of material information is wilful and in the nature of fraud and the company is entitled to avoid the contract. (*Davis, J.C. and Weston, J.*) SHIVKUMAR *v.* NORTH B. M. INSURANCE CO **I.L.R. (1939) Kar. 611=12 R.S. 121=184 I.C. 575=A.I.R. 1939 Sind 254.**

Joint contractors.

——*Death of one—Relationship, if ceases—Heirs of the deceased and surviving contractor—Position of.*

In the case of joint contractors the death of one, does not put an end to the relationship, but the surviving contractor still remains a joint contractor with the heirs of the deceased, (*Nasim Ali and Mukherjea, JJ.*) AZIZUR RAHAMAN OSMANI *v.* UPENDRA NATH SAMANTA. **176 I.C.**

191=11 R C. 56=66 C.L.J. 104=42 C.W.N. 18=A.I.R. 1938 Cal. 129.

Liability under.

——*Contract by power of attorney agent in respect of property of principal and for consideration benefitting principal—Deed reciting that it is executed as authorised agent of another—Signature not as agent—Personal liability.*

Where a person signs a contract in his own name without any qualification he is *prima facie* to be deemed to be contracting personally; in order that he may escape personal liability it must appear from the document that he did not intend to bind himself as principal. Where a person holding a power-of-attorney from another executes a document, which recites that it is being executed by him as the authorised agent of that other. in relation to the property of that another, the consideration under the document being also for the purpose of that another, it must be taken that he acts as agent and not in his personal capacity. He cannot therefore be held personally liable under that contract. (*Madhavan Nair, J.*) MOOKAN SERVAI *v.* MUTHAYYA SERVAI **174 I C. 799=10 R.M. 738=46 L.W. 851=1937 M.W.N. 1118=A.I.R. 1938 Mad. 146=(1938) 1 M.L.J. 63**

Maintenance agreement.

——*Agreement that certain person and his descendants should continue to get maintenance from person in possession of estate—Agreement also making the maintenance a charge on property—Right of person entitled to maintenance to personal decree.*

Where an agreement relating to maintenance provides that a certain person and his descendants should continue to get maintenance at a certain rate from the person then in possession of an estate and that the maintenance would also be a charge on the property, the person entitled to maintenance is entitled to a personal decree against the person in possession of the estate in respect of any arrears due. (*Zia-ul-Hasan and Smith, JJ.*) RAMPAL SINGH *v.* LAL SURENDRA BIKRAM SINGH. **13 Luck. 65=166 I.C. 194=9 R.O. 286 (2)=1937 O.W.N. 136=1936 O.L.R. 720=A.I.R. 1937 Oudh 82.**

——*Talukdar agreeing to pay at certain rate—Subsequent reduction in income of taluka—Rate of maintenance—If can be reduced.*

An agreement by a talukdar to pay maintenance at a certain rate is not binding for all time. The rate of maintenance can and should be reduced on principles of justice, equity and good conscience, if there is reduction in the income of the taluka. (*Zia-ul-Hasan and Smith, JJ.*) RAMPAL SINGH *v* LAL SURENDRA BIKRAM SINGH. **13 Luck. 65=166 I.C 194=9 R O. 286 (2)=1937 O.W.N. 136=1936 O.L.R. 720=A.I.R. 1937 Oudh 82.**

Minor.

——*Fraudulent representation of full age—Effect—Validity of contract—Defence of minority—Estoppel—Right of minor to retain benefit of contract—Restitution—Duty to make—Interest—Right to.*

Where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract; and, though S. 115, Evidence Act, is general in its

terms, it must be read subject to the provisions of Contract Act, declaring a transaction entered into by a minor to be void But the minor defendant should not be allowed to retain the benefit which he has received as a result of his fraudulent misrepresentation, and on equitable principles, in a suit properly framed, he might be called upon to refund the consideration money which has been received by him It is, however, clear that his liability in this respect arises not *ex contractu* but on equitable considerations and the plaintiff cannot therefore in any event claim interest on the loan. because the liability to pay interest arises on one of the stipulations of the contract. (*Edgley, J.*) MANMATHA KUMAR SAHA *v.* EXCHANGE LOAN CO., LTD. **I.L.R. (1937) 1 Cal. 283=165 I.C. 363 =9 R C. 379=41 C.W.N. 115=A.I.R. 1936 Cal. 567.**

Modification.

———*Statutory and contractual obligation—Difference between.*

There is a vast difference between the obligations imposed by statute and terms agreed by the contracting parties, There is no escape from the former, but the latter can always be modified by mutual agreement. (*McNair, J.*) KHIRENDRA NATH *v.* SECRETARY OF STATE. **44 C.W.N. 1069.**

Novation.

———Consideration—Substitution of liabilities—Covenant not to sue and giving of time—Sufficiency. *See* COMPANIES ACT, SS. 91-A, AND 91-B. and Sch. I, TABLE A, ART. 73. **37 Bom.L.R. 978= A.I.R. 1936 Bom. 62.**

———Effect of—Debtor and creditor—Agreement to pay debt due in specified manner—Agreement to sell properties specified and to pay balance with interest in exchange for debt found due—Failure to carry out terms in entirety—Effect—Remedy of creditor—Old obligation—If revives. *See* CONTRACT ACT, S. 62. **63 Cal. 194.**

———*Agreement subsequent to decree as to mode of payment, if amounts to.*

Where by a compromise entered into between the parties subsequent to a decree, it was agreed upon that the decree would be payable by instalments.

Held, the compromise does not amount to a novation of contract, as the only alteration was as to the mode of payment. No third party was introduced and no new conditions were agreed upon. So the original decree can be executed. (*Kichlu, J.*) SURAJ BAT AND SONS *v.* MUKHTAR SHAH. **39 P.L.R. J. and K. 171.**

———*Breach—Revival of original contract.*

On a certain date on taking accounts on a pronote, Rs. 2, 974 were found due from the promisor. On that date the parties arrived at a settlement whereby the promisee agreed to accept Rs. 2,500 in full satisfaction if the amount was paid forthwith. The promisor paid Rs. 2,000 immediately and for remaining amount of Rs. 500 the promisor delivered to the promisee a blank cheque drawn by a third person for the said amonnt. The cheque was dishonoured by the Bank and on such dishonour the promisee sued the promisor for the whole of the amount in balance due from the promisor on the date of the settlement.

Held, that inasmuch as the whole of the amount agreed upon in the settlement was not paid forthwith, the consideration for the settlement had failed and the promisee was entitled to recover the whole amount due on the original pro-note as the original loan remained intact. (*Tek Chand, J.*) A.R. DOWER *v.* SOHAN LAL ANAND. **176 I.C. 30=11 R.L. 185=40 P.L.R. 77=A.I.R. 1937 Lah. 816.**

———Mortgage—Mortgagee purchasing mortgaged properties in consideration of mortgage amount and cash payment—Covenant in sale-deed entitling vendee to recover whole sale price with interest in case of ejectment or dispossession—Effect—If supersedes mortgage contract—Cancellation of sale and di-possession—Right to sue for cash payment and for mortgage amount separately *See* C P. CODE, O. 2, R. 2. **64 C.L.J. 62=A.I. R. 1937 Cal. 57.**

———*New contract compulsorily registrable but not registered—Rights under original contract—Enforceability.*

Where an instrument intended to constitute a novation becomes invalid or inoperative the rights of the creditor under the original contract remain unaffected. Thus where the intended novation was by a document requiring registration and registration was not carried out, the original contract remains enforceable. (*Pollock, J.*) GHARATI HIRACHARAN *v.* KEHAR MANSARAM. **I L.R. (1937) Nag 353=170 I.C. 120=10 R.N. 45 (1)=A.I.R. 1937 Nag. 104.**

Pakki adat.

———*Custom in Lyallpur and Amritsar markets—Market going down—Deposit insufficient—Arhti when can settle transactions.*

A custom is well settled both in the Lyallpur and Amristar markets that if the market is going down and the deposit is found to be insufficient the arhti can make a demand from the purchaser for a further deposit, and it is only if the latter fails to comply within a reasonable time that the arhti is competent to settle the transactions. (*Tek Chand and Skemp, JJ.*) GANPAT MAL SUNDAR SINGH *v.* KHER SINGH BALWANT SINGH. **40 P.L.R 166=174 I.C. 827=10 R.L. 605=A.I.R. 1937 Lah. 581.**

———*Forward contracts—Incidents of relationship between arhti and his client.*

When a constituent places an order with pucca arhti to sell or buy for forward delivery, the pucca arhti can either appropriate or allocate the order to himself or enter into a contract with another merchant in pursuance of the order. In either case, the constituent looks to the pucca arhti alone and regards his order as a contract with him as if he (pucca arhti) were, so far as the constituent is concerned, the principal. Where the pucca arhti, instead of allocating the order to himself enters into a contract with another merchant, the constituent never inquires who the merchant is and the pucca arhti never gives the name of the merchant to the constituent. The reason is that the constituent and the merchant have nothing to do with each other; each regards his transaction as one with the pucca arhti as the principal responsible to him. As an incident of this relationship, the pucca arhti is entitled in such a case to enter into a cross contract before the due date with the same merchant either on his own account or in pursuance of an order from another constituent. In neither case is the pucca

arhti bound to substitute another contract for the first contract entered into by him in fulfilment of the order of the original contract: and in either case the pucca arhti is entitled, without any such substitution, to call upon the constituent, when the due date arrives, to give delivery, if the order was to sell, or to take delivery if the order was to buy, and to pay or receive differences, as the case may be. 15 Bom.L.R. 750 and 7 Bom.L.R. 57, Foll. (*Tek Chand and Skemp, JJ.*) GANPAT MAL SUNDER SINGH *v.* KHER SINGH BALWANT SINGH. **174 I.C. 827=10 R.L. 605=40 P.L.R. 166=A.I.R. 1937 Lah. 581.**

———*Duty to upcountry constituent*—Teji mandi *transaction—Option as to buying or selling*—Pakka adatia—*If bound to exercise without instructions from constituent—Obligation—If can be implied—Course of dealing.*

It cannot be held that there must be implied in every contract of *teji mandi* entered into by a *pakka adatia* on behalf an of upcountry constituent an obligation on the agent without any further instructions to exercise the option as to the selling or buying, on the *sahi* day or to enter into the requisite cross-contract, and carry the transaction through on behalf of the upcountry client. It is of course open to the constituent to provide for it in the original contract. But it is dangerous to imply terms in such contracts which are very common in the Bombay market. *Prima facie*, an agent may accept or refuse business which is offered to him. The fact that he has accepted business on several previous occasions cannot involve him in law in an obligation to accept fresh business in future. (*Beaumont, C.J. and Rangnekar, J.*) BALDEOSAHAI SURAJMAL & Co. *v.* RADHAKISHAN JOHARILAL. **183 I.C. 22=12 R.B. 60=41 Bom.L.R. 308=A.I.R. 1939 Bom. 225.**

Part performance.

———Applicability—Maintenance decree creating charge on immovable property—Transfer of property by judgment-debtor—Agreement between decree-holder and alienee for release of property from charge on payment of certain amount—Payment of portion of amount—Effect—Release not executed—Right to execute decree—If lost. *See* T. P. ACT, S. 52. **1938 M.W.N. 269.**

Penalty.

———*Agreement to pay money by instalments—Provision for forfeiture of payments made, in case of default—If a penalty—Relief that could be given.*

Where it agreed to pay money by various instalments and it is provided that in case of default in the payment of any instalment, the amounts paid till then would be forfeited, the provision is in the nature of a penalty and in case of default only a reasonable sum can be claimed as damages. (*Ziaul-Hasan and Hamilton, JJ.*) MADAN THEATRES, LTD. *v.* NARAYAN DAS **15 Luck. 550=187 I.C. 849=12 R.O. 408=1940 O.W.N 395=1940 O.A. 350=1940 O.L.R. 264=1940 A.W.R. (C.C.) 184 =A.I.R. 1940 Oudh 257.**

———*Owner of land selling mining rights over it—Covenant in sale deed providing that in case of default by vendor to pay assessment on land vendee by paying it should be absolute owner of property—If penal—Relief against.*

An owner of land sold mining rights over it. A covenant in the sale deed provided that the vendor should pay the assessment on the land and in case he committed default in any year the vendee or his heirs would on payment to Government of such land assessment be entitled to hold and possess with full and absolute rights the property in respect of which such payment had been made. The vendor committed default in payment of land assessment and the vendee on payment of the same brought a suit for declaration that he was an absolute owner of the property.

Held, that the covenant was more or less a clause *in terrorem* and in the nature of a penalty which was out of proportion to the possible injury which the vendee might have suffered by reason of the non-payment of assessment. The covenant therefore should be relieved against. (*Pandrang Row and Venkataramana Rao, JJ.*) MALAYALAM PLANTATIONS, LTD. *v.* N. VEERARAGAVIAH. **182 I.C. 120=12 R.M. 7=A.I.R. 1938 Mad. 304.**

Performance.

———*Obligation to pay foreign unit of account—Form of tender—How regulated.*

Where there is an obligation to pay a foreign unit of account, the form in which such payment is to be made must be regulated by the Municipal law of the country whose unit of account is in question. What would or would not be a legal tender or currency must depend upon the law on that subject at the time when the tender should have been made. (1923) 2 Ch. 466, Rel. on. (*Lord Porter.*) PYRMONT, LTD. *v.* LUCILA SCHOTT. **1939 A.C. 145=180 I.C 985=11 R.P.C. 201=A.I.R. 1939 P.C. 74 (P.C.).**

Privity.

———*Absence of—Effect.*

A person obtained a licence for a liquor shop *benami* in the name of another and deposited a certain sum as security. Thereafter he severed his connection with the business but allowed the security to continue as security for the licence of the other person. The latter took a new partner and owing to failure in the payment of the licensing fee, the security was forfeited to Government. In a suit by the original depositor against the old and the new partner, for the recovery of the money forfeited, it was held that there was no privity of contract between the plaintiff and the new partner and that hence no decree could be passed against him. (*Thom, C.J. and Ganga Nath, J.*) PHEKU RAM MALI *v.* GANGA PRASAD. **I L.R. (1940) All. 96=186 I.C. 513=12 R.A 411=1939 A.W.R. (H.C.) 869=1939 A.L.J. 1139=A.I.R. 1940 All. 98.**

———*Third party—Knowledge of breach—Effect.*

Where a third party has knowledge of a breach of contract and with that knowledge is a party to it, privity is established. (*Davis, J.C. and Lobo, A.J.C.*) NATIONAL TALKIES *v.* IMPERIAL TALKIES. **30 S.L.R 157=164 I.C. 929=9 R.S. 57=A.I.R. 1936 Sind 119.**

Prohibition by statute.

———*Working out of equities—Powers of Court.*

Per *Vivian Bose, J.*—When the contract is void because prohibited by statute the Court has power to work out the equities and place the parties upon terms. No question of limitation arises, that is to say, in connexion with the Court's powers to place the parties upon terms if the suit

is otherwise good, nor does any question of court-fees. (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDHESHWAR. **I.L.R. (1939) Nag 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B.).**

Ratification.

——Requirements. *See* HINDU LAW—JOINT FAMILY—ALIENATION—MANAGER. **A.I.R. 1938 Nag. 482.**

——*Conditions—Invalid mortgage—Payment of interest—If amounts to ratification.*

There could be no ratification of an invalid transaction when the person performing the supposed act of ratification was unaware of the invalidity of the transaction and had not at the time of the supposed ratification the means of forming an independent judgment. Accordingly, the mere payment for several years of the interest due under an invalid mortgage does not amount to a ratification of the mortgage, when there is nothing to prove that the interest was paid after its invalidity was fully understood. (*Smith and Nanavutty, JJ.*) RAJA MOHAN MANUCHA *v.* NISAR AHMAD KHAN. **12 Luck. 435=164 I.C. 945=9 R.O. 108=1936 O.W.N. 1033=1936 O.L.R. 526=A.I.R. 1937 Oudh 87.**

Restitution.

——*Illegal contract—The rule andthe exception.*

Per *Vivian Bose, J.*—When a contract is void for illegality as opposed to being merely nugatory, money paid or goods delivered in pursuance of it cannot ordinarily be recovered unless it is still executory because of the maxim *ex turpi causa non oritur actio* in fact the test of illegality is the applicability of maxim. But there are several exceptions to this rule, one of which is where the contract is ma 'e illegal by statute with the object of protecting a particular class of persons, in which case restitution can be ordered. The refusal to direct restitution is not founded on any section of the Contract Act but is because of the matters like public policy, *ex turpi causa, in pari delicto* and the like. (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDHESHWAR. **I.L.R. (1939) Nag. 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B.).**

Sale.

——*Binding nature—Deed executed by competent persons.*

A deed of sale supported by ample consideration and executed by persons who have attained majority and are otherwise competent to act and dispose of their property is binding upon them, in the absence of evidence that they were wrongfully induced so to act. (*Lord Russell.*) DAWSON'S BANK, LTD. *v.* MAUNG MYA THWIN. **44 C.W.N. 1=1939 A.W.R. (P.C.) 152=5 B.R. 889=20 Pat L T. 641=50 L.W. 394=12 R.P.C. 30=1939 M.W.N. 991=1939 A.L.J. 844=1939 O.W.N. 694=1939 O.L.R. 461=182 I.C. 892=A.I.R. 1939 P C. 219 (P.C.).**

——*Contract to sell—Failure to disclose mortgage—Vendee not completing—Right to damages.*

The case of a vendee stands on a different footing from that of a person who is only bound by contract of sale. In view of the duty cast on the seller to disclose any material defect in the seller's title thereto, it may be reasonable to assume that the vendee after completion of a sale in his favour acquires full and correct knowledge as to the

seller's title, but that cannot be said when the sale is in course of negotiation. Where therefore in a contract of sale the party agreeing to sell does not disclose the existence of mortgage on the property, even if the mortgage was a registered one the party agreeing to purchase cannot be saddled with constructive knowledge of the mortgage. In the absence of such knowledge, he must be presumed to have bargained for purchase of the property free from the encumbrance. Hence in case of breach of such a contract the party agreeing to sell has hardly any ground to claim damages from the defendant as if the latter had committed a breach of contract. (*Niyogi, J.*) MT. SUNDERA BAI *v.* PANDHARINATH. **177 I.C. 945=11 R.N. 188=A.I.R. 1938 Nag. 441.**

——*Existence of various other covenants or giving of consideration to seller to induce him to enter into sale—If alters nature of contract.*

The mere fact that in the contract between the parties there might be various covenants, or that any consideration is given to the seller for his having brought about the transaction of sale, cannot change the character of the transaction, if in substance it is one of sale (*Varadachariar and Pandrang Row, JJ.*) SURA REDDI *v.* RAMA NARASU. **176 I.C. 444=11 R.M. 108=A.I.R. 1937 Mad. 714=(1937) 2 M.L.J. 922.**

——*Goods supplied subject to buyer's approval—Buyer's right to reject goods.*

Where a contract for the sale of goods is made conditional on the goods to be supplied being approved by the buyer, the buyer, in the absence of *mala fides*, should not be compelled to pay for goods with which he is not honestly satisfied. (*McNair, J.*) KHIRENDRA NATH *v.* SECRETARY OF STATE. **44 C.W.N. 1069.**

——*Part of consideration retained with vendee for payment to a mortgagee—Failure to pay—Decree and sale on the mortgage—Personal decree, under O. 34, R. 6 for balance—Vendor's right to recover from vendee the amount of decree—Plea in defence, of existence of prior mortgage—Vendor, if estopped from proving their non-subsistence.*

Where a property subject to a mortgage is sold and a portion of the price is reserved with the vendee to pay off the mortgagee and on his failure to pay, a suit is brought on the mortgage and after a sale a personal decree under O. 34, R. 6, C. P. Code, has been passed against the vendor and he brings a suit for the recovery of the amount decreed, against the vendee on the ground of a breach of the agreement in the sale, he is entitled to a decree. Where in such a suit it is pleaded that it was owing to the existence of prior encumbrances as shown in the proclamation that the full mortgage amount was not realised, and the vendor denies the subsistence of such an encumbrance, he is not estopped from showing in this suit that such an encumbrance did not in fact exist then, for he was not bound to appear at the fixing of the proclamation, as he was not on that date the owner of the property. (*Bennet and Verma, JJ.*) QUDRAT ULLAH KHAN *v.* SAMIULLAH KHAN. **181 I.C. 790=11 R A. 610=1939 A.W.R (H.C.) 161=A.I.R. 1939 All. 289.**

——*Time, if essence of contract—Price to be paid in one month—Acceptance of instalments beyond the month.*

Where in a contract for sale, the entire purchase price was to be paid within one month after the receipt of earnest money, and the vendor during that month accepted various instalments towards the purchase-money, the vendor should be regarded to have waived his right for entire payment within one month and could not plead time as essence of contract. (*Roberts, C.J. and Dunkley, J.*) U THA NYO *v.* M. M. R. M. CHETTIYAR FIRM. 178 I.C. 822=11 R.R. 267=A.I.R. 1938 Rang. 367.

Shipping.

———*Bill of lading—Liability of shipping company—Shipper putting goods in lighter for transhipment in ship due to arrive next day—Ship not arriving as expected—Shipper obtaining from manager of shipping company bills of lading duly filled—Bills of lading pledged with Bank for loan raised by shipper—Bank suing shipping company, its manager, and unpaid vendors for realization of amount—Liability under bill of lading—Estoppel by reason of statements in bill of lading.*

One *M* purchased in the local market some bags of foodstuffs and after lodging the shipping bills with the customs, obtained the necessary permission to export, and the goods were put in a lighter for transhipment in a ship which was expected to arrive the next day. The ship did not arrive as expected and in anticipation of her arrival, *M* obtained from the manager of the shipping company bills of lading duly filled in, which he pledged with a Bank the same day and on those bills of lading backed by insurance policies, he obtained from the Bank about Rs. 5000 and disappeared. One of the unpaid sellers made a complaint of cheating against *M* and the police seized all the bags which formed the consignment. As a result, the ship sailed without the consignment which was never put on the Board. The Bank sued the shipping company, its manager, the shipper *M* who had absconded and all the unpaid vendors of foodstuffs sold to *M*.

Held, that the shipping company owed to the Bank as an endorsee of the bill of lading a plain duty not to issue a bill of lading till the goods were on the board. The case of the Bank against the shipping company could be dealt with simply on the principle of estoppel and the shipping company were bound by their own statements in the bills of lading that the goods were received on board in apparent good order and condition (although they were not received on the board at all). The Bank in consequence acted to their detriment in advancing money to *M* and the shipping company were liable to compensate the Bank for the loss suffered by their action. Ordinarily the measure of damages was the value of the bills of exchange drawn against the bills of lading. Neither the shipping documents nor the boat notes were documents of title and even if the shipper *M* had defrauded the shipping company, the fraud did not affect the title of the Bank, they being endorsees for value without notice. No valid pledge of the goods was created in favour of the Bank when the bills of lading were pledged with them by *M* in exchange for their advance. There was no bailment to the Bank apart from the pledge of the bills of lading and the Bank had no claims against the goods in possession of the unpaid vendors or against the unpaid vendors. The Bank was not concerned in whose possession

the goods were then or in future. Even if the Bank had a claim against the unpaid vendors that would not prevent them from enforcing their undoubted claim against the shipping company. (*Davis, J.C. and Tyabji, J.*) MALABAR STEAMSHIP CO. *v.* CENTRAL BANK OF INDIA, LTD. I.L.R. (1939) Kar 439=184 I.C. 226=12 R.S. 96=A.I.R. 1939 Sind 225.

———Special contract with company in terms of or embodying Articles of Association of company—Power of company to evade contract by altering article. *See* COMPANY — ARTICLES OF ASSOCIATION—ALTERATION. 43 Mys.H.C.R. 396.

Specific performance.

———Agreement of partition between father of Hindu minor and his brother—If specifically enforceable. *See* HINDU LAW—PARTITION. 1937 A.W.R. 558=A.I.R. 1937 All. 456.

———*Agreement to execute pucca deed of transfer of house—Right to specific enforcement—Construction of contract.*

Plaintiff, a minor girl, was betrothed to defendant No. 2, and on that occasion defendant No. 1, who was a great aunt of the second defendant and who owned a house executed an agreement under which she agreed that after the marriage of the plaintiff and second defendant, they should live in the house along with her, that if the plaintiff got a son and when that son became 20 years of age, the said son would become the exclusive owner of the house, and in case the plaintiff did not have a son, then the plaintiff when she attained the age of 45 would be the exclusive owner of the house. It was also expressly provided that another pucca document was to be given in writing in accordance with the document and the same was to be registered. The document then proceeded as follows: "And if I do not execute the second document and get it registered then I have got the right to live in the house while I am alive, in accordance with this document which have given in writing; but I shall have no right of ownership left and the ownership is yours." Some months after the marriage defendant No. 1 was called upon to give a proper document and get it registered, but she did not do so. The plaintiff thereupon sued for specific performance of the agreement.

Held, on a construction of the agreement, that (1) on failure of the first defendant to give a pucca writing when demanded, there arose in the plaintiff an immediate right to demand a conveyance in her favour of the property as an absolute owner; (2) that the two conditions of the agreement were neither inter-dependent nor indivisible so as to bar the claim for specific performance. (*Kania and Wassoodew. JJ.*) MANILAL MAGANLAL *v.* BAI CHAMPA. 189 I C. 106=13 R.B. 41=42 Bom.L.R. 382=A.I.R. 1940 Bom. 193.

———Hindu joint family consisting of minor—Contract of sale by manager and adult coparcener—Manager contracting as guardian of minor coparcener—If bad for lack of mutuality. *See* HINDU LAW—JOINT FAMILY. (1937) 2 M.L.J. 653.

———*Right to—Promisee acting dishonestly—If disentitled.*

Equity will not help a dishonest suitor who demands what he is not entitled to. So where in a suit for specific performance of a contract the

plaintiff attempted to put a construction upon the contract which he knew to be wrong,

Held, that the plaintiff acted dishonestly and was not therefore entitled to equitable relief. (*Fazil Ali and Madan, JJ.*) TRIBENI PRASAD SINGH *v.* JAINARAIN SINGH. **18 Pat.L.T. 587=170 I.C. 484=3 B.R. 739=10 R.P. 121=A.I.R. 1937 Pat. 425.**

——*Sale of land—Contract by Hindu coparceners one of whom being a minor—Vendee taking possession and remaining in possession without repudiating—Suit by vendors after majority of minor for specific performance—Maintainability—Plea of minority of one vendor at time of contract—Sustainability.*

The respondents, who were brothers and members of an undivided Hindu family, entered into a contract in writing on 4—8—1930, to sell certain lands to the appellant. The third respondent was a minor at the time and was represented by the 1st respondent as the manager of the family and as his guardian. The appellant went into possession immediately and remained in possession enjoying the rents and profits, but did not pay the price of the land. In a suit for specific performance by the respondents instituted on 4—8—1933, the appellant pleaded that the suit would not lie as one of the vendors was a minor. The latter, however, had become a major at the date of suit.

Held, that having regard to the fact that the appellant had remained in possession of the land and never repudiated the contract, the right to repudiate must be deemed to have been waived, and that the plaintiffs were entitled to a decree, as the third respondent had become a major and there was a good title. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) ADINARAYANA *v.* VENKATASUBBAYYA. **1940 M.W.N. 183=51 L.W. 384=A.I.R. 1940 Mad. 625=(1940) 1 M.L.J. 251.**

Substitution.

——*Non-payment of mortgage money within stipulated period—Effect—If can be substituted by new contract.*

The effect of non-payment of the mortgage money within the stipulated period is merely to furnish a cause of action to the mortgagee to sue on the mortgage; the mortgage remains in force so long as it is not discharged and until this is done it can be substituted by a new contract. (*Fazil Ali and Chatterji, JJ.*) SHIBA PRASAD SINGH *v.* TINCOURI BANERJI. **183 I.C. 855=5 B.R. 999=12 R.P. 195=A.I.R. 1939 Pat. 477.**

——Third party—Right to question validity of *See* LEASE—THIRD PARTY IN POSSESSION. **1940 O.A. 801.**

Third party—Right to sue.

A person who is not a party to a contract is not entitled to maintain an action upon that contract, but this rule is subject to well-recognised exceptions, *e.g*, a person who is not a party can sue if he is claiming through a party to the contract or if he is in the position of a *cestui que trust* or of a principal suing through an agent, or if he claims under a family settlement. A person who merely takes a benefit under a contract to which he was not party cannot sue directly upon that contract without invoking the doctrine of trust or agency. (*Somjee, J.*) MOTILAL *v.* AKBARBHAI. **183 I C. 785=12 R.B. 131=41 Bom.L.R. 538=A.I.R. 1939 Bom. 309.**

A stranger to a contract can sue upon it at any rate in the following circumstances, namely (*a*) where a party to the contract agrees with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally, and (*b*) where the contract creates a trust in favour of the stranger. (*Dunkley, J.*) DAW PO *v.* U PO HMYIN. **1940 Rang L R 237=187 I C. 875=12 R.R. 345=A.I R. 1940 Rang. 91.**

A person who is not a party to a contract can sue on that contract where that contract creates a trust in his favour or where it gives him a benefit under a family arrangement. (*Nanavutty and Zia ul-Hasan, JJ.*) JANG BAHADUR *v.* UMA NATH BAKSH SINGH. **12 Luck. 639=165 I.C. 113=9 R.O. 145=1936 O.W.N. 1021=1936 O.L.R. 585=A.I.R. 1937 Oudh 99.**

Even if a covenant made between *A* and *B* whereby *B* promises to pay *C*, can be enforced in a suit brought by *C* against *B*, it certainly does not follow that *B's* failure to pay to *C* will give a right of action to *D* should *D* suffer damage on account thereof. A stranger is not entitled to sue on a covenant, in the performance of which he has only an indirect interest. (*Panckridge, J.*) C. A. Low *v.* H. V. Low & Co., LTD. **178 I.C. 322=11 R.C 338=A.I.R. 1938 Cal. 578.**

A stranger to a contract cannot take the benefit of a contract between two other parties reserving a benefit to the stranger unless from the terms of the contract it is clear that a trust for that stranger is intended. The question whether or not a trust is created depends upon the construction of the terms of the contract. (*D. N. Mitter and Patterson, JJ.*) ADHAR CHANDRA MANDAL *v.* DOLGOBINDA DAS. **63 Cal. 1172=167 I.C. 604 (2)=9 R.C. 707=63 C.L J. 287=40 C.W.N. 1037=A I.R. 1936 Cal. 663.**

——*Agreement between* A *and* B—A *agreeing to indemnify* B *against all his debts*—B's *creditor*—*Right to sue* A.

The only persons who can sue upon a contract are the parties to that contract There are recognised exceptions to that rule, namely, a person who is not in terms a party to the contract can sue on it when he is claiming through a party to that contract, or when he is in the position of a *cesti que trust* or of a principal suing through an agent. Another exception to the rule is the case of a family settlement. Where *A* and *B* enter into an agreement under which *A* agrees to indemnify *B* against all his debts, a creditor of *B* has no right to sue *A* on that agreement. (*Beaumont, C.J. and Rangnekar, J.*) NATIONAL PETROLEUM CO., LTD. *v.* POPATLAL MULJI. **60 Bom. 954=165 I C. 338=9 R.B. 138=38 Bom.L.R. 610=A.I R. 1936 Bom. 344.**

——*Arbitration — Award — Enforcement by stranger.*

A stranger, who renders services to an arbitrator as his legal adviser and indirectly to the parties, not being a party to the award itself, and there being no privity of contract between him and the parties to the award, cannot sue for an amount agreed to be paid to him under the same; for the principles of justice, equity and good conscience cannot be extended to cover all cases where parties contract to confer benefit upon a stranger so as to enable him to sue upon the contract but where it is clear on facts that some measure of privity is established between the

third person and the contract, he may sue on it. (*Davis, J.C. and Tyabji, J.*) TARACHAND KHIMANDAS *v.* SYED ABDUL RAZAK SHAH. **I.L.R. (1939) Kar. 422=182 I.C. 226=12 R.S. 4=A.I.R. 1939 Sind 125.**

——Contract between Mutual Benefit Fund and member thereof—Money subscribed by member payable to his *nominee* or legal heirs after death or on the happening of an event—Enforcement of contract—Right of nominee or legal heirs. *See* C. P. CODE, S. 60. **70 M.L.J. 581.**

——*Contract of insurance of motor omnibus—Policy giving insurer right to enforce legal rights of insurer against third parties and to do so in name of insured—Indemnity to insured against his legal liability in respect of death or injury to passengers—Accident and death of passenger—Suit by heirs for damages against insurance company—Maintainability.*

A stranger to a contract cannot sue on the contract, and a person who has suffered injury or damage for which an assured under a contract of insurance is liable, not being a party or privy to the contract of insurance, has no right to the money payable under the policy of insurance which he can enforce directly against either the insurers or the insured. A clause in the insurance policy giving the insurance company power to enforce the legal rights of the insured against a third party, and entitling the company to do so in the name of the insured cannot be read as giving a third party a right to sue the company in respect of a liability of the insured, because such a clause is merely an agreement between the insurer and insured and does not add to the rights of either party against a third person. Where a passenger in a motor omnibus receives injuries and dies in consequence of an accident due to the driver's negligence, the heirs of the deceased have no right to sue the Insurance Company with which the motor omnibus is insured on the basis of a clause in the policy of insurance, under which the insurance company is given power to enforce the legal rights of the insured against a third party, and is entitled to do so in the name of the insured. Nor can the victim of the accident be regarded as a beneficiary under an implied trust by reason of the fact that the policy of insurance contains an indemnity clause under which the company undertakes to indemnify the insured against his legal liability in respect of death of, or bodily injury to, passengers, etc. What is insured against, is the insured's legal liability, and the policy is taken for his benefit and not for the benefit of any passenger; and the clause cannot be read as vesting any rights in the passenger. (*Norman, J.*) BRITISH INDIA GENERAL INSURANCE CO., LTD. *v.* JANARDAN. **40 Bom.L.R. 155=175 I.C. 104=10 R.B. 522=A.I.R 1938 Bom. 217.**

——*Later mortgagee undertaking to pay off earlier mortgage—Failure to pay—Decree on earlier mortgage—Purchaser of equity of redemption paying off that decree—If can claim benefit of contract between mortgagor and his mortgagee.*

Where a later mortgagee failed in his undertaking to his mortgagor to pay off an earlier mortgage and a decree had been obtained by the earlier mortgagee, a purchaser of the equity of redemption of the mortgagor who pays off that mortgage decree, cannot seek to claim the benefit of that contract between the mortgagor and his mortgagee, nor enforce it. There is no provision either in the T. P. Act or any other law, providing that the benefit of such a contract attached to immovable property and passed with it. (*Bennet and Verma, JJ.*) PIAREY LAL *v.* DINA NATH. **I.L.R. (1939) All. 185=180 I.C. 913=11 R.A. 529=1939 R.D. 229=1939 A.L.J. 228=1939 A.W.R. (H.C.) 33=A.I.R. 1939 All. 190**

——*Mortgage-deed—Third party advancing part of mortgage-money—Right to sue mortgagor and mortgagee.*

Where according to the terms of a mortgage deed, the plaintiff who was not a party to the deed was to advance a portion of the mortgage money and there was an understanding between the mortgagee and the plaintiff that the sum advanced by the latter would be repaid to him by the mortgagee, the plaintiff can maintain a suit against the mortgagor and the mortgagee although not a party to the mortgage transaction, as his claim really rests on the oral agreement between himself and the mortgagee which was collateral to the mortgage transaction. (*Bhide, J.*) DES RAJ *v.* LODHA RAM. **172 I.C. 752=10 R.L. 366=39 P.L.R. 499 (2).**

——*Purchaser of debtor's property undertaking to discharge debt of seller—Right of creditor to sue purchaser for debt.*

A person who purchases immovable property under a sale-deed in which a debt due by the vendor under a promissory note to a third party is referred to and by which the vendee undertakes to discharge the debt, cannot be made liable for the suit in a suit by the creditor merely by reason of the sale-deed, because the creditor is not a party to the sale and there is no privity of contract between him and the purchaser. (*Beasley, C.J.*) ANJAYYA *v.* GURAYYA. **1937 M.W.N. 408.**

——*Purchaser of land contracting to pay maintenance—Arrears of maintenance—Assignee of—Right to recover arrears from purchaser.*

A widow *W* was to receive maintenance from *M* in exchange of her interest in the land. *W* assigned the arrears to *H* for value. The land was purchased by *F* from *M*. *H* sued *F* for arrears.

Held, *H* was entitled to a decree against *F*, *H* being an assignee of beneficial rights from *W*. *Tweddle* v. *Atkinson*, (1861) 1 B. & S. 393. Foll. (*Cunliffe and Henderson, JJ.*) HARE KRISHNA NAYAK *v* FAKIR CHUNDRA PAL. **162 I.C 754=8 R.C. 650=40 C.W.N. 703=A.I.R. 1936 Cal. 260.**

——*Rule in* Tweedle *v.* Atkinson—*Extent of applicability.*

The English common law doctrine laid down in *Tweedle* v *Atkinson* that a contract can create no right or liability in a person who is not a party to it applies in equity also. But certain exceptions (more apparent than real) have been engrafted on the rule. A person not a party to a contract has been held to be entitled to enforce it in case where a trust or an agency can be founded on the contract. Though the applicability of the rule in *Tweedle* v. *Atkinson* to Courts in India has been the subject of considerable discussion, opinions expressed have by no means

been uniform. A general statement that where a person makes a contract with another for the benefit of a third person, that third person can sue on the contract apart from any reference to agency or trust, is a proposition not supported either by principle or authority. (*Henderson and Biswas, JJ.*) MALDA DT. BOARD *v.* CHANDRA KETU NARAYAN SINGH. **I L.R. (1937) 2 Cal. 698 =175 I.C. 929=10 R.C. 19=66 C.L.J. 373=41 C.W.N. 1008=A.I.R. 1937 Cal. 625.**

——*Sale of mortgaged property—Part of consideration left with vendee to pay-off mortgage—Right of mortgagee to personal decree against vendee.*

Where on a sale of mortgaged property a portion of the sale consideration is left with the vendee for payment to the mortgagee on account of the mortgage, the vendee does not thereby become personally liable to discharge the mortgage debt and the mortgagee is not entitled to a personal decree against him as he was no party to the sale. (*King, C.J. and Zia-ul-Hasan, J.*) WALI UDDIN AHMAD *v.* RAM RAKHAN SINGH. **12 Luck. 215=162 I.C. 451=8 R.O. 382=1936 O.W.N. 483=1936 O.L.R. 281=A.I.R. 1936 Oudh 313.**

——Sale of mortgaged property—Vendee undertaking to pay-off mortgage—Default—Sale in execution of decree on mortgagee—Transferee of part of property free of mortgage—Right to sue vendee on contract made with vendor. *See* LIMITATION ACT, ARTS. 83 AND 116. **17 Pat. 751.**

——Security bond executed to certificate officer—Right of certificate holder to sue on bond. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT, SS. 29-33 AND SCH. II, RR. 77 AND 78. **41 C.W.N. 1008.**

——*Undertaking by under-tenure-holder to tenure-holder to pay—Zamindar rent due from latter—Zamindar's right to sue thereon.*

A third party cannot sue on a contract made by others unless the contract is intended to secure a benefit to him as *cestui que trust* or unless the contract is so framed as to make the promisee a trustee for the third party. A mere undertaking by an under-tenure-holder in the kabuliyat executed by him in favour of the tenure-holder to pay the Zamindar the rent due to him from the tenure-holder, does not create a trust in favour of the Zamindar. Nor can it be said that the tenure-holder received the promise from the under-tenure-holder as agent of the Zamindar. The Zamindar cannot, therefore, on the basis of the kabuliyat sue the under-tenure-holder for the rent of the tenure. The fact that the Zamindar was for a number of years receiving rent from the under-tenure-holder issuing receipts in the name of the tenure-holder, does not indicate that he intended to treat the under-tenure-holder as his debtor. (*Nasim Ali and Henderson, JJ.*) K. C. MUKHERJEE *v.* KIRAN CHANDRA. **42 C.W.N. 1212.**

Validity.

——*Document insufficiently stamped—Effect.*

The fact that a hire purchase agreement is insufficiently stamped does not render the document invalid, although an objection might be taken to its admissibility in evidence. (*Mc Nair, J.*) SATYANDRA NATH *v.* AKHIL CHANDRA.

178 I.C. 971=11 R.C. 443=A.I.R. 1938 Cal. 654.

——*Maintenance agreement—Agreement contemporaneous to marriage.*

An agreement contemporaneous to marriage executed by husband providing that in case of strained relations between him and his wife, the wife would be entitled to her customary maintenance is not void under any provision of law (*Abdul Rashid, J.*) JAMILA KHATOON *v.* ABDUL RASHID. **184 I C. 105=12 R.L. 164=41 P L.R. 711=A I.R. 1939 Lah. 165.**

——*Remedy by specific performance not available—If makes contract void.*

Per *Varadachariar, J.*—The non-availability of the remedy by way of specific performance does not necessarily show that a contract is void. Several instances are well known to the law where a Court may feel obliged to refuse specific performance and yet may award damages. This clearly shows that there may be a valid contract though the remedy by way of specific performance may not be available. A party may be entitled to the remedy by way of damages even in cases in which want of mutuality may preclude the remedy by way of specific performance. (*Cornish and Varadachariar, JJ.*) ZEEBUNNISSA BEGUM *v.* MRS DANAGHER. **59 Mad. 942=163 I. C. 384=43 L.W. 592=1936 M.W.N 379=9 R. M. 4=A.I.R. 1936 Mad. 564=70 M.L.J. 477.**

——*Undue influence—Sale of reversion by expectant heir to his creditor—Burden of proving fairness of transaction.*

In case of a sale of reversion by expectant heirs or transfers by persons under pressure without adequate protection, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract. The Court protects expectant heirs against the consequences of their not being on equal terms with the buyer, or in a position fully to understand the value of their interest and justly to estimate the proposals made to them. Inadequacy of price is not alone sufficient to authorise the vacating of a contract for the sale of a reversion but inadequacy of price coupled with the inexperience and absence of any competent advice on the part of the seller are sufficient to set in motion the protective powers of the Court of Equity. The vendor was a young man in a foreign country, below 22 years of age, urgently in need of cash and with no relation in the country to guide him and he sold his expectant interests under a will to a creditor who already had a powerful grip on them (interests) as security for his debt. The price was fixed between them alone. There was no bargaining or enquiry for a better market by any one on the young man's behalf. The matter cut and dried with a draft assignment already prepared, was placed before the lawyer alleged to be representing the young man and was carried through without any real advice by him. The lawyer merely contented himself with explaining to his client the contents of the draft document prepared by the creditor and made no attempt to advice his youthful client or to assist him in resisting the temptation to exchange his future prospects for immediate cash or to counteract the pressure which must almost necessarily exist where a debtor is negotiating with one who is creditor

concerning the sale of the property which already stands as security for a large indebtedness between them. It was found that the price given was a price not slightly but substantially below the true value of interests which were sold:

Held, that the relative positions of the parties to the contract of sale were such that it was incumbent on the creditor to establish affirmatively that the transaction was fair, just and reasonable and as he had failed to do this and the evidence pointed to contrary conclusion the transaction could no stand, not being one made in good faith and without unfair dealing (*Lord Russel of Killowen*), PERMANENT TRUSTEE CO. *v.* F. H. BRIDGEWATER **166 I.C. 834=9 R.P.C. 159=46 L.W. 291=A.I.R. 1937 P.C. 14=(1937) 2 M.L J. 87 (P.C.).**

Variation.

——*Proof—P entrusting with firm as agent money for investment in other firms—Firm employing it in its own business—Firm's dealing with money subsequent to original contract—If proves variation of contract—Doctrine of ratification.*

One *P* entrusted some money with his agent, a firm, to invest it in other firms. The agent firm had no authority to employ any part of it in its own business In spite of this the agent-firm from a very early date employed a large portion of the money in its own business and a small portion was invested in other firms. On the insolvency of the agent-firm, *P* claimed that the moneys were in effect a trust fund in the hands of the insolvent and should be paid over to him in priority to the claim of the other creditors. *P* had no knowledge of the dealings of the agent-firm subsequently to the original contract The firm contended that its dealings with the money had established a new contract by which *P* authorized it to employ it in its business, or alternatively, it constituted such a ratification of its dealing with the fund that it should be held that the whole fund must be regarded as merely a bank deposit with the firm in respect of which *P* could claim no priority,

Held, that a new contract or a variation of the original contract could not be proved by such means, even if the terms of the supposed new contract were less vague than suggested. Nor the doctrine of ratification could be applied so as to turn the fund originally held by the insolvent as agents in a fiduciary capacity into a mere deposit with it on ordinary banking terms. There was nothing whatever to show that *P* had full knowledge of the facts. So S. 198 of the Contract Act applies. It was also at least doubtful whether what the agent did could be regarded under the circumstances as acts done on his behalf. It was possible that the acquiescence of *P* in the unauthorized dealings by the insolvent might have debarred him from claiming compensation in any shape in respect of particular transactions but it could not affect the fiduciary position in which the insolvent stood to the minor grandson of *P*. (*Sir George Lowndes.*) MURUGAPPA CHETTI *v.* OFFICIAL ASSIGNEE, MADRAS. **64 I.A. 343=31 S.L.R. 678=170 I.C. 329=46 L.W. 399=1937 O.W.N. 928=1937 A.L.R. 731=1937 O.L.R. 478=1937 A.W.R. 879=10 R.P.C. 71=1937 P.W.N. 914=1937 M.W.N. 1179=66 C.L.J. 118=42 C.W.N. 8=18 Pat L.T. 1007=40 Bom.**

L.R. 1=1937 A.L.J. 1381=3 B.R. 770=A.I.R. 1937 P.C. 296 (P.C.).

——*Conduct of parties—Inference from.*

If a contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that, such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly in special cases support, along with other appropriate evidence, a claim for ratification. (*Lord Wright.*) OTTOMAN BANK OF NICOSIA *v.* OHANES CHAKARIAN. **172 I.C. 786=10 R.P.C. 141=A.I.R. 1938 P.C. 26 (P.C.).**

——*Rates agreed in contract abandoned by consent—Substituted proposed rates not accepted by contractor—Work done by contractor—Right to fair and reasonable rates.*

Where the original schedule of rates payable to the contractor fixed under a contract between the Railway and the contractor was abandoned with the consent of both the parties and the new enhanced rates proposed to be substituted by the Railway for those rates were not accepted by the contractor, but the contract employing the contractor remained in operation and the contractor did the work for the Railway, which the latter accepted, the amount which the contractor is entitled to recover from the Railway for the work done should be determined on the basis of fair and reasonable rates. (*Sir Shadi Lal.*) BENGAL NAGPUR RAILWAY CO, LTD. *v.* RUTTANJI RAMJI **I.L.R. (1938) 2 Cal. 72=65 I.A. 66=173 I.C. 15=1938 A.L.J. 169=47 L.W. 281=32 S.L.R. 374=1938 O.L.R. 119=19 Pat.L.T. 125=1938 O.W.N. 261=1938 A.W.R. (P.C.) 52=1938 A.L.R. 167=1938 O.A. 300=40 Bom.L.R. 746=4 B.R. 374=10 R.P.C. 216=42 C.W.N. 985=1938 P.W.N. 360=67 C.L.J. 153=1938 M.W.N. 646=A.I.R. 1938 P.C. 67=(1938) 1 M.L.J. 640 (P.C.).**

Void contract.

——*Nature and force of.*

To say that the contract is void from its inception is a contradiction in terms. A contract void in its inception is not contract at all; it has not passed from the stage of an agreement to the stage of a contract but comes within the broad and general principle that a contract void from its inception is no contract at all but an agreement not enforceable at law and therefore void. (*Davis, J.C. and Mehta, A.J.C.*) SADHUSING FATEHSING *v.* JHAMANDAS VALIRAM. **31 S.L.R. 170=171 I.C. 1005=10 R.S. 132=A.I.R. 1937 Sind. 211.**

——Void and voidable—Distinction between. *See* LIMITATION ACT, ARTS. 91 AND 142—APPLICABILITY **A.I.R. 1938 Nag. 335 (F.B.).**

Wagering contract and speculation.

——*Difference between—Legality—'Difference' contracts—Nature of.*

There is nothing illegal in speculating. It is a common place of the Stock Exchange. This method of doing business is by no means confined to stocks and shares, but is of every day occurrence in almost all commodities. As far as the distinction between speculation and gaming is concerned, it makes but little difference whether the com-

modities are actually paid for, and held with a view of selling again at a profit, or whether the matter is arranged by a re-sale before the time for delivery. Such dealings are perfectly legitimate. Gaming and wagering contracts, on the other hand, are not real dealings at all; they may take the form of purchases and sales, but they are, in fact, mere bets on the market price on commodities at a future date. For a contract to be gaming and wagering contract there must not only be no intention on the part of either party to deliver, or take delivery of the commodities, but also no obligation on either to do so; there must be an agreement or understanding that all that the buyer has to do is to receive from, or pay to, the seller the difference between the price of the bargain and the price at some future date. The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature. (Laws of Stock Exchange, p. 245.) Thus the difference between the two is to be found in seeing whether the transaction in question is a real transaction or whether it is merely a peg to hang a bet upon. Whether it is a real transaction depends upon whether in law the parties could be compelled to carry out the contract of sale. And it is often necessary to look behind the contracts for its proper understanding, but in so doing, one must always bear in mind the fact that there is nothing wrong in difference contracts so long as the parties are not absolved in any event from delivering the commodity or paying if the other party calls for delivery or payment. (*Stone, C. J. and Niyogi, J.*) ARJUNSA *v.* MOHANLAL. **I.L.R. (1938) Nag 308=172 I.C. 812=10 R.N. 246=A.I.R. 1937 Nag. 345.**

Miscellaneous.

——*Stock exchange transactions—Stockbroker, if must retain for his client specific shares purchased.*

A stockbroker is not considered to be under an obligation to retain for his client the specific shares which may be delivered to him under the contract made for his client. But he has, of course, to get into possession and retain an equivalent number of shares. (*Lord Atkin.*) W. C. SOLLOWAY *v.* J. P. MCLAUGHLIN. **47 L.W. 73=177 I.C. 754=11 R.P.C. 94=A.I.R. 1938 P.C. 23 (P.C.).**

CONTRACT ACT (IX OF 1872)—*English cases—Applicability.*

There is no reason why the principles enunciated in English cases should not be applied to suitable cases by Indian Courts which are Courts of Equity as well as of law, if such principles do not go against any provision of the Indian Contract Act (*Zia-ul-Hasan and Smith, JJ.*) RAMPAL SINGH *v.* LALA SURENDRA BIKRAM SINGH **13 Luck 65=166 I.C. 194=9 R.O. 286 (2)=1937 O.W.N. 136=1936 O.L.R. 720=A.I.R. 1937 Oudh 82.**

——*If exhaustive as regards law of agency*

The Contract Act does not draw fine distinction between different classes of agents, but the Act is not exhaustive and so far as the law relating to agency is concerned, it merely lays down general principles. (*Vivian Bose, J.*) KALYANJI *v* TIRKARAM. **176 I.C. 675=11 R.N. 65=A.I.R. 1938 Nag. 254.**

CONTRACT ACT (1872), S. 2.

——*Champerty—Extortionate terms—Relief.*

Where the terms of an agreement to finance litigation were found by the Court to be extortionate and hence invalid and unenforceable the lender was given on equitable grounds, a decree for the amount found to represent the reasonable expenses of the litigation. (*Coldstream and Abdul Rashid, JJ.*) ALOPI PARSHAD *v.* COURT OF WARDS. **181 I.C 728=11 R.L. 873=A.I.R. 1938 Lah. 23.**

——**S. 2**—*"Contract"—Elements of.*

The definition of "contract" in S. 2, Contract Act, appears to be built upon a succession of definitions of the elements which go to make a contract, that is to say, proposal, acceptance, promise, promisor, promisee, consideration and agreement. The expression "reciprocal promises" is explained and finally a contract is defined as an agreement enforceable by law. On the other hand an agreement not enforceable by law is said to be void; that is to say it is not a contract at all. (*Wort and Rowland, JJ.*) SATYADEVA NARAYAN SINHA *v.* TIRBENI PRASAD. **161 I C. 579=8 R.P. 458=1936 P.W.N. 321=A.I.R. 1936 Pat. 153.**

——**S. 2** (a)—*Offer—What amounts to.*

A letter communicating willingness to sell certain property for a certain sum in reply to a letter inquiring whether the property is to be sold amounts to an offer or proposal within the meaning of S. 2 and is not merely an invitation to an offer. (*D.N. Mitter and Patterson, JJ.*) SURENDRA NATH ROY *v.* KEDAR NATH BOSE. **161 I.C. 224=8 R.C. 492=63 C.L.J. 86=A.I.R. 1936 Cal. 87.**

——**S. 2 (d) "Consideration."**

——*Cancellation of account of third parties*

The cancellation or closing of the account of third parties, is 'consideration' within the definition of S. 2 (*d*) of the Contract Act. (*Weston.*) KUTUB UDDIN *v.* DEO KARAN. **1937 A.M.L.J. 110.**

——*Discharge from liability—If good consideration*

Discharge of a person from liability is a sufficient consideration for a contract. (*Nawal Kishore, C J.*) ABDUL GAFFOR *v.* PARSRAM. **1939 M.L.R. 12 (C).**

——*If may move from third party.*

The consideration for a promise need not necessarily move from the promisee but may move from a third party. (*Fazl Ali and Chatterji, JJ.*) SHIBA PRASAD SINGH *v.* TINCOURI BANERJI. **183 I.C. 855=5 R.B. 999=12 R.P. 195=A.I R. 1939 Pat. 477.**

The consideration may move from a third person and need not necessarily move from the promisee. (*Dunkley. J.*) DAW PO *v.* U PO HMYIN. **1940 Rang.L.R. 237=187 I.C. 875=12 R.R. 345=A.I.R. 1940 Rang. 91.**

——*Original contract between parties a wagering transaction—Forbearance of plaintiff to sue and declare defendant defaulter—If constitutes good consideration for fresh agreement.*

The forbearance of a plaintiff to sue coupled with his forbearance to declare the defendant a defaulter constitutes good consideration for a fresh agreement, although the original contract had been in the nature of a wagering transaction

and the plaintiff is entitled to recover on the fresh agreement. The defendant is estopped from setting up the defence that the transaction was wagering. (1908) 2 K.B. 620, Foll (*Addison and Din Mahomed, JJ.*) AYA RAM TOLA RAM *v.* SADHU LAL. **180 I.C. 453=11 R.L. 685=A.I.R. 1938 Lah. 781.**

——*Third party's right to sue on contract.*

The definition of consideration in S. 2 of the Contract Act gives a wider meaning to that term than is accepted in English law as it includes consideration moving from the promisee or any other person. But that does not involve the consequence that a third party may sue on a contract. (*Beaumont, C.J. and Rangnekar, J.*) NATIONAL PETROLEUM CO., LTD *v.* POPATLAL MULJI. **60 Bom 954=165 I.C. 338=9 R.B. 138 =38 Bom.L.R. 610=A.I.R. 1936 Bom. 344.**

——*Threat of bringing false suit.*

The threat of bringing a false suit is really a form of blackmail and cannot be regarded as a good consideration for a contract. *M* owed money to *S* who was on eve of insolvency. To keep this asset out of the hands of the Official Receiver, it was arranged that *M* should execute a bahi entry in which the name of the creditor was not mentioned. The insolvency took place and the bahi was made over to *R*, a relation of *S*. Sometime later *R* threatened to bring a suit against *M* on the strength of the document. The matter was compromised and the terms of compromise were that, *M* should execute two bonds for certain sums in favour of *C*. *C* brought a suit against *M* on these bonds.

Held, that the suit did not lie as the contract was void for want of consideration. (*Beckett, J.*) CHUNI LAL *v* MAULA BAKHSH. **161 I.C. 347=8 R.L. 725=38 P.L.R. 727=A.I.R. 1936 Lah. 6.**

——**Ss. 2 (d) and 25**—*Son signing acknowledgment for father's debt—Acknowledgment, if supported by consideration.*

It is well recognised that an agreement to pay a debt due from a third person is good consideration in law. Where a son signs an acknowledgment in respect of money due from his deceased father presumably to save the estate of his father from sale in execution of any decrees that may have been passed against such estate, there is consideration for the acknowledgment and for assumption of personal liability by the son. (*Jai Lal, J.*) KUNDAN LAL MUNSHI RAM *v.* RAGHU NANDAN LAL. **170 I C. 424=10 R.L. 109 =38 P.L.R 85=A.I.R. 1937 Lah. 484.**

——**S 2 (g) and (j)**—*Relative scope of—Contract when becomes void.*

Not every unenforceable contract is declared void, but only those unenforceable by law, and those words mean not unenforceable by reason of some procedural regulation, but enforceable by the substantive law. For example, a contract which was from its inception illegal such as a contract with an alien enemy, would be avoided by S. 2 (*g*) of the Contract Act and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy would be avoided by S. 2 (*j*). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the orders under the C. P. Code would not cause a contract to become void. (*Lord Porter.*) MAHANTH SINGH *v.* U BA YI. **66 I.A. 198=1939 Rang.L.R. 358=1939 O W.N. 401=70 C.L J 556=43 C.W N. 641=181 I C 1 =5 B.R. 576=1939 O.L.R. 270=11 R.P C. 213 =50 L.W. 27=41 Bom.L R. 742=20 P.L T. 532 =1939 M.W.N. 727=1939 O.A. 559=1939 A.L. J. 697=1939 A.W R. (P.C.) 169=A I.R. 1939 P. C. 110=(1939) 2 M.L.J 253 (P.C.).**

——**S. 4**—Insurance company having head office at *C*—Agent at *E* securing proposal and sending it to head office—Agent having no authority to accept proposal—Offer when comes into existence. *See* C. P. CODE, S. 20 (*c*). **45 L. W. 616=A.I.R. 1937 Mad. 571.**

——**S. 6 (1) and (2)**—*Relative applicability—Allotment of shares long after application—Effect.*

If a proposer revokes his offer before its acceptance, then S. 6 (1) of the Contract Act applies; even if he does not revoke, S. 6 (2) applies unless of course the proposer's conduct amounts to a waiver of the revocation which would follow on the lapse of a reasonable time. Where allotment of shares was made more than five months after the application and it was not even communicated, it was held that the offer to take shares must be deemed to have been revoked. (*Gruer, J.*) RAMLALSAO *v.* K B.M E.R. MALAK. **183 I C. 748=12 R.N. 80=1939 N.L.J. 305=A.I.R. 1939 Nag. 225.**

——**S 7**—Mortgage by deposit of title deeds—Creditor asking debtor to send title deeds by post—Debtor posting them accordingly—Effect—Transaction when complete. *See* T. P. ACT, S. 58 (*f*). **38 Bom.L.R. 1222=A.I.R 1937 Bom. 39.**

——**S. 7**—*Compliance with—What amounts to.*

Where a letter by an intending seller making an offer for the sale of certain property directs that the purchaser will have to write about the acceptance of the offer to a certain person at a particular address, the letter is to be read in a reasonable and a sensible manner and it does not exclude the case where the intending purchaser instead of writing to the person concerned puts himself into communication with him, and where the intending purchaser does so, it cannot be said that there is any contravention of S. 7, Contract Act, as to render the contract not binding on intending seller. (*D. N. Mitter and Patterson, JJ.*) SURENDRANATH ROY *v.* KEDAR NATH BOSE. **161 I.C. 224=8 R.C. 492=63 C L.J 86=A.I.R. 1936 Cal. 87.**

——**S. 7**—*Proposal and acceptance—Statement by defendant as witness in prior suit—Statement that if a certain amount is paid by plaintiff to one X, he would have to pay that amount to plaintiff —Payment by plaintiff to X after two years—Whether amounts to a contract*

In a suit for money the plaintiff put his case as one entirely based upon a contract alleged to arise out of an offer or proposal made by the defendants during the hearing of a suit. The manager of the defendants' firm who was a witness in that suit stated that if the plaintiff takes into account the "havala" (transfer) of *X* and pays him the amount "I shall have to pay that amount to plaintiff." It was contended on behalf of the plaintiff that this statement was an invitation to the plaintiff to pay the amount to *X* and that when nearly two years after the witness had given

evidence, the plaintiff in fact made the payment to X, it was an acceptance of the proposal made on behalf of the defendants and amounted, therefore. to a contract.

Held, that the correct interpretation of the statement would be to regard it as a statement made by the witness of the consequences in law of the plaintiff making the payment, that is, as a statement that he would be liable in a certain event to make a payment to the plaintiff, that even if it was capable of being interpreted as a promise to make repayment in a certain event, there was no context or other material to satisfy the Court that that was the true meaning of the witness and that, therefore, the plaintiff failed to make out the contract which he put forward. (*Sir George Rankin.*) PANNAJI DEVICHAND *v.* KAPURJI MAGNIRAM. **162 I.C. 327=8 R.P.C. 279 (P.C.).**

——**S. 9**—*Scope of.*

S. 9 of the Contract Act proclaims the existence of both express or implied promises. (*Davis.*) RATAN LAL *v.* RAJ MAL. **1939 A.M.L. J. 137.**

——**S. 10**—*Agreement—Party told that stipulation would not be enforced—Effect of.*

If a party to an agreement embodied in a document is told that any stipulation in the agreement would not be enforced, he cannot be held to have assented to it. The document does not amount to real agreement between the parties and the other party cannot sue on it. (*Sir John Wallis.*) TYAGARAJA MUDALIYAR *v.* VEDATHANNI. **63 I A. 126=59 Mad. 446=63 C L J 353=1936 A.W.R. 242=38 P.L.R. 156=38 Bom L R. 373=19 N. L.J. 104=1936 M.W.N 310=160 I.C. 384=1936 O.W.N. 120=1936 A.L.J. 136=40 C W N 353= 43 L.W. 271=8 R P.C. 149=1936 O.L.R 93= 1936 All L.R. 157=1936 P.W.N. 200=A.I R. 1936 P.C. 70=70 M.L J. 232 (P.C.).**

——**S. 11**—*Mortgage in favour of minor—If void—Enforceability by minor.*

It is the promise by a minor which is unenforceable, and an agreement embodying such a promise cannot be a contract. But an agreement as defined in S. 2 (*e*) of Contract Act does not necessarily consist of a set of promises forming the consideration for each other Every promise is an agreement, that is to say, a promise made by an adult in favour of a minor is an agreement by the adult. If the consideration for such a promise or such an agreement is a reciprocal promise by the minor, the whole thing is void; but if the consideration for it is not a promise, but is something actually done, there seems no bar in the statute and no reason in principle why the result should not be a valid contract. Where the consideration has been received for an agreement consisting of a promise in favour of the minor such promise can be enforced by the minor or on his behalf. 30 Cal. 539 (P C.) and 39 Cal. 232 (P.C.), Dist. 40 M. 308 (F B.); 38 All. 154 and 4 P.L.J 682=52 I.C. 338, Foll. So where a mortgagee, a minor, has paid the consideration of the mortgage at the time of the execution of the mortgage deed, such minor mortgagee can sue on his mortgage. (*Wort and Rowland. JJ.*) SATYADEVA NARAYAN SINHA *v.* TRIBENI PRASAD. **161 I.C. 579=8 R.P. 458=1936 P.W.N. 321=A.I.R. 1936 Pat. 153.**

——**Ss 11 and 25 (2)**—*Bond by minor—Fresh bond executed by him in lieu thereof on attaining majority—Enforceability.*

A bond executed by a minor is void and cannot form valid consideration for another bond executed by him subsequently after coming of age. Further as the consideration which passed under the earlier bond cannot be imported into the bond into which the minor entered on attaining majority, the latter bond cannot be enforced under S. 25 (2) of the Contract Act also. 16 L. 546, Foll. (*Madeley, J.*) RAM SARUP *v.* BRIJ MOHAN LAL. **171 I.C 96=10 R O. 89=1937 O L.R. 522 =1937 O.W.N 1034=A.I.R. 1938 Oudh 14.**

——**S. 11**—*Minor emerging from disability—Contract by—Right to carry on transaction.*

Though a contract by minor is void and not voidable, yet it is quite competent for a person emerging from a state of disability to take up and carry on a transaction commenced while he remained under disability in such a way as to bind himself as to the whole. (*Davis, J.C. and Haveliwala, A.J C.*) NIHAL CHAND *v.* IAN MD. KHAN. **31 S.L R. 502=172 I.C. 688=10 R.S. 178=A.I.R. 1937 Sind 310.**

——**S. 11** — Vakalatnama — Competency of minor to execute in favour of advocate to conduct criminal case. *See* MYSORE CR. P. CODE, S. 495 (3). **44 Mys H.C.R 119.**

——**S. 12**—*Burden of proof—Old man proved to be under mental disability, senile dementia at particular period—Presumption of continuance—Transactions by him after such date—Validity—Onus.*

Where mental incapacity is proved, such as senile dementia in the case of an old man, it is reasonable to presume its continuance, and the onus will be on persons who wish the Court to uphold transactions entered into by the patient subsequent to the date when it was proved to prove that the transactions were not vitiated on the ground of his incapacity. (*Varadachariar and Abdur Rahman, JJ.*) GOVINDASWAMI NAICKER *v.* SRINIVASA RAO. **50 L.W. 668=1939 M.W.N. 1023=A.I R. 1940 Mad 73.**

——**S 12**—*Suit to avoid deed on ground of insanity—Scrutiny of pleading and evidence—Necessity—Absence if—Scrutiny—Finding if binding in second appeal.*

Where a party executing a deed seeks to avoid the effect of the same by pleading insanity at the time of executing the same, it is of the utmost importance that the pleadings and evidence of parties on record are scrutinized with advertence to the law of contract as contained in S. 12, where the trial Court and the final appellate Court fail to bear this in mind while deciding the case the decision of the final appellate Court of fact on the issue of insanity will not bind the Court in second appeal. (*Puranik, J.*) MST HAZRA BI *v.* MST FATMABI. **177 I.C. 80=11 R.N. 103=A.I. R. 1938 Nag. 204.**

——**S. 15**—*Coercion—Imposition of fine on son—Attachment of property belonging to father and son—Payment by father—If voluntary—If can be recovered.*

According to S. 15 of the Contract Act 'coercion' among other things, includes the unlawful detention of another man's property with the intention of causing him to enter into an agreement. Where in order to recover a fine imposed on a son

the property belonging both to the father and son is attached and the father, to save the property from sale, pays the amount of the fine, his payment can in no sense be said to be voluntary. The father is made to pay under the force of a legal process. Legally this amounts to coercion. The father can sue to recover it back. (*Rachhpal Singh, J.*) BANSRAJ DAS *v.* SECRETARY OF STATE. 183 I.C. 134 =12 R.A. 93=1939 A.W.R. (H.C) 247=1939 A. Cr.C. 46=A.I.R 1939 All. 373.

——S. 15—*"Coercion"—Need for raising a loan —Sufficiency.*

An agreement executed by a person who borrows money cannot be said to have been executed under coercion merely because he is in need of money. "Coercion" in the legal sense means something very much more than merely the need for raising a loan. (*Drake Brockman, S. M. and Knox, J. M.*) SARJU PRASAD *v.* JATAN SINGH. 1936 A.W.R. 84 (1)=1936 R.D. 52 (1).

——S. 16—*Applicability — Transactions in favour of third parties—If can be avoided—Conditions*

Under S. 16 of the Contract Act, a transaction would be voidable against a third party if it is the result of undue influence and that party took the benefit either as a volunteer or with the knowledge of the exercise of undue influence by a person who was in a position to dominate the will of the executant, as the third party's knowledge of the fiduciary relationship between the parties to a contract and the exercise of undue influence puts that party under the same liability as the other party who occupied the position of confidence. (*Divatia, J, on difference between Barlee and Tyabji, JJ.*) LINGO *v.* DATTATRAYA. 173 I.C. 817 =10 R B. 390=39 Bom.L.R. 1233=A.I.R. 1938 Bom. 97.

——S. 16— *Applicability— Undue influence— Presumption—Onus of proof—Fiduciary relationship—If condition precedent — Gift by young widow in favour of paramour—Validity—Burden of proof—If void for undue influence—Circumstances to be considered.*

It is well-established that when a person obtains any benefit from another, whether under a contract or as a gift by exerting his influence which, in the opinion of Court, prevents the grantor from exercising an independent judgment in the matter in question, the latter can, in a Court of equity, set aside the contract or recover the gift. The Court of equity imposes on the grantee the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it. This rule of equity is not restricted to cases where strictly or technically fiduciary relationship is established. It extends to cases where the possibility of exercising influence exists from confidence created or established by the relation between the donor and donee. The principle has been established to cases of pardanashin ladies. The rule must apply to all variety of relations in which the Court is satisfied that the possibility of exercise of dominion and influence exists; that is the relation of active confidence justifying the raising of the presumption of undue influence. The application of the rule of presumption must, however, depend not merely upon the circumstances attending the transaction but upon the relationship itself. The relation of paramour and mistress may be included in such cases if the party obtaining the benefit is in a position to dominate and influence the will of the other. When the power of influence and the influence itself are established, something more than a bare assertion of affection or a generous feeling of gratitude must be furnished to turn the scale The plaintiff who was an infant widow, having lost her husband while she was barely five years of age, and her father during her infancy, was looked after by her mother. She had inherited some property from her brother who was not very much older than herself and who too died at a comparatively young age. While she was barely twenty-four, her mother died, and thereafter her husband's brother *D*, befriended her and came to live in her parents' house with his family. But she soon quarrelled with him as he was sponging on her slender income and trying to appropriate the property to himself. She was thrown out on the streets, and at that time, the defendant who was an influential man in the village, being a watandar patil took the plaintiff under his protection and helped her to secure her property from her brother-in-law *D*. She was entirely depending on the generosity of the defendant until then. After this the defendant kept her as his mistress for some time in his own house and later in the house of another. She was made the victim of false prosecutions and charges, but escaped with the help of the defendant who led her to believe that she escaped arrest only by reason of the intervention and through the services of the defendant. The latter managed her estate and collected its profits as the plaintiff was without any experience of management and was altogether illiterate. The defendant having by various pretences and show of sympathy and by using his position gained influence and a position of dominance over the plaintiff got her to execute and register a deed of gift in his favour in respect of the property inherited by her from her brother which was all that she had, and shortly after drove her out of his house. The plaintiff sued for a declaration that the gift deed was void as having been obtained by undue influence, fraud and coercion and for possession of the property with mesne profits.

Held, (1) that the relationship between the plaintiff and the defendant and the conduct of the latter towards the former justified the raising of the presumption of undue influence; (2) that the gift deed was a bargain which must "shock the conscience" or in other words be regarded as unconscionable, and on the face of it was a most improvident transaction; (3) that the onus must be laid on the defendant to establish that no undue influence was exercised and that his relationship was not abused and that the act was a righteous and voluntary one; (4) that the defendant whose conduct was time-serving had not discharged the onus and the gift-deed should therefore be set aside and possession of the property awarded to plaintiff with mesne profits. (*Wassoodew and Thakor, JJ.*) SHIVGANGAWA *v.* BASANGOUDA. 176 I.C. 187=11 R.B. 25=40 Bom.L.R. 132=A.I.R. 1938 Bom. 304.

——S. 16—*Burden of proof under—Requisite for application of the rule as to.*

The application of the principle enunciated in S. 16 (3) of the Contract Act as to the burden of proving that the contract was not induced by un-

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due influence presupposes that one of the persons is in a position to dominate the will of another. In the absence of such proof, the rule regarding burden of proof has no operation. (*Srivastava, C. J.*) ABDUL MAJID KHAN *v.* BENI DIN. **10 R. O. 134=171 I.C. 605=1937 O.L.R. 574=1937 O.W.N. 1123=A.I.R. 1938 Oudh 24.**

——S. 16—*High rate of interest—If affords evidence of undue influence.*

Where the borrower of a debt is an educated man capable of understanding business transactions and of looking after himself, the mere fact that the rates of interest are somewhat high affords no evidence that there was any undue influence or that there was anything unfair or unconscionable about the transaction. (*Harries and Ganga Nath, JJ.*) IBNEY HASAN *v.* GULKANDI LAL. **164 I.C. 325=9 R.A. 177=1936 A.L.J. 919=1936 All. L.R. 767=1936 A.W.R. 805=A.I.R. 1936 All. 611.**

——S. 16—*Plea of undue influence—Facts to be found—Mere inadequacy of consideration, if sufficient—Proof of the relations of the parties—Value.*

An error would arise if the positions to be ascertained in cases of undue influence are put in the wrong order. The first thing to be found is whether the party who is said to have induced the contract was in a position to dominate the will of the other. After that the question arises, has the contract been so induced? Inadequacy of consideration alone is not a ground for holding that a contract was induced by fraud or undue influence. Undue influence is not established by a proof of the relations of the parties being such that the one naturally relied upon the other for advice. It has further got to be shown that the influence was undue. (*Mockett and Horwill, JJ.*) SANTHAPPA RAI *v.* SANTHIRAJA. **178 I.C. 563=11 R.M. 473=1938 M.W.N. 99=47 L.W. 714=A.I.R. 1938 Mad. 426=(1938) 1 M.L.J. 676.**

——S. 16—*Relief under—Essentials to be proved—Burden of proof.*

The first thing to be considered under S. 16 of the Contract Act is the relationship between the parties, that is to say, whether one party was in a position to dominate the will of the other; and then it must be proved that that position was used to obtain an unfair advantage; and even though the transaction may be unconscionable, relief cannot be granted under the section until the initial fact of the position to dominate the will is established. If such position is proved, and the transaction also appeared to be unconscionable, the burden of proving that the contract was not induced by undue influence would lie on the person in a position to dominate the will of the other. (*Divatia, J., on difference between Barlee and Tyabji, JJ.*) LINGO *v.* DATTATRAYA. **173 I.C. 817=10 R.B. 390=39 Bom.L.R. 1233=A.I.R. 1938 Bom. 97.**

——S. 16—*Scope.*

S. 16 of the Contract Act relates to transactions entered into by persons *between whom* there is fiduciary relationship. (*Srivastava, Ag. C. J. and Zia-ul-Hasan, J.*) MAHOMED ABDUR RAHMAN KHAN *v.* MAHOMED IBADUL GHANI KHAN. **165 I.C. 597=9 R.O. 235 (2)=1936 O.W.N. 1106=1936 O.L.R. 671=A.I.R. 1937 Oudh 56.**

——S. 16—*Scope—Gift deed executed under undue influence—Claim to relief by avoidance—Laches and delay—If a bar—Limitation Act, Art.* 91.

In the case of gift deed executed under undue influence, the fact that the party seeking to avoid it has been guilty of delay and laches will not be a bar to the grant of the equitable relief of avoidance of the deed. The plea of laches and delay cannot apply to the case of a gift as opposed to a contract. In any case the delay can only begin from the time when the plaintiff discovers the true nature of the deed. He has a period of three years in such a case under Art. 91 of the Limitation Act, which applies to the case; and the period of three years begins to run from the date when the plaintiff discovers the true nature of the deed. So long therefore as the suit is not beyond the three years reckoned from the date of his discovery of the true nature of the deed in question, relief should not be denied to him on the ground of delay and laches. (*Divatia, J., on difference between Barlee and Tyabji, JJ.*) LINGO *v.* DATTATRAYA. **173 I.C. 817=10 R.B. 390=39 Bom.L.R. 1233=A.I.R. 1938 Bom. 97.**

——S. 16—*Undue influence—Burden of proof.*

A person is in a position to dominate the will of another where he holds a real or apparent authority over the other, specially in the case in which the other person is one whose mental capacity is affected by reason of age, illness or bodily or mental distress. If the transaction in question appears on the face of it or on the evidence adduced to be unconscionable, the burden of proving that such transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. (*Guha and Bartley, JJ.*) ABDUR RAUFF *v.* MT. AYMONA BIBI. **174 I.C. 134=10 R.C. 647=A.I.R. 1937 Cal. 492.**

——S. 16 (3)—*Undue influence—Burden of proof.*

In a suit against the son on a bond executed by the father, not only no attempt was made by the son to establish that the father was dominated by the lender at the time of the transaction but in his written statement the son expressly denied that his father was under any necessity to take the loan at the time of the execution of the bond.

Held, that in order to put the burden on the creditor to establish that the debt was not borrowed under undue influence it is essential in the first instance to show as a fact that the lender was in a position to dominate the will of the borrower. Hence it was impossible to give to the son any relief under S. 16: 1924 P.C. 60 Rel. on.; 28 All. 570 (P.C.), Dist. (*Wort and Rowland, JJ.*) BAHORE MAHTON *v.* JURO SAHU. **160 I.C. 1073=8 R.P. 412=A.I.R. 1936 Pat. 78.**

——S. 16—*Undue influence—Burden of proof—Transaction not unconscionable.*

When it is found that a transaction was not unconscionable, the burden would be upon those who attack it, to show that the donee did use his position to obtain an unfair advantage over the donor. (*Nasim Ali and Mukherjea, JJ.*) FORMAN ALI MIJI *v.* UZIR ALI SHEIK. **175 I.C. 712=10 R.C. 817=66 C.L.J. 125=42 C.W.N. 14=A.I.R. 1938 Cal. 157.**

——S. 16—*Undue influence—Facts to be established.*

The first thing which has to be established in a case of undue influence is (and the burden is on

the person asserting it), that the relation subsisting between the parties was such that one of them was in a position to dominate the will of the other. It is only when that has been established that the second question arises, namely whether he used that position in order to obtain an unfair advantage over the other. One of the ways in which the first point can be established is by showing that the mental capacity of the person whose will is said to have been dominated was temporarily or permanently affected by reason of age, illness, or mental or bodily distress. But the burden is still on the party asserting undue influence. Mere physical infirmity does not necessarily carry with it mental incapacity. (*Stone, C.J. and Bose, J.*) TULSIRAM KHIRCHAND *v.* CHUNNILAL PANCHAMSAO. I.L.R. (1940) Nag. 149=178 I.C. 825=11 R.N. 254=A.I.R. 1938 Nag. 391.

——— S. 16—*Undue influence—Ingredients.*

Under S. 16 (1) of the Contract Act, three things must be proved before a contract can be said to be induced by undue influence, namely (1) that the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other; (2) that he used that position; and (3) that an unfair advantage over the other has been obtained by the use of that position. (*Nanavutty and Zia-ul-Hasan, JJ.*) GANGA PRASAD *v.* JANG BAHADUR KHAN. 167 I.C. 424=9 R.O. 387=1937 O.L.R. 114=1937 O.W.N. 277=A.I.R. 1937 Oudh 254.

———S. 16—*Undue influence—Ingredients—Onus of proof.*

In the definition of undue influence there are three ingredients: (1) that the relations subsisting between the parties should be such that one of the parties is in a position to dominate the will of the other; (2) that the dominant party obtains an unfair advantage over the other; and (3) that the dominant party uses his dominant position to obtain that unfair advantage. Although these are the three ingredients constituting undue influence, the party who pleads undue influence has in the first instance to prove only the first and second ingredients. When a person is proved to be in a position to dominate the will of another and the transaction appears on the face of it or on the evidence adduced, to be unconscionable, the onus of proving the absence of the operation of the third factor lies on the dominant party. (*Niyogi, J.*) MT. ANUPA BAI *v.* BHAGWANT SINGH. I.L.R. 1938 Nag. 535=179 I.C. 285=11 R.N. 283=A.I.R. 1938 Nag. 470.

——— S. 16—*Undue influence—Person accepting compromise as he had no other option—Inference of undue influence—If justified.*

The fact that a person accepted the terms of a compromise, as he had no other option, cannot be the test to determine whether compromise is liable to be attacked as vitiated by undue influence. (*Fazl Ali and Chatterji, JJ.*) SHIBA PRASAD SINGH *v.* TINCOURI BANERJI. 183 I.C. 855=5 B.R. 999=12 R.P. 195=A.I.R. 1939 Pat. 477.

———S. 16—*Undue influence—Proof of—Inference from circumstances—Evidence Act, S. 111.*

The onus of proving undue influence ordinarily rests on the party who sets up that plea, but the circumstances of a case may make it an exception

to the general rule. The plaintiff was married to the eldest sister and it appeared from the circumstances that she was in a position to influence her younger sisters, who had lost, not only their father but also their mother, before they executed a promissory note in favour of the husband of the eldest sister, for a certain sum in consideration of certain services rendered by him to them. At the time of the execution both of them were *sui juris*, but the youngest had attained majority only a month or two before she was asked to sign the promissory note. The plaintiff was their agent managing their estate and stood to them in a position of active confidence. The plaintiff after getting a draft of the note prepared by a lawyer dictated it to the second sister, making all the executants jointly and severally liable.

Held, that the plaintiff was in a position to dominate the will of each of the sisters and whether the case came within the purview of S. 111, Evidence Act, or S. 16, Contract Act, the onus in either case was upon him to prove the good faith of the transaction, and if he failed to discharge it, the claim on the basis of the promissory note should be dismissed as against them.

Held, further, that the above failure did not involve the dismissal of his alternative claim to recover remuneration for services rendered by him to them. (*Sir Shadi Lal.*) PALANIVELU MUDALIAR *v.* NEELAVATHI AMMAL. 1937 A.W.R. 332=167 I.C. 5=45 L.W. 355=1937 O.W.N. 319 =39 P.L.R. 245=9 R.P.C. 176=41 C.W.N. 677 =1937 O.L.R. 133=3 B.R. 335=1937 P.W.N. 613=65 C.L.J. 295=1937 M.W.N. 615=1937 A.L.R. 221=1937 A.L.J. 575=39 Bom.L.R. 720= A.I.R. 1937 P.C. 50=(1937) 1 M.L.J. 719 (P.C.).

———S. 16—*Undue influence—Proof required.*

To establish a case of undue influence it is not sufficient to raise an atmosphere of suspicion, but there must be clear and definite evidence of the case propounded. 9 Luck. 178 (P.C.) Rel. on. (*Bhide, J.*) MST. CHANDRAVATI *v.* JANKI PRASHAD. 181 I.C. 92=11 R.L. 753=40 P.L.R. 146 =A.I.R. 1938 Lah. 333.

———S. 16—*Undue influence—Proof—Inference from circumstances—When justified—Mortgage executed by young Mahomedan brother just come of age at the instance and for the benefit of his elder brothers—Presumption of undue influence.*

Where a Mahomedan younger brother who has just come of age enters into a transaction of a mortgage at the instance and for the benefit of his elder brothers who till recently were his guardians and under whose influence he was admittedly living, and the effect of the transaction is to make him and his property liable as security for a heavy debt for which he was not in law liable at all, it is not necessary for him, to sustain his plea of undue influence, to prove by direct evidence that his elder brothers exercised undue influence. The exercise of undue influence may in the circumstances be fairly presumed, in view of the relationship the parties and the nature of the transaction. When there is evidence of overpowering influence and the transaction is immoderate and irrational, proof of undue influence is complete. (*Varadachariar*

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and Pandrang Row, JJ.) AHAMAD IBRAHIM SAHIB *v.* MEYYAPPA CHETTIAR. 1939 M.W.N. 976 =A.I.R. 1940 Mad. 285.

——S. 16—*Undue influence—Questions to be considered by Court.*

The Court in dealing with cases of undue influence has to consider four different questions connected with each other: (1) whether a transaction is a righteous transaction, *i.e.*, whether it is a thing which a right minded person might be expected to do; (2) whether it was improvident, that is to say, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing; (3) whether it was a matter which required legal advice; and (4) whether the intention of making the transfer originated with the transferor. 15 Cal. 684 (P.C.), Foll. *(Guha and Bartley, JJ.)* ABDUR RAUFF *v.* MT. AYMONA BIBI. 174 I C. 134=10 R C. 647= A.I.R. 1937 Cal. 492.

——S. 16—*Undue influence—What constitutes—Advice and persuasion—If proof of undue influence—Circumstances to be considered—Pressure exerted in bringing about transaction—If vitiates it—Use or threat of force—If necessary—Righteous transaction—If protected.*

Advice and persuasion in the case of a person who does not readily agree to do a thing would not be proof of undue influence. Persuasion, appeals to the affections or ties of kindred, to a gratitude of sentiment for past services, or piety for future destitution or the like,—these are all legitimate, and may be fairly passed on a promisor. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid contract or transaction can be made. Importunity or threats, such as the promisor has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the promisor's judgment discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. A party may be led but not driven; and his will must be the offspring of his own volition and not the record of someone else's. Where a party has entered into a transaction when he is surrounded and pressed by those whose interest clearly lies in his entering into it, without any independent advice or opportunity to acquaint himself as to his rights, S 16 of the Contract Act will apply, and a Court of equity will protect a young man of tender age who has entered into such a transaction at the instance of those who are in a position to dominate his will. The righteousness of the transaction is one of the factors to be considered, but it is not the only one. All the circumstances connected with it must be taken as a whole. *(Divatia, J., on difference between Barlee and Tyabji, JJ.)* LINGO *v.* DATTATRAYA. 173 I.C. 817=10 R.B. 390=39 Bom.L.R. 1233=A.I.R. 1938 Bom. 97.

——S. 16—*Validity—Mortgage—Excessive interest.*

The mere fact that the interest is excessive is no ground to make mortgage invalid. *(Harries*

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and Ganga Nath, JJ.) BANARSI DAS *v.* COLLECTOR OF SAHARANPUR. 165 I.C. 498=9 R A. 287= 1936 A.L.J. 1262=1936 A.W.R. 887=1936 All. L.R. 923=A.I R. 1936 All. 712.

——S. 17—Minor—Promissory note by—Liability to return money paid—Failure of minor to reveal age—If amounts to fraud. *See* MINOR. 168 I.C. 730=A.I.R. 1937 Lah. 598.

——Ss. 17, 18 and 19—*Joint owner on attaining majority executing deed accepting partition made during his minority—Undue influence—Avoiding of deed.*

It is true that there is nothing in law to prevent a joint owner of the property, on reaching majority, accepting and agreeing to a partition of the joint property which was made during his (or her) minority But when such person is persuaded to execute a deed accepting the partition by misrepresentation and undue influence of a person standing in fiduciary relation by concealing material facts, such deed is voidable at the instance of such person under S. 19 of the Contract Act. *(Roberts, C. J. and Dunkley, J.)* RAHIMA BIBI *v.* S. MUSTAFA. 178 I C. 83=11 R. R. 193=A.I.R. 1938 Rang. 264.

——Ss. 19 and 20—*Decree for possession with costs—Offer by judgment-debtor not to file appeal if plaintiff gave up costs—Appeal time barred at time of offer—Validity of agreement.*

A Municipal Committee instituted a suit for possession of certain property which was alleged to have been encroached upon by certain person. The suit was decreed with costs. The judgment-debtor thereafter applied to the Municipal Committee to the effect that if the Committee gave up the costs he would not file any appeal from the decree and also deliver possession of the property. The Committee accepted this offer. It was subsequently found that as a matter of fact judgment-debtor had no right to appeal at the time when he made the offer to the Municipal Committee.

Held, that even if the judgment-debtor had made the offer honestly believing that he still had the right to appeal, it would amount to saying that both the parties were under a mistake of fact essential to the agreement when they were alleged to have entered into the agreement in question. If on the other hand judgment-debtor had made a dishonest misrepresentation the agreement would be voidable at the instance of the Committee on that account. In either aspect of the case the agreement would be voidable or void under S. 19 or S. 20. *(Bhide, J.)* RAM RATTAN *v.* MUNICIPAL COMMITTEE, AMRITSAR. I. L.R. (1940) Lah. 392=185 I.C. 713=12 R L. 316=A I.R. 1939 Lah. 511.

——S 19, Excep.—*Applicability—Fraudulent misrepresentation.*

The Exception to S. 19 of the Contract Act applies to cases of misrepresentation as distinguished from fraud and not to misrepresentation which is "fraudulent within the meaning of S. 17." The phrase "fraudulent within the meaning of S. 17" in the exception should be deemed to apply to the preceding word "silence" exclusively, and not to the word "misrepresentation." Where in a suit for rescission of a contract for the purchase of a certain property, the evidence was that the defendant caused certain letters to be written in which bogus offers for the property

were made for the purpose of giving a fictitiously high value to it in the eyes of a purchaser and that the plaintiff was induced by the contents of those letters shown to him by the defendant to enter into an agreement with the latter to purchase the property at a high price.

Held, that it was a case of deliberate active fraud which came within S. 19 and not within the exception, and that, therefore, it was not incumbent upon the plaintiff to establish that he had no means of discovering the truth with ordinary diligence. (*Derbyshire, C.J. and Lort Williams, J.*) JOHN MINAS APCAR *v.* LOUIS CAIRD MALCHUS. I.L.R. (1939) 1 Cal. 389=184 I.C. 321=12 R.C. 220=43 C.W.N. 347=A.I.R. 1939 Cal. 473.

——S. 19, Excep.—*Construction—False and fraudulent statement by vendor to conceal real position of property—Vendor if put on inquiry.*

The Legislature in inserting the Exception to S. 19 of the Contract Act did not intend to depart from the English law, under which it is accepted that where a vendor has deliberately made a false statement with the object of concealing the true position with regard to the property, the vendee is not put upon inquiry. Where a vendor sells property which he ha previously leased out to a third party, and not only fails to disclose the lease but also makes a false and fraudulent representation that the vendee can take immediate possession, he cannot, in a suit by the vendee to set aside the conveyance, plead the Exception to S. 19, and contend that since the lease was a registered lease, the vendee could with ordinary diligence discover the lease by a search in the registration office. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) VENKATARATNAM *v.* SIVARAMUDU 1940 M.W.N. 142=51 L.W. 249=A.I.R. 1940 Mad. 560=(1940) 1 M.L.J. 314.

——S. 19-A—*Contract induced by undue influence—Right of party's representative to avoid—Plea, if can be set up by way of defence.*

A contract induced by undue influence is voidable under S. 19-A of the Contract Act not only at the option of the party induced by such undue influence but also by his representatives, unless the party, at the date of his death, has lost such right by acquiescence or otherwise. Further, such representatives may set up undue influence by way of defence to an action based on the contract by the other party. (*Harries, J.*) MANBHARI *v.* SRI RAM. 165 I.C. 240=9 R.A. 252=1936 A.L.J. 1215=1936 R D. 306=1936 A W.R. 720=1936 All. L.R. 888=A.I.R. 1936 All 672.

——S. 20—*Mutual mistake of fact—Contract void.*

If parties contract under a mutual mistake and mis-apprehension as to their relative and respective rights, the result is that the agreement is void. (*Courtney-Terrell, C.J., Mohammad Noor and Varma, JJ.*) KUCHWAR LIME AND STONE CO. *v.* SECRETARY OF STATE. 16 Pat. 159=166 I.C. 966=9 R.P. 361=1937 P.W.N. 102=3 B.R. 248 (2)=18 Pat. L.T. 95=A.I.R. 1937 Pat. 65 (S.B.).

——S. 20—*Applicability—Decree—Mistake of parties—If ground for setting aside by separate suit.*

S. 20 of the Contract Act only applies to contracts in which there has been a bilateral mistake of the parties which might be rectified. But the

section cannot be applied to a decree and a decree cannot be avoided or set aside by means of a fresh suit on the ground that the decree has been obtained on account of the mistake of the parties. (*Collister and Bajpai, JJ.*) KAZIM ALI KHAN *v.* OM PRAKASH. 172 I C 337=10 R.A 389 (2)=1937 A.W.R 841=1937 All L.R. 952=1937 A. L.J. 1095=A.I.R. 1937 All. 731.

——Ss. 21 and 72—*Payment of bill by consumer to Electricity Supply Co. under mistake that it had made valid rules—Right to refund.*

Where a consumer of electricity pays the bill to the Electricity Supply Co. under mistake that the company had made rules after all necessary legal preliminaries had been gone through, this is not a mistake as to any law in force in British India. This is a mistake of fact and is covered by S. 72. Besides this, if the payment is made under protest after being warned that supply would be disconnected if the payment is not made, this is sufficient to constitute coercion in the general sense of the word and the consumer would be entitled to refund under S. 72 (*Mir Ahmad, J.*) KAKA RAM *v.* KHATTAR ELECTRICAL ENGINEERING & GENERAL SUPPLY CO. 181 I.C. 345=11 R. Pesh. 66=A.I.R. 1939 Pesh. 8.

——S. 23.

Acts defeating statute.
Applicability.
Champerty.
Illegal contract.
Illegal object.
Immoral contract.
Public policy
Stifling prosecution.
Miscellaneous.

——S. 23—Acts defeating statute.

——*Discharged insolvent's agreement with a former creditor—Fresh transaction—Scheduled creditors not affected—Validity.*

An insolvent was granted a discharge under S. 39 (1), Presidency Towns Insolvency Act conditional upon his consenting to a decree being passed against him in favour of official assignee for the full amount of his debts proved in the insolvency. Subsequently *A*, one of the scheduled creditors, agreed to advance certain amount of loan to the insolvent and to waive his claim to the sum due to him from the official assignee as a creditor in the insolvency. The insolvent and *B* as a surety for the insolvent executed promissory notes for the original amount of debt proved in the insolvency with interest thereon from the date of insolvency. The creditor subsequently brought a suit upon the promissory notes.

Held, that as the creditor did not seek to prejudice the rights of any of the scheduled creditors by his new and independent contract, the consideration for the note was neither of such a nature as would defeat the provisions of the Presidency Towns Insolvency Act nor was opposed to public policy. The agreement was perfectly valid and enforceable and a decree could be passed in favour of the creditor. (*Roberts, C.J. and Sharpe, J.*) HASHIM ISMAIL *v.* CHOTALAL. 1938 Rang. L.R. 19=174 I.C. 863=10 R.R. 440=A I.R. 1938 Rang. 11.

——*Partnership — Validity—Insolvent entering into agreement but appointing minor son ostensibly as partner.*

CONTRACT ACT (1872), S. 23.

Where in a partnership business an insolvent enters into an agreement but since he cannot carry out any business in his own name appoints his minor son ostensibly as a partner, the agreement being obviously intended to defeat the provisions of the insolvency law is absolutely void. (*Bhide, J.*) NARINJAN SINGH *v* DAMODAR SINGH. **167 I.C. 311=9 R.L. 481=A.I.R 1936 Lah. 831.**

——*Transfer for consideration, with intention of defeating creditors—If void.*

A transfer for consideration made by a person with the intention of defeating or delaying his creditors is merely voidable and not void *ab initio* and as such does not fall within the ambit of S. 23 Contract Act. (*Pollock, J.*) PARASHARAM *v.* SADASHEO. **I.L.R. (1937) Nag. 94=167 I.C. 703=9 R.N. 200=A.I.R. 1936 Nag. 268.**

——**S. 23**—Acts prohibited by statute—Release of certificate debtor under Bengal Public Demands Recovery Act—Security bond therefor—Consideration, if lawful. *See* CONTRACT ACT, SS. 127 AND 23. **I.L.R. (1937) 2 Cal. 698.**

——**S. 23—Applicability.**

——*Composition between debtor and creditor—Secret agreement to prefer some creditors—Effect of.*

In cases of a composition, where all creditors have joined in on equal terms and a secret preference is given to certain creditors to induce their agreement to the composition, the contract whereby such a preference is given is void under S. 23 as being a contract based on fraud. The essence of the offence against S. 23 is that there is a secret agreement by some creditors that they are to be preferred, so that there is a fraud upon the other creditors, who, ignorant of this secret agreement, have signed the deed of composition in the belief that all are to lose equally and none is to be preferred. (*Davis, J.C and Mehta, J.*) ATUMAL RAMOOMAL *v.* DIPCHAND KESSUMAL. **I.L.R. (1939) Kar 147=179 I.C. 901=11 R.S. 162 =A.I.R. 1939 Sind 33.**

——**S 23—Champerty.**

——*Agreement to finance litigation in consideration of share of property—Validity—Test.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. But agreements of such a kind ought to be carefully watched and when extortionate, unconscionable or made for improper objects, ought to be held invalid. The question as to whether a contract is inequitable and unconscionable depends on the circumstances of each particular case. By an agreement between *A* and *B*, *B* agreed to finance the litigation of *A* in respect of certain property in return for part worth about one lac and fifty thousand rupees of the recovered property, knowing well that the litigation would cost only about Rs. 9,000. *A* was a man of weak intellect and was in the habit of drinking.

Held, that the agreement was unconscionable and therefore invalid. (*Coldstream and Abdul Rashid, JJ.*) ALOPI PARSHAD *v.* COURT OF WARDS **181 I C. 728=11 R.L. 873=A.I.R. 1938 Lah. 23.**

——*Agreement to finance litigation in return for promise to share in fruits of litigation—If champertous and illegal—Power of Court to reduce excessive claim.*

Agreements to finance or to supply funds to carry on a litigation on condition of a promise to share in the fruits of the litigation are not *per se* illegal as being opposed to public policy or void. But if the terms of such agreements are extortionate or unconscionable, and the promised remuneration is out of all proportion to the trouble and expense involved, so as to be inequitable against the borrower, the Court has power to reduce the amount of remuneration to a reasonable amount after reviewing all the circumstances of the case. (*Darling, F.C.*) COURT OF WARDS, VAHALI *v.* ANDREWS. **15 Lah. L.T. 26.**

——*Considerations to be borne in mind in judging a transaction.*

Champertous transactions are in their essence speculative and the fairness or otherwise of a particular bargain is almost always open to some debate. The fairness of the agreement must be considered independently of unproved suggestions that it may have been improperly obtained. In applying the principle that "a fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being; *per se* opposed to public policy" it is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claim and would have had to be shared with the financier. Though it is not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial; and if the financier must need risk losing his money he may well be allowed some chance of exceptional advantage. (*Sir George Rankin.*) RAM SARUP *v.* COURT OF WARDS. **67 I.A. 50=I.L.R. (1940) Lah. 1=I.L.R. (1940) Kar. (P.C.) 63=6 B.R. 278= 185 I.C. 590=12 R.P.C. 109=51 L.W. 86= 1940 A.L.J 54=1940 O.W.N 66=1940 O.A. 106= 1940 O.L.R. 58=44 C.W.N. 345=1940 P.W.N. 180=71 C.L.J. 134=42 P.L.R. 174=1940 M.W. N. 278=42 Bom. L.R. 307=1940 A.W.R. (P.C.) 1=A.I.R. 1940 P.C. 19=(1940) 1 M.L.J. 278 (P.C.).**

——*Champertous agreement—Inadequacy of consideration—Enforceability of contract.*

In order to decide whether a champertous agreement is void as against public policy the Court will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation. It is necessary to examine the circumstances in which such an agreement was made, and possibly, also the consideration given; but mere inadequacy of consideration is not sufficient to enable a Court to set aside a contract of this description on the ground that it is against public

policy. Where the inadequacy of consideration is so glaring and the circumstances surrounding the contract are so suspicious as to lead the Court to the view, not that one of the parties has made a bad bargain merely, but that one of the parties must have been imposed upon and taken advantage of by a person who had better means of knowledge than he himself possessed, the contract may be set aside. (*Roberts, C.J. and Baguley, J.*) KALIMUTHU *v.* MAUNG THA DIN. **14 Rang. 392=166 I.C. 273=9 R.R. 248=A.I.R. 1936 Rang. 491.**

——**S. 23**—Extortionate and unconscionable bargain—Agreement by man of weak intellect to convey half share in property of great value in return for disproportionately small advance to meet litigation expense—Enforceability. *See* REGISTRATION ACT, S. 17 (1) (*b*) AND (2) (*v*). **42 Bom L.R. 165.**

——**S. 23**—If affects leases governed by Crown Grants Act. *See* CROWN GRANTS ACT, SS. 2 AND 3. **42 C.W.N. 81.**

——**S. 23—Illegal Contract.**

——*Abkari sale—Bidder entering into partnership with another after sale and before grant of license in respect of running of business of sale of toddy—Legality.*

The appellant was the successful bidder at an Abkari auction in respect of a toddy shop, held on 8th August, 1932. On 31st August, 1932, before the license was issued to the appellant, he entered into an agreement of partnership with the respondent in respect of the running of the toddy shop business.

Held, that the agreement of partnership was a transfer of the privilege of supply and sale of toddy and was therefore illegal. (*King, J.*) NARASIMHALU NAIDU *v* NAGA REDDI. **1940 M.W.N. 958=52 L.W. 530=(1940) 2 M.L.J. 694.**

——*Marriage of infant in violation of Child Marriage Restraint Act—Money advanced to defray expenses already incurred.*

Where money is advanced by a creditor for the purpose of defraying the expenses already incurred in celebrating a marriage of an infant in violation of the Child Marriage Restraint Act, the consideration is not rendered illegal under S. 23 of the Contract Act. (*Mukherjea, J.*) RAMJAS AGARWALLA *v.* CHAND MANDAL. **65 C.L.J. 557 =41 C.W.N. 1176.**

——*Mortgage of tenancy holding unlawful—Consideration of such mortgage—If can constitute valid consideration for subsequent bond.*

Where a mortgage of a tenancy holding is unlawful, the consideration paid at the time of its execution must be held to be also unlawful. Where, therefore, at the time of redeeming that mortgage, the mortgagor, instead of paying the mortgage-money in cash, executes a simple money bond for that amount there is no valid consideration either for that bond or for the bond executed by him in renewal of it. Accordingly, a suit to recover the amount due on the bond is not maintainable. (*Srivastava, Ag C.J. and Zia-ul-Hasan, J.*) JAGANNATH *v.* BAIJNATH. **12 Luck. 679= 165 I.C. 587=9 R.O 235 (1)=1936 R.D. 535= 1936 O W N. 1115=1936 O.L.R. 670=A.I.R. 1937 Oudh 150.**

——Enforceability—Mortgage by occupancy tenant in contravention of statute—Mortgagee's

right to sue for rent from sub-tenant. *See* AGRA TENANCY ACT, S. 23. **1936 R.D. 384.**

——**S. 23—Illegal Object.**

——*Agent for sale of lands—Agreement with prospective purchaser for sale to him at market price cheaply even if better prices were offered by strangers—Agreement by purchaser to pay commission to agent—Enforceability—If consideration fraudulent or immoral.*

Plaintiff, who was acting as an agent of a lady *A*, for the purpose of selling her lands and occupying a fiduciary position, entered into an agreement with the defendants, to the effect that the lands should be sold cheaply to the defendants at the then market price, and should not be sold to strangers even if better prices were offered by such strangers. The plaintiff was to be paid a commission of five per cent. on the sale price for the trouble he was taking for the defendants. The sale having been completed, the plaintiff sued the defendants for his commission.

Held, that the consideration for the agreement or the object of the agreement between the plaintiff and the defendants was fraudulent and also immoral, and that contract was therefore obviously unenforceable in view of illustration (*j*) to S. 23 of the Contract Act. (*Pandrang Row, J.*) MANIKKA MOOPPANAR *v.* PERIA MUNIYANDI PANDITHAN. **164 I.C. 31=9 R.M. 110=44 L.W. 166=1936 M.W.N. 466=A.I.R. 1936 Mad. 541 =70 M.L.J. 724.**

——*Money lent to illegal partnership with knowledge of illegality—Suit to recover—Maintainability.*

Where a person lends money to a partnership which is an illegal one or is forbidden by law, with the knowledge that it is going to be used for purposes forbidden by law, a suit by him to recover the amount so lent is not maintainable. (*Beasley, C.J.*) VAIRAVA NADAR *v.* POTHIKACHALA NADAR. **165 I C. 765=9 R.M. 299=1936 M.W.N. 507=44 L.W. 203=A.I.R. 1936 Mad. 603.**

——**S. 23—Immoral Contract.**

——*Contract to pay maintenance to past mistress—If void as being immoral or opposed to public policy.*

An agreement by a person to pay to his past mistress a sum of money every month for her maintenance so long as she remained outcasted and unmarried, there being nothing in the agreement with reference to future association cannot be regarded as void as being immoral or opposed to public policy. An agreement to become a mistress, which is doubtless void as being immoral should not be confused with an agreement to compensate a woman afterwards for an injury done to her and for the loss which she has sustained owing to an association, be it immoral or otherwise, with her protector. Past consideration under the Indian Law is good consideration and the fact that the woman has rendered service in the past whether immoral or otherwise and has suffered an injury of a kind and continues to suffer from that injury forms a perfectly good consideration for the contract to compensate her. (*Courtney-Terrel, C.J. and James, J.*) GODFREY *v.* MT. PARBATI PALUNI. **17 Pat. 308=19 Pat.L.T. 893=178 I.C. 574=11 R.P. 270=5 B.R. 114= A.I.R. 1938 Pat. 502.**

CONTRACT ACT (1872), S. 23.

——S. 23—Public Policy.

——*Agreement between priests partitioning disciples—Validity.*

An agreement between two priests by which certain disciples were specifically allotted to each of them with the stipulation that that arrangement would be binding on them and their heirs and that if one of them would perform any religious service in the family allotted to the other priest, he would be liable to pay compensation, is invalid being opposed to public policy. Consequently a suit for damages for breach of that agreement is not maintainable. (*S. K. Ghose and Edgley, JJ.*) KHUDIRAM CHAKRAVARTY *v.* SARADA PROSAD. **42 C.W.N. 1038.**

——Agreement between Hindu husband and wife after marriage to live separately—Husband setting apart specific property and wife agreeing to receive income thereof for maintenance—Relinquishment of right to further maintenance out of other property of husband—Validity—If opposed to public policy. *See* HINDU LAW—MAINTENANCE. **39 Bom.L.R. 458=A.I.R. 1937 Bom. 358.**

——*Agreement in consideration of giving false evidence.*

Where a litigant has agreed to give property to certain person in consideration of latter's agreeing to give false evidence on behalf of the former the agreement is void as the consideration for it is opposed to public policy and is therefore illegal. (*Wright, J.*) KO PA TU *v.* AZIMULLA. **187 I.C. 269=12 R.R. 311=A.I.R. 1940 Rang. 73.**

——*Combination of persons—Agreement not to bid against one another at public auction in respect of Government tolls—Legality—If opposed to public policy.*

There is no warrant for holding that a combination of persons not to bid against one another at a public sale or auction of Government tolls offends against public policy. The law will always encourage freedom to contract. "Public policy" is that principle under which freedom of contract or private dealing is restricted by law for the good of the community. It is a variable thing and must fluctuate with the circumstances of the time. But it is still an untrustworthy ground for legal decision and it must be resorted to within the prescribed limits. A partnership formed solely with a view to take toll contracts at a public auction is in itself not illegal such partners who agree to take tolls for the benefit of their firm would naturally agree not to bid against one another. The principle of public policy cannot be made to apply in its result to a combination of persons who agree not to bid against one another at a public sale held for forming out public revenues. The fact that in certain case such a combination might result in possible loss to public revenue would not make the act, which is perfectly legitimate, opposed to public policy so as to render it void and illegal. (*Macklin and Wassoodew, JJ.*) BHAGWANT GENUJI *v.* GANGABISAN RAMGOPAL. **42 Bom.L.R. 750.**

——Contract of betrothal in marriage between parents of Hindu bride and bridegroom—Validity—If marriage brokage contract. *See* HINDU LAW—MARRIAGE. **1937 M.W.N. 1274.**

——*Government opening telegraph office at particular place at request of certain persons—Contract with them for meeting deficit in its working expenses—Validity.*

Where Government open a telegraph office at a particular place at the request of certain persons in that place, a contract with them for meeting the deficit in its working expenses is a contract relating to a matter of amenity, which a modern State generally provides for, for advancing the material welfare of its subjects, but which it is not bound to do as a part of its fundamental constitutional obligations. There can, therefore, be no objection to such a contract on the ground of public policy. (*M.C. Ghose and R.C. Mitter, JJ.*) KISHORI PRASAD *v.* SECRETARY OF STATE. **I.L.R. (1938) 1 Cal. 463=176 I.C. 990=11 R.C. 194=42 C.W.N. 116=66 C.L.J. 592=A.I.R. 1938 Cal 151.**

——Insolvency—Sale of assets of insolvent by Official Assignee—Agreement between purchaser and insolvents not to make all assets available to creditors—Reservation of portion to insolvents—If can be given effect to. *See* INSOLVENCY—PRACTICE. **(1937) 2 M.L.J. 508.**

——Liquor contract—Agreement of partnership in respect of—Validity. *See* C. P. CODE, EXCISE ACT, S. 62. **A.I.R. 1937 Nag. 250.**

——*Marriage prohibited by Child Marriage Restraint Act performed in Native State to evade Act—Decree for payment of money towards marriage expenses—Enforceability in British India—Bar of public policy.*

It is well-established that the power of the Court to decline to enforce contracts and other instruments on grounds of public policy is a power which should be confined within the limits laid down by authority. The Court would clearly not enforce a contract or a decree if the enforcement implied the approbation by the Court of an act which was contrary to law. But the Court should not refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India, when that object was actually performed in a place or native state where it was perfectly legal. When a decree has been passed against a person requiring him to pay a sum of money towards his share of the expenses of the marriage of his sister, which was performed in a Native State in order to evade the provisions of the Child Marriage Restraint Act, execution of the decree cannot be refused on the ground of public policy on the ground that the marriage if performed in British India would be opposed to the Child Marriage Restraint Act. (*Wadsworth, J.*) ANANDARAMAYYA *v.* SUBBAYYA. **1940 M.W.N. 832=52 L.W. 371=(1940) 2 M.L.J. 353.**

——*Mortgage executed by accused in favour of surety for amount forfeited by latter.*

A surety furnished security for the appearance of the accused on a fixed date before the Magistrate. There was no agreement, express or implied, made between him and the accused at that time that the accused would subsequently reimburse him for such amount as might be forfeited. The security bond was subsequently forfeited as the accused failed to appear on the fixed date. Three years afterwards the accused voluntarily and out of gratitude executed a mortgage in favour of the surety, the consideration of the mortgage being the amount forfeited. The accused subsequently brought a suit for the recovery

of the land on the ground that that consideration for the mortgage was against public policy.

Held, that S. 23 did not apply to the case and it was therefore not open to the accused to get back the land without paying the surety the amount for which the mortgage had been effected.

Held further, that even if an agreement to reimburse had been made between the parties at the time when the security bond was executed, the plaintiff's suit would still fail on the ground that both parties being in *pari delicto*, the Court would help neither party and would let the estate remain where it falls, because a person who has transferred his property to another for an illegal or immoral purpose cannot get the transfer annulled on the ground that the consideration was illegal or immoral. A.I.R. 1921 Oudh 132 Rel. on. (*Tek Chand, J.*) BUR SINGH *v.* KHERU. **182 I. C. 276=12 R.L. 4=A.I.R. 1938 Lah. 732.**

———*Right to do scavenging work exclusively in houses of others—If can be recognised—Contract of assignment for consideration—Validity—S.* 65 *—Right to compensation under.*

The plaintiff's grandmother who was doing scavenging work in 230 houses borrowed a sum of certain sums from the defendant under promissory notes and arranged with the defendant that the latter should do scavenging work in 198 out of the 230 houses, yielding an income of Rs. 90 per mensem and appropriate Rs.45 out of the Rs. 99 for payment to the servants to be engaged by her for doing the scavenging work and credit Rs. 45 a month towards the amount due under the promissory notes. The plaintiff claiming under a will executed by his grandmother bequeathing to him the rights of scavenging in the 230 houses, brought a suit against the defendant for recovery of a sum of money, which he alleged, had been collected by the defendant in excess of the amounts due to him under the promissory notes under the arrangement, for a direction to the defendant to surrender the scavenging work of the 198 houses or in the alternative to pay Rs. 1,800, being the value thereof, and for a declaration that the plaintiff alone had the right to carry on the scavenging work in those 198 houses and for a permanent injunction to restrain the defendant or any one on her behalf from interfering with the plaintiff's rights. There was no contract between the plaintiff's grandmother and the owners or occupiers of the 230 houses by which the former was entitled to do the scavenging work in those houses. Neither the houseowners or occupiers nor the scavenger servants who actually did the work were parties to the suit, and there was nothing to compel the owners or any of the occupants of these 230 houses to employ the scavengers sent by the plaintiff's grandmother or to employ any scavenger at all.

Held, (1) that there was no right of scavenging in the houses which could be bequeathed or transferred under a contract either by way of mortgage or in any other manner; (2) that the arrangement in its entirety was extremely immoral and contrary to public policy, there being no basis for it in law; and even considering it as a custom it was one which no Court of law would recognise at all; ( ) that S. 65 of the Contract Act did not apply to the case so as to entitle the plaintiff to recover amounts collected by the defendant in excess of the due to the latter, as the defendant could not be said to have obtained any from the plaintiff which under S. 65 she could be compelled to restore or for which she could be compelled to make compensation, the case not being one in which the plaintiff or his predecessor in title had parted with any money to the defendant,

Mocket, J.—The money received by the defendant was never the money of the plaintiff at all, but was money received from the householders in her turn as payment to her for providing scavengers, and the arrangement pleaded was nothing else except a trafficking not only in labour but also in the rights of third parties (householders) to employ what scavengers they pleased. (*Burn and Mockett, JJ.*) RAMAMURTHY *v.* RAMULAMMA. **1940 M.W.N. 342=51 L.W. 662=A.I.R. 1940 Mad. 558.**

S. 23.—Stifling prosecution.

———*Agreement to refer dispute to arbitration and drop criminal proceedings—Validity—Collateral agreement by surety—If enforcible.*

Criminal cases under Ss. 147 and 323, I.P. Code, were pending in respect of a dispute between defendants Nos. 1 and 2 about the construction of a wall. The parties agreed to drop the criminal proceedings and refer the dispute as regards the construction of the wall as well as the payment of costs relating to the criminal cases to arbitration. The plaintiff stood surety for defendant No. 1 for payment of any amount which may be awarded against him. The arbitrator awarded a sum of Rs. 200 as against defendant No. 1 and in pursuance of this award the plaintiff paid the sum on behalf of defendant No. 1 to defendant No. 2. Thereafter he instituted the present suit for recovery of the said sum from defendant No. 1.

Held, (*i*) that the agreement to refer to arbitration was void as the dropping of the criminal cases was a part of the consideration for it; (*ii*) but that the contract between the plaintiff and defendant No. 1 as regards the payment of any amount awarded against defendant No. 1 was collateral to the agreement, and that there was no reason why the implied contract between the plaintiff and defendant No. 1 that the latter should reimburse the former for any sum paid by the former on his behalf, should not be enforced. (*Bhide, J.*) MIR MOHAMMAD KHAN *v.* ABDUL KARIM. **41 P.L.R. 144=A.I.R. 1939 Lah. 187.**

———*Bond executed to drop proceedings in respect of a non-compoundable offence—No prior civil liability—Legality of consideration.*

Where the defendant executed a bond in favour of the plaintiff with a view to see that certain pending criminal proceedings in respect of a non-compoundable offence against his brother, are dropped, and there is no suggestion of the existence of any prior civil liability between defendant and the plaintiff, the consideration for the bond is really the abandonment of the criminal proceedings pending against the brother of the executant. S. 23 of the Contract Act applies to such a case. (*Janki Nath Wazir, J.*) MT. FATEH BIBI *v.* SHAMAS DIN. **40 P.L.R. J. & K. 11.**

———*Compromise pending unsuccessful prosecution—Agreement to convey land—If void.*

A person prosecuted some persons for a non-compoundable offence, *i.e.*, for cutting bamboos from the disputed plot which he claimed as his and which, according to the accused belonged to

another person having been purchased by him. When the Magistrate had already come to the conclusion that the criminal prosecution could not stand and obviously a case of theft was not likely to succeed, the parties referred the matter in dispute between them to the arbitration of the landlord of the parties. At his instance, it was agreed that half of the plot should be sold by the accused to the complainant for Rs. 25 Thereafter the accused were acquitted in the criminal case and four months later one of the accused received Rs. 25 from the complainant as the price of half of the plot to be sold and acknowledged it. The accused however did not execute the sale deed and complainant instituted a suit for sepcific performance.

Held, that when the agreement was arrived at the criminal case had practically come to an end, though nominally pending. Secondly, the acceptance by one of the accused of Rs. 25 as the price of the land four months after the criminal prosecution had come to an end could by itself be taken to be a contract having been entered into by the parties long after the criminal case was over. Hence the agreement was not void. (*Mohammad Noor, J.*) RAMASRAY RAI *v.* LAL BAHADUR RAI. **183 I.C. 507=12 R.P. 161=5 B.R. 959=20 P.L.T. 780=A.I.R. 1939 Pat. 291.**

———*Conviction for theft—Appeal—Agreement pending appeal not to contest appeal on condition of accused paying certain sum on his success in appeal—Enforceability.*

It is against public policy to compound a non-compoundable offence, and any agreement to that end is wholly void in law. Defendant was prosecuted for assaulting the plaintiff and for forcibly carrying away her crops and he was convicted under S. 379, I. P. Code. He preferred an appeal, and pending the appeal the parties entered into a compromise under which the defendant agreed to pay the plaintiff a sum of money, if his appeal succeeded and it was also provided that the plaintiff should not contest the appeal either in person or through a pleader. The defendant's appeal was allowed and his conviction was set aside. In a suit by the plaintiff for recovery of the amount which the defendant had agreed to pay.

Held, that the agreement was void, being against public policy and the plaintiff's suit must therefore fail. (*Varma, J.*) MATTA JAGGILODU *v.* MATTA BYRAMMA. **6 Cut.L.T. 70.**

———*Cross criminal cases between the parties—Sale executed in favour of one party by the other—Illegal purpose carried out—Suit instituted to recover back the property and to repudiate the illegal agreement—Maintainability.*

There were two cross criminal cases between the parties, and one of them executed a sale in favour of the other to stifle the prosecution for offences which were not compoundable by law. After the prosecution was withdrawn, the transferor then brought the suit against the other for setting aside the sale-deed and for possession of the property.

Held, the property cannot be recovered back as there was no existence of fiduciary relationship between the parties and as they were in *pari delicto* and there was no exercise of undue influence. Further the illegal purpose had been carried out. It does not matter that the object of the suit was not to enforce the illegal agreement but to repudiate it. (*Srivastava, C.J.*) ABDUL MAJID KHAN *v.* BENI DIN. **171 I.C. 605=1937 O.L.R. 574=1937 O.W.N. 1123=10 R.O. 134=A.I.R. 1938 Oudh 24.**

———*Essentials of—Pre-existing liability—Contract in respect of—Talk or threat of criminal prosecution—Contract by third person in respect of such liability—If illegal or void—Principles.*

In order to render a transaction illegal on the ground that the object of the transaction was to stifle a criminal prosecution, it must be proved to the satisfaction of the Court that it was entered into or brought about in pursuance of an agreement to stifle a caiminal prosecution. The mere possibility or a talk of criminal prosecution at some stage or another will not make the transaction illegal. The mere fact that the plaintiff did not prosecute the defendant as at one time he threatened to do will not warrant the Court in inferring an agreement to abstain from prosecuting, when there is very little basis for finding that the plaintiff could ever have thought seriously that the defendant had committed any criminal offence at all. If the fact of the actual commission of an offence is beyond doubt and the plaintiff knows of it, his abstaining from prosecuting would afford some foundation for the argument that the non-prosecution must have been the result of an agreement not to prosecute. Further a distinction must be made in the case of a transaction where there is a pre-existing civil liability, for that is not the case where the plaintiff wishes to gain some money not already due to him, as a result of an arrangement entered into on the threat of criminal proceedings. When what the plaintiff does is only by way of taking steps to secure payment of a portion of the money undoubtedly due to him from the defendant, the transaction cannot be rendered illegal, merely because there is a threat or talk of criminal prosecution. The circumstance that the defendant becomes the obligor under the contract to the plaintiff in respect of a pre-existing liability of another person will not detract from the validity of the contract, it is only a factor to be borne in mind in drawing the inference of fact as to whether the contract was entered into in pursuance of an agreement to stifle a prosecution. It is not a principle of *law* that wherever a third person undertakes the liability of another in circumstances in which there has at one time been a talk or threat of criminal prosecution, the third person's promise is either without consideration or vitiated by illegality. (*Varadachariar and Mockett, JJ.*) LAKSHMANASWAMY *v.* NARASIMHA RAO. **169 I.C. 435=10 R.M. 34=1936 M.W.N. 1137=44 L.W. 572=A.I.R. 1937 Mad. 223=(1937) 1 M.L.J. 414.**

———*Mortgage deed executed by three brothers to stifle prosecution against two of them—Enforceability—Position of sureties—If different.*

Where a mortgage-deed was executed by three persons who are brothers, in order to stifle the criminal prosecutions against two of them, the deed cannot be enforced against any of them. Nor is the case of the sureties different. They also cannot be bound by their agreement in the mortgage in question which was entered into for the purpose of stifling criminal prosecutions. (*Addison and Din Mohammad, JJ.*) KARAM

CONTACT ACT (1872), S. 23.

SINGH *v.* KHAIRATI RAM. **168 I.C. 991=9 R.L. 702=39 P.L.R. 536=A.I.R. 1937 Lah. 686.**

———*Offence compoundable with permission of Court—Compromise to withdraw prosecution—Legality of consideration.*

It is only in the cases of certain serious offences against the State that no composition is allowed and it is only in such cases that a compromise to withdraw the case is an illegal consideration. But where there is a criminal case in respect of offence which is compoundable with the permission of Court, a compromise during the pendency of the case to refer the dispute to arbitration and incidentally to withdraw the prosecution is perfectly lawful. (*Addison and Ram Lall, JJ.*) RAJA RAM *v.* CHARANJI LAL. **182 I.C. 490=12 R.L. 38=A.I.R. 1939 Lah. 98.**

———*Promissory note partly in consideration of withdrawal of criminal prosecution—Enforceability—If void.*

Where a part of the consideration for a promissory note is the abandonment or withdrawal of criminal proceedings taken by the payee against the executant in respect of a non-compoundable offence such as embezzlement of money or criminal breach of trust, the promissory note is void under S. 23, Contract Act and unenforceable. The fact that a civil liability co-existed with the criminal liability does not necessarily validate the promissory note. It cannot be laid down that in every case in which a civil liability co-exists with the criminal liability the bond taken is not affected by the dropping of the criminal prosecution. It is a question of fact in each case as to whether the bond executed in satisfaction of the civil liability was partly in consideration of the withdrawal of the pending prosecution. (*Niamatullah, J.*) BANU MAL *v.* RATAN DEO. **1937 A L J 333=1937 A.W.R 308 =169 I.C. 533=10 R.A. 20=1937 A.L.R. 542= A.I.R. 1937 All. 370.**

———*Promissory note—Withdrawal of pending criminal prosecution part of consideration—Enforceability.*

Where there is an existing debt or an obligation, a creditor is not precluded from taking any security therefor by threat of a criminal prosecution and the security is not vitiated by the fact that he was induced to abstain from prosecuting the debtor. But if it is a part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be invalid. It need not be the sole bargain. Hence where a promissory note is executed pending a criminal prosecution and it is proved that the withdrawal of such prosecution forms part of the consideration for the promissory note, the promissory note is unenforceable. (Case-law referred.) (*Venkataramana Rao, J.*) VEERAYYA *v.* SOBHANADRI **I.L.R. (1937) Mad 471=167 I C 148= 9 R.M. 425=44 L.W 507=1936 M.W.N. 908 =A. I. R. 1936 Mad. 656=(1937) 1 M.L J. 489.**

———*Sale-deed in consideration of dropping of criminal prosecution—Agreement, if void—Suit to recover unpaid sale price or land conveyed—Maintainability.*

Where the execution of a sale-deed is a part of the consideration for dropping criminal proceedings against the executant, the consideration for the agreement between the parties is illegal and therefore the agreement is void by reason of

CONTRACT ACT (1872), S. 23.

S. 23 of the Contract Act. The executant cannot therefore be permitted to recover either the unpaid purchase-money or the property dealt with under the sale-deed. No refund of money or return of consideration given under an agreement not to prosecute a criminal case will be allowed unless circumstances disclose pressure or undue influence Mere fear of punishment in a criminal case does not, however, constitute undue influence. The fact that the Criminal Court has agreed to the compromise does not make the agreement legal; an agreement that there shall be no prosecution is illegal even though sanctioned by the Court. (*Agarwala and Rowland, JJ.*) BRAHMDEO NARAYAN *v.* BRAJALLABH PRASAD. **19 Pat. 424=188 I.C. 859=13 R.P. 51=6 B.R. 757 A I.R 1940 Pat. 573.**

———*Test—Motive and object of agreement—Distinction.*

It is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compounding an offence which is not compoundable in law. The principle is that no Court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the Judges, and put it in the hands of private individuals. The test to be applied in all such cases is, as to whether it was an express or implied term of the bargain between the parties, that a non-compoundable criminal case should not be proceeded with. If the *quid pro quo* or consideration for a bond in contract is the withdrawal of a criminal prosecution, obviously it is hit by S. 23, Contract Act. But the fact that prosecution was actually withdrawn as a result of the execution of the bond by the accused in favour of the prosecution does not necessarily show that the object or consideration of the bond was the stifling of the criminal case. A distinction has always been drawn between the motive to a transaction and its object or consideration and it is not enough that the motive which impelled the party who executed the bond was that the criminal case against him might be dropped. To bring a case within the purview of S. 23, Contract Act, it is necessary to show that the object or consideration of the agreement is unlawful. When there is a just and *bona fide* debt owing by the accused, against whom a non-compoundable criminal case is proceeding, and he gives a security to his creditor, the entire consideration for which is the pre-existing debt, and no part of it is referable to the withdrawal of the criminal case, the transaction would be a perfectly good transaction. There, as between the debtor and the creditor there is no trading on felony, which public policy condemns and the law attempts at preventing. The creditor gets just what he was entitled to, and there is no advantage or emolument coming to him for withdrawing the prosecution against his debtor. When security is given by an outsider, who is under no existing obligation, the consideration could be nothing else but withdrawing of the criminal case, and as such the security is not entertainable in law. The position is that if the pre-existing liability of the debtor was the sole consideration for the security which he gives the transaction will be protected, even if it were given under threat of criminal proceedings; but if the dropping of prosecution was also

a matter of bargain between the parties, and constituted a part of the consideration apart from the pre-existing debt, the security cannot be enforced in law. (*Derbyshire, C.J. and Mukerjea, J.*) SUDHINDRA KUMAR *v.* GANESH CHANDRA. **I.L.R. (1939) 1 Cal. 241=179 I C. 210=11 R.C. 492=69 C.L.J. 1=43 C.W.N. 147=A.I.R. 1938 Cal. 840.**

——*Validity—Test—Consideration for agreement—Extraneous evidence—Admissibility.*

An act may involve a person in a civil as well as a criminal liability for a non-compoundable offence, the liability depending on proof. The mere fact that an agreement may be made with regard to the civil liability while a possibility of prosecution criminally is existing will not render the agreement void, but if that agreement is made and part of the consideration for it on the side of the aggrieved party is an agreement not to prosecute criminally, then the agreement is void. If the agreement as to the civil liability changes the nature or the extent of the original civil liability, for example if the guarantee of a surety is introduced or if the liability is changed from a personal one to a mortgage security, this will be a strong indication that the agreement is not merely in settlement of the original civil liability, but that it is one made under pressure and in return for an agreement not to prosecute. The additional advantage so conferred by the agreement cannot be enforced in law, though it would be open to a party to fall back upon the original civil liability and enforce it. In considering the question as to whether the consideration of the agreement is the withdrawal of the criminal proceedings, the Court is not confined to the terms of the agreement. It is open to a party to give evidence from which the inference necessarily arises that part of the consideration is unlawful. (*Mitter and Roxburg, JJ.*) SRIS CHANDRA NANDY *v.* SUPRAVAT CHANDRA. **I.L.R. (1940) 1 Cal. 372=71 C.L.J. 215=44 C.W.N. 304=A.I.R. 1940 Cal. 337.**

——**S. 23—Miscellaneous.**

——*Adjustment of attached decree by attaching decree-holder—Adjustment affecting rights of original decree-holder—Validity.*

An adjustment of an attached decree by an attaching decree-holder which involves serious injury to the rights of the original decree-holder is hit by S. 23 of the Contract Act. (*Nasim Ali and R.C Mitter, JJ.*) DURGA PRASAD CHAMARIA *v.* SECRETARY OF STATE FOR INDIA. **172 I.C. 560=10 R.C. 397=41 C.W.N. 880=A.I.R. 1937 Cal 468.**

—— **Ss. 23 and 27**—*Monopoly—Licence granted by zamindar entitling licensee to exclusively collect hides of dead animals within Zamindari—Enforceability.*

A contract or licence under which the licensee is entitled exclusively to collect the hides of all dead animals within a particular area of the zamindari or raj of the grantor of the licence, and under which the chamars and owners of dead animals are bound to sell hides to the licensee and to none else, is one which purports to grant a monopoly and is unenforceable. (*Wort and Manohar Lal, JJ.*) KAMESHWAR SINGH *v.* MD. YASIN KHAN. **17 Pat. 255=179 I C 431=11 R.P. 355=5 B.R. 226=20 Pat.L.T. 309=A.I.R. 1938 Pat. 473.**

——**Ss. 23 and 28**—*Scope and applicability—Agreement restricting litigant to one out of two Courts.*

Where two Courts have jurisdiction to try a case, there is nothing contrary to public policy in an agreement between parties that disputes between them shonld be tried at one place rather than at another. It is not unnatural that a big company which has agents all over the country should enter into agreements with its agents that disputes should be tried in a place where it has its head office, and if the agents agree that disputes should be tried by one out of two competent tribunals, they should be held to this agreement. Nor does S. 28, Contract Act, prohibit an agreement which restricts a litigant to one Court out of two. (*Pollock, J.*) NATIONAL PETROLEUM CO., LTD, BOMBAY *v.* MEGHRAJ. **174 I C. 582=10 R.N. 406=20 N.L.J. 247=A.I.R. 1937 Nag. 334.**

——**S. 23 and Transfer of Property Act, S. 6 (h)**—*Transfer in consideration of past co-habitation—Legality of consideration.*

When a person transfers property to woman in consideration of past co-habitation, the consideration is not illegal. (*Bennet and Verma, JJ.*) BALO *v* MST. PARBATI. **I.L.R. 1940 A. 371=1940 A W.R (H C.) 269=A.I.R. 1940 A. 385.**

——**S. 24**—*One consideration for three promises, one of which is illegal—Whole contract—If void.*

Roberts, C.J.:—If there is one entire consideration for two several contracts and one of these contracts is for the performance of an illegal act, the whole is void. Thus where one sum is to be paid for the doing of a legal and an illegal act, the whole contract is void. And if a contract or promise be founded upon a legal and an illegal consideration and the illegal consideration cannot be seperated from the legal consideration and rejected, the illegality of part vitiates the whole. Where the plaintiff promised Rs. 15,000 and in consideration received promises by the defendant to do three things one of which was illegal, namely, to pay to the plaintiff the latter's losses in respect of a criminal transaction committed at the defendant's instigation.

Held, that one of the considerations for the promise to pay Rs. 15,000 was illegal, and every part of the contract was induced and affected by it as there was no way of dividing up the promise and saying how much was made in respect of the legal consideration and how much in respect of the illegal and that, therefore, the whole contract was void. (*Roberts, C.J. and Braund, J.*) V R. M. RAMASWAMI CHETTIAR *v.* C. T M. N. NACHIAPPA CHETTIAR. **1939 Rang L.R. 711=186 I.C.709=12 R.R. 283=A.I R. 1940 Rang. 45.**

——**Ss. 24 and 57**—*Licensee of electricity supply creating partnership—Partnership agreement transferring undertaking to partners who in their turn agreeing to pay one-tenth of profits to licensee—Agreement void under Electricity Act—Contract, if indivisible.*

A licensee of electric supply created a partnership The partnership agreement vested the building, machinery, licence and book, etc, in the partners and the partners agreed to pay one-tenth of the profits to the licensee and after his death to his heirs as long as the company was in existence. The agreement was void under S. 9 (3) of the

CONTRACT ACT (1872), S. 24.

Electricity Act for want of the previous consent in writing of the Local Government.

Held, that the transfer of the undertaking was a portion of the consideration whereby the other members of the partnership agreed to pay one-tenth of the profits to the licensee and his heirs. The contract was not divisible and therefore void as a whole under S. 24.

Held further, that the contract was a single contract and had no contingent part. Hence S. 57 did not apply. (*Baguley, J.*) MA KYIN HONE *v.* ONG BOON HOCK. **167 I C. 707=9 R.R. 326=A.I.R. 1937 Rang 47.**

——**Ss. 24 and 65**—*Agreement void under S. 24—If one "discovered to be void"—Right to relief under S. 65.*

The provisions of S. 65 of the Contract Act cannot be applied if, in its origin, an agreement was induced by fraud or the contracting parties were animated by fraudulent object or purpose and it was known to both parties to be illegal or immoral at the time of the agreement. The words "discovered to be void" in the section govern the application of the provisions of S. 65, and they cannot be extended to all agreements which are void under S. 24 of the Act by reason of unlawful consideration or object. Where the illegality is both in the matter of consideration and the promise itself as expressed in the agreement and also in its purpose, no relief can be granted under S. 65 S. 65 would not apply to an agreement which is of a fraudulent nature, known to be illegal involving moral turpitude on the part of the plaintiff, and which is an agreement amounting to nothing more than creation of false evidence mentioning false facts and is for compounding a non-compoundable offence. (*Wassoodew and Thakor, JJ.*) RUDRAGOWDA *v.* GANGOWDA. **173 I.C. 553=10 R B. 352=39 Bom.L.R. 1124=A.I.R. 1938 Bom 54.**

——**S. 25**—*Charity — Promise to contribute money to out of one's own pocket—Enforceability.*

A promise to make a contribution of money to a charity or charitable institution, to come out of the promisor's own pocket, is not enforceable, as it is without consideration. (*Courtney-Terrell, C.J. and James, J.*) JAMUNA DAS *v.* RAM KUMARJI. **169 I.C. 396=3 B.R. 570=10 R.P. 13=18 Pat.L.T. 286=1937 P.W.N. 258=A.I.R. 1937 Pat. 358.**

——**S. 25**—Son signing acknowledgment for father's debt—Acknowledgment, if supported by consideration. *See* CONTRACT ACT, S. 2 (*d*). **38 P.L.R. 85.**

——**S. 25 (2)**—*Applicability—Contract by minor—Ratification on attaining majority.*

A contract entered into by a minor, being null and void, its subsequent ratification by the minor on attaining the age of majority cannot form a valid contract on which a suit can be maintained. The consideration which passed under the earlier contract cannot be imported into the contract into which the minor entered on attaining majority. S. 25 (2) has no application to the contract of this kind. (*Din Mohammad, J.*) NAZIR AHMAD *v.* JIWAN DAS. **177 I.C. 388=11 R L. 307=A.I.R. 1938 Lah. 159.**

——**Ss. 25 (2) and 11**—Bond by minor—Fresh bond executed by him in lieu thereof on attaining majority—Enforceability. *See* CONTRACT ACT, **Ss. 11 AND 25 (2). 1937 O.W.N. 1034.**

CONTRACT ACT (1872), S. 25.

——**S. 25 (3)—Time-barred debt.**
Acknowledgment.
Agent.
Applicability.
Promise to pay.
Promise to pay a portion effect.
Renewal of pronote.
Scope

——**S. 25 (3)—Acknowledgment.**

——*Effect of.*

A mere acknowledgment of debt implying a promise to pay is not sufficient to satisfy the requirements of S. 25 (3) of the Contract Act. (*Coldstream and Bhide, JJ.*) KESAR SINGH *v.* SANT RAM **18 Lah. 234=169 I.C. 608=9 R.L. 23 (2) =39 P.L.R. 921=A.I.R. 1937 Lah. 865.**

——*Acknowledgment of a* Khata Baqi *after limitation—Suit on, if lies.*

The acknowledgment of a Khata Baqi after the period of limitation in respect of the original debt, was held to amount to a promise to pay under S. 25 (3) of Contract Act, and that a suit thereon was maintainable. (*Davies*) MOHAN LAL *v.* RAM CHANDRA. **1939 A.M.L.J. 147.**

——*Acknowledgment without express promise to pay—Effect of.*

Mere acknowledgment of liability without any express promise to pay or without any reference to the future liability to pay does not fall within the meaning of S. 25. (*Jai Lal and Dalip Singh, JJ.*) BASHESHAR NATH GOELA *v* BAIJ NATH. **178 I.C. 259=11 R.L. 429=A.I.R. 1938 Lah. 264.**

——*Acknowledgment of partnership debt by newly admitted partner without promise to pay—If binding contract.*

Where a newly admitted partner, along with the existing partners, acknowledges that on a particular day a particular amount is due from the partnership to their creditors, but the acknowledgment does not contain a distinct promise to pay the amount, the partner cannot be said to be doing anything beyond merely acknowledging the correctness of the amounts which stand in the *khata* of the existing firm, and the acknowledgment does not create a new contract so as to bind him, there being no consideration for the same. (*Fazl Ali, J., on difference between Manohar Lall and Chatterji, JJ.*) MADHO PRASAD *v.* GOURI DUTT. **183 I C. 179 (2)=12 R.P. 101 (2)=5 B R. 874=20 Pat L.T. 825=A.I.R. 1939 Pat. 323.**

——**S. 25 (3)— Agent.**

——*"Agent generally or specially authorised"—Minor*—De facto *guardian—Power to renew time-barred debts.*

S. 25 (3) of the Contract Act requires that the person renewing a time-barred debt must be either the person himself or his agent generally or specially authorised in that behalf. A *de facto* guardian of a minor is not generally or specially authorised to renew a time-barred debt and has therefore no power to renew a time-barred debt. (*Lokur, J.*) NAROTTAMDAS *v.* CHITTA. **186 I.C. 66=12 R.B. 294=41 Bom.L.R. 896=A.I.R. 1939 Bom. 464.**

—— **S. 25 (3)—Applicability.**

Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3). (*Bose, J.*) RAMPRASAD JAGBANDHOO *v.* ANANDI BRINDAWAN RAWAT. **I.L.R 1940 Nag. 441=174 I.C. 374=10 R.N. 377=A.I.R. 1938 Nag. 180.**

S. 25 (3) of the Contract Act does not apply where there is no express promise to pay a time-barred debt. (*Skemp, J.*) SHANTI PARKASH *v.* HARNAM DAS. **174 I.C. 258=10 R.L. 535=A.I.R. 1937 Lah. 642.**

Where a claim is barred by statute nothing short of an express promise can provide a fresh period of limitation. (*Monroe, J.*) BARU MAL *v.* DAULAT RAM. **161 I.C. 703 (2)=8 R.L. 787=A.I.R 1936 Lah. 164.**

——*"By the person to be charged therewith"—Meaning of.*

The words "by the person to be charged therewith" in S. 25 (3) of the Contract Act are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning. (*Abdur Rahman, J.*) GOVINDA NAIR *v.* ACHUTAN NAIR. **51 L.W. 520=1940 M.W.N 443=A.I.R. 1940 Mad. 678=(1940) 1 M L.J. 682.**

——*Pronote executed in favour of plaintiff in lieu of bond executed in favour of his minor son under guardianship of plaintiff's father—Bond time-barred at the date of execution of pronote—Pronote, if enforceable.*

Where a pronote was executed by the defendant in favour of the plaintiff in lieu of a bond which was executed by the defendant in favour of the minor son of the plaintiff under the guardianship of the plaintiff's father, and the bond had become time-barred at the date of the execution of the pronote.

Held, that as the debt due on foot of the bond was payable not to the plaintiff but to his son, the pronote was without consideration and that the provisions of S. 25 (3) of the Contract Act were inapplicable to it, as the debt due under the bond was not one of which the plaintiff might have enforced payment but for the law for the limitation of suits, and that, therefore, the suit based on the pronote should be dismissed. (*Srivastava, Ag.C. J. and Thomas, J.*) MOHAMMAD MUMTAZ ALI *v.* RAJA RAM SHUKUL. **167 I.C. 919=9 R O 415=1937 O.L R. 178=1937 O.W.N. 341=A.I.R. 1937 Oudh 300.**

——*Promise to pay barred debt by manager of Hindu family—Junior member not son of promisor.*

A promise to pay a barred debt by a manager of a Hindu family who is not the father of a junior member of a joint Hindu family, is not binding on such junior member. The question lies within the region of the Hindu Law and not of the Contract Act. S. 25 (3), Contract Act, does not apply to such a case. (*Niyogi, J.*) CHUNNILAL DHURAJMAL *v.* CHAKKILAL. **172 I.C. 493=10 R.N. 217=A.I.R. 1937 Nag. 327.**

—— S. 25 (3)—Promise to pay.

——*Balance struck and interest fixed — If amounts to promise to pay.*

Wherever there is a balance struck and interest has been fixed or agreed to be paid, the words have always been construed to mean a promise to pay within the meaning of S. 25 (3). (*Coldstream, Dalip Singh and Din Mohammad, JJ.*) SHANTI PARKASH *v.* HARNAM DAS. **I L.R. (1938) Lah. 193=174 I C 277=10 R.L. 540=40 P.L.R. 533=A.I R 1938 Lah. 234 (F.B.).**

——*Balance struck in account book—Words "baqi rahe lene"—If imply promise to pay.*

Where a balance is struck in the account book of a creditor and is followed by the words *"baqi rahe lene"* signed by the debtor, the document is an "agreement" and not a mere "acknowledgment", as it contains a promise to pay. (*Tek Chand, J.*) FATEH MAHOMED *v.* SURJA. **188 I.C. 420=41 Cr.L.J. 527=41 P.L.R. 194=A.I.R. 1939 Lah. 486.**

——*Promise to pay barred debt—Acceptance of instalments proposed and sent by debtor.*

Where the debtor proposes in a letter to pay a time-barred debt by monthly instalments and remits some of the instalments as proposed, the acceptance of the instalments by the creditor constitutes acceptance of the proposal by conduct so as to convert the proposal into a promise within the meaning of S. 25 (3). (*Dunkley, J.*) GEORGE NEWNES BOOK CO. *v.* K. V. S. IYER. **1940 Rang. L.R. 377=189 I.C. 622=13 R.R. 45=A.I.R. 1940 Rang. 159.**

——*Basis of suit.*

When a promise to pay falls under S. 25 (3) of the Contract Act, it constitutes a valid agreement for the purpose of suing, whether there is a fresh consideration for the promise or not, and it is immaterial whether the debts covered thereby are within limitation or not. (*Beckett, J.*) KISHEN LAL *v.* GOHLI. **178 I.C. 754=11 R.L. 491=40 P.L R. 689=A.I.R. 1938 Lah. 757.**

——*If must be unequivocal.*

In order to keep alive a time-barred debt, the promise to pay must be expressed in unequivocal terms. (*Din Mohammad, J.*) JOTI PRASAD *v.* RAHAM ALI. **186 I.C. 718=12 R.L. 415=A.I.R. 1939 Lah. 466.**

——*If to be express—Implied promise inferred from acknowledgment—Sufficiency.*

For the purpose of S. 25 (3) of the Contract Act, there must be an express promise as opposed to an unconditional acknowledgment involving an implied promise to pay. Where the writing relied upon was to the effect. "A balance is struck. The said Rupees.....are found due. The same are payable," and the Gujerati words were "baki nikliya te deva sahi."

Held, that the words could not be interpreted as containing an express promise under S. 25 (3). (*Wadia and Wassoodew, JJ.*) BALKRISHNA MANSUKHRAM *v.* JAYSHANKAR NARAYAN. **178 I. C. 174=11 R.B. 147=40 Bom.L.R. 1010=A.I. R. 1938 Bom. 460.**

——*Implied promise to pay—Sufficiency.*

Mere implied promise to pay is not sufficient for the purposes of S. 25. More than three years from the last item of account the balance was struck and signed by the debtor. The entry however contained no words which could amount to a promise to pay. On a suit being brought on the basis of such entry,

Held, that the entry did not fulfil the requirements of S. 25. (*Bhide, J.*) RAM LAL *v.* FIRM KARAM CHAND GOPAL CHAND. **178 I.C. 446=11 R.L. 456 (1)=A.I R. 1938 Lah. 155.**

——*Mention of debts in schedule of creditors—Sufficiency.*

S. 25 (3), Contract Act, clearly lays down that the promise to pay must be in writing and that some words which do not by themselves amount to a promise but in which the law implies a promise, shall not be sufficient to constitute a fresh cause of action. The mere mention of a debt in the schedule of creditors cannot amount to any-

thing more than a mere acknowledgment. It cannot by any stretch of language be held to contain in itself a promise to pay. (*Tek Chand and Dalip Singh, JJ.*) CHELA RAM SANT RAM *v.* OFFICIAL RECEIVER. 18 Lah. 562=173 I.C. 361=10 R.L. 440=39 P.L.R. 678=A.I.R. 1937 Lah. 382.

——*Money bond to pay off father's time-barred debts—Extent of liability.*

Where the petitioner enters into a money bond not to raise personal loan but only to pay off his deceased father's time-barred debts, a decree on the bond can be passed only against the estate of the deceased in his hands, but no personal decree can be passed against the petitioner. (*Din Mohammad, J.*) NAZIR AHMAD *v.* JIWAN DAS. 177 I C. 388=11 R.L.307=A.I.R. 1938 Lah. 159.

——S. 25 (3)—*Reference to barred debt if necessary.*

Per *Roberts, C.J.*—It is not necessary that an agreement to pay a debt barred by the law of limitation should refer in terms to the barred debt. (*Roberts, C.J. and Sharpe, J.*) SMITH *v.* HEPTONSTALL. 1938 Rang.L.R. 6=177 I.C. 63=11 R.R. 95=A.I.R. 1938 Rang. 134.

For a promise to pay a time-barred debt to be a good consideration, it is not necessary that the debtor must expressly state that he was renewing a barred debt. (*Tek Chand, J.*) SANDHURA SINGH *v.* KEHR SINGH. 169 I.C. 228=9 R.L. 725=39 P.L.R. 396=A.I.R. 1936 Lah. 1016.

—— *Promise in S. 25 (3)—What is included in.*

A promise under S. 25 (3) of the Contract Act means in accordance with S. 9 of the Act, both an express and an implied promise. Whether any particular form of words used amounts to an express or implied promise is a question of fact which must be decided with reference to the phrases used in each particular case. The words "I am liable to pay Rs. 30, found in a Khata Baqi" was held, being an unqualified admission of a debt, to amount to an implied promise to pay the amount mentioned. (*Davies.*) RATAN LAL *v.* RAJ MAL. 1939 A.M.L.J. 137.

——S. 25 (3)—Promise to pay a portion effect.

——*Express promise to pay a portion of barred debt—If gives cause of action to sue for whole debt.*

An express promise to pay a portion of a debt is not sufficient and cannot provide a good cause of action in regard to the portion for which there is no express promise. If a person promises to pay a portion of a barred debt he can only be sued for that portion and not for the whole debt. (*Abdur Rahman, J.*) GOVINDAN NAIR *v.* ACHUTHAN NAIR. 1940 M.W.N. 443=51 L.W. 520=A.I.R. 1940 Mad. 678=(1940) 1 M.L J. 682.

——S. 25 (3)—Renewal of pronote.

——*Promissory note for debt due under barred promissory note—Enforceability.*

A promissory note executed in renewal of a prior promissory note which has already become barred by limitation on the date of renewed note, being a document which contains an express promise to pay is enforceable under S. 25 (3) of the Contract Act. Though there is no clear reference in the instrument to the previous loan, the loan may be connected by oral evidence with the new instrument. It is not necessary for the purposes of S. 25 (3) that the second instrument must recite the details of the loan and also state

that the promise is to pay a debt barred already. (*R.C. Mitter, J.*) MAUTAZADDIN *v.* NAZAR MAHOMED KHAN. 63 Cal. 759=40 C.W.N. 474.

——*Renewal after period of limitation—Liability under renewed note—Knowledge of maker that former note is barred—If a condition of liability.*

A promissory note executed in renewal of a former note which is barred by limitation is a promise in writing to pay a debt of which the creditor might have enforced payment but for the law of limitation within the meaning of S. 25 (3) of the Contract Act. The maker's knowledge or want of knowledge that the claim under the prior note has become barred has nothing to do with the matter and does not affect his liability under the fresh note. To make the knowledge of the promisor a condition of his liability under S. 25 (3) would be to read into the words of the statute something which is not there. (*Panckridge, J.*) BANGSIDHAR GOPALKA *v.* A. C. BANERJEE & Co. 40 C W.N. 130.

——S. 25 (3)—Scope.

——*Promise—If must be express promise or may be implied.*

The promise referred to in S. 25 (3) of the Contract Act must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. In other words there must be a distinct promise to pay before a document can be said to fall within the provisions of S. 25 (3). (*Abdur Rahman. J.*) GOVINDA NAIR *v.* ACHUTHAN NAIR. 1940 M.W.N 443=51 L W. 520=A.I.R. 1940 Mad. 678=(1940) 1 M.L.J. 682.

——Ss 25 (3), 62 and 249—*New partner along with old ones signing hatchatta account book in respect of debts prior to his joining partnership—Liability.*

Two persons who had entered into a partnership had borrowed money for their business. Subsequently, another person joined these persons to form a new partnership, and he, along with the other two, signed a hatchitta account book in respect of the debts incurred by the other two previous to his joining the partnership. In a suit seeking to make such third person liable on the basis of such document.

Held, (per *Manohar Lall and Fazl Ali, JJ.*: *Chatterji, J.* contra).—On the construction of the document, that the acknowledgment did not amount to a promise to pay, that it was ot supported by consideration and that there was no novation and as such the third person was not liable. (Circumstances under which a new partner can be made liable for debts of old partnership explained) (*Fazl Ali, J., on difference between Manohar Lall and Chatterji, JJ.*) MADHO PRASAD *v* GOURI DUTT. 183 I.C. 179 (2)=12 R.P. 101 (2)=5 B.R. 874=20 P.L,T. 825=A.I.R. 1939 Pat. 323.

——S. 27—*Contract requiring defendants to sell hides only to plaintiff—Validity.*

S. 27 of the Contract Act contemplates not only a total but a partial restraint also. A contract requiring the defendants to sell hides *only* to the plaintiff and to nobody else is a partial restraint on the defendant's exercise of their trade and as such void under that section. (*Thomas and Zia-ul-Hasan, JJ.*) ABDUL KARIM *v.* DUBAR. 13 Luck.

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405 170 I.C. 479=10 R.O. 19=1937 O.L.R. 430 =1937 O.W.N. 879=A.I.R. 1937 Oudh 445.

——S. 27—Monopoly—License by Zamindar entitling licensee to collect exclusively hides of all dead animals within zamindari—Enforceability. *See* CONTRACT ACT, S 23. 17 Pat. 255.

——S. 28—*Applicability—Contract—Arbitration clause—Agreement to refer to arbitration dispute arising from contract in accordance with certain rules and bye-laws—Validity.*

Where parties enter into certain contracts which contain an arbitration clause to the effect that 'in the event of any dispute arising between you and me out of this transaction. I agree to put the matter to arbitration as provided by the bye-laws of the Jain Sanatan Sikh Grain Chamber Limited and to abide by the arbit ation award," the agreement to refer to arbitration is a perfectly valid one and is not in that class of agreement contemplated or prohibted by S. 28 of the Contract Act. That section applies to agreements which wholly or pa tially prohibit the parties from having recourse to a Court of law and not to agreements to refer disputes arising out of contracts between parties to arbitration as provided by certain rules, especially when neither the agreement nor the rules prohibit any of the parties from taking proceedings thereafter in a Court of justice. (*Harries, J.*) GAINDA LAL *v.* RAMESHWAR DAS. 10 R.A. 295=171 I.C 584= 1937 A.L J. 823=1937 A.L R. 867=1937 A.W R. 688=A I R. 1937 All. 650.

——S. 29—*Applicability—Letter by debtor's brother to creditor—Agreement to hold himself liable for loans caused to be advanced to debtor privately or to him jointly with others—No limit as to limit of time or amount—Effect of—Enforceability—If void for uncertainty.*

Where a brother of a debtor writes a letter to the creditor advancing money to the debtor agreeing to hold himself liable for payment of any private loans or other loan caused to be advanced to him jointly with other persons, on the ground that the borrower was acting as the manager of their family, it is an agreement guaranteeing payment of loans advanced to the borrower whether to himself or to him and others. It cannot be said that there is uncertainty with regard to the loans, so as to make it void under S. 29 of the Contract Act As soon as the lender advances money to the debtor or to him and others, the loan comes within the terms of the agreement. The fact that no time limit is stated in it does not render it uncertain and unenforceable; nor does the fact that no amount or limit is stated does so. (*Beasley, C.J.*) SAMBAMURTHI *v.* KANNIAH. 1937 M.W.N 760.

——S. 30—*Applicability—Bombay Wagers Act (III of 1865), S 1—Wager—Contracts for buying and selling shares made through broker—Loss resulting from—Suit by broker for recovery of loss—Maintainability—Claim—If unenforceable.*

Plaintiff, a certified share broker, sold and purchased certain shares for the defendant at his request and by his direction and informed him from time to time. The defendant who had no ostensible property except a house and had no business at the time when he commenced to deal in shares mortgaged that house to the plaintiff to secure the loss sustained in the dealings to the extent of Rs. 5,000. No delivery was either given

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or taken, though business was done to the extent of Rs. 7,00,000. On one occasion the plaintiff sold certain shares for the defendant though he knew that the defendant was not in possession of any such shares. The plaintiff took no further security after the limit of Rs. 5,000 was reached although further loss was incurred, and the plaintiff in one particular delivery did not give or take delivery from any of his other constituent for whom he had done business in the market, and he took no deposit from any of his other constituents, though he took a security to the extent of Rs. 5,000 from the defendant. It was not suggested that the plaintiff was ever called upon to give or take delivery either by the defendant or by any of his other constituents. Nor was it suggested that the third parties who were the other parties to the contract were not in a position to give or take delivery. The transactions of the defendant having resulted in a loss of Rs. 7,741, the plaintiff sued on the defendant for enforcement of the mortgage bond and for recovery of the balance due which was not covered by the mortgage bond personally from the defendant. The defendant pleaded that the transactions were wagering and gambling transactions and therefore void in law, and the claim was therefore not enforceable.

Held, that having regard to the real nature of the transactions, the position of the parties and the usage of the market, the contracts were neither wagering contracts under S. 30 of Contract Act, nor did they fall under S. 1 of the Bombay Wagers Act, (III of 1865), and that therefore the claim was enforceable. (*Rangnekar and Macklin, JJ.*) CHIMANLAL *v.* NYAMATRAI 173 I.C. 205=10 R B. 319=39 Bom. L.R. 1083=A.I.R. 1938 Bom. 44.

——S. 30—*Applicability—Distinction between the positions of a* kachcha arhtiya *and* pakka arhtiya.

The question whether a contract is a wagering one or not has to be decided with reference to the terms of the particular contract and the evidence produced in each case. If in a case two parties enter into an agreement and it is mutually agreed that there is to be no delivery then the contract is void under S. 30 of the Contract Act. In cases of this kind the question of importance is as to who are the parties to the contract. There are two classes of contracts; one made through the agency of *kachcha arhtiyas* and the other made with *pakka arhtiyas*. The position of a *kachcha arhtiya* is that he acts as an agent with personal liability on himself, so far as the third party is concerned, and his remuneration is only the commission that he gets. The position of a *pakka arhtiya* is totally different. He makes himself responsible to his constituent. He does not act as the agent of his constituent. Where the terms of contract showed that the plaintiff and defendant had entered into a contract as principles and that there was mutual understanding that there was to be no delivery and that only differences were to be paid by one party to the other, it was held that the contract was a wagering one which could not, in view of S. 30 of the Contract Act, be enforced. (*Rachhpal Singh, J.*) HARCHARAN DAS *v.* JAI IAI RAM. I.L.R. (1940) All 136=188 I C. 29=12 R.A. 572=1940 A.L.J. 48=1940 A.W.R.(H.C.) 53=A.I.R. 1940 All.182.

——S. 30—*Applicability—Joint betting at horse race by two persons—Receipt of winnings by one—Suit by other for recovery of share of winnings—If barred as wager.*

The plaintiff and the defendant went to horse races together and they each put an equal sum of money on the same horse and the horse won. But it was the defendant who actually entrusted the money to the bookmaker and who collected the money from him, and defendant gave the plaintiff not one-half of the total winnings but only one-half of the original bet or stake. Plaintiff sued the defendant for his share of the profits over and above the sum he staked.

Held, that S. 30 of the Contract Act did not apply to the case and the suit was clearly one for money had and received, the defendant being merely the agent of the plaintiff to make the bet. (*Stodart, J.*) MUTHUSWAMY PILLAI *v.* VEERASWAMY PILLAI. **163 I.C. 251=8 R.M. 1119=1936 M.W.N. 572=43 L.W. 514=A.I.R. 1936 Mad. 486=70 M.L.J. 433.**

——S. 30—*Applicability—Wager—Sweepstake—Ticket obtained by member for outsider—Prize money won by—Suit by third party for declaration of right to prize money on the ground that the ticket was obtained for him and with his money—If barred—Principal and agent.*

A suit by a principal against an agent though its object is to recover winnings on wager is not barred by S. 30 of the Contract Act. S. 30 is no bar to the suit when the defendant is an agent, or trustee or a person in the position of an agent or trustee in respect of the winnings. *M*, a clerk in a Bank, applied through his superior officer *W* for a ticket in the Derby Sweepstake organised by the Royal Calcutta Turf Club. *W* who was a member of the Club obtained a ticket for *M*; and the ticket drew a horse and became entitled to a prize. *W* received the prize money, but before he paid it over to *M*, *K*, the plaintiff, claiming that the ticket in question had been obtained for him and that the price for purchasing it had been paid to *M*, sued *M* for a declaration that he was entitled to the prize money allotted to the ticket and for an injunction restraining the defendant from handling the money or receiving it from *W*.

Held, that the suit was not a suit on a contract of wager and was therefore not barred by S. 30 of the Contract Act, and that the plaintiff was entitled to ask for a declaration and prevent the defendant from actually handling the money. (*Ameer Ali, J.*) KSHITEENDRA NATH RAY CHAUDHURI *v.* MADANESHWAR CHATTERJI. **63 Cal. 1234=169 I.C. 177=9 R.C. 906=A.I.R. 1937 Cal. 297.**

——S. 30—Chit-fund—Lottery—Provision for payment of prize by lot to some of the subscribers and for payment of actual sums subscribed to others—Legality—Suit by non-winner for subscriptions paid—Maintainability. *See* CHIT-FUND—PRIZE KURI. **43 L.W. 77=1936 M.W.N. 89 (2)=70 M.L.J. 36 (F.B.)**

——S. 30—Contract with Bank taking form of purchases of yen to be delivered during specified period at fixed rate—No wager. *See* CONTRACT—BREACH. **A.I.R. 1936 Rang. 269.**

——S. 30—*Forward sales—Re-sale before completion of first transaction—Transaction, if amounts to wagering contract.*

A forward sale by one to another who agrees to purchase stipulated quantity of a commodity at a stipulated price, with a provision for delivery, and re-sale by the latter to the former of the same quantity which is the subject-matter of the previous transaction before the date of the completion of the contract under that transaction, and at the rate ruling on the date of the resale, though in character highly speculative does not amount to a wagering contract. To produce that result it must be proved that the contracts were entered into upon the terms that performance of the contract should not be demanded but the differences only should become payable. Unless the parties to the contract intend at the time of entering into the contract that it should not be what it purports to be but that it should be a transaction which was to be settled only upon the difference between the contract rate and the market rate prevailing at the time fixed for the completion of the contract, the transaction does not amount to wager. (*Roberts, C.J. and Mya Bu, J.*) MAHOMED VALLI PATEL *v.* EAST ASIATIC CO., LTD. **14 Rang. 347=164 I.C. 654=9 R.R. 118=A.I.R. 1936 Rang. 319.**

——S. 30—*Mandi contracts—Validity.*

'Mandi' contracts cannot be held to be wagers merely on their apparent nature and characteristic, without proof of the facts that the common intention of the contracting parties at the time of entering into the particular contract in question was to deal only in differences and in no circumstances to call for, or give, delivery. (*Tek Chand, J.*) LAKSHMI NARAIN *v.* BALA PRASHAD. **182 I.C. 335=12 R.L. 9=A.I.R. 1938 Lah. 825.**

——S. 30—*Nature of transaction—Evidence outside contract—Admissibility.*

In order to determine whether a contract is a wagering contract, the Court will not only look at the terms of the written contract, but also probe among the surrounding circumstance to find out the true intention of the parties. These surrounding circumstances could only be proved by evidence outside the written contract. Courts will have to look behind the form of the contract to the real intention of the parties, which may be gathered from the oral evidence and actual transactions between them. (*Agha Haidar, J.*) LOK NATH *v.* GOPAL SINGH HIRA SINGH. **161 I.C. 713=8 R.L. 793=A.I.R. 1936 Lah. 215.**

——S. 30—*Wager—Burden of proof—Contract made through broker according to usage of market—Presumption against wager.*

The burden of proving that a particular transaction is a wagering and gambling contract is on the party alleging it. In the case of transactions entered into through the medium of a broker according to the usage of a particular market, *e.g.*, when they are made by bought and sold notes and the principal are never brought into contract with each other, there is a very strong presumption against the existence of a common intention to wager. But the presumption can be rebutted by evidence of a common intention to wager, even though the contract may be brought about by a broker. But the magnitude of the transactions though relevant and important, is not sufficient by itself to rebut the presumption against wager in contracts brought about by a broker for his constituent with third parties in the market and in accordance with the usage of

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the market. (*Rangnekar and Macklin, JJ.*) CHIMANLAL *v.* NYAMATRAI. **173 I C. 205=10 R. B. 319=39 Bom.L.R. 1083=A.I.R. 1938 Bom. 44.**

——S. 30—*Wager — Contract of—Intention—Ascertainment of — Evidence — Surrounding circumstances—If can be looked at—Oral evidence —Admissibility to prove intention of parties to written contract.*

In a wagering contract the common intention of both parties at the time of entering into the contract is not to call for or give delivery from or to each other. Neither party intends to perform the contract itself, but only to pay the differences. Such intention is a question of fact There can hardly be any direct evidence of it and though an agreement in writing may ostensibly be for the purchase and sale of goods deliverable on a certain day, oral evidence is admissible to prove that the intention of both parties was only to pay the differences. In order to ascertain the real intention of the parties. the Court must look to all the surrounding circumstances and can even go behind a written contract. (*Rangnekar and Macklin, JJ.*) CHIMANLAL *v.* NYAMATRAI. **173 I.C 205=10 R B 319=39 Bom.L.R. 1083=A.I.R. 1938 Bom. 44.**

——S. 30—*Wagering contract—Essence of—Agreement to pay differences—Speculative transaction—If wager—Distinction.*

The essence of gaming and wagering consists in the agreement that one party is to win and the other party is to lose upon a future event, which at the time of the agreement is of an uncertain nature, that is, that if the future event turns out one way the plaintiff is to win, and if it turns out the other way he is to lose. In order to constitute a wagering contract, neither party should intend to perform the contract iself, but only to pay the differences. The common intention of both parties at the time of entering into the contract must be not call for or give delivery from or to each other. But mere speculation is quite different from wager and there is no law against speculation as there is against gambling or wager. Speculative transactions have therefore to be carefully distinguished from agreements by way of wager. (*Rangnekar and Macklin, JJ.*) CHIMANLAL *v.* NYAMATRAI. **173 I.C. 205=10 R.B. 319=39 Bom.L.R. 1083=A. I.R. 1938 Bom. 44.**

——S. 30—*Wagering contract—Relationship of agency—Rights of agent.*

If a wagering contract is entered into directly between two persons and no relationship of principal and agent existed between them, the fact that it is by way of wager would disentitle one to recover any losses in respect of the contract. But if the contracts were entered into by one not directly with another, but through that person's agency, then that person would be entitled to recover the losses on those contracts provided he proves that either he paid those losses to the persons with whom those contracts were entered into or incurred a pecuniary liability to make good those losses and that liability is still enforceable against him. (*Iqbal Ahmad, J.*) BANKEY LAL NANHEY MAL *v.* BHAGIRATH MAL. **186 I.C. 511 =12 R.A. 399=1939 A.W.R. (H.C.) 819=1939 A.L.J. 1073=A.I.R. 1940 All. 95.**

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——S. 30—*Wagering contract—Speculative transaction—If amounts to.*

Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. Even if one party to a contract were a speculator who never intended to give delivery, and that fact was known to the other party, yet in the absence of any bargain or understanding, express or implied, that the goods were not to be delivered, that would not convert a contract, otherwise innocent, into a wager; nor would the mere fact that as to the greater part of the goods there was no delivery but an adjustment of claims, vitiate the transaction.

Where therefore although the transactions between the parties were speculative in their nature, there is no evidence showing that the transactions were to be on differences only, or that there was no intention to take delivery, the contract relating to such transactions cannot be held to be a wagering contract. (*Addison and Din Mahomed, JJ.*) AYA RAM TOLA RAM *v.* SADHU LAL. **180 I.C. 453=11 R.L. 685=A.I.R. 1938 Lah. 781.**

——S. 32—*Contingent contract—Co-sharer in undivided land contracting to sell 800 acres adjoining vendee's land—Promise in sale-deed to get specified land measured out and to hand it over to purchaser—Purchaser's suit for specific performance—Maintainability—Right to compensation—S. 56.*

A co-sharer in an undivided land contracted with a person to sell him 800 acres out of his share, and that was to be land adjoining that of the purchaser. The sale deed read: "I shall get my land (sold hereby) measured out separately from the other shareholders in the land and shall get the 800 acres cut out as a separate piece and hand over the same to the purchaser so that he shall have the said land adjoining and bordering on his own land." The purchaser brought a suit for specific performance on failure on part of co-sharer to fulfil the agreement.

Held, that the contract was dependent on a contingency which had not then happened, *i.e.,* allocation to him by agreement with his joint owners of his 800 acres. The suit was therefore premature and unenforceable and specific performance could not be granted.

Held, further, that the contract did not fall within provisions of S. 56; the terms relating to partition brought the contract within the provisions of S. 32, Contract Act, and therefore the purchaser was not entitled to compensation. (*Davis, J.C., Dadiba C. and Mehta, A.J.C.*) KIRPAL DAS JIVARAJ MAL *v.* MANAGER, ENCUMBERED ESTATES. **162 I.C. 639=8 R.S. 171=A.I. R. 1936 Sind 26.**

——S. 37—*Scope—If mandatory—Decree on terms other than those contained in contract between parties—Power to make.*

Wort, J.—It is clear that there is no obligation laid down by the legislature in S. 37 of the Contract Act to make a decree in terms of the contract and of no other terms. The section itself provides for a possible dispensation to the parties to the contract, as appears from the latter part of the section. For example, in cases in which the facts come within the provisions of the

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Usurious Loans Act, the strict performance is excused. (*Wort, Dhavle and Manohar, JJ.*) SADANAND JHA *v.* AMAN KHAN. **18 Pat. 13=179 I.C. 379=5 B.R. 265=11 R.P. 357=1938 P.W.N. 513=20 P.L.T. 1=A.I.R. 1939 Pat. 55 (F.B.).**

——**S. 38**—*Applicability—Mortgage Assignees—If joint promisees or co-mortgagees—Realisation by one assignee of his share of mortgage debt—If on behalf of all—If agent or constructive trustee for others.*

An assignee of a promise may be able to claim what his transferor could claim, but he would not become a promisee by reason of the assignment so far as the original promisor is concerned. The power of a co-mortgagee for giving a valid discharge of the whole mortgage debt is based largely on a consideration of S. 38 of the Contract Act, but that section is confined to promisees as defined by the Act and not to the heirs or assignees of a promisee. On a devolution of a mortgagee's interest either on his legal representatives or on his assignees, the latter would be, at least amongst themselves, entitled to recover their own shares and be able to give an acquittance to that extent only and not for the shares of the others. If a co-assignee therefore is found to have realised his own share of the mortgage debt, he cannot be said to have been acting in the capacity of an agent, much less of a constructive trustee, and any receipt by him cannot be considered to be a receipt on behalf of the others. (*King and Abdur Rahman, JJ.*) BAPANNA *v.* JAGGIAH. **188 I.C. 710=50 L.W. 183=1939 M.W.N. 860=A.I.R. 1939 Mad. 818=(1939) 2 M.L.J. 214.**

——**S. 38**—*Offer by promisor to heirs of deceased promisee—Conditions to be fulfilled.*

An offer which a promisor must make to the legal representatives or heirs of a deceased promisee in order to take the benefit of S. 38 of the Contract Act, should be subject to exactly the same conditions as those which it would have had to fulfil, had it been made to the original promisee. (*Panckridge, J.*) ISMAILBHAI RAHIM *v.* ADAM OSMAN. **I.L.R. (1938) 2 Cal. 337=181 I.C. 539=11 R.C. 816=42 C.W.N. 1023=A.I.R. 1939 Cal. 131.**

——**S. 38**—*Offer by promisor through solicitor to pay debt—Section, if complied with.*

An offer made by a promisor through his solicitor to pay a debt with interest due thereon at the date of the offer, does not of itself afford a reasonable opportunity to the promisee of ascertaining that the promisor is able and willing there and then to perform his promise, and does not, therefore, fulfil the conditions laid down by S. 38 of the Contract Act. (*Panckridge, J.*) ISMAILBHAI RAHIM *v.* ADAM OSMAN. **I.L.R. (1938) 2 Cal. 337=181 I.C. 539=11 R.C. 816=42 C.W.N. 1023=A.I.R. 1939 Cal. 131.**

——**S. 38**—*Sale with condition of re-purchase—Deposit of money by vendor within time in Court under S. 83, T. P. Act—Validity of tender.*

Where in respect of a transaction representing a sale with a condition of repurchase, the vendor deposits money in Court within the stipulated time under S. 83 of the T. P. Act, proceeding on the footing that the transaction represents a mortgage by way of conditional sale, and the Court serves notices on all the vendees, there is a valid tender of the money by the vendor who is entitled to a reconveyance. (*Mitter, J.*) BEJOY GOPAL DUTT *v.* NABIN BALA DASSI. **43 C.W.N. 423.**

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——**S. 38 (3)**—*Heirs of single promisee—If joint promisees.*

Obiter.—The heirs of a single promisee are for the purpose of an unaccepted tender in the same position as joint promisees, that is, a tender to one of them is a valid tender. (*Mitter, J.*) BEJOY GOPAL DUTT *v.* NABINI BALA DASSI. **43 C.W.N. 423.**

——**S. 38**—*Co-promisees—Shop owned by several persons—Payment by tenant of rent to one—If valid discharge.*

Where a shop is owned by several co-sharers the payment of the entire rent of the shop by the tenant to one or some of them cannot operate as a valid discharge of the obligation of the tenant. (*Niamatullah, J.*) SHYAM LAL *v.* JAGANNATH. **168 I.C. 198=9 R.A. 633=1937 A.W.R. 390=1937 A.L.J. 395=1937 A.L.R. 327=A.I.R. 1937 All. 527.**

——**S. 39**—*Acquiescence—What may not amount to—Preliminary decree in mortgage suit—Subsequent compromise—Default in carrying out terms.*

In a mortgage suit a preliminary decree fixing the amount due to the plaintiff was passed. Subsequently by a compromise it was agreed that the plaintiff should accept the mortgaged property at valuation less than the amount fixed in the preliminary decree and in addition to this, the judgment-debtor was to pay certain sum on or before a fixed date. A surety was furnished for the due payment of this additional sum. It was agreed that on conveyance of the property and the payment of the additional sum, the plaintiff should not be entitled to a personal decree but in default of the payment he was free to enforce the decree in the usual manner. On default in the payment the plaintiff asked for a personal decree against the judgment-debtor for the amount due on the preliminary decree and at the same time he prayed for execution against the surety. He was unsuccessful in serving notice upon the surety.

Held, that from the mere fact that the plaintiff mistakenly pursued both remedies at the same time, he was not estopped by acquiescence from proceeding with the preliminary decree against the judgment-debtor. (*Baguley and Mosely, JJ.*) V. N. A. FIRM *v.* BANK OF CHETTINAD, LTD. **179 I.C. 875=11 R.R. 351=A.I.R. 1938 Rang. 353.**

——**Ss. 39, 64 and 65**—*Contract wrongfully repudiated by a party—If becomes voidable at other party's option.*

Per *Derbyshire, C.J. and Nasim Ali, J.* (*Lort Williams, J., contra*).—Under S. 39 of the Contract Act, a contract which is wrongfully repudiated by one of the parties to it does not thereby become voidable at the option of the other party so as to attract the operation of S. 64 of the Act. If the other party does not act upon the repudiation, the contract is enforceable by both the parties and continues to be so enforceable until the repudiation is acted upon by him.

Per *Nasim Ali, J.*—Mere repudiation of a contract by a party is nothing but an offer to rescind. The party not in default must act upon the repudiation so as to accept this offer. Otherwise

the contract remains in force and continues to be enforceable by both the parties. Termination of the contract by the promisee is the acceptance of the repudiation. On such acceptance the contract is at an end. At no stage, therefore, the contract is voidable as defined in the Contract Act. In the absence of any clear indication in S. 39, it cannot be held that the legislature intended to include cases under S. 39 within S. 64 of the Contract Act.

Per *Lort Williams, J.*—If a party wrongfully repudiates a contract, the contract becomes voidable at the instance of the other party and he can put an end to it under S. 39 of the Contract Act. If he does so, he must under S. 64 of the Act restore any benefit received to the person from whom he received it subject of course to his right to damages under S. 75 of the Act. The term "put an end to" in S. 39 is not distinguishable from the term "rescind" in S. 64. Alternatively, when a voidable contract is "put an end to" or "rescinded," it becomes void and therefore the provisions of S. 65 are attracted and any advantage received by any person under such contract must be restored or compensation must be given to the person from whom it was received. (*Derbyshire, C.J., Lort Williams and Nasim Ali, JJ.*) INTERNATIONAL FILM CO. *v.* MURLIDHAR CHATTERJEE. **44 C.W.N. 11.**

———**Ss. 39 and 62**—Parties to hand-note agreeing to enter into new contract—Debtor not carrying out in entirety his part of agreement—Right of creditor to sue on hand-note. *See* CONTRACT ACT, Ss. 62 AND 39. **184 I.C. 705.**

———**S. 43**—*Applicability—Landlord and tenant—Holding held by several tenants—Suit for whole rent against some tenants only—Maintainability.*

An action by a landlord against some only of the tenants of a holding for the whole rent is maintainable. By reason of S. 43 of the Contract Act the landlord is entitled to sue one or all of the tenants of the holding as he pleases. (*Wort, A.C.J. and Manohar Lall, J.*) MANBHODH BHAGAT *v.* JASWANT KUMAR SINGH. **17 Pat. 662 =20 P.L.T. 282=1939 P.W.N. 141.**

———**S. 43**—Scope and effect of—Joint promisors—Liability undertaken under same document by several persons—Separate suits by promisee against several promisees—Maintainability. *See* MYSORE C. P. CODE, O. 1, R. 6. **17 Mys.L.J. 257.**

———**S. 43**—*Scope and effect of—Ex-partners—Joint decree against ex-partners and as well as heirs—Discharge of debt by the heirs of ex-partner—Suit for contribution against other ex-partners and heirs—Maintainability — Decree against Hindu partner and as well as shares of son and grandson in family property in respect of partnership debt—Discharge of debt by son of grandson—Right of contribution—Pious obligation if a bar.*

The right to contribution as between partners is not essentially different from the right to contribution as between persons who are jointly liable in respect of a debt. But a partner's action for contribution is conditioned by the special law of partnership. So long as the partnership continues or subsists, no separate action for contribution will lie, because the right of contribution is subject to the special rights and obligations

created by the contract of partnership and the right to contribution can be enforced only as a part of the general suit for accounts of the partnership. Where, however, the partnership relation no longer exists and there is no likelihood of any restitution being necessary, there is no reason to apply the rule prohibiting actions for contribution as between persons who were once partners but have ceased to be such. The right to sue for contribution as between co-judgment-debtors arises out of equity, an equity all the more stringent in view of the provisions of S. 43 of the Contract Act. That is part of the general equity which requires that one shall not bear the whole burden in case of the rest and it comes into existence only when the common burden is discharged and not before. Consequently there is no reason why the right to sue for contribution which accrues to a co-judgment-debtor as such should be deemed or made subject to any equities arising out of a contract of partnership many years after the partnership became dissolved and a suit for general accounts became barred. *A*, the father of the 1st plaintiff and grandfather of the 2nd plaintiff, was a partner along with *J*, the 3rd defendant and the father of defendants 1 and 2, in the suit firm. In February, 1908, *J*, who was also the agent of another firm lent certain monies to the suit firm which became dissolved subsequently by the death of *J*, in November, 1908. One of the partners of the lending firm and his son sued the partners of the suit firm in 1912 for recovery of the monies lent by *J*, and in 1919 obtained a decree against all the partners as well as plaintiffs 1 and 2 who were also impleaded as parties to the suit. Under the decree, the plaintiffs were made liable to the extent of their share. in the joint family properties of themselves and their father, *A* who was one of the partners. In execution of the decree the family house of the plaintiffs was attached, *A* having died in the meanwhile. The plaintiffs were thus compelled to pay the whole decree amount, and they did so in 1923 and then brought a suit against the defendants for contribution of their shares of the decree debt.

Held (*by Pandrang Rao, J., agreeing with Stone, J., on difference between Madhavan Nair and Stone, JJ.*) (1) that the plaintiffs were entitled to invoke the equitable rule as to contribution between joint judgment-debors and to recover from the defendants their shares of the decree debt; (2) that the Hindu Law doctrine of pious obligation of sons to pay their father's debt did not stand in the way of the plaintiffs' claim for contribution. (*Pandrang Row, J., on a difference of opinion between Madhavan Nair and Stone, JJ.*) CHOCKALINGAM CHETTIAR *v.* MEYYAPPA CHETTIAR. **182 I.C. 33=11 R.M. 894=48 L.W. 383=1938 M.W.N. 1041=A.I.R. 1939 Mad. 228=(1938) 2 M.L.J. 287.**

———**S. 43**—Joint promisors—Separate suits against each—Maintainability. *See* MYSORE, C. P. CODE REGULATION, O. 1, R. 6 & O. 2, R. 2. **15 Mys.L.J. 292.**

———**S. 43**—*Joint promisors—Promisor having alternative claims against two—Suit and decree against one—If bars right of suit against the other.*

CONTRACT ACT (1872), S. 45.

A person having a claim against two co-promisors alternatively, if he elects to proceed and obtain a judgment against one of them, cannot proceed against the other; by pursuing his claims against the former to judgment he abandons his claim against the latter. (*Beaumont, C.J. and Rangnekar, J.*) NATIONAL PETROLEUM CO., LTD. *v.* POPATLAL MULJI. **60 Bom. 954=165 I.C. 338 =9 R.B. 138=38 Bom.L.R. 610=A.I.R. 1936 Bom. 344.**

———**S. 45**—*Promissory note in favour of two Hindu brothers—Suit by one alone—Maintainability—Joinder of the other—If essential.*

One of the co-promisees in respect of a promissory note is not entitled to bring a suit without making the other party to it. Under S. 45, Contract Act, the right to claim performance of the promise rests with them jointly. Where, therefore, a promissory note is executed in favour of two brothers forming a joint Hindu family, only one of them who is not the karta of the family is not entitled to bring a suit on basis of the note without joining the other. A.I.R. 1932 Pat. 346 and 1934 Pat. 85, Disting. (*Saunders, J.*) MUNSHI SAHU *v.* BHUPAL MAHTON. **163 I.C. 405=9 R.P. 6 (1)=37 Cr.L.J. 848=17 Pat.L.T. 879= 1936 P.W.N. 239=A.I.R. 1936 Pat. 274.**

———**S. 45**—*Joint mortgagees—Suit by one—Maintainability.*

Where on the death of one of two joint mortgagees, the survivor alone sued on the mortgage.

Held, that the suit was defective owing to the non-joinder of the legal representatives of the joint promisee. (*Weston.*) HAMIR SINGH *v.* AMAR CHAND. **1937 A.M.L.J. 118.**

———**S. 45**—*Joint mortgagees—Suit by one only —Death of the other during pendency of suit—Effect.*

Where there are two mortgagees and a suit is filed on the mortgage by only one of them, the absence of the other as a party becomes immaterial when during the course of the suit he dies. The person suing though he had no right to sue alone on the day on which he sued, acquired that right during the course of the suit by the death of the other. (*Grille and Niyogi, JJ.*) SARJU PRASAD *v.* BADRI PROSAD. **I.L.R. (1939) Nag. 515=188 I.C. 405=12 R.N. 338=1939 N. L.J. 333=A.I.R. 1939 Nag. 242.**

———**S. 46**—Mining lease—Time for payment of royalty not mentioned—Royalty when becomes payable—Limitation for suit. *See* LIMITATION ACT, ART. 110. **21 Pat.L.T. 442.**

———**S. 49**—*Applicability.*

Where there is an obligation to pay money and either from the terms of the contract or from the necessities of the case a further obligation is implied to find the creditor so as to pay him, S. 49 of the Contract Act, does not apply. 5 Rang. 451 (P.C.), Rel. on. (*Din Mahomed, J.*) LAKSHMI INSURANCE CO., LTD. *v.* B. K. KAULA. **A.I.R. 1940 Lah. 85.**

———**S. 49**—*Applicability—Promissory note—Place of payment.*

S. 49 of the Contract Act has no application to a promissory note payable on demand in which no place is fixed for payment. In such a case the Common Law rule applies and it is necessary for the debtor to seek out his creditor and pay him. (*Lort Williams, J.*) SRILAL SINGHANIA *v.* ANANTALAL MONDAL. **I.L.R. (1940) 1 Cal. 323 =44 C.W.N. 609.**

CONTRACT ACT (1872), S. 55.

———**S. 49**—Duty of promisor under—Failure to apply to fix place—Effect—Right of creditor to demand payment at his own place. *See* C. P. CODE, S. 20 (*c*). **48 L.W. 438.**

———**S. 49**—*Scope and effect—Place of performance—Payment of debt—Duty of debtor to find out creditor.*

There is no warrant for holding that S. 49 of the Contract Act gets rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. (*R. C. Mitter, J.*) TULSIMAN BIBI *v.* ABDUL LATIF MIYA. **63 Cal. 726=161 I.C. 427 =8 R.C. 517=40 C.W.N. 392=A.I.R. 1936 Cal. 97.**

———**S. 49**—*Scope—Persons staying at* R *entering into agency contract with person staying at* M *—Implied obligation on them to pay principal at* M.

S. 49 does not displace the ordinary rule of common law that it is the duty of a debtor to seek out his creditor in order to make payment to him. Where certain persons staying at *R* enter into a contract of agency with a person staying at *M*, undertaking to sell his goods on commission at *R*, there is an implied obligation on them, arising from the necessities of the case, that they should pay their principal at his place of residence, namely *M*. A part of the cause of action on a suit for recovery of certain amount alleged to be due from the agents arises at *M* where the principal resides, more so when some payments are actually made by the agents at *M*. (*Dunkley, J.*) ANNAMALAI CHETTYAR *v.* DAW HNIN U. **163 I.C. 397 (2)=9 R.R. 9=A.I.R. 1936 Rang. 251.**

———**S. 55**—*Contract for sale of land—Time, if essence of contract.*

Time is not ordinarily of the essence of the contract for sale of land, but the parties can make it so by express agreement in the contract itself or subsequently by giving reasonable notice to complete on a certain day, or if the nature of the property intended to be sold requires it, as for instance if the contract is for the sale of a life-interest or a mining lease given for a fixed period of time. Time is not of the essence of contract simply because a period of completion is mentioned in the contract. (*R. C. Mitter, J.*) KRISHNA CHANDRA RUDRAPAL *v.* KHAN MAMUD BEPARI. **63 Cal. 804=161 I.C. 166=8 R.C. 485 =40 C.W.N. 659=A.I.R. 1936 Cal. 51.**

———**Ss. 55 and 74**—*Scope—Contract with municipality to complete building within fixed time—Deposit on terms that on failure to complete within time it shall be forfeited—If penalty —Time—If essence of the contract—Right to return of deposit—Performance after time accepted—Effect.*

Where in pursuance of a contract with a Municipality a person undertakes to complete a building within a stipulated time and deposits a sum of money in respect of the contract on the terms that if the work be not completed within the stipulated time, the deposit should be forfeited, the deposit should be considered as result-

ing from a stipulation by way of penalty within the meaning of S. 74 of the Contract Act. The Municipality would not be entitled, on failure of the promisor to complete the work within the specified time, to enforce the penalty, but would be entitled to receive from the other party reasonable compensation not exceeding the amount of the penalty stipulated for. S. 55 of the Contract Act has also to be considered in this connection. The deposit being not only in pursuance of a stipulation by way of a penalty, but in respect of a penalty arising out of a failure to fulfil a term of the contract falling under S. 55—a promise to do something within a stated time—the Municipality can only claim damages. But when the latter does not claim any damages at all and accepts the performance of the contract made after the stipulated time, the deposit cannot be retained as forfeited but must be returned to the promisor. The promisee fixing the time within which the promisor is bound to do the thing should not be considered as a term forming the essence of the contract. (*Barlee and Tyabji, JJ.*) PALLONJEE EDULJEE AND SONS *v.* LONAWALA CITY MUNICIPALITY. **I.L.R. (1937) Bom. 782=171 I.C. 660=10 R.B. 217=39 Bom.L.R. 835=A.I.R. 1937 Bom. 417.**

——**S. 55**—Time—When essence of the contract—Execution sale—Subsequent payment of part of decretal amount—Agreement to pay balance on fixed date—Joint petition to Court on date of sale—Provision that on payment on fixed date sale would be set aside and on default sale would be confirmed—Default—Effect—Sale if automatically confirmed. *See* C. P. CODE, O. 21, R. 89. **17 Pat.L.T. 940 (F.B.).**

——**S. 56**—Applicability—Compromise decree—Direction for payment of money to next friend of minor plaintiff direct out of Court—If unlawful and void—If can be ignored by promisor. *See* C. P. CODE, O. 32, R. 6. **(1939) 2 M.L.J. 262.**

——**S. 56**—Scope—Contract to sell specific area of undivided land—Covenant to get area measured out and to deliver same to vendee—Breach—Suit for specific performance—If lies—Right of vendee to compensation. *See* CONTRACT ACT, S. 32. **A.I.R. 1936 Sind 26.**

——**Ss. 59 to 61**—*Appropriation—Contrary to stipulation in mortgage deed—Validity.*

Where there is the definite stipulation in the mortgage-deed that the money paid is to be appropriated, in the first instance towards payment of interest and the balance set-off against the principal due, the mortgagee must in such a case apply the money received in accordance with the provisions of the mortgage deed. He cannot appropriate such payments towards principal. For purposes of income-tax, the authorities are certainly entitled to assume that a creditor appropriates the payments only in accordance with the agreement with his debtor. (*Derbyshire, C. J. and Costello, J.*) GOPIRAM GOBINDRAM, *In the matter of.* **I.L.R. (1937) 1 Cal. 697=173 I.C. 898 (2)=10 R.C. 582=4 I.T.R. 157=9 I.T.C. 289=A.I.R. 1938 Cal. 20.**

——**Ss. 59 to 61**—*Appropriation—Rule as to—If applies to agreement regulating order of payment of instalments of a debt.*

If a series of separate debts exist between a creditor and a debtor, the debtor may pay any one of them as he may deem fit and if he specifically appropriates the payment to a later debt, the creditor is not entitled to accept the payment otherwise than in respect of the debt to which it is so appropriated by the debtor. This doctrine, however, has no application when the parties enter into an agreement regulating the order of payment of instalments in respect of a debt. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) DHARAM DEO. PANDEY *v.* RAMANUJ PANDEY. **173 I.C. 133=4 B.R. 220=10 R.P. 379=A.I.R. 1938 Pat. 8.**

——**Ss. 59 to 61**—*Running account between creditor and debtor—Account taken and balance struck—Subsequent payment by debtor—If must discharge balance first.*

Where there is a running account between the parties, in the course of which accounts had been taken and a balance struck and the debtor makes certain payment, the natural inference is that all payments made subsequently are to be allocated first to discharge of the balance. (*Fraser, J.C. and Sad-ud-Din Khan, A.J.C.*) SARAB DIAL *v.* NANDA MAL WAZIR CHAND. **A.I.R. 1936 Pesh. 143.**

——**S. 60**—*Absence of express stipulation to appropriate—Duty of Court to ascertain intention.*

Where there is an absence of express stipulation to appropriate the payment to a certain debt, the Court has got a further duty to see whether there was any intention of the parties to appropriate it to a particular debt. (*Wort, J.*) SHYAM LAL *v.* RAGHUNATH MARWARI. **170 I.C. 480=10 R.P. 132=3 B.R. 742 (2)=A.I.R. 1937 Pat. 432.**

——**S. 60**—*Appropriation of payments—Right of creditor.*

Under S. 60 of the Contract Act, if no specific appropriation is made by the debtor in regard to the payments made by him the creditor can appropriate the payments in respect of any debt which is due from the debtor to the creditor. (*Abdul Qayoom, C.J.*) BANSI DHAR *v.* KOTWAL BELIRAM. **39 P.L.R.J. & K. 117.**

——**S. 60**—*Appropriation—Portion of debt not binding on joint family—Realisations—Method of appropriation.*

Where a portion of the joint family debt arising on a single transaction is taken for a future immoral purpose and so not binding on the family, the creditor is not entitled to appropriate a sum realized out of the sale of joint family property towards the whole debt but only towards the portion for lawful purpose. (*Bennet and Verma, JJ.*) BED RAM SINGH *v.* INDERJIT SINGH. **176 I.C. 619=11 R.A. 136=1938 A.L.J. 644=1938 A.W.R. (H.C.) 510=1938 A.L.R. 669=A.I.R. 1938 All. 437.**

——**S. 60**—*Mortgage by manager of joint family—Portion of debt not for necessity—Payment by mortgagor—Mortgagee's power of appropriation.*

It is not open to a mortgagee of a joint family property under a mortgage deed executed by the manager of the joint family, when a portion of the mortgage debt was not raised for legal necessity, to appropriate payments made by the mortgagor towards the discharge of such portion of the debt as was not raised for legal necessity, when the two portions of the debt have not been

definitely ascertained and the mortgagee regards the whole debt as one debt. When it is not clearly known that the debt consists of two definite and specified portions, one for legal necessity and the other not so, the debt must be regarded as a single debt and not as two distinct debts. In such a case it is difficult to see how the creditor can make an appropriation towards an unknown portion of the debt. If in such a case the amount is paid and received towards the whole debt, it must of a necessity go towards the discharge of the whole debt treating it as one single debt. In such an event no question of appropriation in its strict sense arises. It would be just and equitable to distribute the payment rateably between the two portions as found by the Court. This would be all the more so, if the mortgagee maintains till the time of the passing of the decree that the whole debt was one debt binding on the entire family, and leaves it to the Court to decide the matter. If, on the other hand, it is definitely known at the time of the mortgage, or at least at the time of the payment that the debt consists of two specified portions, one for legal necessity and the other not so, the mortgagee in the absence of any specification by the mortgagor can appropriate the payment towards the one or the other portion. In particular, if the payment is made by the mortgagor himself, the mortgagee may well appropriate it towards the portion of the debt which was due from the payer himself. (*Sulaiman, C.J., Bennett and Iqbal Ahmad, JJ.*) GAJRAM SINGH *v.* KALYAN MAL. **58 All. 791=166 I.C. 423=9 R.A. 410=1936 A.W.R. 1136=1937 A.I.R. 31=1936 A.L.J. 1224=A.I.R. 1937 All. 1 (F.B.).**

———**S. 60**—*Payment by debtor—Appropriation during pendency of litigation—Power of creditor.*

Where there has been a payment by a debtor to a creditor and no appropriation has been proved either by the debtor or the creditor, till the date of suit it is open to the creditor to appropriate the amount or any part of it towards the payment of any debt even during the pendency of litigation concerning the payment but only until the judgment is pronounced by the trial Court and not thereafter. (*Sulaiman, C.J., Bennet and Iqbal Ahmad, JJ.*) GAJARAM SINGH *v.* KALYAN MAL. **58 All. 791=166 I.C. 423=9 R.A. 410=1937 A.L.R. 31=1936 A.W.R. 1136=1936 A.L.J. 1224=A.I.R. 1937 All. 1 (F.B.).**

———**S. 60**—*Right of creditor to appropriate—Time for appropriation.*

It is open to a creditor to make an appropriation at the last moment. (*Pollock, J.*) RAGHUNATHJI PIROOLAL *v.* KISANLAL TULSIRAM. **I.L.R. (1938) Nag. 344=168 I.C. 714=9 R.N. 268=A.I.R. 1937 Nag. 94.**

A creditor is entitled under S. 60 of the Contract Act to apply a payment at his discretion to any lawful debt actually due and payable to him from the debtor where the debtor has omitted to intimate and where there are no other circumstances indicating to which debt the payment is to be applied; and the creditor may exercise his option at any time. (*Pollock, J.*) MAHOMED ISMAIL *v.* PROVINCIAL AUTOMOBILE & Co. **20 N. L.J. 108=171 I.C. 781=10 R.N. 136=A.I.R. 1937 Nag. 198.**

———**S. 60**—Several decrees against same judgment-debtor—Money paid by latter in part payment to decree-holder's pleader. Pleader's right of appropriation to any one of decrees. *See* CONTRACT ACT, SS. 230 AND 60. **42 C.W.N. 1263.**

———**S. 60**—*Right of creditor—Payment of debtor—Endorsement of payment silent as whether it is towards principal—Suit by creditor—Appropriation of payment towards principal—If sufficient to save limitation.*

When a debtor makes a payment to the creditor, the latter is not bound to make his appropriation at once; he can do so at any time, it is enough if he makes the appropriation in a plaint in the suit against the debtor. When, therefore, an endorsement of payment made to the debtor does not state that it is towards the principal, and the creditor merely credits it in his accounts and in the plaint in the suit against the debtor appropriates the payment towards the principal, that will be sufficient to save limitation under S. 20 of the Limitation Act. The fact that the endorsement does not state that the payment is towards the principal will not affect the acknowledgment or make it in operative. (*Norman, I.C.S.*) DURGA LAL *v.* KANHAIYA LAL. **1936 A.M.L.J. 34.**

———**S. 61**—*Successive advances by creditor and successive repayments by debtor—Appropriation—Rule—Balance outstanding in favour of creditor—Limitation.*

Where there had been successive advances by the creditor and successive payments by the debtor, the legal position is that each item of debt if unpaid becomes time barred on the expiry of three years from the date on which it is incurred; but the balance outstanding in favour of a creditor is not generally considered to consist of the oldest items of debt. Under S. 61, each payment ought to be appropriated to the satisfaction of the oldest then outstanding debt. (*Rowland and Chatterji, JJ.*) KAMALESHWARI PRASAD *v.* GANGADHAR MAL. **186 I.C. 855=12 R.P. 543=6 B. R. 401=A.I.R. 1940 Pat. 52.**

———**S. 62**—*Applicability—Scope—"Parties to a contract"—Meaning of—Refusal to pay debt on demand—Fresh agreement to repay debt in particular manner—Validity—Failure to carry out substituted contract—Old obligation—If revives—Principles—Old obligation—When wiped out.*

The expression "parties to a contract" ordinarily signifies parties to an existing contract rather than parties to a contract that has already been discharged by breach. It has no doubt been held that the provisions of S. 62 of the Contract Act do not apply after there has been a breach of the original contract and that if the promisor does not satisfy the promisee under the terms of the new agreement, the promisee is relegated to his rights under the old contract and is entitled to sue on the basis of the old obligation. But it is difficult to apply this principle to a debt, for it is strange if the mere failure to pay an outstanding debt on demand brings the case out of the scope of S. 62. Release from an existing obligation is unquestionably good consideration for a promise to undertake a fresh obligation; and it makes no difference whether the original obligation is an obligation to do something *in futuro*,

or is an obligation to pay a debt already due, or is an obligation to pay compensation for the breach of a contract. Whether the failure to carry out the substituted promise revives the original promise depends on the intention of the parties. It is always open to the parties to make an express stipulation of this nature. The law, however, does not imply any such term. Certain debtors who were not in a position to pay cash to their creditor in repayment of the amount found due on adjustment of accounts entered into an agreement with their creditor to pay the debt in a specified manner. The agreement, after reciting the amount admitted to be due provided *inter alia*. "In exchange whereof we shall sell our properties and estate to you.....we shall complete the transaction within two months. If there be any default on our part in this respect, then you shall be entitled to have the same completed by taking legal proceedings." The document provided for liquidation of certain amounts by transfer of specified properties and finally contained an undertaking by the debtors to pay the balance with interest at a certain rate. In pursuance of the agreement the debtors conveyed certain properties and arranged for payment of certain amounts, but they failed to convey some other properties and to make any payment in reduction of the outstanding balance. The creditor sued the debtors for money lent and advanced on the basis of the promise to repay the loan.

Held, that the agreement was a valid and unconditional agreement by reason of the general provisions of the law of contract quite apart from S. 62, but that no term could be inferred providing for revival of the original debt on failure to carry out the new agreement; on the contrary the words "in exchange thereof" were strong evidence that the parties intended to wipe out the debts as such, once for all, and to substitute for them new and permanent obligation set forth in the agreement. (*Panckridge, J.*) BRIJMOHAN *v.* MAHABEER. **63 Cal. 194=166 I.C. 781=9 R.C. 614=40 C.W.N. 808.**

———**S. 62**—*If applies to cases of transfer of property.*

It is doubtful how far the provision of S. 62 of the Contract Act will apply to cases of transfer of property. (*Bennet, Mohammad Ismail and Verma, JJ.*) KANHAIYA PRASAD *v.* MT. HAMIDAN. **I.L.R. 1938 All. 714=1938 A.L.J. 746=176 I.C. 492=11 R.A. 110=1938 A.W.R. (H.C.) 408=1938 A.L.R. 634=1938 O.W.N. 642=A.I.R. 1938 All. 418 (F.B.).**

———**S. 62**—*Mortgage deed by husband and wife jointly—Second deed by husband alone as novation of the first—Effect of.*

Acceptance by a creditor of the sole liability of one of two joint-debtors is good consideration for his agreement to discharge other debtor from liability. So where husband and wife jointly execute a mortgage deed and subsequently a second mortgage-deed is executed by the husband alone, as novation of the first, the consideration for the execution of the second deed by husband is the rescinding of the obligation under first deed and the only extant deed of mortgage upon which a suit can be brought is the second deed. (*Mya Bu and Dunkley, JJ.*) U SAN YA *v.* P. R. M. P.

S. P. L. FIRM. **162 I.C. 388=9 R.R. 213=A.I.R. 1936 Rang. 396.**

———**S. 62**—*Novation—Essentials of—Subsequent contract has to be completed.*

Where the debtors execute a pronote in favour of the creditors and subsequently they execute a bond for the same consideration, but there is a condition precedent to the validity of the bond which is not fulfilled there is no novation of contract and the suit on the pronote is maintainable. (*Tek Chand and Abdul Rashid, JJ.*) PREM DAS RADHA KISHEN *v.* MAHOMED HUSSAIN KHAN. **162 I.C. 882 (2)=8 R.L. 965=A.I.R. 1936 Lah. 51.**

———**S. 62**—*Novation—Oral promise to pay followed by execution of promissory note—Oral agreement—If merged in promissory note.*

There is nothing in law making it imperative that a transaction of debt should be reduced to writing. Oral promise to repay is enough to impose an obligation on the debtor. The contract of debt is complete whether the oral promise to pay is immediately followed by the execution of a promissory note or not. It may in such circumstances serve either as a security or a conditional payment of the debt and the oral agreement to pay is not extinguished nor does it merge in the promissory note. If the obligation to pay is proved to exist independently of the promissory note, the question whether it arose antecedent to or contemporaneous with the execution of the promissory note becomes immaterial. (*Stone, C.J. and Niyogi, J.*) ANANDA NAMDEO *v.* PUNDALIK TUKARAM CHAUDHARY. **167 I.C. 673=9 R. N. 196=A.I.R. 1936 Nag. 225.**

———**S. 62**—*Novation—What constitutes.*

Under S. 62 of the Contract Act there must be a present substitution of another contract for the original contract and not a mere agreement to substitute one in future. 51 All. 799 and A.I.R. 1928 Nag. 289, followed. (*Bhide, J.*) GURANDITTA MAL SANT RAM *v.* LABHU RAM LACHHMAN DAS. **163 I.C. 123=8 R.L. 1013=38 P.L.R. 155=A.I.R. 1936 Lah. 476.**

———**S. 62**—*Novation — What constitutes—Acknowledgment of partnership debt by newly admitted partner along with old partners—Effect of.*

Novation of contract is not consistent with the original debtor remaining liable in any form. Hence where the partners of an existing firm along with a newly admitted partner acknowledge a certain amount to be due from the firm to their creditor, such an acknowledgment does not amount to novation inasmuch as the prior liability of the partners does not become extinct. (*Fazl Ali, J., on difference between Manohar Lall and Chatterji, JJ.*) MADHO PRASAD *v.* GOURI DUTT. **183 I.C. 179 (2)=5 B.R. 874=12 R.P. 101 (2)=20 P.L.T. 825=A.I.R. 1939 Pat. 323.**

———**Ss. 62**—Novated contract—Breach—Revival of original contract. *See* CONTRACT—NOVATION. **A.I.R. 1937 Lah. 816.**

———**S. 62**—*Proposal to discharge debt by executing mortgage—If constitutes novation.*

If there is a proposal to discharge a debt by executing a mortgage but the right of reverting to original position is reserved unless the new transaction is complete, there is no true novation and there is no bar to a suit on the original cause

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of action. (*Beckett, J.*) KISHEN LAL *v.* GOHLI. **178 I.C. 754=11 R.L. 491=40 P.L.R. 689=A.I.R. 1938 Lah. 757.**

———S. 62—*Scope.*

Section 62 presupposes that the original contract is still capable of performance. (*Mackney, J.*) DWARIKA *v.* BHAGAWATI. **186 I.C. 530=12 R.R. 270=A.I.R. 1939 Rang. 413.**

———S. 62—*Suit on novated contract—Burden of proof.*

In a suit based on a novated contract the plaintiff must prove (1) the existence of liability under the original contract and (2) the extinguishment of that liability by the novated contract. (*Fazal Ali and Chatterji, JJ.*) SHIBA PRASAD SINGH *v.* TINCOURI BANERJI **183 I.C. 855=5 B.R. 999=12 R.P. 195=A.I.R. 1939 Pat. 477.**

———S. 62 and Central Provinces Debt Conciliation Act (II of 1933), S. 12—*Novation—Suit on original contract—If lies—Agreement before the Debt Conciliation Board—Refusal to carry out—Suit on original debt—Maintainability.*

From S. 62 of the Contract Act it will be seen that a mere agreement to substitute a new contract does away with the necessity for performance of the first one. This is so even if there is an alteration in the original contract. So where parties come to some agreement before the Debt Conciliation Board and later on the debtor refuses to carry out his part of it, the creditor cannot fall back upon the original contract of debt and sue to recover the amount due. (*Gruer, J.*) SYED AHMAD *v.* RAM GOPAL BHAGWANDEEN. **183 I.C. 478=12 R.N. 66=1939 N.L.J. 256=A.I.R. 1939 Nag. 224.**

———Ss. 62 and 39—*Parties to hand-note agreeing to enter into new contract—Debtor not carrying out in entirety his part of agreement—Right of creditor to sue on hand-note.*

If the parties to a hand-note agree to substitute for the liability under it a new contract under which the debtor has to pay a certain amount down and to execute and register a mortgage-deed for the balance, but subsequently neither the debtor carries out his part of the promise relating to the payment of cash nor the creditor accepts the mortgage-bond the execution of which is a unilateral act of the debtor, there is no novation of contract within the meaning of S. 62 of the Contract Act, and the creditor is, therefore entitled to sue on the original hand-note. In such circumstances the provisons of S. 39 of the Act apply. The debtor having refused to perform his part of the contract in its entirety the creditor is at liberty to resile from his part of the contract in its entirety with the result that the parties are relegated to their own position under the hand-note. The mere registration of the mortgage-bond without the creditor accepting it by words or by conduct expressly or impliedly does not operate to relieve the debtor from meeting his obligation under the hand-note. (*Varma and Manohar Lall, JJ.*) BABU LAL MARWARI *v.* TULSI SINGH. **6 B.R. 66=184 I.C. 705=12 R.P. 269=A.I.R. 1940 Pat. 121.**

———S. 63—*Remission of part of debt—Consideration—Necessity.*

For an agreement to remit consideration is necessary; but if the creditor has actually remitted a portion of the debt due to him and not merely promised to remit it, no consideration is necessary. But actual remission is not completed until the creditor accepts the part payment in full satisfaction. (*King and Stodart, JJ.*) RAMASWAMI *v.* RUDRAPPA. **187 I.C. 338=12 R.M. 715=1939 M.W.N. 464=49 L.W. 684=A.I.R. 1939 Mad. 688.**

CONTRACT ACT (1872), S. 64.

———S. 63—*Scope—Remission by debtor about to become insolvent—Validity as against Official Receiver—Consideration for remission—What amounts to—Standing surety for debtor and joining him in executing mortgage—Sufficiency.*

Under S. 63 of the Contract Act, it is no doubt open to a promisee to remit his claim in whole or in part even without consideration. But when a person who is on the verge of insolvency purports to make a remission the validity of that transaction as against the Official Receiver cannot be determined merely with reference to S. 63 of the Contract Act. Where the remission is without consideration it would obviously be inoperative as against the Official Receiver in view of S. 53 of the Provincial Insolvency Act. Standing surety for the debtor in connection with certain loans and joining him in executing a mortgage to his creditor cannot in law amount to consideration so as to validate a remission by a debtor on the verge of insolvency as against the Official Receiver. (*Varadachariar and Gentle, JJ.*) NARASIMHARAJU *v.* OFFICIAL RECEIVER, EAST GODAVARY. **1940 M.W.N. 495=A.I.R. 1940 Mad. 737.**

———S. 64—Contract wrongfully repudiated by a party—If becomes voidable at other party's option. *See* CONTRACT ACT, Ss. 39, 64 AND 65. **44 C.W.N. 11.**

———S. 64—*"Rescind"—Meaning of.*

Per *Derbyshire, C.J.*—The word "rescind" in S. 64 of the Contract Act from its context implies making the contract null and void *ab initio.*

Per *Nasim Ali, J.*—In the Contract Act, the word "rescind" has been used with reference to two classes of contracts, namely, (1) contracts which are executory and (2) contracts which are partly executed and partly executory. In case of contracts coming under the first head rescission denotes determination of all obligations under the contract. In cases of contracts which come under the second head it involves the determination of outstanding obligations. (*Derbyshire, C.J., Lort Williams and Nasim Ali, JJ.*) INTERNATIONAL FILM CO. *v.* MURLIDHAR CHATTERJEE. **44 C.W.N. 11.**

———S. 64—*'Rescinds'—Interpretation.*

The word 'rescinds' as used in S. 64, Contract Act, implies an "express and unequivocal cancellation of the contract." Where a domestic servant employed as sweeper of the house leaves his master without any notice and the master does nothing except engaging another person for doing the work the contract with the former servant is not necessarily rescinded by the master and hence the servant is not entitled to get the pay for the work done. (*Mackney, J.*) ETBARI *v.* BELLAMY. **176 I.C. 526=11 R.R. 54=A.I.R. 1938 Rang. 207.**

———S. 64, 65 and 72—*Applicability—Debtor of insolvent executing promissory note to creditor of insolvent on eve of insolvency and making payment thereunder after the insolvency and after notice by Official Receiver—Transaction held to*

CONTRACT ACT (1872), S. 65.

be fraudulent preference—Right to recover payments made—"Void——Failure of consideration or mistake—If any.

P. S. was indebted to *N. S.* and the latter in term was indebted to *S.A.* On the eve of the insolvency of *N.S.*, an arrangement was entered into under which in payment of the debt due from *N.S.* to *S.A.*, *P.S.* gave a promissory note to *S.A.* for the amount due by *P.S.* to *N.S.* On the insolvency of *N.S.*, the Official Receiver attacked the arrangement as unreal and collusive and as amounting to a fraudulent preference, and the Court held that the arrangement which resulted in the promissory note was probably not real or *bona fide*, and that in any event it amounted to a fraudulent preference. Even after the adjudication of *N.S.* and after notice given by the Official Receiver to *P.S.* demanding payment of monies due to *N.S.* and prohibiting payments to *S.A.*, *P.S.* made certain payments to *S.A.*, these being endorsed on the promissory note. The Insolvency Court did not accept the plea of *P.S.*, based on these payments in answer to the claim of the Official Receiver. *P.S.* then brought a suit against *S.A.* to recover the payments made by him and endorsed on the promissory note, on the ground that they had become repayable to him by reason of the decision of the Insolvency Court.

Held, (1) that S. 64 of the Contract Act did not apply, as that section only provided for repayment by the person at whose instance or option the contract was rescinded and as *S.A.* did not rescind the arrangement, but wanted to stand by it, *P.S.* could not call in aid S. 64; (2) nor did S. 65 apply, for the transaction in the case being a fraudulent preference voidable at the instance of the Official Receiver as against the creditors, was not one which became 'void' within the meaning of S. 65; (3) that there was no failure of consideration; that the question of motive must be kept distinct from the question of consideration and the consideration for the promissary note, namely that *S.A.* should forego his claim against *N.S.* had never failed; (4) that there was also no 'mistake' as contemplated by S. 72, Contract Act, and *P.S.*, having been a party to a fraudulent transaction and having made payments with eyes open, it was impossible to support his claim on any theory of mistake of fact; (5) and that therefore *P.S.* was not entitled to claim recovery of the amounts from *S.A.* (*Varadachariar and Mockett, JJ.*) SIVAGAMI ACHI *v.* SUBRAMANIA CHETTIAR. **168 I.C. 941=9 R.M. 670=44 L.W. 722=1936 M.W.N. 897=A.I.R. 1936 Mad. 978.**

——S. 65.

Applicability.
Become void.
Contract by minor or ward.
Contract contravening statute.
Cause of action.
Discovered to be void.
Illustration (d).
Impossible of performance.
Marriage contract.
Scope.
Void contract.
Void meaning.
Unlawful agreement.

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Applicability.

——S. 65—*Applicability.*

Per *Vivian Bose, J.*—S. 65 applies to agreements which have been void from their inception as well as to contracts which became void subsequent to their making.

Per *Digby, J.*—S. 65, Contract Act, does apply to agreements which are void by reason of iliegality. (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDESHWAR. **I.L.R. (1939) Nag. 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B.).**

——S. 65—Applicability—Arrangement between scavengers permitting one to do scavenging work in houses in which other was doing—Payment received by the one for such work—Right of other to claim as restoration of benefit received. *See* CONTRACT ACT, S. 23. **1940 M.W.N. 342.**

——S. 65—*Applicability—Contract of suretyship in favour of Local Board in respect of contract of lease by contractor—Failure to comply with formalities—Suit on contract—Right to order restitution.*

Where a contract of suretyship entered into with with a Local Board by a person standing surety for a contractor of lease of fisheries is discovered to be void on account of non-compliance with the formalities of the Act, S. 65 of the Contract Act would apply when S. 23 of the Contract Act does not apply, where advantage has been received by one or other of the parties and the Court can act on the principle of *quantum meruit*. But when no advantage has been received, this cannot be done. (*Davis, J.C. and Weston, J.*) BHUMBHO METHARAM *v.* DT. LOCAL BOARD, HYDERABAD. **I.L.R. (1940) Kar. 347.**

——S. 65—Applicability—Contract by trustee in contravention of scheme of management—Moneys advanced to trustee—Recoverability. *See* TRUST—TRUSTEE. **(1940) 1 M.L.J. 547.**

——S. 65—*Contract void from inception.*

Where a contract is void from its inception, it would fall within the terms of S. 65 as a contract which has become void; and money advanced on it would be recoverable. (*Addison and Din Mohammad, JJ.*) DALIP SINGH *v.* JAGAT SINGH. **182 I.C. 220=12 R.L. 1=A.I.R. 1938 Lah. 721.**

——S. 65—*Applicability to minors.*

S. 65 of the Contract Act is not inapplicable to minors; and minors are not excluded from the persons who have to restore benefits in accordance with the section. It is the duty of Courts to protect the interests of minors; but it is no part of their duty to stretch the law to do injustice on behalf of minors nor to let them escape responsibilities which properly and fairly fall upon them. (*Reilly, C.J. and Venkataranga Iyengar, J.*) MOTHAJI LAKSHMICHAND CO. *v.* MAHOMED HUSSAIN SHERIFF. **18 Mys.L.J. 246.**

——S. 65—*Transactions entered by plaintiff with third person at defendant's instructions—Remittances by defendant appropriated to losses incurred—Suit by plaintiff for balance—Counter-claim by defendant claiming amount so appropriated alleging transaction entered by plaintiff to be void—If can succeed.*

Where in a suit for recovery of balance, in respect of transactions entered by the plaintiff with a third person, arrived at after appropriating to the

losses arising out of such transactions the defendant's remittances, the defendant counter-claims the amount so appropriated on the ground that the transactions entered by the plaintiff are void, the counter-claim falls to be dealt with as a claim for the restoration of an advantage under S. 65. But as the plaintiff has applied the amount or has become legally liable to meet losses arising from the carrying out of the defendant's instructions, the plaintiff cannot be said to have received an advantage within the meaning of S. 65. The fact that there was no privity of contract between the defendant and the third person makes no difference, if the plaintiff has incurred the liability to the third person on carrying out the defendant's instructions. (*Lord Thankerton.*) HARJIVANLAL *v.* RADHAKISON. **32 S.L.R. 235=1938 A.L.J. 77 =1938 M.W.N. 83=1938 A.W.R. (P.C.) 7 =4 B.R. 190=1938 O.A. 63=10 R.P.C. 127 =172 I.C. 330=1938 O.W.N. 10=1938 A.L. R. 4=1938 O.L.R. 1=A.I.R. 1938 P.C. 4 (P.C.).**

Become void.

———S. 65—*Become void—Transfer set aside under S. 53, T.P. Act—Right of transferee to refund of consideration.*

Where a transfer is set aside under S. 53, T.P. Act, the case is governed by S. 65, Contract Act, and the transferor is bound under S. 65 to restore to the transferee, the price that he has received in respect of the transfer. The transferee is not however entitled to recover the money spent in suing the creditors of the transferor, where he himself was a party to the conspiracy to defeat the creditors and was aware of all the facts. (*Pollock, J.*) PARASHRAM *v.* SADASHEO. **I.L.R. 1937 Nag. 94=167 I.C. 703=9 R.N. 200=A. I.R. 1936 Nag. 268.**

———S. 65—Claim for relief under—Lease with Municipality found to be not executed in accordance with Municipal Act. *See* U.P. MUNICIPAL ACT, S. 97. **1940 A.W.R. (H.C.) 243.**

———S. 65—*Construction and scope—Duty of Court to give effect to provisions.*

S. 65 of the Contract Act provides very just and very beneficial compensation in the cases which it covers, and the Court ought not to cut down the plain meaning of its provisions in any way. (*Reilly, C.J. and Venkataranga Iyengar, J.*) MOTHAJI LAKSHMICHAND CO. *v.* MAHOMED HUSSAIN SHERIFF. **18 Mys.L.J. 246.**

Contract by minor or ward.

———S. 65—Contract by minor or ward—Sale-deed executed by minor set aside—Award of compensation to vendee—Discretion of Court. *See* SPECIFIC RELIEF ACT, S. 41. **1937 O.W.N. 1012.**

———S. 65—*Minor over* 18 *and below* 21 *and having certificated guardian—Mortgage by—Fraudulent concealment of minority—Suit by mortgagee after majority—Rihgt to decree—Plea of minority at time of execution of mortgage—If open Estoppel—T.P. Act, S.* 43—*Applicability.*

Where a minor who is over 18 but below 21 years of age borrows money under a mortgage deed under a fraudulent concealment of the fact that he is a minor because a guardian had been appointed for him under the Guardians and Wards Act, the mortgagee cannot enforce the mortgage against the minor even after he becomes a major, and get a decree for the amount either under S. 65 of the Contract Act or under any other equitable principle. S. 65 cannot be availed of and does not apply to a case in which there never was and never could have been a contract. Nor can the transaction be upheld under S. 43, T.P. Act. S. 43 which is based on the principle of estoppel cannot apply to the case, as estoppel cannot be pleaded against a statute so as to prejudice a minor who enjoys the protection of the law (*Sulaiman, C.J., Thom and Bennet, JJ.*) AJUDHIA PRASAD *v.* CHANDAN LAL. **I.L.R. (1937) All. 860=170 I.C. 934=1937 A.L.R. 764=10 R.A. 195=1937 A.L.J. 688=1937 A. W.R. 661=A.I.R. 1937 All. 610 (F.B.).**

———S. 65—*Money advanced to person whose estate is under Court of Wards—Right of creditor to recover money.*

The question whether a contract is void or voidable presupposes the existence of a contract and cannot arise in the case of a person who is disqualified from contracting by any law to which he is subject. S. 65 has no application to such a case in which there never could have been any contract. Where therefore the consideration for a promissory note consists of advances made to a person whose estate is under the superintendence of the Court of Wards and who is consequently incompetent by S. 31, C.P. Court of Wards Act, to enter into any such contract, the contract is an absolute nullity and the creditor is not entitled to recover the advance under S. 65. The fact that a Government ward is incompetent to enter into any contract, rules out of any action founded on S. 65. (*Subhedar and Pollock, A.J.Cs.*) CHANDRADWAJ DEO *v.* ARTRARAN DEO. **31 N.L. R. (Supp.) 62=161 I.C. 351=8 R.N. 211= A.I.R. 1936 Nag. 15.**

———S. 65—*Return of benefit derived—Limits of the rule.*

It cannot be said that in every case in which relief is granted to a minor he should be made to return the benefit derived by him from the contract. Nor could it be said that in no case can any person who seeks to avoid a contract entered into by him in his minority be made to pay compensation to the other party. No hard and fast rule can be laid down on the point. The absence of fraud or misrepresentation on the part of the minor coupled with the fact that the vendee was cognizant of the minority of the person concerned was held to disentitle the vendee in such a case from claiming compensation. (*Thomas, C.J. and Zia-ul-Hasan, J.*) BACHAI *v.* HAYAT MOHAMMAD. **15 Luck. 265=185 I.C. 337= 12 R.O. 219=1939 O.W.N. 1112=1939 A. W.R. (C.C.) 323=A.I.R. 1940 Oudh 119.**

Contract contravening statute.

———S. 65—*Contract contravening statute—Agreement void* ab initio—*Madras District Municipalities Act, S.*69—*Lease in contravention of—Right to sue for damages for use and occupation —"Discovered to be void"—Meaning of.*

The provisions of S. 65, Contract Act, apply to agreements which are void *ab initio*. The words "discovered to be void" in the section include such agreements. Leases granted by a Municipality,

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which do not comply with the requirements of S. 69 of the Madras District Municipalities Act, are merely agreements which are void *ab initio*, to which S. 65 of the Contract Act is applicable. The Municipality can therefore maintain a suit against the lessees for damages for use and occupation, though the leases themselves are not enforceable at law. (*K.S. Menon, J.*) MADURA MUNICIPALITY *v.* RAMAN SERVAI. **161 I.C. 46=8 R.M. 764=1936 M.W.N. 85=43 L.W. 39=A.I.R. 1936 Mad. 98.**

———**S. 65**—Applicability—Lease invalid for non-compliance with Ss. 68 and 69, Madras District Municipalities Act—Suit on—Right to relief. *See* T.P. ACT, Ss. 105 AND 107. **47 L.W. 668.**

———**S. 65**—Applicability—Sale by judgment-debtor in contravention of Sch. III, para. 11, C. P. Code—Effect of—Vendor's right to refund of purchase money. *See* C.P. CODE, SCH. III, PARA. 11. **I.L.R. (1937) Nag. 111.**

———**S. 65**—*Contract by Municipality not complying with requirements of statute—Right to sue for restoration of benefit.*

S. 65 of the Contract Act must be held to apply to agreements which are destitute of legal effect from their inception. An agreement which is merely unenforceable on account of a failure to comply with certain forms or for want of giving expression to an agreement in the manner prescribed by law, *e.g.*, contracts, which are unenforceable by reason of non-compliance with Ss. 68 and 69 of the Madras District Municipalities Act. When a party has not been guilty of any conduct which would disentitle him to come to Court, there is no reason why the principle of S. 65 should not be given effect to. (*Pandrang Row and Abdur Rahman, JJ.*) MADURA MUNICIPALITY *v.* ALAGIRISAMI NAIDU. **I.L.R. (1939) Mad. 928=187 I.C. 780=12 R.M. 764=50 L.W. 440=1939 M.W.N. 821=A.I.R. 1939 Mad. 957.**

———**S. 65**—*Transfer amounting to transfer of occupancy rights—Transfer avoided—Transferee co-sharer, if can sue under S.* 65.

Where an occupany tenant executes a deed of surrender in respect of a field amounting to a transfer of occupancy rights, in favour of a fractional co-sharer in the village and the lambardar gets the transfer set aside under S. 13, C.P. Tenancy Act, and enters into possession of the field the transferee co-sharer, whatever remedies he may have against the transferring tenant, is not entitled to recover under S. 65, Contract Act, from the lambardar the amount of the consideration paid by him. Having knowingly entered into a voidable contract with the object admittedly of cultivating the land himself, he has no remedy whatever under S. 65, Contract Act, against the lambardar, who has enforced the statutory right which he had the option to exercise. The landlord was not a beneficiary under the voidable contract, was not mentioned in it and was not a party to it. The fact that he did derive benefit by his action in avoiding the contract is immaterial. He received no benefit under the terms of the contract himself on which the plaintiff co-sharer is entitled to claim compensation from him. (*Grille, J.*) GANDSINGH *v.* GOWARDHAN. **178 I.C. 656=11 R.N. 246=A.I.R. 1938 Nag. 451.**

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———**S. 68**—*Transfer void owing to provision of law—Recovery of money advanced—Cause of action—Starting point.*

When a transfer is void owing to a provision of law, so that a cause of action to recover the consideration under S. 65, Contract Act arises, time runs, ordinarily, from the date of the agreement. (*Stone, C.J. and Clarke, J.*) GULAM HUSSAIN *v.* MIR JAKIRALI. **180 I.C. 457=11 R.N. 360=1938 N.L.J. 409=A.I.R. 1939 Nag. 27.**

Cause of action.

———**S. 65**—*Cause of action—Agreement void* ab initio—*Cause of action—Date of—Agreement discovered to be void during trial—Right to relief.*

Normally if an agreement is void *ab initio*, the discovery that it is so within the meaning of S. 65 of the Contract Act, must be held to have occurred at the date of the agreement, because the parties must be presumed to have known the law, but the special circumstances of a case may enable the Court to say that the discovery was later than the date of the agreement. Where the discovery about the agreement being void is made after the filing of the suit, the Court is competent to grant relief in the very suit. 4 O.W.N. 256 and 1936 O.W.N. 489, Foll. (*Smith and Nanavutty, JJ.*) RAJA MOHAN MANUCHA *v.* NISAR AHMAD KHAN. **12 Luck. 435=164 I.C. 945=9 R.O. 108=1936 O.W.N. 1033=1936 O.L.R. 526=A.I.R. 1937 Oudh 87.**

———**S. 65**—*Agreement void* ab initio *—Contract discovered to be void during trial—Right to relief.*

S. 65 of the Contract Act is applicable even to agreements which are void *ab initio*. Where the plaintiff's claim under the section is established, he should not be driven to filing another suit even though technically the cause of action may be said to have arisen when the contract was discovered to be void during the trial of the suit, where the defendant could not complain of any prejudice. (*Srivastava and Nanavutty, JJ.*) BHOLA NATH *v.* MAHRANI KUAR. **12 Luck. 185=162 I.C. 362=8 R.O. 364=1936 O.W.N. 489=1936 O.L.R. 242=A.I.R. 1936 Oudh 280.**

Discovered to be void.

———**S. 65**—Discovered to be void—Applicability—"Discovered to be void"—Contract by corporation not in form prescribed by statue—Suit on basis of—Maintainability. *See* MYSORE DISTRICT BOARD'S REGULATION, S. 36. **15 Mys L.J. 395.**

———**S. 65**—Applicability—Agreement void under S. 24—"Discovered to be void"—If covers Agreement void at inception under S. 24—Right to relief. *See* CONTRACT ACT, Ss. 24 AND 65. **39 Bom.L.R. 1124.**

Illustration (d).

———**S. 65, Ill. (d)**—*Departure from English law.*

Per *Nasim Ali, J.*—Illustration (*d*) to S. 65 of the Contract Act provides for restitution to the party who commits breach, where the breach is not wilful and the contract becomes void by reason of some event which the promisor could not prevent. The provisions of S. 65 are a departure from English law to this extent and this depar-

ture has been made on grounds of equity and justice. The equity is in favour of the person whose failure was not wilful. (*Derbyshire, C.J, Lort Williams and Nasim Ali, JJ.*) INTERNATIONAL FILM CO. *v.* MURLIDHAR CHATTERJEE. **44 C.W. N. 11.**

Impossible of performance.

——S. 65—*Impossible of performance—Agreement to purchase plot after sanction of Municipality to 'layout' scheme—Earnest money paid—Sanction suspended by Deputy Commissioner—Vendor, if bound to refund earnest money.*

A 'layout' scheme for constructing small residential houses on plots was sanctioned by the municipality. After the sanction, a person entered into an agreement with the owner of the plots to purchase one for certain price and paid the earnest money. The foundation of the agreement was the permission to convert the plots into a site where the residential buildings and roads could be constructed. The sanction was subsequently suspended by the Deputy Commissioner.

Held, that as the very foundation of the contract had been taken away and as for all practical purposes the contract had become impossible for performance, the vendor was bound to refund the earnest money. (*Tek Chand, J.*) DIN MOHAMMAD *v.* D. R. SETHI. **174 I.C. 926=10 R.L. 626=40 P.L.R. 454=A.I.R. 1937 Lah. 781.**

Marriage Contract.

——S. 65—*Marriage contract—Breach of promise of marriage—Liability to restore ornaments given to bride.*

The plaintiff sued to recover the value of certain ornaments which he had presented to the defendant's niece on his agreeing to marry her to the plaintiff's son. It was found by the Court that the breach of the contract of marriage took place on the side of the plaintiff, and that the plaintiff's son and subsequently the defendant's niece had since been married.

Held, that as both the prospective bride and the bridegroom had since been married, the contract of marriage between them became void, but that as there was nothing to show that the defendant had any of the ornaments in his possession, the presumption was that the girl had them and that the girl, having been married was presumably out of the control of the defendant who could not, therefore, be said to have received any advantage from the plaintiff under the contract of marriage, and consequently, the defendant could not be made liable to the plaintiff either for the return of the ornaments or, for their value under S. 65 of the Contract Act. (*Srivastava, Ag. C.J. and Smith, J.*) JAGANNATH PRASAD *v.* MUNNO-LAL. **12 Luck. 478=165 I.C. 247=9 R.O. 175 =1936 O.W.N. 879=1936 O.L.R. 605=A.I. R. 1937 Oudh 10.**

——S. 65—*Money paid to defendant as consideration for arranging marriage of his sister's daughter with plaintiff's brother—Marriage not arranged—Suit to recover money paid—Maintainability.*

A suit is maintainable for the recovery of the money actually paid by the plaintiff to the defendant as a consideration for the latter arranging the marriage of his sister's daughter with the plaintiff's brother, which he failed to do. The

provisions of S. 65 of the Contract Act are applicable to such a case. (*Mahomed Noor, J.*) SONPHULA KUER *v.* GANSURI. **1937 P.W.N. 175 =3 B.R. 675=10 R.P. 90=169 I.C. 901= A.I.R. 1937 Pat. 330.**

——S. 65—*Scope—Contracts void from inception—Marriage brokerage contract—Marriage not completed—Money paid—Right to recover.*

Contracts that are void from their inception, because of an unlawful object or purpose, come within the scope of S. 65, Contract Act. Where therefore a person pays a certain amount to another in consideration of his arranging a marriage for him, but the marriage is not completed, a suit to recover the money paid is supportable as a suit for money had and received. (*Davies, J.C. and Mehta, A.J.C.*) SADHUSING FATEHSING *v.* JHAMANDAS VALIRAM. **31 S.L.R. 170=171 I.C. 1005=10 R.S. 732=A.I.R. 1937 Sind 211.**

Scope.

——S. 65—*Scope—Assignment of mortgage rights—Mortgage declared void—Liability of mortgagee to refund consideration to assignee.*

Where after the assignment of mortgagee rights the mortgage is declared void *ab initio*, the consideration for the assignment fails, and the mortgagee is, therefore, liable to refund the money received by him to the assignee. (*Abdul Rashid, J.*) HAJI GHULAM MOHAMMAD *v.* FEROZE. **181 I.C. 353=11 R.L. 816=40 P.L.R. 528=A. I.R. 1938 Lah. 566.**

——S. 65—*Money belonging to plaintiff wrongly obtained by defendant under contract with another person—Latter not held out by plaintiff as agent—Plainttiff's right to recover amount.*

Where money belonging to the plaintiff was wrongly obtained by the defendant from another person under a contract with him and such person was not an agent of the plaintiff and was not held out by the plaintiff as such, the plaintiff is entitled to recover the amount from the defendant. S. 65 of the Contract Act may not apply directly to such a case but the same principle would apply. (*Jack, J.*) KARALA VALLEY TEA CO., LTD. *v.* LACHMI NARAYAN AGARWALA. **180 I.C. 141=11 R.C. 652=68 C.L.J. 94=A.I.R. 1939 Cal. 14.**

——S. 65—*Money borrowed on mortgage applied to pay-off business debts and not for the benefit of defendants—No relief under S. 65.*

Where the recitals in a mortgage deed suggest that money is likely to have been applied to pay-off business debts and is applied to pay-off business debts and not applied in any manner for the benefit of defendants there is no right to relief against the defendants under S. 65. (*Varadachariar and Mockett, JJ.*) VENKATRAMA IYER *v.* BALAYYA YESUTHASAN. **165 I.C. 478=9 R.M. 260=44 L.W. 725=1936 M.W.N. 468=A.I. R. 1936 Mad. 595.**

——S. 65—*Mortgage bond by wife to complainant for withdrawal of criminal prosecution against husband—Major part of consideration adjusted towards debt due by husband to complainant—Balance actually received by wife—If may be recovered.*

S. 65 of the Contract Act does not apply where the object of the agreement was illegal to the knowledge of both the parties at the time it was

made. It cannot be said that such an agreement is an agreement discovered to be void within the meaning of that section. A Bank started a criminal case against *K* and some others under Ss. 406 420 and 120-B, I.P. Code, on the allegation that they entered into a conspiracy and defrauded the Bank by withdrawing a large sum of money on insufficient securities. Under an arrangement between the parties that the criminal case would be withdrawn if the dues of the Bank from *K* were adjusted to the satisfaction of the Bank, *K's* wife mortgaged her properties to the Bank. Although the mortgage bond was ostensibly drawn up as for consideration paid in cash, the major part of the consideration was really adjusted towards her husband's debt with the Bank, and she actually received only a small balance.

Held, that at the time when the mortgage bond was given and accepted, both the parties knew that its object or purpose was illegal and that, therefore the small balance paid to *K's* wife under the bond could not, therefore, be recovered back by the Bank. (*Nasim Ali and Henderson, JJ.*) DURGESH NANDINI DASSI *v.* BHOWANIPUR BANKING CORPORATION. **43 C.W.N. 260.**

———**S. 65**—*Scope—Procedure—Relief under—If available to party suing as plaintiff to enforce agreement—Right to relief in the same suit.*

It cannot be held that under S. 65 of the Contract Act it is only when the person benefited under a void agreement comes to Court to get relief in connection with it that the other party can get the benefit restored to him. There is nothing in the section nor in any rule of procedure to prevent a party in the position of a plaintiff, who comes to Court to enforce such an agreement,, and finds by the decision of the Court that it is unenforceable, from claiming the relief given by S. 65, provided he can show that he has really discovered that the agreement which he believed to be a good one is unenforceable in law and that he is not only pretending dishonestly that he was under a misapprehension about the matter when he was never under a misapprehension at all. Nor is it necessary for such plaintiff to seek his remedy in a separate suit. Provided all the materials are before the Court on which the question of the restoration of the benefit by the defendant can be tried, the plaintiff can get the remedy in the same suit and the defendant cannot reasonably plead that he is taken by surprise in the matter. (*Reilly, C.J. and Venkataranga Iyengar, J.*) MOTHAJI LAKSHMICHAND CO. *v.* MAHOMED HUSSAIN SHERIFF. **18 Mys.L.J. 246.**

———**S. 65**—*Suit on mortgage—Mortgage found invalid—Mortgagee, if can recover mortgage.*

Section 65, Contract Act, not only applies to agreements and contracts but also to transfers of property. Where therefore a mortgage is found invalid, a mortgagee can recover the mortgage-money under S. 65, if he prays for such relief in the mortgage suit. But when the mortgagee neither claims such relief in his mortgage suit nor in the memorandum of appeal filed against the decree in such suit, he cannot be granted relief under S. 65, but his remedy lies by a separate suit. (*Thomas and Zia-ul-Hasan, JJ.*) RAJA MOHAN MANUCHA *v.* MANZOOR AHMAD KHAN. **13 Luck. 531=169 I.C. 785=10 R.O. 5=1937 O.W.N. 784=1937 O.L.R. 386=A.I.R. 1937 Oudh 410.**

Void contract.

———**S. 65**—*"Void" contract—Meaning of—Benefit under—If confined to cases of mistake of fact.*

S. 65 of the Contract Act is not at all restricted to cases where there has been a mistake of fact. "Void" in S. 65 means "unenforceable in law" as provided in S. 2 (*g*) of the Act, and cannot be construed as meaning only void for the reasons stated in S. 23 of the Act. If a party has entered into an agreement honestly believing it to be a valid contract, and has given money for other consideration to the other party to the attempted contract, but afterwards discovers, what he had no idea before, that there was a legal obstacle in the way of his attempted contract, there is nothing in the wording of S. 65 to preclude him from claiming the restoration of the benefit which he has given to the other party. (*Reilly, C.J. and Venkataranga Iyengar, J.*) MOTHAJI LAKSHMICHAND CO. *v.* MAHOMED HUSSAIN SHERIFF. **18 Mys.L.J. 246.**

———**S. 65**—*Contract—Sale found to be void—Vendee's right to interest on purchase-money.*

The second part of S. 65, Contract Act, namely "or to make compensation for it" only comes into play when the advantage cannot be restored. Moreover interest on the money paid under void contract would only be payable after the advantage has been refused to be restored. Where therefore a contract of sale by District Board is found to be void for want of sanction of the Commissioner and the money paid under it is repaid to the vendee after the Commissioner had refused his sanction and it is not proved that this money had earned any interest in the hands of the District Board, the vendee is not entitled to any interest from the date when the money had been paid by the vendee to the District Board to the date of institution of suit for damages. Moreover the claim for interest cannot be granted on the ground of negligence on the part of the Board in overlooking the provisions of the law as it is equally the duty of the vendee to know the law. (*Addison and Ram Lall, JJ.*) DISTRICT BOARD, FEROZEPORE *v.* BALWANT RAI. **187 I.C. 742=12 R.L. 490=A.I.R. 1939 Lah. 564.**

———**S. 65**—Suit under—Lease found void—Suit for premium. *See* LIMITATION ACT, ARTS. 65, 97 AND 116. **A.I.R. 1936 Pat. 462.**

"Void, meaning."

———**S. 65**—"Void" meaning — Transaction amounting to fraudulent preference—If "viod". *See* CONTRACT ACT, SS. 64, 65 AND 72. **44 L.W. 722.**

Unlawful agreement.

———**S. 65**—*Unlawful agreement—Moneys paid under.*

S. 65 includes and applies to contracts void *ab initio*. The criterion which causes the Court to say that it will or will not assist the parties to recover the moneys paid under an unlawful agreement is not whether they have had *locus penitentiae* before carrying out the purpose of the fraud but whether it would be contrary to morality and

public policy to give the parties assistance in a Court of Law, where the purpose of the fraud has actually been wholly or partially successfully carried out. 35 Cal. 551, Rel. on. (*Baguley and Mosely, JJ.*) JONE BIN *v.* MANUAL. **14 Rang. 597=164 I.C. 522=9 R.R. 107=1936 Cr.C. 721=A.I.R. 1936 Rang. 358.**

——**Ss. 65 and 70**—*Scope and distinction—Compensation for act done or thing delivered—Right to apart from contract.*

S. 65 of the Contract Act proceeds on the basis of there having been a contract. S. 70 on the other hand does not require the existence of a contract for its application. S. 70 provides for a case where (1) a person lawfully does anything for another person, or delivers anything to him, (2) the lawful act or delivery is not intended to be done gratuitously, and (3) the other person enjoys the benefit thereof. If these three conditions are fulfilled, the section applies and the latter person is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. The compensation to be made is in respect of the benefit enjoyed by the second person. (*Barlee and Tyabji, JJ.*) PALLONJEE EDULJEE & SONS *v.* LONAVALA CITY MUNICIPAILTY, **I.L.R. (1937) Bom. 782=10 R.B. 217=171 I.C. 660=39 Bom.L.R. 835=A.I.R. 1937 Bom. 417.**

——**S. 68**—Applicability—Mahomedan minor—Mortgage by *de facto* guardian—Mortgage by—Decree on—Fresh mortgage to pay off—If binds minor. *See* MAHOMEDAN LAW—MINOR. **(1939) 2 M.L.J. 463.**

——**S. 68**—*Applicability—Hindu minor—Contract by guardian to sell land and receipt of earnest money—Sale not completed—Righ to recover earnest money from minor's estate.*

A covenant by the guardian of a Hindu minor to sell immovable property of the minor cannot be enforced against him, although if a conveyance had been executed by the guardian the vendee would have obtained a valid title to the property on account of pressing necessity for such a sale. Earnest money paid by the vendee to the guardian is not recoverable from the minor or his estate. Such money is paid as a gurantee or security for the performance of the contract which in law is no contract at all, It cannot be regarded as having been paid to the guardian for the necessaries or benefit of the minor. S. 68 of the Contract Act does not appy, and the vendee cannot therefore recover it under S. 68 or under Hindu Law as having been paid for the benefit of the minor's estate. (*Leach, C.J. and Madhavan Nair, J.*) RAGHUNATHAN *v.* RAVUTHAKANNI. **I.L.R. 1938 Mad. 928=182 I.C. 654=12 R.M. 119=48 L.W. 112=1938 M.W.N. 779=A.I.R. 1938 Mad. 765=(1938) 2 M.L.J. 277.**

——**S. 68**—*Applicability—Money advanced to guardian—Liability of minor—Burden of proof—Duty of creditor.*

In a case where a creditor seeks to make the estate of the minor liable for advance made for necessaries (including in term advances made for necessary purposes), mere *bona fide* enquiry by the creditor into the existence of the necessity and advance in good faith thereafter will not suffice,

but at the same time the creditor should not be required to prove actual application of the money. To require this of the creditor is to ask him to do the impossible. The creditor is required to prove the circumstances of the minor's estate, the absence of any other source from which the necessity could be met at the time of transaction and the suitability of the necessity having regard to the social status and the condition in life of the minor. If these are established, and the creditor has advanced money for meeting such necessaries after satisfying himself about the same, the creditor is entitled to a decree against the estate of the minor unless it is proved by the other side that the guardian did not actually apply the money for necessary purposes. (*Vivian Bose and Puranik, JJ.*) SADASHEO BALAJI *v.* SHANKAR GOVIND. **175 I.C. 494=10 R.N. 451=A.I.R. 1938 Nag. 68.**

——**S. 68**—*Burden of proof.*

In the case of necessaries supplied to an infant, the onus of proof lies on the creditor. He has to show first that goods or the money which represents them are suitable to the condition in life of the infant and secondly that they are suitable to his actual requirements at the time; or in other words that the infant has not got a supply from other sources. (*Vivian Bose, J.*) SADASHEO BALAJI *v.* HIRALAL RAMGOPAL. **I.L.R. (1939) Nag. 592=175 I.C. 149=10 R.N. 437=A.I.R. 1938 Nag. 65.**

——**S. 68**—*Claim arising under—Reimbursement—Extent of right.*

Where a claim does not arise out of a contract at all but under the special provisions of S. 68, the plaintiff is only entitled to reimbursement out of the minor's estate and nothing more and he cannot claim any interest on the amount claimed. (*Grille, J.C.*) RAMCHANDRA *v.* HARI. **A.I.R. 1936 Nag. 12.**

——**S. 68**—*Contract by guardian of minor—Liability under—Creditor advancing money for necessaries of minor—Right of re-imbursement—Right to interest—Limitation for suit.*

It is a well-settled principle of the general law that a guardian cannot impose a personal liability on his ward and therefore a minor cannot be bound by a personal covenant in a contract by his guardian. The minor's personal law may, however, affect the position. S. 68 of the Contract Act allows a person who has supplied a minor with necessaries such as maintenance and litigation expenses to reimburse himself from the minor's property; and he can also claim interest on equitable grounds; and a fair rate would be the Court rate of 6 per cent. per annum. Arts. 69 and 120 of the Limitation Act would apply to a suit by the creditor to recover from the minor monies advanced by him for necessaries. (*Leach, C.J. and Patanjali Sastri, J.*) RAJARATHNA CHETTIAR *v.* SHAICK MAHBOOB SAHIB. **I.L.R. (1940) Mad. 27=(1939) M.W.N. 798=50 L.W. 323=A.I.R. 1940 Mad. 106.**

——**S. 68**—*Essentials to be proved.*

Under S. 68 it must be shown not only that the moneys were to be expended on goods suitable to the condition in life of the infant but also that they were suitable to her actual requirements at the time of sale and delivery. As any one who

supplied necessaries to an infant is in the position of a legal creditor, so anyone who advances money to an infant for the purpose of procuring necessaries is entitled to stand in the position of a legal creditor. (*Roberts, C.J. and Dunkley, J.*) DAW NYUN *v.* MAUNG NYI PU. **178 I.C. 680=11 R.R. 258=A.I.R. 1938 Rang. 359.**

———**S. 68**—*Loan taken by guardian for necessity—Liability of minor's estate.*

If a loan is taken by a guardian on behalf of a minor for the purpose of some necessity or for the benefit of the minor's estate, the minor's estate is liable. 49 All. 52 followed. (*Thom and Bajpai, JJ.*) BENARES BANK, LTD. *v.* DIP CHAND. **160 I.C. 64=8 R.A. 560=1936 A.W.R. 87=1936 All. L.R. 44=1936 A.L.J. 155=A.I.R. 1936 All. 172.**

———**S. 68**—*Liability of minor under transaction by guardian—Test of—Alienation by guardian—Distinction.*

It is one thing to lay down set of rules with respect to a transaction which denudes a minor of his property, or a part of it, and quite another to determine whether money and articles supplied to him which add to his property or to his convenience and comfort are necessaries or benefits within the meaning of S. 68. The test of 'fair and proper' can be applied in both cases, but the standard must necessarily differ for what is fair and proper in the shape of benefits conferred or comforts supplied, may not be fair and proper in the case of an alienation. One important point of distinction between the two classes of cases is this: in the case of an alienation where necessity is alleged, enquiries made in good faith protect the transferee, whereas in the case of necessaries such considerations are irrelevant. Then again an alienation by a minor would be *void* whatever the purpose for which it was made, but in the case of necessaries supplied to him it is immaterial whether the order comes from him or from his guardian, in both the cases the test is precisely the same: the suitability of the goods supplied, or the benefits conferred, having regard to the social status and condition in life of the minor, and to his actual requirements at the time of the transaction. (*Vivian Bose, J.*) SADASHEO BALAJI *v.* HIRALAL RAMGOPAL. **I.L.R. (1939) Nag. 592=175 I.C. 149=10 R.N. 437=A.I.R. 1938 Nag 65.**

———**S. 68**—*Marriage expenses of male Hindu minor—Advances for—If amounts to supplying him with necessaries.*

Advancing of funds to a male Hindu minor for meeting his own marriage expenses, is not supplying him with necessaries suited to his condition in life within the meaning of S. 68, Contract Act. (*Punarik, J.*) TIKKI LAL *v.* KOMALCHAND. **1940 N.L.J. 358.**

———**S. 68**—"*Necessaries*".

Cloth supplied to a minor and cash lent to him to effect necessary repairs in his house are "necessaries" within the meaning of S. 68. (*Grille, J.C.*) RAMACHANDRA *v.* HARI. **A.I.R. 1936 Nag. 12.**

———**S. 68**—"*Necessaries*"—*Meaning of—If confined to goods.*

The term 'necessaries' is not confined to goods It can include other things such as good teaching and instruction whereby the minor may profit himself afterwards, and also money to enable him to obtain these necessaries. For example, the term includes costs incurred in defending a suit to save the minor's property and to defend him in a criminal prosecution; so also reasonable marriage expenses of a minor himself or a sister or other coparceners and such religious ceremonies as the minor would have had to perform if he had been an adult. (Case-law referred).

But where a guardian of a Hindu minor borrowed money for Divali expenses.

Held, that the amount would not be allowed as it was not necessary. (*Vivian Bose, J.*) SADASHEO BALAJI *v.* HIRALAL RAMGOPAL. **I.L.R. (1939) Nag. 592=175 I.C. 149=10 R.N. 437=A.I.R. 1938 Nag. 65.**

———**S. 69.**

Applicability.
Bound by law to pay.
Claim under.
Co-tenant paying rent.
Contribution.
"Interested in the payment of money."
Payment of rent or Land Revenue.
Scope of.

Applicability.

———**S. 69**—*Applicability—Contractual obligations.*

Per *Henderson, J.*—S. 69 of the Contract Act applies to contractual obligations. (*Henderson and Latifor Rahman, JJ.*) BIRAJ KRISHNA MUKHERJIA *v.* PURNA CHANDRA TRIVEDY. **I.L.R. (1939) 2 Cal. 226=188 I.C. 116=12 R.C. 648=69 C.L.J. 550=43 C.W.N. 831=A.I.R. 1939 Cal. 645.**

———**S. 69** — *Applicability — "Interested—Meaning— Purchaser of property in Court sale—Payment of arrears of Government revenue to set aside revenue sale—Property later declared to belong to anther—Right to reimbursement of revenue paid by purchaser.*

In execution of a decree on a mortgage certain properties were put up for sale and purchased by the plaintiff. After such purchases the plaintiff found that the kandayam due on the lands for some years had not been paid and that the lands had been sold for recovery of arrears of kandayam. In order to get the sale cancelled he had to pay some amounts. Later it turned out that the sale in his favour was ineffectual and that the lands belonged to some one else. Plaintiff thereupon brought a suit to recover the kandayam paid by him from the person who was declared to be the owner. It was pleaded that the payment by the plaintiff was voluntary and therefore he could not have any right to recover the same.

Held, that the plaintiff, at the time of the payment, apparently had interest in the properties which he sought to protect by paying off the arrears, that the payment was for protecting what the plaintiff thought *bona fide* was his interest at the time, because he purchased the properties in Court sale, and that later events did not affect his right to recover the money from the person who should have paid the kandayam. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) VEERAPPADEVARU *v.* MAHANTADEVARU. **18 Mys.L.J. 290.**

CONTRACT ACT (1872), S. 69.

———S. 69—Lambardar and co-sharers—Suit by former for recovery of arrears of revenue paid by him on behalf of latter—Maintainability in Civil Court. *See* C.P. LAND REVENUE ACT, S. 152. **A.I.R. 1939 Pat. 497.**

———S. 65—Mortgage—Payment of—Revenue and Land tax by mortgagee—Right to reimbursement—Suit for such money—Sale of mortgaged property—If barred. *See* TRANSFER OF PROPERTY ACT, S. 72. **A.I.R. 1936 Rang. 47.**

———S, 69—*Applicability—Mortgagor and mortgagee—Mortgagee obtaining land in compromise of mortgage suit—Arrears of land revenue due by mortgagor—Threatened sale—Payment by mortgagee—Right to be reimbursed.*

Where a mortgagee obtained a land in compromise of his suit on the mortgage and it was threatened to be sold for arrears of land revenue in respect of the period when it was in the possession of the mortgagor, and the mortgagee pays it and wards off the sale, he is entitled to claim reimbursement from the mortgagor who was both by the T. P. Act and Revenue law, bound to pay the land revenue. (*Puranik, J.*) AMRIT WAMAN *v.* MAHADEO. **1940 N.L.J. 337=A.I.R. 1940 Nag. 285.**

Bound by law to pay.

———S. 69 "Bound by law to pay"—Putnidar transferring interest—Transfer not registered in zamindar's serista—Liability for rent. *See* BENGAL PUTNI REGULATION, S. 13. **63 C.L.J. 287 =40 C.W.N. 1037.**

Claim under.

———S. 69—*Claim under—Condition that may give rise to.*

The liability for which payment may be made under S. 69 of the Contract Act, need not be statutory. A contractual liability by the defendant to pay the amount which the plaintiff with a view to protect his own interest has to pay, would entitle the plaintiff to be reimbursed by defendant for the amount paid by him. Any person substituted to the position of the defendant would also be equally liable. (*Iqbal Ahmad and Bajpai, JJ.*) ANGNELAL *v.* SIDH GOPAL. **189 I.C. 60= 1940 A.L.J. 320=1940 A.W.R. (H.C.) 183 =13 R.A. 76=A.I.R. 1940 All. 214.**

———S. 69—*Limitation.*

In the case of a claim to reimbursement under S. 69, Contract Act, on a contract either express or implied to reimburse, the limitation is three years from the date on which the money was paid. (*Bose, J.*) TOTARAM JAWAHARLAL *v.* HARISCHANDRA HARKISAN. **174 I.C. 7=10 R.N. 342=A.I.R. 1937 Nag. 402.**

Co-tenant paying rent.

———S. 69—*Co-tenant paying rent—Right to contribution.*

Where in a suit for contribution between co-tenants, the defendant co-tenants prove an agreement between them and the plaintiff, whereby the plaintiff alone had agreed to pay the entire rent due from the co-sharers jointly, the plaintiff is not entitled to claim contribution in respect of the rent paid by him in pursuance of the agreement. So also where in the suit for contribution the plaintiff impleads a transferee from one of the co-tenants and two landlords on the ground, that the transferee has wrongly paid rent to the

CONTRACT ACT (1872), S. 69.

landlords and claims a refund of the amount from the landlords, his claim to be so reimbursed by the landlords is not maintainable in the suit for contribution, as there is no mutuality between the landlords on one hand and the co-sharer tenants on the other and they do not come within the provisions of S. 69, Contract Act. Nor can the plaintiff claim any contribution from the transferee, when he was not impleaded as defendant to the rent suit and his jama was separately recognized by the landlord. Having once discharged his liability with respect to the portion which appertains to him he cannot be said to be a person within the meaning of S. 69, who was bound to pay what the plaintiff was required to pay. (*Khundkar, J.*) JOY KRISHNA *v.* KALI KRISNA. **43 C.W.N. 242=A.I.R. 1938 Cal. 413.**

Contribution.

———S. 69—*Cause of action — Execution of mortgage—If amounts to payment.*

Plaintiff executed a mortgage in favour of a third person for an amount payable jointly by himself and the defendant, and sued the defendant for contribution.

Held, that the payment made by the plaintiff by way of executing the mortgage is not such a payment as would entitle him to bring a suit for contribution against the defendant unless and until the mortgagor redeems the mortgage by paying up the mortgage money or the property is sold by the mortgagee in satisfaction of the mortgage, and that, therefore, his suit for contribution is premature. (*Srivastava and Nanavutty, JJ.*) RAGHUBAR DAYAL *v.* ABDUL GHAFFAR. **12 Luck. 45=161 I.C. 152=8 R.O. 303=1936 O.W. N. 301=1936 O.L.R. 144=A.I.R. 1936 Oudh 253.**

Interested in the payment of money.

———S. 69—*"Interested in the payment of money"—Meaning of—Hindu reversioner—Payment of Government revenue to avert revenue sale of estate—Right to reimbursement.*

Although a reversioner to the estate of the last male holder under the Hindu Law has no present interest in the estate left by the deceased owner, yet it is manifest that he is substantially interested in the protection of the estate or its devolution. Consequently a reversioner who pays kandayam due to the Government from the estate in order to prevent it from being sold for non-payment of the kandayam by the limited owner or an alienee from the life estate holder, is entitled under S. 69 of the Contract Act to claim reimbursement of the amount paid by him from the defaulter. (*Shankaranarayana Rao and Abdul Ghani, JJ.*) NAGABHUSHANA BHATTA *v.* VISVESWARIAH. **16 Mys.L.J. 399=43 Mys.H.C.R. 557.**

———S. 69—*Interpretation—Insolvent fraudulently transferring land—Annulment proceedings by receiver—Creditor paying land revenue to avoid sale—If interested in such payment.*

The words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience or any detriment at any rate capable of being assessed in money. Thus where an insolvent fraudulently transfers his land and during annulment proceedings by the receiver, the creditor pays the land revenue to avoid sale, the

creditor is a person interested in payment of such money. A.I.R. 1914 Cal. 338, Foll. (*Mosely, J.*) S.R.M.A.R. RAMANATHAN CHETTYAR *v.* R.M. P. CHETTYAR. **172 I.C. 437=10 R.R. 253= A.I.R. 1937 Rang. 350.**

Payment of rent or land revenue.

——S. 69—*Payment of rent or land revenuc—Darpatnidar undertaking to pay putni rent—Such rent paid by mortgagee from Darpatnidar to avoid putni sale—Mortgagee's right to be reimbursed by putnidar.*

A darputnidar who undertook in his lease to pay the putni rent to the Zamindar, executed a mortgage of his tenure. The mortgage-bond provided that the mortgagee was at liberty to pay any rent payable by the mortgagor and recover that amount from the mortgaged property or from the mortgagor personally. The putni rent having fallen into arrears, the Zamindar advertised the putni for sale under Putni Regulation. The mortgagee avoided the putni sale by depositing the sum due and sued the putnidar and the darputnidar for the recovery of that sum.

Held, that the mortgagee was entitled to a decree not only against the darpatnidar but also against the putnidar who was "bound by law to pay" the rent within the meaning of S. 69 of the Contract Act. (*Ghose and Mukherjea, JJ.*) GOSTA BEHARI DUTTA *v.* JIBAN MALL. **43 C.W. N. 852.**

——S. 69—*Mortgagee paying off decree for arrears of land revenue to avert sale.*

There is no reason why a person legally bound to pay should be held to be not a person who is interested in the payment. As between a defaulting landholder and his mortgagee, the former is personally bound to pay and this initial liability does not cease because to protect his security, the mortgagee pays off the arrears. Moreover S. 125 (Proviso), Central Provinces Land Revenue Act, does not override S. 65 (*b*), T.P. Act, which lays on the mortgagor, so long as the mortgagee is not in possession of the mortgaged property, the duty of paying all public charges accruing due in respect of the property. As between the mortgagee and the mortgagor, the latter is primarily bound to pay the arrear and when the mortgagee pays off the arrear he is discharging the mortgagor's obligation with a view to protect his own interest. The case therefore clearly falls under S. 69, Contract Act. (*Niogi, J.*) MT. MULABAI *v.* BALAKDAS. **I.L.R. (1939) Nag. 246=178 I. C. 485=11 R.N. 232=A.I.R. 1938 Nag. 459.**

——S. 69—*Mortgagee paying land revenue on mortgaged land—Right to reimbursement from mortgagor.*

In order that S. 69, Contract Act, should apply, it is essential that there should be firstly a person who is bound by law to make a certain payment, secondly another person who is interested in such payment being made, and thirdly a payment by such last mentioned person. The question whether the person on whose behalf the payment was made was interested in having made the payment does not arise. Where mortgagors are bound in law to pay land revenue and the mortgagees being interested in such payment actually pay it to save the property, the mortgagees are entitled to be recouped under S. 69, Contract Act. (*Pollock,*

J.) BALWANTRAO *v.* TULSA PANDHARINATH. **171 I.C. 740=10 R.N. 130=A.I.R. 1937 Nag. 225.**

——S. 69—*Payment by purchaser of property subject to charge.*

A purchaser of property subject to a charge, is alone liable to pay it and hence he is not entitled under S. 69 of the Contract Act to recover the amount paid by him from the person who might originally have been liable in respect thereof, either alone or along with the person who has made the payment. (*Bennet and Verma, JJ.*) NANDAN SAHU *v.* FATEH BAHADUR SINGH. **I.L.R. (1940) All. 71=186 I.C. 519=12 R.A. 404=1939 A. W.R. (H.C.) 858=A.I.R. 1940 All. 104.**

——S. 69—*Putnidar paying arrears of land revenue in respect of separate account estate to prevent sale—Right to be reimbersed—Liability of co-sharer proprietors who had deposited their shares of revenue.*

A putnidar in respect of an estate comprising a separate account who pays the arrears of land revenue in respect thereof to save the estate from sale, is entitled to be reimbursed under S. 69 of the Contract Act. The fact that some of the co-sharer-proprietors had deposited their shares of the revenue does not affect his position, as such deposit does not take away from the liability of the entire separate account estate being put to sale for arrears of revenue. The putnidar is, therefore, entitled to be reimbursed by all the proprietors. (*S. K. Ghose and McNair, JJ.*) SURATH NATH BANERJEE *v.* ALOKENATH RAY. **41 C.W.N. 428.**

——S. 69—*Tenant paying rent due to landlord—Rent made payable by sub-tenant under registered sub-lease—Suit against sub-lessee—Maintainability—Limitation—Limitation Act, Arts.* 61 *and* 116.

V brought two occupancy fields from *B* and *T* in 1916 and in 1918, and sublet them by a registered lease for *P* and *M* for 7 years, with a condition that *P* and *M* should pay the rent of the fields to the landlords. *P* and *M* did not, however, pay the rent for the years 1923-24 and 1924-1925. In 1925, *V* sold the fields back to *B* and *T*. In 1927 the landlord sued *V*, *T* and *D*, the son of *B* for the rent of three years from 1923-1926 and obtained a decree against all on 12—7—1927. To avoid a sale of the holding *T* paid the decree debt on 27—4—1929 and then sued *V* to recover the latter's share of the debt, *viz.*, the rent of 1923-1925 and obtained a decree on 7—2—1930. *V* paid off the decree amount on 22—11—1930 and on 30—10—1933, he sued his subtenants *P* and *M* to recover the amount from them.

Held, (1) that the suit was one contemplated by S. 69 of the Contract Act and was governed by Art. 61 of the Limitation Act and was in time, having been brought within three years from the date when he made the payment under *T's* decree; (2) that the suit was not one for damages for breach of contract in writing registered and did not fall under Art. 116 of the Limitation Act; (3) that though *V* was bound by law to pay the amount under the decree obtained against him, he was still a person interested in the payment of the same, and the rent being ultimately payable by

CONTRACT ACT (1872), S. 69.

the sub-lessees *P* and *M*, who were bound to pay the same. *V* was entitled to recover the same under S. 69, Contract Act, from *P* and *M*. (*Pollock, J.*) VISHRAM *v.* PANNALAL. **I.L.R. (1940) Nag. 437=169 I.C. 298=9 R.N. 316=20 N. L.J. 73=A.I.R. 1937 Nag. 152.**

Scope of.

——**S. 69**—*Scope of.*

S. 69 of the Contract Act is intended to include the cases not only of personal liability, but all liabilities to payments for which owners of lands are indirectly liable, those liabilities being imposed upon the land held by them. It s not a correct view to take that the section is restricted only to a case of personal liability. (*Bennet and Verma, JJ.*) NANDAN SAHU *v.* FATEH BAHADUR SINGH. **I.L.R. (1940) All. 71=186 I.C. 519=12 R.A. 404=1939 A.W.R. (H.C.) 858=A. I.R. 1940 All. 104.**

——**S. 69**—Words 'interested in payment of money'—Scope.

The words "interested in payment of money" may include the apprehension of any kind of loss or inconvenience or at any rate, any deriment capable of being assessed in money, (*Ismail and Varma, JJ.*) JAGARNATH PRASAD *v.* CHUNNI LAL. **1940 A.W.R. (H.C.) 458=1940 A.L.J. 511=A. I.R. 1940 All. 416.**

——**Ss. 69 and 70**—*Applicability—Co-owners.*

Ss. 69 and 70 of the Contract Act are applicable even as between co-owners and the fact that plaintiff also benefits by the payment made by him is no bar to his claiming reimbursement. (*Varadachariar and Stodart, JJ.*) CHENGALROYA REDDI *v.* UDAIKAVOUR. **167 I.C. 980=9 R.M. 493=44 L.W. 214=A.I.R. 1936 Mad 752=71 M.L. J. 1 (Supp.).**

——**Ss. 69 and 70**—Applicability—Landlord and tenant—Irregular cultivation by tenant with ernment water—Levy of water-cess from landlord —Suit by latter against tenant—If one for "rent" or one for compensation—Jurisdiction of Revenue Court. *See* MADRAS ESTATES LAND ACT, S. 3 (11), **(1939) 2 M.L.J. 440.**

——**Ss. 69 and 70**—*Applicability—Patnidar having 2|3 share paying entire rent to prevent sale—Darpatnidar and Sepatnidar under other patnidar contracting with him to pay his patni rent to Zamindar—Liability to contribute.*

A patnidar having two-thirds share in a patni paid not only his two-thirds share of the rent but also the remaining one-third in order to save the patni from sale. Thereafter he instituted a suit for contribution against the defendant who held darpatni and sepatni leases under the other patnidar having one-third share in the patni, as under the said leases the defendant undertook to pay the patni rent due by him direct to the Zamindar.

Held, that the defendant was not liable to contribute and that Ss. 69 and 70 of the Contract Act did not apply to the case. (*Henderson and Latifor Rahman, JJ.*) BIRAJ KRISHNA MUKERJEA *v.* PURNA CHANDRA TRIVEDY. **I.L.R. (1939) 2 Cal. 226 =188 I.C. 116=12 R.C. 648=69 C.L.J. 550 =43 C.W.N. 831=A.I.R. 1939 Cal. 645.**

——**Ss. 69 and 70**—*Applicability—Sale by Hindu widow—Discharge of personal debts of husband and of debts contracted by her for funeral rites of husband—Illegitimate sons of deceased —Liability to make reimbursement to purchaser in respect of dlscharged debts.*

CONTRACT ACT (1872), S. 69.

Where a Hindu widow sells the estate of her husband who has also left illegimate sons, for discharging purely personal money debts of her hushusband or debts contracted by her to perform the funeral rites of her deceased husband, the purchaser cannot rely on Ss. 69 and 70 of the Contract Act and claim from the illegitimate sons of the deceased owner reimbursement of the moneys paid by him in respect of the debts discharged. Neither S. 69 nor S. 70 have any application to such a case. The fact that the illegitimate sons are benefited by the payment of the debts cannot give any right to the purchaser to recover the money from the illegitimate sons under Ss.. 69 and 70. For the application of S. 70, the person benefited must have an option either to accept or to reject the benefit. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) CHIKKAMMA *v.* NANJUNDA. **16 Mys. L.J. 184=43 Mys.H.C.R. 105.**

——**S. 69 and 70**—*Applicability—"Bound by law to pay"—Meaning.*

C purchased certain properties from *A*, free of encumbrances; the properties were subject to a mortgage in favour of *N;* but *A* himself undertook to discharge the debt of *N*. The appellant, after the death of *A*, took an assignment of certain debts due to *A*, from his widow expressly agreeing to discharge out of the realisation of the same, the debt due to *N* as well as other debts; appellant did not however, discharge the debt of *N*, who therefore sued on the mortgage and obtained a decree for sale, in execution of which he brought the properties to sale. *C*. in order to save his properties, had to pay the decree amount and did pay it, and he thereafter sued the appellant and the widow of *A*, for recovery of the amount that he had to pay in satisfaction of the mortgage decree. The appellant pleaded that there was no privity of contract between him and *C*, and that the latter could not take advantage of the agreement between him and the widow of *A*.

Held, that the appellant was "bound by law" to pay the debt due to *N*, he having contracted to pay it and received consideration for the promise, that *C*, was not liable to pay the debt in question, but was merely interested in discharging it, and that the case was governed by S. 60 of the Contract Act, if not by S. 70 as well. The expression "bound by law to pay" in S. 60 cannot be interpreted as an obligation under a contract and not under law. The expression does not mean bound by law to the plaintiff, but that the defendant at the suit of any person might be compelled to pay. (*Abdul Ghani and Nageswara Iyer, JJ.*) RANGE GOWDA *v.* THIMME GOWDA. **16 Mys.L.J. 27=42 Mys.H.C.R. 637.**

——**Ss. 69 and 70**—*Scope—Bound by law—Zemindari estate—Pre-settlement rent-free inam within—Sale of zemindari village including inam for arrears of* peishcush *due by zemindar—Payment by inamdar to set aside sale—Right to reimbursement—Liability of usufructuary mortgagee from zemindar—Personal liability—Right to charge —Five per cent.* solatium *to purchaser—Right to recover—Salvage lien—Analogy of.*

Plaintiff owned two inam villages within a zemindari under a pre-settlement grant. First defendant was the zemindar and second defendant

was the usufructuary mortgagee of a division of the zemindari. Third defendant was the usufructuary mortgagee of another inam village in the zemindari. The other defendants were interested in some of the other villages in its zemindari. The zemindar as the registered proprietor was liable for the entire *peishcush* due to the Government, although portions of the zemindari had passed out of his ownership, and the villages which had passed out of the zemindari also *remained* liable under the method of settlement in in the zamindari; even pre-settlement inams were liable to Government for the *peishcush* due by the zemindar. But as between plaintiff and the zemindar the former was not liable for the revenue. For arrears of *peishcush* due out of certain villages the latter were sold by the Revenue Authorities including one of the plaintiff's inam villages and some of the villages comprised in the second defendant's mortgage. Plaintiff deposited the arrears due as well as the five per cent. *solatium* to the purchaser and had the sale set aside. He then sued defendants for reimbursement, personally from the defendants 1 and 2 and as a first charge on the villages in the zemindari.

Held, (1) that the plaintiff was entitled to a personal decree both against the zemindar, the first defendant, and against the 2nd defendant, both of whom were "bound by law to pay" the Government revenue, the first defendant as the registered proprietor and the second defendant under S. 76 (*c*) of the T. P. Act by virtue of his being in possession as usufructuary mortgagee and that the claim of the plaintiff fell under Ss. 69 and 70 of the Contract Act; (2) though the plaintiff's village also was saved by reason of the payment, that did not by itself exclude the applicability to Ss. 69 and 70, Ss. 69 and 70 being applicable even as between co-owners; it having been proved clearly that the plaintiff in making the deposit did not act merely for herself but also for the defendants, and the second defendant having undoubtedly accepted the benefit of that payment he was liable to reimburse the plaintiff; (3) the fact that the payment was made by the plaintiff after the sale and not prior to it did not make any difference so far as the liability of the defendants was concerned, for even if it be assumed that the liability of the defendants for the revenue ended with the sale, that would only exclude the applicability of S. 69 and not S. 70. That would affect the right of the plaintiff only in respect of five per cent. *solatium*. The plaintiff was therefore entitled to a decree against the first and second defendants for the amount of the land revenue and cess paid by her with interest thereon either on the basis of S. 69 or S. 70 of the Contract Act, or on general principles of equitable reimbursement; (4) the grant of relief to the plaintiff under Ss. 69 and 70 of the Contract Act did not preclude her right to the declaration of a charge on equitable grounds in addition to personal decree; and the plaintiff should therefore be given a first charge on the entirety of the property registered in the zemindar's name so far as the amount of the land revenue, excess land cess and interest thereon were concerned on the basis of *pro rata* liability of the properties in the hands of the different defendants. But the

sum representing the five per cent. *Solatium* and interest thereon should be distributed on the villages which were in arrears and which were actually sold. The apportionment must be made on the lines indicated in S. 45 of the Madras Revenue Recovery Act. The doctrine of salvage lien has to be invoked more as furnishing an analogy than as literally applicable; (5) that the principle underlying S. 82 of the T.P. Act was not excluded merely because that as between the plaintiff and the zemindar the former was not liable to contribute towards the *perishcush*. (*Varadachariar and Stodart, JJ.*) CHENGALROYA REDDI *v.* UDAIKAVOUR. **167 I.C. 980=9 R.M. 493=44 L.W. 214=A.I.R. 1936 Mad. 752=71 M.L.J. Supp. 1.**

———**Ss. 69 and 230**—Agent undertaking to pay principal for goods supplied by him and not paid for by purchaser—Order not placed through agent—Right of agent to sue purchaser. *See* CONTRACT ACT, Ss. 230 AND 69. **39 P.L.R. 457=A.I.R. 1937 Lah. 607.**

———**S. 70**—Applicability—Conditions—S. 65—Distinction. *See* CONTRACT ACT, Ss. 65 AND 70. **39 Bom.L.R. 835.**

———**S. 70**—*Applicability—Contract imposing obligation on defendant to do act—Absence of—Plaintiff doing act—Right to compensation.*

In the absence of a contract which imposes on the defendant a legal obligation to do the act which the plaintiff claims to have done, the plaintiff cannot succeed in his claim to recover compensation from the defendant under S. 70 of the Contract Act. (*Beasley, C.J. and Stodart, J.*) RADHAKRISHNA IYER *v.* SECRETARY OF STATE. **170 I.C. 304=10 R.M. 183=1936 M.W.N. 761=44 L.W. 518=A.I.R. 1936 Mad. 930.**

———**S. 70**—*Applicability—Co-owners — Joint property—Repairs to well effected by one—Right to contribution from the others.*

A co-owner repairing a well with intention to benefit himself and the other co-owners is entitled to recover expenses from the other co-owners under S. 70, Contract Act, when it is shown that the first co-owner did not intend to do the work gratuitously and that the other co-owner enjoyed the benefit thereunder with him. (*Wort, J.*) BIBI BARATAN *v.* MT. CHANDRAMANI KUER. **167 I.C. 42=9 R.P. 370=18 Pat.L.T. 333=3 B.R. 256=A.I.R. 1937 Pat. 103.**

———**S. 70**—Applicability—Mahomedan minor—Lease by *de facto* guardian void—Right to sue for compensation for use and occupation. *See* MAHOMEDAN LAW—MINOR. **I.L.R. (1940) Kar. 200.**

———**S. 70**—*Applicability—Minor—Liability of.*

S. 73 of the Contract Act does not apply to a minor. In the circumstances set out in S. 70 of the Contract Act the law implies a promise to pay. A minor who is incompetent to contract, cannot be made liable on such a contract. An implied contract is nothing more than a promise which is inferred from certain circumstances The basis of a suit under S. 70 is a contractual one and consequently a minor cannot be sued under S. 70. A liability which cannot be imposed by an express contract cannot be imposed under an implied contract. (*Harries, C.J., Wort and Manohar Lall, JJ.*) BANKEY BEHARI *v.* MAHENDRA. **19 Pat. 739=6 B.R. 743=188 I.C. 772=13**

CONTRACT ACT (1872), S. 70.

R.P. 39=1940 P.W.N. 345=A.I.R. 1940 Pat. 324 (F.B.).

——S. 70—*Applicability — Municipality—Act done by a person for Municipality in contravention of Ss.* 48 *and* 49 *of Bombay Municipal Boroughs Act—Liability of Municipality to make compensation—"Lawful Act"—Ss.* 48 *and* 49—*If exception to S.* 70, *Contract Act.*

S. 70 of the Contract Act contains a provision for binding a person to make compensation under conditions which do not postulate a contract. The applicability of the section cannot be excluded by the fact that there is no enforceable contract, *e.g.*, that there is no contract binding on a Municipality by reason of the requirements of the Municipal Boroughts Act not having been followed. S. 70 does not depend upon the existence of a contract binding on the parties and does not provide for contractual liabilities. The relation under the section is created by tha fact that one person lawfully does something for another or delivers anything to him and by the fact that the other person enjoys the benefit thereof, and when this relation arises, the liability to make compensation or to restore the thing delivered arises as a statutory liability not arising out of contract. There is really no conflict between S. 70 of the Contract Act and Ss. 48 and 49 of the Bombay Municipal Boroughs Act, and an act may be considered to be lawful for purposes of S. 70, Contract Act, though it may have been done in contravention of Ss. 48 and 49 of the Municipal Boroughs' Act. Ss. 48 and 49 of the latter Act cannot be looked upon as an exception to the S. 70 of the Contract Act, even though it may have the effect of imposing liability on a Municipality, for such liability is in no way contractual. (*Barlee and Tyabji, JJ.*) PALLONJEE EDULJEE (& SONS) *v.* LONAVALA CITY MUNICIPALITY. **I.L.R. (1937) Bom. 782=10 R.B. 217=171 I.C. 660=39 Bom.L.R. 835=A.I.R. 1937 Bom. 417.**

——S. 70—Applicability—Sale by judgment-debtor in contravention of Sch. III, para. 11, C. P. Code—Void—Vendor's right to refund of sale price—Implied Contract—If can be presumed. *See* C. P. CODE, SCH. III, PARA. 11. **I.L.R. (1937) Nag. 111.**

——S. 70—*'Benefit'—Act done by plaintiff primarily for own benefit, but resulting in indirect benefit to defendant—Liability of latter to compensate former.*

The "benefit" contemplated by S. 70 of the Contract Act is the direct and natural benefit of the act done by the plaintiff in respect of which he claims compensation. If the object of what has been done was primarily for the benefit of the plaintiff, that and that alone is the direct and natural result of the act or work. The fact that it indirectly benefits the defendant also does not make the defendant liable to make compensation to the plaintiff. (*Beasley, C.J. and Stodart, J.*) RADHAKRISHNA IYER *v.* SECRETARY OF STATE. **170 I.C. 304=10 R.M. 183=1936 M.W.N. 761=44 L.W. 518=A.I.R. 1936 Mad. 930.**

——S. 70—*Compensation—Basis of.*

The basis of compensation under S. 70 of the Contract Act would plainly not be the same as on contractual rights. The latter would be on the footing of the contract between he paries, but under S. 70, it would be in proportion to the benefit enjoyed by the party bound, and appropriate compensation is to be awarded mainly from that aspect. It should be on a footing that would not include any such profits to the party doing or delivering the thing as he might be entitled to claim on the basis of a contract. (*Barlee and Tyabji, JJ.*) PALLONJEE EDULJEE (& SONS) *v.* LONAVALA CLTY MUNICIPALITY. **I.L.R. (1937) Bom. 782=171 I.C. 660=10 R.B. 217=39 Bom. L.R. 835=A.I.R. 1937 Bom. 417.**

——S. 70—*Compensation for services rendered —Right to—Intention of party rendering services —If material.*

The question whether compensation (remuneration for services rendered) should or should not be awarded must depend upon the intention of the person at the time of his doing the thing for which he demands the compensation. He is obviously the person to state what his intention was. Where it is clear that he was under the impression that he would receive remuneration for the services, it cannot be predicated that he intended to act gratuitously and so he is entitled to claim reasonable compensation. (*Sir Shadi Lal.*) PALANIVELU MUDALIAR *v.* NEELAVATHI AMMAL. **1937 A.W.R. 332=167 I.C. 5=45 L.W. 355=A.I.R. 1937 P.C. 50=1937 O.W.N. 319=39 P.L.R. 245=9 R.P.C. 176=1937 P.W.N. 613=65 C.L.J. 295=1937 M.W.N. 615=1937 A.L.R. 221=1937 A.L.J. 575=39 Bom.L.R. 720=41 C.W.N. 677=1937 O.L.R. 133=3 B.R. 335=(1937) 1 M.L.J. 719 (P.C.).**

——S. 70—*Principle of—Delivery of money—It gives right to sue to recover such money—Promise to repay by receiver of money—If necessary—Exemption from liability to repay—Onus of proof.*

Mere delivery of money otherwise than by way of gift or repayment enables the person so delivering money to recover it from the person to whom it is delivered. This principle is given statutory force by S. 70 of the Contract Act in India. If, therefore a person receives money from another he is bound to repay it simply by operation of law and without any promise on his part to repay it. He can of course show that the money was given to him in circumstances which exempt him from the obligation to repay; but the burden of proving those circumstances is on him. (*Norman, J.C.S.*) ONKAR BALLABH *v.* GIRWAR LAL. **1936 A.M.L.J. 37.**

——S. 70—*Suit for money—Alleged agreement found against—No alternative prayer—Relief under section—Court, if can grant.*

Where a plaintiff sues for recovery of money on the basis of an alleged agreement which is found against and there is no relief asked for under S. 70 of the Contract Act, it is not open to the Court to grant that relief. (*Bhide, J.*) TEJ RAJ *v.* RAM LAL. **I.L.R. (1938) Lah. 511=175 I.C. 314=10 R.L. 703=39 P.L.R. 1007=A.I.R. 1938 Lah. 71.**

——S. 70—Suit under—Limitation. *See* LIMITATION ACT, ARTS. 61, 96 AND 120. **18 Lah. 623.**

——S. 70—*Unauthorised borrowing by agent—Liability of principal.*

Where an agent borrows money for the benefit of his principal without proper authority from

him, the principal is liable jointly and severally with the agent for such money as is applied for his benefit. (*Bhide, J.*) RAHIMULLAH KHAN *v.* CHUNI LAL. **173 I.C. 758=10 R.L. 479=39 P. L.R. 208=A.I.R. 1937 Lah. 570.**

——S. 70—*Work done under contract not validly executed—Right to compensation.*

Where work is done by a person under a contract which has not been validly executed but the person on whose behalf this contract has been executed either in wrong form or by an unauthorised person has taken the benefit of the work done by the other party, such person is bound to pay compensation to the other party under S. 70 of the Contract Act although no suit based on the contract would lie. (*Jai Lal, J.*) P. D. KHANNA & Co. *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **167 I.C. 510=9 R.L. 501=38 P.L. R. 618.**

——S. 72—*Applicability.*

S. 72, Contract Act, does not apply to a case where a person has been required by an order of a Court of competent jurisdiction to pay the money and the validity of the order has been challenged. Moreover the section relates to questions of fact and not to questions of law. (*Leach, J.*) OFFICIAL ASSIGNEE *v.* S. P. DAYABHOY. **171 I.C. 401=10 R.R. 150=A.I.R. 1937 Rang. 234.**

——S. 72—Applicability — "Mistake"—Payments made in pursuance of fraudulent preference with notice of insolvency—Right to recover. *See* CONTRACT ACT, Ss. 64, 65 AND 72. **44 L.W. 722.**

——S. 72—Applicability—Money paid into Court to set aside Court sale in execution of decree—Decree subsequently set aside or reversed—Claim for refund of money paid into Court—Maintainability—Right to restitution. *See* C. P. CODE, S. 144. **(1940) 1 M.L.J. 340.**

——S. 72—*Applicability—Money paid under coercion—Levy of municipal toll unauthorisedly from owner of vehicle—Payment insisted on every time of vehicle entering Municipal limits—If voluntary payment.*

Where a municipal toll-contractor insists upon the payment of tolls every time a vehicle enters the municipal limits, and the vehicle cannot cross the municipal limits without such payment the payment made by the owner of the vehicle must be presumed to be not voluntary, but under coercion. A suit by the owner of the vehicle to recover the payments made on the ground that the collection of the same by the municipal contractor was wrongful and unauthorised cannot be defeated on the ground that the payment was voluntary. (*Sankaranarayana Rao and Nageswara Iyer, JJ.*) SANKARA IYER *v.* RAJACHAR. **15 Mys.L.J. 489.**

——S. 72—*Applicability—Payment of taxes and licence fees to Panchayat Board under mistaken belief that properties and business are situate within that Board—Claim to refund—Maintainability.*

A person who has paid taxes and licence fees to a Panchayat Board under the mistaken belief that the properties or business in respect of which the taxes or fees were paid were situate within the jurisdiction of that Board, must be held to have done so under a mistake of fact and is entitled to recover them as money had and received under S. 72 of the Contract Act. (*Abdur Rahman, J.*) AUDINARAYANA NAIDU *v.* PANCHAYAT BOARD OF MUNAGAPAKA. **51 L.W. 437=1940 M.W.N. 423=A.I.R. 1940 Mad. 660=(1940) 1 M.L.J. 582.**

——S. 72—Construction—'Coercion'—Meaning of. *See* C. P. CODE, O. 21, R. 89 AND CONTRACT ACT, S. 72. **47 L.W. 188.**

——S. 72—*Money paid by Official Assignee under garnishee order—If can be recovered back.*

Money paid by a person to another under compulsion of legal process cannot be recovered back even though it is subsequently discovered that the money was in fact not due to him. In an insolvency proceeding the Official Assignee declared dividend in favour of a partner of a firm and that partner was admitted to the rank of creditors. On application of one of the creditors of the firm, the Court issued a garnishee order prohibiting the Official Assignee from paying out the dividend which he had declared in favour of the partner. In accordance with the order the Official Assignee deposited the dividend with the Court without any objection and the money was paid to the creditor. Subsequently it was discovered that the partner was not entitled to the dividend as the debts of the firm had not been first paid out. The Official Assignee brought a suit to recover the amount paid by him.

Held, that the garnishee order and the order of payment to the creditor having been passed by a Court of competent jurisdiction and not having been set aside on appeal or review were final and the Official Assignee could not question their validity and recover back the sum paid by him. A.I. R. 1936 Rang. 151, Rel. on (*Leach, J.*) OFFICIAL ASSIGNEE *v.* S. P. DAYABHOY. **171 I.C. 401=10 R.R. 150=A.I.R. 1937 Rang. 234.**

——S. 72—*Scope—Tax paid to Municipality under misapprehention as to his liability—Suit for refund—Maintainability.*

A person who makes a payment of a tax to a Municipality under a misapprahension as to his liability to do so cannot recover it in a Court of law, although one would expect a Corporate body to refund voluntarily any amount which had been paid to it in error. Payments made by mistake of law cannot be recovered. (*Horwill, J.*) RAMJEE RAO *v.* MUNICIPAL COUNCIL MASULIPATAM. **1940 M.W.N. 956=52 L.W. 437=(1940) 2 M.L.J. 469.**

——S. 72—*Suit against Hindu widow—Personal decree—Estate attached in execution—Property put to sale—Owner paying decretal amount to avoid sale—Right to recover.*

A suit was brought against a Hindu widow on a promissory note and a personal decree was passed against her. In execution of the decree, the decree-holder attached the estate whereupon the owner of the estate raised an objection that the decree-holder could not proceed against the whole estate in execution as the decree was personal against the widow. The objection was dismissed and the estate was put to sale. The owner therefore paid the decretal amount to avoid the sale.

Held, that the money so paid could be recovered back as money paid under compulsion. The fact that the person paying could have been made liable for the amount paid, had suitable proceed-

ings been taken, was held to make no difference. (*Stone, C.J. and Niyogi, J.*) VASANT RAO *v.* BEHARI LAL. **I.L.R. (1938) Nag. 382=178 I.C. 101=11 R.N. 201=A.I.R. 1938 Nag. 225.**

———**Ss. 72 and 21**—Payment of bill by consumer to Electricity Supply Co., under mistake that it had made valid rules—Right to refund. *See* CONTRACT ACT, SS. 21 AND 72. **181 I.C. 345 =A.I.R. 1939 Pesh. 8.**

———**S. 73.**

Applicability.
Breach of contract—Damages.
Damages—Mitigation of.
Interest as damages.
Interest—Claim for.
Measure of damages.

Applicability.

———**S. 73**—Award of interest—Discretion of Court. *See* C. P. CODE, S. 34. **A.I.R. 1936 Rang. 141.**

———**S. 73**—*Applicability—Advance deposit—Forfeiture—Contract of sale of property—Advance insisted on by vendor and paid by vendee—Breach by vendee—Forfeiture of deposit—Right of vendee to refund—Vendee not taking legal proceedings against vendor—If can be presumed to have treated contract as at an end.*

It is a well-known principle of law that if a purchaser on agreeing to purchase a property agrees to pay and does pay, an advance or a deposit, that must be regarded as security for the fulfilment of the contract of sale, more especially when the deposit is insisted upon by the vendor as a term of the contract. Though there is nothing specific said about forfeiture, the mere fact that a deposit is demanded carries with it the implication that it should be forfeited if the contract is broken, unless the vendee proves an agreement to the contrary. Where a sale deed recites that the consideration for the sale should be paid before the registering officer, the implication is that same must be paid within four months which is the period limited for registration of the document. Where the vendee after paying a deposit and taking delivery of the sale-deed from the vendor returns it to the vendor being unable to find the purchase money and allows the period of four months' time for registration to pass without making any further payment, he is not entitled to claim back the deposit paid by him and plead that the vendor has treated the contract as at an end. The vendee who holds a deposit which he can forfeit is not bound to institute a suit for damages or other remedy against a vendee who has no money to pay the vendor. It cannot be inferred from the omission of the vendor to take legal proceedings in such a case that he has treated the contract of sale as at an end. (*King, J.*) GOPALARATNA IYENGAR *v.* RAJARATNA MUDALIAR. **173 I.C. 955=10 R. M. 637=1937 M.W.N. 1288=A.I.R. 1938 Mad. 246.**

———**S. 73**—*Covenant of title in sale-deed—Breach—Decree in favour of third party—Compensation, if claimable before its execution.*

Compensation can only be claimed under S. 73 of the Contract Act when loss or damage has been caused, and it is doubtful whether it could be held that the mere passing of a decree in favour of a third party in respect of property sold

actually causes any loss or damages to the purchaser before the decree is executed. (*King, C.J. and Nanavutty, J.*) BHAGWATI PRASAD *v.* BADRI PRASAD. **11 Luck. 725=160 I.C. 454=8 R.O. 257=1936 O.W.N. 143=1936 O.L.R. 73= A.I.R. 1936 Oudh 141.**

Breach of Contract—Damages.

———**S. 73**—*Deposit forfeited on breach—If must be given credit.*

Where a person deposits a certain amount as a security for the observance of the terms of the contract but breaks the contract and forfeits the amount, the other party must in a suit for damages caused by the breach, give credit for the amount forfeited. He can only recover the difference between the actual loss and the amount forfeited. There is no difference between the suit brought for damages for breach of contract and a suit merely for the value of the damage caused. A.I.R. 1916 Mad. 485 (F.B.), Foll. (*Mosely, J.*) RAMAN *v.* NAGU MUDALIAR. **173 I.C. 406=10 R.R. 344=A.I.R. 1937 Rang. 357.**

———**S. 73**—*Breach of contract—Measure of damages—Costs incurred in defending suit by party committing breach—Right to recover.*

The measure of damages in the case of breach of contract to sell land is the difference between the market value of the land at the time of the contract and the price which was agreed upon under the contract. Where a person, in spite of contract of sale of certain immovable property, has brought a suit on the ground of title to that land and has thus committed a breach of contract, the damages, which the other party is entitled to, cannot include the costs which that party had to incur, in the suit brought against him as such costs are not a damage which flows from the contract itself. (*Dunkley, J.*) MA HLA PO *v.* MA SEIN NU. **189 I.C. 23=13 R.R. 17=A.I.R. 1940 Rang. 146.**

———**S. 73**—*Breach of contract—Remedies open.*

When a person is guilty of a breach of contract then ordinarily, the other party to the contract has open to him two remedies, one by a suit for damages and the other by a suit for specific performance of the contract. Of course, some kinds of contracts cannot be specifically performed, but in every case there is a right of action for damages, and in India that applies to contracts for the sale of immovable property just as much as to contracts for the sale of movable property. (*Dunkley, J.*) MA HLA PO *v.* MA SEIN NU. **189 I.C. 23=13 R.R. 17=A.I.R. 1940 Rang. 146.**

Damages—Mitigation of.

———**S. 73**—*Damages—Mitigation of.*

To maintain suit for damages for breach of contract it is the duty of the party claiming the same to perform his part of the contract and mitigate the damages and put forward the accounts of his loss, and his damages must be on this basis. (*Addison and Ram Lall, JJ.*) GHULAM HAIDER *v.* IQBAL NATH. **184 I.C. 130 =12 R.L. 167=A.I.R. 1939 Lah. 118.**

———**S. 73**—*Landlord and tenant—Covenant by tenant to pay Government revenue—Default—Sale—Landlord failing to avert though aware of sale—Damages—Measure of.*

Every person who has a right to damage for breach of contract must take all reasonable steps to mitigate the loss arising from such breach.

CONTRACT ACT (1872), S. 73.

Where a tenant who promised to pay Government revenue and cess has failed to pay it, but the landlord who has notice of the intended sale takes no steps to avoid the sale by paying necessary dues and the property is ultimately sold, the landlord in a suit by him for damages for breach of contract cannot claim as damages any loss which he could have mitigated by taking necessary steps. (*Harries, C.J. and Dhavle, J.*) DHANU LAL *v.* KULDIP NARAYAN SINGH. **186 I.C. 852=12 R.P. 539=6 B.R. 403=A.I.R. 1940 Pat. 88.**

Interest as damages.

——**S. 73**—*Interests as damages—Award of.*

Where plaintiff is kept out of his money and the defendant has the use of the money in breach of his obligation to the plaintiff, S. 73 of the Contract Act, applies and the plaintiff is entitled to receive not only the money he ought to have been paid on the due date but also interest at a reasonable rate for the period during which he has been kept out of it. (*Stodart, J.*) MUTHUSWAMY PILLAI *v.* VEERASWAMY PILLAI. **163 I.C. 251=8 R.M. 1119=1936 M.W.N. 572=43 L.W. 514=A.I.R. 1936 Mad. 486=70 M.L.J. 433.**

——**S. 73**—*Interest as damages—Detention of debt.*

Under S. 73 of the Contract Act, Interest cannot be allowed by way of damages for wrongful detention of debt. (*Radhkrishna, J.*) BABU LAL *v.* DURGA PRASAD. **188 I.C. 184.**

——**S. 73**—*Detention of debt.*

S. 73 is merely declaratory of the common law as to damages. Interest cannot be allowed at common law by way of damages for wrongful detention of debt. (*Sir Shadi Lal.*) BENGAL NAGPUR RAILWAY CO., LTD. *v.* RUTTANJI RAMJI. **65 I.A. 66=I.L.R. (1938) 2 Cal. 72=1938 A.L.J. 169=19 Pat.L.T. 125=47 L.W. 281=1938 O.W.N. 261=32 S.L.R. 374=1938 A.W.R. (P.C.) 52=1938 O.L.R. 119=1938 A.L.R. 167=1938 O.A. 300=40 Bom.L.R. 746=4 B.R. 374=10 R.P.C. 216=42 C.W.N. 985=1938 P.W.N. 360=67 C.L.J. 153=1938 M.W.N. 646=173 I.C. 15=A.I.R. 1938 P.C. 67=(1938) 1 M.L.J. 640 (P.C.).**

——**S. 73**—*If can be allowed.*

The rule of law is that, in the absence of special circumstances, interest cannot be allowed on damages for breach of contract for sale of goods. (*Tek Chand, J.*) SUKH DIAL-BRIJ LAL *v.* KARKHANA JOINT HINDU FAMILY. **40 P.L.R. 531.**

Interest—Claim for.

——**S. 73**—*Interest—Claim for.*

The Illus. (*n*) to S. 73 does not confer upon a creditor a right to recover interest upon a debt which is due to him when he is not entitled to such interest under any provision of the law. (*Sir Shadi Lal.*) BENGAL NAGPUR RAILWAY CO., LTD. *v.* RUTTANJI RAMJI. **65 I.A. 66=I.L.R. (1938) 2 Cal. 72=1938 A.L.J. 169=19 Pat.L.T. 125=47 L.W. 281=1938 O.W.N. 261=32 S.L.R. 374=1938 A.W.R. (P.C.) 52=1938 O.L.R. 119=1938 A.L.R. 746=4 B.R. 374=10 R.P.C. 216=42 C.W.N. 985=1938 P.W.N. 360=67 C.L.J 153=1938 M.W.N. 646=173 I.C. 15=1938 O.A. 300=40 Bom.L.R. 746=A.I.R. 1938 P.C. 67=(1938) 1 M.L.J. 640 (P.C.).**

——**S. 73**—*After recovery of principal debt—Power of Court to decree—Interest Act.*

A claim for mere interest after the principal amount has been recovered is not tenable. A Civil Court can award interest under S. 73 of the Contract Act only when the right is founded on a contract and when there has been a breach thereof; under the Interest Act the Court has a discretion to award interest in the case of a claim to recover any debt or any sum *certain* payable at a stipulated time; but when the creditor has already recovered his debt, he cannot sue again for interest on the debt. The Interest Act only gives power to the Court but does not create any right in the creditor. (*Niyogi, J.*) MUNICIPAL COMMITTEE, AKOT DT. *v.* SURAJMAL SHRIRAM GINNING FACTORY. **I.L.R. (1938) Nag. 482=175 I.C. 476=10 R.N. 448=20 N.L.J. 145.=A.I.R. 1938 Nag. 119.**

Measure of damages.

——**S. 73**—*Measure of damages—Breach of contract by buyer—Sale of goods by seller.*

Where on the buyer committing breach of contract by failing to take delivery of the goods within the time agreed upon, the seller sells the goods, the measure of damages is the price of the goods on the date of the breach and not on the date of the sale. (*Henderson, J.*) RAM KUMAR *v.* PRAYAG NARAYAN. **44 C.W.N. 792.**

——**S. 73**—*Measure of damages—Contract of sale of goods.*

In the case of breach of contract of sale of goods, the damages must be based on the difference between the market price and the contract price, if there was an available market for the goods at the date of breach. (*Bajpai, J.*) GOPAL DAS AGRARWALA *v.* HARI KISHAN DAS. **163 I.C. 919=9 R.A. 96=1936 A.W.R. 591=1936 All. L.R. 667=1936 A.L.J. 704=A.I.R. 1936 All. 514.**

——**S. 73**—*Marriage—Contract between Hindu parents to give daughter of one in marriage to son of other—Effect of—Breach by father of bridegroom — Damages—Measure of—Suit by father of bride—Claim to amount as increased expenditure in fresh marriage alleged to be due to bride having been discarded—Sustainability.*

Where a contract is entered into between two Hindus that the daughter of the one should be given in marriage to the son of the other, the agreement is between or on behalf of the respective families of the parties to the marriage. When it is broken, damages of two kinds may naturally result: (1) the pecuniary loss, if any, and injury to the feelings and prospects to the bride or bridegroom personally; (2) the pecuniary loss and the loss to the credit and reputation of the family of the injured party. A suit by the father of the bride for damages suffered by him as head of the family and as father of the bride is not strictly an action for breach of promise of marriage as known to English law. S. 73 of the Contract Act which prescribes the general measure of damages for all contracts must be applied to the case. A claim to recover amounts by way of increased expenditure on the bride's subsequent marriage alleged to her having been discarded cannot be allowed, because the increased expenditure cannot be said to arise naturally and directly from the breach of the first marriage and is generally too remote a consequence. (*Krishnan Pandalai, J.*) VENKATA NARASIMHA *v.* GOVINDA KRISHNA. **1937 M.W.N. 1274.**

CONTRACT ACT (1872), S. 73.

———S. 73—*Partnership—Breach of covenant by partner—Claim for damages by another partner—Measure of damages—Calculation on basis of wilful default—If justified.*

The general intention of the law is that in giving damages for breach of contract, the party complaining should, so far as can be done by money, be placed in the same position as he would have been in if the contract had been performed. This necessarily involves a hypothetical element except in cases where the breach relates to ascertained sums of money; and a claim cannot be rejected merely on the ground that the loss is not actual. This principle is equally applicable to cases of partnership accounts in which one partner claims damages for breach of a covenant in the deed of partnership by another partner. The damage or compensation for such a breach is found by calculating the loss of profits which would have been earned but for the breach that is, on the footing of wilful default. In respect of losses attributable to one partner's misconduct or negligence, the partner is certainly compellable in equity to compensate or indemnify the partnership in this respect. (*Dhavle, J., on difference of opinion between Mahomed Noor and Manohar Lall, JJ.*) BANWARILAL *v.* SHAIKH SHUKRULLAH. **19 Pat. 1=188 I.C. 337=12 R.P. 697=6 B.R. 653=A.I.R. 1940 Pat. 204.**

———S. 73—*Measure of damages—Sale of boiler for use with carbon-paper plant—Breach of contract by seller—Buyer's right to loss of profits.*

The plaintiff bought from the defendant a boiler for use in connection with the carbon-paper plant at his factory. The boiler was delivered on 20th October, 1933, and was paid for finally nearly two months later. As the boiler did not conform to the requirements of the Indian Boilers Act and the Regulations made thereunder, the boiler authorities refused to issue a certificate and consequently the plaintiff could not use the boiler for the purpose for which it was required. In April, 1934, the plaintiff purported to reject it. No boiler was however bought to replace it till 1937. It was alleged by the plaintiff that he had been unable to make any profit from producing carbon-paper, and he claimed damages for that loss of profit.

Held, (*i*) that the plaintiff kept the boiler too long to be in a position to be able in law to reject it; (*ii*) that in the absence of evidence that the plaintiff at any time made or was able to make but for lack of a suitable boiler carbon-paper at a profit, his claim for damages on the basis of loss of profit must fail; (*iii*) that the plaintiff could recover damages for breach of contract on the basis of the boiler being unfit for the purpose for which it was supplied to him and of his having to spend money to get one which was fit for the purpose and that those damages came under the following heads:—(*a*) Expense incurred in removing the boiler in question and in installing another suitable one; (*b*) the difference between the price of another boiler suitable for the purpose which could be bought in April or May, 1934, and the price he could get by the sale of the unusable boiler at the same time in 1934; and (*c*) a sum of money estimated to be the overhead charges in respect of the carbon-paper plant only, during the time necessarily taken up in removing the unusable boiler and installing a suitable one. (*Derbyshire, C.J. and Ameer Ali, J.*) JOSEPH MAYAR *v.* PHANI BHUSAN GHOSH. **I.L.R. (1938) 2 Cal. 88=182 I.C. 397=12 R.C. 53=A.I.R. 1939 Cal. 210.**

CONTRACT ACT (1872), S. 74.

———S. 74.

Applicability.
Compensation.
Construction of.
Compound interest.
Forfeiture of advance.
Forfeiture of deposit.
Higher rate of interest.
Higher rate of compound interest.
In default of punctual payment.
Irredeemable pledge.
Penalty.

Applicability.

———S. 74—*Compromise decree—Default clause—Provision for payment of part of suit amount on fixed date and on such payment plaintiff to give up balance—Direction that on default of such payment plaintiff to be entitled to recover full suit amount—If penalty—Power of Court to relieve against or to extend time for repayment—Time—If of essence of contract.*

A compromise, being an agreement, is subject to S. 74 of the Contract Act, and to the equitable relief which the Court can give under that provision, notwithstanding that the compromise is embodied in a decree. The test to decide whether a default clause in a compromise decree is a penalty is to see whether it is a liability imposed on the defendant to pay the decree-holder something more than he would be entitled to under the decree. In a suit against two brothers on a promissory note executed by the younger of them a compromise was entered into which was embodied in a decree of Court. The compromise provided that if out of the suit amount of Rs. 1,383-12-4, the sum of Rs. 800 be paid in two months from that day by the defendants to the plaintiff in cash, the latter should give up the balance amount and costs of suit; but that if the defendants failed to pay the sum of Rs. 800 on the particular date, the plaintiff should recover the whole suit amount from the defendants. The amount of Rs. 800 was not paid on the date fixed, but the Court allowed him to pay a part of it into Court and gave him further time to pay the balance.

Held, that the time stipulated in the compromise for payment was of the essence of the contract, and that the defendants, if they sought to take advantage of the concession of having to pay the smaller sum must carry out strictly the conditions on which it was granted, and not having done so, were not entitled to any relief; and the Court had no power to relieve them from the obligation undertaken by them, as the provision for payment of the full suit amount was not a penal provision. (*Cornish, J.*) SUBBAYYA *v.* PEDDEYYA. **169 I.C. 345=10 R.M. 10=44 L.W. 832=A.I.R. 1937 Mad. 234.**

———S. 74—Compromise decree—Penal provision—If can be relieved against. *See* COMPROMISE—CONSENT DECREE. **A.I.R. 1937 Nag. 413.**

———S. 74—*Scope and effect of—Power of Court to award reasonable damages—Proof of actual loss—If necessary.*

CONTRACT ACT (1872), S. 74.

S. 74 boldly cuts the most troublesome knot in the common law doctrine of damages. Whether actual damage or loss is proved or not, the Court is entitled to award reasonable damages not exceeding the stipulated amount. (*Lobo, J.C. and O'Sullivan, J.*) SHAMBHULAL *v.* SECRETARY OF STATE. **189 I.C. 785=13 R.S. 36=A.I.R. 1940 Sind 1.**

Compensation.

——S. 74—*Compensation—Mortgage—Successive mortgages—Prior mortgagee taking possession of mortgaged property in his foreclosure decree and subsequently selling it to mortgagor—Suit by subsequent mortgagee for redemption of prior mortgage—Amount of interest payable to prior mortgagee.*

The prior mortgagee obtained possession of the mortgaged property in his foreclosure decree and later on sold it to the mortgagor. The subsequent mortgagee was not impleaded as a party to the suit by the prior mortgagee. The subsequent mortgagee then brought a suit to redeem the prior mortgage. The Court decreed his claim on calculating the interest at 1|6 per cent. per mensem as per rate mentioned in the prior mortgage.

Held, that inasmuch as the mortgagor committed default in payment of the mortgage-money, the prior mortgagee was entitled to some compensation by way of interest on default in payment of the loan by the mortgagor under S. 74 of the Contract Act and taking therefore into consideration the position of the parties to the suit, the subsequent mortgagee suing for redemption not being in the position of an unfortunate mortgagor trying to save his property and also the times when the loan was advanced, interest by way of compensation, at 1|12 per cent. per mensem could be granted. (*Gruer, J.*) RAMKUNWAR BAI *v.* MT. CHHITIA BAI. **I.L.R. (1937) Nag. 367=172 I.C. 289=10 R.N. 193=A.I.R. 1937 Nag. 205.**

Construction of.

——S. 74—*Construction of—Right to compensation for breach of contract—Proof of actual damage or loss—If condition precedent.*

The right of a party complaining of a breach of contract to reasonable compensation under S. 74 of the Contract Act is not dependent on proof of actual loss or damage. Even when no actual damage or loss is proved to have been caused by the breach the party is entitled to compensation. (*Ganga Nath, J.*) MUNNA LAL BISWANATH *v.* RAHMATULLAH. **1937 A.L.J. 1385=1938 A.W.R. (H.C.) 11.**

Compound interest.

——S. 74—*Compound interest—Mortgage—Instalment bond—Default clause—Provision for compound interest at 12 per cent.—If penal.*

A mortgage deed provided that the sum of R. 2,000 which was borrowed thereunder should be paid in eight annual instalments of Rs. 250 each, such instalments to count both towards principal and interest on the entire sum. It was further provided that in default of payment of sums due in any instalment, the sum remaining unpaid should be added to the principal and the entire amount become payable at once in a lump with interest at 12 per cent. per annum with yearly rests.

CONTRACT ACT (1872), S. 74.

Held, that the stipulation for payment of compound interest at 12 per cent. per annum was a clear penalty and could not be enforced. (*Pandrang Row and Venkataramana Row, JJ.*) RAMAMURTI *v.* SUBBARAO. **185 I.C. 440 (2)=12 R.M. 539=1939 M.W.N. 323=49 L.W. 534=A.I.R. 1939 Mad. 481=(1939) 1 M.L.J. 491.**

——S. 74—*Mortgage—Provision for compound interest at 18 per cent.—If penal.*

A stipulation in a mortgage-deed for compound interest at 18 per cent. cannot be held to be a stipulation by way of penalty, when it is not a rate in excess of and outside the ordinary and usual stipulation. (*Harries, C.J. and Manohar Lall, J.*) MUKTESWAR TRIGUNAIT *v.* SATYA CHARAN SRIMANI. **180 I.C. 109=5 B.R. 338=1939 P.W.N. 256=11 R.P. 449=20 Pat.L.T. 343=A.I.R. 1939 Pat. 360.**

Forfeiture of advance.

——S. 74—*Forfeiture of advance—Contract of lease—Lessee paying certain sum in advance—Contract providing that in case of failure to pay balance by appointed date, advance would be forfeited—Stipulation, if by way of penalty.*

In a contract of lease for three years at Rs. 5,000 per annum, the lessee paid Rs. 1,000 in advance as a guarantee for carrying out the terms of the contract and agreed to pay the balance on an appointed date. The contract contained a clause that if the balance was not paid by the appointed date, the money already paid would be forfeited. On breach of contract, the lessee brought a suit claiming the refund of advance.

Held, that the clause of forfeiture was not a 'stipulation by way of penalty' within the meaning of S. 74 but a clause for forfeiture of a deposit already made, which was not of a penal character. (*Dalip Singh and Skemp, JJ.*) PARAMPAL SINGH *v.* BUDH SINGH. **177 I.C. 354=11 R.L. 303=A.I.R. 1938 Lah. 62.**

——S. 74—*Contract of sale of land—Payment of half the purchase money as advance—Vendee put in possession of land—Undertaking to pay balance with interest on fixed date—Stipulation that on default vendee to surrender possession of land to vendor and to forfeit sum paid as advance—Enforceability—Penalty—Rule as to.*

It is a well-understood principle of English law that where under a contract of sale of land a sum of money is paid as deposit the vendor is entitled to retain the same if the contract goes off by default of the purchaser, the basis of the rule being that the sum paid as deposit is a guarantee for the performance of the contract. This principle also applies in India. But in order that this rule of English law as to forfeiture of deposit may apply, it must be unmistakably clear from the contract, that the sum forfeited was paid or deposited as a deposit, *i.e.*, it must be a deposit proper and not only a part payment. There may be cases where the Court may find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere security for performance, but rather as a punishment for non-performance of the contract, and in those cases, the Court may doubtless refuse to allow the retention of the whole of the deposit; but where there is no such dispro-

portion and nothing unreasonable in regarding the deposit as security then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default. In spite of the use of the word "deposit", the Court can come to the conclusion that it was not given as deposit in the strict sense of the term. Where under a contract of sale of land for a sum of Rs. 3,000 half the purchase-money is paid as advance, stating that the same is paid out of the total sum of the purchase-money of Rs. 3,000 and the balance of Rs. 1,500, which is referred to the remaining entire amount is made payable with interest, possession being delivered to the vendee, and it is stipulated that if the vendee should fail to pay the said amount on the prescribed date the amount paid as advance shall become forfeited and the vendee shall be entitled to take possession of the land, it cannot, on a fair construction of the contract, be held that the parties can have intended that the sum of Rs. 1,500 paid as advance is to be a mere security for performance of the contract. On the other hand the intention must be taken to be that they regard the forfeiture as punishment for non-performance. (*Venkataramana Rao, J.*) VENKOBA CHAR *v.* SANJIVAPPA. **173 I.C. 233=10 R.M. 542=46 L.W. 839=1937 M.W.N. 313=A.I.R. 1937 Mad. 681.**

Forfeiture of deposit.

———**S. 74**—Forfeiture of deposit—Penalty—Contract to complete building within stipulated time—Clause that on failure to do so deposit made by promisor to be forfeited—Enforceability—If subject to S. 55. *See* CONTRACT ACT, Ss. 55 AND 74. **39 Bom.L.R. 835.**

———**S. 74**—*Contract of service—Security for performance of office—Payment of part—Agreement to pay balance within time specified—Stipulation that on default amount paid to be forfeited—If penal.*

V agreed to serve as a *Mutsaddi* under the appellant, and out of the sum of Rs. 1,000 agreed upon as security for the due performance of the office paid Rs. 400. He agreed to pay up the balance within one month, and stipulated that in the event of his failing to pay up the balance within the time specified he would forego the sum of Rs. 400 already paid as penalty.

Held, that the stipulation was clearly a penal one which was covered by S. 74 of the Contract Act. (*Shankaranarayana Rao and Chari, JJ.*) B. D. NAIDU *v.* SEETHARAMAYYA. **15 Mys.L.J. 339=42 Mys.H.C.R. 275.**

Higher rate of interest.

———**S. 74**—*If a penalty—Relief against—Principles.*

It is settled law that a stipulation for an enhanced rate of interest, if interest is not paid, is not *per se* a penal stipulation. In such a case the most important circumstance on which, the decision would depend, is the difference between the enhanced rate and the original rate. The principle of S. 74 of the Contract Act is that Courts will interfere to vary the contract beween parties only when equity demands that substantial variation should be made. (*Weston.*) BENI PRASAD *v.* SARFRAZ ALI SAYED. **1937 A.M.L.J. 97.**

———**S. 74**—*Mortgage bond—Agreement to pay higher rate of interest in default of punctual payment—Penalty—Relief.*

An agreement in a mortgage bond for increasing the rate of interest if the interest remains unpaid for more than 15 days after the due date for payment is in the nature of a penalty against which the Courts will grant relief. (*Lort Williams, J.*) CALCUTTA IMPROVEMENT TRUST *v.* POORNA CHANDRA SINGHA. **I.L.R. (1937) 1 Cal. 300=173 I.C. 311=10 R.C. 498=41 C.W.N. 781=A.I.R. 1937 Cal. 654.**

Higher rate of compound interest.

———**S. 74**—*Higher rate of compound interest.*

Compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty. 34 Cal. 150 (P.C.), Rel. on. (*Sir Shadi Lal.*) VENKATA HANUMANTHA BHUSHANA RAO GARU *v.* SUBBAYYA. **164 I.C. 27=44 L.W. 414=9 R.P.C. 70=1936 A.W.R. 991=1936 A.L.J. 1191=38 Bom.L.R. 1229=64 C.L.J. 141=41 C.W.N. 18=17 Pat.L.T. 888=1936 A.L.R. 784=1936 O.L.R. 485=1936 M.W.N. 1253=1936 P.W.N. 794=1936 O.W.N. 705=A.I.R. 1936 P.C. 283 (P.C.).**

———**S. 74**—*Penalty—Mortgage bond—Provision for interest at lower rate—Date fixed for payment—In default mortgagee to recover amount of principal and interest by suit—Further provision for increased rate of interest in case of default of payment on due date—If penal.*

A mortgage provided that the money should be re-paid on 30th Jeth 1315, with interest at Rs. 0-9-6 per cent. per month in one lump and that if he failed to pay up in full the principal and interest in one lump on 30th Jeth 1915, the due date of payments the mortgagee or his heirs and representatives would be competent to recover the same from the person and properties of the mortgagor, his heirs and representatives by bringing a suit. Then followed a further stipulation that in case of non-payment on the due date interest would run at Rs. 1-4-0 per cent. per mensem and that the mortgagee would recover interest at 1 1|4 per cent. per mensem after the expiry of the said due date, etc.

Held, that the stipulation for higher interest after default was on a different footing from the primary contract contained in the earlier part, and must be read as a stipulation by way of penalty, but that it did not follow that the rate of interest after default was confined to the original rate stipulated for in the primary contract. (*Rowland and Manohar Lall, JJ.*) NANHAK SINGH *v.* RAM LAGAN DUBEY. **183 I.C. 866=5 B.R. 1009=12 R.P. 209=20 Pat.L.T. 743=1939 P.W.N. 319=A.I.R. 1939 Pat. 457.**

———**S. 74**—*Stipulation for interest at 12 per cent.—Clause that on certain default interest to be paid at 18 per cent. and that interest to be paid on interest—If penal—Power of Court to relieve against.*

A clause in a mortgage-deed which provides for interest at the rate of Re. 1 per mensem, that in a certain event (default) the rate of interest is to increase to Re. 1-8-0 per mensem and that interest should be paid on interest is a penal clause

and can be relieved against. The fact that the mortgagee claims not the increased rate stipulated for, but only compound interest at Re. 1 per mensem, does not stand in the way of the Court giving relief since the contract contains a penal clause. What the Court has to consider is the contract, and not the claim made. When the security at the time of the loan was worth more than twice the amount advanced, the Court can take that into consideration and reduce the interest. In such a case the most that can properly be allowed is 1 per cent. simple interest per mensem, originally reserved in the mortgage deed. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR. **I.L.R. (1938) Nag. 91=179 I.C. 129=11 R.N. 271=20 N.L.J. 285=A.I.R. 1938 Nag. 112.**

In default of punctual payment.

———S. 74—*In default of punctual payment—Compromise decree directing payment of smaller amount on or before certain date in full satisfaction—In default whole amount to be payable—If penal.*

When a contract contains a term which, not being an integral part of the contract, is introduced only for the purpose of securing the performance of the contract, that terms is penal and equity interferes to relieve a party to the contract against it. A penalty is a term which is extraneous and collateral to the actual contract. The reservation of a right to have full payment of money actually due on an existing contract, should there be a failure to pay a smaller sum on a day certain, cannot be treated as a penalty. Where a compromise decree provides that the defendant is to pay to the plaintiff a certain smaller sum in full settlement of the larger sum which is legally due and recoverable, on or before a certain date and in default the defendant is to be liable for the larger amount, the latter provision is not in the nature of penalty. (*Niyogi, J.*) HIRALAL HARIRAM *v.* DURGA BAI MURLIDAR. **173 I.C. 257=10 R.N. 292=A.I.R. 1937 Nag. 413.**

Penalty.

———S. 74—*Penalty—Decree for lesser sum to be paid in instalments—Provision for higher sum on default—Relief in execution.*

The amount which was found due under a decree was Rs. 5,600. This included a sum of Rs. 850 compound and penal interest provided for in the original document as penalty. The decree provided that if the amount less the penalty was paid in certain instalments the debtor would be allowed a rebate of this amount of penalty imposed in the original document between the parties. In default of the payment of instalments the defendant would be liable to pay the whole sum of Rs. 5,600.

Held, that there was clearly a penal clause.

Held, further, that the executing Court as a Court of equity had the power to relieve against the penalty even if the decree was one on award. (*Haveliwala and Lobo, JJ.*) AHMEDBUX *v.* BALCHAND. **177 I.C. 925=11 R.S. 69=A.I.R. 1938 Sind 185.**

———S. 74—*Irredeemable pledge—Pledge—Agreement that it would be irredeemable after certain time.*

An agreement that the pledge should become irredeemable if not redeemed after a certain

period, although it may be an unfair agreement, would not in itself constitute an agreement by way of penalty unless the value of the thing pledged is so very much larger than the amount of the loan that it would become obvious that the clause is really inserted as a means of bringing pressure upon the pledgor to repay the loan within the contracted time. (*Mackney, J.*) DWARIKA *v.* BHAGWATI. **186 I.C. 530=12 R.R. 270=A.I.R. 1939 Rang. 413.**

———S. 74—*Penalty—Interest at enhanced rate on default—If penal.*

A mortgage bond provided for interest at the rate of 12 per cent. and in case of default of payment of interest for an enhanced rate of 18 per cent. per annum,

Held, that the provision for enhanced interest in case of default was not necessarily penal. (*Lobo and Weston, JJ.*) BHAGWANDAS *v.* LADHARAM. **188 I.C. 643=13 R.S. 7=A.I.R. 1940 Sind 68.**

———S. 74—*Penalty—Lease—Deposit as security for replacing alterations on premises and for rents—Default clause.*

A lease provided that the lessee shall be entitled to make alterations on the premises subject to replacing them and as security for replacing the alterations and for rents, shall deposit certain amounts. The deed further provided that in case of non-observance of the terms of the lease the deposit shall be forfeited.

Held, that the clause in the lease relating to the forfeiture of the deposit was not a stipulated penalty. (*Mosely, J.*) RAMAN *v.* NAGU MUDALIAR. **173 I.C. 406=10 R.R. 344=A.I.R. 1937 Rang. 357.**

———S. 74—Penalty—Kabuliyat—Provision for 6 1|4 per cent. interest per mensem in case of even petty defaults—Power of Court to relieve against—B. T. Act, S. 179—If bars powers of Court to reduce rate of interest. *See* BENGAL TENANCY ACT, S. 179. **1939 P.W.N. 220.**

———S. 75—*Anticipatory breach of contract—Right of promisee—Election—Contract not rescinded—Right to sue for damages.*

When a party to a contract commits an anticipatory breach, the injured party has an option of rescinding it or of electing to treat it as continuing and then suing on the due date for such damages as then accrue. There is equally no doubt that an election once made cannot be avoided. Damages for the breach are to be assessed not from the date of breach but from the date on which the other side elects to rescind. There can be no claim for damages with respect to a contract which is still in being, and it is clear the contract cannot be determined by one side alone except by performance. Unless and until the other side chooses to rescind, the contract remains alive for all purposes. It is difficult to see why the wrongdoer should be entitled to take advantage of his own wrong. (*Vivian Bose, J.*) IMAMALI *v.* RANI PRIYAWATI DEVI. **I.L.R. (1938) Nag. 31 =10 R.N. 115=171 I.C. 553=A.I.R. 1937 Nag. 289.**

———S. 75—*Applicability—Contract of marriage—Non-disclosure of bride's disease—Rescission—Suit for damages for money spent—Maintainability—Passive non-disclosure—Actionability.*

A marriage was arranged between the plaintiff's

CONTRACT ACT (1872), S. 78.

son *M* and *A*, the second defendant niece of the first defendant. The negotiations were conducted by the plaintiff on behalf of his son and by the 1st defendant on behalf of his niece. After the negotiations were concluded with the usual *pan rusum* ceremony for which the plaintiff spent Rs. 217, the plaintiff discovered that the prospective bride suffered from epileptic fits during her childhood and so broke off the engagement. He then sued for recovery of Rs. 217 spent by him for *pan rusum* ceremony, alleging that he would not have consented to the engagement if he had known of the girl's disease and that the first defendant who was under a duty to disclose it, having failed to disclose it, was liable for the plaintiff's claim.

Held, (1) that the contract of marriage came under the category of contracts *uberrimae fidei*, and that the first defendant who was in possession of the facts had the duty on him to disclose the fact of his niece having had epileptic fits; but that the 1st defendant was guilty only of a mere passive disclosure and not of any false representation; (2) that the plaintiff though justified in rescinding the contract of marriage was not entitled to obtain the damages claimed as the same did not arise through non-fulfilment of the contract; (3) that when any contract is avoided for breach, it remained operative as to the past and so claims for restitution in respect of acts of performance prior to the rescission are precluded. (*Bose, J.*) HAJI AHMAD KHAN *v.* ABDUL GANI KHAN. **I.L.R. (1937) Nag. 299=174 I.C. 351=10 R.N. 373=A.I.R. 1937 Nag. 270.**

———**Ss. 78, 108 and 121**—*Certificates of shares in company—If goods—Transfer—Effect—Right of transferor to rescind.*

Share certificates are goods within the meaning of S. 78 of the Contract Act when the person in whose name the shares stand sells or transfers them to another, the title to the same passes to the transferee who gets a valid title to them; and the transferor is precluded from rescinding his contract of sale or transfer. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) AKKITHIM MIAH *v.* RANGAPPA. **16 Mys.L.J. 115=43 Mys.H.C.R. 58.**

———**S. 107**—*Power of resale—Duty to sell within reasonable time.*

The right to resell under S. 107 of the Contract Act is intended for the benefit of the seller, and the exercise of such a privilege implies a corresponding duty to resell at such a time as will cause a minimum of loss to the buyer; in other words as soon as possible after the breach. (*Stodart, J.*) CHIDAMBARA NADAR *v.* VADIVEL NADAR. **159 I.C. 1041=8 R.M. 594=1935 M.W.N. 1233=43 L.W. 208=A.I.R. 1936 Mad. 47.**

———**S. 107**—*Seller exercising option of resale—Right to sue for unpaid price.*

A seller of goods, who avails himself of the remedy of resale under S. 107 of the Contract Act, is not entitled to sue for the unpaid price. The seller, since he cannot deliver the goods is debarred from requiring the buyer to pay the price of them. (*Stodart, J.*) CHIDAMBARA NADAR *v.* VADIVELU NADAR. **159 I.C. 1031=8 R.M. 594=1935 M.W.N. 1233=43 L.W. 208=A.I.R. 1936 Mad. 47.**

CONTRACT ACT (1872), S. 124.

———**Ss. 124 and 126**—*Applicability—Contract of guarantee and contract of indemnity—Distinction—Broker and sub-broker—Agreement by latter to save former from loss occasioned in effecting transactions of constituents to be introduced by latter—If indemnity or guarantee.*

A contract of guarantee as defined by S. 126 involves three parties, the creditor, the surety and the principal debtor; and it involves a contract to which those parties are privy. The contract need not be embodied in a single document, but there must be a contract or contracts to which the three parties are privy. There must be a contract, first of all, between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, the case is one indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impiedly requests the surety to act as surety. Unless that element is present, it is impossible to work out the rights and liabilities of the surety under the Contract Act. It is impossible to imply a promise by the principal debtor to indemnify the surety, unless the principal debtor is privy to the contract of suretyship. An agreement between a broker and a sub-broker by which the latter agrees to save the former from any loss which he would suffer by reason of his effecting transactions at the request of the sub-broker for the constituents introduced by the sub-broker, the constituents being unascertained at the time and knowing nothing of the guarantee, is a contract of indemnity under S. 124 and is not a contract of guarantee falling under S. 126. (*Beaumont, C.J. and Kania, J.*) RAMCHANDRA LOYALKA *v.* SHAPURJI BHOWNAGREE. **I.L.R. (1940) Bom. 552=42 Bom.L.R. 550=A.I.R. 1940 Bom. 315.**

———**S. 124**—*Contract of "indemnity"—Undertaking by second mortgagee to pay off prior mortgage—Breach—Suit by mortgagor for damages—Breach—Limitation—Starting point—Limitation Act, Arts.* 83 *and* 116.

An undertaking by a second mortgagee to pay off a prior mortgage cannot be held to be a contract of indemnity in the absence of an express provision in the deed of mortgage to the second mortgagee to indemnify the mortgagor; a suit for damages based on the breach of the undertaking to pay off the first mortgage is governed by Art. 116 of the Limitation Act, when the contract is registered. Limitation commences to run from the time the contract is broken and not from the time at which any damage arising therefrom is sustained by the plaintiff. (*Wort and Varma, JJ.*) KESHWAR SAO *v.* GUNI SINGH. **17 Pat. 338=176 I.C. 269=4 B.R. 694=11 R.P. 75=19 Pat. L.T. 198=1938 P.W.N. 211=A.I.R. 1938 Pat. 275.**

———**Ss. 124 and 125**—*Contract of indemnity—Right of suit—Cause of action—When arises—Suit before actual loss—Maintainability—Limitation Act, Art.* 83.

Reading Ss. 124 and 125 of the Contract Act and Art. 83 of the Limitation Act, it is clear that

under a contract of indemnity the cause of action arises when the damage which the indemnity is intended to cover is suffered; and a suit brought before the actual loss had accrued must be thrown out as premature. (*Wadia and Lokur, JJ.*) SHANKAR NIMBAJI *v.* LAXMAN SUPDU. **188 I.C. 663=13 R.B. 16=42 Bom.L.R. 175=A.I.R. 1940 Bom. 161.**

———**S. 126**—Contract of guarantee—What amounts to—Who can enforce it. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT, S. 57. **I.L.R. (1937) 2 Cal. 698.**

———**S. 126**—*Contract of guarantee—What amounts to.*

Where *A* tells *B* that he may safely do business with *C*, as he was helping them with finance and taking goods from him, that falls far short of a guarantee. (*Leach, C.J. and Madhavan Nair, J.*) MAHOMED SHAMSUDIN RAVUTHAR *v.* SHAW WALLACE & CO. **I.L.R. (1939) Mad. 282=184 I.C. 153=12 R.M. 414=49 L.W. 343=1939 M. W.N. 209=A.I.R. 1939 Mad. 520=(1939) 1 M.L.J. 509.**

———**S. 126**—*Contract of suretyship—Requirements.*

No doubt for a contract of suretyship there should be concurrence of the principal debtor, the creditor and the surety. But this does not mean that there must be evidence showing that the surety undertook his obligation at the express request of the principal debtor. An implied request will be quite sufficient to satisfy this requirement. (*Srivastava, Ag.C.J. and Smith, J.*) JAGANATH BAKSH SINGH *v.* CHANDRA BHUKHAN SINGH. **12 Luck. 484=165 I.C. 370=9 R.O. 195=1936 O.W.N. 979=1936 O. L. R. 625=A.I.R. 1937 Oudh 19.**

———**S. 126**—*Guarantee—Construction—Liability of guarantor.*

In construing a guarantee, the principle is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee. Therefore before a creditor can enforce the liability given by a guarantor, he must satisfy that the conditions of the bond executed by him are fulfilled and that he is seeking the very liability which has been undertaken by the guarantor under the bond. (*Pandrang Row and Venkataramana Rao, JJ.*) VENKAMMA *v.* SANYASAYYA. **179 I.C. 594=11 R.M. 601=1938 M.W.N. 68=47 L.W. 84=A.I.R. 1938 Mad. 422.**

———**S. 127**—*Scope of—Benefit done to principal debtor—If should have been at the desire of the surety—Past benefit, if can be a good consideration for a bond of guarantee.*

Under S. 127 of the Contract Act it is not necessary that the thing done or the promise made for the benefit of the principal debtor should be at the desire of the surety. The section has implied in it some such expression as 'notwithstanding anything contained in S. 2 (*d*) of the Act.' The word 'done' in S. 127 shows that past benefit to the principal debtor can be good consideration for a bond of guarantee. (*Thomas, C.J. and Zia-ul-Hasan, J.*) GHULAM HUSAIN KHAN *v.* FAIYAZ ALI KHAN. **188 I.C. 175=12 R.O. 419=1940 O.A. 428=1940 O.W. N. 486=1940 O.L.R. 326=1940 A.W.R. (C.C.) 228=A.I.R. 1940 Oudh 346.**

———**Ss. 127 and 23**—*Consideration for guarantee—Sufficiency—'Lawful'—Release of certificate-debtor under Public Demands Recovery Act (Bengal Act III of* 1913).

Under S. 127 of the Contract Act anything done for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. The release of a certificate-debtor from arrest under the Public Demands Recovery Act, on a security bond being executed by a surety in favour of the certificate oficer, is a sufficient consideration for the bond. Though such a bond is not authorised by law in the sense that it does not come within the express terms of the relevant sections of the Act, yet it may still be for lawful consideration and legally enforceable. It cannot be said in such a case that what is not expressly permitted by the Act must be held to be forbidden by law, for this doctrine though applicable to a corporation, cannot apply to a Court or an authority exercising judicial functions; a certificate officer is a Court under the Act. The consideration is also 'lawful' in that the release is in fact, in aid, and not to the detriment, of the purposes of the Act, namely, the speedy realisation of the certificate dues. (*Henderson and Biswas, JJ.*) MALDA DT. BOARD *v.* CHANDRA KETU NARAYAN SINGH. **I.L.R. (1937) 2 Cal. 698=66 C.L.J. 373=175 I.C. 929=10 R.C. 19=4 C.W.N. 1008=A.I.R. 1937 Cal. 625.**

———**S. 128**—*Promissory note—Guarantor's liability for interest.*

Under S. 128 of the Contract Act, if a person guarantees the payment of a promissory note without qualification he would be equally with the principal debtor, liable for the interest. It is, however, open to the guarantor to limit by contract his liability to the principal amount of the note. (*Panckridge, J.*) DHIRENDRANATH *v.* BONEBHEARY. **44 C.W.N. 511.**

———**S. 128**—*Special contract—Letter of guarantee—Undertaking to pay amount "after attempts have been made to realise the same from the principal debtor"—Effect—Liability of guarantor—When arises—Mere demand for payment from principal—If sufficient to entitle creditor to proceed against guarantor.*

Where a surety by his letter of guarantee undertakes to pay the creditor the amount which may become due to him under the letter of guarantee "after attempts have been made by the creditor to realise the same from the principal debtor" there is a special contract between the creditor and the guarantor to the effect that the creditor should not be entitled to recover from the guarantor until he has first attempted and failed to obtain satisfaction by some sort of proceedings against the principal debtor. The creditor's right to recover from the grantor is restrained or postponed and does not accrue until the creditor has taken steps to recover the debt by proceeding against the principal debtor or his assets. It is not enough for the creditor to merely demand payment from the principal debtor, as that would not amount to an attempt to realise the debt from the assets of the principal debtor. (*Collister and Bajpai, JJ.*) RADHA KRISHNA DAS *v.* AJODHIYA DAS. **1937 A.L.J. 1265=1937 A.W.R. 1194.**

CONTRACT ACT (1872), S. 128.

———S. 128—*Subsequent surety guaranteeing payment by executants of debt on a promissory note by particular date and promising to execute new note on failure—Failure on surety's part to execute new note—Surety's liability under old note.*

The executants of a promissory note failed to pay the money advanced on the promissory note. A surety guaranteed the payment by the executants by a particular date and on failure promised to execute a new promissory note. The surety failed to execute the new note.

Held, that liability of the surety was co-extensive with that of the principal debtors. If he failed to execute the new promissory note his liability was to pay up the old one. (*Mosely, J.*) C.T.A.C.T. FIRM *v.* MAUNG AYE. **171 I.C. 527=10 R.R. 161 A.I.R. 1937 Rang. 197.**

———S. 128—*Surety for payment of mortgage debt—Liability, when arises—Limitation—Starting point.*

Where a person undertakes that if the mortgagee's money is not realised from the property mortgaged by the mortgagors, then the mortgagee would be entitled to realise his mortgage money from him, the surety, the intention is clear that the mortgagee was first to proceed against the mortgaged property and was to take every step that could be taken against it to realise his money, and the time begins to run against the surety only when the mortgagee fails to realise the whole amount due to him from the mortgaged property and not from the date when the mortgage money becomes due under the mortgage deed. (*Bennet and Verma, JJ.*) DALJIT SINGH *v.* HARKISHAN LAL. **187 I.C. 152=12 R.A. 474=1940 A.W.R. (H.C.) 14=1939 A.L.J. 1137=A.I.R. 1940 All. 116.**

———S. 129—*Continuing guarantee—Breach—Burden of proof—Guarantee for due performance of duties by certain person.*

Where a suit is instituted by a company on the basis of a continuing guarantee entered into by certain persons for the due performance of his duties by a certain person while in the service of the company, the burden is upon the plaintiff company of proving that the person concerned was guilty of such lack of diligence and faithfulness as caused a loss to the company and thereby constituted a breach of the agreement of guarantee. If the losses were the direct result of the company's own bad system, and the employee was plainly unfitted for the work entrusted to him by reason of deficiency in education and experience he cannot be held guilty of lack of diligence and faithfulness, so as to make his guarantors liable under the agreement of guarantee. (*Dunkley, J.*) BALTHAZAR AND SON, LTD. *v.* C. W. JAMES. **167 I.C. 292=9 R.R. 308=A.I.R. 1937 Rang. 37.**

———S. 133—Applicability—Surety for appearance of defendant arrested before judgment—Return of plaint for presentation to Court having jurisdiction—Surety—If discharged—Plaint represented in proper Court—Surety bond—If covers new suit. *See* C.P. CODE, O. 38, R. 2. **50 L.W. 426.**

———S. 133—*Discharge of surety—Breach and variation of terms of contract.*

Where the business in respect of which a surety had guaranteed losses regarding the share of a partner was one the capital of which was limited to a certain amount, and according to the terms of the partnership deed it was stipulated that when losses occurred the partnership was to be dissolved forthwith, the continuation of the business, after losses were incurred, on an extended scale by amalgamation with another concern and the addition of new dealings to the business of the new concern thereby changing the character of the original business constitute not only breaches but also variations of the terms of the contract and exonerate the surety from liability. (*Addison and Ram Lall, JJ.*) JOWAND SINGH *v.* TIRATH RAM. **183 I.C. 740 (2)=12 R.L., 133=41 P.L.R. 47=A.I.R. 1939 Lah. 193.**

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———S. 133—Security bond—Bond to Court pending appeal—Alteration in judgment-debtor's position by act of third party—Liability of surety. *See* SURETY. **A.I.R. 1936 Lah. 470.**

———S. 133—*Surety for tax-collector of municipal committee—Son of tax-collector allowed to collect taxes without notice to surety—Defalcation by son—Liability of surety.*

A person stood surety for the tax-collector of a Municipal Committee. The security bond provided that the surety was to be liable in case the tax-collector misappropriated any amount that came in his hands or in case any default in payment was made by him. Subsequently the son of the tax-collector began to collect the taxes in his father's name with the consent and knowledge of the President and Secretary of the Municipal Committee. The President or the Secretary did not give any notice of this fact to the surety. On a defalcation being made by the son the surety was sought to be made liable.

Held, that as the person had stood surety only for the personal honesty of the tax-collector and not of his son and as the kind of employment was such that it should have been conducted personally by the man for whom the surety had given security, the surety could not be bound to something for which he had not contracted. (*Mosely, J.*) H PIN SEIN *v.* PAUNGDE MUNICIPALITY. **177 I.C. 75=11 R.R. 98=A.I.R. 1938 Rang. 126.**

———Ss. 133 and 134—*Compromise between principal debtor and creditor—Alteration of original contract and addition of new terms—Effect.*

Mere entering into a compromise decree by the parties would not necessarily discharge the surety. But where a complicated arrangement is entered into which could not have been within the contemplation of the surety and new terms are imported which are quite outside the reasonable requirements of a settlement by consent the surety will be discharged. (*Roberts, C.J. and Leach, J.*) MAYANDI *v.* K.E.R.M. RAMAN CHETTYAR. **174 I.C. 915=10 R.R. 445=A.I.R. 1937 Rang. 499.**

———Ss. 133 and 134—*Scope—Failure of consideration for contract of creditor with principal debtor—Effect—Subsequent variation of original contract between creditor and principal debtor—Surety not party to such variation—If discharged.*

It is a fundamental principle of the law of suretyship that a surety cannot be bound to something

for which he has not contracted. The provisions of the Contract Act cannot be deemed to be exhaustive. S. 133 of the Act cannot in any view operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor liable. If the contract with the principal debtor is varied without the consent of the surety, the latter who is not a consenting party to the variation is discharged from liability, although the principal debtor who is entitled to cancel and does cancel the contract, subsequently withdraws the cancellation submits to the claim of the creditor. If the consideration for the original contract with the principal debtor fails, the latter is relieved of all liability, and necessarily the surety also ceases to be liable as surety. The fact that the principal debtor withdraws his defence to an action by the creditor and allows judgment to be given against him cannot affect the position of the surety. (*Leach, C. J. and Venkataramana Rao, J.*) NUSERWANJI CURSIDJI BHASANIA & Co. *v.* MAHAMUGI AMMAL, **182 I.C. 920=12 R.M. 168=1938 M.W.N. 325=A.I.R. 1938 Mad. 585.**

———Ss. 133, 135 and 139—*Applicability—Surety bond to Court pending suit—Decree—Execution against surety not proceeded with—Appeal from decree—Application for stay of execution—Offer and acceptance of fresh surety in appeal—Effect—Former surety—If discharged.*

Having regard to the definition in S. 126 of the Contract Act, Ss. 133, 135 and 139 of the Act cannot in terms apply to a surety who executes a surety bond to a Court; there is in such a case no creditor within the meaning of S. 126. But there is no reason why the principles underlying those sections should not be applied *mutatis mutandis,* though the question whether a surety is discharged from the undertaking he has given to the Court depends on the construction of the surety bond. In a suit for possession of immovable property and mesne profits, the plaintiff applied for appointment of a receiver pending the suit, but the defendant agreed to give security for the profits. One *M* was offered and accepted a surety for the mesne profits of the year 1927—1928 and on 23—10—1937 he executed a bond to the Court undertaking that in the event of the defendant failing to satisfy the decree or order that might be passed against him, he, the surety, would personally pay the amount fixed. For the mesne profits of the following year 1928—1929, one *B.S.* was offered and accepted as surety; on 8—11—1928 he also executed a bond to the Court in essentially similar terms. The suit was decreed on 6—3—1929, and the plaintiff on 16—4—1929 took out execution and obtained possession of the properties only on 15—7—1929. The plaintiff filed another darkhast against the defendant and also *M.* and *B.S.* for recovery of the amounts of mesne profits specified in the surety bonds. The defendant in the meanwhile appealed against the decree for possession and applied for stay of execution which was granted on fresh security. One *D.* was appointed surety for the total amount of mesne profits for which *M.* and *B.S.* the former two sureties were liable, and *D* executed a bond to the appellate Court undertaking to be liable for the amount in case the defendant failed to abide by the final decree or decree that might be passed in the matter. On 23—11—1934 the decree of the trial Court was confirmed. The plaintiff having sought to execute the decree against the former sureties, *M.* and *B.S.*, they pleaded that they were discharged owing to *D.* having been accepted as a new surety in their place.

Held, (1) that the Contract Act was not exhaustive; (2) that the general principles of the law of suretyship (and in particular the principle that the rights of a surety are not to be interfered with without his consent) might be applied and ought to be applied even though the provisions of the Contract Act did not govern the case; (3) that the Court itself having been responsible for a change in the situation which materially affected the position of the former sureties and there having been a delay of six years without any justification it must be held that they were discharged from liability. (*Broomfield and Macklin, JJ.*) PARVATIBAI HARIVALLABHDAS *v.* VINAYAK BALVANT. **I.LR. (1938) Bom. 794=40 Bom. L.R. 989=179 I.C. 258=11 R.B. 244=A.I.R. 1939 Bom. 23.**

———S. 134—*Applicability—Decree against principal and surety—Effect—Release of principal debtor before the Debt Conciliation Board—Surety if can claim to be absolved also.*

When once a decree is passed both against the principal debtor and the surety, the surety becomes a judgment-debtor. His debt becomes a debt of record. The original contract has merged in the decree. Hence when a creditor releases a principal debtor and retains his rights as against the surety judgment-debtor, in proceedings before the Debt Conciliation Board, the surety cannot thereby claim that he is also absolved from his liability S. 134 of the Contract Act has no application to such a case. (*Niyogi, J.*) ZIABAL *v.* RAMACHANDRA. **1939 N.L.J. 402.**

———S. 134—*Applicability—Surety bond executed in favour of Court.*

S. 134 presupposes the existence of a contract of guarantee, to which the creditor and the surety, if not also the debtor are parties. The liability of the surety arises from an undertaking given by him to the creditor in consideration of something done by the latter. Hence where there are no contracts between the sureties and creditor and security bonds are executed by the sureties at the instance of the debtor and in pursuance of the orders of the Court granting stay the creditors are not a party to the contract of guarantee even though they are empowered under the security bond to enforce and hence S. 134 does not apply to this case. (*Niamatullah and Collister, JJ.*) JANG BAHADUR SINGH *v.* BASDEO SINGH. **164 I.C. 248=9 R.A. 132=1936 A.W.R. 793=1936 A.L.J. 860=1936 All.L.R. 719 =A.I.R. 1936 All. 549.**

———S. 134—*Discharge of surety—Suit against insolvent debtor without leave of Court—Surety if released from debt.*

Failure to obtain permission of the Insolvency Court before suing the debtor who had been adjudicated insolvent, does not release the sureties from the debt. (*D. R. Norman.*) SHANKAR LAL *v.* BHANWAR LAL. **1939 A.M.L.J. 84.**

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———**Ss. 134 and 137**—*Construction—Surety under S. 145, C.P. Code—Discharge of—Execution against judgment-debtor barred—Effect.*

The mere fact that an execution against the principal judgment-debtor has been allowed to be barred by lapse of time is no ground for the release or discharge of the surety. (*R.C. Mitter, J.*) BIRENDRAJIT SAHA *v.* RENUPADA SAHA. **40 C.W.N. 465.**

———**Ss. 134 and 137**—*Creditor omitting to sue debtor within limitation—Surety, if discharged.*

The omission of a creditor to sue the principal debtor within the period of limitation does not discharge the surety from his liability. (*Nasim Ali and Remfry, JJ.*) BIRESWAR CHATTERJEE *v.* SAIDPUR COMMERCIAL BANK, LTD. **41 C.W.N. 1361.**

———**Ss. 134 and 137**—*Remedy against principal debtor barred—Surety, how affected.*

A surety is discharged when at the date of the suit against him the creditor's remedy against the principal debtor has become barred by time. (*D. R. Norman.*) NAU RANG RAI *v.* SITA RAM. **1939 A.M.L.J. 66.**

———**Ss. 134 and 139**—*Discharge of surety—Creditor excluding debt guaranteed by surety from settlement by the Debt Conciliation Board.*

The position of the surety is twofold: on the one hand he is liable to pay the debt, on the other hand when he pays the debt, he stands in the shoes of the creditor and he is entitled to enforce against the principal debtor all the remedies which were available to the creditor. If the liability of the surety is so co-extensive with that of the principal debtor, his right is not less co-extensive with that of the creditor after he satisfied his debt. To enable the surety to enforce his right against the 'principal debtor, there are two essential conditions (*i*) that the debt itself must subsist, (*ii*) that his remedy against the principal must remain unimpaired. Consequently the creditor will be entitled to compel the surety to perform his promise only if the debt subsists and the surety's remedy is unimpaired. Where the principal debtor has applied to the Debt Conciliation Board for settlement of his debts, and before the Board the creditor excludes from his statement of debts the debt guaranteed by the surety declaring that he would recover it from the surety, the debt due by the principal debtor does not exist so as to entitle the creditor to enforce his remedy against surety. Granting for the nonce that it subsists, it cannot be overlooked that under S. 15 (3), C. P. Debt Conciliation Act, the surety's remedy is very substantially impaired and the creditor by lifting the burden of the debt from off the shoulders of the debtor and laying it on those of the surety seeks virtually to shift his own disability entailed by the Debt Conciliation Act, on the surety in an aggravated form and hence the surety is discharged. (*Niyogi, J.*) BABU RAO *v.* BABU MANAKLAL. **I.L.R. (1939) Nag. 175=176 I.C. 686=17 R.N. 70=1939 N.L.J. 150=A.I.R. 1938 Nag. 413.**

———**Ss. 134 and 139**—*Discharge of surety—Principle underlying—Scope and applicability of Ss. 134 and 139—Suit against trustees and a guarantor—Substitution of new trustees and striking out of old ones—Effect—Surety, if relieved of his liability.*

A surety is discharged if the creditor, without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time. In each case the ground of the discharge is that the surety's right to pay the debt at any time and after paying it, to sue the principal in the name of the creditor, is interfered with. Ss. 134 and 139 of the Contract Act are merely declaratory of what the law of England was and is. S. 139 only applies where the eventual remedy of the surety against the principal debtor is impaired. Under S. 134 the surety is discharged if, and only if, a contract has been entered into by which the debtor is released or if there has been any act or omission on the part of the creditor the legal consequence of which has been to discharge the principal debtor. Where a plaintiff sued on a building contract certain trustees of a temple and a guarantor but later on as those trustees were removed, he applied for the substitution of the new trustees in the place of the old ones and they were so substituted and the old ones struck out and the suit was continued as against the new ones and the guarantor it was held that as the only result of striking out the original trustees from the action was to preclude the bringing by the plaintiff of a fresh suit in respect of the subject-matter against them, and was not a release or discharge of the principal debt, the debt remained a debt though the creditor by reason of a rule of procedure could not bring an action upon it. It was further held that under the circumstances there was nothing in S. 134 to discharge the liability of the surety and that the plaintiff's act in continuing to sue the surety, though he withdrew his action against the principal debtors, was a clear reservation of his rights, (*Lord Porter.*) MAHANTH SINGH *v.* U BA YI. **66 I.A. 198=70 C.L.J. 556=1939 Rang.L.R. 358=50 L.W. 27=41 Bom.L.R. 742=20 Pat.L.T. 532=1939 A.L.J. 697=1939 M.W.N. 727=1939 A.W.R. (P.C.) 169=11 R.P.C. 213=1939 O.A. 559=1939 O.W.N. 401=43 C.W.N. 641=181 I.C. 1=5 B.R. 576=1939 O.L.R. 270=A.I.R. 1939 P.C. 110=(1939) 2 M.L.J. 253 (P.C.).**

———**Ss. 134 and 139**—*Discharge of surety—Test—Creditor impleading both principal debtor and surety as defendants—Creditor withdrawing suit against principal debtor without permission under O. 23, R. 1 (3), C.P. Code—Surety, if discharged.*

A creditor while enforcing his contract may elect to have recourse to the surety rather than to the principal debtor; but he must not in so doing release the latter in such a way as to render the contract unenforceable against him and therefore void. If he does this, the surety can have no recourse to the principal debtor for repayment and both by virtue of Ss. 134 and 139 the surety is discharged. A.I.R. 1920 Mad. 216, Diss. Thus if the creditor chooses to have recourse to the surety the principal debtor remains liable to the latter, but if the creditor after having instituted a suit against both the principal debtor and his surety, extinguishes his remedy against the principal debtor by withdrawing a suit against

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him without the permission of the Court under O. 23, R. 1 (3), C.P. Code, then his act discharges both the principal debtor and by virtue of Ss. 134 and 139, Contract Act, the surety in addition. 1 L.B.R. 150, Foll. The test is not whether the creditor has for the time being confined his attention to the surety rather than to the principal debtor, but whether he has irrevocably abandoned his rights against the principal debtor by releasing or discharging him from the contract or has impaired the remedy of the surety against the principal debtor. (*Roberts, C.J. and Leach, J.*) U BA YI *v.* MAHANT SINGH. **171 I.C. 291 =10 R.R. 142=A.I.R. 1937 Rang. 302.**

——**Ss. 134 and 145**—*Suit against debtor and surety—Creditor waiving claim against debtor—Effect of—Surety, if discharged.*

The effect of the creditor waiving his claim against the principal debtor in a suit brought against the principal debtor and the surety is the barring of the remedy by suit against the debtor, and is not the extinction of the debt. The remedy of the surety under S. 145 of the Contract Act against the debtor remains open and unimpaired to the surety, and therefore the surety is not discharged. (*Dunkley, J.*) KANAHAI MISSER *v.* SUKANANAN. **14 Rang. 594=168 I.C. 815=9 R.R. 365=A.I.R. 1937 Rang. 72.**

——**S. 135**—*Applicability—Surety bond executed to Court—Discharge of surety.*

Even if S. 135 of the Contract Act does not apply to the case of a bond executed by a surety to Court, the equitable principles on which the section is found do apply and a discharge can be given to all the surety on the grounds mentioned in the section. (*Norman.*) NATHU MAL *v.* ABDUL HAMID. **1936 A.M.L.J. 1.**

——**S. 135**—*Auction-purchaser allowed to withdraw deposit on furnishing security to re-deposit when asked—Surety bond executed—Purchaser when asked to deposit amount asking for time which was granted—Consent of counsel for decree-holder—Surety, if absolved from liability.*

Where in an execution case, the auction-purchaser who had deposited the sale price in Court was allowed to withdraw it on furnishing security to re-deposit when asked to do so, and on so being asked he asked for a month's time to deposit the amount which was granted by the Court and was not objected to by the counsel for the decree-holder, but on subsequent date the Court being aware of the surety bond ordered the surety to deposit the amount and modified the previous orders.

Held, that the surety was not absolved under S. 135, Contract Act. The bond was in favour of the Court and the Court had discretion to order the auction-purchaser to deposit the amount at any date it liked and the consent of the counsel for the decree-holder was immaterial. (*Bhide, J.*) MOHAMMAD RAMZAN *v.* MT. KHADIJA SULTAN BEGUM. **181 I.C. 429=11 R.L. 834=40 P. L.R. 755=A.I.R. 1938 Lah. 472.**

——**Ss. 135, 136 and 139**—Scope of contract between creditor and third person giving time to debtor—If discharges surety—*See* SURETY—DISCHARGE OF. **15 Mys.L.J. 56.**

CONTRACT ACT (1872), S. 139.

——**Ss. 135 and 137**—*Mere forbearance of creditor to sue debtor—If promise to give time—Surety, if discharged.*

Mere forbearance on the part of the creditor to sue the debtor immediately the debt becomes due, at the request of the debtor, does not amount to promise to give time to the debtor, so as to discharge the surety. 4 Cal. 331 (P.C.), Dist. (*Almond, A.J.C.*) MAKHAN SINGH *v.* MT. LACHMI. **161 I.C. 244=8 R. Pesh. 169=A.I.R. 1936 Pesh. 80.**

——**S. 137**—*Construction—"Mere forbearance"—Meaning.*

The words "mere forbearance" in S. 137 mean forbearance of the creditor from suing the debtor within the period of limitation. The simple reason for this interpretation is that a person can only forbear to do a thing as long as he has got a right to do it. Directly the suit of the creditor becomes time-barred, he loses his power to enforce his claim. 1918 P.C. 226, Ref.; 7 I.C. 898 and 1920 Mad. 216, Disapprov.; 5 Bom. 647 and 7 Bom. 146, Dissent.; 24 All. 504, Foll. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) CHATTAR SINGH *v.* MAKHAN SINGH. **160 I.C. 1005=8 R. Pesh. 143=A.I.R. 1936 Pesh. 20.**

——**S. 139**—*Discharge of surety—Neglect of obligee to observe rules as to supervision and checking—Passive acquiescence.*

Where it was not part of the conditions in a bond entered into by the surety of a tax collector, that the Municipality should check and supervise the tax collections, a mere neglect on the part of the Municipality to observe certain rules and bye-laws, as to checking of the tax collector's accounts, does not discharge the surety. Mere laches of the obligee or a mere acquiescence by the obligee in acts which are contrary to the conditions in the bond, is not of itself sufficient to relieve the surety. It must be shown that the obligee is guilty of affirmative and not merely of negative misconduct. (*Mosely, J.*) AHYAN *v.* PRESIDENT, WAKEMA MUNICIPAL COMMITTEE. **1937 Rang.L.R. 405=175 I.C. 255=10 R.R. 478 =A.I.R. 1938 Rang. 90.**

——**S. 139**—*Surety bond—Surety undertaking obligation on behalf of two defendants—Liability in respect of the amount decreed against the defendants—Suit dismissed against one defendant—Compromise decree passed against another defendant—Discharge of surety.*

In a prior suit, a surety gave a security bond, on behalf of both the defendants. The bond ran thus: "The plaintiff having accepted my personal security, I hereby agree and bind myself to pay to the plaintiff or his legal representatives and assignees any amount that may be decreed in the said suit against the defendants in case the same is not recovered from the same defendants. The plaintiff in that suit entered into a compromise with one of the defendants as a result of which that defendant suffered a decree to be passed against him for the amount claimed in the plaint. The other defendant contested the claim and eventually the suit was dismissed against that defendant and no decree was passed in respect of the suit claim. The plaintiff's heir, being unable to recover the amount by executing the compromise decree, brought a suit to enforce the liability under the security bond.

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Held, that before an obligation can accrue in favour of creditor, there must be a decree against both the defendants and there must be a failure to recover the money from both the defendants or their property. A compromise decree against one of the defendants cannot be held to be a decree against the 'defendants' within the meaning of the bond and the plaintiff cannot be heard to say that she has failed to recover the amount from the 'defendants.' The dismissal of the suit against one of the defendants prevented the accrual of any obligation against him and operated as a complete release of one of the parties jointly bound as a principal. So there is an extinction of debt by reason of dismissal of the suit, not merely barring of remedy of creditor. Hence the surety is discharged from his obligation. (*Pandrang Row and Venkataramana Rao, JJ.*) VENKANNA *v.* SANYASAYYA. **179 I.C. 594=11 R.M. 601=1938 M.W.N. 68=47 L.W. 84=A.I.R. 1938 Mad. 422.**

———**S. 141**—*Applicability—Surety for mortgagor—Suit against mortgagor and surety—Plaintiff claiming only money decree—Effect—Surety—If discharged—Enforcement of mortgage right by mortgagee or surety after assignment—If barred—C. P. Code, O. 34, R. 14.*

In a suit on a mortgage bond against the mortgagee and his surety, the plaintiff mortgagee claimed only a money decree and stated in the plaint that he had "given up only the mortgage right and filed the suit as on a simple bond." The surety pleaded that he was exonerated from liability by reason of the plaintiff having given up his rights under the mortgage bond.

Held, that notwithstanding this statement in the plaint, the plaintiff could still sue, under O. 34, R. 14, C. P. Code, for sale, and there was nothing to preclude him from assigning the mortgage right to the surety or to preclude the surety from enforcing the mortgage right by reason of the provisions of S. 141, Contract Act, which entitled him by way of subrogation, to the benefit of the securities held by the principal creditor, and that the surety was therefore not discharged. (*Varadachariar, J.*) AYILI MALLAPPA *v.* SIDRAMAPPA. **169 I.C. 679=10 R.M. 102=45 L.W. 602=1937 M.W.N. 132=A.I.R. 1937 Mad. 501=(1937) 1 M.L.J. 469.**

———**S. 143**—*Applicability—Surety for debtor to bank—Bank if bound to disclose state of account of debtor to surety—Agreement by surety to be liable in spite of composition between lender and debtor—Effect of.*

S. 143 of the Contract Act is not applicable to cases of mere non-disclosure, because mere non-disclosure as distinguished from intentional concealment cannot amount to keeping silence under the section. There is no general obligation on the part of a bank to volunteer to a surety particulars of one of its constituent's indebtedness, for this is a matter on which the surety has to inform himself. A surety bond executed by a surety for a debtor to a bank provided that any contract between the borrower and the lender by which the lender made a composition with or proposed to give time or not to sue the borrower would not discharge the surety. In a suit against the surety after the principal debtor had entered into a composition with the lender, the surety pleaded that the composition discharged him from liability and that the creditor bank had failed to disclose to him the exact liability of the debtor at the time.

CONTRACT ACT (1872), S. 148.

Held, (1) that the surety having expressly contracted to remain liable notwithstanding the discharge of the principal, he could not be allowed to contend that the discharge of the principal was an implied discharge of the surety, (2) that the bank was not bound to break the confidence of its constituents and to disclose its affairs to the surety and S. 143, Contract Act, did not apply. (*Burn and Mockett, JJ.*) KRISHNASWAMI AIYAR *v.* TRAVANCORE NATIONAL BANK, LTD. **I.L.R. (1940) Mad. 757=1940 M.W.N. 322=51 L.W. 333=A.I.R. 1940 Mad. 437=(1940) 1 M.L.J. 424**

———**S. 145**—*Surety executing bond to creditor for future payment—Cause of action against principal debtor.*

The payment which gives the surety a right of action against the principal debtor must be a payment of money or money's worth. Where the surety has not paid the amount due by the principal debtor to the creditor but merely executes a bond for its future payment, a suit by the surety for recovery of the amount due by the principal debtor to the creditor is premature and he has no cause of action until he pays the amount due under the bond. (*Dunkley, J.*) MUTUSWAMY *v.* KAYAMBOO KONAR. **14 Rang. 511=163 I.C. 668=9 R.R. 45=A.I.R. 1936 Rang. 235.**

———**S. 145**—*"Wrongfully"—Meaning of—Suit by creditor against principal debtor and surety—Dismissal against former as barred by limitation—Decree against surety—Payment by surety—If wrongful.*

Where a decree is passed against a surety in favour of the creditor, although the suit is dismissed as against the principal debtor as being barred by limitation payment of money made by the surety under the decree must be held to be rightful payment and not a wrongful payment, unless the decree has been obtained owing to the collusion or the gross negligence of the surety. The surety cannot be held to be grossly negligent merely because he fails to put forward a defence which would be extremely doubtful of success. (*Norman, J.*) HOLLASI *v.* SOKHA. **1936 A.M.L.J. 41.**

———**S. 148**—Delivery of goods for safe custody—Bailment or agency. *See* CONTRACT ACT, S. 237. **A.I.R. 1937 All. 255.**

———**Ss. 148 and 149**—*Bailment—Essentials—Delivery of possession—What amounts to.*

Under Ss. 148 and 149, Contract Act, delivery is necessary to constitute bailment. The delivery may no doubt be made by doing anything which has the effect of putting the goods in the possession of the intended bailee, but the mere leaving of a box in a room in the house of another, when the key of the box is taken away by the person so leaving the box, cannot amount to a delivery to that another of the articles kept locked in the box within the meaning of S. 149. (*Varadachariar, J.*) KALLAPERUMAL PILLAI *v.* VISALAKSHI ACHI. **175 I.C. 343=10 R.M. 767=1937 M.W.N. 1042=A.I.R. 1938 Mad. 32.**

———**Ss. 148 and 151**—*Silver entrusted to another to be made into a finished article—If bailment—Loss of silver by theft—Liability.*

CONTRACT ACT (1872), S. 148.

Where silver entrusted to another is not to be returned *in specie* but has to be returned in the shape of a finished article, the intention of the parties is that the same silver would be used for the purpose, and the transaction is one of bailment. The bailee is absolved from liability for the loss of such silver by theft, if he is not guilty of carelessness or negligence. (*Srivastava, J.*) SITLA BAKHSH SINGH *v.* BAJI NATH. **12 Luck. 128=8 R.O. 327=161 I.C. 417=1936 O.W.N. 334=1936 O.L.R. 176=A.I.R. 1936 Oudh 264.**

——**Ss. 148, 151 and 152**—*Applicability—Stolen property recovered from accused person under Cr. P. Code and kept with person in charge of Malkhana—Such person embezzling such property—Liability of Secretary of State as bailee.*

The servants of the Secretary of State in exercise of the rights vested in them under the provisions of the Cr. P. Code, came into possession of the plaintiff's property which they had recovered from the thieves. The property was then handed over to the person in charge of the Malkhana for safe custody but he absconded with the property. Thereupon the owner of the property sued the Secretary of State for recovery of the property or the value thereof.

Held, that though the property was bound to be returned to the owner on the direction of the Magistrate in that behalf no relationship of bailor and bailee could come into existence between the plaintiff and the Secretary of State. Even if there was a *quasi*-bailment, the Secretary of State could not be liable for the tort committed by his servant in embezzling the property inasmuch as it was not proved that the Secretary of State failed to take care of the property as required by S. 151, Contract Act. (*Addison and Din Mahomed, JJ.*) UMA PARSHAD *v.* SECRETARY OF STATE. **18 Lah. 380=172 I.C. 567=10 R.L. 345=39 P.L.R. 845=A.I.R. 1937 Lah. 572.**

——**Ss. 151 and 167**—*Bailee's responsibility—Rival claims to goods bailed—Remedy of bailee—Bailee aware of passing of title in goods bailed to third person—Subsequent delivery to bailor—Bailee's liability to the third person.*

The remedy of a bailee, from whom the goods bailed are demanded by rival claimants, is to file an interpleader suit against the claimants and thereby protect himself. But if he fails to do that and retains the goods for the bailor or delivers it to him, he must stand or fall by the bailor's title. Where paddy was sent to a mill for milling and the mill owner was informed that the rice had been sold to a third person, but later on the bailor sent a notice to the bailee asking him not to deliver the rice to the third person and the bailee delivers the rice belonging to the third person to the bailor, it is clearly a conversion and the bailee is responsible to the third person for damages. (*Roberts, C.J. and Dunkley, J.*) K. J. PATEL *v.* T. K. V. R. V. CHETTIAR. **1940 Rang. L.R. 361=A.I.R. 1940 Rang. 249.**

——**Ss. 151 and 152**—Common carrier—Loss of goods—Liability for. *See* CARRIERS ACT, S. 3. **1937 A.M.L.J. 56.**

——**Ss. 151 and 152**—Liability of hirer for loss by fire—Express covenant. *See* CONTRACT—HIRE-PURCHASE. **A.I.R. 1937 Sind 207.**

——**Ss. 151 and 152**—*Liability of bailee—Right to contract out of obligation—Contract to keep property for reasonable period as ordinary bailee—Right to add new term absolving from liability.*

There is no doubt that it is open to a bailee to contract himself out of the obligations imposed by S. 151 of the Contract Act. The Act does not prohibit contracting out of S. 151. There is no reason why a man should not be at liberty to agree to keep property belonging to another on the terms that such property is to be entirely at the risk of the owner. The only liability of a bailee is for negligence under S. 151, and therefore any words absolving him from risk must cover the consequences of negligence. But where the true contract as made at the time of acceptance of the offer is that the bailee is to keep or hold the property for a reasonable time as an ordinary bailee, it is not open to the latter to alter that contract until a reasonable period has expired and to add a new term to the contract by providing that he is not to be under the ordinary liability attaching to a bailee and that the property is kept at the owner's risk. (*Beaumont, C.J. and Kania, J.*) LAKHAJI DOLLAJI & Co. *v.* BOORUGU MAHADEO. **181 I.C. 334=11 R.B. 333=41 Bom.L.R. 6=A.I.R. 1939 Bom. 101.**

——**Ss. 160 and 148**—*Government promissory note deposited with Collector by company owning private bounded warehouse—Note not endorsed to company—Company's right to its return on cancellation of excise license—Government, if can plead interest of endorsee—Note attached by Government under S.* 88 (3) (*c*), *Cr. P. Code, against endorsee—Effect.*

When a Government promissory note is deposited with the Collector of Excise by a company owning a private bonded warehouse to secure their liability to pay duty in respect of dutiable liquors imported by them, the Government becomes the bailee of the note within the meaning of S. 148 of the Contract Act. Under S. 160 of that Act, the Government are under a duty to return it without demand on the cancellation of the company's excise license, when the company is not under any liability to Government in respect of the bonded warehouse, although the note had not been endorsed to the company at the time of the deposit. The Government being bailees, are not at liberty to refuse to return it pleading the interest of the person in whose name the endorsement stands. An order of attachment of the note obtained by Government under S. 88 (3) (*c*), Cr. P. Code, against the endorsee is no bar to a decree for the return of the note to the company. (*Panckridge, J.*) REEMAH EZEKIEL *v.* PROVINCE OF BENGAL. **I.L.R. (1939) 2 Cal. 52=185 I.C. 214=12 R.C. 350=41 Cr.L.J. 134=A.I.R. 1939 Cal. 746.**

——**S. 161**—*Construction and scope—Elephant—Hire of for term of one year—Death in the hands of bailee before term—Liability for damages—Negligence of bailee—Onus of proof—Evidence Act, S.* 106.

The defendant took an elephant from the plaintiff on hire for one year from 13th March, 1927, and sent it to the forest for timber hauling. On 8th October, 1927, the elephant died, and the plaintiff sued for damages alleging that the elephant was grossly underfed and overworked and had lost its life on that account.

CONTRACT ACT (1872), S. 161.

CONTRACT ACT (1872), S. 170.

Held, (1) that the burden of proving that the elephant died on account of the defendant's negligence was on the plaintiff, and that S. 161 of the Contract Act was no exception to the rule that a person alleging negligence must prove it; (2) that the death of the elephant was not itself *prima facie* evidence of negligence; (3) though it was not incumbent on the defendant to prove a negative case that he was not negligent, he must frankly put before the Court the material within his peculiar knowledge which would give the Court some idea of the condition of the animal and the work done, etc. A duty was cast on the bailee under S. 106 of the Evidence Act to give a reasonable explanation of the accident, the facts of which were within his peculiar knowledge and known to him alone, and it would be inequitable to call upon the bailor, who had no personal knowledge of how the accident happened, to prove a positive case of negligence until and unless the bailee had proved the circumstances that led to the sickness and death of the elephant. (*Varadachariar and Horwill, JJ.*) PONNAPPA NADAR *v.* PARAKKALATI. **171 I.C. 21=10 R.M. 301=45 L.W. 158=1937 M.W.N. 150=A.I.R. 1937 Mad. 411=(1937) 2 M.L.J. 329.**

———**S. 170**—*Bailee's rights—Sale of cattle entrusted for grazing fees—If justified.*

Though according to S. 170, Contract Act, the bailee has a right to retain goods until he receives due remuneration for the services he has rendered in respect of them, there is nothing in the section which enables him to sell the goods and recover his dues. Hence a person entrusted with cattle for gazing cannot sell them for the recovery of the grazing charges due. (*Puranik, J.*) VITHOBA *v.* MAROTI. **1940 N.L.J. 412.**

———**S. 172**—Profits accruing from immovable property—If can be pledged. *See* T. P. ACT, S. 58. **A.I.R. 1939 Lah. 15.**

———**S. 176**—*"Reasonable notice"—What constitutes.*

A notice to be valid under S. 176, must be a reasonable notice, and it must refer to the debt for which the goods were pledged and for recovering which the pledged goods are to be sold. Otherwise it will not be a proper notice as contemplated by S. 176. (*Wadia, J.*) COOVERJI UMERSEY *v.* MAWJI VAGHJI. **166 I.C. 565=9 R. B. 236=38 Bom.L.R. 982=A.I.R. 1937 Bom. 26.**

———**S. 176**—*Scope—Sale without proper notice—Effect on sale—Right of pawnor to damages—Measure of damages—Price realised by sale in foreign market—Evidence—Account sales—Value of.*

When there is an improper or wrongful sale by the pawnee, without a proper notice of sale as required by S. 176 the pawnee becomes liable in damages for conversion to the pawnor, but the sale is not avoided thereby or liable to be set aside. The correct measure of the damages to which the pawnor is entitled in such cases is the loss which he has actually sustained, taking into account the pawnee's interests in the goods sold at the time of the conversion. Account sales are *prima facie* evidences of the amount realised by the sale of the goods in foreign markets, in the absence of proof that the account sales are incorrect. A mere objection that they are not correct is not enough. Mere offers to purchase

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the goods made by others are also not conclusive as to the rates of prices. (*Wadia, J.*) COOVERJI UMERSEY *v.* MAWJI VAGHJI. **166 I.C. 565=9 R.B. 236=38 Bom.L.R. 982=A.I.R. 1937 Bom. 26.**

———**S. 178**—*Applicability—'Good faith'—Meaning of.*

The words 'good faith' in S. 178, Contract Act, before its amendment bear the same meaning as is given in sub-S. 20 of S. 3 of General Clauses Act, though in terms that sub-section may not apply to any Act earlier in date than the General Clauses Act. The general rule of English law is also to the same effect. In a suit by a motor dealer against his salesman and latter's pledgee (a bank) for recovery of a car or its value it was found that the salesman was in possession of the car and that he had at the same time shown and deposited with the bank a receipt granted by the motor dealer to the salesman for the price of the car and that the enquiries made by the bank also showed that he (the salesman) was the owner of the car. There was nothing to put the bank on its guard. It was argued that the fact that the car bore a trade number should have put the pledgee on its guard and the bank by not insisting on the production of the 'C' certificate which would have shown the name of the owner was guilty of negligence and had therefore not acted in good faith.

Held, that there was nothing suspicious in the conduct of the salesman so as to make any reasonable man suspect that he had no authority to pledge the car. The receipt granted by the motor dealer was sufficient evidence of the ownership of the car by the salesman and the 'C' certificate though *prima facie* evidence of ownership of the car not being the only evidence, the bank was not guilty of negligence in not insisting on the production of it and that the bank had acted in good faith and was therefore entitled to protection under S. 178. (*Pandrang Rao and King, JJ.*) MADRAS AUTOMOBILES *v.* MODERN BANK, LTD., COIMBATORE. **182 I.C. 25=12 R.M. 5=A.I.R. 1938 Mad. 545.**

———**S. 178**—Applicability—Pledgee not acting in good faith—If protected. *See* CR. P. CODE, S. 517. **A.I.R. 1937 Sind 33.**

———**S. 178**—*Mercantile agent obtaining consent of owner by fraud—Position of pledgee.*

If a person has authority to sell goods owned by another, he is a mercantile agent of that another and once it is proved that he has the consent of the owner to sell the goods, it is immaterial whether he has obtained that consent by fraud or not, and if he pledges the goods to a third party, the pledge under S. 178, Contract Act, is valid, and the right of the pledgee to hold the goods pledged to him is secure even though the mercantile agent is convicted under S. 420, Penal Code, for cheating. (*Parker, J.*) AH SAN *v.* MAUNG BA THIT. **169 I.C. 221=9 R.R. 387=38 Cr.L.J. 711=A.I.R. 1937 Rang. 146.**

———**S. 178**—*Object—Pledgee taking goods from person of whom he knew nothing—Pledge turning out to be offence and pledgor agent—Pledgee, if can retain property.*

S. 178 has been enacted in order to protect those persons who in good faith deal with persons whom they know to be mercantile agents, but of the details of whose agency they are not and

cannot be expected to be aware. It is relied upon only in cases where the pledgee is aware that the pledgor is a mercantile agent. The agent referred to is an agent such as the pledgee might well suppose had power to pledge, but if the pledgee did not know him to be an agent at all he cannot have any reason to suppose that he had power to pledge. If he takes goods from a person of whom he knows nothing whatsoever and if it turns out that the person's pledging of the goods with him was a criminal offence and that the pledgor was a mercantile agent, then he can have no claim to retain the property. (*Mackney, J.*) AH CHEUNG *v.* AH WAIN. **176 I.C. 703=11 R.R. 76=39 Cr.L.J. 784=A.I.R. 1938 Rang. 243.**

——**S. 178 (before amendment)**—*"Person who is in possession"—If includes owner.*

The words "a person who is in possession" as used in S. 178 of the Contract Act before its amendment includes an owner as well as a mercantile agent and are not limited either to the latter or to persons other than the actual owner of the goods. (*Derbyshire, C.J., Costello and Panckridge, JJ.*) RAMJIBAN SEROWGEE *v.* NIPPON YUSEN KAISHA. **67 C.L.J. 276.**

——**S. 178**—*Pledge of railway receipts—Effect of—Pledgee handing over receipts to pledgor—If loses rights in property pledged.*

A railway receipt is a document of title and a pledge of the railway receipt operates as a pledge of the goods, though by the general law a pledge of documents is not *prima facie* deemed to be a pledge of the goods. The pledgee does not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the pledgor or his agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them into the pledgee's godowns. Such a procedure is the usual course of business and is either necessary or at least convenient for the conduct of the business. (*Lord Wright.*) MERCANTILE BANK OF INDIA *v.* CENTRAL BANK OF INDIA. **65 I.A. 75=I.L.R. (1938) Mad. 360=172 I.C. 745=42 C.W.N. 321=1938 O.L.R. 68 (2)=1938 O.W.N. 206=1938 A.L.R. 100=1938 P.W.N. 152=19 Pat.L.T. 147=4 B. R. 260=47 L.W. 329=1938 A.L.J. 273=10 R.P. C. 169=1938 A.W.R. (P.C.) 90=66 C.L.J. 510 =1938 O.A. 312=1938 M.W.N. 552=40 Bom. L.R. 713=32 S.L.R. 313=A.I.R. 1938 P.C. 52= (1938) 1 M.L.J. 268 (P.C.).**

——**S. 178**—*Scope of.*

In interpreting S. 178 of the Contract Act the Courts always drew a distinction between juridical possession and mere custody. In the new S. 178 the pledgee is only protected when the pledge is made by a mercantile agent. (*D. R. Norman.*) GULAB CHAND *v.* EMPEROR. **1937 A.M.L.J. 73.**

——**S. 178**—*Validity of pledge—Burden of proof.*

Under S. 178 of the Contract Act, a pledgee may get a better title to the goods or documents pledged than the pledgor had himself provided the circumstances set out in the section are satisfied. The burden of proving the existence of those circumstances is upon the party setting up the validity of the pledge. (*Derbyshire, C.J., Costello and Panckridge, JJ.*) RAMJIBAN SEROWGEE *v.* NIPPON YUSEN KAISHA. **67 C.L.J. 276.**

——**S. 178**—Wife delivering shares to husband for safe custody—Pledge of shares by husband with bank—Bank's right to enforce charge against shares. *See* CONTRACT ACT, S. 237. **A.I.R. 1937 All. 255.**

——**S. 182**—"Agent"—Ajahat gumasta collecting fees for Deshmukh of village—If agent of Deshmukh. *See* LIMITATION ACT, S. 10. **41 Bom.L.R. 215.**

——**S. 182**—*'Agent'—Lessee or contractor of tolls under Municipality—Wrongful and unauthorised collection of tolls—Suit against Municipality for refund—Maintainability.*

A toll contractor of a Municipality though he is referred to as a "lessee" of tolls under the Municipal Regulation, collects the tolls for and on behalf of the Municipality under the express authority vested in him by the Municipality, and is an agent of the Municipality within the meaning of S. 182 of the Contract Act. The Municipality can therefore be sued by a person from whom tolls have been wrongfully and unauthorisedly levied and recovered through the contractor. It cannot be contended in such a case that there is no privity of contract between Municipality and the person from whom the tolls are levied. (*Sankaranarayana Rao and Nageswara Iyer, JJ.*) SANKARA IYER *v.* RAJACHAR. **15 Mys.L.J. 489.**

——**S. 182**—*Agent—Person employed to sell unredeemed articles from pawn shop.*

The definition of an agent in S. 182 is wide enough and covers a person employed to sell unredeemed articles from a pawn shop on behalf of the employer. Such a person although a servant or a shop assistant, is an agent of the employer in the matter of selling such goods. (*Mackney, J.*) AH CHEUNG *v.* AH WAIN. **176 I.C. 703=11 R.R. 76=39 Cr.L.J. 784=A.I.R. 1938 Rang. 243.**

——**S. 182**—*Commission agent—Position of.*

Commission agents are agents within S. 182 but are not agents pure and simple. They are agents up to a point and to that extent they stand in a position of active confidence towards their principals, but beyond that they are not agents in the real sense of the term and the relationship between the parties from then on is one of debtor and creditor. (*Vivian Bose, J.*) KALYANJI *v.* TIRKARAM. **176 I.C. 675=11 R.N. 65=A.I.R. 1938 Nag. 254.**

——**S. 182**—*Commission agent receiving goods as such and then selling them—Position of.*

Where a person receives goods from another as a commission agent and then sells them for him, he is an agent up to a certain point that is up to the date of the sale. Thereafter whether he still continues as an agent or the relationship is that of a debtor and creditor depends on whether the commission agent when he sells has authority to sell in his own name and whether he has authority in his own right to pass a valid title. If he has authority to sell and also authority to pass a valid title in his own right he is acting as a principal *vis a vis* the purchasers and not merely as an agent and therefore from that point on, he is debtor of the erstwhile principal and not merely an agent. Whether this is so or not must depend on facts in each particular case.

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(*Vivian Bose, J.*) KALYANJI *v.* TIRKARAM. **176 I.C. 675=11 R.N. 65=A.I.R. 1938 Nag. 254.**

———**S. 182**—*Definition—Scope of.*

Definition of agent given in S. 182 is very wide and embraces a servant pure and simple. All the agents therefore cannot be placed in the same category. (*Vivian Bose, J.*) KALYANJI *v.* TIRKARAM. **176 I.C. 675=11 R.N. 65=A.I.R. 1938 Nag. 254.**

———**S. 187**—*Liability of principal for act of agent—Suit for price of goods supplied to master through servants—Implied authority of servants—Proof required.*

A person claiming against the principal for an act of his agent must show that the act done was within the scope of the authority or ostensible authority held or exercised by the agent and this can be shown by practice as well as by a written instrument. In a suit for the price of goods supplied on credit to the defendant through his servants, the plaintiff, therefore, must show in the absence of express written authority a course of dealing by which it was a practice for goods to be supplied to him through his servants in the course of their employment. If he shows such a practice, it will be no answer for the defendant to say that particular items of goods did not reach him once the plaintiff has established that they were supplied to his servants for his use. (*Rowland, J.*) SUGA KUER *v.* BRIJRAJ RAMNIWAS. **1937 P.W.N. 36=3 B.R. 509=9 R.P. 521=168 I.C. 986=A.I.R. 1937 Pat. 526.**

———**Ss. 187 and 188**—*Unauthorised borrowings by agent—Principal's liability—Creditor's right to relief against principal—Equitable rule based on theory of unjust enrichment—If excluded by Contract Act.*

Where the agent's authority is defined in writing, it is doubtful if S. 187 of the Contract Act can be relied upon for it is well settled that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. The limits of necessary implication are indicated by S. 188 of the Contract Act. Where there is no justification for the borrowing by the agent on the ground of necessity or with reference to the usual course of business the principal cannot be held liable on the footing that in borrowing the agent has acted within the limits of his authority. But there is a well-established rule of equity based on the theory of unjust enrichment, namely, where by any wrongful or unauthorized act of the agent the money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or the value of the property. The absence of other funds in the hands of the agent at the time of the borrowing is not a necessary condition of the creditor's right to relief against the principal. This equitable rule is not excluded by the Contract Act. (*Varadachariar and Pandrang Row, JJ.*) GOOLABCHAND *v.* M. J. V. MITTER. **182 I.C. 929=12 R.M. 181**

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=1938 M.W.N. 1023=48 L.W. 666=A.I.R. 1938 Mad. 966=(1938) 2 M.L.J. 688.

———**S. 188**—*Authority to receive payment—If implies authority to sue for it.*

Where a person has been authorised to receive refund of octroi duty from the Municipal Board he cannot be deemed to have also the authority to adopt any legal process for recovering the amount. A right to receive is different from a right to recover. (*Mulla, J.*) MUNICIPAL BOARD, JAUNPUR *v.* BANWARI LAL. **12 R.A. 266=184 I.C. 648 (2)=1939 A.L.J. 897=1939 A.W.R. (H.C.) 631=A.I.R. 1939 All. 623.**

———**S. 189**—*Agent acting without principal's instructions—When protected.*

S. 189 of the Contract Act is meant to protect the agent, if for the purposes of safeguarding the interests of his principal the agent does certain acts without any express instructions from the principal. In such a case the agent is exempted from all liability, if his acts are the acts of a man of ordinary prudence and are performed at the time of an emergency. The agents are ordinarily expected to carry out the instructions of their principals in all respects. If, however, the goods are perishable or perishing, the agent is entitled to deviate from his instructions as to the time or price at which they are to be sold. If the principal thereafter sues the agent for damages as a result of his selling the goods without the principal's instructions, the agent is protected under S. 189 of the Act. (*Tek Chand and Abdul Rashid, JJ.*) HARKISHAN SINGH *v.* NATIONAL BANK OF INDIA, LTD. **42 P.L.R. 393=A.I.R. 1940 Lah. 412.**

———**S. 192**—*Sub-agent's liability to account to principal.*

A sub-agent is not liable to account to the principal except in case of fraud or wilful wrong. (*Costello and Mukherjea, JJ.*) BANWARI MUKUNDA DAS NANDI DALAL *v.* PRAMATHA NATH BHATTACHARJYA. **I.L.R. (1937) 2 Cal. 124=173 I.C. 530=10 R.C. 534=A.I.R. 1938 Cal. 12.**

———**S. 194**—*Implied authority to appoint another to act for the principal—Inference—Circumstances.*

Generally an agent cannot without authority from his principal devolve upon another obligations to the principal which he has himself undertaken to fulfil. But in special circumstances it is permissible for the agent to appoint a substitute who would be responsible to the principal in the same way as the agent himself. Where a banking concern is appointed an agent with very wide powers in the matter of letting out certain buildings in the city, it can well be inferred that the concern had authority to appoint another to act for the principal and the person so appointed is accountable to the principal. (*Ismail, J.*) MAHINDER DAS *v.* MOHAN LAL. **180 I.C. 617=11 R.A. 489 =1939 A.L.J. 37=1939 A.W.R. (H.C.) 40= A.I.R. 1939 All. 188.**

———**S. 196**—*Applicability—Contracts forbidden by law—Ratification—Conditions of validity—Delay—Effect.*

S. 196 of the Contract Act refers to contracts which have been entered into by persons on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden by law. An option of ratification under

the section can be held to be capable of being exercised within a reasonable time of the act purported to be ratified and not after the expiry of the period for which the option was open or long after the expiry of the period, if any, for which the contract was to relate. (*Pandrang Row and Abdur Rahman, JJ.*) MADURA MUNICIPALITY *v.* ALAGIRISAMI NAIDU. **I.L.R. (1939) Mad. 928=187 I.C. 780=12 R.M. 764=50 L.W. 440=1939 M.W.N. 821=A.I.R. 1939 Mad. 957.**

——**S. 196**—*Ratification—What constitutes—Effect of ratification.*

To constitute a binding adoption of acts *a priori* unauthorized, these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal; and (2) there must be a full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were. Ratification relates back to the time of inception of the transaction and has a complete retroactive efficacy. (*D. N. Mitter and Patterson, JJ.*) SURENDRANATH ROY *v.* KEDAR NATH BOSE. **161 I.C. 224=8 R.C. 492 =63 C.L.J. 86=A.I.R. 1936 Cal. 87.**

——**S. 198**—Ratification—Applicability of the doctrine. *See* CONTRACT—VARIATION OF. **42 C. W.N. 8=A.I.R. 1937 P.C. 296 (P.C.).**

——**S. 200**—*Scope—If exhaustive—Ratification—Effect on third parties.*

The provisions of the Contract Act relating to agency are not meant to be exhaustive. Neither S. 200 of the Act nor the other provisions of the Act relating to ratification affect the general principle of the law of agency that the general rule as to ratification would not apply when it would affect the rights of other parties. A ratification does not relate back when persons other than the contracting party have acquired interests prior to ratification. (*Venkataramana Rao and Abdur Rahman, JJ.*) THINNAPPA CHETTIAR *v.* KRISHNA RAO. **51 L.W. 453=(1940) 2 M.L.J. 726.**

——**S. 201**—*Agency—Appointment of agent as receiver—If terminates agency.*

When once the Court takes charge of the property in a suit by the appointment of a Receiver or otherwise, rights of management or service which other persons may possess by virtue of and contract with the original owners will cease. But this is not an absolute rule of law but will depend upon the circumstances of each case.

Where the agent of the original owner is appointed as the receiver and he works as an agent of his master notwithstanding his appointment as receiver, his agency does not cease. (*Varadachariar and Mockett, JJ.*) HARI RAO *v.* SOMASUNDARAM CHETTIAR. **166 I.C. 360=9 R.M. 366 =1936 M.W.N. 932=A.I.R. 1936 Mad. 980.**

——**S. 201**—*Agent under power of attorney executed by partners of firm—Authority to agent to file suits and sign plaints on behalf of firm—Insolvency of one partner—If terminates agency.*

Where three persons who are the partners of a firm execute a power of attorney in favour of another constituting the latter the agent of the firm and giving him power to take any legal action or proceeding in connection with the firm and to sign any plaint, etc., on behalf of the firm, the fact that one of the partners subsequently be-

comes an insolvent does not have the effect of terminating the agency so created. No such intention can be read into the document. (*Bose, J.*) SETH AGARCHAND *v.* KASAM. **I.L.R. (1937) Nag. 28=174 I.C. 179=10 R.N. 350=A.I.R. 1937 Nag. 314.**

——**S. 201**—*Agency—Termination—Joint and several principals—Death of one—Effect as regards surviving principal—Suit by latter for rendition of accounts—Starting point.*

Where there are two or more principals and they are joint and several if one of them dies the agency terminates only as regads the representatives of the deceased principal, but it continues as regards the surviving principal. So the period of limitation for the suit against agent for rendition of accounts does not begin to run as against the surviving principal from the death of the deceased principal. (*R. C. Mitter, J.*) MONINDRA LAL CHATTERJEE *v.* HARI PADA GHOSE. **166 I.C. 608=9 R.C. 555=64 C.L.J. 587=41 C.W.N. 27 =A.I.R. 1936 Cal. 650,**

——**S. 201**—*Joint principals—Death of one—If terminates agency as regards surviving principal.*

Where an agency has been created by two principals, the death of one of them terminates the agency merely as regards himself, but does not necessarily operate as such also as regards his joint principal. The true rule is that in each case the Court must determine the true intention of the parties to the contract from the terms thereof and from the surrounding circumstances. (*Vivian Bose, J.*) AGARWAL JORAWARMAL *v.* KASAM. **I. L.R. (1937) Nag. 28=174 I.C. 179=10 R.N. 350=A.I.R. 1937 Nag. 314.**

——**Ss. 201 and 202**—*Applicability—Hindu reversioners—Document by in favour of stranger authorising him to file a suit for possession of estate and to conduct it—Provision for division of estate between them and stranger after recovery in suit in case of success—Death of one reversioner—Effect—Suit by stranger on behalf of all—Maintainability—Agency—If coupled with interest—Right transferred—If mere right to sue.*

On the death of a Hindu widow who held her husband's estate, the estate vested in *R* and *B*, sons of two brothers. After *R's* death, his sons (plaintiffs 1 to 5), along with *B*, executed on 21-11-1916, a document in favour of the 6th plaintiff who was a stranger. The said document provided for the 6th plaintiff filing a suit for possession of the estate on behalf of all the plaintiffs and *B*, and conducting it, and for the properties when recovered by the suit, being divided in two equal halves between him and the reversioners, *i.e.*, plaintiffs 1 to 5 and *B*. *B* himself had a half-share in the properties to be recovered. On 27-9-1926, which was the last day of limitation, the suit was brought, the plaint was in fact signed and verified only by the 6th plaintiff who described himself as the authorised agent under the document of plaintiffs 1 to 5, though it purported to have been filed by all the plaintiffs. *B* died previous to the filing of the suit, and his two sons were impleaded as defendants 6 and 7.

Held, (1) that the document in favour of the 6th plaintiff executed by plaintiffs 1 to 5 and *B* could be construed as a power-of-attorney in favour of the 6th plaintiff; (2) that since *B* one

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of the executants of the power died before it was acted upon, the power-of-attorney was no longer in force and the agency terminated on his death under S. 201, Contract Act; (3) that the agency was not one coupled with interest and was not saved by S. 201 of the Contract Act, as that section applied only to cases in which authority is given for the purpose of being a security or a part of the security and not to cases where the interest of the donee arises afterwards and incidentally; (4) that the 6th plaintiff's agency having become revoked before the date of the suit, the plaint filed by him was an invalid and ineffectual document; (5) that there was no present transfer of a moiety of the reversioner's interest in favour of the 6th plaintiff, but only an assignment of a mere right to sue under S. 6 (*d*), T. P. Act, and hence it was inoperative and invalid; (6) that though the transaction might be an unfair and unconscionable bargain, that was a question between the assignors and the assignee, and the defendants who had no concern with that could not plead that the agreement was champertous so as bar the maintainability of the suit. (*Venkatasubba Rao, J.*) VENKANNA *v.* ATCHUTARAMANNA. **182 I.C. 953=12 R.M. 195=1938 M.W.N. 259 =47 L.W. 492=A.I.R. 1938 Mad. 542=(1938) 1 M.L.J. 610.**

———**S. 202**—Applicability—Power-of-attorney executed by pensioner in favour of creditor—Authority to agent to draw out pension and to appropriate part towards debt—If agency complied with interest—Revocability. *See* MYSORE T. P. REGULATION, S. 6 (*h*). **42 Mys.H.C.R. 715.**

———**S. 213**—Construction—Accounts by agent to principal—If to be rendered at principal's place of business. *See* C. P. CODE, S. 20 (*a*). AND (*b*). **1940 M.W.N. 254.**

———**S. 220**—*Construction and scope—Misconduct of agent—Effect on right to commission—Proof of loss to principal—If necessary for deprivation of commission—Principles.*

There is no warrant for holding that an agent's claim to remuneration is not affected by his misconduct unless it is also shown that the principal has incurred loss thereby. Nor is it correct to hold that even where loss had been caused to the principal it would be sufficient if the agent is directed to make good the loss; the fact that the agent makes good the loss would not entitle him to his full remuneration. To so hold would be to ignore the provisions of S. 220 of the Contract Act. It is clear that the payment of damages caused by the misconduct of the agent is in addition to the forfeiture of commission or remuneration, and the forfeiture of commission is the result of misconduct and not of loss arising from misconduct. A principal is entitled to have an honest agent and it is only the honest agent who is entitled to any commission. If the agent does not perform his appropriate duties, of if he is guilty of gross negligence or gross misconduct, or gross unskilfulness in the business of his agency, he would not only become liable to his principal for any damages which he may sustain thereby, but also forfeit all his commissions. (*Varadachariar and Abdur Rahman, JJ.*) VASANTA RAO ANANDA RAO *v.* GOPALA RAO SETHU RAO. **188 I.C. 626=13 R.M. 41=1939 M.W.N. 1046 (2)=A.I.R. 1940 Mad. 299.**

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———**Ss. 220 and 63**—*Contract in respect of which agent himself is undisclosed principal—Agent, if entitled to remuneration—Principal not repudiating the contract—Effect of.*

It cannot be gainsaid that it is misconduct on an agent's part to deal on his own account in the businesss of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances. An agent is, therefore, not entitled under S. 220 of the Contract Act to any renumeration in respect of a contract of sale in which he himself is the undisclosed principal although purporting to act as agent. The fact that the principal did not repudiate the contract although he knew before performance that the agent was in fact the buyer is immaterial, as the principal cannot thereby be held to have acknowledged the claims of the agent both as an agent and purchaser. S. 63 of the Contract Act is inapplicable to such a case as owing to the limitations imposed by S. 215 on the principal's right to repudiate, there could be no question of his electing to accept a satisfaction from the agent other than the performance of the contract according to its terms. (*Panckridge, J.*) RAMSAROOP MAMCHAND *v.* CHAJURAM & SONS. **41 C.W.N. 460=I.L.R. (1937) 1 Cal. 757=169 I.C. 827=10 R.C. 36.**

———**S. 222**—*Agent executing sarkat for loss arising out of contract—Right to recover loss from principal.*

Where an agent enters into a contract with another person on behalf of his principal, and being required to pay the amount of the loss arising out of the transaction executes a sarkat in favour of the other party, undertaking to make good the loss, he is entitled to recover the said loss from the principal under S. 222, Contract Act. The execution of sarkat by the agent in favour of the other party is as good as a cash payment to him. (*Subhedar, A.J.C.*) KODUSAO ONKARLAL *v.* SURAJMAL NARAYANJI. **31 N.L.R. (Supp.) 154 =161 I.C. 787=8 R.N. 237=A.I.R. 1936 Nag. 37.**

———**S. 227**—*Applicability—Agent authorized to stand surety for one person, standing surety for two more—Unauthorized act is separable from authorised—Principal's liability.*

Where an agent authorized to stand surety for one person stands surety for two persons in addition, outside the scope of his authority, the unauthorised act of the agent is clearly separable from his act in standing surety for the person authorized and the principal's liability will be restricted to that person only under S. 227, Contract Act. (*Roberts, C.J. and Leach, J.*) MAYANDI *v.* K. E. R. M. RAMAN CHETTYAR. **174 I.C. 915=10 R.R. 445=A.I.R. 1937 Rang. 499.**

———**S. 230**—*Agent signing promissory note—Liability of—Ground of exemption from liability—Suit on promissory note by creditor—Note not mentioning that principal was debtor—Right to decree against agent—Negotiable Instruments Act, S. 28—Effect of.*

Under the ordinary law of contract enacted in S. 230 of the Contract Act, if an agent acts on behalf of his principal, the principal being disclosed, a creditor who lends money to the agent is entitled to sue the principal. But the law under

the Negotiable Instruments Act, is an exception to that rule. S. 28 of the Negotiable Instruments Act requires that to make the principal liable it must be clearly indicated on the face of the instrument that the agent is acting on behalf of such principal. Where a promissory note is executed by the agent alone, and there is no suggestion of any indication on the face of the note that the principal is the real debtor, the creditor, in order to bind the principal and make him liable must sue on the loan and not on the instrument. But when the suit is based on the note, and the agent neither alleges nor proves any facts which would entitle him to take advantage of the exception under S. 28 of the Negotiable Instruments Act, *e.g.*, inducement by the plaintiff to sign the bill on the footing that he (the agent) would not be liable, the agent cannot escape liability. (*Wort, J.*) BANK *of* BEHAR, LTD. *v.* MADHUSUDAN LAL. **18 Pat.L.T. 337=170 I.C. 451=10 R.P. 125=3 B.R. 729=1937 P.W.N. 344=A.I.R. 1937 Pat. 428.**

———**Ss. 230 and 69**—*Agent undertaking to pay principal for goods supplied by him and not paid for by purchaser—Order not placed through agent—Right of agent to sue purchaser.*

Under S. 230 of the Contract Act, an agent is not entitled to sue the purchaser personally when the order is not placed through him, even though he has by a separate contract made with the principal undertaken to pay the principal for all goods supplied by him and not paid for by the purchaser. Nor is the agent entitled to claim the benefit of S. 69 as he is not a person interested in the payment of the price to the principal. (*Jai Lal, J.*) NASIRUDDIN *v.* DURGA PRASAD. **168 I.C. 458=9 R.L. 633=39 P.L.R. 457=A.I.R. 1937 Lah. 607.**

———**S. 230**—*Agent having interest in contract —Right to sue in his own name.*

Where an agent enters into a contract as such, if he has an interest in the contract, he may sue in his own name, the agent being in such a case virtually a principal to the extent of his interest in the contract. (*Tek Chand, J.*) HARDAYAL MAL *v.* KISHAN GOPAL. **178 I.C. 939=11 R.L. 510=A.I.R. 1938 Lah. 673.**

———**S. 230**—Applicability—Hindu joint family business—Loan advanced by manager—Suit by manager alone without stating that suit is on behalf of family—Maintainability. *See* HINDU LAW—JOINT FAMILY. **(1938) 1 M.L.J. 526.**

———**S. 230**—*Applicability—Pucca Arhtia.*

Ordinarily the words "Pacca Arhtia" convey that the so-called agent is acting as a principal on behalf of the person with whom he buys or sells the commodities in question. There can therefore be no question of the application of S. 230 of the Contract Act in his case. (*Dalip Singh and Skemp, JJ.*) B. C. G. A. PUNJAB, LTD. *v.* BHARAT KRISHNA TRADING CO., LTD. **177 I.C. 985=11 R.L. 384=A.I.R. 1938 Lah. 253.**

———**Ss. 230 and 60**—*Money paid by judgment-debtor to decree-holder's pleader in part payment of decrees—Pleader, if can be sued alone—Pleader's right of appropriation to any one of decrees.*

Where a judgment-debtor against whom the decree-holder had obtained six decrees paid some money to the decree-holder's pleader in part payment of the decrees and had the execution stayed for a certain period, but on failure of the judgment-debtor to pay the decretal dues in full within that period writs of attachment were executed against him resulting in payment of five of the decrees in full, and the pleader thereafter certified in Court the money paid to him as having satisfied the sixth decree in which the judgment-debtor was only one of two judgment-debtors, in a suit by the judgment-debtor against the pleader for the recovery of the amount paid to him.

Held, (*i*) that the money having been paid to the pleader as agent on behalf of the principal, *viz*,. decree-holder, the suit was not maintainable against the pleader alone; (*ii*) that the money having been paid in part payment of the decrees, the pleader did not act wrongly in appropriating it to the unsatisfied decree. (*M. C. Ghose, J.*) BIDHU BHUSAN SEN *v.* MOFIZUDDIN AHMED. **42 C.W.N. 1263.**

———**S. 233**—*Scope and effect—Right to sue agent and principal.*

In cases where the agent is personally liable the law allows a plaintiff to sue both the principal and agent and to get judgment against both of them jointly for the amount sued for. (*Leach, C.J. Madhavan Nair, J.*) MAHOMED SHAMSUDIN RAVUTHAR *v.* SHAW, WALLACE & CO. **I.L.R. (1939) Mad. 282=184 I.C. 153=12 R.M. 414=49 L.W. 343=1939 M.W.N. 209=A.I.R. 1939 Mad. 520=(1939) 1 M.L.J. 509.**

———**S. 235**—*Basis of action under—Measure of damages.*

The basis of an action under S. 235 of the Contract Act is the implied warranty by the professing agent that he had the authority to act. The measure of damages must accordingly in substance be what benefit the other party would have had from the contract if the representation that he was the authorised agent had been true. (*M. C. Ghose and R. C. Mitter, JJ.*) KISHORI PRASAD *v.* SECRETARY OF STATE. **I.L.R. (1938) 1 Cal. 463=176 I.C. 990=11 R.C. 194=42 C.W.N. 116=66 C.L.J. 592=A.I.R. 1938 Cal. 151.**

———**S. 237**—*Applicability — Conditions—Wife delivering shares to husband for safe custody—If agent for dealing with shares—Pledge of shares by husband with bank—Bank's right to enforce charge against shares.*

S. 237 of the Contract Act has no application unless the relationship of principal and agent is proved to exist between the parties. If illustration (*b*) to that section should come into operation, the person handing over the negotiable instrument must be a principal and the person who receives it must be an agent. Where a wife hands over certain shares to her husband for safe custody, the husband can in no sense be said to be the agent of the wife, and if the husband pledges them with a bank, without having any authority to do so, S. 237 cannot avail the bank in order to entitle the bank to enforce its charge against the shares. A custodian of goods for safe custody is a bailee of the goods and not an agent of the true owner for the purpose of dealing with the goods. (*Harries, J.*) BENARES BANK, LTD., AGRA *v.* PREM & CO. **168 I.C. 156 =9 R.A. 616=1937 A.L.J. 150=1937 A.W.R. 81=1937 A.L.R. 306=A.I.R. 1937 All. 255.**

CONTRACT ACT (1872), S. 237.

———S. 237—*Applicability—Servant of firm ordering goods from another firm—Selling firm having no knowledge and making no inquiry—Right to proceed against other firm.*

A person sent an order for goods in the name of firm *A* to firm *B* and firm *B* executed the order. Such person was not a manager but was only a servant with very limited powers of the firm *A*. The firm *B* had no previous dealings with firm *A*. The firm *B* had no knowledge and made no inquiry about firm *A* before sending goods as per order.

Held, that such a person was not in fact and in law the agent of the firm *A*. The firm *B* could not be deemed to have been influenced by the fact that the firm *A* held out such person as its authorised agent whether as a manager or otherwise to order goods on its behalf. Such person therefore was not entitled to bind the firm *A* so as to make the firm *A* liable for goods ordered by him. (*Davis, J.C. and Mehta, A.J.C.*) GOBINDRAM *v.* PARTABSING. **169 I.C. 423=10 R.S. 1=A.I.R. 1937 Sind 151.**

———S. 239—*Firm, if can be a partner.*

A firm as such cannot enter into a contract of partnership, because it is not a legal entity. But there is nothing to prevent the individual members of a firm from being included in a larger partnership in another firm. Such a partnership will have for its members all the partners of the partner firm and the others. (*Niamatullah and Allsop, JJ.*) BRIJ KISHORE RAM SARUP *v.* SHEO CHARAN LAL. **I.L.R. (1938) All. 100=173 I.C. 853=10 R.A. 503=1938 All.L.R. 193=1937 A.L.J. 1328=1937 A.W.R. 1142=A.I.R. 1938 All. 69.**

———S. 239—*Firm, if can be member of a partnership.*

According to the provisions of S. 239 of the Contract Act partnership can be the outcome only of a combination of persons and as a firm is not a person or a legal entity, a firm as such cannot be a member of a partnership. But there is nothing in law to bar individual members from entering into partnership with other individuals. (*Iqbal Ahmad, Allsop and Bajpai, JJ.*) CHANDRIKA PRASAD RAM SWARUP *v.* COMMISSIONER OF INCOME-TAX. **I.L.R. (1939) All. 690=182 I.C. 845=12 R.A. 58=1939 A.W.R. (H.C.) 479=1939 I.T.R. 269=1939 A.L.J. 419=A.I.R. 1939 All. 341 (F.B.).**

———S. 239—*Firm—If can be partner—Death of member of constituent firm—If dissolves main firm.*

A firm as such cannot be a member of a partnership; a firm is not a person as contemplated by S. 239 of the Contract Act. All the members of the firm must be taken to be individual partners in the main firm; and the main firm would be dissolved on the death of any individual member of the constituent firm. (*Broomfield and Macklin, JJ.*) HAKMAJI MEGHAJI *v.* PUNNAJI DEVICHAND. **11 R.B. 165=178 I.C. 419=40 Bom.L.R. 995=A.I.R. 1938 Bom. 453.**

———S. 239—*Partnership — Validity—Minor partner not contributing capital, labour or skill—His guardian receiving separate wages for his labour.*

Where in a partnership business prior to the Partnership Act (1932) out of the two partners one is a minor who is not to contribute any capital, labour or skill and his guardian appointed as a manager is paid for his labour separately, there is no valid partnership in law. Even if the guardian supplies labour on behalf of the minor, there is no valid partnership as S. 239, Contract Act, implies contribution of personal labour. (*Bhide, J.*) NARINJAN SINGH *v.* DAMODAR SINGH. **167 I.C. 311=9 R.L. 481=A.I.R. 1936 Lah. 831.**

CONTRACT ACT (1872), S. 251.

———S. 241—*Scope—Death of partner—Continuance of partnership by surviving partner—Right of representative of deceased partner to share in partnership assets and profits—Option under English Partnership Act and Indian Partnership Act—If available.*

There is no explicit provision in the Contract Act as in force in the Mysore suit, which gives the representative of a deceased partner the option given to him under S. 37 of the Indian Partnership Act of 1932 and S. 42 of the English Partnership Act, to take either what belonged to the deceased partner out of the partnership assets with interest upon it for the period it is left in the business, or his share of the partnership assets with his share of the profits of the business after his death in accordance with his share in the assets. But that option was recognised in England as available before the Partnership Act became law, and it was recognized in British India too before the Partnership Act of 1932 was passed, under the Contract Act. The same principle should apply in Mysore also, and the same option should be allowed to the representative of a deceased partner, even though the business after the death of the partner is carried on only by one surviving partner and not by more than one. (*Reilly, C.J. and A. S. R. Chary, J.*) CHANNAVEERAPPA *v.* HOSKOTE NANJAMMA. **14 Mys. L. J. 430=42 Mys.H.C.R. 160.**

———S. 247—*Applicability—Family partnership—Minor members—When bound as partners.*

Where members of a family carry on a business and there are minor members in the family there must be some positive conduct from which a Court can infer that the regular members intended to admit to the benefit of the partnership certain minor members. The mere fact that everybody concerned assumed by some error of law that all the children of the family whether majors or minors, were in some manner interested in the business does not suffice to bring S. 247 into operation. (*Varadachariar and Mockett, JJ.*) VENKATARAMA IYER *v.* BALAYYA YESUTHASAN. **165 I.C. 478=9 R.M. 260=44 L.W. 725=1936 M.W.N. 468=A.I.R. 1936 Mad. 595.**

———S. 251—*Scope—Implied authority of partner to borrow—Firm carrying on cotton pressing business—Loan by partner in name of firm—Amount not shown in books of firm but utilised for private purposes—Liability of other partners.*

Where one of the partners of a firm carrying on the business of cotton pressing, for which it is necessary and usual to borrow money, borrows money on promissory notes executed by him alone on the company's note paper and on behalf of the company, without the knowledge or specific authority of the other partners, and utilises them for his own private purposes, the loans not being shown in the books of the firm, all the partners

CONTRACT ACT (1872), S. 251.

are liable for the debts so contracted in the absence of evidence to show that the creditor was aware that the borrowing partner did not require them for the firm but for his own private purposes. It is for the other partners to make out that the borrowing partner had no implied authority to borrow. S. 251 of the Contract Act requires it to be determined whether the acts of a partner were acts necessary for, or usually done in, carrying the business of the partnership of which he is a member. The section deals primarily with the extent of authority that a partner must be deemed to possess as between himself and his co-partners. The position of third parties dealing with the firm may, as against individual partners, be taken to be different from that of the partners amongst themselves. The section has to be read in conjunction with other sections of the Act. (*Broomfield and Tyabji, JJ.*) JAYANTI LAL *v.* POPAT LAL. **170 I.C. 147=10 R.B. 51=39 Bom. L.R. 343=A.I.R. 1937 Bom. 262.**

——**Ss. 251 and 263**—*Scope—Decree in favour of money-lending firm—Assignment by one partner—Validity as against the others—Dissolution of firm—If validates assignment—Partnership Act, Ss.* 19 *and* 47.

Two of seven partners of a money-lending firm assigned individually to two persons a decree obtained by the firm for about Rs. 4,000, one for Rs. 1,300 and the other for Rs. 1,700. The respective assignees applied to the Court to execute the decree as transferees-decree-holders.

Held, that the transaction in each case amounted in fact to the compounding of the claim under the decree though it took the form of an assignment and was therefore invalid, because the making of the assignment could not be regarded as an act within the scope of the apparent or ostensible authority of the partners. An authority to give discharge for a debt on payment would not include a power to compromise or settle it in any way a partner liked. The fact that the firm itself became dissolved would not make any difference and could not validiate the assignments, the principle being that the authority of the partners would continue only so far as might be necessary to wind up the affairs of the firm. (*Venkatasubba Row and Cornish, JJ.*) NAGAPPA *v.* BHAGABANJI RASAJI. **59 Mad. 1036=164 I.C. 239=9 R.M. 97=1936 M.W.N. 716=43 L.W. 769=A.I.R. 1936 Mad. 593=71 M.L.J. 378.**

——**Ss. 252 and 253**—*Partnership-at-will—Dissolution—Institution of suit by partner—If enough to put an end to partnership.*

Where there is no definite contract between the partners as to the duration of the partnership, the partnership is a partnership at-will and as such is liable to be terminated at any time at the will of either partner. Either partner is entitled at any time to intimate his desire to put an end to the partnership and he could so intimate that desire by bringing a suit for dissolution against his partner. The institution of the suit is of itself enough to put an end to the partnership. (*Costello and Mukherjea, JJ.*) MANI BHUSAN DUTT ROY *v.* AMULYA CHANDRA DEB ROY. **I.L.R. (1937) 2 Cal. 120=41 C.W.N. 522.**

——**S. 253 (5)**—*Construction—Invalid act—Confirmation by subsequent act—If validates.*

CONTRACT ACT (1872), S. 261.

Under S. 253 (5) of the Contract Act, an *ex post facto* confirmation cannot give validity to a transaction initially invalid. The section presupposes that a decision was taken, the question having been raised and debated. The power of the majority of partners to decide a matter, though not in itself of a judicial kind, is subject to the rule that every partner must have an opportunity of being heard and the decision must be made in good faith, with a view to the collective interest of the firm. (*Venkatasubba Row and Cornish, JJ.*) NAGAPPA *v.* BHAGABANJI RASAJI. **59 Mad. 1036=164 I.C. 239=9 R.M. 97=1936 M.W.N. 716=43 L.W. 769=A.I.R. 1936 Mad. 593=71 M.L.J. 378.**

——**S. 253**—Firm consisting of constituent firms—Death of member of constituent firm—If dissolves main partnership. *See* CONTRACT ACT, S. 239. **40 Bom.L.R. 995.**

——**S. 254**—*Insolvency of one partner—Effect—Firm—If dissolved—Suit by remaining partners for money due to firm—Competency—C.P. Code, O.* 30, *R.* 1.

Under S. 254 of the Contract Act, which was in force before the Partnership Act came into force, the insolvency of one of the partners of a firm would not of itself operate as a dissolution of the partnership. The remaining partners can institute a suit on behalf of the firm under O. 30, R. 1, C.P. Code. The insolvency of one of the partners is no bar to the maintainability of the suit. Even if the firm be dissolved, the effect of dissolution is not to render the firm non-existent. It continues to exist for all purposes necessary for its winding up, including the recovery of moneys due to it by suit or otherwise. (*Bose, J.*) SETH AGARCHAND *v.* KASAM. **I.L.R. (1937) Nag. 28=174 I.C. 179=10 R.N. 350=A.I.R. 1937 Nag. 314.**

——**S. 259**—*Partnership—Partner carrying on separate business—Partners consenting to and knowing same—Moneys drawn from partnership for separate trade—Profits of latter—If divisible—Interest on advances—Right to.*

A partner is not precluded, under S. 259 of the Contract Act, from carrying on another business with the knowledge or consent of his partners; if with such knowledge the partners agree to a partner drawing moneys from the partnership for the benefit of such separate business, and the moneys so drawn are shown in the partnership books as moneys lent to that business, there is no justification for claiming the profits of that partnership. On the basis of the relationship being one of creditor and debtor, a claim for interest can be substantiated only if it can be based either on contract or on the course of business. (*Varadachariar and Pandrang Row, JJ.*) VENKATARAMANA *v.* VARAHALU. **1939 I.T.R. 560=50 L.W. 581=1939 M.W.N. 1028=A.I.R. 1940 Mad. 308.**

——**S. 261**—*Death of one of partners—Subsequent acknowledgment made by another partner—Liability of estate of a deceased partner.*

According to S. 261 of the Contract Act, the estate of a deceased partner which comes to his son who was never a partner would not ordinarily be liable in respect of any acknowledgment made by another partner after his death. (*Addison and Din Muhammad, JJ.*) MUHAMMAD SAID *v.* THE

CONTRADICTORY STATEMENTS.

PUNJAB NATIONAL BANK, LTD. **170 I.C. 686=10 R.L. 141 (2)=A.I.R. 1937 Lah. 869.**

CONTRADICTORY STATEMENTS.

See PENAL CODE, S. 193.

CONTRIBUTION.

See also (1) CONTRACT ACT, SS. 43, 69 AND 70.
(2) PARTNERSHIP.
(3) T.P. ACT, SS. 82 AND 95.

———*Claim to—Award of interest—Power of Court.*

A claim for contribution has always been recognised as falling within the equitable jurisdiction of the Court, and on such a claim a Court of equity will award interest at a reasonable rate from the date of payment of the amount by the plaintiff in respect of which contribution is claimed. (*Pandrang Row and Krishnaswami Ayyangar, JJ.*) RAMANATHAN CHETTIAR *v.* PALANIAPPA CHETTIAR. **I.L.R. 1939 Mad. 776=188 I.C. 892=13 R.M. 100=49 L.W. 132=1939 M.W.N. 170=A.I.R. 1939 Mad. 531.**

———*Co-defendants—Decree for costs—Payment by one—Right to recover if in proportion to interest affected by decree.*

Certain properties were mortgaged to two persons, who had advanced unequal amounts. A decree was obtained thereon and the properties were brought to sale. Thereafter a third person obtained a declaration that half the mortgaged properties were his and that the half was not liable to attachment and sale. The original mortgagees who were defendants in the above suit were directed to pay the costs of the plaintiff therein. Where such costs are realised from one of the defendants alone, he is entitled to recover from the other defendant, a sum proportionate to his interest in the property affected by the decree in the suit of the third person. (*Misra, J.*) SHIAM LAL *v.* NAWAL KISHORE. **I.L.R. 1938 All. 950=179 I.C. 42=11 R.A. 347=1938 A.L.R. 934=1938 A.W.R. (H.C.) 637=1938 A.L.J. 990=A.I.R. 1938 All. 631.**

———*Co-defendants—Decree for costs—Entire amount paid by one of them—Liability of the other to contribute—Equities.*

In a suit against *A* and *B*, *A* admitted the claim of the plaintiff. *B* contested the suit, and after a contest the suit was decreed with costs against both. B paid the total amount of costs and sued *A* for contribution of his proportionate share.

Held, that it was open to *A* to set up the defence that inasmuch as the costs in that suit were incurred solely by the action of *B*, *B* had no right in equity to call on him for payment of a share of the costs. (*Bennet, J.*) BHAWANI PRASAD *v.* RAM PRASAD. **167 I.C. 913=9 R.A. 595=1937 A.L.J. 1=1937 All. L.R. 278=1936 A.W.R. 1283=A.I.R. 1937 All. 227.**

———*Co-defendant—False defence jointly put forward—Costs awarded to plaintiff—Claim for contribution.*

Where different sets of defendants had jointly put forward a false defence in a previous case and had been ordered to pay the costs of the opposite party, any of them is entitled to maintain a suit for contribution against the others. In the absence of any direction to the contrary in the decree, the costs should be apportioned among the sets equally. (*Tek Chand, J.*) SARAN DAYAL *v.* DAL CHAND. **177 I.C. 847=11 R.L. 370=40 P.L.R. 469=A.I.R. 1938 Lah. 579.**

CONTRIBUTION.

———*Joint decree for costs—Payment by one—Right of contribution as against others—Liability of* pro forma *defendant to contribute.*

The doctrine of contribution in respect of a joint decree for costs against several defendants is well recognised in India and the only cases in which it will not be enforced are those in which a liability arises out of a joint wrong or where the equities of the case demand that the plaintiff should not recover, as where the party sued for contribution was merely a formal defendant in the previous suit in which the decree for costs was passed, and not personally interested in the result of it. Where certain co-defendants in the previous litigation never intended to contest the suit, even though their names may have been by inadvertence included in the list of contesting defendants, it would be inequitable to decree a claim for contribution as against then. (*Fazl Ali and Luby, JJ.*) BISAMBHARDEO NARAYAN SINGH *v.* HITNARAYAN SINGH. **15 Pat. 219=160 I.C. 976=16 Pat.L.T. 813=8 R.P. 399=2 B.R. 264=A.I.R. 1936 Pat. 49.**

———*Joint decree for costs—Satisfaction of entire decree by one defendant—Suit for contribution—Liability of others.*

A joint decree for costs against several persons creates a joint debt on the part of all the judgment-debtors in favour of the successful party, and if any of them is compelled to satisfy the whole, he is *prima facie* entitled to have contribution from his co-judgment-debtors unless the latter can show any ground for being relieved. The judgment-debtor seeking contribution from the others is not bound to show some equity in his favour before the others can be made liable. (*R. C. Mitter, J.*) KULADA PROSAD MITRA *v.* GIRIBALA DEBYA. **40 C.W.N. 1089.**

———*Liability for—Mahomedan co-heirs—Realisation of dower decree from non-taluqdari property—Taluqdari property, if liable to contribute.*

Where a Shia Mahomedan died leaving both taluqdari and non-taluqdari property and one of the widows obtained satisfaction of her decree for dower from out of the non-taluqdari property alone, and where another widow and her children subsequently sued the taluqdar for contribution and claimed that the taluqdari property should contribute to rehabilitate their shares to the extent to which execution was levied against the non-taluqdari property in respect of the dower debt, it was held that the plaintiffs had a right to contribution in respect that the taluqdari property was liable for the debts of the deceased taluqdar along with non-taluqdari property, and that the values of both the kinds of property should be estimated as at the date of the death of the taluqdar. (*Sir George Rankin.*) MAHOMED KAZIM ALI KHAN *v.* SALIQ ALI KHAN. **65 I.A. 219=174 I.C. 977=1938 A.W.R. (P.C.) 138=1938 M.W.N. 545=42 C.W.N. 901=10 R.P.C. 295=48 L.W. 16=32 S.L.R. 772=4 B.R. 606=67 C.L.J. 350=13 Luck. 494=1938 O.A. 508=1938**

CONTRIBUTION.

P.W.N. 514=1938 O.L.R. 282=1938 O.W.N. 581=1938 A.L.R. 415=40 Bom. I.R. 843=1938 A.L.J. 843=A.I.R. 1938 P.C. 169=(1938) 2 M.L.J. 210 (P.C.).

———*Partners—Joint decree against two partners—Satisfaction by one—Right to sue for contribution from other—Claim not based on ground of partnership—If barred.*

Where the basis of a claim for contribution is a joint decree made against the plaintiff and the defendant, in execution of which the plaintiff alone has had to pay the entire amount due under the decree, the law of partnership does not prohibit the entertainment of a claim to contribution, merely because the debt in respect of which the decree was passed was borrowed for the purposes of a partnership trade carried on by the plaintiff and defendant. If the claim is not based on the ground that as a partner the defendant is liable to contribute the law of partnership cannot operate as a bar to the suit. It is only when the claim for contribution is based on the contract of partnership or intimately bound up with the relation of partnership that it would be included by the general doctrine that as between partners there can be no claim for contribution. (*Pandrang Row, J.*) KANNAYYA REDDI *v.* MUTHU REDDI. **185 I.C. 62=12 R.M. 515=1939 M.W.N. 401=49 L.W. 547 (2)=A.I.R. 1939 Mad. 508=(1939) 1 M.L.J. 825.**

———Partnership—Joint decree passed against some of partners of firm in respect of debt contracted by them—One of judgment-debtors paying entire amount—Right to sue rest for contribution—Partnership debt and separate debt—Test. *See* PARTNERSHIP — CONTRIBUTION. **43 C.W.N. 1214.**

———Right to—Ex-partners or persons tracing relationship to dissolved partnership—Right of contribution in respect of debt of partnership. *See* CONTRACT ACT, S. 43. **(1938) 2 M.L.J. 287.**

———Right to—Claim of non-Hindu joint borrower against Hindu borrower—Rule of Damdupat. *See* HINDU LAW—DAMDUPAT. **I.L.R. (1937) 1 Cal. 450.**

———*Suit for—Cause of action—Joint debtors—Payment by one of portion less than own share—Right to sue for contribution.*

A partition suit between the plaintiff's father and the defendant was referred to arbitration, and the arbitration in making an award held and declared that the debt under a bond executed by the plaintiff's father was a debt of the joint estate and that the defendant was liable for half the amount of the debt that remained unpaid at the date of the institution of the suit. There was a decree in terms of the award. Plaintiff had paid the creditor under the bond, a sum of Rs. 1,250 on several dates, and he sued the defendant for recovering half of that amount of Rs. 1,250 with interest, contending that the joint liability of his father and the defendant was declared in respect of the debt and that the defendant was therefore bound to pay him half the amount paid by him and interest.

Held, that since the plaintiff had not paid the creditor anything in excess of his share of the debt, he had no cause of action to sue the defendant for contribution and that the suit was therefore premature; if and when he paid more than half of the sum due to the creditor, a cause of action for the amount paid in excess would arise and not before. (*Mitter, J.*) DHIRENDRA NATH CHOUDHURY *v.* HARENDRA NATH CHOUDHURY. **64 C.L.J. 55.**

CO-OPERATIVE SOCIETY.

———*Suit for—Necessary party not impleaded—Liability of suit to dismissal.*

It has become a fixed principle that in a suit for contribution the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. Such a suit is, therefore, liable to be dismissed if a necessary party in whose absence the liabilities of the parties cannot be satisfactorily ascertained, is not before the Court. (*Dhavle and Manohar Lall, JJ.*) A. JAMES *v.* ACHAIBAR SINGH. **185 I.C. 297=12 R.P. 346=21 P.L.T. 416=6 B.R. 150=A.I.R. 1940 Pat. 119.**

———*Suit for—Plaintiff not being party to contract between defendants—Effect of.*

In a suit which is in essence a contribution suit, the consideration that the plaintiff was no party to the contract between the defendants is by no means conclusive of the matter. (*Dhavle and Manohar Lall, JJ.*) A. JAMES *v.* ACHAIBAR SINGH. **185 I.C. 297=12 R.P. 346=21 P.L.T. 416=6 B.R. 150=A.I.R. 1940 Pat. 119.**

———*Suit for—When maintainable.*

The mere existence of a decree does not afford ground for a suit for contribution. A person who claims a right to contribution cannot claim it unless he has discharged that which he says ought to be treated as a common burden. (*Sukhdeonarain, J.*) LALCHAND *v.* HEERACHAND. **1939 M.L.R. 269 (Civ.).**

CONTRIBUTORY NEGLIGENCE.

See (1) RAILWAYS ACT.
(2) TORT—NEGLIGENCE.

CONVERSION.

See (1) CASTE DISABILITIES REMOVAL ACT.
(2) HINDU LAW—SUCCESSION.
(3) MOHAMMADAN LAW.
(4) TORT.

CONVEYANCE.

See (1) DEED.
(2) PART PERFORMANCE.
(3) T.P.ACT, SS. 8 AND 54.

CO-OCCUPANT.

See (1) CO-SHARER.
(2) OCCUPANCY HOLDING.

CO-OPERATIVE SOCIETY—*Bye-law — Construction—Bye-law providing for payment of honorarium to Secretary out of profits annually—Right to payment—If dependent on vote of general body—Power of latter to refuse payment—Claim to payment for part of year—Sustainability.*

Where a bye-law of a Co-operative Society distinctly provides that the profits should be divided, and that a fourth of it should be paid as honorarium to the Secretary, the Secretary is entitled to claim and recover the same without a vote of the general body. Although it is

open to the latter to alter the bye-law, it is not open to them to withhold payment of the honorarium. But where the law provides for the payment of an annual lump sum, it is not open to the Secretary to claim the proportionate amount for a part of the year. The payment contemplated is contingent on the Secretary serving as such for the entire period of a year. (*Venkataramana Rao, J.*) GANESA AIYAR *v.* LAKSHMI CO-OPERATIVE BUILDING SOCIETY. 45 L.W. 297=171 I.C. 518=10 R.M.354=A. I.R. 1937 Mad. 379=(1937) 1 M.L.J. 511.

CO-OPERATIVE SOCIETIES ACT (II OF 1912)—*Mortgage to society—Bank obtaining award against members of society—Right to sell mortgaged property.*

Where an award obtained by a Bank against a Co-operative Society shows that it was an award against the members of the society, then the Bank could sell the property mortgaged to the society by the members. (*Pollock, J.*) MST. GOMTI *v.* SOCIETY GHAT PINDARI. 178 I.C. 988=11 R.N. 263=1938 N.L.J. 166 =A.I.R. 1938 Nag. 308.

———Statutory Rules under R. 14 (5) (*b*)—Award under Act—Application to Civil Court to enforce–Limitation. *See* LIMITATION ACT. ART. 181. 71 M.L.J. 759.

———S. 2 (c)—*"Member"—Hindu joint family —If can be member.*

A joint Hindu family can be a member of a Co-operative Society. (*Horwill, J.*) VILLUPURAM URBAN CO-OPERATIVE BANK *v.* BALASUBRAMANIA MUDALI. 178 I.C. 808=11 R.M. 500 =1938 M.W.N. 567=48 L.W. 285=A.I.R. 1938 Mad. 809=(1938) 2 M.L.J. 186.

———S. 2 (c)—*Member—Joint Hindu family, if can be a member—Hindu coparcener becoming member of society and taking loans—Liability of joint family.*

The fact that the bye-laws of a co-operative society established under the Co-operative Societies Act of 1912 do not expressly state that the membership of the society is open to a Hindu joint family is no justification for holding that a joint fmily can in no event become a member of the society, when there is no provision in the bye-laws to preclude a joint family from becoming a member of the society through one of its coparceners. It is no doubt desirable to have an express provision in the bye-laws stating that a Hindu joint family may join a society through one of its members chosen by all the other adult members of the family and that loans to such a family would be granted only on clear and complete proof that the money is required for some legal necessity of the family that would avoid a good deal of unnecessary litigation. Where it is clearly proved that a member of a joint family joined the society in a representative capacity with the consent of all the adult members of the family, though he may not have been the karta of the family, and that the debts incurred by him were for the purpose of and on behalf of the family, *i.e.*, for the purpose of purchasing properties for the joint family it must be held that the money was borrowed for the necessity and benefit of the entire joint family, because the member represents the entire joint family in his dealings with the society. In such a case the

society can proceed against the joint family properties including the properties purchased out of the money borrowed for the debts incurred by the member, although that member is not described in the registers of the company or in the order for contribution as representing his family. (*Coutney-Terrel, C.J., Fazl Ali and James, JJ.*) BINDESWARI PRASAD *v.* SHIVA DUTT SINGH. 176 I.C. 49=4 B.R. 661=11 R.P. 43=1938 P.W.N. 329=19 Pat.L.T. 328=A.I.R. 1938 Pat. 315 (S.B.).

———Ss. 8 (3) and 43 (5)—*Bye-law framed by a Society under S. 8 (3) a rule enacted by the Local Government under S. 43 (5)—Conflict between the two as to the persons to whom the Registrar should make a reference—Proper procedure—Registrar following the rule—Legality of the procedure.*

In a case, there is a conflict between a bye-law framed by a Co-operative Society under the powers conferred by S. 8 (3) of the Co-operative Societies Act and a rule enacted by the Local Government under the powers conferred upon it by S.43 (5) of the Act as to the persons to whom reference has to be made by the Registrar. But there is no conflict between the two that the initial procedure by the parties in a dispute is to refer the matter to Registrar. Whereas the bye-law provides for the reference by the Registrar to three arbitrators, the rule empowers the Registrar to decide the matter himself or to refer it to one arbitrator or to three arbitrators. The Registrar preferred to follow the rule.

Held, that there is no rule of law that when there is a conflict between the rule and the bye-law, the bye-law should be preferred. Ordinarily the rule, which is as effective as a section of the Act, must be followed in a preference to a bye-law, if there is a conflict between the two. In cases of such conflict it is for the Registrar to decide which of the two he should follow. So in this case the Registrar has not acted illegally. (*Jai Lal and Abdul Rashid, JJ.*) JINDA RAM *v.* MODEL TOWN SOCIETY, LTD. 10 R.L. 200=171 I.C. 395=A.I.R. 1938 Lah. 8.

———S. 8 (3)—*Bye-law framed under—Construction of house by society—Dispute about the recovery of the amount spent by it—Transaction, if one of loan.*

Where a bye-law framed by a society provides that one of the objects of the Society is to build residential houses and other buildings for private and public use and convenience of the members, the society undertook to construct a house for a member and after the house had been constructed, there was some dispute between the parties as to the amount claimable on account of it by the society.

Held, the transaction does not amount to the granting of a loan by the society to one of its members. (*Jai Lal and Abdul Rashid, JJ.*) JINDA RAM *v.* MODEL TOWN SOCIETY, LTD. 171 I.C. 395=10 R.L. 200=A.I.R. 1938 Lah. 8.

———S. 18—*Co-operative Society—Status and Legal position of—Debts of—If debts of members—Award against society—Execution against members and past members—Right of creditor.*

A Co-operative Society is a statutory corpo-

CO-OP. SOC. ACT (1912), S. 20.

ration and a legal person, and its debts are distinct from the liability of its members; and the members can only be reached by the creditors of the society in winding up proceedings. An award against the society, which has the force of a decree, cannot be executed against the members. An award ordering that a Co-operative Society "consisting of its members or past members all of whom are jointly and severally liable for the debts of the society pay at once, etc." cannot be construed to be one making the members and past members also liable for the debt; the award cannot be executed against the members. (*Stone, C.J. and Niyogi, J.*) SHREELAL MALGUZAR *v.* CENTRAL CO-OPERATIVE BANK OF PIPARIA. **20 N.L.J. 6.**

——**S. 20**—Share of member—If liable to attachment and sale. *See* C.P.CODE, O. 21, R. 58. **A.I.R. 1939 Lah. 305.**

——**S. 23**—*Construction—'Debts of a registered society'—Meaning of.*

The words 'debts of a registered society' as used in S. 23 of the Co-operative Societies Act, refer only to those debts which the society owes and not to those which are owed to the society. (*Addison and Din Mahomed, JJ.*) ANJUMAN I-IMDAD QARZA BAHAMI *v.* MEHR DIN. **18 Lah. 649=175 I.C. 840=11 R.L. 71=40 P.L.R. 422=A.I.R. 1937 Lah. 931.**

——**S. 23**—Scope—If governs S. 42 (2) (*b*). *See* CO-OPERATIVE SOCIETIES ACT, S.42 (2)(*b*) AND (6). **A.I.R. 1937 Lah. 912**

——**Ss. 23 and 24**—*Award against estate of past or deceased member—Jurisdiction of liquidator and of Civil Court.*

A liquidator has no jurisdiction to award anything against the estate of a past or a deceased member, because of the limitation provided under Ss. 23 and 24 of the Co-operative Societies Act. The Civil Court has jurisdiction to go into the question whether the liquidator had jurisdiction to make the award. (*Dalip Singh, J.*) AHMAD ALI *v.* CO-OPERATIVE SOCIETY OF PANIPET. **41 P.L.R. 269.**

——**S. 33**—*Resolution passed at annual general meeting sanctioning dividend—Considerable portion of profits unrealised—Resolution, if* ultra vires.

A resolution passed at an annual general meeting of the shareholders sanctioning the payment of dividend is not in any way illegal or *ultra vires* so long as it does not contravene any of the provisions of the Co-operative Societies Act or any of its bye-laws, although a considerable portion of the profits out of which the dividend could be paid are unrealised interest income. (*Mukherjea, J.*) HARA DAYAL NAG *v.* CHANDPUR CENTRAL CO-OPERATIVE BANK, LTD. **I.L.R. (1938) Cal. 144=181 I.C. 303=11 R.C. 798=42 C.W.N. 461=A.I.R. 1938 Cal. 394.**

——**S. 42**—*Amount realised by Collector—Civil suit in respect of—Maintainability—U. P. Land Revenue Act, S.* 233 (m).

Where the decretal amount due to a Co-operative Society was realised by the Collector as an arrear of land revenue according to the Co-operative Societies Act, no suit could lie in the Civil Court in respect of such a claim, in view of the provisions of S. 233 (*m*) of the U. P. Land Revenue Act. (*Nanavutty, J.*) BHARAT SINGH *v.* DISTRICT CO-OPERATIVE BANK, LTD. **167 I.C. 554=9 R.O. 399=1937 R.D. 152=1937 O.L.R. 148=1937 O.W.N. 298=A.I.R. 1937 Oudh 249.**

CO-OP. SOC. ACT (1912), S. 42.

——**S. 42**—*Award against a society—Liquidator appointed for such society—Execution against—If available.*

Where the award is against a society, the fact of liquidation of that society cannot make any difference, so far as the executability of that award against the members are concerned. He is the only person competent to collect the assets of the society from its members and distribute them rateably among the creditors. So he cannot be proceeded against in execution of an award against the society. (*Bose and Puranik, JJ.*) NARAYAN *v.* CO-OPERATIVE CENTRAL BANK OF MALKAPUR. **I.L.R. (1938) Nag. 604=11 R.N. 219=178 I.C. 293=1938 N.L.J. 82=A.I.R. 1938 Nag. 434.**

——**S. 42**—*Liquidator's actions—Jurisdiction of Civil Courts—Limits.*

The jurisdiction of the Civil Court is ousted only in those cases where the acts of the liquidator are well within the four corners of S. 42. But in cases where his acts are *ultra vires* Civil Courts could go into the question, in order to determine the legality of the order. In a case where a person was proceeded against as a debtor to the society and not as a member contributing to the assets of the society.

Held, that the liquidator could not proceed him under S. 42 (2) (*b*) and his act is clearly *ultra vires* and so Civil Courts could interfere. (*Addison and Din Mahomed, JJ.*) ANJUMAN-I-IMDAD QARZA BAHAMI *v.* MEHR DIN. **18 Lah. 649=175 I.C. 840=11 R.L. 71=40 P.L.R. 422=A.I.R. 1937 Lah. 931.**

——**S. 42 (2) (b)**—*Certain members adjudicated insolvent—Liquidator not appointed until after discharge—Power of liquidator to fix their liability.*

Where a Co-operative Society is dissolved and certain members are adjudicated as insolvents their liability as members is not provable under the terms of S.34 (2), Provincial Insolvency Act, if no liquidator was appointed until after the insolvents had been discharged. Under S. 42, Co-operative Societies Act, it is the liquidator alone who can ascertain and fix the liabilities of the members. Therefore until a liquidator is appointed, it cannot be said that there was any debt or liability certain or contingent which can affect the members. Hence the liquidator is not debarred under the provisions of the Provincial Insolvency Act from fixing the liability as members. (*Dalip Singh, J.*) ANJUMAN IMDAD BAHIMI QARZA *v.* IMAM DIN. **183 I.C. 632=12 R.L. 124=42 P.L.R. 260=A.I.R. 1939 Lah. 275.**

——**S. 42 (2) (b)**—*'Contribution'—What is and what is not.*

Usually the word contribution means and has reference only to the amount payable by a member as such and does not include debts payable to the society. It is in other words the unpaid portion of the liability of a member. (*Addison and Din Mahomed, JJ.*) ANJUMAN-I-IMDAD QARZA BAHAMI *v.* MEHR DIN.

CO-OP. SOC. ACT (1912), S. 42.

18 Lah. 649=175 I.C. 840=11 R.L. 71=40 P.L.R. 422=A.I.R. 1937 Lah. 931.

———S. 42 (2) (b)—*"Member"—Meaning of.*

'Member' obviously means member at the date of the dissolution of the society in S. 42 (*b*). (*Dalip Singh, J.*) ANJUMAN IMDAD BAHIMI QARZA *v.* IMAM DIN. **183 I.C. 632=12 R.L. 124=42 P.L.R. 260=A.I.R. 1939 Lah. 275.**

———S. 42 (2) (b)—Order by liquidator under —Nature of—If "decree for money"—Suit to declare null and void—Court-fee. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), S.7 (IV-A) and Sch. II, Art. 17-A. **(1937) 1 M.L.J. 640.**

———S. 42 (2) (b), (5) and (6)—*Award by liquidator after member is adjudicated insolvent —Power of Court to refuse execution—Provincial Insolvency Act, S. 44.*

A Court called upon to execute an award under S.42 (2) (*b*) of the Co-operative Societies Act passed by a liquidator cannot refuse to execute such an award on the ground that the member against whom the award had been made had prior to the award been declared an insolvent and therefore discharged under S. 44 of the Provincial Insolvency Act from the liability to pay any debt, as the matter is not one of lack of inherent jurisdiction on the part of the liquidator but only a question of illegal exercise of jurisdiction. (*Dalip Singh, J.*) ANJUMAN IMDAD QARZA BAHMI *v.* ABDUL GHANI. **189 I. C. 370 =13 R.L. 75=42 P.L.R. 126=A.I.R. 1940 Lah. 280.**

———S. 42 (2) (b) and (6)—*'Past member'—Meaning of—If subject to S. 23.*

Section 42 (2) (*b*), Co-operative societies Act, is governed by S. 23 of the same Act and the words 'past member' in S.42 (2) (*b*) mean a past member liable for debts under S. 23 of the Act. A person who does not claim to be a past member liable under S.23 of the Act has a right to have his claim investigated by a Civil Court. (*Skemp, J.*) HASSAN MOHAMMAD *v.* CO-OPERATIVE CREDIT SOCIETY OF JURIAN. **175 I.C. 759=11 R.L. 79=A.I.R. 1937 Lah. 912.**

———S. 42 (2) (b) and (6)—*Construction and scope—Liability of past members to contribute —Adjudication by liquidator—Suit in Civil Court to challenge—Maintainability.*

Merely because a person was once a member of a Co-operative Society, it cannot be said that he has no right to ask the Civil Court to decide whether he is under any liability to contribute at all. There is no clear indication in the Co-operative Societies Act that the liquidator can under S. 42 of the Act, determine the question of liability to contribute in such a way that his determination will not be subject to be set aside by the Civil Courts. A person who disputes his liability to contribute on the ground that he ceased to be a member *five years* prior to the dissolution of the Society, but is held liable, is entitled, after payment of the contributions to sue in the Civil Court for a refund of the amount paid on the ground that he is not liable. S. 42 (6) is no bar to the suit. (*King and K. S. Menon, JJ.*) VAIKUNTA BHAT *v.* SARVOTHAMA RAO. **59 Mad. 895=170 I. C. 312=10 R.M. 181=43 L.W. 730=1936 M.W. N. 470=A.I.R. 1936 Mad. 574=70 M.L.J. 604.**

CO-OP. SOC. ACT (1912), S. 43.

———S. 42 (3)—*Powers of liquidator—Power to ask person summoned to furnish security—Punjab Government Rules, R. 26 (e).*

Although S. 42 (3) of the Co-operative Societies Act gives the same power to the liquidator to enforce attendance of witnesses and production of documents as is given under C.P.Code, that power is subject to the rules framed under the Act. R. 26 (*e*) of the Rules framed by the Punjab Government restricts the powers of the liquidators to those given in the sub-rule. A liquidator has, therefore, no power to ask a debtor of the society under liquidation summoned by him to furnish security for his appearance or to impose a sentence of imprisonment or fine for his failure to do so. (*Bhide, J.*) HAKIM, *In the matter of.* **I.L.R. (1939) Lah. 192=183 I.C. 414=12 R.L. 114=40 Cr. L.J. 791=41 P.L.R. 503=A.I.R. 1939 Lah. 357.**

———S. 42 (6)—*Jurisdiction of Civil Court—Denial of membership.*

By S. 42 (6), Co-operative Societies Act, the liquidator is entitled to determine the contribution to be made by the members and past members of the Society. But if a party denies that he is a member, he is entitled to have that question determined by the Court and the Court has jurisdiction to try the suit. (*M.C. Ghose, J.*) BENI MADHAB SIKDAR *v.* SARAT CHANDRA JANA. **176 I.C. 221=11 R.C. 54=A.I.R. 1937 Cal. 643.**

———S. 43—*Reference to Registrar for award —Jurisdiction of Registrar to decide if dispute is time-barred.*

On a reference made to the Registrar for an award under the Co-operative Societies Act, the Registrar acts as a Court and he has jurisdiction to decide whether a dispute before him is time barred or not. Once he has decided that rightly or wrongly, it cannot be said that he acted without jurisdiction. (*Fazl Ali and Varma, JJ.*) SHEOSARAN SINGH *v.* GAYA AMLA CO-OPERATIVE SOCIETY. **5 B.R. 600=181 I.C. 512=11 R.P. 597=A.I.R. 1939 Pat. 500.**

———S. 43 (1)—*Award—Execution.*

An award granted under Co-operative Societies Act is to be executed in the same manner as a decree of Civil Court. (*Bhide, J.*) MT. GULAB BANO *v.* ANJUMAN IMDAD BAHMI QARZA **39 P.L.R. 139=169 I.C. 879=10 R.L. 53=A.I.R. 1937 Lah. 63.**

———S. 43 (1)—*Award made without jurisdiction—Objection, if can be raised in execution proceedings—Objector's remedy.*

Where an award made under the Co-operative Societies Act is alleged to have been made without jurisdiction and not according to the terms of the Act, it is open to the person aggrieved to bring a suit to that effect but such objections cannot be taken in the execution proceedings started in pursuance of the award, the objector's remedy being an appeal to the Registrar. (*Skemp, J.*) BALWANT SINGH *v.* ANJAMAN IMDAD BAHAMI QARZA. **180 I.C. 242=11 R.L. 666=41 P.L.R. 225=A.I.R. 1939 Lah. 40.**

CO-OP. SOC. ACT (1912), S. 43.

———S. 43 (1)—*Death of defendant before institution of proceedings relating to award—Award, if a nullity.*

Where the defendant dies long before institution of proceedings relating to award under Co-operative Societies Act, the award passed against him is a nullity and therefore cannot be executed. (*Bhide, J.*) MT. GULAB BANO *v.* ANJUMAN IMDAD BAHMI QARZA. **169 I.C. 879=10 R.L. 53=39 P.L.R. 139=A.I.R. 1937 Lah. 63.**

———S. 43 (1)—*Rules framed under—Award against a Co-operative Society—Construction—Society consisting of members mentioned declared liable—If an award against the members.*

Where an award under the rules framed under S. 43 (1) of the Co-operative Societies Act was in these terms, 'I therefore in this my award order that the J. Co-operative Society consisting of the following members or past members all of whom are jointly and severally liable for the debts of the Society, pay at once' and proceeded to give a list of members, the decree on the face of it is only an award against the J. Society alone and not against its members. Moreover it is not legally possible for a Registrar to make an award against the members personally for a debt of the Society. (*Bose and Puranik, JJ.*) NARAYAN *v.* CO-OPERATIVE CENTRAL BANK OF MALKAPUR. **I.L.R.(1938) Nag. 604=11 R.N. 219=178 I.C. 293=1938 N.L.J. 82=A.I.R. 1938 Nag. 434.**

———S. 43—*R. 33 of rules framed under—Award and certificate by Registrar of Co-operative Societies—Jurisdiction of Revenue Court to question it.*

The Co-operative Societies Act nowhere gives any power to the Commissioner or any other Revenue Officer to examine or revise the proceedings of the Registrar or other officer of the department. A Revenue Court has no jurisdiction to question and disregard an award given by the Registrar of Co-operative Societies and the certificate issued to the Revenue Courts for recovery of the amount under the award, in pursuance of R. 33 of the rules framed under S.43 of the Co-operative Societies Act. (*Burton, F.C.*) BORDA CO-OPERATIVE SOCIETY *v.* YADAO. **1939 N.L.J. 405.**

———S. 43 (2) (1)—*Award based on arbitration—Validity—Proof that party was member of society—Necessity for—Loan taken by him from society—If proves membership.*

In order that an award based on an arbitration under the Co-operative Societies Act may be valid and binding on a person, it is incumbent on the Society to prove that he was a member of the Society at the time when the reference to arbitration was made. Although ordinarily a Co-operative Society lends money only to its members, a Court will not be justified in holding merely on the basis of an alleged loan taken by a person that he must have been a member on the date on which he took the loan, when the affairs of the Society do not appear to have been carried on in regular manner and it is found by the Court that the register produced by the Society is a fabricated one. (*Bhide, J.*) JACOB *v.* CO-OPERATIVE SOCIETY. **189 I. C. 48=13 R. L. 65=42 P.L.R. 112=A.I.R. 1940 Lah. 193.**

CO-OP. SOC. ACT (1912), S. 43.

———S. 43 (2) (1)—*'Dispute'—Meaning of.*

There would be a dispute so long as a claim is asserted by one party and denied by the other, be the claim a false or a true one or whether it ultimately turns out to be false or true. (*Mitter and Biswas, JJ.*) DACCA CO-OPERATIVE INDUSTRIAL UNION, LTD. *v.* DACCA CO-OPERATIVE SANKHA SILPA SAMITIES, LTD. **I.L.R.(1938) 2 Cal. 103=178 I.C. 363=11 R.C. 346=68 C.L.J. 353=42 C.W.N. 391=A.I.R. 1938 Cal. 327.**

———S. 43 (2) (1)—*'Dispute'—Meaning.*

Where a Co-operative Society has considered its treasurer to be responsible for embezzlement of money deposited with it by a person and the treasurer has throughout contended that he was not concerned with the alleged embezzlement there is clearly a dispute between the treasurer and the society regarding question of embezzlement of money and hence the dispute can be referred to arbitration. (*Bhide, J.*) CO-OPERATIVE SOCIETY, DHINGRANWALI *v.* MUHAMMAD DIN. **42 P.L.R. 273=A.I.R. 1939 Lah. 301.**

———S. 43 (2) (1)—*Dispute between member and society concerning financial obligation of member—If can be referred to special tribunal.*

The words "concerning the business of a Society" occurring in S. 43 (2), Cl. (*l*) and in R. 22 (1) framed by the Local Government, cannot be limited to disputes concerning the internal management of the Society. The principal business of a Society being to finance its members, a dispute concerning the financial obligations of its members to the Society would be a dispute concerning the business of the Society. The use of the word "committee" in S.43 (2), Cl. (*l*) and R. 22 (1) is sufficient to indicate a dispute with the Society itself and enable proceedings to be initiated and carried on before the authority referred to therein in the name of the Society. (*Mitter and Biswas, JJ.*) DACCA CO-OPERATIVE INDUSTRIAL UNION, LTD. *v.* DACCA CO-OPERATIVE SANKHA SILPHA SAMITIES, LTD. **I. L. R.(1938) 2 Cal. 103=178 I.C. 363=11 R.C. 346=68 C.L.J. 353=42 C.W.N. 391=A.I.R. 1938 Cal. 327.**

———S. 43 (1), R. 13 (7) (Assam)—*Order of Registrar not in accordance with rules—Jurisdiction of Civil Court.*

Under R.13 (7) of the Rules framed by the Government of Assam under S.43 of the Co-operative Societies Act, an order of a Registrar or of the Chief Commissioner in appeal is, as between the parties to the dispute, not liable to be called into question in any Civil Court or Revenue Court and is, in all respects, final and conclusive. This presupposes however that the order in question is an order in accordance with the Act and the rules framed thereunder. Where, therefore, the plaintiff calls into question the reference to the Registrar and alleges that there was no compliance by him with the procedure laid down in the rules and he further contends that the rules themselves are *ultra vires* in so far as they oust the jurisdiction of the Civil Court, the Civil Court has jurisdiction to entertain his suit. (*S. K. Ghose, J.*) SHILLONG CO-OPERATIVE BANK, LTD. *v.* CHINIRAM MEHDI. **41 C.W.N. 670.**

———S. 43 (1), R. 22 (1) and (6) (Bengal)—*Reference to arbitration of dispute between*

CO-OP. SOC. ACT (1912), S. 43.

committtee and member—Non-member also party to dispute—Jurisdiction of arbitrator—Non-member submitting to his jurisdiction—Right to question award in Civil Court.

Where a dispute between the committee and a member is referred to arbitration under R. 22, Sub-r. (1) of the Rules framed by the Government of Bengal under S. 43 of the Co-operative Societies Act, the proceedings before the arbitrator are not *ab initio* void for want of jurisdiction merely because a non-member is also a party to the dispute. If the non-member submits to the jurisdiction of the arbitrator, he brings himself within the scope of R. 22, and under sub-r. (6) of that rule the award is not liable to be called into question by him in any Civil or Revenue Court and would be in all respects, final and conclusive. (*S.K. Ghose, J.*) DINAJPUR SAMBAYA BANK, LTD. *v.* BENOY BHUSAN MUKHERJI. **41 C.W.N. 667=65 C.L.J. 206.**

———**S. 43 and Bengal Rule 22 (6)**—*Construction—Award—Finality—Correction of errors—Jurisdiction of civil Court.*

An award under the Co-operative Societies Act which is not appealed against within one month, becomes final, and cannot either be upset or interfered with by the Civil Court to which it is sent for execution. Even though the award may be anomalous and erroneous, the Civil Court cannot go behind it, and utilise its powers under S. 151, C.P. Code, to send the award back to the arbitrator for correction of mistakes in order to obtain some sort of alteration which in its opinion would be in the ends of justice. (*McNair, J.*) NILMANI MAITY *v.* KUMAR NARAYAN JANA. **164 I. C. 802 =9 R.C. 284=40 C.W.N. 89.**

———**S. 43 (2) (1) and (s)**—*R.* 22 (5) *and* (6) *framed by Bengal Government—Arbitration and award—Jurisdiction of Civil Court.*

Where an award is made by a person appointed as arbitrator who could not be appointed such an arbitrator under the law, the award is null and void and the Civil Court has jurisdiction to declare it void. But where the award is made by a person validly appointed as arbitrator, the award is not a nullity although the procedure adopted by the arbitrator is materially irregular and he is guilty of misconduct. Such an award has to be set aside only by taking such proceedings as are provided for for the purpose by the rules framed by the Local Government under S. 43 of the Co-operative Societies Act and the jurisdiction of the Civil Court is barred. 37 C. W.N. 843, Expl. (*Mitter and Biswas, JJ.*) DACCA CO-OPERATIVE INDUSTRIAL UNION LTD. *v.* DACCA CO-OPERATIVE SANKHA SILPA SAMITIES LTD. **I.L.R. (1938) 2 Cal. 103=11 R.C. 346=178 I.C. 363=68 C.L.J. 353=42 C.W.N. 391= A.I.R. 1938 Cal. 327.**

———**S. 43**—*Rule-making power of Local Government—Extent of—R. 22, Sub-Rr.* (2), (5) *and* (6)—*If* ultra vires.

The different clauses of sub-S. (2) of S. 43 of the Co-operative Societies Act are only illustrative and do not restrict the general rule-making power to implement the avowed objects of the Act conferred upon the Local Government by sub-S. (1) of the said section. Sub-Rr. (2), (5) and (6) of R. 22 framed by the Local Government under the powers conferred by S. 43 of the Act are not *ultra vires*. (*Mitter and Biswas, JJ.*) DACCA CO-OPERATIVE INDUSTRIAL UNION, LTD. *v.* DACCA CO-OPERATIVE SANKHA SILPA SAMITIES, LTD. **I.L.R. (1938) 2 Cal. 103=178 I.C. 363=11 R.C. 346 =68 C.L.J. 353=42 C.W.N. 391=A.I.R. 1938 Cal. 327.**

———**S. 43**—*Rule-making powers—Extent of—Bengal Government Rules, R.* 28 (3)—*If* ultra vires.

The limits within which the rule making powers of the Local Government could be exercised are contained in sub-S. (1) of S.43 of the Co-operative Societies Act. Sub-S. (2) of that section simply sets out by way of illustration certain matters, on which rules are considered desirable. It does not in any way limit the powers given by sub-S. (1) and the items mentioned therein do not exhaust the list of matters on which rules might be framed by the Local Government. Accordingly R. 28 (3) of the Rules framed by the Local Government which relates to distribution of profits in case of societies with limited liability and which is framed with a view to carry out the purpose of the Act as laid down in S. 33 is not *ultra vires*, although there is no specific item mentioned in S. 43 (2) relating to distribution of profits in case of Societies with limited liability. (*Mukherjea, J.*) HARA DAYAL NAG *v.* CHANDPUR CENTRAL CO-OPERATIVE BANK, LTD. **I.L.R. (1938) 2 Cal. 144=181 I.C. 303=11 R.C. 798 =42 C.W.N. 461=A.I.R. 1938 Cal. 394.**

———**S. 43**—*Bengal Government Rules, R.* 22—*Suit for dividend on declaration that resolution passed at extraordinary general meeting refusing dividend was* ultra vires—*Jurisdiction of Civil Court.*

Where the plaintiff sues a Co-operative Society for recovery of a certain sum alleged to be due to him as dividend on certain preference shares held by him, on a declaration that the constitution of the Board of management was illegal, that it had no authority to call an extraordinary general meeting of the shareholders, and that the resolution passed at the meeting thus convened under which the payment of the said dividend was refused was illegal and *ultra vires*, the matter is not one which is withdrawn from the Courts by R. 22 of the Rules framed by the Local Government under S. 43 of the Co-operative Societies Act, and a suit is, therefore, maintainable in a Civil Court. (*Mukherjea, J.*) HARA DAYAL NAG *v.* CHANDPUR CENTRAL CO-OPERATIVE BANK, LTD. **I.L.R. (1938) 2 Cal. 144=181 I.C. 303=11 R.C. 798 =42 C.W.N. 461=A.I.R. 1938 Cal. 394.**

———**S. 43**—*R.* 22 (6)—*If* ultra vires—*Award violating rules—Jurisdiction of Civil Court.*

Rule 22 (6) of the Rules framed under S. 43 of the Co-operative Societies Act is not *ultra vires* of the Local Government. But if the award is without jurisdiction, the civil Court can certainly declare it a nullity. Even if the arbitrator is validly appointed, the award can still be a nullity if there is violation of the rules regulating the arbitration in matters of substance. Not only a proper appointment of the arbitrator in accordance with the rules is

CO-OP. SOC. ACT (1912), S. 43.

essential for creating jurisdiction in the arbitrator but the fundamental rules attaching restraint to the exercise of authority by the arbitrator are equally mandatory and a violation of them would nullify the award. But the fact that the arbitrator has ignored the law of limitation is not a ground which would entitle the civil Court to interfere. (*Mukherjea and Roxburgh, JJ.*) CHATRA SERAMPORE CO-OPERATIVE CREDIT SOCIETY, LTD. *v.* GOPAL CHANDRA MITRA. **I.L.R. (1940) 1 Cal. 82=188 I.C. 213=12 R. C. 674=70 C.L.J. 492=A.I.R. 1940 Cal. 198.**

———S. 43—*R.* 22 (6)—*If* ultra vires—*Order on appeal from award showing that claim is barred by limitation—Jurisdiction of Civil Court.*

Rule 22 (6) of the rules framed under S. 43 of the Co-operative Societies Act is not *ultra vires.* The decision of the Assistant Registrar on appeal from an award is, therefore, final and conclusive and the civil Court has no jurisdiction to reopen it although it shows on the face of it that the claim is barred by limitation. All that can be said in such a case is that the tribunal has committed an error of law, but it is not such an error as would make the decision of the tribunal one made without jurisdiction. (*Sen, J.*) CHATRA SERAMPORE CO-OPERATIVE CREDIT SOCIETY, LTD. *v.* BEJOY KRISHNA DE. **70 C.L.J. 489=A.I.R. 1940 Cal. 162.**

———S. 43 (1)—Madras rules, R. 14 (5)—Collector deputing tahsildar to enforce decision—Tahsildar—If proper "Court" for execution—Limitation Act, Art. 182 (5). *See* LIMITATION ACT, ART. 182 (5). **70 M.L.J. 31.**

———S. 43 (1), R. 18 (Punjab)—*Suit between society and members—Jurisdiction of Civil Court.*

Civil Court has no jurisdiction to entertain a suit between a Society and its members, etc., by virtue of R. 18 framed by the Punjab Government under S. 43 (1), Co-operative Societies Act. (*Jai Lal, J.*) MOHAMMAD KHAN *v.* CO-OPERATIVE SOCIETY, KHAWASPUR. **174 I. C. 310=10 R.L. 546=A.I.R. 1937 Lah. 268.**

———S. 43—*Rules under, R.* 18—*Award—Execution held time barred by executing Court—Some dispute referred again to arbitration—Second award—Executability—Right of suit to have it declared void.*

The execution of an award settling the dispute between the Society and its member was held by the executing Court as time-barred and the Society again referred the same dispute to arbitration and obtained an award.

Held, that the dispute between the Society and its member was determined by the first award and the subsequent dispute referred by the Society to arbitration was one which under the rules made under S. 43 could only be decided by the executing Court, for it related wholly to the discharge of the award. The proceedings of the executing Court were subject to the ordinary laws and if the society neglected to execute the award within time, its right to have the award enforced was lost, and that was an end of the dispute which left nothing to be referred to arbitration. Hence the second award was one which could not be passed within the scope of the Act and the rules made under it and a suit could lie to have it declared void. (*Coldstream and Bhide, JJ.*) ANJUMAN DEHI

COORG CODE, S. 16.

v. KEHAR SINGH. **18 Lah. 92=168 I.C. 49= 9 R.L. 587=38 P.L.R. 1113=A.I.R. 1936 Lah. 901.**

———S. 43—*Rules under R.* 18—*Dispute "concerning the business" of Society—Meaning.*

A dispute between *A, B* and *C* who were all members of Society related to a transaction which took place between *A* and the Society. The books of the Society showed that certain money had been borrowed by *A* from the Society, but in reality it had been misappropriated by *B* and *C,* the Secretary.

Held, that the dispute was concerning the business of the Society between three of its members and revision could lie from an order of the executing Court refusing to execute an award on the dispute as it failed to exercise jurisdiction vested in it by law. (*Tek Chand, J.*) KALI DAS *v.* PRABH DAYAL. **165 I.C. 511=9 R.L. 249=A.I.R. 1936 Lah. 786.**

———S. 43 (2) (l) and R. 115 of Rules (U. P.) framed under—*Strict construction—Necessity—Personal decree against alleged representative of a past deceased member—If can be passed—Power of Civil Court to set it aside.*

Jurisdiction has been specially given to the Registrar of Co-operative Societies to decide certain matters under R. 115 of the rules framed by the U.P. Government under S. 43 (2) (*l*) of the Co-operative Societies Act, and cl. (*l*) of sub-S. (2) of S. 43 of the Act, or to refer those matters for decision by an arbitrator. As this jurisdiction is contrary to the ordinary civil jurisdiction of civil Courts, it must be construed strictly. The passing of a personal decree against an alleged representative of a past deceased member, (who denies that he is such a representative) is clearly outside the sub-section or the rule. Both the rule and sub-section give jurisdiction to the Registrar or the arbitrator merely to decide matters concerning the estate of a deceased member. The passing of a personal decree cannot come under this jurisdiction. As such a civil Court can set aside such a decree. (*Bennet, J.*) ARYA CO-OPERATIVE BANK SOCIETY *v.* SHIVA CHARAN. **1940 A.W.R. (H.C.) 419=1940 O.A. 681= 1940 A.L.J. 588.**

CO-OPERATIVE SOCIETIES RULES (U. P.), R. 137 (1)—*Scope of—If confers any right of priority.*

All that R. 137 (1) of the Co-operative Societies Act lays down is that the Collector can adopt the same methods for the realisation of the money as he can adopt for the recovery of an arrear of revenue. It does not invest a debt due to a Co-operative Society with the character of land revenue due to the Crown. It merely provides a summary procedure for the realisation of the money and does not confer a substantive right of priority over other debts. (*Bennet and Verma, JJ.*) PANNA LAL *v.* COLLECTOR OF MEERUT. **I.L.R. (1940) All. 181=188 I.C. 126=12 R.A. 583=1940 A.L. J. 45=1940 A.W.R. (H.C.) 60=A.I.R. 1940 All. 188.**

COORG CODE, S. 16—"European British subject"—Meaning of—Trial and conviction in Coorg—Omission to claim trial as European British Subject—Effect — Revision — Appli-

cation for—Forum—High Court or Judicial Commissioner of Coorg. *See* CR. P. CODE, Ss. 4 (*j*) 439 AND 528-B. **71 M.L.J.827.**

CO-OWNERS.

See also CO-SHARERS.

———Adverse possession Essentials — Mahomedan Law—Co-heirs under—Position of—Alienee from some co-owners—Possession of—If adverse to others. *See* ADVERSE POSSESSION—CO-OWNERS. **I.L.R. (1939) Kar. 597.**

———*Adverse possession — Essentials — Non-receipt of rent by one co-owner—Effect of.*

It is well-established that the mere non-receipt by one co-owner of a share in the profits of land in the physical possession of another co-owner will not be sufficient to establish adverse possession in the absence of positive indications that the co-owner in physical possession was setting up an adverse title to the knowledge of the other co-owner. Possession is never considered adverse if it can be referred to a lawful title. (*Wadsworth and Patanjali Sastri, JJ.*) MEHERWAN JEHANGIR *v.* DHUNBHAI KAVASHA MISRA. **1940 M.W.N. 569=52 L.W. 71=A.I.R. 1940 Mad. 785=(1940) 1 M.L.J. 913.**

———Adverse possession — Possession by one—Effect of—Ouster—Burden of proof. *See* ADVERSE POSSESSION—CO-OWNERS. **A.I.R. 1936 Nag. 214.**

———*Alienation by some—Suit for partition by others—Equities—Several sales by particular co-sharers—Earlier purchaser—If entitled to priority over subsequent purchaser—Rules—Contribution among purchasers.*

In a suit for partition by one or more co-owners against the others and alienees from some of them, where the alienations are not binding on the plaintiffs the Court, as a rule of equity, would generally allot to the alienees what their alienors sold or purported to sell, if that can be done, so that the alienees can get what their alienors sold or purported to sell to them. But where there are several such alienations, the alienees under an earlier sale have no priority over the subsequent purchaser in respect of the property sold; where the estate is not large enough for the alienees to get from their alienors' share all that the alienors purported to sell, all the purchasers would have to make some contribution and to give up some portion of their supposed purchases. (*Davis, J. C. and Lobo, J.*) MANGALMAL AGANMAL *v.* HAJI MAHOMED USIF BHORO. **I.L.R. (1939) Kar. 597=185 I.C. 11=12 R.S. 151=A.I.R. 1939 Sind 315.**

———Joint property—Repairs to well effected by one—Right to contribution from others. *See* CONTRACT ACT, S. 70. **A.I.R. 1937 Pat. 103.**

———*Joint land—Lease by co-owners to tenant for term—Tenant holding over after term—Suit by one co-owner only—Maintainability—Suit by all co-owners—Necessity.*

It is true that where the landlord's rights belong jointly to several persons, a suit to eject a tenant can be instituted only by all the co-owners suing jointly as plaintiffs. This rule, however, applies only where there is a subsisting relationship of landlord and tenant. Where a tenancy is entered into for a fixed term with co-owners of property, and the tenant continues on sufferance after the expiration of the period

of tenancy, a suit to eject the tenant holding over brought by one only of the co-owners is maintainable. The position of tenant on sufferance is akin to that of a trespasser, and one of several co-owners can maintain an action to eject a trespasser who has been holding wrongfully. (*Broomfield, Ag. C. J. and Sen, J.*) YESHWANT BAL KRISHNA *v.* KESHAV ANANT. **12 R.B. 295=186 I.C. 92=41 Bom.L.R. 1213 =A.I.R. 1940 Bom. 13.**

———*Joint property—One of co-owners roofing over part of joint lane and building on it—Right of others to injunction.*

If one of the joint owners of a lane roofs over a part of it adjoining his own property by means of a *chhatra* and builds a room on it a co-owner is entitled to sue for injunction for the removal of that structure, even though the damage only be very slight or hypothetical. But if the latter has made an exactly similar use of the lane opposite to his own property, an injunction will be refused, though he may be granted a decree for damages. (*Beckett, J.*) BARU MAL *v.* RALA RAM. **180 I.C. 202=11 R.L. 665=40 P.L.R. 670=A.I.R. 1938 Lah. 779.**

———*Joint property—Dispossession—Remedy of dispossessed co-owner—Suit for exclusive possession setting up hostile title—Decree for joint possession—If can be granted.*

A co-owner or tenant in common is entitled to possession of every parcel of the common joint property and to be even in exclusive possession of a portion of it, enjoy the same to his best advantage and does not thereby render himself liable to eviction by another co-tenant, because sole occupation of a part does not necessarily imply ouster. A co-owner may lawfully enjoy even the whole of the joint property so long as he does not do any act which amounts to an ouster of his co-tenants. But it is not open to him to claim exclusive possession of the whole; he cannot maintain an action for exclusive possession or for sole enjoyment of the profits of the property, even though another tenant in common dispossesses him of the same. If a co-owner is in possession of the whole or any part in pursuance of an arrangement with the other co-owners or with their consent expres or implied, the others cannot disturb him; and if he is disturbed or dispossessed, the Court will restore him to possession. The remedy of the other co-owners is to sue for partitoin. If one co-owner attempts to occupy the whole or part of the property by setting up a hostile title and seeks exclusive possession against another who has dispossessed him, he is not entitled to exclusive possession or even necessarily to join possession, if he fails to substantiate his claim. He will not be entitled to any relief in such a case. (*Venkatramana Rao, J.*) KOVUMMAL AMMAD *v.* ARANGADAN AMMAD. **163 I.C. 825 =9 R.M. 71=1936 M.W.N. 529=43 L.W. 646=A.I.R. 1936 Mad. 666=71 M.L.J. 145.**

———Land acquisition case—One if can give valid discharge for another interested in the land. *See* LAMBARDAR. **1939 A. W. R. (P.C.) 58.**

———*Ouster—Joint property of minor and major—Minor's guardian and mother attempting to live in house—Major co-sharer opposing*

CO-OWNERS.

and offering to pay rent for minor's share—If exclusion of minor—Liability for rent.

Plaintiff, a minor and his paternal uncle, the defendant were co-owners in respect of a dwelling house which was allotted to them jointly at a partition. The adoptive mother of the plaintiff, who was appointed as his guardian by Court applied to the Court that she should be permitted to open a new gateway to the house so as to enable her to give and live in the house so that her motion might be quite distinct from the defendant's portion of the house. The defendant opposed the application, averring that two families could not conveniently reside in the house and adding that the guardian should not be allowed to live in the house and that, if necessary, he was prepared to credit in the minor's account any reasonable rent which could be realised from his half-share in the house. On this, the guardian's petition was dismissed. The plaintiff sided with the defendant in the quarrel.

Held, though the defendant could not be made liable for rent unless it was shown that the plaintiff was excluded, the conduct of the defendant in opposing the petition of the plaintiff's guardian afforded the clearest possible evidence of exclusion amounting to an ouster in law, and the defendant was therefore liable to pay rent for the plaintiff's half-share in the house. The attitude of the minor in siding with the defendant and his likes and dislikes were matters which were irrelevant to the question. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KUPPUSWAMI AYYAR *v.* SUBBA AYYAR. **180 I.C. 677=11 R.M. 743=(1938) M.W.N. 399=A.I.R. 1938 Mad. 827.**

———*Ouster—Possession by one—Presumption as to being on behalf of all—Denial of title of one by another—Effect of.*

The normal possession in the case of co-owners is that the possession of one is not on his own account only but on behalf of all the co-owners; but where it is admitted that one co-owner has denied the title of another and has been in adverse possession there is no question of any presumption. (*Pollock, J.*) ABDUL AZIM *v.* SHEIKH GAFOOR. **I.L.R. (1937) Nag. 346=172 I.C. 934=10 R.N. 263=20 N.L.J. 143=A.I.R. 1937 Nag. 265.**

———*Partition—Joint property consisting of market and market site—If impartible.*

Partition is one of the ordinary incidents of joint properties. A market or the land on which a market is held is not impartible and a co-owner has the right to sue for partition of the same. (*D. N. Mitter and Patterson, JJ.*) RABIA KHATOON *v.* MAHOMED ALI. **40 C.W.N. 1203.**

———*Suit for accounts—Maintainability.*

A co-owner who has not been actually ousted from the common property can sue another co-owner for accounts, in case the latter receives rents and profits of the joint property in excess of his share, without instituting a suit for partition. (*Mukherjea and Roxburgh, JJ.*) ABU SHABID *v.* ABDUL HOQUE DOBHASH. **I.L.R. (1940) 1 Cal. 110=189 I.C. 642=13 R.C. 95=A.I.R. 1940 Cal. 363.**

———Wall erected by one on top of joint wall—If joint wall. *See* EASEMENT. **A.I.R. 1939 Lah. 28.**

COPYRIGHT.

COPARCENER.

See HINDU LAW.

COPIES.

See (1) EVIDENCE ACT, S. 65.
(2) LIMITATION ACT, S. 12.

CO-PLAINTIFF.

See (1) PRACTICE.
(2) C.P. CODE.

CO-PRISONER—EVIDENCE OF.

See EVIDENCE ACT, S. 30.

CO-PROPRIETORS.

See CO-SHARERS.

COPYRIGHT.

See also COPYRIGHT ACT (III OF 1914).

———Assignment—Author agreeing to grant to publishers sole and exclusive license to print, publish and sell his work—Agreement, if amounts to assignment of copyright. *See* CONTRACT—CONSTRUCTION. **A.I.R. 1938 Lah. 173.**

———*Assignment—Direct words not used—Evidence of parties—If a guide.*

Where direct words are not used to convey a right and the matter is one of inference by implication from the phrases used, then the evidence of the parties, if they are not interested one way or the other in the matter, is the surest of all guides as to the meaning of the phrases used. (*Dalip Singh, J.*) AMAR NATH KHOSLA *v.* M.C. MOHAN. **185 I.C. 65=12 R.L. 265=41 P.L.R. 879=A.I.R. 1939 Lah. 433.**

———*Assignment—Future work.*

There cannot possibly be a transfer of copyright or assignment of copyright in a non-existing work. Where there is no proof that the work was substantially completed at the time when document transferring copyright was drawn up and on the face of it the document refers to a future work copyright cannot be transferred by it. (*Dalip Singh, J.*) AMAR NATH KHOSLA *v.* M.C. MOHAN. **185 I.C. 65=12 R.L. 265=41 P.L.R. 879=A.I.R. 1939 Lah. 433.**

———Assignment of—Registration—If necessary. *See* T.P. Act, S. 54—Applicability. **1939 A.L.J. 71=1939 A.W.R. (H.C.) 121.**

———*Ideas, if protected—Distinction between copyright and patent—Extent of protection.*

The laws of copyright do not protect ideas. Its protection falls within the patent laws. While a patentee has the sole right to use his invention within certain limits and if any body uses the patent, though on independent investigations, there is infringement of the patent. In the case of an infringement of copyright, it must be shown that the defendant has derived his work from the plaintiffs. (*Bennet and Ganga Nath, JJ.*) GOPAL DAS *v.* JAGANNATH PRASAD. **I.L.R. (1938) All. 370=176 I.C. 118=11 R.A. 53=1938 A.L.R. 552=1938 A.L.J. 390=1938 A.W.R. (H.C.) 209=A.I.R. 1938 All. 266.**

———*Infringement—Burden of proof.*

In an action for infringement of a copyright, it is not for the defendant to prove that there has been no infringement. It is for the plaintiff, on whom the onus lies, to prove that in fact there has been an infringement. (*Wadia, J.*) PERFORMING RIGHT SOCIETY, LTD. *v.* INDIAN MORNING POST RESTAURANT. **I.L.R. (1939) Bom. 295=**

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184 I.C. 673=12 R.B. 192=41 Bom.L.R. 530 =A.I.R. 1939 Bom. 347.

———*Infringement—Case relating to—Trial—Help of expert evidence—Desirability.*

Where an infringement of a copyright is complained of, as it involves minute scrutiny of alleged similarities and dissimilarities and extensive and lengthy comparison, it is not only proper but essential, that the case should be tried with the aid of experts who might be appointed commissioners to investigate and report similarities. (*Bennet and Ganga Nath, JJ.*) GOPAL DAS *v.* JAGANNATH PRASAD. **I.L.R. (1938) All. 370=176 I.C. 118=11 R.A. 53= 1938 A.L.R. 552=1938 A.L.J. 390=1938 A.W.R. (H.C.) 209=A.I.R. 1938 All. 266.**

———*Infringement—Compilation not requiring originality—Use of previous works—Limits—Appending of additional information—Work, if ceases to be an infringement.*

The compiler of a work in which absolute originality is by the very nature of the work excluded is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. But no one is entitled to convey the same information, merely with some additions. (*Bennet and Ganga Nath, JJ.*) GOPAL DAS *v.* JAGANNATH PRASAD. **I.L.R. (1938) All. 370=176 I.C. 118= 11 R.A. 53=1938 A.L.R. 552=1938 A.L.J. 390 =1938 A.W.R. (H.C.) 209=A.I.R. 1938 All. 266.**

———*Infringement — Literary copyright—Title originally applied to musical composition applied to talkie film—Theme of film different from that of song.*

In general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale and of so important a character as to be a proper subject of protection against being copied. Where theme of a film is different from that of a song the use for the film of a title of a song is too unsubstantial to constitute infringement of literary copyright. (*Lord Wsight.*) FRANCIS DAY & HUNTER *v.* T. C. F. CORPORATION. **187 I.C. 449=12 R.P.C. 161=21 P.L.T. 355=1940 O.L.R. 266=6 B.R. 585=52 L.W. 10=1940 M.W.N. 677=A.I.R. 1940 P.C. 55 (P.C.).**

———*Infringement — Musical composition—Infringement of performing right—Talkie film adopting title of musical composition but not repeating in any form its words.*

There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. A musical composition is performed by audible reproduction, by the voice or by musical instruments or by mechanical methods of reproduction. Where not a word of a song is repeated in any form in talkie film except that the title of the song is thrown on the film at the outset this does not constitute infringement of performing right in musical composition.

COPYRIGHT ACT (1911), S. 1.

(*Lord Wright.*) FRANCIS DAY & HUNTER *v.* T. C. F. CORPORATION. **187 I.C. 449=12 R.P.C. 161=21 P.L.T. 355=1940 O.L.R. 266=6 B.R. 585=52 L.W. 10=1940 M.W.N. 677=A.I.R. 1940 P.C. 55 (P.C.).**

———*Passing off—Talkie film using title of song—Theme of film different from that of song—Song not sung at any performance.*

There may be a "passing off" by the use of the same title for a literary, artistic or musical work though it is difficult to imagine such a case where there are no circumstances calculated to mislead other than the mere title. A title may, however, be used in the case of a book or newspaper under such conditions that persons may be deceived into buying the defendant's book or newspaper under the impression that they are buying that of the plaintiff. Similarity of name may be strengthened by similarity in make up, and in subject-matter, and by other circumstances. Nor is such a claim limited to things sold, though it is commoner in that class of cases. ,It is not impossible that there might be "passing off" of such a nature that persons might pay to go to a performance of the defendants' work under the impression that they were going to witness the plaintiff's work. Such cases are perhaps not very likely to occur, but there may conceivably be the same element of likelihood of deception, whether designed or not, as to involve an invasion of the plaintiff's common law rights and a disturbance of his business interests. But the thing said to be passed off must resemble the thing for which it is passed off. Where a talkie film has used the title of a song but the theme of the film is different from that of the song and the song is not sung at any performance, there is no passing off. (*Lord Wright.*) FRANCIS DAY & HUNTER *v.* T. C. F. CORPORATION. **187 I.C. 449=12 R.P.C. 161=21 P.L.T. 355=1940 O.L.R. 266=6 B.R. 585=52 L.W. 10=1940 M.W.N. 677=A.I.R. 1940 P.C. 55 (P.C.).**

COPYRIGHT ACT (1911), (ENGLISH) S. 1—*"Original literary work"—Current traditional poems given literary form.*

If current traditional poems embodying the main incidents of legend are given a literary form demanding considerable powers of adaptation and polishing, the result is an original literary work within the meaning of S. 1 of the Copyright Act, 1911. (*Panckridge, J.*) RAMNARAIN TRIVEDI *v.* SHIB KUMAR TEWARY. **178 I.C. 106=11 R.C. 324=42 C.W.N. 541=A.I.R. 1938 Cal 594.**

———**S. 1**—*Traditional songs copied from dictation of another person and published—Right to copyright.*

A man who gets another to sing or recite traditional poems for the express purpose of recording the words and then publishes the record, is entitled to a copyright in it. (*Panckridge, J.*) RAMNARAIN TRIVEDI *v.* SHIB KUMAR TEWARY. **178 I.C. 106=11 R.C. 324=42 C.W.N. 541= A.I.R. 1938 Cal. 594.**

———**(1 & 2 Geo. 5, C. 46), Ss. 1, 2 and 19**—*Broadcast of performance of musical work—Infringement of copyright—Liability of broadcasters.*

The acoustic representation of a musical work by means of wireless so that the musical work is heard many miles away from the transmitting studio or place of actual performance, is a per-

COPYRIGHT ACT (1911), S. 1.

formance (public or private) of the work within the meaning of S. 19 of the Copyright Act. Here it is necessary to remember that the sole right of the owner of the musical work is to perform it *in public*, and that any one may perform the work in private. The original performance in the studio may be, and generally will be, a performance in private. In such a case the broadcasted performance at the receiving end, if in public and unlicensed, will be an infringement of copyright at that place. If there is merely a broadcast from the studio where the piece is performed in studio, there is obviously no performance in public at all. A broadcast *per se* is not an *acoustic* representation of the work. If the broadcast is picked up only by listeners in private it might be difficult to establish that there is a public performance; for each performance would be separate and each would be private. But a broadcast to all and sundry listeners will include hotels and other places of entertainment or refreshment who, if not forbidden, will perform the piece to a number of members of the public, and such a performance will be a public performance within the meaning of the Act by the owners or occupiers of those places; for their actions in connection with the receivers which have been installed there and which they control have caused the public performances to take place. Whether the studio performance is public or private, if the persons who are responsible for that performance are also responsible for the broadcasting of the piece, there is no doubt that they have facilitated the performance of the work in public by any listener who is in a position to use a loud-speaker and thus to perform the piece in public. The question as to the position of the broadcasters in such a case, so far as regards infringement, is answered by the language of S. 1 (2) of the Act. It is sufficient to show that they have "authorised" the performance in public of the works; and this will generally be established by proving that listeners with a licence were entitled to tune in their receivers and thus to perform the musical works in question in public as well as in private. (*Viscount Maugham.*) ARTHUR JOHN MELLOR *v.* AUSTRALIAN BROADCASTING COMMISSION. **188 I.C. 237=A.I.R. 1940 P.C. 111 (P.C.).**

———**S. 1 (2)**—*'Authorize'—Meaning of.*

The word 'authorize' in S. 1 (2) of the Copyright Act, 1911, covers anything done with the knowledge and connivance of a person. (*Braund, J.*) MAUNG NYI PU *v.* EAST END FILMS. **1939 Rang. L. R. 121=183 I.C. 625=12 R.R. 87= A.I.R. 1939 Rang. 266.**

———**Ss. 6 and 7**—*Remedies under—If alternative.*

Though the remedies given by S. 6, Copyright Act, are not alternative to those given by S. 7, yet when an owner of a copyright obtains damages under S. 6, it often happens that he can recover nothing further in respect of damages under S. 7. Where the amount of damages awarded under S. 6 covers the price for permission to publish the work in question, the author is not entitled to damages also under S 7. (*Tek Chand and Abdul Rashid, JJ.*) W.B. YEATS *v.* ERIC DICKINSON. **I.L.R. (1938) Lah. 84=177 I.C. 341=11 R.L. 300=40 P.L.R. 622=A.I.R. 1938 Lah. 173.**

COPYRIGHT ACT (1914), Sch. I.

———**S. 7**—*Owner of copyright—Right to infringing copies—Extent.*

Under S. 7 of the Copyright Act, all infringing copies of any work in which copyright subsists, become the property of the owner of the copyright. He has, therefore, a right to recover the possession of the infringing copies unsold and the price of the copies sold. (*Bennet and Ganga Nath, JJ.*) GOPAL DAS *v.* JAGANNATH PRASAD. **I.L.R. (1938) All. 370=176 I.C. 118= =11 R.A. 53=1938 A.L.R. 552=1938 A.L.J. 390 =1938 A.W.R. (H.C.) 209=A.I.R. 1938 All. 266.**

———**S. 25 (2)**—*Effect of certificate—If extends Act to Dominion where it is not in force.*

The certificate by the Secretary of State, under S. 25 (2), (English) Copyright Act, has merely the effect of bringing into operation the provision that the Dominion in respect of which the certificate is issued should, for the purposes of the rights conferred by the (English) Act (but for those purposes only), be treated as if it were a Dominion to which the Act extended. Thus although under S. 1, (English) Act, an author writing in a Dominion would not, when the (English) Act was passed, have any copyright under the (English) Act, the effect of the certificate would be that such an author would become a person entitled to "the rights conferred" by the (English) Act. Hence the authors in that Dominion will have the same rights under the (English) Act, within the area to which that Act extends as they would have if the Act extended to the Dominion. But the certificate does not and cannot extend the (English) Act to the Dominion, if it is not in force there. (*Lord Macmillan.*) MANSELL *v.* STAR PRINTING CO. **171 I.C. 406=10 R.P.C. 104=A.I.R. 1937 P.C. 326 (P.C.).**

———**(III OF 1914), S. 8 (1)**—*Innocent infringement—Burden of proof.*

Where in an action for infringement of a copyright, the defendant alleges that he was not aware of the existence of the alleged copyright, in order to come within the provisions of S. 8 of the English Copyright Act which has been incorporated in the Indian Act (III of 1914), it is for the defendant to allege and prove that the infringement was innocent. (*Wadia, J.*) PERFORMING RIGHT SOCIETY, LTD. *v.* INDIAN MORNING POST RESTAURANT. **I.L.R. (1939) Bom. 295=184 I.C. 673=12 R.B. 192=41 Bom.L.R. 530=A.I.R. 1939 Bom. 347.**

S. 13—*Jurisdiction under—Madras City Civil Court—If can try suit for infringement of copyright—City Civil Court Act, S. 3.*

Madras City Civil Court has no jurisdiction to try a suit for infringement of copyright. S. 3, City Civil Court Act, gives general jurisdiction to the City Civil Court, but the Copyright Act which deals with the special subject-matter of copyright clearly restricts jurisdiction to hear a suit or proceeding relating to copyright to the High Court and the District Courts. (*Pandrang Row, J.*) DHARMALINGA NAYAKAR *v.* BALASUBRAMANYA IYER. **173 I.C. 452 (2)=10 R.M. 586= A.I.R. 1937 Mad. 94.**

———**S. 19**—*Construction — Musical record —Copyright in—Nature and extent of—Making of the record—If to be lawful - Consent of owner of original work—Necessity—Owner's right to impose restrictive conditions—Copyright of*

CORPORATE BODY.

maker of record—If subject to rights of owner of original work.

S. 19 of the English Copyright Act which confers copyright on the maker of a record of a musical work does not in terms provide that the making of the record must be a lawful act or with the consent of the owner of the copyright in the original work, if such a person exists. But the section must be limited to a lawful making of the record. The copyright conferred by the section on the owner of the plate from which the record is made presupposes, therefore, that that plate came into existence lawfully. Where the original work is the subject-matter of the copyright, it necessarily follows that the consent of the owner of that copyright must be obtained to the making of the plate. Obviously it would be lawful for the owner to refuse his consent. It would also be legitimate for him to give his consent subject to certain conditions and those conditions may involve restricting the copyright which the owner of the plate would otherwise acquire under S. 19. Such copyright might be restricted in various ways, amongst others, by restricting the public performance of records made from the plate.

Quaere.—Whether the rights which accrue to the maker of a record or plate under S. 19, are subject or subsidiary to the rights of the owner of copyright in the original work? (*Beaumont, C.J. and Blackwell, J.*) WELLINGTON CINEMA *v.* PERFORMING RIGHT SOCIETY, LTD. **I.L.R. (1937) Bom. 724=172 I.C. 408=10 R.B. 271=39 Bom.L.R. 654=A.I.R. 1937 Bom. 472.**

CORPORATE BODY.

See (1) CORPORATION.
(2) COMPANY.

CORPORATION. *See also* COMPANY.

———*Powers and liabilities—Distinction between statutory and non-statutory corporations—Denial of liability after obtaining benefit of loan—Permissibility.*

As a general rule, apart from any special statute, a corporation has the same powers and is subject to the same liabilities as a natural person. The distinction between a statutory and a non-statutory corporation is this, that the former has such rights and can do such acts only as are authorized by the statute creating it, while the latter speaking generally, can do everthing that an ordinary individual can do unless restricted by statute. Where a secretary of a Sabha executed a mortgage and the money was in fact spent for the benefit of the Sabha, the Sabha cannot resist a decree being passed against it when it is found that the Sabha had under its constitution power to mortgage and had delegated it to its managing committee which in its turn had authorised the secretary to execute the mortgage. (*Rachhpal Singh, J.*) SHEO PRASAD BANSAL *v.* KULSHARASTRA SABHA. **180 I.C. 737=11 R.A. 519=1938 A.L.J. 663=1938 A.W.R. (H.C.) 513=A.I.R. 1938 All. 527.**

CORROBORATION.

See (1) EVIDENCE ACT, S. 133.
(2) CRIMINAL TRIAL.

CO-SHARER—Who is.

See also (1) CONTRACT ACT, SS. 43 AND 45.
(2) PARTITION.

CO-SHARERS.

CO-SHARERS.

Abadi.
Adverse possession.
Alienation.
Common land.
Compensation.
Co-sharing.
Ejectment.
Exclusive possession by one.
Joint khewat.
Joint land.
Lease by.
Lease by one
Mutual relation.
Partition.
Right to alienate.
Right to contribution.
Shamilat land.
Sir lands.
Suit by one.
Miscellaneous.

Abadi.

———*Abadi—Sale of house by tenant to co-sharer—Nature of rights conveyed—Other co-sharers, if entitled to sue for joint possession.*

The tenant or raiyat has a disposing over only so far as the materials of his house built on the village site are concerned and has not a transferable interest in the site of the house. The fact that the transfer is in favour of one of the co-sharers, has not the effect of depriving the other co-sharers of the right to the joint possession of the site. The retention of possession by such a co-sharer furnishes the others with a cause of action for a suit for joint possession of the site by removal of the materials. The question of special damage does not arise, for the cause of action in such a case is constituted by the invasion of the right of the co-sharers to joint enjoyment of the site of the house. (*Iqbal Ahmad, J.*) DARSHAN SINGH *v.* PRAG SINGH. **187 I.C. 39=12 R.A. 460=1939 A.W.R. (H.C.) 840 =1939 R.D. 612=A.I.R. 1940 All. 79.**

Adverse possession.

See also ADVERSE POSSESSION.
„ CO-SHARER.

———Need for proving ouster. *See* ADVERSE POSSESSION. **1939 O.W.N. 1039.**

———*Essentials—Mortgage of share by one co-sharer—If adverse to others—Nature of acts required—Rule.*

Possession of one co-sharer is presumed to be possession on before of all, but a co-sharer may oust another co-sharer. A co-sharer may mortgage his own share, and if he is in possession of the property, may put a tenant or even his mortgagee in possession. But these acts need not necessarily suggest to the other co-sharers that they are being ousted from their shares. In order that there should be ouster or adverse possession, the acts of tho co-sharer who claims the whole property must be open and of such a kind that the ousted co-sharer, if he was vigilant, would be bound to know that his co-sharer was proceeding to oust him from his share in the joint property. Otherwise there would be no ouster and time will not run against him. (*Harries, J.*) KISHUN PRASAD *v.* SHUBRATAN. **1937 A.W.R. 718=1937 A.L.J. 855=1937 A.L.R. 907=171 I.C. 910=10 R.A. 335=A.I.R. 1937 All. 696.**

———*Exclusion or ouster—What amounts to—Burden of proof.*

Whether there has or has not been an exclusion of one co-sharer from the joint property must be primarily a question of fact. A mere demand for partition made by one co-sharer followed by a refusal, with nothing more, would not amount to exclusion. In order to prove exclusion, it must be shown that there was a deliberate conduct on the part of the co-sharer alleging exclusion to keep his co-sharer out of the enjoyment of the common property and a complete denial of his rights. (*Rangnekar, J.*) DATTATRAYA SITARAM *v.* SHANKAR. **175 I.C. 434=10 R.B. 569 =40 Bom.L.R. 118=A.I.R. 1938 Bom. 250.**

———*Proof of ouster—Necessity—Joint trespassers—Suit by one against another for partition—Plea of absence of title in plaintiff, if open to defendant.*

Where there is a title in certain persons jointly as tenants in common, then one must oust the other before he can claim a title adverse to him. But where both are joint trespassers, as where they were purchasers under a sale which conveyed no title, one can oppose the title of the other in a suit for partition by the other. (*Allsop, J.*) ATTAR SINGH *v.* ASA RAM. **1939 A.W.R. (H.C.) 728=1939 R.D. 574 =A.I.R. 1939 All. 732.**

———*Ouster—Proof of.*

To defeat the title of a co-sharer, there must be an ouster, namely, an assertion of hostile title made with publicity as against the other co-sharer. (*D. N. Mitter and Patterson, JJ.*) SYED MAHOMED MALEEH *v.* SHASI MOULI NAG. **67 C.L.J. 188.**

———*Adverse possession—When can arise.*

In order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that exclusion or ouster must be for the statutory period. What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but such non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession. Regard must be had to all the circumstances, and a most important element is the length of time. Where a co-owner is in sole possession of land for a period of over thirty years and approaching forty years and during that time he enjoyed all the benefits arising from this property and alone paid the taxes which were due on this land, the presumption arising from long possession is the presumption that his possession was possession as sole owner and adverse to the other co-owners. (*Dunkley, J.*) MAUNG HLA PE *v.* MANIKA. **189 I.C. 455=13 R.R. 42=A.I.R. 1940 Rang. 141.**

Alienation.

———*Alienation—Mortgage of specific plots by co-sharer—Subsequent partition—Rights of mortgagee.*

A co-sharer in an undivided property cannot alienate any defined portion of such property even though he might have been in exclusive possession of the same by an agreement amongst the various co-sharers. It follows, therefore, that if a co-sharer executes a mortgage in respect of specific plots of *sir* which are in his

exclusive possession, the mortgage is subject to the right of the other co-sharers to enforce a partition. Where subsequent to the passing of a final decree on such a mortgage there was perfect partition as amongst the co-sharers and the mortgaged plots were allotted to another co-sharer, but in pursuance of the decree the mortgagee put the mortgaged property to sale, purchased them himself and obtained formal possession and then mutation in his favour, the co-sharer to whom the plots were allotted can successfully maintain a suit for their possession against him. (*Bajpai, J.*) ADIT SINGH *v.* BINDAYAL SAHU. **163 I.C. 762=9 R.A. 72=1936 R.D. 250=1936 A.L.J. 630=1936 All.L.R. 645 =1936 A.W.R. 543=A.I.R. 1936 All. 456.**

———*Joint mahal—Some of co-sharers giving plot to third person in exchange for a plot in his mahal—Effect—Such third person, if becomes co-sharer in joint mahal.*

An alienation by one or some of the co-sharers of a portion of a joint mahal which belongs to the whole body of the co-sharers, is not valid. It follows, therefore, that if some of the co-sharers give a plot in the joint mahal to a third person in exchange for a plot in his own mahal, such person acquires no rights in the plot by the exchange and cannot, therefore, be said to be a co-sharer in the joint mahal at all. (*Madeley, J.*) WAJID ALI *v.* MOHAMMAD NAZIRRUDDIN HUSAIN. **171 I.C. 89=1937 O.L.R. 520=10 R.O. 87=1937 R.D. 528=1937 O.W.N. 1036=A.I.R. 1937 Oudh 503.**

———Joint property—Mortgage of undivided share for private debt—Subsequent partition—Allotment of mortgaged property to another co-sharer—Right of mortgagee to proceed against such property—Remedy. *See* HINDU LAW—ALIENATION. **1937 M.W.N. 1340.**

———*Transfer by one of more than his share—Possession also delivered—Effect—Ouster of the others—Remedy—Limitation.*

Where one of two coparceners transfers a share, which is more than his own and follows it up by giving actual possession to the transferee, that constitutes an ouster of the other coparcener and as the transferee would acquire adverse possession as against that coparcener, he would have to bring his suit within 12 years of the ouster. If the transferee is a sole zamindar the limitation would only be 6 months, whereas, if he is one of several zamindars, his possession can be contested within 12 years as prescribed by Art. 142, Limitation Act. (*Mehta, S.M.*) MANIK AHIR *v.* ATIQA AHMAD. **1939 R.D. 1= 1939 A.W.R. (B.R.) 111.**

Common land.

———*Common land—Building on by one—Right of others to mandatory injunction—Proof of special damage, if necessary.*

Where a co-sharer brings a portion of the common property practically under his exclusive possession by building a *chabutra*, the other co-sharers are entitled to get a mandatory injunction against him for its demolition without proof of special damage. (*Bhide, J.*) MANGAT RAM *v.* GHULAM HUSSAIN. **163 I.C. 148=8 R.L. 1028= 38 P.L.R. 679.**

———*Donka belonging to proprietors of two adjoining estates in common—Right of one to put up bund—Right of other to prevent putting up of same—Proof of damage—Necessity.*

CO-SHARERS.

Where a donka forming part of the boundary of two estates belongs in common to the proprietors of both estates, the bed of it belongs to both, and it is not open to one of them to put up a bund across it so as to obstruct water flowing through the donka, and interfere with the common enjoyment of the common property. The other co-sharer has a right to prevent the putting up of the bund even though he may not be able to show any damage or the likelihood of any damage. (*Venkataramana Rao and Abdur Rahman, JJ.*) ZAMINDAR OF BETHAVOLE *v.* SATYANARAYANA RAO. **1940 M.W.N. 311=(1940) 1 M.L.J. 699.**

———*Exclusive possession by one and building on joint land—Permissibility—Right of others—Injunction to restrain building of permanent constructions.*

No co-sharer is entitled to put up constructions of a permanent character on the joint land without the consent of the other co-sharers. A co-sharer may have exclusive possession of a plot of joint land to a limited extent. If he merely uses it as an open ground without enclosing it, and allows booths of a temporary character to be put up on it and allows carts to stand there, that will not amount to ouster of the other co-sharers. But if he constructs a permanent building on the land in his exclusive possession, that would amount to changing the character of possession very materially and to a complete ouster of the other co-sharers, and the latter would in such a case be entitled to an injunction restraining the co-sharer in possession from building any such permanent constructions. (*Sulaiman, C.J. and Harries, J.*) JAMILUNNISSA *v.* MOHAMMAD ZIA. **I.L.R. (1937) All. 609=1937 A.W.R. 430=1937 R.D. 222=1937 A.L.J. 486=170 I.C. 824=1937 A.L.R. 734=10 R.A. 188=A.I.R. 1937 All. 547.**

———*Tenants-in-common—Powers to sell common property—Sale of whole land by one with consent of other—Validity—Sale for purpose different from that for which consent is given—If invalid—Co-tenant deriving benefit from sale and acquiescing—Right to impeach transaction later on—Election.*

One tenant-in-common cannot, generally speaking, sell more than his share of the property so as to bind his co-tenants. It is, however, open to one co-tenant to authorize another to sell his share of the common land and such authorization may be either express or implied. Where the patta for the common land stands solely in the name of one of two tenants-in-common a sale by him with the consent or authority of the other will operate to pass the entire interest in the whole land. When one co-tenant has authorized another to sell, the fact that the sale is made for a purpose other than that for which it has been authorized will not vitiate the sale, because the essential requisite of the validity of the sale is the authority to effect the sale and not a proper application of the purchase-money. When a co-tenant derives a benefit from a sale effected by another co-tenant and abstains from repudiating the transaction for a long time, for about 5 years, it can be safely inferred that he has elected to ratify the sale and he is precluded from attacking the sale subsequently. It is not open to a party to confirm a transaction and obtain a benefit under it and then turn round and impeach it. (*Venkataramana Rao, J.*) APPASAMY MUDALIAR *v.* SUNDARAM PILLAI. **164 I.C. 1078=9 R.M. 196=1936 M.W.N. 907=44 L.W. 205=A.I.R. 1936 Mad. 696=71 M.L.J. 223.**

Compensation.

———*Compensation—Right to—Co-sharer kept out of possession.*

A co-sharer who has been kept out of possession by the other co-sharers is entitled to maintain a suit for compensation against them. (*Dhavle, J.*) BAIJAN SINGH *v.* RAMRATAN PRASAD. **6 B.R. 365=186 I.C. 397=12 R.P. 493=A.I.R. 1940 Pat. 384.**

Co-sharing.

———*Co-sharing—If can be presumed.*

The law requires that co-sharing in cultivation must be proved, if a collateral wishes to inherit a holding under the Tenancy Act. It is not a matter which could be presumed. Zamindars have their rights as well as tenants and when a holding has escheated it is not reasonable to invent presumptions to deprive them of their right to take possession. (*Darling, S.M. and Bomford, J.M.*) RAM HARAKH PATHAK *v.* SHEO NANDAN. **1938 A.L.J. (Supp.) 79=1938 R.D. 780.**

———*Presumption as to—Absence of tenant.*

Where there is adequate proof as to a tenant's co-sharing before he left the village, then it may be presumed that the co-sharing continued during the tenant's absence. (*Mehta, S.M. and Harper, J.M.*) KUBER SINGH *v.* BAIJNATH SINGH. **1940 R.D. 193.**

Ejectment.

———Ejectment—Suit for by co-sharers—Omission to joint mortgagee of share—Effect—If fatal. *See* C. P. CODE, O. 1, R. 1. **1936 R.D. 85.**

———*Liability to—Taking of possession by lambardar after ejectment of tenant—Taking possession thereafter by co-sharer without lambardar's consent.*

Where a lambardar has taken actual possession after ejecting a tenant under S. 79 of the Tenancy Act, any co-sharer who thereafter takes possession without the consent of the lambardar renders himself liable to ejectment. (*Marsh, S.M. and Mehta, J.M.*) HAMIR SINGH *v.* HET SINAH. **1939 R.D. 604=1939 A.W.R. (B.R.) 290.**

———*Right of one of many to eject.*

Where one of the co-sharers alone had ejected a prior tenant and has been collecting the rent till the time of dispute, and recording the collections regularly in the patwari's siyaha, it is not open to the tenant to question such a co-sharer's right to eject solely on the ground that there were other co-sharers in the khewat. (*Marsh, S.M. and Mehta, J.M.*) NARAIN DAS *v.* JAGANNATH. **1939 R.D. 640 (1)=1940 A.W.R. (B.R.) 3.**

Exclusive possession by one.

———*Exclusive possession by one—Basis of right—Change in the nature of possession—Right of co-sharers to object to the change.*

One of several joint owners cannot erect a building on joint land without the consent of other co-sharers. The same principle would seem to apply to a case where he has been

using the land as sahan darwarz. The right of a co-sharer to continue in exclusive possession of those portions of joint land of which he was allowed to acquire exclusive possession arises on the assumption that it was consented to by his other co-sharers; such a consent must be confined to the nature of the possession already enjoyed. If that is changed then the other co-sharers have a right to object to the change. The construction of a building on a plot used as sahan darwaz is to change the method of exclusive possession enjoyed and as such the other co-sharers would be within their rights to object even in the absence of proof of direct injury to them. (*Radha Krishna Srivastava, J.*) RADHEY LAL *v.* MAHARAJ KUNJ BEHARI LAL. **15 Luck. 61=184 I.C. 136=1939 A.W.R. (C.C.) 185=12 R.O.83=1939 R.D. 576=1939 O.A. 725=1939 O.L.R. 590=1939 O.W.N. 863=A.I.R. 1939 Oudh 275.**

———*Exclusive possession by some with consent of all—Right of those out of possession to declaration of right to income—Mortgage by fourteen anna sharers to two anna sharers—Latter in possession and ejecting tenants and bringing holding under own cultivation—Holdings recorded* as sir *and* khudkasht*—If accretion—T. P. Act, S.* 63*—Right of mortgagor—Co-sharers to joint possession—Trusts Act, S.* 90.

Two co-sharers in a village who owned a two anna share in the village were also the mortgagees of the other co-sharers owning the remaining fourteen anna share, and were holding possession of the entire villages under an agreement entered into by all the co-sharers. The mortgage deed empowered the mortgagee co-sharers to file suits for ejectment of tenants, enhancement of rent, arrears of rents and all other suits, etc., in respect of the mortgaged share also. During the continuance of the mortgage the mortgagee co-sharers in possession ejected a large number of tenants, took possession of the holdings and brought them under their own cultivation. Some of those plots were recorded as their *sir*, while the others were recorded as their *khudkasht*.

Held, (1) that whatever rights the mortgagees got in the plots were obtained by them in their capacity as mortgagees and as owners of the two anna share, and all such rights enured to the benefit of all the co-sharers of the 16 anna share in the village, and the mortgagee-co-sharers having got an advantage in their capacity as mortgagees. S. 90 of the Trusts Act applied and they must be deemed to have accepted the position of trustees to the extent of the 14 anna share mortgaged to them and the co-sharers therefore became *sir* holders and *khudkasht* holders in respect of the plots; (2) that the mortgagors co-sharers were therefore entitled to a decree for joint possession in such plots along with the mortgagee-co-sharers; (3) that the plots could not, however, be treated as an accretion, and therefore S. 63, T. P. Act, did not apply; and (4) that since the two co-sharers were in possession with the consent of all the co-sharers, the other co-sharers were not entitled to a declaration of right to obtain a share in the income of the land in question, but would only be entitled to mesne profits from the date of suit till the date on which they get

possession. (*Harries and Rachhpal Singh, JJ.*) PUNJAB SUGAR MILLS CO., LTD. *v.* LAKSHMAN PRASAD. **1937 A.W.R. 372=1937 A.L.J. 501=169 I.C. 17=1937 A.L.R. 467=9 R.A. 725=1937 R.D. 226=A.I.R. 1937 All. 321.**

———Joint land—Ouster—Properties registered in name and remaining in possession of one—No claim of exclusive title—Adverse possession—Inference of—If justified. *See* ADVERSE POSSESSION—CO-SHARERS. **(1937) 2 M.L.J. 511.**

———*Liability of—Possession by one—Liability for rent or mesne profits to the rest.*

If a co-owner makes profits by the use of common property he is accountable to the other co-owners for the profits made by him in excess of his share, but a co-owner in possession cannot merely on the ground of his possession be made liable to pay an occupation rent to his co-owners, especially when it is not suggested that the other co-owners wanted to occupy the property and were prevented from doing so by the one in possession. (*Varadachariar, J.*) RAMAKRISHNA RAO *v.* SUBBA RAO. **1937 M.W.N. 400=45 L.W. 656=10 R.M. 375=171 I.C. 634=A.I.R. 1937 Mad. 398=(1937) 1 M.L.J. 501.**

———*Mode of enjoyment—Cattle troughs and thatched sheds put upon joint land by one co-owner—Right of others to sue for their demolition.*

The erection of a permanent building or joint land by one co-owner is an ouster of the other co-owners and can be objected to by them. On the other hand, if one co-owner occupies a piece of joint land not occupied by others by having some temporary structure or construction on it, there would be no ground for objection by the others. Where, therefore, in a suit brought by a co-owner for demolition of cattle troughs and thatched sheds put upon joint land by another co-owner, the Court arrives at a finding that the cattle troughs do not amount to exclusive possession of the plot or part of it but that the sheds are a step towards an exclusive use of the land and ousting others, the Court can pass a decree for demolition of the thatched sheds but not of the cattle troughs. (*Thom and Bennet, JJ.*) SHANKER LAL *v.* PATI RAM. **1937 A.W.R. 20=1937 A.L.J. 126=1937 R.D. 62=168 I.C. 650=9 R.A.663=1937 A.L.R. 386=A.I.R. 1937 All. 293.**

———*Right of others to money compensation.*

Where one of the co-shares is in exclusive possession of the joint property, the other co-sharers are entitled to money compensation at a proper rate in respect of exclusive use by the co-sharer. (*Tek Chand, J.*) NASIR DIN *v.* ABDUL RAHIM. **176 I.C. 726=11 R.L. 232=40 P.L.R. 95=A.I.R. 1938 Lah. 302.**

———*Right of others to compensation—Conditions.*

The right to claim compensation is confined to cases where one co-sharer appropriates the common land by excluding and ousting the other co-sharer from the enjoyment of his proper share in it, or where he brings into his own use the entire land in defiance of the claim of his co-sharer. A co-sharer is not however entitled to compensation where the other co-sharer has used the land without opposition or resistance from the former. A suit by a co-sharer plain-

tiff was brought against the other co-sharer for compensation for using and occupying lands which were their common property. There was oral evidence adduced by the plaintiff that the employees of the defendant were asked to divide produce of his share in the *bakasht* lands, but that was not done and a demand for partition of the plaintiff's share was made.

Held, that the claim for partition of *bakasht* was not a claim for out and out partition of the village. What the plaintiff really wanted was that there should be such an arrangement between the parties that both of them might cultivate their proportionate area separately. The village amlas were authorized to make this arrangement. It was not the duty of the plaintiff to follow the defendant wherever he might have been in order to obtain his right from him. If the amlas of the defendant, in spite of the demand of the plaintiff, cultivated the entire area, the defendant was answerable for this act of his agent whereby the plaintiff was excluded. Hence the defendant was liable to pay compensation to the plaintiff as he held the possession over the *bakasht* lands in defiance of the plaintiff's claim thereto and to his exclusion from the same. (*Mahommed Noor, J.*) MT. DULHIN SHYAM SUNDAR KOER *v.* MT. SHEOCHARAN KUER. **168 I.C. 597=9 R.P. 502=3 B.R. 449=A.I.R. 1937 Pat. 235.**

———*Right of other co-sharers to dispossess him.*

In a case of a joint khata, where one co-sharer has been in exclusive possession for a long time of a portion of the joint land, which does not exceed his share in the entire holding another co-sharer cannot dispossess him against his will from the portion of which he had been in possession. (*Tek Chand, J.*) KARAM CHAND *v.* KARAM DAS KHAN. **177 I.C. 385=11 R.L. 305=40 P.L.R. 653=A.I.R. 1938 Lah. 465.**

———*When arises—Co-sharer realising rent by sufferance of co-sharer lambardar—Rights of—Transferee from such co-sharer—If can be ejected.*

The nature of exclusive possession which could entitle a co-sharer or his transferee to remain in possession until partition, must be the possession in assertion of a right of a co-sharer. But where the co-sharer is in possession through a tenant and is receiving the rent only at the direction of the lambardar co-sharer, neither he nor his transferee can claim to resist ejectment and remain in possession till a suit for partition is brought. (*Thomas, C.J. and Radha Krishna, J.*) MAHOMED NAZIRUDDIN HASAN *v.* WAJID ALI. **15 Luck. 385=186 I.C. 141=12 R.O. 291=1940 R.D. 89=1940 A.W.R. (C.C.) 89 (2)=1940 O.L.R. 90=1940 O.A. 174=1940 O.W.N. 173=A.I.R. 1940 Oudh 215.**

Joint Khewat.

———*Joint khewat—Sale of a share in—Vendees rights.*

Where a co-sharer sold a half-share out of his half-share in a joint khewat, all that is sold is a half interest in certain plots without an agreement among the co-sharers and demarcation within the plots, the sale could not apply to anything more than a share in the khewat. It is not possible for the vendee to select portions of certain plots and say that those portions represent his severalty. (*Harper, S. M.*) ABEDA BEGAM *v.* SUKHDEI. **1940 A.W.R. (B.R.) 121=1940 O.A. 715.**

Joint land.

———*Joint land—Dealing by one—If binds all or amounts to ouster—Co-sharers allowing one to remain in possession for some time—If lose right to claim partition—If amounts to ouster.*

A transaction which is assented to by some only of the co-sharers cannot be binding on the entire body of the co-sharer landlords and cannot alter the character of the land. Each co-sharer is entitled, subject to paying compensation to the other co-sharers to cultivate any part of the common land not being cultivated by them. The other co-sharers are not thereby ousted, and their remedy, if they object, is merely to obtain partition. The mere fact therefore that some of the co-sharers have allowed others to remain in possession of the lands for some time will not amount to ouster, nor can it defeat their right to claim partition. (*Fazl Ali and Varma, JJ.*) HARIHAR PRASAD SINGH *v.* HITLAL SINGH. **21 Pat.L.T. 320.**

Lease by.

———*Lease by—Co-sharers in leasehold rights in colliery granting sub-lease—Demise not joint but separate—Sub-lessee paying each co-sharer his share of royalty—Right of co-sharer to sue for his share of royalty.*

Certain persons had undivided shares in the leasehold rights in respect of a colliery. A sub-lease of the colliery was granted. The demise was not joint but was made separately by each co-sharer in respect of his respective share. For a certain period, the sub-lessee paid separately to each co-sharer his respective share of the royalty but for certain reason the payment was stopped. Thereupon one co-sharer brought a suit for recovery of his share of the royalty and joined his co-sharers as defendants.

Held, that apart from the nature of the demise which was initially not a joint demise, the subsequent conduct of the parties showed that there was an implied agreement between the parties that each co-sharer's share of the royalty should be paid to him separately. Hence one co-sharer could sue separately for the recovery of his respective share of the royalty. (*Lort Williams, J.*) CHANDRAMANI DEBI *v.* CHANDANMULL. **I. L. R. (1938) 1 Cal. 206=176 I. C. 114=11 R.C. 42=A.I.R. 1938 Cal. 243.**

Lease by one.

———*Lease by one—If void or voidable—Avoidance—Forum—Remedies.*

The lease of khalsa land if given by a single co-sharer is not void by itself but is only voidable. It could be either avoided in the Civil Courts if the aggrieved co-sharers seek their remedy there, or in the Revenue Courts, if all co-sharers including the lessor agree and sue to eject the lessee within 12 years of the lease. (*Darling, S.M. and Bomford, J.M.*) SUKHNA *v.* SHIAM KRISHNA. **1938 A.W.R. (B.R.) 142=1938 R.D. 272.**

———*Remedy of other co-sharers.*

It is perfectly open to a co-sharer to grant a lease of the joint holding. If the other co-sharers are dissatisfied with it, their remedy is to institute a suit for partition. (*Henderson,*

CO-SHARERS.

J.) BHARANI KANTA RAY *v.* RAJAGOPAL LAL. 70 C.L.J. 199.

Mutual relation.

———*Mutual relation—Compensation—improvements effected by one co-sharer.*

Where one of the co-sharers reconstructs joint property without protest from the other co-sharer and the improvements in question are not made with a view to embarrass the other co-sharer at the time of partition, or at an inordinate expense, he is entitled to compensation at the hands of the other co-sharer though he does not make the improvements with his consent. (*Zia-ul-Hasan, J.*) RADHEY SHIAM *v.* MOHAMMAD NASIR KHAN. **13 Luck. 323=168 I.C. 472=9 R.O. 481=1937 O.W.N. 831=1937 O.L.R. 285=A.I.R. 1937 Oudh 394.**

———*Co-sharer mortgaging his share to another—Whether becomes exproprietary tenant of all co-sharers.*

It is now well established that a co-sharer who transfers his share to another becomes an exproprietary tenant not only of his transferee but of the entire body of co-sharers. There can be no distinction between the incidents of exproprietary rights arising on a sale and those of such rights arising on a mortgage. It is because of the fact that a co-sharer is not an absolute proprietor of his *sir* land but owns it jointly with the other co-sharers, that an exproprietary tenant has been held to be a tenant of all the co-sharers, and this reason exists both in the case of a sale and of a mortgage. Some of the co-sharers could not, therefore, sue alone to recover arrears of exproprietary rent under S. 108 (2) of the Oudh Rent Act without joining the other co-sharers in the suit. (*Zia-ul-Hasan, J.*) MOHAN SINGH *v.* HIMMAN SINGH. **11 Luck. 640=159 I.C. 778=8 R.O. 200=1936 R.D. 56=1936 O.W.N. 36=1935 O.L.R. 713=A.I.R 1936 Oudh 147.**

———*Default by some co-sharers in payment of land revenue—Revenue sale of whole estate—Co-sharer by agreement with purchaser obtaining property sold—Right of others to re-conveyance.*

In an estate, the zamindari right was vested in a number of persons and separate accounts had been opened under the Bengal Land Revenue Sales Act. In certain year, some of the co-sharers made default in the payment of their share of the land revenue and consequently the whole estate was put up for sale. Certain co-sharer by an arrangement with the purchaser obtained from him the property sold in the revenue sale with a view to avoid some part of the disaster of a sale. He was not guilty of any acts of bad faith towards his co-sharers, he had not lulled them into a sense of security, he had not abused their confidence and he had done everything that was possible for him to do to prevent the sale. All the co-sharers knew at all material times that the sale could not be prevented as the arrears of revenue had not been paid. Further, he did not do anything to prevent his co-sharers from becoming possible bidders.

Held, that as fraud or bad faith towards his co-sharers had not been proved the other co sharers could not claim to recover their former interest in the estate by paying proportionate portion of the purchase price. (*Sir George Rankin.*) ANANTH NATH BISWAS *v.* DWARKA NATH CHAKRAVARTI.

CO-SHARERS.

I.L.R. (1939) Kar. 149 (P.C.)=181 I.C. 380=43 C.W.N. 529=1939 O.L.R. 340=5 B.R. 654=69 C.L.J. 505=11 R.P.C. 262=20 Pat. L.T. 359=A.I.R. 1939 P.C. 86 (P.C.).

———Default in payment of revenue—Sale under revenue sale law—Purchase by one—If enures for the benefit of all—Absence of fraud or undue advantage on the part of purchasing co-sharer—Effect. *See* TRUSTS ACT, S. 90. **40 C.W.N. 1054.**

———*Grant of easement.*

Where a co-sharer grants a lease with respect to the joint estate, as a general rule, the other co-sharers cannot interfere with the lessee's possession and their remedy would be to bring a suit for partition. But a co-sharer cannot burden the land with incumbrances which will affect the rights of the other co-sharers. He has no right to burden the joint estate with a right of way. In such a case, the other co-sharers can refuse to be bound by the grant and the grantee can have no remedy against them inasmuch as they are not parties to the grant. (*Sen, J.*) HARAN CHANDRA MUKHO PADHYA *v.* SHYAMA CHARAN CHAKRAVARTY. **71 C.L.J. 248=A.I.R. 1940 Cal. 447.**

———*Joint holding—Mortgagee of co-sharer recorded as proprietor—Status of.*

A mortgagee from a co-sharer of a joint holding, who is recorded as a proprietor is reckoned both a proprietor and a co-sharer. (*Drake Brockman, S.M. and Know, J.M.*) SELLO *v.* KURYA SINGH. **1936 R.D. 114.**

———*One co-heir mortgaging his share and also shares of other co-heirs—Suit by mortgagee against mortgagor co-heir—Receiver appointed in suit—Other co-sharers suing for declaration of their rights—If need seek remedy against receiver.*

The possession of a co-heir is possession not only for himself but also for his co-heirs. The fact that he had, without their consent, purported to mortgage not only his own share but also theirs is not in itself an indication that his possession had become adverse to theirs. Hence, the fact that a receiver was appointed in the mortgage suit brought by the mortgagee against mortgagor co-heir cannot prejudice other co-heirs in the enjoyment of their right, they being persons with paramount rights not parties to the action and actually in possession of those rights. In a suit for the declaration of their rights as co-owners they need seek no remedy against the receiver. The claim by the mortgagee that he had a charge on their property which they must redeem is entirely irrelevant to such a suit and is not necessary for decision in suit. In such a suit the co-heirs need not ask for the further relief of partition. (*Mackney, J.*) S. L. S. K. R. CHETTYAR FIRM *v.* FAROK AHMED. **187 I.C. 460=12 R.R. 334=A.I.R. 1940 Rang. 83.**

———*Party-wall—Right of one to make construction—Rule—Presumption as to joint property.*

There is a presumption that a party-wall is joint property of both the owners; and a joint owner of a party-wall may not ordinarily make constructions without the consent of the other owner. (*Norman.*) SRI RAM CHANDRAJI *v.* NATHI. **1936 A.M.L.J. 134.**

———*Person opening doorway in wall of his house abutting on common courtyard--Suit for injunction—If lies.*

Where a person opens a door-way in the wall of his own house abutting on a courtyard which is the joint property of the parties and each one has a door to his house opening in the courtyard, the opening does not amount to an ouster of the other co-owners from the court-yard and the other co-owners cannot bring a suit for injunction to restrain him from opening the door unless an excessive user or a user inconsistent with that to which it has been put before, has been proved. (*Tek Chand, J.*) KHOTA RAM *v.* TIMKU RAM. **178 I.C. 289=11 R.L. 438=40 P.L.R. 746 =A.I.R. 1938 Lah. 487.**

———*Remedy against another co-sharer—Ejectment or partition.*

It is a well known principle of law that one co-sharer cannot bring a suit for ejectment against another co-sharer. His remedy is by way of a suit for partition. (*Thomas, J.*) ALI RAZA KHAN *v.* NAWAZISH ALI KHAN. **14 Luck. 666 =1938 O.A. 845=1938 O.W.N. 1157.**

———*Rights* inter se—*Right of one to build on or let out for building purposes, joint land--Absence of consent of others.*

One of several joint owners of land is not entitled to erect a building upon the joint property without the consent of the other co-sharers, notwithstanding that the erection of that building may cause no direct loss to the other joint owners. If he cannot build he cannot let out any portion of joint land for the purpose of building. (*Radha Krishna, J.*) AMJAD ALI KHAN *v.* BISMILLA. **184 I.C. 266=1939 O.W.N. 911=1939 O.L.R. 597=1939 A.W.R. (C.C.) 214=12 R.O. 88 =1939 R.D. 590=1939 O.A. 776=A.I.R. 1940 Oudh 24.**

———*Rights* inter se—*Two brothers owning land in equal shares—One of them building house and planting garden over portion, entirely at his own expense—Other brother, if can claim it.*

The rule of the English law to the effect that whatever is affixed to the land becomes a part thereof has no applicability in India in view of the provisions of Ss. 51, 63 and 108 of the T.P. Act. Where, therefore, one of two brothers owning certain land in equal shares, builds a house and plants a garden on a portion of it entirely at his own expense, the other brother is not entitled to claim a share in the house and the garden and cannot claim a declaration that the house and the garden are not the exclusive properties of the other brother. (*Addison and Abdul Rashid, JJ.*) GHAZAFAR ALI *v.* MUZAFFAR ALI. **164 I.C. 262=9 R.L. 97=39 P.L.R. 367=A.I.R. 1936 Lah. 511.**

———*Right to profits—Co-sharer starting cattle market in common land—Right of others to profits.*

A co-sharer is perfectly entitled to invest money in a piece of land in a village and would be entitled to all the profits derived from that source, subject to this limitation that he would be liable for payment of the rent of the land used by him like any other co-sharer tenant in that village. There can be no law under which the co-sharers in the village can become entitled to share in the income which a co-sharer may get by investing his money or through his own labour and exertion. And there is no presumption that such investment by the co-sharer is for the benefit of all the co-sharers even if he happens to be the lambardar. Hence if a co-sharer who happens to be a lambardar starts a cattle market in the common land and derives profits, the other co-sharers in the village have no right whatsoever to a share in those profits. 19 Cal. 253 (P.C.) Appl. (*Harries and Rachhpal Singh, JJ.*) CHATTAR SINGH *v.* AJUDHIA PRASAD. **57 All. 707= 162 I.C. 763=8 R.A. 897=1936 All.L.R. 473 =A.I.R. 1936 All. 324.**

———*Suit for profits—One of two co-sharers ex-proprietary tenant—Other co-sharer accepting whole of ex-proprietary rent in lieu of profits—If can claim profits.*

Where one of two co-sharers of a khewat number in a suit for arrears of rent on the ex-proprietary holding, accepts the whole of the ex-proprietary rent from the other co-sharer who is the ex-proprietary tenant in lieu of his share of the profits, he is estopped from subsequently claiming a share of profits in the remaining portion of the *sir* land. (*Bennet and Verma, JJ.*) GHASITOO MAL *v.* ASA RAM. **I.L.R. (1940) All. 8=187 I.C. 369=12 R.A. 536=1940 A.W.R. (H.C.) 129=A.I.R. 1940 All. 17.**

———*Trustee for payment of rent committing default—Purchase by such trustee—Effect of.*

If either a co-sharer or a person who is in a sense a trustee for the payment of rent defaults in the payment of rent with the express object of getting hold of the interest of the other co-sharer, that purchase must be taken to enure for the benefit of the person so defrauded. (*D. N. Mitter and Patterson, JJ.*) SYED MAHOMED MALEEH *v.* SHASI MOULI NAG. **67 C.L.J. 188.**

Partition.

———Partition—Alienation of share in joint property by one co-sharer—Alienee getting possession of item—Suit by other co-sharers for partition—Equities in favour of alienee--Right to retain possession of item purchased--Prospective rights of alienee and transferee from latter as against general body of co-sharers—Partial partition. *See* MAHOMEDAN LAW—CO-SHARERS. **40 Bom.L.R. 1205.**

———*Portion of Mahal held jointly with other Mahals—Procedure—Alternatives open.*

Where a portion of a Mahal is held jointly with other Mahals, if a co-sharer of that Mahal applies for partition, there are two alternatives open. Either the partition can proceed of the area in that particular Mahal apart from the '*Minjumla*' area or else the applicant must first apply for partition of the area held jointly with the other Mahals and then he can proceed with the partition of the Mahal in which he is a co-sharer. (*Darling, S. M. and Bomford, J.M.*) BANSI RAM *v.* DURGA PRASAD. **1938 A.W.R. (B.R.) 132=1938 R.D. 243.**

———*Private partition of Sir plots--Effect on the rights of one with reference to plots allotted to the other—Right to sue trespasser—If entitled to joint possession.*

A private partition of Sir plots among co-sharers has not the effect of destroying the right of

ownership of any one of them in the plots allotted to the others. As such any one of them can sue to eject a trespasser on a plot allotted to another co-sharer. But he is not entitled to joint possession but only to a declaration of title as joint owner with others. (*Bennet and Verma, JJ.*) HALDAR UPADHYA *v.* RAM SUMAR UPADHYA. **182 I.C. 309=11 R.A. 651=1939 R.D. 169=1939 A.L.J. 171=1939 A.W.R. (H.C.) 249=A.I.R. 1939 All. 332.**

———*Right to maintain suit—Stranger-purchaser of co-sharer's share.*

A stranger purchaser of the share of a co-sharer in a joint property is entitled to maintain a suit for partition on the principle that he is in constructive possession of that property, when there has not been to his knowledge any denial of his title or the title of his vendor. (*Mitter and Akram, JJ.*) PRAMATHA NATH *v.* MANDAL KHAN. **43 C.W.N. 1081.**

———*Possession of one—Nature of—Adverse possession—What will and what will not constitute.*

The possession of one co-sharer is possession on behalf of all the co-sharers in the absence of ouster or repudiation of title, and the fact that the non-possessing co-sharers were not in receipt of profits will not suffice to establish adverse possession as against them. (*Collister, J.*) HAIDER HUSSAIN *v.* SUBBHAN KHAN. **1940 A.W.R. (H.C.) 387.**

Right to alienate.

———*Right to alienate—Exchange by one co-sharer of plots appertaining to joint khewat—Acted upon without objection—Plea as to invalidity of exchange—If open to a party to it.*

Where one of the co-sharers transfers by a deed of exchange specific plots appertaining to a joint khewat and the other co-sharers were in no-way concerned with it and did not at any time object to it and where it was acted upon and the parties were put in possession of their respective plots it is not open, in a suit by one of the parties to declare that he is the owner of the plots in his possession for the other party, to raise a point which might have been available to the other co-sharers at the time of transfer that the deed of exchange is invalid as some of the co-sharers had not been parties to the exchange. (*Ismail, J.*) KASHI NATH *v.* MAKCHHED. **184 I.C. 233=12 R.A. 202=1939 A.W.R. (H.C.) 373=1939 A.L.J. 384=A.I.R. 1939 All. 504.**

———*Person in exclusive possession.*

Where a co-sharer has been in exclusive possession of a certain plot of land without let or hindrance by other co-sharers, he can transfer it to a third person, subject to the right of other co-sharers to obtain a partition of the village. (*Srivastava, J.*) SRIPAL SINGH *v.* MATA BADAL. **15 Luck. 15=183 I.C. 593=12 R.O. 42=1939 A.W.R. (C.C.) 132=1939 R.D. 477=1939 O.W.N. 773=1939 O.A. 627=1939 O.L.R. 530 =A.I.R. 1939 Oudh 243.**

———*Some of co-sharers executing mortgage entering into compromise with mortgagee agreeing to deliver some land to him—One of mortgagors not party to it—Compromise, if lagal.*

Even before partition, a co-sharer in possession may mortgage any portion of the joint property not in excess of his share subject to the adjustment of the rights of all the co-sharers at the time of the partition. Where therefore only some of the co-sharers who have executed a mortgage enter into a compromise with the mortgagee, whereby they agree to deliver some land to mortgagee in consideration of his reducing the mortgage charge and releasing rest of the property from the mortgage, the co-sharers entering into the compromise are bound by it to the extent of their share and the compromise is not illegal merely because one of the mortgagors is not a party to it. (*Bhide, J.*) KISHAN SINGH *v.* PRITAM SINGH. **182 I.C. 353=12 R.L. 19=A.I.R. 1938 Lah. 737.**

Right to contribution.

———*Right to contribution—Rent decree obtained after interest of co-sharer tenure-holder is sold in execution of mortgage decree—Amount realised from another co-sharer personally—Liability of former to contribute to latter.*

Where some time before a rent decree was obtained by the landlord the interest of a co-sharer tenure-holder was sold in execution of a mortgage decree, and the landlord proceeded against the judgment-debtors personally and realised the entire decretal amount from another co-sharer, it is certainly open to the latter to proceed against the former for contribution, and the former cannot fasten his liability on the purchaser at the mortgage sale. (*Mukherjea and Roxburgh, JJ.*) RADHA RANI *v.* BRINDARANI. **43 C.W.N. 940.**

———*Right of one co-tenant to deal with property of another.*

A tenant in common cannot deal with the right of his co-tenant in the matter of alienations, without that co-tenant's express authority. (*Grille, J.*) NANURAM *v.* RADHA BAI. **1940 N.L.J. 268.**

Shamilat land.

———Shamilat land—*Exclusive possession of portion—Right of co-sharer.*

One co-sharer may, under certain circumstances, take and keep exclusive possession of a portion of *shamilat* land for his own use until partition, and another co-sharer is not by reason of the land being *shamilat* necessarily entitled to disturb his possession. The commonest instance of the right of exclusive possession occurs when a co-sharer may break up and cultivate a portion of the *shamilat* and take the produce for his own benefit. The principle is precisely the same when a plot of *shamilat* is used as a *bara* or for any purpose other than cultivation. (*Abdul Rashid, J.*) LAKHMIR SINGH *v.* SADHU. **41 P.L.R. 109 =A.I.R. 1939 Lah. 288.**

———*Partition—Land reserved for common purpose—Building erected thereon by some of co-sharers—Right of others to its demolition.*

If the *shamilat* land of a village has been partitioned reserving only special areas for common purposes, as (*e.g.*), land reserved as an appendage to a well, none of the proprietors can alter the condition of the joint property without the consent of all the co-sharers. If some of them erect a building thereon without the consent of the others, the latter can demand its demolition., (*Skemp, J.*) SUNDAR SINGH *v.* HARNAM SINGH. **41 P.L.R. 587=A.I.R. 1939 Lah. 514.**

———*Right of passage.*

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A co-sharer is entitled to a right of passage over the *shamilat* land when it is not reserved for any common purpose of the village. (*Bhide, J.*) DULE *v.* KEHRI SINGH. **42 P.L.R. 142.**

Sir lands.

———Sir *lands—Holding of, in severalty—If indicates ownership—Position of person in possession—His rights.*

The holding of certain *sir* fields in severalty by co-sharers does not indicate that they are either the absolute owners of those fields or that they are not liable to be partitioned. The owner of the entire village is the body of co-sharers and as such a co-sharer in the occupation of *sir* land *prima facie* holds it only as the agent of the general body of co-sharers and it cannot become his exclusive property unless and until he assets a hostile title and perfects it by prescription. Such lands are liable to be partitioned like the rest of the village and when the co-sharer in possession cannot resist it, it follows that his transferee could not be in a better position. (*Stone, C.J. and Clarke, J.*) ANANTRAM *v.* PUNA. **1939 N.L.J. 92.**

Suit by one.

———*Suit by one—Right to recover property from trespasser—If can assert right in whole property.*

The right of a tenant in common to recover the whole property as against a trespasser is a right which he is entitled to assert only on behalf of himself and his co-tenants. He cannot do so in the assertion of a right to the whole property in himself. (*Thomas, J.*) ALI RAZA KHAN *v.* NAWAZISH ALI KHAN. **14 Luck. 666=1938 O.A. 845=1938 O.W.N. 1157.**

———*For whole rent—When permissible.*

Where by local custom one of the co-sharers acts as agent on behalf of the whole body of co-sharers and realises the whole rent from a tenant, then that co-sharer can sue alone without the other co-sharers, for arrears of rent. (*Marsh, S.M. and Mehta, J.M.*) SHIV SAGAR PANDE *v.* LUCHMAN KOERI. **1939 R.D. 598=1939 A.W.R. (B.R.) 268.**

———*Suit for ejectment—When maintainable.*

Where by mutual agreement amongst two brothers, co-sharers, particular plots had been allotted to a particular brother, and that brother alone files a suit to eject a sub-tenant in respect of those plots, the suit is not bad, where there is evidence to show that it was filed with the consent of the other brother; and the defendant is liable to ejectment in that suit. (*Marsh, S.M. and Mehta, J.M.*) SHUGAN CHAND *v.* JAGRAM. **1939 R.D. 603 (2)=1939 A.W.R. (B.R.) 273 (2).**

———*Suit for profits—Right—Excessive use and occupation.*

Although one co-owner is not accountable to the others for "excessive use and occupation," but if his possession or user of joint property is inconsistent with the title of the others, or it amounts to their exclusion or dispossession, such possession or user clearly becomes unlawful and he is bound to render account of the rents and profits of the share of others. (*Tek Chand and Abdul Rashid, JJ.*) PUNJAB NATIONAL BANK, LTD. *v.* SETH PARASRAM. **A.I.R. 1940 Lah. 350.**

CO-SHARERS.

———Suit by, to recover revenue paid—Presumption if any that each has paid a portion. *See* C.P. CODE, O. 22, RR. 3 AND 11. **1139 O.W.N. 711.**

———*Suits between*—Status quo ante—*Duty of Court to maintain pending decision.*

In cases of disputes between co-sharers, it is of the utmost importance that the *status quo ante* should be maintained pending decision of the suit, and that none of the co-sharers should be allowed to deal with joint property in a manner which is likely to render the suit infructuous or create other complications. One of the co-sharers sued for a perpetual injunction, restraining his other co-sharers from building on a portion of joint land, which area was larger than their share. Pending the suit he was granted a temporary injunction against the other co-sharers not to build on joint property till the decision of the suit. The other co-sharers continued building in defiance of the injunction. The Appellate Court characterising the conduct of other co-sharers as reprehensible, found that there was no need for a temporary injunction and allowed them to build at their own risk.

Held, that the statutory rule of maintaining the *status quo ante* was departed from without any adequate reason and the Judge had really exceeded his jurisdiction in virtually deciding the suit on the merits.

Held, further, that there was no obligation on the plaintiff co-sharer, who was granted temporary injunction to sue for partition, It was for the defendant co-sharers to have the land divided before starting the construction either by consent or through Court. (*Tek Chand, J.*) KISHORI LAL *v.* KHAIR DIN. **173 I.C. 731=10 R.L. 478=A.I.R. 1937 Lah. 288.**

———*Miscellaneous—Decree against deceased father—All sons not made parties to execution proceedings—Shares, if exempted from sale.*

Where a decree for arrears of rent is passed against a father and on his death only one of his sons is brought on record as his legal representative in the execution proceedings, it cannot be deemd therefrom that the shares of the other sons are exempted from sale inasmuch as they were not all made parties to the execution proceedings. (*Zia-ul-Nasan and Radha Krishna Srivastava, JJ.*) KANDHAYYA BUX SINGH *v.* THE KURAIN SUKHRAJ KUER. **14 Luck. 751=12 R.D. 154=184 I.C. 818=1939 O.L.R. 660=1939 R.D. 557=1939 O.A. 690=1939 A.W.R. (C.C.) 175=1939 O.W.N. 848=A.I.R. 1940 Oudh 55.**

———*Hindu joint family—Member of—If a co-sharer—Right to possession.*

A member of a joint Hindu family being a coparcener in the coparcenary property situated in a village is by virtue of that fact a co-sharer in the village and therefore will be one of the village proprietors, who can retain possession of village common land until partition. (*Jai Lal, J.*) SHIB LAL *v.* SRI KISHEN DAS. **163 I.C. 701=9 R.L. 37=38 P.L.R. 1093=A.I.R. 1936 Lah. 404.**

———Khudkasht—*Possession of share by one and entry of name in* khewat *as* khudkasht *holder—Application by others to remove name—Maintainability—Remedy.*

Where one of several co-sharers takes certain lands into his possession as *khudkasht* and such

CO-SHARERS.

lands are not more than what his share should be, he cannot be treated or recorded as a trespasser, If his name has been entered as *khudkasht* holder of the lands in question, the other co-sharers have no right to apply to have his name removed from the records by proceedings for correction of the records. Their remedy is a suit for profits. (*Drake Brockman, S.M. and Knox, J.M.* KHUMAN KUNWAR *v.* RAM PIARI. **1936 R.D. 25.**

———*Liability to pay money order and registration charges incurred by the lambardar.*

Where the co-sharers are living away from the village or at a place different from that of the lambardar's, their share of the profits have only to be sent by post and as such, money order and registration charges in connection therewith have only to be borne by them. (*Pollock,* J.) DHUNDIRAJ *v.* GANPAT. **181 I.C. 915=11 R.N. 492=1939 N.L.J. 140=A.I.R. 1939 Nag. 121.**

———*Mortgage with possession by one—Raiyat admitted by mortgagee cultivating and paying rent to mortgagee—Possession for* 12 *years—Effect—Acquisition of occupancy rights—Partition of estate—Right of mortgagee or co-sharer getting land on partition to eject raiyat.*

The leasing out of "bakasht" land to raiyats on an adequate rent is an act of ordinary management of property such as a mortgagee in possession is entitled to do. When the raiyats so admitted cultivate the land and deliver rent to the mortgagee in possession of the proprietary interest of one of several co-sharer landlords, they become raiyats under the mortgagee as representing the proprietor and in due course, after they hold as raiyats for twelve years they would acquire occupancy right and cannot be ejected by the mortgagee and his representatives or by the co-sharer mortgagor and his representatives who may get the land allotted to them on a partition. (*Courtney Terrell, C.J. and James, J.*) RAJA RAM RAI *v.* NIRANJAN RAI. **17 Pat. 143=175 I.C. 943=11 R.P. 35=1938 P.W.N. 371=19 Pat.L.T. 387=4 B.R. 658=A.I.R. 1938 Pat. 297.**

———*Right to share in commission paid to the lambardar.*

The lambardar receives one commission on the land revenue assessed in a mahal and another commission on the land revenue assessed on the *Malik makbauzas*. This commission is given to him not as a proprietor of the village but to compensate him for the trouble he has in collecting the money. Neither forms part of the village assets and in neither have the co-sharers any right. (*Pollock, J.*) DHUNDIRAJ *v.* GANPAT. **181 I.C. 915=11 R.N. 492=1939 N.L.J. 140=A.I.R. 1939 Nag. 121.**

———*Miscellaneous—Sale of a part of a share in a village—If raises a presumption of sale of a corresponding portion of the house in that share.*

When a person sells a part of his share in a village, there is no presumption that a corresponding share in the house in that share is also sold. (*Hamilton, J.*) BACHAN LAL *v.* GOBARDHAN. **15 Luck. 288=185 I.C. 373 (1)=12 R.O. 227=1940 O.W.N. 13=1940 O.A. 33=1940 R.D. 13=A.I.R. 1940 Oudh 118.**

COSTS.

See also (1) C.P. CODE, S. 35.
(2) CONTRIBUTION.
(3) CR. P. CODE, S. 148.
(4) PRACTICE.

Award of.
Discretion of Court.
Liability for.
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Award of.

———Apportionment—Joint decree for costs against several defendants—Execution—Apportionment of liability—Principles. *See* EXECUTION—RIGHT TO. **A.I.R. 1936 Cal. 656.**

———*Attorney of deceased party—Right to apply to Court for order of payment.*

An attorney of a deceased party is entitled to apply to the Court for an order for payment of the costs and expenses incurred by him in the course of the suit, although he is not a party to the suit. (*McNair, J.*) SARBA SUNDARI DASI *v.* NANDA RANI DASI. **I.L.R. (1940) 2 Cal. 102.**

———*Award of—Suit dismissed with costs—Separate sets of costs to different defendants—If justified—Bombay High Court Civil Circulars,* 1925, *Ch. VIII.*

Where a plaintiff's suit is dismissed with costs, the order as to costs must mean that the plaintiff is to pay the costs of the defendants, and if there is more than one defendant he would have to pay the costs of all the defendants, since *prima facie* every defendant is entitled to defend the suit in such manner as he thinks fit and with the help of any pleader in whom he has confidence. Where the order shows on its face that there are two defendants who have incurred separate costs, the matter is made additionally clear. (*Beaumont, C.J. and Lokur, J.*) MARIYAYA CHANVIRAYA *v.* SHANTIRAPPA DANAPP. **I.L.R. (1939) Bom. 478=184 I.C. 15=12 R.B. 152=41 Bom.L.R. 575=A.I.R. 1939 Bom. 338.**

———Co-defendants—Decree for costs against—Payment by one—Right to contribution, *See* CONTRIBUTION—CO-DEFENDANTS. **1938 A.W.R. (H.C.) 637.**

———*Commissioner of Partition—Right to apply to Court for order for payment—Taxation of bills of Commissioner.*

A Commissioner of Partition is entitled to apply to the Court which appointed him and in the suit in which he was appointed for an order for payment of is costs and expenses, although he is not a party to the suit. His bills may be taxed by the taxing officer of the Court. (*McNair, J.*) SARBA SUNDARI DASI *v.* NANDA RANI DASI. **I.L.R. (1940) 2 Cal. 102.**

Discretion of Court.

———*Discretion of Court—Defamation—Suit for damages—Decree for smaller amount than claimed—Full costs—Power of Court to award.*

COSTS.

In cases of claims for damages for defamation, it is not possible for the Court to assess the damages at an exact figure. Parties cannot be expected to assess the damages in an exact manner. Although the amount of damages decreed by the Court is very much less than the amount claimed the Court can award full costs to the plaintiff and not merely proportionate costs. (*Pandrang Row and Abdul Rahman, JJ.*) VENKAYYA PANTULU *v.* SURYA PRAKASAMMA. **1940 M.W.N. 892=52 L.W. 282=(1940) 2 M.L.J. 328.**

———*Discretion of Court—Dismissal of suit—Right of defendant—Defendant not proving case set up by him—If to be deprived of costs.*

Where a suit is dismissed, but the defendant does not succeed in establishing his case, the Court will not give him costs, but will order each party to bear their own costs. (*Fazl Ali and Manohar Lall, JJ.*) MAHABIR DAS *v.* UDIT NARAIN VARMA. **17 Pat. 594=178 I.C. 849=11 R.P. 306=5 B. R. 149=19 Pat.L.T. 570=A.I.R. 1938 Pat. 613.**

———*Dispute as to existence of will—Party denying failing to prove allegation—Award of costs to out of estate—Propriety.*

A person who is instrumental in bringing about an enquiry into the question of the execution or non-execution of a will, by bringing to the notice of the Court that the propounder of the will was instrumental in the preparation and execution of the same cannot be said to be wholly in the wrong even if he does not succeed in the impeachment; and when the propounder is to some extent responsible for some untrue evidence, the case is a fit one in which the Court should order the costs to come out of the estate, even if the party opposing the grant of probate fails in the action. (*Rupchand Bilaram, A.J.C.*) JALALDIN *v.* AMINUDDIN. **29 S.L.R. 366.**

———*Exercise of—Errors and omissions in procedure—If fatal—Proceedings in muffasal Courts governed by scale of fees prevailing on Original Side of High Court—Duty of Taxing Officer in cases of doubt—Failure to follow proper procedure—Effect—C. P. Code, S. 35—Bombay High Court Rules (O.S.), R. 767.*

The practice relating to orders as to costs in incidental or interlocutory proceedings prevailing on the Original Side of the High Court cannot be applied in the muffasil in a rigorous manner. It may happen in the muffasil that the orders of the Court are not sufficiently explicit to determine such questions, and that the Court's directions under S. 35 and R. 767 of the High Court Rules (O.S.) may be considered necessary by the Taxing Officer. He may reasonably think, in view of the practice, prevailing in the muffasil, that such directions were not given by mere oversight. In such cases the proper course for the Taxing Officer would be to give the parties an opportunity of obtaining such directions or orders from the Court before the costs in question are taxed. For preventing delay the Taxing Officer may in proper cases proceed with the taxation, leaving the matter open, or may give an alternative decision. This would enable the Court to deal with the matter ultimately not only in appeal from the Taxing Officer, but to hear the application for directions under S. 35 or R. 767 of the High Court Rules.

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Where the proper procedure with reference to the exercise of discretion under S. 35, C. P. Code, and R. 767 has not been followed, if no substantial injustice has resulted, therefrom, it is just and reasonable to overlook the omissions or errors in procedure. (*Barlee and Tyabji, JJ.*) CHHOTALAL *v.* SOMESHWAR. **173 I.C. 489=10 R.B. 337=39 Bom.L.R. 820=A.I.R. 1938 Bom. 10.**

———*Interference by appellate Court—Grounds.*

An appellate Court will not be justified in interfering with the trial Court's order as to costs unless the appellant is able to show that there has been any error of principle into which the lower Court has fallen in the exercise of its discretion. (*Varadachariar and Pandrang Row, JJ.*) VENKATARAYUDU *v.* RAMAKRISHNAYYA. **173 I.C. 515=10 R.M. 601=1937 M.W.N. 933=46 L.W. 245=A.I.R. 1937 Mad. 810=(1937) 2 M.L.J. 307.**

———Discretion — Interference in appeal—Second appeal—High Court's power of interference. *See* C. P. CODE, S. 100. **51 L.W. 538=(1940) 1 M.L.J. 764.**

———*Interference by appellate Court—Powers of.*

Costs are in the discretion of the trial Court; provided that there was material for the exercise of this discretion, an appellate Court cannot interfere. (*Courtney-Terrell, C.J. and Dhavle, J.*) SECRETARY OF STATE FOR INDIA *v.* LONDON COLLIERY COMPANY. **15 Pat. 510=164 I.C. 860=9 R.P. 122=17 Pat.L.T. 279=1936 P.W.N. 59=A.I.R. 1936 Pat. 513.**

———*Discretion—Mortgage suit—Purchaser of mortgaged property undertaking with mortgagor to pay purchase money to mortgagee but failing to do so and occasioning suit—Order directing him to pay costs of suit—If justified—Reversal by appellate Court—Propriety.*

Wide powers of discretion are given to a Judge when considering the question of costs. His discretion must be exercised judicially and must be in accordance with general principles of law. Before a decision in regard to costs is reversed, it must be shown that the order has been made contrary to a proper exercise of discretion and general principles of law. A purchaser of one item of mortgaged property which had been put up for sale undertook with the vendor to pay to the mortgagee the purchase price towards the mortgage, but he did not keep his promise with the result that the mortgagee had to bring a suit to enforce the mortgage. The purchaser was in occupation and was impleaded as a party to the suit as he was a necessary party. The trial Court by its decree directed the purchaser to bear the costs of the suit personally since through his conduct the mortgagee was forced to take proceedings in the suit. On appeal this order for costs was reversed on the ground that there was no privity of contract between the purchaser and the plaintiff mortgagee.

Held, in second appeal, that it was the failure of the purchaser to carry out his contract of purchase and pay the purchase price that occasioned the suit, and it could not be said that the trial Court acted improperly or contrary to general principles or exercised its discretion in a wong way. Since the order of the trial Court as to costs was correct or at any rate one which in the

exercise of its discretion it was entitled to make, the appellate Court acted wrongly in reversing it, and the order of reversal should therefore be set aside. (*Gentle, J.*) RAGHAVA CHARIAR *v.* PONNUSWAMI MUDALI. **1940 M.W.N. 504=51 L.W. 318=A.I.R. 1940 Mad. 519=(1940) 1 M.L.J. 388.**

———*Pauper suit—Question turning on construction of deed—Dismissal of suit—Order on defendant to pay court-fee due to Government.*

The plaintiff suing in *forma pauperis* claimed that she was entitled to payment of a certain amount by the defendant who was in possession of certain trust fund. On a construction of the deed of settlement on which the suit was based, the Court dismissed her suit, but ordered that the defendant should pay the court-fee due to the Government.

Held (on a difference of opinion between *Varadachariar and Burn, JJ.*), that the case was a fit one for directing the defendant to pay the court-fee payable though he had won the case. (*Madhavan Nair, J., on a difference of opinion between Varadachariar and Burn, JJ.*) NEELAMMA *v.* MAREPPA. **163 I.C. 471=9 R.M. 10=1936 M. W.N. 600=43 L.W. 742=A.I.R. 1936 Mad. 388 =70 M.L.J. 128.**

———*Principles—Conflict of judicial opinion on point—If a ground for not awarding.*

Orders as to costs are discretionary but the discretion should be exercised in a judicial manner, and the normal rule is that costs follow the result. The mere existence of conflict of judicial opinion does not preclude a litigant from obtaining costs when successful. (*Middleton, J.C. and Almond, A.J.C.*) BISHAN DAS *v.* NAND RAM. **161 I.C. 155=8 R. Pesh. 159=A.I.R. 1936 Pesh. 48.**

———Suit for infringement of design—Defendant admitting plaintiff's right and offering to submit to injunction and to pay profits and costs—Refusal of offer by plaintiff—Suit finally decreed in terms of defendant's offer—Costs—Liability for —Rule. *See* C. P. CODE, O. 24. **41 Bom.L.R. 290.**

———Suit for removal of Mutwalli of wakf—Suit *bona fide*—Allegations of plaintiffs substantiated—Order refusing costs out of the funds of the estate—Propriety—Proper order. *See* C. P. CODE, S. 92. **63 C.L.J. 573.**

———*Suit on promissory note—False case of cash consideration persisted in—Court ordering plaintiff to pay defendant's costs and disallowing his own costs—Propriety—Defendant also putting forward false plea—Effect.*

When a plaintiff in a suit on a promissory note falsely puts forward, and persists in, a case that it represented a cash transaction, but the note is found supported by consideration in another form, the case is one in which the Court may properly exercise its discretion by refusing him costs, although it gives him a decree for the amount of the promissory note. But the Court cannot go to the extent of making the plaintiff liable for the costs of the defendant as well, especially when the defendant himself has put forward false and improper pleas. (*Varadachariar and Mockett, JJ.*) LAKSHMANASWAMY *v.* NARASIMHA RAO. **169 I.C. 435=10 R.M. 34=1936 M.W.N. 1137=**

44 L.W. 572=A.I.R. 1937 Mad. 223=(1937) 1 M.L.J. 414.

Liability for.

———*Liability for—Defendant insisting on joinder of another defendant—Court exonerating latter—Appeal and second appeal by former again impleading latter—Liability for latter's costs.*

In a suit, defendant *A* insisted on joining defendant *B* on the ground that *A* had made certain repayments to *B*. The trial Court found that *A* had paid nothing and so discharged *B*. In spite of this, *A* again joined him in the appellate Court and in the High Court although no relief had been claimed.

Held, that *A* was liable to pay *B* the costs in both the appellate Courts. (*Vivian Bose, J.*) JIWANDAS *v.* BABU LAL. **I.L.R. (1937) Nag. 61 =167 I.C. 1003=9 R.N. 233=A.I.R. 1936 Nag. 285.**

———One of the defendants admitting the plaintiff's claim—Liability for costs. *See* OUDH CIVIL RULES, CH. VII, PARA. 6, R. 289. **1937 O.W.N. 1110.**

———Suit on behalf of plaintiff—Dismissal with costs—Absence of direction for payment of costs by next friend—Liability of estate of minor. *See* DECREE—CONSTRUCTION. **41 Bom.L.R. 521.**

Mortgage suit.

———*Mortgage suit — Discretion — Personal decree for costs against non-mortgagor—If can be passed.*

A decree for costs personally against persons other than the mortgagor can be passed in a mortgage action. Courts have a discretion to pass such a decree. (*Madhavan Nair, J.*) TALUK BOARD, CHIDAMBARAM *v.* VARADASESHA IYENGAR. **174 I.C. 784=10 R.M. 745 (1)=1937 M.W.N. 1280 (1)=A.I.R. 1938 Mad. 226.**

———Discretion of Court—Rule—Order for costs—Appeal. *See* C. P. CODE, O. 34, R. 10. **1939 M.W.N. 288.**

———*Personal decree for costs—Permissibility.*

In a suit on a mortgage, costs are recoverable from the mortgaged property and not by a personal decree against any party other than the mortgagor. (*Wort and Rowland, JJ.*) SATYADEVA NARAYAN SINHA *v.* TIRBENI PRASAD. **161 I.C. 579=8 R.P. 458=1936 P.W.N. 321=A.I.R. 1936 Pat. 153.**

———Discretion—Parties other than mortgagor supporting mortgagor in denial of claim and opposing grant of decree—Personal liability for costs—Order of Court imposing—If justified—Interference in appeal. *See* MORTGAGE—MORTGAGE SUIT. **(1937) 2 M.L.J. 896.**

———Redemption suit under Malabar Compensation for Tenants' Improvements Act—Rule as to costs—Defendant making extravagant claim for improvements and refusing offer of reasonable amount before suit—Liability for costs of suit. *See* MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT, S. 5. **1937 M.W.N. 954.**

Partition suit.

———*Partition suit—Principle as to costs—Defendant when to be made liable—Defendant raising objection to partibility on construction of will of testator.*

The ordinary rule in suits for partition is that all costs up to the time of the preliminary decree

or borne by the parties themselves. But when the defendant contests the plaintiff's right to claim partition he may be liable for costs unnecessarily incurred by reason of his unfounded opposition. In a case where there is no contest on the question of title, and all that the defendant states is that on a proper construction of the will in respect of the parties executed by the testator under whom the parties claim there can be no partition of the properties, and that objection is founded on a clause in the will which puts a restriction on partition, the defendant cannot be made liable for costs. The costs must be borne by the parties, equal shares. In other words, these costs should really come out of the estate. (*D. N. Mitter and Patterson, JJ.*) HAREY HAREY SINHA CHOUDHURY *v.* HARI CHAITANYA SINHA CHOUDHURY. **40 C.W.N. 1237.**

Pleader's fees.

———*Pleader's fees — Declaratory suit—Lahore High Court Rules and Orders.*

Under the Rules and Orders of the Lahore High Court, the pleader's fee in a declaratory suit under O. 21, R. 63, C. P. Code, can be assessed at 5 per cent. of the jurisdictional value. (*Bhide and Din Mohammad, JJ.*) SARDOOL SINGH *v.* VIR BHAN. **42 P.L.R. 379.**

———*Pleader's fees—Person not enrolled as lawyer—If can be treated as one for granting pleader's fees as costs.*

A person, who although otherwise qualified, is not enrolled as a lawyer, cannot be treated as a lawyer for purpose of awarding costs, and the person whom he represents as an agent in a suit cannot be given pleader's fee according to the rules. (*Mir Ahmad, A.J.C.*) JAGDISH LALL *v.* SECY. OF STATE. **165 I.C. 904 (1)=9 R. Pesh. 52 (2)=A.I.R. 1936 Pesh. 196.**

Power of Court.

———Power of Court—Costs incurred by receiver in obtaining leave to institute suit—If can be awarded as costs of suit. *See* C. P. CODE, S. 35. **40 C.W.N. 762.**

Practice.

———Practice—Application under S. 66 (3), Income-tax Act—Rules as to costs of. *See* INCOME-TAX ACT, S. 66 (3). **41 Bom.L.R. 919.**

———*Practice—Appeal—Summary dismissal by appellate Court—Appeal to High Court successful—Order as to costs—Practice—Costs of first appeal—If allowable.*

Where an appeal to the High Court against the summary dismissal of an appeal by the lower appellate Court succeeds, it is the general practice to allow costs throughout, and those costs include the costs of the appeal in the lower appellate Court which was summarily dismissed. (*Beaumont, C.J.*) YADAV *v.* BACHOO. **186 I.C. 105=12 R.B. 298=41 Bom.L.R. 949=A.I.R. 1939 Bom. 493.**

———*Practice—Suit for pre-emption—Vendee becoming co-sharer before suit—Dismissal of suit—Proper order as to costs.*

Where vendee has become a co-sharer in mahal by reason of a deed of gift and the pre-emptor does not bring a suit for pre-emption before the date of gift and his suit brought subsequently is dismissed there is no reason why the normal

course of things that is, costs should follow event should not be followed. (*Iqbal Ahmad and Bajpai, JJ.*) SHIAM SUNDER *v.* SARMADI BEGAM. **188 I.C. 386=12 R.A. 13=1940 A.W.R. (H.C.) 262=A.I.R. 1940 All. 171.**

———*Taxing Judge—Duty to follow Division Bench ruling.*

A Taxing Judge is bound to follow the law as laid down by a Division Bench of the High Court, whether he is acting administratively or judicially. (*Skemp, J.*) GOVIND LAL JI *v.* MILAP CHAND. **42 P.L.R. 101.**

Rule as to.

———Rule as to—Dismissal of suit—Separate sets of defendants appearing by separate Counsel—Pleader's fee—Separate sets—If awardable—Proper order. *See* C. P. CODE, S. 35. **1936 A. M.L.J. 63.**

———Suit for infringement of trade mark or copyright in design—Offer, of undertaking by defendant—Refusal by plaintiff—Effect. *See* PATENTS AND DESIGNS ACT, S. 53. **40 C.W.N. 938.**

Solicitor's charges.

———*Solicitor's charges—Claim to more than scale fee—Sustainability—Duty of solicitor to support claim by affidavit—Discretion—Interference.*

The guiding principle as regards costs is that costs are given as an indemnity and the costs allowed ought to be sufficient to cover the client in respect of the costs due to his solicitors which would be allowed on taxation between party and party. But the Judge must be given some materials on which to form an opinion. It does not follow that because the out of pocket costs are heavy, therefore the solicitor's charges also will have to be heavy. If solicitors want to satisfy the Judge that they have done a substantial amount of work which will not be covered by the scale fee, they ought to put in an affidavit shortly stating what work has been done. It is not necessary to go into minute details, but the Judge should be given some material on which he can form an estimate as to the proper sum to be allowed for work which the solicitors have done. The appellate Court will not, in the absence of evidence, interfere with the order made by the trial Judge in his discretion. (*Beaumont, C.J. and Blackwell, J.*) GOPILAL *v.* KOSHAL KISHORE. **175 I.C. 112=10 R.B. 523=40 Bom.L.R. 256=A.I.R. 1938 Bom. 224.**

Taxation.

———*Taxation—Defendants appearing by same attorney but briefing separate counsel—Taxation of costs—Separate costs—When allowed—Discretion of Taxing Master—Interference by Court—Principles.*

Defendants appearing by the same solicitor or attorney can have but one bill of costs; but this will not limit their representation in Court. If their interests are diverse, separate counsel may appear in Court and their charges will be allowed. The test in such cases is whether there is a reasonable probability of there being a substantial difference in the two defences. From the mere fact that two retainers are separately signed by two defendants it does not necessarily follow that their interests cannot be identical, although that is a

matter for consideration in determining whether their interests are identical. The real test to be applied is whether before the hearing commenced there was a reasonable probability of the defences being substantially different. Where the defendants are partners of a firm, each person alleged to be a partner or to have held himself out as a partner has a right to defend himself separately. A certain amount of latitude has to be allowed to the solicitors in considering before the commencement of the hearing whether there is a reasonable probability of the defences being different or not. The Taxing Master has to use his discretion in allowing or refusing separate costs. The Court will not lightly interfere with that discretion except in extreme cases where there has been gross abuse or serious mistake or where he has acted on a wrong principle or applied an altogether wrong consideration. (*B. J. Wadia, J.*) MANILAL LALLUBHAI *v.* THE BHARAT SPINNING AND WEAVING CO., LTD. **60 Bom. 659=163 I.C. 467=9 R.B. 25=38 Bom.L.R. 388=A.I.R. 1936 Bom. 242.**

———Order granting commission for examination of witness on application by defendant—Direction that costs of the application will be costs in the cause—Dismissal of the suit with costs—Right of defendant to costs of commission—Practice—Calcutta High Court. *See* CALCUTTA HIGH COURT RULES (ORIGINAL SIDE), CH. 20, R. 13. **40 C.W.N. 1068.**

———*Taxation—Solicitor employed by client on salary—Right to costs as between party and party—Costs—If limited to mere out of pocket expenses—Indemnity—Burden of proof.*

The fact that the solicitor of a successful plaintiff is a whole time employee of the plaintiff upon a salary would not disentitle him to present a bill of costs including profit costs. It cannot be said that he is entitled only to present a bill for out of pocket expenses. Notwithstanding that he is employed on a salary basis, he is entitled to present a bill which would include profit costs. Where costs are allowed to a plaintiff in a chamber summons, the order being that the defendant should pay the plaintiff his costs of and incidental to the chamber summons, the taxation is to be taxation as between party and party. Of course where an agreement is proved to have been entered into between the solicitor and client that the client should not be liable to pay any costs, the successful party would not be entitled to recover from his opponent more costs than he is liable to pay his solicitor, as party and party costs are awarded as an indemnity only. Inasmuch as the costs of litigation as between party and party are fixed by scale, that scale must be treated as a fair rumuneration for the work done and services rendered in respect of the litigation, notwithstanding that the solicitor is paid a salary, and in the absence of evidence to the contrary, it would be proper to treat costs awarded according to the scale as the expenses actually incurred by the client for which he is entitled to be damnified by the opposite party. The successful party is entitled to set off the costs allowed to him as between party and party against the salary payable by him to his solicitor, and he is entitled to recover them by way of indemnity from the opposite party. In the absence of evidence to the contrary the Court must assume in favour of the successful party that the party and party costs applicable according to scale should be treated as expenditure reasonably incurred in the conduct of the particular litigation. The onus is on the opposite party to show that in the particular circumstances of any case the allowance provided by the scale would give more than an indemnity. (*Blackwell, J.*) MUNICIPAL CORPORATION OF THE CITY OF BOMBAY *v.* ANANDRAO. **42 Bom.L.R. 817.**

———Solicitor—Trustee of public charitable and religious trust—Right to profit—Trustee when acting for himself and co-trustees—Rule—Taxation of costs—If allowed as between attorney and client. *See* TRUSTS ACT, S. 50. **39 Bom.L.R. 633=A.I.R. 1937 Bom. 374.**

———Special referee—Fees of—Bill of costs—Taxation—Principles of—Effectual meeting—Time of computation. *See* CALCUTTA HIGH COURT (O.S.) RULES, CL. 36, R. 32. **40 C.W.N. 1133.**

Miscellaneous.

———*Miscellaneous—Order as to—Practice in muffasal—Proceedings governed by sale of fees applicable to Original Side of High Court—Incidental or interlocutory proceedings in—Failure to make any order as to costs—Effect of—Costs—If can be added to costs of main proceedings.*

The ordinary practice and procedure applicable to orders relating to costs in the muffasal are such that the Courts in the majority of cases do not give directions with reference to the costs of the proceedings leading up to each incidental order as it is made. The failure, therefore, by a mufasal Court to make any order with reference to the costs of an incidental proceeding which forms part of a more comprehensive litigation, the costs of which, under R. 767 of the Bombay High Court Rules (O.S.), have to be taxed according to the table of fees applicable on the Original Side of the High Court, may not carry with it the same implication as in the case of the High Court original side that the Court has refused to exercise the discretion as to the scale of fees or that it is intended that the costs of that part of the proceeding should be borne by each of the parties; nor is there impliedly any decision that ultimately there will be no order that one of the parties shall recover it from the other, the implication may be either that the costs of the proceedings leading up to the incidental order are to form part of the proceedings as a whole, or that the Court may not have exercised its powers with reference to the costs. The case, however, is different where the order in question is not an incidental order arising out of a proceeding forming part of the larger proceeding, but a distinct interlocutory proceedings even though it may be an offshoot of the larger proceeding. If there is no special order relating to a distinct interlocutory proceeding, it can hardly be presumed that the costs must be added to and must follow the costs of the main proceeding. (*Barlee and Tyabji, JJ.*) CHHOTALAL *v.* SOMESHWAR. **173 I.C. 489=10 R.B. 337=39 Bom.L.R. 820=A.I.R. 1938 Bom. 10.**

———Suit for infringement of design—Defendant admitting right of plaintiff and offering to submit to decree for injunction profits and costs—Refusal of offer by plaintiff and prosecution of suit—Liability for costs. *See* C. P. CODE, O. 24

COSTS.

—APPLICABILITY. **41 Bom.L.R. 290=A.I.R. 1939 Bom. 198.**

———*Suit on promissory note—Payee dead—Absence of person entitled to collect debt—Suit brought unnecessarily—Order making costs payable by defendant—Propriety.*

The defendant executed a promissory note to the deceased husband of the plaintiff. The payee of the promissory note died leaving his widow (the plaintiff) and two daughters. The deceased left a will but the plaintiff was not the executrix under that will. There was an administration suit pending betweeen the plaintiff and the daughters of the deceased. There were receivers appointed in the administration suit, but they were not authorised to receive any money or recover the amount due by the defendant. The defendant offered to pay provided the receivers got an order from Court authorising them to collect the money. The plaintiff ultimately got herself appointed as receiver authorising her to prosecute the suit against the defendant and to realise the amount. The plaintiff did not obtain a succession certificate. In the suit filed by the plaintiff, the defendant did not dispute his liability, but on the contrary produced in Court almost the whole amount.

Held, that it would be unjust under the circumstances to make the defendant bear the costs of the suit, which was unnecessary and which was only brought because the persons entitled to claim under the deceased creditor did not understand their legal rights. (*Broomfield and Tyabji, JJ.*) BALMUKUNDAS *v.* DHANLAKSHMI. **165 I.C. 58=9 R.B. 124=38 Bom.L.R. 728=A.I.R. 1936 Bom. 342.**

CO-TENANCY. *See* CO-SHARER.

CO-TENANT. *See* CO-SHARER.

CO-TRUSTEE. *See* TRUSTS ACT.

COTTON GINNING AND PRESSING FACTORIES ACT (1925), S. 9 (3)—"Factory"—Meaning—Definition under Factories Act—Applicability. *See* FACTORIES ACT, S. 2 (*j*). **1937 M.W.N. 1335.**

COUNSEL.

See (1) LEGAL PRACTITIONER.
(2) PRACTICE.

COUNSEL'S FEES. *See* LEGAL PRACTITIONER.

COUNTER-CLAIM. *See* C. P. CODE, O. 8.

COUNTERFEITING COIN. *See* PENAL CODE, S. 232.

———Trade mark. *See* PENAL CODE, S. 482.

COUNTERPART.

See (1) LEASE.
(2) EVIDENCE ACT, S. 65.

CO-URALANS. *See* MALABAR LAW.

COURT.

See (1) C. P. CODE, SS. 9 AND 20.
(2) PRACTICE.
(3) JURISDICTION.

COURT-FEES.

COURT-FEES— Administration suit— Appeal—Court-fee payable. *See* COURT-FEES ACT, S. 7 (*iv*) (*f*). **42 P.L.R. 101.**

———Administration suit by a creditor—Other creditors impleaded as defendants before preliminary decree—Court granting not whole of their claim but only dividends at certain percentage of it— Court-fee payable by them. *See* COURT-FEES ACT, S. 11. **43 C.W.N. 52=A.I.R. 1938 Cal. 785.**

———Appeal—Appeal filed in District Court, transferred to High Court on application by appellant—Court-fee payable. *See* APPEAL—COURT-FEES. **41 C.W.N. 1083=A.I.R. 1937 Cal. 514.**

———*Appeal — Future interest* — Ad valorem *court-fees—If payable—Instalment decree providing interest in case of default of instalment—Appeal for future interest only.*

Court-fees are payable on sums which can be ascertained with certainty, but not on those which cannot be so ascertained. A decree passed on a money bond provided that it was to be paid in four equal annual instalments and on default in payment of any instalment, the balance to carry interest at 8 annas per cent. per month. The decree-holder appealed against the decree for future interest only and paid Rs. 10 only as court-fees on ground that the value of subject-matter of appeal was an unascertainable sum of money.

Held, that so far as the period between the date of decree and the date for payment of first instalment was concerned, the decree-holder could not get interest under the decree whatever happened and as he claimed it in appeal the difference was an ascertainable amount and *ad valorem* court-fees were payable on it. As regards the interest on the remaining instalments a court-fee stamp of Rs. 10 was proper as it was an unascertainable sum depending upon the contingency of default which might or might not happen. (*Bose, J.*) SETH RATANCHAND *v.* GAINDSINGH. **171 I.C. 79=10 R.N. 88=A.I.R. 1937 Nag. 95.**

———*Deficiency in lower Court—Powers of appellate Court.*

If the deficiency in the Court-fee in the lower Court is not made up, the appellate Court may refuse to prepare or sign its decree until the deficiency is made up. (*Bhide, J.*) KISHORI LAL *v.* CHANDAN. **41 P.L.R. 491.**

———*Determination—Basis—Allegations in the plaint—If final—Right of plaintiff to frame plaint so as to avoid higher Court-fee.*

For purposes of calculation of Court-fee, the Court must take the allegations in the plaint to be *prima facie* correct; and a plaintiff is entitled to insist that the Court-fee should be assessed on the basis on which he has framed his plaint although there might be room for suspicion that the plaint has been so drafted as to avoid inconvenient facts and the payment of a higher Court-fee. (*Varadachariar, J.*) KARIA NACHI BIVI *v.* ALLAPICHAI. **45 L.W 720=171 I.C. 572=10 R.M. 373=A.I.R. 1937 Mad. 402=(1937) 1 M.L.J. 572.**

———*Determination—Basis—Allegations in plaint—If sole criterion—Practice in Patna High Court.*

It has not been the practice of the Patna High Court, from the time of its foundation, to depend exclusively on the averments of the plaintiff for the ascertainment of what should be the proper Court-fee payable, or to permit a plaintiff to escape liability by a vague and indefinite statement of facts in the plaint, or to penalize him because he may possibly ask for a declaration which may be unnecessary. (*James, J.*) NANDKISHORE KUMAR *v.* ACHAMBIT KUMAR. **16 Pat. 491=18 Pat.L.T. 438=1937 P.W.N. 532=170 I.C. 959=3 B.R. 780=10 R.P. 156 (2)=A.I.R. 1937 Pat. 514.**

———*Determination—Looking to substance of plaint—Permissibility—Court-Fees Act—Rules of construction.*

Though the Court-Fees Act is a fiscal enactment and its provisions have therefore to be strictly construed, yet they should not be so construed as to furnish a chance of escape and means of evasion. The question of the proper Court-fee payable in a suit is to be determined on the substance of the claim to be gathered from the whole of the plaint and not merely on the language of the relief claimed in the plaint. A Court ought not to allow itself to be deceived by the language used for evading the payment of proper Court-fee by concealing the real purposes of the suit. (*Srivastava, C. J., Zia-ul-Hasan and Smith, JJ.*) ROOP RANI *v.* BITHAL DAS. **13 Luck. 628=172 I.C. 81=10 R.O. 158=1937 O.W.N. 1186=1937 O.L.R. 587=A.I.R. 1938 Oudh 1 (F.B.).**

———*Determination—Basis of—Plea of defendant—If material—Facts found as pleaded by defendant — Proper procedure — Jurisdiction—Forum—Determination.*

The Court-fee payable on a plaint in a suit and the forum of trial depend on the allegations made in the plaint and not on the defence set up by the defendant. If the plaintiff can prove his allegations he would be entitled to the relief on the lines that he has claimed, and the forum of trial is the Court in which he has brought the suit. The fact that the defendant sets up a different title cannot alter the nature of the plaintiff's claim. If the facts are found to be as pleaded by the defendant, the proper course is to dismiss the suit and not to convert the suit into another of a different character. (*Rowland, J.*) DEOKI SINGH *v.* RAMSEWAK SINGH. **182 I.C. 178=5 B.R. 728 =12 R.P. 2.**

———*Determination — Basis of—Substance of relief claimed—Form—If material.*

The principle to be kept in view in determining the proper Court-fee is, what in substance is the relief which the plaintiff seeks and not the form in which it is couched. (*Venkataramana Rao, J.*) NARAYANASWAMI *v.* SWAMINATHA IYER. **175 I.C. 823=11 R.M. 7=46 L.W. 484=1937 M.W.N. 1004=A.I.R. 1937Mad. 876=(1937) 2 M.L.J.616.**

———*Determination— Criterion — Substance of relief claimed.*

It is the substance of the relief claimed in the plaint that must be looked to in questions of Court-fee and jurisdiction. (*King, J.*) KAYATHAN ROCHE *v.* CHINNAYYA ROCHE. **1939 M.W.N. 1114=A.I.R. 1939 Mad. 435=(1939) 1 M.L.J. 425.**

———*Determination of—Considerations—Duty of Court.*

For purposes of Court-fee the Court must look to the plaint only. It cannot demand Court-fee from a plaintiff on the ground that the question of possession will arise in the suit. (*Khaja Mohammad Noor and Varma, JJ.*) SITARAM SINHA *v.* KUMAR JOGENDRA NARAYAN SINHA. **15 Pat. 386=161 I.C. 706=8 R.P. 479=17 Pat.L.T. 115=1936 P.W.N. 172=A.I.R. 1936 Pat. 171.**

———*Determination—Relief available at time of filing of plaint—Further relief due to change of circumstances—Procedure.*

Court-fee is paid on the relief available at the time of the institution of the suit, but if after its

institution circumstances change and it becomes necessary for the plaintiff to ask for any further relief, it is always open to him to apply to the Court for amendment of the plaint by adding new relief, and to offer to pay Court-fee thereon. (*Mahamed Noor and Dhavle, JJ.*) BIRJA RAJKUMARI *v.* BISHWA NATH KUMARI. **182 I.C. 743 =5 B.R. 818=12 R.P. 64=20 Pat.L.T. 818=1939 P.W.N. 61=A.I.R. 1939 Pat. 219.**

———*Determination—Tests—Title given by plaintiff to suit—If conclusive.*

Merely asserting that a suit is a suit for administration does not make it one, and if a party sues to recover an estate, the valuation of the suit must be the value of the estate he seeks to recover. (*Baguley and Mosely, JJ.*) KO'PE KYAI *v.* MA THEIN KHA. **1937 Rang.L.R. 426=173 I.C. 238 =10 R.R. 327=A.I.R. 1937 Rang. 455.**

———*Disposal of suit—Subsequent enquiry into valuation of suit and order for additional Court-fee—Jurisdiction of Court.*

When a Court has finished with and disposed of a suit, it has no jurisdiction to take up the question of valuation of the suit for purposes of Court-fee or to direct the payment of additional Court-fee. There is no provision of law authorizing such a procedure. An order for additional Court-fee made under such circumstances is *ultra vires*. (*Drake Brockman, S.M. and Knox, J.M.*) LALTA PRASAD *v.* EMPEROR. **1936 R.D. 390.**

———*Mesne profits—Claim for—Tentative valuation—If to be given.*

Where a plaint claimed mesne profits from a certain date till delivery of possession of property, but no Court-fee was paid on that claim but a statement was made that Court-fee on that relief would be paid when ordered by the Court,

Held, that the plaint ought to have given a tentative valuation for the claim for mesne profits and on that valuation Court-fees ought to have been paid, and that an amendment of the plaint so as to remove that technical defect could be permitted even in appeal. (*Mitter and Roxburgh, JJ.*) MIDNAPORE ZEMINDARY CO., LTD. *v.* BIJOY SINGH DUDHORIA. **72 C.L.J. 14.**

———Procedure—Duty of Court—Court holding additional Court-fee necessary and returning plaint for necessary amendments instead of demanding additional Court-fee and rejecting plaint on failure to pay—Propriety—Power of Court to direct amendment. *See* PRACTICE—PROCEDURE. **47 L.W. 523.**

———*Refund — Appeal withdrawn—Power of Court.*

When an appeal is withdrawn the Court cannot, either under the Court-Fees Act or under its inherent powers, order the refund to the appellant of the Court-fee paid on the memorandum of appeal. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KAPPINI GOWDER, *In re*. **174 I.C. 991 (2)=10 R.M. 747 (2)=1937 M.W.N. 1157=46 L.W. 757=A.I.R. 1938 Mad. 67=(1937) 2 M.L.J. 788.**

———*Refund—Appeal filed out of time—Conditional order made for admission—Condition not complied with—Right to get refund of court-fees.*

Where on a memorandum of appeal filed out of time a conditional order was made by the Court for its admission and the condition was not complied with by the appellant, he is not entitled to get a refund of the Court-fees paid on the memo-

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randum of appeal. (*S.K. Ghose and Patterson, JJ.*) SIDHESWAR CHANDRA BANERJI *v.* SATYA KISHORE BANERJI. **41 C.W.N. 1184.**

——*Refund—Inherent powers of Court—Suit properly filed in Civil Court—Amendment of law pending suit taking away right to relief claimed in suit—Procedure—Power to order refund of court-fee.*

Where a suit is properly filed in a Civil Court, the plaintiff being at the time entitled in law to institute such suit, but in the meantime the legislature takes, by an amendment of the law, away the right to the relief claimed in the suit, the proper course for the Civil Court to adopt is to dismiss the suit. In such circumstances the Court cannot invoke its inherent powers to order the refund of the Court-fee or grant a certificate under the Court-Fees Act. (*Leach, C.J. and Kunhi Raman, J.*) SECRETARY OF STATE *v.* VEERAYYA VANDAYAR. **186 I.C. 770=12 R.M. 666=51 L.W. 105=1940 M.W.N. 68=A.I.R. 1940 Mad. 451.**

——*Refund—Rejection of plaint for failure to pay deficit Court-fee—Application for refund of Court-fee originally paid—Competency—Power of Court to refund.*

A plaintiff whose plaint is rejected for non-payment of deficit Court-fee within the time fixed by the Court is not entitled to an order of refund of the Court-fee paid by him originally on his plaint. There is no specific provision for refund in such a case, and the Court has no inherent jurisdiction to refund the Court-fee in such a case. (*Harries and Allsop, JJ.*) RAMAKANT PATAK *v.* MURLIDHAR PANDE. **1937 A.W.R. 389 =1937 A.L.J. 481=10 R.A. 107=1937 A.L.R. 664=170 I.C. 483=A.I.R. 1937 All. 505.**

——*Refund of excess fee—Procedure.*

The District Court, as a Court of appeal, is not entitled to issue an order of refund of excess of Court-fees paid on the memorandum of appeal. Recovery of excess amount paid is a matter between the party concerned and the Revenue authorities. All that the District Court can do is to certify that in its opinion the amount paid by the appellant is in excess of the amount required by law. Armed with the certificate the party may go to the Revenue authorities and claim a refund from them. The certificate is however merely the expression of the opinion of the Court which the executive orders of the Government of Burma require to be obtained where any person desires to make an application to the Revenue authorities for the refund of the fees paid in excess. (*Mackney, J.*) U PO TOKE *v.* U LU GYI. **164 I.C. 639=9 R.R. 115=A.I.R. 1936 Rang. 352.**

——*Refund—Inherent jurisdiction of Court.*

The Court has inherent jurisdiction to order a refund of Court-fee even in cases which do not fall within Ss. 13, 14 and 15, Court-fees Act. Where there has been no real trial of the main issues involved in the case in both the Courts below, the appellant is entitled to a refund of Court-fee paid by him in the lower appellate Court on the memorandum of appeal. (*Abdul Rashid, J.*) HARI RAM & SONS *v.* H. O. HAY, **41 P.L.R. 796=A.I.R. 1939 Lah. 257.**

——*Suit for possession—Property intended to be dedicated.*

A mere intention to dedicate property for religious purposes is not sufficient to convert that property into religious property. Court-fee to be paid for recovery of possession of such property will be *ad valorem*. (*Mackney, J.*) DAW SEIN *v.* MA MAI MA. **178 I.C. 232=11 R.R. 219=A.I.R. 1938 Rang. 303.**

COURT-FEES ACT (1870), S. 5.

——Suit or appeal in *forma pauperis*—Review of judgment in—Application for—Court-fee—If payable. *See* C. P. CODE, O. 33, R. 8 AND O. 44, R. 1. **40 C.W.N. 1407.**

——*Trade-mark—Suit for its infringement—Non-payment of court-fee in respect of relief of injunction claimed—If fatal to suit—Proper order—Prayer for destruction of copied labels—Court-fee thereon—If payable.*

If in a suit for infringement of a trade-mark the plaintiff has not paid any Court-fee in respect of the relief of injunction claimed by him the defect is not fatal to the suit. The Court may order in such a case that the plaintiff shall not be permitted to take out execution in respect of the permanent injunction without paying the Court-fee. A prayer for the destruction of the copied labels is not really a prayer for any new relief. It is only ancillary to the relief of permanent injunction and as such has no separate value. Therefore no Court-fee is due thereon. (*Mohammad Ahmad Khan, C.J.*) KAMLAPAT GHASIRAM *v.* BHUKABHAL NARAINDAS. **188 I.C. 462.**

——*Value for purposes of—Appeal against order making decretal amount recoverable from certain property.*

Where a decretal amount has been ordered to be recovered from a certain property and an appeal is preferred to get that property released from the liability, the value for the purposes of court-fee would be the price of the property or the decretal amount whichever is less. (*Almond, J.C. and Mir Ahmad, J.*) B. SUNDAR SINGH *v.* R. B. MAKHAN SINGH. **176 I.C. 319=11 R. Pesh. 5=A.I.R. 1938 Pesh. 38**

COURT-FEES ACT (VII OF 1870)—Procedure—Appeal liable to *ad valorem* Court-fee but not valued as such—*Ad valorem* fee—When to be levied—If to be before admission of appeal. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*) AND (*v*). **18 Pat.L.T. 438.**

——Rules of construction—Language of plaint *See* COURT-FEES—ASCERTAINMENT OF. **1937 O.W.N. 1186=A.I.R. 1938 Oudh 1 (F.B.).**

——**S. 5**—*Scope—Decision of Taxing Officer—Finality.*

The decision of the Taxing Officer of the High Court holding that *ad valorem* fees are payable in respect of a matter is final under S. 5 of the Court-Fees Act and final for every purpose and cannot be impeached before the Court at the time of the hearing.

Venkatasubba Rao, O.C.J.—S. 5, like several other sections, is undoubtedly defective, as it makes no provision for the Taxing Officer being compelled to refer the question to the Judge of the Court. (*Venkatasubba Rao, O. C. J. and Harwill, J.*) KANTHEESWARAM EKANATHALINGASWAMI KOIL, *In re*. **I.L.R. (1937) Mad. 284=165 I.C. 972=9 R.M. 317=1936 M.W.N. 1081=44 L.W. 763=A.I.R. 1937 Mad. 46=71 M.L.J. 677.**

——**S. 5**—*Reference under—Taxing Judge—Powers of—Appeal held liable to* ad valorem *Court fee—Power to criticise procedure of trial Court in not levying* ad valorem *Court-fee.*

COURT-FEES ACT (1870), S. 5.

It is not within the province of a taxing Judge of the High Court under S. 5 of the Court-Fees Act to say whether the trial Court ought to have required payment of *ad valorem* Court-fee before the trial of the suit, while holding that an appeal in that suit is liable to *ad valorem* Court-fee. (*James, J.*) NANDKISHORE KUMAR *v.* ACHAMBIR KUMAR. **16 Pat. 491=18 Pat.L.T. 438=1937 P.W.N. 532=170 I.C. 959=3 B.R. 780=10 R.P. 156 (2)=A.I.R. 1937 Pat. 514.**

——**Ss. 5 and 11 (as amended by Madras Act V of 1922)**—*Suit for possession—Omission to claim future mesne profits—Application for amendment—Rejection—Appeal by defendant—Memo. of objections by plaintiff claiming future mesne profits—Court-fee—If payable—Decision by taxing officer levying* ad valorem *court-fee—Finality—Right to refund order from Court.*

The plaintiff in a suit having omitted to claim future mesne profits, subsequently applied for permission to amend his plaint by including a claim therefor, but the application was rejected. Against the decree for possession the defendant appealed to the High Court and the plaintiff filed a memorandum of objections claiming future mesne profits, but, his contention that no court-fee was payable on the claim for mesne profits was overruled by the Taxing Officer, who held that *ad valorem* court-fee was payable on the amount claimed. At the time of the hearing of the appeal, plaintiff questioned the decision of the Taxing Officer and claimed refund of the amount of court-fee paid by him on the claim for future mesne profits.

Held, (1) that no court-fee was payable in respect of claim for future mesne profits, and under S. 11 of the Court-Fees Act, as amended in Madras, no court-fee is payable in respect of future mesne profits before the final decree is passed, a claim to mesne profits being in respect of a cause of action not arising at the date of the suit, although the Court is empowered to grant the same by way of exception to the general rule and that the decision of the taxing officer was therefore wrong; (2) that under S. 5 of the Court-Fees Act, the decision of the Taxing Officer had become final for every purpose and could not be impeached before the Court at the time of the hearing of the appeal and the Court could not consequently make an order granting a refund of the court-fee paid.

Horwill, J.—The various sections of the Court-Fees Act apply not only to suits but to appeals also. All the High Courts have always taken it for granted that appeals are valued in the same way as suits. (*Venkatasubba Rao, O.C.J. and Horwill, J.*) KANTHEESWARAM EKANATHALINGASWAMI COVIL, *In re*. **I.L.R. (1937) Mad. 284=165 I.C. 972=9 R.M. 317=1936 M.W.N. 1081=44 L.W. 763=A.I.R. 1937 Mad. 46=71 M.L.J. 677.**

——**S. 5**—*Taxing officer of High Court—Jurisdiction—Court-fee payable in Courts below—Jurisdiction to decide.*

The jurisdiction of the taxing officer of the High Court is confined to the question of court. fee on the memorandum of appeal in the High Court only and he cannot decide the question of proper court-fee payable in the Courts below. That has to be decided by the Court itself.

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(*Courtney-Terrell, C.J. and Dhavle, J.*) NOKHE LAL JHA *v.* RAJESHWARI. **3 B.R. 14=165 I.C. 213=9 R.R. 161=17 Pat.L.T. 677=1936 P.W.N. 689=A.I.R. 1937 Pat. 141.**

——**Ss. 5 and 3**—*Reference, when competent—Insolvency Rules (Calcutta), R. 204—Fees prescribed by if covered by S. 3—Presidency Towns Insolvency Act, S. 112.*

Before S. 5 of the Court-fees Act can be applied, it must be shown that the subject-matter of the reference is a fee covered by S. 3 of the Act. A reasonably wide construction must be given to S. 3 and if a particular fee could have been imposed under the High Courts Act or the Government of India Act, it is payable in virtue of the power conferred by that Act within the meaning of the section, even although the High Court purported to impose the fee under a power derived from some other source. R. 204 of the Insolvency Rules (Calcutta) made under S. 112 of the Presidency Towns Insolvency Act could have been made by the High Court under the powers conferred on it by S. 15 of the Indian High Courts Act and the fees prescribed thereby are accordingly covered by S. 3 of the Court-Fees Act. (*Panckridge, J.*) OFFICIAL ASSIGNEE OF CALCUTTA, *In the matter of*. **I.L.R. (1939) 1 Cal. 56=178 I.C. 797=11 R.C. 432=42 C.W.N. 1146=A.I.R. 1938 Cal. 755.**

——**S. 6**—*Document not properly stamped—If nullity.*

A document not properly stamped is not a nullity. (*Nasim Ali, J.*) JITENDRANATH RAY *v.* JNANADA KANTA DAS GUPTA. **167 I.C. 265=9 R.C. 672=A.I.R. 1936 Cal. 277.**

——**S. 6**—*Power and duty of Court under—Suit ostensibly appearing to be one but in substance different—Court's power to go into allegations in plaint and demand additional Court-fee.*

It is always open to the Court to find out by looking into the allegations in the plaint in a suit whether or not the suit is really what it purports to be and whether the Court-fee paid is sufficient. In fact it is a duty cast upon the Court under S. 6 of the Court-fees Act; and if it finds that the suit in substance is not what it ostensibly appears to be but one requiring a larger Court-fee, it can demand additional Court-fee. (*Harries and Rachhpal Singh, JJ.*) KAILASH NARAIN *v.* GOPI NATH. **I.L.R. (1937) All. 703=1937 A.L.J. 562=1937 A.W.R. 480=1937 R.D. 346=171 I.C. 177=1937 A.L.R. 810=10 R.A. 238=A.I.R. 1937 All. 411.**

——**S. 7**—*Order awarding interest on decretal amount to be refunded under S. 144, C. P. Code—Appeal claiming additional interest—Cross-objection praying for reduction—Court-fee payable.*

Where an appeal is filed against an order of the trial Court awarding interest on the decretal amount to be refunded under S. 144, C. P. Code, claiming additional interest, the Court-fee payable is *ad valorem* court-fee on the amount claimed. So also where the opposite party making the refund files a cross-objection praying for reduction of the interest awarded by the trial Court, it must pay *ad valorem* Court-fees on the interest sought to be reduced. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) KALA RAM *v.* PUNJAB NATIONAL BANK, LTD. **9 R. Pesh. 101=167 I.C. 879=A.I.R. 1937 Pesh. 3.**

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——**S. 7 (i,**—*Applicability—Suit for declaration that plaintiff is sole owner of G. P. Notes not yet mature.*

A suit to obtain declaration that the plaintiff is the sole and exclusive owner of G. P. Notes which are not mature for payment is not a suit for recovery of money. As such S. 7 (*i*) does not apply to such a suit. (*Tek Chand and Abdul Rashid, JJ.*) NARINDAR SINGH *v.* KULDIP SINGH. **188 I.C. 461=13 R.L. 36=A.I.R. 1940 Lah. 26.**

——**S. 7 (1)**—*Sub-mortgage—Suit by sub-mortgagee impleading original mortgagor also—Prayer for sale of the properties mortgaged under original mortgage—Court-fee payable—Original mortgage amount or sub-mortgage amount.*

A sub-mortgagee suing for sale of the properties mortgaged to his mortgage, *i.e.*, the original mortgagee, impleading the original mortgagor, is in effect asking for a decree for the amount due under the original mortgage, though as sub-mortgagee he is entitled only to a portion of the said amount under S. 7 (1) of the Court-Fees Act he must pay court-fee on the amount due and under the original mortgage and not on the amount due under the sub-mortgage. (*Venkataramana Rao, J.*) VELLAYAN CHETTIAR *v.* MAHALINGA PATTAN. **173 I.C. 781=10 R.M. 634 =1937 M.W.N. 1040=A.I.R. 1938 Mad. 30= (1938) 1 M.L.J. 171.**

——**Ss. 7 (i) and 11**—*Suit for taking accounts of assets and income of family for partition of outstandings—Suit is not governed by S. 7 (i).*

A suit for taking of accounts of the assets and income of the joint family property for the purposes of partition of the share of the outstandings after taking accounts, is not a claim for money governed by S. 7 (i), so far as the assets of the family or even such funds as may be found to be in the possession of the defendants on the taking of the accounts are concerned, and the Court cannot refuse to accept the plaintiff's valuation even on the ground that it is arbitrary. Nor can the fact that the father of the plaintiff executed a release deed, which is sought to be set aside, detract from the nature of the suit, provided the prayer for setting aside the release deed has been separately valued and court-fee paid thereon. (*Varadachariar, J.*) RANGASWAMI CHETTI *v.* GOPALA CHETTIAR. **165 I.C. 412 (2)= 9 R.M. 246=1936 M.W.N. 401=A.I.R. 1936 Mad. 562.**

——**S. 7 (i) and (iv) (f)**—*Applicability—Suit for accounts—Reference to letter by defendant stating specific sum due—Court-fee.*

In a suit for accounts, the mere fact that the plaintiff refers in the plaint to the account sent by the defendant wherein it is stated that a specific amount was remaining in the hands of the defendant, would not convert the suit into a suit for recovery of a specific sum of money stated in the letter so as to be chargeable to court-fee on that amount. (*Varadachariar, J.*) MAHOMED HUSSAIN *v.* SHEIKH MUHAMMAD MALUMIAR. **163 I.C. 822=9 R.M. 70=A.I.R. 1936 Mad. 525.**

——**S. 7 (i), (iv) (f) and (v)**—*Applicability—Suit for accounts of management—Claim for recovery of specific item of money alleged to have been misappropriated—Claim to recover as trust property—Lands purchased by manager in his name with funds belonging to plaintiffs—Court-fee.*

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The plaintiffs sued their maternal uncle who was in management of their property for several years, substantially, for an account of his management. The plaint in particular recited an item of mismanagement or improper conduct, alleging that the defendant had misappropriated amount due under a promissory note, by destroying the same and getting other notes in his name and in that of another. It was also alleged that he had taken a sale deed of certain lands in his name in satisfaction of a debt due to them from the vendor, and it was claimed that the plaintiffs were entitled to the possession of the lands and mesne profits on the footing that the defendant must be held to have made the purchase as a trustee for them.

Held, that so far as the claim for an account was concerned, Court-fee was payable as on a suit for accounts, including the specific item of the amount due under the promissory note, and that the latter claim could not be treated as an ordinary money claim under S.7 (1) of the Court-Fees Act; that the prayer for possession of the lands was not an alternative prayer, but one for a distinct and separate relief and had to be valued under S. 7 (*v*) of the Act. A person might hold property in trust for another, but if the latter sues for possession, he must pay Court-fee thereon and the claims could not be said to be included in the claim for accounts. (*Varadachariar, J.*) MADHAVA SARMA *v.* SESHAGIRIRAYADU. **160 I.C. 935=8 R.M. 729=1936 M.W.N. 118=43 L.W. 300=A.I.R. 1937 Mad. 235=70 M.L.J. 292.**

——**S. 7 (ii)**—*Applicability—Claim for arrears of maintenance and for declaration of rate at certain rate—Alternative prayer for corpus of fund from which maintenance payable in case Court so held—Court-fee—Payable.*

The plaintiff in a suit prayed that her rights to the benefits created by a deed of settlement in favour of her deceased husband might be established. Under the deed a sum of Rs. 10,000 was set apart as trust fund, the interest of which was to be paid by the settlor to the plaintiff's husband, at the rate of Rs. 50 per month. The plaintiff further prayed for the recovery of Rs. 650 being the arrears of the amount of Rs. 50 for 13 months. Alternatively, she claimed the amount of Rs. 10,000 if the Court held the corpus was payable or for Rs. 50 per month, if she was held entitled to interest only, during the lifetime of the defendant-settlor.

Held, that the suit was not for Rs. 10,000 simpliciter, so as to be liable to *ad valorem* court-fee on Rs. 10,000, but that it fell under S. 7 (11), Court-Fees Act, and court-fee was payable on Rs. 6,650, *i.e.*, Rs. 650, being the arrears, and Rs. 6,000 being ten times the amount claimed per annum. (*Madhavan Nair, J, on a difference of opinion between Varadachariar and Burn, JJ.*) NEELAMMA *v.* MAREPPA. **163 I.C. 471=9 R.M. 10=1936 M. W.N. 600=43 L.W. 742=A.I.R. 1936 Mad. 388 =70 M.L.J. 128.**

——**S. 7 (ii)**—Applicability—Application to Revenue Officer under S. 105, B. T. Act, raising issues under S. 105-A—Court-fee on—Value of subject-matter—Determination. *See* B. T. ACT, S. 105. **40 C.W.N. 1149.**

——**(as amended in Bihar and Orissa), S. 7 (iii) (iv) (c) and (v)**—*Scope and effect—Suit for partition—Allegation that share allotted at prior*

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partition was of less value than that to which he was entitled—Court-fee payable—Ad valorem *court-fee—Valuation.*

In Bihar and Orissa, so far as a partition suit happens to be actually in the nature of a title suit, *ad valorem* court-fee is payable by the plaintiff, whether the suit is regarded as governed by S. 7 (*iii*) or S. 7 (*v*). It makes no practical difference whether the suit is to be regarded as a suit for declaration with consequential relief falling under S. 7 (*iv*) (*c*), or a suit for possession of movable and immovable property governed by S. 7 (*iii*) and (*v*), since in the Court in Bihar and Orissa, where the consequential relief sought is recovery of possession of land the plaintiff is not permitted to value the land at a lower rate than would be assessed under S. 7 (*v*). Plaintiff sued for partition that a partition effected by his uncles was unfair inasmuch as he had been allotted some property which did not belong to the joint family of which he had been a member, some other property allotted to him had been overvalued and certain bad debts had been made over to him. He stated that he was in possession of what purported to be his share in the property, but that the same was of less value than the property to which he was entitled. He wanted the unfair partition, which was effected by an unregistered deed and chittas to be set aside and that his proper share allotted to him. He paid a court-fee of Rs. 15 on his plaint, it was alleged in the plaint that the share allotted to him and of which he was in possession was in deficit by Rs. 8,775.

Held, that the plaintiff should pay *ad valorem* court-fee on the amount of Rs 8,775 which was the amount by which his share in possession was in deficit of the share which he claimed, but that he need pay such court-fee on the value of the whole property which would fall to his share. (*James and Rowland, JJ.*) SITAL PRASAD SAH *v.* RAMDAS SAH. **18 Pat. 267=183 I.C. 281=5 B. R. 893=12 R.P. 122=1939 P.W.N. 197=A.I.R. 1939 Pat. 274.**

——**S. 7 (iv)**—*Construction and scope—If must be read with O. 7, R.* 11 (b), *C. P. Code.*

S. 7 (*iv*), Court-Fees Act, must be read with O. 7, R. 11 (*b*), C. P. Code. S. 7 (*iv*) simply means that the relief sought is to be valued in plaint or memorandum of appeal by the plaintiff. A.I.R. 1933 Sind 322; A.I.R. 1931 Sind 15 and A.I.R. 1934 Cal. 448, Rel. on. (*Davis, J.C. and Rupchand Bilaram, A.J.C.*) *In the matter of* COURT-FEES. **161 I.C. 384=8 R.S. 143=A.I.R. 1936 Sind 25.**

——**Ss. 7 (iv) and 8 (c)**—*Declaratory suit praying consequential relief—Valuation by plaintiff—Revision—Power of Court.*

S 7 (iv) of the Court-Fees Act is subject to the provisions of S. 8 (*c*) of the Court-Fees (Bengal Amendment) Act, 1935. If, therefore, in a suit to obtain a declaratory decree in which consequential relief is prayed, the plaintiff puts an entirely unreasonable valuation on the consequential relief, this valuation may be revised by the Court by adopting the procedure laid down under S. 8 (*c*) of the Court-Fees (Amendment) Act. (*Edgley. J.*) SHAISTA BANU CHOUDHURANI *v.* FAIZUNNESSA KHATUN CHOUDHURANI. **68 C.L.J. 144.**

——**S. 7 (iv) and Sch. II, Art. 17 (iii)**—*Applicability—Declaration and injunction.*

Sch. II, Art. 17 (*iii*), Court-Fees Act, only applies when no consequential relief is sought where consequential relief by way of injunction is asked for then S. 7 (*iv*) applies and *ad valorem* court-fee on the value of the claim has to be paid, a single valuation covering both declaration and injunction. (*D. R. Norman.*) PUKH RAJ *v.* RAM JEEWAN. **1939 A.M.L.J. 80.**

——**S. 7 (iv) (a)**—Applicability—Suit for return of mortgage bond with endorsement of full satisfaction—If one for movable property—Court-fee. *See* COURT-FEES ACT, S. 7 (*ix*) AND (*x*). **63 Cal. 657.**

——**(as amended in Madras), S. 7 (iv) (a) and (b), (v) and Sch. II, Arts. 17-A (1) and 17-B**—*Applicability—Suit for partition by minor Hindu coparcener—Prayer for partition and separate possession of share free from all alienations and debts challenging same as not binding on him—Decrees also impeached as not binding—Prayers for account and for appointment of interim receiver—Court-fee.*

A Hindu minor, by his mother as next friend, brought a suit for partition against his father and three brothers, impleading as parties to the suit twenty strangers, either as alienees of family properties or as creditors of the family, alleging that the alienations and debts in question were not binding on the family. The reliefs claimed in the plaint were (1) an account of the family properties, (2) partition by metes and bounds and possession of the plaintiffs share, (3) appointment of an interim receiver, (4) costs of the suit, and (5) such further and necessary reliefs. The plaintiff valued his share at Rs. 40,000 but paid a court fee of only Rs. 100 under Art. 17-B of Sch. II of the Court-Fees Act, as amended in Madras.

Held, (1) that in respect of the general relief for partition and separate possession of his share. Art. 17-B of Sch. II of the Court-Fees Act correctly applied and the court-fee of Rs. 100 was therefore the proper court-fee, as S. 7 (iv) (*b*) of the Court-Fees Act would not apply to a suit for partition by a member of a joint family who was still in joint possession; (2) that in respect of the transactions which the plaintiff challenged (though he did not ask for specific reliefs in respect of the same), the plaintiff ought to pay Court-fee in accordance with the relief which he actually sought; in other words, he must pay court-fee under S. 7 (v) of the Court-Fees Act, as he was in effect asking that the alienations where possession has passed to the alienees be set aside and he be placed in possession of his share of the properties alienated; (3) that in respect of the decrees passed in suits in which he had been *eo nomine* impleaded as a party, he had to pay court-fee according to S. 7 (iv) (*a*) of the Court-Fees Act, as he must be held to have impliedly asked for a cancellation of the decrees; he must therefore pay *ad valorem* court-fee on the amount of the decrees and not merely on his share fraction as his liability, is for the full amount though limited to the extent of his share in the family assets. It made no difference that the plaintiff was a minor or merely a junior member; (4) that the plaintiff was not liable to pay a separate court-fee on his prayer for the appointment of a receiver as the relief was entirely of an interlocutory character.

Per *Abdur Rahman, J.*—(1) that as regards the other creditors impleaded, the plaintiff could not be called upon to pay any additional court-fee in respect of the transactions challenged, and it

would be for the respective defendants to establish their right to rank as creditors when account was taken; (2) that the prayer of accounts should be taken as equivalent to a prayer for a declaration that the debts and alienations are not binding on the plaintiff, and such a prayer for a declaration could not be regarded as either superfluous or ancillary. The plaintiff should therefore pay court-fee as for simple declarations under Art. 17-A (1) of Sch. II of the Court-Fees Act. (*Leach, C. J., Pandrang Row, Abdur Rahman, Krishnaswami Ayyangar and Patanjali Sastri, JJ.*) RAMASWAMI AIYANGAR *v.* RANGACHARIAR. I.L.R. (1940) Mad. 259=186 I.C. 494=12 R.M. 645= 1940 M. W. N. 126=A.I.R. 1940 Mad. 113= 51 L.W. 11=(1940) 1 M.L.J. 32 (F.B.)

——(as amended by United Provinces Court-Fees Amendment Act), S. 7 (iv) (a) —*Declaration and consequential relief—Computation of court-fee.*

When along with a declaratory relief there is sought some consequential relief in respect of immovable property, but such relief is not capable of valuation in money, then court-fee should be paid as if the relief was one for possession of immovable property. (*Zia-ul-Hasan and Yorke, JJ.*) JANET ANNA BONARJEE *v.* THE UNITED PROVINCES OF AGRA AND OUDH. 15 Luck. 415=186 I. C. 671=12 R.O. 326=1940 A.W.R. (C.C.) 122= 1940 O.W.N. 223=1940 O.A. 212=1940 O.L.R. 141=A.I.R. 1940 Oudh 249.

——S. 7 (iv) (a), (ix) and (x)—*Applicability—Suit to declare assignment of mortgage by mortgagee fictitious and to direct defendants to deliver up bond to plaintiff with endorsement of discharge—Allegation of adjustment and payment—Suit—If one for redemption—Court-fee.*

The plaintiff in a suit alleged that he owed the father of defendant No. 1 Rs. 10,000 for which he executed a mortgage bond to him, that there were payments in part and also an adjustment, that defendant No. 1 granted some remissions and agreed to release the mortgage and deliver up the bond on payment of Rs. 7,200 only, that plaintiff had paid all but Rs. 300 and that on tendering Rs. 300 the defendant No. 1 refused to accept it and deliver up the bond, that defendant No. 1 subsequently assigned the mortgage to defendants. 2 to 4. The plaintiff challenged this assignment and prayed for a declaration that the said assignment was fictitious and prayed that defendant No. 1 may be directed to receive Rs. 300 only and to deliver up the mortgage bond to the plaintiff with an endorsement of satisfcation. He alternatively prayed that if the assignment were found to be real, the defendants 2 to 4 may be directed to receive the sum of Rs. 300 and to deliver up the bond to the plaintiff with an endorsement of satisfaction. He also prayed that, if the defendants failed to do so within a time to be fixed by the Court the Court might make the said endorsement on the bond and return it to the plaintiff.

Held, reading the plaint as a whole, that the suit was in substance a suit for redemption and fell under S. 7 (ix) and the suit must be valued at the mortgage amount (Rs. 10,000) both for purposes of court-fee and for purposes of jurisdiction, and that *ad valorem* court-fees must be paid on that amount.

Held further, that the suit did not fall under S. 7 (*iv*) (*a*) or under S. 7 (*x*). (*R. C. Mitter, J.*) MAHOMED ESHAQUE MIA CHOWDHURY *v.* ANANDA CHANDRA SAHA. 164 I.C. 1042=9 R.C. 325= 40 C.W.N. 90=62 C.L.J. 405.

——S. 7 (iv) (b) and (c)—Suit for partition—Plea by defendant that part of property does not belong to joint estate—Court-fee payable on plaint. *See* COURT-FEES ACT, SCH. II, ART. 17 (*vi*). 1937 Rang.L.R. 447.

——S. 7 (iv) (b) and Sch. II, Art. 17 (vi)—*Relative applicability.*

S. 7 (*iv*) (*b*) of the Court-fees Act will not apply to cases where the plaintiff is in joint possession of the joint family property but it must apply to cases where he is out of possession of it and seeks partition. In the former case the court fee is levied under Art. 17 (*vi*) of Sch. II. (*Thomas, C. J. and Radha Krishna, J.*) DURGA BUX SINGH *v.* AMBIKA BUX SINGH. 15 Luck. 76 =184 I.C. 371=12 R.O. 102=1939 O.L.R. 607= 1939 O.W.N. 1055=A.I.R. 1940 Oudh 47.

——S. 7 (iv) (b) and Sch. II, Art. 17 (vi) —*Suit by Mahomedan co-owner in joint possession for partition—Court-fees.*

Where there is a jointness of title, each coparcener is in possession of every portion of the joint property while his share is not defined and in such cases the change in the mode of enjoyment is not capable of assessment in terms of money and therefore the residuary Art. 17 becomes applicable. Such jointness of title can ordinarily exist in the case of a coparcenary property only, but where the shares of co-owners are known and ascertained, a suit for partition is virtually a suit to enforce a right to a share in joint family property. Under the Mahomedan Law the share of each member of the family in the family property is specific and is known and the title of one member of such family is not joint with that of any other member. Hence a suit by a Mahomedan co-owner in joint possession against the co-owners for possession by partition and separation of his share is a suit for the enforcement of that share which he claims in the family property under the Mahomedan Law. The suit therefore falls under S. 7 (*iv*) (*b*) and not under Art. 17 (*vi*) of Sch. II. (*Addison and Ram Lall, JJ.*) NISAR ALI KHAN *v.* NAWAZISH ALI KHAN. 186 I.C. 328=12 R.L. 388 =A.I.R. 1939 Lah. 568.

——S. 7 (iv) (b) and Sch. II, Art. 17 (vi)—*Suit for partition of joint family property—Plaint alleging joint possession of parties—Court-fee.*

Where the suit is for partition of properties alleged to belong to a joint family, of which the parties are said to be members, and which are stated in the plaint to be in the joint possession of the parties, a fixed court-fee of Rs. 10 is enough and no *ad valorem* court-fee need be paid. (*Tek Chand, J.*) RAM NARAIN KAUL *v.* BISHAN RANI. 179 I.C. 710=11 R.L. 610=40 P.L.R. 2= A.I.R. 1938 Lah. 321.

——S. 7 (iv) (b) and (c) (iv-A) and (v) as amended by Madras Act V of 1922)—*Applicability—Suit by Hindu sons for partition by metes and bounds and for separate possession—Allegation of prior partition—Claim to avoid sale-deed by father—Court-fee.*

Two Hindu sons filed a suit against their step-brothers and step-mother for a declaration that the properties in suit were the undivided ances-

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tral properties of the family and that a sale-deed executed by their father in favour of their step-mother was invalid, and they prayed for separate possession of their shares after a partition by metes and bounds. They also alleged that there was a prior registered partition deed and that the sale-deed in favour of the step-mother was intended merely for the purpose of concealing the properties from them at that partition.

Held, that S. 7 (*v*) of the Court-Fees Act governed that suit and that it did not fall under S. 7 (iv) (*b*) and (*c*) or under S. 7 (iv-A). (*Varadachariar, J.*) SELLAMMAL *v.* JOTHIMANI NADAR. **161 I.C. 679=8 R.M. 851=43 L.W. 582 =1936 M.W.N. 148=A.I.R. 1936 Mad. 411=70 M.L.J. 398.**

——**S. 7 (iv) (b) and (v)**—*Applicability—Hindu co-parcener—Suit for partition—Allegation that family joint and undivided — Absence of specific allegation of plaintiff's possesison and enjoyment—Court-fee payable.*

Where in a suit for partition of joint family property, the plaintiff alleges that he is a coparcener, that is enough to show plaintiff's joint possession, because the possession of one coparcener must be deemed to be possession on behalf of all. A suit for partition must consequently be valued S. 7 (*iv*) (*b*) of the Court-Fees Act, when there is no allegation in the plaint that the plaintiff has been ousted from possession of the joint family properties. And where a plaintiff alleges that the family has continued joint Court-fee has to be calculated on the basis of that allegation and the suits fall under S. 7 (*iv*) (*b*). The suit does not fall under S. 7 (*v*) of the Court-Fees Act merely because the plaintiff does not specifically allege joint possession or enjoyment. (*Venkataramana Rao, J.*) KOTILINGAM *v.* SATYANARAYANAMURTHI. **45 L.W. 541=1937 M.W.N 613=10 R.M. 412=171 I.C. 940=A.I.R. 1937 Mad. 606.**

——**S. 7 (iv) (c)**

Applicability.
Cancellation of document.
Consequential Relief.
Declaratory Suit.
Injunction.
Power of Court.
Valuation.

——**S. 7 (iv) (c)—Applicability.**

——Applicability—Ex-communicated member of caste—Suit for declaration of illegality of resolution ex-communicating him and of plaintiff's right to enjoy caste property in common—Prayer for permanent injunction restraining caste members from obstructing plaintiff's enjoyment of caste properties—Valuation for court-fee and jurisdiction. *See* SUITS VALUATION ACT, S. 8. **41 Bom.L.R. 425.**

——Suit to declare plaintiff's right to recover dower debt from certain waqf property. *See* COURT-FEES ACT, SCH. II, ART. 17 (*iii*) AND S. 7 (*iv*) (*c*). **1939 O.W.N. 152.**

——*Suit for declaration that debt conciliation agreement is without jurisdiction and not binding.*

A claim to have a registered agreement entered into before a Debt Conciliation Board, declared invalid, is equivalent to have it adjudged void or voidable and would therefore fall under S. 39 of the Specific Relief Act under which the Court may adjudge the document void or voidable and order it to be delivered up and cancelled. In such a case the plaintiff must be deemed to have asked for the relief which the Court can grant under S. 39 of the Specific Relief Act and this amounts to consequential relief and hence the suit would fall under S. 7 (*iv*) (*c*) of the Court-Fees Act. (*Pollock, J.*) BABOO RAJA WASTA *v.* SADASHIV. **1940 N.L.J. 96.**

——**S. 7 (iv) (c) and (v)**—*Applicability—Suit for possession of share in village—Allegation that plaintiff is brother of last male holder and that defendant is in wrongful possession—Court-fee payable—Declaration—Prayer for—If necessary.*

S. 7 (iv) (*c*) of the Court-Fees Act has application to declarations properly so called and has no reference to the kind of declaration in the sense of finding a fact as to the plaintiff's title necessary for granting a decree for possession. It is not in the least necessary for a plaintiff in a suit for possession to claim a declaration. A suit for possession of a share in a certain village alleging that the plaintiff is the brother of the last male holder and that the defendant is in wrongful possession, the proper court-fee is that prescribed by S. 7 (v) of the Court-Fees Act. The suit is one purely for possession and no declaration is required. It is not necessary that the plaintiff should also pay Court-fee under S. 7 (iv) (*c*). (*Agarwala, J.*) BRIJ BEHARI PRASAD SINGH *v.* JAHNAVI PRASAD SINGH. **21 Pat.L.T. 609.**

——**(as amended in Bihar and Orissa), S. 7 (iv) (c) and Sch. C, Art. 17 (iii)**—*Applicability—Hindu reversioner—Suit to declare invalid alienations by widow—Application for and granting of interim injunction to restrain further alienations—Nature of suit—Court-fee payable.*

Plaintiff, a Hindu reversioner, brought a suit claiming a declaration that the 1st defendant, the widow of the last male owner, had only a limited interest of a Hindu widow in the inheritance and that certain alienations made by her in favour of the other defendants in the suit were without legal necessity and would not enure beyond her lifetime and would not bind the reversionary body. He paid a court-fee of Rs. 15 on his plaint. During the course of the suit, the plaintiff applied for and obtained an interim injunction to restrain the widow from making further alienations. The question as to the sufficiency of the Court having been raised the Court ordered the plaintiff to pay *ad valorem* court-fee on the ground that the suit was one for a declaration and consequential relief.

Held, in revision, (1) that the suit was one merely for declaration and therefore *ad valorem* court-fee was not leviable; (2) that the ominus relief clause did not make the plaint one for a declaration and consequential relief; (3) that the fact that the plaintiff applied for and obtained an *interim* injunction in the course of the suit did not have the effect of changing the real nature of the suit, though the injunction ought never to have been applied for or granted; and (4) that since several alienations were sought to be declared invalid, each declaration in respect of each alienation mnst be separately valid, and the plaintiff was bound to pay a court-fee of Rs. 15 on each of those declarations and not merely a single court-fee of Rs. 15. (*Harries, C.J. and Moham-*

mad Noor, J.) HAREKRISHNA DAS *v.* SUNAMANI DEI. **186 I.C. 877=6 B.R. 412.**

——**S. 7 (iv) (c) and (d)**—*Applicability—Suit for injunction to restrain defendant from making permanent constructions on land alleging that he is only under-raiyat—Valuation.*

Plaintiff brought a suit for an injunction to restrain the defendant from making permanent constructions on the suit land and for a mandatory injunction for the removal of the construction already made, alleging that he was holding only an under-raiyati interest in the land. The suit was valued by the plaintiff under S. 7 (iv) (*d*) of the Court-Fees Act at Rs. 10 for purpose of court-fees. The lower Court held that the suit was for a declaration of the absence of the right of the defendant to build permanent constructions on the land and for the consequential relief of the injunction stated above (*i.e.*), it was a suit falling under S. 7 (iv) (*c*) of the Act, and that the suit should be valued on the basis that the depreciation in value of the suit land to the defendant in the event of his failure was the benefit the plaintiff derived by the success of his suit.

Held, that S. 7 (iv) (*d*) of the Court-Fees Act applied to the suit and that the valuation put upon it by the plaintiff was correct.

Per *Mukherjea, J.*—It did not make any difference even if S. 7 (iv) (*c*) of the Act applied to the suit, as in both those cases the plaintiff had a right to put his own valuation upon the relief claimed by him, and that the objective standard which the lower Court applied was not applicable to the facts of the case. (*Derbyshire, C.J. and Mukherjea, J.*) BINODE BEHARI *v.* K. C. BISWAS & Co. **44 C.W.N. 1038.**

——**S. 7 (iv) (c)—Cancellation of document.**

——*Deed of family settlement—Suit by Hindu widow for—Allegation of fraud and misrepresentation—Recital in deed that husband was joint with brother and that widow was given properties in lieu of maintenance—Plaint alleging that husband was separate and claiming right of inheritance to estate—Court-fee payable.*

A Hindu widow brought a suit to cancel a deed of family settlement executed between her and her husband's brother alleging that she was induced to sign it by fraud and misrepresentation, and praying that a copy of the decree be sent to the registration office for a note being made that the document has been cancelled. She alleged in her plaint that her husband died separate from his brother and that on his death, she as his widow and heir, got possession of his entire estate. The deed, however, recited that her husband and his brother were joint and that the plaintiff on her husband's death was entitled to maintenance in lieu of which she was given properties worth Rs. 20,000. She originally paid a court-fee of Rs. 15 as on a declaratory suit, but on being directed by the Court to value the relief, she valued it at Rs. 5,100 on which amount court-fees were paid. It was held by the lower Court that she should pay court-fee on the market value of the properties involved, which came to about Rs. 41,000.

Held, that the proper method of valuing the suit was according to the injury or loss from which plaintiff sought protection, and that loss could not be valued at the total value of the properties in suit, though such a value might be proper if the plaintiff were out of possession or if the document sought to be cancelled denied her any right and title whatsoever; in this case since the plaintiff came to Court for some more or better rights than what the document gave her it was for her to value her relief in the suit. Since the valuation put by her was neither wholly unreasonable nor arbitrary, the Court should *prima facie* be disposed to accept the same, and was not justified in demanding court-fee on the market value of the properties in suit.

Mohammad Noor, J.—There is a good deal of difference between a suit in which the plaintiff seeks to recover a property which is not in his possession and a suit in which he wants to avert the danger which is likely to come to the property which is already in his possession. To a suit of the second kind, a valuation on the basis of a suit of the first kind is wholly unjustified. (*Mohammad Noor and Rowland, JJ.*) DEOKALI KUARI *v.* MAHADEO PRASAD BHAGAT. **182 I.C. 153=5 B.R. 727=12 R.P. 1=20 Pat.L.T. 638=A.I.R. 1939 Pat. 531.**

——*Applicability—Will attacked as void and in the alternative as voidable—Cancellation, if a consequential relief.*

Where a will is attacked not only on the ground that it is not genuine and not properly registered, but is also attacked as being brought about by fraud, undue influence, etc., the plaintiff virtually asks for the cancellation of the will and it must be deemed to involve a consequential relief. The plaint has to be stamped *ad valorem* under S. 7 (iv) (*c*) of the Court-Fees Act. (*Zia-ul-Hasan and Yorke, JJ.*) BAIJ NATH SINGH *v.* SRI NATH KUAR. **14 Luck. 536=1939 O.A. 226=180 I.C. 61=1939 O.L.R. 109=11 R. O. 225=1939 O.W.N. 184=A.I.R. 1939 Oudh 125.**

——**S. 7 (iv) (c)—Consequential relief.**

——*Consequential relief—Meaning.*

Consequential relief means a substantial and immediate remedy in accordance with the title which the Court has been asked to declare. A futile and demurrable claim for injunction is excluded. (*Skemp, J.*) SHAM LAL *v.* SHAHBAZ KHAN. **42 P.L.R. 364.**

——**S. 7 (iv) (c)—Declaratory suit.**

——*Consequential relief—Meaning—Suit under O. 21, R. 58, C. P. Code—Court-fee.*

Consequential relief means a substantial and immediate remedy in accordance with the title which the Court has been asked to declare. It does not mean any relief asked for along with the prayer for a declaration. The question whether the plaintiff must ask for a consequential relief in a suit for declaration depends upon the circumstances of each particular case. In deciding what the proper court-fee payable should be, the Court must have regard to the substance of the thing and not to the mere form in which the relief has been prayed for. Where the plaintiff brings a suit for declaration and injunction, it must be seen whether the injunction is a necessary and consequential relief which the plaintiff must pray for and get in his suit or whether it is a meaningless surplusage in order to determine whether court-fees under S. 7 (*iv*) (*c*) or under Sch. II, Art. 17 (*iii*), Court-Fees Act, are payable. Where the decree-holder brings

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a suit for declaration under O. 21, R. 63, C. P. Code, of his right to pursue the attached property for the purpose of satisfying his decree, and ancillary to the declaration asks the relief to have it declared that the sale-deed and the will, put by the defendants are void and also prays for injunction to restrain the defendants from opposing the attachment and sale of the property, the suit is one for mere declaration and court-fees under Sch. II, Art. 17 (*iii*) are payable. The prayer for injunction is a mere surplusage. If the plaintiff gets the declarations he wants in his suit he can go to the executing Court and pursue the property for the satisfaction of his decree on the strength of the declarations obtained. The plaintiff need not and cannot have an injunction restraining the defendants from opposing his attachment; because if the defendants can oppose the attachment on any grounds other than those removed by the declaration in his suit, the defendants will be at perfect liberty to do so. (*C. Mehta, A.J.C.*) KHIMANMAL *v.* HARIRAM. **171 I.C. 900=10 R.S. 130=A.I.R. 1937 Sind 248.**

——*Co-widows—Suit by junior widow against senior widow for declaration of title to half the estate of her husband—Further prayer for joint possession in case she be found to be not in possession—Court-fee payable—Test to determine—Amendment to strike out prayer for relief of possession—Permissibility.*

The junior co-widow of a deceased proprietor of an estate brought a suit against the senior co-widow praying for a declaration of her title to an eight annas interest in the estate and also praying that if the Court should be of opinion that the plaintiff was not in possession of her interest in the estate, she should get joint possession of it along with the defendant. She paid a court-fee of Rs. 15 only.

Held, (*i*) that the suit was one for a declaration with consequential relief falling under S. 7 (*iv*) (*c*) of the Court-Fees Act and therefore required to be stamped with *ad valorem* court-fee; (*ii*) that court-fee had to be paid on the plaint on the relief available to the plaintiff at the time of the institution of the suit, though, if circumstances change afterwards, the plaintiff could apply to the Court for amendment of the plaint by adding new reliefs and offering to pay court-fee thereon; (*iii*) that the plaint should be taken as it stood and the plaintiff allowed to amend the plaint by striking out the prayer for possession, if she so desired, at the risk of having her suit dismissed by reason of S. 42, Specific Relief Act, in case she be found not to be in possession. (*Noor and Dhavle, JJ.*) BIRJA RAJ KUMARI *v.* BISWANATH KUMARI. **182 I.C. 743=5 B.R. 818=12 R.P. 64=20 Pat L.T. 818=1939 P.W.N. 61=A.I.R. 1939 Pat. 219.**

——*Suit for declaration that compromise decree in partition suit was obtained by fraud and for partition—Valuation of relief.*

In a suit for a declaration that a compromise decree passed in a partition suit was obtained by fraud, and for partition, it is difficult to say that the value of the relief setting aside this decree can possibly be the total value of the joint property. There is really no objective standard of valuation at all, and in the absence of rules made under S. 9 of the Suits Valuation Act, it is impossible to say that the plaintiff's valuation of the relief is incorrect. (*Henderson and Khundkar, JJ.*) STAR TRADING AND INVESTMENT, LTD. *v.* ASHUTOSH. **185 I.C. 648=12 R.C. 401=70 C.L.J. 158=43 C.W.N. 1116=A.I.R. 1939 Cal. 627.**

——*Suit for declaration that defendant was not entitled to execute certain decree—Valuation of relief.*

A suit for a declaration that the defendant was not entitled to execute a certain decree falls under S. 7 (*iv*) (*c*) of the Court-Fees Act, and it is for the plaintiff to value the relief of such a figure as he chooses and the Court must accept the figure put by the plaintiff. (*Dalip Singh and Jai Lal, JJ.*) R.H. SKINNER *v.* THOMAS SKINNER. **40 P.L.R. 204.**

——*Suit for declaration of title to provident fund money and for injunction—Proper valuation—Erroneous decision on valuation—Revision.*

Where a suit is instituted for a declaration of title of the plaintiff to a certain provident fund money and for injunction restraining the defendant from withdrawing that money, it cannot be said that there is no objective standard of valuation, and the correct valuation of the relief claimed is the amount of the provident fund. If in such a suit the Court accepts the plaintiff's valuation holding that the exact money value of the claim cannot be ascertained, and the provident fund money exceeds its pecuniary jurisdiction the Court in trying the suit will exercise its jurisdiction wrongly and its decision accepting the plaintiff's valuation is open to revision S. 115, C. P. Code. (*S.K. Ghose, J.*) URMILA BALA *v.* BINAPANI BISWAS. **177 I.C. 893=11 R.C. 287=42 C.W.N. 192=A.I.R. 1938 Cal. 161.**

——*Suit for declaration that decree is invalid and liable to be cancelled—Court-fee payable.*

A suit for declaration that a decree passed against the plaintiffs in a previous suit is invalid, irregular and inoperative as against them and that it is liable to be cancelled on that ground is not a merely declaratory suit but one for declaration with a prayer for consequential relief and the plaintiffs are liable to pay *ad valorem* court-fees. (*Middleton, J.C.*) MT. ZABEDA BEGAM *v.* FAQIR CHAND. **164 I.C. 1029=9 R. Pesh. 34=A.I.R. 1936 Pesh. 180.**

——*Suit for declaration that plaintiff is owner of house and for declaring mortgage-deed executed by defendants ineffective against him—Court-fee payable.*

Where the plaintiff sues for declaration that he is the owner of the house in suit and for declaring the mortgage-deed executed by the defendants ineffective against him, putting his own value for purposes of jurisdiction and pays a fixed amount of court-fees on the plaint, it is not only necessary that he should get a declaration that he is the owner but also that he should pray for the cancellation of the mortgage-deed, and the suit therefore falls under Cl. (*iv*) (*c*) of this section. In a case like this the plaintiff cannot put one value for jurisdiction and another for court-fees, the value must be the same for both and when once he has put his own value for jurisdiction, *ad valorem* court-fees must be paid on the value so stated. (*Addison and Abdul Rashid, JJ.*) MOHAMMAD HYAT KHAN *v.* JASPAL

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RAI BABU RAM. **165 I C. 670=9 R.L. 281 (2)= 38 P.L.R. 923=A.I.R. 1936 Lah. 703.**

——*Suit to declare that decree was obtained by fraud, for setting aside execution sale and for confirmation of possession—Valuation—Principle of.*

In the case of a suit praying for a declaration that a certain decree obtained against a member of the plaintiffs' family was obtained by fraud, and for the consequential relief, that the sale held in execution of the decree may be set aside and the plaintiffs' possession confirmed, the suit has to be regarded as a suit for possession; for purposes of classification under S. 7 (*iv*) (*c*) of the Court-Fees Act there is no distinction between a suit for confirmation of possession and one for recovery of possession. The value of the suit is the value of the land in question, and the plaintiffs are not entitled to place on that relief of confirmation of possession any value which may please them. If the suit is instituted before execution, the value of the suit is the value of the decree. But if the suit is instituted after property has passed by execution proceedings, the value of the suit is the value of the property. (*James, J.*) DWARKA PRASAD *v.* KRISHNA CHANDRA. **179 I.C. 586=5 B.R. 247=11 R.P. 395=A.I.R. 1939 Pat. 254.**

——*Suit to declare lands not liable to charge under maintenance decree.*

A person was a *bona fide* purchaser for value of lands which were found to be burdened with a charge of a maintenance decree. The person brought a suit for a declaration, "that the lands were not liable for the maintenance charge." Question was whether S. 7 (iv) (*c*) or Art. 17 (iii), Sch. II of the Court-Fees Act applied.

Held, that the relief although asked for a mere declaration, yet it involved the consequential relief of amendment of the maintenance decree and hence S. 7 (iv) (*c*) applied. (*Stone, C.J. and Digby, J.*) DATTAJI PARASHRAMJI *v.* BHAGIRATHI. **I.L.R. (1939) Nag 373=174 I.C. 891= 10 R.N. 422=A.I.R. 1938 Nag 183.**

——*Suit for possession of land or declaration of plaintiffs title—Allegation that title not affected by sale deed executed by guardian—Court-fee payable.*

Where the plaintiff in a suit claims relief by way of recovery of possession of immovable property upon declaration or determination that his title to the property is not affected by a sale-deed executed by his guardian, he is not entitled to the relief until the alienation or sale which stands in his way has been avoided or until his legal character or title has been declared by a decree of the Court. In such a case the suit falls under S. 7 (*iv*) (*c*) of the Court-Fees Act, even though the declaration which it is necessary for him to obtain before the further relief by way of recovery of possession can be granted has not been in terms prayed for in the plaint. (*Courtney-Terrell, C.J. and Dhavle, J.*) NOKHA LAL JHA *v.* RAJESHWARI. **165 I C. 213=9 R R. 161= 17 Pat.L.T. 677=1936 P.W.N. 689=3 B.R. 14 =A.I.R. 1937 Pat. 141.**

——**S. 7 (iv) (c)—Injunction.**

——*Suit for injunction against co-trustees and for possession as joint trustee—Joint trusteeship denied—Declaration of joint trustee found necessary for right to relief—Court-fee payable.*

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Where a plaintiff in his plaint prays for an injunction against the defendants with whom he says he is a joint trustee, to restrain them from interfering with his joint possession of the suit properties as joint trustee, and, if necessary, for joint possession along with them, but it is quite clear from the plaint as a whole that his right to be a joint trustee is disputed by several of the defendants and that he cannot possibly get either the injunction or the relief for possession unless his right to be a joint trustee is declared; the suit is really one for a declaration with consequential relief and falls under S. 7 (*iv*) (*c*) of the Court-Fees Act for purposes of court-fee. (*Burn, J.*) MANAITHUNAINATHA DESIKAR *v.* GOPALA CHETTIAR **186 I.C. 153=12 R.M. 596= 49 L W. 270=1939 M.W.N. 255=A.I.R. 1939 Mad. 380=(1939) 1 M.L.J. 317.**

——*Suit for setting aside auction sale and for injunction—Plaintiff in possession of property—Valuation of suit.*

P brought a suit for setting aside a sale held in a certificate case. The property had been found to be worth at least Rs. 12,000 in another proceeding *inter partes*, but it had been purchased by the certificate holder for one pice. *P* however was in possession. In the suit he prayed that the sale might be held to be illegal and might be set aside and that a permanent injunction should issue restraining the auction-purchaser from taking possession on the basis of the said auction sale. *P* framed the suit under S. 7, Cl. (*iv*), sub-Cl. (*c*), Court-Fees Act, and put the valuation at the price for which it had been purchased, *viz.*, one pice and paid court-fee thereon.

Held, that as no objective standard of valuation was available in so far as *P's* claim was concerned he was entitled to put his own valuation. (*S. K. Ghose and Lodge, JJ.*) BAGALA NANDA DUTTA *v.* SHRISH CHANDRA NANDY. **184 I.C. 106 =12 R.C. 203=A.I R. 1939 Cal 278.**

——**S. 7 (iv) (c) and (v)—***Plaintiff in possession suing for cancellation of sale deed—Court-fee—Suit prior to U. P. Court-Fees Amendment Act*, 1938.

A plaintiff in possession suing for the cancellation of a sale deed alleged to have been obtained from her by fraud and undue influence, could not be required prior to the passing of the U. P. Court-Fees Amendment Act of 1938 to pay *ad valorem* court fee on the market value of the property, namely, a house, which is the court-fee payable in a suit for possession. (*Zia-ul-Hasan, J.*) ORI LAL *v.* MST. RAHIN ZADI. **15 Luck. 531 187 I.C 454=12 R O. 381=1940 O.W.N 389= 1940 O A 342=1940 O L.R. 218=1940 A.W.R. (C.C) 171=A.I.R. 1940 Oudh 248.**

——**S. 7 (iv) (c)—Power of Court.**

——*Suit falling under—Plaintiff's valuation—Power of Court to interfere—Limits.*

The Court can interfere with any value put on a relief sought by a plaintiff in a suit falling under S. 7 (*iv*) (*c*) of the Court-Fees Act, if the valuation appears to be arbitrary and unreasonable. But a Court should not endeavour to correct a plaintiff's valuation except in a clear case where the disparity is so great as to show that the plaintiff has not endeavoured to fix a fair value at all, but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated. (*Stone, C.J., Bose and*

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Clarke, JJ.) MOTIRAM SITARAM *v.* DAULAT ANYAJI. I.L.R. (1938) Nag. 558=180 I.C. 271=11 R.N. 346=1938 N.L.J. 327=A.I.R. 1939 Nag. 50 (F.B.).

——S. 7 (iv) (c) and (v)—*Suit ostensibly to establish title and confirm possession—Suit really to set aside portion of compromise decree and execution sale—Proper valuation.*

Plaintiff instituted a suit for establishment of his title to and confirmation of possession in respect of certain property. He alleged that in a previous suit between the parties a compromise decree was passed against him for Rs. 13,000 but that there was an understanding between them that his liability would be really for Rs. 6,000 only. He further alleged that although the claim to the extent of Rs. 6,000 was satisfied by sale of his property, the defendant executed the remaining portion of the decree and in violation of the terms of the real compromise between the parties purchased the property in suit for Rs. 500. As the defendant was trying to dispossess the plaintiff from this property, the plaintiff instituted this suit valuing it at Rs. 500.

Held, that the compromise decree or the execution sale in consequence thereof was not a nullity, that the suit in substance was to set aside that portion of the compromise decree under which a sum of Rs. 7,000 was payable by the plaintiff to the defendant and the execution sale held in pursuance thereof, and that, therefore, the plaintiff should value his suit at that sum. (*Derbyshire, C.J. and Mukherjea, J.*) RAMANI MOHAN *v.* DEBENDRA. 44 C.W.N. 860.

——S. 7 (iv) (c)—Valuation.

——*Suit for declaration and injunction—Plaintiff's right to value as he likes.*

A suit for a declaration and an injunction is a suit for consequential relief. In such suit it is not open to the plaintiff to put any arbitrary value upon the injunction sought and pay court-fee on such value. (*Davis, J.C., Rupchand Bilaram and Mehta, A.J.Cs.*) LAKHOMAL DEEPCHAND *v.* DEEPCHAND TOLARAM. 31 S.L.R. 442=171 I.C. 420=10 R.S. 106=A.I.R. 1937 Sind 241 (F.B.).

——*Suit for declaration and injunction—Valuation for jurisdiction and Court-fees.*

In a suit for declaration and injunction Court-fee should be paid on the suit as valued for purposes of jurisdiction, as the value of the suit for purposes of Court-fee and for purposes of jurisdiction should be the same. (*Addison and Abdul Rashid, JJ.*) DIWAN CHAND *v.* SANT RAM. 167 I.C. 588=9 R.L. 511=A.I.R. 1936 Lah. 990.

——*Suit for declaration and injunction—Court-fee payable.*

Where the plaintiff in a suit for declaration and injunction, chooses to value the relief at a certain figure for the purposes of jurisdiction, he is bound to pay Court-fees *ad valorem* on the same amount, and he will not be permitted by Court to reduce the jurisdictional value of the suit. (*Addison and Abdul Rashid, JJ.*) SUNDAR SINGH *v.* RAJINDAR SINGH. 163 I.C. 227=9 R.L. 1 (1)=38 P.L.R. 688.

——*Scope—Suit for declaration that assessment is* ultra vires *and injunction from recovering it—Valuation by plaintiff—If open to revision by Court.*

Under S. 7 (*iv*) (*c*) of the Court-Fees Act, it is open to the plaintiff to put his own valuation on

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the relief claimed, and however capricious or unreasonable such valuation may appear to be, it is not competent for the Courts to revise it. The question in such cases is whether the reliefs claimed in the suit are such as would bring the case within the terms of S. 7 (*iv*) (*c*). Where a suit is instituted for a declaration that the assessment made by the Settlement Officer having been in contravention of S. 8 (*c*) of the C. P. Settlement Act was *ultra vires*, illegal and void and for a perpetual injunction to restrain the Secretary of State from recovering the assessment in so far as it exceeded what according to the plaintiff was the statutory limit, the relief for a declaration is the substantive relief, and the prayer for injunction is a secondary relief which follows as a consequence from the grant of the main relief. Such a case is governed by S. 7 (*iv*) (*c*) and (*d*), Court-Fees Act, and the plaintiff's valuation is not open to revision by the Court. (*Niyogi, J.*) SECRETARY OF STATE FOR INDIA *v.* GHANSHYAMSINGH. 165 I.C. 106=9 R.N. 59=A.I.R. 1937 Nag. 14.

——*Suit falling under—Person in possession of an item of gifted property seeking cancellation of gift deed.*

Where a suit falls under S. 7 (4) (*c*) of the Court-fees Act, the plaintiff cannot put any arbitrary value on his consequential relief. Where a person in possession of an item of gifted property sues for a declaration and consequential reliefs of cancellation of the gift and possession of the remaining items, then he has to pay a Court-fee only on the value of the properties, possession of which is asked for. (*Niyogi, J.*) MT. THAMBABAI *v.* LALSINGH. 1938 N.L.J. 130.

——*Suit falling under—Plaintiff failing to fix value of suit for purposes of court-fee but separately valuing his suit for jurisdictional purposes at certain sum—Such sum, if should be taken as value of relief for purpose of court-fee.*

The assessment of court-fees on a suit falling under any of the clauses of S. 7 (iv) depends on the amount shown in the plaint or memorandum of appeal, as the case may be. as the value of the suit for purposes of court-fee; but this in turn must depend upon a figure to be fixed by the plaintiff himself. If the plaintiff fails to fix such a figure expressly for court-fee purposes on the erroneous supposition that the suit is not covered by S. 7 (iv) (*c*) and separately values his suit for jurisdictional purposes at a certain figure, he should be taken as having valued the relief sought by him at this amount. He should not be taken as having failed to value his relief within the meaning of the section and so should not be required to fix the value of the relief for the first time. The plaintiff cannot have the benefit of a higher valuation for selecting a superior forum for the hearing of his case and pay a court-fee on a lower valuation. (*Beckett, J.*) BELI RAM *v.* DASONDHA SINGH. I.L.R. (1939) Lah. 172=179 I.C. 154=11 R.L. 534=40 P.L.R. 938=A.I.R. 1938 Lah. 647.

——*Suit for declaratory decree with consequential relief—Valuation—Plaintiff's right to put own valuation.*

Where a plaintiff sues for a declaratory decree and asks for consequential relief and puts his own valuation upon that consequential relief

then for the purpose of court-fee and also for the purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both. It is not however open to the plaintiff to put an arbitrary value on his claim. Plaintiff obtained a decree for Rs. 16,000 against defendant 2 and subsequently defendant 1 obtained a decree for Rs. 30,000 against the same judgment-debtor. Certain property was sold in execution of the plaintiff's decree and the first defendant applied for rateable distribution and eventually obtained Rs. 3,795 out of the sale proceeds of Rs. 5,600. The plaintiff brought a suit claiming a declaration that defendant 1's decree was null and void and not binding on the plaintiff and a refund of Rs. 3,795. An *ad valorem* court-fee on Rs. 3,795 was paid.

Held, that the value that he had put upon the claim was not an unreasonable one and the valuation of the suit both for court-fee and jurisdiction was Rs. 3,795. (*Pollock, J.*) SADASHEORAO *v.* VASANTRAO. **I L.R. (1938) Nag. 302=174 I. C. 90=10 R.N. 339=A.I.R. 1937 Nag. 316.**

——*Suit for declaration and injunction—Valuation of plaintiff—If final—Court-fee payable.*

In a suit for a declaration that a certain mortgage decree is not binding on certain property and for an injunction. falling under S. 7 (*iv*) (*c*) of the Court-Fees Act the plaint has to be stamped according to the amount at which the relief is valued in the plaint. But the plaintiff's valuation must not be arbitrary, and if it is, it can be revised by the Court. The proper valuation is either the amount of the decree or the value of the property whichever be less. A single Court-fee alone is payable. The declaration and injunction do not require separate Court-fees. (*D. R. Norman.*) JANWANT MAL *v.* MOHRI LAL. **1937 A.M.L.J. 28.**

——S. 7 (iv) (c) proviso (as amended by Madras Act V of 1922)—*Applicability—Suit for declaration of right to get water free of irrigation tax claiming refund of tax levied.*

Prima facie interpretation of the expression "the relief sought is with reference to any immovable property" in proviso to S. 7 (iv) (*c*), Court-Fees Act as amended by Madras Act V of 1922, is that the dispute should in some sense relate to the title to immovable property. Where a person brings the suit for a declaration that in respect of certain lands in his holding he is entitled to take water from the river free of irrigation cess and for refund of a sum of Rs. 50 and odd which, according to him, has been illegally levied from him, such a person is not seeking a declaration in respect of a right of easement. He is merely asking for an immunity from assessment. The consequential relief in such a case does not relate to immovable property, but is only a claim for recovery of money. Therefore the case does not fall within the proviso added by Madras Act V of 1922. (*Varadachariar, J.*) GURUNATHA CHETTIAR *v.* SECRETARY OF STATE. **59 Mad. 962=160 I.C. 939=8 R.M. 727=1936 M.W.N. 115=43 L.W. 192=A.I.R. 1936 Mad. 201=70 M.L.J. 625.**

——S. 7 (iv) (c) and (d)—*Applicability and scope—If subject to O. 7, R. 11, C. P. Code—Suit to set aside decree or award and for injunction—Valuation.*

Cls. (*c*) and (*d*) of sub-S. (*iv*) of S. 7, Court-Fees Act, must be read with O. 7, R. 11, C. P. Code, and these provisions of the C. P. Code control the provisions of the Court-Fees Act. The absence of rules under S. 9, Suits Valuation Act, is no bar to the exercise of the powers conferred by O. 7, R. 11, C.P. Code, and the question as to what is a proper valuation depends upon the circumstances of each suit and the judicial discretion of the Court. There is nothing in the Bombay Court-Fees Amending Act (III of 1926) which affects the application of the general provisions of O. 7, R. 11, C. P. Code, to suits to set aside a decree and also praying for consequential relief. Cl. (V) of Art. 17 introduced by the Amending Act merely provides a fixed fee in a suit to set aside a decree but it does not provide for a fixed fee when the suit is to set aside a decree and also for consequential relief. Therefore in a suit to set aside a decree or an award where consequential relief is sought by way of an injunction restraining the decree-holder from enforcing his decree, the fixed fee prescribed by Cl. (V) of Art. 17, Bombay Court-Fees Amending Act, is not the only fee payable and it is not open to the plaintiff to value the injunction arbitrarily and pay court-fee thereon; such value can be revised by the Court (*Davis, J.C., Rupchand Bilaram and Mehta, A.J.Cs.*) LAKHOMAL DEEPCHAND *v.* DEEPCHAND TOLARAM. **31 S.L.R. 442=171 I.C. 420=10 R.S. 106=A.I.R. 1937 Sind 241 (F.B.).**

——S. 7 (iv) (c) and (d)—*Decree—Suit to restrain execution of—Allegation that decree is void and incapable of execution for fraud and collusion—Court-fee—Valuation.*

In a suit for permanent injunction restraining a decree-holder from executing his decree on the ground that the same was obtained by fraud and collusion and was therefore void and incapable of execution, the plaintiff must be required to value his suit according to the amount of the decree which he seeks to avoid, and to pay *ad valorem* Court-fee on that amount. (*James and Rowland, JJ.*) KISHORI LAL *v.* KUMAR CHANDRA NARAIN DEO. **182 I.C. 188=5 B.R. 730=12 R. P. 3=A.I.R. 1939 Pat. 572.**

——Ss. 7 (iv) (c) and (d) and 8-C—*Suit to obtain declaratory decree and injunction—Power of Court to correct plaintiff's valuation.*

In a suit for a declaration of title to a certain property and for an injunction falling within Cls. (*c*) and (*d*) of S. 7 (*iv*) of the Court-Fees Act, the amount of Court-fee is, no doubt, computed according to the amount at which the relief sought is valued in the plaint. But where it is possible for the Court on the facts stated to question the plaintiff's valuation, it can exercise its powers of correction under S. 8-C of the Act. (*M.C. Ghose, J.*) ANNAPURNA GHOSE *v.* RAMESWAR GUHA. **175 I.C. 261=10 R.C. 782=66 C. L.J. 462=A.I.R. 1938 Cal. 302.**

——S. 7 (iv) (c) and (d)—*Suit to set aside decree—Valuation.*

In a suit for a declaration that a certain decree obtained by the defendant against the plaintiff is void and for an injunction restraining the defendant from executing that decree, it cannot be said that there is no objective standard for valuing the relief claimed, as such standard must be taken to be the value of the plaintiff's property which he would stand to lose if the decree against

him is put into execution. It would follow, therefore, that if the value of the decree exceeds the value of the assets, the valuation should be based on the valuation of the assets, or, if the assets are of greater value than the decree, the valuation should be based upon the value of the decree. (*Edgley, J.*) NALINI NATH MALLIK THAKUR *v.* RADHA SHYAM MARWARI. **I.L.R. (1940) 1 Cal. 409=A.I.R. 1940 Cal. 482.**

——S. 7 (iv) (c) and (iv-A) and Sch. II, Art. 17-A (as amended by Madras Act V of 1922)—*Applicability—Suit to declare right to properties by survivorship as joint family properties and for possession—Allegation that will executed by deceased member is forgery—Claim for return of pronote on the ground of discharge—Court-fee payable.*

Plaintiff claimed that one deceased *M* was undivided coparcener of a joint family consisting of *M*, and himself, that the properties in suit belonged to that joint family and that on *M's* death he was entitled to those properties by suvivorship. He alleged that a will left by *M* in favour of defendants 1 and 2, *M's* wife and daughter, was a forgery and prayed for possession of the properties. The third defendant, was the brother of the 1st defendant. He further claimed that a promissory note executed by him to *M* had been discharged and prayed that the discharge might be recognised, and that certain documents which he had handed over to *M* might be returned to him.

Held, (*i*) that the claim in respect of the properties was not governed either by S. 7 (*iv*) (*c*) or S. 7 (*iv-A*), but by Art. 17-A of Sch. II of the Court-Fees Act as amended by Madras Act V of 1922. The relief by way of possession cannot be regarded as a consequential relief, because if the properties be joint family properties, plaintiff's right to possession would be entirely unaffected by the will. The claim should be regarded as one for a declaration only; (*ii*) that the claim for recognition of the discharge of the promissory note and for return of the documents was in substance a claim for cancellation and was governed by S. 7 (*iv-A*). (*Beasley, C.J.*) ATHMARAM CHETTIAR *v.* SARASWATHI AMMAL. **163 I.C. 837=9 R.M. 75=43 L.W. 696=1936 M.W.N. 475=A.I.R. 1936 Mad. 344=70 M.L. J. 542.**

——S. 7 (iv) (c) and (v)—*Applicability—"Declaration"—Suit for possession of land—Anticipation of possible defence on ground of dispossession of property—Defendant challenging title of plaintiff—Court-fee payable.*

There is much misunderstanding in India as to the meaning of the word "declaration" as applied to a remedy to be granted by a Court. The habit has grown up of describing a suit for possession of land as being a suit "for a declaration of title together with a decree for possession of the property in suit," and the word "declaration" has been used to mean what would more correctly be described as the finding of fact necessary before the decree for possession can be granted. In every suit for possession the plaintiff cannot succeed unless he proves the facts necessary to establish his title, but the real remedy which seeks is a decree for delivery of possession. When a question arises as to whether a suit falls under S. 7 (*iv*) (*c*) or under S. 7 (*v*), the valuation of the suit for purposes of Court-fee is to be determined by seeing whether the suit is really one for a declaration in the true sense of the word, or whether the suit is for possession. If there be a claim in the plaint for a declaration, the plaint has to be examined to see whether it is a declaration properly so called, or whether it is an unnecessary claim and the suit is really one for possession. S. 7 (*iv*) (*c*) has application to declarations properly so called, such for instance as declarations of public status, or a declaration that the plaintiff holds a public office, or a declaration as to the meaning of a will or a trust deed or other public document. It has no reference to the kind of declaration in the sense of a finding of fact as to the plaintiff's title necessary for granting a decree for possession. It is not in the least necessary for a plaintiff in a suit for possession to claim a declaration. If he happens to claim a declaration of title in addition to an order for possession, the Court may and should treat the case as a claim for possession pure and simple, and ignore entirely the claim for a declaration of title. Where the essential claim made by the plaintiff is one for possession, the fact that the plaint attempts to anticipate a possible defence and says that the defendants will rely upon certain dispositions of the property falsely alleged to have been made, the suit is one for possession under S. 7 (*v*) of the Court Fees Act, and there cannot be any pretence that the claim is one for a declaration with consequential relief falling under S. 7 (*iv*) (*c*). Merely because the defendants challenge the title of the plaintiff, the suit does not become one for a declaration with consequential relief. (*Courtney-Terrell, C.J., James and Manohar Lall, JJ.*) RAM KHELAWAN SAHU *v.* BIR SURENDRA SAHI. **16 Pat. 766=172 I.C. 840=4 B.R. 178=10 R.P. 349=1937 P.W. N. 989=18 Pat.L.T. 977=A.I.R. 1938 Pat. 22 (S.B.).**

——S. 7 (iv) (c) and (v)—*Applicability—Partition suit—Plaintiff claiming to be in joint possession of property—Prayer for declaration that prior compromise and preliminary decree based thereon inoperative and not binding—Plea of denial of joint possession—Court-fee payable—Principle—Sch. II, Art. 17 (vi).*

It is well-settled that in a suit for partition of property Court-fee is to be determined solely on the consideration of the cause of action as stated in the plaint. A suit for partition alleging joint possession of the property and praying for (1) a declaration that a previous compromise and the preliminary decree passed thereon are inoperative and not binding on the plaintiffs and (2) for partition of the property which is in the plaintiffs' joint possession according to law, falls, so far as the first relief is concerned, under S. 7 (iv) (*c*) and so far as the second relief is concerned under Art. 17 (vi) of Sch. II of the Court-Fees Act. A denial by the defendant of the plaintiffs' joint possession at the date of the suit does not alter the character of the suit. If the defendant succeeds in establishing his plea that the plaintiffs were not in joint possession of the property in suit, the plaintiffs' cause of action as laid would fail and suit would be liable to be dismissed unless the plaintiffs are permitted to amend their plaint and pay the additional requisite Court-fee. (*Rupchand, Ag.J.C. and Lobo, J.*) HUSSEIN BAKSH IMAM BAKSH *v.* MUHAMMAD MUSA MUHAMMAD TAYAB. **32 S.L.**

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R 124=177 I.C. 498=11 R.S. 64=A.I.R. 1938 Sind 189.

——S. 7 (iv) (c) and (v)—*Applicability—Partition suit—Allegation of joint possession in respect of estates and subordinate tenure—Allegation that defendant in joint possession for maintenance but had set up proprietorship—Finding that plaintiff had no title or joint possession—Appeal—Court-fee payable*—Ad valorem *fee—If payable—Test—Payment of* ad valorem *fee—If condition precedent to admission of appeal.*

Appellant instituted a suit for partition of a large area of land consisting of several estates and subordinate tenures, claiming that he was in joint possession with the defendant, a lady, who, he alleged, was in possession merely for her maintenance and who had been permitted to obtain entry of her name in respect of the estate, but who, on the other hand, was setting up proprietorship in herself. The trial Court found that the plaintiff had neither title nor joint possession and that the defendant was entitled to be in possession in her own right. The plaintiff appealed to the High Court from that part of the decree negativing his title and possession.

Held, (*i*) that *ad valorem* Court-fee under S. 7 (*v*) of the Court-Fees Act was payable on the appeal in respect of the share claimed by the plaintiff, and that *ad valorem* Court-fee was properly payable on the value of the estates before the memorandum of appeal could be admitted in the High Court; (*ii*) that the correct procedure was to determine the proper Court-fee payable on an appreciation of what the plaintiff appellant really sought, not requiring payment of *ad valorem* Court-fee merely because a suit for partition was defended by a claim of adverse possession; at the same time the taxing officer should be astute to see that the plaintiff should not avoid liability to pay Court-fee under S. 7 (*iv*) (*c*) or S. 7(*v*) of the Act by merely omitting to insert a prayer for possession in what was essentially a title suit in the guise of a partition suit. (*James, J.*) NANDKISHORE KUMAR *v.* ACHAMBIT KUMAR. **16 Pat. 491 =18 Pat L T. 438=1937 P.W.N. 532=171 I.C. 959=3 B.R. 780=10 R.P. 156 (2)=A.I.R. 1937 Pat. 514.**

——S. 7 (iv) (c) and (v)—*Applicability and scope—Suit by wife of insolvent for declaration that property gifted by husband was hers and for possession from Official Receiver—Court-fee payable—"Consequential relief."*

If in suit for a declaration and consequential relief, the consequential relief is such as to fall directly under some other section of the Court-Fees Act, the suit has to be valued under that special section and not under S. 7 (*iv*) (*c*). A suit by Mahomedan lady for a declaration that a certain property gifted to her by her husband, who subsequently became an insolvent, was her property, and for possession of that property which has been taken possession of by the Official Receiver as part of the estate of the insolvent husband falls under S. 7 (*v*) of the Court-Fees Act and Court-fees must be paid under that clause. S. 7 (*iv*) (*c*) does not apply. (*Mockett and Horwill, JJ.*) AMINA BIBI *v.* KADIR BATCHA ROWTHER. **I.L.R. (1937) Mad. 672=1937 M.W.N. 234=45 L.W. 491=170 I C. 573=10 R.M. 219=A.I R. 1937 Mad. 529=.(1937) 1 M.L.J. 739.**

COURT-FEES ACT (1870), S. 7.

——(as amended in Madras), S. 7 (iv) (c) and (v)—*Applicability—Suit under S. 13, Madras Survey and Boundaries Act, containing prayer for possession—Court-fee payable.*

Obiter.—In a suit for obtaining a modification of the boundary line marked by the survey authorities between two villages under S. 13 of the Madras Survey and Boundaries Act and for possession to the extent to which the defendant might be found to be in possession. Court-fee should be paid under S. 7 (*v*) and not under S. 7 (*iv*) (*c*) of the Court-Fees Act as amended by the Madras Act of 1922. S. 7 (*iv*) (*c*) should not be applied to cases falling under S. 7 (*v*). (*Varadachariar and Abdur Rahman, JJ.*) SEVUGAN CHETTIAR *v.* ZAMINDAR OF SIVAGANGA. **1939 M.W.N. 841=A. I.R. 1940 Mad. 273.**

——S. 7 (iv) (c) and (v), Sch. I, Art. 1 and Sch. II, Art. 17 (iii)—*Possession—Alternative relief for declaration that certain property was acquired with joint family funds and for joint possession also—Court-fees.*

A suit was brought by plaintiff for partition and possession of half-share in the joint family property on the ground that he and the defendants were joint and that the partition deed executed in 1896 was a fraudulent one. The plaintiff in the alternative prayed for a relief that if it was found by the Court that he was not entitled to relief as prayed above then he should be given a declaration that the property mentioned in list *B* was acquired with the joint funds of the parties, that they were in joint possession and occupation thereof, and that he should be put in possession of the half-share jointly with defendants.

Held, that the alternative relief claimed was not one that could fall under S. 7 (*iv*) (*c*) of the Act.

Per *Niamatullah, Allsop, JJ. and Sulaiman, C. J.* contra.—In the alternative relief, the plaintiff substantially claimed for possession of the property and the relief of declaration could very well be ignored. The relief, therefore, was such as to fall under S. 7 (*v*) of the Act, read with Art. 1, Sch I, and the Court-fees payable were those that would be payable if the suit had been one for possession without any mention of declaration.

Per *Sulaiman, C.J.*—The Court-fees payable on the alternative relief should be assessed on the language of that relief. The plaintiff asked for (*i*) declaration that the property in the list B was acquired with the joint funds of the parties, (*ii*) that they are in joint possession of it, and (*iii*) also for actual possession over half-share in it. The relief therefore could not be treated as a simple relief for recovery of possession only and so could not come under S. 7 (*v*) of the Act. The plaintiff should, therefore, pay an *ad valorem* Court-fee on the composite relief as prescribed under Sch. I, Art. 1 of the Act, as such relief has not been specifically provided for anywhere. (*Allsop, J., on difference between Sulaiman, C.J. and Niamatullah, J.*) MUNNI SINGH *v.* BASDEO SINGH. **I.L.R. (1937) All. 443=1937 A.W.R. 218 =175 I. C. 385=10 R.A. 682=1938 A.L.R. 420 =1937 A.L.J. 308=A.I.R. 1937 All. 148.**

——S. 7 (iv) (c) and (v) and Sch. II, Art. 17 (iii)—*Applicability—Suit for declaration of title to immovable property and for possession—Court-fees payable.*

him is put into execution. It would follow, therefore, that if the value of the decree exceeds the value of the assets, the valuation should be based on the valuation of the assets, or, if the assets are of greater value than the decree, the valuation should be based upon the value of the decree. (*Edgley, J.*) NALINI NATH MALLIK THAKUR *v.* RADHA SHYAM MARWARI. **I.L.R. (1940) 1 Cal. 409=A.I.R. 1940 Cal. 482.**

——S. 7 (iv) (c) and (iv-A) and Sch. II, Art. 17-A (as amended by Madras Act V of 1922)— *Applicability—Suit to declare right to properties by survivorship as joint family properties and for possession—Allegation that will executed by deceased member is forgery—Claim for return of pronote on the ground of discharge—Court-fee payable.*

Plaintiff claimed that one deceased *M* was undivided coparcener of a joint family consisting of *M*, and himself, that the properties in suit belonged to that joint family and that on *M's* death he was entitled to those properties by suvivorship. He alleged that a will left by *M* in favour of defendants 1 and 2, *M's* wife and daughter, was a forgery and prayed for possession of the properties. The third defendant, was the brother of the 1st defendant. He further claimed that a promissory note executed by him to *M* had been discharged and prayed that the discharge might be recognised, and that certain documents which he had handed over to *M* might be returned to him.

Held, (*i*) that the claim in respect of the properties was not governed either by S. 7 (*iv*) (*c*) or S. 7 (*iv-A*), but by Art. 17-A of Sch. II of the Court-Fees Act as amended by Madras Act V of 1922. The relief by way of possession cannot be regarded as a consequential relief, because if the properties be joint family properties, plaintiff's right to possession would be entirely unaffected by the will. The claim should be regarded as one for a declaration only; (*ii*) that the claim for recognition of the discharge of the promissory note and for return of the documents was in substance a claim for cancellation and was governed by S. 7 (*iv-A*). (*Beasley, C.J.*) ATHMARAM CHETTIAR *v.* SARASWATHI AMMAL. **163 I.C. 837=9 R.M. 75=43 L.W. 696=1936 M.W.N. 475=A.I.R. 1936 Mad. 344=70 M.L. J. 542.**

——S. 7 (iv) (c) and (v)— *Applicability—"Declaration"—Suit for possession of land—Anticipation of possible defence on ground of dispossession of property—Defendant challenging title of plaintiff—Court-fee payable.*

There is much misunderstanding in India as to the meaning of the word "declaration" as applied to a remedy to be granted by a Court. The habit has grown up of describing a suit for possession of land as being a suit "for a declaration of title together with a decree for possession of the property in suit," and the word "declaration" has been used to mean what would more correctly be described as the finding of fact necessary before the decree for possession can be granted. In every suit for possession the plaintiff cannot succeed unless he proves the facts necessary to establish his title, but the real remedy which seeks is a decree for delivery of possession. When a question arises as to whether a suit falls under S. 7 (*iv*) (*c*) or under S. 7 (*v*), the valuation of the suit for purposes of Court-fee is to be determined by seeing whether the suit is really one for a declaration in the true sense of the word, or whether the suit is for possession. If there be a claim in the plaint for a declaration, the plaint has to be examined to see whether it is a declaration properly so called, or whether it is an unnecessary claim and the suit is really one for possession. S. 7 (*iv*) (*c*) has application to declarations properly so called, such for instance as declarations of public status, or a declaration that the plaintiff holds a public office, or a declaration as to the meaning of a will or a trust deed or other public document. It has no reference to the kind of declaration in the sense of a finding of fact as to the plaintiff's title necessary for granting a decree for possession. It is not in the least necessary for a plaintiff in a suit for possession to claim a declaration. If he happens to claim a declaration of title in addition to an order for possession, the Court may and should treat the case as a claim for possession pure and simple, and ignore entirely the claim for a declaration of title. Where the essential claim made by the plaintiff is one for possession, the fact that the plaint attempts to anticipate a possible defence and says that the defendants will rely upon certain dispositions of the property falsely alleged to have been made, the suit is one for possession under S. 7 (*v*) of the Court Fees Act, and there cannot be any pretence that the claim is one for a declaration with consequential relief falling under S. 7 (*iv*) (*c*). Merely because the defendants challenge the title of the plaintiff, the suit does not become one for a declaration with consequential relief. (*Courtney-Terrell, C.J., James and Manohar Lall, JJ.*) RAM KHELAWAN SAHU *v.* BIR SURENDRA SAHI. **16 Pat. 766=172 I.C. 840=4 B.R. 178=10 R.P. 349=1937 P.W. N. 989=18 Pat.L.T. 977=A.I.R. 1938 Pat. 22 (S.B.).**

——S. 7 (iv) (c) and (v)— *Applicability—Partition suit—Plaintiff claiming to be in joint possession of property—Prayer for declaration that prior compromise and preliminary decree based thereon inoperative and not binding—Plea of denial of joint possession—Court-fee payable—Principle—Sch. II, Art. 17 (vi).*

It is well-settled that in a suit for partition of property Court-fee is to be determined solely on the consideration of the cause of action as stated in the plaint. A suit for partition alleging joint possession of the property and praying for (1) a declaration that a previous compromise and the preliminary decree passed thereon are inoperative and not binding on the plaintiffs and (2) for partition of the property which is in the plaintiffs' joint possession according to law, falls, so far as the first relief is concerned, under S. 7 (iv) (*c*) and so far as the second relief is concerned under Art. 17 (vi) of Sch. II of the Court-Fees Act. A denial by the defendant of the plaintiffs' joint possession at the date of the suit does not alter the character of the suit. If the defendant succeeds in establishing his plea that the plaintiffs were not in joint possession of the property in suit, the plaintiffs' cause of action as laid would fail and suit would be liable to be dismissed unless the plaintiffs are permitted to amend their plaint and pay the additional requisite Court-fee. (*Rupchand, Ag.J.C. and Lobo, J.*) HUSSEIN BAKSH IMAM BAKSH *v.* MUHAMMAD MUSA MUHAMMAD TAYAB. **32 S.L.**

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550=11 R.O. 54=1938 O.A. 692=1938 O.W.N. 889=1938 O.L.R. 425=A.I.R. 1938 Oudh 201 (F.B.).

——Ss. 7 (iv) (c) and 7 (5)—*Declaration and cancellation unnecessarily asked—If S. 7 (4) (c) or S. 7 (5) applies.*

Where a plaintiff asks for declaration and a consequential relief, though it is enough for his purposes to merely ask for possession the suit must be treated as one falling under S. 7 (4) (*c*) of the Court-fees Act. (*Niyogi, J.*) MT. THAMABAI *v.* LALSING. **1938 N.L.J. 130.**

——Ss. 7 (iv) (c) and 8 (c)—*Suit for rectification of* solenama *on which preliminary decree was made in partition suit—Valuation by plaintiff—If final.*

In a suit for rectification of a *solenama* upon which a preliminary decree was made in a partition suit, on the ground of fraud or mutual mistake of parties, the value of the property which would be affected by the preliminary decree which would be made in the partition suit if the plaintiff ultimately succeeded in his suit, cannot be taken as an objective standard for the purpose of determining the value of the relief in the suit. In the absence of any other satisfactory objective standard, the plaintiff's valuation must be taken as correct and final. (*S. K. Ghose and Nazim Ali, JJ.*) KANAI LAL *v.* SATYABATI. **181 I.C. 500=11 R.C. 815=42 C.W.N. 614=68 C.L.J. 413=A.I.R. 1939 Cal. 265.**

——Ss. 7 (iv) (c) and 8-C—*Plaintiff suing for declaration, and praying for injunction besides other reliefs—Power of Court to revise plaintiff's valuation.*

Where the plaintiff sues for a declaration and prays for, besides other reliefs, a perpetual injunction as a consequential relief flowing from the declaration, the suit, so far as it relates to these two reliefs, is a suit for a declaration with a consequential relief within the meaning of S. 7 (*iv*) (*c*) of the Court-Fees Act. Under S. 8-C of that Act, the Court has power to revise the valuation put by the plaintiff and determine the correct valuation for the purposes of court-fees. The Court for that purpose may hold such enquiry as it thinks fit. (*Bartley and Nasim Ali, JJ.*) ANATH NATH BANERJEE *v.* KALIMATA THAKURAIN. **I.L.R. (1938) 2 Cal. 64=42 C.W.N. 504=179 I.C. 355=11 R.C. 536=A.I.R. 1938 Cal. 865.**

——Ss. 7 (iv) (d) and 8-C—*Suit for permanent injunction—Prayer restraining execution of decree against property in plaintiff's possession—Proper valuation.*

In a suit for a permanent injunction restraining the defendant from executing a decree obtained by him against property in possession of the plaintiff, the plaintiff cannot place his own valuation on the relief claimed by him, nor can the relief be valued according to the value of the property which would be affected by the injunction. In a case of this sort the objective standard of valuation must be taken to be represented by the extent to which the plaintiff will be benefited if the succeeds in his suit. It would be necessary during the course of an enquiry under S. 8-C of the Court-fees Act to estimate the value to the plaintiff of the property without the permanent injunction and also on the assumption that a permanent injunction could be obtained. The difference in the amounts of these two estimates would

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be the measure of the value of the relief sought by the plaintiff and it would be according to the figure thus obtained that the plaintiff's suit should be valued. (*Edgley, J.*) MIR AKHATAR HOSSAIN *v.* GUHUPADA HALDAR. **I.L.R. (1940) 2 Cal. 33=44 C.W.N. 591.**

——S. 7 (iv) (f)—*Final decree in suit for dissolution of partnership and accounts—Appeal—Court-fee payable—Basis.*

Where a defendant prefers an appeal against a final decree in a suit for dissolution of partnership and accounts, he has to pay Court-fee on the amount mentioned in the final decree and not on the provisional valuation put in the plaint by the plaintiff for the uncertainty about the amount due has ceased to exist after the final decree. (*Gruer, J.*) SHEO KISANDAS *v.* DANDAS RAMGOPAL. **179 I.C. 224=11 R.N. 280=1938 N.L.J. 341=A.I.R. 1938 Nag. 527.**

——S. 7 (iv) (f)—*Administration suit—Appeal—Court-fee payable.*

In an appeal from a decree in a suit for administration, the appellant is entitled to value his relief for purposes of court-fee at such figure as he may fix. He is not bound to pay court-fee on the *ad valorem* value of the appeal. (*Skemp, J.*) GOVIND LAL JI *v.* MILAP CHAND. **42 P.L.R. 101.**

——S. 7 (iv) (f)—*Scope—If subject to O. 7, R. 11, C. P. Code—Partnership—Suit for accounts—Final decree—Appeal or cross-objections—Court-fee—Valuation—Right of party to put notional value—If absolute—Power of Court to revise valuation and demand additional Court-fee.*

It cannot be laid down as an absolute rule of law that the right of a plaintiff in a suit for accounts of a partnership to put a notional value upon the relief he claims extends throughout the whole course of the proceedings up to second appeal and that it extends to appellants or respondents who file cross-objections. The Court is not bound in every case to accept the valuation put by the appellant upon the relief sought by him. As the suit proceeds and circumstances change and the preliminary decree is followed by a final decree, the relief claimed by an appellant in an appeal from the final decree is no longer tentative and uncertain, but is ascertained and can be accurately valued; and the Court therefore is not bound to apply in such an appeal the principle of notional valuation applied or accepted at the beginning of the suit when everything was uncertain. If the appellant is able to ascertain the amount then remaining in dispute, he must pay Court-fee on the value of the relief he seeks in his appeal and cannot be allowed to put a mere notional value. S. 7 (*iv*) of the Court-fees Act must be read with O. 7, R. 11, C. P. Code, and in case of an under-valuation the Court is entitled to apply O. 7, R. 11, C. P. Code, and require the appellant to correct the same and pay the requisite additional Court-fee. (*Davis and Mehta, A. J.Cs.*) LILARAM *v.* HIRANUND. **31 S.L.R. 37.**

——S. 7 (iv) (f)—*Suit for accounts—Dismissal—Appeal—Valuation—If to be same as in lower Court or if may be changed.*

An appellant against a decree dismissing a suit for an account cannot in appeal change his valuation when the subject matter of the appeal is the same as in the trial Court. The scheme of the Court-Fees Act does not allow the plaintiff to change in appeal the valuation adopted by him in

the plaint in the trial Court. (*Leach, C.J., Varadachariar and Pandrang Row, JJ.*) NARAYANAN CHETTY *v.* PERIAPPAN. I.L.R. (1938) Mad. 1031=48 L.W. 454=11 R.M. 414=178 I C. 159=1938 M.W.N. 946=A.I.R. 1938 Mad. 887=(1938) 2 M.L.J. 557 (F.B.).

——S. 7 (iv) (f)—*Suit for accounts—Plaintiff claiming fixed sum by prior notice—Valuation of claim.*

A suit for accounts of the rent recovered by the defendants, falls under S. 7 (*iv*) (*f*) of the Court-Fees Act, and the plaintiff is at liberty to value it as he pleases. The fact that the plaintiff issued, prior to the institution of his suit, a notice claiming a definite sum does not have the effect of making the suit fall under S. 7 (*i*). (*Macklin, J.*) KRISHNAJI HARI *v.* GOPAL NARAYAN. 162 I.C. 227=8 R.B. 398=38 Bom.L.R. 218=A.I R. 1936 Bom. 166.

——S. 7 (iv) (f)—*Suit for accounts—Appeal by defendant against final decree—Valuation.*

It is, no doubt, settled law that in an appeal against a preliminary decree in a suit for the taking of accounts, the defendant-appellant is not bound by the valuation of the relief made in the plaint and is at liberty to make a fresh valuation for the purposes of the appeal. But in an appeal against a final decree by which it has been decided that a certain specific sum of money is due by the defendant-appellant to the plaintiff-respondent, the only valuation which the defendant-appellant can be permitted to put upon his appeal is the amount of the decree which he seeks to have set aside. (*Dunkley, J.*) MAUNG THET PYIN *v.* MA NU. 1937 Rang.L R. 369=174 I.C. 663=10 R.R. 416=A.I.R. 1938 Rang. 23.

——S. 7 (iv) (f)—*Suit for administration—Appeal—Valuation for Court-fees.*

In a suit for accounts including an administration suit, and in an appeal from a decree in such a suit, a plaintiff or an appellant is entitled to value his relief for the purposes of Court-fees at such figure as he may fix. (*Jai Lal and Dalip Singh, JJ.*) MT. SHAHZADI BI *v.* MT. RRHMAT BI. 168 I.C. 105=9 R.L. 594=A.I.R. 1936 Lah. 879.

——S. 7 (iv) (f)—*Suit for dissolution and accounts of partnership — Appeal—Court-fee payable.*

In an appeal against the final decree in a suit for dissolution and settlement of accounts; it is open to the appellant to value his relief for the purpose of court-fee stamp tentatively at such figure as he may choose to fix, under S. 7 (*iv*) (*f*) of the Court-Fees Act. It is not necessary for him to pay a court-fee stamp on the whole amount which he claims should be taken into account in adjusting the final accounts between the parties. (*Jai Lal and Sale, JJ.*) TARIF SINGH *v.* KANSHI RAM. 160 I.C. 642=8 R.L. 574=A.I. R. 1936 Lah. 458.

——S. 7 (iv) (f)—*Suit for partnership accounts—Appeal against preliminary decree by defendant—Court-fee payable.*

A defendant appealing from a preliminary decree in a suit for partnership accounts cannot value his appeal as he likes. An appeal of this nature must bear Court-fees *ad valorem* on the amount at which the relief is value in the plaint. (*Addison and Din Mohammad, JJ.*) FEROZE DIN *v.* MOHAMMAD DIN. 18 Lah. 196=39 P.L.R. 884=171 I.C. 837=10 R.L. 238=A.I.R. 1937 Lah. 694.

——S. 7 (iv) (f)—*Suit for partnership accounts—Appeal against final decree.*

There is nothing in Cl. (*iv*) (*f*) of S. 7 of the Court-Fees Act which limits its application, in respect of an appeal, to an appeal from a preliminary decree only. It applies also to an appeal against the final decree in a suit for accounts of a partnership. (*Davis and Mehta, A.J.Cs.*) LILARAM *v.* HIRANAND. 31 S.L.R. 37.

——S. 7 (iv) (f)—*Suit for accounts by principal against agent—Preliminary decree—Appeal by defendant—Valuation of sum less than plaintiff's valuation—Propriety—Right of defendant to value at suitable amount.*

Plaintiff sued the defendant as his agent for collecting the rent of a house in Calcutta and for rendition of accounts and valued the suit at Rs. 2,100, or whatever sum was found due, be paid Court-fee on Rs. 2,100. By the preliminary decree the defendant was made liable to render accounts for the period from 1920 to 1928. The latter appealed on the grounds (1) that he was not liable to render accounts before 1923, and (2) that he had rendered accounts for the period 1923-1928, and prayed that the preliminary decree for accounts should be set aside. He valued his appeal at Rs. 100.

Held, that the plaint valuation was intended by the plaintiff to be a valuation of the final decree in the suit and not of the preliminary decree, and though the defendant, if he appealed from the final decree, would have had to pay Court-fee on whatever sum was found due to the plaintiff, the present appeal being one from the preliminary decree, the defendant was entitled to value the appeal at any amount which he considered suitable, and the valuation at Rs. 100 was quite proper and perfectly justified and did not contravene any rule of law. (*Bennet: J.*) HARI DAS *v.* MURLI PRASAD. 1937 A.W.R. 443=1937 A.L.J. 480=170 I.C. 119=1937 A.L.R. 634=10 R.A. 99=A.I.R. 1937 All. 465.

——S. 7 (iv) (f) and (v)—*Applicability—Suit to declare will null and void and administration of estate of deceased—Court-fee payable—S. 17—Applicability—Suit valued at Rs. 200 in Court of First Class Subordinate Judge—Decree—Appeal—Forum—District Court or High Court—Bombay Civil Courts Act, S. 26.*

A suit for declaration that a will executed by a deceased person is null and void and for administration of the estate of that person consisting of movable and immovable properties, must be held to be an administration suit falling under S. 7 (*iv*) (*f*) of the Court-Fees Act, being treated as a suit for accounts. It cannot be treated as a suit for possession of immovable property falling under S. 7 (*v*) in spite of the fact that the final decree in the suit might award possession of immovable properties. Nor can the suit be regarded as embracing two or more distinct subjects so as to attract the operation of S. 17 of the Court-Fees Act. The relief by way of declaration as to the will must be regarded as incidental to the chief item of relief which is the administration of the estate. The Court-fee must therefore be computed according to the amount at which the plaintiff values the relief. Where in such a suit

the plaintiff values the relief at Rs 200 and pays Court-fee accordingly, the suit being instituted in the Court of a Subordinate Judge of the First Class, the subject-matter of the suit is less than Rs. 5,000 and consequently an appeal from the decree in such a suit lies to the District Court and not to the High Court, in view of the provisions of S. 8 of the Suits Valuation Act and of S. 26 of the Bombay Civil Courts Act. (*Broomfield and Tyabji, JJ.*) MAGANLAL *v.* KANCHANLAL. 165 I.C. 954=9 R.B. 189=38 Bom.L.R. 754=A.I.R. 1936 Bom. 353.

——S. 7 (iv) (f) and Sch. II, Art. 17 (iii)—*Applicability—Suit under S. 33, Agriculturists Relief Act (U.P.)—Court-fees payable.*

A suit by an agriculturist debtor against his creditor under S. 33 of the U. P. Agriculturists Relief Act, to take accounts between him and his creditor and declare the amount still payable by him to the creditor is a suit which falls under Art. 17 (*iii*) of Sch II of the Court-Fees Act, as the only decree that can be passed in the suit is a declaratory decree. The proper Court-fee payable on the suit is Rs. 10 only. The suit is not an ordinary suit for accounts as contemplated by S. 7 (*iv*) (*f*) of the Court-Fees Act. In such a suit it is not permissible to the Court under ordinary circumstances to give a decree in favour of the plaintiff as in a regular suit for accounts. Consequently no *ad valorem* Court-fees are payable. (*Collister and Bajpai, JJ.*) GIRWAR SINGH *v.* PEYARE LAL. 1936 R.D. 237.

——S. 7 (iv) (f) and U. P. Agriculturists Relief Act (1934), S. 33—*Suit under Agriculturists Relief Act to declare amount payable—Nature of—Court-fee payable.*

Where a plaintiff asks that it may be declared as to what amount is due by him according to the provisions of the U. P. Agriculturists Relief Act, the suit is clearly a suit for accounts and it comes under S. 7 (*iv*) (*f*) of the Court-Fees Act. It is, no doubt, not that class of suit in which the plaintiff claims that a sum of money is due to him. It is a case where the claim is that a sum of money is due from the plaintiff to the defendant. But the Court-Fees Act does not draw a distinction between these different cases of suits for accounts. The criterion applied by the Court-Fees Act to all suits for accounts is, the amount at which the relief sought is valued in the plaint or memorandum of appeal. (*Bennet and Verma, JJ.*) MOHAMMAD OBAID-ULLAH KHAN *v.* RAMJI LAL. I.L.R. (1940) All. 93=188 I C. 149=12 R.A. 590=1940 A.L.J. 36=1940 A.W.R. (H.C.) 43=A.I.R. 1940 All. 189.

——S. 7 (iv) (s)—*Applicability—Suit for accounts—Appeal by defendant—Court-fee—Appeal against preliminary decree and appeal against final decree—Distinction as regards Court-fee payable.*

A defendant appealing from a preliminary decree for an account has to stamp his memorandum of appeal according to the plaintiff's valuation and cannot value his appeal at whatever may seem to him to be approximately correct. Where a defendant appeals against a final decree, he should pay Court-fee on the amount of the decree passed against him, except in cases where he appeals only against a portion of the decree. S. 7 (*iv*) (*f*) applies to appeals by a defendant. (*Leach, C. J., Varadachariar, Burn, King and*

Venkataramana Rao, JJ.) DHANUKODI NAYAKAR, *In re.* I.L.R. (1938) Mad. 598=175 I.C. 470=10 R.M. 781=1938 M.W.N. 373=47 L.W. 488=A.I.R. 1938 Mad. 435=(1938) 1 M.L.J. 628 (F.B.).

——(as amended in Madras), S. 7 (IV-A)—*Applicability—Ex-minor—Suit to set aside alienation by guardian and for possession of alienated property—Court-fee—Valuation.*

A suit by a minor after attaining majority to set aside an alienation made by his guardian during his minority and for possession of the properties alienated is governed for purposes of court-fee by S. 7 (IV-A) of the Court-Fees Act as amended in Madras. The plaintiff has to pay the court-fee based on the actual value of the property as shown in the sale deed which he seeks to avoid; and not the artificial value prescribed by S. 7 (V) of the Act. (*Wadsworth, J.*) VENKATAKRISHNIAH *v.* SHEIK ALI SAHIB. 182 I.C. 878=12 R.M 160=1938 M.W.N. 835=48 L.W. 277=A.I.R. 1938 Mad. 921.

——(as amended by Madras Act V of 1922), S. 7 (IV-A)—*Applicability—If one for cancellation.*

A plea that a document purporting to be executed by another person in favour of the plaintiff does not amount to a due fulfilment of the contract entered into by that other with the plaintiff is certainly not what in law will be spoken of as a prayer for 'cancellation' of that document. So when such a plea is raised or when a prayer in respect of such plea is added by amending the plaint the case will not fall under S. 7 (IV-A) of the Court-Fees Act, as amended in Madras. Nor will the addition of such a prayer in suit for money make the plaint one comprising distinct subjects within the meaning of S. 17. (*Varadachariar, J.*) NARAYANA MOORTHI *v.* PURNA CHANDRA. 161 I.C. 184=8 R.M. 797=1936 M.W.N. 150=A.I.R. 1936 Mad. 266.

——(as amended in Madras), S. 7 (IV-A)—*Applicability—Hindu reversioner—Suit to declare money decree against widow collusive and not binding on plaintiff or his reversionary interest and for injunction to restrain injunction—Valuation.*

To invoke the application of S. 7 (IV-A) of the Court-Fees Act, as amended in Madras, the essential nature of the relief sought must be the cancellation of the decree for money, *i.e.*, getting rid of an obligation for payment of money imposed by the decree against the party who seeks to get rid of it. Where the plaintiff is not a party to the decree and there is no obligation imposed on him personally or on any property in his hands, Art. 7 (IV-A) will not *prima facie* apply. There is distinction between an obligation imposed on a party by a decree and an obligation imposed on a party by his personal law by which he is governed in pursuance of a decree. In one case he seeks to get rid of the obligation existing under the decree; in the other he seeks to have it declared that he or his interest in the property or estate, which is sought to be made liable, cannot be rendered liable under the decree by virtue of the said personal law. In the latter case he is not bound to sue for cancellation of the decree; in the former he is so bound. Where a Hindu reversioner brings a suit to have it declared that a decree obtained against the widow of the last

male-holder is a collusive decree and does not affect the plaintiff or his vested remainder interest in the properties of the last male-holder, and that the decree-holder should be restrained by a permanent injunction from bringing to sale in execution the interest of the plaintiff, in the estate, the suit does not fall under S. 7 (IV-A) of the Act. (*Venkataramana Rao, J.*) VALLABHACHARYULU *v.* RANGACHARYULU. **1937 M.W.N. 230=45 L.W. 380=10 R.M. 407=171 I.C. 889=A.I.R. 1937 Mad. 449.**

——(as amended in Madras), Ss. 7 (IV-A) and (V)—*Applicability—Suit for cancellation of deed of conveyance and for possession of property comprised therein—Valuation— Court-fee payable.*

In a suit for cancellation of a deed of conveyance and for possession of the property, falling under S. 7 (IV-A) of the Court-Fees Act, as amended in Madras, the proper method of calculating the value of the subject-matter is the market value of the property on the date of the plaint. The valuation should not be in accordance with S. 7 (V). (*Leach, C.J., Krishnaswami Ayyangar and Somayya, JJ.*) KUTUMBA SASTRI *v.* SUNDARAMMA. **I.L.R. (1939) Mad. 764=183 I.C. 95=12 R.M. 232=49 L.W. 566=1939 M.W.N. 407=A.I.R. 1939 Mad. 462=(1939) 1 M.L.J. 702 (F.B.).**

——(as amended in Madras), S. 7 (IV-A) and Sch. II, Art. 17-A— *Applicability—Order by liquidator of Co-operative Society under S. 42 (2) (b), Co-operative Societies Act—Suit to declare null and void—Court-fee payable—"Decree for money."*

An order of the liquidator under S. 42 (2) (*b*) of the Co-operative Societies Act is not a "decree for money" within the meaning of S. 7 (IV-A) of the Court-Fees Act as amended by Madras Act V of 1922, not having been passed by any Court in a suit. S. 7 (IV-A) cannot therefore apply to a suit for a declaration that an order of a liquidator determining the amount of contribution payable by the plaintiff under S. 42 (2) (*b*) of the Co-operative Societies Act is null and void. The suit is governed by Art. 17-A of Sch. II of the Court-Fees Act as amended in Madras. (*Venkataramana Rao, J.*) KUPPU GOVINDA CHETTIAR *v.* UTTUKOTTAI CO-OPERATIVE SOCIETY. **I.L.R. (1938) Mad. 63=1937 M.W.N. 341=169 I.C. 698=10 R.M. 87=45 L.W. 563=A.I.R. 1937 Mad. 604=(1937) 1 M.L.J 640.**

——(as amended by Madras Act V of 1922), S. 7 (IV-A) and Sch. II, Art. 17-A—*Applicability and scope—Razinama decree—Suit to declare null and void—Plaintiffs minors in prior suit represented by defendants or guardians—Court-fee payable.*

In determining the question of Court-fee properly payable, the substance of the relief claimed, and not the form and language of the plaint in the suit must be looked at. The word 'declaration' in Art. 17-A of Sch. II has a different meaning from "cancellation" in S. 7 (IV-A) of the Court-Fees Act. If a party to a decree sues to set aside or cancel a decree, S. 7 (IV-A) governs the Court-fee, but if the plaintiff is not a party to the decree which he seeks to have declared not binding on him, the appropriate provision is Art. 17-A of Sch. II. In a suit where the relief prayed for is that a razinamah decree passed against the members of a tarwad of which the plaintiffs and defendants were members—the plaintiffs then being minors represented by the defendants—may be declared null and void, the declaration must be taken to have been asked for on the footing that the plaintiffs were not parties to the razinamah decree for the reason that they were not properly or legally represented at all in the razinamah, the interests of the defendants being adverse to those of the plaintiffs. The case would therefore be governed by Art. 17-A of Sch. II and not by S. 7 (IV-A). (*Cornish, J.*) ABDULLAH *v.* SUBRAMANYAN PATTAR. **163 I.C. 203=8 R.M. 1112=1936 M.W.N. 566=43 L.W. 715=A.I.R. 1936 Mad. 470=71 M.L.J. 383.**

——(as amended in Madras), S. 7 (IV-A) and Sch. II, Art. 17-A (1)—*Suit under S. 53, T. P. Act—Court-fee payable—Prayer for cancellation of deed—If involved.*

It is clear that the proper prayer in a suit by the creditors of a person under S. 53 of the Transfer of Property Act is a prayer for a declaration that the alienation complained of is not binding upon the creditors to the extent of their debts and not a prayer for the cancellation of the deed of alienation. The suit therefore falls in substance under Art. 17-A of schedule to the Court-Fees Act as amended in Madras and does not come under S. 7 (IV-A). (*Wadsworth, J.*) VELLAYA KONAR *v.* RAMASWAMI KONAR. **I.L.R. (1940) Mad. 73=189 I.C. 301=13 R.M. 229=50 L.W. 248=1939 M.W.N. 778=A.I.R. 1939 Mad. 894=(1939) 2 M.L.J. 400.**

——(as amended in Madras), S. 7 (IV-A) and Sch. II, Art. 17-A (iii)—*Applicability—Suit by Hindu widow—Prayer for declaration that defendant not adopted by her—Further prayer that deed of adoption executed by her in his favour be declared void and cancelled—Court-fee payable—"Document securing money"—Meaning of.*

The substance of the claim made by a plaintiff, a Hindu widow, in a suit in a Subordinate Judge's Court was to have it declared that the first defendant was not adopted by her to her husband and that a certain deed of adoption executed by her in favour of the first defendant should be declared void and cancelled. On the first relief she paid a Court-fee of Rs. 100, valuing the relief at Rs. 8,000, and on the second she paid a Court-fee of Rs. 112-8-0, valuing it at Rs. 1,000. It was found that the market-value of the properties both movable and immovable, affected by the declarations was over Rs. 50,000.

Held, (1) that the Court-fee in respect of the first relief of declaration as to the status of the first defendant was Rs. 500 under Art. 17-A (iii) of Sch. II of the Court-Fees Act as amended in Madras; (2) that the document which the plaintiff sought to have declared void and cancelled was not a document in and by which any property was "secured" in favour of the first defendant within the meaning of S. 7 (IV-A) of the Court-Fees Act as amended in Madras, and did not require to be set aside, and the valuation given by the plaintiff and the Court-fee paid by her were therefore correct.

Held, further, that the documents which required to be set aside were documents whereby rights are transferred or released such as sales, gifts, mortgages, leases, releases, etc., and to fall under S. 7 (IV-A), the document sought to be

set aside must of itself have secured the property, *i.e.*, there must have been a conveyance of the said property or a release of right thereunder which would operate to extinguish the right of the person convenying or releasing, and not merely a confirmation of an already existing right. (*Venkataramana Rao, J.*) SODEMMA *v.* KRISHNAMURTHY. 181 I.C. 431=11 R.M. 809=1938 M.W.N. 520=48 L.W. 623=A.I.R. 1938 Mad. 824.

——(as amended by United Provinces Court-Fees Chief Amendment Act, 1938), S. 7 (IV-B) (b)—*Applicability.*

S. 7 (IV-B) (*b*) of the Court-Fees Act (as amended in United Provinces) applies to a suit in which the only relief claimed is one to obtain an injunction. (*Zia-ul-Hasan and Yorke, JJ.*) JANED ANNA BONARJEE *v.* UNITED PROVINCES OF AGRA AND OUDH. 15 Luck. 415=186 I.C. 671=12 R.O. 326=1940 A.W.R. (C.C.) 122=1940 O.W.N. 223=1940 O.A. 212=1940 O.L.R. 141=A.I.R. 1940 Oudh 249.

——S. 7 (v)—*Applicability — Caste—Suit by members of,on behalf of caste, for administration of caste property after ejectment of defendants in possession—If one for possession—Court-fee.*

A suit which does not fall under S. 92, C. P. Code, and which is not for the administration of any trust but is in substance one for the administration of the property of a caste, wherein all the members of the caste are interested, after ejectment of persons who are in exclusive possession thereof and who refuse to have the same administered for the common benefit, falls directly under S. 7 (*v*) of the Court-Fees Act and must be valued for purposes of Court-fee as a suit for possession. Recovery of possession being a necessary and substantial relief in such a suit, and being sought on behalf of all the members of the caste, the suit comes within the purview of S. 7 (*v*). (*Venkataramana Rao, J.*) MUTHUSWAMI PILLAI *v.* MANICKAVASAGAM PILLAI. 169 I.C. 819=10 R.M. 104=1937 M.W.N. 217=45 L.W. 510=A.I.R. 1937 Mad. 591.

——S. 7 (v)—Applicability—Hindu coparcener—Suit for partition—No allegation in plaint that plaintiff is in joint possession and management—Court-fee payable. *See* COURT-FEES ACT, S. 7 (*iv*) (*b*) AND (*v*). 45 L.W. 541.

——S. 7 (v)—*Applicability — Suit by junior member for partition of thavazhi properties.*

Where the suit is by a junior member for partition of the thavazhi properties, for the purpose of determining the Court-fee payable, the point to be considered is, whether on the date of suit it can be said that the defendant's possession was possession on behalf of the thavazhi. It he is not in such possession, Court-fee should be paid under S. 7 (*v*). (*Varadachariar, J.*) MANAVEDAN *v.* MANAVEDAN. 181 I.C. 905=11 R.M. 874=1938 M.W.N. 131=A.I.R. 1938 Mad. 474.

——S. 7 (v)—Applicability—Suit for declaration of title to property and for possession—Court-fee payable. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*) AND (*v*). 45 L.W. 491=(1937) 1 M. L. J. 739.

——S. 7 (v)—*Applicability—Suit against mortgagor for possession.*

In a suit for possession against a mortgagor who had not deiivered possession of property mortgaged, an *ad valorem* court-fee on the market value must be paid as the defendants are allegedly in possession and as there is no special provisions in the Court-Fees Act as regards suits of this kind. (*Davies.*) NAWAB KHAN *v.* ALI SHAH. 1940 A.M.L.J. 49.

——S. 7 (v)—Applicability—Suit for possession—Defendant challenging plaintiff's title, and plaint anticipating possible defence on that ground—Suit, if one for possession or falls under S. 7 (*iv*) (*c*)—Court-fee. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*) AND (*v*). 18 Pat.L.T. 977=A.I.R. 1938 Pat. 22 (S.B.).

——S. 7 (v)—*Suit for partition and possession by excluded co-sharer—Court-fee payable.*

Where in a suit for partition and possession among co-sharers the plaintiff alleges his exclusion from possession of the property, the court-fee payable is *ad valorem* under S. 7 (*v*) of the Court-Fees Act. (*Venkatasubba Row and Abdur Rahman, JJ.*) SECRETARY OF STATE *v.* SUBRAMANIAN CHETTIAR. I.L.R. (1938) Mad. 309=47 L.W. 70=1938 M.W.N. 169=177 I.C. 904=11 R.M. 392=A.I.R. 1938 Mad. 278=(1938) 1 M.L.J. 29.

——(as amended in Madras), S. 7 (v)—Applicability—Suit under S. 13, Madras Survey and Boundaries Act—Prayer for possession—Court-fee payable. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), S. 7 (*iv*) (*c*) AND (*v*). 1939 M.W.N. 841.

——S. 7 (v) and (x)—*Applicability and scope—Suit for specific performance—Nature of—Claim to possession also included—If makes suit one for possession—Test.*

In a suit for specific performance of a contract for conveyance of immovable properties, there is no question of primary and secondary relief; both the execution of the conveyance and delivery of possession are essential reliefs. In such a suit the purchaser seeks to enforce the terms of his contract. The seller as much agrees to put the purchaser in possession as he agrees to execute a conveyance in his favour. The fact that the purchaser claims possession in the suit will not make the suit one for possession, as the specific provision in Cl. (*x*) of S. 7 of the Court-Fees Act for specific performance will exclude the applicability of the general provision in S. 7 (*v*) relating to suits for possession where the claim to possession is involved in the claim to specific performance, the suit remains one for specific performance and must be dealt with on that basis. Where the plaintiff, in pursuance of an arrangement entered into between him and the defendants, prays that the 1st defendant should be directed to execute a relinquishment in his favour for a third share in certain properties which are part of a schedule to the plaint, and that the 2nd defendant should be directed to execute a conveyance in his favour of all the properties in that schedule including the items in respect of which he claims a relinquishment from the 1st defendant, and also prays for partition and possession, so far as the conveyance from the 2nd defendant is concerned, the plaintiff's suit is essentially one for specific performance falling under clause (*x*) of S. 7 of the Court-Fees Act and court-fee must be paid on the consideration for the conveyance stated in the agreement. So far as the relief against the 1st defendant is concerned, the essential relief

against him is really one for possession and plaintiff is therefore entitled to value it under Cl. (*v*) of S. 7. (*Venkataramana Rao, J.*) DULLABHO SAHU *v.* ADINARAYANA. **176 I.C. 777=11 R.M. 174=1937 M.W.N. 236=A.I.R. 1937 Mad. 831.**

——S. 7 (v) and (x) (a)—*Applicability—Contract of sale—Suit for specific performance and possession—Court-fee.*

A suit for specific performance of a contract of sale of land and for possession falls under S. 7 (*x*) (*a*) of the Court-Fees Act and must be valued for purposes of Court-fee according to the amount of the consideration for the sale. *Ad valorem* Court-fee has to be paid on the full amount of the consideration and not merely on the unpaid portion of the purchase-money due by the buyer to the seller. Possession is only an auxiliary relief and the suit is therefore not one for possession under S. 7 (*v*) of the Act. (*Norman.*) SUKHDEO *v.* KUNJ LAL. **1936 A.M. L.J. 114.**

——S. 7 (v) and (x) (c)—*Applicability—Lease of immovable property executed and registered—Term of twenty years fixed to take effect on future date—Suit by lessee for possession and mesne profits against lessor and others—Allegation that lessor parted with possession to others and refused lessee's demand for possession—Valuation—Court-fee—If one for specific performance.*

Petitioner granted a lease of certain immovable properties to the 1st respondent for 20 years, the period to commence from 2nd June, 1935. The lease was executed on 2—11—1929 and duly registered. The property had been granted by the petitioner's deceased father in 1913 on a lease for 20 years to the 2nd and 3rd respondents and the fathers of the 4th, 5th and 6th respondents. The 1st respondent brought a suit in 1935 against the petitioners and the respondents 2 to 6 and others claiming possession and mesne profits alleging that the petitioner had in collusion with the respondents put the 1st defendant into possession of the property and had refused his demand for possession, and he valued the suit as one for specific performance under S. 7 (*x*) (*c*) of the Court-Fees Act.

Held, that the suit was in substance one for possession and not for specific performance; it was a suit for possession against strangers to the contract who, according to the plaintiff, were unlawfully withholding possession from him, therefore had to be valued under S. 7 (*v*) of the Court-Fees Act. For the purposes of Court-fee what the Court has to look at is the plaint which must be stamped according to the nature of the suit as the claim is formulated by the plaintiff. (*Wadsworth and Krishnaswami Ayyangar, JJ.*) SURYANARAYANA CHARYULU *v.* NARASIMHASWAMY. **I.L.R. (1939) Mad. 367=49 L.W. 196=180 I.C. 640=11 R.M. 736=1939 M.W.N. 152=A.I.R. 1939 Mad. 360=(1939) 1 M.L.J. 268 (F.B.).**

——(as amended by the Madras Act V of 1922), S. 7 (b) and Sch. II, Art. 17-B—*Applicability—Decree-holder purchaser getting symbolical delivery—Suit for possession and mesne profits against person in actual possession—Court-fee payable.*

The appellant who obtained a mortgage decree in respect of the western portion of a house, brought the same to sale in execution of the decree and purchased it himself. He later got symbolical delivery of possession. The respondent who had obtained a mortgage decree in respect of the whole house, executed his decree, and caused the property to be sold. He was himself the purchaser in execution, his purchase, however, being subject to the appellant's right. The respondent was in physical possession of the whole house throughout and refused to allow the appellant to enter into physical possession of his portion. The appellant thereupon brought a suit for partition of the property and for possession of his half-share and for mesne profits. He averred in his plaint that his claim to be put in possession of his share of the house was wrongfully refused by the respondent and he paid a Court-fee of Rs. 15, valuing his plaint under Art. 17-B of Sch. II to the Court-Fees Act, as amended in Madras.

Held, that S. 7 (*v*) of the Act, and not Art. 17-B of Sch. II, applied to the case and that the plaint required to be stamped with *ad valorem* Court-fee on the market value of the house, the suit being in truth and in fact a suit for possession against a person in wrongful possession of the property. (*Leach, C. J. and Somayya, J.*) KAMAKSHI AYYAR *v.* NAMBERUMAL AYYANGAR. **185 I.C. 459=12 R.M. 542=1939 M.W.N. 303=49 L.W. 481=A.I.R. 1939 Mad. 506=(1939) 1 M.L.J. 531.**

——(as amended in Madras), S. 7 (v) and Sch. II, Art. 17-B—*Applicability—Mahomedan co-sharers—Suit by one for share of properties as his share—Claim to properties alienated by defendant co-sharer impeaching alienation as inoperative—Court-fee payable—Alienated and unalienated properties—Distinction.*

A suit by a Mahomedan co-sharer against another co-sharer to recover certain properties being his or her share of the joint properties, some of which have been alienated by the defendant co-sharer, alleging that the alienations are totally inoperative as against the plaintiff, falls under S. 7 (*v*) of the Court-Fees Act so far as the alienated properties are concerned, but falls under Art. 17-B of Sch. II of the Act, as amended in Madras, in respect of the unalienated properties. So far as the alienated properties are concerned, the plaintiff cannot claim to treat the alienees' possession as the possession of a cotenant unlike in the case of the non-alienated properties. (*Varadachariar, J.*) KARAIA NACHI BIVI *v.* ALLAPICHAI. **45 L.W. 720=171 I.C. 572=10 R.M. 373=A.I.R. 1937 Mad. 402=(1937) 1 M.L.J. 572.**

——(as amended in Madras), S. 7 (v) and Sch. II, Art. 17-B—*Applicability—Suit for possession of office of member and manager of school committee—Court-fee—Valuation—Jurisdiction—Value of properties over Rs. 3000—Maintainability in Munsif's Court.*

The plaintiff who claimed to have been appointed member and manager of a school committee in the place of the first defendant who was removed brought a suit praying that the latter should be declared to have been validly removed from the office of member and manager of the committee and institution, that he (the plaintiff) might be declared to have been duly appointed as member and manager and that as such he alone was entitled to be in management of the school. He

asked for a perpetual injunction restraining the first defendant from functioning as the manager of the plaint institution, and further prayed that, if need be, he should be put in possession of the office of managership through process of Court.

Held, (*i*) that the suit in respect of the prayer for possession fell under Art. 17-B of Sch. II to the Court-Fees Act as amended in Madras and did not fall under S. 7 (*v*) of the Act; (*ii*) that where the properties were worth more than Rs. 3000, the suit was maintainable not in a Munsif's Court, but only in Subordinate Judge's Court. (*Somayya, J.*) KARUPPANNA NADAR *v.* KARUPPA NADAR. **189 I. C. 289=13 R.M. 234=50 L.W. 154=1939 M.W. N. 720=A.I.R. 1939 Mad. 776=(1939) 2 M.L. J. 226.**

——**S. 7 (v) and Sch. II, Art. 17 (vi)**—*Applicability—Suit for possession by partition—No joint possession—Property not joint family property—Court-fee.*

If a person is out of possession of property to which he considers he is entitled on the strength of any right, title or interest that he claims in relation thereto, and seeks to obtain possession thereof from the person who is keeping it back from him, there being no jointness of possession or title between the two, his suit is one for possession, bare and simple to which the provisions of S. 7 (*v*) of the Court-Fees Act apply and no occasion arises to invoke Art. 17 (*vi*) of Sch. II to the Court-Fees Act. (*Addison and Din Mahomed, JJ.*) MT. SAT BHAWAN *v.* RAM KISHEN SINGH. **I.L.R. (1938) Lah. 240=176 I.C. 762=11 R.L. 235 (2)=40 P.L.R. 27=A.I.R. 1938 Lah. 275.**

——**S. 7 (v) and Sch. II, Art. 17 (vi)**—*Suit for possession of temple properties--Court-fee payable.*

In a suit for possession of lands and buildings against the defendant alleging that the plaintiff is a Mahant of certain temple and that the property mentioned in the plaint is owned by the idol which is installed in that temple and that the defendant has taken illegal possession of the property, and for an injunction to the defendant restraining him from interfering with the plaintiff's management of the same, the plaintiff is bound to pay *ad valorem* Court-fee on the market value of the property. This, however, is subject to the proviso that where the properties are not capable of being valued owing to the character of the user to which they are put Court-fee under Art. 17 (*vi*) is payable in respect thereof. Such properties ordinarily are the materials and the site of the temple and the materials and the sites of such buildings as are adjunct to the temple and are not directly productive of any income for the temple. (*Jai Lal, J.*) HARI DAS *v.* RAJA RAM. **40 P.L.R. 113.**

——**S 7 (v) (a)**—*Valuation of subject-matter—Proper procedure—Assessment of court-fee on basis of net profits without determining market value—Legality.*

Under S. 7 (v) (*a*) of the Court-Fees Act, the plaintiff must pay Court-fee on fifteen times the net profits arising during the year immediately preceding the institution of the suit. If the amount of the net profits stated by the plaintiff in his valuation statement is accepted by the Court the matter ends. But if the Court sees reason to think that such profits have been wrongly estimated then it is to proceed to make

enquiries on the two heads mentioned in the concluding portion of sub-Cl. (*a*) of S. 7 (v). It must proceed to ascertain (1) the net profits of the land, building or garden as the case may be in the year immediately preceding the presentation of the plaint; and (2) its market value. If the net profits are not readily ascertainable or assessable it is to ascertain the market value, but if the net profits are readily ascertainable or assessable it is under the obligation to direct its enquiry on both the heads—on the market-value also. It can then only require additional Court-fee to be paid (if payable) on the lower of the two figures arrived at such enquiry. The Court cannot merely ascertain the amount of net profits and assess Court-fee on fifteen times such profits without determining the market value. (*Mitter and Akram, JJ.*) BAZLAR RAHMAN *v.* COMMISSIONER OF WAKFS, BENGAL. **44 C.W.N. 822=A.I.R. 1940 Cal. 438.**

——**S. 7 (v) (b)**—*Construction—"Revenue so payable"—Meaning—Remission of revenue granted in particular year—If to be deducted in calculating valuation.*

Remissions of revenue granted in any particular year cannot be taken into account in calculating the value of land for purposes of court-fee under S. 7 (*v*) of the Court-Fees Act; the calculation should be based on the revenue fixed at the settlement. The words "the revenue so payable" and the words "such revenue is settled" undoubtedly refer to the revenue fixed at the settlement and cannot refer to the revenue less remissions in any particular year. (*Bennet, J.*) MAHOMED IBRAHIM *v.* KHAN CHAND. **1937 A.L.J. 838=10 R.A. 278=171 I.C. 528=1937 A.L.R. 856=1937 A.W.R. 747=A.I.R. 1937 All. 657.**

——**S. 7 (v) (b) and (d)**—*Applicability—Suit to recover ¾ of ⅔ share in khewat.*

A suit for the recovery of a three-fourth out of two-third share in a certain khewat is governed by S. 7 (*v*) (*b*) and not by S. 7 (*v*) (*d*) of the Court-Fees Act, if the khewat in question is a distinct unit assessed separately to revenue, as it is easy to ascertain the proportionate amount of revenue assessable on the property sought to be recovered. (*Sulaiman, C.J. and Bajpai, J.*) RANDHIR SINGH *v.* RANDHIR SINGH. **I.L.R. (1937) All. 128=167 I.C. 909=9 R.A. 584=1937 A.W.R. 15=1937 A.L.J. 88=1937 A.L.R. 264=A.I.R. 1937 All. 206.**

——**S. 7 (v) (b) and (d)**—*Applicability—Entire village, having its revenue fixed after consideration of value of* sir *and* khudkasht *fields—Suit for possession of definite share including* sir *and* khudkasht *fields—Court-fee payable.*

A person sued for possession of a definite share in a village with certain specified *sir* and *khudkasht* fields belonging to that share. The revenue of the entire village was fixed after taking into consideration the value of the *sir* and *khudkasht* fields. He paid court-fees on 7½ times the proportionate revenue of the definite share. The Court asked for additional fees on the market value of the *sir* and *khudkasht* fields

Held, the claim fell under S. 7 (*v*) (*b*) and not under (*d*). The order asking for additional Court-fees was bad, because, if he sued for possession of the entire village including all the *sir* and *khudkasht* fields, he would have to pay Court-fee on 7½ times the revenue of the village

and no more. (*Pollock, J.*) GANPAT RAO *v.* PARASRAM. I.L.R. (1937) Nag. 309=169 I.C. 896=10 R.N. 35=A.I.R. 1937 Nag. 100.

——S. 7 (v) (c)—*Construction—Profits in the nature of windfall—If to be excluded for purposes of court-fee.*

S. 7 (v) (*c*) of the Court-Fees Act does not give the Court any option to consider whether or not the net profits for the year preceding the presentation of the plaint are exceptional or unusual. Such profits cannot be excluded from consideration for purposes of court-fee on the ground that they partake of the nature of a windfall. (*Wadsworth, J.*) SYED SABJUMIAH HUSSAIN *v.* KALAYIGAR ABDUL VAHAB SAB. 1940 M.W.N. 817=52 L.W. 146=A.I.R. 1940 Mad. 821 =(1940) 2 M.L.J. 176.

——S. 7 (v) (d) and Oudh Civil Rules, R. 1 (d) and (iv)—*Suit against trespasser by tenant for possession—Calculation of market value.*

Where a suit is by a tenant to recover possession from a trespasser, it falls under Cl. (v) (*d*) of S. 7 of the Court-Fees Act and the market value has to be calculated according to R. IV of the Oudh Civil Rules, R. 1 (1) has no application to such a case. (*Yorke, J.*) BHULAI *v.* GAYA DIN. 174 I.C. 550=1938 R.D. 488=1938 O.L.R. 195=1938 O.A. 423=1938 A.W.R. (C.C.) 42 =10 R.O. 274=1938 O.W.N. 453=A.I.R. 1938 Oudh 139.

——S. 7 (v) (d) and (e)—*Suit by under-proprietor for possession of land with building and guava grove thereon—Separate court-fees—If payable.*

A person claiming under-proprietary rights in land by virtue of a permanent lease executed in his favour brought a suit for possession of the land and the building and a guava grove thereon. The building was not a tenant's house or any other building necessary for the enjoyment of the land but a substantial structure used as a tannery. Similarly the trees were not self-grown but were planted.

Held, that in such circumstances the building and grove could not be said to be appurtenant to the land and hence a separate Court-fee under S. 7 (*v*) (*e*) should be paid on the market value of the building and the grove. (*Thomas and Zia-ul-Hasan, JJ.*) JWALA DEVI *v.* AHMAD HASAN. 172 I.C. 297=1937 O.L.R. 599=1938 O.W.N. 23=1938 O.A. 123=10 R.O. 168=A.I.R. 1938 Oudh 40.

——S. 7 (v) (e) and Sch. II, Art. 17 (6)—*Suit for possession of temple on an agreement for management by rotation—Court-fee.*

Where a plaintiff sues for possession of a temple on the strength of an agreement for management by rotation the court-fees are payable according to Sch. II, Art. 17 (6) of the Court-Fees Act. The temple so long as it stands as a temple remains the property of the deity and has no market value within the meaning of S. 7 (*v*) (*e*) of the Act. (*Niyogi, J.*) MOTILAL *v.* SHAMBHOOLAL. 178 I.C. 97=1938 N.L.J. 214= 11 R.N. 206=A.I.R. 1938 Nag. 481.

——S. 7 (v) (e)—*Suit for possession—Valuation of subject-matter—Distinction between land and house or garden.*

For purpose of computing valuation of the subject-matter in a suit for possession, the legislature had drawn a distinction between the case where the subject-matter is land and where

the subject-matter is house or garden. If the subject-matter in suit is a garden, it would come under Cl. (*e*), sub-S. (*v*), S. 7 and Court-fee will have to be paid on the market value of the garden and not on the basis of annual revenue of land. (*R.C. Mitter, J.*) JOGENDRA NATH DAS *v.* SARUP CHAND HUKUM CHAND. 162 I.C. 810= 8 R.C. 657=A.I.R. 1936 Cal. 264.

——S. 7 (vi)—*Pre-emption of house site—Improvement made on property before suit—Court-fee payable.*

A person who sued for pre-emption of a house site, paid Court-fee only on the market value of the site although the sale deed in respect of the site specified a higher value. The vendees contended that Court-fee should be paid not only on the original price of the site but also on the price of the house that they had built upon it before the suit was brought.

Held, that plaintiff must pay Court-fee on what was *prima facie* the value of the subject-matter, that is, the value of the site as stated in the sale deed plus the costs of the improvements made thereon. If he found when the suit was finally tried out that he had paid higher Court-fee than necessary, then he could claim refund of the excess under S. 10, Court-Fees Act. (*Skemp, J.*) MAHOMED ANWAR *v.* DIAL CHAND. 172 I.C. 392 =10 R.L. 308=39 P.L.R. 511=A.I.R. 1937 Lah. 239.

——S. 7 (ix)—*Applicability—Appeal in mortgage suit—Dispute as to amount of redemption money—Court-fee—Sch. I, Art. 1.*

No doubt in the case of a mortgage where the right to redeem or foreclose is challenged, amount of Court-fee payable on appeal is provided for in S. 7 (*ix*) for "suit" there includes "appeal." But when none of these is challenged as where only the amount of the price fixed for redemption is challenged, such a relief is neither for foreclosure nor for sale, nor is it for redemption. The only dispute is with reference to the difference between the amount fixed in the lower Court, and the amount claimed in appeal. Such a claim does not come under S. 7, Cl. (*ix*), nor does it fall under any other provision in the Act. It is therefore not "otherwise provided for" and so Court-fee must be paid on the memorandum of appeal in accordance with Art. 1, Sch. I, that is the fee must be paid *ad valorem* on the value of the subject-matter in appeal. (*Vivian Bose, J.*) SHEIKH RAHMAN *v.* BALCHAND. 167 I.C. 577=9 R.N. 191=A.I.R. 1937 Nag. 6.

——S. 7 (ix)—Applicability—Suit for redemption—Assignment of mortgage—Suit by mortgagor for declaring fictitious and for direction for delivery of deed to him on payment of part amount—Allegation of part payment and adjustment—Valuation of suit—Court-fee. *See* COURT-FEES ACT, S. 7 (*iv*) (*a*), (*ix*) AND (*x*). 40 C.W.N. 90=62 C.L.J. 405.

——S. 7 (ix)—*Construction—"Recovery of property mortgaged"—Meaning of.*

The phrase "recovery of property mortgaged" in Cl. (ix) of S. 7 of the Court-Fees Act does not mean recovery of possession of the mortgaged property from the mortgagee, but is a phrase convertible with the word "redeem," the ordinary significance of the term "to redeem" being to recover a pledge, to get property freed from a charge or mortgage. (*R.C. Mitter, J.*) MAHOMED

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ISHAK MIYA CHOWDHURI *v.* ANANDA CHANDRA SHAHA. **63 Cal. 657=40 C.W.N. 90=62 C.L.J.405**

——S. 7 (ix)—*Mortgage—Decree for redemption and surplus profits—Appeal from—Appellant challenging both right of redemption and amount of profits awarded—Court-fee payable.*

In an appeal from a decree for redemption of a mortgage and surplus profits, where the appellant challenges *bona fide* both the right of redemption and the amount of profits the appellant is liable to pay Court-fees under S. 7 (ix) of the Court-Fees Act only on the principal sum secured by the mortgage. (*Stone, C.J., Niyogi and Pollock, JJ.*) RAM SAHAY *v.* KANHAIYALAL. **I.L.R. (1937) Nag 49=A.I.R. 1937 Nag. 295 (F.B).**

——S. 7 (ix) (as amended in C.P.)—*"Suits"—If includes appeals.*

The expression "suits" used in Cl. (*ix*) of S. 7 means "appeal" as well, as the expression has been used to cover the entire litigation from its beginning to the end. (*Vivian Bose, J.*) SHEIKH RAHMAN *v.* BALCHAND. **167 I.C. 577=9 R.N. 191=A.I.R. 1937 Nag. 6.**

——S. 7 (ix)—*Suits and appeals under—Valuation of.*

In a suit for redemption, or for foreclosure or for enforcement of a mortgage by conditional sale, the claim cannot be properly valued in accordance with the value of the property, but an artificial value has to be fixed in accordance with S. 7 (*ix*), Court-Fees Act, and the value so fixed cannot vary, but must remain constant throughout all stages of the litigation, because the word "suit" in Cl. (*ix*) covers both the claim in the original Court, as well as that in appeal. (*Vivian Bose, J.*) SHEIK RAHMAN *v.* BALCHAND. **167 I.C. 577=9 R.N. 191=A.I.R. 1937 Nag. 6.**

——S. 7 (ix) and (x)—*Applicability—Suit to recover mortgage bond with endorsement of full satisfaction—If one to redeem mortgage for movable property or for specific performance—Court-fee—S. 7* (iv) (a).

A suit by a mortgagor against the mortgagee and his assignee praying for delivery of the mortgage bond with an endorsement of full satisfaction is a suit which in substance is a suit for redemption and falls for purposes of Court-fee within the first para. of Cl. (ix) of S. 7 of the Court-Fees Act and *ad valorem* Court-fee on the amount of the mortgage debt must be paid. Such a suit is not a suit for recovery of movable property within the meaning of S. 7 (*iv*) (*a*) or a suit for specific performance of a contract as contemplated by S. 7 (*x*) of the Act. The valuation for purposes of Court-fee will also be the valuation for purposes of jurisdiction. (*R.C. Mitter, J.*) MAHOMED ISHAK MIYA CHOWDHURI *v.* ANANDA CHANDRA SAHA. **63 Cal. 657=40 C.W.N. 90=62 C.L.J. 405.**

——S. 7 (x)—Applicability—Mortgage bond—Allegation of part-payment and adjustment—Suit for direction to defendants to deliver up bond with endorsement of satisfaction on payment of part of amount after declaration of fictitious character of assignment of mortgage by mortgagee—Court-fees. *See* COURT-FEES ACT, S. 4 (*iv*) (*a*), (*ix*) AND (*x*). **40 C.W.N. 90=62 C.L.J. 405.**

——S. 7 (x)—Applicability—Specific performance—Suit for—Nature and characteristics—Claim to possession of properties in suit for

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specific performance—Suit—If one for possession. *See* COURT-FEES ACT, S. 7 (*v*) AND (*x*). **1937 M.W.N. 236=A.I.R. 1937 Mad. 831.**

——S. 7 (x)—*Suit for specific performance with reference to some of the properties comprised in the contract—Court-fee—Apportionment of consideration.*

Where specific performance is asked for in respect of some only of several plots comprised in a contract, for purposes of Court-fee, the consideration should be apportioned as between the various items of property. (*D.R. Norman.*) PUKH RAJ *v.* RAM JEEWAN. **1939 A.M.L.J. 80.**

——S. 7 (x) (c)—*Applicability—A executing lease of property in favour of B—Death of A—Court of Wards taking superintendence leasing same property to C and D—Suit by B for possession—If one for specific performance—Court-fee payable.*

A executed a lease of certain property in favour of *B*. Subsequent to *A's* death, the Court of Wards, on taking superintendence of the property of *A's* heirs executed a lease of the property leased to *B* in favour of *C* and *D*. *B* brought a suit for possession of the property leased to him.

Held, that *A*, the landlord, had covenanted to put the lessee *B* in possession of the property when the time arrived. He being dead, his heirs were represented by the Court of Wards and it was the duty of the Court of Wards to put him in possession provided of course the lease was not invalid. If the Court of Wards had to perform that part of the contract, the right of *B* was to sue for specific performance of that part of the contract. The suit therefore fell clearly within the provisions of S. 7 (x) (*c*) of the Act for purposes of Court-fees, as the suit was in effect a suit for specific performance of the lease. (*Rupchand Bilaram and Havelivala, A.J.Cs.*) SWAMIDAS *v.* COURT OF WARDS. **168 I.C. 471=9 R.S. 235 =A.I.R. 1937 Sind 93.**

——S. 7 (x) (cc)—*Applicability—Suit against former tenant who set up a title in himself.*

S. 7 (xi) (*cc*) applies only to a suit by landlord for recovery of immovable property from his tenant, which includes a tenant holding over after the determination of the tenancy. *P* purchased a house and asked *D* who was a tenant of his predecessor to attorn to him. *D* repudiated *P's* title and set up a title of his own. On *D* continuing to set up his own title *P* served him with a notice to vacate the premises in the event of his not paying the arrears of rent and on his refusal to do so brought a suit for recovery of the house from *D*. The suit was based on title and was not one between landlord and tenant.

Held, that S. 7 (xi) (*cc*) did not apply and Court-fees were to be paid on the market value of the property and that was the value for purposes of jurisdiction. *P* having terminated *D's* tenancy because of the right vested in him under S. 111 (*g*), T. P. Act, *D* ceased to be a tenant and became a trespasser; *D* having set up an adverse title in himself could not be said to be holding over. (*Bose, J.*) AHAMADALI FAJRUDDIN *v.* MULLA FIDAALI. **I.L.R. (1940) Nag. 391=174 I.C. 895=10 R.N. 420=A.I.R. 1938 Nag. 162.**

——S. 7 (xi) (cc)—*Applicability—Tenant holding over—Assignee from lessor—Suit by for possession—If one by landlord against tenant—Jurisdiction—Determination.*

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The plaintiff brought a suit for possession of the suit land from the defendant on the allegations that the land had been leased by one *M* to the defendant, that the plaintiff had purchased the land from *M* under a registered sale deed, that the defendant's tenancy had been terminated by *M*; that the defendant was holding over in spite of the termination of tenancy and of the plaintiff's notice to quit; and he prayed that possession of the land might be given to him.

Held, that on the face of the plaint, the plaintiff was claiming to be the assignee of the reversion from the defendant's lessor and that the suit was a suit by a landlord to recover possession of land from a tenant who was holding over and that it fell under S. 7 (*xi*) (*cc*) of the Court-Fees Act, and that the jurisdiction to try the suit had to be determined on that basis. (*Cornish, J.*) SHANMUGA NADAR *v* KANDASWAMI NADAR. **168 I.C. 462=9 R.M. 584=1936 M.W.N. 1374=44 L.W. 800=A.I.R. 1937 Mad. 91=71 M.L.J. 842.**

——**S. 7 (xi)**—*Scope—Suit for fixation of rent under S. 45, Agra Tenancy Act—Court-fees—Valuation.*

A suit for fixation of rent under S. 45 of the Agra Tenancy Act has to be valued for purposes of Court-fee at the annual rent asked for by the plaintiff, as required by S. 7 (*xi*) of the Court-Fees Act. (*Drake Brockman, S.M. and Knox, J. M.*) LALTA PRASAD *v.* EMPEROR. **1936 R.D. 390.**

——**S. 7 (xi) (cc) and Sch. I, Art. 1**—*Applicability—Suit for possession from tenant—Decree—Award of compensation for improvements—Appeal by plaintiff against improvements—Court-fee payable.*

In suit for possession of properties from tenants, if a decree is passed conditional on the plaintiff paying a certain sum of money for valueof improvements due to the defendants, the plaintiff appealing against the decree awarding compensation, there being no question about possession, must pay court-fee on the value of improvements. The subject of the appeal is the value of improvements and not possession of land as in the suit in the lower Court, and it is not therefore enough if the appeal be valued as a suit for possession. (*Madhavan Nair, O.C.J. and Stodart, J.*) MAHADEVI *v.* VEERARAYAN. **I.L.R. (1939) Mad. 328=179 I.C. 421=11 R.M. 582=1938 M.W.N. 1016=48 L.W. 661=A.I.R. 1939 Mad. 49=(1938) 2 M.L.J. 840**

——**S. 8 and Sch. II, Art. 17 (iv)**—*Appeal against order of tribunal constituted under U. P. Town Improvement Act—Court-fee payable—Provision of the Act applicable.*

The court-fee payable in respect of a memorandum of appeal against an award by a tribunal constituted under the U. P. Town Improvement Act, is under S. 8 of the Court-Fees Act which applies to the case, on the difference between the claimed and awarded amount. The appeal will not come under Sch. II, Art. 17 (*iv*) of the Act. (*Bennet, J.*) DEBI DIN *v.* SECRETARY OF STATE. **I.L.R. (1939) All. 142=180 I.C. 73=11 R.A. 417=1938 A.L.J. 1124=1938 A.W.R. (H.C.) 843=A.I.R. 1939 All. 127.**

——**S. 8-B (3) (c)**—*Additional court-fee found due on enquiry not paid—Proper order—C. P. Code, O. 7, R. 11.*

If the plaintiff fails to pay the additional court-fee found payable on an enquiry made under S. 8 (*c*) of the Court-Fees Act, the proper order for the Court to make will be an order for dismissal under the provisions of S. 8-B (3) of that Act as amended in Bengal by Act VII of 1935, and not an order rejecting the plaint under the provisions of O. 7, R. 11, C. P. Code. (*Mitter and Roxburgh, JJ.*) JARIMON KHATOON *v.* SECRETARY OF STATE. **I.L.R. (1940) 2 Cal. 166=44 C.W.N. 745=A.I.R. 1940 Cal. 451.**

COURT-FEES ACT (1870), S. 8-C.

——**S. 8-C**—*Applicability—Case falling within S. 7 (iv) (c).*

S. 8 (*c*) of the Court-Fees Act is applicable to a case falling within S. 7 (*iv*) (*c*) of that Act. (*Mitter and Roxburgh, JJ.*) JARIMON KHATOON *v.* SECRETARY OF STATE. **44 C.W.N. 745.**

——**S. 8-C**—*Suit for declaration that certain municipal assessment is illegal and for injunction—Power of Court to enquire into plaintiff's valuation.*

In a suit brought by the plaintiff on behalf of himself and as representative of the rate payers of a Municipality for a declaration that a certain assessment made by that Municipality is illegal and for injunction restraining it from recovering the rates, it is open to the Court, treating the suit as falling under S. 7 (*iv*) (*c*) of the Court-Fees Act to enquire into the plaintiff's valuation, if it is of opinion that the subject-matter has been wrongly valued. Even if the prayer for injunction is redundant and S. 7 (*iv*) (*c*) does not at all apply, it is open to the Court to consider the question of valuation in order to determine the proper forum. (*S.K. Ghose, J.*) KUMUDINI KANTA MUKHERJEE *v.* MUNICIPAL COMMISSIONER OF THE BARASAT MUNICIPALITY. **42 C.W.N. 315.**

——**S. 8-C**—*Suit to declare right to perfom certain religious ceremonies in efendant's courtyard—Enquiry into valuation—Duty of Court.*

An enquiry under S. 8-C of the Court-Fees Act might be usefully held in a suit by a Mahomedan against a Hindu for a declaration of his right to perform certain religious ceremonies on the occasion of the Muharram every year in a courtyard attached to the palace of the Hindu. If the plaintiff succeeds in his suit, the value of a portion of the defendant's palace will seriously depreciate. Obviously in a case of this sort the extent to which the defendant's property will be depreciated should be taken to correspond to the value of the benefit which the plaintiff seeks to obtain if he succeeds in his suit. From this point of view, it is not correct to hold that there is no objective standard by which the requisite valuation could be made. (*Edgley, J.*) SOURISH CHANDRA RAY *v.* SHAIKH GOPAL OSTAGAR. **I.L.R. (1939) 2 Cal. 20=187 I.C. 51=12 R.C. 543=A.I.R. 1939 Cal. 743.**

——**S. 8-C**—*Suits under S. 7 (iv)—Revision of plaintiff's valuation—Duty of Court.*

Although a satisfactory valuation may not be possible in the majority of suits falling within S. 7 (*iv*) of the Court-Fees Act, when once the Court has formed the opinion that the plaintiff's estimate is wrong, it becomes the duty of the Court to estimate a correct and reasonable valuation of the relief claimed and it follows that it will be for the Court to decide on the merits of each particular case whether the provisions of S. 8 (*c*) of the Act should be invoked for the purpose of revising the plaintiff's valuation. (*Edgley, J.*) NALINI NATH MALLIK THAKUR *v.* RADHA SHYAM MARWARI. **I.L.R. (1940) 1 Cal. 409=A.I.R. 1940 Cal. 482.**

COURT-FEES ACT (1870), S. 8-C.

——S 8-C—*Enquiry into valuation—Duty of Court—Suit to set aside mortgage or sale deed—Proper valuation.*

Under S. 8-C of the Court-Fees Act, it is the duty of the Court when the defendant pleads that the suit has been wrongly valued by the plaintiff to hold a necessary enquiry and then to come to a decision whether the suit has been wrongly valued. It is true where there is no objective valuation, it is not possible to say that the plaintiff's valuation is wrong but every case must be judged on its own facts. Where the plaintiff sues to set aside a mortgage deed or a deed of sale, there is an objective value, namely, the immovable property which is the subject of the mortgage or the sale. If it be found on enquiry that the market value of the immovable property is the same or more than the consideration amount for the deed, then clearly the value of the declaration sought by the plaintiff is the consideration amount. If the market value of the property be less than that amount, then the value of the declaration would be the market value of the immovable property. (*M. C. Ghose, J.*) SANTA PROSAD SAHA *v.* MRINALINI SAHA. **I.L.R. (1938) 1 Cal. 196=174 I.C. 801=10 R.C. 616=41 C.W.N. 1339=A.I.R. 1937 Cal. 748.**

——Ss. 8-C and 7 (iv) (c)—*Enquiry regarding valuation—Duty of Court—Suit for number of declarations and injunction—Proper valuation.*

Under S. 8-C of the Court-Fees Act, it is of course competent for a Court, in fact in many cases, it is the duty of the Court, to hold an enquiry regarding the proper valuation of the subject-matter of suits under S. 7 (*iv*) of the Act in cases in which there is reason to suppose that the relief sought has been under-valued. But where having regard to the nature of the prayers in the plaint, it would be extremely difficult, if not impossible, to estimate the precise value of the relief sought by the plaintiff, such an enquiry by the Court would be unnecessary. The plaintiff instituted a suit for a number of declarations and an injunction against the defendant, the main purpose of which was to ensure that a certain adjustment should be maintained under which the plaintiff had agreed to pay the defendant a certain sum provided the defendant agreed not to execute certain decrees which he had obtained against the plaintiff and not to take possession of some properties which the defendant had purchased at certain execution sales. It appeared to be highly probable that the advantage obtained by the plaintiff in respect of those decrees and sales in the execution proceedings would be almost entirely counter-balanced by the fact that he would have to pay to the defendant the sum due to him under the adjustment. The plaintiff valued the relief sought at Rs. 50.

Held, (*i*) that the valuation was as accurate as could be expected in the circumstances of the case and it need not be at the sum payable to the defendant under the adjustment; (*ii*) that an inquiry under S. 8-C of the Court-Fees Act was, having regard to the circumstances stated above, unnecessary. (*Edgley, J.*) GAHAR ALI SIKDAR *v.* NESAR ALI. **43 C.W.N. 167.**

——S. 8-C (Inserted by Bengal Act VII of 1935)—*Power of Court to correct plaintiff's valuation—Suits falling under S. 7* (iv) *and* (v).

Under S. 8-C of the Court-Fees Act, inserted by Bengal Act VII of 1935, the Court is empowered to hold an enquiry and correct the valuation of the suit fixed by the plaintiff, whether the suit falls under paragraph (*iv*) or under paragraph (*v*) of S. 7 of the Court-Fees Act. (*S. K. Ghose and R. C. Mitter, JJ.*) JITENDRA NATH GHOSH *v.* HIRANMOY KUMAR SAHA. **I.L.R. (1937) 2 Cal. 501=172 I.C. 704=10 R.C. 424=67 C.L.J. 123=41 C.W.N. 977.**

COURT-FEES ACT (1870), S. 11.

—— S. 10—*Court-fee—Question as to—Time for determination.*

Once a Court finds that the market value of the property is different to that alleged in the plaint, the plaintiff should be at once called upon to make up the proper court-fee as determined, before the trial of the suit takes place. It is obviously improper for the Court to hold up the decision on the question of court-fee until the end of the suit and incorporate the order passed in the decree which is perfectly useless. A.I.R. 1935 Lah. 75, Rel. on. (*Dalip Singh, J.*) SIS RAM *v.* SOHAN LAL. **177 I.C. 686=11 R.L. 354=40 P.L.R. 88=A.I.R. 1938 Lah. 311.**

——S. 11—*Administration suit—Preliminary decree—Payment of court-fees by defendants—Practice.*

It is the practice in the mofussil to demand payment of court-fees from defendants, who come in under a preliminary decree in administration suits and they cannot obtain relief under the decree without payment of the proper court-fee. (*Baguley and Mosely, JJ.*) U PO MYA *v.* FATHER RIOUFREYT. **1939 Rang.L.R. 134=181 I.C. 841=11 R.R. 498=A.I.R. 1939 Rang. 115.**

——S. 11—*Applicability—Administration suit by a creditor—Other creditors impleaded as defendants before preliminary decree—Court granting not whole of their claim but only dividends at certain percentage of it—Court-fee payable by them.*

The Court-Fees Act is a fiscal statute and must be construed strictly and S. 11 of the Act, therefore, cannot be applied by analogy. In an administration suit by a creditor, till the decree is passed it is the plaintiff who is the *dominus litis* and has the carriage and conduct of the proceedings. Other creditors impleaded as defendants cannot be said to occupy the position of a plaintiff up to that stage at any rate. Though administration suit is analogous to an account suit up to a certain stage, the two are not identical for all purposes, at least, so far as the ultimate decision of the Court is concerned. Hence where in a suit by a creditor for administration of the estate of a deceased debtor, other creditors are impleaded as party defendants before the preliminary decree and they set out in their written statements their claims against the estate of the deceased aggregating to certain amount, but the Court has allowed certain dividends to be paid to the creditors on a basis of certain per cent. upon the amounts found to have been due to them, those creditors cannot be ordered to pay court-fees upon the entire amount of their claims, irrespective of what are being actually paid to them as dividends. (*M. C. Ghose and Mukherjea, JJ.*) NISHI KANTA *v.* PRAMATH NATH. **I.L.R (1939) 1 Cal. 152=180 I.C. 248=11 R.C. 655=43 C.W.N. 52=68 C.L.J. 345 =A.I.R. 1938 Cal. 785.**

——(as amended in Madras), S. 11—*Applicability—Suit for possession and mesne profits*

past and future—Decree awarding specific sum for past profits and also awarding future profits at definite rate per year—Non-direction of inquiry into mesne profits—If in contravention of O. 20, R. 12—"Final decree"—Application for execution—Court-fee on future profits—Payment of—If condition precedent.

In a suit for recovery of immovable property with mesne profits, past and future, the Court by its decree awarded a sum of Rs. 60 for profits prior to suit, and also awarded profits from date of suit until delivery of possession at the rate of Rs. 60 per annum, without directing any inquiry at all. Plaintiff applied for delivery of possession, for the past profits award and also for a sum of Rs. 540, being the amount of mesne profits due for 9 years from the date of suit.

Held; (1) that para. 1 and not paras. 2 and 3 of the Court-Fees Act, as amended in Madras, applied to the case, and under that paragraph the plaintiff was bound to pay the court-fee on the amount of future mesne profits claimed before the decree in respect thereof could be executed; (2) that it was perfectly competent to the Court under O. 20, R. 12, C. P. Code, without directing an inquiry, to pass a decree finally determining the amount of profits payable subsequently to the suit, if it was made out that it was not necessary to make such an inquiry and it could not be said that such a decree is not final or incapable of execution or that it is in contravention of O. 20, R. 12, C. P. Code. (*Venkataramana Rao and Abdur Rahman, JJ.*) VEERAN CHETTI *v.* VEERAN CHETTI. **I.L.R. (1938) Mad. 1050=182 I.C. 14 =11 R.M. 920=1938 M.W.N. 286=47 L.W. 808 =A I.R. 1938 Mad. 727=(1938) 1 M.L.J. 750.**

——**S. 11**—*Court-fee ordered to be paid by decree and paid—Application for execution—If maintainable.*

The mere fact that Court-fee had not been paid on a decree granted does not prevent the decree-holder from making an application for execution and all that S. 11 provides is that the decree should not be executed. 34 Bom. 189 and A.I.R. 1930 Nag. 241, Rel. on. (*Dalip Singh, J.*) UTTAR CHANDKAPUR AND SONS *v.* SAYAD HAMID ALI. **178 I.C. 202=11 R.L. 419=A.I.R. 1938 Lah. 326.**

——**S. 11**—*Scope—Non-payment of additional Court-fee—Power of Court to dismiss suit—Procedure.*

In cases within the first paragraph of S. 11 of the Court-Fees Act, non-payment of the balance of Court-fee merely postpones the date on which the decree can be executed, while the second paragraph under which the Court has power to dismiss the suit is only applicable "where the amount of mesne profits is left to be ascertained in the course of the execution of the decree." Where the account directed by a decree is not an account of mesne profits nor is it so described, and it involves among other things an account of the sums received from a money-lending business, and further the amount due to the plaintiff thereon is not "left to be ascertained in the course of the execution of the decree," the case does not fall within the second paragraph and the Court has, therefore, no jurisdiction to dismiss the suit for non-payment of the additional Court-fee. Further, an order dismissing a suit for non-payment of additional Court-fee is improper, if passed with a minimum of circumspection and no warning. Where, therefore, at no time was there in existence an order fixing the amount of additional Court-fee and limiting a time for payment, still less was there a peremptory order on the footing that the plaintiff was in default, an order dismissing the suit for non-payment is not a reasonable one and cannot be allowed to stand. (*Sir George Rankin.*) VAISHNO DITTI *v.* RAMESHRI. **64 I.A. 191=18 Lah. 502=168 I.C. 427= 1937 A.L.J. 1000=46 L.W. 52=1937 A.L.R. 412 =1937 O.L.R. 308=1937 O.W.N. 699=39 Bom. L.R. 787=31 S.L.R. 367=1937 A.W.R. 1021= 41 C.W N. 814=39 P.L.R. 472=9 R P.C. 295= 18 Pat.L.T. 445=65 C.L.J. 387=1937 P.W.N. 473=3 B.R. 503=1937 M.W.N. 678=A.I.R. 1937 P.C. 163=(1937) 2 M.L J. 1 (P.C.).**

——**S. 12**—*Appeal—Decision that suit falls within a particular class.*

Though there is no appeal against a decision as to the correct valuation for any particular class of suits, still there is an appeal against a decision that any particular suit falls within a particular class, where, though the suit is nominally one for accounts, still it is part of the case for the defendants that the suit is really one for an ascertained sum of money, there is a conflict between the plaintiffs and the defendants as to the class within which the suit falls, and there is, therefore, an appeal available. (*Macklin, J.*) KRISHNAJI HARI *v.* GOPAL NARAYAN. **162 I.C. 227=8 R.B. 398= 38 Bom.L.R. 218=A.I.R. 1936 Bom. 166.**

——**S. 12**—*Appeal — Preliminary issue as to Court-fee—Decision of trial Court on—Appealability.*

Where, in a suit for a declaration that a certain revenue sale is illegal and *ultra vires* and not binding on the plaintiff, the plaintiff values the suit as one for a declaration only and pays a court-fee of Rs. 200, and the Court decides the question of court-fee as a preliminary issue and decides that that court-fee paid is sufficient, no appeal lies against such decision. The order of the Court holding that the court-fee paid was correct cannot also be taken to be a decree which would be appealable under the C. P. Code. (*S. K. Ghose and Edgley, JJ.*) RASH BEHARI NANDI *v.* HAFEZA KHATUN CHOWDHURANI. **166 I.C. 960=9 R.C. 632=63 C.L.J. 16=A.I.R. 1936 Cal. 784.**

——**S. 12**—*Construction—Order holding Court-fee paid correct—Subsequent order calling for additional Court-fee—Legality—Revision against second order—Power of High Court to revise first valuation and act under S. 12 (2).*

Once on an objection taken by the office or by a defendant, the Court applies its mind and gives it considered decision holding that the Court-fee paid was sufficient and correct, the decision is final under S. 12 (1) and the Court has no power to revise the valuation. Nor can the High Court, in revision against an order of the lower Court from the latter order passed in supersession of the first order, act under S. 12 (2) of the Act, because the suit itself is not before the High Court. The condition precedent to the exercise of powers under S. 12 (2) is that the suit, *i.e.*, the subject-matter of the suit should be before the Court of appeal, reference or review. (*Venkataramana Rao, J.*) SADASIVAM PILLAI *v.* VARADARAJA ODAYAR. **1937 M.W.N. 243=45 L.W. 206=169 I.C. 875=10 R.M. 115=A.I.R. 1937 Mad. 325= (1937) 1 M.L.J. 89.**

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——S. 12 (i)—*Construction—"Every question relating to valuation".*

The expression "every question relating to valuation" in S. 12 (*i*) of the Court-Fees Act is of a comprehensive nature and cannot be construed in the restricted sense of a question relating to appraisement of Court-fee as distinguished from the question of category; nor is there any justification for putting the same limited interpretation on the words "the said question" in Cl. (*ii*) of the section. (*Venkatasubba Rao, O. C. J., Cornish and Venkataramana Rao, JJ.*) MADANA MOHANA NAIKO *v.* KARUPASINDHU NAIKO. **I.L.R. (1937) Mad. 275=166 I.C. 615 (2)=9 R.M. 381 =1936 M.W.N. 1392=44 L.W. 845=A.I.R. 1937 Mad. 81=(1937) 1 M.L.J. 1 (F.B.).**

——S. 12—*Judicial determination of Court-fee —Subsequent variation of.*

When a Court has passed a judicial order fixing the correct court-fee payable on a memorandum of appeal, it is not open to that Court to vary it afterwards either at the instance of a party or of its own motion. (1937) 1 M.L.J. 89 and 69 M.L.J. 439. Foll. (*Pandrang Row, J.*) DURGIAH, *In re.* **48 L.W. 461=(1938) 2 M.L.J. 647.**

——S. 12—*Scope—Valuation for purposes of jurisdiction—Finding by trial Court—Appellate Court, if can go into.*

S. 12 of the Court-Fees Act makes the valuation for the purposes of court-fees final. It has got nothing to do with the question of valuation for the purposes of jurisdiction. If, therefore, a trial Court comes to the conclusion that the value of the subject-matter of a suit is beyond its jurisdiction and returns the plaint under O. 7, R. 10, C. P. Code, in an appeal from that order the appellate Court can enter into the question of valuation, and if it finds that it is within the jurisdiction of the trial Court it should direct it to entertain the suit. (*Nasim Ali and Mukherjea, JJ.*) ANNADA PRASANNA ROY *v.* KSHETRA NATH ROY. **44 C.W.N. 394.**

——S. 12—Scope—Interference—Appeal requiring *ad valorem* court-fee filed as miscellaneous appeal and allowed—Application by respondent after remand for stay of proceedings until payment of proper court-fee—Order rejecting—Revision—Interference. *See* COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA), SCH. I, ART. 1 AND SCH. II, ART. 11. **18 Pat.L.T. 864.**

——S. 12 (1)—*Finding of Court as to net profits or market value under S. 7 (v) (a)—Finality—Extent.*

If the Court comes to the conclusion under S. 7 (v) (*a*) of the Court-Fees Act that a certain amount is the net profit in the year immediately preceding the institution of the suit or investigates the question of market value and arrives at a certain figure, its finding is final and conclusive under S. 12 (1) of that Act only as regards the amount or figure so arrived at. (*Mitter and Akram, JJ.*) BAZLAR RAHMAN *v.* COMMISSIONER OF WAKFS, BENGAL. **44 C.W.N. 822=A.I.R. 1940 Cal. 438.**

——S. 12 (1)—*Valuation for court-fees by the trial Court—If can be challenged.*

The valuation made by the Court of first instance for the purpose of assessing court-fee is final and cannot be challenged in appeal, when there is no question as to the class in which the suit falls and the question is merely of valuation in that class. (*Mitter and Roxburgh, JJ.*) JARIMON KHATOON *v.* SECRETARY OF STATE. **I.L.R. (1940) 2 Cal. 166=44 C.W.N. 745=A.I.R. 1940 Cal. 451.**

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——S. 12 (2)—*Applicability—If confined to appeal by plaintiff only.*

There is no warrant for holding that S. 12 (2) of the Court-Fees Act applies only to cases where the plaintiff is the appellant. Applying S. 10 (2) to appeals and reading it with S. 12 (2), the word "suit" should be deemed to include an appeal. The actual wording of S. 12 (2) shows that the appeal is considered as an extension of the suit. (*Horwill, J.*) VENKATARAMA SASTRI *v.* VENKATASUBRAMANI DIKSHITAR. **51 L.W. 434 (2)=1940 M.W.N. 348=A.I.R. 1940 Mad. 674=(1940) 1 M.L.J. 478 (2).**

——S. 12 (ii)—*Applicability and construction—"Any such suit"—Meaning—Appeal as to part of claim only—Power of appellate Court.*

The words "any such suit" in S. 12 (*ii*) of the Court-Fees Act cannot be construed to mean the entire suit and not a part of the suit. S. 12 (ii) therefore applies not only when the whole decree has been appealed against but also when the appeal is only with regard to a portion of the claim in suit. (*D.N. Mitter and Patterson, JJ.*) RADHARANEE DASSYA *v.* KSHETRA MOHAN. **63 Cal. 720 =40 C.W.N. 406.**

——S. 12 (ii)—*Construction and scope—Court-fee paid in lower Court insufficient—Decision of lower Court on question of category of suit erroneous—Finality—Power of appellate Court to direct payment deficit Court-fee payable in lower Court.*

Under S. 12 (*ii*) of the Court-Fees Act, the appellate Court has power to require a party to make good the deficiency in the Court-fee payable by him in the lower Court in cases in which the lower Court has expressly or impliedly decided the question of the category in which the suit ought to be placed for purposes of Court-fee, but that decision is, in the opinion of the appellate Court, erroneous. (*Venkatasubba Rao, O. C. J., Cornish and Venkataramana Rao, JJ.*) MADANA MOHANA NAIKO *v.* KRUPASINDHU NAIKO. **I.L.R. (1937) Mad. 275=166 I.C. 615 (2)=9 R.M. 381 =1936 M.W.N. 1392=44 L.W. 845=A.I.R. 1937 Mad. 81=(1937) 1 M.L.J. 1 (F.B.).**

——S. 12 (2)—*Power of appellate Court under, to demand additional Court-fee when no question was raised in Court below.*

S. 12 (2) gives an appellate Court power when an appeal comes before it to correct a mistake made below, and as jurisdiction to require payment of the difference between the court-fee actually paid and the proper court-fee payable, although no question was raised when the case was in that Court. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) CHIDAMBARAM CHETTIAR, *In re.* **I.L.R. (1940) Mad. 646=1940 M.W.N. 268=51 L.W. 228=A.I.R. 1940 Mad. 383=(1940) 2 M.L. J. 425.**

——S. 12 (ii)—*Deficit court-fee—Realisation—Powers of appellate Court—Appeal with reference to part only of subject-matter of suit.*

Where only a part of the subject-matter of the suit is the subject of appeal and is before the appellate Court, that Court acting under S. 12 (*ii*) of the Court-Fees Act can realise the deficit court-fee only in respect of that part and not on

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the entire subject-matter of the suit. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SECRETARY OF STATE *v.* SUBRAMANIAN CHETTIAR. **I.L.R. (1938) Mad. 309=177 I.C. 904=11 R.M. 392=47 L.W. 70=1938 M.W.N. 169=A.I.R. 1938 Mad. 278=(1938) 1 M.L.J. 29.**

——**S. 12 (ii)**—*Scope—Decree signed and sealed—Power to require payment of additional court-fee—Power of trial Court and of High Court in revision.*

Once the decree in a suit has been signed and sealed, the judge making that decree becomes *functus officio* and cannot thereafter make an order for payment of deficit court-fee, but if the matter comes to the High Court in revision the High Court has power, if it considers that the question as to court-fees has been wrongly decided, to require payment of such additional fee as would be payable. (*Davis, J.C. and Tyabji, J.*) RAMCHAND KIMATRAI *v.* UDHALMAL DWARKADAS. **I.L.R. (1939) Kar. 469=185 I.C. 364=12 R.S. 163=A.I.R. 1939 Sind 279.**

——**S. 12 (ii)**—"The said question"—Meaning of. *See* COURT-FEES ACT, S. 12 (*i*). **I.L.R. (1937) Mad. 275=(1937) 1 M.L.J. 1 (F.B.).**

——**Ss. 12 (ii) and 28**—*Written statement claiming set-off accepted although not stamped—Court directing payment of court-fees—Court-fees still deficient—High Court's power to direct payment of additional court-fee.*

Where a written statement claiming a set-off is accepted by the trial Judge, through mistake or inadvertence although not stamped, and the trial Judge although he subsequently directs the party to pay the court-fees does not realise the full court-fees, the IIigh Court can in second appeal under S. 12 (*ii*), Court-Fees Act and S. 149, C. P. Code, direct the payment of the additional court-fees. (*Nasim Ali and Henderson, JJ.*) JITENDRA NATH RAY *v.* JNANADA KANATA DAS GUPTA. **167 I.C. 265=9 R.C. 672=A.I.R. 1936 Cal. 277.**

——**S. 12 and C. P. Code, O. 43, R. 1 (a)**—*Appeal against order returning plaint for presentation to proper Court—Determination of principle for purposes of jurisdiction—If barred by S. 12, Court-Fees Act.*

Where a plaint is returned for presentation to the proper Court, as being beyond the Court's jurisdiction and an appeal is preferred against that order, it is open to the appellate Court to go into the question relating to the court-fee and decide that the lower Court had jurisdiction to entertain the suit. S. 12 of the Court-Fees Act is not a bar to such a course. It only makes a decision final as to any question which relates to valuation for the purpose of determining the amount of any fee. It does not apply where there is a dispute as to the class in which the suit falls. If there is any doubt as to what section would apply to a suit, then it raises a question of principle, the jurisdiction to determine which is not impaired by S. 12 of the Court-Fees Act. (*Niyogi, J.*) MOTILAL *v.* SHAMBHOOLAL. **178 I.C. 97=11 R.N. 206=1938 N.L.J. 214=A.I.R. 1938 Nag. 481.**

——**S. 13**—*Remand under S. 151, C. P. Code—Refund of court-fees.*

Where a case is remanded under S. 151, C. P. Code, a refund certificate should not be issued to the appellant. (*Gruer, J.*) RAMBALLABH JASRAJ

COURT-FEES ACT (1870), S. 13.

v. DHARAMSI JETHA & Co. **I.L.R. (1937) Nag. 519=173 I.C. 547=10 R.N. 308=A.I.R. 1937 Nag. 268.**

——**S. 13**—Refund of court-fees—Powers of Court—Order of remand passed under inherent powers. *See* C. P. CODE, S. 151. **14 Rang. 173 (F.B.).**

——**S. 13**—Refund—Appeal from decree under O. 20, R. 12 (2)—Remand—Right to refund of court-fee. *See* COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA), SCH. I, ART. 1 AND SCH. II, ART. 11. **18 Pat.L.T. 864.**

——**S. 13**—*Scope of—Refund of court-fee paid in lower appellate Court—Power to order.*

The words of S. 13 of the Court-Fees Act do not appear to contemplate the grant of a certificate in respect of court-fee paid in the lower appellate Court. (*Pandrang Row and Abdur Rahman, JJ.*) SIVANAGALINGAM PILLAI *v* AMBALAVANA PILLAI. **181 I.C. 858=11 R.M. 867=1938 M.W.N. 161=47 L.W. 300=A.I.R. 1938 Mad. 479.**

——**Ss. 13, 14 and 15**—*Scope—If exhaustive—Inherent powers of Court to refund court-fee.*

The Court has got inherent power to refund court-fee apart from Ss. 13, 14 and 15 of the Court-Fees Act. (*Venkataramana Rao, J.*) VISHNU NAMBUDRI *v.* RAMUNNI MARAR. **1939 M.W.N. 1143=A.I.R. 1940 Mad. 208=(1939) 2 M.L.J. 867.**

——**Ss. 13, 14 and 20**—*Applicability—Custody fees in respect of attachment of movables—Right to refund of when unspent.*

Custody fees deposited by a decree-holder in respect of attachment of movables in execution, come undoubtedly within the purview of S. 20, as they are charges levied upon the decree-holders to meet the costs of the person or persons sent out to ensure safe custody of mavables attached in execution proceedings. There is no rule framed by the High Court under S. 20, Court-Fees Act, relating to the refund of such fees, but there is a provision for refund of poundage fees under Art. 7 of the Rules, if the execution sale is afterwards set aside. Poundage fees are paid invariably after the sale and constitute a sort of percentage or commission upon the gross amount realised by the sale. S. 20, Court-Fees Act, does not authorise High Court to legislate through rules for refund of the poundage fees. The case of custody fees however stands on a different footing; they are taken in anticipation, and if the anticipated circumstances do not happen there is a clear duty to refund on the plainest and most elementary principles of law. The General Letter No. 43 issued by High Court declaring refund of poundage fees as *ultra vires* of the High Court, does not touch the custody fees as there is no rule framed by the High Court, relating to custody fees under S. 20, Court-Fees Act. The provision in para. 790, Note (3) of the Rules and Orders issued by this Court, is not framed under S. 20, Court-Fees Act. It simply lays down the procedure for the quick realization of these deposits if lying unspent. This paragraph does not create the right to get refund, but presupposes it to be already existing. Custody fees though paid in court-fee stamps as a matter of convenience are not court-fees paid for any particular document under the Court-Fees Act. The money is legally payable

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in advance and hence no question of mistake or inadvertence, as in Ss. 13 and 14, Court-Fees Act, comes in. Ss. 13 and 14 of the Act therefore do not apply to this case. The payment is contingent payment and if contingency does not happen the person depositing the fees in advance is entitled to get them back. Apart from any rules, the Court has inherent jurisdiction to grant a refund of the custody fees when lying unspent. (*Ghose and Mukerji, JJ.*) UMESH CHANDRA DE *v.* MAHIM CHANDRA SAHA. **I.L.R. (1937) 1 Cal. 624=168 I.C. 678=9 R.C. 851=41 C.W.N. 155 =64 C.L.J. 492=A.I.R. 1937 Cal. 86.**

——S. 13, Proviso—*Remand order not covering whole of subject-matter—Refund of the whole court-fee—Legality.*

Where an order of remand does not cover the whole of the subject-matter of the suit, an order directing refund of the whole court-fees paid is wrong according to the provisions in the proviso to S 13 of the Court-Fees Act. (*Stone, C.J. and Bose, J.*) SHEOLAL *v.* JUGAL KISHORE. **I.L.R. (1940) Nag. 538=1940 N.L.J. 350=A I.R. 1940 Nag. 349.**

——S. 17—*Applicability—Claim for alternative reliefs.*

Where reliefs claimed are alternative S. 17 of the Court-Fees Act does not apply and the court-fee is payable on the relief which bears the highest valuation. (*D. R. Norman.*) PUKH RAJ *v.* RAM JEEWAN. **1939 A.M.L.J. 80.**

——S. 17—*Applicability—Suit by assignee of mortgagee rights against mortgagee, mortgagor and his surety—Separate court-fees—If payable.*

S. 17 of the Court-Fees Act is inapplicable to a suit by an assignee of mortgagee rights against mortgagee, the mortgagor and his surety, as the cause of action against the mortgagee is not distinct from the cause of action against the mortgagor and his surety, and separate court-fee is therefore not payable. (*Abdul Rashid, J.*) HAJI GHULAM MOHAMMAD *v.* FEROZE. **181 I.C. 353=11 R.L. 816=40 P.L.R. 528=A.I.R. 1938 Lah. 566.**

——S. 17—*"Distinct subjects"—Two reliefs claimed alternatively on the same cause of action—If to be valued separately for purposes of court-fee—Separate court-fee—Necessity.*

Where two reliefs are claimed in the alternative in respect of the same cause of action, they cannot be considered to be "distinct subjects" within the meaning of S. 17 of the Court-Fees Act. Where in respect of a settlement deed executed by the last male holder, his reversioner sues for a declaration that the said deed is not binding on him as having been brought about by fraud, coercion and undue influence, also praying for an alternative relief that if the deed is found to be valid, he should be given a decree for the amount payable under the deed, the cause of action is only one, namely, the execution of the deed; and though two reliefs are claimed in respect thereof, one on the footing of its validity and the other on the footing of its invalidity, they are not distinct subjects and the plaintiff need not therefore pay separate court-fees on each of the two reliefs. (*Pandrang Rao and Venkataramana Rao, JJ.*) RANGASWAMY REDDIAR *v.* VENKATAPERUMAL REDDIAR. **174 I.C. 983=47 L.W. 64=10 R.M. 749=1937 M.W.N. 1252=A. I.R. 1938 Mad. 241=(1938) 1 M.L.J. 139.**

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——S. 17—*"Distinct subjects"—Suit on different mortgages in favour of same person—Court-fee—T. P. Act, S. 67-A—Effect of.*

Where there are different mortgages comprising different properties executed in favour of the same mortgagee by the same mortgagor, a single suit to recover money due on all the mortgage bonds is a suit which embraces distinct subjects within the meaning of S. 17 of the Court-Fees Act, and Court-fees must be paid as provided by S. 17. S. 67-A, T. P. Act, is not in any way intended to affect or control the provisions of S. 17 of the Court-Fees Act and consequently, the plaintiff cannot rely on S. 67-A to avoid praying Court-fee separately in respect of each mortgage. (*D. N. Mitter and Patterson, JJ.*) RADHARANEE DASSYA *v.* KSHETRA MOHAN CHAKRAVARTY. **63 Cal. 720=40 C.W.N. 406.**

——S. 17—*Sale of land—Suit by plaintiff for its possession as owner or in alternative by pre-emption—Court-fees.*

If a plaintiff prays for one of two reliefs in the alternative, based on one cause of action, the value of the suit for purposes of court-fee is determined by the higher of the two reliefs claimed. Where the plaintiffs sue for possession of land alleging that they are the owners and that defendant No. 2 had no right to sell it to defendant No. 1 and pray in the alternative that if they are not found to be the owners, they have a preferential right of pre-emption there is only a single cause of action in the suit, namely, the sale of the property by defendant No. 2 in favour of defendant No. 1; but in respect of this cause of action two reliefs are claimed in the alternative. To such a suit, S. 17 of the Court-Fees Act is obviously inapplicable. (*Tek Chand, J.*) ABDUL RAHMAN KHAN *v.* MOHAMMAD AMIR. **40 P.L.R. 33.**

——S. 17—*Several declarations arising out of a single cause of action—Single court-fee, if sufficient.*

Where in respect of a deed of relinquishment dealing with a number of items of property several declarations are asked for in respect of the various items, only a single court-fee is payable as the relief arises only out of a single cause of action, namely, the deed of relinquishment. (*D. R. Norman.*) PUKH RAJ *v.* RAM JEEWAN. **1939 A.M.L.J. 80.**

——S. 17—*"Distinct subjects"—Suit for money on dealings—Claim to recovery of costs of lawyer's notice and charges—If separate Court-fee payable.*

Where the plaintiff claims a sum of money as being due from the defendant on dealings between the parties, and also includes in the suit claims to certain items of money spent by him in connection with a lawyer's notice issued by him to the defendant and registration charges thereof, the latter items cannot be valued as separate and distinct subjects from the other items relating to the dealings, so as to be leviable to separate Court-fee under S. 17 of the Court-Fees Act. (*Beasley, C.J. and Stodart, J.*) GOPALACHARI, *In re.* **59 Mad. 739=162 I.C. 175=8 R.M. 960=43 L.W. 362=1936 M.W.N. 243 (2)=A.I.R. 1936 Mad. 420=70 M.L.J. 308.**

——S. 17—"Distinct subjects"—Suit for money —Plea in plaint that deed executed by defendant was not a due fulfilment of agreement between

parties—If separate claim for cancellation leviable to separate Court-fee. *See* COURT-FEES ACT AS AMENDED BY MADRAS ACT V OF 1922, S. 7 (IV-A). **A.I.R. 1936 Mad. 266.**

——**S. 17 and Sch. I, Art. 1**—*Applicability of —Appeal against disallowance of claim made under S. 9 of the United Provinces Encumbered Estates Act—Court-fee payable.*

S. 17 of the Court-Fees Act applies to suits where the plaintiff in the same suit united several causes of action against the same defendant or the same defendants jointly and to appeals arising out of those suits. But it cannot apply to a case of a claim made by a creditor by his filing a written statement under S. 9 of the United Provinces Encumbered Estates Act, in respect of various deeds in his favour, the reason being that the written statement under S. 9 is not a suit. Further it is not open to him to split up his claim inasmuch as S. 9 requires only a single written statement to be filed by a creditor in respect of his claim which may consist of claims upon several documents. Hence it cannot be treated as a suit in which several causes of action have been united together. Where such a claim is disallowed and an appeal is preferred, the amount or value of the subject-matter in dispute in appeal is the total amount of the claim by the creditor and according to Sch. I, Art. 1, *ad valorem* court-fee should be paid thereon. (*Thomas, C.J. and Radhakrishna, J.*) SAUBHAGYAWATI DEVI *v.* DEPUTY COMMISSIONER, KHERI. **15 Luck. 395=186 I.C. 144=12 R.O. 296=1940 A. W.R. (C.C.) 84=1940 O.L.R. 92=1939 O.A. 171=1940 O.W.N. 165=A.I.R. 1940 Oudh 243.**

——**S. 19 (xvii)**—*Scope of.*

Sub-S.(*xvii*)of S. 19 of the Court-Fees Act contemplates a petition by a prisoner claiming some relief or indulgence or right on behalf of himself in his capacity as a prisoner. An application by a prisoner praying that an order of acquittal of the opposite party should be set aside and that they should be convicted and sentenced according to law, is wholly unconnected with the applicant's condition or status as a prisoner and asks for no relief affecting him in his capacity as a prisoner. That being so, his application does not fall within sub-S.(*xvii*) of S. 19 and is, therefore, not exempt from stamp fees. (*Harries, J.*) MOTI PANSARI *v.* USMAN SHEIKH. **58 All. 871=162 I.C. 298=8 R.A. 860=37 Cr.L.J. 566=1936 A.L.J. 453=1936 A.W.R. 215=1936 All.L.R. 423=1936 Cr.C. 484 =A.I.R. 1936 All. 318.**

——**S. 19-D**—*Applicability—Hindu coparcener holding undivided share in joint family property —If trustee for other coparceners—Death of coparceners—Application by survivors for Letters of Administration—Liability to pay court-fee—Claim to exemption as trust property—Sustainability—Sch. I, Art.* 11.

When a person chooses to apply for Letters of Administration, whether the letters are absolutely necessary or not and they are granted, he must pay the proper court-fee according to Art. 11, Sch. I of the Court-Fees Act, S. 19-D of the Court-Fees Act does not in any way exempt from payment of court-fee letters obtained by a coparcener of a Hindu joint family in respect of property which he takes by survivorship, and not by inheritance as heir. A co-sharer member of a joint Hindu family interested to the extent of

an undivided share in the whole of the joint family property cannot be held to be "trustee" for the other co-sharers within the meaning of S. 19-D. Whether an application by the surviving coparceners for Letters of Administration in respect of the undivided share of a deceased coparcener is necessary or not, is not a matter to be decided by the Court to which the application is made; when once an application has been made for Letters of Administration, it is necessary to pay the court-fee according to the Act and no exemption can be had. (*Wort and Agarwala, JJ.*) RAMA PRASAD GUPTA *v.* COLLECTOR OF SHAHABAD. **17 Pat. 542=180 I.C. 17=11 R.P. 433=1938 P. W.N. 876=20 Pat.L.T. 181=5 B.R. 349=A.I.R. 1939 Pat. 126.**

——**S. 19 G**—*"Mistake"—Meaning.*

S. 19-G, Court-Fees Act, refers to any mistake not merely to a mistake of fact. (*Davis, J. C. and Lobo, A. J. C.*) KHUBCHAND *v.* MOTILBAI. **30 S.L.R. 201=165 I.C. 202=9 R.S. 91=A.I.R. 1936 Sind 150.**

——**S. 19-I**—*"Property"—Meaning of.*

The word "property" in S. 19-I of the Court-Fees Act is used in its inclusive and not in its exclusive sense, and means all the property of the deceased. What the section requires is a full and honest account of all the property of the estate in respect of which a grant is applied for. (*Davis, J.C. and Lobo, A J.C.*) KHUBCHAND *v.* MOTILBAI. **30 S.L.R. 201=165 I.C. 202=9 R.S. 91=A.I.R. 1936 Sind 150.**

——**S. 19-I**—*Scope and effect of—Probate—Application* in forma pauperis—*Power of Court to permit—Grant of probate without payment of succession duty or probate duty—Power of Court —Procedure for realization of Court-fee—First charge on estate—Madras High Court Rules (O. S.), O. 8, R.* 14—*"Proceeding."*

O. 8, R. 14 of the Madras High Court (Original Side) Rules, which relates to paupers, refers not only to suits but also to proceedings. An application for probate is clearly a proceeding within the meaning of this rule, and it is open to the Court not only to entertain the application *in forma pauperis* but also to make a further order granting probate to the applicant without payment by him of the requisite Court-fee (succession duty) under Art. 11, Sch. I of the Court-Fees Act. In this respect S. 19-I of the Court-Fees Act should be reasonably interpreted; the section cannot be read as altering the policy of the pre-existing law. In such cases, on the analogy of O. 33, R. 10, C. P. Code, the Government has a first charge on the subject-matter of the pauper application, *i.e.*, the estate of the deceased. (*Venkatasubba Rao, J.*) C. GOVINDASWAMY, *In the matter of.* **47 L.W. 736=(1937) 2 M.L.J. 899.**

——**S. 19-I**—Scope—If subject to O. 33, C. P. Code—Probate or letters of administration in *forma pauperis*—Power of Court to issue. *See* C. P. CODE, O. 33. **47 L.W. 731.**

——**S. 19-I**—Scope and effect—If controls S. 276, Succession Act. *See* SUCCESSION ACT, S. 276. **30 S.L.R. 201=A I.R. 1936 Sind 150.**

——**S. 19-I**—*Scope — Non-compliance with— Effect—If renders proceedings null.*

It does not follow that because an application for letters of administration, with the will annexed, is not in proper form, because of non-compliance with the provisions of S. 19-I of the Court-

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Fees Act, the proceedings are a nullity. The Court may not pass an order granting letters until the application is made in proper form and fulfils the requirements of the law. The Court can give the applicant an opportunity to amend the application and make good the debts, and then proceed, to make a grant. It is not necessary that the application should be dismissed and that the applicant asked to start the proceedings *de novo*. (*Davis, J. C. and Lobo, A. J. C.*) KHUBCHAND *v.* MOTILBAI. **30 S.L.R. 201=165 I.C. 202=9 R.S. 91=A.I.R. 1936 Sind 150.**

——**S. 20**—Scope—Custody fees in respect of attachment of movables—Right of decree-holder to refund of unspent fees. *See* COURT-FEES ACT, Ss. 13, 14 AND 20. **A.I.R. 1937 Cal. 86.**

——**S. 27**—*Rules under—Court-fee stamp of required denomination not available—Stamps of lower denomination—If may be used—Plaint filed on last day of limitation—Stamps of required denomination not available—Plaint filed with insufficient stamp—Duty of Court to receive—Refusal to receive—Legality—Revision—Interference.*

There is nothing illegal in the Court permitting a plaintiff to file a plaint with Court-fee stamps of denomination smaller than the one required by the rules under the Court-Fees Act, if the requisite stamps are not available. Nor is there anything in the rules which prohibits the receipt by the Court of a plaint with Court-fee stamps of a denomination lower than the one required by the rules. On the other hand the rules provide that Court-fee stamps of a lesser denomination may be affixed if the stamp of the required value is not available. Where the Court-fee stamps of the requisite denomination are not available, and the plaintiff files his plaint with insufficient Court-fee, the Court is bound to receive the plaint, for a time within which the deficiency should be made up, and if it is not complied with within the time fixed, then to reject it. It is illegal and unjust to refuse to receive the plaint, especially when the plaint is presented on the last day of limitation. The order refusing to receive the plaint is liable to be set aside in revision. (*Venkataramana Rao, J.*) SUBBA REDDI *v.* VENKATANARASIMHA REDDI. **168 I.C. 340=9 R.M. 567=44 L.W. 830=A.I.R. 1937 Mad. 266=71 M.L.J. 804.**

——**S. 28**—*Powers of the High Court under—Appellant led to believe that appeal memo. was sufficiently stamped—Dismissal of appeal on discovery of deficiency—Propriety—Interference by High Court.*

Where there was an entry in the proceedings by the Judge to the effect that the memorandum of appeal was properly stamped, it was held that the counsel for the appellant having thus been deceived into believing that the stamp which he had affixed was quite correct, it would seem to be unfair to dismiss the appeal on the ground that the appeal was incorrectly stamped. It was further held that S. 28 of the Court-Fees Act gave power to the High Court to make such orders as seem to it suitable in the circumstances of each case and that the order of the lower Court in the particular case dismissing the appeal should be set aside. In the result of the appellant was directed to make good the deficiency and whereafter the appeal was directed to be heard and disposed of according to law. (*Davis.*) RIDHA KARAN *v.* SHEO BUX. **1940 A.M.L.J. 19.**

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——**S. 28**—Scope—Written statement claiming set-off not stamped—Effect—Subsequent order for payment of Court-fee—If validates proceedings. *See* COURT-FEES ACT, Ss. 12 (*ii*) AND 28. **A.I.R. 1936 Cal. 277.**

——**S. 34 (3)**—*Charge of an offence under—Facts to be established.*

To establish a charge of an offence under S. 34 (3) of the Court-Fees Act, it is necessary for the prosecution to identify the stamps alleged to have been wrongfully sold. Where the only evidence on the point was that of three entries in a particular exhibit, it was held that it was not enough to sustain the charge. (*Guha and Biswas, JJ.*) RAMKRISHNA SINHA *v.* EMPEROR. **174 I.C. 513=10 R.C. 693=39 Cr.L.J. 417=42 C.W.N. 246=A.I.R. 1938 Cal. 195.**

——**Sch. and Ss. 4, 6 and 7**—*Scope—Imposition of liability.*

The Schedules to the Court-Fees Act, when read with Ss. 4 and 6 of the Act, do impose a liability. S. 7 refers only to suits and, in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the Schedules to the Act, liability being imposed by the Schedules read with S. 4 or S. 6, as the case may be. (*Dunkley, J.*) MARIAM BIBI *v.* MALIM. **1939 Rang. L.R. 474=184 I.C. 171=12 R.R. 129=A.I.R. 1939 Rang. 375.**

——**Sch. I, Art. 1**—*Appeal against rejection of plaint under O. 7, R. 11, C. P. Code—Court-fee payable.*

Where a plaint is rejected under O. 7, R. 11, C. P. Code, as the deficiency in Court-fee was not made good and an appeal is preferred therefrom the subject-matter of the appeal is not the amount of the claim in the suit but the sum of money rightly claimable as Court-fees. *Ad valorem* Court-fee on the difference between the amount demanded by the Court and that paid by the plaintiff ought to be paid on the memorandum of appeal. (*Bose, J.*) MT. MULI BAI *v.* GOPALDAS. **1939 N.L.J. 32.**

——**Sch. I, Art. 1**—*Appeal against mortgage decree—Appellant disputing liability of mortgaged property—Court-fee.*

Where in an appeal against a mortgage decree, the appellant does not dispute the amount decreed but raises the question of the liability of the mortgaged property, the appeal ought to bear an *ad valorem* Court-fee stamp on the total decretal amount, or if the value of the mortgaged property is less than the decretal amount then *ad valorem* Court-fee stamp on the value of the property. (*Addison and Abdul Rashid, JJ.*) FAZAL AHMAD *v.* TOLA RAM SINGH. **162 I.C. 729=8 R.L. 950=38 P.L.R. 12=A.I.R. 1936 Lah. 179.**

——**Sch. I, Art. 1**—*Appeal from mortgage decree for interest disallowed—Court-fee paid sufficient only to cover interest disallowed on one of two mortgages—Duty of appellate Court.*

Where the plaintiff appealed from a mortgage decree as regards the amount of interest disallowed and did not pay the full *ad valorem* court-fee, but the court-fee paid was, however, sufficient to cover the amount of interest disallowed on one of the two mortgages on which the decree was passed, it is the duty of the appellate Court to ask

the appellant what portion of his appeal he wished to have decided, having regard to the amount of court-fee paid. (*Addison and Din Mohammad, JJ.*) JOTI PARSHAD *v.* GIRNARI MAL. **40 P.L.R. 123.**

——**Sch. I, Art. 1**—*Appeal in mortgage suit—Suit decreed overruling defendant's contention as to plaintiff's liability to account—Appeal by defendant—Proper valuation.*

In a suit brought on a mortgage, the Court passed a decree in favour of the plaintiff overruling the contention of the defendant that the plaintiff was not entitled to get a decree without rendering accounts under S. 76 of the T. P. Act. From that decree the defendant preferred an appeal and put his own valuation upon it contending that he was merely seeking in the appeal to get a declaration that he was entitled to accounts from the plaintiff.

Held, that the appeal should be valued according to the amount of the decree of the trial Court and that the court-fee should be paid upon that amount. (*Akram, J.*) SATISH CHANDRA *v.* HIRANMOYEE. **44 C.W.N. 482.**

——**Sch. I, Art. 1**—*Appeal—Suit on pronote—Appeal by defendant—Award of future interest not challenged—Court-fee.*

Where in an appeal by the defendant in a suit on a promissory note, the defendant pays Court-fees on the amount of the principal and interest decreed up to the date of the suit, the Court-fee paid is correct, and the defendant cannot be required to pay Court-fee on future interest when his appeal does not challenge the order for future interest. (*Srivastava, Ag. C.J. and Smith, J.*) KEOLAPATI *v.* VERMA. **12 Luck. 466=165 I.C. 279=9 R.O. 188=1936 O.W.N. 916=1936 O.L.R. 623=A.I.R. 1937 Oudh 3.**

——**Sch. I, Art. 1**—Applicability — Appeal against disallowance of claim made under S. 9 of the United Provinces Encumbered Estates Act. *See* COURT-FEES ACT, S. 17 AND SCH. I, ART. 1—APPLICABILITY OF. **1940 O.L.R 92.**

——**Sch. I, Art. 1**—*Applicability—Decree of special Judge under S. 14, U. P. Encumbered Estates Act—Appeal from—Court-fee—Sch. II, Arts. 11 and 17.*

An appeal from a decree passed by the special Judge under S. 14 of the U. P. Encumbered Estates Act falls under Art. 1, Sch. I of the Court-Fees Act and *ad valorem* court-fee has to be paid. Neither Art. 11 nor Art. 17 of the Second Schedule applies to the case. (*Allsop, Ganga Nath and Ismail, JJ.*) JAGDISH PRATAP *v.* UDAI PRATAP. **I.L.R. (1938) All. 230=10 R.A. 478=173 I.C. 353=1938 O.W.N. 88=1938 R.D. 142=1938 A.L.R. 123=1937 A.L.J. 1373=1938 A.W.R. (H.C.) 22=A.I.R. 1938 All. 97 (F.B.).**

——**Sch. I, Art. 1**—Applicability— Suit for redemption of mortgage — Appeal — Dispute as to amount—Redemption money — Court-fee. *See* COURT-FEES ACT, S. 7 (*ix*). **A.I.R. 1937 Nag. 6.**

——**Sch. I, Art. 1**—Application to Revenue Officer under S. 105 of the B. T. Act—Appeal to special Judge—Court-fee — Calculation—Value of subject-matter. *See* B. T. ACT, S. 105. **40 C.W.N. 1149.**

——**Sch. I, Art. 1**—*Cross-objections to findings and not to decree—Court-fees, if payable.*

Where the suit of the plaintiff-appellant was entirely dismissed by the Court below and therefore there was nothing in that decree against which the defendant-respondent was required to object, objections filed by him supporting the decree on some of the grounds that have been decided against him in the Court below are strictly speaking not cross-objections but are really only a means of giving notice to the appellant of his intentions, and an *ad valorem* court-fee is, therefore, not payable on them. (*Zia-ul-Hasan and Smith, JJ.*) KHURSHED JAHAN BEGAM *v.* SARDAR ALI KHAN. **10 R.O. 122=171 I.C. 459=1937 O.L.R. 554=1937 O.W.N. 1057 =A.I.R. 1937 Oudh 512.**

——**Sch. I, Art. 1**—*Decree granting certain sum payable in annual instalments—In appeal plaintiff claiming full sum without instalments—Court-fee payable.*

Where in a suit on mortgage the plaintiff was granted a decree for Rs. 32,000 payable in eight annual instalments and the plaintiff appealed against this order of instalments, claiming Rs. 32,000 without instalments,

Held, that the court-fee payable in appeal was on the difference between the amount of Rs. 32,000 claimed, and the present value of the sum decreed, which worked out to Rs. 25,498, *i.e.*, on Rs. 6,502. A.I.R. 1936 Pesh. 232, Rel. on. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MAKHAN SINGH *v.* LAKHMI DAS. **167 I.C. 26=9 R. Pesh. 83=A.I.R. 1937 Pesh. 31.**

——**Sch. I, Art. 1**—Inapplicability— Appeal from order granting or refusing letters of administration — Court-fee payable. *See* COURT-FEES ACT, SCH. II, ART. 11. **1938 Rang.L.R. 72.**

——**Sch. I, Art. 1**—*Interest—Claim to after suit—Court-fee—Appeal against decree of dismissal—Court-fee on interest after suit.*

Court-fees are leviable on sums which can be ascertained with certainty, but not on those which cannot. Consequently, as a general rule, Court-fees on a plaint are payable on interest claimed up to date of suit, but not beyond. If, however, the suit is dismissed and the plaintiff still wants future interest in appeal, he must pay Court-fees on the amount he claims up to the date on which he files the appeal but again, not beyond. (*Vivian Bose, J.*) SHEIKH RAHMAN *v.* BALCHAND. **167 I. C. 577=9 R.N. 191=A.I.R. 1937 Nag. 6.**

——**Sch. I, Art. 1**—Order of restitution—Appeal—Court-fee. *See* C. P. CODE, S. 144. **1938 Rang. L.R. 635.**

——**Sch. I, Art. 1**—Order under S. 144, C. P. Code—Appeal—Court-fee. *See* C. P. CODE, S. 144. **42 C.W.N. 152.**

——**Sch. I, Art. 1**—*Redemption suit—Appeal—Court-fees.*

In respect of a memorandum of appeal in a suit for redemption when the subject-matter in dispute in appeal is not about the existence or non-existence of the right to redeem but relates only to the amount directed to be paid by the mortgagor as condition precedent to the redemption decree in his favour, the subject-matter is an ascertained sum and a claim for money and *ad valorem* fee is payable thereon. (*Sukhdeonarain, J.*) MANAKLAL *v.* LAXMIMAL. **1939 Mar.L.R. 81 (Civ.).**

COURT-FEES ACT (1870), Sch. I, Art. 1.

——**Sch. I, Art. 1**—Set-off—Court-fee—Necessity—Amount. *See* C. P. CODE, O. 8, R. 6 AND COURT-FEES ACT, SCH. I, ART. 1. **1940 N.L.J. 176.**

——**Sch. I, Art. 1**—*Set-off—Equitable set-off Court-fee, if payable.*

When the defendant claims an equitable set-off, no Court-fee is payable on it. (*Norman, I.C. S.*) SOLEMON ROZARIO *v.* JAMES D. ROZARIO. **1936 A.M.L.J 60.**

——**Sch. I, Art. 1**—*Set-off—If includes equitable set-off.*

The set-off mentioned in Art. 1 of .Sch. I includes an equitable set-off, and is not confined to a legal set-off. (*Pollock, J.*) HARGOVIND *v.* SHRI KRISHNADAS. **I.L.R. (1937) Nag. 481=170 I.C. 1004=10 R.N. 92=A.I.R. 1936 Nag. 290.**

——**Sch. I, Art. 1**—*Set-off—If includes equitable set-off—Court-fee payable on latter.*

The expression set-off includes an equitable set-off also and is not confined to legal set-off only. Hence a written statement pleading an equitable set-off requires a Court-fee stamp in the same way as written statement pleading a legal set-off. (*Pollock, J.*) BHIKUBAI GOVINDJI & CO. *v.* C. P. CONTRACTING AND MINING SYNDICATE, NAGPUR. **I.L.R. (1937) Nag. 99=165 I.C. 430=9 R.N. 79=A.I.R. 1936 Nag. 222.**

——**Sch. I, Art. 1**—*"Set-off"—If includes equitable set-off—Tentative valuation—Permissibility.*

The word 'set-off' in Sch. I, Art. 1 not having been qualified in any way must include not only a legal set-off but also an equitable set-off. Tentative valuation of a claim is permissible only in suits for account and mesne profits. Defendant who in a suit for damages sets up a cross-claim for damages suffered by him on account of the acts and conduct of the plaintiff and asks for a set-off against the plaintiff's claim must estimate his claim as accurately as he can and pay *ad valorem* Court-fee thereon and cannot be allowed to put a tentative valuation for the claim. (*Derbyshire, C.J. and Nasim Ali, J.*) A. Z. M. REAZAI KARIM *v.* MOHAMMAD ISRAIL OSTAGAR. **183 I.C. 373=12 R.C. 155=43 C.W.N. 838=A.I.R. 1939 Cal. 415.**

——**Sch. I, Art. 1**—*"Subject-matter"—Appeal—Demand for additional court-fee—Failure to comply with—Dismissal of appeal—Second appeal from dismissal—Valuation—Subject-matter—If subject-matter of suit—Court-fee payable.*

In a second appeal from a dismissal of an appeal for non-payment of deficient Court-fee, the dispute in the lower Court having reference only to the Court-fee payable, the subject-matter in dispute in second appeal is the amount of stamp in dispute between the parties, in other words, the difference between the Court-fee paid and the Court-fee demanded is the matter in dispute in second appeal. The appellant in his appeal to the first appellate Court paid a Court-fee of Rs. 100, but the Court held that the correct Court-fee was Rs. 412-7-0 the appellant having failed to pay the balance of the Court-fee amount, his appeal was dismissed. From that dismissal he preferred a second appeal to the High Court valuing it at Rs. 312-7-0 (Rs. 412-7-0 minus Rs. 100), and on that valuation he paid a Court-fee of Rs. 35-15-0. A Court-fee of Rs. 412-7-0, as in the lower Court, was demanded, and the appellant, not having complied with that demand, had his second appeal dismissed.

Held, in Letters Patent Appeal, that the dispute in the lower Court had reference only to the Court-fee payable, and the difference between the Court-fee paid and the Court-fee demanded was the matter in dispute in second appeal, and the Court-fee paid in second appeal was therefore correct and consequently the second appeal must be restored and heard.

Abdur Rahman, J.—The subject-matter of every appeal does not necessarily coincide with the subject-matter of the suit in regard to which the appeal has been filed. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KALIAPPA GOUNDAN *v.* KANDASWAMI GOUNDAN. **I.L.R. (1938) Mad. 981=181 I.C. 433=11 R.M. 807=1938 M.W.N. 264=47 L.W. 356=A.I.R. 1938 Mad. 498=(1938) 1 M.L.J. 662.**

——**Sch. I, Art. 1**—*"Subject-matter in dispute"—Meaning of—Cross-objection.*

The words "the subject-matter in dispute" in Art. 1, Sch. I of the Court-Fees Act mean, in reference to a cross-objection, the subject-matter in dispute in the cross-objection. If, therefore, in an administration suit the respondents, who have been ordered by the preliminary decree to pay to the appellants a certain sum as special costs in any event (the ordinary costs being ordered to abide the passing of the final decree), file a cross-objection relating to the findings in the suit and also to the special costs, the cross-objection, so far as it relates to the special costs, is chargeable with Court-fees *ad valorem* on the amount of the costs. (*Dunkley, J.*) MARIAM BIBI *v.* MALIM. **1939 Rang L.R. 474=184 I.C. 171=12 R.R. 129=A.I.R. 1939 Rang. 375.**

——**Sch. I, Art. 1**—*Suit for declaration that property mortgaged by certain deeds is property of math and cannot be sold by mortgagees—Court-fee payable.*

The plaintiff sued for a declaration that the property mortgaged by certain deeds executed by a Mahant is the property of a certain math and that the mortgagees have no right to have the property sold by auction.

Held, that the plaintiff sought, in effect, to have the mortgage deeds in question adjudged void and the suit must be regarded as falling under S. 39 of the Specific Relief Act and as being not of a purely declaratory nature, and that, therefore, an *ad valorem* Court-fee was payable. 1932 A.L.J. 684 (F.B.), Appl. (*Bennet and Smith, JJ.*) MAHESHER GIR *v.* RAHMAT ULLAH. **165 I.C. 452=9 R.A. 279=1936 A.W.R. 649=1936 A.L.R. 908=1936 A.L.J. 798=A.I.R. 1936 All. 710.**

——**Sch. I, Art. 1**—*Suit for possession—Appellant-defendant admitting plaintiff's title but claiming charge of Rs.700—Court-fee payable*

Where a suit for possession in which the defendant admits plaintiff's title but claims a charge of Rs. 700 over that property is decreed but without upholding defendant's claim and the defendant files an appeal, he should pay *ad valorem* Court-fee on Rs. 700, the amount claimed by him. (*Bhide, J.*) GHULAM MOHAMMAD *v.* BARKAT ALI. **167 I.C. 756=9 R.L. 552=39 P.L.R. 443=A.I.R. 1936 Lah. 935.**

——Sch. I, Art. 1—*Suit for possession—Decree for possession subject to payment of sum of money as condition precedent—Appeal against order for payment—Court fees.*

A plaintiff-appellant who seeks to get rid of an order for payment of a sum of money should value his appeal at the amount of that sum of money. In a suit for possession of property, the plaintiff got a decree for possession, but subject to his paying a sum of Rs. 3000 and odd being his share of the debts binding on the property. Plaintiff appealed against the order requiring him to pay the sum of Rs. 3000 and odd. The appellate Court called upon the plaintiff to pay Court-fee on the amount in question. In revision by the plaintiff,

Held, that he should value his appeal not on the basis of possession being the subject-matter, but should value it on the basis of the value of the order for payment which he wes seeking to get rid of in the appeal. (*Wadsworth, J.*) ABDUL KUDUS *v.* ABDUL GANI. 1940 M.W.N. 904=52 L.W. 397=(1940) 2 M.L.J. 406.

——Sch. I, Art. 1—*Suit for possession of share by partition—Defendant claiming to be in possession under wakfnama—Decree by trial Court finding wakf invalid—Appeal seeking to set aside decree—Claim by appellant that declaration of validity of wakf will be enough—Court-fee payable.*

In a suit for separate possession of a certain share of a certain property by partition, the defendant claimed to be in possession of that property as mutawalli under a wakfnama. The trial Court found that the alleged wakf was not valid and granted a decree to the plaintiff for separate possession. The defendant in appeal asked that the decree should be set aside. He claimed that it would be sufficient if he got a declaration that the wakf was valid. The relief, however, in his appeal was that the decree of the Court below should be set aside and the plaintiff's suit should be dismissed.

Held, that the appellant was in the position of a defendant against whom a decree for possession had been granted which he was seeking to set aside, and his case came within the Court-Fees Act, Sch. I, Art. 1 under which he must pay an *ad valorem* Court-fee, and that his appeal could not be admitted on a declaratory Court-fee. (*Bennet, J.*) RASHIDA KHATUN *v.* FAIYAZ BIBI. 159 I.C. 727=8 R.A. 502=1936 A.W.R. 341=1936 A.L.J. 514=1935 A.L.R. 1187=A.I.R. 1936 All. 216.

——Sch. I, Art. 1—*Suit to enforce mortgage—Appeal by defendant—Court-fees payable.*

In an appeal by the defendant in a mortgage suit, it is not enough for the appellant to value his appeal at the figure at which the plaintiff valued it in the trial Court. He ought to value it a little higher by including the interest *pendente lite*. (*Dhavle and Agarwala, JJ.*) RAM SAWARI KUER *v.* MOTIRAJ KUER. 17 Pat. 687=178 I.C. 150=5 B R. 59=11 R.P. 220=19 Pat.L.T. 885=1939 P.W.N. 162=A.I.R. 1939 Pat. 83.

——Sch. I, Art. 1—*"Value of subject-matter in dispute" — Interpretation — Appeal — Appellant challenging decree on merits and also order of costs—Value of subject-matter in dispute in appeal.*

The words "value of the subject-matter in dispute" in Art. 1, Sch. I of the Court-Fees Act refer, in the case of a suit, to the value of the subject-matter of the suit, and in the case of an appeal, to the value of the subject-matter in dispute in appeal. The subject-matter of the suit and the subject-matter of the appeal may not be the same. Where the appellant appeals against the decree in a suit on merits and also challenges the order of costs independently, then the value of the subject-matter in dispute in appeal is the total amount consisting of the value of the subject-matter in the suit and the amount of costs challenged (*Thomas, C.J. and Radhakrishna, J.*) BHAWANI SHANKAR *v.* MAHOMED HASAN. 15 Luck. 392=1940 O.W.N. 167=1940 O.L.R. 79=1940 O.A. 169=185 I C. 895=12 R.O. 269=1940 A.W.R. (C.C.) 85=A.I.R. 1940 Oudh 182

——Sch. I, Art. 1—Valuation - Suit under O. 21, R. 63, C. P. Code, bearing court-fee of Rs. 15—Demand of *ad valorem* court-fee on value of property—Non-compliance—Rejection of plaint—Appeal—Valuation—Court-fee payable. *See* COURT FEES ACT, SCH. II, ART. 17 (1). 5 B. R. 620.

——Sch. I, Art. 1 and Sch. II, Art. 11—Applicability—Appeal under S. 23, U. P. Agriculturists' Relief Act—Court-fee payable. *See* U. P. AGRICULTURISTS' RELIEF ACT, S. 23. 1937 A.W.R. 932=A.I.R. 1938 All. 14.

——Sch. I, Art. 1 and Sch. II, Art. 11—Applicability—Appeal from order under S. 144, C. P. Code—Court-fees payable. *See* C. P. CODE, S. 144. 41 C.W.N. 157=A.I.R. 1937 Cal. 152.

——Sch. I, Art. 1 and Sch. II, Art. 17—*Appeal and Decree directing payment of sum by instalments—Condition that entire sum is recoverable with interest at 6 per cent. per annum in case of two successive defaults—Appeal—Court-fees.*

Where a decree directs the payment of certain sum by instalments with a condition that if two successive instalments are not paid by due date the whole sum will be recoverable immediately with interest at 6 per cent. per annum from the date of the decree, the Court-fee payable on the memorandum of appeal from the decree is governed by Art. 1 of Sch. I and not by Art. 17 of Sch. II, as the present value of the sum can be ascertained and calculated at the Court rate of 6 per cent. per annum. (*Middleton, J.C. and Almond, A.J.C.*) AGHA SHER MAHOMED KHAN *v.* MIAN HAJI FAZAL ILAHI. 166 I.C. 289=9 R. Pesh. 65=A.I.R. 1936 Pesh. 232.

——Sch. I, Art. 1, and Sch. II, Art. 17—*Appeal in suit for declaration—Cross-objection—Court-fee.*

Art. 17, Sch. II does not mention cross-objections, and therefore *ad valorem* court-fees are payable on cross-objections filed to an appeal in a suit for a delaration. (*Skemp, J.*) KARTAR SINGH *v.* JOGINDAR SINGH. 39 P.L.R. 586.

——(as amended in Madras), Sch. I, Art. 1 and Sch II, Art. 17-B—*Applicability—Suit by tenant under S.* 112, *Madras Estates Land Act—Decree—Appeal by landlord—Court-fee payable.*

A suit under S. 112 of the Madras Estates Land Act is not a suit in which it is not possible to estimate at a money value the subject-matter in dispute; and therefore Art. 17-B of the Court-

Fees Act as amended in Madras cannot apply to such a suit. An appeal by the landlord against a decree in a suit filed by the tenant is not also governed by Art. 17-B. The value of the subject-matter in such a suit or appeal is not more than the annual rent the recovery of which is resisted, an *ad valorem* Court-fee must be paid on such amount under Sch. I, Art. 1. (*Venkatasubba Rao and Venkataramana Rao, JJ.*) DURAISWAMI AIYAR, *In re*. I.L.R. (1937) Mad. 980=46 L.W. 263=173 I.C. 608=10 R.M. 609=1937 M.W.N. 659=A.I.R. 1937 Mad. 786=(1937) 2 M.L.J. 347.

——Sch. I, Art. 1 and Sch. II, Art. 17 (iii)—*Declaration and consequential relief—Province of Court as to—Examination of plaint allegations when justified.*

The position with reference to court-fees is that whereas it is not permissible to a Court to insist on the plaintiff claiming a consequential relief when he has deliberately omitted to claim it and has confined himself to claiming a declaratory relief only and thus insist on the payment of *ad valorem* court-fee, it is equally clear that the question of court-fee has got to be decided on the allegations contained in the plaint and not necessarily by looking at the relief only and the manner in which it has been clothed. Where the plaintiffs ask for a declaration that certain mortgage decrees are null and void and ineffectual, but the allegations in the plaint in effect amount to asking for the cancellation of the mortgage bond on the basis of which the decree was obtained, *ad valorem* court-fee has to be paid. (*Collister and Bajpai, JJ.*) GOVIND RAO *v.* GOVIND RAO. I.L.R. (1938) All. 470=1938 A.L.J. 578=11 R.A. 164=1938 A.W.R. (H.C.) 426=177 I.C. 85=1938 A.L.R. 700=A.I.R. 1938 All. 481.

——Sch. I, Art. 1 and Sch IV, C.P. Code—*Applicability—Claim of equitable set-off in respect of damage to property—Sustainability.*

In a suit to recover the cost of the construction of a house for the defendant as per contract, the defendant claimed to set off a certain sum on the ground of damage caused to his property by the plaintiff. On a demand for court-fee, the defendant contended that it was an equitable set off and as such no court-fee was necessary. It was held that there was nothing to suggest that the claim for set-off was any other than the ordinary claim to set-off. In no sense could such a claim to set-off be said to be a claim in equity. The 1st Sch. of the Court-Fees Act as amended by the IVth Sch. of the C.P. Code, requires *ad valorem* court-fee on such a set-off. (*Bennet, J.*) SHIROMANI SUGAR MILLS, LTD. *v.* SUGNI CHAND HASHMAT RAI & CO. 177 I.C. 474=1938 A.W.R. (H.C.) 489=1938 A.L.R. 767=11 R.A. 195=1938 A.L.J. 701=A.I.R. 1938 All. 522.

——(as amended in Bihar and Orissa), Sch. I, Art. 1 and Sch. II, Art. 11—*Applicability—Decree for mesne profits after inquiry under O.20, R. 12 (2)—Appeal—Court-fee*—Ad valorem *fee on decree amount—Appeal valued as miscellaneous appeal—Appeal allowed and suit remanded without demanding proper court fee—Application by decree-holder subsequently for order staying proceedings as remand—Dismissal—Revision—Interference—Ss. 12 and 13, Court-Fees Act.*

Petitioner who was the decree-holder in a suit for ejectment applied for ascertainment of mesne profits, and in due course got a decree for mesne profits which were ascertained by a Commissioner. The judgment-debtor appealed against the decree to the District Judge valuing his appeal as a miscellaneous appeal and paying a court-fee of one rupee only. The appellate Court allowed the appeal and remanded the case to the trial Court for re hearing. The appellate decree was signed and sealed duly and an application was then put in by the petitioner in the District Court for an order staying further proceedings in the trial Court, under the judgment-debtor, who had not properly valued his appeal, made good the proper court-fee due on the memorandum of appeal. The District Judge who was the successor-in-office of the Judge who decided the appeal, passed an order rejecting the application holding that he had no jurisdiction to revise the decision of his predecessor. Petitioner applied to the High Court in revision and prayed that the High Court, since the matter had come up in revision, should exercise its powers under S. 12 of the Court-Fees Act.

Held, (1) that the appeal to the District Court was not properly valued, and that the appeal ought properly to have been valued as a title appeal on the amount of the decree, and that *ad valorem* court-fee should have been paid on the memorandum of appeal; (2) that though the District Court ought not to have entertained the appeal without requiring the appellant judgment-debtor to pay *ad valorem* court-fee on the amount of the decree appealed from, the order rejecting the application for stay was manifestly correct and was made with jurisdiction; and (3) that the High Court would not interfere in revision so as to set aside the order which was manifestly correct.

Quaere:—Whether if the full court-fee had been paid by the judgment-debtor in the appeal before the District Judge, he would have been entitled to claim a refund on remand under S. 13 of the Court-Fees Act. (*James, J.*) BABUJEE ISAR *v.* CHETIIRU SINGH. 172 I.C. 212=10 R.P. 333=1937 P.W.N. 893=18 Pat. L.T. 864.

——(as amended in Bombay), Sch. I, Art. 1 and Sch. II, Art. 11—*Applicability—Appeal from order under O. 21, R. 50 (2) and (3)—Court-fee.*

The words "or otherwise" in O. 21, R. 50 (3) are wide enough to include court-fee payable. Therefore, for the purposes of court-fees an order under O. 21, R. 50 (2) and (3), granting leave to execute a decree against any person on the ground that he is a partner is not an order within the provisions of S. 47, though an order in execution of a decree against the firm. Hence an appeal from such order falls under Art. 1 of Sch. I, Court-Fees Act, and not under Cl. 5 of Bombay Government Notification No. 590 issued under S. 35, Court-Fees Act, and is chargeable with *ad valorem* court-fee and not the fee chargeable under Art. 11 of Sch. II, Court-Fees Act. (*Davis, J.C., Lobo and Weston, JJ.*) SEOOMAL KHEMCHAND *v.* LAHNIBAI. I.L.R. (1939) Kar. 589=182 I.C. 470=12 R.S. 13=A.I.R. 1939 Sind 161 (F.B.)

——Sch. I, Arts. 4 and 5—*Applicability—Appeal—Dismissal for non-payment of printing charges—Application for restoration—Court-fee—C. P. Code, O. 41, R. 19 and O. 47, R. 1.*

An application for restoration of an appeal dismissed for non-payment of printing costs should be treated as an application for review

and not as an application under O. 41, R. 19 and should be required to be stamped under Arts. 4 and 5 of Sch. I, Court-Fees Act. (*James, J.*) SINGHESHWAR PRASAD *v.* SAHI CHAND. 17 Pat. 252=173 I.C. 633=4 B.R. 306=10 R.P. 427=19 Pat.L.T. 17=1937 P.W.N. 1020=A.I.R. 1938 Pat. 111.

——Sch. I, Arts. 4 and 5—*Application for review—Court-fee payable.*

Under Arts. 4 and 5 of Sch. I of the Court-Fees Act, the Court-fee to be paid on an application for review of judgment must be either the fee or one-half of the fee leviable on the plaint or memorandum of appeal, (*i.e.*) which is prescribed for the original plaint or original memorandum of appeal, and the application cannot be valued in proportion to the value of the relief sought in review. (*Addison and Din Mohammad, JJ.*) RAM GOPAL *v.* GAURI SHANKAR. 18 Lah. 238=170 I.C. 266=10 R.L. 95=39 P.L.R. 897 (2)=A.I.R. 1937 Lah. 439.

——Sch. I, Art. 6—*Acceptance of person as surety on his oral statement—Legality.*

Art. 6, Court-Fees Act, does not lay down that it is illegal for the Court to accept a person as surety in proceedings under S. 55, C. P. Code, on oral statements made before it or that it is obligatory to take a bond in writing. (*Tek Chand, J.*) NANAK CHAND RAMJI DAS *v.* IBRAHIM. 174 I.C. 965=10 R.L. 646=40 P.L.R. 38=A.I.R. 1937 Lah. 772.

——Sch. I, Art. 7—*Order by trial Court refusing to allow costs directed to be paid by Privy Council—If has force of decree.*

S. 47, C.P. Code, applies to execution of decrees of their Lordships of the Privy Council. An order by the trial Court, refusing to allow costs directed to be paid by their Lordships of the Privy Council, has the force of a decree and its copy filed with the appeal from the order, must bear a stamp of Re. 1 under Art. 7, Court-Fees Act. Where however the copy is understamped owing to a *bona fide* mistake, the appellate Court, can under S. 149, C. P. Code, allow the appellant to make up the deficiency and can condone under S. 5, Limitation Act, the period from the day on which the appeal was filed with an insufficient stamped copy up to date. (*Middleton, J. C. and Mir Ahmad, A.J.C.*) KALA RAM *v.* PUNJAB NATIONAL BANK, LTD. 9 R. Pesh. 101=167 I.C. 879=A.I.R. 1937 Pesh. 3.

——Sch. I, Art. 11—Applicability—Hindu joint family—Death of coparcener — Application by survivors for Letters of Administration in respect of undivided interest of deceased—Court-fee—Liability to pay. *See* COURT-FEES ACT, S. 19-D. 17 Pat. 542.

——(as amended by C. P. Court-fees (Amendment) Act 1935—Sch. I, Art. 12—*Applicability—Aggregate of debts due exceeding Rs.* 1000—*Individual items below Rs.* 1,000—*Court-fee, if payable—'Any' meaning of.*

Where an application for a succession certificate relates to several items of debt or securities aggregating to more than Rs. 1000 but no single item of debt or security by itself exceeds Rs. 1000 no court-fee is payable in respect of it, under Sch. I, Art. 12 of the Court-Fees Act as amended by C. P. Court-Fees (Amendment) Act 1935. The word 'Any' occurring in that article indicates one out of a number of persons or things more than

two. (*Gruer, J.*) PREMALABAI *v.* PRIYA KUMARI. 1940 N.L.J. 495.

——Sch. I, Art. 12—Applicability—Succession certificate in respect of Provident Fund—Liability of nominee of Provident Fund to court-fees. *See* PROVIDENT FUNDS ACT, S. 5 (2). A.I.R. 1939 Sind 52.

——Sch. I, Art. 12—*Succession certificate—Calculation of Court-fees—Relevant date—Succession Act, S.* 379.

The Court-fee is not to be paid on the application for the issue of a succession certificate, but on the certificate itself. Therefore, the relevant date for calculating the amount of Court-fee is not the date when the application for the issue of the certificate is made. It is either the date when the certificate is drawn up or the date when the Court passes an order that such certificate should be drawn up. (*Allsop and Ganga Nath, JJ.*) GURCHARAN PRASAD *v.* SECRETARY OF STATE. 58 All. 752=160 I.C. 709=8 R.A. 647 (2)=1936 A.W.R. 111=1935 All.L.R. 166=1936 A.L.J. 55=A.I.R. 1936 All. 309.

——Sch. II, Art. 1—Inapplicability—Appeal from order granting or refusing letters of administration—Court-fee payable. *See* COURT-FEES ACT, SCH. II, ART. 11. 1938 Rang. L.R. 72.

——Sch. II, Art. 1 (a)—*Assistant Commissioner—If a Revenue Court.*

Assistant Commissioner of Income-tax is a Revenue Court for purposes of the Court-Fees Act. The application for certified copy of Assistant Commissioner's order therefore requires a stamp under Art. 1 (*a*), Sch. II of Court-Fees Act, Punjab. (*Dalip Singh and Skemp, JJ.*) MERCHANTS MOHINI FLOUR MILLS CO., LTD. *v.* COMMISSIONER OF INCOME-TAX. I.L.R. (1938) Lah. 229=176 I.C. 171=11 R.L. 167 (2)=5 I.T.R. 459=A.I.R. 1937 Lah. 876.

——Sch. II, Art. 1 (d)—Applicability—Application for restoration of appeal dismissed for non-payment of printing cost. *See* COURT-FEES ACT, SCH. I, ARTS. 4 AND 5 AND SCH. II, ART. 1 (*d*). 19 Pat.L.T. 17.

——Sch. II, Art. 1 (d)—*Same judgment governing several suits—Appeals filed in some to High Court and in others in District Court—Application for transfer of all appeals to High Court for analogous trial—Separate application and vakalatnama for each appeal—If necessary.*

15 suits filed by a person were tried analogously and dismissed by the same judgment. Owing to the difference in valuation, appeals in two of the suits were filed in the High Court and appeals in the remaining thirteen suits were filed in the District Court. An application was made for transfer of all these thirteen appeals to the High Court for analogous trial of the same with the two appeals pending there.

Held, the application must be considered not as an independent application for transfer but as one application made in the appeal pending in the High Court with thirteen prayers each for the transfer of one appeal pending in the District Court and consequently one application stamped with a court-fee stamp of Rs. 2 is necessary and not thirteen applications, each stamped with a court-fee stamp of Rs. 2.

Held also, that the vakalatnama filed in the appeals pending before the High Court enabled the moving of the application for transfer and

that separate vakalatnamas were not required. (*Mitter and Khundkar, JJ.*) KAMALA RAJAN ROY *v.* ABHOY CHARAN PAL. I.L.R. (1939) 2 Cal. 264 =186 I.C. 641=12 R.C. 507=43 C.W.N. 836= A.I.R. 1940 Cal. 84.

——Sch. II, Art. 1, Cl. (d)—*Memo. of objection under O. 41, R. 26, C. P. Code—Court-fee.*

No Court-fee is payable in respect of a memorandum of objection filed under O. 41, R. 26, C.P. Code. The object of the memorandum of objection is to give notice to the opposite party of the grounds on which the finding is proposed to be contested. It does not seek any relief from the Court and does not contain any request for any order being passed on it. It can, therefore, hardly be regarded as an application or petition within the meaning of Art. 1, Cl. (*d*) of Sch. II of the Court-Fees Act. (*Srivastava and Zia-ul-Hasan, JJ.*) SITA RAM *v.* SUKHRAJ SINGH. 11 Luck. 704=160 I.C. 38 (1)=8 R.O. 247 (1)= 1936 O.W.N. 113=1936 O.L.R. 37=A.I.R. 1936 Oudh 180.

——(as amended in Bombay), Sch. II, Art. 6 —Applicability—Bond by guardian of minor's estate under Guardian and Wards Act—Stamp duty. *See* STAMP ACT, ART. 57. 42 Bom.L.R. 668.

——Sch. II, Art. 6—*Applicability—Security bond in mofussil for stay of execution pending appeal—Court-fee and stamp duty.*

Where a security bond is executed by a surety under O. 41, R. 5 or 6, C. P. Code, it is liable to a Court-fee under Art. 6 of Sch. II, Court-Fees Act, and to stamp duty under Art. 57, Sch. I, Stamp Act. This applies only in relation to deeds executed in the mofussil. A.I.R. 1933 Lah. 1004; A.I.R. 1934 Lah. 138 and A.I.R. 1931 Oudh 99 (S.B.) Foll. A.I.R. 1931 All. 189, Not Foll. (Case-law discussed.) (*Davis, J.C. and Mehta, A.J.C.*) *In re* REFERENCE BY DISTRICT REGISTRAR, DADU. 30 S.L.R. 1=8 R.S. 162 (2)=161 I.C. 945=A.I. R. 1936 Sind 41.

——Sch. II, Art. 10—Chargeability of Vakalatnama containing stipulations—Liability to stamp also as agreement under Stamp Act. *See* STAMP ACT, S. 5. 40 C.W.N. 1340.

——Sch. II, Art. 11—*Appeal from order granting or refusing letters of administration—Court-fee payable.*

The court-fee payable on a memorandum of appeal presented to a High Court from an order refusing or granting letters of administration or probate of a will is Rs. 2 under Art. 11, Sch. II of the Court-Fees Act. Neither Art. 1 of Sch. I, nor Art. 1 or Art. 17 (vi) of Sch. II, is applicable to such a case. (*Ba U, J.*) SUBHAN KHAN *v.* MOHAMED EUSOOF. 1938 Rang. L.R. 72=176 I. C. 366=11 R.R. 43=A.I.R. 1938 Rang. 141.

——Sch. II, Art. 11—Applicability—Appeal from order under S. 144—Court-fee payable—If *ad valorem. See* C. P. CODE, S. 144. 41 C.W.N. 157=A.I.R. 1937 Cal. 152.

——Sch. II, Art. 11—*Applicability—Appeal under S. 5 (2) of the U. P. Agriculturists' Relief Act against order under S. 5 (1).*

An order under S. 5 (1) of the U. P. Agriculturists' Relief Act, has not by itself the force of a decree and is not capable of execution by itself. It is an order passed in the suit and should be considered to be interlocutory. On an appeal from such an order *ad valorem* court-fee need

not be paid. (*Niamatullah and Allsop, JJ.*) RAM PRASAD *v.* TRILOKI NATH. I.L.R. (1938) All. 181 =174 I.C. 106=10 R.A. 548=1938 All.L.R. 236 =1938 R D. 22=1937 A.W.R. 1123=1937 A.L. J. 1212=A.I R. 1938 All. 50.

——Sch. II, Art. 11—*Applicability—Dismissal of application under S. 9 (2) and (3) of U. P. Encumbered Estates Act as time-barred—Order declaring that debt is to be deemed to be discharged—Appeal—Court-fee payable.*

Where an application is dismissed as being barred by time according to S. 9 (2) and (3) of the U.P. Encumbered Estates Act an order is passed that according to S. 13 the debt should be deemed to be discharged, and an appeal is preferred against it the court-fee payable is not *ad valorem*, but under Art. 11, Sch. II of the Court-Fees Act. The decision of the special Judge is an order only and not an order having the force of a decree. (*Zia-ul Hasan and Yorke, JJ.*) SUKKHU *v.* NAND BAHADUR SINGH. 14 Luck. 344=1938 R. D. 927=179 I. C. 45(1)= 11 R.O. 152 (1)=1939 O A. 1=1938 O.W.N. 1221=1938 O.L.R. 552=1938 A. W. R. (C. C.) 136=A.I.R. 1939 Oudh 43.

——Sch. II, Art. 11—*Applicability—Mesne profits—Direction for enquiry in execution—Executing Court ascertaining amount and making order for recovery—Appeal to High Court—Court fee.*

Where the executing Court, which is directed under O. 20, R. 12, C. P. Code to determine the amount of mesne profits in execution, ascertains the amount and makes an order for recovery of such amount, the order is one falling under S. 47, C. P. Code, an appeal from such an order falls under Art. 11 of Sch. II of the Court Fees Act, and when presented to the High Court has to be stamped only with a court-fee stamp of Rs. 2. (*Beaumont, C. J.*) BALARAMCHARYA *v.* CHIDAMBARAGAUDA. 176 I.C. 254=11 R. B. 33= 40 Bom.L.R. 416=A.I.R. 1938 Bom. 320.

——Sch. II, Art. 11—*Application for personal decree in mortgage suit—Appeal from order—Court-fee payable.*

The matter of an issue of a personal decree against the judgment-debtor for balance due to decree-holder after the sale of the mortgage property in execution of a mortgage decree falls under S. 47, C. P. Code, and the fee chargeable on an appeal from an order passed on an application for personal decree is limited to amounts chargeable under Art. 11, Sch. II of Court-Fees Act, *i.e.*, eight annas, in accordance with the Government of Burma Financial Department Notification No. 4, dated 19th September, 1921 Cl. 3, p. 74 of the Burma Stamp Manual, and the order of the appellate Court directing the appellant to pay Court-fees *ad valorem* is wrong. (*Mackney, J.*) U PO TOKE *v.* U LU GYI. 164 I.C. 639=9 R.R. 115=A.I.R. 1936 Rang. 352.

——Sch. II, Art. 11—Applicability—U. P. Agriculturists' Relief Act, S. 23—Appeal under—Court-fee payable. *See* U. P. AGRICULTURISTS' RELIEF ACT, S. 23. 1937 A. W. R. 932=A. I. R. 1938 All. 14.

——Sch. II, Art. 11—Applicability—U. P. Encumbered Estates Act, S. 14—Decree under—Appeal—Court-fee. *See* COURT-FEES ACT, SCH. I, ART. 1. (1937) A.L.J. 1373=1938 A.W.R. (H.C.) 22 (F.B.)

COURT-FEES ACT (1870), Sch. I1, Art. 11.

——Sch. II, Arts. 11 (a) and 17 (vi)—*Applicability—Suit on promissory note—Plea of agriculturists by defendant—Decree for payment in 6 half yearly instalments—Appeal by defendant praying for instalments spread over 15 years—Court-Fee—U. P. Agriculturists Relief Act, S. 5 (2).*

In a suit on a promissory note the defendant pleaded that being an agriculturist he should be allowed to pay the amount in instalments and also contended that the rate of interest was excessive. The Court reduced the rate of interest and made a decree for payment of the amount in six half-yearly instalments. The defendant appealed against the decree claiming that the instalments should be allowed for a period of 15 years, and paid a Court-fee of eight annas only as for a miscellaneous appeal under Art. 11 (*a*) of the second schedule to the Court-Fees Act, treating the appeal as one under S. 5 (2) of the Agriculturists Relief Act.

Held, that the appeal was not a miscellaneous appeal and that S. 5 (2) of the Agriculturists Relief Act did not apply; that the appeal was one falling under Art. 17 (*iv*) of Sch. II to the Court-Fees Act and was liable to a Court-fee of Rs. 10. (*Collister and Bajpai, JJ.*) MOHAMMAD YAHIYA KHAN *v.* MANGAT RAI. **1936 R.D. 236.**

——(as amended in Bihar and Orissa), Sch. II, Art. 11—Applicability—Appeal from decree under O. 20, R. 12 (2), C.P. Code—Proper Court-fee. *See* COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA), SCH. I, ART. 1 AND SCH. II, ART. 11. **18 Pat.L.T. 864.**

——(as amended in Bombay), Sch. II, Art 11—Applicability—Order under O. 21, R. 50 (2) and (3)—Appeal from—Court-fee payable. *See* COURT-FEES ACT (AS AMENDED IN BOMBAY) SCH. I, ART. 1 AND SCH. II, ART. 11. **A.I.R. 1939 Sind 161 (F.B.)**

——(as amended in Madras), Sch. II, Art. 11—*Applicability—C. P. Code, O. 20, R. 12—Application to ascertain future mesne profits—Rejection—If decree—Appeal—Court-fee payable.*

An order rejecting an application under O. 20, R. 12, C. P. Code, asking for an inquiry into future profits, which has been left open in the decree in the suit, and for an order directing the defendant to pay the amount found due, is not a decree as defined by S. (2) (*d*), C.P. Code. An appeal from the order rejecting the application, which cannot be regarded even as an order having the force of a decree, has to be valued for purposes of court-fee under Sch. II, Art. 11 of the Court-Fees Act, as amended in Madras, and a court-fee of one rupee is sufficient. The appellant cannot be ordered to estimate the amount at which he values his relief and to pay an *ad valorem*, court-fee on the figure stated by him. (*Abdur Rahman, J.*) PULLA REDDI *v.* VENKATA REDDI, **1939 M. W. N. 485=49 L. W. 652=A.I.R. 1939 Mad. 667=(1939) 2 M.L.J. 356.**

——Sch. II, Art. 17—*Applicability—Appeal against dismissal of suit for partition of joint family property—Proper court-fee.*

Where a suit for partition of joint family property is dismissed on the ground that it was the self-acquired property of the defendants, and an appeal is preferred therefrom, the payment of Rs.15 as court-fee on the memorandum of appeal is sufficient and *ad valorem* court-fee is not necessary. (*Zia-ul-Hasan and Yorke, JJ.*) PARMESHUR DIN *v.* HARGOBIND PRASAD. **14 Luck. 346=179 I.C. 59=11 R. O. 152 (2)=1938 O.L. R. 552=1938 O.W.N. 1265=1938 A.W.R. (C.C.) 139=A.I.R. 1939 Oudh. 90.**

COURT-FEES ACT (1870), Sch.II, Art. 17.

——Sch. II, Art. 17—*Applicability—Suit under O. 21, R. 103, C. P. Code—Relief of possession asked for—If necessitates a levy of* ad valorem *court-fee.*

A suit under O. 21, R. 103, C. P. Code, though the plaintiff claims possession of property of which he had been dispossessed, nevertheless falls under Art. 17 of Sch. II to the Court-Fees Act. The restoration of possession is implicit in the setting aside of the executing Court's order. The consequential relief in substance is not one to seek possession but reversal of the executing Court's order. (*Niyogi, J.*) DINKARRAO *v.* RATANSI ASARAM. **I.L.R. (1939) Nag. 422=179 I. C. 837=11 R. N. 321=1938 N.L.J. 107=A.I.R. 1938 Nag. 300.**

——Sch II, Art. 17—Applicablity—U. P. Encumbered Estates Act, S. 14—Decree under—Appeal—Court-fee. *See* COURT-FEES ACT, SCH. I, ART. 1. **1937 A L J. 1373=1938 A. W. R. (H. C.) 22 (F B)**

——Sch. II, Art. 17—Suit under O. 21, R. 103, C. P. Code—Court-fee. *See* C. P. CODE, O. 21, R. 103. **1935 A. M.L.J. 107.**

——Sch. II, Art. 17 (1)—*Scope—Suit under O. 21, R. 63, C. P. Code—Prayer for injunction—Court-fee payable—Order rejecting plaint for non-payment of* ad valorem *court-fee demanded—Appeal—Court fee.*

Under Art. 17 (1) of Sch. II of the Court-Fees Act a single court-fee of Rs. 15 is sufficient for a suit under O. 21, R. 63, C. P. Code, even if the plaintiff prays for an injunction as well as for a declaration. Where the trial Court demands *ad valorem* court-fee on the value of the property, and on the failure of the plaintiff to comply with the same, the plaint is rejected, an appeal from the order rejecting the plaint must be stamped with court-fee *ad valorem* on the difference between the value of the stamp on the plaint and the amount of court-fee demanded by the trial Court. That is a reasonable method of assessing valuation of court-fee in cases where the point raised is as to whether the plaint was sufficiently stamped. (*James and Rowland, JJ.*) GORAKH SAHU *v.* SHEO NANDAN SINGH. **18 Pat. 323=11 R.P. 616=5 B.R. 620=181 I.C. 611=20 Pat.L. T. 710=A.I.R. 1939 Pat. 571.**

——Sch. II, Art. 17 (1)—*Suit for cancellation of certificate—Court-fees—Valuation of suit for purposes of jurisdiction—Public Demands Recovery Act, S. 34.*

A suit for cancellation of a certificate which was signed by the certificate officer under S. 6 of the Public Demands Recovery Act comes within Art. 17, Cl. 1 of Sch. II of the Court-Fees Act, and only a fixed court-fee is payable. The mere fact that the certificate-debtor has been given a right to file his objections to the certificate or that he has got a right of appeal before a superior Revenue Officer does not take away the summary character of the decision under S. 6 of the Act, as the certificate-debtor has got a statutory right to have the question of his libility decided in the Civil Court. The valuation of the suit for

purposes of jurisdiction is the amount mentioned in the certificate.

Per *Rau, J.*—The very fact that S. 34 of the Act provides for the cancellation or modification of the certificate by the Civil Court, subject doubtless to certain limitations, is an indication that the certificate even in the form in which it ultimately emerges from the Revenue Court, is regarded as embodying no more than a summary decision liable to be set aside or modified upon a regular suit. (*Nasim Ali and Rau, JJ.*) JOY DURGA DASI *v.* MAHARAJ KUMAR SOURISH CHANDRA ROY. 188 I.C. 402=12 R.C. 672=71 C.L.J. 203=44 C.W.N. 255=A.I.R. 1940 Cal. 215.

——(as amended in Bihar and Orissa), Sch. II, Art. 17 (i) and (iii)—Applicability—Suit to declare that decision of Settlement Officer refusing to record name of plaintiff as zamindar is wrong and that entry in Record-of-Rights is incorrect—Court-fee—Plaintiff if bound to claim possession and pay Court-fee accordingly. *See* SANTHAL PARGANAS SETTLEMENT REGULATION, S. 25. 17 Pat.L.T. 115=A.I.R. 1936 Pat. 171.

——(as amended by Madras Act V of 1922), Sch. II, Arts. 17 (1), 17-A and 17-B—*Applicability—Unsuccessful application to Collector under S. 3 (5) of Madras Estates Land Act—Subsequent suit in Civil Court—Court-fee.*

A suit by an unsuccessful applicant to the Collector for registration as a landholder under S. 3 (5) of the Madras Estates Land Act is essentially a suit for a declaratory decree falling under S. 17-A of Sch. II of the Court-Fees Act as amended by Madras Act V of 1922 and Court-fees must be paid accordingly. Neither Art. 17 (1) nor Art. 17-B governs the suit. (*Wadsworth, J.*) ATHIMOOLA MUDALIAR *v.* KUBRA BEGAM SAHEBA. 59 Mad. 882=161 I.C. 879=8 R.M. 884=1936 M.W.N. 45=43 L.W. 364=A.I.R. 1936 Mad. 383=71 M.L.J. 493.

——Sch. II, Art. 17 (iii)—*Applicability—Appeal against dismissal of claim under S. 11 of the United Provinces Encumbered Estates Act.*

Where a claim under S. 11 of the United Provinces Encumbered Estates Act is dismissed according to sub-S. 4 of that section, the order is to be deemed to be a decree of Civil Court of competent jurisdiction. The decree is in the nature of a declaratory one and the claim analogous to a suit under O. 21, R. 63, C. P. Code. An appeal from such a dismissal, is sufficiently stamped by the affixing of 10 Rs. stamps. (*Zia-ul-Hasan and Yorke, JJ.*) HAR GOVIND PRASAD *v.* MT. MAHARAJ KUNWAR. 177 I.C. 976=1938 O.W.N. 1018 (1)=1938 O.L.R. 458=1938 A.W.R. (C.C.) 122 (1)=1938 O.A. 767=11 R.O. 90 (1)=A.I.R. 1939 Oudh 64.

——Sch. II, Art. 17 (iii)—Applicability—Suit by decree-holder under O. 21, R. 58—Prayer for injunction—Effect. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*). A.I.R. 1937 Sind 248.

——Sch. II, Art. 17 (iii)—Applicability—Suit by party to a decree to declare it illegal and void—Consequential relief, if implied. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*) AND SCH. II, ART. 17 (*iii*). 1937 O.W.N. 1186=A.I.R. 1938 Oudh 1 (F.B.)

——Sch. II, Art. 17 (iii)—Applicability—Suit under S. 33, United Provinces Agriculturists Relief Act—Nature of—Court-fee payable. *See*

COURT-FEES ACT, S. 7 (iv) (*f*) AND SCH. II, ART. 17 (iii). 1936 R.D. 237.

——Sch. II, Art. 17 (iii)—*Declaratory relief—Distinct reliefs—Test.*

Where the relief sought consists of two parts which are such that the first is the foundation for the second and the second part is a necessary consequence of the granting of the first part then the two can be taken together as really constituting one relief which is quite enough for the purpose of decreeing the plaintiff's claim. On the other hand, if the two parts are such that the second does not necessarily follow from the first or that the first goes farther than what is necessary for the granting of the second part of the relief, then one sum of Rs. 10 as Court-fees would not be sufficient. Where the relief claimed is that it may be declared that the property in suit is *wakf-alalaulad* and is not attachable and saleable, the declaration that the property is *wakf-alalaulad* is the foundation for and would necessarily involve the granting of the relief that the property is not attachable and saleable and only one sum of Rs. 10 is payable as Court-fees. But where the relief claimed is that it may be declared that the property in suit is owned and possessed by the plaintiff and is not fit for attachment and sale in satisfaction of a certain decree, the plaintiff in asking for a declaration as to possession is asking for more than is actually necessary for the granting of the second part of the relief, as the plaintiff would succeed if he establishes that he is the owner of the property. In such a case, therefore, two distinct reliefs are claimed by the plaintiff and two sums of Rs. 10 are payable as Court-fees. (*Sulaiman, C. J. and Bajpai, J.*) ABDUL SHAKUR *v.* BADARUDDIN. 167 I.C. 59=9 R.A. 476=1937 All. L.R. 127=1936 A.L.J. 1155=1936 A.W.R. 1237=A.I.R. 1936 All. 874.

——Sch. II, Art. 17 (iii)—*Suit for mere declaration—Court-fee—Duty of Court.*

Where the suit as framed is one for a mere declaration where no consequential relief is prayed, Court-fee is payable under Art. 17, Cl. (*iii*). The Court must, for the purpose of fixing the amount of Court-fee in a suit of this kind, look primarily to the language of the plaint. If the plaintiff does not expressly pray for any consequential relief, it would not be proper to treat the plaint as if a consequential relief had been prayed. (*King, C. J. and Nanavutty, J.*) BANK OF UPPER INDIA, LTD. *v.* ABDUL ALI. 8 R.O. 405=1936 O.L.R. 308=1936 O.W.N. 522=162 I.C. 750=A.I.R. 1936 Oudh 317.

——Sch. II, Art. 17 (iii)—*Suit for declaration of title and cancellation of mutation—Mutation relief—If requires Court-fee.*

A mutation merely gives effect to rights and does not create rights; a declaration by a Civil Court upon matters within its jurisdiction declares rights and must be followed by a mutation giving effect to the declaration; there is no analogy between the cancellation of a mutation and the cancellation of a deed between the parties. Hence where plaintiff sues for declaration of title and cancellation of mutation, the mutation relief does not amount to a further relief but is merely redundant and does not require Court-fee. (*Middleton, J.C. and Mir Ahmed, A.J.C.*) MUKARAB KHAN *v.* RAB

NAWAZ KHAN. 163 I.C. 462=9 R. Pesh. 3=A. I.R.1936 Pesh. 140.

——Sch. II, Art. 17 (iii) and S. 7 (iv) (c)—*Applicability—Suit to declare plaintiff's right to recover dower debt from certain waqf property—Nature of decree sought.*

Where the declaration sought by a plaintiff amounts to no more than that she has a right to recover her dower debt from a certain property, the subject of the waqf, the plaintiff is only suing for her right as to the property, namely, the right to attach and put to sale that property for recovery of her dower debt. The declaration sought falls within the purview of S. 42 of the Specific Relief Act and hence the relief is for a mere declaratory decree without any consequential relief coming under Art. 17 (*iii*) of the Second Schedule to the Court-Fees Act and does not fall under S. 7 (*iv*) (*c*). (*Zia-ul-Hasan and Hamilton, JJ*) SUBEHA KHATUN *v.* ANWARUL HASAN. 1939 O.W.N. 152=1939 O.A, 293.

——Sch. II, Art. 17 (iv)—Applicability—Appeal against order of tribunal constituted under U.P. Town Improvement Act. *See* COURT FEES ACT, S. 8 AND SCH. II, ART. 17 (*iv*). 1938 A.L.J. 1124.

——Sch. II, Art. 17 (v)—Suit for cancellation of deed of adoption—Court-fee. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*) AND SCH. II, ART 17 (*v*), A.I.R. 1937 Rang. 400.

——(as amended in Bombay Sch. II, Art. 17 (v)—Applicability—Suit to set aside decree or award and for injunction against execution—Court-fee payable. *See* COURT-FEES ACT (AS AMENDED IN BOMBAY), S. 7 (*iv*) (*c*) AND (*d*). A. I.R. 1937 Sind 241.

——Sch. II, Art. 17 (vi)—*Appeal in suit for partition—Property subject to charge to meet marriage expenses—Court-fee payable.*

It was held by the trial Court in a suit for partition that two of the plaintiffs' appellants each had a share of one-sixth in the property and that the rest of the property belonged in equal shares to their father and mother and two half brothers (*i.e.*) that there were six persons who were each to receive equal shares in the property. It was also found that the property was charged with a sum of Rs. 5,000 to meet the marriage expenses of the plaintiffs' sisters. From that decree there was an appeal by four of the plaintiffs. There were two main contentions. One was that plaintiff's Nos. 3 and 4 also had a share in the property and the other was that the charge of Rs. 5,000 should be upon the whole property and not merely, as held by the trial Court, on the property of the first two plaintiffs and the father and the mother. On a question being raised as to whether the plaintiffs' appellants paid the proper Court-fees in the lower Appellate Court by paying a sum of Rs. 15, as in suits for partition under Sch. II, Art. 17 (*vi*) of the Court-Fees Act.

Held, that the provisions of Sch. II, Art. 17 (*vi*) apply when it is impossible to value the subject-matter in dispute in the Appellate Court and that in this case the appellants, on the findings of the trial Court, were bound to pay half of Rs. 5,000 on account of the marriage expenses, and that as it was contended by them that their half-brothers, defendants Nos. 2 and 3 should also pay their share of those expenses and as according to their contention in appeal, the share of the half-brothers between them was one-fourth, these brothers had between them to pay one-fourth of Rs. 5,000 and that if this contention alone succeeded, the appellants would escape the burden of this charge to the extent of one-half of one-fourth of Rs. 5,000 and the father and the mother would escape the charge to the extent of the other half of one-fourth and that, therefore the subject matter in appeal so far as this point was raised, was one-eighth of Rs. 5,000 and that, therefore, the plaintiffs appellants in the lower appellate Court, should also have paid the Court-fees *ad valorem* on a sum equal to one-eighth of Rs. 5,000 besides the sum of Rs. 15 on account of the dispute of their share. (*Niamatullah and Allsop, JJ*) RAM PRASAD *v.* KRISHNANAND SINGH SHAILA. 159 I.C.802=8 R.A. 520=1936 A.W.R. 340=1936 A.L.J. 513=1935 All. L.R. 1199=A.I.R. 1936 All. 221.

——Sch. II, Art. 17 (vi)—*Applicability—Appeal from final decree for sale in mortgage suit—Decree amount, not challenged—Reliefs for time for payment and for instalments—Court-fee payable.*

Where in an appeal from a final decree for sale in a mortgage suit the amount of the decree is not challenged, but the only reliefs prayed were extension of time for payment and permission to pay by instalments, the reliefs claimed are incapable of valuation and as such Art. 17 (*vi*) of Sch. II applies. In respect of each of the two reliefs, separate court-fee has to be paid. (*Stone, C.J, Grille and Bose, JJ.*) SITABAI *v.* RAMCHANDRA. I.L.R. (1938) Nag. 423=177 I.C. 274=11 R.N. 133=1938 N.L J. 269=A.I.R. 1938 Nag. 409 (F.B.).

——Sch. II, Art. 17 (vi)—*Applicability—Appeal against manner of execution—Court-fee.*

Where an appeal relates only the manner in which the decree is directed to be executed, a declaratory court-fee is sufficient for it. (*Zia-ul-Hasan and Yorke, JJ.*) JAI KRISHNA *v.* ABDUL RAHMAN. 15 Luck. 413=186 I.C. 392=12 R.O. 310=1940 O.W.N. 207=1940 O.L.R. 126=1940 O.A. 194=1940 A.W.R. (C.C.) 112.

——Sch. II, Art. 17 (vi)—*Applicability—Appeal under S. 45, U. P. Encumbered Estates Act—No objection as to amount of decree, but only to conditions imposed.*

Where in an appeal under S. 45, U. P. Encumbered Estates Act, the appellant does not object to the amount of the decree but only to certain conditions imposed by the Special Judge, the appeal comes under Sch. II, Art. 17 (vi) of the Court-Fees Act in that it is not possible to estimate the subject-matter of the appeal at a money value. An appeal which does not relate to the amount of the decree passed but only to the manner in which the decree can be enforced or executed falls only under Art. 17 (vi) of the second schedule to the Court-Fees Act. (*Zia-ul-Hasan and Hamilton, JJ.*) SHANTRANJI *v.* DEPUTY COMMISSIONER, KHERI. 15 Luck 321=185 I.C. 766=12 R.O. 261=1940 R.D. 26=1940 O.L.R. 46=1940 O..W.N 26=1940 A. W. R. (C.C.) 32 =A.I.R. 1940 Oudh. 183

——Sch. II, Art. 17 (vi)—Applicability—Decree against agriculturist—Direction for payment in 6 half yearly instalments—Appeal by defendant claiming instalments for 15 years—

COURT-FEES ACT (1870), Sch. II, Art. 17.

Court-fee. *See* COURT-FEES ACT, SCH. II, ARTS. 11 (a) AND 17 (vi). **1936 R.D. 236.**

——Sch .II, Art. 17 (vi)—Applicability. *See* COURT-FEES ACT, S 7 (*iv*) (*b*) AND SCH. II, ART. 17 (*vi*)—RELATIVE APPLICABILITY. **1939 O.W.N. 1055.**

——Sch. II, Art. 17 (vi)—Applicability—Partition suit—Allegation of joint possession—Denial by defendant of joint possession—Court-fee payable. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*) AND (*v*). **32 S.L.R. 124.**

——Sch. II, Art. 17 (vi)—Applicability—Suit for possession by partition—No joint possession—Property not joint family property—Court-fee. *See* COURT-FEES ACT, S. 7 (*v*) AND SCH. II, ART. 17 (*vi*). **40 P.L.R. 27.**

——Sch. II, Art. 17 (6)—Applicability—Suit for possession of temple. *See* COURT-FEES ACT, S. 7 (5) (*e*) AND SCH. II, ART. 17 (6). **1938 N.L. J. 214.**

——Sch. II, Art. 17 (vi)—*Applicability—Suit for removal of* Mutawalli *and rendition of accounts—Prayer for appointment of plaintiff in the place of the defendant—No prayer for possession.*

Where a plaintiff prays for the removal of *Mutawalli* and his appointment instead, and also prays for the rendition of accounts. but does not ask for possession at all, the suit is governed by Sch II, Art. 17 (*vi*). (*Gruer, J.*) ASALATKHAN *v.* SAMSHERKHAN. **180 I.C 958=11 R.N. 412=1938 N L.J 357=A.I.R. 1938 Nag. 537.**

——Sch. II, Art. 17 (vi)—*Contract to execute deed of trust in respect of joint properties belonging to plaintiff and defendant—Suit for specific performance—Court-fees.*

The plaintiff sued for specific performance of a contract to execute a deed of trust in favour of certain institutions in respect of certain joint properties belonging to and in possession of both the plaintiff and the defendant. Under the trust deed, both the plaintiff and the defendant were made trustees.

Held, that the suit did not come under any of the specified classes of suits for specific performance which are contemplated by S. 7 (*x*) of the Court-fees Act, that the relief claimed was not the property itself but merely specific performance of the agreement, the money value of which it was not possible to estimate, and that consequently the suit was governed by Sch. II, Art. 17 (*vi*) of the Court-Fees Act. (*S. K. Ghose and Edgley, JJ.*) BIRAJA CHARAN NANDA *v.* SAILAJA CHARAN NANDA. **I.L.R. (1938) 2 Cal. 411=181 I.C. 766=11 R.C. 849=42 C.W.N. 667=A.I.R. 1939 Cal 155.**

——Sch. II, Art. 17 (vi)—*Future interest—Cross objection in appeal—Court-fee.*

The amount of future interest cannot be determined as it depends upon the date of payment of the amount decreed, by the judgment-debtor. Therefore, a Court-fee stamp of Rs. 10 only is payable on cross-objections filed with regard to future interest. (*Jai Lal, J.*) BODA RAM *v.* DEVI DAS HARI CHAND. **163 I.C. 928=9 R.L. 65=38 P.L.R. 276=A.I.R. 1936 Lah. 668.**

——Sch. II, Art. 17 (vi)—Inapplicability—Appeal from order granting or refusing letters of administration—Court-fee payable. *See* COURT-FEES ACT, SCH. II, ART. 11. **1938 Rang. L.R. 72.**

COURT-FEES ACT (1870), Sch. II, Art. 17.

——Sch. II, Art. 17 (vi)—*Mortgage suit—Plaintiff granted instalment decree and held entitled to possession under O. 34, R. 2, C. P. Code, on defendant's failure to pay regularly—In appeal plaintiff claiming decree under O. 34, R. 4—Court-fee payable.*

In a suit on mortgage the mortgagee was granted a decree for certain sum payable in annual instalments and was held entitled to possession under O. 34, R. 2, C. P. Code, on mortgagor's failure to pay the instalments regularly. The mortgagee appealed from it claiming a decree under O. 34, R. 4, C. P. Code.

Held, that the court-fee payable in appeal was under Art. 17 (*vi*), Sch. 2. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MAKHAN SINGH *v.* LAKHMI DAS. **167 I.C. 26=9 R. Pesh. 83=A.I.R. 1937 Pesh. 31.**

——Sch. II, Art. 17 (vi)—*Plaintiff praying for being appointed as mutawallis and for ordering the defendant not to interfere with their management and worship—Proper court-fee.*

In a suit the plaintiffs prayed that they be appointed mutawallis and the defendant be ordered not to interfere with their management and worship. The suit having been dismissed, the plaintiffs preferred an appeal. On the question of proper court-fee to be paid by the appellants.

Held, that the relief claimed should not be presumed to be one for possession of the trust property, the latter part of the relief may be considered a superfluity, the case comes under Art. 17 (*vi*) of the second schedule, as it is not possible to estimate at a money value the subject-matter in dispute namely, the appointment of the plaintiffs as mutawallis in the place of the defendant. The criterion is to see whether by obtaining the particular relief claimed, the plaintiffs can obtain possession of the property by execution of the decree. A.I.R. 1934 P. 647; 19 A. 60; 8 L. 730; and 48 M.L.J. 514, Foll.; 8 M. 516; 17 I.C. 270 and 10 B. 60, Not Foll.; A.I R. 1925 M. 804; A.I.R. 1932 A. 593 and 87 I.C. 190, Dist. (*Zia-ul-Hasan and Smith, JJ.*) GAWRI SHANKAR *v.* MOHAN LAL. **171 I.C. 468=10 R.O. 124=1937 O.L.R. 555=1937 O.W.N. 1149=A.I.R. 1938 Oudh 20.**

——Sch. II, Art. 17 (vi)—Suit by Mahomedan co-owner in joint possession for partition—Court-fees. *See* COURT-FEES ACT, S. 7 (*iv*) (*b*), **A.I. R. 1939 Lah 568.**

——Sch. II, Art. 17 (vi)—*Suit for money against joint family consisting of two brothers* B *and* G*—Personal decree against* G *only but decree against both with respect to share in family property—Appeal by plaintiff praying for personal decree against* B *also—Court-fees.*

The plaintiff brought a suit for recovery of money against a joint Hindu family consisting of two brothers *B* and *G*. The Court granted a personal decree against *C* only but granted a decree against both with respect to their share in the joint family property. The plaintiff appealed praying for a personal decree against *B* also and paid court-fees of Rs. 10 on appeal.

Held, that the relief sought by plaintiff to make *B* also liable personally was impossible to be valued in money as his personal liability might be worth thousands or nothing at all. Art. 17 (*vi*) of Sch. 2, Court-fees Act therefore applied to such a case and court-fees of Rs. 10 paid on

COURT-FEES ACT (1870), Sch. II, Art. 17,

appeal was therefore sufficient. (*Almond, J.C. and Mir Ahmad, A.J.C.*) SOBHA RAM *v.* FIRM BHAINSIRAM. 171 I.C. 13=10 R. Pesh. 28 (1)= A.I.R. 1937 Pesh. 89.

——Sch. II, Art. 17 (vi)—Suit for partition of joint family property—Plaint alleging joint possession of parties—Court-fee. *See* COURT-FEES ACT, Ss. 7 (*iv*) (*b*) AND ART. 17 (*vi*). 40 P.L.R. 2.

——Sch. II, Art. 17 (vi) and S. 7 (iv) (b) and (c)—*Suit for partition—Plea by defendant that part of property does not belong to joint estate—Court-fee payable on plaint.*

The proper court-fee payable on a plaint in a suit for partition of property of which the plaintiff alleges to be in actual or constructive possession is Rs. 10 under Sch. II, Art. 17 (6) of the Court-Fees Act. A plea by the defendant that part of the property mentioned in the plaint does not belong to the joint estate does not convert the suit into one to enforce a right to share in property or into one for declaration of title and recovery of possession and consequently an *ad valorem* fee is not payable either under Cl. (*b*) or Cl. (*c*) of S. 7 (*iv*) of the Act. (*Baguley and Sharpe, JJ.*) MA MA NYUN *v.* MAUNG MYA. 1937 Rang.L.R. 447=174 I.C. 794=10 R.R. 428 =A.I.R. 1938 Rang. 76.

——Sch. II, Art. 17 (vi) and S. 7 (v)—Suit for possession of temple properties—Court-fee payable. *See* COURT-FEES ACT, S. 7 (*v*) AND SCH. II, ART. 17 (*vi*). 40 P.L.R. 113.

——(as amended in Madras), Art. 17-A—Applicability—Co-operative Societies Act, S. 42 (2) (*b*)—Order of liquidator under—Suit to declare null and void—Court-fee payable. *See* COURT-FEES ACT, S. 7 (IV-A) AND SCH. II, ART. 17-A. (1937) 1 M.L.J. 640.

——(as amended in Madras), Sch. II, Art. 17-A (1)—*Applicability—Partition suit by Hindu sons against father—Allegation that debts contracted by father are not binding on them—Prayer for injunction against creditors—Court-fee—Valuation—Prayer in respect of debts if one for declaration or injunction.*

In a suit for partition of joint family properties, the plaintiffs who were entitled to a two-thirds share as against their father, the 1st defendant, sought partition and delivery of their separate share and also an account of the income. Their father had contracted certain debts from defendants 2 to 14, the binding nature of which the plaintiffs questioned. After stating that the debts are not binding on the plaintiffs and that they should get their two-thirds share without any liability for the debts in question, they prayed that the defendants 2 to 14 might be restrained by permanent injunctions from proceeding against the properties of the plaintiffs for the debts. No suits in respect of any of the debts, except in respect of one, had been instituted by the creditors on the date of plaint nor any decrees obtained.

Held, that the relief in respect of the debts should be valued as one for a declaration under Art. 17-A (1) of Sch. II of the Court-Fees Act, as amended in Madras, as the relief which the plaintiff had to seek was for a declaration that the debts were not binding on them or their share of the properties, and as no cause of action was disclosed which could support the relief of

COURT-FEES ACT (1870), Sch. II, Art. 17-A,

injunction. The fact that the plaintiffs close to frame the relief in the form of an injunction (as a substantive relief) would not make the action any the less one for a declaration. (*Venkataramana Rao, J.*) NARAYANASWAMI *v.* SWAMINATHA IYER. 175 I.C. 823=11 R.M. 7= 1937 M.W.N. 1004=46 L.W. 484=A.I.R. 1937 Mad. 876=(1937) 2 M.L.J. 616.

——(as amended in Madras), Sch. II, Art. 17-A (1)—Applicability—Suit by creditors under S 53, Transfer of Property Act—Court-fee. *See* COURT-FEES ACT, S. 7 (IV-A) AND SCH. II, ART. 17-A (1). 1939 M.W.N. 778.

——(as amended by Madras Act, V of 1922), Sch. II, Art. 17-A—Applicability—Suit for declaration of right by survivorship to properties as joint family properties and for possession—Allegation that will left by deceased member is forgery—Court-fee payable. *See* COURT-FEES ACT, AS AMENDED BY MADRAS ACT V OF 1922, S. 7 (*iv*) (*c*) AND (*iv-A*) AND SCH. II, ART. 17-A. 70 M.L.J. 542.

——(as amended in Madras), Sch. II, Art. 17-A (1)—Applicability—Suit for partition by Hindu coparcener—Prayer for account of family property—Court-fee payable. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), S. 7 (*iv*) (*a*) AND (*b*), (*v*) AND SCH. II, ARTS. 17-A (1) AND 17-B. (1940) 1 M.L.J. 32 (F.B.).

——(as amended in Madras), Sch. II, Art. 17-A (1)—*Applicability—Suit for partition—Contention that certain mortgages are not binding.*

(*Obiter.*)—Art. 17-A (1) governs only cases where no consequential relief is prayed for. If as incidental to his remedy by way of partition, a plaintiff contends that a mortgage executed on the joint family property is not for family purposes, it cannot be said that the suit is one which no consequential relief is prayed. (*Varadachariar, J.*) MANAVEDAN *v.* MANAVEDAN. 181 I.C. 905=11 R.M. 874=1938 M.W.N. 131=A.I.R. 1938 Mad. 474.

——(as amended by Madras Act V of 1922), Sch. II, Art. 17-A—Applicability—Suit to declare razinama decree null and void—Plaintiffs minors at time of razinama represented by defendants—Court-fee—S. 7 (IV-A). *See* COURT-FEES ACT (AS AMENDED BY MADRAS ACT V OF 1922), S. 7 (IV-A) AND SCH. II, ART. 17-A. 43 L.W. 715=71 M.L.J. 383.

——(as amended in Madras), Sch. II, Art. 17-A—*Suit for declaration filed in District Munsif's Court—Transfer to Subordinate Judge's Court for trial—Decree by Sub-Court—Appeal—Court-fee payable—Decree—If decree of Munsifs' Court.*

Where a suit for a declaration without consequential relief is instituted in the first instance in a District Munsif's Court, but it is later transferred to a Subordinate Judge's Court for trial by that Court, along with another suit in that Court, and disposed of there, an appeal against the decree passed in such suit must be stamped with a court-fee stamp of Rs. 100 and not Rs. 15. The decree appealed against is a decree of a sub-Court; the fact that the suit was originally filed in the Court of the District Munsif cannot make it a decree of that Court for purposes of court-fee under Art. 17-A of Sch. II of the Court-Fees Act. (*Leach, C.J. and Krishnaswami Ayyangar,*

COURT-FEES ACT (1870), Sch. II, Art. 17-A.

J.) CHIDAMBARAM CHETTIAR, *In re.* I.L.R. (1940) Mad. 646=1940 M W.N. 268=51 L.W. 228=A.I.R 1940 Mad. 383=(1940) 2 M.L.J. 425.

——(as amended in Madras), Sch. II, Arts. 17 A (1) and 17-B—*Applicability—Mortgage—Suit to enforce—Person in possession as assignee from purchaser in execution of prior mortgage decree impleaded as defendant—Claim to priority allowed—Appellate Court negativing right of priority—Second appeal—Court-fee payable*—Ad valorem *fee—If to be paid.*

Appellant was impleaded as a defedant in a suit on a mortgage, on the ground that he was in possession of the suit property as an assignee from a purchaser at a sale in execution of a mortgage decree in a suit on a prior mortgage. He claimed priority, setting the prior mortgage as a shield. The trial Court allowed his claim to priority, but on appeal, the lower appellate Court modified the decree; priority was recognised only in respect of a third share in the property and as regards the remaining two-thirds share, be ordered a sale, directing that the sale proceeds should first be paid towards the plaintiff's claim and the balance, if any, to the appellant. Appellant preferred a second appeal paying a court-fee of Rs 15 only. It was contended that *ad valorem* fees should be paid.

Held, that there having been an order for sale already and there being no dispute as to the amount or as to the liability of the mortgaged property, the only relief that the appellant could get was a declaration of his claim to priority; all that he was seeking in appeal was to get rid of the declaration made against him by the lower Court, and to have a declaration in his favour. He was therefore entitled to value the relief under Art 17-A (1) of Sch. II of the Court-Fees Act, as amended in Madras.

Held, further, that if the case did not fall under Art. 17-A (1), the relief must be held to one incapable of valuation, under Art 17-B: and that in any case the court-fee paid was sufficient (*Venkataramana Rao, J.*) SUBBIA PANDARAM, *In re.* I.L R. (1938) Mad. 253=174 I C. 665=10 R M 735=1937 M.W.N. 672=46 L.W. 524=A.I.R. 1937 Mad. 840.

——(as amended in Madras), Sch. II, Art 17-B—Applicability—Suit by Mahomedan co-sharer—Claim to properties as his share impeaching alienation by defendant co-sharer as inoperative—Proper Court-fee. *See* COURT-FEES ACT, S. 7 (v) AND SCH. II, ART. 17 B. (1937) 1 M.L.J. 572.

——Sch. II, Art. 17-B—Applicability—Suit for partition by Hindu coparcener—Court-fee payable. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), S. 7 (*iv*) (*a*) AND (*b*), (*v*) AND SCH. II, ARTS. 17-A (1) AND 17-B. (1940) 1 M.L.J. 32 (F.B.).

——(as amended in Madras), Sch. II, Art 17-B—Applicability—Suit for possession of office of member and manager of school committee—Valuation—Court-fee. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), S. 17 (*v*) AND SCH. II, ART. 17-B. 1939 M.W.N. 720=(1939) 2 M.L J 226.

——(as amended in Madras), Sch. II, Art. 17-B—Applicability — Decree-holder purchaser obtaining symbolical delivery of part of house—

COVENANT.

Suit for partition and possession against another purchaser in physical possession—Valuation—Court-fee. *See* COURT-FEES ACT (AS AMENDED BY MADRAS ACT V OF 1922), S. 7 (*v*) AND SCH. II, ART. 17-B. 1939 M.W.N. 303=(1939) 1 M.L.J. 531.

——(as amended in Madras), Sch. II, Art. 17-B—Applicability—Suit under S. 112, Madras Estates Land Act—Valuation—Court-fee. *See* COURT-FEES ACT, SCH. I, ART. 1 AND SCH. II, ART. 17-A. (1937) 2 M.L.J. 347.

——Sch. II, Art. 22 (Punjab)—*Suit by reversioner challenging alienation of ancestral land by widow—Appeal—Court-fee payable.*

Where in a suit by a reversioner for a declaration that an alienation of a certain land by a widow following customary law would not affect his reversionary rights, the plaint alleged a special custom which restrained the widow from alienating ancestral property and stated that the land was ancestral,

Held, that, having regard to allegations in the plaint, the Court-fee leviable on an appeal by the reversioner was Rs. 20 under Art. 22 of Sch. II to the Court-Fees Act, as amended by the Punjab Court-Fees Act, VII of 1922. (*Coldstream, J.*) RAM SINGH *v.* MST. SAHIBO. I.L.R. (1938) Lah. 450=181 I.C. 426=11 R L 835=40 P.L.R. 1059 =A I.R. 1939 Lah. 58.

——(as amended in Bihar and Orissa) Sch. C, Art. 17—Applicability—Hindu widow—Alienations by—Suit by reversioners to declare invalid and not binding on reversionary body—Further prayer for decree with costs and for other reliefs open to plaintiffs—If suit for pure declaration or for declaration and consequential relief—Court-fee payable—Application for and grant of *interim* injunction restraining widow from making further alienations—Effect of, on nature of suit. *See* COURT FEES ACT (AS AMENDED IN BIHAR AND ORISSA), S. 17 (*c*) AND SCH. C, ART. 17. 20 Pat. L.T. 855.

——(as amended in Bihar and Orissa, Sch. (C), Art. 17 (iii)—Applicability and scope—Hindu widow—Alienations by—Suit by reversioner to declare invalid—Application for and granting of in terim injunction to restrain further alienations by widow—Court-fee payable. *See* COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA), S. 7 (*iv*) (*c*) AND SCH. (*c*), ART. 17 (*iii*). 6 B R. 412.

COURT OF JURISDICTION. *See* JURISDICTION.

COURT OF APPEAL.

See (1) APPEAL.
(2) C. P. CODE, O. 41.

COURT OF WARDS. *See* LOCAL COURT OF WARDS ACTS.

COURT OF WARDS ACT. *See* LOCAL ACTS

COURT SALE

See (1) EXECUTION.
(2) C. P. CODE, O. 21.

COURT'S PROCESS.

See (1) PRACTICE.
(2) C. P. CODE, S. 151.

COVENANT. *See* T. P. ACT, SS. 10, 40, 55, 72, 76 AND 108,

COVENANT, BREACH OF. *See* T. P. ACT, S. 55.

COVENANT, FOR TITLE.
See (1) C. P. CODE, O. 21, R. 93.
(2) EXECUTION SALE.
(3) T. P. ACT, SS. 52, 55.

COVENANT IN RESTRAINT OF TRADE. *See* CONTRACT ACT, S. 27.

COVENANT NOT TO ALIENATE. *See* T. P. ACT, SS. 10 AND 11.

COVENANT RUNNING WITH LAND.
See (1) LANDLORD AND TENANT.
(2) T. P. ACT, S. 40.

CO-WIDOW.
See (1) HINDU LAW—ADOPTION.
(2) HINDU LAW—WIDOW.

CREATION OF ENDOWMENT.
See (1) CHARITY.
(2) CHARITABLE ENDOWMENT.
(3) HINDU LAW—RELIGIOUS ENDOWMENT.
(4) MOHAMEDAN LAW-WAQF.

CREDITOR. *See* DEBTOR AND CREDITOR.

CREDITOR AND DEBTOR. *See* DEBTOR AND CREDITOR.

CREDITOR'S INTEREST. *See* DEBTOR AND CREDITOR.

CRIMINAL BREACH OF CONTRACT.
See (1) ACT XIII OF 1859 (WORKMEN'S BREACH OF CONTRACT ACT).
(2) PENAL CODE, SS. 490-492.

CRIMINAL BREACH OF TRUST. *See* PENAL CODE, SS. 403-409.

CRIMINAL CASE. *See* CRIMINAL TRIAL.

CRIMINAL CONSPIRACY. *See* CRIMINAL PROCEDURE CODE, SS. 120-A AND 120-B.

CRIMINAL FORCE. *See* PENAL CODE.

CRIMINAL INTIMIDATION. *See* PENAL CODE, S. 506.

CRIMINAL LAW AMENDMENT ACT (XXIII OF 1932), S. 7—*If stands repealed by Repealing and Amending Act of 1937—General Clauses Act (XIX of 1936), S. 6-A—Effect of.*

The Criminal Law Amendment Act of 1932 has not been repealed in its entirety by the Repealing and Amending Act (XX of 1937). The effect of S. 4 of the latter Act and S. 6-A of the General Clauses Act (XIX of 1936) is to leave the Criminal Law Amendent Act of 1932 intact so far as S. 7 is concerned. (*Leach, C. J. and Abdur Rahman, J.*) ARUNAGIRINATHAR *v.* EMPEROR. **I. L R. (1939) Mad. 87=179 I.C 605=11 R M. 603 =40 Cr.L J 224=1938 M. Cr. C. 317=1938 M. W.N. 1105 (2)=48 L W. 813=A.I.R. 1939 Mad. 21=(1938) 2 M.L J. 863.**

——**S. 6**—'Court constituted under any law other than this Code'—Panchayat under U. P. Village Panchayat Act—If such a Court. *See* U. P. VILLAGE PANCHAYAT ACT, S. 71. **1939 O.W.N. 231.**

——**S. 7**—Offence under—Abetment of—If punishable. *See* PENAL CODE, S. 41. **(1938) 2 M.L.J. 863.**

——**S. 7 (1) (a)**—*Applicability—Offence against public official.*

There is no justification for the contention that the offence contemplated by S. 7 (1) (*a*) of the **CR. P. CODE (1898), S. 1.**

Criminal Law Amendment Act of 1932 should go unpunished when it is committed in respect of a public official. (*Leach, C. J. and Abdur Rahman, J.*) ARUNAGIRINATHAR *v.* EMPEROR. **I.L R. (1939) Mad. 87=179 I.C. 605=11 R.M, 603=40 Cr.L.J. 224=1938 M.Cr.C 317=1938 M.W.N. 1105 (2) =48 L.W 813=A.I.R. 1939 Mad. 21=(1938) 2 M.L.J. 863.**

CRIMINAL PROCEEDINGS.
See (1) CRIMINAL TRIAL.
(2) JUDICIAL PROCEEDINGS.

CRIMINAL PROCEDURE CODE (V OF 1898)—*Interpretation—No presumption that principles of English Criminal Law were intended to be adhered to.*

In construing the provisions of the Code in which the procedure to be followed has been detailed, it need not be assumed that the principles of English Criminal Law either substantive or procedural, were intended to be adhered to. *Riel* v. *Queen,* (1885) 10 A.C. 675, Rel. on. (*Derbyshire, C.J. Mukerji, Panckridge, M. C. Ghose and Bartley, JJ.*) HARIHAR SINGH *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 711=163 I.C. 9=8 R.C. 698=37 Cr.L.J. 758=40 C.W.N. 876=63 C.L.J. 307=1936 Cr.C. 583=A.I.R. 1936 Cal. 356 (F.B.).**

——*Police regulations—If can alter Cr. P. Code.*

The police regulations are a volume of orders by a local government and there is no provision in the Cr. P. Code, giving the local government power to issue orders for carrying out the provisions of Cr. P. Code. The Cr. P. Code, cannot therefore be modified by any orders of a local government in a departmental Code. (*Bennet, J.*) MOHAMMAD YAKUB *v.* EMPEROR. **1938 A. Cr.C. 79=177 I.C. 867=1938 A.L.R. 794=11 R.A. 235=39 Cr.L.J. 971=1938 A.W.R. (H.C.) 471=1938 A.L.J. 782=A.I.R. 1938 All. 534.**

——**S. 1 (2)**—Scope and effect—Village police patel—Prosecution of—Sanction of Government under S. 197—Necessity. *See* CR. P. CODE, S. 197. **40 Bom.L.R. 1106.**

——**S. 1 (2)**—*'Specific provision'—Meaning.*

(Per *Braund, J.*) What the words "specific provision' occurring in S. 1 (2) of the Cr. P. Code, really mean is, that the particular provision of the Cr. P. Code must, in order to 'affect' the 'Special.....law', clearly indicate, *in itself and not merely by implication* to be drawn from the statute generally, that the 'special law' in question is to be affected, without necessarily referring to that 'special law' or the effect on it intended to be produced in express terms. While requiring something less than what is 'express', they nevertheless require something which is plain, certain and intelligible and not merely a matter of inference or implication to be drawn from the statute generally. (*Collister, Allsop and Braund, JJ.*) BALDEO *v.* EMPEROR. **I.L.R. (1940) All. 396=188 I.C. 562=13 R.A. 48=1940 A. Cr.C. 57=41 Cr.L.J. 627=1940 A.L.J. 241= 1940 AW.R. (H.C.) 229 (F.B.)=A.I.R. 1940 All. 263.**

——**S. 1 (2)**—"Special law"—Evidence Act—If special law. *See* EVIDENCE ACT, S. 27. **50 L.W. 318=(1939) 2 M.L.J. 455.**

CR. P. CODE (1898), S. 4.

———**S. 4 (1) (h)**—"Complaint"—Meaning of —Petition to Magistrate alleging suppression of finding of treasure trove. *See* MALICIOUS PROSECUTION—"PROSECUTION". **1939 M.W.N. 318.**

———**S. 4 (1) (h)**—*'Complaint'—Report of non-cognizable offence by Police-officer.*

When a Police-officer investigates a non-cognizable case under the orders of a Magistrate, the report which he makes at the end of his investigation is of the same nature as a report made under S. 157, Cr. P. Code, and such a report being a police report is not a 'complaint'. But if a Police-officer acting without instructions from a Magistrate reports a non-cognizable offence to a Magistrate with a view to the Magistrate taking action this is a complaint. (*Baguley, J.*) JAGDEO PANDAY *v.* N. C. HILL. **1938 Rang.L.R. 150 =176 I.C. 694=11 R.R. 74=39 Cr.L.J. 776= A.I.R. 1938 Rang. 257.**

———**S. 4 (1) (h)**—Complaint—Substantiation on oath before Magistrate of allegations in petition to Premier. *See* CR. P. CODE, S. 250—APPLICABILITY. **1939 A.W.R. (C.C.) 43=1939 O.W.N. 125.**

———**S. 4 (1) (h)**—*'Complaint'—Application under S.* 552.

An application by a person to a District Magistrate stated that the husband of his niece came to his house and took her away from that house where she was staying with him. The relief which was asked by the application was that she should be set at liberty and taken from the custody of her husband because there was an apprehension that he might ill-treat her.

Held, that the application was one under S. 552, Cr. P. Code, and was not a criminal complaint. (*Bennet, J.*) DALPAT RAI *v.* EMPEROR. **163 I.C. 609=9 R.A. 42=37 Cr.L.J. 857=1936 A.W.R. 396=1936 A.Cr.C. 109=1936 Cr.C. 614 =1936 All.L.R. 620=1936 A.L.J. 592=A.I.R. 1936 All. 469.**

———**S. 4 (1) (h)**—*"Complaint"—Challan of cognizable offence—If amounts to.*

The definition of complaint in S. 4 (*h*), Cr. P. Code, is wide enough to include a report of a non-cognizable offence. But the challan of a cognizable offence is clearly not complaint as defined by S. 4 (*h*). (*Gruer, J.*) EMPEROR *v.* BABULAL. **I.L.R. 1936 Nag. 50=162 I.C. 308= 8 R.N. 258=37 Cr.L.J. 587=19 N.L.J. 120= 1936 Cr.C. 551=A.I.R. 1936 Nag. 86.**

———**S. 4 (1) (h)**—*"Complaint"—Presence of party complaining—If essential.*

The definition of a complaint includes "an allegation made in writing" and does not in itself necessitate the presence of the complainant. 22 Bom. 949 and 7 A.L.J. 618, Dist. (*Middleton, J.C. and Almond, A.J.C.*) HIDAYATULLAH *v.* EMPEROR. **162 I.C. 140=8 R.Pesh. 189=37 Cr. L.J. 604=1936 Cr.C. 222=A.I.R. 1936 Pesh. 66.**

———**S. 4 (1) (h)**—*"Complaint" — What amounts to.*

A document addressed to a Magistrate containing an allegation that an offence has been committed and ending with a prayer that the culprits should be suitably dealt with is a "complaint" within the definition of that term contained in S. 4, Cr. P. Code. It does not cease to be a complaint and become an executive application merely because it also contains a prayer that the case should be investigated by a superior police officer on the ground that the "local" police were hostile to the complaint and under the influence of the principal accused. (*Blacker, J.*) KANIYA RAM *v.* CHANAN MAL. **188 I.C. 524= 13 R.L. 33=41 Cr.L.J. 618=42 P.L.R. 134=A. I.R. 1940 Lah. 208.**

CR. P. CODE (1898), S. 10.

———**S. 4 (1) (1)**—*Investigation—If confined to proceeding under Code.*

Per *Khundkar, J.*—A proceeding by a police officer for the collection of evidence would answer the definition of investigation only if it were a proceeding under the Code. Consequently, neither an investigation by the customs authorities under the Sea Customs Act, nor an investigation by the Calcutta Police who have no power to conduct proceedings under the Code for the collection of evidence since the provisions of Chapter XIV, have not been extended to the police in Calcutta, would satisfy the definition of investigation in the Code. (*Khundkar and Sen, JJ.*) K. HOSHIDE *v.* EMPEROR. **I.L.R. (1940) 1 Cal. 231=186 I.C. 486=12 R.C. 510=41 Cr.L.J. 329 =44 C.W.N. 82=A.I.R. 1940 Cal. 97.**

———**Ss. 4 (1) (j) 439 and 528-B**—*Construction and Scope—"European British subject"—Omission to claim trial as European British Subject—Trial and conviction by trial Court and appellate Court in Coorg as ordinary subject—Right of accused to apply in revision to High Court—Right of trial as European British subject—If can be claimed or asserted—Coorg Code, S.* 16.

The words "European British Subjects" in S. 4 (*j*) of the Cr. P. Code, mean European British Subjects who have claimed to be dealt with as such. The same meaning must be given to the same words occurring in S. 16 of the Coorg Code when therefore an European British Subject never claims to be dealt with as such before the trial or appellate Court, and is tried as an ordinary subject and convicted by the District Magistrate of Coorg the conviction being confirmed on appeal by the Sessions Judge of Coorg, a revision application is not maintainable in the High Court under S. 439, Cr. P. Code. The only revision application which is competent to the accused is one to the Judicial Commissioner of Coorg who is the "highest Court of criminal appeal or revision" for the Coorg locality within the meaning of S. 4 (*j*), Cr. P. Code. The omission on the part of the accused to claim the right to be tried as an European British Subject precludes him from bringing to the notice of the High Court or asserting in revision before the High Court that he is an European British Subject, by reason of the provisions of S. 528-B of the Cr. P. Code, because proceedings in revision are only a subsequent stage of the same case and not. (*Lakshmana Rao and K. S. Menon, JJ.*) BABINGTON, *In re.* **I.L.R. (1937) Mad. 339= 167 I.C. 160=9 R.M. 430=38 Cr.L.J. 336=1936 M.Cr.C. 386=1936 M.W.N. 1091=44 L.W. 755 =A.I.R. 1937 Mad. 14=71 M.L.J. 827.**

———**S. 10**—*District Magistrate invested with powers under—Position of.*

Merely because the District Magistrate has been invested with certain powers under S. 10, it does not follow that he has not other powers

CR. P. CODE (1898), S. 10.

which are not contemplated by the Cr. P. Code. He is in addition the Collector of the District. He is also the District Officer and in those capacities he has to perform many functions which are not covered by the Cr. P. Code. (*McNair and Khundkar, JJ.*) BEJOY KRISHNA DEB *v.* SHYAM NARAIN. **I.L.R. (1939) 2 Cal. 532=187 I.C. 310=12 R.C. 575=41 Cr.L.J. 442=A.I.R. 1940 Cal. 30.**

——**S. 10 (2)**—Scope—Additional District Magistrate—Jurisdiction to try offence under Child Marriage Restraint Act—If to be read with S. 8 of latter Act. *See* CHILD MARRIAGE RESTRAINT ACT, S. 8. **(1937) 1 M.L.J. 498.**

——**Ss. 12 and 107**—*Sub-divisional magistrate—Limits of jurisdiction—Proceedings under S.* 107 *against person in another sub-division if can be taken.*

The essence of the sub-divisional system is that a sub-divisional magistrate should be responsible for his own sub-division and nothing else. A sub-divisional magistrate has no jurisdiction to take cognizance of matters outside the local area within which, he has been appointed by the District Magistrate to act. So where proceedings are taken before a sub-divisional magistrate, under S. 107, against a person living outside the jurisdiction of that sub-divisional magistrate, the proceedings are without jurisdiction and have to be quashed. (*Gruer, J.*) SYED ALI *v.* EMPEROR. **I.L.R. (1939) Nag. 158=176 I.C. 784=11 R.N. 79=39 Cr.L.J. 810=A.I.R. 1938 Nag. 448.**

——**S. 13**—Appointment under—What may amount to. *See* CR. P. CODE, S. 529 (*f*). **42 C. W.N. 246.**

——**S. 15**—*Case of defamation—Trial by Honorary Magistrates—Propriety of.*

Cases of defamation are technical and ordinarily should not be tried by a Bench of Honorary Magistrates. (*Weston.*) GULAB CHAND *v.* GADH MAL. **1937 A.M.L.J. 121.**

——**S. 28**—*Scope—If subject to S.* 30 *and Schedule.*

S. 28, Cr. P. Code, and the Schedule to the Code must obviously be read together, and S. 28 is subject among others, to S. 30 of the Code. (*Gruer, J.*) PRITHVINATH *v.* EMPEROR. **I.L.R. (1938) Nag. 248=175 I.C. 935=11 R.N. 18=39 Cr.L.J. 660=20 N.L.J. 151=A.I.R. 1938 Nag. 56.**

——**S. 29-B**—Scope—Offence under S. 130, Railways Act—Magistrate not empowered under Sch. II—Competency to try. *See* RAILWAYS ACT, S. 133. **30 S.L.R. 9.**

——**S. 29-B**—Trial of juvenile offender—Magistrate not empowered by Local Government—Jurisdiction. *See* REFORMATORY SCHOOLS ACT, S. 8. **1936 A.L.J. 957=1936 A.W.R. 735.**

——**S. 30**—*Magistrate empowered under—Absence on tour—Another Magistrate acting as substitute—Legality.*

The practice under which one Magistrate acts in cases which have not reached the stage of evidence as a substitute for another who has been specially empowered under S. 30, Cr. P. Code, is legally unwarranted and must cease. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. **1936 A.M.L.J. 85.**

CR. P. CODE (1898), S. 35.

——**Ss. 30, 32 (2) and 34**—*Magistrate specially empowered—Power to pass sentence of whipping in addition to maximum sentence of 7 years' imprisonment—Offence under S.* 326, *I. P. Code—Whipping (Burma Amendment) Act (VIII of* 1927), *S.* 3.

A Magistrate who is specially empowered under S. 30, Cr. P. Code, may pass a sentence of whipping in addition to the maximum sentence of seven years' imprisonment for the same offence, by virtue of the provisions of S. 32 (2), Cr. P. Code, if the offence is punishable with whipping in addition to any other punishment. A person who commits an offence under S. 326, I. P. Code, may be punished with whipping in addition to any other punishment to which he may be liable, in view of S. 3 of Burma Act, VIII of 1927. He may, therefore, be sentenced to a term of imprisonment not exceeding seven years and in addition to a sentence of whipping. (*Roberts, C.J. and Dunkley, J.*) NGA KYAN *v.* EMPEROR. **14 Rang. 662=168 I.C. 975=38 Cr.L.J. 670=9 R.R. 380=A.I.R. 1937 Rang. 183.**

——**S. 30**—Scope—If governs S. 28. *See* CR. P. CODE, S. 28. **20 N.L.J. 151.**

——**Ss. 32 and 33**—*Limit as to substantive sentence—If affects power to pass sentence of imprisonment in default of payment of fine.*

It is deducible from the provisions of Ss. 32 and 33, Cr. P. Code, that where a Magistrate has power to pass a sentence of imprisonment as well as of fine the limit placed on the term of the substantive sentence of imprisonment does not affect his power of passing a sentence of imprisonment in default of payment of time. (*Mya Bu, J.*) KING *v.* PO HTWA. **1940 Rang.L.R. 223=189 I.C. 627=41 Cr.L.J. 768=13 R.R. 53=A.I.R. 1940 Rang. 171.**

——**S. 35**—*Applicability—Sentences of imprisonment in default of fine—Power of Court to direct concurrent running of.*

A criminal Court is not competent to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. Under S. 35 of the Cr. P. Code, such a direction can be given only in respect of sentences of imprisonment or transportation. (*Pandrang Row, J.*) KONDA MOOPAN, *In re.* **I.L.R. (1937) Mad. 362=10 R.M. 77=45 L.W. 87=169 I.C. 607=88 Cr.L.J. 796 (2)=1937 M.Cr.C. 36=1937 M.W.N. 52=A.I.R. 1937 Mad. 406=(1937) 1 M.L.J. 74.**

——**S. 35**—*Conviction for theft and mischief—Separate sentences—Legality.*

Where the accused who stole a bullock from the jungle, where it was left to graze by its master, and then killed it for food, is convicted for the offences of theft and mischief, the imposition of separate sentences is legal and justified. (*Mosely, J.*) PAW DIN *v.* THE KING. **1938 Rang.L.R. 63=175 I.C. 515=10 R.R. 503=39 Cr.L.J. 607=A.I.R. 1938 Rang. 138.**

——**S. 35**—*Scope—House-breaking with intent to commit theft and theft following—Separate and consecutive sentences—Legality—Penal Code, S.* 71.

As S. 71, Penal Code, now stands and as S. 35, Cr. P. Code, now stands amended, they do not restrict the passing of separate sentences for house-breaking with intent to commit theft and

CR. P. CODE (1898), S. 35.

the commission of theft which follows it. There can be no doubt that these two separate offences, though they form part of one transaction, can be punished with separate and consecutive sentences. (*Davis, J.C.*) BAIJNATHSING *v.* EMPEROR. **I.L.R. (1939) Kar. 378=181 I.C. 45=11 R.S. 202 =40 Cr.L.J. 466=A.I.R. 1939 Sind 76.**

———(as amended in 1923), S. 35—*Scope—Separate sentences—Conviction under Ss.* 457 *and* 380, *I. P. Code—Separate sentences—Legality of —Interference by appellate Court.*

Under S. 35, Cr. P. Code, as amended in 1923, there is nothing to prevent a Court from passing separate sentences for offences under Ss. 457 and 380, I. P. Code, as these two are separate offences. If the appellate Court finds that the trial Court has wrongly passed two separate sentences in a case, but the sentences taken together are not excessive, the appellate Court can consolidate them; likewise it can reduce the same if it thinks the same excessive. (*Noor and Varma, JJ.*) IDRIS *v.* EMPEROR. **183 I.C. 217=5 B.R. 907= 29 Pat.L.T. 736=12 R.P. 121=40 Cr.L.J. 751= 1939 P.W.N. 35=A.I.R. 1939 Pat. 349.**

———Ss. 35 and 397—Sentences of imprisonment in default of fines—If can be concurrent. *See* CR. P. CODE, SS. 397 AND 35. **I.L.R. (1940) Lah. 143.**

———S. 35—*Separate sentences—Legality—Offences, if need be distinct.*

It is not necessary under S. 35, Cr. P. Code, as amended in 1923, that in order to give separate punishments the offences should be distinct, and a man can be convicted of and separately punished for any two offences, subject to the provisions of S. 71, I. P. Code. (*Mosely, J.*) PAW DIN *v.* THE KING. **1938 Rang.L.R. 63=175 I.C. 515= 10 R.R. 503=39 Cr.L.J. 607=A.I.R. 1938 Rang. 138.**

———S. 35—*Separate sentences on conviction for separate offences—Omission to specify how sentences are to run—Effect—If consecutive sentences.*

Where the trying Magistrate convicts the accused under two sections of the Penal Code and passes two separate sentences of imprisonment, but does not specify that the two sentences are to run consecutively it must be held that they have been ordered to run consecutively under S. 35, Cr. P. Code. (*Noor and Varma, JJ.*) IDRIS *v.* EMPEROR. **183 I.C. 217=5 B.R. 907=20 Pat.L. T. 736=12 R.P. 121=40 Cr.L.J. 751=1939 P. W.N. 35=A.I.R. 1939 Pat. 349.**

———S. 35, Proviso (a)—*Concurrent sentences not exceeding period of fourteen years—If can be passed.*

The Proviso (*a*) to S. 35, Cr. P. Code, aims at the prohibition of the giving of consecutive sentences in one trial beyond the period of fourteen years. If the sentences given in respect of two or more convictions in one trial are directed to run concurrently instead of consecutively and the period of such concurrent sentence does not exceed fourteen years, the Proviso is not in any way infringed. (*Ba U, J.*) NGA MYA GAI *v.* EMPEROR. **171 I.C. 912=10 R.R. 201=39 Cr.L. J. 28 (1)=A.I.R. 1937 Rang. 391.**

———S. 37—Scope—Non-compliance with S. 514 —Order forfeiting bail bond—Omission to call upon sureties to show cause—Defect—If curable.

CR. P. CODE (1898), S. 54.

See CR. P. CODE, S. 514. **185 I.C. 598=6 B.R. 221.**

———Ss. 42 and 59—*Scope and distinction between—Sub-Inspector authorising private individual to arrest person not proclaimed offender—Arrest—Legality.*

A sharp distinction must be drawn between the provisions of Ss. 42 and 59, Cr. P. Code. In S. 59 is included a proclaimed offender, but in order that a man may be a proclaimed offender, it is not sufficient for a Sub-Inspector to say or write that he is a proclaimed offender. It is a matter for the Court as laid down in S. 87 and the following sections. Under S. 59 a private person may himself arrest; under S. 42 of the Code he must assist a Police Officer to arrest but the Police Officer must be present before he can demand the private person's aid. S. 42 does not allow the wholesale delegation by the police of their duties to a private individual and authorize him to arrest an offender. Where a Sub-Inspector gives in writing an authority to a private individual to arrest a person whom he states to be a proclaimed offender but who is not in fact so, the arrest of such person by the private individual is illegal and cannot be justified, under S. 42, Cr. P. Code. (*Davis, J.C. and Haveliwala, A.J.C.*) EMPEROR *v.* HAFIZ MURID DOOD. **32 S.L.R. 41=10 R.S. 116 =171 I.C. 672=38 Cr.L.J. 1101=A.I.R. 1937 Sind 254.**

———S. 45—*Proclaimed offender—Meaning—Proclamation not made strictly according to S.* 87.

If a proclamation has been made in respect of an accused person under S. 87, Cr. P. Code, although it is not made strictly in accordance with the terms of that section, it is sufficient to constitute him a proclaimed offender under S. 45, Cr. P. Code. (*Zia-ul-Hasan and Smith, JJ.*) EMPEROR *v.* RAM SARUP. **172 I.C. 530=39 Cr. L.J. 154=1938 A.Cr.C. 1=1938 O.L.R. 8=1938 O.A. 7=10 R.O. 182=1938 O.W.N. 7=A.I.R. 1938 Oudh 80.**

———S. 45—Village Munsif sending report under —Nature of capacity. *See* CR. P. CODE, S. 117—APPLICABILITY. **A.I.R. 1937 Mad. 578.**

———S. 54—*Powers of arrest under—Applicability—Non-cognizable offence.*

S. 54, Cr. P. Code, authorises the arrest without warrant (1) of a person concerned in a cognizable offence or credibly alleged to have been so concerned, and (2) of any person who has been proclaimed as an offender under the Code. But the section does not apply when the offence for which the alleged offender is sought to be arrested is one which is non-cognisable. (*Rowland, J.*) RAGHUNI PRASAD MAHTO *v.* EMPEROR. **160 I.C. 604=8 R.P. 370=37 Cr.L.J. 318=17 Pat.L.T. 81 =1936 Cr.C. 273=A.I.R. 1936 Pat. 249.**

———S. 54—*Village* chaukidar—*If police officer —Powers of arrest—Arrest of person by* chaukidar *on mere oral direction of police Sub-Inspector —Legality—Rescue of such person—Hurt caused* to chaukidar—*Offence—Penal Code, Ss.* 225 *and* 323.

A village *chaukidar,* is not a "police officer" within the meaning of S. 54, I. P. Code, and has not the powers of arrest conferred on a police officer by S. 54; though he has the limited powers of arrest under S. 27 of the Bihar and Orissa Village Administration Act. Therefore the arrest

by him of a person against whom no process has issued on the mere oral direction of a Police Sub-Inspector is unlawful and the custody by the *chaukidar* of such person is illegal. If any person therefore rescues the arrested person from custody of the *chaukidar* he cannot be convicted for an offence under S. 225, I. P. Code which constitutes a special offence and which cannot be committed unless the custody is lawful. Although the *chaukidar* might act in good faith, that would not prevent his act in arresting and detaining the person arrested from being unlawful. Nor can a person be held guilty of an offence of hurt under S. 323, I. P. Code, if in the course of rescuing the arrested person he causes hurt to the chaukidar. Since the custody of the chaukidar is unlawful, the right of private defence of the person of the arrested person comes into play and unless the right of private defence is exceeded. (*Harries, C.J. and Meredith, J.*) JOGRAJ *v.* EMPEROR. **1940 P.W.N. 687.**

———**S. 54 (1), Para. 7**—Jurisdiction of Police to arrest—Warrant issued by Magistrate of Native State—Sufficiency. *See* INDIAN (FOREIGN JURISDICTION) ORDER IN COUNCIL, 1902. **1938 P.W.N. 869.**

———**Ss. 54 and 56**—*Applicability and relative scope—Arrest without warrant.*

S. 56, Cr. P. Code, applies to cases where a police officer is acting not on his own information but on the order of his superior, but where facts exists which do attract the application of S. 54 itself there appears no reason why a police officer should not act under that section even if the formalities required by S. 56 are not complied with. Where therefore the police constables knew of their ownselves and also on information supplied by the head constable and the complainant that the complainant had made a complaint of house-breaking against the accused, they could just as well have acted under S. 54 as well as under S. 56 if they had had the order in writing required by S. 56, and the fact that they did not have this order in writing would not preclude the application of S. 54 when the provisions of that section were satisfied. (*Davis, J.C. and Haveliwala, A.J.C.*) ACHAR BILAWAL *v.* EMPEROR. **32 S.L. R. 63=172 I.C. 149=10 R.S. 137=39 Cr.L.J. 107 A.I.R. 1937 Sind 308.**

———**Ss. 54 and 56**—*Relative scope—Power of arrest under S.* 54—*If limited by issue of written order under S.* 56—*Substance of order not given out to accused before arrest—Arrest if illegal.*

The issue of a written order under S. 56, Cr. P. Code, does not limit the power to arrest conferred by S. 54 of the Code; and an arrest effected cannot be held to be illegal on the ground that the substance of the command certificate is not given out to the accused before arrest as required by S. 56. (*Varma and Madan, JJ.*) JIOO MIAN *v.* EMPEROR. **16 Pat. 763=1938 P.W.N. 216=19 Pat.L.T. 247=175 I.C. 335=4 B.R. 584=39 Cr. L.J. 563=10 R.P. 623=A.I.R. 1938 Pat. 229.**

———**Ss. 54 and 56**—*Relative scope—Complaint of cognizable offence—Oral order by Police Sub-Inspector to constable to arrest offender—Arrest —Legality—Obstruction to such arrest—Offence —Penal Code, S.* 353.

A girl of three years was run over and injured by a cart on a public road, and while the police

Sub-Inspector was recording the complaint of the child's father he was informed that the cartman concerned had refused to stop the cart when told to do. The Sub-Inspector thereupon ordered two of his constables to go and bring the cartman to him. He did not however send a written order to arrest. The constables went, but the cartman refused to stop his cart; and when they attempted to arrest him, accused intervened and obstructed the constables from making the arrest and told the cartman to proceed without submitting to the orders of the police constables. Accused was charged under S. 353, I. P. Code and convicted. It was urged on behalf of the accused, that there being no written order to arrest as required by S. 56, Cr. P. Code, the arrest was illegal, and the accused was consequently not guilty of any offence.

Held, (1) that the constables had power to arrest the cartman under S. 54, firstly, because the cartman was concerned in a cognizable offence, a reasonable complaint had been made against him and this was so to the knowledge of the constables who were present when the complaint was made, (2) that S. 54, was not controlled by S. 56 of the Code, and hence the absence of a written order of arrest did not make the arrest otherwise than legal, and there was no reason for restricting the operation of S. 54, firstly, to cases where a police officer was acting on his own initiative and without orders; (3) and that the accused was therefore guilty of an offence under S. 353, I.P. Code, and was rightly convicted. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* KESHAVLAL HARILAL. **I.L.R. (1937) Bom. 127=166 I.C. 632=9 R.B. 249=38 Cr.L.J. 267=38 Bom.L.R. 971=A.I.R. 1937 Bom. 56.**

———**S. 55**—*Arrest under—Duty of police to give option of bail to arrested persons.*

The police acting under S. 55, Cr. P. Code, are not bound to give the persons arrested the option of bail. There is no indication in the section that the police, after arrest, are bound either to inform the persons arrested that they are entitled to be released on bail, or to release them on bail. (*Lort Williams and Jack, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* JAHIR ALI. **63 Cal. 189=164 I.C. 1007=9 R.C. 331=37 Cr.L.J. 1070.**

———**S. 56**—Direction to arrest—Constable asked by Sub-Inspector to bring person to thana —If direction for arrest. *See* PENAL CODE, Ss. 224, 225 AND 353. **1940 P.W.N. 149.**

———**S. 56**—*Police constable deputed by station house officer to arrest—Authority in writing—Necessity.*

Where a police constable to whom no complaint had been made and who had not received any credible information independently, but who was only acting under the definite instructions of his station house officer to arrest without a warrant, he should be in possession of an order in writing, and if without it he has no authority to arrest. (*Grille, J.*) MAROTI BANSI TELI *v.* EMPEROR. **I.L.R. (1939) Nag. 488=184 I.C. 231=12 R.N. 101=40 Cr.L.J. 905=1939 N.L.J. 101=A.I.R. 1939 Nag. 95.**

———**S. 56**—Scope—Issue of order under—Effect on power of arrest under S. 54. *See* CR. P. CODE, Ss. 54 AND 56. **16 Pat. 763.**

CR. P. CODE (1898), S. 56.

———**Ss. 56 and 54**—*Legality of arrest.*

An arrest cannot be legally made under S. 56, Cr. P. Code, if the provisions of that section are not complied (*i.e.*), if the officer making the arrest does not notify the substance of the order. Nor can there be a legal arrest under S. 54, Cr. P. Code, if the officer making the arrest has no information or suspicion that the person to be arrested is concerned in a cognizable offence. (*Henderson and Akram, JJ.*) RAJA MIA *v.* EMPEROR. **189 I.C. 480=13 R.C. 106=41 Cr.L.J. 744=44 C.W.N. 502=A.I.R. 1940 Cal. 321.**

———**S. 59**—Scope—Distinction from S. 42. *See* CR. P. CODE, SS. 42 AND 59. **A.I.R. 1937 Sind 254.**

———**S. 64**—*Construction—'Offence', if includes offence under S.* 171-D—*I. P. Code.*

The word 'offence' in S. 64, Cr. P. Code, is wide enough to include an offence under S. 171-D, I. P. Code. (*Mulla, J.*) BRAHMANAND MISRA *v.* EMPEROR. **I.L.R. (1939) All. 924=12 R.A. 273 =184 I.C. 662=1939 A.W.R. (H.C.) 696=1939 A.Cr.C. 164=41 Cr.L.J. 85=1939 A.L.J. 779= A.I.R. 1939 All. 682.**

———**S. 75**—*Warrant—Contents.*

The Cr. P. Code does not define a warrant but in Sch. V, Form No. 2, the form of a warrant is given. The form shows that it is an order addressed to a certain person directing him to arrest the accused and to produce him before the Court. It may also have a further provision for admitting the accused to bail. If the person to whom the warrant is addressed is a Magistrate or Police Officer, he may endorse it to some one serving under him. (*Bennet, J.*) JAGADISH NARAIN BAJPAI *v.* EMPEROR. **187 I.C. 682=12 R.A. 575= 41 Cr.L.J. 500=1940 All.Cr.C. 18=1940 A.W.R. (H.C.) 79=1940 A.L.J. 104=A.I.R. 1940 All. 178.**

———**S. 75**—*Warrant under—Execution outside British India.*

Ss. 72 (1), 1 (2), 82 and 83 when read together make it clear and beyond all question that the warrant contemplated in S. 75 is a warrant issued by a Court in British India and that such warrant is executable at any place in British India within or without the local limits of the jurisdiction of the Court issuing the warrant. There is no provision in the Criminal Procedure Code authorising the issue of a warrant to be executed at any place outside British India. (*Lobo, J.C. and O'Sullivan, J.*) EMPEROR *v.* KARIMBUX RAHMATAN. **A.I.R. 1940 Sind 154.**

———**S. 75 (2)**—*Cancellation of warrant—Formal order—Necessity.*

S. 75 (2), Cr. P. Code, does not, in the case of the cancellation of warrant, require, that there should be a formal order on the record to that effect. Where a Magistrate in Benares wrote to the District Magistrate in Bombay asking him to return the warrants sent to him unexecuted, it was held that the warrants were cancelled by that letter. (*Bennet, J.*) JAGDISH NARAIN BAJPAI *v.* EMPEROR. **187 I.C. 682=12 R.A. 575=41 Cr.L.J. 500=1940 All.Cr.C. 18=1940 A.W.R. (H.C.) 79=1940 A.L.J. 104=A.I.R. 1940 All. 178.**

———**Ss. 76 and 90**—Warrant, issue of—Discretion—Endorsement under S. 76, if necessary. *See*

CR. P. CODE (898), S. 83.

PENAL CODE, SS. 353 AND 225. **1938 A.L.J. 1229 =1939 A.W.R. (H.C.) 63.**

———**S. 80**—*Compliance with—Presumption.*

There being a presumption that all official acts are properly performed it is not necessary for the prosecution to prove under S. 80 that the police officer notified the substance of the warrant to the accused or showed him the warrant. (*Almond, J.C.*) ZARKHAN NURKHAN *v.* EMPEROR. **188 I.C. 78=12 R. Pesh. 37=41 Cr.L.J. 543= A.I.R. 1940 Pesh. 10.**

———**S. 80**—Warrant of arrest—Showing of—Necessity. *See* PENAL CODE, S. 99. **1937 A.L.J. 1334=1938 A.W.R. (H.C.) 17.**

———**Ss. 82 and 83**—*Magistrate in British Baluchistan or Baluchistan Agency Territories—Power to issue warrant to be executed outside British Baluchistan or Baluchistan Agency Territories.*

S. 82 as applied in British Baluchistan empowers a Magistrate in British Baluchistan to issue a warrant of arrest which may be executed at any place in British Baluchistan. Just as a Court of British India has no power under the Criminal Procedure Code to issue a warrant for execution at a place outside British India, so a Magistrate in British Baluchistan has no power under the Criminal Procedure Code as applied to British Baluchistan to issue a warrant to be executed at any place outside British Baluchistan, and the same argument applies with equal force to a Court in the Baluchistan Agency Territories. The mere fact that the Criminal Procedure Code has been extended in its application to British Baluchistan and the Baluchistan Agency Territories does not authorize a Court in British Baluchistan or in the Baluchistan Agency Territories to issue a warrant for the arrest of a person in British India. Though the Criminal Procedure Code has been extended in its application to British Baluchistan and to the Baluchistan Agency Territories, when the Criminal Procedure Code is read by a Magistrate in British Baluchistan or in the Baluchistan Agency Territories, it must be read as if all references to British India in the Code of Criminal Procedure were references to British Baluchistan and the Baluchistan Agency Territories. (*Lobo, J.C. and O'Sullivan, J.*) EMPEROR *v.* KARIMBUX RAHMATAN. **A.I.R. 1940 Sind 154.**

———**S. 83** — *Applicability — Magistrate of Native State—Jurisdiction to issue warrant of arrears against persons in British India.*

A Magistrate of a Native State cannot issue a warrant directing the Police or officials in British India to arrest a person accused of an offence committed within the Native State. S. 83, Cr. P. Code, only contemplates cases where a Magistrate in British India issues a warrant for the arrest of a person in some place in British India outside his jurisdiction. The fact that the Native State in question has adopted the Cr. P. Code, does not give the authorities of that State any right to issue a warrant and obtain the arrest of a person in the manner directed by S. 83, Cr. P. Code. S. 83 cannot apply to the State in its relation with British India, since it is a State wholly outside British India. (*Harries, C.J. and Agarwala, J.*) HARAMOHAN PATNAIK *v.* EMPEROR. **18 Pat. 121 =180 I.C. 787=5 B.R. 491=11 R.P. 533=40 Cr.**

CR. P. CODE (1898), S. 87.

L.J. 500=1938 P.W.N. 869=19 Pat.L.T. 909=A.I.R. 1939 Pat. 129.

———Ss. 87 and 88—*Order of attachment against person other than absconder—Legality.*

An order of attachment passed under Ss. 87 and 88, Cr. P. Code, against a person other than the absconder is without jurisdiction. (*Abdul Qayoom, C.J. and Wazir, J.*) MUNSHI *v.* STATE. **41 P.L.R.J. & K. 60.**

———S. 87 (3)—*Applicability—Date of publication not specified—Record of service of process under Ss. 87 and 88—If sufficient—Proof of publication.*

The provision in S. 87 (3) of the Cr. P. Code is only applicable when a statement in writing by the Court specifies the date on which the proclamation was published. When that is not done, the mere recording of an order to the effect that "Process 87 and 88, Cr. P. Code, served. Accused absent," will not suffice to take the place of direct evidence of publication and service of the proclamation. (*Rowland, J.*) RAGHUNI PRASAD MAHTO *v.* EMPEROR. **160 I.C. 604=8 R.P. 370=37 Cr.L.J. 318=17 Pat.L.T. 81=1936 Cr.C. 273=A.I.R. 1936 Pat. 249.**

———S. 88—*Issue of warrant under—If proclamation under S. 87 to be presumed—Evidence Act, S.* 114.

There is a presumption of law that the acts of a Court must be presumed to have been duly performed. So when a warrant is issued under S. 88, Cr. P. Code, a presumption that the necessary proclamation under S. 87 has already been issued, arises. (*Allsop, J.*) SHIB CHARAN *v.* EMPEROR. **I.L.R. (1938) All. 386=1938 A.W.R. (H.C.) 124=1938 A.Cr.C. 13=1938 A.L.J. 137=174 I.C. 861=1938 A.L.R. 337=10 R.A. 634=39 Cr.L.J. 570=A.I.R. 1938 All. 220.**

———S. 88—Property—Claim or interest in property attached—Hindu joint family—Attachment of property in the hands of sole surviving coparcener who absconds—Rights of maintenance and marriage expenses of widow and unmarried daughters of deceased coparcener—Enforceability against Government. *See* HINDU LAW—JOINT FAMILY. **40 Bom.L.R. 422.**

———S. 88—*Scope and object of—Property of accused attached and sold—Mortgage executed by accused before such attachment and sale—Suit on—Parties—Nonjoinder of Government—If fatal—C. P. Code, O.* 34, *R.* 1.

The object of S. 88, Cr.P. Code, is to compel an accused person to appear in obedience to a summons or warrant issued by Criminal Courts. The attachment and sale provided for are a penalty sought to be enforced against the accused to coerce him to respond to the orders of the Criminal Courts and take his trial and not avoid the reach of justice. The property which is attached and sold is the property of the accused, and the Government by attaching the property does not get any rights in its favour beyond what the section specifically provides. If the accused has, before such attachment and sale, mortgaged or otherwise transferred any interest in such property, that interest cannot be sold. What the Government can sell is only the equity of redemption which alone was in the mortgagor on that day. Neither the Government nor the purchaser at the sale can acquire any higher rights than the mortgagor himself has on that day. A suit by the mortgagee from the accused-mortgagor cannot be defeated for non-joinder of the Government, for Government is not a necessary party to such suit. The only person who is a necessary party to a suit to enforce the mortgage is the purchaser at the sale by the Government, besides the mortgagor. (*Manohar Lall, J.*) BINDESHWARI PRASAD *v.* LAL MUNGARI LAL. **172 I.C. 198=10 R.P. 315=1937 P.W.N. 762=18 Pat.L.T. 814=A.I.R. 1937 Pat. 642.**

CR. P. CODE (1898), S. 94.

———S. 88 (6-A) and (6-D)—*Scope—Failure to prefer claim—Separate suit—If barred.*

Where a property belonging to an absconder has been attached and is at the disposal of the Government under S. 88, Cr. P. Code, persons who have claims to that property but who do not prefer claims under sub-S. 6-A of the section are not debarred from bringing an independent suit to enforce their claims as against the Government. Sub-S. 6-A only says that if any claim is preferred it shall be inquired into. It does not say that an independent suit is not maintainable. So long as the property has not been sold by Government or otherwise disposed, and so long as Government continue to remain in possession of the property attached, it is open to any party claiming an interest in it to file a suit and obtain a decree in a Civil Court declaring his rights in the property, and if he succeeds in obtaining such a decree before Government have finally disposed of the property, that decree would be binding on Government, and the property can be disposed of only subject to the rights established under such decree. The omission to file a claim under S. 88 (6-A) does not bar an independent suit. (*Divatia, J.*) SECRETARY OF STATE *v.* AHALYABAI. **I.L.R. (1938) Bom. 454=40 Bom.L.R. 422=176 I.C. 453=11 R.B. 41=A.I.R. 1938 Bom. 321.**

———S. 88 (6-D)—*Suit without filing claim—If barred.*

S. 88 (6-D), Cr. P. Code, does not prevent a person from filing a suit to establish his title to attached property without first filing a claim or objection under sub-S. (6-A). (*Panckridge, J.*) REEMAH FZEKIEL *v.* PROVINCE OF BENGAL. **I.L.R. (1939) 2 Cal. 52=185 I.C. 214=12 R.C. 350=41 Cr.L.J. 134=A.I.R. 1939 Cal. 746.**

———S. 89—*Release of property—Conditions.*

Before property could be released under S. 89, Cr. P. Code, the person suspected of absconding must prove two things:—(*a*) that he did not abscond, and (*b*) that he did not have notice of proclamation. (*Middleton, J.C.*) EMPEROR *v.* ARAB GUL. **165 I.C. 602=9 R. Pesh. 51=38 Cr.L.J. 99.**

———S. 94—*Discretion of Court—Limits to exercise of—If controlled by S.* 162, *Cr. P. Code—Interference in revision with order for production of documents.*

It is clear that under S. 94, Cr. P. Code, the Court has an absolute discretion to require the production of any document which it considers necessary or desirable for the purposes of the investigation or trial proceeding before it. But the discretion under S. 94 must be exercised judicially, and it should be exercised in such a way as not to conflict with the policy of the Legislature as disclosed in S. 162, Cr. P. Code, and in Ss. 123 to 125 of the Evidence Act. Statements made to

CR. P. CODE (1898), S. 94.

the police are in their nature confidential, and S. 162, Cr. P. Code, illustrates the limited purposes for which their production should be required. It is also necessary to bear in mind that under S. 125, Evidence Act, a police officer cannot be compelled to say whence he got any information as to the commission of any offence. Though normally the High Court will not interfere with an order for production of documents, if the discretion is exercised on a wrong basis altogether, the High Court will interfere. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* BILAL MAHOMED. **42 Bom.L.R. 787.**

———**S. 94**—*Discretion of Court—Trial for offence under S. 34, C. P. Excise Act—Refusal to cause production of departmental enquiry reports—Propriety.*

Section 94 gives the Magistrate discretion about the production of documents and he can, in exercise of that discretion, refuse in a trial under S. 34, C. P. Excise Act, to allow the production of departmental inquiry papers asked for by the accused. Where it has been found by the lower appellate Court that the discretion was exercised judicially the High Court will not interfere. (*Gruer, J.*) CHHOTEY MIYAN *v.* EMPEROR. **I.L.R. (1937) Nag. 165=167 I.C. 860=9 R.N. 228=38 Cr.L.J. 482=1936 Cr.C. 1042=A.I.R. 1936 Nag. 250.**

———**S. 94**—If conflicts with S. 5 of Bankers Books Evidence Act. *See* BANKERS BOOKS EVIDENCE ACT, S. 5. **I.L.R. (1938) Bom. 31.**

———**S. 94**—*Order to produce document—Right of inspection, if necessarily follows.*

When an order for production of documents is made under S. 94, Cr. P. Code, it does not imply that a right of inspection in respect of those documents, should necessarily follow. The power to order production under S. 94, Cr. P. Code, no doubt involves a power in the Court to grant inspection after the order to produce has been complied with. But it is only in respect of those documents which are shown to be relevant. (*Beaumont, C.J., Rangnekar and Norman, JJ.*) CENTRAL BANK OF INDIA, LTD. *v.* SHAMDASANI. **I.L.R. (1938) Bom. 119=172 I.C. 684=10 R.B. 291=39 Cr.L.J. 207=39 Bom.L.R. 1187=A.I.R. 1938 Bom. 33 (S.B.).**

———**S. 94**—Scope—If inconsistent with Bankers Books Evidence Act—Prosecution of Bank's auditors for false statements in balance sheet—Production of Bank's books—If may be ordered—Considerations—Right of prosecutor to inspection of books produced. *See* BANKERS BOOKS EVIDENCE ACT, S. 5. **I.L.R. (1938) Bom. 31.**

———**S. 94 (3)**—*Police officer conducting investigation—Right to inspect Banker's books—Bankers' Books Evidence Act, S. 5.*

S. 94 (3) does not exempt Banker's books from production before the Police and an officer in charge of a Police station conducting an investigation is, therefore, entitled to inspect them even without an order of Court. S. 5 of the Bankers' Books Evidence Act does not prevent him from doing so, as proceedings before him are not a legal proceeding as defined in that Act. (*Skemp, J.*) PRICE *v.* EMPEROR. **17 Lah. 593=167 I.C. 555=9 R.L. 515=38 Cr.L.J. 435=38 P.L.R. 1042=A.I.R. 1937 Lah. 160.**

CR. P. CODE (1898), S. 96.

———**S. 94 (3)**—*Scope—Documents protected by Evidence Act, S. 126—If exempted from production—Objection to production—When to be decided—Procedure.*

Cl. (3) of S. 94, Cr. P. Code, does not exempt documents protected by S. 126 of the Evidence Act and the production of such documents is incumbent under S. 162 of the Evidence Act notwithstanding any objection which there may be to the production or admissibility. The validity of the objection has to be decided by the Court after production; the application for issue of summons for their production ought not to be dismissed on that ground. (*Lakshmana Rao, J.*) PUBLIC PROSECUTOR, MADRAS *v.* M. S. MENOKI. **185 I.C. 419=12 R.M. 563=41 Cr.L.J. 186=50 L.W. 428=1939 M.W.N. 1127=(1939) 2 M.L.J. 634.**

———**S. 96**—*Applicability—No pending enquiry.*

S. 96, Cr. P. Code, applies not only when there is an enquiry pending but also when an enquiry is about to be made. A search-warrant may, therefore, be issued legally for materials an examination of which is required for the purposes of a trial not yet actually embarked upon. (*Khundkar and Sen, JJ.*) K. HOSHIDE *v.* EMPEROR. **I.L.R. (1940) 1 Cal. 231=186 I.C. 486=12 R.C. 510=41 Cr.L.J. 329=44 C.W.N. 82=A.I.R. 1940 Cal. 97.**

———**S. 96**—*Breach of hire-purchase agreement to buy motor bus—Search-warrant for seizure of bus—Legality.*

The processes of the Criminal Court cannot be permitted to be used in order to enforce a purely civil right. A breach of a hire purchase agreement to buy a motor bus is not a criminal matter, and an order of a Magistrate for the issue of a search warrant for the seizure of the bus is without jurisdiction. (*Bartley and Khundkar, JJ.*) HRISHIKESH GHOSH *v.* R. P. MICHAEL. **179 I.C. 484=11 R.C. 551=40 Cr.L.J. 216=67 C.L.J. 569=A.I.R. 1939 Cal. 45.**

———**S. 96**—*Issue of warrant—Duty of Magistrate.*

S. 96, Cr. P. Code, empowers only a Court to issue a search-warrant. A Magistrate is therefore acting as a Court when he issues a warrant and, before he does so, he should apply his judicial mind to the question whether there are sufficient grounds before him for the issue of the warrant. A search-warrant is not to be issued automatically without any further enquiry on a bare statement contained in a letter of a Police officer that a search is necessary. The Magistrate must see whether there are sufficient materials before him to justify the drastic action which he is being invited to take. (*Khundkar and Sen, JJ.*) K. HOSHIDE *v.* EMPEROR. **I.L.R. (1940) 1 Cal. 231=186 I.C. 486=12 R.C. 510=41 Cr. L.J. 329=44 C.W.N. 82=A.I.R. 1940 Cal. 97.**

———**S. 96 (1), third clause**—*Order for seizure and inspection by prosecutor—Power of Court to make.*

Per *Khundkar, J.*:—A Court acting under Cl. (3) of S. 96 (1), Cr. P. Code, can make an order for seizure to be followed by an inspection by the prosecutor where the Court judicially considers that seizure and inspection will serve the purposes of any inquiry, trial or other proceeding under the Code. (*Khundkar and Sen, JJ.*) K. HOSHIDE *v.* EMPEROR. **I.L.R. (1940) 1 Cal. 231**

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=186 I.C. 486=12 R.C. 510=41 Cr.L.J. 329=44 C.W.N. 82=A.I.R. 1940 Cal. 97.

———S. 96 (1), third clause—*Warrant for purposes of investigation—Power of Magistrate to issue.*

The third clause of S. 96 (1), Cr. P. Code, does not provide for any step to be taken in aid of an investigation but it provides for something which the Magistrate may do for the purposes of serving an inquiry, trial or other proceeding under the Code. This clause does not, therefore, empower a Magistrate to issue a search-warrant to help an investigation by the police or by the Customs authorities under the Sea Customs Act. (*Khundkar and Sen, JJ.*) K. HOSHIDE *v.* EMPEROR. **I.L.R. (1940) 1 Cal. 231=186 I.C. 486=12 R. C. 510=41 Cr.L.J. 329=44 C.W.N. 82=A.I.R. 1940 Cal. 97.**

———Ss. 96 (1) and 156—*C.I.D. Inspector conducting investigation—Issue of general search-warrant by Magistrate on his application—Legality—Documents seized containing incriminating matter—If liable to be returned.*

A C.I.D. Inspector who had the same powers as a station house officer under S. 551, Cr. P. Code and who had received confidential information concerning the New Motor Stores was investigating in the matter and had in view a cognizable offence under S. 420, I. P. Code. The Inspector applied for a search warrant to the District Judge. A general search warrant was issued to him. In execution of the warrant several documents were seized and a selection from them was filed in the prosecution against the accused person. The remaining documents were returned to the accused. An application for return of the documents exhibited in the case was filed by the accused on the ground that the search warrant was issued illegally.

Held, that as the Inspector was conducting an investigation under S. 156, Cr. P. Code, and not an enquiry, the issue of the search warrant in general terms, that is to say, not for the search of a particular document or things, was illegal under the third clause of S. 96 (1).

Held also, that though the warrant was illegally issued by the Magistrate and certain documents were seized in pursuance of it, still the selected documents filed in the case contained some incriminating matter against the accused in whose possession they were found and hence they could not be returned to them. (*Spargo, J.*) M. I. MAMSA *v.* EMPEROR. **170 I.C. 870=38 Cr.L.J. 983=10 R.R. 111=A.I.R. 1937 Rang. 206.**

———S. 99-A—*Applicability—Conditions.*

To make S. 99-A, Cr. P. Code, applicable, two things are necessary: (1) promotion of feellings of enmity or hatred and that (2) between different classes of subjects. Everything done which may have a remote bearing of promoting feelings of hatred or enmity would not be an offence. There should be either the intention to promote such feeling or such feeling should be promoted as result of such publications. Again, feelings of enmity and hatred should be aroused between two classes of His Majesty's subjects, that is to say, between two sections of the people who can be classified as two groups opposed to each other. A vague, indefinite and nameless body, even

CR. P. CODE (1898), S. 99-A.

though given one name may not in certain circumstances be considered as a class by itself, particularly if individuals overlap indiscriminately. It is not necessary however that the classes should be so distinct and separate as to make it easy to put an individual in one class or the other. S. 99-A does not contemplate the penalizing of political doctrine, even though of the extreme kind like communism but merely such writings as directly promote feelings of hatred or enmity. Where the original book, the translation of which is published in vernacular, contains passages which might be construed to create some distant feeling of disaffection against the rich and the wealthy but it cannot be said that it has direct effect of actual promotion of any ill-feeling or hatred, particularly when the theme is a contrast between capitalism and labour throughout the world and in all stages of history, it is doubtful whether the book contains objectionable matter within the scope of S. 153-A, I. P. Code, and the person publishing the translation is entitled to have the benefit of doubt. Where however the original book, of which a translation in vernacular is published, not only propounds the doctrine of communism but is a Manifesto of the Communist party and professedly contains "a complete, theoretical and practical party programme" and aims at promoting class hatred and enmity and in fact incites the working classes to overthrow the capitalist classes even with the use of force, it contains matter which is objectionable under S. 153-A. (*Sulaiman, C.J., Allsop and Bajpai, JJ.*) M. L. GAUTAM *v.* EMPEROR. **164 I.C. 253 =9 R.A. 135=37 Cr.L.J. 943=1936 A.L.J. 786 =1936 A.W.R. 638=1936 A.Cr.C. 143=1936 All.L.R. 722=1936 Cr.C. 739=A.I.R. 1936 All. 561 (S.B.).**

———S. 99-A—*Scope of.*

The scope of S. 99-A, Cr. P. Code, is wider than that of S. 153-A, I. P. Code, because "intention" falls short of "attempt" and has in addition been made an alternative ground. What is intended is that where the words written or spoken do attempt to promote feelings of enmity, hatred, etc., and therefore fall under S. 153-A, action can be taken by the Local Government where although there has yet been no occasion for the promotion of any feelings of enmity and hatred and there may have been no attempt yet made to promote such feellings, but the words are *intended* to promote such feelings. The Local Government may intervene at an early stage as a preventive measure and may stop the actual promotion of hatred, etc. (*Sulaiman, C.J., Thom and Niamatullah, JJ.*) GUPTA *v.* EMPEROR. **162 I.C. 507=8 R.A. 873=37 Cr.L.J. 599=1936 A.L.J. 165=1936 A. Cr.C. 67=1936 A.W.R. 227=1936 Cr.C. 480= 1936 All.L.R. 436=A.I.R. 1936 All. 314 (S.B.).**

———S. 99-A—*Scope—Books dealing with conditions prevailing in entire world and directed against capitalists—Originals not prescribed—Translations, if necessarily permissible.*

It cannot be laid down as a general proposition, that translations should be permissible when the originals are not prescribed. Translations in Indian vernaculars may become accessible to a very large population and the danger arising therefrom, may be immensely greater calling for the

CR. P. CODE (1898), S. 99-B.

intervention of the Government. The Courts are not concerned with the policy underlying such forfeitures. The sole consideration is whether the books contain any objectionable matter, referred to in S. 99-A. Where the authors of the books under consideration, were non-Indians and did not have His Majesty the King-Emperor, or the Government established by law in British India, particularly in mind and were attempting to deal with certain supposed conditions prevailing in the entire world, it cannot be held that the books bring or attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards His Majesty or the Government established by law in British India when there is no such intention directly implied, although it is possible that such writings may have the remote effect of causing some disaffection. Where the books are directed against supposed capitalists who exploit the working classes, the publication of their translations cannot be brought within the scope of S. 99-A. (*Sulaiman, C.J., Allsop and Bajpai, JJ.*) M. L. GAUTAM *v.* EMPEROR. **164 I.C. 253=9 R.A. 135 =37 Cr.L.J. 943=1936 A.L.J. 786=1936 A.W. R. 638=1936 A.Cr.C. 143=1936 All.L.R. 722 =1936 Cr.C. 739=A.I.R. 1936 All. 561 (S.B.).**

———S. 99-B—*Application under—Right to begin.*

The language of S. 99-B, Cr. P. Code, clearly indicates that it is the applicant who has to make out a case in his favour. Consequently his counsel has the right to open the case and then have the final right of reply. (*Sulaiman, C.J., Thom and Niamatullah, JJ.*) GUPTA *v.* EMPEROR. **162 I.C. 507=8 R.A. 873=37 Cr.L.J. 599=1936 A.L.J. 165=1936 A.Cr.C. 67=1936 A.W.R. 227=1936 Cr.C. 480=1936 All.L.R. 436=A.I.R. 1936 All. 314 (S.B.).**

———S. 100—*"So confined"—Interpretation—Issue of warrant by Magistrate—Duty of police officer.*

The words "so confined" in S. 100, Cr. P. Code, should be taken in the context in which they occur, and should be taken to imply "believed to be so confined", under that section, it is for the Magistrate to find whether there are reasons for believing that any person is in wrongful confinement; and if he is so satisfied and issues a search warrant, the police officer, to whom the warrant is addressed, has merely to execute it according to its tenor. He is not expected to disregard the finding of the Magistrate, and all that he is to do is to search for the person in question and to take him to the Magistrate, whether or not he is wrongfully confined. (*Niamatullah, J.*) KALLAN BEG *v.* EMPEROR. **162 I.C. 339 (2)=8 R.A. 862 =37 Cr.L.J. 548=1936 A.L.J. 468=1936 All. Cr.C. 93=1936 A.W.R. 223=1936 Cr.C. 459= 1936 All.L.R. 425=A.I.R. 1936 All. 306.**

———S. 100—*Complaint under S. 497, I. P. Code —Issue of warrant for arrest of wife—Propriety.*

A husband had lodged a complaint under S. 497, I. P. Code, against four persons who were carrying on an intrigue with his wife. The wife was living with her mother and there was no suggestion that she was being detained by her mother against her will. On receipt of that complaint, the Magistrate issued a warrant under S. 100, Cr. P. Code, against the wife and when she had been

CR. P. CODE (1898), S. 103.

arrested under the warrant, he proceeded to make an order consigning her to a certain Ashram.

Held, that in the absence of any allegation in the complaint that the woman was confined under circumstances in which that confinement would amount to an offence; there was no jurisdiction to issue a warrant under S. 100 and the subsequent order was also without jurisdiction. (*Bartley and Henderson, JJ.*) THAKAMANI DEBI *v.* NEPAL CHANDRA. **178 I.C. 405=11 R.C. 355 (2)=43 C.W.N. 363=40 Cr.L.J. 58=A.I.R. 1938 Cal. 704.**

———S. 103—*Object of.*

The provisions of S. 103 are enacted for greater certainty and security and not because the statements of certain officers can under no circumstances be accepted. (*Mackney, J.*) EMPEROR *v.* MA THEIN. **160 I.C. 816=37 Cr.L.J. 331=8 R. R. 434=1936 Cr.C. 21=A.I.R. 1936 Rang. 15.**

———S. 103—*Non-compliance with provisions—Evidence of search witnesses—Admissibility.*

The failure to comply with the provisions regulating searches may cast doubt upon the *bona fides* of the officers conducting the search. But when once the evidence of the search witnesses has been believed, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible. (*Bartley and Henderson, JJ.*) BANA MALI BHATTA CHARJYA *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 210=186 I.C. 471=12 R.C. 499=41 Cr.L.J. 316=A.I.R. 1940 Cal. 85.**

———S. 103—*Scope—Search by Excise officer—Evidence of Excise officer not substantiated by evidence of search witnesses, if ground for disbelieving Excise officer.*

The accused was convicted under S. 9 (*a*) of the Opium Act, but was acquitted in appeal, the main reason being that the evidence of the three witnesses who were called to witness the search did not substantiate the evidence of the excise officer, and that in view of the provisions of S. 103, Cr. P. Code, their statements must be believed in preference to those of the searching officers.

Held, that the two excise officers could not be disbelieved when their evidence was supported by distinct documentary corroboration and moreover the three witnesses had not been able to explain that they as three presumably intelligent persons should have signed documents without knowing what the contents were. Evidence of this type should not be preferred to that of the officers. (*Mackney, J.*) EMPEROR *v.* MA THEIN. **160 I.C. 816=37 Cr.L.J. 331=8 R.R. 434=1936 Cr.C. 21 =A.I.R. 1936 Rang. 15.**

———S. 103—*Search witnesses—Respectability —Test.*

In the case of a search witness, respectability does not connote any particular status or wealth or anything of that kind. Any person is entitled to claim respectability provided he is not disreputable in any way, that is if he is not a thief or a criminal of some kind or a person perhaps of grossly immoral habits. (*Allsop, J.*) ASHFAQ *v.* EMPEROR. **165 I.C. 25=9 R.A. 247 (1)=37 Cr.L.J. 1108=1936 A.Cr.C. 149=1936 A.W.R. 731=1936 A.L.J. 958=1936 All.L.R. 886=1936 Cr.C. 893=A.I.R. 1936 All. 707.**

CR. P. CODE (1898), S. 103.

———S. 103—*Search witnesses previously convicted of criminal offences—Search—If amounts to violation of law.*

A quantity of illicit liquor and materials for illicit distillation were recovered from the house of the accused after search by excise officers. The search witnesses were however found to have been previously convicted of criminal offences and one of them had a civil suit against the accused.

Held, that the manner of search amounted to violation of law. (*Bartley and Khundkar, JJ.*) HARADHAN MAITY *v.* EMPEROR. **178 I.C. 409=11 R.C. 355 (1)=40 Cr.L.J. 52=A.I.R. 1938 Cal. 701.**

———S. 103 (1) and (5)—Construction—Refusal to sign—Search-list by person witnessing search—Offence. *See* PENAL CODE, S. 187. **19 Pat. L.T. 461 (F.B.).**

———S. 106—*Applicability—Conviction under S.* 3 (12), *Town Nuisance Act—Order binding over accused—If justified.*

S. 106, Cr.P. Code, should be very sparingly invoked where the offence committed is a petty one; and it is ordinarily objectionable when the accused is convicted only of some petty offence, such as one under S. 3 (12) of the Town Nuisance Act, that he should also be bound over for a considerable time under S. 106, Cr.P.Code, as that would involve a far more serious punishment than the main sentence. (*Horwill, J.*) BALIAN, *In re.* **179 I.C. 169=11 R.M. 526=40 Cr.L.J. 165=1938 M.Cr.C. 180=1938 M.W.N. 588=47 L.W. 138=A.I.R. 1938 Mad. 795=(1938) 2 M.L.J. 152.**

———S. 106—*Applicability—Conviction under Ss.* 147, 324, 325 *and* 342 *read with S.* 149—*Separate sentence—Legality.*

S. 106, Cr.P. Code, is not inapplicable to the case of a conviction under Ss. 147, 324, 325 and 342, read with S. 147, I.P. Code. But the award of separate sentences in such a case is illegal and must be set aside. (*Lakshmana Rao, J.*) MEKRAJ ALLI SAHIB, *In re.* **184 I.C. 452=12 R.M. 456 (1)=50 L.W. 918=41 Cr.L.J. 17 (1)=1939 M.W.N. 609=A.I.R. 1939 Mad. 787=(1939) 2 M.L.J. 36 (1).**

———S. 106—*Applicability—Offence involving breach of the peace—Offence under S.* 3 (12), *Town Nuisance Act.*

An offence under S. 3 (12) of the Town Nuisance Act is an offence involving a breach of the peace for purposes of S. 106, Cr.P. Code. (*Horwill, J.*) BALIAN, *In re.* **179 I.C. 169=11 R.M. 526=40 Cr.L.J. 165=1938 M. Cr.C. 180=1938 M.W.N. 588=47 L.W. 138=A.I.R. 1938 Mad. 795=(1938) 2 M.L.J. 152.**

———S. 106—*Applicability—Person convicted under S.* 510, *Indian Penal Code—Order against him under S.* 106, *Cr.P. Code—Legality.*

An offence under S. 510, I.P.Code, is not an offence involving a breach of the peace and a person convicted under S. 510, I.P. Code, cannot therefore be ordered to execute a bond to keep the peace under S. 106, Cr.P. Code. (*Lakshmana Rao, J.*) VENKATAPPA *v.* EMPEROR. **1940 M.W.N. 531 (1)=52 L.W. 66 (2)=A.I.R. 1940 Mad. 755.**

———S. 106—*"Offences involving breach of peace"—Meaning of—Accused convicted under S.* 294 *Penal Code—If can be bound over.*

CR. P. CODE (1898), S. 106.

The expression "offences involving a breach of the peace" means offences in which the commission of a breach of the peace is a necessary ingredient or offence the commission of which has actually led to a breach of the peace (irrespective of the party by which that breach is committed). It is impossible to construe the word "involve" as equivalent to the words "likely to lead to." The mere use of abusive language in a public place is of itself not a breach of the peace, though of course it is likely to lead to one. It is not one of the offences affecting the public tranquillity mentioned in S. 106, Cr.P. Code. The words "breach of the public peace" have not only in popular usage but in law the significance of a disturbance of the peace by something more than mere abusive or obscene words, that is to say by resort, if not to actual violence, to threats of it. In other words the word "peace" is used as a synonym for security rather than for tranquillity. Hence, where an accused person is convicted of an offence under S. 294, Penal Code, an order under S. 106, Cr. P. Code, cannot be made unless there is a finding that active criminal intimidation or assault, etc., have actually occurred in consequence of the obscene abuse. (*Mosely, J.*) THE KING *v.* MAUNG KYI NYO. **1940 Rang.L.R. 256=187 I.C. 149=12 R.R. 320=41 Cr.L.J. 421=A.I.R. 1940 Rang. 50.**

———S. 106—*Order under—Conviction under S.* 452, *I.P. Code.*

An order under S. 106, Cr.P.Code, does not follow a conviction under S. 452, Penal Code, unless such order is justified by the facts of a particular case. (*Bartley and Henderson, JJ.*) JUNG BAHADUR MISIR *v.* MAHADEO SHAW. **182 I.C. 850=12 R.C. 112=40 Cr.L.J. 721=A.I.R. 1939 Cal. 320.**

———S. 106—*Order under—Legality—Accused convicted of mischief.*

An order under S. 106, Cr.P. Code, cannot be legally passed in a case where the accused has been convicted of an offence under S. 426, I. P. Code, as the offence of mischief of which he is convicted does not involve a breach of the peace. (*Zia-ul-Hasan, J.*) RAM ROOP *v.* EMPEROR. **178 I.C. 665=11 R. O. 121=40 Cr.L.J. 138=1938 O.W.N. 1127=1938 A.W.R. (C.C.) 126=1938 O.A. 906=1938 O.L.R. 509=A.I.R. Oudh 38.**

———S. 106—*Order under on conviction under S.* 447, *I.P. Code—Legality.*

The words "involving a breach of the peace" in S. 106, Cr.P. Code, require that a breach of the peace should be an ingredient of the offence proved, and before the section can be used, there must be a finding that a breach of the peace has occurred. In a case where the accused is convicted under S. 447, I.P. Code, though there is likelihood of a breach of the peace, when there is no finding of an actual breach of the peace an order under S. 106, Cr.P. Code, could not be legally passed. (*Yorke, J.*) BANS GOPAL *v.* EMPEROR. **14 Luck. 360=179 I.C. 269=11 R.O. 156=40 Cr.L.J. 183=1939 A.W.R. (C.C.) 11=1938 O.W. N. 1361=1939 O.L.R. 19=1939 A. Cr.C. 14=1939 O.A. 103=A.I.R. 1939 Oudh 45.**

CR. P. CODE (1898), S. 106.

———**S. 106**—*Order under—Legality—Conviction under Ss. 147 and 323, I.P. Code.*

S. 106, Cr.P.Code, as amended, no doubt, excludes S. 149 as well as other sections of Ch. VIII of the Penal Code from its operation, but it not only does not exclude S. 147 but is applicable to "other offences, involving a breach of the peace". Where, therefore, the accused who are convicted under S. 325 read with S. 149, I.P. Code, are also convicted under Ss. 147 and 323, I.P. Code, both of which involve a breach of the peace, an order under S. 106, Cr.P. Code, could properly be made owing to their conviction under Ss. 147 and 323. (*Zia-ul-Hasan, J.*) MANNI LAL *v.* EMPEROR. **173 I.C. 386=1938 O.A. 158=1938 A. Cr.C. 142=1938 O.L.R. 117=1938 O.W. N. 218=10 R.O. 222=39 Cr.L.J. 341=A.I. R. 1938 Oudh 95.**

———**S. 106**—*Order under—When could be passed—Conviction under Ss. 323 and 342, I.P. Code—Appeal—Conviction on S. 342 alone maintained—Order under S. 106, Cr.P. Code, if proper.*

In passing an order under S. 106, Cr.P. Code, it has to be seen not whether the persons concerned did commit a breach of the peace, but whether they were convicted of an offence which necessarily involves a breach of the peace. If the offence is one in which a breach of the peace may have been committed in the circumstances of the particular case, but which in other circumstances does not necessarily involve a breach of the peace, an order under S. 106, Cr.P. Code, cannot be passed. Where certain persons were convicted under Ss. 323 and 342, I.P. Code, but in appeal the conviction under S. 323 was set aside and that under S. 342 alone was maintained, in such case an order under S. 106, Cr.P. Code, cannot be passed. (*Hamilton, J.*) AKHTAR HUSAIN *v.* EMPEROR. **187 I.C. 808=12 R.O. 417=1940 A. Cr.C. 73=41 Cr.L.J. 505=1940 A.W.R. (C.C.) 218=1940 O.A. 380=1940 O.L.R. 248 =1940 O.W.N. 423=A.I.R. 1940 Oudh 323.**

———**S. 106**—*"Other offences involving a breach of the peace"—Interpretation.*

The words "other offences involving a breach of the peace" in S. 106, Cr.P. Code, refer to the actual definition of an offence in the substantive law, that is to say, the commission of, or intention to commit, a breach of the peace must be one of the elements which would go to make up the offence. (*Henderson and Khundkar, JJ.*) ANKU LAL *v.* SADHAN CHANDRA. **I.L.R. (1939) 2 Cal. 261=69 C.L.J. 565=12 R.C. 177=183 I.C. 672=40 Cr.L.J. 836=43 C.W.N. 867= A.I.R. 1939 Cal. 484.**

———**S. 106**—*Scope—Conviction under S. 426, I.P. Code—Order under S. 106, Cr.P. Code—Sustainability.*

The offence under S. 426, I.P. Code, does not involve a breach of the peace and an order under S. 106, Cr.P. Code, cannot therefore be passed on a conviction under S. 426, I.P. Code. (*Lakshmana Rao, J.*) SUBBA RAO, *In re*. **185 I.C. 753= 50 L.W. 511 (1)=12 R.M. 593=41 Cr.L.J. 235=1939 M.W.N. 1012=A.I.R. 1940 Mad. 55=(1939) 2 M.L.J. 750.**

———**S. 106**—*Security bond—Forfeiture—Liability of surety—Nature and extent.*

CR. P. CODE (1898), S. 107.

Upon the forfeiture of a bond executed under S. 106 by a person to keep the peace for a term, the surety is liable to pay the amount specified in his bond in addition to the penalty paid by the principal. The obligation of the surety is to pay in the event of a breach of the peace by the principal and not in default of payment by the principal after he has committed a breach of the peace. 36 Cal. 562, relied on. 30 P.R. Cr. 1890, 26 P.R. Cr. 1894, 226 P.L.R. 1911, 4 Lah. 462 and 5 Lah. 448, Disapproved. (*Young, C.J. and Monroe, J.*) SARDAR KHAN *v.* EMPEROR. **17 Lah. 523 =167 I.C. 746=9 R.L. 538=38 Cr.L.J. 420 =38 P.L.R. 951=A.I.R. 1937 Lah. 133.**

———**Ss. 106 and 514**—*Bond with sureties—Forfeiture—Extent of respective liabilities.*

In the Code of Criminal Procedure the expression always is 'a bond with sureties' and there is no reason why the liability of a surety under the Criminal Procedure Code should be differentiated from that of a surety under the civil law. The principals can be called upon to pay the amount of the bond, and any one of the sureties can also be called upon to pay the same amount, but if any one is called upon to pay the whole amount, any other on that bond, be he principal or surety cannot be ordered to pay anything more. (*Hamilton, J.*) ABDUS SATTAR *v.* EMPEROR. **1938 O.A. 566=1938 O.W.N. 676=11 R.O. 7=1938 A. Cr.C. 55=1938 O.L.R. 355=176 I.C. 948= 39 Cr.L.J. 831=A.I.R. 1938 Oudh 195.**

———**S. 107**—*Action against leader for apprehended acts of his community—Propriety.*

A person cannot be hauled up under S. 107, Cr. P. Code, merely because he holds a respectable position in the community to which he belongs and wields an enormous influence with its members, when there is nothing to show that he himself is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion the breach of the peace or disturb the public tranquillity. It is the individual who is contemplated in the section and it is the individual act that must be brought home to him. The only case in which a person can be punished for the wrongs done by others is where he abets or instigates the offence. Failing that no person in the world can be visited with any penalty for acts done by others on whom he has no control and for whose conduct he cannot be held responsible. (*Din Mohammad, J.*) MOHAMMAD ABDUL QAYUM *v.* EMPEROR. **I.L.R. (1939) Lah. 554=184 I.C. 279=12 R.L. 196=40 Cr.L.J. 901=41 P.L.R. 318=A.I.R. 1939 Lah. 363.**

———**S. 107**—*Action under—When not justified.*

A person who is doing a lawful act cannot be called upon to execute a bond under S. 107, Cr. P. Code, merely because some other person might commit the breach of the peace and offer violence to the law-abiding citizens. Further, acts in respect of which security is required must not be acts the repetition of which may be merely apprehended from past commission of similar acts, but acts, from which a reasonable inference can be drawn that the accused are likely (not were likely) to commit a breach of the peace. (*Din Mohammad, J.*) MOHAMAD ABDUL QAYUM *v.* EMPEROR. **I.L.R. (1939) Lah. 554=184 I.C. 279=12 R.**

CR. P. CODE (1898), S. 107.

L. 196=40 Cr.L.J. 901=41 P.L.R. 318=A.I.R. 1939 Lah. 363.

———S. 107 — *Applicability — Conditions—"Wrongful act"—Meaning of.*

The word "wrongful" in S. 107 must mean something more than wrongful in the opinion of the Magistrate, and "wrongful act" must mean some act wrongful according to some law. S. 107 cannot be intended to authorize a Magistrate to take action to prevent lawful acts which may result in a breach of the peace because of the wrongful or unlawful acts of others. S. 107 is intended to be applied against the wrong-doers and not also against the wronged. It was never the intention of the section that the wrong-doers and the wronged should be classed together as wrong-doers and made the subjects of a common complaint and common action. The collection or the acquiescing in the collection of women for the purpose of religious instruction, discourse or songs, the meeting together of men and women for a joint satsang or meeting is no offence under the law, nor is the education of children; and the Magistrate cannot take action to prevent such lawful act even though it would result in a breach of peace because of the wrongful acts of others. (*Davis, J.C. and Weston, J.*) JASODA LEKHRAJ *v.* EMPEROR. **I.L.R. (1939) Kar. 662=182 I.C. 698=12 R.S. 31=40 Cr.L.J. 703=A.I.R. 1939 Sind 167.**

———S. 107—*Bond to keep peace—Correct form.*

The correct form of the bond to keep the peace is given in Sch. V, Cr.P. Code, and the correct form of the bond by sureties is also given in the same Schedule. These show that the surety does not take responsibility for the payment of the amount forfeited by the principal in the event of the principal failing to pay it, but enters into a direct bond taking responsibility that the principal shall not commit a breach of the peace. (*Middleton, J.C.*) MIRAN SHAH *v.* EMPEROR. **163 I.C. 443=9 R. Pesh. 2=37 Cr.L.J. 849=1936 Cr.C. 668=A.I.R. 1936 Pesh. 141.**

———S. 107—*Inquiry under—Scope of—Dispute as to possession of property—Ownership and title—Enquiry into—Relevancy—Duty of Magistrate.*

In proceedings under S. 107, Cr.P. Code, the law does not contemplate enquiries into the right to possession of property seized. Such an inquiry is wholly irrelevant in such proceedings. All that the Magistrate has to determine is whether there was a likelihood of the breach of the peace, and it has only to be considered whether the parties claiming a right to possession were ready to fight about it. An elaborate inquiry about ownership and title is entirely out of place. (*Bose, J.*) RANI SONA BAHU *v.* SOBHAG SINGH. **167 I.C. 848=9 R.N. 226=38 Cr.L.J. 467=19 N.L.J. 264.**

———S. 107—*Grounds for order under.*

A Magistrate may not act under S. 107 unless there is in his opinion sufficient ground for proceeding. When the allegations are against a large number of persons, without imputing a specific act to any one, he must be specially cautious before taking action. (*D. R. Norman.*) PET RAM *v.* DAYA CHAND. **1937 A.M.L.J. 57.**

———S. 107—*Order under—Grounds for—Commission of acts of violence in the past—Sufficiency.*

CR. P. CODE (1898), S. 107.

In order to justify an order under S. 107, Cr. P. Code, it must be proved that the persons sought to be bound over are likely to break the peace in future. The fact that they have committed certain acts of violence in the past cannot justify such an order. It is not enough for the Court merely to say that it thinks that men who have been violent once will be violent again. (*King, J.*) KUMARAPPA CHETTIAR *v.* EMPEROR. **174 I.C. 248=10 R.M. 684=1937 M.Cr.C. 314=47 L.W. 322=1938 M.W.N. 212=39 Cr.L.J. 416=1937 M.W.N. 1072=A.I.R. 1938 Mad. 213.**

———S. 107—*Order under—Jurisdiction to pass—Nature of information and evidence requisite—Information as to past acts and general charge of commission of breaches of the peace—Sufficiency of.*

To justify an order under S. 107, Cr.P. Code, there must be information before the Magistrate passing the order that person against whom the order is made is likely to commit any particular breach of the peace or any wrongful act likely to lead to a breach of the peace. Information entirely confined to the past acts of that person or a mere general charge that he has been committing and will continue to commit breaches of the peace will not confer on the Magistrate jurisdiction to pass an order under the section. There must be evidence to show that the person concerned was contemplating doing something in particular which would involve a breach of the peace. (*Pandrang Row, J.*) MARUTHAPALI GOUNDAN, *In re.* **1937 M.W.N. 48=169 I.C. 97=9 R.M. 685=38 Cr.L.J. 699=1937 M.Cr.C. 95=45 L.W. 308 =A.I.R. 1937 Mad. 356.**

———S. 107—*Object of.*

The object of the provisions contained in S. 107, Cr.P. Code, is prevention and not punishment of offences; it is intended not to punish persons for anything that they have done in the past, but to prevent them from doing in future something which might occasion a breach of the peace. (*Guha and Lethbridge, JJ.*) SETH SUKHLAL KARNANI *v.* EMPEROR. **178 I.C. 52=11 R.C. 319=39 Cr.L.J. 992=66 C.L.J. 564=A.I.R. 1938 Cal. 583.**

———S. 107—Proceedings under—Forum. *See* CR. P. CODE, SS. 12 AND 107. **176 I.C. 784=A.I.R. 1938 Nag. 448.**

———S. 107—*Proceedings under—Nature of.*

Proceedings under S. 107 are proceedings for the preservation of peace and not for the preservation of morals. (*Davis, C.J.*) OM RADHE *v.* EMPEROR. **I.L.R. (1940) Kar. 113=183 I.C. 460=40 Cr.L.J. 803=12 R.S. 55=A.I.R. 1939 Sind 238.**

———S. 107—*Petition under—Reference to police for preliminary enquiry—Power of Magistrate.*

There is nothing in the Cr.P. Code, which forbids a Magistrate before whom information has been lodged for taking proceedings under S. 107, to refer the matter to the police for preliminary enquiry. A.I.R. 1928 Lah. 694, overruled. (*Young, C.J. and Tek Chand, J.*) ISMAIL *v.* JAGAT SINGH. **I.L.R. (1938) Lah. 640=179 I.C. 353=11 R.L. 561=40 Cr.L.J. 193=40 P.L.R. 579=A.I.R. 1938 Lah. 861.**

CR. P. CODE (1898), S. 107.

———**S. 107**—*Proceeding under—When may be taken.*

Before taking action under S. 107, the Magistrate has to satisfy himself that a person is likely to commit a breach of the peace or disturb the public tranquillity. The object of the provisions contained in S. 107 is prevention and not punishment of offences; it is intended not to punish persons for anything that they have done in the past, but to prevent them from doing in future something that might occasion a breach of the peace. (*Guha and Lethbridge, JJ.*) SUKHLAL KARNANI *v.* EMPEROR. **178 I.C. 52=39 Cr.L.J. 992=11 R.C. 319=66 C.L.J. 564=A.I.R. 1938 Cal. 583.**

———**S. 107**—*Proceeding under—When may be started.*

The law provides for a proceeding under S. 107, Cr.P. Code, being started on information received, if in the opinion of the Magistrate there is sufficient ground for a proceeding. The Magistrate has to satisfy himself that a person is likely to commit a breach of the peace or disturb the public tranquillity as mentioned in S. 107 before taking action. (*Guha and Lethbridge, JJ.*) SETH SUKHLAL KARNANI *v.* EMPEROR. **178 I.C. 52=11 R.C. 319=39 Cr.L.J. 992=66 C.L.J. 564=A.I.R. 1938 Cal. 583.**

———**S. 107**—*Sacrificing cow near public thoroughfare on occasion of Id—Breach of peace.*

A Muhammadan who, on the occasion of Id-ul-Zuha kills a cow near a public thoroughfare within sight of the non-Muslim inhabitants with the deliberate intention of wounding their religious feelings, commits a wrongful act and one which might probably occasion a breach of the peace or disturb the public tranquillity within the meaning of S. 107, Cr.P. Code. (*Abdul Rashid, J.*) IBRAHIM *v.* EMPEROR. **171 I.C. 950=39 P.L.R. 179=10 R.L. 256=39 Cr.L.J. 23=A.I.R. 1937 Lah. 717.**

———**S. 107**—*Scope and object of—Order for security—Conditions for—Burden of proof—Dispute as to immovable property—Continuance of likelihood of breach of the peace up to date of order—If to be proved—Amount of security.*

It cannot be laid down as a hard and fast rule that in order to support an order for security under S. 107, Cr.P. Code, it is incumbent on the Crown to show not only that there was likelihood of a breach of the peace at some past time, but that this likelihood continued to the date of the order for security. In the case of a claim to immovable property where there is no religious dispute and there is no indication that the accused party are likely to abandon their claims or to give up the intention of using violence in support of them, no such duty is cast on the Crown. The intention of the section in a case of this kind is preventive and not penal, and the security demanded should not therefore be excessive or unnecessarily high. (*Rowland, J.*) MAHABIR GOPE *v.* SAMRATHI SINGH. **189 I.C. 457=13 R.P. 124=21 Pat.L.T. 652=6 B.R. 837=41 Cr.L.J. 746=1940 P.W.N. 52=A.I.R. 1940 Pat. 252.**

———**S. 107 (1)**—*Construction—Notice under—Contents of—"Substance" of information.*

There must of course be something more than the past misconduct of a person proceeded against under S. 107, Cr.P. Code, to justify a notice being served upon him, but there is no provision in the Code which requires the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case. Where a notice states that the person proceeded against is a leader of one of the rival factions in the village, that the feelings between the factions have become strained, that there is a likelihood of a breach of the peace in the village, and that the petitioner is giving active support to the members of his faction to further their nefarious activities in the village, the notice must be regarded as complying with the requirements of the section and as setting out the substance of the information received by the Magistrate. (*Leach, C.J., Krishnaswami Ayyangar and Patanjali Sastri, JJ.*) MUTHUSWAMI CHETTIAR, *In re.* **I.L.R. (1940) Mad. 335=50 L.W. 802=1939 M.W.N. 1209=12 R.M. 584=41 Cr.L.J. 238=185 I.C. 824=A.I.R. 1940 Mad. 23=(1940) 1 M.L.J. 11 (F.B.).**

———**S. 107 (2)**—*Accused living outside jurisdiction of Sub-Divisional Magistrate, temporarily present within his jurisdiction to commit offences—Magistrate by whom proceedings ought to be taken.*

Under S. 107 (2), Cr.P. Code, proceedings cannot be taken against the accused persons by a Sub-Divisional Magistrate unless they are, though temporarily, within the local limits of his jurisdiction at the time when the proceedings are initiated. Where, however, they live outside his jurisdiction but are alleged to have come temporarily within his jurisdiction in order to commit offences, proceedings ought to be taken by the District Magistrate, and not by the Sub-Divisional Magistrate who has no jurisdiction in such circumstances. (*Jack, J.*) (HRIDAY NATH ROY *v.* EMPEROR. **10 R.C. 265=171 I.C. 335=66 C.L.J. 177=38 Cr.L.J. 1078=41 C.W.N. 1091=A.I.R. 1937 Cal. 520.**

———**Ss. 107-119**—*"Acquittal" in proceedings under S. 107—If proper.*

Under S. 119 of the Cr.P. Code, after an enquiry has been made and it is found that no order binding over a person to keep the peace is necessary, the proper course is to 'discharge' that person. The use of the word 'acquittal' is quite inappropriate to a proceeding of this nature. (*Niamatullah and Allsop, JJ.*) BHAGAT RAJ *v.* GAPAI DULAIYA. **I.L.R. (1938) All. 89=173 I.C. 669=10 R.A. 491=1938 A.L.R. 159=1937 A.W.R. 1113=1937 A.L.J. 1281=A.I.R. 1938 All. 49.**

———**Ss. 107 and 145**—*Applicability—Delivery of possession by Civil Court under O. 39, R. 9, C.P. Code—Subsequent dispute as to possession—Proceedings by Criminal Court—If to be under S. 107 or S. 145—Duty of Criminal Court.*

When there is an apprehension of a breach of the peace in respect of a property which has been the subject of delivery of possession by the Civil Court, a Magistrate has discretion to choose either S. 145 or S. 107, Cr.P. Code. If the dispute arises immediately after the delivery of possession by the Civil Court and is between the parties

to that delivery, the more appropriate step is to bind down under S. 107 the party who has been dispossessed by the Civil Court. But if the delivery is an old one or the dispute is between a party who has been given possession and one who has not been dispossessed by the Court, a procedure under S. 145, Cr.P. Code, would generally be more suitable. Where a party is put in possession of a Zamindari property under O. 39, R. 9, C.P. Code, and the merit of delivery is served on the locality, it must be taken to be an effective dispossession of the zamindar, and the Criminal Courts must help the party put in possession in retaining that possession. If the party put in posssession by Court sleeps over his right or allows the dispossessed party to regain possession of the property and the latter is at the time in peaceful possession, the matter stands on a different footing. But in such cases the Magistrates must take it as an indisputable fact, once delivery of possession is proved, that on the day of the delivery the party who was put in possession was in possession as against a person who was a party to the delivery and was bound by the writ. They must start with the presumption that the state of things which existed on that day continued to exist thereafter unless the contrary is established. (*Noor, J.*) RAJENDRA NARAIN BHANJ DEO *v.* CHINTAMONI MAHAPATRA. **180 I.C. 322=11 R.P. 493=5 B.R. 585=20 Pat.L.T. 333=40 Cr.L.J. 339=1938 P.W.N. 526=19 Pat.L.T. 632=A.I.R. 1939 Pat. 151.**

——Ss. 107, 145 and 537—*Complaints under Ss. 107 and 145—Legality of procedure adopted—Interference by Appellate Court—Curability under S. 537.*

The object of both Ss. 107 and 145, Cr.P. Code, is to prevent civil riots and commotions. Where two complaints are made under Ss. 107 and 145, and a Magistrate adopts a particular procedure, the Appellate Court should as far as possible abstain from binding the hands of the Magistrate too tightly. It is partially with this object that S. 537 is enacted. If no injustice has resulted and if the breach of peace has been avoided then the first object of the two sections has been fulfilled, and no interference is called for, and the irregularity, if any, can be condoned under S. 537. (*Davies.*) ZORA *v.* JAWAHIR NATH. **1940 A.M.L.J. 58.**

——Ss. 107 and 147—*Relative scope—Proceedings under S. 107 by Sub-Divisional Magistrate—Order by successor staying such proceedings and ordering the filing of written statements under S. 147—Legality.*

While it is true that where proceedings have been instituted under Chap. VIII of the Cr.P. Code, an order in those proceedings cannot be made under Chap. XII, and that where proceedings have been instituted under Chap. XII, no order in those proceedings under Chap. VIII could be made, a Magistrate is not debarred from taking proceedings under Chap. XII, merely because proceedings have already been taken under Chap. VIII, even though the proceedings are based on the same facts. An action that may be deemed expedient or necessary at one time may not be deemed so at another. Consequently, where proceedings have been instituted under S. 107 by a

Sub-Divisional Magistrate, it is open to his successor to direct those proceedings to be kept pending, and to order the parties to file written statements under S. 147, Cr.P. Code, in regard to their respective claims. A Sub-Divisional Magistrate, on whom rests the responsibility for maintaining the peace of his sub-division, must be given that wide discretion which the law provides. (*Davies, J.C. and Mehta, A.J.C.*) LACHMANDAS SANWALDAS *v.* EMPEROR. **29 S.L.R. 443=164 I.C. 942=9 R.S. 59=37 Cr.L.J. 1036=1936 Cr.C. 863=A.I.R. 1936 Sind 147.**

——S. 108—*Proceedings under—Jurisdiction—Person proceeded against—If must be physically present within jurisdiction at time of preliminary order.*

It is not necessary that a person against whom proceedings under S. 108, Cr.P. Code, are contemplated should be physically within the jurisdiction of the Magistrate at the time he passes the preliminary order under S. 112, once it is admitted that the person ordinarily resides within the jurisdiction of the Magistrate. It is the information which gives the Magistrate power to act and it is usually essential that he should act promptly. The fact that he is not within the jurisdiction at the time of the order does not render the order illegal. S. 531 of the Code cures the defect, if any. (*Bose, J.*) NARSINGH PRASAD *v.* EMPEROR. **I.L.R. (1936) Nag. 200=167 I.C. 739=9 R.N. 209=38 Cr.L.J. 447=19 N.L.J. 183=A.I.R. 1937 Nag. 70.**

——S. 108 (b) and Evidence Act (1872), S. 14—*Proceedings under S. 108 (b), Cr. P. Code to prevent delivery of objectionable speeches—Previous speeches of same party—Admissibility.*

Where proceedings under S. 108 (*b*), Cr.P. Code, are started against a person in order to prevent him from delivering speeches likely to create communal tension, in the inquiry, speeches delivered by the same person on prior occasions are admissible in evidence under S. 14 of the Evidence Act. They serve to show the existence of a particular state of mind or intention. Ill. (*e*) to the section is very similar to the facts of the case. (*Niyogi, J.*) JAGANNATH PRASAD VERMA *v.* EMPEROR. **189 I.C. 74=13 R.N. 39=41 Cr.L.J. 713=1940 N.L.J. 31=A.I.R. 1940 Nag. 134.**

——S. 109 (b)—*Accused proved to be cultivating land of certain person—If can be bound over for want of ostensible means of subsistence.*

Where there is clear evidence that the accused lives in the house of a certain person as his servant and cultivates his land, he cannot be bound over under S. 109 (*b*), Cr.P. Code, for want of ostensible means of subsistence. (*Abdul Qayoom, C.J.*) RIKHIA *v.* STATE. **39 P.L.R.J. & K. 135.**

——S. 109—*Applicability—Absence of evidence to prove existence of circumstances justifying action—Effect—Statement to* daffadar *after arrest amounting to confession—Admissibility—Evidence Act, S. 26.*

It is not possible to lay down general principles for the application of S. 109 (*a*) and (*b*), Cr. P. Code. *R*, a daffadar, on patrol duty, found at midnight the petitioner walking on a *bauth* which

was apparently used as a thoroughfare. Petitioner on being questioned by the *daffadar* replied that he was going to a marriage party and that he had others accompanying him. These other persons came on the scene later and the *daffadar* took all the four to the police station and made a report. Besides stating to the Sub-Inspector that he had met the petitioner and others, the *daffadar* added also that the petitioner had subsequently stated to him that he had been asked by one *R* to commit theft and that it was for this reason that he and his companions had come to the place where they were discovered by the *daffadar*. Proceedings were taken against the petitioner and others under S. 109, Cr.P. Code, and the petitioner examined several witnesses in support of his case.

Held, (1) that the statement of the *daffadar* that the petitioner told him of his having been asked by *R* to commit theft was clearly inadmissible under S. 26 of the Evidence Act, as it was made after his arrest; (2) that the petitioner had given an account of himself which was not shown to be false or in any way unsatisfactory; and (3) that therefore neither Cl. (*a*) nor Cl. (*b*) of S. 109, Cr.P. Code, applied to the case, and the order requiring the petitioner to furnish security could not be sustained. (*Fazl Ali and Meredith, JJ.*) KARU KANDU *v.* EMPEROR. **189 I.C. 641=13 R. P. 137=6 B.R. 842=41 Cr.L.J. 777=21 Pat. L.T. 171=1940 P.W.N. 208=A.I.R. 1940 Pat. 410.**

———S. 109 (b)—*Arrest of man having means of subsistence—Giving false name and trying to escape—Action under the section—Propriety—Construction—"Satisfactory account of himself".*

The expression "satisfactory account of himself" does not necessarily mean that the accused should give his correct name and address but that he should satisfy the authorities by explaining the suspicious circumstances appearing against him. Where a man of position and substance is arrested, the mere fact that he foolishly chooses not to give his correct name and very foolishly tries to run away from the police when he was arrested and declines to explain how he happens to be there is no reason for holding that he could not give a satisfactory explanation of himself or for saying that he is a man of no ostensible means of subsistence. And as such he cannot be bound over under S. 109 to be of good behaviour. A.I.R. 1929 All. 33; A.I.R. 1925 Cal. 616 and A.I.R. 1935 Pat. 69, Rel. on. (*Nanavutty, J.*) DIN MOHAMMAD *v.* EMPEROR. **164 I.C. 105=9 R.O. 36=37 Cr.L.J. 888=1936 O.W.N. 752=1936 O.L.R. 426=1936 Cr.C. 979=A.I.R. 1936 Oudh 383.**

———S. 109—*Order under—When not justified.*

An order under S. 109, Cr.P. Code, cannot be passed against a person on the ground that it is not safe in the interests of justice to allow him unrestricted personal liberty. Such a ground is not one contemplated by the section. (*Bartley and Edgley, JJ.*) KALI PADA DAS *v.* EMPEROR. **42 C.W.N. 816.**

———S. 109—*Proceeding under—Person moving about during night with house-breaking implements.*

When a man is stealthily moving about in the night time in a place where he has no business to be at the time and it appears from the evidence that the man was taking precautions to conceal his presence and house-breaking implements are found on the person of that man, it will be supposed that the man was taking such precautions with a view to committing an offence and he can be rightly proceeded against under S. 109, Cr.P. Code. (*Abdul Qayoom, C.J.*) ABDULA SHERA *v.* STATE. **39 P.L.R.J. & K. 85.**

———S. 109—*Scope and applicability—Concealment, if possible when local residence is known—Section if contemplates continuity in concealment.*

S. 109, Cr.P. Code, is one restrictive of liberty and must be applied only when strictly applicable. The mere taking of precautions to conceal is penalised by the section irrespective of the success or otherwise of the precautions. There can be a concealment even if residence within the local limits is well known and no hard and fast rule could be laid down as regards the continuity of the concealment for it is a question of fact in each case. (*Gruer, J.*) GANPATI *v.* EMPEROR. **I.L.R. (1939) Nag. 405=39 Cr.L.J. 807=11 R.N. 78=176 I.C. 820=A.I.R. 1938 Nag. 465.**

———S. 109 (a)—*"Concealing"—If refers to isolated act.*

Per *Jack, J.*—The word 'concealing' in S. 109, Cr.P. Code, refers to continuous concealment and not to an isolated act of concealment. (*Jack and Patterson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* ISABALI. **I.L.R. (1938) 2 Cal. 221=42 C.W.N. 588=175 I.C. 722=39 Cr.L.J. 647=11 R.C. 1=A.I.R. 1938 Cal. 409.**

———S. 109 (a)—*"Concealing his presence"—Meaning.*

A person was walking along the road, and observing the watchman on the alert, he stood still and waited until his attention should be diverted before proceeding on his way. He did not hide behind anything but stood there apparently in the hope that he might be mistaken for an inanimate object or part of a building if the watchman happened to turn his eyes on him:

Held, that this could not be considered as concealing his presence. (*Grille, J.*) HAFIZ AHESANALI *v.* EMPEROR. **I.L.R. (1938) Nag. 595=176 I.C. 465=11 R.N. 54=39 Cr.L.J. 747=A.I.R. 1938 Nag. 303.**

———S. 109 (a) and (b)—*Scope of—Satisfactory account of one's self—What may not amount to.*

The preliminary words of Cls. (*a*) and (*b*) are so different that they cannot be read together and again within Cl. (*b*) itself the circumstances are mentioned in the alternative, and not in a concurrent sense. The wording of Cl. (*b*) is such that the conditions must of necessity be read discreetly and a person who cannot give satisfactory account of himself is not necessarily a rogue and a vagabond, which might be implied by Cl. (*a*) or the first part of Cl. (*b*). When a man is called on to give a satisfactory account of himself, the implication necessarily follows that it is not a general account of himself but an account of himself in relation to the circumstances in which he is called on to give such

account. The wording of S. 109 is not otherwise from that of S. 55. A person cannot be considered to have given a satisfactory account of himself, if, being found with unmistakable burgling instruments in his possession, in the middle of the night, he says that he is a respected householder, following an honourable profession in the daytime; still less can he be said to have given a satisfactory account of himself when on being accosted, he flings away a bundle of house-breaking implements and runs to his own house by a devious route, and when forced to open his door to the police, denies that he had left his house that night. (*Grille, J.*) HAFIZ AHESANALI *v.* EMPEROR. **I.L.R. (1938) Nag. 595=176 I.C. 465=11 R.N. 54=39 Cr.L.J. 747=A.I.R. 1938 Nag. 303.**

———S. 109 (b)—*'Satisfactory account'—Interpretation.*

The expression "has failed to give a satisfactory account of himself" in S. 109 (*b*), Cr.P. Code, means a satisfactory account of his presence at the place and in the circumstances in which he was found, and not merely a satisfactory account of himself generally. Where a person is arrested in extremely suspicious circumstances, and fails to give any reasonable explanation as to how he came to be in that position, he cannot be said to have given a satisfactory account of himself. (*Jack and Patterson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* ISABALI. **I.L.R. (1938) 2 Cal. 221=42 C.W.N. 588=175 I.C. 722=39 Cr.L.J. 647=11 R.C. 1=A.I.R. 1938 Cal. 409.**

———Ss. 109 (b) and 110—*Scope—Evidence showing accused to be by habit a thief—Order under S.* 109 (b)—*Legality—Proper order.*

A proceeding against a man because he had no ostensible means of subsistence is a totally different proceeding from one for being by habit a thief. Proceedings were started against a person under S. 102 (*b*), Cr.P. Code, as having no ostensible means of subsistence. Evidence adduced to prove this showed that the person was by habit a thief. Still the Magistrate passed an order ordering him to furnish security under S. 109 (*b*). No appeal was filed against the order.

Held, that inasmuch as no appeal was filed against the order and the person having been proved to be by habit a thief, it was proper to pass an order under S. 110 instead of setting aside an order of security already passed. (*Spargo, J.*) KING *v.* NGA BA HEIN. **173 I.C. 213=10 R.R. 321=39 Cr.L.J. 285=A.I.R. 1937 Rang. 544.**

———Ss. 109 and 112—*Appellate Court, if can alter section under which security is to be taken—Entering of actual section and clause, if imperative.*

Where the Appellate Court has considered that what is set out in the body of the order under S. 112 brings the matter within the terms of Cl. (*a*) of S. 109 and not under Cl. (*b*), and it has in effect corrected what it considers either to be a misconception of the trying Magistrate or a clerical error, its order cannot be set aside. The substance of the accusation which the applicant had to meet has not been altered in any way and further there is nothing in the provisions of S. 109 or of S. 112 which makes it imperative on the part

of the Magistrate, after having recited the reasons why the person named is to be called on to execute a bond, to enter the actual section and clause which he considers appropriate. (*Grille, J.*) HAFIZ AHESANALI *v.* EMPEROR. **I.L.R. (1938) Nag. 595=176 I.C. 465=11 R.N. 54=39 Cr.L.J. 747=A.I.R. 1938 Nag. 303.**

———Ss. 109 and 118—*Proceedings under "inquiry"—S.* 517—*Applicability.*

The definition of "inquiry" in the Code is wide enough to include proceedings under the security sections. A proceeding under the security section in Ch. 8 is an inquiry within the meaning of S. 517. S. 517 applies to any property produced before the Court and is not limited to property in respect of which an offence appears to have been committed or which has been used for the commission of an offence. Where a person arrested as a suspicious character with a bundle of money in his possession and proceeded against under Ss. 109 and 118, does not claim the money as his own and there is no proof that it belongs to any one else, the money is liable to be confiscated and to be treated as unclaimed property. It cannot be restored to the person. (*Gruer, J.*) EMPEROR *v.* BENI MADHAO. **I.L.R. (1936) Nag. 150=166 I.C. 271=9 R.N. 118=1936 Cr.C. 694 (1)=38 Cr.L.J. 175=A.I.R. 1936 Nag. 143.**

———Ss. 109, 118 and 123—*Scope and object of—Failure to furnish security—Effect—Order of imprisonment in default—Legality—Imprisonment awardable—Nature of.*

S. 109, Cr.P. Code, merely requires a Magistrate to issue a notice and does not empower him to pass the final order. This is done under S. 118, which in its turn is dependent upon the order passed under S. 112. All that the final order can contain is a direction to furnish security to be of good behaviour for a period which cannot, in any case, exceed one year, and which must not be beyond that specified, in the order under S. 112. Any order which specifies a period of imprisonment in default is to that extent illegal. The penalty for a failure to furnish security is given in S. 123 (1). It is evident from S. 123 (1), Cr.P. Code, that no person committed to prison in this way can be detained there if he furnishes the security required of him after his commitment. Consequently, an order stating that he should suffer a period of imprisonment in default is illegal. The detention under imprisonment will be in accordance with the provisions of S. 123 (1), Cr. P. Code, and as S. 109. Cr. P. Code, is a preventive and not a punitive section in the absence of special reasons, the type of imprisonment should be simple. (*Vivian Bose, J.*) RANGI. *In re*. **167 I.C. 403=9 R.N. 185=38 Cr.L.J. 388=1936 Cr.C. 1138=A.I.R. 1936 Nag. 265.**

———S. 110—*Applicability, scope and object of—Proceedings under against local bosses or dictators not accused or convicted of any crime—Propriety of.*

S. 110, Cr.P. Code, is intended to deal with ex-convicts of habitual criminals and desperate and dangerous outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and normal fear of condign punishment

for crime are not sufficient deterrents or adequate safeguards for the public. The section is obviously not intended for use against merely undisciplined people such as local bosses and faction leaders to clip their wings, to deplete their resources by an expensive inquiry's humble their pride by treating them as criminal mad men, to advertise publicly their high-handed behaviour. To apply the section to such as these is undoubtedly to abuse it. Where a person has lived all his life in a locality and has never been accused before a Court of Law for any crime, far less convicted, there is absolutely no justification for an experimental use of the security sections or for presuming him to be a criminal, not to say a habitual criminal. The section is intended to protect the public against irresponsible criminal maniacs and desperadoes and the weapon of public opinion is the only one adapted to the suppression of undisciplined local dictators. (*Newsam, J.*) RATHINAM PILLAI. *In re*. **172 I.C. 866=10 R.M. 498 =39 Cr.L.J. 230=1937 M.Cr.C. 298=46 L. W. 858=1937 M.W.N. 1065=A.I.R. 1938 Mad. 35=(1937) 2 M.L.J. 749.**

———S. 110—*Construction—"Within the limits of his jurisdiction"—Meaning of—Person not within jurisdiction at time of information and not having left jurisdiction for temporary purpose—If can be proceeded against—Acts done within jurisdiction—Sufficiency to confer jurisdiction.*

S. 110, Cr.P. Code, is quite clear in its language, A Magistrate, in order to have jurisdiction, must receive information that the person to be dealt with is within the limits of his jurisdiction. The section cannot be grammatically read as referring to the place where the acts on which an order is to be based were committed; it refers merely to the place where he was when the information was received. A person can be said to be within the jurisdiction of a Magistrate if he was ordinarily within the jurisdiction of the Magistrate. The mere fact that on the particular date on which the information was received he had gone temporarily out of the jurisdiction would not prevent the section applying. When the person proceeded against was not, in fact, within the local limits at the time when the information was received and had not left such limits for a purely temporary purpose the Magistrate would have no jurisdiction to proceed against him. (*Beaumont, C.J. and Sen, J.*) HANMANTRAO ANNARAO, *In re*. **I.L.R. (1940) Bom. 397=188 I.C. 830=13 R. B. 36=41 Cr.L.J. 686=42 Bom.L.R. 353= A.I.R. 1940 Bom. 204.**

———S. 110—Enquiry under—Procedure—Recall and re-examination of prosecution witnesses —Right of accused. *See* CR.P. CODE, S. 350 (1), PROVISO (*a*). **1937 A.L.J. 373.**

———S. 110—Evidence of general reputation—Admissibility—If affects S. 50, Evidence Act. *See* BUDDHIST LAW (BURMESE)—MARRIAGE. **A.I.R. 1940 Rang. 181.**

———S. 110—*Initiation of proceedings under—Vague and general allegations by tenants of oppression by zamindar spread over several years—If ground for drawing up proceedings—Quashing by superior Court.*

Magistrates, it is doubtedly true, have complete jurisdiction to initiate proceedings under S. 110, Cr.P. Code, provided they are satisfied that there are sufficient materials upon which the proceedings are based. In each case the superior Court would examine, if necessary, the materials on which the proceedings are based. A general and vague allegation of supposed oppressions by a Zamindar spread over a number of years cannot justify the drawing up of proceedings against him at the instance of his tenants who complain of sudh oppression. If, on such allegations, proceedings under S. 110 are initiated against the Zamindar, they are liable to be quashed by the superior Court. (*Manohar Lall, J.*) NARENDRANATH JHA, *In the matter of*. **1938 P.W.N. 588=19 Pat.L.T. 542=176 I.C. 849=4 B.R. 767=39 Cr.L.J. 811=11 R.P. 116=A.I.R. 1938 Pat. 533.**

———S. 110—*Order under—When justified.*

Where in a proceeding under S. 110, Cr.P. Code, there is evidence showing that the accused had been suspected of complicity in certain thefts and had been mentioned in the reports made in the police station, and there is further evidence of men holding good positions in the neighbourhood that the accused has a bad reputation, an order under S. 110 is quite proper. (*Srivastava and Nanavutty, JJ.*) EMPEROR *v.* BACHCHU. **12 Luck. 36 =160 I.C. 1039=8 R.O. 297=37 Cr.L.J. 390=1936 O.W.N. 247=1936 Cr.C. 385=1936 O.L.R. 128=A.I.R. 1936 Oudh 238.**

———S. 110—*Order under—When may be made.*

An order under S. 110 read with S. 118, Cr. P. Code, cannot be made on vague allegations. Unless the requirements of S. 110 are fulfilled or, in other words, a man is proved by habit a robber, house breaker, thief or forger or by habit a receiver of stolen property, etc., this drastic measure cannot be taken against him. If in a case the prosecution witnesses themselves admit that in all cases in which the person proceeded against was sent up, he was either discharged or acquitted, it cannot be urged that the requiremens of S. 110, Cr.P. Code, are satisfied. (*Din Mohammad, J.*) ISLAM-UD-DIN *v.* EMPEROR. **I.L.R. (1939) Lah. 53=183 I.C. 269=12 R. L. 105 (2)=40 Cr.L.J. 753=41 P.L.R. 431 =A.I.R. 1939 Lah. 269.**

———S. 110—*Proceedings under—Duty of Court—Order by Sessions Judge directing that no further prosecution witnesses should be examined—Propriety.*

In proceedings under S. 110 and in enquiries of a similar kind, neither the prosecution nor the defence should be hampered in any way. Where the Sessions Judge, on the proceedings under S. 110, being transferred to him under S. 123, passed an order directing that the plea of guilty made by the accused, should be cancelled as it appeared that the accused had pleaded guilty and refused to cross-examine further witnesses by reason of an impression created by the Police Officer conducting the investigation that they would be left off easily on making a confession, and further directed that the accused should be allowed to examine further defence witnesses if any but

ordered that no further prosecution witnesses were to be examined.

Held, that the order regarding the cancellation of the so-called pleas of guilty was reasonable, as they were really nothing more than mere admissions, but the Sessions Judge had no right to direct that no further prosecution witnesses should be examined. (*Cunliffe and Henderson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* JIBAN KUMAR DE. **163 I.C. 228 (1) =8 R.C. 727=37 Cr.L.J. 818=1936 Cr.C. 529=A.I.R. 1936 Cal. 292.**

———S. 110—*Proceeding under—Jurisdiction of Magistrate—Person not residing within local limits.*

A person proceeded against under S. 110, Cr. P. Code, need not reside within the local limits of the Magistrate's jurisdiction. The words of the section do not mention residence within the jurisdiction of the Magistrate, but are "any person within the local limits of the Magistrate's jurisdiction." There is no justification for importing into it words that are not there, which would restrict its scope so as to defeat its object, namely, the prevention of crime. 36 M. 96 and 14 A. L.J. 1074, Rel. on. (*Coldstream, J.*) GHULAM HUSAIN *v.* EMPEROR. **17 Lah. 453=165 I.C. 648=9 R.L. 274=38 P.L.R. 905=38 Cr.L. J. 144 (2).**

———S. 110—*Proceedings under—Previous conviction—If necessary—Habitual offender—Proof of.*

A previous conviction is not necessary for proceedings under S. 110, Cr.P. Code. There is no such provision in the Law itself which on the other hand lays down in S. 117 (4) that the fact that the man is an habitual offender can be proved by evidence of general repute or otherwise. (*Blacker, J.*) EMPEROR *v.* KHUDA BAKSH. **40 P. L.R. 222=175 I.C. 522=10 R.L. 732=39 Cr. L.J. 599=A.I.R. 1938 Lah. 428.**

———S. 110—*Proceedings under—Previous convictions—Strict proof, if necessary.*

In proceedings under S. 110, Cr.P. Code, it is not necessary for the prosecution to prove a previous conviction of any person in the same formal manner as that required by the provisions of Ss. 310 and 311 of the Code in respect of offences tried in the Court of Session. (*Srivastava and Nanavutty, JJ.*) EMPEROR *v.* BACHCHU. **12 Luck. 36=160 I.C. 1039=8 R.O. 297=37 Cr.L.J. 390=1936 O.W.N. 247=1936 Cr.C. 385=1936 O.L.R. 128=A.I.R. 1936 Oudh 238.**

———S. 110—*Scope of Application if limited to strangers to a locality—Proof of previous convictions, if necessary.*

There is nothing in the wording of S. 110 or of any other section of the Cr.P. Code, that leads to the inference that S. 110 can only be used where the parties are strangers to the locality in which the offences are committed. If the persons, or the acts which they commit, are such as to make it difficult to deal with them under the ordinary provisions of law then S. 110 can be used. Proof of a certain number of prior convictions is not a prerequisite to a person being bound over under this or similar sections. (*Horwill, J.*) SHANMUGAM ASARI *v.* EMPEROR. **47 L.W. 196 =175 I.C. 417=10 R.M. 777=39 Cr.L.J. 588**

=1938 M.Cr.C. 75=1938 M.W.N. 93=A.I. R. 1938 Mad. 482=(1938) 1 M.L.J. 178.

———S. 110 (e)—*"Habitually"—If implies frequent practice.*

The word "habitually" implies frequent practice or use. It implies a tendency or a capacity resulting from the frequent repetition of the same acts. (*Mya Bu, J.*) MAUNG PO AUNG *v.* THE KING. **187 I.C. 609=12 R.R. 340=41 Cr.L.J. 495= A.I.R. 1940 Rang. 95.**

———S. 110 (e)—*"Offences involving breach of the peace"—Meaning.*

The words "offences involving a breach of the peace" mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace. (*Mya Bu, J.*) MAUNG PO AUNG *v*, THE KING. **187 I.C. 609=12 R.R. 340=41 Cr.L.J. 495=A.I.R. 1940 Rang. 95.**

———S. 110 (e) and (f)—*Applicability—Leaders of local factions.*

Where the general evidence against a person was that he led local factions responsible for constant threat and bullying, and it is accepted, it cannot be argued that S. 110 (*e*) and (*f*) do not apply to such leaders of factions. A man is not any the less dangerous to the community, because he lives in a house and owns lands. (*Horwill, J.*) VENKATARAMANAYYA, *In re*. **175 I.C. 491=10 R.M. 783=47 L.W. 139=1938 M.W.N. 213 =1938 M.Cr.C. 132=39 Cr.L.J. 595=A.I. R. 1938 Mad. 448.**

———S. 110 (e) and (f)—*Applicability—Leaders of rival factions arming themselves and their supporters and settling disputes by force—If can be bound over.*

Clauses (*e*) and (*f*) of S. 110, Cr.P. Code, are not inapplicable to leaders of rival factions who use to arm themselves and their supporters and attempt to settle their disputes by force with the result that breaches of the peace often result and are still more frequently threatened. Such persons can be bound over under S. 110 (*e*) and (*f*). A man is not any the less dangerous to the community because he lives in a house and owns lands. (*Horwill, J.*) MANA *v.* EMPEROR. **1938 M. W.N. 213=175 I.C. 491=10 R.M. 783=1938 M.Cr.C. 132=47 L.W. 139=39 Cr.L.J. 595 =A.I.R. 1938 Mad. 448.**

———S. 110 (e) and (f)—*Applicability—Offences involving breach of the peace—Persons in the habit of waylaying women working in fields and attempting to rape them—Order binding them over —If justified.*

Before a person can be bound over under S. 110 (*e*), Cr.P. Code, he must be found to have committed offences of which a breach of the peace is a necessary constituent. An assault is clearly an offence involving a breach of the peace and clearly an attempt to rape does involve an assault upon the person against whom this offence is committed. Persons who habitually attempt to rape women and are in the habit of waylaying women working in fields, and attempting to rape them are habitually committing offences involving a breach of the peace and are desperate characters whom it is dangerous to leave at large. An order binding them over under S. 110 (*e*) and (*f*) is therefore perfectly justified. (*Horwill, J.*) VEERA

CR. P. CODE (1898), S. 110.

REDDI, *In re*. 47 L.W. 640=1938 M.W.N. 601 =176 I.C. 815=39 Cr.L.J. 816=11 R.M. 177 =1938 M.Cr.C. 200=A.I.R. 1938 Mad. 615.

———Ss. 110 and 117 (4)—*Evidence of bad repute—Admissibility.*

In proceedings under S. 110, Cr. P. Code, if the witnesses clearly depose that the accused has the general repute of being an habitual offender, such evidence is admissible under S. 117 (4), and cannot be rejected on the ground that there is no solid foundation for the opinion held by them. (*Srivastava and Nanavutty, JJ.*) EMPEROR *v.* BACHCHU. 12 Luck. 36=160 I.C. 1039=8 R.O. 297=37 Cr.L.J. 390=1936 O.W.N. 247=1936 O.L.R. 128=1936 Cr.C. 385=A.I.R. 1936 Oudh 238.

———Ss. 110 and 145—*Applicability—Substance of information relating to disputes about land—Procedure.*

Where the substance of information received under S. 110 as set out under S. 112 relates to disputes relating to land, special provisions of S. 145 apply excluding the general provisions of S. 110. (*Davis, J.C. and Tyabji, J.*) EMPEROR *v.* ALISHER DOST MUHAMMAD. 184 I.C. 189 (2)= 40 Cr.L.J. 887 (2)=12 R.S. 94=A.I.R. 1939 Sind 261.

———S. 112—*"Information"—Requirements.*

An order under S. 112 must set forth the substance of the information. If neither the time, nor place, nor any indication of the persons alleged to have been threatened is given, the information is not sufficiently detailed to satisfy the legal requirements of an order under the section. (*King, J.*) SANTHANA RAMASWAMI *v.* EMPEROR. 1937 M.W.N. 885.

———S. 112—*Order under — Contents—Non-mention of substance of information received and amount of security required—Legality.*

Where an order does not set forth the substance of the information received, and the amount of security required, it fails to comply with the requirements of S. 112, Cr. P. Code, and is bad. (*Weston.*) PARAM HANS *v.* EMPEROR. 1938 A.M.L.J. 113.

———S. 112—*Order under—Scope—If can exceed information given under S.* 107.

It is doubtful how far an order under S. 112, Cr. P. Code, can properly exceed the information given under S. 107. (*Davis, J.C. and Weston, J.*) JASODA LEKHRAJ *v.* EMPEROR. I.L.R. (1939) Kar. 662=182 I.C. 698=12 R.S. 31=40 Cr.L.J. 703=A.I.R. 1939 Sind 167.

———S. 112—*Preliminary order—Contents.*

S. 112, Cr. P. Code, does not contemplate that the allegations of fact constituting the information should be embodied in the preliminary order. It is meant to intimate to the party the general nature of the case against him to give him an idea as to what the witnesses would testify against him. It need not contain more than an indication of the particular offence which is sought to be prevented. (*Niyogi, J.*) JAGANNATHA PRASAD VERMA *v.* EMPEROR. 189 I.C. 74=13 R.N. 39= 41 Cr.L.J. 713=1940 N.L.J. 31=A.I.R. 1940 Nag. 134.

———Ss. 112, 114 and 115—*Action under S.* 112 *—Form of order—Procedure.*

No action under S. 112 should be taken without a further enquiry apart from the allegations in

CR. P. CODE (1898), S. 117.

the complaint. An order under S. 112 must set out the substance of the information received. A mere printed form is hence inappropriate. After drawing up an order under S. 112, a summons should be issued accompanied by a copy of the order. (*D. R. Norman.*) PET RAM *v.* DAYA CHAND. 1937 A.M.L.J. 57.

———Ss. 114 and 115—Procedure under. *See* CR. P. CODE, Ss. 112, 114 and 115. 1937 A.M.L.J. 57.

———S. 117—*Applicability and scope—Attempt to abet or abetment of forgery—Order—Order under section—Legality.*

An order under S. 117 is in the nature of an interim order and must be of a kind which could be made in a permanent order in the proceedings. The temporary order must be capable of direct relation to the application under Ss. 107, 108, 109 and 110 on which the proceedings are based and it is not intended to apply to an offence that has no relation whatever to the object of the proceedings under the Criminal Procedure Code, no relation whatever to proceedings under Chap. 8. Therefore S. 117 could not be said to apply to an attempt to abet or the abetment of the offence of perjury. (*Davis, J.C. and Weston, J.*) EMPEROR *v.* SUMAR. I.L.R. (1940) Kar. 494=A.I.R. 1940 Sind 175.

———S. 117 (2)—"The manner hereinafter prescribed for conducting trials and recording evidence in warrant cases"—Meaning of—If include right under S. 350 (1), proviso (*a*). *See* CR. P. CODE, S. 350 (1), PROVISO (*a*). 1937 A.L.J. 373.

———Ss. 117 (2) and 107—*Consent to furnish security—If amounts to plea of guilty.*

It depends upon the facts and circumstances of each case as to whether a consent to give security amounts to a plea of guilty. Where the persons proceeded against under S. 107, Cr. P. Code, clearly admitted in their joint written statement the allegations made against them and that they were willing to give security, and the Magistrate took further precautions and examined each of them separately and the reply given by each was that he admitted his guilt and was willing to give security and execute a bail-bond.

Held, that this was itself evidence on which a magistrate could convict and it was really a plea of guilty and that, in the present case, there was a full enquiry as laid down in S. 117 (2), Cr. P. Code, in the manner directed in Ch. XX of the Code. (*Thomas, J.*) DUKHI *v.* EMPEROR. 166 I.C. 850=9 R.O. 341=38 Cr.L.J. 302=1937 A. Cr.C. 31=1937 O.L.R. 62=1937 O.W.N. 133= A.I.R. 1937 Oudh 289.

———S. 117 (4)—*Scope and effect—Charge under S.* 110 (f)—*Evidence of general repute—Sufficiency for action being taken—Police evidence —Admissibility.*

In view of proviso 4 to S. 117 of the Cr. P. Code, a finding in regard to a charge under S. 110 (*f*) of the Code can be based on evidence of general repute of the person proceeded against. The section does not say in what manner evidence is to be given. The evidence of police witnesses with regard to the general repute of the person proceeded against is not inadmissible. The question as to what is a man's reputation is a question of fact and may be spoken to by any one who knows what his general imputation is. (*Burn and Venkataramana Rao, JJ.*) MAILA RAI *v.*

CR. P. CODE (1898), S. 117.

EMPEROR. **I.L.R. (1938) Mad. 720=1938 M.W. N. 313=47 L.W. 428=177 I.C. 586=11 R.M. 351=1938 M.Cr.C. 133=39 Cr.L.J. 898=A.I.R. 1938 Mad. 591.**

———**S. 117 (4)**—*Construction and scope—When to be availed for—Exceptional circumstances—If to be proved.*

S. 117 (4), Cr. P. Code, ought not to be interpreted as if it laid down a general rule of evidence for every security case. It is really an exception to the general rule of evidence that every man is presumed not to be a criminal or offender until he has been found guilty by a competent Court, and like all exceptions, ought to be sparingly used and only in exceptional circumstances. (*Newsam, J.*) RATHINAM PILLAI, *In re.* **172 I.C. 866=10 R.M. 498=39 Cr.L.J. 230 =1937 M.Cr.C. 298=46 L.W. 858=1937 M.W. N. 1065=A.I.R. 1938 Mad. 35=(1937) 2 M.L. J. 749.**

———**S. 117 (5)**—*"Associated together in the matter under inquiry"—Meaning of—Joint inquiry of two or more persons—When justified.*

Where two or more persons have not been associated together in all the matters under inquiry, it is not only not just, but it is not legal to deal with them together in the same inquiry under S. 117 (5), Cr. P. Code. A joint inquiry is out of the question when one charge at least is that two persons are so desperate and dangerous as to render their being at large without security hazardous to the community. There certainly cannot be any such intimate connection between two individuals in regard to their characters as render them liable to a joint inquisition. (*Newsam, J.*) RATHINAM PILLAI, *In re.* **172 I.C. 866=10 R. M. 498=39 Cr.L.J. 230=1937 M.Cr.C. 298=46 L.W. 858=1937 M.W.N. 1065=A.I.R. 1938 Mad. 35=(1937) 2 M.L.J. 749.**

———**S. 118**—*Order under—Contents of—Several accused persons—Self-contained order showing that the case of each suspected person is considered separately—If necessary.*

The proceedings in which suspected persons can be sent to prison on evidence on which they would not ordinarily be convicted if charged with a substantive offence in a Criminal Court are serious proceedings and require to be dealt with quite as carefully as cases where accused persons are charged in the ordinary way with substantive offences in the Criminal Courts, and where in many cases the consequences are not so serious to the persons charged. For instance, it is only fair that the case of each suspected person should be considered separately by the learned Judge. It is true that under the provisions of S. 117 (5), Cr. P. Code, where two or more persons are associated together in the matter under inquiry, they may be dealt with in the same inquiry, but that does not mean that the case of each person concerned need not be separately considered. Justice demands that where a person may be committed to prison for three years on evidence of general repute, his case should be considered separately even if he be associated with other persons in the matter under inquiry in the same inquiry. S. 367 (6) makes an order under S. 118 a judgment, and thereby by analogy an order under S. 118 must be self-contained. It must show that the Court has considered the evidence against each of the suspected persons and has found that the evidence proves the case against each of the suspected persons individually. (*Davis, J.C. and Mehta, A.J.C.*) GHOUSBUX *v.* EMPEROR. **30 S.L.R. 382 =167 I.C. 227=38 Cr.L.J. 363=9 R.S. 173=A. I.R. 1937 Sind 26.**

CR. P. CODE (1898), S. 120.

———**S. 118**—Order under—Contents of. *See* CR. P. CODE, SS. 109, 118 AND 123. **A.I.R. 1936 Nag. 265.**

———**S. 118**—*Starting point.*

The order under S. 118, Cr. P. Code, though restricted in its contents by order under S. 112, is the operative order and time runs from the order passed under S. 118, and not from the order passed under S. 112. The order under S. 118 is not suspended during the time spent on bail; *a fortiori* it will not be suspended during the time spent in prison if suspect be not on bail. (*Davis, J.C. and Mehta, A.J.C.*) GHOUSBUX *v.* EMPEROR. **30 S.L.R. 382=167 I.C. 227=38 Cr.L.J. 363= 9 R.S. 173=A.I.R. 1937 Sind 26.**

———**Ss. 118 and 120 (1) and 123**—*Order for security against suspect undergoing imprisonment for substantive offence—Period of security—Date ofcommencement.*

When a suspected person against whom an order for security under S. 118, Cr. P. Code has been passed, is undergoing imprisonment for a substantive offence, the period for which the security is required commences not from the date of the order for security, but from the date of the expiration of the sentence which the suspect is undergoing for the offence. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* LASHKARO. **31 S.L.R. 409 =170 I.C. 676=38 Cr.L.J. 961=10 R.S. 71=A. I.R. 1937 Sind 203.**

———**Ss. 118 and 424**—Appeal against order under S. 118—Judgment of appellate Court—Contents of. *See* CR. P. CODE, SS. 424 AND 118. **A. I.R. 1937 Sind 26.**

———**S. 119**—*Order of discharge under—Revision—Interference by High Court—Grounds.*

The proceedings under Ch. 8 are serious proceedings and are not to be lightly dealt with. The proceedings should be taken with great care and caution only when the public interest compels. Where there is no reason to suppose that the Magistrate passing an order discharging the accused person under S. 119 is not a careful and responsible Magistrate who does not know his charge, and where he has seen the witnesses and heard what they have to say and has come to the conclusion that the case against the suspected persons is unworthy of credit and that the evidence should be believed, the High Court will not interfere. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* ALI MAHOMED. **165 I.C. 950=9 R.S. 114=38 Cr.L.J. 117=1936 Cr.C. 1099=A.I.R. 1936 Sind 243.**

———**S. 120**—*Commencement of period of security—Stay of order to furnish security pending appeal—Dismissal of appeal.*

Where the operation of an order to furnish security is stayed pending the decision of an appeal therefrom, and the appeal is ultimately dismissed, the date of commencement of the period for which security is required, is the date of the decision in appeal, possibly after deduction of the time between the order of the Magistrate and the order of the appellate Court. (*Hamilton, J.*)

CR. P. CODE (1898), S. 120.

ABDUS SATTAR *v.* EMPEROR. 1938 O.A. 566=1938 O.W.N. 676=11 R.O. 7=1938 A.Cr.C. 54=1938 O.L.R. 355=176 I.C. 948=39 Cr.L.J. 831=A. I.R. 1938 Oudh 195.

———S. 120 (1)—*Scope—Order under S.* 118 *against suspect two days after conviction under S.* 44, *I. P. Code—Period of security—Computation of—Starting point—Order against same person under S.* 123 (2) *and* (3)—*Effect.*

A suspected person was convicted of an offence under S. 411, I. P. Code, on 2-6-1936. Two days later, *i.e.*, on 4-6-1936, an order was passed against him under S. 118, Cr. P. Code. On the same day an order was passed against him under S. 123 (2), Cr. P. Code, by the Sub-Divisional Magistrate.

Held, that under S. 120 (1), Cr. P. Code, the period for which security was to be given should commence from the date of the expiration of the sentence under S. 411, I. P. Code, which the suspect was then undergoing and not from 4-6-1936 on which the order under S. 118, Cr.P. Code, was passed against him; the fact that an order under S. 123 (2) was passed on the same day did not affect the case.

Held further, that S. 120 (1) referred to orders passed under S. 106 or 118, and was not affected in its operation by the orders of Sessions Judge under S. 123 (3). (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* LASHKARO GULSHER. **170 I.C. 676=38 Cr.L.J. 961=10 R.S. 71=31 S.L.R. 409=A.I.R. 1937 Sind 203.**

———S. 121—*Bond by surety for keeping the peace — Breach — Forfeiture—Considerations—Reasons for taking of bond—Relevancy.*

Once a bond has been taken for good behaviour, the reasons leading up thereto are no longer relevant when there is a breach of the bond. What amounts to a breach of the bond is laid down in S. 121 without any ambiguity. 15 P. R. 1913 (Cr.), Diss. 10 P.R (Cr.) 1915, Approved. (*Middleton, J.C. and Almond, A.J.C.*) GHULAM HASSAIN *v.* EMPEROR. **160 I.C. 631=37 Cr.L.J. 342=8 R. Pesh. 122=A.I.R. 1936 Pesh. 16.**

———S. 122—*Acceptance of sureties without enquiry—Power of Magistrate.*

There is a procedure laid down which is to be followed by the Magistrate in rejecting a surety. But there is nothing to prevent him from accepting persons, with whom he is satisfied, as sureties without any sort of enquiry or examination of witnesses on oath. (*Cunliffe and Henderson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* AZIZAR RAHAMAN. **41 C.W. N. 415=168 I.C. 716=9 R.C. 873=38 Cr.L.J. 635=A.I.R. 1937 Cal. 233.**

———S. 123—Construction and Scope—Imprisonment in default—Order of—Legality—Nature of imprisonment awardable in case of failure to give security. *See* CR. P. CODE, Ss. 109, 118 AND 123. **A.I.R. 1936 Nag. 265.**

———S. 123—*Imprisonment under—Calculation of period—Period on bail—If to be taken into account.*

The period for which a person ordered to give security under Ch. VIII of the Cr. P. Code, remains on bail should not be excluded from the period of imprisonment he is sentenced to serve in default of furnishing security. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* KADU. **29 S.L.**

CR. P. CODE, (1898), S. 132.

R. 353=164 I.C. 576=9 R.S. 49=37 Cr.L.J. 1003=1936 Cr.C. 802=A.I.R. 1936 Sind 125.

———S. 123—*Reference under—Power of Judge to decide fitness of sureties.*

A Judge hearing a reference under S. 123, Cr. P. Code, has no jurisdiction to decide who are fit persons to give the security demanded. It is primarily the duty of the Magistrate to deal with the question of the acceptance of the sureties. (*Cunliffe and Henderson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* AZIZAR RAHAMAN. **168 I.C. 716=9 R.C. 873=38 Cr.L.J. 635=41 C.W.N. 415=A.I.R. 1937 Cal. 233.**

———S. 123 (1)—*Suspected person in prison at time of order under S.* 118—*Commencement of period of security—Proper order.*

S. 123 (1) does not contemplate that when a suspected person is in prison when the order under S. 118, Cr. P. Code, against him is passed he should be released from prison on the expiration of the sentence in order that he may find his sureties. He can, if it is possible for him to do so, furnish security while he is in prison undergoing his sentence of imprisonment; and he can, if he cannot furnish security before the expiration of his sentence, furnish security on the expiration of his sentence or at any time during the period for which he is committed to prison in default. Therefore when the suspected person is already undergoing imprisonment for a substantive offence at the time an order under S. 118 has to be passed, the proper order that should be passed is that the period for which the suspect is required to give security shall commence from the date of the expiration of the sentence of imprisonment he is then undergoing and not merely an order detaining him in prison for a certain period on his failure to furnish security. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* HUSSEIN ALLAHDING. **31 S.L.R. 412=171 I.C. 61=38 Cr.L.J. 1014=10 R.S. 86=A.I.R. 1937 Sind 204.**

———S. 123 (3)—*Order under, passed by Sessions Judge confirming Magistrate's order—Effect of.*

When an order has been passed by a Sessions Judge under S. 123 (3), Cr. P. Code, the order that is then in force is the order of the Sessions Judge and not the order of the Magistrate; and though it is often the case that Sessions Judges in passing orders under S. 123 (3), Cr. P. Code, confirm, for reasons given, the Magistrate's order and the use of the word 'confirm' is misleading nevertheless, the order passed under S. 123 (3) must be deemed the order of the Sessions Judge, and the order in operation, overriding the order of the Magistrate. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* LASHKARO. **31 S.L.R. 409=170 I.C. 676=38 Cr.L.J. 961=10 R.S. 71=A.I.R. 1937 Sind 203.**

———S. 132—*Scope—Police officers acting under Ch.* 9—*Bar to prosecution of.*

S. 132, Cr. P. Code, is a bar to the prosecution of police-officers purporting to act under Ch. 9 of the Code without the sanction of the Local Government. It is not necessary that the accused (*i.e.*, police-officers) should prove the existence of an unlawful assembly. (*King, J.*) ELAYA PILLAI *v.* ARULANANDAN PILLAI. **1937 M.W.N. 1243.**

CR. P. CODE (1898), S. 133.

———S. 133—*Applicability—Case where imminent breach of peace is apprehended.*

S. 133 is confined to certain matters which are specifically mentioned therein and cannot be brought into play to govern or control other matters which are quite extraneous to it and it is nowhere contemplated by the section that it would govern cases where an imminent breach of peace is apprehended. (*Din Mohammad, J.*) MIRZA MOHAMMAD ASHRAF *v.* EMPEROR. **18 Lah. 303=39 P.L.R. 863=171 I.C. 941=10 R.L. 250=39 Cr.L.J. 13=A.I.R. 1937 Lah. 101.**

———S. 133—*Applicability — Long-standing obstruction.*

S. 133, Cr. P. Code, is not intended for long-standing obstruction but for an unlawful obstruction lately built, in a public place. Action under the section can be taken only on proof of urgency or imminent danger to the public interest. The fact that an obstruction has been allowed to stand, without objection, in a public place for many years itself indicates that there is no such urgency or imminent danger to the public interest. The existence of a long-standing obstruction cannot, therefore, without proof of something having recently happened, be considered to be a "public nuisance." (*Young, C.J. and Tek Chand, J.*) EMPEROR *v.* TULSI RAM. **I.L.R. (1939) Lah. 381=40 P.L.R. 492=176 I.C. 669=11 R.L. 225=39 Cr.L.J. 775=A.I.R. 1938 Lah. 523.**

———S. 133—*Applicability—Long-standing obstructions.*

S. 133 is not intended for the removal of long-standing obstructions but for unlawful obstructions lately built on public places. Where a road has been recently constructed and there is obstruction to the road of branches of trees alongside, the obstruction can be held to be a recent one, even though the trees in dispute have been in existence for a number of years. If, however, the road was constructed several years ago, then it cannot be said that the trees that have stood alongside this road for a number of years constitute a new obstruction. (*Abdul Rashid, J.*) CONSOLIDATION CO-OPERATIVE SOCIETY *v.* HAR GOBIND. **183 I.C. 292=12 R.L. 106=40 Cr.L.J. 758=42 P.L.R. 219=A.I.R. 1939 Lah. 276.**

———S. 133—*Applicability—Nuisance ceasing to exist—Order if can be made absolute.*

S. 133 applied to existing nuisance and not to nuisance which is likely to arise in future. Where the nuisance complained against has ceased to exist, an order under S. 133 should not be made absolute. (*Varma, J.*) KALYAN MUL MATHUR *v.* EMPEROR. **165 I.C. 542=37 Cr.L.J. 1159=9 R.P. 186=3 B.R. 69=1936 Cr.C. 948 (2)=A.I.R. 1936 Pat. 577.**

———S. 133—*Discretion of Magistrate—Right of private person to insist on order under section—Refusal by Magistrate—Remedy.*

Whether or not an order should be passed under S. 133, Cr. P. Code, is a matter of discretion for the Magistrate and no private person has a right to insist that a Magistrate shall pass such an order. If the Magistrate does not choose to pass an order under the section, the remedy of the aggrieved party is normally in the Civil Court. (*Allsop, J.*) ALI AHMAD *v.* EMPEROR. **172 I.C. 642=10 R.A. 406=1937 A.W.R. 866=1937 A.Cr.C. 165=1937 A.L.J. 903=1938 All.L.R. 10=39 Cr.L.J. 148=A.I.R. 1937 All. 785.**

CR. P. CODE (1898), S. 133.

———S. 133—*Jurisdiction of Magistrate under—Carrying on business by butchers in a locality—Order prohibiting—If justified.*

No length of enjoyment can legalise a public nuisance involving actual danger to the health of the community. Where the carrying on of a business becomes injurious to the health and physical comfort of the community in a particular locality and is found to be a nuisance, a Magistrate has jurisdiction under S. 133, Cr. P. Code, to make an order prohibiting the carrying on of the business. When people choose to live in a well-ordered society, their personal liberties are often curtailed in the interest of the public at large, as the health of the public must be considered to be of paramount importance. An order directing certain butchers to close the business of slaughtering animals and selling beef and meat in their respective houses was upheld on the ground that there was bad smell causing a complete nuisance to the inmates of a school and the public in the neighbourhood. (*Manohar Lall and Chatterji, JJ.*) MAKSOOD ALI *v.* PRESIDENT, UNION BOARD. **17 Pat. 669=180 I.C. 852=5 B.R. 505=11 R.P. 549 (2)=40 Cr.L.J. 516=1939 P.W.N. 95=20 Pat.L.T. 288=A.I.R. 1939 Pat. 183.**

———S. 133—*Magistrate ordering party to remove obstruction or appear before him—Party appearing before him—Power of Magistrate to send case to another Magistrate for disposal.*

Where a Magistrate orders under S. 133 a person causing obstruction or nuisance either to remove the nuisance or to appear before him, and to move to have the order set aside or modified, and the parties so appear before him, it is incumbent on him to proceed with the case himself and he has no power to send it at that stage for disposal to another Magistrate. (*Blacker, J.*) UMRAO SINGH *v.* KANWAR LAL. **175 I.C. 517=10 R.L. 733=39 Cr.L.J. 603=A.I.R. 1938 Lah. 323.**

———S. 133—*Old encroachment—Proceeding, if justified.*

If an encroachment is held by the Magistrate to be a recent one, proceedings under Chapter X, Cr. P. Code, would be perfectly valid. If, however, it is discovered that the obstruction is an old one, such proceedings would not be justified. (*Abdul Rashid, J.*) NANUMAL *v.* EMPEROR. **184 I.C. 352=12 R.L. 211=40 Cr.L.J. 933=41 P.L.R. 515=A.I.R. 1939 Lah. 452.**

———S. 133—*Order under—Duty of Magistrate.*

An order under S. 133 without any inquiry whether the obstruction in dispute amounted to a nuisance under S. 133 is improper. An inquiry should be made into these matters before passing any orders under S. 133. (*Abdul Rashid, J.*) CONSOLIDATION CO-OPERATIVE SOCIETY *v.* HAR GOBIND. **183 I.C. 292=12 R.L. 106=40 Cr.L.J. 758=42 P.L.R. 219=A.I.R. 1939 Lah. 276.**

———S. 133—*Order under—If an injunction.*

A conditional order under S. 133 does not amount to injunction. (*Stone, C.J. and Vivian Bose, J.*) HARGOVIND DULLABH JIWAN *v.* KIKABHAI RAHIMTULLAH. **I.L.R. 1938 Nag. 348=176 I.C. 257=11 R.N. 45=A.I.R. 1938 Nag. 84.**

CR. P. CODE (1898), S. 133.

———S. 133—Power to direct removal of obstruction in public pathway. *See* CR. P. CODE, SS. 147 (2) AND 133. **1938 N.L.J. 139.**

———S. 133—*Proceedings under—Procedure to be observed by Magistrate—Burden of proof—Omission to observe proper procedure—Effect.*

The procedure to be observed by Magistrates under Ch. X, Cr. P. Code, is that when an order under S. 133 has been made with reference to an obstruction in a public way, if the person to whom the order has been addressed appears before the Magistrate, the later must, before proceeding to the inquiry contemplated by Ss. 137 and 138, question the person as to whether he denies the existence of any public right in respect of the way or place. At this stage it is clearly for the person proceeded against to adduce evidence in support of his denial; and the Magistrate ought to record a finding whether the existence of a public right is denied by that person or not, and if it is denied, whether there has been produced or not reliable evidence in support of such denial. If he does not deny the existence of a right of way, or if there is no reliable evidence in support of the denial, the Magistrate must then proceed to the inquiry contemplated by Ss. 137 and 138; and in this inquiry, it is for the Crown to lead evidence, and for the person proceeded against to answer it. The omission to observe this procedure must frequently lead to pitfalls and errors, which render the order passed liable to be set aside. (*Rowland, J.*) EMPEROR *v.* RAGHUNANDA SARAN DAS. **165 I.C. 942=9 R.P. 234=38 Cr. L.J. 29=3 B.R. 107=17 Pat.L.T. 791=1936 P. W.N. 926=1936 Cr.C. 1070=A.I.R. 1936 Pat. 639.**

———S. 133—*Procedure—Two proceedings side by side with regard to practically same subject matter—Propriety.*

Quaere.—It is doubtful if a Magistrate can continue two proceedings under S. 133 side by side with regard to practically the same subject-matter because the danger is that by this procedure a Magistrate may get a chance of reviewing an order which he has already passed. Such procedure is not contemplated by the Cr. P. Code. (*Varma, J.*) KALYAN MUL MATHUR *v.* EMPEROR. **165 I.C. 542=37 Cr.L.J. 1159=9 R.P. 186=3 B.R. 69=1936 Cr.C. 948 (2)=A.I.R. 1936 Pat. 577.**

———S. 133—*"Public right"—Right of cultivators, numbering about 60, in a village to use water of channel for irrigation of lands—If public right.*

Though the word "public" is not defined in the Cr. P. Code, the definition of the word given in the Penal Code, has to be adopted, and it includes any class of the public or any community. A right claimed by a certain number of cultivators in a village, numbering about 60, to use the water of a reservoir flowing through a channel for irrigating their lands cannot be said to be a public right. It is clearly a private right vested only in a selected number of persons. (*Noor and Varma, JJ.*) HARNANDAN LAL *v.* RAMPALAK MAHTO. **18 Pat. 76=1939 P.W.N. 346=184 I.C. 47=12 R.P. 212=6 B.R. 6=40 Cr.L.J. 837=20 Pat.L.T. 748=A.I.R. 1939 Pat. 460.**

———S. 133—*"Public right"—Test of.*

Noor, J.—The best criterion of a public right is to see whether the right claimed is vested in such a large number of persons as to make them unascertainable and to make them a community or class.

Varma, J.—A public right does not depend upon the number of individuals who enjoy it. It is, generally speaking, that which must be enjoyed by members of the general unascertained mass of the public. (*Noor and Varma, JJ.*) HARNANDAN LAL *v.* RAMPALAK MAHTO. **18 Pat. 76=1939 P.W.N. 346=184 I.C. 47=12 R.P. 212=6 B.R. 6=40 Cr.L.J. 837=20 Pat.L.T. 748=A.I.R. 1939 Pat. 460.**

———S. 133—*Resort to proceedings under—When justified—Nature of proceedings under Chapter X.*

Where certain mills have been working under a licence from the Municipality, for a number of years, it would not be proper to have recourse to the provisions of Chapter X of the Cr. P. Code. The proceedings under Chapter X are of a summary nature and intended to enable Magistrate to deal with cases of emergency and not intended to enable a complaint to obtain, by having recourse to this chapter, relief which he should seek in the Civil Court. (*Radha Krishna, J.*) KEDAR NATH *v.* SATISH CHANDRA. **15 Luck. 140=12 R.O. 143=184 I.C. 754=1939 A.W.R. (C.C.) 252=1939 O.L.R. 653=1939 O.W.N. 966=1940 A.Cr.C. 1=41 Cr.L.J. 99=A.I.R. 1940 Oudh 75.**

———S. 133—*Scope—Order under—If can be claimed by part as of right—Discretion of Magistrate.*

A private person has not a right to insist that a Magistrate shall pass orders under S. 133, Cr. P. Code. Whether such orders should be passed is a matter of discretion for the Magistrate. If he does not choose to interfere, the party aggrieved has his normal remedy in the Civil Court. (*Allsop, J.*) SIBTE HUSAIN *v.* EMPEROR. **172 I.C. 642=10 R.A. 406=1938 All.L.R. 10=39 Cr.L.J. 148=1937 A.L.J. 903=1937 A.W.R. 866=1937 A.Cr.C. 165=A.I.R. 1937 All. 785.**

———Ss. 133, 137 and 142—*Scope and effect of—Proceedings under S. 133—Order under S. 142 complied with—Subsequent order under S. 137—Competency of.*

It is no doubt true that an order under S. 137, Cr. P. Code, can only be made when there is existing obstruction or nuisance, and cannot be made in respect of some future nuisance. But the fact that a magistrate has, in a proceeding under S. 133 of the Code, passed an order under S. 142 directing the removal of an obstruction which has been complied with, does not preclude him from making a final order under S. 142, in the same proceeding. Ss. 133, 137 and 142, taken together, clearly mean that the magistrate, in spite of making an order under S. 142, is intended to proceed with the case and make a final order under S. 137 of the Code. (*Lort Willams and Cunliffe, JJ.*) REBATI MOHAN BOSE *v.* CHATTAL CHANDRA SEN. **166 I.C. 221=9 R.C. 490 (1)=38 Cr.L.J. 173=63 C.L.J. 5=1936 Cr. C. 954 (1)=A.I.R. 1936 Cal. 692.**

———Ss. 133, 137 (3)—*Order absolute without taking evidence—Legality.*

A Magistrate is not justified in making an order under S. 133 absolute without taking the evidence of witnesses produced by the party against whom it is passed. (*Varma, J.*) KALYAN MUL MATHUR

CR. P. CODE (1898), S. 133.

v. EMPEROR. **165 I.C. 542=37 Cr.L.J. 1159=9 R.P. 186=1936 Cr.C. 948 (2)=3 B.R. 69=A.I.R. 1936 Pat. 577.**

——**Ss. 133, 137 and 139-A**—*Issue of conditional order under S.* 133—*Procedure to be followed thereafter.*

Where a Magistrate has issued a conditional order as required by S. 133, Cr. P. Code and the party to whom notice was issued appeared but did not deny the existence of a public way, it is clearly incumbent on the Magistrate under S. 139-A to question the party and if he denied the right to proceed to enquire into the matter. The first stage is prescribed by S. 139-A and after complying with it only, should the Magistrate commence the second stage of enquiry as provided by S. 137. (*Mulla, J.*) MT. CHUNNI *v.* EMPEROR. **178 I.C. 742=11 R.A. 335=40 Cr. L.J. 143=1938 All.L.R. 904=1938 A.W.R. (H. C.) 640=1938 A.Cr.C. 105=1938 A.L.J. 1013= A.I.R. 1938 All. 653.**

——**Ss. 133 and 138-A (1)**—*Procedure under —Duty of Magistrate—Person proceeded against denying public right of way—Magistrate making local inspection and examining witnesses for applicant and the* amin *and making order absolute without further inquiry—Legality.*

An application was filed by the counter petitioner against the petitioner under S. 133, Cr. P. Code, alleging that the latter had obstructed a public pathway. The Magistrate issued notice upon him to show cause. The petitioner appeared and denied the existence of any public right, that is to say, that the plot was ever a public pathway. Instead of inquiring into the matter, the Magistrate visited the spot and examined witnesses for the counter petitioner who had put the law in motion and then examined the remaining witnesses twelve days later, including an *amin* who had been deputed to examine the alleged obstruction after comparison with the Survey Map and the record-of-rights. Without any further proceedings, he made the order absolute at once.

Held, the Magistrate ought to have found whether there was any reliable evidence in support of the denial of the petitioner of any public right and thereupon either to have stayed the proceedings altogether or on finding there was no such evidence to have proceeded as laid down in S. 137 or 138 as the case might require; the order passed without making the enquiry enjoined under S. 139-A (1) was *ultra vires* and must be set aside. (*Macpherson, J.*) NARSINGH NARAIN *v.* RAMESHWAR SINGH. **163 I.C. 402=9 R.P. 1 (2)=37 Cr. L.J. 846 (1)=17 Pat.L.T. 399=1936 P.W.N. 332=1936 Cr.C. 560=A.I.R. 1936 Pat. 360.**

——**Ss. 133 and 139**—*Applicability—Application for removal of latrine constructed near well used by public—Procedure—Inquiry under S.* 139 *—Propriety of.*

Where certain persons apply for removal of a latrine constructed near a public well, on the ground that its continuance in the place would render the water of the well insanitary and unfit for use, and there is no denial on the part of the owner of the latrine of the existence of public right in the well and the atmosphere surrounding it, an inquiry under S. 139 is not feasible. S. 133 applies to the case if the Magistrate thinks that the nuisance mentioned should be removed from the public place, *i.e.*, the well. (*Macpherson, J.*) MAHABIR PRASAD CHAUDHURI *v.* DHANUSHDHARI PRASAD SINGH. **163 I.C. 514=9 R.P. 24=1936 P.W.N. 358=1936 Cr.C. 641=A.I.R. 1936 Pat. 409.**

CR. P. CODE (1898), S. 137.

——**Ss. 133 and 139-A**—*Absence of conditional order—Failure to make enquiry under S.* 139-*A—Final order—Legality.*

Where a Magistrate without making a conditional order under S. 133, Cr. P. Code, issued a notice calling upon the opponents to show cause why action under S. 133 should not be taken, and where the opponents appeared and denied the allegations and the Magistrate even then did not issue a conditional order, nor did he make an enquiry under S. 139-A but recorded evidence and passed what purported to be a final order restraining the opponents from committing the acts complained of it was held that the Magistrate had disregarded completely the procedure laid down by the Code and that it was impossible to justify the order. (*Weston.*) CHHITAR MAL *v.* SULEMAN. **1938 A.M.L.J. 4.**

——**Ss. 133 and 139-A**—*Proceedings under S.* 133—*Production of evidence to show title to disputed land—Duty of Magistrate.*

Where in proceedings under S. 133, Cr. P. Code, the party concerned produces documentary evidence to prove title to the land in dispute, and it could not be said that their contention is frivolous, it is obviously a matter which can only properly be decided by a competent Civil Court and hence the proceedings ought to be stayed under S. 139-A. (*Allsop, J.*) KUNDAN LAL *v.* EMPEROR. **180 I.C. 495=11 R.A. 465=1939 A.Cr.C. 31=40 Cr.L.J. 375=1939 A.W.R. (H.C.) 71=A.I.R. 1939 All. 187.**

——**S. 135**—*Burden of proof—Party against whom conditional order is passed—Duty of in showing cause.*

It is not correct to hold that the person against whom a conditional order has been made has the burden of proof on him under S. 135, Cr. P. Code. He has only to show cause in respect of the matters complained of. (*Broomfield and Macklin, JJ.*) EMPEROR *v.* RAMESHWAR NARAYAN. **180 I.C. 511=11 R.B. 301=40 Cr.L.J. 444=41 Bom.L.R. 84=A.I.R. 1939 Bom. 92.**

——**S. 137**—*Duty of Court—Final order—Condition precedent to making of—Evidence—Burden of proof—Result of local inspection*—Ex parte *statements forming basis of conditional order—Relevancy.*

Any information or *ex parte* statements on which a conditional order was passed under S. 133, Cr. P. Code, are not relevant in considering whether the final order under S. 137 is a legal and proper one. The Court is only concerned with the evidence which was given at the inquiry. Nor can a final order be legally based on the result of a local inspection by the Magistrate. The Magistrate under S. 137 has to take evidence as in summons case; the complainant has to make out a *prima facie* case; in other words he must produce before the Court legal evidence which would justify a finding that what is complained of amounts to a public nuisance. (*Broomfield and Macklin, JJ.*) EMPEROR *v.* RAMESHWAR NARAYAN. **180 I.C. 511=11 R.B. 301=40 Cr.**

CR. P. CODE (1898), S. 137.

L.J. 444=41 Bom.L.R. 84=A.I.R. 1939 Bom. 92.

———S. 137—*Order under—Conditions of legality—Failure to make enquiry under S.* 139-*A* (1) *—Effect.*

Where a person against whom proceedings are started under S. 133, appears and denies the existence of any public right of way, it is incumbent on the Magistrate before proceeding under S. 137 or 138 to inquire into the matter and proceed in accordance with S. 139-A (1). An order under S. 137 passed without making the inquiry enjoined by S. 139-A (1) is illegal and cannot stand. (*Macpherson, J.*) NARSINGH NARAIN *v.* RAMESHWAR SINGH. **163 I.C. 402=37 Cr.L.J. 846 (1) =9 R.P. 1 (2)=17 Pat.L.T. 399=1936 P.W.N. 332=1936 Cr.C. 560=A.I.R. 1936 Pat. 360.**

———S. 137—Order under—When to be made—Prior order under S. 142 in case under S. 133—If precludes final order under S. 137. *See* CR. P. CODE, SS. 133, 137 AND 142. **63 C.L.J. 5.**

———S. 137 (3)—*Liability to be set aside on abatement of nuisance.*

An order under S. 137 (3) is not like an order under S. 144 which spends itself in 60 days. An order under S. 137, which is not good by reason of the nuisance having already abated should not be allowed to remain in force but should be set aside by the appellate Court, because, if allowed to remain in force, it is apt to be used in case of future proceedings against the party, against whom it is passed. (*Varma, J.*) KALYAN MUL MATHUR *v.* EMPEROR. **165 I.C. 542=37 Cr.L.J. 1159=9 R. P. 186=1936 Cr.C. 948 (2)=3 B.R. 69=A.I.R. 1936 Pat. 577.**

———Ss. 137 and 139-A—*Public way—Denial by accused—Procedure.*

Under S. 139-A (2), proceedings under Chapter X, Cr. P. Code, are to be taken in two distinct stages. Where obstruction to the use by the public of any way is alleged and denied, the question to be decided at the threshold of the case is whether the denial of the existence of the public right claimed is well founded. It is generally desirable that the Magistrate should record a definite finding in terms of S. 139-A (2). In any event, the Court and the parties should distinctly understand when the case enters on the second stage of the proceedings provided by S. 137, so that the evidence not of the preliminary character contemplated by S. 139-A (2) but such as is contemplated by S. 137 be produced. Where the entire proceedings were taken at one stretch, and the parties could not possibly understand where the enquiry under S. 139-A (2) terminated and that under S. 137 began, the final order of the Magistrate is liable to be set aside. (*Niamatullah, J.*) GANGADHAR MARWARI *v.* EMPEROR. **161 I.C. 309=37 Cr.L.J. 422=8 R.A. 723=1936 A.L.J. 116=1936 A.Cr.C. 48=1936 A.W.R. 127=1936 All.L.R. 251=1936 Cr.C. 178=A.I.R. 1936 A. 150.**

———(as amended in 1923), Ss. 137 and 139-A—*Applicability—Place of burial—Allegation of public place—Order under S.* 133—*Opposite party pleading private possession of place—Proper procedure—Order absolute—Legality—Jurisdiction to pass.*

A Sub-Divisional Magistrate passed a preliminary order under S. 133, Cr. P. Code, relating to the burial at a certain place which was alleged by

CR. P. CODE (1898), S. 139-A.

the first party to be a public place; the second party appeared before the Magistrate and contended that the place in question was in their private possession and that the burial did not cause annoyance to any one. The Magistrate thereupon took evidence on both sides and on consideration of the evidence passed an order under S. 137, Cr. P. Code, making absolute the order passed by him under S. 133.

Held, that the obvious procedure to follow under the circumstances was that prescribed in S. 139-A, Cr.P. Code, that the order was totally without jurisdiction and must therefore be set aside. (*Pandrang Row, J.*) GOVINDA GOUNDAN *v.* AYI GOUNDAN. **I.L.R. (1939) Mad. 1030= 183 I.C. 567=12 R.M. 316=40 Cr.L.J. 813=49 L.W. 476=1939 M.W.N. 409=1939 M.Cr.C. 42 =A.I.R. 1939 Mad. 465=(1939) 1 M.L.J. 649.**

———Ss. 137 and 139-A—*Procedure.*

The Magistrate should hold an enquiry under S. 139-A first before proceeding under S. 137, Cr. P. Code. (*Blacker, J.*) ATA MAHOMED *v.* ABDUL RAHMAN. **39 P.L.R. 484=171 I.C. 279=10 R. L. 181=38 Cr.L.J. 1056=A.I.R. 1937 Lah. 676.**

———S. 139—*Duty of Magistrate under—Dropping of proceedings—When justified—"Reliable evidence"—What is.*

The law requires that the mere existence of reliable evidence in support of the denial of a public right is sufficient to stop the hands of the Magistrate from proceeding further with a case under S. 133, Cr. P. Code. The fact that the public right claimed does not exist at all is a stronger reason for dropping the proceedings.

Varma, J.—If the evidence in support of the denial of the public right stands unrebutted, it is reliable evidence and the public nature of the right will be demolished. (*Noor and Varma, JJ.*) HARNANDAN LAL *v.* RAMPALAK MAHTO. **18 Pat. 76=1939 P.W.N. 346=184 I.C. 47=12 R.P. 212 =6 B.R. 6=40 Cr.L.J. 837=20 Pat.L.T. 748= A.I.R. 1939 Pat. 460.**

———S. 139-A—*Denial of public way—Accused producing Village records—Duty of Magistrate.*

A Magistrate passed a provisional order that one *B* should remove an unlawful obstruction from a public way. *B* denied that there was a public way at the place of the alleged obstruction and produced copies of village records which showed that the alleged obstruction was in certain plots which were recorded as being the property of *B's* wife. There was also an order passed by a Magistrate on a previous occasion in similar proceedings under S. 133 that no public way existed.

Held, that it was the duty of the Magistrate to stay the proceedings until the matter of the existence of the right of way had been decided by a competent civil Court. (*Allsop, J.*) EMPEROR *v.* BATUK. **160 I.C. 889=37 Cr.L.J. 365=8 R.A. 670 (1)=1936 A.W.R. 195 (2)=1936 A.L.J. 76 =1936 A.Cr.C. 52=1936 All.L.R. 191=1936 Cr. C. 140 (2)=A.I.R. 1936 A. 142.**

———S. 139-A—*Duty of Magistrate.*

It is the duty of the Magistrate to ask the person against whom an order is made under S. 133, Cr. P. Code, when he appears before him, whether he denies the existence of any public right in respect of the place in dispute. If he denies the existence of a public right, the Magistrate before proceeding under S. 137 or S. 138, Cr. P. Code, ought to enquire into this matter. If

in such an enquiry, the Magistrate comes to the conclusion that there is some reliable evidence in respect of such denial he should stay the proceedings until the matter is decided by a competent Court. If, on the other hand, he comes to the conclusion that the denial is not supported by any reliable evidence, he can proceed under S. 137 or 138, Cr. P. Code. (*Abdul Rashid, J.*) NANUMAL *v.* EMPEROR. **184 I.C. 352=12 R.L. 211=40 Cr.L.J. 933=41 P.L.R. 515=A.I.R. 1939 Lah. 452.**

———S. 139-A—*Enquiry under—Duty of Magistrate.*

The duty of a Magistrate under S. 139-A, Cr. P. Code, is merely to see whether the denial of the public right is frivolous or not, and it is not his business to decide whether the person who denies the public right had established the absence of such right. If such a person is able to produce some evidence which *prima facie* there is no reason to disbelieve, it is not for the Magistrate to examine evidence on the other side by way of rebuttal and so forth and attempt to arrive at some final decision. (*Allsop, J.*) MAHOMMAD KHALIL *v.* EMPEROR. **58 All. 739=160 I.C. 854 =37 Cr.L.J. 343=8 R.A. 657 (1)=1936 All. Cr. C. 99=1936 A.W.R. 182=1936 A.L.J. 75=1936 Cr.C. 420=1936 All.L.R. 168=A.I.R. 1936 All. 356.**

———S. 139-A—*Filing of written statement—Failure to question opponent—Effect.*

When a written reply has been filed by the opponent, the mere omission of the Magistrate to question him as required by S. 139-A, Cr. P. Code, on points to which he had already replied, is not the omission of an essential formality justifying interference on a reference. (*Weston.*) HANUMAN DAS *v.* DISTRICT BOARD ENGINEER, AJMER. **1938 A.M.L.J. 2.**

———S. 139-A—*Magistrate—Meaning of.*

The Magistrate mentioned in S. 139-A must be the Magistrate before whom the person against whom the order is made is ordered to appear under the last sentence of S. 133 (1), Cr. P. Code. (*Blacker, J.*) ATA MAHOMED *v.* ABDUL RAHMAN. **39 P.L.R. 484=171 I.C. 279=10 R.L. 181=38 Cr.L.J. 1056=A.I.R. 1937 Lah. 676.**

———S. 139-A—*Object of—Person complaining of construction—Right to demand inquiry.*

The provisions that an inquiry should be held under S. 139-A, Cr. P. Code, are intended to protect the rights of a person against whom it is proposed to pass an order under S. 133, Cr. P. Code. They are not intended to enable any person complaining of a construction to compel the Magistrate to hold an inquiry into the rights of the parties concerned. (*Allsop, J.*) SIBTE HUSAIN *v.* EMPEROR. **172 I.C. 642=10 R.A. 406 =1937 A.W.R. 866=1937 A.Cr.C. 165=1937 A. L.J. 903=1938 All.L.R. 10=39 Cr.L.J. 148= A.I.R. 1937 All. 785.**

———S. 139-A—*Object and scope of—Right of private party to ask for enquiry into rights of parties.*

The provisions in S. 139-A, as to the holding of an enquiry are intended to protect the rights of a person against whom it is proposed to pass an order under S. 133, Cr. P. Code, and are not intended to enable any private person complaining of a construction to compel a Magistrate to hold an enquiry into the rights of the parties concerned. (*Allsop, J.*) ALI AHMAD *v.* EMPEROR. **172 I.C. 642=10 R.A. 406=1937 A.W.R. 866= 1937 A.Cr.C. 165=1937 All.L.J. 903=1938 All.L.R. 10=39 Cr.L.J. 148=A.I.R. 1937 All. 785.**

———S. 139-A—*Scope of enquiry under.*

The law does not contemplate the decision by a Magistrate, making a summary enquiry under Chap. X, Cr. P. Code, of any question of title upon weighing evidence produced on both sides. All that he is required to do under S. 139-A, Cr. P. Code, is to hold an enquiry merely to satisfy himself that there is or is not some *prima facie* evidence to support the evidence of the denial of the public right. (*Mulla, J.*) MT. CHUNNI *v.* EMPEROR. **178 I.C. 742=11 R.A. 335=40 Cr.L. J. 143=1938 All.L.R. 904=1938 A.W.R. (H.C.) 640=1938 A.Cr.C. 105=1938 A.L.J. 1013=A.I. R. 1938 All. 653.**

———S. 139-A (2)—*Existence of public right—Denial proved—Duty of Magistrate—Magistrate, if can direct a party to file a civil suit.*

According to S. 139-A (2), Cr. P. Code, if a magistrate on enquiry finds that there is any reliable evidence in support of the non-applicant's denial of the existence of a public right, he should stay the proceedings until the existence or otherwise of the right has been decided by competent civil Court. The magistrate is however not empowered to order either side to file the necessary civil suit. (*Gruer, J.*) BIHARI, *In re.* **176 I.C. 755=39 Cr.L.J. 791 (1)=11 R.N. 77= 1938 N.L.J. 295=A.I.R. 1938 Nag. 512.**

———S. 139-A (2)—*Jurisdiction and duty of Magistrate.*

Under S. 139-A (2), Cr. P. Code, a Magistrate has only to see whether there is any reliable evidence in support of the denial of the person against whom the notice has been issued, or whether the denial is only frivolous. Where the Magistrate finds that there is reliable evidence in support of the denial, he shall stay the proceedings pending the decision by a competent Civil Court as to the existence of such right, and in cases where there is no such evidence he shall proceed according to S. 137 or S. 138 as the case may require. (*Bajpai, J.*) CHHEDI LAL *v.* EMPEROR. **179 I.C. 970=11 R.A. 399=40 Cr.L.J. 286= 1938 A.L.J. 1145=1938 A.W.R. (H.C.) 841= A.I.R. 1939 All. 116.**

———S. 139-A (2)—*'Reliable evidence'—Meaning of—Duty of Magistrate.*

'Reliable evidence' in the sense in which the term is used in S. 139-A, Cr. P. Code, means evidence on which it is possible for a competent Court to place reliance. It does not mean evidence which definitely establishes the title to the land, because, if that was the meaning of the term, it would be unnecessary in any case to refer the matter to the Civil Court at all. It was obviously the intention of the Legislature that questions of title should not be decided in a summary procedure by a Magistrate in a Criminal Court under S. 139-A, it is the duty of the Magistrate merely to see that any claim to a piece of land alleged to be a public place or a public way is not frivolous. (*Allsop, J.*) JANARDAN SARUP *v.* EMPEROR. **166 I.C. 376=9 R.A. 405=38 Cr.L.J. 200 =1937 All.L.R. 28 (2)=1936 A.L.J. 1285=1936**

CR. P. CODE (1898), S. 141.

A.Cr.C. 219=1936 A.W.R. 1058=A.I.R. 1937 All. 12.

———**S. 141**—*Discretion and duty of Magistrate —Order—Form and substance of—Jury failing to function—Procedure—Fresh opportunity to persons proceeded against—If to be given.*

Under S. 141, Cr. P. Code, the Magistrate has a discretion as to the order he should pass, and that discretion means a judicial discretion. The Magistrate cannot under the section pass an arbitrary or capricious or whimsical order. The order must be a reasoned order, such an order as the Court in appeal can uphold. If it is to be a reasoned order, it must be based upon information upon which the Magistrate can rely, and such information, of course, can only come to the Magistrate from materials before him on the record or as the result of any personal inquiry he may have made by visiting the spot. But it cannot be invariably laid down that once the jury have failed to function, the Magistrate is compelled to conduct some inquiry before he can pass an order under S. 141. But if the tribunal chosen by persons against whom a conditional order has been passed has failed to function through no fault of theirs, the Magistrate would be acting properly in giving them an opportunity (reasonable opportunity) of stating their case briefly for his consideration. It is not, however, necessary that he should hold a formal inquiry in which they have the opportunity of cross-examining the witnesses at length. (*Davis, J.C. and Lobo, J.*) JETHANAND *v.* SHIKARPUR MUNICIPALITY. **I.L.R. (1939) Kar. 179=186 I.C. 723=12 R.S. 213= 41 Cr.L.J. 364=A.I.R. 1940 Sind 24.**

———**S. 142**—Order under in proceeding under S. 133—If precludes magistrate from making final order under S. 137. *See* CR. P. CODE, SS. 133, 137 AND 142. **63 C.L.J. 5.**

———**S. 142**—*Order under—When can be passed.*

S. 142 is limited in its scope. The serious injury or the imminent danger contemplated by S. 142 refers to the injury or danger emanating from those things themselves which are specified in S. 133. An order under S. 142 can therefore be passed only if an injury or danger specified in S. 133 is apprehended and not otherwise; where such 'serious injury' or 'imminent danger' is nonexistent an order under S. 142 is not justified. (*Din Mohammad, J.*) MIRZA MOHAMMAD ASHRAF *v.* EMPEROR. **18 Lah. 303=39 P.L.R. 863=171 I.C. 941=10 R.L. 250=39 Cr.L.J. 13= A.I.R. 1937 Lah. 101.**

———**S. 143**—*Applicability—Order without preliminary proceeding under S.* 133*—Legality.*

S. 143, Cr. P. Code, is obviously only applicable where there has been a preliminary consideration under S. 133 and the Magistrate has passed an order under S. 133 prohibiting public nuisance. Then if there is any danger of the nuisance being repeated, an order under S. 143 can be passed. The object of S. 143 is to prevent repetition of a nuisance and it is not for original use, and further, a summary order without giving the parties an opportunity of being heard is not proper. Where previous to an order passed *ex parte* under S. 143, there was no preliminary proceeding under S. 133, the order is illegal, and a conviction for the breach of that order cannot be maintained (*Jack, J.*) SAHABAT ALI MRIDHA *v.* EMPEROR. **41 C.W. N. 638.**

CR. P. CODE (1898), S. 144.

———**S.** 143—*Applicability and scope of—If applies to proceedings subsequent to action under S.* 133.

The nuisance, repetition of which may be forbidden under S. 143 must be a nuisance which has been made a subject of action under S. 133 and the following sections. S. 143 does not apply to original proceedings, but applies only to subsequent proceedings, when a nuisance has been made the subject of inquiry and adjudication under the sections which precede it. It therefore follows that S. 143 does not stand alone but is supplementary to the sections which precede it. (*Davis, J.C. and Weston, J.*) EMPEROR *v.* SULLEMAN YUSIF KUMBAR. **I.L.R. (1940) Kar. 425=189 I.C. 353=41 Cr.L.J. 727=13 R.S. 27=A.I.R. 1940 Sind 124.**

———**S. 144.**

Applicability.
Disobedience of order.
Duty of magistrate.
Interpretation.
Order under.
Particular place.
Powers of magistrate under.
Scope.

Applicability.

———**S. 144**—*Dispute relating to land—Proper procedure—Proceedings under S.* 144*—If justified.*

Where the dispute obviously relates to immovable property, the proper procedure for a magistrate to adopt is to draw up a proceeding under S. 145, Cr. P. Code, provided, of course the magistrate is satisfied that there is a likelihood of breach of peace. Proceedings under S. 144, Cr. P. Code, are not justified in such a case, (*Chatterji, J.*) BIMALA KANTA BAGCHI *v.* SANAT KUMAR GHOSH. **178 I.C. 945=11 R.P. 311=5 B.R. 169=40 Cr.L.J. 144=1939 P.W.N. 134= 19 P.L.T. 620=A.I.R. 1938 Pat. 610.**

———**S. 144**—*Applicability if can be invoked to enable one party to obtain advantage over other.*

It is true that S. 144 gives wide powers to the Magistrate and that imminent danger to the public peace justifies the subordination of private interests. At the same time care should be taken to see that use of this section is not invoked by one party to a dispute in order to obtain material advantage over the other. (*Davis, J.C. and Weston, J.*) VIRU KAMU *v.* DEWANDAS JHAMANDAS. **A.I.R. 1940 Sind 158.**

———**S. 144**—*Order in the nature of permanent injunction prohibiting the holding of* hat *on private land—Legality of—Proper course.*

A Magistrate, as an emergency measure, has power to stop, by an order under S. 144, Cr. P. Code, the holding of a *hat,* or the exercise of his rights by a man on his own land. A man who holds a *hat* on his own land is perfectly entitled to do so, and that by itself is not a wrongful act, for competition in trade unless illegal methods are adopted, is not a wrongful act. When a rival business is started in close proximity to a previously established business, the person interested in the latter is bound to object to the former and some sort of strained feeling is inevitable. This by itself is no ground for restraining the new-

comer from carrying on his trade unless he is doing or is likely to do any wrongful act which may lead to a breach of the peace. The best course in such a case is to prohibit the doing of the wrongful act or, if necessary, to bind down the wrongdoer under S. 107, Cr. P. Code, an order more or less of a permanent nature is not justified under S. 144, Cr. P. Code, which is meant for a speedy remedy. An order which is in the nature of a permanent injunction is neither suitable nor appropriate under S. 144, Cr. P. Code. (*Noor, J.*) RAM BARIK *v.* EMPEROR. **187 I.C. 511=12 R.P. 637=6 B.R. 480 =41 Cr.L.J. 463=1939 P.W.N. 616=A.I.R. 1940 Pat. 185.**

———**S. 144**—*Mandatory order—Order directing a person to cut a* bundh—*Jurisdiction of Magistrate.*

By its very terms, S. 144, Cr. P. Code, empowers the Magistrate to direct a person to take certain order with certain property in his possession. The Magistrate has, therefore, jurisdiction under the section to direct a person to cut a *bundh* which he had erected. (*Henderson and Biswas, JJ.*) BALARAM DEY *v.* PRANRAM CHATTERJEE. **41 C. W.N. 897=65 C.L.J. 460=170 I.C. 499=38 Cr. L.J. 915=I.L.R. (1937) 2 Cal. 475=10 R.C. 150 =A.I.R. 1937 Cal. 406.**

———**S. 144**—*Order under—When to be made—Interference with right of speech—Considerations to be borne in mind by Magistrate—Revision—Interference.*

Every man has a right to express his opinions in public, and in general he should be entitled to the support of the police and the Magistracy in the expression of those opinions. Provided that these opinions are made with a genuine desire to convince people and not to irritate them, he ought not to be muzzled merely because those who dislike his opinions threaten opposition. Where interference with the right to speak is expected it is the opponents that should ordinarily be prohibited from interfering and not the other person from speaking. But private rights have on occasions to be encroached upon in the interests of private rights by those responsible for public order. The fact that no breach of the peace occurred at one time is no sufficient guarantee that no breach of the peace will occur at any other time. The Magistrate passing an order under the section is in the best position to know how far it is necessary to interfere with the lawful rights of a person or body of persons to express their opinions. As long as he bears in mind the fact that normally the police should protect persons who are exercising their rights, even though such exercise might be objectionable to others, the High Court will not readily interfere in revision. (*Horwill, J.*) SRIKANTA IYER, *In re.* **1937 M. W.N. 56=45 L.W. 249=168 I.C. 720=9 R.M. 625=38 Cr.L.J. 582=1937 M.Cr.C. 48=A.I.R. 1937 Mad. 311.**

Disobedience of order.

———**S. 144**—*Disobedience of order—Prosecution for—Trial after withdrawal of order—Legality.*

Where a person has disobeyed an order promulgated under S. 144, Cr. P. Code, which is in force he can be charged with committing an offence against the order at the time when it was in operation. The fact that he is tried for such offence after the order is withdrawn or has ceased to be in operation is entirely irrelevant and cannot be a ground for an acquittal. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* RAJENDRASINGH RAMSING. **188 I.C. 744=13 R.B. 35=41 Cr.L.J. 675 =42 Bom.L.R. 356=A.I.R. 1940 Bom. 195.**

Duty of Magistrate.

———**S. 144**—*Duty of Magistrate under.*

There is nothing in S. 144 requiring the Magistrate to uphold rights, whether constitutional or otherwise, and there is nothing in the section requiring the Magistrate to hold a judicial inquiry into the rights of the parties involved. Once a Magistrate is of opinion that there is sufficient ground for proceeding under S. 144, once a Magistrate considers that there is "apprehended danger" which can only be averted by directing a person or persons to abstain from a certain act which may result in danger to human life or a disturbance of the public tranquillity or a riot or an affray, he is entitled to make an order directing that person or those persons to abstain from such act even though such act was otherwise lawful, even though such person or persons may be acting lawfully in the exercise of a right. This section is intended to provide for an emergency, and it is idle to contend that in an emergency when a riot is apprehended and when there is apprehension of a serious disturbance of the public tranquillity the Magistrate is required to deliberate upon and decide the rights of the parties before acting. (*Lobo and Tyabji, JJ.*) PIR GUL HASAN SAHIB *v.* EMPEROR. **I.L.R. (1939) Kar. 751=183 I.C. 641=12 R.S. 67=40 Cr.L.J. 823=A.I.R. 1939 Sind 230.**

———**S. 144**—*Duty of Magistrate—Case falling under S.* 145 *and Magistrate directed by superior to proceed under S.* 145—*Order under S.* 144—*Propriety.*

For a Magistrate to proceed under S. 144, Cr. P. Code, in spite of directions to him by his superior to proceed under S. 145, and when the case properly falls under S. 145 is an unwarranted use of S. 144 altogether. (*Dhavle, J.*) BINDHESHWARI SINGH *v.* RAGHUNANDAN MAHTO. **188 I.C. 330=6 B.R. 648=41 Cr.L.J. 578= 13 R.P. 12=21 Pat.L.T. 413=A.I.R. 1940 Pat. 559.**

———**S. 144**—*Definite statements of acts prohibited—Necessity for—Delegation by magistrate of discretion to Public Relations Officer—Order directing party to abstain from acts which the Public Relations Officer does not approve of—Legality.*

An order under S. 144, in which the Magistrate delegates to the Public Relations Officer a discretion which he ought himself to exercise is definitely illegal. The Magistrate ought to state in precise and definite language what it is that he is directing a party to abstain from doing by the order made under S. 144; to say that a party must refrain from doing something which a third party such as the Public Relations Officer, does not approve of is not order which complies with the section. It is for the Magistrate himself and not for the third party to say what is the character of act which is forbidden. (*Beaumont, C.J. and Sen, J.*) ARDESHIR PHIROZSHAW MURZBAN, *In re.* **186 I.C.**

CR. P. CODE (1898), S. 144.

477=12 R.B. 352=41 Cr.L.J. 319=41 Bom.L. R. 1253=A.I.R. 1940 Bom. 42.

———S. 144—*Order under—Duty of Magistrate.*

Section 144 deals with urgent cases of nuisance and apprehended danger of breach of public peace and where such danger is apprehended and if in consequence thereof an immediate prevention is necessary, the Magistrate specially empowered in that behalf may issue instructions to individuals or the public in general to abstain from certain acts. The power thus conferred on the Magistrates is an extraordinary power which enables them to suspend the lawful rights of the public if they think it to be in the interests of public peace and safety. But the Magistrates should bear in mind that every citizen has a right to ventilate his grievances either in the public or in private and ask for redress, and this right cannot be curtailed so long as it is exercised in a lawful manner; and it is illegal assumption of power to issue an order under S. 144 on a pretended apprehension of danger of the breach of public peace. (*Ba U, J.*) THAKIN AUNG BALA *v.* DISTRICT MAGISTRATE, RANGOON. **1939 Rang.L.R. 294=182 I.C. 23=11 R.R. 516=40 Cr.L.J. 645=A.I.R. 1939 Rang. 181.**

Interpretation.

———S. 144—*Interpretation—'Or to the public generally when frequenting or visiting a particular place.'*

The words 'or to the public generally when frequenting or visiting a particular place' occuring in S. 144, Cr. P. Code are wide enough to include all members of the public when within the defined area or at the defined place, whether he or she is present there frequently (*e.g.*) as a resident—or merely casually or occasionally—*e.g.*, as a *'visitor'*. (*Braund, J.*) BHAGWATHI PRASAD *v.* EMPEROR. **1940 O.A. 798=1940 A.Cr.C. 124=1940 A.W.R. (H.C.) 449=1940 A.L.J. 547.**

Order under.

———S. 144—*Order under—Contents.*

A Magistrate must satisfy himself that there is sufficient ground for proceeding under S. 144 and when so satisfied, he must set out material facts of the case in his order, the reason being that the public should know why their rights are to be suspended; and failure to do so is fatal to the validity of the order. Merely because the order has been drawn up on the lines of Form 21 of Sch. 5, Cr. P. Code, it cannot be said to be a good and valid order. The order should also state in clear and precise terms what is it that the public are prohibited from doing. It should not be vague and indefinite. (*Ba U, J.*) THAKIN AUNG BALA *v.* DISTRICT MAGISTRATE, RANGOON. **1939 Rang. L.R. 294=182 I.C. 23=11 R.R. 516=40 Cr.L.J. 645=A.I.R. 1939 Rang. 181.**

———S. 144—*Contents of—Reasons for action against person proceeded against—Necessity to specify.*

An order under S. 144, Cr. P. Code, must state the material facts of the case. The Magistrate must give reasons why he has decided to proceed in a particular manner against a particular individual or body of persons. (*Beaumont, C.J. and Sen, J.*) ARDESHIR PHIROZSHAW MURZBAN, *In re.* **186 I.C. 477=12 R.B. 352=41 Cr.L.J. 319=41 Bom.L.R. 1253=A.I.R. 1940 Bom. 42.**

———S. 144 (1), and 2nd para.—*Order under*

CR. P. CODE (1898), S. 144.

—Mode of promulgation—Affixture to conspicuous places—If essential to validity—Irregularity—If makes it ultra vires.

Though it is doubtful whether the affixing of an order under S. 144, Cr.P. Code, to conspicuous places is necessary under S. 144 (1), 2nd paragraph which refers to S. 134, Cr.P. Code, and though it is desirable that it should be so affixed, yet, the fact that it is not so affixed is not fatal. Such irregularity in the method of promulgation of the order would not itself make it *ultra vires* so as to prevent the conviction of a person who having knowledge of the order nevertheless disobeys it. (*Meredith, J.*) MADAN KISHORE AND BADRI LAL, *In the matter of*. **187 I.C. 135=12 R.P. 578=41 Cr.L.J. 414=1940 P.W.N. 469=21 Pat.L.T. 231=6 B.R. 425=A.I.R. 1940 Pat. 446.**

———S. 144—*Order under—Opinion expressed as to possession in favour of either party—If conclusive and final—Real rights of parties—If affected.*

It is well-known that any expression of opinion on the question of possession in favour of one party or another in a proceeding under S. 144, Cr.P. Code, is not of a permanent character. Such an order is passed in summary proceedings and cannot affect the real rights of the parties on the question of possession. (*Varma, J.*) SRI BHAGWAT LAL. *v.* BACHU PANDEY. **186 I.C. 806=41 Cr.L.J. 384=6 B.R. 396=12 R.P. 554=1940 P.W.N. 561=A.I.R. 1940 Pat. 364.**

———S. 144—*Proper order under.*

Orders under S. 144, Cr.P. Code prohibiting the doing of certain things, should be short, simple and absolutely clear. If they are not, they lose almost the whole of their value and become extremely difficult of enforcement. (*Braund, J.*) BHAGWATI PRASAD *v.* EMPEROR. **1940 A.W.R. (H.C.) 449=1940 A.Cr.C. 124=1940 O.A. 798=1940 A.L.J. 547=A.I.R. 1940 A. 465.**

———S. 144—*Question of possession—Observations as to an order under—Evidentiary value of—If conclusive.*

Where an order under S. 144, Cr.P. Code, is passed without any evidence on the question of possession of the disputed property as is often done, the observation of the Magistrate on the question of possession are simply incidental observations in order to enable the order to be made. No inference can be drawn from the order as to possession of any particular party, having regard to the peculiar jurisdiction conferred by the section, though the fact of the order may be admissible in evidene under S. 13 of the Evidence Act. (*Dhavle, J.*) JAINUDDIN AHMAD SHEIKH *v.* KARI KANT DOSS. **1938 P.W.N. 390.**

———S. 144—*Service of order—Copy not stuck up as required by S. 134—Order, if a nullity.*

It is merely an irregularity if a copy of the order under S. 144, Cr.P.Code, is not stuck up as required by S. 134, and the order is not thereby rendered a nullity. Such an irregularity is immaterial if the person whom it is sought to prosecute in respect of any disobedience of the order had knowledge of its contents. (*Edgley, J.*) ABU HUSSAIN SHEIK *v.* EMPEROR. **I.L.R. (1940) 2 Cal. 110=190 I.C. 228=44 C.W.N. 641=A.I.R. 1940 Cal. 358.**

CR. P. CODE (1898), S. 144.

———S. 144—*Value to be attached to orders passed in proceedings under.*

Orders passed in proceedings under S. 144, Cr. P. Code, cannot, of course be taken as decisive of the rights of either of the parties, but the nature of the proceeding and its conclusions may be referred to when the history of the property is in question. (*Dhavle, J.*) JAMUNA SINGH *v.* ZULMI SINGH. **176 I.C. 260=4 B.R. 690=39 Cr. L.J. 721=11 R.P. 77=A.I.R. 1938 Pat. 455.**

———S. 144.—*Value of as to possession.*

An order under S. 144, Cr.P. Code, does not establish possession. (*Khaja Mohammad Noor and Varma, JJ.*) UDIT NARAYAN PATWARI *v.* EMPEROR. **19 Pat.L.T. 336=176 I.C. 713=1938 P, W.N. 542=4 B.R 750=11 R.P. 100=39 Cr. L.J. 778=A.I.R. 1938 Pat. 369.**

"Particular place".

———S. 144 (3)—*"Particular place"—Meaning of—Limits of Union Committee—If particular place.*

There is no reason why the limits of a Union Committee, if clearly and specifically defined, should not be considered to be a particular place within the meaning of S. 144 (3), Cr.P. Code. The sub-section has nothing to do with the nature of the order, but merely refers to the manner of promulgation of the order. An order "forbidding the assembly of five or more persons in any public place, street or thoroughfare within the limits of the N. Union Comittee and forbidding the carrying of any lathi or weapon by any person within those limits", is not invalid on the ground that it does not sufficiently describe a public place. It is a perfectly valid order and describes "a particular place". (*Meredith, J.*) MADAN KISHORE AND BADRI LAL, *In the matter of.* **187 I.C. 135=12 R.P. 578=41 Cr.L.J. 414=1940 P.W.N. 469=21 Pat.L.T. 231=6 B.R. 425 =A.I.R. 1940 Pat. 446.**

———S. 144—*"Particular place"—What is meant by.*

When the Cr.P. Code requires that a 'particular place' should be defined for the operation of the order under S. 144, it means that the public must be informed with certainty of the exact place in, at or within which prescribed acts are forbidden to them. It must not be a matter of doubt or inference, calculation or inquiry. The order must specify the place or area of its operation with such certainty that in the minds of those to be affected by it, there can be no reasonable room for mistake. (*Braund, J.*) BHAGWATI PRASAD *v.* EMPEROR. **1940 O.A. 798=1940 A. L.J. 547=1940 A. Cr.C. 124=1940 A.W.R. (H.C.) 449 =A.I.R. 1940 A. 465.**

Powers of Magistrate under.

———S. 144—*Powers of Magistrate under—Mandatory order—Competency of Magistrate to pass—Bund erected on land of another by person not in possession and having no right whatever—Order directing party in possession to remove bund—Legality—Objection by party erecting bund—Sustainability.*

S 144, Cr.P. Code, empowers a Magistrate not only to direct a person to abstain from a certain act but also to direct a person to take certain order with property in his possession or under his management, if the Magistrate considers that such direction is likely to prevent, or tends to prevent, among other things, a disturbance of the public tranquillity. A Magistrate is therefore clearly empowered to pass a mandatory order, and not merely a prohibitory order, on persons in possession of property under certain conditions. Where a party enters in land belonging to another to which he has no right, and erects a *bund* on that land so as to prevent the water of a river from flowing into a pyne, the Magistrate has got power under S. 144 to direct the party in whose possession the land is, to cut the *bundh*, and it is not for the party who erected the *bundh* unlawfully to attack the order on the ground that it is illegal. (*Agarwala, J.*) LACHMI NARAYAN SINGH *v.* NANDKISHORE SINGH. **184 I.C. 723=6 B.R. 79=20 Pat.L.T. 850=1940 P.W.N. 210=41 Cr.L.J. 98=A.I.R. 1940 Pat. 57.**

———S. 144—*Restriction of liberty of the press—Limits to.*

A Magistrate acting under S. 144, Cr.P. Code, may no doubt restrict the liberty of the press. But he should do so only if the facts clearly make such restriction necessary in the public interest, and he should not impose any restriction which goes beyond the requirements of the case. (*Beaumont, C.J. and Sen, J.*) ARDESHIR PHIROZESHAW MURZBAN, *In re.* **186 I.C. 477=12 R.B. 352 =41 Cr.L.J. 319=41 Bom.L.R. 1253=A.I.R. 1940 Bom. 42.**

———S. 144—*Power of superior Magistrate under—Order made against party called upon to show cause—If can be altered into one against other party not so called upon—Revision—Interference—Order spending itself out—If bar to revision.*

Cl. 4 of S. 144, Cr.P. Code, contemplates only a change in the nature of the order made and not a change in the party against whom it is made. The order can be obsolved only against the party who is called upon to show. It is no doubt open to a superior Magistrate under S. 144 (4) to rescind an order made by a Subordinate Magistrate against a party who was called upon to show cause, but it is not open to him to alter the order into one against the other party who was never called upon to show cause. Such an order is manifestly prejudicial to such party who has never been called upon to show and is liable to be set aside in revision. The fact that the order has spent itself does not preclude interference in revision, when the order is illegal and may affect the future rights of the parties. (*Varma, J.*) PANCHKESAR KUAR *v.* MADHO SINGH. **1938 P. W.N. 709=19 Pat.L.T. 796.**

———S. 144—*Mandatory order—Power of Magistrate to pass—Order directing party to remove fence from land—If authorized.*

Where a party has already taken possession of a disputed plot of land and put up boundary pillars and fence round it, a criminal Court cannot start proceedings under S. 144, Cr. P. Code, with a view to dispossess him from the disputed land. No doubt S. 144, Cr.P. Code gives a Magistrate the power to pass an order to prevent an immediate breach of the peace, but the section does not authorise him to pass a mandatory order to remove the fence. All that a Magistrate can do under

the section is to direct any person to abstain from a certain act or to take certain order without certain property in his possession or under his management. The section, in other words empowers the Magistrate to pass a restrictive order, and the removal of the fence is not act which the Magistrate of the section is to direct a party to do. (*Chatterji, J.*) BIMALA KANTA BAGCHI *v* SANAT KUMAR GHOSH, **178 I.C. 945=11 R.P. 311=5 B.R. 169=40 Cr.L J. 144=1939 P.W.N. 134=19 P.L.T. 620=A.I. R. 1938 Pat. 610.**

———S. 144—*Successive orders under—Propriety.*

A Magistrate is not justified, under the pretext of maintaining the *status quo* in passing successive orders under S. 144, Cr.P. Code, on the ground that a similar order had been passed against the same party on a previous occasion. Such procedure involves a definite abuse of S 144, Cr.P. Code and is entirely unwarranted. It is not open to the Magistrate by passing repeated orders under the section to avoid the decision of a dispute which may be appropriately dealt with under S. 145 or S. 107, Cr.P. Code. The power given under S. 144 is essentially an emergent power which has sometimes to be exercised in disregard of private rights, and an order cannot be allowed by repetition to spell a more or less permanent interference with private rights. The effect of passing repeated orders would be to compel the unsuccessful party to resort to the Civil Court when the Criminal Court has not done anything to look into the rights of the parties, and further, to indirectly prolong the effect of the original order beyond the period of two months fixed in S. 144 (6). (*Dhavle, J.*) F. E. CHRESTIEN *v*. CARTER. **184 I.C. 240=1939 P.W.N. 402= 6 B.R. 30=12 R.P. 232=40 Cr.L.J. 895=20 Pat.L.T. 374=A.I.R. 1939 Pat. 512.**

Scope.

———S. 144—*Order under—Form and contents of—Conditional order—If permissible—Legality—Breach—If offence—Penal Code, S.* 188.

An order under S. 144, Cr.P. Code, must be absolute and definite in terms. The section does not contemplate a conditional order to be made absolute later on. An order for injunction under the section must be absolute and definite, and it must be left to the party to apply for rescinding the order by taking recourse to the procedure laid down in sub-sections (4) and (5). An order "either to refrain from doing any of the acts set forth above . . . or to show cause, if any, against the said orders" is not an order which comes under S. 144; and breach of such an order or an imagined injunction contained in such an order is not an offence punishable under S. 188, I.P. Code. A conviction on a charge of violating such an order cannot be sustained. (*R. C. Mitter, J.*) EMPEROR *v*. BHOLA GIRI MOHUNT. **162 I.C. 827= 37 Cr.L.J. 696=8 R.C. 662 (2)=40 C.W.N. 640=63 C.L.J. 137=1936 Cr.C. 486=A.I.R. 1936 Cal. 259.**

———S. 144—*Order against party wronged—If justified.*

Even in the case of an order in an emergency under S. 144, the Magistrate's action should be directed rather against the wrong-doers than the wronged, though the nature of the emergency may make it necessary for a time, in the public interest, to interfere with the lawful exercise of private rights. (*Davis, J.C. and Weston, J.*) JASODA LEKHRAJ *v*. EMPEROR. **I.L.R. (1939) Kar. 662=182 I.C. 698=12 R.S. 31=40 Cr. L.J. 703=A.I.R. 1939 Sind 167.**

———S. 144—*Scope of order under S. 144 against the public generally—"Place", if should also be a public place.*

The scope of an order passed under S. 144, Cr.P. Code, against the public generally, is narrower than that passed against an individual and served personally on him. Though in sub-S. (3) of S. 144 the word 'public' has not been used with the expression 'particular place', still the law intends not only that the particular place should be specified but also that it should be a place which is frequented or visited by the public. (*Ziaul-Hasan, J.*) BABU *v*. EMPEROR. **15 Luck. 344 =12 R.O. 278=185 I.C. 745=1940 O.L.R. 43=1940 A.W.R. (C.C.) 50=1940 O.A. 128 =1940 O.W.N. 118=41 Cr.L.J. 228=1940 A. Cr.C. 45=A.I.R. 1940 Oudh 241.**

———S. 144—*Procession taken by Adi-Dravidas along streets occupied by caste Hindus—When to be restrained.*

There can be no doubt that Adi-Dravidas have a civil right to take procession along all public streets, just as any other persons may have; and caste Hindus have no right to object at all. Ordinarily, those responsible for law and order should see that the exercise of such rights is supported by the police and the Magistracy except in cases where in the interests of peace persons have to be prevented from exercising their rights. If the Adi-Dravidas conduct the procession in order to irritate and annoy the caste residents of the locality, the Magistrate may properly place some restraint upon the procession. (*Horwill, J.*) SHANMUGAM PANDARAM *v*. PONNUSWAMI IYER. **47 L. W. 741=1938 M. Cr.C. 217=1938 M.W.N. 606=177 I.C. 436=39 Cr.L.J. 886=11 R.M. 326=A.I.R. 1938 Mad. 714=(1938) 2 M.L. J. 160.**

———S. 144 (1), (2) and (3)—*Scope of—Power to issue order to general public—Limits of.*

The first two clauses of S. 144, Cr.P. Code, are confined to the case of an individual person or persons to whom a notice may be issued directing them to refrain from a certain act or to take certain order with certain property in their possession or management. They do not invest the Magistrate with any power to issue an order to the general public. Sub-Cl. (3) makes provision for such an order and according to its terms, no order under S. 144 could be issued to the public generally except when frequenting or visiting a particular place. This is a clear limitation placed by the law upon the power given to the Magistrate to issue an order to the general public under S. 144, Cr.P. Code, and any order which ignores this limitation is bad in law. (*Mullah, J.*) SAT NARAIN *v*. EMPEROR. **I.L.R. 1939 All. 934 =185 I.C. 172=12 R.A. 307=41 Cr.L.J. 121 =1939 A.W.R. (H.C.) 711=1939 A. Cr.C. 169=1939 A.L.J. 1011=A.I.R. 1939 All. 746.**

———S. 144 (1) and (4)—*Order of Sub-Magistrate under—Joint Magistrate not only rescind-*

ing that order but making new orders—Jurisdiction of.

While it is open to a superior Magistrate to alter or rescind the order of an inferior Magistrate, he cannot make a new order under S. 144 (4), Cr.P. Code, though no doubt he couid have made it under sub-S. (1) of S. 144, Cr.P. Code. Where the Sub-Magistrate of a place called *V* made a certain order under S. 144 (1), Cr.P. Code, but both the parties applied under S. 144 (4), Cr.P. Code, to the Joint Magistrate of *K* who had jurisdiction over the Sub-Magistrate of *V*, and he not only rescinded the order of the Sub-Magistrate but made a positive order prohibiting some of the parties from in any way interfering with the execution by the trustee of a temple of an undertaking given by him and also prohibiting some of them from entering a temple without a written consent from the trustee.

Held, that the above orders of the Joint Magistrate were without jurisdiction and hence declared to be null and void. 42 M.L.J. 352=1937 M. 487, Foll. (*Pandrang Row,J.*) RAMASWAMI AIYANGAR *v.* RAMASWAMI PATRACHAR. **1938 M. W.N. 974=(1938) 2 M.L.J. 509.**

———S. 144 (3)—*General order—Legality.*

S. 144 (3), Cr.P. Code, has nothing to do with the nature of the order dealt with in sub- S. (1), but refers to the manner of promulgation of that order. When, because of the number of persons to be directed, it is impracticable for the Magistrate to issue notice to each individual he can issue an order to the public generally, including besides residents, persons who may frequent or visit a particular place, and such order will be effective against each individual to whose knowledge it has come. The fact that an order forbids meetings in so large a place as the Lahore district does not make the order illegal although it might make it difficult to enforce for one reason or another. 27 I.C. 670, relied on. (*Coldstream, J.*) ABDUL KARIM *v.* EMPEROR. *17* **Lah. 515=167 I.C. 284=9 R.L. 474=38 Cr.L.J. 354 (2) =38 P.L.R. 964=A.I.R. 1937 Lah. 80.**

———S. 144 (3)—*General orders to public—Legality.*

The plain meaning of sub-S. (3) of S. 144, Cr. P. Code, read in the light of sub-S. (1), is that, in the circumstances set forth in sub-S. (1), a Magistrate may not only direct an individual to abstain from a certain act or acts but may also issue a similar direction to members of the public generlly, provided in the latter case the prohibition is limited to occasions on which the members of the public may frequent or visit a particular place. In other words, it would not be legal to issue a general prohibition to the public to abstain from a certain act but an order to the public generally to abstain from a certain act on the occasions when they happened to vist a particular place would be valid. The law does not contemplate the prohibition of the frequenting or visiting of the particular place but the prohibition of some act on an occasion on which such place is frequented or visited. (*Edgley, J.*) ABU HUSSAIN SHAIK *v.* EMPEROR. **I.L.R. (1940) 2 Cal. 110=190 I.C. 228=44 C.W.N. 641=A. I.R. 1940 Cal. 358.**

———S. 144 (3)—*Order prohibiting meeting within a certain area—Legality.*

An order under S. 144, Cr.P. Code, that no public meeting shall be held within a certain area, is a definite order, and it does not contravene the provisions of that section. (*Henderson and Khundkar, JJ.*) NIHERENDRU DUTT *v.* EMPEROR. **I.L.R. (1939) 2 Cal. 507=12 R.C. 318=41 Cr.L.J. 105=43 C.W.N. 1061=184 I C. 856 =A.I.R. 1939 Cal. 703.**

———S. 144 (4)—*Construction and Scope—Jurisdiction under—Order under S.* 144 (1) *passed by sub-Magistrate and confirmed by sub-divisional Magistrate—Application to District Magistrate to rescind—Competency—Jurisdiction of District Magistrate—Transfer to Sub-Divisional Magistrate and suspension of operation of order pending disposal—Legality.*

When in an application to a Sub-Divisional Magistrate under S. 144 (4), Cr.P. Code, to rescind an order under S. 144 (1) passed by a Sub-Magistrate, the Sub-Divisional Magistrate confirms that order, the District Magistrate is not precluded from interfering with the order of prohibition passed by the Sub-Magistrate. The District Magistrate has the power, if he thinks fit to rescind or alter the order of the Sub-Magistrate under S. 144 (4), on an application made to him. The District Magistrate is not rendered powerless to interfere with the order of the Sub-Magistrate, merely because the Sub-Divisional Magistrate has already chosen to exercise his powers under sub-S. (4) of S. 144. But the District Magistrate has no power to suspend the order or to transfer the application made to him to the Sub-Divisional Magistrate for disposal. The Code does not give Superior Magistrates a general power to suspend orders of Subordinate Magistrate; nor have the Criminal Courts in the mofussil any inherent power in that right. Nor has the District Magistrate any power to transfer the case; the application under S. 144 (4) cannot be brought either under S. 192 or under S. 528, Cr.P. Code, he has to deal with the application himself. (*Pandrang Row, J.*) MOOKA PANDARAM *v.* SINNU MUTHIRIYAN. **I.L.R. (1937) Mad. 171=166 I.C. 77=9 R.M. 328=38 Cr.L.J. 125=1936 M.Cr.C. 307=1936 M.W.N. 1089 =44 L.W. 686=A.I.R. 1937 Mad. 167=71 M.L.J. 761.**

———S. 144 (4)—*Jurisdiction under—Nature and conditions of—Order by Taluka Magistrate—Application to District Magistrate under S.* 144 (4)—*Transfer to Joint Magistrate—Latter in charge of sub-division at time owiig to absence of Sub-Divisional Magistrate—Sub-Divisional Magistrate's return to duty—Subsequent order by Magistrate—If void.*

A Magistrate who has ceased to possess jurisdiction in respect of a matter cannot pass any valid order in respect of that matter though the matter was properly before him on transfer before he became *functus officio*, When a joint Magistrate has jurisdiction in respect of a matter at the time the matter is transferred to him, owing to the absence from the place of the Sub-Divisional Magistrate to whom he is subordinate, to alter or rescind an order under S. 144 (4) made by a

CR. P. CODE (1898), S. 144.

Subordinate Magistrate, he can only act under the section so long as he is in charge of the sub-division. But as soon as the Sub-Divisional Magistrate returns to duty, the Joint Magistrate becomes *functious officio* and ceases to have jurisdiction, and he is no longer competent to deal with the matter. The jurisdiction conferred by S. 144 (4) is neither appellate nor revisional, but a special one which can be exercised only if the actual terms of the sub-section are strictly satisfied. If such a Magistrate therefore passes an order under S. 144 (4) after he ceases to have jurisdiction, that is illegal and *ultra vires*, The proceedings are void under S. 530 (1), Cr.P. Code. (*Pandrang Row, J.*) SEVUGAN CHETTIAR *v.* KARUPPAN CHETTIAR. **1937 M.W.N. 210=45 L.W. 367=170 I.C. 193=38 Cr.L.J. 864=10 R.M. 152=1937 M. Cr.C. 77=A.I.R. 1937 Mad. 487.**

———S. 144 (4)—*Jurisdiction to rescind order—Application to Subordinate Magistrate to alter or rescind—If bar to exercise of jurisdiction by Superior Magistrate.*

S, 144, Cr,P,Code, contains no provision which suggests that a Superior Magistrate is prohibited from rescinding or altering an order merely because the Subordinate Magistrate has done so or refused to do so. (*Horwill, J.*) SRIKANTA IYER, *In re*. **1937 M.W.N. 56=45 L.W. 249=168 I.C. 720=9 R.M. 625=38 Cr.L.J. 582=1937 M.Cr.C. 48=A.I.R. 1937 Mad. 311.**

———S. 144 (4)—*Power of Superior Magistrate under—Nature and extent of—New order affecting party not before Court—Power to make.*

Jurisdiction is given to a Superior Magistrate under S. 144 (4), Cr.P. Code, only to alter or rescind an order under S. 144 by which the applicant is said to be aggrieved, and he may remove altogether the grievance complained of or reduce its extent as it were, but he could not make a new order which would constitute a fresh grievance to a party not before him. While it is open to him to alter the order, he cannot alter the party to be affected by the order. (*Pandrang Row, J.*) SEVUGAN CHETTIAR *v.* KARUPPAN CHETTIAR. **1937 M.W.N. 210=45 L.W. 367=170 I.C. 193=38 Cr.L.J. 864=10 R.M. 152=1937 M.Cr.C. 77=A.I.R. 1937 Mad. 487.**

———S. 144 (4)—*Scope and object of—Power of rescission—When to be exercised.*

The wide powers of rescission or alteration given by S. 144 (4), Cr.P. Code, are necessary for the protection of the subject, and they are invoked not when a Subordinate Magistrate declines to pass an order under sub-S. (1) of S. 144, but only when an order is passed thereunder interfering with the rights of subjects. Where such an order is passed which interferes with or limits the rights of subjects, the law allows the Magistrate himself who passed the order to change his mind and rescind or alter the order, and allows every Magistrate superior to that Magistrate to do the same thing if he thinks fit. These provisions which are intended for the protection of the liberty of the subject should be construed strictly. (*Pandrang Row, J.*) MOOKA PANDARAM *v.* SINNU MUTHIRIYAN. **I.L.R. (1937) Mad. 171=166 I.C. 77=9 R.M. 328=38 Cr.L.J. 125=1936 M.Cr.C. 307=1936 M.W.N. 1089=44 L.W. 686=A.I.R. 1937 Mad. 167=71 M.L.J. 761.**

CR. P. CODE (1898), S. 144.

———S. 144 (5)—*Application under—Summary disposal—Legality.*

Section 144 (5) is a mandatory provision. Where an application is filed for cancelling the order, the Magistrate should give the applicant an opportunity to support his application. He should not dismiss it summarily. (*Ba U, J.*) THAKIN AUNG BALA *v.* DISTRICT MAGISTRATE, RANGOON. **1939 Rang.L.R. 294=11 R.R. 516=182 I.C. 23=40 Cr.L.J. 645=A.I.R. 1939 Rang. 181.**

———Ss. 144 and 145—*Applicability*—Bona fide *dispute as to possession of land—Proper course—Proceeding under S. 144—Propriety of.*

A Magistrate should bear in mind that in cases of *bona fide* disputes with regard to possession of land, the proper method of dealing with the disputes is by a proceeding under S. 145, Cr.P.Code, and not by a proceeding under S. 144, Cr.P. Code. (*Agarwala, J.*) BHIKHALI TEWARY *v.* ACHAIBAR KUER. **187 I.C. 349=12 R.P. 618=21 Pat.L.T. 326=41 Cr.L.J. 451=6 B.R. 464=1940 P.W.N. 465=A,I.R. 1940 Pat. 471,**

———Ss. 144 and 145—*Applicability—Dispute as to possession of land—Proper procedure—Substitution of proceedings under S. 144—Legality—Duty of Magistrate.*

Although the powers of a Magistrate under S. 144, Cr.P. Code, are very wide, the habitual and unjustifiable use of S. 144 as a substitute for S. 145 or S. 107 ought to be deprecated. If there is a dispute regarding possession of land likely to cause a breach of the peace and requiring a definite decision regarding the possession of land, the normal procedure for the Magistrate to follow is that laid down in S. 145, Cr.P. Code, unless the claim of one party is on the face of it a mere pretence so that it can be said that there is no real dispute. The substitution of proceedings under S. 144, Cr.P. Code, for proceedings under S. 145, Cr.P. Code, appears to have no logical object whatever save to avoid the labour of the taking of oral evidence of possession, and it is a short cut in procedure which is often found to be unsafe. If it is found that the use of S. 144 instead of S. 145 or S. 107 has been a mere abuse of the process of the Court, or that owing to the exercise of that jurisdiction the order has resulted in something akin to the denial of the right of fair trial; then the High Court would feel bound to interfere in the exercise of its powers of superintendence. (*Rowland,J.*) DOMAN GOPE *v.* HET NARAIN SINGH. **190 I.C. 425=1940 P.W.N. 49=A.I.R. 1940 Pat. 382.**

———Ss. 144 and 145—*Applicability—Duty of Court—Magistrate finding existence of* bona fide *dispute as to possession likely to cause breach of peace—Duty to take action under S. 145.*

When in the course of a proceeding under S. 144 the Magistrate finds that there is a *bona fide* dispute as to possession of land likely to cause a breach of the peace he is bound immediately to take action under S. 145. There is no justification for periodical recourse to S. 144 on the plea of emergency in cases where emergency exists only by reason of neglect of the authorities to take proper order when the facts first came to their notice. In other words what the Court deprecates is the habitual and unjustifiable use of S. 144 as a substitute for Ss. 107 and 145. (*Davis, J.C.*

CR. P. CODE (1898), S. 144.

and Weston, J.) VIRU KAMU *v.* DEWANDAS JHAMANDAS. **A.I.R. 1940 Sind 158.**

——**Ss. 144 and 145**—*Applicability and relative scope—Absence of real dispute about possession—Existence of imminent danger of breach of the peace—Procedure.*

It is only when there is a dispute likely to cause a breach of the peace concerning any land or water, etc., and the dispute requires to be decided on evidence that resort to S. 145, Cr. P. Code, becomes necessary; the dispute for this purpose must be a real dispute and not a mere pretence on behalf of one of the contesting parties. If there is no such real dispute but there is a danger of a breach of the peace an order under S. 144, Cr. P. Code, would not be improper. (*Dhavle, J.*) BHUNESHWAR PRASAD *v.* RAMMOY ROY. **187 I.C. 139=6 B.R. 428=12 R.P. 588=41 Cr.L.J. 417=1940 P.W.N. 461=A.I.R. 1940 Pat. 492.**

——**Ss. 144 and 145**—*Jurisdiction under—Exercise of—Duty of Magistrates under—Application under S.* 145 (4)*—Omission to decide likelihood of a breach of the peace or disturbance of the public tranquillity—Effect—Observation that a certain property is in possession—Legality of.*

It is not desirable that a Magistrate, who has jurisdiction should omit to exercise his jurisdiction in the manner prescribed by law but on the other hand proceed to deal with the matter in a way not contemplated by law. If on a petition presented under S. 145 (4), Cr. P. Code, the Magistrate does not decide as a matter of fact whether the dispute in question is likely to lead to a breach of the peace or a disturbance of the public tranquillity, the essential preliminary to assuming jurisdiction is lacking and his order has no legal force and any expression of opinion contained therein, to the effect that a particular party is in possession, must be deemed to be void of legal force or effect. And when the order does not purport to be an order passed under S. 145 or S. 144, Cr. P. Code, or even to be an order passed in the exercise of any jurisdiction conferred on the Magistrate by any section of the Code or any other provision of law, the order is not one having any legal force or effect and does not require to be formally set aside or modified in revision. (*Pandrang Row, J.*) VATTATHARA *v.* REVEREND KOSHI. **45 L.W. 473=1937 M.W.N. 637=170 I.C. 390=38 Cr.L.J. 892=10 R.M. 198=1937 M. Cr.C. 180=A.I.R. 1937 Mad. 494.**

——**Ss. 144, 145 and 107**—*Dispute regarding land—Duty of Magistrate.*

It cannot be laid down as a general proposition that an order under S. 144, Cr. P. Code, cannot be passed without taking evidence nor can it be said that in every case of dispute regarding land, S. 144 is inappropriate and proceedings ought to be had under S. 107 or S. 145. A Magistrate has jurisdiction to pass an order under S. 144 in a case where one party not in good faith is merely setting up a pretence of claim and not a *bona fide* dispute. But it cannot be considered to be a good practice habitually to prejudge without evidence both the merits of the dispute and the question whether it is *bona fide*. Magistrates are entrusted with wide powers to enable them to discharge their important duty of providing for the prevention of a breach of the peace but such powers are not intended to be habitually used for the settling of disputed points which call for a decision on evidence. (*Rowland, J.*) JAGRUPPA KUMARI *v.* CHOTEY NARAIN SINGH. **159 I.C. 455=37 Cr. L.J. 95=8 R.P. 279.**

CR. P. CODE (1898), S. 145.

——**S. 145.**

Actual possession.
Applicability.
Attachment.
Breach of peace.
Costs.
Duty of Magistrate.
Effect of order under.
Enquiry under.
Forcible dispossession.
Jurisdiction.
Order under.
Parties.
Possession.
Procedure.
Preliminary order.
Receiver.
Revision.
Scope.
Summoning of witnesses.
Two months.
Miscellaneous.

Actual possession.

——**S. 154 (1)**—*"Actual possession"—If refers to right to possess.*

What the Magistrate is concerned with, in proceedings relating to disputes as to immovable property under Ch. 12, Cr. P. Code, is not the right to possess the subject-matter of dispute but the actual possession thereof at the date of the order under Cl. (1) of S. 145. The expression "actual possession" is plain and unambiguous and has no reference to any right to possess. (*Davis, J.C. and Lobo, J.*) RAHIMALISHAH *v.* EMPEROR. **I.L. R. (1940) Kar. 421=187 I.C. 627=12 R.S. 253=41 Cr.L.J. 493=A.I.R. 1940 Sind. 61.**

——**S. 145 (1)**—*"Actual possession"—Meaning—If includes constructive possession.*

The words "actual possession" in S. 145, Cr. P. Code, can only mean possession in fact as distinguished from possession implied by law, *i.e.*, constructive possession. (*Pandrang Row, J.*) RANGA RAZU *v.* JAGANNATHA RAO. **177 I.C. 584=11 R.M. 346=39 Cr.L.J. 922=1938 M.W.N. 252=47 L.W. 340=1938 M.Cr.C. 122=A.I.R. 1938 Mad. 654=(1938) 1 M.L.J. 453.**

——**S. 145 (1)**—*Actual possession—Meaning of—Unworked minerals—Actual possession of—What amounts to—Minerals—Possession of—Acts of ownership—Trespasser working mine at certain points—Right of.*

The words "actual possession' in S. 145 (1), Cr. P. Code, mean actual physical possession, but actual physical possession must vary with the subject-matter. If the owner of unworked minerals under a definite area sinks a shaft and begins to work the minerals in that area, he can be properly said to be in actual physical possession of the whole of the minerals in that area. In the same way if the owner of minerals under defined area grants to third parties mining leases of the minerals under portions of such area, he exercises acts of ownership over those minerals, and he can truly be said to be in possession of the

whole of the minerals under that defined area. It cannot however be held that merely by work at three points on one end of a disputed hill possession has been taken of the whole of the minerals underlying the hill. The erection of a *bhandar* and the making of a road fall far short of what is necessary in order to take possession of the whole of the minerals under the hill. Mining by a trespasser in an area of two acres only does not amount to possession of the whole of the mineral field. A person wrongfully working minerals is only in possession of such of the minerals as he has actually mined and is not in possession of any of the unworked minerals. (*Harries, C.J. and Rowland, J.*) RANCHI ZAMINDARI CO., LTD. *v.* PRATAP UDAINATH SAHI DEO. **18 Pat. 215=5 B.R. 711=182 I.C. 89=11 R.P. 657=40 Cr.L.J. 631=1939 P.W.N. 72=20 Pat. L.T. 105=A.I.R. 1939 Pat. 209.**

Applicability.

———S. 145 (5)—*Scope and applicability.*

A Magistrate made an order under sub-s. (1), S. 145, requiring the attendance of parties within a fixed time on a certain date for hearing evidence of their claims. The parties did not appear within the time fixed and the Magistrate consigned the case to the record-room. The applicant moved the District Magistrate who treated the order of the trial Magistrate as tantamount to the cancellation of notice, under sub-s. (5) and dismissed the petition.

Held, that the order of the District Magistrate was wrong. Sub-s. (5) applied only to those cases where any of the parties concerned in the dispute or any other person interested appeared before the Magistrate and denied the existence of the dispute. In absence of such denial sub-s. (5) did not come into operation at all. (*Din Mahommad, J.*) SRI CHAND *v.* BASHAMBAR NATH. **166 I.C. 580=9 R.L. 393 (1)=38 Cr.L.J. 242=1936 Cr. C. 1115=A.I.R. 1936 Lah. 1012.**

———S. 145—*Applicability—Batai share of zamindar in produce of land.*

Section 145 does not apply to a dispute relating to an undivided share in land or to an undivided share in produce of land. A batai share of a zamindar in the produce of the land is not an undivided share and S. 145 applies to a dispute relating to such share. In case of land owned by a zamindar and cultivated by him with his haris he must, before the division of the produce or batai, be deemed to be in possession of the land and of the produce of the land. Uutil the crop is divided between the zamindar and the haris, it is really the zamindar who has custody of the crops and divides them. The position is not altered merely because there is a jagirdar who is also entitled to his share. (*Davis, J.C. and Lobo, A.J.C.*) MUHAMMAD ARAF *v.* SATRAMDAS SAKHIMAL. **164 I.C. 969=37 Cr.L.J. 1030=9 R.S. 60 (2)=1936 Cr.C. 859=A.I.R. 1936 Sind 143.**

———S. 145—*Applicability—Claim to joint possession—Proceedings under S.* **145**—*Propriety of.*

S. 145, Cr. P. Code, is not inapplicable as between parties entitled to joint possession. A case in which one party claims exclusive possession while another party claims to be in joint possession along with that party is no less a question of disputed actual possession than if each party claimed

exclusive possession of the entire area. (*Rowland, J.*) ZAFAR AHSAN *v.* JOGESHWAR BUX. **1939 P.W.N. 855=6 B.R. 155.**

———S. 145 (6)—*Applicability—Delivery of property to applicant by Court—Trespass subsequently by respondent—Application under S.* **145**—*Proper order.*

A piece of land was delivered to the petitioner by Court on 28-3-1938. On 14-4-1938, the respondent trespassed on the land. A petition was filed under S. 145, Cr. P. Code, on 12-5-1938. There was a prelicinary order on 15-6-1938.

Held, that an order should be made under S. 145 (6), Cr. P. Code, declaring the petitioner to be entitled to possession until evicted in due course of law; the fact that the preliminary order was made on 15-6-1938 made no difference. (*Lakshmana Rao, J.*) AMMANNA SASTRI *v.* SITARAMAYYA. **1939 M.W.N. 336=49 L.W. 473.**

———S. 145—*Applicability—Dispossession of tenant by landlord.*

S. 145, Cr. P. Code, applies to a case of dispossession of a tenant by his landlord. The question of title does not arise before the Magistrate making an inquiry under that section. He is concerned with the question of possession only. (*Jai Lal, J.*) MAHOMED ALI *v.* LADHA. **173 I.C. 352 =10 R.L. 439=39 Cr.L.J. 297=39 P.L.R. 775= A.I.R. 1938 Lah. 122.**

———S. 145—Applicability—Dispute relating to land—Proceedings under S. 110—If justified—Proper course. *See* CR. P. CODE, SS. 110 AND 145. **A.I.R. 1939 Sind 261.**

———S. 145—*Applicability — Dispute as to possession of mineral—Proceedings under S.* **145** *—Propriety of.*

Proceedings under S. 145, Cr. P. Code, are not inapplicable to possession of minerals; they are appropriate in cases of disputes as to the possession of minerals, although no question may arise as to the possession of the surface. (*Harries, C.J. and Rowland, J.*) RANCHI ZAMINDARI CO., LTD. *v.* PRATAP UDAINATH SAHI DEO. **18 Pat. 215=5 B.R. 711=182 I.C. 89=11 R.P. 657=40 Cr. L. J. 631=1939 P.W.N. 72=20 Pat.L.T. 105 =A.I.R. 1939 Pat. 209.**

———S. 145—*Applicability—Joint possession.*

When it is found that the contesting parties are actually in joint possession no order should be made under S. 145, Cr. P. Code. But the position is different where one of the parties claims to have and is actually found to have exclusive possession adverse to the other party. The mere fact that the other party sets up a title to joint possession does not render the section inapplicable. (*Gruer, J.*) SHEOPRASAD *v.* GOVINDRAM. **189 I. C. 774=41 Cr.L.J. 799=1940 N.L.J. 375=A.I. R. 1940 Nag. 265.**

———S. 145—*Applicability—Joint possession claimed by one of parties.*

A case in which one party claims exclusive possession while another party claims to be in joint possession along with them is no less a question of disputed actual possession than if each party claims exclusive possession of the entire area. In such a case, therefore, a proceeding under S. 145, Cr. P. Code, is appropriate. (*Rowland, J.*) ZAFAR AHSAN *v.* JUGESHWAR BUX ROY. **185 I.C. 346=12 R.P. 369=41 Cr.L.J. 171=A.I.R. 1940 Pat. 135.**

CR. P. CODE (1898), S. 145.

———S. 145—Applicability—Possession delivered by Civil Court under O. 39, R. 9, C. P. Code—Subsequent dispute—Proceedings under S. 145—Discretion—Duty of Criminal Court to recognise delivery by Civil Court. *See* CR. P. CODE, SS. 107 AND 145. **1938 P.W.N. 526.**

———S. 145—*Possession—Squatter—Right to protection*

S. 145, Cr. P. Code, entitles a squatter to the protection of the law unless his possession began within two months of the filing of a petition under the section. (*Horwill, J.*) MANICKAM PILLAI *v.* MEENAMMAL. **1937 M.W.N. 732.**

Attachment.

———S. 145, (4) second proviso—*Interim attachment—Power of Court—Land claimed to be in joint possession.*

Under S. 145 (4), second proviso, Cr. P. Code, the Magistrate is empowered to attach the land in dispute if he considers that it is a case of emergency, although according to one of the parties the land is in the joint possession of both the parties. (*Ghose, J.*) EMPEROR *v.* BANDE ALI SHAIKH. **I.L.R. (1939) 2 Cal 419=187 I.C. 125=12 R.C. 549=41 Cr.L.J. 396=A.I.R. 1940 Cal 163.**

———S. 145 (4), second proviso—*Order for attachment pending decision of another Court—Legality.*

An order for attachment under S. 145 (4), second proviso, Cr. P. Code, can be operative only until the decision of the Magistrate himself under that section. An order directing that the attachment should be operative until the decision in some other proceedings pending in other Courts is clearly contrary to the terms of the proviso. (*Mukherjea and Biswas, JJ.*) FAIZUR RAHMAN *v.* SHEIKH LADLEY. **42 C.W.N. 351.**

———S 145 (4), second proviso—*Order of attachment—When may be made.*

It is only after drawing up a proceeding in terms of sub-S. (1) of S. 145, Cr. P. Code, that the Magistrate acquires jurisdiction, to make an order of attachment under the last proviso to sub-S. (4). (*Mukherjea and Biswas, JJ.*) FAIZUR RAHMAN *v.* SHEIKH LADLEY. **42 C.W.N. 351.**

Breach of peace.

———S. 145—*Apprehension of—Duty of Magistrate to record finding.*

If a magistrate in his preliminary order had specifically found that the dispute was likely to cause a breach of the peace, it is not necessary for him to repeat in the essential final order that such an apprehension exists. The requisite to give the magistrate jurisdiction under S. 145, Cr. P. Code, is that he should be satisfied that a dispute exists regarding land or water before he makes the preliminary order. Once he is so satisfied, his subsequent action relates to procedure and not jurisdiction and in this aspect not liable to be upset on revision by the High Court. (*Ram Lall, J.*) GURDITTA *v.* TAJA. **I.L.R. 1938 Lah. 611=181 I.C. 59=11 R.L. 471=41 P.L.R. 217=40 Cr.L.J. 519=A.I.R 1939 Lah. 108.**

———S. 145 (4)—*Finding as to breach of peace—Necessity for, in final order.*

A finding by a Magistrate at the time of the institution of the proceedings under S. 145, Cr. P. Code, that he is satisfied of the existence of a dispute likely to cause a breach of peace, is sufficient to give him jurisdiction to proceed in the matter. It is not absolutely necessary that in the final order recorded by him with regard to the question of possession there should be any further finding on the question of the imminence of a breach of the peace. (*Edgley and Akram, JJ.*) GOBARDHAN DUBY *v.* KHIROD CHANDRA BANERJEE. **44 C.W.N. 427=71 C.L.J. 152.**

———S. 145—*Finding of magistrate — Interference by High Court.*

The High Court will not interfere lightly with the finding of a Magistrate as to an apprehension of a breach of the peace when it is based on evidence and the duty of weighing evidence is one purely for the trial Court. (*Ram Lall, J.*) GURDITTA *v.* TAJA. **I.L.R. 1938 Lah. 611=181 I.C. 59=11 R.L. 471=41 P.L.R. 217=40 Cr.L.J. 519=A.I.R. 1939 Lah. 108.**

Costs.

———S. 145—*Costs—Award of, long after disposal of case—Legality.*

Under S. 145, Cr. P. Code, the award of costs should be either contemporaneous with the decision in the case or made within a reasonable time after the disposal of the case. An award of costs made several months after the disposal of the case cannot be sustained. (*Lakshmana Row, J.*) NARIAH *v.* KRISHNAMURTHI. **1938 M.W.N. 1011=48 L.W. 444 (1).**

———S. 145—*Discretion—Magistrate—Failure to exercise—Revision—Cr. P. Code, Ss. 438 and 439.*

A Magistrate in proceedings under S. 145, Cr.P. Code, has discretion to award costs to the successful party; where he does not so award costs and gives no reason for not exercising the discretion in favour of the successful party, the High Court will interfere in revision and award costs to the successful party. (*Madan, J.*) UDHAB CHANDRA PAL *v.* SIDESHWAR PRASAD SINGH. **18 Pat.L.T. 714=1937 P.W.N. 636=171 I.C. 604=10 R.P. 224=4 B.R. 43=38 Cr.L.J. 1099=A.I.R. 1937 Pat. 559.**

Duty of magistrate.

———S. 145—*Absence of complainant — Dismissal—If warranted.*

There is no provision in S. 145, Cr. P. Code, which would warrant the dismissal of a case merely because the complainant failed to attend when there is a finding of a likelihood of breach of the peace. (*Bennet, J.*) RAQUMA *v.* GHIRAI. **184 I.C. 751=12 R.O. 142=1940 A.Cr.C 4=41 Cr.L.J. 96 (2)=1939 O.L.R. 651=1939 A.W.R. (C.C.) 277=1939 O.W.N. 974=A.I.R. 1940 Oudh 22**

———S. 145—*Attachment of property—Subsequent dropping of proceedings—Order for delivery to one of the parties if justified—Proper order.*

Where the subject-matter of dispute is attached but subsequently the proceedings are decided to be dropped as there was no likelihood of a danger to public peace, the Magistrate concerned has no power to pass an order at that stage directing the delivery of possession of the attached property to one of the parties. The proper thing to do would be to direct the property to continue in attachment until the question of title is decided by the Civil Court. (*Bennet, J.*) DALJIT SINGH *v.* TEJ SINGH. **15 Luck. 19=184 I.C. 290=1939**

CR. P. CODE (1898), S. 145.

A.W.R. (C.C.) 203=1939 O.A. 734=1939 O.L. R. 602=1939 O.W.N. 891=12 R.O. 97=1939 A.Cr.C. 178=40 Cr.L.J. 930=A.I.R. 1939 Oudh 284.

——**S. 145**—*Determination of actual possession —Decree of Civil Court.*

The landlord granted a lease of land to *C* for one year. For the next year the landholder decided to withdraw the lease from *C* and granted it to *V*. *C* tried to retain possession of the land and prevented *V* from working on the land. In a suit relating to a minute fraction of the land in question, the Civil Court passed a decree declaring *C* as a tenant of the land for the second year. The trying Magistrate declared *V* to be in possession of the land under S. 145, Cr. P. Code. On revision,

Held, that the decision of the trying Magistrate was correct because it was necessary to determine the actual physical possession of the land as a breach of the peace was likely to result.

Held also, that the trying Magistrate was not bound by the decision of the Civil Court to find that *C* was in possession of the holding. (*Spargo, J.*) CHINA TAMBI *v.* VIRAPPA. **169 I.C. 939=38 Cr.L.J. 805=10 R.R. 39=A.I.R. 1937 Rang 202.**

——**S. 145**—*Magistrate not believing evidence on either side on ground of interestedness—Order of attachment of property without taking further evidence—Legality.*

If a Magistrate, in proceedings under S. 145, Cr. P. Code, feels that it would be unsafe to act on the evidence of either side because of its interested nature, it is his duty to satisfy himself as to who was in possession by taking further evidence. S. 145 (4) contemplates such a course, and the Magistrate is not at liberty to confess his inability to arrive at a conclusion as to possession before he has taken all available steps to satisfy himself as to which party was in possession. If, without taking further evidence and all available evidence, the Magistrate directs attachment of the property in dispute on the ground that he is unable to decide the question, the order is liable to be set aside in revision. (*Pandrang Row, J.*) GOPAMMAL *v.* NALLAMMAL. **1937 M.W.N. 326.**

——**S. 145**—*Question of possession--Magistrate attaching property—Dropping of proceedings on ground that apprehension of breach of peace is not likely—Order confirming attachment and directing parties to seek redress in civil or competent Court—Legality of.*

In proceedings under S. 145, Cr. P. Code, it is the duty of the Magistrate to decide for himself, when a breach of the peace is likely, who is in actual possession so that the parties may know which of them is to go as plaintiff, to the Civil Court. It is not open to the Magistrate to say that he cannot decide the question of possession and to remain without making any attempt to inquire into the matter. Nor can the Magistrate, after the apprehension of a breach of the peace has ceased, merely drop the proceedings and continue the attachment effected by him or confirm it. If he thinks it unnecessary to hold an inquiry or continue the proceedings, he ought to set aside the attachment and pass orders as to the disposal of the property in the custody of the Court. An order confirming the attachment and directing the parties to seek redress in a civil or competent Court, after dropping the proceedings, is without jurisdiction. (*Pandrang Row, J.*) LAKSHMANA RAO *v.* SATYANARAYANA. **1937 M.W.N. 55.**

CR. P. CODE (1898), S. 145.

——**S. 145**—*Possession given by Civil Court—Duty to protect.*

Under S. 145, Cr. P. Code, the Criminal Court is bound to support persons placed in possession of property by the Civil Court and whose possession has been wrongfully disturbed. It is for the other party to show that they subsequently came into possession by some lawful means. Magistrates are bound not only to look into events occurring within two months of the date when the proceedings were drawn up but they should consider the whole history of the dispute from the date when a party was put in possession by the Civil Court. (*Madan, J.*) CHANDESHWAR PRASAD NARAYAN SINGH *v.* DWARKA SINGH. **1937 P.W.N. 571=171 I.C. 593=10 R.P. 223=4 B.R. 41=38 Cr.L.J. 1096=A.I.R. 1937 Pat. 557.**

——**S. 145**—*Possession given by Civil Court—Duty of Criminal Court to respect—If conclusive as to present possession.*

The Criminal Court ought to hold that if on a given date a party has been put in possession by the Civil Court than on that date that party got possession as against his opposite party. But where a considerable period elapses between the date of delivery of possession and the date on which possession of the land is disputed, a stale delivery of possession cannot be conclusive as to present possession. In such a case it is open to the Magistrate to hold that there has been an ouster of the party who was put in possession by the Civil Court. (*Rowland, J.*) ZAFAR AHSAN *v.* JOGESHWAR BUX. **1939 P.W.N. 855=6 B.R. 155.**

——**S. 145**—*Single proceeding against different tenants holding separately under same landlord—Legality.*

A landlord in execution of his rent decrees in respect of various holdings consisting of many plots took out writs of delivery of possession. The tenants resisted. Police lodged information with Magistrate calling for action under S 145, Cr. P. Code. The Magistrate, while proceeding, instead of dealing with each holding or tenant separately, issued one common proceeding in respect of all the holdings. The landlord alone appeared and put in his written statement of his claim. The Magistrate, without proceeding *ex parte* and hearing evidence on the side of the landlord or without granting time to the tenants to file their written statements, went into evidence without first ascertaining which of the tenants was claiming what lands and decided the proceeding as if the entire lands had been claimed by the whole body of the tenants jointly. On revision.

Held, setting aside the order, that the Magistrate should have dealt with the case of each holding separately and should have given the tenants opportunity of producing evidence to show which of the holdings was claimed by each one. (*Rowland, J.*) RAM KISHUN SINGH *v.* FAUJDAR GOP. **3 B.R. 659=170 I.C. 90=38 Cr.L.J. 842=10 R. P. 75=1937 P.W.N. 755=18 Pat.L.T. 824=A.I. R. 1937 Pat. 413.**

CR. P. CODE (1898), S. 145.

Effect of order under.

——S. 145 (6)—*Who are bound—Order against a party—Subsequent application by that party, if maintainable.*

Where on an application under S. 145, Cr. P. Code, on the non-applicants not appearing, an *ex parte* order was made in favour of the applicant under S. 145 (6) and subsequently mutation was made in the name of the sons of the non-applicant and they applied under S. 145, Cr. P. Code, against the original applicant, it was held that the sons were virtually parties to the prior proceedings under S. 145 and as such they were bound by the order and a fresh application by them is not maintainable. (*Zia-ul-Hasan, J.*) MUNESHWAR BAKSH SINGH *v.* GAJJA SINGH. 1938 O.A. 635=1938 O.W.N. 828=177 I.C 247=1938 O.L.R. 401=1938 A.Cr.C. 83=11 R.O. 40=39 Cr.L.J. 868.

Enquiry under.

——S. 145—*Proof required—Order under S. 146—When not proper.*

In a proceeding under S. 145, Cr. P. Code, it is not proper to set up any absolute standard and to say that evidence not up to this standard will not be acted on by the Court for the purpose of an order under that section. The proceeding can be decided on the balance of evidence and if the Magistrate can see his way to express an opinion that the evidence of one side is superior to the evidence on the other side, then he is entitled to and should, if possible, form a definite opinion on the question of fact as to who is in possession. An order under S. 146 attaching the property is a desperate remedy for cases in which the Magistrate finds it quite impossible to choose between the conflicting evidence adduced by the two sides. It would be regrettable if it were necessary to pass such an order when the first Court has been able to make up its mind in favour of one party. If the Magistrate thinks that the evidence for the first party, weak though it may be, is preferable to the evidence for the second party, it is his duty to give a decision in favour of the first party. (*Rowland, J.*) NANDKISHORE SINGH *v.* BIGAN LOHAR. 184 I.C. 817=12 R.P. 281=6 B.R. 81=41 Cr.L.J. 101=1940 P.W.N. 6=21 P.L.T. 306=A.I.R. 1940 Pat. 113.

——S. 145—*Enquiry under—Proof of possession—Delivery of possession by Civil Court—Evidentiary value.*

In an enquiry under S. 145, Cr. P. Code, the Criminal Court ought to hold that if on a given date the plaintiff has been put into possession by the Civil Court then on that date the plaintiff got possession as against the defendant. But where a considerable period elapses between the date of delivery of possession and the date on which possession of the land is disputed, a stale delivery of possession cannot be conclusive as to present possession. (*Rowland, J.*) ZAFAR AHSAN *v.* JUGESHWAR BUX ROY. 185 I.C. 346=12 R.P. 369=41 Cr.L.J. 171=A.I.R. 1940 Pat. 135.

——S. 145 (4)—*Enquiry under—Special oath—Offer by one party to give up claim if opposite party takes special oath—Refusal by latter to do so—Power of Court to take this into consideration.*

If one of the parties to a proceeding under S. 145, Cr. P. Code, offers to give up his claim to the property in dispute if the opposite party takes a special oath but the latter refuses to do so, this refusal is of course not to be treated as anything conclusive, but it is a matter which the Court is entitled to take into consideration along with the other evidence and it is open to it to draw such inference from this conduct of the party as it thinks fit. (*Rowland, J.*) NANDKISHORE SINGH *v.* BIGAN LOHAR. 184 I.C. 817=12 R.P. 281=6 B.R. 81=41 Cr.L.J. 101=1940 P.W.N. 6=21 P.L.T. 306=A.I.R. 1940 Pat. 113.

Forcible dispossession.

——S. 145—*What is.*

Where a zamindar's land is cultivated by his haris on behalf of zamindar and another person has squatted on that land and thereupon the haris declare that they thenceforth are the haris of that person in respect of the same land, such declaration by the haris in such circumstances cannot amount to forcible ousting of the zamindar. (*Lobo, J.C. and O'Sullivan, J.*) MAHOMED ALI *v.* SHAMSUL HAQ. I.L.R. (1940) Kar. 162=187 I.C. 636=12 R.S. 255=41 Cr. L.J. 486=A.I.R. 1940 Sind 33.

Immovable property.

——S. 145 (2)—*Paddy crops cut and stored in khalihan—Dispute as to possession of—Proceedings under S. 145—Jurisdiction to draw up.*

Paddy crops cut and stored in a khalihan do not come within the term "immovable property" within the meaning of S. 145 (2), and a dispute as to possession of such crops does not give a Magistrate jurisdiction to draw up proceedings under S. 145, Cr. P. Code. (*Chatterji, J.*) RAJINDRA LAL *v.* BRICH KURMI. 178 I.C. 582=11 R.P. 276=40 Cr.L.J. 125=5 B.R. 118=1938 P.W.N. 643=19 Pat.L.T. 728=A.I.R. 1938 Pat. 527.

Jurisdiction.

——S. 145—*Delivery of possession by Civil Court—Proceedings under section—Jurisdiction to start.*

It cannot be laid down as a hard and fast rule that a Magistrate has no jurisdiction to start a case under S. 145, Cr. P. Code, once there has been a delivery of possession by the Civil Court. (*Noor, J.*) RAJENDRA NARAYAN BHANJ DEO *v.* CHINTAMANI MAHAPATRA. 180 I.C. 322=11 R.P. 493=5 B.R. 585=20 P.L.T. 333=40 Cr.L.J. 339=1938 P.W.N.526=19 Pat.L.T. 632=A.I.R. 1939 Pat. 151.

——S. 145—*Dispute between parties claiming joint possession—Jurisdiction of Magistrate to deal with.*

A dispute between two parties claiming to hold joint possession of the property in dispute is not outside the scope of S. 145, Cr. P. Code, and a Magistrate has consequently jurisdiction to deal with the matter under the section. (*Madan, J.*) RAJKISHORE NARAIN SINGH *v.* AMIRUL HASAN. 19 Pat L.T. 211

——S. 145 (6)—*Finding of possession in favour of petitioner—Direction to petitioner to restore cemeteries and give access to Mussalmans—Power of Magistrate to order.*

After a finding and a declaration of possession in favour of the petitioner under S. 145 (6) of the Cr. P. Code, it is beyond the powers of the Sub-Divisional Magistrate to direct the petitioner to restore two old cemeteries and allow access to

CR. P. CODE (1898), S. 145.

Mussalmans if they should desire. (*Lakshmana Rao, J.*) BALAKRISHNA REDDIAR *v.* SYED JALALUDDIN SAHIB. 184 I.C. 451 (1)=12 R.M. 452=41 Cr.L.J. 18=1939 M.Cr.C. 77=1939 M.W.N. 737 (1)=50 L.W. 338=A.I.R. 1939 Mad. 791=(1939) 2 M.L.J. 111.

——S. 145 (4)—*Order in favour of person not party to proceedings—Legality.*

An order in favour of a person who is not a party to the proceedings is not warranted and is without jurisdiction. (*Dhavle, J.*) BABU RAM PANDEY *v.* SHYAM DEO NARAIN. 179 I.C. 548=11 R.P. 390=5 B.R. 246=40 Cr.L.J. 220=1938 P.W.N. 810=A.I.R. 1939 Pat. 187.

——S. 145—*Order dealing with lands not included in proceedings—Legality.*

In proceedings under S. 145, Cr. P. Code, a Magistrate should confine his order to the plots of land mentioned in the proceedings and the order should not include lands outside the proceedings. If he deals with a larger area of land in his order than what is included in the proceedings, he acts in excess of his jurisdiction and his order is liable to be set aside. (*Varma, J.*) KIRPAL SINGH *v.* HARI CHOUDHURY. 182 I.C. 54=40 Cr.L.J. 629=12 R P. 5=5 B.R. 710=1939 P.W.N. 392=A.I.R. 1939 Pat. 565.

——S. 145—*Police report—If sufficient to take action.*

A Magistrate has jurisdiction to take action under S. 145, merely upon a police report, if the report sets out the matter of dispute, its cause, its nature, and the apprehension that unless action is taken breach of peace will ensue and thus contains sufficient material for the Magistrate to act upon. (*Davis, J.C. and Lobo, A.J.C.*) MUHAMMAD ARAF *v.* SATRAMDAS SAKHIMAL. 164 I C. 969=37 Cr.L.J. 1030=9 R.S. 60 (2)=1936 Cr.C. 859=A I R. 1936 Sind 143.

——S. 145 (5)—*Power to cancel preliminary order under S.* 145 (1).

A Magistrate has jurisdiction under S. 145 (5), Cr. P. Code, when circumstances justify it, to cancel a preliminary order issued previously under sub-S. (1) of S. 145. The matter is entirely in his discretion, save where the order is passed without any material to justify it. (*Bennet, J.*) DALJIT SINGH *v.* TEJ SINGH. 15 Luck. 19=184 I.C. 290=1939 A W.R. (C.C.) 203=12 R.O. 97=1939 A.Cr.C 178=40 Cr.L.J. 930=1939 O A 734=1939 O.L.R. 602=1939 O. W.N 591=A.I.R. 1939 Oudh 284.

——S. 145—*Successive proceedings—Competency.*

A second proceeding under S. 145, Cr. P. Code, in respect of the same land is not without jurisdiction merely because the Magistrate had already declared a party to be in possession of the very land in previous proceeding; if the conditions of the section are satisfied, the Magistrate can take proceedings. There is no reason why the actual possession of a person who was no party to the previous proceeding should be ignored when there is a dispute about the possession, and why he should not proceed under the section on the ground of there having been a previous proceeding under the section—not necessarily between the same parties. (*Dhavle, J.*) INDERDEO SINGH *v.* KESHO SINGH. 1937 P.W.N. 845=18 Pat.L.T. 886=173 I.C. 107=4 B.R 211=39 Cr.L.J. 268=10 R.P. 372=A.I.R. 1938 Pat. 1.

CR. P. CODE (1898), S. 145.

——S. 145—*Title—Enquiry into—Jurisdiction of Magistrate—Dispute as to possession of unworked minerals—Question of ownership of same—Necessity to decide — Possession, if follows title.*

The Court in proceedings under S. 145 can properly consider questions of title where such is necessary in order to ascertain who is in possession. In a case where the Magistrate has to decide who is in possession of certain unworked minerals, since unworked minerals are not capable of such possession as is the surface of land or a house, it is necessary for the Magistrate to consider who is the owner of the minerals in order to assist him in coming to a conclusion as to who is in possession of the same. Before a Court can come to a decision as to who is in possession of the unworked minerals, the question of ownership has to be considered. In proceedings under S. 145, Cr. P. Code, it is no doubt possession that matters and not ownership, but in the case of unworked minerals possession follows title, and the owner of the unworked minerals is in possession of them though he is not actually engaged in working them. (*Harris, C. J. and Rowland, J.*) RANCHI ZAMINDARI CO., LTD. *v,* PRATAP UDAINATH SAHI DEO. 18 Pat. 215=5 B. R. 711=182 I C. 89=11 R.P. 657=40 Cr.L.J. 631=1939 P.W.N. 72=20 Pat.L.T. 105=A.I.R. 1939 Pat. 209.

"Land or water".

——S. 145 (1) and (2)—*Meaning of—Dispute as to collection of fees* khutagarai, arhat *and* keali *—Proceedings under S.* 145—*Competency—S.* 147, *applicability.*

S. 145, Cr. P. Code, may not apply to a dispute arising out of the collection of certain fees called *khutagarai arhat* and *keali* levied in respect of boats bringing grain and moored in shallow channel in a tauzi within a mauza; the fees being dissociated from the ownership of the site, are not included within the expression "land or water", under S. 145 (1) and (2), Cr.P. Code. But though S. 145 may not apply, S. 147 will and an order passed under S. 145 can be upheld under S. 147, Cr. P. Code. (*Dhavle, J.*) KUNJO *v.* SARJU. 181 I.C. 176=11 R.P. 573=40 Cr.L.J 538=5 B.R. 539=1939 P.W.N. 66=20 Pat.L.T. 164=A I.R. 1939 Pat. 206.

Order under.

——S. 145—*Order of Magistrate set aside in revision on technical grounds—His finding as to possession—Evidentiary value.*

Where an order of a Magistrate under S. 145, Cr, P. Code, has been set aside in revision, though on technical grounds, his finding that the complainant was in possession and was forcibly dispossessed by the accused is not admissible in evidence. But his order is evidence that possession was claimed by the complainant. (*Skemp, J.*) DEBI SINGH *v.* SIS RAM. 41 P L.R. 120=A I.R. 1939 Lah. 188.

Parties.

——S. 145—*Dispute between rival lessees—Cosharers of land, if necessary parties.*

The enquiry under S. 145 is confined to the fact of actual possession irrespective of the merits of the claims of the parties concerned. A claim therefore merely to a right to possession, as distingnished from a claim to be in possession,

would be outside the scope of the enquiry. It is therefore not necessary that all parties interested in or claiming a right to the property in dispute or entitled to it should be made parties to the proceedings. Hence where the dispute is between the two rival lessees, who claim to be in actual possession of certain land and they alone are issued notices under S. 145, and not the co-sharers of the land, there is no defect in the proceeding. 30 Cal. 155 (F.B.), Rel. on. (*Ganga Nath, J.*) EMPEROR *v.* BHUNESHAR PRASAD. 164 I.C. 180=9 R A. 119=37 Cr.L.J. 886=1936 A. Cr.C. 132=1936 A.L.J. 796=1936 A.W.R. 626=1936 Cr.C. 673=1936 All.L.R. 704=A.I.R. 1936 All. 531.

——S. 145—*Dispute between tenants and co-sharer landlords—Failure to implead some landlords—Effect on legality of proceeding.*

Failure to implead some of several co-sharer landlords in a proceedings under S. 145, Cr. P. Code, in a dispute between the landlords and tenants, does not render the proceedings illegal. In the case of co sharer landlords the possession of one is the possession of all and one set of co-sharer landlords can therefore validly represent the entire body of co-sharers in a proceeding under S. 145, Cr. P. Code. (*Agarwala, J.*) RAJA GOPE *v.* SUKAN SINGH. 183 I.C. 286=5 B.R. 894=12 R.P. 120=40 Cr.L.J. 749=20 Pat.L.T. 145=1939 P.W.N. 64=A.I.R. 1939 Pat. 353.

——S. 145—*Party to whom no notice is issued—Right to intervene at the time of arguments.*

Where in a proceeding under S. 145, Cr. P. Code, a person to whom no notice was issued to produce evidence and by whom no evidence was, in fact, produced, intervenes when the arguments of the two parties to the proceeding are being heard and wants to become a party to that proceeding, the Magistrate can rightly refuse to listen to him. (*Nanovutty, J.*) JAGDISH PRASAD SINGH *v.* TEZ BHAN SINGH. (1936) O.W.N. 147.

——S. 145—*Third party—Right to intervene.*

Where the original contesting parties in respect of proceedings under Cr. P. Code, S. 145, had settled their disputes and the danger of a breach of the peace had disappeared, a person not a party to the original proceedings cannot seek to intervene and ask the Court to keep the proceedings pending with a view to enable him to adjudicate his rights and more so when there was no likelihood of a breach of the peace. (*Grille, J.*) EMPEROR *v.* CHUNILAL. 1939 N.L.J. 197.

——S. 145—*Tenant in possession—If necessary party.*

Persons admittedly in possession of the disputed property are necessary parties to the proceedings under S 145, whatever the length or source of their possession may be. The essence of proceedings under S. 145 is the determination of the question as to who is in possession. To say that persons in possession of the disputed property as tenants are not necessary parties is to preclude persons who claim to be in possession from giving evidence that they are in possession; and in discharging such persons the action of the Magistrate is irregular and not in accordance with S. 145 of the Code. If the matter is decided without their being made parties, the decision will not be binding on them and the likelihood of a breach of the peace which the section is designed to obviate, will not be removed. (*Grille, J.*)

NAGARMAL RUDMAL *v.* RUDMAL GANGABISAN. I.L.R. (1937) Nag. 288=167 I. C. 500=9 R. N. 188=38 Cr.L.J. 395=A.I.R. 1937 Nag. 93.

Possession.

——S. 145 (4)—*Evidence of possession not satisfactory—Magistrate, if can consider question of title.*

Where in a proceeding under S. 145, Cr. P. Code, the evidence of possession is not quite satisfactory on either side, and there is no reason to believe one party more than the other, the Magistrate can use evidence of title to supplement the evidence of possession. (*Smith, J.*) JAGDAMBA DEVI *v.* EMPEROR. 171 I.C. 181=1937 O L.R. 526=10 R O. 95=1937 A.Cr.C. 151=38 Cr.L J. 1107=(1937) O.W.N. 1016=A.I.R. 1937 Oudh 510.

——S. 145 (4)—*Finding as to possession of first party—Validity of—If affected by further finding as to his dispossession which is not his case.*

Where the judgment of the Magistrate contains a clear finding to the effect that the first party was in possession of the disputed land, its validity is not affected by a further finding to the effect that the first party was forcibly dispossessed by the second party, which was not a party of the first party's case. (*Edgley and Akram, JJ.*) GOBARDHAN DUBY *v.* KHIROD CHANDRA BANERJEE. 44 C.W.N. 427=71 C.L.J. 152.

——S. 145 (1)—*Omission to pass preliminary order—Effect—Jurisdiction to pass order under S.* 145 (6)—*Failure to object—Effect of.*

In proceedings under S. 145, Cr. P. Code, the question of possession has to be decided with reference to the date of the preliminary order; and if there is no preliminary order, the one question, which the Magistrate has to decide cannot be decided. Consequently unless there is a preliminary order under S. 145 (1), the Magistrate has no jurisdiction to pass any order under S. 145 (6). The mere fact that a party affected by the proceedings allows the Magistrate to go on without objection cannot validate the order which is without jurisdiction. (*Burn, J.*) MARIASUSAI UDYAN *v.* HAJEE MAHOMED AZEZUDEEN SAHIB. 164 I.C. 689 (2)=37 Cr L.J. 953=9 R.M. 158=1936 M.W. N.647=44 L.W. 305=1936 Cr.C. 948 (1)=1936 M.Cr.C. 254=A.I.R. 1936 Mad. 824=71 M.L.J. 305.

——S. 145—*Possession—Possession of well in Railway property—Railway authority entitled to eject person as trespasser—Order declaring Railway authority in possession—If justified.*

Where the Railway authorities establish a case under S. 122, Railways Act, entitling them to eject the person asserting possession over a well in the railway premises, the person ejected cannot be said to have been forcibly and wrongfully dispossessed and therefore the Magistrate is justified in passing order under S. 145 (6) declaring the Railway authorities entitled to possession of the well. (*Davis, J. C. and Weston, J.*) HOTCHAND RAMCHAND *v.* EMPEROR. A.I.R. 1940 Sind 167.

Procedure.

——S, 145—*Claim by landlord and by different sets of tenants separately in respect of several plots of land—Single joint inquiry—Legality—Proper procedure.*

CR. P. CODE (1898), S. 145.

In a case in which a landlord claims a large number of plots of land to be in his possession while different sets of tenants claim different plots in their respective possessions separately, a single inquiry under S. 145, Cr. P. Code, is not illegal or necessarily irregular. Where, however, there is a combination of claims of different sets of tenants against one and the same landlord in one inquiry. The question of prejudice has to be examined. The proceedings must specify which of the plots is claimed by which tenant. The Magistrate must apply his mind to individual holdings and should not draw general conclusions in respect of specific plots of land on general evidence. Lands claimed by each set of tenants should be separately specified in the proceeding, and the Magistrate must come to a conclusion in respect of each holding separately. (*Noor, J.*) GULAB KUER *v.* GANOURI KOERI. **1938 P.W.N. 149=178 I.C. 333=11 R.P. 239=40 Cr.L.J. 17=5 B.R. 11=A.I.R. 1938 Pat. 511.**

——**S. 145 (1) and (3)**—*Defects in procedure—Failure to draw up original order and affix its copy at the spot—If vitiates proceedings.*

Where a Magistrate failed to record an order in writing under S. 145 (1), Cr. P. Code, stating the grounds on which he was satisfied as to the existence of danger of breach of public peace and where he further neglected to place a copy of his order in a conspicuous place near property in question as required by S. 145 (3), the entire proceedings are vitiated and must be set aside. (*Addison J.*) CHANAN SINGH *v.* EMPEROR. **40 P.L.R. 20=176 I.C. 124=31 Cr.L.J. 702=11 R. L. 165=A.I.R. 1938 Lah. 345.**

——**S. 145**—*Dispute as to possession of land—Notice to parties—Filing of written statements and documents—Proper course for Magistrate—Substitution of proceedings under S. 144—If justified—Duty to take evidence.*

In cases of dispute as to possession of land, where notices are issued to the parties calling on them to state their claims in respect of the land in dispute, and the parties appear and file written statements and documentary evidence in the manner indicated in S. 145, Cr. P. Code, the Magistrate should not adopt a short cut by substituting proceedings under S. 144, Cr. P. Code, so as to avoid the trouble of taking oral evidence. The Magistrate must proceed to complete the proceedings under S. 145. The written statements already filed must be considered and any documents filed, if they are to be used as evidence must be marked as exhibits. The Magistrate must hear such evidence as the parties may adduce, and he must then make an order under S. 145 (6) or under S. 146, in accordance with his finding on the question which of the parties was in possession on the date the notices issued. (*Rowland, J.*) DOMAN GOPE *v.* HET NARAIN SINGH. **1940 P.W.N. 49=A.I.R. 1940 Pat. 382.**

——**S. 145**—*Single proceeding in respect of different plots of land held by different tenants—Legality.*

There is nothing necessarily illegal or irregular in combining a large number of plots of land in one proceeding under S. 145, Cr. P. Code, where the dispute is between a landlord who claims a large number of plots on the one side and different sets of tenants claiming different plots of land on the other, provided care is taken to ensure that the parties are not prejudiced by the amalgamation of a number of plots in one proceeding. (*Agarwala, J.*) RAJA GOPE *v* SUKAN SINGH. **183 I.C. 286=5 B.R. 894=12 R.P. 120=40 Cr.L.J. 749=1939 P.W.N. 64=20 Pat.L.T. 145=A.I.R. 1939 Pat. 353.**

CR. P. CODE (1898), S. 145.

——**S. 145**—*Joint possession—Proceeding under—Party alleging joint possession with opposite party—Jurisdiction of Magistrate.*

The Magistrate has no jurisdiction to initiate proceedings under S. 145, Cr. P Code, where a party files a written statement alleging that he and the opposite party are in joint possession of the property in dispute and are members of a joint Hindu family. It is not open to the Magistrate to come to a definite finding, contrary to the express allegations of the party, that he is in exclusive possession of the property in dispute. If there is a likelihood of a breach of the peace between the parties, then proceedings under S. 107, Cr. P. Code, should be taken to bind over either or both of them to keep the peace. (*Nanavutty, J.*) SHANTI PRASAD *v.* EMPEROR. **1937 O.W.N. 214=1937 A.Cr.C. 37.**

——**S. 145**—*Magistrate when can refuse to take action—Report as to danger of breach of peace—Use of evidence given in another case—Legality—Dismissal under S. 203—If proper.*

The only case in which a Magistrate can refuse to take action under S. 145, Cr.P.Code, is when he is not satisfied that there is a danger of a breach of peace. But where the police report is to the contrary and if he is satisfied with it, his duty is to issue notices to the parties and proceed according to sub-S. (4). Where the Magistrate considers the evidence given in another case as evidence in the case on hand, though the other case is between the same parties and pending before him as a Revenue Court, the procedure is entirely illegal, and his dismissal of the case under S. 203, Cr. P. Code, clearly wrong for S. 203 has nothing to do with proceedings under S. 145, Cr. P. Code. (*Zia-ul-Hasan, J.*) EMPEROR *v.* SUBHAN. **1938 O.W.N. 1099=1938 A.W.R. (C.C.) 99=1938 O.A. 904=1938 A.Cr.C. 137=1938 O.L.R. 475=178 I.C. 252=11 R.O. 104=40 Cr.L.J. 33=A.I.R. 1939 Oudh 15.**

——**S. 145**—*Proceedings requiring the filing of statement*—Ex parte *order—Sustainability.*

In proceedings under S. 145, Cr. P. Code, which require the filing of statements by the parties, the Magistrate should not proceed *ex parte*, and an *ex parte* order cannot be sustained. The parties must be given an opportunity to file statements and the inquiry then proceeded with. (*Lakshmana Rao, J.*) PEDDA GIDDASANI *v.* ACHIGADU. **1938 M.W.N. 824=178 I.C. 251=11 R.M. 436=40 Cr. L.J. 32.**

Preliminary order.

——**S. 145 (1)**—*Prolonged inquiry—Propriety.*

Sub-S. (1) does not contemplate any sustained inquiry before the making of the preliminary order. It is in the highest degree absurd for a Magistrate to delay the passing of a preliminary order while he undertakes a prolonged inquiry extending over several hearings. (*Lobo, J.C. and O'Sullivan, J.*) MAHOMED ALI *v.* SHAMSUL HAQ. **I.L.R. (1940) Kar. 162=187 I.C. 636=12 R.S. 255=41 Cr.L.J. 486=A.I.R. 1940 Sind 33.**

CR. P. CODE (1898), S. 145.

Receiver.

——S. 145 (4) second proviso—*Appointment of receiver—Powers of Court.*

Per *Biswas, J.*—Strictly speaking, it is a matter which is arguable whether or not a 'receiver' can be appointed in any proceeding under Chapter XII except under S. 146, Cr. P. Code. Even though a receiver may not be appointed consequent on an attachment made under S. 145 (4), second proviso, a Magistrate is competent to make suitable arrangements for the custody of the property attached. (*Mukherjea and Biswas, JJ.*) FAIZUR RAHMAN *v.* SHEIKH LADLEY. 42 C.W.N 351.

——S. 145 (4)—*Appointment of Receiver—Power of Court.*

Under S. 145 (4) a Magistrate has no power to appoint a receiver and to give in his charge the property in dispute. It can at the most attach it, but the Code does not make it clear by what method the attachment is to be effected. But if the analogy of S. 88 were to be followed, the Magistrate ought to attach the land through the Collector of the District. The word "attach", merely means to bring under the control of the Court, and the Magistrate is entitled to effect that object in any way which is within his power. The appointment of a receiver with the powers of a receiver under the Civil Procedure Code is not one of those ways because unless that power is expressly given, a Magistrate cannot exercise it. At the same time, if the Magistrate's attachment is to be effected, Magistrate must put some person into possession of the property, who will have authority to maintain his possession. However the word "receiver" should not be applied to such person because of possibilities of misunderstanding. The person so appointed can be reimbursed for the legitimate costs incurred by him in management of the property. Another reason for which a "receiver" endowed with powers under the C P. Code, should not be appointed is that the proceedings under S. 145 are intended to be carried through without delay and the time during which the subject of the dispute needs to be under attachment is so short as certainly not to justify the appointment of a receiver having the powers of a receiver under the Civil Procedure Code. (*Mackney, J.*) MAUNG SAN U *v.* MAUNG LU GALE. 174 I C. 958=39 Cr.L.J. 484 =10 B.R. 451=A.I.R. 1938 Rang 88.

——S. 145—*Revision—Interference by High Court.*

The High Court does not interfere in revision with orders under S. 145, Cr P. Code, on the merits as a rule. (*Dhavle, J.*) BABU RAM PANDEY *v.* SHYAM DEO NARAIN. 179 I.C. 548=11 R. P. 390=5 B.R 246=40 Cr.L.J. 220=1938 P.W. N. 810=A.I.R. 1939 Pat 187.

——S. 145—*Proceedings under—Interference by High Court.*

Ordinarily the J.C.'s Court of Sind will not interfere with the proceedings of Magistrates under Ch. 12, merely because Judges would have exercised their discretion differently upon the facts. Proceedings under Ch. 12 are proceedings only of a quasi judicial nature. They are temporary and emergent in their nature and Magistrates on the spot are in a better position to judge of the affairs than Judges in Court many miles away. But where it is shown that there is not upon the record material on which the Magistrate could properly exercise jurisdiction then the High Court will interfere. (*Davis, J.C. and Lobo, A.J.C.*) MUHAMMAD ARAF *v.* SATRAMDAS SAKHIMAL. 164 I.C. 969=37 Cr.L.J. 1030= 9 R.S. 60 (2)=1936 Cr.C. 859=A.I.R. 1936 Sind 143.

CR. P. CODE (1898), S. 145.

——S. 145 (1)—*Preliminary order incomplete—Interference in revision.*

The fact that the preliminary order under S. 145 (1), Cr. P. Code, is not complete, is not a ground for interference in revision. (*Currie, J.*) DALLE *v.* KEHRI SINGH. 39 P.L.R. 503.

Scope.

——S. 145 (4) and (5)—*Scope—If exhaustive —Power of Magistrate to drop or terminate proceedings on being satisfied of non-existence of likelihood of breach of the peace—Information derived from Court diary and conduct of parties —Sufficiency of for terminating proceedings.*

It cannot be said that sub-Ss. (4) and (5) of S. 145, Cr. P. Code, are exhaustive or prevent a Magistrate from terminating proceedings under S. 145 when he is satisfied that the very cause and reasons of proceedings under the section have ceased to exist. S. 145 (5) provides for a special case and does not prevent the Magistrate from terminating or dropping the proceedings if he is satisfied that there is no likelihood of a breach of the peace. It is, however, desirable that they should be terminated with some formality. In other words, he should have on record a police report or other information to the effect that no dispute likely to cause a breach of the peace exists, in the same as proceedings are instituted on some information. But where the diary of a case shows that the parties attended the Court from time to time, talked about a compromise, and then finally stayed away and did nothing for months on end, that might be said to constitute information which would justify the Magistrate in his opinion that no dispute likely to cause a breach of the peace existed any longer and would justify an order terminating the proceedings. Information derived from the Court diary and the conduct of the parties is as good as any other. (*Davis, J.C. and Tyabji, J.*) MAHOMED AYOOB SAIFUDDIN KHAN *v.* GULZAR MEHAR. I.L.R. (1939) Kar. 775=187 I.C. 752=12 R.S. 265=41 Cr.L.J. 507=A.I.R. 1940 Sind 51.

—— S. 145—*Scope—Claim to possession of entire village—Order declaring party to be entitled to possession of undivided share—Legality.*

Where in proceedings under S. 145, Cr. P. Code, a party claims to be in possession of an entire village, it is not permissible for the Magistrate to declare the party to be entitled to possession of an undivided share of the village. (*Lakshmana Rao, J.*) MUTHUSWAMI THEVAR *v.* RAJARAM PANDIAN. 1940 M.W.N. 801=52 L.W. 346 (1)=(1940) 2 M.L.J. 355.

——S. 145 (4)—*Mandatory character—Omission to hold inquiry—Effect.*

Sub-Ss. (1), (4), (5) and (6) of S. 145 are complementary Once an order has been passed under sub-S. (1), it is obligatory for a magistrate to make the inquiry provided for in sub-S. (4) subject only to the obligation under sub-S. (5) to terminate the proceedings in the circumstances therein contemplated. The words of sub-S. (4): "the Magistrate shall then" are mandatory. The word 'then' refers to the stage when in compli-

ance with the order under sub-S. (1) the parties have put in their written statement and attended the Court. On the completion of the inquiry under sub-S. (4) a final order under sub-S. (6) must follow, it being obvious that the holding of the said inquiry is a condition precedent to the making of the order under sub-S. (6). It is erroneous to make order under sub-S. (6) without having ever held any inquiry under sub-S. (4) (*Lobo, J.C. and O'Sullivan, J.*) MAHOMED ALI *v.* SHAMSUL HAQ. I.L.R. (1940) Kar. 162=187 I.C. 636=12 R.S. 255=41 Cr.L.J. 486=A.I.R. 1940 Sind 33.

——S. 145—*Scope and object of.*

The object of S. 145, Cr. P. Code, is to preserve public tranquillity and save the realm from riots and civil commotions. The section cannot be brought into force at all until the Magistrate declares in writing that in his opinion a dispute exists which is likely to cause a breach of the peace. Hence when a Magistrate himself finally states that there is no likelihood of a breach of the peace occurring, the matter must determine and no further order can be made. If the parties still remain at loggerheads, the Magistrate may direct them to have recourse to a Civil Court. (*Davies*) JAWAHAR-UNNISA *v.* YUSUF ALI. 1940 A.M.L.J. 21.

——S. 145—*Successive proceedings under—Maintainability—Order as to possession—Remedy of aggrieved party.*

Under S. 145 (6) of the Cr. P. Code, the party declared to be entitled to be in possession by an order in proceedings under the section is entitled to be protected against disturbance of such possession until evicted therefrom in due course of law. It is not open to the opposite party to institute successive proceedings under the section and thus harass the successful party. The aggrieved party must seek his remedy in the Civil Court where the question of title and possession can be settled as between the contending parties. (*Lort Williams and Cunliffe, JJ.*) ELIMUDDIN SARKAR *v.* UMED ALI BEPARI. 165 I.C. 878=9 R C. 462=63 C.L.J. 7=1936 Cr.C. 881=38 Cr.L.J. 79=A.I.R. 1936 Cal. 659.

——S. 145 (4) and Proviso—*Relative scope of—Magistrate choosing to decide as to possession—Considerations as to dispossession within two months—If relevant*

A reading of the 1st proviso to sub-S. (4) to S. 145, Cr. P. Code, together with the sub-section makes it clear that the procedure prescribed in the proviso is not mandatory and that if a Magistrate chooses to act under sub-S. (4) and decides the question as to which of the parties was in possession at the date of the order made under sub-S. (1) it is not necessary for him to see whether or not any of the parties has been dispossessed within two months next before the date of the order. (*Zia-ul-Hasan and Yorke, JJ.*) MAHOMED NASIR *v.* DWARKA SINGH. 14 Luck. 240=11 R.O. 81=177 I.C. 974=1938 O.L.R. 459=1938 O.A. 778=1938 O.W.N. 1018 (2)=39 Cr.L.J. 963=1938 A.Cr.C. 132=A.I.R. 1939 Oudh 31.

——S. 145—*Summoning of witnesses.*

The duty of the Magistrate acting under S. 145 is to decide whether there is likely to be a breach of peace and whether one party although recently dispossessed, is to be regarded in possession. To do this, he must take such evidence as he finds necessary and it rests with him and not with the parties to decide what evidence is necessary to be called. In S. 145 there is no such provision as is to be found in Cl. 2 of S. 252 of the Code. The amendment to Cl. 4 of S. 145 does not mean anything more than that the Magistrate must receive evidence actually put before him by the parties but does not require him to summon witnesses at the instance of the parties who are unable to bring their witnesses to Court. It is the duty of the Magistrate to obtain such evidence as is requisite to enable him to form a reasonable opinion on the matter before him; it may be that this will entail his summoning the witnesses mentioned by the parties and if so, then it is certainly his duty to summon them. It does not however require of him that he should summon the witnesses whether or not he thinks he needs them. (*Mackney, J.*) A. MEAH *v.* STEEL BROTHERS & CO., LTD. 176 I.C. 266=11 R R. 40=39 Cr L.J. 708=A.I.R. 1938 Rang. 229.

Summoning witnesses.

——S. 145 (9)—*Scope—Examination of several witnesses on either side—Magistrate ignoring evidence and attaching property in dispute—Order set aside in revision—Direction to pronounce judgment on whole evidence—Hearing before new Magistrate—Magistrate—If bound to summon witnesses other than those originally summoned.*

In proceedings under S. 145, Cr. P. Code arising out of a dispute over a plot of land, the Magistrate examined thirteen witnesses on one side and eleven on the other, but he ignored all this evidence and attached the land under S. 146, Cr. P. Code, solely relying on the evidence of the Police Superintendent. This order was set aside by the High Court which directed the Magistrate to pronounce judgment after considering the evidence as a whole. By this time the original Magistrate had been transferred and the case was heard by another Magistrate to whom the case was transferred for disposal. On the case being taken up one of the parties filed a list of 174 witnesses, but they later reduced the number to 92. The Magistrate, however, declined to summon all these witnesses and summoned only those witnesses who had been examined by his predecessor in office, namely, thirteen, and then disposed of the case.

Held, that though under S. 145 (9) of the Cr. P. Code, the Magistrate had power to summon all the proposed witnesses, he was not bound to summon any witnesses other than those originally produced by the parties, and there was therefore no illegality and irregularity calling for interference in revision. (*James, J.*) BHUPAI *v.* ABDUL HAKIM. 5 B R. 319=179 I C. 896=1939 P.W.N. 155=11 R.P. 423=40 Cr.L.J. 276=A.I.R. 1939 Pat. 281.

——S. 145 (9)—*Summoning of witnesses—Discretion of Magistrate.*

The provisions of sub-S. (9) of S. 145, Cr. P. Code, seem to leave it entirely to the discretion of the Magistrate whether he will or will not summon any witness or witnesses. 1930 A L J 484, Doubt. (*Allsop, J.*) KUNJ BEHARI DAS *v.* EMPEROR. 162 I.C. 736=8 R.A. 892=37 Cr L J. 694=1936 A.W.R. 439=1936 A. Cr C. 120=1936 A.L.J. 370=1936 All.L.R. 463=1936 Cr.C. 492=A.I.R. 1936 All. 322.

CR. P. CODE (1898), S. 145.

Two months.

——S. 145 (4), Proviso—*Power to extend.*

There is no provision of law allowing extension of the period of two months laid down in S. 145, Cr. P. Code, whatever the cause of delay may be. The proviso to S. 145, Cr. P. Code, is only permissive and not a mandatory one. The Magistrate may treat the party forcibly and wrongfully dispossessed within two months as if he had been in possession. The main order is to be based on possession at the date of the preliminary order and the words used with reference to it are positive. (*Gruer, J.*) EMPEROR *v.* SUNDERLAL. **I.L.R. (1937) Nag. 174=167 I.C. 359=9 R.N. 179=38 Cr.L.J. 375=1936 Cr.C. 1114=A.I.R. 1936 Nag. 271.**

——S. 145 (4), Proviso—*"Within two months next before the date of such order"—Meaning of.*

The inquiry under sub-S. (4) is as to possession on the date of preliminary order under sub-S. (1) and the words of the proviso "within two months next before the date of such order" are precise and unambiguous. It is difficult to see how these words afford any scope for holding that in those cases where a Magistrate does not make a preliminary order within two months of the dispossession, the party complaining is still entitled to proceed under S. 145. The words "two months before the date of such order" mean two months before the date of the preliminary order. (*Lobo, J.C. and O'Sullivan, J.*) MAHOMED ALI *v.* SHAMSUL HAQ. **I.L.R. (1940) Kar. 162=187 I.C 636=12 R. S. 255=41 Cr.L. J. 486=A.I.R. 1940 Sind 33.**

Miscellaneous.

——S. 145—*Attachment of house—Right of party to enter remove movables in it.*

Once a house is attached under S. 145, the Court is deemed to be in possession of it and neither party can enter it or go into the premises appurtenant to it to remove any movable property which may be on those premises without obtaining an order from the Magistrate. (*Allsop, J.*) NIRANJAN LAL *v.* EMPEROR. **160 I. C. 870 (1)=37 Cr.L.J. 346=8 R.A. 661=1936 A.W.R. 192 (1)=1936 A.L.J. 83=1936 A.Cr.C. 55 (1)=1936 Cr.C. 140 (1)=1936 All. L.R. 180 =A.I.R 1936 All. 141.**

——S. 145—*Decision of Civil Court—Delivery obtained through Court—Binding nature—Limits of rule.*

The rule that Criminal Courts acting under S. 145, Cr. P. Code, should uphold possession obtained through Court would be applicable to possession obtained against the judgment-debtor but not when the party in possession at the time is not the judgment-debtor but one of the decree-holders claiming exclusive title. (*Gruer, J.*) SHEOPRASAD *v.* GOVINDRAM. **189 I. C. 774=41 Cr.L.J. 799=1940 N.L.J. 375=A.I. R. 1940 Nag. 265.**

——S. 145—*Enquiry into possession—Order in favour of one of parties on basis of previous order to which other was not party—Legality—Proper procedure.*

In a proceeding under S. 145, Cr. P. Code, the Magistrate cannot pass an order in favour of the first party on the basis of an order obtained by that party in a previous proceeding under that section in which the second party had no concern.

CR. P. CODE (1898), S. 145.

The Magistrate must come to a decision as to the fact of possession only on the evidence before him. He may, however, take into consideration as part of that evidence the fact that the first party obtained a decision in the previous proceeding. (*Bartley and Roxburgh, JJ.*) NEPAL CHANDRA *v.* PRAFULLA KUMAR. **44 C.W.N. 928.**

——S. 145 (1)—*Non-compliance with—Proceedings, if vitiated.*

The Magistrate, when making an order on an application under S. 145 must comply with the provisions of S. 145 (1) of the Code and he must make an order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed. Where there are actually no grounds whatever of the Magistrate's being so satisfied in view of the facts, and there is a failure on his part to comply with the provisions of S. 145 (1) of the Code, the whole proceedings before the Magistrate are vitiated and are rendered illegal as being without jurisdiction. (*Mackney, J.*) A. MEAH *v.* STEEL BROTHERS & Co. LTD. **176 I.C. 266=11 R.R. 40=39 Cr.L. J. 708=A.I.R. 1938 Rang. 229.**

——S. 145—*Order declaring party in possession—Effect of—Defeated party trespassing and cultivating land surreptitiously and violently occasionally—Effect of—If dispossession of party declared to be in possession.*

An order under S. 145, Cr. P. Code, confers, of course, no title, but the fact of possession remains and the party in possession can only be evicted by a person who can prove a better title to possession himself. If after a party has been declared to be in possession by an order under S. 145, the opposite party has been able on some occasions either surreptitiously or forcibly to exercise acts of possession, such as cultivation of the land, these would be no more than isolated acts of trespass, but not acts amounting to the dispossession of the other side, and would not constitute the juridical possession of the trespasser unless other side refrains from asserting his possession for a sufficiently long time and gives up the protection of the order under S. 145 in his favour. The possession of the party who succeeds in proceedings under S. 145, Cr. P. Code, cannot be put an end to by the defeated party by mere violence or surreptitious invasion. It may be that the position of the parties to a proceeding under S.145 has changed since the passing of the order under the section. But the party prohibited from interfering with the possession of another party cannot be heard to say against that party that he has disobeyed the order and has thus been able to retain or obtain possession. To allow such a plea would be to defeat the object of S. 145. When there has been no change in the position of the parties after the order, the defeated party cannot be allowed to contend that he ignored the order of the Magistrate in favour of the other party and in spite of it continued in possession; so long as the order passed is still in force. (*Khaja Mohammad Noor and Dhavle, JJ.*) AMBIKA THAKUR *v.* EMPEROR. **18 Pat. 544 =6 B.R. 203=185 I.C. 529=49 Cr.L.J 191=12 R P. 389=21 Pat.L.T. 45=1939 P.W.N. 747= A.I.R. 1939 Pat. 611.**

——Ss. 145 and 537—*Preliminary order—Reliance on police report—If a sufficient ground*

CR. P. CODE (1898), S. 145.

—Source of information not recorded—If curable.

When a Magistrate relies on the police report in his preliminary order under S. 145, Cr. P. Code and the report is on the record, his reference to it constitutes sufficient ground for his order. Even if the source of information is not recorded, it would be only an irregularity curable under S. 537, Cr. P. Code. (*Gruer, J.*) SHEOPRASAD *v.* GOVINDRAM. **189 I.C. 774=41 Cr.L.J. 799=1940 N.L.J. 375=A.I.R. 1940 Nag. 265.**

——S. 145—*Proceedings against Hindu father —Sons, if bound.*

In the case of a joint Hindu family, where proceedings under S. 145 are started against the father, the sons are bound by the proceedings and the orders passed therein. (*Grille, J.*) SETH THAKURDAS *v.* NARAYAN. **I.L.R. (1936) Nag. 205 =166 I.C. 709=9 R N. 144=38 Cr.L.J. 307= 1936 Cr.C. 805=A.I.R. 1936 Nag 192.**

——Ss. 145 and 146—*Symbolical possession obtained under decree of Civil Court—Magistrate, if can ignore.*

If in execution of a decree against the judgment-debtor an order for delivery of possession of judgment-debtor's property to the decree-holder is made by the Court and effect is given to that order by an officer of Court executing the delivery warrant and since then the decree-holder is in possession both in fact and law of the land in question but the judgment-debtor within two months from the execution of such warrant attempts a forcible entry upon the land, whereupon the decree-holder files a petition in a Criminal Court under S. 145, the Magistrate cannot go behind the decision of the Civil Court and cannot ignore the decree. It is immaterial whether the possession is actual or merely symbolical and in the inquiry under S. 145 there is only one conclusion possible for the Magistrate to arrive at with reference to the land and it is that it was in possession of the decree-holder on the date of the order passed under sub-S. (1) of S. 145. Even assuming that the decree-holder had been forcibly dispossessed at any time after the execution of the delivery warrant, proviso 1 to sub-S. (4) of S. 145 will operate in favour of the decree-holder. If therefore in such circumstances the Magistrate passes an order under S 146 (1) by which he refers the parties back to Civil Court for the determination of their rights, such an order is highly improper and opposed to all principles of justice. (*Mya Bu, J.*) MAUNG KAN *v.* MAUNG PO TAK. **1940 Rang.L R. 157=185 I.C. 119=12 R.R. 183=41 Cr.L.J. 123=A.I.R 1939 Rang. 388.**

——S. 145—*Proceedings under—Shamilat land —Power of Court.*

The mere fact that the land is shamilat does not preclude the Court from making enquiry and taking proceedings under S. 145, Cr. P. Code. (*Currie, J.*) GIANI *v.* EMPEROR. **166 I.C. 71=9 R.L. 334=38 Cr.L.J 123=38 P.L.R. 332=1936 Cr.C. 1118=A.I R. 1936 Lah. 1015.**

——S. 145 (6)—*Proceeding under S. 147— Road in dispute found to be private road of one party—Order in form under S.* 145 (6)—*If justified.*

Where in a dispute regarding a road, proceedings under S. 147 are started and the Court finds that the disputed portion of the road is the private road of one party, the appropriate order to be passed is a declaration that the road was not a public road and the prohibition directed against the opposite party. Where instead of that, the Magistrate declares that the road was in possession of the first party, and prohibits all disturbance of such possession until eviction in due course of law, by an order in form under S. 145 (6), there is no prejudice to the opposite party. (*Agarwala, J.*) DHANSAR COAL CO., LTD. *v.* BABU LAL AGARWALA. **173 I C. 750=1938 P. W.N. 245=4 B.R. 329=39 Cr.L.J. 363 (2)=19 Pat.L.T. 323=10 R.P. 436=A.I.R. 1938 Pat. 133.**

CR. P. CODE (1898), S. 146.

——Ss. 145 (6) and 146—*Attachment of property under S.* 145(4)—*Subsequent order delivering possession in terms of order of Revenue Court—Legality.*

Where on receipt of a report by the Police the magistrate passed an order under S. 145, Cr. P. Code, and attached the property under S. 145 (4) and subsequently released the property from attachment and directed that possession be delivered to a certain party in accordance with the terms of the order of the Revenue Court in the mutation proceedings which were then pending.

Held, that the proceedings under S. 145 were not properly disposed of as the order could not be supported either under S. 145(6) or S 146 and that the party entitled to possession under the order of the Revenue Court should have sought possession through that Court. (*Ganga Nath, J.*) RADHA RAMAN DAS *v.* EMPEROR. **160 I.C. 20= 8 R A. 558=37 Cr.L.J. 215=1936 A.Cr.C. 46= 1936 A.W.R. 125=1936 A.L.J. 197=1936 A.L. R. 30=1936 Cr.C. 211=A.I.R. 1936 All. 177.**

——S. 146—*Attachment under—Valid grounds for—Inability to come to a finding.*

Though S. 146 (1), Cr. P. Code, empowers a Magistrate to attach the property in question if he is unable to satisfy himself as to which of the parties was in possession, yet attachment should not be resorted to except in rare cases in which a Magistrate is by reason of some special circumstances unable to come to a finding on the question of possession. Mere reference to the evidence without a discussion and failure to give reasons for being unable to come to a definite conclusion make the order of attachment bad. (*Zia-ul-Hasan, J.*) MUNIE AHMAD *v.* MAHMUD-UL-HAQ. **1938 O.W.N. 673=1938 A.Cr.C. 53= 1938 O.A. 942=1938 A.W.R. (C C.) 134.**

——S. 146—*"Competent Court"—Collector preparing record-of-rights during survey and settlement operation.*

A record-of-rights prepared by a Collector or other Government officer during survey and settlement operations under the orders of the Government is a decision of a competent Court within the meaning of S. 146, Cr. P. Code, and the order of the Collector is a determination of the rights of parties thereto or the person entitled to possession thereof. (*Agarwala, J.*) RAM RAN VIJAY PRASAD SINGH *v.* RAM PRASAD GUPTA. **183 I.C. 388=5 B.R 906=40 Cr.L J 797 =12 R.P. 141=1939 P.W.N. 260=20 Pat.L.T. 595=A I.R. 1939 Pat. 348.**

——S. 146—*Order of attachment without enquiry—Legality.*

CR. P. CODE (1898), S. 146.

S. 146 presupposes an enquiry by the Magistrate on the evidence recorded, and its object is to give him jurisdiction to attach the property, if upon the evidence so recorded, he is unable to come to a finding as to who was in possession on the date on which the order, under S. 145 was drawn up. Where, therefore, there is no evidence of any kind on record, the order attaching property is without jurisdiction. (*Ganga Nath, J.*) RADHA RAMAN DAS *v.* EMPEROR. **160 I.C 20=8 R.A. 558=37 Cr.L.J. 215=1936 A Cr.C. 46=1936 A.W.R. 125=1936 A L.J. 197=1936 A.L.R. 30=1936 Cr.C. 211=A.I.R. 1936 All. 177.**

——**S. 146 (1)**—*Order under—When proper—Ample material to decide question of possession—Attachment, if justified.*

S. 146 (1), Cr. P. Code, applies if the Magistrate is unable to satisfy himself as to which of the parties was in possession. Where there is ample evidence on the point of possession, though it may be difficult to decide the question of possession it is not impossible, a Magistrate is not justified in passing an order under S. 146 (1), Cr. P. Code. (*Pollock, J.*) MIYAKHAN *v.* MAHOMED HANIF. **1939 N.L.J. 213.**

——**S. 147**—*Applicability—Dispute about right to worship as pujari in temple—Order in respect of—Jurisdiction of Magistrate.*

A dispute about the right to worship as pujari in a temple is a dispute which comes within the provisions of S. 147, Cr. P. Code, as it is a dispute regarding an alleged right of user of any land as explained in S. 145 (2). Where the dispute is regarding a right which is inseparably connected with the use of any land or building it must be regarded as being within the purview of S. 147. The dispute in actual fact may have more to do with what a man does in the temple after entering into it and not so much with his actual entry into the temple; but since the right is inseparably connected with the right to enter a building and cannot be dissociated from it, the dispute about that falls within S. 147; and the Magistrate has therefore jurisdiction to pass an order under S. 147 regarding it. (*Pandrang Row, J.*) VELAPPA GOUNDAN *v.* RAMASWAMI GOUNDAN. **47 L.W. 305=176 I.C. 127=1938 M.W.N. 348 =11 R M. 32=1938 M.Cr C. 64=39 Cr.L.J. 705 =A.I.R. 1938 Mad. 537=(1938) 1 M L J. 817.**

——**S. 147**—Applicability—Dispute as to collection of fees *khutagarai, arhat* and *keali* levied on boats in channel—Order in respect of—Legality. *See* CR. P. CODE, S. 145 (1) AND (2). **1939 P.W. N. 66.**

——**S. 147**—*Applicability—Proceedings under—Jurisdiction to initiate—Conditions—Existence of dispute likely to cause breach of the peace in future—If sufficient.*

In order to justify the initiation of proceedings under S. 147, Cr. P. Code, there must be a present dispute and a present fear of disturbance of the peace. The section will not apply to a state of things indicating that there may be a breach of the peace in future. If there be no present danger of a breach of the peace, the fact that there is a dispute between the parties which is likely to cause a breach of the peace in the future will not justify a Magistrate taking action under S 147. (*Guha and Lodge, JJ.*) JAGABANDHU MISRA *v.* MANAGER, INDIA JUTE MILLS,

CR. P. CODE (1898), S. 147.

SERAMPUR. **161 I C. 338=37 Cr.L.J. 251=8 R.C. 507=40 C.W.N. 351.**

——**S. 147** — Discretion of Sub-Divisional Magistrate under—Institution of—Proceedings under—If barred by pendency of proceedings under S. 107. *See* CR. P. CODE, SS. 107 AND 147. **29 S.L R. 443.**

——**S. 147**—*Dismissal of—Complaint of one party against another—Magistrate subsequently starting enquiry under S. 147 on police report—Date of institution of enquiry.*

One party filed a complaint against another who had dispossessed the complainant of his rights of ferry. On enquiry the complaint was dismissed under S. 203, Cr. P. Code. The complainant made a report against the other party to the Superintendent of Police. On police enquiry it was discovered that there was a likelihood of breach of peace between the two parties. On the police report Magistrate started enquiry under S. 147 and passed orders. Question was as to what date the institution of enquiry of the Magistrate related back.

Held, that the date of the institution of the enquiry is the date when the likelihood of a breach of the peace was brought to his notice, and not the date when he dismissed the complaint. (*James and Saunders, JJ.*) KINEI MAJHI *v.* GOBIND PRASAD SINGH. **160 I.C. 795=37 Cr.L.J. 327=8 R. P. 382=1936 P.W.N. 104=17 Pat.L.T. 37= 1936 Cr.C 69=A.I.R. 1936 Pat. 44.**

——**S. 147**—*Dispute between rival religious sections as to use of a building—Building in possession of one of them—Orders of Magistrate apart from section—Binding nature of—Use of official means to enable one party to trespass on land in possession of another—Propriety.*

The Dayal Bagh section of the believers in the Radhaswami faith applied to the District Magistrate asking him to fix a date upon which they could perform a *bhandara* ceremony and asking him also to make arrangements to enable the ceremony to be performed without a breach of the peace in a certain building known as a *Samadh* which was in possession of the Swami Bagh section. The District Magistrate passed an order in which he expressed an opinion that a certain judgment of the Privy Council in a suit between both the sections did not imply that the Dayal Bagh section were not entitled to use the *Samadh* for the purposes of performing a *bhandara* and he therefore said that he would make arrangements to see that the *bhandara* was performed without a breach of the peace. This order was passed without any notice having been given to the Swami Bagh section. They, therefore, when they came to know of it, made an application to District Magistrate objecting to it. The District Magistrate passed another order in which he refused toreconsider his previous order, He again passed a third order which he described as an administrative and executive order not intended to affect the civil rights of the parties. In that order he directed that certain police arrangements should be made. The result was that the *bhandara* was performed. Against these three orders, an application was made in revision.

Held, that as the District Magistrate was not intending to take action under S. 147, Cr. P. Code, his orders were not binding on the members of the Swami Bagh party, and that in so far as he

CR. P. CODE (1898) S. 147.

directed certain subordinate Magistrates and police officers to attend at the *Samadh* on a particular date in order to preserve the peace, the Court would suggest that it was not proper to use official means to enable any party to trespass upon land in the possession of the another unless it was decided in the exercise of some jurisdiction that the party who wished to enter upon the land was entitled to do so, and that it was not necessary to set aside any of the three orders which had already served their purpose. (*Allsop, J.*) GUR MAUI SARAN *v.* THE RADHASWAMI SATSANG SABHA, DAYAL BAGH, AGRA. **165 I.C. 721 =9 R.A. 303=1936 A.W.R. 881=1936 A.Cr.C. 172=1936 Cr.C. 1000=1936 A.L.R. 945=38 Cr. L.J. 46=1936 A.L.J. 1047=A.I.R. 1936 All. 759.**

——**S. 147**—*Dispute coming under, tried as one under S. 145—Effect of.*

The initial notice, the written statements and the subsequent proceedings, including the operative order under S. 145, Cr. P. Code, are all substantially covered by S.147, Cr. P. Code. The fact that a wrong section, *viz.*, S. 145, has been quoted will not alter the real character of the proceedings. (*Niamatullah, J.*) GAJRAJ SINGH *v.* EMPEROR. **1936 A.W.R. 529=162 I.C. 760=8 R.A. 900=1936 A.L.J. 746=37 Cr.L.J. 705=1936 A. Cr. C. 110=1936 A.L.R. 472=1936 Cr. C. 490= A.I.R. 1936 All. 320.**

——**S. 147**—*General public—Right to use private property for Moharram ceremonies—Duty of Magistrates.*

Where the owners are in possession of certain property in which the general public have no interest at all and they object to the use of their property by the public for the performance of certain Moharram ceremonies, they cannot be compelled to allow their property to be used in that way unless it is established that the persons claiming to use it have a right of user. A Magistrate should not enforce any use of this private property against the persons in possession thereof unless it is established either by a decree of a Civil Court or as the result of some enquiry under S. 147, Cr. P. Code, that the persons claiming the right to use it have justification for their claim. (*Allsop, J.*) ABDUL MAJEED *v.* EMPEROR. **180 I.C. 499=1939 A Cr.C. 70=11 R.A. 470= 40 Cr L.J. 383=1938 A.W.R. (H.C.) 851=A.I.R. 1939 All. 182.**

——**S. 147**—*Proceeding under—Right to draw water from certain wells in dispute—Entries in*—Wajib-ul-arz—*Value of.*

Where in a proceeding under S. 147, Cr. P. Code, the right to draw water from certain wells is in dispute, and the entries in the *Wajib-ul-arz* show that the right is with one of the parties, it is for the opposite party to establish that these entries are incorrect or that the right given to that party has been abandoned by them. The continuity of the right given to that party under the *Wajib ul-arz* must be presumed, and in the absence of any reliable evidence regarding abandonment, it must be held that the right to draw water from the wells in question has been exercised by that party within three months of the institution of the enquiry. (*Abdul Rashid, J.*) FAJJU *v.* SIRYA. **170 I.C. 392=38 Cr.L.J. 881=10 R.L. 107=39 P.L.R. 491.**

CR. P. CODE (1898), S. 147

——**S. 147**—*Right to discharge water in any direction over another's land—If can be basis of order.*

A right claimed by a person to discharge water over the land of another in any direction he pleases, simply because his own property is slightly higher, cannot be made the basis of any order under S. 147, Cr. P. Code. (*Derbyshire, C.J. and Henderson, J.*) HARADHONE MUKHERJEA *v.* BROJENDRA NATH RAI CHOUDHURI. **171 I.C. 268=10 R.C. 261=38 Cr.L.J. 1071=41 C.W.N. 900=A.I. R. 1937 Cal. 513.**

——**S. 147**—*Wall constructed by a person obstructing a certain drain—Order directing him to pull down the wall—Power of Magistrate to pass.*

There is nothing in S. 147, Cr. P. Code, which would entitle a Magistrate to direct a person to pull down a wall constructed by him which is alleged to obstruct a certain drain. (*Derbyshire, C.J. and Henderson, J.*) HARADHONE MUKHERJEA *v.* BROJENDRA NATH RAI CHOUDHURI. **41 C.W.N. 900=171 I.C. 268=10 R.C. 261=38 Cr.L.J. 1071 =A.I.R. 1937 Cal. 513**

——**S. 147 (2)**—Ad interim order—*Power of Magistrate to pass.*

S. 147 (2), Cr. P. Code, contemplates a final order made after due enquiry in the manner provided for by that section and does not justify an interlocutory order prohibiting interference with the existing rights pending decision in the proceeding. But if the Magistrate finds it necessary to pass an *ad interim* order of any kind, he may do so in the manner provided by S. 145, Cl. (4), proviso 2, Cr. P. Code (*Bartley and Lodge, JJ.*) KHODA BUX *v.* MOZHAHUL HAQUE. **189 I.C. 354= 13 R.C. 80=41 Cr L.J. 728=44 C.W.N. 623=A. I.R. 1940 Cal. 330.**

——**S. 147 (2)**—*Mandatory injunction—Power of Magistrate.*

S. 147 (2), Cr. P. Code, does in a proper case cover the power of a Magistrate to order a person to do some thing or, in other words, the power to direct a mandatory injunction. Where it is found that by reason of the erection of a fencing, an obstruction to the right of way of the complainant is caused, an order directing removal of the obstruction is valid.(*Khundkar and Edgley, JJ.*) BADRIDAS AGARWALLA *v* SOHAN LAL OSWAL **I.L.R. (1940) 1 Cal. 468=44 C.W.N. 368.**

——**Ss. 147 (2) and 133**—*Mandatory order—If can be passed under S. 147 (2)—Removal of obstruction—Procedure.*

Under S. 147 (2), Cr. P. Code, a Magistrate has no power to make an order in the nature of a mandatory injunction for the removal of an obstruction from any way lawfully used by the public. But he has powers under S. 133 to bring about its removal. (*Gruer, J.*) SYED USMAN ALI *v.* EMPEROR. **I.L.R. (1938) Nag. 580=1938 N.L. J. 139=175 I.C. 234=10 R.N. 440=39 Cr.L.J. 584=A.I.R. 1938 Nag 297.**

——**Ss. 147 and 144**—*Applicability—Dispute as to right to drain off surplus water enclosed by alang of other party—Other party having right of irrigation.*

On a report of Sub-Inspector of Police, it appeared that a dispute existed between two parties as to whether the one had a right to drain off surplus water by cutting an alang erected by the other party, and if the right existed, whether the other party having a right of irrigation was enti-

tled to require that the cutting should be limited in depth so as not to allow escape of all the water and damage the bundh erected by them and thus affect their irrigation. The Sub-Divisional Officer issued notices under S. 144 to both the parties in order to prevent immediate breach of the peace and also to show cause if any.

Held, that the case fell not within S. 144, but exactly within the provisions of S. 147 and the Magistrate should have proceeded to make a judicial decision of the dispute.

Held, further, that the notices issued should be considered equivalent to the notices to be issued under S. 147 (1). A.I.R. 1918 Pat. 663, Rel. on. (*Rowland, J.*) INDERDEO NARAYAN *v.* DURGA PRASAD SINGH. **160 I.C. 945=37 Cr.L.J. 378=8 R.P. 397 (2)=17 Pat L.T. 22=1936 Cr.C. 83=1936 P.W.N. 42=A.I.R 1936 Pat. 59.**

——**S. 154**—*First information report—Belated —Value af.*

Where the first information report was made two days after the occurrence the same corroborative value cannot be attached to it as in a case in which the report is made shortly after the occurrence, as there was plenty of time within which the story for the prosecution could be decided upon and the witnesses to be examined in support of it being obtained. (*Niamatullah and Collister, JJ.*) ASHIQ ALI *v.* EMPEROR. **165 I.C. 193=9 R. A. 244=37 Cr.L.J. 1104=1936 A.W.R. 633=1936 A Cr.C. 138=1936 Cr C. 943=1936 A.L.J. 855=1936 All L.R. 874=A.I.R. 1936 All. 747.**

——**S. 154**—First information report—Use of. *See* EVIDENCE ACT, S. 157. **38 P.L.R. 203.**

——**S. 154**—*First information report—Entry in diary mentioning names of culprits given by prosecution witness.*

Where when the Sub-Inspector left the thana before the first information report was recorded, he caused an entry to be made in the daily diary of the thana and in that mentioned the names of the culprits alleged to have been given to him by a prosecution witness.

Held, that the entry could not be treated as a first information report in the case but was a part of the proceedings of the police and therefore inadmissible as evidence for any purpose in Court. (*Tek Chand and Ram Lall, JJ.*) AHMAN *v.* EMPEROR. **180 I.C. 507=11 R.L. 697=40 Cr.L.J. 435=40 P L.R 697=A.I.R. 1938 Lah. 787.**

——**S. 154**—*First information report—Use of—Safeguards to be taken—Relevancy—Value.*

As a general rule, Magistrates and Judges should be quite clear when they make use of the first information reports that they are admissible in evidence. They are admissible under Ss. 155 and 157 of the Evidence Act for the purposes mentioned therein. Though they may become relevant under other sections of the Evidence Act and under certain circumstances, they are not substantive evidence in the case and Courts should be clear about their relevancy before they use them. (*Allsop, J.*) RAM NARESH *v.* EMPEROR. **I L.R.(1939) All. 377=181 I.C. 646=1939 A.Cr. C. 36=1939 A.W.R. (H.C.) 190=40 Cr.L.J. 559 =11 R.A. 597=1939 A.L.J. 107=A.I.R. 1939 All. 242.**

——**S. 154**—*First information report—What amounts to—Evidentiary value of such report.*

S. 154, Cr. P. Code, does not necessarily contemplate that only one information of the crime

should be recorded as first information report but all information given to police before investigation is started may amount to first information report within the meaning of that section. The first information report is not substantive evidence but can only be properly used to corroborate or contradict the maker thereof. If the name of the accused is not mentioned in that report, mere absence of his name is not by itself a sufficient proof of his innocence. (*Kichlu and Wazir, JJ.*) INDER SINGH *v.* EMPEROR. **40 P.L.R. J. K. 23.**

——**Ss. 154 and 548**—*Right of accused to copy of first information report.*

A first report stands more or less on the same footing as a complaint made directly to a Magistrate. It is a valuable document and the accused is entitled to know what was said in that report to connect him with the offence, so that he may be in a position to protect his interests by cross-examining the prosecution witnesses with reference to additions and alterations in the story which might subsequently be made in evidence. (*Rupchand Bilaram, J C. and Lobo, A.J.C.*) BHERUMAL KHANCHAND *v.* EMPEROR. **171 I.C.993 =10 R.S. 134=39 Cr.L.J. 57=A.I.R. 1937 Sind 303.**

——**S. 156**—General search warrant issued to C. I. D. Inspector—Investigation or inquiry. *See* CR. P. CODE, Ss. 96 (1) AND 156. **A.I.R. 1937 Rang. 206.**

——**S. 159**—*Identification — Reference to mashirnama -Permissibility.*

Section 159 is wide enough to cover reference to a mashirnama as to what was done or seen but not as to what was said. There should then be no practical difficulty in the way of adducing sufficient evidence of identification tests in Court to preserve their utility. (*Davis, J.C. and Weston, J.*) MOR MAHOMED *v.* EMPEROR. **I.L.R. (1940) Kar. 487=A.I.R. 1940 Sind 168.**

——**S. 161**—Statement made in answer to requisition by investigating officer under—If privileged. *See* PENAL CODE, S. 499, EXC. 9. **47 L.W. 136.**

——**Ss. 161 and 162**—*'Any person' in S. 161, if includes one who may become the accused later on —S. 162, if applies to a suspect.*

'Any person' occurring in S. 161, Cr. P. Code, which must be read with S. 162, include any person who may subsequently be accused of the crime which is being investigated. Hence S. 162 applies to a person who is suspected of having committed the crime forming the subject-matter of investigation. (*Niyogi, J.*) DINANATH *v.* EMPEROR. **I.L.R. (1940) Nag. 232=189 I.C. 591=13 R.N. 58=41 Cr.L J. 757=A.I.R. 1940 Nag. 186.**

——**S. 162.**

Applicability.
Admissibility.
Contradiction.
Construction and scope.
Copies.
Police diary.
Scope and Object.
"Statement", meaning of
Statement to Police.
Miscellaneous.

Applicability.

——**S. 162 (1), proviso**—*Applicability—Conditions—Statements made to police officer—Admissibility and use of.*

CR. P. CODE (1898), S. 162.

Under S. 162, Cr. P. Code, in all cases not falling under S. 32 (1) of the Evidence Act, no statement, whether oral or written, made by any person to a police officer in the course of an investigation, may be used for any purpose at an inquiry or trial in respect of any offence under investigation at the time when such statement was made. The first proviso to the section makes an exception to that general rule, which is strictly limited in its application. To bring the proviso into operation three conditions must be fulfilled: (1) the statement of the witness in question must have been reduced into writing; (2) the witness must have been called for the prosecution; and (3) the written statement must be proved. When these conditions exist, the proviso directs that the Court "shall, on the request of the accused, refer to such writing, and direct that the accused be furnished with a copy thereof", and then it can be used to contradict the witness. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* MAHOMED ADAM CHOHAN. **167 I.C. 43=9 R.B. 274=38 Cr.L.J. 327=38 Bom.L.R. 1186=A.I.R. 1937 Bom. 60.**

——**S. 162**—*Oral statements by accused to C. I. D. officer—Admissibility—Evidence Act, S. 25.*

Statements made to a C I. D. officer who is investigating an offence of which he has received information are statements made during the course of investigation, and S. 162, Cr. P. Code, would apply to such statements. The fact that the statements are oral makes no difference, because oral statements no less than written statements come within the purview of S. 162, Cr. P. Code. When such statements made by the accused are relied for the purpose of fastening guilt on those who made them, if the statements show that the accused who made them were engaged in an offence, they amount to confessions made to a police officer and cannot be admissible in evidence. (*Pandrang Row, J.*) APPAYYA *v.* GOPALAKRISHNAYYA. **178 I.C. 616=11 R.M. 478=40 Cr.L.J. 108=1938 M.Cr.C. 252=1938 M.W.N. 825=48 L.W. 322=A.I.R. 1938 Mad. 893.**

——**S. 162**—*Statements in investigation not resulting in a trial—Use of statements to police to contradict witness—Procedure.*

The provisions of S. 162, Cr. P. Code, do not apply to statements made in an investigation other than that which results in a trial in which those statements are sought to be used. Even in cases where the provisions of S. 162, Cr. P. Code, do apply, those parts of the statements to the police which are used to contradict the witness in cross-examination must be proved and brought on the record. This can ordinarily be done by the admission of the witness that he made the statement or by examination of the police officer who recorded it. If the latter course is unnecessary, in order to avoid delay, there can be no objection to allowing cross-examination subject to subsequent proof of the statement. In other words formal proof prior to the cross-examination of the witness on his previous statement is unnecessary. If the statement, if not admitted, is subsequently not proved, the evidence based on it must of course be disregarded. This is irrespective of the applicability of S. 162 to the statement in question. (*Grille, J.*) EMPEROR *v.* PARMU. **I.L.R. (1940) Nag. 320.**

CR. P. CODE (1898), S. 162.

——**S. 162**—*Statements made by witnesses—Police officer not recording first information—Admissibility of statements.*

There is no doubt that when an information is given orally under S. 154, Cr. P. Code, and a police officer does not reduce it into writing, he is doing what he ought not to do and has acted in an irregular way. But it is going too far to say that while investigating the truth or otherwise of the information, he is not carrying on an investigation within the meaning of Chap. XIV of the Code. He obviously is and if he is, S. 162, applies to the statements made by persons examined by him, and such statements are, therefore, inadmissible in evidence. (*Cunliffe and Henderson, JJ.*) SHAHED ALI MIRDHA *v.* EMPEROR. **I.L.R. (1937) 2 Cal. 308=10 R.C. 258=171 I.C. 269=38 Cr.L.J. 1067=A.I.R. 1937 Cal. 309.**

——**S. 162**—*Summons case—Application by accused for copies of statements made to police—Refusal—Conviction—Sustainability—S. 537—Application of.*

S. 162, Cr. P. Code, is applicable to the trial of a summons case as well as to the trial of a warrant case, and the accused in a summons case has a statutory right to be supplied with copies of the statements made by witnesses before the police. A refusal to grant his request for such copies vitiates the trial and conviction S. 537, Cr. P. Code, cannot be called in aid to cure the defect, as the Court in such a case is bound to assume prejudice to the accused. (*Manohar Lall and Chatterjee, JJ.*) DINANATH SAHAY *v.* EMPEROR. **17 Pat. 622=180 I.C. 845=5 B.R. 501=11 R.P. 545=40 Cr.L.J. 509=1939 P.W.N. 136=20 Pat.L.T. 70=A.I.R. 1939 Pat. 174.**

——**S. 162**—Suspects. *See* CR. P. CODE, SS. 161 AND 162. **I L R. (1940) Nag. 232.**

——**S. 162 (1), Proviso**—*Witness deposing to essential fact not stated to police—Contradiction by statement recorded by police—Permissibility.*

If a witness in Court states something which is essential to the case but which he did not state to the police, then he may be contradicted by the written record of his police statement. (*D. R. Norman.*) RAHIM BUX *v.* EMPEROR. **1937 A. M.L.J. 18.**

Admissibility.

——**S. 162**—*Case of attempt to murder—Complaint made by accused to police previously admitting stabbing complainant in self-defence—Admissibility against accused.*

A complaint filed by the accused at a police station against the complainant stating that he stabbed him in self-defence is not inadmissible against the accused on a charge of attempt to murder the complainant in respect of the stab, on the ground that it is a statement made under S. 162, Cr. P. Code. or that it is a confession made to a police officer. (*Pandrang Row, J.*) GURUSWAMI TEVAN *v.* EMPEROR. **184 I.C. 336=12 R.M. 435=40 Cr.L.J. 922=51 L.W. 743=1939 M.Cr.C. 188=1939 M.W.N. 513=A.I.R. 1939 Mad. 780=(1940) 1 M.L.J. 747.**

——**S. 162**—*Evidence of identification during investigation.*

The evidence of a test identification held by the police in course of investigation, that is to say, a statement expressed or implied, made to the police by way of identifying the accused is inadmissible in law in view of the provisions of

CR. P. CODE (1898), S. 162.

S 162, Cr. P. Code. (*McNair and Khundkar, JJ.*) KRISHNA KAHAR *v.* EMPEROR. **I.L.R. (1939) 2 Cal. 569=187 I C. 129=12 R.C. 550=41 Cr L J. 405=43 C.W.N. 1117=A.I.R 1940 Cal 182.**

——**S. 162**—*Identification by police—Panch witness—Statement that there were several similar articles.*

Although evidence that certain witnesses pointed out a particular person or property at an identification by the police is barred under S. 162, Cr. P. Code, a statement by the panch witness that there were several similar articles is admissible. (*D. R. Norman.*) RAHIM BUX *v.* EMPEROR. **1937 A.M.L.J. 18.**

——**S. 162**—*Identification of accused before police—Statement of witness as to.*

A statement of a witness that she identified the accused before the police, although made in answer to a question asked in cross-examination, is inadmissible in evidence. (*Henderson and Khundkar, JJ.*) BHOLA NATH DOME *v.* EMPEROR. **43 C.W.N. 1180.**

——**S. 162**—*Statement made to customs officer.*

The Excise Act does not give the customs officer any powers of investigation as conferred upon the police officer under the Criminal Procedure Code. Therefore a statement made to a customs officer does not come within the mischief of S. 162, and is therefore admissible in evidence. (*Henderson and Sen, JJ.*) GHULAM DASTGIR KHAN *v* EMPEROR. **184 I C 581=12 R.C. 244=41 Cr L.J. 40=A.I.R. 1939 Cal. 623.**

——**S. 162**—*Statement to police—Person making statement dead at time of trial.*

A statement made to the police is not admissible in evidence, although the person who made the statement is dead at the time of the trial. (*Ram Lall, J.*) SUNDAR LAL *v.* EMPEROR. **40 P. L.R. 421.**

——**S. 162**—*Statement by accused to police—True test of admissibility.*

The better and truer test of the admissibility of statements made by accused to police is whether the statement is incriminating in itself or exculpatory. If the statement is incriminating in itself, an accused will not desire to put it in evidence; if it is exculpatory in itself, but may, by relation to the other evidence, be made an incriminating statement, then it is admissible in evidence, because the accused's use of that statement as an exculpatory statement may well be permitted to prevail to his advantage over the use by the prosecution of that statement as an incriminating statement. (*Davis, J.C.*) PRITAM HARIOMAL *v.* EMPEROR **I.L.R (1939) Kar. 449=184 I.C. 145=12 R.S. 90=40 Cr.L J. 882=A.I.R. 1939 Sind 185.**

——**S. 162**—*Statement of witnesses during investigation who were made to sign them*

Where during the investigation, certain witnesses were made to sign the statements which they made before the officer, their evidence is inadmissible. (*Zia-ul-Hasan, J.*) EMPEROR *v.* SAMIULLAH. **14 Luck. 302=1938 O W.N. 1048=1938 O.A. 797=1938 A.W R. (C C.) 83=1938 A.Cr. C. 123=1938 O L R. 473=178 I.C. 254=11 R.O. 102=40 Cr.L J. 19.**

——**S. 162**—*Statement made to police officer during investigation not reduced to writing—Admissibility at trial for offence not under investigation.*

CR. P. CODE (1898), S. 162.

Statements not reduced to writing made to a police officer during investigation, if relevant, and not privileged under S. 123 or 124, Evidence Act, can be used at a trial for an offence not under investigation when they were made. (*Coldstream, J.*) BAIJ NATH BHATNAGAR *v* MUHAMMAD DIN. **17 Lah. 472=166 I.C 501=9 R.L. 389=38 Cr.L.J. 246=38 P.L R. 1040=1936 Cr. C. 300=A.I.R. 1936 Lah. 359.**

——**S. 162**—*Statement of witness in Court that he identified accused before Police Officer.*

A statement made by a witness in Court that he identified the accused before the Sub-Inspector of Police, is not inadmissible under S. 162, Cr. P. Code. According to that section, a statement made by a witness to a Police Officer is not evidence at a trial. Here it is not a statement of the witness which is admitted but the fact that he identified the accused before the Police Officer. (*M. C. Ghose and Bartley, JJ.*) LELA LALUNG *v.* EMPEROR. **179 I C. 642=11 R.C. 577=40 Cr.L. J. 240=42 C.W.N. 620=68 C L.J. 103=A.I.R. 1939 Cal. 176.**

Contradiction.

——**S. 162**—*Conditions necessary.*

Under S. 162, Cr. P. Code, the statement of a witness in evidence can only be contradicted by his alleged statement to the police on two conditions, one is that the application for contradiction is made by the accused and the other is that the statement of the police should be proved by a certified copy of the diary. (*Bennet, J.*) W. K. WESLEY *v.* EMPEROR. **1938 A.W R. (H C.) 505=1938 A.Cr.C. 90=1938 A.L.R. 827=178 I.C. 183=11 R.A. 276=40 Cr.L.J. 4=A.I.R. 1938 All. 571.**

Construction and scope.

——**S. 162**—*"Any person"—Previous statement by accused—Admissibility and use of—Rule as to—Admissions and previous statements of witness—Distinction—Previous statement of accused amounting to confession—Admissibility.*

S. 162, Cr. P. Code, has no reference whatever to accused persons or to their statements, but merely codifies with certain modifications the law as to the use which may be made of previous statements which may have been made by witnesses. Admissions by a party to a litigation, whether civil or criminal, differ fundamentally from previous statements made by a witness. An admission is direct evidence of the relevent fact admitted. A previous statement by a witness is not direct evidence of the fact stated by the witness, but is material which may be used either to corroborate the oral testimony of the witness or it may be put to him in cross-examination for the purpose of destroying his credit. It cannot be used to supplement that oral testimony, that is to say, a previous statement of fact by a witness cannot be tendered as evidence in direct proof of the fact stated. The evidence upon which the Court is to consider the material allegation of fact must be the evidence of the witness as given in Court. This fundamental distinction cannot be ignored or lost sight of. It must however be observed that an admission by a party (or an accused), although in itself evidence of the fact admitted, may be attacked on the ground that the party or accused has not in fact made the admission. He may also reduce or destroy its weight as evidence by producing evidence to show that the true facts are contrary to

the admission. It will then be for the Court to weigh the evidence afforded by the admission against the evidence produced at the trial by the defence. An accused against whom a previous statement by him is tendered in evidence is entitled to have the whole statement placed before the Court. If that statement, taken as a whole amounts to a confession the whole statement must be excluded. It is not permissible to place a part of a single statement as a mere admission or series of admissions and to omit merely the confessional part of it. If the statement tendered in evidence does not contain any admission of the offence charged nor indeed an offence of any kind, and there is no indication whatever that it is part of a larger statement making any admission of guilt, it is admissible in evidence against the accused of the truth of the facts stated therein.

Manohar Lal, J.—S. 162, Cr. P. Code, is necessary corollary to Ss. 160 and 161, and must be read along with those two sections. It was never the intention of the Legislature that these three sections should apply to the case of an accused; and these sections do not contemplate the case of an accused person whose attendance is to be secured as provided for in other sections of the Code dealing with the arrest of the accused or issuing summons or warrant to the accused. The question of admissibility of the statement of the accused is governed by the general provisions of the Evidence Act. (*Courtney-Terrell, C.J. and Manohar Lal, J.*) NARAYANASWAMY *v.* EMPEROR. **17 Pat. 15=1938 P.W.N. 338=19 Pat.L.T. 432.**

——**S. 162 (1)**—*Construction — Meaning of words 'in the course of.'*

The words 'in the course of', in the context in which it occurs in S. 162 (1), Cr. P. Code, import that the statements must be made as a step in a pending investigation to be used in that investigation. To confine the words merely to the span of time which elapses between the beginning and the end of the investigation, is to put too narrow a construction on them. The exact shade of the meaning of those words may well vary according to the context. Where they qualify a period of time, they are used to denote a span of time and where on the other hand they qualify a continuing process, they denote something more than a mere period of time (*Collister and Braund, JJ.*) EMPEROR *v.* AFTAB MAHOMED KHAN. **188 I.C. 649=13 R.A. 55=1940 A.Cr.C. 24=1940 A.L.J. 206=41 Cr.L.J. 647=1940 A.W.R. (H.C.) 85=A.I.R. 1940 All. 291.**

——**S. 162 (1) Proviso**—*Proof of statements formally—If condition precedent to use of statements.*

An admission made by a witness that he made a statement is sufficient proof of the statement to enable it to be brought on the record. Formal proof of the statement prior to the cross-examination of the witness is not necessary. Cross-examination may be allowed subject to subsequent proof of the statement by calling the police officer who recorded the statement. (*Grille, J.*) SHIVLAL *v.* EMPEROR. **20 N.L.J. 280=172 I.C. 156=39 Cr.L.J. 68=10 R.N. 169=A.I.R. 1938 Nag. 110.**

——**S. 162**—*Statement under—Admissibility.*

The words of S. 162, C. P. Code, as amended in 1923, lead to the conclusion that a statement under S. 162 is not admissible even when made by the person ultimately accused. The words of the section are wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not. (*Lord Atkin.*) NARAYANASWAMI *v.* EMPEROR. **I.L.R. (1939) Kar. 123 (P.C.)=1939 All. E.R. 396=66 I.A. 66=18 Pat. 234=1939 O.L.R. 134=1939 P.W.N. 205=20 Pat. L.T. 265=1939 A.L.J. 298=69 C.L.J. 273=41 P.L.R. 272=5 B.R. 449=41 Bom L.R. 428=11 R.P.C. 166=40 Cr.L.J. 364=1939 A.W.R. (P.C.) 35=49 L.W. 349=1939 M.W.N. 185=180 I.C. 1=1939 O.W.N. 282=43 C.W.N. 473=1939 A.Cr.C. 49=6 Cut. L.T. 25 (P.C.)=1939 M.Cr.C. 114=A.I.R. 1939 P.C. 47=(1939) 1 M.L.J. 756 (P.C.).**

Copies.

——**S. 162**—*Statements under—Accused's right to copies of—Duty of Court.*

The right of an accused person to copies of the statements under S. 162, Cr. P. Code, is not dependant on his previously establishing an actual instance of a contradiction or laying a foundation for the belief that such a contradiction will be found if the police report is referred to. The section does not require the Magistrate to satisfy himself that a contradiction exists before granting a copy. The Court must, subject to the provisions of the second proviso to the section, grant a copy to the accused; and it is for the accused's counsel to examine it after it is granted and to discover whatever contradiction may exist. (*King, J.*) DASTAGIR, *In re.* **I.L.R. (1938) Mad. 180=10 R.M. 418=39 Cr.L.J. 54=1937 M. Cr.C. 267=1937 M.W.N. 730=46 L.W. 323=171 I.C. 962=A.I.R. 1937 Mad. 822=(1937) 2 M.L.J. 402.**

——**S. 162**—*Statements made by witnesses to police—Copies of—Whether can be granted* suo motu *by Court.*

S. 162, Cr. P. Code, entitles an accused person to request a trial Court to refer to a statement previously made by a prosecution witness to a police officer during investigation. The Court when so requested is bound to refer to such statement and is bound to provide a copy of it unless it is of opinion that it is irrelevant. The onus of moving the Court rests upon the accused, but as the accused may not know what a witness has stated to the police and therefore may not use his privilege when it might assist him, a Judge is at liberty to adopt a course at his own instance which he is bound to do if requested by the accused, and further if such reference reveals any point materially in favour of the accused, it should not be disregarded but the Court should give a copy to the accused of its own motion in order to prevent a failure of justice. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SULTAN MIR *v.* EMPEROR. **166 I.C. 876=9 R. Pesh. 75=38 Cr.L.J. 347=A.I.R. 1937 Pesh. 10.**

——**S. 162**—*Copy of statements—Accused's right to—Stage of trial.*

An accused person is entitled to be furnished with a copy of the statement of a prosecution witness recorded by the police under S. 162, Cr. P. Code, only when the witness is in the witness-box to give his evidence against the accused and is sought to be cross-examined under S. 145 of the Evidence Act, and not before. (*Bartley and Khundkar, JJ.*) AHMADAD RAHAMAN *v.* EMPEROR. **44 C.W.N. 340.**

——S. 162—*Statements made to Police—Right of accused to copies of—Refusal to furnish copies—Effect—Illegality—If curable—S. 537.*

Under S. 162, the accused have a legal right to the statements made by prosecution witnesses to the police whenever they are reduced to writing, and the duty of the prosecution to produce them cannot be evaded by pleading that the statements were only reduced to writing in the shape of rough memoranda and notes. The directions in the Police Manual are that the statements recorded under S. 161 should not form part of the case diary under S. 172, but should be recorded on separate pieces of paper and attached to the diary. The rules also emphasise that the statements should be made at the time the witnesses are examined, which of course is exactly what the law intends. The prevalent practice of writing up these statements at the end of the day from memory or with the aid of rough notes is objectionable, although, of course there is no harm in that being done as well, provided the original statements are preserved and produced at the time of the trial. Whatever the method of recording may be, the right of the accused to be furnished with a copy is unquestionable, unless the Court acts under the proviso to S. 162. A denial of the accused's rights for the copies ordinarily constitutes an illegality which cannot be cured, because the extent of the prejudice caused cannot be gauged. (*Vivian Bose, J.*) VISHVANATH PANDURANG *v.* EMPEROR. **1936 Cr. C. 1040=A.I.R. 1936 Nag. 249.**

——S. 162—*If specifically affects S. 27, Evidence Act.*

Per *Collister, J.*—S. 162, Cr. P. Code, contains provisions plainly and directly, and therefore specifically, affecting S. 27 of the Evidence Act *quod* statements made under that section by an accused person to a police officer in the course of an investigation. In other words, there is a 'specific provision to the contrary' within the meaning of S. 1 (2) of the Cr. P. Code. (*Collister, Allsop and Braund, JJ.*) BALDEO *v.* EMPEROR. **I.L.R. (1940) All. 396=188 I.C. 562=13 R.A. 48=41 Cr L.J. 627=1940 A.Cr.C. 57=1940 A.L.J. 241=1940 A.W.R. (H.C.) 229=A.I.R. 1940 All. 263 (F.B.).**

——S. 162—Effect on Evidence Act, S. 27. *See* EVIDENCE ACT, S. 27 AND CR. P. CODE, S. 162. **1939 N.L.J. 585.**

——S. 162—*Investigation, when starts—Case of murder arising as result of suspicion in mind of police officer.*

In a case of murder which arises from shadowy beginnings and as a result of mere suspicion in the mind of the police officer, the investigation must be held to have started from the moment when he forms an opinion that there are grounds for investigating the crime. (*Roberts, C.J. and Baguley, J.*) SIT RO SAW *v.* EMPEROR. **165 I.C. 319=9 R.R. 204=37 Cr.L.J. 1137=1936 Cr. C. 851=A.I.R. 1936 Rang. 455.**

Police diary.

——S. 162—*Correctness of entries in.*

It is a very widespread and general impression that the entries in the police diaries are not always made at the time they are supposed to have been made and that they do not always represent the true state of affairs. (*Allsop, J.*) ZAHID BEG *v.* EMPEROR. **173 I.C. 838=10 R.A. 508=1938 A.L R. 180=39 Cr.L.J. 364=1937 A. W.R. 1099=1937 A.L.J. 1253=A.I.R. 1938 All. 91.**

——S. 162—*Kept under S. 172—Right of defence to use.*

Police diaries which purport to be diaries kept under S. 172, Cr. P. Code, and which do not contain any statement by any witness, but are only brief records of what the investigating officer saw when he arrived at the spot, and of information which he ascertained as a result of questioning several people, cannot be used by the defence in the manner provided by S. 162, Cr. P. Code. (*Henderson and Khundkar, JJ.*) MOBARAK ALI SHAIK *v.* EMPEROR. **180 I.C. 516=11 R.C, 693=40 Cr.L J. 386=68 C.L.J. 397=A.I.R. 1939 Cal. 252.**

——S. 162—*Police diary containing statements made by witness to police officer during investigation—Use of—Propriety.*

A Magistrate is not entitled to use police notes of what the prosecution witness said to the police officer during investigation of an offence to corroborate the evidence of such witness during trial. But even improper admission of such evidence will not in all cases compel interference by a superior Court unless the error has led to substantial injustice or has prejudiced the accused. (*Rowland, J.*) SANMON TEWARI *v.* EMPEROR. **165 I.C. 761=9 R.P. 211=1936 Cr.C. 952=38 Cr. L.J. 102=3 B.R. 78=1936 P.W.N. 667=A.I R. 1936 Pat. 581.**

——S. 162—*Use of—Duty of Court.*

Where a Magistrate is satisfied on police information that a cognizable offence is committed by a certain person and decides to start prosecution against the accused, the Magistrate should not look to the police diary in considering whether the accused is guilty of the offence but should only look to the evidence recorded by him in the trial. (*Grille, J.*) RAGHUNATHMALL *v.* PATIRAM. **I.L.R. (1938) Nag. 157=172 I.C. 177=10 R.N. 172=39 Cr.L.J. 75=A.I.R. 1937 Nag. 394.**

——S. 162—*Use of—Cross-examination of investigating officer as to previous statement of witness—Desirability of having police diary before Court to explain evidence of investigating officer—Duty of Public Prosecutor.*

When an investigating officer is being cross-examined as to previous statements made to him by the witnesses for the prosecution, it is desirable that the Court should have the police diary before it and see whether a statement by him, in answer to questions put to him, that a certain witness did not state such and such a fact to him during investigation, really gives a picture of what the witness in fact had stated. If not, the fact should be borne in mind and the Court should watch whether the matter is cleared up in re-examination. It is the duty of the Public Prosecutor to see that the negative answer of the investigating officer in respect of the statement of a witness does not create a wrong impression of what the witness stated before the police. He must in these cases bring about other statements to explain the matter referred to in cross-examination. If the Public Prosecutor fails to do so, it is the duty of the Court in fairness to the case and to the witness to bring about facts which will clear up the negative answer. That with the legitimate use of the police diary and one of the modes of

taking aid from it in the trial. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR. **178 I.C. 934=11 R.P. 312=20 Pat.L.T. 51=5 B.R. 185=40 Cr.L.J. 147=1938 P.W.N. 727=A I.R. 1938 Pat. 579.**

Scope and object.

——**S. 162**—*Hostile witness—Questions as to whether he made statements to police—If renders trial illegal.*

S. 162, Cr. P. Code, is designed to keep out evidence which is not of a free and of a fair nature, but may have been induced by some form of police duress. But merely because certain prosecution witnesses who have been declared hostile and cross-examined and questioned as to whether they had not made certain statements to the police, and they deny the same, it cannot be said that the rule embodied in S. 162 is infringed and such a procedure does not vitiate the trial or render it illegal. (*Cunliffe and Henderson, JJ.*) DELBAR MONDAL *v.* EMPEROR. **165 I.C. 31=9 R.C. 362=37 Cr.L.J. 1117=40 C.W.N. 733.**

——**S. 162**—*Scope—Evidence of conduct—If excluded.*

Generally, S 162 shuts out statements written or oral, express or implied, made by witnesses to the police during the course of the investigation; but care must be taken not to shut out evidence of what a witness saw or did. Conduct must be distinguished from speech. (*Davis, J.C. and Weston, J.*) MOR MAHOMED *v.* EMPEROR. **I L.R. (1940) Kar. 487=A.I.R. 1940 Sind 168.**

——**S. 162**—Scope—If controls S. 94. *See* CR. P. CODE, S. 94. **42 Bom.L.R. 787.**

——**S. 162**—If controls S. 27, Evidence Act—Statement falling under latter—If excluded by former. *See* EVIDENCE ACT, S. 27. **1939 M.W.N. 877.**

——**S. 162**—If shuts out statements admissible under S. 27 of the Evidence Act. *See* EVIDENCE ACT, S. 27. **50 L.W. 318=(1939) 2 M.L.J. 455.**

——**S. 162**—*If restricted to cases sent up by police.*

Where the police after investigation into a complaint did not take any action and thereafter the complainant preferred a complaint to a Magistrate which was almost identical with the one made to the police and the Magistrate framed charges on lesser offences which were however included in the more serious offences investigated by the police, and where the defence applied under S. 162, Cr. P. Code, for copies of statements made by the witnesses in the investigation held by the police which was refused by the Magistrate on the ground that defence was entitled to copies only if the case came to the Court as a result of the police investigation, it was held that there was nothing in S. 162 restricting it to cases sent up by the police and the defence was entitled to such copies and that there was no reason to deprive the defence of the privilege, because it had happened that charges of non-cognizable offences had been framed. (*Weston.*) MANGLA *v.* JASSI. **1938 A.M.L.J. 108.**

——**S. 162**—Statement by accused falling under S. 27, Evidence Act—If inadmissible. *See* EVIDENCE ACT, S. 27. **1939 P.W.N. 300.**

——**S. 162**—*Scope—Tracker—Statement as to what he saw or did at identification of footprints during police investigation—Admissibility.*

In spite of S. 162 a tracker can say in Court that during police investigation he recognized on a certain day at a certain place certain tracks, and that the tracks were of a particular person if he knew him already or of a person at the scene of the crime if he did not know him already. (*Davis, J.C. and Weston, J.*) MOR MAHOMED *v.* EMPEROR. I.L.R. (1940) Kar. 487=A.I.R. 1940 Sind 168.

"Statement"—Meaning.

——**S. 162**—*Identification by police—Question by police and gesture by witness in answer—If "statement"—Identification proceedings—Statements during—Admissibility.*

S. 162 of the Cr. P. Code excludes evidence by the police or any other persons that a particular witness identified a particular accused. A gesture by a witness in answer to a question by a police-officer is a statement within the meaning of S. 162, when the identification is done by the question and gesture. "Statement" is the expression of what is in one's mind, however, conveyed. It is not also permissible to ask an identifying witness whether he pointed out some person as the man who committed the offence, because that amounts to questioning him on what he said to the police. The section does not, however, debar the witness from stating that he was shown several men, that the accused were among them, and that he did then recognise them as the offenders. (*Norman, I C.S.*) TOSHIA *v.* EMPEROR. **1936 A.M.L.J. 50.**

——**S. 162 (1).**

S. 162, Cr. P. Code, does not apply to statements made in an investigation other than that which results in a trial in which those statements are sought to be used. (*Grille, J.*) SHIVLAL *v.* EMPEROR. **20 N.L.J. 280=172 I.C. 156=39 Cr.L.J. 68=10 R.N. 169=A.I.R. 1938 Nag. 110.**

——**S. 162**—*"Statement made in course of investigation"—Meaning of.*

The question whether a statement was recorded during investigation or not is a question of fact. Where a Sub Inspector of Police, on hearing of a shooting incident, goes to the house where the shooting has taken place, without knowing whether it was due to accident or design, and on finding a corpse at the house takes down a statement from a person present there, it cannot be said that the statement has recorded by him in the course of the investigation, so as to make it inadmissible in evidence. It is only after recording that statement that the Sub-Inspector can have any real information about the commission of a cognizable offence. (*Burn and King, JJ.*) MYLASWAMI CHETTY *v.* EMPEROR. **180 I.C. 78=11 R.M. 653=40 Cr.L.J. 308 (2)=1938 M.Cr.C. 110=1938 M.W.N. 905=A.I.R. 1939 Mad. 66=(1938) 2 M.L.J. 750.**

Statement to police.

——**S. 162**—*Defence obtaining copy of—Statement favourable to accused—Witness not questioned on point during trial—Statement, if can be used in revision.*

Where the defence had obtained a copy of a statement of a prosecution witness which statement was in their support, but they did not question that witness or any other on the point during the trial, and the accused was declared guilty by the jury.

CR. P. CODE (1898), S. 162.

Held, that the defence could not make use of that statement in revision for invoking High Court's powers of revision to interfere with verdict of the jury. (*James and Saunders, JJ.*) HARI MAHTO *v* EMPEROR. **160 I.C. 675=37 Cr. L.J 320=8 R.P. 375=1936 P.W.N. 286=1936 Cr.C. 70=A.I.R. 1936 Pat. 46.**

——**S. 162**—*Joint statements of witnesses—Use of.*

If an investigating police-officer records in his diary the statements of 2 or 3 persons jointly at one place, these joint statements cannot be legally used as statements of any particular prosecution witness for the purpose of contradicting that witness, for the simple reason that it is not known how much of any particular joint statement was the individual statement of any particular prosecution witness and how much was not his individual statement. (*Nanavutty and Zia-ul-Hasan, JJ.*) EMPEROR *v.* SALIK. **166 I.C. 259=9 R.O. 295=1937 O W.N. 63=38 Cr. L.J. 165=1937 A.Cr.C. 14=1936 O.L.R. 734=A.I.R. 1937 Oudh 201.**

——**S. 162**—*Mode of proof—Portion of statement denied by witness.*

In every case when a witness is confronted with a portion of his police statement which he repudiates, the police-officer recording his statement should be questioned specifically with regard to that portion of the statement. The practice of merely asking the police officer perfunctorily whether a particular document represents the witness's statement as a whole cannot but be condemned. (*Young, C.J. and Blacker, J.*) EMPEROR *v.* JIWAN DAS. **I.L.R. (1939) Lah. 305=185 I.C. 380=12 R.L. 293=41 Cr.L.J. 174=A.I.R. 1939 Lah. 521.**

——**S 162**—*Non-production — Police witness deposing that statements not traceable—If justifies non-production.*

The prosecution cannot evade their duty to produce statements recorded under S. 152, Cr. P. Code, by merely pleading that they were in the form of mere notes or memoranda and cannot be traced. If the notes taken by the police are in existence, they must be traceable, or at any rate some serious effort must be made to find them, and satisfactory reasons given for their non-discovery. A mere statement by a witness that it will not be possible to trace them is not enough in the absence of evidence to show what efforts were made to do so. It is for the Court to decide whether they are really traceable or not, and not for a witness. His opinion about the matter is irrelevant. (*Vivian Bose, J.*) VISHWANATH PANDURANG *v.* EMPEROR. **1936 Cr.C. 1040=A.I.R. 1936 Nag. 249.**

——**S. 162**—*Presumption as to—Omission to put in statements—Inference.*

When it is proved that a witness has made a statement to the Police, and the statement is not put in under S. 162, Cr. P. Code, a presumption arises that such a statement does not contradict his evidence. Similarly, if a witness making an identification in Court has been given a previous opportunity of identification before the police, a presumption arises that he is pointing out in Court the same person as he pointed out in the presence of the Police, because, if were otherwise, the defence could, under S. 162, contradict him by putting in evidence what he said to the police. (*Norman*) TOSHIA *v.* EMPEROR. **1936 A.M.L.J. 50.**

CR. P. CODE (1898), S. 162.

——**S. 162**—*Statement of accused to police—If can be used against him.*

A statement said to have been made by an accused person to a police-officer in the course of a police investigation cannot be utilised by the prosecution or by the Court against the accused nor can any inference adverse to the accused be drawn from such statement. (*Nanavutty, J.*) KANHAIYA LAL *v.* EMPEROR. **168 I.C. 58=9 R.O. 432=38 Cr L.J. 491=1937 O.L.R. 202=1937 A.Cr.C. 80=1937 O.W.N. 505=A.I.R. 1937 Oudh 331.**

——**S. 162**—*Statement made to police—If can be used to contradict Court witness.*

A statement taken from a witness by the police during investigation cannot be used by the prosecution to contradict that witness, even though he is examined as a Court witness. Such a statement cannot be used by any party to contradict any one but a prosecution witness. (*Bartley and Lodge, JJ.*) BHUPAL CHANDRA NASKAR *v.* EMPEROR. **44 C.W.N. 451.**

——**S. 162**—*Statement under—If different from statement on oath.*

Quaere.—It is extremely doubtful if a statement recorded under S. 162, Cr. P. Code, stands on a different footing from a statement on oath recorded by the Court, in an action for damages for having made such statement. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) FAKIR MAHOMED *v.* FAKIR MAHOMED NANJI. **168 I C. 643=9 R.S. 236=30 S L.R. 43=A.I.R. 1937 Sind 44.**

——**S. 162**—*User of proving omissions from police diary—Permissibility.*

S. 162, Cr. P. Code, does not permit or warrant the use of the statements to the police recorded in the police diary for proving omissions. Such statements can, under S. 162, be used only for the purpose of contradiction. The section does not allow the proving of omissions from the police diary by the whole admission of the complete statements made to the police. That is clearly against the policy of the section. (*Grille and Gruer, JJ.*) SAKHAWAT *v.* EMPEROR. **I.L.R. (1937) Nag. 277=167 I.C. 61=9 R.N. 163=38 Cr.L.J. 330=19 N.L.J. 320=A.I.R. 1937 Nag. 50.**

——**S. 162**—*Statement made to police—What amounts to—Statement made to another person in presence of police.*

Per *Young, C.J. and Bhide, J.*—Where an accused person makes a statement to another person in presence of the police, whether that statement is made to the other person or to the police is a question of fact, and not of law. If it is found on the facts of any case that a statement made to a third person, was in reality intended to be made to the police and was represented as having been made to a third person, merely as a colourable pretence in order to evade the provisions of S. 162, the Court will hold it to be excluded by the section. But it cannot be laid down that every statement made to a person assisting the police during an investigation should be treated as a statement made to the police and as such excluded by S. 162. The question is thus one of fact. (*Young, C.J., Tek Chand, Dalip Singh, Monroe, Bhide, Din Mohammad and Ram Lall, JJ.*) HAKAM KHUDA YAR *v.* EMPEROR. I.

CR. P. CODE (1898), S. 162.

L R. (1940) Lah. 242=41 Cr.L J. 591=13 R.L 1 =188 I.C. 498=A.I.R. 1940 Lah. 129 (F.B).

——S. 162—*Statements of witnesses to police—Use of.*

It is not permissible to use statements of witnesses made to the police during investigation in order to show that their evidence in Court did not introduce any new matter. Under S. 162, Cr. P. Code, such statements can only be used for the purpose of contradicting the prosecution witnesses and not for corroborating them. (*Harries, C.J. and Rowland, J.*) EMPEROR *v.* GIRDHARI TELI. 6 B R. 693=188 I C. 429=41 Cr.L J. 587=13 R.P. 9=1940 P.W.N. 625=A.I. R. 1940 Pat. 605.

——S. 162—*Statement of witnesses recorded in police diary—Burden of rebuttal.*

There is an initial presumption of accuracy in the case of official records but in the case of statements of witnesses recorded in the police diaries, the burden of rebutting them is not very heavy. Where the witness is a respectable educated man and quite disinterested and the difference between what he did say and what he is recorded as saying, is very slight and could easily have been due to a misunderstanding by the police officer recording the statement, his denial of the accuracy of the statement attributed to him by the police officer may be accepted as correct. (*Blacker, J.*) RADHA KISHEN *v.* EMPEROR. 179 I C 880=11 R L. 642=40 Cr.L.J. 261=A.I.R. 1938 Lah. 714.

——S. 162—*Statement made to police used in trial to demolish defence case—Verdict of jury—Legality.*

Statement made to a police officer during investigation cannot be used in respect of any trial of any offence under investigation at the time when such statement was made. If such statement is used to demolish the most important portion of the defence case, its admission would prejudice accused to a great extent and the verdict of jury which has been allowed to consider such evidence cannot be upheld. (*Bartley and Henderson, JJ.*) EBRAHIM MONDAL *v.* EMPEROR. 182 I.C. 405=12 R.C. 61=40 Cr.L.J. 665=43 C.W.N. 784=A.I.R. 1939 Cal. 330.

Miscellaneous.

——S. 162—*Admission of evidence in contravention of—Effect on jury trial.*

The admission of evidence in a jury trial in contravention of S. 162, Cr. P. Code, is not a ground for a re-trial when it has not occasioned a failure of justice. The Court of appeal has to see whether such admission has in fact influenced the mind of the jury so seriously as to lead them to a conclusion which might have been different but for such an admission. (*Henderson and Khundkar, JJ.*) NITAI KOLEY *v.* EMPEROR. I.L.R. (1939) 1 Cal. 337.

——Ss. 162 and 164—*Statement by accused to Magistrate — Admissibility — Self-exculpatory statement—If to be treated as confession statement.*

In view of the provisions of S. 162, Cr. P. Code, it is not possible for an arrested person to make a statement to the Police which can be used in evidence. Evidence of what an accused person said when arrested—often so valuable to an accused person according to English experience—is denied to the defence under the Indian Law. But an accused person can—if he knows it—make a statement of his version of the case before a Magistrate under S. 164. Such a statement is admissible, though it should not be treated as a confession statement when it is self-exculpatory. (*Burn and Mockett, JJ.*) APPALANARASAYYA *v.* EMPEROR. 1940 M.W.N. 937=52 L.W. 495= (1940) 2 M L J. 715.

CR. P. CODE (1898), S. 164.

——Ss. 162 and 172—*Mode of use—Statements to police—Mode of use—Statements exhibited entirely without getting witness to admit or deny them—Admissibility.*

The proper procedure in a case when a witness for the prosecution is sought to be discredited by the defence by having him contradicted by his previous statement made before the police is to read out that particular portion of the witness's previous statement made to the police which is in direct contravention of what he has deposed in Court and then to ask him whether he sticks to his former statement as recorded by the police or whether he sticks to his statement as made on oath in Court, and only that portion of his statement as recorded by the police which has been read to the witness should be exhibited in the trial of the case. Where a Court asks the investigating police officer to verify as true the copies of the statements recorded by him in the special police diary and bodily uses these statements for the purpose of contradicting the statements made on oath by the prosecution witnesses without first giving each witness an opportunity of admitting or denying the correctness of the statements recorded by the investigating police officer, the procedure is entirely illegal and all the true copies of statements recorded by the police officer in his diary and exhibited in the case are entirely inadmissible in evidence. (*Nanavutty and Zia-ul-Hasan, JJ.*) EMPEROR *v.* SALIK. 166 I.C. 259=9 R O. 295=1937 O W N. 63=38 Cr. L.J. 165=1936 O L R. 734=1937 A.Cr.C. 14= A.I.R. 1937 Oud h201.

——S. 162 and Indian Penal Code, S. 211—*Investigation on report not resulting in trial—Complaint under S. 211, I. P. Code, against person who made the report—Statement of this complainant in the investigation—Use of—Cr. P. Code, S. 162, if applies.*

Where a person made a report to the police that another had robbed him of a currency note and the police investigated the matter but did not bring the case to the Court and thereupon the person accused of robbery filed a complaint against his complainant under S. 211, I P. Code, on a question whether the statement made by him (*i.e.*, the complainant in the case under S. 211, I. P. Code) during investigation when he was an accused person could be put to him, it was held that S. 162, Cr. P. Code, had no application to the case at all and that the use of the statement in question was governed by the provisions of the Evidence Act and that in assessing the value of the testimony as elicited by the cross-examination, the Magistrate must take into consideration the fact that, when he made the statements which were sought to be put to him were made, he was in the position of being suspected of a criminal offence. (*Grille, J.*) EMPEROR *v.* PARMU. I.L.R. (1940) Nag. 320.

——S. 164

Applicability.

Approver.

CR. P. CODE (1898), S. 164.

Confessions.
Copy of statement.
Duty of Magistrate.
Proof of confession.
Recording of confession.
Recording of statement.
Retracted confession.
Scope.
Statement under.
Voluntary statement.
Miscellaneous.

Applicability.

——S. 164—*Accused killing concubine at her request and with her consent and giving information of same to Magistrate—Statement—Admissibility of—Offence—Murder or culpable homicide.*

The accused who had killed his concubine at her own request and with her glad consent—it being in evidence that they were on affectionate terms—appeared before a Magistrate and made a statement to him that he had killed the deceased and describing the circumstances of the crime. The Magistrate took down the statement in writing and that was admitted against the accused at his trial for murder and he was convicted.

Held, (1) that the statement was not a statement made under S. 164, Cr. P. Code, as the Magistrate was not investigating the case or any of the facts connected with the case, but was itself the first information of the crime and therefore properly admitted in evidence; (2) that the offence was not murder but only culpable homicide not amounting to murder. (*Burn and Stodart, JJ.*) NAINAMUTHU *v.* EMPEROR. **I.L.R. (1940) Mad. 428=186 I.C. 479=12 R.M. 661=41 Cr.L.J. 322=1939 M.W.N. 1132=50 L.W. 784=A.I.R. 1940 Mad. 138=(1940) 2 M.L.J. 89.**

Approver.

——S. 164—*Confession of—Value of.*

Per *Biswas, J.*—The confessions made by the approvers are not substantive evidence, but may be used only for the purpose of contradicting or corroborating their depositions in Court. (*Patterson, Nasim Ali and Biswas, JJ.*) NITAI CHANDRA JANA *v.* EMPEROR. **170 I.C. 201=38 Cr.L J. 852=10 R.C. 98=A.I.R. 1937 Cal. 433 (S.B.).**

Confessions.

——S. 164—*Admissibility — Conditions—Evidence Act, Ss. 24, 25, 26 and 29.*

S. 164, Cr. P. Code, should be read together with Ss. 24, 25, 26 and 29 of the Evidence Act. If so read, we get the following result: (1) that a confession shall not be made to a police officer; (2) that if a person in police custody desires to make a confession, he must do so in the presence of a Magistrate; (3) that the Magistrate shall not record it unless he is, upon enquiry from the person making it, satisfied that it is voluntary; (4) that when the Magistrate records it, he shall record it in the manner provided for in S. 164, Cr. P. Code; (5) that only when so recorded the confession will become relevant and admissible in evidence. (*Ba U, J.*) THE KING *v.* SAW MIN. **1939 Rang.L.R. 97=182 I.C. 705=40 Cr.L.J. 691=12 R.R. 25=A.I.R. 1939 Rang. 219.**

CR. P. CODE (1898), S. 164.

——S. 164—*Confession after warning by Magistrate—Hopes held out to accused previously—Admissibility of confession.*

Where it is clear from the warning given by the Magistrate to the accused before recording his confession, that the accused knew, that when he was making his confession, it would be used against him and that he could not expect any leniency as the result of it and the warning given by the Magistrate was sufficient to put an end to all hopes that might previously have been held out, the confession cannot be said to have been made as a result of inducement and is admissible in evidence. (*Leach and Spargo, JJ.*) HAMID *v.* EMPEROR **164 I.C. 1118=37 Cr.L.J 1112=9 R. R. 185=1936 Cr C. 849=A.I.R. 1936 Rang. 453.**

——S, 164—*Confession made under inducement—Repetition of, before Magistrate after mere warning—Admissibility.*

Where an accused, a Punjabi village boy of 16, made the confession to zaildar while he was taken by him to the police, and he was told by him: "You are a minor, You will be let off if you tell the truth before the police just as you have done in our presence," and before the Magistrate he made the same confession on the Magistrate telling him that he was not to allow any inducement to operate upon his mind in making the confession.

Held, that merely going through the form was not sufficient to remove the effect of inducement and that the inducement operated to defeat the confession under S. 164. (*Young, C. J. and Monroe, J.*) FAIZ AHMAD *v.* EMPEROR. **165 I C. 880=9 R.L 313=38 Cr.L.J. 27=1936 Cr.C. 879 =A.I.R. 1936 Lah. 855.**

——S. 164—*Oral proof by Magistrate—Admissibility.*

Oral proof by a Magistrate of a confession which he could have recorded is inadmissible, for when the Legislature has prescribed a particular mode of proof no other method will suffice. A.I. R. 1936 P.C. 253, Foll. (*Young, C. J. and Ram Lall, J.*) AKBAR BADR DIN *v.* EMPEROR. **40 P. L.R. 890=177 I.C. 617=11 R.L. 339=39 Cr.L.J. 907 (2)=A.I.R. 1938 Lah. 594.**

——S. 164—*Extra-judicial confession — Admissibility.*

In a criminal trial, accused's extra-judicial confession to a Magistrate is not admissible in evidence and must therefore be wholly excluded. (*Coldstream and Bhide, JJ.*) IBRAHIM *v.* EMPEROR. **39 P.L.R. 419=168 I.C. 745=9 R.L. 669=38 Cr.L.J. 583=A.I.R. 1937 Lah. 208.**

——S. 164—*Recorded and unrecorded confession—Admissibility.*

S. 164 does not in terms require a Magistrate, to whom a confession is made, to record it at all. S. 164 clearly leaves it optional to the Magistrate whether he records the confession or not. If he does record it, then the section makes it compulsory, that he shall record it in a certain way. Even in cases where S. 164 applies, *i.e.*, when the confession has been rednced to writing, but S. 164 has not been fully complied with, then S. 533 becomes in terms a special provision referred to in S. 1 (2) and prevents the confession being ruled out entirely as incapable of proof. Where therefore an accused charged with dacoity points out to a Magistrate at an identification parade, another person as being one of the

dacoits, who took part in the dacoity with him, it amounts to confessional action as much as confessional statement and is admissible in evidence as against the other accused although not recorded in writing, if the Magistrate himself is called upon to prove the statements and the actions, which form part of the confession (*Baguley, J.*) NGA THEIN MAUNG *v.* EMPEROR. **164 I.C. 162=9 R.R. 64=37 Cr.L.J. 920=1936 Cr. C. 703=A.I. R. 1936 Rang. 350.**

——**S. 164**—*Where and when to be recorded—Return of accused to police custody—Propriety.*

A confession should be recorded in open Court and during Court hours, unless there are exceptional reasons to the contrary. Further, it is necessary that a confessing accused should not be returned to the custody of the police. (*Young, C. J. and Abdul Rashid, J.*) JAHANA *v.* EMPEROR. **166 I.C. 1003=9 R.L. 458=38 Cr.L.J. 338=38 P.L.R. 791=A.I.R. 1937 Lah. 98.**

——**S. 164**—*Value of—Part of it incorrect.*

If there is any portion of a confession which is not found to be quite correct, it is not necessary that the whole confession should be rejected. (*Abdul Qayoom, C. J. and Wazir, J.*) SANTOKH SINGH *v.* STATE. **39 P.L.R J. & K. 157.**

——**S. 164**—*Confession recorded in presence of police—Value of.*

Where at the time when the confession was made the accused was not only in the custody of the police present in the Magistrate's room but he was actually fettered and had a policeman on either side of him, it is impossible to be sure that the confession was not made under the influence of the police. Such a confession must, therefore, be discarded. (*Young, C. J. and Monroe, J.*) HAIDAR *v.* EMPEROR. **39 P.L.R. 663 (2).**

Copy of statement.

——**S. 164**—*Accused's right to copy of recorded statement.*

The statements recorded under S. 164, Cr. P. Code, are public documents within the meaning of S 74, Evidence Act. That being so, accused is entitled to copies of these documents. Hence a Magistrate is in error in refusing to grant copy to the accused of such statement. (*Rupchand Bilaram, J.C. and Lobo, A.J.C.*) BHERUMAL KHANCHAND *v.* EMPEROR. **171 I.C. 993=10 R.S. 134=39 Cr.L.J. 57=A I.R. 1937 Sind 303.**

Duty of Magistrate.

——**S. 164**—*Reasons for believing confession voluntary—If to be stated.*

It is not enough for a Magistrate recording the confession of an accused to give him a warning, but it is essential that he should put questions to satisfy himself that the confession was in fact voluntary, and the question with its answer must be recorded. It is not enough that the Magistrate was satisfied as to the confession being voluntary, but the Courts before whom the confession is used must have materials on which they can be satisfied that the confession was in fact voluntary. Hence the Magistrate who records the confession must record a brief statement of the reasons for his believing that the statement was voluntarily made. (*Mohammad Noor and Varma, JJ.*) EMPEROR *v.* RAMSIDH RAI. **1938 P.W.N. 559=176 I.C. 530=39 Cr.L J. 725=11 R.P. 79=4 B.R. 724=A.I.R. 1938 Pat. 352.**

Proof of confession.

——**S. 164**—*Proof that maker of statement is person in Court—Need for examination of Magistrate.*

The fact that the person who made the statement under S. 164 is the person in Court can be proved by the police officer who had the statement recorded and the trying Magistrate need not be examined. (*Coldstream, J.*) SADULLA *v.* EMPEROR. **40 P.L.R. 752=177 I.C. 32=11 R.L. 276=39 Cr.L.J. 864 (2)=A.I.R. 1938 Lah. 477.**

——**S. 164**—*Requirements—Compliance with—Sufficiency.*

The accused on being produced before a Magistrate for an order of remand stated that he wanted to make a confession and the Magistrate had his handcuffs removed and gave him ten minutes' time to reflect and then recorded the confession. The certificate required by S. 164 was not appended to the confession but the Magistrate was examined as a witness and had deposed that he had satisfied himself that the confession was being made voluntarily and that he had told the accused that he need not make any confession to him and that if he made one it would be used against him.

Held, that the confession was admissible in evidence. (*Young, C.J. and Tek Chand, J.*) KARTAR SINGH *v.* EMPEROR. **176 I.C. 666=40 P.L.R. 854=11 R.L. 224=39 Cr.L J. 769=A.I.R. 1938 Lah. 556.**

Recording of confession.

——**S. 164**—*Duty to record in Court-room and in Court hours.*

Confessional statements should be recorded in the Court-room, and if for some reason they are not so recorded during the ordinary Court hours, some explanation should be furnished by the prosecution. If the prosecution does not furnish any such explanation, they are liable to be disbelieved. (*Dalip Singh, J.*) AMAR SINGH *v.* EMPEROR. **173 I C. 105=10 R.L. 391=39 Cr.L. J. 262=39 P.L.R. 453=A.I.R. 1937 Lah 746.**

——**S. 164 (3)**—*Record of confession—Essentials to be observed—Duty of Magistrate to question accused to ascertain voluntary character—Omission to put such questions—Effect of admissibility in evidence.*

The provisions of S. 164 (3), Cr. P. Code, are mandatory and a Magistrate must act strictly in accordance with those provisions or not at all. The safeguards prescribed by the Legislature should not be whittled down in any way. A Magistrate before recording the confession of an accused person questioned him in a manner to warn him that he was not bound to make any confession and that if he did so it could be used as evidence against him. It did not appear from the record of the confession that the Magistrate questioned the accused to find out whether the statements were going to be made by the accused voluntarily as contemplated by S. 164, Cr. P. Code. Neither the record of the confession nor the statements of the Magistrate made in Court disclosed such a state of affairs, though there was a memorandum accompanying the record in which the Magistrate stated: "In spite of two warnings in the absence of the police he has made quite voluntarily the statement enclosed. I fully

CR. P. CODE (1898), S. 164.

believe that his confessional statement is quite voluntarily free from any influence."

Held, that though the facts disclosed in the memorandum amounted to a compliance with the provisions of S. 164, Cr. P. Code, the Magistrate was not entitled to take down the confessional statement before he had actually questioned the accused in the manner contemplated in the section, and on the explicit terms of S. 164, Cr. P. Code, the confession was inadmissible in evidence. Since the explanations in the memorandum are not complete the presumption under S. 80 of the Evidence Act that the confession was "duly taken" did not arise. (*Varma and Meredith, JJ.*) EMPEROR *v.* KOMMOJU BRAHMAN. **19 Pat. 301=188 I.C. 57=12 R.P. 674=6 B.R. 577=41 Cr.L.J. 533=1939 P.W.N. 915=A.I.R. 1940 Pat. 163.**

——**S. 164**—*Confession recorded at 9 p.m. and accused afterwards not remanded to judicial lock-up—Value of confession.*

Where the confession had been recorded by the Magistrate at 9 o'clock in the night and the accused was not remanded to the judicial lock-up after the confession had been recorded.

Held, that the confession was not of much value. (*Almond, J. C. and Mir Ahmad, A. J. C.*) KISHAN CHAND *v.* EMPEROR. **174 I C 449=10 R. Pesh. 64=39 Cr.L.J. 448=A.I.R. 1938 Pesh. 5.**

——**S. 164**—*Procedure—Failure to comply with the requisites of criminal rules of practice—Confession, if vitiated.*

Omission to comply with the requisites of the criminal rules of practice, would not vitiate a confession provided S. 164 of the Cr. P. Code is complied with. (*Burn and Mockett, JJ.*) DASI VIRAYA *v.* EMPEROR. **47 L.W. 161=1938 M.W.N. 90=175 I.C. 422=10 R.M. 775=39 Cr.L.J. 585=1938 M. Cr.C. 39=A.I.R. 1938 Mad. 490=(1938) 1 M.L.J. 289.**

——**S. 164**—*Statement of approver—Approver in police custody throughout—Value of statement.*

Where the approver was in police custody from the day of his arrest and where although his statement under S. 164, Cr. P. Code, took some six or seven days to complete he was returned to police custody after every instalment was made, and after the confession was complete he was returned to police custody where he stayed a considerable time.

Held, that the procedure was highly improper and the police control to which he had been subjected was sufficient to cast suspicion on his statement. (*Young, C. J. and Monroe, J.*) ABDUL SATTAR *v.* EMPEROR. **17 Lah. 460=161 I.C. 793=37 Cr.L.J. 493=8 R.L. 802=38 P.L.R. 1=1936 Cr. C. 248=A.I.R. 1936 Lah. 278.**

——**S. 164**—*Subsequent custody of accused.*

The confessing accused must invariably be sent to the judicial lock-up as soon as possible after confession and on no account be returned to Police custody. If the Police thereafter wish the accused for any particular purpose, they may be handed over to the Police for that purpose. There certainly ought to be an interval between the taking of the confession and the handing over of the accused to the Police for any subsequent purpose. (*Young, C.J. and Monroe, J.*) SURAT SINGH *v.* EMPEROR **18 Lah. 740=40 P.L.R. 214=174 I.C. 804=39 Cr.L.J. 475=10 R.L. 600=A.I.R. 1938 Lah. 292.**

CR. P. CODE (1898), S. 164.

——**S. 164**—*Scope—Confession—Recording of—Preliminaries to—Non-compliance—Effect on admissibility of confession—S. 533—Applicability of.*

S. 164 (3), Cr. P. Code, prescribes two imperative preliminaries to the recording of a confession; (1) that it must be explained to the person making it that he is not bound to do so, and that if he does it may be used as evidence against him; (2) the Magistrate must question the person making the confession in order to find out whether it was made voluntarily, and shall not record it until he is so satisfied. These conditions must be strictly fulfilled. Otherwise the confession cannot be admitted in evidence. The section does not prescribe the particular questions to be put, but the questions must be such as to show that the Magistrate made a real endeavour to find out whether the confession was really voluntary. Merely noting the demeanour of the confessor would not be enough. Where the confession is not recorded in the prescribed form and runs straightaway in the form of a narrative, with a memorandum at the end to the effect that the confessing person "was remanded to jail custody on 15-6-1936 and he had enough time to think over and make this confession to-day," but there is nothing on the record to show that the Magistrate questioned the accused so as to bring out whether the confession was voluntary or not, and there is nothing to satisfy the Court on that point, the confession cannot be regarded as having been duly made. S. 533 of the Code cannot apply to such a case; the section will cure the defect only if the questions had in fact been put, but there is a mere failure to record them, provided the error has not injured the accused as to his defence. Necessity for careful compliance on the part of Magistrates with the formalities prescribed by law in recording confessions stressed. (*Grille and Grüer, JJ.*) SARDAR MIYA *v.* EMPEROR. **I.L.R. (1937) Nag. 417=20 N.L.J. 128=170 I C. 868=38 Cr.L.J. 987=10 R.N. 83=A.I.R. 1937 Nag. 257.**

—— **S. 164**—*Warning that accused will not be taken as approver—Failure of Magistrate to record—Effect—Magistrate complying with all requirements and deposing that he did warn the accused—Sufficiency—Madras Criminal Rules of Practice, R. 85.*

Under R. 85 of the Madras Criminal Rules of Practice, a Magistrate who records the statement of an accused has to satisfy himself that the statement is a voluntary one, and as to warn him that he would not be taken as an approver. There is nothing in R. 85 or in S. 164, Cr. P. Code, which requires this warning to be on record, and the fact that he has not noted that he told the accused that he would not be taken as an approver does not detract from its voluntary character. When the Magistrate states in his evidence that he did warn the accused, and when he has complied with the other requirements of R. 85, there is no reason why he should be disbelieved. (*Mockett and Horwill, JJ.*) KARREVADU *v.* EMPEROR. **1937 M.W.N. 562.**

Recording of statement.

——**S. 164**—*Inference—Value to be attached to.*

If the statement of a witness is previously recorded under S. 164, Cr. P. Code, it leads to an inference that at one stage the police thought the

witness would change. But the mere fact that a person's statement was recorded under S. 164 will not be sufficient to discard it. The Court has however to receive it with caution and if it is supported by other evidence, can act upon it. (*Gruer and Puranik, JJ.*) PARAMANAND *v.* EMPEROR. **1940 N.L.J. 459=A.I.R. 1940 Nag. 340.**

Retracted confession.

——S. 164—*Retracted confession—Admissibility.*

A retracted confession is inadmissible in evidence where the Magistrate, in recording the confession, has violated the provisions of S. 164 (3), Cr. P. Code. (*Nanavutty, J.*) RAGHUNANDAN PRASAD *v.* EMPEROR. **1937 O.W.N. 296=1937 A.Cr.C. 59.**

——S. 164—*Conviction, if can be based on.*

The accused can be legally convicted on the basis of his own retracted confession provided it is found that that confession was made by him voluntarily of his own free will and accord. (*Abdul Qayoom, C.J. and Wazir, J.*) SANTOKH SINGH *v.* STATE. **39 P.L.R. J. & K. 157.**

——S. 164—*Conviction, if can be based on.*

An accused person can lawfully be convicted on his own confession even when it has later been retracted if the Court is satisfied of its truth. (*Roberts, C.J.*) NGA PO AUNG *v.* EMPEROR. **170 I.C. 645=38 Cr.L.J. 948=10 R.R. 101=A.I.R. 1937 Rang. 264.**

——S. 164—*Evidentiary value.*

A retracted confession of an accused has little evidentiary value, especially against the co-accused, where the questions put by the Magistrate to satisfy himself as to whether the confession was voluntarily made are all of a stereotyped character and there are internal indications in the confession which suggest that the confession was not the outcome of the accused's own desire to state what he knew. (*Niamatullah and Ganga Nath, JJ.*) MAUJI *v.* EMPEROR. **162 I.C. 914=1936 A.L.J 669=1936 A.W.R. 248=1936 Cr.C. 501=1936 A. Cr.C. 76=1936 All L.R. 516=A.I.R. 1936 All. 388.**

——S. 164—*Sufficiency for conviction.*

Although there is a motive for the accused persons to cause injury to the deceased, in the absence of any direct evidence it is not safe to rely upon their retracted confessions which are contradictory to each other in material details and which have been contradicted by the direct testimony of one of the witnesses, and a conviction for murder based on such confessions is not sustainable. (*Jai Lal and Bhide, JJ.*) RAMELU *v.* EMPEROR. **173 I.C. 315=10 R.L. 431=39 Cr. L.J. 290=39 P.L.R. 815=A.I.R. 1938 Lah. 101.**

——S. 164—*Value.*

In the absence of any direct evidence, it is not safe to rely upon the retracted confessions which are contradictory to each other in material details and which have been contradicted by the direct testimony. The fact that the confessions were retracted and that when they were made some policemen were interested in the investigation of the case, is a good ground for not relying upon the confessions. (*Jai Lal and Bhide, JJ.*) RAMEL SINGH *v.* EMPEROR. **173 I.C. 315=10 R.L 431=39 P.L.R. 815=39 Cr.L.J. 290=A.I.R. 1938 Lah. 101.**

——S. 164—*Value of.*

It will not be safe to convict an accused merely on the basis of his confession which was subsequently retracted. (*Abdul Qayoon, C.J. and Kichlu, J.*) RAZAK MIR *v.* STATE. **42 P.L.R. J. & K. 36.**

——S. 164—*When can be relied on.*

Where a retracted confession which establishes the identity of the corpse is not only voluntary but is sufficiently corroborated by circumstantial evidence, it is safe to rely upon it as a basis for conviction. (*Blacker, J.*) SHANGARA SINGH *v.* EMPEROR. **42 P.L.R. 88.**

Scope.

——S. 164 (4)—*Compliance with—Duty of Magistrate recording confession—Warning to confessor—Nature of.*

A Magistrate who records a confession under S. 26 of the Evidence Act which he knows relates to some definite crime which has been committed and which is being investigated at the time, acts under S. 164, Cr. P. Code, and has to observe the rule laid down in S. 164 (3), he must before recording the statement explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him. It is not enough for the Magistrate to merely tell the person making the statement that he should think over the matter and state what really happened as otherwise the statement would be used against him. This would not satisfy the requirements of S. 164 (3). (*Lakshmana Rao and Stodart, JJ.*) EMPEROR *v.* PERUMAL KUDUMBAN. **1940 M.W.N. 358=51 L.W. 535.**

——S. 164—*If controls S. 29. Evidence Act—Confession recorded as dying declaration—Warning not administered— Admissibility—Duty of Magistrate.*

Where a Magistrate proceeds to record a statement of an injured person under S. 164, Cr. P. Code, without knowing at the commencement whether that statement was going to be an accusation against a third person or a confession against himself, he must, when it becomes clear from the answer of the person making the statement to the Magistrate's questions to him, that he was incriminating himself, pause and inform the person that he was not bound to make a confession, and should further satisfy himself by further questions that the confession is being voluntarily made. If the Magistrate does not do this but records the statement to the end as if it were merely a dying declaration, there is a contravention of the provisions of S. 164, Cr. P. Code, because the Magistrate, knowing that a confession was about to be made, deliberately omits to give the requisite warning to the person making the confession; and oral evidence of the part of the Magistrate would be inadmissible to prove that the confession was a voluntary one. But such a confession would be admissible under S. 29 of the Evidence Act which is not controlled by S. 164, Cr. P. Code. (*King, J.*) RAMPURI *v.* EMPEROR. **1937 M.W.N. 1325.**

——S. 164 (3)—*Non-compliance—Failure to put questions as to voluntary character of confession —Effect.*

It is the duty of a Magistrate to record a confession in accordance with the clear provisions of the Cr. P. Code. He must satisfy himself, by asking the necessary questions, that the confes-

sion was not the result of any undue influence. Where the Magistrate does not question the accused making the confession as to whether the confession was being made of his own free will, after ascertaining how long he had been in custody of the police, there is failure to observe an important provision of the Code intended to safeguard the voluntary character of the confession, and the confession cannot be accepted and acted upon. (*Rowland and Madan, JJ.*) RAM BABU JADAV *v.* EMPEROR. **173 I.C. 418=4 B.R. 266=10 R.P. 402=39 Cr.L.J. 302=1937 P.W.N. 1001=18 Pat.L.T. 964=A.I.R. 1938 Pat. 60.**

——**S. 164**—*Recording of—Formalities—Magistrate not recording actual warnings given to accused and not taking signature of accused—Omission to ask accused if confession is voluntary—If confession inadmissible—Examination of Magistrate—Effect of.*

A retracted confession does not become inadmissible in evidence, merely because the recording Magistrate does not write down the warnings given by him to the accused in the language of the accused, when the Magistrate himself is examined and gives evidence as to the actual warnings given by him to the accused; nor is it inadmissible for the reason that the confession is not signed by the accused, when the Magistrate proves that it is the accused who made the statement. That the Magistrate does not ask the accused in so many words whether his confession is voluntary, will not also make it inadmissible, when the Magistrate has satisfied himself that the confession is voluntary. (*Cunliffe and Henderson, JJ.*) EMPEROR *v.* ARAJADDIN MOLLA. **165 I.C. 196=9 R.C. 357=37 Cr.L.J. 1101=40 C.W.N. 872.**

Statement under.

——**S. 164**—*Admissibility—Objection raised only in appeal—If can be given effect to.*

The High Court will not give effect to a contention that certain statements by the accused are not admissible in evidence by reason of their not being statements as contemplated by S. 164, Cr. P. Code, when such contention is raised for the first time before it. (*Guha and Bartley, JJ.*) NARAIN CHANDRA BISWAS *v.* EMPEROR. **161 I.C. 289=37 Cr.L.J. 445=8 R.C. 508=63 C.L.J. 191=1936 Cr.C. 200 (2)=A.I.R. 1936 Cal. 101.**

——**S. 164**—*Statement of accused after acceptance of pardon—Record of—Oath, if can be administered.*

Per *Gruer, J.*—In recording a statement of an accused person after an acceptance of pardon by him, the Magistrate has the power of administration of oath or solemn affirmation under S 164, Cr. P. Code. (*Niyogi and Gruer, JJ.*) HORILAL *v.* EMPEROR. **187 I.C. 203=1940 N.L.J. 286=12 R.N. 283=41 Cr.L.J. 433=A.I.R. 1940 Nag. 218.**

——**S. 164**—*Statement of person to whom pardon has been tendered—Record of—Power of Magistrate not taking cognizance of offence.*

A Magistrate other than the one taking cognizance of the offence can record the statement of a person to whom pardon has been tendered. 14 L. 507, followed. (*Monroe and Din Mahomed, JJ.*) EMPEROR *v.* AMAR SINGH. **I.L.R. (1939) Lah. 38=181 I.C 509=11 R.L. 855=40 Cr.L J. 543=40 P.L.R. 758 (2)=A.I.R. 1938 Lah. 796.**

——**S. 164**—*Statement of witness—Right of accused to inspect.*

A judge should not decline to allow the pleaders for the defence to see the records of statements made by the prosecution witnesses to a Magistrate under the provisions of S. 164, Cr. P. Code, or to cross-examine the witnesses thereon, because it is an elementary principle of natural justice that an accused person shall have free access at any time during the trial to all the records which are before the Court. The same considerations apply to the refusal to permit reference in cross-examination to the contents of charge sheet, for this also forms part of the committal record. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING. **179 I.C. 783=11 R.R. 247 =40 Cr.L.J. 265=A.I.R. 1938 Rang. 442.**

——**S. 164**—*Value of.*

A statement of a witness obtained under S. 164 always raises a suspicion that it has not been voluntarily made. The section was not intended to enable the police to obtain a statement from some person and as it were to put a seal on that statement by sending in that person to a Magistrate practically under custody, to be examined before the judicial inquiry or trial, and therefore compromised in his evidence when judicial proceedings are regularly taken. (*Dhavle and Chatterjee, JJ.*) EMPEROR *v.* MANU CHIK. **175 I.C. 716=4 B.R. 626=39 Cr.L.J. 635=11 R.P. 11=1939 P.W.N. 25=A.I.R. 1938 Pat. 290.**

——**S. 164**—*Verification proceedings—Legality—Statements by accused to verifying Magistrate—Admissibility.*

Verification proceedings are undertaken with a view to testing the truth of confession and to obtain evidence either corroborating the confession or indicating its falsity, and they are not wholly illegal. The verification report of a Magistrate cannot be ruled out as inadmissible in evidence, when the Magistrate himself is examined as a witness in the case and speaks to the contents of the report made by him, which is placed on record as evidence in support of the confessional statement of the accused. Statements made by the accused to the verifying Magistrate in the course of the proceedings, if they are not recorded in the manner provided in S. 164, Cr. P. Code, are however inadmissible. (*Guha, Bartley and Nazim Ali, JJ.*) JITENDRA NATH GUPTA *v.* EMPEROR. **169 I.C. 977=38 Cr.L.J. 818=10 R.C. 69=A.I.R. 1937 Cal. 99 (S B.).**

Voluntary statement.

——**S. 164**—*Magistrate asking accused to 'make detailed statement'—Statement made thereon—If voluntary.*

Where the Magistrate while recording a confession asked the accused to 'make a detailed statement,' it does not make the statement resulting from that question any the less voluntary. The confession as made is admissible in evidence. Such a question cannot be construed as a threat. (*Young, C.J. and Monroe, J.*) GIAN CHAND *v.* EMPEROR. **18 Lah. 481=170 I.C. 5=38 Cr.L.J. 879=10 R.L. 101=39 P.L.R. 834=A.I.R. 1937 Lah. 399.**

Miscellaneous.

——**S. 164**—*Sending accused back to police custody after confession—Practice—Propriety.*

If confessing persons know that there is likelihood of their being returned to police custody

after making confession, they would be more inclined to make false confessions at the instance of the police than they otherwise would do. The practice of sending the accused after the confession to the custody of the police is very improper. (*Young, C J and Monroe, J.*) NARINJAN SINGH *v.* EMPEROR. 17 Lah. 419=162 I.C 379=37 Cr. L.J. 567=8 R.L. 890=38 P L.R. 820=1936 Cr. C. 298=A.I.R. 1936 Lah. 357.

——S. 164 (2)—*Return of recorded statement to witness or pleader—Legality.*

To return the statement after being recorded under S. 164, either to the witness or to the pleader is wholly illegal. Under sub-S. (2) of S. 164, statements or confessions recorded shall be forwarded to the Magistrate by whom the case is to be tried or inquired into. (*Mosely, J.*) MAHOMED CASSIM *v.* SHAIK THAMBY SAHIB 187 I.C. 77=12 R.R. 310=41 Cr.L.J. 392=A.I.R. 1940 Rang 33.

——Ss. 164 and 364—*Applicability—Enquiry by Magistrate under Reg. 737 of the Police Regulations.*

Where an enquiry is conducted by a Magistrate instead of a police officer under Reg. 737 of the Police Regulations, he does not cease to be Magistrate. Hence the statements made by witnesses before him must be treated as made under S. 164, Cr. P. Code, and unless they are recorded in the manner required by S. 164 read with S 364, they could not be used against them. (*Niyogi, J.*) DINANATH *v.* EMPEROR. I.L.R. (1940) Nag. 232 =189 I C. 591=13 R.N. 58=41 Cr.L.J. 757=A. I.R. 1940 Nag. 186.

——Ss. 164 and 364—*Oral confessions—Value of—Non-observance of precautions by Magistrate.*

Where oral confessions are made before Magistrates some of whom have no power to record a confession at all, and all the Magistrates state that they told the accused that they were Magistrates but omit to record the same in memos. prepared by them, the precautions laid down in Ss. 164 and 364, Cr. P. Code, being not observed, such confessions are of little evidentiary value. (*Dalip Singh, J.*) LAL SINGH *v.* EMPEROR. 164 I C. 373=9 R.L. 111=37 Cr.L J. 940=38 P. L.R. 881=1936 Cr.C. 736=A.I.R. 1936 Lah 707.

——Ss. 164 and 364—*Magistrate not acting under—Oral evidence—Admissibility.*

Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all Other methods of performance are necessarily forbidden. No doubt the Magistrate acting under Ss. 164 and 364 is not acting as a Court, yet he is a judicial officer, and both as a matter of construction and of good sense, the rule above applies to S. 164. Ss. 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Where therefore the Magistrate has neither acted nor purported to act under S. 164 or S. 364, and nothing has been tendered in evidence as recorded or purporting to be recorded

under either S. 164 or S. 364, oral evidence of the Magistrate is not admissible. S. 164 is not meant to allow evidence to be put in a form in which it can prove itself under S. 74 or S. 80, Evidence Act. It is a section conferring powers on Magistrate and delimiting them. If oral evidence be allowed in such a case all the precautions and safeguards laid down by Ss. 164 and 364 would be of such trifling value as to be almost idle. Any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing, or reading to the accused any version of what he was supposed to have said or asking for the confession to be vouched by any signature. The range of Magisterial confessions would be so enlarged by this process that the provisions of S. 164 would almost inevitably be widely disregarded. The effect of Ss. 164 and 364 is clearly to prescribe the mode in which confessions are to be dealt with by Magistrates when made during an inyestigation, and to render inadmissible any attempt to deal with them by allowing oral evidence. A.I.R. 1922 Lah. 237; 137 I.C. 57; A.I.R. 1933 All. 356; 2 C.W.N. 702; 17 Cal. 862; 56 C. 557; A.I.R. 1922 Cal. 342; 9 Mad. 224 and 3 L.B.R. 173, Appr.; 1933 Lah. 716 (F.B.); A I R. 1936 Lah. 247; 21 P.R. 1881 (Cr.) 36; 45 I.C. 843 and A.I.R. 1922 Mad. 40, impliedly overruled. (*Lord Roche*) NAZIR AHMAD *v.* EMPEROR. 63 I.A. 372=17 Lah. 629= 1936 O.W.N 505=1936 A.W.R. 620=1936 M. W.N. 745=1936 A.Cr.C. 126=1936 A.L J 895= 1936 O.L.R. 437=1936 All.L.R 747=1936 M. Cr.C. 361=1936 P.W.N. 615=64 C L J. 445=39 P.L.R 43=17 Pat.L.T. 594=40 C W N. 1221= 163 I.C 881=9 R.P.C 57=19 N.L.J. 214=37 Cr.L J. 897=44 L.W. 583=1936 Cr.C. 752 (2)= 38 Bom.L.R 987=A.I.R. 1936 P.C. 253 (2)=71 M.L.J. 476 (P.C).

——Ss. 164, 364 and 533—*Recording of confession by Magistrate—Formalities not complied with—Examination of Magistrate as witness—Practice condemned.*

Ss. 164 and 364, Cr.P. Code, must he looked at and construed together and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. The practice of allowing defects in the formalities in recording confessions to be cured by permitting Magistrates as witnesses to depose to confessions is improper and where matters could be put on record and would be admissible when so put, there are the strongest reasons of policy for supposing that the legislature designed that such matters should be available in that form and in no other. 17 Lah. 629. Foll. (*Grille and Gruer, JJ.*) NAHRU *v.* EMPEROR. I.L R. (1937) Nag. 268=9 R.N 281 =38 Cr L.J. 642=168 I.C. 962=A.I.R. 1937 Nag. 220.

——Ss. 164 and 533—*Omission to take accused's signature to statement—If curable under S.* 533.

The omission to take the accused's signature to a statement is not necessarily fatal to its admissibility in every case. If such an omission with reference to a statement under S. 164, Cr. P. Code, were to vitiate the confession, S. 533 of the

CR. P. CODE (1898), S. 164.

Code would be rendered entirely otiose. It is exactly for a case of this nature that the provisions of S. 533 of the Cr. P. Code are enacted. (*Grille and Bose, JJ.*) SAMLA HARDEO *v.* EMPEROR. **1940 N.L.J. 497.**

——**Ss. 164 and 533**—*Mode of recording confessions—Failure to record questions and answers—Oral evidence of Magistrate—Admissibility of confession.*

Where a confession was recorded by a Magistrate under S. 164, Cr. P. Code, but the actual questions put to the accused and the answers given were not recorded, but the Magistrate gave evidence under S. 533, Cr. P. Code, that the necessary questions were put.

Held, that Ss. 164 and 533 taken together made the confession admissible in evidence. (*Young, C. J. and Monroe, J.*) MAHOMED DIN *v.* EMPEROR. **18 Lah. 658=174 I.C 881=10 R L. 618=39 Cr.L.J. 488=40 P.L.R. 401=A.I.R. 1938 Lah. 200.**

——**Ss. 164 and 533**—*Retracted confession—Admissibility—Failure to comply with requirements of law as to recording of confessions—When curable under S.* 533.

A confession, though retracted, is admissible against the person making it, provided that the Court is satisfied that it was voluntarily made. Where the requirements of law as laid down in Ss. 164 and 364, Cr. P. Code, have not been complied with at all, in recording the confession of an accused, such a confession will not be admissible. But where the requirements have been attempted to be satisfied but there is still some formal defect in the procedure followed, as for instance, the absence of the formal certificate under S. 164 (3), which does not affect the merits of the statement of the accused, then S. 533 will become applicable and the defect cured. (*Niyogi, J.*) MAROTI JAGO *v.* CROWN. **188 I.C. 146=12 R.N. 333=41 Cr.L J. 553=1940 N.L.J. 210=A.I.R. 1940 Nag. 230.**

——**S. 164 (3)**—*Duty of Magistrate recording confession—Asking accused to think over matter and state what really happened as otherwise statement would be used against him—If sufficient.*

Where all that the Magistrate recording a confession under S. 26, Evidence Act, says to the accused is that he should think over the matter and state what really happened as otherwise the statement would be used against him, the provisions of S. 164 (3) are not complied with and consequently the accused's statement is inadmissible in evidence. (*Lakshmana Rao and Stodart, JJ.*) PERUMAL KUDUMBAN, *In re.* **1940 M.W. N. 358=51 L.W. 535=A.I.R. 1940 Mad. 562.**

——**S. 165**—*Recording of grounds—If mandatory—Police officer acting* bona fide *but not recording grounds—Search, if justified.*

The provisions of S. 165 to the effect that before making a search a police officer should record in writing the grounds of his belief, etc., are directory and not mandatory. Where police officers have good grounds for making a search but omit to record the grounds of doing so, the police officers, assuming that they commit trespass, are justified in making the search and are not liable in an action for damages. But it is wrong to say that the mere fact that search resulted in recovery of articles relevant to the offence justifies the illegality. The criterion for determining whether the police officers were right or wrong is the state of their minds at the time of making the search. A.I.R. 1935 Nag. 237, Diss. (*Skemp, J.*) MAINGAL SINGH *v.* GHULAM MOHAMMAD. **184 I. C. 6=12 R.L. 154=42 P.L.R. 295=A.I.R. 1939 Lah. 280.**

CR. P. CODE (1898), S. 169.

——**Ss. 167 and 344**—*Relative scope—Accused—If can be in police and magisterial custody at same time.*

An accused cannot be in magisterial and police custody at one and the same time, that is to say, he cannot be before a Magistrate in magisterial custody in one case under S. 344, Cr.P. Code, and before a Magistrate in police custody in another case under S. 167, Cr.P. Code. (*Davis, J.C.*) DHAMAN HIRANAND *v.* EMPEROR. **31 S. L.R. 494=171 I.C. 737=10 R.S. 124=39 Cr. L.J. 10=A.I.R. 1937 Sind 251.**

——**S. 167 (2)**—*Construction and scope—Magistrate exercising powers under first part of S.* 167 (2) *and taking action under second part—Powers under first part—If exhausted.*

Once powers conferred by the first part of S. 167 (2), Cr.P. Code, have been exercised by a Magistrate and he has taken action under the second part of S. 167 (2), then the powers under the first part of S. 167 (2) have been exhausted, and cannot be revived and continued by the Magistrate having jurisdiction to whom the accused is sent under the second part of S. 167 (2) of the Code, even to the extent of ordering a remand to police custody for such time as will bring the total period of detention in police custody to fifteen days. (*Davis, J.C.*) DHAMAN HIRANAND *v.* EMPEROR. **31 S.L.R. 494=171 I.C. 737=10 R.S. 124=39 Cr.L.J. 10=A.I.R. 1937 Sind 251.**

——**S. 167 (2)**—*Scope—Accused arrested in Bombay and sent by Presidency Magistrate to Karachi—Karachi Magistrate granting remand under S.* 167 (2)—*Legality—Bombay City Police Act, S.* 70.

S. 70, Bombay City Police Act, must be read with S. 167 (2), Cr.P. Code, and when a Presidency Magistrate acting under S. 70, Bombay City Police Act, and S. 167 (2), Cr.P. Code, sends an accused arrested in Bombay to a Magistrate in Karachi having jurisdiction, he acts under the second part of S. 167 (2), Cr.P. Code, and a subsequent remand, if any, granted by the Karachi Magistrate must be a remand granted not under S. 167 (2), Cr.P. Code, but a remand under S. 344, Cr.P. Code. Remand granted under S. 167 (2) is therefore illegal. (*Davies, J.C.*) DHAMAN HIRANAND *v.* EMPEROR. **31 S.L.R. 494=171 I. C. 737=10 R.S. 124=39 Cr.L.J. 10=A.I.R. 1937 Sind 251.**

——**Ss. 169 and 170**—*Sending up accused for trial—Discretion of investigating officer.*

It is true that in cases where definite allegations are made by aggrieved persons which they are prepared to support by positive evidence, apparently free from taint, it is generally not the function of the police to play the role of Judges and to pronounce their verdict on the truth or falsehood of those allegations. In such cases they are bound to send up the accused for trial and not to discuss the probabilities or the improbabilities of the case and come to a final decision of

their own. But unfortunately in this country, there is a tendency to implicate innocent persons along with the guilty whenever any occasion arises in that respect, and not only the Courts but the investigating officers must proceed cautiously when they are faced with that situation. To restrain them altogether from using their discretion in such cases would prove detrimental to the interest of the public and would lead to unnecessary harassment of persons who had absolutely no hand in the crime. A police officer is in the same position as a Magistrate holding inquiry in cases triable by a Court of Session. (*Din Mohammad, J.*) JAIMAL SINGH *v.* EMPEROR. **I.L.R. (1939) Lah. 307=185 I.C. 266=12 R.L. 275=41 Cr.L.J. 146=41 P.L.R. 763=A.I.R. 1939 Lah. 523.**

———Ss. 170, 173 and 190 (1) (b)—*Scope—Report under S. 173—When to be sent—Jurisdiction of Magistrate to take cognizance otherwise than on such report—Report—If to be sent along with accused forwarded under S. 170.*

It is not correct to say that a Magistrate can only take cognizance on a report submitted under S. 173, Cr.P. Code. Under S. 190 (1) (*b*) of the Code, a Magistrate may take cognizance upon a report in writing, of facts which constitute an offence, made by a police officer. Such a report can be made even before the investigation is complete and not only on completion of the investigation. Further it is not necessary that the report under S. 173 should be sent to the Magistrate at the time the accused is forwarded under S. 170. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. **1936 A.M.L.J. 85.**

———S. 172—*Police diary—Use and admissibility of.*

Under S. 172, Cr.P. Code, any Criminal Court may use the police diary to aid it in the trial. A.I.R. 1935 Rang. 370, Foll. (*Mosely and Ba U, JJ.*) NGA SAN BA *v.* EMPEROR. **161 I.C. 14=37 Cr.L.J. 414=8 R.R. 449=1936 Cr.C. 80=A.I.R. 1936 Rang. 75.**

———S. 172—*Recorded statement—Use of—Right to a copy.*

S. 172 of the Code does not forbid a recorded statement to be used at a trial for an offence not under investigation when it was made. There is, however, no doubt that the record of a statement heard by a police officer in exercise of the power conferred by S. 161 of the Code and recorded either in the diary or separately in the course of investigation proceedings is an unpublished official record relating to an affair of State evidence derived from which cannot be produced in a case to which the first proviso to S. 162 is not applicable except with the permission of the officer at the head of the police department. It cannot in any sense be termed a deposition and it is not evidence. It is not a document, a copy of which must be given on demand under the provision of S. 76, Evidence Act. (*Coldstream, J.*) BAIJ NATH BHATNAGAR *v.* MUHAMMAD DIN, **17 Lah. 472=166 I.C. 501=9 R.L. 389=38 Cr.L.J. 246=38 P.L.R. 1040=1936 Cr.C. 300=A.I.R. 1936 Lah. 359.**

———Ss. 172 and 162—Statements to police—Mode of use—Statements exhibited entirely without getting witness to admit or deny them—Admissibility. *See* CR. P. CODE, SS. 162 AND 172. **1937 O.W.N. 63.**

———S. 173—*Order striking off case on police report—Nature of.*

An order of a Magistrate on a police report under S. 173, Cr.P. Code, that a case be struck off is an administrative order and not a judicial order. (*Blacker, J.*) BRAHM DEV *v.* EMPEROR **40 P.L.R. 239=175 I.C. 850=39 Cr.L.J. 646=11 R.L. 1 (1)=A.I.R. 1938 Lah. 469.**

———S. 173—*Charge-sheet — Alteration and withdrawal of name of person after cognizance—Legality.*

When a Magistrate has once taken cognizance of a case on a charge-sheet by the police, the police cannot in their report under S. 173 withdraw the name of a person mentioned in the original charge-sheet without an order from the Magistrate. It is not legal for the police to send a fresh charge-sheet with a different number with only the names of some of the persons originally named, and omitting the names of others whom they choose not to send up for trial, after the Magistrate has taken cognizance. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. **1936 A.M.L.J. 85.**

———S. 173—*Production of documents along with* chalan—*Duty of prosecution.*

Neither in S. 173, Cr.P. Code, nor in the form prescribed by the Local Government, is it provided that the prosecution should produce along with the *chalan* all the documents on which reliance is to be placed in the trial or which have to be produced by the witnesses to be tendered for the prosecution. An accused person is consequently not entitled, as of right, to insist upon the production of any such document before the case starts. He does not run the risk of being hampered in his defence, as the law clearly entitles him to cross-examine the witnesses even after the charge. (*Din Mahomed, J.*) GAUBA *v.* EMPEROR. **18 Lah. 114=39 P.L.R. 643=170 I.C. 586=38 Cr.L.J. 955=10 R.L. 135=A.I.R. 1937 Lah. 411.**

———S. 173—Report under—When to be sent—Cognizance otherwise than on such report—Magistrate's jurisdiction. *See* CR. P. CODE, SS. 170, 173 AND 190 (1) (*b*). **1936 A.M.L.J. 85.**

———Ss. 177 and 180—*Applicability—Conspiracy—Jurisdiction of Court is determined by place where conspiracy was formed or made and not by place where act in pursuance of conspiracy is done.*

Conspiracy is a substantive offence in itself. It is not given in one of the illustrations to S. 180, Cr.P. Code, as one of the offences, which is an offence because of its relation to another offence, such as abetment which would give the Court jurisdiction either where the principal offence or the connected offence was committed, nor can it be brought within the meaning of this section itself. It is not one of the offences named in S. 181. The gist of the offence of conspiracy lies not in doing that act of effecting the purpose for which the conspiracy is formed nor in attempting to do any of the acts nor in inducing others to do them, but in the forming of the scheme of agreement between the parties. In certain cases it may be difficult for the Courts to decide whether a particular agreement which forms the basis of a criminal charge was made or concluded at a parti-

cular time or at a particular place. But it does not follow therefrom that the scope of the conspiracy would determine the place where the conspiracy or part of it occurred. It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court and in an indictment for conspiracy the venue should be laid where the conspiracy was and not where the result of such conspiracy was put in execution. The criminal conspiracy was formed, that is to say, the offence was committed in U.P., that is, outside the jurisdiction of the Sukkur Court. The accused also entered into a further conspiracy at Sukkur. The accused were however not charged with this second or further conspiracy at all. The two conspiracies were not parts of one transaction.

Held, that S. 177 applied and the Sukkur Court had no jurisdiction to try the offence of criminal conspiracy formed in U.P. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* PURSUMAL GERIMAL. **I.L.R. (1939) Kar. 41=175 I.C. 620=10 R. S. 298=39 Cr.L.J. 630 (2)=A.I.R. 1938 Sind 108.**

———S. 177—*Construction—"Ordinarily".*

The word "ordinarily" means "except where provided otherwise in the Code". (*Broomfield and Sen, JJ.*) EMPEROR *v.* RAMNARAYAN BABURAO. **I.L.R. (1937) Bom. 244=169 I. C. 526=10 R.B. 34=38 Cr.L.J. 769=39 Bom, L.R. 61=.A.I.R. 1937 Bom. 186.**

———S. 177—*Offence of conspiracy—Trial—Forum.*

A conspiracy was entered into in *B* where the accused lived and some acts of cheating were done in *P* and the Court at *P* sought to try for the charge of conspiracy for cheating.

Held, that as it was in *B* where the accused resided, that they entered into the conspiracy, the charge should have been laid there and that the Court at *P* could not be clothed with jurisdiction to try the charge of conspiracy merely because the conspiracy and the different acts of cheating might form part of the same transaction, and that the charges in respect of them might be tried together. It could have jurisdiction only in respect of the acts of cheating alleged to have been committed within its jurisdiction. (*Menon, J.*) *In re* DANI. **162 I.C. 504 (1)=37 Cr.L.J. 634 (1)=8 R.M. 999=1935 M.Cr.C. 461=1935 M.W.N. 1163=1936 Cr. C. 304=A.I.R. 1936 Mad. 317.**

———S. 177—*Offence under S. 498—Jurisdiction to try—If a continuing offence.*

The taking or enticing in S. 498, I.P. Code, is not a continuing offence, but is complete as soon as the person concerned is out of the keeping or control of the person under whose care she was. Enticing from a particular person cannot continue after that person's control has ceased. The offence under the section can therefore be enquired into and tried only by a Court having jurisdiction over the place where the taking or enticing takes place. The Court of the place where the person taking the woman goes to and lives with her has no jurisdiction to try the offence. (*Broomfield and Sen, JJ.*) EMPEROR *v.* RAMNARAYAN BABURAO. **I.L.R. (1937) Bom. 244=39 Bom.L.R. 61=169 I.C. 526=10 R.B. 34=38 Cr.L.J. 769=A.I.R. 1937 Bom. 186.**

———S. 177—*Place of offence—Offence under S. 211, I.P. Code—False report by accused to two officers—One not competent to investigate—Offence—Where committed.*

The accused made a false report to two police officers, one being Assistant S.I. of *M*, who had no jurisdiction to investigate, but the other, the S.I. of *S*, had.

Held, that accused committed offence, though partly at each place. 17 Cal. 574 (F.B.) and A.I.R. 1925 Pat. 678, App. (*Varma and Rowland, JJ.*) NANHKOO MAHTON *v.* EMPEROR. **163 I.C. 805=37 Cr.L.J. 862=9 R.P. 40=17 Pat, L.T. 472=1936 P.W.N. 276=1936 Cr.C. 558 =A.I.R. 1936 Pat. 358.**

———S. 177—*Scope—Trial taking place in wrong district—Conviction—When to be set aside —S. 531.*

S. 177 only provides for the ordinary place of inquiry and trial and can be read along with S. 531, the result being that a conviction cannot be set aside merely on the ground that the trial has taken place in a wrong district, unless the party aggrieved shows such error has, in fact, caused a failure of justice and that the accused have been prejudiced by the trial having taken place in a wrong district. The policy of the Cr.P. Code is to uphold in most cases the order passed by the Criminal Court which lacked jurisdiction or which had committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned thereby. (*Dhavle and Agarwala, JJ.*) ACHARAJA SINGH *v.* EMPEROR. **15 Pat. 418=163 I. C. 518=9 R.P. 22=17 Pat.L.T. 543=1936 Cr.C. 642=1936 P.W.N. 515=A.I.R. 1936 Pat. 410.**

———S. 177—*Transfer of place of offence after cognisance by Magistrate and before commitment—Jurisdiction of Magistrate and Sessions Court.*

Under S. 177, Cr.P. Code, a Magistrate has jurisdiction to take cognisance of an offence committed within the local limits of his jurisdiction, and to try the case or to commit it to sessions. The fact that the locality in which the offence was committed is transferred to another district after the cognisance of the offence by the Magistrate and before commitment, does not oust the jurisdiction of either the Magistrate or the Sessions Court. (*Jack and Khundkar, JJ.*) EMPEROR *v.* SAYER UDDIN PRAMANIK. **I.L.R. (1938) 2 Cal. 357=179 I.C. 805=11 R.C. 618=40 Cr.L.J. 270=A.I.R. 1939 Cal. 159.**

———Ss. 177, 181 (2) and 182—*Applicability—Charge of criminal misappropriation—Trial—Venue—Goods entrusted to salesman in Bombay —Goods taken outside Bombay and sold outside —Failure to account for moneys in Bombay—Prosecution in Bombay—Discharge on the ground of want of jurisdiction—Legality—Determination of jurisdiction.*

The accused who was employed by the complainant firm in Bombay as a travelling salesman and canvasser was given articles valued at about

CR. P. CODE (1898), S. 179.

Rs. 4,500 for sale, and on 11—11—1935, he left Bombay to travel in Gujarat and Karachi. He returned to Bombay on 16—12—1935, and was asked to render accounts. Between 17—12—1935 and 19—12—1935, he came to the office of the firm every day and returned all the goods except goods of the value of Rs, 198—8—0, for which he produced cash memos, showing that they had been sold. The accused having failed to produce the money, he was prosecuted before the Presidency Magistrate of Bombay for criminal breach of trust under S. 408, I.P. Code, in respect of the sum of Rs. 198—8—0. The Magistrate discharged the accused holding that he had no jurisdiction to try the case, as the charge of criminal breach of trust was in respect of moneys received by the accused outside Bombay by the sale of the goods entrusted to him.

Held, in revision, (1) that though the moneys were received outside Bombay, it did not follow that the misappropriation took place outside Bombay, because it might be proved that the accused had the moneys with him in Bombay between 16—12—1935 and 19—12—1935 and that the conversion or misappropriation took place in Bombay; (2) that it was impossible at that stage of the case to say that no offence was committed in Bombay and therefore the finding of the Magistrate that he had no jurisdiction was wrong as being premature and must be set aside; (3) that the case was *prima facie* governed by S. 177 or S. 181 (2), Cr.P. Code, it being the prosecution case that the accused brought the money or some of it to Bombay; and (4) that in any case there was no reason why S. 182, Cr.P. Code, should not apply to the case as alleged, in case there was doubt, though if there was really no doubt at all that there was no offence committed in Bombay, the plea of want of jurisdiction would have to be sustained. (*Broomfield and Wadia, JJ.*) ANTHONY D'MELLO *v.* JOSEPH MATHEW PEREIRA. **I.L.R. (1937) Bom. 743=171 I.C. 42=38 Cr.L.J. 977=10 R.B. 169=39 Bom.L.R. 620=A.I.R. 1937 Bom. 371.**

———S. 179—*Applicability — "Consequence", meaning of—Arrest on charge of cheating—Acquittal—Complaint for defamation on ground of deliberate falsity of charge—Jurisdiction—Arrest, if an essential part of charge of defamation.*

The "consequence" referred to in S. 179, Cr.P. Code, must be a part of the offence with which the accused person is being charged. Hence that section can apply only to a case where a person is charged with an offence not only by reason of some act committed by him, but also by reason of some consequence which has ensued from the Act. In the absence of any one of these two ingredients, the section would be wholly inapplicable. The section would have no application if the consequence is such that even if it had not taken place, the offence would have been complete. On a complaint for cheating under S. 420, I.P. Code, a warrant for the arrest of the accused at a different place was issued. The accused was subsequently tried and acquitted. But even prior to his acquittal, he preferred to the Court where he was arrested, a complaint under S. 500, I.P. Code, against his complainant. On a question as to the jurisdiction of that Court to entertain it, it was held that the arrest of the person was not such a consequence as is contemplated by S. 179, Cr.P. Code and hence it could not give the Court in that place any jurisdiction to try the offence of defamation with which the opposite party was charged. (*Mulla, J.*) MOHAMMAD ABDUL LATIF *v.* AHMAD ABDUL HALIM. **178 I.C. 713=11 R.A. 325=40 Cr.L.J. 128=1938 All.L.R. 894=1938 A.L.J. 969=1938 A.Cr.C. 139=1938 A.W.R. (H.C.) 686=A.I.R. 1938 All. 632.**

CR. P. CODE (1898), S. 181

———S. 179—*Applicability—Criminal breach of trust.*

S. 179 has no application to the offence of criminal breach of trust which is governed by sub-S. (2) of S. 181. (*Khundkar and Edgley, JJ.*) HUDA *v.* ALI HUSSAIN. **189 I.C. 876=41 Cr.L.J. 812=A.I.R. 1940 Cal. 367.**

———S. 179—*Scope of.*

The offences contemplated in S. 179 are those which are not complete till a specified consequence has ensued. The consequence must be an essential ingredient of the offence and it must arise within the jurisdiction of the Court trying the offence. (*Niyogi and Grueer, A.J.Cs.*) DEWAN SINGH *v.* EMPEROR. **8 R.N. 219=37 Cr.L.J. 474 (2)=161 I.C. 635=1936 Cr.C. 367=A.I.R. 1936 Nag. 55.**

———Ss. 179 and 181 (2)—*Interpretation—Jurisdiction—Criminal breach of trust—"Consequence" in S. 179—Meaning of—Misappropriation at Lucknow of money agreed to be sent to Sukkur—Jurisdiction to try offence—Sukkur Court—Jurisdiction of.*

The ordinary grammatical meaning of the word "consequence", construing S. 179 as a whole, is a consequence which is a necessary ingredient of an offence. Loss is not in itself a necessary ingredient of an offence of criminal breach of trust. The essence of the offence is the misappropriation on conversion or user with dishonest intention, and, therefore, it is the act of misappropriation itself which in law amounts to the offence apart from consequences, Therefore if money agreed to be sent to Sukkur is dishonestly misappropriated at Lucknow and is not sent to Sukkur, it cannot be said that it was dishonestly misappropriated or converted at Sukkur. Nor does S. 43, I.P. Code, make any difference to the case. It may be said that the failure to send it to Sukkur is evidence of dishonest misappropriation or conversion or disposal at Lucknow, but a jurisdicion is not to be determined by the place where evidence is to be found but by the place where the offence is committed. This being so, the jurisdiction in such case of misappropriation is governed by S. 181 (2) and not by S. 179. Sukkur Court therefore has no jurisdiction to try the offence. 22 S.L.R. 404=A.I.R. 1922 Sind 30=144 I.C. 99, Overruled; A.I.R. 1930 Bom. 499, Foll. (*Davis, J.C., Rupchand Bilaram, Dadiba C. Mehta and Havelivala, A.J.Cs.*) MUKHI TIRATHDAS *v.* JETHANAND MATVALOMAL. **9 R.S. 222=38 Cr.L.J. 512=31 S.L.R. 123=168 I.C. 89=A.I.R. 1937 Sind 68 (F.B.).**

———S. 181 (2)—*Criminal breach of trust—Jurisdiction—Place of accounting.*

CR. P. CODE (1898), S. 181.

The first part of S. 405, I.P. Code, which deals with dishonest misappropriation or conversion of property, will apply where it is known that the accused had dishonestly misappropriated or converted to his own use certain property at a particular place and the jurisdiction to try the accused will be at the place where that dishonest misappropriation or conversion has taken place. But where it is alleged that the accused has failed to account for the property, then the second part of S. 405, which consists of dishonestly using or disposing of property in violation of any direction of law or any legal contract touching the discharge of the trust, will apply, and jurisdiction exists at the place where the property should have been delivered by the accused.

Where, therefore, the allegations in the complaint are that the accused was engaged in Cawnpore as an agent of a firm of sugar merchants of Cawnpore and that he was sent to Bengal with instructions to effect deliveries of sugar bags and to realise the price of goods from customers and either personally bring the proceeds to Cawnpore or to remit the money to Cawnpore and that he "withheld the moneys collected by him and embezzled, the Magistrate at Cawnpore has jurisdiction, as there is no charge that he misappropriated or converted to his own use the money at any particular place and his offence consists in failing to carry out his contract and remit the money or bring the money to Cawnpore. (*Sulaiman, C. J. and Bennet, J.*) MOHRU LAL *v.* EMPEROR. **58 All. 644=160 I.C. 356=1936 A.W.R. 23=37 Cr.L.J. 284=8 R.A. 595=1936 A.Cr.C. 9=1936 A.L.J. 3=1936 Cr.C. 214=1936 All. L.R. 107=A.I.R. 1936 All. 193.**

———**S. 181 (2)**—*Criminal breach of trust—Jurisdiction—Place of accounting.*

Where the accused, who is under a duty to deposit the moneys realised by him at his master's place of business at a certain place, dishonestly uses the moneys realised by failing to deposit them according to the implied contract between him and his master, the offence of criminal breach of trust is committed at the place where the accused failed to deposit the moneys and render accounts, and the Court at that place is fully competent to try the case. (*Zia-ul-Hasan, J.*) BRIJ KISHORE *v.* CHANDRIKA PRASAD. **12 Luck. 77=160 I.C. 567=8 R.O. 272=37 Cr.L.J. 322=1936 O.W.N. 212=1936 Cr.C. 847=1936 O.L.R. 89=A.I.R. 1936 Oudh 329.**

———**S. 181 (2)**—*Criminal breach of trust—Jurisdiction—Place of accounting in firm* V *at Akyab agreeing to do business at Cochin on firm's behalf and to send money and accounts to Akyab* —K *failing to do so closing business and going away—Complaint by firm* V *for breach of trust lodged at Akyab—Court at Akyab held had no jurisdiction, offence being committed at Cochin.*

The failure of a person to remit the money or to bring it to the place to which he had to bring it does not necessarily constitute the offence of criminal breach of trust although a person may have to account for money; it is not the failure to account, but the misuse of the money for dishonest purposes, which constitutes the offence. *K* was a partner in a firm *V* at Akyab and there was an agreement by which *K* was to go to Cochin and receive the consignment of rice sent by the firm and sell it there. He was required to submit accounts and pay the net cash balance resulting from the business to the firm at Akyab. *K* failed to remit money or to account for it, and closed the business in Cochin but instead of returning to Akyab went to his native place. The firm *V* filed a complaint for breach of trust before a Magistrate in Akyab but he held that he had no jurisdiction,

Held, that the Court in Akyab had no jurisdiction. If *K* had left the money in Cochin the offence of breach of trust was committed at Cochin and if he took the money elsewhere he must have misappropriated the money in Cochin, because it was there that he failed to do with the money that which he was required to do; in any case the offence was committed at Cochin. A.I.R. 1936 All. 193, not approved. (*Mackney, J.*) VASANJI KHIMJEE *v.* KANJI TOKERSEY. **1938 Rang.L.R. 1=175 I.C. 175=39 Cr.L.J. 529=10 R.R. 468=A.I.R. 1938 Rang. 94.**

———**S. 181 (2)**—*Criminal breach of trust—Place of trial.*

A contractor at Barisal, placed an order for certain goods with the complainant's firm carrying on business in Calcutta. The goods were to be sent to Barisal and it was arranged that the purchase price would be remitted to the complainant's firm by a bank at Barisal. It was alleged that the purchaser deposited this sum with the Bank at Barisal and instructed that Bank to remit the money to the complainant's firm at Calcutta. The Bank dishonestly retained the money in contravention of this direction.

Held, that both the entrustment and the breach took place at Barisal and the offence was completed there, and hence, the Magistrate in Calcutta had no jurisdiction to try the case. (*Khundkar and Edgley, JJ.*) HUDA *v.* ALI HUSSAIN. **189 I.C. 876=41 Cr.L.J. 812=A.I.R. 1940 Cal. 367.**

———**S. 181 (2)**—*Criminal misappropriation—Place where money was retained by accused—Jurisdiction.*

K residing at *A* had a promissory note executed in his favour by one *I*, a resident of district *L*. Subsequently on *K* demanding the loan from *I*, the latter pleaded a discharge and produced the original promissory note with an endorsement on its back in the handwriting of one *H* who was also a resident of *A*. *K* demanded the money from *H* and on evasion of payment by him lodged a complaint against him under S. 403, I. P. Code, at *A*.

Held, that the Courts at *A* had jurisdiction to try the case. Even though the money was received by the accused *H* on account of the promissory note at *L*, money was retained by him at *A* to which he admittedly belonged and the retention of the money which the accused knew did not belong to him conferred jurisdiction on the Courts at *A*. (*Din Mohommad, J.*) HUSAIN BAKHSH *v.* KHUDA BAKHSH. **18 Lah. 299=39 P.L.R. 868=171 I.C. 629=10 R.L. 218=38 Cr.L.J. 1100=A.I.R. 1937 Lah. 85.**

———**S. 181 (2)**—*Criminal misappropriation—Place of trial—Liability to account at a place—If confers jurisdiction on that place.*

Where it is alleged that the accused had dishonestly misappropriated monies at a certain place, according to S. 181 (2), Cr. P. Code, the offence

can only be tried by the Court within whose jurisdiction that particular place, where the subject-matter of the offence was received or retained, is situated. The mere liability to account at a place without any duty to deliver any property at that place, cannot confer jurisdiction on the Criminal Court at that place to try the offence. (*Mulla, J.*) FATEH SINGH *v.* EMPEROR. **I.L.R. (1940) All. 43=186 I.C. 481=12 R.A. 436=41 Cr.L.J. 325=1939 A.W.R. (H.C.) 784=1939 A.Cr.C. 198=1939 A.L.J. 1060=A.I.R. 1940 All. 92.**

——**S. 181 (2)**—*Territorial jurisdiction—Complainant sending postal order from* M *to accused in* B—*Complaint of offences under Ss.* 403 *and* 417, *I. P. Code—Proper forum.*

Where it is alleged by the complainant residing at *M* that he posted certain postal orders at *M* payable to an editor of a magazine at *B* and that the editor had committed in respect of them offences under Ss. 403 and 417, I. P. Code, the Court at *M* has no territorial jurisdiction to entertain such a complaint. (*Ismail, J.*) G. A. ST. GEORGE *v.* UMA DUTT SHARMA. **I.L.R. (1939) All. 851=184 I.C. 313=12 R.A. 217=40 Cr.L.J. 917=1939 A.L.J. 574=1939 A.Cr.C. 117=1939 A.W.R. (H.C.) 570=A.I.R. 1939 All. 602.**

——**S. 181 (3)**—*Offence committed beyond British India—Jurisdiction of British Indian Court to try.*

A person cannot be tried in a British Indian Court for an offence committed outside British India. (*Norman.*) NARAIN *v.* EMPEROR. **1937 A.M.L.J. 45.**

——**S. 182**—*Place of trial—Charge under S.* 420, *I. P. Code—Place where cheating and parting with money occur.*

Where a complainant is cheated and parts with his money at a particular place, a case under S. 420, I. P. Code, in respect of the offence can be enquired into and tried by a Magistrate of that place. (*Lakshmana Rao, J.*) NATESA PADAYACHI *v.* EMPEROR. **1940 M.W.N. 391=51 L.W. 552=A.I.R. 1940 Mad. 649=(1940) 1 M.L.J. 760.**

——**S. 188**—*Absence of certificate or sanction—If vitiates trial.*

A Magistrate has no jurisdiction to try an accused in the absence of a certificate or sanction, and a trial without certificate or sanction is void. (*Almond, J.C. and Mir Ahmad, J.*) KHAWAS HABIB *v.* EMPEROR. **188 I.C. 290=12 R. Pesh. 41=41 Cr.L.J. 565=A.I.R. 1940 Pesh. 4.**

——**S. 188**—*Applicability—Case tried by Court in its Admiralty Jurisdiction.*

S. 188 does not apply to cases to be tried by a Court in its Admiralty Jurisdiction. It is not intended to control trials held under the Admiralty Jurisdiction of the Court vested in it by a Parliamentary statute nor does it apply to an offence committed not in the territory of foreign state but on a Merchant ship entering its territorial waters and over which the State exercises only a quasi-territorial jurisdiction. Where therefore an accused is not being tried by virtue of the powers conferred upon the Court under the first part of S. 188 but by virtue of the English Statutes, the second part of S. 188 does not come into operation and no sanction of the Local Government is necessary for prosecuting the accused. (*Davis, J.C. and Rupchand Bilaram, A.J.C.*) FRANCIS XAVIER FERNANDEZ *v.* EMPEROR. **29 S.**

L.R. 281=160 I.C. 375=37 Cr.L.J. 314=8 R.S. 122=1936 Cr.C. 50=A.I.R. 1936 Sind 3.

——S. 188—Certificate under—Necessity—Marriage in Native State in contravention of the Child Marriage Restraint Act. *See* CHILD MARRIAGE RESTRAINT ACT, SS. 5 AND 6. **1939 A.M.L.J. 130.**

——**S. 188**—*European British subject committing offence outside British India brought to trial in British India—Claim to be tried as European British subject—When arises is decided to try him in British India.*

Where an European British subject committing an offence outside British India, is brought to trial in British India, on a certificate being furnished under S. 188, the question in respect of his claim to be tried as a British European subject, does not arise until after the certificate has been furnished, and, it has been decided to deal with him as if the offence has been committed in British India. It is then open to the accused to plead during his trial that he is an European British subject and provisions of Chap. 33 will then operate. The certificate under S. 188 does not invest the District Magistrate with jurisdiction to order the trial of an European British subject before a Magistrate of the First Class in British India. If the accused is a European British subject the Magistrate can do no more than hold an inquiry and commit him for trial; he cannot try him himself. (*Grille, J.*) ZINCKE *v.* EMPEROR. **164 I.C. 687=9 R.N. 26 (2)=37 Cr.L.J. 979=1936 Cr.C. 707=A.I.R. 1936 Nag. 152.**

——**S. 188**—*Jurisdiction under.*

For the purposes of criminal jurisdiction conferred by S. 188, an accused person is found wherever he is actually present whether or not he has been brought there against his will. (*Grille, J.*) ZINCK *v.* EMPEROR. **164 I.C. 687=9 R.N. 26 (2)=37 Cr.L.J. 979=1936 Cr.C. 707=A.I.R. 1936 Nag. 152.**

——**S. 188 and Child Marriage Restraint Act (XIX of 1929), S. 9**—*Marriage in Native State—Complaint within one year but certificate obtained after one year—Trial, if legal.*

Where a marriage in contravention of the Child Marriage Restraint Act is performed in a Native State and a complaint is filed in British India within one year but without a certificate as required by S. 188, Cr. P. Code, and the certificate is obtained beyond the one year, there is no reason why cognizance should not be legally taken even though the further progress of the case depends on the production of the certificate. The contrasting phrases in S. 188, Cr. P. Code, and S. 9 of the Child Marriage Restraint Act are significant and should not be interpreted as meaning one and the same thing. (*Gruer, J.*) HARINARAYAN *v.* GOVINDRAM. **188 I.C. 606=13 R.N. 9=41 Cr.L.J. 645=1940 N.L.J. 304=A.I.R. 1940 Nag. 245.**

——**S. 188, Proviso**—Scope—Offence under Child Marriage Restraint Act committed beyond British India—Prosecution—Certificate from Political Agent or sanction of Local Government—Necessity. *See* CHILD MARRIAGE RESTRAINT ACT. **49 L.W. 656.**

——**S. 190**—If subject to S. 195. *See* CR. P. CODE, SS. 195 AND 190 AND PENAL CODE, S. 182. **1940 O.A. 591.**

CR. P. CODE (1898), S. 190.

———S. 190—*Cognizance in respect of offenders not mentioned in complaint—Jurisdiction of Magistrate.*

As cognizance is taken of an offence and not of the individual offenders, it would ordinarily follow that, once a complaint has been made according to the provisions of Cr. P. Code, cognizance can be taken in respect of the offenders named in the complaint and also others who may be shown to have taken part in the transaction, although no complaint has been specifically made against them. It is an error to suppose that the absence of the name of a person in the operative part of the complaint will be sufficient to take away the jurisdiction of the Magistrate to try him. (*Grille, J.*) EMPEROR *v.* VITHU. **I.L.R. (1937) Nag. 492=169 I.C. 74=38 Cr.L.J. 717=9 R.N. 297=A.I.R. 1938 Nag. 133.**

———S. 190—*Jurisdiction—Magistrate taking cognizance of offence—Power to add co-accused.*

Even if there is only a complaint of an offence as regards the principal offender before a Magistrate, he can add the abettors of that offence as co-accused, because S. 190 refers in terms to "offence" and not "offender," and a Magistrate having taken cognizance of an offence can add co-accused. (*Davis, J.C. and Weston, J.*) ASSUDOMAL RAMANDAS *v.* JHAWANDAS HOTCHAND. **I.L.R. (1940) Kar. 435=190 I.C. 222=A.I.R. 1940 Sind 100.**

———S. 190—*Taking cognizance on report from a Judge of Civil Court—Legality.*

There is nothing in S. 190, Cr. P. Code, which prevents a Sub-Divisional Magistrate from taking cognizance of an offence that happens to be reported to him by an officer who presides in a Court of Justice. (*Allsop, J.*) TARA SINGH *v.* EMPEROR. **1938 A.L.J. 528=1938 A.Cr.C. 45=11 R.A. 158=1938 A.W.R. (H.C.) 361=176 I.C. 960=1938 A.L.R. 689=39 Cr.L.J. 840=A.I.R. 1938 All. 449.**

———S. 190—*Taking cognizance—Meaning of.*

To take cognizance implies a conscious volition on the part of the Magistrate. The fact that a Magistrate passes an order remanding the accused to custody pending investigation does not lead to the inference that he has taken cognizance, when he never considers at all whether he is or, is not taking cognizance. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. **1936 A.M.L.J. 85.**

———S. 190 (1) (a)—*Complaint against receiver—Leave of Court appointing him specifically asked for but not granted—Propriety of entertaining complaint.*

Assuming that a Magistrate has jurisdiction to entertain a complaint against a receiver in the absence of leave of the Court which appointed him, it would not be proper for him to do so when there is no specific leave from that Court for the institution of a criminal case, although leave had been specifically asked for. Although this may not be a bar to jurisdiction, it is certainly relevant on the question of the propriety or desirability of criminal proceedings. (*Khundkar and Rau, JJ.*) JNANENDRA NATH PRAMANIK *v.* NILMONY DEY. **I.L.R. (1939) 1 Cal. 587=184 I.C. 603=12 R.C. 249=43 C.W.N. 582=41 Cr.L.J. 52=A.I.R. 1939 Cal. 701.**

———S. 190 (1) (a)—*Jurisdiction—Initiation of proceedings—Person named as offender—If necessary.*

It is not a condition requisite for the initiation of proceedings in a Criminal Court that there should necessarily be a person named as the offender. The Magistrates mentioned in S. 190, Sub-S. (1) are empowered to take cognizance of an offence whether or not the complaint before them charges any particular individual or individuals with having committed the offence. (*Lobo, J.C. and O'Sullivan, J.*) FATEH MAHOMED *v.* EMPEROR. **I.L.R. (1940) Kar. 287=189 I.C. 586=41 Cr.L.J. 750=13 R.S. 33=A.I.R. 1940 Sind 97.**

———Ss. 190 (1) (a), (b) and (c) and 191—*Applicability—Sub-Divisional Magistrate taking cognizance on petition of complaint and police diary—If takes cognizance under S.* 190 (1) (*c*) *—S.* 191—*Application of—Trial of case by Magistrate succeeding original Magistrate—If in contravention of S.* 191.

The police who investigated a case, after recording the first information, submitted the final report, "Mistake of law as it is civil dispute," upon this the Sub-Divisional Magistrate read the case diary and also a petition of protest by the prosecution, and called for a charge sheet. The case, however, actually came up for trial before another Magistrate who succeeded the first Sub-Divisional Magistrate.

Held, (1) that the case fell within Cls. (*b*) and (*c*) of S. 190 (1), as the Sub-Magistrate acted on the petition of protest filed by the prosecution, which is really a petition of complaint under S. 190 (1) (*a*) and upon the information contained in the police diary, which would fall under Cl. (*b*) of S. 190 (1); (2) that S. 190 (1) (*c*) had no application so as to make S. 191 applicable to the case; (3) that even if S. 190 (1) (*c*) be held to be applicable, S. 191, Cr. P. Code, would not entitle the accused to claim to be tried by a Court or Magistrate of his choice but would only make it impossible for the Magistrate taking cognizance (the first Sub-Divisional Magistrate) to try the accused except with his consent; (4) since in the present case the accused was tried not by that Magistrate but by his successor, the requirements of S. 191 had been substantially complied with, and the accused could have no right to anything beyond what had actually taken place. (*Dhavle, J.*) PANU SAMAL *v.* EMPEROR. **186 I.C. 435=12 R.P. 513=6 B.R. 368=41 Cr.L.J. 318=1939 P.W.N. 803=A.I.R. 1940 Pat. 111.**

———S. 190 (1) (b)—*Requirements—Compliance with.*

The requirements of S. 190 (1) (*b*), Cr. P. Code, are sufficiently complied with although the facts are not actually written out in the charge-sheet but are contained in a document annexed to the charge-sheet. (*Agarwala, J.*) HEMENDRA NATH GUPTA *v.* EMPEROR. **165 I.C. 966=9 R.P. 243=38 Cr.L.J. 94=3 B.R. 114 (2)=17 Pat.L.T. 932=1936 P.W.N. 782=A.I.R. 1937 Pat. 160.**

———S. 190 (1) (b)—Scope—Taking cognizance—Report under S. 173—If condition precedent. *See* CR. P. CODE, Ss. 170, 173 AND 190 (1) (*b*). **1936 A.M.L.J. 85.**

———S. 190 (1) (c)—*Magistrate taking cognisance under—Duty to afford opportunity to accused to elect to be tried by him or not.*

CR. P. CODE (1898), S. 190.

Where a Magistrate himself gains knowledge of an offence from the evidence before him, if he takes cognizance of such offence under S. 190 (*c*), Cr. P. Code, he is bound to afford the accused an opportunity of saying whether he wishes to be tried by that Magistrate or not. He cannot without so doing, proceed to frame the charge and try and convict the accused on such charge. (*King, J.*) RAJARATNAM PILLAI, *In re.* **59 Mad. 442=161 I.C. 846=8 R.M. 880=37 Cr.L.J. 501 =43 L.W. 367=1936 M.W.N. 181=1936 M. Cr. C. 96=1936 Cr.C. 384=A.I.R. 1936 Mad. 341= 70 M.L.J. 340.**

———**S. 190 (1) (c)**—*Scope and effect of—Trial commences as summons case—Magistrate discovering that offence triable as warrant case—Procedure.*

S. 190 (1) (*c*) is concerned with extra judicial information, knowledge or suspicion; it has nothing to do with knowledge gathered by a Magistrate in open Court from the evidence given by witnesses during a trial. If, after beginning a trial as summons case, a Magistrate finds that an offence triable only under warrant case procedure has been committed, he is bound to apply that procedure thenceforward and he is not in any way disqualified from proceeding with the trial. (*Burn, J.*) VENKATA RAMANA IYER. *In re.* **I.L.R. 1938 Mad. 814=1938 M.W.N. 589=177 I.C. 814= 39 Cr.L.J. 958=47 L.W. 739=11 R.M. 385= 1938 M.Cr.C. 190=A.I.R. 1938 Mad. 815= (1938) 2 M.L.J. 360.**

———**Ss. 190 (1) (c) and 191**—*Charge at the instance of Magistrate—Taking cognizance on such report—Failure to comply with S.* 191—*Trial, if vitiated.*

When a charge sheet is filed against any person at the instance of the Magistrate and the latter takes cognizance on such charge sheet, though apparently the case is taken cognizance of on a police report, the action of the Magistrate practically amounts to his taking cognizance under S. 190 (1) (*c*), as he is the real originator of the proceedings. The principle of S. 191 applies to such a case. Failure to comply with the provisions of S. 191 vitiates the proceedings, which have therefore to be quashed. (*Coldstream, J.*) MAHOMED SADIQ *v.* EMPEROR. **173 I.C. 324=10 R.L. 436=39 Cr.L.J. 299=A.I.R. 1938 Lah. 19.**

———**Ss. 190 (1) (c) and 191**—*Construction and scope—"Taking cognizance"—What amounts to—Complaine of one offence—Magistrate adding additional charge after hearing evidence under S.* 254—*If "taking cognizance"—Omission to inform accused of right to be tried by another Court—If illegality.*

The expression "take cognizance" of an offence in S. 190 deals with a matter of a purely technical nature. Cognizance is usually taken upon complaint when process is issued, but no restricted interpretation can be given to that expression in the consideration of the character of the action of a Magistrate at any particlar stage of the proceedings before him. It is clear from the terms of S. 190 that cognizance is taken upon issue of process before evidence is recorded. It is the complaint therefore which gives jurisdiction to the Magistrate to try the offence. Consequently when under S. 254 of the Code the Magistrate thinks, upon the evidence heard, that a charge different

CR. P. CODE (1898), S. 191.

from that indicated by the complaint should be framed. He does not take cognisance under S. 190 (1) (*c*) as contemplated by S. 191, so as to make it obligatory on the part of the Magistrate to inform the accused that he was entitled to have the case tried by another Court under S. 191. The power to frame charge in a warrant case of the offence disclosed is inherent in the jurisdiction assumed by the Magistrate upon the original complaint. Omission on the part of the Magistrate to inform the accused in such a case that he is entitled to be tried by another Court is not an illegality which would vitiate the trial. (*Broomfield and Wasoodew, JJ.*) EMPEROR *v.* BABURAO TATYARAO. **165 I.C. 867=38 Bom.L.R. 946=38 Cr.L.J. 9=9 R.B. 171=1936 Cr.C. 924=A.I.R. 1936 Bom. 379.**

———**Ss. 190 (1) (c) and 195 (1) (b)**—*Applicability and scope—Complaint to District Magistrate in respect of offence by Civil Court—Offence not committed in or in relation to any proceeding in Court—Effect—Trial and conviction —If illegal—Jurisdiction of District Magistrate under S.* 190 (1) (*c*).

The proceeding contemplated by S. 195 (1) (*b*) of the Cr. P. Code, is a judicial proceeding, but if the offence alleged was not committed in or in relation to any proceeding in Court, the bar of S. 195 (1) (*b*) does not apply. If, however, a complaint has been made under S. 476, to a District Magistrate in respect of an offence, and it turns out that the offence alleged was not committed in or in relation to any proceeding in Court, the complaint ceases to be a valid complaint. But that is no ground for holding that the trial and conviction following upon such complaint are illegal or without jurisdiction. The District Magistrate could proceed under Cl. (*c*) of S. 190 (1), Cr. P. Code, as on "information received from any person other than a police officer or of his own knowledge or suspicion" that an offence had been committed. A District Magistrate who receives a complaint under S. 476, Cr. P. Code, in circumstances where S. 476 is not available is not incompetent to take cognizance under S. 190 (1) (*c*). (*Dhavle and James, JJ.*) GOVERNMENT ADVOCATE, BIHAR *v.* KUMAR SINGH. **16 Pat. 571=173 I.C. 432=10 R.P. 408=4 B.R. 274=19 P.L.T. 51=39 Cr.L.J. 314=1937 P.W. N. 937=A.I.R. 1938 Pat. 83.**

———**S. 191**—Applicability and scope—Magistrate taking cognizance under S. 190 (1) (*a*) and (*b*)—Trial by succeding Magistrate—Necessity to inform accused of right of trial by another Magistrate—Section—If complied with. *See* CR. P. CODE, SS. 190 (1) (*a*), (*b*) AND (*c*) AND S. 191. **1939 P.W.N. 803.**

———**S. 191**—Failure to comply with—Proceedings, if vitiated. *See* CR. P. CODE, SS. 190 (1) (*c*) AND 191. **A.I.R. 1938 Lah. 19.**

———**S. 191**—*Scope—Non-compliance—Refusal of transfer—Effect on proceedings.*

The accused has a right in all criminal proceedings to move to have the enquiry placed before another Magistrate under S. 191, Cr. P. Code, when the Magistrate has taken cognizance of a case on his own knowledge or information. The refusal of the request for a transfer is not proper, but highly irregular and renders the proceedings liable to be set aside. (*Rowland, J.*) EMPEROR *v.* RAGHUNANDA SARAN DAS. **165 I.C.**

942=9 R.P. 234=17 Pat.L.T. 791=1936 Cr. C. 1070=1936 P.W.N. 926=38 Cr.L.J. 29=3 B.R. 107=A.I.R. 1936 Pat. 639.

———S. 192—*Part-heard case—Transfer by sub-divisional Magistrate after hearing whole case on ground of heavy work—Propriety.*

A transfer of a part-heard case should be made only in circumstances of an exceptional character and the transfer of a case which has been completely heard on the mere ground that the Magistrate is overworked is very undesirable. (*Grille, J.*) *In re.* KISNI BAXIRAM MARWADI. **I.L.R. (1937) Nag. 163=169 I.C. 96=9 R.N. 301=38 Cr.L.J. 719=A.I.R. 1937 Nag. 103.**

———Ss. 191 and 537—*Non-compliance with S. 191—Validity of subsequent proceedings.*

The failure of a Magistrate to inform the accused that he is entitled to have the case transferred to another Magistrate renders all subsequent proceedings before the Magistrate void, and this is an illegality which is not curable by S. 537. (*Tek Chand and Blacker, JJ.*) ARJAN SINGH *v.* EMPEROR. **I.L.R. (1940) Lah. 102=12 R.L. 241 (2)=41 Cr.L.J. 65=184 I.C. 680=42 P.L.R. 51=A.I.R. 1939 Lah. 479.**

———S. 192—*Applicability—Application to District Magistrate under S. 144 (4) to rescind order passed by subordinate magistrate—Transfer—Competency.*

An application made to a District Magistrate under S. 144 (4) of the Cr. P. Code, to rescind an order passed by a subordinate magistrate under S. 144 (1) is not a *case* falling under S. 192 or 528, Cr. P. Code and cannot be transferred by the District Magistrate for disposal to another Magistrate Subordinate to him. (*Pandrang Row, J.*) MOOKA PANDARAM *v.* SINNU MUTHIRIYAN. **I.L.R. (1937) Mad. 171=166 I.C. 77=9 R.M. 328=38 Cr.L.J. 125=1936 M.Cr.C. 307=1936 M.W.N. 1089=44 L.W. 686=A.I.R. 1937 Mad. 167=71 M.L.J. 761.**

———S. 192—*Order of transfer—Order in writing—Necessity.*

The terms of S. 192, unlike S. 528 (5) of the Cr. P. Code, does not require that an order of transfer under that section should be in writing. (*Guha and Biswas, JJ.*) RAMAKRISHNA SINHA *v.* EMPEROR. **42 C.W.N. 246=174 I.C. 513=39 Cr.L.J. 417=10 R.C. 693=A.I.R. 1938 Cal. 195.**

———S. 192 — *Sub-Divisional Magistrate — Powers of—Calendar case pending before him and triable by First Class Magistrate—Transfer to Second Class Magistrate to enable committal to sessions—Propriety.*

It is not proper for a Sub-Divisional Magistrate to transfer Calendar cases triable by a First Class Magistrate from his file to the file of a Second Class Magistrate with a direction to treat them as preliminary register case, when the intention of such transfer is that the cases should be committed for trial to the Sessions Court. The Sub-Divisional Magistrate has really no power to direct a Second Class Magistrate to treat the Calendar cases which are triable by a First Class Magistrate as sessions cases. If he thinks that those cases ought to be tried by the Court of Session he should himself proceed to commit them to the Sessions Court under S. 347, Cr. P. Code. If he orders a transfer to the Second Class Magistrate, that amounts to a refusal to exercise

his jurisdiction and to perform his duty, and the order of transfer will be set aside in revision by the High Court. (*Pandrang Row, J.*) RAMASUBBAYYA, *In re.* **47 L.W. 486=1938 M.W.N. 417=173 I.C. 182=11 R.M. 45=39 Cr.L.J. 715=1938 M.Cr.C. 56=A.I.R. 1938 Mad. 529=(1938) 1 M.L.J. 403.**

———S. 192—Transfer by Magistrate not competent to transfer—If cured by S. 529 (*f*). *See* CR. P. CODE, S. 529 (*f*). **42 C.W.N. 246.**

———Ss. 192 and 202—Transfer of case——Power of Magistrate after calling for police report. *See* CR. P. CODE, Ss. 202 AND 192. **41 P.L.R. 807.**

———S. 192—*Transfer under, to Magistrate lacking jurisdiction—Effect.*

If a Magistrate to whom a case is transferred under S. 192, Cr. P. Code, lacks jurisdiction to try that case, the order of transfer is bad in law. (*Zia-ul-Hasan, J.*) MATHRA *v.* KAMTA. **15 Luck. 468=187 I.C. 553=12 R.O. 394=1940 A.W.R. (C.C.) 158=1940 O.L.R. 215=1940 A.Cr.C. 68=41 Cr.L.J. 469=1940 O.A. 314=1940 O.W.N. 354=A.I.R. 1940 Oudh 244.**

———Ss. 192, 202 and 203—*Transfer of complaint to Subordinate Magistrate after examining witnesses under S. 202—Power of latter to re-examine them under S. 202 and then dismiss complaint.*

No doubt if a complaint is transferred under S. 192 (1), Cr. P. Code, at the very outset by one Magistrate to another, the latter has power to take action under Ss. 202 and 203, Cr. P. Code, but it is impossible to suppose that the Code contemplates that when one Magistrate has examined witnesses under S. 202 and has believed them, and thereupon transfers the case for trial to a Subordinate Magistrate, that Magistrate should have power to examine those same witnesses over again under S. 202; and then proceed to dismiss the complaint under S. 203, Cr. P. Code. (*Smith, J.*) SHEO BALAK SINGH *v.* SANT BUX SINGH. **165 I.C. 28=37 Cr.L.J. 1128=9 R.O. 166=1936 O.W.N. 1079=12 Luck. 523=1936 O.L.R. 607=A.I.R. 1937 Oudh 81.**

———S. 192 (1)—*Cases that can be transferred.*

S. 192 (1), Cr. P. Code, is sufficiently wide to cover cases under the Code other than criminal cases. The Magistrates mentioned therein have power to transfer cases to subordinate Magistrates either for the purpose of holding a trial, for example under Chaps. XX or XXI of the Code, or for enquiry, for example under Chaps. VIII, XII or XVII of the Code. (*Edgley, J.*) HAFIZAR RAHAMAN *v.* AMINAL HOQUE. **44 C.W.N. 1114=72 C.L.J. 104.**

———S. 192 (1)—*Case transferred after issuing process to one of accused persons—Death of that accused—If terminates proceedings in the case.*

If a Magistrate issues process against only one of the accused persons and then transfers the case, the death of that accused has not the effect of terminating the proceedings in the case. The case against the other accused persons remains undecided until the Magistrate to whom the case is transferred thinks fit to conclude the proceedings against them. (*Edgley, J.*) HAFIZAR RAHAMAN *v.* AMINAL HOQUE. **44 C.W.N. 1114=72 C.L.J. 104.**

CR. P. CODE (1898), S. 192.

———**S. 192 (1)**—*"Inquiry"—If means inquiry under S. 202—Transferee Magistrate—If can return case to transferring Magistrate for issue of process.*

The term "inquiry" in S. 192 (1), Cr. P. Code, is used with special reference to such inquiries as are held in connection with proceedings under Chapters VIII, XII, and XVIII of the Code and does not mean an inquiry under S. 202. When once a case has been validly transferred to a Subordinate Magistrate, such Magistrate has no authority to return the case to the transferring Magistrate in order that the latter may issue process under S. 204, and his duy is to complete the trial according to law. (*Edgley, J.*) HAFIZAR RAHAMAN *v.* AMINAL HOQUE. **44 C.W.N. 1114=72 C.L.J. 104.**

———**S. 192 (1)**—*Powers of transferee Magistrate—Case transferred after summoning one of accused persons—Jurisdiction of transferee Magistrate to summon the others.*

When a case has been transferred to a Magistrate under S. 192 (1), Cr. P. Code, that Magistrate has the same authority to deal with the case which has been transferred to him, as regards the issuing of processes and other matters connected with the inquiry or trial, as is vested in the superior Magistrate from whom he received the case on transfer. If, therefore, the superior Magistrate after an enquiry under S. 202 summons one of the accused persons and then transfers the case for disposal to a subordinate Magistrate, the latter has jurisdiction to summon persons against whom process had not been issued by the superior Magistrate. (*Edgley, J.*) HAFIZAR RAHMAN *v.* AMINAL HOQUE. **72 C.L.J. 104=44 C.W.N. 1114.**

———**S. 192 (1)**—*Transfer of case—Powers of transferring Magistrate thereafter.*

When a case has been transferred under S. 192 (1), Cr. P. Code, it is transferred for all purposes from the file of the superior Magistrate to that of the Subordinate Magistrate and, thereafter, the superior Magistrate has no jurisdiction to issue any orders connected with the case except such as are contemplated under the provisions of S. 528, Chap. XXXII of the Code. (*Edgley, J.*) HAFIZAR RAHMAN *v.* AMINAL HOQUE. **44 C.W.N. 1114=72 C.L.J. 104.**

———**S. 192 (1)**—*Transfer of case—When may be made.*

Under S. 192 (1), Cr. P. Code, it is competent for a Magistrate to retain the case in his own file until after the accused summoned by him has appeared and then transfer it for disposal to a subordinate Magistrate or to transfer the case immediately after the complainant has been examined before the issue of process. (*Edgley, J.*) HAFIZAR RAHMAN *v.* AMINAL HOQUE. **44 C.W.N. 1114=72 C.L.J. 104.**

———**S. 192 (1)**—*Transfer of case—Whole case, if transferred—Piece-meal transfer—Legality.*

The legality of a piece-meal transfer of a case under S. 192 (1), Cr. P. Code, is open to considerable doubt, subject to the authority of a Magistrate who takes cognisance of an offence on complaint to dismiss the complaint as against some of the persons whom it is sought to prosecute and to leave the case open as against others. But even if such piece-meal transfer is in certain circumstances valid, that portion of the case which has not been transferred must be clearly indicated in the order of transfer. In the absence of a clear indication as to which part of the case is retained on the file of the transferring Magistrate or some further indication to the effect that such Magistrate intended to dismiss the complaint against those accused persons in respect of whom he did not issue process it must be taken that the whole case has been transferred to the Subordinate Magistrate not only as against the accused persons actually summoned but against all other persons whom the Subordinate Magistrate might consider to be implicated in the offence. (*Edgley, J.*) HAFIZAR RAHMAN *v.* AMINAL HOQUE. **44 C.W.N. 1114=72 C.L.J. 104.**

CR. P. CODE (1898), S. 195.

———**S. 195.**

Abetment.
Appeal.
Applicability.
Complaint.
Complaint by Court.
Court.
Jurisdiction.
Public Servant.
Revision.
Sanction.
Scope.
Miscellaneous.

Abetment.

———**S. 195 (1) (b)**—*Complaint in respect of offence—Power of Magistrate to convict for abetment.*

Per *Roberts, C.J.*—A Magistrate can take cognisance, not only of the offence under S. 195 (1) (*b*), Cr. P. Code, upon the complaint in writing of the Court in relation to which the offence is alleged to have been committed; but of all cases in which the abetment of such offence has been proved. If therefore a Court decides that a complaint should be made against a person for the commission of forgery under S. 205, I.P. Code, and such a complaint is heard by the Magistrate, he plainly has jurisdiction to convict that person of abetment of forgery merely if he has arrived at the conclusion, after hearing the evidence, that the accused was not a principal but an abettor. (*Roberts, C.J. and Braund, J.*) TAN BA CHENG *v.* REGISTRAR, ORIGINAL SIDE HIGH COURT. **1940 Rang.L.R. 12=187 I.C. 754=12 R.R. 354=41 Cr.L.J. 515=A.I.R. 1940 Rang. 104.**

———**S. 195 (4)**—*Abetment—If "offence".*

Under Sub-S. (4) of S. 195 an "offence" under the section includes abetments and attempts, so that if a complaint of the Court is necessary in the case of the substantive offence it is also necessary in case of an abetment. (*Davis, J.C. and Weston, J.*) ASSUDOMAL RAMANDAS *v.* JHAWANDAS HOTCHAND. **I.L.R. (1940) Kar. 435=190 I.C. 222=A.I.R. 1940 Sind 100.**

Appeal.

———**S. 195 (1) (a)**—*Order refusing to file complaint—Appeal.*

No appeal lies from an order by a public servant under S. 195 (1) (*a*) Cr. P. Code, refusing to file a complaint of an offence under S. 188, I.P. Code. (*Lakshmana Rao, J.*) MARUDA PILLAI *v.* NARAYANASWAMI PILLAI. **181 I.C. 557=11 R.M. 830 =40 Cr.L.J. 568 (2)=49 L.W. 387 (1)=1939**

CR. P. CODE (1898), S. 195.

M.Cr.C. 59=1939 M.W.N. 119=A.I.R. 1939 Mad. 336.

———S. 195 (3)—*Appeal lying from Sub-Judge to both senior Sub-Judge and District Judge—Sub-Judge to whom subordinate.*

For purposes of S. 195, Cr.P.Code, the appellate Court of inferior jurisdiction must be taken to be the Court to which the original Court is subordinate, when appeals from such Court lie to more than one Court. When, therefore, appeals from a Court of Subordinate Judge lie both to the District Judge and to the Senior Subordinate Judge, the Court of the Subordinate Judge is subordinate to the Senior Subordinate Judge for the purposes of the section. (*Skemp, J.*) NOOR MOHAMMAD *v.* EMPEROR. 42 P.L.R. 23.

Applicability.

———S. 195 (1) (b)—*Applicability—"B" summary—If a judicial act.*

The mere fact that a Magistrate gives a "B" summary does not bring the offence in relation to which that summary is given within the provisions of S. 195 (1) (*b*), for the giving of "B" summary is merely an administrative and not a judicial act. (*Davis, J.C. and Tyabji J.*) MT. RAJI *v.* ALLAUDIN. I.L.R. (1939) Kar. 388=180 I.C. 650=11 R.S. 183=40 Cr. L.J. 461=A.I.R. 1939 Sind 65.

———S. 195 (1) (c)—*Applicability—Conditions of—If to be read with S.* 476.

S. 195 (1) (*c*), Cr.P.Code, must be read with S. 476, and it applies only to cases where the offence is committed by a party as such to a proceeding in any Court in respect of a document which has been produced or given in evidence in such proceeding. If the documents in question in respect of which the offence in question is alleged have been committed are not alleged to have been forged by a party as such to the proceedings, the offence, if any, is not committed in or in relation to such proceedings, and hence S. 195 (1) (*c*) will not apply, and no complaint by the Court is necessary. (*Collister and Bajpai, JJ.*) EMPEROR *v.* BISHAN SAHAI. I.L.R. 1937 All. 779=1937 A.W.R. 748=1937 A. L.J. 1073=171 I.C. 994=10 R.A. 350=39 Cr.L.J. 38=1937 All.L.R. 935=1937 A.Cr. C. 119=A.I.R. 1937 All. 714.

———S. 195 (1) (a) and (b)—*Applicability—Defamatory and false allegations in petition and sworn statement filed in Court—Offence—Complaint under S.* 500, *I. P. Code—Maintainability—Complaint by Court—Necessity.*

Where a complaint of defamation is founded on false allegations in a petition and sworn statement filed in Court, the offence falls under S.182 or 193, I.P. Code, and a complaint by the Court under S. 195 (1), Cr.P. Code, is necessary. Parties cannot be allowed to evade the provisions of S. 195, Cr.P. Code, by filing the complaint under another provision of law, *viz.*, S. 500, I. P. Code. (*Lakshmana Rao, J.*) RAMASWAMI KONAR *v.* NACHIAR AMMAL. 1940 M.W.N. 867=52 L.W. 350=(1940) 2 M.L.J. 491.

———S. 195—*Applicability—False information to Police—Subsequent complaint by person falsely accused—Complaint taken on file under S.* 182, *Indian Penal Code—Enquiry by Magistrate*

CR. P. CODE (1898), S. 195.

—Case subsequently taken under S. 211, *Indian Penal Code—Propriety—Objection to maintainability of complaint on ground of want of complaint under S.* 195, *Cr. P. Code—Sustainability.*

The wife of one S. K. died. Information was given to the Village Munsif that the death was due to beating by her husband. The Village Munsif went to the nearest Police Station and gave a report to that effect. The Sub-Magistrate to whom the result of the police investigation was reported to the effect that the information was not true and that death was due to natural causes directed the removal of the complaint from the police file. S.K. then made a private complaint before the Sub-Magistrate against the Village Munsif and his informant for having given false information against him with a view to prosecute him for murder. The Sub-Magistrate took the case on file under S. 182, I.P. Code, and held an enquiry under S. 202, Cr.P. Code. After the enquiry he filed the case not under S. 182, I.P. Code, but under S. 211, I.P. Code. Just before the commencement of the case objection was raised that an offence under S. 182, I.P. Code, having been disclosed in the complaint it could not be entertained without the written complaint of the Police Sub-Inspector under S. 195, Cr.P.Code.

Held, that when all the facts were examined, the only section appropriate and applicable to the case was S. 211, I.P. Code, and a private complaint under S. 211, I. P. Code, being maintainable by a private person, the mere fact that an offence under S. 182, I.P. Code was also disclosed did not in law debar the Court from entertaining and inquiring into the offence under S. 211, I.P. Code. (*King, J.*) MUTHUVELU KUDUMBURAN *v.* SAMIAYYA KUDUMBURAN 59 Mad. 1083=165 I.C. 292=37 Cr.L.J. 1134 =9 R.M. 228=1936 M.W.N. 641=44 L. W. 631=1936 M.Cr. C. 258=A.I.R. 1937 Mad. 8 =71 M.L.J. 485.

———S. 195 (I) (b)—*Applicability — Offence of making false charge.*

S. 195 (1) (*b*) does not apply to a prosecution for the offence of making a false charge which had not reached any Court of law. The accused made a report at a police station charging certain persons with an offence. The police, after investigation, found the report to be false and malicious and threw out the case. The accused did not carry the case any further or file a complaint in any Court, whereupon the accused was prosecuted by the police under S. 211, Penal Code.

Held, that the prosecution was not barred by S. 195 (1) (*b*). (*Mya Bu, J.*) THE KING *v.* MA E. 180 I.C. 906=11 R.R. 441=40 Cr.L.J. 432 =A.I.R. 1939 Rang. 148.

———S. 195—*Applicability—Offences requiring sanction and offences not requiring sanction committed in same transaction—Absence of sanction—Prosecution for offences not requiring sanction—Sustainability.*

Where in the course of one transaction a number of offences are committed, some requiring sanction for prosecution, and others not requiring such sanction, it is not necessary that the prosecution of those offences which do not require sanction should depend upon the obtain-

ing of sanction for prosecution of the offences requiring sanction. The law only requires that for the prosecution of certain particular offences sanction of the Court shall be obtained; but it does not say that if in the course of commission of an offence requiring sanction for prosecution other offences are committed, the Magistrate or the police are helpless in proceeding to prosecute the offender for the latter offences unless the Court sanctions the prosecution of the former. Four Civil Court peons with warrants for attachment of movables along with some men of the decree-holder went to the village of the judgment-debtors to effect the attachment. They attached some head of cattle of the judgment-debtors and were proceeding to attach more when the accused judgment-debtors along with others came on the scene armed with lathis, rescued the cattle and chased the decree-holder's men, the identifiers, and also restrained the Civil Court peons for some time. The accused were convicted under S. 143, I.P. Code. It was contended that there having been resistance to the writ of the Court, the accused could not be prosecuted even for the offence of unlawful assembly or rioting without the sanction of the Court which issued the writs of attachment.

Held, that as the unlawful assembly was a separate offence for which a separate charge was permissible under S. 143, I.P. Code, it was immaterial that there was no sanction as required by S. 195, Cr. P. Code. (*Mahomed Noor and Rowland, JJ.*) SHEO AHIR v. EMPEROR. **17 Pat. 680=11 R.P. 261=40 Cr.L.J. 71=5 B.R. 104=19 Pat. L. T. 665=1938 P.W.N. 813=178 I.C. 487=A.I.R. 1938 Pat. 548.**

——**S. 195 (1) (b)**—*Applicability—Offence under S. 193, I.P. Code—Fabrication of evidence to be used in comtemplated suit—Prosecution for—Complaint by Court—Necessity—Absence of complaint—If vitiates whole proceedings.*

To attract the provisions of S. 195 (1) (*b*), in respect of an offence under S. 193, I.P. Code, it is not necessary that proceedings in Court should be pending at the date of the offence. If the charge is that evidence has been fabricated in connection with proceedings which were only contemplated by the accused, sanction would be necessary, the burden being on the Crown to prove the fact that the proceedings were in fact contemplated because the mere fabrication of evidence is not in itself a criminal offence. S. 195 would, however, not apply to a case in which an offence under S. 193, I.P. Code, is in respect of proceedings in a Court of law which were contemplated but which in fact were never started. But if the fabrication is in relation to a claim made in a suit actually filed in Court, though the suit is instituted only later, a complaint by the Court is necessary in regard to a charge under S. 193, I.P. Code. Absence of complaint in respect of the charge is a defect which affects the entire proceedings. Where the Court has acted without jurisdiction with regard to a part of the trial, the whole proceedings are vitiated by the illegality. (*Wassoodew and Sen, JJ.*) EMPEROR *v.* RAMCHANDRA RANGO. **181 I.C. 870=12 R.B. 356=40 Cr. L.J. 579=41 Bom.L.R. 98=A.I.R. 1939 Bom. 129.**

——**S. 195 (1) (c)**—*Applicability—Offence with reference to document produced in Court committed prior to proceedings—Bar under S. 195 (1) (c)—If applies.*

The relevant date which has to be considered under S. 195 (1) (*c*), Cr.P.Code, is the date at which a Court is invited to take cognizance of a complaint. At that moment the Court has to ask itself whether it is debarred from taking cognizance by reason of the provisions of S. 195, and in cases falling under S. 463 or 471, I.P. Code, the Court has to see whether the offence in respect of which it is asked to take cognizance is alleged to have been committed by a party to any proceeding in any Court, and in respect of a document produced or given in evidence in such proceeding. If at the time when the Court is asked to take cognizance of a complaint the accused is a party to proceedings in a Court in which the document has been produced or used in evidence, then the bar contained in S. 195 (1) (*c*) applies. The section applies if at the time when the complaint is lodged the accused person is a party to a proceeding. It is not necessary that the alleged offence must be committed by a person who at the date of the committal of the offence is a party to proceedings in Court, and must also be in respect of a document produced or given in evidence in such proceeding. (*Beaumont, C. J. and Wadia, J.*) EMPEROR *v.* RACHAPPA YELLAPPA. **60 Bom. 756=163 I.C. 279=37 Cr.L.J. 814=8 R.B. 445=38 Bom. L.R. 440=1936 Cr.C. 627=A.I.R. 1936 Bom. 221.**

——**S. 195 (1) (c)**—*Applicability—User of forged documents after termination of proceedings in Court—Complaint by Court—Necessity.*

Where offences of using forged documents under S. 471, I.P. Code, are committed not in the course of proceedings in Court but after the termination of the proceedings in suit, no complaint by the Court is necessary. (*Lakshmana Rao, J.*) SUBBA RAO *v.* EMPEROR. **1940 M.W.N. 865.**

Complaint.

——**S. 195 (1) (c)**—*Action against party to proceeding before Court quashed for want of complaint of Court—Action against his co-accused for abetting offence—If also to be quashed.*

Where action under S. 467, Penal Code, against the party to the proceeding before a Court has been quashed for want of complaint of Court in which the offence was committed, there is no reason to quash proceeding against his co-accused for abetting offence under S. 467. (*Davis, J. C. and Weston, J.*) ASSUDOMAL RAMANDAS *v.* JHAWANDAS HOTCHAND, **I.L.R. (1940) Kar. 435=190 I.C. 222=A.I.R. 1940 Sind 100.**

——**S. 195 (1) (c)**—*Charges under Ss. 465 and 466, I. P. Code, against presiding Judge—Complaint by Court—If necessary.*

Where a Subordinate Judge has abetted an offence under S. 193, Penal Code, and is also alleged to have committed offences under Ss. 465 and 466, Penal Code, complaint by a Court, so far as the offences under Ss. 465 and 466

are concerned, is not necessary, as he is not a party to the proceeding before the Court. (*Dalip Singh and Blacker, JJ.*) BEHARI LAL *v.* ABDUL QADIR. **190 I.C. 178=A.I.R. 1940 Lah. 292.**

———**S. 195 (1) (a)**—*Complaint by officer subordinate to officer concerned—Jurisdiction of Court to take cognizance.*

The complaint contemplated by S. 195 (1) (*a*) must be filed by the officer concerned or by some officer to whom such officer is subordinate and if filed by some officer who is himself subordinate to such officer concerned the Court has no jurisdiction to take cognizance of it. (*Blacker, J.*) SHER MAHOMED *v.* EMPEROR. **I.L.R. (1940) Lah. 396=186 I.C. 703=12 R. L. 430=41 Cr.L.J. 368=A.I.R. 1940 Lah. 15.**

———**S. 195 (1) (b)**—Complaint in writing—Necessity—Only some of the offences charged, falling under S. 195 (1) (*b*)—Procedure. *See* PENAL CODE, Ss. 193, 211, 218 AND 220. **A.I.R. 1937 Lah. 802.**

———**S. 195 (1) (a)**—*Complaint in writing of public servant—What amounts to.*

Where a Tahsildar submitted a report to his superior Executive officer, the Sub-Divisional officer, proposing to lodge a complaint under S. 186, I.P.Code, against a certain person, and the Sub-Divisional officer endorsed on that report that a complaint might be lodged under S. 183, I.P.Code, and the Tahsildar then forwarded the papers to a Magistrate for favour of further action.

Held, that the communications between the Tahsildar and the Sub-Divisional officer do not constitute a complaint in writing made by a public officer to a Court having jurisdiction in the case under S. 195, Cr.P. Code, and consequently the proceedings before the Magistrate should be quashed. (*Grille, J.*) SYED HABIB *v.* EMPEROR. **I. L. R. (1939) Nag. 116=10 R. N. 152=172 I.C. 51=39 Cr.L.J. 58=A.I.R. 1938 Nag. 106.**

———**S. 195 (1) (b)**—Complaint under—Cognizance in respect of offenders not specifically mentioned in. *See* CR. P. CODE, S. 190. **I. L.R. (1937) Nag. 492.**

———**S. 195 (1) (a)**—*Complaint under S. 186, I. P. Code—Power of superior authority to lodge—Aggrieved person not public servant.*

S. 195 (1) (*a*), Cr. P. Code, does not authorise a superior authority to lodge a complaint under S. 186, I.P. Code, when the aggrieved person is not a public servant. (*Bartley and Sen, JJ.*) MADHUSUDAN *v.* HARIDAS GOPE. **44 C.W.N. 1011.**

———**S. 195 (1) (a)**—*Complaint under S. 225-B, I. P. Code—Proper method—Burma Courts Manual, para.* 1057.

A process server should not make a direct complaint to the Criminal Court under S. 225-B, I.P. Code. The provisions of paragraph 1057 of the Burma Courts Manual require a report to the Civil Court concerned, and an enquiry by that Court, and then preferably a complaint by the Court itself under S. 125, (1) (*a*), Cr.P. Code. It is only where that is not possible that the Court will direct the process server to make a complaint, giving him a letter addressed to the Magistrate, informing the Magistrate that the complaint is being made by the direction of the Court, and that the Court has *prima facie* satisfied itself before permitting the complaint to be made. (*Mosely, J.*) THE KING *v.* MAUNG PO SHAIN. **1939 Rang. L.R. 445 =183 I.C. 791=40 Cr.L.J. 845=12 R.R. 116=A.I.R. 1939 Rang. 320.**

———**S. 195 (1) (a)**—*Communication by Sub-Inspector to Superintendent of Police forwarded by latter to Magistrate—If amounts to complaint—Irregularity—If vitiates trial.*

Per *Rachhpal Singh, J., agreeing with Sulaiman, C. J., Bennet, J., contra*:—Where a Sub-Inspector addressed and sent to the Superintendent of Police a communication headed as 'Report made by Sub-Inspector' stating that a certain Village headman named therein was guilty of an offence under S. 177, I.P. Code and concluding with a request for permission to institute a case against him, and the Superintendent of Police forwarded this to a Magistrate "for information and necessary action."

Held, that the communication made by the Sub-Inspector was nothing else but merely an information report sent to the Superintendent of Police and the communication forwarded by the latter to the magistrate does not amount to a complaint within the meaning of S. 195, Cr. P. Code.

Held further, that the whole trial was illegal because there was no complaint and that the illegality could not be cured by S. 537, Cr. P. Code. (*Sulaiman, C. J., Bennet and Rachhpal Singh, JJ.*) LAKHAN *v.* EMPEROR. **I.L.R. (1937) All. 162=165 I.C. 769=9 R.A. 312= 1936 A.W.R. 905=1936 A.Cr.C. 175=1936 Cr. C. 1011=1936 A.L.J. 1064=38 Cr. L. J. 57=1936 All.L.R. 950=A.I.R. 1936 All. 788.**

———**S. 195**—*Disobedience to orders of Magistrate—Prosecution for offences under Ss.* 447 *and* 188, *Penal Code—Same Magistrate trying case—Validity—Need for complaint.*

The proceedings started with a complaint by the Police against a certain person for offences under Ss. 447 and 188, Indian Penal Code, in respect of a certain act which was said to have constituted disobedience of the orders of the Sub-Magistrate issued under S. 144, Cr.P. Code. It appeared that the very Sub-Magistrate whose orders were said to have been disobeyed by the accused tried the alleged offender, and there was no previous complaint by that Magistrate or by his superor, and the accused was tried and convicted by him.

Held, that there should have been no cognizance taken on the case without a proper complaint as enacted by S. 195, Cr.P.Code, that in any case the Sub-Magistrate should not have heard and decided the case himself and that the proceedings should therefore be quashed. (*Pandrang Row, J.*) VEEAPPAN MOOPPAN, *In re.* **183 I.C. 240=40 Cr.L.J. 752=12 R.M. 263 =1939 M.W.N. 340=49 L.W. 474=1939 M. Cr.C. 103=A.I.R. 1939 Mad. 496=(1939) 1 M.L.J. 573.**

———**S. 195 (1) (b)**—*False allegations in affidavit and sworn statement filed in Court—Complaint of defamation founded on—Complaint by Court—If condition precedent to—Maintainability.*

A complaint of defamation founded on alle-

gations, which are stated to be false, contained in an affidavit and sworn statement filed in a Court of law, is a complaint of an offence falling under S. 193, I.P. Code, and cannot be taken cognizance of without a complaint by the Court as required by S. 195 (1) (*b*) of the Cr.P. Code. The complainant cannot be permitted to evade the provisions of S.195 (1) (*b*), Cr.P. Code, by filing the complaint under another section of the Penal Code. (*Lakshmana Rao, J.*) SHANMUGASUNDARAM PILLAI *v.* MANICKA MUDALIAR. **181 I.C. 86=11 R.N. 770=40 Cr. L.J. 542=49 L.W. 102=1939 M. Cr. C. 77=1939 M.W.N. 192 (1)=A.I.R. 1939 Mad. 368=(1939) 1 M.L.J. 412.**

Complaint by Court.

———S. 195 (1) (c)—*Complaint of forgery in respect of document filed in Civil Court—Maintainability—Complaint by Civil Court—Necessity.*

Where the offence charged in a complaint is one of forgery in respect of a document which is filed in a Civil Court in a judicial proceeding before the complaint in question is instituted in the Criminal Court, the latter is not competent to inquire into the case or take cognizance of the offence in the absence of a complaint by the Civil Court in which the document is filed or by some Court to which that Court is subordinate. A complaint by the Civil Court is necessary in such a case under S. 195, Cr. P. Code. (*Pandrang Row, J.*) RAMADOSS *v.* YELLAMANDA REDDI. **1937 M.W.N. 92.**

———S. 195—*Complaint under Ss.* 204, 409 *and* 420, *I. P. Code—Complaint disclosing primarily offence under S.* 210, *I. P. Code—Complaint of Court—Necessity for.*

Where a complaint is filed by a private person under sections of the Penal Code, which do not require a complaint of the Court under S. 195, Cr.P. Code, but the complaint is such that it discloses other facts which constitute an offence for which a complaint of the Court is necessary, the principle to be followed in cases of this kind is not whether the complaint discloses other facts which constitute offences for which no complaint of the Court is necessary as well as facts for which a complaint of the Court is necessary, but whether there is or is not an evasion of the provisions of S. 195; and the test whether there is evasion or not is whether the facts disclose primarily and essentially an offence for which the complaint of the Court is required. The accused, who was entitled to some amount on a decree on an award on disputes between him and the complainant in partnership business, obtained possession of a copy of the decree from the possession of complainant, on which was entered full satisfaction of the claim of the decree, by falsely representing to him that he wanted it to show to other partners in their business, and instead of returning the said copy to the complainant obtained in execution of the decree a further sum, fraudulently secreting or destroying the document dishonestly obtained by him by false representation. The complainant filed a complaint under Ss. 403, 409 and 420, Penal Code. The trial Magistrate while dismissing the complaint, held that the complaint disclosed primarily an offence under S. 210, Penal Code, for which a

complaint of the Court was necessary. In revision it was sought by the complainant to bring the case under Ss. 403 and 477, Penal Code, also;

Held, to prove an offence under Ss. 204 and 477 proof of an offence under S. 210, Penal Code, was necessary and it required a complaint of the Court. S. 403 was also inapplicable to the case and the facts primarily and essentially disclosed an offence under S. 210, Penal Code, and it was "primarily and essentially" the offence complained of. The other offences alleged were merely subsidiary to that offence, the alleged secretion, cheating and misappropriation being in fact all meant for the purpose of obtaining the fraudulent decree which being the principal offence required a complaint of the Court. (*Davis, J. C.*) SADHURAM CHIMANDAS *v.* CHIMANDAS BUDHURAM. **I.L.R. (1940) Kar. 275=169 I.C. 112=9 R.S. 277=38 Cr. L.J. 742=A.I.R. 1937 Sind 81.**

———S. 195 (1) (c)—*Criminal Court taking cognizance of offence under S.* 468, *I. P. Code—Document subsequently called for by Civil Court—Complaint by Civil Court, if necessary to continue prosecution.*

Where long after the criminal Court had taken cognizance of an offence under S. 468, I. P. Code, the Civil Court called for the document in dispute, which had become an exhibit in the criminal case, and the document was also tendered in evidence in the civil case,

Held, that the prosecution under S. 468, I. P. Code, could continue in the Criminal Court though the Civil Court which had called for the document had not presented a complaint in writing. (*Abdul Rashid, J.*) NANAK CHAND *v.* KHWAJA MAHMUD. **168 I.C. 740=9 R.L. 672=38 Cr.L.J. 581 (2)=38 P.L.R. 1120=A.I.R. 1937 Lah. 238.**

———S. 195 (1) (b)—*Defamatory statement in deposition made in Court—Offence—Prosecution—Complaint by Court—Necessity—Penal Code, Ss.* 193 *and* 500.

The making by a person of a defamatory statement in a deposition as a witness in a case, which is found to be deliberately false, is an offence under S. 193, I. P. Code, and as such cannot be taken cognizance of without a complaint by the Court before which it is made. Parties cannot be allowed to evade the provisions of S. 195 (1) (*b*), Cr. P. Code, by filing a complaint under another provision of the Penal Code, *viz.*, S. 500, I. P. Code. (*Lakshmana Rao, J.*) GANAPATHI ASARI *v.* KUPPUSWAMI ASARI. **183 I.C. 179 (1)=40 Cr. L.J. 757=12 R.M. 250=49 L.W. 456=1939 M. Cr.C. 110=1939 M.W.N. 320=A.I.R. 1939 Mad. 493=(1939) 1 M.L.J. 614.**

———S. 195 (1) (a)—*Enquiry before making of complaint—Mode of.*

Per *Patterson, J.*—The law does not require that proceedings with a view to the making of a complaint under S. 195 (1) (*a*), Cr. P. Code, should be in the form of a public judicial enquiry. *Some* enquiry before making a complaint is of course desirable, but that enquiry ought to be of a purely administrative character and need not be made in public; nor need the statement of witnesses be recorded on oath.

CR. P. CODE (1898), S. 195.

(*Jack and Patterson, JJ.*) RAMESH CHANDRA PODDAR *v.* HARI MOHAN PODDAR. **42 C.W.N. 531.**

———**S. 195 (1) (b)**—*Fabrication of false document for use in criminal proceedings—Proceedings subsequently instituted—Offence—Prosecution—Complaint of Court—Necessity.*

It is quite clear that when certain persons fabricate false documents with a view to make use of them in criminal proceedings which are thereafter immediately instituted, they are guilty of an offecne under S. 193, I.P. Code, in relation to a proceeding in a Court, and therefore a complaint from that Court or some Court to which it is subordinate is required under S. 195 (1) (*b*), Cr.P. Code, for the prosecution of such persons. (*King, J.*) SUBBA REDDI *v.* SWAMI REDDI. **1937 M.W.N. 870.**

———**S. 195 (1) (c)**—*Guardian or next friend of minor party—Prosecution—Complaint by Court—Necessity.*

S. 195 (1) (*c*) cannot apply unless the accused or one of the accused persons was a *party* to some proceeding in Court. A guardian or next friend of a minor party is not a *party* as contemplated by S. 195 (1) (c). Consequently no complaint by the Court is necessary for prosecuting such guardian or next friend for an offence mentioned in the section. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* MALLAPPA TEJAPPA. **166 I.C. 270=9 R.B. 229 =38 Cr. L.J. 149=38 Bom.L.R. 964=A.I.R. 1937 Bom. 14.**

———**S. 195 (1) (b)**—*Offence not committed in Court—Complaint by Court—Necessity.*

S. 195 (1) (*b*) does not relate to offences under S. 211 generally. It relates to offences under S. 211, I.P. Code, when such offences are alleged to have been committed in or in relation to any proceedings in any Court. Where the offence under S. 211, I. P. Code, is not committed in the Court of Sub-divisional Magistrate his giving of the "B" summary as an administrative officer cannot be held to have been a proceeding in his Court. Hence his complaint is not necessary. (*Davis, J.C. and Mehta, J.*) DHARAMDAS HIRANAND *v.* EMPEROR. **I.L.R. (1939) Kar. 241=11 R.S. 82=40 Cr. L.J. 12=178 I.C. 218=A.I.R. 1938 Sind 213.**

———**S. 195 (1) (a)**—*Offence under S. 186, I. P. Code—Public servant concerned withdrawing proceedings for making complaint—Revival of such proceedings by private person—Desirability.*

When the public servant concerned has withdrawn the proceedings originally instituted by him for making a complaint under S. 186, I. P. Code, it is definitely undesirable that they should be revived by a person who is not a public servant. (*Bartley and Sen, JJ.*) MADHU SUDHAN *v.* HARIDAS GOPE. **44 C.W.N. 1011.**

———**S. 195 (1) (b)**—*Offence under S. 211, I. P. Code—Private complaint—Maintainability.*

It is not the intention of the Legislature that an offence under S. 211, I.P. Code, can be made subject of a complaint only by Courts or public officers. When an offence under S. 211 is not committed in or in relation to any Court, a complaint of such an offence can be made by a private individual, and it is not necessary that the complaint must be made by a Court or by a public officer. (*Davis, J.C. and Tyabji, J.*) MT. RAJI *v.* ALLAUDIN. **I.L.R. (1939) Kar. 388= 180 I.C. 650=11 R.S. 183=40 Cr.L.J. 461=A.I.R. 1939 Sind 65.**

———**S. 195 (1) (a)**—*Refusal to make complaint by Subordinate Judge—Power of District Judge to make complaints—Civil Court peon, if subordinate to latter.*

A public servant is not barred from making a complaint under S. 195 (1) (*a*), Cr. P. Code, merely because his subordinate has refused to do so. A District Judge is, therefore, entitled to make a complaint in respect of an obstruction offered to a civil Court peon, although the Subordinate Judge has refused to do so. A civil Court peon, although his immediate superior may be the Subordinate Judge, is none the less a subordinate of the District Judge. (*Jack and Patterson, JJ.*) RAMESH CHANDRA PODDAR *v.* HARI MOHAN PODDAR. **42 C.W.N. 531.**

Court.

———**S. 195 (2)**—*"Court"—Appellate officer under Bengal Agricultural Debtors Act.*

An appellate officer set up under S. 40 of the Bengal Agricultural Debtors Act has functions similar to those of Debt Settlement Boards, and is not a "Court" as defined in S. 195, Cr. P. Code. (*Derbyshire, C.J. and Bartley, J.*) SASHI BHUSAN *v.* FULKHAN. **I.L.R. (1940) 2 Cal. 158 =190 I.C. 448=44 C.W.N. 763=A.I.R. 1940 Cal. 454.**

———**S. 195 (2)**—*"Court"—Interpretation of—Debt Settlement Board—If Court—Bengal Agricultural Debtors Act, S. 3.*

Courts which can make a complaint under S. 195, Cr. P. Code, are not restricted to the Courts detailed in S. 476, Cr. P. Code. The term "Court" in S. 195 must be interpreted in a wider sense so as to include Courts which are outside the Criminal, Civil and Revenue Courts. If a tribunal has power to regulate legal rights by the delivery of definitive judgments, and to enforce its orders by legal sanctions, and if its procedure is judicial in character, in such matters as the taking of evidence and the administration of the oath, then it is a "Court". An essential feature of a Court is that it must be one in which justice is judicially administered, and which is empowered to arrive at an independent judicial decision on legal evidence. Debt Settlement Boards constituted under the Bengal Agricultural Debtors' Act are merely units of a Department of Government, which have been constituted for the purpose of settling debts. They have not been set up as independent judicial tribunals for the purpose of administering justice according to ordinary judicial principles but for the purpose of putting into effect the policy of the Department of Government under which they function and which controls their procedure. Their purpose is to oust the jurisdiction of the Courts which have been set up by the Legislature for the decision of civil matters in accordance with the ordinary legal rights of the parties concerned. They must, therefore, be regarded as agents of the Local Government vested with certain legal powers for a definite purpose and they cannot be regarded as "Courts" even within the wide

meaning with which that expression is used in S. 195, Cr. P. Code. Consequently a complaint by the Board is not necessary for a prosecution for offences under Ss. 465, 467 and 471, I. P. Code, committed in relation to proceedings before the Board. (*Khundkar and Edgley, JJ.*) HARI CHARAN *v.* KAUSHIKI CHARAN. **I.L.R. (1940) 2 Cal. 14=188 I. C. 686=13 R. C. 44=41 Cr.L.J. 662=44 C.W.N. 530=A.I.R. 1940 Cal. 286.**

———**S. 195 (1) (a)**—*Court making complaint under S. 183, I. P. Code, on report of process-server—Considerations.*

Where a District Judge is moved in his capacity as a public servant to whom a process-server is subordinate, to make a complaint under S. 183, I. P. Code, against certain persons alleged in the process-server's report to have offered resistance to him, he must, in considering whether a prosecution is to be ordered or not, have regard to the interests of public justice rather than to the gratification of private spite. Regard may also be had to the question whether the prayer for prosecution is a manoeuvre to obtain an undue advantage by embarrassing the defence in a pending civil proceeding. Another point which might well be considered is whether there is evidence of any criminal act against each individual person against whom it is proposed to take proceedings, and with reference to the general question whether there is a *prima facie* case at all, it may be examined whether the process-server was in fact following a lawful procedure. (*Rowland, J.*) BAJRANG MARWARI *v.* DURGA PRASAD SAO. **166 I.C. 870=9 R.P. 350=38 Cr.L.J. 292 (2)=1936 P.W.N. 747=3 B.R. 226=A.I.R. 1937 Pat. 31.**

———**S. 195 (1) (c)**—*"Court"—Mukhtiarkar holding enquiry in mutation proceedings—If Revenue Court.*

A Mukhtiarkar holding an enquiry in mutation proceedings is a Revenue Court within the meaning of S. 195 (1) (*c*), Cr. P. Code, though his proceedings are not judicial proceedings within the meaning of S. 196, Bombay Land Revenue Code. Hence, where offences under S. 193 and S. 467, Penal Code, are committed during mutation proceedings, the complaint of the Mukhtiarkar is necessary under S. 195 (1) (*b*) and (*c*), Cr. P. Code, before criminal proceedings can be taken against the accused for offences under Ss. 193 and 467, Penal Code. (*Davis, J.C. and Weston, J.*) ASSUDOMAL RAMANDAS *v.* JHAWANDAS HOTCHAND. **I.L.R. (1940) Kar. 435 =190 I.C. 222=A.I.R. 1940 Sind 100.**

———**Ss. 195 (3) and 476-A**—*"Court to which appeals ordinarily lie"—Meaning of—Power of Additional District Magistrate to make complaint under S. 476-A.*

The words "Court to which appeals ordinarily lie" in S. 195 (3), Cr. P. Code, do not mean Court by which appeals are ordinarily heard. Consequently it is the Court of the District Magistrate and not that of the Additional District Magistrate that can make a complaint under S. 476-A, Cr. P. Code, although appeals from orders of the 2nd or 3rd Class Magistrates are ordinarily heard by the Additional District Magistrate. (*Skemp, J.*) NAZAR MOHAMMAD *v.* HARNAM SINGH. **I.L.R. (1938) Lah. 188=178 I.C. 795=11 R.L. 502=40 Cr.L.J. 140=40 P. L.R. 951=A.I.R. 1938 Lah. 641.**

———**S. 195 (2)**—*"Court"—Mamlatdar — If Court.*

A Mamlatdar or City Survey Officer is a Revenue Court within the meaning of S. 195 (2), Cr. P. Code. (*Beaumont, C. J. and Wadia, J.*) EMPEROR *v.* RACHAPPA YELLAPPA. **60 Bom. 756=163 I.C. 279=8 R.B. 445=37 Cr.L.J. 814=38 Bom.L.R. 440=1936 Cr.C. 627=A.I.R. 1936 Bom. 221.**

———**S. 195 (1) (c)**—*Proper Court to complain—Suit before various Courts.*

If a case or proceeding has been before various Courts and an offence is alleged to have been committed in that proceeding or case falling under the various sections prescribed in S. 195, Cr. P. Code, then all the Courts have jurisdiction to make the complaint though, normally speaking, the proper Court to make the complaint is the Court which finally tried and determined the suit. Hence, where an offence is committed in the course of a suit before a Court and that suit is subsequently transferred to another Court the latter Court is competent to make a complaint under S. 195. A.I.R. 1929 Cal. 724, Rel. on. (*Dalip Singh and Blacker, JJ.*) BEHARI LAL *v.* ABDUL QADIR. **190 I.C. 178=A.I.R. 1940 Lah. 292.**

———**S. 195 (3)**—*Subordinate Court—Test.*

The wording of S. 195 does not refer to the locus of the appeal in a particular suit but to the ordinary or usual locus. Hence the Court of Judicial Extra Assistant Commissioner is subordinate to that of the District Judge for the purposes of S. 195, even though an appeal in the suit in respect of which proceedings under S. 195 arise lies to the Judicial Commissioner's Court and not the District Court. (*Middleton, J. C.*) MT. UMTUL QURESH *v.* GHULAM HASSAN. **178 I.C. 747=11 R. Pesh. 57=A.I.R. 1938 Pesh. 83.**

Jurisdiction.

———**S. 195**—*Complaint under S. 193, I. P. Code—Conviction of accused under S. 467, I. P. Code, also—Legality.*

Where a complaint against an accused person was lodged under S. 193, Penal Code only, but he was convicted also of an offence under S. 467, Penal Code.

Held, that the conviction of the accused under S. 467 was irregular and was made without jurisdiction in view of S. 195, Cr. P. Code. (*Middleton, A.J.C.*) KAURA RAM *v.* EMPEROR. **169 I.C. 44=9 R. Pesh. 138=38 Cr.L.J. 748=A.I.R. 1937 Pesh. 67.**

———**S. 195 (1) (a)**—*Petition filed before District Magistrate—Latter sending it for enquiry to Sub-Divisional Magistrate—Cognizance of offence under S. 182, I.P. Code against petitioner—Jurisdiction of Sub-Divisional Magistrate.*

Where a District Magistrate sends a petition filed before him to a Sub-Divisional Magistrate for enquiry, the Sub-Divisional Magistrate cannot take cognizance of a case under S. 182, I.P. Code, against the petitioner, except on the complaint in writing of the District Magistrate before whom the petition was filed or some other public servant to whom he is subordinate. (*Bartley and Khundkar, JJ.*) N. MUKHERJEE,

CR. P. CODE (1898), S. 195.

CIRCLE OFFICER, VISHNUPUR *v.* RAMKINKAR PALIT. **67 C.L.J. 583.**

Public servant.

———**S. 195 (1) (a)**—*"Public servant concerned"—Meaning of—If includes successor in office.*

If allegations are made to a District Judge, which constitute an offence under S. 182, I. P. Code, not only the District Judge to whom the information is given but also his successor-in-office can make a complaint under S. 195 (1) (*a*). The complaint prescribed in S. 195 (1) (*a*) is a simple duty and responsibility and not a personal privilege; and there is nothing against a successor-in-office of the public servant to whom information was given making a complaint under S. 182, I. P. Code. (*Dhavle and James, JJ.*) GOVERNMENT ADVOCATE, BIHAR *v.* KUMAR SINGH. **16 Pat. 571=173 I.C. 432=10 R.P. 408=4 B.R. 274=19 P.L.T. 51=39 Cr.L.J. 314=1937 P.W.N. 937=A.I.R. 1938 Pat. 83.**

———**S. 195 (1) (a)**—*"Public servant"—False information given to Sub-Inspector—Complaint filed by successor in office—Validity.*

The proper construction of the words "public servant concerned" in S. 195 (1) (*a*) is the public servant holding for the time being the office held by the public servant to whom the false information was given. The complaint filed by the successor in office of Sub-Inspector to whom false information was given is therefore a valid complaint under S. 195 (1) (*a*). (*Davis, J.C. and Weston, J.*) JOT NARAIN THAKUR PRASAD *v.* EMPEROR. **I.L.R. (1939) Kar. 656=182 I.C. 412=12 R.S. 7=40 Cr.L.J. 659=A.I.R. 1939 Sind 164.**

Revision.

———**S. 195 (1) (a)**—*Orders of Subordinate and District Judges—Nature of.*

Per *Patterson, J.*—Orders passed by a Subordinate or District Judge under S. 195 (1) (*a*), Cr. P. Code, are purely administrative orders and as such are not subject to revision by the High Court. The question of the competency of a complaint made by a District Judge can only be raised by a Rule directed against the order of the Magistrate taking cognisance of such complaint. (*Jack and Patterson, JJ.*) RAMESH CHANDRA PODDAR *v.* HARI MOHAN PODDAR. **42 C.W.N. 531.**

Sanction.

———**S. 195 (1)**—*Necessity for sanction—Alleged breach of order under S. 144, Cr. P. Code—District Magistrate directing prosecution on report of Sub-divisional Magistrate concerned—Legality.*

Where a Sub-divisional Magistrate acting on information that there was a breach of an order passed by him under S. 144, Cr. P. Code, sent up a report to the District Magistrate and suggested the prosecution of the persons who had committed the breach and the District Magistrate passed an order sanctioning the prosecution of the persons concerned, it was held that the report sent to the District Magistrate could not be treated as complaints under S. 195 (1), Cr. P. Code, and that in the absence of the complaint as required by the mandatory provisions of S. 195 (1), the whole proceedings were rendered nugatory. (*Zia-ul-Hasan, J.*) BABU *v.* EMPEROR. **15 Luck. 344=12 R.O. 278=41 Cr. L.J. 228=1940 A. Cr. C. 45=185 I.C. 745=1940 O.L.R. 43=1940 A.W.R. (C.C.) 50=1940 O.A. 128=1940 O.W.N. 118=A.I.R. 1940 Oudh 241.**

CR. P. CODE (1898), S. 195.

———**S. 195 (1) (b)**—*Necessity for sanction—Complaint to police—No action—Complaint to Court thereafter—Police complaint under S. 211, I. P. Code, against such complainant—Undesirability.*

Where a person complained of theft to the police and on their failure to take action filed a complaint in Court and the police thereupon filed a complaint under S. 211, I. P. Code, against such a complainant the sanction of the Court, wherein the complaint for theft was pending, is necessary. The complaint under S. 211, I. P. Code, is a complaint of an offence alleged to have been committed 'in or in relation to' a porceeding in Court. It is undesirable that where a case has been taken into Court, it should thereafter be open to the police to evade the provisions of S. 195, Cr. P. Code, by filing a complaint under S. 211, I. P. Code, on the complaint by a police officer. The wording of S. 195 (1) (*b*), Cr. P. Code, is wide enough to require that in the above circumstances the Court itself shall make a complaint. (*Pollock, J.*) SARUPSINGH *v.* EMPEROR. **181 I.C. 928=11 R.N. 494=40 Cr.L.J. 638=1939 N.L.J. 210=A.I.R. 1939 Nag. 226.**

———**S. 195 (1) (b)**—*Offence under S. 211, I. P. Code—Police reporting case to be false and praying for complainant's prosecution—Latter filing 'narazi' petition by way of showing cause—Sanction of Magistrate—If necessary for his prosecution.*

Where on the police reporting a case to be a false one and praying for the prosecution of the complainant under S. 211, I. P. Code, the Magistrate calls upon the complainant to show cause why he should not be prosecuted and the complainant thereafter files a "narazi" petition by way of showing cause, sanction of the Magistrate is not necessary before the complainant could be put upon his trial. (*Bartley and Henderson, JJ.*) JAMINI KANTA GHOSE *v.* BHABANATH JAISI. **I.L.R. (1939) 1 Cal. 318=12 R.C. 156=183 I.C. 384=40 Cr.L.J. 785=43 C.W.N. 279=A.I.R. 1939 Cal. 273.**

———**S. 195**—*Permission for prosecution—When can be granted.*

Under S. 195, Cr. P. Code, permission for prosecutions should only be granted when such a course is found necessary in the interests of justice. Where permission is sought by the complainant for the prosecution of a witness merely out of personal spite, the Court would be right in refusing to grant permission. (*Abdul Qayoom, C.J.*) RAVISINGH *v.* ISHRISINGH. **39 P.L.R. J. & K. 72.**

———**(as amended in 1923), S. 195**—*Procedure under—Sanction for complaint.*

The old system of sanctions is now abolished. The Court or officer concerned does not sanction a prosecution. The Court or officer concerned makes the complaint direct. Where therefore a complaint in a case is made by the Sub-Inspector concerned, with the necessary administrative sanction, no judicial sanction is necessary. (*Davis, J. C. and Mehta, J.*)

CR. P. CODE (1898), S. 195.

DHARAMDAS HIRANAND *v.* EMPEROR. **I. L. R. (1939) Kar. 241=11 R.S. 82=40 Cr.L.J. 12=178 I.C. 218=A.I.R. 1938 Sind 213.**

———**S. 195 (1) (b)**—*Witness giving evidence in Court of law—Defamatory statements against person not party to proceedings—Complaint by party defamed alleging statement to be perjury—Sanction of Court—Necessity for.*

It is not correct to hold that in the case of a person alleging that he has been defamed by a witness giving evidence before a Court of Law in proceedings to which the person defamed is not a party, he cannot move a Magistrate to entertain a complaint in respect of such defamation without moving the Court, in which the statement is made by the witness; to make a complaint under S. 195, Cr. P. Code, in respect of perjury committed before it. It is no doubt true that the Courts should be slow to admit complaints of defamation in such cases where the accusation is really one of perjury in which the Court should be moved to make a complaint. But where the complainant who alleges that he has been injured is not a party to the proceedings at all he is asking for the redress of a personal grievance, and no sanction of the Court is necessary. (*Grille, J.*) CHOTELAL *v.* PHULCHAND. **I.L.R. (1937) Nag. 425=169 I.C. 429=10 R.N. 1=38 Cr.L.J. 775=20 N.L.J. 33=A.I.R. 1937 Nag. 138.**

Scope.

———**S. 195 (1) (b)**—*Alleged offence against public justice—Court declining to prosecute—Private complaint by aggrieved party—Maintainability.*

The principle underlying S. 195, Cr. P. Code, is that where an act amounts to the offence of contempt of the lawful authority of public servants, or to an offence against public justice, such as giving false evidence, or to an offence relating to documents actually used in a Court, private prosecutions are barred absolutely, and only the Court in relation to which the offence was committed may initiate proceedings. In the case of an offence alleged to have committed against public justice, if the Court in its discretion has declined to prosecute, on the ground that there was not strong *prima facie* case, the refusal of the Court to prosecute is final, and a private complaint by the party who is animated by a sense of personal grievance is barred under S. 195 (1) (*b*), Cr. P. Code. (*Newsam, J.*) RAMASWAMI IYENGAR *v.* PANDURANGA MUDALIAR. **171 I.C. 943=10 R.M. 414=39 Cr.L.J. 1=1937 M. Cr. C. 289=1937 M.W.N. 1070=46 L. W. 704=A.I.R. 1938 Mad. 173=(1937) 2 M.L.J. 757.**

———**S. 195**—*False allegation in plaint in suit—Complaint of defamation based on—Maintainability—Complaint by Court—Necessity.*

In the case of a complaint based on an allegation in a plaint in a suit, if the allegation is false, the offence falls under S. 193, I. P. Code, and for a prosecution for such an offence a complaint by the Court is necessary. The parties cannot be permitted to evade the law by filing a complaint of defamation. (*Lakshmana Rao, J.*) SAMBASIVAYYA *v.* SIDDALINGAPPA. **51 L.W. 491=1940 M.W.N. 392=A.I.R. 1940 Mad. 677=(1940) 1 M.L.J. 689.**

CR. P. CODE (1898), S. 195.

———**S. 195**—*Offence of forgery committed in relation to proceedings before Court, forming part of same transaction with offences which Court is inquiring—Procedure.*

The purpose of S. 195 is not that one Court should keep check upon another, because if that were so, the Court itself would not be entrusted with the making of a complaint as it is under the provisions of the section. The purpose of the section is to provide, *inter alia*, that an offence of forgery, for instance, shall be inquired into upon a complaint of a Court before which the forged document was produced and not upon the complaint of a private individual. It is the Court before whom the forged document is produced which is to decide whether there should be or should not be an inquiry in the first instance. Since a Court is entrusted by the Legislature with this discretion and with this power, it follows that it is itself entitled to inquire into an alleged offence committed in relation to proceedings before it, provided no other section of the Cr. P. Code bars the way, when that alleged offence is part of the same transaction, with the offences of which the Court has already taken cognizance, and the Magistrate can in such case convert the proceedings before him into one for committal to the Court of Session. (*Davis, J.C. and Tyabji, J.*) JASHANMAL *v.* EMPEROR. **I.L.R. (1940) Kar. 95=183 I.C. 619=12 R.S. 64=40 Cr.L.J. 818 (2)=A.I.R. 1939 Sind 222.**

———**S. 195 (1) (b)**—*Offence under S. 210, I. P. Code—Absence of complaint by Court—Private complaint by aggrieved party under S. 406—Maintainability—Proceedings—Liability to be quashed.*

When the offence disclosed by the facts stated in a complaint is essentially an offence relating to the administration of justice, falling under S. 210, I. P. Code, S. 195, Cr. P. Code, applies, and a complaint in writing to the Court is necessary as required by S. 195. It is not open in such a case to the complainant to prefer a complaint under another section so as to evade the provisions of S. 195. The accused held a decree against the complainant and the latter in satisfaction of the decree made certain payments in kind. The accused, however, fraudulently concealing the payments from the Court, obtained further execution of the decree and got a warrant for the arrest of the complainant. Feeling aggrieved the complainant filed a complaint against the accused under S. 406, I. P. Code.

Held, that the offence alleged was primarily an offence relating to the administration of justice, under S. 210, I. P. Code, and that the proceedings were misconceived and must be quashed. The object and purpose of S. 195, Cr. P. Code, being clearly to keep within the control of Courts in the public interests offences committed in relation to their proceedings, it would be an evasion of the provisions of that section to allow the complainant escape them by placing the offence under S. 406, I. P. Code, instead of under S. 210, I. P. Code. (*Davis, C. J. and Mehta, A.J.C.*) BHIMOMAL *v.* EMPEROR. **29 S.L.R. 356=164 I.C. 797=9 R.S. 55=1936 Cr. C. 804=37 Cr.L.J. 1007=A.I.R. 1936 Sind 123.**

CR. P. CODE (1898), S. 195.

———S. 195—*Order for complaint invalid against some of several accused—Commitment of all for trial—Trial in pursuance of—Legality of prosecution as against persons not specifically named in complaint.*

What S. 195, Cr. P. Code, prohibits is taking cognizance of an offence of a certain class except on a complaint of a Court; but where a Court has complained of an offence specified in the section, then cognisance can be and must be taken of the whole case; that is to say, the prosecution will go forward as against all persons found to be concerned in the offence and also under any other sections found to be applicable to the facts of the case, and not only against those specifically named in the order for complaint. When cognizance has been taken of an offence, the inquiry will proceed against all the persons whom the evidence shows to have been concerned in it, provided that the Court making the complaint and naming some persons therein has not expressly considered and found against the prosecution of other persons on the same facts. S. 195 does not therefore bar the conviction at such trial of an accused who has not been named in the complaint or against whom the complaint is invalid. (*Dhavle and Rowland, JJ.*) JUGESHWAR SINGH *v.* EMPEROR. **15 Pat. 26=164 I.C. 86=37 Cr.L.J. 893=9 R.P. 84=17 Pat.L.T. 234=1936 Cr. C. 539=1936 P.W.N. 489 =A.I.R. 1936 Pat. 346.**

———S. 195 (1) (b)—*Power of Court to file complaint against witness.*

A Court has power to file a complaint against a witness—not party to the suit or proceeding—under S. 193, Penal Code, as there is nothing in S. 195 (1) (*b*) which confines the powers of the Court to persons who are parties to the proceedings. It is S. 195 (1) (*c*) which confines the power of the Court to parties to the proceeding, and then it is in respect of documents and not of oral evidence. (*Parker, J.*) EMPEROR *v.* U KADOE. **164 I.C. 769=9 R.R. 139=37 Cr. L.J. 1008=1936 Cr.C. 771=A.I.R. 1936 Rang. 369.**

———S. 195 (1)—*'Public servant concerned,' meaning of.*

The object of S. 195 (1) (*a*), Cr. P. Code, appears to be that the person best qualified to decide whether complaint should or should not be made, should have the power to make a complaint. Hence the words 'public servant concerned' in S. 195 (1). Cr. P. Code, cannot mean or have reference to any particular person but can only refer to any person who happens to hold the particular post at the particular time. (*Hamilton, J.*) EMPEROR *v.* CHHEDI SINGH. **180 I.C. 769=1939 O.W.N. 337=1939 A.Cr.C. 68= 1939 O.A. 319=1939 O.L.R. 206=40 Cr.L.J. 508 =11 R.O. 260=1939 A.W.R. (C.C.) 71=A.I.R. 1939 Oudh 160.**

———S. 195 (1) (b) and (c)—S. 195 (1) (*c*) only requires the production of a forged document in Court or its being given in evidence. The phrase "in or in relation to any proceeding" only occurs in S. 195 (1) (*b*), which has nothing to do with the offence of forgery. (*King, J.*) N. V. L. NARASIMHA RAO *v.* EMPEROR. **1937 M. W.N. 887.**

CR. P. CODE (1898), S. 195.

Miscellaneous.

———S. 195 (1) (c)—Use of forged receipts in suit—Complaint by judge under S. 193, I. P. Code—Conviction under S. 471—Sustainability. *See* PENAL CODE, Ss. 193 AND 471. **70 M.L.J. 109.**

———S. 195 (1) (c)—*"Committed by a party to any proceeding in any Court"—Construction —Proceeding—If to be pending at time of complaint.*

Obiter:—The words "committed by a party to any proceeding in any Court" in S. 195 (1) (*c*), Cr. P. Code, imply that the proceeding must be pending at the material time, *i.e.*, at the time the Magistrate takes cognizance of the criminal complaint. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* MALLAPPA TEJAPPA. **166 I.C. 270=9 R.B. 229=38 Cr.L.J. 149= 38 Bom. L. R. 964=A.I.R. 1937 Bom. 14.**

———Ss. 195 and 190 and Penal Code, S. 182—*Offence under S. 182, I.P. Code—Absence of complaint of public officer—Effect.*

Where there is no complaint in writing of a public servant against a person accused of an offence under S. 182, I. P. Code, he cannot be convicted. The provisions of S. 190, Cr. P. Code, are subject to the provisions of S. 195 which follow it. (*Zia-ul-Hasan, J.*) RAM PRASAD DUBE *v.* EMPEROR. **189 I. C. 702=41 Cr.L.J. 787=1940 O.L.R. 498=1940 O.W. N. 917=1940 A.W.R. (C. C.) 307 (1)=1940 O.A. 591.**

———Ss. 195 and 476—*Complaints in respect of defamatory statement made in judicial proceedings—Who is to complain—Sanction of Magistrate, if necessary.*

There is nothing in Ss. 195 and 476, Cr.P. Code, which prevents a man from making a complaint for defamation in respect of a statement made during judicial proceedings. The sanction of the judicial authority before whom the statement is made is not necessary. Further according to S. 198, it is only the person defamed who is given the sole right to file a complaint for defamation and hence the judicial authority before whom the statement is made is not competent to file a complaint for prosecution of the person concerned for making the defamatory statement. (*Rachhpal Singh, J.*) MAHOMED ISA *v.* NAZIM HUSAN. **I. L. R. (1940) All. 314=188 I.C. 699=13 R.A. 72= 41 Cr.L.J. 660=1940 A.W.R. (H.C.) 122= 1940 A.Cr.C. 42=1940 A.L.J. 79=A.I.R. 1940 All. 246.**

———Ss. 195 and 476—*Applicability—Execution of decree—Attachment—Obstruction to—Complaint under S. 186, 379 or 424—Complaint by Court—Necessity.*

No complaint of the Court is necessary for an offence under S. 186, 379 or 424, I. P. Code, against persons alleged to have obstructed an amin attaching property in execution of a warrant of attachment. (*Lakshmana Rao, J.*) RENGASWAMI THEVAN *v.* EMPEROR. **(1939) M. W. N. 886.**

———Ss. 195 and 476—*Object and scope of—Proceedings commenced by magistrate having powers—Subsequent cessation of powers—Complaint made after cessation of powers—If bad.*

The intention of the Legislature in enacting Ss. 195 and 476, Cr.P.Code, is to prevent in-

nocent persons being put on trial at the instance of persons likely to be moved by motives of revenge and not to protect guilty persons from the penalty of their crimes. This object is in no way defeated by the fact that at the time the magistrate makes a complaint he is not empowered to act as a magistrate, where he is merely completing the preliminary proceedings that he has begun at a time when he had such powers. (*Dhavle and Rowland, JJ.*) JUGESHWAR SINGH *v.* EMPEROR. **15 Pat. 26=164 I. C. 86=37 Cr.L.J. 893=9 R.P. 84=17 Pat. L.T. 234=1936 Cr.C. 539=1936 P.W.N. 489 =A.I.R. 1936 Pat. 346.**

———Ss. 195 and 476—*Applicability—Persons not parties—Complaint against—Power to make.*

It is to the taking of cognizance of the offence that S. 195 (1), Sub-sections (*b*) and (*c*), Cr. P. Code, refer to; it is the offence and not the offender which is referred to. Thus even if a person is not a party to the proceedings in respect of which a Court wishes to inquire and make complaint under S. 211, I. P. Code, within the provisions of S. 476, Cr. P. Code, the Court is competent to take action against him, if he is connected with the offence by abetting or conspiring. (*Davis, J.C. and Mehta, A. J. C.*) EMPEROR *v.* HENRY BRIDGNELL. **170 I. C. 891=38 Cr. L. J. 1002= 10 R.S. 81=A.I.R. 1937 Sind 193.**

———Ss. 195 (1) (c) and 476—*"Such Court" —Meaning—High Court—Original suit—Production of fabricated documents—Complaint—By whom to be made—Jurisdiction of Chief Justice—Procedure—Preliminaries to making complaint—Application and inquiry—Necessity for.*

The complaint required by S. 195 (1) (c) is the complaint of the Court in which the offence is committed, *i.e.*, the fabricated documents are produced in evidence, and not of the trial Judge necessarily; and where the suit is tried by a Judge of the High Court, the term 'Court' occurring in the section must be taken to mean "the High Court". There is nothing to prevent any Judge of the High Court from dealing with the matter. The Chief Justice has jurisdiction to make the necessary order under S. 476, Cr.P. Code, and when he makes it in the exercise of ordinary original jurisdiction, it is perfectly legal and cannot be questioned as being without jurisdiction. The Court may, under S. 476, make the complaint on application or otherwise, such as on a note put up by the office, and it need not hold a preliminary inquiry. (*Mockett and Lakshmana Rao. JJ.*) VARADARAJALU NAIDU, *In re.* **38 Cr. L. J. 871=170 I.C. 255=I.L.R. (1937) Mad. 612 10 R.M. 163=1937 M.W.N. 330=45 L.W. 257=1937 M.Cr.C. 112=A.I.R. 1937 Mad. 716=(1937) 1 M.L.J. 396.**

———Ss. 195 (1) (b), 476-A and 537—*Offence under S. 193, I.P. Code, committed before Second Class Magistrate—Complaint by Additional District Magistrate—Jurisdiction—Irregularity, if curable.*

An Additional District Magistrate has no jurisdiction to take any proceeding under S. 476-A, Cr. P. Code, or to institute a complaint in respect of an offence under S. 192, I. P. Code, committed in the Court of a Second Class Magistrate. A Second Class Magistrate cannot be deemed to be subordinate for the purposes S. 195, Cr. P. Code, to the Additional District Magistrate, as appeals from his Court do not ordinarily lie to the Additional District Magistrate, but to the District Magistrate. Where such complaint is made by the Additional District Magistrate, the irregularity is not curable by S. 537, Cr. P. Code. (*Rowland, J.*) RAMDIN LAL *v.* EMPEROR. **165 I.C. 970=9 R.P. 246=38 Cr.L.J. 97=18 Pat.L.T. 91=3 B. R. 117=A.I.R. 1937 Pat. 176.**

———Ss. 195 (3) and 476-B—*Small Cause Court—Refusal to make complaint—Appeal to District Judge—Competency.*

On the Small Cause Court refusing to make a complaint under S. 476, Cr. P. Code, an appeal lies to the District Court under S. 195 (3) of the Code. (*Spargo, J.*) ABDUL HUSSEIN *v.* MOHAMED IBRAHIM. **173 I. C. 810= 10 R.R. 371=A.I.R. 1937 Rang. 526.**

———Ss. 195 and 482—*'Court'—Meaning of—Sir-panch, if Panchayat Court—If "Court".*

The word 'Court' in S. 482 and also in S. 195 means all the members constituting the particular Court in question the sir-panch, more specially when he is not even a member of any of the Panchayat Court Benches which are actually sitting, cannot in law represent the 'Court' for the purpose of making the complaint under S. 195 or an inquiry under S. 482. Where a sir-panch who was not even a member of any of the Panchayat Court made a complaint of an offence under S. 228, Penal Code.

Held, that there had been illegality in the institution of the case. (*Gruer, J.*) VITHAL SONAJI *v.* EMPEROR. **I. L. R. (1937) Nag. 145=167 I.C. 378=9 R.N. 181=38 Cr.L.J. 380=1936 Cr.C. 1120=A.I.R. 1936 Nag. 275.**

———Ss. 195 and 537—*Complaint under the directions of the High Court—Deputy Registrar, if can make—Defect if any, if curable.*

The Deputy Registrar of the High Court is the proper officer for filing complaints under S. 195, Cr.P. Code. The mere fact, that the authority to file it was not given in writing is immaterial, when as a matter of fact it is shown to have been filed after consultation with the Judges concerned and with their consent. The irregularity, if any, cannot in view of S. 537, Cr. P. Code, impair the validity of the decision. (*Niyogi,, J.*) SHEOSHANKER *v.* EMPEROR. **188 I.C. 885=13 R.N. 14=41 Cr.L.J. 697= 1940 N.L.J. 165.**

———S. 195 and Central Provinces Debt Conciliation Act (1933), Ss. 24-A and 18—*'Court' in S. 195, Cr. P. Code, meaning of—Debt conciliation Board, if can pass order under S. 195—Order, if appealable.*

The expression 'Court' in S. 195, Cr.P. Code, is of wide scope and includes more than the expression 'Civil, Criminal or Revenue Court' in S. 476. Under S. 24-A of the C. P. Debt Conciliation Act all proceedings under the Act shall be deemed to be judicial proceedings. Hence the Board has power to pass an order under S. 195, Cr.P. Code. But it cannot be held that it is either a Civil or Revenue Court for purposes of proceedings under S. 195. S. 18 of the Debt Conciliation Act bars appeals from

any order passed by a Board. (*Gruer, J.*) BABULAL *v.* KISANSO. 186 I.C. 708=12 R. N. 266=41 Cr. L. J. 376=1940 N.L.J. 23= A.I.R. 1940 Nag. 184.

———Ss. 196—Applicability—Petition to Sub-Inspector of Police by residents of locality—Allegation of offences against another and prayer for protection against claim—Prosecution—Sanction—Necessity. *See* PENAL CODE, S.499, EIGHTH EXCEPTION. 1938 M.W.N. 871 (2) =(1938) 2 M.L.J. 397.

———S. 196—*Order sanctioning prosecution—Form of and compliance with.*

An order of the Government sanctioning under S. 197, Cr.P. Code, a prosecution for an offence of sedition under S. 124-A, I. P. Code, was as follows: "The Deputy Inspector-General of Police.....is requested to depute an officer of the Special Branch, C.I.D., of the rank not lower than that of Inspector of Police, to prefer a complaint, etc." In consequence of this order, a letter was issued by the Deputy Inspector-General to an Inspector of Police, authorizing the latter to prefer a complaint and the letter was signed by the Senior Officer in the office of the Deputy Inspector-General for the Deputy Inspector-General. The complaint was accordingly filed by the Inspector to whom the letter was addressed.

Held, the complaint was properly filed and was in accordance with the order sanctioning prosecution. (*Horwill. J.*) BATLIWALLA *v.* EMPEROR. 1938 M.W.N. 529=48 L.W. 170 =177 I.C. 747=11 R.M. 375=1938 M.Cr.C. 191=39 Cr.L.J. 938=A.I.R. 1938 Mad. 758 =(1938) 2 M.L.J. 416.

———S. 196-A—*Applicability and scope—Charge under S. 120-B, I. P. Code—Absence of sanction—Committal to Sessions — Legality — Misapplication of S. 120-B—Facts alleged by prosecution disclosing offence under S. 109, I. P. Code—Proper course—Allegation of commission of offences in pursuance of conspiracy—Effect of—Committal—If to be quashed—Amendment of charge.*

A commitment on a charge of criminal conspiracy under S. 120-B, I.P. Code, is not legal when no sanction to prosecute or to initiate the prosecution has been obtained as required by S. 196-A, Cr. P. Code, although it is true that S. 196-A was designed to safeguard persons from frivolous accusations of criminal conspiracy and not as loophole of escape for persons committed after full magisterial inquiry on a charge of criminal conspiracy or convicted after full trial of criminal conspiracy. Where the charge under S. 120-B is wrongly laid and Ss. 120-A and 120-B do not apply to the facts alleged by the prosecution, the committal will not be set aside. The mistake or misuse of S. 120-B should be rectified and the proper section should be applied. Where the facts alleged by the prosecution, show that the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been committed in pursuance thereof, Ss. 120-A and 120-B are wholly irrelevant. The proper section to be applied is S. 109, I. P. Code, which applies to the case. Where an offence is alleged to have been committed by more than two persons,

such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under S. 109, I. P. Code. Since no sanction is ever required to initiate a prosecution for a substantive offence, the committal on the charge under S. 120-B should only be altered to one on a charge under S. 109, I. P. Code, it need not be quashed. (*Newsam, J.*) VENKATARAMIAH, *In re.* 173 I.C. 26=10 R.M. 515=39 Cr.L.J. 266= 1937 M.Cr.C. 337=1937 M.W.N. 996=46 L. W. 709=A.I.R. 1938 Mad. 130=(1937) 2 M. L.J. 862.

———S. 196-A (2)—*Scope—Sanction for prosecution — When necessary — Object of accused sought to be attained by resort to non-cognizable offences—Sanction—Necessity.*

According to the terms of S. 196-A (2), Cr. P. Code, the jurisdiction of a Court to take cognizance of an offence of criminal conspiracy under S. 120-B, I.P. Code, depends upon the object of the conspiracy; if the object is to commit a non-cognizable offence, sanction under S. 196-A (2), Cr.P. Code, is essential to give jurisdiction to the Court. The object of the conspiracy has to be determined at the initial stage not only by reference to the sections of the Penal Code mentioned in the complaint, but also upon the facts narrated therein and the evidence tendered. There is recognisable difference between the object of a conspiracy and the means adopted to realize that object. If they are separable, then even if the object of the accused—which is not to commit a non-cognizable offence—is sought to be attained by resort to non-cognizable offences, no sanction is necessary. It does not matter if the object is mixed up erroneously with the statement of method of attaining it in the body of the complaint. It is perfectly open to the Magistrate upon the evidence to dissect the facts in order to decide the question of sanction. (*Wassoodew and Sen, JJ.*) EMPEROR *v.* RAMCHANDRA RANGO. 181 I.C. 870=11 R.B. 356=40 Cr.L.J. 579 =41 Bom.L.R. 98=A.I.R. 1939 Bom. 129.

———Ss. 196-A (2) and 195—*Object of conspiracy to commit non-cognizable offence—Some of accused parties to proceedings in which offence committed—Sanction, if necessary.*

Where a non-cognizable offence is committed and several persons are charged for conspiracy to commit the offence but some only of the accused are parties to the proceedings in which the offence was committed, sanction is not necessary in the case of such accused but is necessary in the case of the others who are not parties to the proceeding. (*Young, C.J. and Tek Chand, J.*) EMPEROR *v.* NAND LAL. 40 P.L.R. 815=176 I.C. 654=11 R.L. 221= 39 Cr.L.J. 765=A.I.R. 1938 Lah. 526.

———S. 197.

Applicability.
Discharge of official duty.
Object underlying.
Public servant.
Sanction.
Sanction, if necessary.
Miscellaneous.

CR. P. CODE (1898), S. 197.

Applicability.

———**S. 197**—*Conditions necessary.*

For S. 197 (1), Cr. P. Code, to apply, it must be shown that the accused was a public servant both at the time of the offence and at the time when he is accused, that is at the time when the accusation is made against him either by a complaint or a police report. (*Bennet, J.*) SURAJ NARAIN CHAUBE *v.* EMPEROR. **I.L.R. 1938 All. 776=1938 A.Cr.C. 60=11 R.A. 201=177 I.C. 462=1938 A.L.R. 751=39 Cr.L.J. 925=1938 A.L.J. 649=1938 A.W.R. (H.C.) 453=A.I.R. 1938 All. 513.**

———**S. 197**—Election officer—If Judge—Removal of names from electoral roll—Prosecution—Sanction of Local Government—Necessity. *See* PENAL CODE, S. 19. **1937 M.W.N. 740.**

———**S. 197**—Offence under S. 63 (1) (*a*), Chota Nagpur Tenancy Act—Procedure. *See* CHOTA NAGPUR TENANCY ACT, S. 63 (1) (*a*). **185 I.C. 738=6 B.R. 241.**

———**S. 197**—*President of Taluka Local Board—If public servant not removable save by or with the sanction of Local Government—Offence by in official capacity—Sanction to prosecute not obtained—Effect—Absence of jurisdiction as to part of trial only—If vitiates entire proceedings.*

The President of a Taluka Local Board is a statutory public servant under S. 135 of the Bombay Local Boards Act, and is removable from office as such President only by the Local Government for misconduct, or neglect of, or incapacity to perform, his duty. S. 197 (1), Cr. P. Code, applies to that case and the Court has consequently no jurisdiction to take cognizance of any offence or offences committed by the President or alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Local Government as required by S. 197, Cr. P. Code. Where the Court has acted without jurisdiction with regard to part of a trial the whole proceedings are vitiated by the illegality, the whole trial is invalid, and any conviction based on such proceedings cannot stand. (*Broomfield and Sen, JJ.*) EMPEROR *v.* RUDRAGOUDA RACHANGOUDA. **I.L.R. (1937) Bom. 256=39 Bom. L.R. 70=168 I.C. 956=38 Cr. L.J. 654=9 R.B. 413=A.I.R. 1937 Bom. 160.**

———**S. 197**—*Retired public servant—Prosecution in respect of act committed while in service—Sanction—Necessity.*

The protection conferred by S. 197, Cr. P. Code, would be largely illusory if it were open to people to wait until the public servant had ceased to hold that position and then lodge their complaint, for generally there is no question of limitation in criminal proceedings. A public servant who is on the verge of retirement would have no protection whatever. S. 197, Cr. P. Code, therefore protects a person who is a public servant at the time of the alleged incident, even if he ceased to be a public servant before the prosecution starts. (*Pollock, J.*) S.Y. PATIL, *In re.* **172 I.C. 669=10 R. N. 232=39 Cr.L.J. 146=A.I.R. 1937 Nag. 293.**

CR. P. CODE (1898), S. 197.

Discharge of official duty.

———**S. 197**—*Excise Sub-Inspector signing certificate for goods imported in bond.*

It was a part of the duty of an Excise Sub-Inspector to sign certificates in respect of goods imported in bond into Afghanistan. The Excise Sub-Inspector signed such certificate knowing that the goods had never been so imported. In order to deceive the Treasury officer, it was essential that the Excise Sub-Inspector ought to have signed such certificates in his official capacity.

Held, that it was only by virtue of his official position that he could sign the certificates and deceive the Treasury Officer. The Excise Officer therefore purported to act in discharge of his official duty when he signed the certificates in the manner as alleged. To launch a criminal prosecution against him it was necessary to obtain the sanction of the Local Government, *viz.*, the authority that had power to remove him from his office; without such sanction the trial was without jurisdiction. (*Middleton, J.C., and Almond, A.J.C.*) EMPEROR *v.* FAZAL RAHMAN. **170 I.C. 772=10 R. Pesh. 23=38 Cr. L. J. 1042=A.I.R. 1937 Pesh. 52.**

———**S. 197**—*"In the discharge of his official duty"—Meaning of—President of Panchayat Court—Abuse and assault of person objecting to procedure adopted by him—Sanction of Local Government—Necessity.*

A complaint against the President of a Panchayat Court alleged that when the president was about to write the Court's order dismissing the complainant's petition, the complainant objected to the dictation by the clerk of the President of the order to be pronounced in the matter, and asked the President not to allow the clerk to dictate the judgment as the Court was bound in law to write its own judgments and that on account of this objection taken by the complainant the President got up from his seat abusing the complainant slapped him on the cheek twice, and also threatened to beat him with his shoe.

Held, that the acts alleged against the President must be deemed to have been done when he purported to act in the discharge of his official duties, though it was not part of his official duties to abuse or assault. To interpret the words, "in the discharge of his official duty" in a strict manner so as to include only acts done strictly within the scope of his authority or jurisdiction would render any protection unnecessary, because an act which is completely within the scope of one's official duties can never be an offence. It is only where offences are committed by a Judge that the necessity for protection comes in, and the protection is limited to cases where the offences are committed while the Judge purports to act in his official capacity though undoubtedly he has outstepped the limits of his duties. Sanction of the Local Government would therefore be necessary for prosecuting the Judge in respect of such offence. (*Pandrang Row, J.*) SUBBIAH *v.* RAMACHARLU. **184 I.C. 112=12 R.M. 412=40 Cr.L.J. 853=1939 M.W.N. 741=49 L.W. 781=1939 M. Cr. C 196=A.I.R. 1939 Mad. 604=(1939) 2 M.L.J. 117.**

———**S. 197**—*Dicharge of official duty—Mem-*

CR. P. CODE (1898), S. 197.

bers of District Council taking bribe before making some appointment at Council meeting.

No doubt, if a public servant is actually engaged in the discharge of his duties, or is purporting or pretending to be so engaged, and commits an offence, the sanction of the Local Government is clearly required before a Court can take cognizance thereof. It is not enough for a public servant to be in an official position, which he may abuse, in order to bring him under the section: he must be purporting, or pretending to act in pursuance of his official duties. Where certain members of a District Council took a bribe to influence their decision in the appointment of a particular person as a permanent overseer of the Council.

Held, that the offence was not committed while acting or purporting to act in the discharge of their official duty within the meaning of the section. It was an independent act committed by persons whose position gave them the opportunity to commit it; but, it was in no way bound up with the performance of their duties and as such sanction of the Local Government was not necessary. (*Roberts, C.J. and Spargo, J.*) U TUN KYWE *v.* THE KING. **1939 Rang. L.R. 72=179 I.C. 679=40 Cr.L.J. 243 (2)=11 R.R. 337=A.I.R. 1939 Rang. 17.**

———**S. 197**—*Discharge of official duty—Prosecution of member of Debt Settlement Board for receiving bribes—Sanction—If necessary.*

Sanction under S. 197 (1), Cr. P. Code, is not necessary for the prosecution of a member of a Debt Settlement Board under S. 161, Indian Penal Code, for receiving bribes for the purpose of showing favour to a party before the Debt Settlement Tribunal, as the offence cannot be said to have been committed by him while acting or purporting to act in the discharge of his official duties. (*Derbyshire, C.J. and Bartley, J.*) KHURSHED AHMED *v.* AMANULLA. **I.L.R. (1940) 2 Cal. 162=71 C.L.J. 475=190 I.C. 157=44 C.W.N. 735=A.I.R. 1940 Cal. 405.**

———**S. 197**—*Discharge of official duty—Public servant giving evidence in Court—Prosecution for perjury—Sanction of Local Government—If necessary.*

A public servant giving evidence in any Court in obedience to a summons does not thereby purport to act in the discharge of his official duty. If, therefore, a public servant who is summoned to give evidence before a commission appointed under Act XXXVII of 1850 to investigate certain charges against another public servant gives deliberately false evidence, the sanction of the Local Government under S. 197, Cr. P.Code, is not necessary for his prosecution for perjury. (*Henderson and Akram, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* JADU NATH ROY. **I.L.R. (1940) 1 Cal. 590=188 I.C. 681=41 Cr.L.J. 659=13 R.C. 43=44 C.W.N. 596=A.I.R. 1940 Cal. 274.**

Object underlying.

———**S. 197**—*Prosecution of a Municipal Commissioner—Sanction—Necessity.*

The policy of the Legislature underlying the enactment of S. 197, Cr. P. Code is to afford a reasonable protection to the public servants in the discharge of their official function and this

CR. P. CODE (1898), S. 197.

policy could not be defeated by the reasoning that at the time of the public servant committing the offence he could not be said to be discharging public duty. Where an accused is admittedly a public servant, is a Municipal Commissioner and that he could not be removed from his office without the sanction of the Local Government, then he is completely protected by S. 197 and sanction is necessary for his prosecution. (*Manohar Lal, J.*) KALI PRASAD SINGH *v.* SIRIKISHUN CHATURVEDI. **176 I.C. 725=4 B.R. 755=11 R.P. 98=39 Cr. L.J. 774=A.I.R. 1938 Pat. 543.**

Public Servant.

———**S. 197**—*District School Board Chairman—If public servant as defined in S. 21 (10), I. P. C.—Sanction to prosecute—Necessity.*

The chairman of a District Board constituted under the Bombay Primary Education Act is a "public servant" as defined by S. 21 (10), I.P. Code, who is not removable from his office save by or with the sanction of the Local Government. He cannot consequently be prosecuted for any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty without the previous sanction of the Local Government as required by S. 197, Cr. P. Code. (*Broomfield .and Wasoodew, JJ.*) NHANE SAHEB AHMED SAHEB, *In re.* **I.L.R. (1937) Bom. 78=165 I.C. 901=9 R.B. 176=38 Bom. L.R. 956=38 Cr.L.J. 16=1936 Cr. C. 1104 =A.I.R. 1936 Bom. 453.**

Sanction.

———**S. 197**—*Form of—Sanction accorded to prosecution under specified section of Penal Code or such other section or sections as may be applicable—Legality of—If bad for vagueness.*

Where the order granting sanction to a prosecution under S. 197, Cr.P. Code, sets out the whole of the facts, and then gives the sanction for a prosecution under a particular section of the Penal Code (specifying the section by the number) or such other section or sections of the Code as may be applicable to the facts of the case, it is a sanction for a prosecution for the offence which those facts may be held to disclose. Such a sanction is in proper form and legal, and when the accused is prosecuted under the specified section and no other, it cannot be held that the prosecution is bad on the ground that the sanction is not in proper form and that it does not specify with sufficient clearness the offences for which the prosecution was permitted. (*Broomfield and Wadia, JJ.*) EMPEROR *v.* DESAIBHAI. **I.L.R. (1937) Bom. 918=172 I.C. 873=10 R.B. 298=39 Cr.L.J. 214=39 Bom. L.R. 1056=A.I.R. 1938 Bom. 50.**

———**S. 197**—*Sanction obtained after filing complaint—Trial, if vitiated.*

In dealing with all technical objections of procedure the final test is whether or not the accused has in any way been prejudiced by the alleged irregularity. The object of sanction under S. 197, Cr.P.Code, is that a public servant should not be unduly harassed. The word 'institution' should not be given a very narrow meaning. In one sense it is true a Court takes cognizance of a matter as soon as it makes any

order, however formal, but even if such formal orders are considered to have been made without jurisdiction, this flaw will not affect orders made after the defect has been removed and the Court is properly seised of the case. In prosecution against a public servant sanction under S. 197, Cr.P.Code, was not obtained before the institution of the complaint. But the sanction was actually put on record before the evidence in the case was recorded. The accused however was not prejudiced in any way owing to this defect in the procedure.

Held, that this was merely an irregularity which in the absence of any prejudice to the accused, did not in any way affect the merits of the case or the procedure after the granting of the sanction and hence the trial could not be vitiated. (*Ram Lal, J.*) MANZUR ALI *v.* EMPEROR. **I.L.R. (1939) Lah. 227=179 I.C. 778=40 Cr. L.J. 252=12 R.L. 631=41 P.L.R. 154=A. I.R. 1938 Lah. 1.**

———**S. 197**—*Sanction under—Legality—Sanction not addressed to any Court or officer—If bad.*

There is nothing in S. 197, Cr.P. Code, which requires that the sanction under the section should be addressed to any particular Court or officer or that orders under the second part of the section should be necessarily passed in every case. A sanction is consequently not bad because it is not addressed to any particular Court or officer. (*Broomfield and Wadia, JJ.*) EMPEROR *v.* DESAIBHAI. **I. L.R. (1937) Bom. 918=172 I.C. 873=10 R. B. 298=39 Cr. L.J. 214=39 Bom.L.R. 1056 =A.I.R. 1938 Bom. 50.**

———**S. 197**—*Acts done by public servant under cloak of office but not part of public duty —Prosecution for.*

S. 197, Cr.P. Code, applies to acts committed by a public officer, although these acts were not part of his public duty. If he committed the act under the cloak of his official position then he is protected. To hold otherwise would be to narrow down the protection almost to vanishing point. (*Pollock, J.*) S.Y. PATIL, *In re.* **172 I.C. 669=10 R.N. 232=39 Cr. L.J. 146 =A.I.R. 1937 Nag. 293.**

———**S. 197**—*Criminal breach of trust by public servant.*

No sanction under S. 197, Cr.P. Code, is necessary for the prosecution of a public servant for an offence under S. 409, I.P. Code, because in committing such an offence the public servant in question cannot be said to be acting in the discharge of his official duty. In fact, in misappropriating such moneys he intends to act in direct opposition to his duty, and his office merely provides him with the opportunity of committing the offence. A.I.R. 1935 Rang. 263, Rel. on; A.I.R. 1936 Lah. 781, Doubt. (*Ram Lal, J.*) MANZUR ALI *v.* EMPEROR. **I.L.R. (1939) Lah. 227=179 I.C. 778=40 Cr.L.J. 252=11 R.L. 631=41 P.L.R. 154= A.I.R. 1939 Lah. 1.**

———**S. 197**—*Inspector of Police—Prosecution —Sanction—Necessity.*

An Inspector of Police comes under the definition of "subordinate ranks" in S. 3 (1), Bombay District Police Act. His appointment is to be made by the Inspector-General under S. 10 of the Act. His suspension, reduction or removal is governed by the provisions of S. 29, which by virtue of S. 243, Government of India Act, must control and regulate the conditions of his service, for although S. 29 does not make special reference to the suspension, reduction, or removal. S. 29 (1) when read with S. 29 (3) makes it clear that the word 'punishment' in S. 29 (3) includes power to suspend, reduce or remove. Under S. 29 (3) it is the Inspector-General or the Deputy Inspector-General who is to suspend the Inspector. Therefore an Inspector cannot claim that he is removable from office only with the previous sanction of the Local Government and hence sanction under S. 197 is not necessary for the prosecution of an Inspector of police. (*Davis, J. C. and Weston, J.*) NIAZ MUHAMMAD *v.* EMPEROR. **I.L.R. (1939) Kar. 652=182 I.C. 513=12 R. S. 18=40 Cr.L.J. 695=A.I.R. 1939 Sind 148.**

———**S. 197**—*"'Judge'"—Village police patel—Offence by in the course of duties while trying case—S. 1 (2)—Scope and effect of.*

A village police patel trying and disposing of a case in exercise of his powers under S. 14 of the Village Police Act of 1867 is a Judge within the meaning of S. 19, I.P. Code, for purposes of S. 197, Cr.P. Code and therefore comes within the protection afforded to Judges and public servants under S. 197, Cr.P. Code, sanction of the Local Government must therefore be obtained to a prosecution of the village police patel for an offence alleged to have been committed by him while acting as Judge. S. 1 (2) of the Cr.P. Code does not prevent the application of S. 197 to the village police patel. All that S. 1 (2) means is that the procedure to be followed by the village police patel is not to be governed by the Cr. P. Code. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* SHANKAR SAYAJI DALVI. **178 I.C. 682=11 R.B. 183=40 Cr.L.J. 116 =40 Bom.L.R. 1106=A.I.R. 1938 Bom. 489.**

———**S. 197**—*"'Magistrate'" or "public servant not removable, etc.'"—Village headman sending report under S. 45—Prosecution of.*

A village munsif or village headman who sends a report under S. 45, Cr.P.Code, is not acting in his capacity as Magistrate, nor is he a public servant removable only by or with the sanction of a Local Government within the meaning of S. 197, Cr.P.Code. Sanction of the Government is therefore not necessary for the prosecution of a village headman in respect of such a report sent by him. (*King, J.*) BALANAGU *v.* KOTAYYA. **1937 M.W.N. 638= 170 I.C. 481=38 Cr.L.J. 950=10 R.M. 206 =1937 M.Cr.C. 188=45 L.W. 697=A.I.R. 1937 Mad. 578.**

———**S. 197**—*Manager under Chota Nagpur Encumbered Estates Act—If a 'Judge'—Offence relating to passing of bills for work done by contractor—Prosecution of manager for.*

There can be no doubt that while exercising the functions referred to in Part IV of the Chota Nagpur Encumbered Estates Act of 1876 relating to the settlement of debts, the Manager is a Judge within the meaning of S. 197, I.P. Code. That being so, S. 197, Cr.P. Code, debars his prosecution on a charge of any of the offences alleged to have been committed by him while acting, or purporting

to act, in the discharge of his official duty. As the manager, while passing the bills for work done by the contractor, acts in his official capacity and in discharge of his official duty, he cannot be prosecuted for an offence relating to the passing of such bills, without the sanction of the Local Government (*Agarwala, J.*) HEMENDRA NATH GUPTA *v.* EMPEROR. **165 I.C. 966=9 R.P. 243=38 Cr. L. J. 94=3 B.R. 114 (2)=17 Pat. L.T. 932=1936 P.W.N. 782=A.I.R. 1937 Pat. 160.**

———**S. 197**—*Officiating* kulkarni—*Collection of land revenue and misappropriation—Prosecution—Bombay Hereditary Offices Act, S.* 58.

An officiating *kulkarni* can, under S. 58 of the Bombay Hereditary Village Offices Act, be removed by the Collector only with the previous sanction of the Provincial Government, and therefore he is a public servant who is not removable from his office save by or with the consent of the Local Government within the meaning of S. 197, Cr. P. Code. But sanction under S. 197, Cr.P. Code, is only required for a prosecution for an offence committed while acting or purporting to act in the discharge of official duty. Where an officiating *kulkarni* collects money on account of land revenue, and, instead of sending it to the treasury, uses it for his own purposes, it cannot be said that in so misappropriating the amount, he is acting or purporting to act in discharge of his official capacity, and therefore he can be prosecuted for misappropriation without sanction under S. 197, Cr.P. Code. (*Broomfield and Macklin, JJ.*) EMPEROR *v.* GURUSHIDAYYA. **I.L.R. (1939) Bom. 119=179 I.C. 686=11 R.B. 287 (2)=40 Cr.L.J. 269=40 Bom.L.R. 1286=A.I.R. 1939 Bom. 63.**

———**S. 197**—*President of Panchayat Court—Money paid to in his capacity as president—Prosecution for criminal breach of trust in respect of.*

The President of a Panchayat Court which a judge within the meaning of the Penal Code should not be exposed to private complaints in respect of acts done by him in his capacity as such and while purporting to discharge his duties, without the safeguard or protection afforded by S. 197, I. P. Code. A prosecution of the President of a Panchayat Court for criminal breach of trust in respect of a sum of money paid to him as such President cannot therefore be launched without the sanction of the Local Government required by S. 197, Cr. P. Code. (*Pandurang Row, J.*) CHELLAPERUMAL PADAYACHI *v.* VELAYUDHA PADAYACHI. **1937 M.W.N. 216.**

———**S. 197 (1)**—*Prosecution of Deputy Superintendent of Police—Preliminary enquiry—If can be held before such sanction.*

A Deputy Superintendent of Police who is appointed by Local Government comes within the purview of S. 197 (1), Cr. P. Code. No prosecution, therefore, in respect of offences alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, can be taken cognizance of without the previous sanction of the Local Government. Preliminary inquiry to see if it is expedient in the interests of justice that an inquiry should be held into the alleged offence by such officer, can be held without the sanction

of the Local Government for it does not entail taking cognizance of any offence. (*Spargo, J.*) U BA HLA *v.* MAUNG TUN SEIN. **170 I.C. 516=38 Cr.L.J. 945=10 R.R. 96=A.I.R. 1937 Rang. 312.**

———**S. 197**—*Prosecution of receiver.*

A receiver appointed by a Civil Court is not a public servant within the meaning of S. 197, Cr. P. Code, and so no sanction of that Court is necessary for his prosecution for a breach of the ordinary criminal law of the country. (*Ba U, J.*) MAUNG SAW MAUNG *v.* MA ME SHWE. **1939 Rang.L.R. 117=182 I.C. 262=11 R.R. 519=40 Cr.L.J. 648=A.I.R. 1939 Rang. 202.**

———**S. 197**—Prosecution of Sub-Inspector of Police—Previous sanction of Local Government—If necessary. *See* POLICE ACT, S. 7. **1938 Rang. L.R. 104.**

———**S. 197**—*Vice-chairman of Municipality—Sanction for his prosecution—Necessity for—Bengal Municipal Act.*

A commissioner who has been elected a vice-chairman of a municipality cannot be prosecuted for acts done in the exercise of his office as vice-chairman, without the sanction of the Local Government in view of the provisions of S. 197, Cr. P. Code. His position as vice-chairman cannot be divorced from his position as a commissioner. In fact, in discharging the duties of that office, he is working as a commissioner. (*Henderson and Sen, JJ.*) EMPEROR *v.* HIRA LAL DAS. **I.L.R. (1939) 2 Cal. 32=184 I.C. 236=12 R.C. 219=40 Cr.L.J. 959=69 C.L.J. 567=A.I.R. 1939 Cal. 636.**

———**S. 197**—*Village Magistrate—Prosecution for making incorrect entries in register of cases.*

A village Magistrate while entering in his register particulars of a case or complaint filed before him, clearly purports to act as a Judge within the meaning of S. 197, Cr. P. Code, and a prosecution of the village Magistrate in respect of such act, on the ground that he has made incorrect entries, requires the sanction of the Local Government. (*King, J.*) SUBBA REDDI *v.* SWAMI REDDI. **1937 M.W.N. 870.**

Miscellaneous.

———**S. 197**—*Power to remove public servant delegated to subordinate authority—Latter, if can sanction prosecution.*

Where an authority delegates the power to remove a public servant to a subordinate authority, the public servant for the purposes of S. 197, Cr. P. Code, nevertheless continues to be removable by the original authority and sanction to prosecute such public servant must be obtained from the Local Government or other superior authority and the delegation of powers cannot by itself sanction prosecution. A.I.R. 1934 Rang. 238 and 33 I.C. 648, Foll. (*Currie, J.*) H. A. M. NEWBOULD *v.* EMPEROR. **165 I.C. 61=9 R.L. 207=37 Cr.L.J. 1056=38 P.L.R. 1061=1936 Cr.C. 793=A.I.R. 1936 Lah. 781.**

———**S. 197 and Police Act (1861), S. 7**—*Sanction of Provincial Government—If necessary, for prosecution of a sub-inspector of police.*

According to S. 7 of the Police Act, it cannot be said that a sub-inspector is a public servant "who is not removable from his office save by or with the sanction of the Provincial Government or some higher authority" and hence S. 197 of

the Criminal Procedure Code will not apply to him and no sanction for his prosecution is necessary. The power to dismiss, suspend or reduce any police officer of the subordinate rank conferred by S. 7 of the Police Act on the Inspector-General and other officers is not a delegation of its powers by the Provincial Government. (*Thomas, C.J. and Zia-ul-Hasan, J.*) MAQBOOL HUSAIN *v.* EMPEROR. **188 I.C. 846=41 Cr.L.J. 695=13 R.O. 31=1940 A. Cr. C. 77=1940 A.W.R. (C.C.) 250=1940 O.L.R. 385=1940 O.W.N. 494=1940 O.A. 459=A.I.R. 1940 Oudh** 382.

———**S. 197 and United Provinces Municipalities Act, S. 40**—*Public servant—Member of non-city Municipal Board—Prosecution—Sanction—Necessity.*

Under S. 40 of the United Provinces Municipalities Act a member of a non-city Municipal Board is removable by the Commissioner and is not such an officer 'not removable from his office save by or with the sanction of a Local Government'. Hence when such a person is prosecuted for an offence under S. 409, I. P. Code, without the previous sanction of the Local Government, he cannot plead that he is entitled to the protection of S. 197, Cr. P. Code. (*Mulla, J.*) SOHAN LAL *v.* MUBARAK ALI KHAN. **I.L.R. (1939) All. 868=185 I.C. 224=12 R.A. 309=41 Cr.L.J. 137=1939 A.L.J. 640=1939 A.W.R. (H.C.) 569=A.I.R. 1939 All. 705.**

———**Ss. 197, 200 and 532**—*Scope—Prosecution requiring sanction—Magistrate examining complainant and issuing warrant—Objection by accused on ground of absence of sanction—Sanction subsequently obtained and case proceeded with—Complainant not examined afresh under S. 200—Effect—Accused taking no objection and not prejudiced—Committal to sessions—Trial by Sessions Judge—If vitiated.*

Where a prosecution which requires the sanction of the Local Government under S. 197, Cr. P. Code, is commenced on a private complaint without the sanction of the Government, the Magistrate examining the complainant and issuing warrant against the accused, but on objection by the accused when appearing in answer to the warrant, the Magistrate obtains the necessary sanction, it is desirable that the Magistrate, before re-commencing the proceedings after sanction, should examine the complainant again and verify his complaint and not merely take on record the complaint verified by his predecessor. But the omission to do so is a purely technical irregularity and does not vitiate the proceedings. When nothing is omitted except the repetition of the verification of the complaint, and the complainant is examined as a witness in the enquiry before the committing Magistrate and at the trial before the sessions. S. 197 must be taken to have been complied with in spirit and substance, and the omission to examine the complainant under S. 200, Cr. P. Code, is a mere irregularity which does not vitiate the proceedings. And when there is no suggestion that the accused is prejudiced in any way by the omission to verify the complaint afresh, and no objection is taken before the Magistrate after sanction and before the commencement of the committal inquiry, S. 532 of the Code applies to the case, and the Sessions Judge is perfectly justified in accepting the commitment. (*Broomfield and Wadia, JJ.*) EMPEROR *v.* DESAIBHAI. **I.L.R. (1937) Bom. 918=172 I.C. 873=10 R. B. 298=39 Cr.L.J. 214=39 Bom.L.R. 1056=A.I.R. 1938 Bom. 50.**

———**Ss. 197 and 537**—*Magistrate only issuing process to accused before sanction—Irregularity—Difference between this section and S. 270, Government of India Act.*

Per *Blacker, J.*—There is a fundamental difference between S. 270, Government of India Act, and S. 197, Cr. P. Code. S. 270 creates bar to the institution of proceedings, that is to say, to the act of a complainant making a complaint or of a police officer making a report as well as to the act of a Magistrate taking cognizance upon such complaint or report. What is barred by S. 197, Cr. P. Code, is not making of a complaint or the submitting of a police report but the act of a Magistrate in taking cognizance of the offence on such complaint or such report or in any other way. The taking of cognizance cannot be regarded as a single momentary act which can only be done once with regard to a particular offence. It is a continuous act which commences as soon as the Magistrate applies his mind to the case and only ends when the Magistrate no longer has seisin of it. It follows therefore that if a Magistrate has purported to take cognizance of an offence before the necessary sanction is received, it is only what he has done up till that time that is void and cannot be revived. This however does not mean that after the sanction has been received he cannot again commence to take valid cognizance. The complaint or police report not being invalidated by the absence of the sanction under S. 197 is still in legal existence and can form the legal basis for the taking of fresh cognizance under S. 190. In this view all that is to be seen is whether S. 537, Cr. P. Code, is applicable to the circumstances of the particular case. Where in a case which requires sanction only under S. 197, all that a Magistrate does before the sanction is received is to issue process against the accused and secure their attendance, his acts may be void for want of jurisdiction but it cannot be said that his omission to issue fresh process to the accused after the sanction had been received which enabled him to take valid cognizance of the offence has caused any failure of justice. Therefore the cognizance taken after the sanction had been received is perfectly valid and the omission of the Magistrate to go back and issue fresh process against the accused is merely an irregularity curable under S. 537 of the Code. (*Tek Chand and Blacker, JJ.*) ARJAN SINGH *v.* EMPEROR. **I.L.R. (1940) Lah. 102=184 I.C. 680=12 R.L. 241=42 P.L.R. 51=41 Cr.L.J. 65=A.I.R. 1939 Lah. 479.**

———**Ss. 198 and 199**—*Object of—Husband himself not complaining of offence under S. 494, I. P. Code—Power of Court.*

The purpose of Ss. 198 and 199 is to make sure that the offences to which they refer are not made the subjects of complaint except by aggrieved persons.

Where therefore the husband files a complaint under Ss. 363, 342 and 506, I. P. Code, and does not himself complain of an offence under S. 494, I. P. Code, it is not open to the Court to force upon him, as a complainant, the character of an aggrieved husband, which he does not

CR. P. CODE (1898), S. 199.

wish to assume. (*Davis, J.C. and Haveliwala, J.*) EMPEROR *v.* GULAB. **I.L.R. (1939) Kar. 12 =176 I.C. 98=11 R.S. 16=39 Cr.L.J. 686= A.I.R. 1938 Sind 141.**

———**S. 199**—*Complaint under S.* 498, *I. P. Code —Competency—Woman discarded by husband and living with father and brother—Elopement with accused and living with him of her own freewill —Complaint by father and brother against accused under S.* 498—*Sustainability—Offence.*

An essential ingredient of the offence under S. 498, I. P. Code, is that the woman concerned shall have been taken or enticed from a person having the care of her on behalf of her husband, and if that is not established, there can be no conviction under that section. The words "on his behalf" require that some delegation by the husband is necessary, though it need not be an express delegation. It is not enough that she is under the protection and care of a particular person. It has to be shown that he had the care of her on behalf of her husband. Where a husband discards his wife, and does not take care her, and she, having nowhere else to go, goes to her father's house, and lives there with her father and brother, it cannot be said that the father and brother have care of her on behalf of her husband. If they prefer a complaint under S. 498, I. P. Code, against a person with whom the woman elopes and lives, they act only on their own authority or assumed authority and not by the authority or on behalf of the husband. The complaint would therefore not be competent under S. 199, Cr. P. Code. (*Broomfield and Sen, JJ.*) EMPEROR *v.* RAMNARAYAN BABURAO. **I.L.R. (1937) Bom. 244=39 Bom.L.R. 61=169 I.C. 526=10 R.B. 34=38 Cr.L.J. 769= A.I.R. 1937 Bom. 186.**

———**S. 199**—*Right to complain—Husband absent—Wife living with father—Husband's brother—If has "care" of the woman.*

The law recognizes no authority of a man to take care of his brother's wife during his brother's absence. Where a person files a complaint under Ss. 497 and 498, Penal Code, alleging that the accused had, during the absence of his brother in jail, married his wife but there is no evidence that the husband entrusted his wife to the care of any person when he was sentenced nor is it shown that the woman was living with the complainant or that he had *de facto* or constructive care of her or that he represented his brother or held authority from him, the complainant cannot be said to have had the care of the woman of a nature to bring his complaint within the purview of S. 199, Cr. P. Code, and the trial Court is debarred from taking cognizance of the complaint. (*Middleton, J.C.*) RABNAWAZ KHAN *v.* EMPEROR. **160 I.C. 726=37 Cr.L.J. 345=8 R. Pesh. 128=1936 Cr.C. 113=A.I.R. 1936 Pesh. 32 (1).**

———**S. 199**—*Scope—Compliance—Offence under S.* 497, *I. P. Code—Absence of complaint by husband—Effect—Power of Court to convict.*

In a charge under S. 497, I. P. Code, a complaint by the husband is an essential ingredient which cannot be dispensed with. If a criminal charge of adultery is to be preferred a formal complaint of that offence must be instituted in the manner provided by law, and if it is not, the requirements of S. 199, Cr. P. Code, will not have been satisfied. In the absence of such a

CR. P. CODE (1898), S. 200.

complaint it is illegal to convict the accused of the offence. (*Broomfield and Sen, JJ.*) EMPEROR *v.* RAMNARAYAN BABURAO. **I.L.R. (1937) Bom. 244=169 I.C. 526=10 R.B. 34=38 Cr.L.J. 769=39 Bom.L.R. 61=A.I.R. 1937 Bom. 186.**

———**S. 200**—*Duty of Magistrate—Enquiry as to scene of offence.*

Magistrates, when verifying complaints, should enquire, so far as they can, as to the scene of offence so as to find out as soon as possible whether the complaint is or is not within their jurisdiction and thus save their own time and of the appellate Courts. (*Davis, J.C.*) ISMAIL ABDUL KARIM *v.* NURALYAR MAHOMED. **166 I.C. 622=9 R.S. 148 (1)=38 Cr.L.J. 291 (1)= A.I.R. 1937 Sind 31.**

———**S. 200**—Scope—Omission to examine complainant under—Effect on proceedings. *See* CR. P. CODE, Ss. 197, 200 AND 532. **39 Bom.L.R. 1056.**

———**S. 200**—*Complaint signed by two persons—Issue of process on examination of one—Legality.*

If a written complaint is signed by two persons, the Magistrate has jurisdiction to examine one of them and issue process on that examination. Should it be necessary to proceed afterwards on the complaint of the second signatory, there is no bar to such action being taken. (*Bartley and Rou, JJ.*) UZALKHAN *v.* PURNA CHANDRA. **43 C.W.N. 527.**

———**S. 200**—*Duty of magistrate—Name or number of Act or section—Mistake in—Procedure.*

It would not be right to say that merely because the complainant, whether in ignorance or inadvertence, mentions the wrong Act or mentions the wrong Section, there is no complaint within the meaning of S. 200. It is true that if such errors occur in the complaint, care must be taken at the proper time to see that the accused is in no way prejudiced. But if the facts are such as to disclose an offence under a particular section, under a particular Act then existing, then whatever errors there may be in the complaint as regards the number or name of the Act or section, the Magistrate should take cognizance of the complaint for what in substance it is, and even if the Magistrate has repeated in the summons the mistake that occurred in the complaint itself, that mistake is a mistake which can subsequently be rectified. (*Davis, J.C. and Mehta, J.*) LILARAM *v.* WADHUMAL. **I.L.R. (1939) Kar. 230=178 I.C. 648=11 R.S. 100=40 Cr.L.J. 122=A.I.R. 1938 Sind 209.**

———**S. 200**—*Examination of complainant—Necessity—Report by Judge of Civil Court.*

According to S. 200, Cr. P. Code, it is unnecessary for a Court to examine the complainant when the complaint is made in writing by a Court or a public servant acting or purporting to act in the discharge of official duties. Hence when a Magistrate takes cognizance on a report from a Judge of a Civil Court, who is a public servant, his examination is unnecessary. Even otherwise, failure to examine would only amount to an irregularity. (*Allsop, J.*) TARA SINGH *v.* EMPEROR. **1938 A.L.J. 528=1938 A. Cr. C. 45=11 R.A. 158=1938 A.W.R. (H.C.) 361=176 I.C. 960=1938 A.L.R. 689=39 Cr.L. J. 840=A.I.R. 1938 All. 449.**

———**S. 200**—Failure to record statement of complainant—If curable under S. 537. *See* CR.

CR. P. CODE (1898), S. 200.

P. CODE, S. 537—EXAMINATION OF COMPLAINANT. 40 P.L.R.J. & K. 1.

———Ss. 200 and 203—*Duty of Magistrate—Procedure for disposal of complaint—Issue of summary under class "C"—Legality—Proper procedure for dismissal of complaint.*

The question of issuing summaries is a mere administrative matter and is not a judicial order passed under the Cr. P. Code at all. A Magistrate, when there is a complaint before him, must deal with it according to S. 200, Cr. P. Code, and the following sections. If he takes cognizance of it under S. 200, he must examine the complainant on oath and reduce the substance of the examination to writing, subject to certain exceptions specified: if he wishes to postpone the issue of process under S. 202, he must comply with the provisions of that section, and if, as a result of a preliminary inquiry, he wishes to dismiss the complaint, he must do so according to S. 203. There is no provision in S. 203 for the issue of a "C" summary; and an order disposing of a complaint by a brief order, "Issue summary order under class C", is not according to law. A complaint cannot be dismissed by the issue of such a summary. A Magistrate is bound under the Code to exercise his own independent judgment when he receives the report of the investigation or inquiry that he has ordered, and it is not an exercise of his independent judgment when he merely accepts without giving reasons the opinion of the police prosecutor. The Magistrate should not surrender his discretion or judgment to that of the police prosecutor. (*Davis, J.C.*) JEOOMAL TIKAMDAS *v.* EMPEROR. I.L.R. (1939) Kar. 277=183 I.C. 449=40 Cr. L.J. 807=12 R.S. 57=A.I.R. 1939 Sind 208.

———Ss 200 and 537—*Omission to examine complainant—Irregularity.*

The omission to examine the complainant under S. 200 before issue of process is an irregularity covered by S. 537 (*a*) of the Code. (*James, J.*) RAMJAS MARWARI *v.* PURULIA MUNICIPALITY. 160 I.C. 343=37 Cr.L.J. 289=8 R.P. 353=17 Pat.L.T. 258=1936 Cr.C. 231=1936 P.W.N. 45 =A.I.R. 1936 Pat. 145.

———S. 202—*Complaint impugning* bona fides *of Police sent to police officer for report—Legality —Revision.*

Although it may be undesirable to send a complaint in which the *bona fides* of the Police are impugned to a police officer for enquiry and report, it is not illegal to do so. Before, therefore, this would be a ground for revision it would have to be found in the words of S. 435, Cr. P. Code, that this particular order was in fact incorrect or improper. (*Blacker, J.*) KANIYA RAM *v.* CHANAN MAL. 188 I.C. 524=13 R.L. 33= 41 Cr.L.J. 618=42 P.L.R. 134=A.I.R. 1940 Lah. 208.

———S. 202—*Construction and scope—Complaint referred to police—Powers of police to arrest accused and to act independently of Magistrate.*

There is nothing in S. 202 which debars the police from exercising their powers under S. 54 and arresting the accused, merely because the Magistrate had referred a case for investigation by them under S. 202. But when a Magistrate has referred a complaint of an offence to the police for investigation under S. 202, it is not competent to the police to investigate the offence complained of independently of the Magistrate's directions and to send up the accused for trial for the offence complained of upon a charge sheet. (*Davis, J.C., Mehta and Lobo, JJ.*) EMPEROR *v.* BIKHA MOTI. I.L.R. (1939) Kar. 85=175 I.C. 899=11 R.S. 13= 39 Cr.L.J. 681=A.I.R. 1938 Sind 113 (F.B.).

CR. P. CODE (1898), S. 202.

———S. 202—*Enquiry under—Protracted proceedings deprecated.*

Dilatory and protracted proceedings in an enquiry under S. 202, Cr. P. Code, are to be deprecated. (*Jack and Khundkar, JJ.*) AJIT NATH DAS *v.* SATISH CHANDRA KAYAL. 179 I.C. 489=11 R.C. 549=40 Cr.L.J. 213=67 C.L.J. 577 =A.I.R. 1939 Cal. 33.

———S. 202—*Enquiry under—Lengthy cross-examination of witnesses by Magistrate—Permissibility.*

The hands of the inquiry Magistrate are not tied in the matter of questioning the witnesses when they are produced under S. 202. It would be dangerous to lay down hard and fast rules as to how far the Magistrate should go in trying to elicit the truth from the witnesses when he is conducting an enquiry behind the back of the accused. It is commendable on the part of the Magistrate to show keenness in finding out the truth or falsity of the case before he gives the accused person the trouble of appearing before him in response to a criminal charge. Hence the anxiety of the trial Magistrate to get at the truth and his intensive cross-examination of the witnesses for that purpose are no grounds in law for directing a further inquiry. (*Mir Ahmad, J.*) GUL MOHAMMAD *v.* HABIBULLAH ULLAH. 182 I. C. 522=12 R. Pesh. 1=40 Cr.L.J. 674=A.I.R. 1939 Pesh. 16.

———S. 202—*Issue of process—Duty of magistrates.*

Persons ought not to be dragged to Court on complaints, without the slightest consideration by Magistrates as to whether there is any substance in the complaint. (*Weston.*) NATHU LAL *v.* MOOLKI. 1938 A.M.L.J. 111.

———S. 202—*Powers of Magistrate—Complaint against several persons—Process if can be issued against some and postponed against others.*

It is wrong to think that if a complaint is made against some persons jointly, the Magistrate has no discretion left to issue processes against some and postpone issue of processes against the others. The fact that he had issued processes against some of the accused would not deprive him of his power to make a preliminary enquiry in respect of the offence alleged against the others under S. 202, Cr. P. Code. (*Niyogi, J.*) HAROON ABDULLA *v.* GAJADHAR SUKHDEO. 186 I. C 459=12 R N. 228==41 Cr.L.J. 312=1940 N. L.J. 43=A.I R. 1940 Nag. 128.

———S. 202—*Procedure—Direction to clerk to verify complaint—Legality—Duty of Magistrates.*

A Magistrate should not direct his clerk to perform the duties of verifying the complaint and making the preliminary enquiry under S. 202 Cr. P. Code. He must do them himself (*Weston.*) LADHU *v.* PHUL CHAND. 1937 A.M.L.J. 140.

———S. 202—*Scope—If applies to transfers under S.* 528.

The 1st part of S. 202 applies only to cases in which the Magistrate has taken cognizance him-

self and does not include a case which is transferred. The transfer under S. 192 comes within the ambit of 2nd part of S. 202 but not transfer under S. 528, because where the language is clear it is not for a Court to probe into the mind of the legislator or to indulge in surmises such that the case of a transfer under S. 528 was overlooked when the section was amended. (*Gruer, J.*) QAMA RALI *v.* MST. TULSI. **178 I.C. 54=11 R. N. 197=39 Cr.L.J. 981=A.I.R. 1938 Nag. 433.**

——S. 202—*Stage for holding inquiry.*

A reference under S. 202 cannot be made after evidence has been taken for the complainant and process issued. The Magistrate cannot go back beyond the stage reached by his predecessor. A necessary preliminary to an inquiry under S. 202 is postponement of issue of process. Where that was not done by the first Court, which in fact procured the attendance of the accused, the stage for holding inquiry under S. 202 has therefore passed and cannot be revived subsequently. (*Gruer, J*) QAMARALI *v.* MST. TULSI. **178 I.C. 54=11 R.N. 197=39 Cr.L.J. 981=A.I.R. 1938 Nag. 433.**

——Ss. 202 and 192—*Transfer of case—Power of Magistrate after calling for police report.*

If a Magistrate acts under S. 202, Cr. P. Code, and sends the case for enquiry and report to the police, he cannot, on receipt of the report, send the case for disposal to a Subordinate Magistrate without deciding whether the case should be dismissed under S. 203 or proceeded with under S. 204. The Subordinate Magistrate in such circumstances is not properly seized of the case and his order summoning the accused is, therefore, without jurisdiction. (*Dalip Singh, J.*) SANTOKH RAJ SINGH *v.* GAHWAR KHAN. **186 I. C. 595=12 R L. 423=41 Cr.L.J. 344=41 P.L.R. 807=A.I.R. 1940 Lah. 61.**

——Ss. 202 and 203—*Dismissal of complaint after issue of process—Legality.*

A Court cannot dismiss a complaint under S. 203, Cr. P. Code, after process has been issued to the accused person. The stage for holding an enquiry under S. 202, Cr. P. Code, is passed when the process for the attendance of the accused person is issued by the Court and cannot be revived by another Magistrate as he cannot go back beyond the stage reached by his predecessor. (*Abdul Qayoom, C.J. and Kichlu, J.*) SITA RAM *v.* STATE. **41 P.L.R. J. & K. 26.**

——Ss. 202 and 203—*Dismissal of complaint without preliminary enquiry—Power of Court.*

Where Ss. 202 and 203 prescribe a course or courses of action, the Court cannot override the statute by dismissing a complaint when the facts as stated in the complaint and the examination of the complainant disclose an offence, without any preliminary inquiry. The High Court can only direct which course should be followed. It cannot quash the Magistrate's proceedings altogether on the mere ground that the complainant had failed to inform the Magistrate that he had already filed a complaint before another Magistrate who had ordered a preliminary enquiry, and had then dismissed the complaint for default. (*Parker, J.*) CHIN HONE ON *v.* AH FOO. **A.I.R. 1937 Rang 35.**

——Ss. 202 and 203—*Procedure—Referring of complaint to accused for report as to truth or falsity of case before issue of summons—Legality.*

It is not only irregular but illegal for a Magistrate to whom a complaint is made to call upon the person accused for a report as to the truth or falsity of the charge preferred against him, before issuing summons to him. A Magistrate would be going out of his way to examine the accused person before calling upon the complainant to substantiate his allegation. (*Manohar Lall, J.*) MUKTI NARAIN *v.* EMPEROR. **186 I.C. 627=12 R.P. 534=6 B.R. 377=20 Pat.L.T. 947 =41 Cr. L. J. 349=1939 P. W. N. 871=A.I.R. 1940 Pat. 97.**

——Ss. 202, 203 and 204—*Complaint—Issue of process—Duty of Magistrates.*

If a Magistrate thinks, upon a reading of the complaint and examination of complainant, that a *prima facie* case is shown, he may order process to issue at once. If he is doubtful he may order enquiry. But, he is, of course, not bound by the opinion of the person holding the enquiry. He should take the opinion and statements during enquiry into consideration and order a case to be continued on the ground that the accused has not proved his innocence. (*Norman, I.C.S.*) BANO *v.* RAHIM BANO. **1939 A.M.L J. 41.**

——Ss. 202, 203 and 204—*Duty of Magistrate under—Holding of inquiry—Proper procedure.*

If a Magistrate to whom a complaint is made has any doubt as to the truth of the allegations in the petition of complaint as supported by the solemn affirmation of the complainant, he ought to record an order to that effect in the order sheet, so that the superior Courts may be satisfied that the Magistrate has justification for refusing to issue summons to the accused as required by law. He can also, after giving proper and adequate reasons, either summarily require into the truth of the complaint himself or call for an inquiry and report as provided by S. 204, Cr. P. Code, If the Magistrate has no ground for disbelieving the truth of the complaint, it is his bounden duty to issue summonses to the accused, and then to pass an order of acquittal, if he is not satisfied, after due inquiry, if the truth of prosecution case presented at the trial. (*Manohar Lall, J.*) MUKTI NARAIN *v.* EMPEROR. **186 I.C. 627=12 R.P. 534=6 B.R. 377=20 Pat. L.T. 947=41 Cr.L.J. 349=1939 P.W.N. 871=A. I.R. 1940 Pat. 97.**

——Ss. 202, 203 and 204—*Scope—Cognizance of case by Magistrate—Procedure on.*

The granting of a summary A, B or C is a mere administrative matter, while the dismissal of the complaint requires a judicial order under S. 203, Cr. P. Code. Ordinarily, when a Magistrate takes cognizance of an offence on a complaint, he should examine the complainant on oath and reduce the substance of his examination to writing, and if he wishes to postpone the issue of process, he acts in accordance with S. 202, Cr. P. Code, and then if after inquiry he wishes to dismiss the complaint he acts under S. 203, Cr. P. Code. But that section contemplates that he should exercise his own independent judgment, and if he does not wish to postpone the issue of process, then he acts under S. 204 and the following sections. (*Davis, J C.*) PHERUMAL LILARAM *v.* EMPEROR. **177 I.C. 744= 11 R.S. 67=39 Cr.L.J. 966=A.I.R. 1938 Sind 192.**

CR. P. CODE (1898), S. 203.

——S. 203—*Applicability — Complaint of a civil nature.*

A complaint in respect of a dispute of civil nature, though dressed up in criminal garments ought to be dismissed *in limine* under S. 203 of the Cr. P. Code. (*Newsam, J.*) MURUGAPPA CHETTIAR *v.* MORANGAMUTHU RAJA. **1937 M.W. N. 1238.**

——S. 203—*Complainant not present on date fixed—Order consigning case to record room agreeing with police report—Legality.*

Even if the complainants who are Government employees are not present on the date fixed for the hearing of the case, the trial Magistrate ought to examine the record and proceed to dispose of the case on merits according to law. The mere fact that the complainants are not present on that particular date is by itself no sufficient ground for the trial Magistrate to record his agreement with the report submitted by the local police in regard to the facts of the case, and to consign the case to the record room. It is his duty to satisfy himself whether the report made by the police is in order. (*Abdul Qayoom, C.J. and Kichlu, J.*) STATE *v.* FATEH DIN. **41 P.L.R J. & K. 41.**

——S. 203—*Dismissal of complaint after enquiry under S. 202—Fresh complaint—If can be entertained.*

Though a previous order dismissing a complaint under S. 203 is not a bar to the institution of a fresh complaint, it is only in exceptional circumstances that the second complaint should be entertained on the same facts, for instance where the order of dismissal was manifestly perverse or foolish or based upon an incomplete record. But where a previous complaint was dismissed after a due inquiry under S. 202, Cr. P. Code, a fresh complaint based on the same facts should not be entertained. (*Coldstream, J.*) CHAMAN LAL *v.* EMPEROR. **161 I.C. 308=8 R.L. 716=37 Cr.L.J. 427=38 P.L.R. 746=1936 Cr. C. 63=A.I.R. 1936 Lah. 47.**

——S. 203—Revision—Refusal to issue process—Failure to give reasons— Revision. *See* CR. P. CODE, SS. 435 AND 439. **(1938) 2 M.L.J. 372.**

——S. 203—*Scope—Duty of Magistrate—Complaint—Dismissal on ground that accused has possible defence—Legality of.*

All that a Magistrate should direct his attention under S. 203, Cr. P. Code, is to ascertain whether there is any reason to disbelieve the complaint made on oath, and not whether there is any possibility of the accused having some defence to the complaint, if true. The dismissal of a complaint on the ground that the accused will possibly be able to defend himself under some provision of law is illegal and is liable to be set aside in revision. (*Agarwala, J.*) SHEODANI PATHAK *v.* BUDHESHWAR DUBEY. **187 I.C. 721= 12 R.P. 648=6 B.R. 542=41 Cr.L.J. 504=21 Pat. L.T. 608=1939 P.W.N. 828=A.I.R. 1940 Pat. 179.**

—— S. 203—*Scope—Dismissal of complaint—Sessions Judge directing further enquiry and transfer to another Magistrate—District Magistrate transferring case—Power to act on evidence already recorded.*

The provisions of S. 203 are very wide. It is not necessary that the Magistrate dismissing a complaint must have himself recorded the evidence in the preliminary inquiry. Where, on the application of a person, whose complaint has been dismissed, for further enquiry, the Sessions Judge while ordering further inquiry, directs that the case should be sent to another Magistrate and the case is accordingly transferred by the District Magistrate to another Magistrate, the transfer of the case is one under S. 192. The case is governed by S. 203 and not by S. 350 and the Magistrate to whom the case is transferred is entitled to act on the evidence previously recorded. (*Davis, J.C. and Lobo, A.J.C.*) VIRUMAL MANGHANMAL *v.* MUHAMMAD KHAN. **30 S.L.R. 217=164 I.C. 1020=37 Cr. L J. 1086=9 R. S. 85=1936 Cr. C. 862=A.I.R. 1936 Sind 146.**

CR. P. CODE (1898), S. 204.

—— Ss. 203 and 259—*Dismissal or discharge for default—Fresh complaint on same facts—Maintainability.*

It is competent for a Magistrate to entertain a second complaint upon a statement of facts which constituted a first complaint which has been dismissed for default under S. 203, Cr. P. Code, or in which the accused have been discharged under S. 259, Cr. P. Code, even when the order of dismissal or discharge, as the case may be, has not been set aside by a higher Court. An order dismissing for default a complaint made either under S. 203 or S. 259, is not a judgment. A Magistrate when entertaining a second complaint should keep in mind the default committed in the earlier proceedings for this default may have bearing not only upon any subsequent default committed, but also upon the merits of the complaint. (*Davis, J.C., Weston and Tyabji, JJ.*) HARBAI *v.* RAYA PREMJI. **I.L.R. (1940) Kar. 74.**

——S. 204—*Opinion of Magistrate—If should be based on evidence.*

It is not necessary that the opinion of a Magistrate that there is sufficient ground for issuing process within the meaning of S. 204, Cr.P. Code, should be based on evidence in the case. The Magistrate may form that opinion from the petition of complaint, sworn statement and the report of the enquiry officer under S. 202, Cr. P. Code. (*Edgley, J.*) HAFIZAR RAHAMAN *v.* AMINAL HOQUE. **44 C.W.N. 1114=72 C.L.J. 104.**

——S. 204—*Registration of a case under a particular section—Who can do it.*

Though of course a Magistrate has to decide under what section the offence disclosed falls, for purposes of the procedure to be followed in the trial, yet the Cr. P. Code nowhere prescribes the registration of a case under a particular section. Under S. 204, Cr. P. Code, the decision rests with the 'Magistrate taking cognizance'. (*Norman.*) KANHAIYALAL *v.* AMRA. **1939 A.M. L.J. 39.**

——S. 204 (3)—*Applicability.*

S. 204 (3), Cr. P. Code, appears to apply only to issue of process to the accused at the first instance. (*Pollock, J.*) EMPEROR *v.* NIRPATSINGH. **1939 N.L.J. 201.**

——S. 204 (3)—*Applicability—Summons case—Non-payment of witness batta—Dismissal of complaint—Power of Magistrate.*

The powers given to a Magistrate under S. 204 (3), Cr. P. Code, applies also to non-payment of witness-batta. If the complainant in a summons

case fails to pay witness-batta, the Magistrate has power to dismiss the complaint. (*Horwill, J.*) RAGHAVALU *v.* NARASA REDDI. I.L.R. (1937) Mad. 515=166 I.C. 639=9 R.M. 389=38 Cr. L.J. 265=45 L.W. 60=1936 M.W.N. 1381 =A.I.R. 1937 Mad. 222=(1937) 1 M. L. J. 120.

——S. 205—*Discretion under—Interference—Bench of Magistrates dispensing with personal attendance of accused—Jurisdiction of Sub-Divisional Magistrate to cancel order of Bench—Proper procedure.*

Where a Bench of Magistrates dispense with the personal attendance of an accused person in the exercise of the discretion under S. 205, Cr. P. Code, it is not open to the Sub-Divisional Magistrate in revision to cancel the order of the Bench dispensing with the personal attendance of the accused. The proper procedure, if the complainant is aggrieved, is for him to request the Bench to direct the personal attendance of the accused, even if a revision petition lies to the Sub-Divisional Magistrate, the latter can only forward the record to the District Magistrate, who under S. 438, Cr. P. Code, should refer the matter to the High Court. But the Sub-Divisional Magistrate has no jurisdiction to cancel the order of the Bench. (*Mockett and Horwill, JJ.*) NAGOJI *v.* VEERAMMA. 1937 M.W.N. 182.

——S. 205—*Personal attendance—Dispensing with—Pardanashin lady.*

The power to dispense with the personal attendance is to be liberally exercised where the person concerned is a pardanashin lady. (*Davies.*) ABDULLAH KHAN *v.* KARIMAN. 1939 A.M.L.J. 129.

——S. 205—*Pardanashin lady.*

When a pardanashin lady applies for exemption from attendance, it should be considered on its merits before ordering her to appear in person. Although the screen must not be used to defeat the ends of justice, it is the duty of Criminal Courts to see that its processes are not used for purposes of persecution. (*D. R. Norman.*) MISRI *v.* DAYA RAM. 1937 A.M.L.J. 60.

——S. 205 (1)—*Scope and applicability of—Appearance of accused against whom warrants though issued were cancelled—If can be allowed to appear by pleader.*

In the case of a warrant having been issued and recalled and a summons then having been issued, it would appear that S. 205, Cr. P. Code, would apply by virtue of the opening word 'whenever'. All that is required in S. 205 (1) is that the Magistrate should consider that a summons is sufficient for the appearance of the accused, and if he is of that opinion, he may permit him to appear by pleader. It was held to be clearly within the jurisdiction of the Court when certain accused appeared before it, against whom though warrants had been issued they had been subsequently cancelled, to permit them to appear by pleader. (*Bennet, J.*) JAGDISH NARAIN BAJPAI *v.* EMPEROR. 187 I.C. 682=12 R A. 575=1940 A.Cr.C. 18=41 Cr.L.J. 500=1940 A.W.R. (H.C.) 79=1940 A. L. J. 104=A.I.R. 1940 All. 178.

——S. 206—*Committal for trial—Power of Sessions Judge to direct Magistrate to commit accused to Sessions.*

Where an accused, who is being tried by a Magistrate for an offence under S. 409, Penal

Code, makes an application to the Sessions Judge claiming a Sessions trial, the Sessions Judge has no jurisdiction to direct the Magistrate to commit the accused to Sessions, and such an order if passed is entirely without jurisdiction. All that the Sessions Judge can do is to make a reference to the High Court in case he thinks that an interference is necessary. (*Henderson and Khundkar, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* NABIN CHANDRA HUR. 175 I.C. 521=39 Cr.L.J. 569=A.I.R. 1938 Cal. 416.

——S. 208—*Scope of—Committal—When to be made.*

A committal to the Court of Session is a very serious matter indeed for an accused person, and he is to be given every reasonable opportunity to show that there is no ground to commit him to the Court of Session because of the evidence he has adduced in his defence. The purpose of committal proceedings is not merely to place on record the case for the prosecution, but to commit to the Court of Session for trial an offence which, after having heard the evidence for the prosecution and for the defence, the Magistrate thinks has been committed. It is true that under S. 208 (3), a Magistrate can for reasons to be recorded refuse to issue process to compel the attendance of any witness, but the section clearly contemplates evidence on behalf of the prosecution and evidence on behalf of the accused or evidence which may be called by the Magistrate, if he thinks it in the interests of justice. Therefore it is not correct for the Magistrate to refuse to call evidence on behalf of the accused persons in committal proceedings merely because they will have ample opportunity to produce whatever evidence they wish later on when they have been committed. Particularly in a case where a charge of forgery is brought for the first time against an accused in the course of proceedings for other offences, every proper opportunity should be given to him to meet a charge which he may with some reason say has taken him by surprise. (*Davis, J.C. and Tyabji, J.*) JASHANMAL *v.* EMPEROR. I.L.R. (1940) Kar. 95=183 I C. 619=12 R.S. 64=40 Cr.L.J. 818 (2)=A.I.R. 1939 Sind 222.

——S. 208—Witnesses not produced in committing court—Right of prosecution to examine in Sessions Court. *See* CR. P. CODE, S. 286 (2). 17 Lah. 176 (F.B).

——S. 209—*Duty of committing Magistrate.*

It is the function of the Magistrate conducting the enquiry to weigh the evidence produced before him and not merely to isolate that which is directed against the accused and act upon it without any analysis of the remaining evidence. A Magistrate conducting an enquiry into a case triable by a Court of Session ought to weigh the evidence produced before him before deciding whether to commit or discharge. (*Middleton, J.C.*) FAZAL RAZAK *v.* EEPEROR. 167 I.C. 602=9 R. Pesh. 88 =38 Cr.L J. 427=A.I.R. 1937 Pesh. 12.

——S. 209—*Duty of committing Magistrate—Power to weigh evidence and to discharge accused after finding case false.*

It is an important part of the duty of a committing Court to prevent false cases and frivolous cases from occupying the time of the Court of Session both in the interests of the accused himself and in the interests of the Court of Ses-

CR. P. CODE (1898), S. 209.

sion. It cannot be laid down without any qualification that a committing Magistrate should not weigh the evidence. On the other hand it is his clear duty to weigh the evidence of the witnesses who appear before him. If he does not, his proceedings are farcical. He should not, of course, require, in cases triable exclusively by the Court of Session, the same high standard of proof for the prosecution as he would require in cases which he can himself finally dispose of. If there merely exists in his mind a reasonable doubt as to the truth or otherwise of the evidence before him, he should commit the accused for trial and leave the Sessions Court to appreciate the evidence for itself. But that is not to say that he is precluded from finding that the prosecution case is false. If that is the only conclusion that the evidence leads him to, he would be failing in his manifest duty if he did not record his finding and discharge the accused. (*King, J.*) ELLA REDDI, *In re.* **169 I.C. 102=9 R.M. 687=38 Cr.L.J. 703=1937 M. Cr.C. 124=1937 M.W.N. 324=45 L.W. 643= A.I.R. 1937 Mad. 654.**

——**S. 209**—*Duty of committing Magistrate—Test to decide whether there should be a committal or not—Refusal to commit—Grounds for.*

The committing Magistrate's duty is to consider whether a conviction is possible in the case, and in order to come to that conclusion he is entitled to appreciate the evidence. But he must appreciate the evidence from that point of view only; it is not within his province to consider the evidence merely from the point of view of the probability of a conviction resulting. A conviction may be improbable; but if it is possible, it is the duty of the Magistrate to commit the accused for trial. If he refuses to commit, he must state the grounds of such refusal, which should be that no conviction is possible. The Magistrate's function is not to see whether a conviction "will" result or not, but his real function is to see whether a conviction can result or not. (*Wadia and Macklin, JJ.*) AKBERALLY *v.* ALI MAHOMED. **184 I.C. 282=12 R.B. 159=40 Cr.L.J. 951=41 Bom.L.R. 749=A.I.R. 1939 Bom. 372.**

——**Ss. 209 and 437**—*Magistrate deciding to try case himself—Interference in revision.*

In a case some persons were accused of forming an unlawful assembly to beat some person and in prosecution of that offence, committing murder or culpable homicide not amounting to murder. The S. 30, Magistrate framed charges under S. 364, part 11/149 and Ss. 325/149, I. P. Code. After taking evidence the Magistrate honestly came to the conclusion that there was no intention to cause death and so convicted the accused under Ss. 325/149, I. P. Code. Thereupon the complainant made an application under S. 437, Cr. P. Code, to the Sessions Judge who, coming to a different finding, directed the accused to be tried before him under S. 302, I. P. Code, on the ground that the Magistrate had no jurisdiction to try the offence and that the Magistrate had snatched at the jurisdiction which he had not.

Held, that under S. 209, Cr. P. Code, the Magistrate had jurisdiction to decide whether the offence was triable by Sessions Court or was triable by himself. There was nothing to show that the Magistrate snatched at any jurisdiction or perversely held that the offence was one triable by himself in order to minimize the offence. It

CR. P. CODE (1898), S. 210.

was a case of an honest difference of opinion on a subject which was always open to doubt and difference of opinion and the best way to decide cases like those was not to consider them abstractly. This being so, it was useless to subject the accused to the strain of re-trial and hence the order of the Sessions Judge should be set aside. (*Dalip Singh, J.*) KIRPAL SINGH *v.* EMPEROR. **38 Cr.L.J. 992=39 P.L.R. 444=170 I.C. 780=10 R.L. 148=A.I.R. 1937 Lah. 217.**

——**Ss. 210 to 216**—*Procedure—Duty of Magistrate as to accused's list of witnesses—Simultaneous framing of charge and order of commitment—Accused failing to file list of witnesses as required by Magistrate at once—Subsequent application in Sessions Court a few days before trial—Sessions Judge holding application not* bona fide *and requiring accused to deposit expenses—Rejection of application on failure of accused to pay—Propriety.*

Where a charge has been framed under S. 210, Cr. P. Code, the Magistrate must require the accused at once to give in a list of the persons whom he wishes to be summoned to give evidence on his trial. The accused is entitled to have the assistance of the Court in obtaining the attendance of the persons whose names he gives in at once, being required to do so under S. 211. The Magistrate has a discretion under S. 211 (2) to allow the accused to give in any further list of witnesses at a subsequent stage. Where the accused fails to give in a list at once when required by the Magistrate, but presents a list of witnesses later on to the Sessions Judge a few days before the date fixed for the Sessions trial, the correct procedure to the Sessions Judge is to forward the application of the accused at once to the committing Magistrate for disposal under S. 211 (2), which gives a discretion to the Magistrate. It is not a wise exercise of the discretion for the Sessions Judge to reject the application on the ground that it is not *bona fide* or to offer to issue summons at the risk of the accused and on his depositing the expenses of the witnesses, though the rejection of the application is not in violation of the law. Since the list of witnesses presented is not a further or additional list, but the first list, it is desirable in such a case to summon at least some of the witness cited by the accused regarding the effect of whose testimony some explanation could be given, especially when the trial is not expected to be finished in one day, and when there would be no real difficulty in obtaining the attendance of the witnesses or the majority of them before the closing of the prosecution case. Further where the Magistrate simultaneously frames the charge and passes the order of commitment and at once calls on the accused to file his list of witnesses, he departs from the order of procedure laid down in S. 210, Cr. P. Code, and the following sections. Though it is not obligatory on the Magistrate to examine defence witnesses with a view to reconsidering the necessity for charge and for a commitment, it is undoubtedly his duty to see to the obtaining of the list of defence witnesses. It the accused is not ready with his list of witnesses at the date of commitment, the Magistrate may conveniently fix a day, perhaps, a fortnight hence up to which the list of witnesses will be received so as to prevent the matter escaping the notice of the accused or his legal

advisers. (*Rowland and Chatterji, JJ.*) MUSHARU *v.* EMPEROR. 19 Pat. 413=21 Pat L.T. 13=1940 P.W N. 83=A.I.R. 1940 Pat. 355.

——S. 213—*Committal—Power and duty of magistrate.*

The Magistrate who having the powers to punish adequately for an offence which is within his jurisdiction fails to do so and commits the accused to Sessions Judge, fails to comply with the provisions of S. 254, Cr. P. Code, and the committal may on that ground be held bad as being an error of law. Where therefore the property stolen is water melons of the value of six annas and an injury has been inflicted by the accused, the mere fact that an injury might have been fatal, when it is in fact not so is no sufficient reason by itself to commit the accused to the Court of Session. A case should be considered from the point of view, not of what injury might have been inflicted but what injury was in fact inflicted. (*Davis, J.C.*) EMPEROR *v.* WAROO. 174 I.C. 920=10 R.S. 271=39 Cr.L.J. 507=A.I.R. 1938 Sind 79.

——S. 213—*Committing Magistrate—Duty of —Power to weigh evidence.*

A committing Magistrate is entitled to, and indeed must weigh the evidence in the case. Although it is not his duty, as it would be in a case which he could try himself, to decide, whether the case has been proved against the accused beyond all reasonable doubt, he must be satisfied before committing the case to the sessions that a *prima facie* case has been made out against the accused, *i.e.*, that the evidence is sufficient to make it possible that the committal may lead to a conviction. If he is of opinion that no criminal Court could convict the accused on the evidence before him, it is his duty to discharge the accused. (*Horwill, J.*) PATTU MUDALI *v.* EMPEROR. 1938 M.W.N. 819=48 L.W. 327.

——S. 215—*Commitment—Quashing of—Effect of.*

The effect of quashing of commitment under S. 215 is that the case should start again from the beginning. It must go on from the point at which the Magistrate took cognizance of the complaint. No fresh complaint however need be made. Where however the Magistrate originally trying the case had to proceed so far as to express his opinion as to the guilt of the accused, the case should not be sent for retrial to the same Magistrate but to some other Magistrate. (*Davis, J C*) EMPEROR *v.* GHOUSBAKSH. 167 I.C. 379=31 S.L.R. 403=9 R.S. 181=38 Cr.L.J. 379=A.I.R. 1937 Sind 32.

——S. 215—*Commitment — Quashing—Principles governing.*

The High Court will not quash a commitment unless it is shown to the commitment was bad on a point of law. It will not quash commitments where there is *prima facie* case against the persons who have been committed to take their trial to a Court of Session. In such a case no legal question arises and so the Court has no power to quash the commitment. (*Rachhpal Singh, J.*) EMPEROR *v.* MIHI LAL. I L.R. (1940) All. 531=190 I.C. 238=1940 A.L.J. 357=1940 A.W.R. (H.C.) 338=1940 A.Cr.C. 90=A.I.R. 1940 All. 396.

——S. 215—*Error of law—Commitment of case exclusively triable by Sessions Court—Committing Magistrate empowered to try case under S. 30.*

Where the offence with which the accused is charged is exclusively triable by a Court of Session, the mere fact that the committing Magistrate is invested with powers under S. 30 and can therefore try such case, does not take away the jurisdiction of the Sessions Judge to try it if committed to it and committing Magistrate cannot be said to have committed an error of law in sending up the case to the Court of Sessions. (*Mir Ahmad, A.J.C.*) EMPEROR *v.* MADAN LAL. 163 I.C. 611=37 Cr.L.J. 852 (1)=9 R.Pesh. 6=1936 Cr.C. 657=A.I.R. 1936 Pesh. 139.

——S. 215—*Point of law—Failure to exercise jurisdiction under S. 254—Commitment—If can be quashed.*

Failure to exercise jurisdiction under S. 254 by a Magistrate is a point of law, on which a commitment can be quashed under S. 215. (*Davis, J.C.*) EMPEROR *v* GHOUSBAKSH. 167 I.C. 379=9 R.S. 181=31 S.L.R. 403=38 Cr.L.J. 379=A.I.R. 1937 Sind 32.

——S. 215—*Point of law—Plea that there is no medical evidence to prove offence.*

Per *Rupchand, A.J.C.*—A plea that there is no medical evidence on record to prove that the accused committed the offence with which he is charged does not raise any point of law and cannot therefore be availed of for the purpose of quashing the proceedings under S. 215. (*Davis, J.C. and Rupchand Bilaram, A.J.C.*) FRANCIS XAVIER FERNANDEZ *v.* EMPEROR. 29 S.L.R. 281=160 I.C. 375=8 R.S. 122=37 Cr.L.J. 314=1936 Cr.C. 50=A.I.R. 1936 Sind 3.

——S. 215—*Quashing commitment—Grounds—Insufficiency of evidence on record for conviction.*

Commitment cannot be quashed merely on the ground that upon the record there was no evidence on which the accused should reasonably have been convicted, because this is a matter which should better be left to the Magistrate who is trying the case. (*Davis, J.C.*) EMPEROR *v.* WAROO. 174 I.C. 920=10 R.S. 271=39 Cr.L.J. 507=A.I.R. 1938 Sind 79.

——S. 215—*Quashing committal—Grounds—Point of law—Meaning.*

Under S. 215, Cr. P. Code, a committal can be quashed only if the order of committal is against law, in the sense that there was any error of law in the proceedings of the magistrate before committal. (*Pandrang Row, J.*) RAMASWAMY GOUNDAN *v.* EMPEROR. 1938 M.W.N. 577=47 L.W. 139=177 I.C. 494=39 Cr.L.J. 894=11 R.M. 330=1938 M.Cr.C. 67=A.I.R. 1938 Mad. 675.

——S. 215—*Quashing of commitment—Power of High Court Judge presiding over Sessions.*

The Judge of the High Court presiding over the Sessions of the High Court has power under S. 215 to quash a commitment made to him by a competent Magistrate. (*Mackney, J.*) M. I. MAMSA *v.* THE KING. 174 I.C. 824=39 Cr.L.J. 470=10 R.R. 433=A.I.R. 1938 Rang. 105.

——S. 217 (1)—*Construction—Witnesses not appearing before magistrate—Whether can be examined in Sessions Court.*

S. 217 (1) indicates that only those witnesses who appear before the Magistrate can be bound down to appear before the Sessions Court. It also clearly shows that witnesses who do not appear before the Magistrate can appear before

the Court of Session, the only disadvantage to the prosecution being that they cannot be bound down so to appear. (*Young, C.J., Addison and Monroe, JJ.*) MUSSAMMAT NIAMAT *v.* EMPEROR. 17 Lah. 176=162 I.C. 976=37 Cr.L.J. 742=8 R.L. 985=38 P.L.R. 421=1936 Cr C. 568 =A.I.R. 1936 Lah 533 (F.B.).

——S. 221—*Charge under S.* 147, *I. P. Code—Contents—"Force or by show of force"—If to be expressly stated.*

In charge under S. 147, I P. Code, it need not include the words "by force or by show of force" because the suggestion of force is contained in the word 'rioting' which is to be included in the charge. (*Agarwala and Madan, JJ.*) SURAJ DUSADH *v.* EMPEROR. 165 I.C. 945=9 R.P. 237= 1936 Cr.C. 1065=38 Cr.L.J. 87=3 B.R. 108= 1936 P.W.N. 626=A.I.R. 1936 Pat. 627.

——S. 221—*Charge—Particulars of—Abetment by conspiracy—Evidence of conspiracy with persons not named in charge—Admissibility.*

In a charge of abetment of an offence it is not necessary to set up the kind of abetment. But when the abetment alleged is one by conspiracy, it is not open to the prosecution to rely on conspiracy with any persons not named in the charge. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. 1936 A.M.L.J. 85

——S. 222—*Charge of conspiracy under S.* 120-*B—Particulars—Necessity.*

There is a distinction between the charge of an offence and a charge of conspiracy to commit such an offence. In the former, particulars as required by the Code are necessary. But it is well settled that in stating the object of a conspiracy, the same certainty is not required as in indictment for the offence conspired to be committed. The Code neither restricts the period over which such a charge may extend nor requires specific acts to be mentioned. (*Guha and Biswas, JJ.*) RAMKRISHNA SINHA *v.* EMPEROR. 42 C W.N. 246=174 I.C. 513=39 Cr.L.J. 417=10 R.C. 693=A.I.R. 1938 Cal. 195.

——S. 222—*Scope—Charge of criminal breach of trust — Necessity for particulars — Vague charge of offence as having been committed "on or about" a particular date—Sufficiency—Conviction—Sustainability.*

A charge of criminal breach of trust under S.409, I.P. Code, which does not unfold to the accused, even approximately, the dates between which he dishonestly converted to his own use the property in question and leaves that part of the prosecution case in obscurity by referring merely to the date on which theconversion wasdiscovered necessarily prejudices the accused seriously in his defence in the trial, and is consequently bad in law, as being not in conformity with S. 222, Cr. P. Code. Where the charge against the accused is that he, as clerk of a Co-operative Society and being in such capacity entrusted with the funds of the society amounting to Rs. 3,481-0 2, committed criminal breach of trust with respect to that amount on or about the 22nd March, 1935, that being the date on which the absence of the cash balance in hand is discovered, but the prosecution is unable to prove by evidence the particular dates or months when the items were actually misappropriated, the charge must be held to be bad for vagueness; and the conviction on such a charge is unsustainable. (*Broomfield and*

Wasoodew, JJ.) EMPEROR *v.* BABURAO TATYARAO. 165 I.C. 867=9 R.B. 171=38 Bom.L.R. 946=1936 Cr.C. 924=38 Cr.L J. 9=A.I.R. 1936 Bom. 379.

——S. 222 (1)—*Charge under S.* 405, *I. P. Code —Particulars.*

S. 405, I. P. Code, covers dishonest misappropriation, dishonest conversion, dishonest user or disposal in violation of a direction of law, or of a legal contract, or dishonestly suffering any other person to do so. A charge which does not indicate which of these several offences is intended and does not state who made the alleged entrustment, or who suffered from the alleged breach of trust offences against the provisions of S. 222 (1), Cr. P. Code. (*Lort Williams and Jack, JJ.*) ABINASH CHANDRA SARKAR *v.* EMPEROR. 63 Cal. 18=161 I C. 280=8 R.C. 502=37 Cr L.J. 439.

——S. 222 (1) and (2)—*Charge under Ss.* 109 *and* 302, *Penal Code—Species of abetment not specified—Sufficiency of notice to accused.*

S. 222 (1) and (2), Cr. P. Code, require that the charge should contain such particulars as are reasonably sufficient to give the accused notice of the matter with which he is charged and that if the offence charged is given any specific name, it may be described by that name only. So it is open to the prosecution to charge abetment generally, and then, if the evidence did not establish abetment other than in one particular form, to rely on this particular form for a conviction. On the facts of the case where the accused was charged with an offence punishable under Ss. 109 and 302, Penal Code.

Held, that it cannot be said that the nature of the case was such that the non-particularisation of the species of abetment charged resulted in withholding such reasonably sufficient notice as the accused were entitled. (*S. N. Guha and Biswas, JJ.*) HARENDRA KUMAR MANDAL *v.* EMPEROR. 66 C.L.J. 196=174 I.C. 36=10 R.C. 607=39 Cr.L.J. 395=A.I.R. 1938 Cal. 125.

——S. 222 (2)—*Applicability—Misappropriation of cash and goods—Single charge in respect of cash and value of goods—Legality.*

S. 222 (2), Cr. P. Code, applies only to a case in which the charge is criminal breach of trust or dishonest misappropriation of *money*; it does not apply to a case of criminal breach of trust or dishonest misappropriation of goods, and affords no justification for mixing up money and goods together or for framing a single charge in respect of the total of the cash said to have been misappropriated and the total value of the goods said to have been misappropriated. Such a charge is not permitted by law. (*Pandrang Row, J.*) PUBLIC PROSECUTOR *v.* SHARMA. 184 I.C. 51=40 Cr.L.J. 851 (2)=12 R.M. 401=1939 M.W N. 468=1939 M. Cr.C. 178=50 L.W. 515 =A.I.R. 1939 Mad. 575=(1939) 2 M.L.J. 518.

——S. 222 (2)—*Charge of criminal breach of trust—Amounts appropriated on different occasions by different transactions—Specification of particular items or exact dates—Necessity.*

In the case of a charge of criminal breach of trust involving amounts appropriated on several different occasions by different transactions, it is not necessary under S. 222 (2), Cr. P Code, to specify particular items or exact dates. (*Wassoodew and Sen, JJ.*) EMPEROR *v.* RAMCHANDRA

CR. P. CODE (1898), S. 222.

RANGO. 181 I.C. 870=11 R.B. 356=40 Cr.L.J. 579=41 Bom.L.R. 98=A.I.R. 1939 Bom. 129.

———Ss. 222 and 233—*Scope—Alternative charges—Joinder and conviction—Rule.*

Where the accused were charged with offences in the alternative, with conspiracy to commit criminal breach of trust and with committing criminal breach of trust in pursuance of that conspiracy, and in the alternative, upon the same facts, when one of the accused is charged as the principal offender with criminal breach of trust and the others as abettors, the accused should be convicted under one or other of the alternative charges; they should not be convicted under both. (*Davis, J. C. and Lobo, J.*) EMPEROR *v.* BALUMAL HOTCHAND. I.L.R. (1939) Kar. 204=177 I.C. 346=39 Cr.L.J. 890=11 R.S. 58=A.I.R. 1938 Sind 171.

———Ss. 222, 233, 234, 235 and 239—*Relative scope of—Joinder of charges—Rule as to—Charge of conspiracy—Acts done in pursuance of conspiracy—Separate charge and punishment for—When justified.*

Ss. 235 and 239, Cr. P. Code, are not controlled by the latter part of S. 233 or by S. 234. If offences are committed in the course of the same transaction they may be tried together, although they are more than three in number and extending over a period of more than a year. But there is nothing in S. 23 or 239 to suggest that they are not governed by S. 222 or the first part of S. 233. On the contrary, it is clear from the illustrations to S. 235 that when different offences are tried together, they must be separately charged. When an offence of conspiracy is charged under S. 120-B, I. P. Code, it is always open to the prosecution to charge further that the illegal acts which were the object of the conspiracy having been carried out, because the punishment for the offence of conspiracy depends upon whether the illegal acts have or have not been carried out. But acts done in pursuance of the conspiracy cannot be separately punished unless these acts are separately charged and particularised as required by the Code. S. 239 (4) does not justify omnibus charges relating to an indefinite number of offences alleged to have been committed within the period stated without anything to specify time, place or circumstances or even which of the accused persons are supposed to have committed any particular offence. (*Broomfield and Norman, JJ.*) EMPEROR *v.* KARAMALLI GULAMALLI. I.L.R. (1939) Bom. 42=178 I.C. 706=11 R.B. 184=40 Cr.L.J. 118=40 Bom.L.R. 1092=A.I.R. 1938 Bom. 481.

———Ss. 222 and 234—*Criminal breach of trust—Three separate charges in respect of three gross sums, each made up of separate items—Joinder of—Legality.*

Three separate charges of criminal breach of trust in respect of three gross sums each made up of separate items can be legally tried together provided the offences in respect of all the three gross sums are alleged to have been committed within a space of twelve months. (*Bartley and Khundkar, JJ.*) MADHUSUDAN MUKHERJEE *v.* EMPEROR. 44 C.W.N. 175.

———S. 223—*Cheating—Consequence by which deception becomes offence—If should be set out.*

The term 'manner' in S. 223, Cr. P. Code, includes, with reference to an offence of cheating, every ingredient by virtue of which the act ceases to become one of mere non-criminal deception and becomes one of cheating within the meaning of S. 415, I. P. Code, and the effect of the deception upon the victim's body, mind, reputation or property would thus be a part of manner of cheating. (*Blacker, J.*) GIAN SINGH *v.* EMPEROR. 180 I.C. 485=11 R.L. 689=40 Cr.L.J. 371=A.I.R. 1938 Lah. 828.

CR. P. CODE (1898), S. 226.

———S. 225—*Charge unsatisfactory—Legality of conviction.*

Before a conviction of an accused person can be reversed on the ground that the charge against him was not drawn up in a satisfactory manner, he must show that he was prejudiced thereby. (*Henderson and Khundkar, JJ.*) MUKHERJEE *v.* EMPEROR. 70 C.L.J. 301.

———S. 225—*Scope—Charge in form contravening S. 233—If vitiates trial.*

Lumping of three cases of cheating in a charge under S. 420, I. P. Code, is no doubt irregular under S. 233, Cr. P. Code, but when no prejudice has been caused to the accused by the form of the charge, the irregularity does not vitiate the trial and is cured by S. 225, Cr. P. Code. (*Harries, C.J. and Varma, J.*) CHANDRA NARAIN JHA *v.* EMPEROR. 6 B.R. 564=187 I.C. 862=12 R.P. 662=41 Cr.L.J. 523=1940 P.W.N. 557=A.I.R. 1940 Pat. 603.

———S. 225—*Scope—Mistake or doubt as to particular weapons used—Effect—If entitles accused to absolute acquittal—Conviction for lesser offence instead of more serious offence—Sustainability.*

What is called the benefit of doubt is not the same thing as the benefit of mistake as to the weapons used by the accused. The benefit of doubt as to the particular weapons which the accused carry cannot entitle them to be acquitted altogether of the charge, although they are specifically charged with using particular weapons. An error in the particulars required to be stated in a charge which does not mislead the accused or occasion a failure of justice is no ground for setting aside a conviction. The accused, though they may not be convicted for a more serious offence in the absence of proof of use of particular weapons, may still be convicted of a lesser offence (*King, J.*) PALANI GOUNDAN *v.* EMPEROR. 1937 M.W.N. 1331.

———Ss. 225 and 537—*Misjoinder of charges—Irregularity.*

Where offences which ought to have been separately charged are joined together but the specific offences are satisfactorily proved by competent evidence corroborated in all necessary respects and no miscarriage of justice in caused, the irregularity is cured under Ss. 225 and 537. (*Lord Wright.*) BABU LAL *v.* EMPEROR. 65 I.A. 158=I.L.R. (1938) 2 Cal. 295=32 S.L.R. 476=1938 O.L.R. 189=1938 O.A. 398=1938 M.W.N. 505=19 Pat.L.T. 343=1938 A.L.R. 309=10 R.P.C. 250=4 B.R. 490=39 Cr.L.J. 452=67 C.L.J. 161=40 Bom.L.R. 787=174 I.C. 1=42 C.W.N. 621=1938 A.W.R. (P.C.) 116=1938 P.W.N. 320=1938 A.Cr.C. 27=1938 O.W.N. 416=1938 M.Cr.C. 220=1938 A.L.J. 382=A.I.R. 1938 P.C. 130=(1938) 1 M.L.J. 647 (P.C.).

———S. 226—*Substitution of charge so as to deprive accused of right of trial by jury—Propriety.*

CR. P. CODE (1898), S. 227.

Where the committing Magistrate framed charges of murder against some of the accused and abetment of murder against others, but when the case came on for hearing in the Court of Sessions, the Judge substituted for them a charge under S. 302 read with S. 120-B, I. P. Code, against all the accused with the result that the accused, instead of being tried by a jury, were tried by the Judge himself sitting with assessors.

Held, that the accused were not properly tried when they were deprived of a trial by a jury by a manœuvre of this kind. (*Cunliffe and Henderson, JJ.*) KHIDIR *v.* EMPEROR. **66 C.L.J. 575.**

——**S. 227**—*Charge—Alteration—Time for—Powers of Court to direct new trial.*

There is nothing in the wording of S. 227 which limits the operation of that section to mere irregularities or to any particular stage of the case prior to the time when the judgment is given or the verdict of the jury is returned. Until that time, it is open to the Court to alter or add to the charge, and the provisions of Ss. 228, 229, 230 and 231, Cr. P. Code, amply provide that the accused shall not be embarrassed or prejudiced by the alteration of the charge. Where evidence relating to six charges has gone on the record, whereas there should be evidence only as to three, it may be well that the Magistrate would exercise a wise and just discretion in directing a new trial under the provisions of S. 229, Cr. P. Code, but the trying Court itself has that power and there is no need to refer the case to High Court. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* MAHOMED ISMAIL. **30 S.L.R. 391=166 I.C. 845=9 R.S. 156=38 Cr.L.J. 324=A.I.R. 1937 Sind 1.**

——**S. 227**—*Power of High Court to alter charge in Sessions trial—Empanelling of common jury after challenging by accused—Subsequent alteration of charge into one requiring special jury—Permissibility—Powers of Court—Discharge of common jury—Conditions laid down by Code—If exhaustive.*

The powers of the High Court in a Sessions trial to alter a charge under S. 227, Cr. P. Code, are very wide. Any restriction of those powers must inevitably lead to failure of justice. When the Judge of the High Court presiding at a Sessions trial finds after a common jury has been empanelled that a charge under S. 304, I. P. Code, has to be altered into one of murder for which a special jury is required, the want of jurisdiction in the common jury to try the accused on the altered charge of murder necessitates its discharge. If therefore the alteration of the charge leads necessarily to the discharge of the former jury, that result must be implied in the power of the Court to alter the charge. The fact that there has been a challenging of the common jury already empanelled cannot affect the power of the Court to alter the charge. The Cr. P. Code cannot be considered to be exhaustive in regard to the conditions under which a jury can be discharged. Nor can rule 865 of the High Court Rules (O. S.) can be taken to limit the powers of the Court to alter the charge. (*Wassoodew, J.*) EMPEROR *v.* YESHWANT VITHU. **I.L.R. (1937) Bom. 369=170 I.C. 153=38 Cr. L.J. 850 (2)=10 B.R. 49=39 Bom.L.R. 355=A.I.R. 1937 Bom. 260.**

CR. P. CODE (1898), S. 233.

——**S. 227 (1)**—Addition of charge—Powers. *See* CR. P. CODE, S. 350. **1938 O.A. 658.**

——**Ss. 231 and 291**—*Scope—Alteration or addition to charge during trial—Right of accused to examine further witnesses—Omission to request Court to summon witnesses—Effect of.*

Where amendments or alterations to the charge are made after the commencement of a Sessions trial, the prosecutor and the accused have the right, under S. 291 read with S. 231, Cr. P. Code, not only to recall and re-summon any witnesses who may have been examined, but also to call any further witness whom the Court may think to be material. A request to summon a fresh witness under S. 231 can only be refused on the ground that the evidence of the witness is not thought by the Court to be material where the accused makes no such request to the Court and expresses no wish to examine any witness, he cannot afterwards complain that the trial was bad or irregular, and it cannot be held that any prejudice is caused to the accused by any failure to follow the correct procedure. (*Rowland and Chatterji, JJ.*) MUSHARU *v.* EMPEROR. **19 Pat. 413=21 Pat.L.T. 13=1940 P.W.N. 83=A.I.R. 1940 Pat. 355.**

——**Ss. 232 and 355**—*Conviction for offence for which no charge was framed—Accused misled in defence—Order of acquittal by appellate Court—Legality.*

If an accused person was convicted for an offence for which no charge was framed against him and he was thereby misled in his defence, the appellate Court should direct a new trial to be had upon a charge properly framed. An order of acquittal by it is bad in law. (*Khundkar and Edgley, JJ.*) SURAJMULL *v.* SEOPUJAN SINGH. **44 C.W.N. 400.**

——**S. 233**—*Absence of separate charges under Ss. 452, 323 and 379, I. P. Code—Legality.*

Where charges under Ss. 452, 323 and 379, I. P. Code, were not framed separately for the different offences as required by S. 233, Cr. P. Code, but the alleged charges were specifically and separately mentioned, the charge sheet does not contravene the provisions of S. 233. (*Zia-ul-Hasan, J.*) MADHO SINGH *v.* EMPEROR. **189 I.C. 258=13 R.O. 92=1940 O.L.R. 420=41 Cr.L.J. 725=1940 O.A. 483=1940 A Cr.C. 98=1940 A.W.R. (C.C.) 253=1940 O.W.N. 607.**

——**Ss. 233 and 235**—*Two distinct offences of theft in two separate houses—Two alternative charges of receiving stolen property concerned in the two thefts—Joint trial—Legality.*

Two distinct offences of theft in two separate houses cannot be joined together and tried at one and the same trial. Nor can two alternative charges under S. 411, I. P. Code, in respect of the properties stolen from the two houses be tried together. (*Pandrang Row and Horwill, JJ.*) EMPEROR *v.* BOYA LINGADU. **188 I.C. 381=13 R.M. 23=41 Cr.L.J. 581=1940 M.W.N. 239=51 L.W. 321=A.I.R. 1940 Mad. 509.**

——**Ss. 233 to 239**—*Misjoinder—Test of legality.*

The test whether a trial is or is not bad owing to a misjoinder of charges is not the number of offences with which he has been charged. The trial is bad not because the accused has been wrongly convicted but because he has been wrongly tried. It is the multiplicity of charges

CR. P. CODE (1898), S. 233.

which vitiates the trial and prejudices the accused in his defence. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* BALUMAL HOTCHAND. **I.L.R. (1939) Kar. 204=177 I.C. 346=39 Cr.L.J. 890=11 R.S. 58=A.I.R. 1938 Sind 171.**

——S 233—*Non-compliance with—If fatal.*

A failure to comply with the provisions of S. 233, Cr. P. Code, may or may not be fatal according to the circumstances of the case. (*Rowland, J.*) RAMDIN LAL *v.* EMPEROR. **165 I.C. 970=9 R.P. 246=38 Cr.L.J. 97=3 B.R. 117=18 Pat.L.T. 91=A.I.R. 1937 Pat. 176.**

——S. 233—*Joint trial — Legality—Test—Offences under Ss. 148 and 333, I.P. Code.*

The legality of a joint trial depends upon whether the whole affair constituted one transaction; and with reference to that, unity of time, place and purpose ought to be looked to. Where the offences charged are Ss. 148 and 333, I. P. Code, and where the affair took place in one village, one incident succeeding another rapidly and where the houses concerned were all in the neighbourhood of each other, the joint trial of such accused is legal. (*Gruer, J.*) NANA *v.* EMPEROR. **I.L.R. (1939) Nag. 686=179 I C. 317=11 R.N. 290=40 Cr.L.J. 197=1938 N.L.J. 90=A.I.R. 1938 Nag. 283.**

——S. 233—*"Same transaction"—Gambling at different places by different groups of persons—Joint trial—Legality.*

Where the accused persons consisting of two groups playing at different places are tried together summarily and convicted under S. 12, Bombay Prevention of Gambling Act, and there is nothing to connect them so as to show that they were engaged in the same transaction, the conviction should be set aside. (*Davis, J.C. and Haveliwala, A.J.C.*) EMPEROR *v.* SHIVALOMAL. **32 S.L.R. 30=172 I.C. 80=10 R.S.135=39 Cr.L.J. 59 (1)=A.I.R. 1937 Sind 304.**

——Ss. 233 and 234—Scope—If control Ss. 235 and 239. *See* CR. P. CODE, Ss. 222, 233, 234, 235 AND 239. **40 Bom.L.R. 1092.**

——Ss. 233, 234 and 235—*Applicability and scope—Same transaction—Charge under S. 408, I. P. Code, in respect of several sums of money appropriated on different occasions and under different transactions—Joinder of further charges under Ss. 477-A and 193 read with S. 109—Legality.*

A charge of criminal breach of trust in respect of several sums of money appropriated on different occasions by different transactions cannot be properly joined with other charges under Ss. 477-A and 193, I. P. Code, read with S. 109, I. P. Code, as the offences are distinct. The offence of falsification of accounts is certainly a distinct offence, falling as it does under a different section of the Penal Code. The offence of fabrication of false evidence relating to items wholly or partly unconnected with the charge of criminal breach of trust is undoubtedly a distinct offence. Unless, therefore, the case can be brought within the exceptions to S. 233, Cr. P. Code, the joinder of the charges offends against the prohibition. S. 234, Cr. P. Code, does not obviously apply because the offences are not of the same kind. A misjoinder of charges for distinct offences cannot be cured under S. 537, Cr.P. Code. If the falsifications of accounts charged is not part of the transaction as to the criminal breach of trust, and if it relates to an act different from the one charged under S. 408, I. P. Code, S. 235 (1) of the Cr. P. Code, would not apply, as the offence does not form "the same transaction." If the charge implies a general conspiracy to defraud, it is intelligible that the series of acts committed to attain the object of the conspiracy, which under the Penal Code is one offence, would form a transaction in itself, and it would be proper to say that the offences constituted by all the acts would be part of the same transaction. But when the allegation of general conspiracy has not been accepted, and a restricted charge of mutual abetment by conspiracy has been framed, it would *prima facie* be difficult to defend the charge on the principle applicable to a trial upon a charge of conspiracy for the purpose of defrauding where the complaint does not indicate an offence punishable under S. 120-B of the Penal Code. In view of the language of S. 109, I. P. Code, it cannot be said that abetment by conspiracy involves a general agreement to do a series of acts of which the abetted act is one. Even assuming that it could be so, if at the end of a long spell new circumstances arise and the parties again agree to make a fraudulent adjustment of their account with a view to prolong the refund of the money misappropriated, that would strictly be a second conspiracy independent of the first. The results of the acts committed under the latter conspiracy cannot be tacked on to a charge on the former. (*Wassoodew and Sen, JJ.*) EMPEROR *v.* RAMCHANDRA RANGO. **181 I.C. 870=11 R.B. 356=40 Cr L.J. 579=41 Bom.L.R. 98=A.I.R. 1939 Bom. 129.**

——Ss. 233, 236, 237 and 423—*Conviction for offence not charged—Validity—Powers of appellate Court.*

A person cannot be convicted of an offence without being definitely charged with it. Where a person was charged with an offence under S. 418, I. P. Code, and convicted it is not open to the appellate Court to convict the accused of an offence under S. 424, I. P. Code. The powers of an appellate Court under S. 423, Cr. P. Code, are limited by the provisions of Ss. 236, 237 and 238, Cr. P. Code. (*Mulla, J.*) NAND KISHORE *v.* EMPEROR. **185 I.C. 151=12 R.A. 304=41 Cr.L.J. 111=1939 A.W.R. (H.C.) 661=1939 A.Cr.C. 152=1939 A.L.J. 941=A.I.R. 1939 All. 710.**

——Ss. 233, 238 and 537—*Charge under S. 304, I. P. Code, but conviction under S. 385—Legality—S 238, Cr. P. Code, if applies—Curability under S. 537, Cr. P. Code.*

Where a person charged with an offence under S. 304, I. P. Code, is convicted under S. 385, I. P. Code, without being either charged under that section or without being given an opportunity to meet the case under that section, the conviction could not be sustained. S. 238, Cr P. Code, could not be invoked to support the conviction, for S. 385, I. P. Code, is not a minor offence with particulars common with an offence under S. 300, I. P. Code. Both of them have got distinct and independent ingredients. Nor could the defect be cured under S. 537, Cr. P, Code. The disregard of an express provision of law as to the mode of trial is not a mere irregularity which could be remedied by S. 537, Cr. P. Code. (*Ismail, J.*) THAKUR SINGH *v.* EMPEROR, **184 I.C. 409=12 R.A.**

CR. P. CODE (1898), S. 233.

A. 226=40 Cr.L.J. 948=1939 A.L J. 547=1939 A.Cr.C. 124=1939 A.W.R (H.C.) 577=A.I.R. 1939 All. 665.

——Ss. 233 and 537—*Offences of kidnapping and abducting in respect of same occurrence—Separate charges—If necessary.*

It is always wise, where a charge is made in respect of same occurrence both of kidnapping and abducting, that the charge should be framed under two heads. It is not however illegal to make the two charges under one head. The point to be seen in each individual case is whether the accused was prejudiced thereby. If the Judge has carefully explained to the jury the difference between abduction and kidnapping and the jury have fully understood the position, the defect in the charge cannot be said to have prejudiced the accused. A.I.R. 1927 Cal, 644. Diss. (*M. C. Ghose and Bartley, JJ.*) EBADI KHAN *v.* EMPEROR. **176 I.C. 104=11 R.C. 36=39 Cr.L.J. 674 =A.I.R. 1938 Cal. 460.**

——Ss. 234 and 222—Criminal breach of trust —Three separate charges in respect of three gross sums, each made up of separate items—Joinder of—Legality. *See* CR. P. CODE, Ss. 222 AND 234. **44 C.W.N. 175.**

——S. 234—*Offences of same kind—Murder and grievous hurt.*

Murder and grievous hurt are not offences of the same kind and so cannot be tried together. (*Bartley and Khundkar, JJ.*) EMPEROR *v.* AFSARUDDI. **179 I.C. 910=11 R.C. 632=40 Cr.L.J. 290=67 C.L.J. 580=42 C.W.N. 1235=A.I.R. 1939 Cal. 32.**

——S. 234—*Scope—Omission to name offences or mention sections—Effect.*

Obiter.—The provisions of S. 234, Cr. P. Code, cannot be evaded by the omission to name the offences and sections in the charge where in fact the accused has been charged and convicted of two offences. (*Davis, J.C. and Haveliwala, A.J.C.*) MOHANLAL BHANALAL *v.* EMPEROR. **32 S.L.R. 87=172 I.C. 374=10 R.S. 149=39 Cr.L.J. 123=A I.R. 1937 Sind 293.**

——Ss. 234 and 235—*Scope—Six counts of bribery and six counts of false personation—Joint trial for—Legality.*

A joint trial of an accused on no less than six counts of bribery and six counts of false personation, the counts of bribery relating to different dates and different persons and the counts of personation relating to different persons, and to the same day, but to different times of the day, is one which is obviously not permitted by law, and a conviction following after a trial of that kind must be regarded as void and of no legal effect. (*Pandrang Row, J.*) APPALASWAMI *v.* EMPEROR. **1937 M W.N. 209.**

——Ss. 234 and 235—*Scope—Three charges of breach of trust and three charges of falsification of accounts—Joint trial—Legality.*

It is true that when falsification of accounts and criminal breach of trust relate to the same item and are so connected as to be part of the same transaction, an accused can be tried for every such offence; still the two offences are two distinct offences though an accused may be charged and tried for them at one trial, and they do not become one offence for the purpose of S. 234. Convenient as it may be that offences of criminal breach of trust and falsification of accounts should be tried together when they relate to the same money and are part of the same transaction, as the law stands, S. 235 may apply to one charge of criminal breach of trust and one charge of falsification of accounts, but not to two or three of each. Hence three charges of criminal breach of trust and three charges of falsification of accounts cannot be combined together at one trial. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* MAHOMED ISMAIL. **30 S.L.R. 391=166 I.C. 845=9 R.S. 156=38 Cr.L.J. 324=A.I.R. 1937 Sind 1.**

CR. P. CODE (1898), S. 235.

——S. 235—*Accused setting fire to his shop to obtain insurance money—Charges of attempt to cheat and arson—Joinder of—Legality.*

Where the case of the prosecution was that the accused having made up his mind to obtain insurance money from the insurance company by fraud, had to that end set fire to his shop and after the fire had put in a claim for the money.

Held, that in the circumstances it was not possible to say that the attempt to cheat was not essentially connected with the arson and that, therefore, the framing of the two charges under Ss. 420-511 and S. 436, I. P. Code, did not amount to a misjoinder. (*Bartley and Khundkar, JJ.*) AHMADAR RAHAMAN *v.* EMPEROR. **44 C.W.N. 340.**

——S. 235 (1)—*Applicability—Test.*

Under S. 235 (1), Cr. P. Code, there must be one continuous thread of a common purpose running through the acts to support a joinder of charges in respect thereof. Mere difference in time or place between the commission of one offence and of another will not necessarily import want of such continuity: they may yet be linked together by a community or continuity of purpose, and thus form the same transaction. (*Henderson and Biswas, JJ.*) KAMALA KANTA *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 98=41 C.W.N. 1112.**

——S. 235—*Applicability—Test—"Same transaction"—Evidence to prove several offences identical—Joint trial—Refusal to hold on the ground that* corpus delicti *is not same in all—Propriety of procedure.*

The test for applying S. 235, Cr. P. Code, is to see whether the acts alleged form a series that can be regarded as one transaction; when the evidence to prove one offence is identical with that by which the other offence or offences are to be established, the acts must be held to form one transaction. S. 235 and the succeeding sections are ample justification for holding one joint trial for such offences, and it is improper for a Court to decline to hold a joint trial and to hold separate trials on the ground that the *corpus delicti* in each case is not the same. The expression *corpus delicti* is nowhere found in the Criminal Procedure Code, by which alone the course of criminal trials in India is to be governed, and not by a criterion derived from the law of some other country. (*Varma and Rowland, JJ.*) EMPEROR *v.* MAYADHAR POTHAL. **18 Pat. 450=1939 P W N. 300=181 I.C. 1001=5 B.R. 706=11 R. P. 653=40 Cr.L.J. 625=20 Pat.L.T. 420=A.I.R. 1939 Pat. 577.**

——S. 235—*Charges of breach of trust, cheating, forgery and using forged tickets as genuine—Joint trial—Legality.*

CR. P. CODE (1898), S. 235.

The accused was an employee of the Aden Settlement Committee. One of the functions of this body was to supply water to the public on payment. This was done for the most part by the sale of water tickets issued in books. Accused was responsible for the sale of these books and for paying the money received into the bank. The case for the prosecution was that the accused caused spurious books to be rinted and misappropriated the proceeds thereby committing offences of breach of trust, cheating, forgery and using forged tickets as genuine. Objection was taken to the legality of the joinder of these four charges and in particular to the inclusion in the third and fourth charges of alleged offences of forgery extending over a period of nearly two years. It was in evidence that 4,100 spurious books were printed and delivered to the accused in different batches and at different intervals during the period of May, 1933 to February, 1935.

Held, that charges in respect of the total number of alleged forgeries extending over this period could only be tried on one charge and at one trial, and such charges could only be combined with the other charges of breach of trust and cheating, if the whole series of acts covered by the four charges could properly be considered as forming the same transaction within the meaning of S. 235 (1), Cr. P. Code, and that although the offences committed in connection with any one consignment of books would be part of the same transaction, the offences committed in connection with any other consignment of books would not be part of the same but of a similar transaction, and the charges against the accused in respect of the forgery of 4,100 books during the period of May, 1933 to February, 1935 were, therefore, illegal, and that the illegality affected all the other charges, and as in the circumstances of the case, it was impossible to say that the accused had not been prejudiced, his conviction should be quashed. (*Broomfield and Divatia, JJ.*) EMPEROR *v.* SHAPURJI SORABJI. **60 Bom. 148=162 I.C. 399=8 R.B. 415=37 Cr.L.J. 688=38 Bom.L.R. 106=1936 Cr.C. 338=A.I.R. 1936 Bom. 154.**

——S. 235—*Charges under S.* 147 *and under Ss.* 323 *and* 325, *I. P. Code—Joinder of—Legality.*

An offence under S. 147, I. P. Code, has been made a substantive offence by the Indian Penal Code and there is no illegality in the accused being charged under that section in addition to charges under Ss. 323 and 325, I. P. Code. (*Zia-ul-Hasan, J.*) MANNI LAL *v.* EMPEROR. **173 I.C. 386=1938 O.A. 158=1938 A.Cr.C. 14=1938 O. L.R. 117=1938 O.W.N. 218=10 R.O. 222=39 Cr.L.J. 341=A.I.R. 1938 Oudh 95.**

——S. 235—*Joint trial of offences under Ss.* 211 *and* 302 *of the Penal Code—Validity of.*

Where an accused was alleged to have killed a person in order to foist a false case of murder upon his enemies and immediately after committing the murder preferred a false complaint and he was tried at the same trial for offences under Ss. 211 and 302, Indian Penal Code.

Held, that though strictly speaking a joint trial conducted for the two offences was not illegal, they ought not to be tried together, as such joint trial would be very embarrassing to the accused and to the prosecution and might lead to failure of justice. (*Burn and Lakshmana Rao, JJ.*) UPPARA DODDA NARASA, *In re.* **179 I.C. 518=11 R.M. 593=40 Cr.L.J. 211=1938 M.Cr.C. 331=48 L.W. 601=1938 M.W.N. 1116=A.I.R. 1939 Mad. 59=(1938) 2 M.L.J. 771.**

——Ss. 235 and 239—*Joint trial on series of charges under Ss.* 342, 376 *and* 377, *I. P. Code—Propriety.*

The accused were jointly tried on a series of charges under Ss. 342, 376 and 377, I. P. Code. Four of the charges were of wrongful confinement, each relating to different confinements, some by all the accused and some by only some of them. The charges of rape were drawn in a peculiar manner. Each of them specified an offence of rape committed either on an indefinite date or between periods extending from six weeks to six months, the time covered being from September, 1936 to June, 1937. The charge under S. 377 specified an offence committed between end of December, 1936 and June, 1937. The charges found were either so vague and general as to be bad in law or were in the alternative absurd. Neither of the offences was a continuing offence. The whole story was vague in details and corroboration, which might have been expected, had not been given. The Judge did not deal with the evidence in a satisfactory way. Instead of putting the evidence, which was marked with suspicious features, before the jury and leaving them to decide whether they were prepared to believe it, he went out of his way by special pleading to ask the jury to believe the whole of it.

Held, that the multiplicity of the charges tried together in the trial must have operated to the prejudice of the accused. That corroboration of the complainant in respect of the offences alleged was a practical impossibility in absence of definite averments as to the time of their occurrence. That the verdict of the jury was vitiated by misdirections. That it was not a case in which retrial should be ordered. (*Bartley and Henderson, JJ.*) ALI HYDER *v.* EMPEROR. **179 I.C. 960=11 R C. 637=40 Cr.L.J. 280=68 C.L.J. 238=A.I.R. 1938 Cal. 769.**

——S. 235 (1)—*"Same transaction"—Meaning of—Community of purpose—If sufficient to constitute same transaction—Abetment by conspiracy—Various acts done—If parts of same transaction.*

The word "transaction" is usually used to include the steps leading to a conclusion or resulting in action though often transaction emphasises the fact of something done or brought to a conclusion. To ascertain whether a series of acts are parts of the same transaction it is essential to see whether they are linked together to present a continuous whole. The expression "same transaction" signifies related to one another in point of purpose or as cause and effect or as principal and subsidiary acts so as to denote one continuous and completed action. The idea of completion cannot be divorced from the interpretation of the expression. A mere common purpose does not constitute a transaction. Nor would community of purpose coupled with concert and design implied in abetment by conspiracy make the different acts alleged parts of the same transaction. (*Wassoodew and Sen, JJ.*) EMPEROR *v.* RAMCHANDRA RANGO. **181 I.C. 870=11 R.B.**

CR. P. CODE (1898), S. 235.

356=40 Cr.L.J. 579=41 Bom.L.R. 98=A.I.R. 1939 Bom. 129.

——S. 235 (1)—*'Same transaction'—Tests.*

Courts have indicated various tests to be employed to decide whether different acts are part of the same transaction or not, namely, proximity of time, unity of place, unity or community of purpose or design and continuity of action. Proximity of time and unity of place are not important tests at all. There may be unity or community of purpose in respect of a series of transactions or several different transactions, and therefore the mere existence of a common purpose cannot by itself be enough to convert a series of acts into one transaction. The main test must really be continuity of action which must mean this: the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts comes to an end, either by attainment of the object or by being put an end to or abandoned. If any of those things happens and the whole process is begun over again, it is not the same transaction but a new one, in spite of the fact that the same general purpose may continue. (*Broomfield and Divatia, JJ.*) EMPEROR *v.* SHAPURJI SORABJI. 60 Bom. 148=162 I. C. 399=8 R.B. 415=37 Cr.L.J. 688=38 Bom. L.R. 106=1936 Cr.C. 338=A.I.R. 1936 Bom. 154.

——S. 235 (1)—*Same transaction—User of four forged documents at registration of a sale deed and obtaining money—Single trial for four charges—Legality.*

The appellant was charged with four offences under S. 471, I. P, Code, on the ground that he used four forged documents during the registration of a sale deed knowing them to be forged and obtained 'money from the complainant'.

Held, that the user of the documents and obtaining the money formed one transaction and the accused could therefore be tried for all the offences at one trial under S. 235 (1), Cr.P. Code. (*Lakshmana Rao, J.*) SUBBA RAO *v.* EMPEROR. 1940 M.W.N. 865.

——Ss. 235 and 239—*"Same transaction"—Charges under R.* 30 (a) (1) (i) *of Madras Motor Vehicles Rules against owners and drivers of several motor lorries—Joint trial—Propriety.*

Several motor lorries were engaged at Calicut in Malabar District to deliver bags of grain at Pollachi in the district of Coimbatore. In some cases the owners and in other cases both the owners and drivers were prosecuted in one and the same trial under S. 16 of the Motor Vehicles Act on the ground that the owners had not obtained permits in form G as required by R. 30 (*a*) (1) (*i*) of the Madras Motor Vehicles Rules.

Held, that the offences were many and must be tried separately and it was very undesirable that they should be lumped and tried together. The offence committed by each person was his own offence and he should therefore be tried separately for it. Though both the owner and the driver of a particular vehicle had committed the offence in respect of a single journey, and could be tried jointly in one trial, it was very objectionable that several owners and several drivers should be tried in one trial for several offences committed separately and on different dates. (*Burn, J.*) PUBLIC PROSECUTOR *v.* KRISHNAN. 1938 M.W.N. 822=177 I.C. 314=39 Cr.L.J. 861

CR. P. CODE (1898), S. 235.

=11 R.M. 303=1938 M.Cr.C. 188=47 L.W. 774=A.I.R. 1938 Mad. 743=(1938) 1 M.L.J. 800.

——S. 235—*"Same transaction"—Offence of conspiracy and acts committed in pursuance of it—Joint trial—Legality.*

Where there is a conspiracy having one or more objects in view and certain offences are committed in pursuance of such conspiracy, the several offences generally form part of the same transaction within the meaning of that expression as used in S. 235. The principle will also apply where the several offences are by different persons. The offence of conspiracy and the acts done in pursuance of the conspiracy can rightly be said to come under one transaction and transaction continues so long as the conspiracy continues. Where, therefore, there is a conspiracy and specific offences are committed in pursuance of such conspiracy, persons who are parties to that conspiracy and concerned in the specific offences can lawfully be tried under one and the same trial. (*Derbyshire, C.J. and Costello, J.*) RASH BEHARI SHAW *v.* EMPEROR. 168 I.C. 657=9 R.C. 853=41 C.W.N. 225=38 Cr.L.J. 545 =1936 Cr.C. 1043=A.I.R. 1936 Cal. 753.

——S. 235—*"Same transaction"—Same person committing two murders successively—Joint trial—Legality.*

Accused was enraged at one *G*, who, was keeping his (accused's) sister, and one *P*, who facilitated intercourse between *G* and his sister, by putting a part of his house at the disposal of *G* and accused's sister. One night, the accused went to *G's* house, called him out on pretext of having to speak to him, and when the two had walked some distance off, accused struck *G* on the neck and killed him. He then ran straight to the house of *P*, called him out and as soon as he came out, struck him on the neck with a bill-hook and killed him.

Held, that the two murders were committed in the course of the same transaction, and a joint trial on the two charges was not therefore illegal, and that the discretion given under S. 235, Cr. P. Code, to try the two offences at the same trial was not exercised wrongly. (*Mockett and Horwill, JJ.*) GANGANNA *v.* EMPEROR. 1937 M.W. N. 463.

——S. 235, Ill. (m)—*Scope—Charge of robbery—Separate charge for hurt—Legality.*

Where hurt is caused to the victim of robbery though not at the time of committing the robbery but subsequent to its commission, during the effort of the offender to get away with the property, a separate charge in respect of the hurt is not sustainable. Robbery by its definition includes hurt caused not only in order to committing of the theft or in committing the theft, but also in carrying away the property obtained by the theft. (*Khaja Mahammad Noor and Dhavle, JJ.*) EMPEROR *v.* HARIA DHOBI. 18 Pat.L.T. 857 =10 R.P. 346=172 I.C. 780=4 B.R. 165=39 Cr.L.J. 156=1937 P.W.N. 868=A.I.R. 1937 Pat. 662.

——S. 235—Scope—If controlled by Ss. 222, 233 and 234. *See* CR. P. CODE, Ss. 222, 233, 234, 235 AND 239. 40 Bom.L.R. 1092.

——S. 235—*Scope—Charges under Ss.* 307 *and* 326, *I. P. Code—Single act of shooting—Conviction under both—Legality—Penal Code. S.* 71.

CR. P. CODE (1898), S. 235.

There is nothing incongruous between a charge of attempted murder under S. 307, I. P. Code, which also includes hurt,and a charge under S.326, I. P. Code, for grievous hurt. A single act of shooting a man with a gun resulting in grievous hurt, may be made the subject of a charge both under S. 307 and S. 326, I. P. Code. There is nothing illegal in a person being charged and convicted at the same trial under both the sections. But there should be only one punishment for the two offences. (*Davis, J.C. and Lobo, A.J.C.*) MANGHAN KHAN *v.* EMPEROR. 30 S.L.R. 238.

——Ss. 235 and 236—*Joinder of charges under Ss.* 302 *and* 201, *I. P. Code—Propriety—Duty of Judge in addressing jury.*

Where there is a very strong case of circumstantial evidence to establish the charge of murder, the addition of a minor charge under S. 201, I. P. Code, to the main charge under S. 302, I. P. Code, would only give the jury an excuse to evade their duty. In such a case, after dealing with the charge of murder, the Judge should put before the jury the case under S. 201, I. P. Code, and then indicate what evidence there is to establish the various elements in this particular charge. (*Cunliffe and Henderson, JJ.*) ABDUL GAFUR *v.* EMPEROR. 41 C.W.N. 414.

——Ss. 235 and 239—*Joint trial—Charges of murder and of conspiracy to commit dacoities—Legality—Test.*

To make a joint trial legal, the accusation must be a real one and not a mere excuse for a joinder of charges which otherwise cannot be joined. A person accused of murder was also tried jointly along with others for conspiracy to commit dacoities. The existence of conspiracy was proved. It was also proved that the conspirators took part in 18 occurrences extending over 16 months and were parties to them with the intention to carry out the conspiracy.

Held, that under the circumstances the inclusion of all the occurrences in one trial by the Magistrate was not illegal and the joint trial also was not illegal. (*Jack and Patterson, JJ.*) SANYASHI GAIN *v* EMPEROR. 171 I C. 183=38 Cr.L. J. 1018=10 R.C 235=A.I.R. 1937 Cal. 269.

——Ss. 235 and 239—*Charge of general conspiracy and charges of overt act—Joinder of—Legality.*

Per *Henderson, J.*—A charge of general conspiracy can be tried together withcharges consisting of overt acts made in pursuance of that conspiracy. 19 C.W.N. 676, relied on. (*Cunliffe and Henderson, JJ.*) C. S. JOSEPH *v.* EMPEROR. 41 C.W.N. 251.

——Ss. 235 (1) and 239 (d)—*"Same transaction"—Meaning of—Conspiracy by several persons—Separate offences by individual conspiracy —Joint trial—Legality*

Separate offences by individual conspirators which are not committed in pursuance of the conspiracy, but which are isolated acts committed individually during the continuance of the conspiracy, are not part of the same transaction with the conspiracy itself and with those acts which are alleged to have been the subject of the conspiracy. In other words, a conspiracy and acts done in furtherance of its common object have no community with separate acts which may be committed by a conspirator for individual gain. A joint trial of the charge of conspiracy and of the separate offences is consequently illegal and not validated by Ss. 235 (1) and 239 (*d*). What amounts to "same transaction" is a question of fact to be decided in the circumstances of each case. (*Collister and Bajpai, JJ.*) EMPEROR *v.* BISHAN SAHAI VIDYARTHI. I.L.R. (1937) All. 779=1937 A.W.R. 748=1937 A.Cr.C. 119=1937 A.L.J. 1073=171 I.C. 994=10 R.A. 350=1937 A.L R. 935=39 Cr.L.J. 38=A.I.R. 1937 All. 714.

——Ss. 235 and 439—*Joint trial of offences committed on different dates—Illegality—Interference in revision.*

Two offences under S. 457 and S. 324 read with S. 34, Penal Code, committed on different dates cannot possibly be considered to be part of one and the same transaction and their joint trial is not mere irregularity but an illegality and the Court can set aside the conviction in revision. (*Currie, J.*) BAHALI *v.* EMPEROR. 162 I.C. 926 =8 R.L. 973=37 Cr.L.J. 722=38 P.L.R. 628= 1936 Cr.C. 512=A I.R. 1936 Lah. 507.

CR. P. CODE (1898), S. 236.

——S. 236 — *Applicability —Conviction under S.* 448, *I. P. Code—If can be altered to one under S.* 341, *I. P. Code.*

It is not necessary for the application of S. 236, Cr. P. Code, that offences should fall under the same chapter; there may be border-line cases where the offences concerned fall under different chapters. The accused who was the complainant's nephew, locked up a room in a house belonging to the complainant by attaching a padlock to the outside of the door. The accused was at the time living in another room in the same house, and it was found that what the accused did was done to recover possession of his share of the property. In his own defence the accused put forward every fact which would be required for a conviction under S 341, I. P. Code. He put forward the fact that he and the complainant were joint owners of the property; he admitted that he put the padlock on the door and locked it. The accused was convicted under S. 448, Penal Code.

Held, that as the accused had not entered the room but locked the door by remaining outside, he could not be convicted under S. 448, Penal Code, but S. 341 of the Code applied to the case as the accused had voluntarily obstructed the complainant from entering into the room.

Held further, that inasmuch as the accused had put up a defence under S. 341 also, the accused would not be prejudiced if the charge under S. 448 was altered to one under S. 341 of the Code. The offence of wrongful restraint under S. 341 though it is in a chapter different from the one in which offence under S. 448 fell, it was one that fell in the border-line cases, as for such offence it was not necessary that anything was necessary to be done directly to the body at all. The offence could be committed by locking the door or by building a wall or something of that kind. S. 236, Cr. P. Code, could be applied to such a case even though Ss. 341 and 448, I. P. Code, fell under two different chapters. Conviction therefore of the accused under S. 448 could be altered to one under S. 341. (*Spargo, J.*) RATI RAM *v.* EMPEROR. 170 I.C. 909=38 Cr.L.J. 989 =10 R.R. 115=A I.R. 1937 Rang. 250.

——S. 236—*Applicability—Conditions.*

S. 236 is limited in its application. It is not intended to be applied to a case where the facts are

CR. P. CODE (1898), S. 236.

left in doubt or to enable to Judge to leave the facts in doubt and thus to escape responsibility and duty of making up his mind which the law places on him. It applies to a case where facts are not in doubt but it is doubtful what provisions of law applies to these facts. (*Davis, J.C. and Lobo, A.J.C.*) GHULAM HYDER IMAM BAKSH *v.* EMPEROR. **174 I.C. 497=10 R.S. 254=31 S.L.R. 480=39 Cr.L.J. 460=A.I.R. 1938 Sind 63.**

——**S. 236**—*Alternative charges under Ss. 302 and 201—Propriety—Accused not free from suspicion of being guilty of main offence—Conviction under S. 201, I. P. Code—Legality.*

A person who has actually committed a crime himself—whether murder or any other crime—is not any the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence. There is no law preventing the main offender from being convicted under S. 201, I. P. Code, and there is no misjoinder in charging an accused in the alternative with the main offence and under S 201. I. P. Code. Nor is there anything irregular or improper in a Judge holding that while the accused is not himself free from the suspicion of being the actual offender, he is none the less liable to conviction under S. 201, I. P. Code. (*Rowland and Chatterjee, JJ.*) NEBTI MANDAL *v.* EMPEROR. **19 Pat. 369=1940 P.W.N. 73=A.I.R. 1940 Pat. 289.**

——**S. 236**—*Same transaction—Statement under S. 164, Cr. P. Code, and contradictory statement at trial—Charge of perjury in the alternative—If justified.*

Quaere.—Whether a statement made by a person under S. 164, Cr P. Code, can possibly be regarded as part of the same transaction as a statement made at the trial so as to justify an alternative charge of perjury under S. 236, Cr. P. Code. (*Beaumont, C.J. and Divatia, J.*) EMPEROR *v.* SULTANSHA SIDISHA. **42 Bom.L.R. 745.**

——**S. 236**—*Scope—Alternative charge and alternative conviction—Permissibility—Accused proved to be guilty of acts constituting offence—Doubt as to which offence exactly is committed—Conviction—If illegal—Procedure.*

It is not correct to hold that there may be an alternative charge but that there cannot be an alternative conviction. If the Magistrate is not able to find for certain that facts exist which justify conviction, he should of course acquit the accused. But where the Magistrate has found that facts do exist which establish that the accused must have committed some offence, although it is doubtful what that offence exactly is, a conviction for the least serious offence is perfectly good. The accused is not entitled to escape punishment merely because it is not possible to say which of two offences he committed, when it is clear that is guilty of one of them. (*Allsop, J.*) BAPU RAM *v.* EMPEROR. **172 I.C. 617=10 R.A. 412=1938 All L.R. 6=39 Cr. L.J. 152=1937 A.L.J. 1214=1937 A.W.R. 885=A.I.R. 1937 All. 754.**

——**S. 236**—*Scope and applicability.*

S 236, Cr. P. Code, deals with cases where it is doubtful which of several offences the facts which can be proved will constitute. The doubt has to be a doubt as to the law applicable to a certain set of facts which have been proved. (*Mosely, J.*) ABDUL HAMID *v.* EMPEROR. **14 Rang. 24=8 R.**

CR. P. CODE (1898), S. 236.

R.509=37 Cr.L.J. 492=161 I.C. 763=1936 Cr.C. 271=A.I.R. 1936 Rang. 174.

——**S. 236**—*Scope and applicability of.*

S. 236 of the Code of Criminal Procedure is generally regarded as limited in its application, it is not intended to be applied to a case where the facts are left in doubt. But it only applies to a case where the facts are not in doubt, but it is doubtful which provision of the law applies to those facts. (*Davis, J.C. and Lobo, A.J.C.*) GHULAM HYDER *v.* EMPEROR. **31 S.L.R. 480=174 I.C. 497=10 R.S. 254=39 Cr.L.J. 460=A.I.R. 1938 Sind 63.**

——**Ss. 236 and 237**—*Charge under Ss. 302 and 457, I. P. Code—Conviction under S. 460, I. P. Code—Legality.*

Where it is doubtful which of several offences a person has committed, he may be charged with all of them or with a number of them in the alternative. In such a case he may be convicted if the facts proved show that he is guilty of an offence with which he might have been charged under S. 236, though in fact he was not specifically charged with that particular offence. Where the accused were charged under Ss. 302 and 457, I. P. Code, and the facts proved established an offence under S. 460, I. P. Code, they could be convicted under that section, although they were not specifically charged with that offence. (*Harries and Rachhpal Singh, JJ.*) MATHURI *v.* EMPEROR. **58 All. 695=163 I.C. 253=37 Cr.L.J. 794=8 R.A. 928 (2)=1936 A.W.R. 1=1936 A.Cr.C. 15=1936 A.L.J. 518=1936 Cr. C. 401=1936 All.L.R. 539=A.I.R. 1936 All. 337.**

——**Ss. 236 and 237**—*Scope of—Charge under S. 295, I. P. Code—Conviction under S. 297 on same facts—Legality—Absence of charge under S. 295—Effect.*

Ss. 236 and 237, Cr. P. Code, authorise the Court, where it is doubtful which of several offences has been committed, to frame charges in the alternative, and, even in the absence of alternative charges, to convict the accused of the offence which he is shown to have committed though he was not charged with it, provided that this offence was one for which he might have been charged under S. 236, that is to say, provided the single act or series of acts charged is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute. An accused charged under S. 295, I. P. Code, can be convicted under S. 297, on the same facts, when they disclose an offence under S. 297, though he was not charged under the latter section. (*Dhavle, J.*) AMIR HASSAN *v.* EMPEROR. **189 I.C. 867=41 Cr.L.J. 810=6 B.R. 874=21 Pat.L.T. 121=1940 P.W.N. 145=A.I.R. 1940 Pat. 414.**

——**Ss. 236, 237 and 423**—*Charge under S. 323, I. P. Code, but conviction under S. 452—Legality—Test—Question of prejudice.*

Though it is not illegal to convict a man of an offence under S. 452, I. P. Code, in a case in which he has been charged under S. 323, I. P. Code, because of the wording of Ss. 236 and 237 of the Cr. P. Code yet in each case the question to be decided would be whether the accused has or has not been prejudiced in his trial by the fact that the charge had been framed under the wrong section. Where it is neither shown nor does appear

that there was any real cross-examination with a view to ascertain whether the shop in question was a building or not within the meaning of S. 442, I. P. Code, the alteration of the charge does cause injustice to the accused and a District Magistrate cannot in appeal alter the conviction under S. 323, I. P Code, to one under S. 452, I. P. Code. (*Yorke, J.*) EMPEROR *v.* SHANKAR DAYAL. **1938 A Cr.C. 100=177 I.C. 616=11 R O 59=39 Cr.L.J. 937=1938 O.A. 740=1938 O.L.R. 432=1938 O.W.N. 960=A.I.R. 1938 Oudh 263.**

——**Ss. 236, 237 and 238**—*Charge of cheating in pursuance of conspiracy—Conviction for cheating without conspiracy—Legality.*

On a charge of cheating in pursuance of a conspiracy, the accused may be found guilty of cheating without a conspiracy. (*Tyabji, J.*) EMPEROR *v.* ABDUL RAHIMAN. **60 Bom. 485=162 I.C. 950=37 Cr.L.J 753=8 R.B. 437=38 Bom. L.R. 153=1936 Cr.C. 573=A.I.R. 1936 Bom. 193.**

——**S. 237**—Applicability of. *See* PENAL CODE, Ss. 120-B, 302 AND 201. **66 C.L.J. 225=42 C.W. N. 129.**

——**S. 237**—*Applicability—Charge under S. 302, I. P. Code—Conviction under S. 201, I. P. Code—Legality.*

An accused charged with an offence of murder under S. 302, I. P. Code, may legally be convicted of an offence under S. 201, I. P. Code, though he has not been charged with that offence, if it appears in evidence that he committed that offence. (*Mockett and Horwill, JJ.*) NAGAN *v.* EMPEROR. **1937 M.W N. 544.**

——**S. 237**—*Charge of robbery—Conviction of receiving stolen property—Legality.*

An accused who is charged with the offence of robbery can be convicted of receiving stolen property under S. 237, Cr. P. Code. The appellate Court can alter the conviction from one of robbery into one of receiving stolen property. (*Norman, J.C.S.*) TOSHIA *v.* EMPEROR. **1936 A.M.L. J. 50.**

——**Ss. 237 and 238**—*Charge under S. 304 /149, I. P. Code—Conviction under S. 326 / 34, I. P. Code—Legality.*

Where the only charge against an accused person is one under S. 304 read with S. 149, I. P. Code, he cannot be convicted under S. 326, read with S. 34, I. P. Code, when no such charge has been framed against him. (*Henderson and Khundkar, JJ.*) KALAL BEPARI *v.* EMPEROR. **44 C.W.N. 651.**

——**S. 237**—Conviction without charge—Charge under S. 426, I. P. Code—Conviction—Alteration of conviction by appellate Court into one under S. 352—Legality. *See* CR. P. CODE, S. 423. **17 Pat.L.T. 572.**

——**S. 238**—*Charge under S. 307, I. P. Code—Conviction under S. 326, I. P. Code—Legality.*

Whether or not an offence under S. 326, I. P. Code, is a minor offence to an offence under S. 307, I. P. Code, a conviction of the accused under S. 326, I.P. Code, on a charge framed under S. 307, I. P. Code, on the specific allegation that he caused hurt to the complainant, is not unsustainable simply because no formal charge under S. 326, I. P. Code, was drawn up. (*Bartley and Rau, JJ.*) SK. IDRIS *v.* EMPEROR. **43 C.W.N. 782.**

——**S. 238**—*Charge under S. 307, read with S. 149, I. P. Code—Conviction under S. 323—Legality.*

The offence of hurt is included in the offence of attempt to commit murder. The fact that the charge against the accused is framed under S. 307, read with S. 149, I. P. Code, does not therefore preclude the Court from convicting the accused under S 323, I. P. Code, and such a conviction is perfectly legal, though there is no specific charge in that behalf. (*Niyogi, A.J.C.*) GANGABISHAN *v.* EMPEROR. **167 I C. 748=9 R.N. 206=38 Cr L.J. 442=19 N.L.J. 18.**

——**S. 238**—*Charge under S. 147, I. P. Code—Conviction under S. 323—Legality.*

The offence of voluntarily causing hurt under S. 323, I. P. Code, is not included in the offence of rioting under S. 147, I. P. Code. The latter is an offence against the public tranquillity. while the former is one affecting the human body. Force or violence is an ingredient of rioting, while causing bodily pain is the essential element of hurt. Where the charge framed against the accused is one under S. 147, he cannot be convicted under S. 323, without a specific charge in that behalf. (*Niyogi, A.J.C.*) GANGABISHAN *v.* EMPEROR. **167 I.C. 748=9 R.N. 206=19 N.L.J. 18=38 Cr.L.J. 442.**

——**Ss. 238 and 537**—*Charge under S. 302 or in the alternative under S. 396, I. P. Code—Conviction under S. 304 (2) and S. 379, I. P. Code—Legality.*

Irregularities in charge have no effect unless they have prejudiced the accused in their defence. Consequently where persons are charged with murder and also under S. 396, Penal Code, conviction under S. 304 (2) and S. 379 is not illegal even though the charge may be in the alternative. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) BAWAR SHAH *v.* EMPEROR. **164 I.C. 899=37 Cr.L.J. 1039 =9 R. Pesh. 31=1936 Cr.C. 830=A.I.R. 1936 Pesh. 172.**

——**S. 238**—*Counterfeiting coins—Charge for substantive offence—Conviction for abetment—Legality.*

A person who is charged with being principal in the manufacture of counterfeit coins can not be convicted of being an abettor, when the facts which constitute the offence of abetment are quite different from the facts which constitute the offence of manufacturing counterfeit coins. (*Blacker, J.*) DHANPAT RAI *v.* EMPEROR. **188 I. C. 64=12 R.L. 505=41 Cr.L.J. 540=42 P.L.R. 12=A.I.R. 1940 Lah. 112.**

——**S. 239**

Applicability.
Conspiracy.
Construction and scope.
Discretion of Court.
Joint trial.
Misjoinder.
Offence.
Same transaction.
Scope.

Applicability.

——**S. 239**—*Requisites.*

For S. 239, Cr. P. Code, to apply it is enough if the different offences are committed in the course of the same transaction. The criterion which makes a joint trial allowable is what the prosecu-

tion case is, and not what the result may be. (*Gruer, J.*) BHAGOLELAL *v.* EMPEROR. 189 I.C. 382=41 Cr.L.J. 734=13 R.N. 47=1940 N.L.J. 309=A.I.R. 1940 Nag. 249.

Conspiracy.

——S. 239—*Each accused charged with one or more of seven specific offences—Legality.*

Where certain persons are charged under S. 120-B, Penal Code, for conspiracy to commit criminal breach of trust and cheating and each of them is charged with one or more of seven specific offences either relating to cheating or criminal breach of trust committed in pursuance of the conspiracy the charges are not contrary to law and there is no misjoinder. (*Guha and Lethbridge, JJ.*) AKHIL BANDHU RAY *v.* EMPEROR. I.L.R. (1938) 1 Cal. 588=175 I.C. 409=10 R.C. 790=39 Cr.L.J. 596=A.I.R. 1938 Cal. 258.

Construction and scope.

——S. 239—*More than one person charged and trial in same trial—Legality.*

The clauses of S. 239, Cr. P. Code, are mutually exclusive in the sense that they cannot be added one to another so as to bring some of the persons charged under one clause and some under another and so to put them upon their trial all together at one and the same time; but they are not mutually exclusive in the sense that persons accused of an offence and persons accused of abetment or of an attempt can only be tried at one trial because their case comes under Cl. (*b*). But if more than one person are to be tried and charged together, their case must be brought within one of the clauses of S. 239 before they can be tried together, or the trial is contrary to law. (*Davis, J.C. and Havelivala, J.*) CHUHARMAL NIRMALDAS *v.* EMPEROR. I.L.R. (1939) Kar. 64=177 I.C. 280=39 Cr.L.J. 881=11 R.S. 53=A I.R. 1938 Sind. 164.

Discretion of Court.

——S. 239—*Exercise of—Revision.*

S. 239 confers a discretion upon a Magistrate to try persons accused of an offence before him either jointly or separately, but the discretion vested in the trying Magistrate is to be exercised by him judicially and according to certain well established principles. Where the trial Court has not exercised a wise discretion in directing the splitting of the case against several accused the High Court will interfere. 26 All. 238, Foll. (*Rupchand Bilaram and Mehta, A.J.Cs.*) DHOLIMAL KAROOMAL *v.* EMPEROR. 162 I.C. 863=37 Cr.L.J. 716=8 R.S. 175=1936 Cr.C. 319=A.I.R. 1936 Sind 47.

——S. 239—*Embarrassment to defence—Joint trial—Propriety,*

Under S. 239, a discretion is given to a Court to try certain persons either jointly or separately. The manner in which this discretion is to be exercised must depend upon the facts of each case, and the High Court, on a consideration of the circumstances of the case, has power to hold that the accused should not have been tried jointly and can set aside the conviction and sentences without directing a retrial, should it think fit. Even where Ss. 238 and 239 justify a joinder, it should not be resorted to, if there is a risk of embarrassment to the defence. (*Derbyshire, C. J. and Costello, J.*) RASH BEHARI SHAW *v.* EMPEROR. 168 I.C. 657=9 R.C. 853=41 C.W.N. 225=38 Cr.L.J. 545=1936 Cr.C. 1043=A.I R. 1936 Cal. 753.

Joint trial.

——S. 239—*Accused tried for murder jointly with others for conspiracy to commit dacoities—Prejudice—Trial by jury.*

Where an accused tried for murder is tried jointly with others also for conspiracy to commit dacoities, there is likelihood of the jury being influenced against him by evidence not strictly relevant to the murder charge introduced by his joint trial with others for conspiracy. By the joint trial, therefore, the person accused of murder, is prejudiced but not others who are tried for conspiracy. (*Jack and Patterson, JJ.*) SANYASHI GAIN *v.* EMPEROR. 171 I.C. 183=38 Cr.L.J. 1018=10 R.C. 235=A.I.R. 1937 Cal. 269.

——S. 239—*Addition of other charges against one or more of persons charged—Legality.*

If persons can properly be charged and tried together under S. 239, Cr. P. Code, there is nothing to prevent other charges being added against one or more of such persons if the addition of such charges is permissible by the Code. (*Harries and Rachhpal Singh, JJ.*) MATHURI *v.* EMPEROR. 163 I.C. 253=58 All. 695=8 R.A. 928 (2)=37 Cr.L.J. 794=1936 A.W.R. 1=1936 A. Cr.C. 15=1936 A.L.J. 518=1936 All. L.R. 539=1936 Cr.C. 401=A.I.R. 1936 All. 337.

——S. 239—*Charge against two persons—Prosecution witnesses as against one really defence witnesses for other—Joint trial—Legality.*

It is no part of the duty of the prosecution to call defence witnesses and if the case is put in such a way that some of the prosecution witnesses are also defence witnesses as regards one of the accused, then the accused should be tried separately. (*Baguley and Shaw, JJ.*) NGA MYA SEIN *v.* EMPEROR. 172 I C. 868=10 R.R. 284=39 Cr.L.J. 198=A.I.R. 1937 Rang. 512.

——S. 239—*Charge under S. 401, I. P. Code—Joint trial of all members of gang—Legality.*

In a prosecution under S. 401, I. P. Code, all the members of the gang can be tried together for the offence of being members of that gang. There is nothing objectionable in such a joint trial if all the accused are in fact members of that gang. (*Horwill, J.*) ARUMUGAM *v.* EMPEROR. 180 I.C. 431=11 R.M. 700=40 Cr.L.J. 355=1938 M.Cr.C. 145=1938 M.W.N. 595=48 L.W. 639=A.I.R. 1938 Mad. 858.

——S. 239—*In violation of—Legality—Test.*

A joint trial in violation of the express provisions of S. 239, Cr. P. Code, is not illegal or void *ab initio* if it has not occasioned failure of justice and has not prejudiced the accused in his defence on the merits. (*Thomas, C. J.*) WALI JAN *v.* EMPEROR. 1938 O.A. 593=1938 M.W.N. 748=1938 A. Cr.C. 68=1938 O.L.R. 370=177 I.C. 74=11 R O. 23=39 Cr.L.J. 853 (1)=A.I.R. 1938 Oudh 216.

——S. 239 (f)—*Legality—Stolen properties not proved to be proceeds of same theft.*

Where there is no proof that the stolen properties in respect of which the accused is charged under S. 414, I. P. Code, were the proceeds of the same theft, the case cannot be brought within the provisions of S. 239 (*f*), Cr. P. Code, and a joint trial of the accused along with another from

CR. P. CODE (1898), S. 239.

whom the properties were recovered is consequently iliegal. The irregularity is not such as could be remedied by S. 537, Cr. P. Code. (*Jack and Khundkar, JJ.*) RAM KHELAWAN KAHAR *v.* EMPEROR. **42 C W.N. 729=11 R.C. 113=176 I. C. 525=39 Cr.L.J. 739=A.I.R. 1938 Cal. 525.**

——Ss. 239 and 537 — *Mutually exclusive evidence—Legality—'Same offence', meaning of—Illegal joint trial, if curable under S.* 537.

When one accused is charged with having murdered a certain person at a certain time and at a certain place and another accused is charged with having murdered the same person at about the same time and place, and both these accused are being prosecuted because there is evidence against both, but the evidence is of such a character that both of them cannot be convicted, and if one set of evidence is believed one of the accused will have to be convicted, whereas if the other set of evidence is believed the other accused will have to be convicted, it cannot be said that those persons are charged with the 'same offence' committed in the course of the same transaction 'The same offence' under S. 239 (*a*), Cr. P. Code, means an offence arising out of the same act or series of acts and can mean nothing else as is clear from the words of the clause 'committed in the course of the same transaction'. When the prosecution evidence against two persons is mutually exclusive, there is no provision of the Code under which those persons can be tried together; and the joint trial of the two persons is not a mere irregularity which can be cured under S. 537 of the Code, it is an illegality which goes to the very root of the trial. (*Dunkley and Wright, JJ.*) MAUNG SAR KEE *v.* THE KING. **1940 Rang.L.R. 203.**

——S. 239 (e)—*Persons charged under S.* 457 *with persons charged under S.* 411, *I. P. Code—Legality.*

S. 457, I. P. Code, includes theft and a person accused of an offence under S. 457 can by virtue of S. 239 (*e*), Cr. P. Code, be legally charged and tried with persons accused of receiving or retaining stolen property under S. 411, I. P. Code. (*Din Mahomed, J.*) EMPEROR *v.* NAWAB. **170 I.C. 303 =10 R.L. 100=38 Cr.L J. 1061=18 Lah. 62=39 P.L.R. 278=A.I.R. 1937 Lah. 463.**

——S. 239 (d)—*Persons charged under S.* 485 *and* 486, *I. P. Code—Legality.*

Where a person charged under S. 486 with having in his possession goods with the counterfeit of the trade-mark and another person charged under S. 485, I. P. Code, with having in his possession a counterfeit trade-mark are charged and tried jointly when there was no evidence to connect the goods found in the possession of accused 1, with the counterfeit die found in the possession of accused 2, the misjoiner renders the trial invalid, being a disregard of an express provision of law as to the mode of trial, and not a mere curable irregularity. (*Mosely, J.*) S. PILLAI *v.* SHAIK THUMBY SAHIB. **189 I.C. 705=41 Cr.L.J. 790= A.I.R. 1940 Rang. 113.**

——S. 239—*Persons charged under S.* 368, *I. P. Code, for separate acts of concealment—Legality.*

There is no provision of law under which persons charged under S. 368, I.P. Code, for separate acts of concealment of the same girl can be tried together. (*Bartley and Henderson, JJ.*) DURGAMONI DASSI *v.* EMPEROR. **43 C.W.N. 196.**

CR. P. CODE (1898), S. 239.

——S. 239 (d)—*Person charged with theft—If can be jointly tried with others charged with having rescued him—Penal Code, Ss.* 379 *and* 147.

A joint trial of a person charged with theft under S. 379, I. P. Code, with others charged under S. 147, I. P. Code, with having rescued him, is illegal. The theft under the subsequent rescue cannot be said to be acts committed in the course of the same transaction. (*Khundkar and Edgley, JJ.*) ASMAT *v.* EMPEROR. **44 C.W.N. 315.**

——S. 239 (e)—*Persons charged under Ss.* 457 *and* 460, *I. P. Code, with those charged under S.* 411, *I. P. Code—Legality.*

From the terms of S. 239, Cr. P. Code, it is clear that an offence which includes theft must mean an offence of which theft is a necessary and essential ingredient. Persons charged under Ss. 457 and 460, I. P. Code, are not persons charged with offences which include theft, though both the offences must frequently be followed by theft and often form part of a larger transaction which may involve or include theft. Consequently they cannot properly be tried with persons charged with receiving stolen property which was stolen in a theft which was committed as part of the transaction involving the other offences. (*Harries and Rachhpal Singh, JJ.*) MATHURI *v.* EMPEROR. **58 All. 695=163 I.C. 253=8 R.A. 928 (2)=37 Cr.L. J. 794=1936 A.W.R. 1=1936 A. Cr.C. 15=1936 A.L.J. 518=1936 Cr.C. 401=1936 All L.R. 539= A.I.R. 1936 All. 337.**

——S. 239—*Three "transactions" of same kind —Joint trial—Legality.*

Under Cl. (*c*) of S. 239, Cr. P. Code, three offences of the same kind may be tried at once, but not three transactions of the same kind. The meaning and nature of transaction is a question which commonsense and the ordinary use of language must decide on the particular facts of the case. (*Davis, J.C. and Havelivala, J.*) CHUHARMAL NIRMALDAS *v.* EMPEROR **I.L.R. (1939) Kar. 64=177 I.C. 280=39 Cr.L.J. 881=11 R.S. 53=A.I.R. 1938 Sind 164.**

——S. 239(d)—*Validity—Offences under S.* 399, *I. P. Code, and S.* 19 (*f*), *Arms Act.*

Where accused illegally possess a revolver for preparation of dacoity, the offence of illegal possession of revolver is a continuing one, and therefore possession of such weapon at the time of preparation for dacoity or at the time of taking part in the dacoity will form part of the same transaction. S. 239 (*d*), Cr. P. Code, being applicable to the case, the accused can be jointly charged and tried under S. 399, I. P. Code, and S. 19 (*f*), Arms Act. (*Young, C.J. and Monroe, J.*) KHAZAN *v.* EMPEROR. **172 I.C. 405=10 R.L. 314=39 Cr.L.J. 141=39 P.L.R. 1013=A.I.R. 1937 Lah. 793.**

——S. 239—*Validity of—Same transaction— Test to be applied—Accusation or result of trial.*

The test to be applied, in judging the validity of a trial, which purports to have taken place under the provisions of S. 239, is the accusation made and not the result of the trial provided the accusation is a real one and not a mere excuse for the joinder of charges which cannot be otherwise joined. In order to decide, whether several persons can be tried jointly with having committed offences forming part of the same transaction the Court has to look to the accusation, *i.e.*, the prosecution case as set forth in the charges and if

according to that case the offences are such as could be regarded as parts of the same transaction, it will be justified in holding a joint trial. The matter must be looked at, as it appeared to the Magistrate at the time when he framed the charges against the accused before him and not to the state of affairs existing long after the trial has proceeded on its way leading to the conviction of the accused. Where having regard to all the facts which were before the Magistrate when he framed the charges against the accused it appears that the Magistrate was acting judicially and properly exercising his discretion given to him under S. 239, there is no illegality in the joint trial of the accused as to warrant quashing of the proceedings. (*Derbyshire, C.J. and Costello, J.*) RASH BEHARI SHAW *v.* EMPEROR. **168 I.C. 657=9 R.C. 853=41 C.W.N. 225=38 Cr.L.J. 545=1936 Cr. C. 1043=A.I.R. 1936 Cal. 753.**

Misjoinder.

——**S. 239**—Defamation by several—Conspiracy—Joint trial—Legality. *See* PENAL CODE, Ss. 500 AND 120 (*b*). **1938 A.W.R. (H.C.) 467=1938 A. L.J. 769.**

——**S. 239**—*Question of—Duty of Court of appeal or revision.*

A Court of appeal or revision in dealing with a question of misjoinder, must look to the possession as it appeared when charges were framed. In deciding whether charges were rightly framed, it must look at the position as it appeared to the Magistrate, when he framed them. But it does not follow, that a Magistrate must wait till the stage of framing of charges before he makes up his mind whether to split a case up Such a course is most inconvenient, and it should ordinarily be possible for a Magistrate to decide the question of joinder after the case has been opened by the Public Prosecutor, (*Guha and Lethbridge, JJ.*) AKHIL BANDHU RAY *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 588=175 I.C. 409=10 R. C. 790=39 Cr.L. J. 596=A.I.R. 1938 Cal. 258.**

——**S. 239**—*Several persons charged with one conspiracy—Unrelated conspiracies proved—Trial if bad.*

Where several persons are charged with same conspiracy, and only a number of unrelated conspiracies are proved, the trial would be bad for misjoinder under S. 239, although *prima facie*, on the prosecution case as alleged the joinder may be quite legal. (*Gruer, J.*) MAHOMED ISMAIL *v.* EMPEROR. **I.L.R. 1936 Nag. 152=165 I.C. 913= 9 R.N. 101=38 Cr.L.J. 106=1936 Cr.C. 561=A. I.R. 1936 Nag. 97.**

Offence.

——**S. 239**—*Meaning of.*

The term 'offence' under S. 239 includes minor or alternative offences within the meaning of S. 235 (2) or S. 236. (*Davis, J.C. and Havelivala, J.*) CHUHARMAL NIRMALDAS *v.* EMPEROR. **I.L.R. (1939) Kar. 64=177 I.C. 280=39 Cr.L.J. 881= 11 R.S. 53=A.I.R. 1938 Sind 164.**

Same Transaction.

——**S. 239 (d)**—*Charge of conspiracy and acts done in pursuance thereof—Joint trial.*

Special considerations attach to a charge of conspiracy and things done in pursuance thereof. In many cases the offence of conspiracy is only provable by proof of the offences done in pursuance thereof. If the proof of those offences can be used to prove the conspiracy, it follows that it is only reasonable, they can be proved as substantive offences against the accused in the same trial. Hence, a person can be charged with offences under conspiracy and acts done in pursuance thereof as they form part of the same transaction. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* BALUMAL HOTCHAND. **I.L.R. (1939) Kar 204=177 I.C. 346=39 Cr.L.J. 890=11 R.S. 58=A.I.R. 1938 Sind 171.**

——**S. 239**—*Complaint under S. 408 against Secretary and Clerk of Co-operative Society—Allegation of joint misappropriation and community of design and objective—Acts of accused if parts of same transaction—Joint charge and trial—Legality.*

What gives the jurisdiction to the Magistrate to proceed with a joint trial of several persons is the manner in which the case has been adumbrated in the complaint and put before the Court by the prosecution witnesses. Where the Secretary of a Co-operative Society, primarily responsible for the custody and safety of the cash of the society, allows his clerk to be in charge of the money, and it is alleged that they have jointly misappropriated the Society's money in that it was not forthcoming at the time of the inspection of the accounts by the auditor, a joint charge of criminal breach of trust under S. 408, I. P. Code, against both of them is *prima facie* justified. When the underlying suggestion in the complaint is community of design and objective on the part of both the two accused, the alleged acts of the accused in respect of the offence charged must be taken to be parts of the same transaction within the meaning of S. 239, Cr. P. Code, and a joint trial of the two is not therefore illegal. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* BABURAO TATYARAO. **165 I.C. 867=9 R B. 171=38 Bom. L.R. 946=38 Cr.L.J. 9=1936 Cr.C. 924=A I.R. 1936 Bom. 379.**

——**S. 239 (d)**—Conspiracy and separate offences by individual conspirators—Joint trial—Legality. *See* CR. P. CODE, Ss. 235 (1) AND 239 (*d*). **I.L.R. (1937) All. 779=1937 A.W.R. 748= A.I.R. 1937 All. 714.**

——**S. 239 (d)**—*Determination of question—Relevant point of time.*

The relevant point of time in the proceedings at which the condition as to sameness of transaction must be fulfilled is the time of accusation and not that of the eventual result. (*Lord Wright.*) BABU LAL CHOUKHANI *v.* EMPEROR. **65 I.A. 158=I.L.R. (1938) 2 Cal. 295=32 S.L.R. 476=1938 O.L.R. 189=1938 O.A. 398=1938 M.W.N. 505=19 Pat.L.T. 343=1938 A.L.R. 309=10 R.P.C. 250=4 B.R 490=39 Cr L.J. 452=67 C L J 161=40 Bom.L.R. 787=42 C.W.N. 621=1938 A.Cr.C 27=1938 O.W.N. 416=1938 A.L J. 382=174 I.C. 1=1938 A.W.R. (P.C.) 116=1938 M.Cr.C. 220=1938 P.W.N. 320=A.I.R. 1938 P.C. 130=(1938) 1 M.L.J. 647 (P.C.).**

——**S. 239**—*False defence supported by witness giving false evidence—Joint trial of defendant and witness—Legality.*

Cases of perjury can be committed in course of the same transaction and therefore may be jointly tried. Where the offence of verifying a false statement is done jointly by two persons in pur-

CR. P. CODE (1898), S. 239.

suance of a common object, it is impossible to hold that these offences are not committed in the course of the same transaction. Where therefore the perjury is committed by a witness in pursuance of the design and defence set up in the written statement by the other, these actions form part of one conspiracy and therefore one transaction and the joint trial of such persons is legal. (*Gruer, J.*) NATHUSINGH GANPATSINGH *v.* EMPEROR. I.L.R. (1937) Nag. 102=167 I.C. 845=9 R N. 222=38 Cr.L.J. 455=1936 Cr.C. 1025=A.I.R. 1936 Nag. 263.

——S. 239—*Joint trial of accused under S.* 304 *and S.* 201, *Penal Code—Legality.*

There may be cases where the primary offence and the offence of destroying evidence of the primary offence are two unconnected matters, but it cannot possibly be said that they can under no circumstances be parts of the same transaction. Where the offence of causing death and the offence of destroying evidence relating thereto, are closely connected in point of time, there is no misjoinder of charges, if a joint trial takes place in respect of them (*Allsop, J.*) ZAHID BEG *v.* EMPEROR. 173 I C. 838=10 R.A. 508=1938 All. L.R. 180=39 Cr.L.J. 364=1937 A.W.R. 1099=1937 A.L.J. 1253=A.I.R. 1938 All. 91.

——S. 239—*Meaning of—Joint trial in respect of large number of counts—Propriety.*

When there is sudden clash between two hostile communities, which is not the result of any previously concerted action on the part of the accused persons, and a number of attacks and events take place in various parts of the village at different times of the day, there is no justification for regarding all the events that take place as parts of the same transaction and it is not right to hold a joint trial in respect of all the occurrences. A joint trial in respect of a very large number of counts, *i.e.*, hurt, mischief, house-breaking and dacoity, rioting armed with deadly weapons, theft, etc., is very much to be deprecated even though the law may not prohibit it. It is one thing to say that a joint trial is legal, but quite another to say that is proper in the circumstances. (*Pandrang Row, J.*) PATEYYA *v.* EMPEROR. 1940 M.W.N. 97.

——S. 239 (d)——*Meaning of—Servants of same master doing different acts at different place and on different occasions—Joint trial—Legality.*

The words "same transaction" in S. 239 (*d*) suggest in particular continuity of action and purpose. The question of joinder or misjoinder depends on the forum of the accusation made rather than on the facts actually proved at the trial. The nature of the charge is really the crucial point. The fact that all the accused persons tried jointly are servants of the same master and, therefore, connected with the same person, would not necessarily involve connection with each other so as to make their acts done at different places and on different occasions parts of the same transaction justifying a joint trial under S. 239 (4). Though it may be possible to infer a common purpose in the various acts alleged against the accused persons, that would not be enough to make their acts part of the same transaction, if the offender act independently. (*Verma and Meredith, JJ.*) NATHU CHOWDHURY *v.* EMPEROR. 6 B.R. 461=187 I.C. 361=12 R.P.

CR. P. CODE (1898), S. 239.

615=41 Cr.L.J. 452=1940 P.W.N. 454=A.I.R. 1940 Pat. 499.

——S. 239 (d)—*Overt acts committed in pursuance of conspiracy.*

If several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it. (*Lord Wright.*) BABU LAL CHOUKHANI *v.* EMPEROR. 65 I A. 158=I.L.R. (1938) 2 Cal. 295=32 S L.R. 476=1938 O L.R. 189=1938 O.A. 398=1938 M. W.N. 505=19 Pat.L.T. 343=1938 A.L.R. 309=10 R.P.C. 250=4 B.R. 490=39 Cr.L.J. 452=67 C.L.J. 161=40 Bom.L.R. 787=42 C.W.N. 621=1938 A.Cr.C. 27=1938 O.W.N. 416=1938 A.L. J. 382=174 I.C. 1=1938 A.W.R. (P.C.) 116=1938 P.W.N. 320=1938 M.Cr.C. 220=A.I.R. 1938 P.C. 130=(1938) 1 M.L.J. 647 (P.C.).

——S. 239 (d)—*Persons committing rape on woman on different occasions—Joint trial—Legality.*

A, *B*, *C* and *D* abducted a woman and raped her in a field. She was subsequently taken to the house of *E* and was raped by him. Afterwards she was handed over to *F* and was raped by him. *A*, *B*, *C*, *D*, *E* and *F* were jointly tried for committing rape and *E* and *F* objected to it.

Held, that the joint trial was illegal as acts committed by *A*, *B*, *C* and *D* on the one hand and by *E* and *F* on the other hand were not done in the same transaction.

Held further, that even supposing a joint trial was legal, it was in no sense compulsory and the objection should have been accepted inasmuch as *E* and *F* were liable to be prejudiced by the admission of evidence which was quite irrelevant so far as the charges against *E* and *F* were concerned. (*Henderson and R. C. Mitter, JJ.*) BHOLA SARDAR *v.* EMPEROR. 169 I.C. 256=9 R.C. 913=38 Cr.L.J. 750 (1)=A.I.R. 1937 Cal. 22.

——S. 239 (d)—*Sale of opium without license and importation of foreign opium—Joint trial—Legality.*

The offence of the sale of opium without a license is quite dissociable from the offence of importing foreign opium into British India. Opium sold without a license need not necessarily be imported opium and opium need not necessarily be imported for sale. These offences therefore cannot be offences committed in the course of the same transaction, falling within the exception to S. 233, Cr. P. Code, laid down in S. 239 (*d*) of the same Code. Hence their joint trial is illegal. (*Grille, J.*) GHASIRAM TULARAM *v.* EMPEROR. 168 I C. 450=38 Cr.L.J. 542=9 R.N. 255=A.I. R. 1937 Nag. 188.

——S. 239 (d)—*Separate offences in same transaction—Separate charges—Necessity for.*

A married girl under 16 years of age was due to return to her husband's house after a visit to her father in a village. On the way she passed the house of the accused. He asked her to come inside on the pretext that his wife wanted her. When she went in he bolted the door and demanded that she should remain with him. In

the night he ravished her. Later on, he took her out and was joined by the other three accused. They took her away, and according to her story, her ornaments were taken off All were jointly charged both with kidnapping and abduction.

Held, that the whole incident could not be regarded as constituting a single offence. Though it might be said that the whole occurrence was one single transaction, even in that case separate charges should have been framed for the separate offences which went to make up that transaction. (*Bartley and Henderson, JJ.*) NANDA GHOSH *v.* EMPEROR. **182 I.C. 322=12 R. C. 40=40 Cr L.J. 649=A.I.R 1939 Cal. 321.**

——**S. 239 (d)**—*Several accused—Particulars of charge against accused.*

Persons accused of different offences committed in the course of the same transaction may, under S. 239 (*d*), Cr. P. Code, be tried together. The words "transaction" must be widely interpreted. It is not necessary in such a joint trial to charge each accused with all the offences committed in the transaction (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. **1936 A.M L J. 85.**

——**S. 239 (a)**—*Test—Continuity of action and unity of purpose—Identity of time—If essential.*

Identity of time is not an essential element in determining whether certain events form the same transaction or not; what has to be looked to is, rather continuity of action and unity of purpose. Where, in an offence under S. 34, C. P. Excise Act, the bottling of the liquor was done in order that the liquor should be kept and sold in pursuance of the unlawful designs of the accused, there is such continuity of action as is required by S. 239, although the bottling was done some time previous to the selling of the liquor. (*Gruer, J.*) CHHOTEY MIYAN *v.* EMPEROR. **I.L R. (1937) Nag. 165=167 I.C 860=9 R.N 228=38 Cr L.J. 482=1936 Cr.C. 1042=A.I.R. 1936 Nag. 250.**

——**S. 239**—*Wrongful confinement and use of force to extort a confession—Joint trial—Legality—Sameness of transaction—Relevant point of time.*

Where several persons are accused of wrongful confinement and the use of force, in order to extort a confession, the unity of criminal behaviour and the common intention prompting it would render all that was done in furtherance of the common object, as a part of one transaction. The acts of violence done are so related to one another in point of purpose, as to constitute one continuous action. The relevant point of time in the proceedings at which the condition as to the sameness of transaction must be fulfilled is the time of accusation and not that of the eventual result. (*Niyogi, J.*) PROVINCIAL GOVERNMENT C. P. & BERAR *v.* DINANATH LALA. **I.L.R. (1939) Nag 644=184 I C. 412=12 R.N. 111=41 Cr. L J 27=1939 N.L.J. 373=A.I.R. 1939 Nag. 263.**

Scope.

——**S 239**—If controlled by Ss. 222, 233 and 234—"Same transaction"—Indefinite number of acts—Omnibus charge in respect of—Legality. *See* CR. P. CODE, Ss. 222, 233, 234, 235 AND 239. **40 Bom L.R. 1092.**

——**S. 239 (c)**—*Scope—Offences of same kind—Joint trial—Legality.*

Where the same persons with the same object and under more or less similar circumstances commit the same offence punishable under the same section of the Penal Code, though on different but near dates, the offences are of the same kind, and a joint trial is permitted under S. 239 (*c*), Cr. P. Code. (*Lakshmana Rao, J.*) KANDAN *v.* EMPEROR. **1939 M.W.N. 1253.**

——**Ss. 239 and 537**—*"Same offence"—Meaning of—Two persons charged with same offence of murder—Evidence against them mutually exclusive—Legality of their joint trial.*

"The same offence" in S. 239 means an offence arising out of the same act or series of acts and can mean nothing else. When one accused is charged with having murdered a certain person at a certain place and another is charged with having murdered the same person at the same time and place and both are prosecuted because there is evidence against both but such evidence against them is mutually exclusive, it cannot be said that those persons are charged with the same offence committed in the course of the same transaction within the meaning of S. 239. There is no provision of the Code under which those persons can be tried together and such a joint trial is not a mere irregularity which can be cured under S. 537 but it is an illegality which goes to the very root of the trial. (*Dunkley and Wright, JJ.*) NGA SAR KEE *v.* THE KING. **185 I. C. 303=12 R R. 189=41 Cr.L.J. 153=A.I.R. 1939 Rang. 390.**

——**Ss. 239 and 342**—*Charge of same offence against several persons—Separate trial of one in order to enable him to give evidence against other—If justified—Discretion of Magistrate—Accused separately tried—If competent witness against co-accused tried separately from him—"Accused"—Meaning of.*

S. 239, Cr. P. Code, is an enabling section. The Magistrate has under it a discretion to order a separate trial. Though it would be undesirable, if there were an alternative satisfactory to all concerned to order a separate trial of one of several persons alleged to have committed the same offence, simply in order that his evidence may be available against the others, it cannot be said that a Magistrate allowing a separate trial of one of several co-accused acts unjudicially. Such a person who is to be tried separately from the others is not accused for purposes of S. 342, Cr. P. Code, so far as the trial of the other accused persons is concerned and he is a competent witness in the case against them. "Accused" in S. 342 means the accused then under trial and under examination by the Court, and cannot include an accused over whom the Court is exercising jurisdiction in another trial. (*Broomfield and Norman, JJ.*) EMPEROR *v.* KARAMALLI GULAMALLI. **I.L.R. (1939) Bom. 42=178 I.C. 706=11 R.B. 184=40 Cr.L.J. 118=40 Bom. L.R. 1092=A.I R. 1938 Bom. 481.**

——**S. 239 (d)**—*Joinder of charges under Ss. 302 and 311 with charges under S. 330, I. P. Code—When justified—Sameness of transaction—Relevant point of time.*

A joinder of charges under Ss. 302 and 311 with charges under S 330, I. P. Code, is justified where the offences were committed in the course of the same transaction. The relevant point of time in the proceedings at which the condition as

CR. P. CODE (1898), S. 239.

to sameness of transaction must be fulfilled is the time of accusation and not that of the eventual result. (*Gruer and Puranik, JJ.*) PARAMANAND *v.* EMPEROR. 1940 N.L.J. 459=A.I.R. 1940 Nag. 340.

——S. 239 (e) and 537—*Misjoinder of persons—Illegality—If curable.*

Misjoinder of persons contrary to S. 239 (*e*), Cr. P. Code, is an illegality and not a mere irregularity, but it is curable by S. 537, if it has not in fact occasioned injustice. (*Harries and Rachhpal Singh, JJ.*) MATHURI *v.* EMPEROR. 58 All. 695=163 I.C. 253=8 R.A. 928 (2)=37 Cr.L.J. 794=1936 A.W.R. 1=1936 A. Cr.C. 15=1936 A.L.J. 518=1936 Cr.C. 401=1936 All.L.R. 539=A.I.R.1936 All. 337.

——S. 242—*Duty of Magistrate under—Record of proceedings—Procedure.*

Although it is not necessary, under S. 242, Cr. P. Code, that the Magistrate should record the whole of the conversation that took place between him and the accused, there must be some indication in the record as to what has been done. The Magistrate must indicate that both parts of S. 242 were complied with, although a detailed note of the proceedings is not required to be recorded. (*Varma, J.*) BHUBNESHWAR PRASAD *v.* EMPEROR. 165 I.C. 844=9 R.P. 223=17 Pat. L.T. 609=1936 Cr.C. 823=38 Cr.L.J. 22=3 B. R. 88 (2)=1936 P.W.N. 646=A.I.R. 1936 Pat. 501.

——S. 242—*Non-compliance with—Effect — If vitiates trial.*

Non-compliance with the provisions of S. 242, Cr. P. Code, is not a mere irregularity but an illegality which vitiates the trial. (*Varma, J.*) BHUBNESHWAR PRASAD *v.* EMPEROR. 165 I.C. 844=9 R.P. 223=17 Pat.L.T. 609=1936 Cr.C. 823=38 Cr.L.J. 22=3 B.R. 88 (2)=1936 P.W.N. 646=A.I.R. 1936 Pat. 501.

——S. 242—*Non-compliance — Effect—Summons case—Omission to state particulars of offence and asking to show cause—Magistrate questioning accused after examination of prosecution witnesses — Sufficiency—Trial—If vitiated.*

The omission in a summons case to explain the particulars of an offence to the accused under S. 242, Cr. P. Code, and to ask him to show cause at that stage is not (in cases in which the accused is defended and pleads not guilty) an illegality vitiating the trial, provided of course that no prejudice can be shown to have been caused to the accused and that the accused has in due course been examined under S. 342. The provisions of S. 242 ought certainly to be complied with, and Magistrates should take care that the record on its face establishes that there has been a full compliance with the law. If a Magistrate proceeds to convict the accused under S. 243 without first stating the particulars of the offence and hearing any cause which the accused has to show, there would be a manifest violation of not only the statute, but also of a fundamental principle of criminal law. But if a Magistrate proceeds to hear evidence, it is difficult to see that the object of the statute can be imperilled provided that after hearing the complainant and his witness the Magistrate gives the accused the opportunity provided by S. 342 of putting forward his answer and explanation. (*Rowland, J.*)

CR. P. CODE (1898), S. 247.

SUKHDEO PRASAD TIWARI *v.* EMPEROR. 16 Pat. 97=173 I.C. 189=10 R.P. 384=39 Cr.L.J. 321=4 B.R. 240=18 Pat.L.T. 370=1937 P.W.N. 353=A.I.R. 1938 Pat. 55.

——S. 242—*Prosecution under Sugar Excise Duty Act—Charge—Necessity—Duty of Magistrate to explain ingredients of offence.*

In a case tried as a summons case, it is of course not incumbent on the Magistrate under S. 242, Cr. P. Code, to frame a formal charge against the accused. But when the prosecution is under an Act of very recent date (the Sugar Excise Duty Act of 1934), with the provision of which the litigants as well as the lawyers are not quite familiar, it would be proper if the Magistrate actually frames a charge or summarises the ingredients of the offence which the accused is required to meet and also reads them over to the accused before the trial begins. (*Manohar Lall, J.*) BEHARI RAM *v.* EMPEROR. 19 Pat.L.T. 415=1938 P.W.N. 426=175 I.C 531=4 B R. 602=10 R.P. 634=39 Cr.L.J. 610=A.I.R. 1938 Pat. 440.

——S. 244—*Discretion of Magistrate.*

Under S. 244, Cr. P. Code, a Magistrate has, no doubt, a discretion to refuse to summon witnesses, but he cannot completely ignore an application made for summoning witnesses. He must consider it and pass orders on it. Where a Magistrate has granted the first application, the presumption is that he would also grant a second application when the witnesses do not appear in Court. (*Blacker, J.*) VIDYA PARKASH *v.* EMPEROR. 186 I.C. 575=12 R L. 422=41 Cr.L.J. 340=41 P.L.R. 804=A.I.R. 1940 Lah. 58.

——S. 246—*Scope—Commencement of trial as summons case—Discovery that acts constitute also offence triable as warrant case—Framing of additional charge and conversion of trial into warrant case—Legality.*

Once a Magistrate has taken cognisance of a summons case, he cannot convict the accused for anything other than an offence triable as a summons case. Where he proceeds to try a case as a summons case, but discovers during trial that the acts constitute an offence triable as a warrant case, he cannot convert the case before him into a warrant case and frame a charge for both offences. Such a course is precluded by the terms of S. 246, Cr. P Code. (*King, J.*) RAJARATNAM PILLAI, *In re.* 59 Mad. 442=161 I.C. 846=37 Cr.L.J 501=8 R.M. 880=43 L.W. 367=1936 M.W.N. 181=1936 Cr.C. 384=1936 M. Cr.C. 96=A I.R. 1936 Mad. 341=70 M L.J. 430.

——S. 247—*Absence of complainant—Procedure—Discretion of Magistrate.*

Under the provisions of S. 247, Cr. P. Code, for some reasons the legislature has laid down that the personal presence of a complainant is necessary in order that a summons case should proceed. The only exception made is for a public servant whose personal attendance is not required by the Magistrate. In the case of any body, except a public servant, the personal attendance of the complainant is necessary. Where a complainant does not attend Court in person, under the provisions of S. 247 of the Code, there are only two courses open to the Magistrate. The more ordinary course is to acquit the accused; the exceptional course is if he had any particular reason for doing so, to adjourn the

CR. P. CODE (1898), S. 247.

hearing of the case to some other day. It is all a question of Magistrate's discretion. (*Allsop, J.*) PIRAG LAL *v.* RUSTAM SINGH. 164 I.C. 784=37 Cr.L.J. 1028=9 R.A. 203=1936 A.L.J. 954=1936 All L.R. 824=1936 A.W.R. 843=1936 Cr. C. 817=A.I.R. 1936 All. 658.

——S. 247—*Applicability—Case adjourned only for judgment.*

S. 247, Cr. P. Code, does not apply when the entire evidence in the case has been concluded and the case has been adjourned only for judgment without the attendance of the complainant having been specially directed. (*Abdul Rashid, J.*) MAHOMED HAYAT *v.* DAULAT. 173 I.C. 306=10 R.L. 433=39 Cr.L.J. 293=39 P.L.R. 838=A.I.R. 1938 Lah. 121.

——S. 247—*Scope and object—'Hearing', meaning of.*

The principle underlying S. 247, Cr. P. Code appears to be that from the first day on which the case is fixed for appearance of the accused and at all subsequent adjourned hearings of the case during which the Court has to take some step or other in the progress of the trial, the presence of the complainant before the Court is insisted on, and if he absents himself on any such hearing, his complaint is liable to be dismissed and the accused acquitted. The word hearing in S. 247 is not used in the limited sense of an investigation of a controversy. (*Puranik, J.*) EMPEROR *v.* LAXMI PRASAD. 1940 N.L.J. 399.

——S. 247—*Several complaints on same facts—Absence of one of the complainants—Acquittal—Validity.*

When more than one complaint is made of an offence arising out of the same set of facts, the word 'complainant' in S. 247, Cr. P. Code, should be construed to include all persons who have made complaints. Notice of hearing should be given to all of them and it is only when all the complainants are absent that the accused can be acquitted under S. 247. (*D. R. Norman.*) BANSHI DHAR *v.* MOOL CHAND. 1939 A.M.L.J. 99.

——S. 248—*Applicability—Application by person not complainant—If can be granted.*

S. 248 provides that a complainant in a summons case may apply for permission to withdraw his complaint and this section can have application only when the Magistrate has taken cognizance of a case upon a complaint preferred to him by the person who seeks to withdraw the complaint. Where an application for withdrawal is made by a person who is not a complainant the Magistrate cannot grant permission to withdraw the complaint. (*Davis, J. C. and Weston, J.*) EMPEROR *v.* ELIAS ARZ MAHOMED. I.L.R. (1940) Kar 429=188 I.C. 870=41 Cr.L.J. 694=13 R. S. 13=A.I.R. 1940 Sind 112.

——S 248—*Complaint relating to compoundable and non-compoundable offences—Case compounded by complainant—Permission for withdrawal of complaint—Discretion of Magistrate.*

Where a complaint related to two offences—one under S. 323 of the Ranbir Penal Code and the other under S. 24 of the Cattle Trespass Regulation,—and the evidence for both the offences was the same, and the matter was compounded by the complainant, the Magistrate while dropping the proceedings relating to the offence under S. 323 which is compoundable should not continue against the wishes of the complainant

CR. P. CODE (1898), S. 250.

the proceedings in regard to the minor offence, although it is non-compoundable. In a case like that, the Magistrate ought to properly exercise his discretion under S 248, Cr. P. Code, and permit the complainant to withdraw the complaint. (*Abdul Qayoom, C.J. and Wazir, J.*) THAKAR *v.* STATE. 41 P.L.R.J. & K 93.

——S. 248—*Scope—Complaint—Withdrawal as against some accused—If operates as withdrawal as against all.*

There is nothing in S. 248, Cr. P. Code, which involves a withdrawal of the whole complaint, merely because the complaint is withdrawn against some only of several accused. (*Lakshmana Rao, J.*) SOUTH INDIAN GENERAL ASSURANCE CO., LTD. *v.* REGISTRAR OF LIFE INSURANCE COMPANIES, MADRAS. 187 I.C. 220=12 R.M. 732 =51 L.W. 515=41 Cr.L.J. 454=1940 M.W.N. 104=A.I.R. 1940 Mad. 623

——S. 250—*Applicability—If confined to case triable by Magistrate—Discharge in case triable by Court of Session—Order for compensation—Legality.*

S. 250 can apply only to a case triable by a Magistrate and not to one which is triable by a Court of Session. An order for compensation by a Magistrate who discharges the accused under S. 209 (2), Cr. P. Code, in a case which is triable by a Court of Session is illegal and without jurisdiction. (*Pandrang Row, J.*) SHAMA RAO *v.* EMPEROR. 1937 M.W.N. 96 (1).

——S. 250—*Applicability—Petition to Premier against Sub-Inspector—Substantiation on oath before Magistrate—If a complaint—Compensation, when accusation is false and frivolous, if can be awarded.*

Where a person sends a petition to the Premier against a Sub-Inspector and when he was sent for by the S. D. O, he appeared and made a statement on oath in respect of his allegations in the petition, this amounts to a complaint as defined in S. 4 (*h*), Cr. P. Code, and when it is found to be false and frivolous, compensation could be awarded. (*Thomas, C.J.*) GAJADHAR *v.* EMPEROR. 179 I.C. 758=11 R.O. 203=1939 A.Cr.C. 26=1939 A.W.R. (C.C.) 43=1939 O.L.R. 73=1939 O.A. 181=1939 O.W.N. 125=A.I.R. 1939 Oudh 101.

——S. 250—*Cause shown by complainant—Duty of Magistrate to record.*

Where the Magistrate does not record any statement made by the complainant as showing cause against his being ordered to pay compensation, but merely states the points that he raises, that is not sufficient. The Magistrate must record the words used by the complainant when showing cause unless of course the complainant chooses to put his reason into writing. If this is done and the writing is filed, it will obviously be unnecessary for the Magistrate to record it again, and filing the written submission will in effect be recording the cause shown. Unless this is done order of compensation is invalid. (*Baguley and Sharpe, JJ.*) THE KING *v.* MAUNG THOUNG SHWE. 175 I.C. 639=39 Cr.L.J. 642=11 R.R. 9=A.I.R. 1938 Rang. 161.

——S. 250—*Compensation payable to each of several accused—Proper order as to imprisonment in default of payment.*

Where a complainant has to pay compensation to each of several accused, the imprisonment which the Magistrate orders in default of pay-

ment should be ordered in respect of default of payment of each of the accused. (*Mackney, J.*) MA PU *v.* MAUNG TUN PE. 187 I C 744=41 Cr. L.J. 506=12 R.R. 351=A.I.R. 1940 Rang. 110.

——S. 250—*Conditions necessary for awarding compensation.*

It is only when the Magistrate is of opinion that the accusation against the accused was not only false but also either frivolous or vexatious that he can act under S. 250, Cr. P. Code. The reason is that this section is not to be applied except in cases which are frivolous or vexatious. It is not intended to be applied in serious cases which are to be dealt with under the provisions of S. 211, Penal Code. It is for this reason that a Magistrate must find that the case is frivolous or vexatious before he has jurisdiction to deal with the matter under S. 250 (*Mackney, J.*) MA PU *v.* MAUNG TUN PE. 187 I C 744=41 Cr. L.J. 506=12 R R 351=A I.R. 1940 Rang. 110.

——S. 250—*Discretion of Magistrate—Interference in appeal.*

Once it has been decided that a case is a false one and frivolous and vexatious, then it is a matter within the Magistrate's discretion as to whether it is one in which compensation should be given or not; and the appellate Court is not entitled to set aside an order for payment of compensation in such a case save for very cogent reasons. (*Mackney, J.*) L. R. ABROL *v.* S. L. SIRPAUL 175 I C 357=10 R.R. 488=39 Cr.L J. 587=A.I.R. 1938 Rang. 200.

——S 250—*Jurisdiction—Discharge or acquittal—Notice to complainant to show cause against order of compensation—Subsequent retirement of Magistrate—Jurisdiction of successor to continue proceedings.*

In sub S. (1) of S. 250, at least, the only Magistrate who may call upon the complainant to show cause is the Magistrate who heard the case and who discharges or acquits all or any of the accused. "The Magistrate" in sub-S. (2) to S. 250 refers to the Magistrate in sub-S. (1) and the definite article "the" does not mean the Magistrate who succeeds the Magistrate who heard the case or any other Magistrate. Hence where a Magistrate who has called upon a complainant to show cause why he should not pay compensation for having made a false and frivolous or vexatious complaint has retired in the course of proceedings before a final order was passed, the notice upon the complainant should be discharged (*Davis, J.C. and Tyabji, J.*) EMPEROR *v.* MAHOMED ALAN. I.L.R (1940) Kar 119=12 R.S. 123=41 Cr.L.J. 53=184 I C. 595=A.I.R. 1939 Sind 321.

——S. 250—Jurisdiction under—Case heard by one Magistrate and charge framed—*De novo* trial by another—Discharge by latter—Order for compensation—Legality. *See* CR P. CODE, S. 350. 38 Bom L.R. 1189=A.I R. 1937 Bom. 55.

——S. 250—*"Magistrate by whom case is heard"—Complaint under S.452, I P Code, transferred to 3rd class Magistrate—Power of latter to order compensation.*

The "Magistrate by whom the case is heard" within the meaning of S. 250, Cr. P Code need not be the same Magistrate before whom the case is instituted. There is nothing illegal or invalid in a Magistrate of the 3rd class proceeding to enquire into a complaint under S. 452, I. P. Code, which was not instituted in his Court but sent to him by a Sub-Divisional Magistrate under S. 192 or S. 528, Cr. P. Code. The 3rd class Magistrate is perfectly competent to deal with the case until he comes either to discharge or to charge with an offence which he is competent to try or to take action under S. 346, Cr P. Code. If at that stage he considers that the case is frivolous and vexatious, there is nothing in S. 250, Cr. P. Code, to prevent him from passing an order under that section. (*Blacker, J.*) PAINDA *v.* GULAB KHATUN. I.L.R. (1938) Lah. 619=181 I.C. 49=11 R.L. 734=40 Cr.L.J. 515=41 P.L.R. 221=A.I.R. 1939 Lah. 122.

——S. 250—*Magistrate refusing to examine witness on commission—Order for compensation—Validity of.*

In a prosecution on a complaint under S. 380, I. P. Code, the Magistrate took the evidence of all the witnesses who were produced by the complainant but refused to accede to the request of the complainant to issue a commission for the examination of a certain witness who was living at a great distance. The Magistrate then discharged the accused person and ordered the complainant to pay compensation under S. 250, Cr. P. Code. It was contended for the complainant in revision that it was only after the examination of all the witnesses that the complainant wanted to examine, that the Magistrate could, in law, come to the conclusion that the case was false and vexatious. Overruling that contention,

Held, that the sole criterion was whether the order of discharge in the case was legal, and that as the Magistrate took all the evidence that was produced by the complainant as he was bound to do under S. 252, Cr. P. Code, and as it could not be said that the refusal to issue a commission for the examination of a witness was a refusal to take the evidence which was produced in support of the prosecution, the order of discharge was perfectly legal, and accordingly there was no legitimate ground of invalidity of the order under S. 250, Cr. P. Code (*Mya Bu, J.*) D.K. NATH *v.* P.K NATH. 1937 Rang. L.R. 159=171 I.C. 921=10 R R. 202=39 Cr. L. J. 29=A. I. R. 1937 Rang. 398.

——S. 250—*Order for compensation—Compliance with procedure—Duty of Magistrate.*

For making an order for compensation under S. 250, Cr. P. Code, a Magistrate is bound to record the reasons and before doing so he should record and consider any objection the complainant makes or any cause he may show (*Kichlu, J.*) NIKKU RAM *v.* REHIMAN. 41 P.L R J. & K. 16.

——S. 250—*Order for compensation—Duty of Magistrate to call upon complainant to show cause.*

Under S. 250, Cr. P. Code, the Magistrate must call upon the complainant to show cause why an order for payment of compensation should not be made. It is only after considering the cause shown by him that an order can be passed directing him to pay compensation. (*Baguley, J.*) MA E MYAING *v.* THE KING. 1938 Rang.L.R 163=176 I C 503=11 R.R. 52=39 Cr.L.J. 743=A.I. R. 1938 Rang. 247.

——S. 250 (2)—*Order for compensation—Omission to record reasons—Effect of.*

CR. P. CODE (1898), S. 250.

Before making an order under S. 250, Cr. P. Code, it is the duty of the Magistrate to state his reasons for requiring the complainant to pay the compensation. The object of the Legislature in requiring Magistrates to record their reasons in such a case is that the power given under the section should not be used indiscriminately and in order to enable a Court of appeal or revision to judge the sufficiency of the grounds on which the order is based. In the absence of such reasons, the order is irregular for non-compliance with the requirements of S. 250 (2), Cr. P. Code, and is, therefore, liable to be set aside. (*Srivastava, Ag. C. J.*) KRISHNA DATT *v.* BRAHMA DATT. **166 I. C. 341=9 R.O. 306=38 Cr.L.J. 191=1937 A.Cr. C. 27=1937 O.W.N. 98=1937 O.L R. 15=A.I.R. 1937 Oudh 269.**

——S. 250—*Order for compensation—Parties on bad terms—If proves falsity of charge.*

The fact that the parties are on bad terms is not a sufficient ground for holding that a charge brought by one against the other is a false one, and cousequently an order for payment of compensation merely on such ground is without jusification. (*Mackney, J.*) MAUNG PAN *v.* MAUNG MYA DIN. **176 I.C. 199=39 Cr.L.J. 704=11 R. R. 38=A.I.R. 1938 Rang. 209.**

——S. 250—*Order for compensation—Validity —Requirements of section not complied with.*

Where in a case there is no opinion expressed by the order of discharge or acquittal that the case is false and either frivolous or vexatious and there is no record of reasons such as is required by sub-S. (2), S. 250, Cr. P. Code, before he passes the order directing the compensation be paid by the complainant to the accused, the order that compensation be paid is bad. (*Spargo, J.*) CHIDAMBARAM *v.* CHAND ALI. **171 I.C. 62=38 Cr.L.J. 999=10 R.R. 126=A.I.R. 1937 Rang. 301.**

——S. 250—*Order for compensation under—When can be made.*

Compensation under S. 250, Cr. P. Code, can be awarded only if "the accusation was false and either frivolous or vexatious". If the accusation is proved to be false but cannot be regarded to be frivolous or vexatious, the section does not justify the award of compensation. If the accusation is not proved to be false, no compensation can be awarded, however frivolous or vexatious the conduct of the complainant might have been. The mere fact that the evidence produced by the complainant in support of his allegation was unreliable or inconclusive will not justify a finding that the allegation was false. (*Niamatullah, J.*) BECHAN PRASAD *v.* JHURI. **161 I.C. 49=37 Cr.L.J. 424 (2)=8 R A. 714=1936 A W. R. 188=1936 A.L.J. 189=1936 All.L.R. 248=1936 Cr.C. 427=A.I.R. 1936 All. 363.**

——S. 250—*Order of discharge signed by Magistrate—Magistrate then typing out further order directing payment of compensation—Legality.*

Where an order discharging an accused of an offence is typed by the Magistrate with a finding that the case is a false one and is signed by him and running straight on the same date, with the same typewriter and obviously done all in one piece, comes an order under S. 250, Cr. P. Code, directing the complainant to show cause against paying compensation in respect of the order of discharge, and it is manifest that the judgment and the further order were typed out at one and the same time, the order of discharge and the further order are one and the same and the intrusion of the Magistrate's signature does not affect the merits of the case. (*Baguley and Mosely, JJ.*) MA SIN *v* MG. MAUNG LAY. **14 Rang. 378=163 I C. 163=8 R R. 613=37 Cr L. J. 773=1936 Cr C. 514=A I R. 1936 Rang 230.**

—— S. 250—*Order under—Legality —Absence of finding as to accusation being false.*

An order granting compensation to the accused under S. 250, Cr. P. Code, is illegal, if no finding is recorded by the Magistrate that the accusation against the accused is false and either frivolous or vexatious. A mere remark by the Magistrate that the complainant has no objection to pay compensation is not sufficient for passing an order under the section. (*Abdul Qayoom, C J. and Wazir, J.*) GOKAL CHAND *v.* STATE. **41 P.L.R. J. & K 88.**

——S. 250—*Order under—Omission to give opportunity to show cause—Legality of order.*

Where in a complaint by a Municipal Committee against a resident an award of compensation was made against such public body without giving it an opportunity of explaining why compensation should not be awarded and the action of the Committee was not grossly careless or vindictive.

Held, this was not a case where compensation should have been awarded.

Held further, that as the mandatory provisions of S. 250 were not complied with the order should be set aside. (*Skemp, J.*) NEW DELHI MUNICIPAL COMMITTEE *v.* RAM BAI. **164 I.C. 368 =9 R.L 109=37 Cr.L J. 935 (2)=38 P.L.R. 886=1936 Cr.C. 719=A.I R. 1936 Lah 702.**

——S. 250—*Order under—Reasons to be recorded.*

The reasons to be recorded by a Magistrate passing an order under S. 250 are the reasons why he directs compensation to be paid, and, not why he regards the complaint as false and frivolous or vexatious. It is beyond the power of the Magistrate to discover why the complainant made a false case. (*Baguley and Mosely, JJ.*) MA SIN *v* MG. MAUNG LAY. **14 Rang 378=163 I.C. 163=8 R. R. 613=37 Cr. L. J. 773=1936 Cr. C. 514=A.I.R. 1936 Rang. 230.**

——S. 250—*Order under—Omission to record reasons—If vitiates proceedings.*

It is the duty of the Magistrate ordering compensation to be paid to the accused under S. 250, Cr P. Code, to record his reasons for passing such an order. The recording of the reasons is a condition precedent to the proper exercise of the power under the section. An order for compensation passed without recording reasons is, therefore, illegal and is liable to be set aside. (*Thomas, C.J.*) BHAGWAN DIN *v.* JAGDAT. **173 I.C. 643=1938 O L R 132=1938 O A. 224=1938 O W.N. 288=1938 A. Cr. C 26=10 R.O. 229=39 Cr.L.J. 378=A.I R 1938 Oudh 99.**

——S. 250—*Order under—When justified.*

To justify an order for the award of compensation under S 250, Cr. P. Code, it is necessary that there should be a finding that the complaint was false and either frivolous or vexatious. (*Kichlu and Wazir, JJ.*) SANT RAM *v.* MALUKA. **39 P.L.R. J. & K. 47.**

CR. P. CODE (1898), S. 250.

——S. 250—Person in whose favour an order for compensation is made—If an accused person within the meaning of S. 439 (2). *See* CR P. CODE, S. 439 (2). **31 S.L.R. 51=A.I.R. 1937 Sind 125.**

——Ss. 250 and 423 (1) (d)—*Appellate or revisional Court—If can direct compensation to be paid on acquittal—Such order, if incidental to order of acquittal*

S. 250, Cr. P. Code, provides for the award of compensation by 'the Magistrate by whom the case is heard' and to that Magistrate is expressly reserved the power to award compensation under S. 250. S. 423 does not invest the appellate Court with authority to make any order which might have been made by the Court below. Hence an order under S. 250 could not be passed by an appellate or revisional Court when setting aside a conviction and acquitting an accused and such an order cannot be an order incidental to the order of acquittal under S. 423 (1) (*d*) of the Code. (*Sharpe, J.*) THE KING *v.* MAUNG KHIN MAUNG. **1940 Rang.L.R. 502.**

——Ss. 250 (1) and (2)—*Construction and scope.*

Sub-S. (1) contemplates that when the Magistrate discharges or acquits the accused he may in that very order call upon the complainant to show cause why he should not pay compensation; and although, strictly speaking, it is correct to say that the Magistrate calls upon the complainant to show cause only after he has discharged or acquitted the accused, it is not correct to say that the sub-section contemplates or requires two orders; one, the order in which he acquits or discharges the accused; the other, the order in which he calls upon the complainant, if he thinks proper—to show cause why he should not pay compensation. Though in sub-S. (1) it is not written 'if the Magistrate finds,' but it is written "if the Magistrate is of opinion" the difference is merely verbal and if the Magistrate in his order under sub-S. (1) says, 'I find' instead of 'I am of opinion,' it cannot be concluded therefrom that he has made up his mind that the complainant would pay compensation or that he has come to an unalterable decision that the complaint is false or vexatious. What is to be regarded is the substance and not the form Moreover the words 'for reasons to be recorded' refer to the payment of compensation and not to the finding of the accusation false and vexatious. (*Davis, J.C. and Mehta, A.J.C.*) DALIP DELAWAR *v.* SAJAN SALEH. **30 S.L.R. 359=166 I.C. 33=9 R.S. 116=38 Cr. L.J. 121=1936 Cr.C. 1096=A.I.R. 1936 Sind 240.**

——Ss. 250 and 30—*Trial by Special Power Magistrate of complainant under S. 376, I. P. Code—Order discharging accused — Power to order payment of compensation.*

If a Magistrate having special powers is able to try the case before him, it is a violation of the ordinary meaning of the word 'triable' to say that the case is not triable by the Magistrate. A Magistrate can only pass an order awarding compensation under S. 250, if he is able to dispose of the case personally. If he is able to end the case by passing an order which operates to the detriment of the accused, then he is equally able to end the case by passing an order which is to the detriment of the complainant. A special Power

CR. P. CODE (1898), S. 252.

Magistrate, trying a complaint under S. 376, Penal Code, and passing an order discharging the accused, is therefore entitled to pass an order awarding compensation to the accused under S. 250, notwithstanding the fact that the offence under consideration is exclusively triable by a Court of Session. (*Baguley and Mosley, JJ.*) MA SIN *v.* MG. MAUNG LAY. **14 Rang. 378=163 I.C. 163=8 R R. 613=37 Cr.L.J. 773=1936 Cr.C. 514=A.I.R. 1936 Rang. 230.**

——S. 252 — *Applicability—Case started on police challan.*

S. 252 like the other sections in Chap. 21, Cr. P. Code, applies to warrant cases generally and so would apply to a case started on police challan. (*Gruer, J.*) HANSRAJ *v.* EMPEROR. **1940 N.L.J. 449.**

——S. 252—*Applicability—Magistrate issuing summons under S. 426, I. P. Code—Accused appearing—Magistrate not applying S. 242, Cr. P. Code, but changing mind and informing accused that other offences also were committed and proceeding to apply S. 252, Cr. P. Code—Legality.*

A Magistrate issued summons to the accused under S. 426, I. P. Code, when the accused was brought before him, he did not apply S. 242, but informed the accused then and there that on reconsideration he held that other offences also were disclosed by the complaint besides one under S. 426, I. P. Code, and proceeded from that moment to apply S. 252.

Held, that there was nothing illegal in the procedure followed by the magistrate, and that a magistrate had power to change his mind in regard to the exact offences which a complainant disclosed before he began to enquire into the case; even if it be argued that the Magistrate had impliedly dismissed a complaint under other sections that S. 426, I.P. Code, he still had power to re-entertain a complaint on the same facts. (*King, J.*) MALAI, *In re.* **I.L.R. (1938) Mad. 343 =172 I.C. 496 (1)=10 R.M. 468=39 Cr L.J. 153 =1937 M.Cr.C. 374=1937 M W.N. 981=46 L. W. 811=A.I.R. 1937 Mad. 944=(1937) 2 M.L.J. 725.**

——S. 252 (1)—*Omission to examine complainant—If vitiates trial.*

If the Court neglects to examine the complainant on the day when the accused appears in answer to the summons, it no doubt fails to comply with the provisions of S 252 (1), Cr. P. Code, but that would not vitiate the trial. (*Grille, J.*) RAHAT ALI *v* MUHAMMAD MURAD. **10 R.N. 161 =172 I C. 113=39 Cr.L.J. 62=A.I.R. 1938 Nag. 103.**

——S. 252 (1) and (2)—*Hearing of unsummoned witnesses after first date of hearing—Discretion of Magistrate.*

Sub-S. (1) of S. 252, Cr. P. Code, refers only to such evidence as is offered on the day when the accused appears or is brought before the Court; it only refers to the initial production of the accused, and not to every appearance of the accused. If the case is initiated on a challan, the accused is produced, and the prosecution witnesses on the day fixed. The prosecution witnesses who have been bound over to appear by the Police are then examined. Undoubtedly, if it is necessary to adjourn the case, such witnesses still come under the category of "such evidence as may be produced in support of the prosecution"

as they were produced on the date of hearing; but where the case is initiated on a complaint, the phrase "such evidence as may be produced in support of the prosecution" refers only to such witnesses as the complainant may bring with him and who have not been summoned by the Court. If on the day when the accused appears in answer to the summons, the complainant has no witnesses present with him, there is no evidence produced in support of the prosecution, and sub-S (2) of S. 252 then comes into play. What this sub-section authorizes is what is done in every complaint case under another name: the filing of a list of witnesses whom the complainant desires shall be summoned. If the list is filed and summonses are issued in respect of the persons named therein, the first stage contemplated in S. 252 (1) passes, and the hearing of any unsummoned witnesses thereafter is a matter within the Court's discretion. (*Grille, J.*) RAHAT ALI *v.* MUHAMMAD MURAD. **10 R.N. 161=172 I.C. 113=39 Cr.L.J. 62=A.I R. 1938 Nag. 103.**

——S. 252 (2)—*Powers under—It can be exercised only once.*

The power given to the Magistrate under S. 252 (2), Cr. P. Code, may be exercised from time to time as the occasion requires. (*Gruer, J.*) HANSRAJ *v.* EMPEROR. **1940 N.L.J. 449.**

——S. 252 (2)—*Scope and object of—Complainant not wishing to proceed with case—Power of magistrate to take evidence and examine witnesses.*

It is open to a Magistrate under S. 252 (2) of the Cr. P. Code, to take such evidence as he considers necessary in order to find whether an offence has really been committed or not, notwithstanding that the complainant's statement that he does not like to proceed with the complainant. Such examination of witnesses must, however, be directed to the ascertainment of the truth of the complaint and all that he has to see on an examination of these witnesses is whether a *prima facie* case of the offence alleged has been made out, so that he can either frame a charge or discharge the accused for the reason that the charge is groundless. (*Venkataramana Rao, J.*) NAGASWAMI NAIDU *v.* RAMASWAMY NAICKEN, **1937 M.W.N. 727.**

——S. 252 (2)—*Summoning of witnesses—Discretion of Magistrate.*

A Magistrate is bound to summon under S. 252 (2) at the expense of Government such of the complainant's witnesses as he considers necessary. Mere fact that the same case was investigated by the police and no challan was put up by them against the accused is no ground for refusing to summon the witnesses unless the Magistrate considers any of the witnesses to be nnnecessary. He can refuse to summon the witnesses on the latter ground but not on the former. (*Blacker, J.*) GHULAM MOHIYUDDIN *v.* SARDARA. **175 I.C. 555=40 P.L.R. 650=10 R.L. 746=39 Cr L.J. 624=A.I.R. 1938 Lah. 444.**

——Ss. 252 and 256—*Examination of witnesses—Recalling for cross-examination—Procedure to be adopted by the Magistrates.*

The ideal procedure as regards the examination of witnesses would be to examine all prosecution witnesses on one day or perhaps on two consecutive days, so that all would be present and ready to be cross-examined if the accused exercised his

rights under S. 256, Cr. P. Code. If the witnesses are allowed to go and are then to be recalled, it throws a heavy burden both on the complainant and the witnesses which should be avoided as far as possible. (*Pollock, J.*) EMPEROR *v.* NIRPAT-SINGH. 1939 N.L.J. 201.

——Ss. 252, 256 and 537—*Relevant and admissible evidence—Prohibition against its admission at any stage if any—Curability.*

There is no prohibition in law against the admission of relevant and admissible evidence for proving an offence after a certain stage. Ss. 252 and 256, Cr. P. Code, are not intended to prohibit such admission. Every Court has an inherent power to allow evidence to be produced at any stage. Even an appellate Court and the High Court have powers to admit evidence, if necessary, for a proper decision of the case. Where documents are admitted during the cross-examination of prosecution witnesses, there is nothing illegal, and even if irregular is curable under S. 537, Cr. P. Code. (*Mulla, J.*) LALA *v.* EMPEROR. **I.L.R. (1938) All. 968=178 I.C. 894=11 R.A. 337=40 Cr.L.J. 145=1938 All.L R. 920=1937 A W.R (H C.) 638=1938 A.Cr.C. 103=1938 A.L.J. 1010=A.I.R. 1938 All. 637.**

——S. 253—*Scope—Discharge of some accused after examination of some witness and framing of charge against rest—Reasons for discharge not given then and there—Legality—Power of Magistrate to defer giving reasons till final order in the case—S. 537, C. P. Code—If cures defect, if any.*

Under S. 253 (2), Cr. P. Code, a Magistrate has power to discharge an accused at any stage when he comes to the conclusion that the charge is groundless, although it must be for reasons to be recorded by him. Where a Magistrate after the examination of most of the witnesses for the prosecution, thinks that in the interests of justice the case should not be proceeded against some of the accused persons and that it is not necessary to examine the other witness so far as they are concerned, it is perfectly competent to him to discharge those accused and to frame a charge against the rest of the accused alone. If he does not give the reasons for such discharge then and there, intending to give them at the time of making the final order in the case in respect of the other accused, he does not act illegally in withholding his reasons and postponing them until the final order in the case. There is nothing in the language of S. 253 which precludes him from doing so. He does not become *functus officio* on pronouncing the order of discharge; he would become so only when he pronounces the final order in the case. Assuming that it is obligatory on the Magistrate to give his reasons before pronouncing the order of discharge, the omission to do is only an irregularity curable under S. 537, Cr. P. Code, particularly when there is no suggestion that any failure of justice has been occasioned thereby. (*Venkataramana Rao, J.*) GOVINDARAJ *v.* EMPEROR. **1938 M.W.N. 38=47 L W. 128=173 I.C. 417=10 R.M. 583=39 Cr.L.J. 335 (2)=1938 M.Cr.C. 42=A.I.R. 1938 Mad. 396=(1938) 1 M.L.J. 110.**

——S. 253 (2)—*Discharge of accused without examining complainant—Power of Magistrate.*

Under S. 253 (2), Cr. P. Code, the Magistrate may in a suitable case come to the conclusion that the charge is groundless even before he has heard

CR. P. CODE (1898), S. 253.

the complainant under S. 252. Such a case might well be one in which the Magistrate in issuing process under S. 204 has mistakenly believed that an offence has been disclosed by the complaint and on the matter being brought to his attention when the case comes before him has seen his error and decided that, in fact, even if the allegations in the complaint are true, no criminal offence has been disclosed. Whether, however, the complaint does in fact disclose a *prima facie* offence, the Magistrate cannot find that the charge is groundless until the complainant has been heard. If the admissions of the complainant under examination under S. 252 make it clear not only that the facts set forth in the accused's petition are correct but also that, on the basis of those facts admitted by the complainant, no criminal offence has been disclosed the Magistrate is naturally at liberty to discharge the accused under S. 253 (2) without calling upon the complainant to produce the rest of his evidence. (*Blacker, J.*) SHIV DATTA *v.* B. K. SOOD. **186 I.C. 635=12 R.L. 427=41 Cr. L.J. 354=41 P.L.R. 702=A.I.R. 1940 Lah. 40.**

——**S. 253 (2)**—*Prosecution under S.* 406, *I. P. Code—Order of discharge after examining only few of prosecution witnesses—Propriety.*

In a case under S. 406, I. P. Code, the question of trust must be fully inquired into and for this purpose it is necessary that the whole of the prosecution evidence should be recorded. It is impossible to guess at an intermediate stage in the case, what would be the result of the inquiry. The Magistrate is not so much concerned as to whether the offence has been committed against the complainant but whether an offence has been committed which is punishable according to law. Therefore in a case under S. 406, when only a few of the prosecution witnesses have been examined it is too premature to decline to examine any more witnesses for the prosecution and discharge the accused on the ground that the case is of a civil nature. (*Mackney, J.*) CHAN ELLIAN *v.* WELLINGTON. **184 I.C. 471 (2)=12 R.R 148=41 Cr. L.J. 25=A.I.R. 1939 Rang. 377.**

——**Ss. 253 (2) and 252**—*Order of discharge without taking evidence of complainant or his witnesses—Lagality.*

A Magistrate has jurisdiction to pass an order of discharge under S. 253 (2), Cr. P. Code, after hearing both sides and examining some documents but without taking the evidence of the complainant or any of his witnesses. S. 252, Cr. P. Code, is not concerned with an order of discharge. The only bar in the Magistrate's way is sub-S. (1) of S. 253. Sub-S. (2) removes the bar. It is only reasonable that an accused person should be allowed to show at any stage of the proceedings that there is no case against him. (*Bartley and Henderson, JJ.*) SUNDAR DAS LOGHANI *v.* FARDUN RUSTOM IRANI **I.L.R. (1939) 1 Cal. 474=182 I.C. 411=40 Cr.L.J. 658=12 R.C. 59=69 C.L.J. 186=A.I.R. 1939 Cal. 329.**

——**S. 254** — Magistrate framing additional charge under—If "takes cognizance"—Right of accused to be informed of right to be tried by another Court—Ss. 190 and 191. *See* CR. P. CODE, Ss. 190 (1) (*c*) AND 191. **38 Bom.L.R. 946.**

——**S. 254**—Scope—Jurisdiction under—Failure to exercise—Effect on commitment. *See* CR. P. CODE, S. 215. **A.I.R. 1937 Sind 32.**

CR. P CODE (1898), S. 256.

——**S. 255-A**—*Scope—Procedure under—Trial by Magistrates of warrant cases without jury—Duty to follow procedure laid down by section.*

The procedure prescribed by S 255-A, Cr. P. Code, as amended in 1923, is inconvenient though not impossible to follow. What the section means is that the Magistrate should first write out a judgment of conviction without passing sentence and then if the accused denies previous conviction, he should proceed to take evidence to prove it. There is no advantage of it in cases tried by Magistrates under the procedure for the trial of warrant cases. This procedure, though not prescribed for magisterial trials prior to 1923, has been deliberately laid after the amendment of 1923 and has to be followed by the Courts, notwithstanding the inconvenience or difficulty in following it. (*Khaja Mohammad Noor, J.*) ISHAR SINGH *v. v.* SHAMA DUSADH **167 I C. 881=9 R.P. 449=38 Cr.L.J. 484=3 B. R. 379=1936 P.W.N. 561=17 Pat.L.T. 627=A. I.R. 1937 Pat. 131.**

——**S. 256**—'*Any remaining witnesses*'—*Meaning.*

If witnesses have been accepted by the Court as competent for the prosecution at any stage before the point for further examination under S. 256 arrives, even if that stage is after charge, they come under the category of 'any remaining witnesses.' (*Gruer, J.*) HANSRAJ *v.* EMPEROR. **1940 N.L.J. 449.**

——**S. 256**—Applicability—Summary trial. *See* CR. P. CODE, SS. 262 AND 256. **1939 N.L.J. 7.**

——**S. 256**—*Defence witnesses—Asking accused to produce—Duty of Magistrate.*

S. 256, Cr. P. Code, makes it clear that the accused cannot be called upon to produce witnesses until the case for the prosecution is completed. Asking them to summon witnesses during the progress of the case for the prosecution can in no way excuse the Magistrate from not asking them when they are subsequently examined under S. 342, whether they desire to call witnesses or not to support their defence. The accused are not bound to summon their witnesses or to produce them until they themselves have been examined. (*Harries, C.J. and Meredith, J.*) FEROZE KAZI *v.* EMPEROR. **1940 P.W.N. 243=6 B.R. 307=186 I.C. 227=12 R.P. 477=41 Cr.L.J. 267=21 Pat. L.T. 731=A.I.R. 1940 Pat. 295.**

——**Ss 256 and 257**—*Order for further cross-examination of prosecution witnesses and production of defence evidence on same day—Legality—Duty of Court.*

It is clear from S. 256 that the accused cannot enter upon his defence until and unless all the prosecution evidence has been exhausted and the further cross-examination of the prosecution witnesses is completed. The Court therefore acts illegally in ordering further cross-examination of the prosecution witnesses and the production of the defence evidence on the same day. The Court should fix a date for further cross-examination of the prosecution witnesses and when that is done or waived it should give another date to the accused for the production of his defence witnesses. The Court is consequently bound to send for the defence witnesses of the accused under S. 257. The Court therefore cannot strike out the defence of the accused merely because the accused had not asked it to summon

his witnesses for the day on which the accused had to further cross-examine the prosecution witnesses. (*Mir Ahmad, J.*) ABDUL GHAFUR *v.* EMPEROR. 188 I C. 419=13 R. Pesh. 1=41 Cr.L. J. 590=A.I.R 1940 Pesh. 9.

——— S. 256—'Hearing', meaning. *See* CR. P. CODE, S. 256—PROPER PROCEDURE TO BE FOLLOWED. 1939 A.W.R. (H.C.) 1.

———S. 256—Irregularity in procedure—Effect. *See* CR. P. CODE, S. 256—PROPER PROCEDURE TO BE FOLLOWED. 1939 A.W.R. (H.C.) 1.

———S. 256—*Procedure—Cross-examination of prosecution witnesses not finished—Power to call upon accused to file list of defence witnesses.*

It is irregular to call upon the accused to submit his list of witnesses before the cross-examination of all the prosecution witnesses is finished. Strictly speaking the accused cannot be called upon to enter into his defence until all the prosecution witnesses have been examined; and till then he cannot under the law, be asked by the Magistrate to file the list of defence witnesses. (*Khaja Mohammad Noor, J.*) ISHAR SINGH *v.* SHAMA DUSADH. 167 I C. 881=9 R.P. 449=38 Cr.L.J. 484=3 B.R 379=1936 P.W.N. 561=17 Pat L.T. 627=A.I.R. 1937 Pat. 131.

———S. 256—*Proper procedure to be followed—Adjournment to next day after examination of prosecution witnesses taking of accused's statement, framing of charge and recording plea of accused—Accused asked about further cross-examination on the next day — Procedure, if regular—Hearing, meaning of—Irregularity in procedure—Effect.*

Where on the same day the prosecution witnesses were examined, the accused's statement was taken, the charge was framed and explained and the accused had pleaded not guilty, and the hearing was adjourned to the next day, when the accused was asked if he wished to further cross-examine the prosecution witnesses the procedure followed is in consonance with S. 256, Cr. P. Code, and quite regular. The word 'hearing' is not defined in the Cr. P. Code. It cannot be said that the proceedings on an adjourned date are not a 'hearing' merely because no other action is to be taken on that date. Even if the proceedings are irregular, the irregularity is not so gross that prejudice to accused could be necessarily inferred. (*Allsop, J.*) EMPEROR *v.* BHAJJA. 181 I.C. 537=40 Cr.L.J. 549=11 R.A 573=1939 A. L.J. 81=1939 A.W.R. (H.C.) 1=1939 A. Cr.C. 17=A.I.R. 1939 All. 238.

———S. 256 (1)—*Accused asked after charge on same day if he wished to cross-examine prosecution witnesses—Prosecution witnesses cross-examined on adjourned hearing—Procedure—Legality.*

Where after the framing of the charge the witnesses for the prosecution were summoned for an adjourned hearing and were cross-examined on that date, the fact that the accused was asked after the charge was framed on that very day whether he wished to cross-examine the witnesses makes no difference to him. (*Allsop, J.*) MOHAMMAD RAFIQ AHMAD *v.* EMPEROR. 162 I C. 758=8 R.A. 901=37 Cr.L.J 710=1936 A.L.J. 274=1936 A.W.R. 375=1936 A. Cr.C. 107=1936 Cr. C. 476=1936 All.L.R. 470=A. .R. 1936 All. 319.

——— S. 256 (1)—*"Any remaining witnesses"—Meaning of—Witnesses not mentioned in list under S. 252 (2)—Right of prosecution to produce.*

The words "the evidence of any remaining witnesses for the prosecution shall next be taken" in S. 256 (1), Cr. P. Code, do not give the prosecution the right to produce any number of witnesses at that stage and the prosecution cannot produce witnesses who were not mentioned in the list of prosecution witnesses under S. 252 (2). Under S. 252 (2), Cr. P. Code, the complainant is required to give in a list of prosecution witnesses. Under S. 254, the Magistrate may examine all those witnesses and then frame a charge sheet or he may frame a charge sheet before he has examined all those witnesses. If he adopts the latter course and certain witnesses remain from the list who have not been examined, then those witnesses are the remaining witnesses under S. 256 (1) and the complainant has a right to produce them after the cross-examination of those witnesses who have been previously examined. But if the Magistrate has examined all the witnesses for the prosecution in the list under S. 252 (2) and has then framed a charge sheet, there are no witnesses remaining who could come under the description in S. 256 (1). (*Bennet, J.*) RAGHUBIR SAHAI *v.* WALI HUSAIN KHAN. 167 I.C. 522=9 R.A. 549 =38 Cr.L.J. 394=1937 All L.R. 205=1936 A.L. J. 1115=1936 A.W.R. 886=1936 A Cr.C. 189= A.I.R. 1937 All. 189.

———S. 256 (1)—*Procedure under—Duty of Magistrate.*

The Magistrate should enquire from the accused under S. 256 (1), Cr. P. Code, whether he desires to cross-examine the witnesses for the prosecution, and it is incumbent on the Magistrate to make a record of this question and answer. If the accused desires to cross-examine the witnesses for the prosecution, the witnesses named by him should be recalled. The word 'recalled' in S 256 (1) means that if the witnesses are not present then the Magistrate should issue process to ensure their attendance. (*Bennet, J.*) RAGHUNATH *v.* HAR KISHAN DAS. 167 I.C. 236 (1)=9 R.A. 517=38 Cr.L.J. 361=1937 A.L.R. 166=1936 A.W.R. 1273=A.I.R. 1937 All. 127.

———S. 256—*Scope—Magistrate calling upon accused forthwith on framing charge whether he wished to cross-examine prosecution witnesses—Omission to give reasons—If illegality vitiating trial.*

Though in ordinary cases the question whether the accused desired to cross examine the prosecution witness should be put to him not soon after the charge is framed but at the next hearing of the case, the Magistrate in a proper case is entitled to put that question to the accused forthwith on the framing of the charge, but the Magistrate in such cases must record his reasons for asking the accused forthwith. But the omission or failure to record the reasons is not an illegality which vitiates the whole of the proceedings thereafter. It is only in the nature of an irregularity which is curable where no injustice has been caused. At best it is a kind of omission in procedure contemplated by S. 537, Cr. P. Code. No doubt, if the Magistrate fails to ask the accused at all whether he wished to cross-examine the prosecution witnesses, that would be a grave

CR. P. CODE (1898), S. 256.

matter and might be an incurable illegality. (*Harries, C.J. and Varma, J.*) NISAR AHMAD *v.* EMPEROR. 180 I.C. 839=5 B R. 499=11 R.P. 541=40 Cr.L J. 419=1938 P.W.N, 832=19 Pat. L.T. 845=A.I.R. 1939 Pat. 172.

——S. 256 (2)—*Admission of accused in his written statement—Court, if can take into consideration.*

It is proper for the Court to take into consideration the written statement of an accused person admitting striking the deceased, where the prosecution has, without such statement, proved that the fatal injury was inflicted by one of the accused persons. (*Skemp, J.*) HASHAM *v.* EMPEROR. 161 I.C. 344=37 Cr.L J. 428=8 R. L. 719=1936 Cr.C. 11=A.I.R. 1936 Lah. 28.

——S. 256 (1)—*Complainant and witnesses not present for further cross-examination—Power of Magistrate to pass order of acquittal.*

There is no provision in the Code entitling a Magistrate to pass an order of acquittal in a case of default of appearance on the part of the complainant and his witnesses on the date fixed for their further cross-examination. (*Bennet, J.*) RAGHUNATH *v.* HAR KISHAN DAS. 167 I.C. 236 (1)=9 R.A. 517=38 Cr.L.J. 361=1936 A.W. R. 1273=A.I.R. 1937 All. 127.

——Ss. 256 and 540—*Right to produce new witnesses after recording of plea of accused—Proper procedure.*

The wording of S. 256, Cr. P. Code, does not give the prosecution the right to require after the plea of the accused has been recorded, that witnesses shall be summoned whose names do not appear in the complaint, who were not produced originally or whose names were not divulged under S. 252. Cr. P. Code. It is however open to the prosecution to ask them to be examined under S. 540, if the required circumstances exist. (*Weston, I.C.S.*) BAL CHAND *v.* SUKH DEO. 1938 A.M.L.J. 78.

——S. 257—*Accused summoning complainant to produce account books—Cross-examination of complainant by prosecution to fill up gaps in evidence—Procedure condemned.*

Where the accused summoned the complainant to produce certain account books and advantage was taken of this fact after the whole prosecution case had been closed to cross-examine the complainant on behalf of the Crown in respect of everything connected with the case and to fill up all the graps in the prosecution evidence.

Held, that such unheard of procedure could not be too severely condemned. (*Nanavutty, J.*) KANHAIYA LAL *v.* EMPEROR. 168 I.C. 58=9 R.O. 432=38 Cr.L.J. 491=1937 O.L.R. 202=1937 A. Cr.C. 80=1937 O.W.N. 505=A.I.R. 1937 Oudh 331.

——S. 257—*Duty of magistrate under—Accused filing list of witnesses late—If ground for not summoning witnesses.*

Although the accused files his list of witnesses late, if the magistrate does not consider that the witnesses are being summoned in order to cause delay in the trial of the case, it is the duty of the magistrate to summon the defence witnesses and to see that the witnesses attend the Court (*Khaja Mohammad Noor, J.*) ISHAR SINGH *v.* SHAMA DUSADH. 167 I.C. 881=9 R P. 449=38 Cr L.J. 484=3 B R. 379=1936 P.W.N. 561=17 Pat.L.T. 627=A.I.R. 1937 Pat. 131.

CR. P. CODE (1898), S. 257.

——S. 257—*Duty of Magistrate—Vexation or delay—What is.*

It may be that the accused is not able to satisfy the Magistrate that witnesses named by him in his application are definitely going to give evidence which is material in the case, but that does not necessarily show that the application is made for the purpose of defeating the ends of justice. (*Mackney, J.*) SUPPAYA CHETTYAR *v.* KARUPPAYA PILLAY. 172 I.C. 937=10 R.R. 291=39 Cr L.J. 211=A.I.R. 1937 Rang. 528.

——S. 257—*Expert witness—Duty of Court to enforce attendance.*

A witness cannot refuse to attend the Court when summoned and the rules of the High Court have clearly laid down the fees to which an expert witness is entitled. The Court, therefore, should not hesitate in exercising its powers under the law, however highly placed a witness may be. An accused should not be burdened with the costs of an expert, if his demand is unreasonable, especially when the Magistrate is empowered to enforce the attendance of the witness and to pay him his reasonable dues (*Din Mohammad, J.*) PARSHOTAM DAS *v.* EMPEROR. 166 I.C 128 (1)=9 R.L. 340=38 Cr.L.J 133 (1)=38 P.L.R. 1165=1936 Cr.C. 1007=A.I.R. 1936 Lah. 919.

——S. 257—*Issue of process—If obligatory, when opportunity to cross-examine was not availed of.*

Where an opportunity to cross-examine the witnesses has been given but not availed of, a Magistrate is justified in acting under the proviso to S. 257, Cr. P. Code, and declining to recall the witnesses for cross-examination. (*James, J.*) SONU KURMI *v.* EMPEROR. 177 I.C. 697=5 B.R. 12=11 R.P. 176=39 Cr.L.J. 950=A.I.R. 1939 Pat. 24.

——S. 257—*Process issued to defence witness—Duty of Magistrate to secure his attendance.*

When once a Magistrate issues process to a defence witness, he is bound to follow up that process if the defence so desires, and to take all possible steps to secure the attendance of that witness. The failure of the Magistrate to follow this procedure and to record any order whatever on the petition filed by the defence for re-summoning the witness, vitiates the subsequent proceedings. (*Patterson, J.*) RAMDHAN MONDAL *v.* GIRDHARI MONDAL. 42 C.W.N. 843.

——S. 257—*Warrant case—Non-cognisable offence—Accused's witnesses—Costs, by whom to be borne.*

In a warrant case, the cost of causing the attendance of the witnesses of an accused person should usually be borne by Government, even though the offence is non-cognizable. A departure from this rule is not permissible without adequate reasons. (*Abdul Rashid, J.*) KHUSHI MAHOMED *v.* ABDULLA KHAN. 39 P.L R. 137=170 I.C. 539=38 Cr.L.J. 941=10 R.L. 132=A.I.R. 1937 Lah. 458.

——S. 257, Proviso—*Accused refusing to cross-examine prosecution witnesses before and after charge—Right to recall them for cross-examination.*

Where the accused refused to cross-examine the prosecution witnesses although asked to do so both before and after the framing of the charge and also refused to answer questions when examined under S. 342, Cr. P. Code, and on the date fixed for arguments, the accused engaged counsel

CR. P. CODE (1898), S. 257.

who requested the Magistrate to recall all the prosecution witnesses for cross-examination and the Magistrate refused.

Held, that the Magistrate was entirely justified in so doing, and that the accused was "mute of malice" and the proviso to S. 257, Cr. P. Code, was enacted to deal with cases like that. (*Skemp, J.*) KHUDA BAKHSH *v.* EMPEROR. 17 Lah. 284=165 I.C. 909=9 R L. .321=38 P L.R. 630=1936 Cr.C. 1023=38 Cr.L.J. 24=A.I.R. 1936 Lah. 914.

——Ss. 257 (2) and 544—*Summoning of witnesses—Order as to deposit for expenses—Powers of Magistrate.*

The Cr.P. Code gives a Magistrate a discretion to pass an order under S. 267 (2) and his discretion is subject to S. 544 and rules framed thereunder. Where an accused in a case under S. 110 files a huge list of 288 witnesses of different places and different occupations, with no attempt to show how they were necessary, a Magistrate is fully justified in passing an order under S. 257 (2) directing the deposit of the reasonable expenses of the witnesses as a condition precedent to their being summoned. (*Bennet, A.C.J. and Verma, J.*) EMPEROR *v.* MAHTAB SINGH. I.L.R. (1939) All. 57=179 I.C. 773=40 Cr.L.J 257=11 R.A. 385=1938 A.L.J. 1082=1938 A.W.R. (H. C.) 780=A.I.R. 1939 All. 101.

——S. 259—Discharge under—If judgment—Fresh complaint—If barred. *See* CR. P. CODE, Ss. 203 AND 259. I L.R. (1940) Kar. 74 (F.B.).

——S. 259—Illegal order under—Setting it aside—Proper procedure. *See* CR. P. CODE. Ss. 369 AND 259. 1938 A.M L.J. 45.

——S. 259—*Scope—Complaint mentioning Cognizable and non-compoundable offence—Complainant absent on date of hearing—Discharge—Legality—Fresh complaint—Proceedings on—If vitiated—Prejudice to accused—Necessity to prove*

There is no universal rule that disobedience even of a mandatory provision in a statute has the consequence of nullification of the proceedings, irrespective of any question of prejudice to the accused or other party. Where on the date fixed for hearing, the complainant was absent, the Magistrate discharges the accused though one of the offences mentioned in the complaint is a cognizable and non-compoundable one, it cannot be held that it is entirely illegal and it vitiates all the proceedings taken on a fresh complaint on the same matter, when there is nothing to show that the accused has in any way been prejudiced. (*Broomfield and Macklin, JJ.*) ALI MAHOMED JOOSAB *v.* KASTURCHAND. 180 I C 241=11 R.B 291=40 Cr.L J. 346=41 Bom.L.R. 90=A.I.R. 1939 Bom. 89.

——S. 260—*Trial of Government servants—Summary procedure—Propriety.*

It cannot be laid down as a broad proposition that a Government servant should not be tried summarily or that generally the summary procedure is inappropriate in cases in which Government servants are accused. It is a question on the facts of each case whether one mode of trial or the other should be employed. (*Ram Lal, J.*) M, A KHAN *v.* EMPEROR. I.L.R. (1939) Lah. 221=184 I.C. 458=12 R L. 225=41 Cr.L.J. 19=41 P. L.R. 743=A.I.R. 1939 Lah. 467.

——Ss. 260 and 263 (h)—*Recording reasons—Form and substance—Object of safeguard.*

CR. P. CODE (1898), S. 263.

In cases of summary trial, it is desirable that the magistrate should set out so much of the reasons that have influenced him as to satisfy the accused that his mind has been applied to the ingredients necessary in law for the conviction of the accused. Though the reasons have to be recorded with brevity, the brevity should not be such as to tend to obscurity. These safeguards are essential, so that the High Court can have before it in case of revision, sufficient materials on record to satisfy itself as to the correctness or otherwise of the order. (*Thomas, J.*) BAIJOO *v.* EMPEROR. 14 Luck. 325=178 I.C. 722=11 R.O. 125=40 Cr.L.J. 141=1938 O L R 512=1938 A. W.R. (C.C) 123=1938 O W N. 1130=1938 O. A. 915=A.I,R. 1939 Oudh 37.

——Ss. 262 and 256—*Summary trial—Warrant cases—Right of accused to have prosecution witnesses recalled for further cross-examination.*

In a warrant case tried summarily the accused is entitled to have the prosecution witnesses recalled for further cross-examination, after the explanation which takes the place of a formal charge. The valuable right, which by law S. 256, Cr. P. Code, allows him, cannot be abrogated. (*Grille, J.*) MUNNA *v.* EMPEROR. I.L.R. (1939) Nag 457=184 I.C. 44=40 Cr.L.J. 846=12 R.N. 89=1939 N.L.J 7=A.I.R. 1939 Nag. 87.

——S. 262 (2)—*Limit contemplated by—If applies only to substantive sentence of imprisonment.*

S 262 (2), Cr. P. Code, does not render illegal a sentence of imprisonment in default of payment of fine if otherwise legal, merely by reason of the fact that the aggregate of the terms of substantive sentence of imprisonment and of the sentence of imprisonment in default of payment of fine exceeds three months or by reason of the Magistrate having passed a substantive sentence of imprisonment for the maximum term allowed by that section The limit placed by S. 262 (2) of the Cr. P. Code applies only to a substantive sentence of imprisonment. (*Mya Bu, J.*) KING *v.* PO HTWA. 1940 Rang.L R. 223=189 I.C 627 =41 Cr.L J. 768=13 R.R. 53=A.I.R. 1940 Rang. 171.

——S. 263—*Scope—Compliance—Case under S. 447, I. P. Code—Judgment of Bench Court—Requirements—Omission to state evidence of trespass intention, etc.—Omission to give reasons for conviction—Effect.*

Even in cases tried summarily by a Bench of Magistrates, where there is a conviction, there must be a brief statement of the reasons for such conviction. Where in a case under S 447, I. P. Code, in the judgment of the Bench Court, there is no statement as to what the evidence is either of the alleged encroachment or trespass or intention or of the reasons for the conviction, the judgment does not fulfil the elementary requirements of the law. Desirability of entrusting cases under S. 447, I. P. Code, for disposal to Bench Courts doubted. (*Pandrang Row, J.*) KANNAYYA *v.* VENKATESAM. 168 I.C. 703=1937 M W.N. 323=9 R M. 620=38 Cr.L.J 581 (1)= 1937 M.Cr.C. 113=45 L.W. 471=A.I.R. 1937 Mad. 480.

——S. 263—*Scope—Summary trial—Requirements.*

Although a certain expedition is necessary and is most desirable in summary trials, yet the sum-

CR. P. CODE (1898), S. 263.

mary procedure laid down in the Criminal Procedure Code must not be made more summary. S. 263 lays down the minimum requirements of law. Although S. 263 dispenses with the formality of recording evidence, it does not dispense with the necessity of hearing evidence or of following the procedure laid down in Chap. 22, Cr. P. Code, for summary trials. Nor does it dispense with the necessity of complying with the provisions of S. 342, the examination of the accused after the case for prosecution is closed. S. 263 merely relieves the Court of the burden of recording evidence (*Davis. J. C. and Lobo, J.*) CHOITHRAM *v.* EMPEROR. 32 S L.R. 684=174 I. C. 685=10 R.S. 259=39 Cr L J. 474=A.I.R. 1938 Sind 70.

——S. 263 (b) and (f)—*Scope—If mandatory—Omission to enter particulars in form—Effect on conviction—S. 537—Effect of.*

Non-compliance with Cls. (*b*) and (*f*) of S. 263, Cr. P. Code, is no ground for quashing a conviction; the mere failure of the Magistrate or the Bench to enter in the form the date of the commission of the case and to enter the value of the property, would not suffice to raise any question of possible or provable prejudice or failure of justice. S. 537, Cr. P. Code, cures such defects and irregularities. (*Dhavle, J.*) MOHSIN *v.* EMPEROR. 186 I.C. 312=12 R.P 503=1940 P. W.N 93=6 B.R 337=41 Cr.L.J. 283=A.I.R. 1940 Pat. 272.

——S. 263 (h)—*Judgment in summary trials—Statement of reasons, necessary.*

S. 263 (*h*), Cr. P. Code, enjoins that a brief statement of reasons for the order should be given by the Magistrate. It is absolutely necessary that this should be done. A judgment which merely states that the accused is fined Rs. 25 or 2 months R. I., in default, is no judgment at all according to law. (*Rachhpal Singh, J.*) EMPEROR *v.* DAL CHAND. 187 I.C. 642=12 R A. 574=1940 A.W. R. (H.C. 206=1940 A.Cr.C. 67=41 Cr L.J. 498 =1940 A.L.J. 154=A.I.R. 1940 All. 195.

——S. 263 (h) (i)—*Summary trial—Judgment—Reasons for sentence if should be given.*

In a summary trial, S. 263 (*h*) and (*i*), Cr. P. Code, requires only the reason for the finding to be stated and not the reasons for the sentence. (*Gruer, J.*) PROVINCIAL GOVERNMENT, C. P. AND BERAR *v.* BHIVRAM. 188 I.C. 80=12 R N. 332=41 Cr.L.J. 545=1940 N.L.J. 242=A.I.R. 1940 Nag. 264.

—— Ss 263 and 264—*Scope—Summary trial—Evidence recorded—If part of record—Change of Magistrate in course of summary trial—Continuance by successor in summary manner—Legality.*

S. 263 does not prevent a Magistrate who tries a case in summary way from recording evidence. It merely says that he need not, but if he does, it cannot by reason of S. 264 form part of record, and evidence so recorded does not come under S. 350 S. 350 which gives a Magistrate the jurisdiction to continue a trial begun by his predecessor is not applicable to cases tried in a summary manner. A Magistrate continuing in a summary manner, a trial which was commenced in summary manner by his predecessor acts without jurisdiction. (*Davis, J.C. and Dadiba C. Mehta, A. J. C.*) EMPEROR *v.* HEMANDAS DEVANSINGH. 161 I.C. 267=37 Cr.L J. 455=8 R.S. 134=1936 Cr.C. 230 =A.I.R 1936 Sind 40.

CR. P. CODE (1898), S. 269.

——Ss. 263 and 355 (2)—*Relative scope—Non-appealable summary trial—Duty of Magistrate to sign memorandum of evidence—Failure to sign—If vitiates trial and conviction.*

S. 263, Cr. P. Code, must be read as an exception to S. 355 (2), Cr. P Code, which is a general provision; further the failure of the Magistrate to sign the memorandum of evidence in non-appealable cases, even if it be assumed the Magistrate is bound to do so, cannot be regarded as sufficiently by itself to vitiate the trial and conviction. (*Dhavle, J.*) MOHSIN *v.* EMPEROR. 186 I. C. 312=12 R P. 503=1940 P W.N. 93=6 B.R., 337=41 Cr.L.J. 283=A.I R. 1940 Pat. 272.

——S. 268 (As applied to Administered Areas in Hyderabad State)—*Additional Sessions Judge—Discretion to dispense with jury and assessors.*

The discretionary power of dispensing with a jury and aid of assessors is conferred not only upon the Sessions Judge but also upon an Additional Sessions Judge, under S. 268, Cr. P. Code, as applied to the Administered Areas in Hyderabad State (*Lord Thankerton.*) FAKIRA *v.* EMPEROR. 64 I.A. 148=I.L.R. (1937) Bom. 711= 1937 All.L.R. 328=46 L.W. 134=1937 P W.N. 441=39 Bom L.R. 966=1937 All. L J. 1055= 1937 A.W.R. 1128=1937 M.Cr. C. 376=167 I.C. 790=39 P.L R 334=1937 O.L.R. 216=41 C.W. N. 741=1937 M W.N. 546=9 R.P.C 231=1937 A. Cr.C. 74=3 B.R. 426=38 Cr.L.J. 498=1937 O.W.N. 412=A.I.R. 1937 P.C. 119=(1937) 2 M. L.J. 323. (P.C.)

——Ss. 268 and 269—*Trial by assessors—Normal procedure.*

In view of the provisions of S. 269, Cr. P. Code, there can be no doubt that the normal procedure under the Code is trial by assessors and it is only when the Local Government publish an order in the Gazette that an offence becomes triable by jury. Such orders may be made or revoked at any time. Accordingly an offence is triable with the aid of assessors in the absence of a notification of the Local Government directing that such an offence is triable by jury. (*Cunliffe and Henderson, JJ.*) YAJNESHWAR GHOSH *v.* EMPEROR. I.L R. (1937) 1 Cal. 306=166 I.C. 418 =9 R.C. 520=1936 Cr.C. 737=38 Cr.L J. 212= 40 C.W.N. 1186=65 C.L.J. 351=A.I.R. 1936 Cal. 527.

——S 269—*Charge under Ss. 395 and 399, I. P Code. for the charge of conspiracy to commit both offences—Trial by jury—Verdict of not guilty—Conviction by Judge under S. 395 read with S. 110-B, I. P. Code, and acquitting on main offence—Legality.*

The accused were charged with offence punishable under Ss. 395 and 399, Penal Code. They were further charged with a conspiracy to commit both those offences. The jury brought in a unanimous verdict of "not guilty." The Sessions Judge acquitted all the accused of the main charges, but convicted them under S. 395 read with S. 120-B, Penal Code, holding that the jury were assessors and that he was entitled to take a contrary view. It was contended on behalf of the accused that the trial was with jurymen and not with assessors, and that the Judge had no jurisdiction to convict them in the face of the verdict of acquittal.

Held, that since there was no notification of the Local Government directing that such an offence

CR. P. CODE (1898), S. 269.

was triable by jury, the trial should be construed to have been carried on with the aid of assessors and the Sessions Judge had jurisdiction to pass that order. (*Cunliffe and Henderson, JJ.*) JOGNESHWAR GHOSH *v.* EMPEROR I.L.R. (1937) 1 Cal. 306=166 I C. 418=9 R.C. 520=38 Cr.L.J. 212=65 C L J. 351=40 C W.N. 1186=1936 Cr. C. 737=A.I.R. 1936 Cal. 527.

——S. 269—*Power of Local Government under.*

The power of a Local Government under S 269, Cr. P. Code, is not limited to merely adding a jury to the Court. The plain words of S. 269 are that any particular class of offences before a Court of Session may be directed to be tried by a jury. This implies that the offences must be before the Court of Session, and cannot derogate from the power otherwise given to prescribe which offences should not come before that Court. (*Gruer, J.*) PRITHVINATH *v.* EMPEROR. I.L.R. (1938) Nag. 248=175 I.C. 935=11 R.N. 18=39 Cr.L.J. 660=20 N.L.J. 151=A.I.R. 1938 Nag. 56.

——S. 269 (3)—*Applicability—Joint trial of several persons, some charged with murder and some charged with conspiracy to murder.*

The plain meaning of the language used in S. 269 (3) is that the procedure indicated in that section is applicable when the accused are charged with more than one offence. In a case certain accused charged with murder were tried jointly with other accused charged with conspiracy to murder. These were the only two charges and no accused was charged with more than one offence.

Held, that S. 269 (3) was not applicable to the case and that the form of the trial was erroneous. (*M. C. Ghose and Bartley, JJ.*) RAM GOBINDA GHOSE *v.* EMPEROR. 175 I.C. 529=10 R. C. 802=39 Cr.L.J. 625=42 C.W.N. 781=A I.R. 1938 Cal. 364.

——S. 269 (3)—*Procedure under—Charge of same person for different charges on same facts—Same set of persons acting as jury in respect of some and as assessors in respect of others—Verdict of not guilty in all—Acquittal by judge in former and conviction in latter in disregard of opinion of assessors—Propriety and Legality of.*

The combined system or practice of trial of having the same set of men acting as a jury at one moment in respect of certain charges and assessors at another moment in respect of certain other charges, though legal under the Cr. P. Code is a most undesirable one. It is not equitable form of process at all. Where in such a trial, the jury acquit the accused in respect of the former set of charges, and also acquit the accused as assessors in regard to the other set of charges based on the same facts, and the Judge accepts the verdict of not guilty in respect of the former and acquits the accused, but does not accept the verdict of not guilty given by them as assessors and convicts the accused in disregard of the opinion of the assessors, he acts illegally and improperly because by doing so he practically reverses the verdict of the jury in respect of the former set of charges. The prosecuting authorities should not pursue this form of double prosecution. (*Cunliffe and Henderson, JJ.*) CHERU SHEIKH *v.* EMPEROR. 40 C.W.N. 1374.

——S. 269 (3)—*Trial of accused for several offences, some with jury and others with assessors*

CR. P. CODE (1898), S. 276.

—Conviction based on verdict of jury set aside—Effect on conviction for offences tried with assessors.

Where the accused was tried under S. 489-B, I. P. Code, with the aid of a jury, and under S. 120-B read with S. 489-B with the aid of assessors, and the conviction for the offence tried by jury is set aside because of certain defect in the verdict, it does not follow as a necessary consequence of it that the conviction for the other offence tried with the aid of assessors must also be set aside. It is so though the evidence recorded in the case was common to both the offences, for, in one case the evidence had to be considered by the jury which had to form its opinion about it and in the other case it had to be considered by the judge. (*Srivastava, J.*) SATDEO *v.* EMPEROR. 11 Luck. 687=159 I.C 919=37 Cr. L J 182=8 R.O. 225=1936 O W.N. 28=1936 O.L.R. 18=1936 Cr.C. 282=A.I.R. 1936 Oudh 164.

——S. 276—*Deficiency in jurors summoned—Procedure—Power of Court to summon jurors from town to fill up deficiency*

When there is a deficiency in the number of jurors summoned, it is open to the Judge to make up the deficiency from persons actually present whom he considers suitable. If he is unable to do this, the only other course left is to postpone the trial and summon another jury. He cannot summon jurors from the town and fill up the deficiency from amongst them. (*Henderson and Biswas, JJ.*) SUBED ALI *v.* EMPEROR. I.L.R. (1937) 2 Cal. 482=170 I C. 237=10 R.C. 123=38 Cr.L.J. 870=A.I.R. 1937 Cal. 389.

——S 276—*Judicial Commissioner's Court—If a Court of Session*

The Judicial Commissioner's Court is a Court of Session following the procedure of a High Court, as the Bombay High Court, in Criminal Sessions. (*Davis. J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. I.L.R. 1940 Kar. 249=184 I C. 474 =12 R.S. 107=41 Cr.L J. 28=A I.R. 1939 Sind 209.

——Ss 276, Proviso 2 and 315—*Applicability and scope—List of persons summoned, as jurors and present exhausted by lot and challenge—Proper procedure for filling up.*

Both the substantive part of S. 276, and the second proviso to S. 276 govern both common and special juries and proceedings in High Court and Sessions Court. When the trial of the case has not begun, S. 276, proviso 2, would apply, and in such a case, a juror can only be chosen from the persons present. Persons, even if qualified, cannot be called from outside the precincts of the Court. Ss. 276 and 279 contemplate that the choosing of the jury shall be a continuous process at the beginning of the trial, and from persons summoned to appear and present in Court at the time of the commencement of the proceedings. A deficiency is only apparent after the names of all those summoned and present have been exhausted by the chances of lot and challenge. Ss 276 and 279 do not contemplate that a deficiency shall be recognized and then obviated by the summoning of fresh jurors, so that the jury can be summoned and chosen in three instalments. It is the actual presence of the potential juror in the Court at the time the deficiency occurs, which is the condition of his eligi-

CR. P. CODE (1898), S. 276.

bility. That is the safeguard that even in this case there shall be an element of chance which is present in the choosing by lot of the other jurors The fact then that the person subsequently summoned may be on the special jury list is no substitute for the fact that he was not present. S 315 (3) does not apply to the choosing of a jury in a particular case where a deficiency of one or more members has appeared within the meaning of Ss. 276 and 279 (2) and the trial has already begun. In a Sessions trial before a Judge of the Judicial Commissioner's Court, sitting in its Sessions Court jurisdiction, 30 persons were called in the first instance from the special jury list; of these 11 were unserved and 19 were present in Court. After the parties had exercised their right of challenge under S. 297, only 8 persons out of the 9 required under S. 274 (1) had been secured. The Judge directed the clerk in accordance with the rules framed by the Judicial Commissioner's Court to issue fresh summons and more persons were summoned. Of these one *M* arrived and was chosen. He was not chosen by lot. One of the jurors already chosen asked to be excused on account of urgent business and he was allowed to go and a juror recently chosen took his place. Still one juror being wanted the clerk issued summons to four persons. Out of these only two appeared; of these two one was chosen by lot.

Held, that there were irregularities in empanelling the jury and the jury was not properly constituted and the trial was vitiated thereby. There was an irregularity when *M* was chosen as a juror because he was not chosen by lot or from persons summoned before deficiency appeared. There was further irregularity in the choosing of the last juror. So far as R. 18 of the Rules of the Judicial Commissioner's Court authorized the procedure followed, it was *ultra vires*. (*Davis, J.C and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. 1940 Kar. 249=184 I.C. 474=12 R S. 107=41 Cr.L.J. 28=A.I.R 1939 Sind 209.**

——S. 276, Proviso 3 (b)—*Judicial Commissioner's Court—If "High Court."*

The Judicial Commissioner's Court is a High Court within the meaning of Proviso 3 to S. 276, and a Judge of that Court, sitting in its Sessions Court jurisdiction, has power to direct a special jury to be empanelled under Cl (*b*) of that Proviso. In a matter, which affects the summoning and empanelling of a jury, the procedure of a High Court should be followed by the Judicial Commissioner's Court exercising its original criminal jurisdiction. Proviso 3 to S. 276, so far as the Judicial Commissioner's Court is concerned, refers to the Court in the exercise of its original criminal jurisdiction and S 276 in S. 266 must be read as referring to the section itself and not to the provisos. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR .I LR. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.

——S. 276, Provisos 3 and 4—*"Chosen"—Meaning of.*

In the absence of words to the contrary in the context, the word "chosen" in proviso 3 and also in Proviso 4. S. 276 must mean chosen by lot as in the substantive part of the section. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R 1939 Sind 209.**

CR. P. CODE (1898), S. 282.

——Ss. 278 and 279—*Allegations of misconduct against jurors—Enquiry into—Discretion of Judge.*

When allegations of misconduct are made against certain jurors, the Sessions Judge has, no doubt, jurisdiction to hold an inquiry, but the question whether he should or should not hold an enquiry is a matter within his discretion. He is not bound by any rule of procedure to hold the inquiry. Where the allegations made are vague and are not supported by any affidavit, the Judge does not exercise a wrong discretion in refusing to hold an enquiry. (*King, C.J.*) BIDESHI *v.* EMPEROR. **12 Luck 170=162 I.C. 705=37 Cr.L.J. 749=8 R.O. 395=1936 O.W.N. 457=1936 Cr.C. 625=1936 O.L.R. 287=A.I.R. 1936 Oudh 268.**

——S. 279—Scope—Deficiency in jury—Procedure for making up. *See* CR. P. CODE, Ss. 276, PROVISO 2, 279 AND 315. **A I.R. 1939 Sind 209.**

——S. 279 (1)—*Decision overruling objection made to juror on ground of partiality—Finality.*

If the Court decides that no presumed or actual partiality in the juror has been made out, the decision is absolutely final and cannot be challenged in appeal by virtue of S. 279 (1), Cr.P. Code. If, however, a Court were to find that some presumed or actual partiality in the juror had been made out but in spite of this finding were to overrule the objection, the decision of the Court overruling the objection might perhaps be challenged in appeal. (*Bartley and Lodge, JJ.*) YAWAR BAKHAT CHAUDHURI *v.* EMPEROR. **I.L.R. (1940) 1 Cal. 531=189 I.C. 173=13 R C. 73=41 Cr L J. 719=44 C W.N. 474=71 C.L.J. 181=A.I.R. 1940 Cal. 277.**

——S. 279 (1)—*Objection to juror on ground of partiality overruled—Decision, if can be challenged in appeal.*

If on an objection taken to a juror on the ground of some presumed or actual partiality in him, the Court decides that no such partiality has been made out, that decision is final and cannot be challenged in appeal. If, however, the Court finds that such partiality has been made out, but in spite of that finding overrules the objection, the decision of the Court overruling the objection may perhaps be challenged in appeal. (*Bartley and Lodge, JJ.*) SYED YAWAK BAKHAT *v.* EMPEROR. **I.L.R. (1940) 1 Cal. 531=189 I C. 173=13 R.C. 73=41 Cr.L J 719=71 C L.J. 181=44 C.W.N. 474=A.I.R. 1940 Cal. 277.**

——Ss. 279 (1) and 278—*Objection that a juror is not an European British subject—Decision—Finality.*

An objection that a juror is not an European British subject is an objection under S. 278, Cr.P. Code, either under Cl. (*b*) or Cl. (*h*) and the decision of the Sessions Judge on the point is final under S. 279 (1). (*Pollock and Gruer, JJ.*) SURAJPAL SINGH *v.* EMPEROR. **I.L R. (1938) Nag. 516=176 I.C. 853=11 R.N 81=39 Cr L.J. 818=1938 N.L.J. 185=A.I.R. 1938 Nag. 328.**

——S. 282—*Applicability—Assessor trial—One assessor ignorant of English—If incompetent to act as assessor—Language of Court as Hindi—Trial, evidence and arguments in Hindi—Evidence taken down in English—Some documents in English—Effect—Trial—If bad.*

CR. P. CODE (1898), S. 282.

Where the language of the Court is Hindi, Hindi knowing jurors and assessors are competent to take part in the trial of cases in which the evidence, argument and summing up are given in Hindi. If evidence is given in Hindi, that fact that it is taken down in English cannot make any difference. The fact that one of the assessors in an assessor trial did not know English, but knew only Hindi would not therefore render the proceedings or trial illegal. There is no similar provision corresponding to S. 282 (which applies to the case of jurors) in the case of assessors; but assuming that the principle of that section applies to the case of assessors, the fact that an assessor does not understand English does not invalidate a trial unless there had been a failure to interpret in Hindi evidence given in English. Nor does the fact that some of the documents in the case are in English affect the competency of the assessor who does not know English or the lawful constitution of the Court. There is nothing in the statute which would render the trial illegal or render such an assessor incompetent. (*Rowland and Madan, JJ.*) RAM BARU JADAV *v.* EMPEROR. **173 I C. 418=4 B.R. 266=10 R.P. 402=39 Cr L.J. 302=18 Pat. L.T. 964=1937 P. W.N. 1001=A.I.R. 1938 Pat. 60.**

——**S. 282 (2)**—*Scope of.*

Sub-S. (2) to S. 282 contemplates the addition of a juror after the trial of the case has begun and not before. S. 282 is limited to cases where a jury had been properly empanelled at the outset and one or more of the casualties, which are bound to occur sometimes in human lives, has in fact occurred. (*Davis, J C. and Lobo, J*) SHEWARAM *v.* EMPEROR. **I L R. (1940) Kar. 249=184 I C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.**

——**Ss. 282 and 283**—*Scope—Inherent power to discharge jury—Grounds—Judge doubting impartiality of jury—Power to discharge jury in the middle of trial and empanel another jury.*

Although the Cr. P. Code does not provide for discharging a jury during the continuance of a trial except in the circumstances mentioned in Ss. 282 and 283, the Sessions Judge has inherent power to discharge a jury and empanel another, if he apprehends that absolute impartiality which is expected of the jury may not be evinced while giving the verdict at the end of the trial, although there may be no misconduct. The inherent power of a Sessions Judge to discharge a jury is not confined to cases of misconduct or to the ground mentioned in Ss. 282 and 283, but plainly extends to cases where the Judge finds reason for doubting the impartiality of the jury after the trial has proceeded for some days. (*Fazl Ali and Dhavle, JJ.*) BIPAT GOPE *v.* EMPEROR. **16 Pat. 8=1937 P.W.N. 271=169 I.C. 495=10 R.P. 19=3 B.R. 584=38 Cr L.J. 777=A.I.R. 1937 Pat. 369**

——**S. 284**—*"Chosen"—Implies selection from larger number of persons present than are requried for trial.*

S. 284, Cr. P. Code, does not prescrible that the assessors are to be chosen by lot; it does not at all say that they should be chosen in any particular manner. The word "chosen" in the section does not imply that there ought to be a selection from a larger number than required for the trial and it is not at all necessary that there should be more present than required, so that the assessors

CR. P. CODE (1898), S. 286

may be "chosen". (*Rowland and Madan, JJ.*) RAM BABBU JADAV *v.* EMPEROR. **173 I.C. 418=4 B.R. 266=10 R.P. 402=39 Cr.L.J. 302=18 Pat.L.T. 964=1937 P.W.N. 1001=A.I.R. 1938 Pat. 60.**

——**Ss. 284 and 537**—*Trial held with only one assessor—Legality.*

When the trial has to be made by a Sessions Court with the help of assessors and the number of assessors is not as required by law, there is no properly constituted Court and the trial held by any such Court is illegal and the defect is not such as can be cured by S. 537, Cr. P. Code. (*Abdul Qayoom, C.J. and Kichlu, J.*) RAHIM BEG *v.* STATE. **39 P.L R J. & K. 3.**

——**S. 285-A**—*Construction--'And is so tried'—Meaning of.*

The words 'and is so tried' in S. 285-A, Cr. P. Code, mean 'if he is in fact so tried' or 'if he is eventually so tried,' for unless the European British accused was in fact tried in accordance with the provisions of S. 275, the Indian accused's ground for claiming a separate trial would disappear. (*Pollock and Gruer, JJ.*) SURAJPAL SINGH *v.* EMPEROR. **I.L R. (1938) Nag. 516=176 I C 853=11 R.N 81=39 Cr.L.J. 818=1938 N L J 185=A.I.R. 1938 Nag 328.**

——**S. 285-A**—*Joint trial—No claim for separate trial—Trial in different Sessions Court—Claim for separate trial—Refusal—Revision disallowed—Re-agitation in appeal from conviction—If permissible.*

Where an Indian accused originally wished to be jointly tried with the European accused but when the case came before a different Sessions Court claimed to be separately tried, which was not permitted, and revision from which order was also dismissed, cannot in an appeal from the conviction in such trial, re-agitate the claim for separate trial, (*Pollock and Gruer, JJ.*) SURAJPAL SINGH *v.* EMPEROR. **I.L R. (1938) Nag. 516=176 I.C 853=11 R.N. 81=39 Cr.L.J 818=1938 N.L J. 185=A I.R. 1938 Nag 328.**

——**S. 286**—*Medical officer examined before committing Magistrate—If must also be examined before Sessions Court.*

It is likely to cause a miscarriage of justice of a grave character if a medical officer witness is examined in the Court of committing Magistrate but he is not examined before the Sessions Judge. Counsel for accused should insist upon his coming before the Sessions Court. (*Young, C.J. and Monroe, J.*) BAHADUR SINGH ARJAN SINGH *v.* EMPEROR. **174 I.C 420=39 Cr.L.J. 410=40 P.L.R. 484=10 R.L. 563=A.I.R. 1938 Lah. 176.**

——**S. 286 (2)**—*Calling of witness—Duty of Public Prosecutor.*

If the Public Prosecutor is of opinion that a witness who was examined on behalf of the prosecution in the committal proceedings is a false witness, or is likely to give false evidence if put into the witness box, he is not bound to call that witness or to tender him for cross-examination. All that he is bound to do is to have the witness present at the trial so as to give the Court or the counsel for the defence, as the case may be, an opportunity of examining him as a witness for the defence. When such a witness is examined as a witness for the defence, then the prosecution

CR. P. CODE (1898), S. 286.

has an undoubted right to cross-examine him. Similarly, it is not the duty of the prosecution to call witnesses who are not in a position to give material information in connection with the offence which has given rise to the prosecution, or to tender such witness for cross-examination by the defence. (*Mya Bu and Baguley, JJ.*) NGA AUNG GYI *v.* EMPEROR. **14 Rang. 45.**

——**S. 286 (2)**—*Calling of witnesses—Witness examined in committal Court—Duty of Public Prosecutor—Judge if can only advise or also direct.*

Where a witness had been examined as a witness in the committal Court, it it not the duty of the Public Prosecutor to call him unless it is thought that he can give material information in connexion with the offence charged; nor is it his duty to tender him for cross- examination. If a Judge advises the Public Prosecutor as to how the latter should exercise his discretion no exception can be taken to it; but if the Judge goes further and instructs the Public Prosecutor not to call the witness, this is going too far. (*Roberts, C.J. and Dnkley, J.*) BRAHMAYA *v.* KING. **179 I.C. 783=11 R.R. 347=40 Cr.L.J. 265=A.I.R. 1938 Rang. 442.**

——**S. 286 (2)**—*False witness—Right of Public Prosecutor to rely on.*

Per *Baguley, J.*—It is the duty of the Public Prosecutor to conduct the case fairly. He is entitled to use every fair means to support his case, but not unfair means, and he is not entitled to rely on a witness who does support him if he thinks that the witness is not telling the truth. (*Mya Bu and Baguley, JJ.*) NGA AUNG GYI *v.* EMPEROR. **14 Rang. 45.**

——**S. 286 (2)**—*Witnesses not produced in committing Court—Right of prosecution to examine.*

The prosecution is at liberty to examine witnesses in the Sessions Court which it has not produced in the Court of the committing magistrate, but only those witnesses so examined in the committing Magistrate's Court can be bound down to attend in the Sessions Court. The prosecution in the Sessions Court if the witnesses are not examined in the Court of the committing Magistrate has to depend upon such witnesses, being willing to give evidence without being bound down to appear, or upon being able to persuade the Court under S. 540, to summon such a witness. (*Yong, C.J. Addison and Monroe, JJ.*) MUSSAMMAT NIAMAT *v.* EMPEROR. **17 Lah. 176=162 I.C. 976=37 Cr.L.J. 742=8 R.L. 985=38 P.L. R. 421=1936 Cr.C.568=A.I.R. 1936 Lah. 533 (F.B.).**

——**S. 288**—*Admission of approver's statement in committing Court—Different statement in Court of Session—Powers of Sessions Judge—Reliance on earlier statement.*

It is competent to a Sessions Judge to admit in evidence the statement made by the approver in the Court of the committing Magistrate and to treat it as evidence. It is also open to him under the provisions of law to hold that the statement made by the approver before the Magistrate was a correct statement and that it should be relied upon in spite of the different statements introduced by him in the Court of Session. (*Rachhpal Singh, J.*) BHOLA NATH *v.* EMPEROR. **I.L.R. 1939 All. 736=184 I.C. 191=40 Cr.L.J. 856=12 R.A. 189=1939 A.Cr.C. 98=1939 A.L.J. 785=1939 A.W.R. (H.C.) 464=A.I.R. 1939 All. 567.**

CR. P. CODE (1898), S. 288.

——**S. 288**—*Applicability — Conditions—Discretion and duty of Court.*

S. 288 is not a section to be lightly used. This section is not to be used as a matter of course but in the discretion of the Judge, and the fact that the whole statement is to be brought on the record and used as substantive evidence suggests that the proper occasion to use it is when the Judge is satisfied that the statement made before him is substantially false and the statement made before the committing Magistrate is substantially true. The existence of minor discrepancies between statements made in committing Magistrate's Court and the Sessions Court is not sufficient to justify the bringing bodily on to the record of the statement of a witness under S. 288, Cr. P. Code. (*Davis, J.C. and Lobo, A.J.C.*) MANGHAN KHAN *v.* EMPEROR. **30 S.L.R. 238=167 I.C. 943=9 R.S. 213=38 Cr.L.J. 487=A.I.R. 1937 Sind 61.**

——**S. 288**—*Applicability and scope—Statements made in committing magistrate's Court—When to be admitted—Discrepancy between former statements and statement in sessions Court—If justifies wholesale admission of former.*

S. 288, Cr. P. Code, is not to be used lightly or as a matter of course. The judge has to use it with discretion. The proper occasion to use it is when the Judge is satisfied that the statement made before him is substantially false and the statement made before the committing Magistrate is substantially true. The existence of minor discrepancies between the statement made in the committing Magistrate's Court and that in the sessions Court does not justify the Judge in bringing in and admitting bodily on the record the statement of a witness made in the committing magistrate's Court under S. 288. (*Davis, J.C. and Lobo, A.J.C.*) MANGHAN KHAN *v.* EMPEROR. **30 S.L.R. 238=167 I.C. 943=9 R.S. 213=38 Cr.L.J. 487=A.I.R. 1937 Sind 61.**

——**S. 288**—*Construction—Evidence given by witness in committing Magistrate's Court—Use of in preference to evidence in Sessions Court—If justified.*

Evidence given by a witness before the committing Magistrate and omitted in the Sessions Court under S. 288, Cr. P. Code, is to be treated as evidence in the case for all purposes. The words "subject to the provisions of the Indian Evidence Act" in S. 288, Cr. P. Code, cannot be read as limiting the purpose for which it may be used. The evidence before the committing Magistrate may therefore be used to prove a fact which the witness denies at the sessions trial and may be preferred to his evidence in the Sessions Court, particularly when there is corroboration. (*Rowland and Chatterjee, JJ.*) NEBETI MANDAL *v.* EMPEROR. **19 Pat. 369=1940 P.W.N. 73=A.I.R. 1940 Pat. 289.**

——**S. 288**—*Deposition taken befort committing Magistrate—Use of.*

The deposition taken before the committing Magistrate, when admitted under S. 288, Cr. P. Code, could be used as evidence in the case for all purposes, and not merely for the purpose of

CR. P. CODE (1898), S. 288.

cross-examination. The words "subject to the provisions of the Indian Evidence Act" cannot be read so as to limit the purposes for which it may be used. (*Lord Thankerton.*) FAKIRA *v.* EMPEROR. **54 I.A. 148=I.L.R. (1937) Bom. 711=167 I.C. 790=39 P.L.R. 334=1937 O.L.R. 216=41 C.W.N. 741=1937 M.W.N. 546=9 R.P.C. 231=1937 A.Cr.C. 74=3 B.R. 426=38Cr.L.J. 498=1937 O.W.N. 412=1937 A.L.R. 328=46 L.W. 134=39 Bom.L.R. 966=1937 A.W.R. 1128=1937 M.Cr.C. 376=1937 P.W.N. 441=1937 A.L.J. 1055=A.I.R. 1937 P.C. 119=(1937) 2 M.L.J. 323 (P.C.)**

———**S. 288**—*Evidence given by witness before committing Magistrate—Use of as substantive evidence in Sessions Court—Conditions—Corroboration—Necessity.*

The deposition of a witness given in the Magistrate's Court may be used as substantive evidence in the Sessions Court under S. 288, Cr. P. Code, if the Sessions Judge records his opinion that the witness was speaking the truth before the Magistrate and had resorted to falsehood before him. But it is clear that the evidence of such a witness cannot be relied upon in the absence of corroboration. (*Burn and Stodart, JJ.*) PAPIAH *v.* EMPEROR. **186 I.C. 484=12 R.M. 663=41 Cr.L.J. 323=1939 M.W.N. 1134=50 L.W. 742=A.I.R. 1940 Mad. 136=(1940) 2 M.L.J. 35.**

———**S. 288**—*Evidence recorded under—Value of.*

There is nothing in S. 288, Cr. P. Code, itself to show that there need be corroboration of evidence so recorded. Evidence recorded in this manner in the Sessions Court is precisely the same as any other evidence. It has, like other evidence, to be examined with care. It is to be considered together with all the other surrounding circumstances. The Judge or Jury, as the case may be, must make up their minds whether the evidence is to be believed or not, and if it is believed, what value has to be placed upon it. No general law can, therefore, be laid down as to this. Evidence must be judged—as all evidence must be—according to the facts of each particular case. It is clear that there is no difference in law between evidence of this sort and any other evidence. 51 P.R. 1887 (Cr.), Foll. (*Young, C.J. and Monroe, J.*) NARINJAN SINGH *v.* EMPEROR. **17 Lah. 419=162 I.C. 379=37 Cr.L.J. 567=8 R.L. 890=38 P.L.R. 820=1936 Cr.C. 298=A.I.R. 1936 Lah. 357.**

———**S. 288**—*Retracted statements—If can be basis of conviction.*

No conviction can be based on the statements of the prosecution witnesses if they without any exception resile from their statements made before the Committing Magistrate, and there is no other independent evidence, direct or circumstantial, on the record. (*Addison, Ag. C. J. and Din Mohammad, J.*) FAZAL *v.* EMPEROR. **41 P.L.R. 862.**

———**S. 288**—*Statement of witnesses at trial contradicted by statements made before committing Magistrate—Accused, if can be convicted.*

Where every one of the witnesses has been demonstrated at the trial to have contradicted the statement that he made before the committing Magistrate, it would not be safe to convict the accused. (*Young, C.J. and Monroe, J.*) HARNAM SINGH *v.* EMPEROR. **169 I.C. 434=38 Cr.**

CR. P. CODE (1898), S. 294.

L.J. 765 (4)=10 R.L. 13=39 P.L.R. 555=A.I.R. 1937 Lah. 597.

———**S. 288**—*Transfer of evidence in the committing Court to the Sessions Court—Value to be attached—Corroboration—Necessity.*

Where under the provisions of S. 288, Cr. P. Code, the evidence of the prosecution witnesses taken in committing Court is transferred to the Sessions Court, it is on the same footing with all other evidence in the case for all purposes and their 'corroboration otherwise' is not necessary. (*Gruer and Puranik, JJ.*) PARAMANAND *v.* EMPEROR. **1940 N.L.J. 459=A.I.R. 1940 Nag. 340.**

———**Ss. 288 and 347**—Commitment to Sessions in warrant case—Statements recorded prior to commitment—If can be treated as substantive evidence. *See* CR. P. CODE, SS. 347 AND 288. **I.L.R. (1940) Lah. 151.**

———**S. 289 (2)**—*Judge's direction—Jury, if can return verdict contrary to.*

The use of the expression 'direct' in S. 289 (2), Cr. P. Code, clearly indicates that the intention of the Legislature was that the jury was bound to accept the opinion of the Judge, whether they agreed with that view or not. The direction of a Judge that there is no evidence that the accused committed an offence is binding on the jury and must be followed by them, and where the Judge in such a case directs the jury to return a verdict of 'not guilty,' but the jury returns a verdict of 'guilty,' such a verdict cannot be accepted. (*Ismail and Mulla, JJ.*) EMPEROR *v.* QUDRAT. **I.L.R. 1939 All. 871=185 I.C. 271=12 R.A. 310=41 Cr.L.J. 142=1939 A.W.R. (H.C.) 693=1939 A.Cr.C. 161=1939 A.L.J. 980=A.I.R. 1939 All. 708.**

———**S. 290**—*Right of accused to argue—Power of Court to limit or curtail—Accused's case not adequately argued—If ground for ordering new trial in appeal—Considerations.*

It is plain that any arbitrary and undue curtailment by the Court of the parties' right of argument is to be deprecated. Although, for the proper administration of justice, the parties should be allowed a full and unrestricted right of addressing the jury, yet it cannot be overlooked that the summing up of the case by the Judge in his charge to the jury plays a very important part in a jury trial. If the Judge has properly charged the jury, the mere fact that the case has not been adequately argued on behalf of the accused cannot by itself be a good ground for ordering a re-trial. Nor should a re-trial be ordered unless it can be shown that matters which counsel would have placed have not been placed before the jury, or that the charge of the Judge is defective or erroneous in material particulars. (*Fazl Ali and Dhavle, JJ.*) K. K. ALI *v.* EMPEROR. **15 Pat. 817=169 I.C. 48=18 Pat.L.T. 535=9 R.P. 526=3 B.R. 514=38 Cr.L.J. 673=1937 P.W.N. 454=A.I.R. 1937 Pat. 263.**

———**Ss. 294 and 309**—*One of assessors basing his opinion on personal knowledge*—De novo *trial—If necessary.*

Where at the end of a criminal trial when the Sessions Judge invited the opinion of the assessors, three of them expressed the view that the accused were not guilty but the fourth said that all the accused were guilty and that he had personal knowledge about the matter.

Held, that the expression of opinion by the assessor did not necessitate a trial *de novo,* and that the proper course for the Judge was simply to ignore the opinion of the assessor if he came to the conclusion it was improperly expressed, or that he had been improperly influenced by extra-judicial consideration. (*Young, C.J. and Blacker, J.*) EMPEROR *v.* PAHLU. **I.L.R. (1939) Lah. 243=184 I.C. 549=12 R.L. 234=41 P.L.R. 731 =41 Cr.L.J. 55=A.I.R. 1939 Lah. 475.**

———S. 297. *See also, Ss. 297* AND *298.*

Burden of proof.
Charge to jury.
Confession.
Duty of judge.
Defence case.
Misdirection.
Nondirection.
Omission.
Proper direction.

Burden of proof.

———S. 297—*Charge to jury—Direction regarding burden of proof.*

Even though the Judge in the course of his charge to the jury explains that the onus is on the Crown to establish guilt, a direction by him as to facts generally, the tendency of which would be to lead the jury to suppose that if anything was unexplained which they thought the accused could explain they not only might but must find him guilty, is open to very serious objection, especially in a very difficult and exceptionally mysterious case in which the area of the unexplained is extensive, and how much the accused himself could explain depends on where he was at material times, and indeed, on the very matter at issue in the trial, namely his guilt or innocence. (*Lord Roche.*) STEPHEN SENEVIRATNE *v.* THE KING. **9 R.P.C. 83=37 Cr.L.J. 963=44 L.W. 661=41 C.W.N. 65=164 I.C. 545=1936 Cr.C. 900 (2) =1936 M.W.N. 1340=1936 P.W.N. 829=39 Bom.L.R. 1=A.I.R. 1936 P.C. 289 (P.C.).**

———S. 297—*Misdirection—Burden of proof of innocence laid on accused—Effect on conviction.*

While the prosecution must prove the guilt of the accused, there is no such burden laid on the accused to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence. Where a Judge, although he has rightly put the burden of proving the guilt of the accused upon the prosecution, has wrongly put the proof of their innocence upon the accused, it amonts to an error of law, and where the error appears to colour the whole of his charge to the jury and finds expression in specific misdirections to the jury, the accused are bound to be prejudiced by the misdirections and the verdict of the jury and conviction should not be allowed to stand. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249 =184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A. I.R. 1939 Sind 209.**

———S. 297—*Misdirection—Judge directing that accused has to prove innocence—Effect of.*

Where a Judge in his charge to the jury says that it is the duty of the accused to prove this fact or that to satisfy the jury on this point or that and leads the jury to believe hat the duty of the prosecution and the duty of the defence so far as the "burden of proof" of their respective cases is concerned, is upon the same footing, so that as the prosecution must prove their case, so the accused must prove theirs, it amounts to a misdirection. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.**

———S. 297—*Misdirection—Remark that accused has failed to explain evidence against him.*

The onus of proof in criminal cases never shifts to the accused and they are under no obligation to prove innocence or adduce evidence in their defence or to make any statement. Where, therefore, the Judge in his charges to the jury, repeatedly draws the jury's attention to the fact that the accused have failed to give any explanation of facts adduced in evidence against them, his remarks amount to misdirection. In any case if the Judge intends to make such remarks, it is his duty first to give the accused an opportunity of explanation by drawing their attention specifically to the evidence upon which the Judge relies. (*Lort Williams and Nasim Ali, JJ.*) BENOYENDRA CHANDRA PANDEY *v.* EMPEROR. **63 Cal. 929=64 C.L.J. 154=161 I.C. 74=37 Cr.L.J. 394=8 R.C. 472=40 C.W.N. 432=1936 Cr.C. 145=A.I.R. 1936 Cal. 73.**

Charge to jury.

———S. 297—*Charge to jury—Charge under S. 366, Penal Code, against two persons—Proper direction.*

Where an allegation is made that two persons have joined in taking or enticing another, the direction to the jury should be that the prosecution must prove that the taking or enticing was by the accused persons or either of them. It is necessary to examine the evidence against each accused jointly charged with the particular offence. In dealing with the intention required under S. 366, it is wrong for the Judge to say that if the jury was not satisfied that the offence under S. 366 was made out against both the accused the alternative is under S. 366-A. If the intention required by S. 366 was not proved, the direction should be that the jury was bound to acquit them or one of them against whom intention had not been made out. (*Bartley and Henderson, JJ.*) KATYAYANI DASI *v.* EMPEROR. **176 I.C. 456=11 R.C. 139=39 Cr.L.J. 751=A.I.R. 1938 Cal. 475.**

———S. 297—*Direction regarding medical evidence where it is conflicting.*

Where the evidence of the medical experts is conflicting and not merely hesitating and doubtful, the judge should not invite the jury on matters involving medical knowledge and skill to come to a conclusion for themselves to which the medical men could not point the way either with certainty or with even an approach to agreement among themselves. (*Lord Roche.*) STEPHEN SENEVIRATNE *v.* THE KING. **9 R.P.C. 83=37 Cr. L.J. 963=44 L.W. 661=41 C.W.N. 65=164 I.C. 545=1936 Cr.C. 900 (2)=1936 M.W.N. 1340= 1936 P.W.N. 829=39 Bom.L.R. 1=A.I.R. 1936 P.C. 289 (P.C.).**

———S. 297—*Duty of Judge—Caution against evidence of bad character.*

Judge should always remember in charging the jury that they should be cautioned against being

influenced against the accused by evidence which shows or tends to show that the accused is of bad character. (*Henderson and Sen, JJ.*) MOSELADDI *v.* EMPEROR. **184 I.C. 206=40 Cr.L.J. 877 =12 R.C. 212 (2)=A.I.R. 1939 Cal. 497.**

———S. 297—*Evidence not properly put before jurors—Conviction, if liable to be set aside.*

In a charge by the Judge to the jury, the evidence in the case was not properly put before the jurors. Various weaknesses in the prosecution evidence were not pointed out and the points in favour of the accused were omitted.

Held, that the charge being defective and misleading the conviction of the accused and the sentence of death passed on him for murder must be set aside. (*Jack and Patterson, JJ.*) SANYASHI GAIN *v.* EMPEROR. **171 I.C. 183=38 Cr.L.J. 1018=10 R.C. 235=A.I.R. 1937 Cal. 269.**

———S. 297—*Explaining law applicable—Duty to record.*

Although it cannot be said that under the law the Judge is bound to record the very words in which he explains the law to the jury, yet it is desirable that there should be a substantial record of what the Judge told them in explaining to them the law applicable to the case. (*Zia-ul-Hasan, J.*) WAJID HUSAIN *v.* EMPEROR. **1936 O.W.N. 201.**

———S. 297—*Failure to point out to jury that deceased had not been cross-examined—Effect.*

Failure of Judge to point out to the jury that the deceased had not been cross-examined cannot have much effect as the jury knew perfectly well that the deceased had not been cross-examined and after they have spent several days in hearing the case, they know what cross-examination is and the purpose it serves. (*Henderson and Sen, JJ.*) MOSELADDI *v.* EMPEROR. **184 I.C. 206=40 Cr.L.J. 877=12 R.C. 212 (2)=A.I.R. 1939 Cal. 497.**

———S. 297—Joinder of charges under Ss. 302 and 201, I. P. Code—Duty of Judge. *See* CR. P. CODE, Ss. 235 AND 236. **41 C.W.N. 414.**

Confession.

———S. 297—*Confession—Voluntary or involuntary nature—If question of law or fact.*

The voluntary or involuntary nature of a confession involves a mixed question of both fact and law. (*Cunliffe and Henderson, JJ.*) BHAKTA BHUSAN PRAMANIK *v.* EMPEROR. **63 Cal. 1089=162 I.C. 636=8 R.C. 618=37 Cr.L.J. 676 =40 C.W.N. 668=63 C.L.J. 142=1936 Cr. C. 380=A.I.R. 1936 Cal. 227.**

———S. 297—*Defective charge—Summarising evidence against each accused and asking jury if he is falsely implicated.*

It is a wrong method of approach in a criminal case for a Judge to summarise the evidence against each of the accused persons and ask the jury at the end of each summary if the accused has been falsely implicated. The judge is thereby very likely to misguide the jury into thinking that unless they are satisfied that the case is false, they should find the accused guilty. The issue before the jury is not whether the accused are being falsely implicated but whether the prosecution has proved beyond reasonable doubt that the accused are guilty. (*Bartley and Sen, JJ.*) MUJJAFFAR SHEIKH *v.* EMPEROR. **44 C.W.N. 840.**

Defence case.

———S. 297—*Direction that its falsity is an element in favour of prosecution.*

Where the Judge in dealing with the defence evidence used at the end of his address to the jury the following words:—"Nevertheless if you find that the defence case is a false one it is certainly an element in favour of the prosecution and against the accused. The falsity of the defence case may have the effect of confirming you in your belief that the prosecution story is true."

Held, that it is of paramount necessity that if such language is employed, it should always be accompanied by the legal caution that the onus of proving explicit guilt is upon the prosecution and prosecution alone, and that the way in which the defence case was dealt with amounted to a most serious misdirection. (*Cunliffe and Henderson, JJ.*) SARAT CHANDRA CHAKRAVARTY *v.* EMPEROR. **170 I.C. 519=38 Cr.L.J. 931= 65 C.L.J. 83=10 R.C. 151=A.I.R. 1937 Cal. 463.**

———S. 297—*Failure to distinguish cases of different accused.*

Where the Judge in his charge to the jury has not sufficiently distinguished the cases of each of the two accused who are being tried and whose cases are widely different, so as to make a difference on the admissibility of evidence, it amounts to a misdirection. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107 =41 Cr.L.J. 28=A.I.R. 1939 Sind 209.**

Duty of Judge.

———S. 297—*Charge to Jury—Duty of judge.*

It is mandatory upon the Judge to charge the jury, and in so doing, to sum up the evidence for the prosecution and the defence and to lay down the law. The object of requiring the judge to sum up the evidence is that he may render such assistance as he can to the jury by pointing out to them the salient evidence for both the prosecution and for the defence. The judge is, therefore, bound to sum up the evidence, whether or not the jury desire him to do so. It is not necessary for him to read his notes of the evidence to the jury, though it may often be desirable to read his notes of important parts of the evidence; nor is it necessary for him to go through the whole of the evidence. (*Beaumont, C. J., Broomfield and Wadia, JJ.*) EMPEROR *v.* PUTTAN HASSAN. **60 Bom. 599=160 I.C. 1060=8 R.B. 293=37 Cr. L. J. 366=38 Bom. L. R. 19 =1936 Cr. C. 164=A.I.R. 1936 Bom. 52 (F.B.).**

———S. 297—Charge under S. 304, Part I read with S. 34, I. P. Code. *See* PENAL CODE, Ss. 304, PART I AND 34. **41 C.W.N. 570.**

———S. 297—*Charge to Jury—Duty of Judge —Charge under S. 304, Part II, read with S. 34, I.P. Code.*

S. 34, I.P. Code, deals with intention, and Part II of S. 304, I.P. Code, deals with knowledge. The result is that in order to establish a charge under S. 304, Part II read with S. 34, I.P. Code, there has to be a peculiar combination of knowledge and intention which would hardly arise in real life. Before a jury can pos-

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sibly convict on such a charge, the matter must be thoroughly explained to them. The evidence bearing upon the intention on the one hand and the knowledge on the other must be carefully put before the jury. Otherwise their verdict cannot be upheld. (*Cunliffe and Henderson, JJ.*) NANDA MALLIK *v.* EMPEROR. **41 C.W.N. 575.**

———S. 297—*Evidence—Case depending on circumstantial evidence—Absence of motive.*

In a case depending on circumstantial evidence the question of motive is of great importance and it is the duty of the Judge to emphasise to the jury the absence of motive which is a circumstance in favour of the accused. (*Bartley and Sen, JJ.*) UPENDRA NATH GHOSH *v.* EMPEROR. 71 **C.L.J. 597.**

———S. 297—*Evidence — Circumstantial evidence—Proper direction.*

In a case in which the guilt of the accused is sought to be established by circumstantial evidence, a theoretical discourse on what is circumstantial evidence couched in language which would be unintelligible to a jury is quite worthless. The Judge should tell the jury that if the circumstances are capable of a reasonable interpretation, consistent with the innocence of the accused, then the accused are entitled to be acquitted even if the circumstances raise a strong suspicion against them. He should summarise the circumstances alleged against the accused and ask the jury to decide whether from those circumstances the only reasonable inference to be drawn is the guilt of the accused and should tell them that if that is not the only reasonable inference, they should acquit the accused. (*Bartley and Sen, JJ.*) MUJJAFAR SHEIKH *v.* EMPEROR. **44 C.W.N. 840.**

———S. 297—*Trial under Ss.* 363, 366 *and* 366-*A—Uncorroborated evidence of prosecutrix.*

In a trial under Ss. 363, 366 and 366-A, I.P. Code, the Judge should point out to the jury the risk of convicting upon the uncorroborated evidence of a prosecutrix. (*Henderson and Khundkar, JJ.*) KALU MIA *v.* EMPEROR. **44 C.W.N. 622.**

———S. 297—*Two factions—Hard swearing on both sides.*

Per *Cunliffe, J.*—Where there is strong enmity on either side on the part of the two factions in a village and there are two diametrically opposed stories supported on oath by two sets of witnesses, the Judge ought to exercise the greatest possible vigilance and the greatest possible care in assisting the jury. If he feels very strongly that the prosecution case is a true one, he ought to, as much as possible, conceal his feelings. But if he feels that there is something extremely suspicious about the prosecution case, he ought to show his hand to the jury. He is not a mere judicial automaton—that is worse than useless—and waste of public time. (*Cunliffe and Henderson, JJ.*) MADAN TILAKDAS *v.* EMPEROR. **169 I.C. 306=9 R.C. 914=38 Cr.L.J. 767=41 C.W.N. 508=A.I.R. 1937 Cal. 266.**

Misdirection.

———S. 297—*Evidence of approver not corroborated in material particulars—Jury not told that such testimony must be corroborated—Conviction —Sustainability.*

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Where in a trial by jury, the evidence of the approver is not corroborated in any material particular bearing upon the implication of the accused in the crime, and the jury is not told that such evidence must be so corroborated, a conviction founded on such uncorroborated testimony cannot be sustained even if the verdict of the jury is unanimous. (*Lakshmana Rao, J.*) KESAVA REDDI, *In re.* **1940 M.W.N. 940=52 L.W. 492 (1)=(1940) 2 M.L.J. 468 (2).**

———Ss. 297 and 298—*Exclusion of relevant evidence of accused—Omission to stress that prosecution witnesses were interested.*

An improper exclusion of relevant evidence attempted to be let in on behalf of the accused and the failure on the part of Judge to lay stress on the fact that all the prosecution witnesses were interested would amount to misdirection. So also failure to put before the jury points which are favourable to the accused is a misdirection which vitiates the trial. (*Pandrang Row, J.*) PATEYYA *v.* EMPEROR. **1940 M.W.N. 97.**

———S. 297—*Judge exhorting to jury that whole city and commercial world is watching their verdict—Propriety of.*

Where a Judge in his charge to the jury exhorts the jury as follows: "The whole of Karachi is watching you. The whole commercial world is watching you," it amounts to introducing into the case extraneous consideration and amounts to a clear direction to the jury to convict. It can mean nothing else and does not leave the jury to come freely to their conclusions. In giving such a direction to the jury, the Judge passes beyond the limits of wise guidance or advice, or that expression of opinion of fact, which the Code of Criminal Procedure allows in the charge of a Judge to jury. (*Davis, J.C., and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.**

———S. 297—*Non-reference to minor matters.*

Where the entire evidence is summarized before the jurors by the Judge, in which all the main features of the case are exhaustively dealt with, non-reference to minor matters of detail does not amount to misdirection or non-direction. (*Guha and Lethbridge, JJ.*) BRINCHIPADA *v.* EMPEROR. **177 I.C. 929=11 R.C. 296=39 Cr.L.J. 964=67 C.L.J. 45=A.I.R. 1938 Cal. 625.**

———S. 297—*Offence of murder—Stab wound penetrating abdominal wall—Judge asking jury to find accused guilty of murder if they found that he inflicted the wound.*

There was absolutely no evidence on the record to show that the accused when he inflicted stab wound had any intention other than the one which must normally be drawn in cases in which one man intentionally stabs aother with sufficient force to penetrate the abdominal walls. The Judge while charging the jury stated: "If you find that accused was there and inflicted this stab wound you ought to find him guilty of murder" and did not raise a case before the jury which was not raised by the accused.

Held, that there was no misdirection in such charge. (*Roberts, C.J. Baguley and Leach, JJ.*) EMPEROR *v.* NGA E PE. **164 I.C. 884=37 Cr.L.J. 1050=9 R.R. 165=1936 Cr.C. 836=A.I.R. 1936 Rang. 421 (F.B.).**

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———**S. 297**—Offence under S. 411, I. P. Code —Omission to tell jury that there should be dishonest receipt or retention of stolen property—Effect. *See* PENAL CODE, S. 411. **71 M.L.J. 536.**

———**S. 297**—*Presumption—Credibility of witness.*

It is a misdirection to tell the jury that a presumption of truth attaches to the statement of a witness unless sufficient reason is shown for disbelieving him. They may disbelieve him for many reasons. (*Henderson and Khundkar, JJ.*) SHAIKH TARKAL *v.* EMPEROR. **43 C.W.N. 695.**

———**S. 297**—*Reception of inadmissible evidence —Introduction of inadmissible statement into record—If amounts to.*

Where when dealing with the second of the two statements made to the Police by the complainant, the Judge pointed out to the jury that it could only be used for the contradiction of the prosecution witness and for no other purpose, and the Judge himself made no reference for the purpose of elucidating the prosecution case to any statement except the first statement, the introduction of the second statement into the record does not amount to a reception of inadmissible evidence. (*Bartley and Rau, JJ.*) SK. IDRIS *v.* EMPEROR. **43 C.W.N. 782.**

———**S. 297**—*Test—Charge to be read as a whole.*

Before one can arrive at any opinion as to whether any particular passage in the summing up amounts to a misdirection or not, one must look at and consider the summing up in its entirety. (*Costello and Nasim Ali, JJ.*) CYRIL BERTRAM PLUCKNETT *v.* EMPEROR. **I.L.R. (1939) 1Cal. 187=184 I.C. 614=12 R.C. 251=43 C.W.N. 133 =41 Cr.L.J. 59=A.I.R. 1939 Cal. 682.**

———**Ss. 297 and 298**—*Omission to state evidence against each accused in respect of particular counts.*

Though the Sessions Judge might ably and fully marshal the evidence as regards each particular count or connected sets of counts, if he does not state to the jury the evidence as against each of the accused in respect of each particular count, that amounts to a serious misdirection. (*Pandrang Row, J.*) PATEYYA *v.* EMPEROR. **1940 M. W.N. 97.**

Non-direction.

———**S. 297**—*Several offences—Girl's testimony —Necessity of corroboration—Failure of Judge to direct Jury.*

In a trial for an offence under S. 366, I.P. Code, the Judge should point out to the jury that they are entitled, if they please to convict the accused upon the uncorroborated testimony of the girl, but that it is dangerous to do so in cases dealing with sexual offences such as rape, abduction and similar cases, etc., and that only in exceptional cases they should convict the accused upon the uncorroborated testimony of the girls. Failure to warn the jury about the danger of convicting the accused on the girl's evidence only amounts to a non-direction, which vitiates the trial. So also where the Judge fails to direct the jury as to whether there is any evidence corroborating the girl's statement of the kind required by law., *i.e.*, evidence independent of her own statements, the trial is vitiated. A.I.R. 1934 Cal. 7, Rel. on. (*Lort Williams and Cunliffe, JJ.*) CHAMUDDIN SARDAR *v.* EMPEROR. **160 I.C. 1028=37 Cr.L.J. 359=8 R.C. 463=1936 Cr. C. 110=A.I.R. 1936 Cal. 18.**

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———**S. 297**—*Caution to jury with regard to accepting uncorroborated evidence of prosecutrix— Omission to deliver.*

When a charge is brought against a man by one of the opposite sex accusing him of having committed a sexual offence, the Judge, in charging the jury, ought never to omit delivering a serious caution to the jury with regard to accepting the uncorroborated evidence of the woman. The Judge should tell the jury that they ought to scrutinize the uncorroborated evidence of a woman or girl with the greatest possible care as it is often dangerous that a man should be convicted on such uncorroborated testimony. At the same time, the Judge may add a rider to the effect that nevertheless if after proper scrutiny and considering the caution delivered by the Judge they are satisfied with the uncorroborated evidence, they may accept it. A Judge would be misdirecting the jury if he does not give the necessary warning as to the evidence of the prosecutrix. (*Cunliffe and Henderson, JJ.*) SIKANDAR MIAN *v.* EMPEROR. **41 C.W.N. 641=I.L.R. (1937) 2 Cal. 345=173 I.C. 881=10 R.C. 594=39 Cr. L.J. 371=A.I.R. 1937 Cal. 321**

———**S. 297**—*Charge of cheating—Omission to explain necessary ingredients.*

In a case where the main charges are of cheating it is the duty of the Judge to explain to the jury the necessary ingredients which the prosecution must prove before the charges can be held established, for the criminal definition of cheating is not exactly what an ordinary layman in the ordinary use of the English language would understand by the term. Where cheating consists of false representations the difference between a promise which is not intended to be kept at the time it is made and the promise which is intended to be kept at the time it is made but is subsequently broken must be explained to the jury, for, in the latter case the offence would not necessarily be one coming under the legal definition of cheating. Failure to explain as aforesaid amounts to misdirection. (*Blacker, J.*) A.M, MATHEWS *v.* EMPEROR. **187 I.C. 456=12 R. L. 492=41 Cr.L.J. 482=A.I.R. 1940 Lah. 87,**

———**S. 297**—*Sexual offences—Evidence of prosecutrix—Omission to give jury special caution.*

The fact that the Judge's charge to the jury did not contain the special caution that when a man is charged with a sexual offence it is dangerous to rely on the uncorroborated evidence of the prosecutrix, is not a ground for setting aside the conviction if the absence of such caution could not have affected the verdict of the jury. (*Guha and Lethbridge, JJ.*) ABDUL GAFUR KOTWAL *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 636=178 I.C. 637=11 R.C. 383=40 Cr.L.J. 101=A.I.R. 1938 Cal. 658.**

———**S. 297**—*Sexual offence—Uncorroborated evidence of woman—Omission to give warning.*

When charges of a sexual criminal character are brought against an accused person in a criminal Court without corroborating evidence, it

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is always necessary for the Judge to warn the jury that whereas after due and careful consideration they are entitled to accept the uncorroborated evidence of the woman, it is really not safe to do so, more especially when the person accused is the subject of dislike or enmity on the part of the woman herself. The want of caution on the part of the Judge vitiates in law to a considerable degree his charge to the jury, however good in other respects. (*Cunliffe and Henderson, JJ.*) SARAT CHANDRA CHAKRAVARTY *v.* EMPEROR. **65 C.L.J. 83=170 I.C. 519=38 Cr.L.J. 931=10 R. C. 151=A.I.R. 1937 Cal. 463.**

———**S. 297**—*Omission to direct as to benefit of doubt.*

The omission on the part of the Judge to give direction to the jury that the accused is entitled to the benefit of a reasonable doubt amounts to non-direction. (*Zia-ul-Hasan, J.*) WAJID HUSAIN *v.* EMPEROR. **1936 O.W.N. 201.**

Omission.

———**S. 297**—*Mandatory character of—Misdirection—Omission to read sections and explain the law—Effect—If vitiates verdict of jury.*

S. 297, Cr. P. Code, is imperative, and under that section it is the clear duty of the Judge to explain what in law are the essential requisites of an offence and what must be proved to constitute that offence. A mere reading of the sections to the jury does not amount to an explanation of the law. Nor can the Judge rely on the fact that advocates on both sides had explained the law to the jury. The Judge must lay down the law by which the jury is to be guided. Where the Judge does not do this, it is an important non-direction to the jury or an omission to direct them on an important point and amounts to misdirection. But S. 297 must be read with S. 537, Cr. P. Code, and if the omission to read and explain the relevant sections has not been such as to occasion a failure of justice, the High Court will not interfere with the verdict of the jury on that ground alone. (*Wadia and Kania, JJ.*) JHINA SOMA *v.* EMPEROR. **I.L.R. (1939) Bom. 648=185 I.C. 382=12 R.B. 248=41 Cr.L.J. 176=41 Bom.L.R. 965=A.I.R. 1939 Bom. 457.**

———**S. 297**—*Misdirection—Charges of dacoity and of conspiracy to commit dacoity against several accused—Omission by Judge to deal with evidence against each accused on charge of dacoity.*

In a case where there is a general charge of conspiracy against a number of accused to commit dacoity and, at the same time, a charge against the accused for having committed a dacoity, it is most necessary that the Judge in summing up to the jury should distingish between what is evidence against each of the accused on the charge of conspiracy and what is evidence against each of the accused on the charge of having committed the dacoity. That is more than ever necessary where the main evidence against the accused or some of them is that of an approver. The failure to do so would amount to misdirection or non-direction. (*Derbyshire, C.J. and Panckridge, J.*) REZAK FAKIR *v.* EMPEROR. **42 C.W.N. 870.**

———**S. 297**—*Charge of kidnapping and abduction—Jury finding accused not guilty of kidnapping and finding girl to be over* 16 *years—Story of prosecution that girl was taken away for marriage without her consent—Charge to jury not referring to such intention—Effect.*

Accused was tried for offences of kidnapping and abduction. The jury found the accused 'not guilty' of the offence of kidnapping and thus found that the girl was not below 16 years of age. The story of the prosecution was that the girl was taken away by the accused for marriage. This fact was also admitted by accused. Of the two intentions specified in S. 366, Penal Code, for the offence of abduction, the question of taking the girl away for illicit intercourse did not arise in face of these facts. The question therefore was whether the girl was taken away by the accused for marriage without her consent. Not a word could be found in the charge to the jury by the Court to find out if there was such intention on the part of the accused. The accused was found guilty of the offence of abduction.

Held, that the non-direction to the jury on one of such vital ingredients of S. 366, Penal Code, amounted to a serious misdirection and occasioned miscarriage of justice. (*Mohamad Noor and Rowland, JJ.*) RAMESHWAR SINGH *v.* EMPEROR. **16 Pat. 413=1937 P.W.N. 596=170 I.C. 464=3 B.R. 734=38 Cr.L.J. 919=10 R.P. 128=18 Pat. L.T. 607=A.I.R. 1937 Pat. 440.**

———**S. 297**—*Charge of theft—Only evidence, that of a receiver of stolen property—Failure to point out the unsafety of relying on such evidence.*

Where in a case of theft, the only evidence connecting the accused with the offence was that of a receiver of stolen property, the Sessions Judge in his charge to the Jury referred to the evidence and also to the fact that the witness was in all probability a receiver of stolen property. It was held that the failure to point out with sufficient force, the unsafety of relying on such evidence, which is very little different from that of an accomplice evidence, amounted to a misdirection. (*Horwill, J.*) KALLI KORAVAN, *In re.* **1938 M. W.N. 96=47 L.W. 158=175 I.C. 416=10 R.M. 774=1938 M.Cr.C. 78=39 Cr.L.J. 580=A.I.R. 1938 Mad. 464=(1938) 1 M.L.J. 234.**

———**S. 297**—*Omission to caution jury against evidence admitted under S.* 33, *Evidence Act.*

The omission by the Judge to caution the jury against the evidence of a witness brought on record of the Sessions trial under S. 33 of the Evidence Act that the witness was not cross-examined before the committing Magistrate, does not amount to misdirection, when the defence had an opportunity of cross-examining that witness in the committing Magistrate's Court but they did not avail themselves of it. (*Henderson and Khundkar, JJ.*) NITAI KOLEY *v.* EMPEROR. **I.L. R. (1939) 1 Cal. 337.**

———**S. 297**—*Offence of dacoity resting on identification—Omission to point out shortcomings in evidence.*

In a case of dacoity where the guilt of the accused depends entirely upon identification, it is essential for the trial Judge to point out to the jurors in his address the shortcomings of the prosecution witnesses, as also the evidence upon which the prosecution relies. Where the Judge not only fails to do so but wrongly asserts that the witnesses who identified the accused committed no mistakes at the time of their identification there is a serious misdirection. (*Nanavutty, J.*)

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BEHARI *v.* EMPEROR. **161 I.C. 408=8 R.O. 326 =1936 O.L.R. 174=1936 O.W.N. 349=A.I. R. 1936 Oudh 223.**

———S. 297—*Omission to warn jury against irrelevant evidence—Reference to inadmissible documents.*

Where the Judge in his charge to jury, omits to remind the jury that the statement attributed to individual accused is not evidence against the other accused in the event of the jury finding that individual guilty and the Judge repeatedly states the case for prosecution and the arguments in support of it without clearly pointing to the jury, those facts of it which are not supported by evidence or which depend merely upon glosses upon evidence; and states that one of the accused is suffering from venereal disease, when there is no evidence to that effect; and while referring to certain anonymous petitions tells the jury that evidence given on oath is of much greater value than statements made by unknown persons in the anonymous petition when there is nothing to show that the statements were made, instead of telling them that the evidence which was improperly admitted in evidence, is of no value and directing them to reject it as irrelevant, and where he refers to the contents of documents which are inadmissible and irrelevant, all these amount to misdirections and non-directions. (*Lort Williams and Nasim Ali, JJ.*) BENOYENDRA CHANDRA PANDEY *v.* EMPEROR. **63 Cal. 929=64 C.L.J. 154=161 I.C. 74=37 Cr.L.J. 394=8 R.C. 472=40 C.W. N. 432=1936 Cr.C. 145=A.I.R. 1936 Cal. 73.**

Proper direction.

———S. 297—*Testimony of approver—Judge cautioning jury of danger of basing conviction upon—Absence of corroboration—Conviction—If bad.*

Where a Sessions Judge expressly warns the jury and cautions them of the danger of convicting the accused on the uncorroborated testimony of an accomplice, it cannot be said that there was any error in the Judge's charge to the jury, and the conviction of the accused cannot be set aside for the simple reason that there is no independent corroboration of the accomplice's tsstimony. (*Grille, J.C. and Niyogi, A.J.C..*) JAMES DOWDALL *v.* EMPEROR. **31 N.L.R. (Supp.) 215=162 I.C. 430=8 R.N. 262=37 Cr.L.J. 607= 1936 Cr.C. 605=A.I.R. 1936 Nag. 103.**

———Ss. 297 and 298—*Charge to Jury—Confession—Judge directing jury as to admissibility—If vitiates trial.*

Where a Judge directs the jury to decide whether certain confessions are admissible in evidence or not, he commits an error in law. But unless there is consequent failure of justice, the trial is not vitiated. (*Cunliffe and Henderson, JJ.*) BHAKTA BHUSAN PRAMANIK *v.* EMPEROR. **63 Cal. 1089=162 I.C. 636=8 R.C. 618=37 Cr. L.J. 676=63 C.L.J. 142=40 C.W.N. 668= 1936 Cr.C. 380=A.I.R. 1936 Cal. 227.**

———Ss. 297 and 298—*Charge to jury—Duty of Judge—Charge to jury in form of judgment and giving conclusions and opinions as definite facts—Essentials of offence charged not explained—Strong bias against defence and in favour of prosecution—Disputed evidence not submitted to jury in detail—Effect.*

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In a trial by jury the Judge summed up the evidence to the jury in a form which was nothing less than a judgment, and throughout gave his conclusions and opinions as definite facts. There was no attempt to explain any law to the jury and to explain what constituted the offence charged. At the end of the charge the Judge did only lip-service to the duties, which had been enjoined on him. The whole charge was vitiated by a strong bias against the defence evidence and strong bias in favour of the prosecution evidence. The disputed evidence was not submitted to the jury in detail, nor was it left to it to consider whether they should believe the defence evidence or not. The whole evidence was very dubious and full of discrepancies:

Held, that the charge was very defective and was delivered in a manner in which no charge to a jury should ever be delivered. (*Grille and Gruer, JJ.*) HAJI FATTEH MOHAMMAD *v.* EMPEROR. **I.L.R. 1937 Nag. 123=168 I.C. 741 =9 R.N. 264=38 Cr.L.J. 589=A.I.R. 1937 Nag. 110.**

———Ss. 297 and 298—*Charge to jury—Duty of Judge—Necessity to deal separately with evidence against each acuused.*

A Judge in his charge to the jury should deal with the evidence against each of the accused person separately. The omission to do so is a very serious defect. (*Pandrang Row, J.*) NACHAPPA GOUNDAN *v.* EMPEROR. **1937 M.W.N. 737 (2).**

———Ss. 297 and 298—*Duty of Judge—Charge under Ss.* 147, 148 *and* 302, *Indian Penal Code—Common intention specified in charge as being to assault and not to kill—Omission of Judge to frame alternative charges under S.* 304, 326 *or* 325 *or to explain Ss.* 34 *and* 149, *Indian Penal Code—Omission to place evidence of each accused separately—Misdirection—Effect on trial.*

In a trial on a charge under Ss. 147 and 148 and S. 302, I. P. Code, where the common object specified in the charges is not to kill, but merely to assault, and yet the accused persons are charged with the substantive offence of murder under S. 302, I. P. Code, it is the duty of the Judge to frame alternative charges under S. 304, 326 or 325, I. P. Code, and to explain to the jury that it is open to them to convict for one or other of these lesser offences. He should tell the jury clearly that even if they believed that the accused had jointly killed the deceased still it would be open to them to convict not under S. 302, but merely under S. 304 or even under S. 326 or S. 325, if they considered that the necessary intention or knowledge to constitute the offence of murder, has not been established on the part of the accused. Further, when the case is that death was due to the effect of all the injuries inflicted by all the accused combined, and there is no proof or allegation that any individual accused inflicted any fatal injury, a conviction under S. 302, I. P. Code, can be had by the application of S. 34 or S. 149, I. P. Code. The judge in such a case should explain to the jury these two sections and point out the convictions to be proved before the sections could be applied, *viz.*, that it must be shown that the offence was committed by the accused in furtherance of the common intention of

CR. P. CODE (1898), S. 297.

all, more especially when there is nothing at all in the charge from which the jury can appreciate this vital fact, when the judge fails or omits to do this, or to consider and place before the jury the evidence against each individual accused separately before the jury, it must be held that there are serious misdirections and non-directions which have possibly prejudiced the accused, and the verdict cannot be upheld. The jury might be misled into thinking that it is their duty to convict all the accused under S. 302, or to acquit all. Such misdirection and non-direction vitiates the trial and conviction. (*Fazl Ali and Meredith, JJ.*) JUDAGI GOPE *v.* EMPEROR. **189 I.C. 426=6 B.R. 805=41 Cr.L.J. 738=13 R. P. 121=1940 P. W. N. 379=21 Pat.L.T. 349=A.I.R. 1940 Pat. 417.**

———**Ss. 297 and 298**—Duty of Judge—Charge under S. 411—Interval between commission of offence and finding of property with accused—Duty of Judge to direct jury to consider interval—Presumption under S. 114, Ill. (*a*), Evidence Act—When justified. *See* EVIDENCE ACT, S. 114, *Ill.* (*A*). **1938 M.W.N. 215.**

———**Ss. 297 and 298**—*Duty of Judge—Differences between statements of witnesses in committing Court and statements in Sessions Court—Direction to jury to treat them lightly on ground that committing Magistrate is only concerned with inquiry and not with making detailed record of evidence—Propriety.*

A committing Magistrate is not holding a trial but only an inquiry leading up to a trial, but the fact remains that he is recording evidence as much as a Sessions Judge himself, and it is his duty to record the evidence fully in order that the accused may have ample notice of the matter with which he is charged and of the evidence by which the prosecutor seeks to prove the case. It is not therefore proper for the Sessions Judge in his charge to the jury to invite them to treat very lightly any differences between the statements before the Sessions Court and the statements before the Court of the committing Magistrate on the ground that committing Magistrates are only concerned with making inquiries leading up to the trial before the Sessions Court and are not concerned with making a detailed record of the statements of the witnesses. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR. **178 I.C. 934=11 R.P. 312=5 B.R. 185=40 Cr.L.J. 147=20 P.L.T. 51=1938 P.W.N. 727=A.I.R. 1938 Pat. 579.**

———**Ss. 297 and 298**—*Duty of Judge—Omission of Judge in charge to deal separately with each accused and to place evidence affecting each accused in proper manner—Effect—Verdict—Interference on appeal.*

It is not in every case in which the charge of the Sessions Judge to the jury is open to criticism in matters of detail that the High Court would interfere in appeal. Language may be used too broadly or not happy in its expression. The essential point for consideration is whether the case against the accused has fairly been brought to their notice which may appropriately guide them in deciding whether the accused is guilty or innocent. When there are several accused, it is in the first degree essential both that the jury should be asked for a separate finding regarding each accused and that the particulars of the evidence affecting each accused should be placed in a manner which may enable the jury to distinguish the cases of accused as against whom the evidence is not of the same degree of cogency. Where the Judge omits to do this, the charge to the jury cannot be said to meet the necessary requirements of justice, and the High Court will interfere in appeal and set aside the verdict. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR. **178 I.C. 934=11 R.P. 312=5 B.R. 185=40 Cr.L.J. 147=20 P.L.T. 51=1938 P.W.N. 727=A.I.R. 1938 Pat. 579.**

———**Ss. 297 and 298**—*Duty of Judge—Statement to police—Omission of names of accused in—Effect of—Judge's duty in charging jury—Judge merely citing observations from old decision—Propriety of.*

The giving of advice to the jury to treat all kinds of statements to the police as of one level of unreliability should be deprecated. If it is the prosecution case that the police-officer's notes in any particular instance are unreliable, that should be brought out in the course of the evidence of the particular officer or it may appear on the face of the facts themselves. What the witnesses according to the notes have actually said should be brought on record. Only by reference to them can it be understood what is really meant by the answers elicited from the witnesses or the police-officer in cross-examination. Whether a discrepancy or omission is effective to contradict a witness in any particular case depends on the nature of the fact in question as well as the fullness with which the statement has been recorded. An omission may amount to contradiction if the matter omitted is one which the witness would be expected to mention and the police-officer to make a note in the ordinary course. Every detail is not expected to be noted, but the names of the accused persons are among the most important of such matter which any police-officer who knows his work would not fail to take down from the lips of the witness. The jury must be properly directed in dealing with an omission of this kind. Their attention should be drawn to the distinction between important and immaterial omissions and they must be invited to apply it. The Judge's duty is not properly discharged by merely citing certain observations about the unreliability of statements recorded by police contained in an old decision given very many years ago with reference to methods of investigation then prevailing in another province. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR. **178 I.C. 934=11 R.P. 312=5 B.R. 185=40 Cr.L.J. 147=20 P. L. T. 51=1938 P. W. N. 727=A. I. R. 1938 Pat. 579.**

———**Ss. 297 and 298**—Duty of Judge—Charge under S. 366-A—Age of girl—Proof of girl being below eight—Necessity—Duty of Judge to emphasise in charge to jury. *See* PENAL CODE, S. 366-A. **1939 P.W.N. 598.**

———**Ss. 297 and 298**—*Non-direction—Charge of sexual offence—Duty of Judge to warn jury of danger of conviction on uncorroborated evidence of girl—Failure to draw attention of jury to improbability of abduction in case of immoral girl—Effect.*

CR. P. CODE (1898), S. 297.

In the class of cases, commonly referred as sexual cases, *e.g.*, charges falling under Ss. 366 366-A, 376, etc., it is essential that the Judge in his charge to the jury specially warn the jury of the danger of convicting upon the uncorroborated testimony of the woman or girl concerned. It is true that there is no rule requiring corroboration, but it is extremely dangerous in this class of cases to act solely on the woman's evidence. When the evidence of the woman concerned is a mass of contradictions such a case is eminently one in which the jury should be warned most emphatically. When the Judge gives no warning of any kind to the jury and does not deal with the question of corroboration, and when further the Judge does not tell the jury that if the girl was immoral or of loose character, it would make the story of abduction and deceit less probable, such failure amounts to non-direction which vitiates the trial. When the Judge further tells the jury that her general moral character was of no consequence, that is likely to mislead the jury, especially when there are statements in the charge about the girl being of loose morals. (*Harries, C.J. and Meredith, J.*) SACHINDER RAI *v.* EMPEROR. 18 Pat. 698=184 I.C. 354=6 B.R. 41=12 R.P. 238=(1939) P.W.N. 598=41 Cr.L.J. 1=20 P.L.T. 898=A.I.R. 1939 Pat. 536.

———Ss. 297 and 298—*Summing up—Object of—Propriety of the charge to jury—Test.*

The object of the summing up under S. 297, Cr. P. Code, is to place before the jury the facts and circumstances of the case both for and against the prosecution so as to help in arriving at a right decision on the points which arise for their consideration. It is unnecessary to refer to every bit of evidence on both sides and failure to refer to all the suggestions made by the defence would not amount to non-direction. S. 298 (2) permits the Judge to indicate his estimate of the evidence. The principal test to be applied to a charge is whether or not the Judge directed the attention of the jury to the essential points and the charge read as a whole is sound. (*Niyogi, J.*) BAPU RAO *v.* EMPEROR. **190 I.C. 283=1940 N.L.J. 264 =A.I.R. 1940 Nag. 221.**

———S. 298—*Duty of Judge under—Absence of evidence to go before jury—Duty to direct verdict of not guilty.*

Under S. 298, Cr. P. Code, it is the duty of the Judge to decide all questions of law arising in the course of the trial. In every case there is a preliminary question, which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is no evidence to go before the jury on which they can be properly directed to give a verdict, it is the duty of the Judge to take action under S. 298 and to ask the jury to return a verdict of not guilty. It is enough that there is some evidence. A scintilla of evidence clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude the fact to be established. It is the duty of a Judge to make out a case for the accused on which he thinks that a verdict of not guilty may be properly returned, though the case has not been suggested by or on behalf of the accused. (*Venkataramana, Rao, J.*) EMPEROR *v.*

CR. P. CODE (1898), S. 298.

LABBAI KUTTI. 180 I.C. 605=11 R.M. 732=40 Cr.L.J. 437=1938 M.Cr.C. 212=1938 M.W.N. 582=A.I.R. 1939 Mad. 190.

———S. 298—*Duty of Judge—Confession—Admissibility and voluntariness of—Function of Judge and jury—Jury directed not to consider voluntariness or otherwise of confession admitted by Judge—If misdirection.*

It is the function of the Judge to decide, whether there is *prima facie* evidence for admitting the confession. That is a question of law to be decided by him. When the confession has been admitted by the Judge it is the function of the jury to consider its credibility and weight, and in so doing the jury are at liberty to consider all the circumstances of the case, including those already proved before the Judge and to give the evidence such credibility as they think it deserves. The jury may, within their province, determine that the confession is untrue, or is not entitled to weight, as being not voluntarily made. To tell the jury that it was no part of their duty to consider whether the confession was made voluntarily or not is an error of law and a misdirection. (*Derbyshire, C.J. Costello and M. C. Ghose, JJ.*) BADAN ALI *v.* EMPEROR. **63 Cal. 833=165 I.C. 127=37 Cr.L.J. 1084=9 R.C. 343=40 C. W.N. 794=66 C.L.J. 406.**

———S. 298—*Duty of Judge—Omission to state evidence in favour of accused—Omission to express his opinion on evidence—Propriety—Charge of theft of ordinary articles—Omission to stress on unidentifiable nature of properties—Misdirection.*

It is not at all proper for a Judge to make any omission in stating the evidence in favour of the accused in his charge to the jury. The charge should not be a colourless charge. In cases where it is necessary in the interests of justice and in order to assist the jury in arriving at a just and true verdict, the Judge must express his opinion on the evidence, making it at the same time very clear that the jury is not bound by his opinion. He should not say anything which is not supported by the record which goes against the prisoner, and he should not omit to say anything which is in the record which goes in his favour. Disregard of this duty is a misdirection which seriously prejudices the accused. Again in the case articles which are alleged to be stolen, and which are of the ordinary kind found in many houses, and hence not unidentifiable by ordinary persons the Judge must lay sufficient stress on the comparatively unidentifiable nature of the properties and he should also warn the jury of the danger of accepting the evidence of identification. If he omits to do this that is a clear misdirection, and makes the charge to the jury one not in accordance with law. (*Pandrang Row, J.*) SUBBA VALAYAN *v.* EMPEROR. **1937 M.W.N. 552.**

———S. 298—*Duty of Judge—Omissions in the evidence of witnesses before Police or committing Magistrate—Duty of Judge to draw attention of jury or to make observations upon—Principles.*

If the defence in a sessions trial relies upon certain omissions made by witnesses either before the police or before the Magistrate, the best course for the Sessions Judge is to draw the attention of the jury to those alleged omissions, and then if, in the opinion of the Judge, the omissions are of

no consequence, it would be quite open to him to place them before the jury and then leave them to consider whether those omissions are of such consequence as to discredit the testimony of the witnesses in the Sessions Court. General observations devoid of facts are likely at some occasions to create an impression in the mind of the jury that every omission in every case is of no consequence whatsoever. (*Noor and Varma, JJ.*) BULAK GOPE *v.* EMPEROR. **178 I.C. 354=5 B.R. 88=1938 P.W.N. 696=11 R.P. 248=40 Cr.L.J. 34=A.I.R. 1938 Pat. 575.**

———S. 298 (2)—*Expression of opinion on facts —Duty of Judge.*

Though S. 298 (2), Cr. P. Code, authorizes the Judge to express to the jury his opinion upon any question of fact in the course of summing up, if he thinks proper, it is an established rule that the Judge should at the same time give the Jury to understand that they are not bound by his opinion and should form an independent opinion of their own on questions of fact. (*Zia-ul-Hasan, J.*) WAJID HUSAIN *v.* EMPEROR. **1936 O.W.N. 201.**

———S. 298 (2)—*Expression of opinion on facts —Judge's right.*

It is the duty of the Judge to help the jury to come to a right conclusion and for this purpose he is entitled to express his opinion on the evidence. Where he qualifies his observations with the remarks that they the members of the jury, are the sole Judge of the facts and are not bound by any opinion on the facts expressed by him, it cannot be said that there is any misdirection or that the summing up is not fair. (*Srivastava-J.*) SATDEO *v.* EMPEROR. **11 Luck. 687=159 I.C. 919=37 Cr.L.J. 182=8 R.O. 225=1936 O.W.N. 28=1936 O.L.R. 18=1936 Cr.C. 282=A.I.R. 1936 Oudh 164.**

———S. 298—*Misdirection—Judge expressing his opinion strongly.*

The Judge not only may but should let his opinion on the evidence appear, provided that he leaves the decision fairly to the jury and does not take it out of their hands. There is no misdirection if the Judge leaves every point of any importance to the jury, although his charge is for a conviction and his presentation of the defence evidence is at times coloured by the strong opinion he has formed. (*Guha and Lethbridge, JJ.*) ABDUL GAFAR KOTWAL *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 636=178 I.C. 637=11 R.C. 383=40 Cr.L.J. 101=A.I.R. 1938 Cal. 658.**

———S. 298—*Offence of abduction—Uncorroborated evidence of abducted woman—Mere direction that her evidence should be received with caution—If sufficient.*

In a case of abduction, the Judge told the jury that the evidence of the abducted woman should be received with caution though not necessarily with distrust. This is all the direction he gave to the jury upon the important question whether the woman's evidence ought to be accepted without corroboration, whether there was corroboration what kind of corroboration it was and whether it was, as is necessary, corroboration with regard to the offence itself and which implicates the accused.

Held, that the conviction could not be allowed to stand. (*Derbyshire, C.J. and Lort Williams, J.*) TASER PRAMANIK *v.* EMPEROR. **190 I.C. 150**

=44 C.W.N. 835=71 C.L.J. 590=A.I.R. 1940 Cal. 391.

———S. 298—*Offence of rape—Uncorroborated evidence of prosecutrix—Proper direction to jury —Prosecutrix, if an accomplice.*

Per *Bartley, J.*—In a case of rape, the jury should be warned that it is unsafe to convict on the uncorroborated testimony of a prosecutrix, but that they might still do so, if satisfied that she was telling the truth. There is no presumption of law which differentiates the evidence of the complainant in a rape case from that of the complainant in the case of any other offence. There can be no assumption, in the absence of evidence, that she is an accomplice.

Per *Sen, J.*—It cannot be laid down that in every case of rape the Judge must direct the jury that they should not convict the accused on the testimony of the prosecutrix unless it is corroborated in material particulars to the same extent as is required in the case of an accomplice's evidence. Even if it be the English rule or practice that every prosecutrix in a rape case should be treated as if she were an accomplice, it is not desirable to import it without qualification in India where the manners, customs and mode of life of women are very different from those of women in England. (*Bartley and Sen, JJ.*) HARENDRA PRASAD BAGCHI *v.* EMPEROR. **I.L.R. (1940) 2 Cal. 180=44 C.W.N. 830=A.I.R. 1940 Cal. 461.**

———Ss. 298 and 299—*Confession—Admissibility—Duty of Judge to decide—Confession admitted—Jury—If can consider voluntariness or otherwise of such confession.*

When the prosecution seek to put a confession into evidence it is the duty of the Judge to decide whether that evidence is admissible or not. When once it has been let into evidence and put before the jury, it is for them to say whether it is true or not, and in so doing the jury are not debarred from considering whether the confession which has been placed before them was voluntary. (*Cunliffe and Henderson, JJ.*) BHAKTA BHUSAN PRAMANIK *v.* EMPEROR. **63 Cal. 1089=162 I.C. 636=8 R.C. 618=37 Cr.L.J. 676=63 C.L.J. 142 =1936 Cr. C. 380=40 C.W.N. 668=A.I.R. 1936 Cal. 227.**

———Ss. 298 and 299—*Scope—Charge under S. 307, I. P. Code, read with S. 149—Absence of direction to convict of minor offence if jury were so minded—Verdict of acquittal—Conviction by Judge under S. 323, I. P. Code—Legality—Cr. P. Code, S. 307.*

In a trial by jury on a charge under S. 307, I. P. Code, read with S. 149, I. P. Code, the Sessions Judge did not explain to the jury that if the facts constituted in their opinion any offence less grave than the one charged they should return a verdict of guilty of such minor offence The jury returned a unanimous verdict of not guilty and the Judge agreed with the verdict, but convicted and sentenced them of the offence of hurt under S. 323, I. P. Code.

Held, that under S. 299, Cr. P. Code, the jury alone had the power to determine the question of fact as to whether the accused were guilty of the offence under S. 307 or under S. 323; and that the jury having acquitted the accused under S. 307, and the Judge having omitted to charge the jury under S. 323, I. P. Code, the conviction of the

CR. P. CODE (1898), S. 298.

accused by the Judge under S. 323, was *ultra vires* and unsustainable. If however, after such a direction as to S. 323, I. P. Code, the jury's verdict had been one of not guilty under S. 323, I. P. Code, and the Judge unable to accept it, the proper course would be to refer the case to the High Court under S. 307, Cr. P. Code. (*Niyogi, A.J.C.*) GANGABISHAN *v.* EMPEROR. **167 I.C. 748=9 R.N. 206=38 Cr.L.J. 442=19 N.L.J. 18.**

———**Ss. 298 (2) and 299**—*Expression of opinion on facts—Duty of Judge.*

A trial Judge is entitled to express his opinion to a jury freely and emphatically when it seems to him to be necessary to do so, provided that he warns the jury that his opinion is in no way binding upon them and that it is the jury's opinion on facts of the case alone which matters. (*Beasley, C.J. and King, J.*) RATNASABAPATHI GOUNDAN *v.* PUBLIC PROSECUTOR. **59 Mad. 904=164 I.C. 243=9 R.M. 99=37 Cr.L.J. 909=44 L.W. 155=1936 M.W.N. 459=1936 M.Cr.C. 232=1936 Cr. C. 635=A.I.R. 1936 Mad. 516=71 M.L.J. 231.**

———**S. 299, Ill. (a)**—*Charge of murder—Duty of Judge to explain distinction between murder and culpable homicide.*

An accused person who stabs another in the abdomen with sufficient force to penetrate the abdominal walls must undoubtedly be held to have intended to cause injury sufficient in the ordinary course of nature to cause death. Where there is absolutely no evidence of any kind on the record upon which a jury could reasonably come to the conclusion that the accused had any intention other than the ordinary one deducible from such an act, and no defence is put forward that the offence might be culpable homicide merely and not murder and the only defence set up is that he came on the scene after the occurrence, it is no part of the duty of the Judge to explain to the jury the law of culpable homicide and the omission to do so does not amount to a misdirection. (*Roberts, C.J., Baguley and Leach, JJ.*) EMPEROR *v.* E PE. **14 Rang. 716=164 I.C. 884=9 R.R. 165=37 Cr. L.J. 1050=1936 Cr.C. 836=A.I.R. 1936 Rang. 421 (F.B.).**

———**S. 303**—*Accused charged with abduction and kidnapping—Separate verdict on each charge—If should be taken.*

In a case where an accused person is charged with both kidnapping and abduction, it is essential to take a separate verdict on each charge. If this is not done, it may become a mere matter of speculation what the decision of the jury really was. (*Bartley and Henderson, JJ.*) NANDA GHOSH *v.* EMPEROR. **182 I.C. 322=12 R.C. 40=40 Cr.L.J. 649=A.I.R. 1939 Cal. 321.**

———**S. 303**—Duty of Judge to specifically ask jury about their finding as to age of girl in a charge under S. 366, I. P. C. *See* PENAL CODE, S. 366. **1936 C. 675.**

———**S. 303**—*Questioning Jury—Duty of Judge—Trial of offence under S. 489-B, I. P. Code—Verdict of jury that accused uttered forged notes—No opinion expressed as to guilty knowledge of accused.*

Where in a trial under S. 489-B, I. P. Code, for uttering forged notes, the jury only expressed their opinion about the fact of the notes having been uttered by the accused being proved, but did not express any opinion as to whether the accused

CR. P. CODE (1898), S. 307.

knew or had reason to believe that the notes were forged, the verdict of the jury is inconclusive and incomplete. The judge ought not to stop merely at recording such verdict, but should under S. 303, Cr. P. Code, ascertain from the jury their opinion as to whether the said notes had been uttered with the knowledge of their being forged. Such a verdict cannot be treated as one of guilty and a conviction based on it is liable to be set aside. (*Srivastava, J.*) SATDEO *v.* EMPEROR. **11 Luck. 687=159 I.C. 919=37 Cr.L.J. 182=8 R.O. 225=1936 O.W.N. 28=1936 O.L.R. 18=1936 Cr. C. 282=A.I.R. 1936 Oudh 164.**

———**S. 306**—*Duty of Judge—Verdict of jury inconsistent and against general trend of Judge's charge—Acceptance of verdict by Judge—Reasons for acceptance—Necessity to state.*

Where the verdict of the jury is in accordance with the general trend of the charge of the Judge, there may be no need for the Judge to give any reason for accepting the verdict. But where the verdict of the jury is not only inconsistent in itself in view of the evidence, but is also clearly against the trend of the Judge's charge, the Judge owes a duty not only to the appellate Court but also to his own judicial conscience to state some reason or other for accepting the verdict. His failure to give reasons makes it impossible for the appellate Court to regard such acceptance as a judicial act. (*Pandrang Row, J.*) NACHAPPA GOUNDAN *v.* EMPEROR. **1937 M.W.N. 737 (2).**

———**S. 307**—*Acquittal by jury—Reference—Competency.*

Where a case entirely depends on the statement of an approver and two retracted confessions which are non-incriminating confessions and the jury hold that evidence is not sufficiently corroborated and hence give a verdict of not guilty, a Sessions Judge has ordinarily no right to put up to High Court a report on such a pure question of fact, the jury being regarded as the masters of facts. (*Cunliffe and Henderson, JJ.*) EMPEROR *v.* GOSTHO SARDAR. **165 I.C. 438=37 Cr.L.J. 1149=9 R.C. 400=1936 Cr.C. 670=A.I.R. 1936 Cal. 407.**

———**S. 307**—*Acquittal by jury—Reference by Sessions Judge disagreeing with verdict—Competency.*

If persons are put on trial before juries and acquitted, the decisions of the jury on questions of fact should always be accepted unless the verdict of acquittal is demonstrably shown to have been arrived at perversely. A reference by the Sessions Judge who disagrees with the verdict of the majority in such a case cannot be accepted unless it is shown unmistakably that the jury failed in their duty in considering the evidence brought before them properly. When there is nothing in the case to suggest that the majority verdict of acquittal is either perverse or unreasonable, there is no justification for the reference. (*Cunliffe and Henderson, JJ.*) EMPEROR *v.* SHERALI BADYAKAR. **169 I.C. 342=9 R.C. 926=38 Cr. L.J. 758=63 C.L.J. 140.**

———**S. 307**—*Acquittal by jury—Reference to High Court—Duty of Judges.*

Judges must convince appellate Courts with extreme particularity in cases of references with regard to acquittals than in cases of reference with regard to convictions. (*Cunliffe and Hender-*

CR. P. CODE (1898), S. 307.

son, JJ.) EMPEROR *v.* GOSTHO SARDAR. 165 I.C. 438=37 Cr.L.J. 1149=9 R.C. 400=1936 Cr.C. 670=A.I.R. 1936 Cal. 407.

———S. 307—Applicability—Charge under S. 307, I. P. Code, read with S. 149—Acquittal by jury—Conviction by Judge under S. 323, I.P. Code.—Absence of direction in charge to jury as to S. 393, I. P. Code—Legality of conviction—Procedure. *See* CR. P CODE, SS. 298 AND 299. 19 N.L.J. 18.

———S. 307—*Consideration of submitted case—If final on all questions of fact—Verdict of jury.*

(Per *Stone, C.J. and Grille, J.*)—The verdict of the jury cannot be regarded as final on all questions of fact, whether for or against the accused, in a reference under S. 307.

(Per *Bose, J.*)—When a tribunal (the jury) has been invested with exclusive jurisdiction to determine certain matters, and when it does its duty strictly in accordance with law, its conclusions cannot be brushed aside simply because another authority not invested with jurisdiction to enter into the facts comes to another conclusion. Hence, the verdict of the jury is to be regarded as final on all questions of fact, whether for or against the accused, in a reference under S. 307, Cr. P. Code provided it is understood that S. 423 (2) permits the High Court to alter or reverse a verdict which it considers to be perverse. (*Stone, C. J., Grille and Bose, JJ.*) DATTATRAYA SADASHIV *v.* EMPEROR. I.L.R. (1940) Nag. 394=186 I.C. 402=12 R.N. 204=41 Cr.L.J. 289=A.I.R. 1940 Nag. 17 (F.B.).

———S. 307—*Consideration of submitted case—Jury's verdict on facts—Interference—If and when justified.*

(Per *Stone, C.J. and Grille, J.*)—High Court can interfere when the verdict of jury on facts is one which reasonable, sensible or prudent men could conceivably reach, if it takes a different view of the evidence. It can interfere when the verdict of the jury is perverse but it ought not to do so unless it is perverse.

(Per *Bose, J.*)—High Court can interfere when the verdict of jury on facts is one which reasonable, sensible or prudent men could conceivably reach if it takes a different view of evidence. But not only ought it not to do so when the verdict is not perverse but it has no power to do so under the law. (*Stone, C.J., Grille and Bose, JJ.*) DATTATRAYA SADASHIV *v.* EMPEROR. I.L.R. (1940) Nag. 394=186 I.C. 402=12 R.N. 204=41 Cr.L.J. 289=A.I.R. 1940 Nag 17 (F.B.).

———S. 307 (3)—*Duty of High Court.*

S. 307 (3), Cr. P. Code, imposes upon the High Court in the clearest terms the duty of considering the entire evidence and of giving due weight to opinions of both the judge and jury. (*M. C. Ghose and Khundkar, JJ.*) EMPEROR *v.* MAJA KHAN. 66 C.L.J. 500.

———S. 307—*Duty of the High Court—Disagreement with the unanimous verdict of the Jury—Exercise of powers—Considerations.*

In disagreeing with the unanimous verdict of the Jury, the High Court has to consider whether the Jurors were entirely unreasonable in the conclusion arrived at by them or whether it was impossible for the Jurors to say that the guilt of the accused had been proved. The High Court does not exercise the power vested under S. 307, Cr. P. Code, in setting aside the verdict of the Jury,

CR. P. CODE (1898), S. 307.

unless it is perverse or patently wrong and is convinced that in giving effect to the same it would not meet the ends of justice. (*Guha and Lethbridge, JJ.*) EMPEROR *v.* NIBARESH MONDAL. 174 I.C. 803=39 Cr.L.J. 479=10 R.C. 726=66 C.L.J. 351=A.I.R. 1938 Cal. 295.

———S. 307—*Interference with verdict of jury—Powers—Scope and extent of.*

In cases where there has been a verdict of not guilty, it is the practice not to reverse the verdict unless it is perverse or manifestly wrong. On the other hand, where the jury has returned a verdict of guilty, the matter stands in a different footing. Having regard to the language of S. 307, Cr. P. Code, and to the duty which is enjoined on the High Court and to the powers conferred upon the High Court, it cannot be held that, so long as the verdict is not perverse or palpably erroneous the High Court must act against its own judgment and convict a person in respect to whose guilt it entertains grave doubts. It is the clear duty of the High Court in the interests of justice to reverse the verdict of a jury when it considers that the prosecution has failed to establish the charge and the verdict of the jury is not sustainable upon the evidence. (*Collister and Bajpai, JJ.*) EMPEROR *v.* BANSI. I.L.R. (1938) All. 483=1938 A.L.J. 282=175 I.C. 130=1938 A.W.R. (H.C.) 217=1938 A. Cr C 20=10 R A 645=39 Cr.L.J. 559=1938 A.L.R. 381=A.I.R. 1938 All. 227.

———S. 307—*Jury returning verdict of guilty—Judge thinking case doubtful—Jurisdiction to make reference.*

The Sessions Judge has jurisdiction to make a reference to the High Court under S. 307, Cr. P. Code, in a case where the jury returns a verdict of guilty and the Judge is not certain in his own mind of the absolute innocence of the accused and the complete falsity of the complaint and is of opinion that the case is doubtful. (*Sulaiman, C.J. and Niamatullah, J.*) MAUJIA *v.* EMPEROR. I.L.R. (1937) All. 419=167 I.C. 802=9 R.A. 578=38 Cr L.J 465=1936 A.W.R. 1284=1937 A.Cr.C. 11=1937 A.L.J. 43=1937 A.L.R. 250=A.I.R. 1937 All. 195.

———S. 307—*Powers of reference under—Case triable with aid of assessors—Judge agreeing with verdict of jury—Reference—Competency.*

A Sessions Judge has no power under S. 307, Cr. P. Code, to refer to the High Court a case in respect of offences triable with the aid of assessors; nor has he any power to refer to the High Court the case of any one in regard to whom he is in agreement with the verdict of the jury. (*Burn and Stodart, JJ.*) BOJJI REDDI, *In re.* 177 I.C. 288=39 Cr.L.J. 864 (1)=1938 M.W.N. 581=11 R.M. 304 (1)=1938 M.Cr.C. 181=47 L.W. 740=A.I.R. 1938 Mad. 686=(1938) 1 M.L.J. 871.

———S.307—*Reference against verdict of acquittal—Questions of fact—Practice.*

A reference on pure questions of fact against a verdict of acquittal by the jury, would not be accepted by the High Court. Such references on pure facts are in reality nothing more or less than appeals by the Crown. (*Cunliffe and Henderson, JJ.*) EMPEROR *v.* MONIBALA DASSI. 41 C.W.N. 610.

———S. 307—*Reference under—Duty of Judge—Power of High Court in revision to direct Judge to make reference.*

CR. P. CODE (1898), S. 307.

The duty of deciding whether the verdict of the jury shall be accepted or not lies upon the Judge who presides at the trial and upon him alone. If he decides that he ought not to make a reference, there is an end of the matter. The High Court has no power in its revisional jurisdiction to direct the Judge to make a reference. 41 C.L.J. 320, Diss. from. (*Henderson and Biswas, JJ.*) AFSAR SHAIKH *v.* EMPEROR. I.L.R. (1937) 2 Cal. 694=171 I.C. 320=10 R.C. 263=38 Cr.L.J. 1075=41 C.W.N. 1020=A.I.R. 1937 Cal. 540.

——S. 307—*Reference under—Grounds.*

Power of making references should be sparingly used. Reliance must be placed upon the decisions of the juries and they must not be disturbed unless it can be shown beyond a per adventure that a perverse verdict has been arrived at. Where, therefore the only ground for making reference was that the "giving effect to the verdict of the majority of the jury will lead to the anomalous result of letting off the principal offender who evaded a regular trial for a pretty long time ever since the alleged occurrence," it is quite insufficient and the application should be rejected. (*Cunliffe and Henderson, JJ.*) EMPEROR *v.* ABUL HOSSAIN SIKDAR. 166 I.C. 286=9 R.C. 490 (2)=38 Cr.L.J. 174 (2)=1936 Cr.C. 685=A.I.R. 1936 Cal. 451.

——S. 307—*Reference under—Duty of Judge—Power of High Court to direct.*

The Legislature has made the Sessions Judge the sole Judge to decide whether a reference should be made in a case. The decision whether a reference should or should not be made depends upon the extent of disagreement which the Judge alone can feel. There is no power in the High Court in a case in which the Judge has not thought fit to refer a case to the High Court under S. 307, Cr. P. Code, to direct him to do so. (*Mohamad Noor and Rowland, JJ.*) RAMESHWAR SINGH *v.* EMPEROR. 16 Pat. 413=18 Pat.L.T. 607=1937 P.W.N. 596=170 I.C. 464=3 B.R. 734=38 Cr.L.J. 919=10 R.P. 128=A.I.R. 1937 Pat. 440.

——S. 307—*Reference under—Grounds for—Duty of Judge.*

Though on the one hand reference should not be made in every case in which the Judge finds himself in disagreement with the jury, on the other, the power of reference is not confined to those cases only in which in the opinion of the Judge the verdict of the jury is entirely perverse. No hard and fast rule can be laid down. The Judge must apply his mind and decide whether the ends of justice demand a reference. (*Mohamad Noor and Rowland, JJ.*) RAMESHWAR SINGH *v.* EMPEROR. 16 Pat 413=18 Pat.L.T. 607=1937 P.W.N 596=170 I.C. 464=3 B.R. 734=38 Cr.L.J. 919=10 R.P. 128=A.I.R. 1937 Pat. 440.

——S. 307—*Reference under—Powers of High Court.*

As a matter of practice, High Court will not set aside the unanimous verdict of the jury unless it is perverse or patently wrong. The discretionary powers of the High Court are however really untrammelled under S. 307, Cr. P. Code, and it can exercise all the powers of an appellate Court and the whole case is open to it (verdict of jury held perverse). (*Gruer and Bose, JJ.*) DATTU DEOMAN *v.* EMPEROR. 167 I.C. 241=9 R.N. 170=38 Cr.L.J. 355=A.I.R. 1937 Nag. 33.

CR. P. CODE (1898), S. 307.

——S. 307—*Reference under—Power of High Court to direct re-trial.*

The High Court has power on a reference under S. 307, Cr. P. Code, to direct a re-trial. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* MAHOMED ADAM CHOHAN. 167 I.C. 43=9 R.B. 274=38 CrL J. 327=38 Bom.L.R. 1186=A.I.R. 1937 Bom. 60.

——S. 307—*Reference under—When may be made.*

Under S. 307, Cr. P. Code, a Judge is required to refer a case to the High Court when he disagrees with the verdict of the jury, and also is clearly of opinion that the ends of justice require that a reference should be made. The Judge may disagree, and yet not think it necessary to express disagreement. The Judge may think that the jury's appreciation of the evidence is wrong, and still hold that it is not perverse or unreasonable and the High Court is, therefore, not likely to interfere. In such a case he is bound under S. 306 to give judgment according to the verdict. (*Henderson and Biswas, JJ.*) AFSAR SHAIKH *v.* EMPEROR. I.L.R. (1937) 2 Cal. 694=171 I.C. 320=10 R.C. 263=31 Cr.L.J. 1075=41 C.W.N. 1020=A.I.R. 1937 Cal. 540.

——S. 307—*Reference under—When to be made—Interests of justice—Whole case if open before High Court on reference—Powers of High Court.*

Before making a reference to the High Court under S. 307, Cr. P. Code, it is not necessary that the Judge must be satisfied that the verdict of the jury is perverse. It is sufficient if he should be clearly of opinion that the reference is necessary in the interests of justice. But when once a reference is made the whole case is opened before the High Court, and the latter can exercise any of its appellate powers, and in doing so, the High Court should consider the entire evidence and give due weight to the opinion of the Sessions Judge and the jury. (*Grille and Gruer, JJ.*) SAKHAWAT *v.* EMPEROR. I.L.R. (1937) Nag. 277=167 I.C. 61=9 R.N. 163=38 Cr.L.J. 330=19 N.L.J. 320=A.I.R. 1937 Nag. 50.

——S. 307—*Reference under—Whole case, if opened up.*

(Per *Stone, C.J. and Grille, J.*)—The whole case is opened up when a reference is made so as to enable the High Court to reach independent conclusions of its own on the evidence. The submission marks the transition stage.

(Per *Bose, J.*)—The High Court must decide, in the first instance, whether the verdict is perverse or not and the whole case is opened up to the extent that it is necessary to enable it to reach such a conclusion but it cannot reach its own decision on the facts unless and until it comes to the conclusion that the verdict was perverse or that it otherwise militates against the provisions of S. 423 (2). (*Stone, C.J. Grille and Bose, JJ.*) DATTATRAYA SADASHIV *v.* EMPEROR. I.L.R. (1940) Nag. 394=186 I.C. 402=12 R.N. 204=41 Cr.L.J. 289=A.I.R. 1940 Nag. 17 (F.B.).

——S. 307—*Scope—Case tried by Assistant Judge partly by jury and partly with assessors—*

CR. P. CODE (1898), S. 307.

Latter appealable to Sessions Judge—Reference to High Court—If to compromise whole case or of only part tried by jury.

It cannot be laid down as an absolute rule that in a sessions case tried partly with the aid of assessors and partly by jury, the reference to the High Court under S. 307, Cr. P. Code, must be confined to that part only which was tried by jury; and a reference of the whole case cannot be regarded as incompetent cases tried by an Assistant Sessions Judge in which the part tried with the aid of assessors is appealable to the Court of session should, if possible, be referred to the High Court in their entirety if an impossible position is to be avoided in dealing with references under S. 304. (*Khaja Mohammad Noor and Dhavle, JJ.*) EMPEROR *v.* HARIA DHOBI. **172 I.C. 780=4 B.R. 165=39 Cr.L.J. 156=10 R.P. 346=1937 P.W.N. 868=18 Pat.L.T. 857=A.I.R. 1937 Pat. 662.**

——S. 307 (3)—*Scope—Power of High Court to go into evidence.*

The High Court, in a reference under S. 307, Cr. P. Code, is entitled to go into the evidence irrespective of whether there was any misdirection or misunderstanding of the law or not; the powers of the High Court in a reference under S. 307 are not limited by S. 423 (2), Cr. P. Code. (*Varma and Meredith, JJ.*) EMPEROR *v.* DULLU KUER. **6 B.R. 465=187 I C. 387=12 R.P. 613=41 Cr.L.J. 457=1940 P.W.N. 466=A.I.R. 1940 Pat. 513.**

——S. 307 (2)—*Trial where jury acted as jurors and assessors—Reference—Proper procedure.*

Where the accused is tried in respect of different offences with the help of a jury acting both as assessors and jurors, if the Sessions Judge wishes to make a reference under S. 307 (2), Cr. P. Code, he can do so only after he records an order of acquittal or conviction in respect of the offence tried with the help of the jury as assessors. If he does not do so the reference is technically wrong. When Sub-S. (2) of S. 307 refers to acquittal or conviction on 'any of the charges on which such accused has been tried,' it means, any of the charges on which the accused has been tried by jury. (*Collister and Braund, JJ.*) EMPEROR *v.* GANGA RAM. **I.L.R. (1940) All. 365=188 I.C. 767=13 R.A. 74=41 Cr.L.J. 676=1940 A.Cr.C. 55=1940 A.L.J. 155=1940 A.W.R. (H.C.) 187=A.I.R. 1940 All. 260.**

——S. 307 (3)—*Word "opinions"—Scope and meaning of.*

The word 'verdict' is not confined to the ultimate conclusion of guilty or not guilty but may embrace other things as well. The sense in which it is used in S. 423 (2) relates to the final decision of the majority and it does not embrace the opinion of the minority. But the word 'opinions' in S. 307 (3) is wider than the word 'verdict' in S. 423 (2), and it includes not only the final decision of the majority [the sense in which it is used in S. 423 (2)], but also the opinion of the minority, and where reasons are disclosed, the reasons given whether by an individual juryman, or by a part of the jury, or by the whole. (*Stone, C.J., Grille and Bose, JJ.*) DATTATRAYA SADASHIV *v.* EMPEROR. **I.L.R. (1940) Nag. 394=186 I.C. 402=12 R.N. 204=41 Cr.L.J. 289=A.I.R. 1940 Nag. 17 (F.B.).**

CR. P. CODE (1898), S. 310.

——**Ss. 307 and 423 (2)**—*Consideration of submitted case—What the Court does—S. 423 (2) if comes into play.*

(Per *Stone, C.J. and Grille, J.*)—The Court to which the case is submitted is not hearing an appeal though it has powers of an appellate Court. There is, nothing to appeal from. There has been no judgment passed. There has been no verdict accepted. There has been no judgment based on that verdict. The Court, on the hearing of a submitted case, is free to acquit or convict without its being necessary to alter or reverse any verdict. It cannot however acquit or convict without considering the jury's opinion. It has to give that opinion, in its proper form unaltered and unreversed, proper weight, but it can leave an opinion which it accepted would amount to a verdict of acquittal completely untouched and still convict and *vice versa*. As it is not concerned with the alteration or reversal of a verdict (which alteration or reversal is not a necessary step before it can proceed to its conclusion) S. 423 (2) does not come into play.

(Per *Bose, J.*)—The verdict of the jury remains its verdict even when the matter is before the High Court and notwithstanding the fact that it has not been accepted by Sessions Judge. There is nothing in the Code which states or suggests that the verdict springs into existence as a verdict only when it is accepted by the Sessions Judge and that until then it is only a pious expression of opinion on the part of the jury. (*Stone, C.J., Grille and Bose, JJ.*) DATTATRAYA SADASHIV *v.* EMPEROR. **I.L.R. (1940) Nag. 394=186 I.C 402=12 R.N. 204=41 Cr.L.J. 289=A.I.R. 1940 Nag. 17 (F.B.).**

——S. 309—*Sentence on each charge—Duty of Magistrate to pass.*

Under S. 309, Cr. P. Code, the Judge is bound to pass a sentence on each of the charges of which the accused is found by him to be guilty. Hence where he has convicted accused under Ss. 302, 304 (1) and 324, Penal Code, his refusal to prescribe the punishments under Ss. 304, Part (1) and 324, I. P. Code, is illegal. (*Almond, J.C. and Mir Ahmad, J.*) MIAN GUL *v.* EMPEROR. **182 I.C. 572=40 Cr.L.J. 686=12 R. Pesh. 5=A.I.R. 1939 Pesh. 23.**

——S. 309 (2)—*Contents of Judgment.*

In a trial with assessors it is the duty of the presiding Judge to ascertain the opinion of the assessors after summing up the evidence to them if he thinks it necessary, and then to deliver a judgment. That judgment must conform to the provisions of S. 367, Cr. P. Code, and must accordingly contain the reasons for the Judge's decision. The section is not complied with if the Judge merely states that he agrees with the opinion of the assessors. (*Derbyshire, C.J. and Panckridge, J.*) NIRMAL KUMAR BHOUMIK *v.* EMPEROR. **177 I.C. 29=11 R.C. 209=39 Cr. L.J. 835=42 C.W.N. 896=A.I.R. 1938 Cal. 551.**

——S. 310—*Charge based on previous conviction—Proper evidences—Necessity for.*

Before an accused can be questioned about previous convictions, there must be evidence legally admissible upon the record which shows that he has committed these previous offences about which he is examined by the Court; and legally admissible evidence as to previous convictions

CR. P. CODE (1898), S. 310.

must fall either within S. 511, Cr. P. Code, or S. 54, Evidence Act. (*Davis, J.C. and Lobo, J.*) GHOUSE BAKSH *v.* EMPEROR. **I.L.R. (1939) Kar. 677=183 I.C. 219=40 Cr.L.J. 770=12 R.S. 49=A.I.R. 1939 Sind 203.**

——S. 310—*Procedure—Recital of previous convictions—Proper course.*

In a case where it is intended to prove previous convictions for the purpose of enhanced punishment the trial is in effect divided into two parts: firstly the trial for the subsequent offence and the opinion of the assessors thereon, and secondly, if the accused be convicted of that subsequent offence there is what amounts to a trial on the charge of previous convictions on account of which the accused is liable to receive enhanced punishment. The second part of the trial of course may be very short, but it is nevertheless to be kept as something apart and separate from the first part of the trial in the sense that it shall not be allowed to influence the assessors or jurors in their opinion as to the guilt of the accused of the subsequent offence for which the accused is at first to be tried. If the statement of the accused relating to the previous convictions and the subsequent offence is treated as a whole and read out at one time to the accused this procedure is clearly contrary to the provisions of S. 310, Cr. P. Code, and though it is true that under S. 221 (7), Cr. P. Code, the charge must contain details of the previous convictions which it is intended to prove for the purpose of enhanced punishment, that section must be read subject to S. 310, Cr. P. Code, and the accused must not be prejudiced in his trial for the subsequent offence by a recital of his previous convictions. (*Davis, J.C. and Lobo, J.*) GHOUSE BAKSH *v.* EMPEROR. **I.L.R. (1939) Kar. 677=183 I.C. 219=40 Cr.L.J. 770=12 R. S. 49=A.I.R. 1939 Sind 203.**

—— S. 310—*Scope—Accused being member of criminal tribe—Evidence as to—When to be given—First information referring to accused as member of criminal tribe read out to jury before verdict—Evidence let in to prove that accused was entered in criminal tribe register—Effect of.*

The fact that an accused is a registered member of a criminal tribe under the Criminal Tribes Act is, like a previous conviction, a matter from which bad character can be inferred and which may affect the sentence. It should be treated in the same way as a previous conviction, and should not be disclosed to the jury until after their verdict, lest their minds should be prejudiced. The accused must have the full protection which the law as enacted in S. 310, Cr. P. Code, and S. 54 of the Evidence Act, is intended to provide. Where, in the course of a trial, the first information report is read out to the jury, without taking care to exclude the portion thereof which refers to the accused as "a member of the Criminal Tribes Act," and the prosecution, is allowed to examine a police clerk to prove that the accused was entered in the criminal tribes register, the procedure is open to grave objection. (*Rowland, J.*) MOSAHEB DOME *v.* EMPEROR. **183 I.C. 660=5 B.R 978=1939 P.W.N. 627=12 R.P. 177=40 Cr.L.J. 833 (2)=20 P.L.T. 879=A.I.R. 1940 Pat. 14.**

——S. 315 (2)—Applicability—Choosing of jury—Procedure of making deficiency. *See* CR. P. CODE, SS. 276, PROVISO 2, 278 AND 315. **A.I.R. 1939 Sind 209.**

CR. P. CODE (1898), S. 326.

——S. 326—*Applicability—Objection to juror in course of trial—Discharge of jury—Selection of another juror by lot without objection by accused—Objection to constitution in appeal—Competency—Absence of prejudice to accused—Verdict—If can be interfered with.*

A trial was taken up before a certain jury. The accused having objected to a certain juror in the course of the trial, the Judge discharged the jury, summoned another jury, selected certain jurors by lot and then proceeded with the trial. One of the jurors was discharged because he said he had heard something about the case. Another juror was then selected by lot to fill up the vacancy. The accused never objected to any of the jurors, but contended in appeal from his conviction that instead of summoning gentlemen living in the locality, the Judge should have drawn lots from the total number of jurymen under S. 326, Cr. P. Code.

Held, that S. 326 did not apply at all to the case, and that the jury empanelled had no jurisdiction to try the case; and in the absence of prejudice to the accused the verdict of the jury could not be interfered with. (*Cunliffe and Henderson, JJ.*) FUKTA BIBI *v.* EMPEROR. **67 C.L.J. 215=40 C.W.N. 1411.**

——Ss. 326 and 327—*Scope—Requisite number of assessors not present—Trial with assessor included in list but not summoned—Legality.*

Where the requisite number of assessors was not present, the Court asked another man who was present in the Court to serve as an assessor to make up the number. This person's name was included in the list of assessors and jurors but he was not summoned for any case on that date.

Held, that the trial was not illegal. (Necessity for following strictly the provisions regarding choosing of assessors explained by Mohamad Noor, J.) (*Mohammad Noor and Varma, JJ.*) EMPEROR *v.* RAMSIDH RAI. **176 I.C. 530=39 Cr. L.J. 725=10 R.P. 79=4 B.R. 724=1938 P.W.N. 559=A.I.R. 1938 Pat. 352.**

——Ss. 326 and 327—*Scope—Requisite number of assessors summoned not present in Court—Judge summoning person present in Court—Latter's name on list of persons qualified—Choosing of latter and those previously summoned and present as assessors—If illegal or improper.*

S. 326 of the Cr. P. Code is not mandatory, it only lays down the procedure 'ordinarily' to be followed. S. 327 gives the Court an emergency power to cause jurors or assessors to be summoned when such direction is found to be necessary. Where a case came up for trial it was found that only three of the assessors summoned in accordance with S. 326 were present. There was, however, present in Court another gentleman whose name was on the list of persons qualified to serve as assessors, and the judge caused a summons to be served on him. The judge then chose as assessors the three persons previously summoned and the fourth gentleman summoned on the date of the trial.

Held, that there was nothing illegal and that since the fourth assessor's name was on the list of assessors, the assessors could not be said to

have not properly constituted. (*Rowland and Madan, JJ.*) RAM BABU JADAV *v.* EMPEROR. **173 I.C. 418=4 B.R. 266=10 R.P. 402=39 Cr.L.J. 302=1937 P.W.N. 1001=18 Pat.L.T. 964=A.I.R. 1938 Pat. 60.**

——S. 337—*Acceptance of pardon—Inference from circumstances.*

It is nowhere laid down in Cr. P. Code that the acceptance of a pardon should be in writing or that it should be expressed in any other manner. It is to be gathered from the circumstances. The very fact that the accused appeared before the various Magistrates in the capacity of a witness, and not that of an accused person, is a clear indication of the fact that he had accepted the pardon tendered to him. (*Monroe and Din Mahamed, JJ.*) EMPEROR *v.* AMAR SINGH. **I.L.R. (1939) Lah. 38=181 I.C. 509=11 R.L. 855=40 Cr L.J. 543=40 P.L R. 758 (2)=A.I.R. 1938 Lah. 796.**

——S. 337 (1)—*District Magistrate—If includes Additional District Magistrate.*

The District Magistrate referred to in S. 337 (1), Cr. P. Code, includes an Additional District Magistrate upon whom the ordinary powers of a District Magistrate have been conferred under S. 10 (2), Cr. P. Code. An Additional District Magistrate is, therefore, empowered to tender a pardon to an accused without the sanction of the District Magistrate. 16 L. 594, dissented from. (*Monroe and Din Mahomed, JJ.*) EMPEROR *v.* AMAR SINGH. **I.L.R. (1939) Lah. 38=181 I.C. 509=11 R.L. 855=40 Cr.L.J. 543=40 P.L.R. 758 (2)=A.I.R. 1938 Lah. 796.**

——S. 337 (2)—*Object.*

The Legislature in the interests of justice requires that an approver, where the case is committed, whatever statements he may have made in the Court of the committing Magistrate, should be examined as a witness in the Sessions trial. With the exception of evidence admitted under S. 288, it is upon evidence led in the Sessions Court that the guilt or innocence of the accused is determined and it is in the Sessions Court the approver has his duty to perform. (*Weston and Tyabji, JJ.*) EMPEROR *v.* SHAHDINO DHANIPATRO. **189 I.C. 452=13 R.S. 30=41 Cr.L.J. 747=A.I.R. 1940 Sind 114.**

——S. 337—*Pardon—Forfeiture of—Conditions—Approver denying all knowledge before committing Magistrate due to threats by co-accused but disclosing all facts before Sessions Court—If forfeits pardon.*

Where an approver after accepting pardon under S. 337 denies all knowledge of facts before the committing Magistrate on account of the threats and influences of the co-accused with whom he was placed in the same prison cell, and after being separated from the co-accused makes a full and true disclosure of facts relating to the offence before the Sessions Court, it cannot be said that the accused has forfeited his pardon. When the evidence given by the approver in the Sessions Court is in accordance with the conditions of his pardon and is evidence upon which reliance may very well be placed, then the fact that in the committing Magistrate's Court the approver gave false evidence cannot necessarily be taken to be non-compliance with the conditions of pardon. (*Weston and Tyabji, JJ.*) EMPEROR

v. SHAHDINO DHANIPATRO. **189 I.C. 452=13 R.S. 30=41 Cr.L.J. 747=A.I.R. 1940 Sind 114.**

——S. 337—Power to tender pardon under—Special Magistrate under Bengal Act XII of 1932—Competency to tender pardon. *See* BENGAL SUPPRESSION OF TERRORIST OUTRAGES ACT, Ss. 24 AND 25. **A.I.R. 1936 Cal. 356 (F.B.).**

——S. 337—*Scope—Availability, if confined to trials concerning graver offences.*

S. 337 is available for obtaining the evidence of approvers not in all trials but only as regards trials concerning some graver offences. (*Derbyshire, C.J., Mukerji, Panckridge, M.C. Ghose and Bartley, JJ.*) HARIHAR SINHA *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 711=163 I.C. 9=37 Cr.L.J. 758=8 R.C. 698=40 C.W.N. 876=63 C.L.J. 307=1936 Cr.C. 583=A.I.R. 1936 Cal. 356 (F.B.).**

——S. 337 (2)—*Scope and effect of—Accused—Tender of pardon- Effect of—Duty of prosecution to examine approver in Sessions Court even when he denies all knowledge of facts.*

When an accused after accepting pardon denies all knowledge of facts before the committing Magistrate and the case is committed to Sessions Court, the pardon cannot be forfeited before the accused is examined in the Sessions Court. Once a pardon is tendered and accepted, S. 337 (2) renders it obligatory for the prosecution to examine the approver both in the committing Magistrate's Court and in the Sessions Court should the case be committed. Failure of the prosecution to examine the approver in the Sessions Court vitiates the trial. (*Weston and Tyabji, JJ.*) EMPEROR *v.* SHAHDINO DHANIPATRO. **189 I.C. 452=13 R.S. 30=41 Cr.L.J. 747=A.I.R. 1940 Sind 114.**

——S. 337—Special Magistrate under Bengal Suppression of Terrorist Outrages Act—Power to tender pardon under S. 337. *See* BENGAL SUPPRESSION OF TERRORISTS OUTRAGES ACT, Ss. 24 AND 25. **A.I.R. 1936 Cal. 356 (F.B.).**

——S. 337—*Tender of pardon—Facts to be taken note of by Magistrate.*

All that an officer who can grant pardon under S. 337 of the Cr. P. Code has to see is whether on the information at his disposal there is a *prima facie* case against the person to whom the pardon is going to be tendered for an offence which is exclusively triable by a Court of Session. If that is so he is competent to grant a pardon. No searching inquiry is called forth in this matter at that stage. As soon as a Magistrate is informed that the offence is one which according to the investigating authority is exclusively triable by the Court of Session, then his duty is to record the statement after granting pardon to the person put before him. (*Rachhpal Singh, J.*) BHOLA NATH *v.* EMPEROR. **I.L.R. (1939) All. 736=184 I.C. 191=40 Cr.L.J. 856=12 R.A. 189=1939 A.W.R. (H.C.) 464=1939 A. Cr.C. 98=1939 A.L.J. 785=A.I.R. 1939 All. 567.**

——Ss. 337 and 494—*Scope and applicability—Tender of pardon to and acceptance by some of the accused—Subsequent withdrawal of prosecution against them under S. 494—Trial of other accused before Magistrate empowered under S. 30—Validity.*

S. 337 of the Cr. P. Code deals with the action of a judicial, and S. 494 with that of an executive officer. S. 494 says nothing about pardons at all,

CR. P. CODE (1898), S. 337.

The whole procedure and the various consequences under S. 494 differ from those under S. 337. If the manner in which the tender of pardon is made, follows in substance the method prescribed by S. 337, then the section must apply. Minor and immaterial irregularities or variations cannot be taken to affect the operation of the section. The special machinery provided under S. 337 has a peculiar feature in that, the pardon under that section is tendered as a judicial act and under the special precautions, rules and consequences which the statute sets out. One consequence, perhaps the most important, is that when a Magistrate has tendered the pardon the trial must not be by another Magistrate even though he is vested under S. 30 of the Code to try such an offence, but by the High Court or Sessions Court. Where certain accused were charged with offences which came within the offences mentioned in S. 337, Cr. P. Code, and a conditional pardon was tendered to and accepted by one of the accused and where subsequently the prosecution applied under S. 494, Cr. P. Code, and got the withdrawal of the case as against that accused and he gave evidence as against the rest in the trial before a special Magistrate, to whom the case had been transferred and who was empowered under S. 30 to try the offences, it was held that what was done came substantially within S. 337 and hence the trial by the special Magistrate was without jurisdiction. (*Lord Wright.*) FAQIR SINGH *v.* EMPEROR. **65 I.A. 388=I.L.R. (1938) Lah. 628=32 S.L.R. 937=40 Bom.L.R. 1254=68 C.L.J. 328=42 C.W.N. 1252=1938 O.L.R. 405=1938 A.Cr.C. 69=19 Pat.L.T. 717=176 I.C. 898=1938 M.W.N. 969=48 L.W. 537=40 P.L.R. 876=11 R.P.C. 81=1938 A.L.R. 753=4 B.R. 850=1938 O.W.N. 809=1938 P.W.N. 698=1938 M.Cr.C. 305=1938 O.A. 672=1938 A.W.R. (P.C.) 170=A.I.R. 1938 P.C. 266=(1938) 2 M.L.J. 780 (P.C.).**

——**Ss. 337 and 494**—Applicability and relative scope. *See* CR. P. CODE, S. 494 (*a*). **A.I.R. 1936 Cal. 356 (F.B.).**

——**S. 339**—*Approver in committing Court—Failure to give reliable evidence—Proper procedure.*

Where in committal proceedings an approver fails to discharge his duty to give reliable evidence, it is illegal for the Magistrate to enter his name as an accused and to proceed with the trial. The proper procedure is to send him up as a witness to the trial Court, irrespective of the evidence that he gives in the committing Court. It is only from that Court that the Public Prosecutor can give the necessary certificate, for his prosecution. (*Davis.*) EMPEROR *v.* BHURA. **1940 A.M.L.J. 57.**

——**S. 339**—*Approver forfeiting pardon—Whether can be convicted on his own statement as approver.*

Where the statement of the approver who has forfeited his pardon is in its general aspect abundantly corroborated and there could be no doubt of the truth of the story told in it, such statement alone would be sufficient evidence for his conviction. (*Young, C.J. and Monroe, J.*) AZIZ BEGUM *v.* EMPEROR. **39 P.L.R. 394=171 I.C. 954=10 R.L. 254=39 Cr.L.J. 16=A.I.R. 1937 Lah. 689.**

CR. P. CODE (1898), S. 339.

——**S. 339**—*Certificate by Public Prosecutor—Latter, if must be Public Prosecutor when granting certificate.*

The person who is authorized to grant a certificate under S. 339, Cr. P. Code is the Public Prosecutor who conducted the case in which the pardon was granted and he need not necessarily occupy the position of Public Prosecutor on the date on which he grants the certificate. (*Monroe and Rangi Lal, JJ.*) INDAR PAL *v.* EMPEROR. **162 I.C. 969=37 Cr.L.J. 732=8 R.L. 978=38 P.L.R. 1128=1936 Cr.C. 389=A.I.R. 1936 Lah. 409.**

——**S. 339**—*Certificate under—Contents.*

The certificate granted under S. 339, Cr. P. Code, cannot be said to be defective because it does not mention the particulars in regard to which the pardon is alleged to have been forfeited. S. 339, Cr. P. Code, does not require that any such particulars shall be given in the certificate. (*Monroe and Rangi Lal, JJ.*) INDAR PAL *v.* EMPEROR. **162 I.C. 969=37 Cr.L.J. 732=8 R.L. 978=38 P.L.R. 1128=1936 Cr.C. 389=A.I.R. 1936 Lah. 409.**

——**S. 339 (1)**—*Certificate under—Power to issue.*

A certificate under S. 339 (1) cannot be said to be without jurisdiction because it was issued by a Public Prosecutor who was put in charge of the case subsequently and not by Assistant Public Prosecutor who was originally in charge of the case. The general powers of control which the District Magistrate and the Public Prosecutor exercise are sufficiently wide to justify a prosecution being taken out of the hands of a particular Assistant Public Prosecutor at any stage of the proceedings and there is nothing in the Criminal Procedure Code which requires that when a Public Prosecutor has once appeared in a case all further proceedings must be conducted by him. (*Weston and Tyabji, JJ.*) EMPEROR *v.* SHAHDINO DHANIPATRO. **189 I.C. 452=13 R.S. 30=41 Cr.L.J. 747=A.I.R. 1940 Sind 114.**

——**S. 339**—*Trial of approver—Certificate by Public Prosecutor—Necessity for.*

According to S. 339, Cr. P. Code, an approver cannot be tried unless the Public Prosecutor has certified that the approver, by concealing something essential or by giving false evidence, has not complied with the condition on which the tender was made. Further an enquiry in the presence of the approver as to whether he had forfeited the pardon tendered to him is absolutely necessary according to law. (*Abdul Qayoom, C.J. and Wazir, J.*) STATE *v.* SHARAF DIN. **41 P.L.R.J & K. 53.**

——**S. 339 (1)**—*Scope—Approver not complying with conditions of pardon in course of inquiry—Withdrawal of pardon and fresh inquiry against accused and approver—Committal of all jointly to sessions—Legality.*

Before the preliminary inquiry on investigation against four persons commenced, pardon was tendered to one of them, and the inquiry commenced against the other three. In the course of the examination of the approver as P.W. 1, it was discovered that he was not prepared to give evidence in accordance with the terms of his guardian and a certificate was given by the Public Prosecutor under S. 339 (1), Cr. P. Code, that he had not complied with the condition of his

pardon. The Magistrate then commenced the inquiry afresh against all the four deleting the approvers deposition from the record and committed all the four to stand their trial before the Sessions Court.

Held, that the joint committal of all the four persons was illegal as being in contravention of the explicit provisions of S. 339 (1), Cr. P. Code. (*King, J.*) RAMACHANDRAYYA *v.* EMPEROR. **1937 M.W.N. 879.**

——S. 339 (2)—*Approver—Retracted statement of—Conviction—Extrinsic corroboration—Necessity.*

When an approver retracts from his statement in the committing Court, and he is tried for the same offence after the forfeiture of the pardon, he can be convicted on his own statement which amounts to a confession. It does not require corroboration as an approver's evidence. (*Young, C.J. and Monroe, J.*) PURAN *v.* EMPEROR. **173 I.C. 484=10 R.L. 449=39 Cr.L.J. 335 (1)=39 P.L.R. 930=A.I.R. 1938 Lah. 135.**

——S. 339 (2)—*Statement of approver—Admissibility.*

Where in spite of being in police custody an approver is neither subjected nor threatened to be subjected to any ill-treatment, the statement made by him will not become inadmissible under S. 24, Evidence Act. (*Monroe and Rangi Lal, JJ.*) INDAR PAL *v.* EMPEROR. **162 I.C. 969=37 Cr.L.J. 732=8 R.L. 978=38 P.L.R. 1128=1936 Cr.C. 389=A.I.R. 1936 Lah. 409.**

——S. 339 (2)—*Statement contemplated by.*

The word "statement" contemplated in S. 339 (2), Cr. P. Code, appears primarily to refer to a statement made by an accused person as a witness as contemplated in S. 337 (2) in the course of an enquiry or trial. It may also include a statement recorded under S. 164 after the tender of pardon but it can in no case include a confessional statement made by an accused person before the tender of pardon unless it was recorded in accordance with the strict procedure provided by Ss. 164 and 364 for recording confessions. (*Niyogi and Gruer, JJ.*) HORILAL *v* EMPEROR. **1940 N.L.J. 286=187 I.C. 203=12 R.N. 283=41 Cr.L.J. 433 =A.I.R. 1940 Nag. 218.**

——S. 339 (3)—*Prosecution of approver for perjury—Sanction for—Discretion of High Court.*

The mere fact that two contradictory statements are made by the approver cannot in every case be a warrant for directing the prosecution of the approver for perjury. The discretion vested in the High Court under S. 339 (3), Cr. P. Code, to accord sanction for the prosecution must be exercised with extreme caution and the cardinal question for consideration by the Court is whether the confession and the incriminating statement made by the approver were or were not true. If the circumstances point to the conclusion that they were not true, the irresistible inference must be that those statements were put in the mouth of the approver by some one and in such a case it would be opposed to public policy to prosecute and punish the approver for perjury. 56 All. 288, Foll. (*Din Mohammad, J.*) EMPEROR *v.* PRABHU. **39 P.L.R. 13=171 I.C. 368=10 R.L. 192=38 Cr.L.J. 1079=A.I.R. 1937 Lah. 551.**

——S. 339-A—*Applicability—Approver stating that his statement as approver was completely false.*

S. 339-A only applies to a case in which the approver's case is still that he was one of the persons who had committed the offence but that the Public Prosecutor was in error in considering that he had in any way failed to comply with any of the conditions upon which the tender of pardon was made. It does not apply to the case of an approver who has stated that his statement as an approver was completely false. (*Young, C.J. and Blacker, J.*) GURDIT SINGH *v.* EMPEROR. **I.L.R. (1939) Lah. 216=181 I.C. 924=11 R.L. 899=40 Cr.L.J. 614=41 P.L.R. 290=A.I.R. 1939 Lah. 66.**

——S. 339-A—*Non-compliance with—Legality of trial.*

According to S. 339-A, Cr. P. Code, it is essential for the trial Court, before proceeding with the trial of the accused for the offence in respect of which the pardon was tendered to him, to make proper enquiry in regard to the point as to whether the accused had complied with the conditions on which the tender of pardon was made and to record the finding whether or not the accused had complied with the conditions of the pardon. Otherwise the trial of the accused on the charge of murder is illegal. (*Abdul Qayoom, C.J. and Janki Nath Wazir, J.*) SANTOKH SINGH *v.* STATE. **39 P.L.R. J. & K. 1.**

——S. 339-A—*Scope of—Failure to comply with requirements of section—Effect.*

Under S 339-A it is imperative on the Court of Session to ask the accused whether he pleads compliance with the conditions on which the tender of pardon was made and to record his plea and then proceed with the trial. The trial for the offence in respect of which the pardon was granted could not begin until the requirements of the section were carried out *in limine* and a judgment of conviction could not be delivered unless the Court with the aid of assessors found that the accused had failed to comply with the conditions of pardon. Where the procedure is not followed the conviction is vitiated and should be set aside. (*Niyogi and Gruer, JJ.*) HORILAL *v.* EMPEROR. **184 I.C. 351=11 R.N. 110=40 Cr. L.J. 916=1939 N.L.J. 497=A.I.R. 1940 Nag. 77.**

——S. 341—*Scope—Reference under—When competent—Case against two accused—One unable to understand proceedings—Reference of whole case—Competency.*

S. 341 of the Cr. P. Code only applies to the case of an accused who is deaf and dumb, and the proceedings to be forwarded to the High Court under the section are only those relating to an accused person who cannot be made to understand the proceedings, though not insane. The section does not permit a reference to the High Court of a case in which there are two accused and one of them, though not insane, is not able to understand the proceedings. The High Court would have no jurisdiction to pass any order with regard to the accused who is able to understand the proceedings. (*Wadia and Divatia, JJ.*) EMPEROR *v.* TRIMBAK DAMODAR. **177 I.C 444=11 R B. 81 (2)=39 Cr L.J. 866=40 Bom.L.R. 495= A.I.R. 1938 Bom. 352.**

CR. P. CODE (1898), S. 342.

——S. 342.
"Accused"—meaning.
Applicability.
Compliance.
Duty of Court.
Examination of accused.
"Inquiry" and "Accused"
Non-compliance.
Power of Court.
Scope.
Statement of accused.

"Accused"—Meaning.

——S. 342—"Accused"—Meaning of—Co-accused charged with same offence—One tried separately from the rest—Competency as witness against the latter. *See* CR. P. CODE, SS. 239 AND 342. **40 Bom.L.R. 1092.**

Applicability.

——S. 342—Applicability--Summary trial. *See* CR. P. CODE, S. 263. **A.I.R. 1938 Sind 70.**

——S. 342—*Applicability—Summary trial in summons case—Case under S. 22, Cattle Trespass Act.*

S. 342, Cr. P. Code, applies to all trials including summary trials. It applies to a summons case tried summarily just as it applies to a summary trial in a warrant case. The section would therefore apply to a case under S. 22 of the Cattle Trespass Act. (*Beaumont, C.J. and Divatia, J.*) EMPEROR *v.* KONDIBA BALAJI. **42 Bom.L.R. 695=A.I.R 1940 Bom. 314.**

——S 342—*Applicability—Additional evidence taken under S.* 428.

S. 342, Cr. P. Code, does not come into operation when additional evidence is taken under S. 428, Cr. P. Code. (*Niyogi, J.*) NATHU SINGH *v.* EMPEROR. **1940 N.L.J. 203=186 I C. 660=12 R.N. 256=41 Cr.L.J 356.**

——S. 342—*Applicability—Summons case.*

The provisions of S. 342, Cr. P. Code, apply to summons cases. (*Weston.*) HAMIRA *v.* MOOL CHAND. **1938 A.M.L.J 1.**

Compliance.

——S. 342—*Compliance—Record of joint statement by all accused—Legality.*

S. 342, Cr. P. Code which applies to summary proceedings as well as long trials, does not contemplate a joint statement by the accused, but it contemplates statement made by accused individually; and a record of joint statement of accused is illegal and conviction should be set aside. (*Davis, J. C. and Haveliwala. A J.C.*) EMPEROR *v.* SHIVALOMAL. **32 S.L R. 30=172 I C 80=10 R.S. 135=39 Cr.L.J. 59 (1)=A.I.R. 1937 Sind 304.**

Duty of Court.

——S. 342—*Duty of Court.*

The object of an examination under S. 342 is for the purpose of enabling the accused to explain circumstances which appear against him. If the judge considers that an explanation is necessary regarding an incriminating matter it is his duty to place the matter before the accused and to ask him whether he wished to give any explanation. It is extremely unfair for a Judge to rely upon a circumstance as being incriminating without giving him an opportunity of explaining the circumstance. (*Henderson and Sen, JJ.*) EMPEROR *v.* JIT LAL **189 I.C. 700=13 R.C. 120=41 Cr.L.J. 783=A.I.R. 1940 Cal. 378.**

CR. P. CODE (1898), S. 342.

——S. 342—*Duty of Court—Accused not offering to produce defence.*

S. 342 cannot be interpreted to mean that it is necessary to examine the accused only if he offers to produce defence. (*Zia-ul-Hasan, J.*) EMPEROR *v.* BRIJ LAL. **12 Luck. 24=160 I.C. 489 =8 R.O. 263=37 Cr L.J. 408=1936 O W N. 215 =1936 O.L.R. 80=A I.R 1937 Oudh 130.**

——S. 342—*Accused refusing to answer beyond what is stated in written statement—Detailed examination on points against accused—Necessity.*

It, no doubt, is the duty of the Court to put to the accused the various points against him, and the filing of a written statement does not abrogate that duty; if, however, when the Court wanted to put questions, the accused practically refuses to answer them, saying that he would give his statement later on and that he had nothing to say beyond what he stated in his written statement filed, it would be useless for the Court to persist with detailed questions and there is no prejudice to the accused. (*Gruer, J.*) RAMSESHAN *v.* EMPEROR. **1936 Cr.C. 689=A.I.R. 1936 Nag. 147.**

——S. 342—*Omission to call on accused to explain adverse circumstances—If fatal to conviction.*

It is the duty of the examining Judge under S. 342 to call upon the accused's attention to any point which the jury considers to be vital, or, in other words, lead to the inference of guilt and to ask for an explanation. Consequently where the evidence against an accused is entirely of a circumstantial nature, though the evidence may be strong enough to justify conviction, unless the Judge has elicited from the accused any explanation he has to give in respect of the facts appearing in the evidence against him, the Judge cannot find whether or not the evidence is sufficient to justify conviction and conviction based on such evidence cannot be sustained. (*Burn and Pandrang Row, JJ.*) NARASIMHAM, *In re.* **59 M. 631 (N)=44 L.W. 57 (N)=164 I.C. 1017=37 Cr.L.J. 1074=9 R M. 212=1936 M.W.N. 521=1936 Cr. C. 763=A.I.R. 1936 Mad 629=71 M.L.J. 141 (N).**

——S. 342—*Duty of Judge under—Omission to comply with strict letter—Effect on conviction—S.* 537.

S 342, Cr. P. Code, must be observed not only in the letter but also in the spirit. It is clearly very unfair to draw an inference of guilt from a fact which an accused person has not had an opportunity of explaining. But every failure to comply strictly with the letter of S. 342 would not render the conviction of an accused illegal. S. 537, Cr. P. Code, has to be read in that connection, and no omission to comply strictly with S. 342 can render a conviction liable to be set aside unless in fact it has occasioned a failure of justice. Where an accused in answer to a general question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in the evidence against him and their implications, and attempts to explain them, the Sessions Judge may by goirg beyond his province if he questions him further in detail. He may be open to the criticism of cross-examining the accused and attempting to elicit contradictory answers. All that can be laid

down is that it is the duty of the Court to be satisfied either by his statements or by his answers to questions or by both, that the accused explains or has an opportunity to explain circumstances from which hostile inference may be drawn against him. (*Burn and Mockett, JJ.*) ANNAMALAI MUDALI *v.* EMPEROR. **I.L.R. (1940) Mad. 514=190 I.C. 206=51 L.W. 206=1940 M. W.N. 93=A.I.R. 1940 Mad. 372=(1940) 2 M.L. J. 39.**

——**S. 342**—*Putting of formal questions to accused—Omission to put specific questions about adverse circumstances—Trial—If vitiated.*

It is the duty of the Court under S. 342 (1), Cr. P. Code, whether the accused person or persons are defended by Counsel or not, to point out to each of the accused the elements of the evidence adduced against them and invite their explanations regarding them. It is not sufficient if the Judge merely puts to the accused the usual formal questions. Although it is not necessary or practically possible for the Sessions Judge to put to the accused every piece of evidence or point which has been given or made against him, he should put matters from which, in the absence of an explanation by him, adverse inferences can be drawn against him. When this is not done, the conviction of the accused is liable to be set aside by the High Court. (*Beasley, C.J. and Gentle, J.*) SANGAMA NAICKER, *In re.* **59 Mad. 622=165 I.C. 743=9 R.M. 295=44 L.W. 52=1936 M. W.N. 613=1936 Cr.C. 818=38 Cr.L.J. 45=1936 M.Cr.C. 154=A.I.R. 1936 Mad. 715=71 M.L.J. 138.**

——**S. 342**—*Conduct of accused explainable—Omission of Magistrate to question accused—Effect—Inference.*

When the accused has been questioned at considerable length, the fact that the Magistrate has missed one or two points cannot by itself invalidate the trial. Where, however, any conduct of the accused is susceptible of reasonable explanation, he must be asked to explain it If he is not asked to explain it, it must be assumed in his favour that he would have given a reasonable explanation. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. **1936 A.M.L J 85.**

——**S 342**—*Examination of accused after further cross-examination of prosecution witnesses.*

Under S. 342, Cr. P. Code, the Magistrate must examine the accused after the further cross-examination of the prosecution witnesses and before the accused is called upon to enter upon his defence. The High Court in revision will order retrial only in cases where non-compliance with the provisions of the Code has prejudiced the accused. (*Abdul Rashid, J.*) GURDAS SINGH *v.* EMPEROR. **179 I C. 249=11 R L 547 (1)=40 Cr. L.J. 186=40 P.L.R. 589=A.I.R. 1938 Lah. 832.**

Examination of accused.

——**S. 342**—*Warrant case—Proper time for.*

The further examination of the prosecution witnesses under S. 256 is not a part of the prosecution case. A.I.R. 1923 Mad. 609 (F.B.), Rel. on. But the further cross-examination is not part of the defence and the defence for which the accused is called on within the meaning of S. 342 starts after the further cross-examination of the prosecution witnesses. A.I.R. 1936 All. 319, dissented. Hence in a warrant case which should be regarded as comprising three stages prosecution, further cross-examination of prosecution witnesses and defence, the examination under S. 342 can be held either immediately after the close of the first stage or immediately before the beginning of the third stage or for the matter of that at any time between these two points. (*Blacker, J.*) MAHOMED NAWAZ *v.* EMPEROR. **I.L R (1938) Lah. 603 =176 I.C. 678=11 R.L 226=39 Cr.L.J. 781=40 P.L.R. 850=A.I.R. 1938 Lah. 543.**

——**S 342**—*Court taking additional evidence under S. 540 after conclusion of defence evidence —Accused—If to be examined again.*

Where the accused has already been examined at the proper time on close of the prosecution case, but subsequently after the close of the defence evidence the Court takes additional evidence under S. 540, it is not necessary to re-examine the accused under S. 342. (*Rowland, J.*) RAMCHANDRA PRASAD *v.* EMPEROR **168 I.C. 979 =38 Cr L J. 657=3 B.R. 508=18 Pat L.T. 483 =9 R.P. 522=1937 P.W.N. 519=A.I.R. 1937 Pat. 246.**

——**S. 342**—*Witness examined under S. 540—Accused, if should be examined again.*

S. 540, Cr. P. Code, is not controlled by S. 342 and therefore where the accused is once examined as required by S. 342, Cr. P. Code, and then a witness is examined under S. 540, the Court is not bound to examine the accused again after recording the statement of that witness. (*Kichlu and Wazir, JJ.*) INDAR SINGH *v.* EMPEROR. **40 P.L.R.J. & K. 23.**

——**S. 342**—*Examination of accused after Court witness—Necessity of.*

S. 342 applies only to the prosecution case and not to the witnesses called by the Court. The accused need not therefore be examined again after the examination of a witness called by the Court. (*Blacker, J.*) GURBAKSH SINGH *v.* EMPEROR. **177 I.C. 298=11 R.L 289=39 Cr.L.J. 856=40 P.L.R. 916=A.I.R. 1938 Lah. 631.**

——**S. 342 (1)**—Examination of accused after examination of Court witness—Necessity. *See* CR. P. CODE, SS. 540 AND 542 (1). **1940 O.A. 596.**

——**S. 342**—*Examination of accused after further cross-examination of P.W.S.—Duty of Court —Omission to examine—If vitiates trial.*

It is imperative under the second part of S. 342, Cr. P. Code, to question the accused after he has further cross-examined the prosecution witnesses subsequent to the framing of the charge, but the omission to do so does not vitiate the trial except where it is shown that prejudice has been done to the accused due to omission to question the accused. (*Middleton, J.C. and Mir Ahmad, A J. C.*) HASSAN *v.* EMPEROR. **167 I C. 318=9 R. Pesh. 85=38 Cr.L.J. 399=1936 Cr.C. 1077=A. I.R. 1936 Pesh. 211.**

——**S. 342**—*Examination of accused after examination of Prosecution witnesses—Prosecution witnesses cross-examined after charge—Omission to re-examine accused—Irregularity.*

Where after the examination of the witnesses for the prosecution, the accused was examined and a charge was framed, and then the witnesses for the prosecution at the instance of the accused were recalled and cross-examined, it is at least arguable that the provisions of S. 342, Cr. P.

CR. P. CODE (1898), S. 342.

Code, do not require the examination of the accused after such cross-examination. When the accused cross-examines the witnesses after the charge, he does so presumably as a part of his defence and it is not to be supposed that he intends to elicit further information which may be used against him. Further, even if it is strictly necessary under S. 342 to re-examine the accused any irregularity in omitting to do so is cured if no injustice is caused to the accused. (*Allsop, J.*) MOHAMMAD RAFIQ AHMAD *v.* EMPEROR. 162 I.C. 758=37 Cr.L.J. 710=8 R.A. 901=1936 A.L.J. 274=1936 A.W.R. 375=1936 A.Cr.C. 107=1936 Cr.C. 476=1936 A.L.R. 470=A.I.R 1936 All. 319.

——S. 342—*Examination of accused before charge—If compulsory.*

Under S. 342, Cr. P. Code, the accused should only be questioned after the witnesses for the prosecution have been examined and before he is called on for his defence. The examination of the accused before framing charge is, therefore, not compulsory. S. 254, Cr. P. Code, itself makes it allowable to frame the charge before examining the accused as well as before recording all the evidence. (*Gruer, J.*) BHANWARSINGH *v.* SUKHRAMSINGH. 1940 N.L.J. 410=188 I.C. 413=13 R.N. 2=41 Cr.L.J. 585=A.I.R. 1940 Nag. 283.

——S. 342—*Examination of accused—Compliance with—Complicated case—Procedure to be adopted—Prejudice to accused—Representation of accused by Counsel—If affects question.*

Where the offences alleged are under Ss. 148 and 333, I. P. Code, and consist of several elements, the position of each accused must be individually considered and a careful examination is necessary. Where a complicated question is put to each accused without reference to the particular position of each as brought out by the evidence against him, it is not a sufficient compliance with the section. The presence of the legal advisers cannot affect the question of prejudice for the examination contemplated by the section is one by the Judge direct without the intervention of Counsel. (*Gruer, J.*) NANA *v.* EMPEROR. I.L.R. (1939) Nag. 686=179 I.C. 317=11 R.N. 290=40 Cr.L.J. 197=1938 N.L.J. 90=A.I.R. 1938 Nag. 283.

——S. 342—*Examination of accused—Duty of Magistrate.*

The examination of the accused after the prosecution evidence has been completed is absolutely essential according to the mandatory provision of law contained in S. 342, Cr. P. Code, and cannot be dispensed with. (*Abdul Qayoom, C.J. and Wazir, J.*) STATE *v.* SHIB RAM. 41 P.L.R. J. & K. 95.

——S. 342—*New witness examined after further cross-examination of prosecution witnesses—Second examination of accused—If obligatory.*

Under S. 342, Cr. P. Code, it is incumbent on the trying Magistrate to question the accused again where after the further cross-examination of the prosecution witnesses a medical witness is newly examined for the prosecution. The omission to do so vitiates the proceedings. (*Skemp, J.*) JHANDU *v.* EMPEROR. 40 P.L.R. 902.

——S. 342—*Non-examination of accused—Prejudice—Presumption.*

CR. P. CODE (1898), S. 342.

No doubt prejudice to the accused may be presumed in a case in which he has not been examined under S. 342, but the presumption is always liable to be rebutted. (*Zia-ul-Hasan, J.*) EMPEROR *v.* BRIJ LAL. 12 Luck. 24=160 I.C. 489=8 R.O. 263=37 Cr.L.J 408=1936 O.W.N. 215=1936 O.L R. 80=A I.R. 1937 Oudh 130.

——S. 342—*Examination of accused—Proper stage—Examination after close of arguments and before judgment—Effect of.*

Under S. 342, Cr. P. Code, the Court must examine the accused at the end of the case for the prosecution and before he is called upon for his defence. If a Magistrate adjourns a case for arguments the moment the case for the prosecution is concluded and after the conclusion of the arguments examines the accused on the day fixed for delivering a considered judgment, the failure to comply with the section, even if it amounts to an irregularity, would seriously prejudice the accused and his conviction is, therefore, liable to be set aside. (*Harries, C.J. and Meredith, J.*) FEROZE KAZI *v.* EMPEROR. 1940 P.W.N. 243=6 B R. 307=186 I.C 227=12 R.P. 477=21 P.L.T. 731=41 Cr.L J. 267=A.I R. 1940 Pat. 295.

——S. 342—*Perfunctory examination of accused—Charge of rioting—Conviction, if liable to be set aside.*

Where in a prosecution under Ss. 452, 325, 323 and 147, I. P. Code, no question in respect of a riot having been committed or in respect of the common object of that riot or in respect of the formation of an unlawful assembly has been put to the accused in his examination under S. 342, Cr. P. Code, and the accused is materially prejudiced in his defence by this serious omission on the part of the trial magistrate, and his conviction is liable to be set aside. (*Nanavutty, J.*) SHAFAAT *v.* EMPEROR. 1936 O.W.N 364.

——S. 342—Examination of the accused under S 342, not satisfactory according to the appellate Court—Proper procedure. *See* CR. P. CODE, Ss. 428, 423 AND 342. 17 Pat.L.T. 445=A.I.R. 1936 Pat. 438.

——S. 342—*Examination of accused—Scope of.*

S. 342, Cr. P. Code, enjoins upon the Court the duty of placing before the accused the circumstances appearing against him in order that the accused may be given an opportunity of explaining them. This is the main object of the section. The section was never intended for the purpose of cross-examining the accused or for filling up gaps in the case for the prosecution. (*Khundkar and Sen, JJ.*) TAHASINUDDIN AHMED *v.* EMPEROR. 188 I.C. 288=12 R.C. 678=41 Cr.L.J. 563=44 C.W.N. 396 (2)=A.I.R. 1940 Cal. 250

——S. 342—*Examination of accused—Summary trial—Failure to record—If fatal.*

Where the Magistrate has considered the statements of the accused they cannot possibly be prejudiced by the mere fact that he did not reduce those statements to writing in the proper column provided in the summary register. Therefore it would be absurd to say that mere failure to record examination can result in miscarriage of justice. (*Almond, J.C.*) KHAN MOHAMMAD *v.* EMPEROR. 187 I.C. 769=12 R. Pesh. 38=41 Cr. L.J. 531=A.I.R. 1940 Pesh. 11.

CR. P. CODE (1898), S. 342.

"Inquiry" and "Accused."

——S. 342—*Meaning of.*

The word "inquiry" used in S. 342 does not include investigation and the word "accused person" must mean one over whom the Magistrate is exercising jurisdiction. Therefore when a person against whom there was sufficient evidence to justify his production for enquiry and trial before a Magistrate under S. 170, is not prosecuted by the police, such person is not an accused person within the meaning of S. 342. There is nothing which precludes the Court from administering oath to such a person. Hence he can be a competent witness even though he was not pardoned under S. 337. But his evidence must ordinarily be of less value than that of a person who has been granted a valid pardon and is no longer under fear of a prosecution. (Case-law discussed.) (*Grille, C. J., Niyogi and Pollock, A.J. Cs.*) AMDUMIYAN GULJAR *v.* EMPEROR. I.L.R. (1937) Nag. 315=166 I.C. 582 and 587=9 R.N. 126 and 132=38 Cr.L.J. 237 and 251=A.I.R. 1937 Nag. 17 (F.B.).

Non-compliance.

——S. 342—*Effect.*

The real object of questioning accused under S. 342 is that the important circumstances which if unexplained would lead to the conviction should be specifically pointed out to him to enable him to give an explanation if any. In cases where the evidence against the accused is not direct but entirely circumstantial it is all the more necessary that the circumstance which if unexplained would lead to conviction should be pointed out to the accused by the Court so that he may have an opportunity to give his explanation if any in regard to it. Failure to comply with this vitiates the trial (*Wadsworth and Menon, JJ.*) CHINNU *v* EMPEROR 59 Mad. 629 (N)= 44 L.W. 55 (N.)=165 I.C. 192=9 R.M. 217= 37 Cr.L.J. 1107=1936 M.W.N. 183=1936 Cr. C. 762=1936 M.Cr.C. 151=A.I.R. 1936 Mad. 628=71 M.L.J. 140 (N.).

——S. 342—*Effect.*

The provision in S. 342, Cr. P. Code, for questioning the accused generally on the case is mandatory, and if that is not complied with the trial and conviction are contrary to law and the conviction must be set aside. (*Pandrang Row, J.*) VARAHALAMMA *v.* EMPEROR. 1937 M.W.N. 574.

——S. 342—*Effect—If ground for re-trial.*

Where in a trial for murder, the approver states that the accused got injuries at the hands of the deceased during their fight and the Magistrate fails to ask explanation from the accused under S. 342, Cr. P. Code, about the injuries on his body, the failure of the Magistrate to ask the accused's explanation on such a vital point necessitates the re-trial of the accused. (*Davis, J.C. and Lobo, A.J.C.*) KHAIRO *v.* EMPEROR. 170 I.C. 922=31 S.L.R. 470=38 Cr.L.J. 995=10 R.S. 77=A.I.R. 1937 Sind 221.

——S. 342—*Effect.*

The failure of a Judge to question the accused about a confession, which forms an integral and substantial part of the prosecution case, is a serious omission, not covered by the provisions of S. 537. (*Davis, J.C. and Haveliwala, J.*) RABAN

CR. P CODE (1898), S. 342.

LALU *v.* EMPEROR. 32 S.L.R. 709=175 I.C. 324 =10 R.S. 296=39 Cr.L.J. 618=A.I.R. 1938 Sind 97.

——S. 342—*Effect—Summary trial of offence under Motor Vehicles Act.*

Where at the summary trial of the accused for an offence under the Motor Vehicles Act, the accused did not admit his guilt and evidence was adduced to prove the charge and the accused was convicted but the Magistrate omitted to question the accused after the prosecution evidence was completed it was held that the proceedings should be quashed. (*Davis.*) GANESH *v.* EMPEROR 1940 A.M.L.J. 23.

Power of Court.

——S. 342—*Accused declining to make statement but preferring to file written statement—If breach of section.*

Where an accused person declines to make a statement, no examination under S 342, Cr. P. Code, is possible, and any attempt to induce answers by repeated questions would not only be futile but also harassing to the accused. An accused person can only be examined under the provisions of S. 342 if he is willing to answer questions put by the Court. If he declines to answer questions and prefers to put in a written statement, there is no violation of the provisions of that section by the Magistrate. (*Grille, J.*) BUDHULAL *v.* EMPEROR. I.L.R. 1937 Nag. 228= 167 I.C. 155 (1)=9 R.N. 168=38 Cr.L.J. 354 (1) =A.I.R. 1937 Nag. 67.

Scope.

——S. 342—*Scope—Compliance— Opportunity to accused to explain matters appearing in the evidence—How to be given.*

Where, in a murder trial, the Sessions Judge reads out nearly two pages of printed matter, being the precis of the evidence against the accused, as it were in one breath, and asks the accused whether he wants to say anything, that is certainly not giving a real opportunity to the accused to explain the matters appearing in the evidence against him, as required by S. 342 of the Cr. P. Code, though it might be said that the letter of the law is observed. (*Pandrang Rao, J.*) KANAKASABAI PILLAI *v.* EMPEROR. 186 I.C. 704= 12 R.M. 682=41 Cr.L.J. 369=50 L.W. 452= 1939 M.W.N. 883=A.I.R. 1940 Mad. 1.

——S. 342—*Scope—Court summoning witness —Re-examination of accused—If necessary.*

The law does not require that the summoning of a witness by the Court should necessitate a further examination of the accused under S. 342, Cr. P. Code, although in some cases when a prosecution witness is re-called and re-examined under S. 540, such procedure should be followed. There can be no prejudice caused whatever to the accused by an omission to do something which the law does not direct, namely the examination of the accused after the recording of this witness's evidence. (*Grille, J.*) SHEORAM IDAN *v.* EMPEROR. I.L.R. (1937) Nag. 541=10 R.N. 102 =38 Cr.L.J. 1058=171 I.C. 262=A.I.R. 1937 Nag. 285.

——S. 342—*Scope— Non-compliance—Effect— If vitiates trial—S. 537.*

It cannot be laid down that every failure to comply with S. 342, Cr. P. Code, necessarily

CR. P. CODE (1898), S. 342.

vitiates the trial. If the Court is satisfied that failure to comply with the strict terms of the section has passed no prejudice, the Court should not interfere. S. 537, Cr. P. Code, would cover such a case. But if S. 342 is entirely disregarded, that would be a ground for setting aside a conviction. (*Beaumont, C.J. and Divatia, J.*) EMPEROR *v.* KONDIBA BALAJI. **42 Bom.L.R. 695=A.I.R. 1940 Bom. 314.**

——**S. 342**—*Scope—Questions to accused to get admissions to fill up gaps in prosecution evidence—Legality.*

The examination of the accused under S 342, Cr. P. Code, for the purpose of getting admissions to fill up the gaps in the prosecution evidence is contrary to law, and the prosecution cannot be permitted to rely on admissions obtained from the accused in such circumstances. The defect in the prosecution case cannot be sought to be cured by examining the accused under S. 342, Cr. P. Code. (*Pandrang Row, J.*) SUBBA RAO *v.* VENKATACHALAPATHI. **178 I.C. 478=11 R M. 459=40 Cr.L.J. 69=1938 M.Cr.C. 169=48 L.W. 320=1938 M.W N. 871 (2)=A.I.R. 1938 Mad. 904=(1938) 2 M.L.J. 397.**

——**S. 342**—*Scope—Questioning of accused—Object of—Taking of statement—If can be dispensed with.*

S. 342, Cr. P. Code, provides for the Court to examine the accused at any stage of any inquiry or trial for the purpose of enabling the accused to explain any circumstances in the evidence appearing against him. It is not a question of what explanation the ingenuity of lawyers can invent. Such imaginative suggestions are no substitute for the taking of a statement from the accused; and not until the accused is asked and gives an explanation, can the question arise for consideration as to whether such an explanation can be accepted or not. (*Rowland, J.*) CHANDRESHWAR PRASAD NARAIN SINGH *v.* ARUNENDRA MOHAN GHOSE. **165 I.C. 931=9 R.P. 231=38 Cr L J. 2 =3 B.R. 104=1936 Cr.C. 1064=17 Pat.L.T. 794=1936 P.W.N. 773=A.I.R. 1936 Pat. 626.**

——**S. 342**—*Scope—Statements under conviction based—Sustainability.*

It is not open to a Criminal Court to rely upon the so-called admissions of the accused made in the statement under S. 342, Cr. P. Code, and to base a conviction on the same, and that too where the prosecution evidence is entirely untrustworthy and unreliable. (*Pandrang Row, J.*) KRISHNAYYA *v.* EMPEROR. **1937 M.W.N. 569.**

Statement of accused.

——**S. 342**—*Statement of accused—To be taken as a whole.*

The Court must accept or reject the statement of the accused as a whole. Where the accused states that he was present at the time of the fight and took part in it but that he acted in self-defence, the whole of his statement should be taken and not merely the inculpatory part of it to the exclusion of the exculpatory part raising the plea of self-defence. (*Agha Haidar and Skemp, JJ.*) AHMAN *v.* EMPEROR. **170 I.C. 81=38 Cr. L J. 843=10 R.L. 77=38 P.L.R. 105=A.I.R. 1937 Lah. 243.**

——**S. 342**—*Statement of accused—Use of, against co-accused—Permissibility.*

CR. P. CODE (1898), S. 342.

Per *Sen, J.*—The Court is not entitled to draw any inference against a co-accused from the answer of one accused given in response to questions put to him under the provisions of S. 342, Cr. P. Code. (*Khundkar and Sen, JJ.*) TAHASINUDDIN AHMAD *v.* EMPEROR. **188 I.C. 288=12 R.C. 678=41 Cr L J. 563=44 C.W.N. 396 (2)=A.I.R. 1940 Cal. 250.**

——**Ss. 342 and 364**—*Duty of Court—Filing of written statement—Practice.*

Every piece of circumstantial evidence tending to incriminate the accused should be pointedly brought to his notice either by the committing Magistrate or in the last resort by the trial Judge in the Court of Session, and the answers of the accused to these questions recorded, as far as possible, in his own words by the Court. Written statements filed on behalf of accused persons are evolved out of the brains of the counsel for the accused helped by the *pairokars* and friends of the accused, and seldom represent the ideas of the accused or the facts as known to the accused. As little or no importance could, therefore, be attached to these written statements, it is the duty of all magistrates and Sessions Judges sternly to discountenance the practice of filing written statements on behalf of accused persons. (*Nanavutty and Smith, JJ.*) MAHOMED ANIS *v* EMPEROR. **12 Luck. 291=164 I C. 482=9 R.O. 81=37 Cr.L.J. 955=1936 O.W.N. 691=1936 Cr.C. 1086=1936 O.L.R. 459=A.I.R. 1936 Oudh 405.**

——**Ss. 342 and 537**—*Omission to re-examine accused after further prosecution witnesses were examined—Irregularity—Trial under Ss. 5 and 6 of Child Marriage Restraint Act.*

Where in a trial under Ss. 5 and 6 of the Child Marriage Restraint Act, an accused person has been examined at length and has been given a full opportunity to state his case and to explain why he has been falsely implicated but he has not been examined *again* after some further prosecution witnesses have been produced, the irregularity would not vitiate the trial unless it is known to have caused prejudice to the accused or a failure of justice. (*King, C.J.*) BACHCHU LAL *v.* EMPEROR. **12 Luck. 263=162 I.C. 389 (2)=8 R O. 376=37 Cr.L.J. 616=1936 O.W.N. 480=1936 Cr.C. 712=1936 O.L.R. 254=A.I.R. 1936 Oudh 311.**

——**Ss. 342 and 537**—*Omission to put necessary question—Irregularity.*

An omission by the trial Court to put a question necessary by virtue of the provisions of S. 342, Cr. P. Code, is dealt with by S. 537, Cr. P. Code. The question in every case in which an irregularity of this kind has been committed is whether in fact a failure of justice has been occasioned by reason of the irregularity which has occurred. (*Roberts, C.J., Leach and Dunkley, JJ.*) EMPEROR *v.* U. DAMAPALA. **14 Rang 666=9 R.R. 340=38 Cr.L.J. 524=168 I.C. 193=A.I.R. 1937 Rang. 83 (F.B.).**

——**Ss. 342 and 540**—*Failure to examine accused subsequent to examination of Court witnesses—Trial, if vitiated.*

Where in a case tried summarily, certain Court witnesses were examined under S. 540, Cr. P. Code, after the close of the defence evidence but

CR. P CODE (1898), S. 344.

the accused was not thereafter examined under S. 342, Cr. P. Code, it was held that the Magistrate should have strictly followed the provisions of S. 342, Cr. P. Code, which applies both to summons and warrant cases but as the accused had once been examined in detail, the failure to examine him once again after the examination of Court witnesses was a mere irregularity and was not fatal to the trial as the accused had not been in any way prejudiced. (*Thomas, C.J.*) KANDHI *v.* MUNICIPAL BOARD, RAE BARELI. 177 I.C. 56=11 R.O. 16 (2)=1938 A Cr.C. 82=39 Cr.L.J. 841=1938 O.A. 591=1938 O.L.R. 365=1938 O. W.N. 743.

——S. 344—*Applicability—Revision application to Sessions Judge—Applicant absent—Adjournment, conditional upon applicant's deposit of prosecutor's fee—Legality.*

Provisions of S 344, do not apply to proceedings in revision. A revision application was filed to set aside an order discharging certain accused persons. On the day of hearing of this revision application, the applicant was unwell and was away. Thereupon, the Sessions Judge granted an adjournment but made it as a condition that he should deposit the fee of the special Public Prosecutor within a week.

Held, the order must be set aside. (*Davis, J.C. and Mehta, A.J.C.*) JETHANAND THAWARDAS *v.* TAHILRAM. 165 I.C. 993=1936 Cr. C. 1091=9 R.S. 115=38 Cr.L J. 119=A.I.R. 1936 Sind 235.

——S. 344—Applicability—Accused arrested in Bombay and sent to Karachi under S. 167 (2), Cr. P. Code—Remand—Procedure. *See* CR P. CODE, S. 167 (2). A.I.R. 1937 Sind 251.

——S. 344—*Costs—Order for—Power of Court—If restricted by S.* 526 (8) *or* (9).

S. 344 of the Cr. P. Code does justify an order for costs and nothing contained in Sub-Ss. (8) or (9) of S. 526 of the Code can restrict the power of a Court to pass an order for costs under S. 344. (*Allsop, J.*) RAM RAKSHPAL *v.* RAM NATH. I.L.R. (1938) All. 233=1937 A.W.R. 1226=1937 A.L. J. 1356 (1)=173 I.C. 385=1938 A.Cr.C. 4=1938 A.L.R. 133 (1)=39 Cr.L.J. 352=10 R.A. 481=A.I.R. 1938 All. 112.

——S. 344—*Remand order—Power to pass before taking cognizance—Accused put before another—Magistrate subsequent to taking cognizance by different Magistrate—Legality—One Magistrate acting as substitute for another during latter's absence on tour—Legality—Remand to police custody—Propriety.*

Unless a Magistrate takes cognizance of a case he cannot legally pass an order of remand under S. 344, Cr. P. Code. Once a Magistrate has taken cognizance, a remand under S. 344 should be to gaol and not to police custody; nor can the accused be legally put before another Magistrate. The practice of one Magistrate acting as a substitute for another Magistrate exercising special powers under S. 30, Cr. P. Code, when the latter is on tour has no legal warrant and should not be continued. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. 1936 A.M.L.J. 85.

——S. 345—*Compromise of compoundable offence—When takes effect—Magistrate's jurisdiction, how affected—Resilement—Effect.*

CR. P. CODE (1898), S. 345.

A composition arrived at between the parties of a compoundable offence complete as soon as it is made and has the effect of an acquittal in spite of the fact that one of the parties subsequently resiles from the compromise. The compromise has the immediate effect of acquittal so as to deprive the Magistrate of his jurisdiction to try the case, and the subsequent withdrawal of a party from it, can neither affect the acquittal nor revive the jurisdiction of the Magistrate to proceed with the case. (*Niyogi, J.*) RAMBAI BAHADUR SINGH *v.* CHANDRA KUMARI DEBI. 186 I.C. 370=12 R.N 202=41 Cr.L.J. 287=1940 N L.J. 25=A.I.R. 1940 Nag. 181.

——S. 345—*Offence under Ss.* 192 *and* 383, *I P. Code—If compoundable.*

Charges of extortion and fabricating false evidence are not private disputes, neither of the offences being compoundable. (*Davis, J.C. and Lobo, A.J.C.*) VIRUMAL MANGANMAL *v.* MUHAMMAD KHAN. 30 S L.R. 217=164 I.C. 1020=37 Cr.L.J. 1086=9 R.S. 85=1936 Cr.C. 862=A.I. R. 1936 Sind 146.

——S. 345 (1)—*Compromise—Effect of—Duty of Magistrate—Right of complainant to resile and proceed with case—Jurisdiction of Magistrate after composition.*

A composition of an offence when arrived at between the parties is in law complete as it is made, and it has the effect of acquittal even though one of the parties later on resiles from the compromise. On the filing of a compromise petition signed by both parties in Court in respect of an offence for which no leave of the Court is required, the Magistrate is in duty bound to order an acquittal. The Magistrate has no jurisdiction to proceed further with case, nor can the complainant, by a subsequent withdrawal of the compromise petition before any order is passed on it, insist on the case being proceeded with. (*Manohar Lall, J.*) DHARICHHAN SINGH *v.* EMPEROR. 180 I.C. 627=1939 P.W.N. 69=11 R.P. 525=40 Cr. L.J. 460=5 B.R. 463=19 Pat.L.T. 840=A.I.R. 1939 Pat. 141.

——S. 345 (1) and (2)—*Applicability and relative scope—Compounding under—Requirements of validity.*

Composition under S. 345 (1), Cr. P. Code, is an act of the parties which requires no permission of the Court. Nor is there any language to restrict its completion to any particular time. But under Cl. (2) of the section, there must be a prosecution pending and the permission of the Court has to be obtained. Any act of the parties done before the commencement of the prosecution and without reference to any Court, cannot amount to a composition under S. 345 (2) and cannot have any effect on the trial. (*King, J.*) PONNUSWAMY AIYAR, *In re*. 172 I.C. 369=10 R.M. 453=39 Cr. L.J. 133=1937 M.Cr.C. 228=1937 M.W.N. 864 =46 L.W. 289=A.I.R. 1937 Mad. 825=(1937) 2 M.L.J. 383.

——S. 345 (1) and (6)—*Scope—Charge under S.* 342, *I. P. Code, for wrongful confinement of two persons—Compounding by one only—Acquittal of accused—Legality.*

Accused was charged under S. 342, I. P. Code, for wrongful confinement of two persons, *P* and *D P* filed a statement in Court to the effect that so far as he was concerned the case had been com-

pounded, and the accused was thereupon acquitted under S. 345 (6), Cr. P. Code.

Held, in revision, that under S. 345 (1) of the Cr. P. Code, the offence could only be compounded by both *P* and *D*, and not by one of them alone, and there having been no compounding so far as *D* was concerned the charge of confinement of *D* still subsisted, and the Court had no jurisdiction to acquit the accused in respect of the offence of wrongfully confining *D*. The acquittal being thus in contravention of the Code of Criminal Procedure was illegal and liable to be set aside. (*Grille, J.*) EMPEROR *v.* KHILWAN SINGH. **I.L.R. (1937) Nag. 286=166 I.C. 926=9 R.N. 154=38 Cr.L.J. 334=A.I.R. 1937 Nag. 72.**

——**S. 345 (2)**—*Duty of Court—Compromise—Effect of acceptance by Court—Magistrate sending record to Superintendent of Police to ascertain latter's opinion—Propriety—Proper course for ascertaining views of Crown.*

In the case of an offence compoundable with the permission of the Court, if the Magistrate in effect though not expressly, accepts a compromise effected by the parties the accused is entitled to be acquitted. The Magistrate cannot proceed with the case on the ground that the complainant has resiled from the compromise. Nor is it right or proper for the Magistrate to send the record of the proceedings, which are of a judicial character, to the Superintendent of Police for taking his opinion on a compromise effected by the parties. The proper course is to ask the prosecuting inspector to take his instructions from the District Magistrate, or may be from the Superintendent of Police, as to the attitude of the Crown towards the compromise. (*Manohar Lall, J.*) DHARICHHAN SINGH *v.* EMPEROR. **180 I.C. 627=1939 P.W.N. 69=11 R.P. 525=40 Cr L J. 460=5 B.R. 463=19 Pat.L T. 840=A.I.R. 1939 Pat. 141.**

——**S. 345 (2)**—*Duty of Court—Reference to police—Propriety.*

A Magistrate cannot surrender the discretion to give permission to compound an offence, which vests in him, to any other Court or to any outside agency. Allowing a case to be compounded is a judicial act, and any argument whether composition should be allowed or not must be addressed to the Magistrate in open Court either by the prosecuting Counsel or the Prosecuting Inspector on behalf of the Crown or by those who desire the composition. It is improper to refer to police authorities by means of correspondence and to arrive at a decision as the result of that correspondence. (*Grille, J.*) HARPRASHAD KIRA LAL, *In re*. **172 I.C. 352=10 R.N. 196 (2)=39 Cr.L.J. 120=A.I.R. 1938 Nag. 39.**

——**S. 345 (2)**—*Duty of Court—Reference to police—Propriety.*

A Magistrate cannot refer the question whether an offence should be compounded or not to the superior Court. The Magistrate himself must determine the question. *A fortiori* the Court is not permitted to refer the question to any outside agency much less to the District Superintendent of Police. The opinion of the Police in a matter which the Magistrate is by law bound to dispose of in his judicial capacity is entirely irrelevant, and where the Magistrate seeks the opinion of the police officers, his conduct is certainly repre-

hensible. It is essential for the administration of justice and for the self-respect of the Magistracy as a body that Magistrates should avoid any suspicion of being influenced in their decisions by the opinion of the police who investigate the cases brought before them. (*Grille, J.*) PARTAP SINGH *v.* EMPEROR. **I.L.R. (1937) Nag. 183=169 I C. 33=9 R.N. 291=38 Cr L.J. 689=A.I.R. 1937 Nag. 114.**

——**S. 345 (2)**—*Offence falling under—Private arrangement between parties before case comes before Court—Legality.*

Under S. 345 (2), Cr. P. Code, any arrangement between the complainant and the accused before the case comes into Court is ineffective, when the offence is compoundable only with the permission of the Court. (*Grille, J.*) HARSWARUP PRASAD *v.* EMPEROR. **172 I.C. 89=10 R.N. 159=39 Cr. L.J. 59 (2)=20 N.L.J. 244=A.I.R. 1938 Nag. 37.**

——**S. 345 (2) and (7)**—*Compounding of offence under S. 420, I. P. Code, out of Court—Absence of permission of Court—Effect.*

Sub-S. (7) of S. 345, Cr. P. Code, lays down that no offence shall be compounded except as provided by that section. An offence under S. 420, I. P. Code, can only be compounded with the permission of the Court and any arrangement of compromise entered into between the parties before the case came into Court at all, is ineffective. It could not be contended that in such a case no permission was necessary, as the Court was not seized of the case. (*Grille, J.*) HARSWARUP CHAUBEY *v.* EMPEROR. **I.L.R. (1940) Nag. 195.**

——**S. 345 (5-A)**—*Discretion of High Court—Proposal for compromise not made before lower Court.*

The High Court has, no doubt, jurisdiction under S. 345 (5-A), Cr. P. Code, to allow the parties to compromise their disputes, although there was no proposal before the Courts below to the effect that any such compromise should be made. But the discretion conferred by the section upon the High Court should be exercised sparingly and only in suitable cases. Where the proceedings before the Courts below disclose no irregularity or impropriety, the exceptional power conferred by the section should not ordinarily be used except in a case in which the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before that Court passed final orders in the case. (*Edgley, J.*) RABUR ALI SARDAR *v.* KALA CHAND BEPARI. **I.L.R. (1939) 1 Cal. 567=185 I.C. 177=12 R.C. 347 (2)=41 Cr. L.J. 125=A.I.R. 1939 Cal. 728.**

——**S. 345 (5-A)**—*Powers of High Court—Aggrieved persons not before it.*

S. 345 (5-A), Cr. P. Code, merely confers jurisdiction on the High Court in the exercise of its powers of revision under S. 439, Cr. P. Code, to allow the aggrieved persons mentioned in Col. 3 of the tables attached to sub-Ss. (1) and (2) to compound the various offences mentioned in those sub-sections. It would not, therefore, be competent for the High Court to allow a compromise to be recorded, unless the aggrieved persons are actually at it and have expressly recorded their consent to such a compromise being recorded.

CR. P. CODE (1898), S. 345.

(*Edgley, J.*) BABUR ALI SARDAR *v.* KALA CHAND BEPARI. I L.R. (1939) 1 Cal. 567=185 I.C. 177 =12 R C. 347 (2)=41 Cr. L.J. 125=A.I.R. 1939 Cal. 728.

——S. 345 (6)—*Accused charged for wrongful confinement of two persons—One person compounding his case—Magistrate acquitting accused—Legality.*

Where a charge is framed an acquittal can be either on merits or under S. 345 of the Code. Where an accused was charged for wrongful confinement of two persons but one of them alone compounded his case with the accused and the Magistrate ignored the fact that the charge was framed for wrongful confinement of two persons and acquitted the accused.

Held, that the acquittal was in contravention of Code of Criminal Procedure inasmuch as the charge was framed in respect of two persons, and only one of them had compounded and not both as required by S 345 of the Code. (*Grille, J.*) *In re* KHILAWANSINGH MANSINGH DANGI. I.L.R, (1937) Nag. 286=166 I.C. 926=9 R.N. 154=38 Cr.L.J. 334=A.I.R. 1937 Nag. 72.

——S. 346—*Order by Sub-Divisional Magistrate cannot be set aside.*

District Magistrate has no power to cancel or set aside an order of a Sub-Divisional Magistrate transferring a case referred to him for transfer, under S. 346. (*Gruer, J.*) EMPEROR *v.* GANPAT. I. L R. (1937) Nag. 135=165 I C. 830=9 R.N. 97= 1936 Cr.C. 937=38 Cr.L.J. 15=A.I.R. 1936 Nag. 220.

——Ss. 346 and 350 (2)—*Proceedings stayed under S. 346—Magistrate by whom case is taken up—If must hold* de novo *trial.*

Where proceedings had been stayed under S. 346, Cr. P. Code, the Magistrate by whom the case is subsequently taken up is to hold a *de novo* trial. (*Henderson and Khundkar, JJ.*) SASTHIGOPAL *v.* HARIDAS BAGDI. 175 I.C. 537=10 R C. 799=39 Cr.L.J. 606 (2)=42 C.W.N. 508=A.I.R 1938 Cal. 415.

——S. 347—*Concurrent jurisdiction—Committal to Court of Session—When justified—Statement of reasons—Necessity.*

Offences which are triable by both a Magistrate and a Sessions Court should ordinarily be tried by the Magistrate, though in certain cases he can commit to sessions. The iatter course is an exception to the general rule, that if the Magistrate can try he should do so. The discretion to commit to sessions must be exercised after due consideration and the reasons for it must be stated because it is only by giving the reason is it possible to tell that the Magistrate has realised that he can try the case himself and is not bound to commit to sessions. (*Hamilton, J.*) SHEOMANGAL *v.* EMPEROR. 184 I.C. 260=12 R O. 87=1939 A. Cr.C. 177=40 Cr.L.J. 903=1939 A.W.R. (C.C.) 188=1939 O.L.R 596=1939 O.A. 729=1939 O. W.N. 868=A.I.R. 1940 Oudh 15.

——Ss. 347 and 288—*Commitment to Sessions in warrant case—Magistrate, if required to start proceedings* de novo—*Statements recorded prior to commitment—If can be used as substantive evidence.*

If in a trial started as a warrant case under Chapter XXI, Cr. P. Code, the Magistrate decides after a charge has been framed to commit the accused to the Sessions Court under S. 347, Cr. P. Code, he is not required to take proceedings *de novo* under Chapter XVIII, Cr.P. Code, provided always that the requirements of Ss. 208, 211 and 212, Cr. P. Code, as well as the formalities required by S. 213, Cr. P. Code, are carefully observed. If the Magistrate commits the accused subject to the above safeguards relating to the rights of the accused, any statement recorded by him in the presence of the accused prior to the commitment would be the evidence of a witness duly recorded under Chapter XVIII, and may, therefore, be transferred and treated as substantive evidence in the trial before the Sessions Court under S. 288, Cr. P. Code. (*Young, C.J. and Sale, J.*) FAZAL *v.* EMPEROR. I.L.R. (1940) Lah. 151=A.I.R. 1940 Lah. 389.

CR. P. CODE (1898), S. 350.

——Ss. 349 and 350 (2)—*Proceedings submitted to superior Magistrate—Right of accused to* de novo *trial.*

Per *Khundkar, J.*—The only reasonable construction to put upon the second part of sub-S. (2) of S. 350, Cr. P. Code, would be to say that where proceedings have been submitted to a superior Magistrate under S. 349, the accused may not insist upon a *de novo* trial. To hold otherwise would be to render S. 349 (2) of no effect. (*Henderson and Khundkar, JJ.*) SASTHIGOPAL *v.* HARIDAS BAGDI. 175 I.C. 537=10 R.C. 799=39 Cr. L.J. 606 (2)=42 C.W.N. 508=A.I. R. 1938 Cal. 415.

——Ss. 349 and 367—*Reference to superior Magistrate—Duty of such Magistrate to form independent judgment—Judgment according to S. 367, if necessary.*

Where a case has been referred to a superior Magistrate under S. 349, Cr. P. Code, it is not sufficient for such Magistrate to merely accept the findings of the inferior Magistrate making the reference. He should form his own independent judgment and write a judgment conforming to the requirements of S. 367, Cr. P. Code. (*Zia-ul-Hasan, J.*) LALLU RAM *v.* EMPEROR. 178 I.C. 173=1938 A.Cr.C 125=39 Cr.L.J 1005=11 R. O. 91=1938 O.W.N. 1051=1938 O.A. 802=1938 A.W.R. (C.C.) 87=1938 O.L.R. 468=A.I.R. 1939 Oudh 35.

——S. 349—Appeal — Competency — Order under S. 349, sentencing the accused to a fine of Rs. 25 passed by a First Class Magistrate coupled with order under S. 106. *See* CR. P. CODE, SS. 413 AND 408. 41 C.W.N. 833=A.I.R. 1937 Cal. 394.

——S. 350—*Applicability—Summary trials.*

S. 350, Cr. P. Code, does not in terms exclude summary trials from its operation. It applies to all enquiries or trials conducted by a Magistrate in which the whole or any part of the evidence has been heard and recorded. The option given by S. 350, Cr. P. Code, to a Magistrate to act on the evidence recorded by his predecessor applies also to summary trials. (*Gruer, J.*) EMPEROR *v.* DURGAPRASAD. 189 I.C 689=41 Cr L.J. 782= 1940 N.L.J. 321=A.I R. 1940 Nag. 239.

——S. 350—Applicability to summary trials—Trial commenced summarily—Change of Magistrate—Jurisdiction of Magistrate to continue in

CR. P. CODE (1898), S. 350.

summary manner. *See* CR. P. CODE, SS. 263 AND 264. A.I.R. 1936 Sind 40.

——S. 350—*"Trial"—Warrant case—"Trial"—When commences—Charge framed by one Magistrate—Trial* de novo *by another—Discharge and order of compensation—If illegal—Magistrate if bound, to recommence only after the stage of charge.*

For purposes of S. 350, Cr. P. Code, the "trial" of a warrant case covers the whole of the proceedings. It cannot be said to commence only when a charge is framed. "Trial" means the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution and defence, if the accused be defended, present in Court for the hearing of the case. A Magistrate who hears a case *de novo* after another Magistrate had already dealt with it and framed a charge does not act illegally or contrary to the terms of S. 350. He is not bound to re-commence only from the stage of the charge. He has power to re-commence the proceedings from the beginning, and is competent to pass an order of discharge, and can pass an order of compensation under S. 250, Cr. P. Code. The fact that another Magistrate had already framed a charge does not make the order of the compensation or discharge illegal. An order under S. 250, Cr. P. Code, can be made as well after an order of acquittal as after an order of discharge. (*Broomfield and Sen, JJ.*) DAGDU GOVINDSHET WANI *v.* PUNJA VEDU WANI I.L.R. (1937) Bom. 211=166 I.C. 598=9 R.B. 247=38 Cr.L.J. 250=38 Bom.L.R. 1189=A.I.R. 1937 Bom. 55.

——S. 350—De novo *trial—Charge previously framed—If subsists or wiped out—Magistrate re-hearing case at discretion and at accused's request—Distinction.*

Under S. 350, Cr. P. Code, the inquiry or trial has to be commenced *de novo* if the succeeding magistrate in his discretion decides that it should be so, with the necessary implication that the charge already framed has to be ignored and is no longer in force. But that is not the case when the case is re-heard at the request of the accused (*Gruer, J.*) TUKARAM MAHAR *v.* EMPEROR. I.L.R. (1936) Nag. 92=164 I.C. 744=9 R.N. 28=37 Cr.L.J. 983=19 N.L.J. 115=1936 Cr.C. 708=A.I.R. 1936 Nag. 153.

——S. 350—De novo *trial—Discretion of Court—Right of accused to object to* de novo *trial.*

It is desirable for the proper administration of justice that normally, the Magistrate who passes the final order should be the Magistrate who has heard all the evidence. The accused has no right to insist that there shall not be a *de novo* trial or inquiry. The Magistrate beginning the proceedings anew against the wishes of the accused is not acting without jurisdiction. There is no provision in the Code which enables the accused to demand that witnesses examined by the Magistrate who has ceased to exercise jurisdiction, shall not be re-summoned and re-heard. (*Grille, J.*) SARDARILAL *v.* EMPEROR. I.L.R. (1937) Nag. 538=169 I.C. 47=9 R.N. 295=38 Cr.L.J. 697 =A.I.R. 1937 Nag. 147.

——S. 350—De novo *trial—Effect of—Succeeding Magistrate granting* de novo *trial—Re-transfer to first Magistrate—Power to proceed with case from stage at which he left case before transfer.*

A *de novo* trial granted by a succeeding Magistrate has the effect of cancelling the proceedings before his predecessor and if the case is re-transferred to the first Magistrate he cannot proceed with the case from the stage at which it was left by him before transfer, even though the case may not have proceeded before the succeeding Magistrate beyond merely ordering *de novo* trial. (*Gruer, J.*) EMPEROR *v.* GANPAT. I.L.R. (1937) Nag. 135=165 I.C. 830=9 R.N. 97=1936 Cr.C. 937=38 Cr.L.J. 15=A.I.R. 1936 Nag. 220.

——S. 350—De novo *trial—Interrogatories previously issued and answered—If should be excluded from evidence.*

Where interrogatories have been served and answered and subsequently a trial *de novo* under S. 350 is demanded and granted, it is not necessary to issue a fresh set of interrogatories nor can the interrogatories which have already been answered be excluded from evidence in the case. The object of re-summoning witnesses who have already been examined is that the Magistrate may see their demeanour in the witness-box. This does not apply in the case of interrogatories and therefore the answers given to the interrogatories before trial *de novo* can be considered as evidence in the case during trial *de novo*. (*Almond, J.C.*) ROSHAN LAL *v.* EMPEROR. 188 I.C. 770=13 R. Pesh. 7=41 Cr.L.J. 681=A.I.R. 1940 Pesh. 17.

——S. 350—De novo *trial—Nature of—Effect on prior proceeding—Latter—If wiped out.*

A *de novo* trial is not strictly speaking a new or fresh trial. All that it means is that the accused shall have the right to have all or any of the witnesses re-summoned and re-heard by the new Magistrate. It does not mean that when the accused claims this privilege of re-summoning and re-hearing the witnesses what had taken place before is completely wiped out or that he should renew every application which he had made before he claimed that privilege. (*Pandrang Row, J.*) VENKATANARAYANA AIYAR, *In re.* 45 L.W. 240=168 I.C. 291=1937 M.W.N. 173 =38 Cr.L.J. 537=1937 M.Cr.C. 105=9 R.M. 559=A.I.R. 1937 Mad. 448=(1937) 1 M.L.J. 338.

——S. 350—*Right to claim* de novo *trial before charge.*

An accused has no right to claim a *de novo* trial when the case is at the stage of enquiry. (*Gruer, J.*) EMPEROR *v.* GANPAT. I.L.R. (1937) Nag. 135=165 I.C. 830=9 R.N. 97=1936 Cr.C. 937=38 Cr.L.J. 15=A.I.R. 1936 Nag. 220.

——S. 350—*Scope of.*

Whereas the accused's right under S. 350 (1), proviso (*a*) arises only when the case is at the stage of trial, the Magistrate is not so bound, and may re-commence the case under S. 350 (1) even when it has not reached the stage of trial. (*Gruer, J.*) EMPEROR *v.* GANPAT. I.L.R. (1937) Nag. 135=165 I.C. 830=9 R.N. 97=1936 Cr.C. 937=38 Cr.L.J. 15=A.I.R. 1936 Nag 220.

——S. 350—*Scope—Error in jurisdictio: if mere irregularity.*

S. 350 relates to jurisdiction and error in jurisdiction is not a mere irregularity. (*Davis, J.C.*

and Dadiba C. Mehta, A J.C.) EMPEROR *v.* HEMANDAS DEVANSINGH. **161 I. C. 267=37 Cr.L J. 455 =8 R.S. 134=1936 Cr.C. 230=A.I.R. 1936 Sind 40.**

——**S. 350**—*Scope and object—Witness examined on commission—If need be re-examined on* de novo *trial.*

S. 350, Cr. P. Code, is inserted in order that an accused should not be prejudiced by a Magistrate relying on evidence which he did not record himself. The words "re-summoned and re-heard" in Proviso (*a*) to S. 350 presuppose that the witnesses have already been summoned and heard. The accused were prosecuted under Ss. 193, 467 and 471, Penal Code, for preparing a forged receipt. The Government Examiner of Questioned Documents was examined on commission. On a transfer of the Magistrate a *de novo* trial was commenced and the second Magistrate recorded again evidence of all the witnesses but did not issue a second commission to examine the Government Expert again and convicted the accused.

Held, that as the Expert was examined by interrogatories there was no point in the second Magistrate issuing a commission over again for interrogatories. S. 350 did not apply to the case. The trial was not therefore irregular. (*Middleton, A.J.C.*) KAURA RAM *v.* EMPEROR. **169 I.C. 44= 9 R. Pesh. 131=38 Cr.L.J. 748=A.I.R. 1937 Pesh. 67.**

——**S. 350 (1)**—*Construction—More than one transfer—Waiver of* de novo *trial—Last Magistrate, if can act on the evidence of the first Magistrate—Predecessor if means 'predecessors'.*

Where a Magistrate had recorded the evidence and the second Magistrate merely recorded the claim for a *de novo* trial and where before the third Magistrate the claim for *de novo* trial is waived by the accused's Counsel, the last Magistrate can act on the evidence recorded by the first Magistrate. The word 'predecessor' in S. 350 (1), Cr. P. Code, should be taken to mean 'predecessors' where there is more than one. (*Gruer, J.*) MOTI *v.* KESHRICHAND. **I.L.R. (1939) Nag. 79= 176 I.C. 808=39 Cr L J. 815=11 R.N. 80=1938 N.L J. 96=A.I.R. 1938 Nag. 288.**

——**S. 350 (1)**—*Duty and discretion of Magistrate—Right of accused to* de novo *inquiry before charge.*

An accused is not entitled under S. 350 (1), Cr. P. Code, to have a *de novo* inquiry prior to the framing of the charge. S. 350 gives the accused the right to have a *de novo* trial. The trial begins only after the framing of a charge. The section leaves the re-summoning of witnesses entirely to the discretion of the Magistrate. If he does not feel it necessary to examine any witness afresh, it is not incumbent on him to do so. (*Horwill, J.*) HARICHANDRA REDDY *v.* EMPEROR, **176 I.C. 879 (2)=39 Cr L J. 828=11 R. M. 189=1938 M.W.N. 587=1938 M.Cr.C. 202= 48 L.W. 136=A.I.R. 1938 Mad. 742=(1938) 2 M.L.J. 222.**

——**S. 350 (1) and (3)**—*Transfer of magistrate who heard the case—New magistrate not doing any thing—Re-transfer of the former magistrate—Right to demand* de novo *trial—Object of S.* 350.

Where a magistrate after examining the prosecution witnesses and recording the statement of the accused and framing a charge, is transferred and the case is transferred to another magistrate for trial, but before any proceedings are taken in his Court, the former magistrate is re-posted to the original place and the case is re-transferred to his file, the accused have no right under the circumstances to demand a *de novo* trial under S. 350 (3), for the re-posted magistrate cannot be considered 'another magistrate' within the meaning of S. 350 (1), Cr. P. Code. The fundamental idea of S. 350, Cr. P. Code, is that the magistrate who passes judgment in a case should be the magistrate who has heard the evidence, and if he has not heard all the evidence, then the accused is given a right to demand resummoning and rehearing. (*Bennet, J.*) SHYAMAPADO DEB *v.* SUNDER DAS. **I.L.R. (1938) All. 794=1938 A. Cr.C 74=1938 A.L.R. 801=177 I.C. 978=11 R. A. 241=39 Cr.L.J. 978=1938 A.L J. 767=1938 A.W.R. (H.C.) 492=A.I.R. 1938 All. 536.**

——**S. 350 (1), Proviso (a)**—*Applicability—Enquiry preliminary to commitment to Sessions.*

Where a Magistrate after examining some witnesses in an enquiry preliminary to commitment to the Court of Sessions ceases to exercise jurisdiction and is succeeded by another Magistrate, the latter Magistrate is not bound to commence the enquiry *de novo*. As this is an enquiry and not a trial, the case does not come under the proviso (*a*) of sub-S. (1) of S. 350, Cr. P. Code. The Magistrate has, however, got a discretion to exercise whether he will act on the evidence recorded by his predecessor, or he will resummon any of the witnesses before he frames a charge against the accused. (*Mukherjea and Biswas. JJ.*) ASHUTOSH SEN *v.* EMPEROR. **42 C. W.N. 224.**

——**S. 350 (1), Proviso (a)**—*Applicability—Enquiry under S.* 110—*Right of person proceeded against to have witnesses re-summoned and re-examined.*

A person proceeded against under S. 110, Cr. P. Code, is entitled to have the prosecution witnesses re-summoned and re-examined in virtue of proviso (*a*) to S. 350 (1) of the Code. The words "the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases" occurring in S. 117 (2), Cr.P. Code, which applies to an enquiry under S. 110, are wide enough to cover the special procedure laid down for the trials of summons cases or warrant cases in Chapters XX and XXI as well as the general provisions as to inquiries and trials contained in Chapter XXIV which contains S. 350. (*Ganga Nath, J.*) EMPEROR *v.* MAHTAB SINGH. **169 I.C. 833=10 R.A. 71=1937 A W.R. 382=1937 A.L.J. 373=38 Cr.L.J. 804=1937 All.L.R. 598=A.I.R. 1937 All. 438.**

——**S. 350 (1), Proviso (a)**—*Applicability—Person against whom proceedings are taken under Ch. 36—Right of.*

The Proviso to Cl. (1) of S. 350, Cr. P. Code, applies only in the case of trials of persons accused of offences alleged to have been committed by them. Hence a person, against whom proceedings are taken under Ch. 36, Cr. P. Code, cannot claim under S. 350 of the Act that the enquiry should be commenced afresh as he is not an accused per-

son. (*Mackney, J.*) U KUN ZAW *v.* MA AYE KHIN. 172 I.C. 876=10 R.R. 285 (2)=39 Cr.L. J. 205=A.I.R. 1937 Rang. 536.

——S. 350 (1), Proviso (a)—*Applicability—Proceedings under S.* 110—De novo *trial—Right of.*

Proviso (*a*) to S. 350 (1), Cr. P. Code, applies to proceedings under S. 110 and other preventive sections of the Code and a succeeding Magistrate is therefore bound to grant an application for a *de novo* enquiry. (*Grille, J.*) GOVINDA *v.* EMPEROR. 20 N.L.J. 117.

——S. 350 (1), Proviso (a)—*Claim for* de novo *trial—Order resummoning witnesses—Witnesses not examined in chief—Legality of trial—Acquiescence of accused—Effect.*

Where a Magistrate recorded the claim of the accused for a *de novo* trial and directed all the prosecution witnesses to be summoned to appear on a particular day, the Magistrate must be deemed to have directed a *de novo* trial (including inquiry). In such a case failure to examine the witnesses in chief vitiates the trial. Mere acquiescence on the part of the accused in such a procedure cannot estop him from questioning the legality of the trial in appeal or revision. (*Niyogi, J.*) PURUSHOTTAMRAO BHANJI *v.* EMPEROR. 178 I.C. 465=11 R.N. 229=40 Cr.L.J. 73 =1938 N.L J. 309=A.I.R. 1938 Nag. 493.

——S. 350 (1), Proviso (a)—*Contravention of —When vitiate trial.*

A contravention of the provisions of S. 350 (1) (*a*) will vitiate the trial only when there is a refusal on the magistrate's part to re-summon and re-hear the witness or when the evidence of witnesses examined against the provisions of Cl. (*a*) is relied upon by the Court. (*Zia-ul-Hasan, J.*) SHEO RAM *v.* EMPEROR. 14 Luck. 172=177 I.C. 200=1938 O.L.R. 399=1938 A. Cr.C. 95=11 R. O. 35=39 Cr.L J. 854=1938 O.A. 661=1938 O.W.N. 881=A.I.R. 1938 Oudh 212.

——S. 350 (1), Proviso (a)—De novo *trial—Prosecution not relying and not wishing to produce witnesses examined before—Accused, if can insist on their production.*

S. 350 (1) (*a*) does not require that even a witness on whom the prosecution does not rely and whom it does not wish to produce at the *de novo* trial though examined in the earlier trial should also be produced at the *de novo* trial. This may be a matter for comment and inference, but the S. 350 (1) (*a*) does not authorise an accused to compel the prosecution to produce a witness whom they do not wish to produce. (*Zia-ul-Hasan, J.*) SHEO RAM *v.* EMPEROR. 14 Luck. 172=177 I.C. 200=1938 O.L.R. 399=1938 A. Cr.C. 95=11 R.O. 35=39 Cr.L.J. 854=1938 O. A. 661=1938 O.W.N. 881=A.I.R. 1938 Oudh 212.

——S. 350 (1), Proviso (a)—*Scope and applicability of—Decision of second magistrate to resummon witnesses—Accused if can insist that there shall be no* de novo *trial.*

The proviso (*a*) to S. 350(1), Cr. P. Code, has no application to a case where the new magistrate decides to re-summon witnesses and to re-commence the inquiry or trial. The proviso only gives the accused a right at the commencement of the proceedings before the new magistrate to demand that the witnesses or any of them be re-summoned

and re-heard, and it does not give him any other right. When the magistrate has decided to exercise the option of re-summoning witnesses, the accused has no right to insist that there shall not be a *de novo* trial or inquiry. (*Thomas C. J. and Yorke, J.*) GUR DAYAL *v.* SHEO DULAREY 14 Luck. 156=177 I.C. 250=1938 A. Cr.C. 86=11 R.O. 37=39 Cr.L.J. 858=1938 O.L.R. 402= 1938 O.A. 652=1938 O.W.N. 841=A.I.R. 1938 Oudh 218.

——Ss. 350 (1), Proviso (a) and 227—De novo *trial — Effect —New charge, if can be framed.*

When a *de novo* trial is granted, it has the effect of wiping out the prior proceedings. Hence a magistrate can frame a new charge or add a new one to the existing charge, when he grants a *de novo* trial. Even otherwise, if a new magistrate does frame a new charge the accused can have no grievance for under S. 227 (1), Cr. P. Code, a Court can, at any time before judgment is pronounced, alter or add to any charge. (*Zia-ul-Hasan, J.*) GAJJU *v* EMPEROR. 177 I C. 193 =1938 O.W.N. 898=11 R.O. 34=1938 O.L R. 394=1938 A. Cr.C. 96=39 Cr.L.J. 849=1938 O.A. 658=A.I.R. 1938 Oudh 247.

——S. 350, Proviso (b)—*Scope —Transfer of Magistate after recording of prosecution evidence and framing of charge—Subsequent retransfer—Beginning of case at stage at which he left before—Refusal to re-summon witnesses —If vitiates proceedings.*

The principle underlying S. 350, Cr. P. Code, is that the Magistrate who hears the evidence should decide the case. The refusal to re-summon and re-hear the witnesses examined by the same Magistrate before is only an irregularity which does not vitiate the proceedings in view of proviso (*b*) to S. 350, Cr. P. Code, and the High Court or a superior Court will not interfere unless the accused has been materially prejudiced thereby. Where a Magistrate after wholly recording the prosecution evidence and framing a charge in a case is transferred, but before the succeeding Magistrate begins a *de novo* trial the former Magistrate is re-transferred to the Court, there is nothing illegal if he proceeds to hear the case from the stage at which he left it at the time of his ceasing to have jurisdiction over the case for a time. His refusal to re-summon and re-hear the witnesses already examined by him before is only an irregularity. (*Lakshmana Rao, J.*) NADDEEM SAHIB *v.* EMPEROR. 1937 M. W. N. 1245.

——Ss. 350, Proviso (b) and 530—*Scope— Change of Magistrate—Demand for re-summoning and re hearing of prosecution witnesses—Refusal—All witnesses recalled and cross-examined —Trial—If vitiated.*

Where after the prosecution witnesses had been examined and a charge framed, a new Magistrate takes up the case, his refusal to accede to the demand of the accused for re-summoning and rehearing of the witnesses is not an irregularity which vitiates the trial. And when all the witnesses are recalled and further cross-examined before the Magistrate who decides this case, the accused cannot be said to be prejudiced by the refusal to re-summon and re-hear the witnesses, and the conviction cannot be set aside on that ground. (*Lakshmana Rao, J.*) RAMAMUNI REDDI, *In re*.

CR. P. CODE (1898), S. 350.

177 I C. 598=48 L W 248=1938 M W.N. 820=11 R.M. 358 (2)=39 Cr.L.J. 932=1938 M.Cr.C. 153=A.I.R. 1938 Mad. 724=(1938) 2 M.L.J. 41.

——Ss. 350 and 537—*Delivery of judgment—Succeeding Magistrate delivering judgment written by his predecessor without adopting it as his own—Irregularity, if curable.*

Under S. 350 it is quite possible that the succeeding Magistrate may take the judgment left by his predecessor and compare it with the evidence recorded in the case and discover that it expresses what he himself would have decided on the case. In that case, if there is no demand for a new trial on the part of the accused, he may deliver that judgment as his own. In fact by so doing it becomes his own judgment. But where the succeeding Magistrate has delivered judgment not as his own judgment but as that of his predecessor without signing it himself or dating it, the defect in the delivery of such judgment goes beyond a mere irregularity curable under S. 537. It is not contemplated in the Code that a Magistrate shall deliver any judgment other than his own and if he does so it is not an irregularity in the form of delivery; it is not delivering judgment at all. (*Spargo, J.*) CHINNAYAR *v.* MAUNG MYA THI. 1939 Rang.L R. 570=183 I C 216=40 Cr.L.J. 829=12 R.R. 69=A.I.R. 1939 Rang. 249.

——Ss. 350 and 537—*Judgment prepared by Magistrate delivered by his successor—Failure to give opportunity to accused to ask for* de novo *trial—Irregularity—If curable.*

Where a case was adjourned for judgment but before that date the Magistrate was transferred and was succeeded by another who signed and delivered the judgment prepared by his predecessor without giving an opportunity to the accused persons to ask for a *de novo* trial, the irregularity, if any, is covered by S. 537, Cr. P. Code (*Ram Lal, J.*) HARNAM SINGH *v.* EMPEROR. 189 I.C. 826=41 Cr.L.J. 808=42 P.L.R. 240=A.I.R. 1940 Lah. 289.

——S. 352—*Holding of trial at place other than Court-house—Proper procedure to be followed.*

The question whether a trial should be held at a place other than the Court-house is a matter purely within the discretion of the Magistrate himself. Where he decides to hold the trial in jail premises he must pass a formal order directing that the trial should be held in the jail premises. Such a formal order must invariably be passed, as otherwise, if accused persons consider that they have a grievance in any matter it would be difficult for them, in the absence of any formal order, to have recourse to higher authority for redress. It is ordinarily for the trying Magistrate to take the initiative in these matters if he considers that the trial should not be held in his Court-house. If however the District Magistrate, who is responsible for law and order in his district, wishes to take the initiative in such matters himself, his proper course is not to move the Local Government himself straightaway in the matter, but to instruct the Public Prosecutor to make an application to the Magistrate asking that the trial shall be held elsewhere It is then for the Magistrate to pass formal orders as to whether he considers it desirable to hold a trial in the Court or outside of it. If the Magistrate then

CR. P. CODE (1898), S. 355.

wishes to try the case in a place other than his Court, he will do so after obtaining the permission of the necessary authorities who are in control of the premises in which the Magistrate desires to hold the trial. (*Mya Bu, Ag. C.J. and Mosely, J.*) THE KING *v.* U KHEMEIN. 1940 Rang L R. 122=187 I.C. 640=12 R.R. 353=41 Cr.L.J. 497=A.I.R. 1940 Rang. 72.

——S. 352, Proviso—*Proceedings in camera—Discretion of Magistrate.*

Where a Magistrate conducts a trial in camera in the exercise of his own discretion and under proviso to S. 352, Cr. P. Code, and no objection is raised to such procedure, the proceeding of the Magistrate cannot be upset except on the ground that one of the parties is prejudiced by the case being not tried in open Court. (*Dunkley, J.*) GARDNER *v.* U KHA 165 I C. 596=9 R R. 217=1936 Cr C. 961=38 Cr.L.J. 48=A.I.R. 1936 Rang. 471.

——Ss. 353 and 537—*Cross-cases—Witness's answer about his statement in cross-case, recorded—Statement in cross-case not brought on record—Procedure, if regular—If curable under S. 537.*

Where a witness's answer as to whether he made a statement in a cross-case is alone recorded, but a copy of the statement in the cross-case is not brought on record, the procedure adopted is improper and irregular being in contravention of S. 353, Cr. P. Code. Where it cannot be said to have caused prejudice, the irregularity can be cured by the application of S. 537. (*Yorke, J.*) TAQI MOHAMMAD *v.* MOHAMMAD JAN. 178 I.C. 169= 11 R.O. 93=1938 A.Cr C. 134=1938 O.W.N. 1064=1938 O.A. 819=1938 A.W.R. (C C.) 96=1938 O.L.R. 465=40 Cr.L.J. 1=A.I.R. 1938 Oudh 253.

——S. 355 (2)—Scope—Summary trial—Magistrate's omission to sign memorandum of evidence—If vitiates conviction. *See* CR. P. CODE, Ss 263 AND 355 (2). 1940 P W.N. 93.

——Ss. 355 and 356—*Applicability—Offences triable summarily, tried in ordinary way.*

There are certain offences which a Magistrate may try summarily under S. 260, Cr. P. Code. If he does so try them, he is not required to make any memorandum of the evidence at all. If he does not try them under S. 260 but tries them in the ordinary course, he is required under S. 355, Cr. P. Code, to make a memorandum of the evidence. He is not required to record the evidence in the language of the Court or have it so recorded. The provisions of S. 356 apply only to cases to which the provisions of S. 355 do not apply. (*Allsop, J.*) MOHAMMAD RAFIQ AHMAD *v.* EMPEROR 162 I.C. 758=8 R.A. 901=37 Cr L. J. 710=1936 A.L.J. 274=1936 A.W.R 375=1936 A.Cr.C 107=1936 Cr.C. 476=1936 All.L.R. 470=A.I R. 1936 All 319.

——Ss. 355 and 356—*Magistrate not complying with requirements owing to other work—Irregularity, if technical.*

A magistrate is not entitled to attend to other work during the hearing of a case and to plead that other work as the reason of his inability to comply with the requirements of Ss. 355 and 356, Cr. P. Code, with regard to the recording of evidence. The irregularity is clearly of much more than a technical nature. (*Smith, J.*) JAGMOHAN SINGH *v.* EMPEROR 166 I.C. 224=9 R.O. 294=38 Cr.L.J. 150=1937 A.Cr.C.

CR. P. CODE (1898), S. 356.

5=1936 O.L.R. 728=1937 O.W.N. 56=A.I.R. 1937 Oudh 126.

——**S. 356**—Non-compliance with—Record, if can be used as basis for prosecution for perjury. *See* PENAL CODE, S. 193. **1938 A.M.L.J. 17.**

——**Ss. 357 to 360**—*Recording of questions disallowed—Duty of Magistrate.*

When a Magistrate disallows questions in cross-examination, he is not required by statute law to make a note of them on the record. If he notes on the record each question which is disallowed, the procedure defeats its own object which is to get on with the case. When a question disallowed is important, or there is reasonable doubt whether it should not be disallowed it may be useful for the Magistrate to note the question and his reasons for disallowing it. But this is entirely a matter for the discretion of the Magistrate. If the accused or the prosecutor is dissatisfied, it is always open to him to put in an application to be placed on the record saying that such and such a question was put but not allowed. (*Skemp, J.*) DEWAN SINGH *v.* EMPEROR. **42 P.L.R. 589.**

——**S. 360**—*Reading over of deposition—Object of—Admissibility, if affected.*

The reading over of the deposition of a witness is intended to protect the accused as well as the witnesses. Where the accused has not raised any objection and where the witness himself has admitted that it was read over to him and correctly recorded, no prejudice has been caused to any body and hence objections to its admissibility in subsequent proceedings are not sustainable. (*Niyogi, J.*) SHEOSHANKER *v* EMPEROR. **188 I.C. 885=13 R.N. 14=41 Cr.L.J. 697=1940 N.L.J. 165**

——**S. 362**—*Mode of recording evidence.*

What the appellate Court requires is not merely the opinion of the Magistrate recording the evidence given by the witnesses in cases from which appeal lies but a correct record of the evidence given by the witnesses: it is for the appellate Court to decide whether the evidence corroborates or contradicts the other evidence which can be done only if the evidence is before it: Where in recording the evidence in chief of two witnesses, the Presidency Magistrate while passing an appealable sentence merely recorded the words "corroborates P. W. 1" and convicted the accused.

Held, that the Magistrate had failed to record the evidence of the witnesses in accordance with the provisions of S. 362 and hence the conviction could not be upheld. (*Henderson and Sen, JJ.*) GHULAM DASTGIR KHAN *v* EMPEROR **184 I.C. 581=12 R.C. 244=41 Cr.L.J. 40=A.I.R. 1939 Cal. 623.**

——**Ss. 364 and 533**—*Scope—Confession recorded in English and not in language of accused—Admissibility—Defect—If curable by S. 533.*

The fact that a confession is recorded in English and not in the language of the accused will not render it inadmissible in evidence. When the Magistrate who recorded the confession is able to say that he was speaking the language of the accused and did not understand what the accused confessed, the fact that he took it down in English, though he could have taken it in the language of the accused, it is only a formal defect in the recording of the confession, which can be cured by the provisions of S. 533, Cr. P. Code.

CR. P. CODE (1898), S. 367.

(*Varma and Meredith, JJ.*) EMPEROR *v.* KOMMOJU BRAHMAN **19 Pat. 301=188 I.C. 57=12 R.P. 674=6 B.R. 577=41 Cr.L.J. 533=1939 P.W.N. 915=A.I.R. 1940 Pat. 163.**

——**S. 366 (3)**—*Signing of judgment — If amounts to its delivery.*

As soon as a Magistrate signs his judgment in the absence of the accused, he delivers it within the meaning of S. 366 (3), Cr. P. Code, and the trial is then over (*Blacker, J.*) GIAN SINGH *v.* AMAR SINGH **I.L.R. (1938) Lah. 567=179 I.C. 990=11 R.L. 656=40 Cr.L.J. 288=40 P.L.R. 996=A.I.R. 1939 Lah. 21.**

——**S. 367**—*Cases of different accused not specifically dealt with—If a 'judgment'*

Where the cases of the different accused are not dealt with specifically with reference to the evidence, the judgment is not a judgment as contemplated by S. 367, Cr. P. Code. (*Zia-ul-Hasan, J.*) MADHO SINGH *v.* EMPEROR. **189 I.C. 258=13 R.O. 92=41 Cr.L.J. 725=1940 O.A. 483=1940 O.L.R. 420=1940 A.Cr.C. 98=1940 A.W.R. (C.C.) 253=1940 O.W.N. 607.**

——**S. 367**—*Contents of judgment.*

It is not necessary for a judgment to contain everything recorded in the evidence; when an appeal is heard the evidence is read. The judgment should contain sufficient of the evidence as is necessary to ascertain the facts deposed to, and the importance of and the value to be attached to the evidence of the witnesses, and the reasoning based on this evidence on which Judge founds his decision and his sentence; to put more than this into a judgment is merely to confuse. (*Mya Bu and Mosely, JJ.*) NGA THAN *v.* THE KING. **184 I.C. 78=12 R.R. 123=40 Cr.L.J. 871=A.I.R. 1939 Rang. 263.**

——**S. 367**—*Duty of appellate Court—Non-compliance—Effect of.*

Per *O'Sullivan, J.*—Where the reasons in the judgment of the appellate Court are not such as to enable a Revisional Court acting under the provisions of Ss. 435 and 439, Cr. P. Code, to form any conclusion as to the correctness, legality or propriety of the findings, the judgment is clearly defective and the appeal must be re-heard. (*Lobo, J.C. and O'Sullivan, J.*) ABDUL KARIM *v.* EMPEROR. **189 I.C. 226=13 R.S. 28=41 Cr.L.J. 724=A.I.R. 1940 Sind 113.**

——**S. 367**—Judgment—Contents—Case referred to superior Magistrate under S 349. *See* CR. P. CODE, Ss. 349 AND 367. **1938 O.W.N. 1051.**

——**S. 367**—*Judgment—Contents of—Magistrate merely summarising evidence without criticism—Sufficiency—Omission to discuss grounds for disbelieving witness—Effect.*

It is not enough for a magistrate in his judgment to merely summarise the evidence of all the important witnesses, without entering into any criticism of the evidence. The first point to consider in a criminal trial is whether the witnesses are speaking the truth and the object of writing a judgment is to make it clear to the appellate Court that the Magistrate has considered such grounds as are brought forward for supposing the witnesses to be false. Failure to discuss such grounds deprives the judgment of much of its value. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. **1936 A.M.L.J. 85.**

CR. P. CODE (1898), S. 367.

——S. 367—*Judgment, contents of—Re-production of all evidence—If necessary.*

A judgment is not required to be a resume or reproduction of all the evidence on record. A Court is entitled to and should select such important evidence as it considers necessary to support a decision on material points arising for consideration. (*Guha, Bartley and Nasim Ali, JJ.*) JITENDRA NATH GUPTA *v.* EMPEROR. 169 I C. 977=38 Cr.L.J. 818=10 R.C. 69=A.I.R. 1937 Cal. 99 (S.B.).

——S. 367—*Judgment—Falsity of prosecution—Remarks by Magistrate—If justified.*

A Magistrate is not bound to confine himself merely to a finding that the accused is not proved guilty. Such a verdict often leaves the accused with a stain on his character in the public estimation though not in law and it is the duty of a Magistrate, if he considers that the prosecution case is not only not proved but was deliberately false and concocted to give such a finding in favour of the accused so that the accused should leave the Court without a stain on his character. The Judge must also be at liberty to make remarks on the character or conduct of certain witnesses who appeared to support that case for otherwise he cannot arrive at a finding that the documents on which the prosecution rely are false and fabricated. When he has done so the remarks that the conduct of persons doing such a thing is criminal or contemptible follows and is justified on the findings arrived at. (*Dalip Singh, J.*) KARAMAT ULLAH *v.* EMPEROR 186 I C. 799 =12 R.L. 431=41 Cr.L.J. 380=A.I.R. 1940 Lah 42.

——S. 367—*Judgment—Requirements — Compliance with—Necessity.*

So long as the law requires a judgment in a particular form the Magistrate must endeavour to comply with it. (*Norman, I.C.S.*) GOPI *v.* EMPEROR. 1939 A.M.L.J. 45.

——S. 367—*Judgment—Contents— Commentaries on law and citation of authorities—Propriety and relevancy.*

Commentaries on law are very useful things, but they must be used with discretion and with discrimination and the mere citation of a long list of authorities in support of a judgment does not of itself make a bad judgment a good judgment or correctly conclude the matter. (*Davis, J.C. and Mehta, A.J.C.*) SUGNOMAL TAHILRAM *v.* PHATANDAS. 166 I.C. 83 (2)=9 R.S. 120=38 Cr. L.J. 133 (2)=1936 Cr.C. 1093=A.I.R. 1936 Sind 237.

——S. 367—*Language of judgment—Duty of Court — Proceedings assuming communal aspect.*

In cases which have assumed a communal aspect, the proceedings in Courts and the language of their judgments necessitate special care and should not themselves promote the feelings of enmity, the promotion of which by others it is their duty to punish under the law. (*Coldstream, J.*) EMPEROR *v.* ATTAH ULLAH SHAH BUKHARI. 162 I.C. 624=37 Cr.L.J. 661=8 R.L. 925=38 P. L.R. 638=1936 Cr.C. 464=A.I.R. 1936 Lah. 429.

——S. 367—*Magistrate exculpating accused—Remarks to prejudice of accused—If justified.*

CR. P. CODE (1898), S. 367.

Where a Magistrate by his own order exculpates rather than inculpates an accused, he is not justified in making remarks seriously to his prejudice which will be justified only if his order tended to inculpate rather than exculpate. (*Davis, J.C. and Lobo, J.*) KARTARCHAND *v.* EMPEROR. 175 I.C. 57=10 R.S. 279=39 Cr.L.J. 524=A.I. R. 1938 Sind 103.

——S. 367—*Power to expunge remarks from Magistrate's judgment or order—When to be exercised.*

It is a serious matter for the High Court to expunge remarks from a Magistrate's judgment or order. High Court will interfere to expunge remarks which are libellous and irrelevant. But if they form an integral part of the judgment or its argument, and if they are inseparable, High Court will not interfere and mutilate a judgment so that it reads disjointedly or incoherently nor will it interfere merely because the Court may have passed remarks adverse to a witness provided the judgment shows there is some basis for them, however inadequate may appear this basis to the higher Court. It may well be the bounden duty of a Judge or Magistrate in giving his judgment and his reasons to comment adversely upon the conduct of witnesses; so also it may be his duty to comment adversely upon the conduct of accused persons even though he may not consider the evidence sufficient to commit them for trial to the Court of Session. Nor will High Court in revision inquire into question of fact, but in dealing with applications of this nature it will take the Magistrate's judgment as it stands. (*Davis, J.C. and Lobo, J.*) KARTARCHAND *v.* EMPEROR. 175 I.C. 57=10 R.S. 279=39 Cr. L.J. 524 =A.I.R. 1938 Sind 103.

——S. 367—*Remarks against person not accused or witness—Propriety.*

Though a Magistrate may have to consider facts in relation to a particular individual who is not an accused or witness in order to weigh fairly the evidence against the accused or the evidence given by witnesses, yet he is not justified in condemning such person without his being given an opportunity of being heard. (*Davis, J.C and Lobo, J.*) KARTARCHAND *v.* EMPEROR. 175 I.C. 57 =10 R.S. 279=39 Cr.L.J. 524=A.I.R. 1938 Sind 103.

——S. 367—*Scope—Compliance with—Requisites—Form of judgment—Absence of strict compliance—Effect.*

S. 367, Cr. P. Code, does not lay down any particular form which a judgment must take; if the point for determination, the decision and the reasons for the decision can be gathered from the body of the judgment, there is sufficient compliance with this section. But a judgment which does not strictly conform to the provisions of S. 367 is not illegal on that ground; an error of this type is a mere irregularity which is curable unless it has caused prejudice to the accused. (*Bose, J.*) SUKHDAYAL *v.* MT. SARASWATI. I L.R. (1936) Nag. 217=173 I.C 844=10 R.N. 326=39 Cr. L.J. 370=A.I.R. 1937 Nag. 122.

——S. 367—*Scope—Duty of Court as regards each individual accused in cases.*

A judgment must conform to the provisions of S. 367 which require, *inter alia*, that it shall contain the points for determination, the decision thereon and the reasons for the decision. These

CR. P. CODE (1898), S. 367.

requirements must be fulfilled in respect of each individual accused or suspect separately in cases where there are more than one. (*Lobo, J.C. and O'Sullivan, J.*) ABDUL KARIM *v.* EMPEROR. 189 I. C. 226=13 R.S. 28=41 Cr.L.J. 724=A.I.R. 1940 Sind 113.

——S. 367 (3)—Scope—Charge under Ss. 302 and 201, I. P. Code—Doubt as to the offence actually committed by accused—Procedure—Sentence—Penal Code, S. 72. *See* PENAL CODE, S. 72. 1940 P.W.N. 73.

——S. 367 (5)—*Heads of charge—Exposition of law to be shown.*

Per *Henderson, J.*—It is absolutely necessary that the heads of charge should show clearly and distinctly what the exposition of the law actually was. (*Cunliffe and Henderson, JJ.*) MADAN TILAKDAS *v* EMPEROR. 169 I.C. 306=9 R.C. 914 (2)=38 Cr.L.J. 767=41 C.W.N. 508=A.I.R. 1937 Cal. 266.

——Ss. 367 and 424—*Appellate judgment—Contents.*

It is the duty of the appellate Court not merely to consider whether there are reasons for differing from the judgment of the trial Court, but to apply its mind afresh to the evidence and to form its own conclusion and to embody its conclusions and the reasons on which they are based, in the considered judgment which will if necessary bear the scrutiny of the High Court. (*Patterson, J.*) KALICHARAN SOM *v.* PRIYA NATH DAS. 176 I.C. 677=39 Cr.L.J. 791 (2)=11 R. C. 150=A.I.R. 1938 Cal. 522.

——Ss. 367 and 424—*Appellate judgment—Contents—Order stating 'appeal rejected', if a proper judgment.*

It is an admitted principle of law that an appellate judge has to write a judgment so as to show that he has applied his mind to the facts of the case. This is important from the point of view of the superior Courts because it gives them an idea that the judge has given his best consideration to the matter. Where an appellate order merely stated 'appeal rejected', it does not fulfil the requirements of law. (*Mir Ahmad, A. J.C.*) ABDUL WAHID *v.* EMPEROR. 173 I C. 672=10 R. Pesh. 52=39 Cr.L.J. 337=A.I.R. 1937 Pesh. 88.

——Ss. 367 and 424—*Judgment—Contents—Duty of appellate Courts.*

It would be well for District Magistrates who hear appeals in criminal cases to bear in mind that they are also subordinate to higher Courts and it is their duty to satisfy the higher Courts by their judgments that they have applied their minds to the case before them and in recording a finding of conviction upon the evidence produced, they have arrived at a correct solution. To discharge this duty, their judgments should fulfil the requirements laid down by the law. It is not enough merely to say that all the points arising in the case have been considered by the Court below and have been rightly decided. Under the law it is clearly the duty of the appellate Court to state the various points urged before it and to record its decision thereon with its reasons for those decisions. (*Mulla, J.*) BANSIDHAR *v.* EMPEROR. I.L.R. (1939) All. 865=185 I.C. 682=12 R.A. 366=41 Cr.L.J. 220=1939 A.L.J. 671=1939 A. W.R. (H.C.) 567=1939 A. Cr. C. 141=A.I.R. 1940 All. 18.

CR. P. CODE (1898), S. 369.

——Ss. 367 and 424—*Judgment—Discussion of evidence—Method.*

A mere statement in the judgment that the Magistrate has gone carefully through the whole evidence and that there are many discrepancies in the depositions of witnesses is no discussion of the evidence at all. (*Grille, J.*) RAGHUNATHMAL *v.* PATIRAM. I.L.R. (1938) Nag. 157=172 I C. 177=10 R.N. 172=39 Cr. L.J. 75=A.I.R. 1937 Nag. 394.

——Ss. 367 and 424—*Judgment—Duty of appellate Court—Conformity to provisions of Cr. P. Code—Necessity.*

Appellate Courts should take care to write judgments which are in consonance with the provisions of the Cr. P. Code because by failing to do so they encourage persons convicted to waste their money and the time of the High Court by making applications in revision. (*Allsop, J.*) RAM SINGH *v.* EMPEROR. 186 I. C. 97=1939 A. W.R. (H.C.) 836=12 R.A. 383=1940 A.Cr.C. 13 =41 Cr.L.J. 249=1939 A.L.J. 1146=A.I.R. 1940 All. 80.

——S. 369—Applicability—Magistrate cancelling order for maintenance—Power of Magistrate to cancel the prior order. *See* CR. P. CODE, S. 489 (2). A.I.R. 1937 Cal. 334.

——S. 369—*Construction.*

S. 369, Cr. P. Code, must be read with S. 430 of the Code. (*Mosely, J.*) THE KING *v.* NGA BA SAING. 1940 Rang.L.R. 145=185 I.C. 142= 12 R.R. 181=41 Cr.L.J. 108=A.I.R. 1939 Rang. 392.

——S. 369—*Review of sentence—Power of High Court before signing warrant.*

S. 369, Cr. P. Code, comes into operation only when the Court has signed its judgment. In the case of the High Court exercising its ordinary original criminal jurisdiction, no judgment nor any other pronouncement of its decision is signed until the warrant is signed by the presiding Judge. In proper cases, therefore, the Judge can review his sentence, though already pronounced in Court, so long as the warrant has not been drawn up and signed. (*Tyabji, J.*) EMPEROR *v.* ABDUL RAHIMAN. 60 Bom. 485=162 I.C. 950=37 Cr. L.J. 753=8 R.B. 437=38 Bom.L.R. 153=1936 Cr.C. 573=A.I.R. 1936 Bom. 193.

——S. 369—Summary dismissal of jail appeal—Finality—Subsequent appeal through counsel—Maintainability. *See* CR. P. CODE, SS. 421 AND 369—JAIL APPEAL. 1940 O.A. 448=1940 O.W. N. 520.

——Ss. 369 and 259—*Order of discharge under S. 259—If a judgment—S. 369 if applies to judgments whether legal or illegal—Wrong order under S. 259—Proper remedy.*

An order of discharge under S. 259, Cr. P. Code, must be taken to be an order in the nature of a judgment and as such S. 369, Cr. P. Code, would apply to such an order. S. 369 applies to judgments whether they are legal or illegal. Where an order under S 259 is clearly wrong, the Magistrate passing the order cannot vacate it. But the proper course is to refer the case to the appellate Court for setting it aside. (*Weston, I. C.S.*) MOHAMED YAHYA *v.* MANAK CHAND. 1938 A.M.L.J. 45.

——Ss. 369 and 476—*Complaint under S. 476—Power of Court to review its complaint—Small Cause Court Judge making complaint under*

CR. P. CODE (1898), S. 369.

S. 476—Whether can subsequently order commitment under S. 478.

S. 369, Cr. P. Code, applies only to a judgment and not to a complaint even when it is made by a Court under S. 476, Cr. P. Code, and it does not therefore amount to a bar against a Court altering or reviewing its complaint under S. 476. Where a complaint made by a Small Cause Court Judge under S. 476 was returned to him by the District Magistrate with the request that he should act under S. 478 and the Small Cause Court Judge thereafter passed an order of commitment under S. 478 after holding a fresh enquiry.

Held, that the Code did not bar a Court from altering or reviewing its complaint under S. 476 and it was open to the Small Cause Court Judge to pass the order of commitment after the further enquiry which he made. (*Bennet, J.*) EMPEROR *v.* JAGATRAM. **166 I C. 915=9 R.A. 469 =38 Cr.L.J. 318=1936 A.W.R. 1125=1936 A. Cr.C. 235=1937 A.L.R. 112=1936 A.L.J. 1199= A.I.R. 1937 All. 76.**

——**Ss. 369 and 561-A**—*Amendment of order —Power of Court.*

The Court has no power to amend its order by way of explanation or otherwise. (*Monroe, J.*) GHANSHYAM DAS BIRLA *v.* SURAJ BHAN. **188 I. C. 856=13 R.L. 74=41 Cr.L.J. 708=42 P.L.R. 153=A.I.R. 1940 Lah. 192.**

——**Ss. 369 and 561-A**—*Review—Inherent power of High Court.*

The High Court has no inherent power to alter or review a judgment in a criminal case. S. 561-A, Cr. P. Code, will therefore not confer such a power on the High Court. (*Pollock, J.*) LAXMANRAO PARASHRAM DESHMUKH *v.* EMPEROR. **I.L.R. (1940) Nag. 267=10 R.N. 192=172 I.C. 299=39 Cr.L.J. 116=A.I.R. 1938 Nag. 74.**

——**S. 374** — *Reference under — Unanimous opinion of jury—Interference—Practice.*

Where the jury are unanimous in their opinion, the High Court would be reluctant to differ from such an opinion apart from strong reasons which would induce them to do so. (*Henderson and Biswas, JJ.*) KUMARISH CHANDRA KARMAKAR *v.* EMPEROR. **173 I.C. 193=10 R.C. 764=39 Cr.L. J. 541 (2)=65 C.L.J. 423=A.I.R. 1938 Cal. 220.**

——**Ss. 374, 418 and 423**—*Sentence of death— —Reference and appeal—Scope of—Power of High Court.*

Accused sentenced to death have under S. 374 read with S. 418, in the High Court a right of appeal on matter of fact as well as of law. In disposing of a reference under S. 374, and appeals by persons sentenced to death, the Judges of the High Court are entitled to come to their own independent conclusions as to the guilt or innocence of accused independently of the verdict of the jury, or of the opinion of the Judge. But although they are not bound by the verdict of the jury, they must attach greatest possible weight to the verdict of the jury, if it answers a reasonable test. It cannot be said that in dealing with a reference under S. 374 and appeal by accused only two courses are open to the High Court, *i.e.*, to acquit the accused or to order a retrial. If after examining the evidence which is admissible in law they find even without any opportunity of hearing witnesses and seeing their demeanour, that certain facts emerge from the evidence as

CR. P. CODE (1898), S. 376.

proved beyond reasonable doubt and the decision in the case depends upon inference to be drawn from these proved facts, they are not bound to order retrial. When however the evidence cannot be properly weighed by the Court without hearing witnesses and seeing their demeanour in the witness-box and they are not in a position to say whether the facts from which inferences are to be drawn are true or false, retrial should be ordered. (*Lort Williams and Nasim Ali, JJ.*) BENOYENDRA CHANDRA PANDEY *v.* EMPEROR. **63 Cal. 929=64 C.L.J. 154=161 I.C. 74=37 Cr.L.J. 394=8 R.C. 472=40 C.W.N. 432=1936 Cr.C. 145=A.I.R. 1936 Cal. 73.**

——**S. 376**—*Order for retrial — Propriety— Conviction for murder set aside owing to defective charge to jury—Occurrence of murder before two years.*

Accused was convicted of murder and conspiracy to commit dacoity. The conviction on the charge of murder was set aside on the ground that the charge to the jury was defective. It was found that occurrence of murder took place nearly two years before and consequently the witnesses would be liable to confuse what they had heard with what they had actually seen at the time of the occurrence. The accused was convicted on the charge of conspiracy to commit dacoities and a sentence of transportation for life was passed on him.

Held, the case should not be sent back for retrial on the charge of murder. (*Jack and Patterson, JJ.*) SANYASHI GAIN *v.* EMPEROR. **171 I.C. 183=38 Cr.L.J. 1018=10 R.C. 235=A.I.R. 1937 Cal. 269.**

——**S. 376**—*Scope—Power of High Court under —Conviction of three persons under S. 377, I. P. Code, on joint trial—Conviction by jury—Appeal by all—Conviction of one under S. 302 at same trial—Proceedings for confirmation of death sentence—Right of accused to argue on questions of fact.*

S. 376, Cr. P. Code, is to be read with S. 418 (2) which is an exception to the general rule that an appeal on a trial by jury will lie only on a matter of law. S. 418 (2) gives a person convicted on a verdict of jury at the same trial with the person sentenced to death the same right to appeal on question of fact as well as law. *K* and *D* were charged with offences under S. 377, I. P. Code, and tried by a Judge and jury at one trial. All the three were found guilty under S. 377, I. P. Code, by unanimous verdict of the jury and convicted and all of them appealed against that conviction. *K* and *D* were further charged with an offence under S. 302, I. P. Code and tried for that offence at the same trial. *D* was found not guilty by a unanimous verdict and acquitted. *K* was found guilty of murder by a majority verdict of seven to two and convicted of the offence of murder and sentenced to death. On the death sentence coming up for confirmation along with the appeals before the High Court,

Held, that *K* had full liberty to attack the verdict of the jury not only on questions of law but also on questions of fact by reason of S. 418 (2). (*Davis, J.C. and Mehta, A.J.C.*) KHADIM *v.* EMPEROR. **169 I.C. 716=10 R.S. 17=38 Cr.L. J. 808=31 S.L.R. 82=A.I.R. 1937 Sind 162.**

CR. P. CODE (1898), S. 377.

——S. 377—*'New sentence or order'—Meaning of.*

The new sentence or order referred to in S 377, Cr. P. Code, refers to the powers of variation of the sentence, etc., conferred by S. 376. (*Lord Thankerton.*) FAKIRA *v.* EMPEROR. 64 I.A. 148=I.L.R. (137) Bom. 711=167 I.C. 790=39 P.L.R. 334=1 37 O.L.R. 216=41 C.W.N. 741=1937 M.W.N. 546=9 R.P.C. 231=1937 A. Cr.C. 74=3 B.R. 426=38 Cr.L.J. 498=1937 O.W.N. 412=1937 A L.R. 328=46 L.W. 134=3 Bom. L.R. 966=1937 A.W R. 1128=1937 P.W.N. 441=1937 M.Cr.C. 376=1937 A.L.J. 1055=A.I.R. 1937 P.C. 119=(1937) 2 M.L.J. 323 (P.C.).

——S. 377—*Sentence of death—Order of confirmation signed only by one Judge—Validity.*

Where the Court consists of two or more Judges and the order of confirmation of sentence of death is only made, passed and signed by one of them, the sentence of death is not validly confirmed but remains submitted to the Court which has to dispose of the same under Ss. 375 to 379, Cr.P. Code. (*Lord Thankerton.*) FAKIRA *v.* EMPEROR. 64 I.A. 148=I.L.R. (1937) Bom. 711=1937 A L.R. 328=46 L. W. 134=167 I. C. 790=33 P. L.R 334=39 Bom.L.R 669=1937 A.W.R. 1128=1937 A.L J. 1055=1937 O.L R. 216=41 C.W. N. 741=1937 M.W.N. 546=9 R.P.C. 231=1937 A.Cr.C. 74=3 B.R. 426=38 Cr.L J. 498=1937 P.W.N. 441=1937 M. Cr.C. 376=1937 O.W.N. 412=A.I.R. 1937 P.C. 119=(1937)2 M.L.J. 323 (P.C.).

——S. 380—*Scope—Proceedings submitted to Sub-Divisional Magistrate—Duty of latter—Reference to District Magistrate or High Court—Competency.*

Under S. 380, Cr. P. Code, a Sub-Divisional Magistrate to whom proceedings are submitted can only dispose of the case in the manner provided by the section. He is not competent to make a reference to the District Magistrate under S. 435 or to submit it to the High Court under S 438. (*Lakshmana Rao, J.*) MAILA GOWDA *v.* EMPEROR. 51 L.W. 480=1940 M.W.N. 244 (1).

——S. 386—*Court passing the sentence—Meaning of—Sentence of fine by Special Magistrate—Termination of special powers—Succeeding Magistrate—Power to execute sentence.*

A sentence was passed by *G* as a Special Magistrate forming a Special Criminal Court within the meaning of S. 23 of Ordinance 11 of 1931. That Court came to an end in May, 1932. *S* succeeded *G* as Sub-Divisional Magistrate.

Held, that *S* was not a successor of *G* as a Special Magistrate forming a Special Criminal Court; consequently *S* could not execute by issue of a warrant of attachment a sentence of fine imposed by *G*. (*Lort Williams and Jack, JJ.*) JADABENDRANATH PANJA *v.* EMPEROR. 63 Cal. 1139=161 I.C. 979=8 R.C. 554=40 C.W.N. 604=37 Cr.L.J. 524 (2)=1936 Cr.C. 291=A.I.R. 1936 Cal. 149.

——S. 386—*Fine on member of joint Hindu family—Attachment of standing crops of family in the hands of the father—Legality.*

Where the offender on whom a fine has been imposed is a member of a Hindu joint family of which the offender's father is the manager, it is not permissible to attach and seize the standing crops of the family for the purpose of realising

CR. P. CODE (1898), S. 386.

the fine, because that would infringe the rights of the father-manager. (*Venkatasubba Rao, J.*) KOLLIVENKATARATNAM *v.* THE COLLECTOR OF KISTNA. 163 I.C. 480 (2)=9 R.M. 23=37 Cr. L.J. 836=1936 M W.N. 728=43 L.W. 760=1936 Cr.C. 672=1936 M.Cr.C. 273=A.I.R. 1936 Mad. 560=70 M.L.J. 717.

——S. 386 (1) (a)—*Recovery of fine imposed upon a coparcener—Movables of the coparcenary body, if can be sold.*

The Court ssing a sentence of fine is authorized by S. 386 (1) *(a)*, Cr. P. Code, to recover it by sale of the movable property of the offender. Where a coparcener is fined, it cannot be said that movable property owned by the coparcenary body is the property of the offender. It is the property owned by several persons in which the offender has only an unascertained interest and so such property cannot be sold for the recovery of the fine. (*Rachhpal Singh, J.*) BANSRAJ DAS *v.* SECRETARY OF STATE. 183 I.C. 134=12 R.A 93=1939 A.W.R. (H.C.) 247=1939 A.Cr.C. 46=A.I.R. 1939 All. 373.

——S. 386 (as amended)—*Warrant by Magistrate—Duty of Civil Court.*

The plain reading of S. 386 after the amendment of 1923 is that the warrant issued by a Magistrate to a Collector authorizing him to realise the amount of fine from accused's immovable property must be accepted as a decree by the nearest Civil Court competent to execute it. (*Almond, J.C.*) COLLECTOR OF PESHAWAR *v.* ABDUL MAJID. 177 I.C. 162=11 R.Pesh. 18 (2)=A.I.R. 1938 Pesh. 40.

——S. 386 (1), Proviso—*Sentence of fine and in default penal servitude—Sentence in default served out—Realisation of fine undesirable and unfair.*

Except in special cases, it is both undesirable and unfair to seek to realise a fine when the sentence ordered to be served in default of payment of the fine has already been served in full; and the proviso to S. 386, Cr. P. Code, is intended to deal with cases where for some sufficient reason the authorities have not been able to realise the fine before the default sentence has been served. A.I.R. 1935 Bom. 160, Foll. (*Lort Williams and Jack, JJ.*) JADABENDRANATH PANJA *v.* EMPEROR. 63 Cal. 1139=161 I.C. 979=8 R.C. 554=40 C. W.N. 604=37 Cr.L.J. 524 (2)=1936 Cr.C. 291=A.I.R. 1936 Cal. 149.

——S. 386 (1) (b), Proviso—*Recording of special reasons—Duty of Magistrate—Warrant issued while prisoner undergoing imprisonment in default of fine—Attached property sold after his release.*

S. 386 (1) (*b*), Proviso, Cr. P. Code, does not require the Magistrate to record his special reasons for issuing a distress warrant when such warrant is issued before the whole of the imprisonment in default of payment of fine has been undergone, although the property seized in execution of that warrant is sold after the prisoner has served his full period of imprisonment. (*Edgley and Lodge, JJ.*) EMPEROR *v.* SAROJINI DE. I.L. R. (1939) 1 Cal. 471=182 I.C. 315=12 R.C. 39=40 Cr.L.J. 654=43 C.W.N. 443=A.I.R. 1939 Cal 337.

——S. 386 (2)—*Disposal of claims made by third party—Procedure in Bengal—Circular Orders (Criminal), R.* 117 (4).

CR. P. CODE (1898). S. 390.

There is of course no necessity for a Magistrate in Bengal to follow the procedure laid down in O. 21, R. 58, C. P. Code, in the determination of claims made by third parties to properties seized in execution of distress warrants. But he is not entitled to utilise the services of a Police Officer in investigating such claims, nor is he entitled to rely simply on the report of a Police Officer. He must follow the procedure prescribed in R. 117 (4) of Circular Order No. 6 (Criminal) of 1925. (*Edgley and Lodge, JJ.*) EMPEROR *v.* SAROJINI DE. I.L.R. (1939) 1 Cal. 471=182 I.C. 315=12 R.C. 39=40 Cr.L.J. 654=43 C.W.N. 443=A.I.R. 1939 Cal. 337.

——Ss. 390 and 391—*Borstal Institution—If a jail—Superintendent of senior training school—If can carry out sentence of whipping—Accused sentenced to detention in school and also to whipping—Proper course for magistrate.*

The Borstal Institution is not a jail within the meaning of S. 391, Cr. P. Code, and the Superintendent, Senior Training School at Thayetmyo is not an officer in charge of a jail and cannot, in his position as Superintendent of the school, carry out the sentence of whipping ordered by a Magistrate. Where a youthful offender is for one offence ordered to be detained in a Borstal Institution or a Training School and for another offence tried at the same trial is sentenced to whipping, the proper course for the Magistrate is to act under S. 390 and either order the whipping to be inflicted in his own presence or direct that it shall be inflicted at some convenient jail in the presence of the officer in charge of the jail. (*Roberts, C.J., Leach and Dunkley, JJ.*) EMPEROR *v.* NGA PYU. 14 Rang. 625=165 I.C. 575=9 R. R. 215=38 Cr.L.J. 33=1936 Cr.C. 976=A.I.R. 1936 Rang. 485 (F.B.).

——Ss. 390 and 391—*Youthful offender—Order for detention in Borstal School for one offence and sentence of whipping for another—Whipping, where to be inflicted.*

Where a youthful offender, for one offence, is ordered to be detained in a Training School or a Borstal Institution, and, for another offence tried at the same trial, is sentenced to whipping, the Magistrate must act under the provisions of S. 390, Cr. P. Code, and either order the whipping to be inflicted in his own presence, or direct that it shall be inflicted at some convenient jail in the presence of the officer in charge of the jail. A person sentenced to detention in a Borstal Institution is not sentenced to imprisonment and a Borstal Institution is not a jail and the Superintendent thereof is not an officer in charge of a jail and, therefore, a sentence of whipping cannot be carried out in his presence. (*Roberts, C.J., Leach and Dunkley, JJ.*) EMPEROR *v.* ISMAIL. 14 Rang. 625=165 I.C. 575=9 R.R. 215=1936 Cr. C. 976=38 Cr.L.J. 33=A.I.R. 1936 Rang. 486 (F.B.).

——S. 393—*Applicability—Sentence aggregating more than five years passed in different cases.*

S. 393, Cr. P. Code, clearly lays down that a person who is sentenced to imprisonment for more than five years shall not be punishable with stripes and the section applies even if the sentences aggregating more than five years' rigorous imprisonment are passed in different cases. A.I.R. 1930 Rang. 138, Foll. (*Din Mohammad, J.*) NUR ILAHI *v.* EMPEROR. 39 P.L.R. 226=171 I.C. 864=10 R.L. 245=39 Cr.L.J. 4=A.I.R. 1937 Lah. 104.

CR. P. CODE (1898), S. 397.

——S. 393—*Cumulative sentence of imprisonment for more than five years—Maintainability when accused is sentenced to whipping.*

The cumulative sentence of imprisonment of more than five years cannot be maintained in the case of a person who has been ordered to undergo punishment of whipping and *vice versa*. (*Almond, J.C. and Mir Ahmad, J.*) KARIM SHAH *v.* EMPEROR. 182 I.C. 530=12 R. Pesh. 2=40 Cr. L.J. 681=A.I.R. 1939 Pesh. 17.

——S. 393—*Whipping in addition to imprisonment for seven years—Legality of order.*

Where the magistrate sentenced the accused imprisonment for seven years and whipping addition,

Held, that the order was against the provisions of S. 393. (*Mir Ahmad, A.J.C.*) SONA KHAN *v.* EMPEROR. 167 I.C. 655=9 R. Pesh. 90=38 Cr. L.J. 429=A.I.R. 1937 Pesh. 22.

——Ss. 395 (1) and 562—*Sentence of whipping found inexecutable—Power of Magistrate to take bond.*

Where a Magistrate finds that a sentence of whipping passed by him is inexecutable due to bad health of the accused, he can either remit the sentence altogether or sentence the offender in lieu of whipping to imprisonment or fine under S. 395 (1), but he has no power to take a bond under S. 562 from the accused. (*Mosely, J.*) THE KING *v.* BA KYWAY. 176 I.C. 224=39 Cr.L.J. 707 (1)=11 R.R. 39=A.I.R. 1938 Rang. 218.

——S. 397—*Applicability—Consecutive sentences of detention under Madras Schools Act—Legality.*

S. 397 of the Cr. P. Code does not apply to sentences of detention under S. 8 of the Madras Borstal Schools Act, consequently a direction that the sentence of detention in one case should commence after expiration of a previous sentence of detention is illegal and liable to be set aside. (*Lakshmana Rao, J.*) *In re* PUBLIC PROSECUTOR, MADRAS. 176 I.C. 768=39 Cr.L.J. 795=11 R.M. 176=47 L.W. 473=1938 M.Cr.C. 141=(1938) M.W.N. 352=A.I.R. 1938 Mad. 613.

——S. 397—*Applicability and construction—"Sentence of imprisonment"—Meaning of—Imprisonment in default of fine—Order for concurrent running with substantive sentence of imprisonment in subsequent case—Legality of.*

The words "sentence of imprisonment" in S. 397, Cr. P. Code, are not restricted to mean a sentence of substantive imprisonment but include imprisonment in default of payment of a fine. Imprisonment in default of payment of fine is a sentence of imprisonment. Imprisonment in default of payment of a fine cannot be made concurrent with a substantive sentence of imprisonment. It makes no difference in this respect whether the sentence of imprisonment in default of payment of fine and the substantive sentence of imprisonment are passed in the same case or whether it is a case in which an accused person is undergoing a sentence of imprisonment in default of payment of fine in one case and a substantive sentence of imprisonment is passed in a different case against him. Where a person is undergoing

imprisonment in default of payment of fine, any subsequent sentence of imprisonment awarded to him would not begin to run until the expiry of the sentence of imprisonment in default. A person was sentenced to a sentence of fine, or to undergo rigorous imprisonment for one month in default on a conviction under S. 379, I. P. Code. He was unable to pay the fine and went to jail. While undergoing such imprisonment he was sentenced by another Court to rigorous imprisonment for two months under the Bombay Abkari Act, and also to rigorous imprisonment for two months under S. 224, I. P. Code. The convicting Court directed that the sentence under the Abkari Act should run concurrently with the imprisonment which the accused was then undergoing in default of payment of fine in the first case.

Held (on a reference by the District Magistrate), that S. 397, Cr. P. Code, applied to the case, that the substantive sentence awarded under the Abkari Act should begin after the expiry of the sentence of imprisonment in default which the accused was then undergoing, and should then be succeeded by the substantive sentence of imprisonment passed under S. 224, I. P. Code, and that the direction for concurrent running was illegal. (*Broomfield and Macklin, JJ.*) EMPEROR *v.* PUNJAJI LALAJI. **I.L.R. (1939) Bom. 160=181 I.C. 979=11 R.B. 374=40 Cr.L.J. 602=41 Bom L.R. 277=A.I.R. 1939 Bom. 174.**

——**S. 397**—*Separate trials—Sentences—Whether concurrent or consecutive.*

By virtue of S. 397, Cr. P. Code, the sentences in each separate trial must run separately unless otherwise ordered. (*Skemp, J.*) TIKAYA RAM *v.* EMPEROR. **38 P.L.R. 223.**

——**Ss. 397 and 35**—*Sentences of imprisonment in default of fines—If can be concurrent—Separate trials—Penal Code, S. 64.*

S. 64, I. P. Code, clearly lays down that any sentence of inprisonment in default of payment of fine has to be *in excess* of any other sentence of imprisonment to which the prisoner may have been sentenced. It is, therefore, illegal to make sentences of imprisonment in default of payment of fine concurrent with each other or with a substantive term of imprisonment. The Court has, therefore, no power in law to make the various sentences of imprisonment in default of payment of fines inflicted for different offences in separate trials concurrent with each other. (*Tek Chand and Blacker, JJ.*) EMPEROR *v.* CHANAN SINGH. **I.L.R. (1940) Lah. 143=A.I.R. 1940 Lah. 388.**

——**S. 401**—*Order of remission—Effect.*

The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation. (*Stone, C.J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR. **I.L.R. (1940) Nag. 1=180 I.C. 594=11 R.N. 380=40 Cr.L.J. 397=1938 N.L.J. 423=A.I.R. 1938 Nag. 513 (F.B.).**

——**S. 401**—*Order under—Nature explained.*

Though an order under S. 401, Cr. P. Code, passed by the Local Government is in the name of the Governor, because that is the constitutional form it has to take, it is in reality an order of the Povincial Government (*Stone, C.J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR. **I.L.R. (1940) Nag. 1=180 I.C. 594**

=11 R.N. 380=40 Cr.L.J. 397=1938 N.L.J. 423 =A.I.R. 1938 Nag. 513 (F.B.).

——**S. 401**—*Prerogative of mercy—When can be exercised.*

Where an approver who had been convicted of being accessory to murder on forfeiture of her pardon was less than 17 years old at the time of the murder, and her statement as approver led to a successful investigation and the conviction of the principal criminal, there could be no stronger case for the exercise of the prerogative of mercy. (*Young, C.J. and Monroe, J.*) AZIZ BEGUM *v.* EMPEROR. **39 P.L.R. 394=171 I C. 954=10 R.L. 254=39 Cr.L.J. 16=A.I.R. 1937 Lah. 689.**

——**S. 401**—*Scope of power of Local Government.*

Per *Bose, J.*—Executive Government has not got unfettered and unqualified freedom of action in the matter of suspension and remission of sentence. Its powers in this respect are in a sense derived from a statutory delegation of the Royal Prerogative of pardon; not co-extensive with it, and not superior to it. That being so, the rights of the Executive cannot be greater than those of His Majesty himself except and unless and only in so far as they are specifically enlarged by statute. Even if it be supposed that the Executive Government has power to cancel an order remitting sentence, the Government must be prepared to substantiate and justify its action and that means that it must give reasons first to the person concerned and then, if the matter reaches Court, to that tribunal. (*Stone, C.J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR. **I.L.R. (1940) Nag. 1=180 I.C. 594 =11 R.N. 380=40 Cr.L.J. 397=1938 N.L.J. 423 =A.I.R. 1938 Nag. 513 (F.B.).**

——**S. 401**—*Unconditional remission of sentence—Government, if can subsequently restore sentence.*

It is not open to Government, after remitting a sentence unconditionally, and in absence of fraud or mistake to cancel the order and restore the sentence. Even assuming that the Government has such power, an order remitting sentence which has been acted upon to the extent of informing the Legislature of the remission, cannot be amended or cancelled or suspended by the Assistant Legal Remembrancer writing to the Superintendent of Central Jail a memorandum telling the Superintendent to keep a prisoner in custody until he is told to let him go. That is not the way that orders are amended. When the amending order is passed some days after an application under S. 491 for writ of *habeas corpus* had been launched and after the prisoner was entitled to be released under the order of remission, any possible *locus penitentiae* is clearly at an end. (*Stone, C.J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR. **I.L.R. (1940) Nag. 1=180 I.C. 594=11 R.N. 380=40 Cr.L.J. 397=1938 N.L.J. 423=A.I.R. 1938 Nag. 513 (F.B.).**

——**S. 401 (1)**—*Scope of.*

Viewing sub-S. (1) as a whole it is clear, that the intention of the Legislature is to confer a 'power' to suspend or remit a sentence. (*Stone, C.J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR. **I.L.R. (1940) Nag. 1=180 I.C. 594=11 R.N. 380=40 Cr.L.J.**

CR. P. CODE (1898), S. 403.

397=1938 N.L.J. 423=A.I.R. 1938 Nag. 513 (F.B.).

——S. 403—*"Acquittal"*—De novo *trial under S. 350—Charge already framed before re-commencement—Discharge of accused—Effect of—If acquittal.*

Where in a *de novo* trial under S. 350, Cr. P. Code, the charge has been framed before the proceedings are re-commenced, the discharge of the accused thereafter amounts to an acquittal and the accused cannot be tried again when that order of discharge is in force, by reason of S. 403, Cr. P. Code. (*Lakshmana Rao, J.*) ABDUL HAMEED ROWTHER *v.* MAHOMED SALI ROWTHER. 52 L.W. 348.

——S. 403—*Applicability—"Judgment"—Order dismissing complaint or discharging accused—Effect of.*

The word 'judgment' indicates some final determination of the case which would end it once for all, such as an order of conviction or acquittal. Hence an order dismissing a complaint under S. 203 or discharging an accused under S. 259 is not a judgment. (*Davis, J.C., Weston and Tyabji, JJ.*) MST. HARBAI *v.* RAYA PREMJI. I.L.R. (1940) Kar. 74=183 I.C. 283=12 R.S. 44=40 Cr.L.J. 745=A.I.R. 1939 Sind 193 (F.B.).

——S. 403—*Applicability and scope—Complaint of offences under Ss. 405 and 420, I. P. Code—Compounding and acquittal under S. 420—Subsequent trial for offence under S. 405—If barred—*Autrefois acquit—*Letters Patent (Mad.), Cl. 25—"In the trial"—Meaning.*

The accused, a partner of a firm of brokers, by means of a false representation that his firm required the temporary use of the complainant's bonds, to satisfy a Bank until other bonds of the same description and value, alleged to have been purchased for the Bank by the accused's firm, were returned from Bombay, after rectification of endorsements, induced the complainant to hand over the bonds to the accused, on the understanding that they were to be immediately returned to him when the purpose of satisfying the Bank was concluded; and the accused as soon as the complainant delivered the bonds to him sold those bonds without the complainant's knowledge or consent and appropriated the proceeds to his own use. On these facts the complainant charged the accused before the Chief Presidency Magistrate with the offences of cheating and criminal breach of trust, under Ss. 420 and 405, I. P. Code, respectively. Summonses were issued in respect of both the offences, but when the parties appeared, it was stated that the complainant wished to compound the offence as the only offence was one of cheating under S. 420, I. P. Code, and the Magistrate after recording the evidence of the complainant's agent, acquitted the accused. The crown having appealed against the acquittal, the acquittal of the offence of cheating was upheld by the High Court, but the Magistrate was directed to restore the summons in respect of the offence alleged under S. 405, I. P. Code and to dispose of it according to law. At the trial the accused pleaded S. 403, Cr. P. Code, in bar of the trial, but the magistrate declined to go into the question, because he considered that he was precluded by the order of the High Court. The accused applied in revision to the High Court against this, but the High Court dismissed his application on the

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ground that there was no reason to interfere. The accused was then committed to the High Court Sessions for trial and S. 403, Cr. P. Code, was again pleaded in bar after the charge was read over to the accused and when he was called upon to plead to it. The crown demurred to the plea on the ground that the plea was barred by reason of the disallowance of the plea of the Magistrate and the order of the High Court in revision. The presiding judge, however, recorded the plea, though he considered that the plea had been decided by implication by the High Court in the appeal by the crown and that the plea was bad in law. The accused was found guilty under S. 405, I. P. Code, by a majority of the judge and convicted by the judge who agreed with verdict. But at the request of the counsel for accused be reserved for consideration of a Full Bench the question whether the plea was good in law under Cl. 25 of the Letters Patent. Before the Full Bench, the crown raised a preliminary objection that the reference was incompetent, on the ground that the plea did not arise "in the trial" and that the plea had already been decided against the accused.

Held, by the Full Bench, overruling the preliminary objection, that the plea of the accused based on S. 403, Cr. P. Code, had not been decided by the High Court either in the appeal or in the revision, that the plea if available to the accused at the Sessions trial, and that it was taken at the right time, so that the judge had jurisdiction to reserve the point under Cl. 25 of the Letters Patent, as it arose in the course of the trial.

(Per *Cornish and Mockett, JJ.. Lakshmana Rao, J.*, dissenting) that the facts in the case of cheating of which he had been acquitted previously were identical with those in the case of the second trial for criminal breach of trust, and that the acquittal in the cheating case furnished a valid plea under S. 403, Cr. P. Code, in bar of the second trial for criminal breach of trust; that S. 235 (1) had no application to the case as the second offence was based on the identical facts on which the first charge was founded; and consequently the conviction on the charge of criminal breach of trust must be set aside.

(Per *Lakshmana Rao, J.*) that the facts alleged in the complaint constituted two distinct offences, and therefore the plea of *autrefois acquit* was not good in law and could not be upheld. (*Cornish, Mockett and Lakshmana Rao, JJ.*) REX *v.* JOHN MCIVER. 162 I.C. 592 (2)=8 R.M. 1000=37 Cr.L.J. 637=43 L.W. 548=1936 M.W.N. 281=1936 Cr.C. 433=1936 M.Cr.C. 157=A.I.R. 1936 Mad. 353=70 M.L.J. 635 (F.B.).

——S. 403—*Complaint dismissed under S. 203—Subsequent complaint—Maintainability.*

The principle that it is not open to a Magistrate to entertain a complaint when a similar complaint has been dismissed by another Magistrate of co-ordinate jurisdiction and the dismissal has not been set aside by higher authority, does not apply where the complaint subsequently filed is not similar to but essentially different from previous complaint. (*Lobo, J.C.*) UMAR AHMAD *v.* EMPEROR. 186 I.C. 95=12 R.S. 191=41 Cr.L.J. 248 =A.I.R. 1940 Sind 15.

——S. 403—*Defamatory allegations against minor daughter affecting father—Acquittal of*

accused on father's complaint—Complaint by daughter—If barred.

Where a report is made to police by certain persons against another containing defamatory allegations against such person's minor daughter, both the father and the daughter can file separate complaints; and the compromise and consequent acquittal of accused in father's complaint will be no bar to the complaint by the daughter, because the complaint by the father although on same facts could not either have been filed on behalf of his minor daughter or compromised without the Court's permission. (*Bhide, J.*) MT. HARBANS KAUR *v.* LAHARI RAM. **178 .C. 791=11 R.L. 499=40 Cr.L.J. 131=A.I.R. 1938 Lah. 739.**

——**S. 403**—*Different accused—Second trial on same evidence—If barred.*

Where an accused has been either acquitted or convicted, there is nothing in law to prevent another accused being subsequently tried and acquitted or convicted, even if the decision in the second trial differs from that of the original trial on exactly the same evidence. It is probable that on exactly the same evidence two equally competent Judges will arrive at the same conclusion, but it is the duty of a Court to decide a case on the evidence before it without being influenced by the fact that another Court has on the same evidence on a previous occasion come to a certain conclusion. (*Hamilton, J.C. and Mir Ahmad, A. J.C.*) AWAL KHAN *v.* EMPEROR. **164 I.C. 145=9 R. Pesh. 11=37 Cr.L.J. 889=1936 Cr.C. 744=A.I.R. 1936 Pesh. 152.**

——**S. 403**—*Offence of conspiracy—Second trial for fresh entry into same conspiracy—If barred.*

The gist of the offence of conspiracy is the agreement or entering into the conspiracy. What S. 403, Cr. P. Code, lays down—if it is a conspiracy matter to be considered—is that a man cannot be tried again for that particular entry into the conspiracy for which he has already been tried. A person can, therefore, be tried again for any fresh entry into the same conspiracy. (*Costello, Jack and M.C. Ghose, JJ.*) PURNANANDA DAS GUPTA *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 1=179 I.C. 506=11 R.C. 557=40 Cr.L.J. 199=68 C.L.J. 206=A.I.R. 1939 Cal. 65 (F.B.).**

——**S. 403**—*Principle of section—Extension—Permissibility.*

S. 403, Cr. P. Code, requires that the Court of the first instance should have been competent to try the charge put forward at the second trial. The principles underlying the English Common Law pleas of *autrefois convict* and *autrefois acquit* have been embodied so far as this country is concerned within the limits, however narrow they may be or have been stated to be, of the language of the Statute itself. It would be bewildering and, indeed, might result in great injustice to the community at large if Courts were to endeavour to stretch the language or extend the principles down in S. 403. (*Costello, Jack and M.C. Ghose, JJ.*) PURNANANDA DAS GUPTA *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 1=179 I.C. 506=11 R.C. 557=40 Cr.L.J. 199=68 C.L.J. 206=A I.R. 1939 Cal. 65 (F.B.).**

——**S. 403**—*Scope—Bar of second trial—Test.*

Per *Mockett, J.*—The terms of S. 403, Cr. P. Code, are very much wider than the rule of *autrefois acquit* in England. The test is whether an accused person is sought to be tried on identical facts a second time. (*Cornish, Mockett and Lakshmana Rao, JJ.*) REX *v.* JOHN MC IVER. **162 I.C. 592 (2)=8 R.M. 1000=37 Cr L.J. 637=43 L. W. 548=1936 M.W.N. 281=1936 Cr.C. 433=1936 M.Cr.C. 157=A.I.R. 1936 Mad. 353=70 M. L.J. 635 (F.B.).**

CR. P. CODE (1898), S. 403.

——**S. 403**—*Scope—Conviction under S. 75, Madras City Police Act—If bars trial under Ss. 323 and 352, I. P. Code.*

The conviction of a person under S. 75 of the Madras City Police Act is no bar to his trial for an offence under Ss. 323 and 352, I. P. Code. (*Lakshmana Rao, J.*) THANAMMAL *v.* ALAMELU AMMAL. **50 L.W. 800 (1)=1940 M.W.N. 172 (1)=12 R.M. 727=187 I.C. 82=41 Cr.L.J. 401 (1)=A.I.R. 1940 Mad. 224=(1939) 2 M.L.J. 814.**

——**S. 403**—*Trial and conviction under S. 45 of Calcutta Police Act—Subsequent trial on same facts under S. 44 of that Act—If barred.*

The trial and conviction of an accused person along with certain others under S. 45 of the Calcutta Police Act does not bar his subsequent trial on the same facts under S. 44 of that Act. The case really comes under the second clause of S. 403, Cr. P. Code. (*M.C. Ghose, J.*) KALI CHARAN *v.* S. K. BRAHMACHARI. **42 C.W.N. 1232.**

——**S. 403 (1), second part**—*Applicability—Test.*

In deciding whether a subsequent trial comes under the second part of S. 403 (1), Cr. P. Code, the test to be applied is whether the acquittal or conviction from the first charge necessarily involves an acquittal or conviction on the second charge. (*Costello, Jack and M.C. Ghose, JJ.*) PURNANANDA DAS GUPTA *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 1=179 I.C. 506=11 R.C. 557=40 Cr.L.J. 199=68 C.L.J. 206=A.I.R. 1939 Cal. 65 (F.B.).**

——**S. 403 (1)**—*Applicability—Acquittal on the ground of want of jurisdiction to entertain complaint—Subsequent trial — If barred*—Autrefois acquit—*Plea of—Sustainability.*

"In order to plead effectually a plea of *autrefois acquit*, it must appear that the accused has been legally acquitted. The question is always whether the accused could have taken a fatal exception to the former indictment; for if he could, no acquittal will avail him." On a complaint by a Revenue Inspector to the Police under S. 353, I. P. Code, and a charge sheet by the Police, before the Sub-Magistrate, the latter, after hearing the prosecution evidence, framed a charge under S. 186, I. P. Code. The accused raised the plea that the trial was illegal as no complaint had been made under S. 195 (1) (*a*) of the Cr. P. Code. The plea was upheld and the accused acquitted. The Revenue Inspector then filed his complaint in person to the Court. The accused's plea of *autrefois acquit* was not entertained.

Held, that the former trial without a complain under S. 195, Cr. P. Code, was void; the charg and the judgment of acquittal were both void an there was nothing which the accused could com pel the Court to recognise in support of a ple under S. 403, Cr. P. Code. (*Beasley, C.J., Pand rang Row and King, JJ.*) MUTHU MOOPAN, *In re* **I.L.R. (1937) Mad. 664=167 I.C. 571=9 R.M 475=1937 M.Cr.C. 41=38 Cr.L.J. 457=1937 M**

CR. P. CODE (1898), S. 403.

W.N. 17=45 L.W. 226=A.I.R. 1937 Mad. 301=(1937) 1 M.L.J. 334 (F.B.).

——S. 403 (1)—*Applicability—Trial and acquittal under Ss. 379 and 411, I. P. Code—Subsequent trial on charge under Sandalwood Transit Rules under Forest Act—If barred.*

In order that S. 403 (1), Cr. P. Code, may be successfully pleaded, S. 236, Cr. P. Code, must apply, and for S. 236 to apply it must be doubtful which of two or more offences certain facts establish. The acquittal of a person on a charge under Ss. 379 and 411, I. P. Code, is no bar to his being tried for an offence under the Forest Act Sandalwood Transit Rules, when the offence under the latter Act is established on the facts, and when the only doubt is whether an offence under the Penal Code is established. The fact that at the previous trial the accused might have been tried for both the offences under the Forest Act and under Ss. 379 and 411, I. P. Code, would not bring the case under S. 236, but only under S. 235 (1), Cr. P. Code. S. 403 (1) is no bar in such a case. (*King, J.*) GURUNATHA GOUNDAN *v.* EMPEROR. 1937 M.W.N. 1247.

——S. 403 (1)—*Applicability — Two charges triable jointly but not falling under Ss. 236 and 237—Acquittal on one—If bar to prosecution on other.*

The principle of S. 403 (1), Cr. P. Code, would not apply to a case where the two charges do not fall within the scope of Ss. 236 and 237, Cr. P. Code, although they could have been tried together. In such cases the acquittal on the one would not bar a prosecution on the other, especially when the scope of the two prosecutions is entirely different. (*Horwill, J.*) DIWAN SAHEB *v.* EMPEROR. 47 L.W. 145 (2)=1938 M.W.N. 586.

——S. 403 (1) and (2)—*Bar of second trial—Test.*

The question as to whether a particular trial is barred by reason of previous prosecution ending in conviction or acquittal is a question to be determined on the facts and circumstances of a particular case. The true test is not so much whether the facts are the same in both trials as whether the acquittal or conviction from the first charge necessarily involves on acquittal or conviction on the second charge. Where the facts in a prosecution under S. 121-A, I. P. Code, and those involved in the earlier prosecution are not the same, though some of the facts are common, and on the facts of the previous trial a charge under S. 121-A, I. P. Code, could not possibly have been framed or a trial held on that charge, and the present charge under S. 121-A includes not merely the offences with which the accused were charged in the earlier trial, but goes much beyond them, the facts of the case attract the operation not of sub-S. (1) but of sub-S. (2) of S. 403, Cr. P. Code, and the prosecution under S. 121-A, I. P. Code, is, therefore, not barred. (*Guha, Bartley and Nasim Ali, JJ.*) JITENDRA NATH GUPTA *v.* EMPEROR. 169 I.C. 977=38 Cr.L.J. 818=10 R. C. 69=A.I.R. 1937 Cal. 99 (S.B.).

——S. 403 (1) and (2)—*Accused acquitted on a charge of affray—Subsequent trial and conviction for causing hurt during the affray—If barred.*

The acquittal of an accused person on a charge of affray under S. 160, I. P. Code, is no bar to his subsequent trial and conviction under S. 323, I. P. Code, for causing hurt in the course of the affray.

CR. P. CODE (1898), S. 403.

The offence of affray and that of causing hurt in the course of an affray are distinct offences coming within sub-S. (2) of S. 403, Cr. P. Code, and the matter is governed by that sub-section, and not by sub-S. (1) as it is not a case of offences coming within S. 236 or 237, Cr. P. Code. (*Dhavle, J.*) SANKATHA RAI *v.* KHADERAN MIAN. 163 I.C. 29=8 R.P. 626=37 Cr.L.J. 785=17 Pat.L.T. 723=1936 Cr.C. 825=A.I.R. 1936 Pat. 503.

——S. 403 (1) and (4)—*Accused convicted under S. 408 or S. 408-109, I.P. Code, by first class magistrate—Conviction quashed by Sessions Judge on appeal—Power of Sessions Judge to direct committal of accused to Sessions under S. 477-A, I. P. Code.*

Where on an appeal by the accused against his conviction by a first class magistrate under S. 408 or S. 408-109, I. P. Code, the Sessions Judge quashes the conviction, he has no jurisdiction, in view of the provisions of sub-sections (1) and (4) of S. 403, Cr. P. Code, to direct upon the same facts that the accused should be committed to Sessions upon a charge under S. 477-A, I.P. Code. (*Thom, J.*) MAHADEO PRASAD *v.* EMPEROR. 167 I.C. 360=9 R.A. 522=38 Cr.L.J. 368=1936 A. W.R. 1133=1937 A.L.R. 174=1937 A.L.J. 2=A.I.R. 1937 All. 117.

——S. 403 (2)—*Acquittal on charge of cheating by filing false affidavit—Subsequent trial for swearing a false affidavit—Whether barred.*

Swearing a false affidavit and cheating by filing such false affidavit are distinct offences even though they are parts of the same transaction. The accused might be tried for both the offences at the same trial. Accordingly the accused who had been acquitted of cheating by filing a false affidavit might subsequently be tried for perjury by swearing a false affidavit. (*Mosely, J.*) ABDUL HAMID *v.* EMPEROR. 14 Rang. 24=8 R.R. 509=37 Cr L.J. 492=161 I.C. 763=1936 Cr.C. 271=A.I.R. 1936 Rang. 174.

——S. 403 (2)—*Applicability—Acquittal on charge under S. 283, Penal Code, for obstructing river—Subsequent prosecution under S. 76-B of Bengal Embankment Act for meddling with embankment—If barred.*

A person was prosecuted under S. 283, Penal Code, for creating obstruction in the bed of a river by extending a tank and making banks. He was acquitted on appeal. Subsequently he was prosecuted under S. 76-B, Bengal Embankment Act, for meddling with embankment.

Held, that S. 403 (2) did not apply as the subsequent offence did not constitute a distinct offence within the meaning of S. 235 (1), Cr.P. Code from one in the former case and, therefore, the principle of *autrefois acquit* operated and the second prosecution was barred. (*Cunliffe and Henderson, JJ.*) SHIB CHANDRA ROY *v.* EMPEROR. 165 I.C. 847=9 R.C. 461=38 Cr.L.J. 1=1936 Cr.C. 946=A.I.R. 1936 Cal. 686.

——S. 403 (4)—*'Competent to try'—Interpretation—Acquittal under S. 211, I. P. Code—Subsequent trial under S. 182 I. P. Code—If barred.*

Under S. 403 (4), Cr. P. Code, the 'competency' of the Court to try an offence means not only the status or character of the former Court to try the offence with which the accused is subsequently charged but also includes within its purview cases in which the Court, though otherwise qualified to try the case could not have done so because cer-

CR. P. CODE (1898), S. 403.

tain conditions precedent for the exercise of its jurisdiction had not been fulfilled. Consequently the acquittal of the accused under S. 211, I. P. Code, at a previous trial does not bar his subsequent trial on the same facts under S. 182, I. P. Code, if at the time of the previous trial there was no complaint in writing of the public servant concerned as required by S. 195, Cr. P. Code. (*Young, C.J. and Tek Chand, J.*) EMPEROR *v.* RAM RAKHA. **I.L.R. (1939) Lah. 373=11 R.L. 375=177 I.C. 894=39 Cr.L.J. 960=40 P.L.R. 501 =A.I.R. 1938 Lah. 625.**

——**S. 403, Ill. (e)**—*Accused tried by 2nd class magistrate under S. 323, I. P. Code and acquitted by him—Power of District Magistrate on revision to order his re-trial under S. 324, I. P. Code.*

A second class magistrate tried *X* along with others under S. 323, I. P. Code, and acquitted him while convicting the rest. On revision, the additional District Magistrate held that the proper charge against *X* would have been one under S. 324, I. P. Code, and as he had not been charged under that section, he ordered that he should be tried under it.

Held, that the case was fully covered by Ill. (*e*) to S. 403, Cr. P. Code, and that the additional District Magistrate had no power to order that *X* should be re-tried under S. 324, I. P Code, as that charge could have been framed by the second class Magistrate. (*Addison, J.*) BHAG SINGH *v.* EMPEROR. **I.L.R. (1938) Lah. 127=177 I.C. 339=11 R.L. 298=39 Cr.L.J. 870=40 P.L.R. 1036=A.I. R. 1938 Lah. 614.**

——**Ss. 403 and 407**—*Scope and effect of—Complaint dismissed under S. 203 or accused discharged under S. 259—Second complaint—If can be inquired into.*

S. 437 is only an enabling section and does not take away by implication the jurisdiction vested in a Magistrate to hear the complaint again. Where therefore a Magistrate dismisses acomplaint for default under S. 203 or discharges an accused under S. 259, it is competent for that Magistrate or his successor in office or any other Magistrate having co-ordinate jurisdiction to entertain a second complaint on the same facts although the order of dismissal or discharge may not have been set aside by a higher Court. Such Magistrate, while entertaining the second complaint should however keep in mind the default committed in the earlier proceedings for that default may have a bearing not only upon any subsequent default committed but also upon merits of the complaint. (*Davis, J. C., Weston and Tyabji, JJ.*) MST. HARBAI *v.* RAYA PREMJI. **I.L.R. (1940) Kar. 74=183 I.C. 283=12 R.S. 44 =40 Cr.L.J. 745=A.I.R. 1939 Sind 193 (F.B.).**

——**Ss. 403 and 423**—*Construction—Trial by Assistant Sessions Judge—Conviction on some charges and acquittal of others—Appeal by accused—Power of Sessions Judge—Retrial and acquitted charges—Competency to order*—Autre fois acquit.

Cunliffe, J.—A Sessions Judge hearing an appeal by a person convicted at a trial by an Assistant Sessions Judge, in which the accused has been acquitted of certain charges but convicted of others in agreement with the verdict of the jury, cannot order a retrial in respect of the offences of which the accused had been acquitted, when there is no appeal by the Crown against the acquittal.

CR. P. CODE (1898), S. 408.

The accused is protected by the rule of *autrefois acquit* embodied in S. 403, Cr. P. Code, so far as the charges of which he has been acquitted are concerned. The retrial should be limited to the charge or charges under which the appeal is preferred.

Henderson, J.—If the prosecution want a retrial on all the charges they must produce a specific order to that effect. (*Cunliffe and Henderson, JJ.*) NAIMUDDIN BISWAS *v.* EMPEROR. **63 Cal. 1112= 63 C.L.J. 124.**

——**Ss. 403 and 531**—*Relative scope—"Competent Court"—Meaning.*

Ss. 403 and 531, Cr. P. Code, must be read together and a Court is a Court of competent jurisdiction within the meaning of S. 403, where the finding, sentence or order of the Court could have been set aside under the provisions of S. 531 but has not, in fact, been so set aside. S. 531 of the Code must be deemed to give jurisdiction to a Court which would otherwise lack it unless it appears that such lack of jurisdiction has in fact occasioned a failure of justice. An accused was tried and acquitted on a charge of cheating by the Sessions Judge of *S* district, who had no territorial jurisdiction as the offence was committed in *L* district. The Resident Magistrate at *L* district again proposed to try him for the same offence on the same facts. There was no application under S. 531 to the High Court.

Held, it was not competent for a Court not acting under S. 531 to say whether a failure of justice had or had not been occasioned. It was clearly not competent for the Resident Magistrate at *L* to decide the Sessions Court at *S* was not a competent Court within the provisions of S. 403 merely because *ex facie* it lacked territorial jurisdiction. (*Davis, J.C. and Mehta, A.J.C.*) DHINGANO KHOSO *v.* GULSHER KAMBIR KHAN. **170 I.C. 314=38 Cr. L.J. 959=10 R.S. 57=A.I.R. 1937 Sind 179.**

——**Ss. 404, 408 and 410**—*Relative scope—Forum of appeal—If depends on status of Judge on the day of judgment.*

Sections 408 and 410 are to be read subject to the provisions of S. 404. S. 404 contemplates that the trial and conviction shall be by the same Judge. The Court to which an appeal lies from the judgment of a Judge is determined by the status of the Judge on the day on which he pronounces judgment. Where, therefore, a trial has been held by a Judge, in the capacity of an Assistant Judge, but the judgment (sentencing the accused to four years' rigorous imprisonment) is pronounced by him in the capacity of an Additional Sessions Judge, to which position he has been promoted before the pronouncing of the judgment, the appeal from the judgment lies to the High Court and not to the Sessions Judge under S. 408 (*b*). (*Davis, J.C. and Mehta, A.J.C.*) JALAL *v.* EMPEROR. **30 S.L.R. 456=167 I.C. 75 =9 R.S. 162=38 Cr.L.J. 350=A.I.R. 1937 Sind 22.**

——**S. 408**—*Appeal—Forum—Assistant Sessions Judge delivering judgment as Additional Sessions Judge—'Trial', if includes judgment.*

The Code of Criminal Procedure (1898) draws a distinction between the 'trial' and the decision of a case. The trial of a case includes only those stages of the proceedings of a case in which parties thereto are entitled to take part and extends to the recording of evidence and to the

CR. P. CODE (1898), S. 408.

hearing of arguments. But the delivery of judgment is an act of the Judge and Judge alone and is therefore no part of the 'trial' and is outside the scope of a 'trial' as contemplated by the Code of 1898. Where a trial commenced before an Assistant Sessions Judge who took the evidence and heard arguments, but who delivered judgment convicting the accused after he was promoted as an Additional Sessions Judge the appeal from such a conviction lies under S. 408, Cr. P. Code, only to the Court of Session and not to the High Court though the conviction was by an Additional Sessions Judge. (*Iqbal Ahmad and Harries, JJ.*) BAKSHI RAM *v.* EMPEROR. I.L.R. (1938) A. 157=173 I.C. 663=10 R.A. 493=1938 All.L.R. 164=39 Cr.L.J. 345=1937 A.W.R. 1147=1937 A.L.J. 1152=A.I.R. 1938 All. 102.

——S. 408 (c)—*Scope — Conviction under S. 124-A, I. P. Code—Appeal to Sessions Judge—Order allowing appeal and reducing sentence—Jurisdiction—Revision—Interference by High Court.*

An appeal from a conviction under S. 124-A, I. P. Code, lies only to the High Court under S. 408 (*c*), Cr. P. Code. A Sessions Judge has no jurisdiction to entertain or hear such an appeal, and if he hears and allows an appeal from a conviction under S. 124-A and reduces the sentence, his order is without jurisdiction and liable to be set aside in revision by the High Court. (*Sulaiman, C.J. and Bennet, J.*) KRISHNA CHANDRA *v.* EMPEROR. 1937 A.L.J. 365=1937 A.Cr.C. 70=1937 A.W.R. 401=1937 A.L.R. 749=170 I.C. 874=10 R.A. 191=38 Cr.L.J. 972=A.I.R. 1937 All. 466.

——Ss. 408 and 413—Scope and effect of. *See* CR. P. CODE, SS. 413 AND 408. 41 C.W.N. 833=A.I.R. 1937 Cal. 394.

——Ss. 408, 414, 415-A and 562—*Right of appeal—Summary trial and conviction—Binding over of some only under S. 562—Right to appeal, if affected by S. 414—Sentence on others, not appealable—If become appealable under S. 415-A.*

Where several persons were tried summarily and convicted but some were bound over under S. 562, Cr. P. Code, S. 408 confers on them the right of appeal against their conviction, notwithstanding the fact that they have not yet been sentenced. That right is not taken away by S. 414. A person convicted along with those mentioned above, but who has been sentenced, gets a right of appeal by virtue of S. 415-A, not only against his conviction but also against his sentence, even though Ss. 413 and 414 would have deprived him of all right of appeal, if he had been tried alone and convicted and sentenced. (*Sharpe, J.*) SHANKAR SUKUL *v.* THE KING. 1940 Rang.L.R. 381=190 I.C. 226=A.I.R. 1940 Rang. 223.

——S. 411—*Appeal—Conviction by Presidency Magistrate—Sentence of whipping—Appealability.*

There is no right of appeal from a sentence of whipping passed on a conviction by a Presidency Magistrate. Such an appeal is barred under Ss. 404 and 411, Cr. P. Code, as such a sentence is not a sentence of imprisonment or of fine falling under S. 411. (*Beaumont. C.J. and Wadia, J.*) EMPEROR *v.* MOTIRAM. 170 I.C. 757=10 R.B. 142=38 Cr.L.J. 985=39 Bom.L.R. 470=A.I.R 1937 Bom. 336.

CR. P. CODE (1898), S. 414.

——Ss. 411 and 415-A—*Accused given non-appealable sentence by Presidency Magistrate—Order releasing co-accused under S. 562—If gives accused a right to appeal.*

An accused person who is convicted on a trial held by a Presidency Magistrate and who is given a non-appealable sentence by him does not acquire a right of appeal under S. 415-A, Cr. P. Code, by reason of an order directing his co-accused who is convicted along with him in the same trial to be released on the execution of a bond under the provisions of S. 562, Cr. P. Code. (*Cunliffe and Henderson, JJ.*) KALI KUMAR MITRA *v.* EMPEROR. I.L.R. (1937) 1 Cal. 123=170 I.C. 26=10 R.C. 122=38 Cr.L.J. 876=A.I.R. 1937 Cal. 413.

——S. 413—*Costs of court-fee awarded under S. 546-A—If form part of fine.*

The amount awarded as costs of the court-fees under S. 546-A, Cr. P. Code, ought not to be regarded as forming part of the fine for purposes of appeal. (*Patterson, J.*) ATUL CHANDRA MODAK *v.* EMPEROR. 42 C.W.N. 760.

——S. 413—*Sentence of fine not exceeding Rs. 50—Sentence passed by Magistrate invested with first class powers only after conclusion of evidence but before sentence—Appeal, if lies.*

Where a trial is commenced before a second class Magistrate and where after the conclusion of the evidence but before the sentence is pronounced by him, he becomes invested with the powers of a first class Magistrate, the Magistrate cannot be regarded as a Magistrate of any other class but the first class at the time of the passing of the sentence. If, therefore, a sentence of fine not exceeding Rs. 50 is passed by such a Magistrate, no appeal will lie against it under S. 413, Cr. P. Code, irrespective of any other provision in the previous part of the Code. In such a case the Magistrate can in passing sentence rely upon his first class powers and pass a sentence which only a Magistrate of the first class can pass. 36 C.W.N. 302, Diss. from. (*Khundkar and Sen, JJ.*) BEJOY KUMAR KUNDU *v.* SITA NATH KUNDU. I L.R. (1940) 1 Cal. 519=44 C.W.N. 677=A.I.R. 1940 Cal. 540.

——Ss. 413 and 408—*Scope and effect of—Order of First Class Magistrate under S. 349—Fine of Rs. 25 coupled with order under S. 106—Appeal, if lies.*

S. 413, Cr. P. Code, takes away the right of appeal not only in those cases which are referred to in the earlier part of S. 408, but also in cases under S. 349 or under S. 380, Cr. P. Code. What has to be seen, in considering whether a case is hit by S. 413, is whether the sentence in question was one not exceeding the limit prescribed, and whether it was a sentence passed by a Court of the class mentioned therein. If these conditions are satisfied, S. 413 would apply, whether the sentence was passed under S. 349 or S. 380 or otherwise. Accordingly no appeal lies from an order passed by a First Class Magistrate under S. 349 sentencing the accused to pay a fine of Rs. 25 and also binding him over under S. 106, Cr. P. Code. (*Henderson and Biswas, JJ.*) KISHORE SINGH *v.* EMPEROR. I.L.R. (1937) 2 Cal. 469=170 I.C. 920=38 Cr.L.J. 990=10 R.C. 212=41 C.W.N. 833=A.I.R. 1937 Cal. 394.

——S. 414—*Applicability, when more than one sentence is imposed.*

CR. P. CODE (1898), S. 414.

S. 414 also applies to a case when more than one sentence is imposed. What is meant by S. 414 is not two punishments similar in kind but a combination of two punishments of two kinds. (*Davis, J.C. and Dadiba C. Mehta, A.J.C.*) EMPEROR *v.* HEMANDAS DEVANSINGH. 161 I.C. 267=37 Cr.L.J. 455=8 R.S. 134=1936 Cr.C. 230=A.I.R. 1936 Sind 40.

——S. 414—Summary trial—Conviction and binding over under S. 562—Right of appeal if affected by S. 414. *See* CR. P. CODE, Ss. 408, 414, 415-A AND 562. (1940) Rang.L.R. 381.

——S. 415—*Applicability—Aggregate sentences of fine not exceeding Rs.* 50.

The combination of punishments which is contemplated by S. 415, Cr P. Code, refers to a combination of the punishments of imprisonment and fine. This section can have no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50. (*Edgley, J.*) KALI CHARAN SARDAR *v.* ADHAR MANDAL. I.L.R. (1939) 1 Cal. 325=182 I.C. 258=12 R.C. 38=40 Cr.L.J. 652=43 C.W.N. 360=A.I.R. 1939 Cal. 274.

——S. 415—*Applicability and construction—"Two or more punishments"—Meaning of—Two non-appealable sentences of fine not exceeding Rs.* 50—*Appeal.*

S. 415 of the Cr. P. Code has no application to a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50. S. 415, when it refers to two or more punishments, must be read as referring to two or more punishments of different kinds. The section is meant to refer to sentences in which two or more different kinds of punishment referred to in Ss. 413 and 414 were combined. (*Burn and Stodart, JJ.*) VENKATARAMANAYYA *v.* EMPEROR. I.L.R. (1939) Mad. 1035=187 I.C. 103=12 R.M. 693=41 Cr. L J. 403=50 L.W. 614=1939 M.W.N. 1039=A.I.R. 1940 Mad. 111=(1939) 2 M.L.J. 878.

——S. 415—*Combination of sentences of fine—Appeal.*

The punishments referred to in S. 415, Cr. P. Code, include not only punishments of different kinds but also of the same kind. An appeal, therefore, lies under that section in the case of a combination of sentences of fine. (*Zia-ul-Hasan and Smith, JJ.*) MAKRAND SINGH *v.* GANGA. 13 Luck. 618=10 R.O. 114=171 I.C. 337=38 Cr. L.J. 1062=1937 O.L.R. 547=1937 O.W.N. 1088=A.I.R. 1937 Oudh 524 (S.B.).

——S. 415—*Interpretation.*

The two sentences referred to in S. 415, Cr. P. Code, must be of fines above Rs. 50 in order to avoid the bar in S. 414. (*Gruer, J.*) PROVINCIAL GOVERNMENT, C. P. AND BERAR *v.* BHIVRAM. 188 I.C. 80=12 R.N. 332=41 Cr.L.J. 545=1940 N.L.J. 242=A.I.R. 1940 Nag 264.

——S. 415—*Offence—Ingredients—Post-dated cheque for goods received—Dishonour of cheque—Complaint of cheating—Abstention of allegation as harm or damage having been caused—Allegation of mere inducement not to file suit against accused immediately on dishonour—Sustainability of complaint.*

In the offence of cheating under S. 415, I. P. Code, there are two elements—deception and dishonest intention to do or omit to do something. Neither mere deception nor mere dishonesty is a criminal offence. To establish the offence of cheating, the complaint must show not only that he was induced to do or not to do something, but that this induced act or omission on his part caused or was likely to cause him some harm or damage in body, mind, reputation or property—which are presumed to be the four cardinal assets of humanity. A post-dated cheque in payment of goods already received is a mere promise to pay on a future date, and if the cheque is dishonoured, there is only a broken promise which is not a criminal offence, though it may amount in certain business relations to discreditable behaviour. A complaint in respect of such act under S. 415, I. P. Code, more than three months afterwards, on the ground that the complainant was induced not to file a suit against the accused immediately on dishonour, is not sustainable, when there is no assertion in the complaint that any harm or damage was caused or likely to be caused. (*Newsam, J.*) CHIDAMBARAM CHETTIAR *v.* SHANMUGAM PILLAI. 173 I.C. 14=10 R.M. 512=39 Cr.L.J. 261=1937 M.Cr.C. 278=1937 M.W.N. 999=46 L.W. 629=A.I.R. 1938 Mad. 129=(1937) 2 M L.J. 878.

CR. P. CODE (1898), S. 417.

——S. 415-A—Summary trial—Conviction and binding over of some under S. 562—Appeal by them—Others convicted and sentenced, if get a right of appeal also. *See* CR. P. CODE, Ss. 408, 414, 415-A AND 562. (1940) Rang.L.R. 381.

——S. 417.

Burden of proof.
Delay in filing.
Interference with acquittal.
New plea.
Powers of High Court.
Principles.
Question of fact.
Retrial.

Burden of proof.

——S. 417.

Where there is a reasonable doubt as to the guilty of the accused, the High Court will not interfere with an acquittal in an appeal from an acquittal. Nor will the Court forget that the burden of proof lies upon the prosecution. It is for the prosecution to prove the guilt of the accused; it is not for the accused to prove his innocence. The High Court will not interfere and reverse an order of acquittal merely because there is room for an honest difference of opinion, merely because upon evidence the lower appellate Court might have come to the conclusion that the accused was guilty, unless it is quite clear that the Judge or Magistrate whose judgment of acquittal is appealed against is wrong. It would in every case give careful consideration and due weight to the findings of the lower Court. S. 417 of Cr. P. Code, is not intended to be used in every case in which the Government thinks that there should be a conviction. It is not a power lightly to be used and should be used only where there is no reasonable doubt upon the record as to the guilt of the accused. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* HAJI GHULAB SHAH. 32 S.L.R. 689=174 I.C. 835=10 R.S. 269=39 Cr.L.J. 504=A.I.R. 1938 Sind 80.

——S. 417—*Acquittal—Interference—Evidence establishing accused's guilt—Accused not attempting to prove exceptions—Acquittal—Legality of.*

CR. P. CODE (1898), S. 417.

Where the evidence clearly establishes that the accused is guilty of murder, the accused has the burden on him to show that he comes within any of the exceptions, if he wants to escape. When he does not attempt to do so, he has to be convicted. An acquittal under such circumstances is clearly wrong and must be set aside. (*Beasley, C.J., Mockett and Horwill, JJ.*) PUBLIC PROSECUTOR *v.* SUBRAMANIA ODAYAR. 1937 M.W.N. 557 (F.B.).

Delay in filing.

——S. 417—*Delay to be avoided.*

In a case of an appeal against an acquittal on a capital charge, it is desirable, if an appeal is to be filed, that the application for admission of the appeal should be made as early as possible and it is not proper to wait for a period of three months, or anything like three months, before appealing against the acquittal, although there may be a departmental circular stating that sanction to appeal will be refused if it is filed after the expiration of three months. (*Mya Bu and Braund, JJ.*) EMPEROR *v.* MAUNG AUNG GYAW. 166 I.C. 645=9 R.R. 278=38 Cr.L.J. 295=A.I.R. 1937 Rang. 7.

——S. 417—*When excusable.*

An accused was convicted on one charge and acquitted on another charge. On appeal from his conviction, High Court suggested that proper conviction should have been on charge on which he was acquitted. Hence, Crown filed on appeal from the original order of acquittal on that charge. The appeal was filed three months and eight days after the date of acquittal.

Held, that although Government should file an appeal with all reasonable expedition, yet when the *interim* time had been occupied by another appeal from conviction by the accused and the appeal by Crown was filed on suggestion made in the order in appeal by the accused, the delay in filing the Crown appeal was excusable. (*Mackney, J.*) THE KING *v.* NGA TOK HLA. 174 I.C. 839=39 Cr.L.J. 490=10 R.R. 437=A.I.R. 1938 Rang. 109.

Interference with acquittal.

——S. 417—*Failure to draw correct and clear inference from proved facts—If ground of interference.*

In a case in which the result depends upon the appreciation of the evidence by the trial Judge, the High Court would be slow to interfere with an order of acquittal. But where the trial judge errs in failing to draw the clear, indubitable and irresistible inference from the facts established by the prosecution in the case, the High Court will interfere and set aside the order of acquittal in appeal. (*Pandrang Rao, J.*) PUBLIC PROSECUTOR *v.* KONDALRAO. 180 I.C. 631=11 R.M. 738=40 Cr.L.J. 458=1938 M.Cr.C. 334=48 L.W. 754=1938 M.W.N. 1121=A.I.R. 1939 Mad. 96.

——S. 417—*Practice.*

Where in an appeal from an acquittal, the facts and circumstances of the case as disclosed by the evidence are such as to reasonably justify the conclusions arrived at by the lower Court, the High Court should treat the application by the Crown for admission of the appeal on the same footing as application by a convicted person against his conviction and sentence, and should decline to interfere. A.I.R. 1934 P.C. 227, Foll.

CR. P. CODE (1898), S. 417.

(*Mya Bu and Braund, JJ.*) EMPEROR *v.* MAUNG AUNG GYAW. 166 I.C. 645=9 R.R. 278=38 Cr. L.J. 295=A.I.R. 1937 Rang. 7.

——S. 417.

In an appeal from an order of acquittal, the High Court will not interfere unless in view of all the circumstances the view taken by the Sessions Judge can be said to be clearly erroneous. (*Jai Lal and Bhide, JJ.*) EMPEROR *v.* SARDARA SINGH. 39 P.L.R. 776.

New plea.

——S. 417—*If open in appeal against acquittal.*

It is not proper in appeal against an acquittal for Government to attempt to snatch a conviction by making out another case against the accused. An appeal against an acquittal is a serious matter. The liberty of a person once acquitted is again to be put in jeopardy, and cases, in which an appeal against an acquittal is to be made, should be carefully considered in all their aspects before the appeal is filed, and Government should be bound in argument and should consider themselves bound in argument to the grounds raised in the memorandum of appeal. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* PURSUMAL GERIMAL. I.L.R. (1939) Kar. 41=175 I.C. 620=10 R.S. 298=39 Cr.L.J. 630 (2)=A.I.R. 1938 Sind 108.

Powers of High Court.

——S. 417—*Principles.*

In dealing with an appeal from an order of acquittal on a matter of fact, the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. Such power is not limited to cases of obstinate bunder on the part of the lower Court and incompetence stupidity or perversity of conduct or misconduct resulting in a clear miscarriage of justice. In exercising this power, the High Court will always give proper weight and consideration to such matters as the views of the trial Court as to the credibility of the witnesses, the presumption of innocence in favour of the accused, his right to the benefit of any doubt, and the slowness of an Appellate Court in disturbing a finding of fact by a judge who had the advantage of seeing the witnesses. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* GHULAMALI BAHAWAL. 32 S.L.R. 694=174 I.C. 694=39 Cr.L.J. 462=10 R.S. 261=A.I.R. 1938 Sind 67.

Principles.

——S. 417—*Weight to be attached to opinion of trial Court—Considerations.*

The accused in an appeal from an acquittal retains his right of being presumed to be innocent until the charge is fully brought home to him. He must also have the benefit of the opinion of the trial Court upon the credibility of the witnesses whom that Court had the advantage of seeing face to face and judging of their demeanour and he has the right to ask that the acquittal should not be set aside unless the trial Court has taken a perverse view of the evidence and has arrived at an unnatural and distorted conclusion. But where the trial Court in considering the point of law has missed the substantial point of the matter which it had to try and the material evidence in the case is almost entirely documentary and

CR. P. CODE (1898), S. 417.

practically nothing turns on the appreciation of oral evidence, so that the appellate Court, so far as the documents are concerned is in as good a position to form its own conclusions as the trial Court, and where further the trial Court's examination of the papers is based upon an incomplete survey of the documentary material, the weight to be attached to the decision of the trial Court is considerably reduced. (*Varma and Rowland, JJ.*) EMPEROR *v.* CHATURBHUJ NARAIN CHOUDHURY. **15 Pat. 108=164 I.C. 74=37 Cr.L.J. 877=9 R.P 77=17 Pat.L.T. 302=1936 Cr.C. 543=1936 P.W.N. 450=A.I.R. 1936 Pat. 350.**

——S. 417—*Principles to be adopted in considering.*

In cases of appeals against acquittals under S. 417, Cr. P. Code, as a matter of jurisdiction, the whole case is at large before the High Court both as to the facts and as to the law. But there is a difference between the consideration of a case upon an appeal against acquittal and its consideration when '*res integra*' in the Court below. An appellate Court should be slow to substitute a view of the facts of its own for an opposite view of the facts held by the trial Court, where the latter are, upon the evidence, reasonable views, even though the Judges in the appellate Court might have preferred a view of their own, if the matter had been '*res integra*'. (*Collister and Braund, JJ.*) EMPEROR *v.* AFTAB MAHOMED KHAN. **188 I.C. 649=13 R.A. 55=1940 A.Cr.C. 24=1940 A.L.J. 206=41 Cr.L J. 647=1940 A.W.R. (H.C.) 85=A.I.R. 1940 All. 291.**

——S. 417.

The High Court in exercising the power conferred by the Criminal Procedure Code and before reaching its conclusion upon facts, should always give proper weight and consideration to such matters as the views of the trial Judge as to the credibility of the witnesses, the presumption of innocence in favour of the accused, a presumption not weakened by the fact that he has been acquitted at the trial, the right of the accused to the benefit of doubt, and the slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. Where the accused not only happened to be a relative of the deceased by marriage but also apparently he could have no motive for the crime, his acquittal in the trial Court should not be set aside. 56 All. 645 (P.C.). Foll. (*Ba U and Mackney, JJ.*) EMPEROR *v.* NGA MYA MAUNG. **170 I.C. 502=10 R.R. 92=38 Cr.L.J. 927=1936 Cr.C. 114=A.I.R. 1936 Rang. 90.**

Question of fact.

——S. 417—*Conviction under S. 335, I. P. Code, and acquittal under S. 304, I. P. Code—Appeal against latter—Right of accused to go into facts—Conviction under S. 335—If can be set aside.*

In an appeal against an acquittal, the accused is entitled to ask the Court to consider all the evidence before it and all the possible grounds which may be raised against the conviction. In an appeal against the acquittal under S. 304, I. P. Code, if the accused who has been convicted under S. 335, I. P. Code, is entitled to argue on the facts of the case to show that he has not committed an offence under S. 304, then although the acceptance of those arguments may not automatically set aside the conviction under S. 355, I. P. Code, yet if the Court were satisfied that no offence was committed, it would undoubtedly exercise *suo motu* its powers under S. 439 (1), Cr. P. Code, and set aside the conviction. (*Horwill, J.*) PUBLIC PROSECUTOR *v.* PANCHAKSHARAM. **177 I.C. 432=48 L W. 142=11 R M. 323=39 Cr L.J. 871=1938 M.W.N 605=1938 M.Cr.C 210=A.I.R. 1938 Mad. 723=(1938) 2 M.L.J. 225.**

CR. P. CODE (1898), S. 417.

——S. 417—*Interference.*

The appeals by the Crown against acquittals purely on questions of fact or not often encouraged by appellate Courts. Where the Magistrate, faced with conflicting facts and conflicting testimony in a rioting case, acquitted the accused.

Held, that High Court could not interfere. (*Cunliffe and Henderson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* JATINDRA MOHAN RAY. **168 I C. 738=9 R.C. 874=38 Cr.L.J. 638=A.I.R. 1937 Cal. 156.**

Retrial.

——S. 417—*Appeal from acquittal—Order of acquittal set aside—High Court refusing to order retrial—If bar to fresh prosecution for same offence.*

If, in an appeal from an acquittal, the High Court while setting aside the order of acquittal is not prepared to order a retrial of the accused, it does not mean that there cannot be a new trial. It is still open to the authority charged with the initiation of prosecutions from prosecuting the accused again for the same offence. (*Beaumont, C J. and Macklin, J.*) EMPEROR *v.* YEMANYA KALLAPPA. **39 Bom.L.R. 76=9 R.B. 371=168 I.C. 479=38 Cr.L.J. 571=A I.R. 1937 Bom. 152.**

——Ss. 417 and 418—*Appeal from acquittal and appeal from conviction—Distinction—Considerations.*

Although Cr. P. Code makes no distinction between an appeal from a conviction and an appeal from an acquittal, yet there is a real distinction, apart from the provisions of Cr. P. Code. Every man is to be presumed innocent until his guilt is established; if there is a reasonable doubt, the accused must have the benefit of that doubt. An appellant from a judgment of conviction can always invoke the support of these principles. If he can show that the essential evidence against him is not sufficiently reliable, as the lower Court thought, or that all reasonable doubt as to his guilt is not removed thereby, he is bound to succeed on these principles. An appellant from a judgment of acquittal has, on the contrary, to work in the face of these principles and satisfy the Court that the accused can derive no benefit from them on the facts of the case under appeal. His task is thus naturally more difficult than that of the convict appellant. The effect of this and other considerations is to make in fact a considerable difference between an appeal from a conviction and one from an order of acquittal though both appeals are placed on the same footing in the statute law of procedure. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* GHULAMALI BHAWAL. **32 S.L.R. 694=174 I.C. 694=39 Cr.L.J. 462=10 R. S. 261=A.I.R. 1938 Sind 67.**

——Ss. 417 and 423—*Appeal against acquittal—Interference—Considerations.*

The fact that it was possible that the High Court if it were hearing the case in the first in-

stance, would have taken a different view from the one taken by the trial Magistrate, is however no ground for interfering in appeal with an order of acquittal. The decision of the trial Court is entitled to great weight and the appellate Court should interfere only when it is satisfied that the view of the trial Magistrate was wrong and that it was contrary to the weight of the evidence. (*Rachhpal Singh and Ismail, JJ.*) EMPEROR *v.* SHYO SEWAK SINGH. 183 I.C. 405=12 R.A. 128=40 Cr.L.J. 772=1939 A.Cr.C. 72=1939 A.W.R. (H.C.) 306=A.I.R. 1939 All. 457.

——S. 418—*Appeal from conviction—Interference—Appreciation of evidence by trial Court—Appellate Court's power to differ from.*

No doubt, the Judicial Commissioner's Court should ordinarily have very strong grounds for differing from the appreciation of evidence of the trial Court who had the advantage of seeing the witnesses and noting their demeanour, but if such grounds do exist, it is entitled to interfere and set aside the conviction. (*Davis, J.C. and Mehta, A.J.C.*) JALAL *v.* EMPEROR. 30 S.L.R. 456=167 I.C. 75=9 R.S. 162=38 Cr.L.J. 350=A.I.R. 1937 Sind 22.

——S. 418—*Case triable with assessors tried by jury—Right of appeal on facts.*

Where a case triable with the aid of assessors is tried with a jury, there is no right of appeal on facts. (*Cunliffe and Henderson, JJ.*) EKABBAR MANDAL *v.* EMPEROR. I.L.R. (1937) 2 Cal. 315=172 I.C. 891=10 R.C. 461=39 Cr.L.J. 182=A.I.R. 1937 Cal. 756.

——S. 418 (1)—*Construction—'Where trial was by jury'—Meaning.*

Per *Biswas, J.*—The words 'where trial was by jury' in S. 418 (1), Cr. P. Code, are not so clear as to admit of one meaning only that they must mean 'where the trial *in fact* was by jury'. These words are equally capable of another construction, meaning 'where the trial was *lawfully* by jury.' (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. I.L.R (1938) 1 Cal. 290=173 I.C. 65=39 Cr L.J. 161=10 R.C. 441=66 C.L.J. 225=42 C.W.N. 129=A.I.R. 1938 Cal. 51.

——S. 418 (2)—Scope and effect of—Effect on powers of High Court under S. 376—Questions of fact—If can be gone into. *See* CR. P. CODE, S. 376. 31 S.L.R. 82=A. .R. 1937 Sind 162.

——Ss. 418 (1) and 561-A—*Jury trial—Appeal against conviction—Powers of appellate Court—Sessions Judge not making reference under S. 307 erroneously thinking he has no jurisdiction—Appellate Court, if empowered under S. 561-A, to send case back to him.*

Where a case has not come up before the High Court under S. 307, Cr. P. Code, but by way of an appeal by the accused against his conviction under S. 418 (1) on a matter of law, namely that the Sessions Judge has erroneously supposed that he had no jurisdiction to refer the case to the High Court, the powers of the appellate Court are governed by S. 423 (2), Cr. P. Code. If the High Court finds that the Judge had erroneously supposed that he had no jurisdiction to make a reference under S. 307, it cannot, as an appellate Court, set aside the verdict of the jury and order a retrial, as there had been neither a misdirection by the Judge nor a misunderstanding of the law on the part of the jury as mentioned in

S. 423 (2). The High Court can, however, set aside the conviction of the accused and send the case back to the Sessions Judge to re-examine the matter carefully and then come to the conclusion whether he should or should not disagree with the verdict of the jury. Such an order is amply justified by the provisions of S. 561-A, Cr. P. Code. (*Sulaiman, C.J. and Niamatullah, J.*) MAUJIA *v.* EMPEROR. I.L.R. (1937) All. 419=167 I.C. 802=9 R.A. 578=1937 A.Cr.C. 11=38 Cr.L.J. 465=1936 A.W.R. 1284=1937 A.L.R. 250=1937 A.L.J. 43=A.I.R. 1937 All. 195.

——S. 419—*Joint appeal by several accused—Maintainability.*

A joint appeal by persons with common interests convicted at the same trial is in accordance with law and should be heard. This proposition will have no application where the interests of any of the appellants conflict with each other. (*Skemp, J.*) MULHE *v.* EMPEROR. 17 Lah. 771=166 I.C. 46=9 R.L. 330=39 P.L.R. 105=38 Cr. L J. 115=1936 Cr.C. 877=A.I.R. 1936 Lah. 859.

——Ss. 419, 420, 421 and 561-A—*Summary dismissal of Jail appeal under S. 421—Subsequent re-presented appeal under S. 419—Maintainability—High Court if can review its own judgment.*

A re-presented appeal under S. 419, Cr. P. Code, is not maintainable after a Jail appeal filed under S. 420 has been summarily dismissed under S. 421 (1), Cr. P. Code. The High Court has not and never had had any inherent power to review its own judgment and S. 561-A, Cr.P. Code, does not confer on it any power to do so. (*Thomas, C.J. and Yorke, J.*) JODHA *v.* EMPEROR. 189 I.C. 83=13 R.O. 50=1940 A.Cr.C. 93=41 Cr L.J 711=1940 O.A. 485=1940 O.W.N. 594=1940 A.W.R. (C.C.) 253=1940 O.L.R. 408=A.I.R. 1940 Oudh 369.

——Ss. 420 and 421, Proviso—*Jail appeal—Right of appellant to be present in Court and to be heard.*

The proviso in S. 421, Cr. P. Code, directing that an appeal shall not be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard does not apply to an appeal presented under S. 420 by a convicted person from jail; and the accused has no right to insist on being heard, and to be present in Court for the purpose of arguing his appeal. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* JALAM BHARATSING. I L.R. (1938) Bom. 357=175 I.C. 352=10 R.B. 535=39 Cr.L.J. 578=40 Bom.L.R. 317=A.I.R. 1938 Bom. 279.

——S. 421—*Appellant heard and records called for—Further hearing after arrival of records—If necessary.*

All that S. 421, Cr. P. Code, requires is that the appellate Court, before dismissing an appeal summarily, must afford the appellant or his pleader a reasonable opportunity of being heard. If, therefore, such reasonable opportunity is afforded on the presentation of the appeal, it is not necessary to hear the appellant or his pleader again after the arrival of the record in the appellate Court. (*Edgley, J.*) AKRAMADDIN *v.* EMPEROR I.L.R. (1939) 1 Cal. 314=183 I.C. 742=12 R.C. 179=40 Cr.L.J. 839=A.I.R. 1939 Cal. 541.

——S. 421—*Dismissal of appeal after hearing appellant's pleader — Non-issue of notice to Crown—If a ground for revision.*

CR. P. CODE (1898), S. 421.

Where a Sessions Judge after hearing the appellant's pleader dismisses an appeal and writes a judgment reviewing the evidence and meeting the points raised, the fact that he did not issue notice to the Crown cannot be made a ground of complaint because it was thought necessary to call upon the Crown to reply. (*James, J.*) SONU KURMI *v.* EMPEROR. 177 I.C. 697=5 B.R. 12=11 R.P. 176=39 Cr.L.J. 950=A.I.R. 1939 Pat. 24.

——S. 421—*Duty of Court—Summary dismissal of appeal for default—Legality.*

A Court cannot dismiss an appeal summarily simply because the accused fails to prosecute his appeal. The law requires that the dismissal of the appeal shall depend upon the exercise by the Judge of his independent and impartial judgment after he has read a copy of the judgment and not upon the failure of the accused to prosecute his appeal. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* BALUMAL HOTCHAND. I.L.R. (1939) Kar. 204=177 I.C. 346=39 Cr.L.J. 890=11 R.S. 58=A.I.R. 1938 Sind 171.

——S. 421—*Power of Court under—Appeal summarily dismissed—Modification of order—Legality.*

It is illegal for a Magistrate at the same time to dismiss an appeal summarily and to modify the order appealed from. A.I.R. 1935 P.C. 89, Foll. (*Rowland, J.*) BALDEO SINGH *v.* MT. DHENO GOALIN. 160 I.C. 152 (1)=37 Cr.L.J. 234=8 R.P. 343 (2)=1936 P.W.N. 22=1936 Cr.C. 144=A.I.R. 1936 Pat. 109.

——S. 421—*Sessions Judge hearing the pleader for the appellant and sending for the record—Point to be noted in the order sheet—Summary dismissal of appeal—Legality—Appellant if given sufficient opportunity.*

An appeal was presented before a Sessions Judge by the pleader for the appellant and he heard him fully but was not inclined to admit the appeal on that date. He sent for the record of the case and having perused the same dismissed it summarily under S. 421.

Held, that it is not open to the appellant to say that he was not given sufficient opportunity at the time of the presentation of the appeal. The Sessions Judge has not committed any illegality. It is desirable in all cases where a busy Sessions Judge sends for the record in a criminal appeal, which is presented to him for admission, that he should note in the order-sheet the points for which he is sending for the record in order to satisfy himself as to the correctness of the submissions made by the appellant before him. (*Manohar Lall, J.*) BASDEO SINGH *v.* EMPEROR. 172 I.C. 944=10 R.P. 369=18 Pat.L.T. 915=39 Cr.L.J. 254=4 B.R. 204=1938 P.W.N. 113=A.I.R. 1938 Pat. 12.

——S. 421—*Summary dismissal of appeal—Contents of order.*

While dismissing an appeal summarily under S. 421, Cr. P. Code, the Appellate Court should write some sort of judgment showing that it applied its mind to the facts of the case and has come to the conclusion that there is no merit in the appeal. (*Mohammad Noor, J.*) BRIJ MOHAN SINGH *v.* DASRATH SINGH. 166 I.C. 494=9 R.P. 304=38 Cr.L.J. 232=3 B.R. 172.

——S. 421—*Summary dismissal of appeal—Order not showing that records were examined or evidence appreciated—Legality—Interference in revision.*

Where it does not appear from the order of the Sessions Judge dismissing an appeal summarily, that he examined the record of the case or that he tested the arguments on questions of fact by examination of the evidence actually given by the witnesses, the High Court will in revision set aside such an order of dismissal. (*James and Madan, JJ.*) CHHATU GOPE *v.* EMPEROR. 173 I.C. 751 (1)=4B.R. 331=10 R.P. 444=39 Cr.L.J. 380=1937 P.W.N. 1020=19 Pat.L.T. 28=A.I.R. 1938 Pat. 176.

——S. 421—*Summary dismissal after sending for record—Legality—Calling for record—Points argued—Desirability of noting.*

Where a Sessions Judge hears the pleader presenting a criminal appeal and before admitting it and in order to satisfy himself as to the points raised by the appellants' lawyer, sends for the record of the case and after perusing the same dismisses the appeal summarily, the Judge does not commit any illegality. But in all cases where a busy Sessions Judge sends for the record in a criminal appeal which is presented to him for admission, it is desirable that he should note in the order-sheet the points for which he is sending for the record in order to satisfy himself as to the correctness of the submission made by the appellants before him. It will be difficult, in many cases, if not in all, for a busy Sessions Judge to remember the submissions which were advanced by the appellants' advocate which had satisfied him to this extent that he was forced to send for the record. (*Manohar Lall, J.*) BASDEO KOIRI *v.* EMPEROR. 172 I.C. 944=4 B.R. 204=1938 P.W.N. 113=39 Cr.L.J. 254=10 R.P. 369=18 Pat.L.T. 915=A.I.R. 1938 Pat. 12.

——S. 421—*Summary dismissal of appeal after records called for—Omission to hear appellant or his pleader—Legality of—Power of High Court to set aside.*

An appellate Court which has called for the record after hearing the appellant's pleader at the time of the presentation of the appeal, does not act illegally if it summarily dismisses the appeal after perusing the record and without further hearing the appellant or his pleader. S. 421, Cr. P. Code, only provides for one reasonable opportunity to be given to the appellant or his pleader. But where the case appears to be one that ought not to have been disposed of summarily, the High Court will set aside such dismissal in revision and order a rehearing. (*Lort Williams and Jack, JJ.*) MONMOTHA NATH SARKAR *v.* DHATRIGRAM UNION BOARD. 164 I.C. 270=9 R.C. 187=37 Cr.L.J. 904=40 C.W.N. 128.

——S. 421—*Summary dismissal of jail appeal—Anothar appeal through counsel—Maintainability.*

A summary dismissal of a jail appeal is a bar to a subsequent entertainment of another appeal presented by the same prisoner through counsel. (*King, C.J. and Nanavutty, J.*) RAM JAS *v.* EMPEROR. 12 Luck. 30=160 I.C. 969=8 R.O. 292=37 Cr.L.J. 362=1936 O.W.N. 194=1936 Cr.C. 344=1936 O.L.R. 125=A.I.R. 1936 Oudh 219.

CR. P. CODE (1898), S. 421.

———Ss. 421 and 369—*Jail appeal—Summary dismissal—Effect—Subsequent appeal through counsel—Maintainability.*

Where a jail appeal is dismissed summarily, as soon as the order is signed and dated by the Judges, they become *functus officio* and the order passed by them becomes final. A re-presented appeal filed at a later date is therefore not maintainable. (*Zia-ul-Hasan and Yorke, JJ.*) RAJKUMARI *v.* EMPEROR. 188 I.C. 780=13 R O. 27=1940 A. Cr.C. 84=1940 A.W.R. (C.C.) 234 =1940 O.L.R. 389=41 Cr.L.J. 682=1940 O.A. 448=1940 O.W.N. 520=A.I.R. 1940 Oudh 371.

———Ss. 421 and 439—*Procedure—Appeal to High Court—Court considering conviction right but sentence severe—Summary dismissal of appeal—Propriety — Proper course—Notice to show cause against reduction of sentence under revisional powers and reduction after hearing Crown—If justified.*

If, when a criminal appeal from a conviction first comes on for hearing before the High Court the High Court considers that the conviction is right but that the sentence is rather too severe, the correct procedure is not to dismiss the appeal summarily under S. 421, Cr. P. Code, but the appeal should be directed to stand over, and at the same time notice should be served on the Government under the revisional powers of the Court under S. 439, Cr. P. Code, to show cause why the sentence should not be reduced. At the same time it will be convenient to send for the record. The notice and the appeal should then be heard on the same day. If, after hearing the Crown counsel, the Court comes to the conclusion that the sentence ought to be reduced, it can be reduced under the revisional powers. Having reduced the sentence, the High Court can then, if so minded, say that it sees no ground for interfering and dismiss the appeal summarily under S. 421. (*Beaumont, C.J. and Macklin, J.*) EMPEROR *v.* BAI DHANKOR. I.L.R. (1937) Bom. 365=168 I.C. 504=38 Cr.L.J. 572 (2)=9 R.B 372=39 Bom.L.R. 74=A.I.R. 1937 Bom. 148.

———S. 422—*Appeal against conviction and order of compensation under S.* 545—*Notice to complainant—Necessity—Right of complainant to be heard in support of conviction.*

S. 422, Cr. P. Code, no doubt, makes no provision for notice in the case of an appeal by an accused person to any other party than the Crown, and an appellate Court does not act without jurisdiction in not sending notice to the complainant. But in appeal from a conviction, the appellate Court should, in the exercise of a proper discretion, give notice of the hearing of the appeal to the complainant when an order of compensation has been made in his favour under S. 545, Cr. P. Code. It is only fair and equitable that in such cases that the complainant should be heard on such points as he may desire. (*Grille, J.*) BALWANT MARATHE *v.* MOTILAL JAIN. I.L. R. (1936) Nag. 147=165 I.C. 641=9 R.N. 93= 19 N.L.J. 140=1936 Cr.C. 694 (2)=38 Cr.L.J. 76=A.I.R. 1936 Nag. 144.

———S. 422—*Appeal against conviction and order under S.* 545 (1) (b)—*Omission to give notice to complainant—If an illegality.*

An omission to issue notice of the hearing of an appeal from a conviction, to the complainant in the trial Court, does not amount to an illegality by reason of the fact, an order of acquittal passed by the Court of appeal would involve the extinguishment of an order for payment of compensation under S. 545 (1) (*b*) as there is no provision of law requiring the issue of the notice of an appeal to be issued to the complainant in the trial Court. It is however desirable that the notice of the appeal should be given to the complainant although omission to do so does not amount to an illegality. (*Mya Bu, J.*) HTANDA MEAH *v.* ANAMALE CHETTYAR. 14 Rang. 744= 163 I.C. 242 (2)=37 Cr.L.J. 832=9 R.R. 6=1936 Cr.C. 593=A.I.R. 1936 Rang. 247.

CR. P. CODE (1898), S. 423.

———S. 422—*Notice to complainant—Absence of —If illegal.*

Notice is not necessary to the complainant under S. 422, Cr. P. Code, and he has no right of audience. Although, as a matter of practice, notice is issued to the complainant in certain classes of cases, and although it may be desirable to do so if he is likely to be personally affected, as for instance, when compensation has been awarded to him, failure to issue notice to the complainant is not illegal and does not justify interference in revision. (*Bose, J.*) KARTIKRAM. *v.* EMPEROR. 167 I.C. 569=9 R.N. 202=19 N.L. J, 158=38 Cr.L.J. 433=A.I.R. 1937 Nag. 123.

———S. 422—*Appeal from conviction—Parties—Right of complainant to notice and to be heard—Private prosecution—Rule to be followed.*

The strict rule is that in an appeal against a conviction only the Crown is entitled to be served with notice, and heard, and nobody but the Crown is entitled to be heard. But in private prosecutions the true rule which should be followed is that the Court in its discretion may allow the complainant to appear by an advocate, but it is not in any case bound to do so. (*Beaumont, C.J. and Sen, J.*) PARAGJI BHULABHAI *v.* BHAGWANJI BAWABHAI. 185 I.C. 795=12 R.B. 311=41 Cr.L.J. 245=41 Bom.L.R. 1231=A.I.R. 1940 Bom. 14.

———S. 422—*Scope and applicability.*

S. 422, Cr. P. Code, deals only with appeals and there is no similar provision dealing with revision, nor does any section apply this procedure to revisions. (*Bennet, J.*) SAT NARAIN LAL *v.* EMPEROR. I.L.R. (1940) A. 539=190 I.C. 225= 1940 A.L.J. 462=1940 A.Cr.C. 100=1940 A.W R. (H.C.) 379=A.I.R. 1940 All. 426.

———S. 423.

Alteration of conviction.
Alteration of sentence.
Enhancement of sentence.
Misdirection.
Powers of appellate Court.
Powers of High Court.
Remand.
Retrial.
Scope.
Setting aside verdict.
That the accused be retried.

Alteration of conviction.

———S. 423—Alteration of conviction—Charge under S. 323, I. P. Code, and conviction under S. 452—Legality—Power of appellate Court. *See* CR. P. CODE, SS. 236, 237 AND 423. 1938 O.W.N. 740.

CR. P. CODE (1898), S. 423.

Alteration of sentence.

——S. 423 (1) (b)—*Applicability—Power to alter acquittal into conviction.*

The words "alter the finding, maintaining the sentence" occurring in S. 423 (1) (*b*) (2) must be read as a whole. The powers under S. 423 (1) (*b*) of altering the finding and then as a Court of revision enhancing the punishment cannot turn upon enhance. Cl. (*b*) of S. 423 (1) does not apply to cases of acquittal, partial or total, but to cases of conviction, and Cl. (*a*) applies to cases of acquittal; and if the appellate powers of the Court are to be exercised to convert an acquittal into a conviction, then they should be exercised on an appeal against an acquittal under S. 423 (1) (*a*) and not on an appeal against a conviction under S. 423 (1) (*b*). (*Davis, J. C. and Lobo, J.*) JADO RAHIM *v.* EMPEROR. **I.L.R. (1939) Kar. 75 =11 R.S 93=178 I.C. 520=40 Cr.L.J. 93=A.I.R. 1938 Sind 202.**

——S. 423 (1) (b)—*Conviction by magistrate under Ss. 363 and 498, I. P. Code—Sessions Judge on appeal finding accused guilty under S. 498 only—Power to pass sentence.*

A Magistrate convicting the accused under Ss. 363 and 498, Penal Code, sentenced them under S. 363 to rigorous imprisonment for one year and six months each but awarded no separate sentence under S. 498. The Sessions Judge on appeal found the accused guilty under S. 498 but not under S. 363. The question arose as to what sentence was to be passed.

Held, that the Sessions Judge had jurisdiction under S. 423, Cr. P. Code, to alter the finding of the lower Court and to pass appropriate sentence under S. 498 subject to the limit of one year and six months which the Magistrate had imposed. (*M. C. Ghose and Bartley, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* HOSSEIN ALI. **175 I.C. 799 (1)=11 R.C. 38=39 Cr.L.J. 684 (1)=42 C.W.N. 1040=A.I.R. 1938 Cal. 439.**

——S. 423 (1) (b)—*Trial Magistrate convicting accused under S. 353, I. P. Code—Power of appellate Court to alter conviction to one under S. 352, I. P. Code.*

Where the trial Magistrate convicted the accused under S. 353, I. P. Code, for assaulting a certain person whom he thought to be a public servant, but the appellate Court finds that that person was assaulted but that he was not a public servant, it can alter the conviction to one under S. 352, I. P. Code. (*Baguley, J.*) MAUNG BA *v.* THE KING. **1938 Rang.L.R. 139=176 I.C 670= 11 R.R. 69=39 Cr.L.J. 761=A.I.R. 1938 Rang. 281.**

——S. 423—Appellate Court finding that evidence was improperly admitted and examination of the accused was not satisfactory—Proper procedure. *See* CR. P. CODE, SS. 428, 423 AND 342. **17 Pat.L.T. 445=A.I.R. 1936 Pat. 438.**

Consequential order.

——S 423 (1) (d)—Consequential or incidental order—Order of compensation under S. 250—Power of appellate or revisional Court to make. *See* CR. P. CODE, S. 439. **A.I.R. 1939 Sind 321.**

Enhancement of sentence.

——S. 423—*Reduction of period of imprisonment and addition of fine.*

CR. P. CODE (1898), S. 423.

The mere fact that a fine was imposed by the appellate Court would not in law be an enhancement of sentence, if the aggregate period of imprisonment which the accused would have to undergo is to any extent less than the period of the original sentence but where such an alteration of the sentence has the effect of rendering it in the circumstances of the case excessive and inappropriate, the interference in revision of a superior Court may be called for. 30 M. 103 F.B., followed. (*Din Mahomed, J.*) PRABHU DYAL *v.* EMPEROR. **167 I.C. 723=9 R.L. 541 (1)=38 Cr. L.J. 428=38 P.L.R. 1051=A.I.R. 1937 Lah. 195.**

——S. 423—*Imposition of fine in place of imprisonment and maintaining same sentence of imprisonment in default of payment.*

To impose a substantial fine in place of a sentence of imprisonment and maintain the same sentence of imprisonment in default of payment, amounts to enhancement of sentence. For the appellant may not be able to pay the fine, then he will have to undergo the imprisonment and his property is liable to attachment for payment of the fine as well. (*Zia-ul-Hasan and Madeley, JJ.*) SHANKAR SINGH *v.* EMPEROR. **170 I.C. 538 =10 R.O. 35=38 Cr.L.J. 935=1937 O.L.R. 452 =1937 A.Cr.C. 104=1937 O.W.N. 754=A.I.R. 1937 Oudh 462.**

——S. 423 (1) (b) (3)—Order of detention in Borstal School — Substitution of sentence of whipping in lieu thereof—If enhancement of sentence. *See* BURMA PREVENTION OF CRIME (YOUNG OFFENDERS) ACT, S. 25. **1939 Rang L.R. 744.**

Misdirection.

——S. 423 (2)—*Trial by jury—Misdirection—What amounts to.*

Where a Judge sums up to the jury by stating the case for the prosecution and then giving a short summary of the evidence of each witness and also dealing with the evidence against each individual accused.

Held (per *McNair, J.*) that the failure to marshal the evidence relating to each element of the charge, or to indicate to the jury how far in his opinion each element has been substantiated by the evidence before them, may not by itself amount to misdirection. But coupled with omissions and inaccuracies, it may amount to misdirection within the meaning of S. 423 (2), Cr. P. Code. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 290=39 Cr.L. J. 161=173 I.C. 65=10 R.C. 441=66 C.L.J. 225 =42 C.W.N. 129=A.I.R. 1938 Cal. 51.**

——S. 423 (1) (d)—Order under S. 250, Cr. P. Code, by appellate Court—If 'incidental' to acquittal. *See* CR. P. CODE, SS. 250 AND 423 (1) (*d*). **1940 Rang.L.R. 502.**

Powers of appellate Court.

——S. 423 (b) (1)—Powers of appellate Court —Appeal from conviction by Assistant Sessions Judge—Order for retrial by Sessions Judge on charges of which accused has been acquitted—Competency. *See* CR. P. CODE, SS. 403 AND 423. **63 C.L.J. 124.**

——S. 423 (1) (b)—*Powers of appellate Court —Accused acquitted under S. 304, I. P. Code, but convicted under S. 325, I. P. Code—Appeal by accused — Appellate Court, if can set aside*

CR. P. CODE (1898), S. 423.

acquittal under S. 304, I. P. Code and order retrial.

Where the accused who was tried under S. 304, I. P. Code, was acquitted of that offence but convicted under S. 325, I. P. Code, in an appeal by him against his conviction under S. 325, I. P. Code, the appellate Court has no authority to set aside the acquittal under S. 304, I. P. Code and to order a retrial, merely because it disagreed with the finding of the lower Court that the accused had not committed the more serious offence under S. 304, I. P. Code (*Allsop, J.*) MOTI RAM *v.* EMPEROR. **165 I.C. 734=9 R A. 301=1936 A. Cr.C. 190=1936 A L.J. 1083=1936 A.W.R. 921 =1936 Cr C. 999=38 Cr.L.J. 71=1936 All.L.R. 944=A.I.R. 1936 All. 758.**

——**S. 423**—*Appeal against conviction—Duty of appellate Court to scrutinize evidence.*

In all cases in which the Court sits in criminal appeal, it has to consider the case against the appellant bearing in mind exactly the same principles as must be borne in mind by the Court of trial in the first instance. The appellant does not come here as one who has been convicted and has to satisfy the Court beyond all reasonable doubt that he has been wrongly convicted. If after a conviction before a Subordinate Court, the Court of appeal comes to the conclusion that there may have been a miscarriage of justice, the appellate Court cannot allow the conviction to stand. The task of the appellant is therefore to bring before the consideration of the appellate Court such matters as may cast a reasonable doubt of his guilt having regard to all the circumstances of the case. It is true that a trial judge hears and sees the witnesses and in many cases his opinion as to their demeanour or truthfulness may be of the highest value, and an appellate Court should not lightly disregard the conclusion at which for properly expressed reasons he arrived. On the other hand it does not absolve the appellate Court from an independent duty of scrutinizing the evidence with care and of being satisfied, not that a reasonable person might have come to the conclusion which the trial Judge came to, but that no reasonable person could have come to any other conclusion but that the accused was guilty of the offence charged against him. (*Roberts, C.J. and Sharpe, J.*) NGA KYAW HLA *v.* EMPEROR. **173 I.C. 94=39 Cr.L.J. 248= 10 R.R. 306=A.I.R. 1938 Rang. 45.**

——**S. 423 (1) (b)**—*Powers of appellate Court —Charge under Ss. 366, 366-A and 498, I. P. Code, in the alternative—Assessors finding accused guilty on alternative charges—Judge agreeing and convicting under S. 366 A—Absence of reference to Ss. 366 and 498—If implied acquittal on charge under S. 498—Power of appellate Court to convict under S. 498, I. P. Code.*

The accused were charged under S. 366, or 366-A, or 498, I. P. Code, alternatively. The assessors found them guilty on the alternative charges. The Sessions Judge, while stating that he agreed with the unanimous opinion of the assessors actually convicted the accused under S. 366-A, I. P. Code, only, ignoring Ss. 366 and 498. The High Court on appeal found that no offence under S. 366 or 366-A was made out, but that the accused were guilty of an offence under S. 498, I. P. Code.

CR. P. CODE (1898), S. 423.

Held, (1) that the High Court was competent under S. 423 (1) (*b*), Cr. P. Code, to alter the conviction under S. 366-A, I. P. Code, into one on the alternative charge under S. 498, I. P. Code, and maintain the sentence, as it was by oversight that the Sessions Judge omitted to convict the accused under S. 498; (2) that the conviction by the Sessions Judge under S. 366-A, I. P. Code, did not by necessary implication involve an acquittal on the charge under S 498, I. P. Code. (*Collister and Bajpai, JJ.*) EMPEROR *v.* JAGANNATH. **1937 A.W.R. 203=1937 A.Cr.C. 39=168 I C. 833=9 R A. 676=1937 A L.J. 547=38 Cr.L. J. 621=1937 A.L.R. 417=A.I.R. 1937 All. 353**

——**S. 423**—Powers of appellate Court—Conviction under S. 240, I.P. Code—Charge found not established in appeal—Facts found sufficient for conviction under S. 241—Power to alter conviction into one under S. 241. *See* PENAL CODE, SS. 240 AND 241. **A.I.R. 1936 Nag. 242.**

——**S. 423**—*Powers of appellate Court—Conviction of accused of case not set out—Legality.*

The appellate Court has no power to convict an accused person of a case he has not been called upon to meet. (*Bose, J.*) KARTIKRAM *v.* EMPEROR. **167 I.C. 569=9 R.N. 202=19 N.L.J. 158 =38 Cr.L J. 433=A.I.R. 1937 Nag. 123.**

——**S. 423**—Powers of appellate Court—Conviction of robbery—Power to alter into one of receiving stolen property. *See* CR. P. Code, S. 237. **1936 A.M.L.J. 50.**

——**S. 423**—Powers of appellate Court—Conviction for substantive offence--Alteration in appeal to one for abetment—Permissibility. *See* PENAL CODE, SS. 193 AND 471. **70 M.L.J. 109.**

——**S. 423 (b) (2)**—*Powers of appellate Court —Conviction under S. 414, I. P. Code, by Second Class Magistrate—Appeal—Alteration into one under S. 409, I. P. Code—Legality.*

An offence under S. 409, I. P. Code, is not triable by a Magistrate of the second Class; where therefore an accused is convicted of an offence under S. 414, I. P. Code, by a Second Class Magistrate, the appellate Court cannot, on appeal alter the conviction into one under S. 409, under S. 423 (*b*) (*2*) read with S. 237, Cr. P. Code, such alteration is illegal. (*Lakshmana Rao, J.*) PONNUSWAMI SERVAI *v.* EMPEROR **174 I.C. 776=39 Cr.L.J. 465=10 R.M. 742=1938 M.Cr.C. 137= 1938 M.W.N. 223=A.I.R. 1938 Mad. 315.**

——**S. 423**—*Powers of appellate Court—Conviction under S. 504, I. P. Code, on charge with two incidents—Alteration on appeal into one for two offences under S. 228, I. P. Code—Legality.*

The appellate Court can change the conviction from one section to another where the facts found are clear and no prejudice would be done to the accused. The trial Court mentioning in the charge two incidents on separate dates wrongly convicted the accused under a single offence under S. 504, Penal Code. The appellate Court changed the conviction to two offences under S. 228 without laying stress on an essential element of S. 228, namely the Court must be sitting in a judicial proceeding at the time when the insult is offered.

Held, that the changing of conviction from single offence to two was formal, but as the accused might have been prejudiced the changing of conviction from S. 504 to S. 228 was illegal. (*Gruer, J.*) VITHAL SONAJI *v.* EMPEROR. **I.L.R.**

CR. P. CODE (1898), S. 423.

(1937) Nag. 145=167 I.C. 378=9 R.N. 181=38 Cr L.J. 380=1936 Cr.C. 1120=A.I.R. 1936 Nag. 275.

——S. 423 (b) (1)—*Powers of appellate Court—Enhancement of sentence—Four months' rigorous imprisonment and fine of Rs. 20—Substitution into imprisonment already undergone and fine of Rs.* 50.

Where on appeal a District Magistrate altered a sentence of four months' rigorous imprisonment and a fine of Rs. 20 to imprisonment already undergone and a fine of Rs. 50.

Held, that it was objectionable on appeal to enhance the sentence of fine. (*Skemp, J.*) ABDUL RAHMAN *v.* EMPEROR. **164 I.C. 462=37 Cr.L.J. 950=9 R.L. 130 (1)=38 P.L.R. 247=1936 Cr. C. 764=A.I.R 1936 Lah. 729.**

——S. 423—Powers of an appellate Court—Limits of. *See* CR. P. CODE, Ss. 233, 236, 237 AND 423. **1939 A.W.R. (H.C) 661.**

——S. 423—*Penalty of appellate Court—Limits of—Alteration of sentence and finding.*

Though S. 423 (*b*) (3), Cr. P. Code, allows the appellate Court, with or without altering the finding, to alter the nature of the sentence, not so as to enhance the same, yet it has no power either to come to a finding which was not within the competency of the trial Court or to pass a sentence which was beyond the jurisdiction given to the trial Court by S. 33, Cr. P. Code. The appellate Court cannot make any order which could not have been made by the trial Court. (*Mosely, J.*) MAUNG E MAUNG *v.* THE KING. **1940 Rang.L.R. 215=188 I.C. 539=41 Cr.L.J. 621=13 R.R. 2=A.I.R. 1940 Rang. 118.**

——S. 423—*Powers of appellate Court—Prosecution and conviction under S.* 181, *I. P. Code—Alteration of conviction into one under S.* 193, *I.P. Code—If justified.*

Where prosecution has been launched under S. 181, I. P. Code, by the Civil Court, the appellate Court under S. 423, Cr. P. Code has power to alter the finding to S. 193, I. P. Code. The appellate Court can exercise this power even though the prosecution has been launched under inappropriate section. (*Gruer, J.*) NATHUSINGH GANPATSINGH *v.* EMPEROR. **I.L.R. 1937 Nag. 102=167 I.C. 845=9 R N 222=38 Cr.L.J. 455=1936 Cr.C. 1025=A.I.R. 1936 Nag. 263.**

——S. 423—*Powers of appellate Court—Verdict of jury—Interference—Enquiry into facts—If justified.*

In an appeal under S. 423 the appellate Court is not authorised to alter or revise the verdict of the jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to misunderstanding on the part of the jury of the law as laid down by him, and consequently the appellate Court cannot go into the facts of the case except to see whether there has been a misdirection by the Judge. (*Beasley, C.J. and King, J.*) RATNASABAPATHI GOUNDAN *v* PUBLIC PROSECUTOR. **59 Mad. 904=164 I.C 243=9 R.M. 99=37 Cr. L.J. 909=1936 M.W.N 459=44 L.W. 155=1936 M.Cr.C. 232=1936 Cr.C 635=A.I.R. 1936 Mad. 516=71 M.L.J. 231.**

Powers of High Court.

——S. 423—*Powers of High Court in appeal—Conviction by jury—Reversal or order for re-trial—Error or defect in Judge's charge to jury—When a ground.*

CR. P. CODE (1898), S. 423.

The power of setting aside convictions and ordering a new trial for any error or defect in the Judge's charge to the jury will be exercised by the High Court on appeal only when it is satisfied that the accused has been prejudiced by the error or defect or that a failure of justice has been occasioned thereby. (*Fazl Ali and Dhavle, JJ.*) K. K. ALI *v.* EMPEROR. 15 Pat. 817=169 I C 48=18 Pat. L T. 535=9 R Pat 526=3 B R. 514=38 Cr.L.J. 673=1937 P.W.N. 454=A.I.R. 1937 Pat. 263.

——S. 423—Powers of High Court—Joint trial—Conviction in—Joint trial justified by law—Interference in appeal—Power to set aside conviction without ordering re-trial. *See* CR. P. CODE, S. 239. **A.I.R. 1936 Cal. 753.**

——S. 423—Powers of High Court—Sentence of death—Reference and appeal—Scope of. *See* CR P. CODE, S. 374. **40 C.W.N. 432=A.I.R. 1936 Cal 73.**

——S. 423—*Powers of High Court—Trial by jury — Decision turning upon inference from facts.*

Where, the decision in a case does not really turn upon questions about the veracity of witnesses or upon the finding of doubtful facts but upon the question what inference is to be drawn from well established facts about the existence of which there is not and cannot be any reasonable doubt, the High Court is at least equally, if not better qualified than the jury to draw the necessary inference. (*Lort Williams and Nasim Ali, JJ.*) BENOYENDRA CHANDRA PANDEY *v.* EMPEROR. **63 Cal. 929=64 C L J. 154=161 I.C. 74=8 R.C. 472=37 Cr.L.J 394=40 C.W.N.432=1936 Cr.C. 145=A.I.R. 1936 Cal. 73.**

——S. 423 (2)—*Trial by jury—Misdirection—Interference.*

In the case of a trial by jury if the High Court finds that there is a misdirection it has to examine the evidence to see whether the verdict is erroneous and has caused a failure of justice. Even if there is a misdirection, the High Court is not entitled to alter or reverse the verdict unless the verdict is erroneous by reason of such misdirection and the High Court before interfering must also find that there has been a failure of justice under S. 537, Cr. P Code. In a case where if the misdirection had not occurred, the jury could not reasonably without being perverse or unduly foolish have come to any other decision, the verdict cannot be said to be erroneous within the meaning of S. 423 (*2*) and the High Court will not interfere. (*Blacker, J.*) A. W. MATHEWS *v.* EMPEROR 187 I C. 456=12 R.L. 492=41 Cr.L J. 482=A.I.R. 1940 Lah. 87.

——S. 423 (2)—*Verdict of jury—Interference in one of two charges.*

Where the High Court finds the verdict by jury on one of the charges to be erroneous it can set aside that verdict and uphold conviction on other charges on which the verdict is not found to be erroneous and need not send the case for retrial. (*Blacker, J.*) A M MATHEWS *v* EMPEROR. 187 I.C 456=12 R L. 492=41 Cr.L.J. 482=A.I.R. 1940 Lah 87.

——S. 423 (2)—*Verdict of jury—Interference—Grounds.*

CR. P. CODE (1898), S. 423.

No Court will interfere with the verdict of a jury, even if it may think itself differently of the evidence, or because it thinks that another jury may have come to a different conclusion. To lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury to a farce. (*Wadia and Kania, JJ.*) JHINA SOMA *v.* EMPEROR. I.L.R. (1939) Bom. 648=185 I.C. 382=12 R.B. 248=41 Cr.L.J. 176=41 Bom.L.R. 965=A.I.R. 1939 Bom. 457.

Remand.

——S. 423 (1) (b)—*Order of remand—Propriety—Case failing for want of sufficient evidence.*

Where the case originally made out against an accused has failed through the absence of sufficient evidence, the accused should be acquitted, and no order for remand for the purpose of allowing the prosecution to supply deficiencies in their original case should be passed. (*Bartley and Khundkar, JJ.*) SURESH CHANDRA DE *v.* EMPEROR. 178 I.C. 415=11 R.C. 356=40 Cr.L.J. 56 (1)=A.I.R. 1938 Cal. 782.

Retrial.

——S. 423—*Order for re-trial—Appeal from conviction for murder—Recorded evidence including inadmissible and inconsistent evidence—Failure of judge to consult records.*

An accused was convicted for murder. The recorded evidence in the Sessions Court, though supporting a *prima facie* case against the accused, included some evidence inadmissible under S. 122, Evidence Act, and inconsistent evidence. The statements of the prosecution witnesses before the trial had been inconsistent and though the committing Magistrate directed the prosecution of two of the principal witnesses for perjury, they were examined at the trial and the fact was not noted by the trial Judge though his attention was drawn to it. The Counsel for the accused at the trial and the Judge presiding at it, both failed to consult the records, though available.

Held, that there was no fair trial for the accused and he should be re-tried. (*Middleton, J.C. and Almond, A. J. C.*) NAJAB GUL MOHAMMAD *v.* EMPEROR. 169 I.C. 257=9 R. Pesh. 143=38 Cr.L.J. 741=A.I.R. 1937 Pesh. 71.

——S. 423—*Re-trial—Failure of prosecution—Duty of Court.*

When the prosecution has proceeded against the accused under a particular section of the Penal Code and eventually fails, a re-trial on another charge, even if the facts fall within any of cls. (2) to (4) of S. 403, Cr. P. Code, should not be ordered except where there is a strong *prima facie* case for a conviction, and when the accused has already served a substantial term of imprisonment, unless a re-trial is clearly required in the interests of justice. (*Weston.*) NARAIN *v.* EMPEROR. 1937 A.M.L.J. 126.

——S. 423—*Retrial—Failure of prosecution—Proper order.*

The general rule is that when the prosecution has failed to prove the facts on which a conviction can be founded the proper order is to acquit the accused and not order a retrial. There may be particular cases in which a retrial would be justified. (*D. R. Norman.*) RAJENDRA KUMAR *v.* CROWN. 1939 A.M.L.J. 60.

CR. P. CODE (1898), S. 423.

——S. 423 (b)—*Retrial—Marking of irrelevant document in evidence—If a ground for retrial.*

The marking of an irrelevant document in evidence is not a ground for ordering a re-trial by an appellate Court. (*Lakshmana Rao, J.*) RAMASWAMI AYYAR *v.* COMMISSIONER, CHITTOOR MUNICIPALITY. 190 I.C. 317=51 L.W. 542 (1)=1940 M.W.N. 386=A.I.R. 1940 Mad. 685.

——S. 423—*Retrial—Order for—When not proper.*

It would be dangerous to order a re-hearing in a case in which there is enmity between the parties and the Court is doubtful as to the value of any evidence that may be adduced upon a re-hearing. (*Harries, C.J. and Meredith, J.*) FEROZE KAZI *v* EMPEROR. 1940 P.W.N. 243=6 B.R. 307=186 I.C. 277=12 R.P. 477=41 Cr.L.J. 267=21 P.L.T. 731=A.I.R. 1940 Pat. 295.

——S. 423 (1) (b)—*Retrial—Order for—Legality—Evidence adduced insufficient for conviction.*

If the evidence actually adduced by the prosecution is insufficient to support a conviction, a retrial cannot be ordered simply to give the prosecution another chance of producing further and better evidence. (*B. K. Mukherjea and Biswas, JJ.*) TRIPURARI BHATTACHARJEE *v.* EMPEROR. 175 I.C. 514=10 R.C. 797=39 Cr.L.J. 604=42 C.W.N. 812=A.I.R. 1938 Cal. 361.

——S. 423 (1) (b)—*Retrial—Order for—Principles.*

Per *McNair, J.*—Where the evidence would not on any proper view of the case support a conviction it would be worse than useless to send back the case for a new trial. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. I.L.R. (1938) 1 Cal. 290=39 Cr.L.J. 161=173 I.C. 65=10 R.C. 441=66 C.L.J. 225=42 C.W.N. 129=A.I.R. 1938 Cal. 51.

——S. 423 (1) (b)—Order for retrial—Production of fresh evidence. *See* CR. P. CODE, S. 530. 41 P.L.R. 198.

——S 423—*Retrial in part—Power to order.*

A partial retrial cannot be directed by the appellate Court. It can either direct a complete retrial or call for further evidence to be placed before itself. (*Rowland, J.*) RAMCHANDRA PRASAD *v.* EMPEROR. 168 I.C. 979=38 Cr.L.J. 657=3 B.R. 508=18 Pat.L.T. 483=9 R.P. 522=1937 P.W.N. 519=A.I.R. 1937 Pat. 246.

Scope.

——S 423—*Scope—Charge and conviction under S. 426, I. P Code—Appeal—Conviction under S. 352, I. P. Code, maintaining sentence—Legality.*

Petitioner was summoned to answer a charge under S. 426 on the ground that he closed an old drain of the complainant, and on the latter coming to open it armed with an order of the *Khasmahal* authorities did not allow him to do so and chased him. He was convicted and sentenced to fine under S. 426. On appeal, the conviction was altered to one under S. 352, I. P. Code, the appellate Court holding that the conviction under S. 426 was unsustainable, but the sentence of the trial Magistrate was maintained.

Held, in revision, that there being nothing to show that the petitioner was ever informed by the trial Magistrate of a charge under S. 352, I. P. Code, the conviction under S. 352 on appeal was not maintainable and must be set aside.

CR. P. CODE (1898), S. 423.

(*Khaja Mohammad Noor, J.*) RAMDHANI MAHTON *v.* EMPEROR. **165 I.C. 600=9 R.R. 197=37 Cr.L.J. 1156 (1)=3 B.R. 62=1936 Cr.C. 898 (1)=17 Pat.L.J. 572=A.I.R. 1936 Pat. 536.**

——**S. 423** (2)—Scope—If controls S 439 (6). *See* CR. P. CODE, S. 439 (6). **42 Bom.L.R. 475.**

Setting aside verdict.

——**S. 423 (1) (b)**—*Appeal from conviction—Verdict of jury set aside—Order for retrial on all charges including those on which accused was acquitted—Power of High Court.*

The verdict of the jury, when set aside on an appeal from a conviction, is set aside in its entirety. When a conviction is set aside and a retrial ordered, the whole case is reopened and the accused may be tried again on all the charges originally framed including those of which he had been previously acquitted by the Court of Sessions. S 403 (1), Cr. P. Code, has no application, inasmuch as the re-trial will not be a second trial, but only a continuation of the first trial. (*Henderson and Biswas, JJ.*) KAMALA KANTA *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 98=41 C.W.N. 1112.**

"That the accused be retried".

——**S. 423 (1) (a)**—*"That the accused be retried"—Words if apply to appellate order of acquittal.*

The words "that the accused be retried" in S. 423 (1) (*a*) do not apply to a case where the order of acquittal is passed on appeal. (*Parker, J.*) EMPEROR *v.* U. KADOE. **164 I.C. 769=9 R.R. 139=37 Cr L.J. 1008=1936 Cr.C. 771=A.I.R. 1936 Rang. 369.**

——**Ss. 423 and 428**—*Scope—Power of appellate Court to give accused chance to adduce further evidence.*

S. 423, Cr. P. Code, deals with the disposal of an appeal, and S. 428 provides powers for the appellate Court to call for further evidence before the appeal is disposed of. An appellate Court can direct the taking of further evidence in support to the prosecution and *a fortiori* it is open to the Court to direct that the accused person may be given a chance adducing further evidence. (*Grille, J.*) SHEORAM IDAN *v.* EMPEROR. **I.L.R. (1937) Nag. 541=10 R.N. 102=38 Cr.L.J. 1058=171 I.C. 262=A.I.R. 1937 Nag. 285.**

——**Ss. 423 (1) Cls. (a), (b) and (c) and 439**—*Powers of High Court—Award of simple imprisonment for failure to give security under Ch. 8—Power to substitute rigorous imprisonment.*

Where a Sessions Judge makes a reference to the High Court recommending that a suspect who has been bound over in proceedings under Ch. 8, Cr. P. Code, and who has failed to give the required security, should be detained in prison with rigorous and not simple imprisonment as has been ordered by the trial Magistrate, the suspect not being a convict and not having been sentenced, the High Court is not limited in the exercise of its revisional powers by the conditions imposed under Cl. (*b*), sub-S. (1) of S. 423. The order falls under Cl. (*c*), sub-S. (1), S. 423 and the High Court can under S. 423 (1), Cl (*c*) read with S. 439, substitute rigorous imprisonment in place of simple imprisonment. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* MANU CHABILO.

CR. P. CODE (1898), S. 424.

166 I.C. 298=9 R.S. 135=38 Cr.L.J. 168=1936 Cr.C. 973=A.I.R. 1936 Sind 188.

——**Ss. 423 and 439**—*Acquittal—Power of High Court to alter into conviction and to award sentence in appeal or revision.*

Quaere—Whether the High Court under its combined appellate and revisional powers can convert an acquittal (under S. 302/149, I. P. Code) into a conviction (under S. 326/149, I. P. Code) and then pass a sentence where none was passed by the lower Court. (*Khaja Mohammad Noor and Dhavle, JJ.*) AMBIKA THAKUR *v.* EMPEROR. **18 Pat. 544=6 B.R. 203=185 I.C. 529=12 R.Pat. 389=21 Pat.L.T. 45=41 Cr.L.J. 191=1939 P.W.N. 747=A.I.R. 1939 Pat. 611.**

——**Ss 423 and 439**—*Accused charged of separate offences under S. 60 (a) and S. 60 (f) of U. P. Excise Act—Magistrate convicting him under S. 60 (f) and acquitting him under S. 60 (a)—Appeal by accused to Sessions Court against his conviction—Power of Sessions Court to convict accused under S 60 (a)—Proper procedure.*

Where an accused was charged of separate offences for possession of illicit liquor under S. 60 (*a*) and for possession of implements for manufacture of illicit liquor under S. 60 (*f*) of the U. P. Excise Act, and the Magistrate convicted him of the offence under S. 60 (*f*) and acquitted him under S. 60 (*a*), on appeal by the accused to the Sessions Court against his conviction, it is not open to the Sessions Court to acquit him of the offence under S 60 (*f*) and convict him under S. 60 (*a*). The appellate Court cannot itself set aside the acquittal and convict the accused of the offence of which he has been charged and acquitted. It must report the case to the High Court for proper orders to be passed and the High Court can, under S. 439, Cr. P. Code, order a retrial. (*Sulaiman, C.J. and Bennet, J.*) SARDA PRASAD *v.* EMPEROR. **168 I.C. 17=1937 A.Cr.C. 1=1937 A.L.J. 143=1937 A.W.R. 66=9 R.A. 623=38 Cr.L.J. 521=1937 A.L.R. 309=A.I.R. 1937 All. 240.**

——**Ss. 423 (2) and 537 (d)**—*Powers of appellate Court—Jury's verdict—Setting aside—Misdirection.*

An appellate Court is not bound to set aside the verdict of a jury merely because there was a misdirection unless it also finds that the misdirection had in fact occasioned a failure of justice. (*James and Saunders, JJ.*) HARI MAHTO *v.* EMPEROR. **160 I.C. 675=37 Cr.L.J. 320=8 R.P. 375=1936 Cr.C. 70=1936 P.W.N. 286=A.I.R. 1936 Pat. 46.**

——**S. 424**—Appellate Court's judgment—Contents. *See* CR. P. CODE, SS 367 AND 424—JUDGMENT. **1939 A.L.J. 671.**

——**S. 424**—Appellate judgment—Contents. *See* CR. P. CODE, SS. 367 AND 424. **173 I.C. 672=A.I.R. 1937 Pesh. 88.**

——**Ss. 424 and 118**—*Judgment of appellate Court—Contents of—Appeal against order under S. 118—Necessity to deal independently with evidence against each appellant separately.*

The appellate Court's judgment cannot be read with and as supplementary to the judgment of the Court of first instance, but it must be quite independent and stand by itself. In the case for instance, in proceedings against several suspected persons where they can be dealt with in one inquiry under law, the appellate judgment must

show that the case against each suspected person has been considered separately and the evidence proves the case against each of them individually. (*Davis, J.C. and Mehta, A.J.C.*) GHOUSBUX *v.* EMPEROR. **30 S.L.R. 382=167 I.C. 227=38 Cr.L.J. 363=9 R.S. 173=A.I.R. 1937 Sind 26.**

——S. 426—*Conviction for attempt to shoot a man—Accused, 19 years old—Whether can be released on bail.*

A man who is convicted of deliberately attempting to shoot a man with a revolver cannot safely be released on bail by the appellate Court, until it is established that he is not guilty or, at any rate, that his conviction is not justifiable. The fact that he is only 19 years of age and that will be unfortunate that he should be associated with bad characters in jail if ultimately it is found that he was not guilty, is no ground for allowing bail. (*Allsop, J.*) DHANPAL *v* EMPEROR **164 I.C 703 (1)=37 Cr L J. 1017=9 R.A. 182=1936 A.Cr.C. 150=1936 A L.J 961=1936 A.W.R. 732=1936 Cr.C. 792=1936 All.L.R. 799=A.I.R. 1936 All. 656.**

——S. 428—*Scope and object of—Conviction under S. 58 of the Madras Abkari Act—Appeal from—Finding that arrack in possession of the accused was not illicit—Proper procedure—Remand for fresh enquiry—Legality.*

The object of S. 428 of the Cr. P. Code, is not for the purpose of enabling the prosecution to produce evidence which could easily have been produced at the first trial It is not intended to enable the prosecution, having failed once, to have an opportunity of trying the case all over again. The accused who was convicted under S. 58 of the Madras Abkari Act for possession of illicit opium, appealed against his conviction. The appellate Court while finding that it was not proved that the arrack was not illicit, observed that on the evidence there were not sufficient grounds for acquitting the accused, and acting under S. 428, Cr. P. Code, remanded the case for a fresh enquiry.

Held, in revision, that it having been found that the arrack was not illicit, there was no offence and the accused was entitled to acquittal. The gist of the offence under S. 58 of the Abkari Act being that arrack is illicit, and that not having been proved, there should be an acquittal, and the order for further enquiry should therefore be set aside. (*Mockett and Lakshmana Rao, JJ.*) HANUMANTHAPPA, *In re.* **166 I.C. 623 (2)=9 R.M. 385 (2)=38 Cr.L.J. 257=1936 M.Cr.C. 421=1936 M.W.N. 1149=44 L.W. 884=A.I.R. 1937 Mad. 181=(1937) 1 M.L.J. 75.**

——S. 428—*Prosecution witnesses not cross-examined at trial—Jurisdiction of appellate Court to direct Magistrate to record that evidence and certify and resubmit it.*

Where the prosecution witnesses have not been cross-examined at the trial, the witnesses not having been recalled after charge, and the accused who on being convicted prefers an appeal and wishes for this additional evidence to be brought before the Court, the appellate Court has jurisdiction under S. 428 to direct the Magistrate to record the evidence of those prosecution witnesses and resubmit that evidence to his Court, and upon receipt of that evidence dispose of the appeal. (*Bartley and Henderson, JJ.*) MUNSHI *v.* MUZAFFAR. **I.L.R. (1939) 1 Cal. 205=11 R.C.**

358=40 Cr.L.J. 47=178 I.C. 422=43 C.W.N. 85=A.I.R. 1938 Cal 781.

——Ss. 428, 423 and 342—*Appellate Court finding that evidence improperly admitted and examination not satisfactory—Proper procedure.*

Where an appellate Court finds that certain documents admitted in evidence have not been proved according to law, and that the examination of the accused under S. 342 is not satisfactory and that the accused should be examined afresh, he can either proceed under S. 428 and then dispose of the appeal under S. 428 (2), or under S. 423 set aside the conviction and order the accused to be retried by a Court of competent jurisdiction. In the former case in ordering additional evidence to be taken, it would be quite proper to direct a further examination of the accused at the same time. An order setting aside the conviction and sending the case back for further evidence but not for complete retrial is illegal. (*Rowland, J.*) KRISHNA PRASAD SINHA *v.* EMPEROR. **164 I.C. 184 (1)=9 R.P. 91=37 Cr.L.J. 906=17 Pat.L.T. 445=1936 Cr.C. 699 (1)=A.I.R. 1936 Pat. 438.**

——S. 431—*Applicability—Revision application—Penal Code, S. 70.*

The principle of S. 431, Cr. P. Code, applies to revisions so that a revisional application against a sentence of fine would not abate by reason of the death of the applicant. Under the provisions of S. 70, I. P. Code, the death of an offender does not discharge any property which would, after his death, be legally liable for his debts from liability to discharge any fine due from him (*Smith, J.*) SITA RAM *v* EMPEROR. **13 Luck. 306=168 I.C. 177=9 R.O. 447=1937 O.L.R. 232=38 Cr.L.J. 509=1937 A.Cr.C. 88=1937 O.W.N. 587=A.I.R. 1937 Oudh 320.**

——S. 432—*Reference on questions of law—Proper course for Magistrate.*

Although the Presidency Magistrates have, under S. 432, Cr. P. Code, the power to refer for the opinion of the High Court any question of law which arises at the hearing of any case pending before them, it is undesirable to make a reference in a form which involves giving a decision on law divorced to some extent from the facts. The more desirable course is for the Magistrate to use the second part of S. 432 which provides that he may give judgment in any such case subject to the decision of the High Court on such reference. By adopting this course duplicity of hearing in both Courts would probably be avoided and all the facts would be before the High Court once for all. (*Derbyshire, C.J. Nasim Ali and Rau, JJ.*) EMPEROR *v.* HEMENDRA PROSAD. **I.L.R. (1939) 2 Cal. 411=183 I.C. 349=12 R.C. 153=43 C.W.N. 950=69 C.L.J. 599=2 Fed.L.J (Part II) 55=40 Cr.L.J. 782=A.I.R. 1939 Cal. 529 (S.B.).**

——S. 435—*Applicability—District Magistrate—Order under S. 39-A, Bombay District Police Court—Revision—Jurisdiction of High Court.*

When the District Magistrate passes orders under R. 17 of the Rules for licensing and controlling places of public entertainment framed under S. 39-A, Bombay District Police Act, the District Magistrate or Magistrate of the District, whichever he may be called, is not acting as an inferior Court within the meaning of S. 435, Cr. P. Code. He is acting as an executive officer in the exercise of powers conferred upon him under S. 39-A of Bombay District Police Act. High Court there-

fore has no jurisdiction under S. 435, Cr. P. Code, to interfere with this order. (*Davis, J.C. and Tyabji, J.*) MAUGHANMAL GIANCHAND *v.* EMPEROR. **I.L.R. (1940) Kar. 102=185 I C 392=12 R. S. 170=41 Cr.L.J. 179=A.I.R. 1939 Sind 340.**

——S. 435—*Duty of applicant to be ready with case and document—Adjournment to enable document to be sent for—Practice.*

Applicants in revision to the High Court must be prepared with their cases and with the documents in support. The Court will not send for the record unless there is sufficient material to justify that course, and will not stand a case over merely to enable a party to do what he should have done before presenting the application. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* MUKUND. **42 Bom L.R. 481=A.I.R. 1940 Bom 283.**

——S. 435—Inferior Criminal Court—Magistrate acting under Naik Girls' Protection Act. *See* NAIK GIRLS' PROTECTION ACT, S. 4. **1938 A. L.J. 1147.**

——S. 435—*Order under S.* 145—*Revision—Finding of possession manifestly wrong—Interference.*

When the finding of the Magistrate as to possession in proceedings under S. 145, Cr. P. Code, is manifestly wrong and unsustainable, the High Court can interfere and set aside the order and declare possession in the other party. (*Gruer, J.*) EMPEROR *v.* SUNDERLAL. **I.L.R. (1937) Nag 174 =167 I.C. 359=9 R.N. 179=38 Cr.L.J. 375= 1936 Cr.C. 1114=A.I.R. 1936 Nag 271.**

——S. 435—*Revision—Competency—Executive order.*

No revision lies against an executive order of the Disirict Magistrate passed for controlling a certin procession. (*Thomas, C.J.*) MOHAMMAD AHMAD KHAN *v.* EMPEROR. **189 I.C. 666=1940 A.W.R (C.C.) 304=1940 O.W.N. 652=1940 A. Cr.C. 105=41 Cr L.J. 781=1940 O.L.R. 490= 13 R.O. 104=1940 O.A. 594=A.I.R. 1940 Oudh 416.**

——S. 435—*Scope of enquiry.*

Per *Sharpe, J.*—It is doubtful whether it is within the province of High Court when acting under S. 435 to canvass and express opinions upon all topics however interesting may be the points of law or practice involved in them, which have arisen in the course of the proceedings before the inferior Criminal Court. On revision inquiry is limited to "the correctness, legality or propriety of any finding, sentence or order recorded or passed" and to "the irregularity of any proceedings of such inferior Court." (*Baguley and Sharpe, JJ.*) THE KING *v.* MAUNG THOUNG SHWE. **175 I.C. 639=39 Cr.L.J. 642=11 R.R 9=A.I.R. 1938 Rang 161.**

——S. 435—*Scope—Proceedings under S.* 145—*Order as to costs—Discretion—Interference by High Court.*

Where in proceedings under S. 145, Cr.P. Code, the Magistrate disallows costs to the successful party under a clear misapprehension the High Court will not hesitate to interfere if it finds that no discretion has been exercised at all or that it has been exercised on wrong principles, though it will be slow to interfere with a real exercise of discretion by the lower Court. (*Dhavle, J.*) KUNJO *v.* SARJU. **5 B.R. 539=181 I.C. 176= 11 R.P. 573=40 Cr.L.J. 538=20 Pat. L.T. 164= 1939 P.W.N. 66=A.I.R. 1939 Pat. 206.**

——Ss. 435 and 438—*Proceedings under—Explanations—Calling for—Propriety.*

Explanations of Magistrates should not be called for in connection with reference to proceedings under Ss. 435 and 438, Cr. P. Code. If the High Court desires any explanation, it will ask for them. (*Davies.*) NATHU LAL *v.* EMPEROR **1940 A.M.L.J. 24.**

——Ss. 435 and 438—*Scope—Pending proceedings in Magistrate's Court—Sessions Judge taking different view of evidence from trying Magistrate—Reference to High Court—Propriety.*

The fact that a Sessions Judge takes a different view from the trying Magistrate on the question of credibility of witness is not a ground on which the High Court will interfere in revision, and does not justify the Sessions Judge in making a reference to the High Court under S. 438, Cr. P. Code. It is not the rule of the Court to interfere with decisions on facts upon evidence except for special reasons, and referring Courts are to make references subject to this consideration. The objections to making references in pending proceedings are still stronger, especially when no error of procedure is suggested to have been committed by the trying Magistrate before whom the proceedings are pending. A criticism of the evidence at such a stage is premature, and such a reference cannot be accepted, but is liable to be discharged. (*Rowland, J.*) CHANDRESHWAR PRASAD NARAIN SINGH *v.* ARUNENDRA MOHAN GHOSE. **165 I.C. 931=9 R.P. 231=38 Cr.L.J. 2=3 B.R. 104=17 Pat.L.T. 794=1936 P.W.N. 773=1936 Cr.C. 1064=A.I.R. 1936 Pat. 626.**

——Ss. 435 and 439—*Acquittal—Revision against—Interference—Rule.*

The right of an accused person who has been acquitted, that he should not be tried a second time is a valuable right and is not to be interfered with lightly. In exceptional circumstances the High Court will interfere in revision even with an acquittal but will not do so until the normal procedure has been followed and has failed. Where no attempt to move Government was made by the aggrieved party for filing an appeal against acquittal and only an application in revision was filed.

Held, that the normal procedure for filing an appeal not being followed, interference with acquittal was not justifiable. (*Davis, J.C. and Lobo, A.J.C.*) KARACHI MUNICIPAL CORPORATION *v.* THAOOMAL KHUSHALDAS. **169 I.C. 40=38 Cr. L J. 665=9 R.S. 254 (2)=A.I.R. 1937 Sind 100.**

——Ss. 435 and 439—*Finding of fact—Interference.*

Normally a Court of revision will not interfere with concurrent findings of fact, but where it is evident that the Courts below have not really approached the case with either a clear appreciation of the issue involved, or a clear understanding of the principles of criminal law, the High Court is entitled to interfere. (*King, J.*) RAMASWAMI NAICK *v.* RANGASWAMI CHETTIAR. **172 I. C. 501=10 R M. 457=47 L.W. 140=39 Cr.L.J. 144=1937 M.Cr.C. 269=1937 M.W.N 733=A. I.R. 1937 Mad. 968.**

——Ss. 435 and 439—Order under S. 517—Discretion of Magistrate—Revision—Interference —When justified. *See* CR. P. CODE, S. 517. **(1937) 1 M.L.J. 128.**

CR. P. CODE (1898), S. 435.

——Ss. 435 and 439—Order under S. 144—Revision. *See* CR. P. CODE, S. 144. **45 L.W. 249.**

——Ss. 435 and 439—*Refusal to issue process against accused—Failure to give reasons—Revision—Jurisdiction of High Court to interfere—Cr. P. Code, S. 203.*

Where an order under S. 203, Cr. P. Code, is passed, declining to issue process to an accused, and the magistrate has not acted as he should under S. 202, Cr. P. Code, the High Court has jurisdiction to entertain a revision application against the order and to interfere, if necessary, in the interest of justice. Where it appears from the records that there are no sufficient grounds for issuing notice to an accused person, the High Court is not justified in interfering in revision merely because the magistrate who had cognisance of the matter failed to give reasons for not issuing the process; but if it appears from the records that the magistrate had not good grounds for not issuing process, the High Court is justified in interfering. The fact there is no evidence on record against the accused is not in itself a sufficient reason for refusing to interfere in revision specially when the complainant says he has evidence. (*Horwill, J.*) VENKATASUBBA PILLAI. *In re.* **177 I.C. 957=11 R.M. 396=48 L.W 801 =1938 M.W.N. 973=1938 M.Cr.C. 262=39 Cr. L.J. 984=A.I.R. 1938 Mad. 879=(1938) 2 M.L. J. 372.**

——Ss. 435 and 439—Scope—Jurisdiction—Failure to exercise—Appeal to Sessions Judge—Objection to jurisdiction—Sessions Judge not deciding question but calling for special report from trial Magistrate—Acceptance of report and declining jurisdiction—Legality of— Revision. *See* CRIMINAL TRIAL—JURISDICTION. **165 I.C. 919 =44 L.W. 689.**

——Ss. 435 and 440—*Exercise of powers under S. 435—Discretion—Accused not surrendering to his bail bond—Right to be heard in revis on.*

Where an accused after the confirmation of his conviction by the appellate Court, still remained at large without surrendering to his bail bond, the High Court would not be justified in exercising its discretionary powers under S. 435 and the sections immediately following till the accused complies with the order of the appellate Court to surrender, his Counsel will not have a right of audience. (*Ismail, J.*) SHEO MANDIL *v.* EMPEROR. **I L.R. (1938) All. 991=178 I.C. 1000=11 R.A. 344=40 Cr.L.J. 153=1938 All.L.R. 930= 1938 A.W.R. (H.C.) 690=1938 A.Cr.C. 142= 1938 A.L.J. 1022=A.I.R. 1939 All. 5.**

——S. 436 — *Applicability — "Discharge"—Failure to charge—If amounts to—Charge framed on minor instead of on major section—Effect of.*

Where a Magistrate deliberately frames a charge on a minor section instead of on the major section, on which the case starts, his action is equivalent to a discharge with regard to the major offence and further inquiry can be ordered by the Sessions Court under S. 436, Cr. P. Code. Failure to charge amounts to a discharge. (*Gruer, J.*) GANGA DATTA *v.* EMPEROR. **I.L.R. (1936) Nag. 54=162 I.C. 925=37 Cr.L.J.715 (2) =8 R.N. 292=1936 Cr.C. 552=A.I.R. 1936 Nag.87.**

CR. P. CODE (1898), S. 436.

——S. 436—*Complaint dismissed under S. 203—Further enquiry—When may be ordered.*

A further enquiry into a complaint which has been dismissed under S. 203, Cr. P. Code, cannot be ordered unless it is shown that the order of the Magistrate is perverse or foolish or is based on an incomplete record of evidence. (*Abdul Rashid, J.*) NAZAR MOHAMMAD *v.* JUMMAN. **171 I.C. 336=10 R. L. 186=38 Cr.L.J. 1072=39 P. L.R. 402=A.I.R. 1937 Lah. 682.**

——S. 436—*Construction—Sessions Judge on setting aside order of discharge—If can send case back to same Magistrate for further enquiry.*

Per *Dadiba C. Mehta, A.J.C.*—The first part of S. 436 is to the effect that the High Court or the Sessions Judge may direct the District Magistrate to make further inquiry either by himself or by any of the Magistrates subordinate to him. If the High Court or the Sessions Judge can direct a District Magistrate by himself to make an inquiry, *a fortiori* can the High Court or the Sessions Judge direct that any particular Magistrate subordinate to the District Magistrate should make the further inquiry. Therefore, where an order is made by a Magistrate discharging an accused person, it is competent to the Sessions Judge, while setting aside the order of discharge, to direct the same Magistrate to complete the inquiry.

Per *Haveliwala, A. J. C.*—The language of S. 436 is plain and leaves no room for doubt that the Sessions Judge has not the power on setting aside the order of discharge to send the case back to the same Magistrate to go on with the inquiry. (*Mehta and Haveliwala, A. J. Cs.*) JETHANAND MURIJMAL *v.* SHIVRAM. **168 I.C. 777=9 R.S. 239=38 Cr.L.J. 596=A.I.R. 1937 Sind 86.**

——S. 436—*Discharge—Setting aside—Duty of revising Court—Expression of opinion on evidence as to whether* prima facie *case is made out.*

Though a Court of revision is right in not embarrassing an accused person unduly by a discussion of the merits of a case, while setting aside an order of discharge and ordering further inquiry, it is only fair to the accused that the revising Court, instead of merely criticising the order of discharge should give its own reasons for holding that some particular offence has been made out *prima facie* by the prosecution evidence. (*King, J.*) SUBBIER *v.* MANICKAM CHETTIAR. **1937 M.W.N. 729.**

——S. 436—*Discharge—Setting aside—Grounds—Misapprehension and misappreciation of evidence.*

It is both legal and proper for a Sessions Judge or a District Magistrate to set aside an order of discharge on the ground of misapprehension of evidence. It is strictly speaking, legal for a Sessions Judge or a District Magistrate to do so on the ground of misappreciation of evidence, but it is not proper to do so unless he is clearly of opinion that the misappreciation is so flagrant that in effect the order is perverse or manifestly unreasonable or foolish or *prima facie* incorrect. Where exactly to draw the line, is a matter for the exercise of common sense. In the application of these principles there is no practical difference between S. 436 and S. 437, Cr. P. Code. (*Gruer and Niyogi, JJ.*) SHEOPRASHAD *v.* EMPE-

CR. P. CODE (1898), S. 436.

ROR. I.L.R. (1938) Nag. 442=177 I.C. 605 (2)= 11 R.N. 148=39 Cr.L.J. 917=1938 N.L.J. 250= A.I.R. 1938 Nag. 394.

——S. 436—*Discharge—Setting aside of—Practice.*

An order of discharge passed by a trial Magistrate after full enquiry and after recording all the evidence produced by the complainant should not be lightly interfered with in revision. (*Abdul Qayoom, C.J. and Kichlu, J.*) SITA RAM *v.* STATE. 41 P.L R J. & K. 26.

——S. 436—*Discharge under S. 209—Interference by Sessions Judge.*

A Sessions Judge should only interfere with an order of discharge under S. 209, when the order of the inquiring Court was perverse or foolish or manifestly against the weight of the evidence or that the Magistrate had failed to record all the evidence. (*Middleton, J.C.*) FASAL RAZAK *v.* EMPEROR. 167 I C. 602=9 R. Pesh. 88=38 Cr.L. J. 427=A.I.R 1937 Pesh. 12.

——S. 436—*Discharge under S. 494—Interference—Jurisdiction of High Court.*

The High Court has jurisdiction to interfere, at the instance of the complainant, with an order of discharge passed by a Magistrate upon an application made by the Public Prosecutor under S. 494, Cr. P Code, for withdrawal of the case, where the Magistrate has not properly exercised his discretion. The fact that the Magistrate has not recorded reasons and therefore no materials would be available for interference by the High Court. does not affect its jurisdiction. (*Derbyshire, C.J., Bartley and Henderson, JJ.*) DEBENDRA KUMAR ROY *v.* SYED YAR BAKHT CHOUDHURY. I.L.R. 1939 Cal. 407=180 I.C. 384=11 R. C. 676=40 Cr L.J 349=43 C.W.N. 301=A.I.R. 1939 Cal. 220 (S.B.).

——S. 436—*Further enquiry—Grounds for ordering—Prosecution evidence doubtful as to whether accused are negligent or dishonest—Existence of strong suspicion without likelihood of finding of guilty on specific charge—Order for further inquiry—If justified.*

Before an order for further enquiry can be made under S. 436, Cr. P. Code, the Court must find whether a specific charge on the facts could be framed against the accused which the accused ought to be called upon to answer. In a case where it is doubtful whether the accused persons are on the evidence guilty or not, the fact that there is strong suspicion on the facts of the case that they must have been guilty of some fraud, is no ground for ordering a further investigation, irrespectively altogether of what the further investigation is to consist of or of whether there is any likelihood of the accused being found guilty. If on the prosecution evidence itself there is reasonable doubt as to whether the acts of the accused were merely negligent or dishonest, the accused even at that stage was entitled to the benefit of that doubt. An order for further inquiry against a discharge in such a case is not warranted. (*King, J.*) KRISHNA CHETTY *v.* KARUR VYSYA BANK, LTD. 1937 M.W. N. 871.

——S 436—*Further inquiry—Grounds for—Misappreciation of evidence.*

It cannot be laid down as a general rule that there should be no revision of an order of discharge when there has been only misappreciation of evidence. In a case in which two views of the evidence are possible, neither of which can be said to be unreasonable, it is not proper to reopen a discharge and order further inquiry. Where the trying Magistrate, after dealing with and discussing the entire evidence fully, discharges the accused, being of opinion that the complaint has considerably exaggerated what had happened and that the story of the complaint bristles with improbabilities, the Sessions Judge ought not to interfere with the order of discharge and order a further inquiry under S 436, Cr. P Code. (*Pandrang Row, J.*) KUMARASWAMI MUDALI *v.* KALIAMMAL. 1937 M.W N. 332.

——S. 436—*"Further inquiry"—Meaning of—Order setting aside discharge and directing further inquiry—Inquiry—If to be begun afresh.*

A magistrate who is directed to make a further inquiry under S. 436 into the case of a person who has been improperly discharged is not bound to begin the inquiry afresh. Further inquiry does not mean merely an examination of witnesses, but a further consideration of the evidence. The inquiry re-commences where it was let off at the time when the improper order of discharge was passed. A magistrate is therefore justified upon perusing the evidence already taken in framing a charge. There is no obligation laid on the magistrate to begin the inquiry afresh. (*Horwill, J.*) HARICHANDRA REDDY *v.* EMPEROR. 176 I.C. 879 (2)=39 Cr.L.J. 828=10 R.M. 189=1938 M.W. N. 587=1938 M.Cr.C. 202=48 L.W. 136=A I.R. 1938 Mad. 742=(1938) 2 M.L J. 222.

——S. 436—*"Further inquiry"—Meaning of—Complaint—Dismissal on police report without examination of witnesses—Order for further inquiry by Sessions Judge—Trial Court ordering inquiry and report by Subordinate Magistrate—Latter summoning accused—Trial and discharge—Legality—S. 529—Applicability.*

An order by a superior Court to an inferior Court to hold a further inquiry into a complaint which has been dismissed under S. 203, Cr. P. Code, has acquired what may be called a technical meaning. It simply means re-consideration. In some cases re-consideration might require summoning of more witnesses, looking into more evidence; in other cases it may be where the previous inquiry has been fuller, to re-consider the order and pass an order accordingly. In a case in which the complaint has been dismissed after perusing the police report and some papers, and without examining witnesses or holding an inquiry under S. 202, Cr. P. Code, the Court to which the case is sent for further inquiry is competent to order an inquiry under S. 202. But the Magistrate who is asked to hold an inquiry and to report by a particular date has no jurisdiction to proceed to summon the accused and hold a trial. A complaint was referred to the police, and on receipt of the police report, the Sub-Divisional Magistrate who had cognizance of it, after considering the report and various aspects of the case, dismissed it on 3-11-1936. The Sessions Judge who was moved by the complainant directed a further inquiry into the complaint. On receipt of this order, the Sub-Divisional Magistrate recorded an order on 10-3-1937 to the effect that the complainant should prove his case before Mr. *O* (a first class Magistrate) who was to fix a convenient date for his inquiry and report by

30-3-1937. Mr. *O* ordered on 31-3-1937 summonses to issue to the accused and proceeded to try the case. He examined some witnesses, and on 29-6-1937 discharged the accused under S. 253 (2). The Sub-Divisional Magistrate before whom the matter came up on 2-7-1937, held that the discharge of the accused by Mr. *O* was entirely without jurisdiction, and ignored it. He ordered summons to be issued against the accused, and after their appearance, made over the case to a second class Magistrate who convicted the accused on 2-9-1937. An appeal therefrom to the first class Magistrate was dismissed. It was contended in revision that the second trial and conviction were illegal as the order of discharge passed by Mr. *O* was not set aside by a competent authority.

Held, that the Sub-Divisional Magistrate who was in charge of the complaint and to whom the case was sent by the Sessions Judge for further inquiry sent the case to Mr. *O* for a limited purpose of inquiry and report, the case remaining with the Sub-Divisional Magistrate; (2) that Mr. *O* to whom the whole case had not been made over went beyond his authority in summoning the accused and proceeding with their trial; (3) the action of Mr. *O* having been entirely without jurisdiction, the Sub-Divisional Magistrate was perfectly justified in ignoring the trial and discharge; and (4) that therefore the second trial and conviction were quite legal and within jurisdiction.

Held, further, that S. 529, Cr. P. Code, did not apply and could not come into play, as there was no ground for holding that Mr. *O* acted in good faith or with care and caution. (*Khaja Mohammad Noor and Varma JJ.*) UDIT NARAYAN PATWARI *v.* EMPEROR. **176 I.C 716=1938 P.W. N. 542=4 B.R. 750=11 R.P. 100=39 Cr.L.J. 778 =19 Pat.L.T. 336=A.I.R. 1938 Pat. 369.**

——**S. 436**—*Further enquiry—Order for, when may be made.*

If a District Magistrate is not satisfied with the 'correctness, legality or propriety of any finding, sentence or order', it is his duty to exercise the discretion he possesses under S. 436 and to order that a further enquiry be made into the complaint that has been dismissed. When in a case for possession of contraband opium the trial Court did not disbelieve the evidence but discharged the accused, and the District Magistrate, in revision, after taking into consideration the conduct of the accused in running away after remarking that the search party would not find anything in his hut, ordered a further enquiry,

Held, that the order of further enquiry could not be interfered with. (*Spargo, J.*) MAUNG SU *v.* EMPEROR **169 I.C 63=9 R.R. 386=38 Cr. L.J. 709=A.I.R. 1937 Rang. 120.**

——**S. 436**—*Further inquiry—When may be ordered.*

A further inquiry can be ordered only on the ground that the judgment of the trial Magistrate was perverse and foolish. (*Mir Ahmad, J.*) GUL MOHAMMAD *v.* HABIBULLAH KARIM ULLAH. **182 I C 522=12 R.Pesh. 1=40 Cr.L.J. 674=A. I.R. 1939 Pesh. 16.**

——**S. 436**—*Order for further enquiry into complaint of offence under S. 304, I. P. Code—Discretion to examine certain persons as witnesses—Refusal of trial Court to examine them as*

Court witnesses—Direction to complainant to deposit costs of summoning such witnesses—Propriety—Duty of Court.

A complaint of an offence under S. 304, I. P. Code, was dismissed under S. 203, Cr. P. Code. On the Sessions Judge being moved in the matter, he passed an order directing further enquiry in the matter and also directing that certain specified persons should be examined in the presence of the complainant and that the latter should be given an adequate opportunity of putting questions to those witnesses. On receipt of this order the trial magistrate called on the complainant to produce his witnesses. The complainant prayed that the persons specified in the order for further enquiry should be summoned as Court witnesses, but that was rejected, the magistrate observing that if the complainant so desired, his witnesses would be summoned on payment of the necessary costs.

Held, that the order was not justified and that the complaint which contained grave allegations should be promptly and thoroughly investigated, and no question of payment or non-payment of costs should be allowed to stand in the way of the examination of all the persons whose evidence might throw any light on the matter. (*Patterson and Cunliffe, JJ.*) SURENDRA NATH DE *v.* KRISHNA DHAN DE **40 C.W.N. 1251.**

——**S. 436**—*Revision against dismissal under S. 203—Issuing of summons without notice to accused—Propriety of.*

Where in revision, against an order under S. 203, Cr. P. Code, the Sessions Judge without issuing any notice on the accused persons, directed the issue of summons on the accused persons straight away and ordered the case to be heard by another Magistrate.

Held, that the form of the learned Judge's order was not correct. The Sessions Judge should have left it to the Magistrate to select the particular form of enquiry instead of directing him categorically to issue a summons against the accused. But if the Magistrate in the exercise of his own discretion chose to issue a summons immediately instead of wasting time over enquiry, he was quite at liberty to do so. (*Cunliffe and Henderson, JJ.*) ANNAKALI DEBI *v.* GYANENDRA CHAKRAVERTY. **173 I.C. 318=10 R.C. 501=39 Cr.L J. 292=A.I.R. 1938 Cal. 22.**

——**S. 436**—*Scope—Discharge in case of theft on ground of dispute being of civil nature—Removal of crops under* bona fide claim *of right—Order for further inquiry—If justified.*

Where there is a dispute about the ownership of certain lands between two parties, and proceedings under S. 145, Cr. P. Code, are dropped and a civil suit is pending between the parties, a complaint by one party against the other for removal of crops from the land under S. 379 or 479, I. P. Code, is not maintainable as the dispute is of a civil nature and the removal is under a *bona fide* claim of right. An order for further inquiry in revision against an order of discharge under S. 253 (1), Cr. P. Code, in such a way is not called for and must be set aside. (*Lakshmana Rao, J.*) AGASTIAPPA NAINAR *v.* SAMI PILLAI. **1940 M.W.N. 871.**

——**S. 436** — *Scope — District Magistrate—Powers of—Order directing complaint to be restored to file—Legality.*

CR. P. CODE (1898), S. 436.

Where a complaint has been dismissed by a Sub-Magistrate under S. 203, Cr. P. Code, the District Magistrate has no power under S. 436, to order that it should be restored to file. All he can do is to direct further inquiry into the case. He cannot compel a Magistrate to take cognizance of a complaint. (*Newsam, J.*) NAGIREDDI, *In re.* 173 I.C. 213 (1)=10 R.M. 536=39 Cr.L. J 281 (1)=1937 M.Cr.C. 384=46 L.W. 642=1937 M.W.N. 1242=A.I.R. 1938 Mad. 112.

——S. 436—*Scope—Order for further inquiry by Sessions Judge—Direction to Magistrate to frame charge under specified section and to dispose of the case—Legality of.*

A Sessions Judge in directing further inquiry under S. 436, Cr. P. Code, has no power to direct a Magistrate to frame a charge under a particular section and to dispose of the case. (*Lakshmana Rao, J.*) SIDDA REDDI *v.* VENKATA GIRIANNA. 1940 M.W.N. 536=52 L.W. 66 (1).

——S. 436—*Sessions Judge—Interference with order of Magistrate- Grounds for*

Jurisdiction exercised in revision is an extraordinary jurisdiction and is to be used only in exceptional cases and sparingly and reading S. 436 with S. 435, Cr. P. Code. A Sessions Judge should not usurp the jurisdiction conferred by law upon a Magistrate and should not interfere with a careful and fairly proper order of a Magistrate merely because the Sessions Judge takes a different view upon the evidence from that of the trying Magistrate, when the view taken by the Magistrate is reasonable in all the circumstances of the case. (*Davis, J.C. and Weston, J.*) AZIZUDDIN *v.* EMPEROR. I.L.R. (1939) Kar. 370=180 I.C. 581=11 R.S. 180=40 Cr.L.J. 454=A.I.R. 1939 Sind 71.

——S. 437—*Construction—'Improperly'—Meaning of.*

'Improperly' in S. 437 of the Cr. P. Code does not mean perverse. A discharge based on a lenient view of the evidence is not improper. But impropriety does imply that the order could not have been passed, if the Magistrate had taken a reasonable view of all the circumstances of the case. (*Horwill, J.*) HARICHANDRA REDDI *v.* SYED KASHIM SAHIB. 1937 M.W.N. 1240.

——S. 437—*Improper discharge— Magistrate weighing the conflicting evidence and discharging accused—Sessions Judge setting aside discharge and ordering commitment—Discretion—Interference in revision.*

A committing Magistrate cannot usurp the functions of a Sessions Court in the matter of appreciating and weighing the evidence; nor can he substitute his judgment for the final judgment of the Court indicated by law for the trial. Where the evidence is conflicting and lays itself open to suspicion, but may be true and may commend itself to certain tribunals, the Magistrate, even if he has reason to doubt whether, if he were trying the case, he could convict, and even if the evidence, in his opinion, is however unevenly balanced, the case is one which has to be tried and the Magistrate is bound to commit it for trial. If in such case he discharges the accused, it is an improper discharge, and a Sessions Judge would be justified in setting aside the order of discharge and ordering a committal to the Court of Session for trial. The discretion of the Sessions Judge under S. 437 should not be interfered with by the High Court in revision. (*Ganga Nath, J.*) ISHAQ *v.* EMPEROR. 1937 A.L.J. 294=1937 A.W.R. 261=1937 A.Cr.C. 55=168 I.C 958=38 Cr.L.J. 659=9 R.A. 687=1937 A.L.R. 431=A.I.R. 1937 All. 373.

CR. P. CODE (1898), S. 437.

——S. 437—*Jurisdiction—Additional Sessions Judge—Power to direct committal.*

An additional Sessions Judge is competent to exercise the powers conferred upon a Sessions Judge by S. 437, and can direct a committal, by virtue of the provisions of S. 438 (2) of the Code. (*Wadia and Macklin, JJ.*) AKBERALLY *v.* ALI MAHOMED. 184 I.C. 282=12 R.B. 159=40 Cr.L.J. 951=41 Bom.L.R. 749=A.I.R. 1939 Bom. 372.

——S. 437—*Sessions Judge—Duty of—Order of discharge—When to be set aside.*

The duty of a Sessions Judge under S. 437, Cr. P. Code, is to appreciate the evidence from the point of view of the correctness of the Magistrate's order of discharge, in other words, to see whether the basis of the Magistrate's order of discharge (namely the impossibility of any conviction resulting) is correct or not. The Sessions Judge should of course be very slow to interfere in revision with an order of discharge. (*Wadia and Macklin, JJ.*) AKBERALLY *v.* ALI MAHOMED. 184 I.C. 282=12 R.B. 159=40 Cr.L.J. 951=41 Bom.L.R. 749=A.I.R. 1939 Bom. 372.

——Ss. 437 and 438—*Applicability—Case triable by Court of Session—Discharge by Magistrate—Finding of no evidence against some accused—Finding of absence of* prima facie *case against others—Duty of District Magistrate—Evidence adduced fully on both sides—Order for further inquiry—Propriety of—Proper course—Committal.*

Where the Magistrate ordering a discharge finds that there is no evidence whatever against some of the accused, and that no *prima facie* case has been made out even as against those against whom there is evidence, the District Magistrate before ordering further enquiry under S. 436, Cr. P. Code, should consider whether it is necessary to have a fresh hearing of the case in view of the fact that all the evidence on both sides have been taken, and whether it would not be proper to order the committal of such of the accused as against whom he thinks there is a *prima facie* case. Though S. 436 permits him to direct further inquiry into the case of any accused person who has been discharged, S. 437 relates more particularly to the case of an improper discharge. When the District Magistrate does not consider all the relevant points, and does not clearly find that all the accused have been improperly discharged and does not reject the defence evidence as unreliable, an order for further enquiry cannot be sustained. The proper course for him is to deal with the case particularly with a view to decide whether the case is one in which all or any of the accused should be committed to stand their trial in a Court of Session, when the case is exclusively triable by the Court of Session. (*Pandrang Row, J.*) VENKATAREDDI *v.* SURAMMA. 1937 M.W.N. 868.

——Ss. 437 and 439—*Exercise of powers under S. 437 in revision—Circumstances which would justify.*

CR. P. CODE (1898), S. 438.

To invoke S. 437, Cr. P. Code not only has it to appear that the accused who was acquitted ought to have been tried in the Sessions Court, but it is also necessary, to show to the satisfaction of the revisional Court that the accused person has been improperly discharged by the inferior Court. (*Davies.*) NANDA *v.* HIRA. **1939 A.M.L.J. 166.**

——S. 438—*Appeal dealt with by Sessions Judge—Reference by District Magistrate to High Court for enhancement of sentence—Propriety.*

Ss. 435 and 438 empower a District Magistrate to refer the case to the High Court after examining the record of any proceedings before any inferior Criminal Court. But where appeal has already been dealt with by the Sessions Judge, the District Magistrate is not entitled to refer the case to the High Court under Ss. 435 and 438 for enhancement of sentences passed by the Sessions Judge. The proper course for him is to instruct the law officers of the Crown to file a petition for revision asking for enhancement of the sentences awarded to the accused with the sanction or under the instructions of the Provincial Government. (*Abdul Rashid, J.*) EMPEROR *v.* RAJA RAM. **184 I.C. 204=12 R.L. 180 (1)=41 P.L.R. 825=40 Cr.L.J. 879=A.I.R. 1939 Lah. 323.**

——S. 438—Applicability—Order of fine on landlord by Sub-Divisional Officer under S. 67, Orissa Tenancy Act—Application to District Magistrate for reference to High Court—Competency—High Court's power to revise. *See* ORISSA TENANCY ACT, Ss. 65 AND 67. **15 Pat. 350.**

——S. 438—*Conviction of accused on his plea of guilty for breach of municipal bye-law—Reference by Sessions Judge questioning validity of bye-law—Competency—United Provinces Municipalities Act, S. 299.*

Where the accused is convicted on his plea of guilty in a summary trial for an offence under S. 299 of the United Provinces Municipalities Act for contravening a bye-law, it is gratuitous on the part of the Sessions Judge to make a reference raising the question as to whether the Municipal Board had any authority to frame such a bye-law or whether the Commissioner was empowered to sanction it, when the point was not raised in the Magistrate's Court, and the Chief Court will decline to accept the reference. (*Nanavutty, J.*) KARIM *v.* EMPEROR. **1936 O.W.N. 220.**

——S. 438—*Incompetent reference—Power of High Court to act on.*

Where the trial Court accepting the verdict of the jury convicted the accused, but the appellate Court finding itself unable to interfere under S. 423 (2), Cr. P. Code, as there was no misdirection in the charge to the jury by the trial Court made a reference to the High Court instead of referring the case to the Local Government for orders.

Held, that though the lower appellate Court did not expressly dismiss the appeal, it had practically done so. If it had done so, the accused would have as of right come in revision to the High Court and the High Court then could have interfered with the decision. The record of the case being before the High Court, and it being clear that injustice had been done in the case to the accused, the mere fact that the record was examined by the High Court on an incompetent reference by the appellate Court, was not enough to prevent the High Court from interfering with the decision if a case for interference was made out. (*Mohamad Noor and Rowland, JJ.*) RAMESHWAR SINGH *v.* EMPEROR. **16 Pat. 413=1937 P.W.N. 596=170 I.C. 464=3 B.R. 734=38 Cr.L.J. 919=10 R.P. 128=18 Pat.L.T. 607=A.I.R. 1937 Pat. 440.**

——S. 438—*Order of District Magistrate not in judicial capacity—No penalty exacted for its non-compliance—Interference by High Court.*

The word 'proceeding' which is used in S. 438 must be a proceeding as referred to in S. 435, that is to say, a proceeding before any inferior Criminal Court. The High Court will not interfere where the Magistrate or other officer is acting in an executive and not in a judicial capacity. Moreover it is only when an order has been made, and for non-compliance of that order some penalty has been exacted, that the High Court will interfere. (*McNair and Khundkar, JJ.*) BEJOY KRISHNA DEB *v.* SHYAM NARAIN. **I.L.R (1939) 2 Cal. 532=187 I.C. 310=12 R.C. 575=41 Cr.L.J. 442=A.I.R. 1940 Cal. 30.**

——S. 438—*Reference by District Magistrate against order of trial Magistrate—District Magistrate ignorant of appellate order of Sessions Judge—Interference by High Court.*

The powers of reference conferred on a District Magistrate by S. 438 relate to proceedings taken by an inferior Court and the Judical Commissioner's Court will not interfere with an appellate order of a Sessions Judge upon a reference by the District Magistrate against the order of the trial Magistrate. The fact that the order of reference is made in ignorance of the existence of an appellate order makes no difference as principles involved are similar. (*Midleton, J.C.*) EMPEROR *v.* FAQIR MAHOMED. **166 I.C. 881=9 R. Pesh. 74=38 Cr.L.J. 335=A.I.R. 1937 Pesh. 6.**

——S. 438—*Reference under — Competency—Reference by District Magistrate criticising order of Sessions Judge—If to be accepted.*

The High Court will not ordinarily accept references from District Magistrates which involve a criticism of orders passed by Sessions Judges. But when the error is a simple and obvious one, the reference should be accepted. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* NASHKARO GULSHER. **31 S.L.R. 409=170 I.C. 676=10 R.S. 71=38 Cr L.J. 961=A.I.R. 1937 Sind 203.**

——S. 438—*Reference under—Discharge under S. 119, Cr. P. Code—Reference by District Magistrate—Letter of police officer criticising order of discharge—District Magistrate associating himself with criticism and forwarding letter—Propriety—Proper procedure.*

A District Magistrate making reference in respect of an order of discharge passed by a subordinate Magistrate under S. 119 should not associate himself with the criticism of the order by the police prosecutor. It is improper on his part to forward a letter of police officer containing his opinion with regard to the order to the Court of reference. If he thinks that the letter contains material of assistance to the Court he should embody that material in his own letter of reference. He should also himself consider the case with care before he commits himself to the reference. (*Davis, J.C. and Mehta, A.J.C.*)

CR. P. CODE (1898), S. 438.

EMPEROR *v.* ALI MAHOMED. **165 I.C. 950=9 R. S 114=38 Cr.L.J. 117=1936 Cr.C. 1099=A.I. R. 1936 Sind 243.**

——**S. 438**—*Reference under—Powers of High Court to interfere—Magistrate refusing to take action under S. 147, Cr. P. Code—Powers of High Court to order Magistrate to initiate proceedings.*

The High Court cannot in revision order a Magistrate to initiate proceedings under S. 147, Cr. P. Code, or under any of the preventive sections of the Code when he has refused to take action thereunder The Magistrate is responsible for the peace of the district and when he says that it is not a proper case under S. 147, Cr. P. Code, and therefore no action is necessary, it is not competent to the High Court to interfere with such order in a reference under S. 438, Cr. P. Code, by the Sessions Judge. (*Varma, J.*) B. B. BISWAS *v.* MUCHIRAM MAHATA. **5 B R. 389 =180 I.C. 332=11 R.P. 497=20 Pat.L.T. 194= 40 Cr.L.J. 345=1939 P.W.N. 21=A.I.R. 1939 Pat. 111.**

——**S. 438**—*Reference under—Procedure—If to be dealt with as on date of commencement of proceedings.*

A reference to the High Court under S. 438, Cr. P. Code, must be decided on the basis of the position as it was on the date the proceedings giving rise to the reference began. (*Rowland, J.*) MUZAFFERPUR MUNICIPALITY *v.* TARA PRASAD. **185 I.C. 630=12 R.P. 433=41 Cr L.J. 217=1940 P.W.N. 255=6 B.R. 226=A.I.R. 1940 Pat. 313.**

——**S. 438**—*Reference under—When to be made—Grounds for.*

Where the District Magistrate or Sessions Judge merely differs from the first Court's appreciation of facts or where he suspects an error of law, then unless the error of law is manifest, unless the case involves a matter of principle and unless there has been a serious failure of justice, unless in short he is clearly of opinion that the public interest demands that there should be intervention by the High Court, he is not under obligation to refer the case. The High Court has ample powers in revision and the widest possible discretion; and if the High Court eventually allows such an application it is not thereby implied that the District Magistrate or Sessions Judge ought to have made a reference. (*Rowland, J.*) ABDUL MANIR *v.* KADIR KHAN. **167 I.C. 894=9 R P. 447=38 Cr.L J. 470=3 B.R 377= 1937 P.W.N. 220=18 Pat.L T. 227=A.I R. 1937 Pat. 110.**

——**S. 438**—*Reference in pending case—Competency—Power of Sessions Judge to make reference on abstract question of law—Reference when there is no illegality—Propriety of.*

Abstract questions of law should not be referred to the High Court for decision in pending proceedings. The object of Ss. 435 and 438, Cr. P. Code, being that incidents of incorrectness, illegality or impropriety should be brought to the notice of the High Court. Where the Sessions Judge himself considers that there has been no illegality, etc., there is no proper ground for making a reference. At the same time the High Court is not precluded from dealing with reference when the matter has been brought to its notice. (*Gruer, J.*) PIRTHVINATH *v.* EMPEROR.

CR. P. CODE (1898), S. 438.

I L.R. (1938) Nag. 248=175 I.C. 935=11 R.N. 18=39 Cr.L.J. 660=20 N.L.J. 151=A.I.R. 1938 Nag. 56.

——**S. 438**—*Reference—When justified.*

No reference ought to be made to the High Court unless the Judge referring is satisfied that there has been an injustice, and the mere fact that the Magistrate has not written a legal judgment does not show that his finding is wrong. (*Norman, I.C.S.*) GOPI *v.* EMPEROR. **1939 A M.L.J. 45.**

——**S. 438**—*Sessions Judge—Reference by—Appeal pending in his Court—Competency.*

Where accused is convicted on his own plea of guilty and he files an appeal to the Sessions Judge, the Sessions Judge cannot refer the case to the High Court when the appeal is pend ng before him. He should himself decide the appeal and if he considers that he has been unable to do substantial justice he may then report the case on the revision side with recommendations as to suggested action which as an appellate Court he was not able to take himself. (*Middleton, J.C.*) MIR GHAWAS *v.* EMPEROR. **161 I.C. 320=37 Cr. L.J. 470=8 R. Pesh. 170=1936 Cr.C. 210=A.I. R. 1936 Pesh. 81.**

——**Ss. 438 and 439**—Discretion—Case under S. 145—Magistrate not awarding costs—Reasons not stated—Revision—Interference. *See* CR. P. CODE, S. 145. **18 Pat.L.T. 714=A.I.R. 1937 Pat. 559.**

——**Ss. 438 and 439**—*Enhancement of sentence—Charge and conviction under S. 193, I. P. Code, in the alternative for making contradictory statements under S. 164, Cr. P. Code, and in the sessions trial—Absence of proof as to which statement was false—Enhancement of sentence—Propriety of.*

The accused made a statement under S. 164, Cr. P. Code, and at the trial in the Sessions Court his evidence contradicted that statement. He was, therefore, charged under S. 193, I. P. Code, with perjury for having made contradictory statements, and convicted and sentenced. On a reference to the High Court by the District Magistrate for enhancement of sentence,

Held, that in such a case, where it had not been proved which of the two statements was false, and the accused had been convicted in the alternative, the High Court should not enhance the sentence, as there was no case for enhancing the sentence. (*Beaumont, C.J. and Divatia, J.*) EMPEROR *v.* SULTANSHA SIDISHA. **42 Bom.L.R. 745.**

——**Ss. 438 and 439**—Interference—Discretionary orders—Order for production of documents under S. 94—Revision. *See* CR. P. CODE, S. 94. **42 Bom.L.R. 787.**

——**Ss. 438 and 439**—*Order under S. 117 (3)—Revision—Interference.*

Although in the case of an emergency order under S. 117 (3), a Court in revision is not in a position, as is the Magistrate to understand the emergency and necessity for the order and will not substitute its own opinion for that of the Magistrate, yet the order of the Magistrate must have a legal basis, though proceedings under Chap. 8 are only of a quasi judicial nature. Where the order is without legal basis the High Court can interfere in revision. (*Davis, J.C. and Weston, J.*) EMPEROR *v* SUMAR. **I.L.R. (1940) Kar. 494=A.I.R. 1940 Sind 175.**

CR. P. CODE (1898), S. 438.

——Ss. 438 and 552—*Powers of District Magistrate—Order directing minor girl to be produced in Court and handed over to her husband.*

Under S. 438, all that the District Magistrate can do is to refer the matter to the High Court with his recommendation. His powers under that section refer to sentences imposed against the applicant before him. Where, therefore, the order complained against is an order directing a minor girl to be produced in Court and handed over to her husband, the District Magistrate has no power in revision to set it aside. Nor is it open to him to set aside the order in virtue of the provisions of S. 552. The District Magistrate can only act under that section, where there is a complaint before him on oath of the abduction or unlawful detention of a woman or of a female under the age of 16 years. (*Thom, J.*) MOTI *v.* BENI. 166 I.C 847=9 R.A. 455=38 Cr L.J. 301 =1937 A L.R. 90=1936 A.L.J 1097=1936 A.Cr. C. 192=1936 A.W.R. 920=1936 Cr.C. 1111=A. I.R. 1936 All. 852.

——S. 439.

Abatement.
Accused.
Acquittal.
Applicability.
Competency of Revision.
Construction and scope.
Discharge.
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Finding of fact.
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Powers of Courts.
Quashing proceedings.
Scope.
Technicality.
Time limit.

Abatement.

——S. 439—*Abatement—Revision against sentence of fine—Death of petitioner.*

A revision petition filed against a sentence of fine does not abate on the death of the petitioner. (*Skemp, J.*) RAM CHAND *v.* EMPEROR. 189 I.C 343=13 R.L. 88=41 Cr.L.J. 729=42 P.L.R. 215 =A.I.R. 1940 Lah. 274.

"Accused".

——S. 439 (2)—*"Accused"—Accused to whom compensation has been awarded—If "accused"—Setting aside order of compensation without accused being served—If illegal.*

Although the interests of justice require that ordinarily an accused person should have notice of any proceedings in which an order awarding compensation to him is to be set aside, he cannot be deemed an accused person on his defence within the meaning of S. 439 (2), Cr. P. Code, so that if, after proper attempts have been made, he cannot be served, an illegal order for compensation passed under S. 250, Cr. P. Code, must not necessarily stand for ever. Moreover, S. 439 (2), Cr. P. Code, must be read with sub-s. (1) of the same section, and the frame of the whole section appears to have application to an accused person charged with some offence and not to an accused person to whom compensation has been ordered to be paid and who is in the position, so far as the order of compensation is concerned, of the complaint. (*Davis, J.C. and Mehta, A.J.C.*) JUMO SILEMAN *v.* HASHIM UMAR. 31 S.L.R. 51=169 I C. 431=10 R.S. 3=38 Cr.L.J. 783=A.I.R. 1937 Sind 125.

CR. P. CODE (1898), S. 439.

Acquittal.

——S. 439—*Acquittal—Interference with.*

The High Court does not ordinarily interfere in revision with judgments of acquittal unless there has been a gross error or grave injustice. (High Court did interfere in this case.) (*Rowland, J.*) BASUDEO LAL *v.* BINDESHRI PRASAD. 172 I.C. 175=10 R.P. 301=39 Cr.L.J. 78=1937 P W.N. 706=A.I.R. 1937 Pat. 646.

——S. 439—*Acquittal—Interference—Grounds—Misreading evidence of a witness.*

A single mistake on the part of an appellate Magistrate of misreading the evidence of a particular witness, would not justify the use of the extraordinary powers which the High Court has in revision of setting aside an order of acquittal. (*James, J.*) RAGHO SINGH *v.* RAM BIRICH SINGH. 177 I.C. 999=5 B.R. 45=11 R.P. 203=39 Cr. L.J. 968=A.I.R. 1939 Pat. 28.

——S. 439—*Acquittal—Interference in revision.*

The High Court will not on an application in revision against an acquittal treat the case before it as a case of appeal. It will not be prepared to interfere unless there are exceptional matters compelling it to do so, as for example where the Magistrate does not appear to have exercised an impartial judicial mind in considering the evidence, where he has entirely left evidence out of consideration or has relied upon evidence which is not to be found on the record. Though the High Court is not bound to accept all the findings of fact of the lower Courts, the power to interfere is one to be exercised most sparingly and only when there appears to have been a miscarriage of justice or a perverse and unreasonable decision. The mere possibility of the High Court taking a different view of the evidence from that taken by the trial Court, is no ground for asking the High Court to set aside an acquittal and direct a retrial. (*Zia-ul-Hasan and Yorke, JJ.*) CHANDRIKA PRASAD *v.* MAHOMED JAFAR. 190 I.C. 266=1940 A.W.R. (C.C.) 373= 1940 A.Cr C. 111=1940 O.L.R. 565=1940 O.A. 734=1940 O.W.N. 757.

——S. 439 — *Acquittal — Revision against—Acquittal in appeal—Power of High Court to order rehearing of appeal.*

Though the High Court should not, in revision against an order of acquittal passed in appeal, direct a rehearing of the appeal on the ground that the appellate Court had taken a mistaken view of the facts, yet it can, and should in proper cases where the appellate Court has misdirected itself on a point of law, point out the error and direct the rehearing of the appeal. (*Mosely, J.*) MA THAUNG *v.* NANDIYA. 1938 Rang L.R. 121= 175 I.C 547=10 R.R. 511=39 Cr.L J. 623=A.I. R. 1938 Rang. 193.

——S. 439—*Acquittal — Revision against—Erroneous view of law.*

Revision of an order of acquittal may be allowed when the order of acquittal is based on

CR. P. CODE (1898), S. 439.

an erroneous view of the law. (*Bhide, J.*) MT. HARBANS KAUR *v.* LAHARI RAM. 178 I.C. 791=11 R.L. 499=40 Cr.L.J. 131=A.I.R. 1938 Lah. 739.

——S. 439—*Acquittal — Revision against—Interference—Power of High Court.*

The High Court has power to interfere in revision with an appellate judgment of acquittal, and though that power should be sparingly exercised, it would be wrong to refuse to exercise it in cases where there has been a failure of justice by reason of the appellate Court not having brought a judicial mind to bear upon the evidence. (*Bartley and Khundkar, JJ.*) SATISHCHANDRA DAS *v.* CHINTA HARAN SAHA. 178 I C. 56=11 R. C. 316=39 Cr.L.J. 988=43 C.W.N. 25=67 C L. J. 571=A I.R. 1938 Cal. 613.

——S. 439—*Acquittal—Revision against—Interference in.*

Ordinarily the Chief Court would not interfere with an order of acquittal specially in a case under S. 323, I. P. Code, but would do so if it appears to it that the trying Magistrate has acquitted the accused owing to a wrong view of the law. (*Zia-Ul-Hasan, J.*) RAM DAYAL *v.* MATA DIN. 166 I.C. 987 (1)=9 R.O. 352=1937 O.L.R. 82=1937 A.Cr.C. 57=38 Cr.L J. 329=1937 O.W N. 281=A.I.R. 1937 Oudh 283.

——S. 439—*Acquittal—Revision against—Interference—Grounds.*

The High Court has ample powers in revision and the widest possible discretion, but the interference with the order of acquittal by the High Court in revision is reserved for exceptional circumstances and for cases in which there appears to have been failure of justice due to some error in a matter of principle. No hard and fast rule however can be laid down. Where the trying Magistrate failed to appreciate the questions of fact which he had to determine in order to adjudicate on the plea of right of private defence and acquitted the accused, and the brother of the complainant who died during the trial, made an application for revision of the order of acquittal to High Court.

Held, that the Magistrate having failed to appreciate the question of fact which he had to determine in order to adjudicate on the plea of private defence, there was no proper trial of the question and so there should be a re-trial (*Rowland, J.*) ABDUL MANIR *v.* KADIR KHAN. 167 I.C. 894=9 R.P 447=38 Cr L.J 470=3 B. R. 377=1937 P.W N. 220=18 Pat.L.T. 227=A.I.R. 1937 Pat. 110.

——S. 439—*Acquittal—Revision against—Interference—Grounds.*

The High Court rarely interferes with acquittals in revision whether it is at the instance of Government or on behalf of private individual. But when it comes to the notice of the High Court that the acquittal in a case has depended not on an appreciation of evidence, but has occurred in complete disregard of the Code of Criminal Procedure, the High Court shall interfere despite the fact that no appeal has been preferred by Government. (*Grille, J.*) KHILAWANSINGH MANSINGH DANGI, *In re*. I L.R. (1937) Nag. 286=166 I.C. 926=38 Cr.L.J. 334=9 R. N. 154=A.I.R. 1937 Nag 72

——S. 439—*Acquittal—Revision against—Interference at instance of private parties.*

CR. P. CODE (1898), S. 439.

Although the High Court is competent to entertain an application to set aside an acquittal, it is not the custom to do so on a consideration of the evidence at the instance of private individuals except in extreme cases. (*Grille, J.*) *In re* KISNI BAXIRAM MARWADI. I.L.R. (1937) Nag. 163=169 I C. 96=9 R.N. 301=38 Cr.L.J. 719=A.I.R. 1937 Nag 103.

——S. 439—*Acquittal—Revision against—Interference—Rule—Civil remedy open to aggrieved party—Jurisdiction to declare acquittal wrong without setting it aside.*

Judgments of acquittal should not ordinarily be interfered with in revision, and this rule applies with greater force to cases where the offence is one like defamation in respect of which there is a civil remedy open which is in some respects more appropriate and satisfactory than the remedy by way of criminal prosecution. But if the acquittal be the result of misappreciation and misunderstanding of the evidence in the case, the High Court, in the interests of justice, would declare the judgment of acquittal to be wrong, though it need not be set aside in revision. (*Pandrang Row, J.*) GOPALA BHATTAR *v.* PARTHASARATHI IYENGAR. 1937 M.W.N. 19.

——S. 439—*Acquittal—Revision against—Maintainability.*

Stone, C.J. and Niyogi, J.—A High Court can entertain an application for revision against an order of acquittal at the instance of a private complainant in view of S. 439, Cr. P. Code, read with S. 423 (1) (*a*) as limited by S. 439 (4). (*Grille, J.*) RAGHUNATHMAL *v.* PATIRAM. I.L. R. (1938) Nag. 157=172 I C 177=10 R.N. 172=39 Cr.L.J. 75=A.I.R. 1937 Nag. 394.

——S. 439—*Acquittal—Revision against—Petition by private party—Interference—Powers of High Court.*

It is open to the High Court to set aside an order of acquittal at the instance of a private complainant and no distiction can be made between a petition for revision by a private complainant and a case reported by a Sessions Judge or a District Magistrate. Interference under S. 439, Cr. P. Code, with an order of acquittal is not limited to cases where there has been an error of law or apparent injustice resulting in misappreciation or misapprehension of a legal principle. The High Courts of India have nevertheless held in several cases that the Court should ordinarily not interfere too freely and especially where the interference is invited on a question of fact. (*Young, C.J. and Blacker, J.*) SHAM LAL *v.* CHAMAN LAL. 184 I C. 358=12 R.L. 212=40 Cr.L.J. 942=41 P.L.R. 1=A.I.R. 1939 Lah. 406.

——S. 439—*Acquittal — Revision against—Power to set aside acquittal not based on merits.*

Judicial Commissioner's Court, upon an application in revision by the complainant, can set aside an acquittal not based on the merits of the case (being one under S. 247) and order the case to proceed according to law. (*Davis, J C. and Tyabji, J.*) MT. SONI *v.* KISHNOMAL. I.L.R. (1939) Kar. 385=180 I.C 989=11 R.S. 198=40 Cr.L J. 524=A.I.R. 1939 Sind 75.

——S. 439—*Acquittal — Revision against by private party—Maintainability—Rule.*

The High Court is as a rule loath to entertain revision applications by private parties against acquittals. But where there are clear indications

CR. P. CODE (1898), S. 439.

that the accused has been defying the law and disobeying the orders of Courts, both Civil and Criminal and been repeatedly creating trouble, and where the circumstances are such that the High Court would feel it its duty *suo motu* to interfere such applications would be entertained. (*Khaja Mohammad Noor and Dhavle, JJ.*) AMBIKA THAKUR *v.* EMPEROR. **18 Pat. 544=6 B. R. 203=185 I.C. 529=12 R.P. 389=21 Pat.L.T. 45=41 Cr.L.J. 191=1939 P.W.N. 747=A.I.R. 1939 Pat. 611.**

——S. 439—*Acquittal—Revision against—Interference—Principles—Wrong application of law—If a ground—Practice.*

Acquittals should not be lightly interfered with in revision at the instance of a private party. The fact that the trying Magistrate, on the facts found by him, has wrongly applied the law, is no ground for reopening the case and for putting the accused person in peril again. An acquittal is not to be set aside merely because bad reasons are given for it. Before the High Court can be induced to interfere, it must be satisfied that the acquittal is wrong altogether, apart from the reasons given by the trying Magistrate. Where it is apparent from the plea of the accused that, if his plea be true, he is not guilty of any offence, and where it is impossible to say, without going into the facts, whether the acquittal is a bad one, the High Court will decline to interfere in revision, according to the long and well-established practice of the Court. (*Cunliffe and Henderson, JJ.*) ROSHAN LAL KHETRI *v.* S. Z. AHAMED. **164 I.C. 996=9 R.C. 327=37 Cr.L.J. 1081=40 C.W.N. 931.**

——S. 439—*Acquittal — Revision against—Interference at the instance of private individual.*

The High Court, though it has power under S. 439, Cr. P. Code, to interfere in revision with an order of acquittal, yet it will not entertain any application for revision against an order of acquittal made by a private individual unless there exist certain circumstances which make it imperative in the interest of public justice for the High Court to set aside an order of acquittal which is manifestly perverse and unjust. (*Nanavutty, J.*) MAULA BAKHSH *v.* RIAS AHMAD. **161 I C. 828=8 R.O. 340=37 Cr.L.J. 490=1936 O.W.N. 381=1936 O.L.R. 207=A.I.R. 1937 Oudh 77.**

——S. 439—*Acquittal—Revision against—Interference—Powers of High Court.*

The High Court has power in revision to interfere with an acquittal, but should not do so except in the interests of public justice. Further the High Court cannot convert an acquittal into a conviction. A verdict of acquittal can only be revised on the ground of some procedural defect in the trial. (*Norman, I. C. S.*) ARIF ALI *v.* YASIN ALI. **1936 A.M.L.J. 65.**

——S. 439—*Acquittal—Revision against—Maintainability.*

The High Court will not ordinarily entertain an application for revision from an order of acquittal, as under S. 417 an appeal is permitted against such order, unless there has been illegality in the proceedings of the Court which passed the order of acquittal or if the order was made without jurisdiction. (*Mya Bu, J.*) HTANDA MEAH *v.* ANAMALE CHETTYAR. **14 Rang. 744=163 I.C. 242 (2)=9 R.R. 6=37 Cr.L.J. 832=1936 Cr.C. 523=A.I.R. 1936 Rang. 247.**

CR. P. CODE (1898), S. 439.

——S. 439—*Acquittal—Revision against—No appeal by Government—Reference by District Magistrate—Interference by High Court.*

Where it is open to the Local Government to appeal against an order of acquittal but no appeal is brought, the practice of the High Court is not to interfere on revision, except in very unusual cases, even on a reference by the District Magistrate. (*Skemp, J.*) EMPEROR *v.* DAYAL SINGH. **17 Lah. 604=167 I.C. 559=9 R L. 519 (2)=38 Cr.L.J. 432 (1)=38 P.L.R. 1015=A.I.R. 1937 Lah. 132.**

——S. 439—*Acquittal — Revision against—Powers of High Court.*

Quaere.—Whether the High Court has power in revision at the instance of a private party to interfere with an acquittal? (*Bose, J.*) KARTIKRAM *v.* EMPEROR. **167 I.C. 569=9 R.N. 202=19 N.L J. 158=38 Cr.L.J. 433=A.I.R. 1937 Nag. 123.**

——S. 439—*Alteration of conviction—Power of High Court.*

On a reference under S. 439, Cr. P. Code, the High Court has no power to alter a conviction under S. 323, to one under S. 325, I. P. Code. (*Bartley and Roxburgh, JJ.*) JOYRAM RAKSHIT *v.* ANNADA PRASAD KUNDU. **72 C.L.J. 59.**

Applicability.

——S. 439—Applicability—Order of District Judge declaring person to be tout under S. 36, Legal Practitioners' Act—Revision—Jurisdiction of High Court. *See* C. P. CODE, S. 115. **47 L.W. 578.**

——S. 439—Applicability—Order of District Judge under S. 36, Legal Practitioners Act declaring person to be tout—Revision—Jurisdiction of High Court. *See* C. P. CODE, S. 115. **(1938) 2 M.L.J. 100.**

——S. 439—*Applicability—Order under S. 476-B by Civil Court—Revision to High Court—Procedure governing—C. P. Code, S. 115—Applicability.*

An application in revision from an order under S. 476-B, Cr. P. Code, by a Civil Court to the High Court should be heard and decided in accordance with the provisions of S. 439, Cr P. Code, and not S. 115, C. P Code. The order in question is one made by a Criminal Court or a Court exercising criminal power, and power to revise such order arises under S. 439, Cr. P. Code; S. 115, C. P. Code, does not apply to such a case.

Broomfield, J.—The commonsense view is that proceedings relating to prosecutions for Criminal offences alleged to have been committed in Court are proceedings of a criminal nature, whether the alleged offence took place in a criminal, Civil or Revenue Court. *Prima facie* the procedure as to revision should be the same as in all other criminal proceedings. (*Beaumont, C.J., Broomfield and Wassodew, JJ.*), EMPEROR *v.* BHATU SADU MALI. **I.L R. (1938) Bom. 331=174 I.C. 780=39 Cr.L.J. 495=10 R.B 495=40 Bom.L R. 297=A.I.R. 1938 Bom. 225 (F.B.).**

——S. 439 (4)—*Applicability—Partial acquittal.*

The bar in sub-S. (4) of S. 439 applies to partial as well as to a total acquittal. Hence where an accused is convicted under S. 304 (1), I. P. Code, and is thus acquitted of offence under S. 302, he cannot in revision be convicted under

S. 302. (*Davis, J.C. and Lobo, J.*) JADO RAHIM *v.* EMPEROR. I.L.R. (1939) Kar. 75=11 R.S. 93=40 Cr.L.J. 93=178 I.C. 520=A.I.R. 1938 Sind 202.

——S. 439—Applicability—Proceeding under S. 476 in Civil Court—Procedure governing—Revision—If governed by Cr. P. Code or C. P. Code. *See* C. P. CODE, S. 115. (1940) 1 M.L.J. 709 (F.B.).

——S. 439—Bail bond—Forfeiture—Failure to hear surety before order of forfeiture—If justifies interference. *See* CR. P. CODE, S. 514. 185 I.C. 598=6 B.R. 221.

Competency of revision.

——S. 439—*Competency of revision—Appellate order of District Magistrate—No revision application to Sessions Judge—Chief Court, if can entertain application for revision—Practice.*

It is the practice of the Oudh Chief Court to refuse to entertain an application in revision against an appellate order of the District Magistrate confirming the conviction and sentence of the applicant where he has not gone in revision to the Court of the Sessions Judge who has concurrent jurisdiction. (*Thomas, J.*) RAJA RAM *v.* EMPEROR. 171 I.C. 167=1937 O.L.R. 523=38 Cr.L.J. 1024=10 R.O. 92=1937 A.Cr.C. 153 (1)=1937 O.W.N. 1044.

——S. 439—Competency of revision—Conviction of European British subject by District Magistrate of Coorg and confirmation of conviction by Sessions Judge—Claim to trial as European British subject not made—Revision to High Court—Competency—Revision—If continuation of same proceeding. *See* CR. P. CODE, Ss. 4 (*j*), 439 AND 528-B. 71 M.L.J. 827.

——S 439—*Competency of revision—Death of applicant after filing application.*

Any case can be brought to the notice of the High Court in revision by any person. Where, therefore, the applicant dies after filing the application in revision, the Court will thereafter take action *suo motu* if the record indicates that there is sufficient reason to do so. (*Allsop, J.*) FARID-UD-DIN KHAN *v.* EMPEROR. 162 I.C. 338=37 Cr.L.J. 562 (1)=8 R.A. 861=1936 A.L.J. 253=1936 A.Cr.C. 73=1936 A.W.R. 273=1936 All. L.R. 424=1936 Cr. C. 479=A.I.R. 1936 All 313.

——S. 439—*Competency of revision — Lower Courts relying on inadmissible evidence.*

Where the Courts below rely on evidence inadmissible for the purposes to which they put it, there is a case for revision. (*Middleton, A.J.C.*) FAZAL AHMAD *v.* EMPEROR. 161 I.C. 885=37 Cr. L.J. 603=8 R. Pesh. 186=1936 Cr.C. 218=A.I.R. 1936 Pesh. 72.

——S. 439—*Competency of revision—Magistrate framing charge for lesser offence and passing unappealable sentence.*

It is the nature of the sentence which does or does not give a right of appeal, and it is hardly open to accused persons to say that they should have been given a higher sentence so that they might have a right of appeal. Where a magistrate contents himself with framing a charge of an offence under S. 147, I. P. Code, instead of under S. 452, I. P. Code, and passes an unappealable sentence, the High Court will not interfere in its extraordinary jurisdiction in revision, on

the ground that if the magistrate had framed a charge under S. 452, I. P. Code, he would have been compelled to pass an appealable sentence. (*Allsop, J.*) ANANT SINGH *v.* EMPEROR. 161 I.C. 307=37 Cr. L.J. 417=8 R.A. 722 (1)=1936 A.L.J. 209=1936 A.W.R. 129=1936 A.Cr.C. 50=1936 All. L.R. 250=1936 Cr.C. 175=A.I.R. 1936 All. 147.

——S. 439—*Competency of revision—Order of District Magistrate under S. 195 (5) directing withdrawal of complaint.*

Making of a complaint under S. 195 (1) (*a*) is not a judicial act but is the act of a public servant. Hence no revision lies under S. 439 from the order of the District Magistrate under S. 195 (5) directing withdrawal of such complaint as it is not passed by him as a Criminal Court. (*Almond, J.C.*) BABA DANE SHAH *v.* GURDITTA MAL. 174 I.C. 344=10 R. Pesh. 63=39 Cr.L.J. 445=A.I.R. 1938 Pesh. 9.

——S. 439—*Competency of revision—Sessions Court having concurrent powers with High Court—Revision direct to High Court—If lies.*

It is not usual for the High Court to entertain an application for revision direct when the applicant has not gone to the Court of Session which has concurrent powers of revision. But if the application has been admitted, it must be disposed of on the merits. (*Dhavle, J.*) CHOKAT AHIR *v.* SURAJ SINGH. 186 I.C. 182=12 R.P. 474=1940 P.W.N. 271=41 Cr.L.J. 257=21 P.L.T. 627=6 B.R. 301=A.I.R. 1940 Pat. 299.

Construction and scope.

——S. 439 (5)—*Construction and scope—Party failing to appeal—Application in revision—Maintainability—Conviction wrong and illegal on face of it—High Court's powers to interfere—Government of India Act, S. 107.*

The words of S. 439 (5) are capable of only one interpretation, *viz.*, that where the party in question has not appealed, no application made by him in revision can be entertained by the High Court. But in the case of an illegal or wrong conviction on the face of it, the High Court in the exercise of its powers of superintendence under S. 107 of the Government of India Act would interfere and set aside the conviction. The powers of superintendence under S. 107 of the Government of India Act, are, it is obvious, not ordinarily meant to be exercised where no power of revision or interference exists under the Cr. P. Code and ought to be exercised only in rare cases where an obvious miscarriage of justice cannot otherwise be prevented. Such powers are not clearly intended to be invoked in order to get round any of the express provisions of the Code. But in an obvious case of a wrong or illegal conviction on the face of it, it is desirable to use the power of superintendence in judicial matters which vests in the High Court under S. 107, Government of India Act. (*Broomfield and Sen, JJ.*) EMPEROR *v.* JAMNADAS NATHJI. I.L.R. (1937) Bom. 263=39 Bom.L.R. 82=168 I.C. 718=9 R.B. 393=38 Cr. L.J. 606=A.I.R. 1937 Bom. 153.

——S. 439 (6)—*Construction and scope—Notice of enhancement of sentence—Accused showing cause—Right to challenge verdict of jury—Facts—If can be gone into—Cr. P. Code, S. 423 (2).*

The provision in S. 439 (6), Cr. P. Code, entitling the accused to show cause against his conviction only means that he can show cause in accor-

dance with law; and where his conviction is based on the verdict of a jury, he has no greater right of appeal that he possesses under S. 423 (2) and cannot challenge the facts. The Court in considering whether the conviction was justified cannot go behind the verdict of the jury on facts, but, of course, in considering the notice to enhance, the Court can look at the whole of the evidence in order to satisfy itself as to the exact nature of the offence in order to determine what sentence should be imposed. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* RAMJI VALA. **I.L.R. (1940) Bom. 500=190 I.C. 412=42 Bom. L.R. 475=A.I.R. 1940 Bom. 279.**

——S. 439—Conviction by Union Bench (under Bengal Village Self Government Act)—Revisional Jurisdiction of High Court. *See* BENGAL VILLAGE SELF GOVERNMENT ACT SS. 71 AND 93. **42 C.W. N. 1068.**

Discharge.

——S. 439—*Discharge—Order setting aside of—Interference—Grounds.*

The High Court sitting in revision has to consider not whether it would have passed an order under S. 437 of the Cr. P. Code, setting aside the discharge, but whether it can be said that no reasonable Judge could hold the view of the Magistrate's order. (*Horwill, J.*) HARICHANDRA REDDI *v.* SYED KASHIM SAHIB. **1937 M. W. N. 1240.**

Discretion.

——S. 439—*Discretion—Dismissal of complaint—Revision—Interference.*

When the lower Court has used its discretion in dismissing a complaint, though there might be something which can be said against that order, if there is as much to be said in its favour, the discretion of the lower Court in dismissing the complaint should not be lightly interfered with by the appellate Court. Jurisdiction in revision is not lightly to be exercised. (*Davis, J.C.*) SADHURAM CHIMANDAS *v.* CHIMANDAS BUDHURAM **I.L.R. (1940) Kar. 275=169 I.C. 112=9 R.S. 277 38 Cr.L.J. 742=A.I.R. 1937 Sind 81.**

——S. 439—*Discretion—Erroneous under S. 523—Interference by High Court.*

Where a Magistrate who has refused to take proceedings under S. 144, Cr. P. Code, considered that, having refused to take proceedings under S. 144 he was not competent to investigate the question as to who was in possession of the property seized by the police and has therefore directed the police to retain it in their custody, and, if it was liable to decay, to sell it, and deposit the money in safe custody pending orders from a proper Court, the High Court would interfere with his order as he has not judicially exercised the discretion which S. 523 confers on him. The Magistrate ought in such a case to exercise the discretion conferred on him by S. 523, that is, if the Magistrate decides that one or other of the parties was in possession at the time the police seized the property, the proper order to be passed would be to restore that party to possession. If the Magistrate is unable to decide who is in possession, it would be his duty to issue a proclamation under sub-S. (2) of S. 523 and proceed in accordanee with the provision of that sub-section. (*Agarwala, J.*) RAMSAGAR YADEN *v.* M. YUNUS. **185 I.C. 773=12**

R. P. 451=41 Cr.L.J 234=6 B.R. 250=1939 P. W.N. 675=20 Pat. L.T. 712=A.I.R. 1940 Pat. 32.

——S. 439—Discretion—Order setting aside discharge and directing committal under S. 374—Revision—Interference. *See* CR. P. CODE, S. 473. **1937 A.W.R. 261.**

——S. 439—Discretion under—Interference with—Summary order of dismissal of appeal. *See* CR. P. CODE, S. 421. **19 Pat.L.T. 28.**

——S. 439—*Discretion of High Court.*

The exercise by the High Court of the revisional jurisdiction is a matter of discretion. (*Davis, J.C. and Tyabji, J.*) EMPEROR *v.* ABDUL MAH KARIM. **I.L.R. (1940) Kar. 83=185 I.C. 268=12 R.S. 161=41 Cr.L.J. 143=A.I.R. 1939 Sind 335.**

Enhancement of sentence.

——S. 439 (6)—*Enhancement of sentence—Accused showing cause against conviction—Duty of High Court to examine evidence.*

On a reference under S. 438, Cr. P. Code, recommending an enhancement of sentence, the accused is entitled to show cause against his conviction. If he does so, the High Court is compelled to examine for itself the actual evidence in the case in order to decide whether the conviction is a proper one or not. (*Bartley and Roxburgh, JJ.*) JOYRAM RAKSHIT *v.* ANNADA PRASAD KUNDU. **72 C.L.J. 59.**

——S. 439—*Enhancement of sentence—Application by private individual—If entertainable—Practice—Principle.*

It is the practice of the Oudh Chief Court not to entertain applications for enhancement of sentence on behalf of private parties. This is based on the sound principle that Courts should not be allowed to become tools in the hands of the members of the public in giving vent to their private animosities. (*Zia-ul-Hasan and Yorke, JJ.*) EMPEROR *v.* SOM NATH. **14 Luck. 401=11 R.O. 153 =1939 A.Cr.C. 28=40 Cr.L.J. 181=179 I.C. 250 =1939 O.L.R. 9=1938 A.W.R. (C.C.) 144=1938 O.W.N. 1366=1939 O.A. 101=A.I.R. 1939 Oudh 54.**

——S. 439 — *Enhancement — Application by private complainant—Interference—Principles.*

In most cases the Court would refuse to entertain an application for enhancement by a private complainant where Government has not seen fit to move. But where in a case there is manifestly a ground for interference it does not matter how the case comes before the Court, whether it be of its own motion, or at the instance of a private complainant, the Court will interfere. (*Gruer, J.*) SHANKAR *v.* RAMA. **189 I.C. 731=41 Cr.L.J. 793 =1940 N.L.J. 389=A.I.R. 1940 Nag. 276.**

——S. 439—*Enhancement of sentence—Conviction under S. 247, I. P. Code—Sentence of six months rigorous imprisonment.*

High Court in the exercise of its revisional power enhances a sentence only where the sentence is so grossly inadequate as to amount to a miscarriage of justice. There was a conviction under S. 247, I. P. Code, and a sentence of one year's rigorous imprisonment was passed. On appeal the Sessions Judge maintained the conviction but reduced the sentence to a term of six months. Petition was made to the High Court for enhancement of sentence.

CR. P. CODE (1898), S. 439.

Held, that the reduction of sentence being reasonable and the sentence not being grossly inadequate, the High Court would not enhance the sentence. (*Abdul Rashid, J.*) MANNA SINGH *v.* EMPEROR. 169 I.C. 171=9 R.L. 720=38 Cr.L.J. 720=A.I.R. 1937 Lah. 215.

———S. 439—*Enhancement of sentence—Exercise of power.*

The power to enhance sentence should be sparingly exercised by the High Court and sentences should be enhanced only in cases where the failure to enhance the sentence would lead to a serious miscarriage of justice. The mere fact that the High Court, had it been trying the case, might have imposed capital sentence is not a sufficient reason for enhancement. (*Young, C.J. and Abdul Rashid, J.*) UTTAM SINGH SOCHET SINGH *v.* EMPEROR. I.L.R. (1938) Lah. 347=174 I.C. 949 =10 R.L. 644=40 P.L.R. 982=39 Cr.L.J. 502= A.I.R. 1938 Lah. 260.

———S. 439—*Enhancement by High Court—Application by complainant—Principles.*

It would only be in a very extraordinary case that the High Court would enhance a sentence on the application of a complainant which the Crown opposes. The complainant may have been put to considerable loss, but the Criminal Courts, however, cannot guarantee to reimburse a complainant by infliction of a heavy penalty on the accused. (*Gruer, J.*) BHAGOLELAL *v.* EMPEROR. 189 I.C. 382=41 Cr.L.J. 734=13 R.N. 47=1940 N.L.J. 309=A.I.R. 1940 Nag. 249.

———S. 439—*Jail appeal of accused dismissed summarily—Recommendation for enhancement of his sentence—Accused if entitled to show cause against his conviction.*

Sub-S. (6) of S. 439 can refer only to sub-S. (5) of the section, and means that, although a party, who has not appealed, could not be allowed to make an application in revision yet, if proceedings are taken against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause, be entitled also to show cause against his conviction. Sub-S. (6) is intended to operate as an exception to what is otherwise laid down in the section itself. Where however a recommendation for enhancement of sentence of an accused is made to High Court after the decision of the appeal filed by him against his conviction, the accused, when called upon to show cause against the enhancement of sentence, is not entitled to show cause against his conviction but may only show cause against the enhancement of his sentence. The order of the High Court in appeal is final and the accused cannot be heard again to show cause against his conviction. The fact that the accused's appeal from jail was dismissed summarily does not make any difference. Such appeals are dismissed summarily after consideration of the grounds of appeal. in addition to the judgment and if necessary, the evidence. (*Mosely, J.*) THE KING *v* NGA BA SAING. (1940) Rang. L R. 145=185 I.C. 142=12 R.R. 181=41 Cr.L.J. 108=A.I.R. 1939 Rang. 392.

———S. 439—*Enhancement of sentence—Jury trial—Examination of evidence by High Court—Practice.*

It is well settled that on an appeal from the verdict of a jury, an accused person is not entitled to appeal on the facts merely because he is called upon to show cause why the sentence should not be enhanced. So. the High Court will not examine the evidence in order to decide whether the sentence should be enhanced. (*Henderson and Khundkar, JJ.*) FAZAR ALI *v*, EMPEROR. 43 C. W.N. 1032.

———S. 439—*Enhancement of sentence—Murder —Accused sentenced to transportation.*

Where in a murder case the Sessions Judge finds the accused guilty of murder but sentences him to transportation for life or for a long term of imprisonment and an appeal from that decision is heard by the High Court a long time afterwards, the High Court even if it confirms the conviction of murder should not open revision proceedings with a view to consider the desirability of enhancing the sentence to one of death since the accused has been led to believe that his life has been spared. (*Sharpe, J.*) NGA CHIT TIN *v.* THE KING. 183 I.C. 145=12 R R. 45=40 Cr.L.J. 725 =A.I.R. 1939 Rang. 225.

———S 439—*Enhancement of sentence—Murder —Sentence of transportation for life—Application for enhancement—Test to be applied—Interference—Grounds.*

Where an application is made to the High Court for enhancement of a sentence of transportation on a conviction for murder, the proper test to be applied is whether the only sentence which could be passed on the evidence is a sentence of death. There are many cases where Sessions Judges are too lenient in the exercise of the discretion vested in them by law, but the High Court will not interfere except when it finds that the sentence of death is the only possible sentence that could be inflicted. The accused who had for years ill-treated his wife, made preparations to murder her, went to the house of a neighbour and borrowed from the latter a bill-hook with which he killed his wife in a most brutal manner inflicting on her as many as eight wounds of a terrible nature. He immediately left the scene and remained in hiding for over 12 months. The Sessions Judge who tried him convicted him of the offence of murder, but awarded the lesser penalty of transportation for life.

Held, that the only possible sentence which a Court of law could pass in the circumstances was the sentence of death, and the sentence of transportation for life should consequently be enhanced to a sentence of death. (*Leach, C.J. and Burn, J.*) NARAYANASWAMI GOUNDAN *v.* EMPEROR. 1937 M.W.N. 1241.

———S 439—*Enhancement of sentence—Offence of murder—Accused sentenced to transporation though deserving death sentence.*

Where a Sessions Judge passes a more lenient sentence in contravention of the rulings of law which are laid down from time to time for the guidance of those dealing with criminal cases, the High Court will interfere and will enance the sentence. It does not, however, necessarily follow that the High Court must enhance the sentence in revision. It is recognized that a person who has, even wrongly, got the benefit of a lenient sentence at his trial, may sometimes be allowed to benefit by his good fortune, provided the sentence passed is one which is legal. The accused was sentenced to transportation for life for the offence of murder though in fact death sentence ought to have been passed on him. It was however found

that there was an absence of premeditation on the part of the accused to commit the offence and three months had elapsed from the date of such sentence during which the accused believed that his life would be spared.

Held, that the sentence of transportation for life passed on the accused should not be enhanced under the circumstances. (*Roberts, C.J. and Leach, J.*) NGA BO THIN *v.* EMPEROR. 1937 Rang.L.R. 169=171 I.C. 285=10 R.R. 141=38 Cr.L.J. 1051=A.I.R. 1937 Rang. 254.

——S. 439—*Enhancement of sentence—Petition by party—Practice.*

It is perfectly true that it is not the policy of the Lahore High Court to enhance sentences in criminal cases on a petition by a party; but it is not an invariable rule. (*Blacker, J.*) ATA MOHAMMAD *v.* KHANU. 173 I.C. 321=10 R.L. 435=39 Cr.L.J. 296=39 P.L.R. 659=A.I.R. 1938 Lah. 116.

——S. 439—*Enhancement of sentence—Powers of High Court—Government not moving in the matter.*

Ordinarily, it is for Government to move the High Court to enhance sentence, but if the attention of the Government is not drawn to a particular matter which requires attention, that is no reason why the High Court should not do its duty and exercise powers conferred on it by law, even in case of conviction by a Judge of the same Court. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* HAJIKHAMOO. 165 I.C. 933=9 R.S. 113=38 Cr.L.J. 114=1936 Cr.C. 1089=A.I.R. 1936 Sind 233.

——S. 439—*Enhancement of sentence—Power of High Court—Exercise of—Practice.*

The power to enhance sentences should be sparingly exercised by the High Court and sentences should be enhanced only in cases where the failure to enhance the sentence would lead to a serious miscarriage of justice. The mere fact that the High Court, had it been trying the case, might have imposed the capital sentence, is not a sufficient reason for enhancement. (*Young, C.J. and Abdul Rashid, J.*) UTTAM SINGH *v.* EMPEROR. I.L.R. (1938) Lah. 347=174 I.C. 949=10 R.L. 644=39 Cr.L.J. 502=40 P.L.R. 982=A.I.R. 1938 Lah. 260.

——S 439—*Enhancement of sentence—Practice.*

Enhancement of sentence after trial is a very real hardship to the prisoner and should be resorted to only when the original sentence is grossly inadequate. (*Skemp, J.*) EMPEROR *v.* SARDAR MAHOMED. 42 P.L.R. 150.

——S. 439—*Enhancement of sentence—Revision.*

Where a sentence is substantial and is not so grossly inadequate as to amount to a miscarriage of justice, the High Court will not enhance the sentence in revision. (*Abdul Rashid, J.*) GHULAM HAIDAR *v.* EMPEROR. 39 P.L.R. 11.

——S. 439—*Enhancement of sentence—Trial by jury and sentence not one of death—Enhancement of sentence to one of death—Propriety.*

An acaused when appearing in answer to a rule to show cause why the sentence passed on him should not be enhanced is in the same position as if he were appealing from an order of conviction. When the trial has been by jury and when the sentence is not one of death the accused cannot ask the Court to enter into questions of fact. If

the accused had been sentenced to death the High Court can consider whether or not the jury were right in their conclusions on the facts, but if the accused have not been condemned to death they cannot appeal on facts and the High Court is therefore debarred from considering whether or not the facts are true. In these circumstances it would be unjustifiable and unfair to enhance the sentence passed to one of death. 62 Cal. 952 and A.I.R. 1934 Cal. 105, Rel. on. (*Henderson and Sen, JJ.*) MOSELADDI *v.* EMPEROR. 184 I.C. 206=12 R.C. 212 (2)=40 Cr.L.J. 877=A.I.R. 1939 Cal. 497.

——S. 439 (6)—*Enhancement of sentence—What is—Order of release under S. 562—Revision—High Court setting aside order and passing sentence instead—If enhancement.*

The enhancement of a sentence presumes that there is a sentence to be enhanced. Under S. 562, when an accused is released on probation of good conduct, no sentence is passed by the Court. Therefore when under S. 562 (3) the High Court sets aside an order and passes a sentence in lieu thereof, it cannot be said that it enhances a sentence within the meaning of S 439 (6) of the Code. (*Davis, J.C. and Tyabji, J.*) EMPEROR *v.* MIRO GHULAM HUSSAIN. I.L.R. (1940) Kar. 88=185 I.C. 428=12 R.S. 168=41 Cr.L.J. 187=A.I.R. 1939 Sind 339.

Finding of fact.

——S. 439—*Finding of fact—Concurrent findings in* ab initio *improbable cases—Setting aside in revision.*

Where a case seems *ab initio* improbable and the element of doubt is so very strong therein that the conviction must be set aside, or where with reference to the first information report and other circumstances the case against the accused is very doubtful and the benefit of the doubt has to be given to the accused, even the concurrent findings of fact of the lower Courts are liable to be set aside in revision. (*Zia-ul-Hasan, J.*) BRIJ KISHORE *v.* EMPEROR 180 I.C 467=11 R.O. 247=1939 O.L.R. 140=40 Cr.L.J. 463=1939 O.W.N. 265=1939 A.W.R. (C.C.) 57=1939 A.Cr.C 43=1939 O.A. 291=A.I.R. 1939 Oudh 156.

——S. 439—*Finding of fact—Interference.*

No doubt the revisional jurisdiction of the High Court can always be exercised in order to prevent a gross and palpable failure of justice. But this exercise of revisional jurisdiction refers to such an error of facts as is obvious upon the face of the record and is not in effect a mistake by the Magistrate as to the question of which set of facts should be deemed more acceptable but a blunder relating to the question as to whether some fact has been proved or not. But where there was evidence before the Magistrate which if he believed it would enable him to find as he did.

Held, that the application in revision by the accused could not be treated as an appeal and the machinery of the Court in criminal revision could not be invoked. (*Roberts. C.J.*) U. PANDITA *v.* MAUNG TINT. 174 I.C. 860=39 Cr.L.J. 492=10 R.R. 438=A.I.R. 1938 Rang. 103.

——S. 439—*Finding of fact—Interference—Grounds—Absence of right of appeal—Effect of.*

It cannot be said that on no account or in no case should a finding of fact by the trial Magis-

trate be upset or reversed in revision. Ordinarily, however, a finding of fact by the trial Magistrate is not interfered with in revision. But in a case where there can be no appeal because a non-appealable sentence is awarded, different considerations prevail as regards the duty of the Court exercising revisional jurisdiction. (*Pandrang Row, J.*) PERIAKARUPPAN CHETTIAR *v.* CHIDAMBARAM CHETTIAR. 1937 M.W.N. 51.

——S. 439—*Findings of fact—Interference—Grounds for.*

Though the Court has a wider power of interference in revision applications to prevent injustice, this power is to be exercised in accordance with well-established principles. It is not, for instance, for High Court in revision to deal with questions of fact or of law as would a Court of first appeal. To justify the interference of the Court in revision it must be shown, first, that the Judge below has committed some error of law; and, secondly, that the accused has been materially prejudiced by that error. The Court may also exercise its revisional power, even as regards findings of fact, in cases where the lower Court has totally misconceived the evidence and come to an obviously wrong conclusion. But it is only very extreme cases which justify such an interference with the appreciation of fact by the lower Court which heard the evidence and the appellate Court which reconsidered its value. (*Davis, J.C. and Haveliwala, A.J.C.*) MOHAN LAL BHANALAL *v.* EMPEROR. 32 S.L.R. 87=172 I.C. 374=10 R.S. 149=39 Cr.L.J. 123=A.I.R. 1939 Sind 293.

——S. 439—*Finding of fact—Interference.*

The High Court sitting in revision is not a Court of first instance dealing with questions of fact, and though it will in certain circumstances interfere on questions of fact, ordinarily it will not do so. It will interfere only on the clearest and strongest grounds as when, for instance, there is no evidence to justify the finding of the lower Court or when it appears to the Court that the proceedings are so defective that the conscience of the Court is touched or there has clearly been a miscarriage of justice. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* ALI MAHOMED. 165 I.C. 950 =9 R.S. 114=38 Cr.L.J. 117=1936 Cr.C. 1099= A.I.R. 1936 Sind 243.

——S. 439—*Finding of fact—Interference—Evidence of accomplice—Lower Court omitting to consider tainted nature of such evidence.*

Ordinarily it is not usual for the High Court to interfere in revision with a decision of the lower Court when that decision is based upon a consideration of the evidence on the record. But where the evidence is that of accomplices and the lower appellate Court has not given due weight to this factor and has upheld the conviction of the accused upon the tainted evidence of accomplices, the conviction cannot be upheld by the High Court in revision. (*Nanavutty, J.*) JAGDISH PRASAD *v.* EMPEROR. 164 I C. 428 (2)=9 R.O. 63=37 Cr.L.J. 951=1936 O.W.N. 829=1936 O.L.R. 454=1936 Cr.C. 1084=A.I.R. 1936 Oudh 401.

Illegal order.

——S. 439—*Illegal order—Non-compliance with S. 252—Revision.*

Refusal to summon witness, whom the complainant has cited even before the evidence for

prosecution has begun, is a grave error on the part of the Magistrate trying a case, as it is a breach of the duty enjoined by S. 252 of the Code. (*Grille, J.*) SETH THAKURDAS *v.* NARAYAN. I L. R. 1936 Nag. 205=1936 Cr C. 805=166 I.C 709 =9 R.N. 144=38 Cr.L.J. 307=A.I R. 1936 Nag. 192.

Interference.

——S. 439—*Interference—Refusal to take further evidence—Proceedings under S. 145—Claimant admittedly not in possession—Refusal to allow further evidence—If ground for interference.*

Where a party to proceedings under S. 145, Cr.P. Code, is admittedly not in possession of the land in dispute or any portion thereof, it cannot be said that the refusal of the Magistrate to take further evidence on his behalf results in any failure of justice justifying interference in revision, in view of the provisions of S. 537, Cr. P. Code. (*Pandrang Row, J.*) RANGA RAZU *v.* JAGANNATHA RAO. 177 I.C. 584=1938 M.W.N. 252=11 R.M. 346=39 Cr.L.J 922=1938 M Cr.C. 122=47 L.W. 340=A.I.R. 1938 Mad. 654=(1938) 1 M. L.J. 453.

——S. 439—*Interlocutory orders—Interference—Power of High Court.*

The High Court has power to interfere in revision with an interlocutory order, where it is found that *prima facie* injustice has been done. (*Ram Lall, J.*) IQBAL BEGUM *v.* IQBAL HUSSAIN. 40 P. L.R. 776.

——S. 439—Jurisdiction—Failure to exercise—Sub-Divisional Magistrate transferring calendar cases from his file to Second Class magistrate to be treated as sessions cases—Propriety—Revision —Interference. *See* CR. P. CODE, S. 192. (1938) 1 M.L.J. 403.

Miscellanous proceedings.

——S. 439—Miscellaneous proceedings—Magistrate acting under Naik Girls' Protection Act—Interference by High Court, *See* NAIK GIRLS' PROTECTION ACT, S. 4. 1938 A.L.J. 1147.

New objection.

——S. 439—*New objection—Maintainability in revision.*

Per *Henderson, J.*—When a covicted person appears in an appellate or revisional Court and asks for interference on the ground that he was prejudiced by the procedure adopted by the trial Court, an important point always is whether the objection was taken at the earliest opportunity. It is doubtful whether, when an accused person does take an objection at the earliest possible moment, he can be debarred from raising it subsequently in a Court of appeal or revision merely because he did not come up straightaway to that Court. But an objection with regard to the legality of a trial can be taken in a Court of revision or appeal, even though it was never taken in the Court of first instance at all. (*Cunliffe and Henderson, JJ.*) C. S. JOSEPH *v.* EMPEROR. 41 C. W.N. 251.

Order of transfer.

——S. 439—*Order of transfer—Absence notice and reasons—Revision.*

An order of transfer of a case was ordered without notice to other side and without assigning reasons for the order. The order was made on account of alleged abnormal delay, but it was not likely that the case would proceed more quickly in the new Court.

CR. P. CODE (1898), S. 439.

Held, that the order for want of notice and being without reasons, although irregular, may not be illegal, but the High Court could interfere with it in revision and that it should be set aside and the other side given chance to advance objections. (*Gruer, J.*) CHOTEMIYA *v.* ASRAFMIYA. I.L.R. (1936) Nag. 87=164 I.C. 692=37 Cr.L.J. 1006=9 R.N. 23 (1)=1936 Cr.C. 705=A.I.R. 1936 Nag. 181.

——S. 439—*Order under S.* 144—*Interference after expiry of time and when finding of lowee Court is supported by circumstances.*

The High Court in revision will not interfere with an order under S. 144, Cr. P. Code, which has already expired and in which the finding as to the claim of the parties is supported by circumstances. (*Agarwala. J.*) BHIKHALI TEWARY *v.* ACHAIBARKUER. 187 I.C. 349=12 R.P. 618=21 Pat.L.T. 326=41 Cr.L.J. 451=6 B.R. 464=1940 P.W.N. 465=A.I.R. 1940 Pat. 471.

Pending case.

——S. 439—*Pending proceedings—Interference—Grounds.*

The High Court can interfere in revision with a pending proceeding, where a criminal charge is unsustainable on the evidence of the prosecution witnesses. It is the duty of the High Court to interfere when the facts proved do not constitute an offence and the continuance of the trial would be an abuse of the process of the Court. (*Niyogi, J.*) ABDUL RAHIM KHAN *v.* EMPEROR. 189 I.C. 579=13 R.N. 67=41 Cr.L.J. 753=1940 N.L.J. 183.

——S. 439—*Pending proceedings—Interference—Reference by Sessions Court.*

Sessions Courts should not readily ask the High Court to interfere with pending proceedings in a criminal Court. If it is a false and vexatious or frivolous case, the trial Court may, and should, take action under S. 250, Cr. P. Code, when it acquits the accused. (*Coldstream, J.*) PARMESSHARI DAYAL *v.* GUMANI RAM. 40 P.L.R. 311.

——S. 439—*Pending case—Quashing of charge.*

It is perfectly proper for an accused person to invoke the revisional powers of the High Court at the stage of the trial when a charge is framed against him, on the ground that there is no *prima facie* case against him to warrant any charge at all or on the ground of misjoinder of charges. In such circumstances, the High Court will absolutely decline to enter into the merits of the evidence but will merely see whether there is any evidence at all which would justify the framing of the charges. (*Cunliffe and Henderson, JJ.*) C. S. JOSEPH *v.* EMPEROR. 41 C.W.N. 251.

Powers of Court.

——S. 439—*Powers of High Court—Alteration of finding.*

The High Court as a Court of revision has the power of Court of appeal, and it is provided in S. 423 (1) (*b*) (ii) that a Court of appeal has power 'to alter the finding maintaining the sentence.' It is therefore open to the High Court, when a case comes up before it in revision, to alter a finding under S. 500, I. P. Code to one under S. 500 read with S. 120 B, I. P. Code. (*Bennet, J.*) TARAPADO SHASTRI *v.* EMPEROR. 1938 A.W.R. (H.C.) 467=1938 A. Cr. C. 75=1938 A.L.J. 769.

CR. P. CODE (1898), S. 439.

——S. 439—*Powers of Court—Conviction under S.* 304 (2) *on a charge under S.* 302, *I. P. Code—Alteration of conviction to one under S.* 302, *I. P. Code.*

Where a charge under S. 302, I. P. Code, is followed by a conviction under S. 304 (2), I.P. Code, the result of the trial includes an acquittal under the major charge. The High Court has no jurisdiction in revision to alter an acquittal into a conviction and cannot, therefore, consider the question whether the accused is in fact guilty of murder. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) BAWAR SHAH *v.* EMPEROR. 164 I.C. 899=37 Cr.L.J. 1039=9 R.Pesh. 31=1936 Cr.C. 830=A.I.R. 1936 Pesh. 172.

——S. 439—*Powers of Court—Order of acquittal—Power of High Court to order re-trial.*

There is no prohibition in S. 439, Cr, P. Code, against the High Court ordering a re-trial, even where there has been an acquittal and there has been no appeal preferred by Government against such an acquittal. The power to order a re-trial is unrestricted and such an order does not amount to a conversion of a finding of acquittal into one of conviction within the meaning of S 439 (4), Cr. P. Code. (*Sulaiman, C.J and Bennet, J*) SARDA PRASAD *v.* EMPEROR. 168 I.C. 17=1937 A.Cr.C. 1=1937 A.L.J. 143=1937 A.W.R. 66=9 R.A. 623=38 Cr.L.J. 521=1937 A.L.R. 309=A.I.R. 1937 All. 240.

——S. 439—*Powers of High Court under—Interlocutory proceedings—Revision—Matter not on record—If can be taken into consideration.*

It is plain that under S. 439, Cr. P. Code, the High Court's revisional powers are only exercisable to rectify any illegality, irregularity, impropriety or mistake appearing on the face of the record of any proceeding in any inferior Court. These powers are to be exercised with circumspection and care, and are discretionary, and the High Court will refuse to interfere at an interlocutory stage of criminal proceeding save where exceptional circumstances call for the exercise of its revisional jurisdiction. The High Court further is restricted to what appears on the record of the proceedings in the lower Court and it would be improper to take into consideration matter entirely extraneous to the record of the proceedings. (*Lobo, J.C. and O'Sullivan, J.*) EMPEROR *v.* JUMO MACHHI. I.L.R. (1940) Kar. 157=188 I.C. 306=41 Cr.L.J. 568=12 R.S. 278=A.I.R. 1940 Sind 65.

——S. 439—Powers of High Court—Order of release on conviction under S. 411, I. P. Code—Power to alter conviction into one of theft and to maintain order of release. *See* CR. P. CODE, S. 562 (1-A). 18 Pat.L.T. 872.

——S. 439—*Powers of High Court—Order for prosecution under S.* 476—*Concurrent orders by Courts below—Interference by High Court.*

The High Court is ordinarily reluctant to interfere with the description concurrently exercised by the Courts below in a matter of granting sanction to prosecute or laying a complaint under S. 476, Cr. P. Code. But if there has been a fundamental misconception in understanding the procedure to be followed, and if the lower Courts have proceeded upon lines which ought not to have been done, the High Court is free to examine the facts for itself and decide whether the prosecution should be launched. (*Manohar Lall,*

CR. P. CODE (1898), S. 439.

J.) MUKTI NARAIN *v.* EMPEROR. 186 I.C. 627=12 R.P. 534=6 B.R. 377=20 P.L.T. 947=41 Cr.L.J. 349=1939 P.W.N. 871=A.I.R. 1940 Pat. 97.

——S. 439—*Powers of High Court—Order of compensation under S.* 250 *in revision—Jurisdiction of High Court to pass.*

An order directing compensation to be paid is not a consequential or incidental order within the meaning of S. 423 (1) (*d*), nor can it be said that in revision the High Court makes an order consequential or incidental to an order of a Magistrate calling upon a complainant to show cause why he should not pay compensation, if it orders compensation to be paid. Hence the High Court cannot under S. 439 read with S. 423 (1) (*d*) make an order for compensation, even if, upon the judgment and even if cause had been shown, the High Court were of opinion that an order of compensation should be made. (*Davis, J.C. and Tyabji, J.*) EMPEROR *v* MOHAMED ALAN. I.L.R. (1940) Kar. 119=12 R.S. 123=41 Cr.L.J. 53=184 I.C. 595=A.I.R. 1939 Sind 321.

——S. 439—*Powers of High Court—Order under S.* 144—*Revision—Interference after it ceases to have force.*

It is open to the High Court in revision, if it thinks that an order ought never to have been made, to set it aside, although before that action can be taken the order may have ceased to be in operation. (*Beaumont, C.J. and Sen, J.*) ARDESHER PHIROZSHAW MURZBAN, *In re.* 186 I.C. 477=12 R.B. 352=41 Cr.L.J. 319=41 Bom.L.R. 1253=A.I.R. 1940 Bom. 42.

——S. 439—*Powers of Court—Reference by Sessions Judge to enhance sentence—High Court if can acquit accused.*

Where the Sessions Judge recommends that the sentence against the accused should be enhanced and the High Court on going through the entire evidence finds that the case for the prosecution is not supported by any reliable evidence, it can give the accused the benefit of doubt and acquit him. (*Abdul Rashid, J.*) RAJINDAR NATH *v.* EMPEROR. 38 P.L.R. 228.

——S. 439—*Powers of Court—Re-trial—Order of—Grounds.*

In the absence of any material irregularity in a trial in which all available evidence was produced an order of re-trial would merely amount to an expression of dissatisfaction with the result, and an order of re-trial should not be given merely because the revisional authority disagrees with the trial Judge as to the offences constituted by proved facts. (*Middleton, J,C. and Mir Ahmad, A.J.C.*) BAWAR SHAH *v.* EMPEROR. 164 I.C. 899=37 Cr.L.J. 139=9 R.Pesh. 31=1936 Cr.C. 830=A.I.R. 1936 Pesh. 172.

——S. 439 (1)—*Powers of High Court—Reversal of finding and sentence and ordering retrial—Failure to charge under S,* 75, *Penal Code.*

Where a man was charged and convicted under S. 380, I. P. Code only, though he had six prior convictions and there was a failure to charge him under S. 75, I. P. Code, the High Court has powers under S. 439 (1) to reverse the finding and sentence and order re-trial by a proper Court. (*Yorke, J.*) EMPEROR *v.* MAHADEO. 1938 O.W.N. 1062=1938 O.A. 805=178 I.C 248=1938 A.Cr.C. 131=1938 A.W.R. (C.C.) 92 (1)=1938 O.L.

CR. P. CODE (1898), S. 439

R. 472=11 R.O. 100=40 Cr.L.J. 25=A.I.R. 1938 Oudh 261.

——S. 439—*Powers of Court—Stay of proceedings—Accused citing as witness person who cannot be served nor examined on commission.*

Proceedings in a trial cannot be stopped merely because the accused cites as one of his witnesses a person on whom process cannot be served and who cannot be examined on commission.(*Almond, J.C.*) FAZAL RAHMAN KHAN *v.* EMPEROR, 162 I.C. 270=37 Cr.L.J. 618=8 R.Pesh. 192=1936 Cr.C. 311=A.I.R. 1936 Pesh. 101.

——S. 439—Powers of High Court—Summary dismissal of appeal by appellate Court—Facts showing that case not one to be disposed of summarily—Interference. *See* CR. P. CODE, S. 421. 40 C.W.N. 128.

——S. 439—Powers of Court—Trial Court ordering splitting of case of persons jointly charged — Revision — Interference. *See* CR. P. CODE, S. 239. A.I.R. 1936 Sind 47.

——S. 439—*Powers of revision—Order under S.* 144 *in spite of direction to proceed under S.* 145—*Revision—Interference—If can be refused on the ground that order is time-expired.*

An order which has been deliberately passed by a Magistrate under S. 144, Cr. P. Code, when the Magistrate knew and had been told in several prior occasions by his superiors, that he should proceed under S. 145, Cr. P. Code, if necessary, cannot be left alone on the mere ground that it is time-expired. It is impossible to encourage a Magistrate to use his powers in that way, and the order will be set aside in revision. (*Dhavle, J.*) BINDHESHWARI SINGH *v.* RAGHUNANDAN MAHTO. 188 I.C. 330=6 B.R. 648=13 R.P. 12=41 Cr.L.J. 578=21 Pat.L.T. 413=A.I.R. 1940 Pat. 559.

Quashing proceedings.

——S. 439—*Quashing proceedings—Charge—Practice.*

It is not the practice of the High Court, nor would it be proper for it ordinarily to alter or quash a charge unless it is clear that the complaint does not disclose the offence in the charge. (*Coldstream, J.*) GUL MOHAMMAD *v.* EMPEROR. 39 P.L.R. 957.

——S. 439—*Quashing proceedings—Ground for—Groundless charge.*

No doubt the High Court ought not to interfere ordinarily by way of quashing a charge, but when all the necessary materials are available and the charge appears to be *prima facie* groundless, it is an obvious duty to interfere, without subjecting a person to the unnecessary harassment of a trial. (*Venkataramana Rao, J.*) RAMASWAMI MUDALIAR, *In re.* 47 L.W. 136=1938 M.W.N. 217=(1938) 1 M.L.J. 810.

Scope.

——S. 439—*Scope—Accused prejudiced by deprivation of substantial privileges—If ground for quashing proceedings.*

Ordinarily any attempt to deprive the accused of the protection and privileges of a substantial nature which the law confers on him must result in a quashing of the proceeding. (*Vivian Bose, J.*) VISHWANATH PANDURANG *v.* EMPEROR. 1936 Cr.C. 1040=A.I.R. 1936 Nag. 249.

——S. 439—*Scope—Appellate Court ordering withdrawal of complaint under S.* 193, *Penal Code—Revision—Powers of High Court.*

CR. P. CODE (1898), S. 439.

Where an appellate Court orders that a complaint under S. 193, Penal Code should be withdrawn, no further appeal lies from such order, but the High Court can set aside the order in revision and can order the complaint to be restored to the file for its disposal according to law, as it has the powers mentioned in S. 423 (1) (*c*) and (*d*). (*Davis, J.C. and Mehta, A.J.C.*) TEOOMAL GERIMAL *v.* PIR ALI MUHAMMAD SHAH. **31 S.L.R. 77=170 I.C. 360=38 Cr.L.J. 873=10 R.S. 53=A.I.R. 1937 Sind 116.**

——**S. 439**—*Scope—Appeal not properly disposed of by appellate Court—Remedy—Powers of High Court.*

An accused is entitled to the judgment of an appellate Court in every case in which an appeal is open to him. But if the appellate Court does not do its duty his remedy lies in an application for revision under S. 439. It is true, the accused can approach the Sessions Judge for a reference to the High Court under S. 438, but in the end it is the High Court which deals with the matter, and its powers are contained in S. 439. Under that the High Court may, if it desires, exercise any of the powers conferred on a Court of appeal by S. 423; that is, it may itself hear the appeal, and dispose of it. Moreover an accused has no right to insist that his appeal should be heard by any particular Court. Under S. 526 (3), the High Court can transfer any appeal pending in a lower Court to itself for trial, provided it is expedient for the ends of justice to do so, and in that case the accused would be deprived of what he calls his right of revision. As a matter of fact, there is no such right. Interference in revision is purely discretionary; it is not even necessary to hear the accused. The fact that he is invariably heard, and the fact that the discretion conferred by S. 439 is exercised in a judicial manner, does not make any difference to the fact that the accused has no right to demand any of these things. All that he is entitled to is that a second Court of competent jurisdiction should hear his entire case as an appeal. If he gets that, he has obtained all that the law allows him and when the High Court hears his appeal in place of a lower Court, he has obtained a good deal more than he had any right to claim. (*Vivian Bose, J.*) BAPU RAO *v.* EMPEROR. **I.L.R. (1937) Nag 38=1936 Cr.C. 715=A.I.R. 1936 Nag. 160.**

——**S. 439**—*Scope — Considerations in revision.*

The main question which the High Court has to consider in an application in revision is whether substantial justice has been done. Though if it has been an appeal, the applicant would be entitled to demand an adjudication upon all questions of fact or law which he wishes to raise, in revision the only question is whether the Court should interfere in the interests of justice. (*Allsop, J.*) KEWAL SINGH *v*, EMPEROR. **164 I.C. 701=9 R.A. 184 (1)=37 Cr. L.J. 1022 (1).**

——**S. 439**—Scope—Discharge under S. 119—Revision—Interference. *See* CR. P. CODE, S. 119. **A.I.R. 1936 Sind 243.**

——**S. 439 (6)**—*Scope—Construction—Enhancement of sentence—Notice of—Accused's right to argue against conviction.*

Section 439 (6) does not destroy and was not intended to destroy the finality of judgments of appellate Courts given under S. 430, Cr. P. Code.

CR. P. CODE (1898), S. 439.

The words in S. 439 (6), Cr. P. Code are "notwithstanding anything contained in this section". It does not say "notwithstanding anything contained in this Code", and the effect of the words is to allow the accused when notice is issued to show cause why sentence should not be enhanced, not only to show cause why sentence should not be enhanced but to show cause against conviction itself, provided that an appeal, if an appeal lies, or revision application, where no appeal lies, has not been already dismissed. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* HAJI KHAMOO. **165 I.C. 933=9 R.S. 113=38 Cr.L.J. 114=1936 Cr. C. 1089=A.I.R. 1936 Sind 233.**

——**S. 439**—*Scope—Discretion—Withdrawal of prosecution under S. 494—Revision—Interference—Prosecution ordered by Civil Court—Withdrawal on the ground of case being weak and the ground of costliness of trial—Propriety.*

The High Court will not ordinarily interfere with the exercise of discretion under S. 494, Cr. P. Code; the High Court has however, power to do so and will do so, in special cases where the withdrawal appears to be manifestly improper. Where a prosecution is directed by a Civil Court after a full trial on the merits, it should not be allowed to be withdrawn by the prosecuting authorities unless for very cogent reasons. If such a prosecution is allowed to be withdrawn on the ground that the prosecution is weak or that the trial would be costly, it is a fit case in which the High Court should interfere. (*Gruer, J.*) SATWARAO *v.* KANBARAO BHAGORAO. **I.L.R. (1939) Nag. 393=174 I.C. 510=10 R.N. 403=39 Cr. L.J. 458 =1938 N.L.J. 12=A.I.R. 1938 Nag. 334.**

——**S. 439**—Scope — Discretion— Refusal to cause production of documents under S. 94—Interference. *See* CR. P. CODE, S. 94. **A.I.R. 1936 Nag. 250.**

——**S. 439 (6)**—*Scope—If overrides S. 423—Power to go into facts in showing cause against enhancement.*

S. 439 (6) does not by implication override the express and imperative terms of S. 423; the convicted person in showing cause against his conviction under S, 439 (6) has only the same right as he has when he comes before the Court by way of appeal under S. 423, and consequently an appellate Court is not entitled to go into the facts of the case and reverse the finding of the jury because a criminal revision case has been filed by the Crown for the enhancement of sentence calling upon the High Court to exercise powers under S. 439. (*Beasley, C.J. and King, J.*) RATNASABAPATHI GOUNDAN *v.* PUBLIC PROSECUTOR. **59 Mad. 904=164 I.C. 243=37 Cr.L.J. 909=9 R.M. 99=1936 M.W.N. 459=44 L.W. 155=1936 M.Cr.C. 232=1936 Cr.C. 635=A.I.R. 1936 Mad. 516=71 M.L. J. 231.**

——**S 439**—*Scope—Order under S. 112—Interference.*

High Court is always very unwilling to interfere in the case of orders passed under the preventive Sections of the Criminal Procedure Code. These orders are largely of an administrative nature; but these orders, though largely of an administrative nature, have a legal basis, and if it is clear that an order under S. 112 has no legal basis and that the Magistrate has proceeded upon a wrong legal principle, applying equally to the wrong-doers as well as to the wronged, the wide

powers conferred upon him by the law for the restraint of the wrong-doers and for the protection of the wronged, High Court is bound to interfere. (*Davis, J.C. and Weston, J.*) JASODA LEKHRAJ *v.* EMPEROR. I.L.R. 1939 Kar. 662=182 I C. 698=12 R.S. 31=40 Cr. L.J. 703=A.I. R. 1939 Sind 167.

——S. 439—*Scope—Order under S.* 144—*Revision—Interference—Principles.*

Under S. 144, Cr. P. Code, the Legislature has invested Magistrates with wide powers of discretion and the High Court should not as a rule interfere; but the High Court may send for the record in order to satisfy itself that the order of the Magistrate was legal and that the Magistrate had not acted in an arbitrary manner. If the order of the Magistrate is legal and made after due and careful consideration it calls for no interference. (*Lobo and Tyabji, JJ.*) PIR GUL HASSAN SAHIB *v.* EMPEROR. I.L.R. (1939) Kar. 751=183 I.C. 641=12 R.S. 67=40 Cr.L.J. 823=A.I.R. 1939 Sind 230.

——S. 439—*Scope—Order under S.* 144—*Revision—Inference when order has spent its force.*

It is not the usual practice of High Court to interfere with an order which has spent in its force unless there are special reasons for such interference. (*Mohammad Noor, J.*) RAMA BARIK *v.* EMPEROR. 187 I.C. 511=12 R.P. 637=6 B R. 480=41 Cr L.J. 463=1939 P.W.N. 616=A.I.R. 1940 Pat. 185.

——S. 439—*Scope—Order under S.* 144, *Cr. P. Code—Revision when order has spent its force—Practice.*

It is not the usual practice of the High Court to interfere in revision with an order under S. 144, Cr. P. Code, which has spent its force, unless there are special reasons for such interference, when it was within the power of the magistrate to pass the order in question. (*Noor, J.*) RAM BARIK *v.* EMPEROR. 187 I.C. 511=12 R.B. 637=6 B.R. 480=41 Cr.L.J. 463=1939 P.W.N. 616=A.I.R. 1940 Pat. 185.

——S. 439—*Scope—Order under S.* 144, ex parte—*Failure to apply under S. 144 (4) and (5)—Revision—Power of High Court to interfere.*

Where an order is made *ex parte* under S. 144, Cr. P. Code, the party aggrieved can, under sub-Ss. (4) and (5) of S. 144, apply to the Magistrate who passed the order to cancel it, and it may be that in some cases the High Court would decline to interfere in revision if no application has been made to the Magistrate. But where a part of the order is rescinded by the Magistrate before there is time to make any application to him, and the whole order is cancelled after an application is made to the High Court, the only Court which would be in a position to set aside the order altogether is the High Court. (*Beaumont, C.J. and Sen, J.*) ARDESHIR PHIROZSHAW MURZBAN, *In re.* 186 I.C. 477=12 R.B. 352=41 Cr.L.J. 319=41 Bom.L.R. 1253=A.I.R. 1940 Bom. 42.

——S. 439—Scope—Order under S. 144—Revision after order has spent itself—Interference—Powers of High Court. *See* CR. P. CODE, S. 144 (4). 1938 P.W.N. 709=19 Pat.L.T. 796.

——S. 439—*Scope—Order under S.* 145—*Finding as to possession—Interference.*

A finding of a Magistrate on the point of possession will not be ordinarily interfered with in

revision; but where the Magistrate's finding is vitiated by his not keeping in view important facts, *e.g.*, the writ of delivery of possession issued by the Civil Court and the other circumstances of the case, the High Court will interfere even though the Magistrate commits no error of jurisdiction. (*Manohar Lall, J.*) BAHALI SINGH *v.* SAFAYAT GOP. 173 I.C. 756=1938 P.W.N. 218=4 B.R. 335=10 R.P. 449=39 Cr.L.J. 379=A I. R. 1938 Pat. 105.

Technicality.

——S. 439—*Technicality—Conviction under S.* 114 *instead of under S.* 109—*If calls for interference.*

Where the accused was convicted under S. 114, Penal Code, by the trial Court, but circumstances showed that he ought to have been convicted under S. 109.

Held, as the accused on either view was liable to exactly the same punishment, the interests of justice required no interference on merely a technical ground. (*Rowland, J.*) JADUNANDAN JHA *v* EMPEROR. 169 I.C. 489=10 R.P. 24=3 B.R. 582=18 Pat.L.T. 628=38 Cr.L.J. 790=A. I.R. 1937 Pat. 317.

Time Limit.

——S. 439—*Time limit—Practice.*

As a general practice, the High Court will not entertain in the absence of most exceptional circumstances an application in its Criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned. (*Rowland, J.*) ZAFAR AHSAN *v.* JUGESHWAR BUX ROY. 185 I.C. 346=6 B.R. 155=12 R.P. 369=41 Cr.L.J. 171=1939 P.W.N. 855=A.I.R. 1940 Pat. 135.

——S. 439—*Time-limit fixed by the Nagpur High Court—If inflexible—Time spent in moving District Magistrate to prefer appeal—If can be deducted—Proper procedure to be followed.*

The rule of 60 days fixed by the rules of the Nagpur High Court within which revisions to the High Court ought to be filed, is not an inflexible rule and might be departed from in exceptional cases. Where in the case of an application by the complainant to revise an order of acquittal, it was filed beyond the 60 days, the time spent by the complainant in trying to move the District Magistrate to prefer an appeal against the acquittal cannot be deducted. The proper procedure would be to file an application in revision before the High Court within time and without waiting for a decision of his application to the District Magistrate to take steps for an appeal. (*Gruer, J.*) NATHU *v.* JAGANNATH. 189 I.C. 479=41 Cr. L.J. 745=13 R.N. 56=1940 N.L.J. 319=A.I.R. 1940 Nag. 259.

——S. 439—*Time limit—Refusal of reference under S.* 438—*If gives fresh start.*

As a general practice, the High Court will not entertain, in the absence of the most exceptional circumstances, an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned. A fresh period of 60 days does not accrue from the date when the Sessions Judge refuses to make a reference under S. 438, Cr. P. Code. The fact that the petitioner is a pardanashin lady or her pleader in the mofassil is not aware of the practice of the High Court, can hardly be regarded as among the most exceptional circumstances.

CR. P. CODE (1898), S. 439.

(*Dhavle, J.*) BECHAN KUER *v.* MAHARAJA OF CHOTANAGPUR. 179 I.C. 15=11 R.P. 338=5 B. R. 206=40 Cr.L.J. 196=1939 P.W.N. 862=A.I. R. 1939 Pat. 320.

——S. 439—*Limitation—Application filed beyond 60 days of order—Maintainability.*

The High Court will not, as a general rule, entertain an application in its Criminal Revisional Jurisdiction after the expiry of 60 days from the date of the order sought to be revised, in the absence of most exceptional circumstances. (*Rowland, J.*) ZAFAR AHSAN *v.* JUGESHWAR BUX. 1939 P.W.N. 855=6 B.R. 155=185 I.C. 346= 12 R.P. 369=41 Cr.L.J. 171=A.I.R. 1940 Pat. 135.

——Ss. 439 and 247—*Acquittal under S. 247—Interference—Principles.*

Acquittal under S. 247, Cr. P. Code, though one not on merits has the force of a complete acquittal for all purposes. The mere fact that the acquittal is not on the merits, does not make any difference whatsoever for deciding whether there should be an interference in revision against such an acquittal. When the local Government does not move in the matter, if the High Court is asked to interfere on reference it will do so only if there be radical and incurable irregularity or a complete disregard of the law and procedure or a manifest injustice which has got to be cured. (*Puranik, J.*) EMPEROR *v.* LAXMI PRASAD. 1940 N.L.J. 399=A.I.R. 1940 Nag. 357.

——Ss. 439 and 421—Appeal from conviction—Conviction right but sentence severe—Reduction of sentence—Powers of High Court—Proper procedure—Summary dismissal of appeal—Propriety. *See* CR. P. CODE, SS. 421 AND 439. 39 Bom.L.R. 74=A.I.R. 1937 Bom. 148.

——Ss. 439 (6) and 423 (2)—*Enhancement of sentence—Conviction on verdict of jury—Right of accused to impugn verdict—Limit to.*

S. 439 (6), Cr.P. Code entitles an accused person who has been convicted on a verdict of jury and who has been called upon to show cause why his sentence should not be enhanced, to show cause against his conviction only within the limits laid down by S. 423 (2). The combined effect of S. 439 (6) and 423 (2) is to entitle the accused to question the conviction by showing that the Judge misdirected the jury or that the jury misunderstood the law laid down by the Judge in his charge. The accused has no right to reopen the case or evidence and impugn the verdict of the Jury. (*Niamatullah and Ganga Nath, JJ.*) EMPEROR *v.* BISHWANATH. I.L.R. (1937) All. 308= 166 I.C. 176=9 R.A. 368=38 Cr.L.J. 137=1936 All.L.R. 1008=1936 A.L.J. 1287=1936 A.Cr.C. 217=1936 Cr.C. 1109=1936 A.W.R. 1042=A.I. R. 1936 All. 850.

——Ss. 439 and 476—*Complaint under S. 476—Expediency of enquiry not stated—Interference in revision.*

There should not be necessarily an interference in revision merely because the order under S. 476 does not record a formal finding as to the expediency of an enquiry, for the absence of such a finding does not necessarily mean that it had not been considered. (*Pollock, J.*) DWARKAPRASAD *v.* EMPEROR. 187 I.C. 521=12 R.N. 298=41 Cr. L.J. 466=1940 N.L.J. 108=A.I.R. 1940 Nag. 227.

——S. 440—Right of audience—Accused not surrendering to his bail bond. *See* CR. P. CODE, SS. 435 AND 440. 1938 A.W.R. (H.C.) 690=1938 A.L.J. 1022.

——S. 440—*Right of audience—Limits—Admission of revision only on the question of sentence—Hearing on merits, if can be claimed.*

According to S. 440, Cr. P. Code, counsel has not got any general right of being heard at all in revision. Where at the time of the admission of a revision an order is passed admitting it 'only on the question of sentence,' that order has limited the right of being heard only to the question of sentence and hence a right to be heard on the merits cannot be claimed at the hearing of the revision. (*Bennet, J.*) SAT NARAIN LAL *v.* EMPEROR. I.L.R. (1940) A. 539=190 I.C. 225=1940 A.L.J. 462=1940 A.Cr.C. 100=1940 A.W.R. (H.C.) 379=A.I.R. 1940 All. 426.

CR. P. CODE (1898), S. 443.

——S. 443—*Applicability of Ch. XXXIII.*

Per *Costello, J.*—Chap. XXXIII, Cr. P. Code, was only designed to apply to cases of racial distinction where there is a real clash between a European as defined in the Code, on the one side and an Indian on the other, or *vice versa*. (*Derbyshire, C. J. and Costello, J.*) CYRIL BERTRAM PLUCKNETT *v.* EMPEROR. I.L.R. (1939) 1 Cal. 187 =184 I.C. 614=12 R.C. 251=43 C.W.N. 133= 41 Cr.L.J. 59=A.I.R. 1939 Cal. 682.

——S. 443—*Omission to record finding—If vitiates proceedings.*

The omission of the District Magistrate to record his finding on the application under S. 440, does not vitiate his proceedings where he implies in his committal order that he has come to a finding. It is sufficient that he has decided under S. 443 that the case ought to be tried under the provisions of Ch. 33 and consequently has under S. 446 (1) committed the case for trial to the Court of Session. (*Mackney, J.*) M. I. MAMSA *v.* THE KING. 174 I.C. 824=39 Cr.L.J. 470=10 R.R. 433=A.I.R. 1938 Rang. 105.

——S. 443—*Trial of case under Ch. XXXIII—Condition precedent.*

Per *Costello, J.*—There are two fundamental conditions precedent for the trial of case outside a presidency town under the provisions of Ch. XXXIII, Cr. P. Code, namely, that the accused person shall claim that the case ought to be tried under that chapter and that the Magistrate shall make an enquiry and record a finding that the case is a case which ought to be tried under the provisions of the chapter. (*Derbyshire, C.J. and Costello, J.*) CYRIL BERTRAM PLUCKNETT *v.* EMPEROR. I.L.R. (1939) 1 Cal. 187=184 I.C. 614=12 R.C. 251=43 C.W.N. 133=41 Cr.L.J. 59=A.I.R. 1939 Cal. 682.

——S. 443—*Waiver of claim.*

Per *Costello, J.*—A European British subject can waive his right to deal with as such under the provision of Ch. XXXIII, Cr. P. Code. (*Derbyshire, C.J. and Costello, J.*) CYRIL BERTRAM PLUCKNETT *v.* EMPEROR. I.L.R. (1939) 1 Cal. 187 =184 I.C. 614=12 R.C. 251=43 C.W.N. 133=41 Cr.L.J. 59=A.I.R. 1939 Cal. 682.

——S. 443 (2)—*Scope and effect—Magistrate rejecting claim of accused without giving him opportunity to produce evidence — High Court's power of revision.*

S. 443 (2), Cr. P. Code, is not intended in any way to bar the High Court's power of revision in a case where the express provisions of the statute

are not complied with. The words "rejects the claim" in Sub-S. (2) mean "rejects the claim on coming to a finding on the merits of the claim in compliance with the provisions of Sub-S. (1) of S. 443". If the Magistrate rejects the claim of the accused without giving him any time to adduce evidence as he is required to do by Sub-S. (1) of S. 443, his order is not a proper order, and it is the duty of the Sessions Judge, if he entertains an appeal, to set it aside and to direct the Magistrate to follow the procedure laid down in that sub-section. If he does not do so, it is the plain duty of the High Court to make that order itself. (*Henderson and Biswas, JJ.*) NITYANANDA SARMA *v.* EMPEROR. **41 C W.N. 996.**

——**S. 443, Ch. 33**—*Privilege under—If can be waived.*

There is no reason why an accused should be compelled to continue to avail himself of a privilege, which there is good reason to believe, his impoverished state will render infructuous, if not harmful. Ch. 33 is a special procedure of which certain individuals at their own request are permitted to avail themselves. There is therefore no reason why the accused cannot waive a right which he need never have claimed, provided his request can be granted without prejudice to the trial of his co-accused or the business of the Courts. (*Davis, J. C. and Havelivala, J.*) WISE *v.* EMPEROR. **I.L.R. (1939) Kar. 38=176 I.C. 705=11 R.S. 35=39 Cr.L.J. 789=A.I.R. 1938 Sind 150.**

——**S. 443, Ch. 33**—*Proceedings under Ch. XXXIII taken—Duty to commit.*

Once a Magistrate has taken proceedings under Ch. XXXIII his powers are curtailed. He cannot for instance under S. 213 (2) cancel the charge, and if he does not discharge the accused under S. 209 or S. 253 he must as S. 446 of the Code directs, commit the accused for trial. (*Davies, J.C. and Havelivala, J.*) WISE *v.* EMPEROR. **I.L.R. (1939) Kar. 38=176 I.C. 705=11 R.S. 35=39 Cr.L.J. 789=A.I.R. 1938 Sind 150.**

——**S. 444**—*'Complaint'—Meaning.*

A Police Inspector, although described in an official document as "the complainant" is not "a complainant" for the purposes of Ch. XXXIII, Cr. P. Code. *A fortiori* a darwan or anybody else who almost by chance—certainly fortuitously—goes to a police station and records in the General Diary that he saw a man lying on the floor of a room with blood marks on his person cannot be considered as a complainant for the purposes of Ch. XXXIII. (*Derbyshire, C.J. and Costello, J.*) CYRIL BERTRAM PLUCKNETT *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 187=184 I.C. 614=12 R.C. 251=43 C.W.N. 133=41 Cr.L.J. 59=A.I.R. 1939 Cal. 682.**

——**Ss. 446 and 29-A**—*'Magistrate' in S. 446 (1)—Meaning of committal of European British subject—Restriction—Magistrate not competent to inquire—Procedure to be followed.*

Magistrate in S. 446 (1), Cr. P. Code means a magistrate having jurisdiction to inquire into the case. If the accused happens or claims to be an European British subject, then S. 446 must be read with S. 29-A, Cr. P. Code. In the absence of any evidence to prove a *prima facie* case against the accused it is not permissible to a magistrate to commit him to the Court of session. Where the accused is an European British subject and

the magistrate is one who could not hold an inquiry in view of S. 29-A, Cr. P. Code, it is incumbent upon such a magistrate to direct the complainant to make his complaint to a magistrate who is competent to hold a preliminary inquiry before committing the accused to the Court of Session. (*Ismail, J.*) G. A. ST. GEORGE *v.* UMA DUTT SHARMA. **I.L.R. (1939) All. 851=184 I.C. 313=12 R A. 217=1939 A.W.R. (H C.) 570=40 Cr.L.J 917=1939 A.L J. 574=1939 A.Cr.C. 117=A.I.R. 1939 All. 602.**

——**S. 449 (1) (c)**—*Application for leave to appeal—Limitation.*

There is some doubt whether an application for leave to appeal under S. 449 (1) (*c*), Cr. P. Code, is not governed by the provisions of Art. 155 of the Limitation Act read with Art. 150 of that Act. (*Derbyshire, C.J. and Costello, J.*) CYRIL BERTRAM PLUCKNETT *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 187=184 I. C. 614=12 R.C. 251=43 C.W.N. 133=41 Cr.L.J. 59=A.I.R. 1939 Cal. 682.**

——**S. 449 (1) (c)**—*Leave to appeal—Grant of—Conditions.*

Per *Costello, J.*—The Court can only grant leave to appeal as laid down in S. 439 (1) (*c*), Cr. P. Code, on the unique ground that the case would if it had been tried outside a presidency town, have been triable under the provisions of Ch. XXXIII. (*Derbyshire, C. J. and Costello, J.*) CYRIL BERTRAM PLUCKNETT *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 187=184 I.C. 614=12 R.C. 251=43 C.W.N. 133=41 Cr.L.J. 59=A.I.R. 1939 Cal. 682.**

——**S. 449 (1) (c)**—*Right to appeal—Foundation of right.*

Per *Costello, J.*—The foundation of a right to obtain an appeal against the verdict and sentence given at a trial in the Sessions in the High Court contrary to the normal rights of a convicted person as laid down in the Letters Patent depends primarily and fundamentally upon the status of the applicant. (*Derbyshire, C.J. and Costello, J.*) CYRIL BERTRAM PLUCKNETT *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 187=184 I.C. 614=12 R.C. 251=43 C.W.N. 133=41 Cr.L.J. 59=A.I.R. 1939 Cal. 682.**

——**S. 449**—*Powers of High Court under—Appeal from conviction of European British subject—If confined to matters of law—Duty of Court to give weight to verdict of jury and opinion of Judge—Burden of proof.*

The ordinary limitation imposed by the Cr. P. Code, on the powers of the appellate Court are, so far as the trial of a European British subject is concerned, removed by S. 449 of the Code, and in a case tried under Chap. XXXIII, an appeal lies to the High Court on a matter of fact as well as on a matter of law, and the High Court cannot therefore refuse to entertain on an appeal on a matter of fact in spite of the fact that the jury's verdict convicting the accused is unanimous and concurred in by the Judge. But the powers of the High Court, unrestricted as they are, must be exercised in accordance with well-recognised principles governing appeal in general. In such an appeal from a conviction founded on a jury's verdict, the High Court must assume that the findings of fact are correct and reasonable, and must lay the burden on the appellant of showing them to be otherwise. The appellate Court must give full weight and consideration to the unani-

CR. P. CODE (1898), S. 464.

mous opinions of the Judge and the jury. (*Grille, J.C. and Niyogi, A.J.C.*) JAMES DOWDAL *v.* EMPEROR. 31 N.L.R (Supp) 215=162 I.C. 430=8 R.N. 262=37 Cr.L.J. 607=1936 Cr.C. 605=A.I.R. 1936 Nag. 103.

——S. 464—*Evidence of civil surgeon—If evidence of prosecution—Opportunity to accused to rebut—Prosecution, if entitled to rebut evidence produced by accused.*

The evidence of a Civil Surgeon taken under S. 464 in order to decide whether an accused person is of unsound mind or not is not evidence produced by the prosecution. The examination of the Civil Surgeon is a duty placed by statute upon the Magistrate himself. If the accused seeks to produce other evidence in rebuttal of the Civil Surgeon's evidence, the prosecution is also entitled to produce evidence in rebuttal of the evidence of the accused. The burden of proving that the accused is of unsound mind and incapable of making his defence lies upon the accused and it is for him to lead evidence on the point in the first place and such evidence as is led on his behalf can be rebutted by the prosecution. (*Almond, J.C.*) EMPEROR *v.* SHERDIL SHER BAZ. 176 I.C. 447=11 R. Pesh. 14=39 Cr.L.J. 737=A.I.R. 1938 Pesh. 24.

——S. 465—*Pleader applying for adjournment to keep accused under mental observation—Accused appearing to judge to be normal in mind—Judge, if bound to hold enquiry.*

Where a verbal application is made by the pleader for the accused for an adjournment in order that the accused may be kept under mental observation, but the accused appears to the Judge to be perfectly normal in mind, it is not necessary, much less is it incumbent upon the Judge, to grant an adjournment of the trial and to hold an enquiry as contemplated by S. 465, Cr. P. Code. (*Guha and Lethbridge, JJ.*) EMPEROR *v.* DURGA CHARAN SING. 173 I.C. 475=10 R.C. 524=39 Cr.L.J. 308=41 C.W.N. 1312=A.I.R. 1938 Cal. 6.

——S. 471—*Order handing over accused to relatives on their furnishing security.*

Where a Magistrate found the accused person guilty under S. 326, Penal Code, but acquitted him under S. 84, Penal Code as the accused was incapable of understanding the nature of his act due to insanity and ordered him to be handed over to the care of his relatives on their furnishing a security for his good behaviour.

Held, that the order was in contravention of S. 471, Cr. P. Code, and the accused should have been detained in safe custody in the lunatic asylum. (*Spargo, J.*) THE KING *v.* TUN KHIN. 175 I.C. 48=10 R.R 460 (1)=39 Cr.L.J. 544=A.I.R. 1938 Rang 96.

——(as amended in 1923), S. 473—*Right to apply under—Stranger to proceedings—Application by—Competency.*

It is open to a Court under S. 476, Cr. P. Code, to entertain an application under the section at the instance of a stranger to the proceedings out of which the application arises. (*Blackwell, J.*) BHAGWANDAS NARANDAS *v.* D. D. PATEL & Co. I.L.R. (1940) Bom 403=187 I.C. 867=12 R.B. 495=41 Cr.L.J. 526=42 Bom.L.R. 231=A.I.R. 1940 Bom. 131.

——S. 473—*Scope—Certificate of visitors of lunatic asylum—Presumption of genuineness—If public document—Formal proof—Necessity for.*

CR. P. CODE (1898), S. 476.

A certificate of the visitors of lunatic asylum or Mental Hospital in the prescribed Government form and signed by the visitors and by the Superintendent of the Hospital, comes within the provisions of S. 79 of the Evidence Act and is a public document, the genuineness of which is to be presumed in view of S. 473, Cr. P. Code. No formal proof of such a document is necessary under the Law. (*Lort Williams and Jack, JJ.*) KALIDAS SARKAR *v.* EMPEROR. 63 Cal. 425.

——S. 476.

Applicability.
Authority to complaint.
Civil Court.
Complaint.
Court.
Delay.
Duty of Court.
Enquiry under.
Expediency of Inquiry.
Jurisdiction to make complaint.
Preliminary inquiry.
Procedure.
Prosecution under.
Prosecution under S. 193, I. P, Code.
Scope.
Miscellaneous.

Applicability.

——S. 476—*Applicability — Departmental inquiry by Judge of Court—Order for complaint against witnesses for giving false evidence—Legality.*

Where an enquiry held by the presiding officer of a Court is a departmental enquiry, S. 476, Cr. P. Code, is not applicable. The Judge cannot in such a case order the filing of a complaint against witnesses for giving false evidence. (*Lakshmana Rao, J.*) ANJANAPPA *v.* EMPEROR. 1940 M.W.N. 805 (2)=52 L.W. 345 (1).

——S. 476—*Applicability—Summons case.*

The word "inquiry" in S. 476 is wide enough to include any proceedings under Chap. 16, Cr. P. Code. S. 476 is not therefore restricted to a warrant case but applies to a summons case also. (*Blacker, J.*) EMPEROR *v.* RAM LAL ANAND. 189 I.C. 628=41 Cr.L.J. 766=13 R.L. 106=42 P.L.R. 505=A.I.R. 1940 Lah. 233.

Authority to complaint.

——S. 476—*Power to complain under—Nature of.*

(Per *Dhavle, J.*) The power to make a complaint under S. 476, Cr. P. Code, is not among the powers specified in Schedule III and IV of the Cr. P. Code, and is not a magisterial power, for it can be exercised as well by Civil or revenue Courts as by criminal Courts. (*Dhavle and Rowland, JJ.*) JUGESHWAR SINGH *v.* EMPEROR. 15 Pat. 26=164 I.C. 86=37 Cr.L.J. 893=9 R.P. 84=17 Pat.L.T. 234=1936 P.W.N. 489=1936 Cr.C. 539=A.I.R. 1936 Pat. 346.

Civil Court.

——S. 476—*Order by Civil Court making complaint—Appeal to High Court—If one of civil nature or criminal nature—Madras Criminal Rules of Practice, R. 37.*

The jurisdiction that is exercised by a Court in filing a complaint under Ss. 195 and 476, Cr. P. Code, is a jurisdiction exercised under the Cr. P. Code, and is therefore of a Criminal nature. The fact that the complaint is filed by a Civil Court

does not make it of a civil nature. There is no rule that everything done by a civil Court should be regarded as being of a civil nature. An appeal by the party complained against to the High Court from another making a complaint must therefore be presented under the Cr. P. Code, and must be treated as an appeal order the criminal side of the High Court and not on the civil side. Rule 37 of the Madras Criminal Rules of Practice cannot affect a right given by a statute, namely, the right of appeal from an order made under S. 476, Cr. P. Code, to the Court to which that Court is subordinate. (*Pandrang Row, J.*) RAJU GUPTA, *In re*. I.L.R. (1939) Mad. 439=189 I C. 25=41 Cr.L.J. 705=13 R.M. 228= 1939 M.W.N. 243=49 L.W. 330=A.I.R. 1939 Mad. 472=(1939) 1 M.L.J. 480.

——S. 476—*Order by Civil Court—Revision—Forum—Civil or Criminal Court.*

Where a Civil Court exercises the special jurisdiction granted by Ss. 476, 476-A or 476-B, Cr. P. Code, it does so as a Civil Court and not as a Criminal Court. A revision against an order in such proceedings lies to a Civil Court and not to a Criminal Court. (*Middleton, A.J. C.*) TEK CHAND *v.* HARNAM SINGH. 161 I.C. 270=8 R. Pesh. 168=A.I.R. 1936 Pesh. 87.

Complaint.

——S. 476 — *Complaint under — Complaint against certain named persons—Refusal to complain against others—Jurisdiction of Magistrate to take proceedings against latter also.*

The Cr. P. Code. provides for taking cognizance of offences and not of offenders, and a Magistrate who has legally taken cognizance of an offence under S. 476, Cr. P. Code, has jurisdiction to proceed against any one who might be proved by the evidence to be concerned in that offence, whether he was mentioned in the order under S. 476 or not, even if the Court making the complaint may have refused to make a complaint against such person. (*Lort Williams and Jack, JJ.*) NITAL CHARAN GHOSE *v.* KSHETRA NATH GANGULY. 63 Cal. 819=162 I.C. 102=8 R.C. 562=37 Cr.L.J. 521=40 C.W.N. 573=1936 Cr. C. 289 (2)=A.I.R. 1936 Cal. 147.

——S. 476—*Complaint in respect of offences under Ss.* 209, 467 *and* 471, *I. P. Code—Suit decided on solemn oath—Propriety.*

A Court ought not to file a complaint in respect of offences under Ss. 209, 467 and 471, I. P. Code, when the matter has not been thoroughly sifted by it in the course of a regular judicial enquiry, as for example, when the matter was not enquired into owing to the plaintiff agreeing to abide by the solemn oath of the defendant. (*Nanavutty, J.*) GAURI *v.* EMPEROR 12 Luck. 62=161 I.C. 602=8 R.O. 333=37 Cr.L.J. 518= 1936 O.W.N. 268.

——S. 476—Irregularity in complaint made by one Court to another—If curable under S. 537 (*a*). *See* CR. P. CODE, SS. 537 (*a*) AND 476. 1938 N.L.J. 285.

——S. 476—*Complaint under—Objection to initiation of proceedings—When to be taken—Failure to appeal against order for prosecution—Objection to legality at trial after commitment—Sustainability.*

Once a commitment has been made in pursuance of a complaint made under S. 476, Cr. P. Code, it

is too late for the accused to take an objection against the initiation of the proceedings on the ground that the Magistrate who preferred the complaint under S. 476 had no magisterial powers on that date and was therefore not a Court capable of initiating proceedings under S. 476. The objection ought to be raised earlier before the order for complaint is made. And when the accused do not appeal against the order for complaint against them, they have no other remedy. (*Dhavle and Rowland, JJ.*) JUGESHWAR SINGH *v.* EMPEROR 15 Pat. 26=164 I.C. 86=8 R.P. 84= 37 Cr.L.J. 893=17 Pat.L.T. 234=1936 Cr.C. 539 1936 P.W.N. 489=A.I.R. 1936 Pat 346.

——S. 476—*Complaint under—Time limit—Motive of application—Relevancy.*

While, no doubt, a Court may properly hesitate to make a complaint on an application which is presented long after proceedings have ended and which is obviously not prompted by any other motive than personal grudge, there is nothing in the Code warranting the proposition that action under S. 476 is only to be taken before the close of the proceedings in which the perjury is alleged to have been committed, or in strict continuation of them, or within any particular time after their termination. Nor is there justification for the view that only applications prompted by high motives are to be entertained. (*Coldstream, J.*) JAHAN KHAN *v.* EMPEROR. 176 I.C. 116=39 Cr. L.J. 698=11 R L. 164=40 P.L.R. 136=A.I.R. 1938 Lah. 429.

——S. 476—Complaint under—Expediency of enquiry not stated—Interference in revision, *See* CR. P. CODE, SS. 439 AND 476. 1940 N.L.J. 108.

——S. 476—*Complaint under—Propriety—False accusation of corruption against judicial officer.*

If an allegation which practically amounts to an accusation of corruption against a judicial officer appears *prima facie* to be false, it is in the highest degree expedient in the interests of justice that there should be an enquiry into it. The making of a complaint against the person making such an allegation is, therefore, fully justified. (*Blacker, J.*) JAI RAM *v.* EMPEROR. 188 I.C. 863=41 Cr.L.J. 701=13 R.L. 66=42 P. L.R. 40 (2)=A.I.R. 1940 Lah. 203.

——S. 476—*Complaint under—Statements not made on oath—Power of Court to act on.*

There is nothing in S. 476, Cr. P. Code, to suggest that a Court making a complaint can only act on statements that are made on oath before it. All that it lays down is that it should "appear" to the Court that an offence has been committed. If a responsible officer in the position of a Subordinate Judge makes a report that certain statements made on oath are false, it would be sufficient to make it "appear" for the purposes of this section that an offence of perjury has been committed. (*Blacker, J.*) JAI RAM *v.* EMPEROR. 188 I.C. 863=41 Cr.L J. 701 =13 R.L. 66=42 P.L.R. 40 (2)=A.I.R. 1940 Lah. 203.

——S. 476—*Form of complaint—Complaint not to invite conviction.*

A complaint which is lodged under S. 476, Cr. P. Code must omit from its contents any reference which might be construed by the Magistrate before whom the proceedings are taken as a pressing invitation to record a finding adverse to

any one charged with an offence. The Magistrate must try the complaint as he would do a complaint of an ordinary kind and must remain completely unaffected by any consideration of its origin. (*Roberts, C.J. and Braund, J.*) TAN BA CHENG *v.* REGISTRAR, ORIGINAL SIDE, HIGH COURT. **1940 Rang.L.R. 12=187 I.C. 754=12 R.R. 354 =41 Cr.L.J. 515=A.I.R. 1940 Rang. 104.**

Court.

——S. 476—*"Court"—Meaning of.*

S. 476 refers not to the Magistrate, but to Court, and contemplates the Court itself and not the personality of the trying Magistrate. Hence, by reason of the words of the section, the request for a transfer of a case to the file of the trying Magistrate before whom the alleged offence is committed, which would otherwise be reasonable, cannot be granted on the ground that he will be the best Magistrate to decide whether complaint should be made or not. (*Davis, J.C.*) JETHANAND *v.* EMPEROR **183 I.C. 195=12 R.S. 47=40 Cr.L. J. 750=A.I.R. 1939 Sind 181.**

Delay.

——S. 476—*Application to lay complaint—Considerations for Court—Delay, effect of.*

Before exercising its discretion to lay a complaint the Court should find first, that it is in the interests of public justice that a complaint should be made, and, secondly, that there is a reasonable probability of a conviction resulting from the complaint. In regard to the first point, although no time-limit for the institution of such prosecutions is laid down in the section, yet prompt action is desirable, and delay on the part of a party in making his application to move the Court to lay a complaint may, if unexplained, be fatal to the application. When the application is delayed, and the delay is not satisfactorily explained, evidence called in support thereof naturally comes under suspicion, and the inference arises that the interests of public justice are less likely to be served than the interests of the applicant by the laying of a complaint. Moreover, a party who has been unsuccessful in a case should not remain indefinitely under the threat that an application for his prosecution may be filed: such a weapon is likely to be used for improper purposes. These considerations apply with most force when the application is not founded on materials to be found on the record of the trial but on evidence of additional facts which the applicant alleges to be available. In such cases strict explanation of the reasons for the delay in making the application is necessary; otherwise it cannot be held that it is in the interests of justice to make a complaint. (*Dunkley, J.*) M. MAHOMED KAKA *v.* DISTRICT JUDGE, BASSEIN. **1937 Rang.L.R. 276=168 I.C 632= 9 R.R. 359=38 Cr.L.J. 615=A.I.R. 1937 Rang. 62.**

——S. 476—*Delay in applying—Application—If to be made in course or immediately after proceedings.*

It is not necessary that an application under S. 476, Cr. P. Code, must be made in the course of the proceedings out of which it arises or immediately thereafter. Whether the Court would accede to an application made long after the termination of the proceedings out of which it arises is a matter which would arise upon the

merits and would depend upon all the circumstances. (*Blackwell, J.*) BHAGWANDAS NARANDAS *v.* D. D. PATEL & Co. **I.L.R. (1940) Bom. 403=187 I.C. 867=41 Cr.L.J. 526=12 R.B. 495 =42 Bom.L.R. 231=A.I.R. 1940 Bom. 131.**

Duty of Court.

——S. 476—*Duty of Court—Opportunity to party against whom enquiry is directed to cross-examine witnesses.*

Where a Magistrate decides to hold a preliminary enquiry under S. 476, the Magistrate should give an opportunity to the party against whom the enquiry is directed to cross-examine the witnesses produced. If he refuses to allow such party to cross-examine the witnesses who were not examined before, the order cannot stand. (*Mackney, J.*) U BA HLA *v.* MAUNG TUN SEIN. **178 I.C. 305=40 Cr.L.J. 56 (2)=11 R.R. 226= A.I.R. 1938 Rang. 297.**

——S. 476—*Prosecution for perjury—Duty of Court.*

Every case of perjury need not necessarily result in the prosecution of the person who is guilty of the offence. The Court should see that the prosecution is undertaken in the interests of justice and not to satisfy the private grudge of a litigant. (*Jai Lal, J.*) NAND LAL *v.* EMPEROR. **172 I.C. 942=10 R.L. 381=39 Cr.L.J. 237=39 P.L.R. 812=A.I.R. 1937 Lah. 867.**

Enquiry under.

——S. 476—*Enquiry under—Scope of—Court—If confined to record of proceedings—Evidence outside the record of proceedings—Admissibility.*

Where an application is made under S. 476, Cr. P. Code, the Court in deciding whether it is in the interests of justice that an inquiry should be made, is not confined to the record of the proceedings, but is entitled to take into account and consider information otherwise acquired. The applicant is therefore entitled to adduce evidence outside the record of the proceedings out of which the application arises, to show that evidence given in those proceedings was false. (*Blackwell, J.*) BHAGWANDAS NARANDAS *v.* D. D. PATEL & Co. **I.L.R. (1940) Bom. 403=187 I.C. 867=41 Cr.L.J. 526=12 R.B. 495=42 Bom.L.R. 231=A.I.R. 1940 Bom. 131.**

Evidence.

——S. 476—*Evidence—Probate proceedings—Application under S. 476 arising out of—Applicant admitting validity of probate—Evidence of forgery of will—Admissibility.*

In an application under S. 476, Cr. P. Code, arising out of a testamentary suit evidence of forgery of the will is admissible in the same manner as it would be admissible in a criminal case, the applicant admitting the validity of the probate decree and the title of the executor. (*Blackwell, J.*) BHAGWANDAS NARANDAS *v.* D. D. PATEL & Co. **I.L.R. (1940) Bom. 403=187 I.C. 867=41 Cr.L.J. 526=12 R.B. 495=42 Bom.L.R. 231=A.I.R. 1940 Bom. 131.**

Expediency of inquiry.

——S. 476—*Absence of finding of expediency—Effect of—Duty of appellate Court.*

Where a Court directs a prosecution under S. 476, Cr. P. Code, the absence of a finding by it that it is expedient in the interest of justice that an enquiry should be made is not in itself fatal to

the proceedings. Where it has not applied its mind to the facts, the appellate Court may look at them independently, and in doing so will not make the usual presumptions in favour of the correctness of the first Court's findings. (*Rowland, J.*) NAWALAL JHA *v.* EMPEROR. **159 I.C. 817=8 R.P. 313=37 Cr.L.J. 193=1936 Cr.C. 254 =A.I.R. 1936 Pat. 162.**

——— **S. 476**—*Expediency of prosecution—Inquiry as to—Duty of Court to hold.*

Before drawing up an order under S. 476, Cr. P. Code, the Court or Magistrate must hold an inquiry as to whether it is desirable in the interest of public justice to order a prosecution. (*Manohar Lall, J.*) MUKTI NARAIN *v.* EMPEROR. **186 I.C. 627=41 Cr.L.J. 349=12 R.P. 534=6 B. R. 377=20 Pat.L.T. 947=1939 P.W.N. 871=A. I.R. 1940 Pat. 97.**

———**S. 476**—*Expediency of inquiry—Failure to record express finding—If invalidate complaint.*

Although it is necessary that a Court deciding to make a complaint under S. 476, Cr. P. Code, should record a finding that in its opinion it is expedient in the interest of justice that an inquiry should be made, the absence from the record of an express finding, or a finding in the exact words of the section will not invalidate the complaint. It is sufficient if the record shows clearly that the Court has applied its mind to the question of expediency and has come to the conclusion that an inquiry is expedient. S. 537, Cr. P. Code, would, in appropriate cases, apply to the failure to record an express finding under the provisions of S. 476, especially when the objection is taken at so late a stage that it is not possible for the Government to find out, whether among other papers not before the Court, the finding required by S. 476 has not been expressly recorded. (*Davis, J.C.*) CHARANDAS KANYALAL *v.* EMPEROR. **I.L.R. (1939) Kar. 280=182 I.C. 914=12 R.S. 35=40 Cr.L.J. 707=A.I.R. 1939 Sind 170.**

———**S. 476**—*Expediency of enquiry—Finding as to—Duty of Court to record.*

It is certainly desirable that Courts of facts should express themselves definitely and unequivocally on the question whether it is expedient in the interest of justice that an inquiry under S. 476 should be made: otherwise the High Court may have to look into the facts for itself and form its own opinion as to whether a prosecution is desirable or not. (*Rowland, J.*) NAND KUMAR SINHA *v.* EMPEROR. **172 I.C. 237=39 Cr.L.J. 103=10 R.P. 316=1937 P.W.N. 119=A. I.R. 1937 Pat 534.**

———**S. 476**—*Expediency of prosecution—Enquiry as to—Duty of Court—Matters for consideration—Absence of finding that prosecution is expedient in the interests of justice—If fatal.*

A Court which orders a prosecution under S. 476, Cr. P. Code, must properly come to the conclusion that a prosecution is necessary in the interests of justice. Though the absence of such a finding is not necessarily fatal, a Court dealing with these matters must apply its mind directly to the question, and in doing so it should consider whether an attempt to use the law in aid of a private grudge is being made and whether the Court should allow itself to become the instrument of a private grudge and also what facts can be proved and whether these facts are sufficient to support the conviction. (*Rowland,*

J.) BACHU SINGH *v.* TRIBENI SAH. **5 B.R. 203= 179 I.C. 167=11 R.P. 328=40 Cr.L.J. 157=1938 P.W.N. 904=A.I.R. 1939 Pat. 178.**

———**S. 476**—*Expediency of prosecution—Offence under S. 199, I. P. Code—Reckless allegations in affidavits filed in support of transfer applications—Order for inquiry and complaint—Propriety.*

There is a tendency on the part of applicants for transfer of criminal cases to make reckless allegations in the affidavits filed in support of such applications. That should not be tolerated and when the persons swearing the affidavit have *prima facie* no real knowledge of the facts stated and do not indicate sources of their knowledge of such matters it would be expedient in the interests of justice to order an inquiry into an offence under S. 199, I. P. Code. (*Dhavle, J.*) MANLAYAK SINGH *v.* RAMKIRIT. **188 I.C. 854=6 B.R. 754=41 Cr.L.J. 702=13 R.P. 54=1940 P.W.N. 745=A.I.R. 1940 Pat. 631.**

Jurisdiction to make complaint.

———**S. 476**—*Jurisdiction to make complaint—High Court sitting in revision—Powers of.*

Though the words 'that Court' in S. 476, Cr. P. Code relate back to the civil, revenue or criminal Court mentioned at the beginning of the section; once proceedings have been called for by a High Court in revision, and it is apparent that an offence referred to in S. 195, Sub-S. (1), Cl. (*b*) or Cl. (*c*) has been committed in relation to the proceedings then before it, the High Court as a criminal Court has power to make a complaint though the offence complained of was not committed in the course of proceedings in the High Court. Where upon application, the J. C.'s Court in revision called for the proceedings of certain complaint and quashing those proceedings came to the conclusion that there was ground to believe that an offence under 'S. 211, I. P. Code, within the provisions of S. 195 (1) (*b*), Cr. P. Code, had been committed in relation to the proceedings which were then before it.

Held, that sitting in revision it had jurisdiction to inquire under S. 476 and make complaint if it was expedient in the interests of justice. It had also the power, if it did not wish to inquire itself, to order the trial Court to inquire either under the provisions of S. 423 (*d*) as an "incidental order' or under S. 564-A. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* HENRY BRIDGNELL. **170 I.C. 891=38 Cr.L.J. 1002=10 R.S. 81=A.I.R. 1937 Sind 193.**

———**S. 476**—*Jurisdiction to make complaint—Power of High Court in Civil revision.*

Under S. 476, Cr. P. Code, the High Court has jurisdiction to make a complaint when hearing a civil revision application, if it comes to the conclusion that it is expedient in the interests of justice that proceedings under that section should be directed. (*Thom and Bennet, JJ.*) SHANKAR LAL *v.* EMPEROR. **I.L.R. (1937) All. 774=1937 A.L.J. 820=171 I.C. 525=1937 A.W.R. 690= 1937 A.Cr.C. 115=10 R.A. 279=1937 A.L.R. 852=38 Cr.L.J. 1080=A.I.R. 1937 All. 681.**

———**S. 476**—*Jurisdiction to make complaint—Suborning evidence before Sub-divisional Magistrate in committal proceedings—Trial by Sessions Judge—Sub-Divisional Magistrate—If can make complaint.*

CR. P. CODE (1898), S. 476.

Where an accused suborned evidence during committal proceedings before a Sub-Divisional Magistrate and the Sessions Judge tried the case, the Sub-Divisional Magistrate can file a complaint under S. 446, Cr. P. Code. (*Rowland, J.*) NAND KUMAR SINHA *v.* EMPEROR. 172 I.C. 237 =39 Cr.L.J. 103=10 R.P. 316=1937 P.W.N. 119=A.I.R. 1937 Pat. 534.

——S. 476—*Jurisdiction—Proceedings instituted in respect of offence—Jurisdiction to proceed against persons not named as offenders but appearing to be involved in the course of proceedings.*

S. 476 is so worded as to make it clear that the procedure therein provided is intended to deal primarily with offences, but with offenders also if they are known and available. S. 476 has no reference to jurisdiction. If then in respect of one of the offences enumerated in S. 195 (1) (*b*) committed in or in relation to any proceeding in any Court that Court or some Court to which that Court is subordinate has proceeded under S. 476 and filed a complaint, the bar under S. 195 is removed. The Magistrate before whom the complaint is lodged takes cognizance of the offence under S. 190 (1) and thereafter proceeds to inquire into the complaint and to deal with it according to law, using for this purpose all the powers vested in him by the Code of Criminal Procedure. If an offender is named in the complaint the Magistrate will proceed against him. If on inquiring into the complaint other persons appear to be involved therein by the evidence recorded by the Magistrate he is entitled to proceed against those others under the powers conferred upon him by S. 190 (1) (*a*) and S. 195 (1) (*b*) cannot possibly bar him from doing so. (*Lobo, J.C. and O'Sullivan, J.*) FATEH MAHOMED *v.* EMPEROR. I.L.R. (1940) Kar. 287=189 I.C. 586=41 Cr.L.J. 750=13 R.S. 33=A.I.R. 1940 Sind 97.

Preliminary inquiry.

——S. 476—*Preliminary enquiry and notice to accused—If condition precedent to complaint.*

The wording of S. 476, Cr. P. Code, does not make it incumbent on the Court to hold any preliminary inquiry or to give accused notice, and if an inquiry is held, its nature, method and extent are entirely within the discretion of the Court. (*Rowland, J.*) NAND KUMAR SINHA *v.* EMPEROR. 172 I.C. 237=39 Cr.L.J. 103=10 R.P. 316=1937 P.W.N. 119=A.I.R. 1937 Pat. 534.

——S. 476—*Preliminary enquiry—Prosecution for fabrication of written evidence—Party, if can be directed to produce documents in his possession.*

Where an application under S. 476, Cr.P. Code is made to the Court for prosecuting a party for fabricating written evidence, the Court can direct a preliminary enquiry and order the party to produce documents in his possession for the purpose of considering whether or not the prosecution should be launched. (*Ameer Ali, J.*) GOPALDAS *v.* JNANENDRA. 180 I.C. 586=11 R.C. 702=40 Cr.L.J. 450=A.I.R. 1938 Cal 677.

——S. 476—*Preliminary enquiry—Notice to accused—If necessary.*

A Court making a preliminary enquiry under S. 476, Cr. P. Code, need not issue notice to the accused. (*Skemp, J.*) NAZAD MOHAMMED *v.* HARNAM SINGH. I.L.R. (1938) Lah. 188=178 I.C. 795=11 R.L. 502=40 Cr.L.J. 140=40 P.L.R. 959=A.I.R. 1938 Lah. 641.

CR. P. CODE (1898), S. 476.

——S. 476—*Preliminary enquiry—When necessary—Right of accused to cross-examine witnesses newly produced.*

It is a fundamental principle of justice that no order to the prejudice of a person shall be made without his being heard, and, therefore, before an order directing the filing of a complaint against a person is made, that person must be heard and must be given full opportunity of showing cause against the making of such an order. When the order depends upon matters already on record, no preliminary inquiry is necessary; but when it depends upon evidence of other facts which are not to be found on the record, in fairness to the person accused a preliminary inquiry must be held and in that preliminary inquiry he must be made aware of the allegations which are made against him and of the materials upon which those allegations are based. If the order is to depend upon additional evidence, and when the additional evidence is procured as a result of an application by a private party, it is essential that, if justice is to be done, the evidence should be recorded in his presence and he should be given an opportunity of cross-examining the witnesses. (*Dunkley, J.*) M. MAHOMED KAKA *v.* DISTRICT JUDGE, BASSEIN. 1937 Rang L.R. 276=168 I.C. 632=9 R.R. 359=38 Cr.L.J. 615=A.I.R. 1937 Rang. 62.

——S. 476—Proceedings in Civil Court under —Jurisdiction—If civil or criminal. *See* C. P. CODE, S. 115. (1940) 1 M.L.J. 719 (F.B.).

Procedure.

——S. 476 — *Procedure — Complaint under S. 211, I. P. Code--Duty of Magistrate before making charge—Formalities to be followed.*

If a Magistrate is going to make a charge against a person of an offence under S. 211, Penal Code, the complaint which the Magistrate holds to be false must have been verified and dealt with by the Court according to law, *i.e.*, when the complaint is made to the Magistrate he is bound to take cognizance of it under S. 200, Cr.P, Code, and to verify the complaint in the ordinary way The Cr. P. Code does not contemplate that when the Magistrate has received a formal complaint he need not follow the procedure set out in S. 200, Cr. P. Code, but can straightaway send it to the police under S. 156 (3), Cr. P. Code, and then upon issue of B summary make a complaint of a false charge. The word "may" under S. 190, Cr. P. Code, does not mean that magistrate may refuse to take cognizance of an offence upon a complaint duly made to him. (*Davis, J.C.*) RADHAKRISHIN *v.* EMPEROR. I.L.R. (1939) Kar. 648=180 I.C. 436=11 R.S. 178=40 Cr.L.J. 449 =A.I.R. 1939 Sind 78.

Prosecution under.

——S. 476—*Prosecution under— Propriety— Absence of probability of conviction.*

Prosecution of a person should not be ordered under S. 476, Cr. P. Code, if there is no reasonable probability of his conviction. (*Bhide, J.*) NATHA MAL *v.* EMPEROR. 41 P.L.R. 96.

——S. 476—*Prosecution under — Revision — Interference.*

Ordinarily the High Court is reluctant to interfere with orders where the Courts below after a

consideration of the entire material on the record have come to the conclusion that an offence has been committed, which it is desirable, in the interests of justice, to send for enquiry to a Magistrate. (*Jai Lal, J.*) NAND LAL *v.* EMPEROR. 172 I.C. 942=10 R.L 381=39 Cr.L.J. 237=39 P.L.R. 812=A.I.R. 1937 Lah. 867.

——S. 476—*Prosecution under—When may be directed.*

To enable a Court to direct a prosecution of a person under S. 476, it is necessary that the desirability of prosecuting the offender should be present in the mind of the Court during the proceeding in course of which the offence was committed or brought to its notice. It is not intended that when the proceedings have terminated the attention of the Court should be drawn by some private person to the fact that in these proceedings there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment. So also no prosecution ought to be directed unless there is a reasonable probability of conviction. 34 Cal. 551 (F.B.) and 37 Cal. 250, Foll. (*Dunkley, J.*) U PO THEIN *v.* BUTA KHAN. 166 I.C. 489=9 R.R. 262=38 Cr.L.J. 226=1936 Cr. C. 963=A.I.R. 1936 Rang. 473.

Prosecution under S. 193, I.P. Code.

——S. 476—*Prosecution under S. 193, I. P. Code—Consideration.*

Where an application under S. 476 read with S. 195 is made to the High Court for taking action against a person for having made contradictory statements in a case, the High Court should after making every allowance for forgetfulness and confusion, take action in a proper case. There must, however, be a reasonable or something more than a reasonable probability of conviction and the High Court should not ordinarily take action unless it has to deal with a really bad case. (*Ameer Ali, J.*) GOPALDAS *v.* JNANENDRA. 180 I.C. 586=11 R.C. 702=40 Cr. L.J 450=A.I.R. 1938 Cal. 677.

——S. 476—*Prosecution under S. 193, I. P. Code—Replication filed by party but rejected by Court—If can be made use of.*

A replication filed by a party under O. 6, R. 5, C. P. Code, which is rejected by Court but placed on record, can legally be made use of for the purposes of prosecution under S. 193, I. P. Code. (*Bhide, J.*) BEHARI LAL SUD *v.* EMPEROR. 185 I.C. 588=41 Cr.L J. 204=12 R.L. 313=41 P.L R. 652=A.I.R. 1939 Lah. 529.

——S. 476—*Perjury—Prosecution for—Advisability—Circumstances to be taken into account—Evidence of the scribe of a will in sessions case—Prosecution in respect of—Desirability.*

Where a scribe of a will denied in the course of his evidence in a sessions case, his having written the will and a complaint was filed against him for perjury, it was held by the appellate Court that though it was ordinarily in the interests of justice to bring the offender to book, it had to be seen whether it would ultimately promote the interests of justice to prosecute the scribe at that stage. As the final decision as to the will would rest with the Civil Court nothing should be done to anticipate or prejudice the result of the civil litigation that was sure to ensure quite soon. (*Niyogi, J.*) REWASHANKAR *v.* EMPEROR. 185 I.

C. 400=12 R.N. 167=41 Cr.L.J. 182=1939 N. L.J. 562=A.I.R. 1940 Nag. 72.

——S. 476—*Prosecution for having made false entry—Evidence necessary.*

Where an application under S. 476 read with S. 195 is made against a person for having fabricated evidence by making a false entry, before action can be taken against such person, there must be some satisfactory evidence that the entry was fabricated for the purpose of being used in the proceedings; but actual user of documents in the proceedings is not necessary. (*Ameer Ali, J.*) GOPALDAS *v.* JNANENDRA. 180 I.C. 586=11 R.C. 702=40 Cr.L.J. 450=A.I.R. 1938 Cal. 677.

——S. 476—*Offence under—S. 193, I. P. Code—Desirability—Matter in dispute difficult to decide.*

In a case where it is very difficult to arrive at certainty or to reach any conclusion which can be rated more highly than the most likely conclusion on the balance of probabilities, it is seldom desirable to launch criminal prosecution lightly against every witness who may be suspected of having departed from the truth in some particular. (*Rowland, J.*) NAWALAL JHA *v.* EMPEROR. 159 I.C. 817=8 R.P. 313=37 Cr.L.J. 193=1936 Cr. C. 254=A.I.R. 1936 Pat. 162.

——S. 476—*Prosecution under S. 193, I. P. Code—Revisions—Scope of.*

In a case where a person is ordered to be prosecuted under S. 193, I. P. Code, in respect of certain statements made by him as a witness in the course of a suit, the scope of revision is limited. Revision can only be granted, if there is some error of law, some irregularity, or some abuse of or failure to exercise jurisdiction. It is inadvisable for the High Court to interfere in revision when two Courts have concurred in holding that a prosecution is in the interests of public policy. Such a course is not even in the interests of the accused person as it deprives him of the only means of clearing his character, which would otherwise remain affected by the fact of the complaint having been made and endorsed, by the Court of appeal. (*Bhide, J.*) BEHARI LAL SUD *v.* EMPEROR. 185 I.C. 588=12 R.L. 313=41 Cr.L.J. 204=41 P.L.R. 652=A.I.R. 1939 Lah. 529.

——S. 476—*Prosecution under S. 193, I. P Code—Statement, if should be material in suit.*

Statements which form the subject matter of a charge under S. 193, I. P. Code, need not be material for the decision of the suit. (*Bhide, J.*) BEHARI LAL SUD *v.* EMPEROR. 185 I.C. 588=12 R. L. 313=41 Cr.L.J. 204=41 P.L.R. 652=A.I.R. 1939 Lah 529.

——S. 476—*Right to proceed under—District Judge acting as* persona designata *under Burma Rural Self-Government Act.*

The District Judge acting not as a Court but as *persona designata* under the Burma Rural Self-Government Act and the rules framed thereunder, is not entitled to proceed under S. 476, Cr. P. Code, and is not entitled to lay a complaint in pursuance of an order passed in the proceedings purporting to have been taken under that section. (*Mackney, J.*) U AUNE MYIN *v.* THE DISTRICT AND SESSIONS JUDGE, HENZADA. 188 I.C 795=41 Cr.L.J. 687=13 R.R. 19=A.I.R. 1940 Rang. 148,

CR. P. CODE (1898), S. 476.

Scope.

——S. 476—*Scope—Defamatory statements in affidavit in course of judicial proceedings—Complaint of defamation—Sanction—Necessity.*

It cannot be said that where defamatory statements are made in an affidavit in the course of judicial proceedings a complaint of defamation cannot in any case be made without complaint of the Court. Where it is a matter of doubt whether the fact complained of constitutes one of the offences relating to the administration of justice as provided in S. 193, Penal Code, or one of its cognate sections, the complainant is not thereby debarred from placing his complaint under S. 500 of the Code. The complaint of the Court not being necessary in such a case, the filing of the complaint under S. 500 does not amount to an evasion of law. (*Davis, J.C. and Lobo, J.*) KALU-MAL MOTIRAM *v.* MULCHAND KIMATRAI. **176 I.C. 365=39 Cr L.J. 736=11 R.S. 17=A.I.R. 1938 Sind 129.**

——S. 476—Scope—If affected by S. 52, Income-tax Act. *See* INCOME-TAX ACT, S. 52. **20 N.L.J. 214.**

——S. 476—Scope—If to be read with S. 195 (1) (*c*)—Complaint by Court—When necessary. *See* CR. P. CODE, S. 195 (1) (*c*). **1937 A.W.R. 748 =A.I.R. 1937 All. 714.**

Miscellaneous.

——S. 476—*Discretion—Stay—Suit dismissed on finding that receipts were forged—Appeal—Application by defendants for prosecution of plaintiff—Dismissal—Appeal by defendants—Appellate Court sending back record for re-consideration on ground of pendency of appeal—Propriety.*

The plaintiff's suit was dismissed by the Court on finding that the receipts filed by him were forged. Plaintiff filed an appeal against this decree. Defendants in the meanwhile filed an application to the original Court for prosecution of plaintiff. The application was dismissed and an appeal was filed against the order. The appellate Court dismissed the defendants' appeal and sent back the record to original Court for re-consideration on ground that an appeal was already pending against the decree of the original Court. On revision,

Held, that the order of the appellate Court was proper as the discretion of staying criminal proceedings, during civil proceedings, in which same facts were at issue, lay with the original Court. (*Agarwala, J.*) SINGHESHWAR PRASAD *v.* SAKHICHAND. **167 I.C. 895=9 R.P. 446=38 Cr.L.J. 476=3 B.R. 376=1936 P.W.N. 855=A.I.R. 1937 Pat. 139.**

——S. 476—*Successive applications under—Competency.*

A Magistrate who has passed an order refusing to start proceedings for perjury under S. 476 can take further action on a subsequent application moving him to the same effect. Ordinarily, however, it would be undesirable to do so unless some fresh facts have emerged showing that the previous order was clearly wrong. (*Gruer, J.*) BHAGWANDAS *v.* MATHURA. **I.L.R. (1937) Nag. 336= 164 I.C. 713 (2)=37 Cr.L.J. 977=9 R.N. 26 (1) =1936 Cr.C. 711=A.I.R. 1936 Nag. 156.**

——S. 476—*Successor of Court—Power to complain.*

Successors in office of a Court are perfectly competent to deal with the proceeding under

CR. P. CODE (1898), S. 476.

S. 476 and order or not order a complaint under S. 195 as they think fit. (*Dalip Singh and Blacker, JJ.*) BEHARI LAL *v.* ABDUL QADIR. **A.I.R. 1940 Lah. 292.**

——S. 476—*Suit on pronote with endorsement of payment—Defendant alleging endorsement as forgery—Allegation not substantiated—Proceedings against defendant for perjury—Plaintiff dying and representatives not taking part in proceedings—If ground for dropping proceedings.*

Where in a suit on a promissory note the defendant filed a written statement that the note sued upon was barred by limitation, that the endorsement alleged to be in his handwriting was not made by him and he also alleged that it was a forgery, and did not substantiate the statement by his evidence in the witness box.

Held, that nevertheless there was his statement on which a finding had to be recorded, and therefore his having been kept out of the box would not absolve him from liability to prosecution for perjury, and the Court can proceed against him under S. 476, Cr. P. Code. The death of the plaintiff in a suit did not make any difference with regard to an application under S. 476, Cr. P. Code. The Court once having been moved, it is then a question for the Court to decide and not for the parties themselves. The fact that the legal representat ives of the plaintiff do not desire to take part in the proceedings on an application under S. 476, does not make any difference. (*Beasley, C.J.*) VENKATRAMA REDDI *v.* SRINIVASA REDDI. **162 I C. 285=8 R.M. 975=37 Cr.L.J. 557=1936 M.W.N. 991=1936 M.Cr.C. 202=1936 Cr.C. 358 =A.I.R. 1936 Mad. 350.**

——Ss. 476 and 195 (1) (b)—*Complaint as to abetment of offences—Filing of—Jurisdiction of Court.*

In S. 376, Cr. P. Code, the words "any offence referred to in S. 195 (1) (*b*)" only mean an offence to which S. 195 (1) (*b*) has reference, and do not mean an offence specifically mentioned in S. 195 (1) (*b*). S. 195 (1) (*b*) read with Sub-S. (4) of that section is made to have reference to an abetment. The Court has, therefore, jurisdiction under S. 476 to lay a complaint in respect of abetment of an offence referred to in S. 195 (1) (*b*). (*Roberts, C.J. and Brand, J.*) TAN BA CHENG *v.* REGISTRAR, ORIGINAL SIDE, HIGH COURT. **1940 Rang.L.R. 12=187 I.C. 754=12 R.R. 354= 41 Cr.L.J. 515=A.I.R. 1940 Rang. 104.**

——Ss. 476 and 195 (1) (c)—*Court, if can proceed against person not a party to the proceedings before it.*

S. 476, Cr. P. Code, does not inhibit the classes of Courts mentioned therein from making a complaint in respect of any of the offences specified in S. 195 (1) (*c*) against persons not parties to a proceeding before it, in which or in relation to which the offence was committed. (*Stone, C.J. and Clarke, J.*) ABDUL RAHIMAN *v.* MT. PUSIA BAI. **181 I.C. 751=11 R.N. 484=40 Cr.L.J. 572 =1938 N.L.J. 348=A.I.R. 1939 Nag. 85.**

——Ss. 476 and 482—*Failure of defendant in civil suit to produce certain records—Refusal by Court to sanction a complaint under S. 476—Complaint under S. 482—Competency.*

After refusal by Court to sanction a complaint under S. 476, a complaint under S. 482, Cr. P. Code, was filed for failure by a defendant in a suit to produce certain documents.

CR. P. CODE (1898), S. 476.

Held, an offence under S. 175, I. P. Code, cannot be said to have been committed in the view or presence of the Court and the complaint was not competent. 13 Mad. 24, Ref. (*Lakshmana Rao, J.*) SHANKARA VARMA RAJAH, *In re.* 187 I.C. 470=12 R.M. 738=51 L.W. 230=1940 M.W.N. 240 (1)=41 Cr.L.J. 465=(1940) 1 M.L.J. 272.

——Ss. 476 and 476-B—*Appeal—Order of District Magistrate making a complaint on appeal—Appeal to High Court, if lies.*

An appeal does not lie to the High Court, from an order of the District Magistrate directing a prosecution under S. 193 of the Penal Code, passed on an appeal from the order of the Sub-District Magistrate refusing to make a complaint. It was never the intention of the legislature to provide two first appeals. (*Courtney-Terrell, C. J., James and Manohar Lal, JJ.*) KESHARINANDAN *v.* EMPEROR. 17 Pat. 9=172 I C. 899=10 R.P. 370=4 B.R. 186=39 Cr.L.J. 181=1937 P.W.N. 978=18 Pat.L.T. 917=A.I.R. 1938 Pat. 19 (F. B.).

——Ss. 476 and 476-B—*Complaint by Court—Omission to appeal against order making complaint—Conviction on such complaint confirmed on appeal—Revision—Objection to legality of complaint—Maintainability.*

A person who has not appealed against an order resulting in a complaint under S. 476, Cr. P. Code, being filed against him is not entitled to question or challenge the legality of the complaint in revision after he has been convicted and such conviction has been affirmed in appeal. (*Varma and Rowland, JJ.*) KUNJO CHAUDHARY *v.* EMPEROR. 16 Pat. 650=19 Pat.L.T. 21=1938 P.W.N. 41=173 I.C. 742=4 B.R. 332=39 Cr.L.J. 353=10 R. P. 443=A.I.R. 1938 Pat. 99.

——Ss. 476 and 476-B—*Complaint under—No appeal—Complaint, if can be challenged before Magistrate.*

Where a Court has made a complaint under S. 476, and no appeal is preferred against it under S. 476-B, it is not open to the accused to challenge the complaint itself before the Magistrate. (*Parker, J.*) EMPEROR *v.* U KADOE. 164 I.C. 769=37 Cr.L.J. 1008=9 R.R. 139=1936 Cr.C. 771=A I.R. 1936 Rang. 369.

——Ss. 476 and 476-B—*Refusal to make complaint—Appeal—Remand—Power of same Judge to make complaint.*

Where a Subordinate Judge had previously refused to make a complaint, it does not follow that he is debarred from laying one *suo motu* if on a further consideration, he finds, whether such conclusion is reached on a further study of facts or on an elucidation by a higher tribunal in its order of remand, that there is really a case for making a complaint. (*Grille, Ag. C.J.*) VITHOO *v.* EMPEROR. I.L.R. (1939) Nag. 338=180 I.C. 577=11 R.N. 373=40 Cr.L J. 388=1938 N.L.J. 285=A.I.R. 1938 Nag 487.

——Ss. 476, 476-B and 435—*Refusal to file complaint—Appeal—Direction to file complaint complaint and conviction—Validity of complaint, if could be questioned in revision against conviction.*

Where in an appeal under S. 476-B from an order refusing to lay a complaint, the appellate Court directed the lower Court to lay the complaint and the complaint was made and the accused was convicted, he cannot in revision against his conviction be permitted to question validity of the complaint, inasmuch as he had failed to avail himself of the remedy open to him then and there to question its validity. (*Grille, Ag. C. J.*) VITHOO *v.* EMPEROR. I.L.R. (1939) Nag. 338=180 I.C. 577=11 R.N. 373=40 Cr.L. J. 388=1938 N.L.J. 285=A.I.R. 1938 Nag. 487.

CR. P. CODE (1898), S. 476-B.

——Ss. 476 and 478—Complaint under S. 476—Power of Court to review its complaint—Small Cause Court Judge making complaint under S. 476—Whether can subsequently order commitment under S. 478. *See* CR. P. CODE, SS. 369 AND 476. 1936 A.L.J. 1199=A.I.R. 1937 All. 76.

——Ss. 476 and 482—*Contempt of Court—Power of Court to proceed under S. 476.*

The provisions of S. 482 can only be employed where cognizance has already been taken under S. 480. S. 482 is in no way independent of S. 480. Therefore in a case of contempt committed *coram judice* and punishable under S. 228, I. P. Code, it is optional with the Court to proceed either under S. 480 or S. 476 and the existence of S. 482 does not operate so as to take away this option. (*Blacker, J.*) EMPEROR *v.* RAM LAL ANAND. 189 I.C. 628=41 Cr.L.J. 766=13 R.L. 106=42 P.L. R. 505=A.I.R. 1940 Lah. 233.

——S. 476-A—*Application for making complaint dismissed in default by lower Court—Jurisdiction of superior Court to make complaint.*

The word 'rejection' in S. 476-A, Cr. P. Code, includes rejection on the ground that the complainant did not appear to prosecute the application. Where, therefore, an application for making a complaint under S. 476 was dismissed in default by the lower Court, the superior Court has no jurisdiction to make a complaint. (*Coldstream, J.*) JAHAN KHAN *v.* THE KING. 176 I. C. 116=39 Cr.L J. 698=11 R.L. 164=40 P.L.R. 136=A.I.R. 1938 Lah. 429.

——S. 476-A—Making of complaint—Power of Additional District Magistrate. *See* CR. P. CODE. SS. 195 (3) AND 476-A. I.L.R. (1938) Lah. 188.

——S. 476-A—*Power to make complaint—Suit transferred to District Judge to Sub-Judge retaining proceeding under S. 476 with himself—Power of Sub-Judge to make complaint.*

Where a Subordinate Judge is alleged to have abetted an offence under S. 193, Penal Code, in course of a suit and the District Judge as superior Court has transferred the suit to senior Subordinate Judge but has retained the proceedings under S. 476 to himself, the effect of this order is to take away the power of senior Subordinate Judge to make complaint and hence the latter Court's order refusing to make complaint on the ground of lack of jurisdiction is right. (*Dalip Singh and Blacker, JJ.*) BEHARI LAL *v.* ABDUL QADIR. A.I.R. 1940 Lah. 292.

——Ss. 476-A and 547—Offence under S. 193, I. P. Code, committed before Second Class Magistrate—Complaint by Additional District Magistrate—Jurisdiction—Irregularity, if curable. *See* CR. P. CODE, SS. 195 (1) (*b*), 476-A AND 537. 165 I.C. 970.

——S. 476-B—*Appeal—Delay in filing—Charge under S. 211, I. P. Code, without giving opportunity to show cause—Appeal beyond time—Delay—If to be excused.*

CR. P. CODE (1898), S. 476-B.

A charge was made against a complainant under S. 211, Penal Code. The complainant was however not given any opportunity of showing cause why the complaint should not be made against him. He knew nothing about the matter until he received summons from the Court to appear and answer a charge upon a complaint made by the Magistrate. As soon as he did this he applied for a copy of the order of the Magistrate and by that time his appeal to the High Court was out of time because more than 30 days had elapsed.

Held, that the delay must be condoned. (*Davis, J.C.*) RADHAKRISHNA *v.* EMPEROR. **I L.R. (1939) Kar. 648=180 I C. 436=11 R.S. 178=40 Cr.L.J. 449=A.I.R. 1939 Sind 78.**

——**S. 476-B**—Appeal—Order of Small Cause Court—Appeal to District Judge—If lies. *See* CR. P. CODE, SS. 195 (3) AND 476-B. **A.I.R. 1937 Rang. 526.**

——**S. 476-B**—Appeal—Order of District Magistrate making complaint on appeal—Appeal if lies to High Court. *See* CR. P. CODE, SS. 476 AND 476-B—APPEAL. **18 Pat.L.T. 917 (F.B.).**

——**S. 476-B**—*Appeal—Forum—Rejection of application under S.* 476-*A by civil judge.*

An appeal against the rejection of an application under S. 476-A by a civil judge lies to District Court and not to High Court, for though appeals from the civil judge at Mirzapur lie both to the District Court (All). and the High Court according to the valuation, yet by reason of S. 195 (3), proviso (*a*) it is the District Court that must be deemed to be the Court to which the Court of the civil Judge is subordinate. (*Mulla, J.*) NAROTTAM DAS AGARWAL *v.* BHAGWAN DAS. **179 I.C. 673=11 R.A. 383=1938 A.L.J. 1196=1939 A Cr.C. 1=1938 A.W.R. (H.C.) 747=A.I.R. 1939 All. 79.**

——**S. 476-B**—*Appeal—Right of—Person who has not applied under S.* 476.

From the language of S. 476-B it is quite clear that a person who has made no application for action being taken under S. 476, has no right of appeal under that section. (*Mulla, J.*) NAROTTAM DAS AGARWAL *v.* BHAGWAN DAS. **179 I.C. 673= 11 R.A. 383=1938 A.L.J. 1196=1939 A.Cr.C. 1=1938 A.W.R. (H.C.) 747=A.I.R. 1939 All. 79.**

——**S. 476-B**—*Appeal under preferred to District Judge—Transfer by latter for hearing to Additional District Judge—Legality—Jurisdiction of Additional Judge to hear appeal and direct withdrawal of complaint made by lower Court—Bengal, Agra and Assam Civil Courts Act, S.* 8.

There is nothing in the Code of Criminal Procedure or in the Civil Courts Act which negatives the power of the District Judge to assign to the Additional District Judge the hearing of an appeal under S. 476-B, Cr. P. Code, by general or special order in his distribution of business; and when an appeal has in that manner been assigned and made over to the Additional District Judge, the latter exercises the same powers as the District Judge and has jurisdiction to hear the appeal and make an order directing the withdrawal of a complaint made by the lower Court. (*James, J.*) BEYAS NARAIN SINGH *v.* DASRATH SINGH. **163 I.C. 451=9 R.P. 11=37 Cr.L.J. 838=17 Pat.L.T. 276=1936 P.W.N. 223=1936 Cr.C. 581=A.I.R. 1936 Pat. 382.**

CR. P. CODE (1898), S. 476-B.

——**S. 476 B**—*Appeal under—Power of Court to remand case to lower Court with direction to lay complaint.*

An appellate Court hearing an appeal under S. 476-B, Cr. P. Code, has the power to remand the case from which the appeal was made and direct it to lay the complaint. (*Grille, Ag.C.J.*) VITHOO *v.* EMPEROR. **I.L.R (1939) Nag. 338= 180 I.C. 577=11 R.N. 373=40 Cr.L.J. 388=1938 N.L.J. 285=A.I.R. 1938 Nag. 487.**

——**S. 476-B**—*Appeal under—Power of Court—Additional evidence—Power to take—Power to remand for taking further evidence and fresh disposal.*

A Court hearing an appeal under S. 476-B of the Cr. P. Code, has power to examine a witness and take evidence for a proper decision of the appeal, but has no power to set aside the order of the lower Court and remand it to that Court for further evidence being taken and the case being decided afresh. The section does not contemplate a power of remand in the appellate Court for further inquiry and reconsideration by the Subordinate Court. (*Sulaiman, C.J, Niamatullah and Bennet, JJ.*) MANNI LAL *v.* EMPEROR. **I.L.R. (1937) All. 517=168 I.C. 434=1937 A.W.R. 290=9 R.A. 639=38 Cr.L.J. 561=1937 A.Cr.C. 94=1937 A L.R. 360=1937 A.L.J. 192= A.I.R 1937 All. 305 (F.B.).**

——**S. 476-B**—*Civil Court refusing to make complaint—Appeal from—Procedure governing—C. P. Code, O.* 41, *R.* 27—*Applicability.*

Although the appeal under S. 476-B itself is one which is allowed by the Code of Criminal Procedure, the appeal from an order of Civil Court refusing to make complaint under S. 476, Cr. P. Code, must be heard by an appellate Court exercising civil appellate jurisdiction. It follows, therefore, that the procedure governing an appeal of this description is one which is to be sought for within the four corners of the Code of Civil Procedure. Where, therefore, in an appeal under S. 476-B from the order of refusal of lower Civil Court to sanction prosecution on an application under S. 476, the appellate Court took further evidence and sanctioned prosecution.

Held, that the appellate Court had power to take additional evidence under O. 41, R. 27, C. P. Code, to enable it to decide the case. (*Pollock, J.*) BHOLANATH BALBHADAR SAHAI *v.* ACHHERAM PURAN KURMI **169 I.C. 816=10 R.N. 20= A I.R. 1937 Nag. 91.**

——**S. 476-B**—*Complaint by single Judge of High Court—Interference by appellate Bench.*

The power to lay a complaint under S. 476, Cr. P. Code, is a discretionary power and an appellate Bench of the High Court would not interfere with the exercise of his discretion by a single judge of the Court unless it could be shown that the discretion had been exercised under some misapprehension or error which was plain on the face of the record. (*Roberts, C.J. and Braund. J.*) TAN BA CHENG *v.* REGISTRAR, ORIGINAL SIDE, HIGH COURT. **1940 Rang.L.R. 12=187 I.C. 754=12 R.R. 354=41 Cr.L.J. 515= A.I.R 1940 Rang. 104.**

——**S. 476-B**—*Complaint by trying Magistrate* suo motu *under S.* 476—*Appeal.*

An appeal lies under S. 476-B to the Sessions Judge when a complaint is filed under S. 476 by the trying Magistrate *suo motu*. **11 Lah. 55,**

followed. (*Agha Haidar, J.*) ZODPA *v.* EMPEROR. **164 I.C. 1057=37 Cr.L.J. 1043=9 R.L. 189=38 P.L.R. 16=1936 Cr.C. 796=A.I.R. 1936 Lah. 828.**

——S. 476-B—*Court of Subordinate Judge—If subordinate to District Judge—Effect of amendment.*

The Court of the Sub-Judge is a Court from whose orders appeals ordinarily lie to two Courts, that the District Judge and the High Court. The appellate Court of inferior jurisdiction, namely the District Judge's Court, is to be the Court to which the Court of Subordinate Judge must be deemed to be subordinate, within the meaning of S. 195, sub-S. (3). The appeal, therefore under S. 476-B lies to the District Judge. That was the position under the Code as it stood before the amendments made in 1923; and the amendments introduced in that year have not changed the law in this respect. 17 All. 51; A.I.R. 1927 Mad. 683, Cr. Appeal No. 331 of 1934 Appr. (*Rowland, J.*) THAKUR PRASAD *v.* EMPEROR. **161 I.C. 20=37 Cr.L.J. 413=8 R.P. 432=17 Pat. L.T. 66=1936 Cr.C. 159=1936 P.W.N. 120=A.I.R. 1936 Pat. 122.**

——S. 476-B—*Munsif refusing to make complaint under S. 183, I.P. Code—Appeal to District Judge—If lies—Revisional powers of High Court.*

No appeal lies to the District Judge under S. 476-B, Cr.P. Code, against an order of a munsif refusing to make a complaint under S. 183, I. P. Code, on a report of a process-serving peon. The section gives an appeal against the refusal of a Subordinate Court to make a complaint under S. 476, Cr. P. Code, which gives a Court power to make a complaint only of an offence referred in S. 195 (1) (*b*) or (*c*), and the offence under S. 183, I. P. Code, is not referred to in that section. An order passed by the District Judge on such an appeal is, therefore, without jurisdiction, and although it is doubtful whether any appeal lies against his order to the High Court under S. 476-B, there is sufficient revisional jurisdiction to empower it to set aside that order in cases in which such interference is called for. (*Rowland, J.*) BAJRANG MARWARI *v.* DURGA PRASAD SAO. **166 I.C. 870=9 R.P. 350=38 Cr.L.J. 292 (2)=1936 P.W.N. 747=3 B.R. 226=A.I.R. 1937 Pat. 31.**

——S. 476-B—*Order on appeal directing prosecution—If appealable—Revision.*

An appeal does not lie from an order for prosecution made by a Sessions Judge under S. 476-B, Cr. P. Code, on appeal from an order of the trial Magistrate refusing to prosecute under S. 476, Cr. P. Code. But an appeal may be treated as a revision by the High Court and dealt with as such. (*Rowland, J.*) BACHU SINGH *v.* TRIBENI SAH. **5 B.R. 203=179 I C. 167=11 R.P. 328=40 Cr.L.J. 157=1938 P.W.N 904=A.I.R 1939 Pat. 178.**

——S. 476-B—*Powers of appellate Court—Remand.*

Proceedings under S. 476-B, Cr. P. Code, are of a criminal character and not of a civil nature irrespective of whether the Court passing the order appealed from is a civil, criminal or Revenue Court. The Cr. P. Code provides for no remand in appeal under S. 476-B of the Code and the appellate Court cannot make a remand to the trial Court, but the appellate Court may itself make an enquiry in a case where it comes to the conclusion

either that the trial Court has made no preliminary enquiry at all or has made a defective enquiry. (*Spargo, J.*) ABDUL HUSSEIN *v.* MOHAMED IBRAHIM. **173 I.C. 810=10 R.R. 371=A.I.R. 1937 Rang 526.**

——S. 476-B—*Proceeding before munsif—District Judge on appeal directing prosecution—Revision—Maintainability—C. P. Code, S. 115.*

Where in a proceeding before a munsif under S. 476, Cr. P. Code, the munsif was of opinion that the facts did not disclose any ground for ordering a complaint to be made, but on appeal the District Judge directed that a prosecution should be commenced, no revision lies to the High Court unless the case could be brought within S. 115, C. P. Code. The High Court will not, therefore, interfere if it is not shown that the District Judge acted in the exercise of his jurisdiction illegally or with material irregularity. (*Harries, J.*) SIPAHI LAL *v.* SURAJ SAHAI. **1936 A.W.R. 1272=1937 A.L.J. 10=1937 A.L.R. 635=170 I.C 125=10 R.A. 100.**

——S. 476-B—Revision—Procedure—Order by Civil Court—Nature of—Application in revision—If one under S. 439 or under S. 115, C. P. Code. *See* CR. P. CODE, S. 439. **40 Bom.L.R. 297 (F.B.).**

——S. 476-B—*Scope—Application under Ss. 193 and 211, I. P. Code—Magistrate declining to prosecute—Remedy—Power of District Magistrate to direct prosecution.*

Once an order has been passed by the Magistrate declining to take action under Ss. 211 and 193, that order can be displaced only by the order of the Appellate Court under S. 476-B, Cr. P. Code. The District Magistrate has no power to direct the prosecution to be commenced. If the trying Magistrate in making the complaint allows himself to be guided by the wishes of a superior executive officer acting in that capacity, he manifestly acts improperly and contrary to law. (*Fazl Ali, J.*) RAMDENI PATHAK *v.* EMPEROR. **173 I.C. 738=39 Cr.L.J. 358=10 R.P. 432=4 B.R. 327=A.I.R. 1938 Pat. 145.**

——S. 476-B—*Scope—Powers of appellate Court under—Remand for holding preliminary enquiry—Legality.*

The powers of the appellate Court, mentioned in S. 476-B, Cr. P. Code, are not exhaustive, and the Court can therefore exercise all the powers contemplated by the Cr. P. Code, except those which are expressly excluded. It has the power to remand a case to the lower Court for holding a preliminary inquiry for finding out if there are sufficient materials to file a complaint under S. 476. A complaint filed by the lower Court after an enquiry after remand is not illegal. (*Varma and Rowland, JJ.*) KUNJO CHAUDHARY *v.* EMPEROR. **16 Pat. 650=19 Pat.L.T. 21=1938 P.W.N. 41=173 I.C. 742=4 B.R. 332=39 Cr.L.J. 353=10 R.P. 440=A.I.R. 1938 Pat. 99.**

——S. 476-B—*Superior Court overlooking right of appeal under—Revision—Power of High Court.*

Where a superior Court has overlooked the alternative of an appeal before him under S. 476 B it would be quite within the powers of the High Court to revise the order of such Court on the ground that it had refused to exercise jurisdiction which was vested in it by law, and High Court can then make complaint itself, or send it to the

CR. P. CODE (1898), S. 476-B.

Sessions Judge for disposal of the appeal. (*Dalip Singh and Blacker, JJ.*) BEHARI LAL *v.* ABDUR QADIR. **A.I.R. 1940 Lah. 292.**

——**Ss. 476-B and 476**—*Appeal—Forum—Complaint by Special Judge acting under U. P. Encumbered Estates Act.*

Where a Special Judge acting under the U. P. Encumbered Estates Act makes a complaint under S. 476, Cr. P. Code, the appeal against that order lies according to S. 476-B to District Judge and not to the High Court. The order is merely one under S. 476 and the forum of appeal has to be decided according to S. 476-B read with S. 195. The Judge was not passing any order under the Encumbered Estates Act in which case alone the appeal will lie to the High Court. (*Mulla, J.*) AKBAR HUSAIN KHAN *v.* EMPEROR. **I.L.R. (1939) A. 975=185 I.C. 700=12 R.A. 371=41 Cr.L.J. 227=1939 A.W.R. (H.C.) 783=1939 A.L.J. 962 =1939 A.Cr.C. 197=A.I.R. 1940 A. 7.**

——**S. 480**—*Debt Conciliation Board—If a Court—Power to punish for contempt—Punjab Relief of Indebtedness Act, S. 16.*

A Debt Conciliation Board is a Court and its proceedings are judicial proceedings by virtue of S. 16 of the Punjab Relief of Indebtedness Act. The Board would, therefore, be acting within jurisdiction in passing an order of fine for contempt under S. 228, I. P. Code, and in adopting the procedure laid down in S. 480, Cr. P. Code. (*Skemp, J.*) BUDHU *v.* EMPEROR. **175 I.C. 797= 11 R.L. 147=39 Cr.L.J. 658=40 P.L.R. 218=A. I.R. 1938 Lah. 366**

——**S. 482**—*Proceedings under—Whether must be drawn up on day on which offence occurs.*

Proceedings under S. 482, Cr. P. Code, need not be drawn up on the day on which the offence occurs. There is no provision in this section, as there is in S. 480, that the Court should take proceedings the same day as that on which the offence is committed. (*Bennet, J.*) EMPEROR *v.* MALKHAN SINGH. **165 I C. 698=9 R.A. 311=1936 A.W.R. 879=1936 A.Cr.C. 171=38 Cr.L.J. 55=1936 Cr. C. 1003=1936 A.L.J. 1056=A.I.R. 1936 All. 762.**

——**S. 488.**

Adopted child.
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Cancellation under.
"Child."
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CR. P. CODE (1898), S. 488.

Right to maintenance.
Scope.
Sufficient cause.
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Adopted child.

——**S. 488**—*Adopted child—Right to maintenance.*

The ordinary meaning of the expressions "legitimate child" or "illegitimate child" implies that the child is a natural child and not an adopted child. An adopted child can not be described as either a "legitimate" or "illegitimate" child. An adopted child, therefore, is not entitled to maintenance under S. 488, Cr. P. Code. (*Mackney, J.*) MA E MYA *v.* U KO KO GYI. **171 I.C. 800=10 R.R. 192=39 Cr.L.J. 14=A.I.R. 1937 Rang. 370.**

——**S. 488**—*Adopted child—Order for maintenance—of—Legality.*

An adoptive father cannot be made liable under S. 488, Cr. P. Code, to pay maintenance to his adopted child, as an adopted child does not fall within the phrase "his legitimate or illegitimate child" within the meaning of the section. (*King, J.*) NANU NAIR *v.* KARTHIYAYINI AMMAL. **I.L.R. (1937) Mad. 775=1937 M.W.N. 464=45 L.W. 431=168 I.C. 782=9 R.M. 648=38 Cr.L.J. 602=A.I.R. 1937 Mad. 547=(1937) 1 M.L.J. 618.**

Amount of maintenance.

——**S. 488**—*Amount of maintenance—Means of person from whom maintenance is sought—Duty of Magistrate to consider.*

The fact of mentioning Rs. 100 a month as the maximum amount of maintenance to be allowed shows that S. 488, Cr. P. Code, does not contemplate a mere maintenance for food, clothing and lodging but the allowance is to be governed by other considerations. In awarding maintenance under S. 488, Cr. P. Code, Magistrates must award a reasonable amount taking into consideration the means of the person required to maintain the wife. Where the allowance is obviously grossly inadequate High Court will interfere. (1909) 1 U. B. R. Cr. 17, Diss. (*Mackney, J.*) MA E MYA *v.* U KO KO GYI. **171 I.C. 800= 10 R.R. 192=39 Cr.L.J. 14=A.I.R. 1937 Rang. 370.**

Applicability.

——**S. 488**—*Applicability—Dancing girl dedicated to temple—Right to marry—Claim to maintenance against husband—Maintainability.*

There is no warrant for holding that a dancing girl once dedicated to a temple can never remarry; and hence there is no bar to award her maintenance under S. 488 against her husband. (*King, J.*) RAMANUJA MUDALIAR *v.* NAGARATHNAMMAL. **1937 M.W.N. 735.**

Arrears of maintenance

——**S. 488(3)**—*Arrears of maintenance—If can be realised from jagir income.*

The jagir income of a person agaist whom maintenance order had been passed by a Magistrate, when collected by the revenue authorities can be taken in satisfaction of the arrears due under the order. The provisions of the C. P. Code, exempting certain property from attachment and sale, do not apply to the Criminal

CR. P. CODE (1898), S. 488.

Courts. (*Tek Chand, J.*) NATHA SINGH *v.* MT. BACHIN KAUR. 39 P.L.R. 100=169 I.C. 944=10 R.L. 65=A.I.R. 1937 Lah. 367.

——S. 488—(3)—*Power of Court to issue one warrant and impose cumulative sentence of imprisonment.*

The intention of the Legislature was to empower the Magistrate after execution of one warrant only to sentence a person who has defaulted in the payment of maintenance ordered under S. 488, to imprisonment for a period of one month in respect of each month's default. The section does not enjoin that there should be a separate warrant in respect of each term of imprisonment for one month. In other words, where arrears have been allowed to accumulate, the Court can issue one warrant and impose a cumulative sentence of imprisonment. (*Thom, C.J., Allsop, Bajpai, Ganga Nath and Ismail, JJ.*) EMPEROR *v.* BENI. I.L.R. (1938) All. 750=1938 O.W.N. 591=176 I.C. 397=1938 A.Cr.C. 47=39 Cr.L.J. 720=10 R.A. 104=1938 A.L.R. 601=1938 A.L.J. 565=1938 A.W.R. (H.C.) 379=A.I.R. 1938 All. 386 (F.B.).

Cancellation under.

——S. 488 (5)—*Cancellation under—If retrospective—Effect on arrears.*

An order under S. 488 (5), Cr. P. Code, cancelling the maintenance of a wife takes effect from the date of the order and has no retrospective operation. It cannot, therefore, affect the arrears due up to the date of the order. (*Biswas, J.*) TARI BALA *v.* KABAT RAM. I.L.R. (1938) 1 Cal. 509=173 I.C. 785=39 Cr.L.J. 357=66 C.L.J. 571=10 R.C. 573=42 C.W.N. 64=A.I.R. 1938 Cal. 144.

"Child".

——S. 488—*Child over age of majority—Right to maintenance.*

The word 'child' in S. 488, Cr. P. Code, merely expresses a relationship which may exist whether the child is under the age of majority or over the age of majority. A child which has reached majority may for some reason be unable to maintain itself, in which case the parent will under S. 488 be liable to maintain it. (*Mackney, J.*) MA E MIA *v.* U KO KO GYI. 171 I.C. 800=10 R.R. 192=39 Cr.L.J. 14=A.I.R. 1937 Rang. 370.

Compromise.

——S. 488 (1) and (3)—*Maintenance order against husband—Subsequent compromise between husband and wife—Effect of.*

After a maintenance order under S. 488 (1) had been passed the parties entered into a compromise and the husband, against whom the order had been passed, applied for setting aside the order. The compromise merely provided for the maintenance of the wife by the husband in a certain manner other than by paying her the monthly allowance ordered by the trial Court; it further provided that in case of failure the order of the trial Court should be enforced.

Held, that the maintenance order passed under S. 488 (1) should remain in force but the existence of the compromise, which could be proved at any time, was sufficient ground for any Magistrate to refuse to enforce the order if moved to do so under S. 488 (3) or S. 490, Cr. P. Code.

Held, further, that it was not until the woman sought to enforce the order that any necessity for considering the compromise would arise. (*Middleton, J.C.*) SULTAN KHAN GULSHAN KHAN *v.* MT. KHANAM JAN. 168 I.C. 832=9 R. Pesh. 133=38 Cr.L.J. 614=A.I.R. 1937 Pesh. 45.

——S. 488—*Compromise as to maintenance—Limits to the power of Court to pass or enforce it.*

An order for monthly maintenance alone based on an application of compromise is not illegal. Where, however, the compromise not merely relates to the amount of monthly maintenance but embodies other consideration or terms or conditions, then the order based on the compromise goes beyond the scope allowed to a Criminal Court, and a Criminal Court has no jurisdiction either to pass or enforce it. (*Mosely, J.*) MA KHIN YI *v.* EDWARD KHIN MAUNG. 1940 Rang. L.R. 151.

Construction.

——S. 488 (1)—*Construction—Application for maintenance for wife and child—Power of Court to award sum in excess of Rs* 100 *for both—Total sum awarded to both—If to be limited to Rs.* 100.

Where a wife makes an application for maintenance for herself and her daughter, the Court has power to award maintenance exceeding Rs. 100 for both. To hold that when a woman makes an application for herself and for her child she can only be given Rs. 100 in all for the maintenance of both herself and her child is to construe S. 488 (1), Cr. P. Code, wrongly. The Court has power to award Rs. 100, to each of the applicants. (*Leach, C.J. and Madhavan Nair, J.*) BULTEEL *v.* BULTEEL. I.L.R. (1938) Mad. 729=177 I.C. 334=39 Cr.L.J. 865=11 R.M. 305=1938 M.W.N. 424=47 L.W. 594=A.I.R. 1938 Mad. 721=(1938) 1 M.L.J. 821.

——S. 488 (3) and (4)—*Construction and scope—Duty of Magistrate—Dismissal of wife's application on mere offer by husband to maintain her—Legality.*

It is wrong to dismiss an application under S. 488, Cr. P. Code, made by a wife, on the mere offer of the husband to maintain her without taking any evidence or giving any finding as to neglect or refusal to maintain the wife or as to the sufficiency or otherwise of the wife's reasons for refusing to live with her husband. The section contemplates a careful order made after a careful inquiry, and there must be a finding after an inquiry which is of a judicial nature. (*Davis, J.C. and Tyabji, J.*) NOORAN *v.* RASOOL BAKSH. I.L.R. (1939) Kar. 383=181 I.C. 75=40 Cr.L.J. 496=11 R.S. 204=A.I.R. 1939 Sind 80.

——S. 488 (9)—*Construction—Jurisdiction under—Mere owning or hiring of dwelling house without residence—If confers jurisdiction—"Resides or.....last resided"—Meaning.*

The terms "resides" and "last resided" in S. 488 (9), Cr. P. Code, mean both permanent as well as a temporary residence. But there is no warrant for holding that the mere hiring or purchase of a residential house at a place would confer jurisdiction on a magistrate of that place to entertain an application against the owner or hirer of the house under S. 488. Applicant and her husband were living together as husband and

CR. P. CODE (1898), S. 488.

wife at a place V. for about 12 or 13 years in a house hired by the husband who was working as a talati at that place. The husband had also hired a house at place N., which was also his native place, for storing his kit. In 1934 applicant left her husband, went to N. and resided in the husband's hired house there and in 1935 she applied to the Magistrate at N. for an order for maintenance against her husband under S. 488, Cr. P. Code.

Held, the husband last resided with his wife, the applicant at V., within the meaning of S. 488 (9), and not at N., and was also residing at V. at the time of the filing of the application and therefore the Magistrate at N. had no jurisdiction to entertain the application. (*Wadia and Wassoodew, JJ.*) BAI GANGA *v.* AMRITLAL PURSHOTTAM. **166 I.C. 574=9 R.B. 244=38 Cr.L.J. 248=38 Bom.L.R. 1107=A.I.R. 1937 Bom. 35.**

——S. 488—*Construction—Power of Magistrate under—Maximum of Rs.* 100—*If awardable to each member of family of father or husband.*

The maximum amount which a Magistrate may award any individual husband or father to pay under S. 488, Cr. P. Code, is Rs. 100 per mensem, whether the application be made on behalf of wife and children or on behalf of wife alone or on behalf of a single child. It is not correct to interpret the section as meaning that Rs. 100 a month may be awarded to each member of a man's family. (*Newsam, J.*) BULTEEL *v.* EMPEROR. **1937 M.W.N. 1127.**

Defence.

——S. 488—*Order by Magistrate in favour of wife and child—Husband impeaching validity of marriage—Proper remedy.*

A magistrate passed an order under S. 488, Cr. P. Code, in favour of a wife and child on being satisfied from the evidence that the parties who were born Indian Christians were Hindu converts at the time of the marriage and that the marriage was celebrated with appropriate Hindu rites. It was contended by the husband in revision that in law a marriage of this character could not be celebrated and could not be given legal effect to.

Held, that the husband, if he wished to impeach the validity of his marriage, should bring a declaratory suit in a Civil Court, and that the order of the Magistrate must be upheld. (*Cunliffe and Henderson, JJ.*) EDWARD SAILENDRA NATH DAS *v.* SNEHALATA DASSI. **41 C.W.N. 898.**

Duty of Court.

——S. 488—*Duty of Court—Application by wife—Mere offer by husband to maintain wife—Dismissal of application—Propriety—Proper procedure.*

Section 488 contemplates a careful order made after a careful inquiry and not an order made in a hasty and summary fashion though such order may appear on the face of it to satisfy law. It is wrong to dismiss an application by the wife under S. 488 on the mere offer of the husband to maintain her without any evidence or giving any finding as to neglect or refusal to maintain the wife or as to the sufficiency or otherwise of the wife's reasons for refusing to live with her husband. "Finding" means a finding after an inquiry which is of a judicial nature. (*Davis, J.C. and Tyabji, J.*) MT. NOORAN *v.* RASOOL BAKHSH. **I.L.R.**

CR. P. CODE (1898), S. 488.

(1939) Kar. 383=181 I.C. 75=11 R.S. 204=40 Cr.L.J. 496=A.I.R. 1939 Sind 80.

——S. 488—*Duty of Court — Compromise—Joint request by both parties for order of maintenance at fixed rate—Dismissal of case—Propriety.*

Where the parties to an application under S. 488, Cr. P. Code, file a joint application, before the case is enquired into, praying the Court to pass an order awarding maintenance at a certain figure in pursuance of an agreement between them, it is the duty of the Court to pass order in accordance with that request. It has no power to dismiss the application on the ground that the case has been compromised. (*King, J.*) RAMA BAI *v.* BHOJA RAO. **1937 M.W.N. 640.**

——S. 488—*Duty of Magistrate under—Compromise between husband and wife—Conditions agreed upon—Changes in future contemplated—Still order under S.* 488 *can be passed.*

The function of the Magistrate is restricted to passing an order as to the amount of maintenance, and his order should not embody restrictive conditions which would not be enforced in these summary criminal proceedings. It would be certainly undesirable if a Magistrate were to pass an order with regard to one part of the compromise incompatible with an order which the civil Court might pass with regard to the rest; but where the Magistrate restricts himself to the fixation of the amount of the maintenance, and where the order is to take effect immediately without further conditions, then it would not matter if changes are contemplated in the future. Case-law referred. (*Gruer, J.*) P. E. COELHO *v.* COELHO. **I.L.R. (1937) Nag. 230=166 I.C. 27=9 R.N. 116=38 Cr.L.J. 170=1936 Cr.C. 913=A.I.R. 1936 Nag. 228.**

Exparte order.

——S. 488 (6)—*Order against absent party at adjourned hearing—If* ex parte *order.*

The proceedings instituted under S. 488, Cr. P. Code, are of a *quasi* civil nature. Therefore, the word *ex parte* used in S. 488 (6) is used in the same sense as is used in Orders 9 and 17, C. P. Code. Therefore an order passed against an absent party at the adjourned hearing of a case is an *ex parte* order. (*Ba U, J.*) MAUNG BA TUN *v.* MA KYWAY. **181 I.C. 377=11 R.R. 460 (1)=40 Cr.L.J. 537=A.I.R. 1939 Rang. 151.**

Imprisonment.

——S. 488 (3)—*Order for imprisonment—Person sentenced already adjudged insolvent—Protection order under S.* 31 *of the Provincial Insolvency Act obtained—If avails as against the order of imprisonment of a Criminal Court.*

An order passed by a Magistrate under S. 488 (3), Cr. P. Code, for the imprisonment of a person who fails to pay a maintenance allowance, is a sentence of imprisonment. An order for the protection already obtained by such a person under S. 31 of the Provincial Insolvency Act protecting him from 'arrest or detention', cannot protect him from arrest in execution of a Criminal Court process or detention under a sentence of imprisonment passed by a Criminal Court. The 'arrest or detention' must mean arrest or detention in pursuance of an order of a Civil Court passed in execution of a decree of such Court. A person who is sentenced to fine and in default

to imprisonment could not escape imprisonment under a protection order passed by the Insolvency Court. (*Allsop, J.*) SHYAMA CHARAN *v.* ANGURI DEVI. I.L.R. 1938 All. 486=175 I.C. 235=39 Cr.L.J. 553=1938 A.Cr.C. 19=10 R.A. 652=1938 A.L.R. 391=1938 A.W.R. (H.C.) 157=1938 A.L.J. 225=A.I.R. 1938 All. 253.

——S. 488 (3)—Imprisonment under—Protection orders under Insolvency Act—Effect of on liability to imprisonment. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 25 (3). 42 Bom.L.R. 742.

Jurisdiction.

——S. 488—*Jurisdiction—Application by wife against husband—Claim for amount exceeding Rs.* 100 *a month for herself and child—If unsustainable—Duty of Magistrate.*

The fact that an applicant, such as a wife, applies for an order to direct her husband to pay an amount more than Rs. 100 a month as maintenance for herself and her child does not oust the jurisdiction of the Magistrate to entertain the application at all. He is bound to deal with the application on its merits, though he cannot make an order for payment of more than Rs. 100 a month. (*Newsam, J.*) BULTEEL *v.* EMPEROR. 1937 M.W.N. 1127.

——S. 488—*Jurisdiction—Claim by wife against husband for maintenance—Existence of decree of Civil Court awarding maintenance—If bars jurisdiction of Magistrate.*

The mere existence of a decree of a Civil Court awarding maintenance to a wife against her husband does not oust the jurisdiction of a Magistrate, in a proper case, to make an order under S. 488, Cr. P. Code, in favour of the wife on an application by her under the section although the existence of such a decree is relevant when the Magistrate is considering what form of order he should make. (*Beaumont, C.J. and Sen, J.*) TARALAKSHMI MANUPRASAD, *In re.* 11 R.B. 175 =40 Cr L.J. 91=178 I.C. 533=40 Bom L.R. 1103 =A.I.R. 1938 Bom. 499.

——S. 488 (8)—*Jurisdiction of Magistrate—Opposite party employed within jurisdiction but not having permanent residence therein.*

The expression "where he resides or is or where he last resided with his wife" in S. 488 (8) is sufficiently wide to confer jurisdiction upon a Presidency Magistrate in a case in which the opposite party works for gain within the jurisdiction of his Court, although he may not have a permanent residence within such jurisdiction. (*Edgley, J.*) INDUBALA DEVI *v.* SATCHID PROSAD. I.L.R. (1939) 1 Cal. 345=181 I.C. 898=11 R.C. 871=40 Cr.L.J. 598=A.I.R. 1939 Cal. 333.

——S. 488 (2)—*Jurisdiction to make order for maintenace—If lost by divorce effected pending proceedings by wife.*

For an order under S. 488 (2) the proper date to be considered is the date on which the application was made. If on the date on which application is made, relation of husband and wife exists, the Magistrate has jurisdiction to pass order under S. 488 (2) directing the husband to pay sums due on account of maintenance from the date of that application until the period of iddat has expired. There is nothing in the provisions of S. 488 which suggest that a husband can avoid payment of sums which a Magistrate might order to be paid under S. 488 (2) by divorcing his wife in the middle of the proceedings. (*Davis, J.C. and Weston, J.*) MAHOMED NAGMAN *v.* ZULLEKHAN. I.L.R. 1939 Kar. 659=183 I.C. 536=12 R.S. 58=40 Cr.L.J. 814=A.I.R. 1939 Sind 179.

——S. 488 (8)—*Jurisdiction—Test—Abandonment of wife.*

Cl. (8) of S. 488, Cr. P. Code, does not say that proceedings shall be taken only in the district where the husband resides and not elsewhere. Where it is the case that the husband abandoned his wife at a place and subsequently took up permanent residence elsewhere, proceedings under this section could be initiated at the former place. (*Hamilton, J.*) ALI HUSAIN *v.* MST. NAIMUNNISA. 1939 O.A. 203=1939 A.W.R. (C.C.) 50=1939 O.W.N. 190 (1)=1939 A.Cr.C. 32.

Living in adultery.

——S. 488 (4)—*'Living in adultery'—Meaning of—Child begotten when husband could not get access to wife—Inference from.*

The word 'live' in the phrase 'living in adultery' conveys the idea of continuance, and consequently the phrase refers to a course of guilty conduct and not to a single lapse from virtue. Where a child was begotten when the husband could not get access to the wife.

Held, that the wife must have been guilty of adultery on more than one occasion and therefore she was not entitled to any maintenance under S. 488. (*Ba U. J.*) MA THEIN *v.* MAUNG MYA KHIN. 168 I.C. 825=9 R.R. 368=38 Cr.L.J. 646 =A.I.R. 1937 Rang. 67.

——S. 488 (5)—*'Living in adultery'—Meaning.*

The phrase living in adultery in S. 488 of the Cr. P. Code, means something quite different from living an unchaste life. The principle seems to be, that a husband is absolved from the obligation to maintain his wife when his wife has a *de facto* protector with whom she lives and by whom she is being maintained as if she were his wife. (*Newsam, J.*) LAKSHMI AMBALAM *v.* ANDIAMMAL. 172 I C 811=10 R.M 497=39 Cr. L.J. 228=1937 M.W.N. 1131=46 L.W. 766=A. I.R. 1938 Mad. 66=(1937) 2 M.L.J. 885.

——S. 488 (5)—*"Living in adultery"—Meaning of.*

The words "living in adultery" denote a continuous course of conduct as distinguished from isolated acts of immorality and mean that the woman must be living in a state of quasi permanent union with the man with whom she is committing adultery; one or two lapses from virtue would be acts of adultery but would be quite insufficient to show that the woman was living in adultery. Words used are "living in adultery" and not "committed adultery." (*Dunkley, J.*) MA MYA KHIN *v.* GODENHO. 165 I.C. 205=37 Cr.L.J. 1115=9 R.R. 191=1936 Cr.C. 864=A.I. R. 1936 Rang. 446.

——S. 488 (4) and (5)—*"Living in adultery"—Meaning of.*

The words "living in adultery" are merely indicative of the principle that occasional lapses from virtue are not sufficient reason for refusing maintenance to a wife. Living in adultery need not be in the house of the adulteror or paramour of the woman. The question to be considered is whether there has been continued adulterous conduct on the part of the wife shortly before or

shortly after the application is made for maintenance. Continued adulterous conduct is what is meant by "living in adultery." (*Pandrang Row, J.*) KISTA PILLAI *v.* AMIRTHAMMAL. I.L.R. (1938) Mad. 1100=177 I.C. 736=39 Cr.L.J. 951 =48 L.W. 273=1938 M.W.N. 829=11 R.M. 382 =A.I.R. 1938 Mad. 833=(1938) 2 M.L.J. 407.

"Living separately by mutual consent."

——S. 488 (4)—*"Living separately by mutual consent"—Meaning.*

In a case under S. 488 after some evidence had been recorded the parties entered into a compromise and the Magistrate made an order embodying the essential terms of the compromise. The compromise provided that the husband would pay certain amount as maintenance to his wife provided she lived in the house which the husband allotted to her separate from his second wife. In case of maltreatment or cruelty to her she was entitled to live separate from her husband wherever she liked and receive the amount fixed as maintenance. The husband refused to provide a house for her.

Held, that the condition, in the order that the husband would provide a house for his wife where she would live separately from his second wife, did not amount to the husband and wife "living separately by mutual consent." It was open to the husband to live either with her or his second wife. No question of living separately by mutual consent was involved in the condition embodied in the compromise. (*Abdul Rashid, J.*) BHAGWAN SINGH *v.* MT. GURCHARAN KAUR. 183 I.C. 464=12 R.L. 117=41 P.L.R. 527=40 Cr.L. J. 794=A.I.R. 1939 Lah. 209.

——S. 488 (4)—*Mutual agreement to live apart —Evidence of—Agreement to pay half the salary to wife as maintenance.*

An agreement by the husband to pay half of his salary every month to his wife as maintenance is not by itself evidence of a mutual agreement to live apart. (*Biswas, J.*) R. B. W. TEASDALE *v.* F TEASDALE. 177 I.C. 939=39 Cr.L. J. 969=66 C.L.J. 567=11 R.C. 298=A.I.R. 1938 Cal. 623.

Living with husband during pendency.

——S. 488—*Application by wife—Wife induced to live with husband by subterfuge during its pendency—Liability to rejection.*

The fact that the husband has succeeded by means of a subterfuge in inducing his wife to live with him for a short period during the pendency of her application filed against him under S. 488, Cr. P. Code, is no ground for its rejection when the husband has neglected his wife for a number of years. (*Abdul Rashid, J.*) GHULAM MOHAMMAD *v.* MST. ALLAH RAKHI. 185 I.C. 69 =12 R.L. 273 (1)=41 Cr.L.J. 107=41 P.L.R. 605=A.I.R. 1939 Lah. 533.

Maintenance of children.

——S. 488—*Joint order in favour of woman and child—Reasons depriving woman of her right, if affect child.*

Where a maintenance order is jointly passed in favour of a child and his mother, consideration which would deprive the mother of her right to maintenance would not prevent the child from asking and recovering it. (*Davis, J.C. and Lobo, J.*) CHETIBAI *v.* NAROOMAL. 176 I.C. 863=11 R. S. 42=39 Cr. L.J. 847=A.I.R. 1938 Sind 151.

——S. 488—*Order for children—Mahomedan wife refusing to live with husband.*

A Mahomedan father is bound to maintain his minor children to the custody of whom the mother is entitled. The fact that the wife had separated from the husband and would not come and live with him is no ground for refusing to pass an order in favour of the children. (*Coldstream, J.*) AKHTARI BEGAM *v.* ABDUL RASHID. 168 I.C. 896=38 Cr.L.J. 672=9 R.L. 699=38 P. L.R. 1117=A.I.R. 1937 Lah. 236.

"Means."

——S. 488—*"Means"—If includes capacity to earn money.*

The term "sufficient means" is not confined to pecuniary resources only; "means" includes a capacity to earn money and if a man can be shown to be capable of being able to earn money then he has the "means" to maintain his wife. (*Tek Chand, J.*) GANGA DEVI *v.* RAM SARUP. 179 I.C. 766=11 R.L. 624=41 P.L.R. 161=A.I.R. 1939 Lah. 24.

Mutual consent.

——S. 488 (4)—*'Mutual consent' — Meaning of.*

'Mutual consent' as used in S. 488 (4), Cr. P. Code, means a consent on the part of the husband and wife to live apart no matter what the circumstances may be. Where a wife refuses to live with her husband on some specific ground, such as cruelty or the fact that he is keeping another woman, it cannot be said that the husband and wife are living apart by mutual consent, if the husband does not insist that the wife should live with him. (*Allsop, J.*) RAM SARAN DAS *v.* RAM PIARI. I.L.R. (1937) All. 430=166 I.C. 894 =38 Cr.L.J. 312=9 R.A. 458=1936 A.L.J. 1379 =1936 A.W.R. 1268=1937 A.L.R. 102=1937 A. Cr.C. 136=A.I.R. 1937 All. 115.

Neglect to maintain.

——S. 488—*Neglect to maintain—Child living with mother—Father not contributing towards its support— If can be ordered to pay maintenance.*

Where after the dissolution of marriage, a minor child, born during coverture, lives with the mother and the husband is admittedly the father of the child it is his duty to make an allowance for its maintenance unless he can show that there has been no negligence or refusal on his part to support and maintain the child. Where he has not been making any contribution towards the support of the child after it has left his protection he is negligent and can be ordered to make an allowance for the maintenance of the child, (*Ba U, J.*) MA SHWEKYIN *v.* MAUNG SAN NYEIN. 169 I.C. 428=10 R R. 5 (1)=38 Cr.L.J. 782=A. I.R. 1937 Rang 205.

——S. 488—*Neglect or refusal to maintain— Husband ill-treating wife and causing her to leave him — Liability to pay maintenance— Reasonable cause for fearing ill-treatment again —If justifies refusal by wife to return to husband.*

In a claim by a wife for maintenance from a husband it is no defence for the latter to say that he is prepared to take his wife back, if the proved facts show that the wife has reasonable cause for fearing to return to the husband's home. If a wife has been ill-treated and there is ground

for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband and to refuse to return to him. The husband in such a case, being the guilty party, must maintain his wife. Causing a wife to leave the protection of her husband by ill-treatment is tantamount to driving the wife deliberately from the home and the wife would be justified in refusing to return to the husband. (*Harries, C.J.*) BHAGIRATHI *v.* LAKSHMI DEVI. 189 I.C. 105=6 B.R. 760=41 Cr.L.J. 718=13 R. P. 71=1940 P.W.N. 713=21 P.L.T. 824=5 C.L. T. 24=A.I.R. 1940 Pat. 242.

——S. 488 (1)—*"Neglect to maintain"—Meaning of.*

A father who does not make a satisfactory arrangement for the maintenance of his minor children, *i.e.*, for the money to reach their guardian, and who does not show that any money actually reached the guardian must be deemed to have neglected to maintain them within the meaning of S. 488 (1), Cr. P. Code. The fact that on a former occasion a promise of payment was made is not sufficient for escaping liability. (*King, J.*) AMBIRATHU *v.* LAKSHMI AMMA. 1937 M.W.N. 985 (2).

Power of Court.

——S. 488—*Function of Magistrate under—If a Civil Court—Limit to powers.*

A Magistrate acting under S. 488, Cr. P. Code, is not a Civil Court of inferior or limited jurisdiction. He remains a Magistrate and has jurisdiction in all cases of desertion and neglect with power to order only that immediate bare necessities be provided; he has no power to settle finally the rights of the parties, which can only be done by a competent Civil Court. (*Newsam, J.*) BULTEEL *v.* EMPEROR, 1937 M.W.N. 1127.

Refusing to live with husband.

——S. 488 (3) Proviso—*Burmese Buddhist having two wives—One wife refusing to live along with other—Right to maintenance.*

Two wives of a Burmese Buddhist can never live amicably in the same house. If therefore one of them living separately, refuses to come and live with her husband along with the other wife, she is justified in doing so and is entitled to claim maintenance. (*Ba U. J.*) MAUNG PAIK *v.* MA OHN SINT. 182 I.C. 671=12 R.R. 24=40 Cr. L. J. 702=A.I.R. 1939 Rang. 210.

——S. 488 (3)—*"Just ground"—Offer by husband to maintain wife—Refusal by latter—When justified — Husband marrying second wife—If ground for first wife's refusal to live with husband.*

A wife is not bound to return to her husband and live with him if really she has a reasonable apprehension of physical ill-treatment. Although the fact that the husband has married a second wife is not a just ground for the first wife's refusal to live with him, that is factor to be taken into account in considering whether the husband's offer to maintain the first wife is a really *bona fide* or not. (*Pandrang Row, J.*) SUNDARAMMAL *v.* PALANIANDI MUDALI. 188 I.C. 32=12 R.M. 809=41 Cr.L.J. 532=51 L.W. 204=1939 M.W. N. 1255=A.I.R. 1940 Mad. 292=(1940) 1 M.L. J. 171.

——S. 488—*Offer by husband to maintain—Refusal by wife on ground of husband having mistress—If justified.*

S. 488, Cr. P. Code, has nothing to do with conjugal rights and a wife cannot exact a promise of sexual fidelity before she returns to live with her husband, and refuse his offer to take her to live with him on the ground of his not giving up a mistress. (*King J.*) AMALDOSS *v.* MRS. KAMALA AMALDOSS, 171 I.C. 914=1937 M.W.N. 1197= 10 R.M. 413=46 L.W. 324=A.I.R. 1937 Mad. 794=(1937) 2 M.L.J. 488.

——S. 488—*Offer to maintain—Refusal—Effect—Claim by Mahomedan wife for herself and minor children*—Bona fide *offer by husband to maintain in his own house—Unreasonable refusal—Dismissal of claim—Propriety—Duty to award maintenance to children.*

A Mahomedan wife applied for maintenance under S. 488, Cr. P. Code, for herself and her children. The Magistrate found that the respondent made a *bona fide* offer to maintain them in his own house, which the wife unreasonably refused to accept. The Magistrate dismissed the application.

Held, that the Magistrate should have awarded maintenance at least to the children who could not be taken to live with their father separately from their mother, the legal guardian. (*King J.*) MOHIDEEN BI *v* BASHU SAHIB. 1937 M.W.N. 565=46 L.W. 318=10 R.M. 409=171 I.C. 905= A.I.R. 1937 Mad. 809=(1937) 2 M.L.J. 278.

Refusal to maintain.

——S. 488—*Refusal to maintain — Absence of demand—Neglect to maintain — Request to wife to return to husband's house—If negatives neglect.*

There is no refusal to maintain when there has been no demand. A husband's action in asking his wife to return to his house, does not acquit him of neglect to maintain her in cases where the wife may have genuine grounds for believing that she would be ill-treated, if she so returns. (*Norman, I.C.S.*) SHAMSHER BEG *v* NAZIR BEGAM. 1939 A.M.L.J. 37.

"Residence" meaning.

——S. 488 (8)—*"Residence"—Meaning of—If permanent residence.*

Where there is something more than a flying visit, where a man leaves his house and resides for some time in the house of his parents in law with his wife, that is a sufficient residence within the meaning of sub-s. (8) of S. 488; sub-s. (8) does not necessarily refer to permanent residence. It refers also to temporary residence. The word "residence" of course implies something more than a mere brief visit, a mere flying visit. It suggests a certain continuity, but if there be a continuity for such a period of time as to allow it fairly to be said that the husband did reside even for a matter of some weeks with his wife, it does not appear that the section should be so strictly construed as to deprive the woman, who often in these cases is helpless, of assistance from the Court which is most easily accessible to her. It is not, however, possible in such cases to fix any arbitrary period of time, say, for instance, two months at Agra, six weeks at Bombay, one month at Karachi as a minimum to constitute residence for the purposes of S. 488. Each case

will have to be dealt with on its merits. It could easily be said that a visit of a few days is not residence within the meaning of S. 488, but it could not easily be said that a visit of a few weeks was not residence within meaning of S. 488. Each case however must be dealt with on its merits, the distinction between a mere visit and residence being borne in mind. (*Davis, J.C., and Lobo, J.*) GANGABAI *v.* PAMANMAL. I.L.R. (1939) Kar. 196 =11 R.S. 97=40 Cr L.J. 117=178 I.C. 527=A.I, R. 1938 Sind 223.

Reunion.

——S. 488 (5)—*Reunion does not automatically vacate order.*

Reunion does not automatically vacate the previous order. The length of time during which reunion lasts is hardly relevant. The parties may contemplate a complete permanent reunion and yet quarrel and separate again after a short interval. (*Gruer, J.*) P. E. COELHO *v.* COELHO. I.L.R. (1937) Nag. 230=166 I.C. 27=9 R.N. 116 =38 Cr.L.J. 170=1936 Cr.C. 913=A.I.R. 1936 Nag. 228.

Right to maintenance.

——S. 488—*Right to maintenance under—Existence of valid marriage, necessity.*

Under S. 488 of the Cr. P. Code, only legally married women are entitled to maintenance. A woman is not entitled to maintenance merely because she has lived with a man as his wife for a long number of years and has also borne him a child. (*Newsam, J.*) LAKSHMI AMBALAM *v.* ANDIAMMAL. 172 I.C. 811=10 R.M. 497=39 Cr.L.J. 228=1937 M.W.N. 1131=46 L.W. 766= A.I.R. 1938 Mad. 66=(1937) 2 M.L.J. 885.

——S. 488—*Right to maintenance—Offer by husband to maintain wife.*

A husband lived away from his wife as he had frequent quarrels since their married life began. On such desertion by the husband, the wife filed a suit for judicial separation but it failed. Thereupon the wife applied under S. 488 for maintenance. The husband expressed his willingness to maintain his wife. There was an attempt on the part of the neighbours to bring about a compromise but it failed on account of the stubborn attitude of the husband.

Held, that the belated offer of the husband to maintain his wife on condition of her staying with him was not a *bona fide* one, as it was made simply as a defence against the wife's application for the maintenance. Moreover, the failure of the wife's suit for judicial separation did not alter the fact that he deserted her and failed to maintain her. Under the circumstances, the order for maintenance was proper. (*Mackney and Spargo, JJ.*) DE CRUZ *v.* DE CRUZ. 173 I.C. 212=39 Cr.L.J. 287=10 R.R. 322=A.I.R. 1938 Rang. 25.

Scope.

——S. 488 (3), Proviso—*Scope—Absence of application for maintenance within one year of order—If deprives wife of right of maintenance under order.*

It is a general principle of law that an order whose term is not fixed and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances remains in force until it is cancelled, and, *prima facie*, this rule applies to maintenance

orders passed under S. 488. Hence where the wife is not living in adultery, nor does she refuse to live with her husband, she is not deprived of her right to maintenance under the order merely because she has not applied for maintenance within one year of the order of maintenance. (*Davis, J.C. and Weston, J.*) JASODABAI *v.* TARACHAND. I.L.R. (1939) Kar. 674=183 I.C. 336= 12 R.S. 51=40 Cr.L.J. 776=A.I.R. 1939 Sind 180.

——S. 488 (3) Proviso—*Scope and effect of—Arrears of maintenance—Right to recover.*

Proviso to sub-S. (3), S. 488 means that a person in whose favour an order for maintenance has been made must, to enable her to recover arrears of maintenance, apply to the Court to recover such arrears within one year from the date the arrears became due. Such person cannot allow arrears to accumulate indefinitely and apply for the recovery of those arrears for the first time after several years. (*Davis, J.C. and Lobo, J.*) CHETIBAI *v.* NAROOMAL. 176 I.C 863=11 R.S. 42=39 Cr.L.J. 847=A.I.R. 1938 Sind 151.

——S. 488—*Scope—Award of maintenance—Jurisdiction of Magistrates in India—Maintenance Orders Enforcement Act, 1921—Effect of.*

The jurisdiction of a Magistrate to award maintenance to a wife and children is that conferred on him by S. 488, Cr. P. Code, and his power is limited by that section. The maintenance Orders Enforcement Act of 1921 confers no jurisdiction on Magistrates in India to award any sum they think fit as maintenance payable to wife and children who are in India but whose husbands and fathers are in England. The latter Act is merely an extension of the principle laid down in S. 488, Cr. P. Code, and was enacted to meet cases where the wife and children are in India and the husband in England and *vice versa*. (*Newsam, J.*) BULTEEL *v.* EMPEROR. 1937 M.W. N. 1127.

——S. 488 (3)—*Scope—Offer to maintain—Husband keeping another woman in his house as mistress—Refusal by wife to accept offer to take back and to return to husband—If justified—Duty of Magistrate.*

Where a husband, against whom an order under S. 488, Cr. P. Code, is claimed by the wife, is keeping in his own house another woman as his mistress, the wife is justified in refusing to accept his offer to take her to live with him, and to refuse to return to him. If he does not offer to expel the mistress from the house or to satisfy his wife that the mistress is no longer there the Magistrate is perfectly entitled to pass an order for maintenance. There is nothing in S 488 (3) which compels the Magistrate to arbitrate, or make suggestions to the parties or consider hypothetical situations and to put forward conditional proposals to the wife-applicant. (*King, J.*) JOSEPH HENRY ROBERT *v.* ALICE KAMALAM ROBERT. 1937 M.W.N. 984.

——S. 488 (4) and (5)—*Relative scope.*

Under sub-Cl. (5) the Magistrate is entitled to cancel the previous orders of maintenance and render them of no effect for the future on a finding that the applicant in whose favour the order had been made was "living in adultery". Under sub-Cl. (4) the Magistrate is entitled to refuse to enforce the maintenance order on a

CR. P. CODE (1898), S. 488.

finding that during the period in respect of which maintenance was sought to be recovered the applicant was "living in adultery". (*Davis, J.C. and Lobo, J.*) CHETIBAI *v.* NAROOMAL. 176 I.C. 863=11 R.S. 42=39 Cr.L.J. 847=A.I.R. 1938 Sind 151.

Sufficient cause.

——S. 488 (3)—"*Sufficient cause.*"

"Sufficient cause" should not be interpreted in a narrow sense as dealing with matters such as proof of disability to pay owing to sickness. Hence an order under S. 488 can be attacked on wider grounds other than above. A.I.R. 1932 Rang. 94 and A.I.R. 1933 Rang. 138, Rel. on. (*Gruer J.*) P. E. COELHO *v.* COELHO. I.L.R. (1937) Nag. 230=166 I C 27=9 R.N. 116=38 Cr.L.J. 170=1936 Cr.C. 913=A.I.R. 1936 Nag. 228.

——S. 488 (3)—"*Sufficient cause*"—*Adjudication as insolvent.*

An order adjudicating as insolvent a person against whom an order for maintenance under S. 488, Cr. P. Code, has been passed, is not a complete bar to realisation of maintenance under that section. On presentation of an application for a distress warrant against such a person under S. 488 (3), it is the duty of the Magistrate to enquire whether in view of his income which up to the extent required for the maintenance of himself and his family has not vested in the Official Assignee, he has or has not failed, without sufficient cause, to comply with the order to pay maintenance. (*Bartley and Roxburgh. JJ.*) RADHARANI DASSI *v.* MATI LAL SEN. 44 C.W.N. 898=71 C.L.J. 507.

——S. 488 (3)—*Sufficient cause—Adjudication in insolvency—Effect of.*

The insolvency of a person who is ordered to pay maintenance to his wife and child under S. 488, Cr. P. Code, is *prima facie* evidence of inability to pay, but it cannot be treated as conclusive evidence of there being sufficient cause for failure to comply with the order of maintenance. (*Beaumont, C.J. and Divatia, J.*) EMPEROR *v.* MAHOMED HUSSAIN. 42 Bom.L.R. 742.

——S. 488 (4)—'*Sufficient reason*'—*What amounts to.*

Where the husband left the wife in the house of her mother after assaulting her and lived apart from her for a long period during which he was never anxious that the wife should come away from her mother to live with him, and the husband's offer to take his wife is not *bona fide* but is made simply with the object of escaping liability, there is 'sufficient reason' within the meaning of S. 488 (4), Cr. P. Code, for the wife refusing to live with him. (*Biswas, J.*) R. B. W. TEASDALE *v.* F. TEASDALE. 177 I.C. 939=39 Cr.L.J. 969=11 R.C. 298=66 C.L.J. 567=A.I.R. 1938 Cal. 623.

"Unable to maintain itself".

——S. 488—"*Unable to maintain herself*"—*Mahomedan girl between* 15 *and* 16 *years—Right to order.*

A Mahomedan girl who is of an age between 15 and 16 is not a child able to maintain herself and therefore is entitled to maintenance under S. 488, Cr. P. Code. (*Mackney, J.*) S. A. HALDAR *v.* SAFURA BIBI. 172 I.C. 879=10 R.R. 285 (1)=39 Cr.L.J. 196=A.I.R. 1937 Rang. 518.

CR. P. CODE (1898), S. 488.

"Wife".

——S. 488—*Wife—Buddhist woman married by Mahomedan.*

A Buddhist woman married by a Mahomedan is a "wife" for purposes of S. 488, although the marriage is not strictly valid according to Mahomedan Law. It is in accordance with justice, equity and good conscience that she should be regarded so. Even in the eye of the Mahomedan Law she appears to be so regarded. (*Spargo, J.*) MAUNG PAHTON *v.* MA SAN. 182 I.C. 259=12 R.R. 1=40 Cr.L.J. 653=A I.R. 1939 Rang. 207.

Miscellaneous.

——S. 488—*Conditional order—Order for maintenance on conditions agreed to by parties—Enforceability.*

There is no reason why the parties to a proceeding under S. 488, Cr. P. Code, should not come to terms on conditions arranged by themselves and that the Magistrate should then not pass an order for maintenance. If the husband agrees to pay maintenance on certain conditions and afterwards finds that those conditions are not satisfied that in itself might be a sufficient cause for non-payment on his part and the Magistrate for that reason might refuse to enforce his original order. Where, therefore, an order for maintenance is passed by a Magistrate with the consent of a husband and wife on certain conditions, *viz.*, that the wife should not go into service or cook for other people, the order is one which could be enforced by a Criminal Court. (*Allsop, J.*) RAM SARAN DAS *v.* RAM PIARI. I.L.R. (1937) All. 430=166 I.C. 894=38 Cr.L.J. 312=9 R A. 458=1936 A.L.J. 1379=1937 A.L R. 102=1937 A.Cr.C. 136=1936 A. W.R. 1268=A.I.R. 1937 All. 115.

——S. 488—*Application for maintenance of child—Lump sum already paid—Application, if barred.*

The parties cannot contract themselves out of the statutory obligation to maintain children under the Cr. P. Code. The mere fact that S. 488, sub-s. (1), Cr. P. Code refers to monthly allowances and monthly rates of allowances merely shows that the Court has taken the month as a convenient unit whereby to calculate allowances. It does not show that independently of an order of the court, as where matter has been referred to arbitration, lump sums cannot be paid for the maintenance of a child, of course, the lump sum is not a complete answer to future applications by the guardian of the minor. If at any time she finds that she has nothing left of this sum she can apply to the Court for a fresh order for maintenance and there will be no obstacle then to this fresh order in the fact that this lump sum had been paid on a previous occasion. 1 L.B.R. 189, Rel. on. (*Spargo, J.*) MAUNG TIN U *v.* MA HLA KYI. 170 I C. 13=38 Cr.L.J. 913=10 R.R. 79=A.I.R. 1937 Rang. 246.

——S. 488—*Order embodying terms of compromise passed by predecessor—Power of Magistrate to refuse to enforce.*

A Magistrate cannot refuse to enforce an order under S. 488, Cr. P. Code, embodying the terms of a compromise passed by his own predecessor and in his own Court, whether or not the validity of such an order can be successfully challenged in revision. (*Bartley and Sen, JJ.*) LATIFANNESSA

CR. P. CODE (1898), S. 488.

BIBI *v.* SK. NANU. 189 I.C. 691=41 Cr.L.J. 789 =44 C.W.N. 734=A.I.R. 1940 Cal. 398.

——S. 488 (8)—*"Where he last resided with his wife"—Interpretation.*

The words "where he last resided with his wife" in S. 488 (8), Cr. P. Code, must be construed as connoting some sort of permanent intention to stay at a particular place and a mere casual visit to a place other than the one where a person has a fixed home will not be sufficient. Where, however, the parties have no home of any sort and are moving about from place to place, each place where they so live, would be their home for the time being. The sole test on the question of residence is—whether a party has *animus manendi* or an intention to stay for an indefinite period, at one place; and if he has such an intention, then alone can be said to "reside" there. A. I.R. 1928 Lah. 853, Overr. (*Young, C.J. and Ram Lall, J.*) CHARAN DAS *v.* SURASTI BAI. 42 P.L. R. 470.

——Ss. 488 and 369—*Magistrate ordering maintenance by mistake—Cancellation—Legality —Proper procedure.*

A Magistrate in the first instance actually ordered husband to pay maintenance of certain sum for his wife although she had not applied for such an order. Subsequently, when his attention was drawn to his mistake he amended his own order without notice to wife and cancelled the order of maintenance for the wife whilst enhancing that of the children.

Held, that this was an illegality on the part of the Magistrate, and that having found his error, it was his duty to submit the proceedings to the learned Sessions Judge for submission to the High Court for rectification. (*Mackney, J.*) SAW GWAN SHEIN *v.* MA KIN KIN. A.I.R. 1940 Rang. 222.

——Ss. 488 and 489—*Order against appellant in favour of child—Subsequent gift by him of property to child—Order, if can be cancelled or modified.*

After an order of maintenance of a child in favour of the child's mother, the appellant made a gift to the child of his half share in a house, the other half of which was held by the mother of the child. The house was being occupied by the mother and the child up to the execution of the gift. It was contended by the appellant that the order of maintenance should be cancelled, as the half share of the rent realized was equal to the amount of maintenance ordered. The appellent could not make much use of the part of the house gifted either by selling or renting it.

Held, that the child's income from its half share of house was not certain. It was likely that the mother might sell the house and fritter away the proceeds or there might be difficulties in securing tenants. Hence the order of maintenance could not be cancelled but could be modified in view of the fact that the house had become the sole property of the mother and the daughter and the gift had caused a change in the child's circumstances (*Spargo, J.*) MAUNG DIN *v.* MA DWE. 170 I.C. 285=38 Cr.L.J. 910=10 R.R. 75 =A.I.R. 1937 Rang. 239.

——Ss. 488, 489—*Order for maintenance—Enforcement—Duty of Court.*

Before the orders regarding fixation of maintenance can be vacated, action must be taken under S. 489. Where a person applied for arrears of maintenance awarded to him under S. 489, Cr. P. Code, and the Court, on the opposite party paying a portion of the amount and promising to allot some land to the petitioner in lieu of maintenance, filed the petition without passing any order thereon:

Held, that the petition was for arrears of maintenance and not for future maintenance. The order granting maintenance was still in force and unpaid arrears should have been awarded by the Court. (*Middleton, J.C.*) MULTAN *v.* FARAMOSH. 160 I.C. 802=37 Cr.L.J. 347 (1)=8 R. Pesh. 130 (1)=1936 Cr.C. 119 (1)=A.I R. 1936 Pesh. 32 (2).

—— Ss. 488 (3) and 489 (2)—*Scope—Duty of magistrate—Order of imprisonment under S.* 488 (3)—*Subsequent order of adjudication in insolvency and order of protection—Effect of—Magistrate—If bound to release person from imprisonment—Provincial Insolvency Act, S.* 23.

Under S. 488 (3), Cr. P. Code it is the duty of the Magistrate in every case to find out whether the person ordered to pay maintenance has or has not failed without sufficient cause to comply with the order. Neither an order of adjudication in insolvency passed subsequently nor an order of protection passed in such insolvency can be regarded as conclusive on the point. The question is one of fact which the Magistrate has to decide for himself, that the order of protection or order of adjudication may be taken into account. Though an order under S. 488 (3), Cr. P. Code, for imprisionment of a person who fails to pay maintenance, is a sentence of imprisonment, a person sentenced under S. 488 (3), is not under "imprisonment in execution of the decree or order of any Court for the payment of money" in terms of S. 23 of the Provincial Insolvency Act; orders referred to in S. 489 (2), Cr. P. Code, which the Magistrate can cancel or vary are orders relating to the amount of maintenance payable. It is not possible for a magistrate who has passed a sentence of imprisonment under S. 488 (3), Cr. P. Code, to cancel the sentence merely because the Insolvency Court has passed an order of protection. The sentence of imprisonment is a punishment inflicted for breach of the order and is covered by S. 23 of the Provincial Insolvency Act. (*Burn and Lakshmana Rao, JJ.*) MUNIKSISHNAYYA *v.* AKULLAMMA. I.L.R. (1940) Mad. 692=189 I.C. 692=41 Cr.L.J. 785=1940 M.W. N. 237=51 L.W. 718=A.I.R. 1940 Mad. 697= (1940) 1 M.L.J. 868.

——Ss. 488 and 490—*Order for maintenance of Children—Order ceasing to be enforceable in respect of eldest of them—If enforceable in respect of the rest.*

Where an order directing a father to pay for the maintenance of his children is made and subsequently if it is proved that the eldest of them who has come of age has become able to earn his livelihood the order ceases to be enforceable in respect of him. But, it cannot be said that it ceases to be enforceable in respect of the remaining children. (*Mackney, J.*) MA E SHI *v.* U SAN KAI. 179 I.C. 643=11 R.R. 336=40 Cr.L.J. 241 =A.I.R. 1939 Rang 67.

——Ss. 488 and 531—*Order for maintenance passed in wrong district—Liability to be set aside.*

CR. P. CODE (1898), S. 489.

An order for maintenance under S. 488, Cr. P. Code passed by a Court in a wrong district is not liable to be set aside in view of the provisions of S. 531, Cr. P. Code, where it has not occasioned a failure of justice. (*Skemp J.*) BALWANT SINGH *v.* MT. PARBATI. **38 P L.R. 963.**

——S. 489—*Application under—Parties—Order for maintenance in favour of wife—Wife becoming lunatic—Application for reduction on ground of change of circumstances—Application laid against wife as represented by manager—Competency.*

Where a person in whose favour an order for maintenance under S. 488, Cr. P. Code, has been made happens to be a minor or becomes a lunatic, an application by the party ordered to pay maintenance, for reduction of maintenance under S. 489, on the ground of change of circumstances, may be made by that person against the minor or lunatic, as represented by his or her guardian or manager as the case may be. (*Broomfield and Wadia, JJ.*) ZINABHAI BHIMBHAI *v.* BAI MANI. **I.L.R. (1937) Bom. 674=171 I.C. 899=10 R.B. 246=39 Cr.L.J. 53=39 Bom.L.R. 626=A.I.R. 1937 Bom. 454.**

——S. 489—*Change in circumstances—What constitutes.*

Before the original order of maintenance against husband can be altered, it must be shown that there has been, if not a change in the circumstances of the husband, then a change in the circumstances of the wife. The mere fact that the wife is living in a different manner from the manner in which she lived at the time the order of maintenance was passed does not necessarily constitute a change in her circumstances. Husband's keeping a mistress and getting children by her and contracting debts for litigation are not circumstances for reducing the allowance awarded to his legal wife. (*Mackney, J.*) MA MYA KHIN *v.* N. L GODENHO. **173 I.C. 135=39 Cr.L. J. 274=10 R.R. 312=A.I.R. 1938 Rang. 42.**

——S. 489 (2)—*Magistrate cancelling order for maintenance upon husband informing about decree against his wife for restitution of conjugal rights—Husband not informing Magistrate that appeal against such decree was pending—Decree set aside in appeal—Power of Magistrate to cancel order rescinding order for maintenance.*

The Magistrate cancelled his previous order for maintenance under S. 488, Cr. P. Code, passed in favour of the wife when the husband informed the Magistrate that he had obtained a decree for restitution of conjugal rights in his favour. The husband however did not then inform the Magistrate that an appeal against such a decree was pending. The decree obtained by the husband was subsequently set aside in appeal whereupon the Magistrate cancelled his previous order rescinding the order for maintenance and restored the original order for maintenance. It was contended that S. 369 of the Code applied to the case and the Magistrate had no jurisdiction to cancel his subsequent order rescinding the order of maintenance.

Held, that in the face of express provisions of Ss. 488 and 489 applicable to such a case, S. 369 was not applicable to the case. The Magistrate had power under S. 489 (2) to alter or vary his order and he could therefore cancel the order re scinding the order of maintenance.

CR. P. CODE (1898), S. 491.

Held, also, that any order obtained by fraud practised on the Court is a nullity and the Criminal Courts have power to ignore orders passed either under a mistake or fraud. (*D. N. Mitter, J.*) BHAGUBAI RANCHODAS *v.* BAI ARVINDA. **173 I.C. 915=10 R.C. 591=39 Cr.L.J. 381=A.I.R. 1937 Cal. 334.**

——S. 489 (2)—*Order in favour of wife—Cancellation of, on subsequent decree for restitution of conjugal rights—Duty of Magistrate.*

Where subsequent to the order for maintenance in favour of wife the husband obtains the decree of the Civil Court for restitution of conjugal rights, that decree has to be considered and if the wife persists without cause in refusing to live with the husband then the order for maintenance is to be cancelled. Of course, the party who obtains a decree for restitution must comply with the conditions of the decree, and failure to comply with those conditions would justify the Magistrate in holding that the order for maintenance should not be cancelled. Another case where the Magistrate would be justified in not cancelling the order for maintenance is where the suit for restitution is brought, not with a view to take the wife back, but simply to evade the payment of the allowance awarded. (*Mosely, J.*) MAUNG PO KWE *v.* MA PWA SHEIN. **1939 Rang.L.R. 741=183 I.C. 692=12 R.R. 100=40 Cr.L.J. 827 (2)=A.I.R. 1939 Rang. 314.**

——S. 489 (2)—*Order in fovour of wife and child—Subsequent decree for restitution of conjugal rights — Effect on liability to maintain child.*

Where a wife and child have obtained order for maintenance in their favour, subsequent decree of Civil Court for restitution of conjugal rights in favour of husband does not affect his liability to maintain the child. 6 L.B.R. 127, Rel. on. (*Mosely, J.*) MAUNG PO KWE *v.* MA PAW SHEIN. **1939 Rang.L.R. 741=183 I.C. 692=12 R.R. 100=40 Cr.L.J. 827 (2)=A.I.R. 1939 Rang 314.**

——S. 489 (2)—Scope—Imprisonment under S. 488 (2)—Subsequent order of adjudication in insolvency and protection order by Insolvency Court—Effect of on imprisonment. *See* CR. P. CODE, SS. 488 (3) AND 489 (2). **1940 M.W.N. 237.**

——S. 490—*Costs.*

S. 490 does not contain any provision such as that in sub-Cl. (7), S. 488, which would enable the Court to grant costs. (*Mackney, J.*) MA E SHI *v.* U SAN KAI. **179 I C. 643=11 R.R. 336=40 Cr.L.J. 241=A.I.R. 1939 Rang. 67.**

——S. 491—Habeas corpus—*Issue of writ—Powers of High Court.*

The High Court has no longer the power to issue the common law writ of *habeas corpus* in any of the cases covered by S. 491, Cr. P. Code. (*Lord Thankerton.*) C. P. MATHEN *v.* DISTRICT MAGISTRATE, TRIVANDRUM. **66 I.A. 222=I.L.R. (1939) Kar. (P.C.) 324=I.L.R. 1939 Mad. 744=41 Bom.L.R. 1119=40 Cr.L.J. 675=1939 A.L.J. 836=70 C.L.J. 270=182 I.C. 551=1939 M.W.N. 744=50 L.W. 48=1939 O.W.N. 602=1939 O.L. R. 433=1939 P.W.N. 581=12 R.P.C. 4=20 P L. T. 597=1939 A.Cr.C. 110=5 B.R. 841=1939 A. W.R. (P.C.) 141=43 C.W,N. 981=A.I.R. 1939 P.C. 213=(1939) 2 M.L.J. 406 (P.C.).**

CR. P. CODE (1898), S. 491.

——S. 491—*"Illegally or improperly detained"—Meaning of—Person lawfully convicted and imprisoned by Court of competent jurisdiction.*

A person who has been convicted and imprisoned lawfully by a Court, which has not misused its powers in any way and which has jurisdiction in the matter, cannot be said to be "illegally or improperly detained" within the meaning of S. 491, Cr. P. Code. (*Stone, C. J. and Niyogi, J.*) DIWAN SINGH *v.* EMPEROR. I.L.R. 1936 Nag. 99=167 I.C. 465=9 R.N. 186=19 N.L.J. 84=38 Cr.L.J. 390=1936 Cr.C. 663=A.I.R. 1936 Nag. 132.

——S. 491—*Order of arrest under Sind Encumbered Estates Act—Interference by High Court.*

When a manager of an estate orders the arrest of a person in exercise of the jurisdiction conferred upon him under S. 10, Sind Encumbered Estates Act, the High Court cannot interfere under S. 491, Cr. P. Code, with the order of the manager. (*Davis, J. C. and Weston, J.*) SHERKHAN *v.* EMPEROR. 182 I.C. 963=12 R.S. 37=40 Cr.L.J. 710=A.I.R. 1939 Sind 155.

——S. 491 and Extradition Act, S. 7—*Warrant by Political Agent—Powers of High Court under S.* 491, *with reference thereto.*

Where a warrant has been issued by a Political Agent under S. 7 of the Extradition Act, the powers conferred by S. 491 Cr. P. Code, on the High Court, do not authorise the High Court to enter as it were upon an enquiry into the conduct of the Political Agent. All that the High Court is concerned with while exercising its powers under S. 491, Cr. P. Code, is to see that the authority under which a person is being detained is on the face of it legal and valid. This is the limit beyond which the High Court cannot go in the exercise of its powers under S. 491, Cr. P. Code. (*Mulla, J.*) ISRAR HUSAIN *v.* EMPEROR. I.L.R. 1940 All. 23=185 I.C. 302=12 R.A. 314=41 Cr.L.J. 152=1939 A.W.R. (H.C.) 737=1939 A.Cr.C. 172=1939 A.L.J. 895=A.I.R. 1939 All. 730.

——Ss. 491 and 83—*Power of High Court—Quashing proceedings taken in pursuance of a warrant issued without jurisdiction.*

Nasirabad is outside British India and therefore a Nasirabad Magistrate has no jurisdiction to issue a warrant under S. 83 for the arrest of a person residing in British India. Such a warrant therefore cannot be executed by a Magistrate in British India and proceedings taken in pursuance of such warrant can be quashed by the High Court under S 491. (*Rupchand Bilaram, Ag. J. C. and Lobo, A.J.C.*) TAHILRAM *v.* EMPEROR. 32 S.L.R. 134=173 I.C. 322=10 R.S. 203=39 Cr.L.J. 298=A.I.R. 1938 Sind 46.

——S. 494—*Applicability to proceedings under Ch. VIII—Proceedings under S.* 107—*Termination—Procedure—Withdrawal by Crown, if can bring them to an end.*

S. 494, Cr. P. Code, has no application to proceedings under Ch. VIII, Cr. P. Code, because such proceedings are not prosecutions. Proceedings under S. 107, after the Magistrate's preliminary order could only be brought to end by the Magistrate passing an order under S. 119 if the necessary materials are before him. They cannot be brought to an end by the Crown withdrawing from the enquiry. (*Dunkley, J.*) THE KING *v.* BA KHIN. 1940 Rang L.R. 226=A.I.R. 1940 Rang. 189.

CR. P. CODE (1898), S. 494.

——S. 494—*Consent of Court for withdrawal—Recording of reasons—If essential.*

Reasons for giving permission to withdraw a case are, no doubt, desirable but are not essential. The Code makes no such requirement, and once the consent of the Court is given, it rests on the party applying to have this decision set aside to show that the consent was given in disregard of the judicial exercise of the discretion which the Magistrate had, to give his consent to the withdrawal. (*Grille, J.*) DATTATRAYA GOVINDRAO PAKODE *v.* EMPEROR. 10 R.N. 167=172 I.C. 130=39 Cr.L.J. 65=A.I.R. 1938 Nag. 76.

——S. 494—*Discretion of Court—Withdrawal of prosecution against one of accused—Ground of risk of misjoinder of charges—Permission, if proper.*

It would not be a proper exercise of discretion by a Court to permit the withdrawal of a case against one of the accused on the ground that there might be a misjoinder of charges. If there is any risk of a misjoinder of charges by two accused being tried together, then their separate trials should be ordered; but it is wrong to acquit an accused against whom a *prima facie* case has been made out by the prosecution evidence merely because of this technical difficulty. (*Roberts, C. J. and Dunkley, J.*) NGA PO HTWE *v.* EMPEROR. 166 I.C. 419=9 R.R. 253=38 Cr.L.J. 183=1936 Cr.C. 964=A.I.R. 1936 Rang. 474.

——S. 494 (a)—*Discretion of Court—Withdrawal of case by Public Prosecutor against accused with object of calling him as witness—Consent of Court—When to be given.*

There is nothing in S. 494 which prevents a Public Prosecutor, if he thinks it is in the interests of the administration of justice, from withdrawing the case as against one of the accused for the purpose of calling him as a witness against the others. It may well be in the interests of justice that the Public Prosecutor should so withdraw so that such evidence should be given to help to secure a conviction against the others. In the same way for the same reasons, it may well be that the Court ought to give its consent to such withdrawal. But in cases where S. 337 is available, it is better that the accused should be dealt with under that section. Even where S. 337 can be applied, it is not contrary to law to discharge the approver under S. 494 (*a*). The approver dealt with under S. 337 gives his testimony with a contingent charge hanging over his head. The evidence of an accomplice whether dealt with under S. 337 or discharged under S. 494 (*a*) or acquitted under S. 494 (*b*) is the evidence of an approver and as such open to suspicion.

Per *Mukerji, J.*—The Court can give its consent on the ground of public policy but in so doing it has to enquire into the reasons which prompt the withdrawal. If the Court finds that S. 337 with its statutory safeguards is open to be availed of, it will be a sound exercise of its discretion to withhold consent.

Per *Panckridge, J*—The discretion under S. 494 is a judicial discretion. Where it is open to the prosecution to obtain the approver's evidence by applying for the tender of a conditional pardon under S. 337 (1), the Magistrate must keep the provisions of that section before

him when he exercises his discretion. As a general rule the discretion will be wrongly exercised in such cases if the consent is given before the charge is framed. (*Derbyshire, C. J., Mukerji, Panckridge, M. C. Ghose and Bartley, JJ.*) HARIHAR SINHA *v.* EMPEROR 163 I.C. 9=8 R.C. 698=37 Cr.L.J. 758=40 C.W.N. 876=63 C.L.J. 307=1936 Cr.C. 583=A.I.R. 1936 Cal. 356(F.B).

——S. 494—*Discretion of Public Prosecutor—Withdrawal of prosecution.*

S. 494, Cr. P. Code, entrusts to the Public Prosecutor discretion to withdraw from the prosecution with the consent of the Court and his withdrawal puts an end to the case. The law gives him a real discretion in the matter and it is open to him to withdraw the case at any stage of the case even after it has commenced and before the return of the verdict of the jury. (*Venkataramana Rao, J.*) EMPEROR *v.* LABBAI KUTTI. 180 I.C. 605=11 R.M. 732=40 Cr.L.J. 437=1938 M.W.N. 582=A.I.R. 1939 Mad. 190.

——S. 494—*Grounds for withdrawal—Prosecution launched by order of Civil Court—Opinion of Prosecution authorities that case was weak and that trial would be expensive—If suffic ent grounds for withdrawal.*

Where a Civil Court after a full inquiry and trial on the merits has ordered a prosecution, and the accused has not appealed against the order for prosecution, it would be allowing an undesirable precedent if such a prosecution were to be cut short and withdrawn by the prosecuting authorities unless for very cogent reasons. The opinion of the Civil Court as to the expediency of the prosecution and the probability of a conviction is entitled to respect. It is in the public interest that offenders should be brought to book in spite of the difficulties and expense necessarily involved in trials of offences. A prosecution so launched ought to be allowed to be withdrawn because the prosecuting authorities think that the case is a weak one or that the trial would be very costly to the Government. The Government has got to face and does face the spending of considerable sums of money in maintaining justice. (*Gruer, J.*) SATWARAO *v.* KANBARAO BHAGORAO. I.L.R. (1939) Nag. 393=174 I.C 510=10 R.N. 403=39 Cr.L.J. 458=1938 N.L.J. 12=A.I.R. 1938 Nag. 334.

——S. 494—*Reasons for withdrawal—Duty of Court to record.*

S. 494, Cr. P. Code, does not prescribe that reasons for the withdrawal of a prosecution should be given in writing by the Magistrate allowing withdrawal. But it is obviously desirable that reasons should be given to enable the High Court to judge whether the withdrawal has been rightly made. (*Gruer, J.*) SATWARAO *v.* KANBARAO BHAGORAO. I.L.R. (1939) Nag. 393=174 I. C. 510=10 R. N. 403=39 Cr. L. J. 458=1938 N.L.J. 12=A.I.R. 1938 Nag. 334.

——S 494—Scope and applicability—Distinction between Ss. 337 and 494. *See* CR. P. CODE, SS. 337 AND 494. 1938 A.W.R. (P.C.) 170=A.I.R. 1938 P.C. 266 (P.C.).

——S. 494—*Withdrawal—Duty of Magistrate and Public Prosecutor,*

The fact that the District Magistrate has instructed the Public Prosecutor to apply for withdrawal, is no reason for a Magistrate giving his consent to such withdrawal. The Magistrate

must not surrender his authority to the District Magistrate, but must act judicially and come to his own independent conclusion as to whether the withdrawal was to be allowed or not on the materials before him A public prosecutor showing his instructions by the District Magistrate to apply for withdrawal, to the Magistrate concerned, acts with grave impropriety. (*Dunkley, J.*) THE KING *v.* BA KHIN. 1940 Rang.L.R. 226=A.I.R. 1940 Rang. 189.

——S. 494—*Withdrawal—Nature and effect of—Consideration for Court.*

Per *Mukerji, J.*,—A withdrawal under S. 494 either under Cl. (*a*) or under Cl. (*b*) is a simple withdrawal—unconditioned and unconditional. The Conrt is concerned only with the question whether the ground for the proposed course is such as would justify it in giving its consent. If the Court finds that the object of withdrawing from the prosecution is to avail of the evidence of the particular accused and the circumstances of the case are such that it would further the ends of justice to have his evidence and that S. 337 is inapplicable, the Court will not be wrong in giving its consent. What the public prosecutor will or will not do thereafter, in a case in which the withdrawal has been under Cl. (*a*) with the effect of a discharge, is a matter which is no concern of the Court. (*Derbyshire, C.J., Mukerji, Panckridge, M. C. Ghose and Bartley, JJ.*) HARIHAR SINHA *v.* EMPEROR. 163 I.C. 9=8 R.C. 698=37 Cr.L.J. 758=40 C.W.N. 876=63 C.L.J. 307=1936 Cr. C. 583=A.I.R. 1936 Cal 356 (F.B.).

——S. 494 (a)—*Withdrawal under—Effect of.*

Where the case against an accused is withdrawn under S. 494 (*a*) he is discharged from those proceedings and cannot be put back into them. He may be tried again in other proceedings on the same charge, but not in those proceedings. (*Derbyshirc, C.J., Mukerji, Panckridge, M.C. Ghose and Bartley, JJ.,*) HARIHAR SINHA *v.* EMPEROR. 163 I.C. 9=8 R.C. 698=37 Cr.L.J. 758=40 C.W N. 876=63 C.L.J. 307=1936 Cr.C. 583=A.I.R. 1936 Cal. 356 (F.B.).

——S. 495—*Application for withdrawal of prosecution—Power of Circle Inspector to present.*

It is clear from S. 495, Cr. P. Code, that an officer of the Police not below a certain rank which the Local Government is to prescribe, is entitled to conduct the prosecution, and is therefore, by the same section, entitled to make an application for withdrawal of the prosecution. Where the lowest rank prescribed by the Local Government is that of the Sub-Inspector the appearance of a Circie Inspector, who is above that rank, in the case under the instructions of the District Superintendent of Police to apply for withdrawal is sufficient to enable him to present the application. (*Grille, J.*) DATTATRAYA GOVINDRAO PAKODE *v.* EMPEROR. 10 R N. 167=172 I.C. 130=39 Cr.L.J. 65=A.I.R. 1938 Nag. 76.

——S. 496—*Applicability to proceedings under S. 109—Security proceedings—Bail bond—Forfeiture—Effect—Defect in form, if can affect liability.*

S. 496, Cr.P. Code, does not merely refer to an accused person but generally to 'any person other than a person accused of a non-bailable

offence who appears or is brought before a Court'. S. 496 authorises the Magistrate conducting an enquiry under S. 117, Cr.P.Code to release the person concerned in the enquiry on bail with or without surety to ensure his attendance in Court. When such a bond is executed, if the accused fails to appear, the bond is forfeited and the amount can be recovered from the surety. The fact that the form used was the one prescribed for purposes of Ss. 496 and 299 could not affect the question, where the bond indicates clearly the nature of the proceedings and the Court in which the person proceeded against is to appear. (*Niyogi, J.*) EMPEROR *v.* KARBALAI HUSSAIN. **I.L.R. (1940) Nag. 61=185 I.C. 318=12 R.N. 149=41 Cr.L.J. 155=1939 N.L.J. 537=A.I.R. 1940 Nag. 75.**

——**Ss. 496 and 497**—*Scope—Charge of offences under Ss.* 147 *and* 324, *I. P. Code—Grant of bail to accused—Subsequent discovery of offence under S.* 326, *I. P. Code—Cancellation of bail—Propriety—Application to High Court for Bail—Right to grant of bail.*

Accused was in the first instance challaned for offences under Ss. 147 and 324, I. P. Code, and was granted bail under S. 496, Cr. P. Code, as the offences were liable. Subsequently the case could not proceed as the wound caused to the complainant became septic, and it then appeared that the accused would have to be challenged for a non-bailable offence under S. 326, I. P. Code. On the application of the Sub-Public Prosecutor, the Magistrate cancelled the bail bond and remanded the accused to custody. Accused having applied to the High Court for bail.

Held, that though originally the accused was entitled to bail under S. 496, Cr. P. Code, when it became apparent that an offence under S. 326, I. P. Code, was committed, S. 497, Cr. P. Code, came into operation and the Magistrate acted rightly in cancelling the bail as the accused was not entitled to bail.

Held further, that under S. 497 (5) the High Court as a Court of Session had power to commit the accused to custody, and the magistrate having exercised powers which the law impliedly conferred on him the order cancelling bail ought to be confirmed and bail refused. (*Davis, J.C.*) USMAN *v.* EMPEROR. **30 S.L.R. 131=165 I.C. 923=9 R.S. 110=1936 Cr.C. 972=A.I.R. 1936 Sind 187.**

——**S. 497 (5)**—*Action under—When justified.*

The granting of bail in a non-bailable offence is a concession allowed to an accused person and it presupposes that this privilege is not to be abused in any manner and that the accused person has not to come into contract with the prosecution witnesses or to exert any undue influence on them so as destroy the evidence or to minimise its effect against him. It is a sort of trust reposed in him by Court and if it is found that he has betrayed this trust in any manner or that he has misused the liberty thus granted to him by the Court, he disentitles himself to the privilege so granted and he can be re-arrested and put into custody under S. 497 (5), Cr. P. Code. This is more specially so, when he happens to occupy a dominating position in relation to the witnesses concerned and can injure or benefit them by his own fiat. The object of S. 497 (5) is not punitive, but it is equally true that the interests of the administration of justice demand that nobody should be allowed to impede the course of justice or hamper its administration in any manner. (*Din Mahommad, J.*) EMPEROR *v.* JIWAN LAL GAUBA. **17 Lah. 779=164 I.C. 376=9 R.L. 110=37 Cr.L.J. 937=1936 Cr.C. 765=39 P.L.R. 56=A.I.R. 1936 Lah. 730.**

——**S. 497 (1)**—*Bail—Rights to—Charge not framed—If ground for grant of bail.*

S. 497, Cr.P. Code, refers to a person "accused" of an offence and not "charged" with an offence. The fact that no charge has been framed against a person is no ground for releasing him on bail. (*Davis, J.C.*) USMAN *v.* EMPEROR. **165 I.C. 923=9 R.S. 110=30 S.L.R. 131=1936 Cr.C. 972=A.I.R. 1936 Sind 187.**

——**S. 497 (5)**—*Construction—Order cancelling bail and directing arrest on accused—Power to pass—Accused released on bail—Transfer of case to another Court—Power of latter Court to direct arrest of accused.*

Where a Magistrate or a Court releases an accused on bail, such order granting bail can be set aside by any other Magistrate or Court to whom the accused is sent for trial, if such Magistrate or Court thinks that there are proper and sufficient reasons for doing so. S. 497 (5) cannot be construed as meaning that the power of cancellation of an order releasing the accused on bail and passing of an order for arrest of such accused can be exercised only by the High Court or Court of session or the Court which released the accused on bail. Every Judge or Magistrate trying a criminal case has inherent power to see that the trial is properly conducted and that the ends of justice are not defeated, and if facts are brought to its attention which suggest that unless the person who is being tried is placed under arrest the ends of justice will be defeated, *e.g.*, where the accused on bail is found to be actually tampering with witnesses—the Court has inherent power to direct his arrest, notwithstanding that an order for his release on bail had been passed by another Magistrate or Court who dealt with the case at a prior stage. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* RAUTMAL KANUMAL. **I.L.R. 1940 Bom. 38=41 Cr.L.J. 251=12 R.B. 312=41 Bom.L.R. 1232=186 I.C. 101=A.I.R. 1940 Bom. 40.**

——**S. 497**—*Scope—Offence under S.* 409—*Complaint filed late—Warrant issued without preliminary inquiry—Refusal of bail—Propriety.*

On a complaint under S. 409, Penal Code, the Magistrate directed the issue of a warrant of arrest against the accused only on the sworn statement of the complainant. The complainant was not asked and did not state how he proposed to prove the allegations. The Magistrate held no preliminary enquiry. There was considerable delay in filing the complaint. The Magistrate refused to grant bail to the accused on the ground that there were reasonable grounds for believing the accused to be guilty.

Held, that the Magistrate ought to have held a preliminary enquiry before issuing a warrant of arrest. The accused should under such circumstances be granted bail. (*Mackney, J.*)

CR. P. CODE (1898), S. 497.

HTYE YAR *v.* EMPEROR. 172 I.C. 176=39 Cr. L.J. 91=10 R.R. 229=A.I.R. 1937 Rang. 474.

———**S. 497**—*Scope and effect of—Granting of bail—Factors to be taken note of.*

The change in S. 497, Cr. P. Code, cannot but be regarded as the result of a liberalising influence on the policy of the legislature and the discretion of Courts will be less fettered than before. A distinction is drawn between non-bailable offences which are punishable with death or transportation for life and other non-bailable offences, and while in the former case the magistrate's powers for granting bail are restricted, it is not so in the latter class of cases. Persons under 16 years and women and sick accused could be released under the powers given by the proviso. When granting or rejecting an application for bail, the social position or status of an accused should never be taken into consideration. It is the duty of the Court to see that the Crown does not get a free hand and that the accused are not locked up or hampered in their defence simply on the ground that it is alleged or feared that they will tamper with the evidence. (*Thomas, C. J.*) EMPEROR *v.* RANI ABHAIRAJ KUNWAR. 183 I. C. 713=12 R.O. 54=1939 A.Cr.C. 155=1939 O. L. R. 548=1939 A. W. R. (C.C.) 144=40 Cr.L.J. 841=1939 O.A. 665=1939 O.W. N. 791=A.I.R. 1940 Oudh 8.

———**S. 498**—*Appeal to Privy Council—Grant of bail—Power of High Court.*

Once the High Court has passed orders in a criminal appeal, it becomes *functus officio* and has no seizin in the case. This seizin may be revived when the Judicial Committee has granted leave to appeal. The power of the High Court to deal with an application for bail pending the decision of the Privy Council appeal depends on whether they have been directed by the Privy Council to do so or not. If the Privy Council grants leave to appeal and directs the appellant to apply for bail to the High Court, bail should ordinarily be granted by them. (*Blacker, J.*) FAQIR SINGH *v.* EMPEROR. 177 I.C. 1001=39 Cr.L.J. 982=40 P.L.R. 595=11 R.L. 385=A.I.R. 1938 Lah. 697.

———**S. 498**—*Commitment on serious charge—Grant of bail—Power of High Court.*

Where after an exhaustive enquiry the accused has been committed by a competent Magistrate on grave and serious charges relating to non-bailable offences, the High Court should not lightly enlarge him on bail. (*Blacker, J.*) MOHI-UD-DIN LAL BADSHAH *v.* EMPEROR. 178 I.C. 632 (2)=11 R.L. 482=40 Cr.L.J. 127=40 P.L.R. 716=A.I.R. 1938 Lah. 762.

———**S. 498**—*Granting of bail—Offence under S. 409, I. P. Code—General rule, if can be stated.*

S. 409, I. P. Code, may cover a breach of trust in respect of any amount from a rupee to a lac of rupees and therefore all cases coming under the section cannot be treated as on the same footing for purposes of bail. (*Norman, I.C.S.*) SOHAN LAL *v.* EMPEROR. 1939 A.M.L.J. 35.

———**S. 498**—*Granting of bail—Procedure — Notice to prosecution—Refusal of bail on report of prosecutor—Legality—Allegation as to tampering of evidence—Duty of prosecution.*

CR. P. CODE (1898), S. 498.

Before granting bail under S. 498, Cr. P. Code, the Sessions Judge, should, of course, give notice to the prosecution, though in special cases *ad interim* bail may be granted. But the prosecutor should appear at the hearing of the application and a Judge should not refuse bail merely on the written report of the prosecutor. When the bail is opposed on the ground of a likelihood of witnesses being tampered, the prosecutor should produce some *prima facie* evidence in support of the allegation. (*Norman, I.C.S.*) SOHAN LAL v. EMPEROR. 1939 A.M.L.J. 35.

———**S. 498**—*Petition for bail—High Court and Sessions Judge having concurrent jurisdiction—Sessions Judge, if should be moved first—Practice.*

Although the High Court and the Sessions Judge have concurrent jurisdiction, it is desirable that the ordinary practice should be that a petition for bail should be presented in the first place to the Court of the Sessions Judge, as it is the Court which is going to try the case and an expression of opinion by the High Court is likely to prejudice the trial in that Court. But there is no bar to the High Court entertaining the petition direct if there are peculiar circumstances in the case which take it out of the ordinary, as where the High Court had on a previous occasion made adverse remarks on the behaviour of the accused when the matter came before it during the pendency of the committal proceedings and the existence of those remarks is likely to prevent the Sessions Judge from giving a wholly free and independent consideration to that aspect of the case. (*Blacker, J.*) MOHI-UD-DIN LAL BADSHAH *v.* EMPEROR. 178 I.C. 632 (2)=11 R. L. 482=40 Cr.L.J. 127=40 P.L.R. 716=A. I.R. 1938 Lah. 762.

———**S. 498**—*Powers of High Court to grant bail.*

Under S. 498, Cr.P. Code, the High Court has power to release a person on bail in any case, that is to say that the powers in granting bail in non-bailable offence is unrestricted; but that power has to be used judicially and not in an arbitrary manner. (*Thomas, C.J.*) EMPEROR *v.* RANI ABHAIRAJ KUNWAR. 183 I. C. 713=12 R.O. 54=1939 A.Cr.C. 155=1939 O.L.R. 548=1939 A.W.R. (C.C.) 144=40 Cr.L.J. 841=1939 O.A. 665=1939 O.W.N. 791=A.I.R. 1940 Oudh 8.

———**Ss. 498 and 561-A**—*Grant of bail pending appeal to be filed before Privy Council—Jurisdiction of High Court.*

The High Court has no jurisdiction to grant bail to an accused person whom it has convicted on appeal, pending an appeal which he says he intends to file before the Privy Council. The words "in any case" and "whether there be an appeal on conviction or not" in S. 498, Cr. P. Code, cannot be taken to mean that the Court can act once it has reached finality. The Code must be read as a whole and since its scheme is to render a Court *functus officio* the moment the judgment is signed, the section cannot possibly mean that nevertheless the High Court has power to release an accused on bail,

and thus suspend sentence when no tribunal is seized of the proceedings. In the absence of express statutory authority, there can be no jurisdiction when there is no seisin. Once, however, leave is granted and seisin taken by the Privy Council, then S. 498 expressly empowers the High Court to act in the matter, not on its own motion but on behalf of their Lordships. The inherent power of a Court under S. 561-A, Cr.P. Code, cannot be invoked with respect to any matter which is expressly dealt with by the Code. The question of bail has been expressly dealt with, and although the matter of bail pending an appeal to the Judicial Committee is not there, its provisions on the subject must be regarded as exhaustive. Moreover, there should not be a resort to inherent power when there are other remedies available. The Local Government has ample power to suspend sentence and to release a convict on such terms as it chooses to fix. (*Gruer and Bose, JJ.*) BASHIRUDDIN AHMAD *v.* EMPEROR. **I.L.R. (1937) Nag. 236=9 R.N. 182=38 Cr. L.J. 384=167 I.C. 373=A.I.R. 1937 Nag. 181.**

———**S. 499**—*Bail—Right of accused—Discretion and duty of Magistrate—Sureties—Duty of Magistrate to accept—Refusal—Grounds for.*

Provided certain conditions are fulfilled, a Magistrate is bound to grant bail. It is a right to which the accused is entitled and not a mere favour. The Magistrate is bound to accept the sureties produced, provided they are properly identified, and are solvent and reliable. He cannot, for instance, reject them on the ground of their political views. (*Bose, J.*) EMPEROR *v.* BANARSIDAS. **I.L.R. 1937 Nag. 168=168 I. C. 876=9 R.N. 275=38 Cr.L.J. 633.**

———**S. 499**—*Proceedings under—Nature of—If judicial or ministerial—Duty of Magistrate under—Sureties where to appear and execute bond—Question of identity and solvency of sureties—If can be referred to Magistrate other than the one having seisin of case—Delegation of functions—Permissibility.*

The granting of bail is a judicial act and not a ministerial one. The proceedings entail something more than the passing of an order. The Judge or Magistrate who grants bail has to be personally satisfied in his judicial capacity that the sureties produced are reliable and solvent, and that the persons who sign the bond are actually the persons they purport to be; and he cannot delegate his responsibility to another unless the law or some rule having the force of law expressly empowers him to do so. When the order granting bail provides for the execution of a bond by sureties, the bond has to be executed by the sureties in the presence of the Magistrate who has seisin of the proceedings. The sureties must appear before him and satisfy him of their solvency and identity. The Magistrate has no power to refer the question of their solvency and identity to some other Magistrate or allow the sureties to execute the bond in the presesce of any other Magistrate than himself. (*Bose, J.*) EMPEROR *v.* BANARSIDAS. **I.L.R. (1937) Nag. 168=168 I.C. 876=9 R.N. 275=38 Cr.L. J. 633.**

———**S. 499**—*Scope—Bail bond—Terms vague and not specific—Enforceability—Burden of proof.*

Bail proceedings are special proceedings about which there are specific provisions in the Code and they must be strictly followed. S. 499 states that the time and place at which the accused is to appear must be mentioned in the bond and Cl. (2), S. 499, says that if the accused is to appear in some other Court, the bond must expressly say so. It is not open to the Court to depart from these provisions. Where therefore there is no mention in a surety bond of the Court in which the accused is directed to appear and all that is mentioned is that the surety undertakes to produce accused in "the Court at *B* till the decision," It is impossible to enforce a vague and slovenly bond of this character. What the surety himself thought about his liability under the bond is immaterial, for the terms of the surety bond have to be determined by the language used in the bond itself. Also, it is not for the surety to show that the bond is illegal, but for the Crown to show that the document, which it wishes to enforce against him, is one which can be so enforced under the law. (*Vivian Bose, J.*) EMPEROR *v.* CHINTARAM. **165 I.C. 825=38 Cr.L.J. 100=9 R.N. 96=1936 Cr.C. 1037=A.I.R. 1936 Nag. 243.**

———**S. 499**—*Scope—If exhaustive—Power of Court to insert condition not provided by section.*

Section 499 is exhaustive of the conditions which can be imposed on sureties. The matter is not like a private contract in which the parties are at liberty to choose their own terms; it is a special proceeding governed by special laws and must conform strictly to them. It is therefore beyond the powers of the Court to insert a provision in a surety bond that the surety should undertake to produce the accused till decision. (*Vivian Bose, J.*) EMPEROR *v.* CHINTARAM. **165 I.C.825=38 Cr.L.J. 100=9 R.N. 96=1936 Cr.C. 1037=A.I.R. 1936 Nag. 243.**

———**S. 499**—*Scope—If overrides inherent powers of High Court—Direction to produce accused in High Court or in any other Court as may be directed—Validity—Failure to produce as directed—Forfeiture.*

The provisions of S. 499 are not exhaustive and do not override the inherent powers of the High Court in the matter of bail. There are no restrictions on the High Court in the matter of imposing conditions on which it grants bail, and there is no irregularity in the High Court directing that the sureties shall be responsible for the production of an accused person on bail in the High Court and for his subsequent production in the Court of the District Magistrate of the District where he was tried to hear the reserved judgment in his appeal. A bond which directs the appearance of the accused not only in the High Court but in such Court in which the High Court might direct him to appear is therefore valid; and there is a forfeiture of the bond, if the sureties, although aware of the terms set out in the bond on which they undertake to furnish security for the due appearance of the accused, fail to produce the accused

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before the Court according to the directions of the High Court. (*Grille, J.*) ADKOO UMRAO KALAR *v.* EMPEROR. **I.L.R. (1939) Nag. 170 =180 I.C. 608=11 R.N. 387=40 Cr.L.J. 464 =A.I.R. 1938 Nag. 420.**

———**S. 499**—*Surety bond undertaking to produce accused in particular Court—Failure to produce in totally different Court—If breach of bond.*

Where a person executes a surety bond under S. 499 undertaking to produce the accused in a particular Court there is no undertaking by him to produce him in any other Court. Where therefore the surety fails to produce the accused in a totally different Court, it does not amount to a breach of the bond and the surety cannot be held liable. The surety cannot be held responsible under the terms of a document which do not apply to the circumstances of the case. (*Vivian Bose, J.*) EMPEROR *v.* CHINTARAM. **165 I.C. 825=38 Cr.L.J. 100=9 R.N. 96=1936 Cr.C. 1037=A.I.R. 1936 Nag. 243.**

———**S. 499**—*Surety—Liability—If confined to bail bond—Order sheet of Magistrate imposing conditions—If part of contract of undertaking by surety—Surety signing order sheet—Effect of.*

It is no doubt true that generally the liability of a person who has stood bail for an accused person must be determined on the terms of the bail bond itself and that the order sheet of the magistrate imposing conditions on the accused before he is released forms no part of the contract of bail. But if the purety has signed the order sheet of the Magistrate against the part which contains the undertaking on which he accepted the bail bond, the order sheet with the surety's signature itself becomes a part of the contract of the surety. In such cases the liability of the surety is not confined to the bail bond alone. (*Dhavle, J.*) RAM BILAS SHARMA *v.* EMPEROR. **185 I.C. 598=6 B.R. 221=1940 P.W.N. 151=12 R.P. 429=41 Cr. L.J. 214=21 P.L.T. 194=A.I.R. 1940 Pat. 375.**

———**Ss. 499 and 514**—*Bail bond—Condition other than for appearance in Court—Validity.*

The only condition contemplated by a bail bond taken under the Code, is a condition for attendance in Court. A condition that the accused person will not deliver any speech until the disposal of the case under S. 124-A, I.P. Code, against him, cannot be imported into the bail bond, and the bond cannot be forfeited under S. 514, Cr.P. Code, on breach of that condition. (*Edgley, J.*) GYANI MEHER SINGH *v.* EMPEROR. **I.L.R. (1939) 2 Cal. 42 =185 I.C. 249=12 R.C. 349=43 C.W.N.639 =A.I.R. 1939 Cal. 714.**

———**Ss. 499 and 514**—*Surety bond—Requirements—Bond by surety alone—If valid—Forfeiture of such bond—Proceedings under S. 514, if can be taken.*

S. 499, Cr.P. Code requires that a bond should specify the time and place at which the accused is to appear. Further a bond has to be obtained from the person released on bail and unless it is done there can be no valid bond

CR. P. CODE (1898), S. 503.

by a surety alone. Where a bond fails to mention the time and place of appearance of accused and is executed by a surety only, it is not possible to take any proceedings under S. 514, Cr.P.Code, for determining whether the bond has been forfeited or not, for no Court being mentioned, no Court can legally take any proceeding under S. 514, Cr.P. Code. (*Mulla, J.*) BRAHMANAND MISRA *v.* EMPEROR. **I.L.R. 1939 A. 924=184 I.C. 662=4 Cr.L.J. 85=12 R.A. 273=1939 A.W.R. (H.C.) 696 =1939 A.Cr. C. 164=1939 A.L.J. 779=A.I. R. 1939 All. 682.**

———**Ss. 500 and 514**—*Accused released under S. 500—Power of Court to restrict his movements—Order that accused should be kept in an Ashram—Surety, if bound by terms of bond.*

When a Court orders the release of an accused under S. 500, Cr.P. Code, it has no right or power to put any restrictions on the accused's movements, and obviously when an accused person is released on the suretyship of another, the intention is that the surety should have control over his movements. If the Court orders that the accused should be kept in an Ashram, the accused is not released within the meaning of S. 500, Cr. P. Code, and this being so, the surety is not bound by the terms of his bond. (*Zia-ul-Hasan, J.*) RAGHUBAR DAYAL *v.* EMPEROR. **13 Luck. 720=172 I.C. 862=1938 A.Cr. C. 7 =1938 O.A. 75=1938 O.W.N. 46=10 R.O. 196=1938 O.L.R. 34=39 Cr.L.J. 219=A.I. R. 1938 Oudh 81.**

———**S. 502**—*Surety applying for cancellation of bail bond—Procedure for Magistrate.*

Where the surety for the appearance of the accused subsequently applies for the cancellation of the bail bond, it is not right, under S. 502, Cr. P. Code, that he should be called upon to forfeit the bond and pay the amount of the bond or any part thereof. The proper procedure under that section is for the Magistrate to issue a warrant for arrest directing that the person or persons for whom he has stood surety, should be brought before him. 95 I.C. 678, Rel. on. (*Spargo, J.*) THA MAUNG *v.* EMPEROR. **171 I.C. 80=10 R.R. 130=38 Cr.L.J. 1010= A.I.R. 1937 Rang. 244.**

———**S. 503**—*Commission — When to issue — Considerations for Court.*

Whenever possible, the normal procedure of the Court should be followed and the witnesses should ordinarily be examined in the Court precincts, and the Magistrate who tries the case should himself see the witnesses. So where an application is made for examining lady witnesses on commission the Court should see whether it would meet the needs of the case if the ladies are examined in the presence of the parties and in the chamber of the Court. (*Davis,, J.C. and Dadiba C, Mehta, A.J.C.*) SALEH *v.* EMPEROR. **166 I.C. 45=9 R.S. 119=38 Cr.L.J. 127= 1936 Cr.C. 1089 (1)=A.I.R. 1936 Sind 221.**

———**S. 503**—*Examination of complainant — Commission for—When justified.*

It is always better that the complainant attends in person rather than that he should be examined on commission. But where the complainant has appeared twice for cross-examination and is unable to attend further, as he is subject to fits on excitement and heart trouble

with other complications and has been certified by doctors that but for complete rest and treatment, he is not likely to recover for another three or four months, the complainant's prayer, that a commission should be issued for his further cross-examination should be granted under the circumstances. (*Spargo, J.*) GUHA *v.* CHANDA. **170 I.C. 238=10 R.R. 67=38 Cr.L.J. 875=A.I.R. 1937 Rang. 231.**

———**S. 503**—*Jurisdiction—Commission to examine witness in Burma—Power of District Magistrate to issue.*

A District Magistrate has no jurisdiction under S. 503, Cr. P. Code, to issue a commission to examine a witness in Burma, since Burma has ceased to be part of British India. (*Lakshmana Rao, J.*) NACHIAPPA CHETTY *v.* NACHIAPPA CHETTIAR. **I.L.R. (1938) Mad. 455=39 Cr.L.J. 27=10 R.M. 413 (2)=171 I.C. 931=1937 M.W.N. 1132=46 L.W. 703=A.I.R. 1938 Mad. 192=(1937) 2 M.L.J. 902.**

———**S. 503**—*Person resident outside British India—Power of Court.*

The Courts in British India have no power to issue process against a witness resident outside British India, for the powers conferred by the Criminal Procedure Code are limited geographically to British India. Nor have the Courts in British India power to issue writs or commission for the examination of a witness resident outside British India. (*Almond, J.C.*) FAZAL RAHMAN KHAN *v.* EMPEROR. **162 I.C. 270=37 Cr.L.J. 618=8 R. Pesh. 192=1936 Cr.C. 311=A.I.R. 1936 Pesh. 101.**

———**Ss. 503 and 506**—*Refusal of commission by trial Magistrate—Remedy—Jurisdiction of District Magistrate.*

The District Magistrate can in a case which is not before him act only upon the application of the trial Magistrate. If the trial Magistrate rejects the application for the examination of witnesses on commission, then the remedy open to the aggrieved party is to go to the High Court in revision. (*Davis, J.C. and Dadiba C. Mehta, A.J.C.*) SALEH *v.* EMPEROR. **166 I.C. 45=9 R.S. 119=38 Cr.L.J. 127=1936 Cr.C. 1089 (1)=A.I.R. 1936 Sind 221.**

———**S. 509**—*Applicability—Murder trial—Medical witness present in Court but dispensed with consent of defence counsel—Legality—Conviction based on post mortem report—Sustainability.*

S. 509, Cr. P. Code, is not intended to be applied where the medical witness is present in Court. It is an elementary rule, that except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions which are evidential are not permitted in a criminal trial. Therefore, no consent or admission by the prisoner's advocate to dispense with the medical witness can relieve the prosecution of proving by evidence the nature of injuries received by the deceased and that the injuries were the cause of the death of the person for whose murder the prisoner is charged and tried. When the medical witness is dispensed with by the prosecution with the consent of the defence advocate, an essential element of proof of the crime alleged against the accused is wanting, and a conviction taking place in the absence of such evidence cannot stand. A post mortem *report*

proves nothing. It is not even evidence and can only be used by the witness who conducted the *post mortem* inquiry as an aid to memory. (*Cornish and K. S. Menon, JJ.*) RANGAPPA GOUNDAN. *In re.* **59 Mad. 349=161 I.C. 663=37 Cr.L.J. 471=8 R.M. 845=1936 M. W. N. 110=43 L.W. 305=1936 Cr.C. 509=A.I.R. 1936 Mad. 426=70 M.L.J. 447.**

———**S. 509 (1)**—*Scope of—If applies to evidence tendered by one, who happens to be a doctor—Dying declaration recorded by a doctor—Proof—Necessity.*

S. 509 (1), Cr. P. Code, is confined to expert evidence tendered by a medical witness as such. But it has no application to evidence which may be tendered by one who happens to be a doctor, Where a dying declaration was recorded by a doctor, it is necessary to prove it by producing the doctor. In recording it he was not acting as a medical man. (*Radhakrishna, J.*) WARISKHAN *v.* EMPEROR. **15 Luck. 429=1940 A.W.R. (C.C.) 92=1940 A. Cr. C. 52=1940 O.A. 177=1940 O.W.N. 177=A.I.R. 1940 Oudh 209.**

———**S. 510**—*Chemical Examiner's report—Proof of.*

Where all that is on the record of a case is a little scrap of paper on which it is written in somebody's handwriting that the Chemical Examiner's report shows that certain packets contained cocaine, it is not legal evidence and cannot be a substitute for the original certificate or at least for a copy of it certified by the Magistrate as being a true copy. The provisions relating to the production of a report by the Chemical Examiner in place of the Chemical Examiner's own personal appearance in Court are special provisions of the Code and must be strictly adhered to. (*Blacker, J.*) PEARY LAL *v.* EMPEROR. **176 I.C. 225 (1)=11 R.L. 167 (1)=39 Cr.L.J. 714=40 P.L.R. 788=A.I.R. 1938 Lah. 496.**

———**S. 510**—*Report of Chemical Examiner—Acceptance without cross-examination—Danger.*

The acceptance of mere written report of the Chemical Examiner as evidence in criminal cases without subjecting him to cross-examination is dangerous. (*Young, C.J. and Blacker, J.*) UJAGAR SINGH *v.* EMPEROR. **I.L.R. (1939) Lah. 206=181 I.C. 864=11 R.L. 895=41 P.L.R. 493=40 Cr.L.J. 576=A.I.R. 1939 Lah. 149.**

———**S. 512**—*Scope—Evidence taken under—Admissibility—Conditions—Onus of proof.*

S. 512, Cr. P. Code, which empowers a magistrate to take the depositions of certain witnesses in the absence of the accused enacts an exception to the principle embodied in S. 33 of the Evidence Act. Before evidence taken under S. 512, can be admitted on the ground that the deponents are dead, it is incumbent that the death of the witnesses must be proved by the party who wishes to tender such evidence. The fact of death must be proved like any other fact, and a mere report that a certain person is dead is not sufficient. (*Venkataramana Rao, J.*) EMPEROR *v.* LABBAI KUTTI. **180 I.C. 605=11 R.M. 732=40 Cr.L.J. 437=1938 M.W.N. 582=A.I.R. 1939 Mad. 190.**

———**S. 512**—*Evidence recorded at prior trial—Admissibility as against absconding accused—Conditions—Procedure for taking evidence when accused absconding.*

CR. P. CODE (1898), S. 512.

It is not necessary that depositions of witnesses must, for the purpose of being used under S. 512, Cr. P. Code, be recorded over again in a separate proceeding. It will suffice if, at the commencement of the hearing, the prosecutor brings to the notice of the Court the fact that an accused person is absconding, examines the witness or witnesses to prove the fact and obtains a direction of the Court that the evidence about to be taken is being taken for the purpose of being used, if necessary, against the absconder under S. 512 as well as against the person then present and under trial. *(Rowland and Madan, JJ.)* **EMPEROR** *v.* **BAHARUDDIN. 16 Pat. 116=1937 P.W.N. 348=4 B.R. 225=39 Cr. L.J. 281 (2)=10 R.P. 390=173 I.C. 230=19 P.L.T. 164=A.I.R. 1938 Pat. 49.**

———S. 512 (1)—*Proceeding under—Scope of enquiry.*

Under S. 512 (1), Cr. P. Code the Magistrate has to enquire whether the accused person has absconded and there is no immediate prospect of arresting him. This preliminary enquiry is merely held in order to ascertain the fact necessary to bring the provisions of the sub-section into operation and to give the Court jurisdiction to record the depositions. There is no finding which is binding on any one or for any purpose, and the magistrate has no jurisdiction to come to any findings of fact to the prejudice of the accused in the latter's absence. *(Roberts, C.J. and Dunkley, J.)* **U BA HLAING** *v.* **BALABUX SODANI. 14 Rang. 633 =167 I.C. 245=9 R.R. 305=38 Cr.L.J. 358= A.I.R. 1937 Rang. 42.**

———S. 514—*Applicability — Surety — Bond—Undertaking to apply to High Court for transfer—Application to Sub-divisional Magistrate and not to High Court according to practice—Rejection—Subsequent compromise and failure to move High Court—Bond—If forfeited.*

A, who had filed a prosecution, applied to the Magistrate for staying of proceedings on the ground that he wanted to apply for a transfer of proceedings to another Court and the Magistrate granted an adjournment on getting a surety bond from *A* that he would apply to High Court for a transfer within three weeks of the date. As *A* did not seek transfer from one district to another but from one Magistrate to another in the same district, according to the practice prevailing in the province, he instead of applying to the High Court for transfer, applied for transfer to the Sub-Divisional Magistrate. On the date fixed for the next hearing the Magistrate trying the case was apprised of the fact and without any demur adjourned the case. The application for the transfer was rejected by the Sub-Divisional Magistrate, but no application for transfer was made to the High Court as the parties compromised the case. The Magistrate then took proceedings against *A* under S. 514 calling upon him to show cause why the surety bond executed by him should not be forfeited and directed him to pay the full amount of the bond on the ground that no application for transfer was made to the High Court.

Held, that the order of the Magistrate was not justified. *A*, in moving, the sub-Divisional Magistrate for the transfer merely followed the practice of the Sind High Court. The technical non-compliance by *A* with the terms of his bond was not enough to justify the order. The failure of *A* to apply to the High Court after dismissal of the application by the Sub-Divisional Magistrate was explained by the fact that the parties had compromised the dispute. *(Rupchand Bilaram and Mehta, A.J.C's.)* **MAHOMED RAMZAN** *v.* **EMPEROR. 162 I.C. 985=37 Cr.L.J. 792=8 R.S. 178=1936 Cr.C. 489=A.I.R. 1936 Sind 51.**

CR. P. CODE (1898), S. 514.

———S. 514—*Bond for appearance of accused—Forfeiture—Order without giving opportunity of showing cause—Legality.*

An order directing forfeiture of bond executed for the appearance of accused and directing the surety to pay penalty without giving the accused and the surety an opportunity of showing cause by adducing evidence, as to why the accused failed to appear is bad and should be set aside. *(Mosely, J.)* **KUMARAPPAN** *v.* **THE KING. 185 I.C. 614=41 Cr.L.J. 216=12 R.R. 240=A.I.R. 1939 Rang. 427.**

———S. 514—*Bond for appearance of accused—Forfeiture—Recording of evidence—If necessary.*

Where a bond has been executed for appearance merely, it is often unnecessary for the Magistrate to record any evidence at all. The Magistrate knows by his own observation that the accused failed to appear in his Court. The burden of proving the negative, that is to say, that the accused absented themselves without reasonable cause for their non-appearance is not upon the prosecution and it is for the surety to give an explanation why the accused person was unable to attend Court. *(Mosely, J.)* **KUMARAPPAN** *v.* **THE KING. 185 I.C. 614=41 Cr.L.J. 216 =12 R.R. 240=A.I.R. 1939 Rang. 427.**

———S. 514—*Bond for keeping peace—Subsequent offence compounded—Forfeiture of bond—Legality.*

Composition of offence under S. 345 (6) has the effect of an acquittal of the accused and if there be no other evidence on record to show that the accused committed a breach of the peace, the order forfeiting the bond previously executed by him for keeping the peace is illegal. *(Skemp, J.)* **CHANDA SINGH** *v.* **EMPEROR. 186 I.C. 642=12 R. L. 426=41 Cr.L.J. 359=A.I.R. 1940 Lah. 32.**

———S. 514—*Bond under S. 106—Forfeiture for breach—Examination of witnesses in presence of accused—If necessary.*

Obiter.—In case of bond under S. 106, Cr. P. Code, it is necessary for the Magistrate to record evidence to prove the commission of a fresh breach of the peace and the forfeiture of the bond. Such evidence need not, according to the terms of S. 514, be taken in the presence of the accused, but when the accused appears and shows cause he must be given an opportunity of cross-examining the witnesses upon whose evidence the Magistrate had directed him to show cause why the bond should not be forfeited. The section does not require that before a final order is made the witnesses on whose evidence the forfeiture is held to be established, if they have been previously examined in the absence of the accused, must again be examined in his presence. *(Mosely, J.)* **KUMARAPPAN** *v.* **THE KING. 185 I.C. 614=41 Cr.L.J. 216=12 R.R. 240=A.I.R. 1939 Rang. 427.**

———S. 514 (1)—*Compliance of—Proof of forfeiture of bond—Grounds of—Omission to record—If illegality.*

S. 514, Cr. P. Code says that the Magistrate shall record the ground of proof of forfeiture before calling for payment of the penalty by the

CR. P. CODE (1898), S. 514.

person bound by the bond. The omission to so record the grounds is, however, a defect which is curable by S. 537, Cr. P. Code. It is sufficient under S. 514, that such grounds exist and appear in the record of the proceedings, though the Court has not separately and formally recorded them. As soon as the magistrate is satisfied *prima facie* that the bond has been forfeited his jurisdiction arises, and the omission to record the reason for his being so satisfied is a matter relating to the procedure and not to jurisdiction. It is not disobedience of an express provision as a mode of trial, and does not vitiate the proceedings in the absence of prejudice to the persons proceeded against. (*Gruer, J.*) NAMDEO *v.* EMPEROR. **178 I.C. 207=40 Cr.L.J. 23=11 R.N. 210=1938 N.L. J. 79=A.I.R. 1938 Nag. 275.**

———**S. 514**—*Forfeiture of bond—When not proper.*

The accused executed a bond for appearance before a certain Court under S. 514, Cr. P. Code. On a certain date of hearing, the Court sat at a place different from its usual place of sitting. The accused did not appear on such date and so his bond was forfeited. It was found that the bond had not been executed as such by the accused as the bond was nowhere signed by him. Moreover, the order sheet also did not show that the accused had knowledge of the change of venue of the Court.

Held, that the bond could not be forfeited under such circumstances. (*Biswas, J.*) IMARAT MALLICK *v.* EMPEROR. **174 I.C. 823=39 Cr. L. J. 473=10 R.C. 728=A.I.R. 1938 Cal. 255.**

———**S. 514**—*Forfeiture of bond—Liability of surety—When arises.*

Where the accused and his surety have executed bonds for keeping the peace, in the first place it is the principal bond which should be forfeited and it is only where that cannot be realized that the surety is liable to pay. The same principle applies to a fractional sum out of the bond. (*Skemp, J.*) CHANDA SINGH *v.* EMPEROR. **186 I.C. 642=12 R.L. 426=41 Cr.L.J. 359=A.I.R. 1940 Lah. 32.**

———**S. 514**—*Forfeiture of bond to keep peace —Time for starting proceedings.*

There is nothing in S. 514, or any other part of the Code, which restricts expressly or by necessary implication the power of the Court to take action for realization of the penalty under the bond to keep the peace after the order convicting the accused has been passed. The mere fact that no immediate action under the section has been taken under the bond against the accused or his surety on the conviction of the former to keep the peace, is no bar to such proceedings being taken at a subsequent time. (*Addison, Tek Chand and Ram Lall, JJ.*) RASUL KHAN *v.* EMPEROR. **I.L.R. (1939) Lah. 283=180 I.C. 849=11 R.L. 725=40 Cr.L.J. 505=41 P.L.R. 69=A.I.R. 1939 Lah. 70 (F.B.).**

———**S. 514**—*Liability of sureties under—Bond by two sureties for total sum of Rs.* 2,500—*Order for payment of Rs.* 1,500 *by each—Legality.*

Where a bond is executed by two sureties jointly and severally undertaking to be liable for a total sum of Rs. 2,000, an order requiring each of them to pay Rs. 1,500 on forfeiture of the bond is illegal. Nor more than the total amount of the bond can be recovered from them together. (*Gruer, J.*) NAMDEO *v.* EMPEROR. **178 I.C. 207=1938 N.L.J.**

CR. P. CODE (1898), S. 514.

79=40 Cr.L.J. 23=11 R.N. 210=A.I.R. 1938 Nag. 275.

———**S. 514**—*Magistrate convicting accused for offence involving forfeiture of bond—Subsequent action on bond—Legality.*

There is nothing in S. 514, Cr. P. Code, to debar a Magistrate, who has convicted a person of an offence which involves the forfeiture of the bond, from subsequently taking action against that person by forfeiting the bond in question. (*Middleton, J.C.*) MIRAN SHAH *v.* EMPEROR. **163 I.C. 443=37 Cr.L.J. 849=9 R. Pesh. 2=1936 Cr.C. 668=A.I.R. 1936 Pesh. 141.**

———**S. 514**—*Proceedings under—Bond by sureties for party—Death of party—Enquiry into breach of conditions—Plea that main case* subjudice—*Sustainability.*

Where proceedings under S. 514, Cr. P. Code, are started on the ground that a bond has been forfeited, it is no answer to such proceedings to plead that the proceedings in respect of which the bond was executed are still *subjudice*, when the person for whom the executants of the bond are sureties is dead. The death of that party terminates the proceedings so far that party is concerned, and there is no obstacle to an enquiry as to whether that person had broken the conditions of the bond. (*Gruer, J.*) NAMDEO *v.* EMPEROR. **178 I.C. 207=1938 N.L.J. 79=40 Cr.L.J. 23=11 R.N. 210=A.I.R. 1938 Nag. 275.**

———**S. 514**—Proceedings under—Maintainability—Bond not mentioning time and place at which accused is to appear. *See* CR. P. CODE, Ss. 499 AND 514—SURETY BOND. **1939 A.L.J. 779.**

———**S. 514**—*Security to keep the peace—Commission of offence under S.* 323, *I. P. Code—If entails forfeiture of bond.*

Where a person who has furnished security to keep the peace commits an offence under S. 323, I. P. Code, his bond is liable to be forfeited, for the commission of an offence under S. 323, I. P. Code, is a breach of the peace. (*Hamilton, J.*) ABDUS SATTAR *v.* EMPEROR. **176 I.C. 948=39 Cr. L.J. 831=11 R.O. 7=1938 A. Cr. C. 55=1938 O.L.R. 355=1938 O.A. 566=1938 O.W.N. 676= A.I.R. 1938 Oudh 195.**

———**S. 514**—*Scope—Non-compliance—Effect—Order of forfeiture without hearing sureties—Legality—If justifies interference in revision—S.* 537—*If cures defect.*

Before an order of forfeiture is passed, the sureties should be called upon to show cause and heard. That is the appropriate procedure. But failure to follow the procedure laid down in S. 514 of the Cr. P. Code, will not be sufficient to render the order of forfeiture illegal where it has not occasioned in any failure of justice. And an order of forfeiture in contravention of S. 514 will not be interfered with in revision when no failure of justice has been occasioned. S. 537, Cr. P. Code, cures the irregularity in such cases. (*Dhavle, J.*) RAM BILAS SHARMA *v.* EMPEROR. **185 I.C. 598=6 B.R. 221=1940 P.W.N. 151=12 R.P. 429 =41 Cr.L.J. 214=21 P.L.T. 194=A.I.R. 1940 Pat. 375.**

———**S. 514**—*Surety bond—Reduction of sum fixed at time of forfeiture—Advisability.*

It is advisable that all considerations should be weighed at the time when a security and surety bond is demanded and that the sum fixed therein should be equitable. The reduction of that sum

CR. P. CODE (1898), S. 514.

at the time of forfeiture is *prima facie* inadvisable and goes far to undermine the whole purpose for which such bonds are taken. (*Middleton, J. C.*) MIRAN SHAH *v.* EMPEROR. **163 I.C. 443=37 Cr.L.J. 849=9 R. Pesh. 2=1936 Cr.C. 668=A.I.R. 1936 Pesh. 141.**

———**Ss. 514 and 496**—*Forfeiture of surety bond —Legality—No recognisance taken from accused.*

An order forfeiting a bond executed by a surety for the appearance of an accused is not illegal, although the accused himself has not executed any recognizance bond. S. 496, Cr. P. Code, does not state that a person released on bail must give a bond himself. Nor is there anything requiring such a bond on first principles. The person giving bail enters into a contract with a penalty clause to produce the accused person before a Magistrate when called upon. The person giving bail is the principal. The person for whom bail is given is the subject of the contract. If the person giving bail fails to perform his contract then the penalty clause may be put into operation against him, although as in other contracts with a penalty clause it is not necessary to exact the penalty in full. (*Skemp, J.*) INDAR *v.* EMPEROR. **42 P.L.R. 411=A.I.R. 1940 Lah. 339.**

———**Ss. 516 and 517**—*Applicability—Charge of cheating or criminal breach of trust—"Stop order" on bank of accused to prevent accused from operating on his bank account—Legality.*

The fact that an accused has been charged with cheating or criminal breach of trust does not give jurisdiction to the magistrate enquiring into the case to pass a "stop order" on the bank in order to prevent the accused from operating on his bank account. Neither Ss. 516 and 517 of the Cr. P. Code, nor any other provisions of the Code authorise the Court to make an order on the accused not to ask the bank to repay the money lent by him to the bank, especially when there is nothing to show that the money in the bank is part of the proceeds of the offence of cheating or criminal breach of trust alleged. (*Lort Williams and Jack, JJ.*) MAKAN LAL CHATTERJEE *v.* EMPEROR. **164 I.C. 377=9 R.C. 201 (1)=37 Cr.L.J. 935 (1)=40 C.W.N. 96.**

———**S. 517**—*Accused discharged on withdrawal of prosecution—Witnesses not examined —Order regarding exhibits—Power of Court to pass.*

Where the accused and the exhibits are sent up by the police to the Magistrate and he takes action under S. 190 (*b*), Cr. P. Code, and directs summonses to issue to witnesses, proceedings are initiated and an enquiry must, therefore, be held to have begun. If thereafter the prosecution is withdrawn in the presence of the accused and the accused is discharged under S. 494, Cr. P. Code, the enquiry is concluded although no witnesses are examined, and the Magistrate has, therefore, power to pass an order under S. 517, Cr. P. Code, with regard to the exhibits. (*Baguley, J.*) MAUNG PO TU *v.* THE KING. **1938 Rang.L.R. 143=176 I.C. 451 =11 R.R. 67=39 Cr.L.J. 763=A.I.R. 1938 Rang. 278.**

———**S. 517**—*Acquittal of accused—Forfeiture of property seized from him—Legality.*

S. 517, Cr. P. Code, confines the powers of confiscation to property "regarding which any

CR. P. CODE (1898), S. 517.

offence appears to have been committed or which has been used for the commission of any offence". Where, therefore, an accused is acquitted by the Magistrate, an order forfeiting to Government property seized from his possession on the ground that it "has not been satisfactorily accounted for and is tainted with suspicion", is bad. (*Grille and Bose, JJ.*) SHALIGRAM *v.* EMPEROR. **10 R.N. 185=172 I.C. 213= 39 Cr.L.J. 105=A.I.R. 1938 Nag. 52.**

———**S. 517**—Applicability—Proceedings under Ch. VIII—"Inquiry". *See* CR. P. CODE, Ss. 109 AND 118. **A.I.R. 1936 Nag. 143.**

———**S. 517**—*Applicability—Property regarding which any offence appears to have been committed—Mica found in premises of holder of mica miner's license in excess of amount entered in acoount—Seizure and prosecution of licensee under S.* 17 (2) (a), *Bihar and Orissa Mica Act—Conviction—Order confiscating mica seized—Legality—Proper order.*

The offence dealt with by S. 17 (2) (*a*) of the Bihar and Orissa Mica Act is that of keeping wrong accounts; and where the account shows the mica to be in excess of the amount entered and sometimes to be less than the amount entered, the offence under the clause is in respect to the account and not in respect to the excess amount of mica found on inspection. Where the Inspector of Mica Accounts visits the godown of the holder of a mica miner's license and finds a certain amount of crude mica kept in a separate room not used ordinarily used for storing mica, which is not entered in the stock, and after seizing the mica institutes a prosecution under S. 17 (2) (*a*), which results in the conviction of the licensee, the mica found in excess of the amount entered in the account book and seized by the Inspector cannot be confiscated under S. 517, Cr. P. Code, in the absence of proof that the mica was obtained by illicit means and in the absence of a charge of illicit obtaining of the same. Such excess mica is not property regarding which any offence has been committed within the meaning of S. 517, Cr. P. Code. The mica should properly be returned to the licensee from whom it has been seized. (*Agarwala and Varma, JJ.*) MANI RAM *v.* EMPEROR. **16 Pat. 323=168 I.C. 795=9 R.P. 505 (2)=38 Cr.L.J. 602 (2)=3 B.R. 486=18 Pat.L.T. 146=1937 P. W.N. 167=A.I.R. 1937 Pat. 257.**

———**S. 517**—*Criminal breach of trust in respect of jewels—Return of jewels—True owner and pledgee—Preference.*

On a conviction for criminal breach of trust in respect of jewels, the property recovered from the pledgee should be directed to be returned to the true owner who has the better title. (*D. R. Norman.*) GULAB CHAND *v.* EMPEROR. **1937 A.M.L.J. 73.**

———**S. 517**—*Currency notes misappropriated—Notes identified by numbers—Order for their disposal.*

Certain currency notes which had been misappropriated by the manager of certain firm were deposited by him with certain other firm to redeem bills of exchange which he had pledged on his own account with that firm. The notes which had been handed over to that firm were identified by their numbers and most of these notes were seized by the police. The Magistrate directed the latter firm to return the currency notes

CR. P. CODE (1898), S. 517.

to the former firm under S. 517. (*Edgley, J.*) AKSHOY KUMAR *v.* NABA KUMAR. **189 I.C. 714=41 Cr.L.J. 791=A.I.R. 1940 Cal. 346.**

———**S. 517**—*Duty of Court under—Charge of theft—Acquittal—Finding that property belongs to complainant—Order returning property to accused—If justified—Proper order.*

It is not an absolute rule of law that when no offence is proved, the property in dispute should be returned to the person from whom it was attached or taken. When the Court finds that the property belongs to the complainant, and that the accused who removed it had no right to do so, the property must be returned to the complainant although the accused is acquitted of the charge of theft brought against him. (*Norman.*) CHHOTEY LAL YATI *v.* DAYA KRISHNAN DIKSHIT. **1936 A.M.L.J. 115.**

———**S. 517**—*Jurisdiction under—Property not subject of offence and not before Court or in its custody—Order for disposal.*

S. 517, Cr.P. Code, has no application when the property ordered to be delivered by the Court is neither in the custody of the Court nor produced before it. When the accused have not committed any offence in respect of the property, and the offence is by a third person not before the Court, though the accused acted under his orders, a Magistrate has no jurisdiction under S. 517, to make an order for disposal of that property. (*Weston.*) SHAM SINGH *v.* BAKTA. **1935 A.M.L.J. 120.**

———**S. 517**—*Limitation—Order of disposal of property—When to be made—Order on application made after lapse of time—If without jurisdiction.*

There is no period of limitation for an application for an order under S. 577, Cr.P. Code. S. 157 cannot be read as requiring that the order for disposal of property must be passed simultaneously with the judgment in the case. The section gives jurisdiction to the Court to pass necessary orders for the disposal of property either at the time of the conclusion of the trial or at a later date. Though the passing of such orders should not be unreasonably postponed, the lapse of time does not relieve the Court of the duty and the corresponding jurisdiction to pass orders for the disposal of property which is in the Court's custody or under its control. (*Rowland and Chatterji, JJ.*) DEOPUJAN MAHTO *v.* KUKUR AHIR. **19 Pat. 337=188 I.C. 260=12 R.P. 695=41 Cr.L.J. 559=6 B.R. 621=1939 P.W.N. 911=21 Pat. L.T. 448=A.I.R. 1940 Pat. 198.**

———**S. 517**—*Notice—Order under section—Prior notice to parties—Necessity for.*

The broad general principle of procedure both in Criminal and Civil Courts is that an order to the detriment of any party ought not to be passed without giving him notice and an opportunity of showing cause why it should not be made. S. 517, Cr. P. Code, does not require in terms, the issue of any notice to parties before an order under the section is passed; if an order regarding disposal of property is passed simultaneously with the judgment in the criminal case, a separate notice to the parties to show cause in respect of the disposal of the property is not necessary, but when an application is made after some lapse of time, it is only

CR. P. CODE (1898), S. 517.

proper on general principle of law that the party to be affected by the proposed order should have notice of the application. (*Rowland and Chatterji, JJ.*) DEOPUJAN MAHTO *v.* KUKUR AHIR. **19 Pat. 337=188 I.C. 260=12 R.P. 695=41 Cr.L.J. 559=6 B.R. 621=1939 P.W.N. 911=21 Pat. L.T. 448=A.I.R. 1940 Pat. 198.**

———**S. 517**—*Order without hearing parties—Legality.*

An order for disposal of property under S. 517, Cr.P.Code, made in the property register without hearing the parties is illegal and cannot be upheld. (*Lakshmana Rao, J.*) RAMAKRISHNAYYA *v.* SEETHAMMA. **186 I.C. 224=41 Cr.L.J. 275=12 R.M. 636=1939 M.W.N. 740=A.I.R. 1939 Mad. 916.**

———**S. 517**—*"Person entitled" —Several persons accused in respect of same property—Acquittal of one only—Disposal of property—Proper order.*

The general rule is that when an accused has been charged with an offence in relation to certain property and he has been acquitted, that property should be returned to him. This rule, however, does not apply where of several persons accused of an offence in respect of the same property one is acquitted while others are convicted. Where *A* and *B* not being mercantile agents within the meaning of S. 2 (9), Sale of Goods Act, deposited ornaments with *C* who received them not in good faith, and all of them were accused of criminal breach of trust but *C* was acquitted.

Held, that *C* was not protected under S. 178, Contract Act, and hence was not entitled to possession under S. 517, Cr.P. Code. (*Davis, J.C.*) GULABCHAND UMAJI *v.* EMPEROR. **167 I.C. 428=9 R.S. 190=38 Cr.L.J. 382=A. I. R. 1937 Sind 33.**

———**S. 517**—*Return of document—Pensioner depositing pension papers with creditor—In criminal proceedings that followed, creditor producing them in Court—Power of Court to return them to pensioner on his acquittal.*

It is perfectly true that in an ordinary case of property or documents with which the Court is called upon to deal, under the provisions of S. 517, the proper order to pass generally is that such property or such documents should, in the absence of a definite finding as to the ownership, be returned to the person with whom it was found. In case of pension papers there is however a marked exception to the general rule. The only person entitled to the possession of the papers is the pensioner himself and the only person to whom they have any value whatsoever is the pensioner himself. Where therefore a pensioner made over to the creditor his pension papers for securing a loan, but the grant of a loan was followed by criminal proceedings in which the pension papers were produced by the creditor, and the proceedings ultimately resulted in the acquittal of the pensioner who afterwards applied to the Magistrate to have the papers returned to him.

Held, that the Magistrate was legally competent to return the pension papers to the pensioner. (*Bartley and Henderson, JJ.*) REZA ALI WASSHAT *v.* DWARKA PERSHAD SARAF.

CR. P. CODE (1898), S. 517.

182 I.C. 571=12 R.C. 83=A.I.R. 1939 Cal. 158.

———**S. 517**—*Return of property to owner or pledgee—Discretion of Court—Sale of Goods Act, Ss. 27 to 30.*

Where on the conclusion of a criminal case the question is as to how to make a disposal of the property under S. 517, Cr.P.Code, if the person disposing of such property belongs to any of the classes mentioned in Ss. 27 to 30, Sale of Goods Act, inasmuch as a person can make a valid pledge or sale, provided the requirements of the provisos are fulfilled, the property should be returned not to the owner but to the pledgee or buyer as the case may be. But where such person does not belong to any of the classes as mentioned above, but is merely a bailee and thus has not the power to make either a valid pledge or sale, the property must be returned to the owner and not to the pledgee or buyer from such person. (*Ba U, J.*) MAUNG PO THAUNG *v.* NOOR MOHAMED. **171 I.C. 897=10 R.R. 199=39 Cr.L.J. 25=A.I.R. 1937 Rang. 385.**

———**S. 517**—*Revision — Discretion under — Order for return of property—Revision—Interference—Grounds.*

S. 517, Cr.P.Code, gives the Magistrate a very wide discretion regarding the return of the property, and unless it is clear that he has exercised it on some wrong judicial principle and that he has returned the property to some one not obviously entitled to it, the High Court will not in revision interfere with his order. (*Horwill, J.*) SUBBARAMA AIYAR *v.* DAMODARAN. **169 I.C. 80=9 R.M. 680=38 Cr.L.J. 690=1937 M.W.N. 53=A.I.R. 1937 Mad 313=(1937) 1 M.L.J. 128.**

———**S. 517**—*Scope—If confined to property in respect of which offence committed.*

S. 517 refers not only to property in respect of which offence has been committed but also to the property before the Court and in its custody. Where criminal breach of trust was proved only in relation to certain ornaments belonging to three persons, and the Magistrate ordered the ornaments produced before him to be restored not only to those three persons but also to six others though no offence had been proved as against the property belonging to them.

Held, that the order was within provisions of S. 517. (*Davis, J.C.*) GULABCHAND UMAH *v.* EMPEROR. **167 I.C. 428=9 R.S. 190=38 Cr.L.J. 382=A.I.R. 1937 Sind 33.**

———**S. 517**—*Title doubtful—Proper order.*

When title is doubtful, the proper order under S. 517, Cr.P.Code, ordinarily should be an order for return to the person from whom the property was attached. (*Weston.*) GOPI *v.* EMPEROR. **1937 A.M.L.J. 141.**

———**Ss. 517 and 520**—*Dacoity case—Order of Assistant Sessions Judge confiscating money found on person of accused—Appeael.*

An appeal lies to the High Court under S. 520, Cr.P. Code, against an order passed by an Assistant Sessions Judge under S. 517, Cr. P. Code, confiscating to the Government the money found on the person of the accused who is convicted of a dacoity. (*Jack, J.*) BIR BIKRAM KISHORE MANIKYA BAHADUR *v.* EMPEROR. **41 C.W.N. 512=65 C.L.J. 397.**

CR. P. CODE (1898), S. 520.

———**Ss. 517 and 520**—*Discretion of Court under—Acquittal of accused—Offence not proved—Order for keeping property in custody of Court pending decision of conflicting claims—Propriety.*

It cannot be laid down generally that if no offence is proved to have been committed in respect of property produced before a Criminal Court and if the accused is acquitted of the charge brought against him, that the Magistrate should restore the property to the person from whom it was last taken. When there are conflicting claims to the property in question, and the titles set up can only be adequately dealt with by a Civil Court, the Magistrate under S. 517 of the Cr. P. Code, or the appellate or revising Court under S. 520 has a discretion and can properly direct that the property should remain in the custody of the trial Court, subject to and pending any decision that might be made by a competent Court of civil jurisdiction. (*Guha and Bartley, JJ.*) RAMPHAL TATWA *v.* JASODIA MALAIN. **40 C.W.N. 862=64 C.L.J. 542.**

———**Ss. 517 and 523**—Appeal—Proceeding under S. 512 (1)—Order of Magistrate disposing of property—Right of appeal. *See* CR. P. CODE, Ss. 523 AND 517. **14 Rang. 633.**

———**Ss. 517 and 523**—*Applicability—Property seized by police under S. 550—Police subsequently acting under S. 169.*

In order that S. 517, Cr. P. Code, may apply, one of the conditions is that there must have been "an inquiry or trial in any Criminal Court", and that such inquiry or trial must have been concluded. Where, therefore, the Police seized property under S. 550, Cr. P. Code, and subsequently acted under S. 169, the case would come under S. 523 and not under S. 517, as the case did not proceed to a trial and it did not reach the stage of an inquiry either. (*Biswas, J.*) MAHOMED YUSUF *v.* KRISHNA MOHAN BHATTACHARYA. **172 I.C. 959=39 Cr.L.J. 245=10 R.C. 478=41 C.W.N. 1376=A.I.R. 1938 Cal. 17.**

———**Ss. 517 and 523**—*Scope and objection of—Jurisdiction under—Property seized not connected with any specific charge of offence—Power to decide right to possession of.*

In essence the object of Ss. 517 and 523 of the Cr. P. Code is to provide a summary method of restoring the *status quo*. If it is established that the property in question has been recently stolen or acquired dishonestly in some other way, the Courts have a discretion to find out summarily who is entitled to possession of that property and to hand the property over to the person so found entitled. But when no charge is established against the person in possession, criminal Courts have no jurisdiction to enter upon a roving inquiry about the rights to possession of pieces of property which are entirely unconnected with specific allegations of crime in respect of them. That is the business of civil Courts to decide. (*Bose, J.*) RANI SONA BAHU *v.* SOBHAGSINGH. **167 I.C. 848=9 R.N. 226=38 Cr.L.J. 467=19 N.L.J. 264.**

———**S. 520**—*'Court of appeal'—Additional Sessions Judge.*

Where an Additional District Magistrate had passed an order of disposal in his judgment of acquittal in appeal, as an appeal from the acquittal would lie only to the High Court and not to the

CR. P. CODE (1898), S. 520.

Sessions Court, the latter Court cannot hear an appeal from the order of disposal. (*Weston.*) GOPI *v.* EMPEROR. **1937 A.M.L.J. 141.**

———**S. 520**—*"Court of appeal"—Construction of —Acquittal by Magistrate and order for disposal of property—Appeal to Sessions Judge against order for disposal—Jurisdiction of Sessions Judge to reverse order.*

The words "Court of appeal" in S. 520, Cr. P. Code, are not limited to a Court before which an appeal from an order of acquittal or conviction, as the case may be, could lie or in which such an appeal is or might be pending. The jurisdiction of a Court of appeal to deal with an order for disposal of property is not dependant on the question in what Court an appeal from the acquittal or conviction might be brought. Where an order is passed by a Magistrate for disposal of property, the accused having been acquitted, the Sessions Judge, as a Court of appeal, *i.e.*, as the Court to which appeals ordinarily lie from the Magistrate's Court, has jurisdiction under S. 520 to entertain and hear and dispose of an appeal from the order for disposal, although there has been and can be no appeal to him from the order of acquittal passed by the Magistrate who passes the order for disposal of the property. (*Guha and Bartley, JJ.*) BANURUDDIN BISWAS *v.* GANI MIA SAWDAGAR. **160 I.C. 591=8 R.C. 445=37 Cr.L.J. 313=40 C.W.N. 287=1936 Cr. C. 112= A.I.R. 1936 Cal. 21.**

———**S. 520**—*Jurisdiction of District Magistrate under—Property if should be proved to be stolen —Burden of proof—Order for sale and for retention of sale proceeds in Court pending decision by Civil Court—Legality.*

In order that a District Magistrate should have jurisdiction to dispose of property under S. 520, Cr. P. Code, it is only necessary that he should find that an offence appears to have been committed in respect of that property. It is not necessary that the property should be proved to have been stolen. There are cases where it may be perfectly manifest that property discovered in some search is stolen property and that it belongs either to the complainant or the accused. If where the person claiming to be the owner of the property is before the Magistrate, he must, if he desires the magistrate to treat as owner any one other than the person who was in possession, prove that it is his. But the magistrate has no jurisdiction to pass an order for sale of the property and for retention of the sale proceeds in deposit in Court pending a decision of a Civil Court as to the ownership of the property. The magistrate ought not by the application of S. 520 to make an order tantamount to attachment before judgment in Civil Court. (*James, J.*) KASIRAM MARWARI *v.* MAKHANJI DWARKA PRASAD. **171 I.C. 589=38 Cr.L.J. 1091=18 Pat.L.T. 441=4 B.R. 40=10 R.P. 221=A.I.R. 1937 Pat. 591.**

———**S. 520**—*Jurisdiction under—Order by Deputy Magistrate for disposal of property after acquittal of accused—Revision by Additional Sessions Judge—Competency.*

Where a Deputy Magistrate makes an order for disposal of property under S. 517 of the Cr. P. Code, the Additional Sessions Judge has

CR. P. CODE (1898), S. 522.

jurisdiction to revise that order, although such order may have been passed in a case in which the accused is acquitted. (*Guha and Bartley, JJ.*) RAMPHAL TATWA *v.* JASODIA MALAIN. **64 C. L.J. 542=40 C.W.N. 862.**

———**S. 520**—*Powers of Sessions Court.*

S. 520, Cr. P. Code, gives the Sessions Court power to modify, alter or annul an order passed under S. 517 by a Subordinate Magistrate. (*Baguley, J.*) MAUNG PO TU *v.* THE KING. **1938 Rang.L.R. 143=176 I.C. 451=11 R.R. 67=39 Cr. L.J. 763=A.I.R. 1938 Rang. 278.**

———**S. 521**—*Complaint under S.* 501, *I. P. Code, in respect of defamatory passages in book—Order for destruction of entire book—Propriety—Proper order.*

Where on a complaint in respect of a defamatory book, certain passages in the book are held to be defamatory, an order directing destruction of the entire book cannot be sustained. The proper order is to direct the pages in the book containing the objectionable passages to be destroyed. (*Lakshmana Rao, J.*) SUMITRAMMA *v.* KRISHNAMURTHI SASTRI. **1940 M.W.N. 532=52 L.W. 118.**

———**S. 522**—*Accused entering possession of complainant's house by breaking lock—Order of restoration of possession—Power of Court to pass.*

Where the accused persons broke open the lock of the house of the complainant in his absence and entered into possession thereof and when the complainant reached the spot, the accused were standing there armed with kulharis and sticks,

Held, that the accused used criminal force to the lock which they broke, criminal because it involved the crime of mischief and that, therefore, an order under S. 522, Cr. P. Code, directing restoration of possession of the house to the complainant was competent on conviction of the accused under S. 448, I. P. Code. A.I.R. 1934 Lah. 454, Diss. from. (*Skemp, J.*) RODA *v.* AUTAR SINGH. **180 I.C. 501=11 R.L. 693=40 Cr.L.J. 380=40 P.L.R. 923=A.I.R. 1938 Lah. 839.**

———**S. 522**—*Conviction by Bench of Honorary Magistrates—Order directing restoration of property by another Bench—Legality.*

Where the accused was convicted for criminal trespass by a Special Bench of Honorary Magistrates since abolished, another Bench has no jurisdiction to pass an order under S. 522, Cr. P. Code, directing the restoration of the property to the complainant. (*Abdul Rashid, J.*) BHANI *v.* NARAIN SINGH. **186 I.C. 895=41 Cr.L.J. 387=12 R.L. 443=41 P.L.R. 908=A.I.R. 1940 Lah. 84.**

———**S. 522 (3)**—*Delivery of possession—Power of revisional Court after expiry of one month after conviction.*

Under S. 522 a month after the date of conviction, the trial Judge becomes *functus officio* in the matter of delivering possession. When once the lower Court has ceased to have the power of giving possession, the revisional Court cannot, when moved to consider the order of that Court refusing to give possession on the ground of limitation, enlarge that period and grant the relief. Sub-Cl. (3) to that section comes into play only when an appeal or revision has been preferred against the conviction. It is then that the appellate or revisional Court is seized of that jurisdiction to res-

CR. P. CODE (1898), S. 522.

tore possession although the original Court may not have done so and such higher Courts are not bound by the limitation of one month in doing so. But this clause does not help if the Court of revision is considering the order of the trial Court under S. 522, Cr. P. Code, refusing to grant possession because the time for making the order had passed. (*Mir Ahmad, A.J.C.*) SAID UMAR *v.* ABDUL QADIR. **166 I.C. 872=9 R. Pesh. 73=38 Cr.L.J. 333=A.I.R. 1937 Pesh. 7.**

———**S. 522**—*Order by appellate Court—Time limit.*

A Court of appeal can pass an order under S. 522, Cr. P. Code, at any time, however long, after conviction. One month is the time limit fixed for the trial Court in sub-S. (1), but there is nothing in sub-S. (3) to show that this limitation applies to a Court of appeal. If it did, the result would be that sub-S. (3) would be of little or no practical use, as a case will not usually reach the appellate Court before the expiry of the month. (*Gruer, J.*) NAMDEO *v.* EMPEROR. **I.L.R. (1938) Nag. 454=173 I.C. 620=10 R.N. 314=39 Cr.L.J. 342=A.I.R. 1938 Nag. 316.**

———**S. 522**—*Order under—Legality—Unlawful entry into house when locked.*

In a case where the complainant himself alleges that the house was locked when the unlawful entry was effected it can by no stretch of language be argued that the offence of criminal trespass was attended by criminal force or show of criminal force or by criminal intimidation. An order under S. 522, Cr. P. Code, in such a case is, therefore, illegal. 40 P.L.R. 923, Diss. from. (*Din Mahomed, J.*) RAM CHAND *v.* EMPEROR. **I.L.R. (1939) Lah. 513=183 I.C. 340=12 R.L. 111=40 Cr.L.J. 781=41 P.L.R. 63=A.I.R. 1939 Lah 184.**

———**S. 522 (3)**—*Order under—Limitation.*

S. 522 (3), Cr. P. Code, imposes no period of limitation on a Court of appeal or revision. Such a Court can, therefore, pass an order restoring the property to the complainant even after the expiry of one month from the original conviction. (*Skemp, J.*) RODA *v.* AUTAR SINGH. **180 I.C. 501=11 R.L. 693=40 Cr.L.J. 380=40 P.L.R. 923=A.I.R. 1938 Lah. 839.**

———**S. 522**—*Order under—Limitation.*

Under S. 522, Cr. P. Code, no order directing restoration of possession of property can be passed more than one month after the decision of the case. It is immaterial that the application for restoration of possession is made within one month from the decision of the case. (*Abdul Rashid, J.*) MUNSHI RAM *v.* MOTA. **41 P.L.R. 877.**

———**S. 522**—*Order under—Limitation—Powers of Court of Revision.*

In a proper case, the Court of appeal or the Court of Revision can pass an order under S. 522, Cr. P. Code, if such Court is satisfied that an order of the nature is necessary in the interest of justice. Where a trial Magistrate passed an order under this section more than two months after the date of conviction of the accused under S. 448, I. P. Code, but the delay in passing the order was not due to any fault on the part of the complainant,

Held, on revision that it was a fit case in which the power under **S. 522, Cr. P. Code,**

CR. P. CODE (1898), S. 523.

should have been exercised and that even if there was any defect in the order of the Magistrate who had passed it, the High Court itself would pass that order. (*Varma, J.*) SAHEBJAN *v.* EMPEROR. **21 Pat.L.T. 697=6 B.R. 366=186 I.C. 423=41 Cr.L.J. 311=12 R.P. 512=1940 P.W. N. 562=A.I.R. 1940 Pat. 409.**

———**S. 522**—*Order under—Time within which it could be passed.*

An order under S. 522, Cr. P. Code, must be passed within one month from the date of the conviction and any further delay would put it beyond the power of the Court to pass an order under the section. It is not sufficient that the application to the Court to exercise its powers should be made within one month of the conviction. Further, it was not the intention of the section that notice should be issued to the accused before the orders should be passed. Otherwise it would be easy for convicted persons to bring it about that the Court should never be able to pass order within one month from the date of the conviction. (*Mackney, J.*) DAW MYA *v.* EMPEROR. **170 I.C. 368=10 R.R. 80=38 Cr.L.J. 918=A.I.R. 1937 Rang. 248.**

———**S. 522**—*Order under—When can be passed.*

For passing an order under S. 522, Cr. P. Code, it must be shown that the owner or occupier of land was dispossessed by reason of force shown to him or her. (*Mackney, J.*) DAW MYA *v.* EMPEROR. **170 I.C. 368=10 R.R. 80=38 Cr.L.J. 918=A.I.R. 1937 Rang. 248.**

———**S. 522 (1) and (3)**—*Restoration of possession—Limitation—Powers of High Court in revision.*

Though an order passed by a Magistrate under S. 522 (1), Cr. P. Code, is illegal if passed beyond the prescribed period of one month, yet it is competent to the High Court as a Court of revision to order the restoration of possession to the person dispossessed under Sub-S. (3) of S. 522 and there is no period of limitation of one month for such an order. (*Ismail, J.*) EMPEROR *v.* NIHAL SINGH. **I.L.R. (1939) All. 863=184 I.C. 384=12 R.A. 225=1939 A.Cr.C. 140=40 Cr.L.J. 958=1939 A.L.J. 595=1939 A.W.R. (H.C.) 566=A.I.R. 1939 All. 662.**

———**S. 522 (3)**—*Court of reference—Meaning of.*

A Court of reference in sub-S. (3) of S. 522 can only be interpreted as meaning a Court which has the power to refer and that is only a Court empowered under S. 433, Cr.P.Code. Hence, a Court which has got power to report a case to the High Court for orders under S. 438 is not a Court of reference. (*Blacker, J.*) MAHOMED SHARIF *v.* DIVAN SINGH. **187 I.C. 407=41 Cr.L.J. 458=12 R.L. 467=A.I.R. 1940 Lah. 95.**

———**S. 522 (3)**—*Scope—Order under S. 522—Right of appeal—If conferred.*

Sub-S. (3) of S. 522 only applies to the Court which is dealing with the original matter either as a Court of appeal, confirmation reference or revision in relation to that matter. It does not give any sort of right of appeal by itself against an order passed under S. 522. (*Blacker, J.*) MAHOMED SHARIF *v.* DIWAN SINGH. **187 I.C. 407=41 Cr.L.J. 458=12 R.L. 467=A.I.R. 1940 Lah. 95.**

CR. P. CODE (1898), S. 523.

———S. 523—*Complaint of theft—Seizure of article during investigation—Case referred as of civil nature—Order for delivery of article to complainant—Legality of—Proper order.*

If no offences is made out in respect of an article seized from a person during investigation, and a complaint of theft is referred as one of a civil nature, the article must be returned to the person from whose possession it is seized and not to the complainant. (*Lakshmana Rao, J.*) SUBBAYYA *v.* EMPEROR. **185 I.C. 440 (1)=12 R.M. 573=41 Cr.L.J. 203=1939 M.W.N. 793 (2)=A.I.R. 1939 Mad. 905.**

———S. 523—*Disposal of property—Duty of Magistrate.*

Under S. 523, Cr.P.Code, what the Magistrate has to consider is, who is entitled to the possession of property which has been seized by the police. Where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider questions of title in order to determine the best right to possession. But where it appears that the police have seized property from a person who is not shown to have committed any offence in relation to that property, then the Magistrate can only hold that that person is entitled to possession of the property. (*Beaumont, C.J. and Macklin, J.*) LAKSHMICHAND *v.* GOPIKISAN. **60 Bom. 183=38 Bom. L.R. 117=162 I.C. 265=37 Cr.L.J. 573=8 R.B. 409=1936 Cr.C. 363=A.I.R. 1936 Bom. 171.**

———S. 523—*Duty of Court—Stolen property—Property found in possession of person other than rightful owner—Duty to restore.*

Where the known facts plainly show that the property has been stolen, it would be intolerable to allow the person in whose possession the property is found to retain it as against the rightful owner and force the latter to a civil suit for its recovery if the accused absconds. (*Mackney, J.*) A.K.A.R.A. CHETTYAR *v.* MA SAW HLA. **172 I.C. 106=39 Cr.L.J. 73=10 R.R. 221=A.I.R. 1937 Rang. 450.**

———S. 523—*Order for custody and production of property—When can be made—Court unable to decide as to ownership of property—Proper procedure—Order for its detention in custody pending civil suit to be instituted—Propriety.*

An order for custody and production of the property can be made under S. 523, Cr.P.Code, only if the person entitled to possession cannot be ascertained, and the Magistrate is bound to make an enquiry touching the right to possession. If on the materials placed before him, he is of opinion that it could not be definitely said that the property belongs to one party rather than to the other, he cannot order it to be detained till the parties settle their disputes in a Civil Court. In such a case, it is his duty to proceed under S. 523 (2) and then under S. 524. It would be quite open to the parties in the meantime to go to the Civil Court, if they so desire, and in case a Civil Court decree is passed, further proceedings before the Magistrate would then at once cease. In no circumstances, whether the case be one under S. 517 or under S. 523, can an order be made for detention in Court custody or in the custody of one of the parties, conditional on a civil suit being instituted for this might mean detention for an indefinite period, if no such suit is brought. (*Biswas, J.*) MAHOMED YUSUF *v.* KRISHNA MOHAN BHATTACHARYA. **172 I.C. 959=39 Cr. L.J. 245=10 R.C. 478=41 C.W.N. 1376=A.I.R. 1938 Cal. 17.**

CR. P. CODE (1898), S. 523.

———S. 523—*Person entitled to possession of property seized—Property not proved to have been connected with any crime—Person in possession not shown to have committed any offence—Duty of magistrate.*

Where it appears that the police have seized property from a person who is not shown to have committed any offence in relation to that property, then the Magistrate can only hold that person to be entitled to possession of the property. (*Bhose, J.*) RANI SONA BAHU *v.* SOBHAGSINGH. **167 I.C. 848=9 R.N. 226=38 Cr.L.J. 467=19 N.L.J. 264.**

———S. 523—*Proceeding under S. 512 (1)—Disposal of property—Duty of Magistrate.*

A proceeding under S. 512 (1), Cr.P.Code, is neither an inquiry nor a trial, and the Magistrate has no authority to arrive at conclusions regarding facts which are in dispute between the contending parties, in order to decide which of these parties is the person entitled to the possession of the property. He must give possession to the person so entitled, having regard to the indisputable or admitted facts, and leave the contending parties to fight out their rights in a Civil Court. (*Roberts, C.J. and Dunkley, J.*) U BA HLAING *v.* BALABUX SODANI. **14 Rang. 633=167 I.C. 245=9 R.R. 305=38 Cr. L.J. 358=A.I.R. 1937 Rang. 42.**

———S. 523—*Scope and applicability.*

S. 523, Cr. P. Code, will equally apply where there has been and there has not been an inquiry or trial, or where the property has been or has not been produced in Court. In other words, even in a case which comes under S. 517, if on the facts the Court finds itself unable to make an order for the disposal of the property in the manner indicated therein, it will be open to it to deal with the matter under S. 523. (*Biswas, J.*) MAHOMED YUSUF *v.* KRISHNA MOHAN BHATTACHARYA. **172 I.C. 959=39 Cr.L.J. 245=10 R.C. 478=41 C.W. N. 1376=A.I.R. 1938 Cal. 17.**

———S. 523 (1)—*Scope—Order of confiscation—Power of Court to pass.*

S. 523 (1) of the Cr. P. Code, is wide enough to cover an order of confiscation of property, and there is nothing to prevent a Magistrate from an order of forfeiture of the property to Government. The mere fact that there may be confiscation under S. 524 after proclamation as prescribed by S. 523 (2) does not preclude confiscation at once under S. 523 (1) without issuing such a proclamation. (*Gruer, J.*) SYED MAHBUB *v.* EMPEROR. **166 I.C. 690=9 R.N. 139=38 Cr.L.J. 262=19 N. L.J. 244=1936 Cr.C. 1139=A.I.R. 1936 Nag. 266.**

———Ss. 523 and 517—*Appeal—Proceeding under S. 512 (1)—Order of Magistrate disposing of property—Right of appeal.*

CR. P. CODE (1898), S. 523.

A proceeding under S. 512 (1), Cr. P. Code, is a judicial proceeding which is neither an enquiry nor a trial within the meaning of S. 517, Cr. P. Code, and hence an order made by a Sub-Divisional Magistrate at the conclusion of such proceeding for the disposal of property produced before the Court, is made under S. 523 of the Code, and not under the provisions of S. 517, and therefore, no appeal lies against such an order. (*Roberts, C.J. and Dunkley, J.*) U BA HLAING *v.* BALABUX SODANI. **14 Rang. 633=167 I.C. 245 =9 R.R. 305=38 Cr.L.J. 358=A.I.R. 1937 Rang. 42.**

———**Ss. 523 and 524**—*Owner of animal seized unknown—Procedure to be followed.*

If a Magistrate finds that the owner of an animal seized by the Police is unknown, he should proceed as directed by S. 523, Cr. P. Code, that is to say, it is obligatory to issue a proclamation requiring any person who has a claim to the animal to establish that claim within six months. On the expiry of that period, if no such claim has been established, and the person in whose possession the animal was actually found, is unable to show that it was legally acquired by him, it shall be at the disposal of the Government. (*Bartley and Henderson, J.*) MAHOMED YUSUF *v.* KRISHNA MOHAN BHATTACHARJEE. **69 C.L.J. 96.**

———**S. 526.**

Adjournment.
Affidavit.
Application for transfer.
Convenience and expediency.
Duty of Court.
Grounds for transfer.
Not a ground for transfer.
"Party".
Procedure.
Power of Court.
Right to apply.
Scope.
Security bond.
Sessions trial.
Transfer.

Adjournment.

———**S. 526 (8)**—*Absence of accused—Plea of illness disbelieved—Application for adjournment under, refused—Transfer, if to be granted.*

The accused who had remained absent produced medical certificate to support their plea of illness but it was disbelieved by the Magistrate. The accused thereupon applied for an adjournment under S. 526 (8) and the application was refused.

Held, transfer should be allowed even though disobedience of S. 526 (8) may be inadvertent and not flagrant specially when the accused declare that they would not claim *de novo* trial. (*Gruer, J.*) NARAYAN *v.* BALA URKUDA. **165 I.C. 425= 37 Cr.L.J. 1146=9 R.N. 78=1936 Cr.C. 693= A.I.R. 1936 Nag. 146.**

———**S. 526 (8)**—*Adjournment granted on condition that applicant should within reasonable time apply to High Court—Application wrongly but in good faith made to local Court—If fatal.*

Where an adjournment under S. 526 (8), Cr. P. Code, is granted to an applicant on condition that he should, within reasonable time, apply to the High Court for transfer of the case, if the applicant in mistake but in good faith first moves the local Court for transfer, he should, if the mistake is made for the first time, be pardoned the delay. (*Davis, J.C. and Lobo, J.*) GAJADHAR BHAGCHAND *v.* EMPEROR. **174 I.C. 521=39 Cr.L.J. 425=10 R.S. 258=A.I.R. 1938 Sind 66.**

CR. P. CODE (1898), S. 526.

———**S. 526**—*Application for adjournment after examination of defence witnesses and before close of defence case—Competency—Arguments for defence not over—If defence case—If closed.*

Obiter: If the defence argument in a case has not concluded, the defence case cannot be said to have been closed; and it cannot be held that there cannot be a case in which the accused cannot justly say that the Court became prejudiced during the hearing of the argument.

Quaere: Whether an application for adjournment under S. 526, Cr. P. Code, is entertainable after the defence of the witnesses have been examined, but before the close of the argument? (*Khaja Mohammad Noor, J.*) ISHAR SINGH *v.* SHAMA DUSHADH. **167 I.C. 881=9 R.P. 449= 38 Cr.L.J. 484=3 B.R. 379=1936 P.W.N. 561= 17 Pat.L.T. 627=A.I.R. 1937 Pat. 131.**

Affidavit.

———**S. 526**—*Affidavit not sworn before High Court—Application for transfer—If can be entertained.*

Where an affidavit is filed along with the application for transfer under S. 526, but the affidavit purports to have been sworn before an officer of the District Judge's Court and not before the High Court as required by S. 539 the said affidavit not being sufficient for the purposes of S. 526 (4) the application for transfer cannot be entertained. A.I.R. 1931 Cal. 710, Rel. on. (*Almond, J.C.*) RAM DITTA MAL *v.* EMPEROR. **184 I.C. 10=12 R. Pesh. 22=40 Cr.L.J. 847=A.I.R. 1939 Pesh. 38.**

Application for transfer.

———**S. 526**—*Application for transfer—Proof of facts—Necessity.*

In case of an application for transfer it is necessary for a person who claims a transfer to prove by affidavit, fully and strictly, all the facts on which he rests his claim. (*Braund and Sharpe, JJ.*) MAUNG BA CHEIN *v.* EMPEROR. **178 I.C. 942=11 R.R. 287=40 Cr.L.J. 154= A.I.R. 1938 Rang. 454.**

———**S. 526 (8)**—*Application for transfer admitted by High Court—Duty of trying Magistrate to stay proceedings.*

When the High Court admits an application for the transfer of a case, there is invariably an order for stay of proceedings. Even if the order is not expressly made, it is implied. If the trying Magistrate is informed that the High Court has admitted the transfer application, it is his duty to stay the case. (*Khaja Mohammad Noor, J.*) ISHAR SINGH *v.* SHAMA DUSHADH. **167 I.C. 881=9 R.P. 449=38 Cr.L.J. 484=3 B.R. 379=1936 P.W.N. 561=17 Pat.L.T. 627= A.I.R. 1937 Pat. 131.**

———**S. 526**—*High Court's powers of transfer—Application by witness—Competency—Grounds.*

The High Court can, if it thinks proper, act upon the application of a witness, and would certainly do so if it is satisfied that the process of the Court is being abused, that the proceedings are sham or bogus proceedings instituted

or continued for some ulterior purpose, for a purpose not within the intention and provisions of the relevant sections of the Code. But where no useful purpose, public or private, would be served by the transfer of the case nor is there any reasonable ground for apprehension on the part of the applicant that the Magistrate will not deal fairly and honestly in his final order with the questions under the provisions of the Cr. P. Code, before him for his decision, the case cannot be transferred. (*Davis, J.C.*) OM RADHE *v.* EMPEROR. **I.L.R. (1940) Kar. 113=183 I.C. 460 =12 R.S. 55=40 Cr.L.J. 803=A.I.R. 1939 Sind 238.**

——**S. 526 (8)**—*Practice in Sind of requiring application for transfer to be made to local authorities—Whether should be altered*—Quaere.

Quaere: Whether in view of the provisions of Cl. 8 of S. 526 the practice now prevailing in the province of Sind of requiring an application for transfer being made to the local authorities should be altered or not. (*Rupchand Bilaram and Mehta, A.J.Cs.*) MAHOMED RAMZAN *v.* EMPEROR. **162 I.C. 985=37 Cr.L.J. 792=8 R.S. 178=1936 Cr. C. 489=A.I.R. 1936 Sind 51.**

Convenience and expediency.

——**S. 526**—*Convenience and expediency.*

While it is true that convenience and expediency are factors to be considered in the trial of a case, beyond even those considerations, is the more important consideration that justice should be done. (*Davis, J.C. and Tyabji, J.*) JASHANMAL *v.* EMPEROR. **I.L.R. (1940) Kar. 95=183 I.C. 619=12 R.S. 64=40 Cr.L.J. 818 (2)=A.I.R. 1939 Sind 222.**

Duty of Court.

——**S. 526**—*Ground for transfer—Considerations before ordering.*

Magistrate should consider and understand the scope and purpose of S. 526, Cr. P. Code, before ordering transfer of a case. For a Magistrate to transfer a case from one Court to another at his whim and caprice would be seriously to interfere with the working of the Courts and would shake the confidence of the public in those Courts, and the transfer of a case from one Court to another is not a thing lightly to be done. (*Davis, J.C. and Mehta, A.J.C*) SUGNOMAL TAHILRAM *v.* PHATANDAS. **166 I.C. 83 (2)=9 R.S. 120=38 Cr.L.J. 133 (2)=1936 Cr.C. 1093=A.I.R. 1936 Sind 237.**

——**S. 526 (1)**—*Procedure—Conviction under Ss. 380 and 454, I. P. Code—Proper sentence—Duty of Magistrate—Release on probation—If justified—Sentence of imprisonment—Necessity for.*

In the case of a conviction for theft and housebreaking, if the Magistrate gives merely a nominal sentence of imprisonment till the rising of the Court, then, although he is complying with the letter of the law, he is in fact treating the accused more leniently than if he had applied S. 562 (1). An accused convicted under S. 379 or 380, I. P. Code, may in a proper case be released on probation of good conduct. If he is convicted under Ss. 454 and 457, I. P. Code, a sentence of imprisonment is obligatory. Where, therefore, in case of conviction under Ss. 380 and 454, the Magistrate considers that it is not desirable to inflict a substantial sentence of imprisonment, his proper course is to direct the accused to execute a bond under S. 562 (1), Cr. P. Code, for the offence of theft under S. 380, I. P. Code, and to sentence him to imprisonment until the rising of the Court for the offence of house-breaking under S. 454, I. P. Code. (*Broomfield and Norman, JJ.*) EMPEROR *v.* YESHABA SAKHOBA. **40 Bom.L.R. 927 =178 I.C. 330=11 R.B. 155=40 Cr.L.J. 48= A.I.R. 1938 Bom. 463.**

Grounds for transfer.

APPREHENSION.
BIAS.
DUTY OF COURT.
EMBARRASSMENT.
EXPEDIENCY.
HOSTILITY.
ILLEGAL ORDER.
IMPROPER CONDUCT.
INCONVENIENCE.
IRREGULAR PROCEDURE.
MISTAKE OF LAW.
PARTY INTERESTED.
OFFICIAL INFLUENCE.
OPINION FORMED.
PREJUDICE.
PUBLIC INTEREST.
SENSATIONAL NATURE OF CASE.

APPREHENSION.

——**S. 526**—*Ground for transfer—Apprehension of accused.*

The accused applied for the transfer of his case to another District on the ground that there were rumours in the city that the Magistrate was bribed by the accused. The other ground stated in the application was that the Magistrate ordered him to pay subsistence allowance for witnesses when he prayed for an adjournment in the case.

Held, that the Magistrate had no power to order the accused to pay the subsistence allowance before granting the adjournment and the order therefore was in itself a sufficient ground to raise an apprehension in the mind of the accused that he would not get a fair and impartial trial. The case could therefore be transferred on such ground alone.

Held also, that a reasonable apprehension would arise in the mind of the accused to the effect that the officer concerned knowing that some allegations had been made against him, would try to clear his character by convicting the accused. The case could be transferred on this ground also. (*Ba U, J.*) LAY TIN NGAR *v.* EMPEROR. **170 I.C. 841=38 Cr.L.J. 963=10 R.R. 105=A.I.R. 1937 Rang. 311.**

——**S. 526**—*Grounds for transfer—Apprehension of accused—Accused applying for stay of proceedings pending application for transfer—Magistrate staying proceedings but cancelling bail bond.*

The accused after having cross-examined the prosecution witnesses made an application for the stay of proceedings pending application for transfer of the case which they intended to make to the Court of the Judicial Commissioner. The trial Magistrate stayed the proceedings for twelve days, but considering that the application was frivolous, and designed to prolong the case, cancelled the bail which had been previously granted.

CR. P. CODE (1898), S. 526.

Held, that the Magistrate's action in cancelling the bail bond was sufficient to create reasonable apprehension in the mind of the accused that fair trial was not likely to be received and hence the transfer of the case was proper. (*Middleton, J.C.*) MT. LALAN *v.* EMPEROR. **167 I.C. 175=9 R. Pesh. 82=38 Cr.L.J. 387=A.I.R. 1937 Pesh. 20.**

———**S. 526**—*Ground for transfer—Accused prosecuted on report of District Magistrate—Transfer of case to Magistrate not subordinate to him.*

The accused who was a clerk to the Bench Magistrate was found to have made some defalcations of money paid in as fines by convicted persons. The District Magistrate after departmental enquiry made a report to the police to start prosecution against him under S. 409, Penal Code, on the ground that there was a *prima facie* case against the accused of having committed an offence under S. 409, Penal Code. The accused filed a transfer application to the effect that the case be tried by a Magistrate outside the district as the Magistrate in the district would not be impartial to him owing to the expression of opinion by the District Magistrate of the commission of the offence.

Held, that though an apprehension in the mind of accused that he would not receive an impartial trial from a Magistrate subordinate to the District Magistrate might actually be groundless, yet it was not unlikely in that a fear might arise in the accused's mind to that effect. It was therefore proper for the ends of justice to transfer the case to a Magistrate who was not immediately subordinate to the District Magistrate and this could be done by transferring the case to a civil Judge invested with the powers of the Magistrate in the same district. (*Mackney, J.*) MAUNG THAN SHWE *v.* DEPUTY COMMISSIONER, HANTHAWADDY. **170 I.C. 420=38 Cr.L.J. 923=10 R.R. 81=A.I.R. 1937 Rang. 284.**

———**S. 526**—*Grounds for transfer—Apprehension of accused—Judge convicting accused for contempt during trial—If ground for transfer.*

The accused, after hearing for the day was finished, was called back and convicted under S. 228, I. P. Code. The accused apprehending that the Court would not conduct the case impartially, applied for transfer of the case.

Held, that it might be that the learned Judge erred in taking proceedings for contempt of Court and in convicting accused for that offence, but the mere conviction did not warrant the transfer of the case. To hold otherwise would be to concede the privilege to a party to a case to secure the transfer of a case from a particular Court by being unnecessarily offensive and insolent and thus courting proceedings for contempt of Court. This could not be allowed. (*Iqbal Ahmad, J.*) SALAG RAM *v.* EMPEROR. **167 I.C. 515=9 R.A. 550=1937 A.L.R. 201=38 Cr.L.J. 416 (2)=1936 A.W.R. 967=1936 A.Cr.C. 207=A.I.R. 1937 All. 171.**

———**S. 526**—*Grounds for transfer—Apprehension—Explanation of magistrate—What should contain—Putting up with the complainant's friend—Reasonable apprehension.*

Where allegations are made against a magistrate in connection with an application for transfer, and an explanation is called for, it would be more satisfactory, if the allegations are not true to straightaway deny them, rather than to indulge in general statements that 'what the petitioner believes is not evidence' and so on. Where an allegation is made that the magistrate was staying with a person who had endorsed the complaint, and it is not denied, then the only question is whether or not the petitioner has reasonable apprehension of prejudice from such conduct. It was held that such conduct was undesirable and that the case should be transferred. (*Dhavle, J.*) BINDESHWARI MISSIR *v.* EMPEROR. **175 I.C. 49=4 R.B. 519 (1)=10 R.P. 571=39 Cr.L.J. 517=1938 P.W.N. 518=A.I.R. 1938 Pat. 376.**

———**S. 526**—*Ground for transfer—Incidents creating apprehension—Transfer to another district—Propriety.*

Where incidents have happened which are calculated to create in the mind of the applicant for transfer a justifiable apprehension that he would not have an impartial trial in the district, it is proper in the interest of justice to transfer the case to another district. (*Nanavutty, J.*) ALI RAZA BEG *v.* EMPEROR. **160 I.C. 965=8 R.O. 295=37 Cr.L.J. 386=1936 O.W.N. 254.**

———**S. 526**—*Grounds for transfer—Magistrate calling witnesses to chamber and interviewing them in the absence of parties and their pleaders—If sufficient ground.*

Where a magistrate calls into his chamber two of the witnesses for the complainant and interviews them during the pendency of the case in the absence of the parties or of their advocates, the circumstance is such as to give rise to reasonable apprehension in the mind of the complainant that his case will be prejudiced if it is heard further by that magistrate, and the High Court on that ground will transfer the case on the application of the complainant. When the conduct of a magistrate becomes so friendly and informal that he interviews witnesses in his room when there is no necessity, when there are no pleaders and when the complainant, though present in Court, is not called, that exceeds proper bounds, and gives rise to the feeling that the magistrate has abandoned that attitude of detachment which a trying magistrate should, in a case where he is to do or to seem to do justice, ordinarily maintain. (*Davis, J.C.*) MAHOMED ABDULLAH *v.* EMPEROR. **29 S.L.R. 329.**

———**S. 526**—*Ground for transfer—Magistrate's display of unnecessary haste in trial of case.*

Where the Magistrate has displayed far too much haste in the trial of the case and has wrongly failed to give the accused opportunity to engage such legal assistance as he thought proper, the conduct of the Magistrate, although not inspired by any unfair motives, is such as to fill the mind of the accused, not unreasonably, with an apprehension that he will not secure a fair and impartial trial before him, and the accused can get his case transferred from such Magistrate. (*Mackney, J.*) U PO MYA *v.* THE KING. **175 I.C. 350=39 Cr.L.J. 576=10 R.R. 483=A.I.R. 1938 Rang. 198.**

———**S. 526**—*Ground for transfer—Apprehension of accused—Magistrate refusing to stay proceedings under Sub-S.* (8).

CR. P. CODE (1898), S. 526.

S. 526 (8), Cr. P. Code, enjoins that the Magistrate should give a reasonable adjournment for the express purpose of affording an applicant an opportunity to obtain a stay order from the High Court Where a Magistrate deliberately refuses to adjourn proceedings, he gives the applicant reasonable ground for apprehension that he will not be unprejudiced in the conduct of the trial, and it is, therefore, desirable that a transfer of the case should take place. (*Grille, J.*) BALIRAM *v.* MARUBAI. **I.L.R. (1936) Nag. 219=37 Cr.L.J. 1054=9 R.N. 51 (2)=164 I.C. 1065=1936 Cr.C. 1027=A.I.R. 1936 Nag. 233.**

———S. 526—*Ground for transfer—Magistrate rejecting sureties without reason.*

Where on the accused furnishing sureties, the Magistrate calls for a report from the Tahsil as to the sufficiency of the security and on receipt of that report reporting the security offered to be sufficient, he for some reason or other accepts the security in one case and rejects it in the other cases against the accused, and on the accused furnishing another surety who had previously stood surety for him and whose security was accepted by the Magistrate, the Magistrate again calls for a report from Tahsil and admits him to bail only after the application for transfer is filed,

Held, that the facts are such as could reasonably create an apprehension in the mind of the accused that he would not get a fair trial and that the case should, therefore, be transferred to another Court, and that in matters like this, considerations of justice must prevail over those of convenience of parties. (*Zia-ul-Hasan, J.*) BRIJ MOHAN PANDE *v.* EMPEROR. **1936 O.W.N. 1232=9 R.O. 266=38 Cr.L.J. 105=165 I.C. 873=1938 A.Cr.C. 52=1936 O.L.R. 691=A.I.R. 1937 Oudh 79.**

———S. 526—*Ground for transfer—Apprehension of accused—Magistrate receiving complainant in his chamber during pendency of his case before him.*

When the accused applies for a transfer of the case to another Magistrate, what effect the words or the action of a trying Magistrate will have on the mind of an accused person should always be considered and if the words or action of the Magistrate would raise an apprehension in the mind of the accused person that he would not have a fair and impartial trial, then the case must be transferred. A Magistrate received the complainant in his own chamber while the complainant's case was pending before him. The Magistrate stated that the complainant had come to him as he was his old friend to pay a formal complimentary call.

Held, that the action of the Magistrate would undoubtedly raise an apprehension in the mind of the accused that he would not have a fair and impartial trial and, therefore, the transfer of case to another Magistrate was proper. (*Ba U, J.*) DE CARMO LOBO *v.* G. C. BHATTACHARJEE. **170 I.C. 270=10 R.R. 71=38 Cr.L.J. 882=A.I.R. 1937 Rang. 272.**

———S. 526 (1) (a) and (e)—*Ground for transfer—Apprehension of accused—Objection to trial by Magistrate on personal grounds—Transfer if to be granted—Principles.*

It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security. What the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding judge against the applicant, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge, are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial. The complainant purchased a car through the trying Magistrate's son who was a salesman of some company on some favourable terms, and this purchase was made by him subsequent to the filing of his complaint. The accused on hearing this applied for transfer of the case.

Held, although the trying Magistrate had no personal knowledge of the transaction till the date of transfer application and the son's conduct in bringing about the transaction was nothing but *bona fide,* the objection being on a personal ground, it was very likely that in spite of his renowned impartiality, he would be placed in an embarrassing position if he would be asked to decide the case even after the application for transfer. The apprehension in the minds of the accused being also justifiable it was expedient in the ends of justice to transfer the case from the file of the trying Magistrate. (*Ghose and Henderson, JJ.*) HEMANTA KUMAR SARKAR *v.* NANDA KUMAR SINGH. **167 I.C. 251=9 R.C. 660=38 Cr.L.J. 344=64 C.L.J. 532=41 C.W.N. 188=A.I.R. 1937 Cal. 64.**

———S. 526—*Grounds for transfer—Reasonable apprehension in mind of accused.*

In a trial the Judge declined to allow the pleaders for the accused to see the record of the statements made by prosecution witnesses under S. 164, Cr. P. Code, or to cross-examine the witnesses thereon. Further in the cross-examination of a witness the Judge disallowed a question which was not material to the accused. Moveover reference in the cross-examination to the contents of the charge sheet was refused.

Held, that these things created an apprehension in the mind of the accused that he would not have a fair and impartial trial and hence the case should be transferred to another Magistrate for trial. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING. **179 I.C. 783=11 R.R. 247=40 Cr.L.J. 265=A.I.R. 1938 Rang. 442.**

———S. 526—*Ground for transfer—Reasonable apprehension—Case remanded after conviction to same Magistrate.*

Any accused who has once been convicted by a Magistrate, to whom a case is sent back because of errors in procedure, has a reasonable apprehension that he is likely to be convicted again by that Magistrate and *prima facie* the case ought to be sent to another Magistrate for trial. (*Skemp, J.*) KANWAR SAIN *v.* EMPEROR. **179 I.C. 819=11 R.L. 640 (1)=41 P.L.R. 213=A.I.R. 1939 Lah. 27.**

CR. P. CODE (1898), S. 526.

———S. 526—*Reasonable apprehension in mind of accused that he would not get fair trial—Transfer.*

Where the attitude and orders of the Magistrate have created a reasonable apprehension in the minds of the accused that they would not get a fair and impartial trial at his hands, the case should be transferred even though there is no reason to doubt that the Magistrate will do his best to come to a correct conclusion if he continues the trial, as it is necessary not only that justice should be done but that it should appear that justice is being done. (*Mohamad Noor, J.*) LAL BAHADUR RAUT *v.* EMPEROR. **175 I.C. 110 =4 B.R. 533=10 R.P. 581=39 Cr.L.J. 527=A. I.R. 1938 Pat. 238.**

BIAS.

———S. 526—*Grounds for transfer—Fanciful apprehension of bias—If sufficient.*

Before the High Court would take into consideration an apprehension raised in the mind of the accused that he would not get a fair trial, it must be satisfied that the apprehension is not a fanciful one. (*Mackney, J.*) KO KO GYI *v.* EMPEROR. **161 I.C. 240=37 Cr.L.J. 436=8 R.R. 460 =1936 Cr.C. 181=A.I.R. 1936 Rang. 114.**

———S. 526—*Ground for transfer—Communal bias of magistrate—Reasonable apprehension.*

A Magistrate is not barred from trying cases between members of two communities by reason of his belonging to one of them. But when a Magistrate finds himself placed in such a position it is incumbent upon him to exercise the greatest tact and discretion in handling the case. If the Magistrate has been guilty of errors of procedure the effect of which has been against the interests of the party belonging to the community to which he does not belong, it is impossible to escape the conclusion that that party has a reasonable apprehension that it is not likely to get an impartial trial. The case in such circumstances should be transferred from the file of the Magistrate, although there is actually no communal bias in his mind. (*Blacker, J.*) LAL SINGH *v.* EMPEROR. **40 P.L.R. 505=177 I.C. 507=39 Cr.L.J. 888= 11 R.L. 333 (1)=A.I.R. 1938 Lah. 576.**

DUTY OF COURT.

———S. 526 (a)—*Ground for transfer—Test to decide whether fair and impartial enquiry cannot be had.*

S. 526, Cr. P. Code, does not say that a transfer may be ordered in any case where it is made to appear to the accused that a fair and impartial enquiry or trial cannot be had, but says so where this is made to appear to the High Court. Therefore what is contemplated is that the Court itself should be satisfied on that point and the real test is not what the accused may reasonably or unreasonably have been led to think about it. (*Davis, J.C. and Mehta, A.J.C.*) SUGNOMAL TAHILRAM *v.* PHATANDAS. **166 I.C. 83 (2)=9 R.S. 120=38 Cr.L.J. 133 (2)=1936 Cr.C. 1093 =A.I.R. 1936 Sind 237.**

EMBARRASSMENT.

———S. 526—*Grounds for transfer—Trial by magistrate who had exercised powers under S. 127 (1), Cr. P. Code—Trial of offence in respect of such disturbance.*

As a general rule the mere fact that a Magistrate has, in his capacity as a Magistrate, exercised the powers given to him under S. 127 (1), Cr. P. Code, in relation to a particular disturbance or series of disturbances affords no ground for the transfer from the cognizance of that Magistrate of a case arising out of that disturbance or series of disturbances. If on the other hand, a Magistrate, in the course of the performance of his duties in relation to any particular disturbance, were to acquire any particular knowledge by his own observation or otherwise which might, in the hearing of any case, tend to embarrass him, it is possible that a transfer either at the instance of the Magistrate himself or at the instance of the accused person, might in some cases be desirable in the interests of justice. (*Braund and Sharpe, JJ.*) MAUNG BA CHEIN *v.* EMPEROR. **178 I.C. 942=11 R.R. 287=40 Cr.L.J. 154=A.I.R. 1938 Rang. 454.**

CR. P. CODE (1898), S. 526.

———S. 526—*Grounds for transfer—Embarrassment—Deputy Commissioner lodging first information—Apprehension as to manner of investigation—Desirability of transfer to another District.*

Where the Deputy Commissioner has himself lodged the first information report in a case, when the accused alleges that the Deputy Commissioner was taking a personal interest in the case and was apprehensive of a fair trial before a Subordinate Magistrate in the same District, it is desirable that the case should be transferred to another District. Though the Deputy Commissioner may be perfectly right in all that he has done, it would be embarrassing to the trial Magistrate to have his Deputy Commissioner as a witness before him, especially when the accused is inclined to criticise the manner of the investigation made against him. (*Gruer, J.*) HORMUSJI *v.* CROWN. **1940 N.L.J 335=A.I.R. 1940 Nag. 275.**

EXPEDIENCY.

———S. 526—*Ground for transfer—Expediency—Sessions Judge on appeal, remanding case holding* prima facie *case under another section—Trial and conviction under this section—Appeal—Transfer to another Sessions Judge—If expedient.*

Where on an appeal by the accused against his conviction under S. 363, I. P. Code, the Sessions Judge remanded the case to the Magistrate on the ground that the accused ought to have been charged under S. 366 or 366-A, I. P. Code, as there was a *prima facie* case against him under those sections, and the Magistrate tried and convicted the accused under S. 366-A, it is expedient in the interests of justice that the appeal against this conviction should be heard by the Court of some other Sessions Judge. (*Abdul Rashid, J.*) ALLAH BAKHSH *v.* EMPEROR. **39 P.L.R. 78=171 I.C. 791=10 R.L. 231=39 Cr.L.J. 28 (2)=A.I. R. 1937 Lah. 652.**

———S. 526—*Ground for transfer—Failure to note questions disallowed.*

The fact that the Magistrate made no note on the record of the questions disallowed in cross-examination is no ground for transfer, as this is not required by statute law. (*Skemp, J.*) DEWAN SINGH *v.* EMPEROR. **42 P.L.R. 589.**

HOSTILITY.

———S. 526—*Grounds for transfer—Hostility—Previous unfavourable comment by accused against Magistrate.*

CR. P. CODE (1898), S. 526.

An Additional District Magistrate was trying a case against the accused. The accused made an application for transfer on the ground that as the accused had previously made some unfavourable comment on the Magistrate while he was Deputy Commissioner, he might harbour resentment against the applicant which would prevent him doing justice in the case.

Held, that this could not be accepted as a ground for a transfer. (*Braund, J.*) U SAW *v.* THE KING. **179 I.C. 72=11 R.R. 298=40 Cr.L.J. 162=A.I.R. 1938 Rang. 456.**

ILLEGAL ORDER.

——**S. 526**—*Ground for transfer—Court passing illegal order—Inference against impartiality—If justified.*

Courts may pass orders which may either be legal or illegal, but the mere passing of an illegal order will not justify an inference against their honesty or impartiality. (*Din Mahomed, J.*) GAUBA *v.* EMPEROR. **18 Lah. 114=170 I.C. 586 =10 R.L. 135=38 Cr.L.J. 955=39 P.L.R. 643 =A.I.R. 1937 Lah. 411.**

——**S. 526**—*Ground for transfer—Illegal order passed by Court.*

A mere mistake of law committed by a Court during the trial of a case is no ground for its transfer, unless it is made to appear that the Court with a view to prejudice the party applying for transfer passed an illegal order. (*Iqbal Ahmad, J.*) SALIG RAM *v.* EMPEROR. **167 I.C. 515=9 R.A. 550=1937 All.L.R. 201=38 Cr.L.J. 416 (2)=1936 A.W.R. 967=1936 A.Cr.C. 207=A.I.R. 1937 All. 171.**

——**S. 526**—*Ground for transfer—Bail application unlawfully refused.*

The accused's application for bail was refused unlawfully and the trial of his case was deliberately postponed by the granting of unnecessarily lengthy adjournments.

Held, that there were sufficient reasons for the transfer of the case to the Court of some other Magistrate competent to try the case. (*Mackney, J.*) M. A. AZEEZ *v.* THE KING. **186 I.C. 147 =12 R.R. 258=41 Cr.L.J. 252=A.I.R. 1940 Rang. 26.**

——**S. 526**—*Ground for transfer—Refusal to give copy of judicial order.*

Where an application for transfer of a case from the file of a Magistrate was dismissed by the District Magistrate who sent back the records to the Magistrate, and the latter refused to supply a certified copy of the District Magistrate's order on the ground that his sanction was necessary.

Held, that the order of the District Magistrate being a judicial order a copy of it ought to have been given, and that as the accused had reasonable apprehension that he might not receive a fair trial, the case was liable to be transferred to the Court of another Magistrate. (*Skemp, J.*) GUR DAS RAM *v.* EMPEROR. **189 I.C. 605=13 R.L. 109=41 Cr.L.J. 756=42 P.L.R. 192=A.I.R. 1940 Lah. 283.**

IMPROPER CONDUCT.

——**S. 526**—*Ground for transfer—Magistrate having interview with one of the parties.*

The fact that the Magistrate had an interview with one of the parties to the case privately and out of Court and heard from that party his version of the facts, is sufficient to disqualify him from

CR. P. CODE (1898), S. 526.

subsequently trying the case, and the case should, therefore, be transferred to another Court. (*Blacker, J.*) PRAN NATH *v.* EMPEROR. **40 P.L.R. 157=175 I.C. 520=10 R.L. 734=39 Cr.L.J. 606 (1)=A.I.R. 1938 Lah. 346.**

INCONVENIENCE.

——**S. 526**—*Grounds for transfer—Magistrate hearing case at untimely and inconvenient hours and refusing adjournment.*

A Magistrate fixed time from 11-30 A.M. to 5 P.M. and again from 5-30 till 10 P.M. for the hearing of the case although defence lawyers conducting cross-examination were Mahomedans fasting owing to Ramzan. Besides this by an earlier order the Magistrate refused to adjourn the case and to give the accused a reasonable opportunity of engaging and instructing another lawyer when his first lawyer conducting cross-examination suddenly fell ill.

Held, that the orders created a reasonable apprehension in the minds of the accused that they would not get a fair and impartial trial at the hands of the Magistrate and hence the orders were sufficient grounds for the transfer of the case. (*Mohamad Noor, J.*) LAL BAHADUR RAUT *v.* EMPEROR. **175 I.C. 110=4 B.R. 533=10 R.P. 581=39 Cr.L.J. 527=A.I.R. 1938 Pat. 238.**

——**S. 526**—*Grounds for transfer—Magistrate, being rather busy.*

The fact that the Magistrate is rather busy does not provide any good reason for the transfer of a case from his Court to another Court wherein almost the entire prosecution evidence had been recorded. (*Abdul Rashid, J.*) BAIJ NATH *v.* RAM SARUP. **166 I.C. 373 (2)=9 R.L. 361=38 Cr.L.J. 181=1936 Cr.C. 795=A.I.R. 1936 Lah. 827.**

IRREGULAR PROCEDURE.

——**S. 526**—*Grounds for transfer—Irregular procedure.*

During the course of the trial the evidence of the police investigating officer was interpolated during the cross-examination of a prosecution witness. Complaint was made of this in the affidavits supporting the petition for transfer.

Held, that although Judge might better have waited till the investigating officer came to be called, he was entirely within his rights in putting this witness in the box. This course could not be said to have prejudiced accused. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING. **179 I.C. 783=11 R.R. 247=40 Cr.L.J. 265=A.I.R. 1938 Rang. 442.**

MISTAKE OF LAW.

——**S. 526 (8)**—*Ground for transfer—Dismissal of application under—Mistake of law on the part of the Magistrate.*

A *bona fide* mistake of law on the part of a Magistrate is not a good ground of transfer; but a flagrant disobedience of the obligation under S. 526 (8) is a sufficient reason for granting a transfer. (*Gruer, J.*) NARAYAN *v.* BALA URKUDA. **165 I.C. 425=37 Cr.L.J. 1146=9 R.N. 78=1936 Cr.C. 693=A.I.R. 1936 Nag. 146.**

PARTY INTERESTED.

——**S. 526 (3) and (8)**—*"Party interested"—Person making report of offence to police—Right to apply for transfer.*

A person making a report of an offence to the police is a party interested in the prosecution which

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may be started by the police within the meaning of Cls. (3) and (8) of S. 526, Cr. P. Code, and has therefore a *locus standi* to apply for a transfer under the section: but his rights are subordinate to those of the Crown, the latter being responsible for the prosecution. *(Ganga Nath, J.)* ABDUL NASEER *v.* EMPEROR. **171 I.C. 934=10 R. A. 349=1937 A.L.R. 919=1937 A.L.J. 845=1937 A.Cr.C. 117=1937 A.W.R. 729=39 Cr.L.J. 33=A.I.R. 1937 All. 664.**

OFFICIAL INFLUENCE.

——S. 526—*Grounds of transfer—Advocate appearing in the case, official superior of brother of the Magistrate—If sufficient ground for transfer.*

Where the advocate appearing in the case is the official superior of the Magistrate's brother, it should better be left to the good sense of the Magistrate whether to try the case himself or not, and if in a particular case, by reason of his brother's relationship with the advocate, he feels in any way embarrassed in dealing with the case, he should send the papers to the superior Court which can, in the inquiry held by itself, make any necessary complaint. *(Davis, J.C.)* JETHANAND *v.* EMPEROR. **183 I.C. 195=12 R.S. 47=40 Cr.L.J. 750=A.I.R. 1939 Sind 181.**

——S. 526—*Ground for transfer—Complaint laid by Deputy Commissioner of district*

The mere fact alone that it is the Deputy Commissioner who has laid the complaint does not afford a reasonable ground for apprehension in the mind of any person that he will not receive a fair trial in the district of the Deputy Commissioner. In order to obtain transfer to another district, he must further show that the Subordinate Magistrates in the district in which the case is being tried are in awe of the Deputy Commissioner and look upon him as a person who must on no account be crossed. However, cases of this nature which have been instituted by the Deputy Commissioner or District Magistrate of a district, should not be tried by the Magistrate who is in such immediate touch with the Deputy Commissioner or District Magistrate as is the Headquarters Magistrate of the district. Where there are Magistrates who are not executive officers, it is desirable that they should be chosen to try such cases. It cannot be denied that an accused person might feel some apprehension that a subordinate executive officer might be unduly influenced by the expressed opinion of the Deputy Commissioner, and might be ready to pay too much deference to that opinion and might even be inclined to follow it in preference to his own. Such an apprehension could scarcely exist in regard to a Magistrate who belongs to the judicial service, and is in no likelihood of being unduly impressed by the authority of the executive head of the district. *(Mackney, J.)* MAUNG BA GON *v.* THE KING. **181 I.C. 315=11 R.R. 458=40 Cr.L.J. 532=A.I.R. 1939 Rang. 88.**

OPINION FORMED.

——S. 526—*Ground for transfer—Conviction by Magistrate—Order for re-trial on appeal—Re-trial by another Magistrate—Desirability.*

Where a Magistrate convicts the accused of the offences with which he is charged but the appellate Court, observing that the accused had not been

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given sufficient facility to summon and examine defence witnesses, orders a re-trial from the stage at which the proceedings became irregular, it is desirable that such a re-trial should not be taken by the officer who has already expressed his final opinion on the merits of the case. *(Rowland, J.)* MUHAMMAD KAISAR *v.* EMPEROR. **166 I.C. 466=9 R.P. 299 (1)=38 Cr.L.J. 229=3 B.R. 170 (2).**

——S. 526—*Ground for transfer—Police Officers of district being witnesses.*

It is undesirable to transfer a case from a district because Police Officers of the district are witnesses in the case. *(Skemp, J.)* DEWAN SINGH *v.* EMPEROR. **42 P.L.R. 589.**

PREJUDICE.

——S. 526—*Ground for transfer—Inference of prejudice from refusal to summon witness—If justified.*

Magistrates must inevitably make mistakes sometimes in the course of the trial of one or other of the cases before them. The fact that they have made a mistake cannot possibly in itself induce any reasonable person to believe that the Magistrate is prejudiced against him. There must be some other circumstances in the light of which a reasonable and *bona fide* apprehension in the accused's mind arises. The fact that the Magistrate was under a misapprehension as to the purpose for which the witnesses were called, and as to his being justified under S. 257, Cr. P. Code, in refusing to issue summons to witnesses residing in a far country, should not indicate to any reasonable person, in the absence of any other factors, that the Magistrate is prejudiced against him, or would not listen to him with an open mind no matter how serious the charge against the accused is. *(Mackney, J.)* SUPPAYA CHETTYAR *v.* KARUPPAYA PILLAY. **172 I.C. 937=10 R.R. 291=39 Cr.L.J. 211=A.I.R. 1937 Rang. 528.**

PUBLIC INTEREST.

——S. 526—*Grounds for transfer—Public interest—Possibility of superior officials appearing as witnesses—If grounds for transfer.*

The mere fact that public interest and some excitement are aroused at the time is no reason for taking a case away from a Magistrate. The possibility that superior officials will appear as witnesses in a case is also not an adequate ground for transferring the case. *(Gruer, J.)* PRITHVINATH *v.* EMPEROR. **I.L.R. (1938) Nag. 248=175 I.C. 935=11 R.N. 18=39 Cr.L.J. 660=20 N.L.J. 151=A.I.R. 1938 Nag. 56.**

——S. 526—*Ground for transfer—Refusal to call certain person as witness.*

Refusal to call a particular person as a defence witness held no reason for transferring the case. *(Skemp, J.)* MIRZA JAFAR BEG *v.* EMPEROR. **A. I.R. 1940 Lah. 354.**

SENSATIONAL NATURE OF CASE.

——S. 526—*Ground for transfer—Sensational nature of case—If justifies transfer.*

The fact that a case is sensational one cannot without qualification be accepted as a ground for the transfer of a case from one Court to another. If in fact the case is a sensational one and arouses a certain amount of public interest or public comment or public feeling, that is no reason, why an accused should lose faith in the Court, or why the superior Court should lose faith in the trial Court

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and order retrial in another Court. (*Davis, J.C. and Mehta, A.J.C.*) SUGNOMAL TAHILRAM *v.* PHATANDAS. **166 I.C. 83 (2)=9 R.S. 120=38 Cr.L.J. 133 (2)=1936 Cr.C. 1093=A.I.R. 1936 Sind 237.**

———**S. 526**—Magistrate issuing search warrant —If can try case. *See* PUBLIC GAMBLING ACT, S. 5. **171 I.C. 1007.**

Not a ground for transfer.

———**S. 526**—*Allowance or disallowance of question by Judge.*

A Judge or Magistrate who conscientiously tries a case in a judicial proceeding has a legal duty to apply, to the best of his ability, the rules of evidence, as those rules are laid down in the Evidence Act. And his plain judicial duty is to exclude irrelevant evidence, whether in examination-in-chief or in cross-examination. The allowance or disallowance of questions by a Judge in pursuance of a judicial duty cannot ever by itself afford a ground upon which to base an application for a transfer of a case, unless it is either shown affirmatively that there exists some improper motive or unless upon the face of the questions themselves, disallowed or allowed as the case may be, the only possible inference must be that they have been allowed or disallowed for some ulterior and improper reason. (*Braund, J.*) U SAW *v.* THE KING. **179 I.C. 72=11 R.R. 298=40 Cr.L.J. 162=A.I.R. 1938 Rang. 456.**

———**S. 526**—*Court convicting applicant for contempt.*

The mere conviction of the applicant for transfer by the Judge for contempt of Court, under S. 228, I. P. Code, does not warrant the transfer of the sessions case from his Court. (*Iqbal Ahmad, J.*) SALIG RAM *v.* EMPEROR. **167 I.C. 515=9 R.A. 550=1937 All.L.R. 201=38 Cr.L.J. 416 (2)=1936 A.W.R. 967=1936 A.Cr.C. 207=A.I.R. 1937 All. 171.**

———**S. 526**—*Magistrate, tenant of father of accused.*

The fact that the Magistrate lives in the bungalow which is owned by the father of one of the accused persons is no ground for transfer, when the landlord lives in another town and the Magistrate took the house on rent long before the institution of the case in his Court. (*Abdul Rashid, J.*) EMPEROR *v.* SHANA. **40 P.L.R. 468 =177 I.C. 187=11 R.L. 274=39 Cr.L.J. 853 (2) =A.I.R. 1938 Lah. 569.**

———**S. 526**—*Refusal to permit questions being put to witness—If ground for transfer.*

A witness who had been examined by the police can reasonably be asked whether a particular version which he was giving in Court was given by him to the police. If he did give it, he is not contradicted. But if he did not, or if there is no mention of it in the diary, the value to be attached to the omission will depend upon the circumstances and may even mean the rejection of the version. The question in any case would be perfectly relevant and legitimate. However, the rejection of such question cannot be a ground for transfer. (*Mohamad Noor, J.*) LAL BAHADUR RAUT *v.* EMPEROR. **175 I.C. 110=4 B.R. 533=10 R.P. 581 =39 Cr.L.J. 527=A.I.R. 1938 Pat. 238.**

———**S. 526**—*Remark by magistrate that he is determined to finish case within six weeks.*

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A remark by a Magistrate to the complainant that he was determined that the case should be finished within six weeks and he would so finish it in some way or other either by dismissing it for default or discharging the accused or any other way, is no ground for transfer, where it is not suggested that the Magistrate is not quite impartial or that he is prejudiced in any way about the merits of the case. (*Allsop, J.*) MT. KAMNI BEGAM *v.* BASHIR-UL ZAMAN KHAN. **165 I.C. 20=37 Cr. L.J. 1100=9 R.A. 242=1936 A.L.J. 975=1936 A.Cr.C. 159=1936 A.W.R. 838=1936 Cr.C. 891 =1936 All.L.R. 885=A.I.R. 1936 All. 695.**

"Party".

———**S. 526 (8)**—*"Party"—Informant under S. 107—Status of.*

The word 'party' within the meaning of S. 526 (8) does include an informant under S. 107. (*Davis, J.C.*) OM RADHE *v.* EMPEROR. **I.L.R. (1940) Kar. 113=183 I.C. 460=12 R.S. 55=40 Cr.L.J. 803=A.I.R. 1939 Sind 238.**

Procedure

———**S. 526**—*Procedure—Explanation of judge concerned—Desirability.*

As a matter of practice the better course to adopt is that when an application for transfer is made, the Judge from whose Court the transfer is sought to be obtained, should be given an opportunity of instructing the Government Advocate on the matters raised in the affidavits. Any formal explanation which is subsequently incorporated in the proceedings is not desirable. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING. **179 I.C. 783=11 R.R. 247=40 Cr.L.J. 265=A.I.R. 1938 Rang. 442.**

———**S. 526 (8)**—*Procedure—Magistrate doubtful whether person asking for adjournment is 'party'—Safe course.*

Where a Magistrate is doubtful whether a person applying for stay of proceedings under S. 526 (8) is or is not a party within the meaning of that sub-section, the safe course for him is to adjourn the case under S. 526 (8), because if he refuses the adjournment and it is afterwards found that such person is 'party' within the meaning of S. 526 (8), all proceedings from the date of refusal would be illegal. (*Davis, J.C.*) OM RADHE *v.* EMPEROR. **I.L.R. (1940) Kar. 113= 183 I.C. 460=12 R.S. 55=40 Cr.L.J. 803=A.I. R. 1939 Sind 238.**

Power of Court.

———**S. 526**—*District Magistrate, if can transfer without notice.*

There is no provision in the Code of Criminal Procedure that a District Magistrate may not transfer a case from a Subordinate Court without giving notice to the accused or the complainant or either. (*Allsop, J.*) KAMNI BEGAM *v.* EMPEROR. **I.L.R. (1938) All. 738=1938 A.L.J. 703=1938 A.W.R. (H.C.) 477=1938 A.Cr.C. 66=177 I.C. 460=39 Cr.L.J. 878=1938 A.L.R. 764=11 R.A. 198=A.I.R. 1938 All. 517.**

———**S. 526 (8) and (9), Expl.**—*Grant of adjournment—Power of Court to impose terms.*

The Court cannot impose terms for granting an adjournment covered by the provisions of sub-S. (8) of S. 526, Cr. P. Code. (*Allsop, J.*) SALEK CHAND *v.* EMPEROR. **I.L.R. (1937) All. 161=166 I.C. 198 (1)=9 R.A. 369=38 Cr.L.J.**

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142=1936 All.L.R. 1015=1936 A.W.R. 985=1936 A.Cr.C. 212 (1)=1936 A.L.J. 1123=1936 Cr.C. 1110=A.I.R. 1936 All. 851.

Right to apply.

——S. 526—*Right to apply for transfer—Complainant in cognisable case.*

The complainant in a cognisable case is, no doubt, entitled to apply for transfer under S. 526, Cr. P. Code but his rights must be subordinate to those of the Crown, and in the case of conflict between the two, the right of the Crown must prevail. 6 Lah. 541, Foll. (*Abdul Rashid, J.*) EMPEROR *v.* SHANA. 40 P.L.R. 468=177 I.C. 187=11 R.L. 274=39 Cr.L.J. 853 (2)=A.I.R. 1938 Lah. 569.

Scope.

——S. 526 (8)—*Scope — Non-compliance—Refusal to accept application and to adjourn case—If ground for transfer.*

Refusal to accept an application under S. 526 (8), Cr. P. Code, and to stay the case in obedience to the mandatory provisions of the section would justify an apprehension in the mind of the applicant that he would not receive a fair trial, and is a ground for transfer. The fact that the application is defective or not in proper form is no ground for declining to adjourn the case. (*Bose, J.*) JANKI PRASAD *v.* MST. SUKHRANI. 1938 N. L.J. 36.

——S. 526 (8) and (9)—Scope—If restrict powers of Courts to pass order for costs under S. 344. *See* CR. P. CODE, S. 344. 1937 A.W.R. 1226.

Security bond.

——S. 526 (8)—*Bond under—Construction—Undertaking to file application before particular date—Application filed within date—Return on ground of defect—If amounts to forfeiture of bond.*

Where a bond executed under S. 526 (8), Cr. P. Code, requires a party to file an application before a fixed date, there is sufficient compliance with the bond if such an application is filed before that date. It is not a reasonable interpretation of the bond to say that the application should be completely free from any defect whatever. The fact that the application is returned because of a certain defect has not the effect of involving, as it were, a breach of the bond. And when the same is re-presented within time after remedying the defect, there is no justification at all for directing forfeiture of the bond. (*Pandrang Row, J.*) NARASIMHA RAO *v.* EMPEROR. 1937 M.W.N. 576.

——S. 526 (8)—*Security bond—Liability to forfeiture—Transfer application filed but not prosecuted.*

A person asked a Magistrate to stay the proceedings before him in order to enable him to file a transfer application. He was asked to execute security bonds, which he did. The transfer application was also made but on being asked for depositing cash money in order to issue notice to District Magistrate, the applicant failed and his transfer application without being further prosecuted was dismissed. The person appeared before the Magistrate before whom the proceedings were stayed and the Magistrate finding that the transfer application was not properly prosecuted forfeited the bond.

Held, that if the intention of the law was that bonds should be furnished with the undertaking

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that not only application should be filed but also that final orders should be obtained thereon, this should be more clearly expressed in the section itself and should also be clearly set out in the terms of the bonds themselves. And as such order forfeiting the bond was illegal. (*Blacker, J.*) TARA SINGH *v.* EMPEROR. 175 I.C. 545=10 R.L. 745=39 Cr.L.J. 609=A.I.R. 1938 Lah. 337.

——S. 526—*Second transfer—Rule as to.*

When a case has already been transferred, very strong grounds are required to transfer it a second time. If accused or his counsel are so unfortunate as to have a reasonable apprehension that the second Magistrate will not give them justice and want to get their case transferred to a third Magistrate, it may well be supposed that the accused or his counsel are to blame in part. (*Skemp, J.*) MIRZA JAFAR BEG *v.* EMPEROR. A. I.R. 1940 Lah. 354.

Sessions trial.

——S. 526 (8) and (9)—*Sessions trial—Grant of adjournment—Duty of Judge.*

In Sessions trials the provisions of sub-S. (8) of S. 526, Cr. P. Code, are no doubt subject to the provision of sub-S. (9) of that section, but unless the case falls strictly within the provisions of sub-S. (9) the Judge is bound to grant time in accordance with the provisions of sub-S. (8). In considering the question whether or not the applicant had ample opportunity before to file an application for transfer regard must be had to the fact whether or not the grounds on which the application for transfer is proposed to be based did exist earlier. Where on the very day on which the Judge cancelled the bail bond of the accused and ordered that he be taken into custody, the accused filed an application under S. 526 (8) for the postponement of the case, an order rejecting that application cannot be supported as it is impossible to hold that the accused had "reasonable opportunity" of applying for transfer of the case on an earlier date. This would be so in spite of the fact that on more occasions than one it was brought to the notice of the Judge that the accused either intended to or had filed applications for transfer in the High Court, when as a matter of fact no such application had ever been filed. (*Iqbal Ahmad, J.*) SALIG RAM *v.* EMPEROR. 167 I.C. 515=9 R.A. 550=1937 All.L.R. 201=38 Cr.L.J. 416 (2)=1936 A.W.R. 967=1936 A.Cr.C. 207 =A.I.R. 1937 All. 171.

Transfer.

——S. 526 (8) and (9)—*Transfer—Considerations—Duty of Court—Court cancelling bail bond of accused—On same day accused applying under S. 526 (8) to adjourn case—Court rejecting application land proceeding under S. 526 (9)—Propriety.*

In considering the question whether or not the applicant had ample opportunity before to file an application for transfer regard must be had to the fact whether or not the ground on which the application for transfer is proposed to be based did exist earlier. The bail bond of the accused was cancelled on a certain date. On the same day he applied under S. 526, sub-S. (8), Cr. P. Code, to adjourn the case in order to enable him to apply for transfer. The Court rejected the application and proceeded with the case under S. 526, sub-S. (9), on the ground that the applicant had ample

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and reasonable opportunity to apply for transfer.

Held, that the applicant had no reasonable opportunity to apply for transfer before his bail bond was cancelled. Therefore the case did not fall under S. 526 (2) and order of the Court under that sub-section was insupportable. (*Iqbal Ahmad, J.*) SALAG RAM *v.* EMPEROR. **167 I.C. 515=9 R.A. 550=1936 A.W.R. 967=1936 A.Cr. C. 207=1937 A.L.R. 201=38 Cr.L.J. 416 (2)= A.I.R. 1937 All. 171.**

———**S. 526**—*Transfer—Improper procedure—If a ground.*

Where a Magistrate proceeds to make a further inquiry on the receipt of the report of a Magistrate to whom he had sent a case for inquiry and neither dismisses the case nor directs issue of summons for a long time, apart from the irregularity of conducting a second inquiry, there is also the inordinate delay to be considered; and the complainant may well feel some apprehension that the fate of his case, so far as the admission of the complaint is concerned, will not rest entirely on the consideration of the report and the Magistrate's conclusions thereon. In such a case the application for transfer is justified. (*Grille, O.C.J.*) TYAB ALI YUSUF ALI *v.* HUSAIN ALI YUSAL ALI. **172 I.C. 203=10 R.N. 174=39 Cr.L.J. 80=A.I.R. 1937 Nag. 389.**

———**S. 526 (8)**—*Transfer—Intimation of intention—When to be made.*

Under S. 526 (8), Cr. P. Code, the intimation of an intention to make an application for transfer must be made before the defence closes its case. A trial Magistrate is not, therefore, bound to adjourn a case if such intimation is made not only after the defence had closed its case but after the judgment had been written and signed. (*Blacker, J.*) GIAN SINGH *v.* AMAR SINGH. **I.L.R. (1938) Lah. 567=40 P.L.R. 996=179 I.C. 990=11 R.L. 656=40 Cr.L.J. 288=A.I.R. 1939 Lah. 21.**

———**S. 526**—*Transfer—Who can apply for—Trial for an offence under S.* 193, *I. P. Code.*

There is nothing in the provisions of the Criminal Procedure Code, which would prevent any person from bringing facts to the notice of the District Magistrate which might suggest to the Magistrate that it was advisable to transfer the case from one Court to another. In a case under S. 193, I. P. Code, the mere fact that the District Magistrate received information on application would not debar him from making an order of transfer, if it was otherwise necessary or proper. (*Allsop, J.*) KAMNI BEGAM *v.* EMPEROR. **I.L.R. (1938) All. 738=1938 A.L.J. 703=1938 A.W.R. (H.C.) 477=1938 A.Cr.C. 66=177 I.C. 460=39 Cr.L.J. 878=1938 A.L.R. 764=11 R.A. 198= A.I.R. 1938 All. 517.**

———**Ss. 526 and 528**—*Ground for transfer—Communal dispute.*

Ordinarily, the mere fact that a case is between Hindus or Mahomedans does not *ipso facto* debar either a Hindu or Mahomedan Judge or Magistrate from hearing it. Where however the case has reached a stage in which the unfortunate question of communalism has become very prominent, by reason of the petitions for transfer by one of the parties, it is desirable in the interests of everybody concerned to transfer the case. (*Blacker, J.*) AMBA PARSHAD *v.* IMAM ALI.

CR. P. CODE (1898), S. 528.

178 I.C. 507=11 R.L. 461=40 Cr.L.J. 79=A. I.R. 1938 Lah. 706.

———**Ss. 526 and 528**—*Order of transfer—When operates—Trial and conviction subsequent to order of transfer but before communication—If void—S.* 531—*Application of.*

An order transferring a criminal case from one Court to another operates from the date on which it is passed and any Court which continues to do any act after the order is passed—even though a copy of the order of transfer has not been received by it—acts without jurisdiction. But it does not follow that the order so passed without jurisdiction is void. S. 531 of the Cr. P. Code would apply to the case and the trial and conviction of an accused cannot, in the absence of a miscarriage of justice, be set aside on the ground that the trial was held after the case was ordered to be transferred from the Court which tried it. (*Horwill, J.*) BORAI GOUNDER *v.* COMMISSIONER, OOTACAMUND MUNICIPALITY. **I.L.R. (1938) Mad. 1003= 1938 M.W.N. 830=48 L.W. 287=178 I.C. 40= 11 R.M. 398=1938 M.Cr.C. 239=39 Cr.L.J. 987 =A.I.R. 1938 Mad. 832=(1938) 2 M.L.J. 394.**

———**Ss. 526 and 539-A**—*Application for transfer—Affidavit of applicant containing allegations against Magistrate—Report of Magistrate—If judicial record—Right of party to contradict report by further affidavits—Practice.*

A report called for by the High Court in connection with the allegations made in an affidavit in support of an application for transfer of a criminal case is not one for which there is any provision in the Criminal Code, though it has been the practice of the Court to call for such a report; the High Court has power to call for such a report. Such report is not made in a judicial capacity. It is in essence a report of an administrative character. A report submitted by a Magistrate in respect of allegations made in an affidavit in support of a transfer application can be contradicted by the affidavit of the parties; it can even be disbelieved for sufficient reasons. Further affidavits in support of the allegations made by the applicant for transfer can be put in under S. 539-A, Cr. P. Code. (*Pandrang Rao, J.*) ANANTHACHARIAR *v.* EMPEROR. **1937 M.W. N. 328.**

———**S. 528**—Applicability—Application under S. 144 (4) to rescind order under S. 144 (1) by Subordinate Court—Power of District Magistrate to transfer. *See* CR. P. CODE, S. 192. **71 M.L.J. 761.**

———**S. 528**—*Application for transfer—Notice to opposite party—Record of reasons for transfer.*

It is incumbent on a Magistrate transferring a case from one Court to another on the application of the Crown to hear the other party and give his reasons for passing the order of transfer. (*Davis, J.C. and Mehta, A.J.C.*) AHMAD CHIBHIR *v.* CHELLARAM. **161 I.C. 939 (1)=37 Cr.L.J. 545 =8 R.S. 162 (1)=1936 Cr.C. 289=A.I.R. 1936 Sind 42.**

———**S. 528**—*Costs—Power of Court to award in application under.*

In applications under S. 528, Cr. P. Code, a Magistrate has no power to award costs. (*Lakshmana Rao, J.*) DISTRICT MAGISTRATE OF KURNOOL *v.* CHANDRA TIRUMAL REDDY. **48 L.W. 381=178**

CR. P. CODE (1898), S. 528.

I.C. 126 (2)=11 R.M. 413=40 Cr.L.J. 46=1938 M.Cr.C. 304=1938 M.W.N. 1105=A.I.R. 1938 Mad. 909=(1938) 2 M.L.J. 531 (1).

——S. 528—*Transfer—Complaint against District Superintendent of Police—Accused, if entitled to have complaint tried by Senior Magistrate.*

An officer of the rank of District Superintendent of Police, against whom a complaint is filed for certain things that he did while he was a Deputy Commissioner of Police, is entitled to have a complaint against him tried by a Senior Magistrate and not by a Subordinate Magistrate, and an order by a District Magistrate transferring the case for trial by a Subordinate Magistrate is not proper. (*Baguley, J.*) J. W. ATKINSON *v.* S. W. H. XAVIER. **162 I.C. 988=8 R.R. 603=37 Cr.L.J. 723=1936 Cr.C. 519=A.I.R. 1936 Rang. 242.**

——S. 528—*Transfer—Complaint against near relation of District Magistrate.*

Where a complaint is filed against a near relation of a District Magistrate, it should only be inquired into by a Magistrate who cannot, in any reasonable sense of the term, be described as a Subordinate of the District Magistrate. As a rule, it should be transferred for disposal to a Magistrate who is entirely indenendent of the District Magistrate. An order by the District Magisrate transferring such complaint to one of his subordinates for disposal, is, although not illegal not proper. (*Baguley, J.*) J. W. ATKINSON *v.* S. W. H. XAVIER. **162 I.C. 988=8 R.R. 603=37 Cr.L.J. 723=1936 Cr.C. 519=A.I.R. 1936 Rang. 242.**

——S. 528—*Transfer—Complainant objecting to trial by Magistrate on ground that he would be called as witness—Magistrate discharging accused on ground that he could not take cognisance of offence without sanction of Local Government—Propriety.*

A complaint against the District Superintendent of Police, which was filed before the District Magistrate, was transferred by him to a Magistrate subordinate to him for disposal. The accused was a relation of the District Magistrate. The acts that gave rise to the complaint occurred about ten years ago and the case, had it come for trial, would have been "cause celebre." The complainant objected to the case being tried by the Magistrate on the ground that he himself would have to be called as a witness in the trial and prayed for its transfer to another Court. The Magistrate, notwithstanding the objection, holding that he could not take cognizance of the offence without the previous sanction of the Local Government, passed an order discharging the accused.

Held, that although the action of the Magistrate could not be said to be illegal, yet in view of the circumstances of the case, the matter, if it had to be put an end to, should have been put an end to in a way correct in every possible detail and the Magistrate, in his somewhat delicate position, would have shown a better sense of fitness of things if he had asked some other Magistrate to deal with the case finally. (*Baguley, J.*) J. W. ATKINSON *v.* S. W. H. XAVIER. **162 I.C. 988=8 R.R. 603=37 Cr.L.J. 723=1936 Cr. C. 519=A.I.R. 1936 Rang. 242.**

CR. P. CODE (1898), S. 529.

——S. 528—Transfer under—Inquiry under S. 202, if can be ordered in such a case. *See* CR. P. CODE, S. 202—SCOPE. **A.I.R. 1938 Nag. 433.**

——S. 528 (2)—*Magistrate transferred after hearing evidence and arguments—Transfer of the case to him for pronouncing judgment—Legality.*

Where a Magistrate is transferred after the evidence and the arguments in the case had been heard and everything had been done by him except the actual pronouncing of judgment, a transfer of the case to him under S. 528 (2), Cr. P. Code, so that the judgment might be pronounced by him is not legal. Under S. 528 (2), the only intention recognised by the legislature for a transfer is that the Court to which the case is transferred should enquire into or try it, and the pronouncing of judgment does not amount to any part of the inquiry of trial. (*King, J.*) *In re,* MURUGAPPA THEVAN. **160 I.C. 104=8 R.M. 605=1935 M. W.N. 1281=37 Cr.L.J. 223=43 L.W. 257=1936 Cr.C. 161=1936 M.Cr.C. 7=A.I.R. 1936 Mad. 163=70 M.L.J. 244.**

——S. 528 (2)—*Scope—Jurisdiction of District Magistrate—Transfer by Sub-Divisional Magistrate—Power of District Magistrate to re-transfer or transfer to another Court.*

Although the District Magistrate has no appellate jurisdiction under S. 528 (2), Cr. P. Code, he has a concurrent jurisdiction and that jurisdiction is not barred merely because it has been exercised by the Sub-Divisional Magistrate in the first instance. Where a Sub-Divisional Magistrate transfers a case from Court *A* to Court *B*, it is open to the party aggrieved to go to the District Magistrate not by an appeal against the order of the Sub-Divisional Magistrate, but by moving the District Magistrate to exercise the jurisdiction conferred upon him in sub-S. (2) for reasons set out in the application showing why the case which is now in Court *B* should be transferred from Court *B* either to Court *A* or to Court *C*; and the District Magistrate after having considered the application on its merits and for good reasons can transfer the case either to Court *A* or to Court *C*. (*Davis, J.C. and Mehta, A.J.C.*) SUGNOMAL TAHILRAM *v.* PHATANDAS. **166 I.C. 83 (2)=9 R.S. 120=38 Cr.L.J. 133 (2)=1936 Cr.C. 1093=A.I.R. 1936 S. 237.**

——S. 528 (5)—Non-compliance with—Effect—Transfer order without notice and without stating reasons—Legality—Revision. *See* CR. P. CODE, S. 439. **A.I.R. 1936 Nag. 181.**

——S. 528-B—"Subsequent stage of the case"—Proceedings in revision under S. 439—Nature of. *See* CR. P. CODE, Ss. 4 (*i*), 439 AND 528-B. **71 M.L.J. 827.**

——S. 529—Applicability—"Good faith"—Order by superior Court to inferior Court to make inquiry into complaint and to report by fixed date—Latter summoning accused and proceeding with trial—Discharge—Legality. *See* CR P. CODE, S. 436. **19 Pat.L.T. 336.**

——S. 529 (f)—*Curability under—Conditions—Second officer transferring to himself case taken cognizance of by the S. D. O. during the latter's absence—Trial by Second Officer—Legality—Cr. P. Code, Ss.* 13 (3) *and* 192.

Where there was a standing order in a District that when the S. D. O. is away from the headquarters, the Second Officer is to carry on the

CR. P. CODE (1898), S. 529.

work of his general file at the headquarters and where in pursuance of it a Second Officer during an absence of the S. D. O. transferred to his own file, a case taken cognizance of by the S. D. O., and tried it himself, on a plea that there has been no proper transfer and as such the proceedings were *ultra vires*.

Held, that the Second Officer must be considered to have been appointed as S. D. O. to carry on the work of the permanent incumbent during his absence, as in this case there has been a delegation under S. 13 (3) to the District Magistrate, of the powers of the Local Government under S. 13 (1) of the Cr. P. Code.

Held further, that the transfer and trial was undoubtedly a defect in the jurisdiction and may apprently appear to be outside the curative provisions of Cl. (*f*) of S. 529, Cr. P. Code, but as the decisions of the Calcutta High Court have held Cl. (*f*) of S. 529 to apply to cases where the order of transfer purported to be made under S. 192, Cr. P. Code, by Magistrates who were not competent to do so, as not being Magistrates who had taken cognizance of them, the defect in this case was cured by S. 529 (*f*). (*Guha and Biswas, JJ.*) RAMKRISHNA SINHA *v.* EMPEROR. **42 C.W.N. 246=174 I.C. 513=39 Cr.L.J. 417=10 R.C. 693=A.I.R. 1938 Cal. 195.**

———**S. 530**—*Facts disclosing offence triable by sessions—Order of acquittal by Magistrate—Legality—Order for re-trial—Production of fresh evidence.*

An order of acquittal passed by a Magistrate in a case where the facts disclosed an offence exclusively triable by a Court of Session, is bad in law and all proceedings taken before the Magistrate are void. A superior Court ordering re-trial may under S. 561-A, Cr. P. Code, with a view to secure the ends of justice and to prevent abuse of the process of the Court, direct that the complainant should not be allowed to lead any evidence in the case which had not been adduced before. (*Din Mahomed, J.*) RAM PRASHAD *v.* DHANNA. **185 I.C. 415=12 R.L. 308=41 Cr.L.J. 184=41 P.L.R. 198=A.I.R. 1939 Lah. 513.**

———**S. 530**—*Order on appeal made without jurisdiction—If valid unless set aside.*

An order which is void for want of jurisdiction must nevertheless be regarded as valid unless set aside by a Court of competent jurisdiction. An accused after conviction by the Sub-Divisional Magistrate appealed to the Sessions Judge who dismissed the appeal on merits. The accused subsequently came to learn that the Sub-Divisional Magistrate was exercising Second Class powers and hence he filed an appeal to the District Magistrate. The District Magistrate made a reference to the High Court.

Held, that the proceedings before the Sessions Judge were no doubt void, but it was not imperative on the High Court to set aside an order made on appeal without jurisdiction. The accused before appealing to the District Magistrate ought first to have applied to the High Court to set aside the order of the Sessions Judge. 6 Cr. L. J. 287, Foll. (*Henderson, J.*) RAKHU SARIF *v.* PANCHANAN MONDAL. **I.L.R. (1937) 2 Cal. 116=169 I.C. 34=9 R.C. 88=38 Cr.L.J. 688=A.I.R. 1937 Cal. 256.**

CR. P. CODE (1898), S. 530 (q).

———**S. 530**—Scope—Demand for re-summoning and re-hearing witnesses under S. 350—Non-compliance—Trial—If vitiated. *See* CR. P. CODE, SS. 350, PROVISO (2) AND 530. **(1938) 2 M.L.J. 41.**

Construction.

———**S. 530 (g)**—*Construction—"Tries an offender summarily"—Meaning of.*

Trying an offender summarily under S. 530 (*g*), Cr. P. Code, means trying the particular offender in a particular case summarily and trying that offender for that offence of which he is accused. The words "offender" and "offence" are not always used in Code with great precision. (*Davis, J.C. and Tyabji, J.*) MAHANAND *v.* EMPEROR. **I.L.R. (1940) Kar. 123.**

———**S. 530 (p)**—*Joint trial of three accused—Magistrate having no power to try one accused—Trial against all accused—If void.*

The word 'proceedings is not defined in the Code but is frequently used therein and, from the nature of its use throughout the Code, it is clear that in connexion with a trial it includes the whole bundle of actions taken and recorded by the Court from the moment of taking cognizance of the case until its disposal. The 'proceedings' in a joint trial cannot be differentiated into separate 'proceedings' against each accused person. Where the accused are tried in a joint trial but one of them is a public servant for whose prosecution sanction of the authorities concerned is necessary, but the Magistrate though not empowered to try him without such previous sanction holds his trial along with other accused the proceedings of the Magistrate are void not only against such public servant alone but that the whole trial against all the accused is void as being without jurisdiction. (*Middleton, J.C. and Almond, A.J.C.*) EMPEROR *v.* FAZAL RAHMAN. **170 I.C. 772=10 R. Pesh. 23=38 Cr.L.J. 1042=A.I.R. 1937 Pesh. 52.**

———**S. 530 (q)**—*Applicability—Complaint of offence under Ss. 147 and 452, I. P. Code—Summons under S. 448—Summary trial—Conviction under S. 452—Legality.*

Where on the allegations in the complaint it is clear that the accused were charged with offences under Ss. 147 and 452, I. P. Code, but the Magistrate before whom the complaint was made issued a summons to the accused, under S. 448, I. P. Code, and proceeded to try the case summarily and ultimately convicted the accused under S. 452, I. P. Code, the procedure adopted by the Magistrate is not only highly irregular but also void under S. 530, Cr. P. Code. In such a case he is not empowered by law to hold a summary trial and S. 530 (*q*), Cr. P. Code, clearly comes into operation and the proceedings are void. (*Mulla, J.*) BALWANT SINGH *v.* EMPEROR. **I.L.R. (1939) All. 931=12 R.A. 277=41 Cr.L.J. 91=184 I.C. 712=1939 A.Cr.C. 167=1939 A.L.J. 783=1939 A.W.R. (H.C.) 710=A.I.R. 1939 All. 693.**

———**S. 530 (q)**—*Applicability—Summary trial of offence under S. 4, Bombay Gambling Act.*

The words of S. 530, Cr. P. Code, are very wide. Trying an offender summarily under S. 530 (q), Cr. P. Code, means trying the particular offender in a particular case, summarily, and trying that offender for that offence of which he is accused. Hence if a Magistrate tries an offence under S. 4, Bombay Gambling Act, summarily, S. 530 (*q*) applies. (*Davis, J.C. and Tyabji, J.*)

CR. P. CODE (1898), S. 531.

EMPEROR *v.* MAHANAND KHERAJMAL. **185 I.C. 543=12 R.S. 169=41 Cr.L.J. 190=A.I.R. 1939 Sind 341.**

———S. 531—Applicability—Contravention of S. 177—Section if can be read together. *See* CR. P. CODE, S. 177. **15 Pat. 418=A.I.R. 1936 Pat. 410.**

———S. 531—*Applicability—Order of commitment.*

An order of commitment by a Magistrate is an order within the meaning of S. 531, Cr. P. Code, and it is certainly made in the course of a proceeding, *i.e.*, the enquiry preliminary to the commitment. Therefore, even if the committing Magistrate had no territorial jurisdiction at the time of the commitment and on that account had no jurisdiction to make the commitment, such want of jurisdiction would not be a good ground for setting aside the order of commitment, when it has not occasioned any failure of justice. (*Jack and Khundkar, JJ.*) EMPEROR *v.* SAYER UDDIN PRAMANIK. **I.L.R. (1938) 2 Cal. 357=179 I.C. 805=11 R.C. 618=40 Cr.L.J. 270=A.I.R. 1939 Cal. 159.**

———S. 531—Applicability—Trial and conviction subsequent to order transferring case to another Court—If void or if cured by Section. *See* CR. P. CODE, SS. 526 AND 528. **1938 M.W.N. 830.**

———S. 531—*Objection to jurisdiction—Maintainability when no failure of justice.*

An objection to jurisdiction must fail under S. 531, Cr. P. Code, when there has been no failure of justice. (*Stone, C.J. and Nyogi, J.*) DIWAN SINGH *v.* EMPEROR. **I.L.R. 1936 Nag. 99=167 I.C. 465=9 R.N. 186=38 Cr.L.J. 390=19 N.L.J. 84=1936 Cr.C. 663=A.I.R. 1936 Nag. 132.**

———S. 531—*Scope—'Local area'—Meaning of.*

Where a Magistrate who tried a case was competent to try it, a conviction by him cannot be reversed for the simple reason that the trial took place within a local area other than the one where the offence was committed. The expression "local area" used in S. 531, Cr. P. Code, is not confined to a province but includes all local areas governed by the Code, which extends to the whole of British India. (*Niyogi and Gruer, A.J.C.*) DIWAN SINGH *v.* EMPEROR. **161 I.C. 635=8 R.N. 219=37 Cr.L.J. 474 (2)=1936 Cr.C. 367=A.I.R. 1936 Nag. 55.**

———S. 531—Scope—Effect on. S. 403. *See* CR. P. CODE, SS. 403 AND 531. **A.I.R. 1937 Sind 179.**

———S. 532—Applicability—Complainant examined and warrant issued—Objection by accused on the score of want of sanction under S. 197—Subsequent grant of sanction—Complainant not examined afresh under S. 200—Inquiry and committal without objection by accused—Accused not prejudiced—Proceedings—If vitiated. *See* CR. P. CODE, SS. 197, 200 AND 532. **39 Bom.L.R. 1056.**

———S. 531—Scope—Effect on S. 403. *See* CR. P. CODE, SS. 164 AND 533. **1940 N.L.J. 210.**

———S. 533—Confession recorded by Magistrate—Formalities not complied with—Examination of Magistrate as witness—Practice condemned. *See* CR. P. CODE, SS. 164, 364 AND 533. **I.L.R. (1937) Nag. 268=168 I.C. 962=A.I.R. 1937 Nag. 220.**

———S. 533—Confession not recorded in prescribed form—No record as to questioning of person confessing by Magistrate—Effect—Omission—If cured. *See* CR. P. CODE, S. 164. **20 N.L.J. 128.**

———S. 533—*Confessional statement not properly recorded—Certificate that confession was voluntary—Magistrate's evidence—Admissibility.*

Where though the confessional statement is not recorded as required by law, yet is certified by the Magistrate recording it that it was made voluntarily in such a case it is impossible to construe S. 533, Cr. P. Code so as to render it inadmissible to give evidence that the statement was duly recorded (*i.e.*), that the statement was voluntarily made and represents what was said. (*Niyogi and Pollock, JJ.*) BALIRAM SINGH *v.* CROWN. **184 I.C. 274=12 R.N. 106=40 Cr.L.J. 937=1939 N.L.J. 442=A.I.R. 1939 Nag. 295.**

———S. 533—*Evidence of Magistrate recording confession—When admissible.*

S. 533 clearly authorises the taking of the evidence of the Magistrate recording the confession, where there is any error in the form of the recording or not recording questions or in the form of the certificate for it cannot be said that these are matters which injured the accused as to his defence on the merits. (*Bennet and Verma, JJ.*) LAL SINGH *v.* EMPEROR. **I.L.R. (1938) All. 875=178 I.C. 694=11 R.A. 327=40 Cr.L.J. 132=1938 A.W.R. (H.C.) 642=1938 A.L.J. 943=1938 A.Cr.C. 107=1938 A.L.R. 881=A.I.R. 1938 All. 62.**

———S. 533—*Non-compliance with Ss. 164 and 364—When not curable.*

In cases where a Magistrate has made no attempt to comply with the requirements of Ss. 164 and 364, Cr. P. Code, in recording the confession of an accused person, such a confession is not admissible in evidence. Where such an attempt has been made, but there is a formal defect in the procedure thereof, then it will become curable under S. 533, Cr. P. Code. Where an accused person on being produced before a Magistrate for a remand, when asked by the Magistrate whether he had anything to say, replied that he committed the offence and that he had nothing to say against a remand being granted and the Magistrate then made a note of it on the back of the application for remand and subsequently gave evidence at the trial.

Held, that the confession was inadmissible as no attempt was made by the Magistrate to comply with the requirements of Ss. 164 and 364, Cr. P. Code. (*Ba U, J.*) THE KING *v.* SAW MIN. **1939 Rang.L.R. 97=182 I.C. 705=12 R.R. 25=40 Cr.L.J. 691=A.I.R. 1939 Rang. 219.**

———S. 533—Omission to take accused's signature—If curable under. *See* CR. P. CODE, SS. 164 AND 533. **1940 N.L.J. 497.**

———S. 533—Scope—Confession—Formal defects in recording of—If curable. *See* CR. P. CODE, SS. 364 AND 533. **1939 P.W.N. 915.**

———S. 533—*Scope—Defect of substance—If curable.*

S. 533, Cr. P. Code, cannot be brought in to cure a defect of substance. By using its provisions, only a defect of form can be removed. (*Varma and Meredith, JJ.*) EMPEROR *v.* KOMMOJU BRAHMAN. **19 Pat. 301=188 I.C. 57=12 R.P. 674=6 B.R. 577=41 Cr.L.J. 533=1939 P.W.N. 915=A.I.R. 1940 Pat. 163.**

CR. P. CODE (1898), S. 533.

———**Ss. 533 and 164**—*Defects in recording confession—If can be condoned.*

Omissions and irregularities in recording confessions under S. 164, are condoned by S. 533 provided they do not prejudice the accused. (*Almond, J.C. and Mir Ahmad, A.J.C.*) KISHAN CHAND *v.* EMPEROR. **174 I.C. 449=10 R. Pesh. 64=39 Cr.L.J. 448=A.I.R. 1938 Pesh. 5.**

———**S. 535**—Conviction for offence for which no charge was framed—Accused misled in defence—Order of acquittal by appellate Court—Legality. *See* CR. P. CODE, SS. 232 AND 535. **44 C.W.N. 400.**

———**Ss. 536 and 537**—*Scope—Irregularity in constitution of jury—If curable.*

In certain cases the failure to choose a jury is not fatal. Assessors may be chosen instead of jury and *vice versa* and the failure to take objection at the time is an answer to a subsequent objection that a case tried by jury was tried with assessors but that is the result of special statutory provisions. S. 536 presumably contemplates a jury lawfully empanelled. S. 537 also makes a provision for errors in the jury list, but an irregularity in the constitution of the jury cannot be said to be an irregularity in the proceedings before or during the trial within the meaning of S. 537. The words "other proceedings" must be read *ejusdem generis* with the words which precede them. S. 537 refers to a Court of competent jurisdiction. It does not refer to anything done in the matter of the constitution of the trial Court, and in a trial by Judge and jury, the Court is the Judge and jury. Any material irregularity in the constitution of the jury affects the constitution of the Court and its competence. It must be in the public interests that a body of persons, in whom lies the power to give a verdict of guilty or not guilty, should be constituted strictly according to law. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249=184 I.C. 474 =12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.**

———**Ss. 536 and 418**—*Appeal—Case triable by assessors tried by jury—Appeal, if lies on facts.*

Where an offence triable with assessors is tried with a jury and results in a conviction of the accused and an appeal is preferred therefrom, on a question whether an appeal lies on facts.

Held, Per *McNair, J.* (*Biswas, J.*, contra).—So long as the trial has in fact been with the aid of a jury, no appeal lies on facts, even though the jury trial was erroneous and the trial should have been by assessors.

Per *Biswas, J.*—Where, through no fault of his, a trial by jury is imposed on an accused person in disregard of the express provisions of the statute which entitle him as of right to a trial with the aid of assessors, it would be a manifest injustice to deprive him of a right of appeal on facts, which he would otherwise have had under the law. In any case S. 536 does not and cannot affect the right of appeal which is governed by S. 418 (1) read with S. 410. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 290=39 Cr.L.J. 161=173 I.C. 65=10 R.C. 441=A.I.R. 1938 Cal. 51=66 C.L.J. 225=42 C.W.N. 129.**

CR. P. CODE (1898), S. 537.

———**S. 536 (2)**—*Scope—Offence under S. 436, I. P. Code—Trial with assessors—Legality—Objection not taken—Effect.*

An offence under S. 436, I. P. Code, is triable in the Jubbalpore District by jury. Where the offence is tried by a Sessions Judge with the aid of assessors in the absence of objection taken to the procedure adopted, the legality of the trial is saved by S. 536 (2), Cr. P. Code. (*Grille and Gruer, JJ.*) SAKHAWAT *v.* EMPEROR. **I.L.R. (1937) Nag. 277=167 I.C. 61=9 R.N. 163=38 Cr.L.J. 330=19 N.L.J. 320=A.I.R. 1937 Nag. 50.**

———**S. 537**—Absence of preliminary enquiry under S. 10 of the Child Marriage Restraint Act—Defect if curable under S. 537. *See* CHILD MARRIAGE RESTRAINT ACT, S. 10 AND CR. P. CODE, S. 537. **1940 N.L.J. 224.**

———**S. 537**—Adimission of evidence—Admission of documents during cross-examining of prosecution witnesses—Curability. *See* CR. P. CODE, SS 252, 256 AND 537. **1938 A.W.R. (H.C.) 638.**

———**S. 537**—Applicability—.Presentation of complaint under S. 22 of Cattle Trespass Act to wrong Court—If curable. *See* CATTLE TRESPASS ACT, SS. 20 AND 122. **175 I.C. 662.**

———**S. 537**—Applicability—Source of information not recorded in preliminary order—If curable. *See* CR. P. CODE, SS. 145 AND 537—PRELIMINARY ORDER. **1940 N.L.J. 375.**

———**S. 537**—*Applicability—Summons not giving details—Trial, if vitiated.*

An omission in the summons to give particulars of the offence with which the accused is charged cannot by itself vitiate a trial. The trial can only be vitiated by a defect in the proceedings at the trial, by which the accused is prejudiced. Where the notice sent to the accused merely mentioned S. 16 of the Motor Vehicles Act, without reference to any rule or stating any other fact in connection therewith, but where at the trial no suggestion was made of any prejudice on this account, the trial is in no way vitiated and defect if any is only an irregularity. (*Radha Krishna and Bennett, JJ.*) EMPEROR *v.* ABDUL. **184 I.C. 742=1939 A.W.R. (C.C.) 248=1939 O.W.N. 960=1939 O.L.R. 647=41 Cr.L.J. 92 (2)=12 R.O. 138=A.I.R. 1940 Oudh 77.**

———**S. 537**—Applicability—Trial for offence under Prevention of Adulteration Act—Absence of complaint by proper authority—Defect—If cured. *See* BIHAR AND ORISSA PREVENTION OF ADULTERATION ACT, S. 10. **A.I.R. 1936 Pat. 636.**

———**S. 537**—Applicability—Use of evidence in one case in another. *See* CRIMINAL TRIAL—COUNTER AND CONNECTED CASES. **1940 O.A. 596.**

———**S. 537**—Charge—Disregard of express provision of law as to—Curability. *See* CR. P. CODE, SS. 233, 238 AND 537. **1939 A.L.J. 547.**

———**S. 537**—*Defect of jurisdiction, if curable.*

Defect of jurisdiction is not curable under S. 537, Cr. P. Code. Hence where a transfer under S. 192, Cr. P. Code, is bad in law, in that the case was transferred to a Magistrate not having jurisdiction, the trial is without jurisdiction and the defect is not cured by S. 537. (*Zia-ul-Hasan, J.*) MATHRA *v.* KAMTA. **15 Luck. 468=187 I.C. 553=12 R.O. 394=1940 A. W.R. (C.C.) 158=1940 O.L.R. 215=1940 A.**

CR. P. CODE (1898), S. 537.

Cr.C. 68=41 Cr.L.J. 469=1940 O.A. 314=1940 O.W.N. 354=A.I.R. 1940 Oudh 244.

———S. 537—*Erroneous statement of charge—If curable.*

There is a distinction between a misjoinder of charge and an erroneous statement of a charge otherwise lawful. Such error in charge can be cured under S. 537. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* BALUMAL HOTCHAND. **I.L.R. (1939) Kar. 204=177 I.C. 346=39 Cr.L.J. 890=11 R. S. 58=A.I.R. 1938 Sind 171.**

———S. 537—Essentials of vitiation—Summons not giving all particulars required by S. 15 of U. P. Prevention of Adulteration Act—Cure of. *See* U. P. PREVENTION OF ADULTERATION ACT, S. 15. **1938 A.L.J. 497.**

———S. 537—*Examination of complainant—Failure to make—If curable.*

The omission to record the statement of a complainant could at best be considered to be an irregularity which cannot vitiate the trial. Such an irregularity can be cured under S. 537 of the Cr. P. Code. (*Kichlu and Janki Nath Wazir, JJ.*) ABDUL AZIZ *v.* STATE. **40 P.L.R. J. & K. 1.**

———S. 537—Joint trial—Mutually exclusive evidence—If curable. *See* CR. P. CODE, SS. 239 AND 537—JOINT TRIAL. **1940 Rang.L.R. 203.**

———S. 537—*Misjoinder of charges—If can be cured.*

A misjoinder of charges mst be regarded as a material defect going to the root of the trial and consequently cannot be cured by the provisions of S. 537, Cr. P. Code. (*Henderson and Biswas, JJ.*) KAMALA KANTA *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 98=41 C.W.N. 1112.**

———S. 537—*Non-compliance with S.* 145 (1) *and* (3)—*Proceedings, if vitiated.*

A failure to make an initial order as required by sub-S. (1) of S. 145, Cr. P. Code, to serve notice as required by sub-S. (3), and to record in the final order a finding that there was a danger of a breach of the peace, are defects which could be cured under S. 537, Cr. P. Code, and the proceedings are, therefore, not thereby vitiated when the party concerned has not been prejudiced in any manner. (*Din Mohammad, J.*) RATAN *v.* TIKA. **183 I.C. 351=12 R.L. 112=40 Cr.L.J. 784=41 P.L.R. 188=A.I.R. 1939 Lah. 233.**

———S. 537—*Non-compliance with S. 339-A—Effect of.*

Where the provisions of S. 339-A are not carried out in the case of an approver, who has forfeited his pardon and is put up for trial and the charge is read out to him and he has been made to plead to it before and not after he has been asked to plead whether or not he had complied with the terms of the pardon, it is an irregularity curable under S. 537. (*Young, C.J. and Blacker, J.*) GURDIT SINGH *v.* EMPEROR. **I.L.R. (1939) Lah. 216=181 I.C. 924=11 R.L. 899=41 P.L.R. 290=40 Cr.L.J. 614=A.I.R. 1939 Lah. 66.**

———S. 537—*Order irregular but not likely to cause failure of justice.*

Where the order passed by the lower Court, even though irregular does not cause actual or possible failure of justice, the Judicial Commissioner's Court will not interfere. (*Mehta and Havelivala, A.J.Cs.*) JETHANAND MURIJMAL *v.* SHIVRAM. **168 I.C. 777=9 R.S. 239=38 Cr.L. J. 596=A.I.R. 1937 Sind 86.**

———S. 537—Procedure in contravention of S. 353—If curable. *See* CR. P. CODE, SS. 353 AND 537. **1938 O.W.N. 1064.**

———S. 537—Scope—Denial of accused's right to copies of statements under S. 162—Illegality—If curable. *See* CR. P. CODE, S. VFB. **A.I.R. 1936 Nag. 249.**

———S. 537—*Scope—Joint trial in disregard of S.* 239 (d)—*Effect on conviction—Illegality.*

A joint trial which infringes the provisions of S. 239 (*d*), Cr. P. Code, is an illegality and not a mere irregularity, and S. 537, Cr. P. Code, will not therefore remedy the defect. The conviction had on such joint trial must be quashed. (*Varma and Meredith, JJ.*) NATHU CHOWDHURY *v.* EMPEROR. **6 B.R. 461=187 I.C. 361=12 R.P. 615=41 Cr.L.J. 452=1940 P.W.N. 454=A.I.R. 1940 Pat. 499.**

———S. 537 (a)—*Scope—Joint trial in contravention of S. 233—Legality of—Accused embarrassed and prejudiced in defence—Conviction—Sustainability—Defect—If curable.*

A violation of a statutory provision is an illegality, *e.g.*, a joint trial which is contrary to the provision of S. 233 is illegal; and if the Court considers that the accused must inevitably have been prejudiced, bewildered and embarrassed in having to defend themselves against a diversity and multiplicity of counts which are illegally joined, the conviction on such trial must be set aside. S. 537 cannot be invoked to cure such an illegality. (*Collister and Bajpai, JJ.*) EMPEROR *v.* BISHAN SAHAI. **I.L.R. 1937 All. 779=10 R. A. 350=171 I.C. 994=1937 A.L.J. 1073=1937 A.W.R. 748=1937 All.Cr.C. 119=1937 All.L. R. 935=39 Cr.L.J. 38=A.I.R. 1937 All. 714.**

———S. 537—*Scope—Joint trial of several persons—Objection not raised at trial—Absence of prejudice—Conviction—If liable to be quashed.*

Where the irregularity, if any, in the joint trial of several persons at one and the same trial, is not such which, on the actual facts of the case, caused any prejudice to the accused or by itself entailed any failure of justice, it is no ground for quashing the proceedings, more so when no protest or complaint is made by or on behalf of the accused against the course adopted by the Magistrate. (*Derbyshire, C.J. and Costello, J.*) RASH BEHARI SHAW *v.* EMPEROR. **168 I.C. 657=9 R.C. 853=41 C.W.N. 225=38 Cr.L.J. 545=1936 Cr.C. 1043=A.I.R. 1936 Cal. 753.**

———S. 537—Scope — Judgment—Non-compliance with S. 367—If curable. *See* CR. P. CODE, S. 367. **I.L.R. 1936 Nag. 217.**

———S. 537—*Scope of—Limits of interference.*

The provisions of S. 537, Cr. P. Code, are mandatory and no Court is entitled to set aside a finding, sentence or order of a subordinate Court in direct contradiction of the terms of the section. The words 'subject' to the provisions hereinbefore mentioned must refer to the other section in that chapter unless there is any specific provisions in any other section of the Code which says that any particular error will vitiate proceedings in spite of the fact that no failure of justice has been occasioned by such error. ((*Allsop, J.*)

CR. P. CODE (1898), S. 537.

EMPEROR *v.* BHAJJA. **181 I.C. 537=11 R.A. 573 =1939 A.L.J. 81=40 Cr.L.J. 549=1939 A.W.R. (H.C.) 1=1939 A.Cr.C. 17=AI.R. 1939 All. 238.**

——**S. 537**—*Scope—Misjoinder of charges—If cured.*

It makes no difference whether the acts charged are forty-one, fourteen or four, provided they exceed the statutory number and are not covered by the provisions of S. 234, Cr. P. Code, or the following provisions relating to the joinder of charges; the misjoinder of charges is a vital defect in the trial which cannot be cured by the provisions of S. 537, Cr. P. Code. (*Davis, J.C. and Havelivala, J.*) CHUHARMAL NIRMALDAS *v.* EMPEROR. **I.L.R. (1939) Kar. 64=177 I.C. 280 =39 Cr.L.J. 881=11 R.S. 53=A.I.R. 1938 Sind 164.**

——**S. 537**—Scope—Non-compliance wih S. 26 —Omission to record reasons for asking accused immediately on framing charge whether he wished to cross-examine witness—If curable. *See* CR.P. CODE, S. 256. **19 Pat.L.T. 845.**

——**S. 537**—Scope — Non-compliance with S. 342—If cured. *See* CR.P. CODE, S. 342. **42 Bom.L.R. 695.**

——**S. 537**—Scope — Non-compliance with S. 297—If curable. *See* **41 Bom.L.R. 965.**

——**S. 537**—*Scope — Non-compliance with Ss.* 10 *and* 11, *Child Marriage Restraint Act—Effect—If fatal.*

Under S. 10 of the Child Marriage Restraint Act, there can be no trial without a preliminary investigation. Disregard of this provision is not a mere error of procedure, but an illegality which vitiates the proceedings and is not cured by S. 537, Cr.P. Code. So also the provisions in S. 11 of the Child Marriage Act that the complainant should not be exempted from giving security except for reasons to be recorded is mandatory; and the omission to comply with that section is substantive error of law vitiating the proceedings and not curable by S. 537, Cr.P. Code. S. 537 applies only to errors of procedure arising out of inadvertence and not to substantive errors of law, or to cases of disregard or disobedience of the mandatory provisions of the Code of any other law at the time in force in respect of the conduct of trials. (*Grille, J.*) GAJAI *v.* BHAGWANDAS. **20 N.L.J. 115.**

——**S. 537**—Scope — Non-compliance with S. 263 (*b*) and (*f*)—Effect on conviction—Defect —If curable. *See* CR.P. CODE, S. 263 (*b*) AND (*f*). **1940 P.W.N. 93.**

——**S. 537**—Scope — Non-compliance with S. 342—Conviction—When liable to be set aside. *See* CR.P. CODE, S. 342. **1940 M.W.N. 93.**

——**S. 537**—Scope — Non-compliance with S. 539-B—If curable. *See* CR.P. CODE, S. 539-B. **A.I.R. 1937 Sind 125.**

——**S. 537**—Scope—Omission to comply with S. 342—If cured. *See* CR.P. CODE, S. 342. **A.I.R. 1938 Sind 97.**

——**S. 537**—Scope—Omission to give reasons for discharge of some accused at time of discharge —Effect—Irregularity — If cured. *See* CR.P. CODE, S. 253. **1938 M.W.N. 38=(1938) 1 M.L.J. 110.**

CR. P. CODE (1898), S. 539-A.

——**S. 537**—*Scope—Summary trial of offence not so triable—Legality of—Defect—If curable.*

If a Magistrate tries a case summarily which he cannot under S. 260, Cr.P. Code, he acts without jurisdiction, and an illegality of such a nature cannot be cured under S. 537, Cr.P. Code. (*Davis, J.C. and Tyabji, J.*) MAHANAND *v.* EMPEROR. **I.L.R. (1940) Kar. 123.**

——**S. 537**—*Scope—Transfer without order in writing—If fatal.*

When a superior Magistrate transfers a case to himself by taking it over to his own file, the absence of a written order of transfer is not fatal, and does not entail a retrial. The absence of a written order is only an irregularity which can be cured under S. 537, Cr.P. Code. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. **1936 A.M.L.J. 85.**

——**S. 537**—*Scope of—Transfer by a Magistrate who had not himself taken cognizance of a case—If curable under S.* 537.

S. 537 as its wording shows, deals only with irregularities committed by Court of competent jurisdiction. Where a Magistrate transfers a case which he has not himself taken cognizance of, it is defect of jurisdiction which could not be cured by S. 537. (*Guha and Biswas, JJ.*) RAMKRISHNA SINHA *v.* EMPEROR. **42 C.W.N. 246 =174 I.C. 513=39 Cr.L.J. 417=10 R.C. 693 =A.I.R. 1938 Cal. 195.**

——**Ss. 537 (a) and 476**—*Scope of—Irregularity in complaint made by one Court to another —If curable.*

Although, it is no longer possible after the amending Act to apply the provisions of S. 537 to cases of want of sanction required under S. 195, Cr.P. Code, an irregularity in a complaint made by one Court to another is curable under Sub-S. (*a*), since a complaint made by a Court is, for the purposes of S. 537, Cr.P. Code, in no way different from a complaint made by a private individual. (*Grille, Ag.C.J.*) VITHOO *v.* EMPEROR. **I.L.R. (1939) Nag. 338=180 I.C. 577 =11 R.N. 373=40 Cr.L.J. 388=1938 N.L.J. 285=A.I.R. 1938 Nag. 487.**

——**S. 539**—*"Commissioner"—Meaning.*

The words "any Commissioner for taking affidavits in any Court of record in British India" do not mean any Commissioner for taking affidavit for use in any Court of record in British India. The Commissioner referred to in S. 539 is a person who is actually sitting in the Court precincts where he is entitled to sit and who has been authorized to administer oaths within the Court precincts. An affidavit cannot be said to have been sworn before a person who is authorized to administer the oath if it is sworn before a Commissioner of Oaths appointed under S. 139, C.P. Code. (*Almond, J.C.*) RAM DITTA MAL *v.* EMPEROR. **184 I.C. 10=12 R. Pesh. 22=40 Cr.L.J. 847=A.I.R. 1939 Pesh 38.**

——**S. 539-A.**—*Public servant—Chief Minister.*

The Chief Minister of a province is a "public servant" within the meaning of S. 539-A, Cr.P. Code. (*Almond, J.C.*) RAM DITTA MAL *v.* EMPEROR. **184 I.C. 10=12 R. Pesh. 22=40 Cr. L.J. 847=A.I.R. 1939 Pesh. 38.**

CR. P. CODE (1898), S. 539-A.

———S. 539-A—Scope—Affidavits to contradict report of Magistrate called for and submitted in respect of allegations in affidavit in support of transfer application—Right of parties to file. *See* CR.P. CODE, SS. 526 AND 539-A. **1937 M. W.N. 328.**

———S. 539-B—*Evidence of identification—Appreciation of—Local inspection by Magistrate.*

Where in a case in which a Magistrate had to determine whether he was prepared to accept the evidence of identification, the defence being that the case was one of mistaken identity, he visited the spot one night and came to the conclusion that there was sufficient light to enable anybody to mark closely the features of a stranger.

Held, that the Magistrate had gone beyond the scope of S. 539-B, Cr.P. Code, in assuming, without any evidence, that the condition of the light and atmosphere were the same on the night that he went to the spot as they were at the time of the occurrence, and also in assuming that the powers of observation of other persons were as well developed as his, and that, therefore, the conviction based on the local inspection should be set aside. (*Bartley and Henderson, JJ.*) BADAL ALI *v.* EMPEROR. **181 I.C. 990=11 R.C. 885 (1)=40 Cr.L.J. 624=43 C.W.N. 392=A.I. R. 1939 Cal. 304.**

———S. 539-B—*Local inspection—Absence of memorandum—If fatal.*

The omission to make a note or memorandum at the time of local inspection as required by S. 539-B, Cr.P. Code, is not a fatal one. Where the local inspection has not much bearing on the case at all, the omission to record the note, can have had no practical effect on the decision. (*Gruer, J.*) JAMNA PRASAD *v.* EMPEROR. **I.L.R. (1940) Nag. 188=174 I.C. 523=39 Cr.L.J. 427 (2)=10 R.N. 417=A.I.R. 1938 Nag. 325.**

———S. 539-B—*Non-compliance with—Trial, if vitiated.*

Non-compliance with the direction in S. 539-B, Cr.P. Code, to make a memorandum of local inspection does not vitiate the trial, and such an omission is an irregularity, unless it was proved that the accused was prejudiced or that the conviction was based on the local inspection. (*Thomas, C.J.*) SHAKURA *v.* NASIRA. **175 I.C. 259 =1938 O.W.N. 595=1938 O.A. 504=1938 A. Cr.C. 50=1938 O.L.R. 290=10 R.O. 319= 39 Cr.L.J. 630 (1)=A.I.R. 1938 Oudh 182.**

———S. 539-B—*Omission to record memorandum—Magistrate using as evidence map prepared by him—Effect.*

If a Magistrate making a local inspection not only fails to record a memorandum but also uses as evidence a map prepared by him, he places himself in the position of a witness. Unless the map is proved in the witness box, it is impossible to use it as evidence or to say what value should be attached to it. The only course open to a Revision Court in such circumstances is to order a re-trial by some other Magistrate. (*Henderson and Sen, JJ.*) RAJENDRA GHOSE *v.* EMPEROR. **183 I.C. 431=12 R.C. 157=40 Cr.L.J. 795=43 C.W.N. 896=A.I.R. 1939 Cal. 487.**

———S. 539-B—*Scope—Local iavestigation—Limits to powers of Court—Charge of cheating in respect of advertisement—Offer by accused to make demonstration in Court to test truth of advertisement—Refusal by Court—If justified.*

CR. P. CODE, (1898), S. 540.

S. 539-B, Cr.P. Code, no doubt empowers the Court to make a local investigation, but it does not contemplate a procedure by which the Judge or Magistrate has to all intents and purposes to put himself in the position of a witness in the case. A Magistrate is therefore perfectly justified in refusing to accept an offer made by the accused, charged with the offence of cheating in respect of an advertisement inserted by him, to make a demonstration of a physical feat in Court, in order to test whether his advertisement was true or false. (*Fazl Ali and Rowland, JJ.*) AKHIL KISHORE RAM *v.* EMPEROR. **174 I.C. 635 =19 Pat.L.T. 375=4 B.R. 466=39 Cr.L. J. 442=10 R.P. 541=1938 P.W.N. 93=A.I. R. 1938 Pat. 185.**

———S. 539-B — *Scope — Non-compliance—Effect on proceedings—Irregularity—If curable.*

A Magistrate made a spot inspection of a site without issuing notices to the parties but the accused was present on the spot by chance and the Magistrate passed a compensation order in favour of accused which showed that he was unduly influenced by his personal inspection of spot and the local inquiries made by him. The Magistrate failed to record a memorandum of the facts observed by him.

Held, that as the Magistrate had entirely neglected to comply with the provisions of S. 539-B, the irregularities disclosed in the proceedings of the Magistrate could not be cured under S. 537 of the Code. As a failure of justice had been caused by his failure to comply with the provisions of S. 539-B the compensation order could be set aside. (*Davis, J.C. and Mehta, A.J.C.*) JUMO SILEMAN *v.* HASHIM UMAR. **31 S.L.R. 51 =169 I.C. 431=10 R.S. 3=38 Cr.L.J. 783 =A.I.R. 1937 Sind 125.**

———S. 540—*Court witness deposing against accused—Right of accused to further opportunity to produce evidence.*

If a witness examined under S. 540, Cr.P. Code, gives evidence which is against the accused, the accused is not entitled to a further opportunity to produce more evidence to rebut his statement, though there may be cases where in the interest of justice a Court would normally give the accused such an opportunity. (*Allsop, J.*) RAM BHAROSEY *v.* EMPEROR. **162 I.C. 47=37 Cr.L.J. 522=8 R.A. 817=1936 A.W.R. 71= 1936 All. Cr.C. 103=1936 A.L.J. 303=1936 Cr.C. 246=1936 All.L.R. 364=A.I.R. 1936 All. 269.**

———S. 540—*Court witness—Examination of—Mode.*

Where a Court witness was examined in chief by the defence and was then virulently cross-examined by the complainant and also by the Court, whose own witness he was.

Held, that it was fantastic that a Court witness should be thus treated. No questions ought to be put to a Court witness except by or through the Court. (*Newsam, J.*) MURUGAPPA CHETTIAR *v.* MORANGAMUTHU RAJA. **1937 M.W.N. 1238.**

CR. P. CODE (1898), S. 540.

———S. 540—*Discretion of Court under—Right of accused to insist on summoning Court witness.*

Summoning of Court witnesses is entirely a matter for the Court to decide and it is not for the accused to insist. It is open to him to summon them in defence, if so advised. (*Guer, J.*) CHHOTEY MIYAN *v.* EMPEROR. **I.L.R. (1937) Nag. 165=167 I.C. 860=9 R.N. 228=38 Cr. L.J. 482=1936 Cr.C. 1042=A.I.R. 1936 Nag. 250.**

———S. 540—*Duty of Court—Suggestions to examine witness emanating from complainant.*

A Magistrate should not of course examine any witness under S. 540, Cr.P. Code, merely because the complainant chooses to suggest the witness. But, if he himself thinks that the evidence of the witness is essential, he is not only allowed to examine the witness but is by law bound to do so, even though the suggestion emanates from the complainant. (*Allsop, J.*) RAM BHAROSEY *v.* EMPEROR. **162 I.C. 47=37 Cr.L. J. 522=8 R.A. 817=1936 A.W.R. 71=1936 All. Cr.C. 103=1936 A.L.J. 303=1936 All. L.R. 364=1936 Cr.C. 246=A.I.R. 1936 All. 269.**

———S. 540—*Duty of Court under—Summoning of witnesses.*

Under S. 540 of the Cr.P. Code, it is manifestly the duty of the Court to summon and examine any person whose evidence the Court considers essential to the just decision of the case. (*Agarwala, J.*) NARSINGH SINGH *v.* EMPEROR. **6 B.R. 215=185 I.C. 594=12 R.P. 431=41 Cr.L.J. 209=1939 P.W.N. 712=20 Pat.L. T. 655=A.I.R. 1939 Pat. 659.**

———S. 540—Failure to examine accused subsequent to examination of Court witnesses—Trial if vitiated. *See* CR.P. CODE, SS. 342 AND 540. **1938 O.W.N. 743.**

———S. 540—*Prosecution not calling material witnesses—Duty of Court to examine them.*

Per *Mya Bu, J.*—In a trial for murder, it is the duty of the prosecution to call on behalf of the Crown all witnesses in absence of sufficient reason, who according to the prosecution case, would be in a position to give material evidence regarding the occurrence. Where such witnesses are not called as witnesses for the prosecution, and there are not sufficient reasons for not calling them, the trial is rendered unsatisfactory by the absence of their material evidence. They should, if they are not for any reason called by the prosecution and the defence do not wish to examine them as their witnesses, be examined as witnesses called by the Court under S. 540, Cr.P. Code. Where none of these courses has been adopted, a re-trial is necessary. (*Mya Bu and Braund, JJ.*) NGA KAN CHAI *v.* EMPEROR. **171 I.C. 129=10 R.R. 133 =38 Cr.L.J. 1040=A.I.R. 1937 Rang. 139.**

———S. 540—*Scope and applicability.*

There is nothing in S. 540, Cr.P. Code, itself to limit it to those witnesses who are examined by the Court on its own behalf. It could apply also to witnesses for the prosecution as well as to witnesses for defence. (*Gruer, J.*) HANSRAJ *v.* EMPEROR. **1940 N.L.J. 449.**

———S. 540—*Scope and object of.*

CR. P. CODE (1898), S. 544.

S. 540 is expressed in the widest possible terms and the intention is not to limit the discretion of the trying Court in any way. At the same time the Courts ought to remember that the purpose of S. 540 is not to enable one party or the other to fill up the gaps in his case and to improve it by new matter at a late stage, but to enable the Court to act in the interest of justice when it considers such action necessary. (*Rowland, J.*) RAMCHANDRA PRASAD *v.* EMPEROR. **168 I.C. 979 =38 Cr.L.J. 657=3 B.R. 508=9 R.P. 522 =1937 P.W.N. 519=18 Pat.L.T. 483=A.I. R. 1937 Pat. 246.**

———Ss. 540 and 342 (1)—*Examination of Court witness at the end of the case—Accused, if should be once again examined under S. 342 (1).*

Though the provisions of S. 540, Cr.P. Code, are very wide and a witness can be summoned and examined by the Court at any stage of an enquiry or trial, still it is not proper to examine the witnesses under that section after a case is practically finished and without examining the accused again under S. 342. (*Zia-ul-Hasan, J.*) BENI MADHO *v.* EMPEROR. **190 I.C. 71=1940 A.W.R. (C.C.) 370=1940 O.W.N. 923=41 Cr.L.J. 816=1940 O.L.R. 521=1940 O. A. 596.**

———S. 540-A—*Illness of accused—If authorises Magistrate to dispense with his attendance.*

The language of S. 540-A, Cr.P. Code, cannot be interpreted as authorising a Magistrate to dispense with the attendance of an accused who is too ill to attend the Court. (*Mackney, J.*) KO KO GYI *v.* EMPEROR. **161 I.C. 240=8 R.R. 460 =37 Cr.L.J. 436=1936 Cr.C. 181=A.I.R. 1936 Rang. 114.**

———S. 540-A—*Requirements of—Non-compliance with as regards one of several accused in a joint trial —Effect.*

Normally a trial in the absence of the accused is a nullity and it is only by virtue of S. 540-A, Cr.P. Code, that this consequence of the absence of the accused can be avoided, if the requirements of this section are not fulfilled, the trial remains a nullity. Where in a joint trial of several accused, the presence of one alone is dispensed with under S. 540-A, Cr.P. Code, without the requirements of that section being fulfilled, the trial is illegal and a nullity not only as regards that particular accused, but against the rest as well, for a joint trial is a single trial and the whole is one and indivisible. (*Young, C.J. and Monroe, J.*) POKHAR DAS *v.* EMPEROR. **174 I.C. 422=10 R.L. 562=39 Cr.L.J. 439=40 P.L. R. 1=A.I.R. 1938 Lah. 216.**

———S. 540-A—*Scope and applicability of.*

S. 540-A is a general section which will apply to cases of all kinds irrespective of whether the accused is in jail custody or is on bail or he is appearing in obedience to a summons. (*Bennet, J.*) JAGADISH NARAIN BAJPAI *v.* EMPEROR. **187 I.C. 682=12 R.A. 575=1940 A.Cr.C. 18= 41 Cr.L.J. 500=1940 A.W.R. (H.C.) 79= 1940 A.L.J. 104=A.I.R. 1940 All. 178.**

———S. 544—*Rules under, made by Punjab Government, Vol. 3, Chap. 9, R. 1—Warrant case—Expenses of Defence witnesses—If to be paid by Government.*

CR. P. CODE (1898), S. 544.

The only fair interpretation of R. 1, Chap. 9, Vol. 3 framed by the Punjab Government which makes no distinction between prosecution witnesses and defence witnesses is that Government by exercising its power of restriction, which it is authorized to exercise by S. 544, Cr.P. Code, has limited the cases in which Magistrates may pay the expenses of witnesses to those mentioned in the rule. If the rule framed by the High Court lays down the contrary, that is to say, that ordinarily the expenses of defence witnesses are to be paid by Government in every warrant case, it is *ultra vires*. (*Tek Chand and Ram Lall, JJ.*) NANAK CHAND *v.* SURAJ PARKASH. **178 I. C. 468=40 P.L.R. 944=11 R.L. 460=40 Cr. L.J. 68=A.I.R. 1938 Lah. 693.**

———**S. 544**—*Expenses of witnesses—Right of witnesses to maintain suit.*

It is entirely within the discretion of the Court which summons a witness to order how much expenses should be allowed to him and which party should pay it. In criminal cases the Court may within certain limits order the Government to pay the expenses of the complainant and witnesses. If a Court has ordered a certain sum to be paid to a witness and if he is aggrieved by that order and thinks that he has not been sufficiently paid it is open to him to approach a higher tribunal for the redress; but he cannot appeal to the civil Court against the order nor can he sue the party or the Government for recovery of any additional amount, much less can he claim it from the presiding officer of the Court. (*Mahomed Noor, J.*) PURNA CHANDRA MITRA *v.* SECRETARY OF STATE. **9 R.P. 455=3 B.R. 361=1937 P. W.N. 281=167 I.C. 938=18 Pat.L.T. 434 =A.I.R. 1937 Pat. 477.**

———**S. 545**—*Compensation—Two accused fined two different amounts—Compensation awarded to witness—One accused paying fine while other courting jail—Fine recovered sufficient to pay up compensation—Right to full compensation.*

Two accused were convicted and sentenced to fines of Rs. 30 and Rs. 80 respectively, compensation of Rs. 40 out of the fine if recovered was to be awarded to one *B*, a witness. One of the accused courted jail but the other paid up his fine of Rs. 80. *B* claimed his compensation of Rs. 40 out of the fine so recovered.

Held, that *B* must get compensation in full when such amount was available in recovery of fine. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* BHAGWANDAS. **166 I.C. 528=9 R.S. 147=38 Cr.L.J. 292 (1)=A.I.R. 1937 Sind 3.**

———**S. 545 (1) (a) and (b)**—*Applicability—Defamatory statement made during evidence in civil suit—Order for compensation for such defamation.*

In a civil suit by *D* against *K* for his dismissal *K* in his evidence made a defamatory statement, not believing in good faith to be true, that he dismissed *D*, because *D* had arranged to sell *K's* ore to *S* and had borrowed money from *S* on the strength of this. This statement was made in cross-examination and again in re-examination voluntarily.

Held, that compensation for such defamation could not be recovered in a civil Court and so S. 545 (1) (*b*), Cr.P. Code, did not apply, but it was a fit case under sub-S. (1) (*a*). (*Mosely, J.*) J. M. KHAN *v.* EMPEROR. **169 I.C. 245= 9 R.R. 390=38 Cr.L.J. 718=A.I.R. 1937 Rang. 192.**

CR. P. CODE (1898), S. 552.

———**S. 545**—Order for compensation on conviction of accused—Appeal by accused—Notice to complainant—Right of latter to be heard. *See* CR.P. CODE, S. 422. **19 N.L.J. 140.**

———**S. 545 (1) (b)**—*Order under—Conviction set aside on appeal—Effect of.*

Where an order under S. 545 (1) (*b*) directing payment of compensation is passed on conviction of an accused, the necessary consequence of the setting aside of the conviction on appeal is the setting aside of the sentence and of which the necessary consequence is the extinguishment of the order made under S. 545 (1) (*b*). (*Mya Bu, J.*) HTANDA MEAH *v.* ANAMALE CHETTYAR. **14 Rang. 744=163 I.C. 242 (2)=9 R.R. 6=37 Cr.L.J. 832=1936 Cr.C. 523=A.I.R. 1936 Rang. 247.**

———**S. 552**—*Applicability and scope—Detention of girl not specifically alleged to be for unlawful purposes—Guardian's remedy—Jurisdiction to grant relief under S. 552.*

The main purpose of S. 552 is to protect women and girls from detention for immoral purposes, although no doubt the section would be appropriate to cases where the purposes of the detention are clearly unlawful although not necessarily immoral. The powers given to District Magistrate by S. 552 are exceptional powers to be used with caution and only when the conditions of the section are satisfied. Taking the word "unlawful" in its ordinary meaning of "contrary to or prohibited by law" in particular cases there cannot be much difficulty in determining whether the purpose is or is not unlawful. Where there is nothing to show that the detention of the girl is for unlawful purposes, nor is it suggesed by specific allegations how the detention is for illegal purposes but there is only a vague reference to the apprehension that the girl would be spoiled as she has been wrongly detained, the remedy of the guardian to demand custody of the girl is by an application under S. 25, Guardian and Wards Act. The Magistrate cannot assume jurisdiction which in the absence of allegations of unlawful purposes he does not possess under S. 552, Cr.P. Code, to give relief, which it is the function of another Court to grant. (*Lobo and Weston, JJ.*) OM RADHE *v.* EMPEROR. **I.L.R. (1939) Kar. 760=182 I.C. 710=12 R.S. 28=40 Cr.L.J. 698=A.I. R. 1939 Sind 152.**

———**S. 552**—*Application under—Omission to take statement on oath—Order for prosecution of complainant under S. 182, I.P. Code—If vitiated.*

The omission to have the statement of the complainant on oath may be a defect in procedure and might vitiate any order for the restoration of the woman under S. 552, Cr. P. Code. Such an omission has, however, no effect on an order for the prosecution of the complainant under S. 182, I.P. Code; under that section the offence is complete as soon as the information is given. Whether the public servant omits to take a statement subsequently on oath of the person giving the information for the purpose of taking certain action

on is a matter which will not affect the giving of the information. (*Bennet, J.*) DALPAT RAI *v.* EMPEROR. **163 I.C. 609=9 R.A. 42=37 Cr.L.J. 857=1936 A.W.R. 396=1936 ACr.C. 109=1936 A.L.J. 592=1936 Cr.C. 614=1936 All. L.R. 620=A.I.R. 1936 All. 469.**

——**S. 552**—*Order directing police to produce woman*—*If comes under.*

An order of a Magistrate directing the police to produce before him a woman unlawfully detained is not one under S. 552, Cr.P. Code. (*Niamatullah, J.*) ABDUL JALIL KHAN *v.* EMPEROR. **162 I.C. 755=8 R.A. 903=37 Cr.L.J. 713=1936 A.W.R. 210=1936 A.Cr.C. 80=1936 A.L.J. 373=1936 All.L.R. 468=1936 Cr.C. 418=A.I.R. 1936 All. 354.**

——**S. 552**—*Order restoring girl to mother*—*Direction to mother to give guarantee for proper care*—*Legality.*

An order directing a mother to whom a girl is restored under S. 552, Cr.P. Code, to give a guarantee that the best interests of the girl will be looked after by her, is entirely without jurisdiction. No such direction is contemplated by that section. (*Bartley and Henderson, JJ.*) SECRETARY, SOCIETY FOR THE PROTECTION OF CHILDREN *v.* ARCHANA DAS. **43 C.W.N. 362.**

——**S. 552**—*Order under*—*Nature of.*

There is nothing in S. 552, Cr.P. Code, which requires service of the order passed under that section on any person. The order is one capable of execution and it is open to the Magistrate to compel compliance with his order using such force as may be necessary. (*Niamatullah, J.*) ABDUL JALIL KHAN *v.* EMPEROR. **162 I.C. 755=8 R.A. 903=37 Cr.L.J. 713=1936 A.W.R. 210=1936 A. Cr.C. 80=1936 A.L.J. 373=1936 Cr.C. 418=1936 All.L.R. 468=A.I.R. 1936 All. 354.**

——**S. 552**—*Order under*—*When can be passed.*

The jurisdiction **conferred by S.** 552, Cr.P. Code, depends upon two factors. There must be, in the first place, an unlawful detention and secondly that that unlawful detention must be for an unlawful purpose. If, therefore, a society to which a girl was entrusted by her mother for the purpose of housing and care refuses to accede to the mother's request to send the girl back to her, an order for the restoration of the girl under S. 552 cannot be passed in the absence of a finding that the purpose for which the society detained the girl was unlawful. (*Bartley and Henderson,JJ.*) SECRETARY, SOCIETY FOR THE PROTECTION OF CHILDTEN *v.* ARCHANA DAS. **43 C.W.N. 362.**

——**S. 552**—*Procedure*—Ex parte *warrant*—*If justificd.*

Although an order for restoration under S. 552 can be enforced by a warrant if necessary, if an order is ordinarily sufficient to meet the purposes of the section, the Magistrate should not make an order for the *ex parte* issue of a warrant. (*Lobo and Weston, JJ.*) OM RADHE *v.* EMPEROR. **I.L.R. (1939) Kar. 760=182 I.C. 710=12 R. S. 28=40 Cr.L.J. 698=A.I.R. 1939 Sind 152,**

——**S. 556**—*Disqualification of Magistrate*—*Subtantial interest*—*Necessity for.*

The accused whose duty as accountant in the office of the D.S.P. was to prepare bills and

treasury vouchers for withdrawal of money required for official purposes and to present the same at the treasury to receive payment, was alleged to have perpetrated falsification of accounts, embezzlements, cheatings and forgeries in the office of the D.S.P. in connexion with the books and papers maintained or issued from there and no question whatever with reference to the efficiency of the work of the treasury officer who also functioned as a Headquarters Magistrate or to the discharge of the work of his office was substantially involved in any of the cases.

Held, that the Magistrate who tried the case though functioned as a treasury officer had no substantial interest in the case so as to disqualify him to try the same, and hence the trial was not vitiated on that account. (*Mya Bu, J.*) MG PO KYWE *v.* KING. **1939 Rang.L.R. 251=182 I.C. 63=11 R.R. 510=40 Cr.L.J. 621=A.I.R, 1939 Rang. 152.**

——**S. 559**—*Applicability*—*Sentence of fine imposed by Special Magistrate under S. 23 of Ordinance 11 of 1931*—*Ordinance expiring in 1932*—*Sentence remaining unexecuted*—*Whether District Magistrate can order execution.*

Quaere—Where a sentence of fine is passed by a Magistrate holding powers under S. 23, Ordinance 11 of 1931, and the sentence remains unexecuted and the ordinance also comes to an end in the year 1932, whether by resorting to S. 559, Cr.P. Code, the District Magistrate can direct any other Magistrate to execute such sentence? (*Lort Williams and Jack, JJ.*) JADABENDRA NATH PANJA *v.* EMPEROR. **63 Cal. 1139=161 I.C. 979=8 R.C. 554=40 C.W.N. 604=37 Cr.L.J. 524 (2)=1936 Cr.C. 291=A.I.R. 1936 Cal. 149.**

——**S. 561-A**—*Construction and scope*—*Inheren-powers of granting bail*—*Extension of time for act caused to surrender to bail after conviction*—*Jurisdiction of High Court.*

(*Henderson, J.*).—It would be incorrect to interpret S. 561-A of the Cr.P. Code, as having any reference to bail, which is a matter specifically provided for by the Code itself. It cannot, however, be laid down that the High Court has no jurisdiction to extend the time for a convicted person to surrender to his bail, under the powers preserved to the High Court by S. 561-A because it is matter outside the specific provisions of the Code, (*Cunliffe and Henderson, JJ,*) BABU-LAL CAUKANI *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 464=166 I.C. 612=9 R.C. 558=40 C.W.N. 1313=1936 Cr.C. 1121=A.I.R. 1936 Cal. 809.**

——**Ss. 561-A and 367**—*Deletion of disparaging remarks from judgment*—*Power of High Court.*

The High Court can interfere under S. 561-A to expunge disparaging remarks from a judgment in cases where the remarks are made about a person who is not a party to the proceedings or a witness in the case. The High Court can also interfere when remarks are made about a party to the proceeedings or a witness in the case and those remarks are not justified by the findings or when the judgment itself shown to be due to bias or perverse. (*Dalip Singh, J.*) KARAMUT ULLAH *v.* EMPEROR. **186 I.C. 799=12 R.L. 431=41 Cr.L.J. 380=A.I.R. 1940 Lah. 42.**

CR. P. CODE (1898), S. 561-A.

———**S. 561-A**—*Disparaging remarks—No opportunity to refute—Power of High Court to expunge.*

No one should be condemned unless he has had an opportunity of defending himself. Though Courts of Justice should, in the interests of the proper administration of justice, be allowed to perform their functions freely and fearlessly and to comment upon the statement of the witnesses when relevant to the case, yet they should not be allowed to make disparaging remarks upon witnesses or those whose names happen to be mentioned in the proceeding. A witness cannot be condemned merely on conjectures or materials not in evidence before the Court. The High Court would be justified in expunging offensive remarks in the exercise of its powers under S. 561-A, Cr. P. Code, when they are not warranted by the evidence on record. (*Radha Krishna Sri Vastava, J.*) GOKARAN PRASAD GUPTA *v*, EMPEROR, **15 Luck, 39=184 I.C. 250=12 R.O. 90=1939 A.W.R. (C.C.) 189=1939 O.L.R. 593=1939 A.Cr.C. 174=40 Cr.L.J. 923=1939 O.W.N. 872.**

———**S. 561-A.**—*Expunging remarks from judgment—Duty of High Court.*

It is the duty of the High Court, in order to prevent abuse of the process of the Courts, and secure the ends of justice, to delete passages commenting adversely upon a person who is not a party to the proceedings and has not had a fair opportunity of being heard and also to delete such passages when they are based upon no evidence, or evidence not properly upon the record. But the power to expunge is not limited to such cases only. It is also desirable that a judgment once delivered should remain in the shape in which it was originally published, and although the practice should not be extended to exercise this peculiar power beyond limits there appears to be no good reason why it should not be used to delete passages which, though based on evidence, damage the character of a person, and are wholly irrelevant to any point in issue and which a Court has unnecessarily gone out of its way to include in a judgment. Further where High Court's notice has been drawn to a judgment which appears to it to be couched in language injudicious and uncalled for, High Court can and ought to express its opinion in the matter whether any passage is or is not ultimately to be expunged. (*Coldstream, J.*) EMPEROR *v.* ATTAH ULLAH SHAH. **162 I.C. 624=37 Cr.L.J. 661=8 R.L. 925=38 P.L.R. 638=1936 Cr.C. 464 =A.I.R. 1936 Lah. 429.**

———**S. 561-A**—*Expunging remarks from lower Court's judgment—Jurisdiction of High Court—Inherent powers—When exercisiable.*

The High Court has no jurisdiction under S. 561-A, Cr.P. Code, to expunge passages from the judgment of an inferior Court which has not been brought before it in regular appeal or revision. All that S. 561-A does is to preserve the inherent powers of the High Court without conferring an additional power. Where the High Court is hearing an appeal or revision, the whole matter is before it, and it can make any order consequential or incidental to the order under review, and in such a case the Court is entitled to expunge any remarks in the lower Court's judgment which it thinks ought not to have been made. (*Beaumont, C.J. and Sen, J.*) ROGERS *v.* SHRINIWAS GOPAL. **I.L.R. (1940) Bom. 415 =42 Bom.L.R. 478=A.I.R. 1940 Bom. 266.**

CR. P. CODE (1898), S. 561-A.

———**S. 561-A**—*Expunging of remarks—Remarks unsupported by evidence.*

A Magistrate is no no doubt, entitled to draw legitimate inferences from the evidence on the record but where the remarks of the Magistrate, for expunging which an application under S. 561-A is presented, are wholly unsupported by the evidence on record even as legitimate inference and are wholly unjustified and reflect on the character of the applicant and are likely to affect his future career, it is only fair that they should be directed to be expunged. (*Bhide, J.*) LACHMAN DAS *v.* JAI GOPAL. **179 I.C. 523=11 R.L. 532= 40 Cr.L.J. 214=A.I.R. 1938 Lah.** 793.

———**S. 561-A**—*Expunging remarks in judgment—Jurisdiction of High Court.*

A High Court has an inherent power to expunge a portion of a judgment by an inferior Court. The power is unbounded by the law, which expressly gives the Court authority to make "such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice." On the other hand, this jurisdiction has always been regarded by the High Courts as one of an extraordinary character to be exercised with care and caution in exceptional cases, because it is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by High Court and because, in weighing evidence and in arriving at conclusions on questions of fact, lower Courts have often to make remarks which reflect adversely on the character of witnesses. (*Coldstream, J.*) EMPEROR *v.* ATTA ULLAH SHAH. **162 I.C. 624=37 Cr.L.J. 661= 8 R.L. 925=31 P.L.R. 638=1936 Cr.C. 464 =A.I.R. 1936 Lah. 429.**

———**S. 561-A**—If confers power on High Court to review its own judgment. *See* CR.P. CODE, Ss. 419, 420, 421 AND 561-A. **1940 O.A. 485,**

———**S. 561-A**—*Inherent powers—Bail to accused pending contemplated application for leave to appeal to Privy Council—High Court's power to grant—Extension of time for surrendering to bail—Power of High Court.*

The High Court has no inherent powers under S. 561-A, Cr.P. Code, to grant bail to a convicted person on the ground that he intends to move the Privy Council for leave to appeal against his conviction.

(*Cunliffe, J.*)—The High Court after it has convicted and before a successful approach has been made to the Privy Council becomes *functus officio* in matters of bail; nor can the Court grant the accused an extension of time for surrendering to his bail after the conviction by the High Court. If a further stage is reached by the acceptance on the part of the Privy Council of the appeal, it may well be that the powers of the High Court would be revived and fresh *seisin* of the case with regard to bail can then be considered.

Henderson, J.—The High Court will not interfere in revision with an order of the Presidency Magistrate refusing a convicted person an exten-

sion of time to surrender to his bail; nor will the High Court extend the time, as the effect of such an order would be neither to prevent the abuse of the process of any Court nor to secure the ends of justice, but would only be to stultify a prior order of the Court directing the accused to surrender to his bail. When leave to appeal has actually been granted, the question of granting bail either directly or indirectly, might arise. (*Cunliffe and Henderson, JJ.*) BABU LAL CHAUKHANI *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 464=166 I.C. 612=9 R.C. 558=40 C.W.N. 1313==1936 Cr.C. 1121=A.I.R. 1936 Cal. 809.**

———S. 561-A—*Inherent powers—Quashing of proceedings—Complaint disclosing no criminal offence but filed* in terrorem*—Dismissal of complaint and quashing of proceedings—Powers of High Court.*

The High Court has inherent jurisdiction to pass any orders necessary to prevent abuse of the process of any Court, that is clearly expressed in S. 561-A, Cr.P. Code. Prevention is always better than cure, and the obligation to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable, yet do not amount to crimes, is one that must never be shirked. In the world of business things are often done which are betrayals of confidence and deceptions, which arouse moral indignation but are nevertheless civil wrongs which can be righted by Civil Courts and are not crimes which can be punished by a Criminal Court; not every immoral act is criminal and it is an abuse of the process of a Court to attempt to create new crimes in order to compel men to conform to a high standard of probity in business dealings or to force them to execute their promises. A criminal complaint in respect of the giving of a post-dated cheque which is dishonoured is not proper, and when it discloses no criminal offence, but is obviously filed *in terrorem*, the High Court will quash the proceedings taken thereon by a Subordinate Court and dismiss the complaint. (*Newsam, J.*) CHIDAMBARAM CHETTIAR *v.* SHANMUGAM PILLAI. **173 I.C. 14=10 R.M. 512=39 Cr. L.J. 261=1937 M.Cr.C. 278=1937 M.W.N. 999=46 L.W. 629=A.I.R. 1938 Mad. 129=(1937) 2 M.L.J. 878.**

———S. 561-A—*Inherent powers of High Court—Prevention of abuse of criminal procedure.*

The High Court has inherent power to make an order to prevent an abuse of the criminal procedure even if there is no express provision in that behalf. (*Bose, J.*) RANI SONA BAHU *v.* SOBHAGSINGH. **167 I.C. 848=9 R.N. 226=38 Cr.L.J. 467=19 N.L.J. 264.**

———S. 561-A—*Offensive remarks in judgment of lower appellate Court—Expunction—Inherent power of Chief Court.*

Where in an appeal against a conviction, the lower appellate Court held that the prosecution story was very unreasonable and improbable and acquitted the accused, and also held that the complainant, who was a schoolmaster and who was not on his trial for any offence under I.P. Code, was guilty of offences punishable under S. 354, I.P. Code, and 377 read with S. 109, I.P. Code:

Held, that in coming to a definite finding that the complainant had been guilty of grave offences, the lower appellate Court travelled beyond its legitimate functions and violated a fundamental and elementary principle of justice that no man should be condemned without being heard, and that the Chief Court had under S. 561-A, Cr.P. Code, inherent powers to expunge the offensive remarks from the judgment. (*Nanavutty, J.*) RISHI LAL *v.* EMPEROR. **167 I.C. 11=9 R.O. 379=1937 A. Cr.C. 51=38 Cr.L.J. 376=1937 O.L.R. 118=1937 O.W.N. 258=A.I.R. 1937 Oudh 277.**

———S. 561-A—*Scope—Powers of High Court under—Wrong conviction—Power to set aside under inherent powers.*

Quaere.—Whether the provisions of S. 561-A, Cr.P. Code, could not be used for passing any orders conflicting with any other provisions of the Code and whether the terms of the section were wide enough to enable the High Court to correct an illegality and to set aside a conviction which is wrong or illegal on the face of it. (*Broomfield and Sen, JJ.*) EMPEROR *v.* JAMNADAS NATHJI. **I.L.R. (1937) Bom. 263=39 Bom.L.R. 82=168 I.C. 718=9 R.B. 393=31 Cr.L.J. 606=A.I.R. 1937 Bom. 153.**

———S. 561-A—*Scope—Powers of High Court to quash proceedings.*

Where the accused charged under S. 366 are acquitted on appeal and a subsequent prosecution is started against them under Ss. 497 and 498 on the same facts with a view to defeat the effect of the previous acquittal, the proceedings being an abuse of the process are liable to be quashed. (*Lort Williams and Jack, JJ.*) MAHOMED HOSSAIN *v.* BHOLANATH DAS. **162 I.C. 176=37 Cr. L.J. 538=8 R.C. 579=1936 Cr.C. 357=A. I.R. 1936 Cal. 224.**

———Ss. 561-A and 369—*Review—Powers of High Court.*

There is no conflict between Ss. 369 and 561-A. S. 561-A does not confer upon the High Court new powers but merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. The High Court has therefore no power to alter or review its own judgment in criminal cases, once it has been pronounced and signed, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits, or to correct a clerical error. 10 L.J. relied on. (*Abdul Rashid, J.*) EDWARD FEW *v.* EMPEROR. **183 I.C. 348=12 R.L. 110=40 Cr.L.J. 763=41 P.L.R. 794=A.I.R. 1939 Lah. 244.**

———Ss. 561-A and 418 (1)—Jury trial—Appeal against conviction—Sessions Judge not making reference under S. 307 erroneously thinking he has no jurisdiction—Appellate Court, if empowered to send case back to him. *See* CR.P. CODE, Ss. 418 (1) AND 561-A, **1936 A.W.R. 1284.**

———S. 562—*Applicability — Conviction for offence under S. 19 (e), Arms Act—Accused a lambardar of 30 years of age.*

S. 562 should only be applied in special cases and for special reasons. A person was prosecuted under S. 19 (*e*), Arms Act, for possessing an unlicensed dagger, No sentence was imposed on him for the offence but merely security under

CR. P. CODE (1898), S. 562.

S. 562 was taken from him on the ground that the accused was lambardar of 30 years of age and a first offender.

Held, that the accused was the lambardar was no reason whatever for leniency. That he was of 30 years of age carried no weight as at that age he was fully responsible for his action and capable of realizing their nature to the full. If a lighter sentence was given to him merely because he was the first offender, the principle would have to be applied in all cases. It was proper that the law should take its normal course and if not allowed to do so, it would itself amount to a gross failure of justice. The accused should undergo a normal sentence. (*Middleton, J.C.*) AKHTAR MUNIR *v.* EMPEROR. **168 I.C. 783=9 R. Pesh. 131=38 Cr.L.J. 610=A.I.R. 1937 Pesh. 51.**

———S. 562—*Applicability—Offences punishable only with fine.*

S. 562, Cr.P. Code, applies to offences punishable only with fine. A.I.R. 1935 Bom. 402, Foll. (*Abdul Qayoom, C.J. and Wazar, J.*) STATE *v.* SHAMBU NATH. **41 P.L.R.J .& K. 74.**

———S. 562 (1)—*Applicability—Conditions—Accused over 21 years—Offence punishable with more than seven years' imprisonment—Release on probation—Legality.*

A Magistrate has no power to act under S. 562 (1), Cr.P. Code, in the case of an offence punishable with more than seven years' imprisonment and where the accused is more than 21 years old. (*Broomfield and Norman, JJ.*) EMPEROR *v.* YESHABA SAKHOBA. **178 I.C. 330=40 Bom.L.R. 927=11 R.B. 155=40 Cr.L.J. 48=A.I.R. 1938 Bom. 463.**

———S. 562—*Order under — Discretion of Court.*

In order to give the benefit under S. 562, Cr.P. Code, to the accused, there must not be any previous convictions, *i.e.*, (1) the accused must be a first offender and (2) the offence for which he is convicted must be one of those offences specified in the section. If these conditions are fulfilled, the Court has jurisdiction to act under this section in the exercise of its discretion, but in exercising its discretion the Court must have regard to the points specified in the section, *i.e.*, the youth, character and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed. (*Janki Nath Wazir, J.*) DIWANUN *v.* STATE. **39 P.L.R.J. & K. 91.**

———S. 562—*Order under—Legality—Conviction under S. 458, I.P. Code—Accused over 21 years.*

The benefit of S. 562, Cr.P. Code can be extended to persons over 21 years of age only in those cases where they are convicted of an offence punishable with imprisonment for not more than seven years. Where, therefore, one of the offences of which the accused is convicted is under S. 458, I.P. Code, which is punishable with 14 years' rigorous imprisonment, an order under S. 562, Cr.P. Code, cannot be made. (*Din Mohammad, J.*) JAWAND SINGH *v.* JAGAT SINGH. **40 P.L.R. 999.**

———S. 562 (1)—*Scope of—Offences punishable with fine only, if comes within the purview of.*

CR. P. CODE (1898), S. 562 (1-A).

It is wrong to think that S. 562 (1), Cr.P. Code, applies only to offences punishable with imprisonment and not to offences punishable with fine only. S. 562 (1) lays down the limit of the gravity of the offence that can be dealt with, in view of the age and the sex of the offenders, under that section, and the mention of certain sentences of imprisonment, etc., does not mean that offences punishable with fine only are not amenable to the provisions of S. 562 (1). (*Ziaul-Hasan and Yorke, JJ.*) SHITAL PRASAD *v.* EMPEROR. **177 I.C. 386=11 R.O. 48=39 Cr.L.J. 889=1938 O.A. 699=1938 A.Cr.C. 98=1938 O.W.N. 919=1938 O.L.R. 421=A.I.R. 1938 Oudh. 233.**

———S. 562 (1)—*Summary trial—Necessity for bond.*

The Magistrate taking action under S. 562 (1), Cr.P. Code, should not let off the accused with a warning but should take from him a proper bond even in cases of summary trials. (*Abdul Qayoom, C.J. and Wazar, J.*) STATE *v.* SHAMBU NATH. **41 P.L.R.J. & K. 74.**

———S. 562 (1-A)—*Applicability—Conviction under S. 411, I.P. Code—Order of release after admonition—Legality—Revision—Power of High Court to alter conviction to one under S. 379, I.P. Code, and maintain order of release.*

A person convicted under S. 411, I.P. Code, cannot be dealt with under S. 562 (1-A), Cr.P. Code, but where the facts found are equally consistent with theft or possession of stolen property, the High Court in revision can alter the conviction into one under S. 379, I.P. Code, and maintain the order under S. 562 (1-A), which would then be perfectly legal. (*Manohar Lall, J.*) EMPEROR *v.* BHOLA MIA. **18 Pat.L.T. 872.**

———S. 562 (1-A)—*Applicability—Youthful offender—Conviction under Ss. 380 and 457, I.P. Code—Poverty and inability to give sureties—Imprisonment—Propriety—Proper course for Magistrate.*

A youthful offender aged 17 to 19 committed offences under Ss. 380 and 457, Penal Code. He could not give sureties and possessed no property of his own, and was sentenced to two months' rigorous imprisonment.

Held, that the Magistrate should not have sent this young offender to prison. He should have known the evil effects of a short term of imprisonment, or indeed, imprisonment at all, may have upon a young offender, The proper course in this case for the Magistrate, when it was clear that the accused could give no sureties, was to admonish him for the offence under S. 380, I.P. Code, under S. 562 (1-A), Cr.P. Code, and to sentence him to imprisonment till the rising of the Court for the offence under S. 457, Penal Code. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* NUR MUHAMMAD. **I.L.R. (1939) Kar. 749=184 I.C. 311=12 R.S. 102=41 Cr.L.J. 14=A.I.R. 1939 Sind 260.**

———S. 562 (1-A)—*Power to release after admonition—If exercisable by all Magistrates.*

The power to release a first offender after due admonition, conferred by S. 562 (1-A), Cr.P. Code, is exercisable by any Magistrate, irrespective of the class to which he belongs. The pro-

CR. P. CODE (1898), S. 562.

viso to S. 562 (1) applies only to what goes before it (*viz.*) S. 562 (1) and cannot apply to what follows it (*viz.*) S. 562 (1-A) (*Sharpe, J.*) THE KING *v.* MAUNG THEIN AUNG. **1940 Rang.L.R. 507.**

——**Ss. 562 (1), proviso and 562 (1-A)**—*Scope—Former—If governs latter—Release on admonition—Powers of Third Class Magistrate.*

There is no reason or justification for reading the proviso to S. 562 (1), Cr.P. Code, into S. 562 (1-A). Both on the language of the section as it stands, and on a consideration of the policy of the legislature, it is clear that the proviso to S. 562 (1) does not extend to the powers conferred by sub-S. (1-A) of S. 562. A Third Class Magistrate is, therefore, entitled to exercise the powers conferred by sub-S. (1-A) of S. 562 and to release an offender after due admonition. (*Beaumont, C.J., Sen and Norman, JJ.*) EMPEROR *v.* WAMAN RAMJI PATIL. **I.L.R. (1938) Bom. 58=171 I.C. 1004=10 R.B. 247 =39 Cr.L.J. 81=39 Bom.L.R. 1065=A.I.R. 1937 Bom. 481 (F.B.).**

——**Ss. 562 and 563**—Sentence during period of binding over—Appeal—Limitation—Starting point. *See* LIMITATION ACT, ART. 155 AND CR.P. CODE, Ss. 562 AND 563. **1940 Rang.L.R. 386.**

——**S. 565**—*Applicability—Order under, if can be passed where accused is sentenced to whipping.*

An order under S. 565, Cr.P. Code can only be made at the time of passing a sentence of transportation or imprisonment on the convict. The section is not applicable to case where a sentence of whipping is passed. An order to report in a case where there is only a sentence of whipping is llegal. (*Dunkley, J.*) THE KING *v.* BA KYAW. **1940 Rang.L.R. 527.**

——**S. 565 (1)**—*Order restricting accused's residence to specified area—Legality.*

An accused was convicted under Ss. 379|75, Penal Code, and was sentenced to a terms of imprisonment for two years. The Magistrate further ordered the accused under S. 565 (1), Cr. P. Code, to restrict his movement after his release from imprisonment to a certain area for a term of three years.

Held, that the order imposing restriction of the accused's residence to a certain area on his release was illegal. (*Spargo, J.*) NGA PO MYET *v.* EMPEROR. **168 I.C. 1008=9 R.R. 385=38 Cr. L.J. 722=A.I.R. 1937 Rang. 164.**

——**Schedule**—If to read together with S. 28. *See* CR.P. CODE, S. 28. **20 N.L.J. 151.**

——**Ch. V**—Applicability—Arrest in execution of warrant—Officer arresting not having warrant with him—Escape from custody—If offence. *See* PENAL CODE, Ss. 224 AND 225. **17 Pat.L.T. 81.**

——**Ch. X**—*Scope—Action under—When to be taken—Possibility of future results—Relevancy.*

The provisions of the sections in Ch. X of the Cr.P. Code relate to the existing state of affairs and not to the possibility of future results. Assuming that a nuisance might be caused in future, that must be left to be dealt with if and when occasion arises. (*Broomfield and Macklin, JJ.*) EMPEROR *v.* RAMESHWAR NARAYAN. **180 I.C. 511=11 R.B. 301=40 Cr.L.J. 444=41 Bom.L.R. 84=A.I.R. 1939 Bom. 92.**

CRIMINAL REVISION. *See* CR. P. CODE, Ss. 435 AND 439.

CRIMINAL RULES OF PRACTICE (MAD.) R. 85—*Scope and interpretation of.*

The whole spirit of R. 85 of the Criminal Rules of Practice, is that a Magistrate should not only satisfy himself that the contemplated confession is voluntary, but should ascertain the exact circumstances in which it is made and the extent to which the accused had relations with the police. For such a purpose, a magistrate may ask such question as he thinks fit provided he records in writing such questions and answers. R. 85 (2) suggests questions which a Magistrate may usefully put. That a Magistrate must be 'satisfied' is emphasised by Sub-R. (3) which provides for cases where the Magistrate is in doubt as to the voluntary nature of the confession. (*Burn and Mockett, JJ.*) VENKATA NARAYANA *v.* EMPEROR. **1938 M.W.N. 24 (2)=47 L.W. 143.**

CRIMINAL TRESPASS. *See* PENAL CODE, Ss. 441 and 442.

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———Abatement—Death of complainant—Effect—Dismissal of Complaint—Legality—Duty of Court. *See* MYSORE PROB. AND ADMINISTRATION REGULATION, S. 87. **41 Mys.H.C.R. 237.**

Absence of Provision.

———*Absence of provision on a particular matter—Procedure to be followed.*

The Criminal Procedure Code is exhaustive only with regard to matters specifically dealt with by it. Absence of any provision on a particular matter does not mean that there is no such power, and the Court may act on the principle that every procedure should be undersood as permissible till it is shown to be prohibited by law. (*Gruer, J.*) HANSRAJ *v.* EMPEROR. **1940 N.L.J. 449.**

Acquittal.

———*Acquittal — Grounds — Discrepancies in statements and confession of accused—If justify acquittal or rejection of prosecution evidence.*

The fact that a statement made by the accused person does not agree entirely with his statements in the confession or with another statement made to the police is no ground for acquitting the accused when the prosecution has proved its case. The discrepancies in the statements and the confession are discrepancies created by the accused himself—not discrepancies created by the prosecution witnesses—and are no grounds for rejecting the evidence of the prosecution witnesses. (*Burn and Stodart, JJ.*) PUBLIC PROSECUTOR *v.* RAJU NAICKEN. **1938 M.W.N. 609=48 L.W. 150=178 I.C. 115=11 R.M. 406=1938 M.Cr.C. 228=39 Cr.L.J. 1006=A.I.R. 1938 Mad. 806.**

———Acquital—Revision against—Interference Grounds—Principles and practice. *See* CR. P. CODE, S. 439. **40 C.W.N. 931.**

Adjournment.

———*Adjournment—Adjournment after framing of charge—If should be long.*

It is not incumbent on Court to give a long adjournment after charge is framed against the accused. (*Gruer, J.*) BHANWARSINGH *v.* SUKHRAMSINGH. **188 I.C. 413=1940 N.L.J. 410=41 Cr.L.J. 585=13 R.N. 2=A.I.R. 1940 Nag. 283.**

———*Adjournment—Telegram from pleader—Court, if obliged to pay attention.*

A Court is not obliged to pay any attention to a telegram from a pleader of the accused asking for adjournment. (*Gruer, J.*) BHANWARSINGH *v.* SUKHRAMSINGH. **188 I.C. 413=1940 N.L.J. 410=13 R.N. 2=41 Cr.L.J. 585=A.I.R. 1940 Nag. 283.**

Appeal.

———*Appeal — Acquittal—Interference—Rule—Local inquiry without notice—Acquittal on basis of result of local inquiry—Sustainability.*

The High Court is reluctant to interfere with an order of acquittal, but when the trial Court commits a serious irregularity in the trial, the High Court will interfere and set aside the order of acquittal. Where the trial Magistrate holds a local inquiry without any notice to the parties

and utilises his observation in the course of that enquiry for coming to a finding, and on the basis of that finding suddenly alters the charge and acquits the accused under S. 247, Cr. P. Code, the order of acquittal is liable to be set aside. (*Varma, J.*) BANKIM BEHARI SEN *v.* YUSUF MIAN. **180 I.C. 858 (1)=5 B.R. 498=11 R.P. 549 (1)=40 Cr.L.J. 514 (1)=1939 P.W.N. 23=19 Pat.L.T. 918=A.I.R. 1939 Pat. 186.**

———*Appeal—Complainant—Right of audience.*

There is no provision in the Code of Criminal Procedure for allowing the complainant to be heard when the Crown does not wish to argue the case. It is however open to the appellate Court to hear the complainant in suitable cases, and a discretion in this matter is left to the appellate Court. (*Grille, J.*) RAGHUNATHMAL *v.* PATIRAM. **I.L.R. (1938) Nag. 157=172 I.C. 177=10 R.N. 172=39 Cr.L.J. 75=A.I.R. 1937 Nag. 394.**

———*Appeal—Dismissal of, with a wrong remark as to presumption—Legality.*

Where a Sessions Judge dismissed a criminal appeal with the remark, that there is no reason why the complainant should pursue the prosecution, unless the appellants did something high-handed,

Held, the presumption is the other way. The order was improper although not illegal. (*Manohar Lall, J.*) BASDEO SINGH *v.* EMPEROR. **172 I.C. 944=10 R.P. 369=18 Pat.L.T. 915=4 B.R. 204=39 Cr.L.J. 254=1938 P.W.N. 113=A.I.R. 1938 Pat. 12.**

———*Appeal—Procedure—Re-trial—When to be ordered.*

The Judicial Commissioner's Court has no doubt powers in a case of misdirection to jury to order a re-trial of the accused or to enter into merits of the case and dispose of it. Where however the case is essentially one where the guilt or innocence of the accused should be determined by a Judge and jury, who have seen the witnesses and heard them give evidence, and, where much depends upon the impression made upon the Court by the witnesses in their evidence and by the accused in their statements, it is not a case in which the Judicial Commissioners should decide the case in an appeal on the paper record. It is a case in which there should be a re-trial. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.**

———*Appeal—Re-trial—Order for—When to be made.*

Where there is sufficient material on record on which the jury could reasonably come to a conclusion that the accused were guilty, the mere fact, that in the opinion of the Judicial Commissioner's Court, the jury might come to a contrary conclusion is not sufficient for that Court to take upon itself the duty of acquitting the accused. Where, there is sufficient evidence on record to justify a re-trial, and it is in the interests of justice that the accused should be re-tried, an order for re-trial is the proper order. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.**

———*Appeal—Sentence passed by Judge of Judicial Commissioner's Court sitting in sessions juris-*

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diction—Appeal to Judicial Commissioner's Court —If lies.

An appeal lies to the Judicial Commissioner's Court against convictions and sentences passed by a Judge of the Judicial Commissioner's Court, sitting in its Sessions Court jurisdiction with a jury only on a point of law. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.**

———*Appeal—Summary dismissal—Duty of Court to consider all aspects of the case and to give reasons for conclusion.*

An appellate Court, before dismissing an appeal summarily, ought to give indications that it has actually considered the various aspects of the case before it and give in short its reasons for its conclusion, so that the High Court in revision can know that the appeal was fully heard. (*Varma, J.*) BALA BUX *v.* EMPEROR. **19 Pat.L.T. 395=176 I.C. 558=39 Cr.L.J. 732=11 R.P. 85=4 B.R. 734=1939 P.W.N. 181=A.I.R. 1938 Pat. 366.**

Approver.

———Approver—Conviction on retracted statement—Extrinsic corroboration—Necessity. *See* CR. P. CODE, S. 339 (2). **39 P.L.R. 930.**

———*Approver—Evidence of—Corroboration—Nature of.*

Merely because an approver tells a probable story it cannot be said that it is corroborated. Nor can it be held to be corroborated by mere evidence of notice. Corroboration in its true sense must be such as connects the accused with the offence committed. (*King and Lakshmana Rao, JJ.*) SUBBANNA *v.* EMPEROR. **183 I.C. 564=40 Cr.L.J. 801=12 R.M. 311=1939 M.W.N. 316=1939 M.Cr.C. 108=49 L.W. 520=A.I.R. 1939 Mad. 469.**

Bar of Prosecution.

———Bar of prosecution—Decree of Civil Court in respect of same matter—Effect of—When bar to prosecution. *See* JURISDICTION—CIVIL AND CRIMINAL COURTS. **41 Bom.L.R. 98.**

———*Bar of—Matter in issue decided by Civil Court—Criminal Court, if debarred from taking cognisance of case.*

Though a civil suit and a criminal prosecution may be based on exactly the same cause of action, the parties are strictly speaking not the same. The burden of proof is differently placed and different considerations may come in. The result may therefore be a conflict in decision. The risk of such conflict is one that is inherent in the division of cause into criminal and civil. The judgment of neither Court is binding on the other and each must decide the cause on the evidence before it. If they arrive at different conclusions it is regrettable but unavoidable. The fact therefore that the matter in issue has already been decided in favour of the accused in a civil suit between the same parties does not debar the Criminal Court from taking cognizance of the case and holding a trial. (*Mosely, J.*) MAUNG PO NWE *v.* MA PWA CHONE. **(1940) Rang.L.R. 163=12 R.R. 176=184 I.C. 842=41 Cr.L.J. 139=A.I.R. 1939 Rang. 394.**

Bail Bond.

———*Bail bond—Forfeiture—Liability of sureties.*

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There can be no forfeiture of penalty in a bail bond except on its own terms. It is no concern of the sureties to find out what exactly it is that the police officer has been directed to do in the way of taking bail with sureties. Their liability must be determined by the agreement that it is actually taken from them. (*Dhavle, J.*) BHATTACHARJEE *v.* EMPEROR. **4 B.R. 503=174 I.C. 984=10 R.P. 566=39 Cr.L.J. 523=A.I.R. 1938 Pat. 211.**

Benefit of doubt.

———*Benefit of doubt—Conviction—Basis of—Suspicion sufficiency—Duty of Court.*

Once the case as presented by the prosecution is found to be false, the accused cannot be convicted. A mere suspicion can form no basis for a conviction. Once the Court has any doubt about the truth of the prosecution version was as first recorded, then the accused is entitled to the benefit of that doubt. (*Harries, C.J. and Fazl Ali, J.*) JADU JHA *v.* EMPEROR. **185 I.C. 162=12 R.P. 339=1940 P.W.N. 197=41 Cr.L.J. 114=6 B.R. 110=A.I.R. 1940 Pat. 365.**

———*Benefit of doubt—Delay in registering case.*

The fact that the case against the accused was registered at the police station 11 days after the alleged occurrence, and 10 days after the accused filed complaints against the police, makes the whole case rather suspicious and entitles the accused to the benefit of doubt. (*Abdul Qayoom, C.J. and Wazir, J.*) STATE *v.* ASAD ULLAH RASOOL KHAN. **41 P.L.R.J. & K. 63.**

———*Benefit of doubt—Duty of Court—Charge under S. 302, Penal Code—Prosecution proving knowledge—Conviction—Proper course.*

It is the duty of a Judge to make up his mind upon the facts of the case before him, and if there is any real doubt as to the facts, then he must give the accused the benefit of that doubt, not by finding him guilty, even in the alternative, of the offence in respect of which the reasonable doubt exists, but by acquitting him of that offence. He should remember that the burden lies on the prosecution to prove the guilt of the accused. If in a case of murder, the prosecution has failed to prove the intention which is necessary in order that an accused should be convicted of murder, then it fails to prove that the accused is guilty of murder and the accused should not be convicted of murder even in the alternative. If the prosecution can prove the knowledge which is necessary for the conviction of an offence under S. 304, Part 2, Penal Code, the proper course is to convict the accused of an offence under S. 304, Part 2, and not in the alternative. In a case of murder, where intention is one of the essential elements of the offence, it is always necessary that there should be a definite finding as to whether the necessary guilty intention is or is not present, and when it is reasonably doubtful upon the evidence of the prosecution whether this intention is present, then the accused is entitled to the benefit of that reasonable doubt and he must be acquitted of the charge of murder even if he is to be convicted of the charge of culpable homicide not amounting to murder. Where only one blow with a hatchet was struck and suddenly in circumstances which are in doubt and there was not probably in the mind of the accused an intention either to kill or to cause a fatal injury..

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Held, that there was a reasonable doubt as to intention of the accused and the offence fell more under S. 304, Part 2, than under S. 302 or S. 304, Part 1. (*Davis, J.C. and Lobo, A.J.C.*) GHULAM HYDER INAM BAKHSH *v.* EMPEROR. **31 S.L.R. 480 =174 I.C. 497=10 R.S. 254=39 Cr.L.J. 460= A.I.R. 1938 Sind 63.**

———*Benefit of doubt—Facts casting suspicion on accused and evidence not conclusive—If justifies conviction.*

It may be that the facts proved against an accused person cast the utmost suspicion on him but if they amount to mere suspicion and do not contain the element of certainty which is essential to a conviction in a criminal case, he cannot be convicted. When the evidence is not conclusive and there is doubt, the accused is entitled to the benefit of that doubt and must be acquitted. (*Burn and Mockett, JJ.*) RAMI REDDI, *In re.* **52 L.W. 420 (2)=1940 M.W.N. 1045.**

———*Benefit of doubt—Facts proved fitting in with two hypotheses.*

If the hypothesis that the object of the accused is to remonstrate with the deceased for molesting his brother's wife fits in with the proved facts quite as well as the hypothesis that the accused had a deliberate intention of committing an assault on the deceased, the accused is entitled to the benefit of the doubt and his case comes under Excep. IV to S. 300, I. P. Code. (*Dalip Singh and Blacker, JJ.*) BAKHSHA *v.* EMPEROR. **184 I.C. 325=12 R.L. 209=40 Cr.L.J. 928=41 P.L. R. 315=A.I.R. 1939 Lah. 426.**

———Benefit of doubt—Meaning of—Mistake as to weapons used by accused—Right to benefit of doubt. *See* CR. P. CODE, S. 225. **1937 M.W.N. 1331.**

———*Benefit of doubt—Old-standing enmity between accused and deceased—Persons named in first information report not supporting prosecution.*

Where from the evidence on record it seems that out of spite and because of the old standing enmity which existed between the accused and the deceased, the accused have been falsely implicated by the deceased, and that is the reason why the persons who were named in the first information report are not prepared to support the story of the prosecution, the guilt of the accused is not proved beyond all reasonable doubt, and the Court would therefore give them the benefit of the doubt and acquit them of the offence charged against them. (*Nanavutty, J.*) MULAIM SINGH *v.* EMPEROR. **9 R.O. 70=164 I.C. 422=37 Cr. L.J. 986=1936 O.W.N. 838.**

———*Benefit of doubt—Partition evidence—Absence of injuries on alleged rioters.*

The absence of injuries on the persons of the alleged rioters arrested shortly after the occurrence is a point which in a case where the evidence is partisan and uncertain must operate as a ground for giving the benefit of doubt as to participation. (*Dalip Singh and Sale, JJ.*) MOHAN SINGH *v.* EMPEROR. **188 I.C. 717=41 Cr.L.J. 667=13 R.L. 56=42 P.L.R. 484=A.I.R. 1940 Lah. 217.**

———*Benefit of doubt—Prosecution witnesses not giving evidence frankly—Plea of* alibi *from stage of investigation.*

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Where in the trial of an offence under S. 147, I. P. Code, the accused, although he fails to establish his plea of *alibi,* on the record before Court, has taken the plea at any early stage of the investigation and from the evidence his presence at the affray is somewhat doubtful, the accused is entitled to the benefit of the doubt, more specially so, when such doubt would not have arisen had the police whom the accused cited as witnesses had given their evidence frankly. (*Currie, J.*) PINDI DAS *v.* EMPEROR. **163 I.C. 135=37 Cr.L.J. 748=8 R.L. 1022=38 P.L.R. 680=1936 Cr.C. 508=A.I.R. 1936 Lah. 473.**

Burden of proof.

———*Burden of proof—Benefit of doubt—Absence of proof of motive—No evidence on vital points—Conviction for murder on suspicion and circumstantial evidence—Sustainability.*

In a criminal trial an accused was charged with murder by poisoning. The conduct of the accused on the day of the crime was suspicious, though motive for the crime was found to be lacking. The evidence of the poison-vendor, who supplied the poison to the accused was not convincing. The Sessions Judge convicting the accused of murder, did not even examine witness to a point of vital importance like the threats of the accused to the deceased for proving motive.

Held, the circumstantial evidence as it was presented to the Court was not such as to make it clear beyond possible doubt that the accused had murdered the deceased. There was ground for doubt of which the benefit must go to the accused. (*James and Varma, JJ.*) EMPEROR *v.* HARDWAR SAH. **164 I.C. 1079=9 R.P. 145=37 Cr.L.J. 1061=1936 Cr.C. 810=A.I.R. 1936 Pat. 486.**

———*Burden of proof—Charge of criminal breach of trust under S. 409, I. P. Code—Failure of accused to explain or prove explanation of entries in accounts—Mere proof of suspicious entries—Absence of proof of suppression of traces of embezzlement or use made of money—Sufficiency for conviction.*

The burden of proving the accused person's guilt rests throughout on the prosecution, and if the prosecution does not of itself discharge that burden, its deficiencies cannot be supplemented by any finding that the accused has not proved his innocence. In a prosecution under S. 409, I. P. Code, in respect of certain amounts and false entries in accounts, the failure of the accused to explain or to prove his explanation of suspicious entries in the accounts cannot be made the basis of his conviction. When there is nothing but certain suspicious entries in the accounts, and there is no case that the accused attempted to suppress all traces of his embezzlements by any manipulation of the accounts, and there is no evidence at all as to any use made of the money alleged to have been misappropriated or as to the accused's financial circumstances which might render probable a case of misappropriation, it is not safe to convict the accused, as it cannot be said that the dishonesty has been proved beyond reasonable doubt. (*King, J.*) RAMA RAO *v.* SUB-INSPECTOR OF POLICE, KALAHASTI STATION. **1937 M.W.N. 566.**

———*Burden of proof—Charge of murder—Circumstantial evidence as to presence of accused with deceased just before or at time of murder—*

Property of deceased found in possession of accused—Presumption of guilt—Accused offering explanation as to property—Duty of prosecution to prove falsity of explanation.

When there is strong circumstantial evidence against an accused person that he was in the presence of a murdered man just before or at the time of the commission of the murder, the Court can safely conclude,—especially when the property of the murdered person is recovered from him soon afterwards—that the murder was committed by him provided no reasonable explanation is given by him as to how the property came into his possession. When the accused offers an explanation, the burden is on the prosecution to prove that the explanation is not true. (*Mockett and Horwill, JJ.*) NAGAN *v.* EMPEROR. **1937 M. W.N. 544.**

———*Burden of proof—Duty of prosecution—Accused's failure to raise legal defence open to him—If ground for conviction.*

An accused person cannot be convicted upon a criminal charge merely on the ground that he has not put forward a defence which was obviously open to him. The prosecution must clearly establish the case irrespective of the defence taken. (*Meredith, J.*) TARA CHAND SAH *v.* EMPEROR. **189 I.C. 737=41 Cr.L.J. 795=13 R.P. 138=6 B.R. 854=1940 P.W.N. 778.**

———*Burden of proof—Duty of prosecution—Defence case palpably false—If ground for conviction.*

A conviction should never be based on the failure of the accused to make good his defence. Even if a defence is palpably false, the burden still rests on the prosecution, which must establish beyond all reasonable doubt that no other alternative than the truth of the prosecution story will explain the facts. (*King, J.*) RAMASWAMI NAICK *v.* RANGASWAMI CHETTIAR. **172 I.C. 501 =39 Cr.L.J. 144=10 R.M. 457=47 L.W. 140 =1937 M.W.N. 733=A.I.R. 1937 Mad. 968.**

———*Burden of proof—Duty of prosecution—Charge of murder of wife against husband—Essentials to be proved—Accused—If bound to prove that no crime has been committed—Evidence Act, S.* 106—*Scope and effect of.*

In a prosecution for murder, burden lies on the prosecution to establish that the act alleged to constitute murder was really the act of a person other than the deceased. The burden is not cast on the accused person of proving that no crime has been committed. S. 106 of the Evidence Act would not absolve the prosecution from the duty of proving that a crime was committed even though it is established that the accused had special knowledge on the point whether a crime was committed or not, the deceased being the wife of the accused. Much reliance cannot safely be placed on the conduct of the accused which might appear to indicate consciousness of some guilt. (*Pandrang Row, J.*) KANAKASABAI PILLAI *v.* EMPEROR. **186 I.C. 704=41 Cr.L.J. 369=12 R. M. 682=50 L.W. 452=1939 M.W.N. 883=A.I. R. 1940 Mad. 1.**

———*Burden of proof—Duty of prosecution to prove case against accused, even when case set up by accused is untrue.*

It is the duty of the prosecution to prove the case against the accused, and even if the version

put forward by the defence is wholly untrue, the prosecution must establish beyond all reasonable doubt that the case put forward by them is true. (*Harries, C.J. and Fazl Ali, J.*) JADU JHA *v.* EMPEROR. **185 I.C. 162=12 R.P. 339=41 Cr.L. J. 114=6 B.R. 110=1940 P.W.N. 197=A.I.R. 1940 Pat. 365.**

———*Burden of proof—Exceptions—Prosecution evidence showing accused's right to claim benefit of exception—Duty of Court.*

The burden is on the accused to prove an exception but he may do so by relying on any of the facts brought out in the case even when they do not appear in his own statement or defence evidence. Where the Court finds on the prosecution evidence itself that the accused is entitled to the benefit of certain exception, it should give the accused that benefit even though he may not have relied on the exception. Hence where in a prosecution for defamation, it is found on the facts that the occasion was a privileged one, the conviction should not be passed even though accused has not expressly relied on this exception. (*Gruer, J.*) BHADDOO CHHOTELAL *v.* EMPEROR. **I.L.R. (1936) Nag. 85=164 I.C. 928=37 Cr.L.J. 1035=9 R.N. 43=1936 Cr.C. 621=A.I.R. 1936 Nag. 119.**

———*Burden of proof — Insanity — Accused knowing that he is doing wrong—Plea that he was caused to act by irresistible impulse produced by deceased—If ground for holding him insance —Burden of proof—Rule as to.*

A man who knows that he is doing what is wrong cannot be held to be insane merely because he is caused to do the act by an irresistible impulse produced by deceased. The burden of proof resting on the accused pleading insanity is certainly not so onerous or heavy as that resting on the prosecution to prove the facts which they have to establish to bring the guilt home to the accused. But the burden in cases in which the accused has to prove insanity may fairly be stated as not being higher than the burden which rests on a plaintiff or defendant in civil proceedings. (*Viscount Hailsham, L.C.*) SODEMAN *v.* REX. **44 L.W. 694 (P.C.).**

———*Burden of proof—Intention of accused—Duty of prosecution to prove.*

The burden of proving a certain intent or knowledge on the part of the accused is thrown on the prosecution by the statutory definition of culpable homicide and murder; and it is not only in cases of murder that this burden of proof is thrown on the prosecution by statute; that burden is imposed in every offence coming within the ambit of the Penal Code. Subject to any statutory exception and subject to the exception as to the defence of insanity which may be raised, the burden of proof rests *ab initio* on the prosecution and is never shifted. It is not the duty of the accused to furnish such evidence as shall satisfy the jury that there was no malice, but the duty remains with the jury to see, whether the prosecution has discharged the burden of proving, which never shifted from them, that the offence of murder has been committed. The maxim *actus non facit reum, nisi mens sit rea* has no application in India, as the statutory definitions of the offences in the Penal Code in each case expressly contain a pro-

position as to the state of mind of the accused. (*Grille and Gruer, JJ.*) DALJIT SINGH *v.* EMPEROR. **172 I.C. 204=39 Cr.L.J. 92=10 R.N. 177 =A.I.R. 1937 Nag. 274.**

———*Burden of proof—Presumption of innocence—Rebuttal—Position, wealth and age of accused—How far relevant.*

Every accused person is certainly entitled to be presumed innocent till there is evidence of his guilt; and the presumption ought not to be too lightly displaced. It may be right to have regard to the position in life of the accused in considering whether it is displaced. But a person cannot, by reason of wealth, position, or age, be deemed to be immune from the consequences of his acts if in fact they are criminal. (*Rowland, J.*) CHANDRESHWAR PRASAD NARAIN SINGH *v.* ARUNENDRA MOHAN GHOSE. **165 I.C. 931=9 R.P. 231=38 Cr.L.J. 2=3 B.R. 104=17 Pat.L.T. 794=1936 P.W.N. 773=1936 Cr.C. 1064=A.I.R. 1936 Pat. 626.**

———*Burden of proof—Prosecution case more probable than defence case—Sufficiency for conviction.*

In a criminal prosecution the onus is upon the prosecution beyond all reasonable doubt that the accused is guilty of the offence charged. The fact that the prosecution case is more probable than the case for the defence is no ground for basing a conviction. (*King, J.*) MUTHUSWAMI GOUNDAN *v.* EMPEROR. **1937 M.W.N. 987.**

———*Burden of proof—Rule.*

The cardinal or basic rule of the administration of criminal justice is that the prosecution must prove the guilt of the accused, and that the accused need not prove anything. He is entitled to stand on the innocence which the law imputes to him till it is displaced. (*Pandrang Rao, J.*) EMPEROR *v.* KRISHNAN. **1939 M.W.N. 1213=A.I.R. 1940 Mad. 329.**

Case and counter case.

———*Case and counter case—Disposal.*

There were two separate trials and two appeals therefrom before the Sessions Judge. The judgment however was one continuous document, but the decisions in the two cases were quite separate and distinct from each other. The findings in one case were not based on the evidence recorded in the other case. The judgment in one case was based upon its own oral and documentary evidence.

Held, that the procedure was not illegal and the accused was not prejudiced thereby. (*Agha Haidar, J.*) PANNA LAL *v.* EMPEROR. **164 I.C. 809=37 Cr.L.J. 1033=9 R.L. 164=1936 Cr.C. 244 (2)=A.I.R. 1936 Lah. 294.**

———*Counter-cases contradictory to each other—Institution of—Propriety—Duty of Public Prosecutor—Duty of police in investigating cases and launching prosecutions.*

It is highly improper for the police to file a charge-sheet against certain persons and then to file another charge-sheet against the majority of their own important witnesses in the first case in regard to the same occurrence alleging that the offenders were the witnesses in this case. For the Public Prosecutor to put such two contradictory "counter cases" before the Court in the sense that if one is true the other must necessarily be false, is to do something derogatory and disrespectful to the Court. The powers of investigation given to the police are extensive and very responsible. They are given for the purpose of ascertaining the truth not for dressing up cases with any evidence true or false which happens to be available. It is not at all legitimate for police officers to put in a charge-sheet and start a prosecution not caring whether is false or true. Police officers must conduct their investigation honestly and must do their duty honestly without being deflected by fear of public opinion or public clamour. (*Reilly, C.J. and Nageswara Iyer, J.*) GIRIYAPPA, *In re.* **18 Mys.L.J. 229=45 Mys.H.C.R. 1.**

———*Counter and connected case—Use of evidence in one in the other—Legality—If curable under S. 537, Cr. P. Code.*

The use in a case of evidence produced in another case is not a mere irregularity but an illegality and not curable by S. 537, Cr. P. Code. The very use of evidence which is not part of the record is by itself proof of prejudice to the accused. (*Zia-ul-Hasan, J.*) BENI MADHO *v.* EMPEROR. **190 I.C. 71=1940 A.W.R. (C.C.) 370 =41 Cr.L.J. 816=1940 O.L.R. 521=1940 O.A. 596=1940 O.W.N. 923.**

———*Case and counter-case—Evidence for prosecution in one case copied word for word in other case for defence and* vice versa*—Trial, if vitiated.*

Where in two cross cases, evidence recorded for the prosecution in one case has been recorded practically word for word as the evidence for the defence in the other and *vice versa*, and the evidence is copied exactly from the body of the other case, there is a serious defect in the procedure and such defective procedure vitiates the whole trial. (*Spargo, J.*) MAUNG PA *v.* EMPEROR. **168 I.C. 713=9 R.R. 364=38 Cr.L.J. 641=A.I.R. 1937 Rang. 100.**

———*Case and counter case—Procedure as to—Duty of Magistrate.*

When so-called counter-cases are presented a Magistrate must either treat them both as defence cases disguised as prosecution cases and discuss both at once, or, if he is unable to come to that conclusion, *prima facie*, he must treat both complaints with equal respect, until he is in a position to make a simultaneous order in each case. The Magistrate must express no opinion until he writes the final judgment. (*Newsam, J.*) PERIASWAMI *v.* EMPEROR. **1937 M.W.N. 998.**

———*Case and counter-case—Prosecution evidence in one treated as defence evidence in the other—Legality—Propriety—Consent of Counsel —If can cure defect.*

Trials in criminal cases are governed by the provisions of Cr. P. Code and the procedure of treating the prosecution evidence in one case as defence evidence in the other and *vice versa* is not warranted by any provisions of that Code. The procedure permissible in civil cases cannot be engrafted on criminal trials. The fact that Counsel on both sides consented to such a procedure, in fact asked for such a procedure to be adopted, cannot make it legal. The Government pleader by assenting to the illegal procedure gives away his legal and necessary right, which in a regular trial he would have of cross-examining the evidence of the defence, as he could not cross-examine the witnesses whom he himself produced

for the prosecution in both the cases. (*Zia-ul-Hasan, J.*) SARJU *v.* EMPEROR. **1938 O.A. 717 =1938 O.L.R. 429=1938 O.W.N. 958=11 R.O. 58=177 I.C. 559=1938 A.Cr.C. 102=39 Cr.L.J. 929=A.I.R. 1938 Oudh 249.**

———*Counter cases—Evidence—Right to use evidence given in one case in other case.*

Where two persons bring cases of mutual assault, the Magistrate is not entitled to use evidence given in one case as evidence in the other; and a conviction based upon such evidence cannot be upheld. (*Henderson, J.*) MRS. WAUGH *v.* EMPEROR. **186 I.C. 67=41 Cr.L.J. 247=12 R.C. 466=A.I.R. 1940 Cal. 59.**

———*Case and counter case—Statements of witnesses who are accused in the counter case—If evidence.*

It is wrong to say that the statements of witnesses are not evidence merely because they happen to be the statements of persons who are the accused in a counter case. (*Burn and Mockett, JJ.*) RAHIMAN KHAN SAHIB *v.* EMPEROR. **180 I.C. 592=11 R.M. 730=40 Cr.L.J. 442=1938 M.W.N. 31=47 L.W. 149=A.I.R. 1938 Mad. 403.**

Charge.

———*Charge—Clerical error in—If vitiates proceedings.*

Where there is a clerical error in the form in which a charge is framed, the proceedings are not, solely on that account, vitiated, and a conviction is not bad when the accused is not in any way prejudiced by the error in the framing of the charge. (*Jack, J.*) ABINAS CHANDRA KUMAR *v.* DHANI BUKSH MAHAMMAD. **165 I.C. 905=9 R.C. 465=38 Cr.L.J. 118=62 C.L.J. 487=1936 Cr.C. 930=A.I.R. 1936 Cal. 673.**

———*Charge—Criminal breach of trust and extortion in respect of same money—Charges of —Maintainability.*

The charges of criminal breach of trust and extortion in respect of the same moneys are incompatible. So a complainant cannot ask for a conviction both for criminal breach of trust and extortion in relation to the same moneys. (*Davis, J.C. and Dadiba C. Mehta, A.J.C.*) SHAMUMAL *v.* R. A. GORDON. **161 I.C. 295=37 Cr.L.J. 457 =8 R.S. 135=1936 Cr.C. 225=A.I.R. 1936 Sind 29.**

———Charge—Defect in—Charge under S. 372, Indian Penal Code—Single charge of hiring minor for money to various persons—General charge of living on immoral earnings—Legality—Conviction —Sustainability. *See* PENAL CODE, S. 372. **40 C. W.N. 1188.**

———*Charge—Defect in—Omission of full particulars—Effect on conviction.*

The offence was committed partially at two places but only one place was mentioned in the charge.

Held, that by mentioning of only one place, the accused was not misled in his defence and that that did not affect his conviction. (*Varma and Rowland, JJ.*) NANHKOO MAHTON *v.* EMPEROR. **163 I.C. 805=37 Cr.L.J. 862=9 R.P. 40=17 Pat.L.T. 472=1936 Cr.C. 558=1936 P.W.N. 276 =A.I.R. 1936 Pat. 358.**

———*Charge—Joinder of charges—Introduction of additional charges—Procedure as to.*

It is waste of public time that charges of conspiracy, which always mean a long trial, however convenient the prosecution may think it to be to the success of its case, should be introduced when no sort of proper appraisement of the preliminary prosecution evidence has apparently been adopted by the prosecuting authorities before the case comes to its actual trial. In a case the accused was originally prosecuted for cheating and criminal breach of trust but subsequently the prosecution authorities to make themselves safe and to let in certain evidence, added the charge of conspiracy to the charges of cheating and criminal breach of trust. In addition to these charges 14 other charges were alleged. The trial Judge tried all these charges and without considering whether there was any real evidence in support of conspiracy convicted the accused of cheating and criminal breach of trust together with conspiracy.

Held, that the trial Judge ought to have insisted on the prosecuting authorities to produce evidence in support of the charge of conspiracy. The result, apart from multiplicity of charges, was that the accused was convicted of conspiracy without consideration of evidence and hence the case should be retried. (*Cunliffe and Henderson, JJ.*) AMITAVA GHOSE *v.* EMPEROR. **166 I.C. 384 =9 R.C. 512=38 Cr.L.J. 201=1936 Cr.C. 954 (2)=A.I.R. 1936 Cal. 693.**

Charge.

———*Joinder of charges—Several charges of unlawful assembly with common object and rioting and other offences against several persons—Common object not proved—Joint trial and conviction of individual offences—Legality.*

Several persons were charged, under nine charges, with the offences of rioting, or rather the forming of an unlawful assembly with an unlawful common object and the doing of various acts in prosecution of that common object. The trial Court found that the common object was not established and therefore the accused were acquitted of the offence under S. 148, I. P. Code, but convicted only in respect of individual acts said to have been committed by them which were alleged to constitute offences under various sections such as Ss. 352, 323, 324 and 325, I. P. Code.

Held, that once it was found that a common object was not established, there was no justification for a joint trial being held in respect of such acts as against different accused; that apart from the improper character of the trial the accused must have been really prejudiced in their defence by the joint trial, and that the convictions and sentences could not be sustained. (*Pandrang Row, J.*) AVANASHI GOUNDAN *v.* PALANI MADARI. **184 I.C. 134 (2)=40 Cr.L.J. 855=12 R.M. 413=49 L.W. 163=1939 M.W.N. 117=A. I.R. 1939 Mad. 406=(1939) 1 M.L.J. 259.**

Charge to jury.

———*Charge to jury—Failure to direct jury as to relevancy of evidence of similar transactions—Effect.*

If a Sessions Judge fails to draw the attention of the jury to the effect of law as to the relevancy of evidence of similar transactions, there cannot be said to be a proper direction to the jury.

CRIMINAL TRIAL.

(*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SETTY, *In re.* **17 Mys.L.J. 238.**

Civil dispute.

———*Civil dispute—Duty of Criminal Court.*

Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court. Criminal Courts should be on their guard not to lend their aid in cases of this kind. (*Din Mohammad, J.*) BHAGWAN SWARUP *v.* EMPEROR. **40 P. L.R. 967.**

———Civil dispute—Pledge of jewels to secure loan—Repayment of loan—Pledgee denying pawn and misappropriating jewels—Amount due not in dispute—Criminal prosecution. *See* PENAL CODE, S. 406. **62 C.L.J. 487.**

Committal to Sessions.

———*Committal to Sessions—Death resulting from injuries—Magistrate finding that a* prima facie *case is made out—Procedure.*

In a case where death appears to have resulted from injuries voluntarily inflicted by the accused, the Magistrate ought to be careful not to take upon himself to absolve the accused from the graver charge unless he is quite clear that there is no sufficient evidence to warrant a commitment of the accused to the Court of Session for murder or culpable homicide not amounting to murder. In a case triable by a Court of Session if the Magistrate finds that a *prima facie* case is made out against the accused and credible witnesses have given evidence, he must commit the accused to the Court of Session. (*Kichlu, J.*) INDER SINGH *v.* STATE. **39 P.L.R.J. and K. 172.**

———*Committal to Sessions—Offence of nose-cutting—If to be committed—Duty of Magistrate.*

Though it cannot be laid down that cases of nose-cutting under S. 326, I. P. Code, should, as a matter of course, be committed to the Court of Session for trial, the Magistrate should always consider whether he ought not to commit. (*Broomfield and Norman, JJ.*) EMPEROR *v.* ISMAIL UMAR. **40 Bom.L.R. 832=177 I.C. 647 =11 R.B. 111=39 Cr.L.J. 928=A.I.R. 1938 Bom. 430.**

———Committal—Quashing of—Effect—Retrial—Original magistrate pronouncing guilt of accused—Case if to be sent to same magistrate. *See* CR. P. CODE, S. 215. **A.I.R. 1937 Sind 32.**

Complaint.

———*Complaint—Dismissal of—Second complaint on same facts—Maintainability.*

It is not open to a Magistrate to entertain a complaint when a similar complaint has been dismissed by another Magistrate of co-ordinate jurisdiction and the dismissal has not been set aside by higher authority. If the complainant is aggrieved by the dismissal of his complaint and the discharge of the accused under S. 259, Cr. P. Code, it is open to him to move the superior Court to order further inquiry under S. 436 because that section is now amended and relates not only to a dismissal of complaint under S. 203 or under sub-S. (3) of S. 204 but to any case where persons accused of an offence have been discharged. (*Davis, J.C. and Mehta, J.*) CHELLOMAL *v.* KEWALMAL. **I.L.R. (1939) Kar. 228= 179 I.C. 898=11 R.S. 164=40 Cr.L.J. 287=A.I. R. 1939 Sind 38.**

CRIMINAL TRIAL.

Confession.

———*Confession—Admissibility.*

A confession if it is to be admissible in evidence, is to be voluntarily made in whole, and not in parts. (*Davis, J.C. and Lobo, A.J.C.*) SAMERO *v.* EMPEROR. **164 I.C. 1036=9 R.S. 63=1936 Cr. C. 856=37 Cr.L.J. 1045=A.I.R. 1936 Sind 140.**

———*Confession—Admissibility—Accused confessing to have killed victim in particular way—Medical evidence showing that death may have been caused in different way—If ground for rejecting confession or acquitting accused.*

The appellant who was charged with the murder of a woman made a confession that he had killed the woman by throttling her. The medical evidence made it clear that the woman might very well have been killed by strangulation with a piece of rope. The medical witness also said that there were marks of fingers and thumbs on the woman's neck. It was contended that the confession ought to be rejected because it differed from the medical evidence as to the manner of causing death.

Held, that the mere fact that the accused gave a wrong or an incomplete description of the way, in which he brought about the woman's death was for not a ground for rejecting the confession or finding him not guilty. (*Burn and Lakshmana Rao, JJ.*) EMPEROR *v.* BANGARU REDDI. **1940 M. W.N. 543=A.I.R. 1940 Mad. 699.**

———*Confessions—Confession implicating others and safeguarding the person confessing—Value of.*

Confessions which seek to implicate a number of other persons whilst carefully safeguarding the conduct of the confessor cannot be read without seeing that they are of a kind very familiar to the Judges. This type of confessor never really does anything at all, but is always on the spot through compulsion, and all that it is useful for is to testify the various happenings which involve other people. Such confessions should therefore be considered with great caution. (*Cunliffe and Henderson, JJ.*) EMPEROR *v.* GOSTHO SARDAR. **165 I.C. 438=37 Cr.L.J. 1149=9 R.C. 400=1936 Cr. C. 670=A.I.R. 1936 Cal 407.**

———*Confession—Conviction on retracted confession—Absence of corroboration—Propriety.*

It would not be safe to base the conviction of an accused on his retracted confession when there is no evidence in corroboration of the statements in it. (*Rachhpal Singh and Ismail, JJ.*) ABDUL SUBHAN *v.* EMPEROR. **186 I.C. 192=12 R.A. 384 =41 Cr.L.J. 258=1939 A.W.R. (H.C.) 768= 1939 A.Cr.C. 182=1939 A.L.J. 966=A.I.R. 1940 All. 46.**

———*Confession—Duty of Court—Accused alleging that confession was extorted by torture resulting in injuries to him.*

Where an accused retracts a confession made by him and alleges that it was not voluntary but was extorted from him by gross torture by the police, resulting in a dislocated shoulder and two broken fingers, it is the bounden duty of the Magistrate trying the case to take immediate steps to have the accused examined by a competent doctor. (Tendency on the part of Magistrates and Judges to regard themselves as mere recording machines and not to take obvious steps for elucidation of matters before them deprecated and attention of Local Government drawn to the matter.) (*Young, C.J. and Blacker, J.*) GURDIT

CRIMINAL TRIAL.

SINCH *v.* EMPEROR. **I.L.R. (1939) Lah. 216=181 I.C. 924=11 R.L. 899=40 Cr.L.J. 614=41 P.L. R. 290=A.I.R. 1939 Lah. 66.**

—— *Confession—Duty of Court to take as a whole—Exculpatory part incredible—When to be rejected.*

It is true that a confession must be accepted or rejected as a whole if it is to be relied on—the part which implicates as well as the part which exculpates, though the part which exculpates may appear inherently incredible because there is no evidence to prove that the part which exculpates is false. But by "evidence" is meant not only direct evidence but circumstantial evidence, and a Judge must not leave out of his consideration, when considering the truth or falsity of a confession or its parts, those probabilities and those presumptions which may properly arise from the other evidence on record, regard being had to the common course of natural events and human conduct, because little evidence is necessary to rebut statements which are in themselves inherently incredible, even when made by an accused in a confession. (*Davis, J.C. and Lobo, J.*) JADO RAHIM *v.* EMPEROR. **I.L.R. (1939) Kar. 75=40 Cr.L.J. 93=11 R.S. 93=178 I.C. 520=A.I.R. 1938 Sind 202.**

——*Confession—If to be accepted in entirety.*

There is no justification for the rule of law that in the absence of other evidence the whole of a given confession must be accepted as a statement of truth in its entirety. It is true that if an accused person makes a confession, the whole of that confession must be placed before the Court and is receivable in evidence. But there is no rule of law which compels belief in the statement of a witness. The Court, if it comes to the conclusion that the statement in its essential particulars is true, is entirely entitled to disregard the statements which it may hold in the circumstances are not true. (*Courtney-Terrell, C.J., Dhavle and Chatterjee, JJ.*) EMPEROR *v.* ITWA MUNDA. **175 I.C. 300=19 Pat.L.T. 476=4 B.R. 568=39 Cr.L.J. 554=10 R.P. 606=1938 P.W.N. 494=A.I.R. 1938 Pat 258 (S.B.).**

——*Confession—If to be accepted or rejected as a whole.*

A Court is not bound in law to accept a confession as a whole. If the Court is satisfied that part of a confession is true and part is false, it can accept the true portion and reject the false part. (*Harries, C.J. and Varma, J.*) EMPEROR *v.* JATE URAM. **187 I.C. 586=12 R.P. 641=41 Cr.L.J. 472=6 B.R. 503=1940 P.W.N. 446=A.I.R. 1940 Pat. 541.**

——*Confessions—Kinds of—Modes of proof—Difference in.*

Confessions are of two kinds judicial and extra-judicial. A judicial confession is recorded by the Magistrate and it proves itself by virtue of S. 80 of the Evidence Act. Extra-judicial confessions are those which are made by a party elsewhere than before a Magistrate. They are proved by witnesses who heard the speaker's words constituting the oonfession. When the fact of the confession is proved, that itself becomes evidence which serves as a means to the ascertainment of the fact in issue. (*Niyogi and Gruer, JJ.*) SUMITRA *v.* EMPEROR. **1940 N.L.J. 343=A.I.R. 1940 Nag. 287.**

CRIMINAL TRIAL.

——*Confession—Police making headman to take statement of accused under their custody and putting it on record—Propriety.*

It is a discreditable and deplorable practice on the part of the police to take the accused arrested by them to the headman and to make him take their statement while the accused are virtually under their custody and while the headman is merely acting as their agent and then subsequently place the statement on record and also allow the headman to give oral evidence of it. (*Mosely and Ba U, JJ.*) NGA BA KYAING *v.* EMPEROR. **162 I.C. 6=37 Cr.L J. 531=8 R.R. 543=1936 Cr.C. 219=A.I.R. 1936 Rang. 131.**

——*Confession—Principles governing acceptance or rejection of confession as a whole or in part.*

Where there is no other evidence, then the confession is to be rejected or accepted as a whole; when there is other evidence whereby the truth or falsity of a part of the confession could be tested, the Court will test the truth or falsity of the confession by that other evidence and will use its discretion and will accept that part of the confession which it believes to be true and reject that part of it which it believes to be false. Where however there is no other evidence as to certain facts to which the accused in his confession testifies and which are in his favour, the Court will accept these facts as true if it accepts the confession and draw from them the proper inferences in favour of the accused. (*Davis, J.C. and Lobo, A.J.C.*) NOUKAR MOULEDINO *v.* EMPEROR. **31 S.L.R. 460=170 I.C. 827=38 C.L.J. 968=10 R.S. 73=A.I.R. 1937 Sind 212.**

——*Confession—Proof of—Duty of Court—Confession not recorded—Circumstantial evidence—Value of—Witness proving confession charging statements from time to time—Admissibility of confession.*

In dealing with an extra-judicial confession, particularly when it is not anywhere recorded, the Court must be very careful and should not act upon it unless it is proved by evidence of the most reliable character. Particular care is necessary in cases of circumstantial evidence bolstered up with extra-judicial confessions. And when the only witness who proves the confession changes his statements from time to time on material points obviously with some purpose, he cannot be regarded as a reliable witness, and the confession cannot be held proved on the sole testimony of such a witness. The confession in such a case must be ruled out and excluded. (*Dhavle and S.C. Chatterji, JJ.*) EMPEROR *v.* MT. JAGIA. **17 Pat. 369=1938 P.W.N. 293=19 Pat.L.T. 268=10 R.P. 531=174 I.C. 524=39 Cr. L.J. 428=4 B.R. 451=A.I.R. 1938 Pat. 308.**

——Confession — Recording of—Omission to give warning and to put formal questions—Effect of. *See* MADRAS CRIMINAL RULES OF PRACTICE, R. 85. **45 L.W. 93=A.I.R. 1937 Mad. 321.**

——*Confession—Reliance upon part and disregard of the rest—Propriety.*

A confession by the accused should be taken into consideration with the utmost possible care. It is not right for the Court to put reliance on a portion of the statement made by the accused which would implicate him in the commission of a crime and to disregard another portion simply because it would go against the prosecution story. (*Rachhpal Singh and Ismail, JJ.*) ABDUL SUBHAN.

CRIMINAL TRIAL.

v. EMPEROR. 186 I.C. 192=12 R.A. 384=41 Cr. L.J. 258=1939 A.W.R. (H.C.) 768=1939 A.Cr. C. 182=1939 A.L.J. 966=A.I.R. 1940 All. 46.

———*Confession—Retracted confession—Corroboration—Necessity for.*

A retracted confession requires corroboration in material particulars before it can be relied on as evidence. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SETTY, *In re.* 17 Mys.L.J. 238.

———*Confession—Retracted—Retracted confession should not form basis of conviction, unless substantially corroborated by independent evidence.*

As a rule of prudence a retracted confession should not be the basis of a conviction unless it is substantially corroborated by independent evidence. The object for looking for corroboration is to find out how far the confession is true and whether it can be acted upon for the purposes of a conviction. The best test is whether the story as set forth in the confession is consistent, natural and plausible. (*Dhavle and Chatterjee, JJ.*) EMPEROR *v.* MANU CHIK. 175 I.C. 716=4 B.R. 626=39 Cr.L.J. 635=11 R.P. 11=A.I.R. 1938 Pat. 290.

———*Confession—Subsequently retracted—Conviction—When justified.*

The general rule is not to convict on retracted confession unless they are corroborated. (*D.R. Norman.*) EMPEROR *v.* BHAGHU NATH. 1939 A. M.L.J. 56.

———Confession—Use of retracted confession—Corroboration — Necessity for. *See* EVIDENCE ACT, S. 24. 1935 A.M.L.J. 123.

———Confession—Voluntary nature of—Question of fact. *See* EVIDENCE ACT, S. 24—SCOPE OF. 1938 M.W.N. 24 (2).

———*Confession—What is—Charge of murder—Statement by accused soon after murder stating that deceased was murdered by others who asked him to conceal clothes and property of deceased—If confession — Admissibility — Property and clothes found in accused's house—Inference — Conviction of murder—Sustainability — Offence —Penal Code, S.* 201.

Where an accused person, who is charged with the offence of murder, has made a statement shortly after the discovery of the murder to the President of the local vigilance committee to the effect that while he was returning home some other persons murdered the deceased man and asked him (accused) to conceal the property of the deceased and the clothes found on his body, the property and clothes being subsequently recovered from his house—is not a confession of his guilt of the crime of murder, which is to be regarded as inadmissible in evidence. Such a statement has to be taken as an admission coupled with an explanation showing how the facts admitted are consistent with his innocence. But such admission is not enough to convict him of the offence of murder. He can only be convicted under S. 201, I. P. Code. Even, however, if the statement is to be excluded as being a confession of guilt, the mere possession of the property and the clothes of the deceased would be sufficient to prove his guilt to justify a conviction under S. 201, I. P. Code. (*Mockett and Horwill, JJ.*) NAGAN *v.* EMPEROR. 1937 M.W.N. 544.

CRIMINAL TRIAL.

Conviction.

———*Conviction—Accused declared 'not guilty' by jury sitting as assessors—Conviction—Legality.*

Where the accused are declared 'not guilty' by the unanimous opinion of the jury sitting as assessors and the evidence does not support the guilt of the accused, the Judge cannot convict them further without giving any reasons for so doing. (*Cunliffe and Henderson, JJ.*) JOGNESHWAR GHOSH *v.* EMPEROR. 166 I.C. 418=9 R.C. 520=38 Cr.L.J. 212=65 C.L.J. 351=40 C.W.N. 1186=1936 Cr.C. 737=A.I.R. 1936 Cal. 527.

———*Conviction—Accused using violence while entering land of holder—Fellow conspirators committing theft—Liability of accused.*

Where a gang of persons goes on to the land of another with the intention of removing the paddy by force, and some of the accused use the necessary violence on the complainant and his friends, whilst others commit the actual theft, all must be held responsible both for the violence which they themselves committed and the theft which their fellow conspirators committed. (*Mackney, J.*) EMPEROR *v.* BASA MEAH. 161 I.C. 90=37 Cr.L.J. 416=8 R.R. 451=1936 Cr.C. 75=A.I.R. 1936 Rang. 70.

———*Convict on—Basis of—Accused absconding.*

Mere absconding of an accused person should not form the basis of a conviction. It comes in as a very useful piece of corroborative evidence if there is other evidence to connect the accused with the crime, but *per se* absconding is not enough to bring home the charge to the person who has absconded. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) JAN KHAN *v.* EMPEROR. 164 I.C. 630=9 R. Pesh. 21=37 Cr.L.J. 988=1936 Cr.C. 827=A.I.R. 1936 Pesh. 169.

———*Conviction—Basis of—Evidence of approver.*

It is not quite safe to convict the accused persons merely on the evidence of the approver when there is no satisfactory corroboration from any independent evidence. (*Abdul Qayoom, C.J. and Kichlu, J.*) LOCHAN *v.* STATE. 39 P.L.R. J. & K. 14.

———*Conviction—Basis of—Evidence of approver.*

Where the approver did not attempt to absolve himself but gave a clear, connected and convincing account of the whole occurrence from the beginning to the end, and further there was the extra-judicial confession of the accused persons made only a few hours after the occurrence.

Held, that the accused persons had been properly convicted. (*Abdul Qayoom, C.J. and Kichlu, J.*) BAG ALI *v.* STATE. 39 P.L.R. J. & K. 17.

———*Conviction—Basis of—Evidence of handwriting expert.*

To base conviction upon the evidence of an expert in handwriting is, as a general rule, very unsafe. (*Nawal Kishore, C.J. and Ranjitmal, J.*) SARKAR *v.* RUGHNATH. 1939 Mar.L.R. 68 (Cr.).

———*Conviction—Basis of—Evidence of witnesses inimical to accused—Sufficiency for conviction.*

It is unsafe to uphold a conviction of the accused which is based on the evidence of witnesses who are shown to be inimical to the accused, more especially when the majority of the assessors are of opinion that the charge is not proved. (*Harries, C.J. and Agarwala, J.*)

CRIMINAL TRIAL.

KHOLIA NAIKO *v.* EMPEROR. **179 I.C. 929=5 B.R. 322=11 R.P. 428=40 Cr.L.J. 318=1939 P.W.N. 283=20 Pat.LT. 313=A.I.R. 1939 Pat. 292.**

——Conviction—Basis of —Homicide —Decision as to—Facts to be taken into consideration—Intention—Relevancy. *See* PENAL CODE, Ss. 304 (1) AND 302. **A.I.R 1938 Rang. 156.**

——*Conviction—Basis of—Mere probability—Sufficiency of.*

A conviction must rest on something more substantial than a mere probability. (*Pandrang Row, J.*) MOHIDEEN PICHAI ROWTHER *v.* EMPEROR. **186 I.C. 525=12 R.M. 671=41 Cr.L J 337=1939 M.W.N. 879=50 L.W. 557=A.I.R. 1940 Mad. 43.**

——*Conviction —Basis of—Murder — Grave suspicion—Evidence falling short of proof—If justifies conviction.*

Where it is not safe to infer from the circumstances proved that the accused must have been concerned in a murder, a conviction is not justified although there is undoubtedly cause for grave suspicion. If the evidence falls short of proof, a conviction is not sustainable. (*Burn and Mockett, JJ.*) RAMASWAMI *v.* EMPEROR. **181 I.C. 849=11 R.M. 870=40 Cr L.J. 596=1938 M.W.N. 36=47 L.W. 272=A.I.R. 1938 Mad. 336.**

——*Conviction—Basis of—Prosecution evidence found to be unsatisfactory.*

Where the prosecution evidence consists of interested persons alone and the only two disinterested persons who were produced to corroborate them have been found to be unreliable and the prosecution has been found to have introduced exaggerations and improvements in their story and presented it in a varnished manner with a view to implicate innocent persons, it is unsafe to convict the accused persons who do not admit their presence on the scene of occurrence. (*Addison and Din Mohammad, JJ.*) HASTA *v.* EMPEROR. **171 I.C. 351=10 R.L. 187=38 Cr L.J. 1073=39 P.L.R. 327=A.I.R. 1937 Lah. 593.**

——*Conviction—Basis of—Retracted confession—Sufficiency—Law in Mysore.*

In Mysore it is permissible for the Court to base a conviction on the retracted confession of the accused alone, if, in the opinion of the Judge, it is voluntary and is true, though ordinarily some corroboration is looked for. (*Abdul Ghani, Offg.C.J. and Singaravelu Mudaliar, J.*) NARAYANA NAIR *v.* GOVERNMENT OF MYSORE. **17 Mys. L.J. 491.**

——*Conviction—Basis of—Statement of co-accused.*

In the absence of any satisfactory corroborative evidence, it will not be safe to convict an accused merely on the statement of his co-accused. (*Abdul Qayoom, C.J. and Wazir, J.*) SUBQAT ULLAH *v.* STATE. **42 P.L.R. J. & K. 234.**

——*Conviction—Basis of—Suspicion.*

Suspicion, though a ground for scrutiny, cannot be the basis of a judicial pronouncement which must rest upon legal ground established by legal testimony. (*Nanavutty and Zia-ul-Hasan, JJ.*) BRIJPAL SINGH *v.* EMPEROR. **165 I.C. 138=9 R.O. 157=37 Cr.L.J. 1065=1936 Cr.C. 1079=1936 O.L.R. 596=1936 O.W.N. 892=A.I.R. 1936 Oudh 413.**

CRIMINAL TRIAL.

——*Conviction—Basis of—Suspicion —Sufficiency.*

For conviction in criminal cases mere suspicion, however strong, is no proof of guilt. (*Varma, J.*) DEONANDAN JHA *v.* EMPEROR. **165 I.C. 230=9 R.P. 164=37 Cr.L.J. 1123=1937 P.W.N. 39=1936 Cr.C. 900 (1)=A.I.R. 1936 Pat. 534.**

——*Conviction—Basis of—Suspicion —Sufficiency.*

The fact that there is considerable suspicion against the accused is not sufficient to convict him. The prosecution must prove their case. (*Weston.*) EMPEROR *v.* NARAIN. **1935 A.M.L.J. 123.**

——*Conviction—Basis of—Track evidence.*

Where the eye witnesses are found to be unreliable, the track evidence together with the oral confession made by the accused to an Honorary Magistrate is insufficient to turn the scales against him. (*Young, C.J. and Skemp, J.*) BACHAN SINGH *v.* DARA. **42 P.L.R. 559.**

——*Conviction—Basis of—Unsustainability of defence case.*

An accused person must be convicted on the strength of the prosecution case and on that alone, however unsustainable the defence case may be. (*King, J.*) MAHANANDI REDDI *v.* EMPEROR. **1937 M.W.N. 992.**

——*Conviction—Bench of Magistrates—Magistrate signing judgment not hearing all the evidence—Effect on conviction.*

A conviction by a Bench of Magistrates is illegal, if the Magistrates who sign the judgment have not heard all the evidence in the case. (*Horwill, J.*) VEERASWAMY REDDI *v.* VENKATASWAMY. **175 I.C. 874=1938 M.W.N. 591=47 L.W. 149=11 R.M. 1 (1)=39 Cr.L.J. 680.**

——Conviction—Charge of abetment of rioting and assault or criminal force to public servant—Absence of definite evidence as to actual words used by accused —Conviction —Sustainability. *See* PENAL CODE, Ss. 147 AND 353 READ WITH 109. **A.I.R. 1936 Pat. 608.**

——*Conviction —Circumstantial evidence—Minor discrepancies—Effect of.*

Where the evidence against the accused is entirely circumstantial, the effect of which taken as whole is such as to lead only to one inference, namely, that the accused is guilty of the offence charged, the fact there are discrepancies in the evidence or minor difficulties in the prosecution evidence, which are not of much importance, will not entitle the accused to an acquittal. The time or hours mentioned by the accused must not be taken as having been given with reference to time-pieces, but must be taken obviously as having been given only approximately. The accused's failure to explain the circumstances against him has also to be taken into account. (*Burn and Lakshmana Rao, JJ.*) EMPEROR *v.* SATYANARAYANAMURTHY. **1937 M.W.N. 1133.**

——*Conviction—Evidence for—Evidence suppressed by witness.*

What a witness does not say is not substantive evidence on which the accused person can be convicted, though it may be that the witness is not telling all he knows. (*Davis, J.C. and Weston, J.*) SHEWAKRAM ISSARDAS *v.* EMPEROR. **182 I.C. 464=12 R.S. 8=40 Cr.L.J. 661=A.I.R. 1939 Sind 130.**

CRIMINAL TRIAL.

———*Conviction*—Mens rea—*Necessity.*

Although it may be stated generally that no crime can be committed unless there is a *mens rea*, there are exceptional cases where a man is treated as guilty and convicted even though he had no guilty mind. In each case the Court has to look to the wording of the section of the Act which defines the offence. (*Madan, J.*) RIVER STEAM NAVIGATION CO., LTD. *v.* EMPEROR. **16 Pat. 668=1937 P.W.N. 813=18 Pat.L.T. 941=4 B.R. 232=173 I.C. 249=39 Cr.L.J. 275=10 R.P. 395 =A.I.R. 1938 Pat. 66.**

———*Conviction—Murder—Circumstantial evidence—Sufficiency.*

Where the circumstances proved are such that a fair inference and indeed the only reasonable inference from them is that the accused committed the murder of the deceased, the accused can beyond doubt be convicted for murder. (*Burn and Mockett, JJ.*) MITTAYI AMEER SAB *v.* EMPEROR. **1938 M.W.N. 34.**

———*Conviction—Murder—Circumstantial evidence—Sufficiency for conviction.*

In order to convict an accused person of the offence of murder on circumstantial evidence, the Court must be satisfied that the circumstantial evidence is of such a nature that it would be inconsistent with his innocence. If it is not of that character, it cannot be made the basis of a conviction. (*Dhavle and S. C. Chatterji, JJ.*) EMPEROR *v.* MUSSAMMAT JAGIA. **17 Pat. 369=1938 P.W.N. 293=19 Pat.L.T. 268=10 R.P. 531=174 I.C. 524=39 Cr.L.J. 428=4 B.R. 451=A.I.R. 1938 Pat. 308.**

———*Conviction—Propriety—Prosecution not examining eye-witnesses.*

Where in a trial for murder, it appears that the evidence of certain persons, who according to the prosecution, were present and who were eye-witnesses of what actually happened at the time of the occurrence has not been given, it is not safe to convict the accused without taking the evidence of those persons, irrespective of the fact whether their evidence is of any value or not. If at the same time, the accused cannot be acquitted on the evidence as it stands, the case is one in which the accused must be retried. (*Mya Bu and Braund, JJ.*) NGA KAN CHAI *v.* EMPEROR. **171 I.C. 129=38 Cr.L.J. 1040=10 R.R. 133=A.I.R. 1937 Rang. 139.**

———*Conviction—Prosecution failing to examine material witness—Effect.*

Where the prosecution have failed to examine an important witness in the committing Magistrate's Court on whose evidence, the prosecution and the Judge largely rely, and with whose evidence the evidence of other witnesses is closely connected, conviction is not justified. (*Davis, J. C. and Haveliwala, J.*) RABAN LALU *v.* EMPEROR. **32 S.L.R. 709=175 I.C 324=10 R.S. 296=39 Cr. L.J. 618=A.I.R. 1938 Sind 97.**

———*Conviction—Prosecution story false in major part—Conviction based on rest of prosecution story—Sustainability—Charge of assault against master and servant—Acquittal of master on plea of* alibi*—Conviction of servant—Legality.*

A master and his servant were charged together with wrongful restraint and assault of the complainant, on the allegation that while the servant at the bidding of his master restrained the complainant by holding a cloth round his neck, the master slapped him on the cheek. The master pleaded *alibi*, which plea was accepted and he was acquitted. The servant was, however, convicted.

Held, that the major part of the prosecution having been definitely found to be false, it was impossible to accept the rest of it and to base a conviction on the same; and the conviction of the servant was not justified in law and could not stand. (*Pandrang Rao, J.*) MAHOMAD ALLI BATCHA *v.* CHOKKAM CHETTY. **1937 M.W.N. 96 (2).**

———*Conviction—Suspicion.*

In order to record conviction against an accused person there must be sufficient evidence to prove that the offence was committed by him as suspicious, however strong, cannot take the place of legal proof. (*Abdul Qayoom, C.J. and Kichlu, J.*) ILMUN *v.* STATE. **41 P.L.R. J. & K. 17.**

———Conviction—Sustainability—Parties putting written arguments after case is heard—Additional arguments for prosecution—Defence not given opportunity to reply—If trial vitiated. *See* PRACTICE—PROCEDURE. **40 C.W.N. 863.**

———*Conviction—Testimony of interested witnesses corroborated by other evidence—Conviction —Sustainability.*

There may be some witnesses for the prosecution who are interested witnesses, but if their evidence is supported by other evidence, it cannot be said that conviction is based on no legal evidence and that therefore it is unsustainable. (*Varma, J.*) BANKEY SINGH *v.* DASRATH PANDEY. **1938 P.W.N. 681.**

Costs.

———*Costs—Adjournment—Application by accused—Order making him liable for costs—Propriety.*

Although Criminal Courts are empowered to order an accused if he asks for adjournment to pay costs to the complainant, this power should not be exercised in such a manner as to place obstacles in this way of the accused properly defending himself. (*Khaja Mohammad Noor, J.*) ISHAR SINGH *v.* SHAMA DUSADH. **167 I.C. 881=38 Cr.L.J. 484=1936 P.W.N. 561=9 R.P. 449=3 B.R. 379=17 Pat.L.T. 627=A.I.R. 1937 Pat. 131.**

———*Costs—Inability to serve notice on one of the accused.*

Where it was not possible to serve a notice on one of the accused, in spite of several attempts it is illegal and irregular for the Magistrate to award costs against the complainant on this ground. (*Davis.*) KANHAIYA LAL *v.* POLU. **1940 A.M.L.J. 56**

———Costs—Jurisdiction to award—Appeal from order of Civil Court declining to prosecute party—Dismissal—Order for costs—Legality. *See* MYS. CR. P. CODE REGULATION, SS. 476 AND 476-B. **15 Mys.L J. 227.**

Cross-cases.

———Cross-cases. *See also* CASE AND COUNTER-CASE.

———*Cross-cases—Circular No. 52 of Judicial Commissioner's Court, N. W. F. Province—Interpretation.*

By Circular No. 52 of the Court of the Judicial Commissioner, N. W. F. Province, it is intended that in cross-cases relating to same transaction the trial Judge should bring on each record separately the whole story complete by itself and

should give findings on the issues involved in that case independently from those which arise in the other. But it is never intended that a part of the story should be admitted in each case and the other part shut out. (*Almond, J.C. and Mir Ahmad, J.*) IBRAHIM *v.* EMPEROR. **174 I.C. 137=39 Cr.L.J. 401=10 R. Pesh. 58=A.I.R. 1938 Pesh 10.**

———*Cross-cases—Fight between two rival factions—Prosecution of one party ending in discharge—Subsequent prosecution of other party—Prosecution witnesses in later case mostly accused in former case—Conviction—Propriety.*

Where rival parties fight over a feud with sticks and stones, and one of the parties is prosecuted, but discharged, it is unsafe to convict the other party on a prosecution commenced subsequently. Where the prosecution witnesses in the later case were mostly accused in the first case, their statements do not amount to evidence because they are statements of persons who were themselves accused of the same offence in the same affray or fight, and because admittedly they have not told the whole truth. (*Newsam, J.*) SANNA BASYA *v.* EMPEROR. **1937 M.W.N. 1196.**

Defence.

———Defence—Divine influence or inspiration—Temporary non-responsibility on account of divine influence—If valid defence. *See* PENAL CODE, S. 300 FOURTHLY. **1937 M.W.N. 93.**

———Defence—Right of accused to select advocate of his choise—Advocate called as witness for prosecution—If bound to withdraw from case—Test—Principles—Power of Court to require advocate to withdraw. *See* LEGAL PRACTITIONER—ADVOCATE. **41 Bom.L.R. 282.**

———*Defence—Plea of* alibi—*When should be raised.*

A defence of *alibi* if true ought to be raised at the earliest possible moment. (*Young, C.J. and Manroe, J.*) DILWAR *v.* EMPEROR. **163 I.C. 143=37 Cr.L.J. 751=8 R.L. 1023=38 P.L.R. 695=1936 Cr.C. 199=A.I.R. 1936 Lah. 233.**

———*Defence—Plea—Different pleas by accused and counsel—Permissibility.*

The accused himself may on his own behalf take up one line of defence, but it is equally open to his pleader on his behalf to take up another and alternative line of defence. (*Dunkley, J.*) NGA BA SEIN *v.* EMPEROR. **160 I.C. 463=37 Cr.L.J. 293=8 R.R. 384=1935 Cr.C. 1319=A.I.R. 1936 Rang. 1.**

———*Defence—Rule of* res judicata—*Application of.*

Under the law it is perfectly open to an accused person to raise any plea of law or fact which may make for his acquittal. There is nothing like *res judicata* in a criminal trial as long as it does not terminate in either acquittal or conviction so as to attract the provisions of S. 403, Cr. P. Code. (*Niyogi and Gruer, A.J.Cs.*) DIWAN SINGH *v.* EMPEROR. **161 I.C. 635=8 R.N. 219=37 Cr.L.J. 474 (2)=1936 Cr.C. 367=A.I.R. 1936 Nag. 55.**

———*Delay in prosecution—Effect—Suspicion.*

Where a prosecution is launched against a public servant after a delay of nearly four years, it rouses a suspicion that it has been done to serve some other end. (*Manohar Lal, J.*) KALI PRASAD SINGH *v.* SRIKRISHUN CHATURVEDI. **176 I.C. 725=4 B.R. 755=11 R.P. 98=39 Cr.L.J. 774=A.I.R. 1938 Pat. 543.**

Duty of Court.

———*Duty of Court—Accused undefended—Duty to question witnesses.*

In a case in which the accused is undefended and does not cross-examine the prosecution witnesses, it is the duty of the trying Magistrate to question the prosecution witnesses in order to satisfy himself that they are speaking the truth. (*Norman.*) LATIF SHAH *v.* EMPEROR. **1936 A.M.L.J. 132.**

———*Duty of Court—Case arising out of party faction—Duty to ascertain cause of trouble—Hearsay evidence—Admissibility.*

In a case which is the result of party faction in a village, where the evidence on either side is liable to be prejudiced it is necessarily of importance to ascertain the cause of the trouble. Hearsay evidence of the complaint as to what a third person told him cannot be admissible unless that third person is examined as a witness or unless it becomes impossible to secure the attendance of such person. (*Agarwala, J.*) NARSINGH SINGH *v.* EMPEROR. **185 I.C. 594=6 B.R. 215=12 R P. 431=41 Cr.L.J. 209=1939 P.W.N. 712=20 Pat.L.T. 655=A.I.R. 1939 Pat. 659.**

———*Duty of Court—Charge for murder—Circumstantial evidence—Omission of Judge to put adverse points to accused and invite explanation—Effect on conviction.*

Where the evidence against the accused was entirely circumstantial, the only incriminating circumstance being that he was last seen with the deceased and that he sold the jewels the deceased was wearing when he was last seen alive, on the very day on which he was last seen alive.

Held, that in the absence of any opportunity given to the accused by putting the particular points to the accused, and asking him his explanation in respect of these points, it was not proper to draw an inference that the accused stole the jewels from the deceased after murdering him. (*Burn and Pandrang Row, JJ.*) NARSIMHAM, *In re.* **59 Mad. 631 (N.)=44 L.W. 57 (N.)=164 I.C. 1017=37 Cr.L.J. 1074=9 R.M. 212=1936 Cr.C. 763=1936 M.W.N. 521=A.I.R. 1936 Mad. 629=71 M.L.J. 141 (N.).**

———*Duty of Court—Complaint—Facts to be taken and considered as a whole—Splitting up and disregarding some of the facts—Propriety.*

When a complaint is made there must be no splitting up of the facts stated therein. The Court is not entitled to disregard some of the facts, and try or convict the accused for an offence which the remaining facts disclose. It must consider the facts in the complaint as a whole and try the accused for the offence disclosed by the facts as a whole. (*King, J.*) MUTHUVELU KUDUMBURAN *v.* SAMIAYYA KUDUMBURAN. **59 Mad. 1083=165 I.C. 292=37 Cr.L.J. 1134=9 R.M. 228=1936 M.W.N. 641=44 L.W. 631=A.I.R. 1937 Mad. 8=71 M.L.J. 485.**

———*Duty of Court—Complainant's request to summon public officer to produce document—Duty to issue summons.*

A Magistrate is bound to issue summons to a witness for production of documents at the instance of a complainant who prays for the same at his own cost, and is not justified in rejecting the request on the ground that the witness is a public officer and that the complainant should produce an endorsement from the officer concern-

ed that his application for copies of the documents has been rejected. (*Lakshmana Rao, J.*) BALAKRISHNA NADAR *v.* EMPEROR. **1940 M.W.N. 387=A.I.R. 1940 Mad. 746.**

——*Duty of Court—Delay in trying case—Delay of over two years and five months involving 30 postponements—Deprecation of.*

Although the Magistrates are busy and it may be impossible to avoid postponement of a case occasionally because the Court is occupied with other work, when a case is dragging on for months and years, it must be somebody's duty to see that it is fixed on a date when it can certainly be taken up and disposed of without fail. A delay of over two years and five months for the trial of a case under the Prevention of Gambling Act, involving no less than thirty postponements, mostly for want of time, is scandalous and oppressive, to which Magistrates must pay serious attention. (*Broomfield, Ag. C.J. and Sen, J.*) EMPEROR *v.* BAPTIST DE SOUZA. **185 I.C. 203=12 R B. 229=41 Cr.L J. 127=41 Bom.L.R. 974=A. I.R. 1939 Bom. 465.**

——Duty of Court—Dismissal of complaint of offence under S. 304, Indian Penal Code—Order for further enquiry with direction to examine certain witnesses—Refusal to examine them as Court witnesses and calling on complainant to deposit costs of summonses—Propriety—Proper procedure. *See* CR. P. CODE, S. 436. **40 C.W.N. 1251.**

——*Duty of Court—Disposal of applications filed during trial.*

If on an application filed in the course of a criminal trial the Court merely says "file" without passing any orders, it is not a proper way of disposing of it. (*Dhavle, J.*) CHOKAT AHIR *v.* SURAJ SINGH. **186 I.C. 182=6 B.R. 301=12 R.P. 474=41 Cr.L.J. 257=1940 P.W.N. 271=21 Pat.L.T. 627=A.I.R. 1940 Pat. 299.**

——*Duty of Magistrate in cases of nose cutting.*

It was laid down for the information of criminal Courts in Ajmer Province, that ordinarily cases of nose cutting should be committed to the Court of Session for trial. (*Davies.*) BHOMA *v.* CROWN. **1939 A.M.L.J. 165.**

——*Duty of Court—Duty to be satisfied as to reliability of evidence—Duty to apply same standard to evidence for accused as for prosecution.*

The fact that it is not an easy task in a village where there are factions to secure independent evidence does not obviate the necessity of the Court satisfying itself that the evidence on the strength of which it is asked to convict the accused is sufficiently reliable. Nor should the Court apply to different standards to the evidence on the side of the prosecution and to that on the side of the defence. Such a course cannot be justified by reason or by principle. (*Pandrang Row, J.*) VENKATARATNAM *v.* RAMASASTRULU. **190 I.C. 366=1939 M.W. N. 1256.**

——*Duty of Court—Events which might happen after prosecution—If can be taken into consideration.*

A Magistrate trying an accused must, in order to dispose of the case, take into consideration only the events that had taken place until the date on which the accused was prosecuted, and cannot take into consideration the possibility of some act that the accused might do subsequent to the prosecution. (*Venkataranga Iyengar, J.*) MANJAPPA *v.* GOVERNMENT OF MYSORE. **17 Mys. L.J. 440.**

——*Duty of Court—Evidence entirely circumstantial—Two interpretations open—Which to be adopted—Considerations.*

Where two interpretations are possible in a case in which the evidence is entirely circumstantial, it is not right to adopt the interpretation which is unfavourable to the accused in preference to the other which is favourable to the accused unless there is some specific reason which justifies the adoption of the unfavourable interpretation. The Court in such a case ought to consider whether the only reasonable inference is the one which is consistent only with the guilt of the accused and inconsistent with his innocence. (*Pandrang Rao, J.*) KANAKASABAI PILLAI *v.* EMPEROR. **186 I.C. 704=41 Cr.L.J. 369=12 R. M. 682=50 L.W. 452=1939 M.W.N. 883=A.I. R. 1940 Mad. 1.**

——*Duty of Court—Examination of witness—Public Prosecutor failing to put necessary question—Duty of Court to put such question.*

If the Public Prosecutor fails to put a witness a question which the trial Court considers necessary, the Court should itself put the question. (*Khaja Mohammad Noor and Dhavle, JJ.*) EMPEROR *v.* HARIA DHOBI. **18 Pat L.T. 857=1937 P.W.N. 868=10 R.P. 346=172 I.C. 780=4 B.R. 165=39 Cr L J. 156=A.I.R. 1937 Pat. 662.**

——*Duty of Court—Indulgence to accused and facilities to examine witnesses—Duty to give—Anxiety of Magistrate to dispose of case likely to raise fear in mind of accused—Propriety of.*

A Magistrate in his anxiety to dispose of a case should not act in any manner which may raise in the mind of the accused a fear that he will not get justice from the Magistrate or that the latter has already made up his mind. The Magistrate ought to be a little indulgent and to give facilities to the accused to examine his witnesses who are necessary witnesses. (*Khaja Mohammad Noor, J.*) ISHAR SINGH *v.* SHAMA DUSADH. **167 I.C. 881=9 R.P. 449=38 Cr.L.J. 484=3 B.R. 379=1936 P.W.N. 561=17 Pat.L.T. 627=A.I.R. 1937 Pat. 131.**

——*Duty of Court—Justice to be done to accused and to appear to be done.*

It is the duty of Courts in criminal trials to give a judicial finding, after applying their minds judicially to the facts of the case, with reference to the case of each individual accused, and the evidence adduced on behalf of the accused in support of their case must also be carefully and fully considered. Though the Courts may not be able to come to a conclusion in favour of the accused in every case, justice must not only be done to the accused in fact, but must also appear to be done. (*Manohar Lal, J.*) MEWALAL SINGH *v.* EMPEROR. **18 Pat.L.T 869=1937 P.W.N. 908 =4 B.R. 202=172 I.C. 933=10 R.P. 368=39 Cr. L.J. 221=A.I.R. 1938 Pat. 34.**

——*Duty of Court—Magistrate attending to other work during hearing—Legality of trial.*

When a Magistrate is engaged in the trial of a case, it is his duty to give his undivided attention to it. If during the hearing of the case he was at times "doing some mechanical work of signing miscellaneous papers", it cannot be said that there was any legal and proper trial of the case at all. (*Smith, J.*) JAGMOHAN SINGH *v.* EMPE-

ROR. 166 I.C. 224=9 R.O. 294=38 Cr.L.J. 150=1937 A.Cr.C. 5=1936 O.L.R. 728=1937 O.W.N. 56=A.I.R. 1937 Oudh 126.

———*Duty of Court as regards defence of poor accused.*

With regard to the defence of prisoners who are too poor to instruct lawyers on their own account, those whose duty it is to select lawyers to defend at the expense of the Crown should not treat the selection as a matter of patronage for the benefit of the lawyer so appointed. The selection should be made from among young men of marked ability; and where the persons actually appointed do their work very badly and conspicuous opportunities for cross-examination and obvious arguments are entirely ignored, the trial Judge should remember that he has duty not only to prosecution but to defence. He has the diary in front of him, and should use his greater experience to cross-examine the witness when he sees that the defence lawyer is incompetent. He should not do this unnecessarily, but only when it is desirable in the interest of justice. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) DARPAN POPTDARIN *v.* EMPEROR. 173 I.C. 833=4 B.R. 342=1938 P.W.N. 266=10 R.P. 456=39 Cr.L.J. 384=A.I.R. 1938 Pat. 153.

———*Duty of Subordinate Magistrates and executive officers—Judicial order by District Magistrate—Duty of lower Court to carry out and to be fair and just—Procedure not to shake public confidence.*

When a matter has reached a judicial stage, executive officers should be careful to see that judicial proceedings are conducted in such a manner as not to shake the confidence of the public in the least. Where the District Magistrate, on being moved against the initiation of proceedings under S. 110, Cr. P. Code, by a Sub-Divisional Officer, passed a judicial order directing a fresh local inquiry, it is the bounden duty of the subordinate officer to carry out that order; it is not for him to try to change the view of the District Magistrate by seeing him and having a personal discussion. A statement by the subordinate officer to the effect "that he must discuss with the District Magistrate regarding the order to hold an enquiry before continuing the proceedings" should never find a place in the order sheet. (*Manohar Lall, J.*) NARENDRANATH JHA, *In the matter of.* 1938 P.W.N. 588=19 Pat.L.T. 542=176 I.C. 849=4 B.R. 767=39 Cr.L.J. 811=11 R.P. 116=A.I.R. 1938 Pat. 533.

———*Duty of Judge—Perverse attitude—Test.*

Where a Judge has said that, as it is a matter of doubt whether the questions asked in the examination-in-chief of certain defence witnesses were leading questions or not, he would presume the point in favour of the accused, it is difficult to see how the accused can call this attitude of the Judge perverse when the interpretation has been entirely in his own favour. (*Grille, J.*) HAFIZ AHESANALI *v.* EMPEROR. I.L.R. (1938) Nag. 595=176 I.C. 465=11 R.N. 54=39 Cr.L.J 747=A.I.R. 1938 Nag. 303.

———*Duty of Court—Plea of private defence not raised by accused—Plea arising on evidence—Duty of Court to raise.*

Though the onus to plead the right of private defence, or any other general exception, is upon the accused and it is not specifically pleaded by the accused, it is open to the Court to consider such plea and therefore cannot in justice be overlooked by the Court. A.I.R. 1927 Mad. 97 and 26 I.C. 158, Appr. (*Dunkley, J.*) NGA BA SEIN *v.* EMPEROR. 160 I.C 463=8 R.R. 384=37 Cr.L J. 293=1935 Cr.C. 1319=A.I.R. 1936 Rang. 1.

———Duty of Court—Processes—Use of for purposes of prosecution. *See* CR. P. CODE, S. 205. 1937 A.M.L.J. 60.

———*Duty of Court—Protection against abuses of the criminal procedure.*

A criminal prosecution which has little chance of ultimate success, is frequently used as a means of annoyance. In such cases it is the duty of the Magistrate to protect the public against such abuses of the criminal procedure. (*Norman.*) BANO *v.* RAHIM BANO. 1939 A.M.L.J. 41.

———*Duty of Court—Refusal to permit examination of all witnesses summoned on behalf of prosecution—When justified.*

A Magistrate cannot refuse to permit the examination of all the witnesses summoned on behalf of the prosecution unless he is in a position upon the evidence already given to discharge the accused person without examining the others. (*King, J.*) SIVAKATHCHAM PILLAI *v.* EMPEROR. 1937 M.W.N. 991.

———*Duty of Court—Rejection of improbable stories.*

It requires a great deal of courage to put forward intrinsically improbable stories before a Court of Justice but it demands greater degree of credulity on the part of a Judge to accept them as true. (*Subhedar, A.J.C.*) MT. PARVATI *v.* EMPEROR. 163 I.C. 319=37 Cr.L J. 821=8 R. N. 307=1936 Cr.C. 553=A.I.R. 1936 Nag. 88.

———*Duty of Magistrate—Transfer application pending—Disposal of case—Propriety.*

When an application for transfer of a case is pending, it is the duty of the trial Magistrate to keep the disposal of the case in abeyance until final orders are passed on the transfer application. If he decides the case without awaiting such orders, his action is clearly irregular and open to grave objection. (*Abdul Qayoom, C.J.*) LACHHU *v.* STATE. 42 P.L.R. J. & K. 245.

Duty of Police.

———*Duty of police—Raising of communal questions—Undesirability.*

Police Officers are not to be permitted to raise communal questions with a view to serve their own purposes. The only pertinent point in a criminal trial is the decision as to the guilt or innocence of the accused. (*Rachhpal Singh and Ismail, JJ.*) ABDUL SUBHAN *v.* EMPEROR. 186 I.C. 192=1939 A.W.R. (H C.) 768=1939 A.Cr. C. 182=1939 A.L.J. 966=12 R.A. 384=41 Cr.L. J. 258=A.I.R. 1940 All. 46.

———*Duty of Police—Investigation—Conflicting versions of occurrence.*

Where conflicting versions of an occurrence are presented to the police in the course of their investigation, the police should make up their minds as to which of the versions is true and should send accused for trial accordingly. When there are two versions of an occurrence which cannot possibly be true, it is clearly improper that persons should be sent up for trial on the basis both of one version and of the other. (*Nana.*

when the witnesses are more or less the same. (*Pandrang Row, J.*) MOHIDEEN PICHAI ROWTHER *v.* EMPEROR. **186 I.C. 525=12 R.M. 671=41 Cr. L.J. 337=1939 M.W.N. 879=50 L.W. 557=A.I. R. 1940 Mad. 43.**

———*Evidence — Appreciation of—Eye-witness not coming forward immediately.*

The mere fact that an eye-witness does not come forward immediately an investigation is begun, is not by itself necessarily a sufficient ground for rejecting his testimony. (*Ranjitmal and Sukhdeonarain, JJ.*) RUGSINGH *v.* SARKAR. **1939 Mar.L.R. 117 (Cr.).**

———*Evidence—Duty of prosecution—Evidence untrustworthy and unreliable as regards some accused—If can be relied on as regards others.*

It is the duty of the prosecution to establish the guilt of the accused by evidence which satisfies the Court, and it cannot be said that evidence which is for the most part untrustworthy can be relied upon or can be said to satisfy the Court as regards a few of the accused when the evidence of the same witnesses does not satisfy the Court in respect of a large number of the accused. The attempt to draw a distinction between the credibility of the same person's evidence so far as it concerns some of the accused and so far as it concerns others is an attempt to do something which is really impossible, and it certainly does not promote the advancement of justice. (*Pandrang Row, J.*) VENKATARATNAM *v.* RAMASASTRULU. **190 I.C. 366=1939 M.W.N. 1256.**

———*Evidence — Appreciation of —Immaterial discrepancies in evidence of witness—If ground for not believing him.*

The fact that there are discrepancies in the evidence of a witness is not *per se* a ground for not believing that witness when the discrepancies are absolutely immaterial. A distinction has to be made between discrepancies that matter and those which do not. A certain amount of latitude for mistake must be allowed to witnesses in their evidence, especially in respect of events occurring after dark. (*Beasley, C.J., Mockett and Horwill, JJ.*) PUBLIC PROSECUTOR *v.* SUBRAMANIA ODAYAR. **1937 M.W.N. 557 (F.B.).**

———*Evidence—Appreciation of—Minor discrepancies—Effect of.*

It is well known that a Burman Buddhist is as a rule reluctant to give evidence against an accused person in a murder case. If he can help it, he will always try and avoid it. The natural reluctance becomes more pronounced when the accused person happens to be a pongyi. Therefore unless a more cogent reason than that of discovering a few discrepancies is given, evidence given by such persons should not be rejected. (*Mosely and Ba U, JJ.*) U ZAWANA *v.* EMPEROR. **161 I.C. 113=37 Cr.L.J. 418=8 R.R. 452=1936 Cr.C. 88=A.I.R. 1936 Rang. 60.**

———*Evidence—Appreciation of—Production of a false witness by prosecution.*

The fact that the prosecution produces a false witness for the purpose of procuring a conviction must affect the mind of the Court as to the rest of the evidence, and when the other witnesses are easily amenable to police influence, the effect will be greater. It would be extremely unsafe for the Court to act upon any of the evidence in the case. (*Young, C.J. and Monroe, J.*) ABDUL SATTAR *v.* EMPEROR. **17 Lah. 460=161 I.C, 793=37 Cr.L.J. 493=8 R.L. 802=38 P.L.R. 1=1936 Cr.C. 248=A.I.R. 1936 Lah. 278.**

———*Evidence—Appreciation — Semi-communal matter—'Deadset' against a particular individual —Method of approach.*

It should no doubt be recognised that in a semi-communal matter, it is always possible that a 'dead-set' may be made against a particular individual of prominence or influence, and that that possibility should always be borne in mind; but the very large volume of evidence by itself should not be treated as giving rise to a suspicion of its truth. Sweeping generalisations like 'the larger the number the greater the suspicion', are a less safe guide than an examination of the evidence itself in the light of the circumstances of the case. (*Collister and Braund, JJ.*) EMPEROR *v.* AFTAB MAHOMED KHAN. **188 I.C. 649=13 R.A. 55=1940 A. Cr.C. 24=1940 A.L.J. 205=41 Cr.L.J. 647=1940 A.W.R. (H.C.) 85=A.I.R. 1940 All. 291.**

———*Evidence—Appreciation of—Slight discrepancies—Effect of.*

Slight differences in the story of witnesses of the same event show that those witnesses are giving their own account of what happened and not telling a single story that has been agreed upon between them. (*Young, C.J. and Monroe, J.*) JAGAT SINGH *v.* EMPEROR. **165 I.C. 795=9 R.L. 317=38 Cr.L.J. 84.**

———*Evidence — Appreciation of — Statement after discovery of incriminating evidence.*

The fact that the witnesses kept quiet for three full days and gave to the Police the present version of the affair at a time when some incriminating evidence was discovered against them is sufficient to rob their evidence of all value. (*Abdul Qayoom, C.J. and Kichlu, J.*) ILMUN *v.* STATE. **41 P.L.R. J. & K. 17.**

———*Evidence—Appreciation of—Truth mixed with falsehood—Duty of Magistrate.*

It is the duty of the trying Magistrate to sift the truth from falsehood and to find out what the real truth of the matter is and not to throw out the entire case merely on the ground that the matter has been exaggerated by the complainant and that truth has been mixed with falsehood. (*Zia-ul-Hasan, J.*) RAM DAYAL *v.* MATA DIN. **166 I.C. 987 (1)=9 R.O. 352=1937 O.L.R. 82=1937 A. Cr.C. 57=38 Cr.L.J. 329=1937 O.W.N. 281=A.I.R. 1937 Oudh 283.**

———*Evidence—Appreciation—Uncross-examined evidence—Presumption as to—Accused not represented.*

The fact that the accused did not cross-examine the witnesses is really of no value in a case where he was unrepresented and was ignorant and could not be expected to know the legal presumption that uncross-examined evidence is probably reliable. (*Zia-ul-Hasan and Madeley, JJ.*) EMPEROR *v* MULHA. **170 I.C. 482=10 R.O. 14=1937 O.L.R. 432 (2)=1937 A. Cr.C. 111=38 Cr. L.J. 889=1937 O.W.N. 816.**

———*Evidence — Appreciation—Village feuds—Testimony of partisans—Value.*

In cases where the existence of party feuds is patent, though it would be wrong to reject the testimony of witnesses merely because they were related or were partisans, yet when the witnesses told lies on material points and their conduct was unnatural, the Court cannot act on such evidence.

CRIMINAL TRIAL.

(*Young, C.J. and Monroe, J.*) JOWAND SINGH *v.* EMPEROR. 39 Cr.L.J. 426=10 R.L. 564=174 I.C. 431=A.I.R. 1938 Lah. 150.

———*Evidence—Approver's testimony—Value—Reliability.*

The question as to whether or not the statement of an approver should be taken into consideration or should be totally rejected is one which will depend on the circumstances of each case. Beyond stating that the statement of an approver must be very thoroughly scrutinised and should not be accepted unless it is corroborated by other independent evidence in the case, no hard and fast rule can be enunciated which will govern all cases. (*Rachhpal Singh, J.*) BHOLA NATH *v.* EMPEROR. I.L.R. (1939) All. 736=184 I.C. 191 =12 R.A. 189=40 Cr.L.J. 856=1939 A. Cr.C. 98 =1939 A.L.J. 785=1939 A.W.R. (H.C.) 464= A.I.R. 1939 All. 567.

———*Evidence—Charge against three persons—Acquittal of two on ground of evidence being insufficient—If ground for acquittal of third also when sufficient evidence exists against him.*

If of three equally guilty people two are so fortunate as to escape owing to the evidence not sufficiently implicating them as a result of the strict application of the rules of evidence, it is neither right nor logically sound to acquit the other accused against whom there is sufficient evidence justifying a conviction. (*Burn and Mockett, JJ.*) RAMI REDDI, *In re.* 52 L.W. 420 (2)=1940 M.W.N. 1045.

Evidence—Circumstantial evidence.

———*Evidence—Circumstantial evidence—Sufficiency.*

Where circumstantial evidence is relied upon by the prosecution, that evidence must be of such a character that it is compatible only with the guilt of the accused and with no other theory. (*Bennet and Verma, JJ.*) JIT SINGH *v.* EMPEROR. 1938 A.W.R. (H.C.) 649=1938 A. Cr.C. 115.

———*Evidence—Accused seen going away soon after the offence from the place of crime—Dying declaration—Sufficiency for conviction.*

When from the evidence of prosecution witnesses it was accused who was seen going away from underneath the 'kabyin' with something long in his hand, soon after the stabbing and when there was sufficient moonlight to enable them to recognize the features of the assailant, this, coupled with the dying declaration of the deceased, if no satisfactory rebutting evidence is produced, clearly establishes the fact that it was the accused who had attacked the deceased. (*Mosely and Ba U, JJ.*) U ZAWANA *v.* EMPEROR. 161 I.C 113=37 Cr L J. 418=8 R.R. 452=1936 Cr.C. 88=A.I.R. 1936 Rang. 60.

———Evidence—Circumstantial evidence—Position of corpse—Nature of offence—Murder or suicide. *See* CRIMINAL TRIAL—OFFENCE. 18 Pat.L.T. 683=A.I.R. 1937 Pat. 652.

———*Evidence—Circumstantial evidence raising suspicion—Sufficiency for conviction.*

An accused can be convicted on purely circumstantial evidence only in a case where the circumstantial evidence is such that it can be explained only on the supposition that the accused is guilty. If there is another possible explanation, the accused must be acquitted. When the circumstances raise only a considerable suspicion against the accused and no more, the accused cannot be convicted but must be given the benefit of the doubt. (*Norman, I.C.S.*) RAM SINGH *v.* EMPEROR. 1936 A.M.L.J. 85.

———*Evidence—Circumstantial evidence—Sufficiency for conviction—Test.*

The legal criterion applicable, where the case for the prosecution is based on circumstantial evidence, is whether the evidence led would satisfy the jury beyond reasonable doubt of the guilt of the accused. It is then for the jury, or for the Judge if there be no jury, to say whether, applying that criterion to the facts proved, the verdict should or should not be one of guilty. (*Lord Alness.*) MANGAL SINGH *v.* EMPEROR. 64 I.A. 134=18 Lah. 371=46 L.W. 33=1937 A.L. R. 401=1937 A. Cr.C. 89=1937 P.W.N. 503= 31 S.L.R. 300=168 I.C. 432=39 Bom.L.R. 960= 1937 A.W.R. 1014=41 C.W.N. 805=1937 O.W. N. 540=39 P.L.R. 426=38 Cr.L.J. 573=9 R.P. C. 284=3 B.R. 501=1937 M.W.N. 633 (2)= 1937 M.Cr.C. 381=1937 O.L.R. 297=A.I.R. 1937 P.C. 179=(1937) 2 M.L.J. 684 (P.C.).

———*Evidence — Circumstantial evidence — Charge of murder—Conviction based on such evidence—When justified.*

Where the charge of murder is based purely on circumstantial evidence, that evidence must point conclusively to the guilt of the accused, and must practically exclude the possibility of murder having been committed by other persons. It must be such as to show that within all human probability the act must have been done by the accused. Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though no explanation of them is forthcoming. (*Zia-ul-Hasan, C.J. and Bennett, J.*) EMPEROR *v.* MENDAI. 14 Luck. 635=1939 A.W.R (C.C.) 102=1939 A. Cr.C. 133=1939 O.L.R. 498=183 I.C. 307=1939 O.A. 654=12 R.O. 23=40 Cr.L.J. 764=1939 O. W.N. 700.

———*Offence—Nature of—Inference from circumstances—Murder charge—Position of corpse—Inference from—Homicide and suicide—Distinction—Test to find out—Dead body with throat cut and with face downwards—Offence inferable.*

There are certain methods by which homicidal and suicidal throat wounds are ordinarily distinguished. If more than one severe wound is present, the case is usually one of murder; a suicide, may make more than one wound, but only one of them will be severe. Again self-inflicted wounds are usually less severe and deep, and inference can sometimes be drawn from the position in which the body is found. An intending suicide seldom cuts his throat while lying in bed; he usually does so in the erect or sitting position, and on the supervention of unconsciousness he collapses to the floor and probably turns over his face A body stretched out in bed with a wound on the throat suggests murder during sleep, one on its back on the floor makes it possible to infer homicide in which more than one person has had a hand; a body face downwards is almost certainly of a suicide. But the position of the body is not of course an absolute indication of the nature of the case, but should be considered along with other circumstances. (*Rowland and Varma, JJ.*) EMPEROR *v.* SHEO CHANDRA PRASAD. 172 I.C. 171 =10 R.P. 292=39 Cr.L.J. 66=18 Pat.L.T. 683 =A.I.R. 1937 Pat. 652.

CRIMINAL TRIAL.

Evidence—Cross-examination.

———*Evidence—Cross-examination— Magistrate restricting cross-examination—Conviction, if legal.*

Where the Magistrate did not allow more than such cross-examination as he thought to be necessary nor considered it necessary to have a record of the evidence in the language of the Court, his order of conviction is liable to be set aside. It is of the utmost importance that the procedure in the trial of a criminal case should inspire confidence in the parties. (*Niamatullah, J.*) RADHE LAL *v.* EMPEROR. **1936 A.W.R. 295=1936 All.Cr.C. 87=1936 A.L.J. 667.**

———*Evidence — Cross-examination—Order that each question must be repeated three times—Propriety.*

Though it is the duty of every Court to see that the questions are properly understood by the witnesses and the cross-examining lawyer does not take undue advantage of the foolishness or simplicity or the want of understanding of a witness in the witness-box, a general order that each question must be repeated three times irrespective of the consideration whether the witness has understood the first question or not and irrespective of the standard of intelligence of the witness can hardly be justified. (*Mohamad Noor, J.*) LAL BAHADUR RAUT *v.* EMPEROR. **175 I.C. 110=4 B.R. 533=10 R.P. 581=39 Cr.L.J. 527=A.I.R. 1938 Pat. 238.**

———*Evidence—Cross-examination of witness—Undue interference by Court—Propriety.*

While it is the duty of every Court to keep the cross-examination of a witness within legitimate bounds it must be careful, in the discharge of that duty, not to exercise too effective a control so as to unduly curtail legitimate cross-examination. Undue interference must be avoided by the presiding Judge as it has, more often than not, the result of robbing the cross-examination of its efficacy. (*Iqbal Ahmad, J.*) SALIG RAM *v.* EMPEROR. **167 I.C. 515=9 R.A. 550=1936 A.Cr.C. 207=1936 A.W.R. 967=38 Cr.L.J. 416=1937 All.L.R. 201=A.I.R. 1937 All. 171.**

———*Evidence—Right of cross-examination—Witness against accused withdrawn from witness-box and made accused—Conviction—Sustainability.*

Where the witness who gave evidence against the appellants was withdrawn from the witness-box and again made an accused, so that the appellants were thereby prevented from cross-examining him,

Held, that the appellants here were deprived of a fundamental right given them by law and that the conviction could not on that ground alone be upheld. (*Derbyshire, C.J., Mukerji, Panckridge, M.C. Ghose and Bartley, JJ.*) HARIHAR SINHA *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 711=163 I.C. 9=37 Cr.L.J. 758=8 R.C. 698=40 C.W.N. 876=63 C.L.J. 307=1936 Cr.C. 583=A.I.R. 1936 Cal. 356 (F.B.).**

Evidence—Demeanour of accused.

———*Evidence—Demeanour of accused—Relevancy.*

The demeanour of an accused person is entirely irrelevant for deciding the question of the guilt or innocence of the accused. (*King, J.*) PUBLIC PROSECUTOR *v.* SINNAKKAL. **1937 M.W.N. 876.**

CRIMINAL TRIAL.

Evidence—Duty of Court.

———*Evidence—Duty of Court to examine all witnesses produced by complainant—Dismissal of complainant after hearing only some of the witnesses produced—Legality.*

A Magistrate is not justified in making up his mind before he hears all the evidence that the complainant desires to place before him. He ought to keep his judgment in suspense till the whole case is closed. If he dismisses the complaint or case after hearing only some of the witnesses produced by the complainant without giving the complainant opportunity to examine all the witnesses, his order of dismissal will be set aside. (*Pandrang Row, J.*) LOUIS AMMAL FERNANDO *v.* SUSAI FERNANDO. **1937 M.W.N. 836 (1).**

———*Evidence—Duty of Court—Comments by, on.*

Judges sitting in appeal are inclined to attach great weight to the views of the trial Judge on the manner in which evidence has been given before them. It is therefore essential that a trial Judge should endeavour to be strictly accurate in making any comment on the evidence given before him. (*Young, C.J. and Monroe, J.*) MEHNGA ALLA BAKHSH *v.* EMPEROR. **175 I.C. 96=39 Cr.L.J. 534=10 R.L. 675=A.I.R. 1938 Lah. 288.**

———*Evidence—Duty of Court—Prosecution and defence not calling and examining material witness—Duty of Court to call and examine such witnesses.*

There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such is the examination of witnesses of its own accord when for certain obvious reasons neither party is prepared to call witnesses who are known to be in a position to speak to important relevant facts. In such cases the Court should call and examine witnesses of its own accord, even though neither the prosecution nor the defence calls them. (*Pandrang Row, J.*) DONALD DIXON *v.* EMPEROR. **1938 M.W.N. 817=48 L.W. 363=178 I.C. 341=11 R.M. 443=40 Cr.L.J. 35=1938 M.Cr.C. 246=A.I.R. 1938 Mad. 900.**

———*Evidence—Duty of Court in recording—Case turning on evidence of boy of tender age—Duty to record evidence in the form of questions and answers.*

In a case where the guilt or innocence of the accused depends almost wholly upon the evidence of a witness of tender age, *e.g.*, a boy of six years, the trial Court would do well to take down that evidence in the form of questions and answers, so as to enable the High Court, when the case comes on before it on a reference, to decide whether the opinion of the jury or the opinon of the trial Judge is to be preferred. (*Khaja Mohammad Noor and Dhavle, JJ.*) EMPEROR *v.* HARIA DHOBI. **18 Pat.L.T. 857=1937 P.W.N. 868=10 R.P. 346=172 I.C. 780=4 B.R. 165=39 Cr.L.J. 156=A.I.R. 1937 Pat. 662.**

———*Evidence—Duty of Judge to scrutinise—Weight to be attached to evidence of witnesses—Considerations.*

It is the duty of the Judge who holds the trial to scrutinize the prosecution evidence on its own merits in each case. In the administration of criminal justice, want of interest in the prosecution does not by itself stamp the evidence of a

witness with truth. The weight, which is to be attached to the testimony of a witness depends, in a large measure upon various considerations some of which are that on the face of it his evidence should be in consonance with probabilities and consistent with other evidence, and should generally so fit in with material details of the case for the prosecution as to carry conviction of truth to a prudent mind. If these elements are wanting in the testimony of a witness, however independent he may appear to be, his evidence should not be relied on in the decision of criminal cases, where persuasion of guilt must amount to a moral certainty. (*Subhedar, A.J.C.*) MT. PARVATI *v.* EMPEROR. **163 I C 319=37 Cr.L J. 821 =8 R.N. 30=1936 Cr.C. 553=A.I.R. 1936 Nag. 88.**

——Evidence—Dying declaration—Corroboration—Practice. *See* EVIDENCE ACT, S. 32 (1). **1940 M.W.N. 163.**

Evidence—Evidence of children.

——*Evidence—Evidence of children—Conviction on—Propriety.*

The evidence of children unless immediately available and unless received before any possibility of coaching is eliminated is notoriously dangerous and it is unsafe to convict on the evidence of a child. (*Courtney-Terrell, C.J. and Manohar, Lall, J.*) DARPAN POTDARIN *v.* EMPEROR. **173 I.C. 833=4 B.R. 342=1938 P.W.N. 266=10 R.P. 456=39 Cr.L.J. 384=A.I.R. 1938 Pat. 153.**

Evidence—Expert evidence.

——*Evidence—Expert evidence—Value of—Conviction—If can be based on.*

The opinion of an expert has a corroborative value only and is useful for ascertaining whether the direct evidence is true or not. It is absolutely unsafe to base a conviction on that opinion only, when there is no other evidence in the case; for it can never be said with certainty that the weapon with which the crime is said by the expert to have been committed, though found in possession of the accused person, was in his possession when the offence was committed. (*Almond, J.C. and Mir Ahmad, A.J.C.*) ABBAS HAYAT KHAN *v.* EMPEROR. **172 I.C. 540=10 R. Pesh. 41=39 Cr.L.J. 234=A.I.R. 1937 Pesh. 99.**

Evidence—First information report.

——*Evidence — First information report—Value—Conviction—If can be based on statements in such report.*

The first information report is not substantive evidence, and the accused cannot be convicted on statements made therein and not repeated at the trial. (*Norman, I.C.S.*) LATIF SHAH *v.* EMPEROR. **1936 A.M.L.J. 132.**

Evidence—Hostile witness.

——*Evidence—Hostile witness—Value of evidence of.*

The evidence of hostile witness is evidence in the same manner and to the same extent as that of any other witness, whether called by prosecution or defence. (*Rowland, J.*) DEODHARI KOERI *v.* EMPEROR. **166 I.C. 726=9 R.P. 342=38 Cr.L.J. 271=3 B.R. 216=A.I.R. 1937 Pat. 34.**

——Evidence—Hostile witness — Prosecution witness giving evidence contrary to other evidence—If ground for treating him hostile and for cross-examining. *See* EVIDENCE ACT, S. 154. **A. I.R. 1936 Mad. 516.**

Evidence—Identification.

——*Evidence — Identification —Appreciation—Principles.*

While any two or more men may well be in a position to recognise a particular group of rioters and those only, yet where witnesses who have no obvious connection with one another furnish long lists of identical people whom they say they recognised among the rioters, there is a possibility that this identification is the result of collaboration between them rather than of actual observation. The true principle to be adopted in such cases is not to discard their evidence altogether, but to regard it, nevertheless with a great deal of suspicion unless it is confirmed from other reliable sources. (*Collister and Braund, JJ.*) EMPEROR *v.* AFTAB MAHOMED KHAN. **188 I.C. 649=13 R.A. 55=1940 A.Cr.C 24=1940 A.L J. 206=41 Cr.L.J. 647=1940 A.W. R. (H.C.) 85=A.I.R. 1940 All. 291.**

Evidence—Medical evidence.

——Evidence—Medical evidence—Duty of prosecution—Murder trial—Medical witness present in Court—Prosecution dispensing with medical witness with consent of defence counsel—Legality—Conviction — Sustainability. *See* CR. P. CODE, S. 509. **59 Mad. 349=70 M.L.J. 447.**

——*Evidence—Medical evidence—Opinion of medical man—Value of.*

The opinion of a medical man which is not based on any well-defined inexorable laws of nature cannot be taken as decisive especially where there is direct evidence opposed to it. (*Abdul Qayoom, C.J. and Kichlu, J.*) SITA RAM *v.* STATE. **42 P.L.R. J. & K. 31.**

——*Evidence—Medical evidence*—Post mortem *certificate—If evidence—Value and use of.*

A Criminal Court is not justified in treating the *post mortem* certificate as evidence and in extracting a sentence from it and relying on it as if it were positive evidence in the case. The *post mortem* certificate is not evidence. It can be properly used by the person who granted the certificate, when giving evidence, to refresh his memory, and it can also be used as a record of what he observed at the time to corroborate, or perhaps to contradict, whatever he might say in the witness box. But it cannot by itself be substantive evidence. It is clear that it would be unsafe to act upon an isolated sentence in a *post mortem* certificate. (*Burn and Mockett, JJ.*) RAMASWAMY *v.* EMPEROR. **181 I.C. 849=11 R. M. 870=40 Cr.L.J. 596=1938 M.Cr.C. 8=1938 M.W.N. 36=47 L.W. 272=A.I.R. 1938 Mad. 336.**

Evidence—Reliability of.

——*Evidence—Reliability.*

"A witness should not be partially believed and partially disbelieved" is a dictum which cannot possibly be upheld. (*Grille, J.*) RAGHUNATHMAL *v.* PATIRAM. **I.L.R. (1938) Nag. 157=172 I.C. 177=10 R.N. 172=39 Cr.L.J. 75=A.I.R. 1937 Nag. 394.**

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———*Evidence—Reliability— Defence witness—Presumption of unreliability.*

A Court is not entitled to decide beforehand that a witness cited by the defence is unworthy of credit. (*Mackney, J.*) NGA TA TE *v.* THE KING. 177 I.C. 946=11 R.R. 187=39 Cr.L.J. 975=A.I.R. 1938 Rang. 295.

———*Evidence—Reliability—Prosecution witness found unreliable—Evidence in favour of accused, if can be relied upon by accused.*

Though a prosecution witness may have been found by a Court to be an unreliable witness, nevertheless the accused is entitled to rely on the statement of such a witness and particularly so where the circumstances support the statement. (*Rachhpal Singh and Ismail, JJ.*) MATHURA *v.* EMPEROR. 1938 A.W.R. (H.C.) 849=1939 A.Cr. C. 93.

Evidence—Right of accused to adduce.

———*Evidence—Right of accused to adduce—Duty of Magistrate.*

Undoubtedly, a Magistrate is bound to allow an accused to defend himself, but on the charge brought against him and to which he has to answer; but the Magistrate should not allow for instance, an accused person charged with theft to bring evidence to justify his theft. He can however bring evidence to explain his motive and his actions so that the Court can come to a true and just decision. (*Davis, J.C.*) OM RADHE *v.* EMPEROR. I.L.R. (1940) Kar. 113= 183 I.C. 460=40 Cr.L.J. 803=12 R.S. 55=A.I.R. 1939 Sind 238.

Evidence—Sufficiency of.

———*Evidence—Sufficiency of.*

There is no provision in the Indian law requiring more than one witness to prove any fact, (*Weston.*) MEHTA *v.* EMPEROR. 1937 A.M.L.J. 134.

———*Evidence*—Sufficiency of—Police agent—Evidence of—Sufficiency for conviction—Corroboration—Necessity—Charge of gambling. *See* BOMBAY PREVENTION OF GAMBLING ACT, S. 5. 39 Bom.L.R. 613.

———*Evidence— Sufficiency of—Statements by accused to police—Use of against co-accused.*

Accused persons are to be convicted upon the evidence produced by the prosecution and not by the statements made by co-accused in the trial. A person's position as a witness or accused is, so far as the admissibility of evidence is concerned, determined by, not what was done by the police in the investigation, but by his position at the trial. A statement made by the accused can be used against his co-accused only if it is a confession within the meaning of S. 30, Evidence Act. Statements made by the accused to police are subject to great restrictions under the Evidence Act. These restrictions are not to be evaded by the subterfuge of making the accused persons as first witnesses and taking statements from them as such. This is a procedure most strongly to be deprecated. (*Davis, J.C. and Weston, J.*) SHEWAKRAM ISSARDAS *v.* EMPEROR. 182 I.C. 464=12 R.S. 8=40 Cr.L.J. 661=A.I.R. 1939 Sind 130.

Evidence—Suspicion.

———Evidence—Suspicion, if can take the place of proof. *See* CRIMINAL TRIAL—PROOF OF GUILT. 40 P.L.R. J. & K. 1.

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Evidence—Value of.

———*Evidence—Value of—Alibi evidence.*

It is of course easy to give evidence of alibi, but where the case for the prosecution depends entirely on the identification in somewhat doubtful circumstances of the accused, the evidence of alibi cannot be lightly brushed aside. (*Mackney, J.*) NGA YE GYAN *v.* EMPEROR. 170 I.C. 273=38 Cr.L.J. 890=10 R.R. 76=A.I.R. 1937 Rang. 267.

———*Evidence—Value of—Approver's statement.*

A conviction can be based on the statement of an approver if it is fully corroborated in material particulars by independent evidence. (*Abdul Qayoom, C. J.*) GHANI DAR *v.* STATE. 42 P.L. R. J. & K. 116.

———*Evidence—Value of—Approver's uncorroborated evidence.*

A conviction cannot be based on the evidence of an approver when it has not been satisfactorily corroborated by independent evidence and it is also contradicted by the medical evidence. (*Abdul Qayoon, C.J. and Kichlu, J.*) KAPURA *v.* STATE. 42 P.L.R. J. & K. 101.

———*Evidence—Value of—Cartridges.*

Provided enough points of similarity and dissimilarity in two fired cartridges are taken, the chances of two different bolts making identically the same marks are so remote as to be to all intents and purposes non-existent. (*Hamilton, J. C. and Mir Ahmad, A. J. C.*) AWAL KHAN *v.* EMPEROR. 164 I.C. 145=9 R. Pesh. 11=37 Cr.L. J. 889=1936 Cr.C. 744=A.I R. 1936 Pesh. 152.

———*Evidence—Value of—Conduct of accused.*

The fact that an accused person remains silent when denounced in the presence of witnesses by another person as the latter's assailant is admissible in evidence. But the degree of weight to be attached to his silence in such circumstances depends upon the nature of the case. Many factors must be taken into account in assessing it and no hard and fast rule can be laid down. It is not permissible to arrive at an adverse verdict on the strength of the opinions formed as to the conduct of an accused person; or to allow the silence of an accused person to supplement a case for the prosecution which at the conclusion of the evidence heard on both sides is too weak to justify conviction. If, however, the silence of the accused is to be regarded as an important point for the prosecution, it is necessary by reason of S. 342, Cr. P. Code, for the trial Court to put to the accused as part of the case for the Crown the fact that he remained silent, and to invite his explanation as to why he did so. (*Roberts, C.J., Leach and Dunkley, JJ.*) EMPEROR *v.* U. DAMAPALA. 14 Rang. 666=168 I.C. 193=9 R.R. 340=38 Cr.L.J. 524=A.I.R. 1937 Rang. 83 (F.B.).

———*Evidence—Value of—Evidence of witness tainted with falsehood.*

Per *Young, C. J.*—Where the falsehood is merely an embroidery to a story, that would not be enough to discredit the whole of the witness's evidence. But if the falsehood is on a major point in the case, or if one of the essential circumstances of the story told is clearly unfounded, this is enough to discredit the witness altogether. (*Young, C.J. and Skemp, J.*) NANDIA *v.* EMPEROR. 42 P.L.R. 570.

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———*Evidence—Value of— Eye-witnesses first telling their stories 40 days after occurrence.*

The oral evidence of eye-witnesses who first told their stories about 40 days after the occurrence is not fully worthy of credit, and if further the circumstantial evidence is not such that it is inconsistent with the innocence of the accused, the accused must be acquitted. (*M.C. Ghose and N. A. Khundkar, JJ.*) EMPEROR *v.* MAJA KHAN. 66 C.L J. 500.

———*Evidence—Value of—Evidence as regards some accused accepted and rejected as regards others—If justified.*

A witness whose evidence has to be rejected so far as certain accused are concerned cannot safely be accepted or acted in the case of other accused. The procedure of rejecting the evidence of certain witnesses so far as certain accused are concerned and accepting it so far as others are concerned cannot be upheld. (*Pandrang Row, J.*) SHANBAGAPERUMAL NAICKER *v.* EMPEROR. 186 I.C. 601=12 R.M. 669=41 Cr.L.J. 342=1939 M.W. N. 1251=A.I.R. 1940 Mad. 279.

———*Evidence—Value of—Evidence disbelieved against co-accused.*

If in a joint trial of two accused persons of the same offence the evidence of a witness is not believed by the Court as against one of the accused who is acquitted, it should not be believed against the other in the absence of convincing reasons. (*Abdul Qayoom, C. J.*) ABDULLA *v.* STATE. 42 P.L.R. J. & K. 75.

———*Evidence—Value of—Evidence not acted on against one of the accused.*

From the mere fact that one of the accused is acquitted as some doubt is raised by the absence of his name in the first information report, it does not follow that the prosecution evidence should be rejected *in toto*, and the others also should be acquitted. (*Dalip Singh and Currie, JJ.*) HARNAM DASS *v.* EMPEROR. 38 P.L.R. 265.

———*Evidence—Value of—First information report.*

The first information report made to the police need not contain full details of the occurrence. Its object is simply to acquaint the police of the commission of an offence. It is not a substantive piece of evidence. (*Abdul Qayoom, C. J. and Wazir, J.*) ALI MOHAMMAD *v.* STATE. 42 P.L.R. J. & K. 123.

———*Evidence — Value of — First information report.*

The first information report is not a substantive piece of evidence. It is never *per se* the statement of the case for the prosecution and the absence of any accused's name in that report is not by itself a sufficient proof of his innocence. (*Abdul Qayoom, C. J. and Wazir, J.*) SAHIB DIN *v.* STATE. 42 P.L. R.J. & K. 242.

———*Evidence—Value of—First information report—Delay in making report—Effect of.*

Delay in making a report to the police is only a suspicious circumstance which puts the Court on its guard and cannot by itself be held to be a reason for rejecting evidence which is otherwise fully entitled to credit. (*Blacker, J.*) RADHA KISHEN *v.* EMPEROR. 179 I.C. 880=11 R.L. 642 =40 Cr.L.J. 261=A.I.R. 1938 Lah. 714.

———*Evidence—Value of—Minor discrepancies.*

Existence of minor discrepancies does not at all make any difference and shows on the contrary

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that the witnesses are not tutored. (*Nawal Kishore, C J. and Ranjitmal, J.*) CHOTHU *v.* SARKAR. 1939 M.L.R. 76 (Cri.).

———*Evidence—Value of—Perjured witness.*

It is impossible entirely to act up to the principle that the evidence of a perjured witness is of no value whatever. Courts in such case must use their judgment in sifting the truth from falsehood. (*Nawal Kishore, C. J. and Ranjitmal, J.*) SARKAR *v.* HAMEERA. 1939 M.L.R. 78 (Cri.).

———*Evidence—Value of—Prosecution witnesses not mentioned in first information report and not independent.*

The fact that none of the prosecution witnesses was mentioned in the first information report and most of them are not independent had made some statements which are contrary to what was stated before the committing Magistrate or the police, is not always sufficient to totally discard their evidence, though they are sufficient to raise a suspicion against their truthfulness and to lead the trying judge to scrutinize the evidence with caution. If oral evidence of witnesses is corroborated by medical or other reliable evidence there is no reason why it should not be believed though the witnesses were not named in the first information report or are not totally independent. (*Zia-ul-Hasan, J.*) DILDAR KHAN *v.* EMPEROR 173 I.C. 339=1939 O.A. 154=1938 A.Cr.C 11=1938 O.L.R. 108=1938 O.W.N. 184=10 R.O. 220=39 Cr.L.J. 330=A.I.R. 1938 Oudh 88.

———*Evidence—Value of—Statement of formal witness for prosecution assisting defence.*

Statement of a formal witness for the prosecution, which goes to assist the defence, does not have that weight which it would have had if he had been a witness for the prosecution as to the material facts of the case. (*Blacker, J.*) RADHA KISHEN *v* EMPEROR, 179 I.C. 880=11 R.L. 642= 40 Cr.L.J. 261=A.I.R. 1938 Lah. 714.

———*Evidence—Value of —Test—Number of witnesses.*

Mere numbers cannot be taken into account for determining the value of the evidence. (*Mulla, J.*) PIR BUX *v.* EMPEROR. 1938 A.W.R. (H.C.) 656=1938 A.Cr.C. 122.

———*Evidence—Value of—Testimony of witness not subjected to cross-examination.*

The testimony of a witness is not legal evidence unless it is subjected to cross-examination. Where no opportunity has been given to the counsel for the accused to test the veracity of the principal prosecution. Witness or where owing to the refractory attitude of the witness the Court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of judicial pronouncement. (*Nanavutty, J.*) RAM KUMAR *v.* EMPEROR. 12 Luck. 553=165 I.C. 486=37 Cr.L.J. 1144=9 R.O. 220=1936 O.W.N. 1094=1936 O. L.R. 655=A.I.R. 1937 Oudh 168.

———*Evidence—Value of—Testimony of witnesses produced by co-accused.*

It is impossible to say that there is anything in the law of evidence or procedure which renders the statements of witnesses produced by one accused inadmissible against a co-accused, but at the same time there are obvious reasons for receiving such evidence with great caution, and

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indeed for regarding it with great suspicion, when the witnesses have little or nothing to say which benefits the person who calls them and appear to be introduced merely with the object of strengthening the case against the co-accused. (*Broomfield and Divatia, JJ.*) EMPEROR *v.* SHAPURJI SORABJI. 60 Bom. 148=162 I.C. 399 =8 R.B. 415=37 Cr.L J. 688=38 Bom.L.R. 106 =1936 Cr.C. 338=A.I.R. 1936 Bom. 154.

——*Evidence—Value of—Witness being complainant's relation.*

The fact that the witness is a relation of the complainant is insufficient for discrediting his testimony unless it is further shown that he is a partisan of the complainant or inimical to the accused. (*Nawal Kishore, C.J. and Ranjitmal, J.*) SARKAR *v.* HAMEERA. 1939 M.L.R. 78 (Cri.).

——*Evidence—Value of — Witnesses interrelated.*

It cannot be laid down as a general rule that if the principal prosecution witnesses are interrelated, their statements should not be believed *in toto* and that the benefit of the doubt should be given to those accused at least who bore no injuries on their persons and whose participation in the assault has not consequently been established beyond doubt. Each case is to be decided on its own merits and in the light of the circumstances disclosed. (*Din Mohammad and Ram Lall, JJ.*) SOHNA *v.* EMPEROR. 186 I.C. 603=12 R.L. 420=41 Cr.L.J 348=41 P.L.R. 802=A.I.R. 1940 Lah. 53.

——*Evidence—Value of—Witness proved to be untrue—Maxim,* falsus in uno, falsus in omnibus.

It is true that the maxim, *falsus in uno, falsus in omnibus* is not the law to be administered by Courts in British India, which are guided by codified rules of evidence. According to the Indian Evidence Act, Courts have to apply the standard of a prudent man which does not, however, totally disregard the salutary principle underlying the maxim. Where the statement of a witness has been clearly proved to be untrue, there is no manner of doubt that the witness is *prima facie* unreliable; and if his evidence is not re-inforced by something else, it is highly unsafe to accept it as the basis of conviction Where, however, the Court considers one part of the evidence of a witness to be not free from doubt, it may well refuse to act upon it without destroying the value of the rest of it, as all that the Court implies in not acting upon one part of the evidence is that it is not safe to accept it. (*Niamatullah and Collister, JJ.*) ASHIQ ALI *v.* EMPEROR. 165 I.C. 193=9 R.A. 244=37 Cr.L.J. 1104=1936 A. L.J. 855=1936 A.Cr.C. 138=1936 A.W.R. 633= 1936 Cr.C. 943=1936 All.L,R, 874=A.I.R. 1936 All. 747.

Evidence—Witness.

——*Evidence—Witness—Complaint of forgery —Right to examine witnesses not named in complaint.*

Where a complainant alleges forgery in respect of a document by antedating it, he is not obliged to confine himself to the evidence of the witnesses named in the petition of complaint. (*James, J.*) HANUMAN SAHAY *v.* EMPEROR. 165 I.C. 564=9 R.P. 183=1936 Cr.C. 897=38 Cr.L.J 72=3 B. R. 54=A.I.R. 1936 Pat. 531.

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——*Evidence—Witness—Duty of prosecution and of Court to call—Omission to call witnesses—Effect of and inference to be drawn from—Considerations—Duty of Judge to tell jury.*

When the prosecution have produced sufficient evidence and the best evidence, it is not always incumbent on them to produce all possible evidence on less important facts. It cannot be laid down as a general proposition of law that the prosecution is or is not obliged to examine persons as prosecution witnesses as to whom the prosecution have reason to believe that they will not help the prosecution case, or that the Court is not bound to examine any person as a Court witness unless the witness appears to be essential to the just decision of the case. The effect of, and the inference to be drawn or not to be drawn from, the absence of relevant witnesses from the witness-box are matters to be considered with reference to the circumstances of each particular case and the facts which the witnesses, if called, would have been required to prove. The jury should be asked by the Judge to consider the same in the light of those circumstances and those facts. The Judge should give assistance to the jury in deciding whether to draw any inference from the failure of the prosecution to call certain witnesses. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR. 178 I.C. 934=11 R.P. 312=5 B.R. 185=20 Pat. L.T. 51=40 Cr.L.J. 147=1938 P.W.N. 727=A.I. R. 1938 Pat 579.

——*Evidence—Witness—Murder of mother—Passers-by attracted by cries of child—Witnesses may speak not only of nature of cries but also of what child said.*

The evidence of the child is not admissible as evidence of the truth of what she said but as explaining the conduct of the other witnesses; even what she said is admissible in evidence. Thus in a trial for murder of mother of a child whose cries attracted the passers-by, the witnesses can speak not only of the nature of the child's cries, but even as to what the child said so far as it explains their conduct. (*Davis, J.C. and Haveliwala, J.*) RABAN LALU *v.* EMPEROR. 32 S.L.R. 709=175 I.C. 324=10 R.S. 296=39 Cr.L.J. 618 =A.I.R. 1938 Sind 97.

——*Evidence—Witness giving evidence hostile to party calling him—Procedure—Prosecution declaring witness as hostile—Propriety—Duty of Court.*

It is not right for a Public Prosecutor to declare a prosecution witness as hostile. The only way in dealing with witnesses who go back on their statements or testify in a way which is frankly against the interest of the party calling them lies with the Judge of the Court. It is the duty of the Public Prosecutor or of counsel representing the Crown to formally ask the leave of the Court to cross-examine the offending witness both with regard to the evidence he has already given which is complained about and also, if necessary, to put questions to him to discredit his testimony generally. (*Cunliffe and Henderson, JJ.*) SAMARALI *v.* EMPEROR. 166 I. C. 323=9 R.C. 494=38 Cr.L.J. 176=1936 Cr.C. 932=A.I.R. 1936 Cal. 675.

——Evidence—Witnesses examined in committal Court—Duty of Public Prosecutor. *See* CR. P. CODE, S. 286 (2). A.I.R. 1938 Rang. 442.

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Evidence—Miscellaneous.

———*Evidence — Anxiety of accused to avoid police enquiry—Whether an indication of guilt.*

The anxiety of the accused to avoid a police enquiry is not necessarily an indication of guilt as a police enquiry is always regarded as a harassment. (*Mahomed Noor and Rowland, JJ.*) EMPEROR *v.* AZHAR MIAN. **161 I.C. 939 (2)=8 R.P. 498=37 Cr.L.J. 559=1936 Cr.C. 645=1936 P.W.N. 524=A.I.R. 1936 Pat. 425.**

———*Evidence—Charge of murder—Case depending on statement of accused—Evidence of prosecution as to part of statement disbelieved—Conviction on rest of the statement—If justified.*

Where in a trial for murder, the case against the accused depends entirely on the statement made by the accused and the discoveries made in pursuance of that statement, if theCourt disbelieves the prosecution case in respect of a part of the statement, it is not safe to base a conviction for murder on the rest of the statement. (*Horwill, J.*) VENKATASWAMI *v.* EMPEROR. **48 L.W. 332=1938 M.W.N 866=177 I.C. 909=11 R.M. 394=39 Cr.L J. 977.**

———*Evidence—Finding of fact in one case unsafe for another.*

A finding of fact in one case cannot be a safe guide as to a finding of fact in another case. (*Vivian Bose, J.*) BAPU RAO *v.* EMPEROR. **I.L R. (1937) Nag. 38=1936 Cr.C. 715=A.I.R. 1936 Nag. 160.**

———*Evidence—Index with notes of things said to have happened at various points in the case—If can be put to the jury.*

Notes contained in an index embodying statements regarding things said to have happened at the various points in the case are not properly to be put before the jury; when the index contains objectiona le material, the better course would be to have a fresh index prepared with the objectionable material eliminated. (*Varma and Rowland, JJ.*) EMPEROR *v.* MAYADHAR POTHAL. **18 Pat. 450=181 I C. 1001=5 B.R. 706=11 R.P. 653=40 Cr L J 625=1939 P.W.N. 300=20 Pat. L.T. 420=A I.R. 1939 Pat. 577.**

———*Evidence—Interested evidence.*

Interested evidence is not necessarily false. (*Davis, J.C. and Lobo, J.*) JADO RAHIM *v.* EMPEROR. **I L R. (1939) Kar. 75=178 I.C. 520=11 R.S. 93=40 Cr L. J. 93=A.I.R. 1938 Sind 202.**

———*Evidence—Opinion of police—Relevancy.*

Where the police noticed that there was sameness in the *modus operandi* in certain house breakings, and came to the conclu ion that it must have been the work of a gang.

Held, per *Gruer, J.*—That the op nion as to the existence of gang was relevant. (*Grille, J.C., Niyogi and Pollock, A.J.Cs.*) AMDUMIYAN GULJAR *v.* EMPEROR. **I.L.R. (1937) Nag 315=166 I.C. 582 and 587=9 R N. 126 and 132=38 Cr.L.J. 237 and 251=A I R. 1937 Nag. 17 (F.B).**

———*Evidence—Proof — Dsbelieved statement of accused—If can be treated as proof of a fact for the prosecution.*

No fact material to the prosecution can be proved solely by a statement of the accused which the Court does not believe (*D. R. Norman.*) CHAND MAL *v.* EMPEROR. **1939 A.M. L.J. 94.**

———*First information report—Admissibility.*

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The first information report, unless the man who made it dies, is not admissible evidence of any fact which is contained in it: it merely proves that this was the original story which set the police in motion. (*Baguley and Mosely, JJ.*) THE KING *v.* MAUNG PO THI. **176 I.C. 683=11 R.R. 72=39 Cr.L.J. 771=A.I.R. 1938 Rang. 282.**

———*First information report—Nature of presumption.*

The presumption with reference to the first information report is that it represents the actual information given to the police and taken down by them. The defence should not be denied the right to use this document because of the failure of the prosecution to formally prove it. If the prosecution suggests that it is garbled, it should give evidence to that effect. (*Gruer and Niyogi, JJ.*) SHEOPRASHAD *v.* EMPEROR. **I.L.R. (1938) Nag. 442=1938 N.L.J. 250=177 I.C. 605 (2)=11 R.N. 148=39 Cr.L.J. 917=A.I.R. 1938 Nag. 394.**

———*First information report—Sufficiency to base conviction—Charge under Ss. 201 and 302, I.P. Code—Incriminatory report by accused—Use and evidentiary value of as basis of conviction.*

In a trial for offences under S. 302 or S. 201, a first information report by an accused person, which deeply incriminates him in the crime, although intended to exculpate, and which is in the nature of a confessional statement made to the police, is inadmissible in evidence at the trial either to convict him of murder or of the lesser offence under S. 201. Although accused persons can, in certain cases, be tried for murder and convicted of causing evidence to disappear, there is evidence, usually other than the mere statements of the accused, to show that they have caused evidence to disappear. Though in a trial for an offence under S. 201, the first information report can be made the basis of a conviction in such a case the accused is not tried for murder and his first information is not a confession. (*Davis, J.C. and Weston J.*) SHEWAKRAM ISSARDAS *v.* EMPEROR. **182 I C. 464=12 R.S. 8=40 Cr.L.J. 661=A I.R. 1939 Sind 130.**

———Fine—Payment of—Reversal of sentence—Return of the amount to a person other than the accused—Legality. *See* INSOLVENCY. **(1937) 1 M.L.J. 130.**

Handwriting.

———*Handwriting — Disputed handwriting or signature—Court deciding case on its own comparison—Propriety—Miscarriage of justice.*

There is considerable danger of a miscarriage of justice when a Criminal Court relies on its own comparison of a disputed signature with another signature for the purpose of determining its authenticity. It is usually desirable to obtain the opinion of an expert on the point, or better still, the evidence of persons who can speak to the signature having been written in their presence. Where the Court in its order of conviction merely states that it is satisfied on a comparison of signature that the accused is guilty, but does not refer to the entire evidence in the case, it is impossible for a Court of revision to decide on the facts stated whether any offence has been committed, and the conviction is consequently liable to be set aside in revision. (*Agarwala, J.*) RAM SUBHAG SINGH *v.* EMPEROR. **166**

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I.C. 136=9 R.P. 260=38 Cr.L.J. 136=3 B.R. 134=17 Pat.L.T. 896=1936 P.W.N. 827=A.I.R. 1937 Pat. 146.

Identification.

——*Identification—If be held before Magistrate.*

It is not necessary for identification tests to be held in the presence of Magistrates. (*Davis, C.J. and Weston, J.*) MOR MAHOMED *v.* EMPEROR. I.L.R. (1940) Kar. 487=A.I.R. 1940 Sind 168.

——*Identification — Proper procedure—Every witness to have independent opportunity of picking out offender.*

It is desirable that, when an identification parade is held, each person who might reasonably be expected to identify an offender should be kept apart from the other prosecution witnesses and not remain present whilst an identification by any other person is proceeding. When one witness has picked out some or all of the supposed offenders, the next witness should be brought upon the scene and invited to pick out the person or persons whom he can identify, without any opportunity of communicating with the first witness who has already done so. This procedure should be followed till every witness has had an independent opportunity of picking out of the identification parade the supposed criminal or criminals. (*Roberts, C.J.*) NGA PO THIT *v.* EMPEROR. 172 I.C. 865=10 R.R. 282=39 Cr.L.J. 193=A.I.R. 1937 Rang. 504.

——*Identification—Value of—Identification by voice.*

It is never safe to rely on the identification of a person by his voice. One is always liable to make a mistake. (*Ba U, J.*) NGA AUNG KHIN *v.* EMPEROR. 172 I.C. 56=10 R.R. 207=39 Cr. L.J. 34=A.I.R. 1937 Rang. 407.

——*Identification—Value of—Important factors.*

The value of identification depends on two most important factors, namely, that the persons who identify an accused have had no opportunity of seeing him after the commission of the crime in connection with which the suspect is put up for identification and secondly that no mistakes have been made by these witnesses or the mistakes made by them are negligible. (*Allsop and Ganga Nath, JJ.*) EMPEROR *v.* CHHADAMMI LAL. 162 I.C. 948=37 Cr.L.J. 730=8 R.A. 916=1936 A.W.R. 185=1936 All. Cr.C. 97=1936 Cr.C 497 (2)=1936 All.L.R. 520=A.I.R. 1936 All. 373.

Identification parade.

——*Identification parade—Mixing of suspects with undertrials—Proportion of* 1 *to* 5*—If satisfactory.*

The value of identification depends on the factors which minimize the possibility of chance as much as possible. In cases in which there is only one or two suspects to be put up for identification, the proportion of 1 to 5 cannot be regarded as satisfactory. There should be at least 10 undertrials for each suspect in such cases because every effort should be made to minimize the possibility of a chance which in the first instance can be done by mixing as many persons as possible with the suspect who is put up for identification. (*Allsop and Ganga Nath, JJ.*) EMPEROR *v.* CHHADAMMI LAL. 162 I.C. 948=37 Cr.L.J. 730=8 R.A. 916=1936 All.Cr.C. 97=

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1936 A.W.R. 185=1936 Cr.C. 947 (2)=1936 All. L.R. 520=A.I.R. 1936 All. 373.

——*Identification parades —Relevancy and value.*

The question whether a witness has or has not identified a man during the investigation is not one which is in itself relevant at the trial. Such parades should be held as a check upon the veracity of people who are believed to know something about the matter. The actual evidence regarding identification is that which is given by the witnesses in Court. It will not be strengthened by proof of the facts that witnesses alleged recognition of an accused at a parade held during the investigation, though, on the other hand, its value will be destroyed if it is shown that they have ever failed to identify the accused prior to the trial. (*Middleton, J.C.*) MAHOMED HUSSAIN *v.* EMPEROR. 164 I.C. 578=37 Cr.L.J. 981=9 R. Pesh. 17=1936 Cr.C. 749=A.I.R. 1936 Pesh. 166.

——*Identification parade—Use of policemen—Permissibility.*

There is no objection to the use of policemen for identification parade if proper precautions are adopted. (*Monroe and Rangi Lal, JJ.*) INDAR PAL *v.* EMPEROR. 162 I.C. 969=37 Cr.L.J. 732=8 R.L. 978=38 P.L.R. 1128=1936 Cr.C. 389=A.I.R. 1936 Lah. 409.

Inherent powers of Court.

——*Inherent powers of Court—Power to split up case at the time of charge owing to misjoinder—Order of* de novo *trial—Propriety.*

Criminal Courts have an inherent power to make such orders as may be necessary for the ends of justice. This inherent power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions. Certain persons were charged with conspiracy to commit criminal breach of trust and cheating. After the prosecution evidence was over, the Magistrate found at the stage of framing of the charges that all the accused could not be tried together and the case should be split up in order to avoid misjoinder. The Magistrate thereupon formed two groups of the accused persons and ordered a *de novo* trial of one of them.

Held, that the Magistrate had acted rightly in the exercise of his inherent power in ordering a *de novo* trial of one of the groups. (*Guha and Lethbridge, JJ.*) AKHIL BANDHU RAY *v.* EMPEROR. I.L.R. (1938) 1 Cal. 588=175 I.C. 409=10 R.C. 790=39 Cr.L.J. 596=A.I.R. 1938 Cal. 258.

——Inherent powers—Charge of cheating or misappropriation—Order on bank of accused to stop payment or operation of account by accused —Jurisdiction of Court to pass. *See* CR. P. CODE, Ss. 516 AND 517. 40 C.W.N. 96.

Judgment.

——Judgment—Discussion of evidence. *See* CR. P. CODE, Ss. 367 AND 424. A.I.R. 1937 Nag. 394.

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——*Judgment—Duty of appellate Court—Consideration of defence evidence—Necessity.*

It is the duty of an appellate Court to consider the defence evidence for what it may be worth, with as much care and attention as the prosecution evidence. Unless this is done, the judgment is vitiated and is no judgment in law. (*Radhakrishna Srivastava, J.*) HULASI *v.* CHHOTEY LAL. **1939 O.A. 820=1939 O.W.N. 1105=1939 A.W.R. (C.C.) 319.**

——*Judgment—If part of trial.*

Quaere.—Whether the judgment is part of the trial or not. (*Davis, J.C. and Mehta, A.J.C.*) JALAL *v.* EMPEROR. **30 S.L.R. 456=167 I.C. 75=9 R.S. 162=38 Cr.L.J. 350=A.I.R. 1937 Sind 22.**

——*Judgment—Magistrate using strong language as regards witnesses—Propriety.*

While it is always open to a Magistrate to disbelieve witnesses and not to rely on their evidence, the use of strong language, such as characterising the witnesses as unblushing liars, particularly in a judgment, is neither appropriate nor called for. (*Chari, J.*) AKKACHAMMA *v.* BABU REDDY. **14 Mys.L.J. 449.**

——*Judgment—Remarks against person not before Court and without affording opportunity for explanation—Expunging of.*

Remarks made in a judgment against a person who was not before the Court and remarks made against a person without affording him any opportunity to offer his explanation should be expunged. (*Lakshmana Rao, J.*) LAKSHMANA RAO *v.* EMPEROR. **186 I C. 472=12 R.M. 657=41 Cr.L.J. 317=1939 M.W.N. 1131=50 L.W. 782=A.I.R. 1940 Mad. 134.**

Jurisdiction.

——Jurisdiction —Absence of —Failure to object—If validates order without jurisdiction. *See* CR. P. CODE, S. 145 (1). **71 M L.J. 305.**

——*Jurisdiction—Appeal from conviction on prosecution sanction by Sub-Collector—Jurisdiction of Sub Collector as Joint Magistrate to hear and decide appeal.*

Where the accused is charged on the initiative and with the sanction of a Sub-Collector under S. 26 (*e*) of the Madras Forest Act and convicted by a Magistrate, it is not competent to that Sub-Collector in his capacity as Joint Magistrate to hear and decide an appeal from such conviction except with the permission of the Court to which an appeal lies from his Court. (*Lakshmana Rao, J.*) PONNUSWAMY PILLAI *v.* EMPEROR. **1940 M.W.N. 805 (1)=52 L.W. 345 (2).**

——*Jurisdiction—Bench of magistrates—Order directing president to constitute Bench in particular manner—Jurisdiction of Sub-Divisional Magistrate.*

There is no authority either in the Criminal Procedure Code or in the Criminal Rules of Practice justifying the Sub-Divisional Magistrate to pass an order directing the president of a Bench Court to constitute a Bench for the trial of a case in a particular way. (*Mockett and Horwill, JJ.*) NAGOJI *v.* VEERAMMA. **1937 M.W.N. 182.**

——Jurisdiction—Calendar case triable by First Class Magistrate on the file of Sub-Divisional Magistrate—Transfer by latter to Second Class Magistrate with direction to treat them as preliminary register cases—Propriety. *See* CR. P. CODE, S. 192. **(1938) 1 M.L.J. 403.**

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——Jurisdiction—Charge under S. 188, I. P. Code—Disobedience of order under S. 144, Cr. P. Code—Magistrate passing order under S. 144, Cr. P. Code—Jurisdiction to try charge. *See* CR. P. CODE, S. 195. **1939 M.W.N. 340.**

——*Jurisdiction—Duty of Court—Magistrate having dual capacity as Assistant Agent and as Sub-Divisional Magistrate—Duty to indicate capacity in which he acts in disposing of case—Omission to indicate—Effect—Subsequent special report explaining—Propriety.*

When a Magistrate exercises authority both as Sub-Divisional Magistrate in the plains and as Assistant Agent in the Agency tract, he must take care to bear in mind when trying cases the particular capacity in which he is acting and to indicate the same in his proceedings. Any laxity in this respect is not to be encouraged; nor can the Magistrate be permitted to rectify the omission later on by making a special report after the case has been disposed of by him. In an appeal to the Sessions Judge from a conviction by the Sub-Divisional Magistrate an objection to the maintainability of the appeal was raised on the ground that the conviction was by the Assistant Agent and thereof the appeal lay only to the Government Agent, and that the Sessions Judge had no jurisdiction. The Sessions Judge called for a report from the Sub-Divisional Magistrate to ascertain in what capacity he tried the case. The latter reported that he tried the case, as Assistant Agent and not as the Sub-Divisional Magistrate and that owing to a mistake he had described himself as Sub-Divisional Magistrate. The Sessions Judge, holding that he had no option but to accept the report, held that the case was tried by him as Assistant Agent, and returned the appeal for presentation to the proper Court. The proceedings, however, showed that the case was dealt with and disposed of by the Magistrate as Sub-Divisional Magistrate, and there was nothing on the record to show that the case was at any time at all dealt with in his capacity as Assistant Agent.

Held, that the calling for the special report was unnecessary and undesirable, that the report made by a Magistrate after pronouncing judgment could not be used to contradict or vary what was contained in the judgment itself, that the Sessions Judge instead of deciding the question of jurisdiction himself as he had the right and duty to do, was wrong in allowing it to be decided for him by the very Magistrate from whose judgment the appeal was preferred, that he was wrong also in holding himself bound to accept the report without question even when the record spoke otherwise, and that consequently there having been no attempt by the Sessions Judge to apply his own mind by the question of jurisdiction, his order declining jurisdiction was wrong and unsustainable, as he had jurisdiction to hear the appeal.

Held, further, that the order should therefore be set aside in revision. (*Pandrang Row, J.*) SATYAM, *In re.* **165 I.C. 919=9 R.M. 312=1936 M.W.N. 1244=38 Cr.L.J. 81=44 L.W. 689=1936 M.Cr.C. 297=A.I.R. 1937 Mad. 17=(1937) .J. 759.**

——*Jurisdiction—Forum—Selection of—Right of accused.*

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Per *Henderson, J.*—The only persons capable of weighing the respective advantages or disadvantages of trial before different types of tribunals are the accused persons themselves and it is their opinion which is entitled to serious consideration. (*Cunliffe and Henderson, JJ.*) NETAI CHANDRA JANA *v.* EMPEROR. I.L.R. (1937) 1 Cal. 169=165 I.C. 162=37 Cr.L.J. 1902 =9 R.C. 351=64 C.L.J. 421=40 C.W.N. 959= 1936 Cr.C. 785=A.I.R. 1935 Cal. 529.

———*Jurisdiction—Magistrate taking dying deposition—Jurisdiction to record evidence in committal Court.*

It is wrong that a Magistrate who takes the dying deposition should record the evide n the commital Court, because if he records evidence in such a case the accused is precluded from questioning the Magistrate as to what happened when the dying deposition was taken. (*Roberts, C.J. and Leach, J.*) NGA CHIT SO *v.* EMPEROR. 172 I.C. 197=10 R.R. 233=39 Cr.L.J. 117=A.I.R. 1937 Rang. 467.

———Jurisdiction—Prosecution requiring sanction—Grant of sanction in respect of one offence —Facts disclosing another offence—Power of Court to convict for offence disclosed—Fresh sanction—If necessary. *See* SUGARCANE ACT, S. 7 —BIHAR AND ORISSA RULES, R. 20. 17 Pat.L.T. 806.

———*Jurisdiction—Statement of accused disclosing offence not triable by Magistrate—If ousts jurisdiction of Magistrate.*

A statement by an accused person that the offence committed by him is a more serious one than one triable by the Magistrate does not deprive the Magistrate of jurisdiction to try the case unless the prosecution accept the truth of the statement or the Magistrate is of opinion that it is true. (*Horwill, J.*) APPU GOUNDAN *v* EMPEROR. 175 I.C 895=1933 M.W.N. 592=48 L.W. 145 (1)=11 R.M. 18=39 Cr.L.J. 659=1938 M. Cr.C. 204=A.I.R. 1938 Mad. 784=(1938) 2 M.L.J. 43.

———Jurisdiction—Trial for offences one of which requires sanction of Local Government for prosecution — Sanction not obtained—Effect—Whole proceedings—If illegal *See* CR. P. CODE, S. 197. 39 Bom.L.R. 70=A.I.R. 1937 Bom. 160.

Jury trial.

———*Jury trial—Charge to jury—Duty of Judge —Case depending upon circumstantial evidence.*

In a case dependent upon circumstantial evidence, it is the duty of the Judge to point out clearly to the jury, that in the case of circumstantial evidence, a conviction is only right and proper, if, from the proved circumstances, the inference of guilt only can reasonably be drawn, and if, from the proved circumstances two inferences can reasonably be drawn, the inference of innocence as well as guilt, the jury is bound to draw the inference of innocence. The fact that the jury can draw from the circumstances of the case an inference of guilt is not sufficient. The inference of guilt must be the only reasonable inference to be drawn from the circumstances. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.

———*Jury trial—Charge to jury—Duty of Judge to explain functions of Judge and jury.*

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It is necessary for a Sessions Judge in his charge to the jury to explain to them the functions of the Judge and jury, as, otherwise the jury who are laymen may overstep the bounds of their function. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SETTY, *In re.* 17 Mys.L.J. 238.

———*Jury trial—Charge to jury—Statements made by Judge in—If forms part of judicial record—Presumption of correctness.*

Statements made by the Judge in his charge to the jury during the course of a criminal trial, form part of the judicial record and as such must be taken as correct, by a tribunal of inquiry making an enquiry as to certain undesirable communal remarks alleged to have been made by a counsel during the course of the trial. (*Davis, J. C. and Mehta, A.J.C.*) MAHOMED ASLAM, *In re.* 162 I.C. 919=37 Cr.L.J. 783=8 R.S. 177=1936 Cr.C. 437=A.I.R. 1936 Sind 49.

———*Jury trial—Jury—Refusal to convict on uncorroborated testimony of approver—If perverse.*

Where the jury refuse to convict an accused on a mere uncorroborated testimony of an approver they cannot be said to be acting perversely. Where it is alleged by the approver that the accused told him that he had sold the stolen property to *A*, but *A* when put in the witness box claimed it as absolutely his own and the articles are not extraordinary, the opinion of the jury that they are not satisfied that the articles in question are proved to have been stolen in the course of dacoity, cannot be said to be unreasonable. (*Cunliffe and Henderson, JJ.*) EMPEROR *v.* GOSTHO SARDAR. 165 I.C. 438=9 R.C. 400=37 Cr.L.J. 1149=1936 Cr.C. 670=A.I.R. 1936 Cal. 407.

———Jury trial — Misdirection — Accused not asked to account for possession of stolen articles —Omission to explain—Charge to jury that if they did not believe statement of the accused, presumption under S. 114 (*a*) of Evidence Act can be drawn—Propriety. *See* EVIDENCE ACT, S. 114, ILL. (*a*). 40 C.W.N. 1090.

———*Jury trial — Misdirection — Committal on charge of rioting with common object to take possession of land—Trial Judge adding common object of assaulting—Direction on both—Propriety.*

In a trial for rioting, it is one thing to say that common object of the accused was to get possession of disputed land and it is quite another to say that common object was to beat apparently for the mere pleasure of beating. It is wrong to include those two contradictory cases at the same trial even more so in one charge. So where a Judge tell the jury that in the event of prosecution failing to establish the case of getting possession of disputed land, with which they come into Court or in the event of jury being unable to come to a decision on the real point of issue between parties, they are to consider the possibility as to the existence of another common object, such procedure is wrong and Judge ought to strike it out of the charge. (*Cunliffe and Henderson, JJ.*) ALKASULLA *v.* EMPEROR. 165 I.C. 666=9 R.C. 444=40 C.W.N. 1109=38 Cr.L.J. 68=1936 Cr.C. 654=A.I.R. 1936 Cal. 429.

———Jury trial—Procedure — Charge under S. 366, Indian Penal Code—Age of girl—Duty of Judge to specifically question jury as to its conclusion—Practice in England—Desirability of

following. *See* PENAL CODE, S. 366. **A.I.R. 1936 Cal. 675.**

——Liability—Test of—Motive — Relevancy—Doing of lawful act but with dishonest motive—Offence. *See* PENAL CODE, S. 383. **1940 P.W.N. 194.**

Misjoinder.

——*Misjoinder—Cases clubbed together improperly—Trial—If vitiated—Prejudice to accused.*

Where there are several cases against several accused persons, they must generally be kept distinct, evidence let in in each case separately and conclusions drawn on the evidence let in in each particular case. But before the conviction can be set aside it must be shown that the accused suffered prejudiced by the cases being clubbed together. Although in most cases of improper clubbing together of cases the accused would be held to have suffered prejudice by being called upon to meet several cases at the same time, in a simple case in which the accused could be tried together in one trial and in which the defence has not been rendered more difficult by the procedure adopted in the trial, the trial cannot be held to be vitiated. (*Horwill, J.*) SYED MUSTAFA SAHIB *v.* EMPEROR. **48 L W. 350=1938 M.W.N. 865=177 I C. 737=11 R M 373=39 Cr.L.J 935=1938 M. Cr.C. 155=A.I.R. 1938 Mad. 910=(1938) 2 M. L.J. 382.**

Motive.

——*Motive—Charge under S. 302—Confession by accused—Absence of motive—If evidence of falsity of confession.*

The absence of motive on the part of the accused charged under S. 302 is not a sufficient reason for coming to the conclusion that the witnesses in the case are telling lies when they have no reason to do so, or that the confession by the accused is false. (*Dhavle and Agarwala, JJ.*) MT. SUKNI CHAMAIN *v.* EMPEROR. **162 I.C. 25=37 Cr.L.J. 543=8 R.P. 506=1936 P.W.N. 189=1936 Cr C. 285=A.I.R. 1936 Pat. 245.**

——*Motive—Duty of prosecution.*

It is not necessary for the prosecution to prove the motive of the crime, where the commission of the crime by the accused has been proved. (*Mosely and Ba U, JJ.*) U ZAWANA *v.* EMPEROR. **161 I.C 113=37 Cr L.J. 418=8 R.R. 452=1936 Cr.C. 88=A.I R. 1936 Rang. 60.**

——*Motive—Proof of—Evidence entirely circumstantial--Trial Judge alleging certain motives, but not giving definite finding—Presumption.*

The prosecution depended entirely on circumstantial evidence in a case for murder of a girl of nine years. The motives suggested for murder were theft of petty ornaments as well as feeling of hatred and enmity towards the mother of the deceased. But the trial Judge failed to record any definite finding on the question of motive.

Held, that his failure could be explained only on the ground that he had failed to discover from the evidence on record any motive whatsoever on the part of the accused to have committed this diabolical murder. (*Subhedar, A.J.C.*) MT. PARWATI *v* EMPEROR. **163 I C. 319=8 R.N. 307=37 Cr.L.J. 821=1936 Cr.C. 553=A.I.R. 1936 Nag. 88.**

——*Motive- Relevancy of.*

Absence of motive, or the existence of an inadequate motive is a matter of comparative unimportance, where there exists absolutely cogent

evidence that a crime has, in fact, been committed by a certain person. (*Nanavutty and Smith JJ.*) MATA DIN *v.* EMPEROR **167 I.C. 579=9 R O. 392=38 Cr.L J. 424=1937 O L R. 122=1937 O. W.N. 291=1937 A.Cr.C. 61=A.I.R. 1937 Oudh 236.**

——*Motive—Relevancy—Duty of prosecution to prove motive.*

It is not necessary for the prosecution to prove the motive for a crime, although proof of the motive may often be an enlightening circumstance. (*Mockett and Horwill, JJ.*) PUBLIC PROSECUTOR *v.* BASAVAYYA. 1937 M.W.N. 993.

Plea of guilty.

——*Plea of guilty—What is—Admission of guilt in proceedings under S. 110, Cr. P. Code—If plea of guilty.*

A plea of guilty in a Criminal Court can only be made in response to a charge made by the Court and an informal admission as to guilt does not amount to a formal plea of guilty and such an admission has not the same binding effect as a plea of guilty. It has not the same effect in fact and it has not the same effect in law. An admission of guilt in proceedings under S. 110 Cr. P. Code, or in proceedings of a more informal character does not amount to a formal plea of guilty. (*Cunliffe and Henderson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* JIBAN KUMAR DE. **163 I.C. 228 (1)=37 Cr L J 818=8 R.C. 727=1936 Cr.C. 529=A.I.R. 1936 Cal. 292.**

Practice.

——*Practice—Adjournment—Sufficient cause—Absence of Counsel—If valid ground.*

In a Sessions case a number of witnesses had been summoned. A Counsel for one of the accused was absent for some reason or the other. Application was filed asking for adjournment on that ground,

Held, that the absence of Counsel for one of the accused was not sufficient cause for granting adjournment. (*Iqbal Ahmad, J.*) SALAG RAM *v.* EMPEROR. **167 I C. 515=9 R.A. 550=38 Cr L.J. 416 (2)=1936 A.W.R. 967=1937 A L.R. 201=A.I.R. 1937 All. 171.**

——*Practice—Appointment of Counsel—Judge appointing Counsel in murder case against wishes of accused—Objection raised by accused at earliest opportunity—Legality of trial.*

The Judge has no power to appoint a Counsel to conduct the defence in a murder case against the wishes of the accused. Where the accused declined to accept the services of the Counsel appinted by the Judge and raised his objection to him at the earliest opportunity and the result was a trial in which the accused was not free to cross-examine the witnesses or to plead for himself, the whole trial is illegal. (*Coldstream and Abdul Rashid, JJ.*) MURID HUSSAIN *v.* EMPEROR. **39 P L.R. 311.**

——*Practice—Copy of explanation to superior Magistrate—Supply of—Propriety.*

The practice of giving to the public copies of private reports by Magistrates to superior Magistrates is most objectionable and should be put an end to. (*Davies.*) NATHU LAL *v.* EMPEROR. **1940 A.M.L J. 24.**

——*Practice—Predecessor's orders—Going behind—Competency.*

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A Magistrate is not competent in law on the same facts to go behind the orders of his predecessor. (*Radha Krishna, J.*) KEDAR NATH *v.* SATISH CHANDRA. **15 Luck. 140=41 Cr.L.J. 99 =1940 A.Cr C. 1=12 R.O. 143=184 I.C. 754= 1939 O.L R. 653=1939 A.W.R. (C.C.) 252= 1939 O.W.N. 966=A.I.R. 1940 Oudh 75.**

Presumption of innocence.

———*Presumption of innocence—Doctrine of.*

To deal with a case upon the ground that when the complainant brings his case he must be assumed to have a real grievance is not the manner in which criminal trials are conducted in this country. The presumption is just the other way. The accused must be presumed to be innocent unless the prosecution have satisfactorily and without any reasonable doubt shown that the guilt is brought home to the accused. (*Manohar Lall, J.*) BASDEO KOIRI *v.* EMPEROR. **4 B.R. 204=1938 P.W.N. 113=172 I.C. 944=39 Cr.L. J. 254=18 Pat.L.T. 915=10 R.P. 369=A.I.R. 1938 Pat. 12.**

———*Presumption of innocence—Circumstances leading to inference of guilty only—Conviction.*

In a criminal prosecution, the accused being entitled to the presumption of innocence, the presumption will be that if the facts will bear an explanation compatible with his innocence, that view should be adopted unless it is proved to be false, but if the circumstances are such that only one inference can follow in the mind of any reasonable man in such a case, there can be a conviction. (*Rowland, J.*) ABDUS SALAM *v.* EMPEROR. **160 I.C. 12=37 Cr.L.J. 219=8 R.P. 326=1936 Cr.C. 142=A.I.R. 1936 Pat. 108.**

———*Previous conviction—Use of—Procedure.*

If in a criminal trial the fact of previous conviction is to be used against any accused person, the accused should be definitely questioned on that point and the fact should also be mentioned in the charge sheet. (*Abdul Qayoom, C.J.*) SUBHAN DOOM *v.* STATE. **42 P.L.R. J. and K. 265.**

Procedure.

———*Procedure — Appeal — Disposal without hearing appellant's pleader at early hour—Dismissal on the merits—Appellant's pleader ignorant of early hour of hearing and appearing to argue appeal at 10 a.m.—Application for re-hearing on hearing of disposal—Refusal—Propriety.*

A criminal appeal was posted for hearing to a particular day. The pleader for the appellant appeared before the Court at 10 a.m. to argue the appeal, but was told that the appeal had been disposed of and dismissed on the merits at 7-30 a m. His request for a rehearing was refused, though he pleaded that he was not aware of the fact that the time of hearing was 7-30 a.m. His absence at 7-30 a.m. did not appeal to have been wilful.

Held, that the order of dismissal should be set aside and the appeal should be directed to be heard by another Judge, as the Judge had disposed of the appeal on the merits without hearing the pleader for the appellant. (*Pandrang Row, J.*) VENKATAKRISHNAYYA *v.* EMPEROR. **1937 M. W.N. 91.**

———Procedure — Appeal from conviction— Powers of High Court to reduce sentence though conviction right—Summary dismissal of appeal—

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Propriety—Proper course—Reduction of sentence under revision and dismissal of appeal afterwards. *See* CR. P. CODE, SS. 421 AND 439. **39 Bom.L.R. 74=A.I R. 1937 Bom. 148.**

———*Procedure—Case disclosing offences triable by Second Class Magistrate—Conversion into preliminary register case on ground of its being counter to preliminary register case—Legality.*

Where in a case the offences disclosed are triable by a Second Class Magistrate who can adequately deal with them, the mere fact that the case is counter to a preliminary register case which has to be committed to the Sessions is not a sufficient reason for treating the former case also as a preliminary register case. An order of the Magistrate converting into a preliminary register case cannot be sustained. (*Lakshmana Rao, J.*) OONNA MUDALI *v.* EMPEROR. **1940 M. W.N. 530=52 L.W. 65=(1940) 2 M.L.J. 215.**

———*Procedure—Charge against police-officer—Trial by Magistrate below the rank of First Class Magistrate—Propriety.*

A criminal case in which a police officer of the rank of a Sub-Inspector of Police is an accused should be tried by a Magistrate not below the rank of a First Class Magistrate. (*Newsam, J.*) NARAYANASWAMI REDDIAR *v.* NATARAJA PILLAI. **1937 M.W.N. 983.**

———Procedure—Charge of conspiracy against several persons—All of them not parties to alleged agreement of conspiracy—Joint trial on general charge of conspiracy and other substantive offences—Propriety of. *See* PENAL CODE, S. 120-A. **A.I.R. 1936 Cal. 753.**

———*Procedure—Charge—Dropping of—Rule—Accused committed on several charges—Sessions Judge framing new charge and trying only under that charge—Absence of any order or trial in respect of other charges—Legality.*

It is better to have too many charges than too few, and once a charge has been framed, it should not be dropped until the conclusion of the trial unless on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges. Where an accused is committed for trial to the Sessions Court on a number of charges, it is open to the Sessions Judge to cancel some of them or to frame a new charge or to stay the trial of some charges or allow them to be withdrawn on conviction being had on the main charge. But he ought not to leave some of the charges in the air without either cancelling them or trying the accused under them or recording some order in respect of the same. (*Noor and Rowland, JJ.*) EMPEROR *v.* SADASIBO MAJHI. **18 Pat. 82=1938 P.W.N. 754=19 Pat.L.T. 801=178 I.C. 130=5 B.R. 53=39 Cr.L.J. 997=A.I.R. 1939 Pat. 35.**

———*Procedure—Charge under S. 498, Penal Code—Summons instead of warrants—Duty of Magistrate.*

In a case under S. 498, Penal Code. where the accused are women, ordinarily the Magistrate should in the first instance issue summons instead of warrants upon all the women. The Magistrate should also consider whether he should not dispense with the attendance of the women accused. (*Davis, J.C.*) BADRUDDIN GUL HASSAN KHAN *v.* BALOCHO BAKAR. **I.L.R. (1940) Kar. 110=186 I. C. 391=12 R.S. 206=41 Cr.L.J. 310=A.I.R. 1939 Sind 342.**

CRIMINAL TRIAL.

——Procedure—Complaint—Disposal—Duty of magistrate to exercise independent judgment—Dismissal of complaint by mere issue of summary under class C—Legality. *See* CR.P. CODE, SS. 200-203. **I.L.R. (1939) Kar. 277.**

——*Procedure—Complicate questions as to conflicting right of landlord and tenant as regards* ferae naturæ—*Jurisdiction of Criminal Court.*

A Criminal Court is not an appropriate tribunal to decide difficult and complicated questions relating to rights of property, *e.g.*, as between landlord and tenant as regards *ferae naturae*. (*Harries, C.J. and Varma, J.*) ADVOCATE-GENERAL, ORISSA *v.* BHIKHARI CHARAN. **187 I.C. 825=6 B.R. 550=12 R.P. 655=41 Cr.L.J. 509=1940 P.W.N. 306=A.I.R. 1940 Pat. 588.**

——Procedure—Dismissal of complaint on police report by Sub-divisional Magistrate—Order for further inquiry by Sessions Judge—Sub-divisional Magistrate directing 1st Class Magistrate to inquire and report—Jurisdiction of latter to summon accused and try case—Order of discharge by latter—Legality. *See* CR. P. CODE, S. 436. **19 Pat.L.T. 336.**

——Procedure—Different charges on same facts—Trial with same persons as jury and as assessors—Desirability—Acquittal by jury and assessors in all—Acceptance of verdict by judge—Conviction in disregard of opinion of assessors—Propriety. *See* CR. P. CODE, S. 269 (*c*). **40 C.W.N. 1374.**

——Procedure—Joint trial of several offences—Rule as to—*Corpus delicti*—Relevancy. *See* CR. P. CODE, S. 235. **1939 P.W.N. 300.**

——*Procedure—Mixed trial—Trial of one offence with jury and another with assessors at one and same trial—Undesirability of.*

The cumbrous decree of a mixed trial, one with the help of jurors and the other with assessors, at one and the same trial, is apt to lead to unsatisfactory and illogical results, and should not be resorted to unnecessarily. (*Grille and Gruer, JJ.*) SAKHAWAT *v.* EMPEROR. **I. L. R. (1937) Nag 277=167 I.C. 61=9 R.N. 163=38 Cr.L.J. 330=19 N.L.J. 320=A.I.R. 1937 Nag. 50.**

——*Procedure—Order-sheet—Substitution by copy—Authentication of copy—Necessity for—Original marked as exhibit and uncertified copy substituted—Propriety.*

When the original order-sheet in a case is marked as an exhibit at the trial the ordinary procedure is that at the conclusion of the trial or proceedings the original order-sheet is kept in its proper place and a copy is retained on the record of the case. But when that is done, the copy must be authenticated as a true copy. The copy placed on the record must be certified to be a true copy and on the margin of it, it ought to be noted that the original has been marked as exhibit number so and so. (*Rowland, J.*) RAGHUNI PRASAD M'AHTO *v.* EMPEROR. **160 I.C. 604=8 R.P. 370=37 Cr.L.J. 318=17 Pat.L.T. 81=1936 Cr.C. 273=A.I.R. 1936 Pat. 249.**

——*Procedure—Plea of absence of jurisdiction upheld—Transfer by District Magistrate to another Magistrate having jurisdiction—Legality.*

Petitioner who was charged with an offence before the Sub-Divisional Magistrate of *J* objected to the jurisdiction of that Magistrate. The Magistrate upheld the plea and submitted the records to the District Magistrate who transferred the case to the Sub-Divisional Magistrate of C. who had jurisdiction.

Held, this was illegal and not permissible, and therefore the order of transfer must be set aside and the case re-transferred to the file of the Sub-Divisional Magistrate of *J* for proper disposal. (*Lakshmana Rao, J.*) SUBBANNA, *In re*. **1939 M.W.N. 517=49 L.W. 643=(1939) 1 M.L.J. 899.**

——*Procedure—Preliminary objection—Duty of Court to decide before proceeding further.*

An objection which goes to the very root of a case should not be reserved till the entire evidence is recorded. The magistrate must deal with such an objection before proceeding further with the case after taking such evidence as may be necessary for deciding that objection. (*Lakshmana Rao, J.*) PARANDHAMAYYA *v.* NAGABHUSHANAM. **183 I.C. 268=40 Cr.L.J. 798=12 R.M. 251 (1)=1939 M.W.N. 888 (1)=1939 M.Cr.C. 201=49 L.W. 545=A.I.R. 1939 Mad. 579.**

——*Procedure—Proceedings under S. 110, Cr. P. Code, drawn up against party—Latter moving both Sessions Judge and District Magistrate—Adverse order by former—Party awaiting result of application to latter—Subsequent revision to High Court—If barred.*

Where a person against whom proceedings under S. 110, Cr. P. Code, are drawn up moves the District Magistrate as well as the Sessions Judge, the fact that he does not come up to the High Court at once after an adverse order of the Sessions Judge but awaits the result of his application to the District Magistrate would not be a bar to his seeking the aid of the High Court subsequently. (*Manohar Lall, J.*) NARENDRANATH JHA, *In the matter of*. **1938 P.W.N. 588=19 Pat.L.T. 542=176 I.C. 849=4 B.R 767=39 Cr.L.J. 811=11 R.P. 116=A.I.R. 1938 Pat. 533.**

——*Procedure—Restoration of proceedings dismissed for default—Powers.*

There is no provision in the Cr. P. Code which would in terms justify the revival of a case dismissed for default. (*Bennet, J.*) RAQUMA *v.* GHIRAI. **12 R.O. 142=184 I.C. 751=1939 O.L.R. 651=1939 O.W.N. 974=1939 A.W.R. (C.C.) 277=1940 A Cr.C. 4=41 Cr.L.J. 96 (2)=A.I.R. 1940 Oudh 22.**

——*Procedure—Trial—When commences—Plea of* autrefois acquit—*Time of raising.*

Per *Cornish, J.*—The trial in a criminal case commences with the arraignment of the accused, that is to say, when the charge is read over to the accused and he is called on to plead to it. There is no rule of practice defining the proper time for raising a plea of *autrefois acquit* in India. The artificial English rule against pleading double is certainly not to be applied. (*Cornish, Mockett and Lakshmana Rao, JJ.*) REX *v.* JOHN MCIVER. **162 I.C. 592 (2)=8 R.M. 1000=37 Cr.L.J. 637=1936 Cr.C. 433=43 L.W. 548=1936 M.Cr.C. 157=1936 M.W.N. 281=A.I.R. 1936 Mad. 353=70 M.L.J. 635 (F.B.).**

Proof of guilt.

——*Proof of guilt—Accused involved by evidence in state of considerable suspicion—Duty of accused to explain.*

Although it is true that the proof of a case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner himself but from the positive

alternative evidence of his guilt that is given by the Crown, it is not an unreasonable thing and it daily occurs in investigations both civil and criminal that if there is a certain appearance made against a party if he is involved by the evidence in a state of considerable suspicion he is called upon for his own sake and his own safety to state and to bring forward the circumstances whatever they may be which might reconcile such suspicious circumstances with perfect innocence. (*Lort Williams and Nasim Ali, JJ.*) BENOYENDRA CHANDRA PANDEY *v.* EMPEROR. **63 Cal. 929=64 C.L.J. 154 =161 I.C. 74=8 R.C. 472=37 Cr.L.J. 394=40 C. W.N. 432=1936 Cr.C. 145=A.I R. 1936 Cal. 73**

———*Proof of guilt—Rejection of defence evidence.*

It is a cardinal basis of our criminal law tha t the true guide to the proving of guilt or innocence is whether the story of the prosecution is believed or not. The rejection of the detence evidence would in no way help in determining whether the prosecution story was true or not. (*Cunliff and Henderson, JJ.*) SARAT CHANDRA CHAKRAVARTY *v.* EMPEROR. **170 I C. 519=38 Cr L J 931=10 R.C. 151=65 C.L.J. 83=A.I.R. 1937 Cal. 463.**

———*Proof of guilt—Strong suspicion—Sufficiency.*

The conviction of an accused person cannot be maintained unless and until the offence is, without the least doubt brought home to him. Though there may be circumstances which create suspicions against the accused, suspicions however strong certainly cannot take the place of legal proof. (*Kichlu and Janki Nath Wazir, JJ.*) ABDUL AZIZ *v.* STATE. **40 P.L.R. J. & K. 1.**

Prosecution.

———Prosecution—Competency — Dispossession from land under *bona fide* claim of right—Remedy of dispossessed party—Suit or prosecution. *See* PENAL CODE, S. 441. **1936 Cr.C. 183=A.I.R. 1936 Rang 116.**

———*Prosecution—Expediency—Witness resiling in Sessions Court from statement made in committing Magistrate's Court—Notice to show cause against prosecution while proceedings are pending —Propriety.*

However exasperating the resiling of a witness from true statement made in the committing Magistrate's Court may be, the Court should not issue notice against him to show cause why he should not be prosecuted for perjury, while the proceedings are pending. The witness cannot then be considered a free witness; he is giving evidence under fear and duress, and it may not only influence and invalidate his testimony, but it may affect the testimony of witnesses who come later. S. 288, Cr. Pro. Code, enables a Magistrate to bring on record as substantive evidence the evidence of witness who falsely resiles in the Court of Session from his former statement and the question of the witness's prosecution should be considered afterwards. (*Davis, J.C. and Lobo, A.J.C.*) SAMERO *v.* EMPEROR. **164 I.C. 1036= 37 Cr.L.J. 1045=9 R.S. 63=1936 Cr.C. 856= A.I.R. 1936 Sind 140.**

———*Prosecution—If can be based on contract not enforceable in Civil Court.*

It cannot be said that a criminal prosecution must fail, if it is based upon a contract which could not be enforced in a Civil Court. (*Zia-ul-*

Hasan and Bennett, JJ.) EMPEROR *v.* RAGHUNATH. **1940 A.W.R. (C.C.) 381=1940 A.Cr.C. 119=1940 O.L.R. 561=1940 O.A. 759=1940 O. W.N. 819.**

———*Prosecution—Intention of the officer making a complaint under S.* 195, *Cr. P. Code—That a certain person should not be prosecuted—Conviction of the person—Setting aside of.*

Where it was the intention of the officer making the complaint and of his superior officer who directed him to make it, that a certain person should not be prosecuted, and the reason for not wishing to prosecute him is obvious and fair, the prosecution so far as he was concerned, should not have been considered. His conviction also will be set aside. (*Grille, J.*) EMPEROR *v.* VITHU. **I.L.R. (1937) Nag. 492=169 I.C. 74=9 R.N. 297=38 Cr.L.J. 717=A.I.R. 1938 Nag. 133.**

Reference.

———*Reference—Reference by District Magistrate criticising orders of Sessions Court—Competency.*

Ordinarily references to High Court from District Magistrates, which involve a criticism of the order of the Sessions Court cannot be accepted. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* LASHKARO. **31 S.L.R. 409=170 I.C. 676=38 Cr. L.J. 961=10 R.S. 71=A.I.R. 1937 Sind 203.**

Review.

———*Review—Power of High Court.*

It is not competent for the High Court to review a judgment once passed, even assuming that an error is made, unless the judgment was passed in a case which the Court had no jurisdiction to try. (*Stone, C.J. and Niyogi, J.*) DIWAN SINGH *v.* EMPEROR. **I.L.R. (1936) Nag. 99 =167 I.C. 465=9 R.N. 186=38 Cr.L.J. 390=19 N.L.J. 84=1936 Cr.C. 663=A.I.R. 1936 Nag. 132.**

Revision.

———Revision—Conviction based on comparison of signature made by Court—Absence of evidence of experts or of other persons who have seen the writing of the signature—Revision—Interference. *See* CRIMINAL TRIAL—EVIDENCE. **17 Pat.L.T. 896.**

———*Revision—Interference—Finding on no evidence—If final.*

The High Court will interfere in revision when the finding of the Courts below is based upon no evidence whatsoever. (*Khaja Mahomed Noor, J.*) GAURI SHANKAR SAHAY *v.* EMPEROR. **165 I.C. 815=9 R.P. 218=17 Pat.L.T. 569=1936 Cr. C. 821=38 Cr.L.J. 77=3 B.R. 83=1936 P.W.N. 679=A.I.R. 1936 Pat. 499.**

———*Revision—Limitation—Application for revision filed beyond time—Maintainability—If to be dismissed.*

Limitation for revision being a matter of practice and not prescribed by statute, when an application though made beyond the period of limitation, has been admitted and argued before the objection on the score of limitation is taken, the Court is not bound to dismiss the application on that ground. Since the mistake in procedure may be a *bona fide* one, the Court has power to consider the application on the merits, though techni-

cally it may be barred by limitation. (*Gruer, J.*) SYED MAHBUB *v.* EMPEROR. **166 IC. 690=9 R.N. 139=38 Cr.L.J. 262=19 N.L.J. 244=1936 Cr.C. 1139=A.I.R. 1936 Nag. 266.**

———*Revision—Questions of facts—If can be raised.*

In revision the High Court cannot allow the applicant to introduce questions of fact which, as they were not disputed, by implication were admitted in the lower Court. (*Davis, J.C. and Tyabji, J.*) NEBHANDAS HOLLARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 91=185 I.C. 832=12 R.S. 192=41 Cr.L.J. 246=A.I.R. 1939 Sind 337.**

———Revision—Trial at High Court Sessions—Revision by High Court—Jurisdiction—Refusal of certificate by Advocate-General—Application for Rule calling upon Advocate-General to show cause why he should not grant certificate—Competency. *See* LETTERS PATENT (CALCUTTA), CL. 26. **63 Cal. 838.**

Right of accused.

———*Right of accused to ask judge to hear case during hours fixed for sitting of Court.*

Counsel for the accused are within their right to ask the presiding Judge to hear the case as far as possible during the hours fixed for the sitting of the Court. (*Iqbal Ahmad, J.*) SALIG RAM *v.* EMPEROR. **1936 A.W.R. 967=1936 A.Cr.C. 207=167 I.C. 515=9 R.A. 550=38 Cr.L.J. 416=1937 All.L.R. 201=A.I.R. 1937 All. 171.**

———*Right of accused—Three persons tried together—One charged with murder and other two as abettors—Accused charged with murder pleading guilty—Right of the others to challenge—Evidence implicating that accused.*

Where three persons are being tried together one of them being charged with murder, and the other two for aiding and abetting the offence, and, for being an accessory after the fact, respectively, the question as to whether the deceased was murdered by the accused charged with murder, is an issue as between each prisoner, and the Crown and the Counsel for the accused charged with being accessory after the fact, is entitled to insist on the proof of it and challenge the evidence of it, even if the accused charged with murder has pleaded guilty, and the Court is not justified in asking him to confine himself to the implication of the accused for whom he is appearing as an accessory. (*Sir Sydney Rowlatt.*) MAHADEO *v.* EMPEROR. **44 L.W. 253=1936 A.W.R. 741=40 C.W.N. 1164=1936 Cr.C. 757=37 Cr.L.J. 914=1936 M.W.N. 889=38 Bom.L.R. 1101=1936 A.L.J. 869=163 I.C. 681=1936 P.W.N. 660=9 R.P.C. 51=A.I.R. 1936 P.C. 242 (P.C.).**

Sentence.

———*Sentence—Accused having previous convictions—Short sentences—Justification.*

Short sentences ought to be deprecated especially where the accused has a previous conviction. (*Gruer, J.*) GOVINDA BALAJI *v.* EMPEROR. **I.L.R. (1937) Nag. 181=167 I.C. 521=9 R.N. 193=38 Cr.L.J. 423=1936 Cr.C. 1039=A.I.R. 1936 Nag. 245.**

———*Sentence—Accused's privacy invaded—If ground for lesser degree of punishment.*

If the right of privacy of the accused's household was being invaded, the accused, though he may have transgressed the law and found guilty,

may be liable to a lesser degree of punishment. (*Manohar Lall, J.*) MEWALAL SINGH *v.* EMPEROR. **18 Pat.L.T. 869=1937 P.W.N. 908=4 B.R. 202=172 I.C. 933=10 R.P. 368=39 Cr.L.J. 221=A.I.R. 1938 Pat. 34.**

———*Sentence—Alteration of, in appeal—Sentence of death—Unreasonable delay in preparation of paper book.*

Where in an appeal and a reference from a sentence of death, there is a delay of four months in getting the paper book ready such delay in a capital sentence case is unreasonable and requires explanation. Where as the result of the delay and the intervention of the long vacation, the appellants have remained under sentence of death for about ten months, the High Court will take the fact into consideration along with all the facts and circumstances of the case in not confirming the sentence of death but reducing it to one for transportation for life. (*Lort Williams, and Nazim Ali, JJ.*) BENOYENDRA CHANDRA PANDEY *v.* EMPEROR. **63 Cal. 929=64 C.L.J. 154=161 I.C. 74=8 R.C. 472=37 Cr.L.J. 394=40 C.W.N. 432=1936 Cr.C. 145=A.I.R. 1936 Cal. 73.**

———*Sentence—Attempt to overawe witness and to assault him—Bribing prosecution witness—Mere admonition—If adequate.*

A person tried to overawe witnesses for the other side and as the witness refused to subdue he organized an assault party against the witness and took part in such assault. In a criminal case against him by the witness he won over the prosecution witnesses by bribing them. The Magistrate released the accused on admonition. The case was referred to the High Court by the Additional District Magistrate on point of inadequacy of sentence.

Held, that it was a serious state of things to allow such a case to be comprised and an order of admonition was not sufficient to meet the ends of justice. (*Dhavle and Agarwala, JJ.*) HIRA KURMI *v.* MADAN SAO. **161 I.C. 932=8 R.P. 493=17 Pat.L.T. 327=37 Cr.L.J. 502=1936 Cr.C. 253=1936 P.W.N. 86=A.I.R. 1936 Pat. 175.**

———*Sentence—Band of Baloochis committing deliberate, audacious and premeditated murder to execute their own sentence of death—Proper sentence.*

A band of armed Baloochis set out deliberately to execute a sentence of death, which they or others had passed and committed a deliberate and premeditated murder. There was no immediate provocation and hasty action in response. Nor was there any doubt about the guilt of the accused.

Held, that the Judicial Commissioner's Court always set its face against private individuals, whether they be Baloochis or members of any other tribe, executing in that manner their own sentences of death. There was nothing in the Penal Code justifying lesser sentence than death for a deliberate, audacious and premeditated murder. (*Davis, J.C. and Mehta, A.J.C.*) MUHAMMAD MURID RIND *v.* EMPEROR. **30 S.L.R. 354=170 I.C. 605=38 Cr.L.J. 953=10 R.S. 63=A.I.R. 1937 Sind 239.**

———*Sentence—Considerations.*

In a criminal trial a sentence must be passed which is considered proper in all circumstances of the case regardless of the consideration whether it should be an appelable one. (*Shaw, J.*) THE

KING *v.* MAUNG SAW HAN. **179 I.C. 716=40 Cr. L.J. 248=11 R.R. 343=A.I.R. 1939 Rang. 69.**

———*Sentence—Considerations—Moral indignation of offence.*

In awarding sentence one need not take into consideration the moral indignation which may be felt on looking at the offence committed; all that is necessary to consider is what sentence is likely to prevent the offender from committing the offence again and to prevent other persons similarly situated from committing similar offences. (*Mackney, J.*) MOHAMMAD CASSIM *v.* THE KING. **176 I.C. 150=11 R.R. 31 (2)=39 Cr.L.J. 692=A.I.R. 1938 Rang. 220.**

———*Sentence—Conviction for house-breaking and theft—Stolen articles of trifling value—Sentence of 8 years on accused having previous conviction and 18 months on accused without previous conviction—If justified.*

Two accused persons were charged and convicted of the offences of house breaking by night and theft in building under Ss. 457 and 380, I. P. Code. The first accused who had a previous conviction in which he was sentenced to 5 years' imprisonment, was sentenced to 8 years' rigorous imprisonment. The second accused who had no such previous conviction was sentenced to 18 months. The properties stolen were worth only Rs. 8, consisting of bronze vessel worth Rs. 6 and ten empty gunny bags worth Rs. 21.

Held, that the sentences were excessive and could not be justified having regard to the trifling value of the articles stolen, and that the previous conviction of the 1st accused would not justify such a severe sentence. (*Pandrang Row, J.*) SUBBA VALAYAN *v.* EMPEROR. **1937 M.W.N. 552.**

———Sentence—Conviction for murder—Case calling for reduction of sentence—Sentence of death—Propriety. *See* MADRAS CRIMINAL RULES OF PRACTICE, R. 260. **1939 M.W.N. 1130.**

———*Sentence—Conviction for murder and sentence of death—Conviction recorded also for robbery—Separate sentence—Necessity for recording.*

Where a person is convicted for murder and also for robbing of the ornaments of the deceased at the time of murdering him or her and a conviction under S. 392, Penal Code, is recorded, separate sentences should be imposed. (*Grille and Gruer, JJ.*) MT. JAMUNIA PARTAP LOHAR *v.* EMPEROR. **I.L.R. 1936 Nag. 78=164 I.C. 964=9 R.N. 48=37 Cr.L.J. 1047=1936 Cr.C. 814=A.I.R. 1936 Nag. 200.**

———*Sentence—Conviction for murder—Sentence of death on two persons for murder of one—If illegal—If ground for lesser sentence.*

The argument that two lives should not be forfeited for one should be rejected. The only way in which death sentence can be altered is by the exercise of the prerogative by the King-Emperor and it has got nothing to do with law at all. (*Cunliffe and Henderson, JJ.*) BHAKTA BHUSAN PRAMANIK *v.* EMPEROR. **63 Cal. 1089=162 I.C. 636=8 R.C. 618=37 Cr.L.J. 676=63 C.L.J. 142=40 C.W.N. 668=1936 Cr.C. 380=A.I.R. 1936 Cal. 227.**

———*Sentence—Conviction under Ss. 279 and 338, I. P. Code—Separate sentences—Legality—Offences forming part of same transaction.*

The imposition of separate sentences is not justified where the acts constituting of two different offences form part of the same transaction against the same accused. Separate sentences are not called for and should not be imposed on a conviction under S. 279 and S. 338, I. P. Code. (*Agarwala, J.*) RAGHO PRASAD *v.* EMPEROR. **183 I.C. 224=5 B.R. 954=40 Cr.L.J. 759 (2)=12 R.P. 131=20 Pat.L.T. 403=1939 P.W.N. 330=A.I.R. 1939 Pat. 388.**

———*Sentence—Conviction under S. 366, I. P. Code—Offence heinous in nature—Accused aged 55 years—If ground for lenient sentence.*

Where the accused was found guilty of an offence under S. 366, Penal Code, and the lower Court though describing the offence to be heinous in nature, sentenced the accused only to one year's rigorous imprisonment on account of the advanced age of 55 years of the accused.

Held, that the advanced age was no excuse for lenient sentence for an offence heinous in nature, that the sentence awarded was manifestly inadequate and that it should be enhanced to 5 years. (*Davis, J.C. and Mehta, A.J.C.*) EMPEROR *v.* HAJI KHAMOO. **165 I.C. 933=9 R.S. 113=38 Cr.L.J. 114=1936 Cr.C. 1089=A.I.R. 1936 Sind 233.**

———*Sentence—Cruel murder—Youth of accused—If ground for not awarding death sentence.*

Youth by itself is not a reason why the Court should evade its duty of sentencing the accused to death or especially in the case of a cruel murder. (*Burn and Mockett, JJ.*) CHENNA REDDI *v.* EMPEROR. **I.L.R. (1940) Mad. 254=1940 M.W.N. 86=A.I.R. 1940 Mad. 710.**

———*Sentence—Death sentence—Form of—Duty of Court in pronouncing.*

The Sessions Judge should not sentence the accused "to receive the supreme penalty." The sentence should direct that the accused be hanged by the neck until he be dead [S. 368 (1), Cr. P. Code.] (*Mosely and Ba U, JJ.*) NGA THEIN MAUNG *v.* EMPEROR. **160 I.C. 459=8 R.R. 383=37 Cr.L.J. 290=1936 Cr.C. 45=A.I.R. 1936 Rang. 46.**

———*Sentence—Defiance of process of law—Proper punishment.*

Defiance of the process of law must be looked upon as a serious offence as it hampers the administration of justice. If allowed to be committed with impunity the prestige of the Court would be lost. Such offences should be punished with adequate sentences and not at all leniently. (*Mahomed Noor and Rowland, JJ.*) SHEO AHIR *v.* EMPEROR. **17 Pat. 680=11 R.P. 261=40 Cr. L.J. 71=19 Pat.L.T. 665=1938 P.W.N. 813=178 I.C. 487=5 B.R. 104=A.I.R. 1938 Pat. 548.**

———*Sentence — Discretion—Interference—Enhancement by High Court—Principles.*

No doubt, the question of sentence is a matter of discretion of the trial Court and the High Court is loath to interfere if that discretion is judicially exercised; yet where it appears that the discretion has not been judicially exercised, and the trial Court has imposed a very lenient sentence for the offence committed, the High Court would interfere and enhance the sentence. (*Pandrang Row and K. S. Menon, JJ.*) *In re.* SUBBIA GOUNDAN. **165 I.C. 330=37 Cr.L.J. 1153=9 R. M. 237=1936 M.W.N. 895=44 L.W. 348=1936**

CRIMINAL TRIAL.

M.Cr.C. 305=1936 Cr.C. 876=A.I.R. 1936 Mad. 788.

———*Sentence—Discretion of trial Court—Interference by superior Court—Absence of evidence as to gravity of offence—Effect.*

An accused person was convicted and fined under S. 6 (*c*). Boilers Act, on his pleading guilty to the charge. His plea being accepted no prosecution evidence was recorded in the case. A reference was made to the High Court to enhance the fine.

Held, that the fine could not be enhanced as there was no evidence on the record to show the heinousness of the offence, and under the circumstances of the case there was no reason to interfere with the discretion of the trial Court. (*Agarwala and Varma, JJ.*) BISWAS *v.* EMPEROR. **168 I.C. 548=3 B.R. 448=38 Cr.L.J. 572 (1)=9 R.P. 499=18 Pat.L.T. 468=A.I.R. 1937 Pat. 275.**

———*Sentence—Element of vengeance to be considered.*

One element in awarding sentences is the element of vengeance; the natural resentment of the aggrieved persons must be satisfied lest they take the law into their own hands. (*Skemp, J.*) HARNAM SINGH *v.* EMPEROR. **165 I.C. 146=37 Cr.L.J. 1079=9 R.L. 218=38 P.L.R. 203=1936 Cr.C. 833=A.I.R. 1936 Lah. 833.**

———*Sentence—Enhancement—Injury to the depth of three inches near left ear caused by plunging of heavy sharp crowbar into head—Sentence of three years' rigorous imprisonment—Adequacy—Proper sentence.*

A wound or injury three inches deep in the region of the left ear caused by the plunging of a sharp heavy crowbar into the head, is most inadequately punished by a sentence of three years' rigorous imprisonment. Sentence enhanced to seven years' rigorous imprisonment. (*King, J.*) VENKANNA *v.* EMPEROR. **1937 M.W.N. 886.**

———*Sentence — Extenuating circumstances — Consequences of crime more serious than ordinary —If justifies severer sentence.*

A Court must not pass the more severe sentence when circumstances of extenuation exist, merely because the consequences of the crime have been more serious than in an ordinary case. Accused was found to have fatally stabbed his wife, who was eight months advanced in pregnancy. The lower Court held that though it believed that there was such provocation as to form a mitigating circumstance, yet that could not be taken into account because more lives than one had been sacrificed,

Held, that this was an erroneous view of looking at the way in which circumstances of extenuation could be taken into account. (*Roberts, C.J. and Leach, J.*) NGA SAW MAUNG *v.* EMPEROR. **172 I.C. 395=10 R.R. 245=39 Cr.L.J. 137=A.I.R. 1937 Rang. 466.**

———*Sentence — Extenuating circumstance—Intention to kill father—Injuries inflicted on son of intended victim causing death—Conviction for murder—Sentence—Lesser sentence.*

When a man is convicted for murdering a child, not because he intended to murder the child, but because in unsuccessful attempt to murder the child's father he unfortunately succeeded in actually killing the child, he should be given the benefit of his good fortune in not having actually killed the father, and in considering the sentence to be passed for killing the child, his absence of intention to kill the child must be considered as an extenuating circumstance. The ends of justice in such a case would be met by a sentence of transportation for life. (*King and Venkataramana Rao, JJ.*) ARUMUGA TEVAN *v.* EMPEROR. **1937 M.W.N. 723.**

———*Sentence—Fine—Fine imposed on representation that a friend would pay it—Propriety.*

The imposition of a fine on the accused on representation to the Judge that a friend might pay it, is not improper, though the accused is made to stay in jail for non-payment of the fine. (*Coldstream, J.*) RATTAN LAL *v.* EMPEROR. **165 I.C. 544=9 R.L. 265=38 Cr.L.J. 51.**

———Sentence—Fine—Payment by relation of accused on behalf of accused—Subsequent reversal of conviction on appeal—Right to refund of fine —Person paying on behalf of accused—Right of. *See* INSOLVENCY—PROCEDURE. **(1937) 1 M.L.J. 130.**

———*Sentence—Fine, when accused is without means.*

There is no point in imposing a fine on an accused who is apparently without means and incapable of paying it. (*Davies, I.C.S.*) EMPEROR *v.* KARIM. **1938 A.M.L.J. 134.**

———*Sentence—Joint fine passed on two accused with terms of imprisonment in default—Legality.*

A sentence of joint fine passed on two accused with terms of imprisonment in default in the case of each of them is plainly open to the objection that it is impossible to say whether either of the convicted persons is liable to suffer the entire term of imprisonment and for what proportion of the default and as such cannot be sustained. (*Dhavle, J.*) SAFDER KHAN *v.* GAYA MUNICIPALITY. **175 I.C. 176=4 B.R. 539=10 R.P. 590 (1)=39 Cr.L.J. 531 (1)=19 Pat.L.T. 748=A.I.R. 1938 Pat. 271.**

———*Sentence—Mitigation—Accused in custody for several months—If ground for reduction of sentence.*

Where the accused, on the date of the judgment, has been in custody for several months (about ten months), that is a circumstance which the Court is justified in taking into consideration and making an equivalent reduction in the sentence to be awarded on conviction. (*Rowland and Madan, JJ.*) RAM BABU JADAV *v.* EMPEROR. **18 Pat.L.T. 964=173 I.C. 418=4 B.R. 266=10 R.P. 402=39 Cr.L.J. 302=1937 P.W.N. 1001=A.I.R. 1938 Pat. 60.**

———*Sentence—Murder—Accused young and inflicting injuries during assault in dark—Lesser sentence.*

Where the accused is young and inflicted the injuries together with another man in the course of a blind assault in the dark death sentence is not called for. (*Mosely and Ba U, JJ.*) NGA THEIN MAUNG *v.* EMPEROR. **160 I.C. 459=8 R.R. 383=37 Cr.L.J. 290=1936 Cr.C. 45=A.I.R. 1936 Rang. 46.**

———Sentence—Murder committed in state of drunkenness. *See* PENAL CODE, S. 302. **A.I.R. 1938 Rang. 448.**

———*Sentence—Murder of child for the sake of jewels worn upon the person—Proper sentence.*

When the accused for the sake of jewels worn upon the person of a young and helpless child who is no other than his own aunt's daughter, murders her, the only possible and proper sentence is a sentence of death and nothing short of it will satisfy the ends of justice. (*Burn and Mockett, JJ.*) MITTAYI AMEER SAB *v.* EMPEROR. **1938 M. W.N. 34.**

———*Sentence—Murder—Delay in arresting accused and trying—If ground for lesser sentence.*

It is not the law that because a man succeeds in evading arrest for a number of years after he commits a murder he is entitled to lesser sentence when he is eventually arrested, although the lapse of time between the offence and the judgment may be taken into account in fixing the appropriate sentence. (*Mockett and Horwill, JJ.*) NARASIMHAJI *v.* EMPEROR. **1937 M.W.N. 571.**

———*Sentence — Murder—Extenuating circumstances—Age and sex of accused—Accused recently delivered of child in jail—If ground for lesser penalty.*

Where a woman murders a child for the sake of its ornaments, penalty of death is not improper; nor will the age and sex of the accused or the fact that she has recently been delivered in jail weigh as extenuating circumstance. (*Grille and Gruer, JJ.*) MT. JAMUNIA PARTAP LOHAR *v.* EMPEROR. **I.L.R. 1936 Nag. 78=164 I.C. 964=37 Cr.L.J. 1047=9 R.N. 48=1936 Cr.C. 814=A.I.R. 1936 Nag. 200.**

———*Sentence—Murder of illegitimate child by an young mother—Transportation for life—If appropriate.*

Where a young girl of 15 kills her new born illegitimate child, a sentence of transportation for life is wholly inappropriate. High Court cannot interfere in such a matter. It can only suggest it to the Local Government to reduce the sentence to one for a short period. (*Young, C.J. and Monroe, J.*) MT. TALIAN *v.* EMPEROR. **40 P.L.R. 23=176 I.C. 272 (2)=39 Cr.L.J. 718=11 R.L. 194=A.I.R. 1938 Lah. 473.**

———*Sentence—Murder—Old age—If ground for lesser sentence.*

Old age is, no doubt, a point to be taken into account in considering what sentence is to be imposed on the accused, but in itself it is not a sufficient ground for not awarding the death penalty on a conviction for murder. (*Mockett and Horwill, JJ.*) SANKARAN NAYAR *v.* EMPEROR. **1937 M.W.N. 728.**

———*Sentence—Murder of old woman for sake of ornaments—Proper sentence—Mitigation—Youth dominated by co-accused—Lesser penalty.*

Where accused persons plan and commit the murder of an old woman for the sake of gain, *i.e.*, for getting her ornaments, all the participants deserve the extreme penalty of the law, unless it be shown that any of them was dominated by the others. Such a presumption may be made in the case of one who is very young. The latter need not be awarded the extreme penalty. (*D. R. Norman.*) RAHIM BUX *v.* EMPEROR. **1937 A.M. L.J. 18.**

———*Sentence—Murder—Youth of accused.*

Youth alone in every case is not such an extenuating circumstance as would justify the imposition of lesser penalty in case of murder but it should be taken into consideration with the other facts of the case. The accused is entitled to the benefit of reasonable doubt in the matter of sentence as in the matter of conviction. The deceased had insulted and provoked the accused as a result of which a fight resulting in the death of the deceased had ensued. The accused was about 17 or 18 years of age, the deceased was an older and bigger man. On the other hand it was equally possible that the accused in order to live up to his reputation of being a bully had wantonly attacked the deceased, who was apparently unarmed. There was considerable doubt about the cause of the quarrel between the accused and deceased,

Held, that under the circumstances the extreme penalty of the law was not called for. A.I.R. 1931 Rang. 171 and A.I.R. 1924 Rang. 179, Rel. on. (*Ba U and Mackney, JJ.*) NGA KAN *v.* EMPEROR. **161 I.C. 574=37 Cr.L.J. 463=8 R.R. 484=1936 Cr.C. 76=A.I.R. 1936 Rang. 71.**

———*Sentence—Offences of dacoity and robbery common in particular place—Deterrent punishment.*

Where offences of dacoity and robbery in causing wrongful loss to cultivators have become very common in a particular district, it should be dealt with severely and deterrent punishment is advisable. (*Mackney, J.*) EMPEROR *v.* BASA MEAH. **161 I.C. 90=37 Cr.L.J. 416=8 R. R. 451=1936 Cr.C. 75=A.I.R. 1936 Rang. 70.**

———Sentence—Offence under S. 471, I. P. Code—Technical offence—Accused making no effective use of forged document—Mitigation of sentence. *See* PENAL CODE, SS. 193 AND 471. **70 M.L.J. 109.**

———*Sentence—Old offender—If to be awarded severe sentence—Rule as to.*

There is no rule of law that the sentence on an old offender should always be at least a little more severe than the sentence just previous, without any regard to the nature of the offence. Such a rule cannot be supported by any good reason. Such a rule though it may be an excellent rule of thumb, cannot be safely followed in imposing sentences. The sentences imposed on criminals should no doubt be adequate to the offence, but not excessive. A sentence of 6 years' rigorous imprisonment awarded on a conviction for theft of a cow worth Rs. 50, on an accused who had been previously convicted and sentenced to 5 years' imprisonment was reduced by the High Court on appeal to one of 3 years' rigorous imprisonment. (*Pandrang Row, J.*) ABDUL GANI SAHIB, *In re.* **59 Mad. 995=165 I.C. 387=37 Cr.L.J. 1150=9 R.M. 236=1936 M.W.N. 985=44 L.W. 558=1936 M.Cr.C. 352=A.I.R. 1937 Mad. 231=71 M.L.J. 536.**

———*Sentences — Police officers committing offences.*

Where persons charged with the maintenance of law and order, themselves transgress the law and have recourse to illegal means, to obtain the credit of detecting crimes, they ought to be severely dealt with. (*Gruer and Puranik, JJ.*) PARAMANAND *v.* EMPEROR. **1940 N.L.J. 459=A.I.R. 1940 Nag. 340.**

———Sentence—Remission—Power of Court—Order writing-off irrecoverable fine—Effect—If operates as remission of sentence awarded in lieu of fine—Power to review decision. *See* MYSORE CR. P. CODE, REGULATION, S. 401. **14 Mys.L.J. 218.**

CRIMINAL TRIAL.

———*Sentence—Several taking part in brutal murder—Duty to discriminate.*

Where several persons took part in a murder which was premediated, deliberate, cruel and was ruthless and brutal in its nature, all of them may justly be condemned to die. In cases where many persons are involved Courts should hesitate to pass sentences of death on all, and try to discriminate. Infliction of several sentences of death in one and the same case, is apt to fail of the effect which such sentences would otherwise have. (*Guha and Lethbridge, JJ.*) EMPEROR *v.* NIBARESH MONDAL. **66 C.L.J. 351=174 I.C. 803=39 Cr.L.J. 479=10 R.C. 726=A.I.R. 1938 Cal. 295.**

———*Sentence—Simple and rigorous imprisonments—Order for concurrent running—Legality.*

It is not illegal to order that simple imprisonment and rigorous imprisonment shall run concurrently. A person who is being rigorously imprisoned is also necessarily and *ex hypothesi* being imprisoned. (*Newsam, J.*) SHEIK BADAI SAHIB *v.* EMPEROR. **1937 M.W.N. 1334.**

———*Sentence—Specific offence proved to be connected with the general conspiracy for which sentence imposed—Additional sentence for specific offence should not be passed.*

Where a person's proved connexion with the specific offence of cheating is only through the general conspiracy to cheat and he has already received a sentence of a certain term of imprisonment for his part in the general conspiracy, there should be no additional sentence on the cheating charge. (*Bartley and Rau, JJ.*) SOLOMAN EZEKIEL *v.* EMPEROR. **186 I.C. 171=41 Cr.L.J. 255=12 R.C. 465=69 C.L.J. 298=A.I.R. 1939 Cal. 376.**

———*Sentence—Youth of about* 16*—Murder—Death sentence—Propriety.*

Where the accused, who was convicted of the murder of his cousin, a girl of about 4 years of age—he having murdered her deliberately to procure money for his debauchery which he obtained by pledging the jewels worn by the murdered girl—was only just over 16 years of age when he committed the crime.

Held, that though the crime was a terrible one, it was not right that he should be sentenced to death, and that a sentence of transportation should be substituted instead of the death sentence. (*Burn and Lakshmana Rao, JJ.*) EMPEROR *v.* SATYANARAYANAMURTHY. **1937 M.W.N. 1133.**

Stay.

———*Stay—Charge under S. 212, I. P. Code——Case relating to offence not disposed—Stay—if to be ordered.*

Where a charge is made under S. 212, I. P. Code, on the ground that the accused harboured certain persons accused of certain offences, the trial of the charge under S. 212, should be stayed until the case relating to the main offences, alleged to have been committed by the persons harboured, is finally disposed of. (*K. S. Menon, J.*) PALANI GOUNDAN *v.* EMPEROR. **1937 M.W.N. 21.**

———*Stay of criminal case pending civil suit—Considerations—Discretion.*

A person instituted a suit against another on a hand note alleged to be executed by him. The defendant after the service of summons of the civil suit against him filed a criminal complaint against the plaintiff alleging that the plaintiff had cheated the complainant by getting his thumb impression on a blank paper and later on by refusing to hand over that paper on which the alleged hand note was written. The plaintiff as an accused in the complaint asked the criminal Court to stay proceedings till the disposal of his civil suit. The trying Court refused the application for stay holding that sufficient grounds for stay were not made out.

Held, that ordinarily the High Court will not interfere with the discretion exercised by the Court of first instance regarding the balance of convenience. But as in this case, the Magistrate did not consider the balance of convenience and the balance of convenience being in favour of the civil suit being first determined and the criminal proceeding being decided afterwards, the criminal proceedings should have been stayed. (*Rowland, J.*) MOLHU RAI *v.* EMPEROR. **166 I.C. 692=9 R.P. 336=38 Cr.L.J. 264=3 B.R. 215=A.I.R. 1937 Pat. 8.**

———*Taking cognizance—Meaning.*

Taking cognizance does not involve any formal action or indeed any action of any kind, but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. It occurs as soon as he reads the complaint and even before he examines the complainant. (*Gruer, J.*) HARINARAYAN *v.* GOVINDRAM. **188 I.C. 606=41 Cr. L.J. 645=13 R.N. 9=1940 N.L.J. 304=A.I.R. 1940 Nag. 245.**

Transfer of case.

———*Transfer of cases—Absence of jurisdiction—Proper procedure to be followed.*

Benches of Magistrates are not authorized to transfer cases. If a bench is of opinion that a case is outside their own jurisdiction the proper procedure is either to return the complaint for proper presentation or refer the case to the learned District Magistrate with their recommendations in the matter. (*Davies.*) MOHAMMED HUSSAIN *v.* RAHIM BUX. **1940 A.M.L.J. 40.**

———*Transfer of case—Apprehension—Trying Magistrate subordinate to accused—Embarrassing position—Expediency of transfer.*

Where the Financial Commissioner is the accused and the case is before an Additional District Magistrate who is also a Collector and as such subordinate to the accused, and where the complainant applied for a transfer of the case it was held that the complainant might, quite reasonably, albeit quite wrongly, have the apprehension that the particular relationship that the Magistrate has to the accused in his case might have some influence on him; and that even if it merely embarrasses him, it would be sufficient to justify the complainant's apprehension that the trial might not be all that could be desired. Where there is such an apprehension with reasonable grounds, it is right to transfer the case in question to some other Court. (*Mackney, J.*) MAUNG CHIT TIN v. REYNOLDS. **39 Cr.L.J. 415=174 I.C. 400=10 R.R. 403=A.I.R. 1938 Rang. 68.**

———*Transfer—Case coming for inquiry before Magistrate who held identification parade—Propriety—Transfer—Desirability.*

It is advisable that the Magistrate who has held the identification parade in a case should not hold

the preliminary inquiry into that case, as the identification is an important part of the prosecution case. If the case is before that Magistrate, it is desirable to have it transferred to some other Magistrate. (*Newsam, J.*) NARAYANASWAMI PILLAI *v.* EMPEROR. **1937 M.W.N. 1200.**

———*Transfer—Grounds—Magistrate wrongly admitting evidence—If sufficient ground.*

While it is easy for an appellate Court to say that this or that evidence should not have been admitted on the record, it is not so easy for a Magistrate who is recording the evidence constantly to interrupt the advocate and shut out the questions and answers the purport or purpose of which may not be clear until some time after the questions have been asked, answered and recorded. It is true the duty lies upon the Court to exclude evidence which is inadmissible in law but the fact that the Magistrate wrongly admits evidence, an error in law is not of itself necessarily good ground to transfer a case. (*Davis, J.C.*) OM RADHE *v.* EMPEROR. **I.L.R. (1940) Kar. 113=183 I.C. 460=40 Cr.L.J. 803=12 R.S. 55=A.I.R. 1939 Sind 238.**

Witness.

———*Witnesses—Binding down for appearance—Power of Magistrate.*

When a Magistrate cannot take cognizance of an offence, his action in binding down certain witnesses for appearance in connection with that offence is clearly without jurisdiction. (*Abdul Qayoom, C.J.*) ABDUL RAHIM *v.* STATE. **42 P. L.R.J. & K. 232.**

———*Witness—Child witness—Value of.*

A person cannot be held guilty of an offence on the uncorroborated statement of a witness who is too young to be administered an oath and is obviously a partisan witness. 1930 O.W.N. 736, Appl. (*Nanavutty, J.*) RISHI LAL *v.* EMPEROR. **167 I.C. 11=9 R.O. 379=1937 O.L.R. 118=1937 A.Cr.C. 51=38 Cr.L.J. 376=1937 O.W.N. 258=A.I.R. 1937 Oudh 277.**

———*Witnesses for prosecution—Freedom to tell truth in the Court of Session.*

It is in the interests of the Crown as well of the interests of justice that prosecution witnesses should be free to tell the truth to the Court of Session irrespective of whatever evidence they may have given in the Court of the committing Magistrate. (*Nanavutty, J.*) PARAGI *v.* EMPEROR. **164 I.C. 107=9 R.O. 34 (2)=37 Cr.L.J. 885=1936 O.W.N. 763=1936 O.L.R. 429=1936 Cr.C. 982=A.I.R. 1936 Oudh 373.**

———*Witness—Ring-leader of gang in custody during investigation—Subsequent release—Production as witness—Legality.*

A person was a ring-leader of a gang, against whom there was evidence as against others. He was in custody during investigation but was released on bail by the Magistrate. The police before challaning the case obtained the order cancelling the bail and produced him as witness in the Court.

Held, per *Grille, J.C. and Pollock, A.J.C.*—That he was a competent witness and failure of the Magistrate to proceed against him did not invalidate the trial. (*Grille, J.C., Niyogi and Pollock, A.J.C.*) AMDUMIYAN GULJAR *v.* EMPEROR. **I.L.R. (1937) Nag. 315=166 I.C. 582 and 587=9**

R.N. 126 and 132=38 Cr.L.J. 237 and 251=A.A.R. 1937 Nag. 17 (F.B.).

CRIMINAL TRIBES ACT (VI OF 1924), S. 23—*Applicability—Conviction under S.* 451, *I.P. Code—Prior conviction under S.* 380, *I.P. Code—Enhanced sentence—If called for.*

S. 23 of the Criminal Tribes Act is not applicable to the case of a person convicted under S. 451, I. P. Code, who has been previously convicted of an offence under S. 380, I. P. Code. Neither S. 380 nor S. 451, I. P. Code, is an offence mentioned in Sch. I of the Criminal Tribes Act. In such a case no enhanced sentence is called for as required by S. 23. (*Rowland, J.*) MOSAHEB DOME *v.* EMPEROR. **183 I.C. 660=5 B.R. 978=1939 P.W.N. 627=12 R.P. 177=40 Cr.L.J. 833 (2)=20 Pat.L.T. 879=A.I.R. 1940 Pat. 14.**

———**S. 23**—*Applicability—Previous conviction under* S. 411, *I. P. Code.*

S. 23 of the Criminal Tribes Act, is inapplicable to a case where a member of a criminal tribe had been previously convicted under S. 411, I. P. Code as an offence under that section does not fall within the purview of Sch. I of the Act. (*Abdul Rashid, J.*) MUKHALYA *v.* EMPEROR. **40 P.L.R. 54.**

———**S. 23 (1)**—*Construction—"Special reasons to the contrary"—Determination of—Circumstances to be considered by Court.*

There is no reason for holding that the "special reasons to the contrary" in S. 23 (1) of the Criminal Tribes Act must be something apart from the nature of the offence, such as youth, illness, age or sex. The fact that the offence is not of a very serious nature may form a "special reason to the contrary" within the meaning of S. 23 (1) for reducing the sentence. The Court must in every case consider all the circumstances in determining whether there are special reasons for not inflicting the minimum sentence. That the previous conviction took place a long time ago, the nature of the offence of which the accused is convicted, and the seriousness of the previous offence, to be judged generally from the sentence imposed, are all circumstances which the Court must consider in determining whether there are "special reasons." (*Beaumont, C.J. and Lokur, J.*) EMPEROR *v.* MAGAN BHIKA. **I.L.R. (1939) Bom. 169=181 I.C. 786=40 Cr.L.J. 565=11 R.B. 350=41 Bom.L.R. 284=A.I.R. 1939 Bom. 153.**

———**Ss. 22 and 23 (1) (b)**—*Convictions required need not be convictions after becoming member of criminal tribe.*

The three convictions required before the provisions of S. 23 (1) (*b*) come into operation need not be convictions after the accused has become a member of a criminal tribe, and if the accused is convicted of scheduled offences before he has become a member of a criminal tribe, these must be counted against him. (*Davis, J.C. and Lobo, A.J.C.*) PANDHI FARID *v.* EMPEROR. **30 S.L.R. 100=164 I.C. 95=37 Cr.L.J. 948=9 R.S. 41=1936 Cr.C. 675=A.I.R. 1936 Sind 91.**

———**S. 23 (1)**—*Membership of criminal tribe—Material time—Time of occurrence or time of conviction.*

S. 23 (1) of the Criminal Tribes Act relates to the time of conviction and not to the time of the occurrence which is the subject-matter of the case

CRIMINAL TRIBES ACT (1924), S. 23.

which ends in his conviction. (*Pandrang Row, J.*) KONDAYYA *v.* EMPEROR. **1940 M.W.N. 242 =51 L.W. 484=A.I.R. 1940 Mad. 298=(1940) 1 M.L.J. 775.**

———**S. 23**—*Scope and applicability.*

S. 23 of the Criminal Tribes Act refers only to convictions for offences specified in Sch. I of the Act and has no application to a conviction for an offence which is not contained in that Schedule. S. 23 (1) of the Act has in mind not only the previous convictions of the accused but also the offence for which he is being tried. (*Thomas, C.J.*) EMPEROR *v.* BEHARI. **14 Luck. 306=1938 O.W.N. 1053=1938 O.A. 804=1938 A.W.R. (C. C.) 88=1938 O.L.R. 464=1938 A.Cr.C. 126= 178 I.C. 95=39 Cr.L.J. 1002=A.I.R. 1939 Oudh 16.**

———**S. 23 (1) (b)**—*"Special reasons to the contrary"—Meaning of.*

The circumstances that a long interval of time has passed between the last conviction and the commission of the present offence is a special reason to the contrary within the meaning of S. 23 (1) (*b*) of the Criminal Tribes Act for awarding a reduced sentence. (*Lakshmana Rao, J.*) VILLI CHINNU *v.* EMPEROR. **49 L.W. 457= 1939 M.W.N. 314=(1939) 1 M.L.J. 617.**

CROSS CLAIMS. *See* C. P. CODE, O. 8, R. 6; O. 21, R. 19.

CROSS COMPLAINTS. *See* CRIMINAL TRIAL.

CROSS DECREE. *See* C. P. CODE, O.21, R. 18.

CROSS-EXAMINATION.

See (1) EVIDENCE.
(2) EVIDENCE ACT, S. 154.
(3) CRIMINAL TRIAL—CROSS-EXAMINATION.

CROSS OBJECTIONS. *See* C. P. CODE, O. 41, R. 22.

CROWN.

See also (1) CR. P. CODE, SS. 256—257.
(2) EVIDENCE ACT, SS. 137—161.

———*Duty of, to abode by and obey law.*

It is the duty of the Crown and of every branch of executive to abide by and obey the law. If there is any difficulty in ascertaining it, it is the duty of the executive in cases of doubt to ask for directions from the Court to ascertain the law, in order to obey it and not to disregard it. (*Courtney-Terrell, C.J., Mohammad Noor and Varma, JJ.*) KUCHWAR LIME AND STONE CO. *v.* SECRETARY OF STATE. **16 Pat. 159=166 I.C. 966 =9 R.P. 361=3 B.R. 248 (2)=1937 P.W.N. 102 =18 Pat.L.T. 95=A.I.R. 1937 Pat. 65 (S.B.).**

———*Liability for torts or negligent acts of servants—Limits.*

When the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. Hence the Secretary of State will not be liable for torts or acts of negligence committed by Government servants while performing acts done in the exercise of powers which are usually termed sovereign. (*Haveliwala, J.C.*) RAHIMBUX *v.* SECRETARY OF STATE. **32 S.L.R. 8=173 I.C. 100=10 R.S. 195 =A.I.R. 1938 Sind 6.**

———Liability for tort of servants. *See* TORT—VICARIOUS LIABILITY. **A.I.R. 1936 Sind 130.**

CROWN.

———*Prerogative to assign or alter sources of irrigation—Nature and extent of—Declaration in respect of—Form—Penal cess—When could be levied—Improper levy—Remedy.*

While Government is entitled to supply water from such source as it thinks proper, this right is subject to the condition that the ryot who is entitled to get water for his registered wet fields gets his accustomed supply of water. A declaration that a person is entitled to take water from a particular sluice only so long as the Government does not make an efficient alternative provision, is quite in accordance with law, Penal Cess was not intended by the legislature to be allowed to be levied in cases where the ryot is only exercising his undoubted rights. Assuming that a penal cess was not illegal when it was levied and as such a refund of the cess paid could not be ordered, the ryot would nevertheless be entitled to damages, if the levy was found to be improper. (*Pandrang Row, J.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* MUNIYAPPAN CHETTI. **1938 M.W.N. 194=48 L.W. 115=178 I.C. 351=11 R.M. 445= A.I.R. 1938 Mad. 509=(1938) 2 M.L.J. 355.**

———Prerogative of dismissing servants at pleasure—Applicability to Local Bodies. *See* BOMBAY MUNICIPAL BOROUGHS ACT, S. 33. **39 Bom.L.R. 1269.**

———*Prerogative of legislation in case of ceded possession—Territory acquired by voluntary cession by consent of inhabitants—Grant of representative institutions—Effect of.*

The prerogative of the Crown to legislate by Orders in Council and Letters Patent for the government of a possession or ceded territory is not restricted to territories acquired by cession in a limited sense, excluding voluntary cession by the consent of the people. There is no authority for making a distinction between cession from some sovereign power and cession by general consent or desire of the inhabitants. The Crown, by the grant of representative institutions to the inhabitants of an acquired territory, is not immediately and irrevocably deprived of its right to legislate by Letters Patent or Orders in Council unless there is an express reservation of a right to that effect. The true rule is that such a grant, without the reservation of a power of concurrent legislation, precludes the exercise of the prerogative while the legislative institutions continue to exist. (*Lord Maugham.*) SAMMUT *v.* STRICKLAND. **180 I.C. 424=11 R.P.C. 159=48 L.W. 551=A.I.R. 1939 P.C. 39 (P.C.).**

———Priority—Court fee due to Government in pauper suit—Order for payment by defendant—Execution sale of latter's property by another decree-holder—Claim by Government for payment out of sale proceeds—Maintainability. *See* C. P. CODE, S. 73 (3), AND O. 33, RR. 10 AND 13. **70 M.L.J. 601.**

———*Right of to levy assessment on land—Claim to exemption—Onus.*

The ruling power in India is entitled as a matter of right to levy such assessment on land as it thinks proper, and if any one wants to claim any exemption from liability to pay such assessment, whether it is called land revenue or ground rent or by any other name, he must establish that exemption by sufficient evidence. It is not for the Crown to prove that it has reserved its right to

levy assessment on land. (*Pandrang Row, J.*) SECRETARY OF STATE *v.* SARANGAPANI. **161 I.C. 1002=8 R.M. 938=1936 M.W.N. 356=A.I.R. 1936 Mad. 320.**

———Right to tax—If lost by not charging land revenue for over 60 years. *See* GRANT—LOST GRANT. **A.I.R. 1937 P.C. 271=(1937) 2 M.L.J. 362 (P.C.).**

———Servants of. *See also* GOVERNMENT OF INDIA ACT, S. 96-B.

———*Servants of—Tenure of—Suit for damages for dismissal.*

A servant of the Crown remains in service at the pleasure of the Crown and is liable to be discharged at any time and hence can have no cause of action against Secretary of State for damages. (*Rupchand Bilaram, A.J.C.*) NARIMAN ARDESHIR *v.* SECRETARY OF STATE. **30 S.L.R. 395 =9 R.S. 203=167 I.C. 812=A.I.R. 1937 Sind 13.**

———Servants under—Tenure of service—Dismissal—Right to damages. *See* MASTER AND SERVANT—CROWN. **A.I.R. 1937 Sind 13.**

———*Stocks of incorporated Railway Company acquired by Crown by Act of Parliament—Subsequent transfer to third person—Remedy of stock holders.*

Where stocks of an incorporated Railway Company are acquired by the Crown or Minister of Finance as a trustee for the Crown by Acts of Parliament, orders in Council and agreement consented to by majority of stock-holders and entries in stock registers are made to that effect, an action by stock-holder of the Company for a declaration that the transfer and acquisition by the Crown of the stocks is *ultra vires* and for rectification of register is not maintainable. Their remedy is by way of petition of rights, notwithstanding that the Crown may have transferred the stocks to third person or amalgamated the same with another incorporated company. But an action for relief by way of damages against the Railway Company founded upon an alleged breach of duty in removing the name of the stock-holder in question and substitution of that of the Crown instead does lie. To such an action the person whose name is substituted for that stock-holder need not be joined as defendant nor can such a claim be prevented from proceeding against the defendant Company, on the ground that the stock-holder's title to any relief may ultimately turn out to depend upon the invalidity of the impeached Acts of Parliament and order in Council. (*Lord Russell of Killowen.*) LOVIBOND *v.* GRAND TRUNK RAILWAY, CANADA. **163 I.C. 547=9 R.P.C. 25=A.I.R. 1936 P.C. 212 (P.C.).**

CROWN DEBTS. *See* (1) C. P. CODE, S. 73.

(2) COMPANIES ACT, S. 230.

———Priority—Money due from mortgagor in respect of *kudimaramath*—Suit on mortgage by simple mortgagee—Appointment of receiver—Right of Crown to payment by receiver out of rents and profits in preference to mortgagee's claim. *See* MORTGAGE—MORTGAGE SUIT. **(1940) 1 M.L.J. 429.**

———Priority—Property sold in execution at instance of attaching creditor—Income-tax due by judgment-debtor—Application by Crown for payment out of sale proceeds—Competency. *See* C. P. CODE, S. 151. **1938 M.W.N. 197=(1938) 1 M.L.J. 351 (F.B.).**

CROWN GRANTS ACT (1895), S. 2.

CROWN GRANTS. *See* CROWN GRANTS ACT.

CROWN GRANTS ACT (XV OF 1895)—*Applicability—Grants of Sunderbans lands—Discretion to impose conditions—If limited.*

Obiter.—The Crown Grants Act applies to grants by Government of Sunderbans lands. The Crown has unfettered discretion to impose any condition, limitation, or restriction in its grants. (*Mitter and Biswas, JJ.*) AMBUJ BASHINI CHOWDHURANI *v.* SECRETARY OF STATE. **I.L.R. (1938) 2 Cal. 1=182 I.C. 121=12 R.C. 5=42 C.W.N. 239=A.I.R. 1938 Cal. 229.**

———*Applicability—Grant of jagir by Government to be enjoyed so long as any of grantee's survivors should survive—Stipulation that grantee should not transfer any part of estate by way of sale or by creation of mokarrari tenure—Effect of*

A tenure was created in 1842, by the proprietor of an estate, and granted in consideration of services to be rendered as barkandaz. The estate was subsequently forfeited to Government, and in 1881, there was a formal dispensation with the services which the jagirdar had to render as barkandaz, and a new grant was created of the tenure freed of those services at an annual rent. The new grant created a jagir for the descendants of an earlier jagirdar to enjoy so long as any of his descendants should survive. There was a stipulation that the jagirdar had no power to transfer by sale or by creation of mokarrari tenures any part of the tenure with a liability to resumption if unauthorised transfer should be made.

Held, (1) that the tenure was a Crown grant, a grant effected by the Crown Grants Act in such a manner that the provisions of the Transfer of Property Act would not apply to it, so that it took effect according to its tenor whatever might be the conditions laid down; (2) that the grant made a clear restriction against alienation and granted a limited interest which was not transferable either by operation of law or by voluntary alienation; and (3) the estate could not therefore be attached and sold in execution of a decree against the jagirdar.

Rowland, J.—When a Crown grant contains a prohibition against alienation of the estate, that prohibition must take effect in accordance with its terms. (*James and Rowland, JJ.*) UPENDRA SINGH *v.* MEGHNATH SINGH. **18 Pat. 370=5 B. R. 850=183 I.C. 56=12 R.P. 86=A.I.R. 1939 Pat 598.**

———*Applicability—Leases of Sunderbans lands.*

The grants or leases of Sunderbans lands, which are lands vested in the Crown by S. 39 of 21 & 22 Vict., c. 106, executed by the Sunderbans commissioner on behalf of the Secretary of State for India in Council are Crown grants and to these grants the Crown Grants Act applies. (*Mitter, J.*) JNANENDRANATH NANDA *v.* JADUNATH BANERJI. **I.L.R. (1938) 1 Cal. 626=178 I. C. 718=11 R. C. 393=42 C.W.N. 81=A.I.R. 1938 Cal. 211.**

———S. 2—*Share in zemindari held by family—Remission of land revenue on the share by Government—Grant for maintenance of family from generation to generation—Sale of share—What passes to purchaser—Benefit of grant.*

Where the Government makes a grant of the land revenue of a share of a zemindari owned by a family for the maintenance of the family

from generation to generation, the right under the grant is one restricted in its enjoyment to the family and is not capable of transfer. Where the share in the zamindari, held by the family from before the grant of the land revenue, is sold in auction, what passes to the purchaser is only such share as it stood before the grant by the Government, the grant of the land revenue remaining with the grantee family. (*Sulaiman, C.J. and Bennet, J.*) HIBA AHMAD *v.* MT. RAM PIARI. **1937 A.L.J. 567=1937 A.W.R. 524=170 I.C. 30=1937 R.D. 300=1937 A.L.R. 645=10 R.A. 105=A.I.R. 1937 All. 533.**

———**Ss. 2 and 3**—*Scope of—Crown lease—Restrictive clause as to submission of boundary dispute only to Revenue authorities—If affected by S. 28 of the Contract Act—Objection as to Civil Court's jurisdiction—Who can raise.*

It is not only the T. P. Act that is affected by the Crown Grants Act. S. 3 of the Act declares the unfettered discretion of the Crown to impose such conditions and limitation as it thinks fit, no matter what the general law of the land be. By reason of this section, a restrictive clause in a Crown lease which compels the lessee to refer any boundary dispute with the adjoining lessee, only to revenue authorities, is not affected by S. 28 of the Contract Act. But such a clause cannot be availed of by a lessee of an adjoining lot, to oust the jurisdiction of the Civil Court, for the reason, that his predecessors in interest were not parties to the contract entered into between the Secretary of State in Council and the other lessees' predecessors in interest. (*Mitter, J.*) JNANENDRANATH NANDA *v.* JADUNATH BANERJI. **I.L.R. (1938) 1 Cal. 626=178 I.C. 718=11 R.C. 393=42 C.W.N. 81=A.I.R. 1938 Cal. 211.**

———**S. 3**—*Effect of.*

The effect of S. 3 of the Crown Grants Act is that when a grant has been made by the Crown, the Crown is not with reference to that grant, bound by any of the sections of either the Tenancy Act or the Transfer of Property Act or the Contract Act. (*Bennet and Verma, JJ.*) GAYA PRASAD *v.* SECRETARY OF STATE. **181 I.C. 584=11 R.A. 587=1939 A.W.R. (H.C.) 155 =1939 A.L.J. 164=1939 R.D. 155=A.I.R. 1939 All. 263.**

———**S. 3**—*Scope and effect of—If confers a right to sue.*

All that S. 3 of the Crown Grants Act means is that the Crown is entitled to put such conditions in a grant which a private individual could not, but the only advantage to the grantee is that the grant to him is not invalid if given by the Crown when it might be invalid if given by an individual. It cannot be said to confer the right to sue on the grantee, if he had no such right, had the grant in his favour been made by an individual. (*Hamilton and Yorke, JJ.*) RAZA HUSAIN KHAN *v.* SAIYID MAHOMED. **14 Luck. 22=174 I.C. 993=1938 O.A. 353=1938 O.W.N. 462=1938 O.L.R. 244=10 R.O. 287= A.I.R. 1938 Oudh 175.**

———**S. 3**—*Scope and effect—Grant of village to poligar to be enjoyed by grantee and his heirs—Prohibition an alienation—Successive life estates to grantee and his heirs—Validity—Attachability of village—C. P. Code, S. 60.*

It is competent to the Crown to make a heritable grant of a village, conferring on the grant not an absolute estate, but a limited interest to enjoy the rents and profits of the village for his life and a similar interest on his heirs who will succeed him; it is open to the Crown to create successive life estates or limited interests, and prohibition as to alienation may be imposed by the Crown either by virtue of an enactment or by a grant. S. 3 of the Crown Grants Act is clear and expressly mentions that all limitations contained in a Crown grant shall be valid and take effect according to their tenor notwithstanding any statute or enactment of the Legislature, which would take in S. 60, C. P. Code. A village was granted to one *S*, a poligar, on 1—8—1902, by the East India Company by a deed of grant. The object of the grant was to make a permanent provision for the grantee and his heirs as compensation for the loss sustained by resumption of the emoluments attached to the office as a result of abolition of such emoluments. The grantee was "to collect those Russooms and Marahs at the rate stipulated in the dowle . . . and to appropriate the amount to your own use." The grantee was also made "to understand that the said village is inalienable by gift, sale or otherwise, but in default of legal heirs, the said village shall revert to the Honourable Company".

Held, (1) that it was competent to the Crown to make such a heritable grant providing for a succession of heirs; (2) that S. 60 of the C. P. Code was not applicable to the case; (3) that the rents and profits of the estate in the hands of the holder could be appropriated for the use of the creditors; (4) that the prohibition against alienation under the grant was not intended for the protection of the Government, but was made in pursuance of a policy of preserving intact the property in the family; (5) the only right of the holder was to enjoy the rents and profits during his life and they are attachable and saleable; (6) and the proper order to be made was to direct the appointment of a receiver. (*Venkataramana Rao, J.*) SUNDARARAJULU NAIDU *v.* PAPIAH NAIDU. **I.L.R. (1938) Mad. 767= 182 I.C. 587=12 R.M. 105=1938 M.W.N. 440= A.I.R. 1938 Mad. 623=(1938) 1 M.L.J. 686.**

———**S. 3 and Berar Inam Rules (1859)**—*Inams—Nature of—Devolution—Law as to.*

An inam which is a Crown grant will be governed by S. 3 of the Crown Grants Act which excludes the application of the personal law. If there is any ambiguity in the inam certificate, the question would have to be decided in accordance with the Inam Rules of 1859. (*Stone, C.J. and Niyogi, J.*) SHRIRAM DEORAO *v.* BANYA BAI. **I.L.R. (1940) Nag. 244=1940 N.L.J. 78=A.I.R. 1940 Nag. 129.**

CRUELTY. *See* RESTITUTION OF CONJUGAL RIGHTS.

CULPABLE HOMICIDE. *See* PENAL CODE, Ss. 299-304.

CUMULATIVE SENTENCE.

See (1) CR. P. CODE, S. 35.
„ (2) PENAL CODE, S. 71.

CURRENT ACCOUNT.

See (1) ACCOUNTS.
„ (2) BANKER AND CUSTOMER.

CUSTODIA LEGIS. *See* C. P. CODE, O. 40, R. 1.

CUSTODY.

See (1) GUARDIAN.
„ (2) GUARDIAN AND WARD.
„ (3) LUNACY ACT.
„ (4) MINOR.
„ (5) POSSESSION.

CUSTOM—(General).

Abrogation.
Applicability.
Burden of proof.
Custom of trade.
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How made.
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Proof.
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Validity.

Abrogation.

———(General)—*Abrogation—Proof.*

It cannot be said that once a custom is proved to exist, it cannot be altered except by subsequent legislation. It is well settled that just as the will of the community established a custom in the first instance, so the same community may by expression of its collective will, evidenced by well-established practice extending over a sufficiently long period, abrogate or change the custom. (*Tek Chand, J.*) ABDUL MAJID *v.* SUBA KHAN. 40 P.L.R. 588.

———*Abrogation—Proof—Village expanding and showing features of town—If proves abrogation of custom.*

Where a wajib-ul-arz has recorded the existence of a custom restraining alienations by non-proprietors in a village, the fact that the village has expanded since then and shows some features of a town cannot by itself be held to be enough to show that the custom has been abrogated. (*Bhide, J.*) RATI RAM *v.* SHERA RAM. I.L.R. (1939) Lah. 266=181 I.C. 436=11 R.L. 828=40 P.L.R. 990=A.I.R. 1939 Lah. 53.

Applicability.

———*Applicability—Presumption.*

In the absence of any special custom to the contrary the parties will be presumed to be governed by their personal law in the matter of succession. (*Abdul Qayoom, C.J. and Janki Nath Wazir, J.*) HAKIM ALI SHAH *v.* NAWAB BIBI. 39 P.L.R.J. & K. 61.

Burden of proof.

———*Personal law—Applicability—Presumption—Burden of proof—Agriculturists tribes of Punjab migrating and settling in Sind—Law of succession.*

There is not, even in the Punjab, any presumption in favour of parties to a suit, being governed by customary law as against personal law. It must be proved. Neither S. 5 of the Bombay Regulation IV of 1827, nor S. 5 of the Punjab Laws Act raises any presumption of any custom as against the general or any personal law. It is only when custom is established that it is to be the rule of law. Any special custom or usage modifying the ordinary law of succession should be ancient and invariable, and should be established by clear and unambiguous evidence. The best evidence of custom is found in connection with the division of land, and the Revenue Records are therefore, of considerable value, when the question is as to the law applicable to parties belonging to agricultural tribes who have migrated from the Punjab to Sind. (*Davis, J.C. and Tyabji, J.*) AISHA BIBI *v.* BEGUM BIBI. I.L.R. (1939) Kar. 475=12 R.S. 143=185 I.C. 87=A.I.R. 1939 Sind 263.

———*Enforceability—Basis of.*

The foundation on which a custom is enforced by the Courts is that the parties have been guiding themselves by a particular course of conduct of their own volition. It is contrary to justice, equity and good concience to make the parties act in disregard of their habits, their methods of dealing with property, and the expectations formed as to the devolution of estates, succession and inheritance. A person who comes forward stating that there is a particular customary rule should obviously be able without any great effort on his part to enunciate the custom with certainty and precision. It is difficult to believe in the existence of a custom, the propounder of which is himself unable to state it in precise and clear terms. It is the foundation on which the force of the custom rests that the custom should be well known, should be clearly understood, and should be the standard by which the parties have been guided in their conduct. (*Bromfield and Tyabji, JJ.*) BAI SARKAR *v.* ISMAIL GAFOOR. 60 Bom. 919=167 I.C. 380=9 R.B. 299=38 Bom.L.R. 1034=A.I.R. 1937 Bom. 65.

Custom of trade.

———*Custom of trade—Duty of person setting up.*

If a custom of trade is to be founded upon, it must be specifically and definitely pleaded and it must be clearly and unambiguously established by the evidence. (*Thom, C.J. and Ganga Nath, J.*) VISHWANATH *v.* RAM NARAIN DAS. 190 I.C. 109=1940 A.W.R. (H.C.) 354=1940 A.L.J. 395=A.I.R. 1940 A. 405.

Customary right.

———*Customary right—Easement—Distinction between.*

A customary right is not an easement properly so called. An easement proper belongs to a determinate person or persons in respect of his or their land. A congeries of persons like the inhabitants of a locality, unless incorporated as a determinate juridical person, cannot claim an easement. A customary right belongs to no individual in particular. Easements are, so to speak, private rights belonging to particular persons, while customary rights are public rights annexed to the place in general. (*Biswas, J.*) HARI SADAN DE *v.* RADHIKA PRASAD PANDIT. 66 C.L.J. 270=175 I.C. 252=10 R.C. 784=A.I.R. 1938 Cal. 202.

———*Customary right—Proof of.*

In order to find a customary right, enjoyment for a period at least as long as a prescriptive

or easementary right would require, is necessary. Consequently to establish a right of cremating dead bodies in a certain land it must be proved that the land has been used as cremating ground continuously for the last twenty years, peaceably and openly. (*Ranjitmal and Sukhdeonarain, JJ.*) GANESH *v.* SONSINGH. **1939 Mar.L.R. 73 (Civ.).**

———*Customary right—Village pathway—Customary easement—Proof of.*

Persons claiming a customary easement have not only to prove the elements required by S. 26 of the Limitation Act, but also something more, namely, that the custom set up was ancient, continuous peaceable, reasonable, certain and compulsory. Where a pathway is claimed as a village pathway, and not as a public pathway, it is necessary to show that the user was of the pathway as a village pathway. It must be shown to have been used by the inhabitants of the village concerned as such and not as members of the general public. (*Biswas, J.*) HARI SADAN DE *v.* RADHIKA PRASAD PANDIT. **66 C.L.J. 270=175 I.C. 252=10 R.C. 784=A.I.R. 1938 Cal. 202.**

Discontinuance.

———*Discontinuance—Tribal custom restraining testamentary disposition discontinued—Duty of Court.*

A trial custom restraining testamentary disposition can be discontinued. Indian Courts ought not to give effect to a custom which the growing consciousness of the community in which it is said to have prevailed is preferred to treat as unsuited to modern conditions and from which it has allowed a departure in several cases. (*Abdul Rashid, J.*) ABDUL MAJID *v.* SUBA KHAN. **189 I.C. 636=13 R.L. 90=42 P.L.R. 70=A.I.R. 1940 Lah. 109.**

Essentials of validity.

———*Essentials of validity.*

A custom must be proved to be ancient and invariable by clear, consistent and cogent evidence. (*Niyogi and Subhedar, A.J.Cs.*) YADGAR HUSSAIN *v.* MUHAMMAD IBRAHIM RAZA. **31 N.L.R. (Supp.) 202=163 I.C. 179=8 R.N. 299=A.I.R. 1936 Nag. 71.**

———*Essentials—Supersession of Hindu Law.*

A custom in supersession of the ordinary rules of Hindu Law, must be ancient, certain and reasonable and being in derogation of the general rules of law must be proved by very strong evidence and be construed strictly. (*Hamilton, J.*) JADUNATH SINGH *v.* BISHESHAR SINGH. **178 I.C. 950=1938 O.W.N. 1267=1939 O.A. 2=11 R.O. 127=1938 O.L.R. 527=A.I.R. 1939 Oudh 17.**

Evidence.

———*Evidence—Appreciation—Finding—How to be arrived at.*

Where a custom is pleaded and evidence is let in, in order to arrive at a finding, the Court should consider the evidence as a whole and the finding should depend upon the cumulative effect of the entire evidence. (*Niamatullah and Bajpai, JJ.*) MAHADEO *v.* BALESHWAR PRASAD. **186 I.C. 564=12 R.A. 415=1939 A.L.J. 708=1939 A.W.R. (H.C.) 671=1939 R.D. 493=A.I.R. 1939 All. 626.**

Family custom.

———*Family custom—Exclusion of daughters from inheritance—Brahm Gaur Thakurs of Pawayan estate in Shahjahanpur district.*

Among the Brahm Gaur Thakurs of the Pawayan estate situated in the Shahjahanpur District of the United Provinces, the custom, or at all events, a common practice in the family of excluding daughers from inheritance was prevalent from as early as 1764. (*Sir George Lowndes.*) AJAI VERMA *v.* VIJAI KUMARI. **I.L.R. (1939) Kar. 98 (P.C.)=179 I.C. 620=1939 A.W.R. (P.C.) 1=1939 O.W.N. 157=41 P.L.R. 112=5 B.R. 312=1939 O.L.R. 90=43 C.W.N. 585=1939 P.W.N. 143=1939 M.W.N. 217=11 R.P.C. 145=1939 A.L.J. 264=41 Bom.L.R. 700=A.I.R. 1939 P.C. 22 (P.C.).**

———Family custom modifying personal law—Whether can be allowed to be proved. *See* BENGAL, AGRA AND ASSAM CIVIL COURTS ACT, S. 37. **A.I.R. 1936 All. 443.**

———*Family custom — Proof — Exclusion of daughters—Instances of custom taking effect—If need be proved.*

Where a family custom of exclusion of daughters from inheritance is pleaded, proof of actual instances of such a custom taking effect is not necessary. (*Sir George Lowndes.*) AJAI VERMA *v.* VIJAI KUMARI. **I.L.R. (1939) Kar. 98 (P.C.)=179 I.C. 620=1939 A.W.R. (P.C.) 1=1939 O.W.N. 157=41 P.L.R. 112=5 B.R. 312=1939 O.L.R. 90=43 C.W.N. 585=1939 P.W.N. 143=1939 M.W.N. 217=11 R.P.C. 145=1939 A.L.J. 264=41 Bom.L.R. 700=A.I.R. 1939 P.C. 22 (P.C.).**

———*Family custom—Proof of.*

A family custom may be proved by any one or all of the following kinds of evidence: (*a*) Official Reports, though not conclusive, these are very valuable as affording the views of Government officials at a time when there was no controversy about the matter. (*b*) Judgments of Courts by which such a custom was judicially recognised. (*c*) Statements by persons having special means of knowledge about such customs JAITMALSINGH *v.* RAWAT HEERSINGH. **1939 Mar. L.R. 14 (I.K.).**

———*Family custom—Proof—Opinion of responsible members of the family—Admissibility—Value.*

Where a family custom is pleaded, the opinions of responsible members of the family as to the existence of such a custom, and the grounds of their opinion, though generally in the nature of family tradition are clearly admissible. There is no reason why such testimony should be disregarded. (*Sir George Lowndes.*) AJAI VERMA *v.* VIJAI KUMARI. **I.L.R. (1939) Kar. 98 (P.C.)=179 I.C. 620=1939 A.W.R. (P.C.) 1=1939 O.W.N. 157=41 P.L.R. 112=5 B.R. 312=1939 O.L.R. 90=43 C.W.N. 585=1939 P.W.N. 143=1939 M.W.N. 217=11 R.P.C. 145=1939 A.L.J. 264=41 Bom.L.R. 700=A.I.R. 1939 P.C. 22 (P.C.).**

———Finding as to existence—When open to interference in second appeal. *See* C. P. CODE, S. 100—CUSTOM. **1939 O.W.N. 372.** *See also* **1939 A.W.R. (H.C.) 313.**

———Finding on custom not based on any evidence—Certificate if necessary for second appeal. *See* PUNJAB COURTS ACT, S. 41. **A.I.R. 1939 Lah. 366.**

CUSTOM—(General).

———Gayawals of Gaya—Gift of gadi by sonless Gayawal—Effect. *See* HINDU LAW—ADOPTION—GAYAWALS OF GAYA. **180 I. C. 990=5 B.R. 516.**

Haq-i-chaharam.

———Haq-i-chaharum—*Existence of practice of exacting—When can be inferred.*

The question whether the *Haq-i-chaharum* could be exacted on sale or not depends really on the contract between the zamindar and the person in occupation of the site. If the grant was made long ago and its nature is not known it may be inferred from the prevailing practice that a grant was made in a particular form. If it can be shown over a long period of years that the assumption has always been made and acted upon that grants included the conditions that a vendor or a vendee would pay 1|4th of the purchase price to the zamindar, then it might fairly be assumed that the forgotten grant was in the same form unless the contrary is shown. Where the grant was made long ago and its nature was unknown and it was not shown that there was any practice of exacting *haq-i-chaharum* at the time the grant was made, it could not be inferred that the grant was subject to such payments, from the mere fact that in recent years such grants were being made subject to such payments. (*Allsop, J.*) RAMAI CHAUBEY *v.* RAM DATTA SONAR. **1940 A.L.J. 267=1940 A.W.R. (H.C.) 252=1940 R.D. 210=A.I.R. 1940 A. 314.**

———Haq-i-chaharam—*Liability to pay—If extends to involuntary sales also.*

Where by a custom the Zamindar is entitled in the case of sales of houses to a share of the sale proceeds as *haq-i-chaharam,* the custom, extends to voluntary and involuntary sales alike. (*Misra, J.*) MANNI LAL *v.* GAURI SHANKAR. **178 I.C. 748=11 R.A. 334=1938 A.W.R. (H.C.) 665=1938 A.L.J. 981=1938 R.D. 815=A.I.R. 1938 All. 655.**

How made.

———*How made.*

Customs are made by the consent of the parties or by the operation of natural forces; they cannot be super-imposed by Government. All that the Government can do is to make the way easy for those who may be in favour of the change. JAITMALSINGH *v.* RAWAT HEERSINGH. **1939 Mar. L.R. 14 (I.K.).**

Jains.

———*Jains—Adoption—Husband's authority — Necessity—Onus.*

It was held that a particular custom that a Jain widow could adopt without her husband's authority had not been established by such a long series of judicial decisions, as to make it apply universally to the Jain community; as such a plaintiff relying on such a custom had to prove that it existed in his own community or family. (*Weston, I.C.S.*) CHAND KOER *v.* PEM RAJ. **1938 A.M.L.J. 79.**

———*Jains—Widow if takes absolute estate.*

The widow takes an absolute estate among Jains in general not merely in some particular sub-sects. (*Stone, C. J. and Bose, J.*) TULSIRAM KHIRCHAND *v.* CHUNNILAL PANCHAMSAO. **I.L.R. (1940) Nag. 149=178 I.C. 825=11 R.N. 254=A.I.R. 1938 Nag. 391.**

CUSTOM—(General).

———Judicial decisions—Value—Considerations. *See* EVIDENCE ACT, S. 13—JUDICIAL DECISIONS. **1939 A.L.J. 708.**

Mamool.

———*Mamool—Inference of legal Origin—Payment of paddy to temple by holder of office of mutta in Agency tracts—Payment made by successive holders for long time beyond the time of living memory—Holders not believers in worship in temple—Inference—Payment—If* virtue tenurae*—Enforceability—If can be deemed voluntary.*

Where a customary payment has been made for a long series of years, the presumption generally is that the payment was not made voluntarily or out of generosity. It is open to the Courts to infer a legal origin for such a payment where it is legally possible. Where it is found that the muttadars of a mutta in the Agency tract of Ganjam have been paying a certain amount of paddy to a certain temple, though the muttadars did not believe in the worship of the deity in the temple, that the origin of the custom of payment was unknown, except that the custom existed beyond the time of living memory, and that the payment, being made by persons who are non-worshippers cannot be regarded as an act of piety, it has to be presumed that there was some reason which obliged the muttadar or office-holder to make the payment. And when it it is established that whoever is the office-holder makes this customary payment, it must be deemed that the payment is one which attaches to the mutta, and that it is payable *virtue tenurae.* The payment there is not a voluntary payment, and the muttadar being under a legal obligation to make the payment by virtue of his holding the office of mutta, the payment can be enforced in a Court of law. (*Venkataramana Rao, J.*) NEELAKANTA RAJENDRA PATRO *v.* BALAJI PATTOMUNDOLO. **173 I.C. 524=10 R.M. 638=1937 M.W.N. 1047=46 L.W. 442=A.I.R. 1937 Mad. 945.**

Nattukottai Chetties.

———*Nottukottai Chetties—"Samans" — Right of foreign agents to.*

It is customary among Nattukottai Chetties to pay ten per cent. of the net profits to foreign agents as "samans". Such a custom is well recognised. (*King and Lakshmana Rao, JJ.*) KARUTHAN CHETTIAR *v.* CHIDAMBARAM CHETTIAR. **179 I.C. 225=11 R.M. 554=1938 M.W.N. 576=48 L.W. 237=A.I.R. 1938 Mad. 725=(1938) 2 M.L.J. 79.**

———Proof—Abadi—Transfer of house sites in village—Evidence required—Agricultural and non-agricultural village — Considerations — *See* Landlord and tenant—Abadi. **1936 R.D. 19.**

Proof.

———*Change of custom—Proof* — Wajib-ul-arz *recording custom restraining alienations by non-proprietors—Proof of subsequent instances of alienation—Effect of.*

Where a *wajib-ul-arz* has recorded the existence of a custom restraining alienations by non-proprietors in a village, a change of custom could not be established except by overwhelming testimony of a very large number of instances of alienations by non-proprietors spreading over a long period which could not be compatible

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with any other conclusion except that the custom had since changed. Proof of particular sales having taken place without objection would ordinarily be very good evidence only of the title of the purchaser to the land sold and while such sales would give title to the indidviduals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished. (*Bhide, J.*) RATI RAM *v.* SHERA RAM. **I.L.R. (1939) Lah. 266=181 I.C. 436=11 R.L. 828=40 P.L.R. 990=A.I.R. 1939 Lah. 53.**

———*Proof—Custom in modification of ordinary law of succession—Essentials of validity—Judicial recognition of custom—Effect of.*

Custom when relied upon as modifying the odinary law of succession must be a custom well-known and distinctly ascertained. It must be pleaded specifically and with certainty and proved as it is pleaded. It must be established to be ancient and invariable by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal right to recognition depends. The fact that a particular custom has been judicially recognised establishes that the custom is reasonable and not opposed to public policy, so that it will be upheld whenever it is proved. But judicial recognition of a custom in one suit leaves untouched the proof of the fact that the custom is applicable to the particular parties who are before the Court in another case. (*Broomfield and Tyabji, JJ.*) BAI SAKAR *v.* ISMAIL GAFOOR. **60 Bom. 919=167 I.C. 380=9 R.B. 299=38 Bom.L.R. 1034=A.I.R. 1937 Bom. 65.**

———*Proof—Custom of neighbouring tribes—Relevancy.*

It is the custom of the tribe to which the parties belong that is to be inquired into. It is only in cases where custom of the parties to the litigation cannot be definitely ascertained that the consideration of the custom of the neighbouring tribes becomes relevant. (*Fraser, J.C. and Saad-Ud-Din, A.J.C.*) ALAM KHAN *v.* MD. AKBAR KHAN. **A.I.R. 1936 Pesh. 116.**

———*Proof—Decision on custom—Value of.*

A decision on custom is not a final decision. It only becomes a relevant instance under S. 13, Evidence Act, that such a right has been asserted and recognized. It is always necessary to assert and prove what the custom is (*Addison, A.C.J. and Din Mahomed, J.*) NARAIN SINGH *v.* MALIK AHMAD YARKHAN. **17 Lah. 133=162 I.C. 374=8 R.L. 888=38 P.L. R. 472=A.I.R. 1936 Lah. 21.**

———*Proof—Duty of Court.*

A custom is to be ascertained from actual facts and it is not a matter of deduction by logical process from certain so called general principles. Whatever the ideas of equity, if a custom is found to exist as a fact, it should be upheld though it may appear to work hardships in some cases. The duty of the Court is to find out the custom of the tribe, and, when ascertained, if it is not against broad principles of justice, equity and good conscience to apply it. (*Fraser, J.C. and Saad-Ud-Din, A.J.C.*) ALAM

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———Proof—Exclusion of daughter from succession—Family custom as to—Evidence requisite—Instance—Sufficiency. *See* HINDU LAW—SUCCESSION. **1937 A.W.R. 169.**

———*Proof—Exclusion of daughters and their sons from inheritance—Evidence—Sufficiency of.*

The evidence led in support of a custom of exclusion of daughters and their sons from inheritance consisted of three *wajib-ul-arz*, some instances and the opinion of some witnesses. One of the three *wajib-ul-arz* was irrelevant, and the other two did not bear out the existence of the alleged custom. The alleged instances were expressly found to be of no value and the opinion evidence of the witnesses was rejected by the Court of facts.

Held, that the alleged custom must be held not established. (*Srivastava and Nanavutty, JJ.*) RABINATH BAKSH SINGH *v.* RAM JIWAN SINCH. **11 Luck. 701=1936 O.L.R. 44=160 I.C. 169=8 R.O. 251=1936 R.D. 54=1936 O.W.N. 50=A.I.R. 1936 Oudh 234.**

———*Proof—Few instances of recent times—Sufficiency.*

A custom can be established only by proof of 'ancient' instances and a few instances of recent times are not sufficient. A.I R. 1937 Lah. 451 (F.B.) Foll. (*Tek Chand, J.*) NOTAN DAS *v.* KARAM HUSSAIN SHAH. **40 P.L R. 690=177 I.C. 513=11 R L. 333 (2)=A.I.R. 1938 Lah. 447.**

———*Proof—General custom—Special custom derogating from general—Burden of proof.*

Where a person governed by the customary law seeks to derogate from the customary law in favour of a special custom, this like a general custom must be proved to be invariable, ancient and well established. If it is to be proved that an old custom has fallen in desuetude and been replaced by a new custom, the new custom must be proved by evidence of conduct over a long period of years. (*Davis, J.C. and Tyabji, J.*) AISHA BIBI *v.* NEGUM BIBI. **I L.R. (1939) Kar. 475=185 I.C. 87=12 R.S. 143=A.I.R. 1939 Sind 263.**

———*Proof—Hindu Law—Custom as to grant of maintenance to illegitimate children of members—Reasonableness—When can be held to be established—Evidence requisite.*

A custom in a Hindu family to grant maintenance cannot be regarded as being unreasonable; but custom can only be relied upon where it is ancient, certain, and where the evidence falls very short of proving this, the custom cannot be held to be proved. The fact that among some families provision has been made for the maintenance of illegitimate children of members of their families cannot be regarded as sufficient to prove a similar custom among other families belonging to a different sub-caste. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) MAHARAJAH OF VENKATAGIRI *v*, RAJARAJESWARA RAO. **I.L.R. (1939) Mad. 622=189 I C. 123=13 R M. 144=49 L.W. 717=1939 M.W.N. 522=A.I.R. 1939 Mad. 614=(1939) 1 M.L.J. 831.**

———*Proof of—Immemorial user—Presumption as to—Limits of rule—Right to exclusive user of public tank.*

Where a declaration was sought that the plaintiffs were entitled to the exclusive user of a

public tank, on the ground of an alleged immemorial user,

Held, that in such case it is not always necessary to produce evidence of user going back beyond the memory of living persons. Nor is it necessary to have evidence of positive acts of exclusion of one party by the other.

Held, further, that a custom proved to have existed during the period of living memory can only be presumed to have existed from before the period of legal memory in cases where conditions may be assumed to have been permanent and stable, so that, it is reasonable to infer that what has happened during the period covered by the evidence has also happened from time immemorial. (*Broomfield and Wadia, JJ.*) NARHARI *v.* BHIMRAO. **39 Bom L.R. 1295=173 I.C. 910=10 R.B. 401=A.I.R. 1938 Bom. 146.**

———*Proof—Isolated instances—Value of.*

Isolated instances do not prove the existence of any well-established custom. (*Abdul Qayoom, C.J. and Kichlu, J.*) LAJU *v.* SANSARO. **39 P.L.R.J. & K. 10.**

———*Proof—Judicial recognition of custom repeatedly brought to notice of Court—Special proof—Necessity.*

Where a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Court may hold the custom to be introduced into the law without the necessity of proof in each individual case. (*Broomfield and Macklin, JJ.*) DASO VENKATESH *v.* RAMCHANDRA RANGO. **I.L.R. (1938) Bom. 810=179 I.C. 326=11 R.B. 248=40 Bom.L.R. 960=A.I.R. 1938 Bom. 456.**

———*Proof—Judicial decisions as evidence.*

The value as evidence of judicial decisions recognizing custom has been recognized and it is the most satisfactory evidence that a party can produce. Of course such decisions do not operate as *res judicata* unless they bind the parties otherwise, and the evidence created by them is capable of rebuttal, but their relevancy as evidence is undoubted. (*Stone, C.J. and Bose, J.*) TULSIRAM KHIRCHAND *v.* CHUNNILAL PANCHAMSAO. **I.L.R. (1940) Nag. 149=178 I.C. 825=11 R.N. 254=A.I.R. 1938 Nag. 391.**

———*Proof—Judicial decisions—Value of.*

Judicial decisions on questions of custom are not of much assistance as they proceed on their own facts and are based on the amount of evidence led in each case. (*Din Mohammad, J.*) ABDUL GHAFOOR *v.* FAJIR ALI. **179 I C 368=11 R.L. 555=40 P.L.R. 796=A.I.R. 1938 Lah. 792.**

———*Proof—Judicial decisions—Value of.*

Courts should not place greater value on judicial decisions than on the statement of a custom in the Customary law. A judicial decision depends on the evidence produced in the case which may be a badly conducted one. A decision on a question of custom is not a judgment *in rem*; it is merely an instance, relevant under S. 13, Evidence Act, of a particular custom being asserted or denied, or possibly recognized though the word 'recognized,' may mean recognized by the parties to a particular transaction rather than by the Courts. (*Addison, J. on difference between Coldstream and Jai Lal, JJ.*) BALANDA *v.* SUBAN. **17 Lah. 232=167 I.C. 951=**

9 R.L. 576=38 P.L.R. 592=A.I.R. 1936 Lah. 418.

———*Proof—Judicial notice.*

Material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them. (*Lord Maugham.*) EFFUAH AMISSAH *v.* EFFUAH KRABAH. **162 I.C. 461=8 R.P.C. 257=44 L.W. 73=A.I.R. 1936 P.C. 147 (P.C.).**

———*Proof—Judicial recognition.*

A custom that has been repeatedly brought to the notice of the Courts, and has been recognized by them regularly in a series of cases attains the force of law, and it is no longer necessary to assert and prove it by oral evidence. (*Harries and Ganga Nath JJ.*) BANARSI DAS *v.* SUMAT PRASAD. **58 A. 1019=164 I.C. 1047=9 R.A. 210=1936 A.L.J. 1237=1936 A.W.R. 857=A.I.R. 1936 All. 641.**

———*Proof of—Length of time necessary.*

Proof of the existence of custom over a period of about 60 years is sufficient to hold that it is binding. The technical rules of English law governing the establishment of custom cannot be followed rigidly in proving the existence of a custom in India. In India a custom may fall into desuetude and be superseded by another custom according to the ethical and legal notions of the community in which it is in force, provided of course existence of substituted custom can be proved by a series of well-known concordant, and on the whole continuous instances, extending over a reasonable length of time. (*Tekchand, J.*) ABDUL MAQSAT *v.* MOHAMMAD AMIN. **179 I.C. 369=11 R.L. 564=40 P.L.R. 959=A.I.R. 1938 Lah. 680.**

———*Proof of—Mode—Instances.*

Custom is a question of fact and it has to be established by proof in the shape of instances, etc., and a finding as to custom cannot be based on mere inferences. (*Bhide, J.*) BASHO RAM *v.* MT. SARUPI. **187 I.C. 218=12 R.L. 452=41 P.L.R. 892=A.I.R. 1940 Lah. 51.**

———*Proof—Nature of evidence necessary—Strict construction.*

A custom to be a rule having the force of law must be ancient, certain, continuous and reasonable. It must be established by clear and unambiguous evidence and being in derogation of the general rules of law must be construed strictly. (*Thomas, C.J., Zia-ul-Hasan and Hamilton, JJ.*) RAGHURAI *v.* BINDRA PRASAD **14 Luck. 89=1938 O.W.N 547=1938 O.A. 447=1938 O.L.R. 252=175 I.C. 32=10 R.O. 294=1938 R.D. 575=A.I.R. 1938 Oudh 140 (F.B.).**

———*Proof of—Necessity—Established custom of universal nature.*

If a custom is universal and established by a series of decisions, a stage may be reached when the custom ceases to be a custom in the strict sense of the word and becomes law. It will then not be necessary to plead or prove it in particular cases. (*Weston, I.C.S.*) CHAND KOER *v.* PEM RAJ. **1938 A.M.L.J. 79.**

———*Proof—Recent instances.*

The evidence of a few and comparatively recent instances of family custom being followed may be accepted as proof that custom is ancient.

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(*Coldstream and Bhide, JJ.*) FATIMA SULTAN *v.* NISAR ALI KHAN. 40 P.L.R. 447=A.I.R. 1937 Lah. 806.

———*Proof required.*

A custom to be legal must be proved to have been in existence for a time preceding the memory of man. It not always being possible to obtain such proof, the Courts have invariably been willing to presume the existence of a custom for such a period provided that evidence is produced which proves that the custom has been in existence as far as living testimony can establish it. (*Young, C.J., Monroe and Din Mahomed, JJ.*) BAHADUR *v.* NIHAL KAUR. 18 Lah. 594=169 I.C. 909=10 R.L. 81=39 P.L.R. 349=A.I.R. 1937 Lah. 451 (F.B.).

———*Proof of—Requisites—Different versions—Effect.*

The evidence for custom must be substantial. The custom must be certain. Where a plaintiff was changing the terms of an alleged custom from time to time and failed to formulate the custom clearly and consistently the custom cannot be said to be proved. (*Bennet and Ganga Nath, JJ.*) JALESHWARI PRATAP NARAIN SINGH *v.* PATESHWARI BAKSH SINGH. 1938 A.W.R. (H.C.) 284=175 I.C. 594=10 R.A. 705=1938 A.L.R. 456=A.I.R. 1938 All. 345.

———*Proof—Right of villagers to use land of another as graveyard or burial ground—Essentials of—Uncertainty as to extent of land used as burial ground—Effect of—Power of Court to define limits arbitrarily.*

A Court should not decide that a local custom exists entitling the residents of a village to use a plot of land belonging to another as a graveyard or burial ground without his consent, unless it is satisfied of its reasonableness and its certainty as to extent and application. If all that is found is that the customary right of burial exists over a portion of the disputed land, and if the extent of land over which the supposed customary right exists is uncertain, the custom lacks in certainty as to extent, and it must be held that the custom is not established. The Court is not entitled to fix the limits arbitrarily in such a case.

Quaere.—Whether a customary right to bury the dead may exist and may be acquired in another's land. (*Rowland and Chatterji, JJ.*) RAM RAN BIJAYA PRASAD SINGH *v.* ABDUL GHANI KHAN. 6 B.R. 157=185 I.C. 350=12 R.P. 349 (2)=20 Pat.L.T. 771=A.I.R. 1939 Pat. 682.

———*Proof—Special instances—If necessary.*

Custom can be properly proved by general evidence given by the members of the family or tribe without proof of special instances. (*Bhide and Currie, JJ.*) SOHAN SINGH *v.* MT. NARAINI. 168 I.C. 929=9 R.L. 688=A.I.R. 1936 Lah. 540.

Reasonableness.

———*Reasonableness—Unreasonable custom—If provable.*

An unreasonable custom is not provable in law. (*Wort and James, JJ.*) BAJRANGI RAUT *v.* JANKI PRASAD. 166 I.C. 198 (2)=9 R.P. 266=3 B.R. 135=A.I.R. 1936 Pat. 637.

Right of privacy.

———*Right of privacy—Marwar.*

The right of the owner of a house to restrain his neighbour from opening new apertures in hi

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wall overlooking his premises will depend entirely upon the question whether the custom of privacy existed in the plaintiff's community. (*Nawal Kishore, C.J.*) GOPILAL *v.* FATEHLAL. 1939 Mar. L.R. 8 (Civ.).

———*Right of sweepers of a locality to perform funeral services to the exclusion of others—Evidence as to exercise of right—If establishes custom—Suit to declare right—Maintainbility.*

Where the sweepers of a particular locality sued for a declaration that they are entitled to perform certain funeral services to the dead in that locality to the exclusion of the sweepers of another locality and let in evidence to show that they have been rendering the services for a number of years, it was held that the evidence did not establish a custom that every resident in the locality should avail himself of the services of those sweepers alone and that it was purely a matter of contract between the parties concerned and as such the suit was not maintainable. (*Bennet, J.*) GANGA BASHI *v.* JAMNA. 189 I.C. 831=1940 A.W.R. (H.C.) 286=1940 A.L.J. 345 =1940 R.D. 180=A.I.R. 1940 All. 343.

Succession.

———*Succession—Exclusion of sisters and sisters' issues*—Wajib-ul-arz *of Isapur.*

The *Wajib-ul-arz* of Isapur was held not to establish a custom of exclusion of sisters and sister's issues. (*Zia-ul-Hasan and Yorke, JJ.*) PIRTHI PAL KUNWAR *v.* MST. SURAJ KUNWAR. 187 I.C. 179=12 R.O. 363=1940 O.W.N. 719= 1940 O.A. 660=1940 A.W.R. (C.C.) 354=1940 O.L.R. 179=A.I.R. 1940 Oudh 269.

———*Succession — Mahomedans — Exclusion of females—Proof of.*

Where with reference to a petty Mahomedan family in Ajmer a custom of exclusion of females from inheritance was set up, it was held that it was opposed to the ordinary principles of the shariat and that a custom of that kind must be shown to be ancient, reasonable and invariable. It was further held that the custom alleged was neither ancient, nor reasonable and that the mere fact that females had been deprived of their rightful share of inheritance provided no proof that such custom existed. (*Davies.*) SHER MOHAMMAD *v.* KHALILUL RAHMAN. 1940 A.M.L.J. 12.

Validity.

———Validity—Custom opposed to public policy —Transfer of office of temple trustee in return for monetary consideration—Legality of. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 57. (1938) 1 M.L.J. 517.

———*Validity—Acquisition of grazing rights by long user by villagers over lands of adjacent village belonging to a person not their landlord—Custom permitting—Reasonableness— Enforceability.*

A custom by which the inhabitants of a village claim rights of pasturage by long user over the lands of an adjacent village belonging to a person not their landlord cannot be considered to be a reasonable custom as it would deprive the owner of those lands completely of his rights to bring the lands under cultivation. Such a custom is not valid and enforceable in law. A right of pasturage acquired by custom as an easement can be enforced in law only if the custom be reasonable. (*M.C. Chose, J.*) SALADUR JAMAN CHAUDHURI

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v. OAJADDIN. 63 Cal. 851=167 I.C. 174=9 R.C. 640=A.I R. 1937 Cal. 46.

———Validity—Deshastha Brahmins of Belgaum District—Adoption of sister's son. *See* HINDU LAW—ADOPTION. 40 Bom.L.R. 960=A.I.R. 1938 Bom. 456.

———*Validity—Essentials.*

A custom must be established to be ancient and invariable before legal recognition can be accorded to it. (*Thomas, C.J. and Bennet, J.*) BARQ RAZA *v.* AKBARI. 185 I.C. 441=1940 O.L.R. 3=12 R.O. 229=A.I.R. 1940 Oudh 152.

———*Validity—Essentials of.*

A local custom need not be immemorial nor necessarily ancient in order that it may be held to be established. But it must be certain, invariable and reasonable, and it must be exercised as of right. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB *v.* LAXMANAPPA RAMAPPA. 178 I.C. 854=11 R.B. 198=40 Bom.L R. 1015=A.I.R. 1938 Bom. 492.

———*Validity—Essentials — Custom of negotiability of "pahunch" or ordinary receipt—Enforceability of.*

Before a Court of Law can give effect to a Custom as a valid one it must have the following attributes: (1) reasonableness; (2) certainty; (3) it should not offend against provision of law; (4) its immemorial usage must be capable of being proved by evidence of positive instances; (5) it should not offend against public policy. If a custom is to have the force of law, upsetting the ordinary law, it must be established by instances that the custom had come into conflict with a state of things inconsistent with the incidents of the custom, and had nevertheless prevailed. To establish a custom or mercantile usage it is not sufficient merely to prove that an alleged practice is what is done constantly in the bazaar. A custom which makes a "pahunch" or an ordinary receipt, negotiable like a bill of exchange, by mere endorsement is neither reasonable nor certain, and offends against public policy as well against the stamp law, the object of merchants resorting to circulation the "pahunch" being to escape payment of the requisite stamp duty which would otherwise be required for transferring it. (*Mehta, J.*) JHANGALDAS CHIMANDAS *v.* CHETUMAL BULCHAND. 32 S.L.R. 640=173 I.C. 591=10 R.S. 220 =A.I.R. 1938 Sind 24.

———*Validity—Public morals—Custom by which girls can be purchased.*

A custom by which girls can be purchased as shop goods is clearly against public moral and cannot be recognised by a Court of Law. (*Abdul Qayoom, C.J. and Kichlu, J.*) GOKAL CHAND *v.* MST. ROMALU. 39 P.L.R.J. & K. 39.

———*Validity — Reasonableness of custom—Period for ascertaining.*

The period for ascertaining as to whether a custom is reasonable or not is the period of its inception. (*M. C. Ghose and Mukherjea, JJ.*) ASRABULLA *v.* KIAMATULLAH HAJI CHOUDHURY. I.L.R. (1937) 2 Cal. 86=171 I.C. 785=10 R.C. 305=66 C.L.J. 284=41 C.W.N. 503=A.I.R. 1937 Cal. 245.

———Validity — Scavenging rights—Custom of tranferability—Legality of. *See* SPECIFIC RELIEF ACT, S. 56. 1938 M.W.N. 806.

———*Validity—Test.*

A custom may modify Hindu Law in several

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important particulars, and the mere fact that custom in a certain district differs from Hindu Law is no test of its validity. In order that a custom, which is recorded in the Riwaj-i-am, may be declared to be invalid, it must be against equity, justice and good conscience or it must be immoral or opposed to public policy. A custom cannot be declared to be invalid on general considerations or because it is at variance with the provisions of Hindu Law. (*Abdul Rashid, J.*) HARI SINGH PREM *v.* MOTI RAM. 184 I.C. 96=12 R.L. 161=41 P.L.R. 417=A.I.R. 1939 Lah. 196.

———(Bengal)—*Kamakhya temple in Assam—Dalois—Appointment of—Eligibility.*

According to the ancient custom of the Kamakhya temple in Assam any adult person is eligible for Daloiship, who is a member of any of the four surviving Bardeori families, *viz.*, the Bura, Deka, Bidhipathak and Hota families. It may be that members of the Deka and Bura families have more duties to perform in connection with the worship and have a greater number of days as *Palas* (turns of worship) or get more emoluments. But these facts are not inconsistent with the custom that a Daloi can be a member of any of the four Bardeori families. The fact that in the past only Dalois were selected from the Bura and Deka families, is after all an equivocal circumstance, and the further fact that no instance has been proved of a Bidhipathak or a Hota being a Daloi in the past is of very little import. (*Mitter and Roxburgh, JJ.*) BARODA KANTA DEBA SARMA *v.* BANGSHINATH DEBA SARMA. 188 I.C. 473=12 R.C. 680=71 C L.J. 17=A.I.R. 1940 Cal. 269

———(Berar)—*Joshipan—Claim to on basis of immemorial user—Onus of proof.*

Where the right to Joshipan in the particular village is founded on immemorial user and not on a grant, it is not enough for the person claiming the right to prove that he belongs to watandar joshi family and has occasionally exercised Joshipan rights in the village; he must establish that he and his forefathers have officiated in the particular village from time immemorial to the exclusion of every one else. (*Bose, J.*) GANGADHAR MAROTI *v.* SHRI SUNDAR NARAIN SANSTHAN. I.L.R. 1936 Nag. 13=164 I.C. 825=9 R N. 39=A.I.R. 1936 Nag. 95.

———(Berar)—*Joshipan—Office of—Nature of—If attached to village.*

The office of a Joshi is attached to a village and not to an area. (*Bose, J.*) GANGADHAR MAROTI *v.* SHRI SUNDAR NARAIN SANSTHAN. I.L. R. 1936 Nag. 13=164 I.C. 825=9 R.N. 39=A.I. R. 1936 Nag. 95.

———(Berar)—*Proof—Joshipan—Nature of—If customary right.*

Right to Joshipan in a village is a customary right as far as Berar is concerned and can be established either by a definite grant or by prescription or by proof of long and uninterrupted usage. (Case-law considered.) (*Bose, J.*) GANGADHAR MAROTI *v.* SHRI SUNDAR NARAIN SANSTHAN. I.L.R. 1936 Nag. 13=164 I.C. 825=9 R.N. 39=A.I.R. 1936 Nag. 95.

———(C. P.)—*Abadi—Mauza Garhakota—Right of transfer of occupant—Absence of house on site for long time after original house fell down—Right of malguzar to deal with.*

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Where it is shown that the occupant of a site in the abadi in Garhakota Mauza had a house standing on it in about the year 1870, and there is no evidence to show that the Malguzar ever objected to the subsequent transfers or took nazarana in consideration of consenting to them, the malguzar has no right to interfere with it. The mere fact that the old house fell down and that there was no house on the site for many years afterwards would not confer any right in the site on the Malguzar, unless he has been in adverse possession of it. (*Pollock, J.*) BABULAL *v.* KAMTA PRASAD. **19 N.L.J. 131.**

——(Jammu and Kashmir) — *Alienation—Powers of—Chib Rajputs of Panjari village.*

A childless Chib Rajput of Panjari village enjoys unrestricted powers in the matter of alienation of his ancestral landed property. (*Abdul Qayoom and Wazir, JJ.*) WALIDAD KHAN *v.* MAHOMED KHAN. **40 P.L.R.J. & K. 47.**

——(Jammu and Kashmir)—*Alienation—Self-acquired property—Right of collaterals to challenge.*

The collaterals have no *locus standi* to challenge a sale effected by a person in regard to his own self-acquired property during the lifetime of such person on the ground that the sale has been effected without any consideration. (*Abdul Qayoom, C.J. and Kichlu, J.*) MAHOMED DIN *v.* HASHAM. **42 P.L.R J. & K. 51.**

——(Jammu and Kashmir) — *Succession—Khana Nashin daughter—Rights of.*

According to the customary law, a Khana Nashin daughter would be entitled to succeed as an equal to a son to the property of the father, but according to the same customary law she is not entitled to succeed to the property of her brother. In customary law no deduction can be drawn and the law is to be followed exactly according to the dictates of that law. Though a Khana Nashin daughter is treated as a son to succeed to the father's property, she cannot be treated as a male to succeed to the brother's property. (*Dalal, C.J. and Sawhny, J.*) AZIS *v.* GANI. **38 P.L.R.J. & K. 86.**

——(Jammu and Kashmir)—*Succession—Khana Nashin daughter.*

According to the Tribal customs in Kashmir, if a man dies leaving a widow and a daughter the whole of his property devolves upon the daughter if she is kept at home with her husband. After the death of the father, a Khana Nashin daughter is, therefore, entitled to have mutation effected in her name. (*Janki Nath Wazir, J.*) MALA BIBI *v.* TAJA BIBI. **39 P.L.R.J. & K. 149.**

——(Marwar)—*Kansalag— Right of Kazi to demand.*

Right of Kazi to demand Kansalag according to an old custom cannot be upheld as this custom is opposed to new ideas which are more in keeping with the march of civilization. The custom of levying this lag is contrary to public policy. (*Nawal Kishore, C.J. and Ranjitmal, J.*) MOHAMMAD RAMZAN *v.* IDU. **1939 Mar.L.R. 101 (Civ.).**

——(N.W.F.P.)—*Adoption—Mahomedans of Hazara district.*

The law of adoption does not prevail amongst the Mahomedan tribes of the Hazara district. (*Mir Ahmad, A.J.C.*) MIR ZAMAN *v.* NUR ALAM.

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162 I.C. 314 (2)=8 R. Pesh. 196=A.I.R. 1936 Pesh. 108.

——(N.W.F.P.)—*Alienation — Ancestral property—Consent of reversioners—When valid.*

The validity of consent is to be determined at the time it is given, and in order to be valid consent, binding upon reversionary heirs, it has to be given by all reversioners equally entitled to the property on the demise of the owner. (*Fraser, J.C. and Saad ud-din, A.J.C.*) AHMAD KHAN *v.* MT. HAYAT BIBI. **A.I.R. 1936 Pesh. 119.**

——(N.W.F.P.)—*Alienation — Gandapur proprietor—Powers of gift.*

A Gandapur proprietor has no power of gifting immovable property either by will or otherwise to his daughters or daughters' sons and *a fortiori* to his wife whether such property is ancestral or self-acquired. (*Fraser, J.C. and Saad-ud-din, A.J.C.*) AHMAD KHAN *v.* MT. HAYAT BIBI. **A.I.R. 1936 Pesh. 119.**

——(N.W.F.P.) — *Alienation—Gandapuris of Kulachi—Gift to daughter—Validity.*

Among the Gandapuris of Kulachi, custom makes no distinction between self-acquired and ancestral property and the power of an owner to deal with either kind of property is the same. A Gandapuri owner of Kulachi is not entitled to gift any portion of his property however small and whether self-acquired or ancestral to his daughter. (*Fraser, J.C. and Saad-ud-din, A.J.C.*) ALAM KHAN *v.* MD. AKBAR KHAN. **A.I.R. 1936 Pesh. 116.**

——(N.W.F.P.)—*Alienation — Powers of—Awans.*

The case of each tribe should be decided on its own custom. Awans are governed by Awan Customary Law and the mere fact that they live in a village Kukar which is part of Tapa Daudzai does not alter the position. According to the customary law of Awans, the Awans have unrestricted power of making testamentary dispositions of their property and hence a will in favour of sister's sons to the total exclusion of collaterals is valid. (*Almond, J.C. and Mir Ahmad, J.*) ISMAIL KHUSHAL *v.* YAKUB MADAD KHAN. **177 I.C. 793=11 R. Pesh. 35=A.I.R. 1938 Pesh. 58.**

——(N.W.F.P.)—*Alienation by widow—Reversioner's right to challenge.*

Under customary law it is not incumbent upon a reversioner to challenge alienations by a widow holding life interest during her lifetime; the nearest reversioner at the time of her death claims the property as reversioner of her husband and not through the intermediate relations through whom he traces his relationship with that husband, and his claim to property as reversionary heir is not affected by any agreement by the widow to refer to arbitration and all transactions subsequent thereto. (*Middleton, J.C.*) AMIR KHAN *v.* GHULAM. **164 I.C. 750=9 R. Pesh. 24 =A.I.R. 1936 Pesh. 163.**

——(N.W.F.P.)—*Alluvion—Right of riparian owner.*

Where a riparian owner claims land formed by alluvion lying adjacent to his own land, custom is the law to be applied in such cases in the N.W F. Province under Bengal Alluvion and Diluvion Regn. 11 of 1825, which is made applicable to the Province by S. 4 of the Law and Justice Regn. 7 of 1901, and where the wajib-ul-arz relating to the village provides that land which

is formed by alluvion belongs to the adjacent riparian owner, such person becomes owner of the land as soon as it emerges from the river. (*Almond, J.C.*) PASAND *v.* FAIZ TALAB. 177 I.C. 154=11 R. Pesh. 17=A.I.R. 1938 Pesh. 48.

——(N.W.F.P.) — *Applicability — Hindus of Bannu District—No presumption.*

There is no presumption in Bannu District that Hindus are subject to local custom regarding which a compilation has been prepared, which relates to Mussalmans alone. (*Middleton, J.C. and Almond, A J.C.*) MUKUNDLAL *v.* SANT RAM. 160 I.C. 672=8 R. Pesh. 124=A.I.R. 1936 Pesh. 26.

——(N.W.F.P.)—*Authorities—Revised edition of customary law by Lorimer—Presumption of truth.*

A presumption of truth attaches to the revised edition of the customary law prepared by Mr. Lorimer in 1899. (*Fraser, J.C. and Saad-ud-din, A.J.C.*) TOR KHAN *v.* MT. AFNAN. 163 I.C. 27 =8 R. Pesh. 211=A.I.R. 1936 Pesh. 128.

——(N.W.F.P.)—*Burden of proof — Will—Beneficiary claiming under—Duty to prove existence of testamentary power.*

Where a beneficiary under a will claims property under it, the burden of proof is on him to prove the existence of the testamentary power on which he relies to substantiate the will in his favour. The burden of proof is heavier upon the person propounding a will, when the customary law records that the tribe to which the person belongs is inclined to refer all questions of will to the test of shariyat. Where, however, a particular decision as to the testamentary power is arrived at on the legal doctrine of burden of proof it would not form a precedent or rule for decision of other cases in which fuller inquiry is made into the practice of the tribe on the exact point at issue. (*Fraser, J.C. and Saad-ud-din Khan, A.J.C.*) SULTAN *v.* WAZIR. A.I.R. 1936 Pesh. 92.

——(N.W.F.P.)—*Gift—Husband and wife—Possession, if need be given.*

Where the donor is the husband and the donee is the wife and *vice versa*, possession need not be given. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MIRA KHAN *v.* SHAD MAHOMED. 169 I.C. 689= 10 R. Pesh. 4=A.I.R. 1937 Pesh. 1.

——(N.W.F.P.)—*Joint family—Father karta —Right of son to ask for rendition of accounts or for removal of father from managership.*

A son cannot ask for rendition of accounts or for the removal of his father from the managership of his property merely because he cannot exercise the right to claim partition by reason of a custom prevailing in the district in which he resides. (*Hamilton, J.C. and Mir Ahmad, A.J.C.*) CHELA RAM *v.* L. GANGA BISHAN. 163 I.C. 52= 8 R. Pesh 203=A.I.R. 1936 Pesh. 111.

——(N.W.F.P.)—*Joint family—Right of member to joint possession.*

Every member of a coparcenary is entitled to joint possession. (*Hamilton, J. C. and Mir Ahmad, A.J.C.*) CHELA RAM *v.* L. GANGA BISHAN. 163 I.C. 52=8 R. Pesh. 203=A.I.R. 1936 Pesh. 111.

——(N.W.F.P.)—*Migration—Custom governing migrating family.*

Custom to be binding must be ancient, and in the normal course a migrating family that follows customary law adheres to its original custom though after complete severance from its former residence and prolonged residence and association with people following other customs it may gradually adopt those other customs. The Khallis of Abdara, following "pagwand" custom, migrated to Becket Ganj where the custom of "chundawand" prevailed and resided for less than three generations. There was no evidence to prove that any member of the family had either adopted the custom of Becket Ganj or had abandoned the custom of Abdara.

Held, that they were still governed by the custom of pagwand to which they were subject when in Abdara. (*Middleton, J.C. and Mir Ahmad, A. J.C.*) AYUB KHAN *v.* AKRAM. 168 I.C. 41=9 R. Pesh. 103 (2)=A.I.R. 1937 Pesh. 28.

——(N.W.F.P.)—*Partition—Right of son to.*

In the Peshawar district a son cannot claim partition of the coparcenary property when the karta is his father. (*Hamilton, J.C. and Mir Ahmad, A. J. C.*) CHELA RAM *v.* L. GANGA BISHAN. 163 I.C. 52=8 R. Pesh. 203=A.I.R. 1936 Pesh. 111.

——(N.W.F.P.)—*Partition—Right of woman to—Kohat district.*

If a woman who is entitled to receive the share of produce of her late husband finds difficulty in recovering her share from the full owners then she is entitled to have the estate partitioned. This right is granted to her on equitable considerations apart from any statement of custom. (*Almond, A.J.C.*) ISMAIL KHAN *v.* MT. ABI JAN. 160 I.C. 372=8 R. Pesh. 107=A. .R. 1936 Pesh. 4.

——(N.W.F.P.)—*Partition—Share of woman —'Baraks' of Kohat District.*

The words in the riwaj-i-am of the Kohat District, para. 119, that "the wife of an owner whose period of childbearing has passed, will also be entitled to get a share," mean that a woman is entitled to get a share on partition if the period has elapsed during which she might bear a posthumous child to her husband. It is obviously intended to protect the interest of unborn children of her husband. (*Almond, A.J.C.*) ISMAIL KHAN *v.* MT. ABI JAN. 160 I.C. 372=8 R. Pesh. 107=A.I.R. 1936 Pesh. 4.

——(N.W.F.P.) — *Proof — Onus — Entry in authorised compilations.*

Where a particular customary rule is found to be recorded in authorised compilations of custom, the burden is on the party alleging the contrary, to prove that the customary rule was wrongly recorded or that the custom has since undergone a change or modification. (*Fraser, J.C. and Saad-ud-din, A.J.C.*) ALAM KHAN *v.* MD. AKBAR KHAN. A.I.R. 1936 Pesh. 116.

——(N.W.F.P.) —*Proof—Will—Testamentary power—Extent of—Determination of—Doctrines evolved for other tribes—Applicability.*

In defining the extent of testamentary power possessed by a person belonging to one tribe, it is not proper to apply doctrines which have been evolved for inhabitants of other tracts. (*Fraser, J.C. and Saad ud-din Khan, A.J.C.*) SULTAN *v.* WAZIR. A.I.R. 1936 Pesh. 92.

——(N.W.F.P.)—*Reversioners—Position of.*

Reversioners governed by the Customary law do not derive their title to challenge an alienation

from or through their father but from or through the ancestor who owned the land. (*Fraser, J.C. and Saad-ud-din, A.J.C.*) AHMAD KHAN *v.* MT HAYAT BIBI. **A.I.R. 1936 Pesh. 119.**

——(N.W.F.P.) — Riwaj-i-am —*Evidentiary value.*

Statements of custom in *Riwaj-i-am*, even if not supported by instances, are evidence of the existence of that custom which must prevail unless rebutted. The *ratio decidendi* of the decisions of Lahore High Court appears to be that apart from the quotation of instances. *Riwaj-i-am* is an official document prepared by an expert having intimate knowledge of customs and based upon answers given to questions by persons following custom at a time when no particular point is in dispute and when they are, therefore, able to give a considered opinion unbiassed by personal interests. 1928 P.C. 294, Foll. (*Middleton, J.C. and Almond, A.J.C.*) MUKUNDLAL *v.* SANT RAM. **160 I.C. 672=8 R.Pesh. 124=A.I.R. 1936 Pesh. 26.**

——(N W.F.P.)—*Succession—Daughter, if excludes collateral.*

A female issue of a woman is included in the expression "other heirs" in Lorimer's Customary Law and she is entitled to inherit to the exclusion of the collaterals, the property gifted to her mother. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MIRA KHAN *v.* SHAD MAHOMED. **169 I.C. 689=10 R.Pesh. 4=A.I.R. 1937 Pesh. 1.**

——(N.W.F.P.)—*Succession—Female heirs of collaterals.*

The Customary law of the Peshawar District does not mention the succession to the property of a sonless proprietor by female heirs of his collaterals. (*Almond, J.C. and Mir Ahmad, J.*) MUZAFFAR SARFRAZ *v.* RAHIM JANA. **190 I.C. 427 =A.I.R. 1940 Pesh. 21.**

——(N.W.F.P.)—*Succession—Khalils of Tahsil Peshawar—Land willed away by person to his wife—Wife succeeding and dying leaving daughters—Daughters, if excluded from succession by reversioners.*

Amongst the Khalils of Tahsil Peshawar, where a person wills away his land to his wife and she duly succeeds to it and dies leaving daughters, the daughters are not excluded from succession by the reversioners of the testator. The property reverts to the family of the donor only on the death of the donee without heirs and the donee's heirs cannot be restricted to her male issue only for the purpose of succession as against the reversioners. (*Jolly, Offg. J.C. and Saad-ud-din Khan, A.J.C.*) SHER ZAMAN *v.* NEK MUHAMMAD. **A.I.R. 1936 Pesh. 138.**

——(N.W.F.P.)—*Validity—Adoption of sister's son—Rawas.*

The Rawas who claim a Rajput origin can adopt the son of a sister. (*Darling, S.M. and Bomford, J.M.*) GANGA DEI *v.* MOHAMMAD HABIBUR RAHMAN KHAN. **1937 R.D. 583.**

——(N W.F.P.)—*Widow—Gigianis of Marozai —Widow's right to keep husband's estate for life or until remarriage.*

Amongst Gigianis of Marozai a widow is entitled to keep her husband's estate for life or until remarriage. (*Fraser, J.C. and Saad-ud-din, A.J.C.*) TOR KHAN *v.* MT. AFNAN **163 I.C. 27= 8 R.Pesh. 211=A.I.R. 1936 Pesh. 128.**

——(N.W.F.P.)—*Will—Testamentary power—Extent of—Sonless Daudzai Pathan of Peshawar District—Power to disinherit brother or brother's son.*

In the matter of determining the extent of the testamentary power possessed by person belonging to a particular tribe, the general principle which is recognized by all tribes is that a father cannot by will totally disinherit a major son except for disloyalty. There is very little difference between the position of a father and that of brothers. The underlying principle is that the testamentary power should not be allowed to interfere with the normal rule of succession except for very good reasons. A sonless Daudzai Pathan of the Peshawar District cannot therefore without good reasons be allowed to change the normal rule of succession and entirely disinherit his brother or a brother's son, unless the beneficiary under the will discharges the burden of proving the unrestricted testamentary power on which he relies to support the will in his favour. Civil Appeal No. 198 of 1927; Civil Appeal No. 8 of 1920; 1 J.R. 66 and 1 J.R. 107, Ref. (*Fraser, J.C. and Saad-ud-din Khan, A.J.C.*) SULTAN *v.* WAZIR. **A.I.R. 1936 Pesh. 92.**

——(N.W.F.P.)—*Will—Testamentary power—Sonless Awan of Tappa Khalsa, Peshawar District—Power to will away whole estate to one set of reversioners to exclusion of another set.*

In case of a will executed by a sonless Awan, proprietor of Tappa Khalsa, in the Peshawar District, bequests of a portion of an estate, even up to half, to dependants, even to married daughters are valid but the devolution of the whole estate away from the reversioners is a power which is not recognised. Nor does the power extend to the willing away of the whole estate to one set of reversioners to the total exclusion of the other especially when the latter stand in very near relationship to the testator, *e.g.*, as brother to brother. If such brother had been shown to be disloyal or hostile to the testator, there might be justification for his exclusion as in the case of a disloyal son. Failing that, especially where ancestral property is concerned, a sonless proprietor is only a temporary holder of the family property and the mere fact that he fails to have direct heirs would not justify him in interfering with the rules of succession, which would have applied if he had not made a will. C. A, No. 103 of 1928, Rel. on; 1 J.R. 107; 1 J.R. 78 and 2 J.R. 2, Dist.; J.R. 111, Commented upon. (*Fraser, J.C. and Saad-ud-din Khan, A.J.C.*) AURANG *v.* KALAM KHAN. **A.I.R. 1936 Pesh. 94.**

——(Orissa)—*House sites—Allotment to cultivator in Gaontiai village of Sambalpur—Right to make—New site and abandoned site with building —Consent of punches—Necessity.*

There is a village custom in the Gaontiai village of Sambalpur District to the effect that the allocation of house sites would be done by the *lambardar* and the *punches*. Whether the site be a new one or an abandoned one on which a house is standing, the *punches* must be consulted before it can be allotted to a cultivator. (*Agarwala, J.*) GAYA SAHU *v.* DEBARCHAN BHOKTA. **180 I.C. 159=5 B.R. 361=11 R.P. 461=1938 P.W.N. 524 =19 Pat.L.T. 663=A.I.R. 1939 Pat. 155.**

——(Oudh)—*Succession— Daughters— Exclusion of—Besain Thakurs of Kandhauli.*

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There is a custom of the exclusion of daughters from inheritance among Besain Thakurs of Kandhauli. (*Srivastava, A.C.J. and Zia-ul-Hasan, J.*) DURGA BAKHSH SINGH *v.* CHANDRAPAL SINGH. **12 Luck. 746=1936 O.W.N. 1219=9 R.O. 259=1936 R D. 587=1936 O.L.R. 692=165 I.C. 865=A.I.R. 1937 Oudh 181.**

——(Oudh)—*Succession— Daughters— Exclusion of—Sheiks of Pargana Mangalzi of Fyzabad District.*

There is no certain and invariable custom among the Sheiks of Pargana Mangalsi of Fyzabad District debarring daughters from inheriting any share in their father's property in the presence of sons. (*Thomas, C.J. and Bennet, J.*) BARQ RAZA *v.* AKBARI. **185 I.C. 441=1940 O.L.R. 3=12 R.O. 229=A.I.R. 1940 Oudh 152.**

——(Oudh)—*Succession—Widow—Nature of estate—Besain Thakurs of Kandhauli.*

There is no custom among Besain Thakurs of Kandhauli that widows become absolute owners of the property left by their husbands. (*Srivastava, A.C.J. and Zia-ul-Hasan, J.*) DURGA BAKHSH SINGH *v.* CHANDRAPAL SINGH. **12 Luck. 746=1936 O.L.R. 692=1936 O.W.N. 1219=9 R.O. 259=1936 R.D. 587=165 .C. 865=A.I.R. 1937 Oudh 181.**

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Abadi.
Abrogation.
Adna malik and Ala malik.
Adoption.
Agricultural tribe.
Alienation.
Alluvion and diluvion.
Ancestral land.
Ancestral property.
Applicability.
Caste.
Customary dues.
Customary law.
Dastartandi.
Gift.
Guardian ship.
Irrigation right.
Landlord and Tenant.
Land Tenure.
Law applicable.
Maintenance.
Marriage.
Migration.
Mukarraridar.
Partition.
Proof.
Religious Endowment.
Reversioner.
Riwaj-i-am.
Shamilat.
Succession.
Town or Village.
Widow.
Will.

Abadi.

——(Punjab)—*Abadi—Building sites granted to non-proprietors—Terms of grant—Presumption.*

In the Punjab villages, it is a matter of presumption that the *abadi deh* is a common property of the proprietary body until partition has taken place; and when an outsider is allowed to settle

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permanently in the village and build a house in the *abadi deh* it is further to be presumed that he does so by license from the proprietors. It is improbable that the terms of this license are ever put into words, but they are known to the parties concerned and are to be implied from local usage much in the same way as certain terms will be read into any other transfer of property, unless there is evidence to the contrary. When a non-proprietor is granted a site for building in a village, one of these implied terms is that he may not transfer it, though it will be allowed to descend to his own family. The addition of such a term to the grant may be called a local custom, or preferably, usage. It is a question of fact whether such a restriction on transfer is to be taken as an implied term when a site is granted to a non-proprietor in any particular village. Generally, it will be presumed that the proprietary body intends the grant to be subject to a restriction on transfer and that this condition has been accepted by any non-proprietor accepting the grant. The presumption may be rebutted in a variety of ways. It may be shown that the course of dealings between proprietors and non-proprietors over a long term of years has been such as to indicate that no restriction on transfer is implied when a grant is made. But the presumption is not rebutted by the mere fact that a number of *pucca* houses have been built on the sites by the non-proprietors in the village. (*Beckett, J.*) CHUNI LAL *v.* BEANT SINGH. **I.L.R. (1938) Lah. 667=40 P.L.R. 634=178 I.C. 551=11 R.L. 471=A.I.R. 1938 Lah. 642.**

——(Punjab)—*Abadi—Ferozepura — Right of reversion in malba of houses of non-proprietors.*

On the non-proprietors leaving, the right of reversion of the malba of the houses of the non-proprietors in Abadi Ferozepura held vested in the founder of that abadi alone and not in all the proprietors of the village. (*Tekchand, J.*) ABDUL MAQSAT *v.* MOHAMMAD AMIN. **179 I.C. 369=11 R L. 564=40 P.L.R. 959=A.I.R. 1938 Lah. 680.**

——(Punjab)—*Abadi—House in—One of proprietors purchasing a house from non-proprietor —Rights of—Liability to ejectment.*

One of the proprietors of a village is entitled to purchase a house in the village *abadi* from a non-proprietor and cannot be ejected except in partition proceedings and then only if it is found that he is in possession of more *abadi* land than he would be entitled to. But the proprietor who so purchases is not the exclusive proprietor of the site under the house. He is only a full proprietor of the materials and the site is owned by the entire proprietary body of the village. He can, however, remain in possession of the site, till he is ejected as a result of the partition of the village *abadi*. (*Jai Lal, J.*) JAN MOHAMMAD *v.* JIWAN KHAN. **165 I.C. 606 (1)=9 R.L. 267 (1)=38 P.L.R. 1125.**

——(Punjab) — *Abadi — Alienation of house sites—Right of non-proprietors—Presumption.*

The initial presumption is that the *abadi* belongs to the proprietary body and therefore that non-proprietors, although they are entitled to the *malba* of their houses, are not entitled to alienate the sites. The onus lies heavily on the non-proprietors to prove their right of alienation. (*Skemp, J.*) SHANKAR LAL *v.* KAILASH CHAND. **183 I.C.**

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794=12 R.L. 187=41 P.L.R. 21=A.I.R. 1939 Lah. 105.

——(Punjab) — *Abadi —Alienation of house sites—Right of non-proprietors—Proof of custom.*

A custom allowing non-proprietors to alienate sites under their houses in the *abadi* can be proved by a large number of instances. If there is a large number of uncontested instances, then it may be a fair presumption that the custom exists. (*Skemp, J.*) SHANKAR LAL *v.* KAILASH CHAND. 183 I.C. 794=12 R.L. 187=41 P.L.R. 21=A.I.R. 1939 Lah. 105.

——(Punjab) — *Abadi — Alienation of house sites—Right of non-proprietors—Sohna village.*

By custom the non-proprietors of Sohna which is a large village have no right to alienate the sites of their houses. If such sites form part of the village common land which belongs to the proprietors of the village, the question that the village has grown into a town is immaterial. It is for the non-proprietors to establish that this old custom has been abrogated and new custom has taken its place. Mere acquiescence by the proprietors in the previous sales does not imply a renunciation of the discretionary right of the proprietors to object to subsequent sales and the evidence of a number of previous sales without objection does not prove an unrestricted right of alienation. Similarly the mere signing of some of the sale deeds by a particular biswedar does not show that the right of the non-proprietors to sell the sites of their houses was recognized by the proprietors as a body. (*Abdul Rashid, J.*) NAWAB KHAN *v.* RANJIT. 41 P.L.R. 227=A.I.R. 1939 Lah. 88.

——(Punjab)—*Abadi — House site—Proof of particular sale without objection by proprietary body—Effect of.*

Proof of particular sale having taken place without objection by the proprietary body would be very good evidence of the title of the purchaser to the land sold and while such sales would give good title to individuals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished. 85 P.R. 1882; A.I.R. 1926 Lah. 622 and A.I.R. 1923 Lah. 467, Rel. on (*Coldstream, J.*) JHANDA SINGH *v.* SHIB DEV SINGH. 164 I.C. 238=9 R.L. 91 (2)=A.I.R. 1936 Lah. 474.

——(Punjab)—*Abadi—House site—Right of non-proprietor to alienate.*

A non-proprietor in Pinanwal village has no right to alienate the site of his house in the abadi of the revenue estate, without the consent of the proprietors of the village. (*Coldstream and Abdul Rashid, JJ.*) DHUMAN KHAN *v.* GURMUKH SINGH. 17 Lah. 403=166 I.C. 157=9 R.L. 345 =38 P.L.R. 887=A.I.R. 1936 Lah. 394.

——(Punjab)—*Abadi—House site—Right of non-proprietor to alienate.*

A non-proprietary resident of village Sangatpura in Amritsar District has no right to alienate his house site in the village abadi without consent of the proprietary body. (*Coldstream, J.*) JHANDA SINGH *v.* SHIB DEV SINGH. 164 I.C. 238 =9 R.L. 91 (2)=A.I.R. 1936 Lah. 474.

——(Punjab)—*Abadi—Village developing into town—Proprietors' right to control alienation.*

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The mere fact that a village has developed to the state of a town does not justify the presumption that the village proprietors have lost or abandoned their customary right of control over the alienations of [sites in the abadi deh. As long as the proprietors have not acted in such a way as to show that they have no regard for their proprietary rights and have abandoned them the presumption will not be justified. (*Coldstream and Abdul Rashid, JJ.*) DHUMAN KHAN *v.* GURMUKH SINGH. 17 Lah. 403=166 I.C. 157= 9 R.L. 345=38 P.L.R. 887=A.I.R. 1936 Lah. 394.

Abrogation.

——(Punjab)— *Abrogation — Recent judicial decisions—If sufficient to abrogate custom.*

Recent judicial decisions are not sufficient to abrogate the custom clearly laid down in the Manual of customary law governing the parties. (*Coldstream and Din Mahomed, JJ.*) NAWAB *v.* MT. SUBHANI. 172 I.C. 158=10 R.L. 277=39 P.L.R. 566=A.I.R. 1937 Lah. 683.

Adna malik and Ala malik.

——(Punjab)—*Adna malik—Agreement recorded in* wajib-ul-arz *preventing acquisition of rights during a certain period—Agreement subsequently ceasing to take effect—Rights, if can be acquired while agreement was in force.*

According to a *wajib-ul-arz* of a certain village prepared at the first regular settlement of 1878, a proprietor had the right to break up waste land adjacent to his own land already under cultivation subject to certain conditions. In 1902, to facilitate the acquisition of land in connection with a project to build a canal, an Act was passed enabling persons having rights in land to enter into agreements to surrender their rights to Government. In accordance with this Act the members of the proprietary body of the village executed an agreement by which they undertook to surrender their rights in the village waste (Shamilat) from the date on which the excavation of the permanent flow canal was begun. It was stipulated that from the date of the agreement up to the date of such surrender no one was to have any right to acquire as against Government any rights in the Shamilat by reclamation of waste land. At this time the second regular settlement was in progress and the entry in the *wajib-ul-arz* regarding the proprietor's right to break up the waste was altered so as to bring it into conformity with this agreement. These provisions were repeated in the *wajib-ul-arz* of the third regular settlement of 1924-26. The project did not mature and in 1929 the Act was repealed. Two of the proprietors of the village sued for a declaration that they have become Adna maliks of a certain area of land which they had reclaimed from the waste lands of the village area. Their contention was that by the repeal of the Act the rights described in the *wajib-ul-arz* of 1878 put in abeyance by that Act had been restored and that they were entitled by virtue of those rights to become Adna maliks of the land which they had broken up whether they had brought it into cultivation before the Act was passed or after it Overruling that contention,

Held, that so long as the agreement recorded in the *wajib-ul-arz* was in force proprietary rights could not be acquired during that period even though the agreement subsequently ceased to

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take effect. (*Coldstream and Jai Lal, JJ.*) AHMAD KHAN *v.* JIWANA RAM. **163 I.C. 864=9 R. L. 58=38 P L.R. 133.**

——(Punjab)—*'Ala malik' and 'talukdar'—Distinction.*

The words 'ala malik' literally mean 'superior proprietor,' and the word 'talukdar' conveys the idea of a landholder or an overlord. A talukdar may be an ala malik, but it is not necessary that he should be so. The status of ala maliks carries with it certain privileges which a mere talukdar does not enjoy and hence the important distinction between these two different kinds of tenures. An ala malik may *inter alia* be entitled to all the unculturable land in the village; he may possess a right of reversion or in other words the right of succession to all lands whose owners die without an heir; he is entitled by the law of pre-emption to exercise a preferential right of purchase on the sale of inferior proprietorships and he may claim a share of the sale money for himself if the inferior proprietorships are sold. But a talukdar is not entitled to any such privileges. (*Addison, A. C. J. and Din Mahomed, J.*) GHULAM MAHOMED KHAN *v.* SAMUNDAR KHAN. **165 I.C. 626=9 R.L. 267 (2)=38 P.L.R. 748=A.I.R. 1936 Lah. 37.**

——(Punjab)—*Ala maliks—Provision for payment of dhauri and juti tax—If enough to confer status.*

The fact that the dhauri and juti tax is provided for in a village, by itself is not enough to confer the status of ala maliks especially where there is no indication in the entry itself as to person or persons responsible for its payment or as to the method of its realization and where it has not been established that this tax was ever collected. (*Addison, A. C. J. and Din Mahomed, J.*) GHULAM MAHOMED KHAN *v.* SAMUNDAR KHAN. **165 I.C. 626=9 R.L. 267 (2)=38 P.L.R. 748=A.I.R. 1936 Lah. 37.**

——(Punjab)—*Adna malik—Right of—Village Noon-Nasheb, District Mianwali.*

The meaning of the *wajib-ul-arz* of the village Noon-Nasheb, District Mianwali, is that the adna maliks, whose land has been completely submerged, have a special right to get from existing banjar shamilat or from other land, which has emerged, areas equal to their submerged areas. Such land can be taken by the adna maliks immediately after it reappeared and though jhuri must be paid by the adna maliks to the ala maliks the payment thereof is not a condition precedent to the adna maliks taking possession of the land to which they are entitled. They are entitled to take possession as soon as they can and settle about the jhuri thereafter. (*Addison and Ram Lall, JJ.*) MUSA *v.* MALIK GHULAM QASIM. **I.L. R. (1939) Lah. 535=12 R.L. 253=184 I.C. 773=41 P.L.R. 835=A I.R. 1939 Lah. 361.**

——(Punjab)—*Ala malik and Adna malik—Shamilat deh—Partition—Right of adna maliks—Village Haidarabad in Tahsil Bhakkar of Mianwali District.*

In the village Haidarabad, in Tahsil Bhakkar of the Mianwali District, the adna maliks have no right to demand partition of the *shamilat deh.* (*Dalip Singh and Bhide, JJ.*) GHULAM HAIDAR *v.* MEHR CHAND. **39 P.L.R. 265.**

——(Punjab)—*Adna malik and ala malik—Village shamilat—Acquisition of adna malkiat rights.*

The provision of the *wajib-ul-arz* of 1878 ceased to be operative in 1902 when the new *wajib-ul-arz* was framed, and under the provisions of the new *wajib-ul-arz* no one could acquire adna malkiat rights in the shamilat land in Village Saggu Shumali in Mianwali District, merely by breaking up such shamilat and offering 'Jhuri" to the Ala Maliks. (*Addison and Abdul Rashid, JJ.*) CHANDAR BHAN *v.* MOHAMMAD. **161 I.C. 942=8 R.L. 822=A.I.R. 1936 Lah. 962.**

——(Punjab)—*Adna malik and Ala malik—Right to cultivate shamilat—Panj Girain, Tahsil Bhakkar, Mianwali District.*

An adna malik in the village Panj Girain in the Tahsil of Bhakkar in the Mianwali District is entitled to cultivate shamilat land without the permission of the ala malik. The only right of the ala malik is priority to cultivate the land before it is actually cultivated by the adna malik. (*Jai Lal, J.*) GHULAM MOHAMMAD SHAH *v.* SADHU RAM. **173 I.C. 807=10 R.L. 490=A.I.R. 1937 Lah. 286.**

Adoption.

——(Punjab)—*Adoption—Awans.*

There is no custom of adoption among the Awans of Garhi Awanan, Gujranwala District. (*Dalip Singh and Beckett, JJ.*) FEROZE DIN *v.* FAZAL QADAR. **A.I.R. 1936 Lah. 67.**

——(Punjab)—*Adoption—Chima Jats of village Gojra—Adoption of daughter's son—Validity.*

Among Chima Jats of village Gojra, in the Daska tahsil, Sialkot district, the adoption of a daughter's son in the presence of collaterals of the third decree is invalid. (*Bhide and Currie, JJ.*) BUTA SINGH *v.* GURMUKH SINGH. **162 I.C. 501=8 R.L. 913=38 P.L.R. 1073=A.I.R. 1936 Lah. 371.**

——(Punjab)—*Adoption—Entry in Riwaj-i-am as to person who can be adopted—If only indicatory—Adoption of collateral in fourth degree among Jats of Mauza Hussainpur, Tahsil Nakodar, Jullunder District—Validity.*

An entry in a Riwaj-i-am as to the persons who can be adopted is only indicatory and not mandatory. An adoption of a collateral in the fourth degree, among Jats of Mauza Hussainpur, Tahsil Nakodar, Jullunder District, is valid even though nearer collaterals are alive. (*Tek Chand, J.*) JOWALA *v.* DIWAN SINGH. **166 I.C. 237=9 R.L. 355=A.I.R. 1936 Lah. 237.**

——(Punjab)—*Adoption—Formalities—Sara sub-caste of Jat tribe in village Hans, District Ludhiana.*

According to the custom relating to adoption among the Sara sub-caste of the Jat tribe in village Hans, Tahsil Jagraon, District Ludhiana, no special formalities are considered necessary in cases of adoption but a mere declaration of adoption and general treatment as a son are considered sufficient. Where there is a deed of adoption which was later followed by a gift of land to the adoptee, this is sufficient compliance with what is required by the customary law. (*Addison and Ram Lall, JJ.*) PHUMAN SINGH *v.* MANU. **182 I.C. 576=12 R.L. 59=41 P.L.R. 387=A.I.R. 1939 Lah. 62.**

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——(Punjab)—*Adoption — Jats of Gurgaon District—Adoption of married person.*

Among the Jats of Gurgaon District when an adoption of a married man takes place, and all the ceremonies connected with Hindu Law adoption are performed on the day of adoption, the adopted person is completely transplanted from the family of his natural father into that of his adoptive father. (*Abdul Rashid, J.*) HARI SINGH PREM *v.* MOTI RAM. **184 I.C. 96=12 R. L. 161=41 P.L.R. 417=A.I.R. 1939 Lah. 196.**

——(Punjab)—*Adoption—Jhali Jats of village Dehlon, Ludhiana District—Right of adopted son to succeed collaterally.*

Among Jhali Jats of the village Dehlon in the Ludhiana District, an adopted son is entitled to succeed collaterally in the family of his adoptive father. (*Bhide, J.*) JAGTA *v.* BUGGA. **177 I.C. 308=11 R.L. 291=A.I.R. 1938 Lah. 103**

——(Punjab)—*Adoption—Jats of Jullundur District—Person outside got, if can be adopted.*

Among the Jats of Jullundur district, the general rule of custom is that a person outside the got of the adopter cannot be adopted. (*Rangi Lal, J.*) AMARJIT SINGH *v.* DHARMSALA DARWAZA KITNI. **161 I.C. 480=8 R.L. 756=A.I R. 1936 Lah. 218.**

——(Punjab)—*Adoption—Qureshis of Village Pind Sheik Musa in Lyallpur.*

Among Qureshis of Village Pind Sheik Musa in Lyallpur, an adopted son will succeed on the death of the person who appointed him as his heir. (*Addison and Din Mohammad, JJ.*) NUR MOHAMMAD *v.* BHAWAN SHAH. **17 Lah. 96=162 I.C. 854=8 R.L. 963=38 P.L.R. 477=A.I.R. 1936 Lah. 465.**

——(Punjab)—*Adoption—Right to adopt—Adopter, if can ignore custom by adopting Dattaka form.*

A person making an adoption under Hindu Law cannot ignore the custom by which he is governed merely by adopting the Dattaka form of adoption. The effect of the ceremony would be to transplant the adoptee into the adopter's family, but the eligibility of the adoptee would still be governed by Hindu Law modified by custom. (*Rangi Lal, J.*) AMARJIT SINGH *v.* DHARMSALA DARWAZA KITNI. **161 I.C. 480=8 R.L 756=A I.R. 1936 Lah. 218.**

——(Punjab)— *Adoption—Sayads—Adoption of daughter's son.*

Among the Sayads of village Kotli Khadam Shah in Tahsil Pasrur of the Sialkot district the adoption of daughter's son is not valid by custom in the presence of collaterals of the third degree. (*Rangi Lal and Monroe, JJ.*) KHAIR ALI SHAH *v.* IMAM SHAH. **17 Lah. 129=161 I C. 634=8 R.L. 775=38 P.L.R. 571=A.I.R. 1936 Lah. 80.**

——(Punjab)—*Adoption — Sister's or daughter's son—Tarkhans of village Chanian, Jullundur district.*

According to the riwaj-i-am of Jullundur district in the Punjab the tarkhans of village Chanian in the Nakodar tahsil of Jullundur district who are governed by custom are prohibited from adopting a sister's or daughter's son. The fact that the tarkhans were not consulted at the time of the preparation of the riwaj-i-am is no ground for applying the provisions of the Hindu law. In view of the provisions of the riwaj-i-am the burden of proving that a sister's or a daughter's son is eligible far adoption lies on the adoptee. (*Abdul Rashid, J.*) GURBAKHSH RAM *v.* MANAK CHAND **A.I.R. 1940 Lah. 392.**

——(Punjab)—*Adoption—Validity— Adoption of daughter's son.*

Among high caste non-agricultural Hindus, resident in towns in the Punjab such as Khatris of Amritsar the strict rule of the Hindu Law of Mitakshara that a daughter's son cannot be adopted has been varied and a daughter's son can be validly adopted. Such an adoption has the full effect of a formal adoption under Hindu Law and the adopted son severs his connexion with his natural family and becomes the male lineal descendant of the adoptive father. (*Tek Chand and Abdul Rashid, JJ.*) ROSHAN LAL *v.* SAMAR NATH. **I.L.R. (1938) Lah. 173=175 I.C 746= 11 R.L. 9=A.I.R. 1937 Lah. 626.**

Agricultural tribe.

——(Punjab)—*Agricultural tribe—Proof.*

For a tribe to be a statutory agricultural tribe, it is necessary that some time or other the tribe must have held land within living memory. Evidence proving that an ancestor had held land combined with other evidence of caste would satisfactorily establish that a person is a member of an agricultural tribe. (*Young, C.J. and Rangi Lal, J.*) GHULAM MOHAMMAD *v.* SECRETARY OF STATE FOR INDIA. **161 I.C. 511=8 R.L. 771=38 P.L.R. 1162=A.I.R. 1936 Lah. 910.**

Alienation.

ANCESTRAL LAND.
ANCESTRAL PROPERTY.
ANTECEDENT DEBT.
NECESSITY.
NON-PROPRIETORS.
POWERS OF.
REVERSIONER.
RIGHT TO CHALLENGE.
SETTING ASIDE.
SHAMILAT.
VALIDITY.
WIDOW.

Alienation—Ancestral land.

——(Punjab)—*Alienation — Ancestral land—Good management.*

It cannot obviously be considered to be an act of good management to sell property worth Rs. 20,500 when there is necessity for a loan of about Rs. 6,000 only. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH. **I.L.R. (1938) Lah. 676=179 I.C. 737=11 R.L. 613=41 P.L.R. 246=A.I.R. 1938 Lah. 648.**

——(Punjab)—*Alienation — Ancestral land—Just debt—Meaning—Amounts borrowed by big zamindar for purchase of costly clothes and ornaments—If just debts.*

Just debt means a debt which is actually due and which is not immoral, illegal or opposed to public policy. It also means a debt not contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interest of the reversioners. It need not be one incurred for a necessary purpose; but if a non-necessary debt is unreasonably large compared to the means and station in life of the proprietor, it cannot come under the definition of a just debt. Similarly if a number of compara-

tively small loans for non-necessary purposes are contracted within an unreasonably short period, they collectively may amount to extravagance, judged by the tests previously mentioned, and may be excluded from the category of just debts. What is unreasonable or extravagant must depend upon the circumstances of each particular case and must be decided by the Court on fair and rational grounds. Amounts borrowed by a big zamindar with a large income and living in a style suited to his social status, for costly clothes and ornaments cannot be considered to be a very unreasonable expenditure so as to exclude the debts from the category of "just" debts. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH. I.L.R. (1938) Lah. 676=179 I.C. 737=11 R.L. 613=41 P.L.R. 246=A.I.R. 1938 Lah. 648.

——(Punjab)— *Alienation — Ancestral land— Necessity—If must exist at the time of alienation.*

Even a male proprietor is not entitled to encumber ancestral property for his future requirements; the necessity to support an alienation of ancestral property must exist at the time of the alienation. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH. I.L.R. (1938) Lah. 676=179 I.C. 737=11 R.L. 613=41 P.L.R. 246 =A.I.R. 1938 Lah. 648.

——(Punjab)— *Alienation — Ancestral land— Necessity—Purchase of ornaments.*

The purchase of ornaments to replace those which had been stolen cannot be considered to be valid necessity for the sale of "ancestral" land. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH. I.L.R. (1938) Lah. 676=179 I.C. 737=11 R.L. 613=41 P.L.R. 246=A.I.R. 1938 Lah. 648.

Alienation—Ancestral property.

——(Punjab)—*Alienation--Ancestral property —Alienation in lieu of dower debt—Validity.*

Under Mahomedan law dower is to be regarded as a debt due from the husband to the wife. This debt is payable on demand. Such debt being a just antecedent debt arising out of the contract of marriage the husband is fully entitled to alienate ancestral land in favour of his wife in lieu of this debt provided it is not unreasonably high. The question as to what is regarded as a reasonable amount of dower is a question of custom and it is incumbent on the party to raise this point in its pleadings and to lead evidence thereon. Where a person wants to show that a custom does not permit the alienation of a good deal of ancestral property in lieu of dower, it is open to him to get an issue framed on this point and to lead evidence to prove the custom. If he fails to do so, such point cannot be raised in appeal for the first time. (*Abdul Rashid, J.*) NAWAB DIN *v.* MAULA BAKHSH. 177 I.C. 399= 11 R.L. 309= A.I.R. 1938 Lah. 431.

——(Punjab)—*Alienation—Ancestral property —Fact that part of property sold was house-property situated within city limits—If sufficient to take it out of customary restriction on sale.*

Where the vendor is admittedly governed by custom with regard to alienation of ancestral property, the mere fact that part of the property sold was house-property situated within the city limits would not be sufficient to take it out of the customary restrictions on sale of "ancestral" properties. (*Bhide and Beckett, JJ.*) IQBAL

SINGH *v.* MAHINDAR SINGH. I.L.R. (1938) Lah. 676=179 I.C. 737=11 R.L. 613=41 P.L.R. 246 =A.I.R. 1938 Lah. 648.

——(Punjab)—*Alienation—Ancestral property —Just debt, meaning of.*

A just debt means a debt which is actually due and is not immoral, illegal or opposed to public policy, and has not been contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interests of reversioners. (*Lord Romer.*) SURENDAR SINGH *v.* GHULAM MOHAMMAD. 66 I.A. 177=I.L.R. (1939) Kar. 268=41 Bom.L.R. 1245=5 B.R. 639=43 C.W.N. 786=41 P.L.R. 454=1939 O.L.R. 316=1939 O.W.N. 557=11 R.P.C. 253=50 L. W. 23=1939 O.A. 553=1939 M.W.N. 1177=1939 A.W.R. (P.C.) 97=181 I.C. 308=A.I.R. 1939 P.C. 150 (P.C.).

——(Punjab)—*Alienation — Ancestral property—Necessity—Discharge of decree.*

Where an alienee, who is an outsider, finds that the alienor's debt is a decretal debt, he need not make any further enquiry, and the reversioners will not be allowed to go behind the decree. This rule is not applicable where it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances, or where it is proved that he actually had knowledge of the bad faith of the decretal transaction. (*Jai Lal and Skemp, JJ.*) PRITAM SINGH *v.* SARJIT SINGH. A.I.R. 1936 Lah. 112.

——(Punjab)—*Alienation—Ancestral property —Necessity—Existence of decretal debts.*

The mere existence of decretal debts is not sufficient proof of there being legal necessity on the part of an alienor of ancestral lands governed by the customary law of the Punjab. It must further be shown that the debts which were decreed were just debts. (*Lord Romer.*) SURENDAR SINGH *v.* GHULAM MOHAMMAD. 66 I.A. 177= I.L.R. (1939) Kar. 268=50 L.W. 23= 41 Bom.L.R. 1245=5 B.R. 639=43 C.W.N. 786=41 P.L.R. 454=1939 O.L.R. 316=1939 O.W.N. 557=11 R.P.C. 253=1939 O.A. 553= 1939 M.W.N. 1177=1939 A.W.R. (P.C.) 97=181 I.C. 308=A.I.R. 1939 P.C. 150 (P.C.).

——(Punjab)—*Alienation—Ancestral property —Necessity—Onus.*

In the case of an alienation of ancestral lands in the Punjab which is governed by the customary law, the onus lies on the mortgagee of proving either that there was legal necessity in fact which would justify the alienation or that he made a proper and *bona fide* enquiry into the alleged necessity and satisfied himself as to the existence of the alleged necessity. But, if he discharges the burden, he is not bound to see that the money paid by him is actually applied by the mortgagor to meet the necessity. (*Lord Romer.*) SURENDAR SINGH *v.* GHULAM MOHAMMAD. 66 I.A. 177=I.L.R. (1939) Kar. 268= 41 Bom.L.R. 1245=5 B.R. 639=43 C.W.N. 786 =1939 O.L.R. 316=41 P.L.R. 454=1939 O.W.N. 557=11 R.P.C. 253=50 L.W. 23=1939 O.A. 553 =1939 M.W.N. 1177=1939 A.W.R. (P.C.) 97= 181 I.C. 308=A.I.R. 1939 P.C. 150 (P.C.).

——(Punjab)—*Alienation—Ancestral property —Necessity—Payment of mortgage.*

An alienation of ancestral property effected to pay a mortgage effected to pay off a previous old creditor is one for necessity. (*Jai Lal and Skemp,*

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JJ.) PRITAM SINGH *v.* SARJIT SINGH. **A.I.R. 1936 Lah. 112.**

——(Punjab)—*Alienation—Ancestral property—Necessity—Proof by alienee.*

The law requiring an alienee to prove necessity for alienation of ancestral property is well known, and if an alienee fails to take the obvious precaution of ascertaining necessity for an alienation of ancestral property and getting it duly recorded at the proper place and time, he must take the consequences. Normally it is sufficient for the alienee to prove that the antecedent debts discharged were due, and it is unnecessary for him to show that the debts were incurred for "necessity". Even an alienee who is an outsider will not be protected, if he is aware of the true nature of the debts discharged by the alienation and acts in bad faith. 65 P. R. 1000, Rel. on. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH. **I.L.R. (1938) Lah. 676=179 I.C. 737=11 R.L. 613=41 P.L.R. 246=A.I.R. 1938 Lah. 648.**

——(Punjab)—*Alienation — Ancestral land—Tiwanas of Punjab.*

It is doubtful whether a custom giving right to alienate ancestral land exists among the Tiwanas of the Punjab. (*Addison, A.C.J. and Din Mahomed, J.*) NARAIN SINGH *v.* MALIK AHMAD YAR KHAN. **17 Lah 133=162 I.C. 374=8 R.L. 888=38 P.L.R. 472=A.I.R. 1936 Lah. 21.**

Alienation—Antecedent debt.

——(Punjab)—*Alienation—Antecedent debt—Debts incurred after agreement of sale and latter included in consideration for that sale.*

An "antecedent debt" means a debt which is not only antecedent in time, but also antecedent in fact, *i.e.*, it must be truly independent of the transaction impeached. In other words, the two transactions must be dissociated in time as well as fact. Debts which were incurred after agreement relating to the sale was entered into and which were later on included in the consideration for that sale cannot be properly held to be "antecedent debts". (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH. **I.L.R. (1938) Lah. 676=179 I.C. 737=11 R.L. 613=41 P.L.R. 246=A. .R. 1938 Lah. 648.**

Alienation—Necessity.

——(Punjab)—*Alienation—Necessity—Alienation of 1/10 part of property to raise funds to go to Mecca.*

Where a person, owning 12 kanals of property, alienates about 1½ kanals in order to raise funds to enable him to go to Mecca, it is not by any means an extravagant transaction. He is well within his rights both according to the tenets of the Mahomedan religion aud the Customary law, to alienate a 1/10 fraction of his property in order to perform the sacred duty of going to Mecca for performing the Haj. (*Agha Haidar, J.*) SHADI-KHAIR DIN *v.* QUTBA. **163 I.C. 963=9 R.L. 71=38 P.L.R. 162=A.I.R. 1936 Lah. 665.**

——(Punjab)—*Alienation—Necessity—Antecedent debt.*

Payment to discharge a decretal debt constitutes necessity. In the absence of proof of immorality or reckless extravagance and wanton waste, a debt can be treated as a just and antecedent debt even if the alienee be the same creditor from whom loans were taken. (*Addison and Ram Lall, JJ.*) ARJAN SINGH *v.* NAWAB. **41 P.L.R. 413.**

——(Punjab)—*Alienation—Necessity—Antecedent debt—Joint debts incurred by members of family for ordinary household necessities.*

It is quite a usual practice for agricultural families to incur joint debts for ordinary household necessities and both parties commonly gain the benefit of the joint credit so obtained. Where there is no reason to suppose that the expenditure covered by a joint debt has been wastefully extravagant, a joint debt can be regarded as a just antecedent debt. (*Beckett, J.*) ALI MOHAMMAD *v.* NUR MOHAMMAD. **179 I.C. 320 (2)=11 R.L. 551=A.I.R. 1938 Lah. 858.**

——(Punjab)—*Alienation—Necessity—Antecedent debt—Proof.*

In the case of an alienation for antecedent debt, there is no necessity for the alienee to prove anything further than the existence of that debt, unless there are circumstances tending to show that the debt is immoral or of an extravagant nature and that he could have come to know this by diligent enquiry. (*Blacker, J.*) MEHNGA SINGH *v.* PHETAM SINGH. **41 P.L.R. 627.**

——(Punjab)—*Alienation — Necessity—Debts raised for marriage of son and for muklawa ceremony of daughter—Necessity—Mortgage to pay off decrees against mortgagor—Validity.*

Where debts are raised by a person for the purposes of marriage of his son and for the muklawa ceremony of his daughter, the purposes are necessary purposes within the meaning of the customary law. A mortgagee is sufficiently protected by law if he advances any amount to the mortgagor for the discharge of decrees obtained against the mortgagor and is not bound to see to the actual application of the money received by the mortgagor. (*Addison and Din Mohammad, JJ.*) TAJ MOHAMMAD *v.* BHAJAN LAL. **175 I.C. 394=10 R.L. 707=A.I.R. 1937 Lah. 942.**

——(Punjab)—*Alienation—Necessity—Enquiry by alienee—Sufficiency.*

The onus lies on the alienee to prove either that there was legal necessity in fact which would justify the alienation, or that he made a proper and *bona fide* enquiry into the alleged necessity and satisfied himself as to the existence of such necessity. If he fails to prove that there was a necessity in fact, alienation may still be upheld if he proves that he made enquiry as to the existence of the alleged necessity, and that the facts represented to him were such as, if true, would have justified the transaction. If he discharges this burden, he is not bound to see that the money paid by him is actually applied by the alienor to meet the necessity. (*Sir Shadi Lal.*) ATMA RAM *v.* THAKUR SADHU SINGH. **32 S.L.R. 395=1938 A.L.J. 190=1938 O.L.R. 110=40 P.L.R. 180=1938 A.L.R. 144=1938 A.W.R. (P.C.) 56=1938 O.A. 206=4 B.R. 353=10 R.P.C. 208=1938 R.D. 399=40 Bom.L.R. 742=172 I.C. 1004=1938 O.W.N. 196=A.I.R. 1938 P.C. 77 (P.C.).**

——(Punjab)— *Alienation — Necessity — Just debts—Meaning of.*

The expression 'just debt' means a debt which is actually due, and which is not immoral, illegal or opposed to public policy. It also means a debt not contracted as an act of reckless extravagance or of wanton waste, or with intention of destroy-

ing the interests of the reversioners. It need not be one incurred for a necessary purpose, but if a non-necessary debt is unreasonably large compared to the means and station in life of the proprietor, it cannot come under the definition of a 'just debt'. Similarly, if a number of comparatively small loans for non-necessary purposes are contracted within an unreasonably short period they collectively may amount to extravagance and may be excluded from the category of just debts. What is unreasonable or extravagant must depend upon the circumstances of each particular case and must be decided by the Court on fair and rational grounds. Large debts were contracted by grandfather and father during a short period of five years. The family was small and there was no evidence showing that they had to incur any extraordinary expenditure for any proper purpose; on the other hand there was evidence to the effect that the father was a drunkard, thief, and a profligate. In a suit by son for declaration that the debts were not binding on ancestral property,

Held, that the debts were incurred by way of reckless extravagance and were not just debts. (*Coldstream and Bhide, JJ.*) MILKHA SINGH *v.* SUBA SINGH. **173 I.C. 977=10 R.L. 516=A.I.R. 1937 Lah. 477.**

——(Punjab)—*Alienation—Necessity—Money required to discharge previous mortgage.*

Money required for the discharge of a previous mortgage is for necessity. The fact that the vendee has not paid the previous mortgagee does not mean absence of necessity for the payment of the item. (*Bhide, J.*) KHAMANA *v.* SITA SINGH. **182 I.C. 801 (1)=12 R.L. 76=41 P.L.R. 16 (1)=A.I.R. 1939 Lah. 182.**

——(Punjab)—*Alienation — Necessity— Mortgage to purchase cow for milk.*

Where a small sum of Rs. 50 was raised by mortgage for the purpose of purchasing a cow and the alienor was not in good health and required milk,

Held, that the sum raised was so small and the purpose for which it was acquired was so ordinary that no enquiry was required by the alienee and hence it was for necessity. (*Jai Lal and Skemp, JJ.*) PRITAM SINGH *v.* SARJIT SINGH. **A.I.R. 1936 Lah. 112.**

——(Punjab)—*Alienation — Necessity—Necessity not proved for small portion of consideration —If a ground for setting aside alienation.*

Where a sale or a mortgage is established for legal necessity, the fact that the vendee or the mortgagee is unable to prove that a small portion of the consideration was applied for purposes of legal necessity, is no ground for setting aside the alienation,nor can the vendee or the mortgagee be held liable to pay to those challenging the alienation that portion of the consideration for which legal necessity is not positively established. A.I.R. 1927 P.C. 37, Foll (*Agha Haidar, J.*) INDAR SINGH *v.* NASIBA. **165 I.C. 23=9 R.L. 228=A.I.R. 1936 Lah. 769.**

——(Punjab) —*Alienation—Necessity—Onus—Antecedent debts—Alienor man of loose character.*

If the alienor is a man of loose character, the initial onus lies on the outsider alienee to show that the debts were due, and when he has discharged that onus, the turn of the opposite party then comes to show that the alienee made no proper enquiry or that if he made one, he must have learnt of the real nature of the debts. The enquiry which should be made by alienee should refer not only to the existence of the debts but include also an enquiry as to their nature if those who challenge the alienation can show that the result of the first enquiry should have raised doubts in the mind of an ordinarily prudent man as to the morality or reasonableness of the debts. When the alienor is living with a mistress, and careless of his own and other people's money but is not guilty of reckless extravagance or wanton waste or trying to injure the estate out of spite, it is not enough for the person challenging the alienation in such a case to show that the alienor is generally a man of bad character. If the alienee pays off debts which are really due to third parties it is for such person to prove that those debts are in each case tainted with immorality. (*Jai Lal and Skemp, JJ.*) PRITAM SINGH *v.* SARJIT SINGH. **A.I.R. 1936 Lah. 112.**

——(Punjab)—*Alienation—Necessity—Onus—Duty of transferee.*

If a transferee makes reasonable enquiry as to the existence of the necessity, and on being satisfied that the necessity existed he advances the money, it is no part of his duty to see to the application of the loan to the necessity. The burden in these cases is always on the transferee. The mere recital as to the existence of the necessity in the deed of transfer is very feeble evidence and Courts of justice ordinarily do not attach much weight to it. (*Agha Haidar, J.*) INDAR SINGH *v.* NASIBA. **165 I.C. 23=9 R.L. 228=A.I.R. 1936 Lah. 769.**

——(Punjab)—*Alienation—Necessity—Proof—Alienation by male proprietor—Proof that alienor could not live within means—Necessity for.*

A male proprietor is not bound to live within his means; that principle applies only to a widow. It is not,therefore,the duty of the alienee to prove that the alienor could not live within his means and that it was necessary for him to borrow money. (*Addison and Ram Lall, JJ.*) ARJAR SINGH *v.* NAWAB. **41 P.L.R. 413.**

——(Punjab)—*Alienation—Necessity—Proof—Antecedent creditor being alienee.*

Where the original debt is a just one,the alienee is protected whether he himself is the antecedent creditor or not. Hence an alienee, even when he himself is an antecedent creditor, need not prove that the antecedent debt was incurred for a necessary purpose, that is to say, a purpose which is recognised as a valid necessity for the alienation of ancestral immovable property. (*Blacker, J.*) MEHNGA SINGH *v.* PHETAM SINGH. **41 P.L.R. 627.**

——(Punjab)—*Alienation—Necessity—Payment of decretal debt.*

Payment for discharge of decretal debts constitutes necessity. A debt which is not otherwise tainted in any manner can be treated as a just and antecedent debt even if the alienee be the same creditor from whom loans have been taken. Where alienation of ancestral property to discharge a part of a decretal debt was made by the father to a creditor from whom he had taken loans for the purpose of acquiring lands.

Held, that inasmuch as reckless extravagance and wanton waste on the part of the father were not proved, the alienation of ancestral property

was valid as being for necessity and for consideration. A.I.R. 1935 Lah. 927, Rel. on. (*Addison and Din Mohammad, JJ.*) SHER AFZAD *v.* BULAQI MAL 172 I.C 519=10 R.L. 336=39 P.L.R. 404=A.I.R. 1937 Lah. 119.

——(Punjab) — *Alienation—Necessity — Payment of Government revenue.*

The payment of Government revenue is a valid necessity. A mortgage executed by a peson who is a lambardar, for raising money to make payment of the Government revenue is valid and binding on the reversioners, when there is evidence to show that not only was the amount borrowed to make payment of Government revenue but it was actually paid into the Government treasury for that purpose. (*Agha Haidar, J.*) WAZIR KHAN *v.* MUKHTAR KHAN. 164 I.C. 836=9 R L. 167=A.I.R. 1936 Lah. 577.

——(Punjab)—*Alienation—Necessity—Sale of ancestrol land by father to purchase land in Bikaner and Gwalior—Elder son attesting deed—Sale, if for necessity.*

One *B* sold ancestral land for Rs. 1,500, the entire consideration being paid to him before the Sub-Registrar. *B's* elder son was present before the Sul-Registrar and attested the deed. The object of the sale was the purchase of land in Bikaner and Gwalior States. *B* spent actually some money in purchasing land in Gwalior. A suit was brought by his minor son for declaration that the sale was without necessity.

Held, that the sale by *B* in the presence of his elder son was an act of good management and was for necessity. (*Skemp, J.*) DIAL SINGH *v.* SURAIN SINGH. 174 I.C. 33=10 R.L. 519 (1)=A.I.R. 1937 Lah. 493.

——(Punjab)—*Alienation—Necessity—Suit by alienor dismissed with costs—Alienation to pay such costs.*

Where a suit by the alienor is dismissed with costs, he is legally liable to pay the costs and as such an alienation to pay such costs is one for necessity. (*Jai Lal and Skemp, JJ.*) PRITAM SINGH *v.* SARJIT SINGH. A.I.R. 1936 Lah. 112.

Alienation—Non-proprietors.

——(Punjab)—*Alienation— Chanauli, District Ambala—Non-proprietors—Right to dispose of house sites.*

No custom exists in village Chanauli, Tahsil Rupar, District Ambala, whereby the non-proprietors are precluded from disposing of the sites of their houses. (*Jai Lal, J.*) MANGAL *v.* HAKIM BEHARI LAL. 163 I. C. 369=9 R. L. 8=A.I.R. 1936 Lah. 263.

——(Punjab)—*Alienation— Non-proprietors—Acquiescence by landlord—Right to object to subsequent alienation.*

The fact that proprietors acquiesced in previous alienations does not necessarily imply a renunciation of their discretionary right to object to a subsequent alienation and the evidence of a number of previous alienations without objection does not prove a custom of unrestricted alienation. (*Coldstream and Abdul Rashid. JJ.*) DHUMAN KHAN *v* GURMUKH SINGH 17 Lah. 403=166 I.C 157=9 R.L. 345=38 P.L.R. 887=A.I.R. 1936 Lah 394.

——(Punjab)— *Alienation—Non-proprietors—Landlords in Sohna—Right to challenge.*

The landlords in Sohna, although it is not a village but a town, have no right to challenge an

alienation of a house belonging to a non-proprietor unless the landlord can show that the house was built on land granted by the proprietary body out of the shamilat deh. A.I.R. 1939 Lah. 88, Reversed. (*Addison and Ram Lall, JJ.*) RANJIT SINCH *v.* NAWAB KHAN. 185 I.C. 395=12 R.L. 284=41 P.L.R. 826=A.I.R. 1939 Lah. 548.

——(Punjab)— *Alienation— Non-proprietor—Rights of—Village Chotala in Sirsa Tahsil of Hissar District.*

Non-proprietors are not entitled to alienate the houses occupied by them, according to the custom prevailing in the Village Chotala in the Sirsa Tahsil of the Hissar District (*Bhide, J.*) RATI RAM *v.* SHERA RAM. I.L.R. (1939) Lah. 266=181 I.C. 436=11 R.L. 828=40 P.L.R. 990=A.I.R. 1939 Lah. 53.

——(Punjab)—*Alienation— Non-proprietors—Rights of— Village Mazara Dingrian, Tahsil Garh Shankar, District Hoshiarpur.*

In the Mouza Mazara Dirgrian, Tahsil Garh Shankar in the District of Hoshiarpur the non-proprietors have a right to alienate the sites under their houses as well as the houses standing thereon. (*Skemp, J.*) DASONDHI *v.* MILKHI RAM. 181 I.C. 703=11 R.L. 878=41 P.L.R. 670=A.I.R. 1939 Lah. 152.

——(Punjab)—*Alienation— Non-proprietors—Rights of—Rule as to.*

In deciding the question whether a non-proprietor has the right to alienate a house belonging to him, broadly stated, it may be taken as a rule that where a large number of unchallenged alienations by non-proprietors have been taking place for a very long period, the onus should be placed on the landlords to show that they have a right to control those alienations. This, they may be able to show, by proving a grant and then the case would be governed by the terms of that grant. (*Addison and Ram Lall, JJ.*) RANJIT SINGH *v.* NAWAB KHAN. 185 I.C. 395=12 R.L. 284=41 P.L.R. 826= A.I.R. 1939 Lah. 548.

——(Punjab)—*Alienation— Non-proprietors—Village Basi Kalan, Hoshiarpur District—Rights of non-proprietors.*

Ghair maliks of Basi Kalan of District Hoshiarpur have power to mortgage and sell their houses. (*Bhide and Currie, JJ.*) BAHADUR KHAN *v.* KUNDAN LAL. 165 I.C. 823=9 R.L. 307=A.I.R. 1936 Lah. 267.

Alienation—Powers of.

——(Punjab) — *Alienation—Powers of—Ancestral property—Sanda Jats and agriculturists of Mianwali District.*

Among Sanda Jats and the agriculturists of Mianwali District, generally, a male proprietor has unrestricted power of alienation in respect of ancestral property and such property can be attached and temporarily alienated for realization of his unsecured debts after his death. (*Tek Chand and Abdul Rashid. JJ.*) MOHAMMAD NAWAZ *v.* KAURA RAM. 40 P.L.R. 565=178 I.C. 74=11 R.L. 397=A.I.R. 1938 Lah. 166.

——(Punjab)—*Alienation—Powers of—Daughters—Arains of Mozang.*

Amongst Arains of village Mozang daughters have the same power of alienation of their father's property as a male proprietor and hence they cannot ali

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(*Addison and Abdul Rashid, JJ.*) MT. CHIRAGH BIBI *v.* UMAR DIN 165 I.C. 553=9 R.L. 257=A.I.R. 1936 Lah. 594.

——(Punjab)—*Alienation—Powers of—Dhamial Rajputs of Gujarkhan Tehsil, Rawalpindi District.*

According to the custom governing Dhamial Rajputs of the Gujarkhan Tehsil of Rawalpindi District, a sonless proprietor is competent to make a gift of ancestral property in favour of his daughter. (*Bhide, J.*) NIZAM DIN *v.* MT. FAZAL NUR. 184 I C. 46=41 P.L.R. 793=12 R. L. 147=A.I.R. 1939 Lah. 259.

——(Punjab)—*Alienation—Powers of—Ghorewaha Rajputs of Rahon, Tahsil Nawanshehr.*

Among the Ghorewaha Rajputs of Rahon, Tahsil Nawanshehr, the original tribal or common bond has not been broken and their powers of alienation in respect of ancestral property are not unrestricted either at Rahon or anywhere else. (*Tek Chand and Skemp, JJ.*) MST. KARM-UL-NISA *v.* SARFRAZ KHAN. 174 I.C. 801 =10 R.L. 602=A.I.R. 1937 Lah. 349.

——(Punjab)—*Alienation—Powers of—Gift by widow in favour of daughter—Rohtak District.*

According to the entry in the riwaj-i-am of the Rohtak District a daughter has no right to succeed to her father's landed property, whether ancestral or self-acquired, and a widow has no right to alienate her husband's property whether ancestral or self-acquired. When such entry is challenged the burden is heavy on the party to prove that the entry in the riwaj-i-am is wrong. (*Jai Lal and Dalip Singh, JJ.*) MT. JAWAHRAN *v.* HAZARI. 179 I.C. 171=11 R.L. 528=40 P.L R 937=A.I.R. 1938 Lah. 562

——(Punjab)—*Alienation—Powers of—Nangianas of Shahpur District.*

According to the custom followed by Nangianas of Shahpur District, they have, in the absence of male issue, unrestricted powers of alienation. (*Addison and Din Mohammad, JJ.*) BAKHSH *v.* AZMAT ALI. 18 Lah. 242=171 I.C. 109=10 R.L. 162=39 P.L.R. 920=A.I.R. 1937 Lah. 704.

——(Punjab)—*Alienation — Powers of—Non-proprietors of village Usman Khattar in Rawalpindi District.*

The non-proprietors of the village Usman Khattar in the Rawalpindi District are by custom entitled to alienate the sites of their houses and a sale of a house owned by a non-proprietor in execution of a decree against him is not invalid. (*Jai Lal, J.*) WARRIS KHAN *v.* ATMA RAM. 173 I.C. 576=10 R.L. 460=A.I.R. 1937 Lah. 298.

——(Punjab)—*Alienation—Powers of—Proof of custom.*

Without details showing that the alienations could have been, but have not been attacked, or on the other hand that they are recent, instances of alienations are of little value in proving unrestricted power of alienation in respect of ancestral property. (*Tek Chand and Skemp, JJ.*) MT. KARM-UL-NISA *v.* SARFRAZ KHAN. 174 I.C. 801=10 R.L. 602=A.I.R. 1937 Lah. 349.

——(Punjab)—*Alienation—Powers of—Sonless Sayad of village Dhok Fateh Shah in Tahsil Talagang.*

A sonless Sayyad of Village Dhok Fateh Shah, in Tahsil Talagang, Attock District, possesses unlimited powers with regard to gifts concerning ancestral land. (*Abdul Rashid, J.*) CHAN PIR *v.* FAKAR SHAH 189 I.C. 725=13 R. L. 104=A.I.R. 1940 Lah. 104.

Alienation-Reversioner.

——(Punjab)—*Alienation—Reversioner—Declaratory suit by—Competency—Alienation of occupancy rights.*

A suit by a reversioner to declare that a certain alienation does not affect his reversionary right is competent, although the alienation is only of occupancy rights. (*Dalip Singh, J.*) UDMI *v.* SHEOJI RAM. 41 P.L.R. 422=A.I.R. 1939 Lah. 512.

——(Punjab) — *Alienation — Reversioner — Right to challenge—If extends to involuntary sales also.*

The rule of custom giving the reversioners the right to challenge the alienations of ancestral property as being without consideration and necessity is not only restricted to voluntary sales but it extends also to involuntary sales such as Court-actions. (*Skemp, J.*) CHANDA SINGH *v.* GANDOO MAL. A.I.R. 1937 Lah. 564.

Alienation—Right to challenge.

——(Punjab)—*Alienation—Right to challenge —Failure to object in mutation proceedings—Effect.*

If a person entitled to challenge an alienation is present at the mutation proceedings and does not object when there is every opportunity of objecting to it, he cannot challenge the alienation subsequently. (*Skemp, J.*) ABDULLA *v.* MEHARBAN. 41 P.L.R. 414=A.I.R. 1939 Lah. 538.

——(Punjab)—*Alienation—Right to challenge —Person born subsequent to alienation.*

An alienation of ancestral property cannot be challenged by a descendant who did not exist at the date of alienation. (*Addison and Ram Lall, JJ.*) CHUNNI LAL RALI RAM *v.* ALTAF-UL-RAHMAN. 183 I.C. 451=12 R.L. 115=42 P.L.R. 237 =A.I.R. 1939 Lah. 290.

——(Punjab)—*Alienation—Right to challenge —Previous mortgage discharged as result of sale —If can be attacked.*

In a suit for a declaratory decree challenging an alienation on the ground of want of legal necessity, the plaintiff can attack a previous mortgage which was paid off as a result of sale. (*Skemp, J.*) KARTAR SINGH *v.* JOGINDAR SINGH. 39 P.L.R. 586.

——(Punjab)—*Alienation—Right to challenge —Right of daughter—Hindu jats of Rohtak District.*

A female has no right to contest an alienation by another female unless she is immediate heir and the alienor possesses a limited estate. According to the customary law of Rohtak District a daughter has no right to inherit and is not therefore heir. Hence she has no *locus standi* to challenge alienation made by another female who is full owner. (*Skemp, J.*) MAM KAUR *v.* MOLIA. 179 I.C. 824=11 R.L. 639=41 P.L.R. 11=A.I R. 1939 Lah. 20.

——(Punjab)—*Alienation—Right to challenge —Reversioners—Nature of their right—Suit by some of reversioners barred by limitation—Suit by the others, if also barred.*

The right to file a suit to set aside an alienation is an independent and individual right accruing to each of the reversioners separately and the

question of limitation will be decided with respect to the law governing the plaintiff in each case. The suit of some of the reversioners may be barred by limitation while the suit of the other reversioners may be within time by reason of their minority at the time when the cause of action arose. They would be entitled to extension of time under S. 6 of the Limitation Act, notwithstanding the existence of the other reversioners competent to challenge the alienation. (*Tek Chand and Abdul Rashid, JJ.*) JATI *v.* MATU. 172 I.C. 218=10 R.L. 285=39 P.L.R. 559=A.I.R. 1937 Lah. 653.

——(Punjab)—*Alienation—Right to challenge—Reversioner—Nature of right—Suit by minor reversioner—Limitation.*

The right of the reversioners to contest an alienation by the last male holder is not a joint and indivisible one and the omission by one reversioner to sue does not debar the others from the suing at all. Each one of the reversioners has an independent and individual right to sue though the decree obtained by one may enure for the benefit of all. The question of limitatian, in such case, is to be considered with respect to the law governing the plaintiff in each case. If therefore a reversioner is minor when right to sue to challenge an alienation accrues to him, he is entitled to file suit within three years of his attaining majority. (*Abdul Rashid, J.*) HARI SINGH PREM *v.* MOTI RAM. 184 I.C. 96=12 R.L. 161=41 P.L.R. 417=A.I R. 1939 Lah. 196.

——(Punjab)—*Alienation—Right to challenge—Remote reversioner.*

Although the general rule is that the proper person to object to an alienation by a female is the nearest reversionary heir, this is not an absolute rule. A suit by a remote reversioner to set aside an alienation by widow cannot be dismissed on the ground of its being speculative, if it has been brought in the interests of his relative who is nearer reversioner. (*Skemp, J.*) MOHAMMAD KHAN *v.* JAN MOHAMMAD. 186 I.C. 145=12 R.L. 367=A I.R. 1939 Lah. 580.

——(Punjab)—*Alienation—Right to challenge—Sale by plaintiff's grandfather long before plaintiff was begotten—Consent given to sale by plaintiff's father.*

The alienation by sale of the ancestral land was effected in 1888 by the grandfather of the plaintiff who was born 26 years after the alienation and 25 years after the death of the alienor. At the time of such sale, only two reversioners were

alive, who could have contested the sale. Of these, one was the father of the plaintiff who had attested the sale deed. The other brought a suit in 1901, for setting aside the alienation but the suit was dismissed. To this the plaintiff's father was made a defendant and he had supported the sale. In 1934, the plaintiff brought a suit for setting aside the alienation, on the grounds that the sale had been effected without consideration and legal necessity. It was not proved that the plaintiff's father gave consent to the sale *mala fide* with a view to injure the interests of the reversioners.

Held, that the sale having become indefeasible at the instance of any reversioner long before the plaintiff was begotten, the plaintiff had no *locus standi* to sue.

Held, further, that the plaintiff's suit was barred by the consent given by his father to the sale. (*Tek Chand, J.*) SOHAN SINGH *v.* DANU. 181 I.C. 31=11 R L. 763=40 P.L.R. 728=A.I.R. 1938 Lah. 467.

Alienation—Setting aside.

——(Punjab) — *Alienation — Setting aside—Declaratory suit by son—Collusion—Meaning of.*

"Collusion" in judicial proceedings has been defined as "a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for a sinister purpose." In a declaratory suit challenging the sale by father of ancestral property, the vendor is merely a *pro forma* defendant and no question of collusion with the defendant against whom relief is claimed really arises as it does, *e.g.*, in suits for divorce, etc. Again when such a suit is instituted on behalf of a minor, there cannot obviously be any collusion on the part of the plaintiff in the above sense, as a minor is legally incapable of entering into any agreement. Even when the plaintiff is a major, the above definition would not apply, as the object of the declaratory decree is to protect the interest of the plaintiff and the other reversioners, and not those of the vendor; and this purpose cannot be considered to be "sinister." (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH. I.L.R. (1938) Lah. 676=179 I.C. 737=11 R.L. 613=41 P.L.R. 246=A.I.R. 1938 Lah. 648.

——(Punjab) — *Alienation — Setting aside — Declaratory suit by son—Collusion—Proof—Son living with father.*

Where a son brings a declaratory suit challenging the alienation of ancestral land by father, the mere fact that the plaintiff being the son of the vendor was living with him is not sufficient to justify the suit being dismissed as collusive. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH. I.L.R. (1938) Lah. 676=179 I.C. 737=11 R.L. 613=41 P.L.R. 246=A.I.R. 1938 Lah. 648.

Alienation—Shamilat.

——(Punjab)—*Alienation—Shamilat — Sale of Adna Malkiyat lands—Shamilat, if also sold.*

Where a person sells certain Adna Malkiyat lands and the sale-deed and the mutation which followed make no mention of the appurtenant shamilat having been transferred, in order to decide as to whether the shamilat is or is not sold, the Court has to look into the surrounding

circumstances and the conduct of the parties and then arive at a conclusion after consideration of all these matters. (*Tek Chand, J.*) JESA RAM *v.* GHULAMAN 166 I.C. 723=9 L.R. 412=A.I.R. 1936 Lah. 816.

Alienation—Validity.

——(Punjab)—*Alienation—Validity— Agriculturist unable to manage cultivation and indebted, selling land to non-agriculturist with sanction of Deputy Commissioner.*

Where an agriculturist who was not able to manage the cultivation, was very much indebted and not even able to pay the land revenue, sold the land to a non-agriculturist with the sanction of the Deputy Commissioner.

Held, that the sale was an act of good management and could not be attacked by his sons. (*Sir Shadi Lal*) ATMA RAM *v.* THAKUR SADHU SINGH. 32 S.L.R. 395=1938 A.L.J. 190=1938 O.L.R. 110=40 P.L.R. 180=1938 A.L.R. 144=1938 A.W.R (P.C.) 56=1938 O.A. 206=4 B.R. 353=10 R.P.C. 208=1938 R.D. 399=40 Bom L. R. 742=172 I.C. 1004=1938 O.W.N. 196=A.I.R. 1938 P.C. 77 (P.C.).

——(Punjab)— *Alienation—Validity— Antecedent debts.*

A mortgage of ancestral property effected to pay off antecedent debts is valid and binding on the reversioners, unless it is established that those debts were immoral, illegal or opposed to public policy or contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interests of the reversioners. (*Addison and Din Mohammad, JJ.*) JHANDA SINGH *v.* BAKHSHISH SINGH. 161 I.C. 592=8 R.L. 774 (2)=38 P.L.R. 376=A.I.R. 1936 Lah. 49.

——(Punjab)—*Alienation—Validity—Sale of reversionary right.*

The sale of reversionary rights in a widow's estate is opposed to the principles of customary or tribal law, and according to the principle of S. 6, T. P. Act, which can be taken as a guide, though the Act is not in force in this province, such a transfer is void. 66 P.R. 1897 (F.B.); A. I.R. 1925 Lah. 341 and A.I.R. 1929 Lah. 2954, Foll. (*Bhide and Currie, JJ.*) SHER MOHAMMAD KHAN *v.* CHUHR SHAH. 168 I.C. 506=9 R.L. 642=A.I.R. 1936 Lah. 753.

Alienation—Widow.

——(Punjab)—*Alienation—Widow—Alienation to celebrate daughter's marriage.*

A widow following the Customary law of the province is not entitled to alienate her estate, even for a necessary purpose like daughter's marriage where it is shown that the income of the estate was sufficient for the purpose. (*Coldstream and Jai Lal, JJ.*) M. MOHOMED SHARIF *v.* TEJA SINGH. 167 I.C. 693=9 R.L. 522=38 P.L.R. 1086=A.I.R. 1936 Lah. 453

——(Punjab)—*Alienation—Widow—Alienation to pay decretal debts of husband—Validity.*

A widow is not competent to alienate the property of her husband even to discharge his decretal debts if the income from the property is sufficient for the purpose. The onus of proof is on the alienee to show that the income of the widow was not sufficient to discharge the debts, and it does not shift to the reversioner on proof by the alienee that the debts of the husband had been discharged. (*Bhide, J.*) JAHAN KHAN *v.* JAHAN KHAN. 163 I.C. 824=9 R.L. 50 (1)=38 P.L.R. 40.

——(Punjab)—*Alienation—Widow—Alienation of non-ancestral property of husband with consent of next reversioner—Transaction, if binding on son of reversioner.*

A widow, who succeeded to the non-ancestral property of her husband on the usual widow's life-estate, and her mother-in-law, who had to be maintained out of the estate, both transferred the property by sale for valuable consideration. The next reversioner on receipt of certain consideration consented to the transaction. On the death of the widow, the son of the deceased reversioner claiming himself as full owner of the property by succession to the widow, sold the property to the plaintiff, who brought the suit for possession.

Held, that to such a transaction the rule against sale of reversionary rights did not apply. The consent by the next reversioner was *bona fide* and was obviously binding on his son, the property not having been proved ancestral. (*Tek Chand, J.*) KHUDA BAKHSH *v.* MOHAMMAD BAKHSH. 174 I.C. 929=10 R.L. 631=40 P.L.R. 676=A.I.R 1937 Lah. 769.

——(Punjab)— *Alienation—Widow — Jasrotia Rajputs of village Sukho Chak in Gurdaspur District.*

The Jasrotia Rajputs of village Sukho Chak in Gurdaspur District follow custom and not Hindu Law. They are the predominant agricultural tribe of the district and the mere fact that many of them enter the army or take up other service does not mean that they have ceased to follow custom. Hence a widow has no power to mortgage agricultural land to pay of her husband's debts because like Hindu Law it is not a case under customary law that a widow can pay off the debts of her hushand which are time-barred or not otherwise recoverable. (*Addison and Ram Lall, JJ.*) RISAL SINGH *v.* ARJAN DEVI. 184 I.C. 89=12 R.L. 158=42 P.L.R. 286=A.I.R. 1939 Lah. 319.

——(Punjab) — *Alienation — Widow—Legal necessity—Pilgrimage to Gaya.*

Pilgrimage to Gaya by a widow is according to Hindu ideas for the spiritual benefit of her deceased husband and would constitute valid necessity for an alienation by the widow. (*Bhide, J.*) MANSA RAM *v.* SADHU RAM. 185 I.C. 422=12 R.L. 291=A.I.R. 1939 Lah. 554.

——(Punjab)—*Alienation — Widow—Powers of.*

Among the agricultural tribes of the Punjab who in matters of succession and alienation, are governed, not by their personal law, but by custom, a widow takes only a life interest in her husband's estate. In this respect her position is analogous to that of a widow under Hindu law. The restrictions imposed upon her power of alienation are inseparable from her estate, and the mere fact that no agnatic relation, or a near cognate, of the husband is alive does not enlarge her powers of alienation and make her an absolute owner. She has only a life-estate in the property of her husband. Her life-estate comes to an end at her death. Hence where she has made a will which is to take effect after her death, there is no property on which the will can operate. (*Tek Chand and Abdul Rashid, JJ.*)

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TARA SINGH *v.* BIBI SURAJ KAUR. **A.I.R. 1940 Lah. 416.**

——(Punjab)—*Alienation—Widow—Powers of —Discharge of husband's debts.*

A widow governed by the customary law cannot alienate her husband's property even for the discharge of her husband's debts, if the income derived from it is ample. (*Din Mahomed, J.*) GHULAM QADIR *v.* ALAF DIN. **189 I.C. 198=13 R.L. 70=42 P.L.R. 105=A.I.R. 1940 Lah. 177.**

——(Punjab)—*Alienation — Widow—Suit for declaration by reversioner—Exact degree of relationship—If material.*

In a suit for declaration by reversioner that a sale by a widow should not affect reversionary rights the exact degree of relationship is not material. A reversioner however distant is competent to challenge a widow's alienation. (*Bhide J.*) MANSA RAM *v.* SADHU RAM. **185 I.C. 422 =12 R.L. 291=A.I.R. 1939 Lah. 554.**

Alluvion and Diluvion.

——(Punjab)—*Alluvion and Diluvion—Makhan Bela village, Alipur Tahsil—Rights of Adna Malik—Construction of wazib-ul-arz.*

When the land is submerged the rights of the Adna Malik in village Makhan Bela, Tahsil Alipur, are extinguished but on its re-emergence he is entitled to regain possession of it by paying Haq Jhuri. The rate of the Jhuri is not fixed and if the superior owner refuses to accept the Jhur offered by the Adna Malik the matter is to be determined with due regard to the quality of the land and the capacity of the Adna Malik. (*Bhide and Currie, JJ.*) KANWAR BHAN *v.* BHAGAT JIWAN DAS. **17 Lah. 470=162 I.C. 704=8 R.L. 944=38 P.L.R. 960=A.I.R. 1936 Lah. 143.**

Ancestral land.

——(Punjab)—*Ancestral land—Ancestral and non-ancestral proportion of land not distinguishable—Whole, if non-ancestral.*

If a Court is unable to find what proportion of land is ancestral and which is non-ancestral the whole must be held to be non-ancestral 42 P.R. 1910 (P.C.) and 60 I.C. 520, Rel. on. (*Dalip Singh and Skemp, JJ.*) LABH SINGH *v.* MST. JASSO. **40 P.L.R. 506=178 I.C. 81=11 R.L. 400=A.I.R. 1938 Lah. 180.**

——(Punjab)—*Ancestral land—Decree against father—Execution against sons—Ferozepore district.*

There is no special custom in the Ferozepore district in accordance with which ancestral property in the hands of the sons could be attached by a Court in executing a simple money decree obtained against the deceased father. (*Addison, Coldstream and Abdul Rashid, JJ.*) RANJIT SINGH *v.* MAGHI MAL. **18 Lah. 125=167 I C. 725 =9 R.L. 535=39 P.L.R. 16=A.I.R. 1937 Lah. 148 (F.B.).**

——(Punjab)—*Ancestral land—Decree against original proprietor—Execution against reversioner—Land attached during lifetime of judgment-debtor.*

The attachment of the ancestral property in the life time of original proprietor does not confer any title and does not amount to a charge on the property, nor does it affect the rights of the reversioners. As in Rohtak District, under customary law, ancestral land, which has come to the reversioners from a judgment-debtor, is not

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liable even for the just debts of the judgment-debtor, it follows that such land cannot be farmed under custom in execution of a decree against the judgment-debtor after his death, though it had been attached in his lifetime. (*Addison and Ram Lall, JJ.*) SUKHRAM PHOLLEY *v.* KANWAL SINGH. **I.L.R. (1940) Lah. 63=190 I.C. 194 =42 P.L.R. 699=A.I.R. 1940 Lah. 4.**

——(Punjab)—*Ancestral land—Liability for debts of last male proprietor—Sonepat Tahsil of Rohtak district.*

There is no special custom in Sonepat Tahsil of the Rohtak district by which ancestral landed property in the hands of the next holder is liable for the debts contracted by the previous male proprietor. (*Addison and Din Mahomed, JJ.*) SHIB CHARAN *v.* CHANDGI RAM. **18 Lah. 420=175 I.C. 312=10 R.L. 704=39 P.L.R. 102=A.I.R. 1937 Lah. 778.**

——(Punjab)—*Ancestral land—Liability in hands of sons for debts of deceased father—Ferozepore District.*

The Customary Law in the Ferozepore District is the same as in most other districts and ancestral land in the hands of the sons of the deceased judgment-debtor cannot be attached by a Court in executing a simple money decree, the debt not having been made a charge on the property. 39 P.L.R. 16 (F.B.), Foll. (*Skemp, J.*) GOBIND RAM *v.* GURBAKSH SINGH. **172 I.C 487=10 R.L. 337 =39 P.L.R. 189=A.I R. 1937 Lah. 638.**

——(Punjab)—*Ancestral land—Liability for father's debts.*

Land inherited by a person from his father is liable for the debts of the father, if such land was not ancestral in the hands of the father. (*Tek Chand, J.*) DILLU *v.* RAM DITTA. **168 I.C. 973=9 R.L. 700=39 P.L.R. 538=A.I.R. 1937 Lah. 696.**

——(Punjab)—*Ancestral land—Liability of reversioner or major son for debt of last holder.*

The reversioner or a major son, who is in possession of the ancestral land, is not liable to pay the debts of the last holder out of the ancestral land which came to him through the common ancestor and such land cannot be attached or sold in their hands to meet those debts. (*Addison, A.C.J. and Din Mahomed, J.*) NARAIN SINGH *v.* MALIK AHMAD YAR KHAN. **17 Lah. 133=162 I.C. 374=8 R.L. 888=38 P.L.R. 472=A.I.R. 1936 Lah. 21.**

——(Punjab)—*Ancestral land—Meaning of.*

Under the Customary law the word "ancestal" carries a peculiar signification and even if the land be ancestral of the last male holder, it cannot be held to be ancestral *qua* the party, unless it is proved that the common ancestor of the parties had ever held it. (*Din Mohammad, J.*) MT. NANHI *v.* BADLU. **A.I.R. 1940 Lah. 245.**

——(Punjab)—*Ancestral land—Strict proof.*

It must be established by evidence that land is ancestral and conjectures, however reasonable, cannot take the place of proof. (*Addison and Abdul Rashid, JJ.*) MST. JATTAN *v.* INDAR. **38 P.L.R. 346.**

——(Punjab)—*Ancestral land—What is—Proprietary rights alone in land devolving on a person on his father's death—Such person subsequently acquiring occupancy rights with his own money—Estate so acquired, if ancestral.*

It is beyond dispute that only that property can

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be held to be ancestral in the hands of a person *qua* his son which has devolved on such person from his father. Where, therefore, all that devolved on such person on his father's death was the proprietary rights in the land and it was long after his father's death that he purchased the occupancy rights held by third parties with money belonging to himself, the estate so acquired is clearly his own self-acquisition, and cannot be said to be ancestral in his hands. (*Tek Chand, J.*) SHANKAR DAS BHAG MAL *v.* LABH SINGH. **162 I.C. 385=9 R.L. 627=A.I.R. 1937 Lah. 596.**

Ancestral property.

——(Punjab)—*Ancestral property—Awan proprietor of Tallaganj—Rights of.*

Among the Awans of Tallaganj Tahsil, Attock District, a proprietor cannot make an unequal distribution of ancestral property amongst his sons. 114 P.R. 1913, A.I.R. 1914 Lah. 227, Foll.; and 88 P.R. 1911, Not foll. (*Hilton and Rangi Lal, JJ.*) MAHOMED NAWAZ KHAN *v.* MANGA KHAN. **163 I.C. 108=8 R.L. 1001=38 P.L.R. 743=A I.R. 1936 Lah. 59.**

——(Punjab)—*Ancestral property — Decree against father—Execution against minor son—Ferozepore District.*

The answer to question 32 of the Ferozepore riwaj-i-am to the effect that a minor who has inherited his father's estate is liable for his father's debts does not mean that he succeeded his father as his legal representative. It means that, in order to pay the debts of a minor's deceased father, the minor's guardian can do what the minor himself could have done under customary law, had he reached majority. Ancestral property in the hands of a minor son cannot therefore be attached in execution of a money decree against his deceased father. A.I.R. 1937 Lah. 148, Foll. (*Abdul Rashid, J.*) NAND MAL DURGA DAS *v.* NAZIR AHMAD. **41 P.L.R. 635=A.I.R. 1939 Lah. 168.**

——(Punjab)—*Ancestral property — Decree against father—Execution against sons—Ferozepore District.*

There is no special custom in the Ferozepore District which makes ancestral property in the hands of sons liable to attachment and sale in the execution of a money decree against their deceased father. (*Abdul Rashid, J.*) LAL MOHAMMAD *v.* KHEM CHAND RADHAKISHAN. **166 I.C. 982=9 R.L. 441=A.I.R. 1936 Lah. 167.**

——(Punjab)—*Ancestral property—Gift from collateral.*

Property ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the common ancestor. Where, therefore, an owner acquires property by gift from a collateral in excess of the share which he would obtain by succession, the excess property is his self-acquired property (*Addison and Din Mohammad, JJ.*) BALDEV SINGH *v.* PAL SINGH. **38 P.L R. 313.**

——(Punjab)—*Ancestral property—Land held by cousins at first settlement—Presumption.*

Where land was held, at the time of the first settlement, by persons who were cousins in precisely the same shares as ancestral land would be held, the presumption, in the absence of any indication that the land was their self-acquired property, is that it was originally held by their

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common ancestor. (*Skemp, J.*) JATI *v.* GIRJA SINGH. **171 I.C. 97=10 R.L. 161=A.I.R. 1937 Lah. 917.**

——(Punjab)—*Ancestral property—Presumption—Foundation of village by common ancestor.*

The fact that the village had been founded in remote antiquity by the common ancestor of the parties cannot give rise to the presumption that the land in their possession is ancestral, when the original ancestral character of the property has been lost by subsequent alienations and redistributions. (*Tek Chand and Beckett, JJ.*) GHULAM GHAUS *v.* MALANG KHAN. **42 P.L.R. 606.**

——(Punjab)—*Ancestral property —Property acquired by son from father by genuine sale—If ceases to be ancestral.*

Property cases to be ancestral when it comes into the hands of an owner otherwise than by descent or by reason merely of his connexion with the common ancestor. Where ancestral property has been genuinely sold by the father to the son, and the sale is not set aside by the reversioners on the ground of want of necessity and consideration, it becomes self-acquired property of the purchaser and he has power to will it away. (*Addison and Ram Lall, JJ.*) GURBACHAN SINGH *v.* ARJUN SINGH. **I.L.R. (1939) Lah. 547=186 I.C. 162=12 R.L. 370=A I.R. 1939 Lah. 541.**

——(Punjab)—*Ancestral property —Rule in 4 P. R. 1913—Whether applies to house property—Estoppel by conduct.*

The rule in 4 P.R. 1913 is not confined to landed property but extends to ancestral house property also. A party may,however, be estopped by his conduct from pleading immunity from attachment for his property. (*Coldstream, J.*) GURBAKHSH SINGH *v.* F. LAL CHAND DARSHAN CHAND. **164 I.C 690=9 R.L. 149=38 P.L.R. 333=A.I.R. 1936 Lah. 737.**

——(Punjab)—*Ancestral property —Sale in execution of decree against deceased grandfather during his lifetime—Death of grandfather pending his objections to sale—Grandsons brought on record as legal representatives—Objections open to them.*

Where property is attached and sold in execution of a money decree against the judgment-debtor who dies during the pendency of his objections to the sale under S. 60 and O. 21, R. 90, C. P. Code, it is not open to his grandsons who are brought on record as his legal representatives to plead that the property being ancestral, it could not under custom be sold in execution of the decree against their grandfather. The only objections that they can raise are those that are open to them in an ordinary suit against a private alienation of the last holder of the property, in addition, of course, to the objections which can be raised under C. P. Code. (*Addison and Abdul Rashid, JJ.*) SUKH DIAL *v.* NAZIR AHMAD **17 Lah. 799=169 I.C. 416=10 R.L. 7= 38 P.L.R. 613=A.I.R. 1937 Lah. 157.**

——(Punjab)—*Ancestral property —Sale of ancestral property resulting in acceleration of succession—If renders property non-ancestral.*

A gift or sale of ancestral property by its owner in favour of a relation, the effect of which is direct acceleration of succession, does not render the property gifted or sold non-ancestral. There is no distinction between a gift and a sale

in such cases. The real test is whether the alienation, whatever form it takes is or is not an acceleration of succession. If it is acceleration of succession, it does not deprive the property transferred of its ancestral character. (*Skemp, J.*) BALWANT SINGH *v.* GURBACHAN SINGH. **184 I.C. 61=12 R.L. 150=42 P.L.R. 256=A.I.R. 1939 Lah. 286.**

——(Punjab)—*Ancestral property—Test.*

Land to be ancestral must have been held by the common ancestor of the parties. (*Tek Chand and Beckett, JJ.*) GHULAM GHAUS *v.* MALANG KHAN. **42 P.L.R. 606.**

Applicability.

——(Punjab) —*Applicability — Agricultural family—Test.*

Where agricultural income is the main source of live lihood of the members of the family if a few members of the family supplement their income by salaries derived from Government service, it does not show that the family has given up agricultural pursuits and that such a family cannot be held to be bound by customary law. (*Addison and Abdul Rashid, JJ.*) RAMA SHAH *v.* KULDIP SINGH. **168 I.C. 557=9 R.L. 645=38 P.L.R. 984=A.I.R. 1936 Lah. 986.**

——(Punjab)—*Applicability—Arains living in the city of Lahore—If governed by custom or personal law.*

Quaere.—Whether Arains living inside the city of Lahore are governed by custom or by their personal law. (*Jai Lal and Abdul Rashid, JJ.*) FEROZE DIN *v.* HASAN DIN. **171 I.C. 498=10 R. L. 207=A.I.R. 1938 Lah. 107.**

——(Punjab)—*Applicability —Brahmins—Presumption.*

In the case of Brahmins the initial presumption is that they are governed by Hindu law and the burden of proof lies on the person who alleges that they are governed by custom. (*Bhide and Currie, JJ.*) TEJ BHAN *v.* SITA RAM. **168 I.C. 591=9 R.L. 654=A.I.R. 1936 Lah. 627.**

——(Punjab)—*Applicability —Brahmins of Kale got of village Jhang Saidan.*

Brahmins of Kale got of the village Jhang Saidan in the Rawalpindi District are governed by Hindu Law and not by custom. (*Bhide and Currie, JJ.*) TEJ BHAN *v.* SITA RAM. **168 I.C. 591=9 R.L. 654=A.I.R. 1936 Lah. 627.**

——(Punjab)—*Applicability—Burden of proof.*

It lies on the person asserting that he is ruled in regard to a particular matter by custom to prove that he is so governed and not by personal law, and further to prove what the particular custom is. (*Bhide and Currie, JJ.*) SOHAN SINGH *v.* MT. NARAINI **168 I.C. 929=9 R.L 688=A.I.R. 1936 Lah. 540.**

——(Punjab)—*Applicability—Burden of proof.*

There is strictly speaking no such thing as a general custom of the Punjab applicable to persons throughout the province like the English common law. It is incumbent on a party to allege and prove the custom on which he relies. (*Addison and Abdul Rashid, JJ.*) KARTAR SINGH *v.* MST. PREETO. **17 Lah. 296=168 I.C. 379= 9 R.L. 617=38 P.L.R. 300=A.I.R. 1936 Lah. 804.**

——(Punjab) — *Applicability — Burden of proof.*

The law to be applied, in relation to the devolution of property, is normally the personal law of the parties; and if a party asserts that the personal law does not apply, the onus is on that party of showing that custom applied, and further he must plead the custom alleged in precise terms and must by evidence establish the custom as pleaded. In many cases the party alleging a custom may by the mere production of the *riwaj-i-am* be able to give *prima facie* evidence of the custom alleged and so cast the onus of proof on his opponent, but this circumstance does not obviously affect the universality of the proposition that he who alleges custom must plead and prove it. (*Young, C.J., Monroe and Din Mohammad, JJ.*) KISHAN SINGH *v.* MST. SANTI. **175 I.C. 87=10 R.L. 678=A.I.R. 1938 Lah. 299 (F. B.)**

——(Punjab) — *Applicability — Burden of proof.*

Under the Punjab Laws Act there is no presumption in favour of custom and, if the party alleges custom the onus lies on him to prove it. If no custom is proved personal law applies. (*Bhide and Currie, JJ.*) TEJ BHAN *v.* SITA RAM. **168 I.C. 591=9 R.L. 654=A.I.R. 1936 Lah. 627.**

——(Punjab)—*Applicability—Gaur Brahmans of Karnal Town.*

Gaur Brahmans who are residents of Karnal Town are governed by Hindu Law and not by custom. (*Bhide, J.*) BASHO RAM *v.* MT. SARUPI. **187 I.C. 218=12 R.L. 452=41 P.L.R. 892=A.I.R. 1940 Lah. 51.**

——(Punjab) — *Applicability — High caste Hindus—Burden of proof.*

In the case of parties who are Hindus of the highest caste residing in a town, the burden of proving that they are governed by custom and not by Hindu Law lies heavily on those who assert it. The fact that they have been notified as an agricultural tribe would not necessarily show that they (and especially those who are residents of a town) follow custom. (*Bhide, J.*) BASHO RAM *v.* MT. SARUPI. **187 I.C. 218=12 R. L. 452=41 P.L.R. 892=A.I.R. 1940 Lah. 51.**

——(Punjab) — *Applicability — High caste Hindus.*

In the case of high caste Hindus, the first presumption is that they follow Hindu law and not "Punjab Customary law or Agricultural Customary Law." (*Dalip Singh, J.*) MISRI LAL *v.* BABU LAL. **161 I.C. 844=8 R.L. 804=A.I.R. 1936 Lah. 151.**

——(Punjab) — *Applicability — Khatris and Brahmans of Gujrat District.*

Khatris and Brahmins of different villages in the Gujrat District follow customary law in matters of inheritance and succession and that they are not governed by the provisions of Hindu Law. (*Addison and Abdul Rashid, JJ.*) RAMA SHAH *v.* KULDIP SINGH. **168 I.C. 557=9 R.L. 645=38 PL.R. 984=A.I.R. 1936 Lah. 986.**

——(Punjab)—*Applicability—Kalals of village Dewatwal in Ludhiana District.*

The burden of proof always lies on the party alleging a custom and the burden is all the more heavy if the tribe to which that party belongs does not usually depend on agriculture but follows a variety of occupations. Kalals of village Dewatwal in Ludhiana District are not primarily an agricultural tribe and are not governed by custom in the matters of alienation of ancestral

property, and they have not by their association with the agricultural tribes in the village since 1841 adopted their customs. The mere fact that the Kalals own a patti in the village Dewatwal would not be sufficient to raise any presumption in favour of custom. Besides, customs are apt to vary with the local history of a tribe and the mere fact that the Kalals in some other places have adopted agricultural custom would be no evidence to show that Kalals of Dewatwal follow custom. (*Bhide, J.*) LABH SINGH *v.* GURBAKSH SINGH. I L.R (1940) Lah. 184=187 I.C. 465=12 R.L. 458=42 P.L.R. 704=A I.R. 1940 Lah.19.

——(Punjab) — *Applicability — Kakazais of Tapala.*

The Kakazais of the village Tapala in the Punjab are governed by personal law (Mahomedan Law) in matters of alienation and the mere circumstance that the village was owned by the Kakazais or that this tribe supplied the lambardars did not prove custom. (*Tek Chand, J.*) BASHIR AHMAD *v.* BUR SINGH. 175 I.C. 23=10 R.L. 657=A.I.R. 1937 Lah. 777.

——(Punjab)—*Applicability—Khojas of Chakwal.*

The Khojas carrying on business in the town of Chakwal are governed by Mahomedan Law and not by custom in matters of inheritance. (*Addison and Din Mohammad, JJ.*) MT. KHADIJA BIBI *v.* HARI SINGH. 169 I C. 272=9 R.L. 732=38 P.L.R. 1022=A.I.R. 1937 Lah. 130.

——(Punjab) — *Applicability — Mahajans of Hissar town.*

The Customary law of the District is based on enquiries made in rural areas at the time of the settlement and no representatives from towns are consulted as a rule. The Mahajans of Hissar town, whose main source of livelihood is business and not agriculture, are not governed by the Customary law, but by the Hindu law. And the mere fact that Mahajans were consulted at the time of preparation of *riwaj-i-am*, would not show that the *riwaj-i-am* was evidence of customs obtaining amongst all Mahajans of the Hissar District particularly amongst residents of towns. (*Bhide, J.*) PATRU MAL *v.* BADRI PARSHAD. 40 P.LR. 781=177 I.C. 403=11 R.L. 313 =A.I.R 1938 Lah. 461.

——(Punjab)—*Applicability—Mahomedan Jats of Punjab migrating and settling in Sind—Law, applicable — Punjab custom excluding females from succession—Applicability—Mahomedan law —Application of.*

In the case of Jats (agriculturists) belonging to the Sunni Mahomedan community who have migrated from the Punjab and settled in Sind under a colonisation scheme to cultivate land watered by the Jamrao canal, and who have migrated as members of the agriculturist classes, bringing with them their cattle, their implements and their womenfolk to live in Sind the same life as they lived in the Punjab, it must be held that they are governed, even in Sind, by the customary law of the Punjab in matters of succession and inheritance. It is unreasonable to suggest that they did not bring with them, when they came to Sind, their customary laws including the customary law of succession, and that the customary law would not stand the strain of a short migration. This customary law excludes females with rare exceptions in the presence of males. The

Sunni Mahomedan Law does not apply to them, though they are Sunni Mahomedans. (*Davis, J. C. and Tyabji, J.*) AISHA BIBI *v.* BEGUM BIBI. I. L.R. (1939) Kar. 475=185 I.C. 87=12 R.S. 143 =A I.R 1939 Sind 263.

——(Punjab)—*Applicability—Maini Khatris of Kasur Tahsil, Lahore District.*

Maini Khatris in the Kasur Tahsil of the Lahore District are governed by custom in the matter of succession to sonless proprietors and not by Hindu Law. (*Bhide and Currie, JJ.*) SOHAN SINGH *v.* MT. NARAINI. 168 I.C. 929=9 R.L. 688=A.I.R. 1936 Lah. 540.

——(Punjab)—*Applicability—Nauhria Aggarwals of Dharam Kot*

Nauhria Aggarwals of Dharam Kot are a trading and money-lending class and are not agriculturists. They do not follow custom but Hindu law. Hence, the burden to prove that they are governed by a special custom, namely, that after the death of a husband leaving a widow without sons and sons by another wife, the widow gets a life interest in half of the property of her husband, is on the widow. Such special custom cannot be established by only one instance to that effect. (*Addison and Abdul Rashid, JJ.*) MILKHI RAM *v.* MT. RAJJI. 40 P.L.R. 912=178 I.C. 316=11 R.L. 442=A.I.R. 1938 Lah. 609.

——(Punjab) — *Applicability — Pawalis of Bhera.*

Where a person asserts that he is governed by costom, it is incumbent upon him to prove that he is so governed and further to prove what that custom is,

Held, that Pawalis of Bhera in Shahpur District are not proved to be governed by custom and are governed by Mahomedan law. (*Abdul Rashid and Addison, JJ.*) ALI MAHOMED *v.* MAHOMED RAFIQ. 179 I.C. 251=11 R.L. 545=40 P.L.R. 905=A.I R. 1938 Lah. 581.

——(Punjab)—*Applicability—Proof.*

There is no such thing as a general custom in the Punjab, and it is necessary in every case to prove that the parties are governed by custom and what the custom is. To hold otherwise would amount to manifest injustice as custom in the Punjab is more local than tribal, though it may be both, and if there is a custom prevalent in a small area or in a small tribe, that custom will always be held not proved because in most areas or amongst other tribes the custom is otherwise. (*Addison, J., on difference between Coldstream and Jai Lal, JJ.*) BALANDA *v.* SUBAN. 17 Lah. 232=167 I.C. 951=9 R.L. 576=38 P.L.R. 592=A I.R. 1936 Lah 418.

——(Punjab)— *Applicability — Proof—Tribe consulted during preparation of* riwaj-i-am.

The fact that a tribe was consulted during the preparation of the *riwaji-i-am* of the district has always been considered an important piece of evidence in coming to the conclusion that that tribe follows custom. (*Addison and Ram Lall, JJ.*) RISAL SINGH *v.* ARJAN DEVI. 184 I.C. 89 =12 R.L. 158=42 P.L.R. 286=A.I.R 1939 Lah. 319.

——(Punjab)—*Applicability—Rule as to.*

There is no such thing as 'general custom' and the point at issue in each case must be decided in accordance with the custom applicable to the parties if any such custom is proved. If no rule of custom is proved on a particular point, that

point must be decided according to personal law. (*Bhide, J.*) KHAN GUL KHAN *v.* KARAM NISHAN. 189 I.C. 851=42 P.L.R. 14=A.I.R. 1940 Lah. 172.

——(Punjab) — *Applicability—Sodhi Khatris of Lyallpur District.*

Sodhi Khatris of Lyallpur District are not governed in matters of alienation by the principles of Punjab Customary Law, but are governed by their personal law, *i.e.*, Hindu Law. (*Tek Chand and Dalip Singh, JJ.*) BAGHEL SINGH *v.* MT. DHAN KAUR. 168 I.C. 952=9 R.L. 695=A.I.R. 1936 Lah. 258.

——(Punjab)— *Applicability — Succession—Burden of proof.*

Where in regard to succession to certain self-acquired property, a party asserts that is governed by custom and not by personal law, he must prove that he is so governed, and further what that particular custom is. (*Tek Chand, J.*) MT. RAQIA BEGAM *v.* NEK MOHAMMAD. 174 I.C. 708 =10 R.L. 591=A.I.R. 1937 Lah. 449.

——(Punjab)—*Applicability—Town Hajjams.*

Hajjams of a town are governed by Mahomedan Law in matters of succession. (*Skemp, J.*) ISMAIL *v.* RASHID. 41 P.L.R. 572=A.I.R. 1939 Lah. 525.

Caste.

——(Punjab)—*Caste—Fakir.*

Fakir is not a caste as such but only a class of persons. Persons of different tribes and castes may join this group of persons who may either be holymen or may be beggars. (*Dalip Singh, J.*) IMAM ALI SHAH *v.* THAKAR DAS. 164 I.C. 260 (2)=9 R.L. 96=A.I.R. 1936 Lah. 496.

Customary dues.

——(Punjab)—*Customary dues—Village Mandauli—Rights of Rajput Khewatdars—Validity of custom.*

There is a custom in the village Mandauli whereby all the bania shop-keepers are enjoined to give one thali of kheel (a dish of puffered rice) and 5 patashas (cakes of sugar) to the house of every khewatdar belonging to Rajput tribe on the Diwali day. But the custom cannot be enforced as it is unreasonable and oppressive. It is not only the monetary aspect of the burden which is unreasonable and oppressive, it is also the onerous nature of the duty imposed on the banias which is even more unreasonable than the monetary burden to which they are subjected. The amount payable by each bania will go on increasing as the number of khewatdars increases irrespective of the fact whether any further advantage is conferred on the bania by the multiplication of the number of the khewatdars. (*Abdul Rashid, J.*) DASAUNDHI KHAN *v.* SADHU. 42 P.L.R. 290=A.I.R. 1939 Lah. 310.

Customary law.

——(Punjab)—*Customary Law of Lahore District by Mr. Bolster—Questions* 61, 62 *and* 63 *—Interpretation.*

The answers to questions 61 and 62 of the Customary Law of Lahore by Mr. Bolster deal with the right of daughters to succeed; but question 63 deals with the question of right of maintenance of daughters and mention is made therein of unmarried daughters. This indicates that questions 61 and 62 are applied to daughters married and unmarried. (*Jai Lal, J.*) MT. NATHO

v. GHULAM MAHAMMAD. 166 I.C. 386=9 R.L. 368=38 P.L.R. 901=A.I.R. 1936 Lah. 687.

——(Punjab)—*Customary law if governs the party—Ancestors living in city—Land not used for agricultural purposes.*

Where the land in dispute is situated in a suburb of the city of Lahore and is included within its municipal limits and has not been used for agricultural purposes since 1902, it has been built upon and all the lands contiguous to it are also occupied by buildings, and there was no proof that it was ever actually cultivated either by the plaintiff's father or his grandfather, and it was found that the plaintiff's father was earning his living by serving as a gardener and his ancestors had lived inside the city.

Held, it will be for the plaintiff to prove that his family is governed by custom and not by Mahomedan Law and the family of the plaintiff is not governed by customary law. (*Jai Lal and Adbul Rashid, JJ.*) FEROZE DIN *v.* HASAN DIN. 171 I.C. 498=10 R.L. 207=A.I.R. 1938 Lah. 107.

Dastarbandhi.

——(Punjab)—Dastarbandhi—*Significance.*

The ceremony of *Dastarbandhi* or placing the *Dastar* or tying it round the head of a person is not a ceremony of selection but it is a ceremony of installation. (*Thomas, J.*) ALI RAZA KHAN *v.* NAWAZISH ALI KHAN. 1938 O.A. 845=1938 O.W.N. 1157.

——Evidence—Instances *post litem*—Admissibility. *See* EVIDENCE ACT, S. 13. 41 P.L.R. 21 =A.I.R. 1939 Lah. 152.

——Fact of adoption disproved—Certificate as to custom—If can be granted. *See* PUNJAB COURTS ACT, S. 41. A.I.R. 1939 Lah. 135.

Gift.

——(Punjab)—*Gift— Ancestral land—Arains of Jullundur Tahsil.*

Among Arains of Jullundur Tahsil, a gift of ancestral land made by a sonless proprietor to relations without the consent of the legal heirs is valid. (*Addison and Din Mohammad, JJ.*) UMRA *v.* FATEH-UD-DIN. I.L.R. (1938) Lah. 490=40 P.L.R. 512=178 I.C. 453=11 R.L. 459 =A.I.R. 1938 Lah. 550.

——(Punjab)—*Gift—Arains of Nakodar Tahsil, Jullundur District—Gift of ancestral property to daughter of predeceased son—Validity.*

Among Arains of Nakodar Tahsil, Jullundur District a sonless proprietor can make a valid gift of his ancestral property in favour of his predeceased son's daughter. (*Tek Chand and Skemp, JJ.*) BUTA *v.* MT. HAPHO. 161 I.C. 510 =8 R.L. 772=A.I.R. 1936 Lah. 156.

——(Punjab)—*Gift—Bhatti Rais of Jhelum District—Gift to daughter in presence of brother.*

Bhatti Rais of the Jhelum District are Rajputs and the custom prevailing amongst them is the same as that of the other Mahomedan tribes in the Jhelum District. Among the Mahomedan tribes of the Jhelum District a sonless proprietor has the power to gift or bequeath the whole or a portion of his ancestral estate to his daughter, or daughter's son in presence of near collaterals. Such gift made in presence of brother is therefore valid amongst the tribe of Bhatti Rais. (*Tek Chand, J.*) MUBARIZ *v.* MT. SATTAN. 174

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I.C. 956=10 R.L. 640=40 P.L.R 452=A.I.R. 1937 Lah. 766.

——(Punjab)—*Gift—Gift by widow to resident son-in-law - Reversion.*

According to the custom in the Kangra District when a gift pure and simple if made by a sonless widow to her resident son-in-law who is rendering services to her, the property reverts to the donor or her line, on the extinction of the line of donee. (*Tek Chand, J.*) MT. MATTO *v.* FATTU. 171 I.C. 808=39 P.L.R. 146=10 R.L. 236=A.I.R. 1937 Lah. 250.

——(Punjab)—*Gift—Dower—Gift of land by husband in favour of his wife—Attock District.*

There is nothing in the Customary law of the Attock District which prevents a husband from increasing the dower of his wife during the subsistence of the marriage The customary right of the husband to make gifts of land in favour of his wife on account of dower cannot be disputed. Custom would obviously not sanction a gift of this kind made for purpose of defrauding the rightful heirs and the amount of land so gifted together with the circumstance of the giver are doubtless considerations of some weight in the eye of custom. (*Abdul Rashid, J.*) CHAN PIR *v.* FAKAR SHAH. 189 I.C. 725=13 R. L. 104=A.I.R. 1940 Lah. 104.

——(Punjab)—*Gift—Gift to daughters—Collaterals beyond fourth degree—If can challenge gift.*

Among the Hindu Jats of Ludhiana District a gift by the father, of any part of his property, to his daughters cannot be challenged by collaterals beyond the fourth degree. (*Addison, A.C.J. and Din Mahomed, J.*) MT. HARNAM KAUR *v.* JAGAT SINGH. 17 Lah. 387=161 I.C. 490=8 R.L. 758 =38 P.L.R. 849=A.I.R. 1936 Lah 108.

——(Punjab)—*Gift* — Khanadamad — *Reversion to donor.*

The custom in the Gujrat District is that property gifted to a *khanadamad* reverts to a donor's reversioner on the extinction of the descendants of the wife of the *khanadamad.* This is so even though the gift is in consideration of services rendered. (*Coldstream and Bhide, JJ.*) KARAM ALI *v.* SHAH MAHOMED. 169 I.C. 593=10 R.L. 23 (1)=39 P.L.R. 722=A.I.R. 1937 Lah. 705.

——(Punjab)—*Gift—Non-ancestral property—Mother of last male holder gifting property with consent of next heir—Collateral, if can challenge.*

Where mother of the last male holder gifts away the non-ancestral property of the last male-holder, with the *bona fide* consent of the next heir, a collateral has no right to challenge the alienation. A.I.R. 1931 Lah. 495 and A.I.R. 1923 Lah. 353, Appr. (*Tek Chand and Abdul Rashid, JJ.*) MAKHAN SINGH *v.* MT. MANGO. 163 I.C. 85=8 R.L. 999=38 P.L.R. 705=A.I.R. 1936 Lah. 192.

——(Punjab)— *Gift — Validity of — Gift in favour of* laipalik *son.*

According to the custom prevailing among Qureshis of Village Pind Sheik Musa in Lyallpur, a gift of ancestral land in favour of a *laipalik* son, that is, one who has been taken and reared as a son is valid. (*Addison and Din Mohammad, JJ.*) NUR MOHAMMAD *v.* BHAWAN SHAH. 17 Lah. 96=162 I.C. 854=8 R.L. 963=38 P.L.R. 477=A.I.R. 1936 Lah. 465.

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Guardianship.

——(Punjab)—*Guardianship — Mother — Rajputs of Jagadhri Tahsil of Ambala District.*

Among Rajputs of the Jogadhri Tahsil of the Ambala District, after the death of the father, the mother is the natural guardian of the property of the minors, whether she is regarded as such under Hindu Law or special custom. (*Beckett, J.*) SADHU RAM *v.* PIRTHI SINGH & Co. 161 I.C. 861=8 R.L. 808=38 P.L.R. 201=A.I.R. 1936 Lah. 220.

Irrigation rights.

——(Punjab)—*Irrigation rights—Dera Ghazi Khan District*—Haqquq-i-abpashi—*Authority of.*

The custom in the Dera Ghazi Khan District is that if any land is entitled to irrigation from a particular stream or channel, it is definitely recorded as so entitled in the document known as the *Haqquq-i-abpashi,* which being a particular statement of individual right clearly takes precedence over vague general statements in the *wajib-ul-arz.* (*Mitchell, F. C.*) PAINDA KHAN *v.* MAHOMED AZIMKHAN. 18 Lah. L.T. 24.

Landlord and Tenant.

——(Punjab)—*Landlord and tenant—Mortgage by tenant of right of residence without landlord's permission—Landlord's right to evict tenant—Mohalla Khajurian of Jullunder city.*

No custom to the effect, that when a tenant mortgages permanent right of residence without the landlord's permission, the right vanishes and the landlord can evict the tenant or the mortgagee in possession without paying the value of the tenant's superstructure, exists in Mohalla Khajurian of Jullunder city. (*Coldstream and Bhide, JJ.*) RAHMAT ULLAH *v* ATTA MOHAMMAD KHAN. 173 I.C. 198=10 R.L. 409=39 P.L. R. 568=A.I.R. 1937 Lah. 360.

Land Tenure.

——(Punjab)—*Land tenure — Dholi tenure—Incidents—Right of dholidar to minerals.*

The nature of dholi tenure is a form of tenure known in Punjab only, for the benefit of the temple. On a grant of dholi the proprietors continue to be proprietors of the land and the dholidar in right of the temple and his successors become tenants in perpetuity. Such tenure however does not ordinarily confer the right of taking minerals on the tenant, unless such right has been expressly conferred on the tenant. (*Monroe, J.*) KHEMA NAND *v.* KUNDAN. I.L.R. (1938) Lah. 447=175 I C. 92=10 R.L. 677=40 P.L.R. 110=A.I R. 1937 Lah. 805.

Law applicable.

——(Punjab)—*Law applicable—Parties governed by custom—Customary law silent on particular matter.*

Among parties ostensibly governed by customary law, if on a particular matter no definite rule of custom is proved to exist the parties are entitled to fall back on their 'personal' law. If the 'personal' law also does not contain any definite rule applicable to the case, it must be decided according to 'justice'equity, and good conscience. 110 P.R. 1906 (F.B.), Rel. on. (*Tek Chand and Abdul Rashid, JJ.*) GURDIAL SINGH *v.* TEJ KAUR.

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175 I.C. 705=11 R.L. 46=39 P.L.R. 926=A.I.R. 1937 Lah. 742.

Maintenance.

——(Punjab) — *Maintenance — Step-mother—Half-share given to her—Nature of estate.*

A step-mother holds only a life-estate in the half-share that is frequently given to her under customary law for her maintenance and the maintenance of her daughters. (*Addison and Ram Lall, JJ.*) DHARMON *v.* RAN SINGH. **185 I.C. 828=12 R.L. 323=41 P.L.R. 620=A.I.R. 1939 Lah. 563.**

——(Punjab)—*Maintenance— Widow—Charge on husband's estate—Enforceability against share obtained by step-son under partition.*

K died leaving behind him three sons *A*, *B* and *C*—*A* by his first wife, who predeceased him and *B* and *C* by his second wife *T*. who survived him along with the sons. The property of the deceased was partitioned and as the parties were governed by the Chundawand rule, *A* received one-half as his share and *B* and *C* together received the other half, each thus receiving one-fourth. The partition made no provision for the maintenance of *T* nor was she consulted. The latter instituted a suit claiming her maintenance from the three sons, *A* resisted the suit claiming that he was the step-son of *T* and so was not liable for her maintenance and she must look to the share allotted to her sons for it.

Held, that the partition, which was the act of the sons to which she was not a party, did not destroy the charge, which she had on the whole and every part of her husband's estate. Hence the charge attached to portion allotted to each son and must be realised in the proportion in which the sons had divided the property among themselves. (*Tek Chand and Abdul Rashid, JJ.*) GURDIAL SINGH *v.* TEJ KAUR. **175 I.C. 705=11 R.L. 46=39 P.L.R. 926=A.I.R. 1937 Lah. 742.**

Marriage.

——(Punjab)—*Marriage—Jats of Garhshankar tahsil—Marriage of father-in-law with his daughter-in-law—Validity.*

There is no direct prohibition in Hindu Law as regards a marriage between a father-in-law and a widowed daughter-in-law least so far as Sudras are concerned. Jats are classed as Sudras and for the purposes of marriage, they are governed by the restrictions laid down in Hindu Law only to such extent as they may have adopted them by usage. There is therefore, no initial presumption against the validity of such marriage. On the contrary, when a marriage has taken place in fact, there is in law a presumption in favour of legitimacy. The presumption is stronger when it appears that the marriage took place long ago and was accepted as valid by the brotherhood. The same presumption is raised even in cases of long cohabitation as man and wife amongst Jats. The daughter-in-law comes from a different Got and from the standpoint of Got pure and simple, there would be no objection to her marriage with her father-in-law. Jats of Garhshankar Tahsil consider that a man has a claim to marry not only his brother's widow, but also widows of other near relations and this he can do even without a marriage ceremony. A marriage between a father-in-law and his widowed daughter-in-law is, therefore, not invalid according to the custom

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governing them. (*Bhide, J.*) JAGINDER SINGH *v.* KARTARA. **166 I.C. 719=9 R.L. 415=A.I.R. 1936 Lah. 551.**

——(Punjab)—*Marriage—Jat Sikhs.*

The Jat Sikhs hold liberal views upon the question of the validity of marriages with women of other castes, and the strict principles of Hindu law are inapplicable to them. (*Coldstream and Jai Lal, JJ.*) MAHOMED SHARIFF *v.* TEJA SINGH. **167 I.C. 693=9 R.L. 522=38 P.L.R. 1086=A.I.R. 1936 Lah. 453.**

——(Punjab)—*Marriage—Presumption from cohabitation*—Karewa *marriage—Jats.*

Marriage cannot be presumed from mere cohabitation without the performance of any ceremony. It makes no difference whether the female is a widow or unmarried. If, however, among the Jats a man dies before the *muklawa* or bringing home of the bride ceremony, and his brother takes the *muklawa*, that is considered tantamount to a *karewa* marriage. (*Addison and Din Mahomed, JJ.*) MT. CHAND KAUR *v* BHAGWAN SINGH. **168 I.C 371=9 R.L. 623=A I.R. 1937 Lah. 612.**

Migration.

——(Punjab)—*Migration—Family of Rajputs. of Jammu migrating to Gurdaspur District—Law applicable—Presumption.*

In the case of family of Rajputs which migrates from Jammu State to Gurdaspur District normally the presumption is that they are governed by their personal law, that is, the Hindu Law and the burden is on them to prove that they are governed by the custom relating to succession and alienation which governs the Rajput agriculturists of Gurdaspur District. (*Jai Lal, J.*) RAJA BALBHADAR SINGH *v.* SHANKAR DAS **172 I.C. 426=10 R.L. 318=39 P.L.R. 434=A.I.R. 1937 Lah. 211.**

Mukarraridar.

——(Punjab) — Mukarraridar — *Status of—Rawal pindi and Attock Districts.*

In Rawalpindi and Attock Districts, a *mukarraridar* is not an *adna malik* and holds a position inferior to him; but at the same time he is not an occupancy tenant, and occupies a much more exalted position. (*Tek Chand, J.*) ALI KHAN *v.* AMAR DAS. **169 I.C. 414=10 R.L. 1=39 P.L.R. 882=A.I.R. 1937 Lah. 693.**

Partition.

——(Punjab)—*Partition—Shamilat land—Measure for partition.*

The measure for the partition of the shamilat land in the village of Sahib Ali is the land revenue assessed on the land and not the area of land held by the co-sharers. (*Dalip Singh and Bhide, JJ.*) RAJAN SHAH *v.* ROSHAN MAL. **178 I.C. 524=11 R.L. 466=A.I.R. 1938 Lah. 624.**

Proof.

——(Punjab)—*Proof—Custom, if can be proved by analogy.*

The existence or otherwise of a custom cannot be decided merely by analogy of another case and as there is no such thing as a general custom that also cannot be relied upon. (*Jai Lal, J.*) FAIZ MOHAMMAD *v.* ALLADITTA. **167 I.C. 297=9 R.L. 477=A.I R. 1936 Lah. 878.**

Religious Endowment.

——(Punjab) — *Religious endowment — Long*

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existence of kacha mosque on site occupied by non-proprietors—Non-proprietors, if can convert it into pacca structure.

Where a kacha mosque was in long existence on a site occupied by the non-proprietors and the mosque was dedicated to worship from a long time without any objection by the proprietors of the site.

Held, the non-proprietors were entitled to convert the mosque into a pacca structure. (*Agha Haidar, J.*) MAHOMED ALI *v.* LABH SINGH. 169 I.C. 940=10 R.L. 62=39 P.L.R. 184=A.I.R. 1937 Lah. 26.

——(Punjab)—*Religious endowment—Mahant—Succession—Thakardwara of Bairagis.*

Where a Mahant of Thakardwara of Bairagis nominates his successor, still the appointment ultimately rests with the Bhek and Sewaks and their confirmation and election is essential. This being a generally recognized custom strong evidence is always required to establish a custom, which is contrary to it. (*Jai Lal, J.*) JIWAN DAS *v.* HIRA DAS. 174 I.C. 126=10 R.L. 526=A.I.R. 1937 Lah. 311.

——(Punjab)—*Religious endowment—Maurusi Gaddi—Succession to mahantship proved to be from Guru to Chela.*

Where the succession the Gaddi (office) of mahantship of an institution has been from Guru to Chela for eight generations, the Gaddi must be held to be a maurusi Gaddi. (*Tek Chand and Dalip Singh, JJ.*) DIGAMBAR DAT GIR *v.* BHAIRON GIR. 18 Lah. 538=165 I.C. 280=9 R.L. 243=38 P.L.R. 1067=A.I.R. 1936 Lah. 839.

Reversioner.

——(Punjab) — *Reversioner— Rights—Nature of.*

The right of the reversionary heir under custom is a right in property, the enjoyment of which is deferred and it is vested interest though only in the sense that the person in whom it inheres has a present fixed right to its future enjoyment. (*Addison, A.C.J. and Din Mahomed, J.*) NARAIN SINGH *v.* MALIK AHMAD YAR KHAN. 17 Lah. 133=162 I.C. 374=8 R.L. 888=38 P.L.R. 472=A.I.R. 1936 Lah. 21.

——(Punjab)—*Reversioner—Nature of right—Ineffective alienation by father of his reversionary right—Alienation, if can be enforced against son.*

A reversioner derives his right to succeed to ancestral property from the common ancestor and not from his father, and an ineffective alienation of prospective reversionary rights made by the father cannot be specifically enforced against the son, when the father never inherited the property. (*Bhide and Currie, JJ.*) SHER MOHAMMAD KHAN *v.* CHUHR SHAH. 168 I.C. 506=9 R.L. 642=A.I.R. 1936 Lah. 753.

Riwaj-i-am.

——(Punjab)—Riwaj-i-am—*Applicability.*

Once it is established that the parties to a litigation are governed by custom, the provisions of the *riwaj i-am* become applicable in their case in al matters which are dealt with in the *riwaj-i-am*. In the case of a lacuna in the *riwaj-i-am* with respect to certain matters it would be legitimate to fall back on the provisions of the personal law. (*Abdul Rashid J.*) GURBAKHSH RAM *v.* MANAK CHAND. A.I.R. 1940 Luh. 392.

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——(Punjab) — Riwaj-i-am — *Applicability—Customary law of Lahore District.*

The provisions of *riwaj-i-am* are applicable to agriculturists and village communities. (*Jai Lal and Abdul Rashid, JJ.*) FEROZE DIN *v.* HASAN DIN. 171 I.C. 498=10 R.L. 207=A.I.R. 1938 Lah. 107.

——(Punjab)—Riwaj-i-am — *Conflict between vernacular and English versions—Preference.*

The *Riwaj-i-am* is usually prepared in vernacular in the first instance and the English version is generally abstract of the same; but the vernacular version is checked by the Settlement Officer when preparing the English abstract and he may at times find it necessary to alter the statement of custom in the vernacular *Riwaj-i-am* if he finds it to be incorrect. The question whether the vernacular or the English version should be preferred must, therefore, depend upon the circumstances of each case. In order to determine whether the vernacular or the English version contains a correct statement of custom, it will be useful to refer to the compilations of customary law prepared at the previous settlements of the district. (*Coldstream and Bhide, JJ.*) MOHAMMAD ALI *v.* MST. ANAYAT BIBI. 173 I.C. 946=10 R.L. 505=A.I.R. 1937 Lah. 459.

——(Punjab) — Riwaj-i-am—*Construction — Reference to ancestral property.*

In the absence of a clear statement to the contrary, "questions" and "answers" in the *riwaj-i-am* should be taken to refer to ancestral property only. Hence the questions and answer 40 of the *riwaj-i-am* of Ambala District governs succession to ancestral property only. (*Tek Chand and Dalip Singh, JJ.*) JOGINDRA KAUR *v.* ARJAN SINGH. I.L.R. (1940) Lah. 164=189 I.C. 553=13 R.L. 85=A.I.R. 1940 Lah. 10.

——(Punjab)—Riwaj-i-am—*Entries — Evidentiary value.*

When the Customary law is silent on a certain point, there is no reason why the local *riwaj-i-am* should not be accepted. As the entries are public documents, these entries can be used as evidence of the existence of a custom, whether instances exist or not. (*Beckett, J.*) DASAUNDHI *v.* LAL SINGH. 179 I.C. 560=11 R.L. 586=A.I.R. 1938 Lah. 849.

—— (Punjab)—Riwaj-i-am — *Entries in—Presumption of correctness—When rebutted.*

An entry in *Riwaj-i-am* as to custom, raises an initial presumption of its existence but the presumption is a rebuttable one. The presumption is rebutted if it is shown that the customary law containing the entry of the custom is an imperfectly complied document. Thereupon the onus of proving the custom re-shifts on the party relying on the existence of custom in his favour. (*Coldstream and Bhide, JJ.*) DIWAN SINGH *v.* NATHA SINGH. 173 I.C. 993=10 R.L. 513=A.I.R. 1937 Lah. 468.

——(Punjab)—Riwaj-i-am — *Entries in—Presumption of correctness—Rebuttal—Judicial decisions to the contrary.*

The presumption of correctness attaching to an entry in a *riwaj-i am* is only a rebuttable presumption and a finding arrived at in a judicial decision after an exhaustive enquiry, is enough to rebut it. (*Bhide, J.*) SHER MAHOMED *v.*

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——(Punjab)—Riwaj-i-am—*Entry in—Onus.*

An entry in the *Riwaj-i-am* recording a special custom is admissible to prove the statement alleged therein even if the statement be unsupported by instances and the onus of rebuttal is upon the party disputing the correctness of the entry. 1927 Lah. 241 and 1928 P.C. 294, Rel. on. (*Jai Lal and Sale, JJ.*) JAWALA SINGH *v.* THAKAR SINGH. 162 I.C. 934=8 R.L. 974=A.I.R. 1936 Lah. 88.

——(Punjab)—Riwaj-i-am—*Entry in—Onus.*

Where the *riwaj-i-am* is perfectly clear and it states that the answer of all tribes to the question whether in matters of succession they recognise the right of representation was in the affirmative, the onus lies on the person claiming that the *riwaj-i-am* is wrong. 1928 P.C. 294, Rel. on. (*Dalip Singh, J.*) MISRI LAL *v.* BABU LAL. 161 I.C. 844=8 R.L. 804=A.I.R. 1936 Lah. 151.

——(Punjab)—Riwaj-i-am—*Entry in—Onus—Discharge of onus by earlier* riwaj-i-am *supported by instances.*

Although a *riwaj-i-am* is unsupported by instances its affect is to shift the onus on to the party who alleges a custom different from that recorded in the *riwaj-i-am* to prove that custom. This onus can be discharged by his producing an earlier *riwaj-i-am* supported by instances (*Dalip Singh and Bhide, JJ.*) SHER MOHAMMAD *v.* ZUL FAQAR. I.L.R. (1938) Lah 345=40 P.L.R. 145 =176 I.C. 846=11 R.L. 245=A.I.R. 1938 Lah. 312.

——(Punjab)—Riwaj-i-am — *Entries in—Presumption—If relates only to ancestral property.*

The presumption raised by an entry in the *Riwaj-i-am* relates only to succession to ancestral property, when there is no clear indication to the contrary therein. (*Tek Chand and Coldstream, JJ.*) KHILU RAM *v.* MST. DHANI BAI. 18 Lah. 350=39 P.L.R. 1016.

——(Punjab)—Riwaj-i-am — *Entry in—Value of—Statement unsupported by instances.*

The fact that a statement of custom in a *riwaj-i-am* is not supported by instances does not in itself provide the necessary rebuttal, and if on an issue regarding the existence of an exception to a general rule of custom the sole evidence offered is a *riwaj-i-am* entry without instances, the issue must be decided in accordance with that entry. (*Bhide and Currie, JJ.*) SAJJAN SINGH *v.* MT. DHANTI. 167 I.C. 33=9 R.L. 436=A.I.R. 1936 Lah. 130.

——(Punjab) — Riwaj-i-am — *Evidentiary value.*

Even if *riwaj-i-am* is not supported by any instances the *riwaj-i-am* must be looked upon as a strong piece of evidence. (*Bhide, J.*) JAI NARAIN *v.* MT. PARSANI. 184 I.C. 648 (1)=12 R.L. 240=41 P.L.R. 822=A.I.R. 1939 Lah. 358.

——(Punjab)—Riwaj-i-am—*Later* riwaj-i-am *carries more weight than previous one.*

The later *riwaj-i-am* must carry more weight than the previous one on the ground that originally a statement of custom in the *riwaj-i-am* is enforceable only during the currency of the settlement. (*Jai Lal, J.*) FAZAL DIN *v.* CHARAN DAS. 174 I.C. 306=10 R.L. 547=A.I.R. 1937 Lah. 257.

——(Punjab)—Riwaj-i-am—*Presumption—If rebutted by instances of other sub-divisions of tribe.*

Custom is a question of fact and not of inference. Where the entries in the *riwaj-i-am* assert that a certain custom exists among a particular sub-division of the Rajput tribe instances relating to other sub-divisions of the tribe are not sufficient to rebut the presumption arising from the entries in the *riwaj-i-am.* (*Bhide, J.*) NIZAM DIN *v* FAZAL NUR. 184 I C. 46=12 R.L. 147=41 P.L.R. 793=A.I.R. 1939 Lah. 259.

——(Punjab)—Riwaj-i-am—*Proof—Rattigan's Digest—Admissibility in evidence—Evidentiary value of.*

Manuals of customary law prepared from official sources are of great authority. Where a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom. The *riwaj-i-am,* which has been established by the Local Government of the Punjab and which is a record of custom in the different parts of the Punjab, including the North-West Frontier Province, formerly included in it, being a public record prepared by a public officer in discharge of his duties and under Government rules is clearly admissible in evidence to prove the facts entered therein subject to rebuttal; the statements therein may be accepted even if unsupported by instances. In the absence of the *riwaj-i-am,* reference may be made to Rattigan's Digest of customary law (*Davis, J.C. and Tyabji, J.*) AISHA BIBI *v.* BEGUM BIBI. I L.R. (1939) Kar. 475=185 I.C. 87=12 R S. 143=A.I.R. 1939 Sind 263.

——(Punjab) — Riwaj-i-am — *Settlement Officer's opinion—Value of.*

In discussing the *Riwaj-i-am* entry the opinion of the Settlement Officers must be deemed to qualify the nature of the answers recorded in the *Riwaj-i-am* itself. For as opinion is entitled to due weight and as the effect of lessening the burden cast on the parties. 1930 L. 761 and 1925 L. 419, Foll. (*Jai Lal and Sale, JJ.*) JAWALA SINGH *v.* THAKAR SINGH. 162 I.C. 934=8 R.L. 974=A.I.R 1936 Lah. 88.

——(Punjab) — Riwaj-i-am—*Statements in—Value of.*

The statements of customs recorded in the *riwaj-i-am* of a tahsil or district regarding the customary law followed by the various tribes holding land in the tahsil in matters of succession are by themselves strong evidence of the customs followed by members of those tribes even if instances are not cited. (*Coldstream and Jai Lal, JJ.*) NIBH KAUR *v* GIAN SINGH. 176 I.C. 801=11 R. L. 240=A.I.R. 1938 Lah. 55.

——(Punjab)—Riwaj-i-am—*Value of—If can be destroyed by Settlement Officer's remarks.*

The value attaching to the answers to questions in the *riwaj-i-am* cannot be destroyed by the remarks made by the Settlement Officer as they merely embody his private opinion. (*Abdul Rashid, J.*) ABDUL MAJID *v.* SUBA KHAN. 189 I.C. 636=13 R.L. 90=42 P.L.R. 70=A.I.R. 1940 Lah. 109

——(Punjab)—Riwaj-i-am *and* Wajib-ul-arz—

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Construction—Reference usually to ancestral property.

Entries in a *riwaj-i-am or wajib-ul-arz*, which do not specifically purport to mention non-ancestral property, must be taken to refer to ancestral property 2 P.R. 1909; A.I.R. 1926 Lah. 210; A.I.R. 1932 Lah. 353 and 591; A.I.R. 1934 Lah. 351 and A.I R. 1935 Lah. 518, Ref. (*Tek Chand and Dalip Singh, JJ.*) AHMAD *v.* MOHAMMAD. **167 I.C. 135=9 R.L. 442=A.I.R. 1936 Lah. 809.**

Shamilat.

——(Punjab)—*Shamilat--Pond reserved for common purposes—Rights of proprietor.*

Although an ordinary *shamilat* field could be taken possession of by some of the proprietors until partition, no proprietor is entitled to encroach upon any part of a pond reserved for the common purposes of the village or cut trees without the consent of the other proprietors. (*Tekchand, J.*) RATI RAM *v.* BALWANT. **178 I.C. 816 (1)=11 R.L. 496=40 P.L.R. 633=A.I.R. 1938 Lah. 768.**

——(Punjab)—*Shamilat-deh—Some of village proprietors in possession of part thereof—If liable to ejectment.*

Where some of the village proprietors take possession of a part of the Shamilat-deh they must be deemed to be in possession as co-sharers and they are not liable to ejectment till partition and even then only if they are in possession of a larger share than they would be entitled to. (*Jai Lal, J.*) TUHI RAM *v.* RAM MEHAR. **38 P.L.R. 200.**

——(Punjab) — *Shamilat land—Right of co-sharer to erect building.*

Per *Din Mohammad, J.*—No individual proprietor can appropriate to himself a portion of the common land without the consent of all other co-sharers and use it in such a way as to affect the rights of all the co-sharers at the time of partition. Where therefore a co-sharer begins building on a part of common land (shamilat abadi) the other co-sharers can restrain him from so doing without proving any special damage to them and relief of injunction can be granted in such a case. (*Coldstream, Monroe and Abdut Rashid, JJ.*) INDER SINGH *v.* BHANA. **175 I.C. 412=10 R.L. 710=A.I.R. 1938 Lah. 296 (S.B.).**

——(Punjab)—*Shamilat rights—Accretion of shamilat—Rights of stranger purchaser.*

Certain shamilat land became attached to a village by a change of course in a river. Previous to the accretion of the shamilat land, some of the proprietors in a tarf of the village sold certain land in the village to a stranger who was therefore recorded as a co-sharer in the tarf of the village. The co-sharers in the tarf brought a suit for a declaration against the stranger purchaser that they were the sole owners of the 1116 share in the shamilat land. The wajib-ul-arz provided that the shamilat was to be partitioned according to shares mentioned in the mislihaquiyat against the co-sharers of the village.

Held, that the purchaser who was a recorded co-sharer was also entitled to a share in the shamilat land proportionate to his proprietary share in the village as it stood on the date of the accretion of shamilat even though the accretion of shamilat was subsequent to the sale. (*Skemp, J.*) UDHAM SINGH *v.* RAM SINGH. **175 I.C. 138**

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=10 R.L. 687=39 P.L.R. 656=A.I.R. 1937 Lah. 428.

——**Succession.**

ADOPTED SON.
ANCESTRAL PROPERTY. *See also* CUSTOM (PUNJAB).—ANCESTRAL PROPERTY.
APPOINTED HEIR.
ARAINS.
BATADAR SON.
CHILDLESS WIDOW.
COLLATERAL.
DAUGHTER.
DAUGHTER *v.* COLLATERAL.
DAUGHTER'S SON.
DELHI PROVINCE.
FEMALES.
FEROZEPORE DISTRICT.
GAUR BRAHMINS.
HOUSE IN ABADI.
MARRIED DAUGHTERS.
RIGHT OF.
SISTER.
SISTER'S SONS.
VILLAGE COMMUNITY.
WHOLE AND HALF BLOOD.
WIDOWS.
MISCELLANEOUS.

ADOPTED SON.

——(Punjab) — *Succession—Randhawa Jat—Adopted son—Right of collateral succession.*

An adopted son of a childless Randhawa Jat of village Khunda, in the Tahsil and District Gurdaspur, who has been formally adopted, can succeed collaterally in the adoptive family. (*Bhide and Currie, JJ.*) LACHHMAN DAS *v.* AMBRIK SINGH. **161 I.C. 768=8 R.L. 797=A.I.R. 1936 Lah. 178.**

ANCESTRAL PROPERTY.

——(Punjab)—*Succession—Ancestral property—Reversioner.*

The idea of a reversioner succeeding to ancestral property as the legal representative of a deceased person, is ordinarily foreign to the foundation on which custom in the Punjab rests; he succeeds by virtue of his connexion through the common ancestor. (*Addison, A.C.J. and Din Mahomed, J.*) NARAIN SINGH *v.* MALIK AHMAD YAR KHAN. **17 Lah. 133=162 I.C. 374=8 R.L. 888=38 P.L.R. 472=A.I.R. 1936 Lah. 21.**

APPOINTED HEIR.

—— (Punjab) — *Succession — Appointed heir dying without lineal descendants—Reversion to heirs of adoptive father.*

Ancestral property inherited by a person who has been appointed an heir under the customary law reverts to the heirs of the adoptive father on the death of the appointed heir without lineal descendants. (*Jai Lal, J.*) MEHR DAS *v.* MUNSHI RAM. **163 I C. 695=9 R.L. 36=38 P.L.R. 838=A.I.R. 1936 Lah. 920.**

——(Punjab) — *Succession —Appointed heirs, descendants—Right to succeed collaterally in family of appointee's natural father.*

The descendants of an appointed heir are not debarred from succeeding collaterally in the family of the appointee's natural father among Rajputs of Garhshankar Tahsil in the District of Hoshiarpur. (*Addison, A.C.J. and Din Mahomed, J.*) GULZARA *v.* QUTBA. **179 I.C. 414 =11 R.L. 575=40 P.L.R. 672=A.I.R. 1938 Lah. 865.**

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ARAINS.

——(Punjab) — *Succession— Arains—Self-acquired property—Daughter* v. *collaterals.*

(Per *Addison and Coldstream, JJ.*; *Jai Lal, J., contra.*)—A daughter of an Arain does not succeed to the self-acquired property of her father after the death of her mother in the Chunian Tahsil of the Lahore District in preference to the nephews and grand-nephews of the last male owner. (*Addison, J on difference between Coldstream and Jai Lal, JJ.*) BALANDA *v.* SUBAN. 17 Lah. 232=167 I.C. 951=9 R.L. 576=38 P.L.R. 592=A.I.R. 1936 Lah. 418.

BATADAR SON.

——(Punjab) — *Succession — Batadar son—Jalaps.*

Among Jalaps a batadar son, that is a son by a mother of an inferior tribe can succeed equally with ordinary sons collaterally, although such a son does not succeed equally in the case of paternal inheritance. (*Dalip Singh, J.*) SARDAR KHAN *v.* MD. AKRAM KHAN. 185 I.C. 894=12 R.L. 336 A.I.R. 1939 Lah. 560.

CHILDLESS WIDOW.

——(Punjab)—*Succession—Childless widow* v. *sons by another wife—Widow's right to partition of her share—Amritsar District.*

In the Amritsar District, if a man dies leaving a childless widow and sons by another wife, the widow is entitled to a share equal to that of a son, and also to a partition of that share. (*Skemp and Dalip Singh, JJ.*) MT. KISSI *v.* BALWANT SINGH. 18 Lah. 778=173 I.C. 712=10 R.L. 471=39 P.L.R. 545=A.I.R. 1937 Lah. 657.

——(Punjab)—*Succession—Cognates.*

In the Punjab, in the absence of all agnates of a childless proprietor, a cognate, however distantly related to him, is entitled to succeed to his property in preference to a stranger. (*Tek Chand and Abdul Rashid, JJ.*) TARA SINGH *v.* SURAJ KAUR. A.I.R. 1940 Lah. 416.

COLLATERALS.

——(Punjab)—*Succession— Collateral — Property owned by non-proprietor in village.*

A collateral in the fourth degree is not entitled to succeed to the house of a non-proprietor. This is the rule which is applied to a house owned in a village by a non-proprietor whether the non-proprietor is governed by Hindu Law or by Mahomedan Law or by Punjab Custom. That is the rule which, generally speaking, applies to a house owned by a village menial, except in those places where a right of sale is established. (*Skemp, J.*) ANOKH SINGH *v.* MT. JAL KAUR. 173 I.C. 845=10 R.L. 493=39 P.L.R. 767=A.I.R. 1937 Lah. 542.

——(Punjab)—*Succession—Collaterals —Right of representation—Aggarwal Mahajans of Rohtak District.*

Though the Mitakshara does not recognize the right of representation in succession amongst collateral heirs, yet amongst the Aggarwal Mahajans of Rohtak District, the rule of law has been modified by custom and such right is recognized by custom, and the nephew is allowed to succeed along with the uncle to the property of a deceased sonless uncle. 71 P.R. 1882 and 39 P.R. 1884, Rel. on. (*Tek Chand, J.*) KAHNI RAM *v.* MOLAR. 175 I.C. 542=10 R.L. 786=39 P.L.R. 912=A.I.R. 1937 Lah. 710.

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——(Punjab)—*Succession— Collaterals—Right of representation—Khatris of Rawalpindi.*

Among the Khatris of Rawalpindi, the right of representation in collateral succession is recognised by custom, and the strict rule of Hindu Law is not followed. (*Tek Chand and Beckett, JJ.*) DIWAN CHAND *v.* BELI RAM. 42 P.L.R. 525=A.I.R. 1940 Lah. 431.

——(Punjab)—*Succession—Collaterals — Milkans of Shahapur District.*

According to the custom prevailing the Milkans tribe, and the Mahomedan landholders of Shahapur District generally, collaterals are excluded by married daughters in succession to the non-ancestral property of a sonless proprietor, but the collaterals have a prior right to succeed to his ancestral property. (*Tekchand and Dalip Singh, JJ.*) AHMAD *v.* MOHAMMAD. 167 I.C. 135=9 R.L. 442=A.I.R. 1936 Lah 809.

——(Punjab)—*Succession—Collaterals daughter's son—Gujranwalla District.*

The customary law of Gujranwalla District containing entry of custom of succession in favour of collaterals in preference to daughter's sons is an imperfectly complied document and is not therefore reliable. (*Coldstream and Bhide, JJ.*) DIWAN SINGH *v.* NATHA SINGH. 173 I.C. 993=10 R.L. 513=A.I.R. 1937 Lah. 468.

——(Punjab)—*Succession—Collateral* v. *married daughters—Amapuri Arora of Multan town.*

According to the Customary law of the Multan District in the Punjab, the custom amongst the Aroras who are the residents of villages and have adopted the professions and habits of agriculturists, is that in the case of the sonless male proprietors, the collaterals within the fourth degree exclude the married daughters. But it is expressly stated there that the Aroras of the towns follow their personal law. Therefore sons of the married daughters of a deceased Amarpuri Arora of Multan town who is governed by Hindu Law take the estate of the deceased in preference to the son of the brother of the deceased, in the absence of the evidence that the deceased had gone to reside in a village and had adopted the professions and habits of an agriculturist. (*Jai Lall and Abdul Rashid, JJ.*) BHAI ASU RAM *v.* BULAQI DAS. 175 I.C. 320=10 R.L. 719=39 P.L.R. 729=A.I.R. 1937 Lah. 500.

——(Punjab)—*Succession—Daughters—Arains of Karnal town.*

Among Arains of Karnal town, a daughter succeeds in the absence of male issue in preference to a brother of the deceased to property not alleged to be ancestral. (*Bhide, J.*) KARIMUDDIN *v.* NASIBAN. 42 P.L.R. 509=A.I.R. 1940 Lah. 408.

DAUGHTER.

——(Punjab)— *Succession—Daughter—Banias of Ambala District.*

In the Ambala District among the Banias the daughters are excluded from inheritance by the collaterals in respect of ancestral and self-acquired property. (*Coldstream and Jai Lal, JJ.*) PRABH DIAL *v.* MADHO RAM. 176 I.C. 894=11 R.L. 246 =A.I.R. 1937 Lah. 635.

——(Punjab)—*Succession—Daughters and collaterals—Gaur Brahmins of Sonepat Tahsil.*

According to the *riwaj-i-am* of Sonepat Tahsil, among Gaur Brahmins of Sonepat Tahsil, District Rohtak, collaterals in the fourth degree have preferential right to succession against daughters

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(*Bhide, J.*) JAI NARAIN *v.* MT. PARSANI. 184 I. C. 648 (1)=12 R.L. 240=41 P.L.R. 822=A.I.R. 1939 Lah. 358.

——(Punjab)—*Succession—Daughters* v. *collaterals—Gujjars of Shakargarh Tehsil of District Gurdaspur.*

Among Gujjars of Shakargarh Tehsil, District Gurdaspur, daughters exclude collaterals in matters of succession to self-acquired property of their father. (*Tek Chand and Beckett, JJ*) LABH *v.* FATEH BIBI. 42 P.L.R. 603=A.I.R. 1940 Lah. 436.

——(Punjab)—*Succession—Daughter and resident son-in-law—Arains of Wazirabad Tehsil, Gujranwala District.*

According to the custom prevailing among the Arains of the Wazirabad Tahsil of the Gujranwala District,if a daughter along with her husband lives with her father, the latter living as a resident son-in-law (*khanadamad*), till his death, she or he is entitled to inherit if there is no son. The provision in the Code of Tribal Custom about a deed of gift or written will by the father is only recommendatory and not mandatory. (*Addison and Din Mohammad, JJ*) FATEH DIN *v.* MT. HAKIM BIBI. 18 Lah. 159=171 I.C. 958=39 P. L.R. 944=10 R.L. 253=A I.R. 1937 Lah. 110.

——(Punjab)—*Succession— Daughter—Hindu Jats of District Rohtak.*

According to the customary law of the Hindu Jats of District Rohtak, a daughter has no right to inherit. (*Skemp, J.*) MT. MAM KAUR *v.* MOLIA. 179 I.C. 824=11 R.L. 639=41 P.L.R. 11=A.I.R. 1939 Lah. 20.

——(Punjab)—*Succession — Daughters —Jodh Rajputs of Chakwal tahsil.*

Daughters of Jodh Rajputs of Chakwal tahsil are entitled to succeed to their father's non-ancestral property in the presence of collaterals of the 4th degree. (*Dalip Singh, J.*) ALLAH DITTA *v.* MT. TAKHTAN. 183 I.C. 844=12 R.L. 145 (1)= 41 P.L.R. 770=A.I.R. 1939 Lah. 261.

——(Punjab)—*Succession—Daughter—Mahtam of Lahore District.*

According to the *wajib-ul-arz* of Lahore District, among Mahtams the daughters in the absence of a son are the next heirs after the widow and therefore a gift by the widow to one of her daughters cannot be challenged by the collaterals of the husband. (*Addison and Ram Lall, JJ.*) KARAM BAKHSH *v.* MEHTAB BIBI. 183 I.C. 768= 12 R.L. 136=41 P.L.R. 298=A.I.R. 1939 Lah. 93.

——(Punjab)— *Succession — Daughter—Non-ancestral property— Exclusion of collaterals—Awans of Khushab Tahsil in Shahpur District.*

In the case of Awans of Khushab Tahsil in Shahpur District,according to the custom governing them, a collateral is not entitled to succeed to non-ancestral property of a deceased person, in the presence of his daughter. (*Bhide, J.*) SHER MAHOMED *v.* JAWAHAR KHATUN. 40 P.L.R. 29=177 I.C. 775=11 R.L. 366=A.I R. 1938 Lah. 309.

——(Punjab)—*Succession—Daughter—Rajputs of Garhshankar Tahsil.*

Among Rajputs of Tahsil Garhshanker, a daughter succeeds in the presence of heirs and collaterals of any degree to the non-ancestral property. (*Addison and Din Mahomed, JJ.*) GHULAM MOHY-UD-DIN KHAN *v.* MT. NIAMAT BIBI. 179 I.C. 534=11 R.L. 584=A.I.R. 1938 Lah. 785.

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——(Punjab)—*Succession— Daughters—Sansi Jats of Amritsar district.*

Among Sansi Jats of Amritsar district, daughters exclude collaterals of the seventh degree in succession to the self-acquired property of their father. (*Dalip Singh and Skemp, JJ.*) MST. GANGO *v.* MT. HUKAM KAUR. 177 I.C. 420=11 R. L. 320=A.I.R. 1938 Lah. 111.

DAUGHTER *v.* COLLATERAL.

——(Punjab) — *Succession — Daughter* v. *Collaterals—Aggarwal Banias of Ambala District.*

Among Aggarwal Banias of Ambala District, the collaterals succeed in preference to daughter. (*Coldstream and Jai Lal, JJ.*) RELU MAL *v.* MUKANDI LAL. 174 I.C. 846=10 R.L. 612=A.I.R. 1937 Lah. 609.

——(Punjab)—*Succession—Daughter* v. *collaterals—Amritsar District.*

In Amritsar District collaterals are not entitled to succeed to the self-acquired property of the deceased in preference to his daughter. (*Bhide and Currie, JJ.*) JAWALA SINGH *v* MT. SANTI. 167 I.C. 314=9 R.L. 483=A.I.R. 1936 Lah. 802.

——(Punjab) — *Succession — Daughter* v. *collaterals—Arains of Amritsar District.*

According to the custom prevailing among the Arains of the Amritsar district, daughters have a superior right to succeed to the self-acquired property of their father as against his collaterals of the third degree. (*Tek Chand and Skemp, JJ.*) ZAINAB BIBI *v.* JAMAL DIN. 18 Lah. 555=163 I. C. 879=9 R.L. 63=38 P.L.R. 874=A.I.R. 1936 Lah. 931.

——(Punjab) — *Succession — Daughters* v. *collaterals—Awans of Shahpur District.*

According to the custom prevailing among the Awans of Shahpur District, daughters succeed to the non-ancestral property of a sonless proprietor in preference to collaterals. (*Tek Chand, J.*) ALAM SHER *v.* MST. SAT BHARAI. 172 I.C. 966= 10 R.L. 383=39 P.L.R. 252=A.I.R. 1937 Lah. 640.

——(Punjab)—*Succession—Daughter* v. *collaterals—Awans of Shahpur District.*

Under custom governing the Awans of Shahpur District, a married daughter has a preferential right to succeed to the non-ancestral property of her father as against his collaterals of the fifth degree. (*Tek Chand, J.*) MST. RANJAN *v.* MST. BANO. 172 I.C 963=10 R.L. 384=39 P.L. R. 276=A I R. 1937 Lah. 641.

——(Punjab)—*Succession—Daughters* v. *collaterals—Jats of Garhshanker Tahsil, Hoshiarpur District.*

Quaere—Whether amongst Jats of Garhshanker Tahsil in the Hoshiarpur District daughters succeed to non-ancestral property in preference to collaterals of the fifth degree. (*Bhide and Currie, JJ.*) MT. KISHNI *v.* MUNSHI. 162 I.C. 382=8 R.L. 893=A.I.R. 1936 Lah. 157.

——(Punjab)—*Succession—Daughters* v. *collaterals—Jats of Hissar District.*

With respect to the self-acquired property among the Jats of Hissar District daughters are preferred as heirs to collaterals. (*Jai Lal, J.*) JIRAM *v.* LOKRAM. 161 I.C. 725=8 R.L. 796 (1) =38 P.L.R. 120=A.I.R. 1936 Lah. 206.

——(Punjab)—*Succession—Daughters* v. *calla*

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terals—'Jats' in Phillaur Tahsil, Jullundur District.

In the Phillaur Tahsil among Jats daughters are excluded by collaterals upto and including the fifth degree in matter of succession and there is no distinction between ancestral and non ancestral property. (*Bhide and Currie, JJ.*) SAJJAN SINGH *v.* MT DHANTI. **167 I C. 33=9 R.L. 436=A.I.R. 1936 Lah. 130.**

——(Punjab)—*Succession— Daughters versus collaterals—Jats of Phillaur tahsil of Jullundur district.*

Daughters do not succeed to the self-acquired land of their father among Jats of Phillaur tahsil of the Jullundur district in preference to second degree collaterals. (*Addison and Abdul Rashid, JJ.*) DEWAN SINGH *v.* MST. SANTI. **17 Lah. 809 =167 I.C. 39=9 R.L. 438=39 P.L R. 148=A.I. R. 1937 Lah. 223**

——(Punjab)—*Succession— Daughters* versus *collaterals—Jats of Tahsil Thanesar, Karnal District.*

Among Jats of Tahsil Thanesar, Karnal District, collaterals in the fourth degree do not exclude daughters from succession to non-ancestral property. (*Tek Chand and Dalip Singh, JJ.*) JOGINDAR KAUR *v.* ARJAN SINGH. **I.L.R. (1940) Lah. 164=189 I.C. 553=13 R.L. 85=A.I.R. 1940 Lah. 10.**

——(Punjab)—*Succession—Daughters* v. *collaterals—Kaler Jats.*

In the Kaler subdivision of the Jats tribe a daughter succeeds to the father in preference to collaterals. (*Bhide and Currie, JJ.*) UJAGAR SINGH *v.* MT. DIYAL KAUR. **167 I.C. 710=9 R. L. 533=A.I.R. 1936 Lah. 991.**

——(Punjab) — *Succession — Daughter* v. *Collaterals—Khatris of Phalia tahsil of Gujrat District.*

Khatris of Phalia tahsil of Gujrat District follow custom according to which daughter cannot inherit ancestral property in presence of her father's collaterals. (*Coldstream and Jai Lal, JJ.*) NIDH KAUR *v.* GIAN SINGH. **176 I.C. 801=11 R. L. 240=A.I.R. 1938 Lah. 55.**

——(Punjab)—*Succession—Daughters exclude collaterals—Khokhars.*

Among Khokhars daughters exclude male collaterals in succession to the self-acquired property of their father. (*Addison Ag. C. J. and Din Mohammad, J.*) SIKANDAR *v.* MT. KARAM NISHAN. **182 I.C. 209=11 R.L. 908=A.I.R. 1938 Lah. 842.**

——(Punjab) — *Succession — Daughters* v. *Collalerals—Jats of Sialkot District.*

Among Jats of the Sialkot District the immemorial custom is that daughters cannot succeed to their father's self-acquired or other property in preference to make collaterals. (*Young, C. J., Monroe and Din Mahomed, JJ.*) BAHADUR *v.* NIHAL KAUR. **18 Lah. 594=169 I.C. 909=10 R. L. 81=39 P.L.R. 349=A.I.R. 1937 Lah. 451 (F.B.).**

——(Punjab) —*Succession — Daughter* v. *collaterals—Kahlon Jats of Gurdaspur.*

Amongst the Khalon Jats of Gurdaspur District a daughter is a preferential heir to the self-acquired property of her father in the presence of even near collaterals such as the brother of the deceased father. (*Tek Chand and Dalip Singh, JJ.*) GURDIT SINGH *v.* MT. MAN KAUR. **171 I.C.**

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683=10 R.L. 224=39 P.L.R. 228=A.I.R. 1937 Lah. 90.

——(Punajb) — *Succession — Daughters* v. *collaterals—Non-ancestral property.*

Among Gujjars of Shakargarh Tahsil, Gurdaspur District, collaterals have not preferential right over daughters to succeed to non-ancestral property. (*Tek Chand and Skemp, JJ.*) NAJJU *v.* MT. AMINA BIBI. **160 I.C. 584=8 R.L. 569 (2) =A.I.R. 1936 Lah. 493.**

——(Punjab) — *Succession — Daughters* v. *collaterals—Randhawa Jats of Amritsar District.*

Among Randhawa Jats of Amritsar District daughters oust collaterals beyond the fifth degree in succession to non-ancestral property. A.I.R. 1935 Lah. 419 and A.I.R. 1935 Lah. 408, Rel. on. (*Jai Lal and Sale, JJ.*) JAWALA SINGH *v.* THAKAR SINGH. **162 I.C. 934=8 R.L. 974=A.I.R. 1936 Lah. 88.**

——(Punjab)—*Succession—Daughters* v. *collaterals—Randhawa Jats of Gurdaspur.*

Among the Randhawa Jats of the Gurudaspur District, the daughters are generally excluded by collaterals within four degrees from inheriting the ancestral or self-acquired property of their father. The collaterals of the father belonging to the fifth degree are not however entitled to exclude the daughters. (*Addison, Ag.C.J. and Din Mahomed, J.*) KESAR SINGH *v* ACHHAR SINGH. **17 Lah. 101=161 I.C. 692=8 R.L. 791= 38 P.L.R. 502=A.I.R. 1936 Lah. 68.**

——(Punjab)—*Succession—Daughters* v. *collaterals—Sayyeds in Jullundur Tahsil.*

Amongst the Sayyeds in Jullundur Tahsil a daughter does not succeed in preference to a collateral of the second degree in case of property which is non-ancestral. 172 P.R. 1889, Diss. (*Bhide, J.*) RUQIA BIBI *v.* MAHBUB ALI SHAH. **173 I.C. 687=10 R.L. 466=39 P.L.R. 831=A.I. R. 1937 Lah. 698.**

——(Punjab)—*Succession—Daughters* v. *collaterals—Self-acquired property.*

Daughters are excluded from self-acquired property by collaterals amongst Aulak Jats of the Amritsar District. (*Addison and Abdul Rashid, JJ.*) KARTAR SINGH *v.* MST. PREETO. **17 Lah. 296=168 I.C. 379=9 R.L. 617=38 P.L.R. 300= A.I.R. 1936 Lah. 804.**

——(Punjab)—*Succession—Daughters* v. *collaterals—Self-acquired property—Jats in Lyallpur District.*

In the Lyallpur District among Jats, emigrants from the Jullundur District, daughters of male proprietors, who die without male lineal descendants, exclude collaterals from the succession to the self-acquired property of their father. (*Bhide and Currie, JJ.*) MT. HARBANS KAUR *v.* NAGINA SINGH. **168 I.C. 843=9 R.L. 677=A.I.R. 1936 Lah. 273.**

——(Punjab)—*Succession—Daughters* v. *collaterals—Self-acquired property—Khaira Jats of Taran Taran Tahsil in Amritsar District.*

Amongst the Khaira Jats of Taran Taran Tahsil in Amritsar District in the Punjab the daughter succeeds in preference to collaterals in respect of the self-acquired property of the father. (*Coldstream and Bhide JJ.*) MST. HUKMI *v.* FAUJA SINGH. **174 I.C. 571=10 R.L. 589=A. I.R. 1937 Lah. 306.**

——(Punjub)—*Succession—Daughter* v. *Collaterals—Zargars of Dera Ghazi Khan.*

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Among *Zargars* in Dera Ghazi Khan, collaterals of the last male owner succeed to his ancestral property in preference to his daughter. (*Tek Chand and Coldstream, JJ.*) KHILLU RAM *v.* MST. DHANI BAI. **18 Lah. 350=39 P.L.R. 1016.**

DAUGHTER'S SON.

——(Punjab)—*Succession— Daughter's son— Rattigan's Digest, Para.* 23 (1).

Remark in para. 23 (1) of Rattigan's Digest that "a person cannot succeed to his maternal grandfather except in succession to his mother" is not a correct statement of the custom as actually existing in the Punjab Province. (*Tek Chand and Dalip Singh, JJ.*) AHMAD *v.* MOHAMMAD. **167 I.C. 135=9 R.L. 442=A.I.R. 1936 Lah. 809.**

DELHI PROVINCE.

——(Punjab)—*Succession—Delhi Province — Property inherited by daughter—Devolution.*

According to the custom recorded in the *riwaj-i-am* of Delhi Province, the proprietors of the thulla are entitled to succeed to the estate of the deceased after the death of his daughter who inherited her father's property and who has left no male descendants. The rule in *riwaj-i-am* that the husband inherits the property of the wife, merely refers to land which is the absolute property of the wife, as, for instance, property gifted to her or property which is her stridhan. It does not relate to property inherited by her as a daughter. In the absence of a clear indication to the contrary, she must be deemed to succeed to an ordinary estate of a female, if not under the Customary law, under the Hindu law. To such property the heirs of her father are entitled to succeed in preference to her husband because on her death the property must be deemed to revert to such heirs. The proprietors of the thulla need not be the descendants of the common ancestor as no such restriction is found in the *riwaj-i-am*. (*Jai Lal, J.*) KALI RAM *v.* BHIKU. **180 I.C. 646 =11 R.L. 706=40 P.L.R. 748=A.I.R. 1938 Lah. 468.**

FEMALES.

——(Punjab)— *Succession— Females— Exclusion—Proof.*

When the interests of a female are in conflict with those of a male and the only evidence is that of instances of succession without any documentary record of the custom alleged, such as a regularity compiled *riwaj-i-am*, the instances can ordinarily have small evidential value unless they show that a claim by a female has been actually made and denied. Where there is no evidence that any female ever claimed an inheritance which was denied, while there is the admitted fact that when a will was made in favour of a nephew to the prejudice of a daughter and a son, the testatør took precautions to obtain the daughter's assent as well as that of the son's, the evidence does not prove that in the family of the parties females do not inherit. (*Coldstream and Bhide, JJ.*) FATIMA SULTAN *v.* NISAR ALI KHAN. **175 I. C. 82=10 R.L. 680=40 P.L.R. 447=A.I.R. 1937 Lah. 806.**

FEROZEPORE DISTRICT.

——(Punjab)—*Succession—Ferozepore District —Pattidars.*

In Ferozepore District a widow has simply a ife-interest in the property of her husband.

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Although the daughter has a preferential right to succeed to the property of her father, where she consents to an alienation of her deceased father's property by her mother, thereby precluding herself from contesting the alienation, the pattidars have a right to bring a suit claiming that they are not affected by the alienation on the ground that the alienation is not in favour of collaterals or reversioners, even though the patti is not homogeneous. (*Addison and Din Mohammad, JJ.*) MIHAN SINGH *v.* RAM SINGH. **174 I. C. 939=10 R.L. 635=A.I.R. 1937 Lah. 483.**

GAUR BRAHMINS.

——(Punjab)—*Succession—Gaur Brahmins of village Chiragh, Delhi Province—Collateral succession—Right of representation.*

The Gaur Brahmins of village Chiragh in the Delhi Province in the matter of succession of property are governed by a custom which admits the right of representation so far as collateral succession is concerned. (*Dalip Singh, J.*) MISRI LAL *v.* BABU LAL. **161 I.C. 844=8 R.L. 804=A. I.R. 1936 L. 151.**

——(Punjab)—*Succession—Gaur Brahmins of Chiragh Delhi—Remoter kindred, if excluded by nearer kindred.*

Amongst the Gaur Brahmins of Chiragh Delhi the remoter kindred are not excluded by the nearer kindred. A.I.R. 1936 Lah. 151, Affir. (*Addison and Abdul Rashid, JJ.*) MISRI LAL *v.* BABU LAL. **166 I.C. 748=9 R.L. 425=A.I.R. 1936 Lah. 679.**

HOUSE IN ABADI.

——(Punjab)—*Succession—House in abadi.*

Where a person who has succeeded to a house in the village abadi after his father who had obtained it from his maternal grandfather dies, the collaterals of his father's maternal grandfather are entitled to it as against the proprietors of the village. (*Tek Chand and Abdul Rashid, JJ.*) ISMAIL *v.* FAZLA. **A.I.R. 1936 Lah. 97.**

MARRIED DAUGHTER.

——(Punjab)—*Succession—Married daughters —Dillu Jats of Sialkot District.*

Among Dillu Jats of Sialkot District married daughters cannot inherit in presence of collaterals. (*Addison and Abdul Rashid, JJ.*) GULAB *v.* UMAR BIBI. **164 I.C. 796=9 R.L. 159=38 P.L.R. 807= A.I.R. 1936 Lah. 403.**

——(Punjab)—*Succession—Unmarried Daughters—Jhang District.*

According to the Customary Law of the Jhang District, unmarried daughters are entitled to inherit the property of their father and to remain in possession so long as they are unmarried. (*Din Mohammad, J.*) JUGAL KISHORE *v.* MST. SHANTI BAI. **188 I.C. 798=13 R.L. 48=42 P.L.R. 198= A.I.R. 1940 Lah. 184.**

——(Punjab)—*Succession—Ranjhas of Bhalwal Tahsil, Shahpur District—Self-acquired property of father—Married daughters, if exclude third degree collaterals.*

There is no custom among the Ranjhas of Tahsil Bhalwal of Shahpur District entitling married daughters to succeed to the self-acquired property of their father in preference to the collaterals of the third degree. (*Addison and Abdul Rashid, JJ.*) MT. BEGUM BIBI *v.* RAJA. **17 Lah.**

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477=161 I.C. 647 (2)=8 R.L. 779=38 P.L.R. 966=A.I.R. 1936 Lah. 205.

———(Punjab)—*Succession — married daughters—Mussalman tribes of Shahpur District.*

Under the customary law which governs all the Mussalman tribes including Tullas of Shahpur District, married daughters do not inherit their father's estate in any circumstances. (*Coldstream and Din Mahomed, JJ.*) NAWAB *v.* MT. SUBHANI. **172 I.C. 158=10 R.L. 277=39 P.L.R. 566=A.I.R. 1937 Lah. 683.**

RIGHT OF.

———(Punjab)—*Succession—Right of—Sameness of got.*

The circumstance that a person is of the same got as the deceased cannot give him any right to succeed to the property of the deceased, even though the latter has left no issue or near relations. (*Tek Chand, J.*) NAURATA *v.* RAN SINGH. **40 P.L.R. 544 (2)=177 I.C. 801=11 R.L. 368=A.I.R. 1938 Lah. 584.**

SISTER.

———(Punjab)—*Succession — Sister — Brahmans of Palampur, Kangra District.*

Brahmans of Palampur tahsil in Kangra District are governed by custom and not by Hindu law and under Customary law of Palampur sister is an heir in the absence of collaterals and has *locus standi* to sue as next reversioner. (*Sale, J.*) TARA MANI *v.* KISHEN DEVI. **186 I.C. 771=A.I.R. 1940 Lah. 33.**

———(Punjab)—*Succession—Sister and sister's son—Kangra District.*

Under the Customary law of the Kangra District, sister and sister's son do not succeed to the deceased proprietor. (*Jai Lal, J.*) MST. BUNDO *v.* MST. NIHATO. **165 I.C. 78 (1)=9 R.L. 212=38 P.L.R. 851=A.I.R. 1936 Lah. 660.**

———(Punjab)—*Succession—Sister* v. *Collateral—Jats of Ambala District.*

According to the customary law governing Jats of the Ambala District, in the absence of collaterals of the 5th degree or less a daughter or daughter's son would succeed in preference to collaterals of a more remote degree and a sister or sister's son would succeed in preference to collaterals of a remoter degree than the 5th in the absence of a daughter or daughter's son. (*Dalip Singh and Skemp, JJ.*) MUNSHI *v.* NARANJAN SINGH. **171 I.C. 959=39 P.L.R. 579=10 R.L. 258=A.I.R. 1937 Lah. 701.**

———(Punjab)—*Succession—Sister* v. *daughter's son—Jhelum District.*

A person died leaving two unmarried daughters and his mother, who inherited his property half and half. One daughter died and the other married, thus leaving their mother in possession of the entire land. After the mother the sister of the original owner claimed property in preference to sons of the married daughter. Neither of the daughters was in possession 26 years before suit,

Held, that sisters inherited the property of their brother. The married daughter ceased to be in possession of the property 26 years ago. Her sons were not consequently entitled to claim that property by right of inheritance. (*Jai Lal, J.*) NAZIR HUSSAIN *v.* MT. SULTAN BI. **173 I.C. 903=10 R.L. 495=A.I.R. 1937 Lah. 321.**

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SISTER'S SONS.

———(Punjab)—*Succession — Sisters' sons—Jats of village Dholewal in Ludhiana District.*

Among Jats of village Dholewal which is situated in Tahsil Ludhiana of the Ludhiana District, sisters and their sons do not succeed even in the absence of collaterals to the self-acquired as well as the ancestral property. (*Beckett, J.*) DASAUNDHI *v.* LAL SINGH. **179 I.C. 560=11 R.L. 586=A.I.R. 1938 Lah. 849.**

VILLAGE COMMUNITY.

———(Punjab)—*Pathankot tahsil—Owner of land dying without any heirs.*

According to the custom prevailing in the Pathankot tahsil as stated in the riwaj-i-am of 1911-12, when an owner of land dies intestate and without any heirs, the village community has a preferential claim of succession to the land. (*Jai Lal, J.*) FAZAL DIN *v.* CHARAN DAS. **174 I.C. 306=10 R.L. 547=A.I.R. 1937 Lah. 257.**

WHOLE AND HALF-BLOOD.

———(Punjab)—*Succession—Whole and half-blood—Mahomedan Rajputs of village Laha in Ambala District.*

Amongst Mahomedan Rajputs of village Laha in Naraingarh Tahsil of Ambala District, where the descendants of two wives of such a Mahomedan have been proved to be separate from each other and form two distinct groups, when succeeding *inter se*, the relatives of whole blood exclude those of half-blood as succession is governed by the rules of succession to the owner of it and not to the ancestral owner. (*Addison and Din Mohammad, JJ.*) MT. TUMAN *v.* UMRAO BAHADUR KHAN. **174 I.C. 921 (2)=10 R.L. 627=A.I.R. 1937 Lah. 332.**

———(Punjab)—*Succession — Widow—Tiwanas.*

Among Tiwanas, who do not follow Mahomedan Law but custom, widows only succeed for their lives and other females take under special conditions. They do not take an absolute interest but they defer the enjoyment of the estate by a reversioner. (*Addison, A.C.J. and Din Mahomed, J.*) NARAIN SINGH *v.* MALIK AHMAD YAR KHAN. **17 Lah. 133=162 I.C. 374=8 R.L. 888=38 P.L.R. 472=A.I.R. 1936 Lah. 21.**

———(Punjab)—*Succession—Widows of predeceased sons—Sidhu Jats.*

Among the Jat Sidhu Barar of Village Sangewala in that Fazilka Tahsil of the Ferozepore District, sonless widows of pre-deceased sons succeed to the estate of their father-in-law, and the unchastity of the widows does not entail forfeiture. But if the widows remarry their deceased husband's brothers, they would not be entitled to succeed. (*Addison and Din Mahomed, JJ.*) MT. CHAND KAUR *v.* BHAGWAN SINGH. **168 I.C. 371=9 R.L. 623=A.I.R. 1937 Lah. 612.**

———(Punjab)—*Succession—Widow succeeding collaterally—Her heirs after death.*

In a case where a widow has succeeded collaterally, after her death it is the heirs of her husband who have to be sought for and not the heirs of the last male holder of the property. (*Dalip Singh and Skemp, JJ.*) MST. GANGO *v.* MT. HUKAM KAUR. **177 I.C. 420=11 R.L. 320=A.I.R. 1938 Lah. 111.**

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———(Punjab)—*Succession — Widow—Widow succeeding to husband's collaterals—Estate, if becomes an accretion to husband's estate.*

Where a widow succeeds to her husband's brother's estate she does so as a representative of her husband; on her death the estate becomes an accretion to her husband's estate and will be treated as his property. (*Coldstream and Bhide, JJ.*) DIWAN SINGH *v.* NATHA SINGH. **173 I.C. 993=10 R.L. 513=A.I.R. 1937 Lah. 468.**

MISCELLANEOUS.

———(Punjab)—*Succession—Nekokara Qureshis of Jhang District—Sister succeeding brother—Her husband's right of succession.*

Amongst Nekokara Qureshis of Jhang District, where a sister succeeds her brother she is succeeded by her sons, but if there are no sons her husband does not succeed. If, however, the land in question is the self-acquired property of the sister her husband would succeed in the absence of sons. (*Addison and Abdul Rashid, JJ.*) UMAR HAYAT *v.* NAZAR MUHAMMAD. **162 I.C. 339 (1) =8 R.L. 884=38 P.L.R. 1077=A.I.R. 1936 Lah. 373.**

———(Punjab)—*Succession—Sayeds of Dera Ghazi Khan District.*

In the Customary law of the Dera Ghazi Khan District, Sayeds are described as following Mahomedan law in matters of succession. (*Tek Chand, J.*) NOTAN DAS *v.* KARAM HUSSAIN SHAH. **40 P.L.R. 690=177 I.C. 513=11 R.L. 333 (2)= A.I.R. 1938 Lah. 447.**

———(Punjab)—*Succession—Sayads of kotla Sayyadan near Shahpur*—Pagwand *v.* Chundawand.

The rule of succession prevailing among Sayads of village kotla Sayyadan near Shahpur is *pagwand* and not *chundawand*. (*Addison and Din Mahomed, JJ.*) BAHADUR SHAH *v.* ZULFIQAR SHAH. **17 Lah. 90=162 I.C. 131=8 R.L. 854= 38 P.L.R. 480 (2)=A.I.R. 1936 Lah. 767.**

TOWN OR VILLAGE.

———(Punjab)—*Test.*

A place which has got public buildings like a school, dispensary, police station, post-office, which has had a population for 70 years or more of over five thousand, which has got two or three bazars and 300 or 400 pucca shops and paved streets and which collected octroi dues over 50 years ago must be regarded as a town and not a village. The mere fact that the tenure in the place is bhaiadhara does not in any way conflict with its being a town and not a village. (*Addison and Ram Lall, JJ.*) RANJIT SINGH *v.* NAWAB KHAN. **185 I.C. 395=12 R.L. 284=41 P.L.R. 826=A.I.R. 1939 Lah. 548.**

———(Punjab)—*Town or village—Test.*

Where a certain place is occupied by a heterogeneous population with a preponderance of non-agriculturists and the culturable area is very small and there are two regular bazars with many shops and there is a hospital, schools for boys and girls, a Post office, such place is a town and not a village. (*Bhide and Currie, JJ.*) BAHADUR KHAN *v.* KUNDAN LAL. **165 I.C. 823=9 R.L. 307=A.I. R. 1936 Lah. 267.**

WIDOW.

———(Punjab)—*Widow—Alienation — Powers of—Awans of Pura Neka.*

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Awans of Pura Neka are governed by custom. According to custom when a widow of a collateral inherits the entire estate of her husband, she takes only a life-estate and hence an alienation by her of the ancestral property can be challenged by other collaterals. (*Bhide, J.*) FAZAL KARIM *v.* ALLAH RAKHA. **182 I.C. 625=12 R.L. 62=41 P.L.R. 300=A.I.R. 1939 Lah. 61.**

———(Punjab)—*Widow — Decree against—If binds reversioners.*

A decree obtained by an alienee against a widow in respect of an alienation made by her husband during his lifetime is binding on the reversioners, as it is a well-recognised rule that a widow represents the estate in such circumstances. (*Beckett, J.*) KHAN *v.* MAHOMED SAEED. **40 P.L.R. 804.**

———(Punjab)—*Widow — Rights of—Land granted to tenant on abadkari terms—Widow acquiring proprietary rights on succeeding to tenancy—If absolute owner of such rights.*

Where a widow of a deceased tenant to whom land was granted as a tenant on abadkari or peasant terms, purchases the proprietary rights on succeeding to the tenancy, she acquires such rights as absolute owner, and the reversioners have no power to control her acts. (*Addison and Din Mohammad, JJ.*) JAGAT SINGH *v.* RAJ DEVI. **I.L.R. (1938) Lah. 271=40 P.L.R. 153 (2)=178 I.C. 331=11 R.L. 446=A.I.R. 1938 Lah. 554.**

———(Punjab)—*Widow—Rights of—Property acquired by widow out of income—If separate property.*

Under Customary law a widow has full power over the income of the estate which she holds as a widow and can do with it as she likes, and if she acquires property out of that income it is not an accretion to her husband's estate but her own separate property. (*Addison and Din Mohammad, JJ.*) JAGAT SINGH *v.* RAJ DEVI. **I.L.R. (1938) Lah. 271=40 P.L.R. 153 (2)=11 R.L. 446=178 I.C. 331=A.I.R. 1938 Lah. 554.**

WILLS.

———(Punjab)—*Will.*

Customary Law of Lahore District by Mr. Bolster, question 106, states that a sonless proprietor can make a will of self-acquired property. (*Jai Lal, J.*) MT. NATHO *v.* GHULAM MOHAMMAD. **166 I.C. 386=9 R.L. 368=38 P.L.R. 901 =A.I.R. 1936 Lah. 687.**

———(Punjab)—*Will — Ancestral property—Mughals of Gujar Khan Tahsil.*

There is no custom restraining the Mughals of the Gujar Khan Tahsil from alienating their ancestral property within the tribe by means of a will. (*Abdul Rashid, J.*) ABDUL MAJID *v.* SUBA KHAN. **189 I.C. 636=13 R.L. 90=42 P.L.R. 70=A.I.R. 1940 Lah. 109.**

———(Punjab)—*Will—Awans of Rawalpindi district—Powers of bequest.*

Among the Awans of the Rawalpindi district, there is an unrestricted power to make a will, even in respect of ancestral property, in favour of the persons of the same tribe and a will of ancestral property made by an Awan in favour of his daughters is valid. (*Jai Lal, J.*) SAJAWAL KHAN *v.* MT. BANO. **172 I.C. 1002=10 R.L. 387=39 P.L.R. 780=A.I.R. 1937 Lah. 525.**

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———(Punjab)—*Will—Mair Minha of Tahsil Chakwal—Powers of bequest.*

A Mair Minhas of Tahsil Chakwal in the Jhelum District has power, in the absence of sons, to dispose of by will both his ancestral and self-acquired property. (*Addison and Din Mohammad, JJ.*) WALI DAD *v.* MT. IMAM KHATUN. **I.L.R. (1938) Lah. 485=40 P.L.R. 267=177 I.C. 424=11 R.L. 323=A.I.R. 1938 Lah. 527.**

———(Punjab)—*Will — Mussalman proprietor in Jhelum District—Power of bequest.*

A sonless Mussalman proprietor in the Jhelum District has the right to make a will of his ancestral property in favour of his daughters. The initial onus of proving that the will made by their father is valid under the customary law is on the daughters claiming under the will. (*Abdul Rashid, J.*) IMAM ALI *v.* SUGHRAN BEGAM. **A.I.R. 1939 Lah. 382.**

———(Punjab)—*Will*—Sials *of Jhang—Powers of bequest.*

According to the custom among the *Sials* of Jhang, a proprietor can by will favour one of his sons as against the others, although the property is ancestral. (*Dalip Singh and Bhide, JJ.*) SHER MOHAMMAD *v.* ZUL FAQAR. **I.L.R. (1938) Lah. 345=40 P.L.R. 145=176 I.C. 846=11 R.L. 245=A.I.R. 1938 Lah. 312.**

———(Punjab)—*Will — Sayyeds of Shahpur District—Powers of bequest.*

Among the miscellaneous Mussalman tribes including Sayyeds of the Shahpur district, there is no general power of devising property by will in favour of daughter's sons. (*Bhide and Currie, JJ.*) AMIR HUSAIN SHAH *v.* GHULAM BAQIR SHAH. **163 I.C. 113=8 R.L. 1019=38 P.L.R. 731=A.I.R. 1936 Lah. 210.**

———(U.P.)—*Proof—Custom of* zari-i-chararum—*Entry in* wajib-ul-arz *as to—If* prima facie *evidence—Absence of entry in prior* wajib-ul-arz *—Effect.*

An entry in a *wajib-ul-arz* to the effect that that a landlord is entitled to certain amount as *zari-i-chaharum* from the tenants on sale of groves, trees, etc., is *prima facie* evidence of such a custom. The fact that the custom is not recorded in the prior *wajib-ul-arz* is not evidence that the custom did not exist then, and does not preclude the Court from taking judicial notice of it and enforcing it. (*Harries, J.*) KALICHARAN CHOWDHARI *v.* BENI MADHO PRASAD SINGH. **1937 A.L.J. 168=1937 R.D. 110=168 I.C. 187=9 R.A. 629=1937 A.L.R. 322=1937 A.W.R. 124=A.I.R. 1937 All. 257.**

CUSTOMARY EASEMENT. *See* EASEMENTS ACT, S. 18.

CUSTOMARY RIGHTS. *See* EASEMENT.

CUTCHA ADATIC AGENCY. *See* CONTRACT ACT, S. 30.

CUTCHI MEMONS. *See* HINDU LAW—APPLICABILITY.

———*Will executed by codicil—Law applicability.*

A Cutchi Memon is governed by the Mahomedan Law so far as the execution of his will and a codicil is concerned. 43 Bom. 641, Rel. on. (*Wadsworth, J.*) MAHOMED YOONUS *v.* ABDUR SATTAR ISMAIL. **182 I.C. 949=12 R.M. 190=47 L.W. 719=1938 M.W.N. 699=A.I.R. 1938 Mad. 616=(1938) 1 M.L.J. 444.**

CYPRES.

See also (1) C. P. CODE, S. 92.
(2) HINDU LAW—RELIGIOUS ENDOWMENT.
(3) MOHAMMADAN LAW—WAQF.

DAMAGES. *See also* (1) CONTRACT ACT, SS. 73, 75.
(2) INTEREST.
(3) TORT—DAMAGES.
(4) VENDOR AND PURCHASER.
(5) SALE OF GOODS.
(6) MASTER AND SERVANT — WRONGFUL DISMISSAL.

———*Claim for—Obstruction to plaintiff's enjoyment of rights by decision of Court in favour of defendant—Defendant if liable.*

It is well established that no action will lie against any one for damages resulting from an erroneous decision of the Court, merely because that person has set the Court in motion, provided that malice is not established. 14 C.W.N. 96, Rel. on. It is also well established that the defendant is only liable for the direct consequences of his wrongful act and that the intervening act of an independent third person bound by law to make a judicial decision breaks the chain of causation. (*Wadsworth, J.*) CHAKRAPANI NAIDU *v.* VENKATARAJU. **181 I.C. 807=11 R.M. 848=48 L.W. 436=1938 M.W.N. 982=A.I.R. 1938 Mad. 958=(1938) 2 M.L.J. 769.**

———*Interest—Party suffering loss by misrepresentation of opposite party—Discretion of Court in awarding interest.*

Where a party claims damages for the loss he has sustained by the opposite party's misrepresentation, the damages which are to be awarded, should include interest. This may be given specifically or taken into account and included in the general sum awarded for damages. This is however in the discretion of the Court. (*Lord Roche.*) WILLIAM I. BISHOP, LTD. *v.* JAMES MACLAREN CO., LTD. **169 I.C. 137=9 R.P.C. 321=A.I.R. 1937 P.C. 193 (P.C.)**

———Measure of—Lessee of mines—Suit for damages against sub-lessee for wrongful removal of minerals—Measure of damages. *See* C.P. LAND REVENUE ACT, S. 218 (4) AND (5). **I.L.R. 1936 Nag. 115.**

———Measure of—Master and servant—Wrongful dismissal of servant—Damages—Assessment—Principles. *See* MASTER AND SERVANT—WRONGFUL DISMISSAL. **42 Bom.L.R. 886.**

———Measure of—Wrongful sale of pledged goods by pawnee without notice—Damages recoverable by pawnor—Calculation of—Sale in foreign markets—Evidence as to price realised by—Account sales. *See* CONTRACT ACT, S. 176. **38 Bom.L.R. 982.**

———Punitive damages—Claim to as special head apart from general damages—Awardability—Claim in second appeal. *See* PRACTICE—APPEAL. **A.I.R. 1936 Nag. 70.**

———*Right to—Connection between act complained of and damage or injury—Necessity for—Remote damages—If can be recovered—Rule.*

DAMAGES.

Both as regards actions in contract and actions in tort, the damage which can be recovered by a plaintiff complaining of a breach of contract or a tort is the damage which necessarily flows from breach of the contract or from the action of the defendant in the case of a tort. To entitle the plaintiff to recover damages, there must be something immediately flowing out of the breach of contract or tort complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract or tort and the damage or injury complained of. Plaintiffs commenced to manufacture brick on a plot of land which they took on lease from certain Mahomedans. The defendants alleging that the plaintiff were desecrating a grave-yard approached the police and informed the police that the action of the plaintiffs would lead to a breach of the peace. The police stepped in and took proceedings under S. 144, Cr.P. Code, thus stopping the work of the plaintiffs. The proceedings eventually terminated in the plaintiff's favour, but in the meanwhile, a heavy fall of rain destroyed a large quantity of the bricks of the plaintiffs which were being manufactured and also damaged the fuel used in burning the bricks. Plaintiff claimed damages from the defendants.

Held, that neither could the defendants have contemplated damages by rain as the result of their action, nor could the damage by rain be said to have flowed necessarily from the action of the defendants, that the damage was too remote and therefore the action for damages could not be sustained. (*Wort, A.C.J. and Manohar Lall, J.*) MAKSOOD ALAM *v.* BANDHU SAHU. **1938 P.W.N. 621=19 Pat.L.T. 670=4 B.R. 800=177 I.C. 263=11 R.P. 139=A.I.R. 1938 Pat, 561.**

———*Right to — Principle underlying—Worry caused by the opposition of another—If an injury in the legal sense of the term.*

Damages are pecuniary compensation which the law awards to a person for actual injury which he has sustained by reason of the act or default of another, when such act or default is a breach of contract or tort. Where a plaintiff alleges that the defendant's actions in trying to prevent the performance of a certain ceremony which the plaintiff proposed to perform, caused him much worry, that so-called worry is nothing but a mental perturbation or emotional excitement caused by the opposition set up by the defendants. It is of too trivial a nature to be regarded as injury in the legal sense of the term. That "worry" cannot supply the plaintiff with any cause of action for damages. (*Niyogi, J.*) DIPCHAND KUNDANMAL *v.* MANAKCHAND MULTANMAL. **I.L.R. (1939) Nag. 429=182 I.C. 18=11 R.N. 504=1939 N.L.J. 184=A.I.R. 1939 Nag. 154.**

———Tenant holding over—Measure of damages. *See* LANDLORD AND TENANT—HOLDING OVER. **1939 M.L.R. 219 (Civ.).**

———Wrongful attachment — Application for compensation under C.P. Code,—Proof of special damage—If essential. *See* C.P. CODE, S. 95. **50 L.W. 640.**

DANGEROUS DRUGS ACT (1930), S. 14.

———Wrongful dismissal of servant of Crown —Assessment of damages. *See* (1) GOVERNMENT OF INDIA ACT (1915), S. 96-B; (2) MASTER AND SERVANT.

DANCING GIRLS—*See* HINDU LAW—ADOPTION.

DAMDUPAT. *See* HINDU LAW—DAMDUPAT.

DANGEROUS DRUGS ACT (II OF 1930)—*Procedure—Trial of offence under—Duty to avoid delay.*

In a case under the Dangerous Drugs Act, it is essential in the interests of justice that there should be as little delay as possible in the trial. (*Harries, C.J. and Varma, J.*) NISAR AHMAD *v.* EMPEROR. **5 B.R. 499=180 I.C. 839=11 R.P. 541=40 Cr.L.J. 419=1938 P.W.N. 832=19 Pat.L.T. 845=A.I.R. 1939 Pat. 172.**

———**Ss. 2 and 13 (b)**—*"Dangerous drug"—Exporter's preparation containing less than ½ per cent. of ganja—Liability to conviction.*

The Dangerous Drugs Act does not say what percentage of ganja will make a mixture or preparation a dangerous drug within the meaning of S. 2. Since the Act does not prescribe any particular percentage, whatever percentage of ganja there may be in a mixture, that mixture must be deemed to be a dangerous drug, unless the case can be brought within the general maxim that the law takes no notice of trifles. But in the case of a drug like ganja, a percentage, even less than ½ per cent. cannot be said to be so trifling that its presence in a preparation may be ignored. A mixture containing even such a percentage is a dangerous drug as defined by the Act, and an exporter of such a preparation is liable to conviction under S. 13 (*b*). (*Pandrang Row, J.*) DANDAPANI PILLAI *v.* EMPEROR. **1937 M.W.N. 174.**

———**S. 10 (b)**—*Registered opium consumer in possession of pyaungchi or opium refuse—When liable to conviction.*

A registered opium consumer may in fact possess pyaungchi or opium refuse, or any other form of prepared opium, in any quantity, provided that the preparation of opium, has been made from the opium which he has purchased under his ticket. A registered opium consumer who is found in possession of pyaungchi and opium refuse therefore cannot be convicted under S. 10 (*b*), Dangerous Drugs Act, if there is no evidence to show that they were not prepared from the opium which such person lawfully possessed. (*Mackney, J.*) EMPEROR *v.* MAUNG THA TUN. **171 I.C. 619=10 R.R. 168=38 Cr.L.J. 1092=A.I.R. 1937 Rang. 346.**

———**S. 14**—*"Sells"—Meaning of—Object of buyer—If material.*

The word "sells" occurring in S. 14, Dangerous Drugs Act, is not used in any but the popular sense. It merely implies transfer of a commodity for a price paid or promised to be paid. The object of the buyer will not affect the real nature of the transaction and the fact that it is brought about to entrap the seller will not make it any the less sale. (*Niamatullah, J.*) MUNNI LAL *v.* EMPEROR. **162 I.C. 792=8 R.A. 895=37 Cr.L.J. 700=1936 A.W.R. 276=1936 A.L.J. 275=1936 A. Cr.C. 72=1936 All.L.R. 467=1936 Cr.C. 425=A.I.R. 1936 All. 361.**

DEBTOR AND CREDITOR.

——S. 14 (a)—*Punishment—Deterrent sentence.*

An offence under the Dangerous Drugs Act is a most serious crime and a deterrent sentence must be imposed to stamp out such crimes. (*Harries, C.J. and Varma, J.*) NISAR AHMAD *v.* EMPEROR. **5 B.R. 499=180 I.C. 839=11 R.P. 541 =40 Cr.L.J 419=1938 PW.N. 832=19 Pat. L.T. 845=A.I.R. 1939 Pat. 172.**

DEBTOR AND CREDITOR—*Action on debt —Contemporaneous khata—Suit, if should be based upon—C.P. Code, O. 7, R.* 14.

Where though there is a contemporaneous khata relating to a loan, there is nothing in law which prevents a plaintiff from suing on the loan. The khata may be evidence of loan, but it does not constitute the contract. In such a case it is not necessary either to produce the khata along with the plaint or to refer to it. (*E. Weston.*) MISRI LAL *v.* PATASI. **1937 A.M.L.J. 75.**

——Adjustment of account—Debtor unable to pay cash—Agreement to pay debts in specified manner by sale of specified properties to creditor and undertaking to pay balance with interest—Failure to carry out in entirety—Remedy of creditor—Old obligation—If revived. *See* CONTRACT ACT, S. 62. **63 Cal. 194.**

——*Appropriation of payments—Compound interest—Deduction of payments—Mode of.*

In the case of simple interest, the interest remains always separate and apart from the principal. But in the case of compound interest, as soon as the interest falls due, it becomes part of the principal and does not remain separate from the principal. So the payment made should be deducted from the total principal so formed and not from the initial principal. Again money paid should be applied in payment of interest first and then, when that is satisfied, in payment of the capital. (*Harries and Ganga Nath, JJ.*) BANARSI DAS *v.* COLLECTOR OF SAHARANPUR. **165 I.C. 498=9 R.A. 287=1936 A.L.J. 1262=1936 A. W.R. 887=1936 All.L.R. 923=A.I.R. 1936 All. 712.**

——Appropriation of payments—Decree debt—Sums received by way of rateable distribution—Mode of appropriation—Costs awarded under decree—If to be excluded. *See* C.P. CODE, S. 73. **1938 M.W.N. 1210.**

——*Appropriation of payments—Method determined by express contract—Specific appropriation on each payment—If necessary.*

Where the method of appropriation was determined at the outset by express contract between the parties, the law does not require a specific appropriation to be made on the occasion of each payment. 19 I.C. 849, Foll. (*Smith and Nanavutty, JJ.*) RAJA MOHAN MANUCHA *v.* NISAR AHMAD KHAN. **12 Luck. 435=164 I.C. 945=9 R. O. 108=1936 O.W.N. 1033=1936 O.L.R. 526=A.I.R. 1937 Oudh 87.**

——*Assignment of part of debt—Consent of debtor not obtained—Suit by assignee—If competent.*

There can be no out and out assignment of part of debt without the consent or acknowledgment of the debtor, except in the sense that the assignee may in equity be looked upon as a joint creditor with the assignor. Just as a suit by one joint creditor for his part of the debt is not competent, a suit by an assignee of part of debt is not competent when the assignment is made without the consent or acknowledgment of the debtor. (*Addison, J.*) MOHAN LAL OM PARKASH *v.* BALA BUX BAJRANG LAL. **189 I.C. 153 =13 R.L. 68=42 P.L.R. 208=A.I.R. 1940 Lah. 279.**

——*Assignment of part of debt—Suit by assignee for the part assigned to him—Maintainability.*

A suit for a portion of a debt jointly owned by various persons is not maintainable. It makes no difference that the plaintiff became a joint owner of the debt by assignment, and was not originally a joint owner. Such a distinction is obviously superficial. (*Addison, J.*) TULSI RAM NARULA *v.* GIAN CHAND AMAR NATH. **187 I.C. 507=12 R.L. 461=41 P.L.R. 888=A.I.R. 1940 Lah. 96.**

——*Charge—Right of creditor—Promise by debtor to pay out of particular fund.*

The principle is well established that when a debtor promises to the creditor to pay out of a particular fund, the creditor has a charge on the same. If, therefore, by a consent decree the judgment-debtor gives to the decree-holder the right to satisfy the decree from a certain fund, the decree-holder acquires a charge on the said fund although there is a further provision in the consent decree that the decree-holder would be entitled at any rate to rateable distribution with two other persons who had already attached the fund. (*Mitter and Khundkar, JJ.*) ATA UL-HUQ *v.* SK. MD. RAMJAN. **43 C.W.N. 410.**

——Composition scheme—Deed by debtor in favour of one creditor as trustee for creditors—Payment of amounts by debtor to the creditor—Latter if becomes trustee or merely agent of debtor—Rights of other creditors as against creditor trustee—Creditors not signifying willingness to arrangement—Right to benefit of arrangement. *See* TRUST—TRUSTEE. **1937 M.W.N. 1081.**

——*Composition—Nature of—Assignment of debtor's property to trustee—Rights and liabilities of creditors.*

A composition is an agreement between the compounding debtor and all or some of his creditors, by which the compounding creditors agree with the debtor, and (expressly or impliedly) with each other, to accept from the debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims. The consideration which in such a case enables the acceptance of part of a debt to operate as a discharge of the whole debt is the mutual agreement of the creditors to forego parts of their claims. One method of arrangement of an insolvent debtor's affairs which the law recognizes is an assignment of the debtor's property to a trustee for realization and distribution of the proceeds rateably amongst all the debtor's creditors, or amongst those who assent to and take the benefit of the assignment. Such an assignment operates in effect to place the administration of the debtor's estate in the hands of a trustee for the benefit of the creditors. The assignment is the voluntary act of the arranging debtor, and the trusts to

which the assignment is subject are those which the debtor himself creates. The deed becomes operative to release or suspend the operation of creditors' claims by virtue of the assent of the creditors thereto; and it only binds those creditors who in writing or otherwise expressly or impliedly assent to it. Until the deed of assignment to a trustee has been executed by or come to the knowledge of the creditors, the trustee is an agent only for the debtor under a revocable authority to deal with the estate. When the instrument expresses the arrangement to be with the creditors generally, or all creditors who assent to it, any creditor who actually or by his conduct assents to and elects to take the benefit of the arrangement within the proper time is entitled to share in the benefits of the arrangement, although he has not signed the deed; and in some cases the Courts will allow a creditor to come in under the arrangement and share in its benefits notwithstanding that the proper time for accession has elapsed. On the other hand, a creditor entitled to the benefit of an arrangement must perform fairly all the conditions of the arrangement which apply to the creditors. If he takes any step which is inconsistent with or opposed to those conditions, as, for instance, by bringing an action against the debtor to recover his debt, he will be liable to be excluded from the benefit of the arrangement. This obligation is binding not only on creditors who execute a deed of arrangement or expressly assent to it, but also on those who by their conduct put themselves in the same situation as if they had executed it. The principle is that if a creditor puts himself in the situation of having the benefit of the deed, he must bear its obligations although he has not literally executed the deed. There is however one benefit to which a secured creditor is entitled. If the composition deed reserves to creditors their rights over securities held by them on the property of the debtor, as by a mortgage charge, the terms of a general release contained in the deed of agreement will not prevent those creditors from realizing or dealing with and obtaining the benefit of their securities in reduction of the debts due to them. But this provision is limited to the extent of their securities, which must be clearly reserved by the deed. (*Bhide and Beckett, JJ.*) NATHU *v.* GOKAL CHAND. **179 I.C. 570=11 R. L. 587=A.I.R. 1938 Lah. 769.**

———Creditor holding security for debt—Suit for debt—Set-off of debt against security—Right of debtor—Security furnished by persons other than debtor—Right of debtor to claim set-off. *See* COMPANY—LIQUIDATION. **(1939) 2 M.L.J. 325.**

———*Discharge of debt—Debt due to deceased ancestor—Payment to one of co-heirs—Effect of.*

One co-heir cannot give a valid discharge, in respect of a debt due to the deceased ancestor, without the concurrence of the other co-heirs. Payment to one of two co-heirs is valid to the extent of his own share of the debt only and it could not operate as a discharge of the share of the other. (*Tek Chand, J.*) SUMER SINGH *v.* HET LAL. **169 I.C. 531=10 R.L. 19.**

———*Gift by debtor to creditor—Gift of amount greater than amount of debt—Presumption of discharge of debt—If arises—Gift by Mahomedan husband to wife of properties and money—Dower debt of smaller amount due to wife—If discharged—Presumption.*

Under the English Law, if a debtor makes to his creditor a gift or gives a legacy of an amount either equal to or greater than the amount of debt, the presumption must be that the gift or legacy was by way of satisfaction of the debt. But this rule of English Law is not applicable to India. A Mahomedan husband agreed to pay his wife a sum of Rs. 700 as and by way of dower. The wife stated in some proceedings after her husband's death that the latter, shortly before his death, while he was very ill, had given her certain immovable properties and also made a gift of Rs. 3,000. In a suit by the wife against the heirs of the husband for recovery of the dower debt, the defendants pleaded that the dower debt must be deemed to have been discharged by this gift. The wife stated that the gift was a provision for her and not in satisfaction of the dower debt.

Held, that the amount of the gift being considerably larger than and quite disproportionate to the amount of the debt, and there being no evidence to contradict the statement of the plaintiff that the gift was not in satisfaction of the dower debt, the dower debt could not be deemed to have been discharged by the gift. (*Venkatramana Rao, J.*) SULTAN NACHI *v.* SULAMA BIBI. **176 I.C. 747=11 R.M. 160=1937 M.W. N. 1166=46 L.W. 617=A.I.R. 1938 Mad. 25.**

———*Interest—Deduction before hand from amount advanced in anticipation—Propriety of.*

The practice of deducting interest beforehand from the money lent by the creditor to the debtor cannot be approved of. The effect of such reduction is that the rate of interest is indirectly enhanced. Such a practice is highly objectionable. (*Reilly, C.J. and Sreenivasa Rao, J.*) URUGEJJEGOWDA *v.* THE CENTRAL CO-OPERATIVE BANK, LTD. **15 Mys.L.J. 230.**

———*Joint creditors—Separate suits—Competency.*

Where the right of a person to recover certain debt has devolved upon his sons jointly, they can only file one suit against their debtors for recovery of the whole amount. Some of them cannot split the cause of action and sue for their share only on the ground that others did not join with them as co-plaintiffs. In that case it would be incumbent upon such of them as are filing the suit to claim the whole amount on behalf of themselves and their brothers on payment of the full Court-fees and making their brothers, who had refused to join, as co-defendants. (*Davis, J.C. and Loba, J.*) GOPALDAS METHARAM *v.* LOKAMAL CHELLARAM. **I.L.R. (1939) Kar. 602=182 I. C. 718=12 R.S. 25=A.I.R. 1939 Sind 173.**

———Joint debtors—Decree against one—If bar to suit against other—Principles. *See* LEASE—ASSIGNMENT BY LESSEE. **40 Bom.L.R. 497.**

———Loan—Advances from time to time—Absence of stipulation as to re-payment—If payable on demand—Right to interest—*See* INTEREST—RIGHT TO. **A.I.R. 1936 Nag. 285.**

———*Mode of payment—Agreement to pay in New Zealand or in England—Creditor exercising*

option to be paid in England—Payment to be in English currency.

The mode of performance of a contract is to be governed by the law of the place of performance. This has the effect of introducing into the contract the law of the currency or the legal tender governing in the place of payment as a mode or method incidental to performance. Thus where there is a common unit of account to which the same denomination applies, as is the case with the word "pound", the debt expressed in the common unit of account must, in the absence of contrary evidence of actual intention, be discharged by payment in the currency of the place of payment. Debenture bonds and coupons, issued in New Zealand under the Local Bodies Loans Act, 1913, of that place, contained the following provisions. "On presentation of this debenture or coupon, at the Bank of New Zealand, London, England, or Auckland, New Zealand, at the option of the holder for the time being on or after 1st January, 1936, the bearer will be entitled to receive £100 or £2 12s.6d. "; the debenture-holders exercised their option to be paid in London.

Held, that the debenture-holders were entitled to be paid in the currency of England, on their availing themselves of the option to be paid in London and not in the currency of New Zealand, which was considerably depreciated. (*Lord Wright.*) THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF AUCKLAND *v.* ALLIANCE ASSURANCE CO., LTD. **167 I.C. 337=9 R.P.C. 192=45 L.W. 543=A.I.R. 1937 P.C. 54 (P.C.).**

———*Payment of debt—Debtor sending hawala (hundi) to creditor asking him to present it to his own debtor—Laches of creditors—Effect of.*

Where a debtor in order to pay his creditor, sends to him a hawala (a form of hundi) asking him to present it to his debtor and take payment of the amount mentioned in it, at the same time calling upon the debtor to duly meet the hawala on presentation, but the creditor by his laches or for reasons of his own, does not present it for payment until the debtor to whom the hawala is to be presented becomes insolvent, the hawala operates as satisfaction of the debt. The creditor must be treated as having accepted the hawala in satisfaction of the amount due from the debtor and cannot be allowed to recover the amount by a suit. (*Page, C.J. and Mya Bu, J.*) HASSANALLY ESMAILJEE *v.* ABDUL RAHMAN. **161 I.C. 791=8 R.R. 507 (2)=A.I.R. 1936 Rang. 164.**

———*Payment of debt to creditor by third person on behalf of debtor—Suit by creditor against debtor for same debt—Decree against debtor—Debtor compelled to pay amount by legal process—Suit by debtor to recover amount—Maintainability.*

If money has been obtained as the result of a decree between the parties, if such be not a compromise decree, then a subsequent suit to recover back that money cannot succeed. Different considerations would arise if the parties had compromised and the compromise had been induced by the fraud of the person who obtained the benefit under the compromise. In such a case the compromise could be set aside as also the decree based upon it. Where therefore *C* is paid his dues on handnote by *B* on behalf of *A*, the executant of the handnote, but in spite of the payment, *C* brings a suit against *A* for recovery of the same money and obtains a decree against *A*, whose defence fails, and *A* is compelled by legal process to pay that decree amount. *A* cannot subsequently bring a suit against *C* for recovery of the money paid by him. (*Harries, C.J. and Fazl Ali, J.*) BIKHARI MAHTO *v.* BANSROPAN RAM. **189 I.C. 754=13 R.P. 126=6 B.R. 858=A.I.R. 1940 Pat. 1.**

———*Place of repayment—Negotiable instrument.*

The ordinary rule under which the debtor must seek his creditor does not apply in the case of a negotiable instrument. (*Vivian Bose J.*) DALSUKH NATHMAL *v.* MOTILAL. **182 I.C. 842=12 R.N. 29=A.I.R. 1938 Nag. 262.**

———Relationship—Delivery of money—If creates—Person receiving money—Liability to re-pay—Absence of promise to re-pay—If bar to suit for recovery of money given—Burden of proof of non-liability. *See* CONTRACT ACT, S. 70. **1936 A.M.L.J. 37.**

———*Remedy—Suit on original consideration—Maintainability—Document embodying only some terms.*

The fact that a document does not contain all the terms of a contract is not of itself sufficient to enable a party to sue on the original consideration without producing the document. (*Spargo, J.*) MAUNG KO *v.* MAUNG LU DOKE. **167 I.C. 479 (2)=9 R.R. 321=A.I.R. 1937 Rang. 61.**

———Security furnished by third party for debtor—Right of creditor to proceed against debtor in case of inability to return security—Rule as to—*See* COMPANY—WINDING UP. **1939 M.W.N. 1193.**

———*Settlement of accounts—Error in calculation and over-payment by debtor—Right to re-open accounts and for refund of excess payment.*

Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of that exact balance; if after such settlement it turns out that the creditor has been paid sums which were not really due to him, and that there are errors in the account, that is a sufficient ground for re-opening the accounts and for setting it right. It is open to the debtor who has made excess payments to have the account re-opened and to claim a refund of the amounts which have been wrongly taken into consideration, and the creditor is bound to refund the said amounts. (*Venkataramana Rao, J.*) KRISHNA BHATTA *v.* ISWARA BHATTA. **1937 M.W.N. 376=45 L.W. 641=169 I.C. 860=10 R.M. 107=A.I.R. 1397 Mad. 579.**

———*Trust for benefit of creditors—Effect of non-communication to creditors—Parties acting on deed—Inference.*

Where a transfer of property has been made to trustees for payment of the debts of the owner, the creditors being neither parties nor privies thereto, the creditors do not thereby become *cestui que trust* and the trustees are mere mandatories. Until the mandate has been acted upon the owner of the property, who alone stands towards the trustees in the relation of *cestui fue trust* can

recall the money and authority at pleasure. It is an arrangement by the debtor for his own convenience only and there can be no privity between the agent and the creditors. Where, however, a trust in favour of creditors has been communicated to the creditors, it can no longer be revoked by the settlor, because the creditors, being aware of such a trust, might have been thereby induced to a forbearance in respect of these claims which they would not otherwise have exercised; and *a fortiori* will this be the case when the deed has been acted upon. The communication may be proved by the creditors by their having acted upon it or being party or privy to it. English cases relied on. (*Madhavan Nair, Offg. C.J. and Stodart, J.*) NAGABHUSHANAM RAO *v.* LAKSHMINARASIMHA RAO. **179 I.C. 449=11 R.M. 586=48 L.W. 564=1938 M.W.N. 1086=A.I.R. 1939 Mad. 42=(1938) 2 M.L.J. 1054.**

DECLARATION. *See also* SPECIFIC RELIEF ACT, S. 42.

———*Granting of—Discretion of Court—Wrongful dismissal of servant—Refusal of declaration where damages adequate remedy.*

In the case of a wrongful dismissal of a servant, the relief by way of damages is an adequate remedy and that being so, a Court can in its discretion refuse a declaration or injunction. (*Harries and Rachhpal Singh, JJ.*) PRABHU LAL UPADHYA *v.* DISTRICT BOARD OF AGRA. **I.L.R. (1938) All. 252=1938 A.W.R. (H.C.) 223=175 I.C. 875=11 R.A. 3=1938 All.L.J. 351=1938 A.L.R. 505=A.I.R. 1938 All. 276.**

DECLARATORY DECREE. *See* SPECIFIC RELIEF ACT, S. 42.

DECREE. *See also* C.P. CODE.

Adjustment and satisfaction.
Amendment.
Appellate decree.
Assignment.
Conditional decree.
Consent decree.
Construction.
Declaratory decree. [*See* SPCIFIC RELIEF ACT].
Executability.
Execution.
Ex parte decree.
Instalment decree.
Interpretation.
Payment under
Recitals in.
Rights under.
Setting aside.
Validity.
Variation by consent.

Adjustment and satisfaction.

———Adjustment and satisfaction — Decree for specific amount as against two persons and for costs as against those and another—Receipt of amounts towards decree—If goes towards reduction of costs also or only amount of decree without costs—Rule—Right of decree-holder. *See* C.P. CODE, O. 21, R. 2. **50 L.W. 908.**

Amendment.

———Amendment—Powers of Court—Limits to—Accrual of interest of third party in property

affected by decree—Subsequent amendment long after—Competency. *See* C.P. CODE, SS. 151 AND 152. **41 Bom.L.R. 800.**

Appellate decree.

———*Appellate decree—Ruling decree.*

Where there is an appellate decree, that is the decree that has to be construed, and that decree takes the place of the lower Court's decree. (*Stone, C.J. and Digby, J.*) SAHEBCHAND HARAKCHAND *v.* BATTASRAO RAMJI. **I,L,R. (1939) Nag. 261=175 I.C. 561=10 R.N. 462=A.I.R. 1938 Nag. 237.**

Assignment.

———*Assignment—Right of assignee to decree passed in appeal.*

Where a decree is assigned what is transferred is not the decree itself but the interest of the decree-holder in the decree as may be finally determined. The assignment of a decree, therefore carries with it the right to the decree passed in appeal. (*Fazl Ali and Meredith, JJ.*) RAM KUMAR RAM SARAFF *v.* MOHAN LAL MAHARAJ. **6 B.R. 256=185 I.C. 788=12 R.P. 421=21 P.L.T. 363=A.I.R. 1940 Pat. 270.**

———*Assignment—Validity—Assignment before it is drawn up.*

An assignment of a decree after the judgment is pronounced but before the decree is prepared and signed, is valid. The assignment of a decree is nothing more than an assignment of the rights conferred by the decree. These rights are acquired as soon as the decree is passed or pronounced and cannot be made dependent on the preparation of the decree which is more or less a ministerial act. As O. 20, R. 7, C.P. Code, provides that the decree shall bear the date on which the judgment is pronounced, the decree must in the eye of law be presumed to have come into existence on the date on which the judgment was pronounced. (*Fazl Ali and Meredith, JJ.*) RAMKUMAR RAM SARAFF *v.* MOHAN LAL MAHARAJ. **6 B.R. 256=185 I.C. 788=12 R.P. 421=21 P.L.T. 363=A.I.R. 1940 Pat. 270.**

———*Attachment and sale of—What passes—Purchase of original decree after confirmation and variation in appeal—Rights of purchaser—Right to benefit of variation—Merger—Rule of—Limitation.*

It is evident that when a person purchases a decree at a sale in execution, he in fact purchases the right acquired by the decree-holder under that decree, and it is only when the decree purchased by him is reversed or set aside that it can be legitimately said that the decree purchased confers no rights upon the purchaser. Where the decree in question is conferred by the appellate Court, it cannot be said that the purchaser gets nothing as purchaser of the decree. The decree does not become a non-entity in law after it is confirmed. On appeal the rule of merger has its own limitations. The decree by confirmation receives further sanctity as a result of the affirmance. The purchaser of the decree cannot however, be entitled to the benefit of any variation in the decree made by the appellate Court, when he has purchased the decree of the lower Court after modification in appeal. (*Harries, C.J. and Fazl Ali, J.*) GOPAL DAS *v.* JAGESHWARI PRASAD NARAIN

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DEC. **190 I.C. 431=21 Pat.L.T. 125=A.I.R. 1940 Pat. 259.**

———Based on admission on point of law by legal practitioner—Binding nature of. *See* LEGAL PRACTITIONER—ADMASSION. **181 I.C. 721.**

Conditional Decree.

———*Conditional decree—Time limit imposed for fulfilment of condition—Appeal filed—Running of time,*

Where a decree directs something to be done by way of a condition and imposes a time limit, the time will run, when an appeal is filed, not from the date of the original decree but from that of the appellate decree, although the position is different in cases where the decree is carried into execution before the appeal is heard. (*Khundkar, J.*) TARAPADA GHOSE *v.* SAKHI KANTA BEHARA. **42 C.W.N. 492.**

Consent decree.

———Constant decree—*See* COMPROMISE.

———*Consent decree—Essentials.*

In a consent decree it should be and generally is stated that it is "by consent". Such a statement is necessary and important because S. 96, C.P. Code, provides that no appeal shall lie from such a decree. To constitute consent there must be a bargain between the parties and not a mere acceptance of the order offered. (*Lort Williams, J.*) RAJ KUMAR *v.* SHIVA PRASAD. **184 I.C. 553 =12 R.C. 241=A.I.R. 1939 Cal. 500.**

———*Consent decree—Variation by consent—Inherent power of High Court—C.P. Code, O. 20, R. 3.*

There is no inherent power in High Court to vary a consent decree by consent. It is true that O. 20, R. 3 does not apply in terms to the High Courts but the principle applies, and the main principle is that a decree once passed is immutable, subject of course to review or to any subsequent order or decree which may be passed on appeal and subject only to one specific provision, O. 20, R. 11 (2), C.P. Code. The fact that the decree is by consent makes no difference whatever. (*Ameer Ali, J.*) SURPUT SINGH *v.* MAHARAJ BAHADUR SINGH. **172 I.C. 282=10 R.C. 356 =42 C.W.N. 519=A.I.R. 1937 Cal. 222.**

Construction.

———*Construction — "Appeal dismissed with costs"—Meaning of—Right of respondent to costs of appeal.*

The expression "Appeal dismissed with costs" can only have one meaning, namely that the appellant has to pay the costs of the respondent of the appeal, he having failed in the appeal. It cannot be construed as meaning merely that the appellant is not to get his costs. (*Beaumont, C. J.*) YADAVA *v.* BACHOO. **41 Bom.L.R. 949=186 I.C. 105=12 R.B. 298=A.I.R. 1939 Bom. 493.**

———*Construction—Application for review dismissed—Order by High Court to treat it as one for setting aside* ex parte *decree—Order subject to condition that applicant should deposit decretal amount within a month—Time, if essential part of order.*

An application for review of judgment was dismissed by the lower Court. The applicant came to the High Court in revision and obtained an order that his application should be treated by the lower Court as one for setting aside an *ex parte* decree. This order was subject to the condition that the applicant should deposit in the Court below the full decretal amount within a month. The amount was deposited only after the period of one month, as there was delay in returning the record to the Court below. The applicant applied to the High Court for extension of time.

Held, that the period of one month was not an essential part of the decree and that the Court merely intended that the matter should not be reopened except upon a deposit of the decretal amount in Court and that as money had been already deposited in accordance with the essential condition which the Court laid down, the application to extend the period should be granted. (*Allsop, J.*) KHIALI RAM *v.* BUCHA RAM. **162 I.C. 909=8 R.A. 914=1936 A.W.R. 220= 1936 All.L.R. 514=A.I.R. 1936 All. 371.**

———Construction—Award against Co-operative Society describing it as consisting of its members and past members—If one against members and past members—Execution against members—Permissibility. *See* CO-OPERATIVE SOCIETIES ACT, S. 18. **20 N.L.J. 6.**

———Construction — Charge decree — Suit for possession by vendee—Decree declaring charge on property for unpaid purchase money in favour of defendant and directing plaintiff to pay unpaid purchase money to defendant within time fixed—In default vendor given right to bring property for sale—If personal decree against vendee —Vendor's right to proceed against other property of vendee without getting personal decree afresh. *See* C.P. CODE, O. 34, R. 4. **42 Bom. L.R. 592.**

———*Construction—Compromise decree — Defendant agreeing to pay minor plaintiff certain sum on his attaching majority and execution receipt—Condition, if a condition precedent—Death of plaintiff before attaining majority—Right of his mother as heiress to recover amount,*

The material words of a compromise decree were as follows: "That thereupon, the first defendant agreed, out of grace and affection, to pay to the plaintiff Rs. 12,000; that regarding the amount of Rs. 15,000 made up of this sum of Rs. 12,000 and the aforesaid mesne profits of Rs. 3,000, together with the interest. . . . . the plaintiff shall, within about six months after his attaining majority execute and get registered a receipt in favour of the first defendant to the effect that the arrears of mesne profits have been discharged, without the plaintiff having any claim to a share in so far as the first defendant is concerned; that the plaintiff shall in person or through Court deliver it to the first defendant; that thereafter the plaintiff shall, by means of a process of Court recover the aforesaid amount by proceeding against the first defendant and the share of properties mentioned in the suit and belonging to him. . . . . That till the said amount is realised, the same shall be charged upon the said properties. So long as the plaintiff does not execute an acquittance receipt, as aforesaid, in favour of the first defendant, within the aforesaid time, the plaintiff is not entitled to recover the above amount in the aforesaid manner." The plaintiff died unmarried before attaining majority, leaving him surviving his mother as his heiress.

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ing, that she might be brought on the record as The plaintiff's mother presented a petition pray- his legal representative and that she might recover the amount to which her son would have been entitled under the decree had he survived. This petition was presented after the date on which the nfant plaintiff, had he survived, would have attained the age of majority.

Held, that the provision for the execution of the acquittance receipt by the original plaintiff was only of the nature of a direction inserted *ex abundanti cautala* to prevent its being thought that the plaintiff on attaining his majority was entitled both to receive the Rs. 15,000 and interest and to take proceedings to set aside the compromise, that it was very unlikely that the compromise would have been framed in such a form that the Rs. 3,000 which were given as representing the balance of the *mesne profits* to which the plaintiff was beyond doubt entitled, whether the compromise agreement was set aside or not, were to be paid only if the plaintiff attained his majority, and that in as much as under the compromise decree the fate of the Rs. 12,000 and of the Rs. 3,000 was joined together, the right of the plaintiff's mother must be the same with regard to the Rs. 12,000 as it was with regard to the Rs. 3,000 and that this constituted a strong reason for holding that the payment of these sums was not subject to a condition precedent that the plaintiff in the action should attain the age of majority, and that the petitioner as a Hindu mother represented the estate of her deceased son for all purposes, and a release receipt executed by her would be as valid as if it had been executed by the original plaintiff. (*Lord Maugham.*) MURUGESAM PILLAI *v.* MINAKSHISUNDARA AMMAL. **63 I.A. 429=38 Bom.L.R. 1233=9 R.P.C. 99=41 C.W.N. 22=17 Pat.L.T. 914=164 I. C. 337=1936 O.L.R. 515=1936 All.L.R. 826 =1936 M.W.N. 1258=1936 P.W.N. 875= 1936 O.W.N. 851=44 L.W. 579=A.I.R. 1936 P.C. 309=71 M.L.J. 831 (P.C.).**

———*Construction — Compromise decree—Two compromise decrees—Mistake in first as to identity of property—Court, if can be influenced by previous compromise.*

Where parties enter into a compromise decree the subject matter in dispute being a previous compromise decree, the previous compromise decree must be taken to have been dead; and a mistake in the first regarding identity of property, though apparently acquiesced in the previous compromise ought not to influence the Court's decision in coming to a correct interpretation on the terms of the later compromise decree. (*Roberts, C.J. and Spargo, J.*) U LUN *v.* SUBRAMANIAN CHETTYAR. **165 I.C. 257=9 R.R. 198=A.I.R, 1936 Rang. 458..**

———*Construction—Consent decree—Stipulations as to time, space or method.*

When parties by consent decree provide that an *ex parte* decree should be set aside if the judgment- debtor furnishes certain security within fixed time but on default the decree should stand, the stipulations as to time, space or method are not to be ignored. (*Roberts, C.J. and Baguley, J.*) ANANT SINGH v. SARJU SUKUL. **164 I.C. 1041=9 R.R. 174=A.I.R. 1936 Rang. 418.**

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———*Construction — Costs—Liability for—Suit on behalf of minor—Dismissal with costs—Absence of direction for payment of costs by next friend—Liability of minor's estate.*

Where the suit of a minor represented by his next friend is dismissed with costs, if the order as to costs does not say that the next friend should pay costs, but provides that the plaintiff do pay the costs of the defendants, the estate of the minor is liable to satisfy the costs. Where the plaintiff is a minor if the Court intends the next friend to pay the costs, there should be an express direction to that effect. In the absence of such direction the estate of the minor remains liable. (*Engineer, J.*) MULCHAND JIVRAJ *v.* D. Low. **41 Bom.L.R. 521=185 I.C. 252=12 R. B. 226=A.I.R. 1939 Bom. 350.**

———*Construction — "Date of realisation"—Award of interest until date of realisation—Decree-holder obtaining leave to bid at sale and set-off—Right to interest after date of sale.*

Where the holder of a decree which awards interest "until the date of realisation" has been given permission to bid and set-off, the date of realisation is the date of sale. The words "date of realisation" in such a case cannot be construed as the date on which the money is realised by the decree-holder. (*Burn and Stodart, JJ.*) RAMABADRA REDDIAR *v.* LAKSHMAMBAL AMMAL. **1939 M.W.N. 310=49 L.W. 440=(1939) 1 M.L. J. 466.**

———Construction—Declaration that plaintiff was owner of share in patni—Direction to pay certain amount in Court within fixed period and direction to defendants to reconvey to plaintiff his share on deposit of amounts and costs of conveyance—Deposit of all amounts by plaintiff—Default by defendant—Effect of—Beneficial interest in share declared—If passes to plaintiff. *See* BENGAL TENANCY ACT, S. 26-F (4) (*a*). **63 C.L.J. 49.**

———*Construction—Decree against firm—Prayer in plaint for personal decree against members of firm.*

Where the plaintiffs filed a suit, praying for a decree against the defendants in their personal capacity, but the Court granted it against the firm of which they were proprietors.

Held, that the decree was granted against the firm which was merely a convenient name for describing a group of people and the decree was, therefore, one against each member of the group and therefore, included within it a grant of the prayer in the plaint. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) FEROZ SHAH *v.* KALU RAM. **164 I.C. 181=9 R. Pesh. 15=A.I.R. 1936 Pesh. 155.**

———*Construction—Decree for future maintenance—Executability—Presumption.*

Ordinarily a decree for future maintenance should be construed as a decree capable of execution unless it clearly appears from the pleadings and from the decree that the intention was to grant a mere declaratory decree. The very purpose of a suit for future maintenance is to ensure the due payment of the amont claimed, and to avoid the institution of fresh suits. (*Iqbal Ahmad and Harries, JJ.*) KALLU MAL *v.* MST. BARFO. **I.L.R. (1938) All. 535=176 I.C. 139=11 R.A. 59=(1938) A.L.R. 565=1938 A.L.J.**

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495=1937 A.W.R. (H.C.) 308=A.I.R. 1938 All. 362.

———*Construction—Decree for khas possession of land—Judgment-debtor not ordered to remove structures within certain time—Possession delivered to decree-holder on judgment-debtor not complying with order—Judgment-debtor, if can compel decree-holder to remove structures or pay compensation.*

The material portion of a decree for khas possession passed in favour of a landlord against his tenant was as follows:—"It is further ordered and decreed that the plaintiff do get khas possession of the land in suit by ejecting defendant therefrom. It is further ordered that the defendant do remove the structures which are on the land, within two months from this date, failing which the structures will be removed by the plaintiff and the defendant will be liable for costs." The defendant-judgment-debtor did not remove the structures within time limited in this decree and the plaintiff decree-holder obtained delivery of possession of the land and the structures. The judgment-debtor then filed an application for restitution of the structures to him.

Held, that the judgment-debtor not having removed the structures within the time limited, lost the right of removing them and that he could not compel the decree-holder to remove them or to pay compensation. (*Mitter and Khundkar, JJ.*) RAGHUBIR SHAW *v.* RAWSAN SHAW. **189 I.C. 467=13 R.C. 71=70 C.L.J. 598=A.I.R. 1940 Cal. 127.**

———*Construction — Decree-holder directed to proceed against certain defendants in the first instance, and in case the amount is not so realised, to proceed against another—Right to execute against latter—Conditions of.*

Where a decree directs that the decree-holder should in the first instance proceed against certain defendants and against another in case the amount cannot be realised from the former, the decree-holder cannot proceed to execute the decree against the latter without alleging and proving that the amount cannot be realised from the defendants who are to be proceeded against in the first instance. The executing Court cannot assume, in the absence of anything on the record to show that the amount cannot be realised from the defendants who are liable in the first instance, that the decree-holder is entitled to or is obliged to execute it against the defendant who is liable only alternatively. (*Burn and Lakshmana Rao, JJ.*) MUTHU RAMA REDDI *v.* MOTILAL DAGA. **I.L.R. (1938) Mad. 326=176 I.C. 753=11 R.M. 164=1937 M.W.N. 943=46 L.W. 540=A.I.R. 1938 Mad. 113.**

———*Construction—Description of plaintiff as "Official Receiver, High Court."*

The words in a decree "Official Receiver, High Court" are merely a description of the occupation and standing of the party concerned. There is nothing in it to appraise the executing Court of the fact that the suit in which the decree was made, was brought by a person who was functioning as a receiver at the time when the suit was brought. (*Costello and Panckridge, JJ.*) KANTI CHANDRA MUKHERJI *v.* MUKUNDA LAL BARMAN. **I.L.R. (1937) 2 Cal. 529=175 I.C.**

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209=10 R.C. 765=A.I.R. 1938 Cal. 304.

———Construction—Direction to party to deposit amount in Court within fifteen days from date of decree—Interpretation of—Date of decree—If to be excluded—Intention of Judge—If material. *See* GENERAL CLAUSES ACT, S. 9. **40 Bom.L.R. 892.**

———Construction—Duty of Court—Order for costs—Circumstances in which order was made and conduct of parties—If relevant. *See* CALCUTTA HIGH COURT RULES. (*ORIGINAL SIDE*), CH. XX, R. 13. **40 C.W.N. 1068.**

———*Construction—Executability—Decree containing provision for payment of instalments—Execution application on default in payment—Subsequent compromise relating to manner of payment—Liability of surety under original decree kept on foot—Original decree, if executable.*

A decree was passed imposing a decretal liability of a certain amount at a certain rate. It did not provide for the discharge of that liability by instalments. It contained provisions for the payment of instalments amounting to a smaller sum and at a lower rate of interest upon the observance of which provisions of the judgment-debtors could escape the decretal liability. On the judgment debtors failing to observe these provisions, an application for the execution of the decree was taken out and a compromise was again arrived at modifying only the provisions upon the observance of which the full decretal liability could be avoided. Under the new compromise the liability of the surety for the decretal amount under the original decree was kept on foot and there was no provision which would operate to render his property liable to meet a liability created by the compromise in substitution therefor:

Held, that the compromise was only a modification of the manner in which the original decree was to be satisfied, that the decree still subsisted and was executable. (*Lord Russel.*) HET RAM BODH RAJ *v.* AYA RAM TOLA RAM. **42 C.W.N. 509=1938 A.L.J. 150=1938 A.W.R. (P.C.) 45= 1938 O.L.R. 98=1938 A.L.R. 129=1938 O.W.N. 310=10 R.P.C. 196=4 B.R. 308=172 I.C. 999=1938 O.A. 323=47 L.W. 606=40 P.L.R. 606=1938 M.W.N. 662=32 S.L.R. 415 (P.C.).**

———*Construction—Injunction restraining permanent installation of image in temple—Temporary installation on particular occasions—If prohibited.*

In a dispute between the Digambar Jains and the Swetambar Jains, the former obtained an injunction against the latter restraining them from permanently installing a clothed and adorned image in a temple visited by the Digambar Jains, because that interfered with the Digambar Jains right of worship. Swetambar Jains took away the image but whenever they went to worship they took the image with them and again brought it back. On an application by the Digambar Jains against this procedure of Swetambar Jains Court ordered the Swetambar Jains to take the image only once or twice a year. On appeal against this order.

Held, that an injunction restraining the Swetambar Jains from permanently installing the image in the temple could not be interpreted as restrain-

ing them from temporarily installing the image on any day in the year. An injunction granted by a decree must be strictly construed. (*Sir John Wallis.*) DHANU LAL SUCHANTI *v.* HUKUM CHAND. **63 I.A. 93=160 I.C. 101=17 Pat.L.T 69=8 R.P.C. 144=38 Bom.L.R. 336=63 C.L.J. 37=40 C.W.N. 293=1936 O.L.R. 71=1936 A.L.R. 104=1936 P.W.N. 88=A.I.R. 1936 P.C. 44 (P.C.)**

———*Construction—Instalment decree—On defendants' failure to pay any instalment on due date, it should be paid along with subsequent instalment with higher interest for days of delay—On defendant's failure to pay both instalments together, whole amount with still higher interest becoming due—Default in payment of one instalment—Defendants paying amount in default with stipulated higher interest before date of following instalment—Default in next instalment—Right to execute for whole amount.*

The plaintiffs obtained an instalment decree providing that each instalment was to be paid on a particular date in every year with certain interest. It further provided that if the defendant failed to pay any instalment together with interest on the due date, then they should pay the amount of two instalments together with higher stipulated interest on the instalment in default for the days of delay, and if they failed to pay both the instalments together, then they should pay the whole amount at once before the expiry of the period of instalments together with a still higher interest. The defendants made default in payment of one instalment, but paid the instalment in default with the stipulated interest before the subsequent instalment became due. The defendants again made default in the payment of the subsequent instalment The plaintiffs applied for execution for the recovery of whole amount due with the penal interest provided therein.

Held, that the decree did not at all mean that both the over-due instalment and the instalment which was payable thereafter might not be paid in full or in part before the date on which the following instalment was due. It was not intended by the parties that even when the subsequent instalment was not paid on the due date., or if the first instalment was paid at any time before that date, the whole amount would not become payable at once. The fact that the defendants paid the over-due instalment earlier than the date provided by the decree for the purpose of avoiding the enhanced interest did not relieve the defendants of the obligation of paying the subsequent instalment on the due date. Therefore the plaintiffs were entitled to apply for the recovery of the whole amount. (*Rupchand Bilaram and Mehta, A.J.Cs.*) GUNOMAL *v.* LALOMAL. **31 S.L.R. 437=171 I.C. 841=10 R.S. 127=A.I.R. 1937 Sind 244.**

———Construction—Liability for costs—Mortgage suit—Subsequent purchaser—Personal liability for costs. *See* MORTGAGE—MORTGAGE SUIT. **177 I.C. 689=1938 P.W.N. 710.**

———*Construction—Mortgage decree—Decree on award, hypothecating land.*

A decree hypothecating land and expressly authorising the decree-holder to get the amount due under it realised by sale of the property falls within the purview of O. 34, C.P. Code and is in substance a mortgage decree, although the decree is based on an award. It is not, therefore, necessary to effect attachment of the land before ordering its sale in execution. (*Ram Lall, J.*) LADLI PRASAD *v.* CHAMAN LAL. **I.L.R. (1940) Lah. 231=185 I.C. 843=12 R.L. 324=41 P.L.R. 632=A.I.R. 1939 Lah. 473.**

———*Construction—Order as to costs—Personal liability—Order giving right to party to recover costs from another party and making costs a first charge on sale proceeds of particular property—Personal liability—If taken away—C. P. Code, S.* 35.

A direction in a decree or order that the defendant do pay a certain sum of money *prima facie* imposes a personal liability, though the words are not conclusive because under S. 35, C. P. Code, the Court has undoubtedly the power to direct that a decree should be paid out of a certain property and by certain people. Where, in proceedings for sale of properties under a mortgage decree, the order as to costs provided, *inter alia,* that "defendants 4 to 7 (appellants and 2nd respondent) will be entitled to half their costs throughout from the 1st respondent which will be paid as a first charge from the sale proceeds of item 2 of the hypotheca,"

Held, that it gave the appellants a personal decree for costs with a charge on the sale proceeds of the hypotheca, and that there was no words which took away the personal liability of the 1st respondent. (*Mockett, J.*) GOPALAKRISHNAYYA *v.* SREERAMAMURTHI. **1937 M.W.N. 292.**

———*Construction—Order for costs in mortgage action—Personal liability for.*

In a suit on a mortgage, the appeal by subsequent mortgagees against the preliminary decree being unsuccessful, those defendants were ordered to pay costs of appeal. Final decree incorporated appellate Court's order as to costs in these words "costs of appeal are to be paid by those defendants to the plaintiff" and also directed that the mortgage debt and costs were to be realised by sale of property.

Held, that in view of the express provisions in the final decree, costs could be recovered personally from the defendants in the first instance. (*Niyogi, A.J.C.*) VITHAL PATEL *v.* GULAMALI. **A.I.R. 1936 Nag. 184.**

———Construction—Provision for turns of worship of family deity and management of endowed property by Hindu brothers in partition decree—Condition against alienation—Right given to strangers to supervise and to take over management in case of mismanagement—Death of one brother without male issue—Daughter's son of latter—Claim to management of deity and endowed property—Sustainability. *See* HINDU LAW—RELIGIOUS ENDOWMENT. **41 Bom.L.R. 458.**

———*Construction—Reference to judgment—Permissibility.*

The judgment can always be referred to in interpreting the decree. (*Horwill, J.*) APPA RAO *v.* VIGNESAM SUBUDHI. **167 I.C. 469=9 R.M. 456=1936 M.W.N. 1354=44 L.W. 825=A.I.R. 1937 Mad. 118=71 M.L.J. 797.**

———*Construction—Reference to nature of suit—Avoidance of anomalous result.*

DECREE.

In construing decrees one must have regard to the nature of the suit and the previous proceedings which led to the suit. A construction which leads to an anomalous result ought to be avoided. (*Niyogi, J.*) CHINTAMAN RAMJIPANT *v.* GOVIND VITHAL. **175 I.C. 753=11 R.N. 12=A.I.R. 1938 Nag. 376.**

———*Construction—Scheme for temple—Provision conferring right to vote on Vaishnavas of Tengalai sect—"Untouchable" Vaishnavas—If excluded—Principles of construction—Omission to put forward claim to vote for ninety years—Effect.*

It is a primary rule of construction that whatever the instrument (statute, will or decree) it must receive a meaning according to the plain sense of the words and the sentences therein contained. Where a scheme framed by the High Court for a temple contains a clause which confers the right to vote at the election of dharmakarthas of the temple, *inter alia,* on *Vaishnavas of the Thengalai* sect, the term *Vaishnavas of the Thengalai* sect, must be construed as meaning all *Vaishnavas* of the *Thengalai* sect, including untouchables as well if they are *Vaishnavas,* where there is no specific exclusion of untouchables as such. The burden is upon those who deny it to prove that the words are intended to mean something different from what they mean. The fact that for many years (ninety years) no member of the untouchable community ever claimed to be included in the voters' list signifies nothing. From the fact that no claim has been made, it does not follow that had the claim been made and contested, it would have been disallowed. Nor would the fact that the community abstained from making a claim for ninety years destroy their legal rights. "It must be remembered that the necessity of the times often forced on men customs which in later years were not necessary. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SUBBARAYALOO *v.* RANGANATHA MUDALIAR. **182 I.C. 78=11 R.M. 915=1938 M.W.N. 376=47 L.W. 480=A.I.R. 1938 Mad. 571=(1938) 1 M.L.J. 530.**

———*Construction—Settlement Court decree—Decree for* qabzadari *rights—If creates occupancy or under-proprietary rights.*

Defendant's father claimed in the settlement Court a certain area which admittedly included the plot in suit as *sir* in the right of zemindar. But the finding in the judgment was that he or his ancestors had never been in proprietary possession of the village and that they had only held management of it at certain times as *muqaddams.* It was further held that he was entitled to a decree for *qabzadari* right in the land in suit.

Held, that although the words *qabzadari* right do not necessarily mean occupancy right and have sometimes been construed even as meaning under proprietary right, the circumstances of the case clearly indicate that the word *qabzadari* was used in the decree only in the sense of occupancy and not in the sense of under proprietary right. (*Srivastava, J.*) BINDA PRASAD *v.* BIHARI TIWARI. **12 Luck. 256=163 I.C. 186=8 R.O. 420=1936 O.W.N. 562=1936 R.D. 283=1936 O.L.R. 338 =A.I.R. 1936 Oudh 316.**

———Construction—Suit against Hindu father and son on mortgage by former—Mortgage held not binding on minor *qua* mortgage—Finding of consideration—Court passing decree for sale against father's share and postponing personal decree—If amounts to exoneration of minor. *See* C. P. CODE, O. 32, R. 7. **(1937) 1 M.L.J. 384.**

———*Construction—"Suit dismissed with costs" Meaning of—Separate sets of costs for defendants—If permissible—Practice in mofussil and appellate side of Bombay High Court.*

The expression "Suit dismissed with costs" in a decree means that the plaintiff is to pay the costs of the defendants; if there are more defendants than one who appear separately, all the defendants are entitled to their costs separately under such an order. Both in the mofussil and on the appellate side of the Bombay High Court, an order expressed in terms "suit (or appeal) dismissed with costs", can only mean that the plaintiff or appellant is to pay all the defendants' or respondents' costs as taxed, and not merely part of them, *i.e.,* one set for all. (*Beaumont, C.J. and Wassoodew, J.*) SHRIDHAR BALKRISHNA *v.* POONA CITY MUNICIPALITY. **42 Bom.L.R. 878.**

———*Construction—Suit by reversioners to set aside sale—Decree declaring part of consideration lawful.*

Where a reversioner brought a declaratory suit praying that certain sale-deed be declared null and void and for proper orders to be issued if any amount of the sale consideration be found lawful, and the suit was decreed, declaring certain part to be lawful consideration.

Held, the import of decree was that when the reversion opened the reversioner would be entitled to obtain possession of the property on payment of the lawful consideration. (*Baipai, J.*) MT. MAINA *v.* BHAGWATI PRASAD. **164 I.C. 193=9 R.A. 122=1936 A.L.J. 1230=1936 A.W.R. 691 =1936 All.L.R. 709=A.I.R. 1936 All. 557.**

———*Effect of—If forms root of title—If can operate as assignment of property.*

Chatterji, J.—It is wrong to say that a decree which is final and conclusive between the parties can never be the root of title. It creates in favour of the successful party a new title though it may be in affirmance of a pre-existing title. But the question whether a decree operates as an assignment of certain property is quite different. That depends upon the nature of the decree. (*Fazl Ali and Chatterji, JJ.*) JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON. **19 Pat. 433 =A.I.R. 1940 Pat. 516.**

Executability.

———*Executability—Award decree—Arbitrator finding that specific sum was due to mortgagee and that he was entitled to immediate possession.*

The parties to a suit referred their dispute regarding a debt due on a mortgage to arbitration without the intervention of the Court. The arbitrator found that a specific sum was due to the mortgagee and that he was entitled to immediate possession. A decree was passed in terms of the award. In execution of the decree by attachment and sale it was contended that the decree could not be executed as it was merely declaratory.

Held, that as the decree-holder was entitled to possession according to the terms of the award, the decree was not merely a declaratory decree and it was therefore executable by attachment and sale of the mortgaged property. (*Middleton,*

J.C.) POKHAR SINGH *v.* RIKI SINGH. **168 I.C. 875=9 R. Pesh. 135=A.I.R. 1937 Pesh. 48.**

———*Executability—Compromise in execution.*

If under a compromise made during the execution proceedings, the judgment-debtor undertakes to transfer a certain land to the decree-holder for a portion of the decretal amount and also to charge their house for the payment of the balance in yearly instalments, the compromise does not create a new contract between the parties and as such it does not extinguish the original decree. All that is intended by the compromise is to prescribe a mode of payment of the decretal amount. (*Abdual Qayoom, C.J. and Wazir, J.*) JAWAL LON *v.* KOTHI VASA RAM. **41 P.L.R. J. & K. 104.**

———*Executability—Decree containing direction to a party to pay a certain sum.*

Although certain parts of a decree may be declaratory in nature, where there are express directions to perform certain duties such as the payment of money either at a point of time or periodically, such directions are meant to be enforced in execution. The appellant was in possession of the land of the respondent on a decree passed on award and had bound himself to pay to the appellant a certain amount per annum and also a certain sum on account of maintenance. The respondent tried to execute the decree for sums not paid. The appellant pleaded that the decree was declaratory in nature.

Held, that the parties did not intend that the respondent should be placed under the necessity of bringing a separate suit for the recovery of these sums of money as they fell due and the decree was a decree directing the payment of those sums and to that extent it was executable. A.I.R. 1928 Mad. 61, Rel. on. (*Almond, A.J.C.*) QUTBUDDIN KHAN *v.* NAWABZADASARDAR SADULLAH KHAN. **169 I.C. 942=10 R. Pesh. 12=A.I.R. 1937 Pesh. 62.**

———Executability—Final decree in mortgage suit—Provision for sale of specified item of property to discharge prior mortgage debt in pursuance of preliminary decree—If merely declaratory. *See* EXECUTION—EXECUTING COURT. **(1937) 2 M.L.J. 881.**

———*Executability—Final decree passed pending appeal from preliminary decree—Appeal resulting in setting aside of preliminary decree—Effect on executability of final decree.*

Where an appeal is brought from a preliminary decree before the final decree is passed, such appeal is competent and if the preliminary decree be set aside, the final decree falls to the ground along with it. The final decree is superseded by the setting aside of the preliminary decree, whether the appeal has been brought before or after the passing of the final decree; and until a final decree in accordance with the appellate decree is passed, there is no decree which can be executed by the parties or which is capable of execution. (*Agarwala and Rowland, JJ.*) JHARI LAL GOPE *v.* RAMDHICARI MISSIR. **6 B.R. 569=188 I.C. 45 =12 R.P. 651=A.I.R. 1940 Pat. 668.**

———*Executability—Substitution of decree—One of the decree-holders in original decree substituted for all by fresh decree—Original decree, if executable.*

Where a decree is substituted by a fresh decree, the original decree could not, no doubt, be executed. But where by the fresh decree there is only a substitution of one of the decree-holders mentioned in the original decree for all of them, there is no substitution of the whole decree, and the substituted decree-holder is still entitled to execute the original decree. (*Skemp, J.*) MST. DURGA DEVI *v.* MATHRA DAS. **166 I.C. 929=9 R.L. 434=38 P.L.R. 580=A.I.R. 1937 Lah. 18.**

Execution.

———Execution—Conditional decree—Mode of applying for execution—Practice. *See* LIMITATION ACT, ARTS. 183 AND 181. **41 C.W.N. 1133.**

———*Execution — Limitation—Starting point—Variation of decree by compromise.*

Where the effect of a compromise was to convert the original decree into a decree for payment by instalments and where according to the terms of the compromise the decree-holder could not put his decree into execution until the judgment-debtor had defaulted, in such case the decree-holder is entitled to put his decree into execution within 3 years after the first default of the judgment-debtor. (*Thom, C.J.*) BHIKI MAL MURARI LAL *v.* KUNDAN LAL. **186 I.C. 614=12 R.A. 426= 1939 A.L.J. 1051=1939 A.W.R. (H.C.) 870=A.I.R. 1940 All. 107.**

Ex parte Decree.

———*Ex parte* decree—Setting aside. SEE ALSO C. P. CODE. O. 9, R 13.

———Ex parte *decree—Setting aside—Remedy of judgment-debtor.*

It is open to the defendant against whom an *ex parte* decree is passed to choose any of the two remedies open to him either by an application under O. 9, R. 13, Cr. P. Code, or by an appeal or revision and the superior Court has the jurisdiction of deciding on appeal or revision as to whether due service was effected or not and of remanding the suit for retrial if it was not so effected. (*Mir Ahmad, A.J.C.*) SIRI KRISHAN SAIGAL *v.* ARJAN SINGH. **160 I.C. 462=8 R. Pesh. 113=A.I.R. 1936 Pesh. 1.**

———Ex parte *decree—Setting aside—Right to sue—Defects in service of summons.*

Defects in service might be grounds for setting aside an *ex parte* decree under O. 9, R. 13, C. P. Code, but unless there was fraud with regard to service which kept the defendant in ignorance of the suit or unless by putting in a false return the plaintiff kept the Court in ignorance of the real state of affairs and thus enabled it to pass a decree which otherwise it could not have passed, no suit for setting aside the decree would lie. (*Mukherjea, J.*) KUMAR SARAT KUMAR ROY *v.* DHARMADAS BHATTACHARJEE. **174 I.C. 522=10 R.C. 685=42 C.W.N. 375=A.I.R. 1937 Cal. 738.**

———Ex parte *decree—Suit to set aside—Claim in original suit—If can be attacked as false.*

In a suit to set aside an *ex parte* decree passed against the plaintiff, the latter may attack not only the original suit in which the *ex parte* decree has been obtained, as being a fraud from beginning to end, but also the claim itself in that suit as false. (*Ghose, J.*) DHARANIDHAR *v.* NITYA GOPAL. **43 C.W.N. 1148=A.I.R. 1939 Cal. 732.**

———*Ex parte* decree—Suit to set aside—Competency. *See* C. P. CODE, O. 9, R. 13. **A.I.R. 1937 Sind 18.**

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———Ex parte *decree—Suit to set aside—Grounds of maintainability—Allegation of perjury on part of plaintiff—Sufficiency.*

In a suit to set aside an *ex parte* decree of a competent Court on the plea of fraud, the mere allegation that the plaintiff had perjured himself is not sufficient to constitute a fraud. It was never intended that a suit based upon the plea of fraud should be used merely in order to get a matter re-heard on appreciation of the evidence which satisfies the unsuccessful party. (*Davis, J.C. and Mehta, A.J.C.*) NARAINDAS MAVJI *v.* THAKURDAS KHEMCHAND. **166 I.C. 438 (1)=9 R.S. 145=A.I.R. 1936 Sind 212.**

———Ex parte *decree—Suit to set aside for fraud—Inference of fraud—Merits of claim in former suit—If can be gone into.*

No doubt, a decree passed by a competent Court cannot be set aside by a suit, simply on the ground that it is based on a false claim or on the mere ground that there was no service of summons or notice; but after the Court comes to a finding as to the non-service of summons or notice, it is open to it to go into the merits of the previous suit with the object of determining as to whether there was a motive for wilful or fraudulent suppression of the notice or summons in order to obtain a decree based on a false claim. Where, therefore, the mere non-service of summons is not by itself sufficient to prove fraud, it is permissible for the Court to go into the merits of the original claim and if the claim is found to be false, to draw such inference as to fraud as the circumstances may warrant. (*Fazl Ali, J.*) JAGDEO PRASAD *v.* BHAGWAN HAJAM. **161 I.C. 474=8 R.P. 449=1936 P.W.N. 151=A.I.R. 1936 Pat. 135.**

———Ex parte *decree got by means of false endorsements on summons—If can be set aside—Extrinsic and intrinsic fraud—Distinction—False allegations in plaint—Effect of.*

A suit to set aside a decree is maintainable on the ground of extrinsic fraud but not on the ground of intrinsic evidence. To make false allegations in a plaint, on the basis of which a decree is passed, does not amount to extrinsic faud. Extrinsic fraud is fraud upon the Court outside the suit. Where false endorsements are got up by the plaintiff on the summons issued by the Court in order to mislead the Court into making an *ex parte* decree against the defendant, the case is one of extrinsic fraud affording sufficient ground for setting aside the *ex parte* decree. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) MARIGA *v.* SANJEEVIAH. **44 Mys.H.C.R. 216=18 Mys.L.J. 36.**

Instalment decree.

———*Instalment decree—Default clause—Option of decree-holder.*

Where the terms of an instalment decree give an option to the decree-holder to enforce the penalty for default, the decree-holder should not be deprived of that option. Thus the whole decree does not become payable on the date of the first default leaving no option to the decree-holder in the matter. (*Tek Chand and Bhide, JJ.*) SHANKAR DAS *v.* DESA MAL MALA MAL. **162 I.C. 673=8 R.L. 938=A.I.R. 1936 Lah. 159.**

———*Instalment decree—Default clause—Waiver—Right of decree-holder.*

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A provision in a decree payable in instalments that on default in payment of any instalment the entire amount then due would become payable forthwith, is imposed for the benefit of the decree-holder and it is open to him to waive the benefit of that provision. (*Tek Chand, J.*) CHARAN SINGH *v.* KISHAN LAL. **40 P.L.R. 527.**

———*Instalment decree—Discretion of Court.*

Where the Court directs a decree to be paid by instalments, the amount of the instalments and the period for their payment is a matter for the discretion of the Court, which is to be exercised within bounds and not in a manner so as to constitute a virtual denial of the creditor's rights. Where debtors want instalments to be fixed, they ought to place evidence on record to show their inability to pay in a lump sum. In the absence of such evidence the Court is not entitled to presume debtor's inability to pay the amount due to the creditors in a lump sum. A.I.R. 1933 All. 90, Rel. on. (*Tek Chand and Abdul Rashid, JJ.*) PREM DAS RADHA KISHEN *v.* MAHOMED HUSSAN KHAN. **162 I.C. 882 (2)=8 R.L. 965=A.I.R.1936 Lah. 51.**

Interpretation.

———*Interpretation — Precedents — Value — Maintenance decree entitling realisation in case of default—If a mere declaratory decree.*

In interpreting a decree it would not be right to be influenced by decisions in which other decrees were interpreted in other cases. Each decree must be construed on its own language. Where a maintenance decree directed payment to be made at a certain date and also provided that in case of default in such payment on the due date, the decree-holder would be entitled to realise the amount due out of the person and property of the judgment-debtor, it is not a mere declaratory decree but is one capable of enforcement by execution. In cases of decrees for payment of money a condition that the money can be realised by execution is always explicit. (*Srivatsava, J.*) AINUL HAQ KHAN *v.* MST. NAWABAN. **183 I.C. 706=12 R.O. 60=1939 O.L.R. 546=1939 A.W.R. (C.C.) 129=1939 O.W.N. 768=1939 O.A. 630=A.I.R. 1939 Oudh 281.**

Payment under.

———*Payment under—Compromise decree providing for instalments to fall due on specified dates—Specified date happening to be holiday—Deposit in Court next day—If sufficient compliance.*

Where a compromise decree provides that the money under it shall be payable in instalments to fall due on specified dates if the due date provided in the decree for payment of any instalment happens to fall on Sunday or holiday, the judgment-debtor is entitled to deposit the amount in Court the next day; and if so deposited there is no default on his part. (*Venkataramana Rao and Abdur Rahman, JJ.*) SURYAPRAKASA RAO *v.* VENKATARATNAM. **178 I.C. 462=11 R.M. 457=1938 M.W.N. 389=47 L.W. 388=A.I.R. 1938 Mad. 523=(1938) 1 M.L.J. 342.**

Recitals in.

———*Recitls in—Effect of.*

A recital in a decree taken apparently from the plaint and not contained in the operative portion, is merely descriptive of the plaintiff's case, and is

not a part of the declaration granted by the decree. (*Jack and Khundkar, JJ.*) LAKSHMI NARAYAN JIE *v.* JAGADISH CHANDRA SUR. **177 I.C. 477=11 R.C. 247=42 C.W.N. 837=A.I.R. 1938 Cal. 541.**

Rights under.

———Right to execute—*Benami* decree—Real owner's right to execute. *See* C. P. CODE, S. 2 (3) AND O. 21, R. 10. **21 Pat.L.T. 146.**

———*Rights under — Determination—Interpretation.*

The rights of the decree-holder under a decree mainly depend upon the interpretation of the decree. (*Stone, C.J. and Digby, J.*) SAHEBCHAND HARAKCHAND *v.* BATTASRAO RAMJI. **I.L.R. (1939) Nag. 261=175 I.C. 561=10 R.N. 462=A.I.R. 1938 Nag. 237.**

Setting aside.

———*Setting aside—Effect—Suit as against* A, B *and* C, *dismissed but decreed against* D *ex* parte—*Retrial ordered on motion of* D—A, B *and* C *not parties to motion—Suit decreed against all on retrial—Decree, if binding on* A, B *and* C.

A suit for rent was dismissed as against *A, B* and *C*. As *D* had not filed a written statement the suit was decreed as against him *ex parte*. From this *ex parte* decree *D* filed a motion. The defendants *A, B* and *C*, were not parties to this motion. After hearing the motion the Judge remanded the case for retrial. On retrial the suit was decreed against all the defendants including *A, B* and *C*.

Held, that *A, B* and *C* did not consent to any order passed in the motion inasmuch as they were not parties therein. They further could not have appealed against that order for the same reason, namely, that they were not parties to the motion. It was open to them to take any objection they chose and to ignore the order passed on the motion and inasmuch as the suit had already been dismissed against *A, B*, and *C* no decree could be passed against them in the subsequent suit. (*Sen, J.*) RADHASHYAM *v.* GOURINATH. **187 I.C. 154=12 R.C. 547=A.I.R. 1940 Cal. 9.**

———*Setting aside—Fraud—Decree on agreement fraudulently obtained.*

Where an illiterate lady is not told what she is signing or she thinks that she is signing a power-of-attorney when in fact she signs an agreement, such a consent is no consent at all and the agreement, therefore, is liable to be set aside. The decree that follows such a statement cannot be put on a higher footing than a consent decree following a fraudulently procured agreement. (*Young, C.J. and Ram Lall, J.*) UMRAO BEGUM *v.* RAHMAT ILLAHI. **I.L.R. (1939) Lah. 433=41 P. L.R. 843=A.I.R. 1939 Lah. 439=186 I.C. 77=12 R.L. 351.**

———*Setting aside—Fraud—Falsity of claim—If and when a material fact—Domestic and foreign judgments—Distinction between.*

A domestic judgment cannot be reopened where the *only* allegation of fraud is that judgment had been given on a false claim known to be false by the plaintiff. That allegation in substance means that the adjudication was wrong, the Court determining on perjured evidence the claim as true which was in fact a false one. The principle of finality of litigation which is the cardinal principle applicable in the domestic forum would then have no meaning. In the case of a domestic judgment falsity of the claim may be one of the material facts only in a limited class of cases, namely, where the judgment was an *ex parte* one, where no summons had been served and the direct proof falls short of actual suppression of summons. If the claim on which the *ex parte* decree was passed was a false one, that would furnish the motive for the suppression of summons, and from the said fact combined with the fact of non-service of summons the Court could infer that the summons had in fact been suppressed. The law applicable to foreign judgments is wider in terms than what would be applicable to domestic judgments. The rule of *res judicata* cannot be invoked in the case of a foreign judgment as it is regarded not *qua* judgment but only as a jural act by which an independent obligation is created. This fact distinguishes a foreign judgment from a domestic one and prevents a Court from reopening in a later action a domestic judgment where the fraud alleged was directly and substantially in issue in the former suit and had been enquired into and repelled. (*Mitter and Roxburgh, JJ.*) KUNJABEHARI *v.* KRISHNADHONE. **44 C.W.N. 912=A.I.R. 1940 Cal. 489.**

———*Setting aside—Fraud—Misrepresentation made by plaintiff on account of ignorance—If ground for setting aside decree.*

A decree is not liable to be set aside on the ground of fraud merely because there was some misrepresentation on the part of the plaintiff in the suit in which that decree was passed, when such misrepresentation is on account of ignorance. (*Collister and Bajpai, JJ.*) KAZIM ALI KHAN *v.* OM PRAKASH. **172 I.C. 337=10 R.A. 389 (2) =1937 A.W.R. 841=1937 A.L.J. 1095=1937 All. L.R. 952=A.I.R. 1937 All. 731.**

———*Setting aside—Fraud—Nature of proof.*

A plaintiff is not entitled to have a decree against him set aside on the ground that it had been fraudulently obtained merely by reason of the fact that the claim in the original suit was false or without any cause of action or merely because the decree was obtained by false representation or suppression of facts, provided the person so applying for a reversal of the decree in the original suit was not prevented by the fraud of the decree-holder from placing his case before the Court. (*Edgley, J.*) DURGAGATI BANERJI *v.* TAHARULLA MIA. **44 C.W.N. 849.**

———*Setting aside—Fraud—Non-service of summons.*

Mere non-service of summons is in the absence of fraud not sufficient to support a subsequent suit to set aside an *ex parte* decree. (*Khundkar, J.*) RAMESH CHANDRA DAS *v.* NATIONAL TOBACCO CO. OF INDIA, LTD. **44 C.W.N. 999=A.I.R. 1940 Cal. 536.**

———*Setting aside—Fraud—Non-service of summons on defendant—If amounts to.*

Non-service of summons on the defendant does not necessarily connote fraud and the decree obtained by the plaintiff cannot, therefore, be set aside for fraud on that ground. (*Sen, J.*) SAGARESWAR CHATTARJI *v.* BABULAL CHATTOPADHYAYA. **68 C.L.J. 75.**

———*Setting aside—Fraud—Proof of.*

In order to maintain a suit to set aside a decree on the ground of fraud, the plaintiff must do

something more than prove that the evidence on which the decree was based was false. It is incumbent upon him to prove that the defendant had carried out a deliberate fraud which, through no default or neglect on his part, he was unable to expose in the previous suit. Re-agitation of questions already decided cannot be permitted; otherwise there will be no finality. (*Roberts, C.J. and Leach, J.*) ABDUL KARIM *v.* LAIQ RAM. **173 I.C. 954=10 R.R. 381=A.I.R. 1937 Rang. 534.**

———*Setting aside—Fraud—Proof required.*

When a suit is instituted to set aside a decree on the ground of fraud, it is obligatory as well as imperative on the plaintiff to allege as well as prove that the decree was obtained by fraud practised upon the Court. General allegations of fraud are insufficient and the plaintiff must particularise the facts upon which fraud is founded. The mere fact that notice was not served is not necessarily a fraud. Unless it is shown that there was a deliberate suppression of summons in order to give effect to a fraudulent scheme, the suppression would not be a fraud. A.I.R. 1930 All. 427 and A.I.R. 1924 Cal. 395, foll. (*Nawal Kishore, C.J.*) NARANA *v.* KOJIRAM. **1939 Mar.L.R. 113 (Civ.).**

———*Setting aside—Fraud—Proof required—Suppression and non-service of summons—Effect of.*

To sustain an action for setting aside a decree the fraud alleged and proved must be "actual positive fraud, meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance." In the case of *ex parte* decrees when the defendant had never appeared the contrivance may consist in suppressing the summons. The fact of suppression would itself be the contrivance, and indeed a most effective contrivance for keeping the defendant in ignorance of his rights and from placing his case before the Court. Mere non-service would not do. But when the fact of non-service of summons is proved by the plaintiff in the later action, and the claim on which the decree was passed is proved to be a false one, the Court may and should ordinarily infer deliberate and hence fraudulent suppression, for the last mentioned circumstance supplies the *motive* for the suppression and indicates that the suppression is itself fraudulent. In such cases the fact that the question of non-service of summons had been adjudicated in an earlier proceeding under O. 9, R. 13, C. P. Code, would not bar the investigation of fraud, as the issues would not be the same. The facts which would constitute the fraudulent contrivance would not necessarily be the same in the case of contested decrees or *ex parte* decrees where the plaintiff in the later action had appeared in the earlier suit at some stage. The fraud must be one extraneous to the suit which terminated in the decree. (*Mitter and Roxburgh, JJ.*) KUNJABEHARI *v.* KRISHNADHONE. **44 C.W.N. 912=A.I.R. 1940 Cal. 489.**

———*Setting aside—Grounds for—Suit to set aside on ground of fraud—Onus of proof.*

A decree passed by a competent Court cannot be set aside by a suit simply on the ground that it was based on a false claim nor on the ground that there was no service of summons or notices.

In a case to set aside a decree on the ground of fraud, the plaintiff has got to establish that there was non-service of the processes upon him and that the non-service was the result of active fraud in the former action. It may be from the circumstances of a case established that the non-service in itself was fraudulent. If that is not found, then it is absolutely necessary to go into the question whether the original claim was a fraudulent one or not. (*Wort, J.*) BADRI NARAIN MANDAR *v.* PARSOTI PASBAN. 170 **I.C. 146=3 B.R. 668=10 R.P. 79=1937 P.W.N. 351=A.I.R. 1937 Pat. 384.**

———*Setting aside—Judgment passed without jurisdiction—Right of suit.*

A separate suit is maintainable for setting aside a decree on the ground that the Court passing had no jurisdiction to pass it. (*Addison and Din Mohammad, JJ.*) INTIZAMIA COMMITTEE *v.* CENTRAL BANK OF INDIA, LTD. **182 I.C. 785=12 R. L. 68=A.I.R. 1938 Lah. 129.**

———Setting aside—Mistake of parties—If ground for setting asitle. *See* CONTRACT ACT, S. 20. **1937 A.W.R. 841=1937 A.L.J. 1095=A.I. R. 1937 All. 731.**

———*Setting aside—Revival of suit—Decree set aside and decree declared null and void and inoperative in subsequent proceeding—Distinction.*

There is no difference in substance or principle between a case in which a decree passed against a person is set aside by a subsequent proceeding, and a case in which the decree is declared null and void and inoperative in a subsequent proceeding; and the suit in which the inoperative decree was passed can be revived against a defendant in whose favour such a decree is passed in a subsequent proceeding. (*Guha and Bartley, JJ.*) MONMOHINI DAS *v.* BEHARI SHAHA. **63 Cal. 1227=166 I.C. 415=9 R.C. 516=40 C.W.N. 1135=A.I.R. 1936 Cal. 421.**

———*Setting aside—Right of—Person not party to decree.*

No person who is not a party to a decree can claim to have it set aside on the grond of fraud or collusion. All that he can claim is that the decree may not affect his rights. (*Addison and Din Mohammad, J.*) INTIZAMIA COMMITTEE *v.* CENTRAL BANK OF INDIA, LTD. **182 I.C. 785=12 R.L. 68=A.I.R. 1938 Lah. 129.**

———*Setting aside—Right of suit—Suit against father and sons in respect of trust properties—Father present trustee for life and sons to be trustees, after father's death—Suit by sons to declare decree void and to set aside during father's lifetime—Maintainability.*

Persons who are parties to a suit are entitled to maintain a suit to set aside a decree passed in that suit on the ground that it is not binding on them. The fact that the decree was passed against them and their father jointly in respect of properties which are trust properties held by their father as the present trustee and that they would become trustees only after the death of their father would not operate as a bar to a suit by them during their father's lifetime. Their right to have the decree set aside does not depend upon whether they have become trustees or not on the date of the suit. There is no reason why persons who are themselves parties to suit and decree should not have the right to sue to obtain a declaration that the

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decree is void. (*Varadachariar and Abdur Rahman, JJ.*) ARAVAMUDHA IYENGAR *v.* RAMANUJA IYENGAR. **183 I.C. 617=12 R.M. 343 (2)=48 L.W. 770=1938 M.W.N. 1153=A.I.R. 1939 Mad. 154=(1938) 2 M.L.J. 982.**

———Setting aside—Right to sue—Court passing decree having no territorial jurisdiction. *See* C. P. CODE, S. 21. **42 C.W.N. 375.**

———*Setting aside—Suit to set aside decree on ground of fraud—Maintainability—Conditions of —Nature of fraud—False statements in pleadings and evidence—Sufficiency—Proper remedy.*

The mere making of a false allegation in a written statement even with knowledge of its falsity would not necessarily amount to a fraud on the Court, so as to render the decree in the suit liable to be set aside in a separate suit on the ground of fraud. The fraud which vitiates a decree must be something extrinsic to the proceedings pending before the Court and the making of false statements in the pleadings or evidence cannot amount to fraud which vitiates a decree passed by the Courts. A decree cannot be set aside on the ground that it was obtained by perjured testimony. The remedy in such cases is by way of appeal or by way of review and not a separate suit to set aside the decree. (*Pandrang Row and Krishnaswami Ayyangar, JJ.*) RAMANATHAN CHETTIAR *v.* PALANIYAPPA CHETTIAR. **180 I.C. 246=11 R.M. 680=48 L.W. 946=1939 M.W.N. 67=A.I.R. 1939 Mad. 146=(1939) 1 M.L.J. 154.**

———*Setting aside—Undefended divorce suit—Trial held not in open Court—Decree* nisi *and absolute—Subsequent re-marriage by one party—Suit by other for setting aside decrees on ground of want of publicity at hearing, if lies.*

A divorce action by a husband against his wife, which the latter did not defend, was held not in the ordinary Court house but in the Judge's library of the Court house during the luncheon interval. Neither the Judge nor Counsel were robed. In other respects the proceedings were quite regular. The library was not closed actually to the public, but there was an appearance of its being closed and of a warning against public intrusion. An ordinary member of the public not familiar with the Court had the impression that he would have no access to the library and in fact no member of the public entered the place during the trial. The Judge however, acted perfectly *bona fide* and announced that he was sitting in open Court before taking seat. A decree *nisi* was made, and it was made absolute in due course. More than a year afterwards, the husband married anotl.er lady. Long after the time for avoiding the decree had gone by the wife of the original marriage commenced an action to have the decrees declared void on the ground that the divorce proceedings were void, because they were held not in open Court.

Held, that the trial was not held in open Court, and the decree was voidable; but no step having been taken to have it set aside in time, it became unassailable and could not be set aside any longer. (*Lord Blanesburgh.*) CORA LILLIAN MCPHERSON *v.* ORAN LEO MCPHERSON. **40 C.W.N. 488=43 L.W. 469=1936 A.L.J. 727=1936 M.W.N. 513 =1936 A.W.R. 613=161 I.C. 260=17 Pat.L.T. 243=8 R.P.C. 183=38 Bom.L.R. 468=1936 P.**

DECREE.

W.N. 244=A.I.R. 1936 P.C. 246=70 M.L.J. 385 (P.C.).

Validity.

———*Validity—Death of plaintiff before hearing —Decree for amount admitted by defendant—If void and without jurisdiction.*

A Court has no jurisdiction to make a decree whether for or against a deceased person, with the sole exception mentioned in O. 22, R. 6, C. P. Code, where one of the parties dies before the hearing. It is immaterial that the decree is passed for an amount admitted by the defendant. The question is one of jurisdiction, and such a decree is a nullity and must be treated as such in execution proceedings. (*Dhavle and Rowland, JJ.*) RAM KHELAWAN *v.* RAMUDAR CHOUDHURY. **182 I.C. 208=5 B.R. 732=12 R.P. 9=A.I.R. 1939 Pat. 534.**

———*Validity—Decree against dead man—Nullity—Suit for rent against recorded tenants—Some tenants dead—Decree—Executability—Right, title and interest of representative of dead tenant—If affected.*

A decree passed against a dead person is a nullity. If a suit for rent is instituted against the recorded tenants some of whom are dead, a decree in the nature of a money decree can be obtained for the whole of the rent against the surviving tenants. But in execution of such a decree the interest of the representative of the deceased tenants cannot be affected or sold. The decree against the dead tenant being a nullity, a sale in execution cannot be held to affect or to pass the right, title and interest of the representative of the deceased tenant. (*Harries, C.J. and Rowland, J.*) MAHANI CHINERA *v.* MIR RAMJAN ALI. **190 I.C. 248=6 B.R. 920=5 C.L.T. 15=A.I.R. 1940 Pat. 243.**

———Validity—Decree against major treating him as minor—If nullity. *See* LIMITATION ACT, ART. 95. **21 Pat.L.T. 269.**

———*Validity—Decree based on wrong principles —If void or liable to be declared void.*

A decree is an adjudication of a Civil Court and is binding on the judgment-debtor and all those claiming from or through the judgment-debtor until it is set aside, or shown to be void. A decree is void if the Court which passed it had no jurisdiction to pass it, or if it is passed against a dead person, or against a person who has never had an opportunity of appearing. It is voidable if it is obtained by fraud or collusion. But a decree can never be declared void because it was based on wrong principles. Such a decree can be corrected by a Court of appeal, but once the opportunity for appeal is past, it is as binding as a decree which is passed on the most clear and correct principles of law. (*Barlee and Divatia, JJ.*) MADIVALAPPA *v.* SUBBAPPA. **172 I.C. 184=10 R.B. 253 (2)= 39 Bom.L.R. 895=A.I.R. 1937 Bom. 458.**

———*Validity—Estate of plaintiff and defendant in hands of common manager of encumbered estates—Both parties represented by same manager —Decree—If nullity.*

It is no doubt an elementary rule of procedure that the same individual even in different capacities cannot be both a plaintiff and defendant to one and the same action. But it is only a rule of procedure and not a rule of jurisdiction. This, however, does not apply to the case of a suit by

a person against another, both of whose estates are placed in the hands of a common manager under the Chota Nagpur Encumbered Estates Act, and the decree in such a suit cannot be said to be a nullity on that account. The fact that the same manager represents both the plaintiff and the defendant undoubtedly makes the proceedings highly anomalous, but the decree cannot be held to be a nullity, so long as there is a genuine and *bona fide* contest in the suit, and there is no suggestion of any prejudice being caused to any of the parties. (*Fazl Ali and Dhavle, JJ.*) LAL TIRATHNATH SAHI DEO *v.* LAL MIRTUNJOYA NATH SAHI DEO. **6 B.R. 98=185 I.C. 79=12 R.P. 295 =21 P.L.T. 645=A.I.R. 1940 Pat. 153.**

———*Validity—Fraud—Party kept in ignorance about proceedings which end in decree.*

It is true that once a judgment has been delivered and a decree passed thereon after contest, that decree cannot be avoided except in appeal. But before a decree can be held to be so binding on a party though it cannot be avoided even by proof of fraud, it must be shown that the decree was passed after a real contest between litigating parties. Where a party is kept in ignorance of the proceedings which culminate in decree against him and his lawyer confesses judgment without his knowledge and consent, fraud is deemed to have been practised not only on such party but also on the Court which passed the decree against him in relation to the proceedings which culminated in the passing of a decree, and in such a case the decree becomes a nullity and not binding in any way on the party. (*Young, C.J. and Ram Lall, J.*) UMRAO BEGUM *v.* RAHMAT ILLAHI. **I.L.R. (1939) Lah. 433=186 I.C. 77=12 R.L. 351=41 P.L.R. 843=A.I.R. 1939 Lah. 439.**

———*Validity—Mortgage suit—Death of defendant after preliminary decree—Final decree without substitution of heirs—If nullity.*

A final decree in a mortgage suit passed without substituting the heirs of the defendant who dies after the preliminary decree and before the final decree, is a nullity. (*M. N. Mukerji, Ag. C. J. and S. K. Ghose, J.*) JONAB ALI KHAN *v.* SATISH CHANDRA ROY. **166 I.C. 73=9 R.C. 468=63 C. L.J. 110=A.I.R. 1936 Cal. 698.**

———Validity — Mortgage suit—Preliminary decree—Subsequent death of mortgagor—Final decree without legal representatives—Validity—If nullity. *See* C. P. CODE, O. 22, RR. 4 AND 6. **63 Cal. 472.**

———*Validity—Mortgage decree obtained in collusive suit.*

A mortgage decree obtained in a collusive suit is not a decree of Court at all in the eye of the law. (*R. C. Mitter, J.*) EMDAD ALI *v.* HARAN SHEIKH. **168 I.C. 959=9 R.C. 884=A.I.R. 1936 Cal. 590.**

———*Validity—Void and voidable decree—Distinction—Absence of jurisdiction in Court—Effect of—Irregular exercise of jurisdiction—Distinction as regards effect on proceedings of Court.*

It is a well-settled principle that an executing Court cannot go behind the decree. If it appears that the Court which passed the decree had no jurisdiction to pass the decree, the decree would no doubt be altogether void, and in that case it would be open to the executing Court to disregard it and refuse to execute it. There is a distinction between a void decree and a voidable decree. While a void decree can be treated as non-existent and of no binding force or effect, a voidable decree is valid and binding until it is declared to be invalid by a competent tribunal. A decree is void when the Court which passed it had no jurisdiction, whether territorial or pecuniary, over the subject-matter, or in respect of the judgment-debtor's person to make it. Where, however, the Court had complete jurisdiction to hear a case, but passes a decree in disregard of some provision of law, the decree is voidable, and is binding unless it is set aside in appropriate proceedings. There is a distinction between an inherent lack of jurisdiction in a Court and lack of jurisdiction on grounds which have to be determined by the Court itself. The first makes the decree a nullity which can be ignored and need not be set aside. The second does not make the decree a nullity, but only voidable; such a decree can be set aside by adopting the proper procedure and cannot be collaterally impeached. (*Rowland and Chatterji, JJ.*) UMAR *v.* MAHABIR LAL. **18 Pat. 708=12 R.P. 192=183 I.C. 799=5 B.R. 996=1939 P.W. N. 631=A.I.R. 1940 Pat. 59.**

Variation by consent.

———*Variation by consent—If possible.*

A decree may be adjusted or satisfied by any agreement between the judgment-debtor and decree-holder. But the decree once passed is immutable and cannot be varied by consent. (*Bose, J.*) KESHAV YESHWANT KOLI *v.* KRISHNA BALAJI MAHAR. **181 I.C. 616=11 R.N. 480= 1939 N.L.J. 13=A.I.R. 1939 Nag. 107.**

See also (1) HINDU LAW ENDOWMENTS.
(2) MAHOMEDAN LAW—WAKFS.
(3) RELIGIOUS ENDOWMENTS.
(4) TRUSTS.
(5) EASEMENTS—PUBLIC PATHWAY.

———*Inference—Private well made available for public use—Punjab.*

In the Punjab it is considered to be an ethical duty to make a private supply of water available to outsiders, and it is not always a sound presumption to conclude that the owner must have intended to dedicate the source of such a supply for public use for ever after; it is just likely that he may wish to retain control over the supply and to gain a reputation for charity by making the supply as a matter of favour. A.I.R. 1924 Lah. 511, Rel. on. But the question whether a Hindu in particular position is more likely to intend a permanent grant or a terminable permission by sinking a well on his own property available and suitable for public use can hardly be called a question of law if it is decided with reference to local custom and conditions. (*Beckett, J.*) WALAITI RAM *v.* NATHU RAM. **182 I.C. 525= 12 R.L. 51=41 P.L.R. 330=A.I.R. 1939 Lah. 12.**

———*Inference for—Owner permitting neighbours to drawn water from his private well for long number of years.*

Where a person has been permitting his neighbours to draw water from his private well for a long number of years, such conduct would at best constitute a bare license—a facility provided for the convenience of his neighbours by him but

without any legal liability to continue it. A user of this kind, however, does not lead necessarily to the conclusion that the well was dedicated to the public. 75 I.C. 896, Rel. on. (*Addison and Ram Lall, JJ.*) WALAITI RAM *v.* NATHI RAM. **41 P.L.R. 536=184 I.C. 76=12 R.L. 152=A.I.R. 1939 Lah. 191.** [On appeal from **A I.R. 1939 Lah. 12.**]

———*Proof—Long user—Inference from.*

In order to prove dedication of property, it is not legally necessary that there should be evidence of express grant. Dedication may be inferred from long user. It is of course always permissible to rebut the presumption by evidence of the owner's intention that the user by the public was permissive. (*Tek Chand, J*) KAMMAN *v.* SUJAN SINGH. **40 P.L.R. 477=A.I.R. 1938 Lah. 619.**

DEED.

Binding character.
Cancellation.
Consideration.
Construction.
Execution.
Genuineness.
Lease.
Material alteration.
Recitals.
Setting aside.
Validity.

Binding character.

———*Executant not reading deed—Liability.*

In a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of *non est factum* is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him not because he has read it or understands it, but because he has chosen to execute it. This is equally true (apart from fraud) in equity as at law, except in those special cases where there is an equitable ground for setting aside or rectifying the deed. (*Lord Maugham.*) MARTIN CASHIN *v.* PETER J. CASHIN. **182 I.C. 419=12 R.P.C. 12=1939 M.W.N. 85=A.I.R. 1938 P.C. 103 (P.C.).**

———Binding character of—Mortgage-deed by two Hindu brothers—Signature of deed by one only—Effect—If binding as regards executant's share. *See* HINDU LAW—ALIENATION. **A.I.R. 1937 Nag. 54.**

Cancellation.

———*Cancellation of—Lease disposed of contrary to terms—Disposition avoided by landlord—Action for cancelling disposition—If necessary.*

It is true that a *fidei commissum* properly constituted and accepted cannot be revoked. It is no doubt also true that a solemnly executed and duly registered instrument must stand until set aside by a competent Court. Where however a lease has been disposed of contrary to the terms contained in it, and that disposition is void or has been avoided by the landlord, there is no room for the application of such a doctrine, even in the case of a sale or other disposition for value, much less where the disposition is a gift. Since the choice in such a case of avoiding the disposition is with the lessor and not with the lessee or his executor, it cannot be said that the lessee or his executor must bring an action to get the dispositions declared void. (*Lord Porter.*) S. C. JAYAWARDENE *v.* A. C. JAYAWARDENE. **182 I.C. 770=12 R.P.C. 18=50 L.W. 87=41 P.L.R. 717=A.I.R. 1939 P.C. 138 (P.C.).**

———*Consideration—Onus of proof—Endorsement by Registrar reciting payment of consideration—Effect of—Denial of consideration—Onus.*

The onus of proving that a transaction recited in the endorsement on a bond which is witnessed by the Registrar is untrue is on the party who denies the truth of the statement contained in that endorsement. Where such endorsement recites that consideration for the bond was paid, it *prima facie* establishes that the recited consideration has passed. It is then for the party denying consideration to prove that consideration has not passed. (*Wort, A.C.J.*) NATHUNI SAO *v.* LACHHMINIA. **180 I.C. 619=11 R.P. 520=5 B.R. 460=1938 P.W.N. 773=A.I.R. 1939 Pat. 108.**

———*Consideration—Onus of—Proof—Recital as to passing of consideration—Impeaching of—Onus.*

A person having an undoubted right to convey certain property conveyed it to his wife in lieu of dower debt and the recitals in the deed of conveyance said that consideration did pass. The persons claiming through him claimed that consideration did not pass and the property in fact belonged to them.

Held, that the burden of proving this was on them and they were in no better position than the transferor through whom they claimed. (*Bose and Puranik, JJ.*) DALCHAND MULCHAND *v.* HASSANBI. **I.L.R. (1938) Nag. 333=176 I C. 315=11 R.N. 41=A.I.R. 1938 Nag. 152.**

———*Consideration—Onus of proof—Recital of payment of full consideration—Plea of non-payment of part—Onus.*

Where there is a recital in sale deed in which the executants admit that they have received the whole of the consideration stated in the sale deed, and the executant also admit before the Sub-Registrar registering the deed that they have received fully the consideration recited in the deed, the burden of proving that a part of the consideration has not been paid and is due to them lies on them. It is not for the vendee to show that he has paid the full consideration. (*Pollock, J.*) MOHAMMAD MUSTAFAKHAN *v.* PT. WAMANRAO. **19 N.L.J. 301.**

———*Consideration—Onus of proof—Sale deed reciting payment of price—Plea of want of consideration—Onus.*

Where the fact that consideration was paid in the presence of the Registrar is recorded in the sale deed, the onus to prove that consideration did not pass and that the sale deed was fictitious is on the party alleging it to be so. (*Wort and Manohar Lall, JJ.*) JOTI LAL SAH *v.* MT. RAMESWARI KUER. **176 I.C. 129=4 B.R. 682=11 R.P. 51=A.I.R. 1938 Pat. 281.**

———*Consideration—Plea of absence of—Right to plead—Suit for possession by vendee under sale deed—Defendant in possession without title—Plea of want of consideration—If open.*

A defendant in possession of property without

any title should not be allowed to plead want of consideration for a sale-deed on the basis of which the plaintiff sues for possession or any other defence which might be open to the vendor. (*Barlee and Macklin, JJ.*) VITHABAI *v.* MALHAR. **I.L.R. (1938) Bom. 155=175 I.C. 190=10 R.B. 524=40 Bom.L.R. 147=A.I.R. 1938 Bom. 228.**

———*Consideration—Proof of—Release deed in favour of mortgagor—Evidence of mortgagor—Sufficiency.*

The uncorroborated evidence of a mortgagor could not be considered sufficient to prove actual payment of consideration for a deed of release in his favour. (*James and Chatterji, JJ.*) BANK OF BIHAR, LTD., CHAPRA *v.* MAHOMED ISMAIL. **175 I.C. 78=10 R.P. 575=4 B.R. 513=A.I.R. 1938 Pat. 380.**

———*Consideration—Stranger's right to impugn.*

Where the parties to the transaction uphold the passing of consideration, no stranger can complain of the want of inadequacy of the consideration. (*Bose and Puranik, JJ.*) SAHAUDRA BAI *v.* SHRI DEO RADHA BALLABHJI. **I.L.R. (1940) Nag. 94=176 I.C. 57=11 R.N. 24=A.I.R. 1938 Nag. 30.**

———*Construction—Agreement regarding financing of litigation—Litigant agreeing to let financer take one half share of properties as compensation for his trouble—Financer given right to join as party and conduct proceedings in suits—Present interest or immediate right—If conferred—C. P. Code, O. 22, R. 10.*

An agreement in respect of financing a litigation provided, *inter alia*, that "one half (of the remaining properties) should be divided in equal halves, and one half should be taken by you as compensation for your trouble.....you are entitled to join as party and conduct proceedings in the above suits."

Held, that the agreement did not confer upon the person who financed the litigation an absolute transfer of a share and did not operate to give him a present interest in the properties, there being no words of transfer capable of conferring an immediate right on the financer. The financer could not therefore claim to come in as a party on the record in place of the litigant on his death under O. 22, R. 10, C. P. Code. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) NELLIAPPA PILLAI *v.* SETHURAMALINGAM PILLAI. **1940 M.W.N. 829 =(1940) 2 M.L.J. 337.**

———*Construction—Agreement to sell—Postscripts—If part of agreement—Deed to be read as a whole—Vendee's right to waive conditions.*

A zamindar entered into an agreement with *P* to sell to the latter 800 acres of his undivided share in certain land. The land to be sold was specified to be land adjoining that of *P*. The sale deed which was drawn up was a document of great crudity and two paragraphs had to be added as postscripts before the document was completed and signed. It was contended on behalf of *P* that the two paragraphs described as postscripts should be cut off from the main body of the document and then the document be considered and that so far as the conditions in favour of *P* were considered he could waive them even at the bar and would accept any 800 acres out of the land of the zamindar.

Held, that *P*, seeing that the stipulated land not being in separate possession of the zamindar and that he could not give possession of it to him, was trying to give his claim a general instead of a specified character to make his agreement enforceable, but he could not be allowed to waive a condition of the contract as a condition in his power if he chooses. The postscripts were really part and parcel of agreement and the agreement could not be divided into parts by cutting off the postscripts. The document must be read as a whole and was for the sale of a specified parcel or portion of land. (*Davis, J.C. and Dadiba C. Mehta, A.J.C.*) KIRPAL DAS JIVRAJ MAL *v.* MANAGER, ENCUMBERED ESTATES. **162 I.C. 639=8 R.S. 171=A.I.R. 1936 Sind 26.**

———*Construction—Ambiguity—Reference to judgment.*

If a decree as drawn up is ambiguous, the executing Court can look to the terms of the judgment. (*Mitter and Lodge, JJ*) RAJENDRA KISHORE BASU ROY *v.* KUMAR PROMOTHA NATH ROY. **72 C.L.J. 49.**

———*Construction — Ambiguous document — Surrounding circumstances—Conduct of parties —Relevancy.*

Where an ambiguous instrument has to be construed, the Court is not confined to the narrow limits of its uncertain terms. It has to look wider and view the surrounding circumstances and gather the intention from the subsequent conduct and acts of the parties. The question was whether an ambiguous document should be treated as a lease or usufructuary mortgage. The parties throughout referred to it as a lease and the defendant refused to amend the pleading and treated it as a question of law even though the lower Court remanded the case, thus giving him an opportunity of doing so.

Held, that the document should be taken only as a lease. (*Vivian Bose, J.*) GANGARAM *v.* MT. KANCHANBAI. **I.L.R. (1936) Nag. 60= 164 I.C. 792=9 R.N. 34=A.I.R. 1936 Nag. 168.**

———*Construction—Annuity—Annuity in favour of daughter and her lineal descendants—Some of lineal descendants dying without leaving lineal descendants—Their shares, if revert to grantor.*

A person created an annuity in favour of his daughter and her lineal descendants by a document, the material portion of which was as follows:—"In my absence you will be entitled to realise this amount together with your sons, grandsons and other heirs of your body from my heirs and successors." Then there was a clause providing that none but the lineal descendants of the grantee would be entitled to have this allowance and that the daughters and other agnatic relations would not be entitled to it.

Held, that it was not the donor's intention that if some of the lineal descendants of the grantee who enjoyed the annuity themselves died without leaving any lineal descendants behind them, their shares would lapse and revert back to the grantor and his heirs, if the other lineal descendants of the original grantee were alive, and that the annuity could, therefore, be claimed by the lineal descendants of the original grantee who might be living at any particular time and the shares amongst them should be cal-

culated on the principle of *per stirpes* and not *per capita*. (*Mukherjea and Latifur Rahman, JJ.*) JYOTISH CHANDRA *v.* PRAFULLA CHANDRA. **187 I.C. 330=12 R.C. 567=43 C.W.N. 937=70 C.L.J. 294=A.I.R. 1940 Cal. 157.**

———*Construction—Assignment of rents and profits—If passes property itself—Mining lease—Assignment of income absolutely and for ever—If passes property itself.*

It is well settled in the case of bequests that a gift of rents and profits arising out of any defined property held by a testator is sufficient to pass the property itself. This rule is not confined to wills but also applies to gifts and assignments. It is open to an assignor to frame his documents in any form he likes, and he may, instead of saying "I convey such and such property," use any other phraseology which will have the same effect. Assignment of rents and profits without limitation is sufficient to pass the property which is the source of such rents and profits and if the intention of the document appears to be to pass the property itself, then a deed cast in that form will pass everything including the reversion, and no question of reversion remaining in the assignor can arise.

Chatterji, J.—It is an accepted rule of construction that an absolute grant of the income of an estate passes the estate itself. In the case of a mining lease if the income of such property is assigned absolutely and for ever, nothing is left to the assignor. The property itself passes to the assignor. (*Fazl Ali and Chatterji, JJ.*) JYOTI PRASAD SINGH DEO *v.* SAMUEL HENRY SEDDON. **19 Pat. 433=A.I.R. 1940 Pat. 516.**

———*Construction — Boundaries — Discrepancy between designation of property in body and description by boundary—Former should prevail.*

If there is a discrepancy between the designation of the property in the body of the grant and its description by boundaries, the designation of the property must prevail. (*Mohammad Noor and Rowland, JJ.*) JYOTI PRASAD SINGH *v.* RAJENDRA NARAYAN SINGH DEO. **162 I.C. 838=8 R.P. 586=1936 P.W.N. 458=A.I.R. 1936 Pat. 287.**

———Construction—Boundaries—Land described as being within specific boundaries—Absence of mention of dimensions—Property recited to be "about 99 grounds"—If part of description—Vendor familiar with land and aware of extent to be sold—Right to claim damages on ground insufficiency in area or extent. *See* VENDOR AND PURCHASER. **1937 M.W.N. 1027.**

———*Construction—Boundaries— Mistake in description of property within—Rule to be observed.*

When the description of boundaries is precise and accurate such description ordinarily will override mistakes or omissions in the description of property within those boundaries. (*Weston.*) RAM NATH *v.* BAHADUR SHAH KHAN. **1938 A.M.L.J. 56.**

———*Construction—Boundaries and area—Conflict—Lease—Plan attached to deed—Conflict between boundaries and area—Which to prevail.*

A plan of the demised land attached to a lease-deed must be treated as forming part of the deed. Though the words of the description in the deed are primarily relied on, in case of ambiguity the plan may control the body of the deed. Where the lessee does not deny that he actually possesses the land which is depicted on the plan and there is no doubt that the land is within the boundaries which are well defined, if in such a case there is a question as between boundaries and area, the former should prevail. (*S. K. Ghose and Patterson, JJ.*) KESHAJI LALJI *v.* PIRAMALL GAYENKA. **179 I.C. 670=11 R.C. 590=67 C.L.J. 521=42 C.W.N. 405=A.I.R. 1939 Cal. 129.**

———*Construction—Boundaries and area—Conflict between—Rule.*

When there is a discrepancy between the area and the boundaries given in a deed, the boundaries will normally be taken as the criterion for determining the property actually conveyed, according to law. (*Bhide, J.*) NAND LAL *v.* GHULAM AHMAD. **175 I.C. 424=10 R.L. 718=A.I.R. 1937 Lah. 940.**

———*Construction—Boundaries and area—Difference between—Rule.*

When a description in a document is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected in accordance with the maxim *falsa demonstratio non nocet cum decorpore constat* and extrinsic evidence to show that the intention of the parties was not in accordance with the part of the description which is correct is inadmissible. So, where there is a description of land in a document setting forth the boundaries and then specifying the quantity as so many acres, etc., the description in regard to the acreage is considered to be mere false description if there is an error in the quantity, and the land within the boundaries passes by the document, whether it be less or more than the quantity specified. (*Roberts, C. J. and Dunkley, J.*) BAKER ALI *v.* AMIR ALI MEAH. **185 I.C. 641=12 R.R. 216=A.I.R. 1939 Rang. 396.**

———*Construction—Boundaries and area—Discrepancy—Which to prevail.*

In case of a discrepancy between dimensions and boundaries the area specified within the boundaries will pass, whether it be less or more than the quantity specified. (*Niyogi, J.*) RAJLU NAIDU *v.* MALAK. **I.L.R. (1939) Nag. 580=186 I.C. 155=12 R.N. 187=1939 N.L.J. 297=A.I.R. 1939 Nag. 197.**

———*Construction — Boundaries and area—Surrounding circumstances—When can be looked to—Intention of parties—Grant—Extent of property granted—Ascertainment*—Falsa demonstratio—*Doctrine of—Applicability and value of.*

In construing the terms of a document or grant it is permissible not only to look at the terms of the document but also to the surrounding circumstances with a view to discover the intention of the parties as expressed in the deed. Where the terms of the deed are not clear and unambiguous and there is some inconsistency between the different parts of the same document, the only way of solving the ambiguity, if any, is to look to the surrounding circumstances, namely, the circumstances which led to the grant

or deed, and the circumstances subsequent to the grant in order to discover whether any portion of the deed or instrument of grant amounts to a *falsa demonstratio.* No doubt in a case where the boundaries are undisputed or can be definitely ascertained, the extent, which is obviously wrong according to the boundaries, can be deemed to be a *falsa demonstratio* and therefore ignored. Where the intention of the parties is that the boundaries are to be looked to for the purpose of deciding what is the land that is granted or the land to which the grantee is to be entitled, under the grant, and the deed also provides that, whatever the extent of the land intended to be granted might be, the entire extent of the land within the boundaries given in the deed is to be held by the grantee subject only to the condition that if that extent be found to be in excess of a specified area rent should be paid for the area in excess, if the given boundary is a well-defined one about which there is really no dispute, that boundary must be acted upon and cannot be ignored. If, however, it were certain that only a certain extent is given and no more, and that the boundaries can therefore be entirely ignored, the case may be different. The doctrine of *falsa demonstratio non nocet* can be of very little use unless one can be fairly certain that any particular *demonstratio* is false. In the case, however, of a boundary which is not well defined and which is disputed, and which fails to throw light, the boundary is of little help; and where the extent also cannot help to locate the boundary, the Court can only decide the question of extent by actual possession sometime before or after the grant. (*Pandrang Rao and Venkataramana Rao, JJ.*) ZAMINDAR OF SIVAGANGA *v.* KARUTHAN AMBALAM. **178 I.C. 625=11 R.M. 482=1938 M.W.N. 335=A.I.R. 1938 Mad. 525=(1938) 2 M.L.J. 490.**

———*Construction—Boundaries and measurements—Discrepancy—Procedure.*

A substantial description of property such as by boundaries must prevail over measurements in a deed of conveyance, as measurements in deeds are seldom accurate. The real question to be decided is whether the deed intended to include the disputed site or not. (*Vivian Bose, J.*) PANNALAL *v.* BHAIYALAL. **173 I.C. 680 =10 R.N. 319=A.I.R. 1937 Nag. 281.**

———*Construction—Charge.*

No particular form of words is necessary for the creation of a charge; it is sufficient if, having regard to all the circumstances of the transaction, the document shows an intention to make a particular property the security for payment of debt. (*Ranjitmal, J.*) JUGRAJ *v.* GORURAM. **1940 Mar.L.R. 74 (Civ.).**

———*Construction—Charge—Document by manager of Bank for proper discharge of duties.*

A person who was appointed as a manager of a Bank agreed that he would furnish security to the value of Rs. 4,000 for the due and proper discharge of his duties. In pursuance of this agreement he executed a document in the body of which he conveyed and transferred to the Bank a certain house which the Bank was to have and to hold as security for the said post of manager. The concluding portion of the document provided that in the event of his removal from his post by resignation, dismissal, death or otherwise, the Bank should reconvey the house to him.

Held, that the last provision must be read in the light of the earlier provisions and that the document read as a whole created a charge on the house in favour of the Bank for any amount up to Rs. 4,000, which might become due from the manager to the Bank by reason of his misconduct or failure to discharge his duty. (*Harries, C. J. and Dhavle, J.*) BANK OF BIHAR, LTD. *v.* OMITANE CHATTERJI. **186 I.C. 221=12 R. P. 458=21 Pat.L.T. 262=6 B.R. 304=A.I. R. 1940 Pat. 283.**

———Construction—Chit fund—Bond to secure future subscriptions executed by bidder and her sons—Sons not parties to chit—Collapse of chit before term—Stake-holder assigning bond—Suit by assignee against executants of bond for refund of benefit received by bidder subject to her right to take back subscriptions paid by her —Maintainability. *See* CHIT FUND—KUBI. **44 L.W. 710.**

———*Construction—Clause in bond that stated account of balance in writing and signed by directors conclusive proof—Directors, if entitled to bring within bond indebtedness not covered by it.*

A clause in a bond provided as follows: "... and also any balance of account which may be found due by the said obligor to the said company and of which said balance a stated account in writing made out of the books of the said company signed and certified by the directors for the time being of the said company shall be sufficient at law and conclusive proof without any other document or voucher to support the same".

Held, such a clause could not entitle the directors to bring an indebtedness not covered by the bond within the bond. (*Lord Thankerton.*) CARSON & CO., LTD. *v.* D.M.C. HULME KING. **176 I.C. 5=11 R.P.C. 31=A.I.R. 1938 P.C. 225 (P.C.).**

———Construction—Clause in deed in contravention of statute—Rest of the deed severable—Whether estoppel arises from the part which is good. *See* EVIDENCE ACT, S. 115. **63 C.L. J. 52.**

———*Construction — Conduct of parties—Sale of* Khudkasht *fields—Sale of "excluding* Sir *and* Khudkasht*"—What passes—Proprietary rights —If reserved—Intention.*

Certain fields which were *Khundkasht* were sold under a deed of sale, which after detailing the area, revenue and cess and all the various rights of land and water, etc., described the property and closed with the words "excluding *Sir* and *Khudkasht*".

Held, that the words "excluding *Sir* lands" were commonly used in documents in the Central Provinces to mean "excluding cultivating rights in *Sir* land, and that the intention of parties was to transfer proprietary right in *Sir* and *Khudkasht,* retaining only occupancy rights.

Held, further, that in construing the deed the conduct of the parties and the subsequent dealing of the parties should be looked to. (*Gruer, J.*) SANTOSHRAO *v.* SHEOLAL. **20 N.L.J.39.**

———*Construction—Conveyance—Land conveyed excepting "all coal and other minerals"—*

DEED.

Vendee's right to petroleum and natural gas.

A deed of conveyance of land contained an exception in the following terms:—"Excepting therefrom all coal and other minerals in and under the said land and the right to use so much of said land or the surface thereof as the company may consider necessary for the purpose of working and removing the said coal and minerals."

Held, that the words "all coal and other minerals" meant grammatically "all coal and all other minerals." All minerals were, therefore, excepted and there was no room for the inclusion in the transfer of any *genus* of mineral. Even if the word "all" was to be restricted in its application to the word "coal," it would still be impossible out of the single ingredient "coal" to construct a *genus* of minerals to which the succeeding general words could be confined. Petroleum and natural gas which come within the definition of "minerals" are therefore excepted, and the vendee is not entitled to them. (*Lord Russel.*) THE KNIGHT SUGAR CO., LTD. *v.* ALBERTA RAILWAY AND IRRIGATION CO. **10 R.P.C. 192=173 I.C. 88 (P.C.).**

———*Construction—Conveyance—"Unto and to the use of".*

The words "unto and to the use of" in a deed are ordinary words of absolute conveyance under the English Conveyancing Law and Practice, at any rate until 1926. (*Ameer Ali, J.*) KANTI CHANDRA MUKHERJEE *v.* JOHN BOISOGOMOFF. **42 C.W.N. 937.**

———*Construction — Conveyance or trust — Document containing both declaration of trust and conveyance.*

A document containing both a declaration of trust and superimposed upon that a conveyance, has the effect of a conveyance. (*Ameer Ali, J.*) KANTI CHANDRA MUKHERJEE *v.* JOHN BIOSOGOMOFF. **42 C.W.N. 937.**

———Construction—Deed by father relinquishing his rights in property—Deed by son agreeing to pay father's illegitimate son—Interest created in favour of latter, treated as gift or settlement or family arrangement or trust. *See* HINDU LAW—FAMILY SETTLEMENT. **A. I. R. 1937 Oudh 99.**

———*Constuction — Deed of relinquishment of certain rights over property—If bars later acquisition of right of easement.*

In a partition between *G* and *N*, *N* executed a document which allowed *G* to build his house in any way he liked. Many years later, successor of *N* claimed a right of easement against *G*. It was contended that the deed executed by *N* was a bar to such claim.

Held, that the document merely empowers *G* to build his house in any manner he thought fit. It certainly did not amount to a relinquishment of the right of easement which would accrue to *N* or his successors in title after the prescribed period of 20 years had expired. The parties were not dealing with hypothetical rights which were to materialise in future, if at all, and the document executed by *N* was no bar to a right acquired later. (*Agha Haidar, J.*) MT. MAHBUB BEGUM *v.* SHER MAHOMED. **162 I.C. 733=8 R.L. 952=A.I.R. 1936 Lah. 109.**

———*Construction—Deed of sale in favour of son at father's instance—Property intended for maintenance of son—If gift.*

Parents usually make provision for the education and maintenance of their children and they may set aside property for such purpose, but they do not as a rule gift the property to the child. (*Harries, C.J. and Chatterji, J.*) SAHDEO KARAN SINGH *v.* USMAN ALI KHAN. **6 B.R. 14=184 I.C. 113=12 R.P. 225=20 Pat.L.T. 787=A.I.R. 1939 Pat. 462.**

———*Construction—Deed to be construed as whole.*

Every agreement must be looked at as a whole, and for the purpose of understanding and interpreting the terms of any one clause it is right and proper that the Court should look at the rest of the provisions of the instrument and construe it as a whole. (*Costello and Panckridge, JJ.*) SHAMLAL SINGH *v.* HIRU SINGH. **166 I.C. 942=9 R.C. 626=A.I.R. 1936 Cal. 472.**

———*Construction—Deed to be taken as a whole.*

A document, for purposes of its construction, must be considered as a whole. (*R. C. Mitter, J.*) NAGENDRA MOHAN NATH *v.* JOGENDRA NATH SEN. **63 C.L.J. 579.**

———*Construction—Description of deed—Value of.*

The construction of a grant or other deed should be determined after considering the whole of the terms of the grant and any light that may be thrown on the matter by the circumstances in which it was granted. The use of a particular term or expression to describe it should not be taken to be conclusive. (*Wort and Rowland, JJ.*) DARBAR SAHEB *v.* BARE LAL KANDARP NATH SAH DEO. **162 I.C. 797=8 R.P. 567=17 Pat.L.T. 488=A.I.R. 1936 Pat. 275.**

———*Construction—Documents in vernacular—English decisions—Value of.*

In construing documents in the vernacular it is not safe to rely upon English precedents. (*Dhavle and Agarwala, JJ.*) PANCHAM SINGH *v.* PROMOTHA NATH. **15 Pat. 680=164 I.C. 358=9 R.P. 111 (2)=1936 P.W.N. 552=17 Pat.L.T. 554=A.I.R. 1936 Pat. 450.**

———*Construction—Duty of Court.*

Construction of a document is a matter of law. When a Court is called upon to construe a document, it is the duty of the Judge to construe the terms of the document according to law and come to an independent conclusion of his own as regards the rights and liabilities created by document. He is not bound to base his conclusion upon matters which are irrelevant in a Court of law. (*Roberts, C.J. and Dunkley, J.*) BAKER ALI *v.* AMIR ALI MEAH. **185 I.C. 641=12 R.R. 216=A.I.R. 1939 Rang. 396.**

———*Construction—Duty of Court—Opinion of attesting witness—Value.*

In the matter of the construction of a document, it is for the Court to decide the question by considering all the terms of the document. The opinion of the attesting witness in the matter of such construction is of no importance. (*Rachhpal Singh and Bajpai, JJ.*) SHIAM PARTAP SINGH *v.* BAISNI MADHO KUNWAR. **189 I.C. 757=13 R.A. 119=1940 A.W.R. (H.C.) 300=A.I.R. 1940 All. 353.**

———*Construction—Form or description of document—If conclusive.*

DEED.

In construing a document, in order to determine the nature of the document one must look to its substance and not to its form or description. (*Cornish, J.*) ARIYAPUTRA NADALWAN *v.* NACHIMUTHU MALAVARAYAN. **165 I.C. 560=9 R. M. 268 (2)=1936 M.W.N. 1104=44 L.W. 620=A.I.R. 1936 Mad. 918=71 M.L.J. 488.**

———*Construction—Form or description of document—If conclusive.*

In order to construe the legal effect of any particular instrument it is not the description at the head of the document which ought to be the controlling factor; it is the substance of the document and not the form which is to be looked into. (*D. N. Mitter and Patterson, JJ.*) BHUPATI NATH CHAKRAVARTHY *v.* BASANTA KUMARI DEVI. **63 Cal. 1098=40 C.W.N. 1320=167 I.C. 713=9 R.C. 719=A.I.R. 1936 Cal. 556.**

———*Construction—Gift—Gift by Hindu woman in favour of grand-daughter—Rules for construction of wills—If applicable.*

Rules for the construction of wills made by a male in favour of a female do not necessarily apply to gifts *inter vivos* made by a Hindu woman to her grand-daughter. The presumption in the case of a will made by a male in favour of a female turns on the estate which, on the death of a male, a woman normally takes. In the case of a deed of gift *inter vivos*, it is necessary to consider the terms of the gift and only in case of ambiguity to fall back upon the surrounding circumstances. Where the operative words in a deed of gift by a Hindu woman in favour of her grand-daughter were:—"I have gifted away to her all my rights and privileges pertaining to the above estate.....that is, all the rights which I hold at present.....No person whosoever has any claim to this share, gifted away; nor shall anybody have any hereafter."

Held, that the gift amounted to a gift of all the donor's right, title and interest, whatever that might be. (*Stone, C.J.*) SIDNATH *v.* JASODA BAI. **10 R.N. 287=173 I.C. 145 (2)=A.I.R. 1938 Nag. 185.**

———*Construction—Gift of moneys absolutely—*Dattam *and* samarpimpabadina*—Effect of—Expression of wish that moneys are to be utilised for the purpose of charity—If amount to dedication for charity.*

The words *dattam* and *samarpimpabadina* connote as absolute gift. The fact that the gift absolute is followed by an expression of the motive of the gift as being a charitable object, cannot lead to the inference that a trust is created for that purpose. (*Venkataramana Rao, J.*) SESHACHARLU *v.* RAMANUJA CHARLU. **173 I.C. 533=10 R.M. 602=1937 M.W.N. 758=46 L.W. 413=A.I.R. 1937 Mad. 789.**

———*Construction—Gift or will—Tests to determine—Intention how gathered—Surrounding circumstances—Deed styled will—Property to be enjoyed by executant and his wife till death, and thereafter to go to named person absolutely—Declaration that he will not incur any debts thereafter—If will or gift.*

The question whether a particular document is a testamentary disposition or a transfer *inter vivos* depends not upon the mere form of the document but upon the intention to be gathered from the document itself in the light of the surrounding circumstances. Various tests have been formulated by Courts for deciding whether a certain document is a deed of gift or a will. The name by which the document is styled, the registration of it, the reservation of a life-estate, the reservation of a power of revocation and the use of the present or future tense are all circumstances which are taken into consideration in coming to a conclusion on the point; all these are indications to find out the intention taken singly or cumulatively. Where the expression used in a document which is styled a will is "that the property shall be enjoyed by me and my wife till my death, and after our death, you shall take possession of the lands, etc., of the above particulars and enjoy the same from son to grandson and so on in succession with powers of alienation such as gift, sale, etc. Besides the debts already contracted on the said lands, "shall not contract any further debts, etc., hereafter", the intention is that so long as the executant is alive he will be owner, that after the death his wife shall be owner, and thereafter only the property should go to the person named in the manner indicated by him. There is no divesture of ownership or a transfer of ownership *in presenti* in favour of anybody and the only operative portion is intended to take effect only after his death and is testamentary in character. The document is therefore a will and not a gift. The fact that the testator agrees not to incur any debts after the date of the document would not make it other than a will, for such expressions of intention are not uncommon in wills. It is nothing more than a pious declaration of intention to leave the property at the date of his death unencumbered. The covenant binds nobody, and even if he contracts debts that would bind his life interest even if the document is construed as a gift. (*Venkataramana Rao, J.*) VEERABHADRAYYA *v.* SEETHAMMA. **1939 M.W.N. 1073=A.I.R. 1940 Mad. 236.**

———*Construction—Gift to named person mentioned as filling particular character or relationship—Description not true—Gift, if takes effect or fails—Mention of donee as adopted son if mere description of* persona designata *or reason and motive of gift—Intention of donor.*

Where a person executes a deed of gift giving properties to another person under the belief that the donee fills a certain character, and the language of the document shows that the intention of the donor is that the donee should take the gift only in that character, if the donor turns out to be mistaken, the gift must fail because the presupposed condition does not exist. In such cases the mention or description of the donee as filling a certain character or relationship is a reason and motive of the gift and indeed a condition of it. But where the donor is under no misapprehension as to the facts and no fraud or deception is practised upon him and he uses language which can apply to no one but the donee, the donee must be taken to be a *persona designata* and the gift must take effect irrespective of whether his description in the deed is true or not. The mention of the donee as filling a certain character must in such cases be taken to be merely descriptive of the person to take under the gift deed. (*Abdul Ghani and Nageswara Iyer, JJ.*) LAKSHAMMA *v.* ERE GOWDA. **16 Mys.L.J. 434=43 Mys.H.C.R. 352.**

DEED.

———*Construction—Intention—How to be gathered—Duty of Court—Language of deed to be taken as a whole.*

In interpreting deeds, the Court must gather the intention from the words of the document, and for that purpose the language of the entire deed should be taken into consideration. The interpretation to be adopted should be one which gives effect, if possible, to all the parts and does not reject any of them. (*Abdul Ghani, O.C.J. and Venkataranga Aiyangar, J.*) SUBBANARAYANA *v.* RAMACHANDRA RAO. **18 Mys.L.J. 196.**

———*Construction—Intention of parties.*

It is by the language alone of any written agreement that the intention of the parties thereto can be deduced. (*Cunliffe and Henderson, JJ.*) NRISINGHA PROSAD CHATTERJI *v.* GIRINDRA NATH MUKERJI. **165 I.C. 941=9 R.C. 466.**

———*Construction—Intention of parties—Ascertainment—Surrounding circumstances—Law governing parties—Value of.*

The intention of the signatories to a document must be gathered from the document itself read in the light of the surrounding circumstances.

Krishnaswamy Ayyangar, J.—The law by which the parties are governed may afford a guidance, as with its aid, it may be possible to ascertain what the executant was aiming at. But care must be taken to see that it is not over-emphasised. By itself, it is not of much value. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) MAHARAJAH OF VENKATAGIRI *v.* RAJARAJESWARA RAO. **I.L.R. (1939) Mad. 622=189 I.C. 123=13 R.M. 144=49 L.W. 717=1939 M.W.N. 522=A.I.R. 1939 Mad. 614=(1939) 1 M.L.J. 831.**

———*Construction—Intention of parties—Duty of Court to ascertain.*

In interpreting a document, the Court should place itself in the position of the parties to ascertain in the best way it can what was the intention of the parties when they entered into the transaction. (*Venkataramana Rao, J.*) SETHURAMA IYER *v.* RAMACHANDRA IYER. **168 I.C. 588=9 R.M. 604=1936 M.W.N. 1000=44 L.W. 759=A.I.R. 1936 Mad. 528.**

———*Construction—Intention of parties—How ascertained—Terms as a whole to be looked into.*

The intention of the parties to a deed has to be gathered from the terms thereof as a whole. (*Thom and Allsop, JJ.*) MURARI LAL *v.* SAMI UDDIN AHMAD KHAN. **1937 A.W.R. 115=1937 A.L.J. 161=168 I.C. 988=9 R.A. 691=1937 A.L.R. 437=A.I.R. 1937 All. 273.**

———Construction—Instrument of partition—Lists of shares to be allotted at partition to be completed in future by execution of formal registered deed—If instruments of partition—If evidence of completed partition effected orally. *See* REGISTRATION ACT, S. 17. **1937 M.W.N. 393.**

———*Construction—Language of entire deed to be considered.*

The cardinal rule of interpretation for deeds as well as for other instruments is to gather the intention from the words of the document, and for that purpose the language of the entire deed should be taken into consideration. The interpretation to be adopted should be one which gives effect, if possible, to all the parts, and does not reject any of them. (*Sir Shadi Lal.*) PURNANANTHACHI *v.* GOPALASWAMI ODAYAR. **63 I.A. 436=164 I.C. 26=44 L.W. 422=9 R.P.C. 72=1936 A.L.J. 1094=1936 A.W.R. 1089=38 Bom. L.R. 1247=64 C.L.J. 147=41 C.W.N. 14=17 Pat. L.T. 910=1936 All.L.R. 782=1936 O.L.R. 482=1936 M.W.N. 1189=1936 P.W.N. 873=1936 O. W.N. 709=A.I.R. 1936 P.C. 281=71 M.L.J. 554 (P.C.).**

DEED.

———*Construction—Language and surrounding circumstances.*

Each document must be construed on its own language and with reference to its own circumstances. (*Dhavle and Agarwala, JJ.*) PANCHAM SINGH *v.* PROMOTHA NATH MITRA. **15 Pat. 680=164 I.C. 358=9 R.P. 111 (2)=17 Pat.L.T. 554=1936 P.W.N. 552=A.I.R. 1936 Pat. 450.**

———*Construction—Lease or easement—Kabuliat giving right of passage over land.*

The difference between a lease and an easement is well defined. By a lease the owner of land retains his ownership but parts with possession. The lessee is entitled to possess the land leased to the exclusion of all others. An easement is a different thing. By granting an easement the owner of the land retains not only his ownership but also his possession. The grantee does not get possession of the land but gets merely a right to the limited use of the land. If a Kabuliat gives a right of passage over a narrow strip of land forming part of a larger part of land, the grantor does not part with possession of the land in any sense, and the Kabuliat is, therefore, not a lease, but merely seeks to create an easement in favour of the grantee. (*Sen, J.*) HARAM CHANDRA MUKHO PADHYA *v.* SHYAMA CHARAN CHAKRABARTY. **71 C.L.J. 248=A.I.R. 1940 Cal. 447.**

———*Construction—Lease or license—Test—Government lands made over to Railway Company for management—Grant of such land by Railway Company for cultivation of special crop for one year—Agreement termed license and prohibiting creation of any interest in the land in favour of the licensee—If lease or license—Suit for profits by Company and Secretary of State—Limitation.*

The distinction between a lease and a license consists in the fact that in the case of a lease there is a transfer of interest in land, whereas in the case of license there is no transfer of such interest. In determining whether a transaction is a lease or a mere license, the substance of the agreement must be considered more than the words. The B.N.W. Railway Company which was in possession and management of certain lands of the Government and which had no power to lease out the lands without the sanction of the Secretary of State for India granted part of such lands to one L. P., the father of the defendants for the purpose of cultivation of castor seed for a period of one year. The agreement under which the lands were so granted was termed a license and provided, *inter alia,* that the licensee should pay to the Railway Company in lieu of rent one half of the crop, that he shall not transfer or sublet, and that he should pay all expenses for execution and registration of the agreement. There was a clause providing that nothing therein contained should be construed to create any right, title or interest in favour of the licensee in the said land or neighbouring lands of the Railway Administration. In a suit by the Railway Company to eject the defendants and for rent and

mesne profits, the defendants pleaded that their father L.P., who was a settled raiyat of the village in which the railway lands were situated, was not a mere licensee but a raiyat and acquired occupancy rights. The Secretary of State was made 2nd plaintiff.

Held, that the deed of agreement conferred on L.P., only the rights of a licensee and nothing more, and that he could not be considered as a tenant or as having held the land as a *raiyat*, that the circumstances under which the agreement was executed took the case out of the operation of the Bengal Tenancy Act, and that no occupancy rights or permanent tenancy rights were or could be acquired by the licensee L.P., or the defendants.

Held, further, the claim for recovery of mesne profits was governed not by Art. 109 or 116, but by Art. 149 of the Limitation Act, the land being the property of the Secretary of State and the Railway Company being in possession merely as Managing Agents. (*Courtney Terrell, C.J. and Agarwala, J.*) BENGAL NORTH WESTERN RAILWAY CO., LTD. *v.* JANKI PRASAD. **163 I.C. 525=9 R.P. 26=17 Pat.L.T. 206=1936 P.W.N. 298=A.I.R. 1936 Pat. 362.**

———Construction—Lease or mortgage—*Zar-e-peshgi* lease—Payment of amount *bataur zar-e-peshgi*—Provision for payment of amount to landholder by lessee—Latter to hold possession for five years—Lessor undertaking to repay *zar-e-peshgi* amount after 5 years—Nature of transaction—Right of lessee to hold after 5 years on non-payment of amount. *See* AGRA TENANCY ACT, Ss. 86 AND 92. **1936 R.D. 461.**

———*Construction—Lease or mortgage*—Zar-e-peshgi kabuliyat *by settled raiyat to landlord—Settlement of land for agricultural purpose at fixed rate for three years accompanied by advance termed* peshgi *money—Effect—Occupancy rights—If acquired—Subsequent acceptance of* ijara *creating mortgage—If destroys occupancy rights.*

In 1913, *K*, who was a settled raiyat of a village, executed in favour of the landlord a document described as a *zar-e-peshgi kabuliyat*, evidencing an advance of a sum of Rs. 145-8-0, as *peshgi*, and agreeing to pay a rent of Rs. 30-12-0 for the term of lease which was for three years. The deed recited *inter alia* that the executant who was a cultivator had not sufficient *kasht* land for his maintenance in the *mauza*, that it became necessary for him to take settlement of further *kasht* land for cultivation, that the landlord granted his request for settlement of *kasht* and that he had therefore taken settlement of the lands described in the deed on payment of the amount as *peshgi* money for a term of three years commencing from the agricultural year, 1321 fasli, at a certain rate of rent per *bigha*. In 1916, *K* was recorded as an occupancy raiyat in respect of the demised land. In 1917, the landlord executed an *ijara* deed in favour of *K* with regard to the lands evidencing an advance of Rs. 200 as *peshgi* for a term of five years, which amounted to a pledge of the land as security for the amount advanced and provided for redemption.

Held, that the *zar-e-peshgi* of 1913 was only a cultivating lease, as the primary object of the same was to demise the land for cultivating purposes, and the amount paid was only by way of premium and not a loan secured by the settlement of the land, and therefore *K* became an occupancy raiyat in respect of the land; the subsequent acceptance by *K* of the *ijara* of 1917 could not operate to deprive him of his occupancy rights. (*Agarwala, J.*) JAGESHAR SINGH *v.* ALAKH NARAIN SINGH. **180 I.C. 95=5 B.R. 335=11 R.P. 447=A.I.R. 1939 Pat. 265.**

———*Construction — Maintenance allowance—Heritability and transferability.*

Some members of the family of a *wakif* brought a suit against the mutwallis of the *wakf* on the footing that the *wakf* properties were still secular and the defendants were mere managers. This suit was compromised on the basis of an agreement entered into between the parties. According to the terms of the agreement, the *wakf* was admitted as valid and binding, and the mutwallis agreed to increase the allowances payable under the *wakf* deed to some members of the family. The agreement further provided that on the death of any of such members, the allowance payable to him or her was to be distributed amongst his or her heirs and residuaries in such proportions as the family council would determine.

Held, that the agreement did not make successive life grants of allowances and that the right to receive the allowances was a heritable and transferable one. (*R. C. Mitter and Biswas, JJ.*) KHAJEH SAJIDULLA *v.* HON'BLE LIEUTENANT NAWAB K. HABIBULLAH. **182 I.C. 626=12 R.C. 86 (2)=68 C.L.J. 371=A.I.R. 1939 Cal. 192.**

———*Construction—Marriage contract—Dower—Liability of surety—Summing up clause.*

A deed of marriage contract after stating the factum of the marriage and its celebration, and mentioning that the husband had accepted his liability to pay certain sum as prompt and certain sum as deferred dower, provided that, in the unhappy event of 'variance' between the parties to the marriage, the husband should pay his wife certain sum per month; that also *A* another person should pay certain sum per month to the wife while the marriage subsisted. Then followed a declaration which was of the nature of a 'summing up' of the preceding provisions. The declaration was in these terms: "It is declared that both the aforesaid dowers, that is the prompt and deferred, are payable in full by the man marrying, as all due debts are, that he should pay the same without any deductions at the time they fall due, and that the girl married is entitled to recover the same from her husband and the surety."

Held, that within the four corners of the deed there was not any definite or unequivocal undertaking on part of *A* to pay the dower, and the cursory reference to the surety in the summing up clause did not fasten the liability on the surety. (*Lord Alness.*) FATIMA BEGUM *v.* AHMAD ALI KHAN. **167 I.C. 785=1937 O.W.N. 499=1937 O.L.R. 222=9 R.P.C. 237=3 B.R. 432=41 C.W.N. 965=46 L.W. 30=1937 A.L.R. 334=1937 P.W.N. 582=31 S.L.R. 279=A.I.R. 1937 P.C. 121 =(1937) 2 M.L.J. 565 (P.C.).**

———Construction—Mortgage by creditor and debtor to creditor of former—Undertaking to pay mortgage jointly and severally—Description of debtor as surety—Effect—Liability of debtor—If one of surety for, creditor. *See* COMPANIES ACT, Ss. 91-A AND 91-B, SCH. I, TABLE A, ART. 73. **37 Bom.L.R. 978=A.I.R. 1936 Bom. 62.**

———(*Construction — Mortgage-deed — Period of redemption—Patent ambiguity.*

Where a mortgage-deed provides in the beginning that the property has been mortgaged for a period of four years but later on it is mentioned that the mortgagors shall pay the entire principal with interest and effect redemption at the end of a certain fasli which would be only three years and two months from the date of the execution of the mortgage and in certain documents executed simultaneously with the mortgage-deed the latter is stated to have been executed for a period of four years, the inconsistency between the two statements contained in the mortgage-deed as regards the period of redemption must be regarded as a case of patent ambiguity and the Court must give effect to the real intention of the parties which is to fix a term of full four years for redemption. (*Srivastava and Nanavutty, JJ.*) RAJA RAM *v.* RAMESHWAR BAKHSH SINGH. **12 Luck. 109=161 I.C. 605=8 R.O. 335=1936 O.W.N. 354 =1936 O.L.R. 194=A.I.R. 1936 Oudh 270.**

———*Construction—Mortgage or charge—Covenant against alienation—Legal effect of.*

A document which was described as a *Zamanatnama* or security bond and which was not stamped as a mortgage-deed, recited that the executants had entered into an agreement with the plaintiffs for an advance of a sum of Rs. 5,000 which would be paid by means of *hundis* drawn by the executants on the plaintiff's firm, from time to time, and that till the discharge of these *hundis* a certain house belonging to them would remain security with the plaintiffs. It was also stated that the house was free from any charge or encumbrance, and that until repayment in full of the amount which might be advanced by the plaintiffs, the executants would not have the right to alienate the property in any way.

Held, that the document merely created a charge in favour of the plaintiffs and not a mortgage and that the legal effect of the covenant against alienation was merely to divest the executant of a portion of his interest in the property in question and not to vest that interest in the plaintiffs. 39 A. 244, followed. (*Tak Chand and Dalip Singh, JJ.*) VIR BHAN *v.* SALIG RAM. **17 Lah. 659=164 I.C. 381=9 R.L. 113 (2)=38 P.L.R. 1078=A.I.R. 1937 Lah. 35.**

———*Construction—Mortgage or lease.*

On a construction of the deed in question,

Held, that the transaction was a mortgage and not a *zarpeshgi* lease. The fact that a rent was reserved was held not to preclude the Court from coming to such a conclusion. The existence of the debt and the provision for redemption were held to indicate that it was a mortgage. (*Wort and Rowland, JJ.*) DILDAR HUSAIN *v.* SADDIQ. **172 I.C. 935=10 R.P. 366 =1938 P.W.N. 15=4 B.R. 206=18 Pat.L.T. 925=A.I.R. 1938 Pat. 35.**

———Construction—Mortgage or lease—Mortgage and lease executed simultaneously—No reference to mortgage in the lease. *See* AGRA TENANCY ACT, SS. 86 AND 92. **1937 R.D. 512.**

———*Construction—Mortgage or lease—Test to decide—Description in deed—If material.*

It is impossible to decide the question whether a particular transaction was a mortgage or a lease merely by the description given to it; the substance of the transaction must be looked at. If the transaction is one of mortgage the fact that it is called a lease will be quite irrelevant. (*Wort and Varma, JJ.*) SARAJBASHINI GOSH *v.* BAIJNATH PANDEY. **176 I.C. 892=4 B.R. 784=11 R.P. 121=A.I.R. 1938 Pat. 388.**

———Construction — Mortgage or sale. *See* TRANSFER OF PROPERTY ACT, S. 58 (*c*)—MORTGAGE OR SALE. **1939 N.L.J. 544.**

———*Construction — Mortgage or sub-lease — Deed by tenant to creditor—Excess profits to go in lieu of interest—Absence of provision for possession until repayment of debt—If mortgage or merely bond.*

A tenant borrowed money and sub-let his fields to the creditor, providing that the excess profits over the rent should go in lieu of interest, but there was no provision that the holding was to remain in the possession of the creditor as security for the repayment of the principal amount borrowed.

Held, that document was not a mortgage, but only a bond and that the creditor was in possession not as mortgagee but as a sub-tenant liable to ejectment. (*Knox, J. M.*) JAGWA *v.* RAM PEARE. **1936 R.D. 365 (1).**

———*Construction — Mortgagee paying stamp duty on mortgage bond in respect of certain amount—If can contend by maintaining another construction that larger amount is due.*

A person who has paid stamp duty on a bond on the footing that it was only for a certain existing debt, cannot afterwards be heard, by maintaining another construction, to say that the real amount was larger and to thereby admit that the revenue was defrauded of the duty on the excess. (*Lord Thankerton.*) CARSON & CO., LTD. *v.* D.M.C. HULME KING. **176 I.C. 5=11 R.P.C. 31=A.I.R. 1938 P.C. 225 (P. C.).**

———*Construction—Oral evidence to determine intention—Admissibility.*

Oral evidence to determine the intention of the parties is certainly not admissible if the document is unambiguous; but if there is doubt then it is permissible. (*Vivian Bose and Puranik, JJ.*) NARAYAN *v.* CO-OPERATIVE CENTRAL BANK, MALKAPUR. **I.L.R. (1938) Nag. 604=178 I.C. 293=11 R.N. 219=1938 N.L.J. 82=A.I.R. 1938 Nag. 434.**

———*Construction — Partition — Subsequent conduct of parties—Value of.*

When a document clearly shows that a definite division has taken place between the parties, its legal construction and effect cannot be controlled or altered by evidence of the parties. (*Sir Shadi Lal.*) VENKATAPATHI RAJU *v.* VENKATANARASIMHA RAJU. **63 I.A. 397= I.L.R. (1937) Mad. 1=38 Bom.L.R. 1238= 64 C.L.J. 131=41 C.W.N. 7=17 Pat.L.T. 881=164 I.C. 1=1936 O.W.N. 673=1936 A. L.J. 1039=1936 All.L.R. 778=1936 O.L.R. 477=1936 M.W.N. 1249=1936 P.W.N. 727= 44 L.W. 408=9 R.P.C. 66=1936 A.W.R. 955 =A.I.R. 1936 P.C. 264=71 M.L.J. 558 (P.C.).**

———Construction — Partition deed — Language plain, and unambiguous—Extrinsic evidence of contemporaneous or subsequent acts of parties

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—Admissibility. *See* HINDU LAW—PARTITION. **(1937) 1 M.L.J. 95.**

———Construction — Power of attorney — If confers authority to execute promissory note. *See* PRINCIPAL AND AGENT. **171 I.C. 412.**

———*Construction — Power-of-attorney—Introductory particulars.*

The rule laying down that powers-of-attorney should be strictly construed relates only to the substantive part of the document where a particular authority is conferred upon the attorney, and not to mere introductory particulars in the document. Documents in this country are not drafted with that meticulous care which is necessary and parties should not be penalized for such formal defects as are not material. (*Addison and Din Mohammad, JJ.*) MEGH RAJ *v.* RAGHBAR DAS. **178 I.C. 1005=11 R.L. 514=A.I.R. 1938 Lah. 712.**

———*Construction—Principles—Repugnancy between earlier and later portion.*

A deed of sale purported to convey lands identical with those covered by a prior lease. The lease contained dimensions of the lands, but the sale did not. It only contained a schedule in which the boundaries were given, following the description given in the lease. There was also a rider appended to the schedule. Whatever may have been the actual intention of the parties, actual measurements disclosed a repugnancy between the rider and the rest of the document.

Held, that as the repugnancy turned to be one of misdescription in the rider, the misdescription should be rejected and that the rider would not prevail over the recital in the body of the sale deed. (*Biswas, J.*) NAGENDRA BALA DEVI *v.* BAIDYANATH CHAKRABARTY. **175 I.C. 113=10 R.C. 750=66 C.L.J. 202=A.I.R. 1938 Cal. 225.**

———*Construction*—Purusha santhathi—*Hindu impartible estate—Settlement deed—Provision for payment of maintenance allowance to junior members for life and after their death to their* purusha santhathi—*Illegitimate sons—If entitled to claim as* purusha santhathi.

The words "*purusha santhathi*" mean male issue, progeny or descendants, and used in their widest sense, the words would cover illegitimate descendants. But an illegitimate son can never be an *aurasa* son. Where a deed of settlement entered into between the holder of an impartible estate governed by the Mitakshara School of Hindu Law and his younger brother, provided that the estate should be treated as impartible and should descend along the eldest line of descent and that the younger brothers and their *purusha santhathi* were entitled to get allowance from the estate, that the holder for the time being should pay the younger brothers allowances until their death to their *purusha santhathi,* there is nothing in the context which warrants the assumption that illegitimate sons are included in the term *purusha santhathi.* The intention on the other hand would seem to be to limit the maintenance allowance to legitimate descendants and that the parties only contemplated the right of maintenance being conferred upon legitimate descendants and that they used the words *purusha santhathi* in this sense. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) MAHARAJAH OF VENKATAGIRI *v.* RAJARAJESWARA

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RAO. **I.L.R. (1939) Mad. 622=189 I.C. 123=13 R.M. 144=49 L.W. 717=1939 M.W.N. 522=A.I.R. 1939 Mad. 614=(1939) 1 M.L.J. 831.**

———*Construction—Reading words into document—Power of Court—Limits to.*

A Court of construction is entitled to read words into a document if that procedure is necessary in order to reconcile conflicting clauses or otherwise to give effect to what the Court considers from a perusal of the whole document to have been the real intention of the parties but, on the other hand, a Court of construction is not entitled to read words which are not there into a document if the document as it stands can be given a rational meaning. (*Beaumont, C.J. and Blackwell, J.*) WELLINGTON CINEMA *v.* PERFORMING RIGHT SOCIETY, LTD. **I.L.R. (1937) Bom. 724=172 I.C. 408=10 R.B. 271=39 Bom.L.R. 654=A.I.R. 1937 Bom. 472.**

———Construction—Recitals—Value—Old transaction. *See* MORTGAGE—RECITALS. **1940 A.L.J. 479.**

———*Construction—Reference to other documents—If permissible.*

The language of one document does not afford much assistance in the construction of another. Each document must be construed according to the words which are contained in it. (*Thomas, C.J., Zia-ul-Hasan and Hamilton, JJ.*) RAGHURAI *v.* BINDRA PRASAD. **14 Luck. 89=175 I.C. 32=10 R.O. 294=1938 R.D. 575=1938 O.L.R. 252=1938 O.A. 447=1938 O.W.N. 547=A.I.R. 1938 Oudh 140 (F.B.).**

———*Construction—Reference to precedents—Propriety—Intention of parties—Duty of Court to ascertain.*

In construing deeds the words of each document must be taken and the Court must ascertain, as best it can, what the intention of the parties was in accordance with the terms expressed with them. It is not very profitable to attempt to construe a deed by reference to authorities. (*Rowland and Chatterji, JJ.*) MATHURA SINGH *v.* PALAKDHARI SINGH. **187 I.C. 484=12 R.P. 598=6 B.R. 477=21 Pat.L.T. 770=A.I.R. 1940 Pat. 512.**

———*Construction — Reference to precedents construing other deeds—Desirability—Intention of parties—Duty of Court to ascertain.*

It is not very profitable to attempt to construe a document by reference to authorities construing other documents; the words of each document must be taken, and the Court must ascertain, as best as it can, what the intention of the parties was in accordance with the terms as expressed by them, and the document must be taken as a whole. (*Wort, C.J. and Manohar Lall, J.*) RAJKUMAR BHARTHI *v.* SURAJDEO SAHI. **17 Pat. 737=177 I.C. 533=11 R.P. 154=4 B.R. 834=19 Pat.L.T. 737=1938 P.W.N. 659=A.I.R. 1938 Pat. 585.**

———*Construction—Reference to precedents—Construing other documents—Propriety.*

The decisions based on the language in one will or document cannot afford any sure guidance in construing another will or document in a different language and made under different circumstances. It will be the duty of the Court to construe a particular document before it on the words in that document itself, considered in the light of the surrounding circumstances. (*Wassodew and Thakor, JJ.*) HILALSING *v.* UDESINGH. **173 I.C.**

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963=10 R.B. 406=39 Bom.L.R. 1217=A.I.R. 1938 Bom. 125.

———Construction—Release of specific property by Hindu coparcener, in favour of another coparcener—Recital that thereafter only blood relationship and no monetary relationship existed between the two—If release of rights in all joint property. *See* HINDU LAW—JOINT FAMILY. **A.I.R. 1937 Mad. 237.**

———*Construction — Rules of — Construction against grantor.*

The rule as to construction against the grantor means that where in construing a document there is a doubt as to the quantity or quality of the estate conveyed, doubt should be dissolved in favour of the grantee. (*Ameer Ali, J.*) KANTI CHANDRA MUKHERJEE *v.* JOHN BOISOGOMOFF. **42 C.W.N. 937.**

———*Construction — Rules* — Ejusdem generis *rule—How far applicable.*

The *ejusdem generis* rule may be a sound one for the interpretation of statutes, since a trained legal draftsman will generally carry the maxims of the learned Maxwell in his mind and will use a special form of drafting if he intends that general words should not run any risk of being interpreted otherwise than in their ordinary meaning; but with regard to any other class of documents, this canon of interpretation does not appear to have been anywhere authoritatively laid down as a rule of presumption. (*Beckett, J.*) WAHID-UD-DIN *v.* HOSIERY KNITTING MILLS, LTD., DELHI. **40 P.L.R. 701.**

———*Construction—Rules—Intention of party.*

It is entirely wrong for a Court to interpret a document in a particular way because some one taking under it chooses to put that interpretation upon it. The intention of a party to a document must be deduced from the document itself by giving the words therein their ordinary natural meaning. (*Henderson and Sen, JJ.*) MAHAMAD ALI *v.* DINESH CHANDRA ROY. **I.L.R. (1940) 2 Cal. 189=71 C.L.J. 432=44 C.W.N. 718=A.I.R. 1940 Cal. 417.**

———*Construction— Rules— Interest conveyed adequately defined—Addition of erroneous description—Effect of.*

It is a settled rule of construction that if there are words in a document, which adequately and with sufficient certainty define the interest that is to be conveyed, the addition of an erroneous description would not vitiate it. (*Mukherjea, J.*) KHULNA LOAN CO., LTD. *v.* TARAPADA BOSE. **44 C.W.N. 783.**

———*Construction—Rules—Liberal construction.*

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be regarded so much as the real meaning of the parties which the transaction discloses. (*Ranjitmal, J.*) JUGRAJ *v.* GOPURAM. **1940 Mar.L.R. 74 (Civ.).**

———*Construction—Rules of—Plain meaning to be given.*

An instrument must be construed according to the plain meaning of the words and sentences contained therein. It is not proper to assume an intention apart from the language of the instrument itself and having done so to bend the language in favour of the assumption so made. (*Addison and Din Mahomed, JJ.*) JAINI BROTHERS &

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CO. *v.* SHANKAR LAL. **178 I.C. 176=11 R.L. 414 =A.I.R. 1938 Lah. 270.**

———*Construction—Rules—Reference to ultimate consequences.*

A deed is to be construed not by reference to the ultimate consequences of fact which might flow from its execution and adoption, but in the light of what it purports to say and the legal consequences of what it does say. (*Khundkar, J.*) BHABATARINI DEBI *v.* ASHMANTARA DEBI. **179 I.C. 847=11 R.C. 620=A.I.R. 1938 Cal. 490.**

———*Construction—Sale—Sale of house—If includes adjacent* chabutra *also.*

A sale of a house does not include a sale of a *chabutra* adjacent to it, when there is no means of ingress and egress from the house on to the platform. (*Dalip Singh, J.*) ANUP SINGH *v.* ARJAN LAL. **41 P.L.R. 579.**

———*Construction—Sale-deed—Executant purporting to sell property for certain sum—Entire consideration left with vendee—Vendee to spend it on intended litigation relating to that property —Property if conveyed* in presenti.

Where the executant of a deed purports to sell a half share of the property to the vendee in lieu of a certain named sum, but the entire sale consideration is left with the vendee to be spent by him on an intended litigation in respect of that property, and the deed is executed, stamped and registered as a sale deed, the deed in favour of the vendee is a deed of sale conveying property to him in *presenti.* The vendee can, therefore, continue the suit brought by him along with the vendor for the recovery of the property, even though the latter withdraws from the suit. (*Srivastava, Ag.C.J. and Zia-ul-Husan, J.*) BISHESHWAR PRASAD *v.* JANG BAHADUR. **12 Luck. 339= 164 I.C. 1039=9 R.O. 130=1936 O.W.N. 857 =1936 O.L.R. 549=A.I.R. 1936 Oudh 410.**

———*Construction — Sale-deed — Indemnity clause.*

Where a sale-deed contains a provision that if in any way the entire property sold, or any portion of it, goes out of the possession of the vendees, compensation is to be given either out of the other property of the vendors, or by the vendors personally, the contingency contemplated and provided for by the deed cannot be said to arise merely by the passing of a decree in respect of the property sold in favour of a third party. Accordingly a suit for compensation by the vendees would be premature before they are dispossessed in execution of the decree. (*King, C.J. and Smith, J.*) NANAK CHAND *v.* IRSHAD HUSAIN. **160 I.C. 960=8 R.O. 289=1936 O.L.R. 120=1936 O.W.N. 148=A.I.R. 1936 Oudh 136.**

———*Construction—Sale-deed — Indemnity clause.*

Where it is definitely provided in the sale-deed that in case of any disturbance or dispute the buyer could claim his money with interest from the seller from the date of dispossession, it is not the intention of the parties that the buyer could claim compensation unless and until he is dispossessed, and that contingency does not arise on the mere passing of a decree in favour of a third party until the buyer is dispossessed in execution of the decree. (*King, C. J. and Nanavutty, J.*) BHAGWATI PRASAD *v.* BADRI PRASAD. **11 Luck.**

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725=160 I.C. 454=8 R.O. 257=1936 O.W.N. 143=1936 O.L.R. 73=A.I.R. 1936 Oudh 141.

———*Construction—Sale-deed—Owner of a 16 pie share in mahal mortgaging 3 pies share—Subsequent sale by him of 8 pies share—Portion of sale consideration left with vendee for payment of mortgage—Sale-deed, if includes mortgaged share.*

An owner of a 16 pie share in a mahal mortgaged 3 pies and subsequently sold 8 pies share. It was stated in the sale-deed that the vendee should pay up the amount of the mortgage debt with a certain sum left with him for that purpose and should obtain a receipt. Nothing was said about this receipt being made over to the vendor, whereas if, in fact, this payment was being made on his behalf, it was obviously necessary that on payment being made, the receipt should be handed over to the vendor as it would not have been of any value to the vendee.

Held, that the use of the words in "shall obtain a receipt" implied that the receipt was being obtained for the benefit of the person who made the payment and who would retain it, and would equally take back the mortgage deed from the mortgagee and that, therefore, the only reasonable conclusion was that the 3 pies share mortgaged was included in the 8 pies share covered by the sale-deed. (*Yorke, J.*) BRIJ BHUKHAN *v.* BHAGWANT DAT. **1938 O.A. 523=1938 O.W.N. 290.**

———*Construction—Sale-deed—Part consideration left with vendee for payment of debts in case vendor failed in suit—If contract of indemnity—Vendor's right to such amount.*

Where under the deed of sale the vendee retains part of the consideration, and the deed contemplates that the moneys retained were the moneys of the vendor, and there is a clear direction to apply the said moneys in discharge of two decrees only in the event of those litigations ending successfully in favour of the decree-holders the object being to prevent the property from being sold in execution of those decrees, and payment of interest for retention of money is expressly waived, the transaction does not amount to a contract of indemnity pure and simple and the vendor and his representatives are entitled to demand the money, the vendee not having to pay the moneys to discharge the decrees recited. (*Venkataramana Rao, J.*) SETHURAMA IYER *v.* RAMACHANDRA IYER. **168 I.C. 588=9 R.M. 604 =1936 M.W.N. 1000=44 L.W. 759=A.I.R. 1936 Mad. 528.**

———Construction—Sale-deed—Passing of title —Intention as to—If to be gathered from the terms only—Extrinsic evidence—Admissibility. *See* EVIDENCE ACT, S. 92. **17 Pat. 318.**

———*Construction—Sale-deed — Sale of zamindari share masewa decree for costs and mesne profits—Decree for costs and mesne profits—If passes to vendee.*

During the pendency of a suit by a lady for possession of zamindary property, the lady entered into a champertous agreement with a third person whereby it was agreed that the latter should bear all the costs of the litigation and should receive in return half of the zamindari property. The lady got a decree for the zamindari property with mesne profits and costs. In accordance with the agreement, a sale-deed was executed which provided that "the half share in the zamindari together with all zamindari rights appertaining thereto masewa the decree for costs and mesne profits have been transferred."

Held, that the expression 'masewa' implied everything but the decree for costs and mesne profits. Hence the decree for costs and mesne profits was not transferred in addition to zamindari share. (*Rowland and Chatterji, JJ.*) HALDHER PRASAD SINGH *v.* NATHA SINGH. **189 I.C. 875=13 R.P. 141=6 B.R. 868=A.I.R. 1940 Pat. 3.**

———*Construction—Sale-deed conveying land "together with the external and internal rights for ever"—Interpretation of—Right to share in village shamilat or common land—If conveyed—Intention of vendor.*

An owner of land in a village sold the same, comprising 207 kanals of land under a registered deed of sale, specifying the fields by their numbers in the revenue records and giving the boundaries of the area, the southern boundary being described as "the area of the shamilat of the village." After stating that the vendor had "now made an absolute sale of land—together with a share in the well and well gear," the deed proceeded: "The agreement is that from to-day's date the said vendee will enjoy possession of the land sold together with the external and internal rigts for ever. In future I have been left no concern or connection with the aforesaid land sold." No division of shamilat or common land of the village on which the villagers enjoyed the privilege of grazing their cattle, had been effected on the date of the sale-deed. The vendee claimed the right to participate in the shamilat, but the vendor disputed that right.

Held, the sale-deed clearly showed an intention on the part of the vendor to convey to the vendee not only 207 kanals of land, but also all rights and interests which he possessed in association with the 207 kanals, including the right to a share in the shamilat. The sale was not only of the 207 kanals, but also of "the external and internal rights for ever", and the vendor's declaration that in future he was to have "no concern or connection with the aforesaid land sold" constituted the most emphatic words of divestiture, giving no room for a suggestion of any kind of reservation by the vendor of any right to himself of claiming an as yet unascertained share of the shamilat. The words "external and internal rights" included a right in respect of the 207 kanals to participate in the ultimate partition of the shamilat. (*Lord Macmillan.*) AYA RAM *v.* RUPCHAND. **I.L.R. (1937) Lah. 662=31 S.L.R. 646=169 I.C. 661 =1937 O.L.R. 403=39 P.L.R. 687=1937 A.L.R. 631=10 R.P.C. 35=1937 O.W.N. 1084= 66 C.L.J. 49=3 B.R. 688=1937 M.W.N. 1316 =(1937) 2 M.L.J. 267 (P.C.).**

———Construction—Sale-deed purporting to convey land with all rights—Vested remainder possessed by vendor—If passes. *See* POWER OF ATTORNEY—CONSTRUCTION. **50 L.W. 192.**

———*Construction—Sale or agreement of sale—Specific recitals as to payment of consideration and conveyance of title—Vendee given right of enjoyment with powers of gift, exchange and sale—Undertaking to execute document of power if*

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required by vendee—If actual sale or mere agreement of sale—Deed inoperative for want of registration—Agreement to execute deed—If specifically enforceable.

Where a document contains not merely general words suggesting a conveyance and a definite agreement that another document will be executed, but contains recitals to the effect that certain property was sold this day and that a hundi for Rs. 2,000, which was the consideration for the sale, was payable with interest "from this day" and that as the vendor has received the amount, the property shall be held and enjoyed as long as the Sun and Moon last by the vendee as he likes with powers of alienation by way of gift, exchange and sale, and there is a further provision that "if the vendee requires any document of power, etc., therefor, the vendor shall, without any delay, have the same completed whenever required at the cost of the vendee" the deed cannot be taken to be a mere agreement to sell or as a document the main purport of which is the execution of another document. The effect of the recitals is that the parties think that a sale has actually taken place that day and that a document is to be executed in the future only if the vendee should require it. The document must be taken to bring about an actual conveyance of property. Where such a document being unregistered is of no legal effect, no conveyance can be brought about. The promise to execute a regular deed in future being inseparable from the rest of the transaction, the vendee, if the land is not sold, cannot insist on the execution of a document as stipulated for, and the specific performance of the agreement cannot therefore be granted. (*Horwill, J.*) M. R. M. RAMASWAMI CHETTIAR *v.* MUTHIAH CHETTIAR. **168 I.C. 528=9 R.M. 600=44 L.W. 569=A.I.R. 1937 Mad. 22=71 M.L.J. 641.**

———Construction—Sale or conditional mortgage—Ostensible sale-deed—Condition for reconveyance on repayment of consideration in one year in lump sum—Vendor not to mortgage or sell for paying for reconveyance—Property not to be sold or mortgaged for five years after reconveyance—Nature of transaction—Sale with condition for reconveyance or mortgage by conditional sale. *See* T. P. ACT, S. 58 (*c*). **1937 A.W.R. 773=A.I.R. 1937 All. 724.**

———*Construction—Sale or exchange.*

The question whether a transaction is a sale or an exchange has to be decided by looking at its substance. A transaction cannot be converted into an exchange merely by the addition of some trifling non-pecuniary consideration to the price so as to defeat the right of pre-emptors. (*Bhide, J.*) NIHALU *v.* BHAGWANA. **162 I.C. 913=8 R.L. 970 (1)=38 P.L.R. 632=A.I.R. 1936 Lah. 234.**

———*Construction—Sale or mortgage—Deed in form of sale—Amount advanced less than value of property—Parties referred to as creditor and debtor—Provision for re-conveyance on payment of amount within 12 years—If sale or mortgage by conditional sale—T. P. Act, S.* 58 (c).

A document in the form of a sale-deed for Rs. 100, contained a provision that in case "I pay you back the aforesaid sum of Rs. 100 before the completion of 12 years form this day, then you should reconvey to me the aforesaid land." It was found that the consideration, *viz.,* Rs. 100 received, was less than the value of the property; the parties were referred to in the deed as creditor and debtor and it stated that the creditor paid to the debtor Rs. 100.

Held, that the transaction was not a sale, but only a mortgage by way of conditional sale and the redemption clause clearly brought the case within S. 58 (*c*) of the T. P. Act. (*Beaumont, C.J. and Sen, J.*) RAJARAM JAYARAM *v.* TANUBAI DHONDIBA. **186 I.C. 528=12 R.B. 347=41 Bom. L.R. 1251=A.I.R. 1940 Bom. 63.**

———*Construction—Sale or mortgage—Test to decide—Surrounding circumstances—Sale-deed—Provision that if within certain period vendee desires to sell vendor would purchase for same amount—Greater part of property left in hands of vendor for rent—Inference of mortgage—If justified.*

The question whether an ostensible sale is a pretence or a reality has to be determined by the construction of the document with the help of the surrounding circumstances. In order to show that a transaction of sale is really a mortgage and not a sale the party alleging it must satisfy the Court from the surrounding circumstances that the parties did not mean what they said. A clause in the sale-deed to the effect that if within a certain period the vendee desired to sell the property, the vendor has a right of purchasing it back at a fixed amount (the amount being the same as that for which the property is sold) would not convert the sale-deed into a transaction of mortgage. Nor would the fact that the greater part of the property sold is allowed to continue in the vendor's possession on lease for rent lead to the inference that the transaction is only a mortgage, unless it can be shown that the rent has been fixed at the specified amount to correspond with the rate of interest agreed on the amount due to vendee-mortgagee, and that the amount due to the latter, that is, the consideration for the sale, is treated as a continuing debt. (*Broomfield, Ag.C.J. and Sen, J.*) GULABCHAND RAYCHAND *v.* NARAYAN MOTIRAM. **186 I.C. 307=12 R.B. 317=41 Bom.L.R. 1217=A.I.R. 1940 Bom. 1.**

———*Construction—Sale or perpetual lease—Validity of the condition to pay rent.*

Where a deed purports to be and is in fact a sale, the parties are referred to as the vendor and the vendee (baya and mushtari), the land transferred as the land sold (arazi-mubaiya), the sale is described as bai kamil, it further provides that the vendee will remain in possession of the land sold with all rights of transfer of every kind from generation to generation like the vendor and that thereafter the executant and her heirs had no concern of any sort and no right (haq) left in the land sold, and all the rights (tamam haquq) in respect of the property sold are transferred in favour of the vendee, and the deed contains a stipulation to the effect that the vendee will pay a certain amount as rent to he vendor in respect of the land sold, and the sale is for a cash consideration.

Held, the deed is an out and out sale of the property in favour of the vendee and not a perpetual lease, and the condition as to the payment of rent is repugnant to the nature of the transaction. (*Srivastava, C.J.*) SHIVA NATH KUNWAR

v. LACHHMI NARAIN. 13 Luck. 662=10 R.O. 132=171 I.C. 504=1937 O.L.R. 559=1937 O.W. N. 1138=A.I.R. 1938 Oudh 17.

———*Construction—Sale or release—Sale of reversionary right by reversioner during lifetime of Hindu widow—Subsequent deed after death of widow acknowledging jurther receipt of money and releasing all rights in property—If mere release or sale—T. P. Act, S.* 54.

During the lifetime of a Hindu widow and while she was in the ownership of her limited estate, the reversioner to the estate executed a sale deed of it for Rs. 2,000 to the respondent. After the death of the widow the reversioner executed to the respondent another deed, which was styled as a release deed, which recited the prior sale and further recited: "As I am the immediate heir under reversionary right, and after the death of the said (widow) I represented to you that the said properties were sold before for a low price and that you should pay more, you agreed to it. I have on this day received from you Rs. 500 as cash and have hereby released all my reversionary right in the said property."

Held, that the document was a transfer by way of sale as defined by S. 54, T. P. Act; and that it was not necessary to a transfer of sale that the word "convey" or any formal terms should be used or employed; and that the intention to transfer the ownership for the price was to be inferred from the document; and the document was therefore not a mere release deed. (*Cornish, J.*) ARIYAPUTRA NADALWAN *v.* NACHIMUTHU MALAVARAYAN. **165 I.C. 560=9 R.M. 268 (2)=1936 M.W.N. 1104 (1)=44 L.W. 620=A.I.R. 1936 Mad. 918=71 M.L.J. 488.**

———*Construction — Sale of share in parent "patti"—If entails transfer of proportionate share of "shamilat patti".*

Where a sale-deed transferring the half share of the vendors stated that they were transferring the half share in the "patti with all the external and internal rights and interests appurtenant to the share" it was held that words were quite appropriate to include a right in respect of the "shamilat" land also. (*Thomas, C. J. and Srivastava, J.*) MAHADEO SINGH *v.* JAISIRI SINGH. **1940 A.W.R. (C.C.) 415=1940 O. W.N. 859=1940 O.A. 834=1940 R.D. 415 = A.I.R. 1940 Oudh 415.**

———*Construction—Same word in the same document—Different meanings—If can be given.*

The ordinary rule, no doubt is, that the same words used in one and the same document should be given the same meaning, but it cannot be an invariable rule and if there are reasons for attaching a different meaning, there is no reason why it should not be so taken. (*Thomas, C.J., Zia-ul-Hasan and Hamilton, JJ.*) RAGHURAI *v.* BINDRA PRASAD. 14 **Luck. 89=175 I.C. 232= 10 R.O. 294=1938 O.L.R. 252=1938 R.D. 575=1938 O.A. 447=1938 O.W.N. 547=A.I. R. 1938 Oudh 140 (F.B.).**

———*Construction—Same word used in different parts of document—Meaning to be given.*

Where a word is used in a document in one sense, the same meaning must be given to it where it appears elsewhere in the document unless it is evident from the document that a different meaning should be put upon it. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) MAHARAJAH OF VENKATAGIRI *v.* RAJARAJESWARA RAO. **I.L.R. (1939) Mad. 622=189 I.C. 123=13 R.M. 144=49 L.W. 717=1939 M.W.N. 522 =A.I.R. 1939 Mad. 614=(1939) 1 M.L.J. 831.**

———*Construction — Settlement —Powers conferred under.*

Under a deed of settlement, *R*, a female, was constituted a tenant for life of certain villages which she was expressly precluded from burdening or transferring. On her death, the villages and the entire property were to become the property of *S*. *R* was given absolute rights over the movables. There were several properties also which stood mortgaged to the estate with possession regarding which it had been settled that if the mortgagors got these properties redeemed from *R* or the said *R* realized the amount due under them by means of a suit then she would be entitled to spend the principal and interest in any way she liked but *R* was not to have the power to transfer these mortgagee rights. *R* accepted very small fraction of the mortgage money from the mortgagors in redemption of the mortgages.

Held, that she had no such power under the settlement. (*Lord Macmillan.*) GAJENDRA SHAH *v.* SHANKAR BAKSH SINGH. **1938 A.W. R. (P.C.) 43=1938 O.A. 179=1938 A.L.R. 134=4 B.R. 322=10 R.P.C. 206=67 C.L.J. 118=47 L.W. 796=40 Bom.L.R. 731=172 I. C. 988=1938 O.W.N. 167=1938 O.L. R. 95 =1938 A.L.J. 138=A.I.R. 1938 P.C. 84= (1938) 1 M.L.J. 849 (P.C.).**

———*Construction—Settlement by Sunni Mahomedan woman—Direction to trustee to pay daughters after her death net rents and profits of property—Interest conferred.*

A Sunni Mahomedan woman executed a deed of settlement of a type very common under the English Law, which after conveying certain properties to a trustee and after providing for payment to her during her life such moneys as she shall require out of the rents and profits, etc., *inter alia* provided: "upon the death of the settlor the trustee shall pay to the said Bai *K* (her daughter) during her life the net rents and profits derived from property *A*, and the trustee shall pay to the said Bai *S* (another daughter) during her life the net rents and profits derived from property *B*."

Held, that under the Sunni Mahomedan Law, according to which the deed had to be construed, the gift was of a life-estate, and that the donees were entitled to the net rents and profits derived from the respective profits during their lifetime. (*Beaumont, C.J., Rangnekar and Divatia, JJ.*) SAROOBAI *v.* HUSSAIN SOMJI. **I.L.R. (1937) Bom. 18=165 I.C. 34=9 R.B. 108= 38 Bom.L.R. 903=A.I.R. 1936 Bom. 330.**

———Construction — Settlement deed — Conferment of absolute estate with power to enjoy with all rights—Subsequent clause prohibiting alienation—Effect of. *See* T. P. ACT, S. 11. **(1939) 1 M.L.J. 575.**

———*Construction—Settlement in consideration of withdrawal of suit against settlor by husband and wife—Endowment of trust fund—Undertaking to pay interest to husband by settlor—Provision that in case of death of husband, be-*

nefit to go to his wife—Wife dying and husband remarrying—Right of remarried wife to benefit of settlement.

M against whom his grandson *V* and his wife *G* had filed a suit, the former for his share in certain properties and the latter for her Stridhanam properties, executed a deed of settlement in consideration of the withdrawal of the suit against him. The deed provided *inter alia*, after referring to the suit by *V* and *G*, as follows: "I have arranged, out of my kindness, a capital of Rs. 10,000 out of my cash property and declared it as a trust, for the sake of your (*V's*) help, improvement and benefit according to dharma. You shall have no right whatever either to receive or to make use of or alienate the aforesaid amount during my lifetime; and it is only after my lifetime that said (trust) amount should come to you; but for the income (interest) of the said trust amount, I shall, during my lifetime, pay you throughout each and every month at the rate of Rs. 50 per month. If I should fail in this condition you shall be only entitled to legally collect the aforesaid entire income (interest); but you shall not be entitled to legally collect the aforesaid entire principal trust during my lifetime. If perhaps any mishap should befall you during my lifetime, then your wife, your sons and grandsons shall alone become entitled to the aforesaid declared trust, interest, etc., everything." The name of *G* appeared only in the preamble and not in the operative part. *G* died and thereupon *V* married the plaintiff. *V* having died, the plaintiff sued *M* the defendant, for the amount of Rs. 50 per month under the deed of settlement.

Held (on a difference of opinion between Varadachariar and Burn, JJ.) that the interest created under the deed of settlement in favour of *V*, was not a vested heritable interest; that the settlor, when he used the expression "your wife," contemplated only *G*, who was *V's* wife living at the time, and that the plaintiff, who was subsequently married by *V*, had no right to claim the benefit of the settlement. (*Madhavan Nair, J., on a difference of opinion between Varadachariar and Burn, JJ.*) NEELAMMA *v.* MAREPPA. **163 I.C. 471=9 R.M. 10=1936 M.W.N. 600=43 L.W. 742=A.I.R. 1936 Mad. 388=70 M.L.J. 128.**

———*Construction—Settlement or will.*

If a document executed by a father in favour of his sons states that the father has already given the property to them, the document is in reality a deed of settlement though it is described as a will. (*Skemp, J.*) RAM CHAND *v.* EMPEROR. **189 I.C. 343=13 R.L. 88=41 Cr.L.J. 729=42 P.L.R. 215=A.I.R. 1940 Lah. 274.**

———*Construction—Single or different tenancies—Dakhila mentioning one rent and giving two names as tenants.*

Where a Dakhila mentions one rent and gives the names of two persons as tenants, there are no two tenancies but the tenancy belongs jointly to two persons. (*R. C. Mitter, J.*) SURENDRA NATH MONDAL *v.* BHUDAR CHANDRA SAFUI. **177 I.C. 996=11 R.C. 307=67 C.L.J. 136=A.I.R. 1938 Cal. 690.**

———*Construction — Subsequent conduct — If relevant.*

If the words of a document are quite clear, it would not be proper to try to come to some other interpretation by reference to the subsequent conduct of the parties. (*S. K. Ghose and Mukherjea, JJ.*) SURESH CHANDRA SEN *v.* MAHENDRA NATH MUKHERJEA. **69 C.L.J. 515=A.I.R. 1939 Cal. 459.**

———*Construction—Surety bond — Principle of construction—Operative part—If controlled by recitals.*

The principles of construction in the case of surety bonds are somewhat different from the principles which should be adopted in the construction of any other document. A surety in the eye of law is a favoured debtor and the well recognised and true canon of construction so far as surety bonds are concerned is that the operative part of it is liable to be controlled by the recitals, at least when the latter are plainly inconsistent therewith, but not otherwise. (*Mukerji and S. K. Ghose, JJ.*) BIR BIKRAM KISHORE MANIKYA BAHADUR *v.* JADAB CHANDRA CHOUDHURY. **160 I.C. 388=8 R.C. 433=40 C.W.N. 245=62 C.L.J. 464=A.I.R. 1935 Cal. 817.**

———*Construction — Surrounding circumstances—If to be considered—Intention of parties.*

In the case of a document which is plain and unambiguous, the intention of the parties should be gathered from the language of the document itself. There is no justification for referring to the surrounding circumstances. (*Venkatasubba Rao, Offg. C. J. and Horwill, J.*) A.M.N. KHOYEE & Co. *v.* GORDON WOODROFFE & Co. **I.L.R. (1937) Mad. 479=166 I.C. 313=9 R.M. 360=1936 M.W.N. 970=44 L.W. 676=A.I.R. 1937 Mad. 40=(1937) 2 M.L.J. 131.**

———*Construction — "Surrounding circumstances"—Power of Court to see—Oral evidence of intention of parties—Admissibility.*

Though surrounding circumstances can be seen or looked at in order to arrive at an interpretation of a document, no oral evidence relating to the intention of parties can be referred to under the guise of surrounding circumstances. The "surrounding circumstances" must be strictly limited to the state of facts, as they existed, under which the document came into existence or came to be executed. (*Wassoodew and Thakor, JJ.*) HILAL SING *v.* UDESING. **173 I.C. 963=10 R.B. 406=39 Bom.L.R. 1217=A.I.R. 1938 Bom. 125.**

———*Construction — Surrounding circumstances—Subsequent conduct of parties—If to be taken into consideration—English canons of interpretation—Applicability of.*

In construing unsophisticated conveyancing deeds regard may be had to the surrounding or attendant circumstances as well as to the subsequent conduct of the parties. In the case of such deeds it would be unreasonable to apply the rigid canons of interpretation appropriate to deeds executed in England. (*Lord Macmillan.*) AYA RAM *v.* RURCHAND. **I.L.R. (1937) Lah. 662=31 S.L.R. 646=169 I.C. 661=1937 O.L.R. 403=39 P.L.R. 687=1937 O.W.N. 1084=66 C.L.J. 49=10 R.P.C. 35=1937 M.W.N. 1316=1937 A.L.R. 631=3 B.R. 688=(1937) 2 M.L.J. 267 (P.C.).**

———Construction — Tauliatnama by Mahomedan lady mutwalli—Provision for succession of

"legal heirs such as sons and grandsons, etc." of appointees as mutwallis—Female heirs—If excluded. *See* MAHOMEDAN LAW—WAKF. **63 C.L.J. 573.**

———*Construction — Transfer of property to Hindu female—Estate taken—If a limited one —Rule.*

Where there are no words used in a document to narrow the interest of a female to whom property is given or transferred, the estate conveyed to her must be taken not to be a limited one. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) KITTAMMA *v.* SESHAMMA. **16 Mys.L.J. 232 =43 Mys.H.C.R. 43.**

———Construction — Trust or agency—Deed transferring property to another for management for term of years—Owners unable to manage conveniently—Power given to transferee to transact all the business of owner, to sue and realise rent, to appoint servant or agent, etc.—Power also conferred to sell with consent of owner—Owner reserving power to sell or mortgage—If deed of trust or agency. *See* LIMITATION ACT, S. 10 AND ART. 89. **5 C.L.T. 18.**

———*Construction — Two possible constructions—Law favours construction making deed valid.*

When two constructions of a deed are possible, the law favours the construction which will make it valid. In understanding a deed, it should be taken most beneficially for the party in whose favour it is made. A deed should not be considered void where the words may be applied to any intent to make it good. (*M. C. Ghose and B. K. Mukerji, JJ.*) BROJESWARI DASSI *v.* MANORANJAN DUTTA. **I.L.R. (1937) 1 Cal. 690=171 I.C. 626=10 R.C. 293 =42 C.W.N. 174=A.I.R. 1937 Cal. 167.**

———*Construction — Use of words 'perpetual' and 'for ever'—Significance.*

The words 'perpetual' and 'for ever' are words of flexible amplitude and if the circumstances under which the instrument is made and the subsequent conduct of the parties show an intention with clearness and certainly that a heritable and transferable grant was made, then it is open to the Court to give that meaning to those words. (*Zia-ul-Hasan and Radha Krishna Sri Vastava, JJ.*) AMAR KRISHNA NARAIN SINGH *v.* NAZIR HASAN. **14 Luck. 723=1939 O.W.N. 825=1939 O.L.R. 563=1939 A.W.R. (C. C.) 160=183 I.C. 821=12 R.O. 67=1939 R.D. 542=A.I.R. 1939 Oudh 257.**

———*Construction—Will.*

A document executed by a person in favour of his daughters which is expressly called a will in the beginning and at the end and which is to come into operation after the date of the death of the executant, is in law a will and cannot be regarded as a deed of gift. (*Abdul Rashid, J.*) IMAM ALI *v.* SUGHRAN BEGUM. **A.I.R. 1939 Lah. 382.**

———Construction — Will or family arrangement—Deed by Hindu styled vyavastha patra—Deed executed in contemplation of death—Recital of agreement between coparceners to separate and divide properties equally half and half —Directions as to management and provision of legacies out of executant's share —Prohibition against adoption by widow of executant—Nature of deed. *See* SUCCESSION ACT, S. 2 (*h*). **39 Bom.L.R. 165.**

———*Construction — Will or gift or contract —Deed executed jointly by donor and donee.*

It is difficult to conceive of a will being executed jointly by the testator and legatee. A memorandum of the points of a compromise arrived at between two parties which takes effect during the lifetime of one of them and by which both parties bind themselves to do certain things, is neither a will nor a deed of gift but a contract. (*Henderson and Sen, JJ.*) MAHAMAD ALI *v.* DINESH CHANDRA ROY. **I.L.R. (1940) 2 Cal. 189=71 C.L.J. 432=44 C.W.N. 718=A.I.R. 1940 Cal. 417.**

Execution.

———*Execution—Burden of proof—Rule as to —Document bearing signature — Inference — Presumption—Shifting of onus.*

The initial burden of proving execution of a document when it is denied is upon the person alleging execution. But if nothing else is known then the mere fact that a document is admitted to bear a certain signature and that it comes from proper custody ought not to be enough to raise an inference that it was signed with the intention of execution. This inference arises in India directly from S. 114, Evidence Act. Persons do not ordinarily sign documents without intending to execute them: that is not the common course of human conduct, nor yet the common course of either public or private business. Consequently if any person wants to rely on an exceptional circumstance, if he wants to show that in some particular instance the ordinary rule was abrogated surely he must prove it and thus the burden shifts on him. (*Bose and Puranik, JJ.*) DALCHAND MULCHAND *v.* HASSANBI. **I.L.R. (1938) Nag. 333=176 I.C. 315=11 R.N. 41= A.I.R. 1938 Nag. 152.**

———*Execution—Proof.*

It would be a serious thing to hold that execution cannot be proved except by direct evidence. (*Bose and Puranik, JJ.*) DALCHAND MULCHAND *v.* HASSANBI. **I.L.R. (1938) Nag. 333=176 I.C. 315=11 R.N. 41=A.I.R. 1938 Nag. 152.**

Genuineness.

———*Genuineness — Proof — Stamp paper — Discrepancy between date of treasury seal and alleged date of sale.*

A deed of authority to adopt purported to have been executed on 9th November, 1915. It was written on a ten rupee stamp paper and the endorsement of the stamp vendor bore the date of 5th November, 1915. The stamp paper was sealed in the Treasury Office in November, 1915. It was proved that no ten rupee stamp sealed in that Treasury Office in November could have been in the hands of the stamp vendor on 5th November or could have been used for a deed executed on 9th November. No satisfactory explanation was offered of the discrepancy between the alleged date of sale of the stamped paper and the alleged date of execution of the deed on the one hand and the date of the Treasury Office seal on the other hand.

Held, that the document could not be genuine. (*Lord Macmillan.*) SRINIVASAN *v.* KRISHNA

AYYAR. **161 I.C. 1=1936 A.W.R. 314=8 R.P.C. 178=1936 O.L.R. 160=1936 A.L.R. 267=2 B.R. 336=1936 O.W.N. 287 (P.C.).**

Lease.

———*Lease — Perpetual lease by* shebait *of deity—Legal necessity—Absence of recital as to —Evidence—Admissibility.*

Even where there is no recital of legal necessity in a document, a party is not prevented from adducing direct or indirect evidence of legal necessity. And when a perpetual lease by the *shebait* of deity has been accepted and not challenged for a long number of years by the *shebaits* succeeding the grantor, legal necessity can be inferred. (*R. C. Mitter, J.*) RAM KISHORE DAS *v.* KEDAR PANDA. **63 C.L.J. 22.**

Material alteration.

———*Material alteration—Alteration in entry not basis of suit—Suit, if liable to be dismissed.*

Where the alteration which has been found to have been made by the plaintiff is not in the entry on the basis of which the suit has been instituted but in an entry relating to repayment, the suit is not liable to be dismissed. (*Din Mahomed, J.*) MUKAT RAM *v.* SITA RAM. **189 I.C. 85=13 R.L. 67=42 P.L.R. 154=A.I.R. 1940 Lah. 228.**

———*Material alteration—Bond not requiring attestation—Alteration by substitution of attesting witness—Liability of executant, if affected.*

In the case of a bond which does not require attestation, the substitution of one attesting witness in the place of another by erasing the name of the witness who had originally attested, does not amount to a material alteration, and it does not, therefore, affect the liability of the executant on the bond. (*Jai Lal, J.*) ISHAR SINGH *v.* SADHU SINGH. **165 I.C. 74=9 R.L. 211=38 P.L.R. 855 =A.I.R. 1936 Lah. 659.**

———*Material alteration—Effect.*

A decree cannot be passed on the basis of a document which has been materially altered, unless the alteration is satisfactorily explained. (*Kichlu, J.*) MASSU *v.* DUKKHAN DINA NATH-HEMRAJ. **41 P.L.R.J. & K. 25.**

———*Material alteration— Effect— Document originally constituting conditional promise to pay —Alteration by plaintiff by cutting off part and making it unconditional—Right to succeed on.*

A plaintiff who sues upon a document in which he has made alterations or interpolations cannot in justice and equity be allowed to adduce secondary evidence of its contents or to succeed upon the same. Where a document, as it originally stood, was a conditional promise to pay but the plaintiff cuts off a portion of it so asto make it an unconditional promise to pay, he is not entitled to succeed upon it. (*Mohammad Noor and Dhavle, JJ.*) JANARDAN PARIDA *v.* PRANDHAN DAS. **190 I.C. 377=5 C.L.T. 45=A.I.R. 1940 Pat. 245.**

———*Material alteration—Effect of—Rule of English Law as to—Applicability to India.*

The rule relating to the effect of material alteration in a deed made after its execution by or with the consent of any party thereto, as it prevails in English Courts, is based on "great good sense." It is dictated by the public policy and is independent of considerations of clime or race. It is consistent with the principle of equity and good conscience which have generally prevailed in India, unless they conflicted with Hindu or Mahomedan Law. There is no such conflict and there is no reason why the rule should not be made applicable to India. (*M. R. Jayakar.*) NATHU LAL *v.* GOMTI KUAR. **190 I.C. 135=1940 A.W.R. (P.C.) 107=1940 O.A. 564=52 L.W. 313=1940 A.L.J. 598=1940 M.W.N. 1018=A.I.R. 1940 P.C. 160 (P.C.).**

———*Material alteration—Rule as to—Scope of.*

A material alteration of a document by a party to it, after its execution without the consent of the other party, renders it void. But this rule applies to those documents only which are the foundation of the plaintiff's claim. It does not apply to documents which are merely evidence of the defendant's pre-existing liability. (*Tek Chand, J.*) SANDHURA SINGH *v.* KEHR SINGH. **169 I.C. 228=9 R.L. 725=39 P.L.R. 396=A.I.R. 1936 Lah. 1016.**

———*Material alteration—Subsequent affixing of stamp—If amounts to.*

The subsequent affixing of a stamp on an account in a bahi, is not a material alteration when the integrity or identity of the contract is not changed by the alteration and that is not done with any fraudulent design, and a suit could, therefore, be brought on it. (*Tek Chand, J.*) FATEH MAHOMED *v.* SURJA. **188 I.C. 420=41 Cr. L.J. 527=41 P.L.R. 194=A.I.R. 1939 Lah. 486.**

———*Material alteration—Test.*

It is well-settled that whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue on it. The question in each case is whether the alteration made any material change as regards the rights and liabilities of the parties or their legal position. (*Mukherjea, J.*) SURENDRA NATH BOSE *v.* KRISHNA CHANDRA KUNDU. **182 I.C. 615=12 R.C. 84=43 C.W.N. 191=A.I.R. 1939 Cal. 181.**

———*Material alteration—What amounts to.*

Any change in an instrument, which causes it to speak a different language in legal effect from that which it originally spoke, which charges the legal identity or character of the instrument, either in its terms or the relation of the parties to it, is a material change, or technically, an alteration, and such change will invalidate the instrument against all parties not consenting to the change. (*Mohamad Noor and Dhavle, JJ.*) JANARDAN PARIDA *v.* PRANDHAN DAS. **190 I.C. 377=5 C.L.T. 45=A.I.R. 1940 Pat. 245.**

Recitals.

———*Recitals—Binding nature—Plea contrary to recitals—Burden of proof.*

The recitals in a document must be presumed to be true and are binding on the executant; and the burden of proving that they are incorrect is on him. (*Bose, J.*) MST. NASIBAN *v.* MOHAMMAD SAYED. **164 I.C. 557=9 R.N. 41=19 N.L.J. 179=A.I.R. 1936 Nag. 174.**

———*Recitals—Value of—If* prima facie *evidence against executant—Execution of deed by guardian on behalf of minor—Effect of.*

Recitals in a deed are *prima facie* evidence against the executant and the fact that the executant happens to be the guardian of a minor is no

ground for not taking them as *prima facie* evidence unless it can be shown that they were made under a mistake or misapprehension. (*Venkataramana Rao, J.*) RAMUDU *v.* SANYASI NAIDU. **52 L.W. 629=1940 M.W.N. 1071=(1940) 2 M.L.J. 668.**

———*Rectification—Mistake of parties—Burden of proof—Mortgage deed—Mistake in—Decree in suit on—Mistake repeated in decree—Power of Court to rectify or set aside decree and mortgage deed—Limits to—Mortgage—If merged in decree.*

In a suit for rectification of a deed it is not necessary for the Court to have evidence of a binding contract antecedent to the instrument or deed which is sought to be rectified; it is enough if the plaintiff proves beyond reasonable doubt the concurrent intention at the moment of executing the instrument, and that the instrument fails to give effect to that concurrent intention. It is open to the Court to act upon intrinsic evidence upon the face of the deed itself that there was a mutual mistake. If there has been a mutual mistake in a mortgage deed in the description of the property, and the same mistake has been reproduced in the decree, but no sale has resulted in execution thereof, the Court may re-form the mortgage deed and the decree so as to make them conform to the intention of the parties. Mere laches is not a bar if the rights of third parties have not intervened. Nor can it be said that the mortgage deed is merged in the decree; since a mortgagor can redeem until confirmation of the sale, there is no merger of the security in the decree. (*Blackwell, J.*) NOORUDDIN ESMAILJI KURWA *v.* MAHOMED UMAR SUBRATI. **I.L.R. (1940) Bom. 605 42 Bom.L.R. 605=A.I.R. 1940 Bom. 321.**

Setting aside.

———*Setting aside--Fraud--Sale deed--Gross inadequacy in price—If evidence of fraud justifying setting aside.*

The rule adopted by the Courts administering equity, justice and good conscience, is that a transaction such as a sale-deed will be set aside on the ground of fraud, when such inadequacy in price is made out as would shock the conscience and amount in itself to be conclusive and decisive evidence of fraud. (*D. N. Mitter and Patterson, JJ.*) NALINI KISHORE CHOUDHURY *v.* ATUL CHANDRA CHAKRABARTY CHOUDHURY. **40 C.W.N. 561.**

———*Setting aside—Onus—Admission of execution by illiterate woman.*

A woman not being a pardanashin lady but an illiterate woman in the habit of conducting her own business admitted the execution of a document but alleged that she put her thumb impression on the document through misrepresentation. She admitted that she was negligent in not having the document read out to her.

Held, that in these circumstances the burden of proof was on her to show that the document was executed under fraud or misrepresentation. (*Yorke, J.*) MAHDEI *v.* ISHWARI. **174 I.C. 843 =10 R.C. 278=1938 O.W.N. 531=1938 O.L.R. 228 =1938 O.A. 393=A.I.R. 1938 Oudh 152.**

———*Setting aside—Undue influence—Gift by old lady to medical attendant who treated her free shortly before gift—Presumption of undue influence—Suit to set aside—Onus of proof of validity—Principles.*

In a suit by a donor to set aside a gift deed executed by him or her on the ground that it was executed under the influence of the defendant (donee) without independent advice, the onus is on the defendant to prove that the gift was the result of the free exercise of the plaintiff's independent will. Where the relationship between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor, the Court will set aside the voluntary gift unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled the donor to exercise an independent will and which justify the Court in holding that the gift was the result of a free exercise of the donor's will. The most obvious thing for the donee to show is that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing. Independent advice need not necessarily be the advice from a lawyer. An old widow of about 82 years, who was attended by a medical man on two occasions of her illnesses in 1928 and 1930, for which he did not make any charge for his professional services, executed in his favour a deed of gift in 1931, conveying to him in fee simple certain land together with a building thereon. Afterwards she claimed to have the deed set aside as having been executed under the influence of the donee.

Held, that the donor and donee stood in the relationship of patient and client or had stood in that relationship so recently as to necessitate that the defendant should rebut the presumption of influence arising from that influence; but since the donor was an intelligent, astute and strong willed woman and had not betrayed any sign of mental weakness, and had executed the deed after advice with full knowledge of what she was doing, the presumption of influence was rebutted, and the transaction must be regarded as having been the result of the free exercise of the debtor's independent will. (*Sir Lancelot Sanderson.*) JAMES AUGUSTUS WILLIAMS *v.* P. P. JOHNSON. **172 I.C. 527=10 R.P.C. 138=47 L.W. 99=1937 A.W.R. 1155=1937 A.L.J. 1027 (P.C.).**

Validity.

———*Validity—Onus—Person ignorant of English affixing mark to document written in English.*

Where a person not knowing English has affixed his mark to a document written in English language, the onus to prove that the document was properly explained and interpreted to the person affixing his mark so as to make him understand its true import is on the party relying on the document. (*Lord Russel of Killowen.*) KWAMIN BASAYIN *v* BENUDENTU II. **170 I.C. 423= 10 R.P.C. 66=A.I.R. 1937 P.C. 274 (P.C.),**

———*Validity—Wrong statement as to consideration—If invalidates deed.*

Where a person having an undoubted right to transfer certain property conveys it to his wife in

lieu of dower debt and the recitals in the deed of conveyance state that consideration did pass, the mere fact that the consideration is wrongly stated in the deed will not be enough to invalidate the deed. (*Bose and Puranik, JJ.*) DALCHAND MULCHAND *v.* HASSANBI. **I.L.R. (1938) Nag. 333=176 I.C. 315=11 R.N. 41=A.I.R. 1938 Nag. 152.**

DEFAMATION. *See* (1) PENAL CODE, S. 499.
(2) TORT—DEFAMATION.

DEFENCE OF INDIA ORDINANCE (V OF 1939), R. 34 (6)—*Scope—Profiteering—If offence—Prejudicial act—If includes profiteering.*

R. 34 (6) of the Defence of India Ordinance is not aimed at profiteering and profiteering was not intended to be included in the definition of "prejudicial act" in R. 34 (6). (*Agarwala, J.*) KESRILAL KEDIA *v.* EMPEROR. **187 I.C. 533=6 B.R. 493=41 Cr.L.J. 467=12 R.P. 639=21 Pat.L.T. 273=1940 P.W.N. 458=A.I.R. 1940 Pat. 373.**

———**R. 34 (6) (e)**—*Sentence on conviction under—Considerations.*

In sentencing an accused on a conviction under R. 34 (6) (*e*) of the Defence of India Rules the Magistrate should not take into consideration the fact that the accused was a member of a revolutionary party and a history-sheeter.

The Court is concerned only with the construction of the speech and it has not to see the effect of the speech on the mind of the people. (*Thomas, C.J.*) CHANDRA BHAN SARAN SINGH *v.* EMPEROR. **1940 O.W.N. 867=1940 O.A. 830=1940 A.W.R. (C.C.) 438.**

———**R. 34 (6) (e)**—*Speech, if amounts to 'prejudicial act'—Intention—How to be ascertained.*

Where the question to be decided is whether a particular speech amounted to a 'prejudicial act,' the intention of the accused has to be gathered from the speech as a whole and not from words and isolated sentences here and there. (*Thomas, C.J.*) CHANDRA BHAN SARAN SINGH *v.* EMPEROR. **1940 O.W.N. 867=1940 O.A. 830=1940 A.W.R. (C.C.) 438.**

———**R. 34 (6), (g) and (h)**—*Scope and effect of—Trader increasing price of dhoties by 10 per cent—Offence—Clothing not notified as essential commodity—Effect.*

The increase by a merchant or trader of the price of dhoties by about 10 per cent. is not an act likely to cause fear or alarm to the public or to any section of it under R. 34 (6) (*g*) of the Defence of India Ordinance, and is not likely to have any bearing on the efficient prosecution of the war and the defence of India or the public safety; nor can it be said to prejudice the public interest under R. 34 (*h*), especially when there is no evidence that clothing has been notified by Government as an "essential commodity" within the meaning of R. 34 (3). Hence the increasing of the price of dhoties cannot be held to be an offence under R, 34 (6). (*Agarwala, J.*) KESRILAL KEDIA *v.* EMPEROR. **187 I.C. 533=6 B.R. 493=21 Pat.L.T. 273=41 Cr.L.J. 467=12 R.P. 639=1940 P.W.N. 458=A.I.R. 1940 Pat. 373.**

———**R. 81 (4)**—*Applicability—Trader increasing price of dhoties by 10 per cent.—Offence—Absence of order fixing price of cloth—Effect of.*

DEKKHAN AGRIC. REL. ACT, (1879).

Before a trader who increases the price of cloth can be held to be liable under R. 81 (4) of the Defence of India Ordinance, it must be proved that there is an order controlling the price of cloth. When there is no order fixing the price of cloth in a District, a trader in that District who increases, the price of dhoties by about 10 per cent. cannot be held to have committed an offence under the Defence of India Rules. (*Agarwala, J.*) KESRILAL KEDIA *v.* EMPEROR. **187 I.C. 533=41 Cr.L.J. 467=6 B.R. 493=12 R.P. 639=21 Pat.L.T. 273=1940 P.W.N. 458=A.I.R. 1940 Pat. 373.**

———**R. 81 (4)**—*Burden of proof—Charge of selling commodity at more than 20 per cent. above the price prevalent on 1—9—1939—Essentials to be proved for conviction.*

On a charge under R. 81 (4) of the Defence of India Ordinance (V of 1939), read with Government Notification No. 3682|33 (*b*), General Department of having sold a specified commodity at a price more than 20 per cent. on the price prevalent on 1—9—1939; the prosecutors, in order to make out the offence, have to prove (1) that they purchased the article at a particular price from the accused; (2) the price that prevailed on 1—9—1939 for that class of commodity; and that such price was more than 20 per cent. less than the price charged by the accused. Unless these are satisfactorily proved, it cannot be said that the offence is established and a conviction cannot be sustained. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* MAHOMEDALI WALIJEE. **189 I.C. 402=13 R.B. 77=41 Cr.L.J. 737=42 Bom.L.R. 473=A.I.R. 1940 Bom. 254.**

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)—*Scope and effect of—Nature of jurisdiction under—General law—If excluded.*

The existence of S. 74 of the Dekkhan Agriculturists' Relief Act makes it incontestable that the Act operates conjointly with the provisions of the general law: except in so far as any specific provision of the Act displaces the general law, the general law is to apply. The Act creates in some cases a special jurisdiction. In other cases it confers powers of a nature different from those ordinarily exercised by the Courts; and according to the rules of interpretation of statutes, those powers must be deemed to be conceded without which that jurisdiction cannot be exercised. (*Tyabji, J.*) VISHARAM SURBA *v.* AMRAT DHAKU. **39 Bom.L.R. 559.**

———*Suit on mortgage—Consideration—Onus of proof.*

It is not the law that in a suit on a mortgage executed by an agriculturist the plaintiff has to prove consideration. There is nothing in the Act which throws the burden of proving consideration on the plaintiff. The Act only says that the Court shall satisfy itself on certain matters, including consideration; and in such cases the issue should be: "what was the consideration?" with the burden thrown neither on the plaintiff nor on the defendant. (*Macklin, J.*) TALAKCHAND *v.* BHAN MARUTI. **164 I.C. 148=9 R.B. 60=38 Bom.L.R. 526=A.I.R. 1936 Bom. 286.**

DEK. AGRIC. REL. ACT, (1879), S. 2.

———**S. 2**—*"Agriculturists"—Minor inheriting agricultural lands if.*

"Agriculturist" as defined in S. 2 of the Dekkhan Agriculturists' Relief Act, does not exclude a minor, A minor is as much capable of being an agriculturist as an adult. If a minor inherits only agricultural lands and his chief source of maintenance is, the income of those lands he is an "agriculturist". (*Kania, J.*) MAHADEV ATMARAM *v.* RAMCHANDRA. **173 I.C. 751 (2)=10 R.B. 375=39 Bom.L.R. 1172=A.I.R. 1938 Bom. 96.**

———**S. 2**—*"Agriculturist"—Trader—If and when an agriculturist.*

A trader may come within the definition of an "agriculturist" in S. 2 of the Dekkhan Agriculturists' Relief Act, as a person who ordinarily engaged personally in agricultural labour. But in order that a trader may come within the definition, he must engage in agricultural labour personally to such an extent that it may reasonably be said of him that he has two occupations, agriculture as well as trade. (*Broomfield, Ag.C.J. and Sen, J.*) GULABCHAND RAYCHAND *v.* NARAYAN MOTIRAM. **186 I.C. 307=12 R.B. 317=41 Bom.L.R. 1217=A.I.R. 1940 Bom. 1.**

———**S. 2**—*Status waived at the time of decree—Claim to relief in execution—Sustainability.*

An agriculturist judgment-debtor who at the time of passing the decree agrees to waive his status, can be allowed to go back upon the agreement and claim all the benefits of an agriculturist at the time of execution. (*Mehta and Lobo, JJ.*) PREMCHAND *v.* MANOMAL. **177 I.C. 202=11 R. S. 49=A.I.R. 1938 Sind 169.**

———**S. 10-A**—*Applicability—Suit by agriculturist for declaration that rent not executed by him to defendant is really a sale deed—Contemporaneous oral agreement—Evidence to prove—Admissibility.*

S. 10-A of the Dekkhan Agriculturists' Relief Act applies only to a transaction of such a nature that the rights and liabilities of the parties under it are triable wholly or in part under Ch. III of the Act. The special privilege which the section confers on an agriulturist of alleging an oral agreement different from the written one evidenced by a document, in spite of the provisions of S. 92 of the Evidence Act, is restricted strictly to suits which fall under Ch. III, and would not be available to parties whose suits do not fall under Ch. III. The provision has to be strictly construed and must be limited to cases which are clearly covered by it. A suit by an agriculturist for a declaration that a rent note executed by him to the defendant was in reality a transaction of sale is not a suit which falls under Ch. III, and the plaintiff cannot therefore claim the benefit of S. 10-A and seek to prove an alleged oral contemporaneous agreement to vary or contradict the terms of the rent note. (*Wadia and Divatia, JJ.*) TARACHAND PIRCHAND *v.* BALA SAKHARAM. **I.L.R. (1938) Bom. 816=178 I.C. 750=11 R.B. 188=40 Bom.L.R. 974=A.I.R. 1938 Bom. 478.**

———**S. 10-A**—*Scope—Agreement of sale of lands to agriculturists—Provision for payment of price in instalments—Default—Suit by vendor for recovery of land—Oral evidence to vary terms of agreement—Admissibility.*

Where certain agriculturists purchase agricultural lands under an agreement agreeing to pay the price in instalments, and on their failure to pay the instalments, the vendor brings a suit to recover back possession of the lands the agriculturists are not entitled to adduce oral evidence under S. 10-A of the Dekkhan Agriculturists' Relief Act to vary the terms of the agreement of sale. Such a transaction is outside the scope of S. 10-A when the suit is to obtain back possession of the property on the ground that the transaction has fallen through and the suit is not to recover the purchase price or to recover any amount due under a written agreement. (*Kania, J.*) RATANSI JETHABHAI *v.* BALKISAN GANGABAKAS. **I.L.R. (1940) Bom. 581=42 Bom.L.R. 528=A.I.R. 1940 Bom. 267.**

———**S. 10-A**—Sope—Operation of—If excluded by proviso to S. 58 (*c*), T.P. Act as amended in 1929. *See* T.P. Act (AS AMENDED IN 1929), S. 52 (1) PROVISO. **30 S.L.R. 196.**

———**Ss. 12 and 13**—*Scope—Suit on promissory note against agriculturist—Defendant withdrawing contentions and praying for accounts—Accounts taken and decree passed in accordance with accounts—Non-examination of defendant—If vitiates decree—Decree for amount, in excess of sum claimed by plaintiff—Legality.*

In a suit on a promissory note, the defendant who was admitted to be an agriculturist and who had raised several contentions, subsequently gave up all his contentions and prayed that accounts may be taken. The Court accordingly appointed a Commissioner who took accounts. The defendant did not seriously object to the accounts taken and the Court accepted the same and passed a decree. The defendant was not examined by the Court. The amount found due according to the accounts taken by the Commissioner was more than the sum claimed by the plaintiff in the suit.

Held, (1) that the defendant having given up his contentions and prayed merely for accounts to be taken, it was not obligatory on the Court to examine the defendant under S. 12 of the Dekkhan Agriculturists' Relief Act, and the non-examination did not vitiate the decision of the Court; (2) that when accounts have been opened up between the parties one of whom was an agriculturist, it was just and equitable to pass a decree on the footing of the account whether that account was in favour of or against the agriculturist, and even if the sum found due on taking the account be in excess of the sum claimed by the plaintiff against the agriculturist, the latter should submit a decree on the account being so taken. (*Divatia, J.*) WAMAN ANANT *v.* CHUNILAL. **181 I.C. 183=11 R.B. 330=41 Bom.L.R. 205=A.I.R. 1939 Bom. 117.**

———**S. 13**—Applicability—Property subject to mortgage held by Hindu widow—Sale by widow declared not binding on reversioners—Suit by reversioners for redemption after death of widow—Right to account of profits during lifetime of widow. *See* HINDU LAW—WIDOW. **39 Bom.L.R. 928.**

———**S. 15-B**—*Applicability—Suit on mortgage—Defendant not agriculturist at time of pre-*

DEK. AGRIC. REL. ACT (1879), S. 15-B.

liminary decree—Subsequent acquisition of status before final decree—Right to claim relief.

In order that a suit may be one against an agriculturist it is not necessary that he should be one when the suit is instituted. It is sufficient if he is an agriculturist at any time during the pendency of the suit when the question of status falls to be determined. Therefore the defendant in a suit on a mortgage who was not an agriculturist on the date of the preliminary decree, but who acquires agricultural status before the date of final decree, **is entitled to plead his status for the purpose** of claiming instalments under S. 15-B of the Dekkhan Agriculturists' Relief Act. (*Broomfield and Macklin, JJ.*) SIDDAPPA GANGAPPA *v.* RAMACHANDRA VISHNU. **42 Bom.L.R. 1005.**

———Ss. 15-B and 20—*Mortgage suit—Decree—Order for sale—Execution—Plea of status as agriculturist—Right to modification of decree—Payment by instalments.*

Where a decree has been passed *ex parte* in a mortgage suit for sale of the mortgaged property and payment of the proceeds to the mortgagee, the defendant-mortgagor is entitled in execution to set up his status as an agriculturist, and to ask for a modification of the decree by directing payment by instalments and consequential alterations in the order for sale. (*Beaumont, C.J., Wadia and Divatia, JJ.*) KASHINATH RUDRAPPA *v.* RAMAYYA RAJANA. **60 Bom. 718=164 I.C. 190=9 R.B. 65=38 Bom.L.R. 562=A.I.R. 1936 Bom. 280 (F.B.).**

———S. 15-D—*Construction and scope—Suit for accounts of mortgage transaction—Plea of purchase of part of property by defendant in Court-sale—Suit—Maintainability—Validity of sale—If can be gone into—Jurisdiction of Court.*

The terms of S. 15-D of the Dekkhan Agriculturists' Relief Act are general. Two preliminary facts are needed for the jurisdiction arising under it; the plaintiff must be an agriculturist, and his property must be mortgaged. The existence or non-existence of these two facts must be determined before the Court can determine whether it has jurisdiction under the section. In a suit brought by the plaintiffs as agriculturists for an account of a mortgage in respect of sixteen pies share in certain property, the defendants pleaded that two pies share of the sixteen pies had been sold in Court auction and purchased by their predecessors-in-title, that the validity of the sale in question could not be impeached or gone into in a suit under S. 15-D, and the suit was therefore not maintainable.

Held, that the suit was maintainable and that the Court ought to determine the validity of the sale, *i.e.*, whether the defendants became entitled by a valid purchase to two pies share, before dealing with the suit in accordance with the provisions of S. 15-D; and that if for any reason, the plaintiffs are found not entitled to the special relief under the Act, the Court should consider whether relief could not be granted under the general law. (*Tyabji, J.*) VISHRAM SURBA *v.* AMRAT DHAKU. **39 Bom.L.R. 559.**

———S. 15-D—*Scope—Suit or account of mortgage involving the setting aside of sale of equity of redemption—Maintainability.*

DEK. AGRIC. REL. ACT (1879), S. 21.

The special relief under S. 15-D of the Dekkhan Agriculturists' Relief Act which is a special privilege given to an agriculturist cannot be granted in a suit which, though not in form, is in reality a suit to set aside an alienation. Such a suit for an account of a mortgage by the mortgor is not maintainable under S. 15-D, when it requires the setting aside of the sale of the equity of redemption. (*Lokur, J.*) KRISHNA VITNAK *v.* SHANKAR KRISHNA. **185 I.C. 807=12 R.B. 269=41 Bom.L.R. 863=A.I.R. 1939 Bom. 419.**

———S. 15-D—*Suit under—Maintainability—Conditions.*

A suit under S. 15-D of the Dekkhan Agriculturists' Relief Act will only lie on the presumption that there is a mortgage in existence by an agriculturist. Such a suit cannot be entertained when the mortgage has been re-deemed by payment of the full amount of the mortgage. (*Broomfield and Sen, JJ.*) SUBRAYA KUPPA *v.* THIMMANNA SUBRAYA. **178 I.C. 974=11 R.B. 214=40 Bom.L.R. 1001=A.I.R. 1938 Bom. 508.**

———S. 15-D (1)—*Procedure—Suit by mortgagor—Accounts—How to be taken—Consideration for mortgage—Inquiry into—Jurisdiction of Court.*

In a suit under S. 15-D (1) of the Dekkhan Agriculturists' Relief Act by the mortgagor for an account of the mortgage, the accounts should be taken as if it were a suit by the mortgagee; and in accordance with the provisions of Ss. 12 and 13 of the Act, which govern a suit by the mortgagee, The Court therefore can go into the question of the consideration for the mortgage for the purpose of opening the accounts of the parties from the commencement of the transaction. (*Lokur, J.*) GULABCHAND MOTILAL *v.* MADHU NARAYAN. **184 I.C. 487=12 R.B. 180 (1)=41 Bom.L.R. 823=A.I.R. 1939 Bom. 388.**

———S. 21—*Plea of being agriculturist—If may be raised in execution—Provision in decree that judgment-debtor would not raise such plea—Effect.*

It is open to an agriculturist to plead his status in execution. Immunity from arrest accrues from his status at the time arrest is sought and even if he was not an agriculturist at the time of the decree, he may very well be an agriculturist at the time the decree is sought to be executed. Although a decree cannot be modified at the instance of the judgment-debtor who consented to it, it cannot be executed in a mode contemplated by it, when that mode is contrary to law. A compromise in terms of which a decree was passed stated that the defendant was not an agriculturist, nor would he raise the plea of being an agriculturist in any execution proceedings of the decree. Decree-holder applied for execution of the decree by arrest of the judgment-debtor, who thereupon pleaded that he was an agriculturist:

Held, that in spite of the provisions contained in the decree it was open to the judgment-debtor to raise the plea of being agriculturist in execution proceedings. (*Davis, J.C. and Weston, J.*) DHERUMAL *v.* TEJUMAL. **I.L.R. (1939) Kar. 304=182 I.C. 696=12 R.S. 34=A.I.R. 1939 Sind 160.**

DEK. AGRIC. REL. ACT (1879), S. 22.

———S. 22—*Applicability—Conditions—Decree against non-agriculturist--Execution against agriculturist heir—Right to benefit of section.*

Under S. 22, as it stands, it matters not what is the status of a defendant when the decree was passed against him. Once it is shown that the property to be attached or sold is the immovable property of an agriculturist not specifically pledged, the section applies, and the property is protected. S. 22 should be read as it stands, to mean what it says, and to protect agriculturists, whether judgment-debtors or the legal representatives of judgment-debtors in the possession of their lands. Hence even if the judgment-debtor is non-agriculturist, his legal representative who is an agriculturist can take advantage of S. 22 when the decree is sought to be executed against him by attachment of property in his possession. (*Davis, J.C. and Tyabji, J.*) WAZIR BEGUM *v.* MT. DADAN. **I.L.R. (1939) Kar. 409=180 I.C. 980=11 R.S. 199=A.I.R. 1939 Sind 68.**

———S. 22—*Appellate Court—Power of to give directions to Collector in absence of application.*

S. 22 does not contemplate that the Appellate Court should give directions to the Collector when no such application under that section was before the lower Court. (*Davis, J.C. and Tyabji, J.*) WAZIR BEGUM *v.* MT. DADAN. **I.L.R. (1939) Kar. 409=180 I.C. 980=11 R.S. 199=A.I.R. 1939 Sind 68.**

———S. 22—*Construction — "Agriculturist" Status—Material date for determining—Date of decree or date of attempted attachment.*

Under S. 22 of the Dekkhan Agriculturists' Relief Act, the material date for the determination of the status of an alleged agriculturist is the date of the decree and not the date of the attempt at attachment or sale. A judgment-debtor who was an agriculturist on the date of the decree when the liability arose must be deemed to be an agriculturist at date of the attachment, though there might be a change of status and would therefore be entitled to the protection given by S. 22 notwithstanding the change of status since the decree. (*Wassodev and Indarnarayan, JJ.*) APPA SAKHARAM *v.* JAGANNATH SAMBHUPA. **I.L.R. (1940) Bom. 353=189 I.C. 706=13 R.B. 78=42 Bom.L.R. 457=A.I.R. 1940 Bom. 239.**

———S. 22—Effect of. *See* C.P. CODE, S. 73. **39 Bom.L.R. 1212.**

———S. 22—*Surety bond—Statement that if amount of bond was not satisfied surety's property would be liable—Mortgage or charge if created.*

The marginal note to S. 22 refers to property specifically pledged. The marginal note however is not part of the Act, but so long as the word "specifically" is emphasized it makes little or no difference whether immovable property is specifically mortgaged or charged. The deeds have to be properly stamped and registered, and a Court is not likely to construe a surety bond with an eight annas stamp as constituting a specific mortgage or charge upon immovable property. A surety bond provided, "if the amount of the bond according to its terms is not satisfied from the surety, I, my property, and my heirs are and shall remain liable." This was followed by a statement that the surety had a large well-known building which was without incumbrance.

Held, that this general statement occurring in a bond of this nature could not fairly be construed as intended to create a mortgage or charge. It created only a personal liability. The statement meant nothing more than evidence of the surety's solvency. (*Davis, J.C. and Tyabji, J.*) WAZIR BEGUM *v.* MT. DADAN. **I.L.R. (1939) Kar. 409=180 I.C. 980=11 R.S. 199=A.I.R. 1939 Sind 68.**

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———S. 63-A—*Applicability.*

S. 63-A of the Dekkhan Agriculturists' Relief Act only applies where there is something on the face of the document to show that it is a document to which the section relates. The section does not apply if there is nothing on the face of the document in question to establish the fact that the executant is an argiculturist. (*Beaumont, C.J. and Sen, J.*) RAJARAM JAYARAM *v.* TANUBAI DHONDIBA. **186 I.C. 528=12 R.B. 347=41 Bom.L.R. 1251=A.I.R. 1940 Bom. 63.**

———S. 71—*Applicability—Adjustment—Suit to file award—Parties not described as agriculturists—Benefit of S. 71—If available.*

S. 71 of the Dekkhan Agriculturists' Relief Act applies only to payments but not to an adjustment. An adjustment not made in any proceeding under the Act is not one in respect of which the benefit of S. 71 can be claimed. A suit for filing an award in which neither of the parties is described as an agriculturist cannot be regarded as a proceeding under the Act, although in the decretal order the defendants are given the benefit of S. 15-B. (*Lokur, J.*) NARAYAN DATTATRAYA *v.* MURLIDHAR PUNAMCHAND. **183 I.C. 419=12 R.B. 100=41 Bom.L.R. 417=A.I.R. 1939 Bom. 255.**

———S. 72—*Applicability—Registered mortgage by agriculturists—Suit on by mortgagee—Claim to decree for sale and for personal decree—Application for personal decree—Limitation—Lim. Act, Art.* 116.

In a suit by a mortgagee upon a registered deed of mortgage executed by an agriculturist containing a personal covenant, claiming a decree for sale and for a personal decree in case the sale proceeds were found insufficient, the suit so far as the claim for a personal decree is concerned, falls under S. 3 (*w*) of the Dekkhan Agriculturists' Relief Act, and is therefore governed by S. 72 of the Act which gives 12 years. Art. 116 of the Limitation Act does not apply to that claim. S. 72 is not confined only to suits which fall only under cl. 3 (*w*) of that Act. (*Lokur, J.*) GURAPPA BHIMANNA *v.* MADWALAPPA. **41 Bom.L.R. 832=185 I.C. 429=12 R.B. 239=A.I.R. 1939 Bom. 392.**

DEPOSIT—Deposit and loan—Distinction. *See* LIMITATION ACT, ARTS. 60 AND 59. **A.I.R. 1937 Lah. 81.**

———Money deposited to a firm as agent--Investment—Conversion to deposit on ordinary banking terms—If allowed—Doctrine of ratification, if applicable. *See* CONTRACT—VARIATION OF. **42 C.W.N. 8=A.I.R. 1937 P.C. 296 (P.C.).**

DISTRICT BOARD—*See* MADRAS LOCAL BOARDS ACT.

DISTRICT BOARD.

———Lease by—Validity—Lease contravening R. 94 of Rules published by Local Government. SEE BENGAL LOCAL SELF GOVERNMENT ACT (III OF 1885). **68 C.L.J. 116.**

DIVORCE—*See also* (1) HUSBAND AND WIFE. (2) MUHAMMADAN LAW—DIVORCE. (3) BUDDHIST LAW—DIVORCE. (4) PARSI DIVORCE ACT.

———*Alimony—Absence of* dum sola et casta *clause in the decree—Subsequent unchastity—If a ground for varying decree.*

The *dum sola et casta* clause must be inserted in an order granting alimony; it will never be inferred. If there is no such clause in the order granting alimony to the wife, the order could not be varied or discharged on the ground of subsequent unchastity. (*Collister and Allsop, JJ.*) CHANDLER *v.* MRS. CHANDLER. **I.L.R. (1939) All. 819=185 I.C. 834=12 R.A. 358=1939 A.L.J. 572=1939 A.W.R. (H.C.) 555=A.I.R. 1939 All. 696.**

———*Desertion—Break in—What amounts to—Desertion for long time—Subsequent association between parties—Party living as strangers under same roof—If sufficient to stop desertion.*

When there has been desertion by the husband of his wife for a long time, a subsequent association between the parties, during which the parties, though living under the same roof live as strangers, cannot amount to a break in the desertion. Desertion is not broken unless the husband offers to the wife a home on terms on which a self-respecting wife can accept. (*Beaumont, C.J.*) FIDO *v.* FIDO. **I.L.R. (1938) Bom. 825=11 R.B. 139=177 I.C. 940=40 Bom.L.R. 900=A.I.R. 1938 Bom. 425.**

———Evidence of nonaccess—Admissibility. *See* EVIDENCE—ADMISSIBILITY. **1939 A.W.R. (H.C.) 420.**

———Undefended action—Trial of—Necessity for hearing in open Court—Trial held in breach of rule of publicity—Effect on decree—Principles—Setting aside—Time for. *See* PRACTICE—PROCEDURE. **40 C.W.N. 488=70 M.L.J. 385 (P.C.)**

DIVORCE ACT (IV of 1869), as amended in 1926 and 1927)—*Suit for nullity of marriage in High Court—Decree in—Form of—if to be* nisi *in first instance or absolute.*

Per *Stone and Mockett, JJ.* (*Wadsworth, J., dissenting.*)—The proper form of a decree to be passed in the first instance in a suit on the original side of the High Court for declaration of nullity of a marriage is that of a decree *nisi and* not a decree absolute.

Per *Wadsworth, J.*—The terms of the Indian Divorce Act contemplate a decree absolute in cases of nullity. (*Stone, Mockett and Wadsworth, JJ.*) SUMATHI AMMAL *v.* PAUL. **59 Mad. 509 and 518=162 I.C. 675=8 R.M. 1028=43 L.W. 312=A.I.R. 1936 Mad. 324=70 M.L.J. 321 (F.B.).**

———**S. 2 (as amended in 1926)**—*Deree of nullity of marriage—Parties not domiciled in India—Jurisdiction of Indian Courts.*

As a result of the amendment in 1926 of S. 2 of the Divorce Act, Courts in India are permitted to make decrees of nullity of marriage even

DIVORCE ACT (1869), S. 3.

though the parties presenting the petition are not domiciled in India. (*Costello, J.*) WENKENBACH *v.* WENKENBACH. **169 I.C. 948=10 R.C. 89=I.L.R. (1937) 1 Cal. 417=41 C.W.N. 268.**

———**S. 2**—*Jurisdiction—Domicile—Last place of cohabitation in India—Sufficiency.*

Where in a petition for dissolution of marriage, the petitioner stated that her husband went to and fro from India and cohabited with her at various places and the last place of cohabitation was at some definite place in India.

Held, that at the time of cohabitation both parties were domiciled in India and thus it conferred jurisdiction on Court in India to hear the petition. (*Wort, J.*) GRANT *v.* GRANT. **167 I.C. 743=9 R.P. 423=18 Pat.L.T. 686=3 B.R. 317=A.I.R. 1937 Pat. 82.**

———**S. 2**—*Proof of domicile—Statement of petitioner—If sufficient.*

The mere statement of the petitioner, who is 42 years old and is in this country, because he is in the service of the Railway that he intends to continue to reside here is not proof of his domicile in India. (*Addison, Monroe and Din Mohammad, JJ.*) MOODY *v.* MOODY. **174 I.C. 992=10 R.L. 652=A.I.R. 1938 Lah. 293.**

———**S. 2**—*Scope and effect of—Suit for declaration of nullity of marriage by wife against husband—Latter domiciled in Mysore State—Jurisdiction of Madras High Court.*

Per *Mockett, J.*—The effect of S. 2 of the Divorce Act is that so far as a suit for dissolution of marriage is concerned a domiciled British subject resident beyond British India, *i.e.*, in Mysore can invoke the jurisdiction of the Madras High Court, but as regards a suit for nullity of marriage, any person resident in India who has been married in India can bring such a suit in the High Court. (*Stone, Mockett and Wadsworth, JJ.*) SUMATHI AMMAL *v.* PAUL. **59 Mad. 509 and 518=162 I.C. 675=8 R.M. 1028=43 L.W. 312=A.I.R. 1936 Mad. 324=70 M.L.J. 321 (F.B.).**

———**S. 3**—Jurisdiction. *See* INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, S. 1. **39 Bom. L.R. 1182.**

———**S. 3 (2) (a) and (1) (d)**—*District Judge—Meaning of—Petition under S. 32 of the Act—Jurisdiction.*

Under the Divorce Act S. 3 (2) (*a*), 'District Judge' means a Judge of a principal Civil Court of original jurisdiction. The Court of the Judicial Commissioner, Ajmer-Merwara, has no original civil jurisdiction and the principal Civil Court of original jurisdiction is therefore the Court of the District Judge. The High Court for Ajmer is the High Court of Allahabad according to S. 3 (1) (*d*). Hence it follows that a petition under S. 32 of the Divorce Act cannot be entertained by the Court of the Judicial Commissioner, Ajmer, as it has no jurisdiction. (*Norman.*) BRAND *v.* MRS. BRAND. **1940 A.M.L.J. 1.**

———**S. 3 (3)**—*Jurisdiction—Parties belonging to and marrying at place within jurisdiction of Court at Mangalore—Last place of residence together—Husband leaving for Rangoon, but having no fixed residence there though employed there—Jurisdiction of Mangalore Court to entertain application by wife.*

DIVORCE ACT (1869), S. 7.

A person cannot be said to reside at a place where he spends only a day or two when he has got a fixed place of residence elsewhere; but where a person has no fixed place of residence the place where he actually lives must be taken to be the place where he resides. The parties husband and wife, belonged to Mangalore in South Kanara, were married in Mangalore, and were living there on more than one occasion. They last resided together at Mangalore until the husband left for Rangoon where he was employed, but he had no fixed place of residence in Rangoon.

Held, that the husband must be deemed to be residing in the place where he actually lived, *i.e.,* in Mangalore, and the District Court of South Kanara had therefore jurisdiction to entertain an application presented by the wife under Ss. 7, 18 and 19 of the Divorce Act for a declaration that the marriage was null and void and for maintenance. (*Pandrang Row, J.*) JOHN BAPTIST D'SOUZA *v.* LIZZIE JANE LOBO. **51 L.W. 523=(1940) M.W.N. 427=A.I.R. 1940 Mad. 584=(1940) 1 M.L.J. 651.**

———**Ss. 7 and 45**—*Joinder of parties—Party named in divorce plaint as having committed adultery—Right to intervene.*

It is clearly in the interests of justice that a party who is named in a divorce plaint as being one of the persons with whom the respondent is alleged to have committed adultery should be allowed to intervene and defend his or her character against the aspersions which have been levelled against her. There is very grave doubt as to whether the person so named has the right under the law as it stands at present, to claim to be added as a party to the divorce proceedings. Hence amendment of Divorce Act suggested. (*Thom, J.*) DOROTHY E. STUART *v.* VERNON STUART. **57 All. 884=163 I.C. 802=9 R.A. 75=1936 A.L.R. 659=A.I.R. 1936 All. 488.**

———**S. 7**—*Procedure—Petition for judicial separation by wife on ground of adultery and cruelty—Decree—Subsequent petition for dissolution of marriage on same grounds—Competency—Fresh evidence of adultery alone in subsequent petition—Sufficiency for decreeing dissolution.*

A wife petitioning for dissolution of marriage is not in the absence of a fresh matrimonial offence, entitled to a decree for dissolution of marriage upon precisely the same grounds as those on which she obtained a judicial separation previously. The Courts cannot possibly countenance a petitioner who had material for dissolution, refraining from claiming it in his or her petition and obtaining only a decree for judicial separation, and then later on when he or she thought it convenient to come to the Court to repeat the same evidence all over again and asking for a decree for dissolution. But where in a case there is, besides the decree for judicial separation, entirely fresh evidence of adultery, the wife would be entitled to a decree *nisi* for dissolution on such evidence without adducing fresh evidence of cruelty which had already been proved in the previous case. (*Mockett, J.*) MANJULA BAI *v.* JANOJI RAO. **I.L.R. (1940) Mad. 319=51 L.W. 142=1940 M.W.N. 601=A.I.R. 1940 Mad. 510=(1940) 1 M.L.J. 210.**

———**S. 7**—*Scope—Marriage under Buddhist law—Parties subsequently becoming Christians—Power of Court to grant relief.*

DIVORCE ACT (1869), S. 10.

A marriage to be recognized as such by the Courts of a Christian country must be a voluntary union for life of one man with one woman to the exclusion of all others, although it need not necessarily have been celebrated in accordance with Christian rites or ceremonies. A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy is not a marriage as understood in England and the Court for Divorce and Matrimonial Causes under S. 7 will not recognize such a marriage as valid. Therefore a marriage contracted between parties according to Buddhist law which recognizes polygamy, is not such a marriage as entitles the parties to relief under the Divorce Act although they may have become Christians subsequently to the marriage. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MA U *v.* KIN RAW GAM. **1940 Rang.L.R. 417=186 I.C. 775=12 R.R. 288=A.I.R. 1940 Rang. 67 (S.B.).**

———**S. 8**—*Transfer of case to High Court—Propriety—Costs of suit in High Court ruinous to husband.*

The husband filed a divorce petition in the District Court. The wife applied to the High Court for the transfer of the case to its own file as the parties were both serving in Calcutta and it was convenient for them both, if the case was tried at Calcutta, and moreover, the wife stated that in case the divorce proceedings were tried in the District Court, she might lose her employment if often required to go there. It was found that on the transfer of the case to the High Court, the costs payable by the husband were very excessive so much so that he would have to go in insolvency for them.

Held, that though there was convenience to both parties if the case was tried in the High Court, it was an expensive task for the husband which might make him apply in insolvency and the application for transfer should, therefore, be refused. (*Ameer Ali, J.*) HARLE *v.* HARLE. **171 I.C. 930=10 R.C. 322=A.I.R. 1937 Cal. 303.**

———**S. 10**—*'Desertion'—Proof required.*

The desertion required to be proved under S. 10 of the Divorce Act must be desertion within the meaning of S. 3 (9) of that Act, *viz.,* a wilful abstention by the husband against the wish of the wife. (*Nanavutty, J.*) FOSTER *v.* FOSTER. **12 Luck. 697=165 I.C. 392=9 R.O. 197=1936 O.W.N. 938=1936 O.L.R. 637=A.I.R. 1937 Oudh 116.**

———**S. 10 and Special Marriage Act, S. 17**—*Dissolution—Order for—Proof of marriage—Condition precedent.*

Unless the marriage is proved which is sought to be dissolved, no relief could be given to the applicant for dissolution. (*Collister, Allsop and Bajpai, JJ.*) PREM DULARI *v.* NARAIN PRASAD. **I.L.R. (1940) All. 99=188 I.C. 610=13 R.A. 47=1940 A.W.R. (H.C.) 207=1940 A.L.J. 228=A.I.R. 1940 All. 308 (F.B.).**

———**Ss. 10 and 14**—*Divorce—Discretion of Court—Misconduct of petitioner.*

Where the petitioner the husband had also been guilty of adultery, it is for the Court to consider whether it should refuse to give him a decree or should exercise its discretion in his favour. The discretion should no doubt be exercised with due care and strictness. Where there was nothing to

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suggest that the petitioner was a man of loose and profligate character and where the parties were living apart and the respondent had given birth to an illegitimate child and there was no collusion or connivance between them, in such a case, it was *held* that a decree for dissolution of marriage should not be refused upon the ground of the petitioner's misconduct. (*Allsop, J.*) ERNEST LIONEL DOUTRE *v.* ANNE RUTH DOUTRE. **1939 A.W.R. (H.C.) 420=I.L.R. (1939) All. 573=184 I.C. 110=12 R.A. 180=1939 A.L.J. 478=A.I.R. 1939 All. 522.**

———S. 10—*Hindu marrying Christian wife—Second marriage with Hindu during subsistence of first marriage—If a ground for divorce.*

Where a Hindu after marrying a Christian wife and while that Christian wife is living, marries a Hindu wife in a Hindu form though the second marriage does not amount to bigamy it amounts to a second marriage and if that marriage is consummated the consummation *vis a vis the* first wife amounts to adultery and forms a ground for divorce on the petition of the first wife. (*Stone, C.J., Gruer and Bose, JJ.*) MRS. CHITNAVIS *v.* A. S. CHITNAVIS. **189 I.C. 432=13 R.N. 46=1940 N.L.J. 391=A.I.R. 1940 Nag. 195 (S.B.).**

———S. 10—*Petition by wife alleging adultery of husband with unknown woman—Identification and name of woman during evidence—Omission to amend petition—If bar to grant of decree* nisi.

Where in a petition for dissolution of marriage by a wife the petitioner stated that the person with whom her husband committed adultery was unknown to her, but in the evidence she and her witnesses identified a particular woman with whom her husband committed adultery.

Held, even hough no amendment in the petition was made as to the name, the identification by the petitioner and her witness was sufficient to grant a decree *nisi* for dissolution of marriage. (*Wort, J.*) GRANT *v.* GRANT. **167 I.C. 743=9 R.P. 423=3 B.R. 317=18 Pat.L.T. 686=A.I.R. 1937 Pat. 82.**

———**Ss. 10, 11 and 12**—*Petition for dissolution—Facts to be proved—Duty of Court.*

In a petition for dissolution of marriage, the petitioner has to allege and prove that he professes Christian religion, that the marriage was solemnised in India, that the parties to the marriage were domiciled in India when the petition was presented, and that the husband and wife reside or last resided together within the local limits of the ordinary jurisdiction of the Court of the District Judge, to whom the petition was presented. These facts must be proved by evidence, and the petitioner is not excused from proving them merely because the respondent admits them. A divorce Court has always to bear in mind the possibility of collusion and must insist on strict proof of all the facts alleged. The Judge should come to a distinct finding as to whether the marriage has been solemnised in India and upon what date. A certificate of marriage is not the only way of proving marriage but it is usually the best way. (*Grille, J.C., Subhedar and Pollock, A. J.C.*) MANOHAR BAPUJI *v.* CHANDRAWATI. **31 N.L.R. (Supp.) 174=8 R.N. 214=161 I.C. 409=A.I.R. 1936 Nag. 26 (S.B.).**

———**S. 10**—*Petition for dissolution—Proof of marriage—Quantum.*

DIVORCE ACT (1869), S. 14.

Before the Court can grant a decree for dissolution of marriage it must be satisfied that the marriage did take place and the marriage is a valid one. A bare statement of the petitioner that he was married is not sufficient evidence of marriage and he must produce the marriage certificate. A.I.R. 1933 Rang. 93, Rel. on. (*Roberts, C.J., Baguley and Leach, JJ.*) C. L. DALE *v.* ENID BERYL DALE. **164 I.C. 712=9 R.R. 133=A.I.R. 1936 Rang. 398.**

———**Ss. 10 and 22**—*Petition for dissolution of marriage—Case made out only for judicial separation—Petition dismissed without considering question of separation—Review, if competent.*

If on a petition by the wife for dissolution of her marriage, a case for judicial separation alone is made out and not for dissolution, the Court can grant a decree for judicial separation. If it dismisses the petition without considering the question of judicial separation, a review application is competent. (*Addison and Ram Lall, JJ.*) GLORIOUS JACOB *v.* MRS. ROSIE JACOB. **184 I.C. 816=12 R.L. 258=41 P.L.R. 337=A.I.R. 1939 Lah. 404.**

———**Ss. 10 and 22**—*Petition for dissolution of marriage by wife—Charge of adultery not proved—Cruelty proved—Right to decree for judicial separation.*

Where in a petition by the wife praying for the dissolution of her marriage with her husband on the ground of her husband's adultery, the wife fails to prove the charge of adultery but succeeds in proving cruelty by the husband towards her, the Court can pass a decree for judicial separation under S. 22 of the Divorce Act, although she has not specifically prayed for such a decree either in her original petition or in her memorandum of appeal. (*Nanavutty and Zia-ul-Hasan, JJ.*) BROWNE *v.* BROWNE, A.N. **12 Luck. 526=165 I.C. 12=9 R.O. 167=1936 O.W.N. 918=1936 O. L.R. 608=A.I.R. 1937 Oudh 52.**

———**S. 14**—*Adultery committed by respondent subsequent to petition—If can be basis of decree—Procedure to be adopted by petitioner.*

Courts in Burma, like the High Court in England, are entitled to pronounce a decree based on adultery committed by the respondent after the presentation of a petition for dissolution of marriage. But the petitioner desiring the Court to do so should, with the leave of the Court, file a duly verified supplemental petition supported by an affidavit setting out the facts, testifying to non-collusion and non-connivance, and should also serve such petition on the respondent and on all persons affected by it. This is the English practice which applies equally in Burma. (*Sharpe, J.*) VIOLA DUNCAN *v.* GEORGE DUNCAN. **1939 Rang. L.R. 267=184 I.C. 801=12 R.R. 172=A.I.R. 1939 Rang. 352.**

———**S. 14, Proviso**—*Applicability—Husband living in adultery treating wife with cruelty and deserting her—Wife marrying Mahomedan husband believing thereby that marriage with former husband would be dissolved—Right to decree.*

Where a woman who has been treated with gross cruelty and has been deserted by a husband guilty of habitual adultery under the most aggravating circumstances and who, after her husband had left the place where he had in fact long deserted her, married a Mahomedan husband accord-

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ing to Islamic law believing that by so doing and by herself becoming a Mahomedan, her marriage with her Christian husband would *ipso facto* be dissolved, it cannot be said, merely because she was wrongly advised as to the law, that exercising discretion in her favour and granting her decree *nisi* would encourage immorality. Hence, discretion under S. 14 should be exercised in her favour. (*Davis, J.C., Mehta and Lobo, JJ.*) HOPE *v.* HOPE. **177 I.C. 169=11 R.S. 47=A.I.R. 1938 Sind 162.**

———**S. 14**—*Condonation of adultery—If cancelled by subsequent cruelty.*

Upon the commission of a subsequent matrimonial offence the forgiveness of the prior offence is cancelled and the old cause of complaint is revived; furthermore, the subsequent offence need not necessarily be *ejusdem generis* as the original offence. Subsequent cruelty would, therefore revive previously condoned adultery. (*Sharpe, J.*) VIOLA DUNCAN *v.* GEORGE DUNCAN. **1939 Rang.L.R. 267=184 I.C. 801=12 R.R. 172= A.I.R. 1939 Rang. 352.**

———**S. 14**—*Decree of divorce—Discretion of Court to grant—Guiding principles.*

There are no regid rules as to the exercise of the discretion of Court to grant a petition for divorce. All relevant facts are to be considered as well as the welfare of the parties themselves and the principles of morality. If the wife's adultery has been conduced by the conduct of her husband, she is entitled to ask the Court to exercise its discretion in her favor and to grant her a divorce. In the event of deliberate suppression by a petitioner the Court will be disinclined to give him or her the assistance that it might have given, had full disclosure been made at the outset. Subject to these guiding principles, the Court will naturally take a large and merciful view, considering the interests of possible children who might otherwise be born out of lawful wedlock, and the probability of one party to the proceedings marrying the third party involved if enabled to do so by being accorded freedom from the marriage tie. (*Nanavutty, J.*) FOSTER *v.* FOSTER. **12 Luck. 697=165 I.C. 392=9 R.O. 197=1936 O.W.N. 938=1936 O.L.R. 637=A.I.R. 1937 Oudh 116.**

———**S. 14**—*Delay of 7 years—Duty of petitioner to explain.*

A delay of 7 years in presenting a petition for divorce is *prima facie* unreasonable and raises a presumption of connivance or condonation and the burden is on the petitioner to explain the delay before he can be granted the decree he seeks. (*Grille, J.C., Subhedar and Pollock, A.J.Cs.*) MANOHAR BAPUJI *v.* CHANDRAWATI. **31 N.L.R. (Supp.) 174=8 R.N. 214=161 I.C. 409=A.I.R. 1936 Nag. 26 (S.B.).**

———**S. 14**—Divorce — Discretion—Misconduct of petitioner—Effect of. *See* DIVORCE ACT, SS. 10 AND 14—DIVORCE—DISCRETION. **1939 A.W.R. (H.C.) 420.**

———**S. 14**—*Husband's connivance of his wife's adultery with co-respondent proved—Her previous adultery with another—If can be revived.*

Where it is proved that the wife's adultery with the co-respondent was with the connivance of her husband, her adultery with him does not revive her previous adultery with another person.

DIVORCE ACT (1869), S. 17.

(*Nanavutty, J.*) FOSTER *v.* FOSTER. **12 Luck. 697=165 I.C. 392=9 R.O. 197=1936 O.W.N. 938=1936 O.L.R. 637=A.I.R. 1937 Oudh. 116.**

———**S. 16**—*Decree for dissolution of marriage by High Court—Form of.*

A decree for dissolution of marriage, made by the High Court under the Divorce Act, whether in its appellate or in its original jurisdiction, should be a decree *nisi* and not a decree subject to the confirmation by the High Court under S. 17. (*Roberts, C.J., Dunkley and Sharpe, JJ.*) PO TUN *v.* MA CHIT. **175 I.C. 408=10 R.R. 489=A.I.R. 1938 Rang. 204 (F.B.).**

———**Ss. 16 and 17-A**—*Decree* nisi—*Right of respondent to intervene—Duties of Government Advocate as King's Proctor.*

S. 16 of the Indian Divorce Act does not give the right to the respondent to object to a decree *nisi* being made absolute. The words "any person" do not apply to parties to the proceedings, and, therefore, cannot include the respondent. The right of the petitioner to have the decree *nisi* made absolute can only be challenged by a third party, or by the Government Advocate who is placed in the position of King's Proctor by a notification of the Governor-General in Council issued in pursuance of the powers conferred on him by S. 17-A. The Government Advocate cannot leave the matter in the hands of the respondent, and the correct course is for him to consider the respondent's allegations and what may be placed before him in connection therewith and then decide whether he should intervene. If he does not consider that the evidence is sufficient to justify his intervention, there is an end of the matter so far as he is concerned. If he does consider that the evidence does justify him in intervening, it is his duty to intervene. (*Leach, J.*) WILLIAMS *v.* WILLIAMS. **14 Rang. 322= 165 I.C. 819=9 R.R. 225=A.I.R. 1936 Rang. 499.**

———**S. 16**—Provision similar to S. 16, if exists to set aside decree absolute. *See* C. P. CODE, S. 151—LIMITS OF INHERENT POWER. **1940 O.A. 140=1940 O.W.N. 139.**

———**S. 17**—*Case returned for enquiry to District Judge—Wife, if can raise counter-allegations against petitioner.*

In a suit for dissolution of marriage brought by the husband on the ground of adultery by his wife an *ex parte* decree was granted but the High Court returned the case for enquiry to the District Judge. He found that the act of adultery, though first condoned, was revived by subsequent matrimonial offence. The wife raised the counter-allegation of petitioner's alleged adultery with another woman subsequent to the decree.

Held, that it was a matter which the wife could not raise; it could only be examined upon the intervention of a third party or of a King's Proctor. A.I.R. 1936 Rang. 499, Rel. on. (*Roberts, C.J., Leach and Dunkley, JJ.*) E. W. G. HOWES *v.* MRS. MYRTLE HOWES. **167 I.C. 735= 9 R.R. 329=A.I.R. 1937 Rang. 79 (S.B.).**

———**S. 17**—*Confirmation of decree—Husband, if can object on ground of wife's marriage since decree.*

Where a divorce decree obtained by the wife comes before the High Court for its confirmation, the husband cannot object to the confirmation of

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the decree on the ground that the wife has married since the passing of the decree by the District Judge. (*Roberts, C.J., Leach and Mackney, JJ.*) MA AYE BYU *v.* MAUNG THA ZAN. **10 R.R. 61 =170 I.C. 200=A.I.R. 1937 Rang. 333 (F.B.).**

——**S. 17**—*Confirmation of divorce—When justified.*

For a husband to live in open adultery in the same house with another is certainly cruelty. In a petition for confirmation of divorce it was established that the husband had an illicit connexion with the widow of his brother. He turned his wife out of the house, when she was pregnant, after beating her. His wife was away for more than two years and he took no steps to secure her return, nor did he take any steps to defend the petition for divorce though he was properly served.

Held, that the decree dissolving marriage should be confirmed. (*Addison, Monroe and Din Mohammad, JJ.*) BARKAT BIBI *v.* NAWAB. **175 I.C. 21=10 R.L. 658=A.I.R. 1938 Lah. 301 (S.B.).**

——**S. 17**—*Decree for dissolution of marriage —Record imperfect—No proof of valid marriage —Decree, if can be confirmed.*

A petition was made for judicial separation. But the petitioner in her evidence asked for a decree for dissolution of marriage. There was no evidence on record disclosing whether the petitioner was a Christian at the time of marriage, nor was there any evidence with regard to the religion of the respondent. Then there was no proof that the pastor who purported to solemnize the marriage was a person authorised under S. 5, Christian Marriage Act, to do so, and lastly no marriage certificate was filed. But a decree for dissolution was granted.

Held, that the decree granting the dissolution of marriage could not be confirmed in such state of record and the record should be returned to the District Court for the amendment of the petition and for proof that a valid marriage had taken place. (*Roberts, C.J., Leach and Spargo, JJ.*) IN GYUNG YANG *v.* N'KHUM GAM. **164 I.C. 974 =9 R.R. 153=A.I.R. 1936 Rang. 429 (S.B.).**

——**Ss. 17 and 55**—*Petition for confirmation of decree—Order regarding damages—If can be attacked by co-respondent.*

A decree for dissolution of a marriage was passed and the co-respondent was ordered to pay damages to the petitioner and respondent. The co-respondent did not appeal from the order regarding damages but when the petition for confirmation of the decree was filed in the High Court he sought to attack the order regarding damages.

Held, that he was entitled to do so even though he had not appealed against the order. 20 Bom. 362 (F.B.), Foll. (*Coldstream, Skemp and Abdul Rashid, JJ.*) C. W. PEYTON *v.* MRS. A. PEYTON. **169 I.C. 654=39 P.L.R. 666=10 R.L. 29=A.I.R. 1937 Lah. 417 (S.B.).**

——**Ss. 18 and 19 (4)**—*Binding marriage— Force of—Essentials of valid marriage between Christians—Effect of.*

A ceremony of marriage ordinarily constituting a binding marriage between the parties subsists unless and until it is set aside on one or other of the grounds which justify annulling or setting aside a marriage. Before a valid marriage can be celebrated both parties to such marriage must be either single or divorced or a widow or a widower and then only are they competent to enter into a valid marriage. If at the time of celebration of the marriage ceremony one or other of the parties had a spouse living, the carlier marriage not having been set aside, the later marriage is void *ab initio;* in other words it is no marriage at all. The law in England that a party to a marriage of which the other party is incompetent to join in the celebration of a valid ceremony because of the existence of a previous husband or wife, is entitled without any recourse to any Court to marry any one else because that particular marriage is not in law a marriage at all applies equally well to marriages between Christians in India inasmuch as no Christian can marry another person in the lifetime of an earlier spouse unless the previous marriage has been set aside. This position cannot be interfered with in regard to a marriage celebrated in India as provided by S. 88, Christian Marriage Act. Unless therefore the marriage is a valid marriage it cannot be a marriage which is in full force within the meaning of S. 19, Divorce Act. (*Gentle, J.*) WILLIAM HUDSON *v.* MRS. K. M. WEBSTER. **169 I.C. 516 =1937 M.W.N. 363=10 R.M. 63=46 L.W. 602 =A.I.R. 1937 Mad. 565.**

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——**Ss. 19 and 10**—*Marriage between Mahomedan husband and Roman Catholic wife— Wife's consent obtained by fraud—Power of Court to annul marriage.*

The policy of the Divorce Act does not contemplate a valid marriage between a Christian and a person professing a religion which is not monogamous. Where prior to and also at the time of their marriage, the husband who was a Mahomedan represented to the wife that he was a Roman Catholic, and the wife who was a Roman Catholic, would not have married him if she had known that he was a Mahomedan, the marriage is void, the wife's consent to it having been obtained by fraud. The High Court has accordingly power to annul that marriage on the ground of fraud under S. 19 of the Act. (*McNair, J.*) THERISA OSMAN AYKUT *v.* MUSTAFA OSMAN AYKUT. **I.L.R. (1939) 2 Cal. 60=186 I.C. 593=12 R.C. 486=A.I.R. 1940 Cal. 75.**

——**S. 19**—*Proof of impotency—Wife's invincible repugnance to act of coitus—Burden of proof—Delay—Effect of.*

Incapacity in wife of consummating marriage, consisting of a nervous and psychic disorder and of invincible repugnance in relation to the act of coitus, at all events in so far as the petitioner husband is concerned, which renders her incapable of submitting to sexual intercourse with him, is sufficient to satisfy the requirements of S. 19, as it constitutes a permanent physical disability. The burden of proving his allegation is on the petitioner and he must remove all reasonable doubts. If there be a direct conflict of testimony between the two parties who alone know the truth, the difficulties are much increased. But the fact that difficulties are increased, does not make them insuperable nor is the Court relieved from the duty of weighing evidence merely

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because the parties tell different stories. The delay on the part of the petitioner increases the burden of proof and is an important factor in deciding whether his story is true. The law requires sincerity in the complainer, *i.e.*, a real sense of grievance complained of, unmixed with any other subsidiary motive, and, as a necessary proof of such sincerity requires all reasonable promptitude to be exhibited by complainer in seeking legal redress. Delay in itself is not an absolute bar to success in a suit of such nature unless the respondent has suffered in any way by reason of it; but it has an important bearing on the evidence by which the charge of impotency is sought to be established and upon the measure of proof required. The one guiding principle is that great delay in the institution of a suit of this description by the husband is an objection to be accounted for. (*McNair, J.*) BULL *v.* BULL. **181 I.C. 89=11 R.C. 780=A.I.R. 1938 Cal. 684.**

———**S. 19 (4)**—*Burden of proof.*

Where a petition to declare a marriage null and void is made under S. 19 (4), Divorce Act, the burden of proof lies upon the petitioner that the previous marriage of the opposite party was in full force and effect and was not set aside at the time when his marriage took place with the opposite party. (*Gentle, J.*) WILLIAM HUDSON *v.* MRS. K. M. WEBSTER. **169 I.C. 516=10 R.M. 63=46 L.W. 602=1937 M.W.N. 363=A.I.R. 1937 Mad. 565.**

———**S. 22**—*Application for judicial separation —Allegation of adultery—Circumstantial evidence —Sufficiency.*

In an application for judicial separation under S. 22, Divorce Act, where adultery is alleged, it is difficult to produce evidence of witnesses who may have seen the guilty party *in flagrante delicto* and at most circumstantial evidence can be led from which a reasonable inference may be drawn of the guilty party having committed adultery. (*Addison and Din Mahomed, JJ.*) BURROWES *v.* BURROWES. **175 I.C. 163=10 R.L. 692=39 P.L.R. 556=A.I.R. 1937 Lah. 395.**

———**S. 22**—*Cruelty by husband—Proof.*

Where the husband has been guilty of beating his wife on several occasions and on one of them her hands were tied with a chain and her feet with a rope and she was kept hanging in a door way until another person came to her rescue, the acts of the husband amount to legal cruelty sufficient to justify the Court to pass a decree for judicial separation under S. 22 of the Divorce Act. (*Nanavutty and Zia-ul-Hasan, JJ.*) BROWNE *v.* BROWNE, A.N. **12 Luck. 526=165 I.C. 12=9 R.O. 167=1936 O.W.N. 918=1936 O.L.R. 608=A.I.R. 1937 Oudh 52.**

———**S. 34**—*Damages—Quantum—Means of adulterer—Relevancy.*

The means of the adulterer have nothing to do with the question of quantum of damages. (*Coldstream, Skemp and Abdul Rashid, JJ.*) C. W. PEYTON *v.* MRS. A. PEYTON. **169 I.C. 654=39 P.L.R. 666=10 R.L. 29=A.I.R. 1937 Lah. 417 (S.B.).**

———**S. 34**—*Husband responsible for his wife's misconduct—If entitled to damages.*

Damages are awarded for the injury done to the husband in alienating his wife's affections. A husband who is himself responsible for his wife's misconduct or who condoned his wife's adultery with the co-respondent cannot claim damages from the latter. (*Nanavutty, J.*) FOSTER *v.* FOSTER. **12 Luck. 697=165 I.C. 392=9 R.O. 197=1936 O.W.N. 938=1936 O.L.R. 637=A.I.R. 1937 Oudh 116.**

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———**S. 36**—*'Net income'—Meaning.*

Net income merely means income after allowing for the cost of collection, income-tax and similar deductions. Net income does not mean any sum which is left over after the husband has spent all that he considers necessary for his maintenance. (*Sen, J.*) LOBO *v.* LOBO. **187 I.C. 252=12 R.C. 554=A.I.R. 1939 Cal. 753.**

———**S. 37**—*Alimony—Gross sum to be paid to wife—Fixing of amount—Principle—Considerations.*

It is difficult to apply any definite principle for the purpose of fixing the gross amount payable to a wife. Considerations as to the existence of debts and increase of illegitimate family are quite irrelevant for such a purpose. (*Yorke, J.*) MRS. QUIEROS *v.* MR. QUIEROS. **14 Luck. 78=174 I.C. 901=10 R.O. 280=1938 O.W.N. 513=1938 O.L.R. 231=1938 O.A. 415=A.I.R. 1938 Oudh 171.**

———**S. 37**—*Arrears of alimony and costs—Order for payment in instalments—Propriety.*

Although the arrears of alimony and costs are ordinarily payable at once, the Court may, having regard to the poverty of the parties, make them payable in monthly instalments. (*Addison and Ram Lall, JJ.*) GLORIOUS JACOB *v.* MRS. ROSIE JACOB. **184 I.C. 816=12 R.L. 258=41 P.L.R. 337=A.I.R. 1939 Lah. 404.**

———**S. 37**—*Order for furnishing security for alimony made four years after decree—Legality——Power of Court to vacate that order.*

Under S. 37 of the Divorce Act the power to make any order on the husband to secure a gross sum or annual income for the wife can only be exercised on the passing of the decree. An order directing the husband to furnish security made four years after the decree for judicial separation is, therefore, without jurisdiction. If such an order is not drawn up and filed, the Court has power to vacate it without an application for review being made to it. (*Panckridge, J.*) RITCHSON *v.* RITCHSON. **I.L.R. (1938) 2 Cal. 22=177 I.C. 729=11 R.C. 269=42 C.W.N. 317=A.I.R. 1938 Cal. 321.**

———**S. 37**—*Power of Court to order furnishing of security for alimony—Extent of.*

Under S. 37 of the Divorce Act, the Court has power to make an order on the husband to secure a gross sum or annual income for the wife. In addition it has also the power to order him to pay to the wife such monthly or weekly sums for her maintenance and support as it may think reasonable. There is however no power given by the section which enables the Court to compel the husband to secure such monthly or weekly payments. (*Panckridge, J.*) RITCHSON *v.* RITCHSON. **I.L.R. (1938) 2 Cal. 22=177 I.C. 729=11 R.C. 269=42 C.W.N. 317=A.I.R. 1938 Cal. 321.**

———**S. 37, Paras. 3 and 4**—*Scope of—Power to substitute order under para. 3 for prior order under para. 4—Power to award gross sum—Nature and extent of wife's right in regard thereto.*

The provisions of paras. 3 and 4 of S. 37 of the Divorce Act, are alternatives at the discretion of

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the Court. They are merely alternative methods of protecting the successful petitioner, the wife. The proviso to the section in terms relates only to the provisions in para. 4 for monthly and weekly payments, and it does not in terms provide for any increase in the amount of the payments. Though a prior order has been made under para. 4, a Court has power on a fresh application to pass an order under para. 3 of S. 37. The correct interpretation of the third para. of S. 37 is that the husband is to secure to the wife a gross sum of money which is to be at her disposal in the same way as the annual sum of money. The section does give power to direct a money payment. (*Yorke, J.*) MRS. QUIEROS *v.* MR. QUIEROS. **14 Luck. 78=174 I.C. 901=10 R.O. 280=1938 O.W. N. 513=1938 O.L.R. 231=1938 O.A. 415=A.I.R. 1938 Oudh 171.**

———**S. 37, Proviso**—*Construction—Power of Court to pass order discharging, varying or suspending original order of alimony as to arrears accrued due.*

Under the proviso to S. 37 of the Divorce Act the Court has jurisdiction only to discharge, modify or suspend an order for alimony in so far as it concerns future payments, that is, as to payments which are to become due in future. The Court has no power to remit arrears and has no jurisdiction to declare that the husband should not be liable to make good sums of alimony which have already accrued due under the decree in execution proceedings or otherwise. (*Harries, J.*) H.C.D.GOODALL *v.* B.H.A.GOODALL. **I.L.R. 1938 All. 213=174 I.C. 330=1938 A. L.R. 270=10 R.A. 569=1937 A.L.J. 1363= 1938 A.W.R. (H.C.) 37=A.I.R. 1938 All. 121.**

———**S. 37, Proviso**—*Discretion—Exercise of——Delay in applying for modification—Suspension or discharge—Effect.*

The power given to the Court under the Proviso to S. 37 of the Divorce Act to discharge, modify or suspend an order for alimony is discretionary, and should not be exercised by the Court in favour of applicant who has unreasonably delayed his application. (*Harries, J.*) H.C.D. GOODALL *v.* B.H. A. GOODALL. **I.L. R. 1938 All. 213=174 I.C. 330=1938 A.L.R. 270=10 R.A. 569=1938 A.W.R. (H.C.) 37 =1937 A.L.J. 1363=A.I.R. 1938 All. 121.**

———**S. 40**—*Discretion—Application by guilty party—When to be allowed—Duty of Court to preserve* status quo—*Right of innocent party to retain benefit of settlement.*

The power given to the Court under S. 40 of the Divorce Act is a discretionary one, the discretion must be exercised judically. It is of course open to a guilty party to make an application under S. 40, but such an application should not be readily acceded to, unless special circumstances exist which make it just and proper to make an order upon the application of a guilty party varying a settlement, the *status quo* should remain undisturbed. The Court should not ordinarily deprive an innocent party of any interest which he or she takes under a settlement, even though it be for the benefit of the children of the marriage. (*Harries, J.*) H.T. WOODWARD *v.* I.M. WOODWARD. **I.L.R. 1938 All. 95 =1938 A.W.R. (H.C.) 35=173 I.C. 925=**

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1938 A.I.R. 203=10 R.A. 526=1937 A.L.J. 1368=A.I.R. 1938 All. 126.

———**Ss 41 and 43**—*Order for maintenance——Interference by High Court.*

The order passed by the District Judge about maintenance under S. 41, Divorce Act, terminates when a final order is passed under S. 43, and S. 41 gives the Court a very wide discretion to fix such maintenance as it thinks fit. High Court will not therefore ordinarily interfere with an order fixing the amount of maintenance unless it appears to have been passed in disregard of the evidence and is clearly unreasonable. (*Coldstream, J.*) MILLICANS *v.* MRS. GLADYS MILLICANS. **173 I.C. 518=10 R.L. 454=A.I.R. 1937 Lah. 862.**

———**S. 43**—*Custody of children—Order for—Power of Court—Limits to.*

The power of Court to make any order for the custody of a minor child, the marriage of whose parents is the subject of a suit for obtaining a dissolution of that marriage, is limited to making an order in respect of such child only so long as that child remains a minor child within the meaning of the Divorce Act. The proper practice to be followed in Burma is to limit the order for custody to the age which is fixed by S. 3 (5) of the Act and also to direct that the person to whom is given the custody should not remove the child outside the jurisdiction of the Court without its sanction. (*Sharpe, J.*) VIOLA DUNCAN *v.* GEORGE DUNCAN. **1939 Rang.L.R. 267=184 I.C. 801=12 R. R. 172=A.I.R. 1939 Rang. 352.**

———**S. 44**—*Application for custody of child and for arrears of maintenance—Jurisdiction of District Judge—When decree for dissolution of marriage confirmed by High Court.*

Where a decree for dissolution of marriage granted by District Judge is confirmed by High Court, the jurisdiction to entertain an application for the custody of the child or for arrears of maintenance lies with the District Judge. High Court has in such case no jurisdiction to hear the application. (*Tek Chand, Skemp and Abdul Rashid, JJ.*) P. W. Q. HARDLESS *v.* G. I. HARDLESS. **187 I.C. 272=12 R.L. 449 =A.I.R. 1940 Lah. 82 (S.B.).**

———**S. 51**—*Petition for dissolution of marriage by wife—Evidence of all witnesses including petitioner taken on commission in England—Admissibility.*

On a petition by a wife for dissolution of marriage filed in India evidence of all the witnesses including the petitioner was taken on commission in England, though, in fact, she ought to have given evidence in the Court itself.

Held, on considering, that the petitioner was the wife and completely at the mercy of her husband so far as her means were concerned and necessarily with regard to her opportunity of travel to India, the evidence though taken on commission could be accepted in view of the law as to evidence on commission in England. (*Wort, J.*) GRANT *v.* GRANT. **167 I.C. 743=9 R.P. 423 =18 Pat.L.T. 686=3 B.R. 317=A.I.R. 1937 Pat. 82.**

———**S. 55**—*Proceedings under—Order of Court after hearing arguments of parties—Appeal from such order—If competent.*

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During the proceedings under the Divorce Act, Court passed an order after hearing the arguments of parties. The party affected by order appealed under S. 55. The opposite party contended that the appeal was not competent,

Held, that an appeal lay from such order under S. 55 of the Act. (*Jai Lal, J.*) R. C. CHAMARETTE *v.* MRS. P.E. CHAMARETTE. **172 I.C. 619=10 R.L. 352=39 P.L.R. 262= A.I.R. 1937 Lah. 176.**

———S. 55—*Scope—Order fixing maintenance —Appeal, if lies.*

DYING DECLARATION.

The language of S. 55, Divorce Act, provides expressly for an appeal from all orders passed by the District Judge. It is one of the sections dealing with 'procedure' and must apply only to the procedure to be followed and the Court to which appeals lie. An appeal lies from an order of the Court fixing amound of maintenance under S. 41. (*Coldstream, J.*) MILLICANS *v.* MRS. GLADYS MILLICANS. **173 I.C. 518=10 R.L. 454=A.I.R. 1937 Lah. 862.**

DYING DECLARATION. *See* EVIDENCE ACT, S. 32 (1).

SUPPLEMENT.

ABATEMENT—*Suit against several persons including minors—Decision against plaintiff—Appeal by plaintiff without impleading minor defendants—Abatement.*

Where a suit against certain persons some of whom are minors is decided against the plaintiff and the plaintiff appeals without impleading the minor defendants, the appeal does not abate if plaintiff is satisfied with a decree against the major defendants. (*Agarwala, J.*) SHEONANDAN GOPE *v.* SHAHDEO KHATIK. **A.I.R. 1940 Pat. 671.**

ACT OF STATE—*Confiscation by Crown in* 1859—*House sites in Lucknow City—Title to—Financial Commissioner's letter dated 7th August,* 1868—*Effect of.*

By the confiscation in 1859, the Crown became the owner of all house sites in Lucknow City thereby terminating the title of prior owners. The letter of the Financial Commissioner dated 7th August, 1868, declared that the land occupied by houses in the City of Lucknow was the property of the owners of the houses in possession. The Crown thus waived its right in favour of the occupiers of the houses and not in favour of the original owners of the sites. (*Hamilton, Yorke and Radhakrishna, JJ.* on difference of opinion between *Thomas, C.J. and Zia-ul-Hasan, J.*) RAHAS BEHARI LAL *v.* KANHAIYA LAL. **188 I.C. 451=6 B R. 472=1940 A.W.R. (C.C.) 245 (1)=1940 O.L R. 375=13 R.O. 1=1940 O.W.N. 1264 =A.I.R. 1940 Oudh 289 (F.B.).**

ADMINISTRATION –*Administration suit—Suit based on decree—Decree unenforceable owing to absence of leave of Court of Wards as required by statute—Suit for administration to obtain satisfaction of decree—Maintainability.*

To maintain an administration suit to administer the estate of a deceased debtor on the basis of a decree obtained against him during his lifetime, the decree-holder must have a decree which can be enforced. A decree the execution of which is barred by time cannot confer on the holder of the decree a right to maintain a suit on such a decree. Where a decree cannot be executed except by leave of the Court of Wards which has not been obtained as required by statute, it is a decree which cannot be enforced and therefore cannot give the decree-holder a right to maintain an administration suit solely for its satisfaction. (*Harries, C.J., and Manohar Lall, J.*) LACHMI NARAYAN *v.* MAHOMED MEHDI. **21 Pat.L.T. 947.**

ADVANCEMENT—Doctrine of—Applicability—Purchase by father or husband in name of child or wife—Presumption of advancement—Benami purchase. *See* BENAMI — BURDEN OF PROOF. **I.L.R. (1940) Kar. 334.**

ADVERSE POSSESSION—*Acquisition of title—Law of limitation before* 1877.

Per *Nasim Ali, J.*—Even before 1877, the law of limitation was regarded not simply as barring the remedy but also as conferring title on the adverse possessor. (*Nasim Ali and Rau, JJ.*) RAJNANDINI DEBI *v.* MONMOTHA PAL CHOUDHURY. **I.L.R. (1940) 2 Cal. 393=44 C.W.N. 1079.**

———*Burden of proof.*

Where the plaintiff sues for possession of an immovable property on the basis of his title and the defendant pleads adverse possession, the onus is on the defendant to prove his adverse possession. (*Abdul Qayoom, C. J. and Wazir, J.*) GAFFAR *v.* BALKU. **42 P.L.R.J. & K. 262.**

———*Burden of proof—Waste and jungle land and tank—Presumption of possession.*

The possession of the taluqdar is to be presumed in waste, and jungle land and tanks situated in the village of which he is the proprietor, Hence, in the case of acts which constitute a trespass upon that possession, the burden is ordinarily upon the trespasser to establish that he has perfected a title by adverse possession. (*Yorke, J.*) MAHOMED MEHDI *v.* JAGAT SINGH. **1940 O.W.N. 990=1940 O.A. 955=1940 R.D. 484=1940 A.W.R. (C.C.) 458.**

———*Co-heirs.*

The possession of the heirs under the Mahomedan Law will not be adverse till an heir is dispossessed of the property. (*Birdi, J.*) ZAINAB BI *v.* ABDUR RAHMAN. **188 I.C. 872.**

———*Co-sharers—Occupancy tenancy.*

A co-sharer, whether in an occupancy tenancy or in a land in which he has proprietary rights, cannot set up adverse possession against the other co-sharers unless he definitely shows that there was an open assertion of hostile title on his part and the other co-sharers had the knowledge of such adverse claim. (*Wazir, J.*) MAHOMED AKBAR *v.* SYED MAHOMED. **42 P.L.R.J. & K. 283.**

———*Essentials.*

Possession to be adverse must have certain definite attributes The fundamental condition is that the possession must involve an intention to hold as owner and to the exclusion of everybody else. It is not enough to show that it was adequate in continuity and in extent. (*Biswas, J.*) HEMGIRI ROY *v.* SHYAM SUNDAR. **44 C.W.N. 1105.**

———*Essentials—Mortgage—Sale by mortgagor without knowledge of mortgagee—Vendee taking possession—Possession—If adverse to mortgagee under English mortgage.*

Where the mortgagor has sold and handed over possession of the property to the purchaser without the knowledge of the mortgagee and the mortgagee holding a mortgage in the English form has become entitled to possession, it cannot be said that the possession of the purchaser was

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adverse to the mortgagee. (*Tyabji, J.*) JASRAJ FAOOJI *v.* SUGRABAI. **A.I.R. 1940 Sind 195.**

———*Possession under invalid title—Wakf invalid—Possession of mutawalli—Nature of.*

If a wakf is invalid, the possession of the mutwalli, on the supposition that it is valid, is till the possession of a manager, not his own possession in his personal right. His possession is the possession for the rightful owner, not the possession of a wrongdoer. (*Mitter and Roxburgh, JJ.*) MOHIUDDIN AHMED *v.* SOFIA KHATUN. **I.L.R. (1940) 2 Cal. 464=44 C.W.N. 974=A.I.R. 1940 Cal. 501.**

———Submerged land—Constructive possession —Principle of. *See* LIMITATION ACT, ART. 142. **44 C.W.N. 935.**

AGRA PRE-EMPTION ACT (XI OF 1922), S. 4—*Co-sharer—Mahomedan who has made a* waqf alal-a-ulad—*If can maintain suit for pre-emption.*

Where a Mahomedan makes a *waqf alal-a-ulad* of his entire property, he divests himself of the entire property and it vests in the Almighty and hence, such person is not entitled to any share or part in the mahal or village in which the property is and is therefore not entitled to maintain a suit for pre-emption—even though he might describe himself as *mutawalli*. He cannot be allowed to amend his plaint in second appeal and substitute the Almighty as plaintiff. (*Thom, C.J. and Ganga Nath, J.*) BANWARI RAM *v.* MOHAMED YAR KHAN. **1940 A.L.J. 835=1940 A.W.R. (H.C.) 597.**

———S. 4 (1)—*Suit for pre-emption—Conditions necessary—Vendee becoming co-sharer by virtue of an exchange—Deprivation of that property during pendency of pre-emption suit—Right of pre-emption, if can be exercised.*

A suit for pre-emption does not lie against a vendee who on the date of the sale sought to be pre-empted had an interest in the mahal, even though that in erest is defeasible. Further, a right of pre-emption can be exercised only if the right exists on three material dates, *viz.*, on the date of the sale sought to be pre-empted, on the date of the suit and on the date of the decree of the trial Court. The suit cannot be decreed if the right does not exist on any one of the above dates. Where the vendee became a co-sharer by virtue of an exchange, but was deprived of that property during the pendency of the suit for pre-emption, the right of pre-emption cannot be exercised in such a case, as the right of pre-emption did not exist on two of the three material dates. (*Iqbal Ahmad, J.*) ALIMULLAH *v.* MAHOMED KHALIL. **1940 A.L.J. 569=1940 A.W.R. (H.C.) 475=A I.R. 1940 All. 478.**

———S. 7—*Intention of—Right of non-agriculturist to sue for pre-emption of Bundelkhand land, if affected.*

The intention of the Legislature in enacting S. 7 of the Agra Pre-emption Act was to ensure that so far as Bundelkhand land is concerned, non-agriculturists should be permitted to pre-empt only if they had obtained the sanction of the Collector to institute a suit for pre-emption. The right of a non-agriculturist to institute proceedings for the pre-emption of Bundelkhand land is preserved by the provisions of the Agra Pre-emption Act. (*Thom, C.J., Allsop and Ganga Nath, JJ.*) ZAMAN KHAN *v.* BAHADUR SINGH.

AGRA TENANCY ACT (1926), S. 8.

I.L.R. (1940) All. 522=189 I.C. 841=13 R.A 136=1940 O.A. 1261=1940 A.L.J. 434=1940 O. W.N. 929=1940 R.D. 404=1940 A.W.R. (H.C.) 359=A.I.R. 1940 All. 371 (F.B.).

AGRA TENANCY ACT (II OF 1901), Ss. 58 and 63 and C. P. Code, O. 23, R. 1 (4)—*Suit for ejectment—Who can file—Suit by mortgagee in possession—Mortgagors also added as co-plaintiffs—Mortgagee, if can withdraw—Competency of mortgagor to continue suit alone.*

A suit for ejectment under S. 58, Agra Tenancy Act of 1901, could only be brought by the landholder (*i.e.*) the person to whom the rent is payable. A mortgagee with possession becomes the landholder of the tenants situated in the share mortgaged, for the mortgagor loses by his mortgage all rights of making collections. Consequently under S. 63 of the Act of 1901 it is the mortgagee who has a right to file a suit for ejectment and not the mortgagor. In such a suit by the mortgagee where the mortgagors are also added as co-plaintiffs, it is open to the mortgagee to withdraw from the suit and it is not competent to the mortgagor co-plaintiff to carry on the suit alone. Though under O. 23, R. 1 (4), one or some of the several plaintiffs cannot withdraw from the suit without the consent of others, it applies only to cases where all the plaintiffs have equal interest in the suit. (*Sathe, J.M.*) MUZAFFARUDDIN AHMAD *v.* MURTAZA HUSAIN. **1940 R.D. 390=1940 A.W.R. (B.R.) 251.**

———(III OF 1926), S. 3 (14)—Decree—Order of remand in a case under S. 37. *See* AGRA TENANCY ACT, SS. 244, 249 AND S. 3 (14). **1940 A.W.R. (B.R.) 237.**

———S. 3 (15)—*Grove—Test—Greater portion of land not precluded from cultivation.*

Where in a plot the trees are all on the boundary and do not preclude the major portion of the plot from being cultivated, the plot does not come within the definition of a grove as defined in S. 3 (15) of the Agra Tenancy Act. (*Sathe, J.M.*) SARDA DIN *v.* MASURIYA DIN. **1940 R.D. 362=1940 A.W.R. (B.R.) 180.**

———Ss. 8 and 50—*Agreement as to enhancement by more than 25 per cent.—How far valid.*

Where there is an agreement for enhancement by more than 25 per cent. according to sub-Cl. (1) of S. 8 of the Tenancy Act, the agreement is void "to that extent" and according to sub-Cl. (2) it is void "if and in so far" as it purports to enhance the rent otherwise than in accordance with the provisions of the Act. Hence the agreement is not wholly void but is valid to the extent of 25 per cent. (*Harper, S.M.*) NAVIN CHANDRA *v.* SUMER. **1940 R.D. 444=1940 A.W.R. (B.R.) 263.**

———S. 8 (3)—*Scope of—Nautor land—Commutation—If available.*

Cl. (3) of S. 8 of the Agra Tenancy Act gives an exception to the general provisions of Cl. (1) and states that where nautor land is settled for the first time the provisions of S. 8 will not apply to the conditions of any contract which may have been entered into between the parties. This only means that if the contract is contrary to the terms of the Act, it will be upheld notwithstanding Cl. (1) of S. 8 for a period of 14 years. Where the contract between the parties is an oral one and the tenant has not contracted himself out of his rights under the Act the tenant does not

AGRA TENANCY ACT (1926), S. 17.

forego the right of commutation under the Act later on. (*Harper, S M. and Sathe, J.M.*) MAHESH SINGH *v.* SHUKURUKKAH. **1940 R.D. 521=1940 A.W.R. (B.R.) 204=1940 O.A. 1100.**

——**S. 17 (1) (a)**—*Occupancy rights—If can be conferred by* sir *holder of specific plots.*

If several co-sharers are in a mahal and one or other of those co-sharers has *sir* rights, all the co-sharers are proprietors of the area comprised in the *sir* and accordingly the person whose *sir* it is, is not entitled to transfer permanent rights in the land. A *sir* holder of specific plots is not a landlord within the meaning of S. 17 (1) (*a*) of the Agra Tenancy Act, and occupancy rights cannot be conferred by him but only by the whole coparcenary body. (*Harper, S.M.*) SHEO HARAKH *v.* JAI SRI. **1940 R.D. 339=1940 A.W.R. (B. R.) 174.**

——**S. 18 and U. P. Land Revenue Act, S. 39**—*Conversion of proceedings under S.* 18, *Agra Tenancy Act, into proceedings under S.* 39, *U. P. Land Revenue Act—If possible in revision.*

It is not possible in revision to convert proceedings under S. 18 of the Agra Tenancy Act into proceeding under S. 39 of the U. P. Land Revenue Act. (*Sathe, J.M.*) RAM CHARITTAR TEWARI *v.* BIKRAMA TEWARI. **1940 R.D. 226=1940 A.W.R. (B.R.) 84.**

——**S. 18 (5)**—*Scope and applicability of.*

S. 18 (5) of the Agra Tenancy Act is specially meant for those tenants who have to pay heavily for a lease which purports to give them rights under S. 17 of the Act, but which for some reason or other failed to convey those rights adequately. Any flaw in the execution of the lease as acquired by S. 17, should not prevent the would-be tenant from recovering the amount paid, under S. 18 (5) of the Act. (*Sathe, J.M.*) GULAB *v.* GIRDHARI. **1940 A.W.R. (B.R.) 126=1940 O.A. 775=1940 R.D. 367.**

——**S. 18 (5)**—*Scope of—Costs of ejectment, if can be awarded, as damages.*

The wording of S. 18 (5) of the Agra Tenancy Act is very wide. It contemplates payments in addition to the repayment of the consideration money and there is nothing in the wording of the section which limits damages to payments made before the execution of the deed. Where ejectment of a tenant is a necessary part of a transaction, costs of such ejectment may be awarded as damages, irrespective of the time when they were incurred. (*Harper. S.M. and Sathe, J.M.*) MANI RAM *v.* SRI NATH SINGH. **1940 R.D. 356=1940 A.W.R. (B.R.) 169.**

——**Ss. 19, 40 and 41**—*Statutory tenant—Tenant under deed prior to Act of* 1926, *conferring occupancy rights—Acquisition of lands—Section applicable.*

Under the Agra Tenancy Act of 1901 occupancy rights could not be conferred by a deed, though rights equivalent to them could be so conferred. A tenant, under a deed prior to the passing of the Act of 1926, conferring occupancy rights on him, is to be classed as non-occupancy tenant under the old Act and becomes statutory tenant under the new Act—where the zamindar wants to acquire the lands of such a tenant, it is S. 41 and not S. 40 of the Act of 1926 that applies. (*Sathe, J.M.*) RADHA PRASAD SHASTRI *v.* DERYODHAN SINGH. **1940 R.D. 396.**

AGRA TENANCY ACT (1926), S. 29.

——**S. 24**—*Co-sharing—Possibility—Land in possession of sub-tenants when occupancy tenant died—Collateral of deceased, if can succeed to tenancy.*

Where the land was in possession of the sub-tenants at the time of the death of the occupancy tenant, there is no possibility of a collateral relative of the deceased co-sharing in cultivation; and as such the collateral relative has no title to succeed to the occupancy tenancy. (*Harper, S.M.*) KOMAL *v.* SWARATHI. **1940 R.D. 331=1940 A.W.R. (B.R.) 175.**

——**S. 24**—*Widow inheriting husband's holding—Re-marriage—Effect—Widow remaining in possession—Her rights.*

The rights inherited by a widow in her deceased husband's holding terminate on her re-marriage. If the zamindar takes no action on the re-marriage, the widow remains on as an ordinary tenant until she acquires occupancy rights herself and if any one seizes the land against her he is a trespasser. It is in the option of the zamindar to determine the tenancy rights inherited from her husband. It is not in his option to determine or not the occupancy rights. (*Harper, S.M. and Sathe, J.M.*) BHAGWATI PRASAD *v.* MUNNA KUAR. **1940 R.D. 504=1940 A.W.R. (B.R.) 271.**

——**Ss. 24 and 35**—*Widow of occupancy tenant—Re-marriage—Effect—Rights of collaterals.*

On the re-marriage of a widow of an occupancy tenant, her rights automatically terminate as laid down in S. 24, but the tenancy is not extinguished under S. 35, if there is an heir entitled under S. 24 to succeed. The nearest collateral who had co-shared with the deceased husband would have a perfectly good title to continue the tenancy. Failing any legal heir then the tenancy is extinguished. The widow has no title as her re-marriage is tantamount to her death. The zamindar can then step in and create a new tenancy in the name of the re-married widow if he so desires. (*Harper, S.M.*) BASKARI *v.* JASMAL. **1940 R.D. 499=1940 A.W.R. (B.R.) 185=1940 O.A. 1006.**

——**Ss. 24 and 35**—*Widow of occupancy tenant—Unchastity of—If extinguishes her tenancy rights.*

Unchastity on the part of the widow of an occupancy tenant is no ground for the extinction of tenancy rights. (*Harper, S.M. and Sathe, J.M.*) UDLA *v.* MAHABIR RAI **1940 R.D. 480 (1)=1940 A.W.R. (B.R.) 186=1940 O.A. 1009.**

——**Ss. 24 and 35 (1) (a)**—*Widow of occupancy tenant—Re-marriage—Effect.*

In the case of the widow of an occupancy tenant, her re-marriage has the same effect as the death of the occupancy holding widow and her tenancy terminates as provided in S. 35 (1) (*a*) of the Agra Tenancy Act. The right of succession then opened as provided in S. 24 of the Act. It is open to the zamindar to recognise the widow as tenant in the absence of any of the heirs mentioned in S. 24. The estate of the widow who has re-married is a matter for the landlord to decide. (*Harper, S.M. and Sathe, J.M.*) SANGRAM *v.* KESHO DAS. **1940 A.W.R. (B.R.) 206=1940 O.A. 1103.**

——**S. 29 (4)**—*Unregistered sub-lease for five years—Admissibility—If exempted by Government Notification of* 1885.

AGRA TENANCY ACT (1926), S. 32.

Under S. 29 (4) of the Agra Tenancy Act a sub-lease for five years is required to be registered, and if not so registered, it is not admissible in evidence. The exemption given by the Government of India Notification of 1885 does not apply to sub-leases required to be registered under S. 29 (4) of the Tenancy Act. (*Sathe, J.M.*) ASHIQ HUSAIN *v.* MAHANBUA. **1940 R.D. 398=1940 A.W.R. (B.R) 259.**

——**S. 32** (3)—*Sub-lease —Validity—Test—Sub lease to creditor's brother—Lessee, if protected by S. 32* (3).

Where there is no obvious connection between the lease and the money transaction, the lease must be considered to be an independent transaction and both the lessor as well as the lessee must abide by it. But where however connection between the two transactions (*i e.*) between the lease and the bond, is established, the lease must be held to be only a mortgage in disguise and when either party comes and seeks the assistance of Court he will not get the help against principles of equity where an alleged lessee is the brother of the creditor and a member of the same joint family and the amount of the debt and the payments to be made on account of the lease are also the same, then such a lessee will not be protected by S. 32 (3) of the Tenancy Act. (*Sathe, J.M.*) MATA DIN *v.* SHANKAR BUX SINGH. **1940 O.A. 493 (2)=1940 R D. 229=1940 A.W.R. (B.R.) 109=1940 A.L.J. (Supp.) 28.**

——**S. 35**—Widow of occupancy tenant—Remarriage—Tenancy, if extinguished. *See* AGRA TENANCY ACT, SS. 24 AND 35—WIDOW OF OCCUPANCY TENANT. **1940 R.D. 499.**

——**S. 35**—Widow of occupancy tenant—Unchastity of—Tenancy rights, if extinguished. **1940 R.D. 480 (1).**

——**S. 35 (1) (a)**—Re-marriage of widow of occupancy tenant—Effect. *See* AGRA TENANCY ACT, SS. 24 AND 35 (1) (*a*). **1940 A.W.R. (B.R.) 206.**

——**S. 37**—*Suit under—Maintainability—Compromise prior to Act of* 1926, *evidencing agreement as to shares—Binding nature.*

Where prior to the Act of 1926 there was a compromise between the parties which showed that there was a definite agreement among them as to what their respective shares were, and that they were in possession in accordance therewith and further that they also bound themselves to remain in possession, in future in accordance with the compromise, it was held that the terms indicated that the division made by the parties among themselves was of final and binding nature and that a suit under S. 37 of the Act of 1926 was not maintainable, for a division of the holding. (*Sathe, J.M.*) UMRAO LONIA *v.* JHURMUL LONIA. **1940 R.D. 443=1940 A.W.R. (B.R.) 220.**

——**S. 37**—*Suit under—Zamindar, not a party—Division, binding nature.*

If a zamindar is not a party to a suit under S. 37 of the Agra Tenancy Act the rights of the co-tenants do not get extinguished in whatever divisions may be formed from the original holding. Though the zamindar may consent to the division and confer occupancy rights on a party in respect of the plots in possession of that party, the rights of the co-tenants cannot be effected by it, for the zamindar has no authority to revoke the rights of the former tenants in the plots in question. (*Harper, S. M. and Sathe, J.M.*) MAHOMED KHALIL *v.* EHSAN ULLAH. **1940 R.D. 497=1940 A.W.R. (B.R.) 197.**

AGRA TENANCY ACT (1926), S. 44.

——**S. 37, Proviso**—*Division of holding—No agreement in writing by landlord—Binding nature.*

Under the proviso to S. 37 of the Agra Tenancy Act a division of the holding is not binding on the landholder where he has not given his agreement to it in writing. But so far as the parties to the suit are concerned it is binding. (*Harper, S.M. and Sathe, J.M.*) RAM LAGAN KURMI *v.* NAGESARI. **1940 A.W.R. (B.R.) 188=1940 O.A. 1012=1940 R.D. 542.**

——**Ss. 40 and 41**—Acquisition of land—Statutory tenant—Section applicable. *See* AGRA TENANCY ACT, SS. 19, 40 AND 41. **1940 R.D. 396.**

——**S. 44**—*Applicability—Sale of* sir—*Ex-proprietary rights neither surrendered nor relinquished—Vendee getting into possession, if can be ejected under S.* 44—*Limitation.*

Where on the sale of *sir* there has been neither a surrender of the ex-proprietary rights under S. 15 (2), nor a relinquishment subsequent to the six months provided by S. 15 (1) of the Tenancy Act, the creation of the ex-proprietary rights is automatic and could be terminated only under S. 35 (*f*) of the Act. With the creation of the ex-proprietary rights in the *sir*, the vendor becomes the tenant of the whole coparcenary body and a suit to eject a trespasser vendee falls under S. 44 of the Agra Tenancy Act and is subject to 12 years limitation. (*Harper, S.M. and Sathe, J.M.*) TARIF *v.* SOHAN. **1940 R.D. 473=1940 A.W.R. (B.R.) 225.**

——**S. 44**—*Lease of* theka *land to sons of* thekadar—*Termination of* theka—*If renders the lessees liable to ejectment as trespassers.*

The mere fact that the lessees of *theka* land are the sons of the *thekadar* is no ground for vitiating the contract of tenancy entered into between the *thekadar* and his sons, five years prior to the termination of the period of the *theka* and where the rent fixed is economic; and the lessees cannot be ejected as trespassers after the termination of the period of the *theka*. (*Harper, S.M. and Sathe, J.M.*) MISAR AJODHIA NATH *v.* ROSHAN LAL. **1940 R.D. 392.**

——**S. 44**—*Liability to ejectment—Mortgagee of proprietary right taking possession.*

The mortgagee of proprietary rights who takes possession of any land which the mortgagor held singly or even in conjunction with others is a trespasser liable to ejectment as such. (*Harper, S.M. and Sathe, J.M.*) KUNDAN LAL *v.* TULSHI RAM. **1940 R.D. 244=1940 A.W.R. (B.R.) 147.**

——**S. 44**—*Mere cultivation of land as* khudkasht—*If confers a right to eject tenant put in by lambardar.*

By cultivating a plot of land as his *khudkasht* for a number of years, a person does not become its landowner and as such he cannot eject under S. 44 of the Tenancy Act a person put in possession by the lambardar as a tenant. (*Sathe. J.M.*) SHANKER LAL *v.* BINDA PRASAD. **1940 R.D. 238=1940 A.W.R. (B.R.) 154.**

——**S. 44**—*Remedy under—Against whom available—Recalcitrant co-sharer—Proper remedy against.*

AGRA TENANCY ACT (1926), S. 44.

Under S. 44 of the Agra Tenancy Act a trespasser may be ejected. In the case of co-sharers, they are entitled to joint possession and they cannot, therefore, be ejected under S. 44. If one co-sharer is recalcitrant and takes possession of a particular plot in defiance of the wishes of the lambardar and the other co-sharers, their remedy is not by way of a suit for ejectment under S. 44 but by way of a suit for joint possession or for partition. (*Thom, C.J., Allsop and Ganga Nath, JJ.*) SULTAN AHMAD KHAN *v.* JALALUDDIN. **I. L.R. (1940) All. 528=189 I.C. 189=1940 A.L.J. 433=1940 O.W.N. 637=1940 O.A. 658=13 R A. 83=1940 A.W.R. (H.C.) 362=A.I R. 1940 All. 370 (F.B.).**

——S. 44—*Right to sue under—Co-sharer cultivating certain land as his* khudkasht *for two years.*

Where a co-sharer has cultivated a certain area of land as his *khudkasht* for two years, it does not necessarily constitute the same as his severalty giving him the right to act as its landholder. He is therefore not entitled to sue to eject as a trespasser under S. 44, Agra Tenancy Act, a tenant who has been put into possession of the land by the lambardar. (*Harper, S.M. and Sathe, J.M.*) GHURAYAN *v.* RUP NARAIN. **1940 R.D. 373=1940 A.W.R. (B.R.) 227.**

——S. 44—*Right to sue under—Lessee under invalid lease.*

A lease by one of the co-sharers only conferring occupancy rights is invalid and it cannot create any other tenancy. It could not confer some other rights as tenants-in-chief which would confer on the lease-holder the right to sue under S. 44 of the Tenancy Act. (*Harper, S. M.*) SHEO HARAKH *v.* JAI SRI. **1940 R.D. 339=1940 A.W.R. (B.R.) 174.**

——S. 44—Sir *holder—If a 'landholder' under S.* 44.

A *sir* holder is entitled to have his land cultivated by tenants and he is a landholder therefore within the meaning of S. 44 of the Tenancy Act. (*Thom, C J. and Ganga Nath, J.*) RAMPET SINGH *v.* NAGESHAR SINGH. **191 I.C. 107=1940 A.W.R. (H.C.) 452=1940 O.A. 686=1940 A.L. J. 596=A.I.R. 1940 All. 455.**

——S. 44—*Suit under—Limitation—Starting point and period.*

A suit for the ejectment of the defendant as a trespasser is due to be brought within 12 years of the date when the landholder first knew of the unauthorized occupation. On the facts it was held that the defendant was not in effective adverse possession for the requisite period to the knowledge of the plaintiff. (*Harper, S.M. and Sathe, J.M.*) CHABBO BEGUM *v.* RAM SWARUP. **1940 R.D. 371=1940 A.W.R. (B.R.) 209.**

——S. 44—*Trespass, date of — Sub-tenant, shown as chief tenant.*

Where in a suit under S. 58 of Act II of 1901 a compromise is entered into whereby the defendant agreed to give up certain plots and consented to a decree for her ejectment from them being passed and thereafter, the name of the sub-tenant was entered as chief tenant, the latter's trespass against the zamindar commences only from the date of the ejectment decree and a suit for the trespasser's ejectment can be brought within 12 years from that date. (*Sathe, J.M.*)

AGRA TENANCY ACT (1926), S. 44.

BHIKHAI *v.* AZIZ BANDI BIBI. **1940 R.D. 394=1940 A.W.R (B.R.) 254.**

——Ss. 44 and 86—*Relative applicability—Vendor of* sir *lands not claiming ex-proprietary rights—Status of tenants of* sir*—Liability to ejectment.*

Where the vendor of lands wrongly entered as *sir* does not claim ex-proprietary rights after the sale, the tenants of the *sir* become non-occupancy tenants and are liable to ejectment under S. 86 of the Agra Tenancy Act and not trespassers liable under S. 44 of the Tenancy Act. (*Sathe, J.M.*) SAIDA BIBI *v.* NABBA. **1940 R.D. 397=1940 A. W.R. (B.R.) 260.**

——Ss. 44, 86 and 192—*Sale of* sir*—Ex-proprietary rights not claimed—Suit for ejecement of tenants under S. 44—Decree—Stay of Proceedings Act in operation—Decree under S. 86, if could be passed after Stay of Proceedings Act had come to an end.*

Where on the sale of *sir*, ex-proprietary rights are not claimed and a suit for ejectment is filed against the tenants under S. 44 of the Agra Tenancy Act and a decree obtained, but the Stay of Proceedings Act was in force, a decree under S. 86 of the Tenancy Act could not be substituted for the one under S. 44, after the Stay of Proceedings Act had come to an end. Though under S. 192 relief can be given under S. 86, even if the suit was originally filed under S. 44. where the tenants in question are non-occupancy tenants such relief could not be given. (*Harper, S. M. and Sathe, J.M.*) GAYA SHUKLA *v.* RAMDHANI RAM. **1940 R.D. 489=1940 A.W.R. (B.R.) 246.**

——Ss. 44 and 99—*Dispossession by one of the co-sharers—Proper remedy.*

Where there has been a forcible dispossession by only one of several co-sharers of the patti, the remedy is under S. 44 and not under S. 99 of the Tenancy Act. (*Sathe, J.M.*) BASAWAN KHAN *v.* SUCHIT KOERI. **1940 A.W.R. (B.R.) 124=1940 R.D. 345=1940 A.L.J. (Supp.) 21.**

——Ss. 44, 99 and 212—*Dispossession of thekadar by purchaser—Mutation also effected—Remedy of thekadar.*

Where a thekadar is dispossessed by a purchaser who had got his name also mutated, the remedy of the thekadar is not by a suit under S. 44 or S. 99 of the Tenancy Act for they both refer only to landholders. His remedy is under S. 212 which specifically refers to a landlord. (*Harper, S.M.*) QAIM HUSAIN *v.* BALDEO DAS BAJORIA. **1940 R.D. 501=1940 A.W.R. (B.R.) 270.**

——Ss. 44 and 99—*Proper remedy of ejected tenant-in chief—Sub-tenant of sub-tenant in possession and recorded as tenant-in-chief.*

Where a sub-tenant of a sub-tenant is in possession after the expiry of the period of tenancy and the tenant-in-chief had been ejected under S. 79 of the Tenancy Act, and where the sub-tenant has also been recorded as the tenant-in-chief, the remedy of the ejected tenant-in-chief, if any, is under S. 99 of the Act and not under S. 44. (*Harper, S.M.*) PURNI *v.* NATHOO. **1940 A.W.R. (B.R.) 161.**

——Ss. 44 and 99—*Who can sue under.*

The present Tenancy Act allows a tenancy to exist where there is an implied contract to the effect that rent is payable. Hence, a person who

is recorded as holding the land *bila tasfia lagan* can sue under Ss. 44 and 99 of the Tenancy Act. Though no rent is paid, he is liable to pay rent and hence he has acquired tenancy rights and so can sue under those sections. (*Harper, S.M. and Sathe, J.M.*) SAIDA BIBI *v.* WALI MOHAMMAD. 1940 A.W.R. (B.R.) 122=1940 O.A. 717=1940 R.D. 376=1940 A.L.J. (Supp.) 30.

——Ss. 44 and 107—*Suit against trespasser—Latter, if can plead that holding has been abandoned.*

Where a tenant sues to eject a trespasser, the defendant cannot contend that whether his position is that of a trespasser or not, the plaintiff is not entitled to sue for ejectment as she had abandoned the holding. It is for the zamindar to treat a holding as abandoned and not for a trespasser to do so. (*Harper, S.M. and Sathe, J.M.*) SAHDEI KUNWAR *v.* SHFIKH USMAN. 1940 R.D. 526=1940 A.W.R. (B.R.) 210=1940 O.A. 1107.

——S. 50—Agreement as to enhancement by more than 25 per cent—Extent of—Validity. *See* AGRA TENANCY ACT, SS. 8 AND 50. 1940 R.D. 444.

——S. 54-A—*Suit for abatement of rent under—Duty of Court in dealing with suits for abatement or enhancement of rent—Considerations to be borne in mind.*

It is desirable that both in the case of enhancement as well as abatement of rent, there should be prompt disposal of suits. There are various factors which have to be taken into consideration in deciding a suit for enhancement or abatement of rent and the fundamental factor that would determine the rate ot enhancement or abatement would be not the price factor but the fair and equitable rate of rent prevailing in periods of sufficient length when prices similar to the prices of staple food crops at present ruling prevailed. The crucial words in S. 54-A are 'fall in average local price of staple food crops during the currency of the present rent' and to arrive at that one must take prices for a period of five years at about the time of the lease of the holding and compare it with those for a period of five years at about time when the suit for abatement is filed (*Marsh, S.M. and Mehta, J.M.*) NAND KISHORE SINGH *v.* KISHORI RAMAN PRASAD. 1940 A.W.R. (B.R.) 97=1940 R.D. 340.

——S. 58—*Suit under—Compromise—Recognition of occupancy rights of defendants—Provision for enhancement—Binding nature.*

Where a suit under S. 58 of the Agra Tenancy Act, was compromised and the zamindars admitted that the defendants were occupancy tenants, it is binding on both parties. But where the other part of the compromise provided for an enhancement, it will not be binding on the defendants as the matter is not in issue in a suit under S. 58, unless it was properly registered. (*Sathe, J.M.*) KHEDU SINGH *v.* MAHESH. 1940 R.D. 239 =1940 A.W.R (B.R.) 144.

——S. 70—*Applicability—Tenant with rights of occupancy in perpetuity—No reduction of rent on account of any calamity—Status of tenant—If entitled to remission of rent.*

Where prior to the passing of Act III of 1926 rights of tenancy in perpetuity were conferred on a tenant and there was a clause that there would be no reduction in rent on account of any calamity, such a tenant is clearly a non-occupancy

tenant. Such tenants cannot get abatement of rent on account of slump in prices and would not be entitled to any remission. A reduction of rent in the case of such tenants is governed by S. 70 of the Agra Tenancy Act. (*Mehta, S.M. and Harper, J.M.*) ROOP NARAIN *v.* DULARE. 1940 R.D. 369 (2)=1940 A.W.R. (B.R.) 245.

——S. 80—*Ejectment—Extension of time—Final conditional order for ejectment—Propriety.*

Where after several extensions the Court directs the ejectment of the judgment-debtor but adds that if he pays the rent due even up to the date of delivery of possession, his fields would be restored to him, such a conditional order cannot be passed. (*Harper, J.M.*) SHEO NAIK *v.* HIDAYAT ULLAH KHAN. 1940 A.W.R. (B.R.) 93 (1)=1940 R.D. 369 (1).

——S. 86—Applicability. *See* AGRA TENANCY ACT, SS. 44 AND 86—RELATIVE APPLICABILITY. 1940 R.D. 397.

——S. 86—*Suit under—Person in actual cultivation not impleaded*—Dekhal dehani—*Effect—Person in cultivation, if should apply under O.* 21, *R.* 101.

Where in a suit under S. 86 of the Agra Tenancy Act, the person in actual cultivation of the plot is not impleaded as a party, and the suit is decreed and a formal *dekhal* is also obtained, it does not bind the person who is in actual cultivation and who has not been made a party to the suit. Hence it is unnecessary for him to file an application under O. 21, R. 101, C. P. Code. His possession should not be disturbed until the decree-holder takes proceedings under S. 44 or any other provision of law. (*Harper, S.M. and Sathe, J.M.*) DHUPAN *v.* RAM DEO DASS. 1940 R. D. 482=1940 A.W.R. (B.R.) 218

——S. 99—*Mere plea of holding through zamindar—Sufficiency.*

Per *Sathe, J.M.*—It is not enough for a defendant merely to say that he is holding the land through the zamindar in order to make S. 99 applicable. There must be something more than a claim without the shadow of a title. (*Harper, S.M. and Sathe, J.M.*) RAM LAGAN KURMI *v.* NAGESARI. 1940 A.W.R. (B.R.) 188=1940 O.A. 1012=1940 R.D. 542.

——S. 99—Proper remedy of ejected tenant in chief—Sub-tenant of sub-tenant in possession. *See* AGRA TENANCY ACT, SS. 44 AND 99. 1940 A. W.R. (B.R.) 161.

——S. 99—*Suit under—Propriety—Ejectment—New lease—Ejected tenant restored to possession on review—New lessee's remedy.*

Where a tenant is ejected under S. 81 of the Tenancy Act and new lease of the holding is granted to a different tenant and he gets into possession of it, but is subsequently dispossessed by the former tenant in virtue of the cancellation of the ejectment order on review, his proper remedy is by a suit under S. 99 of the Tenancy Act. (*Sathe, J.M.*) DURGA PRASAD *v.* RAM AUTAR. 1940 A.W.R. (B.R.) 165.

——Ss. 99, 121-123—*Dispossession from land constituting severalty of the defendant—Proper remedy of plaintiff.*

Where the plaintiff is dispossessed from land constituting the severalty of the defendant the plaintiff's remedy, if any, lies under S. 99 of the Tenancy Act and not by suit under Ss. 121-123 On the facts it was held, that where the sale wa

AGRA TENANCY ACT (1926), S. 103.

in effect of specific *sir* plots and ex-proprietary rent was fixed and collected by vendee alone, the land constituted the severalty of the vendee. (*Harper, S.M. and Sathe, J.M.*) NEHAL SINGH *v.* HARCHAND. 1940 R.D. 447=1940 A.W.R. (B.R.) 266.

——Ss. 103 and 107—*Surrender in favour of one of the co-sharers—Legality—Responsibility for rent—When would cease.*

Where the surrender is in favour of one of the co-sharers only it is not a legal surrender. A tenant cannot avoid responsibility for the payment of rent by merely abandoning his holding, unless the landholder takes possession of it under S. 107 (4). Nor can he avoid it on the excuse that he was not in possession during the years in suit. If he was dispossessed against his wishes, it is up to him to get the other person ejected under S. 44 of the Act and then formally surrender to the whole body of landholders. Till then his liability for rent continues. (*Harper, S.M. and Sathe, J.M.*) MANGAL CHAND *v.* RASOOL BUX. 1940 R.D. 527=1940 A.W.R. (B.R.) 281.

——S. 107—Abandonment — Plea to whom available. *See* AGRA TENANCY ACT, SS. 44 AND 107. 1940 R.D. 526.

——Ss. 107, 44 and 99—*Non-payment of rent—One of the co-sharers if can take possession on the plea of abandonment—Correct procedure—Effect of not following it.*

If a tenant makes no arrangement for the payment of the rent due from him, it is for the whole body of landholders to take steps for treating it as abandoned and one of the landholders alone would not be justified in taking possession of it on the plea that the holding had been abandoned. The correct procedure to be followed in such cases is described in S. 107 (4) of the Agra Tenancy Act. It is no doubt not mandatory to follow it, but if the landholder otherwise takes possession he does so at his own risk. Where one of several co-sharers takes possession of a vacant plot of land, he cannot claim the protection of S. 99 of the Tenancy Act and he is liable to ejectment under S. 44 of the Act by the landholder. (*Harper, S. M. and Sathe, J.M.*) SAHDEI KUNWAR *v.* SHEIKH USMAN. 1940 R.D. 526=1940 A.W.R. (B.R.) 210=1940 O.A. 1107.

——S. 107 (3)—*Applicability.*

In the case of a tenant who is ousted by forcible possession by third party the period of five years limitation imposed by S. 107 (3) cannot apply and the period during which he is at liberty to regain possession is twelve years. (*Sathe, J. M.*) BASAWAN KHAN *v.* SUCHIT KOERI. 1940 A. W R. (B.R.) 124=1940 R.D. 345=1940 A.L.J. (Supp.) 21.

——S. 121—*Suit for declaration—When can lie—Persons once in possession, if can sue under S. 121, to regain possession.*

A case for a declaration under S. 121 of the Tenancy Act can lie only when brought by those who have never been in possession and may not immediately desire possession or are in possession but their rights as tenants are denied. The remedy is not open to a person who was once in possession and who is seeking to regain possession. (*Harper, S.M. and Sathe, J.M.*) NEHAL SINGH *v.* HAR CHAND. 1940 R.D. 447=1940 A.W.R. (B. R.) 266.

AGRA TENANCY ACT (1926), S. 227.

——S. 121—*Suit under—Ancestral holding—Entry in name of one branch only—Evidence of separation—Declaration as to co tenancy, if can be made.*

Where the holding was ancestral but for over 40 years and over a settlement only one branch of the family has been shown in the revenue records, and there was evidence of separation, the members of the other branches cannot obtain a declaration to the effect that they are co tenants. (*Harper, S.M.*) ASHRAF KHAN *v.* SAHEB KHAN. 1940 A.W.R. (B.R.) 160.

——S. 121—*Suit under—Maintainability—Civil suit to set aside—Compromise fixing enhanced rent, barred by limitation.*

Where in a suit under S. 95 of Act II of 1901, a compromise is entered into between the parties, some of whom were minors, fixing an enhanced rent, but the necessary sanction of the Court was not obtained, the minors on attaining majority have two remedies open to them, *viz.*, (1) to file a civil suit for the cancellation of the compromise, and (2) to file a suit for a declaration of the correct rent of the holding under S. 121 of the Agra Tenancy Act. Even if the limitation for the first remedy is over, there is no limitation for a suit under S. 121 as long as the tenancy last and the same grounds can be taken in suit under that section to question the validity of the compromise as could be taken in a civil suit. The fact of the compromise having been acted upon for a long number of years would not estop the plaintiffs from questioning it as the case is not governed by S. 115, Evidence Act. (*Sathe, J.M.*) BRIJ NARAIN SINGH *v.* SRI KANT SINGH. 1940 R.D. 386=1940 A.W.R. (B R) 253.

——S. 121—*Suit under—Possession asserted by one party but denied by the other—Absence of issue—Remand for fresh disposal.*

Where in a suit under S. 121 of the Tenancy Act, possession is asserted by one party and denied by the other and there had been no specific issue on the point, when the matter came up in appeal, an issue was framed as to possession and the case remanded for fresh disposal as such an issue was necessary for the decision of such a suit. (*Harper, S.M. and Sathe, J.M.*) ALTAF HUSAIN *v.* KEDAR SINGH. 1940 A.W.R. (B.R.) 132(1)= 1940 O.A. 780.

——Ss. 132 and 133 (2)—*Decree for arrears of rent—Form—Different holdings—Separate specification of amount—Necessity.*

If a decree for arrears of rent in respect of different holdings does not specify separately the amount found due in respect of each, the decree would have to be set aside and the case remanded for preparation of fresh decree in accordance with S. 133 (2) of the Agra Tenancy Act and for fresh proceedings under S. 80. (*Harper, S. M. and Sathe, J.M.*) BUDHA *v.* JWALA DEVI. 1940 R.D. 554.

——S. 212—Applicability—Remedy of dispossessed *thekadar* against purchaser. *See* AGRA TENANCY ACT, SS. 44, 99 AND 212. 1940 R.D. 501.

——S. 227—*Suit for profits by mortgagee of half of a patti with* sir *and* khudkasht—*Proceedings under S. 36, Lond Revenue Act not taken—Entire* sir *and* khudkasht *continuing in mortgagor's possession—Share of the mortgagee.*

Where the defendant the sole owner of a patti mortgages his half share in it including the *sir*

AGRA TENANCY ACT (1926), S. 242.

and *khudkasht* land to plaintiff, but defendant continued in possession of the entire *sir* and *khudkasht* land as proceedings under S. 36, Land Revenue Act were not taken, in a suit by the mortgagee for profits it was held that as half of the *sir* and *khudkasht* land did not become subject to ex-proprietary tenancy the plaintiff and defendant were entitled to proprietary rights in the half area in equal shares and that the plaintiff was therefore entitled to profits of ¼ of the *sir* land. (*Iqbal Ahmad, J.*) MOLAI MISIR *v.* GOPAL LAL. **1940 A.L.J. 585=1940 A.W.R. (H.C.) 478 =1940 R.D. 435=A I.R. 1940 All. 485.**

——**Ss, 242 (3) and 252**—*Applicability—Test—Neither party in a position to appeal—Revision, if barred.*

S. 242 (3) (*a*) of the Agra Tenancy Act does not make all cases in which a question of proprietary right has been in issue in the trial Court appealable; it only makes such cases appealable if the question of proprietary right is in issue again in the appeal. Where neither party was in a position to file an appeal and no appeal was filed as a matter of fact, S. 242 (3) is no bar to the entertainment of a revision. (*Harper, S.M. and Sathe, J.M.*) MOHAN LAL *v.* LAKSHMI SINGH. **1940 R.D. 234=1940 A.W.R. (B.R.) 145.**

——**S. 244**—*Second appeal—Interference with findings of fact by the Board—Rules as to.*

The Board will in second appeal interfere even with findings of fact, if it can be shown that the findings are based on little or so inadequate evidence that the findings can be held to constitute a substantial error in procedure. But for this purpose the appellant would have to show that there is practically little evidence to support the findings of the Courts below. The mere fact that the Board, if it had been hearing the case as a Court of original jurisdiction or of first appeal it would have come to a different conclusion will not be sufficient to warrant interference in second appeal. Before this can be done it must be shown that the Courts below did not apply their mind to a consideration of the evidence and arrived at their findings with practically no basis of evidence on record. (*Harper, S.M. and Sathe, J.M.*) ABDUL RAZZAQ *v.* BEHARI LAL. **1940 A.W.R. (B.R) 134 (2)=1940 O.A. 719.**

——**Ss. 244, 249 and 3 (14)**—*Remand in a case under S. 37—If a decree—Appealability.*

An order of remand passed by the commissioner in a case filed under S. 37 of the Agra Tenancy Act is not a decree within the definition of the term as given in S 3 (14) of the Act and no appeal lies from it under S. 249 of the Act. (*Sathe, J.M.*) MST. SUMERIA *v.* MST. UTMI. **1940 R.D. 580=1940 O.A. 1214=1940 A.W.R. (B.R.) 237.**

——**S. 249**—Appeal—Order of remand in a case under S 37—If appealable. *See* AGRA TENANCY ACT, Ss. 244, 249 AND 3 (14). **1940 A.W.R. (B. R.) 237.**

——**S. 252**—*Revision—Competency—Existence of right of appeal to District Judge.*

Where the claim is for over Rs. 200 in respect of arrears of rent, the Assistant Collector's decree is appealable to the District Judge and hence under S. 252 of the Agra Tenancy Act, no revision will lie to the Board against that decree. (*Sathe, J.M.*) PANCHAM LAL *v.* RAM LAL. **1940 A.W.R. (B.R.) 92.**

AGRA TENANCY ACT (1926), S. 271.

——**S. 265**—*Lambardar—Right to collect rent—Limits*

Under S. 265 of the Agra Tenancy Act the lambardar can collect rent only on the common land of the patti of which he is a lambardar. A usage to the contrary would prevent a lambardar from collecting rents in the common land of the patti. There is no provision under which a usage to the contrary would allow him to collect rents where there is no common land. (*Harper, S.M. and Sathe, J.M.*) NATHU RAM *v.* PAHAR SINGH. **1940 R.D. 241=1940 A.W.R. (B.R.) 151.**

——**S. 266**—*Effect of—Transfer of proprietary right after decree for rent—Who can execute decree—Procedure.*

Where there is a transfer of the proprietary rights of some of the holders of a decree for arrears of rent after the decree, the decree cannot be executed by the original decree-holders, even if there has been no mutation. The proper thing would be for the remaining decree-holders to wait until the transferees obtain mutation. (*Harper, S.M. and Sathe, J.M.*) RAM MANOHAR *v.* RAM ADHIN. **1940 R.D. 449=1940 A.W.R. (B.R.) 268.**

——**S. 266**—*Suit by one co-sharer alone—Principle on which it is permitted.*

A collecting co-sharer, to entitle him to sue alone, must produce clear evidence of an agreement among the co-sharers entitling him to deal with the specific plot as if it were his severalty or in the alternative that they have had an opportunity to object to his dealing with the plot in this way and had not raised any objection. (*Harper, S.M.*) LACHMI CHAND *v.* MISRI LAL. **1940 A.W.R. (B.R.) 166.**

——**S. 266**—*Suit by some co-tenants only for declaration of occupancy tenancy—Maintainability.*

Where some only of the co-tenants bring a suit for a declaration that they are occupancy tenants, it should fail inasmuch as all the co-tenants have not joined in the suit. (*Sathe, J.M.*) BHAGWAN DIN *v.* SURJA. **1940 R.D. 237.**

——**S. 266**—*Suit by some co-sharers only—Plaintiffs alone interested in the khudkasht rights sought to be protected—Absence of other co-sharers, if fatal to suit.*

Where the plaintiffs are the only persons interested in the khudkasht rights which they seek to protect in the suit, it is unnecessary for them to implead other co-sharers in such a suit. This is especially so where the particular interest is being invaded by the other co-sharers. (*Thom, C.J. and Ganga Nath, J.*) RAMPAT SINGH *v.* NAGESHAR SINGH. **191 I.C. 107=1940 A.W.R. (H.C.) 452=1940 O.A. 686=1940 A.L.J. 596= A.I.R. 1940 All. 455.**

——**S. 266**—*Suit under Ss. 44 and 99, by one of two recorded tenants—Material irregularity.*

Where a suit under Ss. 44 and 99 of the Tenancy Act are brought by one of two recorded tenants is a material irregularity which vitiates the institution of the suit *ab initio* and the suit is bad under S. 266. (*Harper, S.M. and Sathe, J.M.*) SAIDA BIBI *v.* WALI MOHAMMAD. **1940 A.W.R. (B.R.) 122=1940 O.A. 717=1940 R.D. 376= 1940 A.L.J. (Supp.) 30**

——**S. 271, Expl. 11**—*Question of proprietary right—Issue as to defendant co-sharer's nature of possession.*

AGRA TENANCY ACT (1926), Sch. IV.

Where the only question in issue between the parties is as regards the nature of the possession of the defendant who is a co-sharer of the patti, that is to say, whether he was in possession as a tenant of the plaintiff or whether he was holding the plot as his *khudkasht*, it does not, in view of Expl. 11 to S. 271 of the Agra Tenancy Act, raise a question of proprietary right and hence no issue could be referred to the Civil Court. (*Collister, J.*) BINDRABAN KATIAR *v.* GANGA RAM. 190 I.C. 522=13 R.A. 202=1940 A.W.R. (H.C.) 383=1940 A.L.J. 573=A.I.R. 1940 All. 445.

——Sch. IV, Group F, Serial Nos. 3 and 5—*Decree declaring proper rent and the costs to be paid—Nature of decree—Limitation.*

Where a decree declared the rent payable and also stated the amount to be paid by way of costs, the decree is a declaratory decree primarily and only subsidiarily a decree for costs. It is not a purely money decree and the period of limitation is only one year. (*Harper, S. M.*) MOHABBE ALI KHAN *v.* CHHOTEY. 1940 R.D. 533=1940 A.W.R. (B.R.) 278.

AJMER MUNICIPAL REGULATION (1925)—*Prosecution for nuisance—Dismissal on accused filing civil suit—Propriety.*

Where a criminal case of nuisance is brought against an accused under the Ajmer Municipal Regulation it is illegal and irregular for a Magistrate to dismiss it on an oral application only by the accused that he had filed a civil suit in connection with the matter; for even if the accused succeeds in the civil suit, he will still be open to the charge of nuisance. (*Davies.*) MOHAMMAD BUX *v.* DR. M. L. TALWAR. 1940 A.M.L.J. 53.

——*Public nuisance—Nature of offence—Acquittal on one occasion—If bars second prosecution.*

A nuisance is a continuing offence. So long as it continues to be a nuisance a prosecution will be after notice to accused. The mere fact that he was acquitted on a former occasion will be no bar to a second prosecution. (*Davies.*) DR. M. L. TALWAR *v.* BENI GOPAL. 1940 A.M.L.J. 54.

——S. 167—*Prosecution under—Onus—Notice to quit premises—Sufficiency of time.*

For the purposes of S 167 of Ajmer Municipal Regulation where the Committee institute a prosecution against a woman on the ground that she is a public prostitute, it is the duty of the Committee to prove their allegation. Twenty-four hours is quite insufficient notice to any person to change his or her residence and move to another locality. It would only be reasonable to allow at least one week in such cases. (*Davies.*) EMPEROR *v.* BIBBOJAN. 1940 A.M.L.J. 50.

APPEAL—*Duty of appellant—Proof of—Incorrectness of judgment.*

It is for an appellant to show that the Court below is wrong, and a respondent is entitled to rely on the statements of facts contained in the judgment of the Court below until they are shown by the appellant to be incorrect. (*Bennet and Varma, JJ.*) RAMCHARAN DAS *v.* BHAGWAT SARAN. 1940 A.W.R. (H.C.) 623=A.I.R. 1940 All. 467.

ARBITRATION— Abatement— Reference of family disputes—Death of one party to the reference—If puts an end to arbitration proceedings. *See* C. P. CODE, O. 22. (1940) 2 M.L.J. 520.

——*Agreement to refer—Agreement to be bound by statement of referee—Parties, if can resile.*

Where the parties to a proceeding enter into an agreement to be bound by whatever statement is made by a certain third person in relation to their disputes, they are at liberty to resile from that agreement before such statement is made. (*Din Mahomed, J.*) NAWAL KISHORE *v.* LAKSHMI CHAND. 42 P.L.R. 495.

——*Arbitrator—Misconduct—Examination of one party in the absence of others—If vitiates award.*

Where in arbitration proceedings, one of the parties is in jail, and the fact of his being in jail is an obstacle, known to all the parties concerned to the examination of one party in the presence of the other parties, it cannot be said that the examination of one party by the arbitrator in the absence of the others amounts to misconduct which will vitiate his award. (*Horwill, J.*) RAMAKOTESWARA RAO *v.* SURYANARAYANA. 1940 M.W.N. 808=52 L.W. 373=A.I.R. 1940 Mad. 905=(1940) 2 M.L.J. 356.

——Award—Order passing decree in terms of—If revisable. *See* C. P. CODE, S. 115—AWARD. 1940 O.A. 748=1940 O.W.N. 794.

——*Award—Validity—Part in excess of arbitrators' powers—Failure to decide one of the matters referred to.*

Where part of an award is found to be invalid, being in excess of the arbitrators' powers, and it is separable from the rest, the remainder of the award is good. In the same way because of an omission on the part of the arbitrators to decide one of the matters referred to arbitration the award cannot be considered invalid unless the omission has substantially influenced the decision given. (*Mya Bu and Mosely, JJ.*) TI TI MA *v.* MAHOMED EUSOOF. 191 I.C. 102=A.I.R. 1940 Rang. 203.

——*Examination of arbitrators—Question that cannot be asked.*

No questions can be put to an arbitrator as to what passed in his own mind when exercising his discretionary power on the matters submitted to him. (*Mya Bu and Mosely, JJ.*) TI TI MA *v.* MAHOMED EUSOOF. 191 I.C. 102=A.I.R. 1940 Rang 203.

——*Reference to—Authority—Mother acting on behalf of minor daughter—Binding character.*

Where on the death of a Hindu, disputes arose between his collaterals on the one side and his widow, a minor and married daughter on the other, the mother acting on behalf of her minor daughter has no power to bind the minor by an agreement to refer the disputes to arbitration and the minor's right to the property would be unaffected by any award that might be passed in pursuance of any such reference. (*Lord Russell of Killowen.*) HAR NARAIN KUNWAR *v.* SAJJAN PAL SINGH. 190 I.C. 184=1940 A.W.R. (P.C.) 124=52 L.W. 409=1940 O.A. 666=1940 A.L.J. 774=45 C.W.N. 40=1940 O.L.R. 591=13 R.P.C. 75=7 B.R. 103=A.I.R. 1940 P.C. 181 (P.C.).

——*Reference—Construction.*

Arbitrators were appointed to consider and determine the respective claims of the parties and

their disputes in connexion with "houses, shops, moneys, etc."

Held, that the word 'etcetera' after the word "moneys" could be read as covering the jewelleries. (*Mya Bu and Mosely, JJ.*) TI TI MA *v.* MAHOMED EUSOOF. **191 I.C. 102=A.I.R. 1940 Rang. 203.**

———*Reference—Minority of one party—Effect—Award—If void—Right of major party to challenge award.*

An arbitration to which a minor is a party is not in itself void; it is only voidable at the instance of the minor. And when the minor supports it, it is not open to the other party who is a major, to have the award made at his instance set aside on the ground of the other party being a minor. (*Horwill, J.*) RAMAKOTESWARA RAO *v.* SURYANARAYANA. **1940 M.W.N. 808=52 L.W. 373=A.I.R. 1940 Mad. 905=(1940) 2 M.L.J. 356.**

ARBITRATION ACT (IX OF 1899), S. 2—*Suit instituted in Amritsar—Applicability of Act—Punjab Arbitration Amendment Act, S. 2.*

By reason of the notification under the Punjab Arbitration Amendment Act, the application of the Indian Arbitration Act to Amritsar has been limited to cases where the parties expressly declare in the agreement that that Act should apply. If, therefore, the agreement between the parties does not recite any such declaration, the Arbitration Act does not apply to a suit instituted in Amritsar although the suit might have also been instituted in a place to which the Act applies. (*Sale, J.*) HUKAM CHAND KANCHI RAM *v.* MITSUI BUSSAN KAISHA, LTD. **42 P.L.R. 555.**

———S. 11 (2)—*Fees of arbitrators not paid—Power of Court to compel them to file award.*

There is no provision in the Arbitration Act by which the Court can compel the arbitrators to file an award in the Court when the fees and charges due to them in respect of the arbitration have not been paid. (*Weston, J.*) DAYASING MANGHARAM *v* CHARANDAS MATHRADAS. **189 I.C. 806=13 R.S. 46=A.I.R. 1940 Sind 144.**

———S. 19—*Application for stay—Discretion of Court—Circumstances justifying refusal—Party cancelling contract—Right to invoke arbitration clause.*

The defendant who had sold to the plaintiff piecegoods of Japanese manufacture cancelled his contract relying on a clause which provided that "in the event of the manufacturers experiencing any difficulties in making the goods such as Government putting control on the output or stopping exports, etc., directly or indirectly on account of war, the contract will be considered as cancelled unconditionally. "The plaintiff sued the defendant for damages occasioned by the failure of the defendant to deliver the goods, and the defendant applied for an order staying the suit under S. 19 of the Arbitration Act relying on an arbitration clause in the contract which provided for a reference to arbitration of any dispute arising between the parties regarding the contract, at the option of the seller, to the Bengal Chamber of Commerce or two European or Japanese merchants, one to be named by each party.

Held, that by using the word "cancellation", the defendant meant no more than that they had been relieved of their liability to deliver the goods owing to the events which had happened and that they did not mean that the contract had come to an end for all purposes including the purpose of the arbitration clause.

Held, further, that the Court should exercise its discretion to refuse to grant the application for stay as the question whether the state of things existing in the Far East was within the meaning of the contract was a difficult question of law quite unsuited for decision by laymen and as the decision of that question by two Japanese merchants if the defendant referred the matter to them as he was entitled to do, would cause considerable embarrassment to them. (*Panckridge, J.*) TOLARAM CHAMPALAL *v.* JEWANRAM GANGARAM. **I.L.R. (1940) 2 Cal 26.**

ARMS ACT (XI OF 1878), Ss. 4 and 19 (f)—*"Arms"*—Takwas.

It is always the purpose for which an implement is primarily used which determines the question whether it does or does not fall within the definition of 'arms'. Implements or articles primarily intended for domestic or agricultural use are not arms under the Act and *takwas* fall under the former category. A.I.R. 1927 Lah. 162, Rel. on. (*Skemp, J.*) UDHAM SINGH *v.* EMPEROR. **42 P.L.R. 815=A.I.R. 1940 Lah 468.**

———S. 19 (f)—*Offence under—What constitutes.*

The offence under S. 99 (*f*) of the Arms Act is constituted by 'possession or control' of any arms, etc. The test provided by the section is not as to whom the arms belong to but whether they are in the possession or under 'control' of the person charged. It is not exclusive possession or exclusive control that is required by the section, but merely possession or control. It is the actual physical possession and control that the Act is speaking of and not merely a 'possession' or 'control' by construction of law. The offence is the offence of physically and actually possessing or controlling the arms in question. It is not a liability to be found in a merely constructive or presumed possession or control which the law might for other purposes import into the facts of the case. (*Braund, J.*) ABDUL RAHMAN *v.* EMPEROR. **I.L.R. (1940) All 657=190 I.C. 785=1940 A.W.R. (H.C.) 445=1940 A Cr.C. 126=1940 A.L.J. 467=A.I.R. 1940 All. 449.**

ATTACHMENT—Effect—If creates right or interest in land attached. *See* REGISTRATION ACT, S. 17 (2) (*vi*). **42 Bom.L.R. 1016.**

BANKER AND CUSTOMER—Relationship—Trust—Deposit of bank's employees' cash security with scheduled bank—Position of latter—If trustee—Liquidation—Claim to priority over other debts of depositee bank—Sustainability. *See* COMPANIES ACT, S. 282-B (1). **(1940) 2 M.L.J. 559.**

BENAMI—Benamidar—Position of. *See* U. P. ENCUMBERED ESTATES ACT, SS. 9 AND 10—BENAMIDAR. **1940 A.L.J. 823.**

BENGAL AGRICULTURAL DEBTORS' ACT (VII OF 1936), Ss. 2 (8) (iii) and 34—*Money decree for share of* bhag *produce—If debt—Execution of such decree—If can be stayed by notice.*

A money decree against a *bhagdar* representing the price of the share of the produce due from him is not a debt within the meaning of S. 2 (8) of the Bengal Agricultural Debtors' Act, as this

cash liability is really a liability in respect of a share of the produce of the land to which reference is expressly made in S. 2 (8) (*iii*) of the Act. The execution of that decree cannot, therefore, be stayed by a notice issued under S. 34 of the Act. (*Edgley, J.*) HEMENDRA NATH ROY *v.* PURNA CHARAN. **44 C.W.N. 1045=A.I.R. 1940 Cal. 549.**

——**S. 2 (9)**—Adhiars, bargadars *and* bhagdars *—If debtors.*

The reference in S. 2 (9) (*b*) of the Bengal Agricultural Debtors' Act to a person "who cultivates land himself" must mean a person other than a raiyat or an under-raiyat who has some interest in the land, which would entitle him to employ hired labourers, *adhiars, bargadars* or *bhagdars* for the purpose of cultivating it, but such hired labourers and the other persons mentioned would not themselves be included within the definition of "debtor". (*Edgley, J.*) HEMENDRA NATH ROY *v.* PURNA CHARAN. **44 C.W.N. 1045=A.I.R. 1940 Cal. 549.**

——**S. 8 (5)**—*Second application relating to same debt after dismissal of first—Maintainability.*

S. 8 (5) of the Bengal Agricultural Debtors' Act merely means that, if the debtor finds that through oversight or otherwise he has omitted to mention a particular debt in his first application, he may include it in certain circumstances in a further application to the Board. After an application to a Board has been dismissed, another application cannot be made to another Board relating to the same debt. (*Edgley, J.*) KALI SUNDAR ROY *v.* KHUMCHAND. **44 C.W.N. 984=A.I.R. 1940 Cal. 473.**

——**Ss. 27 (1) and 25 (1) (e)**—*Award converting usufructuary into simple mortgage—Jurisdiction of Board.*

The intention of the legislature in enacting S. 27 (1) of the Bengal Agricultural Debtors' Act was merely to specify the extent to which a mortgage will continue to subsist after an award has been made. The sum specified in the award must obviously be regarded as a charge on the mortgaged property until the conditions of the settlement have been fulfilled, but, subject to the provisions of this section, the Board has full authority to modify the terms of the original mortgage upon which the loan had been advanced. The Board will not, therefore, act without jurisdiction in making an award the effect of which is merely to convert a usufructuary mortgage into a simple mortgage. In doing so, the Board will not exceed its powers under S. 25 (1) (*e*) of the Act which gives it authority to prescribe a manner for liquidating the debt settled different from that prescribed by the terms of the mortgage. (*Edgley, J.*) FAZLUR RAHMAN SARKAR *v.* ATAL BEHARY GHOSH. **I.L.R. (1940) 2 Cal. 203.**

——**S. 33**—*Suit for ejectment under S. 48-C of the Bengal Tenancy Act—If in respect of debt constituted by arrears of rent.*

A suit for ejectment under S. 48-C of the Bengal Tenancy Act in which there is no claim for arrears of rent, is not a suit in respect of arrears of rent and is, therefore, not a suit in respect of a debt within the meaning of S. 33 of the Bengal Agricultural Debtors' Act. Such a suit is, therefore, not barred although the arrears of rent have been included by the defendant in his

application to a Debt Settlement Board. (*Biswas, J.*) MYMEN SINGH LOAN OFFICE, LTD. *v.* BASIR SHEIKH. **44 C.W.N. 1113=A.I.R. 1940 Cal. 523.**

——**S. 34**—*Notice for stay of execution—Validity—Notice omitting one decree-holder and adding stranger as judgment-debtor.*

A notice under S. 34 of the Bengal Agricultural Debtors' Act issued in the prescribed form giving correctly the number of the execution case which is to be stayed is not rendered invalid by the mere omission of the name of one of the decree holders or by the inclusion of the name of a stranger as a judgment-debtor. These are mere formal defects which cannot possibly affect the merits. (*Henderson, J.*) PYARI MOHAN MANJHI *v.* HASHEM ALI KHAN. **I.L.R. (1940) 2 Cal. 226.**

——**Ss. 34 and 35**—*Failure of Board to issue notice—Execution sale — Validity of—Setting aside of sale—Revival of debt.*

There can be no doubt that the intention of the Legislature is to provide that all proceedings for the execution of decrees for debts included in an application under S. 8 of the Bengal Agricultural Debtors Act should be automatically stayed as soon as the application is filed before a Board and for this purpose, it is provided under S. 34 of the Act that due notice with regard to such application should be given to the Civil Court. At the same time, in view of the language of S. 35 of the Act it is impossible to hold that it could have been the intention of the Legislature that a judgment-debtor should be deprived of a valuable right which has been conferred upon him by the Act by reason of some carelessness on the part of the Board, which might result in failure to issue the required notice. In a case in which the Board fails to fulfil its duty under S. 34 and the execution sale is held by reason of such failure it would be open to the judgment-debtor himself to bring the matter to the notice of the Court which would be bound to set aside the sale. The result would be that even if the debt had been extinguished by the sale, it would revive after the sale had been set aside and the provisions of the Bengal Agricultural Debtors' Act would apply thereto. (*Edgley, J.*) SHEIKH TAMIZALI *v.* NASARALI BHUIYA. **I.L.R. (1940) 2 Cal. 334=72 C.L.J. 66.**

——**S. 35**—*Applicability — Application filed before Board after execution case is started.*

Per *Mukherjea, J.*—S. 35 of the Bengal Agricultural Debtors' Act is applicable although the application under S. 8 of the Act is presented to the Board after the execution case is started. (*Derbyshire, C. J. and Mukherjea, J.*) FATIMA KHATUN *v.* MANINDRA CHANDRA. **44 C.W.N. 1125.**

——**S. 35**—*Executing Court informed by Board of pending application—Notice not issued in prescribed form—Court, if bound to stay proceedings.*

The provisions of S. 35 of the Bengal Agricultural Debtors' Act are mandatory, and once the executing Court is informed by the Board that there is an application pending under S. 8 it must act under that section if an execution is pending, although no notice in the prescribed form is issued by the Board under S. 34 of the Act. A sale held after such information is received is invalid. (*Derbyshire, C.J. and Muk-*

BENG. ALLU. & DILU. REG. (1825), S. 4.

herjea, J.) FATIMA KHATUN *v.* MANINDRA CHANDRA. **44 C.W.N. 1125.**

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), S. 4—*Right under — Absence of offer by patnidar to pay additional rent for increment to tenure—Effect of.*

The absence of an offer by the patnidar to pay additional rent for the increment to his tenure, cannot take away the right conferred on him by S. 4 of Regulation XI of 1825. (*Mitter and Roxburgh, JJ.*) MIDNAPORE ZEMINDARY CO., LTD. *v.* BIJOY SINGH DUDHORIA. **72 C.L.J. 14.**

BENGAL CHOWKIDARI ACT (VI OF 1870), S. 34—Scope—Warrant for attachment for arrears of tax—Assessor signing not in proper place nor dating—Effect—Omission to fill name of person authorised to execute—Effect—If renders warrant illegal. *See* PENAL CODE, S. 186. **21 Pat.L.T. 716.**

BENGAL FOOD ADULTERATION ACT (VI OF 1919), S. 6 (1) and (4)—*Consignee taking delivery of consignment of oil at railway station—Oil found to be adultered from sample taken at railway premises—Presumption, if arises.*

If a consignee takes delivery of a consignment of mustard oil at a railway station for the purpose of selling it, he stores them for sale within the meaning of S. 6 (1) of the Bengal Food Adulteration Act from the moment he takes such delivery until the goods are actually exposed for sale in his shop. The presumption under S. 6 (4) of the Act, therefore, arises if from a sample taken from the goods while they are actually on the railway premises the oil is found to be adulterated. (*Edgley, J.*) HARI RAKSHAK DUTT *v.* CHAIRMAN, DISTRICT BOARD, BIRBHUM. **44 C.W.N. 1139.**

——**S. 6 (3)**—*Want of opportunity to examine nature of goods—If valid defence.*

The fact that a consignee had no opportunity to examine the nature of the goods between the time when he took delivery of them and the time when a sample was taken, is not a valid defence by reason of S. 6 (3) of the Act. (*Edgley, J.*) HARI RAKSHAK DUTT *v.* CHAIRMAN, DISTRICT BOARD, BIRBHUM. **44 C.W.N. 1139.**

BENGAL LAND REVENUE SALES ACT (XI OF 1859), S. 37, proviso—*"Raiyat"—Meaning of.*

The word "raiyat" in the proviso to S. 37 must be read in its ordinary sense of a cultivator. It does not include the successors-in-interest of raiyats. (*Henderson, J.*) KHODADAT BIBI *v.* KAMALA RANJAN ROY. **44 C.W.N. 1136=A.I.R. 1940 Cal. 584.**

BENGAL MONEY-LENDERS ACT (VII OF 1933), S. 4—*"Principal of the loan"—Meaning of—Renewed bond.*

In S. 4 of the Bengal Money-Lenders Act, the phrase "principal of the loan" means the amount *actually advanced* or *parted with* by the money-lender, the original loan and not what is stated as the principal in the renewed bond and which is made up of the original loan or balance thereof *and* the arrears of interest capitalised. (*Mitter and Akram, JJ.*) SUDHAMYA MOHAN *v.* PRIJYA SANKAR. **44 C.W.N. 1133=A.I.R. 1940 Cal. 570.**

BENG. PUB. DEM. REC. ACT (1913), S. 4.

BENGAL PATNI REGULATION (VIII OF 1819), S. 11—*Position of purchaser.*

It is wrong to say that an auction-purchaser gets the patni in the condition in which it was at the time of its creation. The true position is that a purchaser gets it free from incumbrances made by the patnidar, but he cannot ignore the acts of the Zamindar. If the Zamindar has made a separate patni the purchaser cannot ignore the transaction. (*Henderson, J.*) SAIBALINI DEVI *v.* ABINASH CHANDRA. **A.I.R. 1940 Cal. 591.**

——**S. 11**—*Purchaser's rights—Zamindar creating separate patni of choukidari chakran lands—Provision that purchaser of original patni would be entitled to benefit of lease—Validity—T. P. Act, S. 28.*

A Zamindar created a separate patni of choukidari chakran lands. The terms of this patni provided that if the original patni was sold for arrears of rent or extinguished for any reason whatever, then with it the patni right in the separate patni of chaukidari chakran lands would be taken to have been sold and the purchaser would be entitled to the benefit of the lease of chaukidari chakran lands. The Zamindar sold the original patni for arrears of rent.

Held, that the purchaser was entitled to the chaukidari chakran lands on the strength of his purchase of original patni. The purchaser was liable to pay to the Zamindar the rent fixed in the lease. The provision was valid under S. 28, T. P. Act. (*Henderson, J.*) SAIBALINI DEVI *v.* ABINASH CHANDRA. **A.I.R. 1940 Cal. 591.**

BENGAL PUBLIC DEMANDS RECOVERY ACT (III OF 1913), S. 3 (1)—*Addition of person as debtor—Circumstances showing.*

The plaintiff purchased certain property at the sale in execution of his decree and got his name mutated in the collectorate records. In the meantime a certificate was filed against the former proprietors of that property in respect of arrears of cess. After notices under S. 7 of the Act had been served on the persons against whom the certificate was filed a report was made to the certificate officer that the property had already been sold to the plaintiff. The certificate officer on receiving the names of two more recorded proprietors including the plaintiff directed notices to be issued against them. Subsequently the usual sale proclamation was issued and admittedly the proclamation contained the plaintiff's name.

Held, that the circumstances clearly showed that the plaintiff's name was added within the meaning of S. 3 (1) and that in order to nullify the effect of the certificate sale, the plaintiff had failed to discharge a very heavy onus which lay on him to show that there had been a non-compliance with the requisite formalities required under the Act and that the plaintiff's name had not been added within the meaning of S. 3 (1).

Held, further, that as the plaintiff's name actually appeared in the sale proclamation there was a presumption to the effect that the sale proclamation was drawn up after notice to the plaintiff as required under Sch. II, R. 46 (2) of the Act. (*Edgley, J.*) AMIYA BIKASH *v.* MOHALUXMI BANK, LTD. **A.I.R. 1940 Cal. 587.**

——**Ss. 4 and 5**—*Certificates signed without filling in blanks—If legal—Sale on basis of such certificate—Validity.*

BENG. PUB. DEM. REC. ACT (1913), S. 19.

Where a certificate is signed without filling in the blanks as required, there is no legal certificate at all, and no valid sale can follow on the basis of it. This applies equally to a certificate under S. 4 and to a certificate under S. 5 of the Public Demands Recovery Act. (*Biswas, J.*) SUDHER CHANDRA CHAKRAVARTY *v.* SUDHANSHU KUMAR. **44 C.W.N. 1097=A.I.R. 1940 Cal. 556.**

——**S. 19 (3)**—Certificate holder—Representative character—Limits—Right to adjust the decree *See* C. P. CODE, O. 21, R. 53 (3) AND PUBLIC DEMANDS RECOVERY ACT, S. 19 (3). **1940 A.L.J. 617 (P.C.).**

——**S. 37**—*Scope—Suit to set aside sale on ground other than fraud—Jurisdiction of Civil Court—Sale held on date different from that mentioned in sale proclamation—Suit to set aside such sale—Maintainability*

No doubt, under S. 37 of the Public Demands Recovery Act a suit to set aside a sale would lie in the Civil Court only when there is fraud. But that section does not oust the jurisdiction of the Civil Court to entertain a suit where the certificate officer had no authority to hold the sale and it was not a sale under the Act at all. If the certificate officer holds the sale on a date different from that mentioned in the sale proclamation under Rule 46, Sch. II of the Act, he assumes a jurisdiction which he does not possess, and the Civil Court is entitled to set aside such sale. (*Mukherjea and Lodge, JJ.*) TIKENDRAJIT GHOSE *v.* JADAV MONDAL. **44 C.W.N. 1103=A.I.R. 1940 Cal. 554.**

BENGAL PUBLIC GAMBLING ACT (II OF 1867), S. 5—*Search warrant executed by different officer—Legality of search.*

If the search warrant is executed by an officer different from the one to whom it is issued, the search is illegal. (*Edgley, J.*) EMPEROR *v.* GOBINDA CHANDRA DAS. **71 C.L.J. 542=44 C.W.N. 1123=A.I.R. 1940 Cal. 586.**

——**Ss. 5 and 6**—*Expression "Common gaming house" not used in search warrant—Prosecution, if entitled to benefit of S. 6.*

The expression "a common gaming house" has a special meaning under the Public Gambling Act, and unless that expression is used in the search warrant, the prosecution cannot avail themselves of the special provision of S. 6 of that Act. (*Edgley, J.*) EMPEROR *v.* GOBINDA CHANDRA DAS. **71 C.L.J. 542=44 C.W.N. 1123=A.I.R. 1940 Cal. 586.**

BENGAL REGULATION (XIX OF 1793), Ss. 7 and 8—*Assessment of rent—Suit for—Damages for period prior to suit—If can be recovered.*

A proprietor cannot recover damages for use and occupation on the basis of rents assessed for any period antecedent to the date of the suit for assessment of rent. (*Nasim Ali and Mukherjea, JJ.*) JUGAL CHARAN *v.* DEBENDRANATH. **44 C.W.N. 1141=72 C.L.J. 248=A.I.R. 1940 Cal. 572.**

——**Ss. 7 and 8**—*Half of produce—Material time.*

In assessing revenue at half of the produce, the value of the produce at the time of the Permanent Settlement must not be looked at. The material time is when the lands are actually resumed and held liable to be assessed to revenue. (*Nasim Ali and Mukherjea, JJ.*) JUGAL CHARAN *v.* DEBENDRANATH. **44 C.W.N. 1141=72 C.L.J. 248=A.I.R. 1940 Cal. 572.**

BENG. TENANCY ACT (1885), S. 26-F.

——**S. 9**—*Applicability—Lands held in assertion of* lakhiraj *rights but no grant before or after 1790 proved—Assessment of rent—Civil suit—Maintainability.*

S. 9 of the Regulation XIX of 1793 has no application where lands are alleged to have been held in assertion of *lakhiraj* rights as a part of an independent *lakhiraj* estate which was formed out of certain lands, but no grant of any kind either before or after 1790 has been established in respect of them. In such a case a suit for assessment of rent of the lands is maintainable in a Civil Court. (*Nasim Ali and Mukherjea, JJ.*) JUGAL CHARAN *v.* DEBENDRANATH. **44 C.W.N. 1141=72 C.L.J. 248=A.I.R. 1940 Cal 572.**

——**S. 9**—*Land held under invalid* lakhiraj *grant—Assessment of revenue—Civil suit—Maintainability—Bengal Regulation II of 1819, S. 30—Bengal Act VII of 1862, S. 2.*

Where the right of a proprietor to the revenue of land held under an invalid *lakhiraj* grant made prior to 1790 is based upon S. 6 of Regulation XIX of 1793, he can have the revenue assessed only in the manner contemplated by S. 9 of the Regulation and not by a suit in the Civil Court. The procedure laid down in S. 9 of the Regulation was not altered by S. 30 of Regulation II of 1819 or by S. 2 of Act VII of 1862. These subsequent Regulations do not contemptate proceedings for assessment proper and the actual fixing of the revenue but relate to proceedings for resumption where the only question for determination by the Court is whether the lands are or are not liable to be assessed to revenue. (*Nasim Ali and Mukherjea, JJ.*) JUGAL CHARAN *v.* DEBENDRANATH. **44 C.W.N. 1141=72 C.L.J. 248=A.I.R. 1940 Cal. 572.**

BENGAL TENANCY ACT (VIII OF 1885), S. 26-F (New)—*Applicability—Mokarari holding—Tenants having occupancy rights therein.*

S. 26-F of the Bengal Tenancy Act substituted by the Amending Act of 1938 is as much within the scope of S. 18 (2) as the old section was. The provisions of the new section are not, therefore, applicable to a mokarari holding although the tenants have also occupancy rights therein. (*Derbyshire, C.J. and Mukherjea, J.*) KEDAR NATH MAJHI *v.* INDRA NARAIN. **44 C.W.N. 955.**

——**S 26-F (as amended)**—*Applicability—Purchase by co-sharer jointly with strangers—Right of pre-emption of other co-sharers.*

S. 26-F of the amended Bengal Tenancy Act, 1938, is not inapplicable when a co-sharer figures as a purchaser jointly with other persons who are strangers out and out. In such a case, the right of pre-emption can be exercised by the other co-sharer tenants with respect to that portion of the holding which has been acquired by the stranger purchasers. (*Derbyshire, C.J. and Mukherjea, J.*) KHODEJA *v.* MAHOMED ABDUL. **190 I.C. 758=44 C.W.N. 981=A.I.R. 1940 Cal. 472.**

——**S. 26-F (as amended)**—*Transfer executed before but registered after amended section coming into force—Right of co-sharer tenant to apply for pre-emption.*

A co-sharer tenant of an occupancy holding is entitled to apply for pre-emption under S. 26-F of the B. T. Act as amended in 1938, in a case

where the deed of transfer of the holding in favour of a stranger was executed by his co-sharer before but registered after the amended section coming into force. (*Sen, J.*) UMASASHI DEVI *v.* RADHA BINODINI. **191 I.C. 58=44 C.W.N. 1092=A.I.R. 1940 Cal. 513.**

——S. 26-G—*Mortgage—Construction — Usufructuary or mortgage by conditional sale.*

By a document described as a mortgage by conditional sale, the possession of the properties was delivered over to the mortgagees and the stipulation was that they would enjoy the usufruct and credit the same towards interest. The document mentioned a due date for payment of entire mortgage debt and provided that in default of payment within that date the mortgagee would be entitled to foreclose and that the conditional sale would then ripen into an absolute sale.

Held, that the transaction was not a usufructuary mortgage but a mortgage by conditional sale to which S. 26-G (5) of the Bengal Tenancy Act was not applicable. (*Derbyshire, C.J. and Mukherjea, J.*) MAHENDRA NATH *v* KALIPADA HALDAR. **44 C.W.N. 1009=72 C.L.J. 95=A.I.R. 1940 Cal. 486.**

——S. 26-G—*Mortgaged land represented as* mokarari *holding—Mortgagor, if estopped from showing that it is occupancy holding.*

A mortgagor who had represented to the mortgagee that the land mortgaged was *mokarari* holding is not estopped from showing that it is really an occupancy holding which will attract the operation of S. 26-G of the Bengal Tenancy Act. (*Derbyshire, C.J. and Mukherjea, J.*) MAHENDRA NATH SARDAR *v.* KALIPADA HALDAR. **44 C.W.N. 1009=72 C.L.J. 95=A.I.R. 1940 Cal 486.**

——S. 26-G (5)—*Order declaring extinction of mortgage debt—Legality.*

A Court dealing with an application under S. 26-G (5) of the Bengal Tenancy Act will be exceeding its jurisdiction if it passes an order declaring that the mortgage debt has been extinguished. (*Derbyshire, C.J. and Mukherjea, J.*) GURU CHARAN *v.* RADHANATH BEPARI. **44 C.W.N. 1095.**

——Ss. 26-G (5) and 3 (3)—*Mortgage—Construction.*

In a mortgage deed the mortgagor purported to mortgage land to the mortgagee to secure an advance of certain amount. Possession of the property was delivered to the mortgagee and there was an express covenant that the mortgagee would remain in possession till the mortgage-money was paid. There was a stipulation to the effect that in case the mortgagee was dispossessed from any portion of the mortgaged property, the

mortgagor would be personally liable to pay the money with interest and the mortgagee would be at liberty to sue for the same and in execution of the decree put up to sale the mortgaged property as well as the other properties of the mortgagor.

Held, that the mortgage was usufructuary and the covenant in the last portion of the deed did not alter the character of the mortgage. (*Mukherjea and Mahomed Akram, JJ.*) GAYAMANI BEWA *v.* DHARANIDHAR JANA. **A.I.R. 1940 Cal. 544.**

——S. 50—*Presumption under—Applicability—Record-of-rights finally published.*

As soon as the record-of-rights is finally published a presumption will arise as to the status of the tenant from that entry, and the peculiar presumption laid down in S. 50 of the B. T. Act can no longer be justified. (*Henderson, J.*) KHODADAT BIBI *v.* KAMALA RANJAN ROY. **44 C.W.N. 1136=A.I.R 1940 Cal. 584.**

——S. 50—*Presumption under—Applicability—Suit to eject defendant as trespasser.*

The presumption arising under S. 50 of the B. T. Act is restricted to suits or proceedings under that Act, that is to say, suits or proceedings which raise questions involved in the relationship of landlord and tenant. It has no application to a suit in which the plaintiff is seeking to eject the defendant on the ground that he is a trespasser. (*Henderson, J.*) KHODADAT BIBI *v.* KAMALA RANJAN ROY. **44 C.W.N. 1136=A.I.R. 1940 Cal. 584.**

——S. 50—*Presumption under —Rebuttal — Slight variation in rent—If sufficient.*

Even a slight variation in rent is enough to rebut the presumption under S. 50 of the Bengal Tenancy Act. The relevant question is whether there has been really a change or variation and not whether the same was in respect of a substantial amount. (*Khundkar, J.*) ABDUL WAHED *v.* NAGENDRA CHANDRA LAHIRI. **44 C.W.N. 993=A.I.R 1940 Cal. 524.**

——S. 51—*Presumption under—Applicability—Written lease.*

There cannot be scope for any presumption of the terms of a lease under S. 51 of the Bengal Tenancy Act, where there is a written lease setting forth the terms. (*A. N. Sen, J.*) ATUL KRISHNA BOSE *v.* ZAHED MONDAL. **72 C.L.J. 132=45 C.W.N. 129.**

——(as amended in 1907), S. 102 (gg)—*Survey ordered before coming into force of amendment—Omission to record irrigation rights or to prepare* fard-i-abpashi—*Effect of—If negatives irrigation rights.*

Cl. (*gg*) of S. 102 of the Bengal Tenancy Act was added to the section only in the year 1907, by the amendment of 1907. Where the order for survey of a village was passed before the amendment came into force, it could not have provided for the preparation of any record of irrigation rights [which are provided by Cl. (*gg*)], and consequently no *fard-i-abpashi* could have been prepared, since the particulars to be recorded must depend on the terms of the order. This would explain the omission to record the water rights for the village in the survey operations ordered before 1907. No adverse inferences should therefore be drawn from the omission to so record irrigation rights. (*Agarwala and Meredith, JJ.*) HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER. **21 Pat.L.T. 873.**

BENG. TENANCY ACT (1885), S, 103-B.

——**S. 103-B** (5)--*Presumption under—Availability against person challenging correctness of entry under S.* 106.

The presumption of correctness of the entry in the record-of-rights under S. 103-B, sub-S. (5) of the Bengal Tenancy Act, will be available against any person who has challenged the correctness of the record under S. 106 of that Act. (*Khundkar, J.*) ABDUL WAHED *v.* NAGENDRA CHANDRA LAHIRI. **44 C.W.N. 993=A.I.R. 1940 Cal. 524.**

——**S. 146-A**—*Rent suit—Principle of representation—Condition.*

If it is not shown that the landlord has actually joined as defendants in his suit for rent all the persons whose names are borne in his rent roll as tenants the fundamental condition for invoking the principle of representation under S. 146-A of the Bengal Tenancy Act is lacking. (*C. C. Biswas, J.*) HARAN CHARAN MANDAL *v.* HIRA LAL NASKAR. **72 C.L.J. 123.**

——**S. 148-A**—*Suit for apportionment of rent and recovery thereof—Persons setting up rival claims as co-sharer landlords joined as defendants in the alternative—Latter, if can join as co-plaintiffs.*

In a suit for apportionment of rent and recovery thereof after apportionment, the plaintiff is entitled under O. 1, R. 3, C. P. Code, to join as defendants in the alternative all those persons who set up rival claims as co-sharer landlords. In such a case it would be quite unnecessary to decide any question of title between defendants *inter se*. But the defendants cannot join the plaintiff as co-plaintiff and then make their conflicting claims purporting to act under S. 148-A of the B. T. Act. There is no provision in that section which permits of such a course nor does the general law sanction it. Persons cannot join as plaintiffs in the alternative and claim against a defendant and ask the Court to decide the controversy between them. (*Sen, J.*) MAKHAN LAL BISWAS *v.* NAGENDRA BALA DEBI. **44 C.W.N. 1053.**

——**S. 153**—*Decision of title between defendant* inter se--*Appeal.*

A decision of a question of title between rival co-sharer landlords impleaded as defendants in the alternative in a suit for apportionment of rent, is a decision of question of title within the meaning of S. 153 of the B. T. Act. An appeal is, therefore, competent from a decree of a Subordinate Judge passed in such a suit, although the amount claimed does not exceed Rs. 100. (*Sen, J.*) MAKHAN LAL BISWAS *v.* NAGENDRA BALA DEBI. **44 C.W.N. 1053.**

——**S. 153**—*Decree for apportionment of rent—Appeal.*

A decree for apportionment of rent is made pursuant to a decision as to the amount of rent annually payable within the meaning of S. 153 of the B. T. Act. An appeal from such a decree of a Subordinate Judge is, therefore, competent, although the amount claimed in the suit does not exceed Rs. 100. (*Sen, J.*) MAKHAN LAL BISWAS *v.* NAGENDRA BALA DEBI. **44 C.W.N. 1053.**

——**Ss. 159 and 161**—*Reservation of power to annual incumbrances—Scope and object.*

The whole object of the reservation by Ss. 159 and 161 of the B. T. Act of a power in the auction purchaser to annul incumbrances is to enable

BERAR LAND REV. CODE (1928), S. 141.

him to get rid of a subordinate interest the holder whereof may intercept the rent which would otherwise be legitimately payable to him. There is intelligible principle on which he can be allowed to leave untouched an interest subordinate the purchased interest and at the same time annul as incumbrances interest of an inferior grade. (*Sir George Rankin*) PROFULLA NATH TAGORE *v.* SANTOSH KUMAR DAS. **190 I.C. 472=1940 O.L. R 643=13 R.P.C. 92=1940 O.A. 1224=7 B.R. 129=1940 O.W.N. 935=A.I.R. 1940 P.C. 187 (P.C.).**

——**Ss. 170 and 171**—*Right to deposit—Unrecognised transferee of non-transferable holding.*

An unrecognised transferee of a portion of a non-transferable occupancy holding comes within the category of persons whose interests are affected by the sale within the meaning of S. 170 or S. 171 as well as of S. 174 of the B. T. Act. Such a person is, therefore, competent to make a deposit under S. 170 and claim the rights of a statutory mortgagee under S. 171 of the Act. (*C. C. Biswas, J.*) HARAN CHARAN MANDAL *v.* HIRA LAL NASKAR. **72 C.L.J. 123.**

——**S. 182**—*Tenant of homestead subsequently acquiring raiyati right in contiguous village—If acquires raiyati right in homestead land.*

If a person who has taken a lease of homestead land subsequently acquires the right of a raiyat in a contiguous village, the provisions of S. 182 of the B. T. Act are attracted, and he acquires a raiyati right in the homestead land. That section does not presuppose that the agricultural tenancy in the same or contiguous village is held at the time that the homestead tenancy is created. (*Sen, J.*) ANANTAMONI DASI *v.* BHOLA NATH. **44 C.W.N. 1099=72 C.L.J. 99.**

BENGAL WAKF ACT (XIII OF 1934), S. 73—*Applicability—Suits by Commissioner and by other persons—Necessity for obtaining leave.*

S. 73 (1) of the Bengal Wakf Act applies not to suits generally but only to suits which fall strictly within S. 14 of the Religious Endowments Act and S. 92, Civil Procedure Code, and it simply exempts the Wakf Commissioner from obtaining leave of the Court or the Advocate-General. But if persons other than the Commissioner sue under Ss. 14 and 92, they must obtain the consent of the Commissioner in addition to the leave of the Court or the Advocate-General. (*Ameer Ali, J.*) ABDUL HALIM *v.* NASIBUNNESSA BIBI. **44 C.W.N. 969.**

BERAR COTTON MARKET RULES, R. 56 (3)—*Scope and applicability.*

Where the purchase is by an adatya, the adatya buys on behalf of principal, names his principal, enters the name of his principal as that of the buyer, and that being so and the purchase taking place through the agent in the market proper, the principal buys within the market and he falls within the class of 'a person buying within the market.' That class is prohibited from doing that unless they are registered. (*Stone, C.J. and Grille, J.*) EMPEROR *v.* P. R. MEHTA. **I.L.R. (1940) Nag. 615=191 I.C. 54=1940 N.L.J. 443=A.I.R. 1940 Nag. 385.**

BERAR LAND REVENUE CODE (1928), S. 141 (c)—*Applicability—Alienated holding.*

The process in S. 141 (*c*) is applicable to any holding in respect of an arrear of land revenue due upon it. In Cl. (*f*) alienated holdings are re-

BERAR LAND REV CODE (1928), S. 192.

ferred to. The fact that in Cl. (*f*) a special process is prescribed exclusively for alienated holdings does not imply that the general process provided in S. 141 (*c*) is not applicable to an alienated holding. Further alienated holdings are not excluded from the definition of holdings in S. 2 (5) of the Code. (*Burton, F.C.*) HARIBHAN SONAJI *v.* SAMPATLAL. **1940 N.L.J. 525.**

——**S. 192 (1), proviso**—*Construction—Suit involving question of interpretation of sanad—Jurisdiction of Civil Court to try.*

The proviso following Cl. (*e*) in S. 192 (1) of the Berar Land Revenue Code is applicable to all the clauses from (*a*) to (*e*) in the preceding part of the S. 192 (1). It must be read as common to each of the clauses preceding it. Where a suit involves the question of interpretation of a sanad and a Resident's order, the Civil Court has jurisdiction to try the suit. (*Niyogi, J.*) SHRINIWAS RAO *v.* SECRETARY OF STATE. **1940 N.L.J. 582= A.I.R. 1940 Nag. 402.**

BERAR PATELS AND PATWARIS LAW (1900), S. 5 (3) and (4)—*Appointment of* patwari *—Preference—Nearness by inheritance and educational qualification.*

The provisions of S. 5 (3) and (4) of the Patels and Patwaris Law do not require that the person having the preferential claim by inheritance to the post of patwari must be appointed and relieved from the obligation of personal service, in preference to a person having a more distant claim by inheritance and being qualified and being able to serve in person. A person who is ineligible under R. 1 of the rules framed under S. 21 of the Act, cannot be relieved of personal service under Rule VIII, because his disqualification is not by reason of incompetence but results from lack of the required educational qualification. (*Burton, J.C.*) BHAGWANTRAO *v.* KRISHNARAO. **1940 N.L.J. 621.**

BERAR REVENUE BOOK CIRCULAR III-8—*Collector proceeding—Acceptance of bid—If appealable.*

There is neither ground nor authority for the view that no appeal lies against Collector's acceptance of the bid under R. 11 (2) of the Berar Revenue Book Circular III-8. (*Burton, F. C.*) KUNJI LAL *v.* BHAURAO. **1940 N.L.J. 478.**

BHOPAL CIVIL PROCEDURE CODE, S. 2—*"Decree"—Order dismissing appeal for non-payment of deficient court-fee—Appeal.*

An order rejecting an appeal on account of the failure of the appellant to pay the deficient court-fee as previously ordered, has the effect of a decree and is clearly appealable as such. (*Mahomed Ahmad Khan, C.J. and Ali Ahmad Khan, J.*) DHANRUPMAL *v.* MULCHAND. **189 I.C. 681.**

——**S. 58**—*Orders in execution—Appealability—Test—Order confirming sale—Appeal if lies.*

In order to decide whether a determination of a question arising in execution proceedings is appealable as a decree or not, one must look to the combined effect of S. 47 and S. 2 (2), C. P. Code, only such questions as relate to the rights and liabilities of the parties with reference to the relief granted by the decree are properly within the scope of S. 47 (58 Bhopal), of the Code, but orders that are merely incidental and relate to the conduct of the execution proceedings are not within the section. As for instance, orders fixing

BHOPAL C. P. CODE O. 6, R. 17.

the date of any sale, or refusing to stay proceedings, or even refusing leave to bid at execution sale are merely interlocutory and hence not appealable. An order confirming the sale held nearly two years back on the ground that all objections against the sale had been disposed of previously, is merely incidental and follows the disposal of all applications challenging the sale under provisions of C. P. Code under O. 43, R. 1 (*j*) an appeal is no doubt allowed from an order "setting aside or refusing to set aside a sale", but no appeal is permitted by any provision of the Code from an order confirming a sale and directing the issue of a certificate of sale in respect of the property sold. (*Mahomed Ahmad Khan, C. J. and Birdi, J.*) BINDRABANDAS *v.* NANNAY. **190 I.C. 174.**

——**S. 78**—*"Same judgment-debtor"—Several decrees against same person—Some individually against him and others jointly with other persons.*

If there are several decrees against one person, some of which are individually against him while others are against him jointly with other persons, the holders of individual decrees are entitled to a rateable distribution in execution of joint decrees to the extent of that person's interest in the property realised. For the purposes of S. 78 of the Bhopal C. P. Code such a person falls within the meaning of "same judgment-debtor." (*Mahomed Ahmad Khan, C.J.*) HASAN MAHOMED KHAN *v.* PANMALL. **189 I.C. 585.**

——**S. 106/1**—*Appealable orders.*

S. 106/1 of Bhopal C. P. Code has been so framed as to exclude all orders other than "final" from the category of appealable orders. (*Mahomed Ahmad Khan, C.J. and Ali Ahmad Khan, J.*) NANOO MAL *v.* DEO CHAND. **190 I.C. 28.**

——**S. 130**—*Powers of Court—Order enlarging time containing default condition—Further enlargement after expiry of time—If can be granted.*

Under S. 130, Bhopal C. P. Code, the Court has full discretion to enlarge the time for the payment of Court-fee even after the expiry of the period originally fixed or previously extended. One extension after the other is permissible. Before the first extension expired the Court can grant futher extension even in the case in which default condition occurred in the first order enlarging time. But after the expiry of the period fixed the Court has no power to extend the time inasmuch as the order works itself out and becomes absolute by reason of the non-fulfilment of the condition contained therein. (*M.A. Khan, C.J. and Ali Ahmad Khan, J.*) NATHURAM *v.* MULLOBAI. **189 I.C. 537.**

——**S. 134**—*Inherent powers—Exercise of—Applicant allowing his remedy to be time-barred.*

It is a well-settled principle that a Court cannot exercise the inherent jurisdiction when the applicant had his remedy provided in the Code and had neglected to avail himself of it. Such jurisdiction must be exercised with great caution, and the Court is not expected to ignore the provisions of the law of limitation by appealing to S. 151 (134 Bhopal) of the Code. (*Mahomed Ahmad Khan, C.J. and Birdi, J.*) BINDRABANDAS *v.* NANNAY. **190 I.C. 174.**

——**O. 6, R. 17**—*Nature of suit not changed—Suit for refund of money paid out of Court but*

BHOPAL C. P. CODE O. 21, R. 2.

not certified—Amendment into one for damages —Permissibility.

The plaintiff filed a suit for the refund of money paid out of Court to the defendant's attorney towards a decretal amount but which payment was not certified. To overcome the legal objection that such a suit was not maintainable, he sought permission to amend the plaint so as to convert the suit into one for the recovery of damages.

Held, that permission to amend the plaint must be granted, as the nature of the suit remained the same whether the money was claimed by way of damages or as a refund. (*Mahommad Ahmad Khan, C J. and Birdi, J.*) BHAIRON PRASAD *v.* AULAD HOSAIN. **189 I.C. 165.**

——**O. 21, R. 2**—Execution petition—Decree-holder mentioning payments by judgment-debtor and producing writing signed by him—If sufficient certification. *See* BHOPAL LIMITATION ACT, S. 20. **189 I.C. 374.**

BHOPAL COURT-FEES ACT, S. 7 (iv) (b)—Suit for partition—Plaintiff alleging joint possession—Court-fees. *See* BHOPAL COURT-FEES ACT, ART. 17 (*iv*). **189 I.C. 681.**

——**Sch. II, Art. 17 (iv) and S. 7 (iv) (b)**—*Suit for partition—Plaintiff alleging joint possession—Court-fees.*

In suits for partition the question of Court-fee must always be decided upon the allegations contained in the plaint. If a relief for possession is claimed by the plaintiff, the Court would be justified in calling upon him to make good the deficiency in court-fee, otherwise if the plaintiff alleges to be in joint possession of the property, in that case the matter would be governed by Art. 17 (iv) of Sch. II of the Court-Fees Act. S. 7 (iv) (*b*) is inapplicable because a suit for partition is not the same thing as a suit to enforce the right to share in any property on the ground that it is joint family property. When the plaintiff alleges his joint possession, and in fact proves the same by his actual residence in a portion of the house sought to be partitioned he can no longer be considered to be in need of possession, and his right to share the property is certainly beyond question. An *ad valorem* Court-fee is payable only by such a plaintiff who is out of possession, and by means of his suit tries to obtain possession as well as partition. The plaintiff may be in actual possession of even a smaller share than is his due, yet he cannot be considered to be out of possession. By the very act of his occupation his right to share in the property becomes established, and his asking for a partition by metes and bounds simply amounts to a prayer for enabling him to enjoy his share separately and more fully. This request amounts to nothing more than a desire for a change in the mode of enjoyment of the joint property. A relief like this is not measurable in terms of money and therefore property falls within the purview of Art. 17 (iv) of Sch. II of the Court-Fees Act. (*Mahomed Ahmad Khan, C.J. and Ali Ahmad Khan, J.*) DHANRUPMAL *v.* MULCHAND. **189 I.C. 681.**

BHOPAL CRIMINAL PROCEDURE CODE, Ss. 232-3—*Retracted statement—Evidential value of.*

BHOPAL LIMITATION ACT, Art. 57.

S. 288, Cr. P. Code (=232/3 Bhopal) gives full discretion to the presiding Judge to treat a previous statement made by a witness before the committing Court as evidence in the case "for all purposes", which means that even the verdict or finding in any case could be based on such evidence. At the same time one must not forget that admissibility of a statement as a piece of evidence is one thing and its evidential value quite another. A retracted statement may rank as evidence under S. 288 if it fulfils the formalities required, yet, its value may widely differ according to the circumstances of each case. (*Mahomed Ahmad Khan, C.J. and Birdi, J.*) RAISUDDIN *v.* GOVERNMENT OF BHOPAL. **190 I.C. 322.**

BHOPAL LIMITATION ACT, S. 20—*Execution petition — Decree-holder mentioning payments by judgment-debtor and producing writing signed by him—If sufficient certification—Extension of time—C. P. Code, O. 21, R. 2*

Where the decree-holder has mentioned three consecutive payments in his execution petition and produced a writing purporting to bear the signatures of the judgment-debtor in respect of these payments, all the three payments must be held to have been duly certified under O. 21, R. 2, C. P. Code, and the writing alleged to have been executed by the judgment-debtor is sufficient to save limitation under S. 20 of the Limitation Act, if it is proved to have been signed by him. (*M.A. Khan, C.J. and Birdi, J.*) KISHAN SINGH *v.* AMARCHAND. **189 I.C. 374.**

——**Art. 57**—"*Account stated*"—*Meaning of—Some of items time-barred—Effect.*

The document forming the basis of a suit, evidencing an account stated between the parties, need not contain the whole account in detail. A mere reference to an outstanding account which was settled mutually by striking a balance and by the admission of the debtor as to its correctness should be quite enough for the purpose. The mere fact that some of the items were statute-barred could be of no avail when the suit is brought on account stated. In suits based on a stated account, it is always open to the defendant to challenge the document on various grounds such as fraud, undue influence, and want of proper knowledge. If he succeeds in establishing that the accounts were never understood by him and hence were never settled, the substratum of the plaintiff's suit will disappear. But on the other hand if it is proved that the parties went through the accounts and the defendant having fully understood every item of it either side, had freely accepted his liability thereunder, the transaction would take the form of a new agreement legally known as account stated, which is neither a simple acknowledgment of liability nor can it be called a new contract for want of an express promise to pay as contemplated by S. 25 (3) of the Contract Act. Therefore the question of time barred items, which came under consideration before a settlement was reached, does not arise. Just as time-barred debts may be revived by an express promise to pay, in the same manner in settling an outstanding account the debtor may accept liability as to the balance found due, in respect of even time-barred items, and consequently give rise to a new cause of action from the date of such acceptance. In the circumstances, it becomes impossible to go behind such a

BHOPAL LIMITATION ACT, Art. 57.

mutual settlement so long as its integrity is beyond reproach. (*Mahomed Ahmad Khan, C.J. and Birdi, J.*) PEARE LAL *v.* RATAN LAL. **189 I.C. 802.**

——**Art. 57 and S. 19**—"*Account stated*" *and acknowledgment—Distinction between.*

Acknowledgment is a wider term including account stated within its sphere, but differing therefrom in respect of the applicability of the provisions of S. 19 of the Limitation Act. Such an acknowledgment as is outside the scope of account stated is effectual only if made within the period of limitation, whereas an account stated is independent of this condition and takes effect in virtue of the provisions of Art. 57 of the Bhopal Limitation Act. (*Mahomed Ahmad Khan, C.J.*) PEARE LAL *v.* RATAN LAL. **189 I.C. 802.**

——**Arts. 121 and 139**—Applicability—Mortgage—Suit for sale or foreclosure. *See* **188 I.C. 669.**

——**Arts. 139 and 121**—*Applicability—Mortgage—Suit for sale or foreclosure.*

Art. 121 of the Bhopal Limitation Act (corresponding to Art. 132 of the British Indian Act) is not applicable to suits for either sale or foreclosure brought on the basis of a mortgage. The appropriate article for such suits is Art. 139 of the Bhopal Act (corresponding to Art. 147 of the British Indian Act) prescribing a 60 years' limitation. (*Mahomed Ahmad Khan, C.J. and Ali Ahmad Khan, J.*) AGHA JALALUDDIN *v.* RAJJIBAI. **188 I.C. 669.**

BHOPAL SMALL CAUSE COURTS ACT, S. 11—*Review—Deposit or furnishing of security along with application—If necessary.*

Under S. 11 of the Small Cause Courts Act, an applicant for review need not deposit the decretal amount or furnish security at the time of presenting the application. According to that section, the condition which is prescribed for furnishing security or depositing cash will take effect within 90 days from the date of judgment. (*Birdi, J.*) PRABHULAL *v.* RAMNARAIN. **188 I.C. 771.**

BHOPAL STAMP ACT, S. 33—*Document unstamped—Power of appellate Court to allow party to pay duty and penalty—Proper course.*

Where the trial Court has excluded a document from evidence as unstamped, the Court of appeal is, no doubt, not competent to order the deficiency of stamp to be made good. But there is nothing in law to prevent it from remanding the case to the original Court for the purpose of enabling the party to pay the proper duty and penalty and to get the document admitted in evidence (*M. A. Khan, C.J. and Birdi, J.*) AHMAD KHAN *v.* FAIZUL HAQ. **189 I.C. 308.**

BHOPAL TRANSFER OF PROPERTY ACT, S. 58—*Document disclosing usufructuary mortgage—Possession not delivered—Nature of mortgage.*

Where a document discloses a usufructuary mortgage without a personal covenant of any sort made for the payment of the mortgage-money, and the transaction is accompanied by actual delivery of possession of the mortgaged property, then the mortgagee has no remedy in law to sue for his money or for sale or foreclosure so long as the security remains in tact and within his hands. But the position becomes quite different when no possession as stipulated is given to the mortgagee. In that case, the mortgage is neither usufructuary nor anomalous but has the same effect and is subject to the same legal limitations as are characteristic of a simple mortgage. (*Mahomed Ahmad Khan, C.J. and Ali Ahmad Khan, J.*) AGHA JALALUDDIN *v.* RAJJIBAI. **188 I.C. 669.**

BIHAR MONEY-LENDERS REG. OF (TRANS.) ACT (1939), S. 13.

——**S. 58**—*Mortgage and charge—Distinction—*Bona fide *purchaser—Position of.*

Mortgage as distinguished from charge is a *jus in rem* and holds good against subsequent transferees even without notice. (*Mahomed Ahmad Khan, C.J. and Ali Ahmad Khan, J.*) AGHA JALALUDDIN *v.* RAJJIBAI. **188 I.C. 669.**

BIHAR AND ORISSA MUNICIPAL ACT (VII OF 1922, as amended in 1934), Ss. 282 (1) and 291 (j)—*Bye-laws under—Scope—Druggist's shop—Licence fee before amendment—If annual fee or for all time—Amendment—Effect—Liability of druggist's shop registered prior to amendment to pay annual licence fee—Amendment—If* ultra vires.

Under S. 282 (1) of the Bihar and Orissa Municipalities Act, once a druggist's shop is registered, the Commissioner must grant a licence, the licence being not an annual one, but one which permits the occupier of the premises to sell drugs for an indefinite period. Under S. 291 (*f*) the Municipality has the right to fix a licence fee for the licence granted to sell drugs in the premises. The fee fixed by the law as it stood before 1931, was Rs. 20, being a lump sum of Rs. 20 for all time and not an annual fee of Rs. 20. If that fee is paid, the owner of the shop is not liable to pay anything more. The fact that by a subsequent amendment of the bye-laws the fee is paid an annual payment, cannot add to the liability of the holder of the licence granted to him before the amendment.

Quaere.—Whether the amendment of bye-law in 1934, making the licence an annual one is *ultra vires.* (*Harris, C.J. and Fazl Ali J.*) CUTTACK MUNICIPALITY *v.* SURENDRA NATH SAHU. **21 Pat.L.T. 713=A.I.R. 1940 Pat. 706.**

BIHAR MONEY-LENDERS (REGULATION OF TRANSACTIONS) ACT (VII OF 1939), S. 2—"*Debtor*"—*If includes judgment-debtor.*

The word "debtor" is used in the Bihar Money-Lenders Act in a wide sense and would include a judgment-debtor. (*Fazl Ali and Meredith, JJ.*) LAL PARI *v.* JANKI RAI. **1940 P.W.N. 750=A.I.R. 1940 Pat. 718.**

——**S. 11**—*Applicability—Purchaser of mortgaged property—Right to apply.*

S. 11 of the Bihar Money-Lenders Act is intended for the benefit of all judgment-debtors. The benefit of that section is not confined only to a mortgagor and cannot be denied to a purchaser of the equity of redemption in mortgaged property. If such purchaser is impleaded in a mortgage suit and a decree passed against him, he is a judgment-debtor and as such he is entitled to the protection afforded by S. 11. (*Fazl Ali and Meredith, JJ.*) LAL PARI *v.* JANKI RAI. **1940 P.W.N. 750=A.I.R. 1940 Pat. 718.**

——**Ss. 13 and 14**—*Applicability and scope—Purchaser of mortgaged property impleaded in suit on mortgage suit—Decree—Right to apply under S. 13.*

BIHAR TENANCY ACT (1885), S. 67.

A purchaser of mortgaged property who is impleaded in a suit on the mortgage, and is one of the judgment-debtors under the decree passed in the suit on the mortgage, is entitled to apply under S. 13 of the Bihar Money-Lenders Act of 1939, and to ask the Court to estimate the value of the property after hearing him as well as the decree-holder. S. 14 of the Act is entirely dependant on S. 13. (*Fazl Ali and Meredith, JJ.*) LAL PARI *v.* JANKI RAI. **1940 P.W.N. 750=A.I.R. 1940 Pat. 718.**

BIHAR TENANCY ACT (VIII OF 1885, as amended in 1937), S. 67—*Scope—Retrospective—Suit before amendment—Decree after—Procedure—Damages under old S. 68—Award of—Legality.*

The new S. 67 of the Bihar Tenancy Act, as amended in 1937, is not retrospective. A suit for arrears of rent of faslis 1341 to 1344 was brought on 23rd September, 1937, before the Bihar Tenancy Amendment Act of 1937 came into force. That Act came into force on 10th March, 1938 and on 16th July, 1938, the Court passed a decree under which it awarded damages to the plaintiff at 25 per cent. as provided by S. 68 of the old Act before its amendment in 1937.

Held, the decree which was passed after the new Act came into force was not correct, because S. 68 of the old Act having been repealed could not be availed of as no litigant had any vested right in the provisions of the old S. 68. The discretion given to the Court by that section having been taken away by the repeal of that section, the Court could not resort to it on the date of the judgment when that section was no longer in existence. The Court could only proceed under S. 67, but since the new S. 67 was not retrospective, a decree in terms of the old S. 67 only could be given to the plaintiff calculating simple interest at 12½ per cent. (*Manohar Lall, J.*) BHAJAN SINGH *v.* MOTIPUR ZAMINDARY CO., LTD. **6 B.R. 773=189 I.C. 269=13 R.P. 67=A.I.R. 1940 Pat. 675.**

——(before amendment of 1937), Ss. 67 and 68—Applicability—Suit for arrears of rent in 1937—Decree in 1938, after amendment came into force—Procedure—Damages at 25 per cent.—Award of—Legality. *See* BIHAR TENANCY ACT (AS AMENDED IN 1937), S. 67, **6 B.R. 773=189 I. C. 269.**

——S. 87—*Scope—Mortgagee in possession—Proceedings under section for default in payment of rent—Subsequent settlement of land on mortgage—Effect—Right of original tenant to redeem mortgagee—Duty of mortgagee in possession.*

A mortgagee from a tenant, who enters into possession of the holding, is bound to maintain his possession as against the land. He cannot by suffering dispossession (by committing default in payment of rent in breach of his undertaking under the mortgage) put an end to the tenancy and then take a new tenancy or settlement from the landlord and thereby change the character of his possession as against the original tenant (his mortgagor), and his successors in title. If he takes a new lease, that must in law be held to be taken for the benefit of the mortgagor and the mortgagor and his representatives would be entitled to redeem. The mortgagee cannot be heard to say that the land is no longer subject to the

BIHAR TENANCY ACT (1934), S. 169.

mortgage as a result of his own default or of any act on his part; to claim that the land is not being held subject to the mortgage is to claim a benefit arising from his own default, which the law does not permit. It is true that if the landlord takes proceedings under S. 87 of the Bihar Tenancy Act and enters into possession the tenant's right as against the landlord is extinguished. But where the proceeding under S. 87 are taken against the mortgagee from the tenant as a result of default committed by the mortgagee in paying rent and then the mortgagee takes a new settlement from the landlord, the new tenancy will enure for the benefit of the mortgagor, who and his successors-in-title would be entitled to redeem the mortgagee, notwithstanding the dispossession and new settlement. (*Harris, C.J. and Fazl Ali, J.*) CHANDI MANDER *v.* SITABI BHAGAT. **190 I.C. 40=6 B.R. 890=13 R.P. 151=21 Pat.L.T. 699.**

——S. 155—*Notice—Validity—Misuse complained of incomplete at time of issue of notice—If renders notice defective.*

A notice under S. 155 of the Bihar Tenancy Act is not defective because at the time it was issued the misuse may have been incomplete whereas at the time of the suit it is complete. (*Agarwala and Rowland, JJ.*) SHYAM JHULAN PRASAD SINGH *v.* SATRUHAN PRASAD SAHI. **19 Pat. 917=21 Pat.L.T. 622=A.I.R. 1940 Pat. 703.**

——S. 155 (1)—*Contents of notice—Express demand to quit land in the alternative—If essential.*

S. 155 does not require that a notice under the section should demand of the tenant in the alternative that he vacate the holding. The law does not require that the notice should contain an express demand to quit the land in order to comply with the requirements of S. 155 (1). (*Agarwala and Rowland, JJ.*) SHYAM JHULAN PRASAD SINGH *v.* SATRUHAN PRASAD SINGH. **19 Pat. 917=21 Pat.L.T. 622=A.I.R. 1940 Pat. 703.**

——S. 155 (1)—*Notice—Notice issued by Court and stated to be issued by Court—Landlord's name appearing as being the applicant seeking issue of notice—Validity.*

Tbere is nothing in S. 155 of the Bihar Tenancy Act to require that the notice to the tenant should represent it to be from the landlord direct and not from the Court at the instance of the landlord. Where the notice actually served is headed as being a notice from the Court, but the landlord's name appears on the heading as the applicant at whose instance the notice is issued, there is no defect in the notice and it is a valid notice. (*Agarwala and Rowland, JJ.*) SHYAM JHULAN PRASAD SINGH *v.* SATRUHAN PRASAD SAHI. **19 Pat. 917=21 Pat.L.T. 622=A.I.R. 1940 Pat. 703.**

——(VIII OF 1934), S. 169 (1) (c)—*Auction-purchaser—Liability of for rent between date of sale and its confirmation.*

According to S. 169 (1) (*c*) the decree-holder is entitled to receive from the surplus sale proceeds any rent which may have fallen due in respect of the tenancy between the institution of the suit and the date of the confirmation of the sale and no longer. It is quite clear then that from the date of the confirmation of the sale the only person to whom the landlord can look for his

BIHAR TENANCY ACT (1934), S. 169.

rent is the auction-purchaser. He is not liable to pay rent from the date of sale up to its confirmation as the Bihar Tenancy Act must be held to prevail and the more general enactment, that is to say S. 65, C. P. Code, will to that extent not be applicable. (*Agarwala and Rowland, JJ.*) CHHATAR SINGH *v.* SYED SHAH QASIM GHANI. **19 Pat. 824=A.I.R. 1940 Pat. 673.**

——**S. 169 (1) (c)**—*Sale—Effect of on charge for rent—Extent to which it is extinguished.*

The ordinary rule as to the consequences of a suit to enforce a charge or a mortgage is that on sale of the charged or mortgaged property the purchaser acquires the rights of both mortgagor and mortgagee, so that the charge or mortgage sought to be enforced is extinguished. Under S. 169 (1) (*c*), the decree-holder enforces a charge for the rent not only to the date of suit but rent that should accrue due up to the date of the confirmation of the sale and if that is the extent of the charge that he is enforcing that will also be the extent of the charge which is extinguished. After a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant, it cannot again be sold in execution of any other decree for rent due by the same tenant. (*Agarwala and Rowland, JJ.*) CHHATAR SINGH *v.* SYED SHAH QASIM GHANI. **19 Pat. 824=A.I.R. 1940 Pat. 673.**

——**S. 188**—*Scope—Notice under S.* 155—*Suit by some of the co-sharer landlords for ejectment after expiry of notice—Maintainability.*

A suit to eject a trespasser can be maintained by a co-sharer; but in order to have a cause of action for a suit to eject a tenant as a trespasser, the tenancy must first have been determined and the tenancy must be determined by the whole body of landlords. There must be an expression in the notice on behalf of the sixteen annas landlord of an intention to terminate the tenancy. The service of a notice under S. 155 of the Bihar Tenancy Act has not the effect of a notice under S. 49. But a suit for ejectment under S. 188 by some co-sharers only after the expiry of notice under S. 155, ought not to be dismissed entirely. A suit of this nature is not one which the whole body of landlords are required or authorised to bring. S. 188 cannot be a bar to the maintainability of a suit for compelling the defendant to set right the misuse of the land. Though ejectment cannot be decreed, the Court can and should pass a decree directing the defendant to remedy the misuse and for damages. (*Agarwala and Rowland, JJ.*) SHYAM JHULAN PRASAD SINGH *v.* SATRUHAN PRASAD SAHI. **19 Pat. 917 =21 Pat.L.T. 622=A.I.R. 1940 Pat. 703.**

BOMBAY ABKARI ACT (V OF 1878, as amended by Act VI of 1940), S. 7—*Applicability and scope—Notification prohibiting possession of intoxicants issued under old Act—Decision of High Court declaring same* ultra vires—*Subsequent Amending Act validating Rules and Notifications under original Act—If validates or revives Notification declared* ultra vires—*Statute—Retrospective operation—Rule.*

The Court leans strongly against a construction which gives to an act retrospective action, because it manifestly shocks one's sense of justice that an act legal at the time of doing it shall be made unlawful by some new enactment. On 17th July, 1939, the Government of Bombay issued a notification under the Bombay Abkari Act, 1878, S. 14-B (*b*), prohibiting the possession by any person in the Town and Island of Bombay, without a permit or licence issued by an Abkari Officer, of any intoxicant specified in the schedule thereto were respectively enacted, proceeded in these terms: "and any rule, order or notification made or issued under the said Act" (*i.e.*, the Abkari Act) "before the commencement of this Act shall be deemed to have been made or issued under the said Act as amended by this Act."

Held, (1) that S. 7 of the Amending Act would embrace the Notification of 17th July, 1939, the only notifications falling within the section were notifications effective at the date of the passing of the Amending Act and the section was not intended to affect the construction of notifications already rescinded still less of a notification which had been declared invalid and therefore had never had any effect and was a mere nullity, and S. 7 did not therefore apply to the Notification of 17th July, 1939, in excess of the amount therein mentioned. On 11th April, 1940, the High Court declared the said notification *ultra vires* and of no effect, on the ground that the Government under S 14-B of the Act could not prohibit the possession of inhabitants by the public generally. On the same day, but after the said decision of the High Court the Governor of Bombay, being the then legislative authority in Bombay, passed Bombay Act VI of 1940, amending the Bombay Abkari Act of 1878. By S. 6 of the amending Act, the proviso to sub-S (1) of S. 14 B, was deleted, and sub-S. (2) of S. 14 B was also amended in such a way as to remove in the case of notifications issued under the amending Act, the ground upon which the High Court held the notification of 17th July, 1939, to be invalid. S. 7 of the amending Act, after providing that the amendments to the preamble and the provisions of the Act should have effect from the date on which the said preamble and the said provisions; (2) that even if S. 7 did apply to the notific tion in question, it had not the effect of reviving that notification; (3) that an order of the Court was valid although the reasons upon which it was based no longer applied; (4) (*obiter*) that the notification of 17th July, 1939, even if considered to be still in force and to have been passed under the amended Act, would still be invalid because it went beyond the powers of the Provincial Legislature in that the absolute prohibition against possession went much further that merely incidentally diminishing the revenue of the Central Government, but it destroyed, though indirectly, yet none the less effectively the right to import and export intoxicants across the sea-frontier of Bombay, the principal port of British India. (*Beaumont, C.J., Wadia, Wassoodew and Sen, JJ.*) EMPEROR *v.* SAVER MANUEL DANTES. **191 I.C. 85 =42 Bom.L.R. 791=A.I.R. 1940 Bom. 307 (F. B.).**

BOMBAY CO-OPERATIVE SOCIETIES ACT (VII OF 1925), S. 54—Sale by society of property mortgaged by member—Suit by later for injunction against sale—If barred. *See* BOMBAY CO-OPERATIVE SOCIETIES ACT, SS. 70 AND 54. **189 I.C. 880=A.I.R. 1940 Sind 143.**

——**Ss. 70 and 54**—*Sale by society of property mortgaged by member—Suit by latter for injunc-*

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tion against sale—Notice, if necessary—Suit, if barred.

A suit by a member of a Co-operative Society for an injunction to restrain the society from selling the property mortgaged by him to it for securing a loan, is liable to be dismissed for want of notice under S. 70 of the Bombay Co-operative Societies Act and the suit is also barred under S. 54 of the Act. The granting of loans to its members is the business of the society and the act which the society is alleged to be about to do is an act "touching the business of the society." It is, therefore, essential that the plaintiff before filing his suit should give the society the notice specified in S. 70 of the Act. Further the dispute is one between a member and the society and under the terms of S. 54 of the Act it should be referred to the Registrar for decision by himself or his nominee. (*Lobo, J.*) FAKIR MAHOMED *v.* MERCANTILE CO-OPERATIVE BANK, LTD., KARACHI. **189 I.C. 880=13 R.S. 49=A.I R. 1940 Sind 143.**

BOMBAY DISTRICT LOCAL BOARDS ACT (VI OF 1923), S. 42—*Applicability—Suit by Local Board—Compliance with S. 42 (2).*

S. 42 of the Bombay District Local Boards Act applies not only to a suit against a Local Board but also to a suit by a Local Board. Therefore in a suit by the District Board on a contract the formalities prescribed by S. 42 (2) are required to be satisfied. An agreement of suretyship executed in favour of a District Local Board by a person standing surety for a contractor for a lease of fisheries under the Local Board is an agreement between the Local Board and the surety and must comply with the provisions of S. 42 (2) of that otherwise no suit could be brought upon it. (*Davis, J.C. and Weston, J.*) BHUMBHO METHARAM *v.* DISTRICT LOCAL BOARD, HYDERABAD. **I.L.R. (1940) Kar. 347=A.I.R. 1940 Sind 199.**

——**S. 42 (2)**—*Scope—Executed and executory contracts—Destruction—Omission to comply with requirements—Effect—English common law rule—Exceptions—Application of.*

Under the common law of England a contract with a corporation must be made under seal, but this general rule is subject to certain exception one of which is that if the work done or goods to be supplied to carry out the purposes of the corporation are accepted by the corporation and the consideration is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under seal is no answer to an action brought in respect of the work done or goods supplied. But this exception in respect of executed contracts does not apply to a case where there is express statutory prohibition in India: statutory prohibitions are not subject to the common law exception executed contracts. In the case of a contract with a Local Board which does not comply with S. 42 (2) of the Bombay District Local Board, the omission to comply with the provisions of that section is fatal though the contract is an executed contract and not executory. (*Davis, J.C. and Weston, J.*) BHUMBHO METHARAM *v.* DISTRICT LOCAL BOARD, HYDERABAD. **I.L.R. (1940) Kar. 347=A.I.R. 1940 Sind 199.**

BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901), S. 45—*Employee under Municipality— Dismissal— When wrongful—Suit for damages—Cause of action— Essentials to be proved.*

In the case of the discharge or dismissal of an employee of a local body such as a Municipality, a cause of action for damages for wrongful dismissal arises when there has been a breach of any provision, whether contained in a statute or rule made under the statute, which may fairly be regarded as forming one of the conditions of service, and affecting the tenure of office of the employee concerned. If the plaintiff fails to establish that there has been any breach of any provision in the statute or rules, that is fatal to his claim. (*Broomfield and Divatia, JJ.*) GOKAK MUNICIPALITY *v.* RAJARAM SHRIDHAR. **42 Bom. L.R. 886=A.I.R. 1940 Bom. 386.**

BOM. DT. POLICE ACT (1890), S. 36.

——**S. 48**—*Construction—Bye-laws—Essentials—Necessity for resolution of Municipality after sanction of Commissioner.*

Bye-laws may be made by a District Municipality under S. 48 of the Bombay District Municipal Act with the previous sanction of the Commissioner. The only way in which a Municipality can make a bye-law is by passing a suitable resolution after the sanction of the Commissioner is obtained. The proposed bye-law does not become operative at once as soon as the sanction of the Commissioner is given. Where the Commissioner makes material alterations in the draft, the Municipality must follow the provisions of S. 48 (2) and invite criticism on the altered bye-law. Where the Commissioner make alterations in some of the draft bye-laws but leaves others untouched, it is not enough for the Municipality to invite criticism upon the bye-laws altered by the Commissioner without doing anything further. The Municipality has to adopt them as altered by a resolution. The fact that some of the draft bye-laws are not altered or modified by the Commissioner does not warrant the view that that part must be deemed to have been passed and to have come into operation. If the Municipality does not pass a resolution bringing the bye-laws into operation, there is no bye-law in existence in the eye of the law. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* SHRINBAI SORABJI. **42 Bom.L. R. 1060.**

——**S. 59 (x-a)**—*Construction—"May"—Meaning of—Terminal tax—Power to impose—Specific legislation by local Legislature—If necessary.*

The word "may" used in Cl. (x-*a*) of S. 59 of the Bombay District Municipal Act means no more than "can" or "could be." It does not mean has been. S. 59 (x-*a*) is itself sufficient authority to enable a Municipality to impose a terminal tax. It is not necessary that there should be specific legislation by the local Legislature authorising the imposition of any particular tax by a local authority. (*Wadia and Sen, JJ.*) NAROTTAMDAS HARJIVANDAS & Co. *v.* BULSAR TOWN MUNICIPALITY. **42 Bom.L.R. 1034.**

BOMBAY DISTRICT POLICE ACT (VI OF 1890), S. 36 (2)—*Applicability—Police Officer enticing away married woman employed as sweeper in police lines—Offence.*

The scope and purpose of S. 36 (2) (*c*) of the Bombay District Police Act is clearly limited to offences committed by police officers as such, the clause cannot apply and is not intended to apply to a case of an offence alleged to have been committed not in relation to any breach of duty by a

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police officer as such but as a member of a public. Where a police officer entices away a married woman employed as a sweeper in the police lines and thereby commits an offence under S. 498, I. P. Code. S. 36 (2) (*c*) has no application, as it is not designed to deal with such an offence. (*Davis, J.C. and Weston, J.*) MAHOMED RAMZAN KHAN *v.* EMPEROR. I.L.R. (1940) Kar. 443=190 I.C. 447=41 Cr.L.J. 955=A.I.R. 1940 Sind 192.

BOMBAY HIGH COURT (APPELLATE SIDE) RULES — Costs—Taxation—Practice—Suit or appeal dismissed with costs—Meaning—Defendants—If entitled to separate sets of costs or only one set. *See* DECREE—CONSTRUCTION. 42 Bom.L.R. 878.

BOMBAY HIGH COURT (ORIGINAL SIDE) RULES (1936), R 138—*Scope and effect of—Reply to counter-claim—Necessity—Duty of defendant to counter-claim to put in written statement.*

R. 138 of the Bombay High Court (Original Side) Rules applies in terms to any defendant to a counter-claim; and in every case in which a counter-claim is filed there is an obligation on the defendant or defendants to the counter-claim to put in a reply and they wish to avoid the application of R. 138. R. 138 is not limited in its application to a case in which there are more defendants to the counter-claim than the original plaintiff to the suit. It equally applies to a case where the original plaintiff to the suit is the sole defendant to the counter-claim. (*Blackwell, J.*) BAI DAYAMBAI *v.* MAHOMEDALLI EBRAHIMJI. I.L.R. (1940) Bom. 663=42 Bom.L.R. 919=A.I.R. 1940 Bom. 410.

——**R. 534**—*Scope—Attorney and client—Agreement to pay costs on original side scale in appellate side matter—Remedy of attorney—Order for taxation—Jurisdiction to make—Suit for costs.*

The only remedy open to an attorney who claims costs on the original side scale in an appellate side matter on the basis of an agreement made by the client to pay such costs, is to bring a suit upon the agreement which he relies on to get that agreement established by the Court and to ask for an order for taxation and for payment of the bill when taxed. It is not open to a Judge or to the Prothonotary to make an order for taxation in respect of an appellate side matter under R. 534 of the Original Side Rules of the Bombay High Court. (*Blackwell, J.*) SMETHAM BYRNET LAMBETT *v* DARASHAW. 42 Bom.L.R. 922=A.I R. 1940 Bom. 412.

BOMBAY INSOLVENCY RULES (1910), R. 52-B (2)—*Affidavit in opposition to insolvency notice—If to be filed by debtor personally—Affidavit by constituted attorney - Sufficiency.*

There is nothing in R. 52-B (2) of the Bombay Insolvency Rules which makes it incumbent on a debtor to file the affidavit in opposition to the insolvency notice personally. He may file an affidavit by his constituted attorney; and if he does he complies sufficiently with the rule. (*Blackwell, J.*) MORARJEE GOKULDAS & Co. *v.* SHOLAPUR SPINNING AND WEAVING CO., LTD. 42 Bom.L.R. 948.

——**R. 52-B (2)**—*Set-off—Validity—Insolvency notice by several judgment-creditors—Set-off available against one only—If effective answer to notice.*

In answer to an insolvency notice by several judgment-creditors it is not open to the debtor to set up a counter-claim or set-off which he has against one creditor only. Such a set off cannot be relied upon in answer to the insolvency notice where other judgment-creditors have the right to enforce payment of the decrees. (*Blackwell, J.*) MORARJEE GOKULDAS & Co *v.* SHOLAPUR SPINNING AND WEAVING CO., LTD. 42 Bom.L.R. 948.

BOMBAY LAND REVENUE CODE (V OF 1879), S. 65—*Applicability to alienated land.*

S. 65 of the Bombay Land Revenue Code, though in terms applies to unalienated land, can be made applicable to alienated land. (*Beaumont, C.J.*) BAI KABA *v.* RAMNIKLAL SUNDERLAL. 42 Bom.L.R. 747=A.I.R. 1940 Bom. 342.

——**S. 65**—*Scope—Permanent tenant under S. 83—User of land for non-agricultural purposes—Permission of Collector—Necessity for.*

Under the general law as between a landlord and tenant, the tenant is not entitled to alter the character of the property. The rights of a permanent tenant whose tenancy arises by reason of the presumption in S. 83 of the Bombay Land Revenue Code are really governed not by the general law but by the Land Revenue Code. Such a tenant is not entitled to use the land for non-agricultural purposes without the permission of the Collector under S. 65 of the Land Revenue Code, whether or not he can do so under the general law. (*Beaumont, C.J.*) BAI KABA *v* RAMNIKLAL SUNDERLAL. 42 Bom.L.R. 747=A.I.R. 1940 Bom. 342.

——**S. 83**—*Applicability*— Dewasthan *inam-land—Presumption of permanent tenancy—If arises.*

S. 83 of the Bombay Land Revenue Code makes no distinction between land belonging to a temple or a deity and land belonging to private owners and there is no reason why the presumption under S. 83 should not apply to *dewasthan* inam land. A presumption of permanent tenancy can therefore arise even in respect of such lands under S. 83. (*Wadia and Sen, JJ.*) INJAL DEVI *v.* BHUJYA ANAJI. 42 Bom.L.R. 1031.

——**S 83**—*Presumption under—Conditions.*

The particular presumption under S. 83 is not directed to be made save upon two conditions (among others): first, that there is no satisfactory evidence of the date of the commencement of the tenancy, and secondly, that this lack is due to the antiquity of the tenancy. The first condition is not excluded by showing that the tenancy had its origin at some date within a period of twenty years which cannot be more precisely ascertained. By a tenancy's antiquity the section does not intend any reference to remote ages in the past or to "time immemorial" in the sense of the English law. It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted. Where the tenancies are not proved to have been in existence before 1892 the presumption under S. 83 cannot properly be applied to them, notwithstanding that the evidence by no means excludes the possibility of an earlier origin. 47 Bom. 4, Disappr. (*Sir George Rankin.*) SHANKARRAO *v.* SAMBHU

BOM. LAND REV. CODE (1879), S. 135-J.

NATHU. 190 I.C. 342=45 C.W.N. 57=1940 O. L.R. 608=13 R P.C. 81=52 L W. 966=7 B.R. 110= A.I.R. 1940 P.C. 192 (P.C.).

——S. 135-J—*Entry in record-of-rights—Presumption--Property of inam-holder managed by Collector at time of preparation.*

The entry in the record-of-rights prepared in 1915, of the inam village of Khed Digar in Shahada Taluka of West Khandesh District in the Bombay Presidency, recording the tenancies of the village as permanent and heritable must be given the full benefit of S. 135-J, Bombay Land Revenue Code. The presumption under the aforesaid section is not weakened by the mere fact that when the record-of-rights was prepared the holder of the inam village was a minor and his property was being managed by the Collector on his behalf. But a detailed and reliable evidence of the manner in which and the basis on which an increase of rent was made by the landlord can have great effect in rebutting the presumption of the tenancies being permanent. (*Sir George Rankin.*) SHANKARRAO *v.* SAMBHU NATHU. **190 I.C. 342=45 C.W.N. 57=1940 O.L.R. 608=13 R.P.C. 81=52 L W. 966=7 B. R. 110=A.I.R. 1940 P.C. 192 (P.C.).**

——Ss. 137 and 187—*Toll contract—Arrears due under—Claim in respect of—Preference—Right of claimant.*

Under S. 187 of the Bombay Land Revenue Code, a claim for recovery of dues in respect of toll contracts stands on the same footing as a claim for the recovery of arrears of land revenue, and a claimant in respect of such arrears can claim preference under S. 137 of the Code if he proves that a process was issued in respect of a demand for the arrears of the current year for that year, although the sale takes place not that year but only afterwards. (*Rangnekar, J.*) HANMANTAGOUDA NAGANGOUDA *v.* SHIVAPPA DUNDAPPA. **42 Bom.L R. 1123.**

——S. 187—Scope and effect of—Toll contract—Arrears due under—Right to preference—If stand on same footing as arrears of land revenue. *See* BOMBAY LAND REVENUE CODE, SS. 137 AND 187. **42 Bom.L.R. 1123.**

BOMBAY MUNICIPAL BOROUGHS ACT (XVIII OF 1925), Ss. 105 and 203—*Construction and scope—Distress for taxes—Limitation—Suit under S. 203 barred by time—If bars remedy by distress.*

On a construction of Ss. 105 and 203 of the Bombay Municipal Boroughs Act, there is no justification for holding that the levy of taxes by distress under S. 105 can only be made within the period limited for a suit under S. 203. S. 105 is not subject to any limitation and it would apply even if the period for bringing a suit under S. 203 has expired. (*Broomfield and Divatia, JJ.*) SURAT BOROUGH MUNICIPALITY *v.* SARIFA. **42 Bom.L R. 960.**

——S. 152 (1) (a)—*Construction—Setting up stall—What amounts—Lorry on wheels with goods for sale.*

Introducing into a street a lorry on wheels with goods for sale upon it does not amount to setting up a stall within the meaning of S. 152 (1) (*a*) of the Bombay Municipal Boroughs Act. That sub-section deals with making some form of addition or annexe, more or less permanent, to a building in the street. It is directed against the man who has a shop or house in the street, and who encroaches upon in the street by making some sort of addition to his house or shop. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* HASAM MAMAD. **I.L.R. (1940) Bom. 774=42 Bom.L.R. 785=A.I.R. 1940 Bom. 378.**

BOM. PREV. OF GAMB. ACT (1887), S. 4.

——S 152 (1) (b)—*"Any other thing"—Meaning of—Hand-cart with merchandise left standing in street—If covered by S. 152 (1) (b).*

The words "any other thing" in S. 152 (1) (b) of the Bombay Municipal Boroughs Act must be read *ejusdem generis* as the words "box, bale, package or merchandise." Those words seem to cover merchandise and things in which merchandise can be packed, and any other thing must be of the same kind or genus and does not include a vehicle. A motor car or a motor lorry or a horse drawn vehicle or a hand-propelled vehicle such as a hand-cart, though containing merchandise and left standing in a street, cannot be said to come within the sub-section. A vehicle does not fall within the mischief of S. 152. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* HASAM MAMAD. **I L.R. (1940) Bom. 774=42 Bom.L.R. 785=A.I.R. 1940 Bom. 378.**

——S. 203—Scope—If controls S. 105—Distress for taxes after expiry of time fixed for suit—Permissibility. *See* BOMBAY MUNICIPAL BOROUGHS ACT, SS. 105 AND 203. **42 Bom.L.R. 960.**

BOMBAY PREVENTION OF FOOD ADULTERATION ACT (V OF 1925), S. 13—*Scope—Charge under S. 4 (1) (b) and (c)—Particulars—Summons—Form and contents of—Essentials.*

Under S. 13 of the Bombay Prevention of Adulteration Act, every summons should specify the particulars of the offence charged, the name of the complainant and the date and place fixed for the hearing of the case. A summons which does not state the name of the complainant but which merely mentions some initials at the top and does not mention the date and place of the offence or what the offence consisted of, is not a proper summons. It is not enough to say that the offence has been charged under a particular section. The title of the Act and not merely an alteration of it must be set out; and the accused must also be told what he is said to have done which he ought not to have done. A summons to an accused charged under S. 4 (1) (*b*) and (*c*) of the Bombay Prevention of Adulteration Act was addressed to the accused and said "Comp. M.D. F I. Whereas it is necessary for you to present yourself for answering the charge for an offence under the Bombay Prevention of Adulteration Aet, S. 4 (1) (*b*). (*c*)., you are hereby ordered to be present personally or by a pleader before the Honorary Magistrate of Surat on the date the 30th of November 1939 A.D."

Held, that the summons was hopelessly inadequate and was such as to cause prejudice to the accused. The accused must be told what the offence charged was, namely, that he sold or offered or exposed for sale as eatable food, a substance which was not eatable. (*Beaumont, C. J. and Wassoodew, J.*) EMPEROR *v.* SHAMLAL JAMNADAS. **42 Bom.L R 1028.**

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887), S. 4—*Inability to pay—If ground for imposing lesser fine.*

BOM. TOLL ON ROADS & BRIDGES ACT (1875), S. 3.

It is within the meaning of the proviso of the clause relating to the imposition of punishments for offences under S. 4 for the Court to put on record as a special reason for the imposition of a lesser fine, the inability of the accused to pay it. (*Davis, J.C.*) NARSI DEVJI *v* EMPEROR. **190 I. C. 703=41 Cr.L.J. 959=A.I.R. 1940 Sind 187.**

BOMBAY TOLL ON ROADS AND BRIDGES ACT (III OF 1875), S. 3—Levy of toll under—If incident of ownership of land—Toll—If immovable property. *See* REGISTRATION ACT, S. 17 (1) (*b*). **42 Bom.L.R. 750.**

BOUNDARIES—*Fixation of—Tidal and navigable river given as boundary—Boundary line—Where to be fixed—Rule.*

Where a property is bounded by a road or a river, the boundary, even if given as the road or the river, is the middle of the road or the river as the case may be. This principle is not applicable to the case of a river which is tidal and navigable. In the case of tidal and navigable rivers the bed of the river belongs to the Crown up to the line of medium high water mark, that is, the line of the medium between the spring and the neap tides throughout the year. Such medium high water mark is not to be taken as the same thing as the middle line of the river *ad medium filum aquae*. Where a tidal and navigable river is given as the northern boundary of a Municipality in a Government notification, since the bed of the river vests in the Crown, and not in the Municipality, a place beyond or below the line of medium high water mark is not within the municipal limits. (*Wadia and Sen, JJ.*) NAROTTAMDAS HARJIVANDAS *v.* BULSAR TOWN MUNICIPALITY. **42 Bom.L.R. 1034.**

BUDDHIST LAW (Burmese)—Burman Buddhist becoming a rahan—Effect. *See* SPECIFIC RELIEF ACT, S. 42—DECLARATORY SUIT. **1940 Rang.L.R. 668.**

——(Burmese)—Eindaunggyi *couple*—Atetpa *property—If becomes joint property—Right, if any acquired by either spouse.*

In the case of an *eindaunggyi* couple, their *atetpa* property does not become their joint property. Neither spouse acquires any interest in the *atetpa* property of the other. (*Mosely and Sharpe, JJ.*) U SAN YI *v.* MAUNG PO YI. **1940 Rang.L.R. 534=A.I.R. 1940 Rang. 286.**

——(Burmese)— Eindaunggyi *couple—Death of both without issue within a week--Rights of* atet *children—Doctrine of common disaster—Applicability.*

Where both the *eindaunggyi* husband and wife die within a week of each other without leaving any children of the marriage, the *atet* children of the wife are not entitled to any share in the *atetpa* property of their step-father, in preference to the claims of his *atet* children. The doctrine of common disaster is not of any assitance to wife's *atet* children. It cannot be applied to mean that the heirs of each spouse are entitled to a share in the *atetpa* of the other spouse as if their parent had been the survivor. (*Mosely and Sharpe, JJ.*) U SAN YI *v.* MAUNG PO YI. **1940 Rang.L.R. 534=A.I.R. 1940 Rang. 286.**

BURDEN OF PROOF — *Consideration—Absence of—Literate executant.*

BURMA LAWS ACT (1898), S. 37.

When a person who is literate and does moneylending business admits the execution of a document but pleads want of consideration, the onus of proving want of consideration is upon him and not upon his opponent. (*Abdul Qayoom, C.J.*) MELA RAM *v.* GOKAL CHAND. **42 P.L.R. J. & K. 270.**

——*Shifting of—Meaning.*

The phrase 'shifting of the onus of proof' is an unfortunate one, although one finds it very commonly used in judgments. Once the onus is laid on a party at the time of framing the issue there is no such thing as the shifting of the onus at a later stage on account of the fact that the party on whom the onus lay had produced a certain amount of evidence. All that can happen in such cases is that the Court might hold that the party on whom the onus lay had sufficiently discharged it by production of the evidence concerned and that if the opposite party wants to prove any fact to rebut the evidence produced by the party on whom the onus lay then the onus of proving the additional fact must lie on the party which relies on that fact. (*Sathe, J.M.*) MAHABIR *v.* SARJU. **1940 A.W.R. (B.R.) 130=1940 R.D. 333=1940 O.A 722=1940 A.L.J. (Supp.) 26.**

——*When a determining factor and when not—Withholding of evidence relying on onus—Propriety—Duty of parties.*

Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence *pro* and *con* so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered. Persons in possession of documents or information cannot lie by trusting to the abstract doctrine of burden of proof and fail to furnish to the Courts the best material for its decision. Though this may be right with reference to third parties it is, so far as parties to the suit are concerned, an inversion of sound practice to withhold the best evidence from the Court. (*Mya Bu and Mosely, JJ.*) CHAN WAN HONG TONG *v.* A. K. A. C. T. V. CHETTIAR FIRM. **1940 Rang.L.R. 659.**

BURMA CARRIAGE OF GOODS BY SEA ACT (1925), Sch., Arts. 2 and 3—*Act and Schedule incorporated in contract to carry goods by sea—Damage to goods by negligence—Cause of action on contract or tort—Limitation.*

Where in a contract to carry a cargo of potatoes by sea all the terms and provisions of the Burma Carriage of Goods Act had been incorporated as applicable to the contract, and there is damage to the cargo owing to the negligence of the servants of the carrier, by virtue of Art. 11 of the schedule the carrier shall be liable under the contract and not by way of tort in addition to it. A suit in respect of such damage is to be brought within 1 year after delivery or the date when goods should have been delivered. (*Roberts, C.J. and Dunkley, J.*) BILASROY *v.* SCINDIA STEAM NAVIGATION CO., LTD. **1940 Rang. L.R. 552=A.I.R. 1940 Rang. 294.**

BURMA LAWS ACT (XIII OF 1898), S. 13 and Succession Act (1925), S. 37—*Indian or Burmese Christians—S. 13 of the Burma Laws Act, if applies—Illegitimate and adopted children, if can come in under S. 37 of Succession Act.*

CAL. MUNICIPAL ACT (1923), S. 27.

S. 13 of the Burma Laws Act does not apply to Indian or Burmese Christians and an adopted child is not an heir entitled, on an intestacy, to inherit the estate of his deceased adoptive parent, such parent dying a Christian. Adopted and illegitimate children cannot be included under S. 37 of the Succession Act. (*Roberts, C.J. and Blagden, J.*) CYRIL *v.* J. D. ATTAIDES. **1940 Rang. L.R. 654.**

CALCUTTA MUNICIPAL ACT (III OF 1923), S. 27—*Appointment of more than one election agent—Validity—Rejection of nomination papers.*

S. 27 of the Calcutta Municipal Act provides that in each nomination paper the candidate shall sign a declaration appointing *either* himself *or* some other person to be his election agent. If, therefore, a candidate appoints a certain person as his election agent in the first two nomination papers but in the subsequent nomination papers appoints himself without revoking the previous nomination, the returning officer will be justified in rejecting these nomination papers for failure to comply with the provisions of the Act which provides that only one election agent shall be appointed. (*McNair, J.*) MAHOMED HOSSAIN *v.* MAHOMED RAFFIQUE. **I.L.R. (1940) 2 Cal 230.**

——**S. 46**—*Election petition—Returning officer—If necessary party.*

The returning officer is not a party who should be joined in an election petition. (*McNair, J.*) MAHOMED HOSSAIN *v.* MAHOMED RAFFIQUE. **I.L.R. (1940) 2 Cal. 230.**

——**S. 46**—*Plural-Councillor constituency—Petition challenging election of one Councillor—Other Councillors, if necessary parties.*

If an election petition challenges the validity of the election of one of the councillors elected to a plural-councillor constituency all the other elected councillors of that constituency should be made parties to it. For, if the election of one candidate is void, the entire election in that constituency has to be held afresh. (*McNair, J.*) GIRISH CHANDRA GHOSH *v.* SUDHIR CHANDRA RAY. **I.L.R. (1940) 2 Cal. 242.**

——**Ss. 46 and 47**—*Recount and scrutiny—Order for—Power of Court.*

Under the Calcutta Municipal Act, the Court has no power to order a recount and scrutiny of votes. Even if a recount is permissible under the Act, an order for recount should not be made except in cases which are substantiated by specific instances. (*McNair, J.*) SHARFUDDIN AHMAD *v.* SHAMSUL HUQ. **I.L.R. (1940) 2 Cal. 373.**

——**Ss. 46 and 47**—*Rejection of nomination papers—Decision of returning officer—If can be questioned.*

If the returning officer ejects the nomination papers of a candidate, his decision cannot be questioned in an election petition. (*McNair, J.*) MAHOMED HOSSAIN *v.* MAHOMED RAFFIQUE. **I.L.R. (1940) 2 Cal. 230.**

——**S. 407**—*Person selling singara fried in ghee—If can be convicted under.*

A person found to have sold singara fried in ghee cannot be said to have sold ghee and hence cannot be convicted under S. 407 of the Calcutta Municipal Act. (*Henderson and Mahamed Akram, JJ.*) ABALA KANTA GHOSE *v.* CORPORATION OF CALCUTTA. **A.I.R. 1940 Cal. 577.**

C. P. DEBT CONCIL. ACT (1933), S. 7-A.

——**Sch. II, Part I, Para. 3**—*Offence of personation—Candidate identifying personator after delivery of ballot paper—If guilty.*

Sch. II, Part 1, para. 3 of the Calcutta Municipal Act makes the offence of impersonation the procuring of an application by a person for a voting paper in the name of some other person. The offence is complete when the person applies for a ballot paper. A candidate who identifies the alleged personator after the ballot paper is delivered to him when his right to vote is challenged, is not guilty of this offence. (*McNair, J.*) GIRISH CHANDRA GHOSH *v.* SUDHIR CHANDRA RAY. **I.L.R. (1940) 2 Cal. 242.**

CANADA SEDUCTION ACT (1922), S. 5—*Right of action under—Conditions.*

Under S. 5 the Legislature intended to give a new right of action "in the same manner as an action for any other tort" to an unmarried female who has been seduced. The action under S. 5 has nothing to do with the parental relations, nothing to do with the relation of master and servant, and nothing to do with loss of service or service, and there is no *a priori* probability that S. 5 contemplates relief conditioned upon the seduction being followed by childbirth or pregnancy or illness directly traceable to the physical act of copulation and giving rise to some disability for service. No such conditions are expressed in S. 5. (*Lord Thankerton.*) J. E. BROWNLEE *v.* VIVIAN MACMILLAN. **A.I.R. 1940 P.C. 219.**

CAUSE OF ACTION—*Inchoate nature of—Remedy—Amendment when useful.*

Anything done by a party after the filing of the suit could not complete an incomplete cause of action, nor entitle the party to any further relief in the suit. If a party at the moment he commences a suit has but an inchoate cause of action, nothing he thereafter does can entitle him to any relief in that suit. His only course is to discontinue it and, if possible, start afresh. A party who, having a complete cause of action, alleges it imperfectly may be helped by amendment; but a premature suit is incurable. (*Roberts, C.J. and Blagden, J.*) EUSOOF KARWA *v.* NIEMEYER. **1940 Rang.L.R. 603.**

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933)—*Board's acts—Presumption as to.*

The ordinary presumption is that Courts and official bodies like the Debt Conciliation Boards act legally and with due regard to the rules of law. Hence, if the Board records a settlement, it must be assumed, until the contrary is shown, that the settlement was according to law. Where the 40 per cent. rule could not have been observed in a case unless the order of discharge in respect of other debts had been already passed, it must be assumed that the order was passed before the settlement was reached. (*Bose, J.*) DEOBA *v.* GANESHLAL. **1940 N.L.J. 614.**

——**S. 7-A**—*Scope of operation.*

After the passing of S. 7-A in respect of applications made after S. 7-A was passed the Civil Court cannot go into the question of jurisdiction, but as regards applications pending when S. 7-A was passed, it can. If it finds that in truth and in fact the applicant was not a debtor it follows that the Board has no jurisdiction. (*Stone, C.J. and*

C. P. DEBT CONCIL. ACT (1933), S 8.

Clarke, J.) · BENIRAM *v.* RAMKRISHNA. **1940 N. L. J. 562.**

——**Ss. 8 (2) and 16**—*Debt declared discharged —Effect of outside the province—Promissory note executed in Bombay—Declaration of discharge by Central Provinces Debt Conciliation Board—Suit on promissory note in Bombay—Maintainability—Jurisdiction — Contract—Suit—Law applicable.*

The discharge of a debt due under a promissory note executed in Bombay by the Debt Conciliation Board of Central Provinces under the Central Provinces Debt Conciliation Act is no defence to a suit on the promissory note in a Court in Bombay. A Civil Court in Bombay has jurisdiction to entertain the suit to recover the debt which has been duly declared to be discharged by the Debt Conciliation Board of the Central Provinces. When there is nothing in the terms of the promissory note determining the law of the contract, the law of the place, namely, Bombay, where the contract is made is the law of the contract. Although the Province of Bombay and the Central Provinces are both part of British India, when the law of one province is distinct from the law of the other, the two provinces must be regarded for the purposes of the rule, as foreign countries *inter se*. The contract made in Bombay cannot be discharged by a method recognised in the Central Provinces. (*Beaumont, C.J. and Wassoodew, J.*) SHANKAR VISHNU *v.* MANEKLAL HARIDAS. **42 Bom L.R. 873=A.I R. 1940 Bom. 362.**

——**S. 12 (1)**—*Determining point of time—Discharged debts—If can be excluded.*

The point of time with which S. 12 (1) of the Central Provinces Debt Conciliation Act is dealing, is the date of the amicable settlement. The moment that an order of discharge is passed under S. 8 (2) in respect of certain debts, they cease to be owing and hence they ought to be excluded, when the remaining debts are taken up for settlement. (*Bose, J.*) DEOBA *v.* GANESHLAL. **1940 N L J. 614.**

——**S. 13 (1) and Central Provinces Land Alienation Act (II of 1916), S. 16 (2)**—*Sale under S. 13 (1) of Debt Conciliation Act—If can be held under S. 16 (2) of the Land Alienation Act.*

Where on the failure of a member of an aboriginal tribe to pay the instalments fixed by the C. P. Debt Conciliation Board an application for sale under S. 13 (1) of the C P. Debt Conciliation Act was made, it was held that there was nothing to show that it was ever contemplated or intended that the provisions of S. 13 of the Act should operate so as to deprive a debtor, being a member of an aboriginal tribe, of the protection afforded to his immovable property by the Land Revenue Act, and that hence the land in question was not liable to be put to sale in pursuance of S. 13 (1) of the Debt Conciliation Act and S 16 (2) of the C. P. Land Alienation Act. (*Burton, F.C.*) DIWAN TIMRANSHAH *v.* BABU ANANTRAM. **1940 N.L.J 579.**

CENTRAL PROVINCES LAND REVENUE ACT (II OF 1917), S. 37 and C. P. Tenanay Act, S. 24—*Powers of an appellate Court—Appeal against ejectment.*

An appellate Court disposing of an appeal against an ejectment of a tenant under S. 24, C. P. Tenancy Act, is not empowered by S. 37 (3) of the C. P. Land Revenue Act, at the time of reversing the order appealed against himself to proceed with and carry out the order for ejectment under sub-S. (2) of S. 24 of the C. P. Tenancy Act. There is no provision for the appellate Court to take the case on its own file for disposal. (*Burton, F.C.*) LAXMIKANT WASUDEO *v.* NILKANTH. **1940 N.L.J 698.**

C, P. LAND REV. ACT (1917), S. 187.

——**Ss. 68 and 106**—*Declaration of* khudkasht *land as* sir—*If a matter of discretion—Duty of Revenue Officer with reference to.*

The provisions of sub-S. (3) of S. 68 of the Central Provinces Land Revenue Act are mandatory and impose a duty, not a discretionary power, on the Deputy Commissioner to record *khudkasht* land as *sir* land on conditions stated. The declaration under S. 68 read with S. 108 is obligatory if the conditions of sub-S. (3) of S. 68 are satisfied. An attachment by Civil Court of the land in question cannot affect these provisions. The Revenue Officer is bound to satisfy himself by reference to the relevant records that land claimed to have been cultivated continuously by a proprietor for six continuous years is recorded in the village land records as having been so cultivated for the required period. (*Burton, F.C.*) BALMUKUND *v.* MAHADEO. **1940 N.L.J 611.**

——**S. 146**—*Sale in disregard of conditions of sanction—If without sanction.*

Where a sale is held in disregard of the conditions imposed by the Deputy Commissioner when according sanction, the sale must be deemed to be without sanction and it is not in accordance with law and could not be maintained. (*Burton, F.C.*) BUDHMAL MARWARI *v.* BALARAM. **1940 N.L.J 581.**

——**S. 166**—*Scope and object of—Imperfect partition if prohibited.*

S. 166 of the Central Provinces Land Revenue Act is designed to give the Revenue Officer discretion to refuse to make an imperfect partition involving the tenant's land and to limit the partition to the homefarm land, and the principal object was to avoid sub-division of tenant's rents and not to save time and labour involved in partition. There was no intention to prohibit altogether imperfect partition involving shares of dimensions less than those stated but the Deputy Commissioner was given discretion to limit the partition to the homefarm land. (*Burton, F.C.*) SUMANT PRASAD *v.* SURAJ KUNWAR. **1940 N.L. J. 632.**

——**S. 187**—*Minor lambardar—Exercise of powers—Procedure.*

Where a lambardar is a minor, his guardian cannot exercise the powers of a lambardar in relation to the proprietary body. The power of a lambardar to act through a guardian is nowhere recognised in the Central Provinces Land Revenue Act, the only provision for the exercise of the powers of a lambardar who is under a disability is through a duly appointed lambardar gumashta. (*Grille and Pollock, JJ.*) BRIJMOHAN SINGH *v.* TULSIRAM. **1940 N.L.J. 430=A.I.R. 1940 Nag 377.**

——**S. 187 (3)**—*Interpretation—'The duties of the office'.*

The phrase 'the duties of the office' in sub-S. (3) of S. 187 of the Central Provinces Land

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Revenue Act is sufficiently wide to cover both the phrases 'the duties imposed' and the 'powers conferred' in sub-S. (1) of that section. Were the lambardar gumashta's activities confined to the duties imposed under S. 188 (1), the anomalous position might arise that a minor lambardar might refuse to collect rents or village profits and yet the lambardar gumashta would remain liable for the collection of the land revenue which is assessed at a proportion of the village profits. (*Grille and Pollock, JJ.*) BRIJMOHAN SINGH *v.* TULSIRAM. **1940 N.L.J. 430=A.I.R. 1940 Nag. 377.**

——**S. 189**—*Removal from office of persons mentioned in—Grounds.*

The Deputy Commissioner can remove a sardar lambardar, a lambardar, or a lambardar gumashta either because he ceases to have a proprietary interest, or on account of his bad character, or gross misconduct, or because he is neglectful in the discharge of his duties: (1) *vis a vis*—the Government, and (2) *vis a vis*—the proprietary body. Were the circumstances on which a removal from office could be founded not general to all persons specified in the sub-section, that sub-section would have been differently worded. (*Grille and Pollock, JJ.*) BRIJMOHAN SINGH *v.* TULSIRAM. **1940 N.L.J. 430=A.I.R. 1940 Nag. 377.**

——**S. 203**—*Sites in abadi—Power to distribute—Co-sharer, if can purchase.*

The allotment of sites in the abadi is a matter that has been placed by the C. P. Land Revenue Act in the hands of the lambardar. It is not open to a co-sharer to buy up a site without a lambardar's consent and claim to retain possession of the site, and a lambardar can sue to obtain possession of it. (*Grille and Pollock, JJ.*) NILKANTH *v.* VISHWANATH. **1940 N.L.J. 480=A.I.R. 1940 Nag 370.**

CENTRAL PROVINCES MONEY-LENDERS ACT (XIII OF 1934), S. 11—*Application under—Forum.*

An application for the grant of instalments under S. 11 of the C. P. Money-Lenders' Act is to be made to the decree Court and not to the executing Court. (*Stone, C.J. and Clarke, J.*) HARI SADASHEO *v.* INDIAN COTTON COMPANY, LTD. **1940 N.L.J. 561.**

——**S. 11**—*Power conferred by—Nature—Interference in appeal—Propriety.*

S. 11 of the C. P. Money-Lenders Act confers upon the Court discretionary power to grant instalments and where the discretion is exercised judicially it is not proper for an appellate Court to interfere with it. (*Stone, C.J. and Clarke, J.*) HARI SADASHEO *v.* INDIAN COTTON CO., LTD. **1940 N.L.J. 561.**

CENTRAL PROVINCES PROHIBITION ACT (VII OF 1938), S. 11—*Applicability—Proper sentence for a first offence.*

S. 11 of the C. P. Prohibition Act is not intended to apply to a host who offers spirituous refreshment to a friend. For a first offence of drinking spirit the sentence of four months' rigorous imprisonment is entirely disproportionate, particularly when there is provision in the Act for binding over people for such offences. (*Grille, J.*) EMPEROR *v.* MAHADEO. **1940 N.L.J. 574.**

CHILD MAR. RES. ACT (1929), S. 5.

CENTRAL PROVINCES RELIEF OF INDEBTEDNESS ACT (1939), S. 6 (3)—*Applicability—Proceedings for confirmation of Collector's sale.*

S. 6 (3) of the C. P. Relief of Indebtedness Act in no way bars the confirmation of a sale by a Collector. (*Burton, F.C.*) BABULAL SHEO CHARANLAL *v.* BHAGWANTIBAI. **1940 N.L.J. 697.**

CENTRAL PROVINCES TENANCY ACT (I OF 1920), S. 13—*Right to apply under—Transferee from party to a transfer contrary to S. 12.*

Where a surrender by a tenant of an occupancy holding to the proprietor in lambardar and the latter's lease to another on the same day of the holding in the same right, is found to be a transfer contrary to S. 12 of the C. P. Tenancy Act, a subsequent transferee of the whole proprietary interest (who had become a lambardar) cannot, under S. 13 of the Act, have the former transfer set aside in as much as he had only succeeded to the right, title and interest of his transferor, who had accepted the surrender and so could not question its validity. (*Greenfield.*) CHHOTELAL *v.* HAJI MULLA. **1940 N.L.J. 483.**

——**S. 24**—*Applicability—Change of lambardar pending ejectment proceedings.*

There is nothing in S. 24 or in any other section of the Central Provinces Tenancy Act to warrant the view that, if the decree-holder named in the order of ejectment is no longer lambardar or landlord, proceedings may not be taken under that section. The order of ejectment is not drawn in the name of the lambardar or landlord as such *ex officio*; hence a change of lambardars cannot affect the right to execute the decree. (*Burton, F.C.*) LOKMAN TIKWA LODHI *v.* GAWARABAI. **1940 N.L.J. 523.**

——**S. 24 and C. P. Land Revenue Act, S. 23**—*Notice of ejectment—Proper service—Appeal from order of ejectment.*

Service on a pleader appearing for a party in an appeal of a notice of ejectment, has the effect of service on the party if the pleader by his appearance can be held to have been appointed to act in the proceeding in appeal from the order of ejectment. (*Burton, F.C.*) LAXMIKANT WASUDEO *v.* NILKANTH. **1940 N.L.J. 698.**

CHARGE—Creation—Agreement by debtor to creditor out of salary every month—Authority to employer to pay creditor part of salary every month—Effect—If creates charge or equitable assignment. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 60. **1940 M.W.N. 1167.**

——Enforcement—Charge for maintenance created by decree—Recovery of arrears of future maintenance awarded—Execution—Permissibility—Fresh suit—Necessity. *See* C. P. CODE, S. 47. **21 Pat L.T. 783.**

CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929), S. 5—*Construction and scope—"Perform, conduct or direct"—Meaning of—Parents of grown up bride taking part in Kanyadan ceremony—If liable.*

S. 5 of the Child Marriage Restraint Act is intended to punish the solemnizing a child marriage. The words "perform, conduct or direct" in S. 5 bear the same import and mean working towards the end, that is, completing the union, and are used to indicate the solemnization of the

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marriage. They do not suggest the arranging of marriage merely or attending a marriage ceremony with a view to assisting in the solemnization of the marriage. The words are used in relation to the ceremony. The performance of a marriage among Hindus means the solemnization thereof by conducting such ceremonies as would complete and validate the marriage, that is, the performance of the sacramental or religious and not the secular ceremony. Mere participation in the latter ceremony would not offend against S. 5. S. 5 is not intended to punish parents who arrange or assist in the performance of the marriage ceremony. The parents of a grown up bride who take part in the kanyadan ceremony cannot be made liable under S. 5. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* FULABHAI BHULABHAI. **I.L.R. (1940) Bom. 709=190 I.C. 794=42 Bom.L.R. 857=A.I.R. 1940 Bom. 363.**

——**S. 10**—*Scope—If mandatory—Non-compliance—If vitiates proceedings.*

S. 10 of the Child Marriage Act contains provisions which are mandatory, and omission to conform with the procedure prescribed by the section would vitiate all subsequent proceedings. (*Davies, J.C. and Weston, J.*) EMPEROR *v.* MAHOMED HASHIM ALI. **I.L.R. (1940) Kar. 442 =A.I.R. 1940 Sind 213.**

CHOTA NAGPUR TENANCY ACT (VI OF 1908)—*Rent suit—Parties—Absence of proper parties—Effect on Revenue Court's jurisdiction—Revenue Officer can pass decree and order sale only when holding is properly represented.*

In Chota Nagpur when a rent suit is brought, the Revenue Officer's jurisdiction to pass a rent decree and therefore to order a sale of the holding or tenure arises only if the holding or tenure as the case may be is properly represented. Consequently, when the purchasers of interest of some of the tenure-holders or some of the tenure-holders themselves are added as parties after limitation the Revenue Court has no jurisdiction to pass a decree in respect of rent which may have become barred at the time of the addition of aforesaid parties. (*Manohar Lall, J.*) LAL BALLABH NATH SAH DEO *v.* HABIBUR RAHMAN. **A.I.R 1940 Pat. 702.**

——**S. 77**—*Pradhani—If service tenure.*

The pradhani in such a case as Kalajhore is not a service tenure because pradhan's land is not held by him in virtue of an office and as remuneration for the performance of its duties. His services are minor duties on behalf of his landlord, either taking care of the jungles and trees, or providing rasad and reporting crimes, which are part of the landlord's original responsibility. (*Sir George Rankin.*) JAGADISH CHANDRA DEO *v.* DEBNATH MAHTO. **19 Pat. 949 =189 I.C. 606=1940 O.L.R. 506=13 R.P.C 40 =1940 P.W N. 781=21 Pat.L.T. 1005=6 B.R. 876=A I R. 1940 P.C. 137 (P.C.).**

——**S. 186 (e)**—*Pradhani—Sale of—If barred.*

It is wrong to say that the pradhani cannot be sold as the sale would be of a right of personal service. The sale of the tenure would not be bad as the sale of a right on the part of the pradhan to render personal service to the zamindar. It would be the sale of the tenancy with all its incidents—a subject-matter very different from a valuable right to perform certain ceremonies for

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reward or to discharge certain functions which are held in estimation. Similarly the sale of the pradhani would not be the sale of something more than the pradhan's interest in the land of his tenancy. His right to have the area increased as jungle is cleared and cultivated by the raiyats is only an incident of his tenure and if he fails to perform his duty to pay rent, the existence of other duties towards the zamindar is no reason to bar a sale if the zamindar is otherwise entitled to such remedy. (*Sir George Rankin.*) JAGADISH CHANDRA DEO *v.* DEBNATH MAHTO. **19 Pat. 949 =189 I.C. 606=1940 O.L.R. 506=13 R.P.C. 40 =1940 P.W N. 781=21 Pat.L T. 1005=6 B.R. 876=A.I.R. 1940 P.C.** 137 (P.C.).

——**(as amended in 1920), Ss. 208 and 74-A**—*Pradhan—Sale of tenure in execution of rent decree—Exemption.*

Pradhans are no doubt a sort of tenure-holders and come within that class under some provisions of the Act but so far as regards villages in Dhalbhum, such as Kalajhore, it is an essential feature of the technique of the Act that the pradhan is a tenure-holder. Hence, he cannot be held exempt from the liability to have the tenure sold in execution of a rent decree under S. 208. This liability is not affected by S. 74-A as the terms of that section are addressed to the case in which the pradhan has been evicted by the landlord but, either no other person has been given the tenancy, or else it has been given to someone who is not suitable to hold it, having regard to its customary character. The principle, that a right in which third persons are interested cannot be sold behind their back is not applicable to such a case. 15 Pat. 644=A.I.R. 1936 Pat 563=165 I. C. 378, Reversed. (*Sir George Rankin.*) JAGADISH CHANDRA DEO *v* DEBNATH MAHTO. **19 Pat. 949=189 I C. 606=1940 O L.R. 506=13 R.P.C. 40=1940 P.W.N. 781=21 Pat.L.T. 1005=6 B.R. 876=A I.R. 1940 P.C. 137 (P.C).**

CHOTA NAGPUR TENURE-HOLDERS RENT ACCOUNT ACT (I OF 1929), S. 11 (a) and (b)—*Registration fee and maintenance fee—Calculation—Basis of—Whole rent or rent of separated portion only.*

With regard to the registration fee under S. 11 (*a*) of the Chota Nagpur Tenure-holders Rent Account Act of 1929, as it stood before the amendment in 1939, it is to be calculated on the rent of the separated portion as in the case of S. 11 of the Chota Nagpur Tenancy Act. That is, the fee will be levied on the rent of the portion of the tenure in respect of which a separate account has been opened. The position however is different as regards S. 11 (*b*) of Act I of 1929, for in the case of the annual maintenance fee it is to be calculated on the rent of the whole tenure. The Amendment Act XIV of 1939 has altered this. (*Fazl Ali and Meredith, JJ.*) ISHWAR NATH ROY *v.* PERTAPUDAI NATH SAHA DEO. **19 Pat. 662=1940 P.W.N. 884=A.I.R. 1940 Pat. 658.**

——**S. 11 (b)**—*"Rent"—If means primary rent alone or includes cess.*

The word " rent " in S. 11 of the Chota Nagpur Tenure-holders' Rent Account Act of 1929 was intended to include cess, and the fee of two per centum is to be calculated upon the amount of the rent plus cess. (*Fazl Ali and Meredith, JJ.*) ISHWAR NATH ROY *v.* PERTAPUDAI NATH SAHA

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DEO. 19 Pat. 662=1940 P.W.N. 884=A.I.R. 1940 Pat. 658.

——S. 11 (b)—*"Rent of the tenure"—Meaning—Rent of the whole tenure or rent of the separated part.*

The expression "rent of the tenure" in S. 11 (*b*) of Act I of 1929, before its amendment in 1939, means the rent of the whole tenure and not merely the rent of the separated portion. (*Fazl Ali and Meredith, JJ.*) ISHWAR NATH ROY *v.* PERTAPUDAI NATH SAHA DEO. 19 Pat. 662=1940 P.W.N. 884=A I.R 1940 Pat. 658.

CIVIL COURT—If comprise the Crown. *See* WORDS AND PHRASES—CIVIL COURT. 1940 N.L.J. 638.

CIVIL PROCEDURE CODE (V OF 1908), S. 2 (2)—*Decree—Alternative claims—Adjudication on a preliminary issue in respect of one.*

Where a plaintiff sues to recover from the purchaser, certain property sold in a revenue sale on the ground that it was a benami purchase for the plaintiff or alternatively on the ground that there was a subsequent transfer in his favour and the Court on a preliminary issue as to the maintainability of the suit by reason of S. 66, C.P. Code, decides against the plaintiff, it amounts to decree. If the Court decides that one of the two modes of seeking a remedy is not available, that branch of the case is finally decided. (*Stone, C. J. and Clarke, J.*) SRIDEO JANKI RAM *v.* NATHURAM. 1940 N.L.J 663.

——S. 2 (2) and O. 7, R. 11—*Rejection of appeal as time-barred—If a decree—Appealability.*

The rejection of a memorandum of appeal as being out of time amounts to a decree and is appealable. (*Meredith, J.*) GAJADHAR BHAGAT *v.* MOTICHAND. 7 B.R. 126=190 I.C. 671.

——S. 2 (10)—Judgment-debtor — Subsequent alienee of part of mortgaged property—Suit on mortgage impleading alienee—Final decree for sale—Alienee—If judgment-debtor. *See* MADRAS AGRICULTURISTS' RELIEF ACT. S. 23. (1940) 2 M. L.J. 749,

——S. 2 (11)—*Hindu son—If legal representative of father in respect of separate debt of father—Suit against son for father's separate debt—Decree against son as legal representative—If can be passed—S. 53—Effect of.*

It is well settled that a Hindu son can be sued for the separate debt of his father, and is liable, at any rate, to the extent of the separate estate of his father come to his hands. The son of a Hindu, where there has been no appointment of an executor or administrator in law represents the estate of his father and is therefore the legal representative within the meaning of S. 2 (11), C. P. Code, and where there is an allegation that the estate of the deceased father is in the hands of the son, the son is liable to have a decree passed against him for the father's debt, to be recovered only out of any assets of the father which come to his hands and are not duly accounted for. S. 53, C. P. Code, does not in any way negative the claim of the son to be a legal representative within S. 2 (11). (*Beaumont, C. J., Wadia and Wassoodew, JJ.*) JAMBUJRAO SATAPPA *v.* ANNAPPA RAM CHANDRAPPA. 42 Bom. L.R. 1066 (F B.).

——S. 9—*Jurisdiction—Determining factor.*

It is a well-recognised principle of law that

C. P. CODE (1908), S. 11.

the nature, and not the merits, of the claim determines the question of jurisdiction. (*Niyogi, J.*) SHRINIWAS RAO *v.* SECRETARY OF STATE. 1940 N. L.J. 582=A.I.R. 1940 Nag. 402.

——S 10—*Applicability — Suit by a debtor under S. 33 of the United Provinces Agriculturists' Relief Act—Subsequent suit by mortgagee on mortgage—Latter suit, if can be stayed.*

Where a debtor files a suit under S. 33 of the United Provinces Agriculturists' Relief Act for accounts in respect of a mortgage, and subsequently the mortgagee files a suit on his mortgage, the latter suit cannot be stayed under S. 10, C. P. Code, inasmuch as, the relief required by the mortgagee cannot be given in the suit under S. 33, unless the defendant applies for it and the money had become payable. In order that S. 10, C. P. Code, may apply it is necessary that the Court in which the first suit is pending should have jurisdiction to grant the relief claimed in the second suit. (*Zia-ul-Hasan and Yorke, JJ.*) BEHARI LAL *v.* DURGA. 190 I C. 240=13 R.O. 130 =1940 R.D. 400=1940 O.L.R. 554=1940 A.W. R. (C C) 407=1940 O.A 796=1940 O.W.N. 802=A.I.R 1940 Oudh 440.

——S. 10—*Priority of suits—Test—One of the suits filed in* forma pauperis.

A plaint in a suit in *forma pauperis* should be deemed to have been filed when the application for leave to sue as a pauper was presented and not when the Court-fee on rejection of the application was paid. Same considerations would apply in deciding the question of priority for purposes of S. 10, C. P. Code, as between two suits, one of which is filed in *forma pauperis.* (*Zia-ul-Hasan and Yorke, JJ.*) RAISUDDIN *v.* BASTI SUGAR MILLS. LTD. 190 I.C. 108=13 R.O 113=1940 A.W.R (C.C.) 360=1940 O L.R 534=1940 O. A. 750=1940 O W.N. 784=A.I R. 1940 Oudh 441.

——S. 11—*Adverse finding—Decree favourable—If can operate as* res judicata.

A judgment against which a party has no right of appeal because the decree was in his favour though some of the findings were against him, cannot operate against him as *res judicata.* (*Sathe, J.M.*) PHUNNAI *v.* NARSINGH DAS. 1940 R.D. 355=1940 A W.R. (B.R.) 170.

——S. 11—*Cause of action different.*

The decision in a prior suit cannot bar the filing of a subsequent suit on a different cause of action. (*Sathe J.M.*) BHIKHAI *v.* AZIZ BANDI BIBI. 1940 R D. 394=1940 A.W.R. (B.R.) 254.

——S. 11—*Cause of action same—Decision as to ancestral character of a holding in earlier suit—If can operate as* res judicata *in a later suit in respect of a different holding.*

Though the question in issue in both suits is whether the particular holding in question in the respective suits is ancestral or not, the decision in the earlier of the suits with respect to one holding does not constitute *res judicata* because it does not follow that if one holding is ancestral, the other must also necessarily be so. The facts of each holding have to be examined independently. (*Sathe, J.M.*) GANESH SINGH *v.* KAPILDEO SINGH. 1940 R D. 471=1940 A W.R (B.R.) 249.

——S. 11—*Co-defendants*—Res judicata—*Conditions—Partition suit— Rule in— Defendant claiming share giving rise to conflict of interest—Court giving express decision as to share though*

C. P. CODE (1908), S. 11.

decision not necessary for giving relief to plaintiff —Res judicata.

Ordinarily a decision operates as *res judicata* as between co-defendants if (1) there has been a conflict of interest between such co defendants; (2) it was necessary to decide the conflict to give the plaintiff the relief claimed by him; and (3) the question between the co-defendants was finally decided. But a partition suit differs very materially from an ordinary title suit or money suit and the decree in a partition suit stands on a different footing from a decree in a suit for money or for the delivery of specific property. Where the defendants in a partition suit pray for partition of their shares, then before such relief can be given to them, their shares must be ascertained. In such a case there is obviously a conflict of interest between the defendants and between a particular defendant and the plaintiff. A defendant who asks for his share is entitled to such relief and when a decree is drawn up he can take steps to enforce such a decree in much the same manner as if he was a plaintiff. Where a defendant in a partition suit asks for separation of his share, and plead what his share is, there is a conflict of interest, and when an express decision is given that he is the owner of all the properties or share claimed by him, that is an express adjudication and operate as *res judicata* in a separate suit, although the decision might not be necessary for the purpose of granting relief to the plaintiff. (*Harries, C J. and Manohar Lall, J.*) HARIHAR PRASAD SINGH *v.* NARSINGH PRASAD SINGH. **19 Pat. 669.**

——S 11—*Competent Court.*

It is well-settled that in order that a decision in a prior suit may operate as *res judicata* under S. 11, C P. Code, the Court which gave the previous decision must be competent to try the subsequent suit. (*Manohar Lall and Chatterji, JJ.*) KAPILESHWAR MITRA *v.* SANTI NAYAK. **21 Pat.L. T. 894=1940 P.W.N. 961.**

——S. 11—*Competent Court—Meaning—Competency of Court—Relevant point of time.*

The words 'competent to try such subsequent suit' occurring in S 11, C. P. Code, refer to the jurisdiction of the Court that decided the earlier suit at the time when the first suit was brought and that if at that time such Court would have been competent to try the subsequent suit, had it been brought, the decision of such Court would operate as *res judicata*, although on a subsequent date, by a rise in the value of the property, that Court had ceased to be a proper Court, having regard to its pecuniary jurisdiction, to take cognizance of a suit relating to that very property. S. 11 is silent as to the point of time with reference to which the competency of the Court that decided the earlier suit to try the subsequent suit is to be determined. It is, however, clear that the question of the competency is to be judged either by reference to the date on which the earlier suit was filed or by reference to the date on which the subsequent suit filed. To hold that the competency is to be judged by reference to the date of the institution of the subsequent suit would lead to anomalous and starting results. (*Iqbal Ahmad and Verma, JJ.*) SAHIB NASIB KHAN *v.* KUTBUNNISA **1940 A.W.R. (H.C.) 504 =1940 O.A. 878=1940 A.L.J. 679.**

C. P. CODE (1908), S. 11.

——S. 11—*Competent Court—Small Cause Court—Decision in rent suit that tenancy is governed by T. P. Act—If bars claim in subsequent title suit that tenancy is governed by B. T. Act.*

The claim of the plaintiff in a title suit that the B. T. Act will apply to his tenancy is not barred by *res judicata* by a decree passed by a Court of Small Causes in a previous rent suit declaring that the tenancy is governed by the T P. Act, as the Small Cause Court has no jurisdiction to try the subsequent title suit. (*Sen, J.*) ANANTAMONI DASI *v.* BHOLA NATH. **44 C.W.N. 1099=72 C.L. J. 99.**

——S. 11—*Connected cases—Same evidence—Single judgment—Separate appeals—Dismissal of one for insufficiency of Court-fee—If operates as* res judicata *as regards other appeal.*

Where two suits were governed by identical evidence, identical issues and a common judgment and though two appeals were preferred, one of them is dismissed for insufficiency of Court-fee, it would operate as *res judicata* as regards the other appeal which cannot be thereafter heard. (*Harper, S. M. and Sathe, J. M.*) RAM DIN *v.* RAM SAHAI. **1940 A.W.R. (B.R) 125=1940 O. A. 777=1940 R.D. 374=1940 A.L.J. (Supp.) 24.**

——S. 11—*Execution proceedings—Constructive* res judicata—*Execution sale— Failure to raise plea of inalienable character of land sold—Decision confirming sale—Effect of—Plea of inalienability—If can be raised in subsequent proceedings.*

The decision of a Court to confirm an execution sale operates as *res judicata* against a judgment-debtor who could have raised a plea, but did not, that the land sold was inalienable. It is equally binding whatever be the nature of the subsequent proceedings in which the judgment-debtor attempts to have the sale set aside. (*King, J.*) VENKATAPPADU *v.* APPALASWAMI. **52 L.W. 416=(1940) 2 M.L.J. 487.**

——S. 11—*Issue of law—Decision—If can be reconsidered in later suit—Sameness of cause of action—Relevancy—Decision as to competency of plaintiff to sue alone—If* res judicata *in later suit.*

Under certain circumstances a decision on an issue which mainly depends on an interpretation of law should be open to reconsideration on the question of law in a subsequent suit between the same parties. The question whether the cause of action is the same or different makes no difference in considering whether the previous decision on a point of law operates as *res judicata* or not. A reconsideration should be permissible in cases for instance where the law on the subject itself is changed by statute or what is almost equivalent to it, the authoritative interpretation of the section concerned as given by the binding rulings of the highest tribunal is changed. The question whether a plaintiff was entitled to sue alone or not is a mixed question of law and fact and a decision in respect of it must operate as *res judicata* in a subsequent suit between the same parties, if there has been no change in the relevant statutory law or in its authoritative interpretation. (*Harper, S. M and Sathe, J. M.*) ISHRI *v.* PARASRAM. **1940 R.D. 535=1940 A.W. R. (B R) 256.**

——S. 11—*Litigating under the same title—Suit on mortgage by assignee under unregistered deed*

C. P. CODE (1908), S. 11.

—*Dismissal—Fresh suit after obtaining registered deed of assignment—If barred.*

S. 11 must be read as a whole, and the words "litigating under the same title" must be read with the words "No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in the former suit. A purchaser of a mortgage debt at an auction-sale brought a suit on the mortgage bond but his suit was dismissed for want of registered deed of assignment of mortgage debt. Subsequently a second suit was brought based essentially on the same purchase but supported by a registered deed of assignment obtained after the dismissal of the first suit.

Held, that the suit was barred by *res judicata*. (*Davis, C. J. and Lobo, J.*) JETHANAND ISSARDAS *v.* UDHOMAL. **A.I.R 1940 Sind 227.**

——**S. 11**—*Plea of* res judicata—*Availability—Reasons for declining jurisdiction—If decisions.*

A Court which declines jurisdiction cannot bind the parties by its reasons for declining jurisdiction. Such reasons are not decisions and are certainly not decisions by a Court of competent jurisdiction. It would indeed be strange if on a dispute as to the jurisdiction of a Civil Court to try an issue, that Court by its reasons for holding that it had no jurisdiction, could upon the principle of *res judicata*, decide and bind the parties upon the very issue which it was incompetent to try. (*Lord Russell of Killowen.*) UPENDRANATH BOSE *v.* LALL. **191 I.C 7=1940 A.W.R. (P.C.) 147=1940 O A 881=1940 M.W N. 1122=1940 O.W.N. 1103=21 Pat.L.T. 935=52 L W. 800=1940 P.W N. 888=A.I.R. 1940 P.C. 222 (P.C.).**

——**S. 11**—*Representative suit— Representor abandoning suit—Representee not made a party to the suit—Fresh suit by representee, if barred by* res judicata.

In a representative suit under O. 1, R. 8, C. P. Code, the representees are not parties to the suit unless they apply to be made and are made parties. Where a representor plaintiff abandons the suit and it is dismissed without a decision on the merits, it cannot operate as *res judicata* to prevent a representee who is not made a party to the suit from re-agitating the matter by a separate suit. Although the representee is bound by a final decision, it is only by the result of litigation that he becomes bound, and, 'the decision' means a decision by a Judge who is trying the case and not a decision by one of the parties to pursue the matter no further. (*Roberts, C. J. and Blagden, J.*) THAIVANAI ACHI *v.* RAMANATHAN CHETTYAR. **1940 Rang.L.R. 643.**

——**S. 11**—*Scope—General principles* of res judicata—*Application of—Limits to.*

S. 11, C. P. Code, does not, no doubt, codify or crystallize the entire law regarding the doctrine of *res judicata* and where circumstances other than those provided for in that section exist, the principle underlying the rule of *res judicata* may be invoked in a proper case without recourse to the provisions of that section. But where the section is applicable, its provisions cannot be overriden by reference to general principles of *res judicata*. Such principles cannot, therefore, be invoked in a case where the Court which tried the first suit had not the jurisdiction to try the second suit. (*Sen, J.*) ANANTAMONI DASSI *v.* BHOLANATH. **44 C.W.N. 1099=72 C.L.J. 99.**

C. P. CODE (1908), S. 11.

——**S. 11**—*Scope—Insolvency proceeding—Finding that certain person is not partner of insolvent firm—If* res judicata *against all creditors—Official Assignee—If represents creditors for all purposes.*

There can be no doubt that S. 11, C. P. Code, is not exhaustive regarding the principle of *res judicata* and that the plea of *res judicata* may successfully be raised in circumstances which do not fall within the purview of the section. Such a plea can be supported on the general principle of law that there must be an end to litigation. But an element essential to the success of such a plea is that the matter must have been in controversy between the same parties or between parties under which the present parties claim. A finding of the Insolvency Court that a certain person is not a partner of the insolvent firm does not operate as *res judicata* against a creditor of that firm, when the decision was neither sought for nor opposed by him or by any one under whom he claims. The fact that the decision is binding upon the Official Assignee does not make it binding upon each and every creditor. The Official Assignee does not represent the creditors for all purposes in insolvency proceedings. In many respects his interest and that of a creditor may be in conflict. (*Sen, J.*) PUNJAB NATIONAL BANK *v.* BALIKRAM KISSENCHAND. **190 I.C. 537=13 R.C. 175=A.I.R. 1940 Cal. 225.**

——**S. 11**—*Scope—Issue in proceeding decided by final order—Power of succeeding judge to reopen issue in some proceeding at later stage.*

S. 11 is not exhaustive of the principle of *res judicata*. When an issue in a proceeding has been made the subject of a final order by a Court, that order cannot be impugned by a succeeding judge, nor has the Court jurisdiction to alter its decision except on grounds which would justify a review. (*Wadsworth, J.*) SUBRAMANYA RAO *v.* RAMI REDDI. **1940 M.W N. 994=52 L.W. 462=A.I.R. 1940 Mad. 957=(1940) 2 M.L J. 499.**

——**S. 11, Expl. IV**—*Applicability—Title of transferee from Hindu widow admitted by lambardar in suit for profits—Subsequent suit by lambardar as reversioner of estate, against transferee, for possession, if barred.*

Where the transferee from a Hindu widow sues the lambardar (who happened to be also the reversionary heir to the husband of the transferor) for profits and the lambardar admits the claim, it would by virtue of Expl. IV to S. 11, C. P Code, operate as *res judicata* in a subsequent suit for possession against the transferee, by the lambardar after the death of the widow as the reversioner to the estate, for it was open to him to have questioned the transferee's title in the profits suit itself. (*Niyogi, J.*) BALARAM JAIRAM PATIL *v.* KEWALRAM. **1940 N.L.J. 499=A.I.R. 1940 Nag. 396.**

——**S. 11, Expl. IV and C. P. Debt Conciliation Act, S. 21**—*Applicability—Stay of proceedings in Civil Court on a certificate under S. 21 of the Debt Conciliation Act—Question of competency of application under the Act—If can be raised later on.*

Where execution proceedings have been stayed in the Civil Court by virtue of S. 21 of the C. P. Debt Conciliation Act, and the decree-holder

later on objects on the ground that the judgment-debtor is not a 'debtor' within the meaning of the Act. Such a plea is not barred by the principle of constructive *res judicata*, unless it is clearly shown that the decree-holder knew that in fact his judgment-debtor was not a 'debtor' and failed to raise the objection at the time when the stay was made. If litigants desire to win by such a technical plea as constructive *res judicata* they must found their plea firmly by proving the facts from which a Court can infer that at the critical time the person, sought to be barred, might and ought to have raised the plea. (*Stone, C.J. and Clarke, J.*) BENIRAM *v.* RAMKRISHNA. **1940 N. L.J. 562.**

——**S. 13**—*Scope—Suit on foreign judgment—Nature of relief.*

Per *Chatterji, J.*—S. 13, C. P. Code, simply says that a foreign judgment shall be conclusive evidence. But where a foreign judgment is made the sole foundation of a suit, the relief asked for in the suit must be such as is awarded by the foreign judgment. (*Chatterji and Meredith, JJ.*) WAZIR SAHU *v.* MUNSHI DAS. **190 I.C. 545=7 B.R. 37=1940 P.W.N. 758**

——**S. 13 (a), (b) and (d)**—*Foreign judgment—Conclusive character of—Suit in French Court against British Indian subject*—Ex parte *decree—Subsequent "opposition" application by defendant praying inquiry into merits—Rejection of application and confirmation of prior judgment—Effect of—If with jurisdiction and on merits—Failure to follow rules of British Indian Procedure—Effect of.*

On 13—7—1933 the appellants who were carrying on business in Chandernagar (French India) brought a suit for damages in the French Court for breach of a contract made with the defendant who was a resident of and carrying on business in British India. On 10—3—1934, they obtained an *ex parte* decree in Chandernagar for Rs. 800 and odd against the defendant. On 26—5—1934, in accordance with the procedure of the French Courts the defendant was notified of this decree, and on 26—6—1934, the defendant filed in the French Court an "opposition," a form of proceeding in French Courts partaking of the nature of a rehearing application, but apparently wider in scope, since upon such application the French Courts re-consider the case on the merits and do not confine themselves to the question whether process had been properly served. On 23—3—1935 the application in opposition was rejected and the *ex parte* decree was confirmed. After unsuccessful attempts to execute this decree at Chandernagar and in British India, the appellants, on 20—4—1937, filed a suit in British India on the judgments of the Chandernagar Court, under S. 13 of the C. P. Code, stating that the cause of action had arisen on 23—3—1935, the date on which the judgment was passed in the "opposition" case confirming the *ex parte* decree of 16—3—1934. The defendant pleaded that the judgment was not conclusive, because it had not been pronounced by a Court of competent jurisdiction, that it had not been given on the merits, and that it had been obtained by fraud. It was found that there was no fraud and that the defendant did appear before the French Court.

Held, (1) that *prima facie* it might be presumed that the judgment of a French Court in an *ex parte* case would be based upon a consideration of the truth of the claim, because that was what the French Code of Civil Procedure prescribed by Art. 434, and since before judgment the plaintiff's pleader was heard and the letters of the defendant forming the basis of the contract were considered, the *ex parte* judgment was clearly one on the merits; (2) that the judgment given later in the "opposition" application of the defendant which was wider in scope than that of a rehearing application in British India and in which the defendant himself raised the issue of merits, was one on the merits; (3) that though the defendant was not resident in Chandernagar and had not in any way submitted to the French Court at the time of the *ex parte* judgment and therefore that judgment might be held to be without jurisdiction, yet the second judgment passed after rejection of the defendant's "opposition" application was clearly passed with jurisdiction because there was a voluntary submission to jurisdiction by the defendant before it was passed. Since the defendant himself in fact asked for this decision and was prepared to take the benefit of it if the decision was in his favour, he must be prepared also to be bound by it if it went against him; (4) that the second judgment could and did amount to an adjudication in itself apart from its confirming the previous *ex parte* judgment, and the matter of the correctness of the claim was directly adjudicated upon it that after the defendant had a hearing upon the merits; (5) that the suit being on the foreign judgment and not on the contract itself, the validity of the contract could not be raised, and the defendant could be allowed to go behind the conclusive foreign judgment and reopen the issues as to the merits; (6) that the fact that the foreign judgment might fail to show that every separate issue, such as the statue of the contracting parties or the measure of damages, was separately framed and decided was irrelevant unless it could be shown that that failure brought the case within the purview of one of the exceptions to S. 13, C. P. Code; (7) that the fact that French Court did not follow the procedure of British Indian Courts and did not observe British Indian rules as to evidence could not afford any ground for finding that the proceedings were opposed to natural justice. (*Chatterji and Meredith, JJ.*) WAZIR SAHU *v.* MUNSHI DAS. **190 I.C. 545=7 B.R. 37=1940 P.W.N. 758.**

——**S. 13 (b)**—Ex parte *decree—If not on merits.*

An *ex parte* decision may or may not be on the merits. The mere fact of its being *ex parte* will not justify a finding that the decision was not on the merits. The real test is whether it was merely formally passed, as a matter of course or by way of penalty, or whether it was based upon a consideration of the truth or otherwise of the plaintiff's claim. (*Chatterji and Meredith, JJ.*) WAZIR SAHU *v.* MUNSHI DAS. **190 I.C. 545=7 B.R. 37=1940 P.W.N. 758.**

——**S. 13 (b)**—*Natural justice—Meaning of.*

"Natural justice" in S. 13 (*d*) does not mean British justice as opposed to the justice of any particular foreign country. The fact that the foreign Court follows its own rules of procedure and does not follow the procedure of British Courts and observe British Indian rules as to evidence cannot afford ground for finding that

C. P. CODE (1908), S. 17.

the proceedings are opposed to natural justice. (*Chatterji and Meredith, JJ.*) WAZIR SAHU *v* MUNSHI DAS. 190 I.C. 545=7 B.R. 37=1940 P.W.N. 758.

——S. 17—*Applicability — Application under para. 20 (2), Sch. II—Jurisdiction — Property situate within the jurisdiction of several Courts—Jurisdiction to entertain and deal with application.*

The intention of para. 20 (2) of Sch. II, C. P. Code, is that applications coming thereunder should in every way be treated as suits and the procedure applying to suits should apply to them. S. 17 of the Code is one of the sections which the Court may take into account for deciding the question of jurisdiction in a case under para. 20 (2) of Sch. II. Consequently where an application under para. 20 (2) relates to property within the jurisdiction of more than one Court in British India, it is open to the Court within the jurisdiction of which part of the property is situate to entertain the application and deal with it. (*Mockett and Krishnaswami Aiyangar, JJ.*) VENKATACHALAM *v.* SURYANARAYANAMURTY. 1940 M.W.N. 1083=52 L.W. 556=(1940) 2 M.L.J. 520.

——S. 23—*Applicability—Plea of want of jurisdiction taken in one Court—Transfer, if can be ordered.*

S. 23, C. P. Code, postulates that the several Courts concerned shall both have jurisdiction. Where a plea of want of jurisdiction is taken by one of the parties in one Court, an application by that party under S 23 (3) cannot succeed. (*Collister and Bajpai, JJ.*) BABU LAL GIRDHARI LAL *v.* KOTUMAL. 1940 A.W.R. (H.C.) 503=1940 O. A. 877=1940 A.L.J. 611.

——S. 24 and O. 7, R. 10—*Suit instituted in proper Court—Transfer for disposal to another Judge of same Court—Amendment of plaint taking suit beyond jurisdiction of Judge—Procedure to be followed—Power of High Court to transfer—Return of plaint under O. 7, R. 10—Necessity.*

A suit for a declaration and injunction valued at Rs. 205 was filed in the 1st Class Sub-Judge's Court. It was allocated by him to the Joint 1st Class Sub-Judge under the rules for distribution of work. Subsequently by order of the District Judge, the case was sent to the Court of the Extra Joint Second Class Sub-Judge, attached to the 1st Class Court. By an amendment of the plaint, certain property were newly included in the plaint, as a result of which the suit became one beyond his pecuniary jurisdiction. He therefore sent the case back to the 1st Class Court and reported the matter to the District Judge, who sanctioned the procedure. When the case was taken up, the defendant pleaded that the 1st Class Sub-Judge had no jurisdiction and that the only legal way for the Second Class Sub-Judge was to return the plaint for presentation to the 1st Class Judge under O. 7, R. 10, C. P. Code. The 1st Class Sub-Judge made a reference to the High Court under O. 46, R. 1.

Held, (1) that the reference was incompetent and O. 46, R. 1 did not apply, as the 1st Class Sub-Judge in whose Court the suit was filed had jurisdiction to try it and could not refuse to try it and his decision being subject to appeal, no reference lay; (2) that the case of one in which the High Court could properly take action *suo*

C. P. CODE (1908), S. 47.

motu under S. 24, C. P. Code, in order to save difficulty and delay and transfer the suit to the 1st Class Sub-Judge for disposal; (3) that the case was properly filed in the Court of the 1st Class Sub-Judge; (4) that O. 7, R. 10, C.P. Code, had no application to the case as the suit had not been filed in a wrong Court without jurisdiction. The amendment of the plaint did not make it a new suit and no re-institution of the suit was necessary. (*Broomfield and Divatia, JJ.*) BABUBHAI VAMAL CHAND *v.* HIRALAL VAMAL CHAND. 42 Bom.L R. 1093.

——S. 35—Scope—If limited or restricted by S. 27 (1), Land Acquisition Act. *See* LAND ACQUISITION ACT, S. 27 (1). (1940) 2 M.L.J. 753.

——S 47—*Appeal—Order under O. 21, R. 15 refusing execution.*

No appeal lies from an order under O. 21, R. 15, C. P. Code, refusing to allow execution in favour of one of the decree-holders made for the protection of the interest of the other joint decree-holders. (*Almond, J.C.*) ABDUL RAHMAN *v.* GHULAM ALI. 189 I.C. 603=13 R.Pesh. 12=A. I.R. 1940 Pesh. 24.

——S. 47—Applicability of orders—Test—Order confirming sale—Appeal, if lies. *See* BHOPAL C. P. CODE, S. 58. 190 I.C. 174.

——S. 47—*Applicability—"Parties"—Mortgage suit—Person impleaded as party to suit but not made party to application for personal decree—Claim by to property attached in execution of personal decree—Procedure—If governed by S. 47 or O. 21, R. 58.*

In order to determine whether the parties to a proceeding arising in execution are "parties within the meaning of S. 47, C.P. Code, the governing factor is not whether the disputants were parties to the decree but whether the disputants were parties to the suit in which the decree was passed. A personal decree arising out of a mortgage suit is a decree passed in the mortgage suit and though a party has not been given notice of an application for a personal decree, if he was a party to the suit in which such decree is passed, S. 47, C. P. Code, would govern the investigation of a claim preferred by him in relation to the execution of such personal decree. The personal decree is not a distinct decree, nor the proceeding for a personal decree a separate proceeding from the trial of the suit; and therefore O. 21, R. 58, C. P. Code, is not applicable to a claim preferred to property attached in execution of the personal decree by a person who was a party to the mortgage suit but who was not party to the personal decree proceedings. The fact that he drafts his claim as one under O. 21, R. 58, C. P. Code, does not make S. 47, inapplicable. (*Wadsworth, J.*) SARASWATAMMA *v.* MAKI NAIDU. 1940 M.W.N. 826=A.I.R. 1940 Mad. 881=(1940) 2 M.L.J. 305.

——S. 47—*Applicability — Property of judgment-debtor's transferee before suit wrongly attached in execution of decree against judgment-debtor—Transferee paying decretal amount under protest and applying for refund—Refund under S. 151—Power of Court—Separate suit for refund.*

In execution of a decree against the judgment-debtor the property of his transferee prior to institution of suit against him was wrongly

C. P. CODE (1908), S. 47.

sought to be attached. In order to save his property from attachment the transferee deposited the decretal amount in Court and applied for refund of the amount paid.

Held, that the fact that the decree-holders sought to attach the property of the transferee in execution was enough to bring the refund of money paid into Court within the scope of S. 47 and although the application did not fall directly within the scope of O. 21, R. 58, resort to S. 151 was appropriate. A separate suit for refund was not necessary. *(Weston, J.)* D. K. JAI SINGHANI, *In re.* **A.I R. 1940 Sind 191.**

——**S. 47 and O. 21, R. 58**—*Applicability—Representative — Insolvent judgment debtor—Attachment—Objection by Official Receiver that all properties vested in him from date of insolvency petition—Order disallowing objection—Appeal—Competency—Remedy—Suit.*

No hard and fast rule can be laid down regarding the position of the receiver in insolvency in whose the estate of a judgment-debtor has vested. The facts of each case have to be taken into consideration in order to find out whether the Official Receiver is a representative of the judgment-debtor or not. Where the Official Receiver objects to an attachment contending that all the property of the insolvent judgment-debtor had vested in him with effect from the date of the insolvency petition, he is in the position of a third party objecting to attachment under O. 21, R. 58, C. P. Code, and when his objection is disallowed, he has no right of appeal but has the right of filing a suit under O. 21, R. 63, C. P. Code. *(Burn and Mockett, JJ.)* OFFICIAL RECEIVER, GUNTUR *v.* SESHAYYA. **1940 M.W.N. 1225=52 L.W. 810=(1940) 2 M.L.J. 860.**

——**S. 47**— *Bar of suit—Decree for money against Ward of Court of wards—Leave of Court not obtained—Execution disallowed on ground of non-compliance with S. 60-A, Bengal Court of Wards Act—Suit on decree—Maintainability—Principles.*

An action on a judgment is permissible only where the judgment cannot be enforced in some other way. A simple money decree can be enforced by execution, and a suit based upon such a decree will not lie. The fact that such a decree cannot be executed by reason of S. 60-A of the Bengal Court of Wards Act—leave of the Court not having been obtained or accorded—is not an inherent defect in the decree itself which renders it incapable of execution. Absence of leave of the Court is no doubt a bar to execution and nothing more; it is not a ground for holding that a suit will lie upon the judgment. Such a suit will lie only when the decree from its very nature is incapable of execution. The decree for money being an executable decree has to be enforced by execution and a separate suit is barred by S. 47, C. P. Code. *(Harries, C.J. and Manohar Lall, J.)* LACHMI NARAYAN *v.* MAHOMED MEHDI. **21 Pat.L.T. 947.**

——**S. 47**—*Bar of suit—Puisne mortgagee purchasing part of mortgaged property—Suit by prior mortgage—Decree and sale without impleading puisne mortgagee purchaser—Application by latter under O. 21, R. 89, C. P. Code—Dismissal—No appeal—Suit by him by redemption—Competency—If barred by S. 47 or O. 21, R. 92 (3), C. P. Code—Right to redeem part.*

C. P. CODE (1908), S. 47.

Defendant No. 1 who was a prior mortgagee from defendant No. 2 under a mortgage of 1920, obtained an award decree on foot of his mortgage and in execution of that decree purchased the entire mortgaged property in Court auction on 19th December, 1934. The plaintiff who held a second mortgage over the property purchased half of the same property from defendant No. 2 under a sale deed dated 6th February, 1934, by private sale. The plaintiff as such purchaser applied under O. 21, R. 89, C. P. Code, to have the sale in favour of the defendant No. 1 set aside, but his application was dismissed. Plaintiff did not appeal against the order refusing to set aside the sale, but he instituted a suit for redemption of the whole mortgaged property, as purchaser of part of the mortgaged property under S. 91, T. P. Act.

Held, (1) that the plaintiff's application under O. 21, R. 89, C. P. Code, did not make him a party to the suit within the meaning of S. 47, C. P. Code, and the suit for redemption was therefore not barred by S. 47, C. P. Code; (2) that since the plaintiff, who was a puisne mortgagee and subsequent purchaser was not joined as a party to the suit on the first mortgage of defendant No. 1, he was not bound by the decree passed on that suit and could sue for redemption without getting the sale set aside; (3) that since it was open to the plaintiff to sue for redemption without getting the sale set aside, his omission to appeal against the order rejecting his application under O. 21, R. 89, C. P. Code, did not bar his suit for redemption under O. 21, R. 92 (3), C. P. Code; (4) that the plaintiff was therefore entitled to redeem half the property which he had purchased on payment of the amount claimed by the prior mortgagee purchaser. *(Davis, J.C. and Weston, J.)* KHIALMAL *v.* POHUMAL. **I.L.R. (1940) Kar. 447=A.I.R. 1940 Sind 251.**

——**S. 47**—*Executability of decree—Decree for future maintenance creating charge on property—Arrears of future maintenance—Recoverability by execution—Fresh suit—Necessity.*

A decree awarding future maintenance can be executed for arrears of such future maintenance and no fresh suit is necessary. Where the decree contains an express provision that certain property would be earmarked for future maintenance and that arrears of future maintenance can be realised by sale of that property, it is not a mere money decree, but is itself a decree for sale, and future maintenance when falling due can be recovered in execution without further suit. It can be executed against a purchaser of the property with notice, though he is not a party to the suit itself. *(Varma and Meredith, JJ.)* BASUMATI KUAR *v.* HARBANSI KUAR. **21 Pat.L.T. 783=1940 P.W.N. 818.**

——**S. 47 and O. 21, R. 58**—*Relative scope—Inquiries under—Difference—Question of title.*

For the purpose of deciding a claim under O. 21, R. 58, C. P. Code, the Court is bound to find who was in possession at the time of the attachment. It is not bound to find who had the title to the land or property attached and can refer parties to a suit for determining title. For the purpose of deciding a claim under S. 47, C. P. Code, it is necessary to go into all the contention of the parties including the contention as to title. The scope of the enquiry cannot be restricted

C. P. CODE (1908), S. 47.

merely to the question of possession at the time of the attachment. The difference between the two enquiries is, therefore, not a difference in procedure so much as a difference in the scope of the enquiry. (*Wadsworth, J.*) SARASWATAMMA *v.* MAKI NAIDU. **1940 M.W.N. 826=A.I.R. 1940 Mad. 881=(1940) 2 M.L.J. 305.**

——**S. 47** — "*Representative*"— *Meaning* — *Auction purchaser of judgment-debtor's property in execution.*

The word "representative" in S. 47, C.P.Code, is used in a wide sense and includes as a representative of the judgment-debtor the auction-purchaser of the judgment-debtor's property in execution to the extent of the property received by him. (*Varma and Meredith, JJ.*) BASUMATI KUAR *v.* HARBANSI KUAR. **21 Pat.L.T. 783=1940 P.W.N. 818.**

——**S. 47**—"*Representative*"—*Sale of judgment debtor's property under Bombay Land Revenue Code for arrears of toll—Purchaser—If representative of judgment-debtor—Decree creating charge on judgment-debtor's property—Executability against purchaser at revenue sale.*

A "representative" is a person in whom the interest of a party to the suit has vested either by an act of the party, *i.e.*, a transferee from the party, or by an operation of law. Operation of law would ordinarily mean and include cases of testamentary and intestate succession upon the death of the party to the suit or upon his insolvency or cases of forfeiture. A Court auction-purchaser at a sale in execution of a decree who is a stranger is not a representative of either the judgment-debtor or the decree-holder so far as Bombay is concerned. There is also a distinction between the position of a voluntary transferee from a judgment-debtor or a decree-holder and a Court-purchaser. When a Court-purchaser is not a representative of the judgment-debtor, a revenue purchaser, *i.e.*, a purchaser of the judgment-debtor's property at a sale under the Bombay Land Revenue Code for arrears due under a toll-contract is not a representative of the judgment-debtor and cannot therefore be proceeded against in execution of the decree against the judgment-debtor, creating a charge of the property of the judgment-debtor. (*Rangnekar, J.*) HANMANTAGOUDA NAGANGOUDA *v.* SHIVAPPA DUNDAPPA. **42 Bom.L.R. 1123.**

——**S. 47**—*Scope—Validity of execution sale.*

The question as to the validity of the execution sale is clearly a matter which arises between the parties to the suit and relates to the execution of the decree and therefore falls within the purview of S. 47, C. P. Code. (*Edgley, J.*) SHEIKH TAMIZALI *v.* NASARALI BHUIYA. **I.L.R. (1940) 2 Cal. 334=72 C.L.J. 66.**

——**S. 50**—*Jurisdiction—Death of judgment-debtor—Substitution of heirs—Power of Court to which decree is transferred for execution—Order by transferee Court for substitution—Legality—Interference in appeal—S. 99.*

Under S. 50, C. P. Code, it is the Court which passed the decree which has power to substitute heirs of a deceased judgment-debtor and not the Court to which the decree is transferred for execution. But when a Court to which a decree has been transferred for execution makes an order for substitution under S. 50, C. P. Code, it is a matter of procedure and not of jurisdiction. An

C. P. CODE (1908), S. 60.

appellate Court should not consequently interfere with an order for substitution made by the Court to which the decree has been transferred execution when the merits of the case are not affected by the irregularity in view of S. 99, C. P. Code. (*Agarwala and Rowland, JJ.*) DEBENDRA NATH HALDAR *v.* ARATOON. **19 Pat. 838=1940 P.W.N. 963.**

——**S. 51**—*Execution by arrest—Circumstances—Onus—Finding of lower Court—Interference.*

Where execution by arrest is asked, the question whether the necessary circumstances exist is one of fact. The burden lies on the judgment-creditor to show that the necessary circumstances exist. If it is found either way by the lower Court, it is not open to the High Court to go behind it in second appeal. (*Braund, J.*) R. M. JASAWALA *v.* AMULYA CHANDRA DUTTA. **1940 A. W.R. (H.C.) 454=A I.R. 1940 All. 494.**

——**S. 51, Proviso**—*Applicability—Decree for alimony under Divorce Act—If decree for money.*

A decree for the payment of arrears of alimony passed under S. 37 of the Divorce Act is a decree of a special character; but it is a decree for the payment of money within the meaning of the proviso to S. 51, C. P. Code. Before ordering arrest and detention in prison of the debtor in execution of such a decree, the Court must be satisfied as to the matters covered by the proviso. (*Beaumont, C. J.*) J. G. KHAMBATTA *v.* M. C. KHAMBATTA. **42 Bom.L.R. 945.**

——**S. 53**—Scope—Hindu son—If legal representative of father under S. 2 (11). *See* C. P. CODE, S. 2 (11). **42 Bom.L.R. 1066 (F.B.).**

——**(as amended in 1937), S. 60 (1)(i) and (k)**—*Scope and effect of—Decree obtained against public officer in suit instituted after 1st June, 1937—Extent of salary attachable—Contribution to Provident Fund—Deduction of—Salary—If means net salary or gross salary—Income-tax—If deductible.*

The Civil Procedure Code Amending Act (IX of 1937) enlarges the exemption from attachment of a judgment-debtor's salary provided the proceedings relate to suits instituted on or after 1-6-1937. The new Cl. (*i*) of S. 60 (1) exempts from attachment in execution of a decree the salary of a public officer to the extent of the first hundred rupees and one-half the remainder of such salary. Further, Cl. (*k*) of S. 60 (1) exempts all compulsory deposits to a Provident Fund when the judgment-debtor belongs to a recognised Provident Fund. The exemption of deposits in Provident Fund is separate from the exemption in respect of salaries given by Cl. (*i*), and the result therefore is that the recurring contributions of the judgment-debtor to the Provident Fund must, in working out the amount attachable, fall on that moiety of the excess of the salary over the first hundred rupees which is not already reserved for the judgment-debtor by Cl (*i*). In other words, a decree-holder who is hit by the amendment of 1937, is only entitled to look to the balance after deducting the Provident Fund Contribution from the amount that was left over after giving effect to the exemption granted by Cl. (*i*).

Quaere.—Whether income-tax deductions made from the monthly salary of a public officer have to be deducted for the purpose of Cl. (*i*) and whether salary means net salary only after such

C. P. CODE (1908), S. 64.

deduction? (*Dhavle, J.*) BHAGWAN DASS RAMPRASAD *v.* SECRETARY OF STATE. **21 Pat.L.T. 776.**

——**S. 64**—*Applicability—Attachment—Subsequent mortgage by judgment-debtor—Execution sale—Private sale by debtor before confirmation of execution sale with permission of Court—Deposit of sale proceeds by private purchaser—Decree satisfied and attachment withdrawn—Position and rights of purchaser—Mortgage—If void as against purchaser*—Lis pendens—*Applicability—T. P. Act, S.* 52.

A sale by the Court in pursuance of an attachment cannot be said to be the same thing as a sale by a judgment-debtor independently or in spite of the attachment. Title in the first case is conveyed by operation of law and any alienation by the judgment-debtor, if contrary to the attachment is void against all claims enforceable under the attachment, while title in the other is conveyed by the judgment-debtor himself who cannot derogate from his grant even if made after the attachment. A sale by the judgment-debtor with the permission of the Court and after obtaining a certificate from Court under O. 21, R, 83, C. P. Code, is a private sale and is not a sale either by or under the orders of the Court. A purchaser at such a sale by the judgment-debtor under O. 21, R. 83, C. P. Code, cannot be said to have a claim enforceable under the attachment within the meaning of S. 64, C. P. Code, where pending attachment in execution, the judgment-debtor mortgages his properties, and subsequently one of the items of the mortgaged properties is sold in execution, but before confirmation of the sale, the judgment-debtor privately sells that item with the sanction of the Court under O. 21, R. 83, C. P Code, and the decree is satisfied by the deposit of the proceeds of the private sale and the attachment withdrawn, the purchaser cannot claim that the mortgage is void as against him under S. 64, C. P. Code. Both the mortgagee and the private purchaser stand in the shoes of the judgment-debtor, and the moment the attachment ceases to exist, the mortgage executed during the continuance of the attachment takes effect and has priority over the subsequent purchaser from the judgment-debtor, since both alienations are made by the same person (judgment-debtor). Nor is the mortgage to be held to be void on account of *lis pendens* under S. 52, T. P. Act. S. 52, T.P. Act, does not apply to the case. The alienation mentioned in S. 52, T. P. Act, must be such as "to affect the rights of any other party thereto," and not the rights of the person who has dealt with the property or of those who stand in his shoes. It cannot be contended that every alienation by a judgment-debtor during the pendency of an execution petition would be hit by the provision of S. 52, T. P. Act. (*Pandrang Row and Abdur Rahman, JJ.*) LANKARAM *v.* SUNDARAGOPALA AYYAR. **52 L.W. 862=(1940) 2 M.L J 1038.**

——**S. 64**—*Scope of—Attaching creditor, if can claim to restrict the effects of a private transfer.*

All that S. 64, C.P Code, provides is that claims enforceable under the attachment will remain unaffected by the private transfer and the attaching creditor can proceed to enforce his claim under the attachment, irrespective of the transfer. It is not open to the attaching creditor to say that a private transfer does not bring about all the consequences which it does ordinarily bring about

C. P. CODE (1908), S. 73.

and at the same time certain covenants in the sale deed are binding and can be taken advantage of by the attaching creditor. (*Collister and Bajpai, JJ.*) RAM CHANDRA *v.* RAM LAL. **I.L.R. (1940) All. 681=1940 A.L J 744=1940 A.W.R. (H.C.) 470=A.I R. 1940 All. 500.**

——**S. 65**—*Scope and effect of.*

S. 65 determines priority as between purchasers at successive sales. It is not meant to confer on a defaulting tenant the privilege of rent free occupation for so long as he or the decree-holder can delay confirmation of the sale. (*Agarwala and Rowland, JJ.*) CHHATAR SINGH *v.* SYED SHAH QASIM GHANI. **19 Pat. 824=A.I.R. 1940 Pat. 673.**

——**S. 66**—*Applicability—Revenue sale.*

S. 66, C.P. Code, is confined to a purchase certified by the Court in the manner prescribed by the C. P. Code and hence a person who is not claiming title under a purchase so certified by the Court, would not be protected under S. 66, C. P. Code. (*Stone, C.J. and Clarke, J.*) SHRIDEO JANKI RAM *v.* NATHURAM. **1940 N.L J 663.**

——**S. 66**—*Scope of—Absence of case independent of auction sale—Right to relief.*

S. 66, C.P. Code, excludes any claim based upon an averment that an auction purchase had been made by the defendant on account of the plaintiff as well as on his own account Where no case independent of this purchase and basing title upon possession is traceable in the pleadings, the plaintiff could not get any relief. (*Sir George Rankin.*) BISHUN DAYAL *v.* KESHO PRASAD. **190 I C 677=1940 M W.N 1125=1940 O.W.N. 1061=1940 A. L J. 772=52 L.W. 755=1940 O L.R. 669=1940 A.W.R (P.C.) 150=1940 O.A. 886=A.I.R. 1940 P.C. 202 (P.C.).**

——**S. 67 (2)**—*Rule of Coorg Chief Commissioner—Applicability—Execution of decree of Coorg Court in British India.*

The rule promulgated by the Chief Commissioner of Coorg under S. 67 (2), C. P. Code, embodying the restriction upon sales of land in execution of decrees of Civil Courts is a rule merely governing the execution of decrees within the province of Coorg and applies only to sales of land within the jurisdiction of the local Government of Coorg. The power to enact such special rules contemplates only the enactment of rules restricting execution of money decrees within the local area and not in British India. (*Wadsworth, J.*) ABDUI LA KAKA *v.* MUTTHANNA. **1940 M.W.N. 861=52 L.W. 851=(1940) 2 M. L.J. 420.**

——**S. 73**—*Applicability—Conditions—Creditor obtaining attachment before judgment but not taking out execution—Right to rateable distribution.*

Under S. 73, C. P. Code, the Court can only divide the assets among such persons as may have made application to the Court for the execution of decrees. So where a creditor merely gets an attachment before judgment, he is not entitled to claim rateable distribution of assets realised in execution before he took out execution proceedings. (*Horwill, J.*) MOIDIN *v.* DAKSHAYANI AMMA. **52 L.W. 807=1940 M.W. N. 1151=(1940) 2 M.L.J. 844.**

——**S. 73**—Assets held by the Court—Decree liable to be set-off under O. 21, R. 18—Effect

C. P. CODE (1908), S. 73.

See C. P. CODE, O. 21, R. 18—RIGHT TO SET OFF CROSS-DECREES. (1940) 2 M.L.J. 677 (P.C.)

——S. 73—*Same judgment-debtor —Decree against debtor during his lifetime and decree against his legal representatives—If 'passed against the same judgment-debtor'.*

Where a creditor obtains a decree against a debtor during his lifetime and on his death executes it against his legal representative, and another creditor obtains a decree against such legal representative in respect of a debt due by the deceased debtor, the latter cannot claim rateable distribution in the amount realised in execution of the decree of the first creditor, inasmuch as the two decrees are not 'passed against the same judgment-debtor' within the meaning of S. 73, C. P. Code. (*Mackney, J.*) SARJU SUKUL *v.* RANGIDHAR DUBAY. **1940 Rang.L.R. 492= A.I.R. 1940 Rang 243.**

——S. 80—*Municipal Committee superseded under S. 238 of Punjab Municipal Act—Service of notice on Deputy Commissioner—Validity.*

Where the Municipal Committee has been superseded under S. 238 of the Punjab Municipal Act, the service of the notice under S. 80, C. P. Code, on the Deputy Commissioner who is the Collector of the District as well as the administrator of the Municipal Committee is valid and proper. (*Din Mahomed, J.*) MAHOMED SHAFI *v.* SIALKOT MUNICIPALITY. **42 P.L.R. 550=A.I.R. 1940 Lah. 451.**

——S. 80—*Notice served under old section—Suit lodged subsequent to Government of India (Adaptation of Indian Laws) Order, 1937—Validity af notice.*

A notice served under the old S. 80, C. P. Code, prior to Part III of the present Government of India Act and with it the Government of India (Adaptation of Indian Laws) Order, 1937, coming into force, is valid although the suit is lodged subsequently. The suit is saved by paragraphs 9 and 11 of the Preamble to the Government of India (Adaptation of Indian Laws), Order. (*Tek Chand and Skemp, JJ.*) THAKAR DAS *v.* TUSI RAM. **42 P.L.R. 596=A.I.R. 1940 Lah 455.**

——S. 88—*Interpleader suit—Matter in dispute —Valuation.*

In an interpleader suit the matter in dispute is the title to the property which is claimed by two or more persons, and its valuation is the value of that property. (*Mulla, J.*) RAFIQ AHMAD *v.* BABU RAM. **1940 A.W.R. (H.C.) 448=1940 O.A. 707=1940 A.L.J. 578=A.I.R. 1940 All. 452.**

——S. 92—*Right to sue—Sanction obtained by several persons—One of them dying before suit—Suit by rest if regular.*

Where sanction under S. 92 is obtained by several persons and one of them dies before the institution of suit, the suit instituted by the rest is valid. (*Skemp, J.*) SHEO RAM *v.* RAM CHAND. **A.I.R. 1940 Lah. 356.**

——S. 92—*Trustee* de son tort—*Person succeeding to religious institution as son and chela of his father.*

A sanyasi appointed by the people to look after a temple died and after his death his son took possession of the property as chela of his father. He was however appointed neither by the bhek nor by the representatives of the people:

C. P. CODE (1908), S. 100.

Held, that the person who had succeeded to the temple as son and chela of father could not be described as trustee *de son tort* (*Skemp, J.*) SHEO RAM *v.* RAM CHAND. **A.I.R. 1940 Lah. 356.**

——S. 96—*Appeal against findings when decree is not against a party—If lies.*

Under S. 96 C. P. Code, an appeal can lie only against a decree and not against any findings or observations made in the body of the judgment, if the final decree is not against the party concerned. (*Sathe, J.M.*) PHUNNAI *v.* NAR SINGH DAS. **1940 R.D. 355=1940 A.W.R. (B.R.) 170.**

——S. 99—*Applicability —Proceedings under United Provinces Land Revenue Act*

S. 99 of the C. P. Code has no application to proceedings under the United Provinces Land Revenue Act. (*Harper, S.M. and Sathe, J.M.*) DEBI SARAN SAITHWAR *v.* NEEBAR. **1940 A.W.R. (B.R.) 168=1940 R.D. 445=1940 O.A. 1000.**

——S. 99—*Applicability—Successor of mutawalli—Pending litigation—Decree in his favour without being brought on record—Irregularity if covered by section.*

The successor of a deceased or resigned mutawalli has no *locus standi* in a pending litigation until his name is actually brought on the record in place of the former mutawalli. No order or decree in his favour could be passed till then. But if a decree were to be passed prior to such bringing on record, the irregularity affects the merits of the case fundamentally and is not covered by S. 99, C. P. Code. (*Harper, S.M. and Sathe, J.M.*) AJUDHYA *v.* BUDHSEN. **1940 R.D. 402=1940 A.W.R. (B.R.) 214.**

——S. 99—Scope—Decree transferred for execution to another Court—Order by latter Court for substitution of heirs of deceased judgment-debtor—Legality—Interference by appellate Court. *See* C. P. CODE, S. 50. **19 Pat. 838.**

——S. 100—*Concurrent findings—Adequacy of rent—Interference in second appeal.*

Where in a suit certain leases were contested solely on the ground of inadequate rental but the two lower Courts had held that the rental was not unreasonably low in view of certain circumstances, it is not a point which could be contested in second appeal. (*Harper, S.M.*) ANANDI KUNWAR *v.* RAMRAJ. **1940 A.W.R. (B.R.) 120= 1940 O.A. 710.**

——S. 100—*Finding of fact—Finding based on wrong legal view—Interference.*

Where a finding of fact that a certain watercourse is an artificial channel is based mainly on inadmissible evidence and on an incorrect view of what in law constitutes a natural stream or water channel, the finding cannot be conclusive in second appeal and can be interfered with. (*Agarwala and Meredith, JJ.*) HARIHAR PRASAD SINGH *v.* JANAK DULARE KUER. **21 Pat.L.T. 873.**

——S. 100—*Finding of fact—Finding without considering all the evidence or based on inadmissible evidence—If conclusive.*

The High Court ordinarily has no jurisdiction under S. 100, C. P. Code, to reverse findings of facts of the lower appellate Court unless the findings are vitiated by an error of law. But when all the evidence has not been considered in arriving at the findings or when inadmissible evidence has been considered and mainly relied on to arrive at the findings in question, the find-

C. P. CODE (1908), S. 100.

ings are vitiated and are not conclusive. (*Agarwala and Meredith, JJ.*) HARIHAR PRASAD SINGH *v.* JANAK DULARE KUER. **21 Pat L.T. 873.**

——S. 100—*Finding of fact—Interference—Existence of document not appreciated.*

When the existence of a document does not appear from the judgment of the first appellate Court to have been appreciated by it, and no effect whatever is given to the statutory presumption arising from the document, the questions of fact as well as of law are open in second appeal as well as in Privy Council appeal. (*Sir George Rankin.*) SHANKAR RAO *v.* SAMBHU NATHU. **190 I.C. 342=45 C.W.N. 57=1940 O.L.R. 608=13 R.P.C. 81=52 L.W. 966=7 B.R. 110=A.I.R. 1940 P.C. 192 (P.C.).**

——S. 100—*Findings of fact—Tenancy—Binding nature.*

The findings of fact of the first appellate Court with regard to a tenancy are binding in second appeal but not its conclusions as to their effect in law. (*Sir George Rankin.*) SHANKAR RAO *v.* SAMBHU NATHU. **190 I.C. 342=45 C.W.N. 57=1940 O.L R. 608=13 R.P C. 81=52 L.W. 966=7 B.R. 110=A.I.R. 1940 P.C. 192 (P.C.).**

——S. 100—*Mixed question of fact and law—Question of limitation—Interference in second appeal—Lower appellate Court differing from trial Court.*

An issue regarding limitation is a mixed question of fact and law and it is liable to reconsideration by the second appellate Court, specially while the trial Court who had an opportunity of hearing the witnesses in person, came to a conclusion different from that of the lower appellate Court. (*Harper, S.M.and Sathe, J.M.*) HARDASI DUKHNA. **1940 R.D. 388=1940 A.W.R. (B.R.) 229.**

——S. 100—*New plea—Plea raising question of fact.*

A plea raising a question of fact which requires investigation cannot be allowed to be raised in second appeal for the first time. (*Manohar Lall and Chatterji, JJ.*) KAPILESHWAR MISHRA *v.* SANTI NAYAK. **21 Pat.L.T. 894=1940 P.W.N. 961.**

——S. 100—*Powers of High Court—Remand—When necessary—High Court's power to set aside findings of lower courts and to substitute its own findings of fact.*

Though the High Court, in second appeal is not a Court of fact and cannot properly set aside the findings of fact arrived at by the Courts below and substitute its own findings upon an examination of the evidence, it must at the same time avoid a remand if possible. When there are sufficient findings of facts in the decisions of the Court below to justify a decision of the case finally after making the proper legal inferences a remand is unnecessary. (*Agarwala and Meredith, JJ.*) HARIHAR PRASAD SINGH *v.* JANAK DULARI KUER. **21 Pat.L T. 873.**

——S. 100—*Question of fact—Negligence.*

Negligence is a question of fact and the findings of fact of the lower appellate Court on that question are binding in second appeal. (*Davies, C.J. and Lobo, J.*) RAMDAS TOPANDAS *v.* SUKKUR MUNICIPALITY. **A.I.R 1940 Sind 254.**

——S. 100—*Question of law—Construction of document.*

C. P. CODE (1908), S. 114.

The construction of a document of title which is the foundation of the suit, is a question of law which can be raised in second appeal. (*Tek Chand and Bhide, JJ.*) OM PARKASH *v.* MUKHTAR AHMAD. **42 P.L.R. 660=A.I.R. 1940 Lah. 486.**

——S. 100—*Question of law—Inference from findings of fact.*

The legal inference to be drawn from the findings of fact is a question of law. (*Davies, J.C. and Weston, J.*) TEKCHAND NICHALDAS *v.* RIJHUMAL VIRUMAL. **190 I.C. 271=13 R.S. 59=A I.R. 1940 Sind 138.**

——S 102—*Suit of small cause nature—Matter in execution of decree—Second appeal, if lies.*

In the case of a suit of the nature of small causes no second appeal lies under S. 102, C.P. Code, whether the appeal was against the decision in the suit or whether the matter arose in the course of execution proceedings. (*Ghulam Hasan, J.*) SITA RAM *v.* BADRI DASS. **1940 O.A 1026=1940 A.W.R. (C.C.) 444=1940 O.W.N. 1118.**

——S. 107 and O. 41, R. 27—*Additional evidence in appeal—Filling up of gaps in evidence—Evidence of attesting witness—Production in second appeal—If permissible.*

The provisions of S. 107 as elucidated by O. 41, R. 27, C. P. Code, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Where a plaintiff though he made an attempt in the trial Court to get the case adjourned for producing one of the attesting witnesses, subsequently gave up the request and no attempt at all was made while the case was in the lower appellate Court to produce that witness or get the case remanded for the evidence of that witness, it was held that in second appeal an opportunity could not be given to produce that witness and that it would not be just to the opposite party to send the case back for the evidence of that witness whom the plaintiff should have produced long before. (*Zia-ul-Hasan, J.*) KALICHARAN *v.* SURAJ BALI. **1940 O.A. 1029=1940 A.W.R. (C.C.) 446 =1940 O.W.N, 1077.**

——S. 110 — *"Decree of affirmance" — For appeals against same decree by both parties—One dismissed and other allowed—Only one decree issued—Application for leave to appeal by party whose appeal is dismissed—Competency.*

Where two appeals are preferred against the same decree one by the one party and the other by the other party, but one appeal is allowed and the other dismissed, though one decree is issued in the cases, it is an essence a document containing two decrees and in effect there are two decrees. The decree in the appeal which is dismissed is a decree of affirmance within the meaning of S. 110, C. P. Code. No leave can be granted unless there is a substantial question of law involved. (*Pandrang Rao and Venkataramana Rao, JJ.*) SOKKALINGAM CHETTI *v.* OFFICIAL ASSIGNEE OF MADRAS. **1940 M.W.N. 878 =52 L W. 509=(1940) 2 M.L.J. 645.**

——S. 114—Applicability—Proceedings under S. 66, Income-tax Act—Application for review of judgment — Maintainability. *See* INCOME-TAX ACT, S. 66-A. **1940 I.T.R. 412.**

C. P. CODE (1908), S. 115.

——Ss. 115 and 152—*Amendment of decree—If revisable.*

Application under S. 115, C. P. Code, are entertainable against orders of amendment of decrees made under S. 152, C. P. Code. (*Yorke, J.*) MUJAWIR HUSSAIN *v.* KISHWAR JEHAN BEGAM. 1940 O.A. 978=1940 A.W.R. (C.C.) 429=1940 O.W.N. 1010.

——S. 115 and O. 6, R. 17—*Amendment of plaint—Order refusing—If revisable.*

No revision lies from an order refusing to allow an amendment of the plaint. (*Thomas, C. J. and Ghulam Hassan, J.*) PURSHOTAM LALJI *v.* HARA NARAYAN DASS. 1940 O.A. 1126=1940 O.W.N. 1194=1940 A.W.R. (C.C.) 474.

——S. 115—*Award—Order passing decree in terms of—If revisable.*

No revision is maintainable against an order passing a decree in terms of an award. (*Zia-ul-Hassan and Yorke, JJ.*) RAM SWARUP *v.* HARDWARI MAL. 190 I.C. 257=13 R.O. 132=1940 O.L.R. 560=1940 A.W.R. (C.C.) 358=1940 O.A. 748=1940 O.W.N. 794.

——S. 115—*Case decided—Decision on issue in suit—Revision—Competency—Interference.*

The High Court will not ordinarily entertain revision applications against decisions on issues which are not decisions of the whole suit. But where such a decision relates to the question of the jurisdiction of the Court to entertain the suit and it relates to a matter which, if decided wrongly, would result in an elaborate trial which would otherwise be unnecessary, the High Court will interfere in revision. (*Wadsworth, J.*) MUTHUSWAMI CHETTIAR *v.* PERIAL ACHI. 52 L.W. 522=1940 M.W.N. 1039=(1940) 2 M.L.J. 606.

——S. 115 — Interference — Order allowing appeal when no appeal lies — Revision—Interference—No substantial injustice done—Failure to raise plea of non-maintainability of appeal—Effect. *See* C. P. CODE, O. 9, R. 9. (1940) 2 M.L.J. 374.

——S. 115— Jurisdiction—*Ex parte* decree—Order setting aside—Absence of finding as to sufficient cause—Order—If without jurisdiction—Interference in revision — If justified. *See* C. P. CODE, O. 9, R. 13. 1940 M.W.N. 1179.

——S. 115—Jurisdiction—Order directing party to amend plaint—Jurisdiction of Court to make—Revision—Interference. *See* C. P. CODE, O. 6, R. 17. 1940 P.W.N. 797.

——S. 115—*Other remedy open—Remedy by way of suit available—Interference in revision—Jurisdiction of High Court.*

It cannot be held that whenever there is a remedy by way of suit, the remedy by way of revision cannot be allowed. The High Court has jurisdiction to act under S. 115, C. P. Code, and set aside an order passed without jurisdiction and prevent unnecessary multiplication of legal proceedings. (*Burn and Mockett, JJ.*) OFFICIAL RECEIVER, GUNTUR *v.* SESHAYYA 1940 M.W.N. 1225=52 L.W. 810=(1940) 2 M.L.J. 860.

——S. 115—*Scope—Construction of S. 23 of Madras Agriculturists Relief Act—Revision.*

The interpretation of S. 23 of the Madras Agriculturists Relief Act is an important matter coming within the scope of S. 115, C. P. Code, and in an appeal from the decision passed by the lower Court in an incompetent first appeal, the High Court will deal with the matter in revision and revise the decision of the first Court. (*King, J.*) SUBBA NAICKER *v.* SAVARIMUTHU PILLAI. 1940 M.W.N. 1121=52 L.W. 646=(1940) 2 M.L.J. 709.

C. P. CODE (1908), S. 144.

——S. 144—*Applicability—Decree for money—Execution sale—Subsequent reduction of decree amount in second appeal—Such reduced amount higher than price fetched at sale—Application for restitution—Maintainability—Finding that judgment-debtor unable to pay up even reduced amount on date of sale or within 30 days thereof—Effect.*

The prejudice to be removed by restitution must be the result of the erroneous terms of the original decree. Once it is found that the erroneous character of the original decree has made no difference to what has taken place, there is manifestly no case for restitution; whether the modification of the decree is slight or substantial will be irrelevant. The respondent obtained a decree against the appellants for Rs. 963-12-15 *dams* and in execution of that decree the property of the appellants was sold on 15—6—1936 for Rs. 300 and purchased by the respondent decree-holder. Subsequently in 1937, the amount of the decree was reduced by the High Court in second appeal to the sum of Rs. 507-14-6. The appellants thereupon applied under S. 144, C. P. Code, to get the sale set aside on payment of Rs. 507-14-6 and to get back possession on their properties by way of restitution. It was found as a fact that even if the decretal amount had been only Rs. 507-14-6 at the time of the sale, the judgment-debtors appellants were not in a position to pay up that amount and thereby avoid the sale, before the sale was held or within thirty days from the date of sale.

Held, that the position was not altered in any way by the modification of the decree in second appeal, and as the appellants could not have paid up even the reduced decretal amount and the sale price realised was less than the reduced decretal amount, the situation would not have been altered in any way had the decree been modified before, instead of after, the sale. There having been no prejudice owing to the erroneous character of the original decree, S. 144, C. P. Code, did not apply and there was no case for restitution. (*Fazl Ali and Meredith, J.*) GANSU RAM *v.* PARWATI KUER. 21 Pat.L.T. 973.

——S. 144—Application under—Limitation. *See* LIMITATION ACT, ART. 181—APPLICABILITY. 1940 A.W.R. (H.C.) 579.

——S. 144—*Construction and scope—"Party"—Meaning of—If confined to original party—Assignment of decree—Realization of decree by assignee—Restitution on reversal—Right of defendant as against original decree-holder.*

S. 144, C. P. Code, is worded in the most comprehensive terms and should be widely construed. Its object is to put right what was originally an error of the Court and to restore the parties to the position they would have occupied. The word "party" should be given a wide meaning so as to include persons who would become subsequently concerned. The fact that a party to a suit (a plaintiff) who has obtained a decree wrongly against another person prefers to get the immediate benefit of it by a sale or transfer, rather than by way of execution, in no way

C. P. CODE (1908), S. 144.

affects the right of the original party defendant to recover in restitution what he has paid over under pressure of the original erroneous decree. The fact that he paid it over to a nominee of the original plaintiff is wholly irrelevant to his right to recover against the person who caused him to make that payment, namely, the original plaintiff. (*Mockett, J.*) KADIRVELU CHETTIAR *v.* KEMPU CHETTIAR. 1940 M.W.N. 1255=52 L.W. 816=(1940) 2 M.L.J. 877.

——S. 144—*Mesne profits by way of restitution—Calculation—Ejectment suit against tenant—Tenant claiming occupancy right—Decree and possession by landlord—Decree reversed on appeal to Privy Council—Claim by tenant to mesne profits by way of restitution—Basis of assessment—Rent due by tenant—Deduction of—Interest.*

Certain tenants who were sought to be ejected by suits resisted the suits on the ground that they had occupancy rights. The suits were decreed by the trial Court and thereupon the landlord entered into possession. The decrees were confirmed in appeal and second appeal, but ultimately, they were reversed on appeal before the Privy Council who held that the landlord was only entitled to *melwaram* right, the *kudiwaram* right being vested in the defendants (tenants). The tenants applied for restitution claiming mesne profits.

Held, that the tenants were entitled only to be put in the same position in which they would have been had they been enjoying the *kudiwaram* right throughout the period of dispossession. As occupancy rights they were liable to pay rent to the landlord and the amount of rent should therefore be deducted from the mesne profits. The value of the *kudiwaram* right was represented by the net value of the produce less the portion which must be delivered to the landholder as the owner of the *melwaram* right.

Held, further, that the tenants were also entitled to interest on the mesne profits from the date of the order for restitution up to the date of payment of realization. (*Leach, C.J., King and Patanjali Sastri, JJ.*) VENKATAPPAYYA *v.* RAMASWAMI. 52 L.W. 876=(1940) 2 M.L.J. 984 (F.B.).

——S. 144—*'Parties'—Meaning of—Assignee and attaching creditor of party.*

The word 'parties' mentioned in S. 144, C. P. Code means persons claiming under them which obviously means persons who have succeeded to the position of the parties in the litigation either by contract or by operation of law or in other words who are their representatives. An assignee is obviously a representative of the original party and is therefore liable to restitution. Similarly, though it is by a legal fiction that the attaching creditor becomes a party, yet once he has been empowered to execute a decree under O. 21, R. 53 (3), C. P. Code, there is no reason why he should not be taken to be a party to the proceedings when he has done so. Hence he is also a representative for the purposes of S 144, C. P. Code. (*Mir Ahmad, J.*) MANGAL SINGH LAKHBIR SINGH *v.* JAGGAT RAM. A.I.R. 1940 Pesh. 44.

——S. 144—*Right to apply under—Decree for ejectment set aside on appeal—Only formal delivery of possession in execution—Judgment-debtors, if entitled to compensation.*

Where a decree for ejectment is set aside in appeal and only formal possession had been given to the decree-holder in execution of the decree, inasmuch as that whatever possession of the holding was with the judgment-debtors prior to the decree for their ejectment, it continued throughout until the ejectment decree was upset in appeal, the judgment-debtors are not entitled to any compensation under S. 144, C. P. Code. (*Harper, S.M.*) BISHWA NATH PRASAD *v.* MAHARAJA OF BENARES. 1940 R.D. 330=1940 A.W.R. (B.R.) 176 (1).

C. P. CODE (1908), S. 149.

——S. 145—*Liability of sapurdars—Raising of attachment—Effect of.*

The sapurdars are not relieved of their responsibility about the property entrusted to their care by the Court when the attachment ceases nor have they authority to hand over the goods to the judgment-debtor at the request of the decree-holder. The sapurdars take the goods from the agent of the Court subject to certain conditions to wit that they shall produce the goods whenever the Court orders them to do so or pay its equivalent value to the Court. It follows from the contract itself that they cannot deal with the property without first obtaining the direction of the Court. (*Mir Ahmad, J.*) ABDUL HAKIM *v.* ALI AKBAR. 189 I.C. 810=13 R. Pesh. 17=A.I.R. 1940 Pesh. 29.

——S. 146—*Applicability—Ejectment suit—Partition decree pending such suit—Property involved in ejectment suit allotted to son of lessor (plaintiff)—Decree for ejectment—Appeal by defendant—Application by son to implead him as party in appeal—Competency.*

S. 146, C. P. Code, applies only when the person claiming to take or continue a proceeding can properly be regarded as claiming under the original party who brought the action or took the proceeding. Where pending a suit for ejectment by a lessor, a final partition is passed in another suit allotting the property, the subject of the ejectment suit the son of the lessor, it cannot be said that the son gets the property by reason of any assignment from his father and the son cannot be regarded as a person claiming under the lessor within the meaning of S. 146, C. P. Code, so as to entitle him to come on record in an appeal against his father alone by the defendant in the ejectment suit from the decree therein. (*Patanjali Sastri, J.*) RATNASABAPATHI PILLAI *v.* GOPALA AIYAR. 1940 M.W.N 876=52 L.W. 357=A.I.R. 1940 Mad. 876=(1940) 2 M. L.J 349.

——S. 146—Applicability—Mortgage during pendency of suit—Decree against mortgagor—Appeal by mortgagee—Competency—O 22, Rr. 10 AND 11. *See* SUCCESSION ACT, S. 96. (1940) 2 M.L.J 376.

——S. 149—*Scope—Grant of time for payment of deficit Court-fee after limitation—Effect of.*

Whatever the reasons for the Courts granting time for payment of deficit Court-fees, the effect of the grant of time, even if it is after the claim is barred by litigation, is that the plaint takes effect as if it had been presented along with the full Court-fee on the date of its first presentation. (*Pandrang Row and Abdur Rahman, JJ.*) VENUGOPAL PILLAI *v.* THIRUGNANAVALLI AMMAL.

C. P. CODE (1908), S. 149.

1940 M.W.N. 901=52 L.W. 533=A.I.R. 1940 Mad. 934=(1940) 2 M.L.J. 427.

——S. 149 and O. 7, R. 11 – *Relative scope of.*

The provision in the Code which really enables a Court to grant time to make good a deficiency in Court-fee stamp on the plaint is not R. 11 of O. 7, but S. 149, C. P. Code; O. 7 R. 11, does not enforce upon a Court, the granting of time to make good the deficiency in Court-fee stamp. It is not an enabling provision but a disabling one. The authority to issue the order granting time lies in S. 149 and the penalty for default in R. 11 of O 7; S. 149 gives the Court a discretion either to grant time or to refuse to grant time. (*Yorke, J.*) SHIVA CHARAN LAL *v.* BEHARI LAL. 190 I C 197=13 R O. 122=1940 O.L R. 539=1940 A.W. R. (C.C.) 345=1940 O.W.N. 797=1940 O.A. 699.

——S. 149 and O 33—*Discretion of Court—Application to sue* in forma pauperis *found* mala fide—*Extension of time.*

Where an application to sue *in forma pauperis* is found to be *mala fide* the Court in the exercise of its discretion is justified in refusing to grant extension of time under S. 149 (*Young, C.J. and Sale, J.*) DT. OFFICIAL RECEIVER, AMRITSAR *v.* SOHAN LAL RAMJI DASS. 42 P.L.R. 684=A I.R. 1940 Lah. 446.

——S. 151—Inherent powers—Exercise of—Applicant allowing his remedy to be time-barred. *See* BHOPAL C. P. CODE, S. 134. 190 I.C. 174.

——S. 151—*Inherent powers—Exercise of—Existence of other remedy—If a bar.*

The proposition that where an alternative remedy is provided the Court is precluded from exercising its inherent jurisdiction under S. 151, C. P Code, is too wide and does not take into account cases of a special and exceptional character which may demand the exercise of the equitable jurisdiction in the ends of justice to correct palpable mischiefs. There is no reason to limit the powers of the Court in cases where the Court is moved to correct its own mistake and wants to afford redress to the party who has been made to suffer for such mistake. (*Ghulam Hasan, J.*) BADRI PRASAD *v.* AMBIKA PERSHAD. 1940 A.W R. (C C.) 457=1940 O.W.N. 1086=1940 O.A. 1040

——S. 151—*Inherent powers—Order for interim maintenance—Power of Court to award—Suit for possession or in the alternative for possession—Plea that properties are self-acquisitions—Order for interim maintenance—If justified.*

A Court has no inherent power under S. 151, C. P. Code, to pass an interim order of maintenance. Plaintiff brought a suit against his father and brother for recovery of certain properties which he said were allotted to him under an agreement, and in the alternative he prayed for partition. The defendants claimed most of the properties as self-acquisitions. Pending the suit the plaintiff applied for interim maintenance, and the Court allowed an amount far in excess of the mesne profits from the items of property which the defendants admitted to be the plaintiff's.

Held, that the order was not justified and that the plaintiff was not entitled to anything more than an amount in proportion to the property admittedly belonging to him. (*Horwill, J.*) LATCHANNA DORAVARU *v.* MALLU DORAVARU. 52

C. P CODE (1908), O. 1, R. 10.

L.W. 487=1940 M.W.N. 1038=(1940) 2 M L.J. 572.

——S. 151—Inherent powers — Refund of money—Powers of Court—Attachment of wrong property in execution—Owner depositing amount in Court to avert sale—Application for refund—Power of Court to order. *See* C. P. CODE, S. 47. A.I.R. 1940 Sind 191.

——S 151— *Other remedy open — Inherent jurisdiction, if can be invoked.*

As long as a legal remedy is open the Court has no right to invoke its inherent jurisdiction. (*Harper, S M.*) KARIMA *v.* PARTAB SINGH 1940 A.W.R. (B R.) 118=1940 O.A. 709.

——S. 151—*Scope—Party having appropriate remedy under specific provision in Code but failing to avail himself of same—Right to invoke inherent powers.*

A party, who had an appropriate remedy under a specific provision of the Code of which he has failed to avail himself, cannot be allowed to invoke the inherent powers of the Court. There is no room for the exercise of such powers in a case coming within any specific provision of the Code. (*Patanjali Sastri, J.*) RATNASABAPATHI PILLAI *v* GOPALA AIYAR. 1940 M.W.N. 876=52 L.W. 357=A.I.R. 1940 Mad. 876=(1940) 2 M. L.J 349.

——S. 162—*Jurisdiction— Appeal—Abatement in part—Decree on merits as against surviving respondents—Amendment of decree —Forum—Trial Court or appellate Court.*

When an appeal abates so far as one of the respondents is concerned but is decided on the merits so far as the other respondents are concerned, a subsequent application for amendment of the decree under S. 152, C. P. Code, at the instance of the legal representatives of the deceased respondent must be made in the appellate Court and not in the trial Court. The power of amendment must be limited to the appellate Court when an appeal has abated only in part and a decree on the merits has been given as against the other respondents, because in such a case there is a decree capable of execution passed by the appellate Court. (*Wadsworth, J.*) ZULEKA BI *v.* KULSUM BI. 1940 M.W.N. 834=52 L.W. 458=(1940) 2 M L.J. 393.

——O. 1, R. 10—*Procedure—Application by persons to be impleaded as additional plaintiffs—Duty of Court—Dismissal of application on dismissal of suit—Propriety of.*

Where an application is made in a suit under O 1, R. 10, C. P. Code, by certain persons to be brought on record as additional plaintiffs, the Court allow the same without further question. It should not keep the application pending till the disposal of the suit and then dismiss the application on the dismissal of the suit itself. Such an *ex post facto* method of disposing of application of this kind must be condemned unreservedly. (*Pandrang Row and Abdur Rahman, JJ.*) BALA VENKATARAMA CHETTIAR *v.* HINDU RELIGIOUS ENDOWMENT BOARD. 1940 M.W.N. 1016=(1940) 2 M L.J. 615.

——O. 1, R. 10—*Scope — Transposition of parties—When permissible—Promissory note in renewal of earlier one—Insufficiently stamped—Prior note not wiped of.*

Where a later promissory note in renewal of an earlier one is found to have been insufficiently

stamped and hence inadmissible in evidence the prior promissory note cannot be said to have been merged in or wiped off by the later document. An endorsee of a promissory-note which was in renewal of an earlier one brought a suit and when it was discovered that the suit promissory note was inadmissible in evidence. The endorser (the payee of earlier promissory-note) who had been impleaded as a defendant can be transferred as a plaintiff and permitted to amend the plaint and continue the suit on the original promissory-note. The powers conferred on Courts under O. 1, R. 10, C. P. Code, are wide enough to enable the Court to make such an order. (1934) 58 Bom. 536 and (1939) 39 L.W. 387, Dist (*Abdur Rahman, J.*) NARAYANA *v.* GURRAMMA. **52 L.W. 828=(1940) 2 M L.J. 918.**

——**O. 2, R. 2 (3)**—*Bar of suit—When arises—Person entitled to possession suing only for mesne profits—Second suit for mesne profits—If lies.*

If a person is wrongfully kept out of possession of immovable property he is entitled to sue for possession and for mesne profits and under the provisions of O 2, R. 2 (3) he is bound to include both claims in one suit. If he sues only for mesne profits he cannot in a subsequent suit sue separately for possession. In other words he is no longer entitled to possession and if he is not entitled to possession, he is not entitled to mesne profits. A subsequent suit for mesne profits is therefore barred. (*Thom, C. J. and Ganga Nath, J.*) SAGHIR HASAN *v.* TAYAB HASAN. **1940 A.L.J 727=1940 A.W.R. (H.C.) 547=A.I.R 1940 All. 524.**

——**O. 6, R. 17**—*Amendment—Prayer for—Procedure to be followed.*

It is generally most desirable that a party desiring to amend his pleadings should submit his proposed amendments in explicit form before leave sought is granted (*Roberts, C.J. and Blagden, J.*) EUSOOF KARWA *v.* NIEMEYER. **1940 Rang L.R 603.**

——**O 6, R 17**—*Change in the nature of suit—Amended claim based on prior loan—Original claim based on pronote in renewal of original loan—Amended suit by plaintiff as executrix—Character of suit if altered—Liability of executrix for costs.*

Where the original mortgage suit was on a promissory note dated 6th September, 1932, together with a deposit of the title deeds, which note was in renewal of a pronote dated 4th December, 1922 and the amended claim was put in by the plaintiff as executrix of her husband, based on the original loan of 1922, the fundamental character of the suit is not altered merely because the claim rests upon the loan of 1922 to the testator and not upon the note in renewal thereof given in 1932 Further it could not be said that by reason of the plaintiff suing as executrix, the liability for costs is in any way affected. Though when an executrix is sued upon a liability of her testator she has the protection of S. 52, C. P. Code, if she seeks to assert a claim as she does in this case, the fact that she possesses it by virtue of her being the sole executrix and beneficiary, puts the defendant at no disadvantage from which he would have been free if the claim had been brought otherwise than in a representative capacity. (*Roberts, C.J. and Blagden, J.*) EUSOOF KARWA *v.* NIEMEYER. **1940 Rang L.R 603.**

——**O. 6, R. 17**—*Scope—Power of Court—Order directing party to amend his plaint—If justified—Revision—Interference.*

A Court has no jurisdiction to direct a party to amend his plaint. If it thinks that there are grounds for rejecting the plaint, it may do so, but it cannot insist on a party amending his plaint. If it passes an order calling on the party to amend the plaint, the High Court will interfere and set aside the order as it is without jurisdiction. (*Agarwala, J.*) BHAGWAT PRASAD *v.* FANISH DEO TEWARI. **190 I.C. 754=7 B.R. 116=21 Pat. L.T. 946=1940 P.W.N. 797.**

——**O. 7, R. 10**—Applicability—Suit instituted in proper Court—Transfer to Subordinate Judge of same Court—Amendment taking suit beyond jurisdiction of that Judge—Procedure—Return of plaint—If necessary. *See* C. P. CODE, S. 24 AND O. 7, R. 10. **42 Bom L.R. 1093.**

——**O. 7, R. 11**—*Applicability—Application to sue* in forma pauperis.

O. 7, R 11 does not apply to an application for permission to sue *in forma pauperis*. Such an application is specifically dealt with by O. 33, R. 8 which makes it clear that an application for permission to sue *in forma pauperis* is only deemed to be a plaint in the suit, when the application is granted. Where the application has never been granted O. 7, R. 11 does not apply. (*Young, C.J. and Sale, J.*) DT. OFFICIAL RECEIVER, AMRITSAR *v.* SOHAN LAL RAMJI DASS. **42 P.L.R. 684=A.I.R. 1940 Lah. 446.**

——**O. 8, R. 6**—*Scope—Suit by landlord for rent—Counter-claim by defendant tenant for damages for dispossession—Propriety—Failure to pay court-fee on counter-claim—Right of defendant to relief.*

Where in a suit for rent by a landlord against his tenant, the tenant makes a counter-claim for damages on account of his having been dispossessed by the landlord but does not pay court-fee on the amount claimed by him as damages, he is not entitled to any relief in the suit in respect of the damages claimed. Further the nature of the enquiry which would be necessary to determine the claim for damages would be quite foreign to the scope of a rent suit. If, therefore, the Court refuses to enter into the question and refers the defendant tenant to a separate suit, the Court would be exercising a wise discretion and it cannot be said that the decision is wrong or contrary to law. (*Harries, C.J and Manohar Lal, J.*) JWALA PRASAD *v.* HARIHAR PRASAD. **21 Pat L.T. 821.**

——**O. 9, R 8**—*Plaintiff not appearing—Proper order to pass.*

Where at the hearing there is no appearance whatsoever on behalf of the plaintiff, the case should be dismissed under O. 9, R. 8. The Court is not entitled to pass an order holding over the case indefinitely. (*Harper, S.M. and Sathe, J.M.*) AJUDHYA *v.* BUDHSEN. **1940 R.D. 402=1940 A.W.R. (B.R.) 214.**

——**O. 9, R 9 and S. 151**—*Dismissal in default—When should be ordered—Dismissal early in the day and under misapprehension—Restoration under inherent powers.*

An order of dismissal in default should not be passed till the end of the day when the Court was

C. P. CODE (1908), O. 9, R. 13.

rising, because there could be no default until the Court rose for the day. Where an application under O. 21, R. 97 was dismissed in default early in the day, and the party in default was late only by 15 minutes and applied at once for its restoration it was held that there was in fact no dismissal for default at all and that the Court had perfect jurisdiction to revoke its own order passed under a misapprehension and restore the application. (*Ghulam Hasan, J.*) BADRI PRASAD *v.* AMBIKA PERSHAD. **1940 O A. 1040=1940 O.W.N. 1086=1940 A.W R. (C.C.) 457.**

——**O. 9, R. 13**—*Construction and scope—Duty of Court—Express finding as to sufficient cause or want of due service—Court if bound to record—Failure to record — If justifies interference in revision—Order—If without jurisdiction.*

O. 9, R. 13, C. P. Code, merely requires an applicant seeking to set aside an *ex parte* decree to satisfy the Court that summons was not duly served on him or that he was prevented by any sufficient cause from appearing. It does not require the Court to record a finding to that effect and it is not obligatory on the Court to record an express finding that the applicant was prevented by sufficient cause from appearing, before setting aside the *ex parte* decree. Merely because a Court does not set forth the reasons for passing an order setting aside the *ex parte* decree, the order cannot be said to be one passed without jurisdiction, and the absence of such a finding is no ground for interference in revision. (*Wadsworth, J.*) VIRESAM *v.* ADINARAYANA. **1940 M.W.N. 1179=52 L W. 809=(1940) 2 M.L.J. 977.**

——**Orders 12 and 23**—*Applicability—Proceedings under U. P. Land Revenue Act.*

The U. P Land Revenue Act being a self-contained enactment in respect of procedure, the provisions of the C. P. Code do not apply to proceedings under the Act unless they have been made specially applicable; and Orders 12 and 23 are not among those which have been made applicable to such proceedings. (*Harper, S.M. and Sathe, J.M.*) KADAM SINGH *v.* PHALDAN SINGH. **1940 A.W.N. (B.R.) 138=1940 O.A. 860=1940 R.D. 364.**

——**O. 17, Rr. 2 and 3**—*Applicability and scope—Issues framed and suit adjourned for production of evidence by parties—Plaintiff failing to appear—Procedure — Disposal of merits—Propriety—Discretion of Court—Judicial exercise.*

The last words of R. 2 of O 17, C. P. Code, confer on the Court a discretion, but it is a discretion which must be exercised judicially. A judge, in exercising such discretion, may grant a further adjournment, or, if the circumstances justify such a course, he can pass an order on the merits; but he must have material before him to justify that course. If there is no evidence before him, he cannot in the exercise of judicial discretion proceed to deal with the case on merits; he must either dispose of the matter under O 9, C. P. Code or else grant an adjournment. R. 3 of O. 17 is not in terms confined to default of appearance as is R. 2. though it may be brought into operation by default of appearance. It deals with the failure by a party to do an act for which he has been allowed time; and even under R. 3 the Court must have material to enable it to exercise its proper discretion by deciding the

C. P. CODE (1908), O. 21, R. 11.

case of merits where the hearing of a suit has been adjourned under O. 15, R. 3 for the production of evidence by the parties, and the plaintiff fails to appear on the adjourned date, it cannot be said that O. 17, R. 3, applies. The case falls under O. 17, R. 2, and if there is no material before the Court, the Court can only dismiss the case for want of appearance if it does not grant an adjournment. (*Beaumont, C.J. and Wassoodew, J.*) RUKMANSA RAJANSA *v.* SHANKARGOUDA BASANGOUDA. **42 Bom.L.R. 1111.**

——**O. 21, Rr. 2 and 15**—*Joint decree-holders—Right of one to receive payment and give valid discharge—Adjustment between judgment-debtor and one of several joint decree-holders—If binds the rest—If can be recorded—Duty of Court.*

In the case of partners who have become joint decree-holders (and are not merely joint private creditors), one of them as such decree holder is not competent to receive the joint decree debt so as to release the judgment-debtor from liability in execution for even a portion of the decree debt. If satisfaction of a decree should be entered on the report of one of the joint decree-holders it would amount to a violation of O. 21, R. 15, C. P. Code. If, however, express authority of the executing decree-holder to receive the decree amount on behalf of all the joint decree-holders is proved, or if it is established that in fact all the decree-holders have received their shares of the amount, then an adjustment binding on all of them can and should be recorded under O. 21, R. 2, C. P. Code. If no such express authority or receipt be proved, then O. 21, R. 15 has to be looked into. If the executing joint decree-holder says in his application that the other decree-holder will be produced at the time of recovery of money that is a sufficient compliance with O. 21, R. 15, C. P. Code, because no particular form of words is required to express the undertaking required by Cl (1). Cl. (2) imposes duty on the Court to make the necessary order for protecting the interests of the other joint decree-holders who have not joined in the execution application. If the other decree-holder is not produced at the time of receipt of money by the applicant, an adjustment by the applicant with the judgment-debtor cannot bind the other decree-holder who has not joined. (*Davis, J.C. and Weston, J.*) SHAHBAZKHAN *v.* KAKALMAL. **I.L.R. (1940) Kar. 461=A I.R. 1940 Sind 230.**

——**O. 21, R. 11 (2) (f)**—*Construction and scope—"Results" of previous application—If mean completed results—Levy of execution—If operates as stay of further execution of decree.*

O. 21, R. 11 (2) (*f*) requires an application for execution to state whether any and what previous applications have been made for the execution of the decree and their results. The word "result" does not mean completed results and does not imply that no further application for execution can be entertained so long as one is pending. The rule is complied with if in a further application for application the result of a previous application is stated whatever the result may be, as for instance, that it has been completely infructuous. The mere fact that execution has already been levied under the decree does not operate as a stay of execution on the decree in law. (*Blackwell, J.*) MORARJEE GOKULDAS & Co. *v.* SHOLAPUR

C. P. CODE (1908), O. 21, R. 15.

SPINNING & WEAVING CO., LTD. **42 Bom.L.R. 948.**

——**O. 21, R. 15**—Scope and effect of—Execution application by one joint decree-holder—Competency - Subsequent adjustment between applicant and judgment-debtor—Validity—If can be recorded so as to bind other joint decree-holders. *See* C. P. CODE, O. 21, RR. 2 AND 15. **I. L.R. (1940) Kar. 461**

——**O. 21, R. 18**—*Right to obtain order under—Actual attachment of cross-decree—If necessary.*

A decree-holder is not precluded from obtaining an order under O. 21, R. 18, C. P. Code, by reason of the fact that at the time when the execution application is filed, the cross-decree had not been actually attached. (*Lord Romer.*) MAHALINGAM CHETTIAR *v.* RAMANATHAN CHETTIAR. **190 I.C. 13=1940 M.W.N. 1194=7 B.R. 24 =13 R.P.C. 51=1940 A L J. 837=1940 O.A. 1219=42 Bom.L.R. 1166=1940 A.W.R. (P.C.) 180=1940 O.W.N. 880=52 L W. 540=1940 O. L.R 556=A.I.R. 1940 P.C. 173=(1940) 2 M.L. J. 677 (P.C.).**

——**O. 21, R. 18**—*Right to set-off cross-decrees—If defeated by attachment of cross-decree by third party.*

The moment that cross-decrees such as are mentioned in R. 18 of O. 21, C. P. Code, are in existence the decree-holders become entitled to the right of set-off. It is true that effect cannot be given to the set-off until applications are made to the Court for the execution of the two decrees. The right nevertheless is there, and this right of the holder of one decree cannot be defeated by an attachment in favour of a third party of the other decree made after the right of set-off has arisen. Whatever may be the true position in law of an attaching creditor, it is plain that he can have no higher rights in respect of an attached decree than were possessed by his judgment-debtor. If at the time of the attachment of a decree the decree-holder is liable to have his debt extinguished by being set-off against a cross-decree against him, the attaching creditor is subjected in respect of the decree to the same liability. The right to rateable distribution under S. 73, C. P. Code, is confined to assets held by the Court. Where one of the judgment-debtor's assets is a decree for the payment to him of a sum of money which is liable to be extinguished by being set-off against a cross-decree against him, no assets representing that decree will ever come into the possession of the Court if the right of set-off be exercised. Hence the rule laid down in O. 21, R. 18 must be first applied before any question can arise for rateable distribution under S. 73. (*Lord Romer.*) MAHALINGAM CHETTIAR *v.* RAMANATHAN CHETTIAR. **190 I.C. 13=1940 M.W.N. 1194=7 B R. 24=13 R P C. 51=1940 A.L.J. 837 =1940 O A. 1219=42 Bom.L.R. 1166=1940 A. W.R (P.C) 180=1940 O.W N. 880=52 L.W. 540=1940 O L.R. 556=A.I.R. 1940 P.C. 173= (1940) 2 M L.J. 677 (P.C.).**

——**O. 21, R. 48**—*Duty of Court—Ascertainment of attachable portion of salary—Necessity for obtaining material from disbursing officer and then attaching definite amount.*

A Court acting under O. 21, R. 48, C. P. Code, must follow the Code. Sub-R. (2) of R. 48 speaks of the attachable portion of the salary. It would better for the Court, in the interests of all concerned, to obtain on the application of a decree-holder, the relevant materials from the disbursing officer in order to work out the figures itself and then issue an attachment for a definite, specified amount so that the parties and the disbursing officer may be under no misapprehension, especially when there is more than one execution case pending against the same judgment-debtor. (*Dhavle, J.*) BHAGWANDAS RAMPRASAD *v.* SECRETARY OF STATE. **21 Pat L.T. 776.**

C. P. CODE (1908), O. 21. R. 53.

——**O. 21, R. 49 (2)**—*Rights of judgment-creditor of partner who has overdrawn—Priority of partners to reimbursement—Appointment of receiver—Effect.*

Where the interest of a partner extends only to the profits and has nothing to do with the assets and such partner overdraws his share of the profits, then the remaining partners are entitled to reimburse themselves from the overdrawing partner's share of the profits before handing over any part of such share to the overdrawing partner. A judgment-creditor of such a partner can have no higher rights than his judgment-debtor and hence the remaining partners will get priority over the overdrawing partner's judgment-creditor or assignee. A receiver appointed under O. 21, R. 49 (2) in respect of such a partner's share in the profits though in no better position, has a right to accounts and can insist that nothing be paid over to the judgment-debtor partner for his private and personal purposes as distinct from payments made for business purposes. (*Stone, C. J. and Bose, J.*) PANMAL KESHRI CHAND *v.* DHANALAL. **1940 N.L.J. 596.**

——**O. 21, R. 53 (1) (b)**—*Scope and object of the request.*

O. 21, R. 53 (1) (*b*) does not purport to prohibit the Court to which it is addressed from executing the decree unless the conditions contained in the request are fulfilled. The object of the request is to ensure that the holder of the decree does not himself proceed to execution without the leave of the Court making the attachment. It is not intended to prevent other attaching creditors from asking for execution of the decree. (*Lord Romer.*) MAHALINGAM CHETTIAR *v.* RAMANATHAN CHETTIAR. **190 I.C. 13=52 L.W. 540= 1940 O.L.R. 556=1940 M.W.N. 1194=7 B.R 24 =13 R.P.C. 51=1940 A.L J. 837=1940 O.A. 1219=42 Bom L R. 1166=1940 A.W R. (P.C.) 180=1940 O.W N. 880=A.I.R. 1940 P.C. 173= (1940) 2 M.L J.677 (P.C.).**

——**O. 21, R. 53 (3) and Bengal Public Demands Recovery Act, S. 19 (3)**—*Attaching decree-holder—Representative character—Limits—Analogous position of certificate-holder under S 19 (3) of the Public Demands Recovery Act—Right to adjust the decree.*

An attaching decree-holder in R. 53 of O. 21, C. P. Code, or the certificate-holder in S. 19 of the Bengal Public Demands Recovery Act, is by a legal fiction the representative or agent of the holder of the attached decree for the limited purpose of executing the decree (*i.e.*) enforcing it by process of the Court and of satisfying his own decree out of the proceeds of such execution. He is not an assignee of the decree, so as to acquire all the rights of the original decree-holder in the decree. Nor can he adjust the attached decree. (*M. R. Jayakar.*) RADHAKISHEN *v.* DURGA PRASAD. **190 I.C. 87=1940 O.**

C. P. CODE (1908), O. 21, R. 53.

A. 900=21 Pat.L.T. 797=1940 A.W.R. (P.C.) 152=1940 A.L.J 617=52 L.W. 647=1940 M.W.N. 1129=1940 O.W.N. 1031=45 C.W.N. 1=1940 O.L.R. 572=7 B.R. 73=13 R.P.C. 63=42 Bom.L.R. 1172=A.I.R. 1940 P.C. 167=(1940) 2 M.L.J. 952 (P.C.).

——O. 21, R. 53 (3)—*Decree attached by several creditors—Right of one to execute without the consent of others.*

There is no reason for thinking that a judgment creditor who has succeeded in attaching a decree is unable to apply to the Court for execution of the decree without obtaining the concurrence or consent of other attaching creditors. On the contrary R. 53 (3) of O. 21, C. P. Code, provides in terms that an attaching creditor shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute the attached decree in any manner lawful for the holder thereof. The fact that there may be other attaching creditors in the same position is immaterial. Any money recovered by the execution creditor will be held by the Court and be subject to the provisions of S. 73 of the Code. Any payments made out of Court to the attaching creditor as representative of the holder of the attached decree would be avoided as against the other attaching creditors by S. 64 of the Code. The other attaching creditors are therefore adequately protected, and their concurrence in or consent to the execution is unnecessary. (*Lord Romer.*) MAHALINGAM CHETTIAR *v.* RAMANATHAN CHETTIAR. 190 I C 13=1940 O.W N. 880=52 L.W. 540=1940 O L.R. 556=1940 M.W N. 1194=7 B.R. 24=13 R P.C. 51=1940 A L.J 837=1940 O.A. 1219=42 Bom. L R. 1166=1940 A.W.R. (P.C.) 180=A.I.R. 1940 P.C. 173=(1940) 2 M.L J 677 (P.C.).

——O. 21, R. 54—*Attachment of immovable property—Service of prohibitory order—If necessary to complete the attachment—Procedure required by O.* 21, *R.* 54.

There is no warrant for the proposition that an attachment is not complete until notice of the prohibitory order is served upon the owner of the property. There is no direction in O. 21, R. 54 that a copy of such order shall be served upon the defendant. All that is enjoined is that the order shall be proclaimed and affixed. If those are done, the attachment is complete and valid. (*Thom, C. J. and Ganga Nath, J.*) KARAN SINGH *v.* RAM SAHAI. 1940 A.L.J. 894=1940 A.W.R. (H.C.) 598.

——O. 21, R. 57—*Applicability—Attachment before judgment.*

O. 21, R. 57, C.P. Code, applies to a case where application is made in execution against property attached before judgment and the application is dismissed on default of the decree-holder.

Weston, J.—An attachment obtained before judgment under O. 38, C. P. Code, is, after judgment, as much an attachment in execution as an attachment obtained on application under O. 21, R 11, C. P. Code. (*Davis, J.C. and Weston, J.*) PRIBHOMAL *v.* KISHNOMAL. I.L.R. (1940) Kar. 454.

——O. 21, R. 57 (N.W.P.)—*"Default"--Decree-holder's refusal to proceed with execution application—If amounts to.*

The decree-holder's refusal to proceed with his execution application amounts to a "default" as contemplated by O. 21, R. 57, C. P. Code. (*Mir Ahmad, J.*) ABDUL HAKIM *v.* ALI AKBAR 189 I. C. 810=13 R.Pesh. 17=A.I.R. 1940 Pesh. 29.

C. P. CODE (1908), O. 21, R. 90.

——O. 21, R. 58—Applicability—Insolvent—Judgment-debtor— Official Receiver—If representative—Attachment—Objection by receiver claiming that all property vested in him from date of insolvency petition— Rejection— Remedy—Appeal or suit. *See* C. P. CODE, S. 47 AND O. 21, R. 58. (1940) 2 M.L.J. 860.

——O. 21, Rr. 58 and 63—*Effect of order under R.* 58—*Withdrawal of attachment—Necessity for suit under R.* 63.

Where subsequent to the dismissal of a claim under O. 21, R. 58, C. P. Code, the attachment ceases within one year from the date of the order, for whatever reason, it is not necessary for the claimant to file a suit under O. 21, R. 63 and the order dismissing the claim is of no effect. (*Yorke, J.*) HIDAYAT-UL-NISSA *v.* JALALUDDIN. 1940 O.A. 1036=1940 A.W.R. (C.C.) 448=1940 O.W.N. 1057.

——O. 21, R. 63—*Suit under after auction sale—Decree-holder, if a necessary party.*

Where a suit is brought under O. 21, R. 63, C. P. Code, after the property had been sold in auction, the decree-holder is a necessary party to such a suit and it would be unsustainable in his absence. (*Gruer, J.*) RAGHO *v.* TULSIRAM. 1940 N.L.J. 604.

——O. 21, R. 83—Scope—Permission by Court for sale by judgment-debtor and grant of certificate—Effect of—Sale if one by Court or under orders of Court—Right of purchaser—If "claim enforceable under the attachment." *See* C. P. CODE, S. 64. 52 L.W 862=(1940) 2 M.L.J. 1038.

——O. 21, R. 86—*Default of payment by purchaser—Sale, if nullity.*

If a purchaser makes default of payment of the balance of the purchase-money, he forfeits all claim to the property purchased, whether the deposit made by him under O. 21, R. 85, C. P. Code, be forfeited or not, and the auction sale at which he purchased becomes a nullity. (*Lodge, J.*) ANNAPURNA DASI *v.* BAZLEY KARIM FAZLEY MOULA. 72 C.L.J. 129.

——O. 21, R. 90—*Applicability—Sale in execution of decree for arrears of rent under Madras Estates Land Act—Setting aside — Power of Revenue Court—Madras Estates Land Act, Ss.* 132 *and* 194.

O. 21, R. 92, C. P. Code, does not apply to sales in execution of decrees for rent passed under the Madras Estates Land Act. The rule is not made applicable to such sales by S. 192 of the Estates Land Act. S. 132 of the Estates Land Act, by making the provisions of Ch. VI of the Act applicable to the execution by a Revenue Court of any decree for arrears of rent, provides a complete Code of Procedure, and S. 192 which applies the provisions of the C. P. Code to proceedings under the Act, must be read subject to S. 132. The amendment of S. 192 by Act VII of 1934 does not make any difference. (*Patanjali Sastri, J.*) SURYANARAYANA *v.* SOBHANADRI APPA RAO BAHADUR. 52 L W. 505=1940 M.W.N. 976=(1940) 2 M.L J 584.

——O. 21, R. 90 (Madras amedment of 1937), Proviso 1—*Construction and scope—If* ultra vires—*Order for security before admission of*

C. P. CODE (1908), O. 21, R. 92.

application—Opportunity to applicant to show cause before order—Necessity.

The first proviso to O. 21, R. 90, C. P. Code, added by the Madras High Court by the amendment of 1937, must be held to be *intra vires* the rule-making powers of the High Court under S. 122, C. P. Code An applicant seeking to set aside a sale under O. 21, R. 90, C. P Code, as amended in 1937, on the ground of material irregularity or fraud, must be given an opportunity of showing cause before an order is made against him requring security before admitting the application. The subsequent amendment of the rule and the re-framing of the first proviso put this beyond all controversy. (*Leach, C.J., King and Patanjali Sastri, JJ.*) SEETA RAMANJANEYALU *v* RAMAYYA. **1940 M W.N. 1260=52 L.W. 906=(1940) 2 M.L.J. 972 (F.B.).**

——**O. 21, R. 92 (3)**—Scope—Sale in execution of decree on prior mortgage—Puisne mortgagee purchasing part of mortgaged property not impleaded in suit—Application by latter to set aside sale under O. 21, R. 89—Dismissal—Subsequent suit by him to redeem—If barred. *See* C. P. CODE, S. 47. **I L.R (1940) Kar. 447.**

——**O. 21, R. 94**—*Mistake in the matter of the number of the house sold—Parties not mislead—Agitation after eleven years—Relief if can be given.*

Where a plaintiff claims after an interval of just short 12 years to take a technical advantage of mistake in the number of the house sold and entered in the sale certificate and to insist that he is now entitled to have the property of the exact description which he bought, irrespective of what the real intention of the parties may have been and of any equities between them, Courts in India, in their application of principles of justice, equity and good conscience. would refuse to give him the relief prayed for. (*Braund, J.*) KALYAN DAS *v* BRIJKISHORE. **1940 A W.R. (H.C.) 539=1940 O.A 969=1940 A L.J 762.**

——**O. 21, Rr. 97 and 103**—*Dismissal of application under R. 97 of O. 21—Appealability—Scope of R. 103 of O. 21.*

An order dismissing an application as barred by time is not an 'order made under R. 98, 99 or 101' of O. 21, within the meaning of R. 103 of O. 21, but it is a decree within the meaning of S. 2 (2) and is hence appealable. What R 103 prevents is an appeal, not from 'an order on an application under O. 21, R. 97' but from 'an order....under R. 98, R. 99 or R. 101.' (*Braund, J.*) BAHADUR KHAN *v.* BARI TALA. **1940 A.W.R (H.C.) 515=1940 O.A. 937=1940 A.L.J. 785=A.I.R. 1940 All. 525.**

——**O. 21, R. 103**—Scope of. *See* C. P. CODE, O. 21, RR. 97 AND 103. **1940 A.W.R. (H.C) 515.**

——**O. 22**—*Applicability— Arbitration—Reference by parties of family disputes—Death of one party—If put an end to arbitration proceedings.*

Where certain family disputes are referred to arbitration and the parties intend to proceed with the arbitration to a decision, the death of one of the parties to the arbitration will not bring the arbitration to an end So long as a dispute is pending before arbitrators on a private reference, the proceedings before them are not governed by O. 22, C. P. Code, and there can be no question of the legal representative of a deceased party being brought on the record. (*Mockett and Krishnaswami Ayyangar, JJ.*) VENKATACHELLAM *v.* SURYANARAYANAMURTHY. **1940 M.W.N 1083=52 L.W. 556=(1940) 2 M.L.J. 520.**

C. P. CODE (1908), O. 30, R. 1.

——**O. 22, R. 4**—*Administration suit—Death of one of defendants—Abatement of suit.*

It not uncommonly happens, in a suit for administration, that for one reason or another a particular interest is not represented before decree, but is either provided for by the decree, or is asserted at a later stage under the decree, or is given effect by a party being permitted to attend certain accounts and enquiries so as to be bound by the result. A Mahomedan brought a suit against his co-heirs for administration. One of the defendants who had the same interest and was in the same position as that of the plaintiff died and no application was made by the plaintiff to bring his heir on the record.

Held, that the suit for administration did not come to an end by reason of abatement as against the deceased defendant. (*Sir George Rankin.*) MAHOMEDALLY TAYEBALLY *v.* SAFIABAI. **A.I.R. 1940 P.C 215 (P.C).**

——**O. 22, R. 4**—*Contest by some of several defendants—Presumption as to knowledge of rest—If applies to deceased defendant—Mandatory character of O. 22, R. 4.*

Where there are several defendants to a case, only some of whom are contesting the case actively the knowledge of the silent defendants may be presumed from the fact that other co-defendants are actively contesting the proceedings. But this presumption can hardly apply to a deceased defendant. Neither his knowledge nor that of his heirs can be presumed from the fact that some of the other defendants, who are alive, are contesting the proceedings. The provisions of O. 22, R. 4, C. P. Code, are mandatory and it is necessary before the proceedings can continue that when one of the defendants dies his heirs must be brought on the record. (*Harper, S.M. and Sathe, J.M.*) BHARATH DASS *v.* INDRASAN. **1940 R.D. 474=1940 A.W.R. (B.R.) 195=1940 O.A. 1021.**

——**O. 22, R. 10**—*Order under—Competency to pass after disposal of case.*

An order under O. 22, R. 10 can only be passed, if the original case is still pending. If the case is disposed of the Court has no jurisdiction in the case at all, and so no order under R. 10 of O. 22 could be passed. (*Harper, S.M. and Sathe, J.M.*) AJUDHYA *v.* BUDHSEN. **1940 R.D. 402=1940 A. W.R. (B.R.) 214.**

——**O. 23**—Applicability—Proceedings under U. P. Land Revenue Act. *See* C. P. CODE, ORDERS 12 AND 23—APPLICABILITY. **1940 R.D 364.**

——**O. 23, R. 1 (4)**—Applicability. *See* AGRA TENANCY ACT (1901), SS. 58 AND 63 AND C. P. CODE, O. 23. R. 1 (4). **1940 R.D. 390.**

——**O. 30, R. 1**—*Suit by sole proprietor—Proper frame of suit.*

It is implicit in O. 30, R. 1, C. P. Code, that a suit can be brought in the name of a firm only where the firm consists of more than one person. Where a firm consisted of a sole or single proprietress a suit brought in the name of the firm, the addition of the words 'through Mst. Munia, proprietress' was held to remove the defect in the frame of the suit. (*Bennett J.*) LUCKNOW AUTOMOBILES *v.* REPLACEMENT PARTS CO. **190 I.C. 554=1940 O.L.R. 623=1940 O.W.N. 901=1940 O**

C. P. CODE (1908), O. 30, R. 8.

A. 852=1940 A.W.R. (C.C.) 395=A.I.R. 1940 Oudh 443

——**O. 30, R. 8**—*Scope—Defendant served as partner—Appearance in protest and denial of being partner—Right to ask for issue of partnership being tried first.*

A person served as a partner, who enters an appearance under protest denying that he is a partner, is not entitled to dispute the liability of the firm, and cannot therefore obtain an order for an issue to try the question of his partnership before the other issues in the action. (*Blackwell, J.*) NANDLAL TRIBHOVANDAS *v.* BAKER JAFER & Co. **42 Bom.L.R. 935=A.I.R. 1940 Bom. 390.**

——**O. 30, R. 10**—*Scope—Person sued in name adopted for purpose of dealings—Another using that name independently or by transfer of business before suit—If* ipso facto *become liable for debts incurred by former.*

When a person is sued not in his own name but in the name which he adopts for the purpose of dealings, this does not mean that another person who also has used that name either independently or by transfer of business before the suit, *ipso facto* has made himself liable for the debts incurred by the first person. (*Weston, J.*) JAI SINGHANI, *In re.* **A.I.R 1940 Sind 191.**

——**O. 32, R. 3**—*Appointment of guardian—Father refusing to act and suggesting mother—Mother if should notify willingness.*

It is quite open to the Court to make an order appointing the mother as guardian of her minor sons on the application from their father stating that he did not desire to be their guardian but he desired that his wife in whose charge the minors were to be their guardian. It is not necessary for the mother in whose care the minors are to notify to the Court her willingness to act. (*Bennett and Verma, JJ.*) RAMCHARAN DAS *v.* BHAGWAT SARAN. **1940 A.W.R. (H.C.) 623=A. I.R. 1940 All. 467.**

——**O. 32, R. 3**—*Appointment of guardian—Minor's name wrongly given—None misled in fact—Objection in execution—Sustainability.*

In his plaint as well as the application for impleading the two minor sons of the defendant and for appointment of a person as their guardian the plaintiff incorrectly described the name of one of the two minors. The Court also repeated the same mistake in its order appointing the mother of the minors as their guardian. But the mother described the names of her minor sons correctly in the written statement filed by her, and contested the case on their behalf through a counsel who was engaged on a vakalatnama to represent their case in which the correct names of the minors were given. On the application of the wrongly described minor objecting to the execution of his decree by the plaintiff decree-holder on the ground that the decree did not bind him as he was not properly represented in the suit.

Held, that in view of all the circumstances of the case the fact that the plaintiff in his plaint and application under O. 32, R. 3 gave a wrong name for one of the minors was not a matter of vital importance, since there were only two minor sons of defendant in existence on the date of suit, and they were obviously intended by the plaint and no serious objection was taken in the trial Court or in the High Court that those names did not correctly represent the two minor sons of the defendant. As there was no real doubt as to the persons intended and as those persons were actually represented by a written statement and a counsel, it was not open to one of the persons after the proceedings had terminated in decrees of the trial Court and the appellate Court to come forward in execution proceedings and claim that he was not really represented in the suit and appeal. (*Bennet and Verma, JJ.*) RAMCHARAN DAS *v.* BHAGWAT SARAN. **1940 A.W.R. (H.C) 623=A.I.R. 1940 All. 467.**

C. P. CODE (1908), O. 34, R. 1.

——**O. 32, R. 7**—*Absence of leave—Effect.*

The provisions of O. 32, R. 7, C. P. Code, are mandatory and if a compromise is entered into on behalf of a minor without leave of the Court, it is null and void so far as the minor is concerned. (*Harper, S.M. and Sathe, J.M.*) MAHOMED KHALIL *v.* EHSAN ULLAH. **1940 R.D. 497=1940 A.W.R. (B.R.) 197.**

——**O. 33, Rr. 10 and 11**—*Plaintiff succeeding only in part—Order for payment of whole Court fee by defendant—Propriety.*

The Court-fee payable in a case is the Court-fee leviable upon the plaint. Where the plaintiff in a suit filed as a pauper succeeds only in part, there is nothing improper in the trial Court ordering the defendant to pay the whole Court-fee, if the Court thought that it was a proper order. If the defendant thought that order unjust, he could appeal against that portion of the order. (*Yorke, J.*) MUJAWIR HUSAIN *v.* KISHWAR JEHAN BEGAM. **1940 O.A. 978=1940 A.W.R. (C.C.) 429=1940 O.W.N. 1010.**

——**O. 34**—*Applicability to charges created by decrees.*

The principles underlying O. 34, C. P. Code, although they may not strictly apply in the case of a charge, may be applied and ought to be applied by analogy to charges created by a decree, unless indeed the terms of the decree make it clear that the remedy of recovering the decretal amount from the property charged was not given in lieu of the personal remedy, but in addition to it. In every case it is essentially a question of construction of the decree. (*Broomfield and Divatia, JJ.*) RAYCHAND JIVAJI *v.* BASAPPA VIRAPPA. **42 Bom.L.R. 1113.**

——**O. 34, R. 1**—*Scope—Non-joinder—Effect.*

Order 34, R. 1 makes it obligatory for a plaintiff in a mortgage suit to join all persons having an interest in the right of redemption. Where such a person is not joined as a party his rights can in no wise be affected by the proceedings in the suit. The result of the non-joinder of a person in whom the equity of redemption had vested, as a party to the mortgage suit, therefore, is that in spite of the decree passed and the subsequent purchase by the plaintiff at a sale in execution of that decree, the plaintiff acquires no further rights in the property as against the owners of the equity of redemption, and merely remains what he was, a mortgagee with such rights as he already had under the mortgage. His suit for possession of mortgaged property is governed by Art. 135. (*Tyabji, J.*) JASRAJ FAOOJI *v.* SUGRABAI. **A.I.R. 1940 Sind 195**

——**O. 34, R. 1**—Scope—Prior mortgage—Suit on without impleading puisne mortgagee-purchaser—Decree and sale—Purchase by prior mort-

C. P. CODE (1908), O. 35, R. 5.

gage—Effect—Right of subsequent mortgagee to redeem. *See* C. P. CODE, S. 47. **I.L.R. (1940) Kar. 447.**

——**O. 35, R. 5**—*Scope—Landlord and tenant—Interpleader suit by tenant against landlord and stranger—Maintainability.*

S. 116 of the Evidence Act prevents a tenant from denying the title of his landlord at the commencement of his tenancy, and the tenant cannot therefore bring a suit in which a claim inconsistent with his landlord's title at that time is to be limited. In order therefore that a tenant may maintain an interpleader suit, the claim of the party other than the landlord must be consistent with the title of the landlord at the commencement of the tenancy in question. (*Broomfield and Divatia JJ.*) YESHWANT BHIKAJI *v.* SADASHIV GOVIND. **42 Bom.L.R. 881=A.I.R. 1940 Bom. 414.**

——**O. 39, R. 1**—Powers under—If can be exercised by Special Judge under United Provinces Encumbered Estates Act. *See* UNITED PROVINCES ENCUMBERED ESTATES ACT, S. 54, R. 6 OF RULES UNDER. **1940 A.L.J. 820.**

——**O. 41 R. 4**—*Scope of—Withdrawal of appeal filed by one of several defendants—Other defendants not parties, if can claim to continue appeal.*

The words of R. 4 of O. 41, C. P. Code, only mean that if an appeal is filed by only one of the parties, the whole case is reopened. This is different from saying that all the co-plaintiffs or co-defendants become appellants, *ipso facto* merely by one man out of them filing the appeal. A party becomes an appellant only when he either signs the memorandum of appeal or authorises the person actually signing it, to file it on his behalf. Hence on the withdrawal of an appeal filed by only one of the several defendants, the other defendants who had not cared to join in the presentation of the appeal, cannot claim to continue that appeal. (*Sathe, J.M.*) ABHI RAI *v* KAMAL RAI. **1940 R.D. 439=1940 A.W.R. (B. R.) 235.**

——**O. 41, Rr. 4 and 33**—*Combined effect of—Suit by co-sharers—Appeal—Death of some—Legal representatives not brought on record—Appeal, if can be continued by others.*

The combined effect of the language used in Rr. 4 and 33 of O. 41, C. P. Code, is sufficient to empower the appellate Court to pass any decree as a whole even though the appeal may have been filed by some only. Where a suit for possession is filed by the plaintiffs as co-sharers and joint owners in the plots in dispute, all the plaintiffs are interested in a common case, and the result of the decree in favour of the plaintiffs would also enure to the benefit of all the co-sharers. In an appeal by the plaintiffs, if some them die, and their legal representative is not brought on record the remaining plaintiffs appellants are entitled to continue the appeal in the absence of such legal representatives. (*Ghulam Hasan, J.*) SHEO GOBIND *v.* LAHUR MAHOMED. **1940 A.W.R. (C.C.) 478=1940 O.A. 1079=1940 O.W.N. 1155.**

——**O. 41, R. 6**—*Stay of sale—Duty of Court—Rule for stay discharged under R. 5.*

Under O. 41, R. 6, C. P. Code, it is incumbent upon the Court to stay the sale on suitable terms as to security, if an application is made to it. The fact that the stay for execution has been

C. P. CODE (1908), O. 44, R. 1.

refused by the appellate Court under O. 41, R. 5, C. P. Code, or that the rule for stay must be taken to have been discharged by reason of the non-fulfilment of the terms on which the stay was granted by the appellate Court, does not justify the Court in refusing to exercise the jurisdiction vested in it under O. 41, R. 6. (*Lodge and Akram, JJ.*) DHIRENDRA NATH ROY *v.* SAILAJ KUMAR BOSE. **44 C.W.N. 1150=A.I.R. 1940 Cal. 582.**

——**O. 41, R. 6 (2)**—*Limited stay order—If can be granted*

Under the provisions of O. 41, R. 6 (2) the Court which passed the decree has full powers to stay a sale on taking security from the judgment-debtor. It need not, and ought not to, grant a limited stay order and ask the judgment-debtor to obtain a further order of stay from High Court. (*R.C. Mitter and Mahomed Akram, JJ.*) MURARI MOHAN BANDARY *v.* KRISHNAPADA BANDARY. **A.I.R. 1940 Cal. 543.**

——**O. 41, R. 20**—*Addition of necessary parties—Powers of Board—When to be exercised—Procedure to be followed where defect occurred in the lower Court.*

The Board undoubtedly possesses the power of requiring all necessary parties to be impleaded in an appeal under O. 41, R. 20, C. P. Code; but this power should not be exercised when the defect has occurred in the lower appellate Court and not before the Board. In such a case, if the case is to be heard on the merits, the only possible solution is to remand the case back to the Commissioner for rehearing. (*Harper, S.M. and Sathe, J.M.*) JHAGRU *v.* SHEODATTA. **1940 R.D. 440=1940 A.W.R. (B.R.) 223.**

——**O. 41, R. 22**—*Applicability—Revision petitions—Memorandum of cross-objections—Competency.*

A memorandum of cross-objections cannot be filed in a revision petition (*Horwill, J.*) LATCHANNA DORA VARU *v* MALLU DORA VARU. **1940 M.W.N. 1038=52 L.W. 487=(1940) 2 M.L.J. 572.**

——**O. 41, R. 27 (1) (b)**—*Lacuna—Negligence of party—Admissibility of new evidence in appeal.*

Where it is really to enable a party to fill up a lacuna in his evidence which lacuna was the result of his own negligence, and not necessary to enable the Court to pronounce judgment, new evidence should not be allowed to be admitted in appeal. (*Yorke, J.*) KHADIM ALI *v.* JAGANNATH. **1940 O.A. 973=1940 A.W.R. (C.C.) 428 =1940 O.W.N. 999.**

——**O. 41, Rr. 33 and 4**—Combined effect of. *See* C. P. CODE, O. 41, RR. 4 AND 33—COMBINED EFFECT OF. **1940 O.A. 1079.**

——**O 43, R 1 (k)**—*Suit—If includes appeal—Order refusing to set aside abatement of appeal—Appealability.*

The word "suit" in O. 43, R. 1 (*k*), C. P. Codes includes an appeal and an appeal therefore lie against an order refusing to set aside the abatement of an appeal. (*King, J.*) RAJU MUDALI *v* CHINNARAJU NAIDU. **52 L.W. 476=1940 M.W N. 1005=(1940) 2 M.L.J. 562.**

——**O. 44, R. 1**—*Pauperism—Determination—Property decreed in trial Court, if can be taken into account.*

Where a pauper plaintiff who has partially succeeded wishes to appeal against the decree as

C. P. CODE (1908), O. 44, R. 1.

a pauper, the property decreed in his favour by the trial Court cannot be taken into account in determining the sufficiency or otherwise of the plaintiff's means to enable him to pay the Court-fee. That decree could be appealed against by the defendants and till that becomes final, it cannot be said that the plaintiff appellant can exercise effective control or dominion over the decreed property and therefore he cannot be held to be possessed of sufficient means to pay the Court-fee. (*Thomas, C.J. and Ghulam Hasan, J.*) NASIR AHMAD KHAN *v.* SAIDAN. **1940 A.W.R. (C.C.) 470=1940 O A. 1118=1940 O.W.N. 1188.**

——**O 44, R. 1**—*Procedure—Rejection of application without hearing applicant or giving him opportunity of being heard—If justified.*

An application for leave to appeal in *forma pauperis* cannot be rejected without hearing the applicant or giving him an opportunity of being heard. The reference in the rule to a "perusal" by the Court of the documents specified is not sufficient to justify a departure from the ordinary *cursus curiae*. (*Patanjali Sastri, J.*) SUBBAYYA NADAR *v.* ANJANEYALU. **52 L.W. 514=1940 M. W.N. 1026=(1940) 2 M.L.J. 570.**

——**O. 46, R. 1**—*Applicability—Reference—When competent.*

O. 46, R. 1, C P. Code, cannot apply except in cases where there is a pending suit or appeal in which the decree is not subject to appeal. (*Broomfield and Divatia, JJ.*) BABUBHAI VAMALCHAND *v.* HIRALAL VAMALCHAND. **42 Bom.L.R. 1093.**

——**O. 47, R. 1**—*Discovery of new matter—Decree under S. 14 of Encumbered Estates Act—*Pendente lite *and future interest not granted—Dispossession of mortgagee-decree-holder under S. 35 of that Act—If a "discovery of new matter"*

Where a decree under S. 14 of the Encumbered Estates Act is passed without granting *pendente lite* and future interest and the mortgagee-decree-holder is subsequently dispossessed by the Collector under S. 35 of the Act, it is not a 'discovery' though it may be a new and important matter. The dispossession cannot be used as a 'discovery' of a new matter to obtain under O. 47, R. 1, a review of the decree passed under S. 14. (*Mulla, J.*) BAIJNATH MARWARI *v.* GANESH SINGH. **1940 A.L.J. 632=1940 A W.R. (H.C.) 493=1940 R D. 493=A.I.R. 1940 All. 519.**

——**O. 47, R. 1**—*Ground for review—Illness of party.*

Per *Sathe, J.M.*—It cannot be laid down once for all that illness can never be a sufficient cause for granting a review application under O. 47, R. 1. Each case must be considered on its merits.

Per *Harper, S.M.*—A review is justified only when there is something intrinsically wrong in the order against which the application is made. Illness is not a sufficient ground. (*Harper, S.M. and Sathe, J.M.*) IKRAM-UN-NISA BIBI *v.* DELI. **1940 R.D. 502=1940 A.W.R. (B R.) 279.**

——**O. 47, R. 1**—*Mistake—Nature.*

In order that a mistake can be corrected in review it must be apparent on the face of the record. But an order alleged to be based upon a mistaken impression of an admission by a party is not such an order as could be modified in review. (*Harper, S.M. and Sathe, J.M.*) INDER KUNWAR *v.* DALJIT. **1940 R D. 517=1940 A.W.R. (B R.) 200=1940 O.A. 1073=1940 O.W.N. 1074.**

COMPANY.

——**O. 47, R. 1 and O. 41, R. 2**—*Review on ground not urged by applicant—Granting of, by appellate Court, after refusal by first Court—Propriety.*

Where a judgment-debtor filed a review application against an ejectment order, on the ground that he could not appear on the last day on account of his mother's death, and his own subsequent illness, and prayed for its cancellation aud the Tahsildar dismissed it, but the Collector set it aside and granted the review and cancelled the original order of ejectment on the ground that the adjournments given for the payment of arrears were inadequate, it was held that the Collector's action in granting the review application was entirely irregular and could not be justified. It was further held that though a ground not taken in the memo. of appeal could be raised in arguments, it could not travel beyond the original case as made out in the trial Court and that no decision could rest on any such ground unless the party who might be affected thereby has had sufficient opportunity of contesting the case on that ground. (*Harper, S.M. and Sathe, J.M.*) HAZARI LAL *v.* NAWAB SINGH. **1940 R D. 378=1940 A.W.R. (B.R.) 234.**

——**Sch. II, Para. 20 (2)**—Jurisdiction—Application dealing with property situate within jurisdiction of more than one Court—Forum—Procedure as to suits—Application of S. 17. *See* C. P. CODE, S. 17. **(1940) 2 M.L.J. 520.**

——**Sch. III, Para. 2**—*Property under management of Collector—Alienation by judgment-debtor—If void or voidable—Sale and subsequent acceptance by Collector—Effect.*

An alienation by a judgment-debtor, whose property is under the management of the Collector under Sch. III, C. P. Code, is void *ab initio* and not merely voidable at the instance of the Collector or the decree-holder. Where a judgment-debtor privately sells such property under the management of the Collector before the date fixed for sale, to the decree-holder himself and the Collector accepts it and sale deed is registered thereafter, the sale is void inasmuch as the Collector's powers had not terminated before the sale became effective and the decree also had not been extinguished by them. (*Niyogi, J.*) SHALAGRAM *v.* SK. MANNU. **1940 N.L.J. 616.**

COMPANY—*Debenture holders—Rights of.*

The debenture holders can have no greater rights than the company from which their rights are derived. They have a charge on the assets of the company, but what those assets are depends on the rights of the company. (*Iqbal Ahmad and Allsop, JJ.*) MITHAN LAL *v.* OFFICIAL LIQUIDATORS, AGRA SPINNING AND WEAVING MILLS CO., LTD. **1940 A.L.J 626=1940 A.W.R. (H.C.) 498=A.I R. 1940 All. 490.**

——*Deposits by employees in Bank as security—Nature of.*

Where certain cash deposit is made with a Bank as security for the good behaviour of an employee, the amount is received by the Bank on a specific understanding to be applied for a specific purpose and as such it constitutes trust money in the hands of the Bank and does not form part of the assets of the Bank divisible among creditors. (*Zia-ul-Hasan and Yorke, JJ.*) DINSHAW & Co. *v.* KRISHNA PIARY. **1940 O.A.**

COMPANY.

991=1940 A.W.R. (C.C.) 433=1940 O.W.N. 1022.

——*Liquidation—Charge in respect of trust monies—If and when extends to realisations subsequent to liquidation.*

On a contention that a charge in respect of certain trust monies extends only to the assets in the hands of a Bank on the date of its liquidation and that the subsequent realisations of assets of the Bank were replenishments of the Bank's funds, but not necessarily of trust funds, it was held that where the subsequent realisations are only the previously existing assets changed into a different form, and not fresh funds which were not part of the previeus assets, the charge would extend to those realisations also. (*Zia-ul-Hasan and Yorke, JJ.*) DINSHAW & Co. *v.* KRISHNA PIARY. **1940 O.A. 991=1940 A.W.R. (C.C.) 433=1940 O W.N. 1022.**

——*Winding up—Agreement to advance money and get cotton spun—Adjustment of charges against advances—Winding up—Rights, how to be worked.*

Where a person agreed to supply cotton to a company's mill for being spun into yarn and to advance sums of money for various expenses and the arrangement was that the creditor should deduct his advances from the spinning charges and the company was later on wound up, it was held that the creditor had agreed to pay only the balance due from him after his advances had been deducted from the spinning charges calculated at the agreed rate and that the liquidators can recover only if the balance on such accounting is in their favour. (*Iqbal Ahmad and Allsop, JJ.*) MITHAN LAL *v.* OFFICIAL LIQUIDATORS, AGRA SPINNING AND WEAVING MILLS CO., LTD. **1940 A.L.J. 626=1940 A.W.R. (H.C.) 498=A.I.R. 1940 All. 490.**

COMPANIES ACT (VII OF 1913), S. 34 (3)

—*Scope—Company—Expulsion of member by resolution—Name struck out from register of members—Subsequent amendment of articles to enable company to transfer such member's shares without proper instrument of transfer*—Ultra vires—*Sale of shares by company—Legality—Right of members as shareholder—If affected.*

The petitioner who was a shareholder in a Banking corporation was expelled from the membership of the corporation by a resolution passed at a general meeting under the Articles of Association for wrongful conduct. On the date of the said resolution, the company had no power under the Articles to deal with the share of the expelled shareholder. Subsequent to that, the company altered its Articles by making an addition, but notice of the meeting at which the Articles were changed was not given to the petitioner. Under the amended Article, the company could in effect force an expelled member to sell his share to any person at a price which is fixed uuder the Articles, and the company would be able to authorise a director to sign the necessary transfer instrument on behalf of such transferor if he failed to do so. Subsequently the company wrote to the petitioner stating that his share had been transferred to another and a cheque for Rs. 70 was sent to him as the price for such share. The petitioner wrote objecting to the action of the company and said that he did not propose to cash the cheque and did not do so. In

COMPANIES ACT (1913), S. 186.

a petition by the petitioner under S. 38 (1) (*a*) of the Companies Act for rectification of the share register,

Held, (1) that under S. 34 (3) of the Companies Act it was not lawful to register a transfer of shares in the absence of a proper instrument of transfer duly stamped and executed by the transferor and the transferee, and the addition of an Article purporting to confer power on the directors to transfer shares in the absence of an instrument of transfer was clearly *ultra vires* of S. 34 of the Companies Act; (2) that the alteration in the Articles effected after the resolution of expulsion could not in any way be binding upon the petitioner as notice of the meeting at which the alteration was made was withheld from him; (3) that since the powers of the company at the date when the petitioner was purported to be expelled did not empower them to deprive him of his share and while he remained a shareholder he must also remain a member, it must follow that the resolution of explusion had no effect, and the sale of his share in law could not be carried out; (4) that the petitioner never ceased to remain a member of the company inasmuch as he always remained a shareholder and should be placed in the position. (*Gentle, J.*) MADHAVA RAMACHANDRA KAMATH *v.* CANARA BANKING CORPORATION, LTD. **52 L W. 741=1940 M.W.N. 1173=(1940 2 M.L.J. 721.**

——**S. 38 (1) (a)**—*Applicability—"Omitted"—Meaning—Striking out name of shareholder—Right af latter to apply to Court for rectification.*

The striking out of the name of a shareholder from the register containg the names of the members amount to an omission of his name from the register within the meaning of S. 38 (1) (*a*) of the Companies Act and the shareholder whose name is so struck out can apply to the Court under S. 38 (1). (*Gentle, J.*) MADHAVA RAMACHANDRA KAMATH *v.* CANARA BANKING CORPORATION, LTD. **52 L.W. 741=1940 M.W.N. 1173=(1940) 2 M.L.J. 721.**

——**Ss. 185 and 188**—*Direction to refund moneys paid—Jurisdiction of Court—Limits.*

Where an application was made by the liquidators, asking the Court to direct certain persons to refund sums paid to them by the managing agents, after winding up petition, it was *held* that S. 185 of the Company's Act empowered the Court exercising jurisdiction under the Act to require contributories and certain others to deliver up money, etc., in their hand to the liquidator and that neither S. 185 nor S. 188 gave the Court any power to pass orders against persons other than those mentioned in S. 185 of the Act, and that hence the Court had no jurisdiction to pass orders for the payment asked for by the liquidators. (*Allsop, J.*) OFFICIAL LIQUIDATORS OF THE GORAKHPUR ELECTRIC SUPPLY CO., LTD. *v.* SIEMENS (INDIA). LTD. **1940 A.W.R. (H.C.) 494=1940 A. L.J. 739=A.I.R. 1940 All. 514.**

——**S. 186**—*If deprives contributory of right to claim set-off.*

There is nothing in S. 186 which can reasonably be construed as a general deprivation of contributories to companies in liquidation of the right of set-off. (*Thom, C.J., Ganga Nath and Braund, JJ.*) BENARES BANK, LTD. *v.* OFFICIAL LIQUIDATOR. **1940 A.L.J. 826=1940 A.W.R. (H.C.) 639 =A.I.R. 1940 All. 544 (F.B.).**

COMPANIES ACT (1913), S. 186.

——S. 186 (1)—*If mandatory—Refusal by Court to make an order under S.* 186 (1)—*Remedy of liquidator.*

The provisions of S. 186 (1) are not mandatory and it is open to the Court exercising jurisdiction in the winding up of a company in its discretion to grant or to reject an application under S. 186. If the Court refuses to make an order under S. 186 (1) the liquidator to enforce his claim against the contributory must proceed by way of a civil suit in which the contributory is entitled to maintain the ordinary legal defences to such a claim. (*Thom, C.J. Ganga Nath and Braund, JJ.*) BENARES BANK, LTD. *v.* OFFICIAL LIQUIDATOR. **1940 A.L.J. 826=1940 A.W.R. (H.C.) 639=A.I.R. 1940 All. 544 (F.B.).**

——Ss. 209 and 209-A to H—*Creditors' voluntary winding up—Provisions not complied with—Procedure to be followed.*

S. 209 and Ss. 209-A to H of the Companies Act make provision for the procedure to be followed in a creditors' voluntary "winding up". If owing to an oversight these provisions have not been followed in the wind-up, the best course to adopt will be for the Court to order that a meeting of the creditors should be held and that notices of the meeting should be sent by post to the creditors forthwith, and the company should cause notice of the meeting of the creditors to be advertised in the manner specified in S. 206 (1) for the publication of a notice under that sub-section, and the directors of the company should cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before such meeting of creditors, and the directors of the company should appoint one of their number to preside at the said meeting. At such meeting the creditors should consider the question of nomination of a liquidator under S. 209-B, and the appointment of a committee of inspection under S. 209-C, and other questions dealt with in Ss. 209-D to H. (*Lort Williams, J.*) LIGHT OF ASIA INSURANCE CO. LTD, *In re.* **I.L.R. (1940) 2 Cal. 325.**

——S. 216—*Right to apply—Company in voluntary liquidation—Application by Registrar of Joint Stock Companies for removal of liquidator and appointment of another by Court—Maintainability.*

S. 216 of the Companies Act is exhaustive of the persons who are entitled to make applications and the Registrar of Joint Stock Companies has no *locus standi* to make an application to the Court for an order removing a voluntary liquidator and appointing another liquidator for a Company which is under voluntary liquidation. (*Kania, J.*) PEOPLES INTERNATIONAL TRAVEL, EDUCATION AND COMMERCIAL CO., LTD. *In re.* **42 Bom L.R. 1021.**

——S. 227 (2)—*Validation of payments under—Principles upon which Courts should Act.*

As regards the validation of payments under S. 227 (2) of the Companies Act, the Court will usually validate payments made in good faith in the ordinary course of business. In deciding what are such payments, the principle is to be kept in mind is that all creditors to whom money is due at the date of the petition for winding up, should be treated equally, with certain exceptions in favour of those who have priority under the express provisions of the Act. Where preferential payments are made to some creditors by the company or its officers, it is acting, against this rule. Where on the other hand the business of the company is continued in good faith either because it is hoped that it may not be necessary eventually to wind up the company or because in the interests of all concerned it is better that the company should on being wound up be transferred as a going concern, it is necessary for the company to enter into various transactions and it would be impossible for it to do so if it was not able to make any transfers. Though no definite rule could be laid down to govern all cases, generally speaking, it would not be just for the Court to validate a transaction which amounted to no more than the payment of a debt which was due to one or more creditors at the date of the winding up petition, if that would result in loss to other creditors who should be treated equally with those who have been paid. (*Allsop, J.*) OFFICIAL LIQUIDATORS OF THE GORAKHPUR ELECTRIC SUPPLY CO., LTD. *v.* SIEMENS (INDIA), LTD. **1940 A.W.R. (H.C.) 494=1940 A.L.J. 739=A.I.R. 1940 All. 514.**

COMPANIES ACT (1913), S. 235.

——S. 230-A (5)—*Discretion of Court—Application for rescission of contract—Maintainability*

Under S. 230-A (5), the Court is given a discretion to make an order rescinding a contract made by a person with a company prior to the winding up, on his application to the Court. If the contract has already been rescinded, an application will not lie. (*Leach, C.J. and Horwill, J.*) R. C. BHIDE *v.* TRAVANCORE NATIONAL AND QUILON BANK, LTD. **1940 M.W.N. 1077=52 L.W. 635=(1940) 2 M.L.J. 697.**

——S. 234—*Trust monies—Disappearance—Claim entered as preferential claim under S.* 234—*Effect.*

Trust monies are entirely outside the liquidation and do not vest in the liquidator as assets. Trust monies never become assets of the company where certain Government Promissory Notes were deposited in a Bank as security for the good conduct of an employee and on liquidation, it was found that the notes in question were not traceable but the liquidator had entered the name of the depositor in the list of preferential claims under S. 234 of the Companies Act, it was *held* that it amounted to an admission that the proceeds of those notes were included in the Bank's moneys and as such it was not open to the liquidator to disclaim all responsibility in the matter. (*Zia-ul-Hasan and Yorke, JJ.*) DINSHAW & CO. *v.* KRISHNA PEARY. **1940 O.A. 991=1940 A.W.R. (C.C.) 433=1940 O.W.N. 1022.**

——S. 235—*Powers of Court—Books in possession of manager of company—Order for delivery to liquidator—Power of Court to pass.*

Where books of a company which must have some value to the company are found in the possession of the manager of the company, the Court has power to order them to be delivered to the liquidator; it is not necessary that the order should also state the amount for which the person against whom it is passed is liable in the event of non-delivery of the property. (*Leach, C.J. and Horwill, J.*) GOPALASWAMI GOUNDAR *v.* KRISHNASWAMI GOUNDAR. **52 L.W. 502=1940 M.W.N. 1056=(1940) 2 M.L.J. 594.**

COMPANIES ACT (1913), S. 282-B.

——S. 282-B (1)—*Bank taking cash security from employees and depositing same in scheduled bank—Latter if a trustee or holds it for specific purpose—Liquidation of latter bank—Right of depositor to preferential payment.*

As the result of the statutory obligation under S. 282-B (1) of the Companies Act imposed upon a Bank, the employee's cash security was deposited by that Bank in a scheduled Bank which subsequently went into liquidation. The depositor bank claimed priority in respect of the deposit on the ground that the amount had been deposited for a specific purpose.

Held, that the depositor Bank held the moneys for a special purpose and was required by statute to deposit therein a scheduled bank, and that the depositee bank was not a trustee, though the depositor was a trustee. The position of the depositee bank was still that of a banker keeping an account for a customer and therefore the depositor could not claim any priority. The relationship between the depositor and depositee was only that of creditor and creditor though the depositee having notice of the trust could not be a party to a breach of trust by the trustee. (*Leach, C.J. and Horwill, J.*) NAYAR MODERN BANK, LTD., PALGHAT *v.* OFFICIAL LIQUIDATORS OF THE TRAVANCORE NATIONAL AND QUILON BANK, LTD. **52 L.W. 512=1940 M W.N. 1036=(1940) 2 M.L.J. 559.**

COMPROMISE—*Consent decree—Operation as to estoppel.*

A consent decree based on a compromise. creates an estoppel and it would bar the trial of the questions involved once again between the same parties. (*Iqbal Ahmad and Varma, JJ.*) SAHIB NASIB KHAN *v.* KUTBUNNISSA. **1940 A.W. R. (H.C.) 504=1940 O.A. 878=1940 A.L.J. 679**

——*Consent decree — Validity—Undertaking of joint liability by majors and minors—Non-enforceability against minors — Majors—If absolved from liability.*

The mere fact that a joint bond executed as a part of a compromise is not enforceable against a minor executant of a bond does not absolve the major executant from liability. (*Agarwala, J.*) SHEONANDAN GOPE *v.* SHAHDEO KHATIK. **A.I.R. 1940 Pat. 671.**

CONFLICT OF LAWS—Easement operating in British India in favour of party in possession of property in Native State—Suit by foreigner for injunction against servient owner in British India—Law applicable. *See* COURT-FEES ACT, S. 9 (*iv*) (*c*) AND (*d*). **(1940) 2 M.L.J. 655.**

CONTEMPT OF COURT—*Apology—Court's power to reject.*

It does not follow that because an apology is offered the Court must accept it and is disarmed. A Court can refuse to accept an apology which it does not believe is genuine; it can even, when it accepts the apology, commit an offender to prison or otherwise punish him. Furthermore, there cannot be both justification and apology. The two things are incompatible. (*Davis, C. J. Lobo, Weston and Tyabji, JJ.*) EMPEROR *v.* P. C. TARAPORE. **A.I.R. 1940 Sind 239 (F.B).**

——*Article in newspaper—Printer's and publisher's liability.*

A printer and publisher of an article amounting to contempt of Court is liable for contempt

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of Court even if the article is written by another and he has dissociated from it and disapproved it. (*Davis, C.J., Lobo, Weston and Tyabji, JJ.*) EMPEROR *v.* P. C. TARAPORE. **A.I.R. 1940 Sind 239 (F.B.).**

——*Chief Court of Sind—Jurisdiction of.*

The Chief Court of Sind has a right to punish in a summary way contempt of itself. (*Davis, C.J., Lobo, Weston and Tyabji, JJ.*) EMPEROR *v.* P. C. TARAPORE. **A.I.R. 1940 Sind 239 (F.B.).**

——*Commitment—When to be made—Technical contempt—If to be punished—Principles.*

There can be no doubt that a Court need not and should not interfere in all cases of contempt. It is a very arbitrary method of dealing with an offence and contempt proceedings should be sparingly instituted, and a person should not be convicted unless it is essential in the interests of justice that he should be; where the matter complained of tends to prejudice and tends to cause substantial prejudice, it does call for action, as it cannot be said to be a mere technical contempt. A mere technical contempt of Court is not sufficient to warrant the High Court interfering and convicting the offender. There must be a substantial contempt, that is, something which tends in a substantial manner to interfere with the due course of justice or tends substantially to prejudice the public against the accused in a pending criminal case. If the Court is satisfied that there is a danger of grave prejudice and a danger of substantial and real interference with the due course of justice, the Court will take action and commit the offender for contempt. (*Harries, C.J., and Dhavle, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS BIHAR *v.* MURLI MANOHAR PRASAD. **1940 P.W.N. 902=21 Pat.L. T. 980.**

——*Criticism of Court—Absence of good faith—Misstatement and misrepresentation—Effect of.*

It is not possible to say that criticism of Court is protected and can be justified where there is no good faith, where there are misstatements and misrepresentation and where necessarily the Court is brought into contempt and disrepute. The writer cannot claim to act in good faith when he ignores the sources of the truth which were open to him. (*Davis, C.J., Lobo, Weston and Tyabji, JJ.*) EMPEROR *v.* P. C. TARAPORE. **A.I.R. 1940 Sind 239 (F.B.).**

——*Duty of Court to preserve proceedings from misrepresentation.*

It is a duty of a Court, not so much to itself but to the public in whose interest it administers justice, that it should preserve its proceedings from misrepresentation. There is no distinction between a misrepresentation of the action of a Chief Court when it exercises its undoubted powers of superintendence of Magisterial Courts under S. 224, Government of India Act, 1935, and S. 17, Sind Courts Act, 1926, and the misrepresentation of the action of the Court or a Judge in a judicial as distinct from an administrative capacity, provided always that that action relates to the administration of justice. (*Davis, C.J., Lobo, Weston and Tyabji, JJ.*) EMPEROR *v.* P. C. TARAPORE. **A.I.R. 1940 Sind 239 (F.B.).**

——*Essence of offence—Complaint for defamation in respect of allegations in insolvency petition—Distinction between threat before and after the starting of proceedings.*

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The essence of an offence of contempt of Court lies in the fact that the person complained against has done something which might have the effect of prejudicing the fair trial of a pending case, inasmuch as it is of great importance to the administration of justice that it should be allowed to take an unfettered course and not be sullied and besmirched in any manner. Where a person files a complaint for defamation in respect of various allegations against him contained in a petition to adjudicate him an insolvent and also says that he had told the other party that if insolvency proceedings are started, he would take counter proceedings, there is nothing done from which an inference could be drawn that if the allegations in the insolvency proceedings are withdrawn, the criminal proceedings for defamation would also be dropped. There is a distinction between a threat before proceedings are instituted and a threat after proceedings have been instituted. If when the earlier proceedings have been taken a threat is held out then to the person who institutes the proceedings by the opposite party to the effect that unless the proceedings are withdrawn drastic action would be taken, the holder of the threat would be guilty of contempt of Court; but where the threat is held out before the institution of the proceedings it amounts only to a warning so that an unguarded action may not be taken. There may well be action in the nature of a blackmail and it would be dangerous to hold that if the person attempted to be blackmailed were to hold out a counter threat, he would be guilty of contempt of Court. (*Collister and Bajpai, JJ.*) RADHEY LAL *v.* NIRANJAN NATH. **1940 A.L.J. 798=1940 A.W.R, (H.C.)584.**

———*Essentials — Pendency of proceedings—Necessity for —Prejudicing mankind against person on trial.*

It is of the very essence of contempt of Court that proceedings should be pending, when the article alleged to constitute contempt is published. It is not necessary that the accused in a criminal case which is the subject of comment should have been committed for trial or even for him to have been brought before a committing Magistrate provided he has been arrested and is in custody when the article is published.

Dhavle, J.—It is contempt of Court to publish a newspaper article containing comments on the facts of a case which is pending before a Court or is about to come before a Court, if the comments are calculated to obstruct or interfere with the course of justice. In such cases the contempt takes the form of prejudicing mankind against persons who are on their trial raising an atmosphere of prejudice against them by comment which is addressed to the public at large. (*Harries, C. J. and Dhavle, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MANOHAR PRASAD. **21 Pat.L.T. 980=1940 P.W.N. 902.**

———*Newspaper articles—Special responsibility of editors.*

Far from there being any special privilege of the press, there is on the other hand a special responsibility affecting the editor of a newspaper, namely that he is in duty bound always to bear in mind the danger of prejudicing the course of justice by the publication of articles in his newspaper which though innocent in appearance may easily be so read by members of the public as to prejudice the course of litigation. (*Thomas, C.J. and Yorke, J.*) NASIR AHMAD *v.* ANIS AHMAD ABBASI. **1940 O.A. 1137=1940 O. W.N. 1197.**

———*Practice—Affidavit in support of application by clerk—Propriety of—Duty to set affidavit sworn to by responsible officer.*

Where an application is made to the High Court on behalf of the Legal Remembrancer for taking proceedings against a person for contempt of Court, it is not proper that the affidavit in support of the application should be that of a clerk. It should be the affidavit of some responsible officer. (*Harries, C. J. and Dhavle, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MANOHAR PRASAD. **21 Pat.L.T. 980=1940 P.W.N. 902.**

———*Proceedings — Right to initiate—Legal Remembrancer of Bihar—Right to move High Court on behalf of Government or Governor.*

The Legal Remembrancer of Bihar is competent to represent the Government or the Governor in proceedings for contempt in Bihar and can move the Court to take proceedings. His functions and duties are wide enough to empower him to move on behalf of the Government or the Governor and to instruct the Advocate-General to carry on proceedings for contempt in the High Court. (*Harries, C. J. and Dhavle, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MANOHAR PRASAD. **1940 P.W.N. 902=21 Pat.L.T. 980.**

———*Scandalizing Court—Article suggesting abuse by Chief Court of its powers—If contempt*

Scandalizing the Court amounts to contempt of Court. It is immaterial whether the attack on the Judge is with reference to a case about to be tried or actually under trial or recently adjudged And the offence is in no way mitigated when the attack is not upon a particular Judge but upon the Court as a whole, indeed, upon all the Judges. Contempt is not only committed when there is a detailed discussion of the facts and merits, but when, for instance, some presumptuous person states that the case of the party is sound in law and fact before such case is heard and decided. An article suggesting abuse by Chief Court of its powers, a desire on the part of that Court to enter into a conflict with the executive Government and containing a plain invitation to Magistrates to disregard the authority of that Court and to subordinate themselves to the alleged wishes of the executive Government, is an article tending to embarrass the administration of justice and calculated to create in the minds of the general public grave apprehension that the Chief Court is not entitled to public confidence in its discharge of its duties. Such article amounts to contempt of Court. (*Davis, C.J., Lobo, Weston and Tyabji, JJ.*) EMPEROR *v.* P. C. TARAPORE. **A.I.R. 1940 Sind 239 (F.B.).**

———*Summary jurisdiction.*

Summary jurisdiction in contempt is a powerful weapon in the hands of the Court and is to be used sparingly. But its use must in large part depend upon those who by their misconduct invite its application. (*Davis, C.J., Lobo, Weston and Tyabji. JJ.*) EMPEROR *v.* P. C. TARAPORE. **A.I.R. 1940 Sind 239 (F.B.)**

———*What constitutes—Intention—Relevancy of.*

CONTEMPT OF COURTS ACT (1926), S. 2.

Any act done or writing published, which is calculated to interfere with the due course of justice is a contempt of Court, and writings prejudicing the public for or against a party are similarly contempts. No intent to interfere with the due course of justice or to prejudice the public need be proved if the effect of the article or matter alleged to constitute contempt is to create prejudice or to interfere with the due course of justice. The writer of an article can be guilty of contempt without intending to interfere with the due course of justice. The test is not what the writer intends but what effect the words would have. An article written with the deliberate intention of interfering with the due course of justice would be an extremely serious matter meriting very severe punishment. Once it is held that the words are likely to cause substantial interference with the due course of justice or likely substantially to prejudice the hearing of a case or the trial of an accused person, then the writer is guilty of contempt whether or not he intended such results. The question of intention is irrelevant in considering whether the offence has been committed, though, of course, it is a most important matter in considering the appropriate punishment to be awarded. (*Harris, C. J. and Dhavle, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MANOHAR PRASAD. **1940 P.W.N. 902=21 Pat.L.T. 980.**

CONTEMPT OF COURTS ACT (XII OF 1926), S. 2 (1)—*Jurisdiction of High Court—Contempt of Subordinate Court—Power of High Court to take proceedings* suo motu—*Application defective as being taken out by person not competent to represent Government—If bar to proceedings.*

The High Court of its own motion can issue a rule calling upon a person to show cause why he should not be committed for contempt of the High Court or for contempt of a subordinate Court. The powers of the High Court with regard to contempt of Subordinate Courts are precisely the same as its powers with regard to contempt of itself. Under S. 2 (1) of the Contempt of Courts Act of 1926, the High Court can do in the case of contempt of a Subordinate Court whatever it can do in the case of contempt of the High Court itself. Therefore even if an application for taking proceedings is not competent, as being taken out by a person not competent to represent the Executive Government, the High Court can take notice of the contempt alleged of its own motion and issue a rule. (*Harries, C.J. and Dhavle, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BIHAR *v.* MURLI MANOHAR PRASAD. **1940 P.W.N. 902=21 Pat.L.T. 980.**

——**S. 3, Proviso**—*Belated apology—Value.*

The proviso to S. 3 of the Contempt of Courts Act, no doubt, seems to contemplate an apology at a late stage. But where the accused takes such action as any reasonable man must realise to be likely to prejudice the trial of a case and where instead of apologising at the earliest possible opportunity he or his counsel contends most strenuously that no contempt has been committed, his apology thereafter can only be regarded as an after-thought put forward in the hope of avoiding the wrath to come. (*Thomas, C.J. and*

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Yorke, J.) NASIR AHMAD *v.* ANIS AHMAD ABBASI **1940 O.A. 1137=1940 O.W.N. 1197.**

CONTRACT—*Construction—Arbitration clause—"All unpaid claims whether admitted or not . . . arising out of or in relation to contracts", etc.—Meaning of.*

The defendants who were doing business as *pakka adatias* were employed by the plaintiffs to effect forward transactions in cotton, and the defendants, among others, sold 200 bales of cotton and sent a contract into the plaintiffs on 9—6—1939, which was signed by the plaintiffs. Thereafter owing to fluctuations in the market the defendant demanded margin money but plaintiffs failed to pay the same. The defendants thereupon closed the transaction on 3—2—1940. On receipt of this intimation the plaintiffs repudiated this closing transaction whereupon the defendants offered to resell if the margin demanded was paid. The plaintiffs did not reply and the defendants then sent a contract note with their letter of 6—2—1940 to the plaintiffs. The plaintiffs retained this with them. On 20—2—1940, the defendants sent a statement of account showing the balance due by them to the plaintiffs and asked the plaintiffs to draw up a hundi for that balance. No reply was sent to this. On 19—3—1940 the plaintiffs sent a telegram to the defendant asking them to "settle 200 bales of cotton vide your contract note . . . . purchasing market price to day." The defendants replied that the purchase had already been effected on 3—2—1940, and that there was no outstanding business. The plaintiffs filed a suit for the amount due to them. The defendants applied under protest and applied for stay of suit on the basis of an arbitration clause in the contract which provided for "all unpaid claims whether admitted or not . . . arising out of or in relation to contracts made subject to these bye-laws", etc.

Held, that the clause was wide enough to include the dispute in suit, as the matter in dispute was in respect of an unpaid claim in relation to the contract of 6—11—1939, and the suit therefore be stayed. (*Kania, J.*) SUKHANANDAN RAMDHIN *v.* MANIKLAL. **42 Bom.L.R. 1135.**

——*Construction—Rules—Apparent inconsistency.*

If in a case of a contract in which there is an apparent inconsistency according to the literal construction of the words used, there is any other reasonably possible construction by which the apparent inconsistencies can be reconciled, that construction should be adopted. (*Lord Russel of Killowen*) RANEEGUNGE COAL ASSOCIATION, LTD. *v.* TATA IRON AND STEEL CO., LTD. **1940 O.L.R. 542=52 L W. 591=189 I.C. 869=1940 A.L.J. 701=1940 O A. 987=1940 A.W.R. (P.C.) 172=1940 M W.N. 1202=7 B.R. 6=13 R.P.C. 58=A. I R. 1940 P.C. 151 (P.C.).**

——*Mercantile contracts—What is.*

Where both parties are engaged in business and articles are purchased by one party from the other party for business purposes, the transaction falls within the term 'mercantile transaction.' (*Bennet, J.*) LUCKNOW AUTOMOBILES *v.* REPLACEMENT PARTS CO. **190 I.C. 554=1940 O.L R. 623=1940 O.W.N. 901=1940 O.A. 852=1940 A.W.R. (C C.) 395=A.I.R. 1940 Oudh 443.**

——*Right to enforce—Third party—Bank in liquidation—Compromise between manager and*

CONTRACT ACT (1872), S. 23.

Official Liquidator — Manager undertaking to satisfy claim of depositor of bank—Default by manager—Suit by depositor against manager—If maintainable.

Certain bank went into liquidation and the Official Liquidator took misfeasance proceedings against the manager of the Bank and in the course of those proceedings the manager effected a compromise with the Official Liquidator by which he undertook among other things "to adjust or satisfy and claim" of certain depositor of the Bank among others and to indemnify the Official Liquidator against any such claim. A decree was passed in terms of the compromise. The manager having made default in satisfying the claim of the depositor he instituted a suit against the manager:

Held, that the Official Liquidator who entered into a compromise with the manager was representing all the depositors, creditors and shareholders of the Bank and was in a way acting as their agent. It could not be argued therefore that the depositor was a perfect stranger to the agreement and did not come within the ambit of the well-recognized exception based either on the ground that he claimed through a party to the contract or on that of agency, even if it be not possible to hold that an express or implied trust was created in his favour. His suit was therefore maintainabie. (*Din Mahomed, J.*) SURJAN SINGH *v.* NANAK CHAND. **A.I.R 1940 Lah. 471.**

CONTRACT ACT (IX OF 1872), S. 23—*Scope and applicability—Mortgage to pay debt incurred for bribing an officer—If can be impeached.*

S. 23 is not concerned with motive. It is confined to the object of the transaction and not to the reasons or motives which prompted it. The law does not prevent even the most degraded of men from having their own friends and from receiving gifts from them whatever the motive of the donors may be, provided the object is not to induce or encourage the commission of an illegal or an immoral act. *B*, a Hindu, borrowed a certain amount from *A* in order to bribe a certain officer. After the bribing was done and completed. *B* obtained a loan from *C* in order to pay off *A* and executed a mortgage in favour of *C*.

Held, that the purpose of the mortgage loan was not to effect an illegal purpose. Such illegal purpose as had been effected had been effected. The mortgage loan was at worst a loan designed to enable the borrower to pay back a lender who could not have sued the borrower in a Court of law successfully and therefore it was no more contrary to public policy than would be a loan to a borrower to enable that borrower to make a gift. The mortgage consequently was not void on account of public policy. The fact that the mortgagee as security of title took a number of documents from the mortgagor for the ordinary loan and regarded the transaction as queer did not make the transaction contrary to public policy.

Held, further, that quite different consideration would arise as regards the mortgagor's sons who could trace back the mortgage loan in order to test whether it was a loan that fell within the prohibition preventing alienations for illegal or immoral purposes under the Hindu Law. (*Stone, C.J and Bose, J.*) KASHINATH *v.* BAPURAO. **I L. R. (1940) Nag. 618=1940 N.L.J. 528=A.I.R. 1940 Nag. 305.**

CONTRACT ACT (1872), S. 55.

——**S. 23**—*Stifling prosecution—Agreement not to file suit in consideration of forbearance to prosecute for forgery—Legality of—If bar to suit.*

In a claim preferred by the plaintiff under O. 21, R. 58, C. P. Code, he produced a *hatchitta*. The defendants' case was that this was a forged document and they proposed to file a petition to the Court to make an inquiry with a view to prosecute the plaintiff. The plaintiff then withdrew his claim and agreed not to file suit under O. 21, R. 63, C. P. Code, in consideration of the defendants not proceeding with their petition for inquiry. The plaintiff subsequently took back the *hatchitta* and then filed a suit under O. 21, R. 63, C. P. Code. The defendants pleaded the agreement of the plaintiff in bar of the suit.

Held, that the agreement in question was an agreement for an illegal consideration within the meaning of S. 23 of the Contract Act, and was therefore not binding on the plaintiff so as to bar the suit. (*Wort and Manohar Lall, JJ.*) KARNIDAN SARDA *v.* SAILAJA KANTA MITRA. **19 Pat. 715=A.I.R 1940 Pat. 683.**

——**S. 25 (3)**—*Applicability.*

The implied promise to pay which is contained in all acknowledgments will not attract the provisions of S. 25 (3) of the Contract Act, because the promise to pay is not in writing. Where an acknowledgment is in this form 'after taking old accounts into consideration there remains to be paid a balance of Rs. 3,200; unless there is consideration for the implied promise to pay, S. 25 (3) will not come to the aid of the person relying on such acknowledgment. (*Stone, C.J. and Clarke, J.*) SHEOJIRAM *v.* GULABCHAND. **1940 N.L.J. 607.**

——**S. 51 and Sale of Goods Act (1930), S. 32**—*Contract for sale of goods—Suit for damages for breach—Proof of readiness and willingness to perform—Delivery of shares at seller's option—Notice to deliver, if and when necessary.*

In a suit by the buyer for damages for breach of a contract for sale of goods, it is incumbent upon him to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the goods, or that he had at all events made proper and reasonable preparations and arrangements for securing the purchase-money. Readiness and willingness to perform includes ability to perform. Where delivery of shares is to be at the seller's option, if delivery is made during the currency of the option, then the seller should give to the buyer sufficient notice of his intention to deliver and a reasonable time to arrange for payment. Where the seller fails to exercise the option earlier, then the contract becomes a contract to sell and deliver on the day fixed and the purchaser has to be ready and willing to take delivery on that day and pay for them on that day. (*Roberts, C.J. and Dunkley, J.*) JAGANNATH SAGARMAL *v.* AARON & Co. **1940 Rang L.R. 593=A.I.R. 1940 Rang. 284.**

——**S. 55**—*Time, when essence of contract—Extension, where time is the essence—Effect.*

In cases other than commercial contracts the ordinary presumption is that time is not of the essence of the contract; there is no such presumption in the case of commercial contracts. If time is originally the essence of the contract, it does not cease to be so because one of the parties

CONTRACT ACT (1872), S. 178.

had agreed to grant short extension. (*Bennet, J.*) LUCKNOW AUTOMOBILES *v.* REPLACEMENT PARTS CO. **190 I.C. 554=1940 O.L.R. 623=1940 O.W.N. 901=1940 O.A. 852=1940 A.W.R (C.C.) 395 =A.I.R. 1940 Oudh 443.**

——(as amended in 1932), Ss. 178, 178-A and 179—*Applicability and scope—Pledge by husband of wife's property without authority—Validity—Right of wife to recover pledged articles from pawnee.*

The plaintiff brought a suit for recovery of certain articles or their value, Rs. 60 on the ground that they belonged to her (plaintiff) and that the 1st defendant got possession of the articles by stealth. It was found that they had been pledged with the 1st defendant by the 2nd defendant, plaintiff's husband, but that the articles belonged to the plaintiff. It was not shown that the 2nd defendant had any authority from his wife, the plaintiff, to pledge the articles. Nor was he a mercantile agent.

Held, that the 1st defendant could not claim to recover the amount due on the pledge from the plaintiff on the ground that she was a *bona fide* pledgee, and the pledge did not confer any right on her, and the plaintiff was therefore entitled to a decree. (*Nageswara Iyer and Subramanya Aiyar, JJ.*) MALLAMMA *v.* BASAMMA. **18 Mys. L.J. 457.**

——Ss. 178 and 179—*Relative scope.*

S. 179 is an enabling section and must be read with S. 178. (*Davis, J.C. and Weston, J.*) DAYALJI PRAGJI *v.* KARACHI ELECTRIC SUPPLY CORPORATION. **190 I.C. 790=A.I.R. 1940 Sind 177.**

——S. 179—*Applicability—Mortgage—Movable property—Mortgagee allowing mortgagor to remain in possession — Mortgagor mortgaging same to third party against—First mortgagee's right to proceed second mortgagee.*

Where there is a mortgage of movable property, and the movable property is allowed by the mortgagee to remain in possession of the mortgagor as ostensible owner, and the property is again mortgaged to a third party and sold, the first mortgagee cannot recover from the second mortgagee unless he can show that the second mortgagee had notice of the prior mortgage. S. 179, Contract Act, has no application to such a case. (*Davis, J.C. and Weston, J.*) DAYALJI PRAGJI *v.* KARACHI ELECTRIC SUPPLY CORPORATION. **190 I.C. 790=A.I.R. 1940 Sind 177.**

CO-OWNERS—*Right of suit—Joint property—Suit to eject trespasser by one only or by alienee from one—Maintainability without joining the other co-owner.*

One of two co-owners of joint property is competent by himself to maintain a suit for ejecting a trespasser without joining the other co-owner when the property has not been divided between them; and an alienee from one of the co-owners is entitled to maintain such a suit without reference to the other co-owner. (*Nageswara Iyer and Subrahmanya Aiyar, JJ.*) MUNISWAMY RAJU *v.* MADHAVA RAO. **18 Mys.L.J. 495.**

CORONERS ACT (IV OF 1871), S. 19—Statement by suspect confessing complicity in murder recorded by coroner—If confession—Admissibility in trial on charge of murder against confessor and co-accused. *See* EVIDENCE ACT, SS. 24 AND 26. **42 Bom.L.R. 938.**

CO-SHARERS.

CO-SHARERS—*Common land—Exclusive possession by one in defiance of the rights of others—Claim to compensation by others—Maintainability—Limitation applicable—Limitation Act, Arts* 109 *and* 120—*Basis of calculation—Rental basis or produce basis.*

A co-sharer who is in separate possession of the common land (irrespective of what his share of such land would be upon partition) without ouster or exclusion of or without objection from, the other co-sharers is under no obligation either to account or to pay compensation to them in respect of the profits earned by him by his own industry. But if a co-sharer is deliberately and continuously excluded from his share of the *bakasht* lands by the co-sharer in possession who acts in defiance of the other's right, the excluded co-sharer would be entitled to compensation from the co-sharer in possession. It cannot however be held that the excluded co-sharer would be entitled to compensation even if he had never objected to the exclusive use and occupation of the *bakasht* lands by the co-sharer in possession. Art. 120 and not Art. 109 of the Limitation Act applies to a suit for compensation by an excluded co-sharer. Compensation in such cases is a matter of justice, equity and good conscience; and in a case where the co-sharer in possession cultivates the lands not through tenants but by his own *ziratia*, the compensation should be awarded not on a rental basis but on the basis of the produce of the land in the years in suit. (*Harries, C.J. and Dhavle, J.*) RAJ RANJAN PRASAD SINHA *v.* KHOBHARI LAL. **21 Pat.L.T. 854.**

——*Co-tenancy—Proof of— Circumstances — Inference.*

A man in possession of a part of a holding, who is not a sub-tenant, is not necessarily a co-tenant in the whole holding. His possession may be that of a trespasser or a licencee. Hence, no inference can possibly be drawn in favour of a co-tenancy merely from the fact that certain persons are in possession over certain plots and pay rent and canal dues for them direct to the zamindar. (*Harper, S.M. and Sathe, J.M.*) BHIKHARI *v.* INDRAJIT. **1940 A.W.R. (B.R.) 136.**

——*Co-tenancy—Subsistence—Duration—Unregistered exchange of interest—If terminates co-tenancy.*

A co-tenancy, once it is proved to exist, must be held to subsist until it is legally terminated. An unregistered exchange of the interest of one of the co-tenants could neither terminate the legal rights of that co-tenant, nor the co-tenancy itself. (*Harper, S.M.*) RAM AUTAR SINGH *v.* BABU **1940 R.D. 384=1940 A.W.R. (B.R.) 247.**

——*Co-tenants—Ancestral holding—Loss of right—Absence of proof of abandonment or adverse possession.*

In the case of a co-tenant of an ancestral holding, in the absence of proof of abandonment or adverse possession, there can be loss of his rights, merely by reason of his living in the adjoining village, or by his name not appearing in the revenue papers. (*Harper, S. M, and Sathe, J. M.*) RISAL SINGH *v.* BALDEO SINGH. **1940 R.D. 561.**

——*Exclusive possession of common land by one in defiance of rights of others—Compensation to excluded co-sharer—Right to interest on —Mesne profits—Distinction.*

CO-SHARERS.

It is almost impossible to make any distinction between mesne profits as defined in the C. P. Code, and the compensation awarded to a co-sharer of common land who has been deliberately excluded from enjoyment of the land by another who cultivates it in defiance of the other's rights. Interest is payable on the compensation so payable from one co-sharer to another, and can be rightly awarded. (*Harries, C.J. and Dhavle, J.*) RAJ RANJAN PRASAD SINHA *v.* KHOBHARI LAL. **21 Pat.L.T. 854.**

———*Right to alienate—Other co sharers' rights.*

If a co-sharer is in established possession of any portion of an undivided holding, not exceeding his own share, he cannot be disturbed in his possession until partition. Hence a co sharer who is in such possession of any portion of a joint khata, can transfer that portion subject to adjustment of the rights of the other co-sharers therein at the time of partition. Other co-sharers' rights will be sufficiently safeguarded if they are granted a decree declaring that the possession of the transferees in the lands in dispute will be that of co-sharers, subject to adjustment at the time of partition. (*Tek Chand and Bhide, JJ.*) SUKH DEV *v.* PARSI. **A.I.R. 1940 Lah. 473.**

———*Sale of a fractional share—Meaning.*

The sale of a fractional share means the sale of that share out of the entire khata and not out of the area remaining after transfers of specific plots. (*Bennett, J.*) IFTIKHAR KHAN *v.* HAYAT KHAN. **1940 O.A. 1032=1940 O.W.N. 1052=1940 R D. 531=1940 A.W.R (C.C.) 467.**

COSTS—*Discretionary matter.*

The grant of costs is discretionary and not obligatory. (*Sathe, J.M.*) MAHRANA *v.* MAHRAJ NARAIN **1940 O.W.N 1152=1940 R.D. 549.**

———*Mistake of Court—Correction—Order for costs, if justified.*

A Court is not justified in awarding costs in a case where the Court only corrected its own order passed under a misapprehension. (*Ghulam Hasan, J.*) BADRI PRASAD *v.* AMBIKA PERSHAD. **1940 O A. 1040=1940 O.W.N. 1086=1940 A.W.R. (C.C.) 457.**

———*Right to—Failure to produce evidence in trial Court—Disentitling circumstance.*

Where a party fails to produce the necessary evidence in the trial Court, and succeeds in his suit on the production of such evidence in the appellate Court, he is not entitled to costs, as all the trouble was due to his own negligence. (*Harper, S.M. and Sathe, J.M.*) RAM BEHARI UPADHYA *v* SHYAM CHARAN. **1940 R.D. 560.**

———Trade mark—Passing off action—Plea of acquiescence—Dismissal of suit—Costs—Defendant's right to. *See* TRADE MARK—INFRINGEMENT. **(1940) 2 M L.J. 793.**

COURT-FEES ACT (VII OF 1870), S. 6 (2), (3) and (4)—*Duty of Courts to follow provisions of.*

It is imperatively necessary to faithfully follow the provisions of Cls. 2, (3) and (4) of S. 6 of the Court-Fees Act. (*Iqbal Ahmad and Varma, JJ.*) BAIJNATH PRASAD *v.* TEJPAL. **1940 A.W.R. (H.C.) 577=1940 O.A. 1168=1940 A.L.J. 891.**

———**Ss. 6 (4), and 6-A**—*Question of Court-fee and merits of case decided in a single judgment*

COURT-FEES ACT (1870), S. 7.

—Decree to be prepared on deficiency being made good—Regularity of procedure—Appeal—Nature.

Where on an objection as to court-fee paid being raised, the Court decides the question of court-fee along with the merits of the case and embodies everything in a single judgment and adds a direction that the decree is to be drawn up after the deficiency is made good, the procedure adopted by the Court is in flagrant violation of the provisions of S 6 (4) of the Court-Fees Act. Where the plaintiff in such a case does not make good the deficiency and appeals the appeal is an appeal against an order in accordance with S.6-A, Court-Fees Act and not against a decree under S. 96, C. P. Code, for no decree has been drawn up in the case. (*Iqbal Ahmad and Varma, JJ.*) BAIJNATH PRASAD *v.* TEJPAL. **1940 A.W.R. (H. C.) 577=1940 O.A. 1168=1940 A.L.J. 891.**

———**S. 7 (iv) (c) and (d)**—*Applicability--Suit for injunction in respect of easement as occupier of property situate in Hyderabad—Title of plaintiff in property - If to be gone into—Court-fee payable—Valuation—Right of plaintiff—Plaintiff native of Hyderabad and claiming easement as appurtenant to property in Hyderabad—Law applicable—Jurisdiction of British Indian Court.*

The plaintiff claimed that irrigation works in his occupation situate within the Hyderabad State received their customary supply of water from the overflow of tanks belonging to the defendant situate in British India. The suit was for a series of injunctions restraining the defendant from carrying out certain projected works, which it was alleged, would endanger the customary flow of water to the plaintiff's tank.

Held, (1) that a suit to establish a right of easement could be maintained by the occupier of the dominant tenement, and no question as to the nature of the plaintiff's title in the estate which he occupied arose; (2) that if the right of easement be established by the evidence, there would be no legal impediment which had to be removed before the injunction protecting that right could be granted; and whether the plaintiff had or had not sued for a declaration, it was not necessary for him to pay court-fee on the footing that the finding which he sought as to his title was really a declaration necessarily required as a preliminary to the grant of the injunction. The plaint fell under S. 7 (iv) (*d*) of the Court-Fees Act, and the plaintiff was entitled to place his own valuation on the injunctions sought by h m, and, however inadequate that might be the Court had no jurisdiction to revise that valuation; (3) that the suit being one for injunction against the defendant residing in British India to protect a right of easement, which, though appurtenant to property in Hyderabad, had a local existence only in British India, was cognizable by a British Indian Court; and (4) that the easement in question being localised in British India must be determined according to the law of British India. (*Wadsworth, J.*) VENKATA RANGA RAO BAHADUR *v.* SITA RAMACHANDRA RAO BAHADUR. **52 L.W. 610=1940 M.W.N. 1062=(1940) 2 M.L J. 655.**

———**S. 7 (iv) (f) and Sch. II, Art. 17 (iii)**—Suit under S. 33, U. P. Agriculturists Relief Act—Court-fee payable. *See* U. P. AGRICULTURISTS RELIEF ACT, S. 33 AND COURT-FEES ACT, S. 7 (iv) AND ART. 17 (iii), SCH. II. **1940 A.L.J. 689 (F.B.).**

COURT-FEES ACT (1870), S. 17.

——**S. 17**—*Distinct subject—Suit for redemption of mortgage with claim for surplus profits—If comprises distinct reliefs.*

A plaintiff suing for redemption of a mortgage and asking for surplus profits is not asking for two distinct reliefs, and the suit does not comprise distinct subject, within the meaning of S. 17 of the Court-Fees Act. The value which the plaintiff places on the relief for redemption covers the relief in regard to surplus profits as well, and the latter need not be valued separately. (*Abdur Rahman, J.*) RADHAKRISHNA CHETTY *v.* SCHOMBERG. **1940 M.W.N. 1153=(1940) 2 M.L.J. 867.**

——**Sch I, Art. 1**—*Applicability—Set-off—Counter-claim — Conditions necessary—Suit to restrain company selling shares for alleged debt—Written statement pleading right to exercise its power of sale—If should be stamped.*

A set-off can be pleaded only in a money suit. A counter-claim is a cross-action brought by the defendant against plaintiff and a pleading which asks no cross-relief against the plaintiff is not a counter-claim. Where a suit is brought to restrain a company from selling the shares of the plaintiff for an alleged debt and the company in its written statement asserts that it has a power of sale over the shares in respect of any of its claims, the written statement does not plead a counter-claim and hence it does not require to be stamped. (*Ba U, J.*) U BA PE *v.* THE SUN PRESS, LTD. **1940 Rang L.R. 529=A.I.R. 1940 Rang. 300.**

——**(as amended in Madras) Sch I. Art. 1 and Sch. II, Art. 17-B**—*Applicability—Suit on promissory note—Decree against defendant personally—Appeal alleging that defendant is not personally liable but only as trustee—Court-fee payable.*

The appellants were executants of three promissory notes on which suits were instituted. Two of the notes were executed by them simply in their personal capacity while in the third there was a reference to a trust in the body of the instrument, though the appellant had not signed as trustees. In all the three suits the claim was against the appellants in their personal capacity and decrees were passed rendering them personally liable. The appellants preferred second appeals and contended that as the debts had been contracted for trust purposes they should not be made personally liable, and that the decrees should have been against them as trustees and against the trust property in their hands. The appellants claimed that the appeals were incapable of valuation and that they were only liable to court-fee under Art. 17-B of Sch. II of the Court-Fees Act as amended in Madras and that no *ad valorem* court-fee was payable.

Held, that the appellants were seeking to get rid of their liability to the extent of both their persons and property in respect of the amounts decreed against them, and it could not therefore be said that the subject-matter of the appeals was incapable of valuation so as to permit court-fee being paid under Art. 17-B of Sch. II of the Court-Fees Act as amended in Madras and that therefore court-fee must be paid *ad valorem* on the value of the decree in each suit. (*Venkataramana Rao, J.*) BALAVENKATRAMA CHETTIAR *v.* MARUTHAMUTHU CHETTY. **52 L.W. 903=(1940) 2 M.L.J 946.**

COURT-FEES ACT (1870), Sch. II, Art. 17.

——**Sch. I, Art. 1 and Sch. II, Art. 17 (iii)**—*Suit to declare decree void and illegal—If involves consequential relief—Court-fee payable.*

Where a plaintiff asks for a declaration that a certain decree against him is void and illegal, it involves the setting aside of the decree and relieving plaintiff of the obligations arising thereunder and, therefore, involves a consequential relief and the plaintiff is liable to pay an *ad valorem* court-fee under Art. 1, Sch. I of the Court-Fees Act and not fixed fee as given in Art 17 (*iii*), Sch. II of the Act. (*Thomas, C.J. and Ghulam Hasan, J.*) BIRENDRA KUMAR *v.* BANSA DEVI. **1940 O A. 1050=1940 A.W.R. (C. C) 454=1940 O.W.N. 1121.**

——**Sch. II, Art. 11**—*Applicability — Appeal against decision under S. 14, U. P. Encumbered Estates Act.*

Where the appeal is against a decision only under S. 14 of the U. P. Encumbered Estates Act, it falls within the scope of Art. 11, Sch. II, Court-Fees Act and *ad valorem* court-fee need not be paid (*Zia-ul-Hasan and Yorke, JJ.*) RAMESHWAR BAKHESH SINGH *v.* GOVIND PRASAD. **190 I.C. 814=1940 O.L.R. 633=1940 A.W.R. (C.C.) 412=1940 O.W.N. 862=1940 O.A. 825=1940 R.D. 416.**

—— **(as amended in U. P.). Sch. II, Art. 17 (1)**—*Scope—Suit by defeated claimant under O. 21, R. 63—Prayer for injunction to restrain delivery of possession—Delivery already effected—Liability for levy of* ad valorem *court-fee.*

A suit under O. 21, R. 63, C. P. Code by a defeated claimant, to set aside an order made in the claim case, falls under Art. 17 (1) of the Court-Fees, Act and is liable to Court fee only under that Article. The fact that the plaintiff prays for an injunction to restrain delivery of possession of the property, or the circumstance that delivery of possession of the suit property has already been effected, cannot take the suit out of the scope of Art. 17 (1) of Sch. II and render the plaint liable to *ad valorem* court-fee. (*Harries, C.J. and Manohar Lall, JJ.*) UDAI CHAND LAL *v.* PANNALAL CHAMPALAL. **1940 P.W.N. 984 =21 Pat.L.T 1019.**

——**Sch. II, Art. 17 (iii)**—Applicability—Suit to declare decree void. *See* COURT-FEES ACT, SCH. II, ART. 1 AND SCH. II, ART. 17 (iii). **1940 O W N. 1121.**

——**Sch. II, Art. 17 (vi)** — *Applicability — Partition suit — Appeal against rejection of defence of paramount possession in lieu of dower.*

Where in defence to a suit for partition by a Mahomedan heir, the widow pleads her right to remain in possession in lieu of dower is paramount to that of the plaintiff's and her defence is rejected, the test to be applied to find out the proper court-fee payable in respect of an appeal against the rejection of such a plea is to consider what would be the position, if the appellant was endeavouring to establish in a suit in which she was plaintiff the same right as she is trying to maintain in the appeal. Applying the test it was held that the court-fee payable was not an *ad valorem* court-fee but court-fee under Art. 17 (vi) of the second Schedule of the Court-Fees Act. (*Braund, J.*) MUNIRAM *v.* MUKHTAR

COURT-FEES ACT (1870), Sch. II, Art. 17-B.

BEGAM. 1940 A.W R. (H.C.) 536=1940 O.A. 970 =1940 A L.J. 789=A.I.R. 1940 All 521.

——(as amended in Madras), **Sch. II, Art. 17-B** — Applicability — Decree personally against defendant in suit on promissory note—Appeal alleging that note was executed as trustee and therefore defendant was not personally liable but liable only as trustee—Appeal, if incapable of valuation—Court-fee. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), SCH. I, ART. 1 AND SCH. II, ART. 17-B. (1940) 2 M.L.J. 946.

CRIMINAL PROCEDURE CODE (V OF 1898), Ss. 1 and 83—*"British India"—Quetta—Warrant issued by Court in Quetta—Executability in British India.*

Quetta is not a part of British India and a warrant issued by a Court in Quetta cannot, therefore, be executed in British India. The Court in Baluchistan must proceed under the provisions of the Extradition Act. (*Almond, J.C.*) DEVKI NANDAN *v.* EMPEROR. **190 I C. 203=41 Cr.L.J. 857= 13 R.Pesh. 24=A.I.R. 1940 Pesh. 30.**

——**S. 33**—Scope—If extends term of imprisonment under S. 65, I. P. Code. *See* PENAL CODE, S. 65. **21 Pat.L.T. 795.**

——**Ss. 75 to 86**—*Duty of Court—Arrest of persons residing outside local limits of jurisdiction of Court issuing warrant—When to be directed—Duty of Court to satisfy itself that the persons to be arrested have committed offence.*

The power of directing the arrest of some person at a place outside the local limits of the jurisdiction of a Court, particularly when that place is far removed from the local limits, is one which should be exercised with the utmost circumspection. To arrest persons in one place and to take them in custody all the way to a distant place can only be justified, if the Court issuing the warrant has substantial reason to believe that those persons have committed the offence complained of. (*Beaumont, C. J. and Wassoodew, J.*) SAGARMAL KHEMRAJ, *In re:* **42 Bom.L.R 904=A.I.R. 1940 Bom. 397.**

——**Ss. 75 and 86**—*Scope and effect—Procedure for arrest of person outside the local limits of Court issuing warrant—Arrested person brought before Magistrate—Inquiry by latter under S.* 186 *—Competency—Duty of Magistrate—S.* 186, *if overrides Ss.* 75 *to* 86.

Under Ss. 75 to 86, Cr. P. Code, which deal with the issue of warrants to be executed outside the local limits of the jurisdiction of the Court issuing the same, the person arrested outside the local limits of the jurisdiction of the Court issuing warrant has to be taken before a Magistrate or Commissioner or District Superintendent of Police, and such officer has to satisfy himself that the person arrested appears to be the person intended by the Court which issued the warrant, and when so satisfied he is bound to direct the removal of the arrested person in custody to the Court which issued the warrant. The Magistrate in such a case is not entitled to institute an inquiry under S. 186, Cr. P. Code, which deals with a different matter. That section deals with a case in which the Court which has jurisdiction has not taken cognizance of the matter, and the offence is brought to the notice of a Magistrate who is not competent to try it, in which case he

CR. P. CODE (1898), S. 108.

may send it to a Magistrate who is not competent. S. 186 does not override the provisions of Ss. 75 to 86 which deal with the execution of warrants. The only point which the Magistrate is competent to inquire into under Ss. 75 to 86 is the question whether the arrested person is the person whose arrest was intended by the Court issuing the warrant. (*Beaumont, C. J. and Wassoodew, J.*) SAGARMAL KHEMRAJ, *In re.* **42 Bom. L.R. 904=A I.R 1940 Bom. 397.**

——**Ss. 77 and 83**—*Relative scope—Latter if overrides former*

S. 83, Cr. P. Code, which provides that in the case of a warrant to be executed outside the local limits of the Court issuing the same such Court may, instead of directing such warrant to a police officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police, or the Commissioner of Police in a Presidency town would override the express direction of S. 77 that a Presidency Magistrate must direct the warrant to a police officer. (*Beaumont, C. J. and Wassoodew, J.*) SAGARMAL KHEMRAJ, *In re.* **42 Bom.L.R. 904=A.I.R. 1940 Bom. 397.**

——**Ss. 77 and 83**—*Warrants—Form and contents of—Warrant not addressed to any definite officer and not containing address, description and occupation of person to be arrested—Validity of.*

A robbery was committed in Calcutta of four currency notes of the denomination of Rs. 1,000 each. One of these notes was subsequently traced to two merchants in Bombay, and the Bombay Police communicated this fact to the Calcutta Police. Thereupon the Chief Presidency Magistrate of Calcutta issued non-bailable warrants stating that the two merchants stood charged with the offence under S. 392, I. P. Code, *i.e.*, robbery. The warrants were addressed to the "O.C concerned" and referred to the two merchants merely by their names and in the margin of the warrants was a note initialled by the Chief Presidency Magistrate of Calcutta to the effect. "Forwarded to the third Presidency Magistrate. Bombay, for favour of execution and return". The warrants only contained the surname and preceding name of the two merchants, without any reference to address, description or occupation of the persons to be arrested. There was no such officer as the third Presidency Magistrate in Bombay.

Held, that the warrants were clearly bad and invalid, in that they were not sufficiently definite either in the name of the person to whom the warrant was addressed or in the description of the persons to be arrested. (*Beaumont, C.J. and Wassoodew J.*) SAGARMAL KHEMRAJ, *In re.* **42 Bom.L R 904=A.I.R 1940 Bom. 397.**

——**S. 83**—Scope—If overrides S. 77. *See* CR. P. CODE, SS. 77 AND 83. **42 Bom.L R. 904.**

——**S. 108 and Penal Code, S. 153-A**—*Isolated seditious or objectionable speech—Under what provision of law to be proceeded against.*

A person who makes an isolated seditious speech, or who is found on a stray occasion only circulating notices which may have the effect of promoting enmity between classes, may possibly be prosecuted under S. 153-A of the I. P. Code, but he cannot be proceeded against under S 108, Cr. P. Code. (*Thomas, C. J. and Ghulam Hasan, J.*) EMPEROR *v.* SWAMI SARUPANAND. **1940 O.A. 938=190 I.C. 805=1940 A.Cr.C. 147=1940 O.**

CR, P. CODE (1898), S. 110.

L.R. 640=1940 · A.W.R. (C.C.) 441=1940 O. W.N. 1018.

——**S. 110**—Person proceeded under—If prosecuted for offence. *See* CR. P. CODE, S. 495 (1) AND (4). **42 Bom.L.R. 909.**

——**Ss. 123 (6) and 108**—*Rigorous imprisonment for failure to give security in proceedings under S.* 108—*Legality.*

Under the provisions of S. 123 (6), Cr. P. Code, a sentence of rigorous imprisonment for failure to give security for good behaviour where the proceedings are taken under S. 108, Cr. P. Code, is illegal. The imprisonment should be simple. (*Thomas, C. J. and Ghulam Hasan, J.*) EMPEROR *v.* SWAMI SARUPANAND. **1940 O.A. 938 =190 I.C. 805=1940 A. Cr.C. 147=1940 O.L R. 640=1940 A.W.R. (C.C.) 441=1940 O.W.N. 1018.**

——**S. 139**—*Scope—Power of Court—Juror expressing opinion before completion of appointment of jury—Effect—Jury with such juror—If proper—Report—Legality—Power of Court to appoint fresh jury.*

S. 139, Cr. P. Code, contemplates a legal verdict by a duly constituted jury. Where before the appointment of the jury becomes complete, one of the jurors expresses his opinion, he is not a fit person to be on the jury. If he serves as a juror, the constitution of the jury is essentially defective, and the report of the majority of the jury itself becomes illegal and cannot be acted upon. In such a case the Magistrate should appoint a fresh jury and allow the proceedings to go on with a fresh jury and should not act on the report of the jury whose constitution was defective. (*Dhavle, J.*) KEWAL SARAN SINGH *v.* KAMLAPATI LAL. **21 Pat.L.T. 793=A.I.R. 1940 Pat. 717.**

——**S. 139-A**—*Scope—Duty of Magistrate—Denial of public right of way—Long user by private person of alleged public way*—Bona fide *assertion of claim—Procedure.*

Long user by a person of what is claimed to be a part of a public way may be taken as a *bona fide* assertion of claim ousting the jurisdiction of the Criminal Court to pass a summary order under S. 133, Cr. P. Code, against him. Where the person clearly denies the existence of the public right alleged, and there is evidence in support of the denial, the Magistrate must refer the parties to a Civil Court under S. 139-A. If the Magistrate does not do so and goes to hold that the place is a public way his order must be set aside. (*Dhavle, J.*) BHAJOO GOPE *v.* GHOLAM HAIDAR. **21 Pat.L.T. 1028.**

——**S. 139-A**—*Scope—Non-compliance—Effect—Magistrate not ascertaining whether there is evidence in support of denial of public right but deciding question of existence of public right—Propriety of.*

S. 139-A of the Cr. P. Code is mandatory and is clearly designed to ensure that where there is reliable evidence in support of the denial of the public right, the Magistrate shall have no jurisdiction to pronounce on the cogency of the evidence but must refer the matter to a civil Court. A Magistrate who does not direct his mind at all to ascertaining whether there is any evidence in support of the denial of the existence of the public right and takes upon himself to decide the question whether a public right exists

CR. P. CODE (1898), S. 155.

or not usurps the function of a Civil Court and deprives the party concerned of his right to have the matter decided by that Court. The order passed in such circumstances is illegal and must be set aside. (*Agarwala, J.*) MUNI LAL AGARWALA *v.* PUBLIC OF BHAGALPUR. **190 I.C. 879=7 B.R. 36=1940 P.W.N. 774=21 Pat.L.T. 843.**

——**S. 139-A**—*Scope—Non-compliance—Effect on proceedings.*

The provisions of S. 139-A, Cr. P. Code, are clearly designed to ensure that where there is reliable evidence in support of the denial of the existence of the public right, the Magistrate shall have no jurisdiction to pronounce on the cogency of the evidence, but must refer the matter to the Civil Court. When the Magistrate fails to observe the provisions of the section and takes upon himself to decide the question whether a public right exists or not, he usurps the function of a Civil Court and his order, being without jurisdiction, must be set aside. (*Dhavle, J.*) NIRSU RAUT *v.* SOMAR NONIA. **1940 P.W.N. 775=21 Pat.L.T. 852.**

——**S. 141**—*Applicability — Jury defectively constituted or exceeding its functions.*

S. 141, Cr. P. Code, has nothing to do with a jury defectively constituted or with a jury which exceeds its functions in material respects. (*Dhavle, J.*) KEWAL SARAN SINGH *v.* KAMLA PATI LAL. **21 Pat.L.T. 793=A.I.R. 1940 Pat. 717.**

——**S. 144 (6)**—*Extension of order after its expiry—Power of Local Government.*

S. 144 does not permit the Local Government to resuscitate an order under S. 144 by extending it when it has already expired and is no longer in force. (*Sale, J.*) CHANAN SINGH *v.* EMPEROR. **42 P.L.R. 786=A.I.R. 1940 Lah. 459.**

——**S. 145**—*Powers of Court—Matter in dispute—If can be referred to arbitration.*

There is no provision in the Criminal Procedure Code, for reference of any matter to arbitration or delegation of his powers by a Criminal Court to an arbitrator. According to S. 145, Cr. P. Code, it is for the Court itself to make an enquiry and to find out who is in actual possession. The procedure laid down under S. 145 does not contemplate that the question as to who is in actual possession should be delegated, even by the consent of parties to an arbitrator. The section directs the Magistrate himself to receive the evidence adduced by the parties and, on a consideration thereof, to come to a decision. (*Ganga Nath, J.*) AHMAD ULLAH *v.* SRINIWAS JOSHI. **1940 A.L.J. 758=1940 A.W.R. (H.C.) 561.**

——**S. 155 (2)**—*Prohibition contained in—Nature of.*

The prohibition contained in sub-S. (2) of S. 155, Cr. P. Code, is not absolute but is qualified by the phrase "without the order of a Magistrate . . . ," and the preventive action of the police is not restricted to the prevention of cognizable offences only. The police derive their power not only from the Code of Criminal Procedure but also from the Police Act and S. 23 of the latter Act gives them wide powers for prevention of offences and breaches of the law generally. (*Thomas, C.J. and Zia-ul-Hasan, J.*) EMPEROR *v.* THAKURI. **189 I.C. 655=41 Cr.L.J. 778=1940 O.W.N. 655=1940 A.Cr.C. 103=1940 O.A. 588**

CR. P. CODE (1898), S. 156.

=1940 A.W.R. (C.C.) 305=13 R.O. 103=1940 O.L.R. 492=A.I.R. 1940 Oudh 413.

———S. 156 (3)—*Scope—Power of Magistrate to refuse to take cognizance of offence on presentation of complaint—Duty of Magistrate on presentation of complaint.*

S. 156 (3), Cr. P. Code, relates to a stage before the Magistrate has taken cognizance of the offence and not after, but a Magistrate cannot refuse to take cognizance of an offence upon a complaint made to him within the definition of S. 4 (*b*). S. 156 (3) does not alter the rule that it is the duty of a Magistrate on presentation of a complaint of an offence to proceed in the manner laid down in Ch. XVI. He cannot refuse to take cognizance of it and send it to the police for inquiry and then dispose of it by executive orders and by a "B" summary. (*Davis, J.C. and Lobo, J.*) SHAHDAD GUDAI *v.* EMPEROR. **I.L.R. (1940) Kar. 431=A.I.R. 1940 Sind 215.**

———S. 186—Scope—It overrides Ss. 75 to 86—Person arrested in place outside jurisdiction of Court issuing warrant—Inquiry by Magistrate before whom arrested person is brought—Scope of—Duty of Magistrate. *See* CR. P. CODE, Ss. 75 TO 86. **42 Bom.L.R. 904.**

———Ss. 190, 191 and 351—*Relative applicability of Ss. 190 and 351—Detention of witness and trial under S. 351—Legality—Jurisdiction.*

S. 190, Cr. P. Code, applies to the initiation of proceedings and S. 351 applies to proceedings that have been already initiated. Looking at the positions which Ss. 190 and 351 respectively occupy in the Code, the intention of the legislature becomes quite apparent. S. 190 appears in a chapter dealing with conditions requisite for initiation of proceedings, whereas S. 351 appears in a chapter dealing with matters arising out of proceedings already initiated. After a Magistrate has taken cognizance of an offence in one of the 3 methods mentioned in S. 190, he gets the seizin of the whole case and his jurisdiction to bring everybody concerned in the commission of the offence to justice is in no way restricted—when a Magistrate detains under S. 351 a person who has come as a witness and tries him, S. 191 is not a bar to his jurisdiction. (*Ba U, J.*) MAUNG THET *v.* MAUNG CHIT KYWE. **1940 Rang.L.R. 676.**

———S. 195 (1) (a)—*Offence under S. 182, I. P. Code—Initiation of proceedings—Procedure.*

Where it is proposed to prosecute a person in respect of the false information contained in a telegram sent by him to a Sub-Divisional Officer, it is necessary under S. 195 (1) (*a*), Cr. P. Code, that the proceedings should be initiated on the complaint of the Sub-Divisional Officer or some officer to whom he is subordinate. (*Agarwala, J.*) TEJNARAYAN LAL *v.* EMPEROR. **190 I.C. 768=7 B.R. 35.**

———S. 195 (1) (a)—*Offence under S. 186, I. P. Code—Proper procedure to be followed—Complaint by the officer concerned—Appeal, if lies.*

An offence under S. 186, I. P. Code, does not fall within the purview of S. 195 (1) (*a*), Cr. P. Code and the officer concerned is therefore not entitled to make an inquiry or issue a notice under S. 476, Cr. P. Code, in respect of the offence. Where such inquiry is started under a mistake but subsequently dropped and a complaint is made of the offence under S. 186, I. P. Code, the officer concerned must be taken to be acting under the power given to him by law to make a complaint and his order is not open to appeal. (*Mulla, J.*) BHOOP RAM *v.* EMPEROR. **1940 A.W.R. (H.C.) 618=1940 A.L.J. 876.**

CR. P. CODE (1898), S. 203.

———S. 195 (1) (b)—*Applicability and construction—"In relation to"—Meaning of—Offence committed in relation to proceedings subsequently instituted in Court—Complaint by Court—Competency.*

A complaint by a Court is necessary under S. 195 (1) (*b*), Cr. P. Code, in respect of an offence under S. 211, I. P. Code, when such offence has been committed in or in relation to any proceeding in any Court. The words "in relation to" in S. 195 (1) (*b*) make it clear that the section is wide enough to cover a case where the offence alleged is committed in relation to a proceeding subsequently instituted in Court. When false information to the police is followed by a complaint to a Court based on the same facts and the same charge, S. 195 (1) (*b*) requires the complaint of the Court itself for prosecution of the informant under S. 211, I. P. Code, in respect of the false charge to the police. The agency by which the Court proceedings are instituted is not a deciding or relevant factor. There must be relation between the allegation to the police and the allegation to the Court. Once the subject-matter of the false charge to the police is made the subject-matter of a judicial investigation, the necessary relationship is established irrespective of how and by whom that judicial investigation is started (*Lobo, J.C. and O'Sullivan, J.*) EMPEROR *v.* NABI BUX KHAIR MAHOMED. **I.L.R. (1940) Kar. 414=A.I.R. 1940 Sind 209.**

———S. 195 (1) (c)—Offences specified in—Complaints in respect of, against persons not parties to proceedings before Courts, mentioned in S. 476—Power of such Courts to prefer. *See* CR. P. CODE, Ss. 476 AND 195 (1) (*c*). **I.L.R. (1940) Nag. 652.**

———S. 196—Scope—If affects Defence of India Rules—Charge of offence amounting to sedition, under R. 38 (1) (*a*), Defence of India Rules—Complaint by or authority of Provincial Government—If essential for taking cognizance. *See* DEFENCE OF INDIA RULES, R. 38 (1) (*a*). **(1940) 2 M.L.J. 830.**

———S. 197—*Arbitrator—Prosecution of—Sanction, if necessary.*

It is clear from the provisions of Sch. II, Para. 16, C. P. Code, that an arbitrator is not empowered to give a judgment at all. He makes an award and the Court passes judgment thereon. An arbitrator therefore is not a Judge within the meaning of S. 19 or S. 21, Penal Code and sanction under S. 197, Cr. P. Code, for his prosecution is not necessary. (*Almond, J.C.*) PEAREY LAL. *v.* EMPEROR. **191 I.C. 91=A.I.R. 1940 Pesh. 41.**

———S. 200—"Complaint"—Petition of protest to Magistrate before receipt of police report—If complaint. *See* CR. P. CODE, S. 436. **21 Pat.L.T. 1026.**

———S. 203—*Dismissal of complaint—Fresh complaint—When may be entertained.*

The District Magistrate who was also a Deputy Commissioner dealt with the original complaint in an unsatisfactory manner in dismissing it under S. 203 by passing an executive instead of a magisterial order and thereby did not leave the com-

CR. P. CODE (1898), S. 209.

plaint open to any further proceedings in any other Court. The case however was of considerable importance involving corruption in the administration of justice.

Held, that there were exceptional circumstances in the case which would justify the institution of a fresh complaint. (*Almond J.*) PEAREY LAL *v.* EMPEROR. **191 I C. 91=A I.R. 1940 Pesh. 41**

——**Ss. 209 and 342**—Scope and object of—Duty of Magistrate—Questions to accused—Purpose of—Filing of written statement in answer to questions—Propriety of—Admissibility of such statement in evidence of trial. *See* CR. P. CODE, S. 287. **1940 M.W.N 1163.**

——**S. 233**—*Charges under Ss. 452, 323 and 379, I. P. Code—Separate and specific mention—Charge, if defective.*

Where though the charge sheet mentioned the three Ss. 452, 323 and 179, I. P. Code together, but the sections and the alleged charges under those sections are specifically and separately mentioned, the charge does not contravene the provisions of S. 233, Cr. P. Code. (*Zia ul-Hasan, J.*) EMPEROR *v* MADHO SINGH **189 I C. 258=13 R.O. 92=1940 O.A. 483=1940 O.W N. 607=1940 A Cr C. 98=1940 A.W.R. (C.C) 253=1940 O.L.R 420=41 Cr.L J. 725=1940 O.W.N. 927=A.I.R. 1940 Oudh 396.**

——**S. 233**—*Scope of joinder of charges in respect of three offences under S. 409, I. P Code, and three offences under S. 477-A, I. P. Code—Legality.*

S. 233, Cr. P. Code, requires that for every distinct offence there shall be a separate charge and every such charge shall be separately tried, except in cases mentioned in Ss. 234, 235, 236 and 239 Where an accused is charged with three offences under S. 409, I. P. Code, and with three offences under S. 477-A, I. P. Code, there is a misjoinder of charges and the trial is illegal. (*Ganga Nath, J.*) BHU PRAKASH *v.* EMPEROR. **1940 A.W.R. (B.R.) 583=1940 A L J. 796.**

——**S. 235**—*Joinder of charges—Offence of cheating and offence under S. 6, Merchandise Marks Act.*

Where the offence under S. 6, Merchandise Marks Act, was not committed in the course of the same transaction as the offence of cheating, a joinder of the charges amounts to misjoinder of charges. (*Edgley, J.*) A. K. SEN *v.* MADHU MANGAL. **A.I.R. 1940 Cal. 583.**

——**S. 235 and Penal Code, Ss. 124-A and 153-A**—*Separate trials in respect of same speech for different offences—Necessity—Legality.*

Where in respect of the same speech a person is charged with two offences under Ss. 124-A and 153-A, I. P. Code, there should not be two separate trials and the accused could be convicted under both the sections in one trial. But where there has been separate trials and the accused has not been prejudiced, the trial cannot be held to be illegal. (*Thomas, C.J.*) VISHAMBAR DAYAL TRIPATHI *v.* EMPEROR. **190 I C. 887=1940 A.Cr C. 136=1940 O.L.R. 648=1940 O.A. 922=1940 A. W.R. (C.C.) 440=1940 O W N. 965.**

——**Ss. 247 and 259**—*Applicability—Charge of summons case and charge of warrant case arising from same transaction—Trial of both as warrant cases—Absence of complainant—Discharge of accused—Effect of—If bar to fresh complaint.*

CR. P. CODE (1898), S. 274.

In a case where there are two charges arising out of the same transaction, one triable as a summons case and the other as a warrant case, it is permissible for the Magistrate to try them together; but if he does so, he must follow the procedure laid down for warrant cases, and he cannot whilst proceeding with the two cases together, treat them separately. Where in such a case the complainant is absent on the adjourned date, and the Magistrate discharges the accused, the order operates simply as an order of discharge under S. 259, Cr. P. Code, it cannot be construed in one sense in respect of the warrant case in another sense in respect of the summons case. A fresh complaint on the same facts is therefore maintainable in respect of both offences. If, however, the case is tried as a summons case, the Magistrate has no jurisdiction to make any order other than that of acquittal or adjournment under S. 247, Cr. P. Code. (*Beaumont, C.J. and Wassoodew, J.*) KANJI VIJPAL *v* PANDURANG KESHAV, **42 Bom. L.R. 902=A.I.R. 1940 Bom. 413.**

——**S. 250**—*Applicability—Case instituted on police report—Real or formal complainant.*

S. 250, Cr. P. Code, will apply to information given by a Police Officer if that information can come as a complaint under Cl (*a*), S. 190 (1), Cr. P. Code; but S. 250 will not apply to a police report falling under Cl. (*b*) of S. 190 (1). S. 250 applies only to the formal complaint and not the "real" complaint. It will not apply to the real complainant as against the formal complaint. The remedy provided by the section is summary and does not contemplate an inquiry which might be a long inquiry into a chain of informants to ascertain who is the real as against the formal complainant. The section is not therefore susceptible of a complete and logical application to all false and frivolous or vexatious cases. (*Davis, J C., Lobo and Weston, JJ*) EMPEROR *v.* MAHOMED HASHIM. **I.L.R. (1940) Kar. 470=189 I.C. 703=41 Cr L J. 788=13 R.S. 47=A.I.R. 1940 Sind 134 (F B.).**

——**S. 250**—*False complaint—Finding as to—Necessity for.*

S. 250, Cr. P. Code, does not require a categorical finding that the complaint is false but that the Magistrate should be of opinion that the accusation is false. (*Skemp, J.*) DAROPADI *v.* PARS RAM. **42 P.L.R. 678.**

——**S. 257**—*Court, if bound to summon all witnesses.*

A Court is not bound to summon all the witnesses cited by an accused person and under the provisions of S. 257, Cr. P. Code, it has power to refuse to summon all the witnesses, if it thinks that the application is made for the purpose of vexation or delay or for defeating the ends of justice. (*Thomas, C.J.*) VISHAMBHAR DAYAL TRIPATHI *v.* EMPEROR. **190 I.C. 887=1940 A. Cr. C. 136=1940 O.L.R. 648=1940 O.W.N. 965=1940 O A 922=1940 A.W.R. (C.C.) 440.**

——**S. 259**—Applicability—Joint trial of summons case and warrant case arising out of same transaction—Procedure—Trial as warrant cases—Absence of complainant—Discharge of accused—If acquittal—Second complaint—If barred. *See* CR. P. CODE, SS. 247 AND 259. **42 Bom.L.R. 902.**

——**S. 274**—*Trial with seven jurors—Presumption.*

CR. P. CODE (1898), S. 275.

If the Judge proceeds with seven jurors, it must be assumed in the absence of anything on the record to satisfy the Appeal Court that it was practicable to have more than seven jurors, that S. 274 had been complied with. 62 C. 900 (S.B.), Appr. (*Lord Wright.*) MIRZA AKBAR *v.* EMPEROR. **I.L.R. (1940) Lah. 612=52 L.W. 662 =1940 O.W.N. 1112=1940 P.W.N. 809=190 I. C. 233=1940 A.W.R. (P.C.) 175=1940 A.L.J. 778=41 Cr.L.J. 871=1940 O.L.R. 619=13 R.P. C. 88=7 B.R. 118=1940 O.A. 943=A.I.R. 1940 P.C. 176=(1940) 2 M.L.J. 811 (P.C.).**

——**S. 275**—*Construction—Finding as to accused being European or Indian subject—What amounts to—Application for trial by majority of European or Indian jurors at trial in Sessions Court—Maintainability—Duty of Magistrate holding enquiry—Cr. P. Code, Ss. 443 and 447.*

From a reading of Ss. 275, 443 and 447 of the Cr. P. Code, it is clear that a person under trial is entitled to make an application to be tried under Ch. XXXIII of the Code, but such an application must be made before the commitment in the case of an enquiry prior to commitment to the High Court. At the trial, before the first jury is empanelled, the accused is entitled to make an application to be tried by jurors the majority of whom are Europeans or Americans, if he is a European or by a jury the majority of whom are Indian British subjects if he is an Indian. If the Magistrate holding an inquiry is of opinion that the case ought to be tried under Ch. XXXIII, it is his duty to inform the accused of his rights under that Chapter. An application cannot be made at the trial under S. 275, Cr. P. Code, unless it has been found that the prisoner is a European British subject or an Indian British subject, as the case may be. The Magistrate holding the inquiry is required to explain the provisions of the Chapter to the accused only if he is of opinion that the case is one to be tried under the Chapter. Where it is found that the committing Magistrate has explained the provisions of S. 447, Cr. P. Code, to the prisoner and his lawyer, that must be regarded as a finding of the Magistrate that the case is one in which the prisoner is entitled to be tried under the provisions of Ch. XXXIII, and therefore the prisoner can maintain an application under S. 275 at the trial for trial by a jury the majority of whom are Europeans or Indians as the case may be. (*Agarwala, J.*) EMPEROR *v.* ALBERT BARNEY. **1940 P.W.N. 894.**

——**S. 287**—*"Duly recorded"—Meaning of—Examination of accused—Object of—Evidence insufficient to implicate accused—Answers elicited by Court and recorded—If "duly" recorded—Admissibility in evidence at trial.*

Ss. 209 and 342, Cr. P. Code, cast upon the Magistrate the duty to interrogate the accused if the facts and circumstances proved are of such a nature that they tend, if unexplained, to implicate the acccused. The interrogation is to be made in order to afford him an opportunity for offering an explanation. Where in a case the evidence falls short of making out a *prima facie* case against the accused, and is not sufficient to implicate the accused, if the Magistrate proceeds to examine the accused and record his answers, it cannot be said that the examination of the accused is *duly recorded* within the meaning of S. 287, Cr. P. Code, so as to make the same evidence against the accused in the trial. There is no warrant for supplementing the evidence for the prosecution by statements obtained from the accused as the result of judicial interrogation. The puropose of interrogation by Court or by the committing Magistrate is merely to obtain an explanation from the accused in respect of circumstances appearing against him, and it is not to be extended to cases where the prosecution evidence is insufficient to involve the accused in guilt Gaps in the case of the prosecution cannot be filed by answers elicited from the accused during his examination by the Court. (*Krishnaswami Ayyangar, J.*) EMPEROR *v.* KUPPAMMAL. **1940 M.W.N. 1105=52 L.W. 710.**

CR. P. CODE (1898), S. 350.

——**S. 287**—*"Duly recorded"—Meaning—Preliminary inquiry—Magistrate questioning accused under S. 209—Accused filing written statement—Such statement—If one "duly recorded"—Admissibility—Ss. 209 and 342.*

Under Ss. 209 and 342 of the Cr. P. Code, the Court is entitled to put questions to the accused for the purpose of affording him an opportunity to explain such circumstances as appear in the evidence against him. The questions are to be put by the Court and the answers to be recorded are the answers to those questions. There is no warrant for the accused or his advisers taking advantage of the occasion to prepare a written statement before hand and to put it in lieu of the explanation which is to be elicited and only to be elicited by questions in Court. Such a written statement filed by the accused in answer to questions put to him by the committing Magistrate holding the preliminary enquiry, cannot be considered to be a document containing the examination of the accused *"duly recorded"* within the meaning of S. 287, Cr. P. Code and must therefore be excluded from the record at the trial. (*Krishnaswami Ayyangar, J.*) REX *v.* KRISHNAN. **52 L.W. 774=1940 M.W.N. 1163.**

——**S. 287**—Retracted statement — Evidential value of. *See* BHOPAL CR. P. CODE, SS. 232 AND 233 **190 I.C. 322.**

——**S. 288**—*Scope—Witnesses giving evidence before committing Magistrate as to certain facts—Subsequent change of evidence in Sessions Court—Depositions before committing Magistrate—Admissibility at trial.*

Where witnesses depose to certain facts before the committing Magistrate, but before the Sessions Judge change their testimony and state that they have no personal knowledge of the occurrence, it is open to the Sessions Judge to admit under S. 288, Cr. P Code, the depositions given by those witnesses before the committing Magistrate and treat the same as substantive evidence at the trial. (*Burn and Lakshmana Rao, JJ.*) PACHAYANNA GOUNDAN, *In re.* **1940 M.W.N. 1235=52 L.W. 634=(1940) 2 M.L.J. 767.**

——**S. 350**—*Object and scope of—Trial* de novo *by successor—Cross-examination on commission of witness examined on commission in previous proceedings—Propriety.*

The purpose of S. 350 clearly is to provide that the Magistrate should, if the circumstances so require decide the case only on evidence that he has himself recorded, upon the evidence of witnesses that he has seen. In a trial *de novo* by the previous Magistrate's successor, the purpose

CR. P. CODE (1898), S. 350.

which governs this section cannot be assisted by the cross-examination upon commission of a witness whose evidence has been recorded upon commission in the previous proceedings and whom the Magistrate has never seen. (*Davis, J. C. and Weston, J.*) SUKHRAMDAS *v.* EMPEROR. **I. L R. (1940) Kar. 498=A I.R. 1940 Sind 193.**

——**S 350 (1) Proviso and S 257**—*Applicability—Witness examined on commission—Recalling and re-hearing of—Necessity for.*

The proviso to S. 350 (1) applies where the accused in a trial *de novo* by the previous Magistrate's successor himself has demanded that the witnesses should be resummoned and reheard. But a demand of this sort cannot apply to the case of a witness who has never been summoned, never been heard by the Court and whose evidence has only been taken upon commission in previous proceedings. The Magistrate has a discretion under S. 257 and he cannot be said to have exercised the discretion wrongly in refusing to compel the attendance of the witness. (*Davis, J. C. and Weston, J.*) SUKHRAMDAS *v.* EMPEROR. **I.L.R. (1940) Kar. 498=A.I.R. 1940 Sind 193.**

——**S. 351**—Applicability. *See* CR. P. CODE, Ss. 190, 191 AND 351—RELATIVE APPLICABILITY. **1940 Rang.L.R. 676.**

——**S. 367 (5)**—*Award of lesser penalty—Duty of Court to give proper reasons.*

The Court while awarding the lesser penalty must give proper reasons for doing the same. The remark that there had been a dispassionate consideration of all the circumstances is not sufficient reason in the eye of law to justify the award of a lesser penalty. (*Mir Ahmad and Soofi, JJ.*) MIANJI KHAN *v.* EMPEROR. **A.I.R. 1940 Pesh. 49.**

——**S. 369**— *Applicability—Appellate Magistrate postponing decision to await examination of new witnesses by the lower Court—Subsequent decision without such evidence—Propriety.*

Where an appellate Magistrate passed an order that before he decides the appeal the evidence of certain new witnesses should be taken by the lower Court and sent, it is not a judgment to which S. 369, Cr. P. Code, applies. Nevertheless, if the Magistrate decides the appeal eventually without the new evidence, the procedure adopted would be highly irregular. (*Zia-ul Hasan, J.*) EMPEROR *v.* MADHO SINGH. **189 I.C. 258=1940 O.L.R. 420=41 Cr L J. 725=1940 O.W.N. 607=1940 O.A. 483=1940 A.W.R. (C C.) 253=13 R. O. 92=1940 A.Cr C. 98=1940 O.W.N. 927=A. I.R. 1940 Oudh 396.**

——**S. 393**—Scope—If controls Whipping Act—Age limit. *See* WHIPPING ACT, SS. 3 AND 5. **I.L.R. (1940) Kar. 477.**

——**S. 418**—*Appeal against conviction under Ss. 366 and 302, I. P. Code—Trial by jury for S. 366 and with assessors for S. 302—Jury's verdict unanimous—Accused if can attack, in the absence of misdirection, facts about kidnapping in appeal against the charge of murder—Murder trial—Ambiguity in procedure—Benefit to accused.*

Where an appeal is preferred against convictions under Ss. 366 and 302, I. P. Code and the trial of the offence under S. 366 was by jury and under S. 302, with assessors and the jury's verdict is unanimous, and the facts relating to the two offences are so connected together, it is open

CR. P. CODE (1898), S. 439.

to the accused to challenge every fact on which the conviction under S. 302 rests though in an appeal against conviction under S. 366 only it would not have been open to him to question the same facts. In a case when a man is on trial for his life every ambiguity in the law of procedure should be resolved in his favour. (*Grille and Bose, JJ.*) MOUJILAL *v.* EMPEROR. **1940 N.L.J. 565.**

——**S. 435**—*Jurisdiction of District Magistrate—Order under S. 145 by Subordinate Magistrate—Power of District Magistrate to set aside—Procedure.*

The jurisdiction of a District Magistrate in respect of proceedings under S. 145, Cr. P. Code, held before a Subordinate Magistrate, is an appellate jurisdiction. He has not even power to revise the order of the Magistrate himself. All he can do is to call for the record under S. 435, Cr. P. Code, and if he considers that the order should be interfered with his duty is to refer it to the High Court under S. 438, Cr. P. Code. He cannot set aside the order straightaway. Before referring the case to the High Court, it is desirable that he should hear the opposite party also. (*Agarwala, J.*) LUTI SINGH *v.* RAM KIRIT, **1940 P.W N. 777.**

——**S 436**—*Power of Sessions Judge—Petition of protest to Magistrate before receipt of police report—If "complaint"—Order "file" on such petition—Competence of Sessions Judge to direct further inquiry.*

An anticipatory protest petition, *i.e.*, a petition made to the Magistrate before the receipt of the police report, amounts to a petition of complaint on which the petitioner must be examined under S. 200, Cr. P. Code. Where on such a petition the Magistrate merely passes an order, "file", it is competent to the Sessions Judge to order further inquiry under S. 436, Cr. P. Code. (*Dhavle, J.*) SAIDU KHAN *v.* GAYA PRASAD. **21 Pat.L.T. 1026.**

——**S. 439**—*Acquittal—Interference — Principles.*

In all cases of application for setting aside an order of acquittal, the power is one to be exercised only in exceptional cases and with caution. Where there are signs in a judgment of a possible failure of justice and where the Sessions Judge has not exercised a proper judicial mind and has come to a decision without a proper review of the evidence, the order of acquittal must be set aside and a rehearing ordered. (*Yorke and Bennett, JJ.*) RAM LAL *v.* RAM PIARE. **1940 O A. 1142=1940 O.W.N. 1257.**

——**S. 439**—Enhancement of sentence—Powers of High Court—Murder—Sentence of transportation on ground that evidence is circumstantial—If justified—Enhancement. *See* PENAL CODE, S. 302. **(1940) 2 M.L.J. 895.**

——**S. 439**—*Enhancement of sentence—Practice.*

In a criminal trial the Court in revision is always reluctant to enhance sentences *suo motu*. (*Mir Ahmad and Soofi, JJ.*) MIANJI KHAN *v.* EMPEROR. **A.I.R. 1940 Pesh 49.**

——**S. 439**—*Order under S. 494—Revision application by witness—Maintainability.*

An order made by a Magistrate under S 494, Cr. P. Code, can be set aside in revision, even if the revision application is made by a witness in

CR. P. CODE (1898), S. 439.

the case who is the aggrieved person. (*Davis, C.J. and Weston, J.*) FAKIR CHAND RAMKRISHIN *v.* MURAD UMAR. **A.I.R. 1940 Sind 233.**

——**S. 439**—*Quashing proceedings—Summons case wrongly tried as warrant case—Dilatory trial—Error discovered No suitable evidence by prosecution towards end of trial—Retrial ordered—Quashing.*

A summons case was wrongly tried as a warrant case and the error in procedure was not pointed out by the Crown until the case was practically finished. The Magistrate thereupon ordered a fresh trial against which the accused came up to the High Court in revision.

Held, that further proceedings pending against the accused should be quashed in as much as the trial was conducted in a most dilatory manner by the Crown who had been given adjournments which would have been quite unsuitable in a summons case and who had not produced evidence which could sustain a conviction. (*Henderson and Khundkar, JJ.*) D. MODY *v.* EMPEROR. **45 C.W.N. 53=A I.R. 1940 Cal. 579.**

——**Ss. 443 and 449**—Scope—Right to be tried under Ch. XXXIII—When to be claimed—Application at trial in Sessions—Maintainability—Duty of committing Magistrate. *See* CR. P. CODE, S. 275. **1940 P.W N. 894.**

——**S. 476**—*Application not made immediately—If may be entertained.*

It cannot be said that there is a legal bar to the entertainment of an application not made immediately. (*Blacker, J.*) JAWALA PARSHAD *v.* RAM PARSHAD. **A.I.R. 1940 Lah. 526.**

——**S. 476**—*Application under—Duty of Court—Dismissal for non-appearance of applicant—Propriety.*

An application under S. 476 is entirely different from a complaint; it is merely the means of drawing the Court's attention to the fact that an offence appears to have been committed in proceedings before that Court, a fact, which it can in the majority of cases verify even without the help of the applicant. It is manifestly most improper for the Court to shirk its obvious duty of applying its mind to the question whether it should make a complaint or not, merely because the applicant does not appear in support of his application. There is no provision of law making it necessary to examine the applicant on his application as there is in the case of a complaint. Further, Ss. 476-A and 476-B do not talk about dismissing an application but in one case of rejecting it and in the other case of refusing to act on it. It is, therefore, improper to dismiss the application merely because the applicant is not present. However, there would be nothing wrong in rejecting the application on the ground that it does not give sufficient indication of facts and that the applicant is not there to supplement it. (*Blacker, J.*) JAWALA PARSHAD *v.* RAM PARSHAD. **A.I.R. 1940 Lah. 526.**

——**S. 476**—*'Civil Court'—Special Judge acting under U. P. Encumbered Estates Act, if included.*

A Special Judge sitting as a Court under the U. P. Encumbered Estates Act has jurisdiction as a Civil Court to proceed under S. 476 of the Cr. P. Code. (*Yorke, J.*) MAHOMED MEHDI *v.* RAMJILAL. **1940 O.A. 981=1940 A.Cr. C. 150=1940 O.W.N. 1004.**

CR. P. CODE (1898), S. 488.

——**S. 476**—*First application dismissed for non-appearance of applicant—Second application—If can be made.*

There is no provision of law that a second application under S. 476 cannot be made where a first application has been dismissed for non-appearance of the applicant. The principle of "*nemo debet*" is not applicable where there has been no inquiry on the merits. (*Blacker, J.*) JAWALA PARSHAD *v.* RAM PARSHAD. **A.I.R. 1940 Lah. 526.**

——**S. 476**—*Power of Court—Offences not referred to in S* 195—*Inclusion in complaint.*

S. 476, Cr. P. Code, is an enabling section and does not debar a Magistrate from including in his complaint offences not referred to in S. 195, Cr. P. Code. Nor does it debar the Magistrate to whom the complaint is presented from issuing process for such offences, if from the facts alleged they appear to have been committed. (*Davis, J.C. and Weston, J.*) DHARMUMAL TENMAL *v.* TEUNMAL LAKHRAJ. **I.L.R. (1940) Kar. 500=190 I.C. 119=41 Cr.L.J. 821=13 R.S. 52=A.I.R 1940 Sind 133.**

——**Ss. 476 and 195 (1) (c)**—*Power of Courts mentioned in S. 476—Compluint against persons not parties to proceedings before them, in respect of offences specified in S.* 195 (1) (*c*).

S. 476, Cr. P. Code, does not inhibit the classes of Courts mentioned therein from making a complaint in respect of any of the offences specified in S. 195 (1) (*c*) against persons not parties to a proceeding before it, in which or in relation to which the offence was committed. (*Stone, C.J. and Clarke, J.*) ABDUL RAHIM KHAN *v.* PUSIABAI. **I.L.R. (1940) Nag. 652.**

——**S. 476-B**—*Order dismissing application in default—Appealability.*

S. 476-B gives an appeal against a refusal to make a complaint, not against a dismissal of an application in default (*Blacker, J.*) JAWALA PARSHAD *v.* RAM PARSHAD. **A.I.R. 1940 Lah. 526.**

——**S. 488**—*Claim by wife—Opposite party behaving badly—Date from which maintenance to be awarded.*

In an application for maintenance by a wife where the opposite party is found to have behaved badly so as not to deserve any sympathy or consideration, the Magistrate should award maintenance not from the date of his order but from the date of the wife's application. (*Davis, J.C. and Lobo, J.*) HEMIBAI *v.* KUNDIBAI. **A.I.R. 1940 Sind 222.**

——**S. 488**—*"Just cause"—Wife suffering from unpleasant disease not uncommon, incurable or serious—If just cause for husband's refusal to live with wife.*

The fact that the wife is suffering from some unpleasant female disease which is not uncommon, incurable or serious, is not just cause for the husband's refusal to live with his wife, especially so when the wife is in fact proved to have been cured. (*Davis, J.C and Lobo, J.*) HEMIBAI *v.* KUNDIBAI. **A.I.R. 1940 Sind 222.**

——**S. 488**—*Maintenance to children—Offspring aged 20—"Inability to maintain himself"—Burden of proof.*

The word "child" in S. 488, Cr. P. Code, whether it means a human being under any particular age or whether it is used in the more general

sense as meaning any offspring, however old, of a human being—is qualified by the phrase "unable to maintain itself". A person whose age is 20 and who is healthy is presumed to be capable of maintaining himself and the burden of proving the contrary is in any case on him. (*Young, C.J. and Blacker, J.*) MAHOMED YAR *v.* ALI MAHOMED. 42 P.L R. 743.

——S 488—*Maintenance claim by wife—Husband member of joint Hindu family—Order—Form of—If can be against family.*

Where a husband is a member of a joint Hindu family and is represented by his father in proceedings under S. 488, Cr. P. Code, instituted by his wife, though the Magistrate has to consider the property of the family in determining what sum he should award the wife for maintenance, the order should be passed against the husband himself and not against the joint family. A wife, however, cannot be deprived of her right to maintenance nor be debarred from obtaining an order of maintenance nor can she be deprived of her right to enforce the order, even, if necessary, by an order sentencing the husband to imprisonment for failure to pay maintenance merely on the ground that the husband is a member of a joint Hindu family. (*Davis, J.C. and Lobo, J.*) HEMIBAI *v.* KUNDIBAI. A I.R 1940 Sind 222.

——S. 488—*Parties—Claim by wife—Husband member of joint Hindu family—Husband falsely alleged to have committed suicide or been murdered—Husband's father—If can be made party—Procedure.*

S. 488 does not contemplate proceedings against the whole family merely because the husband against whom the proceedings are taken is a member of the joint Hindu family, and therefore where the husband is alleged falsely to have committed suicide or been murdered, a more proper course for the Magistrate is to treat the husband's father as a witness and not as a party to the proceedings. (*Davis, J. C. and Lobo, J.*) HEMIBAI *v.* KUNDIBAI. A.I.R. 1940 Sind 222.

——S. 488—*Procedure—Jurisdiction of Magistrate—Order directing attachment of movables of husband's joint Hindu family and holding joint property liable for maintenance—Legality.*

Where a Magistrate comes to a finding under S. 488 that the wife is entitled to maintenance at Rs. 40 per month but does not pass a proper maintenance order in precise terms and at once directs the attachment of the movables of the husband's joint Hindu family, holding the joint property liable for the wife's maintenance, the order is premature and beyond the provisions of S. 488 (1) and (2). The liability of the joint family property and the way in which the order for maintenance should be enforced is a matter to be considered after a proper order in the terms of S. 488 (1) and (2) is passed and after an application is made by the wife under S. 488 (3), Cr. P. Code, for the enforcement of the order for maintenance. (*Davis, J.C. and Lobo, J.*) HEMIBAI *v.* KUNDIBAI. A.I.R. 1940 Sind 222.

——Ss. 489 (2) and 488—*Civil suit subsequent to order under S. 488—Decree—Subsequent procedure.*

Where after an order for maintenance of an alleged illegitimate child is passed against a person and he sues under S. 42, Specific Relief Act, for a declaration that he is not the father of the child, if he succeeds, the proper course for him is to approach the Criminal Court under S 489 (2), Cr. P. Code and ask for the cancellation or variation of the order for maintenance. (*Mya Bu and Mosely, JJ.*) U. ARZEINA *v.* MA KYIN SHWE AND ANOTHER. 1940 Rang. L.R. 668=A. I.R. 1940 Rang. 298.

——S. 494—*Duty of Magistrate to exercise independent judgment.*

"Consent" within the meaning of S. 494 means a consent freely given by a free and independent Magistrate. The Magistrate must not surrender his authority to the District Magistrate, but must act judiciously and come to his own independent conclusion as to whether withdrawal ought to be permitted or not upon a consideration of all the relevant circumstances. The Magistrate also must not surrender his authority and discretion, as such, to the Executive Government. (*Davis, C.J. and Weston, J.*) FAKIRCHAND RAMKRISHIN *v.* MURAD UMAR. A.I.R. 1940 Sind 233.

——S. 494—*Extraneous reasons—If proper.*

Reasons extraneous to the case are not proper reasons for the withdrawal of the case. (*Davis, C.J. and Weston, J.*) FAKIRCHAND RAMKRISHIN *v.* MURAD UMAR. A.I.R 1940 Sind 233.

——S. 494—*Reasons for permitting withdrawal—Duty of Court to record,*

An order under S. 494, Cr. P. Code, consenting to the withdrawal of a case is a judicial order; to be a judicial order there must be reasons underlying it. These reasons should be capable of articulate expressions. Hence in the interests of justice reasons should be given by a subordinate Magistrate so that the High Court can judge whether the Magistrate's discretion has been rightly exercised. (*Davis, C.J. and Weston, J.*) FAKIRCHAND RAMKRISHIN *v.* MURAD UMAR. A.I.R. 1940 Sind 233.

——S. 495—*Duty of Magistrate—Application for permission—Proper authority to deal with——Engagement of advocate privately engaged by complainant—Propriety.*

Where an application is made to a Magistrate for permission to conduct the case on behalf of the prosecution, the proper authority to deal with the application is the Magistrate himself. In the prosecution of a case of murder an advocate privately engaged by the complainant is not a proper person to conduct the prosecution. The Crown stands for justice and not necessarily for a conviction and in a prosecution on behalf of the Crown private interests and private feelings should have no place. (*Davis, J. C.*) AHMAD MAHOMED ISMAIL *v.* EMPEROR. I.L.R. (1940) Kar. 482=A.I.R. 1940 Sind 220.

——S. 495 (1) and (4)—*Applicability—Case under S. 110—Police Officer inquiring into case—Application for permission to conduct case before Magistrate on behalf of prosecution—Propriety of.*

S. 495 (4) Cr. P. Code, does not apply to the case of an inquiry under S. 110, Cr. P. Code, because a person in respect of whom an inquiry is being held under S. 110, is not being prosecuted for an offence. On the other hand S. 495 (1) would apply because the Magistrate is inquiring into a case. Under S. 495 (1), the Magistrate has a discretion to allow a Police Sub-Inspector to conduct the prosecution or not. It is generally undesirable for a Police Sub-Inspector who has

been inquiring into case under S. 110 to conduct such case before the Magistrate; and if the Magistrate refuses to allow the Police Sub-Inspector to conduct the prosecution case, he is entitled to so exercise his discretion. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* ANANDYA SAMBHYA. **42 Bom.L.R. 909=A.I.R. 1940 Bom. 416.**

——S. 499—*Bond for attendance on day to be thereafter given—Reasonable notice of that day—Necessity for.*

Form No. 25 in Sch. V, Cr. P. Code, provides for the time referred to in S. 499, Cr. P. Code, to be not only a specified day but also a day on which the accused may thereafter be required to attend. Nevertheless when the bond takes this latter form, a reasonable notice must be given to the accused and his surety of the day on which the accused's attendance before the Court is required. (*Davis, J.C. and Lobo, J.*) FATEH CHAND *v.* EMPEROR. **I.L.R. (1940) Kar. 479=13 R.S. 51=189 I.C. 800=41 Cr.L.J. 802=A.I.R. 1940 Sind 136.**

——S. 502—*Discharge of surety—Procedure.*

S. 502, Cr. P. Code, does not provide for a Magistrate discharging a surety so soon as he applies. The Magistrate shall issue a warrant directing the arrest of the accused, and only on the appearance of the accused before him does the Magistrate then discharge the surety. He cannot discharge the surety before the accused appears or is brought before him. (*Davis, J.C. and Lobo, J.*) FATEH CHAND *v.* EMPEROR. **I.L.R. (1940) Kar. 479=13 R.S. 51=189 I.C. 800=41 Cr.L.J. 802=A.I.R. 1940 Sind 136.**

——S. 507 (2)—*Trial* de novo *by successor—Examination and cross-examination of witness on commission in previous proceedings—Admissibility.*

In the trial *de novo* before the successor of the previous Magistrate, the examination and cross-examination of a witness taken on commission in the previous proceedings is admissible without anything further in subsequent proceedings. (*Davis, J.C. and Weston, J.*) SUKHRAMDAS *v.* EMPEROR. **I.L.R. (1940) Kar. 498=A.I.R. 1940 Sind 193.**

——S. 514—*Forfeiture of bond—Notice to surety—If necessary.*

S. 514, Cr. P. Code, requires the Court to record grounds of the proof that the bond has been forfeited and a bond for appearance is forfeited when the accused does not appear, but it does not require the Court to issue notice to the surety to show cause why the bond should not be forfeited. The Court may issue notice to show cause why the penalty resulting from the forfeiture should not be imposed. (*Davis, J.C. and Lobo, J.*) FATEH CHAND *v.* EMPEROR. **I.L.R. (1940) Kar. 479=13 R.S. 51=189 I.C. 800=41 Cr,L.J. 802=A.I.R. 1940 Sind 136.**

——S. 522—*'Force'—Meaning of.*

The only force that is contemplated by S. 522 is force as applied to a human body—the use of force as mentioned in Ss. 349 and 350, I. P. Code. Hence, where the complainant was dispossessed of his house in his absence, no criminal force can be said to have been used to any person. No order can therefore be made under S. 522. 40 P. L.R. 923 Over.; A.I.R. 1939 Lah. 184, App. (*Din Mahomed and Ram Lall, JJ.*) NARAIN SINGH *v.* PANNA LAL. **42 P.L.R. 791=A.I.R. 1940 Lah. 460.**

——S. 522—*'Force'—Meaning of.*

Criminal force as defined in S. 350 contemplates force used to a person and not to a thing where the complainant was dispossessed of his property in his absence, by breaking open his lock no criminal force can be said to have been used to any person. No order can therefore be made under S. 522, Cr. P. Code. (*Almond, J.C.*) KALAL DIN *v.* EMPEROR. **A.I.R. 1940 Pesh. 51.**

——Ss. 529 and 197—*Applicability—Wrong sanction under S. 197—Special appointment of Magistrate otherwise competent to try case.*

Where in consequence of a wrongly given sanction under S. 197, a Magistrate otherwise competent to try the case is specially appointed to try the particular case, the provisions of S. 529 have no application. (*Almond, J.C.*) PEARY LAL *v.* EMPEROR. **191 I.C. 91=A.I.R. 1940 Pesh. 41.**

——S. 537—*Sanction under S. 197 for prosecution wrongly given—Magistrate otherwise competent to try case specially appointed—Proceedings if vitiated.*

The irregularity in the proceedings before the trial in consequence of the sanction of the Local Government under S. 197, Cr. P. Code, for prosecution having been wrongly given resulted in the appointment of a spectal Magistrate who was even otherwise competent to try the case. There was also a further irregularity in consequence thereof during the trial as the Magistrate refused to stay proceedings pending a transfer application by the accused to the High Court.

Held, that it was necessary for the accused to show that as a consequence of the irregularities there had in fact been a failure of justice and that in the circumstances of the case there had been no actual miscarriage of justice. (*Almond, J.C.*) PEARY LAL *v.* EMPEROR. **191 I.C. 91=A.I.R. 1940 Pesh. 41.**

——S. 540—*Discretion of Court—Right of prosecution to summon fresh witnesses in Sessions Court for first time—Witnesses sought being accomplices—Duty of Court.*

Under S. 286, Cr. P. Code, the prosecution is not confined to the witnesses examined before the committing Magistrate, but may examine other witnesses as well, in the Sessions Court. But the prosecution is not entitled to have fresh witnesses summoned for the purpose of their evidence being taken and considered in the trial. If the prosecution has additional witnesses ready and available to it for giving evidence, their evidence may be taken and there is no legal objection to that course. But if the evidence of fresh witnesses cannot be made available without the intervention of the Court, the Court under S. 540, Cr P. Code, has to be satisfied that the case is a fit one for exercising its discretion by summoning the witnesses and that the evidence of the witnesses is essential to the decision of the case, before it will decide to call them. When the witnesses sought to be summoned are accomplices whose evidence must be received with caution and only after corroboration in material particulars, the Court will decline to have them summoned when the Court is not satisfied that their evidence is essential to the just decision of the case. (*Krishnaswami Aiyangar, J.*) REX *v.*

CRIMINAL TRIAL.

NARAYANA REDDI. **52 L.W. 790=1940 M.W.N. 1164.**

CRIMINAL TRIAL—Ambiguity in procedure —Murder trial—Benefit to accused. *See* CR. P. CODE, S. 418—APPEAL AGAINST CONVICTION UNDER SS. 366 AND 302 I. P. CODE. **1940 N.L.J. 565.**

———*Burden of proof—Duty of prosecution to prove guilt of accused beyond reasonable doubt.*

There is no question in a criminal case of the accused being required to prove his innocence. The burden of proving that the accused is guilty is always on the prosecution, and the accused can be convicted only if he is proved to be guilty and not merely because he fails to establish his innocence. If any explanation that the accused chooses to give is not proved beyond doubt, he cannot claim to be innocent; but even so, if his explanation throws any reasonable doubt on the prosecution story, he would be entitled to an acquittal, not because he proves the facts and circumstances referred to, for instance, in Ss. 105 and 106 of the Evidence Act, but because the prosecution has failed to establish the guilt of the accused beyond reasonable doubt. When the prosecution has proved facts and circumstances from which the guilt of the accused can be properly inferred, and the explanation offered by the accused is rejected, there is nothing left to throw any doubt on the prosecution case, the accused is liable to be convicted. But the onus of proving the guilt of the accused beyond reasonable doubt never changes; it always rests on the prosecution. Even in those cases in which the accused is required to produce evidence on some point or other, and does so, the rejection of this evidence as unsatisfactory does not necessarily warrant the conclusion that the accused is guilty; the prosecution is bound to fail in every case in which the guilt of the accused is not established on the evidence beyond reasonable doubt. (*Dhavle, J.*) RAGHUNATH GOPE *v.* EMPEROR. **21 Pat L T. 1021.**

———*Confession—Admissibility—Considerations for Court—Free and voluntary nature of confession—Prosecution—If bound to prove—All parts of confession—If to be given equal weight.*

All parts of a confession are not entitled to equal weight. But it is the duty of every Court to inquire very carefully into all the circumstances which have led to the making of the confession. The length of time during which an accused person was in police custody before he made his confession is an important element for the consideration of the Court in reference to the admissibility of the confession. The admissibility of each confession must be decided on all the facts and surrounding circumstances and also from the intrinsic evidence of the confession itself, there being no hard and fast rule. It is not necessary for the prosecution affirmatively to prove that the confession was freely and voluntarily made. (*Wadia, J.*) EMPEROR *v.* BHAGWANDAS BISESAR. **42 Bom.L.R. 938.**

———Confession—Extra-judicial and retracted—Admissibility. *See* EVIDENCE ACT, S 24—RETRACTED EXTRA-JUDICIAL CONFESSION. **1940 N.L.J. 623.**

———*Confession—Retracted confession — Admissibility and use of against confessor and co-accused—Rule as to—Corroboration—Necessity.*

A confession is not to be regarded as involuntary merely because it is retracted. As against the maker of the confession, the retracted confession may be made the basis of conviction if it is believed to be true and voluntarily made; as against a co-accused, the Court as a rule of prudence and caution, should not rely on it without independent and full corroborative evidence. The corroboration should not only confirm the general story of the alleged crime but must also connect the co-accused with it. It is however not illegal to convict an accused person on the confession of a co-accused; nor is there any rule of law requiring a retracted confession to be supported by corroborative evidence in material particulars. The use to be made of such a confession is more a matter of prudence than of law. (*Wadia, J.*) EMPEROR *v.* BHAGWANDAS BISESAR. **42 Bom.L.R. 938.**

———*Cross cases—Hearing by same assessors and decision by same judgment—Legality.*

The procedure by which two cross-cases, tried separately, are heard by the same set of assessors and decided by the same judgment is not illegal; but the danger is that by adopting this method the Courts are liable to mix up the evidence in the two records. If they do so, the procedure is irregular and it is difficult to hold that the irregularity is one that can be condoned by reason of absence of prejudice to the accused. It is almost inevitable that in such cases there must be prejudice to the accused. (*Young, C.J. and Sale, J.*) KHAIR MAHOMED *v.* EMPEROR. **42 P.L.R. 809= A.I.R. 1940 Lah. 466.**

———*Evidence— Admissibility — Behaviour of police dog.*

In a case of house-trespass a police officer took the police dogs to the place where a man was suspected to have climbed over the wall. He allowed them to smell that place and then he took them to a group of eight people who were sitting close by including the accused. He stated that one of the dogs pointed to the accused but the other dog did not do so as it was ill that day. The fact which the prosecution sought to establish was that the smell of a certain person who had been in one place was the same as that which the dog pointed out.

Held, that the behaviour of a dog could not be evidence in the case and that such evidence was completely irrelevant. (*Almond, J.C.*) SAID ALI *v.* EMPEROR. **A.I.R. 1940 Pesh. 47.**

———*Evidence—Charge of murder—Evidence proving that accused inflicted fatal wounds—Injuries on accused unexplained—If ground for rejecting evidence—Sentence—Injuries found on accused—If ground of mitigation of sentence.*

Where in a trial on a charge of murder the evidence is clear that it was the accused who inflicted the fatal wounds upon the deceased, it is not possible to reject that evidence merely because the prosecution witnesses do not explain how the accused himself came by his injuries. Where the accused is properly convicted of murder and it is found that the attack upon the deceased was deliberate, the severe injuries received by the accused cannot be considered as a reason for mitigating his punishment. (*Burn and Lakshmana Rao, JJ.*) SUBBIGADU, *In re.* **1940 M.W.N. 1236=52 L.W.884=(1940) 2 M L. J. 1018.**

———*Evidence—Necessity for full and conclusive evidence—Evidence casting suspicions on*

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accused—Sufficiency of—Charge against woman of causing death of her new born child by drowning it in cesspol—Facts to be proved.

Where a woman is charged for an offence of murder under S. 302, I. P. Code, by intentionally causing the death of her new born infant by drowning it in a cesspool on or about a particular date, the prosecution must not only prove that she was recently delivered of a child, but also that the body of the child found in the cesspool was the body of her child. Evidence tending to show that the accused was in an advanced state of pregnancy shortly before the date in question and was delivered of a child before the finding of a dead child in the cess-pool would not be enough for a conviction, for those circumstances only cause a suspicion against the accused. In the trial of an accused for a crime suspicion cannot be made the ground of a finding of guilty by the jury, and in such a case it must be held that there is no case to go before the jury. (*Krishnaswami Ayyangar, J.*) EMPEROR *v.* KUPPAMMAL. **1940 M.W.N. 1105=52 L.W. 710.**

———*Evidence — Value of — First information report.*

The first information report is not a piece of substantive evidence but it can be used only as a previous statement admissible to corroborate or contradict the author of it. (*Wazir, J.*) AHMED SHAH *v.* STATE. **42 P.L.R.J. & K. 362.**

———*Investigation—Getting statements repeated before witnesses—Propriety.*

In principle, it is of course objectionable for a police officer who has received information from the accused and is proceeding to act on that information to get him to repeat that information before witnesses. (*Grille and Gruer, JJ.*) BHAROSA RAMDAYAL *v.* EMPEROR. **I.L.R. (1940) Nag. 679=1940 N.L.J. 623.**

———*Judgment—Contents—Duty of trial Courts.*

It is not sufficient for trial Courts to give a summary of the various statements in their judgments but they should judge and assess the true evidentiary value of these statements. The judgments of judicial Courts should be self-contained and should contain a proper discussion of the material points involved in the case. (*Abdul Qayoom, C.J.*) KARIM AITU *v.* STATE. **42 P.L.R. J. & K. 321.**

———*Jurisdiction—Charge under S. 406, I. P. Code—Accused arrested illegally outside jurisdiction and brought up—Release on bail—Subsequent appearance of accused—Jurisdiction of Magistrate—If affected by illegality of arrest.*

Although the arrest of an accused person may have been illegal, when he is released on bail and subsequently appears in Court of his own accord, the illegality of the original arrest has no bearing on the proceedings after his appearance, and cannot affect the jurisdiction of a Magistrate to inquire into an offence under S. 406, I. P. Code, committed by the accused within his jurisdiction. (*Lakshmana Rao, J.*) SUBRAMANIA CHETTY, *In re.* **52 L.W. 892=(1940) 2 M.L.J. 1016.**

———*Sentence—First offender—Short term of imprisonment—Propriety of*

The passing of a short sentence of imprisonment upon a first offender is very often an introduction to a life of crime and is harmful and should not be resorted to. (*Davis, J.C. and Weston, J.*) EMPEROR *v.* ACHAR HAMZO. **I.L.R. (1940) Kar. 477.**

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———*Witness—Duty of prosecution — Hostile witnesses—If to be called.*

It is obviously within the discretion of the prosecution to call or not to call all the witnesses at the trial. It cannot be said that the prosecution should call witnesses who have unquestionably turned hostile. (*Burn and Mockett, JJ.*) EMPEROR *v.* VELLAKANNU KARUPPAN PILLAI. **52 L.W. 642=1940 M.W.N. 1050.**

CUSTOM—*Proof of—Quantum of evidence.*

There is no hard and fast rule as to how much evidence would be sufficient to prove the existence of a custom. It depends entirely on the nature of the evidence as well as on the circumstances of each case. In some cases a large number of instances may be insufficient, while in others a much smaller number may be quite sufficient. (*Thom, C.J. and Ganga Nath, J.*) NARAIN SINGH *v.* NET RAM. **1940 A.L.J. 650=1940 O.W.N. 1136=1940 R.D. 545=1940 O.A. 1264=1940 A. W.R. (H.C.) 486=A.I.R. 1940 All. 535.**

———**(N.W.F.P.)**—*Alienation — Non-proprietor —Right of residence in shop built on site granted by proprietor.*

The general custom is that a non-proprietor who has built a shop on a site granted to him by the proprietors of the village cannot alienate his right of residence therein without their permission. There is no special custom contrary to this general custom in the village of Zaida. (*Almond, J.C.*) JAIKARAN DASS *v.* ABDUL GH FUR KHAN. **190 I.C. 35=13 R.Pesh. 20=A.I.R. 1940 Pesh. 31.**

———**(Punjab)**—*Alienation — Widow—Suit by some reversioners challenging alienation—Other reversioners impleaded as defendants—Compromise decree — Alienee surrendering immediate possession to plaintiffs on cash payment—Right of defendant reversioners to share in benefit of decree.*

Where some of the reversioners bring a suit for a declaration that an alienation by the widow would not affect their reversionary rights on the termination of the life-estate and implead in that suit the other reversioners as defendants; and the suit ends in a compromise decree whereby the alienee surrenders immediate possession of the property to the plaintiff reversioners on cash payment by them, the defendant reversioners are not entitled to share in the benefit of the decree for possession which is obtained by the plaintiffs in their own favour, but are only entitled to succeed on the death of the widow. There is no equitable ground for holding that reversioners who are impleaded as defendants in a declaratory suit of this kind are not only entitled to the benefit of any declaration which may be obtained by the active reversioners, but are also entitled to share in any additional benefit which the active reversioners may secure for themselves by inducing a person in lawful possession to forego his rights in return for a cash payment to be made by themselves alone. (*Beckett, J.*) JALAL DIN *v.* NAWAB. **42 P.L.R. 765.**

———**(Punjab)** — *Applicability — Mahomedan Qureshi family residing in Gujrat town.*

Where the Mahomedan Qureshi family of the parties to the suit is proved to have resided in the town of Gujrat in the Punjab and almost all

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the members of the family of the common ancestor of the parties are shown to have followed urban pursuits, then in the absence of evidence to show that any one of them followed agriculture as his avocation or the ancestor of the family belonged to any compact village community or that the succession in the family was ever regulated by custom it cannot be said that the family of the parties is not governed by Mahomedan law but by agricultural custom whereby neither the widow nor the daughter is entitled to any inheritance. (*Bhide and Din Mahomed, JJ.*) SHARIFA BEGAM *v.* COURT OF WARDS. **A.I R 1940 Lah. 475.**

——**(Punjab)**—*Applicability—Proof—Instances showing exclusion of female heirs—Value of.*

In view of the fact that female heirs seldom contest their inheritance with male heirs and that mothers and sisters are always complaisant enough not to insist on their 'pound of flesh' instances showing that succession in the family was regulated by custom are not sufficient to determine that the parties do not follow their personal law unless there has been a clear demand by the female and refusal by the male. (*Bhide and Din Mahomed, JJ.*) SHARIFA BEGAM *v.* COURT OF WARDS. **A.I.R. 1940 Lah. 475.**

——**(Punjab)**—*Succession — Sisters, married—Sayyads of Jhang district.*

Under the customary law applicable to Sayyads of Jhang district, married sisters succeed to the property of their deceased brothers if collaterals within five degrees do not exist. Among the married sisters those of them alone are preferred who are married to collaterals within five or six degrees, and all other sisters who are married to collaterals remoter than six degrees or strangers stand on equal footing. (*Bhide and Din Mahomed, JJ.*) ZAWAR HUSSAIN SHAH *v.* SALEH MAHOMED SHAH. **42 P.L.R. 644=A.I.R. 1940 Lah. 515.**

——**(Punjab)**—*Succession—Sisters, unmarried—Alienation—Powers of—Sayyads of Jhang district.*

Per *Din Mahomed, J.*—Among Sayyads of Jhang district, unmarried sisters succeed till marriage and their estate is, therefore, limited and not absolute. An unmarried sister in possession of the property cannot alienate the property so as to prejudice the right of a married sister. (*Bhide and Din Mahomed, JJ.*) ZAWAR HUSSAIN SHAH *v.* SALEH MAHOMED SHAH. **42 P.L.R. 644 =A.I.R. 1940 Lah. 515.**

DANGEROUS DRUGS ACT (II OF 1930), Ss. 13 (a) and 32—*Scope—Charge of importing opium contrary to act—Burden of proof—Accused found in possession of opium—No evidence of import from elsewhere — Offence—Conviction—Sustainability—Presumption of import—If justified.*

Mere import of opium is not an offence under S. 13(*a*) of the Dangerous Drugs Act. The offence consists in importing contrary to the provisions of the Act. All that S. 32 of the Act amounts to is that all imports, if proved, will be regarded as imports contrary to the Act until the presumption is rebutted by the accused. But the fact of import cannot be presumed from mere possession of the dangerous drug. Where all that is proved is that a certain amount of crude opium was found in the possession of the accused, but there is no evidence to show that he actually

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imported the thing from anywhere else, it cannot be presumed that the accused has committed any offence in respect of a dangerous drug and he cannot be convicted under S. 13 (*a*) of the Dangerous Drugs Act. Presumption cannot be substituted for the proof of facts which go to make up an offence. (*Harries, C.J. and Varma, J.*) RAGHUBAR DAYAL MISSIR *v.* EMPEROR. **21 Pat. L.T. 976.**

——**S. 32**—Scope and effect — Presumption. under—If sufficient in absence of proof of import —Inference from mere possession—If justified. *See* DANGEROUS DRUGS ACT, SS. 13 (*a*) AND 32. **21 Pat.L.T. 876.**

DECREE—*Amendment ex parte, of orders—If permissible.*

Once having passed an order, which is also carried out, the officer passing the order, is incompetent to amend his own order. It is not open to a Court to alter *ex parte* its own previous order. (*Harper, S.M and Sathe, J.M.*) LALJI PANDE *v.* IDU KHAN. **1940 R.D. 495=1940 A.W. R. (B.R.) 187=1940 O.A. 1010.**

——Construction—Instalment decree—Charge on immovable property with right to recover amount out of property charged in case of default in payment of instalment—If money decree—Personal liability of defendant—If and when arises. *See* REGISTRATION ACT, S. 17 (1) (*e*). **42 Bom.L.R. 1113.**

——*Construction—Suit on promissory note—Attachment of land before judgment—Compromise decree creating charge on land and directing defendant to pay in instalments—Provision for sale of land through Court in default—Defendant exempted from personal liability—Effect of—Decree not registered and hence ineffective for charge—Execution by attachment and sale of land —Permissibility.*

In a suit on a promissory note, certain land was attached before judgment. Later there was a compromise decree by which the defendant was to pay the plaintiff a certain sum of money by five instalments. The decree also created a charge on the land attached before judgment and provided that in default of the payment by the defendant of any three instalments the plaintiff should recover the whole of the amount then remaining due by sale through Court of the land attached and charged. The decree further provided that the defendant was not personally liable for the debt. The decree was not registered as required by S. 17 (2) (*vi*) of the Registration Act, and hence was inadmissible, in evidence for the purpose of reading it as creating a charge on land.

Held, (*i*) that though the decree could not be enforced as a mortgage decree, by reason of the non-registration of the decree as required by S 17 (2) (*vi*) of the Registration Act, the decree as a decree could be executed by attachment and sale of the land as the same was not exempted from execution; (2) that the provision in the decree that the defendant was not personally liable for the debt only meant that the defendant was not liable to be arrested in execution. (*Beaumont, C.J. and Wassoodeo, J.*) CHHOTIBAI DAULATRAM *v.* MANSUKHLAL JASRAJ. **42 Bom.L.R. 1016.**

——Construction—Suit under S. 53 challenging assignment of decree by debtor—Decree declaring assignment bogus and fraudulent stating that

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it is cancelled and of no effect against plaintiff and other creditors of the defendant—Meaning of—If cancellation of decree altogether. *See* T. P. Act, S. 53. **42 Bom. L.R. 1057.**

DEED—*Construction—Express covenant of title.*

Where a sale-deed by the Court of Wards on behalf of a ward contained the following: "And the vendor hereby covenants with the purchasers that the premises hereby transferred shall be quietly entered into and upon and held and enjoyed and the rents and profits received without any interruption or disturbance by the said K . . . or any person claiming through or in trust for him and further that the said K . . . and every person claiming through or in trust for him will, at the cost of the person requiring the same, execute and do every assurance or thing necessary for the further or more perfectly assuring the said premises to the purchasers, their heirs or assigns as by them shall be reasonably required," it was held that the words constitute an express covenant of warranty of title in the deed itself. (*Thomas, C.J. and Ghulam Hasan, J.*) Mansingh *v.* Babu Lal. **1940 A.W.R. (C.C.) 471=1940 O.W.N. 1142=1940 O.A. 1060.**

———*Construction—Form of transaction—If can be ignored—Rule in income-tax cases.*

It is true that in income-tax cases the substance of the matter should be looked at. But it is impossible for a Court to ignore altogether the form in which the parties have chosen to express their contract. (*Harries, C.J., Fazl Ali and Manohar Lal, JJ.*) Commissioner of Income-tax, Bihar and Orissa *v.* Kumar Kamaksha Narain Singh. **21 Pat L.T. 897=1940 I.T.R. 563=1940 P.W.N. 1044=A.I.R. 1940 Pat. 633 (S.B.).**

———*Construction—Form of transaction—If can be ignored or disregarded.*

It is no doubt permissible, as a matter of construction, to look behind the form of a transaction contained in a deed to ascertain in its substance and give effect to it according to the intention of the parties, but it is a different thing to ignore the form in which the parties have deliberately cast their bargain, when such form is intended to govern their mutual rights and obligations. (*Wadsworth and Patanjali Sastri, JJ.*) Abdul Khadir *v.* Subramanya Pattar. **52 L.W. 683=1940 M.W.N. 1144=A.I.R. 1940 Mad. 946=(1940) 2 M.L.J. 760.**

———*Construction—Lease or sale—Coal mining lease and sale of coal land—Distinction.*

One of the essential points of distinction between a mining lease and a sale of coal land is that while in a mining lease the lessor has the right of reversion, there is no such right of reversion in a sale. Another point of distinction is that while in a sale the consideration is the price, in a mining lease there is the price otherwise called premium and the royalty which at least outwardly bears a closer resemblance to rent than to price. (*Harries, C.J., Fazl Ali and Manohar Lall, JJ.*) Commissioner of Income-tax, B. & O. *v.* Kumar Kamaksha Narain Singh. **21 Pat.L.T. 897=1940 I.T.R. 563=1940 P.W.N. 1044=A.I.R. 1940 Pat. 633 (S.B.).**

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———*Construction—Principle—Construction as a whole to ascertain intention.*

It is a well-recognized rule of construction of documents that they must be construed as a whole that every part of the documents must receive, attention and that the intention should be gathered from the whole context of the instrument so as to make one entire and consistent construction of the whole. (*Niyogi, J.*) Ganpatdas *v.* Harivallabh. **1940 N.L.J. 601.**

———*Construction—Real character—Ascertainment—Test—Description by party, if a guide.*

In order to ascertain the real character of a document one has to look to the terms of the deed, and the description of the document given by the executant cannot be an infallible guide. (*Iqbal Ahmad and Verma, JJ.*) Ramman Lal *v.* Raghunath Shankar. **1940 O.A. 1167=1940 A.W.R. (H.C.) 572.**

DEFENCE OF INDIA RULES, R. 38 (1) (a)—*Charge of offence amounting to sedition—Cognisance on report of public servant—Competency of Court to take—Complaint by or under the authority of Provincial Government—If necessary—Cr. P. Code, S. 196—Scope.*

Where a person is charged under R. 38 (1) (*a*) of the Defence of India Rules for doing a prejudicial act within the meaning of R. 34 (6) (*e*) and (*k*), which might amount to sedition, the Court is competent to take cognizance of the offence on the report in writing of a public servant as required by R. 130 (1) of the Rules. It is not necessary that a complaint should be made by order of or under the authority of the Provincial Government as required by S. 196, Cr. P. Code. (*Lakshmana Rao, J.*) Ramanuja Aiyangar, *In re.* **1940 M.W.N. 1241=52 L.W. 773=(1940) 2 M.L.J. 830.**

DIVORCE—*Costs of wife for defence—Husband, if should pay for—Default in payment—Procedure.*

Where a husband seeks dissolution of the marriage on the ground of the wife's adultery the latter should ordinarily be allowed costs from her husband to enable her to defend herself upon the charge, unless there are special reasons to the contrary. When an order for such payment is made, but the amount is not paid, the petition should be made to stand out till such costs are paid. (*Allsop, J.*) Yaqub Masih *v.* Christina Masih. **1940 A.L.J. 737=1940 O.A. 1058=1940 A.W.R. (H.C.) 558.**

———*Order for custody of child—Form—Limitation of period—Practice.*

In cases coming under the Indian and Colonial Divorce Jurisdiction Act when an order is made for the custody of a minor child, the order is not to be expressly limited in point of time to any particular period. (*Sharpe, J.*) Doris Royston *v.* Frederick Royston. **1940 Rang.L.R. 674=A.I.R. 1940 Rang 303.**

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